

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

\* \* \* \* \*

CLAIMANTS: Jeffrey J. Leek; Michelle S. Leek; Yellowstone  
Foundation Properties LLC

NOTICE OF INTENT TO APPEAR: State of Montana University  
System (MSU)

**CASE 41H-1046-R-2021**

41H 15361-00

41H 15362-00

41H 15362-01

**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 rights claims 41H 15361-00, 41H 15362-00, and 41H 15362-01 appeared in the Preliminary Decree for the Gallatin River (Basin 41H) with issue remarks received

during the Department of Natural Resources and Conservation's (DNRC) review in preparation of the preliminary decree. Specifically, water rights claims 41H 15362-00 and 41H 15362-01 received point-of-diversion issue remarks.

The State of Montana University System (MSU) through attorneys Dana Pepper and Bina Peters filed a November 15, 2019 Notice of Intent to Appear (NOIA) in the proceedings resolving the issues regarding water right claim 41H 15362-00.

The Water Court consolidated the water rights claims into Water Court case 41H-1046-R-2021 and set a filing deadline for the claims' owners to review and verify the means of diversion and the legal land descriptions identifying the points of diversion/means of diversion for water rights claims 41H 15362-00 and 41H 15362-01.

On May 6, 2021, claim owner, Yellowstone Foundation Properties, LLC, filed a response with the court, including affidavits filed by William A. Hritsco, president of Yellowstone Foundation Properties, LLC, and Jeffrey J. Leek. The response and affidavits request the court to modify elements of the water rights claims to resolve the issue remarks. The Water Court requested additional information, and on October 4, 2021, the claims' owners filed additional information evidencing historical use of the consolidated water rights claims.

On May 19, 2021, NOIA party MSU indicated it did not oppose the claims being corrected as outlined in the filed response and affidavits.

The Water Court presently resolves the issue in this case.

### ISSUES

*1. Whether a preponderance of the evidence supports amending elements of the consolidated water rights claims by request and whether the requested amendments require additional notice per § 85-2-233(6), MCA.*

### 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.

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.

After the issuance of the temporary preliminary decree and the close of the objection period in a basin, claim owners may amend their statements of claim. Section 85-2-233(6), MCA. Claim owners seeking to amend their claims must give notice to other water users in the basin when an amendment has the potential to adversely affect other water users’ water rights. Section 85-2-233(6), MCA. “Adverse effect is a broad concept recognized as one of the legal mechanisms to protect existing water rights.” *Circle S Ranch, Inc.*, 2019 Mont. Water LEXIS 8 at \* 7. Clerical corrections, reductions, and modifications to water rights that do not propose fundamental changes to the way a claim is used on the ground do not have the potential to adversely impact other water users and do not trigger the additional notice requirements per § 85-2-233(6), MCA. *Circle S. Ranch, Inc.*, 2019 Mont. Water LEXIS 8 at \*\* 4-5.

### DISCUSSION

1. *Whether a preponderance of the evidence supports amending elements of the consolidated water rights claims by request and whether the requested amendments require additional notice per § 85-2-233(6), MCA.*

#### 41H 15361-00

Water right claim 41H 15361-00 is a stock-use claim for surface water from the East Gallatin River in Gallatin County, Montana. The claim’s preliminary decree abstract indicates the claim’s means of diversion is the Schwietering-Wittman Ditch and that the claim’s periods of use and diversion are from May 1 to November 1.

The May 6, 2021 response and affidavits filed by the claim’s co-owners ask the Water Court to amend: the periods of use and diversion from May 1 to November 1 to year-

round use and diversion; the means of diversion from ditch to livestock direct from source; and the claim's point of diversion from the NWSW of Section 10, Township 2S, Range 6E, Gallatin County, to the SWSW of Section 10, Township 2S, Range 6E, Gallatin County.

In support of the requested amendments, the claim's owners filed the following evidence:

Claimants believe it is more probable than not that the Schwietering-Wittman Ditch was severed from the East Gallatin River in the 1960s, when a large and substantial haul road was constructed across the ditch for hauling sand for the construction of Interstate 90. Accordingly, prior to June 30, 1973, it is more probable than not that livestock began watering directly from the East Gallatin River as it meanders through Claimants' properties, rather than drinking from the abandoned Schwietering-Wittman Ditch. Therefore, Claimants, as co-owners of stock water claim 41 H 15361-00, respectfully request that the Court (a) modify the Point of Diversion to the area where the East Gallatin River traverses their properties, legally described as the SWSW Sec. 10, T2S, R6E; and (b) modify the Means of Diversion to "Livestock Direct from Source." Claimants believe these modifications will accurately describe the exercise of the stock water right as of June 30, 1973. Finally, Claimants request that the Period of Use and Period of Diversion be modified to the standard for stock water claims of January 1 - December 31, pursuant to the guideline set forth in Rule 25(a)(1), *Montana Water Right Claim Examination Rules*.

