

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

\*\*\*\*\*

CLAIMANT: Calvin E. Weymiller

CASE 43D-0620-R-2021  
43D 24142-00

**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**

The above captioned irrigation claim appeared in the Preliminary Decree with the following issue remarks.

THE PERIOD OF DIVERSION MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF THE PERIOD OF USE ISSUE.

THE CLAIMED PERIOD OF USE EXCEEDS THE USUAL GROWING SEASON FOR THIS CLIMATIC AREA WHICH IS APRIL 15 TO OCTOBER 15.

THE PLACE OF USE SHOULD BE IN GOVT LOT 7 SENESW SEC 29 TWP 9S RGE 22E CARBON COUNTY MT.

RESERVOIR RECORD 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.

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. The issue remarks were resolved by information in the claim file and information before the court except the following issue remark:

THE PLACE OF USE SHOULD BE IN GOVT LOT 7 SENESW SEC 29 TWP 9S RGE 22E CARBON COUNTY MT.

Pursuant to § 85-2-248(3), MCA, the court may first contact claimants for further evidence in an attempt to resolve issue remarks. Therefore, a deadline was set for claimant, Calvin E. Weymiller, to file evidence resolving the issue remark. Claimant failed to participate in the issue remark resolution process. The court set a show cause filing deadline for claimant.

## **Issues**

1. What is the historically accurate place of use?
2. Is the place of use issue remark resolved?
3. Are the period of use, period of diversion, and reservoir record issue remarks resolved?

## **Finding of fact**

The historically accurate place of use for claim 43D 24142-00 is Government Lot 7, SENESW of Section 29, Township 9 South, Range 22 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. 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. 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. 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. All parties subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

## **Analysis**

### **Issues 1 and 2 – place of use; issue remark resolution**

Pursuant to § 85-2-248(3), MCA, claimant was ordered to file a statement with the

court agreeing or disagreeing with the modified place of use suggested by the issue remark. Claimant failed to file a statement by the deadline.

An order set a filing deadline for claimant to show cause why claim 43D 24142-00 should not be amended as suggested by the issue remark to resolve the place of use issue remark. Claimant also failed to comply with this filing deadline.

Claimant's failure to provide any evidence to address or resolve the place of use issue remark leaves the claims examination and resulting issue remark as strong evidence of actual historical use.

### **Conclusions of law**

Based on information in the claim file and the claimant's failure to comply with orders issued by the Water Master, claim 43D 24142-00 should be amended as recommended by the place of use issue remark. The place of use issue remark is resolved.

### **Issue 3 – period of use, period of diversion, and reservoir record issue remark resolution**

The period of use issue remark questions the year-round period of use identified by claim 43D 24142-00. However, the claim file included information supporting the year-round period of use. Importantly, the claim included an onstream reservoir at least partially fed by a spring for incidental fish and wildlife use. Given the claim's source, means of diversion, and incidental fish and wildlife use, a year-round period of use makes good sense.

The year-round period of diversion does not require modification as the year-round period of use is historically accurate.

Claim 43D 24142-00 appeared in the Preliminary Decree with the above referenced notice issue remark concerning reservoir record. Water users were given the opportunity to review the claim and file an objection. The deadline to file objections has expired. No objections were filed against the claim.

### **Conclusions of law**

The period of use issue remark does not overcome the prima facie proof afforded

the pre-decree amendment to claim 43D 24142-00 identifying a year-round period of use. The year-round period of diversion does not require adjustment.

The period of use and period of diversion issue remarks are resolved. The notice issue remark concerning reservoir record served its purpose.

## **Recommendations**

Based upon the foregoing, claim 43D 24142-00 should be amended as follows to accurately reflect historical use.

### **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>
	1.00	7	SENE SW	29	9S	22E	CARBON
TOTAL:	1.00						

The issue remarks appearing on the claim abstract should be removed.

A Post Decree Abstract of Water Right Claim reflecting the proposed recommendations accompanies this report to confirm the recommendations have been implemented in the state's centralized water right record system.

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Anna M. Stradley  
Senior Water Master

### **Service via USPS Mail**

Calvin E. Weymiller  
c/o Michael Schmaing  
3000 Lake Elmo Rd.  
Billings, MT 59105-4519

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

**Water Right Number:** 43D 24142-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** CALVIN E WEYMILLER  
% MICHAEL SCHMAING  
3000 LAKE ELMO RD  
BILLINGS, MT 59105 4519

**Priority Date:** MAY 1, 1969

**Type of Historical Right:** USE

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 17.00 GPM

PRIMARILY A DIRECT FLOW SYSTEM; FLOW RATE RETAINED.

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

PRIMARILY A DIRECT FLOW SYSTEM; VOLUME NOT DECREED.

**Climatic Area:** 3 - MODERATE

**Maximum Acres:** 1.00

**Source Name:** UNNAMED TRIBUTARY OF CLARKS FORK YELLOWSTONE RIVER

**Source Type:** SURFACE WATER

THIS WATER RIGHT ALSO INCLUDES SURFACE WATER FROM AN  
UNDEVELOPED SPRING IN THE SENESW SEC 29 TWP 09S RGE 22E CARBON  
COUNTY.

**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	7	SENESW	29	9S	22E	CARBON

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

**Diversion Means:** DAM

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
7	SENESW	29	9S	22E	CARBON

**Diversion to Reservoir:** DIVERSION # 1

**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	1.00	7	SENESW	29	9S	22E	CARBON

**Total:** 1.00

**Remarks:**

THIS WATER RIGHT IS INCIDENTALLY USED FOR FISH AND WILDLIFE PURPOSES.