

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

43B-0140-R-2020

December 22, 2021

Montana Water Court

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

CLAIMANT: Lower Mill Creek Ranch LLC

CASE 43B-0140-R-2020
43B 39130-00
43B 39132-00

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 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

Claim 43B 39130-00 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 TIMELY FILED OBJECTION OF TAVNER J. WALKER WAS AMENDED BY DONLEY CLARK TO INCLUDE POINT OF DIVERSION . BECAUSE THIS ELEMENT WAS NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 09/28/2017 , THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY LOWER MILL CREEK RANCH LLC.

THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NENENW SEC 3 TWP 6S RGE 9E PARK COUNTY.

Claim 43B 39132-00 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 CLAIMED FLOW RATE EXCEEDS THE 17 GPM PER ACRE GUIDELINE AND CANNOT BE CONFIRMED DUE TO LACK OF DATA. THE FLOW RATE EQUALS 19.00 GPM PER ACRE.

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 point of diversion and flow rate issue remarks were not addressed and resolved during the objection process. The Legislature has directed the Water Court to resolve the issue remarks using the procedures set forth in 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. In this instance, the information in the claim files is sufficient to address and resolve both issue remarks. In order to give the claimant an opportunity to review the remarks and file additional evidence if it so chose, an Order Consolidating Case and Setting Filing Deadline was issued on October 23, 2020, setting a December 18, 2020 filing deadline. On January 26, 2021 the claimant filed a response reiterating that the ditch for claim 43B 39130-00 is Mill Creek Flat Ditch, requesting the addition of the pipeline built in the 1980s as a second point of diversion, and providing information addressing and resolving the flow rate issue remark on claim 43B 39132-00. On January 27, 2021 the claimant filed a

response stating that it appears the legal description for the point of diversion on claim 43B 39132-00 is also erroneous and should be changed. On February 4, 2021 and February 8, 2021 the claimant filed additional responses concerning the point of diversion legal description for claim 43B 39130-00 but they concern the post-1973 pipeline rather than the pre-1973 Mill Creek Flat Ditch point of diversion.

The ditch identified on the abstract for claim 43B 39130-00 is Mill Creek Flat Ditch. As there were multiple claims for Upland Ditch and Mill Creek Flat Ditch and apparent confusion over the correct legal description for the headgate for each ditch, the Court requested assistance from DNRC to determine the correct point of diversion legal descriptions and to prepare a marked aerial photograph for the Court and various claimants to use to determine the correct ditch and its point of diversion legal description. On February 26, 2021 the DNRC provided a new marked aerial photograph copy.

On June 18, 2021 the General Notice and Order Setting Filing Deadline with a copy of the new marked aerial photograph attached, was sent to the claimant. It set a July 30, 2021 deadline for the claimant to file a written statement confirming the ditch for this claimed right and its legal description. Nothing was filed by the claimant.

The claimant's responses and the General Notice and Order Setting Filing Deadline with the attached copy of the new marked aerial photograph are viewable in the Court's FullCourt Enterprise case management system.

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.

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. For claim 43B 39130-00, Lower Mill Creek Ranch LLC is listed as the owner of this claim in the Preliminary Decree. The ownership remark is no longer pertinent and should be removed.

The Statement of Claim states that Flat Ditch is the diversion for this claimed right. The Preliminary Decree states that the ditch name is Mill Creek Flat Ditch and the point of diversion legal description is SWNWSE section 3, T6S, R9E, PARK. The clear import of the Lower Mill Creek Ranch LLC response is that Mill Creek Flat Ditch is the correct ditch for this claim. The ditch name should remain Mill Creek Flat Ditch but the legal description should be corrected to the Mill Creek Flat Ditch legal description. The legal description should be NESWNE section 3, T6S, R9E, PARK as stated on the new marked aerial photograph prepared by the DNRC. The pipeline should not be added as it was not in existence prior to July 1, 1973. The point of diversion issue remark should be removed as addressed and resolved.

The other remarks provide notice of changes made during the Temporary Preliminary Decree proceedings and prior to issuance of the Preliminary Decree. The remarks do not raise unresolved issues which need to be addressed. There are no proceedings required for these remarks. The remarks should be removed as having served their notice purposes.

2. For claim 43B 39132-00, the Preliminary Decree states that the flow rate is 224.40 GPM. The response filed by the claimant on January 26, 2021 states:

Claim file indicates that the water flow should be changed from 224.4 gpm to 204 gpm a change of 18.6 gallons per acre to the guideline of 17 gpm per acre. (12 acres x 17 gpm = 204 vs 12 acres x 18.6 gpm = 224.4) I believe this to be a very slight discrepancy and this is a decreed water right of 1882. Furthermore the 17 gpm is a guideline. Some clay soils would need much less the 17gpm and the 12 acres that we are considering here are characterized by thin soil profiles underlain by well drained sand, gravel, and cobble historically deposited by the stream and glaciers. The claimed flow rate simply reflects the extra amount of water needed to convey water across the alluvial soils and to sufficiently flood irrigate the uneven and well drained soils in these fields. I recommend no change for the historical water right.

The flow rate should not be changed. The flow rate issue remark should be removed as addressed and resolved.

The other remarks provide notice of changes made prior to issuance of the Preliminary Decree. The remarks do not raise unresolved issues which need to be addressed. There are no proceedings required for these remarks. The remarks should be removed as having served their notice purposes.

The point of diversion for claim 43B 39132-00 is not at issue. It may be addressed by filing a motion to amend pursuant to section 85-2-233(6), MCA. As it appears all claims with Mill Race Ditch had their point of diversion legal descriptions changed to the NENESW section 17, T5S, R9E PARK during preparation of this Preliminary Decree, the claimant is encouraged to contact the Bozeman DNRC Regional Office to review the resources which were used to determine that legal description.

CONCLUSION OF LAW

The Statements of Claim, the claimant's responses, and the new marked aerial photograph prepared by the DNRC 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 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 USPS Mail:

Lower Mill Creek Ranch LLC
PO Box 85
Pray, MT 59065-0085

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

Water Right Number: 43B 39130-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: LOWER MILL CREEK RANCH LLC
PO BOX 85
PRAY, MT 59065 0085

Priority Date: MAY 1, 1900

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 3.40 CFS

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 112.00

***Source Name:** MILL 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		NESWNE	3	6S	9E	PARK

Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: HEADGATE

Ditch Name: MILL CREEK FLAT DITCH

Period of Use: MAY 1 TO OCTOBER 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	112.00		NW	20	5S	9E	PARK

Total: 112.00

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.

39130-00 39131-00 39133-00 39134-00

AUTHORIZATION TO CHANGE THE POINT OF DIVERSION ISSUED 11/25/1996. NOTICE OF COMPLETION DUE 12/31/1998. SEE 43B 39130-00

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

Water Right Number: 43B 39132-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: LOWER MILL CREEK RANCH LLC
PO BOX 85
PRAY, MT 59065 0085

Priority Date: JUNE 1, 1882

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 224.40 GPM

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 12.00

Source Name: MILL 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		NENSW	17	5S	9E	PARK

Period of Diversion: JUNE 1 TO OCTOBER 1

Diversion Means: HEADGATE

Ditch Name: MILL RACE DITCH

Period of Use: JUNE 1 TO OCTOBER 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	12.00		NENW	20	5S	9E	PARK

Total: 12.00