

41H-1271-R-2021

July 20, 2021

Montana Water Court

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

\* \* \* \* \*

CLAIMANT: Pioneer Ready Mix

OBJECTORS: Datus Proper; Sundance Realty; George Sagar;  
Helen Hui

**CASE 41H-1271-R-2021**  
41H 125494-00

**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 125494-00, owner by Pioneer Ready Mix, 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 water right claim indicates: “A LATE OBJECTION HAS BEEN FILED TO ALL ELEMENTS OF THIS WATER RIGHT CLAIM.” Indeed, the claim’s file include late objections to all elements of water right claim 41H 125494-00 filed by counsel Suzanne Nellen on behalf of late objectors Datus Proper, Sundance Realty, George Sagar, and Helen Hui. The objections “question the validity of this claim and all aspects of this claim”; “objector questions ownership, priority date, purpose, use, and source of this right.”

The Water Court resolves late objections before issuance of a final decree. Therefore, to better understand the objection, the Water Court consolidated water right claim 41H 125494-00 into Water Court case 41H-1271-R-2021 and set a filing deadline for the late objectors to file information indicating they wished to pursue their objections, as well as information substantiating their objections. On July 8, 2021, Suzanna Nellen filed a status report, motion to withdraw as counsel for Datus Proper and Sundance Realty, and motion to withdraw the objection on behalf of Helen Hui and George Sagar. The court grants Nellen’s request to withdraw as counsel for Datus Proper and Sundance Realty.

The Water Court presently resolves the remaining issue in this case.

### ISSUES

1. *Whether the Water Court dismisses the late objection.*

### 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.

“If a claimant, objector, or intervenor fails to . . . comply with an order issued by the water court, the water court, upon motion, or its own initiative, may issue such orders of sanction with regard thereto as are just. . . . Sanctions applied as against objectors and intervenors may include dismissal of the objector or intervenor from the proceeding.” Rule 22, W.R.Adj.R.

### DISCUSSION

#### *1. Whether the Water Court dismisses the late objection.*

The late objectors bear the burden to overcome the prima facie status afforded to the elements reflected by the original statement of claim. The information filed by Nellen indicates Nellen represented the late objectors in 2002 when the objection was filed. However, Nellen indicates she presently represents only Hui. Nellen’s filing states:

Counsel only continues to represent Helen Hui.

Counsel is personally aware that George Sagar no longer resides in Montana and furthermore he does not own the real property associated with this case, including any water rights. Furthermore, counsel has not heard from Datus Proper and Sundance Realty since 2002—2003 regarding this matter. Counsel also advises the Court that Datus Proper and Sundance Realty do not own any water rights pursuant to DNRC ownership data.

The Water Court grants Nellen’s request to withdraw the objection as it pertains to Helen Hui. While Nellen states she does not currently represent George Sagar, the filing includes a request to withdraw the objection as it pertains to Sagar. It is unclear whether the court can grant Nellen’s request to dismiss the objection as it pertains to Sagar. However, a preponderance of the evidence does not support modification to the claim’s originally claimed elements; late objectors have not met their burden and/or substantiated the objection. Thus, in response to the motion to withdraw the objection filed by Nellen regarding Helen Hui, and pursuant to its authority under Rule 22, W.R.Adj.R., the Water Court dismisses the late objection.

The water right claim additionally received issue remarks providing notice certain elements of the claims were modified or corrected during reexamination of the basin. The issue remarks state if no objections are filed to the claim, the remarks will be removed. The

Water Court hereby dismissed the objection, no additional proceedings are required, and the issue remarks shall be removed.

### RECOMMENDATIONS

This Water Master recommends the Water Court to dismiss the objection and to remove the resolved issue remarks. The Water Court attaches a post-decree abstract of 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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**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 125494-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** PIONEER READY MIX  
% JTL GROUP DBA KNIFE RIVER  
PO BOX 9  
BELGRADE, MT 59714 0009

**Priority Date:** MAY 31, 1963

**Type of Historical Right:** USE

**Purpose (Use):** INDUSTRIAL

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS  
ONSTREAM RESERVOIR.

**Volume:** 1,215.07 AC-FT

**Source Name:** WASTE & SEEPAGE, UNNAMED TRIBUTARY OF THOMPSON CREEK

**Source Type:** GROUNDWATER

**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		SESWSE	7	1S	5E	GALLATIN

**Period of Diversion:** MARCH 1 TO NOVEMBER 30

**Diversion Means:** PUMP

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESWSE	7	1S	5E	GALLATIN

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 23.00 FEET

**Depth:** 20.00 FEET

**Surface Area:** 5.00 ACRES

**Capacity:** 50.00 ACRE-FEET

THE PIT EXTENDS INTO THE NENWNE SEC 18 TWP 1S RGE 5E GALLATIN  
COUNTY.

**Period of Use:** MARCH 1 TO NOVEMBER 30

**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			SESWSE	7	1S	5E	GALLATIN