

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE RIVER BELOW POWDER RIVER - BASIN (42M)
INTERLOCUTORY DECREE

CLAIMANTS: Daniela J. Bennion; Brett R. Bennion

CASE 42M-0003 I-2023

42M 30114746

OBJECTORS: Daniela J. Bennion; Brett R. Bennion

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

FINDINGS OF FACT

1. Daniela J. Bennion and Brett R. Bennion (the Bennions) domestic claim 42M 30114746 was decreed with a DNRC notice-type issue remark:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 42M DECREE ISSUED 01/24/2014.

2. The Bennions objected to claim 42M 30114746 stating:

Claimant objects to the Place of Use/Maximum Acres and Purpose of Right elements of Claim 42M 30114746 in order to correct the elements to reflect the fact that 4.00 Acres of the surrounding lawn and garden were historically irrigated by Claim 42M 30114746 for pasturing stock animals as well as aesthetic lawn and garden purposes, as timely claimed by Claimants on November 27, 2017 on the Statement of Claim for Existing Water Right and erroneously changed by the DNRC to 1.00 Acre. As such, the Purpose of the Right should be changed to Domestic, Lawn and Garden, and Stock purposes to reflect its historical use. Claimant reserves the right to identify additional bases for objection in the event additional issues arise regarding this claim are publicly noticed or arise during field investigation, discovery or otherwise.

DATED this 13 day of January 2023.

/s/ Betsy R. Story

SIGNATURE OF OBJECTOR OR OBJECTOR'S ATTORNEY

3. A deadline was set for Daniela J. Bennion and Brett R. Bennion to file documentation indicating how the Objection to claim 42M 30114746 should be resolved. (Doc.¹1.00). On November 13, 2023, the Bennions filed a Verified Motion to Amend Statement of Claim and Brief in Support. (Doc. 2.00).

4. The November 13, 2023 Motion requested the place of use/maximum acres of domestic claim 42M 30114746 be changed to 4.00 acres, as originally claimed. Additionally, the November 13, 2023 Motion indicated the following modification should be made to the purpose:

Purpose(use): DOMESTIC, LAWN AND GARDEN, STOCK

5. An Order Setting Filing Deadline was issued on November 15, 2023, stating “4.00 acres of domestic irrigation was claimed on the original statement of claim and the map attached to the Amendment shows 4.00 acres.” The order explained that while domestic claims often include lawn and garden use (as appears to be the case for claim 42M 30114746), domestic claims do not include stock use. A deadline was set for the Bennions to file evidence showing how statement of claim 42M 30114746, or the documents attached thereto, indicate stock use from the well described by the claim; a deadline was also set for the Bennions to file a proposed abstract. (Doc. 3.00).

6. On January 5, 2023, the Bennions filed a Statement Regarding Stock Use and Proposed Abstract. (Doc. 4.00). The January 5, 2023 filing included photographs showing evidence of historical stock use, presumably at the claimed place of use,

¹ “Doc.” numerical references correlate to case file docket numbers in the Water Court’s Full Court case management system.

including a rusty hay feeder, a concrete hay trough, a cattleguard, and an old wooden trough. The January 5, 2023 filing also included photos of current stock use, presumably at the claimed place of use, including a barn and corral, and horses.

The Bennions included a proposed abstract showing the maximum acres/place of use should be modified from 1.00 to 4.00, as originally claimed; additionally, the Bennions proposed the following remark be added to claim 42M 30114746:

THIS RIGHT IS ALSO USED FOR INCIDENTAL LAWN AND GARDEN AND STOCK WATERING PURPOSES. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THIS WATER RIGHT.

Alternatively, the Bennions requested an implied claim for stock use.

PRINCIPLES AND CONCLUSIONS OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.

