

Montana Water Court
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40N-0020-R-2021

September 24, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
ROCK CREEK, TRIBUTARY OF THE MILK RIVER BASIN (40N)
PRELIMINARY DECREE

* * * * *

CLAIMANT: State of Montana (Board of Land Commissioners)	CASE 40N-0020-R-2021
	40N 212325-00
OBJECTOR: State of Montana (Board of Land Commissioners)	40N 212326-00
	40N 215634-00

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 the 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 the Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to the Master's Report must be filed within 10 days of the date of the Master's Report. Because the Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. This means your objection must be received no later than **13 days** from the above stamped date.

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

the content of this Master's Report.

MASTER'S REPORT

Statement of the case

Stock claims 40N 212325-00 and 40N 212326-00, and irrigation claim 40N 215634-00 received issue remarks. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. The following issue remarks appeared on the claims.

40N 212325-00

POINT OF DIVERSION NO. 8 APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NWNW SEC 36 TWP 33N RGE 36E VALLEY COUNTY.

40N 212326-00

THE CLAIMED SOURCE MAY BE QUESTIONABLE. BASED ON AVAILABLE DATA, THE SOURCE MAY BE SURFACE WATER FROM WILLOW CREEK.

40N 215634-00

CLAIM WAS NOT INCLUDED IN THE BASIN 40N PRELIMINARY DECREE ISSUED 08/13/85. CLAIM FILED LATE 07/01/1996.

IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

THE VALLEY COUNTY WATER RESOURCES SURVEY (1968) APPEARS TO INDICATE 29.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE DIKE CANNOT BE IDENTIFIED FROM AVAILABLE DATA. NO PRIORITY DATE WAS CLAIMED.

NO PRIORITY DATE WAS CLAIMED.

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A USE AND RESERVED RIGHT.

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

Each claim received an objection from the State of Montana (Board of Land Commissioners) (“BLD”). On July 22, 2021, BLD filed Verified Motions to Amend Water Right Claim resolving its objection to and the issue remarks appearing on each claim.¹

Each element discussed in this report appeared on the Basin 40N Preliminary Decree objection list.

On July 22, 2021, Assistant Attorney General Michele L. Snowberger filed a Notice of Filing on behalf of BLD. This is deemed Ms. Snowberger’s appearance on behalf of BLD. The mailing list shall be updated accordingly.

Issues

1. What is the historically accurate place of use and point of diversion for claim 40N 212325-00?
2. Is the point of diversion issue remark appearing on claim 40N 212325-00 resolved?
3. What is the historically accurate source for claim 40N 212326-00?
4. Is the source issue remark appearing on claim 40N 212326-00 resolved?
5. What are the historically accurate priority date, type of historical right, volume, maximum acres irrigated, point of diversion, and place of use for claim 40N 215634-00?
6. Are the priority date, type of historical right, volume, maximum acres irrigated, point of diversion, late claim status, and lack of the claim’s inclusion in the previous 40N decree issue remarks resolved?

Findings of fact

1. Livestock direct from source claim 40N 212325-00 identified eight place of use and point of diversion legal land descriptions.

¹ The Verified Motions to Amend Water Right Claim attached to BLD’s October 23, 2020 objections were not for the correct claim numbers. The July 22, 2021 Verified Motions to Amend Water Right Claim replaced those attached to the October 23, 2020 objections.

2. The historically accurate place of use and point of diversion for parcel ID number 8 of claim 40N 212325-00 is the NWNW of Section 36, Township 33 North, Range 36 East.

3. The Preliminary Decree abstract for stock claim 40N 212326-00 identified Eagle Creek as its source.

4. A preponderance of evidence establishes the historically accurate source for claim 40N 212326-00 is Willow Creek.

5. The Preliminary Decree abstract for irrigation claim 40N 215634-00 appeared with a blank priority date and identified “use” as the type of historical right, an 80.00 AF volume, a 40.00 acre place of use, and dikes located in the SESESE and NWNWSW of Section 26, Township 33 North, Range 36 East.

