

**IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
FRENCHMAN CREEK (40L)**

CLAIMANTS: Blaise Bergtoll	CASE 40L-0001-R-2019
OBJECTORS: United States of America (Bureau of Reclamation)	40L 188604-00 40L 211794-00
CLAIMANTS: Blaise Bergtoll	CASE 40L-0009-R-2019
OBJECTORS: United States of America (Bureau of Reclamation)	40L 188606-00 40L 188607-00 40L 188609-00 40L 188610-00 40L 188611-00 40L 188612-00 40L 188613-00 40L 188614-00

ORDER APPROVING SETTLEMENT AND CLOSING CASES

BACKGROUND

Claimant Blaise Bergtoll (“Bergtoll”) seeks Water Court approval of a stipulation (“Stipulation”) and proposed abstracts to resolve issue remarks and objections to the water right claims consolidated in these cases. Objector United States of America (Bureau of Reclamation) is the other party to the Stipulation and does not oppose Bergtoll’s motion.

FINDINGS OF FACT

Procedural and Historical Background

1. Frenchman Creek flows from Canada into the United States in Phillips County, Montana. From the Canadian border, Frenchman Creek flows south through Phillips County and Valley County to its confluence with the Milk River near Saco, Montana.

2. The Bergtoll family owns and operates a ranch north of Saco. As part of their operation, they claim rights to use water from Frenchman Creek and various tributaries. Blaise Bergtoll currently owns the water right claims. Blaise Bergtoll's father is Darrel Bergtoll. Darrel Bergtoll is Leo Bergtoll's son. Leo Bergtoll and Aldon Bergtoll acquired the property in the 1950s.

3. On April 18, 1949, a Montana state district court in Phillips County issued findings of fact, conclusions of law, and a judgment decreeing water rights on Frenchman Creek and select tributaries in *Frenchman Irrigation Co. v. State of Montana*, Case 4024 ("Case 4024"). Case 4024 contains several tabulations of water rights, including a list of rights and priorities on Frenchman Creek, and a list of rights and priorities on Frenchman Creek tributaries.

4. After the district court issued the Case 4024 decree, the State Water Conservation Board ("SWCB") developed plans for a reservoir project on Frenchman Creek. On July 25, 1950, the SWCB executed a declaration stating its intent to divert and store all unappropriated waters of Frenchman Creek and its tributaries. This declaration is the basis for the State's water right claim 40L 119577-00.¹

5. Frenchman Reservoir was completed in 1951. The reservoir impounds water on lands that had previously been irrigated under water rights decreed in Case 4024. Frenchman Dam failed in April 1952 and was rebuilt in time for the 1953 irrigation season.

¹ The Water Court resolved issues and objections to claim 40L 119577-00 in case 40J-74 in 2015.

6. On April 29, 1982, Leo O. Bergtoll and Aldon C. Bergtoll filed statements of claim for existing water rights for the water right claims in this case.

7. On January 16, 1985, the Water Court issued a temporary preliminary decree (“TPD”) for Basin 40L. Each claim in this case except claim 40L 211794-00 was included in the TPD. After the TPD, the Water Court conducted proceedings for the claims and issued master’s reports and orders adopting masters reports.

8. As part of the TPD proceedings, on June 6, 1986, Leo Bergtoll and Aldon Bergtoll wrote the water master assigned to Basin 40L to provide additional information about the Bergtoll claims. The water master accepted the letter as an affidavit and used some of the information contained in the letter to resolve claim issues as documented in several master’s reports. The water master deferred addressing certain issues in the Bergtoll’s letter on the basis that they were late objections that could be resolved at the next proceeding stage.

9. In October 1986, claim 40L 211794-00 was created as an implied claim.

10. On October 26, 2017, the Water Court issued the Preliminary Decree for Frenchman Creek (Basin 40L). The preliminary decree abstracts for the claims in these cases include issue remarks resulting from claim examination conducted by the Department of Natural Resources and Conservation (“DNRC”).

11. The United States on behalf of the Bureau of Reclamation (“Reclamation”), the Bureau of Land Management (“BLM”) and the Bureau of Indian Affairs (“BIA”) filed timely objections to various Bergtoll claims. The Water Court consolidated the claims into these cases to address the objections and issue remarks. The claims in these cases did not receive any objections other than those filed by the United States.

12. On January 11, 2021, Bergtoll withdrew claims 40L 167799-00, 40L 167809-00, 40L 188605-00, and 40L 188608-00. The Court issued an order dismissing these claims from these cases on March 4, 2021. The dismissal order resolved the BIA’s objections claims 40L 188605-00 and 40L 188608-00. The dismissal order also resolved BLM’s objection to claim 40L 167809-00. With the resolution of the BIA and BLM objections, the United States on behalf of Reclamation remained the sole objector.

13. On March 25, 2021, following cross-motions by the parties, the Water Court issued an Order on Pending Motions. The order made several modifications to the remaining claims, including: (a) amending claim 40L 188604-00, 40L 188606-00, 40L 188607-00, 40L 188609-00, 40L 188610-00 and 40L 188612-00 from use rights to decreed rights; (b) amending the priority dates for claims 40L 188611-00, 40L 188613-00, and 40L 188614-00 to April 19, 1949; and (c) dismissing implied claim 40L 211794-00.

14. The Court set a hearing on the remaining issues to commence on May 19, 2021. Prior to the start of the hearing, the parties notified the Court that they had reached a settlement.

15. On May 28, 2021, Bergtoll filed an Unopposed Motion to Adopt Stipulation and Evidence in Support of Proposed Abstracts (“Motion to Adopt”). The Motion to Adopt includes a copy of the Stipulation executed by counsel for each party. The Motion to Adopt also includes water right abstracts with the changes proposed from the preliminary decree abstracts. The Motion to Adopt, and its exhibits, propose resolution of the issue remarks and objections for the remaining claims.

Claim 40L 188604-00

16. Claim 40L 188604-00 is included in the preliminary decree as a use right to divert water from Frenchman Creek to irrigate 252.00 acres with a June 3, 1911 priority date.

17. The preliminary decree abstract for claim 40L 188604-00 includes the following issue remarks:

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A CHANGE IN FLOW RATE. THIS SHALL BE HEARD AT THE PRELIMINARY DECREE STAGE.

SOURCE NAME, POINT OF DIVERSION, AND RESERVOIR RECORD 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.

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A
USE RIGHT ON FRENCHMAN CREEK WITH A PRIORITY DATE
PREDATING CASE NO. 183482, PHILLIPS COUNTY.

18. After the objection period closed, Bergtoll moved to amend three elements of this claims: (a) amend the type of right from “use” to “decreed”; (b) amend the “historically-exchanged” source from Brush Creek to Box Elder Creek; and (c) amend the priority date from June 3, 1911 to November 21, 1902.

19. The source element in the preliminary decree includes the following information remark:

CASE NO. 4024 PHILLIPS COUNTY DECREED THE SOURCE AS BRUSH
COULEE. WATER FROM THIS SOURCE IS EXCHANGED FOR WATER
FROM FRENCHMAN CREEK.

20. This remark was proposed in the Bergtoll letter of June 6, 1986, and accepted by the water master in a master’s report.

