

Montana Water Court
PO Box 1389
Bozeman MT 59771-1389
(406) 586-4364
1-800-624-3270 (IN-STATE)
FAX: (406) 522-4131

FILED
SEP 24 2012

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER - FROM HOLTER DAM TO SUN RIVER - BASIN 41QJ

CLAIMANTS: Linda M. Johns; W. Steve Johns;
Betty L. Bicknell; Gene E. Bicknell; Diana L. Nelson;
Sue A. Weingartner; Russell W. Weingartner; Elizabeth
C. Dagnall; Robert G. Dagnall

OBJECTOR: United States of America (Department of
Interior-Bureau of Indian Affairs)

41QJ-19	
41QJ 5581-00	41QJ 97570-00
41QJ 34410-00	41QJ 97571-00
41QJ 41568-00	41QJ 97572-00
41QJ 41569-00	41QJ 143007-00

ORDER ADDRESSING P490 ISSUE REMARK

PROCEDURAL HISTORY

This case involves water right claims on Prickly Pear Creek, a tributary of the Missouri River north of Helena, Montana. Prior to the current adjudication process, these claims were the subject of three court actions resulting in decrees of water rights in Prickly Pear Creek.¹ The claims are also diverted and used in an area formerly occupied by the Blackfeet Tribe, and described in treaties between the Tribe and the United States.

The Department of Natural Resources and Conservation (DNRC) completed claims examination of these water rights in 2005. The DNRC placed various issue remarks on these claims including P490, which states:

¹ *Gans and Klein Investment Co.v. Liddolph et al.*, Case No. 5627, First Judicial District of Montana, (1905), hereinafter 1905 decree. The First Judicial District Court issued two other decrees: one in 1890 and the third in 1908. *See Gans & Klein Inv. Co. v. Sanford et al.*, 91 Mont. 512,516-17, 8 P.2d 808, 809 (1932).

P490. AT THE TIME OF THE CLAIMED PRIORITY DATE, IT APPEARS THAT THE PLACE OF USE WAS PART OF AN INDIAN RESERVATION.

The DNRC uses a Claims Examination Manual to guide its staff when reviewing water rights. The Claims Examination Manual states:

[Issue] remarks alert the claimant to potential issues during claimant contact prior to the Water Court issuing a decree. The issue remarks are also utilized by other parties reviewing claims. Careful consideration is required before applying an issue remark to a claim as statute requires the Water Court to resolve all issue remarks. DNRC CEM,V.B.

The Manual further provides:

k. Priority Date Precedes Indian Cession: the boundaries of most Indian reservations in Montana were originally larger than present day reservation boundaries. Over the years, Indian reservations were reduced in size by various treaties and Congressional acts.

Many water rights claims were submitted with claimed priority dates which are earlier than the date on which portions of reservation land was ceded from Tribal ownership. In other words, on the date of the priority claimed, it appears the land was under Indian ownership.

Each office has been provided with a map showing successive changes in Indian reservation boundaries. See exhibit VI-15 for an explanation of the dates on the Indian lands Cession map. When a claim has a priority date preceding the Cession date for the area, add a priority date remark to the examination report. CEM, VI.J.3.k.

The Water Court issued a Preliminary Decree for Basin 41QJ on February 6, 2008. On July 31, 2008, the United States Department of Interior, Bureau of Indian Affairs (hereinafter United States) filed objections to three claims included in this case. The objections concerned priority date and flow rate or volume for claim numbers 41QJ 97571-00 and 41QJ 97572-00. For claim 41QJ 143007-00, the United States objected to the priority date, flow rate or volume, source, place of use, point of diversion or method of diversion and potential abandonment or non-perfection issues.

Eight claims were consolidated into Water Court Case 41QJ-19 on January 21, 2010. On March 17, 2010, the United States filed a Notice of Participation and Offer of

Settlement. The Water Master interpreted the United States' Notice of Participation and Offer of Settlement as a Motion to Intervene on claims 41QJ 5581-00, 41QJ 34410-00, 41QJ 41568-00, 41QJ 41569-00 and 41QJ 97570-00.

The Water Master then ordered Claimants to meet with DNRC by May 31, 2010. Claimants Robert G. and Elizabeth C. Dagnall filed a Status Report on June 1, 2010. Their Report expressed concern about United States' objection to claim 41QJ 143007-00 and the United States' proposal to move their priority date back to July 5, 1874. These Claimants rejected the United States' proposal because "any agreement to back up our priority date could adversely affect our right to use Water Right No. 41QJ 143007-00 by making the water right subject to call by other Little Prickly Pear water users or downstream users with priority dates between July 6, 1873 and July 4, 1874." *Status Report*, p. 1.

On June 16, 2010, the Water Master entered an Order Setting Settlement Conference. The United States was excused from attending the settlement conference. During the settlement conference, the parties, DNRC personnel, and the Water Master resolved all issues in the Case except the P490 issue remark pertaining to the priority dates of water rights on the former Blackfeet Indian Reservation.

On February 11, 2011, Claimants Charles D. McDonald and Diana Nelson filed a Motion and Memorandum in Support of Declaratory Judgment. Their motion asks this Court to remove the priority date issue remarks relating to Indian reservations for statements of claim in Basin 41QJ. Over the next several months, the United States filed two requests for additional time to respond to the Claimants' Motion and Memorandum. On March 21, 2011, the Water Master issued an Order Continuing Stay of Proceedings for Indian Cessions Issue. In this Order, the Water Master noted the status of the P490 issue remark would be addressed in a separate proceeding.

Chief Water Judge Loble assumed control of this case and entered an Order Lifting Stay and Setting Optional Briefing Dates on February 15, 2012. On July 19, 2012, Judge Loble assigned this matter to Judge McElyea.

