

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

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CLAIMANTS: Gayleen M. Malone; Martin C. Malone; Jeremiah  
N. Bates; Tracy C. Bates

CASE 43B-0142-R-2020

43B 191096-00

43B 191097-00

43B 191098-00

43B 191099-00

43B 191100-00

43B 215747-00

OBJECTOR: Trout Unlimited

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**INTRODUCTION**

This case involves six water right claims owned by Martin C. Malone (“Malone”) and Gayleen Malone (collectively, “Malones”).<sup>1</sup> Following issuance of a preliminary decree, Trout Unlimited (“TU”) objected to all six claims. The Water Court conducted an evidentiary hearing to address TU’s objections and the Malones’ request for two implied claims. The Court now enters these findings of fact, conclusions of law, and an order modifying the claims to address the various objections and issue remarks.

**PROCEDURAL BACKGROUND**

The State’s centralized water rights record system identifies the Malones’ six claims as water right numbers 43B 191096-00, 43B 191097-00, 43B 191098-00, 43B 191099-00, 43B 191100-00, and 43B 215747-00. The Water Court decreed each claim in

<sup>1</sup> Jeremiah N. Bates and Tracy C. Bates (collectively, “Bates”) are co-owners of claims 43B 191097-00, 43B 191098-00, 43B 191099-00, and 43B 191100-00. The Bates did not participate in the evidentiary hearing so the Court’s rulings as to these claims are binding on them.

the Preliminary Decree for the Yellowstone River Basin above and including Bridger Creek (Basin 43B) issued on May 9, 2019. The Court described the elements of each claim on a decree abstract. All of the abstracts have issue remarks.

Other than TU, no one objected or counterobjected to the Malone claims. The claims all were included on the Basin 43B objection list, but no one filed notices of intent to appear. After the objection and appearance periods closed, the Water Court consolidated the claims into this case to address the issue remarks and TU's objections.<sup>2</sup>

On August 2, 2021, TU filed a motion for summary judgment asking the Court to modify the periods of use for claims 43B 191096-00, 43B 191097-00, and 43B 215747-00. (Doc. 16.00). The Malones filed a cross-motion for summary judgment asking for rulings on several legal theories, including whether the doctrines of res judicata, collateral estoppel, law of the case apply in in this proceeding. (Doc. 18.00).

On May 26, 2022, the senior water master previously assigned to this case issued an order denying TU's motion and partially granting the Malones' motion as to the claim and issue preclusion arguments. The summary judgment order precluded TU from relying on the doctrines of res judicata or collateral estoppel to support its objections. However, the order recognized TU still had other grounds to object. (Doc. 22.00). The case later was stayed, then reassigned to a water judge for trial.

On November 16, 2023, the Court conducted the evidentiary hearing at the Water Court in Bozeman, Montana. Prior to the hearing, the Court approved a prehearing order and a number of stipulated exhibits. (Doc. 50.00). The Court heard testimony from six witnesses. TU called Rankin Holmes and Martin Malone as witnesses, and Chris Clancy as a rebuttal witness. The Malones called Keith Neal, Gordon Rigler, Martin Malone, and Riley Schimmin. A record of witnesses who testified and exhibits offered and admitted or refused<sup>3</sup> is contained in court minutes filed by the Court. (Doc. 64.00).

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<sup>2</sup> Initially this case included only claims 43B 191096-00 and 43B 215747-00, with the other claims consolidated in case 43B-0107-R-2020. The Court reconsolidated this case on April 1, 2021 to include all six claims. (Doc. 12.00).

<sup>3</sup> The Malones' exhibits are identified with numbers and TU's with letters.

After the hearing the parties filed proposed findings of fact and conclusions of law and supporting briefs.

### **ISSUES**

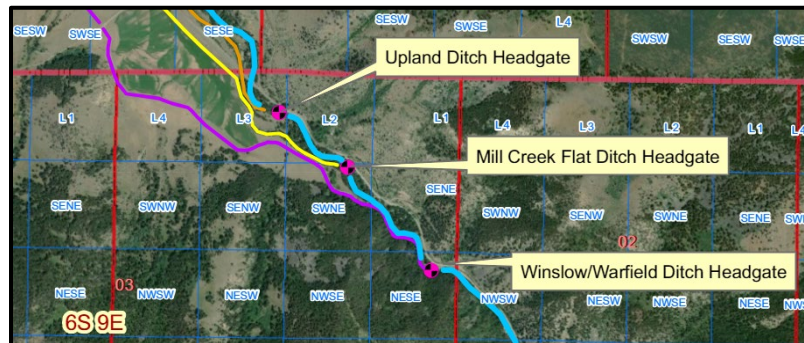
1. Should the Court deny TU's objections for lack of standing?
2. Should the Court modify the maximum acreage elements of the Malones' irrigation claims?
3. Should the Court modify the period of use for the Malones' claims 43B 191096-00, 43B 191097-00, and 43B 215747-00?
4. Should the Court create implied claims based on claims 43B 191096-00, 43B 191097-00?
5. Are the issue remarks resolved?

### **FINDINGS OF FACT**

#### *Setting and Ownership*

1. The Malones' claims describe rights to use water from Mill Creek, a tributary of the Yellowstone River. Five of the Malones' claims are for irrigation use, and the remaining claim (43B 215747-00) is for stock water use.
2. Mill Creek flows generally westerly from its headwaters in the Absaroka Mountains to its confluence with the Yellowstone River near Pray, in Park County, Montana. The Mill Creek drainage lies entirely within hydrologic basin 43B.
3. As described by the various witnesses, Mill Creek follows an annual hydrologic cycle typical of streams in Montana that originate in mountain terrain. Mill Creek is characterized by high spring and early summer flows in response to mountain snowmelt. Streamflows naturally decline as summer wears on, with flows sometimes augmented by precipitation events.
4. Over time, water users constructed several ditches to divert water from Mill Creek. These ditches were built on both the north and the south sides of the creek. Many of these ditches convey water to multiple water users with Mill Creek water rights.

