

Montana Water Court
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40E-0034-R-2022

November 16, 2022

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
 LOWER MISSOURI DIVISION
 MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER
 AND FORT PECK DAM - BASIN (40E)
 PRELIMINARY DECREE

CLAIMANT: United States of America (Department of Interior
 Fish & Wildlife Service)

CASE 40E-0034-R-2022

40E 38993-00

40E 39006-00

40E 42284-00

40E 164969-00

OBJECTORS: United States of America (Department of Interior
 Fish & Wildlife Service); Leah R. Cole

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, conclusions 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

The above-captioned claims appeared in the Preliminary Decree for the Missouri River Between Musselshell River and Fort Peck Dam (Basin 40E) issued October 7,

2020. The claims received issue remarks resulting from the Department of Natural Resources and Conservation's (DNRC) review in preparation of the Preliminary Decree. These issue remarks identify potential legal or factual issues with the water rights. Claims 40E 39006-00 and 40E 164969-00 also received objections from the United States Department of Interior Fish & Wildlife Service (United States). The Water Court consolidated the claims into Water Court Case 40E-0034-R-2022 to address the objections and issue remarks.

The Court requested that the United States file information or evidence supporting its objections and addressing the issue remarks on the claims, and on August 9, 2022, the United States filed its Response.

FINDINGS OF FACT

Claim 40E 38993-00

1. Claim 40E 38993-00 is a stock claim to water from Dawson Creek. It appeared in the preliminary Decree with the following issue remark that serves only to provide notice to water users (Notice Only Remark):

THE TIMELY FILED OBJECTION OF THE UNITED STATES OF AMERICA WAS AMENDED BY THE PARTIES IN THIS MATTER TO INCLUDE POINT OF DIVERSION AND PLACE OF USE BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THESE CHANGES MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

Claim 40E 39006-00

2. Claim 40E 39006-00 is a water spreading irrigation claim to water from an unnamed tributary of Box Creek, North Fork. It appeared in the Preliminary Decree with the following issue remark raising potential legal or factual issues:

THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE MAY BE QUESTIONABLE. DOCUMENTATION TO SUPPORT THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE WAS NOT SUBMITTED WITH THIS CLAIM.

3. In response to this issue remark, the United States requests that the “historical type of right should remain a ‘use’ right and the priority date should remain September 20, 1960, as indicated on the Statement of Claim.” Response at 2. This claim is currently described as a “filed” right because the original claimant checked the “filed” box on the Statement of Claim. However, no filed notice of appropriation was associated with the claim and the original claimant wrote “none” next to the portion of the statement

of claim form requesting documentation. During the DNRC's original verification of this claim the examiner checked the box stating that the priority date was OK. The Court interprets the United States' response as a request to modify the type of historical right from "filed" to "use" and retain the claimed priority date.

4. The United States objected to this claim's type of historical right, maximum acres, means of diversion, place of use, point of diversion, and priority date. Its Response seeks to modify its points of diversion to reflect the historical use of multiple diversion dikes. The following modification should be made as requested by the United States' Response:

Point of Diversion and Means of Diversion

<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			NWSWSW	34	24N	41E	Garfield
2			<u>NWSWSW</u>	<u>34</u>	<u>24N</u>	<u>41E</u>	<u>Garfield</u>
3			<u>SESWSW</u>	<u>34</u>	<u>24N</u>	<u>41E</u>	<u>Garfield</u>
4			<u>SENWNW</u>	<u>3</u>	<u>23N</u>	<u>41E</u>	<u>Garfield</u>

Type of Historical Right: Filed Use

5. The point of diversion modifications are supported by a 1971 aerial photo submitted by the United States showing the location of the dikes, and are consistent with language in the Statement of Claim referring to multiple dikes flowing from one down to another.

Claim 40E 164969-00

6. Claim 40E 164969-00 is a claim to stock drinking from a reservoir on Sheep Creek. It appeared in the Preliminary Decree with the following issue remark raising a legal or factual issue:

A LATE OBJECTION HAS BEEN FILED TO THE PERIOD OF USE OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE.

