

41H-0865-R-2020

July 28, 2021

Montana Water Court

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

* * * * *

CLAIMANTS: Lois C. Cok; Timothy S. Cok; Ronald W. Laden;
Carl Lehrkind III; Win Inc.

CASE 41H-0865-R-2020
41H 7061-00

NOTICE OF INTENT TO APPEAR: Four Corners County Water
& Sewer District

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

Water right claim 41H 7061-00 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, an issue remark appearing on the claim's preliminary decree abstract states: "BASED ON AERIAL PHOTOS, THE POINT OF DIVERSION FOR THE LOWER MIDDLE CREEK SUPPLY DITCH APPEARS TO BE IN THE NESENW SEC 23 T2S R4E."

On November 15, 2019, Four Corners County Water & Sewer District (Four Corners) filed a notice of intent to appear (NOIA) in the proceedings resolving the claim's point-of-diversion issue remark.

The Water Court consolidated water right claim 41H 7061-00 into Water Court case 41H-0865-R-2020 and set a filing deadline for the parties to file information with the court. On January 11, 2021, Four Corners filed a conditional withdrawal of its NOIA if the claim's point of diversion remains as it appears on the claim's preliminary decree abstract or is modified consistent with DNRC's issue remark. The Water Court did not receive further filings from the parties.

The Water Court presently resolves the issues in this case.

ISSUES

1. *Whether a preponderance of the evidence supports modifying the legal land description for the claim's point of diversion to the NESENW of Section 23, Township 2S, Range 4E, Gallatin County.*

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 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 legal land description for the claim's point of diversion to the NESENW of Section 23, Township 2S, Range 4E, Gallatin County.*

Water right claim 41H 7061-00 is a decreed sprinkler-irrigation right for surface water from an offstream reservoir in the SWNESW of Section 20, Township 1S, Range 5E, Gallatin County. The preliminary decree abstract indicates the water right utilizes water from the West Gallatin River diverted to the claim's place of use through a headgate on Lower Middle Creek Supply Ditch in the NWNENW of Section 26, Township 2S, Range 4E, Gallatin County. An issue remark appearing on the claim's preliminary decree abstract states: "BASED ON AERIAL PHOTOS, THE POINT OF DIVERSION FOR THE LOWER MIDDLE CREEK SUPPLY DITCH APPEARS TO BE IN THE NESENW SEC 23 T2S R4E."

Based on the court's review of the record, the original statement of claim states the claim's point of diversion is in the NENWNW of Section 26, Township 1S, Range 5E, Gallatin County. A September 13, 1983 verification worksheet in the claim's file indicates DNRC modified the legal land description of the originally claimed point of diversion to the NWSESE of Section 23, Township 2S, Range 4E, Gallatin County.

A July 6, 1992 Master's Report in the claim's file (Water Court case 41H-212) states the point of diversion for water right claim 41H 7061-00 is in the NWSESW of Section 23, Township 2S, Range 4E, Gallatin County.

An October 22, 2003 Master's Report in the claim's file (Water Court case 41H-395) indicates the Water Court further modified the legal land description for the point of diversion to the NWNENW of Section 26, Township 2S, Range 4E, Gallatin County, consistent with other water rights claims utilizing the headgate on Lower Middle Creek Supply Ditch. DNRC water rights specialist at the time, Rusty Taylor, informed the court that the correct point of diversion for the Lower Middle Creek Supply Ditch was in the NWNENW of Section 26, Township 2S, Range 4E, Gallatin County. The 2003 Master's

Report based its findings and conclusions on that information. The 2003 Master's Report characterizes its correction to the legal land description for the claim's point of diversion as an effort to standardize the location of the headgate across the various claims utilizing the Lower Middle Creek Supply Ditch. The 2003 Master's Report states: "These corrections should be made so that the tabulation of water rights on the West Gallatin River will be accurate for enforcement purposes."

DNRC added the point-of-diversion issue remark to the claim's preliminary decree abstract on September 11, 2017, stating "[b]ased on aerial photos, the Point of Diversion for the Lower Middle Creek Supply Ditch appears to be in the NESENE of Section 23, Township 2S, Range 4E, Gallatin County.

Because the claim's owners have not participated in the proceeding, the court makes its decision based on evidence in the record. The Water Court previously concluded in a 2003 Master's Report that the claim's point of diversion was in the NWNENW of Section 26, Township 2S, Range 4E, Gallatin County, based on evidence provided by DNRC. The issue remark on the claim's preliminary decree abstract does not compel the court at this time that it erred in correcting the point of diversion in its 2003 Master's Report. Thus, the legal land description for the claim's point of diversion will remain as it appears on the claim's preliminary decree abstract. The claim's point-of-diversion issue remarks are resolved and removed.

Four Corners indicated it would withdraw its NOIA if the legal land description for the point of diversion remained as it currently appears. Therefore, the NOIA is withdrawn and resolved.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks. The Water Court attaches a post-decree abstract for the water right claim to this Master's Report.

Kirsa Shelkey
Water Master
she/her/hers

Service via USPS Mail:

Lois C. Cok
Timothy S. Cok
2474 Love Ln
Bozeman, MT 59718

Ronald W. Laden
93 Horse Creek Rd N Fork
Wilsall, MT 59086

Carl Lehrkind III
PO Box 10580
Bozeman, MT 59719

Win Inc.
Craig & Jill Del Grande
727 Harper Puckett Rd
Bozeman, MT 59718

Susan B. Swimley
Attorney and Counselor at Law
1807 W Dickerson Unit B
Bozeman, MT 59715

Service Via Electronic Mail:

Dana E. Pepper
Bina R. Peters
River and Range Law, PLLC
PO Box 477
Bozeman, MT 59771
(406) 599-7424
office@riverandrangelaw.com
dana@riverandrangelaw.com
bina@riverandrangelaw.com

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

Water Right Number: **41H 7061-00** STATEMENT OF CLAIM

Version: 6 -- POST DECREE

Status: ACTIVE

Owners:

LOIS C COK
2474 LOVE LN
BOZEMAN, MT 59718 7234

TIMOTHY S COK
2474 LOVE LN
BOZEMAN, MT 59718 7234

RONALD W LADEN
93 HORSE CREEK RD N FORK
WILSALL, MT 59086 9518

CARL LEHRKIND III
PO BOX 10580
BOZEMAN, MT 59719 0580

WIN INC
CRAIG & JILL DEL GRANDE
727 HARPER PUCKETT RD
BOZEMAN, MT 59718

Priority Date: OCTOBER 15, 1866

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 7.50 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: 480.00

***Source Name:** WEST 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>Tw</u>	<u>Rge</u>	<u>County</u>
1		NWNE	26	2S	4E	GALLATIN

Period of Diversion: MAY 15 TO SEPTEMBER 15

Diversion Means: HEADGATE

Ditch Name: LOWER MIDDLE CREEK SUPPLY DITCH

Period of Use: MAY 15 TO SEPTEMBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Tw</u>	<u>Rge</u>	<u>County</u>
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1	160.00	NE	29	1S	5E	GALLATIN
2	160.00	SE	20	1S	5E	GALLATIN
3	160.00	SW	20	1S	5E	GALLATIN
Total:	<hr/> 480.00					