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

* *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE JEFFERSON RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE JEFFERSON RIVER IN BROADWATER, GALLATIN, MADISON, JEFFERSON AND SILVER BOW COUNTIES, MONTANA.	**CASE NO. 41G-190** 41G-W-197162-00 41G-W-197167-00

CLAIMANT: Hamilton Ranches Partnership

MOTION OF MONTANA WATER COURT

OBJECTOR: United States of America (Bureau of Land Management), United States of America (USDA Forest Service), Montana Department of State Lands

OPINION

In the Temporary Preliminary Decree for the Jefferson River Basin (41G), the Seidensticker Ranch Partnership was decreed stockwater claims 41G-W-197167-00 and 41G-W-197162-00. The Seidensticker Ranch Partnership subsequently transferred its claims to Hamilton Ranches Partnership. The Water Court called claim 41G-W-197167-00 in on its own motion to address a point of diversion and place of use issue. The Montana Department

of State Lands ("DSL") filed objections to the ownership, place of use, point of diversion, and "other" stating that:

> This claim includes an implied water right of the Montana Department of State Lands for direct livestock use from Cottonwood Creek in Section 36, T02S, R07W, Madison County, Montana. Specifically: Point of Diversion #03 and place of use #002 in claim 197167 describe section 36 above, which is state school trust land leased by this claimant. These locations should be deleted from this claim and issued in a separate and distinct water right to the state, pursuant to the Montana Supreme Court decision in *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948, 42 St. Rep. 869 (1985). The Department of State Lands did not file a claim, during the filing period, for this location and use.

The United States Department of the Interior, Bureau of Land Management ("BLM") filed objections to the ownership, place of use, and point of diversion for claim 41G-W-197167-00, stating that:

> This water right, as claimed, includes public lands of the United States within the listed points of diversion and/or places of use. All use of public lands for livestock grazing is subject to permit by the Bureau of Land Management; therefore, the water right should be amended to exclude the public lands or should be decreed in whole or in part, as appropriate, to the United States of America (Bureau of Land Management).

The United States Department of Agriculture, Forest Service ("USFS") filed objections to every element listed on the objection form for claim 41G-W-197162-00, stating that the claim "[s]hould be in the name of United States."

The claims and objections were assigned to Water Master Michael J. L. Cusick, pursuant to § 85-2-233, MCA, who consolidated them into the present case.

In 1994, Hamilton Ranches ("Claimant"), DSL, BLM, and USFS filed cross-motions for summary judgment with respect to the claims and objections. All parties waived their right to a hearing and submitted motions on briefs alone. The Water Master issued a Master's Report and Memorandum recommending that the Court enter an order granting the

Claimant's motion for summary judgment and denying the motions of the DSL, BLM, and USFS.

With respect to the DSL arguments, the Master concluded that *Pettibone* did not apply in this case, because the Seidensticker appropriation of water in 1870 predated the State's acquisition of title to the Section 36 school trust land. Therefore, the Seidenstickers could not have acted on behalf of the State, as did the lessees in *Pettibone*. (Master's Mem. on Cross-Mot. for Summary J. at 27.) The Master's conclusion was correct. As the DSL did not object to the Master's Report, the Court need not address the DSL's issues any further. *Marriage of Doolittle* (1994), 265 Mont. 168, 171-72, 875 P.2d 331, 334; *Marriage of Hayes* (1993), 259 Mont. 302, 304, 856 P.2d 227, 229.

The BLM and USFS filed objections to the Master's Report and requested the Court to enter summary judgment in their favor and to terminate the claims. In the alternative, the BLM requested that federal land not be described as the place of use for claim 41G-W-197167-00. As the USFS has adopted by reference all arguments made by the BLM in its Objection to the Master's Report, the Court has consolidated the arguments and, where appropriate, refers to the parties as the "United States."

I. JURISDICTION

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees under the authority granted in § 85-2-233, MCA. It has concurrent jurisdiction to adjudicate federal rights to the use of water and to review federal objections to state based water right claims filed in comprehensive state water rights adjudications under the authority granted by the McCarran Amendment of 1952, 43 U.S.C. § 666 (2000) and §§ 85-2-231, -233, and -234, MCA. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 549, 103 S. Ct. 3201, 3204-05, 77 L. Ed. 2d 837, 845 (1983); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 812, 96 S. Ct. 1236, 1243, 47 L. Ed. 2d

483, 495 (1976); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes* (1985), 219 Mont. 76, 84, 86, 712 P.2d 754, 759; *State ex rel. Greely v. Water Court* (1984), 214 Mont. 143, 152, 691 P.2d 833, 838.

II. STANDARD OF REVIEW

The Montana Water Court's standard of review for objections to summary judgment rulings by a Water Master is *de novo*. *Mead v. M.S.B., Inc.* (1994), 264 Mont. 465, 470, 872 P.2d 782, 785. When the Water Court reviews a Water Master's recommendation to grant summary judgment, the Court applies the same evaluation that the Water Master applied to decide the summary judgment motion. *Bruner v. Yellowstone County* (1995), 272 Mont. 261, 264, 900 P.2d 901. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), M.R.Civ.P. The Water Court reviews the legal conclusions of a Master in a summary judgment ruling for error. *Bruner*, 272 Mont. at 265. When reviewing objections made on the basis of state law, the Court must apply state law; when reviewing objections made on the basis of federal law, the Court must apply federal law. *San Carlos Apache Tribe*, 463 U.S. at 551, 571; *Colo. River Water Conservation Dist.*, 424 U.S. at 812-13; *Confederated Salish & Kootenai Tribes*, 219 Mont. at 95.

III. LEGAL ISSUES

The legal issues raised by the parties in their motions for summary judgment are rephrased by the Court as follows:

A. Whether these stockwater claims are valid water rights under Montana law?

1. Whether Montana law prior to July 1,1973 recognized the right to appropriate direct instream water rights for private livestock use?

2. Whether Montana law prior to July 1, 1973 required the appropriator to exercise exclusive use, dominion, and control over a water source in

order to appropriate a direct instream water right for private livestock use on federal public lands?

3. Whether Montana law prior to July 1, 1973 required the appropriator to hold an interest in or the intent to patent the land where the water was appropriated and used in order to appropriate a direct instream water right for private livestock use on federal public lands?

B. Whether these stockwater rights are owned by the Claimant?

C. Whether private ownership of these stockwater rights conflicts with federal law?

D. Whether the policies articulated in *Department of State Lands v. Pettibone* should apply to these claims?

This Opinion is the second in a series of decisions that the Water Court has issued and will issue in the next few weeks involving public land and livestock issues. *See Opinion* in Water Court Case No. 40E-A (June 29, 2005) and Case No. 41G-3.

IV. DISCUSSION

Background

The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, establish that:

Sylvester Seidensticker ("Sy"), testifying on behalf of the Seidensticker Ranch ("Seidensticker"), stated that his grandfather, John C. Seidensticker, Sr. ("J.C. Seidensticker"), appropriated stockwater right claims 41G-W-197167-00 and 41G-W-197162-00 from Cottonwood Creek and the East Fork Steels Pass Spring, respectively, in 1870.[1] Sy testified that shortly thereafter, his grandfather acquired Section 16, T2S, R6W, just southwest of the confluence of Cottonwood Creek and the Jefferson River, in Madison

[1] *Cottonwood Creek* is a small, intermittent stream that commences on or near Section 26 in T2S, R7W, then flows southeasterly across private and public land in sections 26, 36, and 6 to its confluence with the Jefferson River. The *East Fork Steels Pass Spring* is a natural spring that rises in the SW¼ of Section 14, T2S, R7W, and flows into the East Fork Steels Pass Creek, which is tributary to the main stem of Steels Pass Creek in the NW¼ of Section 14, which is tributary to Hells Canyon Creek, which flows southeasterly to its confluence with the Jefferson River.

