

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BIG HOLE RIVER BASIN (41D)

CLAIMANTS: Joan E. Pendergast; Thomas F. Pendergast

CASE 41D-6001-A-2021
41D 93416-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of this Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. *If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.*

MASTER'S REPORT

On February 11, 2021 Joan E. Pendergast and Thomas F. Pendergast filed a Motion to Amend Point Of Diversion For Water Right Claim And Brief In Support ["Motion To Amend"]

pursuant to section 85-2-233(6), MCA. As the requested amendments have the potential to adversely affect other water rights, an Order Requiring Publication And Service Of Notice Of Motion To Amend Water Right Claim was entered March 26, 2021. On May 5, 2021 the Proof Of Service Of Notice To Water Users, the Affidavit Of Publication from the Dillon Tribune, and the Proof Of Publication from The Montana Standard were filed. The copies of the Notice state that the deadline for filing any response or objection to the Motion To Amend is June 5, 2021. No response or objection was filed.

APPLICABLE LAW

The Montana Water Court has jurisdiction to review a motion to amend pursuant to section 85-2-233(6), MCA.

Rule 15 M.R.Civ.P. restricts the scope of the amendments to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the "same set of operative facts as contained in the original pleading." *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985). The requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

Notice must be published by newspaper if the requested amendments "may adversely affect other water rights." Section 85-2-233(6)(a)(i), MCA.

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

FINDINGS OF FACT

1. The changes requested in the Motion To Amend arise out of the same conduct, transaction, or occurrence specified on the original Statement of Claim, are based on the same operative facts specified in the Statement of Claim, and merely make more specific that which

was already claimed on the original Statement of Claim.

2. The period of diversion was changed during the proceedings after issuance of the Temporary Preliminary Decree in 2007, so the latest version of the abstract for this claim is the Post Decree Abstract attached to the Master's Report filed on April 22, 2014, Order Adopting Master's Report entered on May 20, 2014.

3. The Post Decree Abstract states that the Point of Diversion and Means of Diversion are:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
NWNESE	27	2S	9W	SILVER BOW

Diversion Means: HEADGATE

Ditch Name: PENDERGAST DITCH

PUMP LOCATED IN THE NWNWSE SEC 35 TWP 2S RGE 9W IS A SECONDARY MEANS OF DIVERSION.

4. The Motion To Amend states that the ditch name is South MaCauley Ditch. The database would not accept this spelling. The Court confirmed there are other 41D claims with the same point of diversion legal description, but the ditch name is South McCauley Ditch. South McCauley Ditch is the ditch name which should be used.

The point of diversion and means of diversion should be:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
SWNWSE	10	2S	9W	SILVER BOW

Diversion Means: HEADGATE

Ditch Name: SOUTH MCCAULEY DITCH

Secondary: NWNENW 35 2S 9W MADISON

Diversion Means: HEADGATE

Ditch Name: PENDERGAST DITCH

WATER RIGHT 41D 93416-00 IS DIVERTED IN THE SWNWSE OF SECTION 10 T2S R9W SILVER BOW COUNTY INTO THE SOUTH MCCAULEY DITCH. THE WATER TRAVELS THROUGH THE SOUTH MCCAULEY DITCH UNTIL IT ENTERS CAMP CREEK IN THE SENWSW OF SECTION 26 T2S R9W SILVER BOW COUNTY WHICH IS USED AS A NATURAL CARRIER UNTIL IT IS DIVERTED INTO THE PENDERGAST DITCH IN THE NWNENW OF SECTION 35 T2S R9W MADISON COUNTY WHERE IT TRAVELS TO THE PLACE OF USE IN THE SE OF SECTION 35 T2S R9W MADISON COUNTY.

4. The following remark should be added to the abstract of this claim noting the

amendment:

THE POINT OF DIVERSION AND MEANS OF DIVERSION WERE AMENDED BY
THE WATER COURT PURSUANT TO SECTION 85-2-233(6), MCA.

CONCLUSIONS OF LAW

1. The notice requirements for a motion to amend claim specified in section 85-2-233(6), MCA have been met. Section 85-2-233(6), MCA.
2. The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).
3. The Motion To Amend is sufficient to contradict and overcome the prima facie claim as modified after issuance of the Temporary Preliminary Decree.

RECOMMENDATIONS

Based upon the above, this Master recommends that the Court grant the Motion To Amend this claim and make the changes specified in the Findings of Fact to correct the Temporary Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

Kathryn L. W. Lambert
Senior Water Master

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BIG HOLE RIVER
BASIN 41D**

Water Right Number: **41D 93416-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JOAN E PENDERGAST
 PO BOX 44
 MELROSE, MT 59743 0044

 THOMAS F PENDERGAST
 PO BOX 44
 MELROSE, MT 59743 0044

Priority Date: MAY 31, 1886

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 2.71 CFS

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 71.50

Source Name: BIG HOLE RIVER

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	10	2S	9W	SILVER BOW

***Period of Diversion:** MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: SOUTH MCCAULEY DITCH

2 - SECONDARY		NWNENW	35	2S	9W	MADISON
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Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: PENDERGAST DITCH

WATER RIGHT 41D 93416-00 IS DIVERTED IN THE SWNWSE OF SECTION 10 T2S R9W SILVER BOW COUNTY INTO THE SOUTH MCCAULEY DITCH. THE WATER TRAVELS THROUGH THE SOUTH MCCAULEY DITCH UNTIL IT ENTERS CAMP CREEK IN THE SENWSW OF SECTION 26 T2S R9W SILVER BOW COUNTY WHICH IS USED AS A NATURAL CARRIER UNTIL IT IS DIVERTED INTO THE PENDERGAST DITCH IN THE NWNENW OF SECTION 35 T2S R9W MADISON COUNTY WHERE IT TRAVELS TO THE PLACE OF USE IN THE SE OF SECTION 35 T2S R9W MADISON COUNTY.

Period of Use: MAY 1 TO OCTOBER 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	4.00		S2NESE	35	2S	9W	MADISON
2	9.00		S2NWSE	35	2S	9W	MADISON
3	58.50		S2SE	35	2S	9W	MADISON
Total:	71.50						

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.

93416-00 196273-00

THE POINT OF DIVERSION AND MEANS OF DIVERSION WERE AMENDED BY THE WATER COURT PURSUANT TO SECTION 85-2-233(6), MCA.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 10/20/1995: POINTS OF DIVERSION, FLOW RATE, PRIORITY DATE. THE AMENDMENT WAS RESCINDED DURING RE-EXAMINATION AS THE POINT OF DIVERSION AND FLOW RATE WERE AS CLAIMED AND THE PRIORITY DATE WAS CHANGED PER RULE.

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