

ELECTRONICALLY FILED

Montana Water Court  
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43B-0065-R-2020

September 15, 2021

Montana Water Court

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

\* \* \* \* \*

CLAIMANTS: Warfield Ranch; Melissa A. Klarr

**CASE 43B-0065-R-2020**

43B 193695-00  
43B 195243-00  
43B 195244-00  
43B 210762-00

**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

Warfield Ranch claim 43B 193695-00 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 65 MINER'S INCHES DECREED IN CASE NO. 7583, PARK COUNTY. 193695-00, 195243-00.

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

Melissa A. Klarr claim 43B 195243-00 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 65 MINER'S INCHES DECREED IN CASE NO. 7583 , PARK COUNTY. 193695-00, 195243-00.

THE MAJORITY OF THIS PARCEL AND THE PLACE OF USE APPEAR TO BE LOCATED IN LOT 3 OF PLAT 22 IN THE NENENW SEC 3, T6S, R9E, PARK COUNTY.

POINT OF DIVERSION 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.

Melissa A. Klarr claim 43B 195244-00 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 25 MINER'S INCHES DECREED IN CASE NO. 7583 , PARK COUNTY. 195244-00, 210762-00.

POINT OF DIVERSION 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.

Warfield Ranch claim 43B 210762-00 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 25 MINER'S INCHES DECREED IN CASE NO. 7583, PARK COUNTY. 195244-00, 210762-00.

The issue remarks were not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimant an opportunity to file additional information or evidence. As agreed by the parties, on June 19, 2020 the Order Setting Deadlines Pursuant To Section 85-2-248(5), MCA, was issued for the DNRC to assist the parties with the point of diversion and place of use concerns.

On September 17, 2020 the DNRC Memorandum was filed making various recommendations after meeting with the parties. On December 10, 2020 the DNRC filed a supplemental aerial photograph copy with the places of use for the Melissa A. Klarr claims clearly marked. A copy of this aerial photograph has been added to the Melissa A. Klarr claim files.

On January 22, 2021 Dr. Caroline Klarr, on behalf of her mother Melissa A. Klarr, filed a Response with copies of various documents, including a copy of a map and its notation that it is dated March 27, 1947, prepared from a survey completed March 19, 1947, concerning the J. S. Klarr Cabin Site located in section 33, T5S, R9E and section 3, T6S, R9E, and a copy of the Abstract Of Title for the Melissa A. Klarr property. The Abstract Of Title includes a copy of the September 15, 1947 Warranty Deed transferring 1.717 acres in sections 33, T5S, R9E and section 3, T6S, R9E from W. E. Moore and Louise Moore to J. S. Klarr and Caroline Klarr (Dr. Caroline Klarr's great grandparents).

On April 14, 2021 Warfield Ranch filed a Verified Motion To Amend concerning all four claims. This is deemed a motion to amend filed pursuant to section 85-2-233(6), MCA, for the Warfield Ranch claims. Only the claimant may amend their own claims pursuant to this statute. The balance of the Motion concerning the Melissa A. Klarr claims is deemed a generic motion to change the Melissa A. Klarr claims, filed by Warfield Ranch. The Certificate of Service states that the Motion was mailed to Melissa A. Klarr at her current address of record. Fourteen days passed with no response filed by Melissa A. Klarr. On May 13, 2021 an Order Setting Filing Deadline was issued with a DRAFT Master's Report and abstracts for the parties to review. On June 11, 2021 Dr. Caroline Klarr, on behalf of Melissa A. Klarr, filed a response stating that John S. Klarr and Caroline Klarr were her great grandparents (not grandparents), that Melissa Klarr did not receive a copy of the April 14, 2021 Warfield Ranch Verified Motion To Amend, and concluding that she saw no other changes to be made to the drafts. Nothing was filed by Warfield Ranch.

The information filed by the parties addresses and resolves all of the issue remarks. All of the settlements documents are viewable in the Court's FullCourt Enterprise case management system.

#### APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

The Montana Water Court has jurisdiction to review a motion to amend pursuant to section 85-2-233(6), MCA.

Rule 15 M.R.Civ.P. restricts the scope of the amendments to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the "same set of operative facts as contained in the original pleading." *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985). The requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

Notice must be published by newspaper if the requested amendments "may adversely affect other water rights." Section 85-2-233(6)(a)(i), MCA.

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.

#### FINDINGS OF FACT

1. The changes requested in the Verified Motion to Amend for claims 43B 193695-00 and 43B 210762-00 arise out of the same conduct, transaction, or occurrence specified on the original Statements of Claim, are based on the same operative facts specified in the Statements of Claim, and merely make more specific that which was already claimed on the original Statements of Claim.

2. For Warfield Ranch claim 43B 193695-00, the Preliminary Decree states that the ditch name is WINSLOW DITCH. The ditch name should be MILL CREEK FLAT DITCH. As requested, the following clarification remark should be added to memorialize the diversion history for this right: THIS WATER RIGHT WAS ORIGINALLY DECREED THROUGH THE WINSLOW DITCH, THE HEADGATE FOR WHICH IS LOCATED IN THE NENESE OF SECTION 3, T6S, R9E. THE POINT OF DIVERSION WAS CHANGED TO MILL CREEK FLAT DITCH IN 1969. The point of diversion issue remark should be removed as addressed and resolved.