5. The Mill Creek ditches include the Upland Ditch and the Mill Creek Flat Ditch. Both ditches historically<sup>4</sup> tapped Mill Creek on its southwest bank to convey water to land generally south and west of the creek. The points of diversion of the two ditches are close to each other in Section 3, Township 3 South, Range 9 East. The point of diversion for the Mill Creek Flat Ditch historically was located in the NESWNE of Section 3, Twp 6S, Rge 9E in Park County. The point of diversion for the Upland Ditch historically was located in the NENENW of Section 3, Twp 6S, Rge 9E in Park County. The point of diversion for the Mill Creek Flat Ditch is upstream from the Upland Ditch point of diversion. The following excerpt of a map prepared by the Department of Natural Resources and Conservation (“DNRC”)<sup>5</sup> illustrates the relative location of the two ditches:



6. Even though the courses of the Mill Creek Flat and Upland Ditches run close to each other, the ditch owners historically maintained each ditch separately. (Tr.<sup>6</sup>, at 3:46 (Rigler)). Although the Malones provided some testimony that water diverted to the Mill Creek Flat Ditch and the Upland Ditch comingles between the ditches, the Malones do not contend their rights in the two ditches should be marshaled together.

<sup>4</sup> Unless otherwise specified, for purposes of this Order the Court uses the terms “historical” and “historically” to describe events that occurred prior to July 1, 1973, the effective date of the Water Use Act.

<sup>5</sup> Court Minutes, Scheduling Order, and Order Updating Mailing List, Case 43B-0142-R-2020, at 5 (filed on April 19, 2021, Doc. 13.00). The map is included in this Order for illustrative purposes only to show the locations of the ditches in relation to each other.

<sup>6</sup> “Tr.” refers to the time of hearing audio recording. The testifying witness also is identified in the transcript citations.

7. The Malones own property in Park County that includes land in the SW of Section 30, Township 5 South, Range 9 East. The Malones acquired this land from Leo Briggs in 1980.

8. The Malones' property is located several miles from the headgates, and approximately three-quarters of the way down the length of the Mill Creek Flat Ditch.

#### *District Court Decrees*

9. Prior to the enactment of the Water Use Act in 1973, the state district court in Park County conducted proceedings and entered decrees in two cases involving Mill Creek water rights. The first case was the District Court in the 1938 case, *Sallie A. Allen, et al. v. N.F. Wampler, et al.*, Cause No. 7583 (Mont. Sixth Jud. Dist., June 1, 1938) ("*Allen Decree*").

10. The *Allen Decree* involved the adjudication of numerous rights to divert water from Mill Creek through several ditches, including the Mill Creek Flat Ditch and the Upland Ditch. The decree made findings as to the legal descriptions for the ditches, the water users on each of the ditches, and relative priority dates for each water user on each ditch, and numerically precise flow rates for each of the various decreed water rights. As part of the findings, the District Court also made findings describing the irrigated lands of the decreed water users, and the relative fractional ownership interests in the ditches. Based on the findings, the Court made conclusions of law as to the relative rights to water from Mill Creek generally, and as to the users on the various ditches.

11. The priority dates for Mill Creek diversions decreed in the *Allen Decree* range from June 1, 1880 to June 1, 1932. The decreed priority dates on the Mill Creek Flat Ditch range from April 1, 1883 to June 1, 1906. The decreed priority dates on the Upland Ditch range from June 1, 1903 to June 1, 1932.

12. The *Allen Decree* included two water rights decreed to Leo Briggs from the Mill Creek Flat Ditch. These included an 8 miner's inch right with an April 1, 1883 priority date. The 1883 right is the basis for the Malones' claim 43B 191100-00, with its 90.00 gallons per minute ("gpm") flow rate. The District Court also decreed to Leo Briggs a 17 miner's inch right with a June 1, 1906 priority date. The 1906 right now is

reflected in the Malones' claim 43B 191099-00, with a flow rate of 193.00 gallons per minute.

13. In addition to the rights decreed to Leo Briggs in the *Allen Decree*, the District Court also decreed a 70 miner's inch right to L.A. Briggs from the Upland Ditch with a May 1, 1904 priority date. The 1904 right is the basis for Malone's claim 43B 191098-00, with its 1.75 cfs flow rate.<sup>7</sup>

14. In the *Allen Decree* the District Court decreed other water rights to other water users with varying priority dates in both the Mill Creek Flat Ditch and the Upland Ditch in addition to the rights decreed to Leo Briggs and L.A. Briggs.

15. The *Allen Decree* required that decreed water users install and maintain headgates and measurement devices at the points of diversion of all ditches addressed in the decree, including the Mill Creek Flat Ditch and the Upland Ditch. (Ex. A, Findings of Fact ¶ 129).

16. The *Allen Decree* also required "that measuring boxes be installed and maintained in all openings in any such ditch from which water is taken by any of the parties." (Ex. A, Conclusions of Law, ¶ VIII).

17. The second of the two District Court decrees was a supplemental water rights decree in 1964 for Mill Creek in the case *Gerald F. Petrich, et al. v. Archibald and Margret E Allen, et al.*, Cause No. 11616 (Mont. Sixth Jud. Dist., Park County, July 22, 1964 ("*Petrich Decree*") (Ex. B).

18. The *Petrich Decree* was based on a finding by the District Court that Mill Creek had an amount of undecreed water available between May 1 and July 15 each season. The Court then decreed this "excess" water to various water users on various ditches, including both the Mill Creek Flat Ditch and the Upland Ditch. All of the rights decreed in the *Petrich Decree* to these two ditches have a June 4, 1963 priority date.<sup>8</sup>

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<sup>7</sup> The relationship between L.A. Briggs and Leo Briggs is not entirely clear from the record, but unimportant for purposes of the issues before the Court because no one seems to dispute the Malones also are the successors in interest to the right decreed to L.A. Briggs.

<sup>8</sup> The District Court also decreed several Mill Creek rights to the plaintiff parties with a priority date of June 3, 1964, one day senior to the rights decreed to the counterclaimants. (Ex. B, at 11).

19. In the *Petrich Decree*, the District Court decreed to Leo Briggs a 10 miner’s inch right through the Mill Creek Flat Ditch with a June 4, 1963 priority date. This right is the basis for the Malones’ claim 43B 191096-00, with a flow rate of 112.00 gpm.

20. In the *Petrich Decree*, the District Court also decreed to Leo Briggs a 90 miner’s inch right through the Upland Ditch with a June 4, 1963 priority date. This right is the basis for the Malones’ claim 43B 191097-00, with a flow rate of 2.25 cfs.

21. Like the *Allen Decree*, the *Petrich Decree* included a provision requiring that “measuring boxes be installed and maintained in all openings in any such ditch from which water is taken by any of the parties, and that each of the parties be restrained and enjoined perpetually from using such ditch unless and until such measuring bozes (*sic*) are installed and maintained.” (Ex. B, Conclusions of Law, at 14, ¶ VII).

