

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: Clark A. Brevig; Charles A. Brevig

OBJECTOR: Clark A. Brevig

CASE 41S-0716-R-2024

41S 5005-00

41S 5006-00

41S 139607-00

41S 139608-00

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 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

FINDINGS OF FACT

1. Clark A. Brevig and Charles A. Brevig are the record co-owners of claims 41S 5005-00, 41S 5006-00, 41S 139607-00, and 41S 139608-00.

2. In December 1984, after the objection period closed for the Basin 41S Temporary Preliminary Decree, Joan K. Brevig filed late objections to claims 41S 500500, 41S 5006-00, 41S 139607-00, and 41S 139608-00 indicating the following:

The foregoing objections pertaining to priority dates, places of use, acres irrigated, sources, and points of diversion are primarily due to the division of the Brevigs' irrigation water rights in Big Spring Creek into four separate water rights.

The Brevigs' water right in Spring Creek arises from a valid appropriation of 400 miners' inches from the creek by their predecessor in interest on July 16, 1893. The Brevigs contend that their irrigation water right should be decreed under a single water right with a priority date of July 16, 1893. The irrigated acres of each separate water right should be combined to total 149.2 acres, and the place of use for the right should be extended to the total 149.2 acres.

Also, the Brevigs have only one point of diversion on Spring Creek, which consists of a headgate located at NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 28, Township 16 North, Range 17 East, County Fergus. Consequently, the point of diversion under the single water right should be so designated.

The Brevigs have also objected to the volume or flow rate of their irrigation water rights. The Brevigs contend that the flow rate for the combined irrigated water right should be set at 10 CFS, and the volume set at 1620 acre feet per year. The Brevigs will establish upon hearing that this is the amount of water put to beneficial use by their prior appropriation.

Because the objections were late, an issue remark was added to the claims ensuring the Objections could be addressed during the Preliminary Decree in Basin 41S. The Preliminary Decree was issued on August 18, 2022.

3. Claims 41S 5005-00, 41S 5006-00, 41S 139607-00, and 41S 139608-00 were decreed with the following DNRC issue remark:

- ON 12/18/1984 JOAN K. BREVIG FILED AN OBJECTION TO THE PRIORITY DATE, PLACE OF USE, ACRES IRRIGATED, SOURCE, POINT OF DIVERSION, VOLUME, AND FLOW RATE. THIS IS A LATE OBJECTION AND CANNOT BE HEARD UNTIL AFTER PROPER NOTICE ON THE NEXT OBJECTION LIST.

Claim 41S 139607-00 was also decreed with the following DNRC issue remarks:

- FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
- THE FERGUS COUNTY WATER RESOURCES SURVEY (1970) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
- USDA AERIAL PHOTOGRAPH NO(S). 30027-278-18 , DATED 09/25/1979 , APPEARS TO INDICATE 12.70 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.
- THE MAXIMUM COMBINED ACRES FOR THIS GROUP OF SUPPLEMENTAL CLAIMS MAY REQUIRE MODIFICATION PENDING RESOLUTION OF MAXIMUM IRRIGATED ACRES ISSUE.

And claim 41S 139608-00 was also decreed with the following DNRC issue remarks:

- FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
- THE FERGUS COUNTY WATER RESOURCES SURVEY (1970) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
- USDA AERIAL PHOTOGRAPH NO(S). 30027-278-18 , DATED 09/25/1979 , APPEARS TO INDICATE 9.00 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.

4. An Order was issued to determine if Joan K. Brevig would pursue the late Objections and Ordering Claimants Clark A. Brevig and Charles A. Brevig to meet with the DNRC to address unresolved issue remarks. (Doc. ¹3.00).

5. On July 22, 2024, Clark A. Brevig filed a statement indicating he intends to assume and pursue the late objections filed by Joan K. Brevig. (2.00).

6. On July 23, 2024, an Order was issued setting two sets of deadlines. First, an August 18, 2024 deadline was set for Clark A. Brevig to indicate how the late Objections filed in this Case should be resolved. Second, Claimants Clark A. Brevig and Charles A. Brevig were ordered to contact the DNRC to address the unresolved issue remarks decreed on claims 41S 139607-00 and 41S 139608-00. (Doc. 3.00).