County, where he established a modest livestock operation and supplied local mining camps with beef and mutton. (Sylvester Seidensticker Dep. at 6, 9, and 35 (March 17, 1994) (hereinafter referred to as "Seid. Dep.")). *See also* the deed from Samuel Getts to John C. Seidensticker filed August 14, 1875. (Claimant's Mot. for Summary J. Regarding Ownership of Stockwater Claims, Ex. C). Between 1870 and 1904, the Seidensticker family was the only family running livestock in the Cottonwood Creek area. (Seid. Dep. at 35).

In the 1870s, the land surrounding Cottonwood Creek was nearly all public domain – open range, largely unfenced and available for use and homesteading by the public. (Mem. in Support of Objector BLM's Mot. for Summary J. at 7-8); (Seid. Dep. at 29-31). Like many other early stockmen, J.C. Seidensticker augmented his small, private land holding with free grazing on the public domain. As was the custom, the Seidensticker livestock were turned out to graze on nearby public domain and to drink from the known water sources located on it. (Seid. Dep. at 29) As Sy explained, "That was the days of open range. Why own something when you had it out there to use?" (Mem. in Support of Objector BLM's Mot. for Summary J. at 7) (quoting Seid. Dep. at 15-16). "Your cattle just scattered everyplace . . . where they had feed and water," with everyone's cattle being sorted out "when you brought them in for winter." (Seid. Dep. at 29).

Sy testified that without fences to control them, his grandfather's stock grazed from their home range near Cottonwood Creek clear to "the bar" high in what is now the Deerlodge National Forest, (Seid. Dep. at 36), and that, as anticipated, they watered from the natural sources on the range, including Cottonwood Creek and the East Fork Steels Pass Spring. (Seid. Dep. at 70). Sy testified that the livestock had always depended on water from these sources to live, and that the Seidenstickers would have gone to court to protect their right to use them. (Seid. Dep. at 106).

Over time, J.C. Seidensticker and his successors-in-interest acquired more land and land leases, gradually increasing the size of their private land base. (Seid. Dep. at 17).[2] They continued, however, to use public grazing lands and the water thereon to augment their growing livestock operation. In the 1960s, the Seidenstickers purchased Sections 25 and 15, adjacent to Section 14, from the Reids. Subsequently, they entered into cooperative agreements with the United States to erect a fence between the private and public land in Section 14, to develop the East Fork Steels Pass Spring, and to install stock tanks on both the public and private sides of the fence. (Seid. Dep. at 57-61).

For over a century, J.C. Seidensticker and his successors-in-interest continued to use the waters of Cottonwood Creek and the East Fork Steels Pass Spring for the benefit of their livestock grazing on public and private lands, and no one (including the United States) ever challenged their right to do so, in court or otherwise.

The United States does not seriously dispute any of these facts. The BLM recognizes that prior to 1934, Section 26, T2S, R7W and the N½ of Section 6, T3S, R6W (the only place of use currently administered by the BLM) were part of the public domain and "entirely open range with no fences." (Mem. in Support of Objector BLM's Mot. for Summary J. at 8) (citing to Seid. Dep. at 26-27). In 1934, Section 26 and the N½ of Section 6 were withdrawn from the public domain pursuant to the Taylor Grazing Act and related executive orders. By 1939, the newly created General Land Office and Grazing Service (precursors to BLM) classified, administered, and managed the land for grazing in conjunction with the State of Montana. Although the Seidensticker Ranch continued to graze its livestock in Sections 6

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[2] Other deeds indicate that J.C. Seidensticker acquired additional lands in the Cottonwood Creek area well before passage of the Taylor Grazing Act. In November 1889, J.C. Seidensticker purchased land in Sections 20 and 21. In 1896, he purchased land in Section 29, T3S, R6W. In 1901, he purchased land in Section 34, T1S, R5W. In October 1901, he purchased land in Section 32, T3S, R6W. In April 1905, he purchased land in Section 3, T3S, R6W. In 1904, he purchased land in Section 27, T3S, R6W. In 1905, he purchased from the Northern Pacific Railway land in Sections 9 and 17, T3S, R6W. Only Section 9 of the foregoing parcels is included within the place of use for claim 41G-W-197167-00. Claimant's Mot. for Summary J. Regarding Ownership of Stockwater Claims, Ex. D-J (May 20, 1994).

and 26 after 1934 and 1939, the grazing was subject to the terms and conditions of federal permits.

The USFS concedes that prior to 1907, "many small ranchers commonly used the range and water of Section 14 (including the East Fork of Steels Pass Spring) without restriction for their livestock running at large on the public domain." (United States' Mot. for Summary J. and Br. in Support at 10). A notation in USFS official records, in fact, recorded the agency's belief that J.C. Seidensticker first established himself in the area in 1876 and was issued one of the first permits to graze on Section 14. (United States' Mot. for Summary J. and Br. in Support, at Ex. B). The Court takes judicial notice of the fact that Section 14 was not withdrawn from the public domain and reserved as part of the Helena Forest Reserve until the Presidential Proclamation of April 12, 1906, or consolidated into the Deerlodge National Forest until the Executive Order of July 1, 1908. In 1907, acting under the broad authority of the Organic Act of 1897, the USFS began regulating Section 14 as part of the national forest system and issuing permits to graze. After 1907, the Seidensticker Ranch continued to graze its livestock on its customary range in Section 14, but the grazing thereafter was subject to the terms and conditions of a USFS grazing permit.

A. Validity under Montana Law

In early Montana, an enforceable water right was acquired simply by taking possession of water on the public domain and putting it to beneficial use, with first in time being first in right.[3] The customs of the early water users in their appropriation of water rights, ripened into well-recognized rules, known as the prior appropriation doctrine, which were subsequently adopted by Montana's early settlers and ultimately given the force of law by Congress, the Montana legislature, the United States Supreme Court, and the Montana

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[3] *See* cases cited in the Court's *Opinion* in Water Court Case 40E-A (June 29, 2005), fn. 7.

Supreme Court. *Mettler v. Ames Realty Co.* (1921), 61 Mont. 152, 170-71, 201 P. 702, 707-08.[4]

In 1900, the Montana Supreme Court described the historic "use" method of appropriating water rights as follows:

> We recognize the doctrine that right to the use of water . . . is a possessory one, that may be obtained by actual appropriation and diversion, perfected by application of the water so appropriated to a beneficial use then present or contemplated, and made before appropriation and use by another.

Toohey v. Campbell (1900), 24 Mont. 13, 17, 60 P. 396, 397. It remained a viable method of appropriation in the unadjudicated streams of Montana until July 1, 1973, when procedures set forth in the Montana Water Use Act superceded all prior methods of appropriation.

The United States cites to Sy's deposition testimony that "there was no mention of water rights whatsoever. . . didn't think about those things in those days," as proof that Sy's grandfather's lacked the intent necessary to appropriate the water rights. (BLM Resp. to Claimant's Mot. for Summary J. on Claim Number 41G-W-197167, at 8). The testimony was actually a response to Attorney McElyea's questions about whether either of the agencies had ever told Sy that they were claiming ownership of either of these water rights. (Seid. Dep. at 65 and 106). Construing Sy's response as a reflection of his grandfather's intent about the Seidensticker Ranch's prima facie water right claims is highly speculative. Speculative, fanciful, conclusory, gauzy, or even suspicious statements are insufficient to raise the genuine issue of fact needed by a party to oppose a motion for summary judgment. *Sprunk v. First Bank Sys.* (1992), 252 Mont. 463, 466-67, 830 P.2d 103, 105; *Cheyenne W. Bank v. Young* (1978), 179 Mont. 492, 497, 587 P.2d 401, 404.

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[4] *See, e.g.*, Mont. Const. art. III, § 15 (1889); Act of March 3, 1877, 43 U.S.C. § 321; Act of July 9, 1870, 30 U.S.C. § 52 (amending Act of July 26, 1866); Act of July 26, 1866, 43 U.S.C. § 661; § 1, 1885 Mont. Laws 130; §§ 737-38, 1879 Mont. Laws 52; Ch. 34, §§ 11, 12, 1872 Mont. Cod. Stat.; §§ 2, 8, 9, 1869-1870 Mont. Laws; and cases cited in fn. 3, supra.

