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MONTANA WATER COURT, YELLOWSTONE DIVISION  
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN  
BASIN 43B  
PRELIMINARY DECREE

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CLAIMANTS: 360 Holdings LLC; Arthur L. Burns Jr. &  
Catherine L. Burns Trust; Christopher J. Jensen;  
Lydia A. Jensen; South Fork LLC

**CASE 43B-0323-R-2021**

43B 194781-00

43B 194782-00

OBJECTOR: Trout Unlimited

**ORDER ON MOTION FOR SUMMARY JUDGMENT**

Objector Trout Unlimited (“TU”) filed a motion for summary judgment seeking an order limiting the period of diversion and period of use for water right claims 43B 194781-00 and 43B 194782-00 to May 1 to July 15 each year. Claimants 360 Holdings LLC, Arthur L. Burns J. & Catherine L. Burns Trust, Christopher J. Jensen, Lydia A. Jensen and South Fork LLC (collectively, the “Claimants”) oppose the motion. For the reasons stated in this Order, the Court grants TU’s motion in part.

**PROCEDURAL BACKGROUND**

The Water Court consolidated claims 43B 194781-00 and 43B 194782-00 into this case to address objections to the claims filed by TU.<sup>1</sup> (Doc. 2.00). After various procedural proceedings, on September 14, 2024, TU filed its summary judgment motion. (Doc. 26.00). TU’s motion asks the Court to enter an order “finding that the period of use

<sup>1</sup> Lowell E. Baier Revocable Trust also objected to the claims, but withdrew the objections pursuant to the terms of a stipulation filed as document no. 1.00 in this case. The document numbers (abbreviated as “Doc.”) refer to the document sequence numbers in the Court’s Full Court Enterprise case management system.

and diversion of claims 43B 194781-00 and 43B 194782-00 and all claims derived from decreed water rights under the *1964 Petrich Decree*, have a period of use and diversion of May 1 to July 15.” (Doc. 26.00, at 2).

TU filed a brief in support of its motion. (Doc. 27.00, “Opening Br.”). TU also filed various exhibits, enumerated as Exhibits A through P. (Docs. 28.00 through 31.00).<sup>2</sup> The Claimants filed a response on October 5, 2023. (Doc. 32.00, “Response”). The Response includes five paginated exhibits.<sup>3</sup> TU then filed a reply (Doc. 33.00, “Reply”).

### **UNDISPUTED FACTS**

1. The Water Court included claims 43B 194781-00 and 43B 194782-00 in the Preliminary Decree for the Yellowstone River Basin Above and Including Bridger Creek (Basin 43B).

2. The Preliminary Decree describes claim 43B 194781-00 as a decreed right to divert water from Mill Creek and convey it through a ditch called the North Side Ditch to a 421-acre place of use for irrigation use. The claim is decreed with a June 4, 1963 priority date, and a period of use from April 20 to September 20 each year.

3. Similar to claim 43B 194781-00, the Preliminary Decree describes claim 43B 194782-00 as a decreed right to divert water from Mill Creek and convey it through the North Side Ditch to a 405-acre place of use for irrigation use. The priority date is June 3, 1963 – one day earlier than claim 43B 194781-00. The claim is decreed with the same April 20 to September 20 period of use.

4. Claimants own water right claims 43B 194781-00 and 43B 194782-00 as successors in interest to Philip and Sharon Malcolm (“Malcolms”).

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<sup>2</sup> TU filed its exhibits in four attachments. The first four pages of docket no. 29.00 provide a list of the exhibits in each attachment. Docket no. 29.00 contains the first attachment. Docket no. 28.00 contains the second. The third and fourth exhibits are contained docket nos. 31.00 and 30.00 respectively. Because the Claimants also used letters to enumerate their exhibits, for ease of reference, TU’s exhibits will be referenced by the exhibit letter designation with the prefix “TU,” and the Bates number within the referenced exhibit. For example, “TU Ex. A, at [page number].”

