

Montana Water Court
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FILED

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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
TETON RIVER BASIN (410)

CLAIMANTS: Raymond W. Gustafson, Patricia J. Gustafson

OBJECTORS: Bruce C. Martin, Janet D. Martin, Larry L. Martin, Donald M. Koenig, Mary L. Sauer, Jerry M. Philipps

NOIA: Raymond W. Gustafson

INTERVENOR: Walter L. Hammermeister

410-11
410 114165-00
410 114172-00
410 114175-00

NOTICE OF FILING MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court on the above stamped date. Please read this Report carefully.

If you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report, you may file a written objection to the Report within **10 days** from the above stamped date. (Rule 23, Water Right Adjudication Rules.) If you file an objection, you must also mail a copy of the objection to all parties on the Service List found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

1. Water Court case 410-11 includes stock claim 410 114165-00, irrigation claim 410 114172-00, and domestic claim 410 114175-00. All three claims are based on a George Mackie Notice of Water Right with a claimed priority date of April 11, 1902 (Exhibit C-4). The notice was filed with the Teton County Clerk and Recorder on April

26, 1902. The source for all three claims is Aldrich Springs, a group of three natural springs located in the N2N2 of Section 26, T27N, R4W, Teton County. Nearly all of the claimed water originates in the middle spring. The east and west springs serve to add minimal flows to the claimants' irrigation ditches (Exhibit C-2a). The middle spring is referred to as Aldrich Spring. All three claims appeared in the Temporary Preliminary Decree for this basin with the following issue remark:

BASED ON AVAILABLE DATA, IT IS QUESTIONABLE WHETHER ALDFUCH SPRING IS A TRIBUTARY OF ALDFUCH COULEE (BASIN 410) OR PONDERA COULEE (BASIN 41P).

The irrigation claim received additional remarks noting flow rate, acres irrigated, and place of use issues. The irrigation claim also received multiple objections from water users on South Pondera Coulee.

2. Aldrich Spring is the claimed source for a number of water right claims in addition to the three claims in this case. (See Cases 410-10 through 18). Except for two stock claims and a single agricultural spraying claim, all of these claims are for domestic use. At some point in time, Aldrich Spring was developed to allow water users to fill portable tanks and transport water back to their homes. There is currently a gravity pipeline leading downhill from the spring to a stand pipe that can be turned on and off to fill truck mounted tanks. All of these claims received the same basin designation issue remark noted above. As a result, the majority of these claim owners were very concerned about this issue. It was perceived that a possible change in the basin designation from 410 to 41P could invalidate these filings. To address this common issue, a joint first status conference for Water Court cases 410-10 through 410-18 was held on April 2, 2008 in Choteau, Montana. Based on the discussion at this conference and a review of the claim files, the Water Master determined that the only claims that could be affected by the basin designation issue were the stock claim and irrigation claim in case 410-11. A potential change in basin designation would have no affect on the other claims.

3. On April 10, 2008, the Master issued an order in all of these cases (except 410-11) setting a deadline for filing a Motion to Intervene in case 410-11. The Order

stated that the basin designation question would be addressed in case 410-11 and that this determination would apply to all Aldrich Spring claims. Any claimant or objector in the other Aldrich Spring cases could intervene into this case and take part in proceedings on this issue. A single Motion to Intervene was filed by Walter L. Harnmermeister. The Master granted intervention on December 10,2008.

4. Hearing in case 410-11 took place on June 2,2009 in Conrad, Montana. All parties were present with the exception of objector Bruce Martin. The hearing addressed all issues on the three claims in this case. However, only the natural direction of flow for the springs and period of use issues were contested. The claimants presented evidence to resolve all issues regarding the flow rate, volume, acres irrigated and place of use. A site inspection was conducted following the hearing.

5. On June 8,2009, the claimants filed a Motion to Amend the Priority Date for claim 41 0 114172-00 and complied with the notice by publication requirements found in Section 85-2-233(6), MCA. The current objectors and intervener objected to the motion. There were no new objections resulting from publication. The proposed amendment was briefed by all parties. On October 7,2009, the claimants withdrew the motion. As a result, the priority date for claim 41 0 114172-00 is not at issue and will not be changed.

Acres Irrigated/Place of Use

6. Claim 41 0 114172-00 was originally filed for irrigation on 110.00 acres. In 1985, the claimants amended the acres irrigated to 240.00 acres. This is the acreage figure that appeared on the claim in the Temporary Preliminary Decree. The claim received issue remarks indicating that 0.00 acres irrigated were confirmed in the 1962 Teton County Water Resource Survey and 79.00 acres irrigated were confirmed in a September 22, 1979, USDA air photo of the area. At hearing, the claimant amended this acreage figure to 120.00 acres and provided evidence to support the historical irrigation of these acres.

7. Raymond W. Gustafson testified that he has been involved with irrigation on this property since 1952. He purchased the property in 1963. He stated that irrigation

practices on the property have not changed over this period of time. He thinks that his irrigation practices are the same as the previous owners of the property. He could not explain the lack of irrigation in the Water Resource Survey or the lower acreage figure in 1979 but does not think they are an accurate reflection of historical use. There has been some variation in the number of acres irrigated each year. He testified that Exhibits C-2a and C-2b accurately show his place of use. Mr. Gustafson also testified that he uses the water from the springs for stock water in generally the same location as the irrigation. Cattle access the natural flow below the springs and water in his ditch system. This use is reflected in claim 41 0 114165-00.

8. The 1962 Teton County Water Resource Survey did not include a map for T27N, R4W. It is not clear that this area was included in the survey. The county map that is a part of the survey does not show any irrigation in this township. The lack of a township map and the scale of the county map makes the value of the survey minimal in this situation. The USDA air photo of the area was filmed on September 22, 1979. This is late in the irrigation season and may not show the full extent of the irrigated ground. It is also a "snapshot in time" that may or may not support the full extent of historical irrigation in the area. Mr. Gustafson's testimony is more credible evidence supporting historical use.

Flow Rate/Volume

9. Claim 41 0 114172-00 appeared in the Temporary Preliminary Decree with a claimed flow rate of 5.00 cfs. The claim received an issue remark stating that this claimed flow rate appears to exceed the capacity of the diversion and conveyance facilities. A second issue remark states that the flow rate may require modification if the acres irrigated are changed.

