

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

* * * * *

CLAIMANT: TO LLC

CASE 41H-0353-R-2021

41H 136490-00

41H 136492-00

41H 136500-00

41H 136502-00

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 if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within **10 days** of the date of the Master's Report. If this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

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 this 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

Claims 41H 136490-00 and 41H 136492-00 are sprinkler/flood irrigation claims. Claim 41H 136500-00 is a flood irrigation claim from a reservoir. Claim 41H 136502-00 is stock claim. The claims are owned by TO LLC. The claims appeared in the Preliminary Decree for Basin 41H (Gallatin River) and underwent the pre-decree examination process by the Department of Natural Resources and Conservation (DNRC). The claims received DNRC issue remarks.

The Water Court set various deadlines pursuant to Section 85-2-248(5), MCA, for Claimant and the DNRC to file documents resolving the issue remarks to these claims.

FINDINGS OF FACT:

1. On July 1, 2021, DNRC Water Resource Specialist Kara Huyser filed a Memorandum that included recommendations regarding the disposition of the issue remarks.
2. The Memorandum states that Claimant Marilee Langohr contacted the DNRC, and the recommendations are based on an email from Langohr received on June 23, 2021.

Claim 41H 136490-00

3. Claim 41H 136490-00 received the following issue remarks:

THE CLAIMED PLACE OF USE AND ACRES IRRIGATED MAY BE QUESTIONABLE.
REVIEW OF THE AVAILABLE DATA APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM
ACRES ISSUE.

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM
ACRES ISSUE.

4. For the place of use issue remark, Ms. Huyser writes that Claimant clarified that the right is only available intermittently. Aerial imagery supports the clarification and the DNRC believes that the remark may be removed.

5. For the volume issue remark, Ms. Huyser writes that an informational remark for historical volume has already been applied to the claim and the issue remark may be removed.

6. For the flow rate issue remark, Ms. Huyser writes that the flow rate does not appear to require modification since it falls below the DNRC standard of 17 GPM and the issue remark may be removed.

Claim 41H 136492-00

7. Claim 41H 136492-00 received the following issue remarks:

THE CLAIMED PLACES OF USE AND ACRES IRRIGATED MAY BE QUESTIONABLE.
REVIEW OF THE AVAILABLE DATA APPEARS TO INDICATE 5.00 ACRES IRRIGATED.

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM
ACRESS ISSUE.

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM
ACRESS ISSUE.

8. For the place of use and acres irrigated issue remark, Ms. Huyser writes that Claimant clarified the right is only used intermittently and agrees with the DNRC that 5.0 acres are irrigated. The DNRC believes the reduction resolves the issue remark and it can be removed.

9. For the volume issue remark, Ms. Huyser writes that the issue remark should be removed and the following information remark should be added to the claim per the W.R.C.E.R. Rule 15(d):

THE TOTAL VOLUME OF THE RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO
HISTORICAL AND BENEFICIAL USE.

10. For the flow rate issue remark, Ms. Huyser writes that the flow rate of the claim should reflect the 17 GPM standard because of the reduced acres irrigated. The total volume should be modified to 85 GPM under the standard.

Claim 41H 136500-00

11. Claim 41H 136500-00 received the following issue remarks that require review:

THE CLAIMED PLACE OF USE AND ACRES IRRIGATED MAY BE QUESTIONABLE.
REVIEW OF THE AVAILABLE DATA APPEARS TO INDICATE 0.00 ACRES
IRRIGATED.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 105 TIMES THE CAPACITY OF THE RESERVOIR.

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

12. For the place of use and acres irrigated issue remark, Ms. Huyser writes the DNRC reverses its position and the acreage should remain as claimed. The DNRC reaches this conclusion after further inspection of aerial photo 179-283R, which indicates a field delineation that matches the claim file map. The issue remark can be removed.

13. For the excessive volume issue remark, Ms. Huyser writes that the means of diversion of the claim is the “natural overflow of pond during irrigation season.” Furthermore, the capacity of the reservoir has no bearing on the volume calculation because no stored water appears to be used. The DNRC believes this resolves the issue remark and it may be removed.

14. For the volume issue remark, Ms. Huyser writes that the volume for the claim should be 24.7 AF. Ms. Huyser reached this conclusion following the guideline for Climatic Area III, which is 1.9 AF per acres per year and applying the guideline to the 13.0 irrigated acres.

15. For the flow rate issue remark, Ms. Huyser writes that the flow rate does not appear to require modification, but the following issue remark should be added per W.R.C.E.R. Rule 14(d):

PRIMARILY A DIRECT FLOW SYSTEM; FLOW RATE RETAINED.

16. The remaining issue remarks on this claim provide notice to Claimant of DNRC modifications and may be removed.

Claim 41H 136502-00

17. Claim 41H 136502-00 received the following issue remarks that require review:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE.

THE CLAIMED VOLUME EQUALS 32 TIMES THE CAPACITY OF THE RESERVOIR.