<sup>3</sup> The Claimants’ exhibits are filed in the same document no. (Doc. 32.00) as their Response. The exhibits are referenced in this Order as “Cl. Ex. [letter], at [page number].”

5. The Malcolms filed the statement of claim forms for claims 43B 194781-00 and 43B 194782-00. The statements of claim described the same period of use (April 20 to September 20) as what the preliminary decree abstracts state. The Malcolms' statements of claim also described the claims as "decreed" rights. The Malcolms included with their statements of claim pages from the decree issued by a state district court in *Gerald F. Petrich, et al. v. Archibald and Margaret E. Allen, et al.*, Cause No. 11616 (Mont. Sixth Jud. Dist., Park County, July 22, 1964) ("Petrich Decree"). (TU Ex. B and TU Ex. C).

6. In 1938, the District Court decreed water rights from Mill Creek in the case *Sallie A. Allen, et al. v. N.F. Wampler, et al.*, Cause No. 7583 (Mont. Sixth Jud. Dist., June 1, 1938) ("*Allen v. Wampler Decree*"). (TU Ex. F).

7. On June 3, 1963, Gerald F. Petrich, Alexander A. and Elizabeth Malcolm, and Robert L. Melin and Wanda Melin filed a Complaint and Petition in Park County District Court pursuant to § 89-829, R.C.M. (*repealed*). The plaintiffs asked the District Court to decree the water rights from Mill Creek in addition to rights the Court previously had decreed in the *Allen v. Wampler Decree*. The plaintiffs sought the supplemental water rights to divert water conveyed to a new ditch. The new ditch now is known as the North Side Ditch.

8. The Complaint and Petition initiating the 1963 litigation named as defendants several other persons with water rights on Mill Creek. The defendants answered and cross-claimed or counterclaimed for supplemental decreed rights of their own. The defendants also sought supplemental water rights to divert additional water from Mill Creek through several existing ditches. (TU Ex. H).

9. The District Court conducted a trial on the lawsuit in March 1964. At the pretrial conference, the attorneys of record stipulated as to various matters before the Court, including the following:

It was stipulated by and between attorneys of record that the Court is to take as a matter of proof that Mill Creek has surplus water in excess of decreed water which

is at least 10,000 inches which exists during the spring run-off, *but not later than July 15th*.[.]

(TU Ex. E, emphasis added).

10. Following trial, the District Court entered a Judgment and Decree as to water rights from Mill Creek in the *Petrich Decree*. (TU Ex. A). The findings of fact in the Court's order included the following:

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.

(*Petrich Decree*, Findings of Fact, ¶ II).

11. Based upon this and other findings of fact, the District Court also 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).

12. The District Court decreed water rights to both the plaintiffs and defendants. The District Court decreed to the three sets of plaintiffs, including the Malcolms, water rights with both June 3, 1963 and June 4, 1963 priority dates. The District Court decreed to the defendants water rights with a June 4, 1963 priority date.

(*Petrich Decree*, Conclusions of Law, ¶ III, No. 35 and No. 36).

13. Claim 43B 194781-00 is based on the June 4, 1963 right decreed by the District Court. Claim 43B 194782-00 is based on the June 3, 1963 right decreed by the District Court.

14. Additional facts are discussed below as necessary.

### ISSUE

Should the Court limit the period of use of claims 43B 194781-00 and 43B 194782-00 to May 1 to July 15 each year?

### DISCUSSION

#### A. Summary Judgment Standard.

Summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M. R. Civ. P. 56(c)(3). A material fact involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. In determining whether a material fact exists, the court views the evidence in the light most favorable to the non-moving party. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186. “All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment.” *Id.*

Where the moving party demonstrates there is no genuine issue as to any material fact, the burden shifts to the party opposing the motion to establish an issue of material fact. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 26, 304 Mont. 356, 362, 22 P.3d 631, 636. The non-moving party “must set forth specific facts and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements.” *Thomas v. Hale*, 246 Mont. 64, 67, 802 P.2d 1255, 1257 (1990). “Where the material facts are undisputed, the court must simply identify the applicable law, apply it to the uncontroverted facts, and determine who prevails.” *Perl v. Grant*, 2024 MT 13, ¶ 12, 415 Mont. 61, 542 P.3d 396 (citation omitted).

