**ELECTRONICALLY FILED** 

Montana Water Court PO Box 1389 Bozeman, MT 59771-1389 1-800-624-3270 (406) 586-4364 watercourt@mt.gov

43B-1095-R-2021

December 2, 2022

Montana Water Court

### MONTANA WATER COURT, YELLOWSTONE DIVISION YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN BASIN 43B PRELIMINARY DECREE

CLAIMANT: Tom Tollefson

OBJECTOR: United States of America (Department of

Agriculture Forest Service)

COUNTEROBJECTOR: Tom Tollefson

CASE 43B-1095-R-2021

43B 17166-00 43B 41828-00

### NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above-stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

### **MASTER'S REPORT**

### FINDINGS OF FACT

- 1. Tom Tollefson (Tollefson) is the current record owner of claims 43B 17166-00 and 43B 41828-00.
  - 2. Claim 43B 17166-00 was decreed with DNRC issue remarks:

A LATE OBJECTION HAS BEEN FILED TO THE FLOW RATE, PRIORITY DATE, ACRES IRRIGATED AND PLACE OF USE OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE.

POINT OF DIVERSION AND DITCH NAME WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

- 3. The United States of America (Forest Service) objected to claim 43B 41828-00. Tom Tollefson filed a Notice of Intent to Appear.
- 4. Claim 43B 17166-00 was previously involved in proceedings in Water Court Case 43B-170 to address a decree exceeded issue with other claims that did receive timely filed objections that were properly noticed. The late objection issue remark decreed on claim 43B 17166-00 references a Stipulation filed by the parties in Case 43B-170 on August 15, 1988 (1988 Stipulation). Proper notice was not provided that changes may be made to claim 43B 17166-00 during the Temporary Preliminary Decree, so an issue remark was placed on the claim that the changes would be made to the claim during the next decree the "late objection" issue remark noted above.<sup>1</sup>
- 5. A Status Conference took place on February 9, 2022. Anika M. Stern presided; Tom Tollefson was present and Romney Philpott appeared for the Forest Service. During the Status Conference, the parties discussed the issue remark decreed on claim 43B 17166-00:

A LATE OBJECTION HAS BEEN FILED TO THE FLOW RATE, PRIORITY DATE, ACRES IRRIGATED AND PLACE OF USE OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE.

Claim 43B 17166-00-00 was previously involved in proceedings in Water Court Case, 43B-170. A copy of the August 15, 1988 Stipulation in Case 43B-170 is in the claim file

<sup>&</sup>lt;sup>1</sup> The same issue remark was placed on claim 43B 36543-00 (Case 43B 1079-R-2021) and claim 43B 123895-00 (Case 43B-1069-R-2022). Claim 43B 44516-00 was also addressed in the Stipulation in Case 43B-170 and a Master's Report was issued in that Case on June 3, 2022 and adopted on June 17, 2022.

and is referred to as the "late objection" in the issue remark. Pursuant to the agreement, changes should be to the flow rate, the priority date, the maximum acres, and place of use:

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With respect to claim No. 017166, the parties agree that the water right shall note the following changes:

Flow Rate Claimed

Flow Rate to be Decreed

16 miner's inches

11 miner's inches or .275 cfs

Priority Date Claimed

Priority Date7 to be Decreed

June 1, 1885

June 30, 1897

Place of Use and Number of Acres to be Decreed

14.3 acres E2E2SE Section 35 T#2N R14E

The remaining elements of this water right shall be decreed as claimed.
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Based on this Master's understanding, it appears the following changes should be made to claim 43B 17166-00:

Priority Date:	MAY 10, 1918 JUNE 30. 1897						
Flow Rate:	168.30 GPM 112.20 GPM						
Maximum Act Place of Use:	<del>16.00</del> 14.30						
<u>ID</u>	Acres Govt Lot Qtr Sec Sec Twp Rge County						
1	41.00 14.30 E2E2SE SESE 35 2N 14E SWEET GRASS						
2	5.00 NESE 35 2N 14E SWFFT GRASS						
Total:	<del>16.00</del> 14.30						

The parties at the Status Conference also discussed the Objection to claim 43B 41828-00. Mr. Philpott indicated the place of use currently describes Forest Service property and it should be modified to exclude Forest Service property.

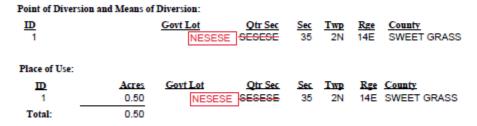
An Order was issued setting a deadline for Mr. Tollefson to file a statement agreeing or disagreeing with the proposed changes for claim 43B 17166-00 and for Mr. Tollefson and the Forest Service to file settlement documents.

