

Montana Water Court
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FILED
07/09/2024
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41H-0688-R-2024
Nordlund, Julia
1.00

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

CLAIMANT: David Johnson

CASE 41H-0688-R-2024
41H 195258-00
41H 195259-00

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

All water right claims that appeared in the Preliminary Decree for the Gallatin River (Basin 41H) were subject to issue remarks resulting from pre-decree examination by the DNRC, objections, and counterobjections. Claims 41H 195258-00 and 41H 195259-00 are owned by David Johnson. These claims received issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and the Water Court is required to resolve these potential issues.

This masters report is the only action in this case and shall also act to consolidate the above listed claims into **Case No. 41H-0688-R-2024**.

FINDINGS OF FACT

41H 195258-00

1. Claim 41H 195258-00 was decreed in the 43B temporary preliminary decree as a stock claim that diverts surface water from Timberline Creek.

2. The claim received the following issue remark:

CLAIM WAS IMPROPERLY DESIGNATED TO BASIN 43B . CLAIM WAS NOT INCLUDED IN THE BASIN 41H TEMPORARY PRELIMINARY DECREE ISSUED 12/26/1985.

3. This remark has served its notice purpose and will be removed from the claim because the basin has formerly been corrected.

4. Claim 41H 195258-00 also received the following issue remark:

OWNERSHIP OF THIS RIGHT APPEARS QUESTIONABLE. THE PLACE OF USE IS HIGHLY SUBDIVDED PER GALLATIN COUNTY CLERK AND RECORDERS AND CADASTRAL RECORDS.

5. The Department of Natural Resources and Conservation (DNRC) is responsible for maintaining ownership records on water rights pursuant to Mont. Code Ann. § 85-2-424(2).

6. This ownership remark should be removed.

7. Claim 41H 195258-00 also received the following issue remark:

THE POINT OF DIVERSION MAY BE INCORRECT. SEE DNRC MEMORANDUM DATED 02/22/1995.

8. The DNRC memorandum referred to in the issue remark dated February 22, 1995, cites errors involving the county designations as the reason for this remark:

In addition to the above mentioned basin errors, Claim Nos. W195258 and W195259 also have other errors. The other errors involve county designations for both point of diversion and place of use.

9. An abstract attached to the DNRC memorandum identifies the point of diversion in the SW of section 23, township 2S, range 7E as being in Gallatin County rather than Park County:

POINTS OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTR</u>	<u>SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
			SW	23	02S	07E	PARK Gallatin
			N2	26	02S	07E	GALLATIN

10. The point of diversion correction was not made to the claim in the former decree.

41H 195259-00

11. Claim 41H 195259-00 was decreed in the 43B temporary preliminary decree as a stock claim that diverts surface water from Timberline Creek.

12. The claim received the following issue remark:

CLAIM WAS IMPROPERLY DESIGNATED TO BASIN 43B. CLAIM WAS NOT INCLUDED IN THE BASIN 41H TEMPORARY PRELIMINARY DECREE ISSUED 12/26/1985.

13. This remark has served its notice purpose and will be removed from the claim because the basin has been corrected.

14. Claim 41H 195259-00 also received the following issue remark:

THE POINT OF DIVERSION AND PLACE OF USE MAY BE INCORRECT. SEE DNRC MEMORANDUM DATED 02/22/1995.

15. An abstract attached to the DNRC memorandum identifies corrections as described below:

POINTS OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTR</u>	<u>SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
			S2SW	24	02S	07E	PARK Gallatin
			N2	25	02S	07E	GALLATIN
			S2NW	30	02S	08E	PARK
			SW	30	02S	08E	PARK

DIRECT FROM SRC
 DIRECT FROM SRC
 DIRECT FROM SRC
 DIRECT FROM SRC

PLACE OF USE FOR STOCK

<u>ACRES</u>	<u>LOT</u>	<u>BLK</u>	<u>QTR</u>	<u>SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001				S2SW	24	02S	07E	GALLATIN
002				N2	25	02S	07E	GALLATIN
003				S2NW	30	02S	07E	GALLATIN PARK
004				SW	30	02S	07E	GALLATIN PARK

16. The point of diversion and place of use corrections were made to the claim by DNRC during reexamination on April 7, 2017.

