

Montana Water Court
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FILED
10/06/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41H-0644-R-2022
Nordlund, Julia
18.00

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

CLAIMANT: Douglas R. Hamilton

NOTICE OF INTENT TO APPEAR: Frank DeHaan

CASE 41H-0644-R-2022

41H 132258-00
41H 132260-00
41H 132261-00
41H 132262-00
41H 30002025

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. 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, conclusions 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 serve 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

FINDINGS OF FACT

1. The claims in this case appeared in the Preliminary Decree for Basin 41H with Montana Department of Natural Resources and Conservation (DNRC) issue remarks. The claims received no objections or counterobjections but did receive notices of intent to appear from Frank DeHaan.

2. Claimant Douglas Hamilton filed a filed a Motion to Amend these claims to address the issue remarks on March 13, 2023. On June 1, 2023, a Notice of Objection to Motion to Amend ("Objection") was filed by DeHaan. On July 7, 2023, Hamilton filed a Supplement to the Motion to Amend. DeHaan stated the Supplement resolved his objection to the Motion to Amend.

3. The Court also ordered notice of the potential change to interested parties Robert and Judy Brownell. Robert and Judy Brownell had until June 1, 2023, to respond to the requested changes if they had an objection. Nothing was filed.

4. Hamilton requests to clarify and correct the points of diversion of water right claims 41H 132258-00, 41H 132260-00, 41H 132261-00, 41H 132262-00, and 41H 30002025, so they more accurately reflect the historical beneficial use of these water right claims.

5. For these water right claims, the legal land description listed by Norman J. Irvine on the Statements of Claim describes the location where he diverted water into his commercial fish ponds on his property. The point of diversion listed by Norman J. Irvine on the Statements of Claim was the NWSWSW of Section 35; T2N, R4E, Gallatin County. However, this location is not where the water is initially diverted from the source, which is Dry Creek. The correct location of the diversion from the Dry Creek source is in the NWSESW of Section 26, T2N, R4E, Gallatin County.

6. Water is first diverted from Dry Creek by headgate in the NWSESW of Section 26, T 2N, R4E, Gallatin County before flowing to Hamilton's property, where it is then diverted into the fish ponds; the diversion headgates into the fish ponds are located in the NWSWSW, of Section 35, T2N, R4E, Gallatin County.

7. Hamilton states, the existing points of diversion listed on the Preliminary Decree abstracts, which are the NWSWSW of Section 35, should remain on the water

right claims. These points of diversion are not the primary diversion from Dry Creek, and therefore, should be designated as secondary points of diversion. Additionally, a remark should be added clarifying Horse Creek as a natural carrier to further clarify the nature of the points of diversion that are located in Section 35.

8. Hamilton further requests to reduce the volume of claim 41H 132260-00 to 71.04 acre-feet.

CONCLUSIONS OF LAW

1. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

3. The degree or weight of evidence needed to contradict or overcome the prima facie proof statute is a preponderance of the evidence. *Burkhartsmeier et al. v. Burkhartsmeier et al.*, Case 40G-2, (MT Water Court Memorandum Opinion and Order Adopting Master's Report, Mar. 11, 1997). The Montana Supreme Court has defined preponderance as "a relatively modest standard that the statutory criteria are 'more probable than not' to have been met." *Hohenlohe v. State*, 2010 MT 203 ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

5. The issues raised by issue remarks must be resolved as part of the adjudication process pursuant to Section 85-2-248, MCA.

6. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

7. For the above-mentioned reasons, the claims 41H 132258-00, 41H 132260-00, 41H 132261-00, 41H 132262-00, and 41H 30002025 should be modified as shown on the attached abstracts to accurately reflect historical use.

8. The remaining issue remarks have served their purpose of providing notice of the changes and potential issues and can be removed.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified above to correct the Preliminary Decree for this Basin. Post Decree Abstracts of Water Right Claims are served with this Report to confirm that the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

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

Water Right Number: 41H 132258-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: DOUGLAS R HAMILTON
PO BOX 560
THREE FORKS, MT 59752 0560

Priority Date: APRIL 30, 1866

Type of Historical Right: DECREED

Purpose (use): COMMERCIAL

Flow Rate: 192.98 GPM

Volume: 156.04 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: DRY 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		NWSWSW	35	2N	4E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

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>
	N2SWSW	35	2N	4E	GALLATIN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 28.00 FEET

Depth: 25.00 FEET

Surface Area: 5.50 ACRES

Capacity: 55.00 ACRE-FEET

SEE THE QUESTIONNAIRE FOR COMMERCIAL WATER USE CLAIMS IN THE CLAIM FILE FOR ADDITIONAL RESERVOIR DATA.

