

41H-0226-R-2020

July 8, 2021

Montana Water Court

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

\* \* \* \* \*

CLAIMANT: McIlhattan Ranch LLC; David H. Manley; Thelma J.  
Manley; Eileen C. McIlhattan

OBJECTORS: Manley Meadows HOA, Inc.; McIlhattan Ranch  
LLC

NOTICE OF INTENT TO APPEAR: East Gallatin LLC; Old River  
Farm Homeowners Assn  
Inc.; Riverside Country Club;  
Manley Meadows  
Homeowners Association  
Inc.

**CASE 41H-0226-R-2020**  
41H 139033-00  
**41H 139036-00**

**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 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 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**

Multiple-use water rights claims 41H 139033-00 and 41H 139036-00<sup>1</sup> 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. The claims received objections from McIlhattan Ranch LLC (McIlhattan), represented by Abigail Brown, Manley Meadows HOA, Inc. (Manley Meadows), represented by Jeremy Michael, and filed notices of intent to appear (NOIAs) from East Gallatin LLC and Old River Farm Homeowners Assn Inc. (Old River), both represented by Art Wittich, and Riverside Country Club (Riverside) represented by Ben Sudduth. The issue remarks, objections, and NOIAs indicate ownership issues paralleling many cases in the Gallatin River Basin due to rapid land transfer and subdivision without clear retention or disposition of appurtenant water rights.

The Water Court consolidated the water rights claims into 41H-0226-R-2020 and set filing deadlines for the parties to file information resolving the issues.

The Water Court received a Notice of Appearance from attorneys Patience Llewellyn and John Christensen for the representative of the Thelma J. Manley Trust. The notice indicated Thelma Manley, presently listed as a co-owner of water right claim 41H 139036-00 is deceased, and that the Thelma J. Manley Trust was Thelma Manley's predecessor in interest. The court later learned the Thelma J. Manley Trust "distributed its interest in the real property to which 41H water rights are appurtenant to the Jeana L. Gaskill Trust and Quinn D. Manley Trust by Trustee's Deeds of Distribution dated August 8, 2019. Counsel for Thelma Manley Trust is now counsel for the Jeana L. Gaskill Trust and Quinn D. Manley Trust (Manley/Gaskill Trusts)."

On December 10, 2020, parties Manley HOA, Manley/Gaskill Trusts, McIlhattan, East Gallatin LLC, and Old River filed a signed Stipulation and Settlement Agreement

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<sup>1</sup> Manley HOA requested the Water Court to reconsolidate the case to include water right claim 41H 139036-00, because water rights claims 41H 139033-00 and 41H 139036-00 are multiple uses of the same water right. The court granted the request.

with the Water Court. While not a signatory to the Stipulation and Agreement, Riverside later indicated the filed Stipulation and Agreement resolved its NOIA concerns.

The parties filed additional information with the court, including chain-of-title documents and a map, supporting assertions in the Stipulation and Agreement. On May 30, 2021, Jason West filed a deed indicating his co-ownership of water rights claims 41H 139033-00 and 41H 139036-00.

The Water Court presently resolves the issue in this case.

### ISSUES

*1. Whether the Water Court approves the Stipulation and Agreement filed by the parties.*

*a. Whether the evidence in the record supports McIlhattan, Manley HOA, and Jason West presently co-own usufruct interests in multiple-use water rights claims 41H 139033-00 and 41H 139036-00 as a matter of law.*

*b. Whether a preponderance of the evidence supports modifying the location of the point of diversion associated with water rights claims 41H 139033-00 and 41H 139036-00 from the SWSWSW of Section 30, Township 1S, Range 6E, Gallatin County, to the SESWSW of Section 30.*

### 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 counter-objection period follows the objection period.

After the close of the counter-objection period, the water court notifies each party named in the water court decree that any persons other than the claimants or objectors to a particular claim may file a notice of intent to appear. Section 85-2-233(3),(4), MCA; Rule 9, W.R.Adj.R. While a NOIA party properly filing a NOIA is entitled to participate in the

