

Montana Water Court
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43A-0334-R-2020

September 15, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
SHIELDS RIVER BASIN 43A
PRELIMINARY DECREE

* * * * *

CLAIMANT: Henry Guth, Inc.

OBJECTOR: Cindy Zimmerman; Ned E. Zimmerman

CASE 43A-0334-R-2020

43A 23722-00 43A 23718-00
43A 23727-00 43A 191257-00
43A 23728-00 43A 191256-00

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. Henry Guth Inc. claims 43A 23718-00, 43A 23722-00, 43A 23727-00, 43A 23728-00, 43A 191257-00, and 43A 191256-00 were decreed with the following DNRC issue remarks:

Claim 43A 23718-00:

THE POINT OF DIVERSION LEGAL LAND DESCRIPTION COULD NOT BE REFINED FROM INFORMATION IN THE CLAIM FILE.

Claims 43A 23722-00, 43A 23727-00, and 43A 23728-00:

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.

Claim 43A 195256-00:

SOURCE 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.

Claim 43A 195257-00:

POINT OF DIVERSION 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 PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A USE RIGHT ON DAISY DAN CREEK, NORTH FORK WITH A PRIORITY DATE PREDATING CASE NO 2717, PARK COUNTY. IF NO OBJECTIONS ARE FILED TO PRIORITY DATE OR TYPE OF HISTORICAL RIGHT, THESE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS REMARK WILL BE REMOVED.

2. Cindy Zimmerman and Ned E. Zimmerman objected to claims 43A 23718-00, 43A 23722-00, 43A 23727-00, 43A 23728-00, 43A 191257-00, and 43A 191256-00.

3. Henry Guth, Inc. is owned by Cindy Zimmerman and Ned E. Zimmerman.

4. A deadline was set for the parties to file documentation addressing the issue remarks and settling the Objections. Nothing was filed by the deadline and a Scheduling Order was issued.

5. The July 16, 2021 Proposed Prehearing Order indicated that there are no adverse party in this Case and only issue remarks remain to be resolved.

6. The parties argue that the elements of the claims are correct as claimed.

7. On July 28, 2021, an Order Setting Filing Deadline Pursuant to Section 85-2-248, MCA was issued, ordering an authorized representative of the Claimant to meet

with the DNRC to address the point of diversion issue remark decreed on claim 43A 23718-00.

8. On September 8, 2021, DNRC Water Resource Specialist Mary Crable filed a Memorandum indicating that she was not contacted by any party in this Case and declining to make a recommendation for the disposition of the issue remark.

PRINCIPLES AND CONCLUSIONS OF LAW

1. A properly filed Statement of Claim for an existing water right is *prima facie* proof of its content. Section 85-2-227, MCA. This *prima facie* validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.

2. The ditch name and source issue remarks appearing on claims 43A 23722-00, 43A 23727-00, 43A 23728-00, 43A 191256-00, and 43A 191257-00 are notice-type issue remarks. As no objections are being pursued, no further proceedings are required.

3. With respect to the priority date of claim 43A 191257-00, the only evidence before the Court is the existence of Case No. 2717 and the resulting issue remark that appeared on the claim. While historical decrees provide some evidence of water rights on a given source, they are not conclusive. Decrees were often the result of a specific controversy between water users; thus, rights were adjudicated on a piecemeal basis by the district courts. Further, decrees were usually limited in scope, and often multiple decrees were issued on the same stream. *See Albert Stone, Are There Any Adjudicated Streams in Montana?* 19 Mont. L. Rev. 19 (1957).

In short, there are numerous reasons why the claim in this Case may not have appeared in the District Court decree, but objectors bear the burden of establishing that the priority date should be something other than what was claimed. In this Case, the *prima facie* proof of priority date has not been overcome.

RECOMMENDATION

1. The issue remarks should be removed from the claims in this Case with no changes to the elements of the claims.

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

Anika M. Stern
Senior Water Master

Service Via Electronic Mail:

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHIELDS RIVER
BASIN 43A**

Water Right Number: **43A 23718-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
GUTH HENRY INC
%ZIMMERMAN NED
95 DAISY DEAN RD
WILSALL, MT 59086 9403

Priority Date: JUNE 1, 1884

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 157.10 GPM

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

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 11.60

***Source Name:** SHIELDS RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

| ID | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | NWNWSW | 17 | 3N | 9E | PARK |

Period of Diversion: APRIL 1 TO OCTOBER 10

Diversion Means: HEADGATE

Ditch Name: SHEILDS RIVER RANCH CO CANAL

Period of Use: APRIL 1 TO OCTOBER 10

***Place of Use:**

| ID | Acres | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 11.60 | | E2SW | 17 | 3N | 9E | PARK |
| Total: | 11.60 | | | | | | |

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.

