

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

\* \* \* \* \*

CLAIMANTS: Kelly Kirby; Noah Grzywinski

**CASE 43B-1069-R-2022**  
43B 123895-00  
43B 30069662

**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, conclusions 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 be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve 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. Kelly Kirby is the current record owner of water right claim 43B 123895-00. Noah Grzywinski is the current record owner of water right claim 43B 30069662.

2. Claims 43B 123895-00 and 43B 30069662 were decreed with a DNRC issue remark:

A LATE OBJECTION HAS BEEN FILED TO THE FLOW RATE, ACRES IRRIGATED AND PLACE OF USE OF THIS WATER RIGHT CLAIM. IT WILL BE RESOLVED DURING THE ADJUDICATION OF OBJECTIONS TO THE PRELIMINARY DECREE. SEE STIPULATION FILED 8/15/88 LOCATED IN CLAIM FILE.

3. Claim 43B 123895-00 was previously involved in proceedings in Water Court Case 43B-170 to address a decree exceeded issue with other claims that did receive timely filed objections that were properly noticed. The late objection issue remark decreed on claims 43B 123895-00 and 43B 30069662 references a Stipulation filed by the parties in Case 43B-170 on August 15, 1988 (1988 Stipulation). Proper notice was not provided that changes may be made to claim 43B 123895-00 during the Temporary Preliminary Decree, so an issue remark was placed on the claim that the changes would be made to the claim during the next decree – the “late objection” issue remark noted above.<sup>1</sup>

4. In 2014, claim 43B 123895-00 was split into two separate water claims, representing different ownership interests (claim 43B 123895-00 and 43B 30069662). The “late objection” issue remark was placed on claim 43B 30069662 too, as the 1988 agreement still needed to be addressed.

5. Regarding claim 43B 123895-00, the 1988 Stipulation in Case 43B-170 stated:

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<sup>1</sup> The same issue remark was placed on claim 43B 17166-00 (Case 43B 1095-R-2021) and claim 43B 36543-00 (Case 43B-1079-R-2022). Claim 43B 44516-00 was also addressed in the Stipulation in Case 43B-170 and a Master's Report was issued in that Case on June 3, 2022 and adopted on June 17, 2022.

The parties hereby agree that all elements of that claim shall remain as claimed with the exception of the flow rate which shall be changed as follows:

<u>Flow Rate Claimed</u>	<u>Flow Rate to be Decreed</u>
10 miner's inches	9 miner's inches or .225 cfs
<u>Place of Use and Number of Acres<sup>7</sup> to be Decreed</u>	
11.8 acres S2SE Section 35 T02N R14E	

6. Based on this Water Master's analysis, the combined flow rate of claim 43B 123895-00 and split claim 43B 30069662 needs to be reduced to 100.98 gallons per minute (9 miner's inches/.225 cubic feet per second) as agreed upon in the 1988 Stipulation.

7. Previously, a deadline was set for Claimant Noah Gryzwinski and then-Claimants Lisa Camp and Scott Camp to file documentation showing how the flow rate and irrigated acres/places of use should be reduced, consistent with the 1988 Stipulation. A deadline was also set for the Claimants to express if they disagreed that the Stipulation should be implemented.

8. On February 16, 2022, Claimant Noah Grzywinski filed a statement indicating disagreement with a "proposed reduction:"

As the owner of the property to which claim 43B 30069662 is attached, I object to proposed reduction to my flow rate and acres irrigated.

My rights and my neighbor's rights were both established in 1897. The party filing the initial objection had their property's water rights established in 1918. As such, it would seem that any clerical errors that may have occurred in the establishment of their junior water rights shouldn't have any impact on our senior, historically established rate of use, acres irrigated etc as our water rights were established twenty one years before the rights of the other party.

Additionally, the only 1988 agreement that pertains to my water that I can find is simply an agreement between a handful of properties in my immediate area to set specific days of use for each property. This agreement did not involve the initiators of the case at hand in any way, as their property is miles away from us.

As such, without more information about the 1988 agreement that the other party is referring to, we don't see why we should suffer a reduction in our flow rate or acres irrigated.

