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FILED

FEB 12 1992

NOTICE OF FILING OF MASTER'S REPORT

Montana Water Court

TO: ALL PARTIES

RE: 41H-124, 41H-W-012235-00, 41H-W-012235-01, 41H-W-012236-00

This is to provide you with Notice that the Water Master has filed a Master's Report (Findings of Fact and Conclusions of Law) with the Clerk of the Water Court for the water right(s) listed above. A copy of the Master's Report is enclosed with this Notice.

Please review this Master's Report carefully. If there are any corrections or changes that need to be made, you have 10 days from service of this Notice to file a written objection. You must mail a copy of your written objection to all the other parties who have been involved in this proceeding and file a certificate of such mailing with the Water Court. (This procedure is required by Rule 1.II. Water Right Claims Examination Rules and by Rules 5 and 53 of the Montana Rules of Civil Procedure.)

DATED this 12th day of February, 1992.

LORI M. BURNHAM  
Clerk of Court  
Montana Water Court  
P. O. Box 879  
Bozeman, MT 59771-0879  
(406) 586-4364  
1-800-624-3270 (in Montana)

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

FEB 12 1992

Montana Water Court

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF	)	CASE NO. 41H-124
THE EXISTING RIGHTS TO THE USE OF ALL	)	
THE WATER, BOTH SURFACE AND UNDERGROUND,	)	41H-W-012235-00
WITHIN THE GALLATIN RIVER DRAINAGE AREA	)	41H-W-012235-01
INCLUDING ALL TRIBUTARIES OF THE	)	41H-W-012236-00
GALLATIN RIVER IN GALLATIN, PARK AND	)	
MADISON COUNTIES, MONTANA	)	

CLAIMANT: Ronald J. Van Dyke and Raymond Van Dyke

ON MOTION OF THE WATER COURT

OBJECTOR: Clifford Nixon

MASTER'S REPORT

FINDINGS OF FACT

1. Water right claim 41H-W-012235-00 was filed by Raymond and Ronald J. Van Dyke for irrigation. The basis of this claim is a water right which was previously decreed to John R. Scahill and W.R.C. Stewart for 140.00 miner's inches (3.50 cfs) of water from Bear Creek with a June 1, 1880 priority date in *Bell v. Armstrong*, Case No. 3850, Gallatin County. The claimed flow rate of water right claim 41H-W-012235-00 is 140.00 miner's inches.

2. On December 6, 1985, Clifford W. Nixon filed an objection to water right claim 41H-W-012235-00 on the basis of ownership and acres irrigated.

3. Water right claim 41H-W-012235-00 was called in On Motion of the Water Court because there appeared to be problems with acres irrigated, volume and flow rate.

4. On September 8, 1987, John and Ramona Baden filed a Notice of Intent to Appear to water right claim 41H-W-012235-00.

5. Water right claim 41H-W-012236-00 was filed by Raymond and Ronald J. Van Dyke for irrigation.

6. On December 6, 1985, Clifford W. Nixon filed an objection to water right claim 41H-W-012236-00 on the basis of acres irrigated.

7. Water right claim 41H-W-012236-00 was called in On Motion of the Water Court because there appeared to be problems with acres irrigated, volume and flow rate.

8. On August 21, 1989, the parties filed Stipulations with the Water Court. The Stipulations stated that the acres irrigated of water right claims 41H-W-012235-00 and 41H-W-012236-00 is 455.00 acres. The legal description for the stipulated irrigated acreage was set out by Affidavit of Ronald Van Dyke filed with the Water Court on October 1, 1991, as follows:

PLACE OF USE:

<u>ACRES</u>	<u>QTR.</u>	<u>SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
215.00			19	03S	05E	GALLATIN
<u>240.00</u>	N2		30	03S	05E	GALLATIN
455.00						

9. The August 21, 1989 Stipulation for water right claim 41H-W-012235-00 also indicated the ownership and flow rate of that claim should be changed. The Water Court did not accept that part of the Stipulation.

10. On March 22, 1990, Claimants Ronald and Raymond Van Dyke filed a Motion to Create an Implied Claim and Memorandum in Support of the Motion. The Motion indicated that through inadvertence and mistake, Ronald and Raymond Van Dyke claimed the

full 140.00 miner's inches of previously decreed water but that part of it was owned by Donald Strang.

11. By Order of the Water Court dated July 18, 1991, Donald Strang was Ordered to appear as a party pursuant to M.R.Civ.P. Rule 19(a).

12. On October 22, 1991, Ronald Van Dyke and Don Strang filed a Memorandum in Support of Ownership, Renewal and Amendment to Motion for Creation of an Implied Claim.