21. In its March 25, 2021 order, the Court modified the claim from a use right to a decreed right based on the June 3, 1911 Wesley C. Wright water right described in the Case 4024 Decree as tributary water right no. 6 to Brush Coulee and determined the modification resolved the priority date issue remark.²

22. Brush Coulee is a tributary on the east side of Frenchman Creek several miles north of Frenchman Reservoir. The preliminary decree abstract contains a remark indicating Bergtoll used Brush Coulee under an exchange arrangement whereby Bergtoll diverted Brush Coulee water from Frenchman Creek downstream from the confluence.

23. Bergtoll’s current motion requests (a) the priority date be amended to November 21, 1902; (b) the source be changed to Panhandle Coulee; and (c) that place of use be revised.

² The priority date issue remark refers to “CASE NO. 183482, PHILLIPS COUNTY.” The Court assumes the case reference in this remark is the same as Case 4024 because Case 4024 is the only decree to Frenchman Creek provided in the parties filings and available in the state listing of decrees. *See* <http://dnrc.mt.gov/divisions/water/water-rights/docs/statewide-pre-1973-decree-index.pdf>.

24. The parties stipulate that the United States' objection are resolved if the Water Court orders the following modifications to claim 40L 188604-00 from what was described in the preliminary decree:

- a. Modify the priority date from June 3, 1911 to November 21, 1902;
- b. Limit the flow rate to 8.625 cfs, with the following flow rate information remark:

CUMULATIVE INSTANTANEOUS FLOW RATE AT POD 1
AND POD 2 MAY NOT EXCEED 8.625 CFS.

- c. Reduce the volume from 756 AF to 230 AF;
- d. Reduce the maximum acres from 252 acres to 210 acres;
- e. Change the source from Frenchman Creek to Panhandle Coulee;
- f. Include a second point of diversion on Panhandle Coulee with the following legal description, and include an "exchange remark" that says:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
2		NESWNE	23	34N	34E	PHILLIPS

Period of diversion: APRIL 1 TO AUGUST 31

Diversion means: HEADGATE

BY EXCHANGE FROM PANHANDLE COULEE TO FRENCHMAN DITCH.

- g. Include on the decree abstract an information remark following the point of diversion that says:

WATER FROM PANHANDLE COULEE IS DIVERTED AT POD 1 INTO THE BERGTOLL DITCH AND MAY BE CONVEYED TO THE PLACE OF USE AND DIRECTLY APPLIED FOR IRRIGATION PURPOSES. A PORTION OF THE WATER DIVERTED FROM PANHANDLE COULEE AT POD 1 MAY BE RELEASED FROM THE DITCH THROUGH A CULVERT LOCATED IN THE SESWSE, SECTION 23 T34N R34E ("MEASUREMENT POINT 1") AND THEN CONVEYED TO FRENCHMAN CREEK THROUGH A CULVERT LOCATED IN THE SWSESW, ("MEASUREMENT POINT 2"). THE PANHANDLE COULEE WATER DIVERTED AT POD 1 AND RETURNED TO FRENCHMAN CREEK AT MEASUREMENT POINT 2 MAY THEN BE DIVERTED BY EXCHANGE FROM FRENCHMAN CREEK AT POD 2.

- h. Replace the place of use on the preliminary decree abstract with the following place of use description:

<u>ID</u>	<u>Acres</u>	<u>Govt</u> <u>Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	5.00		SESENW	23	34N	34E	PHILLIPS
2	2.00		SWSWNE	23	34N	34E	PHILLIPS
3	31.00		NESW	23	34N	34E	PHILLIPS
4	22.00		SESW	23	34N	34E	PHILLIPS
5	20.00		NWSE	23	34N	34E	PHILLIPS
6	30.00		SWSE	23	34N	34E	PHILLIPS
7	16.00		NENW	26	34N	34E	PHILLIPS
8	20.00		NWNE	26	34N	34E	PHILLIPS
9	46.00		S2NE	26	34N	34E	PHILLIPS
10	18.00		E2SE	26	34N	34E	PHILLIPS
Total:	210.00						

- i. Add the following remarks to assist in administration:

THE EXCHANGE FROM PANHANDLE COULEE TO FRENCHMAN CREEK WILL ONLY BE ALLOWED TO OCCUR AT TIMES WHEN THERE IS A LIVE FLOW AT ALL OF THE FOLLOWING POINTS:

- (A) IN PANHANDLE COULEE ALL THE WAY TO POD #1, AND
- (B) FROM MEASUREMENT POINT 1 IN THE SESWSE SECTION 23 TO THE OXBOW CONNECTED TO MEASUREMENT POINT 2, AND
- (C) FROM MEASUREMENT POINT 2 TO FRENCHMAN CREEK.

MEASUREMENT POINT 1 AND MEASUREMENT POINT 2 ARE SHOWN ON THE STIPULATION MAP IN THE FILE FOR CASE 40L-0001-R-2019.

THE EXCHANGE FROM PANHANDLE COULEE TO FRENCHMAN CREEK UNDER THIS WATER RIGHT IS LIMITED TO THE LESSER OF THE FOLLOWING FLOW RATES:

- (A) THE MEASURED RELEASE FLOW FROM THE CULVERT AT MEASUREMENT POINT 1 LOCATED IN THE SESWSE SECTION 23, OR
- (B) THE FLOW AT MEASUREMENT POINT 2, OR
- (C) THE FLOW BEING DIVERTED AT POD #2, OR
- (D) 8.625 CFS.

IN ANY CONFLICT OVER THE ADMINISTRATION OF THE EXCHANGE OR THE RIGHT TO CLAIM AN EXCHANGE UNDER THIS WATER RIGHT, CLAIMANT SHALL MEASURE THE FLOW RELEASED AT MEASUREMENT POINT 1 IN THE SESWSE SECTION 23, AND IF NEEDED AT MEASUREMENT POINT 2, TO ESTABLISH THE AMOUNT AVAILABLE FOR EXCHANGE. IN THE ABSENCE OF MEASUREMENT OF THE RELEASE FROM MEASUREMENT POINT 1 AND PROOF OF THE FLOW AVAILABLE FOR EXCHANGE, NO EXCHANGE MAY BE OPERATED.

25. In Case 4024, the district court decreed to James E. Wightman (“Wightman”) the right to use 8 5/8 cfs from Box Elder Coulee with a priority date of November 21, 1902.

26. The drainage referred to as “Box Elder Coulee” for Wightman’s November 21, 1902 water right in the Case 4024 decree also is known as “Panhandle Coulee.”

27. Although Case 4024 did not decree places of use, according to the “Separate Answer of Defendants James E. Wightman and Margaret Wightman” filed in Case 4024, Wightman owned land in Sections 23 and 26, T34N, R34E.

28. Wightman conveyed this land and the appurtenant water rights to the SWCB. Following several mesne conveyances, none of which severed the water rights from the land, Bergtoll became the owner of the land and appurtenant water rights in Sections 23 and 26, T34N, R34E. The conveyances support the request to amend the priority date to the November 21, 1902 dated decreed in Case 4024, and to change the source to Panhandle Coulee.

29. No person filed a statement of claim for a decreed right from Frenchman Creek with a November 21, 1902 priority date.

