

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

ELECTRONICALLY FILED

43B-0002-R-2020

December 17, 2021

Montana Water Court

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

CLAIMANT: United States of America (USDA Forest Service

OBJECTOR: Trout Unlimited

CASE 43B-0002-R-2020

43B 20810-00

43B 20813-00

43B 23570-00

43B 23571-00

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, Conclusions 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. If 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

Claim 43B 20810-00 appeared in the Preliminary Decree with the following remarks:

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

AN AMENDMENT WAS SUBMITTED ON 02/26/2018 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF 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.

Claims 43B 20813-00, 43B 23570-00, and 43B 23571-00 each appeared in the Preliminary Decree with the following remarks:

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

AN AMENDMENT WAS SUBMITTED ON 02/26/2018 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE JUNE 2, 1987 MEMORANDUM OF THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION SPECIFIES THAT THE POINT OF DIVERSION SHOULD BE SWNESE SEC 08 TWP 09S RGE 09E, PARK COUNTY.

THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE MAY BE QUESTIONABLE. DOCUMENTATION TO SUPPORT THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE WAS NOT SUBMITTED WITH THIS CLAIM.

Trout Unlimited filed a Notice of Intent to Appear for each claim. The issue remarks were not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimant an opportunity to file additional information or evidence. On September 4, 2020 the United States of America (USDA Forest Service) filed its Response to Issue Remarks and Proposed Resolution including exhibits ["Response"]. On September 8, 2020 Trout Unlimited filed its Status Report and Consent to Terms of Settlement. These settlement documents are viewable in the Court's FullCourt Enterprise case management system.

The Response includes changing the type of historical right and priority date for all of the claims. As type of historical right and priority date were not at issue on claim 43B 20810-00, the Response is deemed the United States of America (USDA Forest Service) motion to amend filed pursuant to section 85-2-233(6), MCA. On June 9, 2021 the Order For Newspaper Publication And Personal Service Of Motion To Amend was issued. On October 29, 2021 the United States' Notice Of Filing was filed confirming the required personal service and newspaper service of its notice of motion to amend were completed. No objections to the motion to amend were filed.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

The Montana Water Court has jurisdiction to review a motion to amend pursuant to section 85-2-233(6), MCA.

Rule 15 M.R.Civ.P. restricts the scope of the amendments to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the "same set of operative facts as contained in the original pleading." *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985). The requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

Notice must be published by newspaper if the requested amendments "may adversely affect other water rights." Additional personal notice may be ordered as the Court deems necessary. Section 85-2-233(6)(a)(i) and (c), MCA.

"When the testimony of a witness is sufficient to prove an act or transaction within a certain period, but is so vague and uncertain as not to fix the time within that period, the best that can be done for the party producing such witness is to fix the date at the end of the period." *Vidal v. Kensler*, 100 Mont. 592, 598 (1935). See also Rule 13(c), W.R.C.E.R.

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. The remarks concerning period of diversion, the remarks concerning the 2018 Amendments, and the remark on claim 43B 20810-00 concerning the DNRC modification of the point of diversion provide notice of these changes made prior to issuance of the Preliminary Decree. They do not raise unresolved issues which need to be addressed. These remarks should be removed as having served their notice purposes.

2. For each claim, the Preliminary Decree states that the point of diversion legal description is the NWNESE section 8, T9S, R9E, PARK. The legal description should be SWNESE section 8, T9S, R9E, PARK. The point of diversion issue remark should be removed from the abstracts of claims 43B 20813-00, 43B 23570-00, and 43B 23571-00.

3. The changes to type of historical right and priority date requested in the motion to amend for 43B 20810-00 arise out of the same conduct, transaction, or occurrence specified on the original Statement of Claim, are based on the same operative facts specified in the Statement of Claim, and merely make more specific that which was already claimed on the original Statement of Claim.

4. Each Statement of Claim includes a copy of the 1969 Amended Judgement entered in *Blankenship v. Hayes*, Cause No. 12471, Sixth Judicial District in and for Park County. The Response exhibits include a copy of the 1969 Court's Findings of Fact and Conclusions of Law entered in *Blankenship v. Hayes*. It is clear this 1969 Case concerned ditch rights and maintenance costs which were incurred. It does not decree a water right, and particularly states that it does not decree a water right for defendant Hayes because Hayes did not comply with the requirements of section 89-829, R.C.M., for granting a water right on a decreed stream. However, as a predicate to determine that Hayes did have a ditch right and did incur ditch maintenance costs, the Court found that Hayes continuously diverted water from Bear Creek via the ditch at issue since 1953. The four claims in the Water Court Case are all for portions of this Hayes appropriation. The priority dates claimed are December 15, 1969 (the date the Amended Judgment was signed) or December 29, 1969 (the date the Amended Judgment was filed), and the type of historical right claimed is DECREED based on the 1969 proceedings.

