

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

CLAIMANTS: Donna M. Braun Trust; Peggy Sue Downam;
Clayton R. Downam

CASE 43D-0624-R-2021
43D 41649-00
43D 41650-00

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

On June 16, 1998, then claimants Douglas D. Braun and Donna M. Braun (“Brauns”) filed an Affidavit concerning irrigation claims 43D 41649-00 and 43D 41650-00. The Affidavit proposed a reduced priority date and flow rate for claim 43D 41649-00 and a reduced priority date and modified type of historical right, source, and means of diversion for claim 43D 41650-00. On May 29, 1998, the United States of America (USDA – Forest Service) filed a conditional withdrawal of objection to claim 43D 41652-00 based upon the court implementing the modifications proposed by the Brauns’ Affidavit concerning irrigation claims 43D 41649-00 and 43D 41650-00. The Brauns’ Affidavit was docketed as a late objection to claims 43D 41649-00 and 43D 41650-00. The court added the following issue remarks to the claim abstracts:

43D 41649-00

ON JUNE 16, 1998, DOUGLAS D BRAUN AND DONNA M BRAUN FILED AN AFFIDAVIT SPECIFYING CHANGES TO BE MADE TO THE PRIORITY DATE AND FLOW RATE. THIS HAS BEEN DOCKETED AS A LATE OBJECTION AND WILL BE HEARD AFTER PROPER NOTICE ON THE NEXT OBJECTION LIST.

43D 41650-00

ON JUNE 16, 1998, DOUGLAS D BRAUN AND DONNA M BRAUN FILED AN AFFIDAVIT SPECIFYING CHANGES TO THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, SOURCE AND MEANS OF DIVERSION. THIS HAS BEEN DOCKETED AS A LATE OBJECTION AND WILL BE HEARD AFTER PROPER NOTICE ON THE NEXT OBJECTION LIST.

Both claims received an additional issue remark stating:

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A USE RIGHT ON WILLOW CREEK WITH A PRIORITY DATE PREDATING CASE NO. 2484, CARBON COUNTY.

Montana law requires the Water Court to resolve all issue remarks appearing on a claim. The priority date issue remark was resolved based upon information before the court. To resolve the late objection issue remarks, the court gave current claimants the opportunity to comment on the modifications proposed by the Brauns’ 1998 Affidavit. The order setting the comment deadline included the following language, “claimants’ failure to file

comments will be viewed as agreement with the modifications proposed by the Brauns' 1998 Affidavit and reflected by the draft modified abstracts." No comments were filed by the deadline thereby signaling claimants' agreement with the proposed modifications.

Issues

1. What are the historically accurate priority date and flow rate for claim 43D 41649-00?
2. What are the historically accurate priority date, type of historical right, source, and means of diversion for claim 43D 41650-00?
3. Is the late objection issue remark on each claim resolved?
4. Is the priority date issue remark on each claim resolved?

Findings of fact

1. Preliminary Decree abstract 43D 41649-00 identifies a July 1, 1905 priority date and a 2.91 CFS flow rate.
2. The historically accurate priority date for claim 43D 41649-00 is January 27, 1922.
3. The historically accurate flow rate for claim 43D 41649-00 is 278.27 GPM.
4. Preliminary Decree abstract 43D 41650-00 identifies a use right with a July 1, 1917 priority date from Willow Creek, diverted by a headgate.

A preponderance of evidence establishes the following facts for claim 43D 41650-00:

5. The historically accurate type of right is filed and the historically accurate priority date is June 16, 1930.
6. The historically accurate source is an Unnamed Tributary of Willow Creek and the historically accurate diversion means is ditch.

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. 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.

Analysis

Issues 1 - 3 – priority date and flow rate for claim 43D 41649-00; type of historical right, priority date, source name, and means of diversion for claim 43D 41650-00; late objection issue remark resolution

The late objection issue remark on each claim stated the late objection would be heard after notice on the Preliminary Decree objection list. The Brauns’ objection to each claim was included on the Preliminary Decree objection list. Water users were given the opportunity to review the claims and file an objection. The deadline to file objections has expired. No objections were filed against the claims.