13. By Order dated December 3, 1991, the Water Court Denied the Motion to Create an Implied Claim.

14. However, based on the Memorandum referred to in Finding of Fact No. 12 above, water right claim 41H-W-012235-01 will be generated by the Water Court, through the adjudication process, to reflect Donald Strang's ownership of 40.00 miner's inches of water based on the previously decreed right to John Scahill and W.R.C. Stewart of Bear Creek water with a June 1, 1880 priority date decreed in *Bell v. Armstrong*, Case No. 3850, Gallatin County. The water right shall appear as follows:

WATER RIGHT NUMBER 41H-W-012235-01

OWNERS: STRANG DONALD  
13730 PORTNELL ROAD  
GALLATIN GATEWAY, MT 59730

STRANG JUDITH  
13730 PORTNELL ROAD  
GALLATIN GATEWAY, MT 59730

PRIORITY DATE: JUNE 1, 1880

FLOW RATE: 1.00 CFS

VOLUME:

SOURCE: BEAR CREEK, TRIBUTARY OF THE WEST GALLATIN

MAXIMUM ACRES: 20.00

PURPOSE (USE): IRRIGATION

PERIOD OF USE: APRIL 1 TO OCT 31

POINT OF DIVERSION:

<u>QTR. SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
SWNWNE	32	03S	05E	GALLATIN

PLACE OF USE:

<u>ACRES</u>	<u>QTR. SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
20.00	SWSW	20	03S	05E	GALLATIN

REMARK: THIS RIGHT REFLECTS A SPLIT IN THE OWNERSHIP OF CLAIM 41H-W-012235-00 AS ORDERED BY THE WATER COURT IN CASE 41H-124.

15. The Stipulation filed on water right claim 41H-W-012235-00 by the parties will be accepted by the Court.

16. The flow rate of water right claim 41H-W-012235-00 will be reduced to reflect the correct flow rate which is 2.50 cfs (100.00 miner's inches) and the objections of Clifford W. Nixon are withdrawn.

17. Water right claims 41H-W-012235-00, 41H-W-012235-01 and 41H-W-012236-00 are direct flow irrigation rights which are susceptible to measurement by flow rate.

18. On November 27, 1991, John and Ramona Baden filed a Withdrawal of Notice of Intent to Appear to water right claim 41H-W-012235-00.

CONCLUSIONS OF LAW

I.

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. §85-2-233.

II.

The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider a matter within the Court's jurisdiction on its own motion. Mont. Code. Ann. §3-7-224.

III.

The changes to flow rate, acres irrigated and place of use of water right claim 41H-W-012235-00 shall appear in the Preliminary Decree for the Gallatin River Basin (41H) as stated in the Findings of Fact.

IV.

Water right claim 41H-W-012235-01, generated by the Water Court through the adjudication process, shall appear in the Preliminary Decree of the Gallatin River Basin (41H) as stated in the Findings of Fact.

V.

The change to acres irrigated and place of use of water right claim 41H-W-012236-00 shall appear in the Preliminary Decree for the Gallatin River Basin (41H) as stated in the Findings of Fact.

VI.

Water right claims 41H-W-012235-00, 41H-W-012235-01 and 41H-W-012236-00 are direct flow irrigation rights which are susceptible to measurement by flow rate. The volume quantification shall be removed pursuant to Mont. Code Ann. §85-2-234(6)(b)(i).

DATED this 12<sup>th</sup> day of February, 1992.

  
Patti L. Rowland  
Water Master

CERTIFICATE OF SERVICE

I, Melody J. Colwill, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Ronald J. Van Dyke  
13333 Portnell Road  
Gallatin Gateway, MT 59730

Clifford W. Nixon  
1110 Little Bear Lane  
Gallatin Gateway, MT 59730

Raymond Van Dyke  
12500 Churchill Road  
Manhattan, MT 59741


Cindy Younkin, Attorney  
P.O. Box 1288  
Bozeman, MT 59771-1288

John and Ramona Baden  
P.O. Box 247  
Gallatin Gateway, MT 59730

Leanne M. Schraudner, Attorney  
108 South Church  
Bozeman, MT 59715

Donald E. Strang  
13730 Portnell Road  
Gallatin Gateway, MT 59730

DATED this 12<sup>th</sup> day of February, 1992.

  
\_\_\_\_\_  
Melody J. Colwill  
Deputy Clerk



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

IN THE MATTER OF THE ADJUDICATION OF  
THE EXISTING RIGHTS TO THE USE OF ALL  
THE WATER, BOTH SURFACE AND UNDERGROUND)  
WITHIN THE GALLATIN RIVER DRAINAGE AREA )  
INCLUDING ALL TRIBUTARIES OF THE )  
GALLATIN RIVER IN GALLATIN, PARK, AND )  
MADISON COUNTIES, MONTANA. )  
----- )

) CASE NO. 41H-124

**FILED**

NOV 27 1991

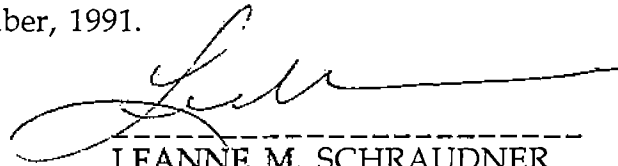
Montana Water Court

WITHDRAWAL OF NOTICE OF INTENT TO APPEAR

I, LEANNE M. SCHRAUDNER on behalf of JOHN BADEN and RAMONA MAROTZ-BADEN, will withdraw the Notice of Intent to Appear to Claim No. 012235 if the corrections are made in accord with the filed stipulations.

If such corrections are made, it will no longer be necessary to have a hearing before the Water Court regarding the above Notice of Intent to Appear.

DATED this 22 day of November, 1991.