As detailed in the Response, the claimed right was described in the 1969 District Court decision, but not actually decreed in those proceedings. As requested, the priority date should be December 31, 1953 and the type of historical right should be USE. The issue remarks concerning the type of historical right and priority date should be removed from the abstracts as addressed and resolved.

CONCLUSIONS OF LAW

1. For claim 43B 20810-00, the notice requirements for a motion to amend specified in section 85-2-233(6), MCA have been met.
2. The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).
3. The amendments and settlement documents are sufficient to contradict and overcome the prima facie claims and to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above, this Master recommends that the Court grant the motion to amend and 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 for each 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 Email:

Romney S. Philpott, Trial Attorney
US Department of Justice
ENRD, Natural Resources Section
999 18th Street, South Terrace Suite 370
Denver, CO 80202
(303) 844-1810
romney.philpott@usdoj.gov
carla.valentino@usdoj.gov
amber.engelkes@usdoj.gov
Montanabasins.enrd@usdoj.gov
william.bridges@usdoj.gov
efile_nrs.enrd@usdoj.gov

Meg Casey, Attorney
Patrick Byorth, Attorney
321 E Main St Ste 411
Bozeman, MT 59715
(406) 599-8666
mcasey@tu.org
pbyorth@tu.org

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

Water Right Number: 43B 20810-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF AGRICULTURE FOREST SERVICE)
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION
26 FORT MISSOULA RD
MISSOULA, MT 59804 7203

Priority Date: DECEMBER 31, 1953

Type of Historical Right: USE

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: BEAR 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		SWNESE	8	9S	9E	PARK

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: BIGELOW-CHAPMAN DITCH

Period of Use: MAY 1 TO OCTOBER 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			S2NW	14	9S	8E	PARK
2			N2N2SW	14	9S	8E	PARK
3			SWNE	14	9S	8E	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.

20810-00

20813-00

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

Water Right Number: 43B 20813-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: USA (DEPT OF AGRICULTURE FOREST SERVICE)
 WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION
 26 FORT MISSOULA RD
 MISSOULA, MT 59804 7203

Priority Date: DECEMBER 31, 1953

Type of Historical Right: USE

Purpose (Use): IRRIGATION
Irrigation Type: FLOOD

Flow Rate: 5.00 CFS

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

Climatic Area: 5 - LOW

Maximum Acres: 140.00

Source Name: BEAR 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		SWNESE	8	9S	9E	PARK

Period of Diversion: MAY 1 TO OCTOBER 31
Diversion Means: HEADGATE
Ditch Name: BIGELOW-CHAPMAN DITCH

Period of Use: MAY 1 TO OCTOBER 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	80.00		S2NW	14	9S	8E	PARK
2	10.00		N2N2SW	14	9S	8E	PARK
3	20.00		NWSE	14	9S	8E	PARK
4	30.00		SWNE	14	9S	8E	PARK
Total:	140.00						

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.

20811-00 20812-00 20813-00

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.

20810-00 20813-00

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

Water Right Number: 43B 23570-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: USA (DEPT OF AGRICULTURE FOREST SERVICE)
 WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION
 26 FORT MISSOULA RD
 MISSOULA, MT 59804 7203

Priority Date: DECEMBER 31, 1953

Type of Historical Right: USE

Purpose (Use): IRRIGATION
Irrigation Type: FLOOD

Flow Rate: 2.50 CFS

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

Climatic Area: 5 - LOW

Maximum Acres: 70.00

Source Name: BEAR 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		SWNESE	8	9S	9E	PARK

Period of Diversion: MAY 1 TO DECEMBER 1
Diversion Means: HEADGATE
Ditch Name: BIGELOW-CHAPMAN DITCH

Period of Use: MAY 1 TO DECEMBER 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	40.00		NESE	14	9S	8E	PARK
2	15.00		E2NWSE	14	9S	8E	PARK
3	5.00		SESWNE	14	9S	8E	PARK
4	10.00		S2SENE	14	9S	8E	PARK
Total:	70.00						

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.

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

Water Right Number: 43B 23571-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: USA (DEPT OF AGRICULTURE FOREST SERVICE)
WATER RIGHTS PROGRAM MANAGER, NORTHERN REGION
26 FORT MISSOULA RD
MISSOULA, MT 59804 7203

Priority Date: DECEMBER 31, 1953

Type of Historical Right: USE

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: BEAR 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		SWNESE	8	9S	9E	PARK

Period of Diversion: MAY 1 TO DECEMBER 1

Diversion Means: HEADGATE

Ditch Name: BIGELOW-CHAPMAN DITCH

Period of Use: MAY 1 TO DECEMBER 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			SENE	14	9S	8E	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.

23570-00 23571-00