

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

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

CLAIMANTS: BFR Family Limited Partnership
LLLP; Anthony R. Chater; Pleasant
View Ranch LLC; Steven R. Taylor;
Lisa D. Taylor, Steven M. Swan

CASE 41G-0080-R-2021
41G 197216-00
41G 202305-00

OBJECTOR: Kelly R. Hall

CLAIMANTS: BFR Family Limited Partnership
LLLP; Anthony R. Chater; Steven R.
Taylor; Lisa D. Taylor; Gidions View
Trust; Von Bergen Properties LLC,
Steven M. Swan, Pleasant View
Ranch LLC

CASE 41G-0081-R-2021
41G 197214-00
41G 197215-00
41G 202306-00

OBJECTOR: Kelly R. Hall

CLAIMANTS: Elizabeth A. Hall; Kelly R. Hall

CASE 41G-0362-R-2021
41G 195586-00

COUNTEROBJECTORS: BFR Family Limited
Partnership LLLP

**ORDER DENYING JOINT OBJECTION TO THE WATER JUDGE AND
MOTION TO TRANSFER MATTER TO WATER JUDGE**

INTRODUCTION

This matter involves three water rights cases containing six water rights claims.
The procedural history of these cases is interrelated and complex.

Case 41G-0080-R-2021 (“Case 41G-80”) includes claims 41G 197216-00 and 41G 202305-00. Both claims were filed for the same original water right appropriated by Henry and John Rundell. The Rundells filed a Notice of Appropriation for a water right with a flow rate of 150 miner’s inches, or 3.75 CFS.¹ Claim 41G 197216-00 has a flow rate of 6.25 CFS and claim 41G 202305-00 has a flow rate of 2.46 CFS. The total of these two flow rates is 8.71 CFS, which exceeds the amount claimed by the Rundells.² Because of this problem, the Montana Department of Natural Resources and Conservation (“DNRC”) placed issue remarks on both claims noting the flow rates exceeded the amount in the Rundells’ Notice of Appropriation. Kelly R. Hall, co-owner of a claim in case 41G-0362-R-2021 (“Case 41G-362”), also objected to both claims.

Case 41G-0081-R-2021 (“Case 41G-81”) includes claims 41G 197214-00, 41G 197215-00, and 41G 202306-00. All three of these claims are based on another Notice of Appropriation filed by the Rundells for 250 miner’s inches of water, or 6.25 CFS. The flow rates of the three claims total 7.77 CFS, thereby exceeding the 6.25 CFS flow rate referenced in the Rundell Notice of Appropriation.

Case 41G-362 has only one claim, claim 41G 195586-00, owned by Kelly R. Hall and Elizabeth Hall. The Halls’ claim is part of this proceeding because Kelly R. Hall objected to the claims in cases 41G-80 and 41G-81 and the owners of those claims filed counterobjections to the Halls’ claim.

Most of the parties in the three cases filed a *Stipulation and Agreement* (“*Stipulation*”) intended to resolve issues regarding their claims and objections. *See Stipulation and Agreement*, June 1, 2022, Doc. 20.00. The settling parties agreed to address the Notice Exceeded issue in Case 41G-80 by re-labeling claim 41G 197216-00 as a previously unclaimed use right rather than a filed right and by re-setting its priority

¹ Water right claims based on Notices of Appropriation are called filed rights.

² Overclaiming a historical water right based on a Notice of Appropriation causes what is known as a Notice Exceeded issue. This problem arises when the combined flow rates of multiple water rights based on the same original Notice of Appropriation exceed the flow rate described in the original Notice. The same problem can arise with water rights based on historical district court decrees. The latter problem is called a Decree Exceeded issue. The DNRC’s purpose in identifying these issues is to ensure that the flow rates of historical water rights are not exceeded.

date to January 1, 1874 – one-day junior to its originally claimed priority date of December 31, 1873. The settling parties did not provide evidence of historical use of the new use right, and it does not appear any of the settling parties previously claimed a use right with a priority date of January 1, 1874. The settling parties asserted that these two changes adequately addressed the Notice Exceeded issue and warranted the closure of case 41G-80.

