

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: Isabelle Birkeland

CASE 43B-0631-R-2022

43B 31128-00

OBJECTORS: United States of America DOI, Bureau of Land
Management

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 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 (Bureau of Land Management) objected to Isabelle Birkeland claim 43B 301128-00. The Preliminary Decree includes the following ownership remark:

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 09/22/2017 , THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY EOB RANCH LLC.

The May 20, 2022 Order Consolidating Case set a July 6, 2022 deadline for filing an ownership update. As no ownership update was filed, the remark was removed from the abstract and EOB Ranch LLC was removed from the mailing list by Order entered July 14, 2022. On August 1, 2023 Eleanor Molzahn, granddaughter of Isabelle Birkeland, filed a response detailing changes to be made to the point of diversion and place of use. As point of diversion is not at issue, this is deemed the claimant's motion to amend pursuant to section 85-2-233(6), MCA. On August 24, 2023 the United States of America (Bureau of Land Management) filed a response stating that it agrees with the requested changes, and if made, its objection is satisfied.

The September 7, 2023 Order Setting Filing Deadline states:

Claim 43B 31128-00 has means of diversion LIVESTOCK DIRECT FROM SOURCE. Livestock direct from source claims have identical legal descriptions for the point of diversion and place of use, as they both describe where the stock water from the source. The claimant's response filed on August 1, 2023 does not change the means of diversion but it requests a legal description for the point of diversion which does not match the requested place of use legal descriptions. It appears the requested point of diversion legal description is intended to identify where the particular spring arises rather than where the stock subsequently drink from the spring creek. Rather than change the point of diversion to the SWSENE section 2, T2S, R15E, SWEET GRASS as requested, it appears the point of diversion should be changed to match the requested place of use. A DRAFT abstract has been prepared and is attached for the parties' review. Therefore, it is

ORDERED that the deadline for the parties to file written statements showing cause why the Court should not proceed with changing the point of diversion and place of use as shown on the attached DRAFT abstract is **September 21, 2023**. If nothing is filed by this date, the Court will conclude the parties agree with the changes as shown on the attached DRAFT abstract.

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

The claimant's August 1, 2023 response includes a request to change the ownership. An ownership update should be filed with the Montana Department of Natural Resources and Conservation to pursue such change.

APPLICABLE LAW

The Montana Water Court has jurisdiction to review a motion to amend pursuant to section 85-2-233(6), MCA.

Rule 15 M.R.Civ.P. restricts the scope of the amendments to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the “same set of operative facts as contained in the original pleading.” *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985). The requested amendment “merely makes more specific that which has already been alleged.” *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).

Notice must be published by newspaper if the requested amendments “may adversely affect other water rights.” Section 85-2-233(6)(a)(i), 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 amending their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The change requested in the motion to amend arises out of the same conduct, transaction, or occurrence specified on the original Statement of Claim, is based on the same operative facts specified in the original Statement of Claim, and merely makes more specific that which was already claimed on the original Statement of Claim.

2. The Preliminary Decree states that the point of diversion is the SWSESW section 34, T1S, R15E, SWEET GRASS. The point of diversion should be:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
SWNW	2	2S	15E	SWEET GRASS
N2SW	2	2S	15E	SWEET GRASS
SENE	3	2S	15E	SWEET GRASS

3. The Preliminary Decree states that the place of use is the NE section 34, T1S, R15E, SWEET GRASS. The place of use should be:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
SWNW	2	2S	15E	SWEET GRASS
N2SW	2	2S	15E	SWEET GRASS
SENE	3	2S	15E	SWEET GRASS

CONCLUSIONS OF LAW

1. The requested amendment does not adversely affect other water rights as it is a correction to the abstract which does not make any change to the actual historical use of the claimed right on the ground. Notice by publication of this amendment is not required. Section 85-2-233(6), MCA.
2. The requested amendment "merely makes more specific that which has already been alleged." *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972).
3. The parties' responses are sufficient to contradict and overcome the *prima facie* claim as it appeared in the Preliminary Decree.

RECOMMENDATIONS

Based upon the above, this Master recommends that the Court grant the motion to amend this claim and 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 E-Mail:

Romney S. Philpott, Trial Attorney
US Department of Justice
ENRD, Natural Resources Section
999 18th Street, South Terrace Suite 370
Denver, CO 80202
(303) 844-1810 w
romney.philpott@usdoj.gov
Montanabasins.enrd@usdoj.gov

Peter G. Scott
Attorney at Law
682 Ferguson #4
Bozeman, MT 59718
peter@scott-law.com
office@scott-law.com

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

Water Right Number: **43B 31128-00 STATEMENT OF CLAIM**

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ISABELLE BIRKELAND

DECEASED

301 W GREYCLIFF AVE
BIG TIMBER, MT 59011 7893

Priority Date: DECEMBER 31, 1916

Type of Historical Right: FILED

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:** SPRING, UNNAMED TRIBUTARY OF LOWER DEER CREEK

Source Type: GROUNDWATER

***Point of Diversion and Means of Diversion:**

ID	Govt Lot	Otr Sec	Sec	Twp	Rge	County
1		SWNW	2	2S	15E	SWEET GRASS
Period of Diversion:	JUNE 1 TO JANUARY 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		N2SW	2	2S	15E	SWEET GRASS
Period of Diversion:	JUNE 1 TO JANUARY 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		SENE	3	2S	15E	SWEET GRASS
Period of Diversion:	JUNE 1 TO JANUARY 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
Period of Use:	JUNE 1 TO JANUARY 31					

Place of Use:

ID	Acres	Govt Lot	Otr Sec	Sec	Twp	Rge	County
1			SWNW	2	2S	15E	SWEET GRASS
2			N2SW	2	2S	15E	SWEET GRASS
3			SENE	3	2S	15E	SWEET GRASS