30. The Stipulation's flow rate limit of 8.625 cfs³ is consistent with what the district court decreed in Case 4024.

31. The Stipulation memorializes the exchange arrangement under which water may be diverted from either Panhandle Coulee or by exchange from Frenchman Creek during those time periods when Panhandle Coulee is flowing. The Stipulation also explains the details of when and how water must be measured and monitored to ensure water only is used when Panhandle Coulee is flowing. Exhibit 4, which is attached and incorporated by reference, depicts the locations of the points agreed to by the parties to implement the exchange arrangement under the Stipulation.⁴

32. The affidavit referenced in the first issue remark is the letter June 5, 1986 from Leo O. Bergtoll and Aldon C. Bergtoll providing additional information about various water right claims, including claim 40L 188604-00. The letter says the claim is based on a water right from Brush Coulee decreed to Wesley C. Wright in Case 4024. The 1986 letter also says the claim should have a numeric flow rate of 180 miner's inches or 2019.6 gpm. The Stipulation resolves the flow rate request reflected in this issue remark.

33. The Stipulation modifies the place of use by reducing the maximum acres from 252 acres to 210 acres and clarifying the legal land description of the place of use.

Claim 40L 188606-00

34. Claim 40L 188606-00 was included in the preliminary decree as a use right to divert 236.30 gpm from Frenchman Creek to irrigate 13.90 acres with an April 9, 1910 priority date.

35. The preliminary decree abstract for claim 40L 188606-00 includes the following issue remarks:

³ Due to database limitations, the flow rate on the post-decree abstract will appear as "8.63 CFS," but the information remark notes the 8.625 cfs limitation.

⁴ Exhibit 4, and Exhibits 5 and 6 referenced below, are the exhibit numbers used in the Stipulation, and are retained for this Order to avoid confusion.

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A CHANGE IN FLOW RATE. THIS SHALL BE HEARD AT THE PRELIMINARY DECREE STAGE.

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A USE RIGHT ON FRENCHMAN CREEK WITH A PRIORITY DATE PREDATING CASE NO. 183482 , PHILLIPS COUNTY.

36. As part of its Motion to Adopt, Bergtoll asks the Court (a) to amend the priority date of claims 40L 188606-00 and 40L 188607-00 to October 2, 1905; and (b) to “proportionately split the decreed flow rate between claim 40L 188606-00 and 40L 188607-00.”

37. The Stipulation states the United States’ objections to 40L 188606-00 are resolved if the Water Court orders the following modifications to claim 40L 188606-00 from what was described in the preliminary decree:

- a. The priority date is changed from April 9, 1910 to October 2, 1905;
- b. The flow rate is changed from 236.30 gpm to 3.375 cfs, and the following remark is added:

THE FLOW RATE FOR CLAIM NOS. 40L 188606-00 AND 40L 188607-00 IS CUMULATIVE AND THE COMBINED FLOW RATE FOR CLAIM NOS. 40L 188606-00 AND 40L 188607-00 SHALL NOT EXCEED 3.375 CFS.

- c. A volume limit of 41.70 AF is added; and
- d. The following information remark is added to assist in administration:

USE OF THIS RIGHT IS LIMITED TO TIMES WHEN FRENCHMAN CREEK IS FLOWING INTO FRENCHMAN RESERVOIR.

38. In Case 4024, the district court decreed the “Third Water Right” to Frenchman Creek to Bertha D. Wright, a/k/a Bertha D. Wodtkey (“Wodtkey”). The decree quantified the right as 3 3/8 cfs, and assigned it an October 2, 1905 priority date.

39. Although Case 4024 did not decree places of use, Wodtkey owned land in portions of Section 14, T34N, R34E at the time of decree. Wodtkey later conveyed this land to the State of Montana in connection with the construction of Frenchman Reservoir, but reserved the water rights.

40. Wodtkey conveyed the water rights she reserved to J.A. Mavencamp and John D. Broadbrooks. By mesne conveyances Mavencamp and Broadbrooks were predecessors in interest to Bergtoll as to various property, including property in Sections 26 and 35, T34N, R34E. Based upon these conveyances, Bergtoll is the successor in interest as to the October 2, 1905 Wodtkey right decreed in Case 4024 and the land to which the decreed right is appurtenant. The conveyances support the request to amend the priority date to the October 2, 1905 dated decreed in Case 4024, and to change the type of right to “decreed.”

41. No person filed a statement of claim for a decreed right from Frenchman Creek with an October 2, 1905 priority date.

42. The 13.9 acre place of use for claim 40L 188606-00 is depicted on Exhibit 5, which is attached and incorporated into this Order. This place of use is unchanged from what was described in the preliminary decree.

43. The 3.375 cfs flow rate in the Stipulation is consistent with the 3 3/8 cfs flow rate decreed to Wodtkey in Case 4024.⁵

44. The 41.70 AF volume in the Stipulation is the same volume claimed in the Statement of Claim for Existing Water Rights filed by Leo Bergtoll and Aldon Bergtoll for claim 40L 188406-00.

45. The point of diversion for claim 40L 188606-00 is downstream from Frenchman Reservoir. The stipulated condition limiting use of the water right to those time period when water is flowing into Frenchman Reservoir precludes Bergtoll from using this claim to use stored water.

⁵ Due to database limitations, the flow rate will appear on the post-decree abstract as 3.38 cfs.

Claim 40L 188607-00

46. Claim 40L 188607-00 was included in the preliminary decree as a use right to divert 1.33 cfs from Frenchman Creek to irrigate 35.00 acres with a November 21, 1902 priority date. The preliminary decree abstract for claim 40L 188607-00 includes the following issue remarks:

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A CHANGE IN FLOW RATE. THIS SHALL BE HEARD AT THE PRELIMINARY DECREE STAGE.

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A USE RIGHT ON FRENCHMAN CREEK WITH A PRIORITY DATE PREDATING CASE NO. 183482, PHILLIPS COUNTY.

47. The parties stipulate that the United States' objection are resolved if the Water Court orders the following modifications to claim 40L 188607-00 from what was described in the preliminary decree:

a. The priority date is changed from November 21, 1902 to October 2, 1905.

b. The flow rate is changed from 1.33 cfs to 3.375 cfs, and the following remark is added:

THE FLOW RATE FOR CLAIM NOS. 40L 188606-00 AND 40L 188607-00 IS CUMULATIVE AND THE COMBINED FLOW RATE FOR CLAIM NOS. 40L 188606-00 AND 40L 188607-00 SHALL NOT EXCEED 3.375 CFS.

c. A volume limit of 105.00 AF is added; and

d. The place of use is amended to the following:

<u>ID</u>	<u>Acres</u>	<u>Govt</u> <u>Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	5.00		SESE	26	34N	34E	PHILLIPS
2	30.00		E2NE	35	34N	34E	PHILLIPS
Total:	35.00						

e. The following information remarks is added to assist in administration:

USE OF THIS RIGHT IS LIMITED TO TIMES WHEN FRENCHMAN
CREEK IS FLOWING INTO FRENCHMAN RESERVOIR.

48. As part of its motion, Bergtoll asks the Court to amend the priority date to the same October 2, 1905 date they request for claims 40L 188606-00. Bergtoll also asks the Court to proportionately split the decreed flow rate with claim 40L 188606-00, and to amend the place of use to the land described in the Stipulation.

49. The 35.00 acre place of use for claim 40L 188607-00 is depicted on Exhibit 6, which is attached and incorporated into this Order. While the total number of acres does not change, 5.00 acres is amended from the W2NW of Section 36, T34N, R34E to the SESE of Section 26, T34N, R34E. Exhibit 5 illustrates this amendment.

50. The factual support for amending the priority date to October 2, 1905 as a decreed right is the same as for claim 40L 188606-00.