22. The following table shows in order of priority the priority dates, flow rates and ditches for the Malones’ irrigation claims decreed by the District Court in the *Allen Decree* and the *Petrich Decree*:

Claim	Priority	Flow rate	Ditch
43B 191100-00	4/1/1883	8 MI (90 gpm)	Mill Creek Flat
43B 191098-00	5/1/1904	70 MI (1.75 cfs)	Upland
43B 191099-00	6/1/1906	17 MI (193 gpm)	Mill Creek Flat
43B 191096-00	6/4/1963	10 MI (112 gpm)	Mill Creek Flat
43B 191097-00	6/4/1963	90 MI (2.25 cfs)	Upland

#### *Water Use Act Claim Filings*

23. On February 24, 1982, the Malones filed statements of claim for each of the irrigation claims as required by the Water Use Act. (Ex. 1 through 5). The Malones submitted a map with each statement of claim. Although the quality of the map is somewhat poor, the map depicts portions of the southwest quarter of Section 30 as historically irrigated and not irrigated. The non-irrigated portion is shown with cross-hatching. (*E.g.*, Ex. 2, at 0004).

24. The statement of claim for claim 43B 191096-00 includes the 10 miner’s inch (112 gpm) flow rate and June 4, 1963 priority date from the *Petrich Decree*. The

claim form identifies the ditch as the “Mill Creek Flat” ditch, but included the legal description for the Upland Ditch (NENENW). Interlineations on the claim form in the claim file indicate DNRC modified the point of diversion legal description to the SWNWNE to approximately<sup>9</sup> correspond to the Mill Creek Flat legal description. (Ex. 1, at 0034). The statement of claim describes the period of use as April 20 to August 1 and includes a 133 acre place of use in Section 30, Township 5 South, Range 9 East.<sup>10</sup>

25. The statement of claim for claim 43B 191097-00 includes the 90 miner’s inch (2.25 cfs) flow rate and June 4, 1963 priority date from the *Petrich Decree*. The claim form identifies the ditch as the “Upland Ditch,” but included the legal description for the Mill Creek Flat Ditch (SWNWNE). Interlineations on the claim form indicate DNRC modified the point of diversion legal description to the NENENW to approximately correspond to the Upland Ditch legal description. (Ex. 2, at 0002). The statement of claim describes the period of use as April 20 to August 1 and includes the same 133 acre place of use as the Malones’ other irrigation claims.

26. The statement of claim for claim 43B 191098-00 includes the 70 miner’s inch (1.75 cfs) flow rate and May 1, 1904 priority date from the *Allen Decree*. The claim form identifies the ditch as the “Upland Ditch,” but included the legal description for the Mill Creek Flat Ditch (SWNWNE). Interlineations on the claim form indicate DNRC modified the point of diversion legal description to the NENENW to approximately correspond to the Upland Ditch legal description. (Ex. 3, at 0002). The statement of claim describes the period of use as April 20 to October 1 and includes the same 133 acre place of use as the Malones’ other irrigation claims.

27. The statement of claim for claim 43B 191099-00 includes the 17 miner’s inch flow rate and June 1, 1906 priority date from the *Allen Decree*. The claim form identifies the ditch as the “Mill Creek Flat” ditch, but included the legal description for

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<sup>9</sup> As indicated on the map reproduced above the Mill Creek Flat Ditch point of diversion is very close to the line between the SWNWNE and the NESWNE of Section 3. Both descriptions appear to describe the physical location of the same point of diversion for the Mill Creek Flat Ditch.

<sup>10</sup> The claim form appears to have initially claimed the southeast quarter, but was interlined to change “SE” to “SW.”



the Upland Ditch (NENENW). Interlineations on the claim form in the claim file indicate DNRC modified the point of diversion legal description to the SWNWNE to approximately correspond to the Mill Creek Flat legal description. (Ex. 4, at 0002). The statement of claim describes the period of use as April 20 to October 1 and includes the same 133 acre place of use as the Malones' other irrigation claims.

28. The statement of claim for claim 43B 191100-00 includes the 8 miner's inch flow rate and April 1, 1883 priority date from the *Allen Decree*. The form identifies the ditch as the "Mill Creek Flat" ditch, but included the legal description for the Upland Ditch (NENENW). Interlineations on the claim form in the claim file indicate DNRC modified the point of diversion legal description to the SWNWNE to approximately correspond to the Mill Creek Flat legal description. (Ex. 5, at 0002). The statement of claim describes the period of use as April 20 to October 1 and includes the same 133 acre place of use as the Malones' other irrigation claims.

29. The statements of claim for the five irrigation rights mirror the elements decreed by the District Court in the *Allen Decree* and the *Petrich Decree* as to priority date, flow rate, and ditches, with the legal descriptions for the Mill Creek Flat Ditch and Upland Ditch points of diversion updated.

30. On July 1, 1996, the Malones filed a statement of claim for claim 43B 215747-00 as a claim for a use right for stock water use from the Upland Ditch with a June 4, 1963 priority date. The claim correctly described the Upland Ditch point of diversion and the Malones' property as the place of use.

*Water Court Temporary Preliminary Decree Proceedings*

31. On January 16, 1985, the Water Court issued a temporary preliminary decree ("TPD") for Basin 43B. Prior to issuing the TPD, DNRC verified the claims based on the claim examination procedures in place at that time. The verification worksheets are contained in the claim files.

32. The Water Court included the Malones' five irrigation claims in the TPD. (The Malones filed claim 43B 215747-00 as a late claim after the TPD was issued). During the TPD objection period, several parties filed objections to the claims, including

the United States Bureau of Reclamation (“Reclamation”) and the Montana Department of Fish, Wildlife and Parks (“FWP”). The Water Court also called in the claims on motion “because it appears there may be a problem with acres irrigated.” TU did not file objections at the TPD stage. The Court consolidated the claims into case 43B-342 to address the objections and the Court’s motion.

33. On August 30, 1994, the water master assigned to Basin 43B issued a master’s report containing findings of fact and conclusions of law regarding the Malones’ irrigation claims. The master’s report recommended minor modifications to the point of diversion legal description for claims 43B 191097-00 and 43B 190098-00. These modifications apply to the Upland Ditch. The master’s report did not recommend modification of any other elements of the claims in response to Reclamation or FWP’s objections. The Court adopted the Master’s Report on September 22, 1994.