10. At hearing, the parties stipulated that the flow rate for claim 41 0 114172-00 should be 75.00 gpm. This flow rate includes 60.00 gpm from Aldrich Spring itself and an additional 15.00 combined flow rate from the east and west springs associated with this diversion system. Raymond W. Gustafson testified that 75.00 gpm is a reasonably

accurate flow rate for claim 41 0 114172-00.

11. The parties' stipulation at hearing indicates that the standpipe tapping Aldrich Spring is capable of delivering about 50.00 gpm (See *also* Exhibit C-7). An additional 10.00 gpm is not captured by the standpipe system. When the standpipe is not in use, all 60.00 gpm are available for irrigation and stock use. Domestic claim 41 0 114175-00 appeared in the Temporary Preliminary Decree with a claimed flow rate of 50.00 gpm. This flow rate is based on the capacity of the standpipe system and is accurate as it appeared in the Temporary Preliminary Decree for this Basin.

12. Claim 41 0 114172-00 appeared in the Temporary Preliminary Decree with two volume information remarks. The first remark is the standard volume remark used on direct flow irrigation claims. The second remark indicates that the volume was reduced to the 1.7 acre-feet per acre guideline that is applied to water spreading claims. However, this is not a water spreading claim Rule 2(a)(77), W.R.C.E.R., it is a direct flow claim. It did not receive a quantified volume. Rule 24(c) W.R.C.E.R. It is apparent that the second volume remark was placed on the claim in error and should be removed.

Period of Use

13. The objections to claim 41 0 114172-00 include the issue of period of use. The claim appeared in the Temporary Preliminary Decree with a January 1 to December 31 period of use. The objectors assert that the claimants have not historically irrigated through the winter. They further argue that if there has been winter irrigation, it is a wasteful practice that does not provide a benefit and that should not be allowed.

14. Long time area residents Larry Martin, Willard Martin, and Elmer Phillips all testified that South Pondera Coulee historically flowed through the winter months. Water use on South Pondera Coulee consists of a series of onstream stock ponds. All three testified that the ponds would fill over the winter when the coulee was flowing. Since about 2000, they have had difficulty filling the ponds because the coulee has not been consistently flowing. All three think that this has changed in recent years due to Gustafsons' winter irrigation. Mr. Phillips in particular testified that winter irrigation was

not the historical practice on this property. He believes that it has only been in the last ten years that Gustafson has engaged in the practice on a regular basis. In some years, they have been able to reach an agreement with Gustafson to release spring water into South Pondera Coulee.

15. Phyllis Phillips has been an area resident since 1988. She is employed by the U.S. Natural Resource and Conservation Service as an area manager. She testified that her job includes working with irrigation systems. She was not listed as an expert witness and was not qualified as an expert witness. *See* generally Article VII, M.R.Evid. Nonetheless, Ms. Phillips testified that winter irrigation is not a beneficial use. She stated that attempting to irrigate in the winter provides no benefit to plants and does not help to fill the soil profile with moisture. She agreed that Gustafson has been attempting to irrigate in the winter, but asserts that he should not be allowed to do so. She has not compiled data on the specific soils in the Gustafson place of use and has not researched the possible connection between winter irrigation and groundwater.

16. In 2001, Phyllis Phillips lodged a complaint with the Montana Department of Natural Resources and Conservation (DNRC) regarding Gustafsons' winter irrigation. As a result of the complaint, DNRC employees Marv Cross and Jay Johnson performed a field investigation on April 13, 2001 (Exhibit C-13). In their Field Investigation Report, Cross and Johnson noted that allowing water to sit on a field and freeze is common practice in eastern Montana. They compared the Gustafsons' practice to water spreading systems. The report found that Gustafsons' practice of winter irrigation was not a waste of water.

17. Raymond Gustafson testified that he has always irrigated year round when he can do so. He stated that late February and early March irrigation are key to his operation. He believes that his current practices are the same as previous owners of the property. He stated that he will send water to the west into South Pondera Coulee during the winter if he has no use for it, but thinks that doing so is at his discretion.

18. Eric Gustafson testified that he has been familiar with the Aldrich Spring area

since the late 1950s. He grew up helping irrigate in this area and is currently engaged in ranching with his father Raymond. He testified that he has irrigated this property in every month of the year. They will irrigate when they have warm winter days. This may allow the water to sink into the soil or it may just allow them to spread the water and let it freeze on the ground. Eric stated that the flow of Aldrich Springs is seldom sufficient to irrigate all 120.00 acres. To compensate for the available flow, they spread water on the land whenever they can, year round.

Natural Direction of Flow of Aldrich Spring/Source

19. The most contentious issue on these claims is the natural direction of flow for Aldrich Spring. The spring is located on the dividing line between Aldrich Coulee which flows into Muddy Creek and eventually the Teton River, and South Pondera Coulee which flows into Pondera Coulee and eventually the Marias River. The spring has been developed since at least 1902 and possibly much earlier. That development has included improvements to the spring itself, a pipeline to a stand pipe, and a ditch system that facilitates irrigation on 120.00 acres. The 120.00 acres that comprise the claimed place of use are located in both Aldrich Coulee and South Pondera Coulee. Through the irrigation ditch system, Raymond Gustafson and his predecessors have been able to control the flow of the spring and send water down either coulee. It is doubtful that the surface water flowing from the spring has completely followed its natural course for a hundred years.

