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IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
WESTSIDE SUBBASIN OF THE BITTERROOT RIVER BASIN (76HF)

****

Claimant: Big Creek Lakes Reservoir Association)
)
Objectors: Big Creek Lakes Reservoir Association,) **CASE 76HF-168**
United States of America (USDA Forest Service)) 76H 120062-00
United States of America (Bureau of Indian Affairs)
Avista Corporation, Montana Department of Fish,)
Wildlife & Parks)
)

SOUTH FORK LAKE DECISION

Water Master Douglas Ritter filed a Master's Report in Case No. 76HF-168, finding and concluding that irrigation claim 76H 120062-00, filed by Big Creek Lakes Reservoir Association (the Association), was abandoned. The Association filed its Objections to Master's Report. The United States Department of Agriculture, Forest Service (Forest Service), filed its Response to Claimant's Objections to the Master's Report and generally supports the Master's Report. The Association withdrew its request for a hearing on its objections. No other parties filed objections or briefs.

This Decision addresses only claim 76H 120062-00. The other two claims consolidated into this case were resolved earlier in separate orders. Pursuant to Rule 53(e)(2), M.R.Civ.P., the Court now amends the Master's Report as set forth below and adopts the Master's Report as amended.

Factual and Procedural Background

Claim 76H 120062-00 is an irrigation water right timely filed in 1982 by the Association. The Association has about 80 users. Tr. 117:14. The claim consists of the use of water stored in South Fork Lake, a natural lake situated at the headwaters of the South Fork of Big Creek. The exit of the lake includes a small dam that raises the natural level of the lake a few feet and, at one time, a headgate allowed the release of stored water for irrigation use. When it was operational, the South Fork Lake impoundment supplemented the Association's larger main reservoir on Big Creek Lakes. According to Association witness Dean Jaques, the water impounded in South Fork Lake was used as "backup" during dry years and could provide five days of additional irrigation. Tr. at 180:22-25-181:1-5; 186:21-23.

Both reservoirs are within the Selway Bitterroot Wilderness and access to South Fork Lake has always been difficult. Tr. at 101:18-25-102:1-9. The trail goes through heavy timber, bogs, avalanche chutes, and has not been as well maintained by the Forest Service as frequently traveled trails. Tr. 94:11-13; 168:8-9; 169:12-13.

On January 14, 1998, the Preliminary Decree for the Westside of the Bitterroot River (Basin 76HF) was issued. Claim 76H 120062-00 was included in that decree. The abstract for the claim included remarks noting potential issues with respect to place of use, acres irrigated, flow rate, and nonuse after 1955. The Association, the United States Bureau of Indian Affairs (BIA), the Forest Service, and Avista Corporation filed objections to the claim based on those remarks. The BIA subsequently withdrew its objections.

Water Master Douglas Ritter held a two-day hearing on the remaining objections and filed a Master's Report finding and concluding that water right claim 76H 120062-00 had not been used from approximately 1964 to 2004, which raised a rebuttable presumption that the Association intended to abandon the water right. Master's Report at 11-13; Master's Report Findings of Fact 10 at 25; Master's Report Conclusion of Law VI at 27. The Master found that nonuse between 1964 and 1977 was explained and excused by the Forest Service's restriction against issuing a special use permit for reconstruction

of the South Fork dam and reservoir; and that nonuse between 1998 and 2004 was explained and excused by the filing of objections to the water right claim in this adjudication. The Master nevertheless concluded that the Association's nonuse between 1977 and 1998 was not sufficiently explained or justified and that the water right was therefore abandoned. Master's Report Conclusion of Law VI at 27.

The Association timely filed objections to the Master's Report asserting that the Master erred in finding the claim abandoned, because: (1) the Water Master did not properly consider the Association's intent with regard to the South Fork Lake dam and reservoir; (2) the testimony of Association officers and minutes of past Association meetings prove that it never intended to abandon the water right; (3) the Master placed too much emphasis on the fact that the Association did not reapply for a special use permit to reconstruct the South Fork Lake dam and reservoir after 1977; and (4) the Association's actions were consistent with its ownership right-of-way pursuant to the Act of 1891.

