

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

CLAIMANT: Ellis Cattle Co.

NOTICE OF INTENT TO APPEAR: Weast Partnership

43D-0563-R-2021
43D 16991-00
43D 16994-00
43D 197755-00

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

The Water Court issued two decrees for Basin 43D - the Temporary Preliminary Decree in 1993 and the Preliminary Decree in 2017. To prepare the Preliminary Decree for issuance, the Water Court ordered the Department of Natural Resources and Conservation ("DNRC") to standardize points of diversion, ditch names, and sources, and to add an issue remark to claims noting such modifications. The above captioned irrigation claims appeared in the Preliminary Decree with an issue remark noting ditch name was modified by the DNRC. Each claim also received a priority date issue remark.

No objections were filed against the claims. The claims received a notice of intent to appear from Weast Partnership to "make sure any changes made to this [these] water right[s] conform to the previous stipulation."

Montana law requires the Water Court to resolve issue remarks and notices of intent to appear. Based upon information in the claim files and before the court, the issue remarks were resolved without any modification to the claims.

An order set a filing deadline for Weast Partnership to comment on the court's proposed resolution of the issue remarks without changes to the claims. The order included language stating that if no comments were filed by the deadline, the court would conclude Weast Partnership agreed no changes should be made to the claims, and the issue remarks should be removed.

Weast Partnership did not file any comment by the deadline.

Issues

1. Are the ditch name and priority date issue remarks on each claim resolved?
2. Are the notice of intent to appear party's concerns resolved?

Findings of fact

1. The Preliminary Decree abstracts identify the historically accurate ditch name and priority date.
2. The priority date and ditch name issue remarks are resolved.
3. Weast Partnership's concerns are resolved.

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. Prima facie proof may be 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. Any individual with a valid appropriation not a party to a district court decree may petition the district court to make the individual a party to the decree and establish the right in relation to the other rights in the decree. Section 89-835, RCM (1947) (repealed 1973). Failure to follow this procedure disallows an appropriator to assert a priority against any subsequent appropriator identified by the decree. Section 89-837,

RCM (1947) (repealed 1973).

6. Judicial notice of facts may be taken from a source “whose accuracy cannot be reasonably questioned.” Rule 201, M.R.Ev.

Analysis

Issues 1- 3 – ditch name, priority date and issue remark resolution

The ditch name issue remark instructed water users that if no objections were filed to the modifications, the ditch name would remain as it appears on the Preliminary Decree abstracts. No objections were filed to the claims and the notice of intent to appear for the claims is resolved.

The priority date issue remark on claim 43D 16991-00 notes the claim is a filed right on Hogan Creek with a priority date predating a district court decree for West Red Lodge Creek (Case No. 247). The decree includes the source identified by the claim - Hogan Creek. The record does not indicate why this claim was not included in Case No. 247, Carbon County. The issue remark is not supported by evidence sufficient to overcome the prima facie proof afforded the priority date for this claim.

The priority date issue remark on claim 43D 16994-00 notes at the time of the claimed priority date, the place of use was part of an Indian reservation. The remark gave notice to other water users of their opportunity to review the claim and file an objection to the claim if the priority date was not historically accurate. No objections were filed to the claim and the notice of intent to appear for the claim is resolved.

The priority date issue remark on claim 43D 197755-00 notes the claim is a filed right on Hogan Creek with a priority date postdating a district court decree for West Red Lodge Creek (Case No. 247). The decree includes the source identified by the claim - Hogan Creek. This remark reflects § 89-835 of the Revised Codes of Montana (1947) (repealed 1973), governing the appropriation of junior water rights from a decreed stream. The statute allows an appropriator to petition the district court to open the decree, add the new appropriation, and establish its relation to the other rights affected by the decree. If an appropriator fails to follow this procedure, that water right cannot be exercised against any appropriator mentioned in or bound by that decree. *See also*

Section 89-837, RCM (1947) (repealed 1973). In other words, any appropriator who failed to follow these statutes would become junior to a subsequent appropriator who followed the statutes. The issue remark on claim 43D 197755-00 identifies this possibility.

The Preliminary Decree source index for Basin 43D identifies all claims from Hogan Creek. No claim identifies a priority date junior to claim 43D 197755-00. The remark does not raise a valid issue.