The *Stipulation* also modified the priority dates and the type of right of two water rights in case 41G-81. The settling parties agreed to change the priority dates of 41G 197214-00 and 41G 197215-00 to January 1, 1873 – also one-day junior to the December 31, 1872, priority date in the Notice of Appropriation upon which these rights are based. The parties also agreed to characterize claims 41G 197214-00 and 41G 197215-00 as use rights rather than filed rights. The parties did not provide evidence of historical use of the new use rights and it does not appear any of the settling parties previously claimed water rights with priority dates of January 1, 1873. The proposed shift from filed rights to use rights means that claims 41G 197214-00 and 41G 197215-00 are being used as vehicles to claim water rights not previously claimed in this adjudication. The settling parties asserted these changes addressed the Notice Exceeded issues in case 41G-81.

Finally, the settling parties agreed to dismiss their counterobjections to the Halls’ right in case 41G-362 in exchange for Mr. Hall’s promise to withdraw objections to water rights in cases 41G-80 and 41G-81.

A. The Water Master’s First Ruling Regarding the *Stipulation*

The Water Master presiding over this case rejected the *Stipulation* and denied a motion to change elements of claims 41G 202305-00 and 41G 202306-00. See *Order Rejecting Stipulation and Den. Mot.*, July 6, 2022, Doc. 23.00. The Water Master provided two reasons for her decision: first, she noted that some parties did not sign the *Stipulation* and, second, she noted that the settling parties had not supplied sufficient evidence of historical use to support the existence of the new use right claims referenced in the *Stipulation*.

The Water Master explained that the settling parties' decision to change the priority date of some claims by one day and to re-characterize them as use rights rather than filed rights was not evidence of historical use. She further explained that the Rundell Notices of Appropriation, which acts as evidence of a filed right, could not now be used as evidence to support a use right and that the parties "should file evidence to support a separate and independent use of water..." *Id.*, at 3.

Following the *Order Rejection Stipulation and Denying Motion*, BFR Family Limited Partnership LLLP ("BFR") filed an *Objection and Unopposed Motion for Summary Judgment* in all three cases. *See Obj. and Unopposed Mot. for Summ. J.*, March 8, 2023, Doc. 32.00. BFR asserted that the Water Master incorrectly applied Rule 17 of the Water Right Adjudication Rules to the *Stipulation*. Rule 17(b), W.R.Adj.R. requires supporting evidence when the parties to a settlement agreement seek to enlarge a water right. *Obj. and Unopposed Mot. for Summ. J.*, at 3-6. Meanwhile, Rule 17(c), W.R.Adj.R. requires no supporting evidence when the parties to a settlement agreement seek to reduce a water right. BFR characterized the parties' agreement to create three new junior water rights as reductions. *Obj. and Unopposed Mot. for Summ. J.*, at 4. BFR argued these reductions did not require supplemental evidence under Rule 17(c), W.R.Adj.R. and the Water Master was wrong to ask for it. *Id.*

BFR also argued that the Water Court has previously approved settlement agreements like the one in this case without requiring supplemental evidence to support the creation of new use rights. *Id.*, at 5. BFR characterized this disparate treatment as an unconstitutional abridgment of its due process and equal protection rights under Article II, Sections 4 and 17 of the Montana Constitution. *Id.*, at 6.

In addition to its argument about the constitutionality of the Water Master's decision, BFR supplied additional evidence to support priority dates for the three new use rights created in the *Stipulation*. *Id.*, at 15-19. BFR supplied this additional information as part of a renewed effort to have the *Stipulation* approved. A summary of this evidence is provided below.

