

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

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CLAIMANTS: Kirk J. Fleming; Robin L. Fleming

CASE 41S-0034-R-2024

41S 152162-00

41S 152164-00

OBJECTORS: Kirk J. Fleming; State of Montana Department  
of Fish, Wildlife & Parks

**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 have **13 days** from the service date of the notice of filing of this report to file a written objection or request an extension of the objection period. Rule 23, Water Right Adjudication Rules; Rule 6, Montana Rules of Civil Procedure. 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 above-captioned claims appeared in the Preliminary Decree for the Judith River (Basin 41S) issued on August 18, 2022. The claims are owned by Robin L. and Kirk J. Fleming (“Claimant”). Claim 41S 152164-00 also received issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and the Water Court is required to resolve these potential issues. Kirk J. Fleming self-objected to claim 41S 152162-00. The Montana Dept. of Fish Wildlife & Parks (“MFWP”) objected to claim 41S 152164-00.

### FINDINGS OF FACT

1. On August 15, 2024, the Court consolidated the claims and ordered Claimants and MFWP to file evidence resolving the objections and issue remarks on the claims. (Doc.<sup>1</sup> 1.00).

#### **41S 152162-00**

2. Claim 41S 152162-00 was decreed as a sprinkler irrigation claim with a flow rate of 85.00 GPM for use on 5.00 acres in the N2SE of Section 31, Township 15N, Range 19E, Fergus County. The claim received the following acres irrigated and flow rate issue remarks:

THE MAXIMUM NUMBER OF ACRES CLAIMED ON THE ORIGINAL STATEMENT OF CLAIM IS 10.00 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). 30027-278-212 , DATED 09/25/1979 , APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

3. Kirk J. Fleming self-objected to correct the maximum acres and place of use of the claim, stating:

*This right has been used constantly since 1960 to irrigate 2-3 acres by A.W. Johnson, Robert L. Johnson and currently Kirk and Robin Fleming. Irrigation is by pump and existing underground sprinkler system. Total acres is approximately 3.*

4. On September 20, 2024, Claimants filed their Memorandum to Resolve Objection and Issue Remarks (“the Memo”) for claim 41S 152162-00. (Doc. 4.00). The

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

Memo contains evidence, including affidavits from consultant Scott Irvin and Robin Fleming and aerial photographs. Mr. Fleming's objection to correct the maximum acres and place of use of the claim will be resolved if the Court makes these corrections.

5. To resolve Mr. Fleming's objection and the acres irrigated issue remark, the Memo provides evidence supporting that the maximum acres should be reduced from 5.00 acres to 2.20 acres to accurately reflect the historically irrigated acreage of the claim.

6. To resolve the flow rate issue remark, the Memo provides evidence that the modern irrigation pumps employed by Claimants achieve the same flow rate as the historical pumps used prior to July 1, 1973. Therefore, modifying the flow rate of claim 41S 152162-00 is unnecessary.

**41S 152164-00**

7. Claim 41S 152164-00 was decreed as a power generation claim. This claim was not decreed with issue remarks, but MFWP objected to all elements of the claim, stating:

*This claim for power generation has not been perfected and/or has been abandoned.*

8. On January 31, 2025, Claimants and MFWP filed a Stipulation and Agreement Concerning Statement of Claim No. 41S 152164-00 ("the Stipulation"). (Doc. 10.00). In the Stipulation, the parties agree that Claimants will continue to use water from Big Spring Creek for power generation subject to the following:

- a. So long as the use of in stream power generation does not create a significant impact on the fish or ecosystem of Big Spring Creek;
- b. The use is non-consumptive;
- c. The flow rate is reduced to 2.00 CFS and the volume is reduced to 1,451.80 acre-feet.
- d. The means of diversion is an instream generator/turbine that is approved by MFWP; and
- e. An information remark is placed on the claim abstract noting the existence of this Stipulation.

9. The parties agree that the modifications outlined in the Stipulation will resolve MFWP's objection to claim 41S 152164-00 if adopted by the Court.

#### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Mont. Code Ann. § 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. §§ 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. § 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. If a claimant agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remark remains. Rule 17(c), W.R.Adj.R.

