

41H-0237-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: Albert D. Bos; Joan D. Bos

OBJECTOR: Albert D. Bos

CASE 41H-0237-R-2021
41H 126847-00

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 126847-00, owned by Albert and Joan Bos, 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. The issue remarks state:

THE POINT OF DIVERSION LEGAL LAND DESCRIPTION COULD NOT BE REFINED FROM INFORMATION IN THE CLAIM FILE.

WATER IS NOT DIVERTED FROM THE CLAIMED SOURCE.

On April 19, 2019, Albert Bos filed an objection to the water right claim's point of diversion/means of diversion.

The Water Court consolidated water right claim 41H 126847-00 into Water Court case 41H-0237-R-2021 and set filing deadlines pursuant to § 85-2-248(5), MCA, for Bos to contact and work with DNRC to resolve the objection and issue remarks.

On July 15, 2021, DNRC filed a Memorandum (DNRC Memo) with the Water Court indicating Bos contacted DNRC. The DNRC Memo includes DNRC's recommendations for resolving the issues and maps depicting the two points of diversion associated with the water right claim.

The Water Court presently resolves the issues in this case.

ISSUES

1. *Whether a preponderance of the evidence supports water right claim 41H 126847-00 utilizes two points of diversion diverting water from the claimed source—Godfrey Creek—in Gallatin County, Montana.*

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 water right claim 41H 126847-00 utilizes two points of diversion diverting water from the claimed source—Godfrey Creek—in Gallatin County, Montana.

The preliminary decree abstract for water right claim 41H 126847-00 indicates the water right claim is a sprinkler/flood-irrigation use right for surface water diverted from Godfrey Creek by a headgate in the NESESE of Section 13, Township 1S, Range 3E, Gallatin County, Montana, for use on forty-five acres in the NE of Section 13. Issue remarks appearing on the claim's preliminary decree abstract state:

THE POINT OF DIVERSION LEGAL LAND DESCRIPTION COULD NOT BE REFINED FROM INFORMATION IN THE CLAIM FILE.

WATER IS NOT DIVERTED FROM THE CLAIMED SOURCE.

The objection to the claim's point of diversion/means of diversion filed by Albert Bos asserts: "I divert water from Godfrey Creek by use of a rock dam with ditches on either side of the creek, or by use of the Valley Ditch, again with a head ditch along the canal and a headgate buried in the ditch bank."

The Water Court sought DNRC's expertise because it was unclear whether two points of diversion were associated with the water right claim, or if Bos' objection discussed two separate water rights claims.

The DNRC Memo states Point of Diversion ID No. 1 is in the SWSWNE of Section 13, Township 1S, Range 3E, Gallatin County, not in the NESESE of Section 13, Township 1S, Range 3E, Gallatin County. The Water Court here excerpts the DNRC Memo for future reference:

Mr. Bos filed an objection to the Point of Diversion (POD) for this water right, providing clarification and evidence for the diversion of water from Godfrey Creek to the Place of Use (POU) on his property along with a detailed map. He subsequently submitted hand-drawn maps on aerial imagery and photos of the individual diversions to DNRC, reiterating the basis for his objection.

Claimant emphasized a rock dam is placed and removed seasonally to 'check up' (build a head of water) the water to divert water to these ditches and so is not visible in all aerial imagery. DNRC used aerial imagery from 1990 as a reference as these ditches are very clearly visible. USDA imagery from 1979, and WRS photos from 1947, show these ditches as well, yet are much

less easily decipherable at the lower resolution of the photos as scanned. The legal land description for this POD currently reads NESENE of Section 13, Township 1 South, Range 3 East, Gallatin County. The correct location is actually **SWSWNE Section 13, Township 1 South, Range 3 East, Gallatin County**.

The DNRC Memo additionally indicates a secondary point of diversion is associated with the water right claim and should be added to the claim's decree abstract. The DNRC Memo states:

DNRC was also able to pinpoint the referenced conveyance of water from Godfrey Creek via Valley Ditch (which does not appear to be included in the objection other than the map provided.) The Valley Ditch is not currently represented as a POD on the claim abstract nor referenced in the claim file. DNRC believes the following POD should be added to the claim abstract, with the legal land description of the point where it crosses Godfrey Creek: **SWSESW of Section 13, Township 1 South, Range 3 East, Gallatin County**. The Means of Diversion for this second POD should be a Headgate. The Ditch Name should be Valley Ditch. All other relevant elements should match the first listed POD.

Note: There is a diversion "down ditch" of this initial POD which is marked on the map and appears to be a continuation of Valley Ditch to the POU, but which does not require a POD listing on the abstract as it is not on the Source and does not meet the criteria for a 'secondary' diversion.

A preponderance of the evidence therefore supports two points of diversion are associated with water right claim 41H 126847-00—one in the in the SWSWNE of Section 13, Township 1S, Range 3E, Gallatin County, and the other in the SWSESW of Section 13, Township 1 South, Range 3 East, Gallatin County, via a headgate on the Valley Ditch. The point of diversion element will appear as follows on the water right claim's post-decree abstract:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1			SWSWNE	NESENE	13	1S	3E	GALLATIN

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
2			SWSESW	13	1S	3E	GALLATIN

Period of Diversion: **MAY 1 to OCTOBER 31**

Diversion Means: **HEADGATE**

Ditch Name: **VALLEY DITCH**

Period of Use: **MAY 1 TO OCTOBER 31**

The DNRC Memo confirms the water right claim utilizes water from the claimed source. To this end, the DNRC Memo states:

The original claim form states that water used in this right is wastewater from the Keughen and Davis ditches (West Gallatin River). Based on information provided by Mr. Bos, while the Valley Ditch does collect some waste and seepage water from the Keughen Ditch, the water used in this right is solely water from Godfrey Creek. DNRC believes this remark may be removed from the claim abstract based on this clarification.

The issue remarks are resolved and hereby removed from the claim's post-decree abstract. The court's findings of fact and conclusions of law regarding the claim's point of diversion and removal of the resolved issue remarks resolve Bos' objection.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks and to modify the claim's point of diversion as follows:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1			SWSWNE	NESENE	13	1S	3E	GALLATIN

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
2			SWSESW	13	1S	3E	GALLATIN

Period of Diversion: **MAY 1 to OCTOBER 31**

Diversion Means: **HEADGATE**

Ditch Name: **VALLEY DITCH**

Period of Use: **MAY 1 TO OCTOBER 31**

The Water Court attaches a post-decree abstract of the water right claim and the maps attached to the DNRC Memo to this Master's Report to evidence the changes made. The court additionally places a copy of the DNRC Memo in the claim file for water right claim 41H 126847-00 for future convenience.

Kirsa Shelkey
Water Master
she/her/hers

Service via USPS Mail:

Albert D. Bos
Joan D. Bos
8070 Churchill Rd
Manhattan, MT 59741

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

Water Right Number: **41H 126847-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ALBERT D BOS
 8070 CHURCHILL RD
 MANHATTAN, MT 59741

 JOAN D BOS
 8070 CHURCHILL RD
 MANHATTAN, MT 59741

Priority Date: DECEMBER 31, 1915

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 2.08 CFS

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

Climatic Area: 3 - MODERATE

***Maximum Acres:** 45.00

Source Name: GODFREY 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		SWSWNE	13	1S	3E	GALLATIN

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

2		SWSESW	13	1S	3E	GALLATIN
---	--	--------	----	----	----	----------

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: VALLEY DITCH

Period of Use: MAY 1 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>
1	45.00		NE	13	1S	3E	GALLATIN

Total: 45.00