

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; Gail A. Brevig; Joan Brevig

CASE 41S-0717-R-2024

41S 211140-00

41S 30131587

41S 30131588

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 Joan K. Brevig are the record co-owners of claim 41S 211140-00; Clark A. Brevig and Gail A Brevig are the record co-owners of claims 41S 30131587, and 41S 30131588.

2. Claims 41S 211140-00, 41S 30131587, and 41S 30131588 were decreed with the DNRC issue remarks:

41S 211140-00:

- 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 AND 30027-278-20 , DATED 09/25/1979 , APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
- THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41S TEMPORARY PRELIMINARY DECREE ISSUED 05/17/1984.
- CLAIM FILED LATE 12/10/1984 . 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.
- 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.

41S 30131587:

- THE PRIORITY DATE MAY BE QUESTIONABLE. IT IS UNCLEAR WHETHER THE CLAIMED PRIORITY DATE IS 1939 OR 1942 .
- THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41S DECREE ISSUED 05/17/1984.

41S 30131588:¹

- THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT APPEAR TO BE DUPLICATE FILINGS. IT APPEARS ONLY ONE WATER RIGHT IS INVOLVED. 41S 502-00 & 41S 139611-00
- THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41S DECREE ISSUED 05/17/1984.

3. Clark A. Brevig and Gail A. Brevig were ordered to meet with a DNRC employee to address the following unresolved issue remarks decreed on claims 41S 211140-00, 41S 30131587, and 41S 30131588; due to Water Master oversight, Joan K.

¹ This Water Master is unclear as to the meaning of this issue remark. The remark did not appear on either of the claims referenced in the remark – failing to provide adequate notice.

Brevig was not added to the Order. (Doc.² 1.00).

4. DNRC Water Resource Specialist Carli Bluhm filed a Memorandum stating “the Claimant” met with the DNRC; this Water Master is unsure which Claimant met with the DNRC. (Doc. 2.00). Ms. Bluhm indicated she reviewed scanned claim files, an aerial photo, and the Fergus County Water Resources Survey to prepare the Memorandum. A map and proposed abstracts were attached to the Memorandum.

Ms. Bluhm stated, "after discussion with the claimant who provided insight on the land, the DNRC located the claimed ditch and field boundaries present on the claimed land." Ms. Bluhm recommended the following modifications be made to claim 41S 211140-00:

Flow Rate:	4.38	5.07 -CFS					
Maximum Acres:	115.50	167.80					
Place of Use:							
ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	10.7 23.00		S2S2SW	17	16N	17E	FERGUS
2	9.20 15.00		SESE	18	16N	17E	FERGUS
3	51.20		N2	20	16N	17E	FERGUS
4	5.00		N2NWSE	20	16N	17E	FERGUS
5	4.10 8.50		NESE	20	16N	17E	FERGUS
6	23.60 3.20		SW	21	16N	17E	FERGUS
7	2.00 5.00		SWSWSE	21	16N	17E	FERGUS
8	8.70 13.70		SWNW	21	16N	17E	FERGUS
9	1.00 5.00		N2NWNE	28	16N	17E	FERGUS
Total:	167.80	115.50					

Regarding claim 41S 30131587, Ms. Bluhm recommended that the priority date remain as decreed – December 31, 1942. Regarding claim 41S 30131588, Ms. Bluhm reported:

During initial examination, the DNRC found the same portion of Big Spring Creek claimed on this claim and claims 41S 5021-00 and 41S 139611-00. Through investigation ordered by Court, the DNRC found claim 41S 5021-00 has a claimed priority date of December 31, 1900 and claiming livestock direct with 125 sheep, 5 horses, and 200 cattle. In comparison, claim 41S 30131588, claimed 275 beef cattle with a priority date of March 31, 1894. Due to these findings of differences in claimed Livestock served, priority date, and volume claimed, the DNRC found that these are not duplicate filings. Claim 139611-00, the claim was decreed as livestock direct from Big Spring Creek, in the W2SW of Sec 21, T16N, 17E. After investigation the DNRC found that Big Spring Creek does not flow through the W2SW of Sec 21, T16N, 17E, rather the source is an unnamed tributary of Big Spring Creek (Attachment 4). Due to the two claims using two separate sources, the DNRC and claimant agreed with the finding of no duplicate filings.

