

Montana Water Court  
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43D-0571-R-2021

December 1, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
CLARKS FORK YELLOWSTONE RIVER (BASIN 43D)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Charlene D. Giffin; William E. Giffin; Larry S.  
Larsen

**43D-0571-R-2021**  
43D 19927-00  
43D 19928-00

**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**

### **Statement of the case**

Irrigation claims 43D 19927-00 and 43D 19928-00 appeared in the Preliminary Decree with issue remarks concerning maximum acres irrigated, flow rate, and priority date. Irrigation claim 43D 19927-00 appeared in the Preliminary Decree with an additional issue remark concerning point of diversion.

Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim.

Montana law requires the Water Court to resolve issue remarks. Claimants completed the issue remark resolution process. All elements mentioned by this report, except point of diversion for claim 43D 19928-00, appeared on the Basin 43D Preliminary Decree objection list.

### **Issues**

1. What are the historically accurate maximum acres irrigated, flow rate, point of diversion, and priority date for claim 43D 19927-00?
2. Are the maximum acres irrigated, flow rate, point of diversion, and priority date issue remarks appearing on claim 43D 19927-00 resolved?
3. What are the historically accurate maximum acres irrigated, flow rate, and priority date for claim 43D 19928-00?
4. Are the maximum acres irrigated, flow rate, and priority date issue remarks appearing on claim 43D 19928-00 resolved?
5. Should the court grant the motion to amend point of diversion for claim 43D 19928-00?

### **Findings of fact**

1. On September 29, 2021, the DNRC filed a Memorandum concerning claimants' attempt at resolution of the issue remarks. Included with the DNRC

Memorandum were a Verified Motion to Amend Water Right Claim 43D 19927-00 from Charlene D. Giffin and William E. Giffin (“Giffins”), a Verified Motion to Amend Water Right Claim 43D 19928-00 from Giffins and Larry S. Larsen (“Larsen”), and several aerial photos.

2. The DNRC reported Giffins’ and Larsen’s proposed modifications resolved the issue remarks on each irrigation claim.

3. The historically accurate maximum acres irrigated for claim 43D 19927-00 are 29.10.

4. The historically accurate flow rate for claim 43D 19927-00 is 1.30 CFS.

5. The historically accurate point of diversion for claim 43D 19927-00 is the NWNWSE of Section 7, Township 6 South, Range 22 East, Carbon County.

6. The historically accurate maximum acres irrigated for claim 43D 19928-00 are 16.80.

7. The historically accurate flow rate for claim 43D 19928-00 is 336.60 GPM.

8. The Preliminary Decree abstract for each claim identifies the historically accurate priority date.

A preponderance of evidence establishes the following fact:

9. The historically accurate point of diversion for claim 43D 19928-00 is the NENWNW of Section 13, Township 6 South, Range 21 East, Carbon County.

## **Principles of law**

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the

Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. The Montana Water Court may accept a settlement agreement that reduces or limits an element of a claim and need not determine whether the burden of proof is met unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

5. When resolving issue remarks, the Montana 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.

6. If the Montana Water Court cannot resolve issue remarks based upon information in the claim file or information available to the Court, claimants shall be required to confer with the DNRC to attempt resolution of the issue remarks. Claimants shall file documentation to resolve the issue remarks, and the DNRC shall submit recommendations regarding disposition of the issue remarks. Section 85-2-248(5), MCA.

7. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

8. Any individual with a valid appropriation not a party to a district court decree may petition the district court to make the individual a party to the decree and establish the right in relation to the other rights in the decree. Section 89-835, RCM (1947) (repealed 1973). Failure to follow this procedure disallows an appropriator to assert a priority against any subsequent appropriator identified by the decree. Section 89-837, RCM (1947) (repealed 1973).

9. Judicial notice of facts may be taken from a source “whose accuracy cannot be reasonably questioned.” Rule 201, M.R.Ev.

10. Notice by publication of an amendment is required if there is the possibility of

adverse affect to other water users. Section 85-2-233(6), MCA.

11. Rule 15, M.R.Civ.P., restricts the scope of an amendment to the conduct, transaction, or occurrence set forth in the original pleading - the “same set of operative facts as contained in the original pleading.” *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423, 708 P.2d 1014, 1017 (1985). The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15, 504 P.2d 277, 281 (1972).

