

41H-0193-R-2021

September 3, 2021

Montana Water Court

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

* * * * *

CLAIMANT: Jennifer J. Combs

OBJECTOR: Jennifer J. Combs

CASE 41H-0193-R-2021

41H 30115329

41H 30115330

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 claims 41H 30115329 and 41H 30115330, owned by Jennifer Combs, appeared in the Preliminary Decree for the Gallatin River (Basin 41H) with issue remarks

from the Montana Department of Natural Resources and Conservation's (DNRC) review in preparation of the preliminary decree.

On October 16, 2018, Combs filed objections to elements of the claims. Specifically, Combs objected to the priority date and type of historic right for water right claim 41H 30115329, and the flow rate/volume and place of use/maximum acres for water right claim 41H 30115330.

The Water Court consolidated water rights claims 41H 30115329 and 41H 30115330 into Water Court case 41H-0193-R-2020 and held a February 4, 2021 status conference, which Jennifer Combs did not attend. The Water Court set several filing deadlines for Combs to substantiate her objections. The court and Combs spoke informally over telephone several times during the proceedings. Combs filed information with the Water Court on May 4, 2021, and on May 24, 2021.

The Water Court presently resolves the issues in this case.

ISSUES

1. *Whether a preponderance of the evidence supports water right claim 41H 30115329 is a stock-use right with a June 30, 1901 priority date.*
2. *Whether a preponderance of the evidence supports modifying the priority date for water right claim 41H 30115330.*
3. *Whether a preponderance of the evidence supports modifying the volume and/or lawn and garden irrigation acres for water right claim 41H 30115330.*

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.

DISCUSSION

1. *Whether a preponderance of the evidence supports water right claim 41H 30115329 is a stock-use right with a June 30, 1901 priority date.*

Water right claim 41H 30115329 is a previously exempt stock right for surface water from Aajker Creek in Gallatin County, Montana. The claim’s priority date and type of historical right appear blank on the claim’s preliminary decree abstract. The claim thus received the following issue remarks:

NO PRIORITY DATE WAS CLAIMED.

NO TYPE OF HISTORICAL RIGHT WAS CLAIMED.
DOCUMENTATION TO SUPPORT THE TYPE OF HISTORICAL
RIGHT WAS NOT SUBMITTED WITH THIS CLAIM.

On January 22, 2018, Combs filed an Amendment to Statement of Claim stating the claim was a “use right” with a June 1901 priority date. The amendment further stated, “inadvertent omission on original form,” and “[p]riority date claimed to the best of owners knowledge for date of original homestead.”

On October 16, 2018, Combs filed an objection to the claim’s priority date and type of historic right, stating: “Property homesteaded in 1901 according to previous owner’s property. Property was improved in 1940’s but was farmed for decades prior. Use right=livestock direct from source was not required to be filed with the county.” Attached to the objection is a Property Report Card indicating “existing dwellings” including a “ranch” built in “1900” and a “split level” built in “1969.”

The court’s previous order asked Combs for additional information supporting historical water use on the property. While Combs was not able to provide definitive evidence, Combs provided the following circumstantial evidence. The property was

homesteaded in 1901. Combs spoke with Sandy Gagnon, an elderly neighbor, about “whether he could attest to any livestock having been kept at the property in question.” Gagnon “was unequivocal that the history of livestock on the property was established well before 1973.” Combs further notes: “Adjacent neighbors on the same creek have their water rights claims established in the 1800’s.”

Combs does not have personal knowledge of pre-1973 stock use because she acquired the property after 1973. This situation is not unique, particularly in the Gallatin Valley where land transfers are happening at an increasing pace. While the evidence in the record does not definitively put stock on the property drinking from Aajker Creek in 1901, the court finds it more likely that not that the accurate priority date for this claim is June 30, 1901, and that the claim is a “use right.” The court is further comforted by the fact that Combs objected to this claim’s priority date, meaning water users in the basin had the opportunity to weigh in, but did not.

The Water Court instates the June 30, 1901 priority date and “use” type of right, resolving the filed objection and amendment request from Combs.

2. *Whether a preponderance of the evidence supports modifying the priority date for water right claim 41H 30115330.*

Water right claim 41H 30115330 is a previously exempt domestic-household use right for groundwater from a well in the SESESW of Section 16, Township 2S, Range 5E, Gallatin County. The priority date appears blank on the claim’s preliminary decree abstract. The claim’s preliminary decree abstract states the claim’s volume is 6 acre-feet per year (AC-FT).

The claim received the following priority date issue remarks:

NO PRIORITY DATE WAS CLAIMED.

THE PRIORITY DATE MAY BE QUESTIONABLE. ACCORDING TO INFORMATION IN THE CLAIM FILE, IT APPEARS WATER FROM THE SOURCE WAS FIRST USED IN 1969.