The Forest Service filed a response brief which generally supports the Master's findings and conclusions, but informally objects to the Master's finding and conclusion that the filing of objections to the claim in 1998 excused the Association's nonuse from 1998 through the date of the hearing in 2004.

Standard of Review

Whether a water right has been abandoned in Montana is a question of fact. *79 Ranch, Inc. v. Pitsch* (1983), 204 Mont. 426, 431, 666 P.2d 215, 217. Therefore, the Water Court reviews a Master's findings on abandonment to determine whether such findings are clearly erroneous. Rule 53(e)(2), M.R.Civ.P. To determine whether a Master's findings are clearly erroneous, the Water Court reviews the findings in a light most favorable to the prevailing party, *Anderson v. Jacqueth* (1983), 205 Mont. 493, 495, 668 P.2d 1063, 1064, and uses a test similar to the three-part test employed by the Montana Supreme Court in *Interstate Prod. Credit Ass'n v. DeSaye* (1991), 250 Mont. 320, 323, 820 P.2d 1285, 1287. A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or this

Court is left with a "definite and firm conviction" that a mistake has been made. *Id.* (citations omitted).

This Court reviews a Master's conclusions of law to determine whether the "conclusions are correct as a matter of law." *Geil v. Missoula Irrigation Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, ¶ 22, 59 P.3d 398, ¶ 22 (citation omitted); *Steer, Inc. v. Dep't. of Revenue* (1990), 245 Mont. 470, 474-75, 803 P.2d 601, 603.

Discussion

The primary issue before the Court is whether the Master erred in finding and concluding that claim 76H 120062-00 was abandoned based on the Association's failure to sufficiently explain and excuse twenty-one years of nonuse between 1977 and 1998. The principles of law governing the abandonment of water rights in Montana are well established. It is fundamental that the appropriation of water is based on beneficial use and when an appropriator or his successor ceases to use water for its beneficial purpose, the right to use the water ceases. *79 Ranch*, 204 Mont. at 432, 666 P.2d at 218.

Although the mere nonuse of a water right is not conclusive evidence of abandonment, it has long been considered evidence of intent to abandon a water right and an extended period of nonuse is considered "strong," "potent" or "clear" evidence of intent to abandon a water right. *79 Ranch*, 204 Mont. at 432, 666 P.2d at 218; *Holmstrom Land Co. v. Meagher County Newland Creek Water Dist.* (1979), 185 Mont. 409, 424, 605 P.2d 1060, 1069; *Smith*, 18 Mont. at 438, 45 P. at 634. In *79 Ranch*, the Montana Supreme Court held that: "In effect such a long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse." 204 Mont. at 432-33, 666 P.2d at 218; *see also* Master's Report, Conclusion of Law V at 26.

The Montana Supreme Court summarized the two-step process for determining the abandonment of a water right as follows:

> The objectors have the initial burden of proving that a water right has not been used for a sufficiently long period of time to raise a rebuttable presumption of an intent to abandon that right. Once a period of nonuse sufficient to raise the presumption of an intent to abandon has been

> established, the burden shifts to the claimant of the water right to explain the reasons for nonuse. To rebut the presumption of abandonment, the claimant must establish some fact or condition excusing the long period of nonuse, not mere expressions of hope or desire reflecting a gleam-in-the-eye philosophy regarding future use of the water.

Clark Fork River II, 74 Mont. at 344, 908 P.2d at 1355 (internal citations and quotations omitted); s*ee also* Master's Report, Conclusion of Law V at 26.

