

Montana Water Court
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41H-0234-R-2021

September 9, 2021

Montana Water Court

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

CLAIMANTS: Stacey A. Deck; Thomas G. Kubit; Edward G.
Reiser; Mary R. Reiser

CASE 41H-0234-R-2021
41H 210808-00

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 25659-00, 41H 210808-00, 41H 30071994, 41H 30071997, and 41H 30072000 appeared in the Preliminary Decree for the Gallatin River (Basin 41H). The Department of Natural Resources and Conservation's (DNRC) water

rights database maintains: Stacey Deck and Thomas Kubit co-own water right claim 41H 25659-00; Stacey Deck, Thomas Kubit, and Edward and Mary Resier¹ co-own water right claim 41H 210808-00; Campbell Jefferson Revocable Trust owns water right claim 41H 30071994; Lisa Volgenau and Christopher Fitzgerald co-own water rights claims 41H 30071997; and John Ducken owns water right claim 41H 30072000.

The Water Court originally consolidated the claims² into Water Court case 41H-0232-R-2020 and held a December 2, 2020, status conference attended by Deck, Kubit, Galen Jefferson for Campbell Jefferson Revocable Trust, Volgenau, and Fitzgerald. The court explained each claim received the same issue remark resulting from DNRC's preparation of the preliminary decree. The issue remark on each claim states:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 75 MINER'S INCHES DECREED IN CASE NO. 3850, GALLATIN COUNTY. 41H 25659-00, 41H 210808-00, 41H 30071994, 41H 30071997, 41H 30072000.

The Water Court and the parties determined a settlement filing deadline would be appropriate to resolve the decree-exceeded-flow-rate issue. Galen Jefferson and Bruce Campbell, as well as Lisa Volgenau and Christopher Fitzgerald filed information indicating the flow rate associated with their water rights appeared accurate. On July 16, 2021, Stacey Deck and Tom Kubit filed information resolving the decree-exceeded issue remark.

The court removed water right claim 41H 210808-00 from Water Court case 41H-R-0232-2020 to be closed by a Master's Report in the present case—Water Court case 41H-R-0234-2021.

The Water Court presently resolves the issue in this case.

ISSUES

1. *Whether the decree-exceeded issue involving water right claim 41H 210808-00 is resolved.*

APPLICABLE LAW

¹ At the status conference, the parties discussed the Reisers were deceased, and that the appropriate paperwork had been filed with DNRC, but not reflected in DNRC's water rights database.

² The court originally consolidated water right claim 41H 30071999 into Water Court case 41H-0232-R-2021. The court removed the claim to be reconsolidated in a separate case because of unresolved issue remarks not related to the present decree-exceeded issue.

“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.

The Water Court may correct a clerical mistake found in a judgment, order, or other part of the record on motion or on its own, with or without notice. Rule 60(a), M.R.Civ.P.

DISCUSSION

1. *Whether the decree-exceeded issue involving water right claim 41H 210808-00 is resolved.*

Water rights claims 41H 25659-00, 41H 210808-00, 41H 30071994, 41H 30071997, and 41H 30072000 are decreed rights with a June 1, 1873, priority date. The Decree in Case No. 3850, Gallatin County, appears in each of the claims’ files, attached to the claims’ original statements of claim, supporting the original appropriator’s beneficial use of water—75 miners inches—on the claimed priority date—June 1, 1873.

DNRC marked each of the consolidated water rights claims with a remark stating:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 75 MINER'S INCHES DECREED IN CASE NO. 3850, GALLATIN COUNTY. 41H 25659-00, 41H 210808-00, 41H 30071994, 41H 30071997, 41H 30072000.

The remark flagged the existence of an unresolved decree-exceeded issue to the court: If the 75 miner’s inches decreed in Case No. 3850, Gallatin County (*Bell v. Armstrong*), is the basis for the claims’ flow rates, then the sum of the claims’ flow rates

cannot exceed 75 miner's inches. The sum of the claims' flow rates for water rights claims presently 41H 25659-00, 41H 210808-00, 41H 30071994, 41H 30071997, 41H 30072000 exceeds 75 miner's inches.

The July 16, 2021, filing states there are two entries for "Holloway, W.L." for 75 miner's inches on June 1, 1873; water rights claims 41H 210808-00 and 41H 25659-00 were each decreed 75 miners inches. The Court here incorporates the filing for reference:

After working with Mary Crable, Water Resource Specialist of the Montana Dept. of Natural Resources and Conservation, I am presenting evidence that proves water right 41H 25659-00 (and its children 41H 30071994, 41H 30071997, 41H 30072000) is allocated 75 miners inches (MI) total and water right 41H 210808-00 is also allocated 75 MI.