9. An Order on Status of Case and Order Setting Show Cause Filing Deadline was issued on August 25, 2022. The Order explained the status of the other claims involved in the 1988 Stipulation:

Four claims were involved in the 1988 Stipulation:

- Claim **43B 17166-00** was consolidated into Case 43B 1095-R-2021.
  - A Statement Regarding 1988 Stipulation was filed on August 12, 2022. The Statement indicated that the Claimant agrees with the 1988 Stipulation “so long as long as the changes called for in the Stipulation are made to all four claims in the Stipulation.” The August 12, 2022 Filing also indicated that a specific remark referencing the 1988 Stipulation be placed on all four claims; the remark differs from the one referenced in the Stipulation in Case 43B 1081-R-2021, below. A deadline will be set in Case 43B-1095-R-2021 to confirm the parties agree the information remark added in Case 43B-1081-R-2021 is agreeable.
- Claim **43B 36543-00** was consolidated into Case 43B 1079-R-2022.
  - An Order Setting Filing Deadline was issued on January 1, 2022. The Order set a deadline for the parties to agree or disagree that the flow rate be reduced as stipulated in the 1988 Stipulation. The Claimants did not respond. Unfortunately, this Water Master failed to address the place of use or information remark portion of the Stipulation. Another Order will be issued.
- Claim **43B 44516-00** was consolidated into Case 43B 1081-R-2022.
  - A Master’s Report was issued in Case 43B 1081-00 on June 3, 2022 and adopted on June 17, 2022. Finding of Fact No. 5 stated:

5. Additionally, claim 43B 44516-00 was previously the subject of a Master’s Report in case 43B-170 during the Temporary Preliminary Decree in this Basin. A Stipulation filed in the Case indicated a remark should be added to the involved claims referring parties to the Stipulation. Unfortunately, the other claims in the Stipulation (43B 17166-00, 43B 36543-00, and 43B 123895-00) were stayed and not addressed during the Temporary Preliminary Decree. Claims 43B 17166-00, 43B 36543-00, and 43B 123895-00 are being addressed during the Preliminary Decree and this Master intends to add the following information remark to the claims, consistent with the August 15, 1988 Stipulation:

ON AUGUST 15, 1988, THE OWNERS OF CLAIMS 43B 44516-00, 43B 17166-00, 43B 36543-00, AND 43B 123895-00 ENTERED INTO A ROTATIONAL USE AGREEMENT WHEN WATER SHORTAGE MANDATES. A COPY OF THE AGREEMENT IS IN THE CLAIM FILES.

The information remark should be added to claim 43B 44516-00.

- Claim **43B 123895-00** was consolidated into Case 43B 1069-R-2022 (this Case).

10. On August 26, 2022, Claimant Tom Tollefson filed a statement in Case 43B 1095-R-2021 indicating agreement that the proposed remark be added to claim 43B 17166-00.

An Order was issued in Case 43B-1079-R-2022, setting a deadline for Claimants Lana R. King and Marc C. King to file a statement agreeing or disagreeing that the changes addressed in 1988 Stipulation be made to claim 43B 36543-00. The Order indicated that if nothing were filed by the deadline, this Master would conclude Claimants Lana R. King and Marc C. King agree with the changes and a Master's Report would be issued; nothing was filed.

The Master's Report was already adopted in Case 43B 1081-R-2022 adding the rotational use agreement information remark to claim 43B 44516-00.

11. The August 25, 2022 Order on Status of Case and Order Setting Show Cause Filing Deadline addressed claims 43B 123895-00 and 43B 30069662, explaining that the 1988 Stipulation indicates the now-combined flow rate of claim 43B 123895-00 and split claim 43B 30069662 needs to be 100.98 gpm (9 miners inches), the combined acres/places of use of both claims need to be reduced to 11.8 acres in the S2SE of Section 35 as shown in the 1988 Stipulation, and the information remark needs to be added to both claims. The August 25, 2022 Order suggested a proposed resolution:

Unless the Claimants provide another proposal, the flow rate can be divided on a pro-rata basis and place of use discrepancy and be resolved as follows:

**43B 123895-00:**

\*Flow Rate: 67.55 ~~75.00~~ GPM

\*Maximum Acres: ~~8.00~~ 7.90

**\*Place of Use:**

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	<span style="border: 1px solid red; padding: 2px;">7.90</span> <del>8.00</del>		S2SE	35	2N	14E	SWEET GRASS
<b>Total:</b>	<span style="border: 1px solid red; padding: 2px;">7.90</span> <del>8.00</del>						

ON AUGUST 15, 1988, THE OWNERS OF CLAIMS 43B 44516-00, 43B 17166-00, 43B 36543-00, AND 43B 123895-00 (SPLIT CLAIM 43B 30069662) ENTERED INTO A ROTATIONAL USE AGREEMENT WHEN WATER SHORTAGE MANDATES. A COPY OF THE AGREEMENT IS IN THE CLAIM FILES.