Here, substantial evidence supports the Master's finding that claim 76H 120062-00 was not used from the beginning of 1964 through the date of the hearing in 2004. Master's Report at 18; s*ee also*, Forest Service Exhibits G-41 and G-93; and testimony of Jed Simon, William T. Goslin, Brian Langton, and David Bull. In fact, the only evidence that the Association may have impounded and used this water right after its acquisition in 1955 was Dean Jaques' testimony that he closed the South Fork Lake headgate once between 1959 and 1963, as instructed by his father, who was then president of the Association and who had opened the headgate earlier in the year. Tr. at 189:23-25-190:1-17. The only affirmative action taken by the Association after 1963 with respect to the water right appears to have been filing the Statement of Claim in 1982, and a single request by the Association to the Forest Service in 1990 to maintain the trail to the dam and reservoir, which the Forest Service complied with the following year. Master's Report at 15-16; Tr. 26:19-25-27:1-3.

Twenty-three years of continuous nonuse is sufficient to raise a rebuttable presumption of intent to abandon the water right and shift the burden of proof onto the nonusing Association to provide reasons for nonuse. *See Clark Fork River I*, 254 Mont. at 16; Conclusion of Law VI at 27.

Excuses for Nonuse: Interference by Forest Service and the Association's Disability

The Association's primary excuse for the nonuse of its South Fork Lake water right claim is that the Forest Service interfered with the Association's attempt to gain access to the South Fork Lake dam and reservoir. Additionally the Association explains, even if it had access, it had a financial disability and time constraints because it would have been forced to work simultaneously on its dams at Big Creek Lakes and South Fork

Lake. Master's Report at 13; Tr. at 109:2-6; Tr. at 112:2-4; Tr. at 117:21-23; Tr. at 118:16-25; Tr. at 123:7-9.

The Forest Service's interference with access is asserted to have occurred both before and after the passage of the Wilderness Act of 1964. After discussing the trail issue at length, the Master summarized the evidence and his finding as follows:

> The condition of the South Fork trail and the alleged lack of Forest Service trail maintenance is not a compelling argument. There is no evidence showing that the Forest Service had a special duty to put the time and effort into the South Fork trail that the Association apparently thought was necessary. All parties acknowledge that the trail is hardly fit for horses under the best of circumstances. It is simply difficult to get to South Fork Lake.

Master's Report at 15.

Substantial evidence supports the Master. Association witness Dean Jaques agreed that the South Fork trail was "always a difficult trail." Tr. 188:1-3. From 1955-57, Mr. Jaques recalled the trail was "tough" because "the Forest Service didn't maintain it that frequently in those days" and also because of the "nature of the country," which includes "a lot of snow slides," "huge piles of logs," and in places "a lot of springs and surface water coming up that made the trail a terrible bog." Tr. 181:6-15. Association witness Chinook Swindle stated that he has been to the South Fork Lake area several times, with his first trip in 1965 or 1968 and his last trip in 2002. Tr. 99:20-25-100:1-5. His experience with the trail is "that it's not exactly stock passable." Tr. 102:4-5. These trail descriptions pre- and post-date the passage of the Wilderness Act of 1964.

No member of the Association tried to clear the South Fork trail because it assumed the Forest Service had a policy against such action. Tr. 116:19-25. Yet, its members did "cut out" portions of the Big Creek Lakes trail, despite its assumption of this Forest Service policy. Tr. 113:16-19.

In a "typical" canal or ditch easement in Montana, water users have a "secondary easement to enter, inspect, repair and maintain a canal or ditch." Section 70-17-112 (1981), MCA; *see also Laden v. Atkeson* (1941), 112 Mont. 302, 305-06, 116 P.2d 881,

883-84. Under Montana law, the owner of the land on which a water source is located (the servient owner), absent agreement, has no duty to maintain an accessible trail to the water source for the benefit of the water user (the dominant owner). Montana law on easements seems to follow the general rule that whenever a secondary access route "becomes founderous, impassable, or merely inconvenient," the duty is primarily on the dominant owner to repair the route and "to provide the 'necessary upkeep' in maintaining the secondary easement." *Engel v. Gampp* (2000), 298 Mont. 116, 129, 993 P.2d 701, 710 (citing *Laden*, 112 Mont. at 308; 116 P.2d at 884).

