

41H-0160-R-2021

September 14, 2021

Montana Water Court

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

* * * * *

CLAIMANTS: Justin Bigart; Stephanie S. Bigart

OBJECTOR: Justin Bigart

CASE 41H-0160-R-2021

41H 136696-00

41H 138727-00

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 rights claims 41H 136696-00 and 41H 138727-00, owned by Stephanie and Justin Bigart, 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, water right claim 41H 138727-00 received issue remarks regarding the claim's maximum irrigable acreage, place of use, flow rate, and volume. The issue remarks recommend indicate: "REVIEW OF THE AVAILABLE DATA APPEARS TO INDICATE 23.00 ACRES IRRIGATED." Additional issue remarks indicate the flow rate and volume may be overclaimed based on the recommended reduction in acres irrigated.

On November 7, 2018, Justin Bigart objected to DNRC's recommended reduction in the claim's maximum irrigable acreage.

The Water Court consolidated the water rights claims into Water Court case 41H-0160-R-2021 and set a filing deadline for the Bigarts to file information resolving the objection and issue remarks. The court did not receive information from the Bigarts.

Because the issues involve maximum acres irrigated, the court asked the Bigarts to contact and work with DNRC pursuant to § 85-2-248(5), MCA, and for DNRC to file a memorandum with the court including its recommendations to resolve the issues.

The Bigarts contacted DNRC, and on September 9, 2021, DNRC filed a Memorandum (DNRC Memo), including its recommendations to resolve the issue remarks, with the Water Court.

The Water Court presently resolves the issue in this case.

ISSUES

1. Whether a preponderance of the evidence supports reducing the maximum acres irrigated and flow rate for water right claim 41H 138727-00.

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.

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 reducing the maximum acres irrigated and flow rate for water right claim 41H 138727-00.

Water right claim 41H 138727-00 is a decreed flood-irrigation claim for surface water from Bostwick Creek for use on 40 maximum acres in the N2NW of Section 6, Township 1S, Range 6E, Gallatin County, Montana. The water right claim received the following issue remarks requiring resolution:

IT APPEARS THAT 23.0 ACRES ARE ACTUALLY IRRIGATED AND PROBLEMS COULD EXIST WITH FLOW RATE AND VOLUME. TO ASSURE THE ORDERLY ADMINISTRATION OF WATER RIGHTS, THE WATER COURTS WILL SET A HEARING TO DETERMINE THESE ISSUES IF NO OBJECTIONS ARE MADE.

THE CLAIMED PLACE OF USE AND ACRES IRRIGATED MAY BE QUESTIONABLE. REVIEW OF THE AVAILABLE DATA APPEARS TO INDICATE 23.00 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. THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT MAY BE ADDRESSED AT THE OBJECTION STAGE.

The DNRC Memo states: “Claimant intends to withdraw their objection to DNRC’s reduction from the originally claimed 40.0 acres to the verified 23.0 acres. This appears to resolve the issue.” A preponderance of the evidence therefore supports reducing the claimed maximum acres irrigated from 40 acres to 23 acres.

Because the water right claim is used for direct flow irrigation, the following standard informational remark will replace the quantified 143.20 acre-feet (AC-FT) volume appearing on the claim’s preliminary decree abstract: THE TOTAL VOLUME OF THE RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND

BENEFICIAL USE. *See* Rule 15, W.R.C.E.R. The volume issue remark is therefore resolved and shall be removed.

Regarding DNRC's flow rate issue remark, the DNRC Memo states:

The original flow rate was claimed as 1.25 cubic feet per second (CFS) and is equivalent to 14.025 gallons per minute (GPM)/per acre (AC) for the originally claimed 40.0 acres. With the acreage deduction to 23.0 acres, this increases to 24.2 GPM/AC which exceeds the DNRC standard of 17.0 GPM/AC. Claimant agrees that a reduction to the 17.0 GPM/AC standard is appropriate given the reduction in irrigated acreage. Thusly, at 23.0 acres and 17.0 GPM/AC, the maximum flow rate should be modified to 391 GPM, or 0.87 CFS, and the remark may be removed from the claim.

A preponderance of the evidence therefore supports reducing the claimed flow rate from 1.25 CFS to 391 GPM consistent with DNRC's reduction to the claim's maximum acres irrigated and corresponding flow rate guideline. The flow rate issue remark is resolved and shall be removed.

The consolidated water rights claims additionally received issue remarks providing notice that elements of the claims were modified during reexamination of the basin. The issue remarks state if no objections are filed to the claims, the issue remarks will be removed. The claim did not receive related objections. No proceedings are required, and the issue remarks shall be removed.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks, to reduce the maximum acres irrigated for water right claim 41H 138727-00 from 40 acres to **23 acres**, to replace the quantified volume for water right claim 41H 138727-00 with the standard informational volume remark for direct flow claims, and to reduce the flow rate for water right claim 41H 138727-00 from 1.25 CFS to **391 GPM**. The court attaches post-decree abstracts for each water right claim to this Master's Report to reflect the changes made, as well as the DNRC Memo for future reference.

