

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
JUDITH RIVER BASIN (41S)
PRELIMINARY DECREE

CLAIMANTS: American Prairie Foundation

CASE 41S-0009-R-2024
41S 135365-00

OBJECTORS: American Prairie Foundation; United States of
America (DOI Bureau of Land Management)

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

Claim 41S 135365-00 appeared in the Preliminary Decree for the Judith River (Basin 41S) and was decreed with the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE FERGUS COUNTY WATER RESOURCES SURVEY (1970) APPEARS TO INDICATE 64.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

USDA AERIAL PHOTOGRAPH NO(S). 30027-278-44 , DATED 09/25/1979 , APPEARS TO INDICATE 43.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

POINT OF DIVERSION 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 MAXIMUM COMBINED ACRES FOR THIS GROUP OF SUPPLEMENTAL CLAIMS MAY REQUIRE MODIFICATION PENDING RESOLUTION OF MAXIMUM IRRIGATED ACRES ISSUE.

The American Prairie Foundation (APR) and the United States of America Bureau of Land Management (BLM) filed objections to the claim.

On April 22, 2024, claimant APR filed a Motion to Amend Claim 41S 135365-00 (Doc.¹ 6.00). The Motion requested several reductions to the claim. Attached to the motion is aerial imagery from 1954 and 1977 showing a total of 59.6 acres irrigated. An analysis of the 1979 aerial image referenced in the issue remark and showing 59.6 irrigated acres is also included with the Motion. The Motion notes that it is unclear why the DNRC examination concluded only 43 acres were irrigated.

On May 2, 2024, BLM filed a Statement Regarding Claimant’s Motion to Amend (Doc. 7.00) stating that adoption of the proposed reductions would resolve the BLM's objection to the claim.

FINDINGS OF FACT

1. The Motion proposes modifying claim 41S 135365-00 as follows:

Flow Rate: ~~5.69 CFS~~ **5.6 CFS**

Maximum Acres: ~~150.00~~ **59.6**

¹ “Doc.” numerical references correlate to case file docket numbers in the Water Court’s Full Court case management system.

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	110.00 6.0	SESWSE	E2	15 10	22N	16E	FERGUS
2	20.00 35.3	W2NE	N2NE	22 15	22N	16E	FERGUS
3	16.00 18.3	N2SE	NESW	15	22N	16E	FERGUS
4	4.00		SESENW	15	22N	16E	FERGUS
Total:	150.00 59.6						

PRINCIPLES OF LAW

1. The Montana Water Court has the authority to determine the extent of all water rights in the state as they existed prior to July 1, 1973. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 367 P.3d 732; §§ 85-2-233, -102(13), MCA.

2. A properly filed Statement of Claim for Existing Water 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. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

3. If a claimant agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remark remains. Rule 17(c), W.R.Adj.R.

CONCLUSIONS OF LAW

1. The flow rate and place of use modifications discussed in Finding of Fact #1 should be accepted as a reduction.

2. The flow rate and place of use reductions resolve the flow rate issue remark as well as the issue remark referencing the Water Resource Survey. The remaining ‘acres irrigated’ issue remark fails to overcome the prima facie status of the claim given the post-1973 date the imagery was taken as well as the additional aerial images provided with the Motion. The remaining remarks should be removed as they fail to overcome the prima facie status of the claim.

3. Adoption of the requested reductions to the claim resolves the BLM objection.

RECOMMENDATIONS

1. The flow rate, place of use and maximum acres should be modified as discussed above.

2. The issue remarks should be removed from the claim.

3. The BLM objection should be resolved upon adoption of the requested reductions to the claim.

A Post Decree Abstract of Water Right Claim is attached to this Master's Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail:

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**POST DECREE
 ABSTRACT OF WATER RIGHT CLAIM
 JUDITH RIVER
 BASIN 41S**

Water Right Number: 41S 135365-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

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

Priority Date: MAY 1, 1915

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 5.60 CFS

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 59.60

Source Name: JUDITH RIVER

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		NWSWNE	15	22N	16E	FERGUS

Period of Diversion: MAY 1 TO SEPTEMBER 30

Diversion Means: PUMP

Period of Use: MAY 1 TO SEPTEMBER 30

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	6.00		SESWSE	10	22N	16E	FERGUS
2	35.30		W2NE	15	22N	16E	FERGUS
3	18.30		N2SE	15	22N	16E	FERGUS

Total: 59.60

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.

135365-00	135366-00	135367-00	135371-00	135374-00	135376-00
135377-00	135378-00	139679-00			