

WC-0001-C-2021

July 12, 2024

Montana Water Court

1 Kristin L. Omgvig
Benjamin J. Hammer
2 OMVIG HAMMER LAW, P.C.
4 Sunset Plaza, Suite 200
3 P.O. Box 1202
Kalispell, MT 59903
4 Telephone: (406) 885-2850
E-mail: kristin@ohlawmt.com
5 ben@ohlawmt.com
Attorneys for Omgvig Hammer Law, P.C. Objectors

8 **IN THE WATER COURT OF THE STATE OF MONTANA**
9 **CONFEDERATED SALISH AND KOOTENAI TRIBES -**
10 **MONTANA - UNITED STATES COMPACT**

11 **CASE NO. WC-0001-C-2021**

12 **OMVIG HAMMER LAW, P.C.’s OBJECTORS Ross Middlemist, Timothy G.**
13 **and Margaret A. Orr Revocable Living Trust and Daniel B. Cole NOTICE OF**
14 **ERRATA**

15 COMES NOW, Ross Middlemist, Timothy G. and Margaret A. Orr Revocable Living
16 Trust, and Daniel B. Cole (collectively, the “Objectors”) by and through their counsel of
17 record Omgvig Hammer Law, P.C. and files this Notice of Errata.

18 Exhibits A and B to Exhibit R – Affidavit of Omgvig Hammer Law, P.C.’s Objector
19 Ross Middlemist, attached to the Motion for Summary Judgment and Brief filed by these
20 Objectors on July 10, 2024 in this matter, were inadvertently omitted from Exhibit R.
21 Attached hereto is the corrected Exhibit R - Affidavit of Omgvig Hammer Law, P.C.’s
22 Objector Ross Middlemist.
23
24

1 Counsel for Objectors Ross Middlemist, Timothy G. and Margaret A. Orr Revocable
2 Living Trust, and Daniel B. Cole apologizes to the Court for any confusion caused by this
3 error.

4 DATED this 12th day of July, 2024.

5 OMVIG HAMMER LAW, P.C.

6 By: /s/ Benjamin J. Hammer _____
7 Kristin L. Omvig
8 Benjamin J. Hammer
9 Attorneys for Omvig Hammer Law, P.C. Objectors
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

OMVIG HAMMER LAW, P.C. OBJECTORS' NOTICE OF ERRATA

CERTIFICATE OF SERVICE

I, Benjamin J. Hammer, one of the attorneys of the law firm of OMVIG HAMMER LAW, P.C., do hereby certify that on the 12th day of July, 2024, I served a true and correct copy of the foregoing document upon the person(s) named below, at the address set out below, either by emailing, mailing, hand delivery, or Federal Express, in a properly addressed envelope, postage prepaid, or by telecopying a true and correct copy of said document.

