

Montana Water Court
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**IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)
PRELIMINARY DECREE**

CLAIMANTS: Cynthia M. Sanderson; Roger Sanderson; Rueben F. Gingerich; Clifford Herschberger; Rhoda Herschberger; Dennis Miller; Joas Miller; Martha Miller; Dorcas Yoder; Mahlon Yoder; Rudy Yoder; Rosanna Yoder

CASE 41I-2047-R-2024
41I 2239-00
41I 90199-00

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 water right claims listed above appeared in the Preliminary Decree for the Missouri River above Holter Dam (Basin 41I) issued on June 24, 2022. The claims received issue remarks from the Department of Natural Resources and Conservation

(DNRC) raising potential legal or factual issues with the claims. The Water Court consolidated the claims into case 41I-2047-R-2024 to address these issues.

In response to the issue remarks the record claimants submitted requests to modify the claims on November 19, 2024 (41I 90199-00) and November 26, 2024 (41I 2239-00). Docs. 3.00-4.00.¹

FINDINGS OF FACT

1. Water right claims 41I 2239-00 and 41I 90199-00 are based on a June 10, 1916 Notice of Appropriation filed by Otilie Smith, Willis A. Smith, Albert L. Smith, and Leslie E. Smith for of 2.5 CFS of water from certain unnamed springs.

2. The claims appeared in the Preliminary Decree with the following substantive issue remarks:

41I 2239-00

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41I 2239-00, 41I 90199-00.

THE BROADWATER COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 85.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

SOURCE NAME 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.

41I 90199-00

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41I 2239-00, 41I 90199-00.

THE BROADWATER COUNTY WATER RESOURCES SURVEY (1956) APPEARS TO INDICATE 190.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

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

POINT OF DIVERSION, SOURCE NAME, DITCH NAME AND MEANS OF DIVERSION WERE 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.

3. The claims should be corrected as follows as requested by the claimants and to resolve the issue remarks:

41I 2239-00:

Maximum Flow Rate: ~~2.50 CFS~~ 1.25 CFS

Maximum Acres: ~~143.00~~ 33.00

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	70.00 17.00		N2NE	8	5N	2E	BROADWATER
2	50.00 16.00		S2NE	8	5N	2E	BROADWATER
3	10.00		NENW	8	5N	2E	BROADWATER
4	5.00		SENW	8	5N	2E	BROADWATER
5	8.00		NW	9	5N	2E	BROADWATER

41I 90199-00

Owners:

- Rueben Gingerich
- Clifford Herschberger
- Rhoda Herschberger
- ~~Dennis Miller~~
- ~~Joas Miller~~
- ~~Martha Miller~~
- ~~Doreas Yoder~~
- ~~Mahlon Yoder~~
- ~~Rosanna Yoder~~
- ~~Rudy Yoder~~

Maximum Flow Rate: ~~2.50 CFS~~ 1.25 CFS

Maximum Acres: ~~480.00~~ 32.95

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	W2NWNE	S2NE	23	5N	1E	BROADWATER
Source Name:	SPRING, UNNAMED TRIBUTARY OF CROW CREEK					
Period of Diversion:	APRIL 15 TO AUGUST 1					
Diversion Means:	DITCH Drain Ditch					
2	W2SE	S2NW	24	5N	1E	BROADWATER
*Source Name:	SPRING, UNNAMED TRIBUTARY OF CROW CREEK					
Period of Diversion:	APRIL 15 TO AUGUST 1					
Diversion Means:	DITCH Drain Ditch					
3		S2NE	24	5N	1E	BROADWATER
*Source Name:	SPRING, UNNAMED TRIBUTARY OF CROW CREEK					
Period of Diversion:	APRIL 15 TO AUGUST 1					
Diversion Means:	DITCH					
4--SECONDARY		NESWNW	20	5N	2E	BROADWATER
*Source Name:	SPRING, UNNAMED TRIBUTARY OF CROW CREEK					
Period of Diversion:	APRIL 15 TO AUGUST 1					
Diversion Means:	HEADGATE					
Ditch Name:	BROADWATER MISSOURI WATER USERS ASS'N CANAL (WEST SIDE)					
5--SECONDARY		NWSWNW	16	5N	2E	BROADWATER
*Source Name:	SPRING, UNNAMED TRIBUTARY OF CROW CREEK					
Period of Diversion:	APRIL 15 TO AUGUST 1					
Diversion Means:	HEADGATE					
Ditch Name:	L. SMITH DITCH					

Place of Use:							
ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	136.00	23.41	NW N2NW	4	5N	2E	BROADWATER
2	74.00	9.54	SW NESE	4 8	5N	2E	BROADWATER
3	8.00		SE	8	5N	2E	BROADWATER
4	91.00		SW	8	5N	2E	BROADWATER
5	21.00		W2SW	9	5N	2E	BROADWATER

Information Remark:

~~WATER DIVERTED FROM COLLECTION DITCH IS CONVEYED TO CROW CREEK WHICH IS USED AS A NATURAL CARRIER TO SECONDARY POINTS OF DIVERSION IN THE NESWNW SEC 20 TWP 5N RGE 2E (BROADWATER MISSOURI WATER USERS ASS'N CANAL (WEST SIDE). AND THE NWSWNW SEC 16 TWP 5N RGE 2E (L. SMITH DITCH)~~

PRINCIPLES OF LAW

1. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. The Montana Water Court

has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. § 85-2-248(3), MCA.