20. Attempts to determine the natural flow of the spring face some significant obstacles. The spring is located on a north facing hillside above a natural basin. Water from the spring flows into channels in this basin and slowly makes its way through to eventual outlets. The channels are not continuous or clearly apparent. At some point, the amount of water in the basin is sufficient for it to push its way through the flat area and allow it to flow down one or the other of the coulees, or both. The basin itself is very flat and shallow. There are numerous small ridges and depressions, some natural and some man made, that direct the flow of water as it accumulates. The area is probably as much a wetland as a hay field. One hundred years of irrigation has undoubtedly had some affect

on the landscape. Decades of controlling the flow of water may have changed natural flow patterns. The west boundary of the basin was altered years ago by an elevated road bed. The road has been abandoned for years, but the elevated bed is largely in tact. Any water flowing to the west must pass under or around the old road bed. The objectors assert that resolving the direction of flow question is fairly simple; stop all diversions from the spring for several weeks and monitor the results. The claimant is reluctant to lose the use of the water for an extended period of time. It is not clear that allowing unimpeded flow of the spring for a period of time will yield the same answer during different times of the year or in different years. It appears to be that close of a call. It is also apparent that a definitive answer to the natural direction of flow could be an expensive proposition. The issue has the potential for endless studies by a variety of experts. That is not the approach employed by the parties in this case. The only expert testimony at hearing came from surveyor Thomas L. Russett. As a result, most of the testimony is from fact witnesses with definite opinions on the direction of flow. Not surprisingly, these opinions tend to align with the interest of that witness.

21. The three claims at issue in this case are all based on a George Mackie Notice of Water Right filed with the Teton County Clerk and Recorder on April 26, 1902. The notice identifies the source for this appropriation as Aldrich Springs, but does not indicate where water flows after leaving the spring. The three claims filed by Gustafsons identify the source as Aldrich Springs but do not indicate where water flows after leaving the spring. The claims were designated as Basin 410 filings indicating that either Gustafsons or the DNRC made the choice of drainage at the time of filing. Gustafsons amended claim 410 114172-00 in 1985, but again did not address direction of flow. A DNRC examination worksheet dated August 4, 1999 changes the source name to an Unnamed Tributary of Aldrich Coulee, again indicating that the department was treating the filings as 410 claims. In 2001, the DNRC conducted a field investigation of the area in response to a complaint received from Phyllis Phillips (*See* Findings of Fact 15 and 16). A DNRC Field Investigation Report issued on April 20, 2001 (Exhibit C-13) states that the natural

drainage of Aldrich Springs is to Aldrich Coulee. The report does not discuss this finding further or provide the basis for this determination. DNRC basin line maps provided by the claimants (Exhibits C-15 and C-16) show Aldrich Springs in Basin 410. The DNRC Review Abstracts of Water Right Claims, dated April 28, 2005 continue to show the source as Unnamed Tributary of Aldrich Coulee but add the issue remark referenced in finding of Fact 1. There is nothing in the claim files to indicate the source for the remark or the type of review that was conducted before it was added to the claims.

22. Thomas L. Russett is a registered land surveyor. He was qualified as an expert witness for the objectors. In October, 2001, Mr. Russett performed a topographic survey of the Aldrich Springs area to determine the significant land elevations that affect the flow of water. He testified that the spring flows into an extremely flat area with a variety of ground undulations. He found that the direction the water flows is not perceptible to the human eye. Mr. Russett took nearly 1600 GPS readings that measure elevation to a centimeter level of accuracy. The data was loaded into a computer program that generates a contour map of the area (Exhibits O-A and O-B). He stated that based on the numerical indications from his survey, the water pools in the area below the spring and then drains to the west. He bases this conclusion on the GPS readings and computer generated map that show the channel to the west at a slightly lower elevation than the channel to the east. He stated that a far more extensive survey could be done of the area, but he does not *think* it would result in a different conclusion. He does not *think* that vegetation or wet ground affected his survey. He is confident that the survey shows that the natural contours of the property send water to the west. His readings do not reflect a man made system. He testified that if there was sufficient flow, such as a flood event that created significant pooling, the water could go in both directions. It is his opinion that the natural flow is to the west.

23. The objectors and intervener offered the testimony of several long time area residents, including Willard Martin, Elmer Phillips, Morris Mancoronal, and Walter Harnnermeister, to support their contention that water from the spring has historically

flowed down South Pondera Coulee. With some variation, all of this testimony indicates that water flowed down South Pondera Coulee for many years. The general perception is that the connection between the spring and South Pondera Coulee has been interrupted in the last ten years by Mr. Gustafson's irrigation practices.

24. Larry Martin is a long time resident of the area. He has a stock pond on South Pondera Coulee several miles below Aldrich Springs. He testified that Aldrich Springs provided water to South Pondera Coulee during the winter. It was common for the coulee to go dry during the summer, but in his experience, it always ran through the winter and spring. He testified that Aldrich Spring is a significant tributary of the coulee providing as much as 80% of the flow. In 2001, there was no winter flow. He stated that the Gustafson place was leased through the 1990s and South Pondera Coulee had winter water every year. Since 2001 they have received water when they have been able to reach an agreement with Mr. Gustafson. He testified that a series of small berms were placed in the property by Gustafson a few years ago to manipulate the direction of flow (Exhibits O-C, O-D, and O-E). The berms tend to make the water flow to Aldrich Coulee. Mr. Martin tried to have Gustafson allow the spring flow naturally for several days before the hearing to show the natural flow during the site inspection. However, Gustafson did not completely cooperate. Exhibits O-F and O-G are DVD pictures of the area showing a May 3, 2009 snow storm. Mr. Martin testified that the pictures show the flow pattern because the snow melted in the flowing water. He testified that all of his experience shows that the natural flow is to the west.

25. Dale Kyle has practiced law in this area for many years. He first investigated the Aldrich Springs direction of flow for some clients in 1968. At the time he was a law school student. Based on this site visit, he determined that the bulk of water was flowing to the west at the time. He conducted a second site inspection in November 1981 for a client with property located further down Aldrich Coulee. His client was worried about Aldrich Spring flooding and damaging his property. He again found that the natural flow was to the west. At that time, water was being diverted into the east ditch and sent down

Aldrich Coulee. He sent Raymond Gustafson a letter demanding that he quit sending all the water to the east because of the damage. He has had no further contact with this issue. He stated that irrigation is common in this area well into December.

26. The claimants' post hearing filings assert that Aldrich Springs is capable of flowing in both directions:

"In fact, it appears that due to the flat nature of the divide, the water flows naturally into both basins. However, the water flows at a faster rate and a higher volume to the east into the Teton Basin." (Claimants Brief, Paragraph 1 at Page 9).

