

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

\* \* \* \* \*

CLAIMANT: Carroll MT Properties LLC

OBJECTOR: Carroll MT Properties LLC

**CASE 40N-0043-R-2021**  
40N 30138595

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

**Statement of the case**

Stock claim 40N 30138595 appeared in the Basin 40N Preliminary Decree with

the following issue remarks:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N DECREE ISSUED 08/13/1985.

THE OWNERSHIP OF THIS RIGHT MAY BE QUESTIONABLE. PART OF THE PLACE OF USE APPEARS TO BE ON VALLEY COUNTY PROPERTY.

THE OWNERSHIP OF THIS RIGHT MAY BE QUESTIONABLE. PART OF THE PLACE OF USE APPEARS TO BE ON USDI BUREAU OF LAND MANAGEMENT PROPERTY.

THIS CLAIM APPEARS TO BE CLAIMING A RESERVOIR WITHIN THE PLACE OF USE LOCATED IN THE E1/2SWSE SEC 5 T35N R38E.

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.

Claimant Carroll MT Properties LLC also filed an objection to the claim 1) requesting the addition of an information remark to the claim identifying the private land to which the claim is appurtenant, and 2) stating the claim does not include a reservoir.

Montana law requires the Water Court to resolve issue remarks and objections.

## **Issues**

1. Are the potential owner issue remarks resolved?
2. Is claim 40N 30138595 an exempt right pursuant to Section 85-2-222, MCA?
3. Is the issue remark questioning the claim’s exempt status resolved?
4. Is the notice issue remark concerning the claim’s lack of inclusion in the previous Basin 40N decree resolved?
5. Are Carroll MT Properties LLC’s objections resolved?

## **Findings of fact**

1. Carroll MT Properties LLC owns claim 40N 30138595.
2. The historical place of use does not include property in Section 34, Township 35 North, Range 37 East, Valley County.
3. The following information remark should be added to the abstract:

PART OF THE PLACE OF USE CONSISTS OF FEDERAL PUBLIC LANDS.

4. Stock claim 40N 30138595 is an exempt right pursuant to Section 85-2-222, MCA.

### **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 claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. The Montana 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.

5. 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.

6. 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.

7. The issue of private ownership of stockwater claims on federal public lands was resolved in Water Court Cases 40E-A and 41G-190. In Case 40E-A, the Court held

that under pre-July 1, 1973 law, individuals could appropriate private stockwater rights on federal public land. This right to appropriate is not unfettered. Federal regulations or agreements in place at the time of an individual's appropriation may affect that individual's right to appropriate. *Lawrence Edwards, et al. v. United States of America (Bureau of Land Management), et al.*, Case 40E-A, at p. 2 (MT Water Court Order Jun. 29, 2005). Proof of such federal regulation or agreement should be filed by the identified federal entity. *Edwards*, Case 40E-A, at p. 30 (MT Water Court Opinion Jun. 29, 2005).

8. “‘Existing right’ or ‘existing water right’ means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Section 85-2-102(13), MCA

9. Exempt rights are existing rights for stock or domestic use of groundwater or instream flow. Section 85-2-222(1), MCA.

## **Analysis**

### **Issues 1 and 5 – potential owner issue remark resolution; objection resolution**

The ownership issue remark for the Bureau of Land Management provided notice to the federal government that it may have a potential ownership interest in this claim. The federal government did not file an objection to the claim, thereby confirming its lack of ownership interest in the claim.

An order set a deadline for Carroll MT Properties LLC to identify the base property description for its federal grazing leases and provided notice to Valley County of its potential ownership in the claim and set a deadline for Valley County to file an ownership update for the claim if it co-owned the claim.

The order stated that in lieu of the base property legal land description identified by a grazing permit, the claim abstract could include an information remark stating:

PART OF THE PLACE OF USE INCLUDES FEDERAL LAND.

Carroll MT Properties LLC opted for the addition of the above information remark to its claim abstract.

Valley County did not file an ownership update with the DNRC, thereby confirming its lack of ownership interest in the claim. Carroll MT Properties LLC

proposed a reduced place of use and point of diversion for this livestock direct from source claim, removing Valley County's property located in the W2NE and SW of Section 34, Township 35 North, Range 37 East, Valley County.