#### B. Application

The adjudication of water rights in Montana starts with the filing of a statement of claim. When properly filed, the claim then serves as prima facie proof of its content.

Section 85-2-227, MCA. Unless an objector overcomes the presumption of claim validity (and subject to resolution of issue remarks), the Water Court adjudicates the elements of the claim as filed. 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.

The Water Use Act requires the Water Court to adjudicate several elements of each existing water right included in a final decree. These elements include “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.<sup>4</sup> The Malcolms filed the statements of claim for claims 43B 194781-00 and 43B 194782-00 identifying periods of use from April 20 to September 20. These periods of use have prima facie status, meaning the Claimants met their burden to establish these two elements unless an objector proves otherwise. Section 85-2-227, MCA.

TU contends it meets its burden to overcome the prima facie status of these elements as a matter of law because the Malcolms 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. The Court previously ruled on similar motions filed by TU in cases involving the successors of the other two sets of plaintiffs in the litigation that led to the *Petrich Decree*. See *In re Melin*, Case 43B-0148-R-2020, 2023 Mont. Water LEXIS 37 (Or. on Mot. for Summary Judgment, Jan. 11, 2023); *In re Petrich Fam. P’ship*, Case 43B-0354-R-2021, 2023 Mont. Water LEXIS 116 (Or. on Mot. for Summary Judgment, Jan. 11, 2023).

*1. TU’s Period of Use Argument.*

TU’s argument is fairly simple. The *Petrich Decree* specified that “during the months of May and June and until approximately the 15th day of July of the normal irrigating season” water was available in Mill Creek in excess of what the District Court

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<sup>4</sup> Because the date ranges for these elements are the same in both the Preliminary Decree and TU’s motion, the Court refers to both elements collectively as the “period of use” for the duration of this Order.

previously decreed in the *Allen v. Wampler Decree*. The April 20 to September 20 period of use dates specified in the Water Court Preliminary Decree for claims 43B 194781-00 and 43B 194782-00 do not match the dates in the *Petrich Decree*. TU argues the *Petrich Decree* dates set the period of use because the two claims are “decreed” rights.

The Water Court based the period of use dates in the Preliminary Decree on the statements of claim the Malcolms filed. The statement of claim forms required all persons claiming existing (*i.e.* pre-July 1, 1973) rights provide a variety of information about the claimed water rights, including the period of use. The Water Use Act does not authorize parties to claim water rights without evidence. Instead, the Water Use Act requires a claimant to include “evidence in support of the claim.” Section 85-2-224(2), MCA. A claimant can provide this evidence several ways, one of which is to claim the right as a “decreed right.”

Although the type of right is not an element the Water Court ultimately decrees, the type of right information serves an evidentiary purpose because the “type” of right states “the historical basis of an existing water right.” Rule 2(a)(70), W.R.C.E.R. (defining “Type of Historical Right”).<sup>5</sup> When a claimant describes a water right claim as a decreed right, the claimant’s evidentiary basis for the claim is what was “determined in a judicial decree prior to the commencement of this adjudication or after commencement of this adjudication.” Rule 2(a)(18), W.R.C.E.R.

