

Montana Water Court
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ELECTRONICALLY FILED

41H-0244-R-2021

September 1, 2021

Montana Water Court

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

CLAIMANT: BBR Family LLC

OBJECTOR: National Park Service Water Resources Division

COUNTEROBJECTOR: Duncan T. Patten

CASE 41H-0244-R-2021
41H 139125-00

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 139125-00, owned by BBR Family LLC, appeared in the Preliminary Decree for the Gallatin River (Basin 41H). The United States National Parks

Service, Water Resources Division (NPS), and Duncan Patten, managing member for BBR Family LLC, filed objections to the claim's maximum acres irrigated.

The Water Court consolidated water right claim 41H 139125-00 into Water Court case 41H-0244-R-2021 and set a filing deadline for the parties to file settlement documents with the court resolving the objections. On July 29, 2021, the parties filed a Stipulation to Resolve Objections with the court.

The Water Court presently resolves the issue in this case.

ISSUES

1. *Whether the Water Court approves the stipulation filed by the parties and modifies the claim's place of use and maximum acres irrigated consistent with the filed stipulation.*

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 modifies the claim's place of use and maximum acres irrigated consistent with the filed stipulation.*

The preliminary decree abstract indicates the claim is a flood-irrigation use right for surface water from Monument Creek used on seventy-five acres in Gallatin County, Montana. The water right claim's priority date is December 31, 1923.

The United States National Parks Service, Water Resources Division (NPS), filed a May 9, 2019 objection to the claim, stating:

The claimant claims to irrigate a maximum of 75 acres. NPS examination did not find evidence to support this acreage, but could only find 12 acres.

Evidence is needed to document the actual historic beneficial use, if any, for this claim.

Duncan Patten, managing member for BBR Family LLC, additionally filed a July 29, 2019 objection to the claim, stating:

The original claim was to irrigate 75 acres. Some acreage has been abandoned. 18 acres still can be irrigated during dry years or when needed. Our claim should continue for at least 18 acres plus flow-through water for stock and fire-fighting water.

The July 29, 2021 Stipulation Resolving Objections signed and filed by the parties states:

1. The maximum acres for the Claim should be reduced to 18.00.
2. The place of use for the Claim should be modified as follows (with changes reflected in **BOLD**):

Place of Use:

<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	8.00		SWNENW	28	9S	SE	GALLATIN
2	10.00		NWSENW	28	9S	5E	GALLATIN
3	20.00		NENW	28	9S	SE	GALLATIN
4	20.00		SWSE	21	9S	5E	GALLATIN

Total: **18.00**

Based on the court's review, the Stipulation Resolving Objections is not contrary to law, court rule, or public policy. The Stipulation Resolving Objections does not propose modifications enlarging any element of the water right claim. In fact, the stipulation requests the court to reduce the claim's maximum acres irrigated and place of use. The Water Court approves the Stipulation Resolving Objections filed by the parties, and modifies the claim's maximum acres irrigated and place of use as follows:

Maximum Acres: 18.00

Place of Use:

<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>
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3	20.00		NENW	28	9S	SE	GALLATIN
4	20.00		SWSE	21	9S	5E	GALLATIN

Total: **18.00**

Water right claim 41H 139125-00 received an issue remark providing notice DNRC modified an element of the claim during reexamination of the basin. The issue remark states if no objections are filed to the claim, the remark will be removed. The claim did not receive

objections regarding the modified element, no proceedings are required, and the issue remark shall be removed.

RECOMMENDATIONS

This Water Master recommends the Water Court to approve the stipulation, and to modify the claim's maximum acres irrigated and place of use consistent with the filed stipulation. The Water Court attaches a post-decree abstract for the water right claim to this Master's Report, as well as the Stipulation Resolving Objections filed by the parties.

Kirsa Shelkey
Water Master
she/her/hers

Service via USPS Mail:

BBR Family LLC
Duncan T. Patten
Black Butte Ranch
8945 Trooper Trl
Bozeman, MT 59715

Service Via Electronic Mail:

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william.bridges@usdoj.gov
efile_nrs.enrd@usdoj.gov

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

Water Right Number: 41H 139125-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: BBR FAMILY LLC
8945 TROOPER TRL
BOZEMAN, MT 59715

Priority Date: DECEMBER 31, 1923

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 273.77 GPM

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

Climatic Area: 5 - LOW

Maximum Acres: 18.00

Source Name: MONUMENT 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		SWSWSE	21	9S	5E	GALLATIN

Period of Diversion: JUNE 15 TO SEPTEMBER 15

Diversion Means: HEADGATE

2		NESENW	28	9S	5E	GALLATIN
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Period of Diversion: JUNE 15 TO SEPTEMBER 15

Diversion Means: HEADGATE

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSENEW	28	9S	5E	GALLATIN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 11.00 FEET

Depth: 8.00 FEET

Surface Area: 0.10 ACRES

Capacity: 0.40 ACRE-FEET

SEE THE RESERVOIR WORKSHEET IN THE CLAIM FILE FOR ADDITIONAL RESERVOIR DATA.