1. Validity of Direct Instream Stockwater Rights

In the BLM Objections to Master's Report, the United States asserted that:

> The Montana Supreme Court's conclusion in *Bean Lake* that appropriation of water for recreation and stockwatering was "not theretofore recognized under [Montana] law" is well grounded in prior decisions of the Court, which repeatedly have held that prior to the enactment of a statute prescribing the method of appropriating in 1885, "the essential elements of an appropriation were **a completed ditch** and the application of water through it to a beneficial use."

BLM Objection to Master's Report, at 7 (March 16, 1995) (bolding added) (citing *In the Matter of the Adjudication of the Dearborn Drainage Area* (1988), 234 Mont. 331, 343-44, 766 P.2d 228, 235-36 ("*Bean Lake I*")). The United States also argues that "Other states have also long required an actual diversion to support an appropriation." BLM Objection to Master's Report, at 7 fn. 4.

In *In the Matter of the Adjudication of the Missouri River Drainage Area*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (*Bean Lake III*), the Montana Supreme Court revisited and overruled some of the earlier conclusions in *Bean Lake I*, as follows:

> [W]e overrule the *Bean Lake* conclusion that Montana, prior to 1973, did not recognize fish, wildlife and recreation appropriations of water, whether diversionary or non-diversionary. We hold that Montana [law] recognized fish, wildlife and recreation uses as beneficial and that valid instream and inlake appropriations of water existed in Montana prior to 1973 where the intended beneficial use did not require diversion, and when the facts and circumstances indicate that notice of the appropriator's intent had been given.

Bean Lake III, ¶ 40.[5] In re-visiting the validity of pre-1973 instream fish, wildlife, and recreation claims, the Court also looked specifically at Montana's "legendary history of cattle

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[5] Interestingly, in its Amicus Curiae Brief to the Montana Supreme Court in *Bean Lake III*, the United States, takes the exact opposite of its position in Case 41G-190 (set forth at the top of the page), and states:

> **the decisions of this Court do not hold that a diversion is an absolute prerequisite for all valid appropriations of water. Indeed, the courts of Montana and other western states have long recognized the validity of appropriations that do not involve a diversion** where no diversion is necessary to achieve the intended beneficial use and the requirements of notice and intent are satisfied.

Br. of Amicus Curiae United States, *Bean Lake III*, at 17 (Dec. 2000) (bolding added).

and sheep ranching" and found that:

> No doubt Montana's stockgrowers would be surprised to learn, as the dissent suggests, that Montana law would not have recognized a right to water stock directly from a stream, lake, pond or slough without a man-made diversion. . . .
>
> The fact that there are no Montana decisions establishing such an instream right merely reflects the fact that that issue was not litigated, not that such a right was beyond the pale of Montana prior appropriation doctrine. . . . Given our history, there is every reason to believe that had the issue arisen, Montana would have followed the lead of Nevada and held that no ditch, dam, reservoir or other artificial means was necessary for watering cattle. If there must be a diversion with intent to apply water to a beneficial use, then 'the drinking by cattle constitutes a diversion, [and] the necessary intent must be that of the cattle.'
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> . . . .
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> Given Montana's long history of beneficially using water for purposes of agriculture, mining, cattle and sheep ranching, logging, railroading, fishing and recreation, **we . . . hold that the doctrine of prior appropriation does not require a physical diversion of water where no diversion is necessary to put the water to a beneficial use. Thus instream/inlake appropriations of water for beneficial uses may be valid when the purpose (e.g. stock-watering, fish, wildlife and recreation) does not require a diversion.**

Bean Lake III, ¶¶25, 26, 36 (bolding added) (citations omitted).

Appropriating stockwater rights directly from sources on the public domain was clearly a well-established and wide-spread custom on the open ranges of the unreserved public domain in Montana in the 1870s. To hold that Montana law did not recognize the validity of such direct stockwater rights prior to July 1, 1973, would be contrary to both Montana history and the Montana Supreme Court's explicit recognition of such rights.

Accordingly, this Court finds and concludes that because the stockwatering in this case did not require a physical (man-made) diversion in order to put the water to beneficial use, and because the facts and circumstances (plain view and custom) indicate that notice of the appropriator's intent was given, the instream stockwater claims in this case were not invalidated by the lack of a physical diversion.

2. Exclusive Use, Dominion, and Control Over Water

The United States also contends that in order to appropriate a valid water right in Montana prior to July 1, 1973, an appropriator was required to maintain exclusive use, dominion, and control over the claimed water source. The United States bases this argument on statements made by the Montana Supreme Court in *Jones v. Hanson* (1958), 133 Mont. 115, 320 P.2d 1007.

The *Jones* case does not stand for the proposition asserted by the United States. The language in *Jones*, cited by the United States, stands only for the proposition that proof of exclusive use, dominion, and control of a water source was required when an appropriator claimed the exclusive use of an entire water source, or claimed a water right by prescription. *Jones*, 133 Mont. at 119, 123.[6]

The Montana Supreme Court set forth the controlling rule in *Bullerdick v. Hermsmeyer*:

> The use of the waters in the streams in this state is declared by the Constitution to be a public use. (Constitution, Art. III, sec. 15) Such being the case, every citizen has a right to divert and use them, so long as he does not infringe upon the rights of some other citizen who has acquired a prior right by appropriation. Each citizen may divert and use them without let or hindrance when no prior right prevents. When his necessary use ceases, he must restore them to the channel of the stream, whereupon they may be used by any other person who needs them.

32 Mont. 541, 554-55, 81 P. 334 (1905). In *St. Onge v. Blakely*, the Montana Supreme Court reiterated that:

> [T]wo parties may at the same time be in possession of water from a creek and neither hold adverse to the other; each may justly claim the right to use the water he is using, without affecting the rights of the other, and therefore, in order to constitute adverse possession of water, the burden is upon the claimant to show that his use of water deprived the prior appropriators of water

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[6] For a more in depth discussion of this issue, see the Court's *Opinion* in Water Court Case 40E-A (June 29, 2005), which analysis is incorporated herein.

> at times when such prior appropriators actually needed the water . . . . and therefore proof merely that the claimant used water and claimed the right to use it is no proof whatever of adverse use.

76 Mont. 1, 16, 245 P. 532 (1926) (citations omitted).

More recently, in *Bean Lake III*, the Montana Supreme Court recognized the existence of pre-July 1, 1973 instream recreation, fish and wildlife appropriations. In doing so, it did not include "exclusive use" as an essential element in the appropriation of a valid pre-July 1, 1973 water right in Montana. *Bean Lake III*, 2002 MT at ¶¶ 20, 22, 23, and 37. Indeed, it would be a rare occasion for an instream appropriator to ever exercise the "exclusive use, dominion, and control" of a water source.

Accordingly, the Court finds as a matter of law that prior to July 1, 1973, appropriators like J.C. Seidensticker did not have to exercise exclusive use, dominion, and control over a water source in order to appropriate a direct instream stockwater right for private livestock use.

3. "Interest In" or "Intent to Patent" Land

The United States further contends that only those settlers who were in possession of the public domain with the bona fide intention of acquiring title from the United States had such title as would support a valid water right. It bases this argument primarily on statements and holdings by the Montana Supreme Court in *Wood v. Lowney* (1897), 20 Mont. 273, 50 P. 794; *McDonald v. Lannen* (1897), 19 Mont. 78, 47 P. 648; and *Gilcrest v. Bowen* (1933), 95 Mont. 44, 24 P.2d 141.

The *McDonald* and *Gilcrest* holdings, however, do not stand for the proposition that "possession with the intent to patent" the place of use was necessarily *required* in order to appropriate a valid water right in Montana. They simply hold that a squatter on the public domain with only inchoate title to the land could, under narrow circumstances, appropriate and verbally transfer water rights appurtenant to his irrigated land.

The water rights claimed in the three cited cases were all appropriated for the irrigation of agricultural lands at a time when Montana statute provided:

> That all persons, who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream, water, creek, or river for the purpose of *irrigation* and making said claim available to the full extent of the soil for agricultural purposes.

