

Montana Water Court
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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: American Prairie Foundation; United States of
America (Dept of Interior Fish & Wildlife
Service)

OBJECTORS: American Prairie Foundation; United States of
America (Dept of Interior Fish & Wildlife
Service)

CASE 40E-0078-R-2022
40E 12727-00
40E 12729-00
40E 214036-00

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 objections from Claimant American Prairie Foundation (“APF”). Claim 40E 214036-00 also received an objection from the United States Department of Interior Fish & Wildlife Service (“United States”), and issue remarks from the Department of Natural Resources and Conservation (“DNRC”) raising potential legal or factual issues with the claim. The claims were consolidated into case 40E-0078-R-2022 to address the objections and issue remarks.

On May 25, 2023, APF filed a Motion to Amend the claims in this case. Doc. 12.00.¹ The motion is supported by an attached memorandum prepared by DMS Natural Resources dated May 16, 2023, including attached aerial photographs. On May 31, 2023, the United States filed a Status Report stating that its objection to claim 40E 214036-00 is resolved by the changes requested in APF’s Motion to Amend. Doc. 13.00.

FINDINGS OF FACT

Claim 40E 12727-00

1. The following point of diversion should be added to claim 40E 12727-00 as requested in APF’s objection and Motion to Amend and supported by a 10/3/1964 aerial photograph showing the additional diversion:

Point 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			NWNESE	20	23N	31E	Phillips
<u>2</u>			<u>SESWSW</u>	<u>20</u>	<u>23N</u>	<u>31E</u>	<u>Phillips</u>

Claim 40E 12729-00

2. Claim 40E 12729-00 is a water spreading irrigation claim from Telegraph Creek. The initial Statement of Claim indicated water was diverted via dikes *and ditches*. However, the latter was removed during DNRC examination. The DMS Memorandum states that based on historic aerial imagery and on-the-ground knowledge, there were

¹ “Doc.” refers to the docket number of a document filed in the Water Court’s Full Court Enterprise Case Management system.

additional points of diversion, including dikes and berms and ditches with no control mechanism that divert water from Telegraph Creek when water is high enough. Aerial photos and information attached to the Motion to Amend support the following modifications:

Climatic Area: ± 2

Point of Diversion ID No. 1:

Diversion Means: ~~Dike~~ Ditch

Additional points of Diversion:²

ID	Gov Lot	Qtr	Sec	Sec	Twp	Rge	County
2			NW	SE	33	24N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Dike/Berm						
3			SW	NS	33	24N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Ditch						
4			SW	NS	33	24N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Dike/Berm						
5			S	WS	33	24N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Dike/Berm						
6	Lot 1		SE	NE	5	23N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Dike/Berm						
7			SW	SE	5	23N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Ditch						
8			SE	NE	8	23N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Dike/Berm						
9			N	EW	19	23N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Dike/Berm						
10			SE	NE	19	23N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Dike/Berm						
11			NE	SE	19	23N	31E PHILLIPS
	Period of Diversion: January 1 to December 31						
	Diversion Means: Ditch						

40E 214036-00

3. Claim 40E 214036-00 appeared in the Preliminary Decree as a stock claim to a reservoir on Carpenter Creek. APF and the United States objected to the claim, and the claim received the following substantive issue remark:

² APF will note that the abstracts include only one diversion means per point of diversion due to limitations of the water rights database. An information remark has been added noting that where the means of diversion lists “dike,” a berm is also used.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT APPEAR TO BE DUPLICATE FILINGS. IT APPEARS ONLY ONE WATER RIGHT IS INVOLVED. 214036-00 79870-00

4. Water right 40E 79870-00 is a provisional permit for recreation and stock use of the same reservoir covered by claim 40E 214036-00. APF requests that the recreation use from the provisional permit be added to claim 40E 214036-00, and asserts that it will submit a request to terminate the permit once the Water Court has granted the changes requested by APF. Doc. 15.00 at 2. The United States has indicated that its objection is resolved by the inclusion of historical recreational use on claim 40E 214036-00 and termination of permit 40E 79870-00. Doc. 13.00. The addition of historical recreation use is supported by an October 10, 1991 Affidavit of Howard Faraasen, who states he constructed the dam for this reservoir for “stock watering and recreation use.” The claimed quantified volume should be added to the claim and the place of use should be corrected to account for the entire reservoir.

Pursuant to evidence submitted with the Motion to Amend, the following corrections should be made to the claim 40E 214036-00:

Purpose: Stock

Recreation

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.~~

216.32 Acre Feet

Additional Place of Use:

NENENE Section 23, T23N, R35E, Valley County

5. The claim also received the following issue remarks that serve only to provide notice to the Claimants and other water users in the Decree (“Notice Only Remarks”):

THIS WATER RIGHT CLAIM WAS NOT INCLUDED IN THE BASIN 40E TEMPORARY PRELIMINARY DECREE ISSUED 03/07/1985

CLAIM FILED LATE 10/11/1991 . IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

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.

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.

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 that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also*, Rule 7, W.R.Adj.R. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. § 85-2-247(2), MCA.