**43B 30069662:**

\*Flow Rate: 33.35 ~~37.00~~ GPM

\*Maximum Acres: ~~4.00~~ 3.90

\*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	3.90 4.00		S2SE	35	2N	14E	SWEET GRASS
<b>Total:</b>	<b>3.90 4.00</b>						

ON AUGUST 15, 1988, THE OWNERS OF CLAIMS 43B 44516-00, 43B 17166-00, 43B 36543-00, AND 43B 123895-00 (SPLIT CLAIM 43B 30069662) ENTERED INTO A ROTATIONAL USE AGREEMENT WHEN WATER SHORTAGE MANDATES. A COPY OF THE AGREEMENT IS IN THE CLAIM FILES.

The Order set a show cause filing deadline for the Claimants, providing time for the parties to work together to divide the flow rate and the place of use reductions themselves if they did not agree with this Water Master's proposal (as shown on the draft abstracts attached to the Order). In the alternative, the Order stated that the parties must file *legal* argument by the deadline why the 1988 Stipulation does not apply to them, and the parties must show cause why the 1988 Stipulation should not be implemented as to claims 43B 123895-00 and 43B 30069662. Additionally, the Order stated that if the Claimants did not show cause by the deadline, this Master would conclude the Claimants agree the issues should be resolved as shown on the proposed draft abstracts, and a Master's Report would be issued. The following language was included in the Order:

Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and termination of a water right claim or dismissal of objections. Rule 22, W.R.Adj.R.

12. On September 21, 2022, Kelly Kirby filed a Request for Extension of the deadline noting that Kirby finalized a property purchased in February of 2022. Kelly Kirby replaced Lisa Camp and Scott Camp as record owners of claim 43B 123895-00. The deadlines set in the August 25, 2022 Order were subsequently extended.

13. On October 19, 2022, Kelly Kirby filed a statement. Kirby expressed concern that each involved party receive similar treatment:

...

As Mr. Gryzinski stated previously, our rights were established in 1897 and are senior to the instigating party's rights of 1819. However, per the Stipulation of 1988, the original parties outlined a rotational use of the full 50 miner's inches of water- OR to a reduction of flow rate, for all parties! I'm assuming that the objecting party would prefer a reduction of "our" (Mr. Gryzinski and myself) water rights, while increasing "theirs". I feel that is not in the spirit of the original agreement, which was made by all parties sitting down and discussing the matter. I, personally, would prefer to hold to the spirit of the original agreement, rather than reduce the flow rate. In addition, the Stipulation of 1988 states: "so long as long as the changes called for in the Stipulation are made to all four claims in the Stipulation'. Would all four involved parties agree to a rotational use, or are all four parties agreeing to a commensurate reduction of EACH CLAIM's rights? In my personal opinion, in light of the current climate, I feel that what applies to one should apply to all. I believe that was the spirit of the original stipulation.

...

### PRINCIPLES AND CONCLUSIONS OF LAW

1. The Water Court is required to address all issue remarks decreed on claims. Sections 85-2-247, and 85-2-248, MCA.

2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.

3. The August 15, 1988 Stipulation was signed by Terrill S. Tollefson and Lois D. Tollefson, the record-owners of claim 43B 17166-00, on August 15, 1988. The 1988 Stipulation included the following language regarding successors-in-interest, heirs, and assigns:

The parties further acknowledge that this document with attached exhibits will be filed at the Sweet Grass County Clerk and Recorder's office, and each parties' successors in interest, heirs, and assigns will be bound by this marshaling and distribution agreement.

The terms of the 1988 Stipulation are plain and unambiguous.