The Malcolms checked the box for “Decreed Water Right” on their claim forms. The claim filing process required the Malcolms to include a copy of the document supporting the type of right designation. The Malcolms met this requirement by filing a certified copy of the *Petrich Decree*. Because claims 43B 194781-00 and 43B 194782-00 are claimed as “decreed rights” TU argues the May through mid-July dates in the *Petrich Decree* define the outer limits of Claimants’ period of use because the claims are claimed as decreed rights. In other words, because the dates specified in the *Petrich Decree* – the

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<sup>5</sup> For adjudication purposes, the Water Court incorporates the definitions in the Water Right Claim Examination Rules, unless the context requires otherwise. Rule 2(b), W.R.Adj.R.

supporting evidence filed by the Malcolms – do not support an April 20 to September 20 period of use, TU maintains it met its burden under Rule 19 to prove the period of use in the Preliminary Decree is not supported by evidence in the claim file record.

2. *Claimants' Responses.*

a. *Interpretation of District Court Decree.*

The Claimants respond with several arguments. They first argue TU misinterprets the *Petrich Decree* because the decree did not specify a period of use in the conclusions of law; instead, the May through mid-July dates appear only in the District Court's findings of fact. (Response, at 6). In a narrow, technical sense Claimants are correct that the *Petrich Decree* did not include in the conclusions of law a specific time limitation as to when water may be used. However, as the Court ruled in prior Mill Creek orders, that alone does not make the May to July dates meaningless.

The Court issued the two Mill Creek decrees pursuant to a statute the 1921 Montana legislature passed codifying private water right adjudication proceedings. Ch. 228, Laws of 1921. The 1938 *Allen v. Wampler Decree* awarded water rights to the various parties identified in the decree. Under the framework of the 1921 statute, the *Allen v. Wampler Decree* caused Mill Creek to be an adjudicated stream.

The 1921 legislation included a process to appropriate additional water on a previously adjudicated stream. Section 89-829, R.C.M. 1947 (*repealed*). The process required filing with the clerk of district court a petition describing:

[T]he amount of water sought to be appropriated, a description by name or otherwise of the watercourse or body from which he intends to appropriate the water, and a general description of the ditch or aqueduct, stating its size, length, and capacity, showing the proposed means of appropriation and use of the water, and also the place of use thereof.

Section 89-829(1)(b), R.C.M. 1947 (*repealed*). Following the filing of a petition, the 1921 statute required a district court to conduct a proceeding and, if the evidence warranted, to “enter an interlocutory or permanent decree allowing the appropriation



sought, either in whole or in part, subject to the terms of all prior decrees.” Section 89-831, R.C.M. 1947 (*repealed*).

The District Court conducted the proceedings leading to the 1964 *Petrich Decree* to supplement the *Allen v. Wampler Decree*. The Malcolms and other plaintiffs in the 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.” (TU Ex. G, ¶ 3). The defendants answering the complaint did not dispute surplus water was available in Mill Creek; instead, they counterclaimed, asking the Court to decree water they apparently already were diverting at various other ditches. The counterclaims mostly followed a similar format, alleging more specifically 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*. (*See, e.g.*, TU Ex. H, Leo Briggs Counterclaim, ¶ IV).

In the *Petrich Decree* case, the parties litigated whether there was surplus water in Mill Creek in the context of both the plaintiffs’ complaint seeking a new use, and the defendants’ counterclaims seeking to divert additional water through existing ditches. To determine whether surplus water was available for the parties, the District Court first made the overall fact finding that approximately 10,000 miner’s inches of surplus water was available “during the months of May and June and until approximately the 15th day of July of the normal irrigating season.” The District Court then allocated the surplus water in specific amounts to the various parties. The May to July dates provided the foundational facts for the Court to determine enough water was available during a specific window of time to allocate flows to all the plaintiffs and defendants in the case. The District Court made this clear when it stated in the conclusions of law that the parties “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.*” (Response, Ex. A, Concl. of Law ¶ II) (emphasis added). The emphasized language indicates the District Court only decreed water it first found available in the findings of fact, which means water available within a specific time window. See *In re Marriage of Johnson*, 1999 MT 254, ¶ 24, 296 Mont. 311, 989 P.2d 356 (purpose of findings of fact “is to provide a foundation for the court’s judgment”).