-----  
LEANNE M. SCHRAUDNER  
ATTORNEY FOR BADENS

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document was on this 25<sup>th</sup> day of November, 1991, mailed to the following parties of record:

John Baden and Ramona Marotz-Baden  
P.O. Box 247  
Gallatin Gateway, MT 59730

  
Pamela J. Dreier  
Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF ) CASE NO. 41H-124  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDERGROUND, ) 41H-W-012235-00  
WITHIN THE GALLATIN RIVER DRAINAGE AREA ) 41H-W-012236-00  
INCLUDING ALL TRIBUTARIES OF THE )  
GALLATIN RIVER IN GALLATIN, PARK AND )  
MADISON COUNTIES, MONTANA )

FILED

CLAIMANT: Ronald J. Van Dyke and Raymond Van Dyke

DEC 3 1991

ON MOTION OF THE WATER COURT

OBJECTOR: Clifford Nixon

Montana Water Court

ORDER DENYING MOTION

A Motion to Create an Implied Claim and Memorandum in support thereof was filed with the Water Court March 22, 1990, by Claimants Ronald and Raymond Van Dyke, by and through their attorney, Cindy E. Younkin. The motion requested the Court to create an implied claim in the name of Donald Strang for 40.00 miner's inches.

By Order of the Water Court dated July 18, 1991, Donald Strang was made a party to the case pursuant to Rule 19(a) M.R.Civ.P.

On October 22, 1991, Ron Van Dyke and Don Strang, by and through their attorney, filed a Memorandum in Support of Ownership, Renewal and Amendment to Motion for Creation of an Implied Claim. Attached to the amended motion was evidence and additional information showing Don Strang's ownership of 40.00 miner's inches of June 1, 1880 Bear Creek water previously decreed to John Scahill and W.R.C. Stewart in Bell v. Armstrong, Case No. 3850, Gallatin

County.

Implied claims are only generated by the Water Court in very specific instances. When it is evident that a single claim contains more than one water right, the Water Court will separate the multiple rights and create an implied claim. It is not evident from the claim form of water right claim 41H-W-012235-00 that multiple rights are contained therein.


Reliance by claimant on the creation of implied claims involving state lands for authority to create an implied claim in this case is misplaced. The use of implied claims in cases involving state lands is in response to Department of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948 (1985). The factual and legal issues involved in Pettibone, were very different than those involved here.

The Motion to Create an Implied Claim and Amended Motion for Creation of an Implied Claim are therefore DENIED for the reasons set forth above.

However, the issue of the correct ownership of water right claim 41H-W-012235-00 is an issue before the Court during adjudication of the Basin 41H Temporary Preliminary Decree. The Stipulation filed on this claim by the parties will be accepted by the Court. The additional evidence and information provided with the Amended Motion to Create an Implied Claim provides the substantiation of ownership and right to the water that was necessary for the Water Court to accurately adjudicate and determine the existing water right.

Therefore, the ownership of water right claim 41H-W-012235-00 shall be determined during the adjudication process and shall be the subject of a Master's Report on the matter.

DATED this 3<sup>rd</sup> day of December, 1991.

  
Patti L. Rowland  
Water Master

Ronald J. Van Dyke  
13333 Portnell Road  
Gallatin Gateway, MT 59730

Clifford W. Nixon  
1110 Little Bear Lane  
Gallatin Gateway, MT 59730

Raymond Van Dyke  
12500 Churchill Road  
Manhattan, MT 59741

Cindy Younkin, Attorney  
P.O. Box 1288  
Bozeman, MT 59771-1288

John and Ramona Baden  
P.O. Box 247  
Gallatin Gateway, MT 59730

Leanne M. Schraudner, Attorney  
108 South Church  
Bozeman, MT 59715

Donald E. Strang  
13730 Portnell Road  
Gallatin Gateway, MT 59730

IN THE WATER COURTS OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION - GALLATIN RIVER BASIN (41H)

\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
OF ALL THE WATER, BOTH SURFACE AND  
UNDERGROUND, WITHIN THE GALLATIN  
RIVER DRAINAGE AREA, INCLUDING ALL  
TRIBUTARIES OF THE GALLATIN RIVER  
IN GALLATIN, PARK, AND MADISON  
COUNTIES, MONTANA.

Case No. 41H-124

FILED

MAR 22 1991

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Montana Water Court

MEMORANDUM IN SUPPORT OF OWNERSHIP, RENEWAL  
AND AMENDMENT TO MOTION FOR CREATION OF AN IMPLIED CLAIM

COMES NOW Ron Van Dyke, claimant, and Don Strang, movant for an implied claim, by and through the undersigned attorney of record, and files this Memorandum in support of Don Strang's ownership of the 40 inch, June 1, 1880, water right for which a Motion to Create an Implied Claim was filed on March 22, 1990, and which Motion is herein renewed and amended.

Background Information

The West Gallatin Decree, Case No. 3850, dated October 1, 1909, awarded John Scahill and W.R.C. Stewart a 140 inch, June 1, 1880, water right from Bear Creek to be used on property located in Sections 19 and 30, T3S, R5E. See Finding No. 108 from the West Gallatin Decree attached hereto as Exhibit "A".

