

41H-1145-R-2021

September 9, 2021

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

Montana Water Court

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CLAIMANT: Sico Montana LLC

NOTICE OF INTENT TO APPEAR: Whisper Ridge Ranch LLC

CASE 41H-1145-R-2021

41H 115511-00

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 115511-00, owned by Sico Montana, LLC (Sico), appeared in the Preliminary Decree for the Gallatin River (Basin 41H) with a "notice-only" issue remark giving water users notice the Montana Department of Natural Resources and Conservation (DNRC) modified the claim's ditch name during reexamination of Basin 41H.

On November 15, 2019, Whisper Ridge Ranch, LLC (Whisper Ridge), through counsel Ryan Mattick, filed a Notice of Intent to Appear (NOIA) in the case proceedings implicating the claim's ditch name.

To discuss whether the filed NOIA expands the issue in this case and to establish a plan for resolution, the court consolidated water right claim 41H 115511-00 into Water Court case 41H-1145-R-2021, and held a status conference attended by Ryan Mattick. A representative for Sico did not attend. Following the status conference, the Water Court set an additional filing deadline for Whisper Ridge to file information substantiating the NOIA party's filed NOIA. On July 14, 2021, Whisper Ridge filed information with the court.

The Water Court presently resolves the issue in this case.

ISSUES

1. *Whether the ditch name associated with water right claim 41H 115511-00 should be identified as Byrd Ditch.*

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 the ditch name associated with water right claim 41H 115511-00 should be identified as Byrd Ditch.*

Water right claim 41H 115511-00 is a filed flood-irrigation right for surface water diverted from Jackson Creek by headgates on the Byrd Ditches in Gallatin County, Montana. The notice-only issue remark regarding DNRC's modification to the ditch name—Byrd Ditches—for water right claim 41H 115511-00 states: "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."

The NOIA filed by Whisper Ridge states: "POD #1 NESWNE of Section 1 branches off of Whisper Ridge's Ditch, the Fordyce-Kirschner Ditch, and irrigates property owned by Whisper Ridge. The ditch name is in question. Sico Montana sold part of the place of use and therefore, a portion of this water right to Whisper Ridge's predecessor. Whisper Ridge Ranch should be added as a co-owner of this water right claim."

In Whisper Ridge's recent filing with the court, Whisper Ridge indicated: "it is appropriate for the point of diversion and ditch name for water right claim no. 41H 115511-00 to be identified as the 'Byrd Ditch.'" There are no other issues involved in adjudication of this claim. While the Water Court has indicated it will update ownership as a matter of law in Basin 41H after reviewing filed deeds evidencing clear ownership of a water right claim, it does so when an ownership issue is properly before the court or implicated by resolution of other outstanding issues before the court.

Whisper Ridge did not object to ownership. The court explained in its first order consolidating this case, the NOIA party cannot "[expand] the issues in a water rights case"; parties filing NOIAs do not have the ability to independently raise issues not identified on the objection list. *In re Erb*, 2016 Mont. Water Lexis 2, *12. The policy considerations behind the Water Court's holding in *In re Erb* are straight forward. Acceptance of a NOIA raising a new issue enables a NOIA party to circumvent the objection process prescribed by statute, deprives claimants of the right to counterobject, and deprives other water users notice that an objection exists. Cases involving NOIAs filed on claims with "notice-only" issue remarks routinely removed by the Water Court without additional proceedings are generally resolved by Closing Order.

The court appreciates Whisper Ridge's efforts to file chain-of-title documentation, but does not update ownership where there is no issue presently requiring resolution before the court. The water right claim will remain as it appeared in the preliminary decree. Ownership can be updated by contacting the Bozeman DNRC office.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remark. The court attaches a post-decree abstract to this Master's Report to reflect the changes made.

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 115511-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: SICO MONTANA LLC
509 GUI SANDO DE AVILA STE 200
TAMPA, FL 33613

Priority Date: APRIL 23, 1885

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 2.50 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: 90.00

Source Name: JACKSON 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		NESWNE	1	2S	7E	GALLATIN

Period of Diversion: MAY 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: BYRD DITCHES

2		SENENW	11	2S	7E	GALLATIN
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Period of Diversion: MAY 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: BYRD DITCHES

3		NESENW	11	2S	7E	GALLATIN
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Period of Diversion: MAY 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: BYRD DITCHES

Period of Use: MAY 1 TO NOVEMBER 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	60.00		N2	11	2S	7E	GALLATIN
2	30.00		W2SW	11	2S	7E	GALLATIN
Total:	90.00						

