

Montana Water Court
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43B-0635-R-2022

July 18, 2022

Montana Water Court

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

CLAIMANTS: Ashley Agadez Childs Trust; Samantha A. Childs
Trust; Ann E. Wilcox

OBJECTORS: Samantha Atherton Childs Trust; Ann E. Wilcox

CASE 43B-0635-R-2022

43B 110805-00

43B 110807-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. 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

Samantha Atherton Childs Trust and Ann E. Wilcox objected to each of these claims.

Claim 43B 110805-00 appeared in the Preliminary Decree with the following issue remark:

THE MEANS OF DIVERSION APPEARS TO BE INCORRECT. THE MEANS OF DIVERSION APPEARS TO BE A DITCH.

Claim 43B 110807-00 appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED FLOW RATE EXCEEDS THE 17 GPM PER ACRE GUIDELINE AND CANNOT BE CONFIRMED DUE TO LACK OF DATA. THE FLOW RATE EQUALS 74.00 GPM PER ACRE.

On June 15, 2022 the claimants filed the Affidavit Of Ann Wilcox. The Affidavit is 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.

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. For claim 43B 110805-00, the Preliminary Decree states that the means of diversion is DITCH/GRAVITY FLOW. The means of diversion should be DITCH. The issue remark should be removed as addressed and resolved.

The Preliminary Decree also includes the following remarks:

THE TIMELY FILED OBJECTION OF HOWARD CARTER WAS AMENDED BY AGREEMENT OF THE PARTIES TO INCLUDE POINT OF DIVERSION. BECAUSE THIS ELEMENT WAS NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR

MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A USE RIGHT ON PINE CREEK WITH A PRIORITY DATE PREDATING CASE NO 3717, PARK COUNTY. IF NO OBJECTIONS ARE FILED TO PRIORITY DATE OR TYPE OF HISTORICAL RIGHT, THESE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS REMARK WILL BE REMOVED.

The first remark provides notice of changes made during the Temporary Preliminary Decree proceedings and does not raise an unresolved issue which needs to be addressed. The second remark provides notice of a possible issue; however, no one objected to pursue the possible issue. The remarks should be removed as having served their notice purposes.

2. For claim 43B 110807-00, the Preliminary Decree states that the flow rate is 2.00 cfs. The Affidavit Of Ann Wilcox provides the following information:

4. We get our water from the Smith Wiggins ditch which was improved/ constructed many years ago in the late 1940s or early 1950s by my grandfather, John Wiggins, and a neighbor named Arthur Smith. Mr. Smith owned the property across and west of East River Road (the Smith Property became Valley View Subdivision in the early 1960s). From our head gate on Pine Creek, the ditch is steep and rocky but underneath there is a base of gravel and sandy, silty material. As the ditch flattens out, it becomes all gravel and sand that continues the length of our property (approximately one half mile +). Because of the ditch's composition of sand and gravel, it is a continuous job to **keep** the irrigation water from plugging up. It also takes copious amounts of water for grasses, etc. to survive and do well.

5. It is a well known fact that much of the land in the Pine Creek area has very poor, rocky, sandy, gravelly soil. It has been difficult to get things to grow and keep them alive. Our property is extremely rocky, gravelly, and sandy and the little dirt there is has the consistency of a thin layer of tan powdered sugar. As a consequence, the soil does not hold the water and acts like a sieve.

The flow rate should not be changed. The flow rate issue remark should be removed as addressed and resolved.

The Preliminary Decree also includes the following remark:

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.

This remark 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. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The settlement filed by the parties is sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court 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.

Kathryn L. W. Lambert
Senior Water Master

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

Water Right Number: 43B 110805-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ANN E WILCOX
PO BOX 1300
LIVINGSTON, MT 59047 1300

CHILDS, ASHLEY AGADEZ TRUST
115 13TH ST
DEL MAR, CA 92014

CHILDS, SAMANTHA A TRUST
429 S SIERRA AVE #245
SOLANA BEACH, CA 92075 2271

Priority Date: SEPTEMBER 15, 1882
Type of Historical Right: USE
Purpose (use): STOCK

***Flow Rate:** NO FLOW RATE HAS BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name** PINE 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		NESW	12	4S	9E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

Ditch Name: SMITH-WIGGINS 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			NENWSW	12	4S	9E	PARK
2			SWNWSW	12	4S	9E	PARK
3			SENWSW	12	4S	9E	PARK
4			SENESE	11	4S	9E	PARK

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

Water Right Number: 43B 110807-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ANN E WILCOX
PO BOX 1300
LIVINGSTON, MT 59047 1300

CHILDS, ASHLEY AGADEZ TRUST
115 13TH ST
DEL MAR, CA 92014

CHILDS, SAMANTHA A TRUST
429 S SIERRA AVE #245
SOLANA BEACH, CA 92075 2271

Priority Date: APRIL 29, 1972

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 2.00 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: 12.05

Source Name PINE 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		NESW	12	4S	9E	PARK

Period of Diversion: APRIL 20 TO JULY 15

Diversion Means: HEADGATE

Ditch Name: SMITH-WIGGINS DITCH

Period of Use: APRIL 20 TO JULY 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	0.38		SENESE	11	4S	9E	PARK
2	1.32		NENWSW	12	4S	9E	PARK
3	4.82		SWNWSW	12	4S	9E	PARK
4	5.53		NWNWSW	12	4S	9E	PARK

Total: 12.05

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.

110806-00

110807-00