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

7. On August 8, 2024, Gail Brevig filed a Statement and attached the Affidavits of Clark A. Brevig and herself, along with a Statement from Clark A. Brevig. (Doc. 4.00). It appeared the August 8, 2024 filing was a proposal to resolve the late Objections that Clark A. Brevig assumed. However, the proposal was not entirely clear. It appeared Clark A. Brevig proposed changing the point of diversion for claims 41S 5005-00, 41S 139607-00, and 41S 139608-00, matching claim 41S 5006-00. Additionally, it appeared Clark A. Brevig proposed changing the source for claims 41S 5005-00, 41S 139607-00, and 41S 139608-00 to Big Spring Creek, also matching claim 41S 5006-00.

8. On August 16, 2024, DNRC Water Resources Specialist Carli Bluhm filed a Memorandum indicating she reviewed claims 41S 139607-00 and 41S 139608-00 and she recommended the issue remarks be removed without changing the elements of the claims. (Doc. 5.00).

9. On August 20, 2024, another deadline was set for Clark A. Brevig to indicate how the Objections to claims 41S 5005-00, 41S 5006-00, 41S 139607-00, and 41S 139608-00 should be resolved. (Doc. 6.00).

10. On November 20, 2024, Clark A. Brevig responded to the August 20, 2024 deadline by filing a statement indicating the following:

- Clark A. Brevig does not wish to pursue the 1984 late Objection to claims 41S 5005-00 and 41S 139607-00.
- Clark A. Brevig proposes the maximum acres and place of use be increased for claim 41S 5006-00, reflecting the reflect 143.30 acres and the guideline flow rate.
- Clark A. Brevig proposes the place of use legal land description be modified.

(Doc. 9.00). A technical letter from consultant Scott Irvin of Big Sky Water Rights, LLC was attached to the Response, along with maps and proposed abstracts.

11. An Order was issued to verify Claimant Charles A. Brevig agreed with the modifications proposed by Clark A. Brevig and that the modifications proposed by Clark A. Brevig resolved his Objections. (Doc. 10.00). The Order indicated that if nothing were filed by the deadline, this Water Master would conclude Charles A. Brevig agreed with the November 20, 2024 filing and that the November 20, 2024 filing resolved Clark A. Brevig's Objections. Nothing was filed by the deadline.

12. **Claim 41S 5005-00:** Pursuant to the record, no modifications are needed to the elements of the claim.

13. **Claim 41S 5006-00:** Consultant Irvin reported that he conducted a site inspection on October 4, 2024; additionally, he reviewed water right files, aerial imagery, the Fergus County Water Resources Survey, and consulted with Clark and Gail Brevig regarding historical water use and site conditions. Mr. Irvin stated:

However, the acreage noted on the Statement of Claim form is not accurate. It appears the accounting of acres on the claim form understated the irrigated area.

...

Based on the combination of data sources and your explanation of irrigation practices, I find 143.3 acres (ArcGIS Pro calculation) to be historically irrigated under 41S 5006.

Mr. Irvin recommended adjusting the flow rate to the DNRC's 17.00 gallon per minute flow rate guideline and changing the volume from a quantified volume to the standardized remark for direct flow claims. Based on the record, the following modifications should be made to claim 41S 5006-00:

Flow Rate:	5.43	9.91-CFS	VF009: THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.						
Volume:	256.00-AC-FT								
Climatic Area:	4 - MODERATELY LOW								
Maximum Acres:	143.30	403.20							
Place of Use:									
ID	Acres	Govt Lot	Qtr.Sec	Sec	Twp	Rge	County		
1	8.20	5-00	SWSE	17	16N	17E	FERGUS		
2	6.60	5-00	E2SESW	17	16N	17E	FERGUS		
3	68.80	00-20	NE	20	16N	17E	FERGUS		
4	13.00	41-00	NESE	20	16N	17E	FERGUS		
5	37.80	41-00	S2SE	21	16N	17E	FERGUS		
6	6.30	5-00	S2SWNW	21	16N	17E	FERGUS		
7	2.60	8-00	N2N2NE	N2SESW	28	24	16N	17E	FERGUS
Total:	403.20	143.30							

14. **Claim 41S 139607-00:** Pursuant to the record, no modifications are needed to the elements of the claim and the issue remarks can be removed according to Ms. Bluhm.