Section 1, 1865 Bannack Stat. 367. Accordingly, the Court in *McDonald*, held that a bona fide squatter (possessor) on the unsurveyed public lands of the United States, who had not yet taken the land to patent, had the right to appropriate and transfer appurtenant irrigation water rights. 19 Mont. at 86. The Court applied the *McDonald* holding in *Wood* and *Gilcrest*, where it reiterated that:

> This court has long been committed to the holding, in effect, that . . . any person who occupies land, fences and improves it with the bona fide intention of acquiring title from the United States at some time, has such title as will support a water appropriation -- in common parlance, a "squatter's right" . . . and that such a water right may be orally conveyed with his right in the land so held.

Gilcrest, 95 Mont. at 52.

The controlling rule regarding the appropriation of water rights on the public domain in Montana was set forth in *Smith v. Denniff*, which held that:

> [L]egal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right, for the bona fide intention which is required of an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other than those of the appropriator, or a use for purposes other than those for which the right was originally appropriated. Section 1882 of the Civil Code.

24 Mont. 20, 29, 60 P. 398, 401 (1900) (citations omitted). Similarly, in *Bailey v. Tintinger*, the Montana Supreme Court clarified that:

> While the Act of 1870 . . . sought to limit the right to appropriate water for irrigation to persons or corporations owning or in possession of agricultural lands, the provision was omitted advisedly from the Codes of 1895 and 1907, and it has since been held that the appropriator need not be either an owner or in possession of land in order to make a valid appropriation for irrigation purposes.

45 Mont. 154, 175, 122 P. 575, 582.[7]

> Wells A. Hutchins explained the rule in Montana as follows:
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> The Montana rule does not require fee simple title in the appropriator to land to be irrigated under his right. It does apparently contemplate that if the appropriator does not own the land he intends to irrigate, at least rightful possession – that is, a possessory interest – is necessary to his acquisition of a valid water right. This requirement is satisfied by lawful entry and settlement on public lands or a bona fide intent to acquire title to both land and water, or by one holding lands under contract for its purchase. Also acceptable is rightful possession of land under a contract with the owner the nature of which does not appear in the record.

1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, at 263-64 (1971) (citations omitted).

Nor did Montana law ever require an appropriator to own an interest or an easement in the land where the water right was appropriated. An appropriator was simply precluded from appropriating or exercising a water right in trespass. *See Connolly v. Harrel* (1936), 102 Mont. 295, 299, 57 P.2d 781, 782; *Warren v. Senecal* (1924), 71 Mont. 210, 220, 228 P. 71, 74-75. Though the Court in *Smith* stated that, "[o]ne may not acquire a water right on

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[7] *See also Department of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948 (validating stockwater rights appropriated by lessees on and for use on school trust land, even though ownership accrued to State); *St. Onge v. Blakely* (1926), 76 Mont. 1, 16, 245 P. 532 (finding that right to use water may be owned without regard to title to land upon which the water is used); *Sayre v. Johnson* (1905), 33 Mont. 15, 81 P. 389 (recognizing validity of water rights appropriated on public domain for use on school trust land, even though appropriator did not own or intend to patent place of use); *Bullerdick v. Hermsmeyer* (1905), 32 Mont. 541, 81 P. 334 (recognizing validity of water right appropriated to irrigate land appropriator merely occupied on public domain); *Hays v. Buzard* (1904), 31 Mont. 74, 82, 77 P. 423 (recognizing validity of water right appropriated for use on land rented by appropriator); and *Toohey v. Campbell* (1900), 24 Mont. 13, 17-18, 60 P. 396 (denying claimant full amount of his claim, not because he was not in possession of or did not intend to patent place of use, but because he could not have intended to appropriate irrigation water for land he acquired by Act passed five years after his claimed irrigation appropriation).

the land of another without acquiring an easement in such land," it subsequently clarified that while it was necessary for an appropriator to acquire an express or implied grant to appropriate on, or conduct water across the *private* land of another, appropriators already had "by statutory grant, the privilege of appropriating [and conducting] water upon the *public domain*." *Smith*, 24 Mont. at 22, 25 (emphasis added).

The Montana Supreme Court reiterated this distinction in *Prentice v. McKay*, where it found that:

> The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation; but neither has authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. **The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation.**

38 Mont. 114, 117, 98 P. 1081, 1083 (1909) (bolding added) (citations omitted).

In *Connolly v. Harrel*, the Montana Supreme Court reviewed *Prentice v. McKay* and other cases and found that in each case, "the person claiming the water right was attempting to assert the right, as against the owner of the land on which he had committed trespass, either in an attempt to initiate the right or to continue the exercise thereof." 102 Mont. at 299. Therefore, the Supreme Court limited the general expressions found in those decisions to cases of trespass and upheld the validity of an irrigation water right appropriated pursuant to a verbal license to use another's point of diversion and ditch, even though that permission was subsequently revoked. 102 Mont. at 301.

Accordingly, this Court concludes that because J.C. Seidensticker was occupying the public domain with the consent of the federal government in 1870, he was not in trespass, and he was not precluded from appropriating these stockwater rights under Montana law. The fact that he did not necessarily intend to acquire title to all of the public domain on

which his livestock grazed neither precluded nor invalidated his water rights under Montana law.

B. Ownership of the Water Right

The United States contends that even if these stockwater claims are valid water rights under Montana law, they could not be owned by the Claimant, because under Water Right Claim Examination Rules 4.II and III, and the rule set forth in *Castillo v. Kunnemann* (1982), 197 Mont. 190, 642 P.2d 1019, the water rights became appurtenant to federal land. The Water Master disagreed and concluded that "the water right[s] appropriated became the property of claimant's predecessors rather than an appurtenance to the public domain as urged by the United States," and that "the water right – used for the benefit of claimant's privately owned lands – is appurtenant to claimant's privately owned lands." (Master's Mem. on Cross-Mot. for Summary J. at 20 & 22.) The Master was correct.

Prior to 1973, a water right appropriated on the public domain in accordance with Montana law or custom generally vested in the appropriator. *Osnes Livestock Co. v. Warren* (1936), 103 Mont. 284, 290, 62 P.2d 206, 209; *St. Onge*, 76 Mont. at 18; *Smith*, 24 Mont. at 26-27. "When the right was fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the owner could only be divested in some legal manner." *Osnes Livestock Co.*, 103 Mont. at 294. *See also Smith*, 24 Mont. at 26-27.

Once perfected, the water right included "an incorporeal hereditament . . . the right to have the water flow in the stream, without diminution or deterioration, to the head of the ditch or place of diversion, – an easement in the stream . . . an easement not attached to land, and therefore *akin to an easement in gross* at the common law," which may or may not become an easement annexed or attached to particular land. *Smith*, 24 Mont. at 25, 27 (emphasis added).

The general statutory rule in Montana is that, "[a] thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit,"[8] and "the transfer of a thing transfers also all its incidents, unless expressly excepted."[9] Thus, the Montana Supreme Court has held that, "a water right acquired by appropriation and *used for a beneficial and necessary purpose in connection with a given tract of land*, is an appurtenance thereto, and as such passes with the conveyance of the land, unless expressly reserved from the grant." *Yellowstone Valley Co. v. Assoc. Mtg. Investors* (1930), 88 Mont. 73, 81-82, 295 P. 255, 258 (quoting *Lensing v. Day & Hansen Security Co.* (1923), 67 Mont. 382, 384, 215 P.2d 999, 1000). *See also Castillo*, 197 Mont. at 196.

The mere use of a water right by the appropriator on land titled in another, however, does not necessarily make the water right appurtenant to that land. The Court in *Smith v. Denniff* explained that "an easement, to be appurtenant to a parcel of land, must be attached to the dominant estate . . . [and] [i]t can become legally attached only by unity of title in the same person to both the dominant estate and the easement claimed." *Smith*, 24 Mont. at 27-28.

