

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

\*\*\*\*\*

CLAIMANTS: Tracy A. Russell; Steven S. Russell

**CASE 43D-0615-R-2021**

43D 208902-00

43D 208903-00

**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**

**FINDINGS OF FACT**

1. Domestic well claim 43D 208903-00 and stock well claim 43D 208902-00 appeared in the Preliminary Decree with a January 1, 1972 priority date and with the following issue remark concerning the priority date:

THE PRIORITY DATE IS IN QUESTION. NO DOCUMENTATION AS REQUIRED BY THE 1961 GROUNDWATER CODE WAS SUBMITTED TO SUPPORT THIS CLAIM.

2. The claims received no objections. The issue remark was not addressed and resolved during the objection process. The Montana Legislature directs the Water Court to resolve issue remarks using the procedures set forth in § 85-2-248, MCA.

3. The 1961 Ground Water Code required the filing of certain documents with the county clerk and recorder's office to establish priority date for groundwater appropriated between January 1, 1962, and July 1, 1973. Neither a Notice of Appropriation nor a Notice of Completion was filed in support of the priority date claimed by Statements of Claim 43D 208903-00 and 43D 208902-00. Therefore, it appeared that the priority date should be the date the Statements of Claim were filed, April 30, 1982.

4. Pursuant to § 85-2-248(3), MCA an order set a deadline for claimants, Tracy A. Russell and Steven S. Russell, to file a copy of a duly filed Notice of Appropriation and/or Notice of Completion to support the earlier claimed priority date of January 1, 1972.

5. No further documentation was submitted by Tracy A. Russell and Steven S. Russell.

6. Based upon the current record, the priority date for the claims should be the date the Statements of Claim were filed, April 30, 1982. The type of historical right should be changed from "use" to "filed", and the following general clarification remark should be added to the claim abstracts:

THIS IS AN EXISTING RIGHT. ITS POST-1973 PRIORITY DATE IS DECREED PURSUANT TO SECTION 85-2-306(4) MCA.

7. The issue remark regarding priority date should be removed as it has been resolved.

8. Domestic well claim 43D 208903-00 appeared in the Preliminary Decree with an additional issue remark stating:

THE CLAIMED FLOW RATE EXCEEDS THE 35 GPM GUIDELINE FOR THIS PURPOSE AND CANNOT BE CONFIRMED DUE TO LACK OF DATA.

9. The issue remark notes the flow rate identified by claim 43D 208903-00 exceeds the Department of Natural Resources and Conservation 35.00 GPM guideline for domestic purposes.

Information in the claim file does not indicate the claimed flow rate is historically inaccurate. A guideline, without further explanation, is not evidence sufficient to overcome the prima facie proof afforded the flow rate for this claim. No further proceedings are required for this claim.

10. The issue remark regarding flow rate should be removed as it has been resolved.

### CONCLUSIONS 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. This prima facie proof may be contradicted and 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.

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. 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.

4. 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.

5. Montana law required an appropriator of groundwater by means of a well between January 1, 1962 and July 1, 1973 to timely file a Notice of Completion of Groundwater Appropriation with the county clerk of the county in which the appropriation was located. Section 89-2913(d), RCM (1963). Until an appropriator filed a Notice of Completion no right to use the water was recognized. Section 89-2913(e),

RCM (1963). These provisions were repealed in 1973 with the enactment of § 85-2-306, MCA. The statute provides:

(4) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962 and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (3), with the department to perfect the water right. The filing of a claim of existing water right pursuant to 85-2-221[a Statement of Claim] is sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing of a notice as provided in subsection (3), or the date of the filing of the claim of existing water right.

6. As a Notice of Completion was not filed, the priority date of the claimed appropriation for claims 43D 208903-00 and 43D 208902-00 is the date of the filing of the Statements of Claim. Section 85-2-306(4), MCA.

7. There is sufficient information to resolve the issue remarks.

### RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions 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. Post Decree Abstracts of Water Right Claim accompany this Report to confirm that the recommended changes have been made in the state's centralized water right record system.

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Anna M. Stradley  
Senior Water Master

### Service via USPS Mail

Tracy A. Russell  
Steven S. Russell  
14 Whitehorse S. Rd.  
Laurel, MT 59044

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

**Water Right Number:** 43D 208902-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** STEVEN S RUSSELL  
14 WHITEHORSE S RD  
LAUREL, MT 59044

TRACY A RUSSELL  
14 WHITEHORSE S RD  
LAUREL, MT 59044

**Priority Date:** APRIL 30, 1982

THIS IS AN EXISTING RIGHT. ITS POST-1973 PRIORITY DATE IS DECREED  
PURSUANT TO SECTION 85-2-306(4) MCA.

**Type of Historical Right:** FILED

**Purpose (Use):** STOCK

**Flow Rate:** 6.00 GPM

**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:** GROUNDWATER

**Source Type:** GROUNDWATER

**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		SWSESW	32	2S	24E	CARBON

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** WELL

**Period of Use:** JANUARY 1 TO DECEMBER 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>
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**Priority Date:** APRIL 30, 1982

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PURSUANT TO SECTION 85-2-306(4) MCA.

**Type of Historical Right:** FILED

**Purpose (Use):** DOMESTIC

**Flow Rate:** 40.00 GPM

**Volume:** 10.10 AC-FT

**Households:** 2

**Maximum Acres:** 4.22

**Source Name:** GROUNDWATER

**Source Type:** GROUNDWATER

**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		SWSESW	32	2S	24E	CARBON

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** WELL

**Period of Use:** JANUARY 1 TO DECEMBER 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	4.22		SWSESW	32	2S	24E	CARBON
<b>Total:</b>	4.22						