



JUN 04 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)  
PRELIMINARY DECREE

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CLAIMANTS: 199-201 W Boylston ST LLC; BC2 LLC; Bear Creek  
Hollow LLC; Dusty Bottom Ranch LLC

**CASE 41H-R131**  
41H 141891-00  
41H 141892-00

OBJECTOR: 199-201 W Boylston ST LLC

NOTICE OF INTENT TO APPEAR: Judy Neiminen

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date appearing on the Master's Report if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Maser'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 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**

INTRODUCTION

Water right claims 41H 141891-00 and 41H 141892-00 appeared in the Preliminary Decree for the Gallatin River (Basin 41H) and received objections from 199-201 W

Boylston ST LLC and notices of intent to appear (NOIA) from Judy Neiminen, through attorney Cindy Younkin. The Water Court consolidated the claims into Water Court case 41H-R131, held a January 28, 2020 status conference attended by both parties, and set an April 28, 2020 filing deadline for the parties to submit a settlement agreement addressing the objections to the claims' points of diversion. On April 30, 2020, the parties filed a Settlement Agreement and map (Map A) resolving the objections filed by 199-201 W Boylston ST LLC.

### ISSUE

*Whether a preponderance of the evidence supports the modifications to the points of diversion for claims 41H 141891-00 and 41H 141892-00 requested by the parties' Settlement Agreement consistent with historical use.*

### APPLICABLE LAW

“The Montana [W]ater [C]ourt has a statutory obligation and the exclusive authority to adjudicate claims of existing water rights.” Rule 1(a), W.R.Adj.R.

After the Water Court issues a preliminary decree in a basin, an objection period provides parties with an ownership interest in water or its use the opportunity to raise issues regarding their own water rights or other water rights in the preliminary decree. Section 85-2-233(1)(b); *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 33, 361 Mont. 77, 255 P.3d 179.

A counter-objection period follows the objection period. After the close of the counter-objection period, parties other than claimants or objectors to a particular claim may file a NOIA. Section 85-2-233(3),(4), MCA; Rule 9, W.R.Adj.R. While Montana water law entitles the NOIA party to participate in the proceedings for certain claims, participation is limited to the “resolution of issues raised by objections, counterobjections, issue remarks, or issues raised on motion of the Water Court.” *In re Erb (Geoduck)*, 2016 Mont. Water Lexis 2, \*12. The NOIA party cannot “[expand] the issues in a water rights case.” *Geoduck*, \*12.

A properly filed statement of claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R. A

preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628. The party seeking to overcome the prima facie status of a statement of claim, including a claimant objecting to his or her own claim, bears the burden of proof. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

Settlement agreements do not bind the Water Court and are subject to the court’s review and approval. Rule 17(a), W.R.Adj.R. The water right adjudication rules require settlement agreements enlarging an element of a water right to meet the applicable burden of proof. Rule 17(b), W.R.Adj.R. The rules do not require settlement agreements reducing an element of a water right to meet the applicable burden of proof. Rule 17(c), W.R.Adj.R.

DISCUSSION

On May 6, 2019, 199-201 W Boylston ST LLC filed objections to the points of diversion stated by the preliminary decree abstracts for claim 41H 141891-00 and 41H 141892-00.

Claims 41H 141891-00 (sprinkler/flood irrigation) and 41H 141892-00 (stock) are multiple uses of the same right for surface water from Bear Creek in Gallatin County, Montana. The DNRC water rights database indicates 3 Drakes & a Hen LLC, Railroad Ranch LLC, BC2 LLC, and 199-201 W Boylston ST LLC currently co-own claims 41H 141891-00 and 41H 141892-00. Discussion during the January 28, 2020 status conference indicated that the four entities have the same owner.

The preliminary decree abstract for claim 41H 141891-00 states that the legal land description for the claim’s point of diversion is:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWNWNW	8	1N	5E	GALLATIN

The objection filed by 199-201 W Boylston ST LLC states that the accurate historical legal land description of the claim’s point of diversion is:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NENENW	8	1N	5E	GALLATIN

The preliminary decree abstract for claim 41H 141892-00 states that the legal land description of the claim’s point of diversion is:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SENE	7	1N	5E	GALLATIN
2			N2SE	7	1N	5E	GALLATIN
3			NESW	7	1N	5E	GALLATIN

The objection filed by 199-201 W Boylston ST LLC states that the Water Court add an additional point of diversion to claim 41H 141892-00 in the NENENW of Section 8, Township 1N, Range 5E, Gallatin County.

Consistent with the filed objections, the Settlement Agreement states that the parties agree claims 41H 141891-00 and 41H 141892-00 historically diverted water from Bear Creek for irrigation and stock purposes, respectively, at the Huffine Ditch headgate in the NENENW of Section 8, Township 1N, Range 5E, Gallatin County. Map A depicts the accurate historical point of diversion (a headgate) on Bear Creek for the Huffine Ditch in the NENENW of Section 8, Township 1N, Range 5E, Gallatin County.

A preponderance of the evidence supports that the points of diversion requested by the parties in the Settlement Agreement reflect accurate historical use. The prima facie status of the points of diversion stated by the original statements of claim and preliminary decree abstracts is overcome. The points of diversion for each claim appeared on the objection list and no additional notice is required.

Claim 41H 141891-00 additionally received issue remarks providing notice that DNRC modified elements of the claim during its reexamination of the basin. The issue remarks state that if no objections are filed to the claims, the remarks will be removed. The claims did not receive objections. The issue remarks are resolved.

#### RECOMMENDATION

This Water Master recommends the Water Court to remove the issue remarks from claim 41H 141891-00 and to modify the points of diversion appearing on claims 41H 141891-00 and 41H 141892-00 as follows:

#### 41H 141891-00

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENW	NWNWNW	8	1N	5E	GALLATIN

#### 41H 141892-00

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
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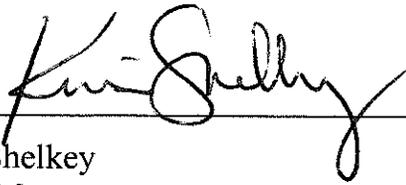
NENENW 8 1N 5E GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Post-decree abstracts of the water rights claims are attached to this Master's Report.

DATED this 4<sup>th</sup> day of June, 2020.

  
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Kirsa Shelkey  
Water Master

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