A preponderance of the evidence supports amending the claim's means of diversion, point of diversion, and periods of use and diversion as requested, consistent with historical use. Thus, the court amends the claim's: means of diversion from DITCH to **LIVESTOCK DIRECT FROM SOURCE**; point of diversion from the NWSW of Section 10, Township 2S, Range 6E, Gallatin County, to the to the **SWSW of Section 10**, Township 2S, Range 6E, Gallatin County; and the periods of use and diversion from MAY 1 To NOVEMBER 1 to **JANUARY 1 TO DECEMBER 31**.

Because the point-of-diversion and means-of-diversion elements appeared on the objection list, water users in the basin received notice that those elements were potentially at issue in this phase of the basin's adjudication. The court further concludes the court's amendments to the claim's periods of use and diversion do not have the potential to

adversely impact water users' water rights in the basin. Thus, no additional notice is necessary.

41H 15362-00 and 41H 15362-01

Water right claim 41H 15362-00 is a flood-irrigation use right for surface water from the East Gallatin River in Gallatin County, Montana. The preliminary decree abstract indicates the claim's means of diversion is a headgate in the S2SW of Section 10, Township 2S, Range 6E, Gallatin County—the legal land description of the claim's point of diversion on the East Gallatin River. The issue remark appearing on water right claim 41H 15362-00 states:

LOCATION OF THE HEADGATE COULD NOT BE DETERMINED  
WITH AVAILABLE INFORMATION.

THE WATER COURT HAS BEEN PRESENTED WITH EVIDENCE  
THAT THERE IS A SECOND POINT OF DIVERSION. THE SECOND  
POINT OF DIVERSION MAY BE AS FOLLOWS: SESWSW, SECTION  
10, T02S, R06E IN GALLATIN COUNTY.

Water right claim 41H 15362-01 is a sprinkler-irrigation use right for surface water from the East Gallatin River in Gallatin County, Montana. The preliminary decree abstract indicates the claim's means of diversion is a headgate in the NWSWSW of Section 10, Township 2S, Range 6E, Gallatin County—the legal land description of the claim's point of diversion on the East Gallatin River. The issue remark appearing on water right claim 41H 15362-01 states:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE  
LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM  
AVAILABLE DATA.

For water right claim 41H 15362-00, the Leeks request the court to remove the flood-irrigation type from the claim's irrigation purpose and to replace headgate with pump as the claim's means of diversion. For water right claim 41H 15362-01, the Leeks request the court to replace headgate with pump as the claim's means of diversion and to reflect the claim's point of diversion in the SWSWSW of Section 10, Township 2S, Range 6E, Gallatin County.

As stated above, the evidence filed by the claims' owners indicates "irrigation practices changed when the Schwietering-Wittman Ditch was severed from the river, and

irrigation water under claims 41H 15362-00 and 41H 15362-01 was thereafter pumped directly from the East Gallatin River within the areas described in the Place of Use for each claim.” The claims’ owners “believe that the Schwietering-Wittman Ditch was obliterated and abandoned at least by 1971 when the haul road began being used as a driveway to House #1, and more probably when the haul road was constructed in the 1960s.” While the evidence offered is not dispositive, the claims’ owners attached Exhibit 3—a 1976 aerial photo—evidencing the Schwietering-Wittman Ditch cannot be seen east of the driveway to House #2 or over or under the haul road serving as the driveway to House #1 after 1976.

The affidavit of Claimant Jeffrey J. Leek attests that without the ditch, surface water was pumped from the source. Thus, the means of diversion was no longer the headgate on the non-existent ditch, but a pump. Likewise, the claims’ owners could no longer flood-irrigate the property associated with water right claim 41H 15362-00. Mr. Leek further attests the accurate historical legal land description identifying the point of diversion associated with water right claim 41H 15362-01 is the SWSWSW of Section 10, Township 2S, Range 6E, Gallatin County.