Claimants’ efforts to downplay the importance of the time window limitation by constraining them to the findings of fact in the *Petrich Decree* also is at odds with how the Montana Supreme Court interprets district court decrees. For example, in *Quigley v. McIntosh*, 110 Mont. 495, 508, 103 P.3d 1067, the Supreme Court addressed the question of whether water use had been expanded beyond what had previously been decreed by a district court. The Court acknowledged the trial court’s “findings, conclusions, orders and instructions” were not “fully detailed” as to the size of the place of use. *Quigley*, 110 Mont. at 508. Nonetheless, the Court had a sufficient record to determine that a decreed flow rate included inherent limits based on what was at issue in the trial court proceeding that could not be expanded without a new appropriation. The Court explained that if acreage was expanded from what was assumed at the time of the decree, the flow rate would have to be used for a longer period of time to provide adequate water for irrigation. *Quigley*, 110 Mont. at 509-10. The Court concluded an adjudicated flow rate “necessarily also includes the element of time during which the flow is used, and therefore the element of total volume.” *Quigley*, 110 Mont. 508.

Although *Quigley* involved the issue of expanded acreage rather than expanded period of use, the principles set out of the Supreme Court are directly analogous. Had the Court in *Quigley* followed the strict conclusions of law constraint advocated by Claimants, it would have been impossible for the Court to reach the holding it did. Instead, only by viewing the conclusions of law in light of the factual circumstances of the case did the Court conclude an impermissible expansion occurred.

Applied to Claimants’ argument, the District Court in the *Petrich Decree* reached its conclusions about water availability after making findings of fact specifying the May

to mid-July dates. The interpretation Claimants posit would make the findings of fact meaningless. However, just as in *Quigley*, the time constraint about water availability was a fundamental part of what the District Court decreed, even if the foundational time window was not expressly stated in the conclusions of law. Thus, interpreting the *Petrich Decree* holistically and cognizant of the importance of water use timing – as *Quigley* instructs – the *Petrich Decree* is properly interpreted as only decreeing water use for the seasonal time period specifically mentioned in the decree.

*b. Pre-1973 Change Statute.*

In a somewhat related argument, Claimants suggest a water user was free to change the period of use under an old decree “simply by implementing the change” under the provisions of the change statute that existed prior to 1973. (Response at 9, citing § 89-803. R.C.M.) (*repealed*). Prior to its repeal, this statute stated:

The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, but which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

Section 89-803, R.C.M. (1947) (*repealed* Ch. 452, Laws of 1973).

The plain language of this statute limited pre-1973 changes to point of diversion, place of use, and purpose of use. The statute did not authorize water users to expand the period of use and call it a change. Instead, water use outside the historical period of use was considered a new appropriation, with a priority date of the date of beneficial use. *See Quigley*, 110 Mont. at 510; *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, ¶ 33, 407 Mont. 278, 502 P.3d 1080 (new water use is a new appropriation, not a change in place or manner of use).

Claimants cite *Hansen v. Larsen*, 44 Mont. 350, 120 P. 229 (1911) to support their change argument. *Hansen* involved a change in purpose of use from mining to agriculture. Purpose of use changes were expressly authorized by the old change statute.

*Hansen* says nothing about changes to the period of use element and it is not mentioned in the statute, so it offers Claimants no support.

Claimants also cite *Lokowich v. Helena*, 46 Mont. 575, 578, 129 P.1063 (1913) for the proposition that a water user with decreed rights could change the “period of use, which the statute does not explicitly knowledge.” Claimants read too much into *Lokowich*. The case did not involve the now-repealed change statute, but rather only confirmed prior interpretation of the Spokane Ranch decree near Helena. The Court interpreted the decree, but did not authorize any changes to the period of use of water rights outside of what had been decreed.

Claimants do not cite any case where a water user expands the period of use under the authority of the prior change statute. Just as with expansions of place of use, the lack of any case upholding expansions to period of use indicates the legislature viewed such expansions as a new use, not a change to an existing use. Claimants’ citation to the repealed change statute therefore undercuts their argument because the result they seek is missing from the statute they cite.