### **Conclusions of law**

The proposed modifications to the point of diversion and place of use are reductions within the parameters of statement of claim 40N 30138595 and justify the modifications to the claim. The ownership issue remarks served their notice purpose. The potential ownership issue remarks and Carroll MT Properties LLC's objection to ownership of the claim are resolved.

### **Issues 2, 3, and 5 – exempt right status; issue remark resolution; objection resolution**

Statement of claim 40N 30138595 identified its means of diversion as stock drinking directly from the claimed sources, not stored water from a reservoir. Carroll MT Properties LLC explained and provided an aerial photo confirming that there is a reservoir in Section 5, Township 35 North, Range 38 East, Valley County, but the reservoir is not on the claimed sources. The aerial photo makes clear that the claim does not include stored water from a reservoir.

A copy of the aerial photo is included with this report. A copy of this report and the aerial photo will be placed in the claim file for future reference.

### **Conclusions of law**

Evidence provided by Carroll MT Properties LLC, evidence in the claim file, and the prima facie proof afforded stock statement of claim 40N 30138595 confirm the claim is an existing stock right for instream flow. Claim 40N 30138595 meets the definition of an exempt right. The issue remark concerning the claim's exempt right status and Carroll MT Properties LLC's objection to the claim are resolved.

### **Issue 4 – notice issue remark resolution**

Stock claim 40N 30138595 is an existing right for instream flow. The claim meets the definition of an "exempt claim." Section 85-2-222(1), MCA. In 2013 and 2017, the

Montana Legislature amended § 85-2-222, MCA, and provided for the filing of exempt claims subject to specified terms and conditions. The claim is a timely filed exempt claim.

The claim appeared in the Preliminary Decree with the following issue remark:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N DECREE ISSUED 08/13/1985.

Water users were given the opportunity to review the claim and file an objection. The deadline to file objections has expired. The only objections filed against the claim were from claimant to its own claim and are resolved by these proceedings.

### **Conclusion of law**

The notice issue remark concerning lack of the claim's inclusion in the previous decree served its purpose.

### **Recommendations**

Stock 40N 30138595 should be modified as follows to accurately reflect historical use.

#### **POINT OF DIVERSION AND PLACE OF USE:**

**SEE MODIFIED ABSTRACT ATTACHED TO THIS REPORT.**

#### **Add Remark:**

**PART OF THE PLACE OF USE INCLUDES FEDERAL LAND.**

The issue remarks should be removed from the claim abstract.

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

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Anna M. Stradley  
Senior Water Master

**Service via Electronic Mail**

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

**Water Right Number:** 40N 30138595 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:** CARROLL MT PROPERTIES LLC  
PO BOX 1549  
BOONE, NC 28607 1549

**Priority Date:** JANUARY 23, 1915

**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** COW COULEE

**Source Type:** SURFACE WATER

THE SOURCE INCLUDES UNNAMED TRIBUTARIES OF COW COULEE.

**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		NENE	4	34N	37E	VALLEY
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
2		SENE	14	35N	37E	VALLEY
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
3		E2SE	14	35N	37E	VALLEY
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
4		SESE	22	35N	37E	VALLEY
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
5		N2NE	23	35N	37E	VALLEY
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
6		S2SW	23	35N	37E	VALLEY
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					



<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
7	E2NW	26	35N	37E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
8	NESW	26	35N	37E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
9	SWSW	26	35N	37E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
10	E2	27	35N	37E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
11	SESE	33	35N	37E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
12	W2NE	5	35N	38E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
13	SE	5	35N	38E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
14	N2SW	5	35N	38E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
15	E2SW	7	35N	38E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
16	W2	8	35N	38E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
17	NW	18	35N	38E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
18	NW	19	35N	38E	VALLEY	
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
<b>Period of Use:</b>	JANUARY 1 TO DECEMBER 31					
<b>Place of Use:</b>						

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NENE	4	34N	37E	VALLEY
2			SENE	14	35N	37E	VALLEY

3	E2SE	14	35N	37E	VALLEY
4	SESE	22	35N	37E	VALLEY
5	N2NE	23	35N	37E	VALLEY
6	S2SW	23	35N	37E	VALLEY
7	E2NW	26	35N	37E	VALLEY
8	NESW	26	35N	37E	VALLEY
9	SWSW	26	35N	37E	VALLEY
10	E2	27	35N	37E	VALLEY
11	SESE	33	35N	37E	VALLEY
12	W2NE	5	35N	38E	VALLEY
13	SE	5	35N	38E	VALLEY
14	N2SW	5	35N	38E	VALLEY
15	E2SW	7	35N	38E	VALLEY
16	W2	8	35N	38E	VALLEY
17	NW	18	35N	38E	VALLEY
18	NW	19	35N	38E	VALLEY

PART OF THE PLACE OF USE INCLUDES FEDERAL LAND.

