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

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IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE 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 AND OPINION GRANTING IN PART AND DENYING IN PART UNITED STATES' MOTION FOR RECONSIDERATION

On July 19, 2005, the Court issued an Opinion and Order recognizing the right to appropriate direct instream water rights in 1870 for private livestock use on federal public lands. In its Order, the Court stated that unless the parties proposed a mutually acceptable clarification remark, the Court would add a remark to the private livestock claims that:

> 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.

Order at 2-3 and Opinion at 25 and 32.

On September 6, 2005, the United States of America, USDA-Forest Service, filed a Motion for Reconsideration and Brief in Support stating that:

> (1) To properly adjudicate and administer the stockwater rights in this case and elsewhere in Montana, the Water Court must clarify its ruling that the stockwater rights are appurtenant to private land, not held in gross, and must identify the land to which it is appurtenant; (2) The Court should clarify that recognition of the water right claims does not create or imply any right of access to federal lands; and (3) The source type and means of diversion for Claim No. 41G-W-192162-00 are inconsistent with the Judge's characterization of this claim as direct-from-source.

United States' Motion for Reconsideration and Brief in Support, filed September 7, 2005, at 1.

The Court has carefully reviewed its Opinion and Order and the briefs filed by the parties. Upon reconsideration, it now affirms its Opinion and Order, as modified herein.

I. Appurtenant Land

The United States has asked the Court, with respect to claim 41G-W-197162-00, to clarify that this stockwater right is appurtenant to private land, and to identify the private land to which it is appurtenant. Alternatively, if the Water Court finds that the water right is held in gross, the United States argues that "[u]nder the circumstances of the instant case, the Court should find that [this stockwater right] . . . is owned by the individual or entity holding the Forest Service grazing permit covering the National Forest System land upon which the water source is located and upon which the water is beneficially used." United States' Motion for Reconsideration at 2, 5, 6-7.

In its Brief, the United States argues that the clarification remark proposed by the Court creates ambiguity regarding the nature of the water right and does not adequately identify the private land to which the water right is appurtenant. United States' Motion for Reconsideration at 2. It further argues that:

> Given that the claims are prima facie valid, Mont. Code. Ann. § 85-2-227 (2003), using the private lands identified on the statement of claim is the simplest approach for the Water Court to use to determine private lands to which the water right is appurtenant.

Id. at 5.

In the Claimant's Reply to United States' Motion for Reconsideration, the Claimant agreed with the United States that using the private lands identified on the statement of claim was the simplest procedural approach for the Water Court to use to identify the private lands to which the water right is appurtenant and suggested that the following sentence be added to the Court's proposed clarification remark:

> The lands owned by the Claimant to which this right is appurtenant are as follows: *[Insert appropriate legal description]*.

Claimant's Reply at 2.

In response, the United States argued that the place of use should remain as described on the water right abstract, but that the following clarification remark should be added to the abstract:

> The lands owned by the Claimant to which this right is appurtenant are as follows: Sections 15, 23, and the SW1/4 of Section 22, Township 2 South, Range 7 West, Madison County, Montana.

United States' Reply on Motion for Reconsideration at 3.[1]

Section 85-2-231(4), MCA, provides that the: "temporary preliminary decree or preliminary decree must contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234." Section 85-2-234(6)(e), MCA, provides that: "the final decree must state . . . the place of use and a description of the land, if any, to which the right is appurtenant."

In its Opinion, this Court distinguished between the place of use, as defined by the Water Right Claim Examination Rules, and the land to which a water right is appurtenant. "Place of Use" is defined by Rule 1.III(45) as: "the lands, facilities, or sites where water is beneficially used." "Beneficial Use" is defined by Rule 1.III(8) and § 85-2-102(2), MCA, as a use of water recognized as beneficial prior to July 1, 1973 and "used for the benefit of the appropriator, other persons or the public. . ." Rule 4.III directs the DNRC to describe the place of use for stock purposes on the water right abstract as "the actual place where the stock drink the water."