REQUEST FOR DECLARATORY JUDGMENT

The United States contends the request for a declaratory judgment is improper because it was raised by motion rather than by filing a complaint and because it does not name the Blackfeet Tribe, which the United States contend is a necessary party.² The Uniform Declaratory Judgment Act's purpose "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" § 27-8-102, MCA. This Act allows a party to file a petition for declaratory judgment because the constitutionality of a law is questioned or a person's rights are affected. *See Estate of Marchwick*, 2010 MT 129, ¶ 7, 356 Mont. 385, ¶ 7, 234 P.3d 879, ¶ 7 (declaratory relief granted petition and declared Marchwick sole lineal descendant). A court may use its discretion to refuse to render judgment. § 27-8-206, MCA. *See Skinner Enterprises, Inc., v. Lewis and Clark County Bd. of Health*, 286 Mont. 256, 950 P.2d 733 (1997) (review of the board's decision was not a proper subject for a declaratory judgment).

Declaratory relief is unnecessary here because the Montana Water Court already has an obligation to resolve issue remarks under section 85-2-248, MCA. If an issue remark is not resolved through an objection, the Water Court must refer the claimant to work with DNRC to resolve the remark. §§ 85-2-248(5)(a)-(c), MCA. If the remark cannot be resolved with DNRC assistance, then the Water Court must schedule proceedings and issue a decision. §§ 85-2-248(6)-(12), MCA. The Water Court may also address issue remarks on its own motion, if needed. § 85-2-248(3), MCA. *See also In the Matter of the Water Court Procedures in Addressing Factual and Legal Issues Called in "On Motion of the Water Court,"* 1995 ML 108, 1995 Mont. Water LEXIS 7.

² The United States asked for significant extensions to respond to the Motion for Declaratory Judgment. As a basis for this additional time, the United States asserted it "has a trust responsibility to all federally-recognized Indian tribes and Alaska Natives, and an obligation to consult with tribes when the actions of the government may impact tribal interests. ... The United States has determined that matters raised in Claimants' Motion -- including but not limited to the interpretation of Treaties concluded between the United States and Indian tribes in 1851 and 1855 -- potentially affect the rights and interests of [*sic - a*] number of Indian tribes, as well as one tribe in Idaho. At a minimum, it is incumbent upon the United States to make some effort to notify these potentially affected tribes, given that they are almost certainly unaware of Claimant's Motion." *United States of America Request for Enlargement of Time*, p. 2. No tribes have asked to participate in this matter.

This issue remark was referred to DNRC and remains unresolved. Regardless of the request for declaratory judgment, the Water Court has an obligation “to resolve all issue remarks that remain unresolved” § 85-2-248(6), MCA. Because Montana statutes require this Court to address the issue raised by Claimants, Claimants’ request for declaratory judgment is moot.

DISCUSSION

The question presented is whether the P490 issue remark should be removed from Claimants’ rights. Claimants Nelson and McDonald argue the issue remark is incorrect as a matter of law. Claimants assert Basin 41QJ is not within an Indian reservation and that a reservation did not exist prior to cession. They argue any Indian title existing prior to cession was merely a right of occupancy. According to Claimants, the Treaty of 1855 did not preclude adjudication of rights in Basin 41QJ or justify attachment of issue remark P490 to water rights in the Basin. Finally, Claimants argue the Treaty of 1855 (hereinafter 1855 Treaty or Treaty) authorizes appropriation of water within the boundaries of a reservation.

The United States argues the 1855 Treaty established a reservation for the Blackfeet Tribe. The United States contends Article 7 of the Treaty does not carve out an exception enabling the State of Montana to award pre-cession water rights on lands described in the Treaty. According to the United States, the Treaty precluded non-Indian settlement and precluded appropriation of non reserved state law based water rights on the Blackfeet Reservation so long as it existed.

Creation of a Reservation

The first question is whether the 1855 Treaty established a reservation for the Blackfeet Tribe in the area currently known as Basin 41QJ. Title to Indian land can arise in a variety of ways and take a number of different forms. Original Indian title is derived from possession and exercise of sovereignty, rather than formal conveyance. Cohen, *Handbook of Federal Indian Law*, § 15.04[2], pp. 969-970 (2005 Ed.). Recognized title “refers to tribal property that has been formally acknowledged by Congress through treaty or statute.” Cohen, § 15.04[3][a], p. 974. Both forms of title can give rise to claims for water rights in favor of a Tribe. “Uninterrupted use and occupation of land”

are the bases for aboriginal rights, whereas reserved rights may be implied from “federal treaty, federal statutes, or executive order, and are governed by federal law.” *State of Montana ex rel. Greely v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 219 Mont. 76, 91, 89, 712 P.2d 754, 763, 762 (1985). The United States argue recognized title alone is enough to support application of P490 issue remarks to the claims in Basin 41QJ, and that “[t]his Court need not address whether ‘original Indian title’ is sufficient” *United States’ Response to Motion and Memorandum in Support of Declaratory Judgment and Opening Memorandum Re: Questions Posed by the Water Court Re: Article 7 of the 1855 Treaty*, p. 8. The Court agrees. Accordingly, the focus below is on recognized title and water rights reserved by treaty.

The United States and various Tribes signed a Treaty on October 17, 1855, and Congress ratified it on April 15, 1856. 11 Stat. 657. Parties to the 1855 Treaty included the Blackfoot Nation, consisting of the Piegan, Blood, Blackfeet and Gros Ventre Indians; the Flathead Nation, consisting of the Flathead, Pend d’Orielle and Kootenai Indians; and the Nez Perce Tribe. Although the 1855 Treaty does not use the word “reservation,” intent to create a reservation can be inferred from the Treaty’s language. *Winters v. U.S.*, 207 U.S. 564, 575-76, 28 S. Ct. 207, 211 (1908). Where ambiguity exists, language in treaties should be construed in favor of Indian Tribes. *Winters*, 207 U.S. at 576-77, 28 S. Ct. at 211. Article 4 of the Treaty established the territory of the Blackfoot Nation “over which that nation shall exercise exclusive control, excepting as may be otherwise provided in this Treaty.” 1855 Treaty, Art. 4.

Applying the rules of construction enunciated in *Winters*, the Treaty’s use of specific land descriptions and reference to exclusive control over those lands in Article 4 signaled intent to create a reservation for the Blackfeet Tribe. The Court concludes a reservation was created for the Blackfeet by the 1855 treaty.

