

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: Kim E. Jensen; Mikolich Land Co. LLC

OBJECTORS: Church Universal & Triumphant Inc.

NOTICE OF INTENT TO APPEAR: Trout Unlimited

CASE 43B-0672-R-2022

43B 195245-00

43B 195247-00

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

Claim 43B 195245-00 appeared in the Preliminary Decree with the following remarks:

THE STIPULATION FILED ON JULY 13, 1990 SPECIFIES CHANGES TO BE MADE TO THE PRIORITY DATE, PERIOD OF USE AND VOLUME. THIS IS A LATE OBJECTION AND WILL BE HEARD AFTER PROPER NOTICE IN THE NEXT OBJECTION LIST.

THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION MEMORANDUM DATED JUNE 2, 1987 STATES THAT THE CORRECT LEGAL DESCRIPTION FOR THE POINT OF DIVERSION IS SESWSE SEC 07 TWP 09S RGE 08E. THIS WILL BE HEARD AFTER PROPER NOTICE IN THE NEXT OBJECTION LIST.

Claim 43B 195247-00 appeared in the Preliminary Decree with the following remarks:

THE TIMELY FILED OBJECTION OF THE UNITED STATES OF AMERICA WAS AMENDED BY THE UNITED STATES OF AMERICA TO INCLUDE PRIORITY DATE AND PERIOD OF USE BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THESE CHANGES MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

IT IS NOTED THAT THE PRIORITY DATE AND FLOW RATE REFLECT A NEGOTIATED AGREEMENT WHICH REDUCED HISTORICAL FLOW RATES AND RELINQUISHED MORE SENIOR PRIORITY DATES, AND MAY NOT EXACTLY CORRELATE WITH THE PRIOR DECREE ENTERED IN CAUSE NO. 2176, PISOR V REESE, SIXTH JUDICIAL DISTRICT, PARK COUNTY.

THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S JUNE 2, 1987 MEMORANDUM STATES THAT THE CORRECT LEGAL DESCRIPTION FOR THE POINT OF DIVERSION IS SESWSE SEC 07 TWP 09S RGE 08E. THIS WILL BE HEARD AFTER PROPER NOTICE IN THE NEXT OBJECTION LIST.

The Church Universal & Triumphant Inc. objected to both claims. Trout Unlimited filed a notice of intent to appear for both claims.

On July 26, 2023 the parties filed a Stipulation Settling Claims. The August 7, 2023 Order Setting Filing Deadline states:

On July 26, 2023 the parties filed their Stipulation Settling Claims. The AGREEMENT portion of the Stipulation identifies certain changes to be made to each claim, and for each claim states "[A]ll other elements of this claim will remain as they appear in the Preliminary Decree." Marked copies of the abstract for each claim are attached to the Stipulation as Exhibit B. The markings include changes which are not specified in the AGREEMENT portion. Those additional changes appear appropriate but the Court does not want to act contrary to the clear language in the AGREEMENT portion. If the parties want those additional changes made, a brief Addendum clearly stating that should be filed. Therefore, it is

ORDERED that the deadline is **August 28, 2023** for filing an addendum. If not filed by this deadline, the Court will conclude that only the changes identified in the AGREEMENT portion of the Stipulation should be made.

On August 28, 2023 the Church Universal & Triumphant Inc., the objector, filed an Addendum To Stipulation Settling Claims which is not signed by the claimants or the notice of intent to appear party.

The August 30, 2023 Order Setting Filing Deadline states:

The August 7, 2023 Order Setting Filing Deadline set August 28, 2023 as the deadline for filing an addendum to the Stipulation, if the parties so chose. On August 28, 2023 the objector filed an Addendum To Stipulation Settling Claims ["Addendum"]. It is noted that the period of diversion for claim 43B 195247-00 is not included in the Addendum. The Addendum is not signed by the claimants or notice of intent to appear party who signed the Stipulation. The absence of these signatures may indicate disagreement amongst the parties. Therefore, it is

ORDERED that the deadline is **September 13, 2023** for the other parties to file their endorsement of the Addendum. If not filed by the deadline, the Court will conclude the other parties do not agree with the Addendum and will proceed with basing the Master's Report only on the AGREEMENT portion of the Stipulation.

On November 7, 2023 the claimants filed their Agreement With Addendum. Nothing was filed by Trout Unlimited. Therefore, Court concludes that Trout Unlimited does not agree with the Addendum and bases this Master's Report only on the Agreement portion of the Stipulation Settling Claims. 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. For claim 43B 195245-00, the Preliminary Decree states that the priority date is July

1, 1883. The priority date should be June 1, 1883.

The Preliminary Decree states that the point of diversion legal description is the SWSESE section 7, T9S, R8E, PARK. The legal description should be SESWSE section 7, T9S, R8E, PARK. The point of diversion issue remark should be removed as addressed and resolved.

