

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
BOULDER RIVER BASIN, TRIBUTARY OF YELLOWSTONE RIVER (43BJ)

CLAIMANT: Mark E. & Kathy F. Wilkins Trust

CASE 43BJ-6006-A-2023
43BJ 45766-00

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, 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 be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve 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 case involves a water right claim owned by Mark and Kathy Wilkins. Wilkins filed a Motion to Amend on November 20, 2023. The Court ordered Publication

of Notice to Amend Water Right Claim pursuant to MCA 85-2-233(6). Wilkins published Notice in the Big Timber Pioneer and Livingston Enterprises. No objections were filed.

FINDINGS OF FACT

1. Wilkins moved to amend the flow rate for claim 43BJ 45766-00 from 408 GPM to 125 miners inches (3.125 CFS).

2. Wilkins gives a history of the changes made to this claim which is supported by evidence in the claim file.

3. The original flow rate on the Statement of Claim was 125 miners inches.

4. DNRC reduced the flow rate for claim 43BJ 45766-00 to 408 GPM based on its standard of 17 GPM/acre. No other justification was made by DNRC to why the flow reduction occurred.

5. Wilkins discovered the error while in meetings with their ditch company and DNRC regarding the installation of a new headgate.

6. Wilkins certify they have historically consistently used the full 125 miners inches to irrigate their alfalfa due to the existence of gravel beds throughout the soil in the field.

CONCLUSIONS OF LAW

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. 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 an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

2. The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider any matter within the Court's jurisdiction on its own motion, or on the motion of an interested party. Section 3-7-224, MCA.

3. Montana law allows claimants to amend their statements of claim, and objectors to amend their timely filed objections after the objection period in a basin has closed. Motions to amend a claim or objection are governed by Section 85-2-233(6),

MCA:

(6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend a statement of claim or a timely filed objection that may adversely affect other water rights must be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the statement of claim or objection was filed. The notice must specify that any response or objection to the proposed amendment must be filed within 45 days of the date of the last notice. The water judge may order any additional notice of the motion as the water judge considers necessary. The cost of notice required pursuant to this subsection must be borne by the moving party.

5. In a Motion to Amend proceeding, the movant/claimant has the initial burden to prove, by a preponderance of the evidence, that a mistake was made in the original claim filing and that the correct historical use of the claim is accurately reflected by the requested amendment(s). Evidence and testimony submitted by objectors in a Motion to Amend proceeding can serve to increase movant's burden in that they must contradict the Objector's relevant offerings in addition to overcoming the prima facie status of the claim filing. Section 85-2-227, MCA; Rule 19, W.R.Adj.R.; Section 85-2-233(6), MCA. Pursuant to § 85-2-227(2)-(3), MCA:

(2) A water judge may consider all relevant evidence in the determination and interpretation of existing water rights. Relevant evidence under this part may include admissible evidence arising before or after July 1, 1973.

6. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence. Rule 401, M.R.Evid. The Water Court has acknowledged its authority to generate implied claims during adjudication.

Although [Rule 35, W.R.C.E.R.] generally applies to claims under examination by DNRC [the Department of Natural Resources and Conservation] prior to issuance of a decree, the Water Court routinely cites to the Rule when it generates implied claims after the issuance of its decree. Where a single claim form contains multiple rights and has been timely filed, the § 85-2-221, MCA statutory deadline for filing claims is satisfied for the multiple rights. [Rule 35(c)(3), W.R.C.E.R.]

Bergin v. Nelson, Case 40C-47 at p. 16, (MT Water Court Memorandum Opinion Feb. 21, 2001).

7. In this case, Wilkins are not trying to prove a mistake was made in the original filing, but to return to the original filing. Therefore, there is no burden on the movant to overcome prima facie status of the statement of claim. The DNRC did not provide any evidence as to why the change to the claim's flow rate was made. The flow rate should be changed back to the original amount of 125 miners inches, or 3.125 CFS.¹

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified above to correct the claim. A Version 2 Abstract of Water Right Claim is served with this Report to confirm that the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS mail:

Mark E. & Kathy F. Wilkins Trust
PO Box 1723
Big Timber, MT 59011

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¹ Due to DNRC Database restrictions, this will be rounded up to 3.13 CFS on the abstract.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOULDER RIVER, TRIBUTARY TO YELLOWSTONE RIVER
BASIN 43BJ

Water Right Number: 43BJ 45766-00 STATEMENT OF CLAIM
Version: 2 -- ORIGINAL RIGHT
Status: ACTIVE

Owners: WILKINS, MARK E & KATHY F TRUST
PO BOX 1723
BIG TIMBER, MT 59011

Priority Date: MAY 1, 1893

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 3.13 CFS

***Volume:**

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 24.02

Source Name: BOULDER 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		SESWW	28	1S	14E	SWEET GRASS

Period of Diversion: APRIL 15 TO OCTOBER 19

Diversion Means: HEADGATE

Ditch Name: CREST DITCH

Period of Use: APRIL 15 TO OCTOBER 19

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	8.02		NWSE	21	1S	14E	SWEET GRASS
2	16.00		NESE	21	1S	14E	SWEET GRASS
Total:	24.02						

Remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.