6. A preponderance of evidence establishes that the priority date for claim 40N 215634-00 is December 31, 1968, and the claim historically irrigated a 29.00 acre place of use in Sections 25 and 26 with dikes located in the NWNWSW of Section 25 and the SESESE of Section 26, all in Township 33 North, Range 36 East with an 80.00 AF volume.

Principles of law

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. Settlement, including the documents filed by a BLD where the BLD is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. If the settlement agreement expands or enlarges an element of a claim, evidence meeting the burden of proof must be provided. If the evidence does not meet the burden of proof, the element shall not be expanded or enlarged. Rule 17(b), W.R.Adj.R.

5. The Water Court may accept a settlement agreement that reduces or limits an element of a claim and need not determine whether the burden of proof is met unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

6. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

7. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

8. A clerical mistake or mistake arising from omission or oversight may be corrected by the court at any time. Rule 60(a), M.R.Civ.P.

9. Late claim fees may be waived by the court. Rule 30, W.R.Adj.R.

Analysis

Issues 1 through 6 – point of diversion, place of use 40N 212325-00; source 40N 212326-00; priority date, type of historical right, volume, maximum acres irrigated, point of diversion, and place of use 40N 215634-00; issue remark resolution

For stock claim 40N 212325-00, BLD agreed with the point of diversion issue remark's suggested refinement to parcel ID number 8 and proposed that place of use parcel ID number 8 match the refined point of diversion. The refined point of diversion and place of use are within the parameters of prima facie statement of claim 40N 212325-00.

BLD agreed with the source issue remark on stock claim 40N 212326-00 and

proposed the source should be modified to Willow Creek. The resources reviewed by the DNRC and BLD support the historical accuracy of the modified source name for claim 40N 212326-00.

For irrigation claim 40N 215634-00, based upon the 1968 Valley County Water Resources Survey, BLD proposed a December 31, 1968 priority date, confirmed the claim is a “use” right, and agreed with the 29.00 maximum acres irrigated identified by the issue remark on the claim. BLD states the point of diversion issue remark concerning location of the dikes should be removed as the 1968 Valley County Water Resources Survey map attached to the Verified Motion “clearly shows them.” Upon review of the map, the Preliminary Decree abstract appears to include a clerical error. The dike located in the NWNWSW should identify Section 25, not Section 26 of Township 33 North, Range 36 East. **If BLD disagrees with this correction, it should object to this Master’s Report.** The resources reviewed by the DNRC and BLD support the historical accuracy of the proposed priority date, type of historical right, maximum acres irrigated, place of use, and point of diversion for claim 40N 215634-00.

Claim 40N 215634-00 received an issue remark noting the volume may require modification if the maximum acres irrigated were adjusted. Information in the claim file does not indicate the volume is historically inaccurate. Without further explanation, the volume issue remark is not evidence sufficient to overcome the prima facie proof afforded the volume for claim 40N 215634-00.

Claim 40N 215634-00 was filed after the April 30, 1982 claim filing deadline expired. As a result, the claim is defined as a “late claim” under § 85-2-102(15), MCA, and was deemed forfeit pursuant to § 85-2-226, MCA. In 1993, the Montana Legislature enacted § 85-2-221(3), MCA, and provided for the remission of forfeiture of late claims, subject to specified terms and conditions. This claim is a “remitted” late claim. The abstract of this claim contains an issue remark citing § 85-2-221(3), MCA, advising water users that the claim may be subordinate, and therefore junior, to certain permits and reservations of water. Persons holding a post-June 30, 1973 permit or reservation, who relied to their detriment on the failure of a BLD to timely file a claim, were required to

file an objection and thereby seek the subordination of any remitted late filed claim to their permit or reservation. The claim also included an issue remark advising water users that the claim had not been included in the previously issued Preliminary Decree for Basin 40N. Water users were given the opportunity to review the claim and file an objection.

BLD's Verified Motions included maps depicting the refined point of diversion and place of use for claim 40N 212325-00, the historically accurate source for claim 40N 212326-00, and the historical place of use and dikes for claim 40N 215634-00. Copies of the maps are included with this report. Both the report and the maps will be placed in the claim files for future reference.

