

Montana Water Court  
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43B-0426-R-2022

November 7, 2022

Montana Water Court

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

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CLAIMANT: Carbella Ditch Co.

**CASE 43B-0426-R-2022**

43B 16778-00

43B 25637-00

**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**

Claim 43B 16778-00 appeared in the Preliminary Decree with the following remarks:

THE TIMELY FILED OBJECTION OF MARYANN MOTT WAS AMENDED BY AGREEMENT OF THE PARTIES TO INCLUDE ACRES IRRIGATED AND POINT OF DIVERSION BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THESE CHANGES MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

DITCH NAME 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.

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A USE RIGHT.

Claim 43B 25637-00 appeared in the Preliminary Decree with the following remarks:

THE TIMELY FILED OBJECTION OF MARYANN MOTT WAS AMENDED BY AGREEMENT OF THE PARTIES TO INCLUDE ACRES IRRIGATED, POINT OF DIVERSION AND MEANS OF DIVERSION BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THESE CHANGES MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

DITCH NAME 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.

The remarks concerning the timely filed objections and the ditch names provide notice of these changes made during the Temporary Preliminary Decree proceedings or prior to issuance of the Preliminary Decree. The remarks do not raise unresolved issues which need to be addressed. This report will recommend removal of the remarks as they have served their notice purposes.

The remark concerning the type of historical right was not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark. In this instance, the information in the claim file is sufficient to address and resolve the issue remark

without additional proceedings. Copies of the contents of each claim file have been scanned and are viewable on the DNRC Water Right Query System at <http://wrqs.dnrc.mt.gov>.

#### 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. Both of these claims - plus another Carbella Ditch Company claim 43B 193795-00, and John S. Armstrong and Thomas Grinsteiner claim 43B 195144-00 - appeared in the 1985 Temporary Preliminary Decree for this Basin with a decree exceeded issue remark because multiple claims were filed based on the Anna Armstrong July 1, 1896 right decreed in a 1938 District Court Decree, Cause Number 7515, *Scott et al. v. Merrell, et al.* Multiple objections were filed to the claims. The claims were consolidated into a single Montana Water Court Case numbered 43B-83.

On January 12, 1990 the parties in that Case filed a Stipulation which states that John S. Armstrong and Thomas Grinsteiner claim 43B 195144-00 should be for the Anna Armstrong July 1, 1896 decreed right, but all three Carbella Ditch Company claims should have their priority dates changed to June 1, 1970. On December 7, 1991 the Master’s Report for Case 43B-83 was filed, and on December 29, 1994 the Order Adopting Master’s Report was issued. The priority date for each of the three Carbella Ditch Company claims was changed to June 1, 1970, but the type of historical right remained in the database as “DECREED”.

The 1990 Stipulation does not state if the June 1, 1970 right is a decreed right, a filed right, or a use right. There is no copy of a District Court Decree with a June 1, 1970 decreed

right in it or a copy of a June 1, 1970 filed right attached to the Stipulation. The implication is that the June 1, 1970 right is a use right.

It is noted that the third Carbella Ditch claim which is not in this Case, 43B 193795-00, now states that its type of historical right is USE. This claim was in Preliminary Decree Case 43B-0385-R-2021. In the proceedings for that Case, the type of historical right was changed to USE. See Master's Report filed September 7, 2021; Order Adopting Master's Report issued October 7, 2021.

It is also noted that since 2001, Carbella Ditch Company is a co-owner of the Anna Armstrong July 1, 1896 decreed right claim 43B 195144-00 along with claimants John S. Armstrong and Thomas Grinsteiner.

2. For both of the claims in this Case, the Preliminary Decree states that the type of historical right is DECREED. The type of historical right should be USE. The issue remark should be removed as addressed and resolved.

3. The remarks concerning the timely filed objections and the ditch names should be removed with no additional proceedings or changes made to the elements.

#### CONCLUSION OF LAW

The information in the claim files is sufficient to resolve the issue remark without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

#### RECOMMENDATIONS

Based upon the above Finding of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Finding 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.

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Kathryn L. W. Lambert  
Senior Water Master

**Service Via USPS Mail:**

Carbella Ditch Co.  
c/o Mary Hagemeyer  
P.O. Box 93  
Emigrant, MT 59027

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

**Water Right Number:** 43B 16778-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** CARBELLA DITCH CO  
% MARY HAGEMEYER  
PO BOX 93  
EMIGRANT, MT 59027

**\*Priority Date:** JUNE 1, 1970

**Type of Historical Right:** USE

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 251.00 GPM

**Volume:** 30.00 AC-FT

**Climatic Area:** 4 - MODERATELY LOW

**\*Maximum Acres:** 123.24

**\*Source Name:** TOM MINER 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		NENESE	25	7S	6E	PARK

**Period of Diversion:** MAY 15 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** BAILEY DITCH

2		NWNWSW	30	7S	7E	PARK
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**Period of Diversion:** MAY 15 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** BAILEY DITCH

3		NENESE	25	7S	6E	PARK
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**Period of Diversion:** MAY 15 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** BAILEY DITCH

THESE MULTIPLE DIVERSION POINTS DO NOT GIVE THE CLAIMANT THE POWER TO USE AT ANY ONE TIME MORE THAN THE FLOW RATE DECREED FOR THAT RIGHT BY THE USE OF THE RIGHT FROM MORE THAN ONE POINT OF DIVERSION. SEE STIPULATION FILED 1-12-1990 IN CASE 43B-83.

**Period of Use:** MAY 15 TO OCTOBER 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	44.39		SE	19	7S	7E	PARK
2	78.85		NE	30	7S	7E	PARK
<b>Total:</b>	123.24						

PLACE OF USE IS WITHIN CERTIFICATE OF SURVEY #473, TRACTS 1, 2, 9, 10, 11, 12, 13, 15, 16, 18, 19, 20 & 26 AND CERTIFICATE OF SURVEY #866, TRACTS 17A & 24A.

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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.

16777-00

16778-00

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

**Water Right Number:** 43B 25637-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** CARBELLA DITCH CO  
% MARY HAGEMEYER  
PO BOX 93  
EMIGRANT, MT 59027

**\*Priority Date:** JUNE 1, 1970

**Type of Historical Right:** USE

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 1.55 CFS

**Volume:** 263.50 AC-FT

**Climatic Area:** 4 - MODERATELY LOW

**\*Maximum Acres:** 123.24

**\*Source Name:** TOM MINER 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		NENESE	25	7S	6E	PARK

**Period of Diversion:** APRIL 1 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** BAILEY DITCH

2		NWNWSW	30	7S	7E	PARK
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**Period of Diversion:** APRIL 1 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** BAILEY DITCH

3		NENESE	25	7S	6E	PARK
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**Period of Diversion:** APRIL 1 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** BAILEY DITCH

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**Period of Use:** APRIL 1 TO OCTOBER 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>
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25634-00

25636-00

25637-00