Although legal access rules on public lands may be different from legal access rules on private lands, the Association cited no authority to support its argument that the Forest Service had a duty to maintain a fully accessible trail to South Fork Lake for the Association's benefit. Absent such a duty, the record does not excuse the Association's failure to use the South Fork Lake water for more than 23 years.[1]

After reviewing the record, the most likely reason the Association did not use South Fork Lake for forty years is because the Association simply did not have the time and resources to maintain and rebuild the dam. All of the Association's available money and its membership's time and efforts were spent on higher priority projects.

Since the 1950s, there has "always been a lot of talk about South Fork Lake. . . . [W]e knew we had to do something." Tr. 118:16-19. But, it took a back seat to more pressing affairs. "It really did . . . The, the main [priority was working on the dam at Big Creek Lakes], you know, you're talking about a twenty acre lake versus 242 acre lake. . . . So, it's a lot bigger item." Tr. 118:19-24. After the Big Creek Lakes dam was rebuilt, "the funding dried up." Tr. 121:11. The Association did not explore alternative funding sources, it lacked extra money, and the money it had was spent on maintenance, forming a water cooperative with fourteen other lake associations to help them obtain recognition

1 The issue of whether the Association owns an easement on the South Fork Lake dam and reservoir apparently is being litigated as a quiet title action in the U.S. District Court for the District of Montana, in *Big Creek Lakes Reservoir Association v. United States of America*, Cause No. CV 04-39-M-DWM. Whether the issues in the U.S. District Court action include the access and interference issue is unknown. If the U.S. District Court concludes the Forest Service interfered with the Association's attempt to gain access to the South Fork Lake dam and reservoir, matters beyond the jurisdiction of the Water Court, then the Water Court might be requested to revisit the abandonment issue in this case.

of their easements, and legal representation. Tr. 121:21-25; 122:24-25; 123:7-11. The scope of the financial disability of the Association was never explained beyond these general remarks. Moreover, the Association did nothing after the work on the Big Creek Lakes dam and impoundment system was completed in 1977. Master's Report at 14.

Insufficient funds to apply water to a beneficial use is not sufficient to excuse an extended period of nonuse. Nonuse due to economic constraints "is not consistent with the protection and preservation of existing water rights." *79 Ranch*, 204 Mont. at 433-34, 666 P.2d at 218-19 (citations omitted). In reviewing the record in this case, it is clear that from 1955 forward, the Association simply did not focus its time and resources on maintaining or rebuilding the South Fork Lake dam.

The Master weighed the evidence and concluded that the Association's lack of time and money did not excuse such an extended period of nonuse. Master's Report at 17. Substantial evidence supports the Master's findings.

Excuse for Nonuse: Objections to Claim in the Adjudication

In a footnote to its USDA-Forest Service's Response to Claimant's Objections to the Master's Report, the Forest Service objects to the Master's conclusion that the period of nonuse ended when the objections to the claim were filed in 1998. Response at 4, n.1. The Forest Service argues that the period of nonuse for this water right should have run through the date of the hearing on December 13 and 14, 2004.

In his report, the Master specifically found that:

> When the Preliminary Decree for the Westside of the Bitterroot River was issued on January 14, 1998, the Association claim for South Fork Lake was subject to objections. The Forest Service filed an objection to the claim on October 9, 1998. Although the Association did not assert this point, this objection and the other objections filed against this claim can be viewed as a form of restriction on the exercise of the right. Once the validity of the claim was challenged in this adjudication, it was unreasonable for the Association to put its efforts into defending the claim. There is little sense in spending Association time and money working on the physical components of the claim until the allegations of abandonment are resolved. Therefore, the Master agrees that a new restriction on use of the claim began in 1998.

Master's Report at 15.