A preponderance of the evidence, including the court’s review of the attached exhibits, supports the claims’ owners pumped water from the source before 1973. A preponderance of the evidence thus supports the amendments requested by the claims’ owners consistent with historical pre-1973 use. Accordingly, the Water Court amends: the means of diversion for water rights claims 41H 15362-00 and 41H 15362-01 from HEADGATE to **PUMP**; the purpose of water right claim 41H 15362-00 from FLOOD IRRIGATION to **IRRIGATION**; and the point of diversion for water right claim 41H 15362-01 from the NWSWSW of Section 10, Township 2S, Range 6E, Gallatin County, to the **SWSWSW** of Section 10, Township 2S, Range 6E, Gallatin County.

Because the point-of-diversion/means-of-diversion elements appeared on the objection list for the respective water rights claims, water users in the basin received notice that those elements were potentially at issue in this phase of the basin’s adjudication. The court further concludes the amendments do not have the potential to adversely impact other water users’ water rights in the basin. Thus, no additional notice is necessary.

Additionally, the secondary-point-of-diversion issue remark appearing on the preliminary decree abstract for water right claim 41H 15362-00 is resolved and hereby removed. No secondary point of diversion is associated with water right claim 41H 15362-00. As indicated by the claims' owners, the secondary point of diversion relates to the exercise of child claim 41H 30107024.

#### RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks and to amend elements of the water rights claims as requested by the parties, consistent with the findings of fact and conclusions of law above. The Water Court attaches post-decree abstracts for the water right claim to this Master's Report to evidence the changes made.

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Kirsa Shelkey  
Water Master  
*she/her/hers*

**Service via USPS Mail:**

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**WATER COURT  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 15361-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** JEFFREY J LEEK  
212 STORY HILL RD  
BOZEMAN, MT 59715 9640

MICHELLE S LEEK  
212 STORY HILL RD  
BOZEMAN, MT 59715 9640

YELLOWSTONE FOUNDATION PROPERTIES LLC  
2050 OVERLAND AVE  
BILLINGS, MT 59102

**Priority Date:** MAY 1, 1917

**Type of Historical Right:** USE

**Purpose (Use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** EAST GALLATIN RIVER

**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		SWSW	10	2S	6E	GALLATIN

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**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			W2SW	10	2S	6E	GALLATIN

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**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

15361-00

15362-00

**WATER COURT  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 15362-01 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** JEFFREY J LEEK  
212 STORY HILL RD  
BOZEMAN, MT 59715 9640

MICHELLE S LEEK  
212 STORY HILL RD  
BOZEMAN, MT 59715 9640

OWNERSHIP UPDATE PROCESSED TO ADD NEW OWNERS. THE WATER RIGHT MAY BE SPLIT INTO SEPARATE WATER RIGHTS UPON REQUEST OF THE OWNERS.

**\*Priority Date:** MAY 1, 1917

**\*Type of Historical Right:** USE

**\*Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER

**\*Flow Rate:** 153.44 GPM

**\*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:** 10.00

**\*Source Name:** EAST GALLATIN RIVER

**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		SWSWSW	10	2S	6E	GALLATIN

**Period of Diversion:** MAY 1 TO NOVEMBER 1

**Diversion Means:** PUMP

**\*Period of Use:** MAY 1 TO NOVEMBER 1

**\*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	10.00		W2SW	10	2S	6E	GALLATIN

**Total:** 10.00

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**Remarks:**

THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41H 15362-00.

**WATER COURT  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 15362-00 STATEMENT OF CLAIM

**Version:** 5 -- POST DECREE

**Status:** ACTIVE

**\*Owners:** JEFFREY J LEEK  
212 STORY HILL RD  
BOZEMAN, MT 59715 9640

MICHELLE S LEEK  
212 STORY HILL RD  
BOZEMAN, MT 59715 9640

**Priority Date:** MAY 1, 1917

**Type of Historical Right:** USE

**Purpose (Use):** IRRIGATION

**Irrigation Type:** OTHER

**\*Flow Rate:** 190.06 GPM

**\*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:** 13.88

**Source Name:** EAST GALLATIN RIVER

**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		S2SW	10	2S	6E	GALLATIN

**Period of Diversion:** MAY 1 TO NOVEMBER 1

**Diversion Means:** PUMP

**Period of Use:** MAY 1 TO NOVEMBER 1

**\*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	13.88		W2SW	10	2S	6E	GALLATIN

**Total:** 13.88

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**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

15361-00

15362-00

SPLIT CLAIM NO. 41H 30107024 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.