*Water Court Preliminary Decree*

34. On May 9, 2019, the Water Court issued the Basin 43B Preliminary Decree.

35. The Preliminary Decree included abstracts of all claims of existing water rights within the basin based on DNRC’s reexamination of the claims and the Water Court’s review of a summary report of the claims prepared by DNRC.

36. The Preliminary Decree included abstracts of claims 43B 191096-00, 43B 191097-00, 43B 191098-00, 43B 191099-00, 43B 191100-00, and 43B 215747-00. Each of these abstracts described the elements of the claims as decreed by the Water Court.

37. The preliminary decree abstracts for claims 43B 191096-00, 43B 191097-00, 43B 191098-00, 43B 191099-00, 43B 191100-00 all describe rights to use water from Mill Creek for irrigation use. The preliminary decree abstracts for all five irrigation claims all describe an identical 133.00 acre place of use in the SW of Section 30, Township 5 South, Range 9 East.

38. The preliminary decree abstract for claim 43B 215747-00 describes a claim to use water from Mill Creek for stock water use.

39. The preliminary decree abstracts for the five irrigation claims and stock claim 43B 215747-00 all identify the Upland Ditch as the means to convey water from a headgate on Mill Creek to the Malones' place of use. However the abstracts identify two different point of diversion legal descriptions in Section 3, Township 6 South, Range 9 East, as indicated on the following table, which compares the two decrees:

Claim	TPD Legal	TPD Ditch	PD Legal	PD Ditch
43B 191096-00	SWNWNE	Mill Creek Flat	NESWNE	Upland
43B 191097-00	NENENW	Upland	SENENW	Upland
43B 191098-00	NENENW	Upland	SENENW	Upland
43B 191099-00	SWNWNE	Mill Creek Flat	NESWNE	Upland
43B 191100-00	SWNWNE	Mill Creek Flat	NESWNE	Upland

40. The preliminary decree abstract for claim 43B 215747-00 also describes a place of use in the SW of Section 30, Township 5 South, Range 9 East in Park County.

41. All the preliminary decree abstracts for the Malones' claims include issue remarks. The abstracts for claims 43B 191096-00, 43B 191099-00, and 43B 191100-00 include the following issue remark:

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

42. This remark was added when DNRC changed the ditch name from the Mill Flat Ditch to the Upland Ditch in the preliminary decree abstracts even though DNRC did not change the point of diversion legal description.

43. The abstract for claim 43B 191097-00 and claim 43B 191098-00 both include the following issue remarks:

THE TIMELY FILED OBJECTION OF THE DEPARTMENT OF FISH, WILDLIFE AND PARKS WAS AMENDED BY AGREEMENT OF THE CLAIMANT TO INCLUDE POINT OF DIVERSION. BECAUSE THIS ELEMENT WAS NOT

INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

THE POINT OF DIVERSION APPEARS TO BE INCORRECT.  
THE POINT OF DIVERSION APPEARS TO BE IN THE  
NESWNE SEC 3 TWP 6S RGE 9E PARK COUNTY.

44. The objection amendment issue remark that now appears on claims 43B 191097-00 and 43B 191098-00 is based on the Master's Report and provides notice that the settlement of FWP's objections in case 43B-342 included resolution of objections to the volume, flow rate, acres irrigated and alleged abandonment of the claims.

45. That abstract for claim 43B 191097-00 also has a remark stating: "THE VOLUME IS MISSING."

46. The Preliminary Decree abstract for claim 43B 215747-00 includes the following three issue remarks:

CLAIM WAS NOT INCLUDED IN THE BASIN 43B  
TEMPORARY PRELIMINARY DECREE ISSUED 01/16/1985.

CLAIM FILED LATE 07/01/1996. IN ADDITION TO BEING  
SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED  
WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS  
BASED ON STATE LAW, THIS RIGHT MAY ALSO BE  
SUBORDINATE TO CERTAIN PERMITS AND  
RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

THE POINT OF DIVERSION APPEARS TO BE INCORRECT.  
THE POINT OF DIVERSION APPEARS TO BE IN THE  
NESWNE SEC 3 TWP 6S RGE 9E PARK COUNTY.

47. After the Water Court issued the Basin 43B Preliminary Decree, TU filed timely objections to the Malones' six claims. (Prehearing Order, Agreed Facts, ¶ 1).

*Historical Place of Use*

48. The parties presented two categories of evidence at the hearing regarding the scope of historical water use. The first category addresses TU's objection to the

historical place of use for the Malones five irrigation water right claims. As previously noted, statements of claim for the Malones' five irrigation claims all identify 133.0 acres irrigated in the SW of Section 30, Township 5 South, Range 9 East.

49. TU's objections contend the Court should reduce the decreed place of use from 133.00 acres to 76.00 acres. TU arrived at this figure by citing to Leo Briggs' evidence in the *Wampler Decree* litigation where Briggs alleged in his counterclaim he was irrigating "approximately 76 acres." (Ex. E, at 3).

50. DNRC verified only 103 acres appeared to be irrigated as of 1979. Based on the verification, the TPD abstracts for the five irrigation claims included an issue remark stating:

THIS CLAIM PRESENTS ISSUES OF LAW AND FACT THAT MAY BE ADDRESSED AT THE OBJECTION STAGE. IT APPEARS THAT 103.0 ACRES ARE ACTUALLY IRRIGATED AT THIS TIME.<sup>11</sup>

51. After issuing the TPD, the Water Court called the Malone's irrigation claims in on-motion "because there appears to be a problem with acres irrigated." (Ex. 1, at 8). In response to the Water Court's motion and appearances and objections filed by others, Martin Malone filed an affidavit (the "Malone Affidavit") with the Court. The Malone Affidavit states:

I am the owner of the SW 1/4 of Section 30, Township 5 S, Range 9E. This parcel of land has been irrigated since the early 1900's by my predecessors using flood irrigation methods. The portion of the historically irrigated ground is noted in Attachment A in the dark shade. Since acquiring the property I have installed a sprinkler system to improve the efficiency of water application. The increase in the number of irrigated acres solely due to the use of sprinkler irrigation, and improved irrigation efficiency not to increased water usage.

(Ex. 1, at 20).

