

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364
FAX: (406) 522-4131

FILED

OCT 31 2012

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
TETON RIVER BASIN (41O)

CLAIMANTS: Richard L. Bjork, Barbara R. Callender, Allen B.
Callender, Jr.

OBJECTORS: Priest Butte Farm, Inc., Robert E. Stephens, Jr., William
and Betty Jo Miller

Case **41O-489**
41O 49694-00
41O 49695-00
41O 49696-00
41O 30063626

NOTICE OF FILING MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court on the above stamped date. Please read this Report carefully.

If you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report, you may file a written objection to the Report within **10 days** from the above stamped date. (Rule 23, Water Right Adjudication Rules.) If you file an objection, you must also 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

PROCEDURAL HISTORY

Case 41O-489 involves water right claims 41O 49694-00, 41O 49695-00 and 41O 49696-00. These claims are owned by Richard Bjork, Barbara Callender and Allen Callender.

Priest Butte Farm, Inc., Robert Stephens, Lower Teton Joint Objectors, Salmond Ranch Co., and William and Betty Jo Miller all filed timely objections to claims 41O 49694-00, 41O 49695-00 and 41O 49696-00. Maryetta Hodgskiss filed a Notice of Intent to Appear for the three claims. The Lower Teton Joint Objectors withdrew their objections on January 11, 2010. Salmond Ranch Company withdrew their objections on January 21, 2010. Maryetta Hodgskiss withdrew her Notice of Intent to Appear on December 16, 2009.

On May 23 and 24, 2011 a hearing for case 41O-489 was held at the Teton County Courthouse in Choteau, Montana.

On June 23, 2011, the Claimants filed their Motion for Leave to File Offer of Proof and Supplement to the Record, which was denied by this Court on August 3, 2011.

FINDINGS OF FACT

Finding of Fact #1): The ditch claimed for 41O 49694-00 is the Bjork Ditch; the ditch claimed for 41O 49695-00 is the ST Canal; and the ditch claimed for 41O 49696-00 is the Cascade Canal. All three claims claim Deep Creek as their source. The Bjork Ditch (41O 49694-00) is the last ditch on Deep Creek before it joins the Teton River. The ST Canal (41O 49695-00) is upstream from the Bjork Ditch, and the Cascade Canal (41O 49696-00) is immediately upstream from the ST Canal.

Finding of Fact #2): The Bjork/Callender property at issue is located in Section 6, T23N, R4W and Section 31, T24N, R4W in Teton County. August Bjork (the Grandfather of claimants Richard Bjork and Barbara Callender) owned and operated the property from 1936 until his death in 1962.

Finding of Fact #3): The claims that make up case 41O-489 appeared in the Temporary Preliminary Decree with the following issue remarks:

41O 49694-00:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON
RESOLUTION OF MAXIMUM ACRES.

THE TETON COUNTY WATER RESOURCES SURVEY (1962)
APPEARS TO INDICATE 37.00 ACRES IRRIGATED. A

DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

THE TETON COUNTY WATER RESOURCES SURVEY (1962) INDICATES AN ADDITIONAL 40.62 ACRES MAY HAVE BEEN IRRIGATED PRIOR TO THE SURVEY. THE ACREAGE WAS NOT BEING IRRIGATED AT THE TIME OF THE SURVEY.

41O 49695-00:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE TETON COUNTY WATER RESOURCES SURVEY (1962) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

41O 49696-00:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE TETON COUNTY WATER RESOURCES SURVEY (1962) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

Claim 41O 49694-00 (Bjork Ditch):

Finding of Fact #4): Claim 41O 49694-00 appeared in the Temporary Preliminary Decree as a September 30, 1877 use right to 5.0 cfs of water from Deep Creek for the irrigation of 150 acres. With the claimed priority date, this water right would be the first right on Deep Creek.

Finding of Fact #5): The claimants base the priority date for claim 41O 49694-00 on the homestead entry documents of Joseph Howard (*Ex. C-28*). The Howard homestead basically comprises the claimed place of use for claim 41O 49694-00. On cross-examination, claimant Bruce Callender testified that the claimants didn't initially believe they had a first right on Deep Creek and didn't know what their priority date was until they completed some research in the early 1980's.

All three homestead proof testimonies (all sworn on February 18, 1885) for the Howard homestead conflict with each other. Joseph Howard's *Homestead Proof.-Testimony of Claimant* states he built his house in 1872 and has been cultivating 35 acres of crop since 1872. There are also two *Homestead Proof.-Testimony of Witness* for this property, the first witness proof by Samuel Burd and the second by Matthew Carroll. Mr.

Burd states that Mr. Howard settled on the homestead in 1875 and established his residence in 1978, and has been cultivating 30 acres of crop since 1875. Mr. Carroll states that Mr. Howard settled on the homestead in 1872 and established his residence in 1875, and has been cultivating 30 to 35 acres of crop. The three testimonies list the improvements to the Howard homestead as being a house, corral, stable and 40-45 fenced acres.

The claimants' expert witnesses, John Westenberg and Bruce Anderson, testified that the Bjork Ditch could have been built within 5 years of Howard's entry. Expert Westenberg testified on cross examination that there were inconsistencies among the three proof testimonies concerning the date of the Howard settlement, the date Howard established residence upon the land, and the improvements to the land. Expert Westenberg further testified that none of the proof testimonies completed in 1885 mention ditches or irrigation, and that any of the information contained in the proof testimonies could be inaccurate.

Finding of Fact #6): The claimants submitted *Exhibit C-39*, which is a February 14, 1884 article from the Sun River Sun, stating that Joe Howard and others have "well improved farms." The article does not describe the farm nor describe the meaning of "well improved."

The Court finds that this article is not evidence of irrigation on the Howard homestead.

Finding of Fact #7): Joseph Howard eventually transferred the Howard homestead to his wife, Mary Howard, in November 1888 (*Ex. M-P*). This indenture does not mention any water rights or ditches.

Finding of Fact #8): Mary Howard transferred the Howard homestead to Peter Trudo on August 7, 1899 (*Ex. M-Q*). This indenture specifically states, "...also all water rights, franchises, ditches rights of way, belonging to or in any wise connected with said premises."

Finding of Fact #9) On May 26, 1920 Peter Trudo entered into a Mortgage with the Federal Land Bank of Spokane for \$4,000.00 wherein the lender deemed a portion of the

ranch to be irrigable (*Ex. C-25*). The loan contained a provision that if any time after five years from the date of the loan the bank directors deem the water supply or drainage no longer adequate, the bank could call on Mr. Trudo to reduce the balance due on the loan by fifty percent, or give additional security. The Mortgage describes “317.37 acres... together with all water from Deep Creek used in the irrigation of the above described land...”