Kirsa Shelkey
Water Master
she/her/hers

Service via USPS Mail:

Justin Bigart
Stephanie S. Bigart
6500 E Baseline Rd
Bozeman, MT 59715

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATIONGREG GIANFORTE
GOVERNOR

41H-0160-R-2021

September 9, 2021

STATE OF MONTANA

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BOZEMAN, MONTANA 59715
Montana Water Court

MEMORANDUM

DATE: September 8, 2021

CASE HEADING: **CASE:** 41H-0160--R-2021
CLAIMS: 41H 136696-00
41H 138727-00

TO: Kirsa Shelkey
Water Master

FROM: Kara Huyser
Water Resource Specialist

CLAIMANT(S): Justin Bigart; Stephanie S. Bigart

OBJECTOR: Justin Bigart

Introduction:

On June 14, 2021, the Water Court ordered the claimant to confer with the DNRC Bozeman Regional Office to resolve issue remarks placed as a result of DNRC claims examination or reexamination rules. The Water Court further requested DNRC provide a memorandum discussing the results of that conference. The Water Court further requested that DNRC submit recommendations for the resolution of said remarks. DNRC received a call and subsequent email from the claimants expressing their interest in withdrawing their objections and their agreement with DNRC's examination remarks.

Materials Reviewed:

- Information in claim files
- USDA Aerial Imagery
- USGS Topographic Quadrangle: Bozeman Hot Springs, 1987
- Water Rights Claim Examination Rules (W.R.C.E.R), 2013

Discussion:**41H 136696-00, Stock; BOSTWICK CREEK:**

Point of Diversion Issue Remark, P88:

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

This modification to the Ditch Name did not receive an objection and may be removed from the claim.

41H 138727-00 Irrigation; BOSTWICK CREEK:

General Information Issue Remark, GIIS:

IT APPEARS THAT 23.0 ACRES ARE ACTUALLY IRRIGATED AND PROBLEMS COULD EXIST WITH FLOW RATE AND VOLUME. TO ASSURE THE ORDERLY ADMINISTRATION OF WATER RIGHTS, THE WATER COURTS WILL SET A HEARING TO DETERMINE THESE ISSUES IF NO OBJECTIONS ARE MADE.

Place of Use Issue Remark, P289:

THE CLAIMED PLACE OF USE AND ACRES IRRIGATED MAY BE QUESTIONABLE. REVIEW OF THE AVAILABLE DATA APPEARS TO INDICATE 23.00 ACRES IRRIGATED.

Claimant intends to withdraw their objection to DNRC's reduction from the originally claimed 40.0 acres to the verified 23.0 acres. This appears to resolve the issue, and both remarks may be removed from the claim.

Volume Issue Remark, V55:

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

This remark is unnecessary due to Rule 15(c) in W.R.C.E.R. which states "*a volume will not be decreed for direct flow irrigation rights. Direct flow irrigation includes flood and sprinkler systems...*" The volume should instead be set to null, and the following standard informational remark added to the claim abstract:

VF009 THE TOTAL VOLUME OF THE RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Flow Rate Issue Remark, F180:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE. THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT MAY BE ADDRESSED AT THE OBJECTION STAGE.

The original flow rate was claimed as 1.25 cubic feet per second (CFS) and is equivalent to 14.025 gallons per minute (GPM)/per acre (AC) for the originally claimed 40.0 acres. With the acreage deduction to 23.0 acres, this increases to 24.2 GPM/AC which exceeds the DNRC standard of 17.0

GPM/AC. Claimant agrees that a reduction to the 17.0 GPM/AC standard is appropriate given the reduction in irrigated acreage. Thusly, at 23.0 acres and 17.0 GPM/AC, the maximum flow rate should be modified to 391 GPM, or 0.87 CFS, and the remark may be removed from the claim.

Point of Diversion Issue Remark, P88:

DITCH NAME AND POINT OF DIVERSION WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

This modification to the Ditch Name and Point of Diversion did not receive an objection and may be removed from the claim.

By: /s/ Kara Huyser September 8, 2021
Kara Huyser, Water Resource Specialist

REVIEWED:

By: /s/ Kerri Strasheim September 8, 2021
Kerri Strasheim, Bozeman Regional Manager

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Justin & Stephanie S. Bigart
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Bozeman, MT 59715

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

Water Right Number: **41H 138727-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JUSTIN BIGART
6500 E BASELINE RD
BOZEMAN, MT 59715

STEPHANIE S BIGART
6500 E BASELINE RD
BOZEMAN, MT 59715

Priority Date: DECEMBER 31, 1883

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 391.00 GPM

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

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 23.00

Source Name: BOSTWICK 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		NWSENE	6	1S	6E	GALLATIN

Period of Diversion: MAY 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: STIMPSON DITCH

Period of Use: MAY 1 TO NOVEMBER 1

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	23.00		N2NW	6	1S	6E	GALLATIN

Total: 23.00

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.

136696-00 138727-00

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

Water Right Number: **41H 139969-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MICHAEL M ANDERSON
5485 SPAULDING BRIDGE RD
BELGRADE, MT 59714 8113

NORMA J ANDERSON
5485 SPAULDING BRIDGE RD
BELGRADE, MT 59714 8113

Priority Date: JANUARY 1, 1900

Type of Historical Right: USE

Purpose (Use): STOCK

Flow Rate: 5.00 GPM

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: EAST 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>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSWSW	29	2N	4E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PUMP/HEADGATE W/DITCH OR PIPELINE

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			NE	19	2N	4E	GALLATIN