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[1] The United States contends that Claimant only owns the SW1/4 of Section 22, and that the remainder of the section is owned by the BLM.

Rule 4.III is not a determination that the water right is attached to the land as an appurtenance, or a description of the land to which a stockwater right is appurtenant. As explained by this Court, a water right is in the nature of an easement in gross, "which may or may not become an easement attached to particular land as an appurtenance. Opinion at 17, citing *Smith v. Denniff* (1900), 24 Mont. 20, 25, 27, 60 P. 398. Montana statutes have long provided that "a water right is incidental or appurtenant to specific land, when it is by right used with the land for its benefit," 70-15-105, MCA, and that "the transfer of a thing transfers also all its incidents, unless expressly excepted." 70-1-520, MCA. The Montana Supreme Court has also long 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* § 85-2-403(1), MCA.

The statement of claim for this water right, as well as the record supporting the motions, indicate that prior to July 1, 1973, the Claimant's stock, though consuming the water and grazing on public lands in Section 14, were also grazing on Claimant's private deeded lands in nearby Sections 15, 22, and 23. Exhibits attached to the United States' motion for summary judgment support the fact that Sections 14, 15, 22 and 23 were all included in Claimant's Hells Canyon Forest Service allotment. See United States (USDA-Forest Service) Motion for Summary Judgment at 4, 6, 7, 10, 13, and Exhibits C, E, and F, attached to the motion. In its motion for summary judgment, the United States represented that:

> As in other areas, the Forest Service allotted the ranchers in the Hells Canyon area joint and common use of this portion of the Deerlodge National Forest based on the dates the ranchers first established themselves in the area, on the amount of base land the ranchers owned, and on the carrying capacity of the land.

Id. at 10. The cooperative agreement for range improvements entered into between the Forest Service and the Claimant reflects the cooperative and joint nature of land use within the Claimant's allotment. *Id.* at 7; and Exhibit F to motion.

Therefore, upon consideration of the modifications to place of use proposed by the parties, this Court concludes that the place of use for claim 41G-W-192162-00 should remain as described on the temporary preliminary decree water right abstract, but the place of use clarification remark proposed by the Court should be modified to state:

> THE PLACE OF USE CONSISTS OF FEDERAL PUBLIC LAND. THIS RIGHT IS APPURTENANT TO THE FOLLOWING PRIVATE LANDS: SECTIONS 15, 23 AND SW1/4 OF SECTION 22, TOWNSHIP 02 SOUTH, RANGE 07 WEST, MADISON COUNTY, MONTANA.

II. Right of Access

The United States also argues that by decreeing water rights which include federal public lands 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 asked the Court to exclude any description of federal public lands in the point of diversion or place of use, and/or to add the following clarification remark to the water right abstract:

> Entry of a decree containing this water right does not create any right, title or interest in the use of or access across any federal lands.

United States' Reply at 6.

The language proffered by the United States suggests a judicial determination has been made on the access issue when, in fact, no such determination has been decided by the Montana Supreme Court or the federal courts. Opinion at 32. For example, in *Hunter v. United States of America*, 388 F.2d 148 (1967), the Ninth Circuit concluded that "although Hunter is not entitled to an easement to graze livestock on the lands within the boundaries of the Monument, he should be allowed a right of way over those lands to divert the water by one of the methods contemplated by the statue." 388 F.2d at 154 citing at footnote 4 to *Patterson v. Ryan*, 37 Utah 410, 108 P. 1118 (1910); *Davis v. Gale*,

32 Cal. 26 (1867). Although the case was remanded for further proceedings to resolve the easement issue, no further history of the case was reported. Therefore, the legal issue of the right to cross federal public lands to access the private water rights in that case does not appear as if it was ever fully resolved. Furthermore, the adjudication of access easements is beyond the jurisdiction of the Water Court. *See e.g.*, §§ 3-7-224 and 3-7-501, MCA. Some other court will need to resolve the access issue when, or if, the issue ever arises.