The Court finds this Mortgage evidence that Peter Trudo was irrigating out of Deep Creek in the early 1920's.

Finding of Fact #10) The Baptiste Champaigne homestead included Lots 3, 4, and 5, and the SENW of Section 6, T23N, R4W in Teton County. This homestead would be located between Deep Creek and the western boundary of the Joseph Howard homestead. This property is now currently owned by objectors William and Betty Jo Miller. Mr. Miller testified that this is not irrigated land, and does not have any rights to any ditches.

The Baptiste Champaigne patent was issued pursuant to the Military Bounty Land Act of March 3, 1855. The land warrant was initially issued to Thomas Dunn, who then sold and assigned it to Baptiste Champaigne on March 13, 1883 (*Ex. C-29*). Bapstiste Champaigne's *Pre-Emption Proof.-Testimony of Claimant* states he settled on the land in 1879 and built a house. He states that the only improvement was a ditch in which he purchased an interest. He further states that since settling on the land he farmed and raised stock, cultivating about 5 acres - raising oats and vegetables.

There are two *Pre-Emption Proof.-Testimony of Witness*, the first by Frank Burd and the second by Samuel Burd. Frank Burd states the only improvements on the land are a house and 4 to 5 acres of land under cultivation. He also states Mr. Champaigne raised stock. Samuel Burd states the only improvements to the land are a house and an out house, and that Mr. Champaigne gardened and kept stock.

Expert witnesses Lee Yellin and John Westenberg disagreed on what ditch is referred to in the Baptiste Champaigne Testimony. Mr. Yellin testified that the reference could have been to the Bjork Ditch or the ST Ditch. Mr. Westenberg testified that due to the location of the property, relative to the location of the present day Bjork Ditch,

relative to the lay of the land, the only possible present day ditch could be the Bjork Ditch crossing the Champaign homestead to the Howard homestead. He further testified that it could not be the ST Ditch because it would have to run uphill.

The Court finds the expert witness testimony conflicting and speculative, due to the reference could have been to a ditch that does not exist today.

Finding of Fact #11): When the Howard proof testimonies were signed in 1885, they all contradicted each other and did not mention any ditches or irrigation upon the Howard homestead that had supposedly been in existence since 1877.

The Champaign proof testimonies are vague and non-descriptive. They mention a ditch, but offer no clues to what areas the ditch served, where the ditch was placed, who operated the ditch or what capacity the ditch carried. The Champaign proof testimonies offer no relevant evidence that would link it to what is today known as the Bjork Ditch. The Howard and Champaign land entry documents have inherent credibility problems and would require high levels of speculation on the part of this Court to support the claimed 1877 priority date.

The Court finds that without other supporting evidence, the Howard and Champaign land entry documents are of no value in supporting or proving up the claimed September 30, 1877 priority date.

Finding of Fact #12): The claimants introduced *Exhibit C-31*, which are e-mails between Bruce Callender and the Overholser Historical Research Center. The e-mails state the Choteau County Court House burned down on January 5, 1883. Further, there are records that date back to 1876, but apparently many of the land records were destroyed in the fire.

The Court finds that the Choteau County Court House burned down in 1883, however, no evidence was presented that would indicate a filed right for claim 410 49694-00 was on file at the Court House at the time of the fire.

Finding of Fact #13): In 1958 August Bjork purchased a 19.89 acre, wedge-shaped tract of land (“County Wedge”) from Teton County, located on the east side of the Bjork Ranch in the W2E2NE of Section 6, T23N, R4W. Claimant Bruce Callender testified that he first went to work on the Bjork property in 1972, and that Ray Bjork was flood

irrigating the County Wedge with water from the Bjork Ditch in 1972.

The Court finds Bruce Callender's testimony credible and is evidence that the County Wedge was being irrigated with water from the Bjork Ditch in 1972.

Finding of Fact #14): Objector William Miller was born in 1950. He testified that from 1950 to 1970, the portion of the Bjork/Callender farm that is served by the Bjork Ditch was leased to the Freeman Ranch. The Freeman Ranch was operated by Mr. Miller's Grandmother Helen Freeman, Great Uncle Louie Hallberg and his Uncle Jack O'Neil. Mr. Miller testified that starting in the 1950's he would travel a road that went through the Bjork Ranch most every day, sometimes multiple times a day. Growing up, Mr. Miller thought the Freeman Ranch owned the Bjork property due to the Freeman Ranch either leasing or crop sharing the property since he was a child and they were always on the property.

Mr. Miller testified that while he was growing up he knew August Bjork and does not recall August Bjork having any involvement with the lands north of the Bjork home. He recalls Mr. Bjork having animals and a garden, and does not recall August having any irrigation. He does not know what the water source was for the garden, and assumes August had a well due to the animals needing a year round water source.

Mr. Miller worked on the Freeman Ranch during his childhood, beginning around 1958. He testified that he used to cross the Bjork Ditch during irrigation season five to six times a year during the early 1960's to the 1970's. He crossed the Bjork Ditch at two different points, the first being close to the 1950 to 1970 Miller home and the second point being close to the beginning of the east running lateral. Mr. Miller testified on direct examination that there wasn't water in the Bjork Ditch or the east running lateral until culverts were installed at the crossings in the 1970's. On cross examination Mr. Miller testified that he did not see water from 1958 to 1964. On re-direct, Mr. Miller testified that while his family was operating the property they never irrigated the Bjork property.

Mr. Miller testified that while his family was operating the Bjork/Callender property, the property was strip farmed, and they never irrigated the property from the

Bjork Ditch, and they farmed over the ditches. The Freeman Ranch strip farmed the property with wheat and barley and put up a couple little pieces of dryland hay north of the house.

Mr. Miller testified that his family stopped leasing the Bjork Ranch property around 1970, at which time Ray Bjork began operating the property. Mr. Miller testified that Ray Bjork started digging ditches off of the east running lateral at this time.

Finding of Fact #15): Jim Salmond testified that his family ranch has water rights on Deep Creek and its tributaries. He began irrigating at 9 years old in 1950 from Deep Creek and its tributaries. He testified that his family would receive calls for water from Mrs. Freeman, and now his boys receive calls for water from Mr. Miller. He testified that the Salmond Ranch has never received calls for water from the Bjorks/Callenders. He further testified that he is familiar with the Bjork/Callender property, he used to pheasant hunt on the property when Jack O'Neil was operating it, and the Bjork/Callender property was a dryland farm.

