

43B-0391-R-2021

August 17, 2021

Montana Water Court
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Montana Water Court

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

* * * * *

CLAIMANT: Lumsden Farms LLC

OBJECTORS: Robert Bruce Malcolm; Connie M. Malcolm

CASE 43B-0391-R-2021
43B 192642-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusion of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of this 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

Robert Bruce Malcolm and Connie M. Malcolm objected to Lumsden Farms LLC claim 43B 192642-00. This claim appeared in the Preliminary Decree with the following remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

A LATE OBJECTION HAS BEEN FILED TO THE POINT OF DIVERSION OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE.

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 late objection is an affidavit filed in 1994 by then owners Robert Bruce Malcolm and Connie M. Malcolm.

At the June 7, 2021 scheduling conference, Stan Lumsden reported that Mr. Malcolm passed several years ago. As Mrs. Malcom did not appear, her default was entered. The Court Minutes and Orders filed June 9, 2021 state:

The Malcolms' late objection states that the point of diversion legal description should be changed to the NENESW section 9, T8S, R6E. Prior to issuance of the Preliminary Decree, the DNRC standardized the point of diversion to the NENESW section 9, T8S, R6E. Mr. Lumsden stated that he agrees: the point of diversion legal description should remain as NENESW section 9, T8S, R6E as it appeared in the Preliminary Decree. Therefore, pursuant to Rule 22, W.R.Adj.R., it is

ORDERED that the deadline for Connie M. Malcolm to show cause in writing why the Malcolms' objection to this claim should not be DISMISSED as now moot is **July 7, 2021**. If no such writing is filed by July 7, 2021, the Court will proceed with dismissing the objection as now moot.

Nothing was filed.

APPLICABLE LAW

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 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 including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. As the DNRC already changed the point of diversion legal description during its preparation of the Preliminary Decree and as current owner Lumsden Farms agrees with the correction, the late objection is now moot and should be dismissed. The late objection remark should be removed as addressed and resolved. The point of diversion remark should be removed as having served its notice purpose.

2. The period of diversion remark provides notice of this change made prior to issuance of the Preliminary Decree and does not raise an unresolved issue which needs to be addressed. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The change made to the point of diversion legal description during preparation of the Preliminary Decree is sufficient to contradict and overcome the prima facie claim and to address and resolve the late objection.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

Kathryn L. W. Lambert
Senior Water Master

Service Via USPS Mail:

Lumsden Farms LLC
% Stanley M. Lumsden
303 Watermark Dr
Peachtree City, GA 30269-6650

Robert Bruce Malcolm
Connie M. Malcolm
2319 Hwy 89 S
Emigrant, MT 59027

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B**

Water Right Number: **43B 192642-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: LUMSDEN FARMS LLC
 % STANLEY M LUMSDEN
 303 WATERMARK DR
 PEACHTREE CITY, GA 30269 6650

Priority Date: JULY 1, 1919

Type of Historical Right: DECREED

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: TOM MINER 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		NENESW	9	8S	6E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

Ditch Name: TOM MINER DITCH

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			N2	9	8S	6E	PARK
2			N2	10	8S	6E	PARK
3			S2	3	8S	6E	PARK

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.

192639-00 192642-00