> Section 1078 . . . may not be interpreted to mean that a water right acquired by prior appropriation by one who has only possessory title to the land, although with the intent at the time to use the water upon such land, shall, by the mere act of using it as intended, become inseparably attached as an appurtenance, and the appropriator thereby lose his water right. Such an interpretation would not only violate recognized custom and legal principles, but would render inoperative the provisions of Section 1882 of the Civil Code.[10]

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[8] Section 70-15-105, MCA (initially enacted as §1078, Civ. C. Mont. (1895)). *See, e.g., Castillo v. Kuennemann* (1982), 197 Mont. 190, 201-02, 642 P.2d 1019.

[9] Section 70-1-520, MCA (initially enacted as §1491, Civ. C. Mont. (1895)). *See, e.g., Lincoln v. Pieper* (1990), 245 Mont. 12, 15, 798 P.2d 132, 134-35; *Schwend v. Jones* (1973), 163 Mont. 41, 44-45, 515 P.2d 89, 91; *Tucker v. Jones* (1888), 8 Mont. 225, 231-32, 19 P. 571, 573-74.

[10] A legal appropriator may change the place of its use, and may use the water for other purposes than that for which it was originally appropriated. § 1882 Civ. C. Mont. (1895).

> The common-law rule that an easement acquired by a tenant as an appurtenance to the land inures to the benefit of the landlord upon the expiry of the tenancy is . . . inapplicable to cases arising under the statutes in respect of prior appropriation of water rights.

Smith, Mont. at 30 (citations omitted).[11] Without unity of title, a water right could not attach as appurtenant to land titled in another, until: (1) the appropriator obtained title to the land; (2) conveyed the water right to the owner of the land; or (3) the facts and circumstances indicated that the appropriator intended to make the right appurtenant to the land.[12]

The United States presented no evidence even suggesting that J.C. Seidensticker conveyed the water rights to the United States or intended to make the water rights appurtenant to the public domain. Accordingly, the Master correctly concluded that, although the stockwater was beneficially used on part on the public domain, title to the water rights vested in J.C. Seidensticker, and did not become appurtenant to the public domain.

The United States argues that the *McDonald* line of cases (supra at p. 13) impliedly overruled the *Smith* "unity of title" rule. However, whether the water rights were actually appurtenant to the land was not a factual issue in those cases and was never discussed. Like the Court in *Smith*, the Court in *McDonald* merely recognized that an appropriator on the public domain was not required to own the place of use in order to appropriate a valid water right, limited the *Barkley v. Tieleke*, 2 Mont. 59 (1874) rule of abandonment upon transfer,

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[11] A California Court of Appeals came to the same conclusion with respect to a substantially similar statute in California:

> [A]ppellant is mistaken in his claim that, under said section 662 of the Civil Code, the mere use of water with land for its benefit makes the water appurtenant to said land. The section provides that "a thing is deemed to be incidental or appurtenant to land when it is by *right* used with the land for its benefit" . . . It would be subversive of the constitutional privilege of property ownership to hold that a person may *without right* use upon his land water belonging to another and by such use make it appurtenant to his land. Manifestly, the use must coexist with the ownership of the water right to make it appurtenant to his land.

Gause v. Pacific Gas & Electric Co. (Cal. App. 1923), 212 P. 922, 928 (emphasis in the original).

[12] Whether a water right becomes appurtenant to and transfers with particular land in Montana are matters of intent and questions of fact. The one asserting ownership by appurtenancy has the burden of proving that it is appurtenant. *Smith*, 24 Mont. at 29. *See also* 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, at 458-59 (1971).

and held that in certain narrowly defined circumstances, a settler with inchoate title to land could verbally transfer the land and water rights used in connection with the land.

The issues of whether or when a *stockwater* right becomes appurtenant to particular land has rarely been addressed by American courts. However, an early New Mexico Supreme Court decision found that stockwater rights appropriated on the public domain were held in gross by the appropriator. In *First State Bank of Alamogordo v. McNew*, 269 P. 56 (N.M. 1928), the New Mexico Supreme Court considered whether a stockwater right that was purchased for the purpose of watering livestock grazing on the public domain attached and became appurtenant to the public grazing land and transferred to a subsequent purchaser of the land under the Stock Raising Homestead Act. The Court concluded that, but for the fact that McNew merely held possessory title to the grazing land, the water right would be deemed appurtenant to the grazing land:

> [W]ater for stock-raising, as well as for irrigation, may become incident to the beneficial use of land . . . The [irrigation] water right is considered incident or appurtenant to the land irrigated, because that is the use to which it is applied and for which appropriated. For the same reason, it should be deemed incident to the land on which W.H. McNew's cattle grazed.

269 P. at 60 (citations omitted). Because McNew held only a possessory interest in the public grazing land, however, and not fee title, the New Mexico Court concluded that the water right was held in gross and only temporarily used on the public domain. Consequently, the water right did not become appurtenant to the grazing land, and the subsequent purchaser took title to the land under the Stock Raising Homestead Act *subject to McNew's personal water right and conveyance system*. *Id.* at 62-63. The Court explained that:

> In the case of a transfer by one having a unity of interest in the water and the land, there are certain reasons of necessity which may be invoked to sustain the inference that it was intended to transfer the water right with the possession [or title to] the land, and which are not so cogent when we come to consider the rights of the homestead entryman by virtue of his entry alone.

> One of the reasons which impels the courts to favor the presumption that the grantor intended the so-called appurtenances to go with the land is that the continuance of the previous use is indispensable to the future enjoyment of the estate granted, in the condition it was when transferred, and that, the grantee having paid a valuable consideration for the transfer, such continued use must have been within the contemplation of the parties.

Id.

Similarly, the Montana Supreme Court has observed that, "[t]he reason why things pass as parcel of the principal thing, although not named in the deed, is because they are *necessary to the use and enjoyment of the thing granted*, and because parties may be supposed to intend to make these grants beneficial and useful." *Donnell v. Humphreys* (1872), 1 Mont. 518, 532 (emphasis in original). In *Tucker v. Jones*, the Montana Supreme Court further explained:

> [I]t is a rule, in accordance with natural justice and reason, that, where one sells a house or a farm, every right will pass to the purchaser which is *necessary to the complete use and enjoyment of the property conveyed*, unless expressly reserved. . . . [W]here, by destination a right of way attaches to and in favor of a certain house, farm, ranch, or plantation, or a certain right of drainage exists in favor of a farm, or the use of a certain ditch and water for the irrigating of a farm, they will pass by the deed, even without the use of the word "appurtenance"; for the acquisition of the easement or servitude was intended for the benefit of the estate, and by destination is to be considered as incidental to the use of and as a part and parcel of the realty.

8 Mont. 225, 231, 19 P. 571, 573 (1888) (emphasis added).

Today, as in earlier times, a supply of water is as indispensable to a livestock operation as it is to an irrigated farm, a sluice box, or a mill propelled by water power. Without such a supply, neither cattle ranch nor farm, mining claim nor mill, could long survive. The Montana Supreme Court has acknowledged that access to federal range (grazing lease or permit) benefits and increases the value of deeded base holdings used in conjunction with the federal range. *Watson v. Barnard* (1970), 155 Mont. 75, 80, 469 P.2d 539. Similarly, this Court acknowledges that the ownership of water rights appropriated

from sources on those federal range lands also benefits and increases the value of the deeded base holdings used in conjunction with the federal range.

Accordingly, this Court agrees with the Water Master that "the water right[s] appropriated became the property of claimant's predecessors rather than an appurtenance to the public domain as urged by the United States," and that "the water right – used for the benefit of claimant's privately owned lands – is appurtenant to claimant's privately owned lands."

No Genuine Issues of Material Fact

The USFS also argues that four "unopposed facts" presented in its Motion for Summary Judgment raised genuine issues of material fact regarding the appurtenancy of these stockwater rights to Claimant's private lands.