The assertion that a greater volume of water flows east into Aldrich Coulee is based on the testimony of Eric Gustafson. Eric grew up in this area and is familiar with Aldrich Springs from that period of time. He is 52 years old. Eric returned to the area several years ago and currently runs a cow/hay operation with his father Raymond that includes the Aldrich Springs area. Eric testified that he measured the flow rate and volume of water flowing into both coulees in preparation for the hearing. He recorded the process. (Exhibit C-17). Other than this DVD video, no evidence was provided to quantify actual flow rates into each coulee. In the video, Eric measures the width and depth of the outlet into each coulee. He then measures the speed of the flowing water. However, the results of these measurements are never provided. There is no testimony or exhibit showing a calculated flow rate based on the measurements shown in the DVD. In addition, it is apparent from the DVD and Eric's comments that the recording took place following a May 2009 snow storm that added a significant amount of water to the divide basin. Water flowing into each coulee at the time of the recording probably exceeded the 75.00 gpm flow rate of Aldrich Springs.

27. Eric Gustafson provided two other items to support Aldrich Coulee as the natural drainage for the springs. Exhibit C-12 is a NRCS map and summary showing a soil survey of this area. Eric testified that the map shows that the soils on the Aldrich Coulee side indicate the presence of water while the South Pondera Coulee soils indicate the absence of water. From this he concludes that the natural flow goes into Aldrich

Coulee. He stated that this information speaks for itself and does not require expert interpretation. He also testified that there are teepee rings a short distance down Aldrich Coulee. He stated that this indicates water flowing down Aldrich Coulee because the Native Americans who camped there would have wanted a water source nearby. Again, the claimants appear to assert that the presence of teepee rings speak for themselves and do not require expert interpretation. There was no testimony on the presence or absence of teepee rings in South Pondera Coulee. Eric was not qualified as an expert witness.

CONCLUSIONS OF LAW

1. Jurisdiction The Montana Water Court has exclusive jurisdiction to interpret and determine all existing water rights. *Mildenberger v. Galbraith* (1991), 249 Mont. 161, 166, 815 P.2d 130. An "existing water right" is defined as "a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law." Section 85-2-102(12), MCA. This includes jurisdiction to review all objections to preliminary decrees, Section 85-2-233, MCA, and all issue remarks resulting from Montana Department of Natural Resources and Conservation claim examination, Section 85-2-248, MCA.

2. Notice All water right claims that appeared in the 410 Temporary Preliminary Decree and all water right claims that received objections or counter objections appeared in the 410 Basin Objection List issued on November 14, 2007. All water users and interested parties received notice that the objection list was available for review. This provides Basin-wide notice of the elements of each water right claim that are at issue and may be subject to amendment. Water users can file a Notice of Intent to Appear to assure that they are included in proceedings on any claim. The Basin Objection List is sufficient for the public notice requirements afforded to all water users. Rules 9 and 27, W.R.Adj.R.

3. Based on the direction of flow issue that is common to numerous claims from this source, all parties claiming a water right from Aldrich Spring received additional

notice and were given the opportunity to address this issue in case 4.10-11. All of these claimants have been informed that the decision on this issue that results from these proceedings will be binding on their water right claims. This additional process is sufficient notice for these water users.

4. Burden of Proof A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by other evidence that proves that one or more elements of the prima facie Statement of Claim are incorrect. This is the applicable standard of proof regardless of whether the objectors are adverse parties or the claimants objecting to their own water right claims. *See* Memorandum Opinion, Order Adopting Master's Report, Water Court Case 40G-2 (March 11, 1997).

5. Expert testimony is appropriate if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Rule 702, M.R.Evid. A witness who is qualified as an expert may testify in the form of an opinion up to and including an opinion on the ultimate issue before the trier of fact. Rule 704, M.R.Evid. A witness who has not been qualified as an expert is limited to testimony on their personal knowledge of a matter. Rule 602 M.R.Evid. At the same time, this testimony can, in some circumstances, include opinions or inferences. In the present case, both claimants and objectors offered testimony from witnesses that were not qualified as experts but who offered opinions on matters that appear to require scientific, technical, or other specialized knowledge. As a result, only limited credibility will be placed on this testimony. *Weimer v. Lyons*, 2007 MT 182, 729, 338 Mont. 242, 164 P.3d 922.

Acres Irrigated/Place of Use

6. Claim 41 0 114172-00 appeared in the Temporary Preliminary Decree for this Basin with a claimed place of use totaling 240.00 acres. Based on the testimony of the claimant and the record before the Master, the place of use for this claim should be 120.00 acres. The legal description for this 120.00 acres is found on the Water Right

Claim Abstract attached to this report.

7. Claim 41 0 114165-00 appeared in the Temporary Preliminary Decree for this Basin with a claimed point of diversion and place of use located in the N2N2 of Section 26, T27N, R4W. Based on the record before the Master, the point of diversion and place of use should include the N2N2 of Section 25 and the N2N2 of Section 26, T27N, R4W. As a direct from source claim, the point of diversion and place of use should be the same.

8. Point of diversion and place of use were not issues raised for claim 41 0 114165-00 in the Basin 410 Objection List. However, these elements were raised as issues on claim 410 114.172-00. Claims 410 114.165-00 and 410 114172-00 are multiple uses of the same historical water right. As a result, there has been notice of potential changes to these claim elements for this historical right. In addition, adding the N2N2 of Section 25 to the claim has minimal impact. Therefore, there is no reasonable potential to adversely affect other water users. Additional notice as contemplated by Section 85-2-233(6), MCA, is not required.

Flow Rate/Volume

9. Claim 41 0 114172-00 appeared in the Temporary Preliminary Decree with a claimed flow rate of 5.00 cfs. At hearing, the parties stipulated to a flow rate of 75.00 gpm. This flow rate includes 60.00 gpm from Aldrich Spring itself and an additional 15.00 gpm combined flow rate from the east and west springs associated with this diversion system. The standpipe tapping Aldrich Spring is capable of delivering about 50.00 gpm. An additional 10.00 gpm is not captured by the standpipe system. Based on the agreement of the parties and the record before the Master, the flow rates for these claims should be:

41 0 114172-00(irrigation)	5.00 cfs	75.00 gpm
41 0 114175-00 (domestic)	50.00 gpm	(no change)
41 0 114165-00 (stock)	Standard Remark	(no change)

10. The volume clarification remarks that appear on claim 41 0 114172-00 are in error and should be replaced with the standard volume remark that appears on direct flow

irrigation claims. The text of this remark is found on the Water Right Claim Abstract attached to this report.

