

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BOULDER RIVER, TRIBUTARY OF THE JEFFERSON RIVER (41E)
* * * * *

NOTICE OF FILING OF MASTER'S REPORT

FILED

TO: ALL PARTIES

JAN 29 1991

RE: Case No. 41E-45, 41E-W-094077-00

Montana Water Court

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 in Rules 5 and 53 of the Montana Rules of Civil Procedure.)

DATED this 29th day of January, 1991.

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)

FINDINGS OF FACT

1. The current owner of this water right claim is:
Diane Fassel and Anne Wilson Schaef, Co-Trustees
of the Anne Wilson Schaef Revocable Trust

2. This Commercial claim was called in on Motion of the Montana Water Court due to the gray area remark concerning the fact this is purely an instream use for "wildlife, fish and peaceful ambience of the hotel property for patrons."

3. The Abstract of Water Right in the Temporary Preliminary Decree included a remark which stated:

"The Water Court finds no legal basis for this purpose to be considered a beneficial use or appropriation of water."

4. Stuart Lewin, the former owner, filed an objection to this claim based upon purpose of right.

5. This Commercial water right claim is an instream use for fish and wildlife purposes and is characterized by the lack of a man made physical diversion.

CONCLUSIONS OF LAW

I.

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. Sec. 3-7-224.

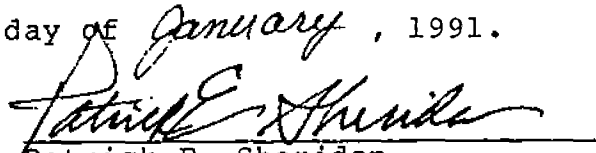
II.

The Montana Supreme Court has held that in order for a water user to claim a valid water right recognized under Montana law the use must be characterized by an actual physical diversion of the water. Matter of Dearborn Drainage Area, 234 Mont. 331 (1988).

III.

Based upon the Original Statement of Claim For Existing Water Right, the Court record, oral argument and Montana law, claim 41E-W-094077 shall not appear in the Preliminary or Final decree of the Boulder River, Tributary of the Jefferson River Basin (41E).

Dated this *29th* day of *January*, 1991.


Patrick E. Sheridan
Water Master

CERTIFICATE OF SERVICE


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

Matthew Williams, Attorney
506 East Babcock
Bozeman, MT 59715

Stuart F. Lewin, Attorney
615 3rd Avenue N.
Great Falls, MT 59715

Diane Fassel and Anne Wilson Schaeff
Co-Trustees for the Anne Wilson Schaeff Revocable Trust
P.O. Box 18686
Boulder, CO 80302

Dated this *29th* day of *January*, 1991.



Melody J. Colwill
Deputy Clerk of Court

IN THE WATER COURT OF THE STATE OF MONTANA
 UPPER MISSOURI DIVISION
 BOULDER RIVER, TRIBUTARY OF THE JEFFERSON RIVER (41E)
 * * * * *

IN THE MATTER OF THE ADJUDICATION)
 OF THE EXISTING RIGHTS TO THE USE)
 OF ALL THE WATER, BOTH SURFACE AND)
 UNDERGROUND WITHIN THE BOULDER RIVER,)
 TRIBUTARY OF THE JEFFERSON RIVER)
 DRAINAGE AREA, INCLUDING ALL TRIBUTARIES)
 OF THE BOULDER RIVER, TRIBUTARY OF THE)
 JEFFERSON RIVER IN JEFFERSON COUNTY,)
 MONTANA.)

Case No. 41E-45
 41E-W-094077-00

FILED

APR 30 1991

Montana Water Court

CLAIMANT: Paul A. Lewin, A Gift Trust for Stuart & Irving Lewin
 Gift Trust for Rachel Michele, Willard Mack,
 Robert P. Ryan (Former Owners)
 Diane Fassel and Anne Wilson Schaeff, Co-Trustees
 for the Ann Wilson Schaeff Revocable Trust (Present
 Owners)

ON MOTION OF THE WATER COURT

OBJECTOR: Stuart F. Lewin

ORDER ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, Section
 85-2-233(4), the above entitled case was assigned to Water Master
 Patrick E. Sheridan. On January 29, 1991, the Water Master
 issued a report containing Findings of Fact and Conclusions of
 Law. Copies of the report were served upon the claimant. On
 February 1, 1991, an objection was filed to the Master's Report
 by Matthew W. Williams, Attorney for claimant, the Anne Wilson
 Schaeff Revocable Trust, Anne Wilson Schaeff and Diane Fassel,
 Co-Trustees. Previously, claimant's attorney, by letter dated
 January 4, 1990, advised the Court that this claim could be
 submitted to the attention of the Chief Water Judge on the
 existing record and did not ask for or require oral argument.

