

Montana Water Court
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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: Veseth & Veseth Livestock Co.

OBJECTION: Veseth & Veseth Livestock Co

CASE 40E-0170-R-2024

40E 22372-00

40E 30160071

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 22372-00 appeared in the Preliminary Decree for the Missouri River Between Musselshell River and Fort Peck Dam (Basin 40E) issued October 7, 2020. Claimant Veseth & Veseth Livestock (“Veseth”) objected to the claim and the claim also received issue remarks from the Department of Natural Resources and Conservation (“DNRC”) identifying potential legal or factual issues. The Water Court consolidated this claim and others into Water Court Case 40E-0017-R-2022 to address objections and issue remarks.

On October 6, 2022, Veseth submitted its Notice of Filing of Resolution of Objections in Case 40E-0017-R-2022 (“Response”) and on July 10, 2023, Veseth filed its Notice of Filing of Additional Evidence in that case (“Additional Evidence”). The water master issued a Master’s Report in Case 40E-0017-R-2022, on February 9, 2024.

Veseth objected to the Master’s Report, identifying corrections to 40E 22372-00 and implied claim 40E 30160071 (which the Master’s Report recommended generating based on 40E 22372-00). On March 13, 2024, the Court issued an Order Adopting Master’s Report in Part and Order Recommitting Claims. That order adopted the Master’s Report as to all claims except 40E 22372-00 and 40E 30160071, which were reconsolidated into this case, 40E-170-R-2024, and recommitted the claims to the water master for further proceedings as necessary. Having reviewed the objection to the Master’s Report in Case 40E-0017-R-2022 and the claim file, it appears the objection can be addressed without further proceedings. This Master’s Report supersedes the February 9, 2024 Master’s Report in Case 40E-0017-R-2022 as to claims 40E 22372-00 and 40E 30160071.

FINDINGS OF FACT

40E 22372-00

1. Claim 40E 22372-00 was decreed as an irrigation claim to two reservoirs – one on Third Creek and one on an unnamed Tributary of Third Creek. It appeared in the Preliminary Decree with the following substantive issue remark:

THIS CLAIM APPEARS TO BE CLAIMING TWO SEPARATE SOURCES OF WATER.
MORE THAN ONE WATER RIGHT MAY BE INVOLVED.

Veseth requested that the reservoir on Third Creek be removed from claim 40E 22372-00 and be reflected in an implied claim (40E 30160071).

40E 22372-00 should be modified as follows:

Source Name: THIRD CREEK
 Source Type: SURFACE WATER
~~Source Name: UNNAMED TRIBUTARY OF THIRD CREEK~~
~~Source Type: SURFACE WATER~~
 --
 Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NESESE	29	24N	29E	PHILLIPS
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: DAM						
2		NWNWSW	28	24N	29E	PHILLIPS
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: DAM						
Reservoir: ONSTREAM						

	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
		NESESE	29	24N	29E	PHILLIPS
Diversion to Reservoir:	DIVERSION # 1					
Dam Height:	12.00 FEET					
Depth:	9.00 FEET					
Surface Area:	16.69 ACRES					
Capacity:	60.08 ACRE-FEET					
Reservoir:	ONSTREAM					

	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
		NWNWSW	28	24N	29E	PHILLIPS
Diversion to Reservoir:	DIVERSION # 2					
Dam Height:	12.00 FEET					
Depth:	9.00 FEET					
Surface Area:	11.53 ACRES					
Capacity:	41.51 ACRE FEET					

~~THE CAPACITY, DAM HEIGHT, MAXIMUM DEPTH, AND SURFACE AREA HAVE BEEN ESTIMATED BY DNRG.~~

Additionally, as noted in Veseth’s Objection to the Master’s Report in Case 40E-0017-R-2022, the following clerical error in the dam location information remark should be corrected:

THE DAM EXTENDS INTO THE W2SWSW, SEC ~~29~~ **28** TWP 24N RGE 29E PHILLIPS.

40E 30160071 (implied from 40E 22372-00)

3. Implied claim 40E 30160071 should be created with the same elements as claim 40E 22372-00 except as follows:

Source Name: UNNAMED TRIBUTARY OR THIRD CREEK

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	NWNWSW	28	24N	29E	PHILLIPS

Source Name: UNNAMED TRIBUTARY OF THIRD CREEK
Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: DAM

Reservoir: ONSTREAM

<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
NWNWSW	28	24N	29E	PHILLIPS

Diversion to Reservoir: DIVERSION #2
Dam Height: 12.00 FEET
Depth: 9.00 FEET
Surface Area: 11.53 ACRES
Capacity: 41.51 ACRE-FEET

The following information remark should be added to the claim, as requested in Veseth's Objection to Master's Report, and supported by the originally filed Statement of Claim:

THE DAM EXTENDS INTO THE NESE OF SEC 29 TWP 24N RGE 29E PHILLIPS.