Finding of Fact #16): Harold Yeager testified that he owned a ranch that had rights on Deep Creek upstream from the Bjork/Callender property. His parents bought the ranch in 1939 and sold it in 1994, and he was involved in the ranch activities and irrigation of the ranch. His understanding of Deep Creek priority is that Birch (now Jerry Larson) was first, Robinson was second, and the Freeman Ranch was third. He was not aware of any water rights for the Bjork/Callender property. He was never contacted by anyone from the Bjork/Callender property for water.

Finding of Fact #17): Jack Clark testified that his family owned the O'Neil Ranch from 1937 to 1948. He was born in 1936. His understanding of Deep Creek priority is that Birch was first, the ST Canal was second, and the Cascade Canal was third. He knew August Bjork because his father and August were friends, and his father would help August farm. He remembers the Bjork/Callender property being a dryland farm, and doesn't recall the Bjorks irrigating at all. He doesn't recall any mention of the Bjorks having any water rights.

Finding of Fact #18): Wayne Gollohon testified that he leased the Freeman Ranch from

1968 to 1974. He did the irrigating of the Freeman Ranch with water rights out of Deep Creek. His understanding of Deep Creek priority is that Birch was first, the ST Canal was second, and the Cascade Canal was third. He testified that when he was irrigating he would have Jack O'Neil make calls to upstream junior water right holders, and that the Bjorks/Callenders never asked for Freeman Ranch water. He testified that during the time he was leasing the Freeman Ranch he never saw any irrigation on the Bjork property. Finding of Fact #19): Boyd Johnson testified that he was familiar with the Bjorks and the Bjork Ranch when he was young. He helped August Bjork with haying in 1942, 1943 and 1944. He stated that while he was haying, August Bjork would do the irrigating. He testified that he saw water flowing in the field ditches, and he witnessed August Bjork irrigating into the month of July. He testified that August Bjork had first priority for water, and he witnessed August irrigating into the month of July. The area that Mr. Johnson identified as being irrigated would correspond with Bjork Ditch water. Mr. Johnson testified on cross examination that he didn't help with the actual irrigation, he didn't visit the headgates, and he knew there was water but he didn't know where it came from.

Finding of Fact #20): The field notes from the *1962 Teton County Water Resources Survey* (WRS)(*Ex. C-14*) indicate that August Bjork was interviewed in August 1961. The field notes for Plat No. 31 identify the Bjork Ditch as a use right, with Pete Trudeau being the "name of appropriator to whom decreed". The notes state the date of appropriation as "1890?", and does not identify if the Bjork Ditch is in use. Plat No. 31 identifies 30 present irrigated acres, and 18 irrigable acres, and does not identify a value in the Miner's inches column. The field notes for Plat No. 41 again identifies the Bjork Ditch as a use right with Peter Trudeau being the appropriator. The notes for Plat No. 41 identify the date of appropriation as "1890", and identifies the Bjork Ditch as being in use. Plat No. 41 identifies 21 present irrigated acres, and 40 irrigable acres, and has a "?" in the Miner's inches column.

Claimant Barbara Callender testified that at the time August Bjork was interviewed for the WRS in 1961, August Bjork was elderly (83 years old), living alone

and in failing health. Ms. Callender testified that his health had been failing for some time, he was suffering from bouts of pneumonia and refused to see a doctor. He also had poor hearing and did not have hearing aids, and you had to yell at him in order for him to hear you. Ms. Callender testified that his health was so poor in 1961 that he would likely not have been very engaged in the interview. August Bjork passed away 7 months after the WRS interview.

The Court finds the WRS to be inconsistent and conflicting with the testimony of Mr. Miller, Mr. Salmond and Mr. Yeager.

Finding of Fact #21): *Exhibit C-27* is an Affidavit sworn to by Minnie Bruno on November 2, 1981. Ms. Bruno states she was living on land owned by Peter Trudo, and she remembers Mr. Trudo irrigating the land with ditches in 1906 or 1907, and he also had a garden he irrigated.

The Affidavit is not specific to ditches or area irrigated.

Finding of Fact #22): *Exhibit C-26* is an Affidavit sworn to by Raymond Bjork on November 2, 1981. Mr. Bjork states from 1936 until he passed away in 1962, his father (August Bjork) used all the water he could get from Deep Creek, and discontinued use of Cascade Ditch water about 1939 to insure peace and harmony.

The Affidavit does not address the Freeman Ranch leasing the property from 1950 to 1970.

Finding of Fact #23): *Exhibit C-18* is a letter written by the Ray Bjorks on June 8, 1955 that states a new well was drilled in front of the house, and that Dad has been busy irrigating hay. The letter is not specific to what area is irrigated or from what ditch.

Finding of Fact #24): *Exhibit C-17* are pictures of Richard Bjork and Barbara (Bjork) Callender taken in 1950 and 1956 in their Grandpa August Bjork's yard. Barbara testified that the ditch in the picture was used to irrigate the garden and trees. She further testified the ditch in the picture wasn't in use in 1977 when they moved back, and hasn't been used since.

Finding of Fact #25): There was testimony and evidence presented that the Bjorks rebuilt the upper diversion of the Bjork Ditch after the 1964 flood. *Exhibit C-35* is an Income

and Expense Summary from 1964 which show expenses for the cost share with the Soil Conservation Service to rebuild the headgate and upper reach of the Bjork Ditch.

Finding of Fact #26): *Exhibit C-40* consists of evidence of water calls by Bruce Callender and Rick Bjork. On November 3, 1991, Bruce Callender sent a letter to Jim Salmond stating that from 1964 to 1990 all the upstream users managed to take all of the water out of Deep Creek and leave the Callenders with a dry streambed, and they have only been able to water in March and April before. There is a letter titled "Subject: Official call for Deep Creek water" dated June 4, 2001, wherein Bruce Callender and Rick Bjork state they have been instructed by the NRCS in Havre to make an official call for water in order to preserve their 1877 right on Deep Creek. There is also a letter to the Havre DNRC indicating only 2 people responded to the call for water out of the 14 Deep Creek users contacted. Callender/Bjork made another call for water on April 15, 2002. On April 24, 2002 Callender/Bjork sent a letter to objector Bill Miller asking Mr. Miller to help them out and let some water flow down Deep Creek so they could do some irrigating. There is another letter to George Higgins dated April 24, 2002 asking him to let some water flow down the creek. About a month later, on May 21, 2002, Curtis Law Office sent a letter to Mr. and Mrs. Miller, insisting that the Callender/Bjork calls for water be honored.