7. The late objection noticed by this remark was filed by Leah Cole seeking a year-round period of use. The Court ordered Ms. Cole to inform the Court if she intended to pursue her objection. Nothing was filed by the deadline and the Court concludes Ms. Cole does not intend to pursue the objection.

8. The United States objected to the flow rate, volume, period of diversion, and period of use for the claim. The following modifications should be made as requested

by the United States' Response, and consistent with DNRC guidelines for stockwater claims:

Period of Diversion: April 1 to November 30 January 1 to December 31

Period of Use: April 1 to November 30 January 1 to December 31

9. The United States also requests modifications to the reservoir record based on the Statement of Claim, which claims a volume of 28.8 and includes the following handwritten calculation "12 x 6 x .4." The United States interprets this notation to mean that the Claimant intended a dam height of 12 feet, depth of 6 feet, and surface area of .04 acres. However, according to the DNRC standard equation for reservoir capacity (Surface Acres x Depth x 0.4), this would result in a capacity of only .96 acre feet. It therefore appears that the claimant intended to claim a depth of 12 feet and a surface area of 6 feet and the ".4" represents the standard multiplier from the DNRC calculation. DNRC Claim Examination Manual (2013) at p. 345.

10. The following modification should be made to correct the reservoir information. If the United States disagrees with this interpretation, it may object to this Master's Report:

Reservoir Record:

Dam height: 8.00 FEET

Depth: ~~5.00 FEET~~ 12.00 FEET

Surface Area: ~~4.00 ARES~~ 6.00 ACRES

Capacity: ~~8.00 ACRE FEET~~ 28.8 ACRE FEET

11. The claim also received the following Notice Only Remarks:

RESERVOIR RECORD 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.

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

Claim 40E 42284-00

12. Claim 40E 42284-00 is a claim for stock drinking from an unnamed tributary of Stole Creek. It appeared in the Preliminary Decree with the following issue remark raising legal or factual issues:

POINT OF DIVERSION NO.4 IS ON AN UNNAMED TRIBUTARY OF STOLE CREEK.

13. The United States agrees with the remark that the following modification should be made:

Means of Diversion and Point of Diversion ID No. 4

Source: Unnamed Tributary, Stole Creek

14. The claim also received the following Notice Only Remark:

THE TIMELY FILED OBJECTION OF UNITED STATES OF AMERICA WAS AMENDED BY CONSENT OF THE PARTIES LISTED IN THIS MATTER TO INCLUDE POINT OF DIVERSION AND PLACE OF USE BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THESE CHANGES MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE

PRINCIPLES OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is *prima facie* proof of its content. § 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. Rule 19, W.R.Adj.R.

2. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. 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. 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. § 85-2-248(3), MCA.

CONCLUSIONS OF LAW

1. Each of the Findings of Fact above is supported by a preponderance of the evidence. The reservoir information modification to livestock claim 40E 164969-00 is not a change to the water right likely to adversely affect other water users without notice. The claims should be modified as described in Findings of Fact No. 4, 8, 10, and 13, above. Based on information before the Court, these modifications resolve the United States' objections.

2. The type of historical right remark on claim 40E 39006-00 and point of diversion remark on claim 40E 42284-00 are resolved by the modifications described above. The late objection to claim 40E 164969-00 has been addressed. The Notice Only Remarks do not raise legal or factual issues for the Water Court to resolve. The issue remarks should be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends the claims be modified as described above and the issue remarks be removed from the claims.

A post-decree abstract of each water right claim is attached to this Master's Report for review.