"The controlling principle upon which water 'rights' in Montana are perfected and continue to possess legal validity is that of beneficial use; water rights cease when the water is no longer applied to a beneficial use." *In re Adjudication of Musselshell River* (1992), 255 Mont. 43, 47, 840 P.2d 577, 580 (citing *Power v. Switzer* (1898), 21 Mont. 523, 529-30, 55 P. 32, 35, *79 Ranch*, 204 Mont. at 431-32, 666 P.2d at 218). The requirement for beneficial use of a water right does not end with the filing of an objection and adjudication of a water right. Claimants routinely and properly continue to use their water right even after objections to their claim are filed.

In the present case, substantial evidence supports the Master's finding that the Association did not use this water right between 1964 and 2004 – a period of forty years. The nonuse continued after the objections to the water right claim were filed in 1998 and through the 2004 hearing. There is nothing in the record indicating that water was not available after 1998 to impound at South Fork Lake for future use, or of any order prohibiting the Association from impounding or using the water while the objections were being adjudicated.

The continued nonuse of the water right after the objections were filed, therefore, was voluntary and constitutes further evidence that the Association intended to abandon the water right. Defending a water right against objections can be costly and time consuming. Nevertheless, insufficient funds and a lack of time to apply water to beneficial use is no excuse for nonuse while an objection is being resolved. Both the Montana and Colorado Supreme Courts have noted that: "Considering the large demands for all of the appropriatable water in this state [and the consequent high value of water], it might be said that nearly every abandoned water right could have its non-use justified by the economics that might prevail sometime in the future . . . ." *79 Ranch*, 204 Mont. at 433, 666 P.2d at 219 (*quoting CF & I Steel Corp. v. Purgatoire River Water Conservation Dist.* (Colo. 1973), 183 Colo. 135, 515 P.2d 456, 458) (internal quotations omitted); *see also Clark Fork River II*, 274 Mont. at 347; 908 P.2d at 1357.

The Master erred in finding and concluding that the objections filed against the water right claim in this case "restricted" the Association's use of the water right, and

excused the Association's nonuse of the water right from 1998 through the 2004 hearing date. This Court rejects the finding and the rationale supporting the finding, and amends the finding to include six additional years of unexcused nonuse by the Association. Although this amendment may seem moot in light of the Master's ultimate finding of abandonment, the Court concludes that the Master's error is not harmless and must be corrected. It is important for claimants to understand that the mere filing of an objection to a claim does not insulate the claim from the continuing requirement of beneficial use, or necessarily excuse prolonged nonuse of the claims while the objections are being resolved.

Intent to Abandon: Rebuttal Testimony and Minutes

The Association's first objection to the Master's Report is that the Master did not fully consider the Association's intent with regard to the South Fork Lake dam and reservoir. Objections to Master's Report at 2. The Association analogizes this case to *Beaver Park Water, Inc. v. City of Victor* (Colo. 1982), 649 P.2d 300, and contends that the Master failed to give proper weight to the rebuttal testimony of its board members and officers, and the minutes of past annual meetings, which prove that the Association never intended to abandon the water right during the period of nonuse. Objections to Master's Report at 3-4.

The Association cites to: (1) testimony that no one specifically stated "we abandon the South Fork Lake" water right; (2) evidence that it once discussed looking into putting a dam at South Fork Lake; and (3) evidence that it once discussed inspecting South Fork Lake and building a headgate. *Id.*

In *79 Ranch*, the Montana Supreme Court emphasized the critical role of intent in proving the abandonment of a water right in Montana when it quoted with favor the finding of the Colorado Supreme Court that: "Nonuse alone will not establish abandonment where the owner introduces sufficient evidence to show that during the period of nonuse there never was any intention to permanently discontinue the use of water." *79 Ranch*, 204 Mont. at 433, 666P.2d at 218 (*quoting Beaver Park*, 649 P.2d at 302). In Colorado, this rule applies even to a *prima facie* presumption of intent to

abandon a water right.[2]

Similarly, although not statutorily directed to do so, the Montana Supreme Court appears to have signaled its endorsement of the "general modern trend" and "express intent of our legislature" that ten years of nonuse may result in a *prima facie* presumption of abandonment. *See 79 Ranch,* 204 Mont. at 434, 666 P.2d at 219. Significantly, in the instant case, the Master found the shortest "unexplained" period of the Association's nonuse to be twenty-one years, from 1977 to 1998.