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

In Water Court proceedings, the parties may file settlements stipulating the terms under which the parties contractually agree to resolve decree objections. A settlement may include a claimant’s legally binding commitment to modify water right claims to resolve objections and issue remarks and an objector’s agreement to withdraw objections conditioned upon the court’s acceptance of the claim modifications. *E.g., In re Pondera Cty. Canal & Reservoir Co.*, Case 41M-202, 2020 Mont. Water LEXIS 19 (Jan. 9, 2020). 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 court may rely on the stipulated facts and agreements of a settlement that are “not contrary to law, court rule, or public policy.” *In re Marriage of Hill*, 265 Mont. 52, 58, 874 P.2d 705, 708 (1994). When a stipulation proposes modifications to water right claim elements, the court must evaluate each proposed modification to ensure the modification is supported by the evidence and within the court’s authority to adjudicate. *In re Argabright*, Case 41I-265, 2014 Mont. Water LEXIS 9, (December 12, 2014) (affirming rejection of stipulation); *In re Dana Ranch Co.*, Case 41J-265, 2017 Mont. Water LEXIS 13 (rejecting stipulation). 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

1. *Whether the Water Court approves the Stipulation and Agreement filed by the parties.*

a. *Whether the evidence in the record supports McIlhattan, Manley HOA, and Jason West presently co-own usufruct interests in multiple-use water rights claims 41H 139033-00 and 41H 139036-00 as a matter of law.*

DNRC's water right database indicates McIlhattan owns water right claim 41H 139033-00, and McIlhattan, David and Thelma Manley, and Eileen C. McIlhattan co-own water right claim 41H 139036-00.

The parties to the Stipulation and Agreement stipulate:

[T]he correct ownership for water right claims 41H 139033-00 and 41H 139036-00 is Manley HOA, Manley/Gaskill Trusts, McIlhattan, and the Lot Owners (which include the Manley/Gaskill Trusts) in the Manley Meadows Subdivision as shown on Montana Cadastral. Manley HOA, Manley/Gaskill Trusts, and the Lot Owners (which include the Manley/Gaskill Trusts) own property associated with Places of Use Nos. 1 and 3, and McIlhattan owns property associated with Place of Use No. 2.

In support, the Stipulation and Agreement and April 6, 2021 motion to correct filed by McIlhattan indicates the original water rights claimants, David and Thelma Manley, sold the property associated with Place of Use ID No. 2 for water right claims 41H 139033-00 and 41H 139036-00 to Paul and Mildred Boylan, who then sold the property to Eileen and John McIlhattan. On January 13, 1993, Eileen McIlhattan quit claimed the property to John McIlhattan, who then transferred the property to McIlhattan.

The Stipulation and Agreement further indicates David and Thelma Manley sold the property associated with Places of Use ID Nos. 1 and 3 for water rights claims 41H 139033-00 and 41H 139036-00 to Jase Development, Inc, which subdivided the property associated with Places of Use ID Nos. 1 and 2 into the Manley Meadows Subdivision. The lots within the Manley Meadows Subdivision were sold to individual lot owners. Manley HOA obtained quitclaim deeds from thirty-six of forty-two lot owners within Manley Meadows subdivision to consolidate and clarify ownership of the water rights claims. Manley HOA filed the quitclaim deeds with the court on April 4, 2021.

The Water Court gave notice of potential co-ownership of water rights claims 41H 139033-00 and 41H 139036-00 to the individual lot owners that had not quit-claimed their

interest in the water rights claims. Potential owners included Larson Trust Agreement, Jonathan and Sophia M. Cok, Jason Grey West, Esnard Family Trust, Sierra Nevada, L.L.C., and Noel and Rebecca Yantos. The Water Court indicated it would update ownership as a matter of law based on review of deeds evidencing individual ownership. On May 30, 2021, Jason West filed a deed indicating his co-ownership of water rights claims 41H 139033-00 and 41H 139036-00. The Water Court did not receive deeds evidencing ownership from the other potential owners.