Claim 41G 197214-00

This right is for instream stockwater use from Antelope Creek. Instream stock rights are typically diverted by livestock drinking directly from the source. BFR asserts recognizing the claim as a use right is warranted because a survey dating from 1870 shows a cabin adjacent to Antelope Creek. *Id.*, at 16. BFR contends the occupants of the cabin had livestock that watered directly from Antelope Creek. *Id.* Although there is no direct evidence of this assertion, BFR contends it is reasonable to recognize the claim as a use right because everyone had livestock in 1870 and Antelope Creek was the nearest source of stockwater. *Id.*

Claim 41G 197215-00

BFR also asserted the presence of the cabin along Antelope Creek proved the existence of an irrigation right with a January 1, 1873, priority date. *Id.*, at 17. Although General Land Office (“GLO”) surveys from this era often identify and label ditches or irrigation, this survey does not reference such features. *Id.* Despite the absence of evidence of irrigation, BFR nevertheless asserts “it was incredibly common to subsistence farm and to irrigate pasture at a remote residence like the one reflected on the Survey.” *Id.*

BFR also referenced the GLO land entry files of Issac Patrick, who received a patent for land in the NW of Section 32 on January 31, 1903. *Id.* An affidavit signed by Patrick in 1902 states he built a residence on the property in early 1897, and references cultivation of 25 acres, but does not mention construction of ditches or use of water for irrigation. *Id.* BFR contends this evidence “conclusively establishes a use water right was in existence by at least March of 1897.” *Id.*, at 18.

Claim 41G 197216-00

For this right, BFR again relied on the GLO survey showing the cabin and separate GLO land entry files of John Drake, who purchased land from a previous entrant. *Id.* The documents pertaining to John Drake’s purchase of property do not reference irrigation, nor does BFR supply other evidence of irrigation prior to Drake’s purchase. *Id.* Nonetheless, BFR asserted that Drake’s purchase of land from an

unidentified prior homestead entrant “conclusively establishes a use water right was in existence by at least August 9, 1903. *Id.*, at 19.

B. The Water Master’s Second Ruling Regarding the *Stipulation*

The Water Master ruled on BFR’s motion for summary judgment on August 2, 2023. *Order Den. Mot. Summ. J.*, August 2, 2023, Doc. 35.00. The Water Master determined that the proposed changes to claims 41G 197214-00, 41G 197215-00, and 41G 197216-00 were not reductions, but the creation of new water rights, and that the modifications to existing rights and creation of new ones required supporting evidence. *Id.*, at 4. She ruled that the settling parties had the burden of proving, by a preponderance of the evidence, that changes to the water rights in the *Stipulation* were supported by historical beneficial use. *Id.*

The Water Master then reviewed the evidence supplied by BFR in the motion to further support the proposed use right claims. *Id.*, at 5-7. She concluded the evidence of a cabin adjacent to Antelope Creek was sufficient to establish historical use of an instream stockwater right at that location since 1873. *Id.*, at 6. The ruling meant that 41G 197214-00 could be recognized as a use right as described in the *Stipulation*. She also concluded the existence of the cabin did not establish use rights for irrigation claims 41G 197215-00 and 41G 197216-00, at least not as those claims were described in the *Stipulation*. *Id.* The Water Master concluded the settling parties and BFR had not supported their proposed amendments with adequate evidence of historical use. *Id.* She was not persuaded that the documents referencing Isaac Patrick and John Drake proved historical irrigation. *Id.* “BFR has not presented evidence to show the use of irrigation claims 41G 197215-00 and 41G 197216-00, each claiming a flow rate of 6.25 CFS, since 1874.” *Id.*

The Water Master denied BFR’s motion for summary judgment and set a date for a status conference to discuss next steps in all three cases. *Id.*, at 7.

C. The Settling Parties’ Joint Objection to the Order Denying Summary Judgment

Several parties filed an objection in response to the Water Master’s denial of their summary judgment motion. *Joint Obj. to the Water J., Mot. to Transfer Matter to Water*

J., and Req. for Status Conf., Sept. 6, 2023, Doc. 36.00. The parties contend they supplied the best available evidence to support their motion for summary judgment and that no additional evidence is available. *Id.*, at 4. They contend the Water Master erred by concluding this evidence was insufficient to support their new use rights. *Id.* The parties seek transfer of this case to a judge and request a telephone status conference because they do not believe a trial or mediation is necessary given their *Stipulation. Id.*, at 6.