One of the "facts or conditions" sufficient to excuse a long period of nonuse is evidence establishing that there was no intention to abandon the use of the water. Subjective statements of intent, however, although relevant and admissible, can rarely stand alone as sufficient to rebut a presumption of intent to abandon a water right. As explained by the Ninth Circuit Court of Appeals: "Subjective intent is difficult to prove by direct evidence. Few water right holders say in front of witnesses, 'I intend to abandon my water rights.' Therefore, indirect and circumstantial evidence must almost always be used to show abandonment." *United States v. Orr Water Ditch Co.* (9th Cir. 2001), 256 F.3d 935, 945. Similarly, in *79 Ranch*, the Montana Supreme Court found that sweeping claims of insufficient funds "unsupported by more specific evidence, [are] not sufficient to rebut the presumption of abandonment." 204 Mont. at 433, 666 P.2d at 218.

The Association's reliance on *Beaver Park* is misplaced. In *Beaver Park*, the Colorado Supreme Court found "[g]enerally, the reasons underlying the nonuse period are only relevant to the question of intent to abandon and will not alone rebut a *prima facie* showing of abandonment." 649 P.2d at 303, n.1. Moreover, "self-serving statements of intent by the owner of . . . water rights are insufficient by themselves to rebut a presumption of abandonment." *Id.* at 302. Therefore, although the Colorado Supreme

2 In 2003, the Colorado Supreme Court clarified that under Colorado law: "the owner of the water right can rebut the presumption of abandonment by introducing evidence sufficient to excuse the non-use or demonstrate an intent not to abandon." *East Twin Lakes Ditches & Water Works, Inc. v. Lake County* (Colo. 2003), 76 P.3d 918, 921 (quoting *Haystack Ranch, LLC v. Fazzio* (Colo. 2000), 997 P.2d 548, 552) (internal quotation omitted); *see also Danielson v. City of Thornton* (Colo. 1989), 775 P.2d 11, 19 (holding that "the existence of such an excuse is not independently significant but is relevant to the determination of the owner's intent.")

Court considered the testimony of former officers, directors, and employees stating that their predecessors did not intend to abandon the water rights during the period of nonuse, the court based its decision on "other consistent and competent evidence" showing that the water rights were involved in constant activity during the twenty years of nonuse. *Id.*

Similarly, in *East Twin Lakes Ditches & Water Works, Inc. v. Lake County* (Colo. 2003), 76 P.3d 918, the Colorado Supreme Court considered the general partners and a county commissioner's testimony that there never was any intent to abandon a water right. Again, however, the court found that "these statements, although valid evidence to be weighed by the water court, are necessarily subjective and therefore fall well short of the quantum of proof necessary to rebut a presumption of abandonment." *Id.* at 922; *see also Southeastern Colorado Water Conservancy Dist. v. Twin Lakes Assoc., Inc.* (Colo. 1989), 770 P.2d 1231, 1238 (concluding that "[e]vidence sufficient to rebut the presumption of abandonment must consist of more than mere subjective declarations by the owner of the water right that he did not intend to abandon the right, or that he intended to resume use of the right at some future time.")

Here, the Association's evidence consisted of subjective declarations of the water users that they intended to use the South Fork Lake water, but were prevented from doing so by the Forest Service, or by the disability of the Association. In summary, the Association presented the testimony of: (1) Brian Langton, an Association member who testified that the Association's intent was to continue to use the water, but it had to focus on Big Creek Lake so much that the Association did not have time to reconstruct South Fork Lake dam and reservoir; (2) Jack Buker, a past president of the Association who testified that he never heard anybody in the Association say, "we abandon the South Fork Lake"; and (3) Dean Jaques, a son of a former president of the Association who testified that the Association always intended to have this water right available and believed it was important to protect it. Tr. 112:2-4; 150:16-19; 177:13-19. Additionally, the minutes of past Association meetings merely document the subjective desire of some board members to reconstruct the project and use the water at some undefined time in the future.