In 1914, Scahill and Stewart sold part of Section 19, T3S, R5E, together with 40 inches of this 1880 decreed right to Catherine L. McDonnell. See deed from Scahill and Stewart to McDonnell recorded November 13, 1914, attached hereto as Exhibit "B".

Wm. and Catherine L. McDonnell conveyed this property in Section 19 and the 40 inch 1880 right to Carl Rosenberg in a deed recorded on February 26, 1917. See deed attached hereto as Exhibit "C".

Carl L. Rosenberg apparently passed away in about 1929 and evidently by way of will, devised the property in Section 19 and the water right to his children, who in turn conveyed it to their mother, Anna Rosenberg, by way of quitclaim deed on May 31, 1929. See quitclaim deed attached hereto as Exhibit "D".

Anna Rosenberg died on May 29, 1952. Through Court Order for distribution of her estate, dated June 25, 1952, Ed and Oscar Rosenberg acquired property in Section 20 and 19, T3S, R5E, and the 40 inch, 1880, water right. See Order attached hereto as Exhibit "E" and deed between Oscar and Edward Rosenberg attached hereto as Exhibit "F".

The Water Resources Survey (WRS) for Gallatin County was being conducted in the early 1950's. On October 9, 1952, the farm of Anna Rosenberg was checked by the field surveyors. The WRS field notes from that visit indicate that Anna Rosenberg was presently using the 40 inch, 1880, water right to irrigate 45 acres located in the  $E\frac{1}{2}E\frac{1}{2}$  of Section 19 and in the  $W\frac{1}{2}SW\frac{1}{4}$ , SESW and SWSE of Section 20, T3S, R5E. Those notes also indicate that part of the 40 inch right was used on Oscar Rosenberg land in Section 29. The WRS field notes for the Oscar Rosenberg land in Section 29 indicated that there was no irrigation conducted at the time. The irrigation for Section 20 is shown on the WRS map. See WRS field notes and map attached hereto as Exhibit "G".

A life-long neighbor to the Rosenberg property, Robert Reiser, attests that Oscar and Edward Rosenberg used the 40 inch, 1880, right on acreage

in the  $W\frac{1}{2}SW\frac{1}{4}$  of Section 20, T3S, R5E. See Affidavit of Robert Reiser attached hereto as Exhibit "H".

Oscar Rosenberg acquired sole ownership of the property and water right when his brother passed away. Don Strang had entered into a Contract for Deed to purchase part of Section 20 in 1987. That Contract was defaulted and a new Contract was entered into on October 15, 1991, between the estate of Oscar Rosenberg with Donald and Judith Strang for most of the  $SW\frac{1}{4}SW\frac{1}{4}$  of Section 20, T3S, R5E, as Tract 5, C.O.S. #1050 with Donald and Judith Strang. See Notice of Buyers Interest and COS 1050 plat map attached hereto as Exhibit "I".

#### Discussion and Conclusion

The foregoing described chain of title, WRS field notes and map and Affidavit clearly establishes that the 40 inch, June 1, 1880, water right has historically been appurtenant to and historically used to irrigate the  $W\frac{1}{2}SW\frac{1}{4}$  of Section 20, T3S, R5E.

Based upon the information set forth above, movant wishes to amend his Motion for Creation of an Implied Claim to reflect that the place of use for the 40 inch, June 1, 1880, right which should be indicated as 20 acres in the  $SW\frac{1}{4}SW\frac{1}{4}$ , Section 20, T3S, R5E. This number and location of acres is based on information from Robert Reiser (see Exhibit "H"). An aerial photo depicting this acreage is attached hereto as Exhibit "J".

The Court is respectfully requested to create an implied claim based upon the Memorandum in support thereof filed on March 22, 1990, and upon the above information in support of the existence and ownership of the historical right. The implied claim should have the following characteristics:



Claim #: 41H-W-  
Owner: Donald and Judith Strang  
Source: Bear Creek, Tributary of West Gallatin River  
Flow Rate: 40 M.I./1.0 C.F.S.  
Priority Date: June 1, 1880  
Point of Diversion: SWNWNE Section 32 T3S R5E  
Means of Diversion: Scahill-Stewart Ditch  
Period of Use: April 1 through October 31  
Place of Use: 20 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$  Section 20 T3S R5E

All in Gallatin County, Montana.

DATED this 22<sup>nd</sup> day of October, 1991.

MOORE, O'CONNELL, REFLING & MANOS

BY: Cindy E. Younkin  
CINDY E. YOUNKIN  
P.O. Box 1288  
Bozeman, MT 59771-1288  
ATTORNEYS FOR RON VAN DYKE AND DONALD  
E. STRANG

Certificate of Mailing

This is to certify that the above and foregoing was duly served upon the opposing counsel of record at their addresses, by mail postage-prepaid, this 22<sup>nd</sup> day of October, 1991, as follows, to-wit:

Ronald J. Van Dyke  
13333 Portnell Road  
Gallatin Gateway, MT 59730

Clifford W. Nixon  
1110 Little Bear Lane  
Gallatin Gateway, MT 59730

Raymond Van Dyke  
12500 Churchill Road  
Manhattan, MT 59741

John & Ramona Baden  
P.O. Box 247  
Gallatin Gateway, MT 59730

Leanne M. Schraudner  
Attorney at Law  
108 South Church  
Bozeman, MT 59715

Donald E. Strang  
13730 Portnell Road  
Gallatin Gateway, MT 59730

Cindy E. Younkin  
CINDY E. YOUNKIN

IN THE WATER COURTS OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION - GALLATIN RIVER BASIN (41H)

\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
OF ALL THE WATER, BOTH SURFACE AND  
UNDERGROUND, WITHIN THE GALLATIN  
RIVER DRAINAGE AREA, INCLUDING ALL  
TRIBUTARIES OF THE GALLATIN RIVER  
IN GALLATIN, PARK, AND MADISON  
COUNTIES, MONTANA.

