

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

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

CLAIMANTS: Lana M. Klimek; Marco J. Klimek; Elizabeth L. Clarke

CASE 43B-0551-R-2021
43B 107177-00

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

This claim appeared in the Preliminary Decree with the following remarks:

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 3475 TIMES THE CAPACITY OF THE RESERVOIR.

The volume issue remark was not addressed through the objection process. The Water Court is required to resolve the issues raised by an 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 and the Court can provide the claimants an opportunity to file additional information or evidence.

The August 9, 2022 Court Minutes and Order Setting Deadline Pursuant To Section 85-2-248(5), MCA directed the claimants to meet with the Montana Department of Natural Resources and Conservation [“DNRC”] to resolve the issue remark. On October 21, 2022 the DNRC Memorandum was filed stating that based on the reservoir data, the volume would be 0.04 acre-feet. As nothing was filed by the claimants, an Order Setting Deadlines Pursuant To Section 85-2-248(5), MCA was issued on October 28, 2022 setting a deadline for the claimants to show cause why the volume should not be reduced to 0.04 acre-feet. On January 13, 2023 Lana M. Klimek and Marco J. Klimek filed their Show Cause Statement with supporting information. On January 19, 2023 the Order Updating Caption And Mailing List and Order Setting Deadline was issued stating:

ORDERED that the deadline for Elizabeth C. Clarke to file her response to the Show Cause Statement is **February 17, 2023**. If nothing is filed by this deadline, the Court will conclude Elizabeth C. Clarke agrees with the Show Cause Statement.

Nothing was filed by Ms. Clarke. These documents are 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. The Preliminary Decree states that the volume 139.00 AC-FT. The volume should be 4.21 AC-FT. The volume issue remark should be removed as addressed and resolved.

2. The volume requested by the claimants is based on revised reservoir data provided by their consultant, gathered at a site visit. The Preliminary Decree includes the following reservoir data:

Depth: 1.00 FEET
Surface Area: 0.10 ACRES
Capacity: 0.04 ACRE-FEET

The reservoir data should be:

Depth: 9.00 FEET
Surface Area: 0.50 ACRES
Capacity: 1.71 ACRE-FEET

3. The other remarks provide notice of changes made prior to issuance of the Preliminary Decree and do not raise unresolved issues which need to be addressed. These remarks should be removed as having served their notice purposes.

CONCLUSION OF LAW

The information provided by the claimants 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 is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via USPS Mail:

Elizabeth L. Clarke
120 Old Clyde Park Rd
Livingston, MT 59047-9226

Service Via Electronic Mail:

Vuko J. Voyich
Anderson & Voyich
Attorneys at Law, P.L.L.C.
PO Box 1409
Livingston, MT 59047
(406) 222-9626
office@andersonandvoyich.com

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

Water Right Number: 43B 107177-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

ELIZABETH L CLARKE
120 OLD CLYDE PARK RD
LIVINGSTON, MT 59047

MARCO J KLIMEK
605 WOODRIDGE DR
LITTLE ELM, TX 75068

LANA M KLIMEK
605 WOODRIDGE DR
LITTLE ELM, TX 75068

Priority Date: JULY 4, 1971

Type of Historical Right: USE

Purpose (use): RECREATION

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: 4.21 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: UNNAMED TRIBUTARY OF YELLOWSTONE RIVER

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		NESWNW	5	2S	10E	PARK

Period of Diversion: JUNE 1 TO FEBRUARY 29

Diversion Means: DAM

Subdivision: HEINRICH SUBD TRACT/LOT: 002

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NESWNW	5	2S	10E	PARK

Diversion to Reservoir: DIVERSION # 1

Depth: 9.00 FEET

Surface Area: 0.50 ACRES

Capacity: 1.71 ACRE-FEET

Period of Use: JUNE 1 TO FEBRUARY 29

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			NESWNW	5	2S	10E	PARK
Subdivision:		HEINRICH SUBD TRACT/LOT: 002					