As requested, the following clarification remark should be added to the flow rate:

THE STIPULATION FILED ON JULY 13, 1990 SPECIFIES THAT THE COMBINED TOTAL APPROPRIATION FOR THIS WATER RIGHT AND 43B 195245-00 CANNOT EXCEED 0.25 CFS.

The notice remark concerning the 1990 Stipulation should be removed as having served its notice purpose.

2. For claim 43B 195247-00, the Preliminary Decree states that the point of diversion legal description is the SWSESE section 7, T9S, R8E, PARK. The legal description should be SESWSE section 7, T9S, R8E, PARK. The point of diversion issue remark should be removed as addressed and resolved.

As requested, 10.39 should be added as the acreage total in the place of use.

The notice remarks concerning the timely filed objection and the negotiated agreement should be removed as having served their notice purposes.

CONCLUSION OF LAW

The settlement filed by the parties is sufficient to contradict and overcome the prima facie claims and 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 for each 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

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

Water Right Number: **43B 195245-00 STATEMENT OF CLAIM**

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
KIM E JENSEN
8088 SPRINGHILL RD
BELGRADE, MT 59714 8699

MIKOLICH LAND CO LLC
11200 E YARROW RD
PALMER, AK 99645

Priority Date: JUNE 1, 1883

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 112.20 GPM

THE STIPULATION FILED ON JULY 13, 1990 SPECIFIES THAT THE COMBINED TOTAL APPROPRIATION FOR THIS WATER RIGHT AND 43B 195247-00 CANNOT EXCEED 0.25 CFS.

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

Climatic Area: 5 - LOW

Maximum Acres: 10.39

Source Name: REESE 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 | | SESWSE | 7 | 9S | 8E | PARK |

Period of Diversion: MAY 1 TO SEPTEMBER 30

Diversion Means: HEADGATE

Ditch Name: LUSTRICK DITCH

Period of Use: MAY 1 TO SEPTEMBER 30

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 | 10.39 | | NENESE | 6 | 9S | 8E | PARK |
| Total: | 10.39 | | | | | | |

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

195245-00

195246-00

IT IS NOTED THAT THE STIPULATION FILED ON JULY 13, 1990 INCLUDES AGREEMENTS CONCERNING MATTERS BEYOND THE ADJUDICATION OF THE ELEMENTS OF THIS RIGHT, SUCH AS EASEMENTS, INSTALLATION OF STRUCTURES, MAINTENENCE OF A MINIMUM INSTREAM FLOW, ETC.

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

Water Right Number: **43B 195247-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
KIM E JENSEN
8088 SPRINGHILL RD
BELGRADE, MT 59714 8699

MIKOLICH LAND CO LLC
11200 E YARROW RD
PALMER, AK 99645

***Priority Date:** JUNE 1, 1883

Type of Historical Right: DECREED

Purpose (use): STOCK

***Flow Rate:** 112.20 GPM

THE WATER RIGHTS 43B 190980-00, 43B 190983-00, 43B 191009-00, 43B 195247-00, 43B 196085-00 AND 43B 196087-00 ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES, 55.00 MINER'S INCHES, EXCEEDS THE 50.00 MINER'S INCHES DECREED IN CASE NO. 2176, PISOR V REESE, SIXTH JUDICIAL DISTRICT, PARK COUNTY. AT THE SEPTEMBER 6, 1990 CONFERENCE THE PARTIES NOTED THAT THE CHANGED FLOW RATE AND PRIORITY DATE REPRESENTED A NEGOTIATED COMPROMISE, THAT THE PARTIES RELINQUISHED MORE SENIOR DECREED PRIORITY DATES AND GREATER FLOW RATES. THE RESULTING FLOW RATE, ALTHOUGH IT EXCEEDS THE 50.00 MINER'S INCHES DECREED WITH A JUNE 1, 1883 PRIORITY DATE IN PISOR V REESE, WAS USED HISTORICALLY UNDER OTHER SENIOR RIGHTS AND THAT GREATER FLOW RATES WERE USED HISTORICALLY.

THE STIPULATION FILED ON JULY 13, 1990 SPECIFIES THAT THE COMBINED TOTAL APPROPRIATION FOR THIS WATER RIGHT AND 43B 195245-00 CANNOT EXCEED 0.25 CFS.

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: REESE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| <u>ID</u> | <u>Govt Lot</u> | <u>Otr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | SESWSE | | 7 | 9S | 8E |

***Period of Diversion:** APRIL 15 TO OCTOBER 15

Diversion Means: DITCH

Ditch Name: LUSTRICK DITCH

***Period of Use:** APRIL 15 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 | 10.39 | | NENESE | 6 | 9S | 8E | PARK |
| Total: | 10.39 | | | | | | |

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.

190980-00

190983-00

191009-00

195247-00

196085-00

196087-00