As a matter of law, “[w]ater rights transfer with the conveyance of real property[,] unless specifically reserved in an instrument of conveyance,” regardless of whether DNRC processes an ownership update or fee. *Guenther v. Guenther*, 2019 Mont. Water LEXIS 106, \*11 (emphasis added) (citing § 85-2-403(1), MCA; *Adams v. Chilcott*, 182 Mont. 511, 518, 597 P.2d 1140, 1145 (1979); *MacLay v. Missoula Irrigation Dist.*, 90 Mont. 344, 3 P.2d 286 (1931)). Nothing in Montana’s water law statutes prohibits the Water Court from updating ownership as a matter of law in instances outside the purview of §§ 85-2-421 through 85-2-246, MCA. Accordingly, consistent with Legislative intent, concern for judicial economy, and the Water Court’s statutory directive to resolve objections and issue remarks before issuance of a basin’s final decree, the Water Court updates legal water right ownership based on a preponderance of the evidence in the record.

The record contains complete chain-of-title documentation evidencing the land and water right transfers discussed in the filed Stipulation and Agreement. Accordingly, the Water Court removes Eileen McIlHattan, and Thelma and David Manley as co-owners of water right claim 41H 139036-00 as a matter of law. While the individual lot owners that have not quitclaimed their interest in the water rights claims may still update ownership by contacting DNRC, the Water Court does not update ownership without reviewing deeds evidencing ownership. Thus, the co-owners of water rights claims 41H 139033-00 and 41H 139036-00 are McIlHattan, Manley HOA, and Jason West as a matter of law. The Water Court updates ownership accordingly.

b. *Whether a preponderance of the evidence supports modifying the location of the point of diversion associated with water rights claims 41H 139033-00 and 41H 139036-00 from the SWSWSW of Section 30, Township 1S, Range 6E, Gallatin County, to the SESWSW of Section 30.*

Multiple-use water rights claims 41H 139033-00 (sprinkler/flood-irrigation) and 41H 139036-00 (stock) utilize surface water diverted from the East Gallatin River through a headgate on Old Ditch in Gallatin County, Montana. While the claims' preliminary decree abstracts indicate the claims' point of diversion—the headgate on Old Ditch—is in the SWSWSW of Section 30, Township 1S, Range 6E, Gallatin County, Montana, the parties stipulate:

[T]he correct point of diversion legal land description for these water rights is **SESWSW** of Section 30, T1S R6E. These water right claims are diverted into the 'Old Ditch', which is shared with water right claims 41H 158515-00, 41H 158516-00, 41H 158517-00, 41H 158518-00 and 41H 158519-00 belonging to Greg Gianforte Revocable Inter Vivos Trust Agreement dated September 19, 2000, Susan Gianforte Revocable Inter Vivos Trust Agreement dated September 19, 2000, Old River Farm Homeowners Association Inc, and East Gallatin, LLC (consolidated into Water Court Case 41H-R12). The correction to the point of diversion legal land description agreed to above is consistent with a Stipulation and Agreement entered into in Water Court Case 41H-R12 identifying the correct location of the point of diversion for the 'Old Ditch.'

The court has reviewed the attached map (Exhibit B to Stipulation and Agreement) and the August 24, 2020 Master's Report in Water Court case 41H-0012-R-2020 correcting the legal land description associated with the point of diversion diverting water from the source into Old Ditch. A preponderance of the evidence supports modifying the point of diversion associated with multiple-use waters rights claims 41H 139033-00 and 41H 139036-00 consistent with the same modification made in Water Court case 41H-0012-R-2020 and the Stipulation and Agreement.

In sum, the Stipulation and Agreement is not contrary to law, court rule, or public policy. The Stipulation does not propose modifications substantially changing or enlarging any element of water rights claims 41H 139033-00 and/or 41H 139036-00. The Water Court approves the Stipulation and Agreement filed by the parties, updates ownership to reflect McIlhattan, Manley HOA, and Jason West co-own the water rights claims, and modifies the point of diversion for Old Ditch consistent with the legal land description recommended by the Stipulation and Agreement and findings and conclusions in Water Court case 41H-0012-R-2020.