On October 16, 2018, Combs filed an objection to the claim’s the flow rate/volume and place of use/maximum acres, stating: “There is a homestead structure on the property that was built in 1901, which has served domestic purposes since that date.” Attached to

the objection is the same Property Report Card indicating “existing dwellings” including a “ranch” built in “1900” and a “split level” built in “1969.”

It appears DNRC suggested the 1969 priority date based on the Property Card appearing in the claim’s file; the Property Card indicates a dwelling was built in 1969. While the Property Report Card evidences property ownership, it does not necessarily indicate when or how the water right was historically used to the court.

The Water Court asked Combs to file additional information. On April 9, 2021, Combs filed the Declaration of Vested Groundwater Rights form indicating the earliest date the well was beneficially used was May 5, 1961.¹ Thus, a preponderance of the evidence supports the claim’s priority date in May 5, 1961. The court modifies the claim’s decree abstract accordingly.

3. *Whether a preponderance of the evidence supports modifying the volume and/or lawn and garden irrigation acres for water right claim 41H 30115330.*

Water right claim 41H 30115330 received the following volume issue remark:

THE CLAIMED VOLUME EXCEEDS THE 1.5 ACRE-FEET
GUIDELINE FOR THIS PURPOSE. ITS ACCURACY CANNOT BE
CONFIRMED DUE TO LACK OF DATA.

The water right claim’s preliminary decree abstract currently indicates the claim’s volume is 6 AC-FT.

DNRC calculates volume for domestic wells as follows: (1.5 AC-FT x number of households) + (2.5 AC-FT x number of acres). DNRC could not confirm the accuracy of the claimed volume in relation to its guideline because Combs left blank the “number of persons served” and the “number of acres of lawn and garden irrigation” lines on the statement of claim. On January 22, 2018, Combs filed an amendment indicating the well is for lawn and garden use on 1.5 acres. On October 16, 2018, Combs filed an objection to volume indicating “2 acres of lawn and garden are served by this water right.”

¹ Prior to the Montana Legislature’s enactment of the Montana Water Use Act, the 1961 Montana Groundwater Code required groundwater well appropriators to file a notice of completion with the appropriate county clerk and recorder. The 1961 Groundwater Code applied to original appropriations made from January 1, 1962, to July 1, 1973. The 1961 Groundwater Code does not apply to this water right claim; this claim’s first beneficial use pre-dates the 1961 Groundwater Code.

The court asked Combs to verify the accuracy of the acreage associated with the water right but did not receive additional information regarding the claim's volume. The court therefore looks to the most recent filing from Combs and finds the claimed volume within DNRC's volume guideline: (1.5 AC-FT x 1 household) + (2.5 AC-FT x 2 acres). A preponderance of the evidence does not support modifying the claim's volume. However, the Water Court reflects 2 acres of lawn and garden irrigation on the claim's decree abstract to reduce future confusion.

Finally, the exempt water rights claims received issue remarks giving notice to water users in the basin that the previously exempt claims did not appear in the September 26, 1985 temporary preliminary decree for Basin 41H. The water rights claims appeared in the October 11, 2018 preliminary decree for Basin 41H with the exempt-claim issue remarks. Thus, the exempt-claim issue remarks have served their notice purposes and are hereby removed.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks, to instate a **JUNE 30, 1901** priority date for water right claim 41H 30115329, to reflect water right claim 41H 30115329 is a "**USE**" right, to instate a **MAY 5, 1961** priority date for water right claim 41H 30115330, and to reflect **2** lawn and garden irrigation acres are associated with water right claim 41H 30115330. The Water Court attaches post-decree abstracts to reflect the changes made and files the Declaration of Vested Groundwater Rights form in the claim file for water right claim 41H 30115330 for future reference.

Kirsa Shelkey
Water Master
she/her/hers

Service via USPS Mail:

Jennifer J. Combs
730 Three Feathers Rd
Bozeman, MT 59718

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

Water Right Number: 41H 30115329 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: JENNIFER J COMBS
730 THREE FEATHERS RD
BOZEMAN, MT 59718 9174

Priority Date: JUNE 30, 1901

Type of Historical Right: USE

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: AAJKEK 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		SESESW	16	2S	5E	GALLATIN

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			SESESW	16	2S	5E	GALLATIN

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

Water Right Number: **41H 30115330** STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: ACTIVE

Owners: JENNIFER J COMBS
730 THREE FEATHERS RD
BOZEMAN, MT 59718 9174

Priority Date: MAY 5, 1961

Type of Historical Right: USE

Purpose (Use): DOMESTIC

Flow Rate: 35.00 GPM

Volume: 6.00 AC-FT

Households: 1

Source Name: GROUNDWATER

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		SESESW	16	2S	5E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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	2.00		SESESW	16	2S	5E	GALLATIN

Total: 2.00