17. Claim 41H 195259-00 also received the following issue remarks pertaining to ownership:

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 10/23/2014 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY AARON EP HIEBER, 2436 GLYNDON AVE, VENICE, CA, 90291-5005.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 08/09/2015 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY DAVID TREDINNICK, 1165 FEARRINGTON POST, PITTSBORO, NC, 27312-5014.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 02/26/1997 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY ERIC W & MONIKA LABOUVIE, 153 COMFORT LN, BOZEMAN, MT, 59718-9131.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 10/26/2012 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY DELMER E & KAREN J. COX, 3015 WOODCHUCK RD, BOZEMAN, MT, 59715-1702.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 05/28/2010 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY JEFFERY S. RUNKEL, 3030 WOODCHUCK RD, BOZEMAN, MT, 59715-1702.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 03/22/2002 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY ROGER J & JUDITH E VAN ANDEL, PO BOX 5263, BOZEMAN, MT, 59717-5263.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 06/28/2004 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY JASON T SCOTT, 501 LITTLE BASIN CREEK RD, BUTTE, MT, 59701-9613.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 02/25/2010 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY JAMES O EIB, 2570 HIGH RIDGE RD, BOZEMAN, MT, 59715-1811.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 07/02/2004 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY BRUCE G. KENNEY & RACHEL A EMMONS, 3005 WOODCHUCK RD, BOZEMAN, MT, 59715-1702.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 09/05/2003 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY BRENT L & ELIZABETH K. BROCK, 3025 WOODCHUCK RD, BOZEMAN, MT, 59715-1702.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 02/07/2010 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY LEWIS FAMILY TRUST 2006 DTD 06/14/06, 13316 GLEN BRAE DR, SARATOGA, CA, 95070-4431.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 10/23/2014 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY AARON EP HIEBER, 2436 GLYNDON AVE, VENICE, CA, 90291-5005.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 09/26/2005 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY DEL V & JULIE A HOPEWELL, 7811 48TH PL E, BRADENTON, FL, 34203-7964.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 08/10/2015 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY ALEXANDER S. SAWICKI, PO BOX 10334, BOZEMAN, MT, 59719-0334.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 05/14/2007 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY ROBERT S. & SHELLEY A. PIERCE, PO BOX 3928, BOZEMAN, MT, 59772-3928.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 09/02/2004 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY JOE & LISA BALLER, 3020 WOODCHUCK RD, BOZEMAN, MT, 59715-1702.

ACCORDING TO CADASTRAL PROPERTY OWNERSHIP RECORDS, AS OF 07/08/2013 , A PORTION OF THE PROPERTY ON WHICH THIS WATER RIGHT IS USED APPEARS TO BE OWNED BY ELIZABETH M. & ERIC C HUELSON, 1521 E ST., GOLDEN, CO, 80401-4923.

18. The Department of Natural Resources and Conservation (DNRC) is responsible for maintaining ownership records on water rights pursuant to Mont. Code Ann. § 85-2-424(2).

19. If you are receiving this order, it is because you are listed as an owner of the water right in this case. If you feel the ownership is incorrect, it is your obligation to contact the DNRC to update the ownership accordingly. The DNRC may be contacted at the following:

<p><u>Contact Information</u> Bozeman Regional Office, DNRC 2273 Boot Hill Court, Ste. 110 Bozeman, MT 59715 (406) 586-3136</p>
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PRINCIPLES OF LAW

1. 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.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. 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.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court 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.

7. When resolving issue remarks, the 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. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. The party seeking to overcome the prima facie status of a Statement of Claim bears the burden of proof; this burden also applies to a claimant’s objection to his own claim. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

CONCLUSIONS OF LAW

1. The evidence in the record is sufficient to resolve the issue remarks placed on the above-captioned claims.

2. The county of the point of diversion on claim 41H 195258-00 will be changed to reflect the abstract attached to the DNRC memo described in finding of fact number 8:

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SW	23	2S	7E	PARK
Source Name: TIMBERLINE CREEK						Gallatin
Period of Diversion: APRIL 1 TO DECEMBER 1						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						

3. The county of the point of diversion on claim 41H 195259-00 will remain as is because the current points of diversion and places of use reflect the proposed changes in the abstract attached to the DNRC memo described in finding of fact number 8. The changes were also made by DNRC on April 7, 2017.

RECOMMENDATIONS

1. All issue remarks should be removed from the claims.

2. Claim 41H 195258-00 should be modified as described in conclusions of law number 2.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

David Johnson
% Lumber Enterprises
7720 Shedhorn Drive, Ste A Pmb201
Bozeman, MT 59718-8108

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

Water Right Number: 41H 195258-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DAVID JOHNSON
% LUMBER ENTERPRISES
7720 SHEDHORN DRIVE, STE A PMB201
BOZEMAN, MT 59718-8108

Priority Date: DECEMBER 31, 1890

Type of Historical Right: USE

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: TIMBERLINE CREEK

Source Type: SURFACE WATER

Source Name: UNNAMED TRIBUTARY OF TIMBERLINE 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		SW	23	2S	7E	GALLATIN

Source Name: TIMBERLINE CREEK

Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2		N2	26	2S	7E	GALLATIN
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Source Name: UNNAMED TRIBUTARY OF TIMBERLINE CREEK

Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: APRIL 1 TO DECEMBER 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			SW	23	2S	7E	GALLATIN
2			N2	26	2S	7E	GALLATIN

Remarks:

POINT OF DIVERSION AND PLACE OF USE INCLUDE ALL TRIBUTARIES OF TIMBERLINE CREEK WITHIN THE ABOVE LAND DESCRIPTION.

POINT OF DIVERSION NO. 2 IS ON UNNAMED TRIBUTARIES TO TIMBERLINE CREEK.

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

Water Right Number: 41H 195259-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DAVID JOHNSON
% LUMBER ENTERPRISES
7720 SHEDHORN DRIVE, STE A PMB201
BOZEMAN, MT 59718-8108

Priority Date: DECEMBER 31, 1890

Type of Historical Right: USE

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: TIMBERLINE 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		S2SW	24	2S	7E	GALLATIN

Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

2		N2	25	2S	7E	GALLATIN
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Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

3		S2NW	30	2S	8E	PARK
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Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

4		SW	30	2S	8E	PARK
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Period of Diversion: APRIL 1 TO DECEMBER 1

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: APRIL 1 TO DECEMBER 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			S2SW	24	2S	7E	GALLATIN
2			N2	25	2S	7E	GALLATIN
3			S2NW	30	2S	8E	PARK

4

SW 30 2S 8E PARK