

Montana Water Court
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FILED
01/02/2025
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: Regina Certalic
41S-0916-R-2024
Stern, Anika
6.00

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

CLAIMANTS: Clarajean Merrill; Cory Merrill; Durl Gibbs
Living Trust

CASE 41S-0916-R-2024
41S 104017-00
41S 135411-00
41S 135412-00

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. The Durl Gibbs Living Trust, Clarajeane Merrill, and Cory Merrill (Claimants) are the record owners of claim 41S 104017-00¹; Clarajeane Merrill and Cory Merrill are the record owners of claims 41S 135411-0 and 41S 135412-00.

2. Claims 41S 104017-00, 41S 135411-00, and 41S 136512-00 were decreed with DNRC issue remarks:

41S 104017-00:

- THE MAXIMUM NUMBER OF ACRES CLAIMED ON THE ORIGINAL STATEMENT OF CLAIM IS 80.00 ACRES. THE DNRC'S RE-EXAMINATION WAS OF THESE ORIGINAL CLAIMED ACRES.
- 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). 30027-278-86 , DATED 09/25/1979 , APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
- THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 62.01 TIMES THE CAPACITY OF THE RESERVOIR.

41S 135411-00:

- THE MAXIMUM NUMBER OF ACRES CLAIMED ON THE ORIGINAL STATEMENT OF CLAIM IS 60.00 ACRES. THE DNRC'S RE-EXAMINATION WAS OF THESE ORIGINAL CLAIMED ACRES.
- FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
- THE FERGUS COUNTY WATER RESOURCES SURVEY(1970)APPEARS TO INDICATE 15.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.
- USDA AERIAL PHOTOGRAPH NO(S). 30027-278-76 , DATED 09/25/1979 , APPEARS TO INDICATE 18.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.
- THE POINT OF DIVERSION MAY BE INCORRECT. THE LOCATION OF THE DIKE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

41S 135412-00:

- 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). 30027-278-76 , DATED 09/25/1979 , APPEARS TO INDICATE 0.00 ACRES IRRIGATED.
- THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 7.24 TIMES THE CAPACITY OF THE RESERVOIR..

3. The Claimants were ordered to meet with a DNRC employee to address the unresolved issue remarks.

¹ Clarajeane Merrill and Cory Merill are contract for deed purchasers.

4. DNRC Water Resource Specialist Carli Bluhm filed a Memorandum stating the Claimants met with the DNRC on October 2, 2024. (Doc.² 4.00). Ms. Bluhm indicated she reviewed aerial photographs and the Fergus County Water Resource Survey to prepare the Memorandum. A notarized Affidavit of Durl Gibbs, maps, and proposed abstracts were attached to the Memorandum.

5. **41S 104017-00:** Ms. Bluhm referenced the information provided by Durl Gibbs and stated that she found 60.00 acres historically irrigated by claim 41S 104017-00; she recommended the following modifications be made:

Volume: 8.55 240.00-AC-FT

Maximum Acres: 60.00 68.00

*Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SENWNW	17	12N	16E	FERGUS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 14.00 FEET

Depth: 11.00 FEET

Surface Area: 0.95 0.89 ACRES

Capacity: 3.42 3.87 ACRE-FEET

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	35.00 38.00		NWNW	17	12N	16E	FERGUS
2	25.00 30.00		NENE	18	12N	16E	FERGUS
Total:	60.00 60.00						

6. **41S 135411-00:** Ms. Bluhm indicated that she confirmed the claimed point of diversion and recommended the following modifications be made to claim 41S 135411-00, addressing the issue remarks:

Flow Rate: 306.00 GPM 1.29-CFS

Maximum Acres: 18.00 34.00

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	8.50 13.00		N2NWSW	14	11N	16E	FERGUS
2	5.00		N2NWSE	15	11N	16E	FERGUS
3	9.50 16.00		N2NESE	15	11N	16E	FERGUS
Total:	28.00 18.00						

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

7. **41S 135412-00:** Ms. Bluhm confirmed 60.00 acres of historical irrigation at the claimed place of use. Based on the measurements provided by the Claimants, Ms. Bluhm recommended the following modifications to claim 41S 135412-00:

Volume: 155.98 AC-FT 184.40 AC-FT

*Reservoir: ONSTREAM Reservoir Name: SKILLEN POND

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESWSE	10	11N	18E	FERGUS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 11.00 FEET

Depth: 22.00 8.00 FEET

Surface Area: 7.09 ACRES

Capacity: 62.40 22.89 ACRE-FEET

8. An Order was issued to determine if the Claimants agreed or disagreed with the recommendations made by Ms. Bluhm. (Doc. 4.00). The Order indicated that if nothing were filed by the deadline, this Water Master would conclude the Claimants agreed with the recommended modifications. Nothing was filed.

PRINCIPLES AND CONCLUSIONS OF LAW

1. The Water Court must address all issue remarks decreed on a claim. Section 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. The notice-type issue remarks decreed on claims 41S 104017-00, 41S 135411-00, and 41S 136512-00, indicating that if no objections are filed can be removed as they have served their purpose. No objections were filed, no further proceedings are required.

