

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

Montana Water Court

* * * * *

CLAIMANT: Tarwe Inc.

OBJECTOR: Timber Line Angus LLC

CASE 41H-0145-R-2020
41H 133984-00

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 133984-00 appeared in the Preliminary Decree for Gallatin River (Basin 41H). Timber Line Angus, LLC (Timber Line), through attorney Matthew Williams, filed a May 9, 2019 objection stating that the claim was abandoned. The Water Court consolidated the claim into Water Court case 41H-0145-R-2020 and set several filing deadlines to determine current ownership of the water right claim.

On September 16, 2020, Tarwe Inc. (Tarwe), through counsel Cusick, Farve, Mattick & Reiling, P.C., filed a response indicating Tarwe owns water right claim 41H 133984-00 and wishes to participate in resolution of the issues. Based on the court's review of Montana Cadastral, the quitclaim deed, and the evidence supporting Tarwe's ownership of the claim in Tarwe's response, the Water Court concluded Tarwe is the current owner of water right 41H 133984-00. DNRC updated its water rights database to reflect Tarwe's current ownership of the water right claim.

The court set a December 17, 2020 settlement filing deadline for the parties to file settlement documents resolving Timber Line's abandonment objection. The parties did not file settlement documents by the deadline. The Water Court set the case on a hearing track. On June 4, 2021, the parties filed a Stipulation with the court requesting the court to decree the claim as it appeared in the preliminary decree with the addition of an information remark stating: "Notwithstanding the priority date of this right, it shall be exercised and administered as if it is junior in priority to water right 41H 117928-00 and to any other water right or permit whose point of diversion is the same as water right claim 41H 117928-00, provided that the aggregate amount of water diverted at the named point of diversion does not exceed 1.25 CFS." While the court initially rejected the Stipulation, after reviewing contextual information filed by Timber Line on July 30, 2021, the court reconsiders the previously filed stipulation. The Water Court hereby vacates its previous rejection of the Stipulation and resolves the issue in this case.

ISSUES

1. *Whether the Water Court approves the stipulation filed by the parties and adds the stipulated information remark to the decree abstract for water right claim 41H 133984-00.*

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 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 filed by the parties and adds the stipulated information remark to the decree abstract for water right claim 41H 133984-00.

Water right claim 41H 133984-00, owned by Tarwe, is a decreed irrigation claim for 1.25 cubic-feet-per-second (CFS) of surface water from Pass Creek in Gallatin County, Montana. Timber Line objected to the water right claim asserting the water right claim was abandoned. Timber Line owns water right claim 41H 117298-00.

On June 4, 2021, Tarwe and Timber Line filed a Stipulation with the court resolving Timber Line's objection by adding the following information remark to the claim's decree abstract: "Notwithstanding the priority date of this right, it shall be exercised and administered as if it is junior in priority to water right 41H 117928-00 and to any other water right or permit whose point of diversion is the same as water right claim 41H 117928-00, provided that the aggregate amount of water diverted at the named point of diversion does not exceed 1.25 CFS."

The Stipulation further states:

2. The addition of the above specified informational remark to water right claim no. 41H 133984-00 resolves Timber Line's objections to water right claim no. 41H 133984-00 and upon execution and filing of this Stipulation, Timber Line's Objection shall be deemed withdrawn.
3. Tarwe agrees to abide by any legitimate request by Timber Line to cease or curtail diversion and use of water right claim no. 41H 133984-00.
4. In the event Timber Line applies with the Department of Natural Resources and Conservation (DNRC) for a change application to Water Right No. 41H 117298-00, Tarwe agrees to not object to any such change application. Tarwe further waives any objection it may have to DNRC's confirmation of a new water use permit to Timber Line to divert water at the point of diversion of Water Right No. 41H-117298-00, and agrees that its Water Right shall not be part of any "legal availability" or "adverse affect" analysis by the DNRC under any application for such a permit.