Period of Use

11. The claimants assert that the period of use for claim 41O 114172-00 is year round (January 1 to December 31). This is the period of use that was claimed by the claimants in 1982 and that appeared in the Temporary Preliminary Decree. This period of use was supported at hearing by the testimony of Raymond Gustafson and Erik Gustafson. Both of these witness have firsthand knowledge of irrigation on this property prior to July 1, 1973. Objector testimony from Larry Martin, Willard Martin, and Elmer Phillips indicated that winter irrigation was not the historical practice on this property and only became the norm in the last ten years. The Gustafson testimony is more specific to the property while the Martin and Phillips testimony is more general in nature and is based on observations from a distance. These witnesses were not looking for winter irrigation. Gustafsons on the other hand were doing the irrigating.

12. Through the testimony of Phyllis Phillips, the objectors asserted that the practice of irrigating in the winter is a waste of water that provides no beneficial use. Although Ms. Phillips has a background in this area of expertise, she was not testifying as an expert witness. As a result, her opinion is of limited value. At the same time, the DNRC Memorandum filed by Marv Cross and Jay Johnson (Exhibit C-13) stated that winter irrigation is a common practice in eastern Montana and is not considered to be a wasting of water. Both Raymond and Eric Gustafson testified that the practice is beneficial for this property. Although the practice may not provide the same benefit as irrigation during other seasons of the year, it appears that it is of some value. Even if winter irrigation is not the most efficient practice, it is an accepted practice and can be employed by these claimants. *Worden v. Alexander* (1939), 108 Mont. 208, 215, 90 P.2d 160, 163.

13. The objectors carry the burden of proving by a preponderance of the evidence that the claimed period of use is not an accurate reflection of the historical use of claim

41 0 114172-00; or, in the alternative, that part of the claimed period of use constitutes a wasting of water that provides no beneficial use. They have failed to meet that burden. Therefore, the January 1 to December 31 period of use should remain on this claim.

Natural Direction of Flow of Aldrich Spring/Source

14. Water, being subject to the laws of gravity, flows downhill. *Ducham v. Tuma* (1994), 265 Mont. 436,441, 877 P.2d 1002, 1005. If that were the only consideration, Aldrich Spring would be tributary to South Pondera Coulee. However, the path to South Pondera Coulee is only a few inches lower than the path to Aldrich Coulee. As a result, even a small obstacle is sufficient to alter the course of the spring water. Water will pool when it hits an obstacle, and, as a result, may change its course. That course change may be as large as the Missouri River changing its course over thousands of years, or it may be as small as Aldrich Springs changing its course from season to season; or even day to day. Based on the record before the Master, Aldrich Springs water encounters obstacles in the shallow basin below the springs, and as a result pools and sends some of its flow into each coulee. As a result, it appears that Aldrich Springs provides water to both Aldrich Coulee and South Pondera Coulee in varying amounts. In addition, the pooling of water in the basin below the springs likely allows for a certain amount of groundwater recharge. Both coulees probably benefit from this recharge although it appears that Aldrich Coulee receives a significantly larger groundwater boost.

15. Based on the finding that Aldrich Springs is tributary to both coulees, the source for the three claims in this case should be amended to reflect this situation. The source for claims 41 0 114165-00 and 41 0 114172-00 is currently listed as

SPRING, UNNAMED TRIBUTARY OF ALDRICH COULEE
(ALSO KNOWN AS ALDRICH SPRINGS)

The Source for claim 41 0 114175-00 is listed as:

ALDRICH SPRING

The source for all three claims should be amended to:

SPRING, UNNAMED TRIBUTARY OF ALDRICH COULEE AND SOUTH PONDERA
COULEE
(ALSO KNOWN AS ALDRICH SPRINGS)

REMARK: THE SOURCE FOR THIS APPROPRIATION IS LOCATED ON THE DIVIDE BETWEEN ALDRICH COULEE IN BASIN 410 AND SOUTH PONDERA COULEE IN BASIN 41P. THE FLOW FROM THE SOURCE IS TRIBUTARY TO BOTH COULEES.

The same source name amendment should be applied to all claims from Aldrich Springs.

16. Unfortunately, finding that Aldrich Springs is tributary to two separate drainages does little to resolve the controversy. It does not facilitate administration of the three claims in this case or any of the other claims from this source. In terms of this adjudication process, it means that all of these claims should receive an interbasin remark and be subject to adjudication in Basins 410 and 41P. It also means that the claims must be administered in both sources at the same time. A senior user from either source can make a call on all junior Aldrich Spring users. The lack of a quantified flow in either direction will make it very difficult to make a call. The senior user is entitled to the flow of the source without interference from the junior user. But, only to the extent that the natural flow of the spring is part of that source. That information was not provided by the parties and cannot be determined by the current record. It is likely, that the natural flow of water into either coulee changes depending on several factors. It is doubtful that assigning a quantified flow rate, a portion of the 75.00 gpm flow rate from the springs, to each coulee is feasible. In addition, how all claims with a connection to Aldrich Springs interact will not be determined until Basin 41P is issued in a Water Court decree and claims are subject to objections in that Basin.

17. An interbasin transfer is a claim that has a point of diversion in one basin and all or part of the place of use in a different basin. As such, this type of claim is subject to proceedings in both basins, Rule 8(c), W.R.C.E.R. In this case, the Master finds that Aldrich Springs is tributary to Aldrich Coulee in Basin 410 and to South Pondera Coulee in Basin 41P. This is somewhat different from the typical interbasin claim. Nonetheless, all of the claims from Aldrich Springs have the potential to affect water users in both basins. Therefore, all three claims in this case and all Aldrich Springs claims in related cases should receive an interbasin remark and should be subject to proceedings in Basin 41P as well as 410:

THE SOURCE FOR THIS APPROPRIATION IS LOCATED ON THE DIVIDE BETWEEN ALDRICH COULEE IN BASIN 410 AND SOUTH PONDERA COULEE IN BASIN 41P. THE FLOW FROM THE SOURCE IS TRIBUTARY TO BOTH COULEES. ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

To assure that all Aldrich Springs claims appear in the Basin 41P decree issued by the Water Court, this remark should be placed in the 'issue remark' box on these claims. This placement tends to assure notice of the situation, it does not imply a problem with the claims.

