

41H-1205-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: Rachel L. Weaver; Richard D. Weaver

CASE 41H-1205-R-2021

41H 140999-00

41H 141000-00

41H 141001-00

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 140999-00, 41H 141000-00, and 41H 141001-00, owned by Rachel and Richard Weaver, appeared in the Preliminary Decree for the Gallatin River (Basin 41H) with point-of-diversion 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-1205-R-2021 and set a filing deadline for the Weavers to review and verify the legal land descriptions identifying the claims' points and means of diversion.

On April 27, 2021, Richard Weaver filed information with the court. To ensure accurate adjudication of the water rights claims, the court asked the claims' owners to further contact and work with DNRC pursuant to § 85-2-248(5), MCA. Mr. Weaver met with DNRC on August 16, 2021. On August 27, 2021, DNRC filed a Memorandum (DNRC Memo), including its recommendations to resolve the issue remarks, with the Water Court.

The Water Court presently resolves the issue in this case.

ISSUES

1. *Whether a preponderance of the evidence supports modifying the points of diversion/means of diversion associated with water rights claims 41H 140999-00 and 41H 141000-00.*

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 points of diversion/means of diversion associated with water rights claims 41H 140999-00 and 41H 141000-00.*

Water right claim 41H 140999-00 is a sprinkler/flood-irrigation use right for surface water from Bird Spring Creek in Gallatin County, Montana. The preliminary decree abstract indicates the claim's means of diversion is a "PUMP/HEADGATE W/DITCH OR PIPELINE" in the SENWNW of Section 19, Township 2S, Range 6E, Gallatin County—the legal land description of the claim's point of diversion on Bird Spring Creek. The issue remark appearing on water right claim 41H 140999-00 states: "UNABLE TO DETERMINE THE LOCATION OF THE HEADGATE AND DITCH WITH AVAILABLE INFORMATION. THE CLAIM FILE IS LACKING A CLEAR MAP TO INDICATE THE LOCATION OF THE POINT OF DIVERSION."

The DNRC Memo recommends the Water Court to remove the resolved issue remark; Mr. Weaver verified the location of the point of diversion as stated by the preliminary decree abstract. The DNRC Memo includes a map depicting the point of diversion for water right claim 41H 140999-00 in the SENWNW of Section 19, Township 2S, Range 6E, Gallatin County, as originally claimed. The issue remark is hereby resolved and removed.

Water right claim 41H 141000-00 is a sprinkler/flood-irrigation use right for surface water from Nash Spring Creek in Gallatin County, Montana. The preliminary decree abstract indicates the claim's means of diversion is a "PUMP/HEADGATE W/DITCH OR PIPELINE" in the SENWNW of Section 19, Township 2S, Range 6E, Gallatin County—the legal land description of the claim's point of diversion on Nash Creek. The issue remark appearing on water right claim 41H 141000-00 states: "THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA."

The DNRC Memo recommends the Water Court to remove the resolved issue remark after correcting the legal land description for the claim's point of diversion consistent with discussions with Mr. Weaver. Mr. Weaver verified the historical location

of the point of diversion is in the NWSENW of Section 19, Township 2S, Range 6E, Gallatin County, and not in the SESENW of Section 19. The DNRC Memo includes a map depicting the point of diversion for water right claim 41H 141000-00 in the NWSENW of Section 19, Township 2S, Range 6E, Gallatin County. Accordingly, the Water Court makes the recommended correction and the issue remark is hereby resolved and removed.

Water right claim 41H 141001-00 additionally received issue remarks providing notice that elements of the claim were modified during reexamination of the basin. The issue remarks state if no objections are filed to the claim, the issue remarks will be removed. The claim did not receive objections. No proceedings are required, and the issue remarks shall be removed.

RECOMMENDATIONS

This Water Master recommends the Water Court to remove the resolved issue remarks and to correct the legal land description identifying the point of diversion associated with water right claim 41H 141000-00 from the ~~SESENW~~ of Section 19, Township 2S, Range 6E, Gallatin County, to the NWSENW of Section 19. 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:

Rachel L. Weaver
~~PO Box 547~~
~~Merkel, TX 79536~~
(Return mail received)
4833 Glenwood Dr Apt
Bozeman, MT 59718

Richard D. Weaver
2404 Spring Creek Dr
Bozeman, MT 59715

Note: Service List Updated 9-12-21

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

41H-1205-R-2021

August 27, 2021

Water Resources Division • Bozeman Regional Office

2273 Boot Hill Ct, Suite 110, Bozeman, MT 59715 Phone: (406) 586-3136 Fax: (406) 587-9726

GREG GIANFORTE, GOVERNOR

Montana Water Court
1539 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE: (406) 444-2074
FAX: (406) 444-2684PO BOX 201601
HELENA, MONTANA 59620-1601