Period of Use: JANUARY 1 TO DECEMBER 31

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			N2SWSW	35	2N	4E	GALLATIN

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

Water Right Number: 41H 132260-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: DOUGLAS R HAMILTON
PO BOX 560
THREE FORKS, MT 59752 0560

Priority Date: MAY 31, 1867

Type of Historical Right: DECREED

Purpose (use): COMMERCIAL

***Flow Rate:** 35.90 GPM

Volume: 71.04 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: DRY 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		NWSESW	26	2N	4E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

2 - SECONDARY		NWSWSW	35	2N	4E	GALLATIN
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

A CHANNEL OF DRY CREEK, KNOWN LOCALLY AS HORSE CREEK IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE NWSWSW OF SECTION 35, T2N, R4E.

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	N2SWSW	35	2N	4E	GALLATIN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 28.00 FEET

Depth: 25.00 FEET

Surface Area: 5.50 ACRES

Capacity: 55.00 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

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			N2SWSW	35	2N	4E	GALLATIN

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

Water Right Number: 41H 132261-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: DOUGLAS R HAMILTON
PO BOX 560
THREE FORKS, MT 59752 0560

Priority Date: APRIL 30, 1866

Type of Historical Right: DECREED

Purpose (use): COMMERCIAL

Flow Rate: 192.98 GPM

Volume: 156.04 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: DRY 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		NWSEW	26	2N	4E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

2 - SECONDARY		NWSWSW	35	2N	4E	GALLATIN
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

A CHANNEL OF DRY CREEK, KNOWN LOCALLY AS HORSE CREEK IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE NWSWSW OF SECTION 35, T2N, R4E.

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	N2SWSW	35	2N	4E	GALLATIN

Diversion to Reservoir: DIVERSION # 1

Dam Height: 28.00 FEET

Depth: 25.00 FEET

Surface Area: 5.50 ACRES

Capacity: 55.00 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

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			N2SWSW	35	2N	4E	GALLATIN

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

Water Right Number: 41H 132262-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: DOUGLAS R HAMILTON
PO BOX 560
THREE FORKS, MT 59752 0560

Priority Date: MAY 31, 1865

***Type of Historical Right:** DECREED

***Purpose (use):** COMMERCIAL

THIS USE IS FOR A PAY-TO-FISH FACILITY KNOWN AS PARADISE LAKE.

***Flow Rate:** 170.54 GPM

FLOW RATE EQUALS 15 MINER'S INCHES.

***Volume:** 90.72 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: DRY CREEK

Source Type: SURFACE WATER

THE SOURCE IS A CHANNEL OF DRY CREEK, KNOWN LOCALLY AS HORSE CREEK.

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		NWSESW	26	2N	4E	GALLATIN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

2 - SECONDARY		NWSWSW	35	2N	4E	GALLATIN
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

A CHANNEL OF DRY CREEK, KNOWN LOCALLY AS HORSE CREEK IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE NWSWSW OF SECTION 35, T2N, R4E.

***Reservoir:** OFFSTREAM **Reservoir Name:** PARADISE LAKE

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	N2SWSW	35	2N	4E	GALLATIN

Diversion to Reservoir: DIVERSION # 1

Period of Use: JANUARY 1 TO DECEMBER 31

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			N2SWSW	35	2N	4E	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.

132262-00 30002025

SPLIT CLAIM NO. 41H 30002025 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

AUTHORIZATION TO CHANGE THE POINT OF DIVERSION, PLACE OF USE, PURPOSE AND PLACE OF STORAGE ISSUED 11/16/1992. NOTICE OF COMPLETION DUE 11/30/1994 SEE 41H 132259-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL 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. 41H 132258-00, 41H 132260-00, 41H 132261-00, 41H 132262-00.

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

Water Right Number: 41H 30002025 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DOUGLAS R HAMILTON
PO BOX 560
THREE FORKS, MT 59752 0560

***Priority Date:** MAY 31, 1865

***Type of Historical Right:** DECREED

***Purpose (use):** IRRIGATION

Irrigation Type: SPRINKLER

***Flow Rate:** 56.00 GPM

THE FLOW RATE EQUALS 5 MINER'S INCHES.

***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:** 6.00

***Source Name:** DRY CREEK

Source Type: SURFACE WATER

THE SOURCE IS A CHANNEL OF DRY CREEK, KNOWN LOCALLY AS HORSE CREEK.

***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		NWSESW	26	2N	4E	GALLATIN

***Period of Diversion:** APRIL 1 TO OCTOBER 15

Diversion Means: HEADGATE

2 - SECONDARY		NWSWSW	35	2N	4E	GALLATIN
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***Period of Diversion:** APRIL 1 TO OCTOBER 15

Diversion Means: PUMP

A CHANNEL OF DRY CREEK, KNOWN LOCALLY AS HORSE CREEK IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE NWSWSW OF SECTION 35, T2N, R4E.

***Period of Use:** APRIL 1 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	6.00		SWSW	35	2N	4E	GALLATIN

Total: 6.00

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.

132262-00 30002025

THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41H 132262-00.