

Montana Water Court
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43B-0615-R-2022

November 4, 2022

Montana Water Court

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

CLAIMANTS: Rebecca Johnson; Wendy Thomas

OBJECTOR: United States of America (USDA Forest Service)

COUNTEROBJECTORS: Rebecca Johnson; Wendy Thomas

CASE 43B-0615-R-2022
43B 194611-00

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

The United States of America (USDA Forest Service) objected to this claim. This claim appeared in the Preliminary Decree with the following remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 220 MINER'S INCHES DECREED IN CASE NO. 4627 , PARK COUNTY. 446-00, 214144-00, 106777-00, 14422-00, 15834-00, 194609-00, 194611-00, 211367-00, 23531-00, 5699-00, 16097-00, 30071954, 30071955, 30071956, 9957-00.

POINT OF DIVERSION AND DITCH NAME WERE 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 decree exceeded issue remark 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 or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark. A review of all the claims listed in the decree exceeded issue remark revealed that one claim should not have been included and that its inclusion caused the flow rate over-claim. The issue remark is erroneous and does not require additional proceedings.

On September 30, 2022 the parties filed a Stipulation To Resolve Objections. The Stipulation 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. This claim and all of the other claims listed in the decree exceeded issue remark – except 43B 30071954 - are based on the April 13, 1883 220.00 miner's inch right decreed to L. H. Van Dyck Company in Cause No. 4627, *Randall v. L. H. Van Dyck Company et al.*, Sixth Judicial District, Park County. Claim 43B 30071954 is based on the April 7, 1972, 15.00 miner's inch right decreed to Joe Kurtz and Vicki Kurtz in Cause No. 13255, *Rigler v. Abbie et al.*, Sixth Judicial District, Park County. Removal of the flow rate for claim 43B 30071954 from the combined flow rates reduces the combined claimed flow rate total. The total no longer exceeds the 220.00 miner's inches decreed for the April 13, 1883 right. The remark is erroneous and should not have been added to any of the claims listed in the remark. The remark should be removed with no additional proceedings.

2. The Preliminary Decree states that the ditch name for point of diversion number 2 is Rigler Ditch. The ditch name should be Simonson Ditch.

3. The Preliminary Decree states that the place of use is:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	12	8S	7E	PARK
	13	8S	7E	PARK

The place of use should be:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
SESW	12	8S	7E	PARK
N2	13	8S	7E	PARK

4. As requested, the following clarification remark should be added to the abstract of this claim:

THE POINT OF DIVERSION AND PLACE OF USE ARE ENTIRELY ON PRIVATE LAND.

5. The period of diversion and ditch name remark provides notice of these changes made prior to issuance of the Preliminary Decree and does not raise unresolved issues which need 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 contradict and overcome the prima

facie claim.

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

Water Right Number: 43B 194611-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: WENDY THOMAS
PO BOX 458
GARDINER, MT 59030 0458

REBECCA JOHNSON
PO BOX 458
GARDINER, MT 59030

Priority Date: APRIL 13, 1883

Type of Historical Right: DECREED

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

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: CEDAR 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		NENWNE	13	8S	7E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

Ditch Name: RIGLER DITCH

2		NWNE	13	8S	7E	PARK
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

Ditch Name: SIMONSON 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			SESW	12	8S	7E	PARK
2			N2	13	8S	7E	PARK

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

194609-00

194611-00

THE POINT OF DIVERSION AND PLACE OF USE ARE ENTIRELY ON PRIVATE LAND.