

41G-0320-R-2021

July 21, 2021

Montana Water Court

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

* * * * *

CLAIMANT: Glenda L. Ohs

OBJECTOR: Glenda L. Ohs

CASE 41G-0320-R-2021

41G 195513-00

41G 195518-00

41G 195548-00

NOTICE OF FILING OF 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.*

MASTER'S REPORT

FINDINGS OF FACT

1. Case 41G-0320-R-2021 was consolidated to address the objections and issue remarks received by claims 41G 195513-00, 41G 195518-00, and 4G 195548-00.
2. Claims 41G 195513-00 and 41G 195518-00 received the following DNRC 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.

POINT OF DIVERSION APPEARS TO BE IN THE NESWNW SEC 11, TWP 02S, RGE 02W. THIS ISSUE REPRESENTS A SUSTAINED ELEMENT AND SO WAS NOT MODIFIED PER WATER COURT ORDER.

The ditch name and source name issue remarks 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. No parties filed objections to the ditch name or the source name for claims 41G 195513-00 and 41G 195518-00. The remarks should be removed.

On June 24, 2021, the Claimant filed a statement indicating their agreement with the DNRC issue remark recommending that the point of diversion for claims 41G 195513-00 and 41G 195518-00 be modified to NESWNW Sec 11, TWP 02S, RGE, 02W. The point of diversion for both claims should be modified pursuant to the issue remark, and the point of diversion issue remarks should be removed from the claims.

3. Claim 41G 195513-00 received an objection from the claimant concerning the period of use and period of diversion. The January 23, 2019 objection states that the “[p]eriod of use was originally claimed as being May 1 – September 15. For reasons unknown, the date was written over and changed to June 1 – July 15.”

Claim 41G 195513-00 is a historical use right for sprinkler/flood irrigation. The original statement of claim listed the period of use as May 1 – September 15. However, at some point the period of use was changed to June 1 – July 15. It is not clear from the information in the claim file why the period of use was modified. The Claimant’s objection seeks to correct the period of use and period of diversion for claim 41G 195513-00 back to the originally filed period of use. The evidence on the statement of claim form supports the claimant’s objection; the period of use and period of diversion should be modified to May 1 – September 15.

4. Claim 41G 195548-00 received the following issue remarks:

WHEN THIS CLAIM WAS ORIGINALLY DECREED, THE PERIOD OF DIVERSION WAS NOT INCLUDED AS AN ELEMENT OF THE CLAIM. IN 2008, THE PERIOD OF DIVERSION ELEMENT WAS ADDED TO ALL CLAIM ABSTRACTS. IT IS NOT CERTAIN IF THE PERIOD OF DIVERSION DATES ADDED TO THIS CLAIM ACCURATELY REFLECT THE HISTORICAL PERIOD OF DIVERSION. MORE INFORMATION IS REQUIRED.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 10.15 TIMES THE CAPACITY OF THE RESERVOIR.

There is no evidence before the court contradicting the decreed period of diversion and the decreed volume. No objections were filed to either the period of diversion or the volume, indicating that no one takes issue with those claimed elements. Accordingly, the issue remarks should be removed from claim 41G 195548-00.

5. The Claimant filed an objection to the point of diversion for claim 41G 195548-00 on July 11, 2018 stating, “[p]oint of diversion IDs 2 and 3 should have the source name as North Willow Creek instead of South Willow Creek. The Lower Mason Lake dam feeds into Cataract Creek which feeds into North Willow Creek as evidenced in claim # 41G 195547-00.”

The point of diversion index for Basin 41G identifies North Willow Creek as the source for points of diversion in the SWNWNW of Section 19 and the NWNE of Section 21, 2S, 3W supporting the claimant’s objection. Additionally, the information remark on the claim identifies North Willow Creek as a natural carrier, further supporting the objection. Finally, the documents and map attached to the statement of claim form also

indicate that North Willow Creek is the correct source for points of diversion numbers 2 and 3. The source should be modified accordingly.