52. The Malone Affidavit included two attachments. The referenced "Attachment A" is a shaded map. Malone testified that Attachment A depicts the area

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<sup>11</sup> The TPD abstracts are not actually in the record, but the Court takes judicial notice of them. They are available through the Water Rights Query System, or on the adjudication webpage for Basin 43B.

irrigated with the Malones' water rights prior to 1973. (Tr., at 2:31:20-2:23:25). After the filing of the Malone Affidavit, Reclamation and FWP withdrew their TPD objections to the Malones' claims.

53. The Water Master reviewed Mr. Malone's affidavit and concluded it was "proper and accepted by this Court." The Master's Report then concluded the "acres irrigated do not require change." (Ex. 1, at 16-17, ¶¶ III and VII).

54. TU's expert witness Rankin Holmes examined a series of aerial photographs that include depictions of the Malones' claimed place of use. Holmes' analysis included photographs from 1954, 1976, 1979, 1984, and 2017. Based on his analysis of the photographs, Holmes opined that the following number of acres were irrigated within the claimed place of use:

Year	Reference	Acres
1954	Ex. R, at 7-8	36.1
1976	Ex. R, at 8	68.1
1979	Ex. R, at 8-9	90.4
1984	Ex. R, at 9	101.1
2017	Ex. R, at 9-10	141.3

(Ex. R, at 6 (Table 2)). Holmes conceded that he had not actually visited or physically inspected the Malones' claimed place of use.

#### *Historical Period of Use*

55. The second category of evidence regarding the scope of the Malones' claims is the historical season of water use as to claims 43B 191096-00 and 43B 191097-00. Claims 43B 191096-00 and 43B 191097-00 both are based on the June 4, 1963 right decreed by the District Court.

56. TU contends the periods of use for these claims should be limited to May 1 to July 15, based on the Malones' filing the claims as "decreed" rights. TU does not object to the period of use for the Malones' other irrigation claims.

57. The periods of use appearing in the 2019 Preliminary Decree and at issue in this case are: April 20 to August 1 (43B 191096-00), April 20 to August 4 (43B 191097-00), and April 1 to October 15 (43B 215747-00).

58. When the Malones filed their statements of claim, they described the type of rights for the two claims as “decreed rights” based upon the *Petrich Decree*. The TPD and the Preliminary Decree abstracts also describe the type of right as “decreed” rights.

59. The plaintiffs in the *Petrich Decree* case initiated the proceeding because they wanted to build a new ditch to divert previously unadjudicated water from Mill Creek and convey it to their properties. Their complaint alleged “Mill Creek has surplus or extra water that has not been previously decreed.” (Ex. C, ¶ 3).

60. Leo Briggs and numerous others answered the complaint and filed counterclaims. (Ex. E). The counterclaims asked the District Court to decree water they alleged they already were diverting at various other ditches. Briggs’ counterclaim alleged that “there has been flowing in Mill Creek during the months of May and June and generally until approximately the 15th day of July, an estimated 10,000 miner’s inches of water in excess of the total amount of water adjudicated in” the *Allen v. Wampler Decree*. (Ex. E, at 4, ¶ IV).

61. The *Petrich* decree made the following finding as to water availability in Mill Creek:

That the Court finds that during the months of May and June and until approximately the 15th day of July of the normal irrigating season there is flowing in Mill Creek at the headgate of the Mill Creek Flat Ditch approximately 10,000 miners’ inches of water in excess of the total quantity of water heretofore adjudicated and decreed by this Court in the aforesaid action.

Ex. B, at 3 (Finding of Fact No. II).

62. Based upon this and other findings of fact, the District Court made conclusions of law, including the following:

The Court concludes, as a matter of law, that each of the parties to this action are the owners of and entitled to the possession of their respective lands as described in their complaints and cross complaints filed herein and in these Findings of Fact; and that each of the parties to this action are owners of the right to the use of that quantity of the waters of Mill Creek and its tributaries in addition to their previous decreed rights, hereinabove set forth in said findings of fact \*\*\*.

(*Petrich Decree*, Conclusions of Law, ¶ II).

63. Various witnesses testified that water was diverted from Mill Creek prior to the May 1 date specified in the *Petrich Decree*. Their testimony establishes that the headgates for the Mill Creek Flat Ditch and Upland Ditch were usually opened in mid-April or May, sometimes in March. (Tr. at 3:24:45-3:25:45 (Neal); Tr. at 5:17:10-5:17:23 (Shimmin)).

64. The fact witnesses did not specifically quantify or otherwise identify any high water diverted prior to May 1 of any year before July 1, 1973. Under the terms of the *Allen Decree*, several water users, including Leo Briggs, held rights to divert water to the Mill Creek Flat Ditch with priority dates of April 1, 1883. (Ex. A, at 107).

65. The fact witnesses were equivocal about diversions of water after July 15 of each year. Their unprompted answers indicated that during most years, high water ran out by sometime between July 4 and mid-July. The fact witnesses only mentioned high water into August when prompted by counsel. The testimony as to high water ending in early to mid-July is more consistent and more credible.

66. Malone testified that often his 1904 or 1906 rights went out of priority in early to mid-July. Malone said he used his 1963 water rights water past July 15 and into August some years, but could not recall the exact years he did so, nor did Malone explain how he distinguished his 1963 rights from the more senior Malone rights. When other higher-priority water users needed water, Malone testified he ceased using his 1963 rights. (Tr., 4:43-4:45 (Malone)).

67. Even though the two decrees required measurement devices at the points of diversion, and at the turnouts for the various ditch users, no water measurement records were offered at the hearing to document when the Malones and their predecessors historically used water or in what amounts. Instead, all water use testimony was anecdotal, based on the memories of the various witnesses, including Malone.

68. At some point during the 1980s, a pipeline was installed to allow water to be delivered more efficiently to water users. The installation of the pipeline facilitated



water use later into the summer season by reducing ditch loss and improving conveyance efficiency. The testimony of the witnesses seems to have been clouded somewhat by the effect of the pipeline installation, which apparently allowed water users to use water under their senior water rights consistently longer into the season.

## CONCLUSIONS OF LAW

### *General*

1. Each of the findings of fact is supported by a preponderance of evidence. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Montana Water Court has a statutory obligation and the exclusive authority to adjudicate claims of existing water rights. Rule 1(a), W.R.Adj.R. An “existing water right” is the right to the use of water that would be protected under the law as it existed prior to July 1, 1973. Section 85-2-102(13), MCA.

