

41H-1258-R-2021

July 8, 2021

Montana Water Court

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

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CLAIMANTS: Anne B. Owen; Timothy C. Owen

CASE 41H-1258-R-2021
41H 101064-00

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

Water right claim 41H 101064-00, owned by Anne and Timothy Owen, appeared in the Preliminary Decree for the Gallatin River (Basin 41H) with an issue remark received during the Department of Natural Resources and Conservation's (DNRC) review in

preparation of the preliminary decree. Specifically, an issue remark appearing on water right claim 41H 101064-00 indicates: “THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED NOTICE OF WATER RIGHT IS 06/06/1913.”

The Water Court consolidated the water right claim into Water Court case 41H-1258-R-2021 and set a filing deadline for the claim’s owners to file information evidencing the water right claim’s accurate historical priority date. When the claim’s owners did not file information by the initial filing deadline, the court sent a show cause order indicating it would modify the priority date from June 6, 1903, to June 6, 1913.

On June 28, Timothy Owen filed a response with the court.

The Water Court presently resolves the issue in this case.

ISSUES

1. *Whether a preponderance of the evidence supports modifying the claim’s priority date.*

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.

DISCUSSION

1. *Whether a preponderance of the evidence supports modifying the claim's priority date.*

The claim's preliminary decree abstract indicates water right claim 41H 101064-00 is a filed stock right for surface water direct from an unnamed tributary of South Dry Creek in Gallatin County, Montana, with a June 6, 1903 priority date. However, it is unclear from the handwriting in the Notice of Water Right whether the year is 1913 or 1903. The "0" in year 1903 is replaced by a "1" on the original statement of claim, indicating the year of appropriation may be 1913.

In its Show Cause Order, the Water Court indicated it, consistent with DNRC, interpreted the "1" to replace the "0" and would modify the claim's priority date from 1903 to 1913, unless the claim's owners filed information indicating otherwise.

The information filed by Owen states:

The date is 1903. In that era the zeros had a slash through them to distinguish it from the letter "O". This was common when so much was handwritten. The same issue is evident on the water right 41H-101065-00 which was recorded on the same date. Also, the 1903 date on multiple claims transfer through ownership of multiple landowners over the years. All the claims recorded on 06/06/1903 have transferred as that date with no evidence of a 1913 date.

Based on the information filed by Owen, the court concludes the prima facie status afforded to the claim's originally claimed priority date is not overcome by a preponderance of the evidence. The claim's accurate priority date is June 6, 1903, and the issue remark is hereby removed.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks. The court attaches a post-decree abstract to this Master's Report to reflect the changes made.

Kirsa Shelkey
Water Master
she/her/hers

Service via USPS Mail:

Anne B. Owen
Timothy C. Owen
8289 Chapman Rd
Bozeman, MT 59718

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

Water Right Number: 41H 101064-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ANNE B OWEN
8289 CHAPMAN RD
BOZEMAN, MT 59718 7642

TIMOTHY C OWEN
8289 CHAPMAN RD
BOZEMAN, MT 59718

Priority Date: JUNE 6, 1903

Type of Historical Right: FILED

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: UNNAMED TRIBUTARY OF SOUTH DRY CREEK

Source Type: SURFACE WATER

WATER FROM THIS SOURCE IS EXCHANGED FOR WATER FROM THE WEST GALLATIN RIVER AT POINT OF DIVERSION NO. TWO.

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		NENWSW	33	2S	5E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

2		NWNWSW	33	2S	5E	GALLATIN
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

3		E2NE	32	2S	5E	GALLATIN
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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			E2NE	32	2S	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.

101064-00 101065-00