This conclusion is supported by subsequent actions of the United States, the Blackfeet, and the State of Montana. Within ten years of the original Blackfeet Reservation’s creation, negotiations began to reduce the Reservation’s size and to open a portion of original Reservation lands to settlement by non-Indians. Because of the discovery of gold and a rapidly increasing population, Montana was made a territory in

1864. On November 16, 1865, a Treaty was signed with the Blackfoot Nation “to relinquish so much of their reservation as lies south of the Missouri River’ for the purpose of opening up the region to settlement.” *Blackfeet v. the United States*, 81 Ct. Cl. 101, 110 (Ct. Cl 1935), *referencing Unratified Treaty With the Blackfeet*, Nov. 16, 1865.

The lands the U.S. intended to open for settlement included the Prickly Pear Creek drainage, now a part of Basin 41QJ. This treaty was not ratified by Congress and did not become effective. A similar treaty was negotiated and signed in 1868, but it too was never ratified. It is obvious however, that if the 1855 Treaty did not create a reservation, then the treaties of 1865 and 1868 would not have been negotiated to reduce the size of the reservation.

On July 5, 1873, the President of the United States created a new Blackfeet Reservation by Executive Order. 1 Kapp. 855 (1904). This reservation fell within, but was smaller than, the reservation created by the 1855 Treaty. On April 15, 1874, the United States Congress amended the boundaries of the Blackfeet Reservation. 18 Stat. 28. The boundaries of the new reservation were the same as those created in the unratified treaties of 1865 and 1868. Again, both the 1873 Executive Order and Congressional action in 1874 would not have occurred if a Blackfeet Reservation did not already exist via the ratified 1855 Treaty.

By Executive Order dated August 19, 1874, the President of the United States restored to the public domain all lands within the boundaries of the 1855 Treaty, excepting those lands which created a new Blackfeet Reservation via the July 5, 1873 Executive Order. The lands referenced in the President’s 1874 Order included Prickly Pear Creek and Basin 41QJ. The 1874 Order was the last in a series of steps to convert Basin 41QJ from reservation lands to federal lands open to settlement.

The reservation’s existence was also recognized in litigation between the United States and the Blackfeet Tribe. In 1925, the Blackfeet and other Tribes filed a claim against the United States seeking payment for loss of reservation lands stemming from the President’s Executive Order of 1873 and Congress’ Act of 1874. *Blackfeet*, 81 Ct. Cl. at 113. The Court of Claims recognized the 1855 Treaty set aside a reservation for the Indians. *Blackfeet*, 81 Ct. Cl. at 133. The Court of Claims determined the Blackfeet

were entitled to compensation for lands lost when their reservation's boundaries were decreased from the size established in 1855 to the smaller reservation created by subsequent Executive Orders and Congressional action.

Finally, the reservation's existence was recognized in a water rights Compact between the State of Montana, the United States, and the Blackfeet Tribe. The Compact provides: "... pursuant to the Treaty of 1855, 11 Stat. 657, a Reservation was established in Montana for the Blackfeet Tribe" § 85-20-1501, Art. I, MCA.

The foregoing history affirms the 1855 Treaty created a reservation for the Blackfeet Tribe. The United States, the Blackfeet, and the State of Montana all recognized the existence of the reservation in various acts of Congress, treaties, lawsuits and in a water rights Compact. This history also indicates that, within a few years of its creation, the United States and the Blackfeet, and then the United States acting unilaterally, began removing lands in Basin 41QJ from the reservation to facilitate settlement by non-Indians.³

Reservation of Water Rights

After the reservation was created, the United States contends no waters could be appropriated on Prickly Pear Creek until reservation lands were ceded back to the United States. Whether this assertion is correct depends on how much water was reserved through creation of the Blackfeet Reservation, and whether unreserved water rights thereon could be appropriated under state law.

The first case recognizing water rights arising from creation of an Indian reservation was *Winters*. 207 U.S. at 564, 28 S. Ct. at 207. The *Winters* case involved the Fort Belknap Reservation created by Congressional Act on May 1, 1888. 25 Stat. 124. The Act described portions of the reservation as 'adapted for and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising

³ Whether the Blackfeet wanted to facilitate non-Indian settlement by signing the treaties of 1865 and 1868 is doubtful. As the Arizona Supreme Court observed, "[d]espite what may be set forth in official documents, the fact is that Indians were forced onto reservations so that white settlement of the West could occur unimpeded." *In re Adjudication of All Rights to Use Water in the Gila River System and Source (Gila V)*, 201 Ariz. 307, 314, 35 P.3d 68,75 (Ariz. 2001) (internal citation omitted).

thereon of grass, grain and vegetables... .’ *Winters*, 207 U.S. at 564, 28 S. Ct. at 207, referencing *Fort Belknap Indian Reservation*, 25 Stat. 124.

In *Winters*, non-Indians upstream of the Fort Belknap Reservation installed large diversion structures along the Milk River, impairing the ability of Indians on the Reservation to obtain water. The *Winters* Court determined that in the interpretation of agreements and treaties with the Indians, ambiguities should “be resolved from the standpoint of the Indians.” *Winters*, 207 U.S. at 576, 28 S. Ct. at 211. Using this principle, the *Winters* Court concluded:

The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. 207 U.S. at 576, 28 S. Ct. at 211.

The Court determined that reduction in size of an Indian reservation without setting aside water rights would defeat the purposes of the reservation.

Winters was the first in a long line of cases discussing federal reserved rights. *Winters* did not specify how much water was reserved or provide a test to quantify the reservation. In the absence of guidance as to the amount of water reserved, early cases applying the *Winters* doctrine took an expansive view, assuming that if a reservation occurred, all available water was withheld from other uses. *United States v. McIntire et al.*, 101 F. 2nd 650, 653-54 (9th Cir. 1939). “These waters were reserved by the United States for the use of the Crow Indians, and being owned by it, were not the subject of further appropriations by others.” *Anderson v. Spear Morgan Livestock Co.*, 107 Mont. 18, 25, 79 P. 2d 667, 669 (1938).