STANDARD OF REVIEW

The Water Court appoints Water Masters to hear cases and prepare reports containing findings of fact and conclusions of law. Rule 53(a)(1)(C), M. R. Civ. P.; Rule 23, W.R.Adj.R. The Water Court reviews findings of fact for clear error and conclusions of law to determine whether they are correct. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 25, 328 P.3d 644 (citing *Heavirland v. State*, 2013 MT 313, ¶ 13, 372 Mont. 300, 311 P.3d 813).

The Water Court uses a three-part test for reviewing objections to a Water Master's findings of fact. *See Interstate Prod. Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991); Rule 11(c), W.R.Adj.R. (referencing Rule 53(e), M. R. Civ. P.); *See In re the Existing Rights within the Jefferson River Drainage Area*, Nos. 41G-137, 41G-W-182145-00, 1999 Mont. Water LEXIS 1, at *3-4 (Dec. 27, 1999).

First, the Water Court reviews the record to see if the Master's findings are supported by substantial evidence. *In re the Existing Rights within the Jefferson River Drainage Area*, 1999 Mont. Water LEXIS at *3. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Skelton Ranch*, ¶ 27 (quoting *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993)).

Second, even if the findings are supported by substantial evidence, the Water Court may determine a finding is clearly erroneous if the Water Master misapprehended the effect of the evidence. *In re the Existing Rights within the Jefferson River Drainage Area*, 1999 Mont. Water LEXIS at *4.

Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Water Court may still determine that a finding is clearly erroneous when a review of the record leaves the Water Court with the definite and firm conviction that a mistake has been committed. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16); *In re the Existing Rights within the Jefferson River Drainage Area*, 1999 Mont. Water LEXIS at *4. A finding may be clearly erroneous even though there is evidence to support it. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16).

The Water Court reviews a master's conclusions of law to determine whether they are correct. *Heavirland*, ¶ 14 (citing *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398). "Thus, the Water Court reviews the Water Master's findings of fact for clear error and the Water Master's conclusions of law for correctness." *Heavirland*, ¶ 14 (citing Rule 53(e)(2), M. R. Civ. P.; *Geil*, ¶ 22).

Based on these standards of review, the Water Judge "may adopt, modify, or reject the [Master's] report, in whole or in part, or may receive further evidence or recommit it with instructions." Rule 23, W.R.Adj.R.

ISSUES

1. *Did the Water Master properly determine that the party's request for recognition of previously unclaimed use rights was an expansion of a claim under Rule 17(b), W.R.Adj.R.?*
2. *Did the Water Master properly determine there was insufficient evidence to support summary judgment?*

ANALYSIS

1. *Did the Water Master properly determine that the party's request for recognition of previously unclaimed use rights was an expansion of a claim under Rule 17(b), W.R.Adj.R.?*

The parties disagree with the Water Master's conclusion that recognition of previously unclaimed use rights is not a reduction of a water right as contemplated by Rule 17, W.R.Adj.R. Rule 17's three parts must be read together for a full understanding of the Rule's purpose.

Rule 17(a) states the Water Court is not bound by settlement agreements and that such agreements are subject to review and approval by the Court. This rule recognizes that all water rights from the same source conflict with each other. The purpose of Water Court review is to prevent self-dealing by parties to settlement agreements which harm other water users by changing historical use of a shared resource. Rule 17(b) requires that enlargement of a claim be supported by sufficient evidence to meet the burden of proof applicable to any water right. If the burden is not met, then “the water court shall not enlarge or expand the element of the claim.” Rule 17(b), W.R.Adj.R.

Finally, Rule 17(c) states that the Water Court may accept a reduction to a claim without determining whether the burden of proof has been met. The parties contend that changing water rights by making them one day junior constitutes a permissible reduction under Rule 17(c). *See Joint Obj. to the Water J., Mot. to Transfer Matter to Water J.*, at 3. This belief is mistaken.