Conclusions of law

BLD's proposed modifications to each claim are historically accurate and overcome by a preponderance of evidence the prima facie proof afforded each statement of claim where necessary, justify the modifications to each claim, and resolve the objection to and the issue remarks on each claim.

The volume issue remark on claim 40N 215634-00 is not supported by evidence sufficient to overcome the prima facie proof afforded the volume for the claim. The volume issue remark is resolved.

The issue remarks appearing on claim 40N 215634-00 concerning the claim's late claim status and lack of inclusion in the previous decree served their notice purpose.

Recommendations

Stock claim 40N 212325-00 should be modified as follows to accurately reflect historical use.

POINT OF DIVERSION AND PLACE OF USE:

SEE MODIFIED ABSTRACT ATTACHED TO THIS REPORT.

Stock claim 40N 212326-00 should be modified as follows to accurately reflect historical use.

SOURCE NAME: ~~EAGLE CREEK~~

WILLOW CREEK

Irrigation claim 40N 215634-00 should be modified as follows to accurately reflect historical use.

PRIORITY DATE: ~~BLANK~~

DECEMBER 31, 1968

MAXIMUM ACRES: ~~40.00~~

29.00

POINT OF DIVERSION AND PLACE OF USE:

SEE MODIFIED ABSTRACT ATTACHED TO THIS REPORT.

The issue remarks should be removed from the claim abstracts.

A de minimis amount of time was spent adjudicating late claim 40N 215634-00. The late claim fee assessment for claim 40N 215634-00 should be waived as authorized by Rule 30, W.R.Adj.R.

Post Decree Abstracts of Water Right Claim accompany this report to confirm implementation of the recommendations in the state's centralized water right record system.

