

43D-0292-R-2020

September 10, 2021

Montana Water Court  
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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
CLARKS FORK YELLOWSTONE RIVER (BASIN 43D)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Living Waters Ranch LLC; Alexis M. Adams;  
Dylan E. Avery; Mary E. Avery; Thomas A. Avery;  
Bottrell Family Investments Limited Partnership;  
Catherine C. Neu; James E. Neu; Denise Rivette

**43D-0292-R-2020**  
43D 17193-00  
43D 200088-00

**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 the 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 the Master's Report was filed and mailed. Rule 23 of the Water Right 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**

### **Statement of the case**

Irrigation claim 43D 17193-00 appeared in the Preliminary Decree with the following issue remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 43D 017193-00, 43D 200086-00, 43D 200088-00, 43D 200089-00, 43D 200090-00, 43D 200091-00, 43D 200095-00, 43D 200096-00.

THE CARBON COUNTY WATER RESOURCES SURVEY (1966) APPEARS TO INDICATE 92.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

THE CARBON COUNTY WATER RESOURCES SURVEY (1946) APPEARS TO INDICATE 103.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

USDA AERIAL PHOTOGRAPH NO(S). 279-10, DATED 10/03/1980, APPEARS TO INDICATE 126.50 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

Irrigation claim 43D 200088-00 appeared in the Preliminary Decree with the following issue remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 43D 017193-00, 43D 200086-00, 43D 200088-00, 43D 200089-00, 43D 200090-00, 43D 200091-00, 43D 200095-00, 43D 200096-00.

DITCH NAME 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

Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim.

Montana law requires the Water Court to resolve issue remarks. Co-claimants of claim 43D 200088-00, Dylan E. Avery, Thomas A. Avery, Mary E. Avery, and Alexis M. Adams, did not complete the issue remark resolution process. The court set a show cause filing deadline for these claimants.

## **Issues**

The Preliminary Decree abstract for claim 43D 17193-00 identifies a 120.00 acre place of use in Sections 7 and 8 of Township 6 South, Range 21 East, Carbon County.

The Preliminary Decree abstract for claim 43D 200088-00 identifies a 240.00 acre place of use in Sections 5, 6, 7, and 8 of Township 6 South, Range 21 East and Crockett Ditch.

1. What are the historically accurate maximum acres irrigated and place of use for each claim?
2. Are the overlapping place of use issue remarks on both claims and the maximum acres irrigated issue remarks on claim 43D 17193-00 resolved?
3. Is the ditch name issue remark on claim 43D 200088-00 resolved?

## **Findings of fact**

1. Living Waters Ranch LLC filed a Verified Motion to Amend Water Right Claim 43D 17193-00. The claimant proposed a reduced number of maximum acres irrigated and refined place of use.

2. Bottrell Family Investments Limited Partnership, James E. Neu, Catherine C. Neu, and Denise Rivette filed Verified Motions to Amend Water Right Claim 43D 200088-00. These claimants proposed a reduced number of maximum acres irrigated and refined place of use.

3. DNRC filed a Memorandum concerning the above claimants' attempt at resolution of the overlapping place of use and maximum acres irrigated issue remarks on April 15, 2021. DNRC reported the overlapping place of use and maximum acres irrigated issue remarks were resolved, but co-claimants of claim 43D 200088-00, Alexis M. Adams, Dylan E. Avery, Mary E. Avery, and Thomas A. Avery, failed to complete the issue remark resolution process with the DNRC.

4. An order set a filing deadline for Alexis M. Adams, Dylan E. Avery, Mary E. Avery, and Thomas A. Avery to show cause why irrigation claim 43D 200088-00 should not be amended as proposed by Bottrell Family Investments Limited Partnership, James

E. Neu, Catherine C. Neu, and Denise Rivette and as recommended by DNRC to resolve the overlapping place of use issue remark on claim 43D 200088-00. Co-claimants Alexis M. Adams, Dylan E. Avery, Mary E. Avery, and Thomas A. Avery failed to comply with this show cause filing deadline.

5. Claim 43D 17193-00 historically irrigated 96.57 acres.
6. Claim 43D 200088-00 historically irrigated 18.40 acres.
7. The Preliminary Decree abstract for claim 43D 200088-00 identified the historically accurate ditch name – Crockett Ditch.

### **Principles of law**

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. 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 an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

4. 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. Section 85-2-248(3), MCA.

5. If the Montana Water Court cannot resolve issue remarks based upon

information in the claim file or information available to the Court, claimants shall be required to confer with the DNRC to attempt resolution of the issue remarks. Claimants shall file documentation to resolve the issue remarks, and the DNRC shall submit recommendations regarding disposition of the issue remarks. Section 85-2-248(5), MCA.

