

Montana Water Court
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41H-0938-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: Bakwin Trail Creek LLC; Abigail Nelson

CASE 41H-0938-R-2021

41H 9949-00
41H 132296-00
41H 132298-00
41H 30110572
41H 30110573
41H 30110578

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 9949-00, 41H 132296-00, 41H 132298-00, 41H 30110572, 41H 30110573, 41H 30110578, owned by Abigail Nelson and Bakwin Trail Creek LLC, 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 Water Court consolidated the water rights claims into Water Court case 41H-0938-R-2021 and set filing deadlines for the claims' owners to contact and work with DNRC and for DNRC to file a memorandum with the Water Court pursuant to § 85-2-248(5), MCA.

The claims' owners did not contact DNRC. On September 2, 2021, DNRC filed a Memorandum (DNRC Memo), including DNRC's recommendations for resolving the issue remarks, with the court.

The Water Court presently resolves the issues in this case.

ISSUES

1. *Whether a preponderance of the evidence supports modifying the claimed place of use, maximum acres irrigated, volume, and/or flow rate for water right claim 41H 132296-00.*
2. *Whether a preponderance of the evidence supports modifying the priority date for previously exempt stock-use water right claim 41H 30110572.*

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 modifying the claimed place of use, maximum acres irrigated, volume, and/or flow rate for water right claim 41H 132296-00.*

Water right claim 41H 132296-00-00 received the following DNRC issue remarks:

THE CLAIMED PLACE OF USE AND ACRES IRRIGATED MAY BE QUESTIONABLE. REVIEW OF THE AVAILABLE DATA APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

Water right claim 41H 132296-00 is a filed flood-irrigation claim for surface water from an unnamed tributary of Meadow Creek in Gallatin County. The claim's preliminary decree abstract states the claim is for use on 40 maximum acres; the claim's flow rate and volume are presently 1.5 gallons-per-minute (GPM) and 200 acre-feet (AC-FT).

The DNRC Memo states:

Claimant originally claimed 40.0 acres of irrigation. Imagery available to DNRC did not provide sufficient clarity to recommend a resolution to the issue remarks above. While aerial photo R-26 does not significantly indicate irrigation, the property does appear to have markers of agriculture such as nearby fence lines which could delineate a field. DNRC does not have enough information at this time to create a map which would delineate these acres as claimed nor examined.

As such, the Water Court affords prima facie status to the originally claimed elements. DNRC has not met its burden. The maximum acres irrigated, flow rate, and volume for water right claim 41H 132296-00 shall remain as they appeared in the preliminary decree. The issue remarks regarding these elements are resolved and shall be removed.

2. *Whether a preponderance of the evidence supports modifying the priority date for previously exempt stock-use water right claim 41H 30110572.*

The issue remark appearing on the preliminary decree abstract for water right claim 41H 30110572 states: "THE PRIORITY DATE MAY BE QUESTIONABLE. ACCORDING TO INFORMATION IN THE CLAIM FILE, IT APPEARS WATER FROM THE SOURCE WAS FIRST USED IN 1891." Consistent with the filed February

21, 2017 Statement of Claim for Existing Water Right, the preliminary decree abstract for water right claim 41H 30110572 states the claim's priority date is December 31, 1889.

The DNRC Memo states:

The original claim form states "1889" as the date of first use which was standardized to December 31, 1889, per W.R.C.E.R., but the submitted Land Patent states an issuance of 8/4/1891. No other date of first use is mentioned in the documentation submitted. Without more information from the claimant, DNRC does not have enough information to recommend a resolution to this issue remark, since the issuance date of the Land Patent does not necessarily determine a date of first use but can act as supporting evidence to a claimed date.

NOTE: The remaining two exempt claims, 41H 30110573 and 41H 30110578, were submitted with claim 41H 30110572, using the same Land Patent for supporting documentation, and claimed 8/4/1891 as the date of first use.

Claims 41H 30110573 & 41H 30110578 did not receive [priority-date] issue remarks necessitating removal.