*c. Evidence from Other Claims.*

Claimants also argue an issue of fact exists as to period of use because the statements of claim filed by Claimants and other water users describe periods of use extending beyond May 1 to July 15. Claimants suggest the uniformity of Mill Creek decreed right claims with periods of use extending beyond July 15 indicates the excess water dates described in the *Petrich Decree* have not been interpreted as limitations. Claimants ask the Court to take judicial notice of these other claims in the Preliminary Decree. (Response at 8).

Claimants’ logic is circular. They seem to argue the Preliminary Decree abstract dates are correct because of the dates stated in the Preliminary Decree abstracts. Simply citing back to claims and abstracts and calling them prima facie proof when they are not consistent with the *Petrich Decree* does not establish a disputed fact issue. To create a disputed fact issue as to period of use, Claimants must provide affidavits or other

evidence sufficient to prove historical use of these water rights outside what the District Court decreed. M. R. Civ. P. 56(e)(2). The claims and abstracts standing alone do not meet that burden.

Additionally, Claimants' argument also is inconsistent with stipulations made in connection with the trial that led to the *Petrich Decree*. Prior to trial, attorneys for the Malcolms and other plaintiffs made a stipulation on the record that "surplus water in excess of decreed water which is at least 10,000 inches which exists during the spring run-off, but not later than July 15th." (Undisputed Facts, ¶ 9). The case went to trial based on this stipulation. Stipulations of counsel entered in court minutes bind their clients. Section 37-61-401, MCA; *Daniels v. Dean*, 253 Mont. 465, 470, 833 P.2d 1078 (1992) (enforcing stipulation "entered upon the minutes of the court").

*d. Evidence of DNRC Change Authorizations.*

Claimants cite to a number of Mill Creek claims decreed in the Preliminary Decree "with an information remark indicating that the respective claim when through the Department of Natural Resources and Conservation's ("DNRC") change authorization process." (Response, at 8). Claimants suggest DNRC tacitly endorsed a period of use beyond July 1 by approving change authorizations involving other claims decreed in the *Petrich Decree*.

This does not create a fact dispute as to the interpretation of the *Petrich Decree* because DNRC lacks authority to modify the period of use in a change proceeding. Section 85-2-102(7), MCA (limiting changes to "change in the place of diversion, the place of use, the purpose of use, or the place of storage"). Nor is DNRC authorized to interpret the terms of a district court decree because decree interpretation is a matter for the Court, not an administrative agency. *In re Quigley*, 2017 MT 278, ¶ 15, 389 Mont. 283, 405 P.3d 627, ("[i]nterpretation of a prior court decree is an issue of law"). Even if DNRC had such authority, Claimants do not cite any analysis by DNRC of the historical use of claims 43B 194781-00 and 43B 194782-00 in the context of a change proceeding. Moreover, DNRC changes to existing rights are effectively provisional because they

remain subject to the ultimate determination of the elements of the right by the Water Court. *Hohenlohe v. State*, 2010 MT 203, ¶ 31, 357 Mont. 438, 446, 240 P.3d 628, 633 (“water rights, regardless of whether they are approved for change of use by the Department, remain subject to final adjudication and quantification by the Water Court”); *Fellows v. Office of Water Comm'r*, 2012 MT 169, ¶ 15, 365 Mont. 540, 545, 285 P.3d 448, 452 (“the jurisdiction to determine existing water rights rests exclusively with the Water Court”).