15. **Claim 41S 139608-00:** The place of use for claim 41S 139608-00 was originally claimed in the NESE of Section 20, Township 16 North, Range 17 East, Fergus County. A DNRC data entry error entered the place of use for claim 41S 139608-00 in the

NWSE of Section 20. Pursuant to the record, the place of use for claim 41S 139608-00 should be:

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	8.00		NESE	NWSE	20	16N	17E	FERGUS
Total:	8.00							

According to Ms. Bluhm, the issue remarks can be removed from claim 41S 139608-00.

PRINCIPLES AND CONCLUSIONS OF LAW

1. The Water Court must address all issue remarks that appear on a claim as well as any objections the claim receives. Sections 85-2-233, 85-2-247, and 85-2-248, MCA.

2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.

3. Pursuant to Rule 22, W.R.Adj.R., if a claimant, objector, or intervenor fails to appear at a scheduled conference or hearing or fails to comply with an order issued by the Water Court, the Water Court may issue such orders of sanction with regard thereto as are just.

4. The issue remarks decreed on claims 41S 1439607-00 and 41S 1439608-00 indicating the “maximum combined acres for this group of supplemental claims may require modification...” is not relevant because supplemental rights remarks on claims no longer include a quantified acreage figure. The remark can be removed from both claims.

5. The source name issue remark decreed on claim 41S 139608-00 is a notice-type issue remark. As the only objection has been resolved, no further proceedings are required.

RECOMMENDATIONS

1. Claim 41S 5006-00 should be modified as follows:

Flow Rate:	5.43	3.94-CFS	VF009: THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.						
Volume:	266.00	AC-FT							
Climatic Area:	4 - MODERATELY LOW								
Maximum Acres:	143.30	403.20							
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	8.20	5.00	SWSE	17	16N	17E	FERGUS		
2	6.60	5.00	E2SESW	17	16N	17E	FERGUS		
3	68.80	80.20	NE	20	16N	17E	FERGUS		
4	13.00	11.00	NESE	20	16N	17E	FERGUS		
5	37.80	11.00	S2SE	21	16N	17E	FERGUS		
6	6.30	5.00	S2SWNW	21	16N	17E	FERGUS		
7	2.60	8.00	N2N2NE	N2SESW	28	24	16N	17E	FERGUS
Total:	403.20	143.30							

Claim 41S 139608-00 should be modified as follows:

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	8.00		NESE	NWSE	20	16N	17E	FERGUS
Total:	8.00							

2. The issue remarks should be removed from claims 41S 5005-00, 41S 5006-00, 41S 139607-00, and 41S 139608-00.

Abstracts are attached for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Clark A. Brevig
 Charles A. Brevig
 676 Quarry View Ln
 Lewistown, MT 59457

Joan K. Brevig
 550 E. McKellips Rd, Apt. 1048
 Mesa, AZ 85203

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

5005-00

5022-00

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

Water Right Number: 41S 5006-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: CHARLES A BREVIG
676 QUARRY VIEW LANE
LEWISTOWN, MT 59457

CLARK A BREVIG
676 QUARRY VIEW LN
LEWISTOWN, MT 59457

Priority Date: JULY 16, 1893

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 5.43 CFS

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 143.30

Source Name: BIG SPRING 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		NWNENE	28	16N	17E	FERGUS

Period of Diversion: MARCH 1 TO OCTOBER 1

Diversion Means: HEADGATE

Period of Use: MARCH 1 TO OCTOBER 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	8.20		SWSE	17	16N	17E	FERGUS
2	6.60		E2SESW	17	16N	17E	FERGUS
3	68.80		NE	20	16N	17E	FERGUS
4	13.00		NESE	20	16N	17E	FERGUS
5	37.80		S2	21	16N	17E	FERGUS
6	6.30		S2SWNW	21	16N	17E	FERGUS
7	2.60		N2N2NE	28	16N	17E	FERGUS

Total: 143.30

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.

5005-00

5006-00

139607-00

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

Water Right Number: 41S 139608-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: CHARLES A BREVIG
676 QUARRY VIEW LANE
LEWISTOWN, MT 59457

CLARK A BREVIG
676 QUARRY VIEW LN
LEWISTOWN, MT 59457

Priority Date: JANUARY 30, 1950

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 100.00 GPM

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 8.00

***Source Name:** SPRING COULEE 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		SENESE	20	16N	17E	FERGUS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

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	8.00		NESE	20	16N	17E	FERGUS

Total: 8.00