12. The party seeking to amend a water right claim has the burden to show, by a preponderance of the evidence, that the claim elements they challenge do not accurately reflect the beneficial use of the water rights as they existed prior to July 1, 1973. *Nelson v. Brooks*, 2014 MT 120, ¶34, 375 Mont. 86, 329 P.3d 558; Rule 19, W.R.Adj.R.

## **Analysis**

### **Issues 1 - 4 – maximum acres irrigated, place of use, flow rate, and priority date both claims and point of diversion claim 43D 19927-00; issue remark resolution**

The DNRC reviewed 1951, 1962, and 1980 aerial photos and visited with Giffins and Larsen. Giffins and Larsen proposed reductions to maximum acres irrigated and place of use for their claims in agreement with the maximum acres irrigated and place of use confirmed by DNRC on the aerial photos. DNRC recommended removal of the Giffins from the ownership of claim 43D 19928-00 based upon the proposed and agreed upon modified place of use. Giffins and Larsen also proposed reducing the flow rate for their respective claims in agreement with the DNRC. Giffins proposed reducing the point of diversion for their claim 43D 19227-00. The DNRC recommended removal of the issue remarks based upon claimants’ proposed reductions to maximum acres irrigated, place of use, and flow rate, and the Giffins’ proposed reduction to point of diversion for claim 43D 19227-00.

Claimants’ Verified Motions included aerial photos depicting the reduced maximum acres irrigated and place of use for each claim, and the reduced point of diversion for claim 43D 19227-00. Copies of the aerial photos are included with this

report. Both the report and the aerial photos will be placed in the claim files for future reference.

The above captioned claims appeared in the Preliminary Decree with an issue remark:

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A USE RIGHT/FILED APPROPRIATION ON ELBOW CREEK WITH A PRIORITY DATE POSTDATING CASE NO. 323 AND PREDATING CASE NO. 2494, CARBON COUNTY.

The record does not indicate why the claims were not included in Case No. 2494, Carbon County. The issue remark is not supported by evidence sufficient to overcome the prima facie proof afforded the priority date for the claims.

The issue remark also notes that the claims' priority date postdates a district court decree for Elbow Creek, Case No. 323, Carbon County. This portion of the issue remark reflects § 89-835 of the Revised Codes of Montana (1947) (repealed 1973), governing the appropriation of junior water rights from a decreed stream. The statute allows an appropriator to petition the district court to open the decree, add the new appropriation, and establish its relation to the other rights affected by the decree. If an appropriator fails to follow this procedure, that water right cannot be exercised against any appropriator mentioned in or bound by that decree. *See also* Section 89-837, RCM (1947) (repealed 1973). In other words, any appropriator who failed to follow these statutes would become junior to a subsequent appropriator who followed the statutes. The issue remark on claims 43D 19927-00 and 43D 19928-00 identifies this possibility.

The Preliminary Decree source index for Basin 43D identifies all claims from Elbow Creek with a priority date postdating the district court decree for Case No. 323. All such claims are "filed" or "use" rights. None of the "filed" or "use" right appropriators junior to claims 43D 19927-00 and 43D 19928-00 petitioned the district court to be added to the Elbow Creek decree, Case No. 323.

Therefore, none of the junior "filed" or "use" claims can assert a priority date senior to claims 43D 19927-00 and 43D 19928-00 based on compliance with § 89-835, RCM. The issue remark stating claims 43D 19927-00 and 43D 19928-00 postdate the Elbow Creek district court decree, Case No. 323, does not raise a valid issue.

## **Conclusions of law**

There is no burden of proof for claimants to meet. The evidence entered into the record results in reductions within the parameters of statements of claim 43D 19927-00 and 43D 19928-00, justifies the modifications to the claims, and resolves the maximum acres irrigated, flow rate, and priority date issue remarks on both claims, and the point of diversion issue remark on claim 43D 19927-00.

## **Issue 5 – motion to amend point of diversion 43D 19928-00**

Statement of claim 43D 19928-00 and the map attached to the statement of claim identified the NENWNW of Section 13, Township 6 South, Range 21 East, Carbon County as the historical point of diversion. DNRC modified the point of diversion during claims examination based upon “claimant’s map and air photo.” The Giffins’ and Larsen’s Amendment to irrigation claim 43D 19928-00 assert the point of diversion located in the NENWNW of Section 13, Township 6 South, Range 21 East, Carbon County and identified by statement of claim 43D 19928-00 is the historically accurate point of diversion.