MEMORANDUM

DATE: August 27, 2021
CASE HEADING: **CASE: 41H-1205-R-2021**
Claims: 41H 140999-00
41H 141000-00
41H 141001-00

TO: Kirsa Shelkey, *Water Master*
FROM: Mary Crable, *Water Resource Specialist*
CLAIMANTS: Rachel L. Weaver; Richard D. Weaver

INTRODUCTION:

On March 22, 2021, the Montana Water Court consolidated claims 41H 140999-00, 41H 141000-00, and 41H 141001 into Case 41H 1205-R-2021 because claims 41H 140999-00 and 41H 141000-00 appeared in the Preliminary Decree with point of diversion (POD) issue remarks. The Court ordered claimants Rachel L. Weaver and Richard D. Weaver to submit information to resolve the issue remarks.

On April 27, 2021, Richard Weaver submitted information to the Water Court to resolve the issue remarks, however, the information provided did not reflect the historic PODs claimed on the Statement of Claim filings (filing) for water rights 41H 1410999-00 and 41H 141000-00.

On June 16, 2021, the Water Court ordered claimants Rachel L. Weaver and Richard D. Weaver to confer with the DNRC Bozeman Regional Office to discuss the resolution to the issue remarks. It was further ordered that the DNRC file a memorandum that discusses the results of the conference and provides recommendations for the resolution of issue remarks by September 16, 2021. Richard Weaver contacted the DNRC on June 21, 2021 and met with the DNRC on August 16, 2021.

During the August 16, 2021, meeting, the DNRC explained to Mr. Weaver that the issue remarks only pertained to two of the water rights historic point of diversion. Mr. Weaver would like the court to disregard his previous response as he addressed all three water rights and did not accurately reflect the historic points of diversion.

MATERIALS REVIEWED:

- Claim files for 41H 140999-00 and 41H 141000-00

DISCUSSION:**CLAIM 41H 140999-00: 1866 IRRIGATION out of BIRD SPRING CREEK**

POINT OF DIVERSION ISSUE, PDIS:

UNABLE TO DETERMINE THE LOCATION OF THE HEADGATE AND DITCH WITH AVAILABLE INFORMATION. THE CLAIM FILE IS LACKING A CLEAR MAP TO INDICATE THE LOCATION OF THE POINT OF DIVERSION.

Mr. Weaver grew up within the place of use of this water right and is very knowledgeable about the historic distribution of the water as he used to help his father operate the headgates. Mr. Weaver mentioned that the landscape has changed over time and the 2017 aerial provided by the DNRC does not reflect the historic landscape. However, Mr. Weaver marked the location of the historic point of diversion on the 2017 aerial. See Figure 1.



Figure 1. POD located in the SENWNW of section 19, Township 2 S Range 6E, Gallatin County for water for water right 41H 140999-00.

While the landscape has changed, Mr. Weaver was able to verify the location of the headgate via a photograph that was submitted with the filing. See page 41 of the scanned document for this photo. The headgate for this water right is referred to as #3 on the filing.

Based upon the information provided by Mr. Weaver and the photographs submitted with the filing, the DNRC considers this issue remark resolved and recommends it be removed.

CLAIM 41H 141000-00: 1919 IRRIGATION out of NASH SPRING CREEK

POINT OF DIVERSION ISSUE, P49:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

As previously stated, Mr. Weaver mentioned the landscape has changed over time and that the 2017 aerial photo does not reflect the historic landscape. However, Mr. Weaver was able to mark the location of the historic point of diversion on the 2017 aerial. Mr. Weaver also verified the location of the headgate utilizing the photographs submitted with the filing. The photographs can be found on pages 5 through 7 of the scanned document for this right. The location Mr. Weaver marked on the aerial aligns with the location of the diversion marked on the map submitted with the filing (referred to as #1). However, a clarification to the legal land description is needed.

The historic point of diversion for this water right should be clarified from the SESENW of Section 19, Township 2S, Range 6E, Gallatin County to NWSENW of Section 19, Township 2S, Range 6E, Gallatin County. See figure 2 for the location of the POD for this right. See attached red-marked abstract for how this water right should read.

Based upon the information provided by Mr. Weaver and the photographs submitted with the filing, the DNRC considers this issue remark resolved and recommends it be removed.