9. The party seeking to overcome the prima facie status of a Statement of Claim bears the burden of proof; this burden also applies to a claimant's objection to his own claim. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

10. The Water Court is not bound by parties' settlement agreements. Any settlement reached by the parties is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

11. Montana has recognized wildlife use as beneficial and valid instream and in lake appropriations of water existed in Montana prior to 1973 where the intended beneficial use did not require diversion, and when the facts and circumstances indicate that notice of the appropriator's intent has been given. *In re Adjudication of Existing Rights to the Use of All Water*, 2002 MT 216, ¶ 40.

#### CONCLUSIONS OF LAW

##### **41S 152162-00**

1. The acres irrigated issue remarks on claim 41S 152162-00 overcome the prima facie status of the claim. Evidence from the Memo is sufficient to reduce maximum acres and place of use of the claim, while maintaining the original flow rate.

##### **41S 152164-00**

2. MFWP's objection to claim 41S 152164-00 overcomes the prima facie status of claim. Evidence from the Stipulation entered between Claimants and MFWP is sufficient to modify the claim.

#### RECOMMENDATIONS

##### **41S 152162-00**

1. The maximum acres of claim 41S 152162-00 should be reduced from 5.00 acres to 2.20 acres.

2. The place of use of claim 41S 152162-00 should be:

<u>ID</u>	<u>ACRES</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
1	1.90	NWNESE	31	15N	19E	FERGUS
2	0.30	SWSENE	31	15N	19E	FERGUS
TOTAL:	2.20					

**41S 152164-00**

3. The flow rate of claim 41S 152164-00 should be reduced from 90.00 CFS to 2.00 CFS.

4. The volume of claim 41S 152164-00 should be reduced from 65,320.02 acre-feet to 1,451.80 acre-feet.

5. The diversion means of claim 41S 152164-00 should be: "OTHER (INSTREAM TURBINE)."

6. The place of use of claim 41S 152164-00 should be NWNESE of Section 31, Township 15N, Range 19E, Fergus County.

7. The following information remark should be added to claim 41S 152164-00: "THIS WATER RIGHT IS SUBJECT TO A PRIVATE WATER AGREEMENT."

An abstract is enclosed.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via Electronic Mail:**

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

**Water Right Number:** 41S 152162-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** KIRK J FLEMING  
436 FISH HATCHERY ROAD  
LEWISTOWN, MT 59457  
  
ROBIN L FLEMING  
436 FISH HATCHERY ROAD  
LEWISTOWN, MT 59457

**Priority Date:** FEBRUARY 11, 1903

**Type of Historical Right:** FILED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER

**Flow Rate:** 85.00 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:** 2.20

**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		NWNESE	31	15N	19E	FERGUS

**Period of Diversion:** MARCH 31 TO NOVEMBER 1

**Diversion Means:** PUMP

**Period of Use:** MARCH 31 TO NOVEMBER 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	1.90		NWNESE	31	15N	19E	FERGUS
2	0.30		SWSENE	31	15N	19E	FERGUS

**Total:** 2.20

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

**Water Right Number:** 41S 152164-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** KIRK J FLEMING  
436 FISH HATCHERY ROAD  
LEWISTOWN, MT 59457  
  
ROBIN L FLEMING  
436 FISH HATCHERY ROAD  
LEWISTOWN, MT 59457

**Priority Date:** FEBRUARY 11, 1903

**Type of Historical Right:** FILED

**Purpose (Use):** POWER GENERATION

**Flow Rate:** 2.00 CFS

**Volume:** 1,451.80 AC-FT

THIS USE MAY CONSUME SOME WATER, BUT UNTIL THAT AMOUNT IS QUANTIFIED,  
IT IS PRESUMED THAT THE USE IS NON-CONSUMPTIVE.

**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		NWNESE	31	15N	19E	FERGUS

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** OTHER  
(INSTREAM TURBINE)

**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			NWNESE	31	15N	19E	FERGUS

**Remarks:**

THIS WATER RIGHT IS SUBJECT TO A PRIVATE WATER AGREEMENT.