

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

* * * * *

CLAIMANTS: Craig S. Buscher; Susan P. Tirrell

CASE 43B-0116-R-2020

43B 7368-00

NOTICE OF FILING OF SECOND 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 finding 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.

SECOND MASTER'S REPORT

The ditch identified on the abstract for this claim in the Preliminary Decree is Upland Ditch. The Statement of Claim states that the ditch name is Upland Ditch. During preparation of the Preliminary Decree, the point of diversion legal description was changed to the legal description for Mill Creek Flat Ditch, not for Upland Ditch.

In 2021, the Montana Department of Natural Resources and Conservation ["DNRC"] prepared a new marked aerial photograph for the Mill Creek claimants and the Court to use to determine the correct ditch name and point of diversion legal description. On June 19, 2023

the Order Re-Opening Case And Setting Filing Deadline was issued to address this error with the claimants. A copy of the new marked aerial photograph was included. Nothing was filed by the claimants. The August 22, 2023 Revised Order Setting Show Cause Filing Deadline states:

The abstract of claim 43B 7368-00 states that the ditch name is Upland Ditch but the point of diversion legal description is for Mill Creek Flat Ditch. The Statement of Claim states that the ditch name is Upland Ditch. Therefore, it is ORDERED that the deadline is September 25, 2023 for the claimants to file a written statement showing cause why the Court should not change the point of diversion legal description on this claim to the Upland Ditch legal description which is the NENENW section 3, T6S, R9E, PARK. If not filed by September 25, 2023, the Court will conclude the claimants agree with this change and will proceed with changing the claim as detailed above.

Nothing was filed. These documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

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.

Rule 19, W.R.Adj.R.

FINDING OF FACT

The Preliminary Decree states that the point of diversion legal description is the NESWNE section 3, T6S, R9E, PARK. The legal description should be the NENENW section 3, T6S, R9E, PARK. UPLAND DITCH already correctly appears as the ditch name on the abstract.

CONCLUSION OF LAW

The Statement of Claim and the new DNRC marked aerial photograph are sufficient to contradict and overcome the *prima facie* claim as incorrectly modified prior to issuance of the Preliminary Decree.

RECOMMENDATIONS

Based upon the above Finding of Fact and Conclusion of Law, this Master recommends

that the Court make the change specified in the Finding 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 change has been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via USPS Mail:

Craig S. Buscher
Susan P. Tirrell
19 River Dr
Livingston, MT 59047

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

Water Right Number: **43B 7368-00** STATEMENT OF CLAIM

Version: 5 -- POST DECREE

Status: ACTIVE

Owners:
CRAIG S BUSCHER
19 RIVER DR
LIVINGSTON, MT 59047

SUSAN P TIRRELL
19 RIVER DR
LIVINGSTON, MT 59047 8705

Priority Date: MAY 1, 1904

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 22.44 GPM

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 0.94

Source Name: MILL 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 | | NENENW | 3 | 6S | 9E | PARK |

Period of Diversion: APRIL 1 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: UPLAND DITCH

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> |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 0.94 | | SESESE | 14 | 5S | 8E | PARK |
| Total: | 0.94 | | | | | | |

THE PLACE OF USE IS LOCATED IN LOT 44 PARADISE VALLEY ESTATES.

Remarks:

AUTHORIZATION TO CHANGE ISSUED 10/23/1989 FOR CHANGE IN POINT OF DIVERSION COMPLETED 10/28/1991. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE SEE 43B 7354-00

LEASE AUTHORIZATION TO CHANGE THE POINT, PLACE, AND PURPOSE OF USE ISSUED 01/27/1993 TO THE DEPARTMENT OF FISH, WILDLIFE & PARKS. SEE 43B 5862-00.