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

Ms. Bluhm recommended the duplicate claim issue remark be removed from claim 41S 30131588.

5. On August 19, 2024, Gail Brevig filed a statement:

ELECTRONICALLY FILED

From: [Gail Brevig](#)
To: [Watercourt \(Bozeman\)](#)
Subject: [EXTERNAL] Brevig
Date: Monday, August 19, 2024 1:36:36 PM
Attachments: [map of acres .pdf](#)

41S-0717-R-2024

August 19, 2024

Montana Water Court

Dear Ms. Stern

I have attached a map from the original filing and am confused to where these acres show up on our water rights. We received a memorandum from our local DNRC dated: 8/14/2024 on case 41S-0717-R-2024 and the attachment 1 map of the document shows acres but not all the acres from the original filing are noted in green. I am concerned that the map is incorrect and that acres are missing.

Thank you for your time.

Gail Brevig

Sent from [Mail \[go.microsoft.com\]](mailto:Gail.Brevig@montana.gov) for Windows

(Doc. 3.00). Gail A. Brevig did not indicate which claim she was discussing in her August 19, 2024 filing; however, it is implied that she is discussing claim 41S 211140-00. It appeared Gail Brevig (and by inference, Clark A. Brevig) disagreed with the DNRC's recommendation as to claim 41S 211140-00 and a deadline was set for Clark A. Brevig and Joan K. Brevig to file further information.

6. On November 20, 2024, Clark A. Brevig and Gail A. Brevig responded to the August 20, 2024 deadline by filing a statement indicating they do not agree with Ms. Bluhm's recommendations as to claim 41S 211140-00 and referencing and agreeing with the finding made by their consultant. (Doc. 7.00). A technical letter from consultant Scott Irvin of Big Sky Water Rights, LLC was attached to the Response, along with maps and proposed abstracts.

7. An Order was issued to verify Claimant Joan K. Brevig agreed with the modifications proposed by Clark A. Brevig. (Doc. 8.00). The Order indicated that if nothing were filed by the deadline, this Water Master would conclude Joan K. Brevig agreed with the November 20, 2024 filing. Nothing was filed by the deadline.

8. **Claim 41S 211140-00:** 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 indicated the point of diversion for claim 41S 211140-00 should be modified to reflect the means of diversion for point of diversion no. 1 as a headgate.

In her Memorandum, Ms. Bluhm recommended the place of use for claim 41S 211140-00 be reduced to 115.50 acres; Mr. Irvin stated that parts of the DNRC's place of use/maximum acres findings are accurate and parts are not:

Fields 1 and 2 (Exhibit 1). Field 1 has never been irrigated.² Field 2 has never been irrigated under 41S 211140.³ The two fields are identified as POU IDs 2 and 8 on the "Red Lined" abstract in DNRC's Attachment 2 to its August 14, 2024 Memorandum. These two POUs should be deleted from the abstract.

Fields 3 and 4 (Exhibit 1). The field boundaries for Fields 3 and 4 appear to be correctly delineated in DNRC's Attachment 1 and my Exhibit 1 (i.e., DNRC's map appears accurate), but DNRC's calculation of irrigated acres for the two fields is incorrect. DNRC found a total of 97.6 acres for Fields 3 and 4 (DNRC Attachment 2 - POU IDs 1, 3-7, and 9), and I find 123.0 acres for Fields 3 and 4.⁴

Additionally, DNRC did not find as irrigated a field east of Big Spring Creek that you assert was historically irrigated. Per your account, a secondary pump was placed in the Brevig Ditch at a point lying just west of the field, and water was conveyed by pipeline to the POU. The irrigated boundary you defined for me consists of 13.8 acres.

Exhibit 2 is a 1977 aerial photo with marked POUs. Exhibits 3 and 4 are unmarked 1977 and 1962 images with marked exterior POU boundaries. Defined field boundaries are visible, similar

to the criteria DNRC cited in its August 14, 2024 Memorandum to the Water Court.⁵ Both photos were taken late in the growing season (September) after the crop had been harvested.

The combined acreage for the three fields is 136.8 acres.⁶

Mr. Irvin recommended adjusting the flow rate to the DNRC's 17.00 gallon per minute flow rate guideline.

9. **Claims 41S 30131487 and 41S 30131588:** Pursuant to the record, no modifications are needed to the elements of the claims and the issue remarks can be removed, according to Ms. Bluhm.