<p>5 Daniel J. Decker 6 Melissa Schlichting 7 Christina M. Courville 8 Zach Zipfel 9 Confederated Salish & Kootenai Tribes 10 Tribal Legal Department 11 PO Box 278 12 Pablo, MT 59855</p>	<p>[] E-Filing Service [] U.S. Mail (first class postage) [] Federal Express [] Hand-Delivery [] Telefacsimile [X] Other: E-mail: Melissa.Schlichting@cskt.org Christina.Courville@cskt.org daniel.decker@cskt.org zachary.zipfel@cskt.org</p>
<p>11 Ryan C. Rusche 12 Sonosky, Chambers, Sachse, Endreson & 13 Perry, LLP 14 PO Box 2930 15 Columbia Falls, MT 59912</p>	<p>[] E-Filing Service [] U.S. Mail (first class postage) [] Federal Express [] Hand-Delivery [] Telefacsimile [X] Other: E-mail: rusche@sonosky.com</p>
<p>14 Todd Kim 15 Assistant Attorney General 16 David W. Harder 17 Senior Attorney for Legal Issues 18 Bradley S. Bridgewater, 19 Trial Attorney 20 U.S. Department of Justice 21 Indian Resources Section 22 Environment & Natural Resources Div. 23 999 18th St. 24 South Terrace, Suite 370 Denver, Colorado 80202</p>	<p>[] E-Filing Service [] U.S. Mail (first class postage) [] Federal Express [] Hand-Delivery [] Telefacsimile [X] Other: E-mail: david.harder@usdoj.gov bradley.s.bridgewater@usdoj.gov efile_denver.enrd@usdoj.gov</p>
<p>20 Yosef Negose, Trial Attorney 21 United States Department of Justice 22 Indian Resources Section 23 Environment and Natural Resources Div. 24 P.O. Ben Franklin Station Washington, D.C. 20004</p>	<p>[] E-Filing Service [] U.S. Mail (first class postage) [] Federal Express [] Hand-Delivery [] Telefacsimile [X] Other: E-mail: yosef.negose@usdoj.gov</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Rebecca M. Ross, Senior Attorney James Cooney, Trial Attorney United States Department of Justice Indian Resources Section Environment and Natural Resources Div. 150 M Street, NE Washington, DC 20002	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: rebecca.ross@usdoj.gov james.cooney@usdoj.gov
Molly M. Kelly Jennifer C. Wells Montana Department of Natural Resources and Conservation 1539 Eleventh Avenue PO Box 201601 Helena, MT 59601	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: Molly.kelly2@mt.gov Jean.saye@mt.gov J.Wells@mt.gov
Terisa Oomens Agency Legal Counsel Agency Legal Services Bureau P.O. Box 201440 Helena, MT 59620-1440	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: Terisa.oomens@mt.gov

/s/ Benjamin J. Hammer
Benjamin J. Hammer

1 3. Revais Creek historically supplied stock and agricultural water to the lands I
2 now own through a ditch just upstream of the current diversion works.

3 4. To my knowledge, in the 1920's the Bureau of Indian Affairs constructed the
4 Revais Creek Canal (Revais Canal) to direct a portion of flows in an easterly direction across
5 much of the property that I now own. The canal has been used to supply stock water year-
6 round to my lands. This continued with the construction of the BIA project and the operation
7 of the Revais Canal.

8 5. I use the Revais Canal and the Springs I have developed above my pastures
9 for stock water and the irrigation of my pasture land. All of my acres have water sources and
10 stock water has been historically available year-round from the BIA FIP project.

11 6. Upon life experience, information, and belief, the water in Revais Creek flows
12 steadily from its origin to about the location of the current diversion structure, where an
13 abrupt change in the stream character results in much of the water disappearing underground
14 and never reaching the Flathead River. I have observed that only in the spring or upon
15 extreme rainfall will the water in Revais Creek reach the Flathead River.

16 7. In addition to supplying irrigation and stock water for my operations, the
17 unlined Revais Canal and my irrigation and stock operations supply the water needed to
18 support the multi-acre Tribally-owned wetland north of my property. The runoff from my
19 operations is directly related to the vitality of the Tribal wetlands.

20 8. Upon information, observation, and belief, I understand that the reduction of
21 water in the Revais Canal planned by the Compact's time-immemorial instream flow in
22 Revais Creek, or the imminent shut down of my stock water in the fall and winter, will
23 negatively impact me and will harm the Tribal Wetlands.

24

AFFIDAVIT OF ROSS MIDDLEMIST

1 9. In February, 2024, Nick Belcourt advised me the Revais Canal would be shut
2 off so water would not be available beginning September 15, 2024. In April, I had meetings
3 with Heather McAdams from the MT DNRC regarding the shut off of stock water and
4 irrigation water by September 15, 2024. In February 2024, Nick and I also discussed
5 mitigation money that may be available to mitigate stock water impacts covered by the
6 Compact. At that time, Nick said the FIIP was not interested in providing stock water tanks
7 for just a few cows and/or horses. This money would mostly be for range land. Nick also said
8 FIIP would have to mitigate the wetlands since the tail water from the use of Revais Creek on
9 my ranch drains directly to the Tribally owned wetlands bordering the Flathead River.

10 10. Shutting off Revais Canal will dry up the water I need to water my cattle
11 during the late fall, early winter as the cows are getting ready to calve.

