

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

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER
AND FORT PECK DAM - BASIN (40E)
PRELIMINARY DECREE

CLAIMANT: Margaret (Peggy)A. Bergsagel

CASE 40E-0127-R-2023
40E 164977-00

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 to 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

Water right claim 40E 164977-00 appeared in the Preliminary Decree for the Missouri River Between Musselshell River and Fort Peck Dam (Basin 40E) issued October 7, 2020. The claim did not receive objections but received issue remarks from

the Department of Natural Resources and Conservation (“DNRC”) raising potential legal or factual issues. The Water Court consolidated the claim into Water Court Case 40E-0127-R-2023 to address the issue remarks.

FINDINGS OF FACT

1. Water spreading irrigation claim 40E 164977-00 appeared in the Preliminary Decree with the following substantive issue remark from the DNRC:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE DIVERSION DAM CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

The DNRC employee reexamining the claim placed the following note in the claim file:

Issued P49: THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE DIVERSION DAM CANNOT BE IDENTIFIED FROM AVAILABLE DATA. Looked through historical photos and current aerials and I cannot find evidence of a water source and a diversion dam as claimed in the file. Perhaps it is actually in the NWNENW or in the SWNWNE and coming from Telegraph Creek but claimant is needed to clarify. 12/12/2018 EMM

2. The Court requested input from Claimant Bergsagel to resolve this issue remark. Ms. Bergsagel submitted two substantive responses: the first on August 28, 2023 (Doc. 4.00),¹ and the second on March 8, 2024 (Doc. 7.00). Both responses agree with the DNRC note that the source is Telegraph Creek. However, the first indicates the point of diversion should be in the SWNENE of Section 27, T24N, R31E, while the second response indicates the point of diversion is in the SWSW of Section 22.

Each of Ms. Bergsagel’s responses included an aerial photo. Neither photo shows a distinct point of diversion on Telegraph Creek. But taken together, along with the map in the claim file dated August 1, 1988, the images suggest that water from Telegraph Creek makes its way to a clearly visible dike system beginning in the SWSW of Section 22. This point of diversion is consistent with the original Statement of Claim.

¹ “Doc.” refers to the docket number of a document filed in the Water Court’s Full Court Enterprise Case Management system.

3. The following modifications more clearly describe the first identifiable point at which water is diverted by this claim:

Source: ~~Unnamed Tributary of Second Creek~~ **Telegraph Creek**

Point of Diversion:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NENENW <u>SWSW</u>	27 <u>22</u>	24N	31E	Phillips

Means of Diversion: **Dike**

4. The point of diversion for this claim was modified in a prior master's report issued June 2, 1989, in Case 40E-60. That report was based on a DNRC memo which identified a diversion dam in the NENENW of Section 27 (which DNRC can no longer find) and the dike system beginning in the SWSW of Section 22. The dike system is currently described on an information remark on the claim. The point of diversion modification described above simply removes the point of diversion in the NENENW of Section 27, and more clearly identifies the first point at which water is diverted under this claim.

5. The claim also received the following issue remark that serves only to provide notice to the Claimant and other water users.

THE TIMELY FILED OBJECTION OF WATER COURT WAS AMENDED BY CONSENT OF THE CLIENT TO INCLUDE POINT OF DIVERSION AND PLACE OF USE BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THESE CHANGES MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

PRINCIPLES OF LAW

1. The Montana Water Court has the authority to determine the extent of all water rights in the state as they existed prior to July 1, 1973. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 367 P.3d 732; §§ 85-2-233, -102(12), MCA.

2. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R. The Montana Water Court has the authority to resolve issue remarks when the claim file

and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

3. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

CONCLUSIONS OF LAW

1. The Findings of Fact above are supported by a preponderance of the evidence. The claim should be modified as described above.

2. These modifications resolve the substantive issue remark on the claim. The Notice Only Remark has served its notice purpose. The issue remarks should be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends the changes described above.

A Post Decree Abstract of Water Right Claim is attached to this Master's Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Margaret (Peggy) A Bergsagel
5247 Telegraph Rd
Malta, MT 59538
406-252-5537

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: 40E 164977-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MARGARET (PEGGY) A BERGSAGEL
5247 TELEGRAPH RD
MALTA, MT 59538

Priority Date: DECEMBER 31, 1939

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

***Volume:** 409.50 AC-FT

Climatic Area: 1 - HIGH

***Maximum Acres:** 273.00

***Source Name:** TELEGRAPH CREEK

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSW	22	24N	31E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DIKE

THE WATER SPREADING SYSTEM INCLUDED DIKES IN THE SWSW SEC. 22 AND THE N2SE SEC. 21, TWP 24N, RGE 31E, PHILLIPS COUNTY.

Period of Use: JANUARY 1 TO DECEMBER 31

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	135.00		SE	21	24N	31E	PHILLIPS
2	61.00		E2SW	21	24N	31E	PHILLIPS
3	29.00		SWSW	22	24N	31E	PHILLIPS
4	10.00		S2SESW	22	24N	31E	PHILLIPS
5	38.00		NWNW	27	24N	31E	PHILLIPS

Total: 273.00