The USFS contends that the Claimant failed its own appurtenancy test, because the facts establish that the Claimant's predecessors-in-interest did not own the sections of land adjacent to Section 14, "to which the Water Master finds claim No. 41G-W-197162 appurtenant," until the 1960s. The Claimant does not dispute that its predecessors did not acquire the land adjacent to Section 14 until the 1960s. However, the Master concluded that "the water right – used for the benefit of claimants privately owned lands – is appurtenant to claimant's *privately owned lands*" – not merely the land it currently owns adjacent to section 14. (Master's Report at 21-22) (emphasis added) Claim 41G-W197162-00 is based on the Seidensticker Ranch's historical use of the East Fork Steels Pass Spring for its own livestock operation (Seid. Dep. at 64) – not on the Reids' use of the same spring for their livestock operation. The USFS does not seriously contest that J.C. Seidensticker began acquiring land and appropriating water rights on the public domain for his livestock operation in the mid-1870s. *See, e.g.*, (United States' Mot. for Summary J. and Br. in Support at 10 & Ex. C).

The USFS also contends that the fact that three other water sources are located on Seidensticker deeded pasture in close proximity to the East Fork Steels Pass Spring shows that:

> . . . the water from East Fork Steels Pass Spring was needed in the southwest corner of section 14, not elsewhere. Based on the three other springs available for stock in the privately owned parts of the pasture, and the fact the water was needed in section 14, the United States asserts that Claimant does not need this fourth water source for use on private land in the same pasture.

(USFS Reply Br. on Mot. for Sum. J. at 12).

The record does not support the USFS's own speculative conclusions. The four water sources are in sections 14, 15, 22 and 23 (seemingly a fairly large pasture), and all four springs run "so little water, that . . . you'd just find a few cows here and a few cows there . . . . And actually if they were not developed, I mean it would be very difficult for them to get enough water." (Seid. Dep. at 69-70). Furthermore, "this corner of 14 was the main cow trail. They all passed through the country right there, grazed through." (Seid. Dep. at 70).

The USFS also asserts that the Temporary Preliminary Decree abstract of claim 41G-W-197162 identified the "place of use" as Section 14, T02S, R07W, which is national forest land owned by the United States, and that the Claimant did not object to the claim. It argues that "[t]his creates a fundamental problem with the Water Master's recommendations. While he concludes that the rights are appurtenant to Claimant's privately owned lands, as to claim No. 41G-W-197162, those privately owned lands are not even identified as a part of the claim." (USFS Obj. to Master's Report at 12).

There is no fundamental problem. The place of use identified on the abstract for 41G-W-197162 is based on Water Right Claim Examination Rules 4.II(2) and 4.III(1), which direct that:

> For direct instream surface water stock use, the legal land description of the [point of diversion] will be the same as the legal land description of the [place of use].
>
> . . . .
>
> The place of use for stock purposes will be identified and described by the nearest reasonable and concise legal land description. The [place of use] is the actual place where the stock drink the water.

While Rules 4.II(2) and 4.III(1) describe the legal land description to be assigned the point of diversion and place of use for direct instream stockwater rights in this general adjudication, they do not determine the land to which the water rights are appurtenant, or who owns the water rights. *Pettibone*, 216 Mont. at 372; *Yellowstone Valley Co.*, 88 Mont. at 80; *Lensing*, 67 Mont. at 384. If this were otherwise, Rules 4.II(2) and 4.III(1) could effectively and unilaterally divest all appropriators of pre-1973 direct stockwater rights appropriated on lands other than their own – a result which would be contrary to both Constitutional and long-standing Montana law. (*See e.g.*, *Osnes Livestock Co.*, 103 Mont. at 290; *St. Onge*, 76 Mont. at 18; and *Smith*, 24 Mont. at 26-27) Neither this Court, nor the Montana Supreme Court, intended for such a divestiture to occur when these rules were proposed and approved in 1987.

Finally, the USFS objects that the Master's statements about changing the "place of use" for these claims to the Claimant's privately owned lands, and that such a change "is the subject of an administrative proceeding under § 85-2-402, MCA," improperly recognizes a right "dependant on a future act." (USFS Objection to Master's Report at 14). The Master, however, was not conditioning the recognition of this stock right on a future event, but simply pointing out that any potential *change* in the place of use – i.e. the place where the livestock drink – to some other location (for example, if practicable, to Claimant's private lands through the use of an artificial diversion and conveyance system), would be subject to § 85-2-402, MCA. Such a potential future effort is not a condition precedent to this Court's

recognition of the water right. Whether such a change happens or not is immaterial to, and has no effect on, the issues presently before this Court.

The United States failed to present any evidence that raised a genuine issue of material fact with respect to J.C. Seidensticker's appropriation, perfection, and ownership of these stockwater rights, or the subsequent transfer of his water rights to the current Claimant. The unopposed facts raised by the USFS in its Motion for Summary Judgment and other briefs, were either immaterial to a decision on the issues, or merely speculative conclusions drawn by the USFS, itself. To defeat a motion for summary judgment, the opposing party's facts must be material and substantial and implications based on the opposing party's opinions are not enough. The presentation of factual issues in conclusory fashion in briefs is not an appropriate means of opposing a motion for summary judgment. *See generally Westlake v. Osborne* (1986), 220 Mont. 91, 713 P.2d 548.

Accordingly, this Court agrees with the Master that "the water right[s] – used for the benefit of claimants privately owned lands – [are] appurtenant to claimant's privately owned lands" and owned by the Claimant. However, in order to prevent confusion over the relationship of Water Right Claim Examination Rules 1.III(45), 4.II(2), and 4.III(1) to the ownership of these water rights, this Court adds the following clarification remark (or similar language) to these direct stockwater rights:

> THIS WATER RIGHT IS EITHER HELD IN GROSS BY THE CLAIMANT OR IS APPURTENANT TO LAND OWNED BY THE CLAIMANT AND USED IN CONJUNCTION WITH FEDERAL PUBLIC LAND.

C. No Conflict with Federal Law

The United States argues that even if these stockwater claims are valid under Montana law, they cannot be decreed with a point of diversion or place of use legal description on federal land. The United States asserts that if private parties are decreed water rights on federal public lands, federal agencies will be unable to fulfill their congressional mandate to

administer the federal lands for multiple public use. It contends that when state law conflicts with federal law, federal law preempts state law under the Supremacy Clause of the United States Constitution.

The United States made similar arguments in Water Court Case 40E-A. In that case, this Court found as a matter of law that:

- Only when the federal government properly asserts its authority to control the use of federal property, and state law conflicts with that authority, does federal authority preempt state law under the Supremacy Clause of the United States Constitution. (*Opinion* in Water Court Case 40E-A at 15)

- Whether a federal action actually preempts state law in any single instance depends upon the intent of Congress or the Executive, as expressed in the language of the Act or Order, its legislative or administrative history, contemporary administrative and judicial decisions, the degree of conflict, and the relation of purposes of the federal legislation or executive order to the state aims. (*Id.*)

- The Acts of 1866, 1870, and 1877 acknowledged and confirmed the right to appropriate private stockwater rights in accordance with Montana custom and law. (*Order* in Water Court Case 40E-A at 2.) *See also Opinion* at 15-17.

- By [those Acts], if not before, Congress "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself" and "reserved [the waters] for the use of the public under the laws of the states and territories." (*Opinion* at 17 (citations omitted)).

- In light of the long history of congressional deference to state control over the waters on federal public land, there is a presumption that state law will control all non-reserved claims, which can be overcome only by evidence of a clear and explicit exercise of federal authority to preempt state water law, or by necessary implication. (*Id.* at 18-20).

- The Taylor Grazing Act did not explicitly amend or repeal the Acts of 1866, 1870, or 1877, or abandon Congress' historical deference to state control over the appropriation of water on unreserved federal lands. (*Id.* at 28)

- Valid state based water rights appropriated prior to creation of a federal reserved water right are not affected by the federal reservation. (*Id.* at 27)

This Court adopts the analysis set forth in Case 40E-A and incorporates it herein by reference. With these principles in mind, the Court next determines whether federal law prevents recognition of these private stockwater rights.