The claim's file contains an obituary for previous landowner Emil Hoell and an affidavit signed and sworn by Chris Bakwin indicating Bakwin had a personal relationship with Hoell and believed the land had been used since the 1800's. Bakwin filed the Statement of Claim for Existing Water Right claiming an "1889" priority date. As acknowledged by DNRC, while the attached August 4, 1891 patent reflects the earliest date documented by the United States Bureau of Land Management (BLM), the patent does not necessarily reflect the date of earliest beneficial use, nor does the fact that Bakwin claimed August 4, 1891, as the priority date for water rights claims 41H 30110573 and 41H 30110578. No evidence dispositively proves the claim's first beneficial use was in 1889. However, DNRC has not met its burden to overcome the prima facie status this court affords to the originally claimed priority date by a preponderance of the evidence.

Without additional evidence, the court affords prima facie status to the priority date originally claimed—"1889." The issue remark shall be removed, and the claim's priority date shall remain as claimed and reflected by the preliminary decree abstract in the preliminary decree.

Additionally, stock-use water rights claims 41H 30110572, 41H 30110573, 41H 30110578 received issue remarks providing notice the claims did not appear in the

September 26, 1985 temporary preliminary decree for Basin 41H because the claims were previously exempt from the filing requirements of § 85-2-221, MCA. The claims did however appear 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.

The consolidated claims further received issue remarks providing notice that elements of the claims were modified during reexamination of the basin. The issue remarks stated if no objections were filed to the claims, the issue remarks would be removed. The claims did not receive objections. No proceedings are required, and the issue remarks shall be removed.

Finally, water right claim 41H 132298-00 received an issue remark stating: “THERE HAS BEEN A POST 1973 EXPANSION OF THIS WATER RIGHT. SEE THE CLAIM FILE FOR DETAILS.” As stated by the DNRC Memo, “[t]his remark will be addressed by the New Appropriations staff and may require a Change Application to be filed by the claimant.” The issue does not require present resolution by the court and the issue remark shall be removed.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks. The court attaches post-decree abstracts for each water right claim to this Master’s Report to reflect the changes made, as well as the DNRC Memo for future reference.

Kirsa Shelkey
Water Master
she/her/hers

Service via USPS Mail:

Bakwin Trail Creek LLC
PO Box 1542
Bozeman, MT 59771

Abigail Nelson
316A Otter Creek Rd
Big Timber, MT 5901

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

ELECTRONICALLY FILED

41H-0938-R-2021

September 2, 2021



GREG GIANFORTE
GOVERNOR

STATE OF MONTANA

Montana Water Court

WATER RESOURCES DIVISION-BOZEMAN REGIONAL OFFICE
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2273 BOOT HILL COURT
SUITE 110
BOZEMAN, MONTANA 59715

MEMORANDUM

DATE: September 2, 2021

CASE HEADING: **CASE:** 41H-0938--R-2021

CLAIMS: 41H 9949-00 41H 30110572
41H 132296-00 41H 30110573
41H 132298-00 41H 30110578

TO: Kirsia Shelkey
Water Master

FROM: Kara Huyser
Water Resource Specialist

CLAIMANT(S): Bakwin Trail Creek LLC; Abigail Nelson

Introduction:

On June 9, 2021, the Water Court ordered the claimant to confer with the DNRC Bozeman Regional Office to resolve issue remarks placed as a result of DNRC claims examination and reexamination rules. The Water Court further requested DNRC provide a memorandum discussing the results of that conference and submit recommendations for the resolution of said remarks. DNRC received no contact from the claimant.

Materials Reviewed:

- Information in claim file
- USDA Aerial Imagery
- Water Resource Survey Aerial Photo R-26, dtd. 05/06/1947
- USGS Topographic Quadrangle: Bald Knob, 1987

Discussion:

41H 9949, Irrigation; MEADOW CREEK:

Point of Diversion Issue Remark, P88:

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. 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.

No objection appears to have been received so this issue remark may be removed from the claim abstract.

41H 132296-00, Irrigation; UNNAMED TRIBUTARY of MEADOW CREEK:

Place of Use Issue Remark, P289:

THE CLAIMED PLACE OF USE AND ACRES IRRIGATED MAY BE QUESTIONABLE. REVIEW OF THE AVAILABLE DATA APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

Volume Issue Remark, V55:

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

Flow Rate Issue Remark, F180:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

Claimant originally claimed 40.0 acres of irrigation. Imagery available to DNRC did not provide sufficient clarity to recommend a resolution to the issue remarks above. While aerial photo R-26 does not significantly indicate irrigation, the property does appear to have markers of agriculture such as nearby fence lines which could delineate a field. DNRC does not have enough information at this time to create a map which would delineate these acres as claimed nor examined.