51. The 105.00 AF numeric volume in the Stipulation is the same volume claimed in the Statement of Claim for Existing Water Rights filed by Leo Bergtoll and Aldon Bergtoll for claim 40L 188407-00.

52. The point of diversion for claim 40L 188606-00 is downstream from Frenchman Reservoir. The stipulated condition limiting use of the water right to those time period when water is flowing into Frenchman Reservoir precludes Bergtoll from using this claim to use stored water.

Claim 40L 188609-00

53. Claim 40L 188609-00 was included in the preliminary decree as a use right to use water from Corral Coulee to irrigate up to 199.60 acres with a June 23, 1901 priority date. The Preliminary Decree does not include a numeric flow rate because the claimed water use “consists of direct flow water spreading.”

54. Corral Coulee is a tributary drainage that flows into Frenchman Creek from the northwest. The confluence of Corral Coulee and Frenchman Creek is inundated by Frenchman Reservoir.

55. The preliminary decree abstract for claim 40L 188609-00 includes the following issue remarks:

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A CHANGE IN FLOW RATE. THIS SHALL BE HEARD AT THE PRELIMINARY DECREE STAGE.

POINT OF DIVERSION WAS 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.

56. In Case 4024, Bertha Wodtkey was decreed a water right on Corral (aka Corral) Coulee with a priority date of June 23, 1901.

57. In its March 25, 2021 order, the Court modified the claim from a use right to a decreed right.

58. In their June 6, 1986, letter to the water master, Bergtoll requested a flow rate of 450 miner's inches or 5049 gpm for claim 40L 188609-00. The water master deferred addressing this request, which led to the flow rate issue remark.

59. The proposed abstract included with the Motion to Adopt does not request the numeric flow rate from the June 6, 1986 letter, so the factual basis for flow rate issue remark no longer exists.

60. The parties stipulate to reduce the volume from 399.20 AF to 300.00 AF.

Claim 40L 188610-00

61. Claim 40L 188610-00 was included in the preliminary decree as a right to use water from Rattlesnake Coulee to irrigate up to 164.20 acres with a November 13, 1897 priority date.

62. Rattlesnake Coulee is a tributary drainage that flows into Frenchman Creek from the northwest, below Ash Coulee and Corral Coulee. The confluence of Rattlesnake Coulee and Frenchman Creek is inundated by Frenchman Reservoir.

63. The preliminary decree abstract for claim 40L 188610-00 includes the following issue remarks:

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A CHANGE IN FLOW RATE. THIS SHALL BE HEARD AT THE PRELIMINARY DECREE STAGE.

64. In its March 25, 2021 order, the Court modified the claim from a use right to a decreed right and determined the modification resolved the priority date issue remark.

65. In Case 4024, Bertha Wodtkey was decreed a water right on Rattlesnake Coulee with a priority date of November 13, 1897.

66. In their June 6, 1986, letter to the water master, Bergtoll requested a flow rate of 523 miner's inches or 5868.06 gpm for claim 40L 188610-00. The water master deferred addressing this request, which led to the flow rate issue remark.

67. The proposed abstract included with the Motion to Adopt does not request the numeric flow rate from the June 6, 1986 letter, so the factual basis for flow rate issue remark no longer exists.

Claim 40L 188611-00

68. Claim 40L 188611-00 was included in the preliminary decree as a right to use water from Ash Coulee for irrigation use with a September 10, 1909 priority date.

69. Ash Coulee is a tributary drainage to Corral Coulee.

70. The preliminary decree abstract for claim 40L 188611-00 includes the following issue remark:

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A CHANGE IN FLOW RATE. THIS SHALL BE HEARD AT THE PRELIMINARY DECREE STAGE.

71. In its March 25, 2021 order, the Court amended the priority date to April 19, 1949.

72. In their June 6, 1986, letter to the water master, Bergtoll requested a source correction for claim 40L 188611-00, but did not request a change to the flow rate. The water master corrected the source from "Corrall Cowlee" as claimed, to Ash Coulee.

Therefore, DNRC's issue remark for claim 40L 188611-00 is partially inaccurate and otherwise resolved.

73. The parties stipulate to a volume from 100.00 AF, which modifies the unspecified volume limit in the preliminary decree abstract.

Claim 40L 188612-00

74. Claim 40L 188612-00 was included in the preliminary decree as a use right to use water from Bohner Coulee to irrigate 35.00 acres with an August 12, 1907 priority date. The claim is for use by water spreading, so it does not include a numeric flow rate.

75. Bohner Coulee is a tributary drainage that flows into Frenchman Creek from the northwest, above Corral Coulee.

76. The preliminary decree abstract for claim 40L 188612-00 includes the following issue remarks:

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A CHANGE IN FLOW RATE, SOURCE, AND PLACE OF USE. THESE SHALL BE HEARD AT THE PRELIMINARY DECREE STAGE.

SOURCE NAME WAS 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.

77. In its March 25, 2021 order, the Court modified the claim from a use right to a decreed right.

78. In their June 6, 1986, letter to the water master, Bergtoll requested a flow rate of 120 miner's inches or 1346.4 gpm for claim 40L 188613-00. The water master deferred addressing this request, which led to the flow rate issue remark.

79. The proposed abstract included with the Motion to Adopt does not request the numeric flow rate from the June 6, 1986 letter, so the factual basis for flow rate issue remark no longer exists.

80. As part of the Motion to Adopt, Bergtoll provided additional information about the place of use and requested that it be modified. The additional information,

which includes analysis of historical aerial photographs, maps and documents, claimant interviews, and site visits establishes the following as the historical place of use:

<u>ID</u>	<u>Acres</u>	<u>Govt</u> <u>Lot</u>	<u>Qtr</u> <u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	18.00		S2SESE	1	34N	34E	PHILLIPS
2	12.00		N2NE	12	34N	34E	PHILLIPS
3	5.00		NWNWNW	7	34N	34E	PHILLIPS
Total:	35.00						

81. The amendment to the place of use eliminates the issue of whether a portion of the place of use in N2SENE Section 12, T34N, R34E (POU ID #4 on the preliminary decree abstract) is owned by the State of Montana. Order on Pending Motions at 13-15 (describing issue).

Claim 40L 188613-00

82. Claim 40L 188613-00 was included in the preliminary decree as a right to use water from Ash Coulee to irrigate 20.00 acres with a September 10, 1909 priority date. The claim is for use by water spreading, so it does not include a numeric flow rate.

83. The preliminary decree abstract for claim 40L 188613-00 includes the following issue remarks:

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A CHANGE IN MEANS OF DIVERSION AND POINT OF DIVERSION. THESE SHALL BE HEARD AT THE PRELIMINARY DECREE STAGE.

POINT OF DIVERSION WAS 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.

84. In its March 25, 2021 order, the Court amended the priority date to April 19, 1949.

85. In their June 6, 1986, letter to the water master, Bergtoll requested a correction to the point of diversion land description for claim 40L 188613-00, but did not

request a change to the flow rate. Therefore, DNRC's issue remark for claim 40L 188613-00 is not accurate.

86. On April 22, 2021, the United States filed a notice that the Court's March 25, 2021 resolved its objection to claim 40L 188613-00.

Claim 40L 188614-00

87. Claim 40L 188614-00 was included in the preliminary decree as a right to use water from an unnamed tributary of Frenchman Creek to irrigate 30.00 acres with a February 7, 1908 priority date. The preliminary decree abstract includes an information remark in the source element that says:

CASE NO. 4024 PHILLIPS COUNTY REFERS TO THIS SOURCE AS
ROCK COULEE.