The Amendment is supported by prima facie statement of claim 43D 19928-00. The changes requested in the Amendment 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 are what was already claimed on the original statement of claim. The statement of claim and the Amendment and evidence in support of the Amendment are sufficient to support the historical accuracy of the amended point of diversion identified by claim 43D 19928-00.

No intervening pre- or post-July 1, 1973 water users exist between the current and proposed legal land descriptions. The Amendment does not have the possibility to adversely affect other water users. No public notice of the Amendment is required.

## **Conclusion of law**

Giffins’ and Larsen’s Amendment identifies the historically accurate point of diversion for irrigation claim 43D 19928-00. Giffins’ and Larsen’s Amendment should

be granted.

## Recommendations

Irrigation claim 43D 19927-00 should be modified as follows to accurately reflect historical use.

**FLOW RATE:**                      ~~2.16 CFS~~                      **1.30 CFS**

**MAXIMUM ACRES:**                      ~~56.90~~                      **29.10**

**POINT OF DIVERSION:**

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	NENWNW	13	6S	21E	CARBON

**Diversion Means:** HEADGATE

SENENE	7	6S	22E	CARBON
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**Diversion Means:** HEADGATE

NWNWSE	7	6S	22E	CARBON
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**Diversion Means:** HEADGATE

**PLACE OF USE:**

	<u>ACRES</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
23.90	<del>28.00</del>		W2SW	5	6S	22E	CARBON
	<del>11.20</del>		SE	6	6S	22E	CARBON
	<u>5.20</u>		E2NENE	7	6S	22E	CARBON
TOTAL:	<b>29.10</b>						

Irrigation claim 43D 19928-00 should be modified as follows to accurately reflect historical use.

**FLOW RATE:**                      ~~1.08 CFS~~                      **336.60 GPM**

**MAXIMUM ACRES:**                      ~~28.40~~                      **16.80**

**POINT OF DIVERSION:**

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
NENWNW	NWNENW	13	6S	21E	CARBON

**Diversion Means:** HEADGATE

NWNWSE	7	6S	22E	CARBON
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**Diversion Means:** HEADGATE

**PLACE OF USE:**

	<u>ACRES</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	7.67 <del>23.40</del>	3	SW	7	6S	22E	CARBON
	9.13 <del>5.00</del>	4	SW E2NENE	7	6S	22E	CARBON
TOTAL:	16.80 <del>28.40</del>						

The issue remarks should be removed from each claim abstract.

Post Decree Abstracts of Water Right Claim accompany this report to confirm implementation of the recommendations in the state's centralized water right record system.

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Anna M. Stradley  
Senior Water Master

**Service via USPS Mail**

Charlene D. Giffin  
William E. Giffin  
PO Box 137  
Roberts, MT 59070

Larry S. Larsen  
204 Clear Creek School Rd.  
Roberts, MT 59070-9428

**WATER COURT  
ABSTRACT OF WATER RIGHT CLAIM  
CLARKS FORK YELLOWSTONE RIVER  
BASIN 43D**

**Water Right Number:** 43D 19927-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** CHARLENE D GIFFIN  
PO BOX 137  
ROBERTS, MT 59070

WILLIAM E GIFFIN  
PO BOX 137  
ROBERTS, MT 59070

**Priority Date:** SEPTEMBER 27, 1913

**Type of Historical Right:** FILED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 1.30 CFS

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

**Climatic Area:** 2 - MODERATELY HIGH

**Maximum Acres:** 29.10

**Source Name:** ELBOW 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		NWNWSE	7	6S	22E	CARBON

**Period of Diversion:** APRIL 1 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Period of Use:** APRIL 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	23.90		W2SW	5	6S	22E	CARBON
2	5.20		E2NENE	7	6S	22E	CARBON
<b>Total:</b>	29.10						

**WATER COURT  
ABSTRACT OF WATER RIGHT CLAIM  
CLARKS FORK YELLOWSTONE RIVER  
BASIN 43D**

**Water Right Number:** 43D 19928-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** LARRY S LARSEN  
204 CLEAR CREEK SCHOOL RD  
ROBERTS, MT 59070 9428