12 11. Cost to haul water to my cattle is exorbitantly expensive and time consuming.

13 12. Cost to dig additional pipelines is also very expensive. I estimate it would
14 cost \$60,000.00 to \$100,000.00 in labor and materials to get water to the tanks and pastures.
15 For example, bringing a pipe down one mile or more east or west of Bull Mountain costs
16 approximately \$6.00 a foot. According to Heather, there could be a cost sharing of 50%.
17 However, she also said there is only approximately \$4 million dollars available for the
18 ranchers in the FIIP.

19 13. Also, I cannot dig additional wells above my pastures because this could
20 cause the existing Springs to dry up. Also, the 6 (approximate) springs I have cannot support
21 the cattle without additional water sources. (A cow needs approximately 30 gallons of water
22 per day.)

23

24

AFFIDAVIT OF ROSS MIDDLEMIST

1 14. Moreover, the groundwater which seeps into the land below my pastures,
2 known as Mosquito Ranch/Wetlands (land owned by the Confederated Salish Kootenai
3 Tribes), would be negatively impacted. This in turn, could cause the death and/or relocation
4 of the animals, birds, insects who live in these wetlands.

5 15. Also, Revais Creek, even with the closure of the Revais Canal, will not flow
6 into the Flathead River because of the nature of the creek bed – large rocks, gravel that is
7 very porous, as well as the in-stream flow is 4 cfs which does not allow it to reach the
8 Flathead River. So as the water dissipates, it sinks into the ground and it becomes a total
9 waste of water.

10 16. I, along with the other ranchers who used Revais Creek/Revais Canal water,
11 wrote to Senator John Melcher on October 14, 1988, regarding these same concerns. *See*
12 **EXHIBIT A** attached hereto and incorporated herein by reference.

13 17. In 1988, I interviewed Florence Howes Smith, who was raised on Bench Road
14 during the construction of the Revais Canal. She, too, stated that the ditch was not shut off
15 during winter months. *See* **EXHIBIT B** attached hereto and incorporated by reference.

16 18. In approximately sixty (60) days I am facing a shut off of stock water. At this
17 time I have no idea as to how I may solve this issue and face potential irreparable damage,
18 both monetary and nonmonetary, including but not limited to the preservation of my
19 livestock and the preservation of my family’s livelihood and legacy.

20
21
22
23
24

AFFIDAVIT OF ROSS MIDDLEMIST

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

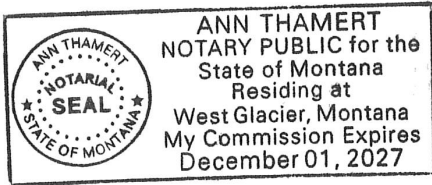
Further your affiant says not.

Dated: 7/8/2024

Ross Middlemist
(Affiant's Signature)

SUBSCRIBED AND SWORN TO before me this 8th day of July, 2024

by Ross Middlemist.



Ann Thamert
SIGNATURE
Ann Thamert
PRINT OR TYPE NAME

Notary Public for the State of Montana.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE OF SERVICE

I, Kristin L. Omgig, one of the attorneys of the law firm of OMOVIG HAMMER LAW, P.C., do hereby certify that on the 10th day of July, 2024, I served a true and correct copy of the foregoing document upon the person(s) named below, at the address set out below, either by emailing, mailing, hand delivery, or Federal Express, in a properly addressed envelope, postage prepaid, or by telecopying a true and correct copy of said document.

Daniel J. Decker Melissa Schlichting Christina M. Courville Zach Zipfel Confederated Salish & Kootenai Tribes Tribal Legal Department PO Box 278 Pablo, MT 59855	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: Melissa.Schlichting@cskt.org Christina.Courville@cskt.org daniel.decker@cskt.org zachary.zipfel@cskt.org
Ryan C. Rusche Sonosky, Chambers, Sachse, Endreson & Perry, LLP PO Box 2930 Columbia Falls, MT 59912	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: rusche@sonosky.com
Todd Kim Assistant Attorney General David W. Harder Senior Attorney for Legal Issues Bradley S. Bridgewater, Trial Attorney U.S. Department of Justice Indian Resources Section Environment & Natural Resources Div. 999 18th St. South Terrace, Suite 370 Denver, Colorado 80202	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: david.harder@usdoj.gov bradley.s.bridgewater@usdoj.gov efile_denver.enrd@usdoj.gov
Yosef Negose, Trial Attorney United States Department of Justice Indian Resources Section Environment and Natural Resources Div. P.O. Ben Franklin Station Washington, D.C. 20004	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: yosef.negose@usdoj.gov