The Taylor Grazing Act of 1934 and Claim 41G-W-197167

As acknowledged by both the United States and Montana Supreme Courts, from the time Congress opened the public domain to homesteading in 1862, if not before, it acquiesced in the use of federal lands by the public for a multitude of purposes, including the grazing of livestock. Growing "out of that custom of nearly a hundred years" evolved "an implied license . . . that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids their use." *Buford v. Houtz*, 133 U.S. 320, 326, 10 S. Ct. 305, 307, 33 L. Ed. 618, 620 (1890). *See also Clemmons v. Gillette* (1905), 33 Mont. 321, 326-27, 83 P. 879, 880.

Pursuant to that implied license, J.C. Seidensticker grazed his livestock on the public domain between 1870-1875 and to 1934, and, while doing so, he appropriated water from Cottonwood Creek and the East Fork Steels Pass Spring for the use of his livestock. Appropriated and perfected in accordance with Montana law and custom, these stockwater rights vested in his name and were conveyed to his successors in interest.

Seidensticker's free and unregulated use of the public domain came to an end on June 28, 1934, when Congress passed the Taylor Grazing Act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; and to stabilize the livestock industry dependent upon the public range. Act of June 28, 1934, 43 U.S.C. § 315a (2000); *Public Lands Council v. Babbitt*, 529 U.S. 728, 733, 120 S. Ct. 1815, 1819, 146 L. Ed. 2d 753, 760 (2000); *Kidd v.*

United States Dep't of Interior, Bureau of Land Mgmt, 756 F.2d 1410, 1411 (9th Cir. 1985); *In re Kalfell Ranch, Inc.* (1994), 269 Mont. 117, 887 P.2d 241. At approximately that time, pursuant to the Taylor Grazing Act and related executive orders,[12] Section 26 and the N½ of Section 6, where Cottonwood Creek is located, were withdrawn from the public domain, and by 1939, the land was classified for grazing and managed and regulated by the newly created General Land Office and Grazing Service (precursors to the BLM) in coordination with the State of Montana.

Federal regulation of the grazing land, however, did not divest the Seidensticker Ranch of this stockwater right because the Taylor Grazing Act expressly provided that:

> [N]othing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereinafter initiated or acquired and maintained in accordance with such law.

43 U.S.C. § 315b (2000).

The Organic Act of 1897 and Claim 41G-W-197162-00

Section 14, where the East Fork Steels Pass Spring is located, was withdrawn from the public domain by Presidential Proclamation on April 12, 1906, at which time it became part of the Helena Forest Reserve, and was subsequently consolidated into the Deerlodge National Forest by Executive Order of July 1, 1908.

At the time Section 14 was withdrawn from the public domain and reserved, J.C. Seidensticker had already appropriated, perfected, and maintained Claim 41G-W-197162-00 in accordance with Montana law and custom. Any federal water rights impliedly created by the reservation in 1906, therefore, are junior and subject to that prior appropriation. *New Mexico*, 438 U.S. at 698; *California v. United States*, 438 U.S. at 662-63; *Cappaert v. United*

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[12] *See, e.g.*, Exec. Order No. 6910 (Nov. 26, 1934)

States (1976), 426 U.S. 128, 138, 143-46, 96 S. Ct. 2062, 48 L. Ed. 2d 523; *Hunter v. United States* (9th Cir. 1967), 388 F.2d 148, 152-53.[14]

Livestock Reservoir Act and Public Water Reserve No. 107

Although the United States also cited the Livestock Reservoir Act of January 13, 1897 in support of its case, there is no evidence that either of these claims involved a livestock reservoir constructed pursuant to that Act. Similarly, Public Water Reserve No. 107, also cited by the United States in support of its argument, was issued *after* Section 14 was withdrawn from the public domain for national forest purposes and is not relevant to the issues in this case.

Therefore, none of the Federal Acts cited by the United States precluded or preempted the appropriation of these stockwater rights on this federal land in 1870. Appropriated, perfected, and maintained in accordance with existing Montana law, title to the water rights vested in the appropriator. Only when state law directly conflicts with a clear and explicit exercise of federal power, does federal power preempt state law under the Supremacy Clause of the United States Constitution.

D. Department of State Lands v. Pettibone

Finally, the United States argues that the rationale and policies articulated by the Montana Supreme Court in *Department of State Lands v. Pettibone*, should apply to vest title to these stockwater rights in the United States.

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[14] The United States Supreme Court has held that *even after* the reservation of a national forest and concommittal creation of federal reserved water rights, private stockwater rights could still be appropriated on national forest lands in accordance with state law:

> While Congress intended the national forests to be put to a variety of uses, including stockwatering, not inconsistent with the two principal purposes of the forests, stockwatering was not itself a direct purpose of reserving the land. If stockwatering could not take place on the Gila National Forest, Congress' purposes in reserving the land would not be defeated. Congress, of course, did intend to secure favorable water flows, and one of the uses to which the enhanced water supply was intended to be placed was probably stockwatering. But Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators under state law. There is no indication in the legislative histories of any of the forest Acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.

New Mexico, 438 U.S. at 716-17 (emphasis added).

In Water Court Case 40E-A, the United States made a similar argument, and this Court found as a matter of law that:

> The decision of *Dep't of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948 is applicable to waters appropriated on and for use on Montana school trust lands **and is not applicable to the use of water on federal public lands.**

Order in Water Court Case 40E-A at 2. In its *Opinion*, this Court explained that:

> Prior to 1973, a water right appropriated on the public domain in accordance with Montana law or custom generally vested in the appropriator. *Osnes Livestock Co. v. Warren* (1936), 103 Mont. 284, 290, 62 P.2d 206, 209; *St. Onge*, 76 Mont. at 18; *Smith v. Denniff* (1900), 24 Mont. 20, 27, 60 P. 398, 400. "When the right was fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the owner could only be divested in some legal manner." *Osnes Livestock Co.*,103 Mont. at 294. *See also Smith*, 24 Mont. at 27 (stating that a water right is "a positive, certain, and vested property right" of which the appropriator could not be divested).
>
> Unless and until the federal government reserves land or water for permanent federal purposes, or explicitly and clearly abandons its historical deference to state control over the water resources within a state's boundaries . . this Court will not presume to do so through application of the *Pettibone* decision.

Opinion at 13-14. The Court's analysis with respect to this issue in Case 40E-A is incorporated herein by reference and adopted for purposes of adjudicating claims 41G-W-197162-00 and 41G-W-197162-00.

There is no genuine issue of material fact that at the time these stockwater rights were appropriated in 1870, the land on which they were appropriated had not yet been surveyed for purposes of the public school trust, and was still part of the unreserved public domain. Appropriated, perfected, and maintained in accordance with existing Montana law, title to the water rights vested in the appropriator.

The fiduciary principles applicable to private charitable trusts that the Montana Supreme Court applied to the public school trust lands in *Pettibone* do not – and should not

– apply to the federal public lands in this case. While there may be changing policies and priorities with respect to the management of federal lands and resources, it is the province of the federal government – not this Court – to effect those changes. It is noteworthy that on the most recent occasions when Congress enacted legislation modifying its management policies for public lands and resources, it again chose not to preempt state control over the water resources on federal public lands.[15] The Department of the Interior did not revise its regulations with respect to the appropriation of water rights on federal range land until 1995 – more than a century after these two stockwater rights were appropriated. This Court reiterates that unless the federal government has explicitly and clearly abandoned its historical deference to state control over the water resources on federal lands, this Court will not presume to do so through application of the *Department of State Lands v. Pettibone*.[16]

The United States has expressed concern that by decreeing water rights which include federal lands of the United States within the listed points of diversion and/or places of use, the decrees could be interpreted as granting incidental easements in federal land. To avoid this interpretation, the United States has requested, in the alternative, that the water rights be amended to exclude any description of federal public lands.

The Montana Supreme Court has consistently distinguished between incorporeal water rights, which are the subject of this statewide adjudication, and the corporeal (e.g., access) easements that may be used in conjunction with them. *See Connolly*, 102 Mont. at 300 (finding that "water rights and ditch rights are separate and distinct property rights," and that

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15 *See e.g.*, Federal Land Policy and Management Act of 1976, P.L. 94-579, Title VII, § 704(a), 90 Stat. 2792; Multiple-Use Sustained Yield Act of 1960, P.L. 86-517, § 1, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-531); *New Mexico*, 438 U.S. 696; *Sierra Club v. Watt* (D.C. 1981), 659 F.2d 203.