For context, Timber Line explains: "To the extent any lawful demand at the point of diversion of 41H 117928-00, Water Claim No. 113984 must give way to the first 1.25

CFS that can be diverted from Pass Creek. Lawful demand has the same meaning as any other subordination.”

Montana water law allows parties to contractually agree to resolve decree objections. Furthermore, information remarks are “[r]emarks that limit, define, or explain unique aspects of a claim....” Rule 2(a)(57), W.R.C.E.R.

[M]any water rights cannot be accurately described by elements alone, and are therefore supplemented with information remarks.... Information remarks provide facts regarding prior use of a right that are critical to its administration in accord with historical use. ...[I]nformation remarks are routinely used by the Water Court to supplement abstracts.

76G-A8, Order Adopting Master’s Report in Part, October 29, 2014.

Based on the court’s review, the Stipulation is not contrary to law, court rule, or public policy. Timber Line’s assertion that a water commissioner appointed to implement this Court’s decree is “limited to the face of the decree as the yardstick of his authority” is well-taken. Indeed, addition of the information remark makes practical sense considering this water right may be enforced by an appointed water commissioner in the future. The Stipulation does not propose modifications enlarging any element of water right claim 41H 133984-00. The addition of the stipulated information remark indicates Tarwe agrees to subordinate its water right consistent with the information remark despite its priority date. The Water Court approves the Stipulation and adds the information remark to the claim’s post-decree abstract. Approval of the Stipulation and addition of the stipulated information remark resolves the objection and issue in this case.

RECOMMENDATIONS

This Water Master recommends the Water Court to add the stipulated information remark to the decree abstract for water right claim 41H 133984-00. The Water Court attaches a post-decree abstract for water rights claim 41H 133984-00 to this Master’s Report, as well as the Stipulation and Motion to Reconsider Order Rejecting Settlement filed by the parties.

Kirsa Shelkey
Water Master
she/her/hers

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

Water Right Number: **41H 133984-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: TARWE INC
 PO BOX 55432
 SEATTLE, WA 98155 0432

Priority Date: APRIL 30, 1867

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 1.25 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:** 55.00

Source Name: PASS 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		NWSWNE	35	3N	5E	GALLATIN

Period of Diversion: APRIL 1 TO NOVEMBER 15

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO NOVEMBER 15

***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	55.00		NW	35	3N	5E	GALLATIN

Total: 55.00

Remarks:

NOTWITHSTANDING THE PRIORITY DATE OF THIS RIGHT, IT SHALL BE EXERCISED AND ADMINISTERED AS IF IT IS JUNIOR IN PRIORITY TO WATER RIGHT 41H 117928-00 AND TO ANY OTHER WATER RIGHT OR PERMIT WHOSE POINT OF DIVERSION IS THE SAME AS WATER RIGHT CLAIM 41H 117928-00, PROVIDED THAT THE AGGREGATE AMOUNT OF WATER DIVERTED AT THE NAMED POINT OF DIVERSION DOES NOT EXCEED 1.25 CFS.

RYAN K. MATTICK
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Attorneys for Claimant

41H-0145-R-2020

June 4, 2021

Montana Water Court

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

CLAIMANT: Tarwe Inc.

OBJECTOR: Timber Line Angus LLC

41H-0145-R-2020
41H 133984-00

STIPULATION

This Stipulation is entered and agreed to by and between Claimant Tarwe Inc., hereinafter referred to as “Tarwe” and Objector Timber Line Angus, LLC, hereinafter referred to as “Timber Line” and collectively referred to as “Parties”.

The Parties to this Stipulation are participants in the adjudication of water rights in the Upper Missouri Division, Gallatin River (Basin 41H), Water Court Case 41H-0145-R-2020; and

Tarwe owns water right claim no. 41H 133984-00 for the use of Pass Creek; and

Timber Line owns water right claim no. 41H 117298-00 for the use of Pass Creek; and

The Parties recognize that continued litigation among them is expensive, time consuming, and detrimental to community relations; and

The Parties desire to bring to an end the litigation among them and to reach a final understanding and agreement concerning the respective water right claim no. 41H 133984-00; and

The Parties have reached certain agreements which they believe reflect historic beneficial uses of water right described in this agreement.