The Preliminary Decree states that the place of use is 65.00 acres in the SE section 33, T5S, R9E, PARK. The place of use should be 34.00 acres in the S2SE section 33, T5S, R9E, PARK and 31.00 acres in the N2NW section 3, T6S, R9E, PARK.

The decree exceeded issue remark is resolved by the changes made to Melissa A. Klarr claim 43B 195243-00. The decree exceeded issue remark should be removed as addressed and resolved.

The remark concerning the period of diversion provides notice of this change made prior to issuance of the Preliminary Decree and does not raise an unresolved issue which needs to be addressed. There are no proceedings required for this remark. The remark should be removed as having served its notice purpose.

3. For Melissa A. Klarr claim 43B 195243-00, the Preliminary Decree states that the

priority date is June 1, 1903 and the type of historical right is DECREED. The type of historical right should be USE. The priority date should be March 19, 1947, the date referenced on the map for the J. S. Klarr cabin site. The decree exceeded issue remark should be removed as addressed and resolved.

The Preliminary Decree states that the point of diversion is in the NWSWNE section 33, T5S, R9E, PARK and that the ditch name is CARTERS DITCH. The point of diversion should be NENENW section 3, T6S, R9E, PARK and the ditch name should be UPLAND DITCH.

The Preliminary Decree states that place of use is 1.70 acres in the SESESE section 33, T5S, R9E, PARK. The place of use should be 1.70 acres in the NWNENW section 3, T6S, R9E, PARK. The place of use issue remark should be removed as addressed and resolved.

The remarks concerning the period of diversion and point of diversion provide notice of changes made prior to issuance of the Preliminary Decree and do not raise unresolved issues which need to be addressed. There are no proceedings required for these remarks. These remarks should be removed as having served their notice purposes.

4. For Melissa A. Klarr claim 43B 195244-00, the Preliminary Decree states that the priority date is June 1, 1932 and the type of historical right is DECREED. The type of historical right should be USE. The priority date should be March 19, 1947, the date referenced on the map for the J. S. Klarr cabin site. The decree exceeded issue remark should be removed as addressed and resolved.

The Preliminary Decree states that the point of diversion is in the NWSWNE section 33, T5S, R9E, PARK and that the ditch name is CARTERS DITCH. The point of diversion should be NENENW section 3, T6S, R9E, PARK and the ditch name should be UPLAND DITCH.

The Preliminary Decree states that place of use is 1.70 acres in the SESESE section 33, T5S, R9E, PARK. The place of use should be 1.70 acres in the NWNENW section 3, T6S, R9E, PARK.

The remarks concerning the period of diversion and point of diversion provide notice of changes made prior to issuance of the Preliminary Decree and do not raise unresolved issues which need to be addressed. There are no proceedings required for these remarks. These remarks should be removed as having served their notice purposes.

5. For Warfield Ranch claim 43B 210762-00, the Preliminary Decree states that the ditch name is UPLAND DITCH. The ditch name should be MILL CREEK FLAT DITCH. As requested, the following clarification remark should be added to memorialize the diversion history for this right: THIS WATER RIGHT WAS ORIGINALLY DECREED THROUGH THE UPLAND DITCH, THE HEADGATE FOR WHICH IS LOCATED IN THE NENENW OF SECTION 3, T6S, R9E. THE POINT OF DIVERSION WAS CHANGED TO MILL CREEK FLAT DITCH IN 1969.

The Preliminary Decree states that the place of use is 65.00 acres in the SE section 33, T5S, R9E, PARK. The place of use should be 34.00 acres in the S2SE section 33, T5S, R9E, PARK and 31.00 acres in the N2NW section 3, T6S, R9E, PARK.

The decree exceeded issue remark is resolved by the changes made to Melissa A. Klarr claim 43B 195244-00. The decree exceeded issue remark should be removed as addressed and resolved.

The remark concerning the period of diversion provides notice of this change made prior to issuance of the Preliminary Decree and does not raise an unresolved issue which needs to be addressed. There are no proceedings required for this remark. The remark should be removed as having served its notice purpose.

#### CONCLUSIONS OF LAW

1. The requested amendments do not adversely affect other water rights as they are corrections to the abstracts which do not make any changes to the actual historical use of the claimed rights on the ground. Notice by publication of these amendments is not required. Section 85-2-233(6), MCA.

2. Each requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

3. The DNRC Memorandum, the additional documentation attached to the Response, and the Verified Motion To Amend are sufficient to contradict and overcome the *prima facie* claims as they appeared in the Preliminary Decree and sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

## RECOMMENDATIONS

Based upon the above, this Master recommends that the Court grant the Verified Motion to Amend 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.

