

Montana Water Court
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FILED
10/20/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
40E-0122-R-2023
Ostrem, Eyvind
7.00

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

CLAIMANTS: Margaret (Peggy) A. Bergsagel; Jeanne Mae
Engebretson; Susan L. Snyder; Erik
Engebretson

CASE 40E-0122-R-2023
40E 166523-00
40E 166531-00
40E 166545-00

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 to 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 right 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 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-0122-R-2023 to resolve the issue remarks.

On August 28, 2023, Claimant Margaret Bergsagel submitted a response addressing the issue remarks on the claims. The remaining claimants have not participated in this case despite being given multiple opportunities to do so (June 7, 2023 Order Consolidating Claims and Setting Filing Deadline; July 13, 2023 Order on Ownership and Filing Deadline).

FINDINGS OF FACT

40E 166523-00

1. Claim 40E 166523-00 is a claim to a stock reservoir in the NESWNE of Section 8, T23N, R32E. The DNRC placed the following substantive issue remark on the claim that the Water Court is required to address:

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA.

2. The DNRC employee examining the claim did not explain what information was relied upon in placing the remark on the claim. Often, small stock reservoirs are ephemeral and not visible on all aerial photographs. Ms. Bergsagel's Response states that the claim is correct as decreed and requests the issue remark be removed.

40E 166531-00

3. Claim 40E 166531-00 is a claim to a stock reservoir in the NESWNE of Section 7, T23N, R32E. The DNRC placed the following substantive issue remark on the claim that the Water Court is required to address:

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA.

4. The DNRC employee examining the claim did not explain what information was relied upon in placing the remark on the claim. Ms. Bergsagel's Response states that the claim is correct as decreed and requests the issue remark be removed.

40E 166545-00

5. Claim 40E 166545-00 is a stock claim to water from a spring in the NENW of Section 31, T24N, R32E, which appeared in the Preliminary Decree with the substantive issue remark that the Water Court is required to address:

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

6. DNRC notes in the claim file indicate the DNRC employee examining the claim was unable to locate the spring on aerials or maps and suggest that the DNRC believes the source of the claim may need to be changed to Unnamed Tributary of Telegraph Creek. Ms. Bergsagel's Response states that this spring arises in the channel of Telegraph Creek, which typically does not flow all year. Ms. Bergsagel's response explains why DNRC was unable to locate the spring on aerials. Ms. Bergsagel states that the claim is correct as decreed and requests the issue remark be removed.

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 issue remarks on claims 40E 166523-00 and 40E 166531-00 fail to overcome the prima facie status of the statements of claim and should be removed from the claims. Ms. Bergsagel's response to the remark on claim 40E 166545-00 is supported by a preponderance of the evidence, and the remark should be removed from the claim.

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.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Margaret (Peggy) A Bergsagel
Erik Engebretson
5247 Telegraph Rd
Malta, MT 59538

Jeanne Mae Engebretson
Susan L Snyder
PO Box 12
Pendroy, MT 59467

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E**

Water Right Number: 40E 166523-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

SUSAN L SNYDER
PO BOX 12
PENDROY, MT 59467

JEANNE MAE ENGBRETSON
DECEASED
MALTA, MT 59538

MARGARET (PEGGY) A BERGSAGEL
5247 TELEGRAPH RD
MALTA, MT 59538

Priority Date: DECEMBER 31, 1939

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 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: SMITH 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		NESWNE	8	23N	32E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NESWNE	8	23N	32E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

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			NESWNE	8	23N	32E	PHILLIPS

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

Water Right Number: 40E 166531-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

SUSAN L SNYDER
PO BOX 12
PENDROY, MT 59467

MARGARET (PEGGY) A BERGSAGEL
5247 TELEGRAPH RD
MALTA, MT 59538

ERIK ENGBRETSON
5247 TELEGRAPH RD
MALTA, MT 59538 9567

Priority Date: DECEMBER 31, 1917

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 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: UNNAMED TRIBUTARY OF SMITH 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		NESWNE	7	23N	32E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NESWNE	7	23N	32E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

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			NESWNE	7	23N	32E	PHILLIPS

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**MISSOURI RIVER, BETWEEN MUSSELSHELL RIVER AND FORT PECK DAM
BASIN 40E**

Water Right Number: 40E 166545-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

SUSAN L SNYDER
PO BOX 12
PENDROY, MT 59467

MARGARET (PEGGY) A BERGSAGEL
5247 TELEGRAPH RD
MALTA, MT 59538

ERIK ENGBRETSON
5247 TELEGRAPH RD
MALTA, MT 59538 9567

Priority Date: DECEMBER 31, 1938

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: SPRING, TELEGRAPH CREEK

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		NENW	31	24N	32E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: FLOWING

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	31	24N	32E	PHILLIPS