RECOMMENDATIONS

1. The changes to claims 41 0 114165-00, 41 0 114172-00, and 410 114175-00, as found in this report should be adopted by the Water Court to accurately reflect their historical use. All issue remarks should be removed from these claims.

2. All claims from Aldrich Springs should receive an interbasin remark and should be included in the Basin 41P adjudication process.

A Post Decree Abstract of Water Right Claim for each claim addressed in this report, is attached to confirm that the above amendments have been made in the state's centralized water right record system.

DATED this 24 day of November, 2009.


Douglas Ritter
Senior Water Master

CERTIFICATE OF SERVICE

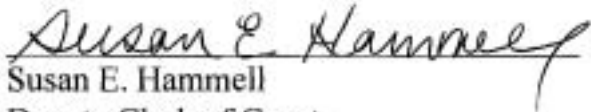
I, Susan E. Hammell, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **NOTICE OF FILING MASTER'S REPORT** and **MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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DATED this *24th* day of *November*, 2009.


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FILED
OCT 30 2012

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
TETON RIVER BASIN (410)

CLAIMANTS: Raymond W. Gustafson, Patricia J. Gustafson
OBJECTORS: Bruce C. Martin, Janet D. Martin, Larry L. Martin,
Donald M. Koenig, Mary L. Sauer, Jerry M. Philipps
NOIA: Raymond W. Gustafson
INTERVENOR: Walter L. Hammermeister

CASE 410-11
410 114165-00
410 114172-00
410 114175-00

ORDER ADOPTING MASTER'S REPORT
PROCEDURAL BACKGROUND

Pursuant to section 3-7-301, MCA, a Senior Water Master was assigned this Case. On November 24, 2009, the Master filed with the Clerk of Court a Master's Report containing Findings of Fact and Conclusions of Law. All parties were served a copy of this Report.

On December 8, 2009, Intervenor Walter L. Hammermeister filed an Objection to Master's Report (Hammermeister Objection). On January 4, 2010, Mr. Hammermeister filed a second Objection to Master's Report on behalf of Morris O. Mancoronal and Elizabeth Mancoronal. The argument submitted by the Mancoronals elaborates on Mr. Hammermeister's Objection. Mr. Hammermeister is not a lawyer and is not authorized to represent the Mancoronals. The Mancoronals are not parties to this Case.

Accordingly, the Mancoronal objection will be treated as a supplemental objection by Mr. Hammermeister.

On January 4, 2010, counsel Scott O. Swanson filed an Objection to Master's Report on behalf of Objectors Janet D. Martin, Larry L. Martin, Donald M. Koenig, Mary L. Sauer, and Jerry M. Philipps (Combined Objectors). Their objection challenges the Water Master's Conclusion that Aldrich Springs provides water to both South Pondera Coulee and Aldrich Coulee. Upon review of the entire record and briefing, the Court Adopts the Master's Report.

STANDARD OF REVIEW

This "court must accept the master's findings of fact unless clearly erroneous." M. R. Civ. P. 52(e)(2). The Montana Supreme Court adopted a three-part test to make this determination. *Interstate Prod. Credit Ass'n. v. Desaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). First, the Court reviews the record to see if the findings are supported by substantial evidence. *Desaye*, 250 Mont. at 323, 820 P.2d at 1287. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Arnold v. Boise Cascade Corp.*, 259 Mont. 259,265, 856 P.2d 217,220 (1993) (internal citation omitted). It is more than a scintilla, but less than a preponderance. *State v. Shodair Hosp.*, 273 Mont. 155, 163, 902 P.2d 21, 26 (1995). "Second, if the findings are supported by substantial evidence," the Court determines whether the Master "has misapprehended the effect of the evidence." *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287 (internal citation omitted). "Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may" nevertheless determine the findings clearly erroneous "when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287 (internal citation omitted).

FACTUAL BACKGROUND

The Lay of the Land

Aldrich Springs is the source for the three claims in this Case. Aldrich Springs is located on the dividing line between the Teton and Marias river drainages. To the east lies Aldrich Coulee, which flows into Muddy Creek and eventually the Teton River. To the west is South Pondera Coulee, which flows into Pondera Coulee then into the Marias River. Aldrich Springs has been developed since at least 1902 and includes a pipeline to a gravity-fed standpipe for truck-mounted tanks and a ditch system that facilitates irrigation on 120 acres in both Aldrich Coulee and South Pondera Coulee.

Hammermeister's Objections and Supplemental Objection

Mr. Hammermeister raises the following three objections to the Master's Report: (1) the Water Master should not have relied on the DNRC site inspection because DNRC personnel did not actually inspect the entire claimed area of the water right; the DNRC site inspectors were not at the hearing for Mr. Hammermeister to cross-examine, and the DNRC colluded with Claimant and his son; (2) the DNRC maps and land summary reports provided by Eric Gustafson should be stricken because nothing indicates where the soil survey was taken, or if the east or west flow was being used at the time of the sampling, and the maps and summary do not show any flow from Aldrich Gulch; (3) Eric Gustafson's testimony on teepee rings should be stricken because he was not qualified as an expert witness, and his interpretation is inaccurate. Mr. Hammermeister seeks to stay this Case until the adjudication of Basin 41P, South Pondera occurs. This Basin is part of the Marias River Drainage. He believes another more senior right in Basin 41P is impacted by this ruling.

Mr. Hammermeister's supplemental objection argues that the Water Master wrongly concluded that water flows both east and west and argues the flow was historically to the west. Mr. Hammermeister argues Claimants have made changes to the land, and these changes have altered the natural course of flows from Aldrich Springs.

Specifically, the westerly flow is obstructed by an old road, and the easterly flow is enhanced by a new ditch.

Combined Objectors' Objection

Combined Objectors also believe the Master should have concluded that Aldrich Springs is a tributary of Marias Basin and take exception to the Master's Report as follows: (1) the Master gave little weight to the testimony of licensed surveyor Thomas L. Russett, and (2) with respect to water right claim 410 114172-00, the Master should have reduced the decreed year round period of use to seasonal use because this claim was not historically used for irrigation during the winter months.

