

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

40E-0076-R-2022

November 3, 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: American Prairie Foundation

CASE 40E-0076-R-2022

40E 166593-00

40E 187208-00

40E 187212-00

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 water rights appeared in the Preliminary Decree for the Missouri River Between Musselshell River and Fort Peck Dam (Basin 40E) issued

October 7, 2020. Each claim received one or more issue remarks from the Department of Natural Resources and Conservation (DNRC) identifying potential legal and factual issues with the claim. The claims were consolidated into Case 40E-0076-R-2022 to resolve the issue remarks.

FINDINGS OF FACT

1. Claims 40E 166593-00 and 40E 187212-00 are water spreading irrigation claims that each appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE DIKE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

2. DNRC notes in the claim files indicate that these issue remarks were placed on the claims because the original maps provided by claimants were poor copies and the DNRC therefore could not locate the dikes on available aerial photographs. The DNRC did not indicate which aerial photographs it reviewed in attempting to locate the dikes. This information is particularly useful where, as here, the water right is for water spreading, which may occur sporadically and not be visible in all aerial photographs.

3. On August 30, 2022, the Claimant filed aerial photographs depicting the places of use and points of diversion. The Claimants do not request any change to the points of diversion for these claims.

4. Claims 40E 166593-00 and 40E 187208-00 also received the following issue remarks, respectively, which serve only to provide notice to water users in the Preliminary Decree (Notice Only Remarks):

THE TIMELY FILED OBJECTION OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION WAS AMENDED BY THE CLAIMANT TO INCLUDE THE 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.

THE TIMELY FILED OBJECTION OF THE WATER COURT WAS AMENDED BY CONSENT OF THE CLAIMANT IN THIS MATTER TO INCLUDE 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. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

2. 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.

CONCLUSIONS OF LAW

1. The point of diversion issue remarks fail to overcome the prima facie status of claims 40E 166593-00 and 40E 187212-00 and should be removed from the claims.

2. The Notice Only Remarks do not raise legal or factual issues for the Water Court to resolve. They have served their notice purpose and can be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court remove the issue remarks from the above-captioned claims.

A post-decree abstract of each water right claim reflecting the recommended changes is attached to this Report.

Eyvind Ostrem
Senior Water Master

Service via Electronic Mail

W John Tietz
Browning, Kaleczyc, Berry & Hoven PC
PO Box 1697
Helena, MT 59624
(406) 443-6820
john@bkbh.com
bethany@bkbh.com
kathys@bkbh.com

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

Water Right Number: 40E 166593-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: AMERICAN PRAIRIE FOUNDATION
PO BOX 908
BOZEMAN, MT 59771 0908

Priority Date: APRIL 14, 1908

Type of Historical Right: FILED

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:** 13.50 AC-FT
Climatic Area: 1 - HIGH

***Maximum Acres:** 9.00

Source Name: JOHNSTON COULEE
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		S2	NWSE	8	23N	33E	PHILLIPS

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</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	1.50		SENW	8	23N	33E	PHILLIPS
2	2.50		NESW	8	23N	33E	PHILLIPS
3	5.00		NWSE	8	23N	33E	PHILLIPS
Total:	9.00						

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.

166593-00

187212-00

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

Water Right Number: 40E 187208-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: AMERICAN PRAIRIE FOUNDATION
PO BOX 908
BOZEMAN, MT 59771 0908

Priority Date: DECEMBER 31, 1908

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:** 87.00 AC-FT
Climatic Area: 1 - HIGH

***Maximum Acres:** 58.00

Source Name: ALFALFA COULEE
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID **Govt Lot** **Qtr Sec** **Sec** **Twp** **Rge** **County**
1 NWSWNW 26 24N 32E PHILLIPS

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	23.00		SWNW	26	24N	32E	PHILLIPS
2	33.00		W2SW	26	24N	32E	PHILLIPS
3	2.00		NWNWNW	35	24N	32E	PHILLIPS
Total:	58.00						

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

Water Right Number: 40E 187212-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: AMERICAN PRAIRIE FOUNDATION
PO BOX 908
BOZEMAN, MT 59771 0908

Priority Date: DECEMBER 31, 1900

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: 10.12 AC-FT
Climatic Area: 1 - HIGH

Maximum Acres: 7.00

Source Name: SPRING, UNNAMED TRIBUTARY OF JOHNSTON COULEE
Source Type: GROUNDWATER

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	8	23N	33E	PHILLIPS
Period of Diversion: APRIL 15 TO DECEMBER 15						
Diversion Means: DIKE						
Period of Use: APRIL 15 TO DECEMBER 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	5.00		NWSE	8	23N	33E	PHILLIPS
2	2.00		NENESW	8	23N	33E	PHILLIPS
Total:	7.00						

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.

166593-00 187212-00