Case No. 41H-124

\*\*\*\*\*

STATE OF MONTANA )

:ss. AFFIDAVIT

COUNTY OF GALLATIN )

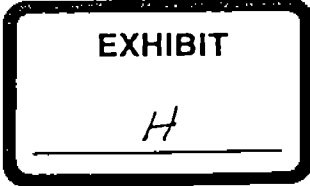
I, Robert Reiser, being first duly sworn, deposes and says:

1. That I have lived and ranched near Gallatin Gateway, Montana, since 1937

2. That since 1955 I have become personally familiar with all the water rights on Bear Creek from which I irrigate my property.

3. That I personally knew Oscar and Edward Rosenberg who were the predecessors of Donald Strang. The Rosenberg/Strang property in Section 20, Township 3 South, Range 5 East, is supplied with water diverted from Bear Creek about 1/2 mile upstream from where water is diverted to supply my property.

4. That Oscar and Edward Rosenberg used 40" of Bear Creek, priority June 1, 1880, to irrigate approximately 20 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 20, Township 3 South, Range 5 East.



Further affiant sayeth not.

Robert Reiser  
Robert Reiser

STATE OF MONTANA            )  
  : ss.  
COUNTY OF GALLATIN        )

On this 25 day of September, 1991, before me, the undersigned officer, personally appeared Robert Reiser, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this instrument first above written.

Judy S. Patterson  
Notary Public for State of Montana  
Residing at: Bozeman, MT  
My Commission Expires: 11-12-91

(SEAL)

IN THE WATER COURTS OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION - GALLATIN RIVER BASIN (41H)

\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
OF ALL THE WATER, BOTH SURFACE AND  
UNDERGROUND, WITHIN THE GALLATIN  
RIVER DRAINAGE AREA, INCLUDING ALL  
TRIBUTARIES OF THE GALLATIN RIVER  
IN GALLATIN, PARK, AND MADISON  
COUNTIES, MONTANA.

Case No. 41H-124

FILED

\*\*\*\*\*

STATE OF MONTANA )

:ss.

AFFIDAVIT

Montana Water Court

COUNTY OF GALLATIN )

Ronald J. Van Dyke, being first duly sworn, deposes and says:

1. That together with Raymond Van Dyke, he is one of the owners of Claims 41H-W-012235 and 41H-W-012236.
2. That on August 21, 1989, he entered into a Stipulation with Objector Clifford Walter Nixon agreeing to 455 acres as the correct number of irrigated acres.
3. That the legal description for the agreed irrigated area is:
  - 215 acres, Section 19, Township 3 South, Range 5 East
  - 240 acres, Section 30, Township 3 South, Range 5 East
 Total 455 acres

This is the same description as that for the verification of irrigated acres by the DNRC. A copy of the DNRC's aerial photo depicting the 455 verified acres is attached hereto.

Further affiant sayeth not.

Ronald J. Van Dyke  
Ronald J. Van Dyke

SUBSCRIBED AND SWORN to before me this 26 day of September, 1991.

Kevin J. Moore  
Notary Public for State of Montana  
Residing at: Bozeman  
My Commission Expires: May 8, 1993

(SEAL)

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

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF )  
THE EXISTING RIGHTS TO THE USE OF ALL )  
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WITHIN THE GALLATIN RIVER DRAINAGE AREA )  
INCLUDING ALL TRIBUTARIES OF THE )  
GALLATIN RIVER IN GALLATIN, PARK AND )  
MADISON COUNTIES, MONTANA. )

CASE NO. 41H-124

**FILED**

JUL 18 1991

CLAIMANT: Ronald J. Van Dyke and Raymond Van Dyke

Montana Water Court

ON MOTION OF THE WATER COURT

OBJECTOR: Clifford Nixon

ORDER ADDING PARTY AND SETTING STATUS CONFERENCE

Water right claims 41H-W-012235-00 and 41H-W-012236-00 were filed by Ronald J. and Raymond Van Dyke for irrigation. Both claims were called in on Motion of the Water Court on the issues of acres irrigated, volume and flow rate. Clifford Nixon objected to claim 41H-W-012235-00 on the issues of ownership and acres irrigated and objected to claim 41H-W-012236-00 on the issue of acres irrigated.

On August 21, 1989, Van Dyke and Nixon filed a Stipulation with the Water Court stating that the correct acreage of water right claim 41H-W-012236-00 is 455.00 acres. The Stipulation is accepted by the Court pending clarification of the legal description of those 455.00 acres.