A copy of the Brauns' Affidavit is included with this report. The report and the Affidavit will be placed in the claim files for future reference.

Conclusions of law

There is no burden of proof to meet for the proposed reductions to the priority date and the flow rate of claim 43D 41649-00. The referenced late objection issue remark served its notice purpose.

All proposed modifications for claim 43D 41650-00 are supported by the filed Notice of Appropriation attached to statement of claim 43D 41650-00 located in the claim file. Brauns' Affidavit in agreement with the information in the filed Notice of Appropriation overcomes, by a preponderance of evidence, the prima facie proof afforded statement of claim 43D 41650-00. The referenced late objection issue remark served its notice purpose.

Issue 4 – priority date issue remark resolution both claims

The District Court decree for Willow Creek, Case No. 2484, Carbon County was signed by Judge Robert C. Stong on January 26, 1922. The proposed modifications to priority date for claims 43D 41649-00 and 43D 41650-00 result in the claims no longer predating Case No. 2484, Carbon County.

Conclusion of law

The priority date issue remark on each claim is resolved.

Recommendations

Irrigation claim 43D 41649-00 should be modified as follows to accurately reflect historical use.

<u>PRIORITY DATE:</u>	JULY 1, 1905	JANUARY 27, 1922
<u>FLOW RATE:</u>	2.91 CFS	278.27 GPM (0.62 CFS)

Irrigation claim 43D 41650-00 should be modified as follows to accurately reflect historical use.

PRIORITY DATE: ~~JULY 1, 1917~~ **JUNE 16, 1930**

TYPE OF HISTORICAL RIGHT: ~~USE~~ **FILED**

SOURCE NAME: ~~WILLOW CREEK~~ **UNNAMED TRIBUTARY, WILLOW CREEK**
SOURCE IS COMPOSED OF A SLOUGH AND SPRINGS.

DIVERSION MEANS: ~~HEADGATE~~ **DITCH**
AN UNNAMED DITCH FROM THE SLOUGH AND SPRINGS FLOWS TO THE CALDWELL DITCH.

The issue remarks should be removed from the claim abstracts.

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.

Anna M. Stradley
Senior Water Master

Service via USPS Mail

Peggy Sue Downam
Clayton R. Downam
1106 Willow Creek Rd.
Red Lodge, MT 59068

Donna M. Braun Trust
333 South 38th Street
Billings, MT 59102

Courtesy Copy

Jody Miller
Office of the General Counsel
United States Department of Agriculture
Federal Building, Room 205
26 Fort Missoula Rd
Missoula, MT 59804

JUN 16 1998

Montana Water Court

IN THE MATTER OF THE ADJUDICATION OF)	CASE NO. 43D-119
THE EXISTING RIGHTS TO THE USE OF ALL)	
THE WATER, BOTH SURFACE AND UNDERGROUND,)	
WITHIN THE CLARKS FORK YELLOWSTONE)	43D-W-041652-00
RIVER DRAINAGE AREA INCLUDING ALL)	43D-W-198620-00
TRIBUTARIES OF THE CLARKS FORK)	43D-W-198678-00
YELLOWSTONE RIVER IN BIG HORN, CARBON)	
PARK, STILLWATER AND YELLOWSTONE)	
COUNTIES, MONTANA)	

OBJECTOR: City of Red Lodge, Crow Tribe of Indians, United States of America (USDA Forest Service), United States of America (Bureau of Indian Affairs)

STATE OF MONTANA)
) ss. AFFIDAVIT
County of Carbon)

1. Our names are DOUGLAS D. BRAUN and DONNA M. BRAUN, and we reside at 2509 Patricia Lane, Billings, MT 59102.

2. We are owners of certain property located in Carbon County, MT., and claimants of Temporary Preliminary Decree Water Rights No. 43D-W-041649 and 43D-W-041650 relating to that property.