The Statement of Claim filed on November 27, 2017 indicates 4.00 acres of lawn and garden are part of domestic claim 76M 30114746:

8. NUMBER OF PERSONS SERVED: (use one form per household) 5
NUMBER OF ACRES OF LAWN AND GARDEN IRRIGATION: (cannot exceed 5 acres) 4 acres

Later, an Amendment to Stock & Domestic HB-110 Exempt Filings was submitted to the DNRC on November 20, 2020, reducing the place of use to 1.00 acre; however, the map attached to the November 20, 2020 submission suggests confusion on behalf of the claimant, referring to 4.00 acres:



2. Water Right Claim Examination Rules 18 and 19 contemplate the inclusion of up to 5.00 acres of lawn and garden irrigation for domestic purposes. *See* W.R.C.E.R. 18(b) and 19(b). Four acres of lawn and garden irrigation is included in domestic claim 42M 30114746, an incidental use remark for lawn and garden use unnecessary.

3. Implied claims are claims authorized by the water court to be separated and individually identified when a statement of claim includes multiple rights. Rule 2(33), W.R.C.E.R. If the single claim form containing multiple rights has been timely filed, the Section 85-2-221, MCA statutory deadlines for filing claims is satisfied. Rule 35(c)(3), W.R.C.E.R.

Before the Court will recognize an implied claim, a claimant must prove that several factors exist. These include: (1) proof of two or more water rights in the original claim form or the material submitted with the claim form; (2) proof of historic use corroborating the implied claim; and (3) proof that recognizing the implied claim(s) will avoid causing a change to historic water use or increase the historic burden to other water users. *Bodle v. Thomas-Rupert*, Case 76HA-74, 2020 Mont. Water LEXIS 361, *26-27 (citing *In re Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17, * 32 (Jan. 31, 2013); *In re Martinell*, Case 41A-148, 2018 Mont. Water LEXIS 3, *6 (June 14, 2018)). The requirements for generation of an implied claim from claim 76M 30114746 have not been met.

4. In Case 41K-A3, an exception was created for situations where there is a Statement of Claim for *irrigation* by ditch but no *stock* Statement of Claim was filed for that same historical right. In Case 41K-A3, the stock use was truly incidental, and the

Court stated: “That stock use only occurs when water is diverted for irrigation and does not increase the amount of water diverted.” The incidental use remark added to the claims in Case 41K-A3 noted the limitation. Case 41K-A3 created a solution when no stock Statement of Claim was filed and an implied claim for stock could not be generated from the irrigation Statement of Claim. *Broken O Land & Livestock LLC v. Tee Bar Ranch Co.*, Case 41K-A3, 2017 Mont. Water LEXIS 10 (April 7, 2017).

5. In the present case, the Bennions have shown evidence of stock use, likely at their claimed place of use and Statement of Claim 42M 30114746 does not support the creation of an implied stock claim. However, the Bennions have not provided evidence showing that stock use is incidental to the use of the domestic well described by claim 42M 30114746; instead the Bennions showed photos including hay feeders and troughs, which require active management of water to accomplish stock use – not incidental.

6. The remark indicating claim 42M 30114746 was not included in the 2014 decree is a notice-type issue remark; as the Objection to claim 42M 30114746 has been addressed, the remark can be removed.

RECOMMENDATIONS

1. Claim 42M 30114746 should be modified to reflect a 4.00 acre place of use:

Maximum Acres:	4.00	4.00						
*Place of Use:								
ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County	
1	4.00	4.00	S2NWNE	11	22N	58E	RICHLAND	
Total:	4.00	4.00						

2. The issue remarks should be removed from claim 42M 30114746.
 3. The Bennions request to add an incidental use remark to domestic claim 42M 30114746 should be denied.

A Post Decree Abstract of Water Right Claim is served with the Report for review.

Service Via Electronic Mail:

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, BELOW POWDER RIVER
BASIN 42M**

Water Right Number: 42M 30114746 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: BRETT R BENNION
34670 HWY 200
SIDNEY, MT 59270

DANIELA J BENNION
34670 HWY 200
SIDNEY, MT 59270

***Priority Date:** DECEMBER 31, 1952

Type of Historical Right: USE

Purpose (Use): DOMESTIC

Flow Rate: 35.00 GPM

Volume: 4.00 AC-FT

Households: 1

Maximum Acres: 4.00

Source Name: GROUNDWATER

Source Type: GROUNDWATER

***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		SWNWNE	11	22N	58E	RICHLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

Period of Use: JANUARY 1 TO DECEMBER 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	4.00		S2NWNE	11	22N	58E	RICHLAND

Total: 4.00