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 requirement to resolve issue remarks does not eliminate the prima facie status granted to water rights, nor does it change the burden of proof required to modify or invalidate a claim. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. If it meets this standard, then the burden of proof shifts to the claimant to prove his or her claim's validity. An issue remark is weighed like any other evidence. When an issue remark is placed on a claim, "the information resulting in the issue remark and the issue remark *must be weighed against* the claimed water right." § 85-2-247(2), MCA (emphasis added). The Water Court shall review an issue remark "to determine if information in the claim file or information obtained by the court provides a sufficient basis to resolve the identified issue remark or to determine if the issue remark can be corrected as a clerical error." § 85-2-248(3), MCA. Determining whether the factual issues raised by an issue remark have been resolved requires the exercise of judicial discretion. *Id.*

4. The ditch name and source name issue remarks appearing on claims 41G 195513-00 and 41G 195518-00 do not overcome the prima facie status of the claims and should be removed.

The point of diversion issue remarks appearing on claims 41G 195513-00 and 41G 195518-00 indicate the points of diversion needed correction. The claimant agreed with the issue remarks. The evidence before the court overcomes the prima facie status of claims 41G 195513-00 and 41G 195518-00 regarding the points of diversion. The points of diversion for claims 41G 195513-00 and 41G 195518-00 should be corrected.

The claimant's objection to the period of use and period of diversion is supported by the original statement of claim form. The evidence overcomes the prima facie status of the claim and the period of use and period of diversion should be corrected.

5. The period of diversion and the volume issue remarks appearing on claim 41G 195548-00 are not supported by evidence that overcomes the prima facie status of the claim. The issue remarks should be removed.

The claimant objected to the source name associated with the points of diversion IDs 2 and 3 on claim 41G 195548-00. The information in the claim file and other evidence available to the court supports the correction to the source name requested by the claimant. The source name should be corrected.

RECOMMENDATIONS

1. The period of diversion for claim 41G 195513-00 should be modified to May 1– September 15.

2. The point of diversion for claims 41G 195513-00 and 41G 195518-00 should be modified to NESWNW Sec 11, TWP 02S, RGE, 02W.

3. The source name for points of diversion 2 and 3 on claim 41G 195548-00 should be modified to North Willow Creek.

4. The issue remarks should be removed from the claims.

Post Decree Abstracts of Water Right Claims are served with the Report to confirm that the recommended modifications have been made in the state's centralized record system.

Madeleine Weisz
Senior Water Master

Service via USPS Mail:

Glenda L. Ohs
PO Box 152
Harrison, MT 59735-0152

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

Water Right Number: 41G 195513-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: GLENDA L OHS
2585 OLD YORK ROAD
HELENA, MT 59602

***Priority Date:** OCTOBER 25, 1935

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 12.50 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: 608.00

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		NESWN	11	2S	2W	MADISON

Period of Diversion: MAY 1 TO SEPTEMBER 15

Diversion Means: HEADGATE

Ditch Name: ALLEN BOWMAN DITCH

Period of Use: MAY 1 TO SEPTEMBER 15

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	32.00		SWNW	25	1S	2W	MADISON
2	75.00		W2SE	25	1S	2W	MADISON
3	160.00		SW	25	1S	2W	MADISON
4	125.00		SE	26	1S	2W	MADISON
5	103.00		NE	35	1S	2W	MADISON
6	71.00		W2NE	36	1S	2W	MADISON
7	42.00		NW	36	1S	2W	MADISON

Total: 608.00

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.

195513-00

195514-00

195515-00

195516-00

195517-00

195518-00

THIS WATER RIGHT CLAIM WAS MODIFIED BY THE MONTANA WATER COURT IN A CERTIFICATION ACTION PURSUANT TO SECTION 85-2-406(2)(B), MCA.

AUTHORIZATION TO CHANGE PLACE OF USE COMPLETED 11/21/1986. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE.