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. Claim 41S 211149-00 is a late claim. The late claim issue remark decreed on the claim gave notice that the claim could be subordinate, and therefore junior, to certain permits and reservations of water. Any party asserting a superior claim to water based on a permit or reservation was required to file an objection during the Basin 41S objection period. Because no such objections were filed, this remark can now be removed from the claim.

5. The issue remark decreed on claim 41S 211140-00 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. Further, the claim does not have a supplemental rights remark. The remark can be removed.

6. The point of diversion issue remark decreed on claim 41S 211150-00 is a notice-type issue remark. As the only objection has been resolved, no further proceedings are required.

7. The remarks indicating claims 41S 30131587 and 41S 30131588 were not included in the 1984 decree are notice-type remarks. As no objections were filed, no proceedings are needed as a result of the remarks.

RECOMMENDATIONS

1. Claim 41S 211140-00 should be modified as follows:

Flow Rate: 5.18 6.07-CFS

Maximum Acres: 136.80 467.80

*Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NWNENE	28	16N	17E	FERGUS
Period of Diversion:		MARCH 1 TO OCTOBER 1				
Diversion Means:		PUMP HEADGATE				
2		NWNWNE	20	16N	17E	FERGUS
Period of Diversion:		MARCH 1 TO OCTOBER 1				
Diversion Means:		PUMP				

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	16.00 20.00		S2S2SW	17	16N	17E	FERGUS
2	15.00		SESE	10	16N	17E	FERGUS
3	85.70 61.20		N2	20	16N	17E	FERGUS
4	5.00		N2NWSE	20	16N	17E	FERGUS
6	6.50		NESE	20	16N	17E	FERGUS
6	37.30 3.20		SW	21	16N	17E	FERGUS
7	4.10 5.00		SWSWSE	21	16N	17E	FERGUS
8	12.10 13.70		SWNW	21	16N	17E	FERGUS
9	1.60 5.00		N2NWNE	28	16N	17E	FERGUS
Total:		467.80					136.80

2. The issue remarks should be removed from claims 41S 211140-00, 41S 30131587, and 41S 30131588.

Abstracts are attached for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

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

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

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

Water Right Number: 41S 211140-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: CLARK A BREVIG
676 QUARRY VIEW LN
LEWISTOWN, MT 59457

JOAN K BREVIG
550 E. MCKELLIPS APT 1048
MESA, AZ 85203

Priority Date: JULY 16, 1893

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 12/10/1984 . 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: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 5.18 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: 136.80

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

2		NWNWNE	20	16N	17E	FERGUS
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Period of Diversion: MARCH 1 TO OCTOBER 1

Diversion Means: PUMP

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	16.00		S2S2SW	17	16N	17E	FERGUS

2	65.70	N2	20	16N	17E	FERGUS
3	37.30	SW	21	16N	17E	FERGUS
4	4.10	SWSWSE	21	16N	17E	FERGUS
5	12.10	SWNW	21	16N	17E	FERGUS
6	1.60	N2NWNE	28	16N	17E	FERGUS
Total:	<u>136.80</u>					

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

Water Right Number: 41S 30131587 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: CLARK A BREVIG
676 QUARRY VIEW LN
LEWISTOWN, MT 59457

GAIL A BREVIG
676 QUARRY VIEW LN
LEWISTOWN, MT 59457

***Priority Date:** DECEMBER 31, 1942

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: GROUNDWATER

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		NWNWSW	15	16N	17E	FERGUS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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			NWNWSW	15	16N	17E	FERGUS

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

Water Right Number: 41S 30131588 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: CLARK A BREVIG
676 QUARRY VIEW LN
LEWISTOWN, MT 59457

GAIL A BREVIG
676 QUARRY VIEW LN
LEWISTOWN, MT 59457

Priority Date: MARCH 31, 1894

Type of Historical Right: USE

Purpose (Use): STOCK

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

***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: 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		SESW	17	16N	17E	FERGUS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2			20	16N	17E	FERGUS
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

3			21	16N	17E	FERGUS
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

4		N2N2NE	28	16N	17E	FERGUS
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

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			SESW	17	16N	17E	FERGUS
2				20	16N	17E	FERGUS
3				21	16N	17E	FERGUS
4			N2N2NE	28	16N	17E	FERGUS