NOW THEREFORE, for good and sufficient consideration exchanged among the Parties, it is agreed as follows:

1. Water right claim No. 41H 133984-00 shall appear in the Basin 41H Final Decree identical to how it appeared in the Basin 41H Preliminary Decree except this water right shall have the following informational remark associated with this claim: “Notwithstanding the priority date of this right, it shall be exercised and administered as if it is junior in priority to Water Right No. 41H-117928-00, and to any other water right or permit whose point of diversion is the same as Water Right No. 41H-117928-00, provided that the aggregate amount of water diverted at the named point of diversion does not exceed 1.25 cfs.”

2. The addition of the above specified informational remark to water right claim no. 41H 133984-00 resolves Timber Line’s objections to water right claim no. 41H 133984-00 and upon execution and filing of this Stipulation, Timber Line’s Objection shall be deemed withdrawn.

3. Tarwe agrees to abide by any legitimate request by Timber Line to cease or curtail diversion and use of water right claim no. 41H 133984-00.

4. In the event Timber Line applies with the Department of Natural Resources and Conservation (“DNRC”) for a change application to Water Right No. 41H 117298-00, Tarwe agrees to not object to any such change application. Tarwe further waives any objection it may have to DNRC’s confirmation of a new water use permit to Timber Line to divert water at the point of diversion of Water Right No. 41H-117298-00, and agrees that its Water Right No. 41H

133984-00 shall not be part of any "legal availability" or "adverse affect" analysis by the DNRC under any application for such a permit.

ADDITIONAL PROVISIONS

5. Each party shall bear its own costs and attorney's fees arising from the negotiation and execution of this Stipulation, and in the proceedings before the Water Court regarding the above-captioned water right claims.

6. This Stipulation shall be binding on all heirs, successors, administrators, executors, assigns, representatives, and agents of the Parties.

7. Each of the Parties entered into and executed this Stipulation in good faith and without any fraud, misunderstanding, overreaching, duress, or undue influence whatsoever; and have had the same reviewed by counsel or have had the opportunity to consult with counsel prior to execution.

8. The Parties hereto represent and affirm the signatories to this Stipulation are legally authorized to bind their respective parties in this matter.

9. This Stipulation constitutes the entire agreement between the Parties and shall be effective upon the signature of the last party to sign the Stipulation.

10. This Stipulation may be executed by the Parties in several counterparts, each of which when executed and delivered shall constitute an original of the same document. Facsimile, electronic or digital copies of signatures shall be deemed the equivalent of original signatures.

Tarwe, Inc.

5/26/2021

Date

DocuSigned by:
By: Laura Burns
93CD9F9EEBC5434...
Its: President

Timber Line Angus, LLC

5-18-2021
Date

By: [Signature]

Its: Managing member

Agreed to as to form.

Cusick, Farve, Mattick & Refling, P.C.

By: [Signature]

Ryan K. Mattick
Attorneys for Claimant

Date: 6/4/2021

MW Law Firm, PLLC

By: [Signature]

Matthew W. Williams
Attorneys for Objector

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document was duly served upon the opposing parties and counsel of record at the below addresses and in the manner indicated on this 4th day of April, June 2021.

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(406) 551-6169
Attorney for Objector

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☐ Facsimile
☐ Hand Delivery
☒ Email: matthew53@aol.com

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☒ US Mail
☒ Email: davidyakos@yahoo.com

[Signature]

ELECTRONICALLY FILED

Matthew W. Williams
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Attorney for Timber Line Angus LLC

41H-0145-R-2020

July 30, 2021

Montana Water Court

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

Claimant: Circle 4 Ranch

Objector: Timber Line Angus LLC

)
) **CASE 41H-R145**
)
) 41H 133984
)
)
) **Motion to Reconsider Order**
) **Rejecting Settlement.**
)
)

Comes now Timber Line Angus LLC (“Timber Line”), by and through its attorney, and moves this Court for an Order vacating its rejection of the settlement agreement forged by Timber Line and the Claimant. As grounds therefore, Timber Line shows this Court the its settlement says no more than what is required to resolve the controversy before the Court, and not giving it effect at best just defers this necessary step to another Court.