88. The preliminary decree abstract for claim 40L 188614-00 includes the following issue remarks:

THE AFFIDAVIT FILED BY THE CLAIMANTS REQUESTED A
CHANGE IN FLOW RATE AND SOURCE. THESE SHALL BE HEARD
AT THE PRELIMINARY DECREE STAGE.

89. In its March 25, 2021 order, the Court amended the priority date to April 19, 1949.

90. On April 22, 2021, the United States filed a notice that the Court's March 25, 2021 resolved its objection to claim 40L 188614-00, conditioned upon the source information remark being removed from the claim. The source remark does not provide information useful to the administration of claim 40L 188614-00.

91. In their June 6, 1986, letter to the water master, Bergtoll requested a flow rate of 180 miner's inches or 2019.6 gpm for claim 40L 188614-00. The water master deferred addressing this request, which led to the flow rate issue remark.

92. The proposed abstract included with the Motion to Adopt does not request the numeric flow rate from the June 6, 1986 letter, so the factual basis for flow rate issue remark no longer exists.

DISCUSSION

1. *Standard for Stipulation Approval.*

Stipulations are a form of settlement agreement that are subject to Water Court review and approval when they resolve issues within the Court's jurisdiction. Section 85-2-233(5)(b); Rule 17(a), W.R.Adj.R. In Water Court proceedings, settlement stipulations set the terms under which the parties contractually agree to resolve objections. A settlement stipulation 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). As with any stipulation submitted to a court, the Court may rely on the terms of a stipulation as long as they are "not contrary to law, court rule, or public policy." *In re Marriage of Hill*, 265 Mont. 52, 58, 874 P.2d 705, 708 (1994).

When a stipulation proposes to modify elements of a water right claim, the Court must determine whether each proposed modification is supported by a preponderance of evidence and whether the stipulated modifications are otherwise consistent with the Court's obligations to adjudicate existing water rights consistent with the Montana Water Use Act. *In re Argabright*, Case 41I-265, 2014 Mont. Water LEXIS 9, (December 12, 2014) (affirming rejection of stipulation); *In re Dana Ranch Co.*, Case 41J-265, 2017 Mont. Water LEXIS 13 (rejecting stipulation). When a stipulation proposes to reduce the element of a claim, the Court may accept the reduction without requiring additional evidence. Rule 17(c), W.R.Adj.R.

The Stipulation proposed by the parties meets these standards. The parties developed an extensive evidentiary record in anticipation of a hearing. The parties also put extensive daylight on the various issues through their thoughtful and detailed motions. Even though the Court did not grant much of the motions, the motions were most useful in narrowing the issues and providing a backdrop to demonstrate the requisite

evidentiary support for the Stipulation and the modified claims. The Stipulation does not contain any provisions inconsistent with Montana law, nor does it propose provisions outside of what the parties referenced in the supporting documents. Subject to the following additional comments, the Stipulation meets the standards for approval.

2. *Notice.*

As with many resolutions of issue remarks and objections following a preliminary decree, Bergtoll as the claimant, proposes to amend various aspects of the claims and the United States conditions the withdrawal of its objections on the proposed amendments being accepted by the Court. Whenever a claimant proposes to amend a claim, the proposed amendment implicates the notice provisions of § 85-2-233(6), MCA which states in relevant part:

(6) (a) After the issuance of a temporary preliminary decree or preliminary decree, notice must be published once a week for 3 consecutive weeks in two newspapers of general circulation in the basin where the decree was issued for: (i) a motion to amend a statement of claim that may adversely affect other water rights.

The procedural touchpoint of this statute is whether the motion to amend “*may adversely affect* other water rights.” *Id* (emphasis added). If so, the court may require additional notice. When claims are amended following a preliminary decree, the Court applies this statute against the backdrop of notice that was provided in the decree.

The amendments proposed by Bergtoll do not require additional notice. Bergtoll does not ask the Court to generate implied claims; rather, the package of claims objected to by the United States actually is smaller due to claim withdrawals and the Court’s prior orders. Likewise, even though some of the acreage and other claim elements will shift from what was spelled out in the preliminary decree, there is no indication that any modification will increase the burden on the sources to the detriment of other water rights. Additionally, if other parties had concerns about what might transpire, those parties had ample opportunity to participate through the objection, counterobjection and notice of intent to appear process. Thus, unlike other cases where objection and issue remark resolution includes amendments that potentially cross the “may adversely affect”

line and exceed the notice provided by the preliminary decree, objection list and claim record, the amendments proposed in this case do not implicate the additional notice provisions of § 85-2-233(6), MCA. *Compare, In re Circle S Ranch, Inc.*, Case 41P-108, 2019 Mont. Water LEXIS 8 (Order on Motion to Modify Claims) (May 16, 2019); *In re Petrolia Irrigation Dist.*, Case 40B-12 (Order on Motion to Reopen) (Apr. 5, 2019).⁶

3. *Information remarks.*

The Water Use Act requires the Water Court to adjudicate certain specific elements of each water right. Section 85-2-234(6)(a)-(h), MCA. The statute also requires the Court to include “any other information necessary to fully define the nature and extent of the right.” Section 85-2-234(6)(a)-(h), MCA. This provision recognizes the practical reality that sometimes additional explanation about how a water right was historically used or the terms of a settlement agreement is required to ensure water rights are administered correctly. *In re Clark Fork Coal.*, 2014 Mont. Water LEXIS 15, *10 (“Information remarks provide facts regarding prior use of a right that are critical to its administration in accord with historical use”). The Water Court implements this part of the statute by including information remarks on the decree abstracts that ultimately become part of final decrees.⁷

The Stipulation includes several proposed information remarks. First, the parties stipulate and provide facts to show that claim 40L 188604-00 includes an exchange arrangement whereby Bergtoll diverts Panhandle Coulee water from Frenchman Creek. Exchange arrangements allow water decreed from one source to be diverted from a different source so long as the exchange does not increase the burden on the source. An increased burden might occur, for example, if water is diverted from the exchanged source during time periods when the original source no longer is flowing. The Stipulation

⁶ The order approving stipulation in this case may be found at *In re Petrolia Irrigation Dist.*, 2021 Mont. Water LEXIS 61

⁷ Preliminary decree abstracts often include information remarks to explain particular aspects of DNRC’s claim review that preceded a preliminary decree. The Court generally removes these information remarks during the adjudication process because they are not necessary to administer water rights even though they are useful to adjudicate the rights.

is carefully drafted to address this concern. The Court agrees that incorporating the Stipulation's terms as an information remark meets the standard of "information necessary to fully define the nature and extent of the right."

Next, the proposed revisions to claims 40L 188606-00 and 40L 188607-00 include two proposed information remarks. The first says the flow rate for two claims is cumulative and cannot exceed the aggregate of 3.375 cfs at any time. The second limits diversions to only those time periods when Frenchman Creek is flowing into Frenchman Reservoir. Both remarks provide information to ensure the rights are administered consistent with the agreements embodied in the Stipulation. The combined flow rate limit remark addresses linking both claims to the October 2, 1905 Wodtkey right decreed in Case 4024 and prevents the potential of the claims exceeding what the district court decreed. The reservoir inflow limitation prevents Bergtoll from diverting stored water under these claims, which the claims do not authorize. Both remarks provide information that clarifies the historical use and future administration of the claims.