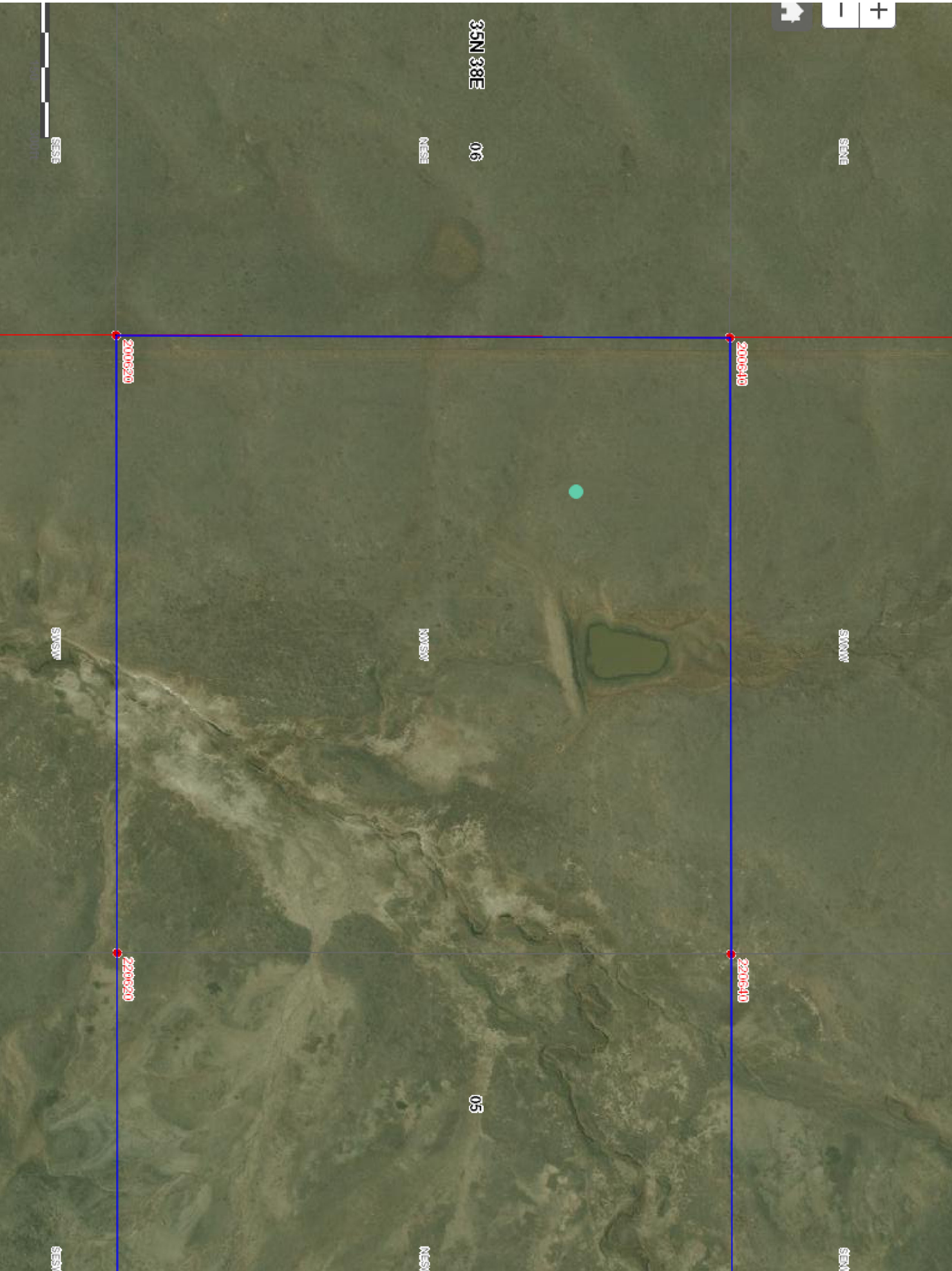


Exhibit 4