RECOMMENDATIONS

1. Claim 41S 104017-00 should be modified as follows:

Volume: 8.55 240.00-AC-FT

Maximum Acres: 80.00 88.00

*Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SENWNW	17	12N	16E	FERGUS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 14.00 FEET

Depth: 11.00 FEET

Surface Area: 0.95 0.88 ACRES

Capacity: 3.42 3.87 ACRE-FEET

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	35.00 38.00		NWNW	17	12N	16E	FERGUS
2	25.00 30.00		NENE	18	12N	16E	FERGUS
Total:	60.00 60.00						

*Volume: 60.00 2,480.00-AC-FT

Claim 41S 135411-00 should be modified as follows:

Flow Rate: 308.00 GPM 1.29 GFS

Maximum Acres: 18.00 34.00

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	8.50 13.00		N2NWSW	14	11N	16E	FERGUS
2	5.00		N2NWSE	15	11N	16E	FERGUS
3	9.50 16.00		N2NESE	15	11N	16E	FERGUS
Total:	34.00 18.00						

Claim 41S 135412-00 should be modified as follows:

Volume: 155.88 AC-FT 184.40-AC-FT

*Reservoir: ONSTREAM Reservoir Name: SKILLEN POND

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESWSE	10	11N	16E	FERGUS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 11.00 FEET

Depth: 22.00 8.00 FEET

Surface Area: 7.00 ACRES

Capacity: 62.40 22.80 ACRE-FEET

2. The issue remarks should be removed from claims 41S 104017-00, 41S 135411-00, and 41S 136512-00.

Abstracts are attached for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Clarajean Merrill
Cory Merrill
Durl Gibbs Living Trust
503 E Dry Creek Rd
Buffalo, MT 59418

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

Water Right Number: 41S 104017-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: GIBBS, DURL LIVING TRUST
503 E DRY CREEK RD
BUFFALO, MT 59418

Priority Date: APRIL 1, 1885

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: 8.55 AC-FT

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 60.00

Source Name: DRY 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		SENWNW	17	12N	16E	FERGUS

***Period of Diversion:** APRIL 15 TO OCTOBER 15

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>
	SENWNW	17	12N	16E	FERGUS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 14.00 FEET

Depth: 11.00 FEET

Surface Area: 0.95 ACRES

Capacity: 3.42 ACRE-FEET

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	35.00		NWNW	17	12N	16E	FERGUS
2	25.00		NENE	18	12N	16E	FERGUS

Total: 60.00

Contract for Deed Purchasers: CLARAJEAN MERRILL
503 E DRY CREEK RD
BUFFALO, MT 59418

CORY MERRILL
503 E DRY CREEK RD
BUFFALO, MT 59418

THIS WATER RIGHT IS APPURTENANT TO REAL PROPERTY THAT IS THE SUBJECT OF A CONTRACT FOR DEED. THE CONTRACT FOR DEED PURCHASER IS ENTITLED TO THE SAME NOTICE AS THE OWNER OF THE PROPERTY PURSUANT TO 85-2-232(1)(C) AND 70-20-115, MCA. REFERENCE TO THE CONTRACT FOR DEED PURCHASERS IN THIS ABSTRACT IS FOR NOTICE PURPOSES ONLY AND DOES NOT AMOUNT TO A STATEMENT REGARDING OWNERSHIP. UPON TRANSFER OF THE PROPERTY IDENTIFIED AS THE PLACE OF USE FOR THIS WATER RIGHT, THE TRANSFEREE IS RESPONSIBLE FOR UPDATING OWNERSHIP AS REQUIRED BY 85-2-423 AND -424, MCA. IN THE EVENT OF A DEFAULT RESULTING IN TERMINATION OF THE CONTRACT FOR DEED AND RELEASE OF DOCUMENTS FROM ESCROW, THE OWNERS SHALL PROVIDE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION WITH A COPY OF A QUIT CLAIM DEED OR SIMILAR INSTRUMENT INDICATING THE CONTRACT FOR DEED PURCHASERS ARE NO LONGER ENTITLED TO RECEIVE NOTICE OF PROCEEDINGS INVOLVING THIS WATER RIGHT.

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

Water Right Number: 41S 135411-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: CLARAJEAN MERRILL
503 E DRY CREEK RD
BUFFALO, MT 59418

CORY MERRILL
503 E DRY CREEK RD
BUFFALO, MT 59418

Priority Date: MARCH 17, 1901

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 306.00 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: 18.00

Source Name: ROSS FORK 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		NENWSW	14	11N	16E	FERGUS

Period of Diversion: MAY 15 TO AUGUST 15

Diversion Means: DIKE

Period of Use: MAY 15 TO AUGUST 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	8.50		N2NWSW	14	11N	16E	FERGUS
2	9.50		N2NESE	15	11N	16E	FERGUS

Total: 18.00

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

Water Right Number: 41S 135412-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: CLARAJEAN MERRILL
503 E DRY CREEK RD
BUFFALO, MT 59418

CORY MERRILL
503 E DRY CREEK RD
BUFFALO, MT 59418

Priority Date: NOVEMBER 10, 1903

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: 155.98 AC-FT

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 60.00

Source Name: UNNAMED TRIBUTARY OF ROSS FORK 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		SESWSE	10	11N	16E	FERGUS

***Period of Diversion:** MAY 15 TO AUGUST 15

Diversion Means: HEADGATE

***Reservoir:** ONSTREAM **Reservoir Name:** SKILLEN POND

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESWSE	10	11N	16E	FERGUS

Diversion to Reservoir: DIVERSION # 1

Dam Height: 11.00 FEET

Depth: 22.00 FEET

Surface Area: 7.09 ACRES

Capacity: 62.40 ACRE-FEET

Period of Use: MAY 15 TO AUGUST 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	40.00		NENW	15	11N	16E	FERGUS

2	5.00	SENW	15	11N	16E	FERGUS
3	10.00	W2NWNE	15	11N	16E	FERGUS
4	5.00	SWSE	10	11N	16E	FERGUS
Total:	<u>60.00</u>					

Remarks:

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.

135406-00 135412-00