Later cases considering reservations on federal land have taken a narrower approach to defining the amount of water reserved, holding that because reservations are implied rather than explicit, they include ‘only that amount of water necessary to fulfill the purpose of the reservation, no more.’ *United States v. New Mexico*, 438 U.S. 696, 700, 98 S. Ct. 3012, 3014 (1978), citing *Cappaert v. United States*, 426 U.S. 128, 141. 96

S. Ct. 2062, 2071 (1976). “The Supreme Court has applied this concept to Indians and Indian reservations, holding that the establishment of the reservation implies a right to sufficient unappropriated water to accomplish its purposes.” *Spokane Tribe of Indians v. Anderson*, 736 F.2d 1358, 1362, 1984 U.S. App. LEXIS 20677, **6 (9th Cir. 1984). Other federal decisions have held that “*New Mexico* and *Cappaert*, while not directly applicable to *Winters* doctrine rights on Indian reservations ... establish several useful guidelines.” *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

The Montana Supreme Court, after discussing *United States v. New Mexico* and *Cappaert*, stated “[t]he purposes of Indian reserved rights, on the other hand, are given broader interpretation in order to further the federal goal of Indian self sufficiency.” *Greely*, 219 Mont. at 98, 712 P.2d at 768 (internal citations omitted).

Reserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water. The basis for an Indian reserved water right is the treaty, federal statute or executive order setting aside the reservation. Treaty interpretation and statutory construction are governed by federal Indian law. *Greely*, 219 Mont. at 90, 712 P.2d at 762.

Accordingly, determining how much water was reserved for the Blackfeet requires a review of the Treaty, and subsequent Presidential actions and Congressional acts to determine the reservation’s purpose. If all the water in Basin 41QJ was reserved in 1855, then subsequent settlers could not have appropriated water under state law until that water was restored to the public in 1873.⁴

The 1855 Treaty had several purposes. A central objective was to secure peace between the Blackfeet, the United States, and other Indian Tribes. Article 2 states “the aforesaid nations and tribes of Indians, parties to this treaty, do hereby jointly and severally covenant that peaceful relations shall likewise be maintained among themselves

⁴ Indian Tribes may also have aboriginal water rights in addition to water rights reserved in a treaty. “[T]he treaty is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.” *United States v. Winans*, 198 U.S. 371, 381, 25 S. Ct. 662, 664, (1905). “Within its domain, the Tribe used the waters that flowed over its land for domestic purposes and to support its hunting, fishing and gathering lifestyle. This uninterrupted use and occupation of land and water created in the Tribe aboriginal or ‘Indian title’ to all of its vast holdings.” *Adair*, 723 F.2d at 1413 (internal citations omitted).

in future; and that they will abstain from all hostilities whatsoever against each other and cultivate mutual good-will and friendship.” 1855 Treaty, Art.2.

Article 3 of the Treaty provided for the creation of common hunting lands to be shared by all parties to the Treaty without resting exclusive control in one group. The common hunting ground consisted of a “portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory” Treaty, Art. 3. This area covered much of what is now southwestern Montana. Establishment of permanent settlements within the common hunting area was prohibited and no tribe was given exclusive control of these lands. The common hunting area was also limited in duration to ninety-nine years. “The hunting ground was not Indian territory in a legal sense; no one tribe possessed any exclusive right of occupancy.” *Blackfeet*, 81 Ct. Cl. at 122. Accordingly, Article 3 of the 1855 Treaty did not establish a reservation and did not reserve water rights.

Article 4, which created the Blackfeet Reservation, is silent regarding farming, cultivation or establishment of crops. It prohibited the Blackfeet from establishing settlements near the boundary of the common hunting ground established in Article 3 and divided hunting rights in the reservation between the Blackfeet and Assiniboine.

Article 7 provided that “*citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them.*” 1855 Treaty, Art. 7 (emphasis added). The italicized portion of the foregoing quote authorizes non-Indians to live within the Reservation and by implication to appropriate water. Article 7 further provided that the United States was bound to protect Blackfeet “against depredations and other unlawful acts which white men *residing in* or passing through their country may commit.” 1855 Treaty, Art. 7. Again, this passage makes reference to non-Indians residing in the Blackfeet Reservation.⁵

Article 8 discussed establishment of “travelling thoroughfares through their country ...” and further authorized the United States to:

⁵ Treaties with Indian Tribes in Montana contained different language regarding occupancy of reservation lands by non-Indians. Unlike the Treaty with the Blackfeet, the Flathead Treaty of 1855 expressly prohibited non-Indians from living on the reservation without permission. “Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes” *Treaty With the Flathead, Etc.*, Jul. 16, 1855, Art. 2, 12 Stat. 975.

construct roads of every description; establish lines of telegraph and military posts; use materials of every description found in the Indian country; build houses for agencies, missions, schools, farms, shops, bills, stations, and for any other purpose for which they may be required; and permanently occupy as much land as may be necessary for the various purposes above enumerated, including use of wood for fuel and land for grazing, and that the navigation of all lakes and streams shall be forever free to citizens of the United States. 1855 Treaty, Art. 8.

Together, Article 7 which authorized non-Indians to live on the reservation, and Article 8, which allowed for permanent occupation of land for farms among other uses, constituted a significant exception to the exclusive control provisions in Article 4.

Article 10 of the Treaty contains the only reference to agriculture, but no reference to irrigation. The Treaty provided for the allocation of \$15,000 annually for a ten-year period and for the establishment of instructing the Tribes of the Blackfoot Nation “in agricultural and mechanical pursuits, and in educating their children, and in any other respect promoting their civilization and Christianization” 1855 Treaty, Art. 10.

Taken as a whole, the 1855 Treaty’s purpose was to establish a reservation large enough to enable the Blackfeet Tribe to continue its traditional nomadic existence. In this regard, the history of the Blackfeet 1855 Treaty and the history of the Assiniboine Treaty described in *Winters* are the same. Both tribes began with large tracts of land “adequate for the habits and wants of a nomadic ... people.” *Winters*, 207 U.S. at 576, 28 S. Ct. at 211. By subsequent action of the United States, these large tracts were reduced in size so they could not support a nomadic lifestyle, and remaining smaller reservations required irrigation to meet the needs of the Tribe. Creating a large reservation to support a nomadic lifestyle, however, did not reserve all the waters in Basin 41QJ for the exclusive use of the Blackfeet Tribe.