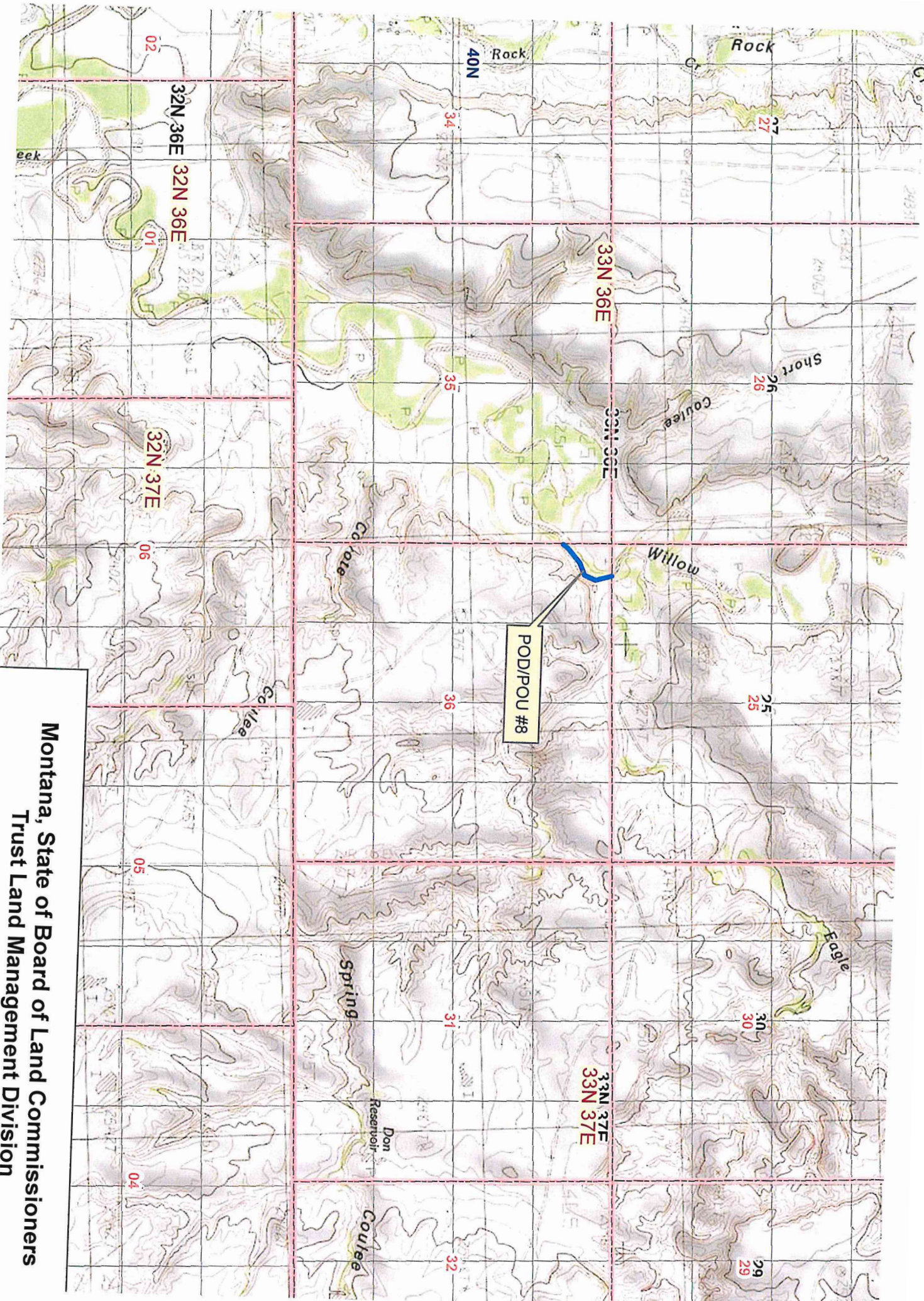
Anna M. Stradley
Senior Water Master

Service via Electronic Mail

~~Ben Eckstein~~

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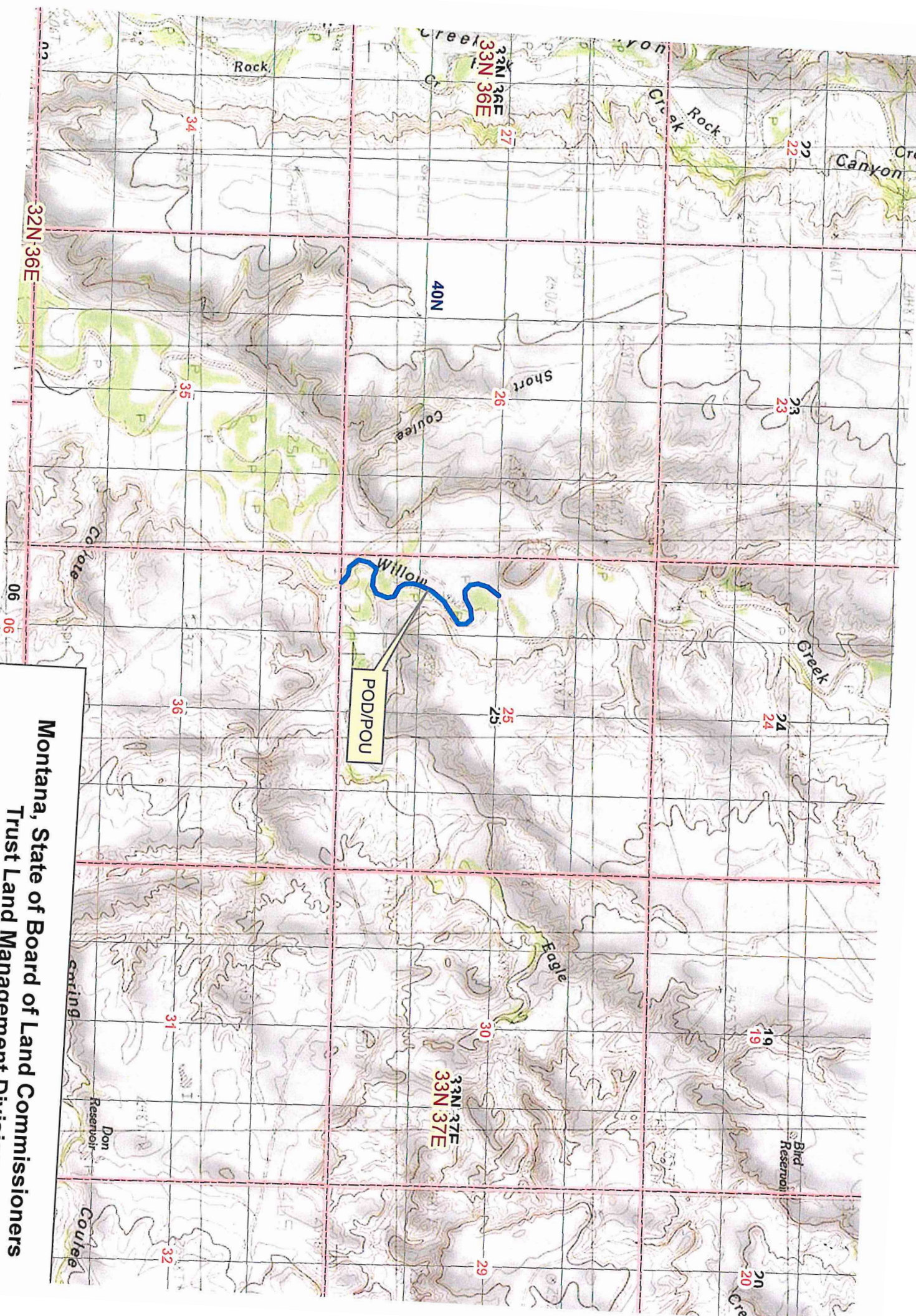
Service List Updated 9/23/2021



