

Montana Water Court
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41H-0733-R-2021

September 13, 2021

Montana Water Court

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

CLAIMANTS: Matthew K. Adams; Heather Widlund; Schwing
Opportunity Fund V, LLC

CASE 41H-0733-R-2021
41H 136580-00
41H 136584-00

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 136580-00 and 41H 136584-00 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, an issue remark appearing on water right claim 41H 136584-00 indicates: "THE TYPE OF HISTORICAL RIGHT MAY BE

QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A FILED AND A USE RIGHT.”

The Water Court consolidated the water rights claims into Water Court case 41H-0733-R-2021 and set a filing deadline for the claim’s owners to file information evidencing whether water right claim 41H 136584-00 is a “filed right.”

On June 8, 2021, Abigail R. Brown filed a motion requesting the court to substitute Schwing Family Opportunity Fund V, LLC (Schwing) for Michael Evans, explaining that Schwing “purchased certain real property in Basin 41H formerly owned by Michael L. Evans and therefore is the successor in interest as claimant to water right claim 41H 136580-00.” Attached to the motion is a deed evidencing ownership.

Brown additionally filed notices of appearance for co-owners Schwing, Matthew K. Adams, and Heather Widlund, and requested an extension for good cause.

On July 9, 2021, Schwing, Matthew K. Adams, and Heather Widlund filed comments with the court.

The Water Court presently resolves the issue in this case.

ISSUES

1. *Whether Schwing co-owns water right claim 41H 136580-00 with the other co-owners of the water right claim as a matter of law.*
2. *Whether a preponderance of the evidence supports water right claim 41H 136584-00 is a “use right.”*

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.

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 Schwing co-owns water right claim 41H 136580-00 with the other co-owners of the water right claim as a matter of law.*

As a matter of law, “[w]ater rights transfer with the conveyance of real property[.] unless specifically reserved in an instrument of conveyance,” regardless of whether DNRC processes an ownership update or fee. *Guenther v. Guenther*, 2019 Mont. Water LEXIS 106, *11 (emphasis added)(citing § 85-2-403(1), MCA; *Adams v. Chilcott*, 182 Mont. 511, 518, 597 P.2d 1140, 1145 (1979); *MacLay v. Missoula Irrigation Dist.*, 90 Mont. 344, 3 P.2d 286 (1931)). Nothing in Montana’s water law statutes prohibits the Water Court from updating ownership as a matter of law in instances outside the purview of § 85-2-421 through § 85-2-246, MCA. Accordingly, consistent with Legislative intent, concern for judicial economy, and the Water Court’s statutory directive to resolve objections and issue remarks before issuance of a basin’s final decree, the Water Court updates legal water right ownership based on a preponderance of the evidence in the record.

Here, the conveyance by deed of a portion of the place of use associated with water right 41H 136580-00 from Michael Evans to Schwing evidences Schwing co-owns the water right claim with the other co-owners of the water right claim as a matter of law. The Water Court updates ownership accordingly.

2. *Whether a preponderance of the evidence supports water right claim 41H 136584-00 is a “use right.”*

An issue remark appearing on water right claim 41H 136584-00 indicates: “THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A FILED AND A USE RIGHT.”

The claim’s preliminary decree abstract indicates water right claim 41H 136584-00 is a filed sprinkler-irrigation right for surface water pumped from Bridger Creek in Gallatin County, Montana.

The Water Court resolves issue remarks before issuance of a final decree. Based on the court's review of the record, it appears water right claim 41H 136584-00 is a use right—not a filed right—with a December 31, 1887 priority date, consistent with a warranty deed appearing in the claim's file; no filing of appropriation is attached to the original statement of claim.

Additionally, water right claim 41H 136580-00 received an issue remark providing notice an element of the claim was modified during the reexamination process. The issue remark states if no objections are filed to the claim, the remark will be removed. The claim did not receive objections, no proceedings are required, and the issue remark shall be removed.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks, to update ownership of water right claim 41H 136580-00 by adding co-owner Schwing to the water right claim's post-decree abstract, and to reflect that water right claim 41H 136584-00 is a “use right” and not a “filed right.”

Kirsa Shelkey
Water Master
she/her/hers

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

Water Right Number: 41H 136580-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:

MATTHEW K ADAMS
516 N GRAND AVE
BOZEMAN, MT 59715 3512

HEATHER WIDLUND
516 N GRAND AVE
BOZEMAN, MT 59715 3512

AMY R WRIGHT-EVANS
PO BOX 4810
SEVIERVILLE, TN 37864 4810

SCHWING FAMILY OPPORTUNITY FUND V LLC
1102 RIVER BEND DR
HOUSTON, TX 77063

Priority Date: MAY 10, 1965

Type of Historical Right: FILED

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: UNNAMED TRIBUTARY OF BRIDGER CREEK

Source Type: SURFACE WATER
BIG DRAW DRAINAGE

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		NWNW	17	1S	7E	GALLATIN

Period of Diversion: APRIL 15 TO NOVEMBER 15

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2		NWSENW	17	1S	7E	GALLATIN
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Period of Diversion: APRIL 15 TO NOVEMBER 15

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: APRIL 15 TO NOVEMBER 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			NWNW	17	1S	7E	GALLATIN
2			NWSEnw	17	1S	7E	GALLATIN

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.

136580-00 136586-00

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

Water Right Number: **41H 136584-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MATTHEW K ADAMS
 516 N GRAND AVE
 BOZEMAN, MT 59715 3512

 HEATHER WIDLUND
 516 N GRAND AVE
 BOZEMAN, MT 59715 3512

Priority Date: DECEMBER 31, 1887

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 42.00 GPM

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: 3.00

Source Name: BRIDGER 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		NESENW	17	1S	7E	GALLATIN

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: PUMP

Period of Use: APRIL 15 TO OCTOBER 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	3.00		N2SENW	17	1S	7E	GALLATIN

Total: 3.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

136584-00 136585-00 136586-00

FILE REFLECTS AUTHORIZATION TO CHANGE POINT OF DIVERSION. COMPLETED 08/11/1980.