On August 21, 1989, Van Dyke and Nixon filed a Stipulation with the Water Court stating that the correct acreage of water right claim 41H-W-012236-00 is 455.00 acres. The Stipulation also stated that the ownership of the 3.50 cfs (140.00 miner's inches) originally claimed should be changed as follows:

Ronald Van Dyke	2.50 cfs (100 miner's inches)
Donald Strang	1.00 cfs (40 miner's inches)

Donald Strang appeared at a Status Conference held November 17, 1989, but has not yet become a party to this case. On March 22, 1990, claimants Ronald and Raymond Van Dyke, by and through their attorney, made a Motion to Create an Implied Claim. The Motion requested the Court to create an implied claim in the name of Donald Strang. Elements of the water right were stated but no evidence has been presented in support of this Motion.

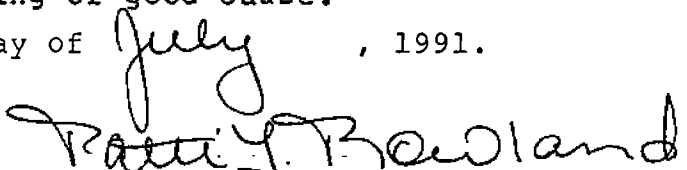
Pursuant to M.R.Civ.P. 19(a), it is hereby

ORDERED that Donald Strang be made a party to this case to ensure that complete relief is accorded among those already parties. Mr. Strang appears to be claiming an interest in the water which is subject to this case and would appear to be a necessary party in the adjudication of water right claim 41H-W-012235-00 before this Court.

FURTHER ORDERED that a Status Conference is scheduled for August 20, 1991, at 9:30 AM in the courtroom of the Montana Water Court, 601 Haggarty Lane, Bozeman, MT 59715.

Failure to appear as Ordered may result in sanctions, unless a request for a continuance is made before the time set for a conference and upon a showing of good cause.

DATED this 18<sup>th</sup> day of July, 1991.

  
Patti L. Rowland  
Water Master

Ronald J. Van Dyke  
13333 Portnell Road  
Gallatin Gateway, MT 59730

Clifford W. Nixon  
1110 Little Bear Lane  
Gallatin Gateway, MT 59730

Raymond Van Dyke  
12500 Churchill Rd  
Manhattan, MT 59741

John & Ramona Baden  
P. O. Box 247  
Gallatin Gateway, MT 59730

Cindy Younkin, Attorney  
P. O. Box 1288  
Bozeman, MT 59771-1288

Leanne Schraudner, Attorney  
108 S. Church  
Bozeman, MT 59715

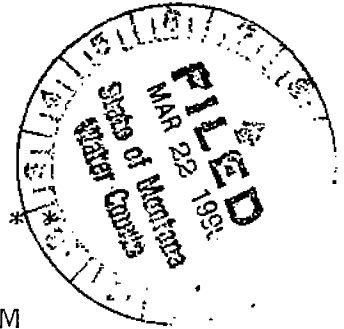
Donald E. Strang  
13730 Portnell Road  
Gallatin Gateway, MT 59730

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

\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
OF ALL THE WATER, BOTH SURFACE AND  
UNDERGROUND, WITHIN THE GALLATIN  
RIVER DRAINAGE AREA, INCLUDING ALL  
TRIBUTARIES OF THE GALLATIN RIVER IN  
GALLATIN, PARK AND MADISON COUNTIES,  
MONTANA.

Case No. 41H-124



\*\*\*\*\*

MOTION TO CREATE AN IMPLIED CLAIM

COME NOW Claimants Ronald and Raymond Van Dyke, by and through their attorney, and request the Court to create an implied claim as follows:

Claim No.:	41H-W-000000
Owner:	Donald Strang
Source:	Bear Creek, Tributary of West Gallatin River
Flow Rate:	40 miner's inches
Priority Date:	June 1, 1880
Point of Diversion:	SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 32
Means of Diversion:	Scahill-Stewart Ditch
Place of Use:	30 acres, E $\frac{1}{2}$ SE $\frac{1}{4}$ , Section 19 10 acres, W $\frac{1}{2}$ SW $\frac{1}{4}$ , Section 20

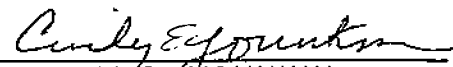
All in T3S, R5E, Gallatin County, Montana.

The reasons for implying this claim are set forth in the accompanying memorandum in support of this motion.



RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of March, 1990.