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Kathryn L. W. Lambert  
Senior Water Master

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

**Water Right Number:** **43B 193695-00** STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**Owners:** WARFIELD RANCH  
538 MILL CREEK RD  
LIVINGSTON, MT 59047

**Priority Date:** JUNE 1, 1903

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 1.62 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:** 65.00

**Source Name:** MILL CREEK

**Source Type:** SURFACE WATER

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

<b>ID</b>	<b>Govt Lot</b>	<b>Qtr</b>	<b>Sec</b>	<b>Twp</b>	<b>Rge</b>	<b>County</b>	
1		NE	SW	3	6S	9E	PARK

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

**Diversion Means:** HEADGATE

**Ditch Name:** MILL CREEK FLAT DITCH

THIS WATER RIGHT WAS ORIGINALLY DECREED THROUGH THE WINSLOW DITCH, THE HEADGATE FOR WHICH IS LOCATED IN THE NENESE OF SECTION 3, T6S, R9E. THE POINT OF DIVERSION WAS CHANGED TO MILL CREEK FLAT DITCH IN 1969.

**Period of Use:** MAY 1 TO SEPTEMBER 1

**Place of Use:**

<b>ID</b>	<b>Acres</b>	<b>Govt Lot</b>	<b>Qtr</b>	<b>Sec</b>	<b>Twp</b>	<b>Rge</b>	<b>County</b>
1	34.00		S2SE	33	5S	9E	PARK
2	31.00		N2NW	3	6S	9E	PARK
<b>Total:</b>	<b>65.00</b>						

**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.

193694-00        193695-00

AUTHORIZATION TO CHANGE POINT OF DIVERSION ISSUED 06/28/1991. NOTICE OF COMPLETION DUE 11/30/1993. SEE 43B 193695-00.

LEASE AUTHORIZATION TO CHANGE THE POINT, PLACE, AND PURPOSE OF USE ISSUED 01/27/1993 TO THE DEPARTMENT OF FISH, WILDLIFE & PARKS. SEE 43B 5862-00.

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

**Water Right Number:** **43B 195243-00** STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** MELISSA A KLARR  
PO BOX 133  
PRAY, MT 59065

**Priority Date:** MARCH 19, 1947

**Type of Historical Right:** USE

**Purpose (Use):** DOMESTIC

**Flow Rate:** 27.00 GPM

**Volume:** 1.50 AC-FT

**Households:** 2

**Maximum Acres:** 1.70

**Source Name:** MILL 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		NENENW	3	6S	9E	PARK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DITCH

**Ditch Name:** UPLAND DITCH

**Period of Use:** JANUARY 1 TO DECEMBER 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	1.70		NWNENW	3	6S	9E	PARK
<b>Total:</b>	1.70						

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

**Water Right Number:** **43B 195244-00** STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** MELISSA A KLARR  
PO BOX 133  
PRAY, MT 59065

**Priority Date:** MARCH 19, 1947

**Type of Historical Right:** USE

**Purpose (Use):** DOMESTIC

**Flow Rate:** 26.93 GPM

**Volume:** 1.50 AC-FT

**Households:** 2

**Maximum Acres:** 1.70

**Source Name:** MILL 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		NENENW	3	6S	9E	PARK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DITCH

**Ditch Name:** UPLAND DITCH

**Period of Use:** JANUARY 1 TO DECEMBER 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	1.70		NWNENW	3	6S	9E	PARK
<b>Total:</b>	1.70						

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

**Water Right Number:** **43B 210762-00** STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**Owners:** WARFIELD RANCH  
538 MILL CREEK RD  
LIVINGSTON, MT 59047

**Priority Date:** JUNE 1, 1932

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 281.00 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:** 65.00

**Source Name:** MILL CREEK

**Source Type:** SURFACE WATER

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

<b>ID</b>	<b>Govt Lot</b>	<b>Qtr Sec</b>	<b>Sec</b>	<b>Twp</b>	<b>Rge</b>	<b>County</b>
1		NESE	3	6S	9E	PARK

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

**Diversion Means:** HEADGATE

**Ditch Name:** MILL CREEK FLAT DITCH

THIS WATER RIGHT WAS ORIGINALLY DECREED THROUGH THE UPLAND DITCH, THE  
HEADGATE FOR WHICH IS LOCATED IN THE NENENW OF SECTION 3, T6S, R9E. THE  
POINT OF DIVERSION WAS CHANGED TO MILL CREEK FLAT DITCH IN 1969.

**Period of Use:** MAY 1 TO SEPTEMBER 1

**Place of Use:**

<b>ID</b>	<b>Acres</b>	<b>Govt Lot</b>	<b>Qtr Sec</b>	<b>Sec</b>	<b>Twp</b>	<b>Rge</b>	<b>County</b>
1	34.00		S2SE	33	5S	9E	PARK
2	31.00		N2NW	3	6S	9E	PARK
<b>Total:</b>	<b>65.00</b>						

**Remarks:**

AUTHORIZATION TO CHANGE POINT OF DIVERSION ISSUED 06/28/1991. NOTICE OF COMPLETION DUE  
11/30/1993. SEE 43B 193695-00.

LEASE AUTHORIZATION TO CHANGE THE POINT, PLACE, AND PURPOSE OF USE ISSUED 01/27/1993 TO  
THE DEPARTMENT OF FISH, WILDLIFE & PARKS. SEE 43B 5862-00.