3. The Water Use Act requires the Water Court to describe several specific elements of each state-based existing water right included in a final decree. Section 85-2-234(6), MCA. The combined elements define the scope of a water right. Any water use outside or beyond the scope of the elements the Court adjudicates is not part of an existing water right.

4. The Malones properly filed their statements of claim and the claims are prima facie proof of their content. Section 85-2-227, MCA.

5. Unless TU overcomes the presumption of claim validity, the Water Court must adjudicate the elements of the claims as filed and decreed, subject only to resolution of issue remarks. W.R.Adj.R. 19; *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, ¶ 17, 407 Mont. 278, 502 P.3d 1080.

6. If TU proves its objections overcome the prima facie status of any of the elements of the claims, the burden of proof shifts to the Malones to prove the validity of the elements of the claims. If the Malones fail to meet this burden, the Court may modify the claims consistent with TU’s objections and resolution of any issue remarks.

### *TU's Standing to Object*

7. Even though TU did not object to the Malones' irrigation claims following the TPD, TU did not waive its right to object to the claims in the Preliminary Decree because the Basin 43B TPD was issued prior to March 28, 1997. Section 85-2-233(2)(c), MCA.<sup>12</sup>

8. The Malones argue in their proposed findings and conclusions that TU's objections should be dismissed because TU lacks standing. (Malone Proposed Conclusions of Law, ¶ 23-26). The Malones did not preserve this argument in their contentions set forth in the Prehearing Order. "Failure to raise an issue in the pretrial order may result in a waiver." *Ganoung v. Stiles*, 2017 MT 176, ¶ 28, 388 Mont. 152, 398 P.3d 282. The Malones do not have a basis to raise standing as an issue in their proposed findings and conclusions because they failed to raise it as a prehearing contention.

9. Even if the Malones preserved a standing argument, they fail to cite or apply the correct test. The Malones contend TU lacks standing to object to Mill Creek water rights because TU does not have water rights of its own on Mill Creek. The Montana Supreme Court rejected this argument in *Montana Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, 361 Mont. 77, 255 P.3d 179. The Supreme Court concluded that participation as an objector turns on whether an objector has "good cause" to object to a claim. *Montana Trout Unlimited*, ¶ 34. Because the Malones incorrectly assume "good cause" requires TU to hold a right to water on Mill Creek, the Malones fail to prove TU lacks standing to participate in this case as an objector.

### *Place of Use*

10. The Water Use Act requires the Water Court to adjudicate "the place of use and a description of the land, if any, to which the right is appurtenant." Section 85-2-234(6)(e), MCA. As part of the place of use determination for irrigation claims, the Water Court also determines the maximum number of acres historically irrigated and includes this figure on the decree abstract.

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<sup>12</sup> This statute states in relevant part: "A person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree issued before March 28, 1997."

11. For purposes of the place of use elements, the Malones' five statements of claim for irrigation rights are prima facie proof of historical beneficial use of water diverted from Mill Creek to irrigate 133.0 acres in the southwest quarter of Section 30, Township 5 South, Range 9 East in Park County. TU bears the burden of proving the acreage is incorrect.

12. DNRC's interpretation at the verification stage of 103.0 acres irrigated is not sufficient evidence to prove the 133.0 acres described on the preliminary decree abstracts is incorrect. The water master addressed acreage in case 43B-342 and found, based on Malone's affidavit, historical irrigation increased over time to 133.0 acres.

13. TU did not meet its burden to prove by a preponderance of evidence that the maximum acres for claims 43B 191096-00, 43B 191097-00, 43B 191098-00, 43B 191099-00, and 43B 191100-00 is overstated.

14. Even if the burden of proof shifted to the Malones, when weighed against (a) the water master's findings in case 43B-342, (b) Malone's testimony about his irrigation practices, and (c) Malone's explanation of the documents filed with the statements of claim to support the acreage, TU's evidence of historical records and aerial photographs showing no more than 76 acres were irrigated prior to July 1, 1973, does not overcome the prima facie status afforded to the 133.0 acres the Malones' claimed. The maximum number of acres irrigated for each irrigation claim should remain at 133.0.

#### *Period of Use*

15. The Water Use Act also requires the Water Court to adjudicate "the inclusive dates during which the water is used each year." Section 85-2-234(6)(h), MCA. These dates are the period of diversion and period of use of a water right.

16. TU contends the periods of use for claims 43B 191096-00 and 43B 191097-00 should be reduced by ten days at the beginning of the season by modifying the start date for the period of use from April 20 to May 1. At the end of the season, TU contends the period of use should be reduced by a little more than two weeks from August 1 (claim 43B 191096-00) or August 4 (claim 43B 191097-00) to July 15. TU also contends the period of use for claim 43B 215747-00 should be similarly reduced. TU does not

challenge the April 20 to October 1 period of use for the Malones' three most senior claims (43B 191100-00, 43B 191098-00, and 43B 191099-00).

17. TU contends it meets its burden to overcome the prima facie status of these elements as a matter of law because the Malones filed the claims as “decreed” rights. As decreed rights, TU argues the claims are constrained by the period of use and diversion dates defined in *Petrich Decree*, which are more limited than the periods of use and diversion on the statements of claim and as reflected in the Preliminary Decree.

18. Interpretation of a prior court decree is an issue of law. *Granite Cnty. Bd. of Comm'rs v. McDonald*, 2016 MT 281, ¶ 19, 385 Mont. 262, 383 P.3d 740.

19. The District Court conducted the proceedings leading to the *Petrich Decree* to supplement the *Allen v. Wampler Decree*.

20. The findings of fact in the *Petrich Decree* specify that water is available from May to mid-July in Mill Creek in excess of what the District Court previously decreed. TU is correct that the Preliminary Decree period of use dates for claims 43B 191096-00, 43B 191097-00, and 43B 215747-00 do not match findings of fact in the *Petrich Decree* because the Preliminary Decree describes the periods of use for claims 43B 191096-00 and 43B 191097-00 as April 20 to August 1 and August 4, and for claim 43B 215747-00 as April 1 to October 15.

21. The unambiguous language and context of the *Petrich Decree* provide for a period of use of May 1 to July 15. The language of the decree overcomes the prima facie status afforded to what was claimed. Section 85-2-227, MCA, Rule 19, W.R.Adj.R. TU met its burden to overcome the prima facie status of the period of use elements of the three claims with undisputed facts by referencing the same decree Malone's predecessors relied on as the evidentiary basis for the claims.