6. On August 12, 2022, counsel for Tom Tollefson filed a Statement Regarding the August 15, 1988 Stipulation involving claim 43B 17166-00:

Claimant agrees with the Stipulation and requests its approval and adoption by the Water Court, so long as the changes called for in the Stipulation are made to all four claims in the Stipulation.

7. On August 15, 2022, a Stipulation was filed resolving the Forest Service Objection to claim 43B 41828-00 and addressing proposed changes to claim 43B 17166-00.

The parties agree the Objection to claim 43B 41828-00 will be resolved if the claim is modified as follows:



Based on the August 15, 2022 Stipulation, the following remark should be added to claim 43B 17166-00:

### THE PLACE OF USE IS ENTIRELY ON PRIVATE LAND.

8. The August 15, 1988 Stipulation dictated that a remark be added to the involved claims. The following remark was added to claim 43B 44516-00, in the June 3, 2022 Master's Report:

ON AUGUST 15, 1988, THE OWNERS OF CLAIMS 43B 44516-00, 43B 17166-00, 43B 36543-00, AND 43B 123895-00 (SPLIT CLAIM 43B 30069662) ENTERED INTO A ROTATIONAL USE AGREEMENT WHEN WATER SHORTAGE MANDATES. A COPY OF THE AGREEMENT IS IN THE CLAIM FILES.

This Master proposes the above-listed remark be added to each of the claims involved in the August 15, 1988 Stipulation.

9. Another deadline was set for Mr. Tollefson to agree or disagree with the addition of the rotational use agreement remark to claim 43B 17166-00. On August 26, 2022, Mr. Tollefson filed a statement agreeing with the proposed remark.

### PRINCIPLES AND CONCLUSIONS OF LAW

- 1. The Water Court is required to address all issue remarks decreed on claims. Sections 85-2-247, and 85-2-248, MCA.
- 2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.
- 3. The August 15, 1988 Stipulation was signed by Terrill S. and Lois D. Tollefson, the then-record-owners of claim 43B 17166-00. The 1988 Stipulation included the following language regarding successors-in-interest, heirs, and assigns:

The parties further acknowledge that this document with attached exhibits will be filed at the Sweet Grass County Clerk and Recorder's office, and each parties' successors in interest, heirs, and assigns will be bound by this marshaling and distribution agreement.

The terms of the 1988 Stipulation are plain and unambiguous.

- 4. A properly drafted stipulation is a form of contract to be interpreted according to contract principles. *Jensen v. Department of Labor & Indus., Job Serv. Div.*, 221 Mont. 42, 47, 718 P.2d 1335, 1338 (1986). As applied to Water Court proceedings, a stipulation serves as the terms under which the parties agree to resolve objections, and may include a claimant's legally binding commitment to modify claims to resolve objections and issue remarks, and an objector's agreement to withdraw objections conditioned upon the Court's acceptance of the claim modifications. *E.g., In re Pondera Cty. Canal & Reservoir Co.*, Case 41M-202, 2020 Mont. Water LEXIS 19 (Jan. 9, 2020).
  - 5. The point of diversion and ditch name issue remark decreed on claim 43B 17166-00 is a notice-type issue remark. As no objections were filed, no further proceedings are required.

### RECOMMENDATIONS

1. Claim 43B 17166-00 should be modified as shown in Finding of Fact No. 4 and the following remarks should be added to the claim:

ON AUGUST 15, 1988, THE OWNERS OF CLAIMS 43B 44516-00, 43B 17166-00, 43B 36543-00, AND 43B 123895-00 (SPLIT CLAIM 43B 30069662) ENTERED INTO A ROTATIONAL USE AGREEMENT WHEN WATER SHORTAGE MANDATES. A COPY OF THE AGREEMENT IS IN THE CLAIM FILES.

### THE PLACE OF USE IS ENTIRELY ON PRIVATE LAND.

- Claim 43B 41828-00 should be modified as shown in Finding of Face No.6, resolving the Forest Service Objection.
- 3. The issue remarks should be removed from claims 43B 17166-00 and 43B 41828-00.

Post Decree Abstracts of Water Right Claims are served with the Report for review.