Instead, the 1855 Treaty reserved enough water to support the Tribe’s traditional means of existence. The Court of Claims described this tradition:

The Blackfoot Nation had in earlier times roamed over a vast region of country extending from the north fork of the Saskatchewan River in Canada to the headwaters of the Muscle Shell River and from the Rocky Mountains on the west to the 106 o of longitude on the east. They were a warlike, nomadic people, depending on the buffalo for practically every want of their primitive existence. They followed the buffalo in its migrations,

usually spending their summers in the part of the territory lying to the North the international boundary line and their winters on American soil. Their country was the home of vast herds of buffalo, which ranged on plains of the Muscle Shell, the Judith, the Missouri, the Milk, and the Saskatchewan Rivers in countless numbers. That portion of their territory on the east slope of the Continental Divide was rich in elk, deer, antelope, mountain sheep, and other game and fur-bearing animals. While these Indians were truly nomadic, there were certain sections of their territory which in time became recognized as their "home" territories. Thus the Blackfeet proper and the Bloods occupied principally the country about the sources of Maria's and Milk Rivers, while the Piegans occupied generally the country between the Milk River on the north and the Maria's and Teton Rivers on the South. *Blackfeet*, 81 Ct. Cl. at 105.

At the time of the negotiation of the treaty of 1855 the common hunting ground was not well known to the outside world, and the number of white people in the region was negligible. *Blackfeet*, 81 Ct. Cl. at 109.

The Blackfeet 'home' territory was amply supplied with game and buffalo and vast herds ranged at various times on the Maria's, the Teton, the Sun and Milk Rivers, and north of the international boundary line in Canada. *Blackfeet*, 81 Ct. Cl. at 109.

Eradication of the buffalo, discovery of gold in Montana, creation of a new Montana territory, passage of the Homestead Act, and a flood of settlers had not occurred. These life-altering changes would force the Blackfeet and other Tribes onto smaller and smaller tracts of land, where water for uses other than nomadic purposes would eventually become critical to the Tribe's future. In 1855, however, these events had not yet changed the face of the West, and the Treaty did not contemplate or create the need for reservations of water for irrigation and other uses as demonstrated by later actions of the United States.⁶

⁶ The practice of irrigation was extremely rare in Montana in 1855. There are no water right claims for irrigation, or any other use, in Basin 41QJ with priority dates earlier than 1855. According to the Court of Claims, one of the intended purposes of the Treaty was to "... encourage cultivation of the soil" *Blackfeet*, 81 Ct. Cl. at 118. This intention is inferred from instructions given by the Commissioner of Indian Affairs to the negotiators of the Treaty. Language to this effect is not found within the Treaty, and it is unlikely either the Blackfeet or the United States envisioned the Blackfeet converting from their traditional nomadic existence to an agrarian lifestyle at the time the Treaty was signed.

Appropriation of Non Reserved Water Rights on Reservation Land

The next issue is whether unreserved water could be appropriated under state law on the reservation. The United States argues that once a reservation was created or recognized by the 1855 Treaty, no water rights could be appropriated in Basin 41QJ until those lands were ceded back to the United States by the President's Executive Order dated July 5, 1873.⁷ "First, 'no title to the waters could be acquired by anyone [pre-cession] except as specified by Congress.'" *United States' Response to Motion and Memorandum*, p. 11, citing *McIntire*, 101 F.2d at 653.

The United States misquotes *McIntire* by omitting a key reference to reservation of water at the beginning of the sentence and by inserting a reference to cession missing from the original. The correct quote reads: "*Being reserved* no title to the waters could be acquired by anyone except as specified by Congress." *McIntire*, 101 F.2d at 653 (emphasis added). At most, *McIntire* stands for the self evident and uncontroversial proposition that once water was reserved, it could not later be appropriated by someone else. *McIntire* does not prohibit appropriation of unreserved water.

Nevertheless, the United States argues *McIntire* applies far more broadly. Under the interpretation urged by the United States, *McIntire* completely preempts the right of anyone to appropriate water on reservations, regardless of the purpose of the reservation or the amount of water reserved to fulfill that purpose. Even assuming *McIntire* articulated such a rule, it does not reflect current law regarding appropriation of water on federal reservations. Since *McIntire*, case law and federal policy have evolved to

⁷ This argument hinges on two key assumptions not supported by the Treaty. First, the Treaty did not prohibit settlement within reservation boundaries, and no prohibition on non-Indian appropriations can reasonably be read into the Treaty, provided they were not in conflict with Indian reserved rights. Second, the Treaty did not recognize or protect all the waters in Basin 41QJ. Accordingly, there was at least some water left open for appropriation between 1855 and 1873.

recognize appropriation of state-based water rights on both the public domain and on federal reservations.⁸

Appropriation of water on federal land is part of a doctrine of federal deference to state water rights dating back to early settlement of the western United States. “The history of the relationship between the federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.” *California v. United States*, 438 U.S. 645, 653, 98 S. Ct. 2985, 2990 (1978).

The rule generally recognized throughout the states and the territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well.

⁸ *McIntire* is factually distinguishable from the present case. The lands in *McIntire* remained within reservation boundaries at the time the case was decided. The lands in Basin 41QJ have not been within reservation boundaries since 1873. In *McIntire*, the Indian reserved rights and non-Indian rights based on state law were competing for water from the same stream. Unlike *McIntire*, Basin 41QJ is geographically distant from the current Blackfeet Reservation. It is physically impossible to deliver water from Basin 41QJ to the Blackfeet Reservation. Diversion of water in Basin 41QJ does not impact the Blackfeet tribe, nor does diversion of water by the Blackfeet Tribe impact water users in Basin 41QJ. The lack of a physical connection between water rights in Basin 41QJ and reserved water rights claimed by the Blackfeet Tribe is significant. No physical connection is acknowledged implicitly by the terms of the Blackfeet Water Compact, which does not assert a claim for water in Basin 41QJ. § 85-20-1501, MCA.