e. *TU Status as an Objector*

Finally, Claimants assert the Court should reject TU’s position because TU “does not have any statements of claim on Mill Creek nor any privity with any water users that appeared in the Petrich decree.” (Response at 11). Claimants essentially argue TU lacks standing to enforce the clause or “avail itself to the district court as it is not a party to *Allen* or *Petrich*.” (Response at 15). To the extent Claimants argue TU cannot raise an objection to interpretation of a district court decree when it is not a successor to a party to the decree, Claimants are incorrect. Claimants’ predecessors put the interpretation of the *Petrich Decree* at issue when they filed the two claims as decreed rights. TU has proven the proper legal interpretation of the decree sets a period of use of May 1 to July 15. The Water Use Act does not bar TU or any other lawful objector from raising this challenge in a Water Court proceeding. *See Montana Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, 361 Mont. 77, 255 P.3d 179. Thus, TU is not barred from relying on the legal interpretation of the *Petrich Decree* to overcome the prima facie status of the period of use elements of these two claims. Because the undisputed facts establish the scope of the period of use for these decreed rights is limited to May 1 to July 15, TU has met its burden to overcome the prima facie status of the period of use.

3. *Effect of Petrich Decree injunction provision.*

TU’s satisfaction of the burden to overcome the prima facie period of use element does not fully resolve the question. As noted previously, the question of type of right is primarily evidentiary in nature. By proving the *Petrich Decree* did not contemplate water

use after July 15 each year, TU overcame the prima facie status of the period of use. Overcoming the prima facie status shifts the burden to the Claimants. *79 Ranch v. Pitsch*, 204 Mont. 426, 433, 666 P.2d 215 (1983). In other words, TU proved the evidence filed in support of the claims does not support water rights for a period of use either before May 1 or after July 15 each year. To the extent Claimants contend such water rights are within the scope of the statements of claim filed by the Malcolms, it now is Claimants' burden to prove the elements of such rights.

TU's motion contends an injunction provision contained in the *Petrich Decree* bars such claims as a matter of law. The injunction provision states the parties to the decree and their successors are

forever barred and perpetually restrained and enjoined from asserting any claim to, or any right, title or interest in or to, the rights to the use of the waters of the said stream elsewhere herein awarded and decreed, and from interfering in any way with the use and enjoyment by such parties and their successors in interest of the said rights as herein awarded and decreed.

(*Petrich Decree*, Conc. of Law ¶ V).

TU argues this provision bars Claimants and all the other parties to the decree from using water from Mill Creek inconsistent with the terms of the decree. (Opening Br., at 21-22).

The injunction clause did not prohibit future new water uses outside the scope of the decree. The language of the provision protects rights recognized in the decree from being collaterally attacked, but did not necessarily prohibit uses on the source with junior priority dates. The potential for such new uses was contemplated by the 1921 statute, albeit with a penalty provision making such new water use junior to any subsequent appropriator.<sup>6</sup> Section 89-837, RCM (1947); *In re Gravely*, Case 76G-187, 1994 Mont. Water LEXIS 12, \*5 ("the penalty imposed by 89-837 R.C.M. \*\*\* does not mean that an

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<sup>6</sup> Prior to its repeal in 1973, this provision stated in full:

Failure to comply with the provisions of this act deprives the appropriator of the right to use any water of such stream, or other source of supply, as against any subsequent appropriator mentioned in or bound by a decree of the court.

appropriator who fails to comply with the act has no water right claim at all”) (water master order denying summary judgment). To the extent TU argues Claimants’ are precluded from attempting to prove the elements of any existing rights with periods of use prior to May 1 or subsequent to July 15, the *Petrich Decree* does not support such an interpretation.

### **ORDER**

Therefore, it is ORDERED that TU’s motion for summary judgment is GRANTED in part. TU has met its burden to overcome the prima facie status of claims 43B 194781-00 and 43B 194782-00. The elements of those claims are modified to May 1 to July 15. TU’s motion is DENIED to the extent it seeks to bar Claimants from proving existing rights based on the statements of claim with different periods of use. Claimants bear the burden of proof as to the elements of any such rights. The Court will issue a separate order setting a conference to discuss additional proceedings for this case in light of this ruling.

### **ELECTRONICALLY SIGNED AND DATED BELOW**

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