4. *Modified flow rates.*

As indicated in the quoted issue remarks, for a number of claims Bergtoll requested numeric flow rate limits in the June 5, 1986 letter. The water master deferred ruling on these proposed flow rate amendments and they were not included in the preliminary decree, but were noted on issue remarks. To the extent Bergtoll desired to resurrect the proposed flow rates, they had the opportunity to do so by including them in requested post-preliminary decree amendments. Except as noted, they did not and the flow rate issue remarks are resolved.

5. *Modified volume.*

The Water Use Act does not require the Water Court to quantify volume for irrigation, except when the Court determines a quantified volume is water judge determines require both volume and flow rate are necessary "to adequately administer the right." Section 85-2-234, MCA; *In re Eldorado Coop. Canal Co.*, 2016 MT 94, ¶ 20, 383 Mont. 205, 369 P.3d 1034. When parties request a quantified volume as part of a stipulated settlement, the Water Court assumes the necessity to adequately administer

factor is met because the parties have incorporated a quantified volume as a material term to compromise their differences.

When the Water Court determines a numeric volume is necessary to adequately administer the right, it also must quantify the volume. For claims 40L 188406-00 and 40L 188407-00, the parties stipulate to volume figures that mirror the information on the respective statements of claim: 41.7 AF for 40L 188406-00 and 105 AF for 40L 188407-00. This methodology is consistent with Montana law and does not require additional supporting evidence. *In re Eldorado*, ¶¶ 33-34. For claim 40L 188611-00, the parties stipulated to a volume amount (100.00 AF) that is less than what was claimed (598.8 AF). For claim 40L 188609-00, the parties propose a reduction in volume (300.00 AF) from what was included in the preliminary decree (399.20) AF, which does not require additional evidence. Rule 17(c), W.R.Adj.R.

CONCLUSIONS OF LAW

1. Each finding of fact is supported by a preponderance of evidence.
2. Proper foundation exists for the documents filed as evidentiary support of the Stipulation.
3. The Stipulation is not contrary to law, court rule, or public policy. The Stipulation has been fully executed by all of the parties and is enforceable by and against each of the parties.
4. The Stipulation and supporting documents provide a sufficient basis to amend the preliminary decree abstract for claim 40L 188604-00 by: (a) modifying the priority date to November 21, 1902; (b) changing the flow rate to 8.625 cfs; (c) limiting the volume to 230.00 AF; (d) limiting the maximum acres to 210.00 at the place of use described in this Order; and (e) including the limitations specified in the information remarks set forth in this Order, as applicable.
5. Panhandle Coulee is included as an historical source of water for claim 40L 188604-00 under an exchange arrangement that provides for diversion from Frenchman Creek during the conditions specified in this Order.

6. The Stipulation and supporting documents provide a sufficient basis to amend the preliminary decree abstract for claim 40L 188606-00 by: (a) modifying the priority date to October 2, 1905; (b) changing the flow rate to 3.375 cfs; (c) limiting the volume to 41.70 AF; and (d) including the limitations specified in the information remarks set forth in this Order, as applicable.

7. The Stipulation and supporting documents provide a sufficient basis to amend the preliminary decree abstract for claim 40L 188607-00 by: (a) modifying the priority date to October 2, 1905; (b) changing the flow rate to 3.375 cfs; (c) limiting the volume to 105.00 AF; and (d) including the limitations specified in the information remarks set forth in this Order, as applicable.

8. The Stipulation and supporting documents provide a sufficient basis to amend the preliminary decree abstract for claim 40L 188609-00 by limiting the volume to 300.00 AF.

9. The Stipulation and supporting documents provide a sufficient basis to amend the preliminary decree abstract for claim 40L 188610-00 by clarifying the means of diversion.

10. The Stipulation and supporting documents provide a sufficient basis to amend the preliminary decree abstract for claim 40L 188611-00 by: (a) modifying the flow rate consistent with water spreading systems; (b) limiting the volume to 100.00 AF; and (c) clarifying the means of diversion.

11. The Stipulation and supporting documents provide a sufficient basis to amend the preliminary decree abstract for claim 40L 188612-00 by: (a) deleting the reference to “Three Chimney Coulee”; and (b) modifying the place of use.

12. The Stipulation and supporting documents provide a sufficient basis to amend the preliminary decree abstract for claim 40L 188614-00 by deleting the reference to Rock Coulee.

13. The amendments to the claims specified in this Order meet the conditions to resolve the United States’ objections to claims 40L 188604-00, 40L 188606-00, 40L

188607-00, 40L 188609-00, 40L 188610-00, 40L 188611-00, 40L 188612-00, 40L 188613-00, and 40L 188614-00.

14. The evidence and information filed by the parties provides a sufficient basis to resolve all of the preliminary decree issue remarks.

15. All flow rate references to “runoff” are eliminated as unnecessary.

16. To the extent not otherwise referenced, the provisions of the Court’s Order on Pending Motions are confirmed and reflected in the attached abstracts.

17. Except as modified by this Order, the elements of the claims consolidated in this case are unchanged from what appear in the Preliminary Decree.

ORDER

Therefore, it is ORDERED:

1. The Unopposed Motion to Adopt Stipulation is GRANTED;
2. The Stipulation is APPROVED;
3. The United States’ objections are DISMISSED as resolved;
4. The preliminary decree abstracts of claims 40L 188604-00, 40L 188606-00, 40L 188607-00, 40L 188609-00, 40L 188610-00, 40L 188611-00, 40L 188612-00, 40L 188613-00, and 40L 188614-00 are amended as provided in this Order, with all issue remarks removed as resolved.
5. These cases are CLOSED.

Post-decree abstracts of the claims are included with this Order to confirm the modifications to the claims have been made in the State’s centralized water rights database records.

