

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

\* \* \* \* \*

CLAIMANT: Leep Land LLC

OBJECTOR: Leep Land LLC

**CASE 41H-0236-R-2021**  
41H 29101-00

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

This Master's Report was filed with 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 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 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**

INTRODUCTION

Water right claim 41H 29101-00, owned by Leep Land LLC (Leep), appeared in the Preliminary Decree for the Gallatin River (Basin 41H). Yellowstone Foundation Properties LLC and Pennmont Foundation—Leep's predecessors in interest, filed a May 8, 2019 objection to the water right claim's maximum acres/place of use.

The Water Court consolidated water right claim 41H 29101-00 into Water Court case 41H-0236-R-2021 and set a filing deadline for the current water right owner to substantiate the objection. On June 3, 2021, Leep filed an affidavit from Sherwin Leep with the court. On November 12, 2021, Leep filed additional evidence, including an affidavit from Water Commissioner George Alberda.

The Water Court presently resolves the issue in this case.

### ISSUES

1. *Whether a preponderance of the evidence supports modifying the place of use and maximum acres associated with water right claim 41H 29101-00.*

### 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. The Water Court resolves issue remarks before issuance of a final decree and may use information submitted by the DNRC, the statement of claim, and any other data obtained by the court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

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 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 bears the burden of proof. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

### DISCUSSION

1. *Whether a preponderance of the evidence supports modifying the place of use and maximum acres associated with water right claim 41H 29101-00.*

The preliminary decree abstract indicates water right claim 41H 29101-00 is a decreed sprinkler/flood-irrigation claim for surface water diverted from South Cottonwood Creek by a headgate on Ward Ditch for use on 40 acres in the SESE of Section 1, Township 3S, Range 4E, Gallatin County, Montana (claimed place of use).

The objection asserts the water right claim's place of use should be amended to 80 acres in the W2NW of Section 6, Township 3S, Range 5E, Gallatin County, and 40 acres in NWSW of Section 6, Township 3S, Range 5E, Gallatin County (amended place of use) to reflect historic use. After completion of the West Gallatin Canal (also known as Kleinschmidt Canal) in 1889, a diversion structure would have had to transport water across the canal to divert water from the Ward Ditch to the claimed place of use. Thus, Leep argues: "it is more probable than not that the South Cottonwood Creek water for the subject claim, conveyed through the Ward Ditch, was only used on lands above or east of the West Canal, both prior to and after 1973."

In support of the amended place of use, the Sherwin Leep affidavit establishes the following:

3. Leep Land, LLC (or its predecessors) has leased the property known as *The Rob Myers Ranch* near Gallatin Gateway, Gallatin County, Montana continuously since 1993. Leep Land, LLC raises hay and grains on the property and irrigates the property with stored contract water from the Middle Creek Water Users Association as well as with natural flow water right claim 41H 29101-00.
4. Contract water for the subject property from the Middle Creek Water Users Association is diverted from South Cottonwood Creek in the SESWSE Section 17, T3S, R5E, and conveyed to the subject property through the Ward Ditch, the same as the point of diversion and means of conveyance for 41 H 29101-00.
5. The contract water is delivered to the Rob Myers Ranch and used for irrigation of approximately 120 acres of farmland known as Tracts 6, 7, 8 and 9 (as well as a portion of Tract 3), Certificate of Survey No. 1285, Records of Gallatin County, Montana, a copy of which is attached hereto as EXHIBIT 1.
6. We irrigate the subject land with a combination of one pivot (with canal crossings for the towers) and sprinkler pipe. The map attached hereto as EXHIBIT 2 accurately indicates the lands we irrigate with both the stored contract water and 41H 29101-00.

7. The West Gallatin Canal, also known as the Kleinschmidt Canal, traverses the subject property as shown in the aerial photo attached as Exhibit 3. According to the West Gallatin Canal Company's website, construction on the canal began in 1882 and was completed in 1889.

8. Ward Ditch, which is the means of conveyance for 41H 29101-00, lies east of the West Gallatin Canal and no means exist presently by which water from the Ward Ditch can be conveyed over or across the West Gallatin Canal such that it could be utilized on the 40-acre tract which is the Place of Use described on the Abstract for said claim (being the SESE Sec. 1, T3S, R4E, Gallatin County).

