

Montana Water Court
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ELECTRONICALLY FILED

43D-0628-R-2021

September 15, 2021

Montana Water Court

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

CLAIMANTS: Anne Marie Lohof; Bruce A. Lohof

CASE 43D-0628-R-2021

43D 29356-00

43D 29357-00

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

Lawn and garden claims 43D 29356-00 and 43D 29357-00 appeared in the Preliminary Decree with issue remarks. Issue remarks may result from Department of Natural Resources and Conservation ("DNRC") claims examination. DNRC confirms the historical use of water right claims and identifies issues with claims. If DNRC cannot confirm some aspect of a claim, DNRC adds an issue remark to the claim. The issue remarks appearing on claim 43D 29356-00 concern flow rate and the issue remark on claim 43D 29357-00 concerns priority date. No objections were filed to the claims. Montana law requires the Water Court to resolve issue remarks.

Issues

1. What is the historically accurate flow rate for claim 43D 29356-00?
2. Are the flow rate issue remarks appearing on claim 43D 29356-00 resolved?
3. What is the historically accurate priority date for claim 43D 29357-00?
4. Is the priority date issue remark appearing on claim 43D 29357-00 resolved?

Findings of fact

1. The Preliminary Decree abstract for claim 43D 29356-00 identifies the historically accurate flow rate, 10.00 GPM.
2. The Preliminary Decree abstract for claim 43D 29357-00 identifies the historically accurate priority date, June 5, 1972.

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 and 2 – flow rate and issue remark resolution, claim 43D 29356-00

The flow rate issue remarks on claim 43D 29356-00 state the claimed flow rate exceeds the 35.00 GPM guideline, and documentation submitted with the claim identifies a flow rate of 10.00 GPM. The statement of claim identifies a 50.00 GPM flow rate based upon pump capacity while the Notice of Completion of Groundwater Appropriation attached to the statement of claim identifies a 10.00 GPM flow rate.

The volume identified by the statement of claim, 6.40 AF, sets a limitation on the flow rate. Based on the 123-day period of use, a flow rate of 11.80 GPM achieves the 6.40 AF volume identified by the claim. (See Feasibility Check Equation May 2013 DNRC Water Right Claims Examination Manual Ch.VIII.C.2.d.) The 11.80 GPM flow rate is well below the 35.00 GPM guideline for lawn and garden claims and is a *de minimis* amount over the amount identified by the Notice of Completion of Groundwater Appropriation submitted with the claim.

Conclusions of law

The flow rate issue remarks and the information resulting in the issue remarks do not overcome the prima facie proof afforded the flow rate identified by statement of claim 43D 29356-00. The flow rate issue remarks do not raise issues requiring resolution by the court.

Issues 3 and 4 – priority date and issue remark resolution, claim 43D 29357-00

The issue remark notes claim 43D 29357-00 is a use right with a priority date postdating a district court decree for Willow Creek (Case No. 2484). 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 29357-00 identifies this possibility.

The Preliminary Decree source index for Basin 43D identifies all claims from Willow Creek with a priority date postdating the district court decree. All such claims are “filed” rights or are “B” late claims. None of the “filed” right appropriators junior to claim 43D 29357-00 petitioned the district court to be added to the Willow Creek decree. “B” late claims are subordinated to all timely filed claims.

Therefore, neither the “B” late claims, nor the junior “filed” claims can assert a priority date senior to claim 43D 29357-00 based on compliance with § 89-835, RCM. The issue remark stating claim 43D 29357-00 postdates the Willow Creek district court decree does not raise a valid issue.

Conclusions of law

The Preliminary Decree abstract for lawn and garden claim 43D 29357-00 identifies the historically accurate priority date, June 5, 1972. The issue remark stating claim 43D 29357-00 postdates the Willow Creek district court decree does not raise a valid issue. The priority date issue remark is resolved.

Recommendations

The elements of lawn and garden claims 43D 29356-00 and 43D 29357-00 accurately reflect historical use. No changes to the elements of the claims should be made.

The 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

Service via USPS Mail

Anne Marie Lohof
Bruce A. Lohof
PO Box 641
Red Lodge, MT 59068

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

Water Right Number: **43D 29356-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ANNE MARIE LOHOF
 PO BOX 641
 RED LODGE, MT 59068

 BRUCE A LOHOF
 PO BOX 641
 RED LODGE, MT 59068

Priority Date: JUNE 8, 1973

Type of Historical Right: FILED

Purpose (Use): LAWN AND GARDEN

Flow Rate: 50.00 GPM

Volume: 6.40 AC-FT

Maximum Acres: 3.20

Source Name: SPRING, UNNAMED TRIBUTARY OF WILLOW 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		NWSWNE	32	7S	20E	CARBON

Period of Diversion: JUNE 1 TO OCTOBER 1

Diversion Means: PUMP

Subdivision: GRIZZLY PEAK MT HOMES SUBD TRACT/LOT: 13 BLOCK: 2

Period of Use: JUNE 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	3.20			32	7S	20E	CARBON

Subdivision: GRIZZLY PEAK MT HOMES SUBD TRACT/LOT: 13 BLOCK: 2

Total: 3.20

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

Water Right Number: **43D 29357-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ANNE MARIE LOHOF
 PO BOX 641
 RED LODGE, MT 59068

 BRUCE A LOHOF
 PO BOX 641
 RED LODGE, MT 59068

Priority Date: JUNE 5, 1972

Type of Historical Right: USE

Purpose (Use): LAWN AND GARDEN

Flow Rate: 30.00 GPM

Volume: 1.00 AC-FT

Maximum Acres: 0.50

Source Name: WILLOW 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		NWNWSE	32	7S	20E	CARBON

Period of Diversion: JUNE 1 TO OCTOBER 1

Diversion Means: PUMP

Subdivision: GRIZZLY PEAK MT HOMES SUBD TRACT/LOT: 10 BLOCK: 2

Period of Use: JUNE 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	0.50			32	7S	20E	CARBON

Subdivision: GRIZZLY PEAK MT HOMES SUBD TRACT/LOT: 10 BLOCK: 2

Total: 0.50