The Court finds that starting in 2001, Callender/Bjork made calls for a first right on Deep Creek that were not honored by most of the upstream users.

Finding of Fact #27): Montana Department of Natural Resources and Conservation (DNRC) Water Resources Specialist Kraig Van Voast stated in a 2008 Memorandum to Senior Water Master Ritter (*Ex. C-12*) that the place of use for claim 410 49694-00 appeared irrigated in the 1937 and 1941 aerial photographs. Water Resources Specialist Van Voast testified at hearing that the 1937, 1941 and 1978 aerial photographs show full irrigation of the claimed place of use. Specialist Van Voast testified that the 1957 aerial photograph did not show irrigation, and did show dryland strip cropping.

Specialist Van Voast testified that the DNRC erred in the claim examination of claim 410 49694-00 by incorrectly mapping the eastern boundary, and this error resulted

in an erroneous acres irrigated issue remark on the abstract, and testified that his recommendation is to remove all of the issue remarks contained on the abstract for water right claim 41O 49694-00.

Finding of Fact #28): Expert Witness Lee Yellin testified that his opinion was that the majority of the claimed place of use was not irrigated in the 1937 aerial photograph. The claimants introduced *Exhibit C-3* into evidence, which is an August 1937 aerial photograph from Mr. Yellin's deposition, wherein he admitted that fields 1 through 3 received water near the time the photo was taken. Mr. Yellin testified that the 1941 aerial photograph shows very little irrigation on the property except for a small portion. On cross-examination, he testified that fields 1 through 3 could have been irrigated at some point, and that the irrigation for these fields would have likely come from the Bjork Ditch. Mr. Yellin testified that the 1954 aerial photograph (*Ex. PB/S F-3*) shows very little irrigation and that the strip farming is an indication that the fields were not being irrigated. He testified that the 1978 aerial photograph (*Ex. PB/S F-5*) shows 85 acres of the claimed place of use being irrigated, and further shows irrigation on land that he previously did not identify as being irrigated on any pre-1973 aerials.

Finding of Fact #29): Expert Witness John Westenberg testified that he concluded 127 acres were being irrigated in the 1937 aerial photograph (*Ex. C-21 and C-21B*), and the date of the photograph is an indication of more than a high water right. He testified that the 1941 aerial photograph (*Ex. C-22 and C-22B*) shows 137 acres were being irrigated. Mr. Westenberg testified that 44 acres were being irrigated in the 1951 aerial photograph (*Ex. C-23 and C-23B*), and the date of the photograph was an indication that they were on the second cutting of hay. Mr. Westenberg testified that there is generally less ground irrigated in the 1957 aerial photograph (*Ex. C-24*) than what is shown in the 1937 and the 1941 aerial photographs. He testified that his ultimate conclusion is that the 1877 priority date is valid.

Finding of Fact #30): Expert witness Bruce Anderson testified to the capacity of the Bjork Ditch. *Exhibit C-43* is a Memorandum dated October 13, 2010 authored by Mr. Anderson. Mr. Anderson testified the Claimants were diverting 5.5 cfs on the day of his

site visit, and the Bjork Ditch has the capacity to divert up to 15 cfs.

No evidence was submitted that the Claimants diverted more than their claimed 5.0 cfs prior to July 1, 1973.

Claim 41O 49695-00 (ST Canal):

Finding of Fact #31): Claim 41O 49695-00 appeared in the Temporary Preliminary Decree as an April 1, 1905 use right to 112.20 gpm of water from Deep Creek for the irrigation of 30 acres in the W2SE of section 6.

Finding of Fact #32): Objector William Miller testified that from 1957 through the 1980's he trailed sheep every April/May and would bring them back in August along the strip of land between the ST Canal and Cascade Canal. He testified that he or someone on his behalf has annually cleaned the ST Canal, and he has never seen a turnout to the Bjork/Callender property. He further testified that he has never seen anyone other than the Freeman Ranch and himself use the ST Canal, and he has never seen the Bjork/Callenders use the ST Canal. Also, he testified that the Bjorks/Callenders have never paid for improvements or provided maintenance of the ST Canal.

Mr. Miller testified that in 1975 there was flooding and the ST Canal overflowed onto the Bjork/Callender property.

Finding of Fact #33): Objector Betty Jo Miller testified that the Miller's have only allowed the Callenders to use water from the ST Canal on one occasion, which was to wash gravel, not to irrigate. She testified that other than the gravel washing, she is not aware of the Callenders using ST Canal water.

Finding of Fact #34): Wayne Gollohon testified that he leased the Freeman Ranch from 1968 to 1974, and that he conducted maintenance on the ST Canal every year. He testified that he never observed any turnouts, diversions or flumes from the ST Canal to the Bjork/Callender property.

Finding of Fact #35): Expert witness Lee Yellin testified that the 1937 and 1941 aerial photos show some irrigation, and the 1978 aerial photo shows the most irrigation on the claimed place of use.

Mr. Yellin testified that he has found no evidence of a water right out of the ST

Canal or any agreement allowing the Bjorks/Callenders to use water from the ST Canal. He testified that he conducted a site visit, and was unable to locate any evidence of any turnouts from the ST Canal. He testified he did see some low lying areas that could have possibly been old ditches.

Mr. Yellin testified that in his opinion, there is no valid claim to a water right out of the ST Canal.

Finding of Fact #36): Expert witness John Westenberg testified the 1937, 1941 and 1951 aerial photos show irrigation on the claimed place of use for claim 41O 49695-00. He testified that the 1957 aerial photo did not show irrigation, and he did not review the 1978 aerial photo.

Mr. Westenberg testified that water from the ST Canal could have irrigated both of the claimed places of use for claims 41O 49695-00 and 41O 49696-00, and water from the Cascade Canal could have irrigated both of the claimed places of use for claims 41O 49695-00 and 41O 49696-00.

He testified that he did not find any documents transferring a right to the Bjorks/Callenders for use of the ST Canal. He testified that he has not reached any opinion regarding the validity of the priority date for the ST Canal, other than the fact it is consistent with Peter Trudos entry onto the land.

Finding of Fact #37): DNRC Water Resource Specialist Kraig Van Voast testified the 1937, 1941 and 1978 aeriels showed irrigation on the claimed place of use for claim 41O 49695-00. Mr. Van Voast testified that the WRS does not indicate any conveyance to the southern portion of the Bjork/Callender property where the claimants claimed to use water from the ST Canal.