41H 132296-00, Fish & Wildlife; UNNAMED TRIBUTARY of MEADOW CREEK:

Purpose Issue Remark, PUIS:

THERE HAS BEEN A POST 1973 EXPANSION OF THIS WATER RIGHT. SEE THE CLAIM FILE FOR DETAILS.

This remark will be addressed by the New Appropriations staff and may require a Change Application to be filed by the claimant.

Volume Issue Remark, V145:

A GUIDELINE FOR THE FLOW RATE AND VOLUME OF THIS CLAIM CANNOT BE DETERMINED FROM AVAILABLE INFORMATION, AND FLOW RATE AND VOLUME REMAIN AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE AND VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO

THIS CLAIM THE FLOW RATE AND VOLUME WILL BE DECREED AS CLAIMED,
AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

No objection appears to have been received for this issue and DNRC believes the remark may be removed from the claim.

41H 30110572, 41H 30110573, 41H 30110578 Stock; UNNAMED TRIBUTARY of MEADOW CREEK & MEADOW CREEK:

Priority Date Issue Remark, P405:

THE PRIORITY DATE MAY BE QUESTIONABLE. ACCORDING TO INFORMATION IN THE CLAIM FILE, IT APPEARS WATER FROM THE SOURCE WAS FIRST USED IN 1891.

The original claim form states “1889” as the date of first use which was standardized to December 31, 1889, per W.R.C.E.R., but the submitted Land Patent states an issuance of 8/4/1891. No other date of first use is mentioned in the documentation submitted. Without more information from the claimant, DNRC does not have enough information to recommend a resolution to this issue remark, since the issuance date of the Land Patent does not necessarily determine a date of first use but can act as supporting evidence to a claimed date.

NOTE: The remaining two exempt claims, 41H 30110573 and 41H 30110578, were submitted with claim 41H 30110572, using the same Land Patent for supporting documentation, and claimed 8/4/1891 as the date of first use.

Claims 41H 30110573 & 41H 30110578 did not receive issue remarks necessitating removal.

By: /s/ Kara Huyser September 2, 2021
Kara Huyser, Water Resource Specialist

REVIEWED:

By: /s/ Kerri Strasheim September 2, 2021
Kerri Strasheim, Bozeman Regional Manager

Electronic Service:

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Service via US Postal Service:

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Bozeman, MT 59771

Abigail Nelson
316A Otter Creek Rd
Big Timber, MT 59011

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

Water Right Number: 41H 9949-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ABIGAIL NELSON
316A OTTER CREEK RD
BIG TIMBER, MT 59011 7752

BAKWIN TRAIL CREEK LLC
PO BOX 1542
BOZEMAN, MT 59771

Priority Date: DECEMBER 31, 1886

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 426.36 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: 25.00

Source Name: MEADOW 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		SWSESE	2	3S	7E	GALLATIN

Period of Diversion: JUNE 1 TO JULY 15

Diversion Means: HEADGATE

Ditch Name: HOELL DITCH

Period of Use: JUNE 1 TO JULY 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	20.00		W2SE	2	3S	7E	GALLATIN
2	5.00		NESENW	2	3S	7E	GALLATIN
Total:	25.00						

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

Water Right Number: **41H 132296-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: BAKWIN TRAIL CREEK LLC
 PO BOX 1542
 BOZEMAN, MT 59771

Priority Date: MARCH 17, 1889

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.50 CFS

Volume: 200.00 AC-FT

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 40.00

Source Name: UNNAMED TRIBUTARY OF MEADOW 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		SENENW	12	3S	7E	GALLATIN

Period of Diversion: JUNE 1 TO OCTOBER 1

Diversion Means: HEADGATE

Period of Use: JUNE 1 TO OCTOBER 1

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	40.00		NWNW	12	3S	7E	GALLATIN

Total: 40.00