Claimant's Exhibits C-66-69, 71, 72. This testimony and evidence are insufficient to rebut the presumption of abandonment.

The only evidence of any activity with respect to the South Fork Lake water right from 1964 to 2004 is the Statement of Claim filed by the Association in 1982 and a single request by the Association to the Forest Service in 1990 to maintain the trail to the reservoir. The filing of a statement of claim is not sufficient to rebut a presumption of intent to abandon, for if it were, no water right "claim could ever be found abandoned." Memorandum Opinion in Water Court Case 41G-137 at 20 (filed December 27, 1999). With respect to the 1990 trail clearing request, the Forest Service cleared the trail in 1991, but there is no evidence the Association took advantage of the cleared trail.

The Association simply did not present any consistent, specific, or objective evidence to support and confirm the subjective statements of intent. The testimony and the minutes, therefore, consist of nothing more than "mere expressions of hope or desire reflecting a 'gleam-in-the-eye philosophy' regarding future use of the water," which the Montana Supreme Court has specifically held is not sufficient to rebut the presumption of intent to abandon a water right in Montana. *Clark Fork River II*, 274 Mont. at 347, 908 P.2d at 1355 (citation omitted).

In summary, the record lacks evidence proving that the Association ever: (1) affirmatively took action to maintain the dam or control structure to impound and store water in the South Fork Lake reservoir between 1964 and 2004; (2) impounded water in the structure from at least 1964 through the hearing in 2004; (3) attempted to work on or expend money on the structure, with or without a permit; (4) made use of the cleared trail after 1990 to repair and use the dam and headgate; or (5) separately measured or accounted for the South Fork Lake water right claim.

After weighing the evidence presented by the Association, the Master concluded that it was insufficient to rebut the presumption of intent to abandon the water right. Master's Report at 2-10, 13, 19, Finding of Fact 10 at 25, and Conclusion of Law VI at 27. Where there is conflicting evidence in the record, the credibility and weight given to that evidence is the province of the finder-of-fact and will not be reversed unless there is a

lack of substantial evidence to support the ruling. Sections 26-1-202 (1983), 203 (1983), MCA; *Anderson*, 205 Mont. at 495, 668 P.2d at 1064. In this instance, the evidence substantially supports the Master's finding.

Forest Service Permit for South Fork Lake Dam and Reservoir

The Association also objects that the Master placed too much emphasis on the fact that the Association did not apply for a new permit for the South Fork Lake dam and reservoir subsequent to its replacement of the Big Creek Lake dam in 1977. Objections to Master's Report at 4. The Association argues that it is not required to obtain a permit from the Forest Service to reconstruct or operate the facility because it owns an easement for the dam and reservoir, pursuant to the Right of Way Act of March 3, 1891, 26 Stat. 1101-02, codified as amended at 43 U.S.C. §§ 946-49. It contends that its decision not to apply for a special use permit after 1977 was consistent with that belief, and therefore does not constitute evidence that it intended to abandon the water right. *Id.* at 4-5.