22. The Malones did not provide sufficient evidence to convince the Court to interpret the decree any differently than as applying to the specified May 1 to July 15 window. Instead, the witness testimony as to flow patterns of Mill Creek and diversions to the two ditches is consistent with the dates addressed by the District Court in the *Petrich Decree*.

23. TU proved the periods of use and diversion for claims 43B 191096-00, 43B 191097-00, and 43B 215747-00 should be modified to May 1 to July 15.

#### *Implied Claims*

24. Montana recognizes “implied claims” for water use. *Hoon v. Murphy*, 2020 MT 50, ¶ 54, 399 Mont. 110, 134, 460 P.3d 849, 864. The definitions incorporated into the Water Court’s adjudication rules define an “implied claim” as “a claim authorized by the water court to be separated and individually identified when a statement of claim includes multiple rights.” W.R.C.E.R. 2(a)(33). The Water Court does not recognize implied claims that expand a water right or that circumvent the Water Use Act claim filing requirements. *In re Eliasson Ranch Company*, Case 40A-115, 2004 Mont. Water LEXIS 2, \*6.

25. The Water Court applies a three-part test to evaluate whether to authorize an implied claim: (a) the implied claim must be supported by evidence in the claim form or the documents attached to the claim form; (b) substantial credible evidence must exist of actual historical use corroborating the implied claim; and (c) creating the implied claim should not result in a change to historical water use or increase the historical burden on other water users. *In re Lee E. Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17, \*32 (Order Amending and Partially Adopting Master’s Report as Amended); *Hoon v. Murphy*, ¶ 54 (upholding implied claim based on “substantial credible evidence” of historical use).

26. The Malones meet the first part of the implied claims test because the statements of claim for claims 43B 191096-00 and 43B 191097-00 each identify at least two claims with different periods of use. The statements of claim each describe periods of use that extend before May 1 and after July 15 each year. The “decreed” rights with their June 4, 1963 priority dates extend from May 1 to July 15. The claim forms also identify claimed water use prior to April 20 and after July 15. As these are outside the decreed period of use and are not supported by a notice of appropriation, they describe “use”

rights.<sup>13</sup> By describing both decreed rights and use rights on the same statement of claim, the claim forms each identify at least two claims.

27. The Malones bear the burden of proving the second part of the implied claim test because the statements of claim forms do not provide prima facie proof of any use rights. Rather, the statements of claim only describe decreed rights. To meet their burden, the Malones must prove by a preponderance of evidence that water was used for the dates in their claim form outside what the District Court decreed.

28. The Malones' argument that "[c]redible lay witness testimony establishes that the Malones and their predecessor diverted all of the water they possibly could given the supply in Mill Creek" (Malone Proposed Conclusions of Law, ¶ 5.b.) is not enough to prove the second part of the test. As described in the Preliminary Decree, the Malones' senior water rights authorize diversions of up to 1.75 cfs to the Upland Ditch (claim 43B 191098-00) and 283.0 gpm (0.63 cfs) to the Mill Creek Flat Ditch, for a total of 2.83 cfs. The Malones did not provide any proof that any amount of water in excess of this flow was available for diversion or actually diverted either before May 1, or between July 15 and August 4 of any year between 1963 when the District Court issued the *Petrich Decree* and 1973 when the Legislature passed the Water Use Act. Anecdotal testimony that some unquantified amount of water was available is not enough because the Malones have rights to divert some measure of water after July 15 under their senior rights. This lack of proof is underscored by the *Allen Decree* and *Petrich Decree* requirement for measurement devices. Absent any such proof of post July 15 water use in excess of the Malones' senior rights, the Malones do not meet the second element of the implied claim test to prove actual historical use of the water they seek for implied claims.

29. Without proof of whether the Malones or their predecessors ever diverted and put water to beneficial use in excess of their senior rights between 1963 and 1973, the Malones also fail to meet the third element of the implied claim test which requires

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<sup>13</sup> A "use" right is defined as "a claimed existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree." Rule 2(a)(71), W.R.C.E.R., incorporated by reference by Rule 2(a), W.R.Adj.R.

the Malones to prove implied claims with periods of use prior to May 1 or after July 15 does not increase the historical burden on the source.

30. Because the Malones fail to meet the second and third elements of the implied claim test, the Malones have not proved the Court should authorize any implied claims.

*Issue Remark Resolution*

31. Neither TU nor the Malones objected to the point of diversion for any of the claims. However, each claim has a point of diversion issue remark. The Malones propose to resolve the remark by restoring the points of diversion to how they were claimed on the statements of claim. This recommendation is consistent with the historical decrees and the statements of claim, which have prima facie proof of their contents. Section 85-2-227(1), MCA.

32. The points of diversion and ditch names for the irrigation claims should be modified as follows:

Claim	TPD Legal	TPD Ditch	PD Legal	Corrected
43B 191096-00	SWNWNE	Mill Creek Flat	NESWNE	NESWNE
43B 191097-00	NENENW	Upland	SENENW	NENENW
43B 191098-00	NENENW	Upland	SENENW	NENENW
43B 191099-00	SWNWNE	Mill Creek Flat	NESWNE	NESWNE
43B 191100-00	SWNWNE	Mill Creek Flat	NESWNE	NESWNE

33. These clarifications resolve the various point of diversion issue remarks. The missing volume remark is resolved by including the standard narrative volume remark for irrigation claims.

**ORDER**

Based upon the foregoing, it hereby is ORDERED that:

1. Claims 43B 191096-00, 43B 191097-00, 43B 191098-00, 43B 191099-00, 43B 191100-00, and 43B 215747-00 are modified as provided in this Order. The issue remarks are removed from each claim and the information remarks are retained, modified, or removed as provided in this Order.

2. All objections to claims 43B 191096-00, 43B 191097-00, 43B 191098-00, 43B 191099-00, 43B 191100-00, and 43B 215747-00 are DISMISSED as resolved.