Conclusions of law

Information in the claim files and before the court resolves the ditch name and priority date issue remarks. The issue remarks served their notice purpose. The Preliminary Decree abstracts identify the historically accurate ditch name and priority date for each claim. The concerns of the notice of intent to appear party, Weast Partnership, are resolved.

Recommendations

Irrigation claims 43D 16991-00, 43D 16994-00, and 43D 197755-00 accurately reflect historical use. No changes to the elements of the claims should be made.

The ditch name and priority date issue remarks should be removed from the claim abstracts.

Post Decree Abstracts of Water Right Claim accompany this Report to confirm removal of the issue remarks in the state's centralized water right record system.

Anna M. Stradley
Senior Water Master

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

Water Right Number: 43D 16991-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ELLIS CATTLE CO
18 ELLIS LN
RED LODGE, MT 59068

Priority Date: NOVEMBER 10, 1896

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 7.50 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: 631.00

Source Name: HOGAN 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		SWNWSE	22	6S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
Ditch Name:	ELLIS DITCH					
2		NENENW	27	6S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
Ditch Name:	ELLIS DITCH					
3		NWNWSE	4	7S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
4		NENWSW	4	7S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
Ditch Name:	ELLIS DITCH					

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

Water Right Number: 43D 16994-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: ELLIS CATTLE CO
18 ELLIS LN
RED LODGE, MT 59068

Priority Date: MAY 18, 1886

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 4.12 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: 321.00

Source Name: THIEL 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		SESWNW	26	6S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
2		NWNWSW	26	6S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
3		NWSWSW	26	6S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
Ditch Name:	ELLIS DITCH					
4		SWSESE	27	6S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
5		SWNWNE	34	6S	19E	CARBON
Period of Diversion:	APRIL 1 TO OCTOBER 1					
Diversion Means:	HEADGATE					
Ditch Name:	THIEL DITCH					

Period of Use: APRIL 1 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	78.00		SE	23	6S	19E	CARBON
2	81.00		NE	26	6S	19E	CARBON
3	108.00		NW	26	6S	19E	CARBON
4	6.00	16	NWSW	26	6S	19E	CARBON
5	9.00		E2SENE	27	6S	19E	CARBON
6	23.00		NESE	27	6S	19E	CARBON
7	16.00		SESE	27	6S	19E	CARBON
Total:	321.00						

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.

16994-00 16999-00 17005-00

AUTHORIZATION TO CHANGE THE PLACE OF USE ISSUED 09/15/1998. NOTICE OF COMPLETION DUE 12/31/1999. SEE 43D-016994-00 .

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

Water Right Number: 43D 197755-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ELLIS CATTLE CO
18 ELLIS LN
RED LODGE, MT 59068

Priority Date: JUNE 25, 1963

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 2.05 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: 279.00

Source Name: HOGAN 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		SWNWSE	22	6S	19E	CARBON
Period of Diversion: APRIL 1 TO OCTOBER 1						
Diversion Means: HEADGATE						
Ditch Name: ELLIS DITCH						
2		NENENW	27	6S	19E	CARBON
Period of Diversion: APRIL 1 TO OCTOBER 1						
Diversion Means: HEADGATE						
Ditch Name: ELLIS DITCH						
3		SENWNW	4	7S	19E	CARBON
Period of Diversion: APRIL 1 TO OCTOBER 1						
Diversion Means: HEADGATE						
Ditch Name: ELLIS DITCH						
4		NWSESE	5	7S	19E	CARBON
Period of Diversion: APRIL 1 TO OCTOBER 1						
Diversion Means: HEADGATE						
Ditch Name: HOGAN DITCH						
Period of Use: APRIL 1 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	41.00		E2NE	22	6S	19E	CARBON
2	3.00		SESWNE	22	6S	19E	CARBON
3	7.00		W2NESE	22	6S	19E	CARBON
4	21.00		NWSE	22	6S	19E	CARBON
5	6.00		W2NWNW	23	6S	19E	CARBON
6	51.00		NE	33	6S	19E	CARBON
7	41.00		NW	33	6S	19E	CARBON
8	23.00		NWSE	33	6S	19E	CARBON
9	32.00		N2SW	33	6S	19E	CARBON
10	18.00		SESW	33	6S	19E	CARBON
11	28.00		SWSW	33	6S	19E	CARBON
12	8.00		N2NWNW	4	7S	19E	CARBON
Total:	279.00						

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.

16991-00	16992-00	16996-00	16997-00	17000-00	17001-00
40283-00	197754-00	197755-00			