

Montana Water Court
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43B-0036-R-2020
December 28, 2021

Montana Water Court

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

* * * * *

CLAIMANTS: Jones Family LLC

CASE 43B-0036-R-2020
43B 196308-00

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 to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. 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 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

Jones Family LLC claim 43B 196308-00 appeared in the Preliminary Decree with the following remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.
THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 250 MINER'S INCHES DECREED IN CASE NO. 12611, PARK COUNTY. 196308-00, 39093-00.

THE CLAIMED FLOW RATE EXCEEDS THE 17 GPM PER ACRE GUIDELINE AND CANNOT BE CONFIRMED DUE TO A LACK OF DATA. THE FLOW RATE EQUALS 112.00 GPM PER ACRE.

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 claimants an opportunity to file additional information or evidence. On March 8, 2021 the parties filed a Stipulation To Resolve Objections stating that the Shane Flanagan and Toni Flanagan claim 43B 39093-00 should be terminated. The Order Dismissing Claim 43B 39093-00 was issued on October 15, 2021.

No evidence addressing and resolving the flow rate issue remark on Jones Family LLC claim 43B 196308-00 was provided. Instead, the Stipulation simply states the Statement of Claim is *prima facie* evidence that the claimed flow rate is correct. On April 23, 2021 the Court issued an Order Setting Filing Deadline for the claimant to file additional information or evidence to address and resolve the flow rate issue remark. On October 19, 2021 the Order Updating Caption And Mailing List and Order Setting Show Cause Filing Deadline was issued which states:

The April 23, 2021 Order Setting Filing Deadline states the following concerning the unresolved flow rate issue remark on claim 43B 196308-00:

The issue remark states:

THE CLAIMED FLOW RATE EXCEEDS THE 17 GPM PER ACRE GUIDELINE AND CANNOT BE CONFIRMED DUE TO A LACK OF DATA. THE FLOW RATE EQUALS 112.00 GPM PER ACRE.

This is not a *di minimis* amount – it is over six times the guideline. The Stipulation simply states that the claim is *prima facie* proof and remove the

remark. This argument disregards the legislative directive for the Water Court to address and resolve all issue remarks added to a claim by the DNRC. The assertion that a *prima facie* claim trumps an issue remark is contrary to the whole process directed in sections 85-2-247 and 85-2-248, MCA. The DNRC added the remark because the Statement of Claim does not include any data explaining why the flow rate is so high. The Court reviewed the Statement Of Claim and confirms there is no information which explains why the flow rate is over six times the guideline. There is an Affidavit signed by Frank Jones which states that he owned the property from 1968 to 1980 and that he estimates he used 50 miner's inches. The *implication* is that only 50 inches of the 250 miner's inch right were used to irrigate the claimed place of use. In addition to lack of data supporting the claimed flow rate, there is an Affidavit attached to support the claim which suggests less water was historically used.

A May 28, 2021 deadline was set for Jones Family LLC to file information resolving this issue remark. On May 28, 2021 Jones Family LLC filed a Status Report requesting an extension of the filing deadline. On June 18, 2021 the Order Granting Motion For Extension was issued extending the filing deadline to June 28, 2021 as requested. Nothing was filed.

If a claimant fails to comply with an order issued by the Water Court in its review of an issue remark, the Water Court may amend the element of the claim to conform it with information in the claim file. Section 85-2-248(9)(a), MCA. The Frank Jones Affidavit indicates that the flow rate diverted from 1968 to 1980 is 50.00 miner's inches (equivalent to 1.25 CFS or 561.00 GPM). The maximum acres irrigated for this claim is 25.00 acres. That results in 2.00 miner's inches or 34.00 GPM per acre. Therefore, it is

ORDERED that the deadline is **November 30, 2021** for Jones Family LLC to show cause in writing why the Court should not proceed with reducing the flow rate of claim 43B 196308-00 from 6.50 cfs to 1.25 cfs. If nothing is filed by November 30, 2021, the Court will conclude Jones Family LLC agrees with this flow rate reduction and will proceed with making the reduction.

Nothing was filed by the claimant.

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.

If a claimant fails to comply with an order issued by the Water Court in its review of an issue remark, the Water Court may amend the element of the claim to conform it with information in the claim file. Section 85-2-248(9)(a), MCA. *See also* Rule 22, W.R.ADJ.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 withdrawal and dismissal of claim 43B 39093-00 resolves the decree exceeded issue remark. The remark should be removed.
2. The Preliminary Decree states that the flow rate is 6.25 CFS. The flow rate should be 1.25 CFS. The flow rate issue remark should be removed as addressed and resolved.
3. The remark concerning the period of diversion 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. There are no proceedings required for this remark. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The withdrawal and dismissal of claim 43B 39093-00, and Statement of Claim 43B 196308-00 and its attachments, are sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

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

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

Water Right Number: **43B 196308-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: A

Owners: JONES FAMILY LLC
2705 E RIVER RD
LIVINGSTON, MT 59047 9140

Priority Date: MARCH 21, 1968

CLAIM FILED LATE 05/03/1982 . AS MANDATED BY SECTION 85-2-221(3), MCA,
THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL FEDERAL AND
INDIAN RESERVED WATER RIGHTS.

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.25 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: 25.00

Source Name: DEEP CREEK

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NESWNE	36	3S	9E	PARK

Period of Diversion: APRIL 1 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: SCHNABLEGGER DITCH

Period of Use: APRIL 1 TO OCTOBER 15

***Place of Use:**

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	3.00		E2NWSW	36	3S	9E	PARK
2	22.00		NESE	36	3S	9E	PARK
Total:	25.00						

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.

196307-00 196308-00 196309-00