3. This case is CLOSED.

A modified version of the abstract for each claim is included with this Order to confirm that the modifications have been made in the State's centralized water right record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via Electronic Mail:**

Meg Casey, Attorney  
Patrick Byorth  
Adam Shaw  
Trout Unlimited  
321 E Main St Ste 411  
Bozeman, MT 59715  
(406) 599-8666  
mcasey@tu.org  
pbyorth@tu.org

Benjamin Sudduth  
Sudduth Law, PLLC  
1050 East Main St Ste 3B  
PO Box 507  
Bozeman, MT 59771-0507  
(406) 272-2390  
benjamin@sudduthlaw.com

**Service Via USPS Mail:**

Jeremiah N. Bates  
Tracy C. Bates  
104 Pray Rd  
Livingston, MT 59047  
(646) 499-1930  
jeremiahbates@gmail.com



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

**Water Right Number:** 43B 191096-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** GAYLEEN M MALONE  
PO BOX 152  
PRAY, MT 59065

MARTIN C MALONE  
PO BOX 152  
PRAY, MT 59065

**Priority Date:** JUNE 4, 1963

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**Flow Rate:** 112.00 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:** 133.00

**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		NESWNE	3	6S	9E	PARK

**Period of Diversion:** MAY 1 TO JULY 15

**Diversion Means:** HEADGATE

**Ditch Name:** MILL CREEK FLAT DITCH

**Period of Use:** MAY 1 TO JULY 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	133.00		SW	30	5S	9E	PARK

**Total:** 133.00

**Remarks:**

AUTHORIZATION TO CHANGE ISSUED 07/21/1988 FOR CHANGE IN POINT OF DIVERSION AND PLACE OF USE.

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.

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

**Water Right Number:** 43B 191097-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** JEREMIAH N BATES  
104 PRAY RD  
PRAY, MT 59065-8708

TRACY C BATES  
104 PRAY RD  
PRAY, MT 59065

GAYLEEN M MALONE  
PO BOX 152  
PRAY, MT 59065

MARTIN C MALONE  
PO BOX 152  
PRAY, MT 59065

**Priority Date:** JUNE 4, 1963

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**Flow Rate:** 2.25 CFS

**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:** 133.00

**\*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:** MAY 1 TO JULY 15

**Diversion Means:** HEADGATE

**Ditch Name:** UPLAND DITCH

**Period of Use:** MAY 1 TO JULY 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	133.00		SW	30	5S	9E	PARK

**Total:** 133.00

**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.

191097-00

215747-00

AUTHORIZATION TO CHANGE ISSUED 07/21/1988 FOR CHANGE IN POINT OF DIVERSION AND PLACE OF USE. SEE 43B 191096-00.

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

**Water Right Number:** 43B 191098-00 STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**Owners:** JEREMIAH N BATES  
104 PRAY RD  
PRAY, MT 59065-8708

TRACY C BATES  
104 PRAY RD  
PRAY, MT 59065

GAYLEEN M MALONE  
PO BOX 152  
PRAY, MT 59065

MARTIN C MALONE  
PO BOX 152  
PRAY, MT 59065

**Priority Date:** MAY 1, 1904

**Type of Historical Right:** DECREEED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**Flow Rate:** 1.75 CFS

**\*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:** 133.00

**\*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 20 TO OCTOBER 1

**Diversion Means:** HEADGATE

**Ditch Name:** UPLAND DITCH

**Period of Use:** APRIL 20 TO OCTOBER 1

**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	133.00		SW	30	5S	9E	PARK

**Total:** 133.00

**Remarks:**

AUTHORIZATION TO CHANGE ISSUED 07/21/1988 FOR CHANGE IN POINT OF DIVERSION AND PLACE OF USE.  
SEE 43B 191096-00

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.

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

**Water Right Number:** 43B 191099-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** JEREMIAH N BATES  
104 PRAY RD  
PRAY, MT 59065-8708

TRACY C BATES  
104 PRAY RD  
PRAY, MT 59065

GAYLEEN M MALONE  
PO BOX 152  
PRAY, MT 59065

MARTIN C MALONE  
PO BOX 152  
PRAY, MT 59065

**Priority Date:** JUNE 1, 1906

**Type of Historical Right:** DECREEED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**Flow Rate:** 193.00 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:** 133.00

**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		NESWNE	3	6S	9E	PARK

**Period of Diversion:** APRIL 20 TO OCTOBER 1

**Diversion Means:** HEADGATE

**Ditch Name:** MILL CREEK FLAT DITCH

**Period of Use:** APRIL 20 TO OCTOBER 1

**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	133.00		SW	30	5S	9E	PARK

**Total:** 133.00

**Remarks:**

AUTHORIZATION TO CHANGE ISSUED 07/21/1988 FOR CHANGE IN POINT OF DIVERSION AND PLACE OF USE.  
SEE 43B 191096-00

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.

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

**Water Right Number:** 43B 191100-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** JEREMIAH N BATES  
104 PRAY RD  
PRAY, MT 59065-8708

TRACY C BATES  
104 PRAY RD  
PRAY, MT 59065

GAYLEEN M MALONE  
PO BOX 152  
PRAY, MT 59065

MARTIN C MALONE  
PO BOX 152  
PRAY, MT 59065

**Priority Date:** APRIL 1, 1883

**Type of Historical Right:** DECREEED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**Flow Rate:** 90.00 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:** 133.00

**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		NESWNE	3	6S	9E	PARK

**Period of Diversion:** APRIL 20 TO OCTOBER 1

**Diversion Means:** HEADGATE

**Ditch Name:** MILL CREEK FLAT DITCH

**Period of Use:** APRIL 20 TO OCTOBER 1

**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	133.00		SW	30	5S	9E	PARK

**Total:** 133.00



**Remarks:**

AUTHORIZATION TO CHANGE ISSUED 07/21/1988 FOR CHANGE IN POINT OF DIVERSION AND PLACE OF USE.  
SEE 43B 191096-00

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.

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

**Water Right Number:** 43B 215747-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Late Claim:** B

**Owners:** GAYLEEN M MALONE  
PO BOX 152  
PRAY, MT 59065

MARTIN C MALONE  
PO BOX 152  
PRAY, MT 59065

**Priority Date:** JUNE 4, 1963

**Enforceable Priority Date:** JUNE 30, 1973

CLAIM FILED LATE 07/01/1996 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

**Type of Historical Right:** DECREED

**Purpose (Use):** STOCK

**\*Flow Rate:** NO FLOW RATE HAS BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM.

**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:** 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:** MAY 1 TO JULY 15

**Diversion Means:** HEADGATE

**Ditch Name:** UPLAND DITCH

**Period of Use:** MAY 1 TO JULY 15

THIS RIGHT INCLUDES HIGH OR FLOOD WATERS OF MILL CREEK.

**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			SW	30	5S	9E	PARK

**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.

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