

41G-0114-R-2021

July 16, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
JEFFERSON RIVER BASIN (41G)  
PRELIMINARY DECREE

\* \* \* \* \*

CLAIMANT: Robert J. Wagner

OBJECTOR: Robert J. Wagner

NOTICE OF INTENT TO APPEAR: Robert J. Wagner

**CASE 41G-0114-R-2021**  
41G 197201-00

**MASTER'S REPORT**

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

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 this 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.*

## FINDINGS OF FACT

1. Water right claim 41G 197201-00 appeared in the Preliminary Decree for the Jefferson River (Basin 41G) issued on February 15, 2018. The claim received an objection from the Claimant and issue remarks from the DNRC. Claim 41G 197201-00 is consolidated into case 4G-0114-R-2021 to address the objection and issue remarks.

2. Claim 41G 197201-00 is a historical use right for flood irrigation. On March 1, 1982 the original owner of the appurtenant land filed claim 41G 197201-00 with the listed the flow rate of 50 miners inches (1.25 cfs). DNRC notes in the claim file created during the verification process state that the claimed flow rate of 1.25 cfs was correct per a self-serving affidavit. However, the July 24, 1989 DNRC claim abstract listed the flow rate as .57 cfs. It is not clear from the information in the claim file why the DNRC modified the flow rate.

3. The Claimant filed an objection to the flow rate for 41G 197201-00 on February 5, 2019, seeking to modify the flow rate for claim 41G 197201-00 back to the originally claimed flow rate of 1.25 cfs. The Claimant's objection states, "[t]he total 1.25 cfs is needed to get the water to P.O.U." The Claimant also filed a notice of intent to appear.

4. Claim 41G 197201-00 also received the following issue remarks:

DITCH NAME 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 SOURCE NAME HAS BEEN CHANGED TO BE CONSISTENT WITH THE 1988 UNITED STATES GEOLOGICAL SURVEY QUADRANGLE FOR THIS AREA. SOURCE NAME OF THIS CLAIM HAS BEEN CHANGED FROM WILLOW CREEK TO NORTH WILLOW CREEK. BECAUSE OF INCONSISTENT SOURCE NAMES APPEARING IN THE TEMPORARY PRELIMINARY DECREE DURING THE OBJECTION PERIOD, ANY WATER USER WHOSE RIGHTS HAVE BEEN ADVERSELY AFFECTED BY THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

3. The ditch name and source name issue remarks indicate that if no objections were filed, those elements of the claims would remain as they appear on the abstracts and the remarks will be removed. No objections were filed to either the ditch

name or the source name for claim 41G 197201-00. The issue remarks should be removed.

### CONCLUSIONS OF LAW

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. § 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. Rule 19, W.R.Adj.R.

2. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. 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. § 85-2-248(3), MCA.

3. The ditch name and source name issue remarks appearing on claim 41G 197201-00 indicate that if no objections are filed, those elements of the claims will remain as they appear on the abstracts and the remarks will be removed. Claim 197201-00 did not receive any objections concerning the elements addressed in the issue remarks. The remarks have served their notice purpose and should be removed.

4. The original March 1, 1982 Statement of Claim for 41G 197201-00 listed the flow rate as 1.25 cfs. The Claimant represents that the claimed flow rate is necessary to move water to the place of use. The evidence before the court supports modifying the flow rate back to 1.25 cfs pursuant to the objection. This modification resolves the objection and notice of intent to appear.

### RECOMMENDATIONS

1. The flow rate for claim 41G 197201-00 should be modified to 1.25 cfs.
2. The issue remarks should be removed from the claims.

A post-decree abstract of the water right claim is served with this Report to confirm that the recommended modifications have been made in the state's centralized record system.

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Eyvind Ostrem  
Water Master

**Service via USPS Mail**

Robert J Wagner  
PO Box 191  
Harrison, MT 59735-0191

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
JEFFERSON RIVER  
BASIN 41G**

**Water Right Number:**      **41G 197201-00**      STATEMENT OF CLAIM

**Version:**      3 -- POST DECREE

**Status:** ACTIVE

**Owners:**                      ROBERT J WAGNER  
                                     PO BOX 191  
                                     HARRISON, MT 59735 0191

**Priority Date:**                DECEMBER 31, 1937

**Type of Historical Right:**    USE

**Purpose (Use):**                IRRIGATION

**Irrigation Type:**            FLOOD

**Flow Rate:**                 1.25 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:**            15.00

**Source Name:**              NORTH 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         |                 | NESWNW         | 11         | 2S         | 2W         | MADISON       |

**Period of Diversion:**      MAY 1 TO OCTOBER 1

**Diversion Means:**         HEADGATE

**Ditch Name:**               ALLEN BOWMAN 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         | 15.00        |                 | NESE           | 25         | 1S         | 2W         | MADISON       |

**Total:**                        15.00