Finding of Fact #38): Claimant Bruce Callender testified that he's lived on the ranch since 1977, and the only time that he can recall ST Canal water being on the Bjork/Callender property is when it overtopped the ditch in the 1970's. He further testified that he has never irrigated out of the ST Canal.

Finding of Fact #39): Claimant Barbara Callender testified that when she was a child in the mid to late 1950's, there was water running in the ditches around August Bjork's

home, that the water was coming “from up the hill”, and that she used to play in the water filled irrigation ditches. She testified that some of these ditches are shown in *Exhibit C-17*, and that the ditches haven’t been used since they moved back to the area in 1977. Ms. Callender’s testimony was unspecific as to whether the ST Canal was the water source for the ditches in the pictures in *Exhibit C-17*.

Finding of Fact #40): Boyd Johnson testified that he helped August Bjork with haying in 1942, 1943 and 1944, however he did not help with the actual irrigation, he did not visit the headgates, and he knew there was water but didn’t know where it came from.

Claim 41O 49696-00 (Cascade Canal):

Finding of Fact #41): Claim 41O 49696-00 appeared in the Temporary Preliminary Decree as a May 1, 1905 use right to 1.00 cfs of water from Deep Creek for the irrigation of 30 acres in the W2SE of Section 6.

Finding of Fact #42): *Exhibit C-26* is an Affidavit sworn to by Raymond Bjork on November 2, 1981. In the Affidavit, Mr. Bjork states his father (August) discontinued use of Cascade Canal water in about 1939 to insure peace and harmony.

Finding of Fact #43): Claimant Bruce Callender testified that Raymond Bjork continued with his father’s wishes and did not pursue a water right out of the Cascade Canal. Mr. Callender testified that he tried to reestablish a Cascade Canal water right in the 1980's by inserting a pipe into the Cascade Canal, however Joyce Robinson pulled the pipe out and called the Sheriff. He installed another pipe into the Cascade Canal when Joyce Robinson sold to Larry Semenza, Mr. Semenza eventually filed a complaint against Mr. Callender. Mr. Callender installed a pipe into the Cascade Canal a third time in the 1990's when Robert Stephens bought out Semenza, the pipe was eventually plugged by Mr. Stephens.

Finding of Fact #44): Objector Robert Stephens testified that he had ownership of the Cascade Canal in the 1990's. He testified that in 2007, he was cleaning the Cascade Canal, and he was asked by Mr. Callender to not clean the ditch by the new 4-wheeler bridge. Mr. Stephens inspected the bridge, and discovered that Mr. Callender had installed a pipe under the bridge. He had a conversation with Mr. Callender after he

found the pipe, and informed Mr. Callender he was going to block the pipe, and he eventually plugged the pipe with rocks and posts.

Mr. Stephens testified that the Bjorks/Callenders have never paid or compensated him for maintaining the Cascade Canal. He has never received a call for water from the Bjorks/Callenders for Cascade Canal water.

Finding of Fact #45): Objector William Miller testified that when he was moving sheep as a child he did see a dilapidated wooden flume from the Cascade Canal that crossed the ST Canal, and if it was in working condition would have conveyed water to the Bjork farm. He testified that it did not look like it could convey water, and that he never witnessed it convey water.

Finding of Fact #46): Claimant Barbara Callender testified that she recalls playing at the ST Canal when she was 4-6 years old (1955-1957) and seeing a wooden flume crossing the ST Canal with water in it. She testified that she does not recall seeing water in the flume while she was in high school (1968-1969).

Ms. Callenders' testimony conflicts with the Raymond Bjork Affidavit.

Finding of Fact #47): Expert witness Lee Yellin testified that he does not believe that the Bjork/Callenders have a valid right out of the Cascade Canal, based on the fact that the Cascade Canal was a development company that sold shares and interests in the ditch. Mr. Yellin could not find any records of the Bjorks/Callenders, or their predecessors, purchasing a right out of the Cascade Canal.

Finding of Fact #48): DNRC Water Resource Specialist Kraig Van Voast testified the 1937, 1941 and 1978 aerials showed irrigation on the claimed place of use for claim 41O 49696-00. Mr. Van Voast testified that the WRS does not indicate any conveyance to the southern portion of the Bjork/Callender property where the claimants claimed to use water from the Cascade Canal.

Finding of Fact #49): Expert witness John Westenberg testified the 1937 and 1941 aerial photos show irrigation on the claimed place of use for claim 41O 49696-00. He testified that he did not review the 1978 aerial photo.

He testified that he did not find any documents in the chain of title search for the

Bjork/Callender property to use Cascade Canal water.

Finding of Fact #50): *Exhibit M-U* is a July 27, 2000 sworn statement by Dorothy O'Neil. It states she moved to the Freeman Ranch in 1923. She states August Bjork did not use water from the ST Canal from the 1940's to the time of her sworn statement, and the Bjork family did use water from the Cascade Canal until 1988.

This evidence conflicts with the testimony of Bruce Callender, wherein he testified that Raymond continued with August's wishes and not pursue a water right out of the Cascade.

GENERAL FINDINGS OF FACT:

Water Right Claim 41O 49694-00 (Bjork Ditch):

Finding of Fact #51): The objectors have demonstrated by a preponderance of the evidence that the claimed September 30, 1877 priority date is incorrect. The testimony of Mr. Miller, Mr. Salmond and Mr. Yeager show that August Bjork never asserted a senior right against Deep Creek irrigators, when the testimony showed it was common practice to do so on Deep Creek. The current claimants only began asserting a senior right in 2001, with Mr. Callender testifying that he didn't know what the priority date of claim 41O 49694-00 was until he completed some research in the early 1980s. It's no surprise that the upstream early rights on Deep Creek did not honor the Bjork/Callender calls for water in 2001 and 2002, the evidence shows these were the first calls made on behalf of claim 41O 49694-00.

Finding of Fact #52): The evidence is less than clear concerning what priority date August Bjork believed he had for claim 41O 49694-00. He informed the WRS staff of an 1890 priority date, however the priority date showed up with a question mark in the WRS Plat No. 31 field notes. The claimants argued that the 1961 WRS field notes were questionable at the time of the WRS, and the Court agrees.

The claimants responded with evidence consisting of the Howard and Champaigne land entry documents, and a theory of how these early settlers would have begun irrigating. These documents are self-serving, vague and non-descriptive, and contain contradicting information in each. The claimants theory consists entirely of speculation.

The Court cannot give these documents any weight toward proving up a 1877 priority date. The documents simply do not discuss irrigation of the claimed place of use for 41O 49694-00.

