

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MISSOURI RIVER BELOW FORT PECK DAM BASIN (40S)  
INTERLOCUTORY DECREE

\* \* \* \* \*

CLAIMANTS: Clayton Zerbe; Jennifer Zerbe

**CASE 40S-0020-I-2024**

40S 30132675

40S 30132676

**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

Claims 40S 30132675 and 40S 30132676 appeared in the Lower Missouri River, Below Fort Peck Dam Interlocutory Decree (Basin 40S). All claims that appeared in the Interlocutory Decree were subject to “issue remarks” resulting from pre-decree examination by the Montana Department of Natural Resources and Conservation (“DNRC”), objections, counterobjections, and notices of intent to appear.

Claims 40S 30132675 and 40S 30132676 received issue remarks but no objections, counterobjections, or notices of intent to appear. It is therefore ORDERED claims 40S 30132675 and 40S 30132676 are consolidated into Water Court Case 40S-0020-I-2024.

### FINDINGS OF FACT

1. Claims 40S 30132675 and 40S 30132676 are exempt groundwater claims for stock use. Clayton and Jennifer Zerbe own both claims.

2. The claims received the following identical issue remarks:

THE CLAIMED MEANS OF DIVERSION CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

THE CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40S DECREE ISSUED 12/29/1999.

3. The interlocutory decree abstracts for both claims list the means of diversion as a developed spring.

4. The Claimants specifically claimed the means of diversion of the claims as a developed spring on the statements of claim.

5. The DNRC placed the means diversion issue remark on the claims during its examination of the claims in preparation for the Basin 40S Interlocutory Decree. In placing the remark, it failed to include any notes to support its reasoning in adding the remark.

6. The second issue remark placed on the claims is for notice purposes only.

### CONCLUSIONS 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. The degree or weight of evidence needed to contradict or overcome the *prima facie* proof statute is a preponderance of the evidence. *Burkhartsmeier et al. v. Burkhartsmeier et al.*, Case 40G-2, (MT Water Court Memorandum Opinion and Order Adopting Master's Report, Mar. 11, 1997). The Montana Supreme Court has defined preponderance as "a relatively modest standard that the statutory criteria are 'more probable than not' to have been met." *Hohenlohe v. State*, 2010 MT 203 ¶ 33, 357 Mont. 438, 240 P.3d 628.

3. 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.

4. While the means of diversion may not be identifiable with the evidence in the claims' files, the DNRC fails to prove that the means of diversion as claimed does not reflect the historical use of the claims. Thus, the *prima facie* status of the claims has not been overcome and the means of diversion issue remark should be removed from both claims.

5. The second issue remark placed on the claims is for notice purposes only. It has served its purpose and should be removed.

#### RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends the Court make the changes specified above.

Post Decree Abstracts of Water Right Claims 40S 30132675 and 40S 30132676 are served with this Master's Report to confirm the recommendations have been made in the state's centralized record system.

#### **ELECTRONICALLY SIGNED AND DATED BELOW.**

Electronically Signed By:  
Hon. Judge Brooke Reynolds  
Thu, Aug 08 2024 10:35:12 AM

**Service via USPS Mail:**

Clayton Zerbe  
Jennifer Zerbe  
203 Grand Prairie Rd  
Frazer, MT 59225-9637

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MISSOURI RIVER, BELOW FORT PECK DAM**  
**BASIN 40S**

**Water Right Number:** **40S 30132675 STATEMENT OF CLAIM**

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:**  
CLAYTON ZERBE  
203 GRAND PRAIRIE RD  
FRAZER, MT 59225-9637  
  
JENNIFER ZERBE  
203 GRAND PRAIRIE RD  
FRAZER, MT 59225-9637

**Priority Date:** DECEMBER 31, 1955

**Type of Historical Right:** USE

**Purpose (Use):** STOCK

**\*Flow Rate:** 15.00 GPM

**\*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, UNNAMED TRIBUTARY OF MISSOURI RIVER

**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		SWNWSW	19	27N	45E	VALLEY

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DEVELOPED SPRING

**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			SWNWSW	19	27N	45E	VALLEY

**Remarks:**

THIS WATER RIGHT IS LOCATED, IN WHOLE OR IN PART, WITHIN THE BOUNDARY OF THE FORT PECK INDIAN RESERVATION.

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**MISSOURI RIVER, BELOW FORT PECK DAM**  
**BASIN 40S**

**Water Right Number:** **40S 30132676 STATEMENT OF CLAIM**

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:**  
CLAYTON ZERBE  
203 GRAND PRAIRIE RD  
FRAZER, MT 59225-9637  
  
JENNIFER ZERBE  
203 GRAND PRAIRIE RD  
FRAZER, MT 59225-9637

**Priority Date:** DECEMBER 31, 1955

**\*Type of Historical Right:** USE

**Purpose (Use):** STOCK

**\*Flow Rate:** 10.00 GPM

**\*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, UNNAMED TRIBUTARY OF MISSOURI RIVER

**Source Type:** GROUNDWATER

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

<b>ID</b>	<b>Govt Lot</b>	<b>Qtr Sec</b>	<b>Sec</b>	<b>Twp</b>	<b>Rge</b>	<b>County</b>
1		SESESE	26	27N	44E	VALLEY

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DEVELOPED SPRING

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<b>ID</b>	<b>Acres</b>	<b>Govt Lot</b>	<b>Qtr Sec</b>	<b>Sec</b>	<b>Twp</b>	<b>Rge</b>	<b>County</b>
1			SESESE	26	27N	44E	VALLEY

**Remarks:**

THIS WATER RIGHT IS LOCATED, IN WHOLE OR IN PART, WITHIN THE BOUNDARY OF THE FORT PECK INDIAN RESERVATION.