

Montana Water Court
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ELECTRONICALLY FILED

43A-0222-R-2021

December 8, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
SHIELDS RIVER BASIN 43A
PRELIMINARY DECREE

* * * * *

CLAIMANT: Johnstone Ranch LLC

CASE: 43A-0222-R-2021

43A 191156-00

43A 191652-00

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, conclusion 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

The above-captioned claims appeared in the Preliminary Decree for Basin 43A. The claim did not receive objections or notices of intent to appear but was called in on motion by the Water Court in an order issued on December 26, 2019.

FINDINGS OF FACT

1. Claims 43A 191156-00 and 43A 191652-00 were called in on-motion of the Court because the claims appeared to be based on the same October 8, 1889 Orion Holliday 345.00 miner's inch (8.625 cubic feet per second (cfs)) right from Cottonwood Creek. Together, the claims appear to exceed the 8.625 cfs decreed to Orion Holliday:

- 43A 191652-00: 6.00 cfs
- 43A 191156-00: 3.45 cfs
- Total: 9.45 cfs**

2. Each claim received an issue remark from the DNRC stating that:

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED DECREE IS OCTOBER 8, 1889.

3. A Status Conference for Case 43A-0222-R-2020 took place on March 17, 2021 by telephone conference call. Water Master Eugene C. White presided; Claimants Alan D. Johnstone and Lillian Johnstone were present on behalf of Johnstone Ranch, LLC. During the conference, the Court discussed the potential decree exceeded situation that led to the claims being called in on motion, and Mr. Johnstone explained the finding from Johnstone Ranch, LLC's research.

4. After the conference, the Court set a filing deadline for the Claimants to file additional information or evidence addressing the decree exceeded situation.

5. On May 17, 2021, Claimant Johnstone Ranch, LLC filed a *Response*. The information contained in the *Response* includes a description of the claims and states that while the claims do have the same point of diversion, priority date, and means of conveyance, they were filed by separate people—brother J.H. and O.S. Holliday—and

have separate places of use though now both places of use are owned by the Claimants. Further, the Claimants state claim 43A 191652-00 is for 345 miner's inches and is based on an October 8, 1889 J.H. Holliday right decreed in Park County Case 2717 and that claim 43A 19156-00 is a separate right with a different place of use based on the original October 8, 1889 O.S. Holliday right also decreed in Park County Case 2717. Supporting the information stated in its *Response*, Johnstone Ranch LLC attaches a map showing differing places of use for the aforementioned claims; a copy of Park County Case 2717, stating that the O.S. Holliday right was purchased from Ken and Betty Johnson and the J.H. Holliday right was purchased from Arthur Howard and Joyce Keys; and copies of the original decrees for the J.H. Holliday and O.S. Holliday rights from Park County Case 2717.

6. Upon review of Mr. Johnstone's first *Response*, the Court set a filing deadline in an Order issued August 6, 2021 for Johnstone Ranch, LLC to file additional information clarifying its suggestions contained in the *Response* pertaining to the potential decree exceeded situation.

7. On August 26, 2021, Johnstone Ranch, LLC filed a second *Response* reiterating its position that claim 43A 191156-00 is in fact based on the O.S. Holliday right and claim 43A 191652-00 is based on the J.H. Holliday right. To further support this position, Johnstone Ranch, LLC's *Response* also attaches a *Claimant Assistance Letter* written by DNRC Water Resources Specialist Mary Crable. Ms. Crable's *Letter* concurs with the position proffered in Johnstone Ranch's first and second *Responses* and attaches the relevant portion of the Park County decree showing the same.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 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. Sections 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. Section 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. If a claimant fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R.

11. Sanctions applied against a claimant may include modification of a claim to conform with data provided by the DNRC, information obtained by the Court, or information included in an objection, or the entry of default and termination of a water right claim. Rule 11, W.R.Adj.R.

CONCLUSIONS OF LAW

1. Based on the Claimant's filed *Responses*, along with the attached *Claimant Assistance Letter* from Ms. Crable, the evidence shows by a preponderance that there is no decree exceeded situation present among the claims and the on-motion status of the claims is resolved.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

Eugene C. White
Water Master

Service via USPS Mail:

Johnstone Ranch LLC
50 Indian Creek Rd
Wilsall, MT 59086-9562

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHIELDS RIVER
BASIN 43A**

Water Right Number: 43A 191156-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: JOHNSTONE RANCH LLC
 50 INDIAN CREEK RD
 WILLSALL, MT 59086 9562

Priority Date: OCTOBER 8, 1889

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION
Irrigation Type: FLOOD

Flow Rate: 3.45 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 222.00

Source Name: COTTONWOOD 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		SWSENE	13	3N	10E	PARK

***Period of Diversion:** APRIL 1 TO OCTOBER 15
Diversion Means: HEADGATE
Ditch Name: UPPER COTTONWOOD DITCH

***Period of Use:** APRIL 1 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	132.00		W2	3	2N	10E	PARK
2	90.00		SE	4	2N	10E	PARK
Total:	<u>222.00</u>						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

191152-00 191153-00 191155-00 191156-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHIELDS RIVER
BASIN 43A**

Water Right Number: 43A 191652-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: JOHNSTONE RANCH LLC
50 INDIAN CREEK RD
WILLSALL, MT 59086 9562

Priority Date: OCTOBER 8, 1889

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 6.00 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 211.60

Source Name: COTTONWOOD 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		SWSENE	13	3N	10E	PARK

***Period of Diversion:** APRIL 1 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: UPPER COTTONWOOD DITCH

***Period of Use:** APRIL 1 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	165.70		E2	3	2N	10E	PARK
2	45.90		NWNW	2	2N	10E	PARK
Total:	<u>211.60</u>						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

191652-00 193210-00