AFFIDAVIT OF ROSS MIDDLEMIST

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Rebecca M. Ross, Senior Attorney James Cooney, Trial Attorney United States Department of Justice Indian Resources Section Environment and Natural Resources Div. 150 M Street, NE Washington, DC 20002	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: rebecca.ross@usdoj.gov james.cooney@usdoj.gov
Molly M. Kelly Jennifer C. Wells Montana Department of Natural Resources and Conservation 1539 Eleventh Avenue PO Box 201601 Helena, MT 59601	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: Molly.kelly2@mt.gov Jean.saye@mt.gov J.Wells@mt.gov
Terisa Oomens Agency Legal Counsel Agency Legal Services Bureau P.O. Box 201440 Helena, MT 59620-1440	<input type="checkbox"/> E-Filing Service <input type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input checked="" type="checkbox"/> Other: E-mail: Terisa.oomens@mt.gov

/s/ Kristin L. Omgig
Kristin L. Omgig

October 14, 1988
Revais Creek Water Users
R.R.
Dixon, MT. 59831

Senator John Melcher
730 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Melcher,

Following your meeting in Rohan last summer, several of us talked to you about the stockwater situation on the Flathead Irrigation Project and in particular the Revais canal. At that time you requested a letter from us outlining the problem.

Project Manager Bill Brooks has requested that all canals be shut off December 1, 1988. His reason is that this will prevent damage to canal banks by livestock and also allow for winter repairs and maintenance. In the past 60 years we have not been aware that our livestock have caused appreciable damage or that maintenance has been hindered because of stockwater.

To verify how long the Revais canal has provided stockwater we consulted several Dixon pioneers. They assured us that the canal has flowed every winter since its construction in about 1920. After this canal has provided stockwater for over 60 years, the people affected by the shut off were not consulted or given a chance to debate the issue.

Since there is no storage facility on the Revais system, we are not depleting stored water to provide stockwater. Nor are we affecting fisheries since Revais is an intermittent stream. The Revais canal also provides a source for springs for domestic and livestock use. These springs will cease to exist if the canal is shut off.

In conclusion Senator Melcher, we are requesting your assistance in solving this problem.

Sincerely,

Ross Middlermeist
Howard Moss
Bob M. Gellert
Ed Priddy
Mary A. Smith
Cal Smith
R. W. Priddy

Eugene L. Pitts
Clara Likens
Judy Wypplinger
Allen Wypplinger
C. F. Ehl
Charlotte Priddy
Clare Priddy
Aron D. Mikkelsen

Photocopies:
Mr. Bill Brooks
Mr. Wyman Babby
Mr. Alan Mikkelsen

December 6, 2020

One of the most memorable interviews I did in October 1988 was that with Florence Howes Smith. She was raised on Bench Road during the construction of the Revais Canal.

She related the following story to me over the phone from her home in Plains, Montana.

"I was a young girl and each year we were promised the Revais Canal would be completed "next year" and so we waited. My family had one of the only wells on the bench and so my sister and I would always take note of a dust heading our way, then dash over and pump the tank full of water. The dust was nearly always a team of thirsty horses pulling a wagon bound for Dixon and they would turn in to "water up" on a summer day. At long last the Revais Canal was completed and what a difference it made for all of us on the bench! Besides providing the desperately needed irrigation water it gave all of us stock water year long. Until this construction event happened, many of the pastures on the bench had no water, so this immediately made useful grasslands where none had existed. It also made dry fields available to winter cattle and horses because it ran year round."

She stated unequivocally that the ditch was not shut off during winter months and was amazed that it was suddenly an issue.