CONCLUSIONS OF LAW

1. The Findings of Fact above are supported by a preponderance of the evidence. The claims should be corrected as described above.

2. APF is hereby ORDERED to contact DNRC and terminate provisional permit 40E 79870-00. The duplicate claim remark on claim 40E 214036-00 is addressed by the corrections and APF's termination of the provisional permit.

3. The objections have been addressed and are resolved.

4. The Notice Only remarks do not raise legal or factual issues for the Court to address. 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 modify the claims as described above.

A Post Decree Abstract of each water right claim reflecting the recommended changes is attached to this Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail

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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 12727-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

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

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

OWNERSHIP UPDATE PROCESSED TO ADD NEW OWNERS. THE WATER RIGHT MAY BE SPLIT INTO SEPARATE WATER RIGHTS UPON REQUEST OF THE OWNERS.

Priority Date: JANUARY 19, 1909

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: 392.00 AC-FT

Climatic Area: 1 - HIGH

Maximum Acres: 196.00

Source Name: BOX ELDER 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		NWNESE	20	23N	31E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DIVERSION DAM

2		SESWSW	20	23N	31E	PHILLIPS
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DIVERSION DAM

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	122.00		W2	20	23N	31E	PHILLIPS
2	27.00		E2SE	19	23N	31E	PHILLIPS
3	12.00		NW	29	23N	31E	PHILLIPS

4	<u>35.00</u>
Total:	196.00

NE 30 23N 31E PHILLIPS

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

Water Right Number: 40E 12729-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

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

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

OWNERSHIP UPDATE PROCESSED TO ADD NEW OWNERS. THE WATER RIGHT MAY BE SPLIT INTO SEPARATE WATER RIGHTS UPON REQUEST OF THE OWNERS.

Priority Date: DECEMBER 9, 1930

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: 1,447.50 AC-FT

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 985.00

Source Name: TELEGRAPH 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		SWSWSE	28	24N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DITCH					
2		NWSENW	33	24N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DIKE					
3		SWNWSW	33	24N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DITCH					
4		SWNWSW	33	24N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DIKE					
5		SWSWSW	33	24N	31E	PHILLIPS

Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DIKE					
6	1	SENE	5	23N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DIKE					
7		SWSESW	5	23N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DITCH					
8		SENE	8	23N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DIKE					
9		NENWSE	19	23N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DIKE					
10		SENE	19	23N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DIKE					
11		NESESW	19	23N	31E	PHILLIPS
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	DITCH					

EACH POINT OF DIVERSION WITH A DIVERSION MEANS OF "DIKE" ALSO INCLUDES A BERM.

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	58.00		S2NW	33	24N	31E	PHILLIPS
2	65.00		SW	33	24N	31E	PHILLIPS
3	30.00		NE	33	24N	31E	PHILLIPS
4	35.00		SE	33	24N	31E	PHILLIPS
5	275.00		E2	5	23N	31E	PHILLIPS
6	64.00		N2NE	19	23N	31E	PHILLIPS
7	77.00		NE	30	23N	31E	PHILLIPS
8	10.00		NWSE	30	23N	31E	PHILLIPS
9	20.00		W2W2NW	17	23N	31E	PHILLIPS
10	118.00		SE	18	23N	31E	PHILLIPS
11	30.00		E2NE	18	23N	31E	PHILLIPS
12	25.00		NWNW	20	23N	31E	PHILLIPS
13	15.00		SESESW	5	23N	31E	PHILLIPS
14	5.00		W2NWNE	8	23N	31E	PHILLIPS
15	40.00		NW	8	23N	31E	PHILLIPS
16	24.00		SW	8	23N	31E	PHILLIPS
17	58.00		W2SW	17	23N	31E	PHILLIPS
18	25.00		SESE	7	23N	31E	PHILLIPS
19	11.00		N2SE	19	23N	31E	PHILLIPS

Total: 985.00

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.

12723-00

12726-00

12728-00

12729-00

12731-00

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

Water Right Number: 40E 214036-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: AMERICAN PRAIRIE FOUNDATION

PO BOX 908
BOZEMAN, MT 59771-0908

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

***Priority Date:** SEPTEMBER 30, 1969

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 10/11/1991 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: USE

Purpose (Use): STOCK

Purpose (Use): RECREATION

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:** 216.32 AC-FT

***Source Name:** CARPENTER 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		SWNWNW	24	23N	35E	VALLEY

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>
	SWNWNW	24	23N	35E	VALLEY

Diversion to Reservoir: DIVERSION # 1

Dam Height: 28.00 FEET

Depth: 24.00 FEET

Surface Area: 17.40 ACRES

Capacity: 167.00 ACRE-FEET

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			NWNW	24	23N	35E	VALLEY
2			SWSWSW	13	23N	35E	VALLEY
3			S2SESE	14	23N	35E	VALLEY
4			NENENE	23	23N	35E	VALLEY

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE ASSOCIATED WHICH MEANS THE RIGHTS SHARE THE SAME POINT OF DIVERSION.

79870-00 214036-00