DISCUSSION

Direction of Flow of Aldrich Springs

The objections assert the natural direction of flow for Aldrich Springs is west into South Pondera Coulee. The Intervenor and Objectors argue the Water Master erred in concluding: "Aldrich Springs provides water to both Aldrich Coulee and South Pondera Coulee in varying amounts." Master's Report, Conclusion of Law 14, p. 16. In reaching this Conclusion, the Water Master considered expert testimony from surveyor Thomas L. Russett, DNRC records, maps, exhibits and witness testimony from Willard Martin, Elmer Philipps, Morris Mancoronal, Walter Hammermeister, Larry Martin, Dale Keil, Eric Gustafson and Claimant Dr. Raymond (Rib) Gustafson. He also undertook a personal inspection of the site.

Because insufficient evidence existed to do so, the Master did not quantify flows from Aldrich Springs to either Aldrich Coulee or South Pondera Coulee. The Water Master also recommended changing the Source Name for the appropriation of the water rights to include both the Unnamed Tributary of Aldrich Coulee in Basin 410 and South Pondera Coulee (also known as Aldrich Springs) in Basin 41P.

Despite Intervenor Hammermeister's concerns, the Water Master did not give weight to the DNRC Field Inspection and Report. Although the DNRC Report stated that the direction of flow was into Aldrich Coulee, the Master noted: "The [DNRC] report

does not discuss this finding further or provide the basis for this determination." Master's Report, Finding of Fact 21, p. 9. The Master also noted there was no information in the claim files indicating "the type of review that was conducted by the DNRC prior to addition of the remark about Aldrich Coulee. Master's Report, Finding of Fact 21, p. 9. The Master had obvious concerns about the basis of the DNRC opinion and made an effort to explain those concerns in the Master's Report. Hammermeister's objection the Master relied too heavily on the DNRC Report or claims examination is denied.

Similarly, Mr. Hammermeister inaccurately asserts the Water Master relied on Mr. Eric Gustafson's mapping, DVD and tree ring testimony. The Master notes the DVD video was taken after a late season "snow storm that added a significant amount of water to the divide basin." Master's Report, Finding of Fact 26, p. 11. The Master noted that Eric Gustafson merely "recorded the process." Master's Report, Finding of Fact 26, p. 11. While Eric Gustafson testified to measuring the flow rate and volume of water flowing in each coulee, "no evidence was provided to quantify actual flow rates into each coulee." Master's Report, Finding of Fact 26, p. 11. Moreover, Eric Gustafson's "measurements are never provided." Master's Report, Finding of Fact 26, p. 11. Instead, there was "no testimony or exhibit showing a calculated flow rate based on the measurements shown in the DVD." Master's Report, Finding of Fact 26, p. 11. Last, the Master gave no weight to Mr. Eric Gustafson's teepee ring testimony, noting that "Eric was not qualified as an expert witness." Master's Report, Finding of Fact 27, p. 12. It is clear that Gustafson's testimony regarding maps, DVD and tree rings had no effect on the Master's decision.

Mr. Hammermeister also argues that Morris and Elizabeth Mancoronals' senior water rights were adversely affected ten years ago when Claimants altered the land and inhibited the natural flow of Aldrich Springs to the west. Specifically, Objectors assert Claimants dug a ditch along the south base of the north hills, which prevents Aldrich Springs' water from reaching Pondera Coulee and Mancoronals' property.

The Master addressed this issue when finding that Aldrich Springs is a tributary to two separate drainages and "[t]he senior user is entitled to the flow of the source without interference from the junior user." Master's Report, Conclusion of Law 16, p. 17. In recognition of the problem created when the same source flows to two drainages, the Master recommended adding an interbasin issue remark to the claims in this Case, noting that the claims must be administered in "both sources at the same time." Master's Report, Conclusion of Law 16, p. 17. Based on the Master's Conclusions, the Mancoronals will, if they have a valid senior right, be able to place a call on junior rights in Aldrich Springs.

Combined Objectors assert the Master should have relied more heavily on the testimony of Thomas Russett. Thomas L. Russett is a licensed surveyor and was qualified as an expert witness. He took nearly 1,600 Global Positioning System (GPS) readings to measure elevation. Exhibits 0-A & 0-B. Although he concluded that the water flows to the west, Mi. Russett admitted the direction of flow was hard to determine:

It was so flat. I mean it was there was no, ah, obvious . . . It was imperceptible. You can't go out, look at it and determine which way the grade is. It is just not that obvious at all. Russett Testimony, June 2, 2009, 9:34:35-9:34:50.

Mi. Russett further testified:

There are some obvious depressions or undulations in the ground that show ...uh... one going over here and another one extending on down the hill ... kinda obvious... It kind of pools over here. It really is very slow moving. ... I really can't see a grade percent. Russett Testimony, June 2, 2009, 9:36:08-9:36:45.

When asked for his expert opinion, Mr. Russett noted that if unobstructed, the natural flow would be west.

Q: And, in your opinion, if the water from Aldrich Springs was left to its own devices, would water flow in what direction?

A: Well it would pool, and then it would run to the west by these numbers.

Q: There is no possibility it would run to the east?

A: Well, only if it was intercepted and moved to the east . . . that's the reason I think these ditches are obviously to move that water. ...

Q: If water were to be allowed to be pooled to the east, what would happen?

A: No I think there is actually a divide. I think this is generally an area of a divide. If water was moved down the ditch, it would continue to the east.

Q. But if not moved down the ditch, it would go west?

A. Yes. Russett Testimony, June 2, 2009, 9:41:45-9:44:02.

With differences in elevation of only inches, the Master noted that a small obstacle might change the course of the water flow over thousands of years, season to season, or day to day. Master's Report, Conclusion of Law 14, p. 16. In other words, the flow of the water within this broad, open and flat basin depends on many factors, including the season, rainwater, use, and animal and human made diversion systems.

Mr. Russett's testimony was both contradicted and confirmed by other witnesses.

Dale Keil testified that the water flows in both directions.

I went up there and looked at the spring. And, at that time, the bulk of the water was running to the west. I, I can't tell you that there wasn't some water running to the east, but at the time I was there that would have been in the summer months of 1968, the water was running to the west. Keil Testimony, June 2, 2009, 1:46:49-1:47:11.