The May 26, 1920 Mortgage with the Federal Land Bank of Spokane is the earliest evidence of the claimed place of use being irrigated with water from Deep Creek. The priority date for claim 41O 49694-00 should be changed to May 26, 1920.

Finding of Fact #53): The objectors established a long period of continuous nonuse of claim 41O 49694-00 through the testimony of people who were on the ground and irrigating out of Deep Creek at the time. Mr. Miller and his family, who were leasing the claimed place of use, were farming the claimed place of use at the time, and according to his testimony never irrigated the leased property, and actually farmed over the irrigation ditches. The testimony of both Jim Salmond and Harold Yeager add support to Mr. Miller's testimony that the Bjork/Callender property was not irrigated from 1950 to 1970. This raises a rebuttable presumption that claim 41O 49694-00 has been abandoned. The burden of proof shifts to the claimants to provide evidence excusing the long period of nonuse. *See 79 Ranch*, 204 Mont. At 432-33, 666 P.2d at 218.

Finding of Fact #54): The immediate record shows substantial and specific evidence explaining the nonuse of claim 41O 49694-00. Mr. Miller testified that his family plowed over the ditches and put the property into strip crops when they were leasing the property from 1950 to 1970, although expert witnesses Westenberg and Yellin testified there was some (albeit less than was claimed on the Statement of Claim) irrigation going on in the place of use during the early and mid 1950s as shown in the aerial photos. Mr. Miller was born in 1950, and would have been a child during the 1950s. He testified that when he was a child he thought his family owned the property at issue, which shows he didn't have a good understanding of the lease or crop share between the Freeman Ranch and Bjorks. Further, August Bjork was 83 years old when he passed away seven months after the WRS interview in 1961. His granddaughter Barbara Callender testified that August's health had been failing for some time, and he had been suffering from bouts of pneumonia around the time of his death.

The record also shows specific objective evidence of the Bjork/Callender intent not to abandon water right 41O 49694-00. Ray Bjork rebuilt the head gate and upper portion of the Bjork Ditch the same year it was wiped out by a flood in 1964. Also, Mr. Miller testified that when the lease ceased in 1970, Ray Bjork began digging ditches, presumably the same ones that were farmed over by the Freeman Ranch.

Lastly, the record shows affirmative efforts to place the water to beneficial use and lack of intent to abandon. Bruce Callender testified that when he went to the Bjork Ranch in 1972 Ray Bjork was irrigating. All of the experts testified that the property began to show full irrigation on the aerial photos dated in the 1970s. Mr. Callender further testified that the main limiting factor with the Bjork Ditch irrigation system is the upstream users taking all of the water. The objectors don't argue that the irrigation system hasn't been used from the 1970s to present.

This evidence rebuts the presumption of an intent to abandon water right claim 41O 49694-00.

Finding of Fact #55): Based on the evidence submitted at hearing, and the Statement of Claim for water right 41O 49694-00, the Water Court should generate implied claim 41O 30063626 to accurately reflect a distinct water right found within the Statement of Claim for claim 41O 49694-00. The evidence shows that August Bjork purchased the 19.89 acre County Wedge in 1958, which was included in the place of use on the Statement of Claim for claim 41O 49694-00.

Bruce Callender testified that Ray Bjork was irrigating the County Wedge in 1972, which is the earliest evidence of irrigation for this piece of property.

The priority date for implied claim 41O 30063626 should be April 1, 1972.

Finding of Fact #56): No evidence was presented that the claimants used more than their claimed 5.00 cfs prior to July 1, 1973 for claim 41O 49694-00 as claimed on the Statement of Claim. The following information remark should be added to the flow rate field on the abstracts for claims 41O 49694-00 and 41O 30063626:

THE COMBINED FLOW RATE FOR CLAIMS 41O 49694-00 AND 41O 30063626 CANNOT EXCEED THE HISTORICAL USE OF 5.00 CFS.

Finding of Fact #57): Claim number 41O 30063626 should receive the following general

information remark on its abstract:

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT
BASED ON INFORMATION IN CLAIM NO. 410 49694-00.

Claim number 41O 30063626 should receive the following issue remark on its abstract:

CLAIM WAS NOT INCLUDED IN THE BASIN 41O TEMPORARY
PRELIMINARY DECREE ISSUED 12/29/2005.

Finding of Fact #58): The maximum acres irrigated for claim 41O 30063626 should be 19.89 acres and the place of use should be the W2E2NE of Section 6, T23N, R4W in Teton County.

Finding of Fact #59): The place of use for claim 41O 49694-00 should be changed to the following:

	<u>ACRES</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
	78.00	W2NE	6	23N	4W	TETON
	23.00	SWSE	31	24N	4W	TETON
	<u>26.00</u>	SESW	31	24N	4W	TETON
TOTAL:	127.00					

Finding of Fact #60): Claim number 41O 49694-00 should receive the following general information remark on its abstract:

THE IMPLIED CLAIM LISTED FOLLOWING THIS STATEMENT
WAS AUTHORIZED AND GENERATED BASED ON INFORMATION
IN THIS CLAIM. 41O 30063626.

Water Right Claim 41O 49695-00 (ST Canal):

Finding of Fact #61): The Court finds that the evidence supports the objectors' argument that there has never been a Bjork/Callender water right out of the ST Canal, and that claim 41O 49695-00 was never perfected.

Expert witness Yellin and DNRC Water Resource Specialist Van Voast both found evidence of irrigation on the 1937, 1941 and 1978 aerial photos in the place of use, and Mr. Yellin found some low spots during his site visits that could have been old ditches. The Court is not sure how Mr. Yellin and Mr. Van Voast found irrigation in the 1978 aerial photo when Mr. Callender testified that he has never irrigated out of the ST Canal since he began residing on the ranch in 1977. Yellin, Westenberg and Van Voast all found irrigation for claim 41O 49695-00 in the 1937 and 1941 aerial photos. The Court finds that the place of use for claim 41O 49695-00 was being irrigated by the

Cascade Canal in the 1937 and 1941 aerial photos, as Mr. Westenberg testified that the Cascade Canal was able to irrigate the place of use of either claim 41O 49695-00 or 41O 49696-00.

The evidence is clear in that those who spent time in the area of the ST Canal from the 1950's to present have never seen a turnout, diversion or flume from the ST Canal that would serve the Bjork/Callender property. Also, Mr. Callender did not provide any evidence that the Bjorks/Callenders ever maintained the ST Canal. Claimant Bruce Callender's testimony that since he's been living on the ranch he's never irrigated out of the ST Canal show that claim 41O 49695-00 was never perfected and the water was never put to a beneficial use. Further, this long period of continuous nonuse was not rebutted by the Claimants.