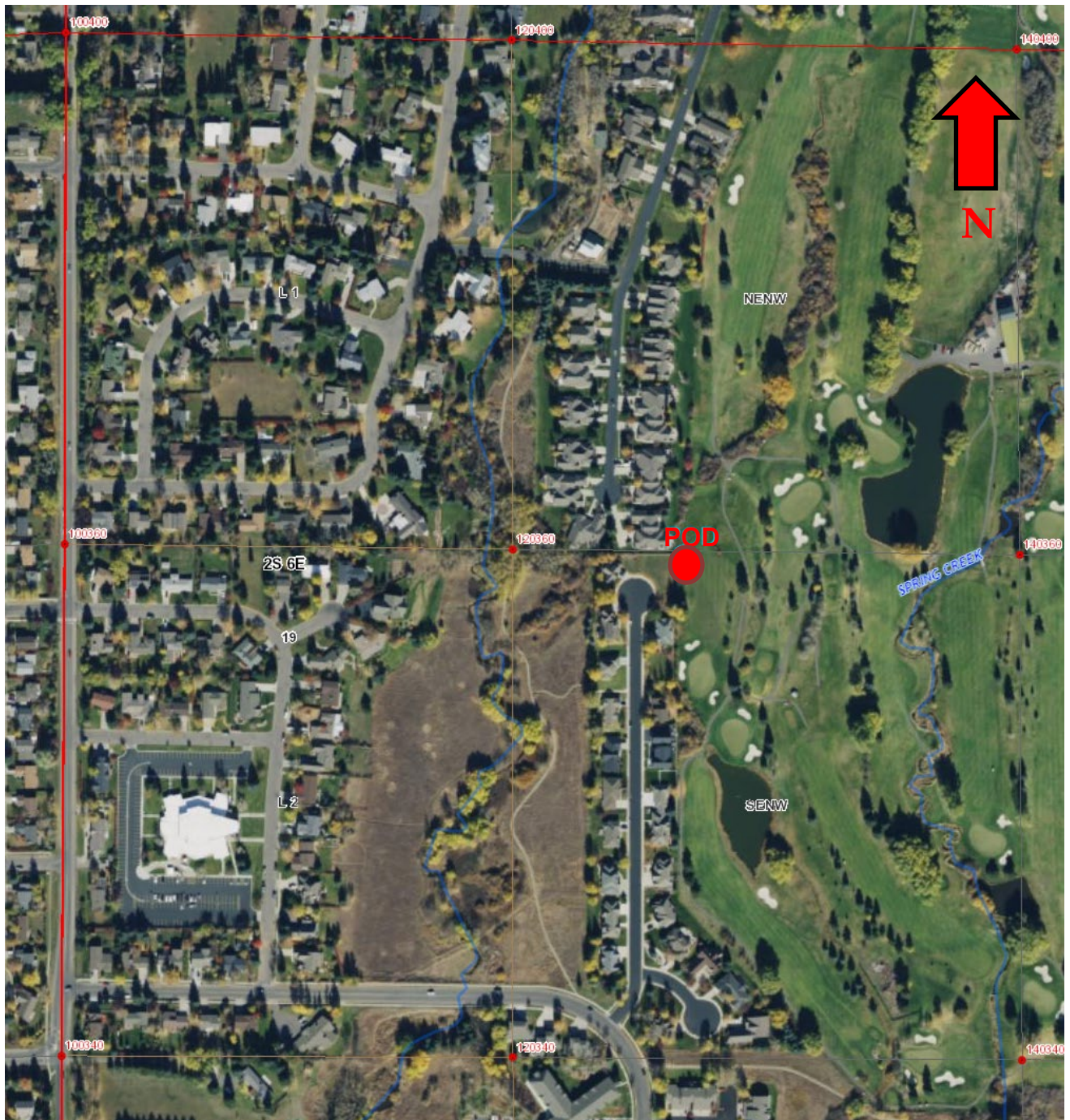


Figure 2. POD in the NWSE of Section 19, Township 2S, Range 6E, Gallatin County of water right 41H 141000-00.

SIGNATURES:

Signed and dated this 27th day of August, 2021
by /s/Mary Crable
Mary Crable, Water Resource Specialist
(406)556-4501
Mary.crable@mt.gov

Reviewed, signed and dated this 27th day of August, 2021
by /s/Kerri Strasheim
Kerri Strasheim, Regional Manager

SERVICE LIST:

Water Master Shelkey
1123 Research Dr
Bozeman, MT 59718
watercourt@mt.gov

Richard D. Weaver
2404 Spring Creek Dr.
Bozeman, MT 59715

Rachel L. Weaver
PO Box 547
Merkel, TX 79536

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

IMPORTANT NOTICE

YOUR WATER RIGHT AS SHOWN ON THIS ABSTRACT MAY HAVE CHANGES FROM YOUR WATER RIGHT AS CLAIMED OR AMENDED. AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY THE MONTANA WATER COURT AFTER ISSUANCE OF THE TEMPORARY PRELIMINARY DECREE OR BY THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION (DNRC) DURING THE PREPARATION OF THIS PRELIMINARY DECREE. THESE CHANGES ARE AUTHORIZED BY THE MONTANA SUPREME COURT WATER RIGHT CLAIMS EXAMINATION RULES OR BY ORDER OF THE WATER COURT.