WHEREFORE, for the reasons set forth herein, the Court should vacate its rejection of the settlement agreement, and adopt the parties' resolution.

Discussion

The parties' settlement includes a remark that must be included in the remarks section of any decree adjudicating the above-styled claim: "Notwithstanding the priority date of this right, it shall be exercised and administered as if it is junior in priority to Water Right No. 41H-117928-00, and to any other water right or permit whose point of diversion is the same as Water Right No. 41H-117928-00, provided that the aggregate amount of water diverted at the named point of diversion does not exceed 1.25 cfs."

This measure is not hard to understand. To the extent of any lawful demand at the point of diversion of 41H-117928-00, Water Claim No. 113984 must give way to the first 1.25 cfs that can be diverted from Pass Creek. Lawful demand in this context has the same meaning as any other subordination. The call must come from a water right, and there must be actual need for the amount of water called at the time of the call. The measure of any water right is the lesser of its flow rate, or the amount of water actually then required by the senior user. This principle simply reflects the duty of every water user to not divert his entitlements, and to otherwise leave that water in the creek for other users, whenever he has no need for his full decree. *Cook v Hudson*, 110 Mont. 263, 103 P.2d 137 (1940), overruled on other grounds *Grimsley v. Estate of Spencer*, 206 Mont. 184, 670 P.2d 85 (1983); *Maclay v. Missoula Irr. Dist.*, 90 Mont. 344, 3 P.2d 286 (1931); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401.

Timber Line understands that this settlement could have been implemented by a recorded settlement agreement incorporating its terms. However, this settlement required the provision to be incorporated in this Court's decree, because Timber Line did not want to defer matters to subsequent judicial proceedings.

To the extent that any water commissioner is hereafter appointed to implement this Court's decree, that commissioner is necessarily limited to the face of decree as the yardstick of his authority. *State ex. rel. Reeder v. District Court*, (1935), 100 Mont. 376, 47 P.2d 653. It is the decree itself that is the yardstick of his authority, *Quigley v. McIntosh* (1930), 88 Mont. 103, 290 P. 266, and the Commissioner is but a disinterested stakeholder whose task is to breathe life into the decree by distributing water to those who are entitled to available flows as a result of their seniority. *State ex rel McKnight v. District Court*, 111 Mont. 520, 111 P.2d 292.

This limited framework is necessary to protect the procedural due process rights of water users. If it is not determined in a decree, the water commissioner as a state official may not summarily execute extra-judicial directions. *State ex. rel. Reeder v. District Court, supra*; *State ex rel McKnight v. District Court, supra*. Summary administration of water rights without a prior opportunity to be heard is lawful only where the terms of the decree itself demonstrate the reach and limit of the commissioner's authority. *See also, In re Petition of the Deadman's Basin Water Users Association*, 2002 MT 15, ¶ 15, 308 Mont. 168, 40 P.3d 387 (District Court supervising water commissioner's actions may not adjudicate water rights. It is limited to giving effect to existing decree.)