MOORE, O'CONNELL, REFLING  
& MANOS

BY:   
CINDY E. YOUNKIN  
P.O. Box 1288  
Bozeman, MT 59771-1288  
ATTORNEYS FOR CLAIMANTS

Certificate of Mailing

This is to certify that the above and foregoing was duly served upon the opposing counsel of record at their addresses, by mail postage-prepaid, this 22<sup>nd</sup> day of March, 1990, as follows, to-wit:

Ronald J. Van Dyke  
13333 Portnell  
Gallatin Gateway, MT 59730

Raymond Van Dyke  
12500 Churchill Road  
Manhattan, MT 59741

Clifford W. Nixon  
1110 Little Bear Lane  
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John & Ramona Baden  
P.O. Box 247  
Gallatin Gateway, MT 59730

Leanne Schraudner  
Attorney at Law  
910 Technology Blvd., Suite A  
Bozeman, MT 59715

Don Strang  
13730 Portnell Road  
Bozeman, MT 59715

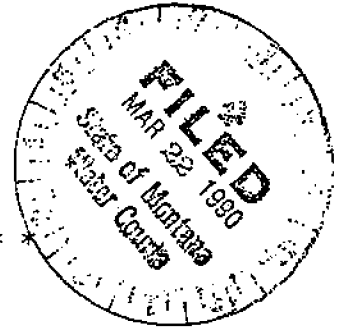
  
CINDY E. YOUNKIN

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

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IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
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MONTANA.

Case No. 41H-124



\*\*\*\*\*

MEMORANDUM IN SUPPORT OF MOTION  
TO CREATE AN IMPLIED CLAIM

FACTS

Bell v. Armstrong, the West Gallatin Decree (Case # 3850, Finding No. 108) decreed a 140 miner's inch right with a June 1, 1880, priority date to John Scahill and W. R. Stewart. Scahill and Stewart are the predecessors in interest to Claimant Ronald Van Dyke (Claim No. 41H-W-012235) and to Donald Strang.

This 140 M.I. right was split by deed. Edward G. Reiser was deeded 100 M.I. Robert and Theresa Reiser, heirs to Edward G. Reiser, deeded this 100 M.I. along with the sale of their farm to Ronald and Raymond Van Dyke.

The remaining 40 M.I. of this decreed water right was deeded to Oscar Rosenberg. Mr. Rosenberg passed way about the time that the water rights claims were being filed, and his estate failed to claim this 40 M.I. portion of the right. Donald Strang is successor in interest to Oscar Rosenberg.

Ronald and Raymond Van Dyke, through inadvertence and mistake, filed a claim (No. 41H-W-012235) for the full 140 M.I. of flow.

Claim No. 41H-W-148638, filed by Edwin Kundert, personal representative for the Estate of Oscar Rosenberg, claimed 60 M.I., also from Bear Creek or Big Bear Creek, with the same point of diversion as Claim No. 41H-W-012235. The place of use for 41H-W-148638 is 80 acres in the SE $\frac{1}{4}$ , Section 19, T3S, R5E, Gallatin County, Montana. This claim was divided, with half of the right (30 M.I.) transferred to Donald Strang, and supports the fact that there are appurtenant lands to these decreed water rights.

#### ARGUMENT

The Constitution of the State of Montana, Article IX Section 3(1) states:

All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. (Emphasis added).

This constitutional provision has statutory counterpart and further definition. Mont. Code Ann. § 85-2-101 (1989) states:

(4) ... it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

Mont. Code Ann. § 85-2-102 (1989) states:

(a) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

It is clear that neither the founders of our Constitution nor the Legislature intended to create a situation in which a valid water right could be easily lost to its owner.

The legislature provides a system under which a complete adjudication of the waters of the State of Montana may be accomplished. As part of that system, each holder of a water right was required to file a claim to the right. Failure to file such a claim establishes a conclusive presumption of abandonment of the right.

As the adjudication process moved along from its beginning, the Water Court and others came to realize that certain rights may not have been properly claimed. Yet, circumstances existed under which it would be clearly inequitable to hold that the right no longer existed. The concept of an "implied claim" is available to deal with these situations.

In addition to other situations, a claim can be implied when, through inadvertence or mistake, one person claimed a right which correctly belonged to another. This system is of particular importance to the state itself in protecting its right to water on school trust lands.

The state is, by the very nature and extent of its trust lands, required to rely on information provided by its lessees when preparing and filing its claims. In at least one instance, the lessee claimed water for use on his private land that was actually used on school trust lands. The state, relying on information provided by the lessee, did not claim the water.

The water adjudication process was not designed and was certainly not intended to deprive the state of its water right under the circumstance described above. The Water Court did not allow such a result. Instead, the Court created an implied claim under which the proper flow rate, priority date, and place of use could be decreed to the state. The original private claimant of the right, acknowledging his mistake, stipulated to the

creation of the implied claim and the corresponding reduction in his own right to the use of the water.

The wisdom of this course is clear. The water right was claimed. The world was put on notice of its existence. The creation of the implied claim did nothing more than change the ownership and the place of use. The only objector to the claim withdrew its objection. Should others, who did not object, believe they have been injured, they can object at the Preliminary Decree stage of the proceeding.

The situation at hand is virtually identical. Through inadvertence and mistake, Ron Van Dyke claimed the right and the predecessors of Don Strang did not. But the right was claimed.

The Court should now create an implied claim for 40 M.I. identifying Don Strang as the owner and describing the proper place of use. The 140 M.I. right claimed by Ron Van Dyke should be reduced to 100 M.I. He has agreed to such a reduction. Walter Nixon, the only objector, will withdraw his objection should the implied claim be created.

By creating the implied claim, the Court will have satisfied the mandate of our Montana Constitution by recognising and confirming a valid water right which would be protected under the law as it existed prior to July 1, 1973.