Anika M. Stern Senior Water Master

### Service Via Electronic Mail:

Romney S. Philpott, Trial Attorney
US Department of Justice
ENRD, Natural Resources Section
999 18th Street, South Terrace Suite 370
Denver, CO 80202
(303) 844-1810
romney.philpott@usdoj.gov
Montanabasins.enrd@usdoj.gov

Christopher Scoones Lund Law PLLC 662 S. Ferguson Ave. Unit 2 Bozeman, MT 59718 scoones@lund-law.com

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**ELECTRONICALLY FILED** 

TODD KIM, Assistant Attorney General Environment & Natural Resources Division

JESSE LASLOVICH, United States Attorney District of Montana

ROMNEY S. PHILPOTT, Senior Attorney United States Department of Justice Environment and Natural Resources Division Natural Resources Section 999 18th Street, South Terrace – Suite 370 Denver, CO 80202 (303) 844-1810 43B-1095-R-2021

August 15, 2022

Montana Water Court

ATTORNEYS FOR UNITED STATES OF AMERICA, USDA Forest Service

# IN THE WATER COURT OF THE STATE OF MONTANA YELLOWSTONE DIVISION YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK – BASIN 43B PRELIMINARY DECREE

CLAIMANT: Tom Tollefson

OBJECTOR: United States of America (Department of

Agriculture Forest Service)

COUNTEROBJECTOR: Tom Tollefson

CASE 43B-1095-R-2021 43B 17166-00

43B 1/166-00 43B 41828-00

### STIPULATION TO RESOLVE OBJECTIONS

This Stipulation, entered into by the United States of America, Department of Agriculture Forest Service (the "United States") and Tom Tollefson ("Claimant"), is for the purpose of resolving the United States' objection to Water Right Claim No. 43B 41828-00 and addressing a proposed modification of the place of use for Water Right Claim No. 43B 17166-00.

#### RECITALS

A. Pursuant to Mont. Code Ann. § 85-2-221, Claimant's predecessor in interest timely filed a Statement of Claim for Claim 43B 17166-00 and 43B 41828-00 (the "Claims")

with the Department of Natural Resources and Conservation ("DNRC").

- B. Pursuant to Mont. Code Ann. § 85-2-233, the United States timely filed a Notice of Objection to claim 43B 41828-00 as it appeared on the Preliminary Decree for Basin 43B. Claimant subsequently filed a response to the United States' objection to claim 43B 41828-00 on a Notice of Counterobjection and Request for Hearing form.
- C. Claim 43B 41828-00 asserts a filed right for domestic use of water from a spring, which is an unnamed tributary of Big Timber Creek. On the Preliminary Decree, the point of diversion and place of use for the claim are inaccurately described as the SESESE of Section 35, Township 2 North, Range 14 East ("Section 35"), in Sweet Grass County. The claimed use occurs on private land in the NESESE of Section 35.
- D. Claim 43B-17166-00 asserts a decreed right for irrigation from Big Timber Creek. As described in the Preliminary Decree, the place of use includes 11 acres in the SESE of Section 35 and 5 acres in the NESE of Section 35. The place of use (and other elements) of claim 43B 17166-00 were addressed in a stipulation between Claimant's predecessor in interest and other parties, executed on July 20, 1988 ("July 20, 1988 Stipulation"), during the Temporary Preliminary Decree proceedings in Water Court Case No. 43B-170. In the instant proceeding on the Preliminary Decree, the Court attached proposed that changes be made to claim 43B 17166-00 to make it consistent with the July 20, 1988 Stipulation, including that the place of use be modified such that it is described as including 14.30 acres in the E2E2SE of Section 35. *See Court Minutes and Order Setting Filing Deadline* (Feb. 11, 2022). This proposed description of the place of use is overbroad and could be construed as including federal land in the SESESE of Section 35.
  - E. In the interest of resolving this case without the need for further litigation,

Claimants and the United States stipulate to the modification below.

### **STIPULATION**

1. The point of diversion and place of use for Claim 43B 41828-00 should be amended to the following (with changes in **BOLD**):

<u>ID</u>	Govt Lot	Qtr Sec	Sec	Twp	Rg	County
1		NESESE	35	2N	14E	SWEET GRASS

The proposed abstract attached as **Exhibit A** to this Stipulation accurately reflects the modification stipulated above.