As summarized in *Fellows v. Water Commissioner*, 2012 MT 189, 365 Mont. 540, 545, 285 P.3d 448, 452-453,

“(a) long line of cases has constrained the application of § 85-5-301, MCA, to disputes arising within the confines of a prior water right decree entered by a district court. The only purpose of a dissatisfied water user petition is to provide a summary proceeding to enforce rights determined under a prior decree. In *Re Kelly*, 2010 MT 14, ¶ 31, 355 Mont. 86, 224 P.3d 640. The “whole question” in such a proceeding is whether the water commissioner is distributing water to the respective users according to the applicable decree. *Quigley v. McIntosh*, 110 Mont. 495, 499-500, 103 P. 2d 1067, 1069 (1940); *Allen v. Nichols*, 143 Mont. 486, 495, 392 P.2d 82, 86 (1964). A district court hearing a dissatisfied water user’s complaint may not adjudicate water rights, but may only enforce right determined in a prior decree. *Luppold v. Lewis*, 172 Mont. 280, 288-289, 563 P.2d 538, 542 (1977).

Consequently, in the event that the subordination is not incorporated in this Court’s decree, it would be incumbent upon Timber Line to initiate another proceeding in district court under MCA 85-2-406 to secure supplementary instructions to the Commissioner. There is little doubt that the district court would accord Timber Line the relief it sought. Contracts, after all, are contracts, and there is no reason not to enforce this one. *See MCA 28-2-701 et. seq.* However, Timber Line is not interested in a result where more judicial proceedings are on the plate, and this Court should be chary of adopting a process that simply defers matters to any such proceeding.

Timber Line presumes that this Court’s reluctance to adopt the settlement agreement is premised upon the fact that the subordination does not name all the rights protected by the subordination. While Timber Line does not understand why this concerns that Court, it has done everything it can do.

For some five years, Timber Line has been working on developing a small hydroelectric facility for its system. There is significant fall between the point of diversion and Timber Line’s

irrigated area (indeed Timber Line's sprinkler runs on gravity), and there is no reason not to use that fall to produce renewable energy, at least enough the Pass Creek community.

To do that, at the minimum Timber Line needs a water use permit from the DNRC for at least the non-irrigation season. Hydros do not implicate downstream users, because they are nonconsumptive. Whatever comes in goes out, and it comes in and goes out on Timber Line's property without affecting downstream users.

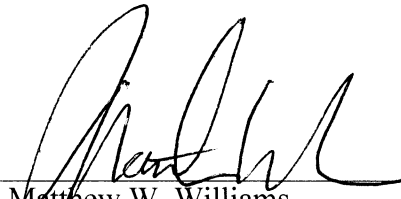
The only significant right upstream is the very right involved in this proceeding. Indeed, the DNRC has indicated to Timber Line that the bare existence of this right in the preliminary decree creates an issue of legal availability for any new water use permit under MCA 85-2-311, as there is not dependably more water than 1.25 cfs in Pass Creek at or near the point of diversion of Timber Line's right except at times of spring snowmelt runoff. Indeed, this is why there is an objection to this right in this proceeding.

Timber Line shouldn't be asked to guess at what combination of a new permit and/or change of water right will ultimately be required to implement its plans. It depends upon the future actions of the DNRC, and whether this right continues to frustrate the legal availability required for a new permit.

In the event that Timber Line develops its hydroelectric facility, there won't be a time during the year at which water is not being diverted through its system. If for some reason it can't be developed, 41H 133984 will just be subject to Timber Line's irrigation right. The settlement agreement contemplates either result, depending upon DNRC action and ultimate development of the hydro system.

This Court should defer to the parties. They know the hydrology of Pass Creek. They know how they intend to use the water. The Claimant knows that he is unlikely to have water except at times of runoff. All these issues have been put to bed, and neighbors can be neighbors again. This Court should not frustrate that end.

Respectfully submitted this 30th day of July, 2021.

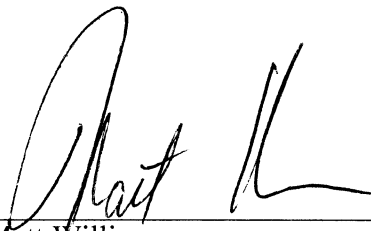


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Certificate of Service

I certify that the foregoing was duly served electronically, this 30th day of July, 2021,
addressed to the following individuals:

Ryan Mattik
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Matt Williams