6. All parties subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

## **Analysis**

### **Issues 1 and 2 – maximum acres irrigated and place of use; overlapping place of use issue remark resolution, both claims and maximum acres irrigated issue remark resolution, claim 43D 17193-00**

DNRC reviewed 1962 and 1980 aerial photos, mapping the conveyance system and places of use on the 1962 and 1980 aerial photos, then overlaying the mapping on a 2017 aerial photo for a more accurate, undistorted measurement of the maximum acres irrigated within the historical places of use. DNRC reviewed a report from the consultant for Bottrell Family Investments Limited Partnership, Pat Riley and visited with Denise Rivette; Rodney Cole, Managing Member on behalf of Living Waters Ranch LLC; and consultant Pat Riley. Living Waters Ranch LLC proposed a reduced place of use for claim 43D 17193-00. Denise Rivette; Jim Bennett, President on behalf of Bottrell Family Investments Limited Partnership; Catherine C. Neu; and James E. Neu proposed a reduced place of use for claim 43D 200088-00. DNRC recommended removal of the overlapping place of use<sup>1</sup> issue remark on both claims and the maximum acres irrigated issue remarks on claim 43D 17193-00 based upon Living Waters Ranch LLC's, Denise

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<sup>1</sup> Due to recent Water Court proceedings (Cases 43D-R54 and Case 43D-R55), the only claim that still had an overlapping place of use with claim 43D 17193-00 was claim 43D 200088-00.

Rivette's, Bottrell Family Investments Limited Partnership's, Catherine C. Neu's, and James E. Neu's agreement with the places of use confirmed by DNRC on the 1962 and 1980 aerial photos.

Alexis M. Adams', Dylan E. Avery's, Mary E. Avery's, and Thomas A. Avery's failure to provide any evidence to address or resolve the overlapping place of use issue remark on claim 43D 200088-00 left DNRC's review of aerial photos and recommendation, along with Denise Rivette's, Bottrell Family Investments Limited Partnership's, Catherine C. Neu's, and James E. Neu's agreement, as strong evidence of actual historical use.

DNRC's Memorandum included aerial photos depicting the reduced places of use for each claim and the conveyance system. Copies of the aerial photos are included with this report. Both the aerial photos and the report will be placed in the claim files for future reference.

### **Conclusions of law**

Based on DNRC's recommendation and Living Waters Ranch LLC's agreement, the maximum acres irrigated and place of use identified by claim 43D 17193-00 should be modified as recommended by DNRC and agreed to by Living Waters Ranch LLC. The evidence entered into the record is a reduction within the parameters of statement of claim 43D 17193-00, justifies the modifications to the claim, and resolves the issue remarks on the claim.

Based on DNRC's recommendation, and Denise Rivette's, Bottrell Family Investments Limited Partnership's, Catherine C. Neu's, and James E. Neu's agreement, and the remainder of the claimants' failure to comply with orders issued by the Water Master, claim 43D 200088-00 should be amended as recommended by DNRC and agreed to by Denise Rivette, Bottrell Family Investments Limited Partnership, Catherine C. Neu, and James E. Neu.

The overlapping place of use issue remark on both claims and the maximum acres irrigated issue remarks on claim 43D 17193-00 are resolved.

### Issue 3 – ditch name; issue remark resolution, 43D 200088-00

Irrigation claim 43D 200088-00 appeared in the Preliminary Decree with the above referenced notice issue remark concerning ditch name.

Water users were given the opportunity to review the claim and file an objection. The deadline to file objections has expired. No objections were filed against the claim.

#### Conclusions of law

The ditch name identified by the Preliminary Decree abstract is historically accurate. The notice issue remark concerning ditch name served its purpose.

#### Recommendations

Irrigation claim 43D 17193-00 should be amended as follows to accurately reflect historical use.

<b><u>MAXIMUM ACRES:</u></b>		<del>120.00</del>				<b>96.57</b>		
<b><u>PLACE OF USE:</u></b>								
	<b><u>ACRES</u></b>	<b><u>GOVT LOT</u></b>		<b><u>QTR SEC</u></b>	<b><u>SEC</u></b>	<b><u>TWP</u></b>	<b><u>RGE</u></b>	<b><u>COUNTY</u></b>
	<del>37.52</del> <del>29.00</del>			NESE	7	6S	21E	CARBON
	<del>38.67</del> <del>40.00</del>			NWSE	7	6S	21E	CARBON
	<del>5.81</del> <del>25.00</del>	7	SW	<del>N2S2</del>	7	6S	21E	CARBON
	<del>2.07</del> <del>11.00</del>			NWSW	8	6S	21E	CARBON
	<del>12.50</del> <del>15.00</del>			SWSW	8	6S	21E	CARBON
TOTAL:	<del>96.57</del> <del>120.00</del>							

Irrigation claim 43D 200088-00 should be amended as follows to accurately reflect historical use.