OBJECTIONS MAY BE FILED ACCORDING TO THE PROCEDURES OUTLINED IN THE DOCUMENT ENTITLED "NOTICE OF ENTRY OF PRELIMINARY DECREE AND NOTICE OF AVAILABILITY."

Water Right Number: 41H 141000-00 STATEMENT OF CLAIM

Version: 2 -- REEXAMINED

Status: ACTIVE

Owners: RICHARD D WEAVER
2404 SPRING CREEK DR
BOZEMAN, MT 59715

RACHEL L WEAVER
PO BOX 547
MERKEL, TX 79536

***Priority Date:** MAY 15, 1919

Type of Historical Right: USE

Purpose(use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 157.00 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: 9.30

Source Name: NASH SPRING CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NW	SE	19	2S	6E	GALLATIN

Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: PUMP/HEADGATE W/DITCH OR PIPELINE

Period of Use: MAY 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	2.00		SWNENW	19	2S	6E	GALLATIN
2	7.30		W2SESW	18	2S	6E	GALLATIN
Total:	9.30						

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.

140999-00 141000-00

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

THE FOLLOWING ISSUES WERE IDENTIFIED BY THE DNRC DURING ITS EXAMINATION OF THIS WATER RIGHT CLAIM.

~~THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.~~

Remove

A BETTER UNDERSTANDING OF YOUR CLAIMED WATER RIGHT CAN BE OBTAINED BY COMPARING YOUR RIGHT WITH OTHER CLAIMS IN THE BASIN. FOR EXAMPLE, COMPARE PRIORITY DATES, FLOW RATES, VOLUMES, OR ACRES IRRIGATED. ALSO, YOUR WATER RIGHT MAY BE SUBJECT TO WATER RIGHTS IN ADJOINING SUBBASINS OR BASINS AS WELL AS BEING SUBJECT TO OTHER RIGHTS ON YOUR SOURCE OF SUPPLY. FINALLY, YOUR WATER RIGHT MAY BE SUBJECT TO INDIAN RESERVED AND FEDERAL RESERVED WATER RIGHTS.

COMPLETE DETAILS REGARDING THE DNRC PREPARATION OF THIS PRELIMINARY DECREE AND RELATED MATERIALS CAN BE REVIEWED AT THE OFFICE LOCATIONS IDENTIFIED IN THE DOCUMENT ENTITLED "NOTICE OF ENTRY OF PRELIMINARY DECREE AND NOTICE OF AVAILABILITY."

SEE GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR FURTHER EXPLANATION OF YOUR CLAIMED WATER RIGHT. THESE FINDINGS CAN BE FOUND AS INDICATED IN THE DOCUMENT ENTITLED "NOTICE OF ENTRY OF PRELIMINARY DECREE AND NOTICE OF AVAILABILITY." IF YOU NEED OBJECTION FORMS, OR HAVE QUESTIONS ABOUT WATER COURT PROCEDURES OR CHANGES TO YOUR RIGHT, YOU CAN CONTACT THE WATER COURT BY CALLING 1-800-624-3270 (WITHIN MONTANA ONLY) OR 1-406-586-4364, OR BY WRITING TO P.O. BOX 1389, BOZEMAN, MT 59771-1389.

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

Water Right Number: 41H 140999-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RACHEL L WEAVER
PO BOX 547
MERKEL, TX 79536

RICHARD D WEAVER
2404 SPRING CREEK DR
BOZEMAN, MT 59715

Priority Date: DECEMBER 31, 1866

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

***Flow Rate:** 269.30 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: 11.40

Source Name: BIRD SPRING 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		SENWNW	19	2S	6E	GALLATIN

Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: PUMP/HEADGATE W/DITCH OR PIPELINE

Subdivision: WESTRIDGE SUBD

Period of Use: MAY 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	1.00		NENWNW	19	2S	6E	GALLATIN
Subdivision:		WESTRIDGE SUBD	TRACT/LOT: 4	BLOCK: 3			
2	1.50		NWNENW	19	2S	6E	GALLATIN
Subdivision:		WESTRIDGE SUBD					
3	8.90		W2NENW	19	2S	6E	GALLATIN
Subdivision:		WESTRIDGE SUBD					
Total:	11.40						

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.

140999-00

141000-00