

Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
1-800-624-3270  
(406) 586-4364  
watercourt@mt.gov

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

\* \* \* \* \*

CLAIMANTS: Clifford Herschberger; Rhoda Herschberger

**CASE 41I-2055-R-2024**  
41I 6766-00

**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

### FINDINGS OF FACT

1. Clifford and Rhoda Herschberger are the record owners of claim 41I 6766-00.

2. Claim 41I 6766-00 was decreed with a Montana Department of Natural Resources (DNRC) remark noting a potential legal or factual issue:

THE PRIORITY DATE MAY BE QUESTIONABLE. THE DATE OF FILING THE FORM GW2 , NOTICE OF COMPLETION OF GROUNDWATER APPROPRIATION. IS 06/05/1969.

3. Claim 41I 6766-00 was decreed with a January 7, 1969 priority date which appears to be the date the well was dug. However, the claim file does not contain a Notice of Appropriation for that priority date – the file only contains a “Notice of Completion.”

4. An Order was issued explaining that the 1961 Groundwater Code requires that when no Notice of Appropriation was filed, the priority date for groundwater rights appropriated after January 1, 1962, is the date a Notice of Completion was *filed*. In this case, the Notice of Completion was filed June 5, 1969. A deadline was set for the Claimants to determine if a Notice of Appropriation was filed for claim 41I 6766-00. (Doc.<sup>1</sup>1.00).

5. On December 23, 2024, another Order was issued setting a deadline for the Herschbergers to show cause why the priority date for claim 41I 6766-00 should not be modified to June 5, 1969, consistent with the Notice of Completion in the record. The Order indicated that if the Herschbergers disagree with the proposed priority date modification, they should contact the Court by February 3, 2025; nothing was filed by the deadline. (Doc. 2.00).

### 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

---

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

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. For groundwater appropriations between January 1, 1962 and July 1, 1973 a Notice of Appropriation and a Notice of Completion both had to be filed in order to have the priority date relate back to when the water was first diverted and used. If only a Notice of Completion was filed, the priority date is the date the Notice of Completion was filed. Section 89-2913(e) R.C.M.

#### CONCLUSIONS OF LAW

1. The priority date of claim 41I 6766-00 should be modified to reflect the date of the Notice of Completion was filed. The modification resolves the substantive issue remark decreed on claim 41I 6966-00.

#### RECOMMENDATIONS

The priority date for claim 41I 6766-00 should be modified from January 7, 1969 to June 5, 1969, and the issue remark should be removed. An abstract is attached for review.

#### **ELECTRONICALLY SIGNED AND DATED BELOW.**

#### **SERVICE VIA USPS MAIL**

Clifford Herschberger  
Rhoda Herschberger  
188 Smith Ln  
Toston, MT 59643

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

Water Right Number: 41I 6766-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: CLIFFORD HERSCHBERGER  
188 SMITH LN  
TOSTON, MT 59643-9757

RHODA HERSCHBERGER  
188 SMITH LN  
TOSTON, MT 59643-9757

Priority Date: JUNE 5, 1969

Type of Historical Right: FILED

Purpose (Use): STOCK

Flow Rate: 20.00 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		SWSWSW	9	5N	2E	BROADWATER

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			SWSWSW	9	5N	2E	BROADWATER