McIntire is also legally distinguishable. In ruling that water rights could not be appropriated on an Indian Reservation, the *McIntire* Court relied on Montana’s Enabling Act and the Montana Constitution, which provided that the people of Montana:

[A]gree and declare that they forever disclaim all right and title to ... all lands ... owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction of the Congress of the United States 25 Stat. 676, § 4, mentioned in *McIntire*, 101 F.2d at 654.

Based on this interpretation of the Enabling Act, the *McIntire* Court concluded Congress had not authorized appropriation of water rights within reservation boundaries.

This conclusion was reached before the passage of the McCarran Amendment and before *Arizona v. San Carlos Apache Tribe*. 463 U.S. 545, 103 S. Ct. 3201 (1983). After reviewing Montana’s Enabling Act, the United States Supreme Court wrote: “[W]hatever limitation the Enabling Acts or federal policy may have originally placed on state-court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.” *Arizona*, 463 U.S. at 854, 103 S. Ct. at 3212 (internal citation omitted).

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154, 55 S. Ct. 725,727 (1935).

The first Congressional confirmation of appropriating water on federal lands occurred in the Mining Act of 1866. This Act provided:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same 14 Stat. 254, 43 U.S.C. § 661(a).

The Mining Act did not create a new right to appropriate water on federal lands. The Mining Act was “rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.” *Broder v. Natoma Water and Mining Co.*, 101 U.S. 274, 276, 25 L. Ed. 790, 791 (1879).

Federal deference to state-based water rights continued with Congressional adoption of the Desert Lands Act of 1877, which provided:

... all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. 19 Stat. 377, 43 U.S.C.A. § 321.

In addition to Congress, courts also recognized that local water appropriations were “... rights which the government had, by its conduct, recognized and encouraged and was bound to protect” *Broder*, 101 U.S. at 276, 25 L. Ed. at 791.

In 1952, Congress passed the McCarran Amendment, which waived sovereign immunity of both the United States and Indian Tribes and provided for their joinder in state lawsuits or proceedings involving the comprehensive adjudication of water rights. 43 U.S.C. § 666. Despite the McCarran Amendment’s passage, both the United States and Montana Indian Tribes attempted to avoid determination of tribal water rights in state court by filing lawsuits in Montana federal courts to adjudicate their claims. The United

States Supreme Court rejected this approach, holding that Indian tribal rights should be adjudicated in *Montana Water Court*. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569, 103 S. Ct. 3201, 3215 (1983).

After passage of the McCarran Amendment, the United States Supreme Court defined the scope of federal reserved water rights on federal reservations, and affirmed the ability of private appropriators to claim water rights within the boundaries of federal reservations. *United States v. New Mexico*, 438 U.S. 698, 716-17, 716 S.Ct. 3012, 3022-23 (1978).

The foregoing history illustrates the longstanding policy of the United States Congress and federal courts to protect appropriation of water rights on federal lands, including lands within federal reservations.⁹

Applying these principles to the present case, it is clear settlers in Basin 41QJ had a right to appropriate water rights, *provided* doing so did not conflict with water rights held by the Blackfeet Tribe for continuation of their nomadic existence. The language of the 1855 Treaty also supports this conclusion. Articles 7 and 8 expressly authorized non-Indians to live within the reservation, and such occupancy could not have occurred without use of water.

No evidence exists that water rights appropriated by early settlers interfered with the water rights implicitly protected by the 1855 Treaty. Regardless, the United States soon terminated the Blackfeet's water rights, thereby making any argument about the existence of such conflict irrelevant.

Evidence of intent by the United States to terminate the Blackfeet's ownership of land and water rights in Basin 41QJ is clear. Soon after the 1855 Treaty, the United States took dramatic steps to reshape the reservation and pave the way for settlement. In 1865, Congress appropriated funds:

⁹ Whether early settlers in Basin 41QJ could obtain title to the lands they were occupying within the Blackfeet Reservation before these lands were restored to the public domain in 1873 is irrelevant, as numerous courts have held that water rights may be appropriated by squatters occupying lands they do not own and to which they do not have a legitimate claim of title. "We recognize the doctrine that the right to the use of water may be owned without regard to the title to the lands upon which the water is to be used" *Toohey v. Campbell*, 24 Mont. 13, 17, 60 P. 396, 397 (1900); *Thomas v. Ball*, 66 Mont. 161, 166, 213 P. 597, 599 (1923).

... to be used by the Secretary of the Interior in an effort to negotiate a treaty with the Blackfoot nation to secure if possible a cession of so much of their existing reservation "as lies south of the Missouri River." The moving cause for this legislation and procedure was a prevalent supposition that the lands abounded in gold and should be made available to settlement by incoming emigrants. A treaty was made with the ... [Tribe] at Fort Benton, Montana on November 16, 1865 (4 Kapp. 1133), by its terms of which the United States procured the contemplated cession" *Blackfeet*, 81 Ct. Cl. at 123.

The 1865 Treaty was followed by another in 1868.¹⁰ These treaties were intended to remove lands from the boundaries of the original Reservation and cede them back to the United States for settlement by non-Indians. *Blackfeet*, 81 Ct. Cl. at 110. Termination of any water rights previously reserved in Basin 41QJ occurred upon issuance of the July 5, 1873 Executive Order modifying the boundaries of the reservation. "... *Winters* rights were only intended to assist in accomplishing the needs of the reservation; where the land has been removed from the Tribe's possession and conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated." *Spokane Tribe of Indians v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984).

In this case, Claimants' predecessors were early settlers upon lands originally part of the reservation in 1855, but later restored to the public domain. The 1905 Decree shows appropriation of waters in Little Prickly Pear Creek began as early as 1866.¹¹ The decree states:

That on or about October 15, 1866 Katherine Richardson, and her predecessors in interest, appropriated and began to use of the waters of little prickly pear Creek 40 inches of water, for the purpose of irrigating 320 acres of land of which she is the owner, and have ever since used the same for a useful and beneficial purpose. 1905 Decree, p. 3, #9, attached to Claim 41QJ-005581.

