

Montana Water Court
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FILED
09/09/2024
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41S-0220-R-2024
Block, Nathaniel
4.00

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
JUDITH RIVER BASIN (41S)
PRELIMINARY DECREE

CLAIMANTS: Clayton R. Busch; Joyce C. Busch

CASE 41S-0220-R-2024

41S 10484-00
41S 10485-00
41S 10495-00
41S 10496-00

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

The above-captioned claims appeared in the Preliminary Decree for the Judith River (Basin 41S) with issue remarks.

The claims were consolidated into Case 41S-0220-R-2024 on March 1, 2024 and the claimants were ordered to work with the Department of Natural Resources and Conservation to resolve the issue remarks on the claims. On June 12, 2024, a Memorandum ("Memo") was filed (Doc.¹ 2.00). Maps showing the points of diversion and places of use for the claims were attached to the Memo. The Memo states that claimants Joyce and Clayton Busch and attorney John Christensen met with DNRC to discuss the issue remarks and 'find resolutions'.

FINDINGS OF FACT

1. Claim 41S 10484-00 was decreed with the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE. THE AFFIDAVIT OF MARY MYLLYMAKI FILED ON 06/18/1985 STATES THAT THE MAXIMUM ACRES IRRIGATED AND PLACE OF USE SHOULD BE 250 ACRES IN THE N2 SEC 9, TWP 17N, RGE 12E JUDITH BASIN CO AS CLAIMED AND THAT THE VOLUME SHOULD BE 100 ACRE-FEET PER YEAR. THE JUDITH BASIN COUNTY WATER RESOURCES SURVEY (1963) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

USDA AERIAL PHOTOGRAPH NO(S). 30045-279-84 , DATED 09/18/1979 , APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

THE MAXIMUM COMBINED ACRES FOR THIS GROUP OF SUPPLEMENTAL CLAIMS MAY REQUIRE MODIFICATION PENDING RESOLUTION OF MAXIMUM IRRIGATED ACRES ISSUE.

2. The Memo recommends dismissal of the claim.

3. Claim 41S 10485-00 was decreed with the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE. THE AFFIDAVIT OF MARY MYLLYMAKI FILED ON 06/18/1985 STATES THAT THE MAXIMUM ACRES IRRIGATED AND PLACE OF USE SHOULD BE 250 ACRES IN SECTIONS 4, 8, AND 9, TWP 17N, RGE 12E JUDITH BASIN CO AND THAT THE VOLUME SHOULD BE 1868 ACRE-FEET PER YEAR. THE JUDITH BASIN COUNTY WATER RESOURCES SURVEY (1963) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

USDA AERIAL PHOTOGRAPH NO(S). 30045-279-84 AND 30045-279-86 , DATED 09/18/1979 , APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

THE MAXIMUM COMBINED ACRES FOR THIS GROUP OF SUPPLEMENTAL CLAIMS MAY REQUIRE MODIFICATION PENDING RESOLUTION OF MAXIMUM IRRIGATED ACRES ISSUE.

4. The Memo recommends dismissal of the claim.

¹ "Doc." numerical references correlate to case file docket numbers in the Water Court's Full Court case management system.

5. Claim 41S 10495-00 was decreed with the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
THE AFFIDAVIT OF CLAYTON R. BUSCH FILED ON 06/18/1985 STATES THAT THE MAXIMUM
ACRES IRRIGATED AND PLACE OF USE SHOULD BE 130 ACRES IN THE SW SEC 15, TWP 17N,
RGE 12E JUDITH BASIN CO AS CLAIMED AND THAT THE VOLUME SHOULD BE 624 ACRE-FEET
PER YEAR.

THE JUDITH BASIN COUNTY WATER RESOURCES SURVEY (1963) APPEARS TO INDICATE 0.00
ACRES IRRIGATED.

USDA AERIAL PHOTOGRAPH NO(S). 30045-279-65 , DATED 09/18/1979 , APPEARS TO INDICATE
0.00 ACRES IRRIGATED.

THE MAXIMUM COMBINED ACRES FOR THIS GROUP OF SUPPLEMENTAL CLAIMS MAY REQUIRE
MODIFICATION PENDING RESOLUTION OF MAXIMUM IRRIGATED ACRES ISSUE.

6. The Memo states that the DNRC was able to find 45 acres of irrigation. The Memo recommends reducing the flow rate to 1.70 CFS and removal of the ‘acres irrigated’ remarks without modification to the place of use or acreage. The Memo states that reduction of the flow rate resolves the flow rate issue remark.

7. Claim 41S 10496-00 was decreed with the following issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.
THE JUDITH BASIN COUNTY WATER RESOURCES SURVEY (1963) APPEARS TO INDICATE 0.00
ACRES IRRIGATED.