1. Decree 3850 (from Bell vs Armstrong) from 1909 does limit the amount of water pulled from the ditch. Please see the attachment titled "Decree 3850.Bell.vs.Armstrong.ReferenceBook.pdf." Page 10 of document (page 6 of the pdf) lists 2 entries for the Holloway, W.L. both show 75MI and a June 1,1873 date.

Thus, water right 41H 210808-00 is entitled to the 75 MI and water right 41H 25659-00 is also entitled to 75 MI of water.

2. Water rights 41H 025659-00 and 41H 21808-00 appeared before the court in case 41H-147. A Stipulation was filed on December 27, 1991, and a Master's Report was issued on April 6, 1993. The Master's Report specifies that the Stipulation appears proper and is accepted by the court. The Stipulation specifies that claim 41H 25659-00 is entitled to 75 MI of the June 1, 1873, decreed right and that claim 41H 210808-00 is entitled to 75 MI of the June 1, 1873, decreed right. As stated above in #1, 75 MI was decreed to W.L. Holloway twice. This allocation of 75 miner's inches to each water right lines up with the decree from case 3850, Bell v. Armstrong. The Master's report establishes that both rights are for 75 MI with a June 1,1873, priority date. The Order Adopting Master's report was filed May 5, 1993. This Master's Report is evidence that there is not a decree exceeded issue amongst 41H 25659-00 and 41H 210808-00 as both rights were decreed with 75 MI and a June 1, 1873, priority date in the report.

3. Claims 41H 30071994, 41H 30071997, 41H 30072000 are child claims to 41H 25659-00. The sum of the flow rates for these claims is 843.74 gallons per minute (gpm). 843.74 gpm is equal to [75 miners inches.] There is no decree exceeded issue amongst the parent and child claims.

A preponderance of the evidence supports DNRC added the issue remarks in error, despite the Court's previous determination that two allocations for 75 miners inches were

decreed. The filed information resolves the issue remarks. The flow rate for water right claim 41H 210808-00 will remain as it appeared in the preliminary decree.

Water right claim 41H 210808-00 received an additional issue remark stating:

THE REQUEST TO SPLIT, SUBMITTED ON 04/02/2015, WILL BE PROCESSED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

Upon review of the aforementioned split request (Form No. 641) and attached September 20, 2018, DNRM Memorandum, it appears there are “multiple form deficiencies, potential Place of Use legal land description errors, and claim file inconsistencies. Multiple potential owners are not represented as well as current owners on the claim.” As stated by the September 26, 2018, Water Court’s Closing Order, “other claimants of the claim have not signed off on the proposed changes, and there are place of use description errors.”

The information necessary to split the claim is not before the court. Furthermore, the Water Court no longer oversees split requests. The claim’s owners should contact DNRC if the parties are still interested in splitting water right claim 41H 210808-00.

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:

Stacey A. Deck
Thomas G. Kubit
PO Box 6612
Bozeman, MT 59771

Edward G. Reiser
Mary R. Reiser
~~49 Cottonwood Rd~~
~~Townsend, MT 59644~~
(Return mail received)

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

Water Right Number: **41H 210808-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

STACEY A DECK
PO BOX 6612
BOZEMAN, MT 59771 6612

THOMAS G KUBIT
PO BOX 6612
BOZEMAN, MT 59771 6612

EDWARD G REISER
DECEASED
49 COTTONWOOD RD

TOWNSEND, MT 59644 9607

MARY R REISER
DECEASED
49 COTTONWOOD RD

TOWNSEND, MT 59644 9607

***Priority Date:** JUNE 1, 1873

***Type of Historical Right:** DECREED

***Purpose (Use):** IRRIGATION

Irrigation Type: SPRINKLER

***Flow Rate:** 1.88 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:** 173.30

***Source Name:** BIG BEAR 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		NWSEW	29	3S	5E	GALLATIN

Period of Diversion: MAY 15 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: HOLLOWAY-WOODWORTH DITCH

***Period of Use:** MAY 15 TO OCTOBER 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>
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1	150.40	E2	24	3S	4E	GALLATIN
2	22.90	W2W2	19	3S	5E	GALLATIN
Total:	173.30					

Remarks:

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41H 110406-00.