4. A properly drafted stipulation is a form of contract to be interpreted according to contract principles. *Jensen v. Department of Labor & Indus., Job Serv. Div.*, 221 Mont. 42, 47, 718 P.2d 1335, 1338 (1986). As applied to Water Court proceedings, a

stipulation serves as the terms under which the parties agree to resolve objections, and may include a claimant's legally binding commitment to modify claims to resolve objections and issue remarks, and an objector's agreement to withdraw objections conditioned upon the Court's acceptance of the claim modifications. *E.g., In re Pondera Cty. Canal & Reservoir Co.*, Case 41M-202, 2020 Mont. Water LEXIS 19 (Jan. 9, 2020).

5. Current claimants Kelly Kirby and Noah Grzywinski did not file legal argument showing why the 1988 Stipulation should not apply to claim 43B 123895-00 and split claim 43B 30069662. The terms of the 1988 Stipulation should be applied to claim 43B 123895-00 and split claim 43B 30069662.

#### RECOMMENDATIONS

1. Claims 43B 123895-00 and 43B 30069662 should be modified as shown in Finding of Fact No. 11.

2. The late objection issue remark should be removed from both claims because the terms of the 1988 Stipulation have been applied to claims 43B 123895-00 and 43B 30069662.

Post Decree Abstracts of Water Right Claims are served with the Report for review.

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Anika M. Stern  
Senior Water Master

#### **Service via USPS Mail:**

Noah Grzywinski  
25 Otter Creek Rd.  
Big Timber, MT 59011

Kelly Kirby  
2206 College Dr.  
Devils Lake, ND 58301



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

**Water Right Number:** 43B 123895-00 STATEMENT OF CLAIM  
**Version:** 4 -- POST DECREE  
**Status:** ACTIVE

**Owners:** KELLY KIRBY  
2206 COLLEGE DR  
DEVILS LAKE, ND 58301

**Priority Date:** JUNE 30, 1897

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**\*Flow Rate:** 67.55 GPM

**\*Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 2 - MODERATELY HIGH

**\*Maximum Acres:** 7.90

**Source Name:** BIG TIMBER 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		NWNWNW	35	2N	14E	SWEET GRASS	
<b>Period of Diversion:</b>	MAY 15 TO OCTOBER 15						
<b>Diversion Means:</b>	HEADGATE						
<b>Ditch Name:</b>	O'ROURKE-BRUFFEY DITCH						
<b>Period of Use:</b>	MAY 15 TO OCTOBER 15						
<b>*Place of Use:</b>							
<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	7.90		S2SE	35	2N	14E	SWEET GRASS
<b>Total:</b>	7.90						

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**Remarks:**

SPLIT CLAIM NO. 43B 30069662 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

ON AUGUST 15, 1988, THE OWNERS OF CLAIMS 43B 44516-00, 43B 17166-00, 43B 36543-00, AND 43B 123895-00 (SPLIT CLAIM 43B 30069662) ENTERED INTO A ROTATIONAL USE AGREEMENT WHEN WATER SHORTAGE MANDATES. A COPY OF THE AGREEMENT IS IN THE CLAIM FILES.

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

**Water Right Number:** 43B 30069662 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** NOAH GRZYWINSKI  
25 OTTER CREEK RD  
BIG TIMBER, MT 59011

**Priority Date:** JUNE 30, 1897

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 33.35 GPM

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 2 - MODERATELY HIGH

**Maximum Acres:** 3.90

**Source Name:** BIG TIMBER 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		NWNWNW	36	2N	14E	SWEET GRASS

**Period of Diversion:** MAY 15 TO OCTOBER 19

**Diversion Means:** HEADGATE

**Ditch Name:** O'ROURKE-BRUFFEY DITCH

**Period of Use:** MAY 15 TO OCTOBER 19

**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	3.90		S2SE	35	2N	14E	SWEET GRASS

**Total:** 3.90

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**Remarks:**

THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 43B 123895-00.

ON AUGUST 15, 1988, THE OWNERS OF CLAIMS 43B 44516-00, 43B 17166-00, 43B 36543-00, AND 43B 123895-00 (SPLIT CLAIM 43B 30069662) ENTERED INTO A ROTATIONAL USE AGREEMENT WHEN WATER SHORTAGE MANDATES. A COPY OF THE AGREEMENT IS IN THE CLAIM FILES.