N
1:24,000
Map Created: 10/20/2020
0.1 0.2 0.4 Miles



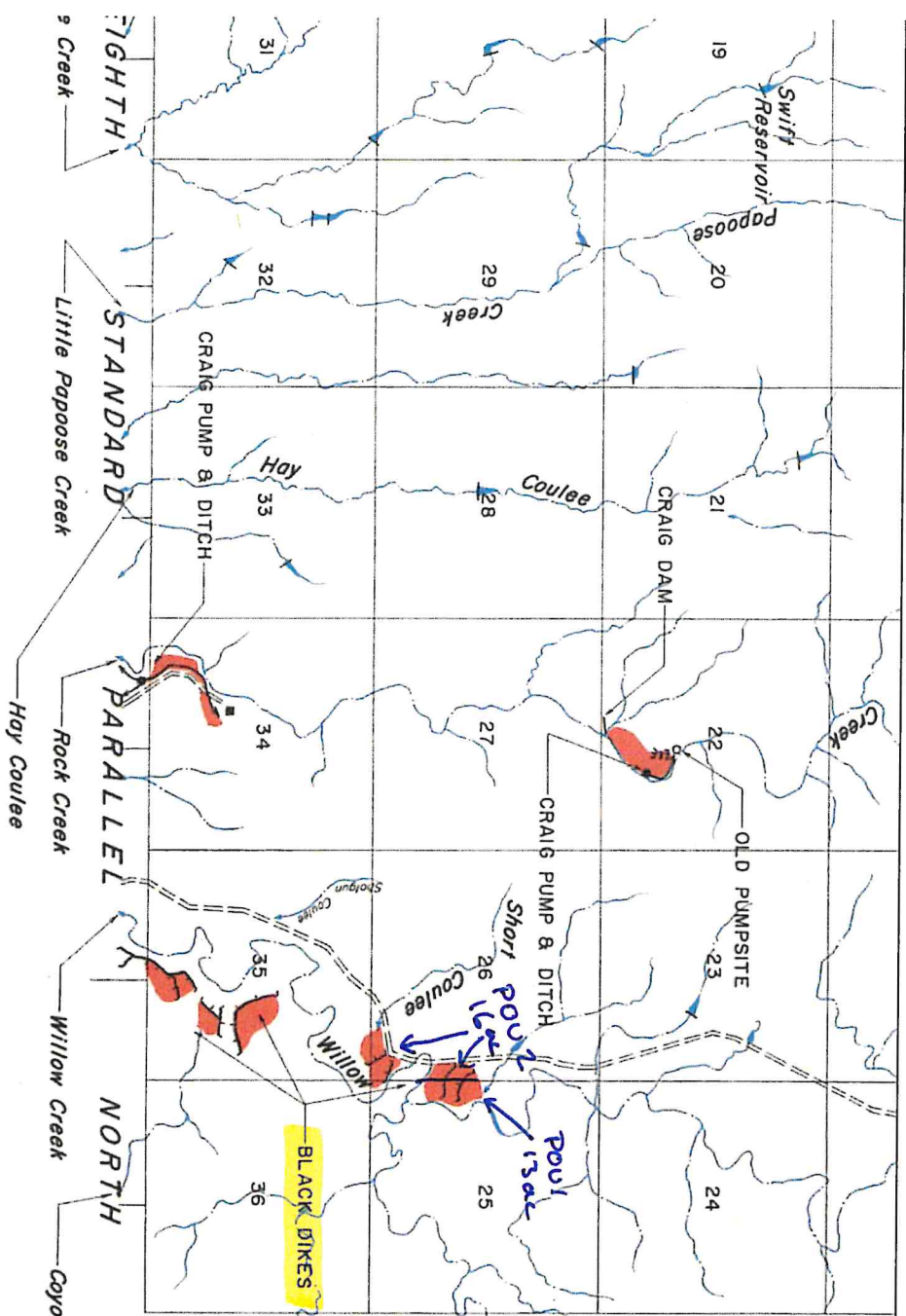
Montana, State of Board of Land Commissioners
Trust Land Management Division
40N 212325-00
Miller Spring Quad
Dennis Meyer