¹⁰ The Court recognizes the 1865 and 1868 Treaties, though signed, were not ratified. Nevertheless, these Treaties are a strong expression of intent by the United States. Similar expressions of intent were relied on by the Court in *United States v. New Mexico*. 438 U.S. at 715-17, 716 S. Ct. at 3021-23.

¹¹ In this matter, the water right claims date back to 1872. Other court decrees recognized priority dates of claims to Prickly Pear water as early as 1867. See, e.g., *Gans & Klein Inv. Co., v. Sanford et al.*, 91 Mont. at 516, 8 P.2d at 809.

The United States argues these settlers were trespassers who could not have appropriated water rights on reservation lands. Having signed treaties to encourage settlement, the United States cannot now argue settlers were trespassers who should have the priority dates of their water rights arbitrarily back-dated to the time of cession.

The United States also fails to acknowledge the Blackfeet Tribe received compensation for loss of previously reserved lands in Basin 41QJ. *Blackfeet*, 81 Ct. Cl. at 136. In *Blackfeet*, the Tribe sought compensation for loss of lands set aside for them in the 1855 Treaty and subsequently taken back by the United States when the original reservation was reduced in size. The Court of Claims agreed and provided: “the Blackfeet ... were deprived of 12,261,749.76 acres for which they have not been compensated.” *Blackfeet*, 81 Ct. Cl. at 136. The Court established a value for the land and ordered payment. The award of damages by the Court of Claims marked the final chapter of a drama that began with creation of a massive reservation to perpetuate the nomadic traditions of the Blackfeet and ended with relegation of the Tribe to a much smaller area and a much different way of life. Having terminated large areas of the reservation to facilitate non-Indian settlement, and having paid damages for its decision, the United States cannot now argue a reserved water right remains viable in this Basin, and that successors of the settlers it induced to occupy these lands should have their priority dates modified.

This conclusion is supported by the Blackfeet Compact. According to the Compact, the United States filed claims for itself and on behalf of the Blackfeet Tribe in the general adjudication of water rights within the State of Montana. § 85-2-1501, ARTICLE I. The Compact is between the United States, the State of Montana and the Blackfeet Tribe. It is intended to be a final settlement of all “the federally reserved water rights claims of the Blackfeet Tribe...and of the United States on behalf of the Tribe.” *Id.* The compact contains no assertion of rights for water in Basin 41QJ.¹²

Finally, the United States acknowledges priority dates among non-Indians in Basin 41QJ may be enforced against each other even if they predate cession. *United States’*

¹² The Compact has not yet been approved by the Congress of the United States, and is not effective. Were the Compact effective, the Court’s analysis in this case would have started and ended with the Compact.

Response to Motion and Memorandum, p. 13. While this admission is commendable because it partially addresses the problems inherent in changing the priority dates of thousands of early Montana water rights, it contradicts the United States' assertion that such water rights could not have been appropriated within the boundaries of an Indian Reservation under state law.

CONCLUSION

Under the particular and complicated facts of this case, there is no practical benefit to placing issue remarks on Claimants' water rights stating that lands within their place of use were once within a former Indian reservation. Although the remark is historically accurate, it serves no useful purpose. Waters in Basin 41QJ are not physically available for diversion or use by the Blackfeet Nation, and any aboriginal water rights once in existence there have been terminated. The Blackfeet Tribe sued and recovered compensation for this termination. The Blackfeet have not made a claim to water from Basin 41QJ in their Compact with the State of Montana and the United States. The Tribe has not objected to the water rights in this case. No injury has been demonstrated to the Tribe or its members if these or any water rights in Basin 41QJ are diverted in accord with their actual priority dates. The United States concedes the priority dates of Claimants' water rights are valid and enforceable against other non-Indian water rights. Accordingly,

IT IS ORDERED that P490 issue remark shall be removed from the claims in this case.

IT IS FURTHER ORDERED that the Water Master remove P490 issue remark from all claims in Basin 41QJ.

DATED this 24 day of September, 2012.



Russ McElyea
Associate Water Judge

CERTIFICATE OF SERVICE

I, Swithin J. Shearer, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER ADDRESSING P490 ISSUE REMARK** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Linda M. Johns
W. Steve Johns
PO Box 453
Canyon Creek, MT 59633 0453

DNRC, Water Resources
Division
Team A
PO Box 201602
Helena, MT 59620-1602

Susan L. Schneider, Attorney
U.S. Department of Justice
Environment and Natural
Resources Division
Indian Resources Section
South Terrace, Suite 370
999 18th Street
Denver, CO 80202
(303) 844-1348
susan.schneider@usdoj.gov

Betty L. Bicknell
Gene E. Bicknell
PO Box 494
Canyon Creek, MT 59633

Roselyn Rennie
Office of the Billings Field
Solicitor
316 North 26th Street
Billings, MT 59101
(406) 247-7545
roselyn.rennie@sol.doi.gov

John C. Chaffin
Office of the Field Solicitor
PO Box 31394
Billings, MT 59107-1394
(406) 247-7583
jonhaffin@bresnan.net

KD Feedback
Attorney-at-Law
PO Box 1715
Helena, MT 59624-1715
(406) 442-8560
kd@gsjw.com

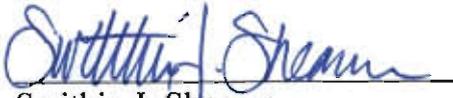
Patrick Barry, U.S. Attorney
Laura Maul
U.S. Department of Justice
Indian Resources Section,
ENRD
PO Box 7611
Ben Franklin Station
Washington, DC 20044-7611
(202) 305-0269
patrick.barry@usdoj.gov
Laura.Maul@usdoj.gov

Bureau of Indian Affairs
Water Resources Office
Attn: Frank Rollefson and Jim
Gappa
316 N. 26th Street
Billings, MT 59101

Sue A. Weingartner
Russell W. Weingartner
4480 Last Straw Dr
Helena, MT 59602 7132

Elizabeth C. Dagnall
Robert G. Dagnall
PO Box 463
Canyon Creek, MT 59633 0463

DATED this 24th day of September, 2012.