18. For the volume issue remark, Ms. Huyser writes that the issue remark is superfluous because the DNRC has already applied an information remark on the claim abstract to clarify the volume of the stock claim. The DNRC believes that the information remark resolves the issue remark, and it may be removed.

19. The remaining issue remarks on this claim provide notice to Claimant of DNRC modifications to the claim and may be removed.

CONCLUSIONS OF LAW:

1. The Montana Water Court has the authority to determine the extent of all water rights in the state as they existed prior to July 1, 1973. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 367 P.3d 732; §§ 85-2-233, 85-2-102(12), MCA.

2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA.

3. Prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

4. The degree or weight of evidence needed to contradict or overcome the prima facie proof statute is a preponderance of the evidence. *Burkhartsmeier et al. v. Burkharmsmeier et al.*, Case 40G-2, (MT Water Court Memorandum Opinion and Order Adopting Master's Report, Mar. 11, 1997). The Montana Supreme Court has defined preponderance as "a relatively modest standard that the statutory criteria are 'more probable than not' to have been met." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

5. Section 85-2-248(2), MCA, requires that the Montana Water Court resolve all issue remarks that are not resolved through the objection process.

6. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

7. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to resolve issue remarks. Section 85-2-231(2), MCA.

8. If a claimant agrees to reduce or limit an element of a claim, the Montana Water Court does not need to determine whether the burden of proof has been met. The Montana Water Court may accept a claimant's requested reduction or limitation without further presentation of evidence. Rule 17(c) W.R.Adj.R.

9. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

10. The Memorandum filed by Kara Huyser resolves the issue remarks to the claims. It appears Claimant agrees with all reductions and modifications to the claims to resolve the issue remarks.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends the Court make the changes specified above for claims 41H 136490-00, 41H 136492-00, 41H 136500-00, and 41H 136502-00.

Post Decree Abstracts of Water Right Claim are served with this Report to confirm the recommended corrections have been made in the state's centralized record system.

Julia J. Nordlund
Senior Water Master

Service via USPS Mail:

TO LLC
27600 Rocky Mountain Rd
Belgrade, MT 5971

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

Water Right Number: 41H 136490-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: TO LLC
27600 ROCKY MOUNTAIN RD
BELGRADE, MT 59714

Priority Date: APRIL 1, 1906

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 112.20 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: 8.00

Source Name: UNNAMED TRIBUTARY OF VALLEE 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		NWSWNW	8	3N	5E	GALLATIN

Period of Diversion: MARCH 15 TO OCTOBER 31

Diversion Means: HEADGATE

Period of Use: MARCH 15 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	8.00		NWNW	8	3N	5E	GALLATIN

Total: 8.00

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

Water Right Number: 41H 136492-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: TO LLC
27600 ROCKY MOUNTAIN RD
BELGRADE, MT 59714

Priority Date: OCTOBER 24, 1944

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 85.00 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: 5.00

Source Name: BLACKTAIL 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		NWNWSE	6	3N	5E	GALLATIN
Period of Diversion: MARCH 15 TO OCTOBER 31						
Diversion Means: HEADGATE						
2		SWNESW	6	3N	5E	GALLATIN
Period of Diversion: MARCH 15 TO OCTOBER 31						
Diversion Means: HEADGATE						

Period of Use: MARCH 15 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	5.00		NESW	6	3N	5E	GALLATIN
Total:	5.00						

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

Water Right Number: 41H 136500-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: TO LLC
27600 ROCKY MOUNTAIN RD
BELGRADE, MT 59714

Priority Date: MAY 1, 1901

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 170.54 GPM
PRIMARILY A DIRECT FLOW SYSTEM; FLOW RATE RETAINED.

Volume: 24.70 AC-FT

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 13.00

Source Name: UNNAMED TRIBUTARY OF BLACKTAIL 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		NENENE	32	4N	5E	GALLATIN

Period of Diversion: MARCH 15 TO OCTOBER 31

Diversion Means: DIKE

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NENENE	32	4N	5E	GALLATIN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 13.00 FEET

Depth: 10.00 FEET

Surface Area: 0.14 ACRES

Capacity: 0.56 ACRE-FEET

Period of Use: MARCH 15 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	13.00		NENE	32	4N	5E	GALLATIN
Total:	13.00						

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.

136500-00

136501-00

136514-00

136515-00

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

Water Right Number: 41H 136502-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: TO LLC
27600 ROCKY MOUNTAIN RD
BELGRADE, MT 59714

Priority Date: JANUARY 30, 1904

Type of Historical Right: FILED

Purpose (Use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. 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: LONE PINE 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		SENWSE	32	4N	5E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PIPELINE

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SENWSE	32	4N	5E	GALLATIN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 13.00 FEET

Depth: 10.00 FEET

Surface Area: 0.20 ACRES

Capacity: 0.80 ACRE-FEET

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			SENESW	32	4N	5E	GALLATIN
2			SWNWSE	32	4N	5E	GALLATIN

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.

136499-00

136502-00