Montana, State of Board of Land Commissioners
Trust Land Management Division
40N 212326-00
Miller Spring Quad
Dennis Meyer

N
0 0.1 0.2
1:24,000
Map Created: 10/20/2020
0.4 Miles





400 215634-00
 1968 WRS (29 acres)
 Shows Dikes & POU
 7/8/2021

Twp. 33 North
 Rge. 36 East

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
ROCK CREEK, TRIBUTARY TO MILK RIVER
BASIN 40N

Water Right Number: 40N 212325-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

Priority Date: DECEMBER 31, 1895

Type of Historical Right: USE

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. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

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: WILLOW CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NW	24	33N	36E	VALLEY
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		W2SW	24	33N	36E	VALLEY
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		W2W2	25	33N	36E	VALLEY
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
4		E2NENE	26	33N	36E	VALLEY
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
5		E2NE	35	33N	36E	VALLEY
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					

6 SWNE 35 33N 36E VALLEY
Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
7 NWSE 35 33N 36E VALLEY
Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
8 NWNW 36 33N 36E VALLEY
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			NW	24	33N	36E	VALLEY
2			W2SW	24	33N	36E	VALLEY
3			W2W2	25	33N	36E	VALLEY
4			E2NENE	26	33N	36E	VALLEY
5			E2NE	35	33N	36E	VALLEY
6			SWNE	35	33N	36E	VALLEY
7			NWSE	35	33N	36E	VALLEY
8			NWNW	36	33N	36E	VALLEY

Remarks:

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 40N 188618-00.

**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
ROCK CREEK, TRIBUTARY TO MILK RIVER
BASIN 40N**

Water Right Number: 40N 212326-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

Priority Date: DECEMBER 31, 1895

Type of Historical Right: USE

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. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

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: WILLOW 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		W2SW	25	33N	36E	VALLEY

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			W2SW	25	33N	36E	VALLEY

Remarks:

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 40N 188619-00.

**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
ROCK CREEK, TRIBUTARY TO MILK RIVER
BASIN 40N**

Water Right Number: 40N 215634-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

Priority Date: DECEMBER 31, 1968

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 07/01/1996 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

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: 80.00 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 29.00

***Source Name:** UNNAMED TRIBUTARY OF WILLOW 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		SESESE	26	33N	36E	VALLEY

Period of Diversion: APRIL 1 TO OCTOBER 15

Diversion Means: DIKE

2		NWNWSW	25	33N	36E	VALLEY
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Period of Diversion: APRIL 1 TO OCTOBER 15

Diversion Means: DIKE

Period of Use: APRIL 1 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	13.00		W2W2	25	33N	36E	VALLEY
2	16.00		E2E2	26	33N	36E	VALLEY
Total:	29.00						