

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

43B-0035-R-2020

September 16, 2021

Montana Water Court

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Elbow Creek Ranch; State of Montana Board of Land
Commissioners

CASE 43B-0035-R-2020
43B 36728-00
43B 214201-00

OBJECTOR: State of Montana Board of Land Commissioners

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court on the above stamped date. Please read this Report carefully.

You may file a written objection to the Report if you disagree with the Master's Findings of Fact, Conclusion of Law, or Recommendations; or if there are errors in the Report. The above stamped date indicates the date the Master's Report was filed and mailed. Rule 23 of the Water Adjudication Rules requires written objections to the Master's Report must be filed within 10 days of the date of the Master's Report. Because the 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. This means your objection must be received no later than 13 days from the above stamped date.

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 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

Elbow Creek Ranch claim 43B 36728-00 appeared in the Preliminary Decree with the following remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 70.00 MINER'S INCHES DECREED IN CASE NO. 3075 , PARK COUNTY. 43B 36728-00, 43B 214201-00.

THE TIMELY FILED OBJECTION OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION WAS AMENDED BY AGREEMENT OF THE PARTIES TO INCLUDE POINT OF DIVERSION . BECAUSE THIS ELEMENT WAS NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

THE LEGAL LAND DESCRIPTION FOR POINT OF DIVERSION NO. 2 COULD NOT BE REFINED FROM INFORMATION IN THE FILE. THIS CLAIMED POINT OF DIVERSION CANNOT BE CONFIRMED.

POINT OF DIVERSION AND DITCH NAME WERE 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.

State of Montana Board of Land Commissioners (Trust Lands Management Division)

["TLMD"] claim 43B 214201-00 appeared in the Preliminary Decree with the following remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 70 MINER'S INCHES DECREED IN CASE NO. 3075 , PARK COUNTY. 43B 36728-00 AND 43B 214201-00.

CLAIM WAS NOT INCLUDED IN THE BASIN 43B TEMPORARY PRELIMINARY DECREE ISSUED 01/16/1985.

CLAIM FILED LATE 11/27/1990 . IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

THE POINT OF DIVERSION IS INCORRECT. SEE CLAIM FILE FOR ADDITIONAL INFORMATION.

TLMD objected to this claim. A Verified Motion To Amend concerning the point of diversion legal description and ditch name is attached to the objection.

On January 19, 2021 the parties filed a Stipulation To Resolve Issue Remarks concerning the decree exceeded issue remarks. On January 25, 2021 Elbow Creek Ranch filed a Notice Of Issue Remark Resolution for this Case plus two other Cases. This filing also notes an erroneous source clarification remark on claim 43B 214201-00. On February 26, 2021 an Order Setting Filing Deadline was issued concerning claim 43B 214201-00. The Order reviews the Stipulation and sets an April 1, 2021 deadline for the parties “to file a different rationale or to file evidence supporting the Stipulation by establishing the existence of an October 1, 1884 use right.” On March 29, 2021 TLMD filed a Verified Motion To Amend Claim 43B 214201-00. On May 24, 2021 TLMD filed additional information supporting its Motion. The TLMD Motion and additional information address and resolve the decree exceeded issue remark on both claims. The settlement documents are viewable in the Court’s FullCourt Enterprise case management system.

APPLICABLE LAW

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to 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 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 including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

If, at the time an appropriation is made, the appropriator is a lessee of school trust land and if the lessee makes and uses the appropriation on school trust land, the appropriation is owned by the State of Montana rather than the lessee. *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985). Implicit in this rule is the determination that the land was indeed fully vested as state school trust land at the time the appropriation was made. *See Findings of Fact, Conclusions of Law, and Memorandum*, Case No. 43A-A, June 29, 2000; *Opinion* (page 3), Case No. 41G-190, July 19, 2005, and *Opinion*, Case No. 41G-3, August 3, 2005.

FINDINGS OF FACT

1. For claim 42B 36728-00, the decree exceeded issue remark should be removed as addressed and resolved by the changes made to claim 43B 214201-00.

The claimant confirmed that the legal description for point of diversion number 2 is correct, in particular noting that it was addressed during the Temporary Preliminary Decree proceedings for this claim and is shown at that location in the 1951 Park County Water Resources Survey. The issue remark concerning the legal description for point of diversion number 2 should be removed as addressed and resolved.