9. During the past 28 years in which we have leased the subject property, and by all indications in all past years, the Place of Use for 41H 29101-00 has been within the 120 acres described as the W2NW and the NWSW Sec. 6, T3S. RSE, and lying east of the West Gallatin Canal.

(emphasis added). Sherwin Leep has operated the former Dr. Rob Meyers Ranch—the place of use associated with water right claim 41H 29101-00—since 1993.

George Alberda is the Dam Tender for the Middle Creek Water Users Association and Water Commissioner for South Cottonwood Creek, Hyalite Creek, and the Gallatin River. The Alberda affidavit confirms the information stated by the Leep affidavit and asserts: “to the best of my knowledge and belief, there are presently no flumes, culverts, or other means of conveying water from the Ward Ditch across the West Gallatin Canal for irrigation of lands on the Dr. Rob Myers farm located west of the West Gallatin Canal, nor am I aware of any evidence of such conveyance at any time in the past, including prior to 1973.”

To further substantiate pre-1973 use, Leep attached aerial photographs from 1945, 1947, and 1976 to illustrate the visual absence of a flume, culvert, or other structure crossing the West Gallatin Canal and capable of carrying the appropriated water to the claimed place of use. In the 1945 aerial photograph, it appears the Ward Ditch splits into two branches after crossing Gooch Hill Road—one branch heads west towards the West Gallatin Canal, and the other branch heads northwest to the amended place of use. The westerly branch of the Ward Ditch cannot be identified in the 1976 aerial photograph.

The court concludes Leep has met its burden and proved by a preponderance of the evidence that the accurate historical place of use is the amended place of use stated in the objection. Because Leep objected to the elements at issue, no additional proceedings are

necessary. The Water Court modifies the claim's place of use and total maximum acres accordingly, resolving the filed objection.

Futhermore, the Leep affidavit states:

The Abstract for 41H 29101-00 also contains a Remark that it is supplemental to two other irrigation claims which are utilized upon 40 acres in the SESE Sec. 1, T3S, R4E, being 41H 29098-00 and 41H 29099-00. I believe this remark should be removed from the Abstract for 41H 29101-00 because it is not supplemental to the other two irrigation claims.

The Water Court removes the supplemental-use information remark from the final decree abstract for water right claim 41H 29101-00.

Finally, the water right claim received an issue remark providing notice DNRC modified an element of the claim during reexamination of the basin. The issue remark states if no objections are filed to the claim, the remark will be removed. The claim did not receive related objections, no proceedings are required, and the issue remark shall be removed.

#### RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remark, removed the supplemental-use information remark, modify the claim's total maximum acres from 40 acres to **120 acres**, and to modify the place of use associated with water right claim 41H 29101-00 from 40 acres in the SESE of Section 1, Township 3S, Range 4E, Gallatin County, to **80 acres in the W2NW of Section 6, Township 3S, Range 5E, Gallatin County**, and **40 acres in NWSW of Section 6, Township 3S, Range 5E, Gallatin County**.

The Water Court attaches a post-decree abstract for water right claim 41H 29101-00 to this Master's Report. The information filed in the case proceedings can be found docketed in the court's Full Court Enterprises online docketing system.

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Kirsa Shelkey  
Water Master  
*she/her/hers*

**Service via USPS Mail:**

William A. Hritsco, Esq.  
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**WATER COURT  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 29101-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** LEEP LAND LLC  
531 COBB HILL RD  
BOZEMAN, MT 59718 9069

**Priority Date:** OCTOBER 1, 1878

**Type of Historical Right:** DECREEED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**\*Flow Rate:** 3.25 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:** 120.00

**Source Name:** SOUTH COTTONWOOD CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESWSE	17	3S	5E	GALLATIN

**Period of Diversion:** MAY 1 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** WARD DITCH

**Period of Use:** MAY 1 TO OCTOBER 15

**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	80.00		W2NW	6	3S	5E	GALLATIN
2	40.00		NWSW	6	3S	5E	GALLATIN
<b>Total:</b>	120.00						