The purpose of the water rights adjudication is to insure recognition of rights that have been historically used. In keeping with that purpose all participants in the adjudication process should make all necessary efforts to insure that all water rights, particularly decreed water rights, receive proper recognition.

CONCLUSION

It is clear from Claims No. 41H-W-012235 and 41H-W-148638 and their attachments that a right for 40 M.I. with a priority date of June 1, 1880 is available for use on 30 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ , Section 19 and 10 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ , Section 20, T3S, R5E, Gallatin County, Montana.

The Claimant requests that the Water Court create an implied claim which is recognized in the Water Rights Claims Examination Rules, Rule 1.III, Paragraph 28 and Rule 6.IV.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of March, 1990.

MOORE, O'CONNELL, REFLING  
& MANOS

BY: *Cindy E. Younk*  
CINDY E. YOUNKIN  
P.O. Box 1288  
Bozeman, MT 59771-1288  
ATTORNEYS FOR CLAIMANTS

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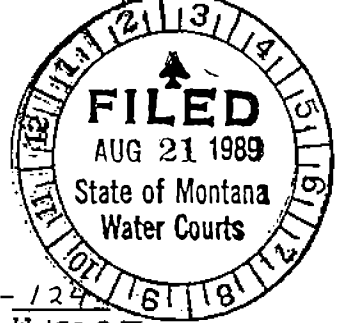
Leanne Schraudner  
Attorney at Law  
910 Technology Blvd., Suite A  
Bozeman, MT 59715

Don Strang  
13730 Portnell Road  
Bozeman, MT 59730

*Cindy E. Younk*  
CINDY E. YOUNKIN

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

\*\*\*\*\*



IN THE MATTER OF THE ADJUDICATION OF )  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDERGROUND, )  
WITHIN THE GALLATIN RIVER DRAINAGE AREA )  
INCLUDING ALL TRIBUTARIES OF THE )  
GALLATIN RIVER IN GALLATIN, PARK AND )  
MADISON COUNTIES, MONTANA. )

CASE NO: 41H-124  
CLAIM NO: 41H-W 12235  
S T I P U L A T I O N

Ronald Van Dyke, and  
Clifford W. Nixon hereby stipulate and agree as follows:

1. The area irrigated is changed from 513 acres to 455 acres.
2. The ownership of the 3.50C (140 miners inches) of water, originally claimed by Ronald Van Dyke, is changed as follows:  
 Ronald VanDyke owns 2.50 C (100 miners inches)  
 Donald Strang owns 1.00 C (40 miners inches)  
 See the enclosed written statement for the details and conditions of the agreement Ronald VanDyke has entered into with Donald Strang.
3. Upon entry of Preliminary and Final decrees for Basin 41H which reflect the above listed corrections to Water Right Number 41H-W 12235 and with no further changes to the Abstract of Water Right, the Objection of Clifford W. Nixon shall be deemed to have been withdrawn.
4. That this stipulation was entered into and executed voluntarily by all parties as undersigned herein in good faith, and without any fraud, misunderstanding, misrepresentation, duress or undue influence, whatsoever.

DATED this 21<sup>st</sup> day of August, 1989.

BY: Ronald Van Dyke  
Ronald Van Dyke

BY: Clifford W. Nixon  
CLIFFORD W. NIXON, Objector

This agreement is between Ron VanDyke and Don Strang  
dated August 19, 1989.

Ron VanDyke will transfer 40 miners inches of Bear  
Creek water, dated 1880 priority date, to Don Strang  
contingent upon Don Strang purchasing land from the  
Oscar Rosenberg estate.

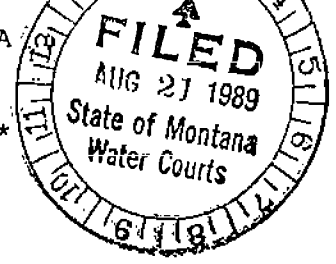
  
Don Strang

  
Ron VanDyke



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

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IN THE MATTER OF THE ADJUDICATION OF )  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDERGROUND, )  
WITHIN THE GALLATIN RIVER DRAINAGE AREA )  
INCLUDING ALL TRIBUTARIES OF THE )  
GALLATIN RIVER IN GALLATIN, PARK AND )  
MADISON COUNTIES, MONTANA. )  
\_\_\_\_\_ )

CASE NO: 41H-124  
CLAIM NO: 41H-W12236  
S T I P U L A T I O N

Ronald Van Dyke, and  
Clifford W. Nixon hereby stipulate and agree as follows:

1. The area irrigated is changed from 513 acres to 455 acres.
2. Upon entry of Preliminary and Final decrees for Basin 41H which reflect the above listed correction to Water Right Number 41H-W12236 and with no further changes to the Abstract of Water Right, the Objection of Clifford W. Nixon shall be deemed to have been withdrawn.
3. That this stipulation was entered into and executed voluntarily by all parties as undersigned herein in good faith, and without any fraud, misunderstanding, misrepresentation, duress or undue influence, whatsoever.

DATED this 21<sup>st</sup> day of August, 1989.

BY: Ronald Van Dyke  
Ronald Van Dyke

BY: Clifford W. Nixon  
CLIFFORD W. NIXON, Objector

2