An informational remark should be added to claims 40E 30160071 and 40E 22372-00, stating:

THE COMBINED VOLUME OF CLAIMS 40E 22372-00 AND 40E 30160071 SHALL NOT EXCEED 74.50 AC-FT.

Claim 40E 22372-00 also received the following issue remarks that serve only to provide notice to the Claimant and other water users (Notice Only Remarks):

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

RESERVOIR RECORD AND MEANS OF DIVERSION 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.

PRINCIPLES OF LAW

1. 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.

2. The Water Court may correct a clerical mistake or a mistake arising from oversight or omission where one is found in a part of the record. Rule 60(a), M.R.Civ.P.

3. The Water Court recognizes implied claims where a claimant can prove that: (1) the claimant's original statement of claim and attached documentation indicate the existence of two or more water rights; (2) historic use corroborates the implied claim; and (3) the court's recognition of the implied claim will not alter historic water use or increase the historic burden to other water users. *Claimants: Lee E. Foss*, 2013 Mont. Water LEXIS 17, *32; *In re Tucker*, 2019 Mont. Water LEXIS 59, *2-3.

4. 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.

CONCLUSIONS OF LAW

1. The Findings of Fact above are supported by a preponderance of the evidence. The clerical errors identified in the Findings of Fact should be corrected pursuant to Rule 60, M.R.Civ.P. The claims should be modified as described above.

2. The implied claim requested by Veseth is supported by filings submitted with the Statement of Claim. Those filings are evidence of historical water use, and the implied claim does not increase the extent of the right and therefore does not increase the historical burden on other water users. Implied claim 40E 30160071 should be generated as described above.

3. The substantive issue remark on 40E 22372-00 is resolved. The Notice Only Remarks have served their notice purpose. The issue remarks should be removed.

4. The claim modifications and removal of issue remarks described above resolve Veseth's objection to claim 40E 22372-00 and to the Master's Report in Case 40E-0017-R-2022.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends the Court modify claim 40E 22372-00, generate implied claim 40E 30160071, and remove issue remarks, as described above.

A Post Decree Abstract of Water Right for each water right claim is attached to this Master's Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

SERVICE VIA ELECTRONIC MAIL

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

Water Right Number: 40E 22372-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: VESETH & VESETH LIVESTOCK CO
22787 MIDALE RD
MALTA, MT 59538

Priority Date: JUNE 17, 1946

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: 74.50 AC-FT

THE COMBINED VOLUME OF CLAIMS 40E 22372-00 AND 40E 30160071 SHALL NOT EXCEED 74.50 AC-FT.

Climatic Area: 1 - HIGH

Maximum Acres: 52.00

Source Name: THIRD 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		NESESE	29	24N	29E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

THE DAM EXTENDS INTO THE W2SWSW, SEC 28 TWP 24N RGE 29E PHILLIPS COUNTY.

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NESESE	29	24N	29E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 12.00 FEET

Depth: 9.00 FEET

Surface Area: 16.69 ACRES

Capacity: 60.08 ACRE-FEET

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	13.00		NWSW	28	24N	29E	PHILLIPS

2	34.00	SWSW	28	24N	29E	PHILLIPS
3	5.00	SESW	28	24N	29E	PHILLIPS
Total:	<u>52.00</u>					

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

22372-00

22385-00

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

Water Right Number: 40E 30160071 STATEMENT OF CLAIM
Version: 2 -- ORIGINAL RIGHT
Status: ACTIVE

Owners: VESETH & VESETH LIVESTOCK CO
22787 MIDALE RD
MALTA, MT 59538

Priority Date: JUNE 17, 1946

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: 74.50 AC-FT

THE COMBINED VOLUME OF CLAIMS 40E 22372-00 AND 40E 30160071 SHALL NOT EXCEED 74.50 AC-FT.

Climatic Area: 1 - HIGH

Maximum Acres: 52.00

Source Name: UNNAMED TRIBUTARY OF THIRD 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		NWNWSW	28	24N	29E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

DAM EXTENDS INTO THE NESE OF SEC 29 TWP 24N RGE 29E PHILLIPS COUNTY.

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWNWSW	28	24N	29E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 12.00 FEET

Depth: 9.00 FEET

Surface Area: 11.53 ACRES

Capacity: 41.51 ACRE-FEET

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	13.00		NWSW	28	24N	29E	PHILLIPS
2	34.00		SWSW	28	24N	29E	PHILLIPS

3	5.00	SESW	28	24N	29E	PHILLIPS
Total:	52.00					

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

22386-00 30160071