<b><u>MAXIMUM ACRES:</u></b>		<del>240.00</del>				<b>18.40</b>	
<b><u>PLACE OF USE:</u></b>							
	<b><u>ACRES</u></b>	<b><u>GOVT LOT</u></b>	<b><u>QTR SEC</u></b>	<b><u>SEC</u></b>	<b><u>TWP</u></b>	<b><u>RGE</u></b>	<b><u>COUNTY</u></b>
	4.50		NWNWSE	5	6S	21E	CARBON
	<del>3.80 110.00</del>	SENENE	SW	7 5	6S	21E	CARBON
	<del>5.00 6.50</del>	W2NENW	SESE	8 6	6S	21E	CARBON
	<del>2.40 15.00</del>	SENWNW	NENE	8 7	6S	21E	CARBON
	<del>2.20 80.00</del>	SWNWNW	NW	8	6S	21E	CARBON
	<del>5.00 24.00</del>	SWNW	NWSW	8	6S	21E	CARBON
TOTAL:	<del>18.40 240.00</del>						

The issue remarks should be removed from the claim abstracts.

Post Decree Abstracts of Water Right Claim accompany this report to confirm implementation of the recommendations in the state's centralized water right record system.

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Anna M. Stradley  
Senior Water Master

**Service via USPS Mail**

Living Waters Ranch LLC  
309 Clear Creek Rd  
Roberts, MT 59070

Alexis M Adams  
PO Box 2088  
Red Lodge, MT 59068

Dylan E Avery  
Mary E Avery  
Thomas A Avery  
342 Clear Creek Rd  
Roberts, MT 59070

Bottrell Family Investments  
Limited Partnership  
PO Box 80284  
Billings, MT 59108

Catherine C Neu  
James E Neu  
329 Clear Creek Rd  
Roberts, MT 59070

Denise Rivette  
344 Clear Creek Rd  
Roberts, MT 59070-9416



**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
CLARKS FORK YELLOWSTONE RIVER  
BASIN 43D**

**Water Right Number:** 43D 17193-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** LIVING WATERS RANCH LLC  
309 CLEAR CREEK RD  
ROBERTS, MT 59070

**Priority Date:** APRIL 15, 1896

**Type of Historical Right:** DECREEED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 3.50 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:** 96.57

**Source Name:** ROCK 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		SWSE	11	7S	20E	CARBON

**Period of Diversion:** MAY 1 TO SEPTEMBER 30

**Diversion Means:** HEADGATE

**Ditch Name:** CLEAR CREEK DITCH

**Period of Use:** MAY 1 TO SEPTEMBER 30

**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	37.52		NESE	7	6S	21E	CARBON
2	38.67		NWSE	7	6S	21E	CARBON
3	5.81	7	SW	7	6S	21E	CARBON
4	2.07		NWSW	8	6S	21E	CARBON
5	12.50		SWSW	8	6S	21E	CARBON
<b>Total:</b>	96.57						

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
CLARKS FORK YELLOWSTONE RIVER  
BASIN 43D**

**Water Right Number:**      **43D 200088-00**      STATEMENT OF CLAIM

**Version:**      3 -- POST DECREE

**Status:** ACTIVE

**Owners:**

ALEXIS M ADAMS  
PO BOX 2088  
RED LODGE, MT 59068

DYLAN E AVERY  
342 CLEAR CREEK RD  
ROBERTS, MT 59070

MARY E AVERY  
342 CLEAR CREEK RD  
ROBERTS, MT 59070

THOMAS A AVERY  
342 CLEAR CREEK RD  
ROBERTS, MT 59070

CATHERINE C NEU  
329 CLEAR CREEK RD  
ROBERTS, MT 59070

JAMES E NEU  
329 CLEAR CREEK RD  
ROBERTS, MT 59070

DENISE RIVETTE  
344 CLEAR CREEK RD  
ROBERTS, MT 59070 9416

BOTTRELL FAMILY INVESTMENTS LIMITED PARTNERSHIP  
PO BOX 80284  
BILLINGS, MT 59108

OWNERSHIP UPDATE PROCESSED TO ADD NEW OWNERS. THE WATER RIGHT  
MAY BE SPLIT INTO SEPARATE WATER RIGHTS UPON REQUEST OF THE  
OWNERS.

**Priority Date:**      JUNE 1, 1897

**Type of Historical Right:**      DECREED

**Purpose (Use):**      IRRIGATION

**Irrigation Type:**      SPRINKLER/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:**      18.40

**Source Name:**      CLEAR 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		SWNESE	18	6S	21E	CARBON

**Period of Diversion:** APRIL 15 TO NOVEMBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** CROCKETT DITCH

**Period of Use:** APRIL 15 TO NOVEMBER 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	3.80		SENESE	7	6S	21E	CARBON
2	5.00		W2NENW	8	6S	21E	CARBON
3	2.40		SENWNW	8	6S	21E	CARBON
4	2.20		SWNWNW	8	6S	21E	CARBON
5	5.00		SWNW	8	6S	21E	CARBON
<b>Total:</b>	18.40						

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**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.

200086-00	200088-00	200089-00	200090-00	200091-00	200095-00
200096-00	206820-00				