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.

3. The claimant of a water right claim may waive the advantage of § 85-2-227, MCA by requesting a reduction or limitation of an element of a water right claim. The water court may accept a claimant's requested reduction or limitation without further presentation of evidence unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

CONCLUSIONS OF LAW

1. The Findings of Fact above are supported by a preponderance of the evidence. The claims should be modified accordingly.

2. The modifications resolve the substantive issue remarks on the claims. Each claim also received a Notice Only remark that has served its notice purpose and does not raise legal or factual issues for the Court to resolve. The issue remarks should be removed.

RECOMMENDATIONS

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

Abstracts reflecting the recommended changes are attached to this Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

SERVICE VIA USPS MAIL

Gingerich, Rueben F
97 Antler Ln
Toston, MT 59643-9607

Herschberger, Clifford
Herschberger, Rhoda
188 Smith Ln
Toston, MT 59643-9757

Miller, Dennis
150 Smith Ln
Toston, MT 59643-9757

Miller, Joas
Miller, Martha
1115 River Rd
Toston, MT 59643-9755

Sanderson, Cynthia M
Sanderson, Roger
152 Montana Hwy 437
Toston, MT 59643-9736

Yoder, Dorcas
Yoder, Rudy
953 River Rd
Toston, MT 59643-9773

Yoder, Mahlon
Yoder, Rosanna
44 Antler Ln
Toston, MT 59643-9607

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I**

Water Right Number: 411 2239-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: CYNTHIA M SANDERSON
152 MONTANA HWY 437
TOSTON, MT 59643-9736

ROGER SANDERSON
152 MONTANA HWY 437
TOSTON, MT 59643-9736

Priority Date: JUNE 10, 1916

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.25 CFS

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

Climatic Area: 3 - MODERATE

Maximum Acres: 33.00

***Source Name:** SPRING, UNNAMED TRIBUTARY OF CROW CREEK

Source Type: SURFACE WATER

SOURCE IS COMPOSED OF SEVERAL UNDEVELOPED SPRINGS WITHIN THE POINT OF DIVERSION LEGAL LAND DESCRIPTION.

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		NE	23	5N	1E	BROADWATER

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: DITCH

2		N2	24	5N	1E	BROADWATER
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Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: DITCH

Period of Use: APRIL 15 TO OCTOBER 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	17.00		N2NE	8	5N	2E	BROADWATER
2	16.00		S2NE	8	5N	2E	BROADWATER

Total: 33.00

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.

2237-00

2239-00

2241-00

6228-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I**

Water Right Number: 411 90199-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RUEBEN F GINGERICH
97 ANTLER LN
TOSTON, MT 59643-9607

CLIFFORD HERSCHBERGER
188 SMITH LN
TOSTON, MT 59643-9757

RHODA HERSCHBERGER
188 SMITH LN
TOSTON, MT 59643-9757

Priority Date: JUNE 10, 1916

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 1.25 CFS

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

Climatic Area: 3 - MODERATE

Maximum Acres: 32.95

***Source Name:** SPRING, UNNAMED TRIBUTARY OF CROW CREEK

Source Type: SURFACE WATER

THE SOURCE IS WATER COLLECTED ALONG THE LENGTH OF DITCH WITHIN THE POINT OF DIVERSION LEGAL LAND DESCRIPTION.

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		W2NWNE	23	5N	1E	BROADWATER

Period of Diversion: APRIL 15 TO AUGUST 1

Diversion Means: DRAIN DITCH

2		W2SE	24	5N	1E	BROADWATER
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Period of Diversion: APRIL 15 TO AUGUST 1

Diversion Means: DRAIN DITCH

WATER DIVERTED FROM COLLECTION DITCH IS CONVEYED TO CROW CREEK WHICH IS USED AS A NATURAL CARRIER TO SECONDARY POINTS OF DIVERSION IN THE NESWNW SEC 20 TWP 5N RGE 2E (BROADWATER-MISSOURI WATER USERS ASS'N CANAL (WEST SIDE). AND THE NWSWNW SEC 16 TWP 5N RGE 2E (L. SMITH DITCH)

Period of Use: APRIL 15 TO AUGUST 1

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	23.41		N2NW	4	5N	2E	BROADWATER
2	9.54		NESE	8	5N	2E	BROADWATER
Total:	<u>32.95</u>						