Claim 41O 49695-00 should be terminated and should not appear in the Final Decree for the Teton River Basin.

Water Right Claim 41O 49696-00 (Cascade Canal):

Finding of Fact #62): The objectors established a long period of nonuse of claim 41O 49696-00. The evidence showed that there was a wooden flume from the Cascade Canal that crossed the ST Canal and conveyed water to the Bjork/Callender property. The 1937 and 1941 aerial photos, and the testimony of Barbara Callender stating she remembers the flume carrying water during 1955 to 1957, show that the Bjorks had a water right out of the Cascade Canal and used it until the mid 1950's. However, the evidence showed that water right claim 41O 49696-00 was not used from the late 1950's to the early 1980's, when Bruce Callender attempted to reestablish the water right out of the Cascade Canal. This raises a rebuttable presumption that claim 41O 49696-00 has been abandoned. The burden of proof shifts to the claimants to provide evidence excusing the long period of nonuse.

Finding of Fact #63): Claimant Bruce Callender testified that Raymond Bjork continued with his father's wishes and did not pursue a water right out of the Cascade Canal. This testimony and *Exhibit C-26* are evidence of August and Raymond Bjorks' intent to abandon water right claim 41O 49696-00.

The 1978 aerial photo showed irrigation on the claimed place of use, however this

evidence conflicts with the testimony of Bruce Callender, wherein he testified that Raymond continued with August's wishes and not pursue a water right out of the Cascade. The Court finds the testimony of Bruce Callender is better evidence than the 1978 aerial photo interpretation.

The claimants did not provide evidence excusing the period of nonuse from the late 1950's to the early 1980's. Water right claim 41O 49696-00 is abandoned, should be terminated, and should not appear in the Final Decree for the Teton River Basin.

CONCLUSIONS OF LAW

Conclusion of Law #1): The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights. Section 3-7-224, MCA.

Conclusion of Law #2): A properly filed Statement of Claim for Existing Water Right, or a Statement of Claim that is amended before the issuance of a Water Court decree, constitutes prima facie proof of its content until the issuance of a final decree. Section 85-2-227, MCA. A prima facie claim meets the minimum threshold of evidence necessary to establish the facts alleged, and shifts the burden of production to an objector to overcome that threshold. In order to overcome the prima facie validity that accompanies a properly filed Statement of Claim, or an amended Statement of Claim, the objector must demonstrate by a preponderance of evidence that one or more elements of the prima facie Statement of Claim is incorrect. Nonetheless, the burden of persuasion remains ultimately with the claimant to prove up a water right claim. Section 26-1-402, MCA. Without evidence to the contrary, the prima facie claim may satisfy a claimant's burden. However, the Court is not compelled to accept the prima facie Statement of Claim as true. Rule 19, W.R.Adj.R.; *Burkhartsmeyer et al. v. Burkhartsmeyer et al.*, Mt. Water Court Case 40G-2, Memorandum Opinion, Pg. 11-13 (1997).

Conclusion of Law #3): The Water Court has found the degree or weight of evidence needed to contradict or overcome the prima facie proof statute is a preponderance of the evidence. The Montana Supreme Court has defined preponderance as "a relatively modest standard that the statutory criteria are 'more probable than not' to have been met." *Hohenlohe v. State*, 2010 MT 203 ¶ 33, 357 Mont. 438, 240 P.3d 628.

Conclusion of Law #4): There are two elements for abandonment - intent to abandon and

actual nonuser. “Neither an intention to abandon nor nonuser is sufficient: the union of both is indispensable to constitute abandonment.” *Thomas v. Ball*, 66 Mont. 161, 213 P. 597, 599 (1923). Having asserted abandonment in this case, the objectors have the burden of proving both actual nonuse and an intent abandon. In *79 Ranch v. Pitsch*, 204 Mont. 426, 431-432, 666 P.2d 215, 217-218, the Montana Supreme Court stated:

The appropriation of water is based on its beneficial use. When the appropriator or his successor in interest abandons or ceases to use the water for its beneficial use, the water right ceases. Section 89-802, R.C.M., 1947 (repealed 1973). This fundamental principle has long governed the determination of water rights in Montana. In *Power v. Switzer* (1898), 21 Mont. 523, 55 P. 32, this controlling policy of beneficial use was explained:

“...It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or ‘claimed’ and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases. (Sections 1880, 1881, Civil Code.)”

Conclusion of Law #5): The Court employs a two-step process for determining abandonment of a water right. The objectors bear the initial burden of showing a long period of continuous nonuse. This showing raises a rebuttable presumption that the claimant or his predecessors intended to abandon the water right. The burden then shifts to the claimants to explain the long period of nonuse. *In re the Adjudication of Water Rights of the Clark Fork River*, 254 Mont. 11, 15, 833 P.2d 1120, 1123 (1992); *79 Ranch*, 204 Mont. At 432-33, 666 P.2d at 218-19.

Conclusion of Law #6): While the “Water Court cannot specify a minimum number of years that must elapse before the burden shift [to the party opposing abandonment] will occur, the continuum stretches 10-23 years.” *Hardwig v. Taylor Land & Livestock*

Company, LLC, Case WC-2005-01, at pg. 4, (MT Water Court Order Establishing Standard of Proof and Assigning Burdens of Proof, July 31, 2006).

Conclusion of Law #7): The presumption of abandonment that arises from a long period of continuous nonuse cannot be rebutted by simply expressing a hope or desire reflecting a “gleam in the eye philosophy” regarding the future use of water. *In re Clark Fork River*, 254 Mont. at 15, 833 P.2d at 1123; *79 Ranch*, 204 Mont. at 433-34, 666 P.2d at 219. The claimant must introduce specific evidence explaining or excusing the long period of nonuse. *In re the Adjudication of Water Rights of the Musselshell River*, 255 Mont. 43, 51, 840 P.2d 577 (1992).

Conclusion of Law #8): In *Heavirland v. State of Montana*, Water Court Case 41O-97, *Order Regarding Abandonment of Claim 41O 47356-00*, p. 17, filed September 19, 2012, Associate Water Judge McElyea held that a claimant can rebut the presumption of an intent to abandon a water right claim when the record shows: 1.) substantial and specific evidence explaining nonuse of the water right, 2.) specific objective evidence of intent not to abandon the water right, and 3.) affirmative efforts to place the water to beneficial use and lack of intent to abandon. Through the evidence submitted at hearing, the claimants have rebutted the presumption of an intent to abandon water right claim 41O 49694-00 as explained in Finding of Fact #53.