2. The following information remark should be added to the abstract for Claim 43B 17166-00:

### THE PLACE OF USE IS ENTIRELY ON PRIVATE LAND.

- 3. Upon entry of a ruling and final order in this case reflecting the amendments specified above for the Claim, the United States' objection to claim 43B 41828-00, and the issues raised by Claimant on the Notice of Counterobjection form, shall be deemed resolved, provided that such order(s) do not expand or change other substantive elements of the claim.
- 4. This Stipulation is the compromise of disputed water claims and is not to be construed as an admission against the interests of any party.
- 5. The terms of this Stipulation are binding on the parties, their successors, and assignees. Nothing in this Stipulation shall create any right, claim, cause of action, objection, defense, or other remedy in any person not a party to the Stipulation.
- 6. Each party will bear its own costs and attorney fees arising from the negotiation and execution of the Stipulation and in proceedings before the Montana Water Court regarding this case.
  - 7. Each undersigned party entered into and executed this Stipulation voluntarily, in

good faith, and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence, whatsoever.

- 8. The parties hereto represent and affirm that the signatories to this Stipulation are legally authorized to bind the party to this matter.
- 9. This Stipulation may be executed by the parties in counterparts, each of which when executed and filed with the Montana Water Court shall be an original, but all of which together shall constitute one instrument.
- 10. This document (¶¶ 1-10) embodies the entire Stipulation of the parties.

  IT IS SO STIPULATED on the date last entered below:

TODD KIM, Assistant Attorney General Environment & Natural Resources Division

JESSE LASLOVICH, United States Attorney

District of Montana

Dated: 8/12/22, 2022

ROMNEY S. PHILPOTT, Senior Attorney Romney.Philpott@usdoj.gov | (303) 844-1810

United States Department of Justice

Environment & Natural Resources Division

Natural Resources Section

999 18th St. #370 Denver, CO 80202

Electronic Service: MontanaBasins.ENRD@usdoj.gov

ATTORNEYS FOR UNITED STATES OF AMERICA, USDA Forest Service

Dated: 8/11/2022

2022

Tom Tollefson

49 Otter Creek Rd.

Big Timber, MT 59011-7754

## Exhibit A

### **EXHIBIT A**

# PRELIMINARY DECREE YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK BASIN 43B ABSTRACT OF WATER RIGHT CLAIM

### IMPORTANT NOTICE

YOUR WATER RIGHT AS SHOWN ON THIS ABSTRACT MAY HAVE <u>CHANGES</u> FROM YOUR WATER RIGHT AS CLAIMED OR AMENDED. AN ASTERISK (\*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY THE MONTANA WATER COURT AFTER ISSUANCE OF THE TEMPORARY PRELIMINARY DECREE OR BY THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION (DNRC) DURING THE PREPARATION OF THIS PRELIMINARY DECREE. THESE CHANGES ARE AUTHORIZED BY THE MONTANA SUPREME COURT WATER RIGHT CLAIMS EXAMINATION RULES OR BY ORDER OF THE WATER COURT.

OBJECTIONS MAY BE FILED ACCORDING TO THE PROCEDURES OUTLINED IN THE DOCUMENT ENTITLED "NOTICE OF ENTRY OF PRELIMINARY DECREE AND NOTICE OF AVAILABILITY."

Water Right Number:

43B 41828-00 STATEMENT OF CLAIM

Version: 2 -- REEXAMINED

ACTIVE

Owners:

TOM TOLLEFSON 49 OTTER CREEK RD

BIG TIMBER, MT 59011 7754

Status:

**Priority Date:** 

**FEBRUARY 1, 1970** 

Type of Historical Right: USE

Purpose(use):

DOMESTIC

Flow Rate:

5.00 GPM

Volume:

2.00 AC-FT

Households:

1

Maximum Acres:

0.50

Source Name:

SPRING, UNNAMED TRIBUTARY OF BIG TIMBER CREEK

Source Type:

**GROUNDWATER** 

Point of Diversion and Means of Diversion:

<u>ID</u>

**Govt Lot** 

Govt Lot

Qtr Sec NE SESE

 $\frac{\text{Sec}}{35}$   $\frac{\text{Twp}}{2\text{N}}$ 

1.

14E SWEET GRASS

Rge County

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means:

**DEVELOPED SPRING** 

Period of Use:

JANUARY 1 TO DECEMBER 31

Place of Use:

ID Acres

Qtr Sec Sec Twp Rge County

1 0.50

NE SESE

35 21

2N 14E SWEET GRASS

Total:

0.50

Remarks:

Page 2 of 2

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

THE DNRC EXAMINATION OF THIS CLAIM FOUND NO SIGNIFICANT FACTS, DATA, OR ISSUES TO REPORT TO THE WATER COURT.