Period of Use: JUNE 15 TO SEPTEMBER 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	8.00		SWNENW	28	9S	5E	GALLATIN
2	10.00		NWSENW	28	9S	5E	GALLATIN
Total:	<u>18.00</u>						

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.

139125-00 139126-00

41H-0244-R-2021

July 29, 2021

Montana Water Court

LEIF M. JOHNSON, Acting U.S. Attorney, District of Montana
JEAN A. WILLIAMS, Acting Assistant Attorney General
Environment & Natural Resources Division
ROMNEY S. PHILPOTT, Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
PRELIMINARY DECREE

CLAIMANT: BBR Family LLC

OBJECTOR: National Park Service Water Resources
Division

COUNTEROBJECTOR: Duncan T. Patten

CASE 41H-0244-R-2021
41H 139125-00

STIPULATION TO RESOLVE OBJECTIONS

This Stipulation, entered into by Objector United States of America, on behalf of the National Park Service, Water Resources Division (“United States”), Claimant BBR Family LLC (“Claimant”), and Counterobjector Duncan T. Patten, Managing Member of BBR Family LLC, is for the purpose of resolving the United States’ objections as to Water Right Claim No. 41H 139125-00 (“Claim”). This Stipulation is entered into as of the last date accompanying the signatures below.

A. Pursuant to Mont. Code Ann. § 85-2-221, Claimant’s predecessor timely filed a Statement of Claim for the Claim with the Department of Natural Resources and Conservation.

B. Pursuant to Mont. Code Ann. § 85-2-233, the United States timely filed a Notice of Objection to the Claim as it appears on the Preliminary Decree for Basin 41H. Duncan Patten, Managing Member of Claimant, timely filed a counterobjection form in response to the objection on behalf of Claimant.

C. Claim 41H 139125-00 is a use right for irrigation from Monument Creek for a maximum of 75 acres as described in the Preliminary Decree. The water right is no longer used for some of the formerly irrigated acres.

D. In the interest of resolving this case without the need for further litigation, the parties have executed this Stipulation.

AGREEMENT

The parties stipulate as follows:

1. The maximum acres for the Claim should be reduced to 18.00.
2. The place of use for the Claim should be modified as follows (with changes reflected in **BOLD**):

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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3	20.00		NENW	28	9S	5E	Gallatin
4	20.00		SWSE	21	9S	5E	Gallatin
Total:	18.00						

A proposed abstract reflecting this change is attached hereto as Exhibit 1.

3. Upon entry of a ruling and final order in this case reflecting the amendment specified above, the United States' objections to the Claim and the counterobjection filed by Duncan T. Patten shall be deemed resolved, provided that such order(s) do not expand or change other substantive elements of the claim.

4. This Stipulation is the compromise of disputed water claims and is not to be construed as an admission against the interests of any party.

5. The terms of this Stipulation are binding on the parties, their successors, and assigns. Nothing in this Stipulation shall create any right, claim, cause of action, objection, defense, or other remedy in any person not a party to the Stipulation.

6. Each party agrees to bear its own costs and attorney fees arising from the negotiation and execution of the Stipulation and in proceedings before the Montana Water Court.

7. Each undersigned party entered into and executed this Stipulation voluntarily, in good faith, and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence, whatsoever.

8. The parties hereto represent and affirm that the signatories to this Stipulation are legally authorized to bind the party to this matter.

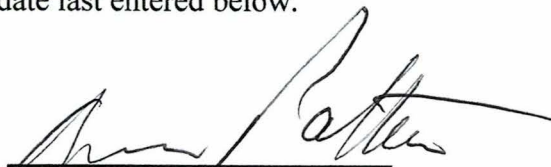
9. This Stipulation may be executed by the parties in counterparts, each of which when executed and filed with the Montana Water Court shall be an original, but all of which together shall constitute one instrument.

10. The parties agree that this document (¶¶ 1-10) embodies the entire stipulation of the parties.

IT IS SO AGREED AND STIPULATED on the date last entered below.