Conclusion of Law #9): Pursuant to Rule 35, Water Right Claim Examination Rules, the Water Court may generate implied claims whenever a single claim appears to contain more than one right. Based on the evidence received at the hearing and the information contained in the Statement of Claim for water right claim 41O 49694-00, the Water Court should generate implied claim 41O 30063626 to accurately reflect a distinct water right found within the Statement of Claim for claim 41O 49694-00. See also *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985).

Conclusion of Law #10): The common law elements of a valid appropriation of water are intent, notice, diversion, and application to beneficial use. *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water within the Missouri River Drainage Area (Bean Lake III)*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396. Beneficial use is the basis, the measure and the limit of all rights to the use of water. *McDonald v.*

State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986). Without placing the water to a beneficial use, there can be no valid appropriation. Because water from the ST Canal was never put to a beneficial use, water right claim 41O 49695-00 was never perfected.

Conclusion of Law #11): The claimants failure to use water right claim 41O 49696-00 from the late 1950's to the early 1980's establishes a long period of nonuse sufficient to shift the burden the claimants to rebut the presumption of an intent to abandon the claim. Bruce Callender's testimony and the Affidavit of Raymond Bjork show an intent to abandon water right claim 410 49696-00.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends the Court make the changes specified in the Findings of Fact to correct the Temporary Preliminary Decree for this Basin.

Post Decree Abstracts of Water Right Claims are served with this Report to confirm that the recommended changes have been made in the state's centralized record system.

DATED this 31ST day of OCTOBER, 2012.


Jay Porteen
Water Master

CERTIFICATE OF SERVICE

I, Carol A. Bertke, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **NOTICE OF FILING OF MASTER'S REPORT AND MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.


Ross D. Miller
Attorney-at-Law
PO Box 7637
Missoula, MT 59807
(406) 543-2714
ross@millerlawmontana.com

John J. Ferguson
Attorney-at-Law
116 West Front Street
Missoula, MT 59802
(406) 532-2664
johnf@fergusonlawmt.com

Holly Jo Franz
Attorney-at-Law
PO Box 1155
Helena, MT 59624-1155
(406) 442-0005
hollyjo@franzdriscoll.com

Caption and Service List updated 10/26/12

DATED this 31ST day of October, 2012.



Carol A. Bertke
Deputy Clerk of Court

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TETON RIVER
BASIN 410
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 410 49694-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners:

ALLEN B CALLENDER JR
14 BJORK LN
CHOTEAU, MT 59422

BARBARA R CALLENDER
14 BJORK LN
CHOTEAU, MT 59422

RICHARD L BJORK
14 BJORK LN
CHOTEAU, MT 59422

***Priority Date:** MAY 26, 1920

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

***Flow Rate:** 5.00 CFS

THE COMBINED FLOW RATE FOR CLAIMS 410 49694-00 AND 410 30063626 CANNOT EXCEED THE HISTORICAL USE OF 5.00 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:** 127.00

Source Name: DEEP CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNESE	1	23N	5W	TETON

Period of Diversion: APRIL 1 TO NOVEMBER 30

Diversion Means: HEADGATE

Ditch Name: BJORK DITCH

Period of Use: APRIL 1 TO NOVEMBER 30

***Place of Use:**

<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	78.00		W2NE	6	23N	4W	TETON
2	23.00		SWSE	31	24N	4W	TETON
3	26.00		SESW	31	24N	4W	TETON
Total:	127.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE ASSOCIATED WHICH MEANS THE RIGHTS SHARE THE SAME PLACE OF USE.

10790-00 10792-00 49694-00

THE PRIORITY DATE WAS AMENDED BY THE CLAIMANT ON 11/09/2001.

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

IMPLIED CLAIM NO. 41O 30063626 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TETON RIVER
BASIN 41O
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41O 30063626 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: ALLEN B CALLENDER JR
14 BJORK LN
CHOTEAU, MT 59422

BARBARA R CALLENDER
14 BJORK LN
CHOTEAU, MT 59422

RICHARD L BJORK
14 BJORK LN
CHOTEAU, MT 59422

Priority Date: APRIL 1, 1972

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 5.00 CFS

THE COMBINED FLOW RATE FOR CLAIMS 41O 49694-00 AND 41O 30063626 CANNOT EXCEED THE HISTORICAL USE OF 5.00 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: 19.89

Source Name: DEEP CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SW	NE	1	23N	5W	TETON

Period of Diversion: APRIL 1 TO NOVEMBER 30

Diversion Means: HEADGATE

Ditch Name: BJORK DITCH

Period of Use: APRIL 1 TO NOVEMBER 30

Place of Use:

<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	19.89		W2E2NE	6	23N	4W	TETON
Total:	19.89						

Remarks:

THE PRIORITY DATE WAS AMENDED BY THE CLAIMANT ON 11/09/2001.

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

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41O TEMPORARY PRELIMINARY DECREE ISSUED 12/29/2005.

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41O 49694-00.

THE DNRC EXAMINATION OF THIS CLAIM FOUND NO SIGNIFICANT FACTS, DATA, OR ISSUES TO REPORT TO THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TETON RIVER
BASIN 410**

IMPORTANT NOTICE

*****THIS WATER RIGHT CLAIM HAS BEEN DISMISSED*****

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 410 49695-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: DISMISSED

Owners:

ALLEN B CALLENDER JR
14 BJORK LN
CHOTEAU, MT 59422

BARBARA R CALLENDER
14 BJORK LN
CHOTEAU, MT 59422

RICHARD L BJORK
14 BJORK LN
CHOTEAU, MT 59422

Priority Date:

Type of Historical Right:

Purpose (use): IRRIGATION

Flow Rate:

Volume:

Source Name: DEEP 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 DURING ADJUDICATION OF THE 410 TEMPORARY PRELIMINARY DECREE.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TETON RIVER
BASIN 410**

IMPORTANT NOTICE

*****THIS WATER RIGHT CLAIM HAS BEEN DISMISSED*****

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 410 49696-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: **DISMISSED**

Owners:

ALLEN B CALLENDER JR
14 BJORK LN
CHOTEAU, MT 59422

BARBARA R CALLENDER
14 BJORK LN
CHOTEAU, MT 59422

RICHARD L BJORK
14 BJORK LN
CHOTEAU, MT 59422

Priority Date:

Type of Historical Right:

Purpose (use): IRRIGATION

Flow Rate:

Volume:

Source Name: DEEP 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 DURING ADJUDICATION OF THE 410 TEMPORARY PRELIMINARY DECREE.