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

Water Right Number: **41G 195518-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: GLENDA L OHS
 2585 OLD YORK ROAD
 HELENA, MT 59602

Priority Date: DECEMBER 31, 1865

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 283.00 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: 608.00

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		NESWN	11	2S	2W	MADISON

Period of Diversion: MAY 1 TO SEPTEMBER 15

Diversion Means: HEADGATE

Ditch Name: ALLEN BOWMAN DITCH

Period of Use: MAY 1 TO SEPTEMBER 15

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	125.00		SE	26	1S	2W	MADISON
2	160.00		SW	25	1S	2W	MADISON
3	75.00		W2SE	25	1S	2W	MADISON
4	71.00		W2NE	36	1S	2W	MADISON
5	103.00		NE	35	1S	2W	MADISON
6	32.00		SWNW	25	1S	2W	MADISON
7	42.00		NW	36	1S	2W	MADISON
Total:	<u>608.00</u>						

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.

195513-00

195514-00

195515-00

195516-00

195517-00

195518-00

THIS CLAIM AND 41G-G(W)195547-00 HAVE OVERLAPPING PLACES OF USE

AUTHORIZATION TO CHANGE PLACE OF USE COMPLETED 11/21/1986. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE.

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

Water Right Number: **41G 195548-00** STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: GLENDA L OHS
 2585 OLD YORK ROAD
 HELENA, MT 59602

Priority Date: AUGUST 15, 1901

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS
ONSTREAM RESERVOIR.

Volume: 138.00 AC-FT

Climatic Area: 3 - MODERATE

Maximum Acres: 320.00

***Source Name:** NORTH WILLOW CREEK

Source Type: SURFACE WATER

***Source Name:** CATARACT 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		SWSESE	29	2S	3W	MADISON

***Source Name:** CATARACT CREEK

Period of Diversion: APRIL 15 TO OCTOBER 1

Diversion Means: DAM

2 - SECONDARY		SWNWNW	19	2S	3W	MADISON
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Source Name: NORTH WILLOW CREEK

Period of Diversion: APRIL 15 TO OCTOBER 4

Diversion Means: HEADGATE

Ditch Name: ADKINS DITCH

3		NWNE	21	2S	2W	MADISON
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Source Name: NORTH WILLOW CREEK

Period of Diversion: APRIL 15 TO SEPTEMBER 15

Diversion Means: HEADGATE

DIVERSION NO. 1 IS LOWER MASON LAKE DAM.

***Reservoir:** ONSTREAM

Reservoir Name: LOWER MASON LAKE

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSESE	29	2S	3W	MADISON

Diversion to Reservoir: DIVERSION # 1

LOWER MASON LAKE IS ALSO KNOWN AS MARSH LAKE.

Period of Use: APRIL 15 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	100.00		NE	7	2S	2W	MADISON
2	40.00		NESE	7	2S	2W	MADISON
3	20.00		N2SESE	7	2S	2W	MADISON
4	80.00		N2NW	8	2S	2W	MADISON
5	40.00		SWNW	8	2S	2W	MADISON
6	40.00		NWSW	8	2S	2W	MADISON
Total:	320.00						

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.

195545-00 195546-00 195547-00 195548-00 195549-00

AUTHORIZATION TO CHANGE THE POINT OF DIVERISON AND PLACE OF USE ISSUED 05/17/1993. SEE 41G 195547-00. NOTICE OF COMPLETION DUE 12/31/1994.

CATARACT CREEK AND NORTH WILLOW CREEK ARE USED TO CONVEY THIS RIGHT FROM A RESERVOIR AT MASON LAKE TO A SECONDARY POINT OF DIVERSION AT NWNWNW SEC 19, TWP 02S, RGE 02W MADISON COUNTY. THIS RIGHT FLOWS THROUGH CATARACT RESERVOIR AT NWSWSE SEC 23 TWP 02S RGE 03W. CLAIMANT HAS NO RIGHT TO CONTROL THE HEADGATE AT CATARACT RESERVOIR, BUT ONLY THE RIGHT TO CALL THE CATARACT DAM TENDER FOR FLOW THROUGH OF THIS RIGHT AS HISTORICALLY BENEFICIALLY USED.