Date:

7/24/21



DUNCAN T. PATTEN
Managing Member
BBR Family LLC
8945 Trooper Tr.
Bozeman, MT 59715

Date: July 29, 2021

JEAN E. WILLIAMS
Acting Assistant Attorney General



ROMNEY S. PHILPOTT, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division

Natural Resources Section
999 18th Street, South Terrace – Suite 370
Denver, CO 80202

ATTORNEYS FOR UNITED STATES OF
AMERICA, National Park Service

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1424 9TH AVENUE P.O.BOX 201601 HELENA, MONTANA 59620-1601

GENERAL ABSTRACT

Water Right Number: 41H 139125-00 STATEMENT OF CLAIM
Version: 2 -- REEXAMINED

Version Status: ACTIVE

Owners: BBR FAMILY LLC
8945 TROOPER TRL
BOZEMAN, MT 59715

Priority Date: DECEMBER 31, 1923

Enforceable Priority Date: DECEMBER 31, 1923

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Maximum Flow Rate: 273.77 GPM

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

Climatic Area: 5 - LOW

Maximum Acres: **18.00**

Source Name: MONUMENT 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		SWSWSE	21	9S	5E	GALLATIN

Period of Diversion: JUNE 15 TO SEPTEMBER 15

Diversion Means: HEADGATE

2		NESENW	28	9S	5E	GALLATIN
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Period of Diversion: JUNE 15 TO SEPTEMBER 15

Diversion Means: HEADGATE

Reservoir: OFF STREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSE	28	9S	5E	GALLATIN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 11.00 FEET

Depth: 8.00 FEET

Surface Area: 0.10 ACRES

Current Capacity: 0.40 ACRE-FEET

SEE THE RESERVOIR WORKSHEET IN THE CLAIM FILE FOR ADDITIONAL RESERVOIR DATA.

Period of Use: JUNE 15 to SEPTEMBER 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>
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Geocodes/Valid: 06-0160-28-1-01-02-0000 - Y

Remarks:

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139125-00 139126-00

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS

Remarks:

ONE.

OWNERSHIP UPDATE RECEIVED

OWNERSHIP UPDATE TYPE DOR # 166293 RECEIVED 03/16/2017.

OWNERSHIP UPDATE TYPE DOR # 170628 RECEIVED 03/29/2018.

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRO REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDER. 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.

41H-0244-R-2021

July 29, 2021

Montana Water Court

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JEAN A. WILLIAMS, Acting Assistant Attorney General
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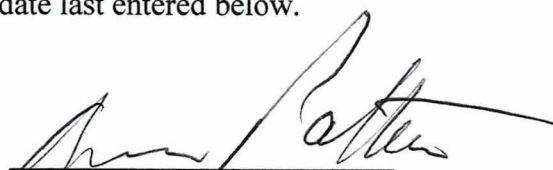
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Date: July 29, 2021

JEAN E. WILLIAMS
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STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1424 9TH AVENUE P.O.BOX 201601 HELENA, MONTANA 59620-1601

GENERAL ABSTRACT

Water Right Number: 41H 139125-00 STATEMENT OF CLAIM
Version: 2 -- REEXAMINED
Version Status: ACTIVE

Owners: BBR FAMILY LLC
8945 TROOPER TRL
BOZEMAN, MT 59715

Priority Date: DECEMBER 31, 1923
Enforceable Priority Date: DECEMBER 31, 1923

Type of Historical Right: USE

Purpose (use): IRRIGATION
Irrigation Type: FLOOD

Maximum Flow Rate: 273.77 GPM

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

Climatic Area: 5 - LOW

Maximum Acres: 18.00

Source Name: MONUMENT 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		SWSWSE	21	9S	5E	GALLATIN

Period of Diversion: JUNE 15 TO SEPTEMBER 15
Diversion Means: HEADGATE

2		NESENW	28	9S	5E	GALLATIN
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Period of Diversion: JUNE 15 TO SEPTEMBER 15
Diversion Means: HEADGATE

Reservoir: OFF STREAM
Govt Lot **Qtr Sec** **Sec** **Twp** **Rge** **County**
SWSWSE 28 9S 5E GALLATIN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 11.00 FEET
Depth: 8.00 FEET
Surface Area: 0.10 ACRES
Current Capacity: 0.40 ACRE-FEET

SEE THE RESERVOIR WORKSHEET IN THE CLAIM FILE FOR ADDITIONAL RESERVOIR DATA.

Period of Use: JUNE 15 to SEPTEMBER 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>
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Total:	18.00						

Geocodes/Valid: 06-0160-28-1-01-02-0000 - Y

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.

139125-00 139126-00

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS

Remarks:

ONE.

OWNERSHIP UPDATE RECEIVED

OWNERSHIP UPDATE TYPE DOR # 166293 RECEIVED 03/16/2017.

OWNERSHIP UPDATE TYPE DOR # 170628 RECEIVED 03/29/2018.

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRO REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDER. 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.