The other remarks concerning the period of diversion, point of diversion, and ditch name provide notice of these changes made prior to issuance of the Preliminary Decree. No proceedings are required for these remarks. These remarks should be removed as having served their notice purposes.

2. For claim 43B 214201-00, the Preliminary Decree states that the priority date is OCTOBER 1, 1884 and the type of historical right is DECREED. The information filed shows that the place of use “was school trust land on July 17, 1957. The GLO Survey was accepted on October 12, 1874 and the State acquired the land . . . on November 8, 1889.” The priority date should be JULY 17, 1957 and the type of historical right should be USE.

The Preliminary Decree states that the point of diversion is SWSWSW section 15, T5S, R9E, PARK. The point of diversion should be NWNENW section 22, T5S, R9E, PARK and Walker Ditch should be added as the ditch name. The point of diversion issue remark should be removed as addressed and resolved.

The Preliminary Decree states that the source is Magee Creek and includes the following clarification remark: ALSO KNOWN AS ELBOW CREEK, NORTH FORK. As noted by Elbow Creek Ranch in its January 25, 2021 filing and as shown in the 1951 Park County Water Resources Survey, Magee Creek and Elbow Creek, North Fork are two separate sources. The clarification remark should be removed as erroneous.

The remark concerning the period of diversion provides notice of this changes made prior to issuance of the Preliminary Decree. No proceedings are required for this remark. This remark should be removed as having served its notice purpose.

The remarks concerning the claim filed late and claim not included in the prior Decree provide notice of these facts. No objection concerning these remarks was filed. No proceedings are required for these remarks. These remarks should be removed as having served their notice

purposes.

CONCLUSION OF LAW

The settlement documentation and supporting evidence entered into the record are sufficient to contradict and overcome the prima facie claims and to address and resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court accept the settlement filed in this matter and make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

Kathryn L. W. Lambert
Senior Water Master

Service Via Email:

Benjamin Sudduth
Sudduth Law, PLLC
1050 East Main St Ste 3B
PO Box 507
Bozeman, MT 59771-0507
(406) 272-2390
benjamin@sudduthlaw.com

Michele L. Snowberger
~~Ben Eckstein~~
Montana Attorney General
Agency Legal Services Bureau
PO Box 201440
Helena MT 59620-1440
(406) 444-0296
blcwatercourt@mt.gov

Note: Service List Updated 8/13/2021

**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B**

Water Right Number: 43B 36728-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ELBOW CREEK RANCH
%MT PARADISE LLC
1924 W STEVENS ST SUITE 203
BOZEMAN, MT 59718

Priority Date: OCTOBER 1, 1884

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 1.75 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:** 245.00

***Source Name:** ELBOW CREEK, NORTH FORK

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	26	5S	9E	PARK

Period of Diversion: MAY 1 TO AUGUST 1

Diversion Means: HEADGATE

Ditch Name: WALKER DITCH

2 - SECONDARY		NWNENW	22	5S	9E	PARK
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Period of Diversion: MAY 1 TO AUGUST 1

Diversion Means: HEADGATE

WATER DIVERTED FROM ELBOW CREEK, NORTH FORK IS CONVEYED TO MAGEE CREEK WHICH IS USED AS A NATURAL CARRIER TO CONVEY WATER TO THE PLACE OF USE.

Period of Use: MAY 1 TO AUGUST 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	76.00		S2SW	10	5S	9E	PARK
2	4.00		W2SWSE	10	5S	9E	PARK
3	80.00		W2NW	15	5S	9E	PARK
4	18.50		W2E2NW	15	5S	9E	PARK
5	56.50		W2SW	15	5S	9E	PARK

6	10.00	W2NESW	15	5S	9E	PARK
Total:	245.00					

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.

36721-00 36722-00 36727-00 36728-00

**WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B**

Water Right Number: 43B 214201-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

Priority Date: JULY 17, 1957

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 11/27/1990 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 184.00 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: 70.00

Source Name: MAGEE 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		NWNENW	22	5S	9E	PARK

Period of Diversion: APRIL 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: WALKER DITCH

Period of Use: APRIL 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	70.00		E2E2	16	5S	9E	PARK
Total:	70.00						

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.

214201-00

214202-00