USDA AERIAL PHOTOGRAPH NO(S). 30045-279-65 , DATED 09/18/1979 , APPEARS TO INDICATE
0.00 ACRES IRRIGATED.

8. The Memo states that the DNRC was able to find 26 acres of irrigation. The Memo recommends reducing the maximum acres to 26 acres and the flow rate to 442 GPM. The Memo states that adoption of the recommendations would resolve the ‘acres irrigated’ issue remarks and the flow rate issue remark.

PRINCIPLES OF LAW

1. The Montana Water Court has the authority to determine the extent of all water rights in the state as they existed prior to July 1, 1973. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 367 P.3d 732; §§ 85-2-233, -102(13), MCA.

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. § 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.

3. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. §§ 85-2-227, -231(2), MCA.

CONCLUSION OF LAW

1. The DNRC recommendations should be adopted.

RECOMMENDATIONS

1. Claims 41S 10484-00 and 41S 10485-00 should be dismissed.

2. Claim 41S 10495-00 should be modified as follows:

Flow Rate: ~~4.71 CFS~~ **1.7 CFS**

3. Claim 41S 10496-00 should be modified as follows:

Flow Rate: ~~2.05 CFS~~ **442 GPM**

Maximum Acres: ~~54.00~~ **26.00 ac**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	16.00 12		SENE	15	17N	12E	JUDITH BASIN
2	38.00 14		SE	15	17N	12E	JUDITH BASIN
Total:	54.00 26						

4. Pursuant to the Memo, adoption of the recommendations resolves the issue remarks on the claims except for the remark referencing an affidavit on claim 41S 10495-00. The issue remark referencing Clayton Busch’s affidavit should also be considered resolved as the Memo stated that only 45 acres were found, not the 130 acres referenced in the affidavit. The issue remarks should be removed from the claims.

Post Decree Abstracts of Water Right Claims are attached to this Master’s Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Clayton R. Busch
 Joyce C. Busch
 PO Box 8
 Stanford, MT 59479-0008

\\JUDHLNSRV-DATA\Share\JUDGALH2OSRV (Datavol)\Share\WC-BASIN FOLDERS\41S PD\Cases\220\NB 41S-0220-R-2024 MR - Resolution of IRs 248 (NEW, multiple claims,FR, POU_POD, issue remarks) 8-12-2024 rr.docx

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JUDITH RIVER
BASIN 41S

Water Right Number: 41S 10484-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: **DISMISSED**

Owners: CLAYTON R BUSCH
PO BOX 8
STANFORD, MT 59479-0008

JOYCE C BUSCH
PO BOX 8
STANFORD, MT 59479-0008

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: MEADOW CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JUDITH RIVER
BASIN 41S**

Water Right Number: 41S 10485-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: **DISMISSED**

Owners: CLAYTON R BUSCH
PO BOX 8
STANFORD, MT 59479-0008

JOYCE C BUSCH
PO BOX 8
STANFORD, MT 59479-0008

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: MEADOW CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JUDITH RIVER
BASIN 41S**

Water Right Number: 41S 10495-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: CLAYTON R BUSCH
PO BOX 8
STANFORD, MT 59479-0008

JOYCE C BUSCH
PO BOX 8
STANFORD, MT 59479-0008

Priority Date: MAY 3, 1882

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.70 CFS

Volume: 225.00 AC-FT

Climatic Area: 3 - MODERATE

Maximum Acres: 45.00

Source Name: WOLF 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		SWSESW	15	17N	12E	JUDITH BASIN

Period of Diversion: JUNE 1 TO AUGUST 31

Diversion Means: HEADGATE

Period of Use: JUNE 1 TO AUGUST 31

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	45.00		SW	15	17N	12E	JUDITH BASIN
Total:	45.00						

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.

10495-00 10497-00

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.

10495-00

16504-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JUDITH RIVER
BASIN 41S**

Water Right Number: 41S 10496-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: CLAYTON R BUSCH
PO BOX 8
STANFORD, MT 59479-0008

JOYCE C BUSCH
PO BOX 8
STANFORD, MT 59479-0008

Priority Date: MAY 27, 1893

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 442.00 GPM

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

Climatic Area: 3 - MODERATE

Maximum Acres: 26.00

Source Name: WOLF 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		NENWSE	21	17N	12E	JUDITH BASIN

Period of Diversion: JUNE 1 TO AUGUST 31

Diversion Means: HEADGATE

Period of Use: JUNE 1 TO AUGUST 31

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	12.00		SENE	15	17N	12E	JUDITH BASIN
2	14.00		SE	15	17N	12E	JUDITH BASIN

Total: 26.00