3. The water claimed in the above rights is supplemental to

FILL

the water claimed in Rights 43D-W-041651 and 43D-W-041652.

4. We wish to amend our Right No. 43D-W-041649 in the Temporary Preliminary Decree as follows:

- a. PRIORITY DATE: January 27, 1922.
- b. FLOW RATE: 24.75 Miners Inches (.62 CFS).

5. All other information regarding Water Right No. 43D-W-041649 in the Temporary Preliminary Decree is correct.

6. We wish to amend our Right No. 43D-W-041650 in the Temporary Preliminary Decree to correct its historical basis as stated in the original claimant's Statement of Claim, namely:

- a. TYPE OF HISTORICAL RIGHT: Notice of Appropriation filed June 16, 1930, as Document No. 41650, by Walter Hietala.
- b. SOURCE: Slough and springs draining as an unnamed tributary to Willow Creek.
- c. MEANS OF DIVERSION: unnamed ditch from the slough and springs to Caldwell (Caldwell-Heitala) Ditch.

7. All other information regarding Water Right No. 43D-W-041650 in the Temporary Preliminary Decree is correct.

8. Claimants respectfully request the Court to amend the Temporary Preliminary Decree to reflect the amendments and corrections specified above.

DATED this 24th day of April, 1998.

Douglas D. Braun Donna M. Braun
DOUGLAS D. BRAUN DONNA M. BRAUN

SUBSCRIBED AND SWORN TO before me, this 24th day of April, 1998.

Claren Neal

Notary Public for the State of Montana
My commission expires July 25, 2000

Residing at Helena, MT



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

Water Right Number: 43D 41649-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: CLAYTON R DOWNAM
1106 WILLOW CREEK RD
RED LODGE, MT 59068

PEGGY SUE DOWNAM
1106 WILLOW CREEK RD
RED LODGE, MT 59068

BRAUN, DONNA M TRUST
333 SOUTH 38TH ST
BILLINGS, MT 59102

Priority Date: JANUARY 27, 1922

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 278.27 GPM
(0.62 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: 76.70

Source Name: WILLOW 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		NENWNE	9	6S	20E	CARBON

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: CALDWELL DITCH

Period of Use: MAY 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	10.00		NWNE	33	5S	20E	CARBON
2	38.00		SWNE	33	5S	20E	CARBON
3	1.00		SENW	33	5S	20E	CARBON

4	27.70	NWSE	33	5S	20E	CARBON
Total:	76.70					

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.

41649-00

41650-00

41652-00

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

Water Right Number: 43D 41650-00 STATEMENT OF CLAIM

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Status: ACTIVE

Owners: CLAYTON R DOWNAM
1106 WILLOW CREEK RD
RED LODGE, MT 59068

PEGGY SUE DOWNAM
1106 WILLOW CREEK RD
RED LODGE, MT 59068

BRAUN, DONNA M TRUST
333 SOUTH 38TH ST
BILLINGS, MT 59102

Priority Date: JUNE 16, 1930

Type of Historical Right: FILED

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: 3 - MODERATE

Maximum Acres: 76.70

Source Name: UNNAMED TRIBUTARY OF WILLOW CREEK

Source Type: SURFACE WATER

SOURCE IS COMPOSED OF A SLOUGH AND SPRINGS.

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		NENWNE	9	6S	20E	CARBON

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: DITCH

Ditch Name: CALDWELL DITCH

AN UNNAMED DITCH FROM THE SLOUGH AND SPRINGS FLOWS TO THE
CALDWELL DITCH.

Period of Use: MAY 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	10.00		NWNE	33	5S	20E	CARBON
2	38.00		SWNE	33	5S	20E	CARBON
3	1.00		SENE	33	5S	20E	CARBON

4	27.70	NWSE	33	5S	20E	CARBON
Total:	76.70					

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41649-00 41650-00 41652-00