A BETTER UNDERSTANDING OF YOUR CLAIMED WATER RIGHT CAN BE OBTAINED BY COMPARING YOUR RIGHT WITH OTHER CLAIMS IN THE BASIN. FOR EXAMPLE, COMPARE PRIORITY DATES, FLOW RATES, VOLUMES, OR ACRES IRRIGATED. ALSO, YOUR WATER RIGHT MAY BE SUBJECT TO WATER RIGHTS IN ADJOINING SUBBASINS OR BASINS AS WELL AS BEING SUBJECT TO OTHER RIGHTS ON YOUR SOURCE OF SUPPLY. FINALLY, YOUR WATER RIGHT MAY BE SUBJECT TO INDIAN RESERVED AND FEDERAL RESERVED WATER RIGHTS.

COMPLETE DETAILS REGARDING THE DNRC PREPARATION OF THIS PRELIMINARY DECREE AND RELATED MATERIALS CAN BE REVIEWED AT THE OFFICE LOCATIONS IDENTIFIED IN THE DOCUMENT ENTITLED "NOTICE OF ENTRY OF PRELIMINARY DECREE AND NOTICE OF AVAILABILITY."

SEE GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR FURTHER EXPLANATION OF YOUR CLAIMED WATER RIGHT. THESE FINDINGS CAN BE FOUND AS INDICATED IN THE DOCUMENT ENTITLED "NOTICE OF ENTRY OF PRELIMINARY DECREE AND NOTICE OF AVAILABILITY." IF YOU NEED OBJECTION FORMS, OR HAVE QUESTIONS ABOUT WATER COURT PROCEDURES OR CHANGES TO YOUR RIGHT, YOU CAN CONTACT THE WATER COURT BY CALLING 1-800-624-3270 (WITHIN MONTANA ONLY) OR 1-406-586-4364, OR BY WRITING TO P.O. BOX 1389, BOZEMAN, MT 59771-1389.

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2022, I sent a true and correct copy of the foregoing document to the following parties:

### Service via Electronic Mail:

Christopher Scoones Lund Law PLLC 662 S. Ferguson Ave. Unit 2 Bozeman, MT 59718 scoones@lund-law.com

/s/ Emily Rabun

Emily Rabun, Law Clerk

### POST DECREE

### ABSTRACT OF WATER RIGHT CLAIM

## YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK BASIN 43B

Water Right Number: 43B 17166-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: TOM TOLLEFSON

49 OTTER CREEK RD

BIG TIMBER, MT 59011 7754

Priority Date: JUNE 30, 1897

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 112.20 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT

TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 14.30

Source Name: BIG TIMBER CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID Govt Lot Otr Sec Sec Twp Rge County

1 SESESE 27 2N 14E SWEET GRASS

**Period of Diversion:** APRIL 1 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: RUDD DITCH

Period of Use: APRIL 1 TO OCTOBER 15

Place of Use:

ID Acres Govt Lot Otr Sec Sec Twp Rge County

1 14.30 E2E2SE 35 2N 14E SWEET GRASS

**Total:** 14.30

THE PLACE OF USE IS ENTIRELY ON PRIVATE LAND.

### Remarks:

ON AUGUST 15, 1988, THE OWNERS OF CLAIMS 43B 44516-00, 43B 17166-00, 43B 36543-00, AND 43B 123895-00 (SPLIT CLAIM 43B 30069662) ENTERED INTO A ROTATIONAL USE AGREEMENT WHEN WATER SHORTAGE MANDATES. A COPY OF THE AGREEMENT IS IN THE CLAIM FILES.

### **POST DECREE**

### ABSTRACT OF WATER RIGHT CLAIM

## YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK BASIN 43B

Water Right Number: 43B 41828-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: TOM TOLLEFSON

49 OTTER CREEK RD

BIG TIMBER, MT 59011 7754

Priority Date: FEBRUARY 1, 1970

Type of Historical Right: USE

Purpose (use): DOMESTIC
Flow Rate: 5.00 GPM
Volume: 2.00 AC-FT

Households: 1

Maximum Acres: 0.50

Source Name: SPRING, UNNAMED TRIBUTARY OF BIG TIMBER CREEK

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

ID Govt Lot Qtr Sec Sec Twp Rge County

1 NESESE 35 2N 14E SWEET GRASS

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DEVELOPED SPRING

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

ID Acres Govt Lot Qtr Sec Sec Twp Rge County

1 0.50 NESESE 35 2N 14E SWEET GRASS

Total: 0.50