The modifications resolve the issue remarks and objections and NOIAs filed by the parties.

### RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks, to remove co-owners Eileen McIlHattan and Thelma and David Manley from the decree abstract for water right claim 41H 139036-00, to add co-owner Manley HOA to the decree abstract for water right claim 41H 139033-00, to add co-owner Jason West to the decree abstracts for both water rights claims 41H 139033-00 and 41H 139036-00, and to modify the legal land description associated with the point of diversion from the SWSWSW of Section 30, Township 1S, Range 6E, Gallatin County, to the **SESWSW** of Section 30.

The Water Court attaches post-decree abstracts for the water rights claims to this Master's Report. In addition to being available on FullCourt, the Water Court files copies of the information filed in this case in the claim folder for water right claim 41H 139033-00.

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Kirsa Shelkey  
Water Master  
*she/her/hers*



**Service via USPS Mail:**

David H. Manley  
Thelma J. Manley  
1045 Boylan Rd Apt 9  
Bozeman, MT 59715

Eileen C. McIlhattan  
2717 McIlhattan Rd  
Bozeman, MT 59715

*Potential Owner:*  
Larson Trust Agreement  
45 El Pintado Place  
Danville, CA 94526

*Potential Owners:*  
Jonathan and Sophia M. Cok  
127 Churn Creek Drive  
Bozeman, MT 59715

*Potential Owner:*  
Jason Grey West  
1725 W. Koch St., Apt. 2  
Bozeman, MT 59715-4129

*Potential Owner:*  
Esnard Family Trust  
970 W Broadway, Ste. E105  
Jackson, WY 83001-6402

*Potential Owner:*  
Sierra Nevada, L.L.C.  
P.O. Box 55287  
Houston, TX 77255-5287

*Potential Owners:*  
Noel and Rebecca Yantos  
333 Churn Creek Dr.  
Bozeman, MT 59715

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**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 139033-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** JASON G WEST  
1725 W KOCH ST APT 2  
BOZEMAN, MT 59715 4129  
  
MANLEY MEADOWS HOMEOWNERS ASSOCIATION INC  
PO BOX 11353  
BOZEMAN, MT 59719  
  
MCILHATTAN RANCH LLC  
3100 SENTINAL DR  
BOZEMAN, MT 59715 8750

**Priority Date:** DECEMBER 31, 1864

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER/FLOOD

**Flow Rate:** 3.75 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:** 211.00

**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		SESWW	30	1S	6E	GALLATIN

**Period of Diversion:** MAY 1 TO OCTOBER 31

**Diversion Means:** HEADGATE

**Ditch Name:** OLD DITCH

**Period of Use:** MAY 1 TO OCTOBER 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	80.00		E2NW	25	1S	5E	GALLATIN
2	40.00		NESE	25	1S	5E	GALLATIN
3	91.00		NE	25	1S	5E	GALLATIN
<b>Total:</b>	211.00						

**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

139033-00          139034-00

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.

139033-00          139036-00

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 139036-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:**

JASON G WEST  
1725 W KOCH ST APT 2  
BOZEMAN, MT 59715 4129

MANLEY MEADOWS HOMEOWNERS ASSOCIATION INC  
PO BOX 11353  
BOZEMAN, MT 59719

MCILHATTAN RANCH LLC  
3100 SENTINAL DR  
BOZEMAN, MT 59715 8750

TRANSFER PROCESSED TO ADD NEW OWNERS. THE WATER RIGHT WILL BE  
SPLIT INTO SEPARATE OWNERSHIPS AFTER FINAL DECREE.

**Priority Date:** DECEMBER 31, 1864

**Type of Historical Right:** DECREED

**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		SESWW	30	1S	6E	GALLATIN

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

**Diversion Means:** HEADGATE

**Ditch Name:** OLD DITCH

**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			E2NW	25	1S	5E	GALLATIN
2			NESE	25	1S	5E	GALLATIN
3			NE	25	1S	5E	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.

139033-00

139036-00