Since issuance of the Master's Report no application has been made to the Water Court requesting a hearing or oral argument.

Rule 53(e)(2), M.R.Civ.P., requires a Court to accept a Master's Findings of Fact unless clearly erroneous. The Court has reviewed carefully the Water Master's Findings and Conclusions and the objection and response filed. The Court has listened to the tape of the oral argument held July 31, 1990. The Court has read the objections and briefs submitted by counsel. The Court cannot conclude that the Master's Findings of Fact are clearly erroneous. Once the Findings of Fact are determined not to be erroneous, then the Master's ultimate Conclusions of Law represent a correct application of the law to the facts and should not be disturbed.

Pursuant to Rule 53(e) M.R.Civ.P., the Court adopts the Master's Report and

ORDERS that changes recommended in the Master's Conclusions of Law be made to the abstract of claim(s) listed above as they appear in the Temporary Preliminary Decree of the Boulder River, Tributary of the Jefferson River Basin (41E).

MEMORANDUM

Counsel for claimant tries to persuade the Court that construction of a massive resort property on the banks of the Little Boulder River manifests an intent to take advantage of the recreational benefits of the adjacent water course and that claimant has a right to certain specified instream flows. Essentially, claimant could be asserting a claim based upon the common-law doctrine of Riparian rights. That doctrine is not

applicable to Montana. Mettler v. Ames Realty Co., 61 Mont. 152, 170, 201 Pac. 702 (1921). Even if Riparian rights are not being claimed here, the Montana Supreme Court case of In the Matter of Dearborn Drainage Area, 234 Mont. 331, 766 P.2d 228 (1988) ("Bean Lake") is controlling on this Court.

In the "Bean Lake" case the Department of Fish, Wildlife and Parks (DFWP) engaged in extensive fish and wildlife activities and claimed an instream or inlake recreational, fish and wildlife water right. The Supreme Court rejected that effort. The Court stated in 234 Mont. at 343 as follows:


"It is clear therefore that under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute. The prevailing legal theory was that some form of diversion or capture was necessary for an appropriation even though some forms of non-diversionary water rights were given appropriation status. In this case the Water Court denied the appropriation water right claim 'because of the lack of diversion, intent, and notice.' Whatever the merits of the lack of diversion argument, the DFWP and the public could not have intended an appropriation where none was recognized by law, and for the same reason, adverse appropriators could not have had notice of such a claim. We therefore uphold the Water Court's decision that DFWP, for itself or for the public, had no appropriation right in Bean Lake, and no 'existing right' therein which is protected by Art. IX, Section 3(1) of the 1972 Montana Constitution."

Even if the Montana Supreme Court had not spoken in the "Bean Lake" case as it did, the argument that the construction of the resort on the banks of the Little Boulder establishes an intent to appropriate Little Boulder instream waters is not persuasive. From a review of the copy of the application for registration of the property on the National Register of Historic

Places submitted to the Court by letter dated June 22, 1990, it appears more likely that the site selected for construction has less to do with the Little Boulder and more to do with the "thirty hot water springs" asserted to be found within the confines of the acreage of the Boulder Hot Springs Hotel Complex. See continuation sheet 4, item 7, page 4; continuation sheets 5, 6, 7, 8, item number 8, pages 1, 2, 3, and particularly page 4 ("The drawing card during the entire hot springs commercial enterprise has been the hot springs themselves.")

Accordingly, this Court adopts the Master's Report in whole.

DATED this 30th day of April, 1991.



C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

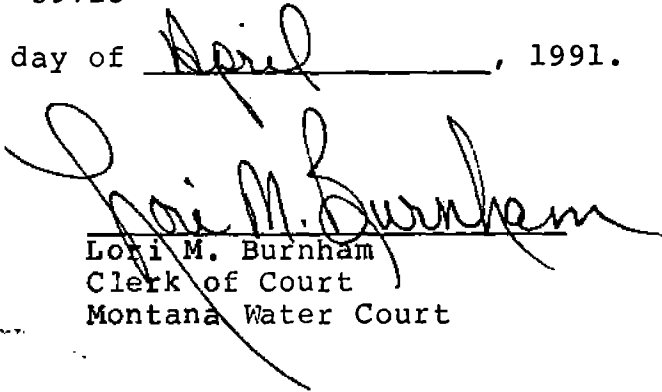
I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER ADOPTING MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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Co-Trustees for the Anne Wilson Schaeff
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Boulder, MT 80302

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DATED this 30 day of April, 1991.


Lori M. Burnham
Clerk of Court
Montana Water Court