16 *See, e.g., United States v. New Mexico*, 438 U.S. at 700; *California v. United States*, 438 U.S. at 662-63; Memorandum from Theodore B. Olson, Ass't Att'y Gen., Dep't of Justice, to Carol E. Dinkins, Ass't Att'y Gen., Land and Nat. Res. Div., 6 Op. O.L.C. 328, 360 (June 16, 1982); Solicitor's Op. —36914 (Supp. III), 96 I.D. 211 (1988); Solicitor's Op. —36914 (Supp.), 88 I.D. 253, 256 (1981); Solicitor's Op. —36914, 86 I.D. 553, 592 (1979); George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 Envtl. L. 535, 584 (1982).

"one may own a water right without a ditch right, or a ditch right without a water right."); *Smith*, 24 Mont. at 24 (finding that water rights and easements of access or conveyance are distinct and discreet property rights). Generally, the Water Court does not have jurisdiction to adjudicate the corporeal easements that may accompany a water right. To alleviate the concern of the United States, however, the Court would consider adding clarification remarks to the abstracts of claims 41G-W-197162-00 and 41G-W-197167-00, if the parties can agree on appropriate language.

E. Collateral Estoppel

As noted by Hamilton Ranches in its Motion for Summary Judgment, the general ownership issue in this case was litigated by the United States to final judgment before the Water Court in the Powder River Preliminary Decree in 1983. *See* Powder River Claim File #3443 (Main Consolidation File). In its March 31, 1983, Findings of Fact and Conclusion of Law, the Water Court identified the issue as follows:

> Does title to the water right vest in the appropriator (individual permittee) or the United States as owner of the land where the water is diverted?

In its Conclusions of Law, at 5, the Water Court concluded:

> II.
>
> The water law of the governing state shall be applied to public domain lands of the United States.
>
> III.
>
> The point of diversion of all water rights at issue is on public domain lands owned by the United States.
>
> IV.
>
> The appropriators of the water are individual permittees or their predecessors in interest.
>
> V.
>
> Under Montana law, title to a water right vests in an appropriator regardless of ownership of land.

On April 14, 1983, the Water Court entered its Final Judgment in the Powder River Decree. On May 16, 1983, the United States filed its Notice of Appeal to the Montana Supreme Court. On May 25, 1983, the United States filed its Amended Notice of Appeal. On September 20, 1983, the "appeal of the federal appellant," was dismissed by the Montana Supreme Court (Voluntary Dismissal of Appeal).

In view of this prior litigation (and the Water Court's *Order* and *Opinion* in Water Court Case 40E-A at 31-32), and despite the fact that the rules prescribing the use of collateral estoppel may vary when the United States is a party in the case, *see e.g., United States. v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed. 2d 379 (1984), the doctrine of collateral estoppel or issue preclusion may be applicable to one or more of the issues in this case. *See e.g., United States v. Stauffer Chemical Co. v. E.P.A.*, 647 F.2d 1075 (10th Cir. 1981); *Peschel v. Jones* (1988), 232 Mont. 516, 521, 760 P.2d 51, 54 and *In re Beneficial Water Use Permit* (1996), 278 Mont. 50, 61-63, 923 P.2d 1073.

V. CONCLUSION

A claim of an existing water right filed in accordance with § 85-2-221, MCA, constitutes prima facie proof of its contents until issuance of the final decree. § 85-2-227, MCA.[17] In order to succeed on its motions for summary judgment, the United States had the burden of proving that there were no genuine issues of material fact with respect to its objections and that it was entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. To successfully defeat the Claimant's motion for summary judgment, the United States had the burden of presenting evidence that established a genuine issue of material fact with respect to the Claimant's ownership of these water rights. Rule 56(c), M.R.Civ.P.

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[17] *See* analysis of this issue in *Memorandum Opinion of the Montana Water Court*, Case No. 40G-2 (March 11, 1997), which the Court incorporates into this Opinion by reference.

After a careful review of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," the Court finds that there are no genuine issues of material fact with respect to any of the motions for summary judgment, but that the United States is not entitled to summary judgment on its motions as a matter of law. The Claimant, on the other hand, is entitled to summary judgment with respect to its motion. Accordingly,

The motions for summary judgment by the DSL and the United States, and the objections of the United States to the Master's Report are respectively **DENIED** and **DISMISSED**. The Claimants' motion for summary judgment is **GRANTED.** Stockwater claims 41G-W-197162-00 and 41G-W-197167-00 shall otherwise appear unchanged in the Preliminary Decree for the Jefferson River Basin, except for the addition of the clarification remarks mentioned earlier in this Opinion.

DATED this 19 day of July, 2005.

C. Bruce Loble
Chief Water Judge

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

* *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE JEFFERSON RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE JEFFERSON RIVER IN BROADWATER, GALLATIN, MADISON, JEFFERSON AND SILVER BOW COUNTIES, MONTANA.	**CASE NO. 41G-190** 41G-W-197162-00 41G-W-197167-00

CLAIMANT: Hamilton Ranches Partnership

MOTION OF MONTANA WATER COURT

OBJECTOR: United States of America (Bureau of Land Management), United States of America (USDA Forest Service), Montana Department of State Lands

ORDER AMENDING AND ADOPTING MASTER'S REPORT

This matter came before the Court on the cross-motions of the Hamilton Ranches Partnership, the Montana Department of State Lands ("DSL") and the United States of America (Bureau of Land Management and USDA-Forest Service) for summary judgment on issues of law. After careful consideration of the briefs submitted by the parties, the Master's Report, and the law, and for the reasons set forth in the accompanying Opinion, it is Ordered:

1. Pursuant to Rule 53(e), M.R.Civ.P., the Court **AMENDS** the Master's Report (a) to conform to the factual and legal analysis set forth in this Opinion; and (b) to add the point of diversion and place of use clarification remark respectively specified or solicted on pages 25 and 32 of the Opinion. As so amended, the Master's Report is **ADOPTED**;

2. The motions for summary judgment by the DSL and the United States, and the objections of the United States to the Master's Report are **DENIED** and **DISMISSED**;

3. The Claimants' motion for summary judgment is **GRANTED;**

4. The Court concludes as follows:

(a) Stockwater claims 41G-W-197162-00 and 41G-W-197167-00 are valid water rights under Montana law.

(1) Montana law prior to July 1, 1973 recognized the right to appropriate direct instream water rights for private livestock use.

(2) Montana law prior to July 1, 1973 did not require the appropriator to exercise exclusive use, dominion, or control over a water source in order to appropriate direct instream water rights for private livestock use on federal public lands .

(3) Montana law prior to July 1, 1973 did not require an appropriator to hold an interest in or the intent to patent the land where the water was appropriated and used in order to appropriate direct instream water rights for private livestock use on federal public lands.

(b) Stockwater claims 41G-W-197162-00 and 41G-W-197167-00 are owned by Hamilton Ranches Partnership and not by the United States.

(c) The private ownership of these stockwater claims do not conflict with federal law.

(d) The decision of *Dep't of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948 and the policies set forth therein are applicable to waters appropriated on and for use on Montana school trust lands and are not applicable to the use of water on federal public lands.

5. Stockwater claims 41G-W-197162-00 and 41G-W-197167-00 shall otherwise appear unchanged in the Preliminary Decree for the Jefferson River Basin (41G), except for the addition of the clarification remarks specified in the Opinion.

6. Unless the parties provide the Court with clarification remark language which is more suitable than the Court's remark set forth on page 25 of the Opinion, or, the parties accept the offer on page 32 of the Opinion to include a mutually acceptable remark, the Court will issue its Closing Order with attached modified abstracts after thirty days from the date hereof.

DATED this 19 day of July, 2005.

C. Bruce Loble
Chief Water Judge

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