Stephen R. Brown
Associate Water Judge

Service List for 40L-0001-R-2019

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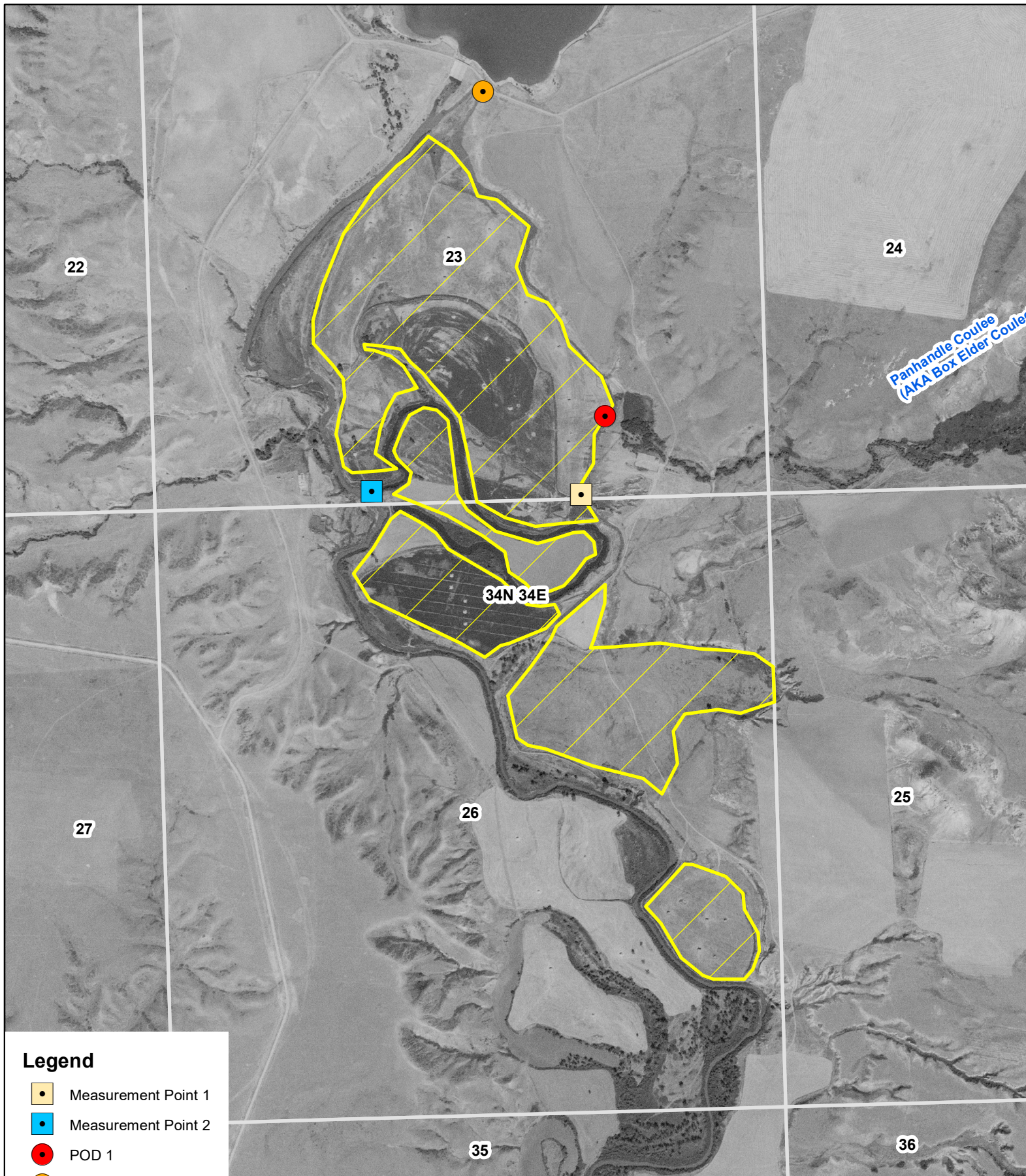
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Legend

- Measurement Point 1
- Measurement Point 2
- POD 1
- POD 2
- 188604 POU

Case 40L-0001-R-2019
Claim 40L 188604-00

EXHIBIT
4





August 21, 1969 Aerial photo - AZS-3KK-224
NAD 1983, Montana State Plane
For illustrative purposes only.
All depictions are approximate.

0 660 1,320 2,640 Feet

May 14, 2021



Legend

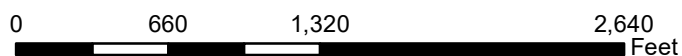
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-  188606 POU

Case 40L-0009-R-2019
Claim 40L 188606-00

EXHIBIT
5





August 21, 1969 Aerial photo - AZS-3KK-224
NAD 1983, Montana State Plane
For illustrative purposes only.
All depictions are approximate.



May 14, 2021



Legend

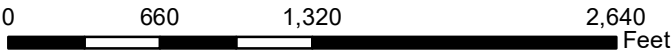
-  POD 188607
-  188607 POU

Case 40L-0009-2019
Claim 40L 188607-00

EXHIBIT
6



August 21, 1969 Aerial photo - AZS-3KK-224
NAD 1983, Montana State Plane
For illustrative purposes only.
All depictions are approximate.



May 14, 2021

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188604-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

Priority Date: NOVEMBER 21, 1902

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 8.63 CFS

CUMULATIVE INSTANTANEOUS FLOW RATE AT POD 1 AND POD 2 MAY NOT EXCEED 8.625 CFS.

Volume: 230.00 AC-FT

THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE, NOT TO EXCEED 230.00 AF PER YEAR.

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 210.00

Source Name: PANHANDLE COULEE

Source Type: SURFACE WATER

WATER FROM PANHANDLE COULEE IS EXCHANGED FOR WATER DIVERTED FROM FRENCHMAN CREEK.

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		SESWSE	23	34N	34E	PHILLIPS

Period of Diversion: APRIL 1 TO AUGUST 31

Diversion Means: DITCH

Ditch Name: BERGTOLL DITCH

2		NESWNE	23	34N	34E	PHILLIPS
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Period of Diversion: APRIL 1 TO AUGUST 31

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO AUGUST 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	5.00		SESENW	23	34N	34E	PHILLIPS
2	2.00		SWSWNE	23	34N	34E	PHILLIPS

3	31.00	NESW	23	34N	34E	PHILLIPS
4	22.00	SESW	23	34N	34E	PHILLIPS
5	20.00	NWSE	23	34N	34E	PHILLIPS
6	30.00	SWSE	23	34N	34E	PHILLIPS
7	16.00	NENW	26	34N	34E	PHILLIPS
8	20.00	NWNE	26	34N	34E	PHILLIPS
9	46.00	S2NE	26	34N	34E	PHILLIPS
10	18.00	E2SE	26	34N	34E	PHILLIPS
Total:	<u>210.00</u>					

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.

188604-00 188607-00 188615-00

WATER FROM PANHANDLE COULEE IS DIVERTED AT POD 1 INTO THE BERGTOLL DITCH AND MAY BE CONVEYED TO THE PLACE OF USE AND DIRECTLY APPLIED FOR IRRIGATION PURPOSES. A PORTION OF THE WATER DIVERTED FROM PANHANDLE COULEE AT POD 1 MAY BE RELEASED FROM THE DITCH THROUGH A CULVERT LOCATED IN THE SESWSE, SECTION 23, T34N R34E ("MEASUREMENT POINT 1") AND THEN CONVEYED TO FRENCHMAN CREEK THROUGH A CULVERT LOCATED IN THE SWSES, SECTION 23, T34N R34E ("MEASUREMENT POINT 2"). THE PANHANDLE COULEE WATER DIVERTED AT POD 1 AND RETURNED TO FRENCHMAN CREEK AT MEASUREMENT POINT 2 MAY THEN BE DIVERTED BY EXCHANGE FROM FRENCHMAN CREEK AT POD 2.

THE EXCHANGE FROM PANHANDLE COULEE TO FRENCHMAN CREEK WILL ONLY BE ALLOWED TO OCCUR AT TIMES WHEN THERE IS A LIVE FLOW AT ALL OF THE FOLLOWING POINTS:

- (A) IN PANHANDLE COULEE ALL THE WAY TO POD #1, AND
- (B) FROM MEASUREMENT POINT 1 IN THE SESWSE SECTION 23 TO THE OXBOW CONNECTED TO MEASUREMENT POINT 2, AND
- (C) FROM MEASUREMENT POINT 2 TO FRENCHMAN CREEK.

MEASUREMENT POINT 1 AND MEASUREMENT POINT 2 ARE SHOWN ON THE STIPULATION MAP IN THE FILE FOR CASE 40L-0001-R-2019.

