

ELECTRONICALLY FILED

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

43D-0630-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

CLAIMANT: Phyllis L. Sullivan

CASE 43D-0630-R-2021
43D 214952-00

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

FINDINGS OF FACT

1. Irrigation claim 43D 214952-00 appeared in the Preliminary Decree for Basin 43D with the following issue remark:

IT APPEARS THIS WATER RIGHT MAY NOT HAVE BEEN PERFECTED. ACCORDING TO INFORMATION IN THE CLAIM FILE, THERE APPEARS TO BE NO APPROPRIATION OF WATER. ALL ELEMENTS OF THIS CLAIM MAY BE QUESTIONABLE. SEE CLAIM FILE FOR ADDITIONAL INFORMATION.

2. The definitions of appropriation and natural overflow have not changed since this claim was examined. “‘Appropriate’ means to divert, impound or withdraw a quantity of water for a beneficial use.” Rule 2(a)(6), W.R.C.E.R. “‘Natural Overflow’ means the water that results in the flooding of land adjoining a stream during high flow with *no man-made diversion involved*.” Rule 2(a)(43), W.R.C.E.R. (emphasis added). The Preliminary Decree Abstract for claim 43D 214952-00 identifies natural overflow as the means of diversion. Due to this fact and the above definitions, the Department of Natural Resources and Conservation (“DNRC”) Water Rights Claim Examination Manual directed the DNRC claims examiner to place the above issue remark on the claim.

3. Based upon the filed notice of appropriation attached to the statement of claim, the intent was to use the water for the beneficial purpose of irrigation.

4. The DNRC Examination Worksheet used one data source, a United States Department of Agriculture aerial photograph dated 1980, to confirm the claimed number of acres irrigated and the place of use. The DNRC agreed with the claimed information presumably indicating the water was used for a beneficial purpose.

5. Based upon the information contained in the filed notice of appropriation and the DNRC claim examination materials, there was a bona fide intent to use this water right claim for the beneficial purpose of irrigating the 6.80-acre place of use. This indicates the claim was perfected, and establishes the claim is a valid appropriation.

6. The issue remark questioning perfection of the claim should be removed as it has been resolved.

7. Claim 43D 214952-00 was filed on February 7, 1996, after issuance of the first decree for Basin 43D. The following notice issue remark appears on the abstract of the claim:

CLAIM WAS NOT INCLUDED IN THE BASIN 43D TEMPORARY PRELIMINARY DECREE
ISSUED 06/09/93.

The notice issue remark served its purpose of notifying other water users that the claim missed the first decree and objections could be filed to the claim after issuance of the second decree on April 7, 2017. Additionally, because claim 43D 214952-00 was filed after the April 30, 1982 claim filing deadline expired, the claim is defined as a “late claim” under § 85-2-102(15), MCA, and was deemed forfeit pursuant to § 85-2-226, MCA. In 1993, the Montana Legislature enacted § 85-2-221(3), MCA, and provided for the remission of forfeiture of late claims, subject to specified terms and conditions. This claim is a “remitted” late claim. The abstract of this claim contains an issue remark citing § 85-2-221(3), MCA, advising water users that the claim may be subordinate, and therefore junior, to certain permits and reservations of water. Persons holding a post-June 30, 1973 permit or reservation, who relied, to their detriment, on the failure of a claimant to timely file a claim, were required to file an objection and thereby seek the subordination of any remitted late filed claim to their permit or reservation. The deadline to file objections has expired. No objections were filed against claim 43D 214952-00, and both referenced notice issue remarks served their purpose.

CONCLUSIONS 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.

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. Judicial notice is taken of the DNRC Water Rights Claim Examination Manual. Rule 202, M.R.Evid.

6. The DNRC examined this claim and outlined its findings on DNRC Examination Worksheets. The DNRC Examination Worksheets are added to the claim file and provided to the court pursuant to § 85-2-243(1)(d), MCA, as they are information the DNRC has in its possession regarding an existing water right.

7. A valid appropriation exists when there is a bona fide intent to use water for a beneficial purpose. *Wheat v. Cameron*, 64 Mont. 495, 508, 210 P. 761, 765 (1922). Historically, an actual diversion of water was sufficient proof of intent, but was not the only way to determine intent, and was not an essential requirement in and of itself. *In re Adjudication of Existing Rights to the Use of all Water*, 2002 MT 216, ¶ 23, 311 Mont. 327, 55 P.3d 396. Indeed, valid water right claims have been found to exist where no diversion is needed to put the water to beneficial use. *In re Adjudication of Existing Rights to the Use of all Water*, ¶ 24. Intent can be proven by other facts and surrounding circumstances, including actual and contemplated use, and the purpose thereof. *Toohy v. Campbell*, 24 Mont. 13, 18, 60 P. 396, 397 (1900); *Wheat*, 64 Mont. at 501, 210 P. at 763. *See In re Adjudication of Existing Rights to the Use of all Water*, ¶ 22.

8. There is no evidence to contradict or overcome the prima facie proof that this claim was perfected and is a valid appropriation.

9. The evidence entered into the record is sufficient to resolve the issues noted by the remarks on the claim.

10. Late claim fees may be waived by the court. Rule 30, W.R.Adj.R.

RECOMMENDATIONS

The elements of irrigation claim 43D 214952-00 accurately reflect historical use. No changes to the elements of the claim should be made.

The issue remarks should be removed from the claim abstract.

A *de minimis* amount of time was spent adjudicating late claim 43D 214952-00. The late claim fee assessment for claim 43D 214952-00 should be waived as authorized by Rule 30, W.R.Adj.R.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm removal of the issue remarks in the state's centralized water right record system.

Anna M. Stradley
Water Master

Service via USPS Mail

Phyllis L. Sullivan
c/o Brougham S
4903 Indian Ridge Rd.
Billings, MT 59101

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

Water Right Number: 43D 214952-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: PHYLLIS L SULLIVAN
% BROUGHAM S
4903 INDIAN RIDGE RD
BILLINGS, MT 59101

***Priority Date:** APRIL 16, 1907

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 02/07/1996 . 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:** FILED

Purpose (Use): IRRIGATION

Irrigation Type: NATURAL OVERFLOW

Flow Rate: NO FLOW RATE HAS BEEN DECREED FOR THIS NATURAL OVERFLOW METHOD OF IRRIGATION.

***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: 6.80

Source Name: BEAR 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 | | N2NESE | 6 | 8S | 21E | CARBON |

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: NATURAL OVERFLOW

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 | 6.80 | | N2NESE | 6 | 8S | 21E | CARBON |

Total: 6.80