23718-00

23720-00

23725-00

23730-00

23731-00

191258-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHIELDS RIVER
BASIN 43A**

Water Right Number: **43A 23722-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
GUTH HENRY INC
%ZIMMERMAN NED
95 DAISY DEAN RD
WILSALL, MT 59086 9403

Priority Date: JUNE 25, 1909

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

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: 4 - MODERATELY LOW

Maximum Acres: 244.00

Source Name: DAISY DEAN CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| ID | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | SENWSE | 11 | 3N | 9E | PARK |

Period of Diversion: APRIL 1 TO OCTOBER 10

Diversion Means: HEADGATE

Ditch Name: FALLAN-SMEHAUG DITCH

Period of Use: APRIL 1 TO OCTOBER 10

Place of Use:

| ID | Acres | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|-----------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 244.00 | | S2 | 10 | 3N | 9E | PARK |

Total: 244.00

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.

23722-00

23723-00

23727-00

23728-00

23729-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHIELDS RIVER
BASIN 43A**

Water Right Number: **43A 23727-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
GUTH HENRY INC
%ZIMMERMAN NED
95 DAISY DEAN RD
WILSALL, MT 59086 9403

Priority Date: JUNE 24, 1908

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 336.62 GPM

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 244.00

Source Name: DAISY DEAN CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| ID | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | SENWSE | 11 | 3N | 9E | PARK |

Period of Diversion: APRIL 1 TO OCTOBER 10

Diversion Means: HEADGATE

Ditch Name: FALLAN-SMEHAUG DITCH

Period of Use: APRIL 1 TO OCTOBER 10

Place of Use:

| ID | Acres | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 244.00 | | S2 | 10 | 3N | 9E | PARK |
| Total: | 244.00 | | | | | | |

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.

23722-00

23723-00

23727-00

23728-00

23729-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHIELDS RIVER
BASIN 43A**

Water Right Number: **43A 23728-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
GUTH HENRY INC
%ZIMMERMAN NED
95 DAISY DEAN RD
WILSALL, MT 59086 9403

Priority Date: JUNE 29, 1973

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 5.00 CFS

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 244.00

Source Name: DAISY DEAN CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| ID | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | SENWSE | 11 | 3N | 9E | PARK |

Period of Diversion: APRIL 1 TO OCTOBER 10

Diversion Means: HEADGATE

Ditch Name: FALLAN-SMEHAUG DITCH

Period of Use: APRIL 1 TO OCTOBER 10

THIS RIGHT IS LIMITED TO HIGH OR FLOOD WATERS OF DAISY DEAN CREEK.

Place of Use:

| ID | Acres | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 244.00 | | S2 | 10 | 3N | 9E | PARK |
| Total: | 244.00 | | | | | | |

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.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHIELDS RIVER
BASIN 43A**

Water Right Number: 43A 191256-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: GUTH HENRY INC
%ZIMMERMAN NED
95 DAISY DEAN RD
WILSALL, MT 59086 9403

Priority Date: JULY 28, 1919

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 100.00 GPM

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 90.00

Source Name: UNNAMED TRIBUTARY OF DAISY DEAN CREEK, SOUTH FORK

Source Type: SURFACE WATER

Source Name: DAISY DEAN CREEK, SOUTH FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|----------------------|---|------------|------------|------------|---------------|
| 1 | | NWNENE | 34 | 4N | 10E | PARK |
| | Source Name: | UNNAMED TRIBUTARY OF DAISY DEAN CREEK, SOUTH FORK | | | | |
| | Period of Diversion: | MAY 15 TO OCTOBER 15 | | | | |
| | Diversion Means: | DIKE | | | | |
| 2 | | SENENW | 34 | 4N | 10E | PARK |
| | Source Name: | DAISY DEAN CREEK, SOUTH FORK | | | | |
| | Period of Diversion: | MAY 15 TO OCTOBER 15 | | | | |
| | Diversion Means: | DIKE | | | | |
| | Period of Use: | MAY 15 TO OCTOBER 15 | | | | |
| | Place of Use: | | | | | |

ID **Acres** **Govt Lot** **Qtr** **Sec** **Twp** **Rge** **County**

| | | | | | | | |
|---------------|-------|--|------|----|----|-----|------|
| 1 | 35.00 | | N2NE | 34 | 4N | 10E | PARK |
| 2 | 55.00 | | NW | 34 | 4N | 10E | PARK |
| Total: | 90.00 | | | | | | |

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHIELDS RIVER
BASIN 43A**

Water Right Number: **43A 191257-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
GUTH HENRY INC
%ZIMMERMAN NED
95 DAISY DEAN RD
WILSALL, MT 59086 9403

Priority Date: APRIL 16, 1907

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 444.31 GPM

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 26.00

Source Name: DAISY DEAN CREEK, NORTH FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| ID | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | NENENW | 33 | 4N | 10E | PARK |

Period of Diversion: MAY 15 TO OCTOBER 15

Diversion Means: DIKE

Period of Use: MAY 15 TO OCTOBER 15

Place of Use:

| ID | Acres | Govt Lot | Qtr Sec | Sec | Twp | Rge | County |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 26.00 | | N2NW | 33 | 4N | 10E | PARK |
| Total: | 26.00 | | | | | | |