The two claims in case 41G-80 were filed by two different parties for the same underlying water right. The underlying water right was originally asserted by the Rundells based on a filed Notice of Appropriation. The flow rate described in the Rundell Notice of Appropriation was 6.25 CFS. Consequently, the maximum amount of water that could have been historically diverted pursuant to the Rundell Notice of Appropriation was 6.25 CFS. In the absence of the *Stipulation* reached between the parties, the Water Court’s job would have been to determine who owned the 6.25 CFS of the Rundell water right. Regardless of how that ownership decision came out, the maximum withdrawal of water from the source of supply would have been capped at 6.25 CFS.

The *Stipulation* increases the amount of water that may be withdrawn from the source by recognizing, for the first time, use rights that have not been previously claimed. Using the water rights in case 41G-80 as an example, the owner of 41G 202305-00 keeps the same priority date and full flow rate of the Rundell right. Under this arrangement the owners of 41G 202305-00 own the entire Rundell water right, leaving no portion of that right available for anyone else. As part of the *Stipulation*, however, the owners of 41G 197216-00 receive a water right they did not originally claim. That right is now described

as a use right with a priority date one day junior to the Rundell right and a flow rate of 2.46 CFS. That flow rate, when combined with the flow rate for 41G 202305-00, exceeds the amount of water historically diverted pursuant to the Rundell Notice of Appropriation. The effect of this arrangement is to place a new burden on the source of supply, thereby creating potential harm to other water users. Under the terms of the Stipulation, there will be more water diverted from the source than was historically diverted pursuant to the Rundell Notice of Appropriation alone.

The parties to the Stipulation assert that making the priority date of 41G 197216-00 one day junior constitutes a reduction within the meaning of Rule 17(c) and should have been approved by the Water Master. This argument assumes that the owners of 41G 197216-00 had a legitimate claim to some or all the Rundell right. It also ignores the fundamental issue in this case, which is that multiple parties claimed more water than was justified under the Rundell Notice of Appropriation, thereby creating a burden on the source that did not historically exist. Altering the priority date of 41G 197216-00 by one day did not materially reduce this burden. On the contrary, the addition of a previously unclaimed water right potentially increases the burden on the source to the detriment of other water users.

The same analysis applies to the three water rights in case 41G-81, where the settling parties made the priority dates of two rights one day junior and relabeled them as use rights. Again, the effect of this arrangement places a new burden on the source. This new burden arises because the two new use rights created by the *Stipulation* were not claimed by anyone previously and were not part of any prior decree issued by the Water Court. The flow rates of these new rights are in addition to the amount historically diverted pursuant to the Rundell Notice of Appropriation, thereby resulting in a potential expansion of water use.

As discussed above, the purpose of Rule 17, W.R.Adj.R., is to prevent increases in water use beyond those that can be historically substantiated. Creation of new use rights, and substitution of those rights for inflated and potentially invalid filed rights, places a potentially unprecedented burden on the source of supply. The Water Master correctly

concluded that the arrangement created by the settling parties to the *Stipulation* constituted a potential expansion of water use that required supporting evidence before it could be approved.

2. *Did the Water Master properly determine there was insufficient evidence to support summary judgment?*

After rejection of the *Stipulation*, BFR, joined by the other settling parties, filed an unopposed motion for summary judgment. *Obj. and Unopposed Mot for Summ. J.*, June 8, 2023, Doc. 32.00. The intent of this motion was to supply evidence supporting the assertion that the new use rights described in the *Stipulation* had been used historically. Except for one stockwater right, the Water Master denied the motion for summary judgment. *Order Den. Mot. Summ. J.*, August 2, 2023, Doc. 35.00. She ruled that the parties had not met their burden of providing sufficient evidence to show historical use of the new water rights created in the *Stipulation*. She concluded there were unresolved issues of fact that prevented summary judgment.

Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Stanley L. & Carolyn M. Watkins Tr. v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620 (citing Rule 56(c), M.R.Civ.P.). To determine the existence or nonexistence of a genuine issue of material fact, the Water Court will look to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 24, 304 Mont. 356, 22 P.3d 631. All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing the summary judgment motion. *Id.*, ¶ 25.