To the extent the Association is suggesting that the nonuse of its easement for the South Fork Lake dam and reservoir does not necessarily prove that it abandoned this water right, the Association is correct. "Montana law has long recognized that water rights and easement rights such as ditch rights [and reservoir rights] are distinct interests which can be conveyed separately and abandoned separately." *Musselshell River*, 255 Mont. at 47, 840 P.2d 577 (citing *McDonnell v. Huffine* (1912), 44 Mont. 411, 422-23, 120 P. 792, 795); *see also Clark Fork River I*, 254 Mont. at 17, 833 P.2d at1124. In *Musselshell River*, the court emphasized that "[t]he controlling principle upon which water 'rights' in Montana are perfected and continue to possess legal validity is that of beneficial use; water rights cease when the water is no longer applied to a beneficial use." 255 Mont. at 47, 840 P.2d 577 (quoting *E.E. Eggebrecht, Inc. v. Waters* (1985), 217 Mont. 291, 295, 704 P.2d 422. The "mere non-use of an easement by grant, no matter how long continued, does not constitute abandonment." *Id.* Therefore, the creation and continued existence of an easement by grant is not analogous to the creation and continued existence or abandonment of a water right in Montana. *Musselshell River*, 255 Mont. at 47, 840 P.2d 577.

However, in determining the issue of abandonment, the Master was authorized to consider all relevant admissible evidence, including "without limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973." Section 85-2-227(3), MCA. The Association's decision not to reapply for a special use permit to rebuild the South Fork Lake dam and reservoir and make the use operational after complying with the Forest Service restriction in 1977, is relevant to the issue of whether it abandoned this water right. The dam and reservoir are an essential part of the supply and delivery system for this water right. Moreover, the Association justified its nonuse of the water right between 1964 and 1977 to a large extent on the basis of the Forest Service restriction against issuing a South Fork Lake permit during that period. *See* Claimant's Post-Hearing Brief at 2-3.

The Association's decision not to apply for a new permit for the facility is but one factor considered by the Master in determining whether this water right was abandoned, and the Master supported his ultimate finding of abandonment with a substantial amount of other evidence. For example, there is no evidence of the impoundment of South Fork Lake water from 1964-1977. In fact, "[s]ometime in the mid-1960s," the Association's headgate "disappeared" from the South Fork Lake dam and was never replaced. Claimant's Post-Hearing Brief at 2, n.4.

The Association's argument that it was not required to obtain a special use permit to reconstruct and operate the South Fork Lake dam and reservoir has consequences. If the Association's argument is correct, then there were no restrictions against the Association's use of the South Fork Lake dam and reservoir and no excuses for the Association's nonuse of its water right between 1964 and 1977. Association witness Jack Bucker referenced this dilemma in his response to a question about whether Association members ever went to South Fork and removed debris or worked on the dam "without Forest Service permission." He stated: "if I thought I could get away with it, yeah. I don't know how to answer that. I'm, I'm screwed either way." Tr: 162: 15-22. His personal view is that there is "nothing wrong with doing that," but, to the best of his knowledge, no Association member ever did so. Tr. 162:21-25 and Tr. 163:1-2.

Conclusion

Applying the three-part test set forth in *DeSaye* to determine whether the Master's findings are clearly erroneous, the Court concludes that substantial evidence supports the Master's findings (1) that water right claim 76H 120062-00 was not used from at least 1964 through the hearing date in 2004 and (2) that the Association's nonuse between 1964 and 1977 was sufficiently explained or excused by the Forest Service's restriction against issuing a permit for reconstruction of the South Fork Lake dam and reservoir, if such a permit was required. If a Forest Service permit was not required, then thirteen additional years of unexplained nonuse exist. The Court further concludes that the Master erred in finding and concluding that the Association's nonuse of its water right between 1998 and 2004 was excused by the filing of the objections.

The Association failed to sufficiently explain or rebut the nonuse of its water right claim from 1977 to 1998, and from 1998 to 2004. Whether the period of nonuse was twenty-one or twenty-seven years, substantial evidence supports the Master's ultimate finding and conclusion that the Association's water right claim was abandoned. Claim 76H 210062-00 is terminated and dismissed and will appear as such in the final decree, together with a remark on the claim abstract that:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT DURING ADJUDICATION OF THE PRELIMINARY DECREE.

DATED this 11 day of December, 2007.

C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Staci Green, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **SOUTH FORK LAKE DECISION** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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Note: Service List Updated 12-10-07

DATED this 11 day of December, 2007.

Staci Green
Staci Green
Deputy Clerk of Court