Eyvind Ostrem
Senior Water Master

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Notice: Service List Updated 10.27.22

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: **40E 38993-00 STATEMENT OF CLAIM**

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
USA (DEPT OF INTERIOR FISH & WILDLIFE SERVICE)
DENVER FEDERAL CENTER
PO BOX 25486, MS #60189
DENVER, CO 80225 0486

Priority Date: DECEMBER 31, 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:** DAWSON CREEK

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

ID	Govt Lot	Otr Sec	Sec	Twp	Rge	County
1		SE	2	23N	41E	GARFIELD

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:**

ID	Acres	Govt Lot	Otr Sec	Sec	Twp	Rge	County
1			SE	2	23N	41E	GARFIELD

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: **40E 39006-00 STATEMENT OF CLAIM**

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF INTERIOR FISH & WILDLIFE SERVICE)
DENVER FEDERAL CENTER
PO BOX 25486, MS #60189
DENVER, CO 80225 0486

Priority Date: SEPTEMBER 20, 1960

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: 50.00 AC-FT

Climatic Area: 1 - HIGH

Maximum Acres: 25.00

Source Name: UNNAMED TRIBUTARY OF NORTH FORK BOX CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Otr Sec	Sec	Twp	Rge	County
1		NWSWSW	34	24N	41E	GARFIELD

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DIKE

2		NWSWSW	34	24N	41E	GARFIELD
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DIKE

3		SESWSW	34	24N	41E	GARFIELD
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DIKE

4		SENWNW	3	23N	41E	GARFIELD
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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:

ID	Acres	Govt Lot	Otr Sec	Sec	Twp	Rge	County
1	4.00		NWSWSW	34	24N	41E	GARFIELD
2	10.00		E2NWNW	3	23N	41E	GARFIELD
3	4.00		NESWNW	3	23N	41E	GARFIELD

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: **40E 42284-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
USA (DEPT OF INTERIOR FISH & WILDLIFE SERVICE)
DENVER FEDERAL CENTER
PO BOX 25486, MS #60189
DENVER, CO 80225 0486

Priority Date: MAY 3, 1939

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:** STOLE CREEK

Source Type: SURFACE WATER

***Source Name:** UNNAMED TRIBUTARY OF STOLE CREEK

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

ID	Govt Lot	Qtr	Sec	Twp	Rge	County
1	4		3	24N	42E	MCCONE

***Source Name:** UNNAMED TRIBUTARY OF STOLE CREEK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2	1	4	24N	42E	GARFIELD
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***Source Name:** UNNAMED TRIBUTARY OF STOLE CREEK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

3	2	4	24N	42E	GARFIELD
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***Source Name:** UNNAMED TRIBUTARY OF STOLE CREEK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

4	8	4	24N	42E	GARFIELD
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Source Name: UNNAMED TRIBUTARY OF STOLE CREEK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE
5 SE 31 25N 42E MCCONE
Source Name: STOLE CREEK
Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
6 NW 32 25N 42E MCCONE
***Source Name:** UNNAMED TRIBUTARY OF STOLE CREEK
Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
7 S2 32 25N 42E MCCONE
Source Name: STOLE CREEK
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		4		3	24N	42E	MCCONE
2		1		4	24N	42E	GARFIELD
3		2		4	24N	42E	GARFIELD
4		8		4	24N	42E	GARFIELD
5			SE	31	25N	42E	GARFIELD
6			NW	32	25N	42E	MCCONE
7			S2	32	25N	42E	MCCONE

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E

Water Right Number: **40E 164969-00 STATEMENT OF CLAIM**

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
USA (DEPT OF INTERIOR FISH & WILDLIFE SERVICE)
DENVER FEDERAL CENTER
PO BOX 25486, MS #60189
DENVER, CO 80225 0486

Priority Date: DECEMBER 31, 1951

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. 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 STOCKWATERING 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: SHEEP CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County	
1		SESWNE		11	22N	39E	GARFIELD

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

Govt Lot	Qtr Sec	Sec	Twp	Rge	County	
	SESWNE		11	22N	39E	GARFIELD

Diversion to Reservoir: DIVERSION # 1

Dam Height: 8.00 FEET

Depth: 12.00 FEET

Surface Area: 6.00 ACRES

Capacity: 28.80 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County	
1			SESWNE		11	22N	39E	GARFIELD