III. Characterization of Claim 41G-W-197162-00

Finally, the United States asserts that the: "Water Court's opinion erroneously refers to Claim No. 41G-W-197162-00 as a direct from source claim from a spring. Opinion at pp. 24, 25." It argues that:

> Given that the Court did not acknowledge that Claim No. 41G-W-197162-00 is a groundwater claim as opposed to a direct from source claim, questions regarding priority date, source, expansion of the right with development, and groundwater permit needs are not addressed in the Court's opinion, but are raised by the facts in the case.

United States' Motion for Reconsideration at 9. The United States further argues that, in light of the Court's characterization of the claim as a "direct from source right," and its conclusion that the right is appurtenant to lands other than those described as the place of use, the Court should clarify "that the volume used under the right will be determined by the actual number of animals that graze and consume water in Section 14 under Forest Service permit." *Id.*

The Claimant replied that "the Court is free to include a remark for this claim indicating that use is limited to 400 cattle, and that volume should be quantified as 21,600 gallons per day, which were both listed on the statement of claim. Claimant's Reply at 7. The United States argues that this quantification is "inconsistent with the DNRC Claims Examination Rules and . . . with [other] calculations made on the statement of claim form." United States' Reply at 7. Therefore, the United States has also requested that the volume be remanded back to the Water Master for clarification and quantification.

In reviewing the summary judgment motion, the Court reviewed the history of the water right, as represented in the pleadings, depositions, answers to interrogatories, and admissions and affidavits on file with the court. This Court ultimately found that there was no genuine issue of material fact with respect to the claim that this water right was appropriated in 1870 by J.C. Seidensticker as a result of his livestock drinking directly from the East Fork of Steel's Pass Spring, and that in the 1960s the spring was improved and developed, and stock tanks were installed on the public and private sides of the fence. Opinion at 7. All of the legal arguments raised by the United States to contradict the claim challenged the validity and ownership of the water right. Therefore, the Court's discussion most often referred to the water right as it existed at the time of its original appropriation in 1870, i.e. a direct instream stockwater right, appropriated from an undeveloped spring.[2]

At some point, the spring was apparently "developed," perhaps in 1953, perhaps in 1967. The United States asserts it has grazing association meeting notes from 1954 indicating that "a spring was developed in the Steels Pass area the previous year." United States' Motion for Summary Judgment and Brief in Support (USDA-FS Motion) filed May 20, 1994 at 6. The 1981 Affidavit of S. J. Seidensticker, attached to the statement of claim, states that water from the spring was originally appropriated in 1870, but that the Affiant constructed "a catch basin and ran the water by pipe to a metal water trough" in 1967.

The claim was filed with a flow rate of 15 gpm from a source identified as a "spring." It was decreed with a flow rate of 15 gpm from a "developed spring." The extent of the development and whether this claim was a "direct from source" claim was not raised as an issue in the motions for summary judgment. As previously noted, the summary judgment issues were directed at the validity and ownership of a private water right first used on public lands.

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[2] The Court notes that the Forest Service, itself, has confused the nature of this stockwater right. In its Reply Brief to Cross-Motions for Summary Judgment, the Forest Service characterized the water right as follows: "Claim 41G-W-197162 is also a **direct from source stockwater claim**, the type of claim for which the point of diversion and place of use are identical. See Exhibit D, DNRC Water Rights Claims Examination Manual, May 1992 Edition at 352, 354. Therefore, on its face, Claim 41G-W-197162 appears not to be a stockwater right for cattle which graze on private land, but for cattle which graze on National Forest." United States' (USDA-Forest Service) Reply to Cross-Motions for Summary Judgment, filed August 15, 1994, at 11.

Now that the issues raised in the motions for summary judgment have been resolved, the Court and the parties may now address the other issues raised by the objections. Accordingly, the Court will set a status conference to address what needs to be done to bring this case to a close.

CONCLUSION

After careful consideration, the Court affirms its prior Opinion and Order Amending and Adopting Master's Report except for the Place of Use clarification remark set forth above. Further proceedings will be held to resolve any remaining objections to claims 41G-W-197162-00 and 41G-W-197167-00.

DATED this 27 day of April, 2006.

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