**Priority Date:** SEPTEMBER 27, 1913

**Type of Historical Right:** USE

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 336.60 GPM

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

**Climatic Area:** 2 - MODERATELY HIGH

**Maximum Acres:** 16.80

**Source Name:** ELBOW 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		NENWNW	13	6S	21E	CARBON

**Period of Diversion:** APRIL 1 TO OCTOBER 31

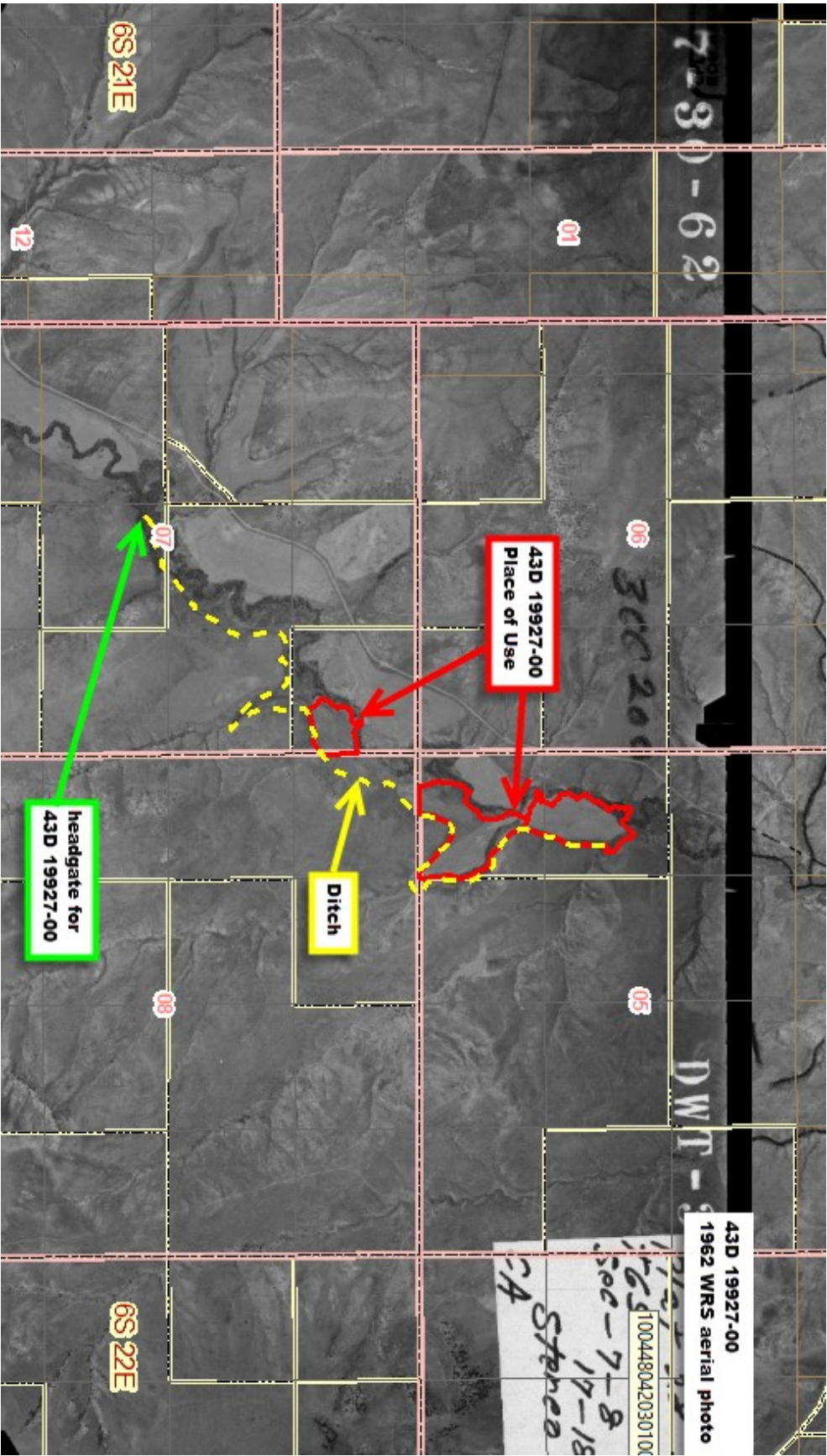
**Diversion Means:** HEADGATE

**Period of Use:** APRIL 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	7.67	3	SW	7	6S	22E	CARBON
2	9.13	4	SW	7	6S	22E	CARBON

**Total:** 16.80



43D 19928-00  
1962 WRS aerial photo



43D 19928-00  
Place of Use

Ditch

headgate for  
43D 19928-00