The party seeking summary judgment has the burden of demonstrating an absence of genuine factual issues. *Id.* Proof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel. *Montana Metal Buildings, Inc. v. Shapiro*, 283 Mont. 471, 476, 942 P.2d 694, 697 (1997). Where the moving party can demonstrate that no genuine issue of material fact remains in dispute, the burden shifts to the party opposing the motion. *Lee*, ¶ 26. To raise a genuine issue of

material fact, the party opposing summary judgment must “present material and substantial evidence, rather than merely conclusory or speculative statements.” *Id.*

Although there was no opposition to the motion for summary judgment, the Water Master was still obligated to determine whether a genuine issue of material fact existed. Regardless of whether a motion for summary judgment is opposed, a Water Master must determine there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Chapman v. Maxwell*, 2014 MT 35, ¶ 11, 374 Mont. 12, 322 P.3d 1029.

After reviewing the evidence supplied by BFR to support the settling parties' proposed changes to the claims, the Water Master reached two conclusions.

First, the Water Master concluded that a September 28, 1870, survey conducted by the GLO showing the existence of a cabin near Antelope Creek was sufficient to support historical use of stockwater claim 41G 197214-00. She reasoned that most people of that era depended on livestock and livestock would have consumed water from Antelope Creek.

Second, the Water Master concluded that the survey was not sufficient evidence to support the historical use of irrigation claims 41G 197215-00 and 41G 197216-00. The survey conducted by the GLO does not describe irrigation or irrigation infrastructure in the area, nor does other documentary evidence. The settling parties argue that despite this lack of evidence, there must have been irrigation because people were living near Antelope Creek in 1870. Application of this rationale would allow virtually any water right to be ratified by showing that humans were present at the time of the alleged appropriation. Such a low standard falls short of the burden of proof historically imposed on water users who are seeking to expand water use beyond those amounts originally claimed and precludes summary judgment.

The settling parties also argue that the evidence provided is the best available and is not contradicted by other evidence. Relying on this rationale, the settling parties assert the master had no option but to grant summary judgment. This argument misapplies the summary judgment standard.

The evidence to support claims 41G 197215-00 and 41G 197216-00 is speculative. Courts are not obligated to grant an unopposed summary judgment motion simply because the evidence offered is the only evidence available. The question is whether genuine issues of material fact have been eliminated. The evidence supplied does not establish that there are no genuine issues of material fact and does not therefore entitle the settling parties to summary judgment.

The Water Master correctly concluded that the settling parties did not meet their burden of proof. The evidence provided is inconclusive, and in some cases suggests no irrigation occurred on the dates claimed. The Water Master correctly determined there were genuine issues of material fact regarding historical use of the previously unclaimed water rights referenced in the *Stipulation*. Having reached that decision, there is no reason to address the settling party's entitlement to judgment as a matter of law.

CONCLUSION

The Water Master's August 2, 2023, Order Denying Motion for Summary Judgment is affirmed. This matter is remanded to the Water Master for further proceedings.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Anthony R. Chater
PO Box 525
Pony, MT 59747-0525

Steven R. Taylor

Lisa D. Taylor

PO Box 522
Pony, MT 59747
steve@bridgeraerospace.com

Steven M. Swan

PO Box 578

Pony, MT 59747

Service via Electronic Mail:

William C. Fanning **Esq.**
Fanning Law PLLC
300 N. Wilson Ave. Suite 3007
Bozeman, MT 59715-3551
(406)-220-2805
william@fanninglawpllc.com
becki@fanninglawpllc.com

Ryan McLane
FRANZ & DRISCOLL, PLLP
PO Box 1155
Helena, MT 59624-1155
(406) 442-0005
Ryan@franzdriscoll.com
Office@franzdriscoll.com

Ryan K. Mattick
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
office@cmrlawmt.com

Abigail R. Brown
Attorney at Law
Parsons Behle & Latimer
PO Box 104
Helena, MT **59624**
Main: 406-317-7220
Direct: 406-317-7243
AbbyBrown@parsonsbehle.com
ecf@parsonsbehle.com

Michael JL Cusick
Jeremy A. Michael
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
office@cmrlawmt.com

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