Swithin J. Shearer
Deputy Clerk of Court

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, FROM HOLTER DAM TO SUN RIVER
BASIN 41QJ
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41QJ 97570-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: RUSSELL W WEINGARTNER
4480 LAST STRAW DR
HELENA, MT 59602 7132

SUE A WEINGARTNER
4480 LAST STRAW DR
HELENA, MT 59602 7132

Priority Date: MARCH 1, 1872

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 2.50 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 180.00

Source Name: LITTLE PRICKLY PEAR 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	3	NW	12	12N	6W	LEWIS AND CLARK

Period of Diversion: MARCH 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: GANS KLEIN DITCH

Period of Use: MARCH 1 TO NOVEMBER 1

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	10.00		SE	8	12N	5W	LEWIS AND CLARK
2	50.00		E2	8	12N	5W	LEWIS AND CLARK
3	120.00		W2	8	12N	5W	LEWIS AND CLARK

Total: 180.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

97569-00 97570-00

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.

97570-00 97572-00

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

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS. THESE ISSUES MAY REMAIN UNRESOLVED IF NO OBJECTIONS ARE FILED DURING THE NEXT OBJECTION PERIOD.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 300 MINER'S INCHES DECREED IN CASE NO. 5627 , LEWIS AND CLARK COUNTY. 41QJ-143007, 41QJ-34410, 41QJ-41568, 41QJ-41569,41QJ-5581, 41QJ-97570, 41QJ-97571, 41QJ-97572.

THE LEWIS AND CLARK COUNTY WATER RESOURCES SURVEY (1957) APPEARS TO INDICATE 137 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

USDA AERIAL PHOTOGRAPH NO(S). 278-93 , DATED 09/02/1978 , APPEARS TO INDICATE 143 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, FROM HOLTER DAM TO SUN RIVER
BASIN 41QJ
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41QJ 97571-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: RUSSELL W WEINGARTNER
4480 LAST STRAW DR
HELENA, MT 59602 7132

SUE A WEINGARTNER
4480 LAST STRAW DR
HELENA, MT 59602 7132

Priority Date: MARCH 1, 1872

Type of Historical Right: DECREED

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: LITTLE PRICKLY PEAR 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		S2NWNW	8	12N	5W	LEWIS AND CLARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2		N2SWNW	8	12N	5W	LEWIS AND CLARK
---	--	--------	---	-----	----	-----------------

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

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			S2NWNW	8	12N	5W	LEWIS AND CLARK
2			N2SWNW	8	12N	5W	LEWIS AND CLARK

Remarks:

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

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS. THESE ISSUES MAY REMAIN UNRESOLVED IF NO OBJECTIONS ARE FILED DURING THE NEXT OBJECTION PERIOD.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 300 MINER'S INCHES DECREED IN CASE NO. 5627 , LEWIS AND CLARK COUNTY. 41QJ-143007, 41QJ-34410, 41QJ-41568, 41QJ-41569, 41QJ-5581, 41QJ-97570, 41QJ-97571, 41QJ-97572.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, FROM HOLTER DAM TO SUN RIVER
BASIN 41QJ
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41QJ 97572-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: RUSSELL W WEINGARTNER
4480 LAST STRAW DR
HELENA, MT 59602 7132

SUE A WEINGARTNER
4480 LAST STRAW DR
HELENA, MT 59602 7132

Priority Date: MARCH 1, 1872

Type of Historical Right: DECREED

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: LITTLE PRICKLY PEAR 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	3	NW	12	12N	6W	LEWIS AND CLARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

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			NWSW	8	12N	5W	LEWIS AND CLARK
2			SWSW	8	12N	5W	LEWIS AND CLARK

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.

97570-00 97572-00

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

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS. THESE ISSUES MAY REMAIN UNRESOLVED IF NO OBJECTIONS ARE FILED DURING THE NEXT OBJECTION PERIOD.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 300 MINER'S INCHES DECREED IN CASE NO. 5627 , LEWIS AND CLARK COUNTY. 41QJ-143007, 41QJ-34410, 41QJ-41568, 41QJ-41569, 41QJ-5581, 41QJ-97570, 41QJ-97571, 41QJ-97572.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, FROM HOLTER DAM TO SUN RIVER
BASIN 41QJ
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41QJ 143007-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
ELIZABETH C DAGNALL
PO BOX 463
CANYON CREEK, MT 59633 0463

ROBERT G DAGNALL
PO BOX 463
CANYON CREEK, MT 59633 0463

Priority Date: MARCH 1, 1872

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 3.75 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 474.00

Source Name: LITTLE PRICKLY PEAR 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	3	N2	12	12N	6W	LEWIS AND CLARK

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: GANS KLEIN DITCH

Period of Use: APRIL 15 TO OCTOBER 15

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	32.00		W2NW	16	12N	5W	LEWIS AND CLARK
2	104.00		SW	16	12N	5W	LEWIS AND CLARK
3	156.00		NE	17	12N	5W	LEWIS AND CLARK
4	22.00		NENW	17	12N	5W	LEWIS AND CLARK
5	128.00		NE	21	12N	5W	LEWIS AND CLARK

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>
6	16.00		NENW	21	12N	5W	LEWIS AND CLARK
7	16.00		NESE	21	12N	5W	LEWIS AND CLARK
Total:	474.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

143007-00 143010-00

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 1/8/2001: PLACE OF USE, MAXIMUM ACRES, FLOW RATE, PERIOD OF USE.

THE TYPE OF RIGHT WAS AMENDED BY THE CLAIMANT ON 01/19/2006.

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

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS. THESE ISSUES MAY REMAIN UNRESOLVED IF NO OBJECTIONS ARE FILED DURING THE NEXT OBJECTION PERIOD.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 300 MINER'S INCHES DECREED IN CASE NO. 5627 , LEWIS AND CLARK COUNTY. 41QJ-143007, 41QJ-34410, 41QJ-41568, 41QJ-41569, 41QJ-5581, 41QJ-97570, 41QJ-97571, 41QJ-97572.

THE LEWIS AND CLARK COUNTY WATER RESOURCES SURVEY (1957) APPEARS TO INDICATE 222 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

USDA AERIAL PHOTOGRAPH NO(S). 278-93 , DATED 09/02/1978 , APPEARS TO INDICATE 348.5 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.