THE EXCHANGE FROM PANHANDLE COULEE TO FRENCHMAN CREEK UNDER THIS WATER RIGHT IS LIMITED TO THE LESSER OF THE FOLLOWING FLOW RATES:

- (A) THE MEASURED RELEASE FLOW FROM THE CULVERT AT MEASUREMENT POINT 1 LOCATED IN THE SESWSE SECTION 23, OR
- (B) THE FLOW AT MEASUREMENT POINT 2, OR
- (C) THE FLOW BEING DIVERTED AT POD #2, OR
- (D) 8.625 CFS

IN ANY CONFLICT OVER THE ADMINISTRATION OF THE EXCHANGE OR THE RIGHT TO CLAIM AN EXCHANGE UNDER THIS WATER RIGHT, CLAIMANT SHALL MEASURE THE FLOW RELEASED AT MEASUREMENT POINT 1 IN THE SESWSE SECTION 23, AND IF NEEDED AT MEASUREMENT POINT 2, TO ESTABLISH THE AMOUNT AVAILABLE FOR EXCHANGE. IN THE ABSENCE OF MEASUREMENT OF THE RELEASE FROM MEASUREMENT POINT 1 AND PROOF OF THE FLOW AVAILABLE FOR EXCHANGE, NO EXCHANGE MAY BE OPERATED.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: **40L 211794-00** STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: **DISMISSED**

Owners: BLAISE BERGTOLL
 PO BOX 287
 SACO, MT 59261 0287

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: FRENCHMAN CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188606-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

Priority Date: OCTOBER 2, 1905

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 3.38 CFS

THE FLOW RATE FOR CLAIM NOS. 40L 188606-00 AND 40L 188607-00 IS CUMULATIVE AND THE COMBINED FLOW RATE FOR CLAIM NOS. 40L 188606-00 AND 40L 188607-00 SHALL NOT EXCEED 3.375 CFS.

Volume: 41.70 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 13.90

Source Name: FRENCHMAN 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		E2NW	26	34N	34E	PHILLIPS

Period of Diversion: APRIL 1 TO AUGUST 31

Diversion Means: PUMP

Period of Use: APRIL 1 TO AUGUST 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	6.00		NESENW	26	34N	34E	PHILLIPS
2	7.90		W2SWNE	26	34N	34E	PHILLIPS
Total:	13.90						

Remarks:

USE OF THIS RIGHT IS LIMITED TO PERIODS OF TIME WHEN FRENCHMAN CREEK IS FLOWING INTO FRENCHMAN RESERVOIR.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188607-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

Priority Date: OCTOBER 2, 1905

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 3.38 CFS

THE FLOW RATE FOR CLAIM NOS. 40L 188606-00 AND 40L 188607-00 IS CUMULATIVE AND THE COMBINED FLOW RATE FOR CLAIM NOS. 40L 188606-00 AND 40L 188607-00 SHALL NOT EXCEED 3.375 CFS.

Volume: 105.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 35.00

Source Name: FRENCHMAN CREEK

Source Type: SURFACE WATER

CASE NO. 4024 PHILLIPS COUNTY DECREED THE SOURCE AS BOX ELDER COULEE. WATER FROM THIS SOURCE IS EXCHANGED FOR WATER FROM FRENCHMAN CREEK.

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		NENENE	35	34N	34E	PHILLIPS

Period of Diversion: APRIL 1 TO AUGUST 31

Diversion Means: PUMP

Period of Use: APRIL 1 TO AUGUST 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	5.00		SESE	26	34N	34E	PHILLIPS
2	30.00		E2NE	35	34N	34E	PHILLIPS
Total:	35.00						

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.

188604-00

188607-00

188615-00

USE OF THIS RIGHT IS LIMITED TO PERIODS OF TIME WHEN FRENCHMAN CREEK IS FLOWING INTO FRENCHMAN RESERVOIR.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188609-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

Priority Date: JUNE 23, 1901

Type of Historical Right: DECREED

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: 300.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 199.60

Source Name: CORRAL COULEE

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		SEWN	11	34N	34E	PHILLIPS

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

Diversion Means: DIVERSION DAM

***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	64.40		NW	23	34N	34E	PHILLIPS
2	11.00		SWNE	14	34N	34E	PHILLIPS
3	11.60		SEWN	14	34N	34E	PHILLIPS
4	112.60		SW	14	34N	34E	PHILLIPS
Total:	199.60						

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.

167800-00 188609-00 188610-00 188611-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188610-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

***Priority Date:** NOVEMBER 13, 1897

Type of Historical Right: DECREED

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: 300.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 164.20

Source Name: RATTLESNAKE COULEE
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		NENWSW	14	34N	34E	PHILLIPS

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

Diversion Means: HEADGATE W/DITCH OR PIPELINE/FLOOD AND DIKE

***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	114.20		SW	14	34N	34E	PHILLIPS
2	50.00		NW	23	34N	34E	PHILLIPS
Total:	164.20						

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.

167800-00 188609-00 188610-00 188611-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188611-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

Priority Date: APRIL 19, 1949

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: WATER SPREADING

Flow Rate: NO FLOW RATE HAS BEEN DECREED BECAUSE THIS USE CONSISTS OF DIRECT FLOW WATER SPREADING.

Volume: 100.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 199.60

Source Name: ASH COULEE

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		SE	14	34N	34E	PHILLIPS

Period of Diversion: APRIL 1 TO AUGUST 31

Diversion Means: DAM

Period of Use: APRIL 1 TO AUGUST 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	108.20		SW	14	34N	34E	PHILLIPS
2	17.00		SE	14	34N	34E	PHILLIPS
3	10.00		SWNE	14	34N	34E	PHILLIPS
4	64.40		NW	23	34N	34E	PHILLIPS
Total:	199.60						

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.

167800-00 188609-00 188610-00 188611-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188612-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

***Priority Date:** AUGUST 12, 1907

Type of Historical Right: DECREED

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: 70.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 35.00

Source Name: BOHNER COULEE

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		SWNWSE	1	34N	34E	PHILLIPS

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

Diversion Means: DIVERSION DAM

2		NWSWSE	1	34N	34E	PHILLIPS
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***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DIKE

3		NESESW	1	34N	34E	PHILLIPS
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***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DIKE

4		SENESEW	1	34N	34E	PHILLIPS
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***Period of Diversion:** JANUARY 1 TO DECEMBER 31

Diversion Means: DIKE

***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	18.00		S2SESE	1	34N	34E	PHILLIPS
2	12.00		N2NE	12	34N	34E	PHILLIPS

3	5.00	NWNWNW	7	34N	35E	PHILLIPS
Total:	35.00					

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.

188605-00 188612-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188613-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

Priority Date: APRIL 19, 1949

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: 40.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 20.00

Source Name: ASH COULEE

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		SWSWSE	11	34N	34E	PHILLIPS

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

Diversion Means: DIVERSION DAM

***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	19.00		NWNE	14	34N	34E	PHILLIPS
2	1.00		SENENW	14	34N	34E	PHILLIPS

Total: 20.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
FRENCHMAN CREEK
BASIN 40L**

Water Right Number: 40L 188614-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: BLAISE BERGTOLL
PO BOX 287
SACO, MT 59261 0287

Priority Date: APRIL 19, 1949

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: 60.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 30.00

Source Name: UNNAMED TRIBUTARY OF FRENCHMAN 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		SENESE	25	34N	34E	PHILLIPS

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

Diversion Means: DIVERSION DAM

***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	10.00		NESW	25	34N	34E	PHILLIPS
2	10.00		NWSW	25	34N	34E	PHILLIPS
3	5.00		SWNW	25	34N	34E	PHILLIPS
4	2.00		SESENE	26	34N	34E	PHILLIPS
5	3.00		NENESE	26	34N	34E	PHILLIPS

Total: 30.00