Claimant Rib Gustafson agreed that the water goes both directions, but testified that the majority of it travels east.

The natural flow can go either way. There's just a little bit that does go west. It has to go over that old road bed. ... Some of it can seep to the west. But the majority of it goes to the east. Gustafson Testimony, June 2, 2009, 3:05:47-3:07:02.

The Master noted that if gravity were the only factor in this Case, then Aldrich Springs would be a tributary to South Pondera Coulee. Master's Report, Conclusion of Law 14, p. 16. However, gravity alone was not the only factor influencing the direction of water flowing from Aldrich Springs. Flows were also impacted by manmade obstacles.

Based on the record, including Mr. Russett's testimony and exhibits, and the testimony of other witnesses familiar with Aldrich Springs, the Master concluded:

Aldrich Springs water encounters obstacles in the shallow basin below the springs, and as a result pools and sends some of its flow into each coulee. As a result, it appears that Aldrich Springs provides water to both Aldrich Coulee and South Pondera Coulee in varying amounts. In addition, the pooling of water in the basin below the springs likely allows for a certain amount of groundwater recharge. Both coulees probably benefit from this recharge although it appears Aldrich Coulee receives a significantly larger groundwater boost. Master's Report, Conclusion of Law 14, p. 16.

It is unusual, but not unprecedented, to encounter problems in determining the flow of water. In 1923, the Montana Supreme Court addressed a similar landscape with a "flat tableland," calling it a "freak of nature the counterpart of which probably cannot be found elsewhere in the state." *Thomas v. Ball*, 66 Mont. 161, 163-64, 213 P. 597, 598 (1923). In that case, as here, the trial judge "heard the witnesses testify, observed their demeanor on the stand, and made personal inspection of the premises in question before a determination was had." *Thomas*, 66 Mont. at 165, 213 P. at 598. The Montana Supreme Court deferred to the trial judge's findings and conclusions.

In this Case, the evidence and testimony conflict, but there is enough evidence to support the Master's Findings. The landscape is open and flat. The drainage is unusual. The flow of water is not obvious. The natural direction of flows from Aldrich Springs was influenced by the hand of man. The record supports a conclusion that Aldrich Springs flows east and west to both Aldrich Coulee and South Pondera Coulee.

Period of Use

Combined Objectors' Objection also asserts the Master erred in recommending that the period of use for claim 41 0 114172-00 remain as year round. They assert that long-time residents Larry Martin, Willard Martin and Elmer Philipps all testified that the stockwater ponds along South Pondera Coulee would fill until the year 2000 when Claimants began diverting water for winter irrigation.

A properly filed Statement of Claim for an existing water right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves an element of the prima facie claim is incorrect. See Memorandum Opinion, Order Adopting Master's Report, Water Court Case 40G-2, Mar. 11, 1997.

A year round, January 1 to December 31, period of use was included on the original Statement of Claim, timely filed on February 2, 1982. Year round use also appeared in the Temporary Preliminary Decree. Therefore, Objectors carried the burden of proving by a preponderance of the evidence that the claimed period of use is not an accurate reflection of historical use or that part of the claimed period of use constitutes a waste of water.

Claimant Rib Gustafson and his son, Eric Gustafson, testified that they both irrigate the property year round. Ray Gustafson testified February and March irrigation were key to his operation, and that he had been familiar with irrigation of the property since 1952. Eric Gustafson testified he had irrigated the property in every month of the year.

Rib Gustafson stated that the flow of Aldrich Springs is seldom sufficient to irrigate the 120 acres decreed for this claim. Gustafson Testimony, June 2, 2009, 2:50:37-2:50:51 and 2:46:55-2:47:55. To compensate for a lack of adequate flow, he put water on the land whenever possible, including year round. Gustafson Testimony, June 2, 2009, 2:48:39-2:50:01 and 2:54:45-2:56:20. Based on all of the evidence and testimony, the Water Master concluded, "[a]lthough the practice may not provide the same benefits as irrigation during other seasons of the year, it appears that it is of some value." Master's Report, Conclusion of Law 12, p. 15.

Life-long resident, 82-year-old Elmer Philipps testified that the winter irrigation began in approximately 2000.

A: It wasn't until . . . uhhh . . . I would say the last ten years that he started irrigating in the winter quite a bit so there wasn't any water coming down the coulee then.

Q: So prior to ten years ago, was there ever winter irrigation conducted?

A: No. No. He didn't irrigate then. Just the last ten years or so he was doing that. Philipps Testimony, June 2, 2009, 1:41:55-1:42:15.

Larry Martin and Willard Martin also generally testified that Claimants started the practice of winter irrigation ten years ago.

The Martin testimony conflicts with the Original Statement of Claim and the Gustafsons' testimony. Faced with this conflict, the Master concluded:

The Gustafson testimony is more specific to the property while the Martin and Phillipps testimony is more general in nature and is based on observation from a distance. These witnesses were not looking for winter irrigation. Gustafsons on the other hand were doing the irrigating. Master's Report, Conclusion of Law 11, p. 15.

Additionally, Objectors argue that the Master should have given more weight to the testimony of Phyllis Philipps. Ms. Philipps was not an expert witness, but she had a background in irrigation. She asserted that winter irrigation is a waste of water in this region. As a lay witness, the Water Master concluded her opinion was "of limited value." Master's Report, Conclusion of Law 12, p. 15. Winter irrigation is a common practice in eastern Montana and is not considered a waste of water. DNRC Memorandum, Ex. C-13, p. 4. "[T]he system of irrigation in common use in the locality, if reasonable and proper under existing conditions, it to be taken as the standard, although a more economical method might be adopted." *Worden v. Alexander*, 108 Mont. 208, 215, 90 P.2d 160, 163 (1939). Winter irrigation may not be the most efficient practice, but it is an accepted practice "that has been historically established since as early as 1902." DNRC Memorandum, Ex. C-13, p. 4.

Substantial evidence supports the Master's Conclusion that year round irrigation occurred using this right. Substantial evidence is more than a scintilla, but less than a preponderance. *State v. Shodair Hosp.*, 273 Mont. 155, 163, 902 P.2d 21, 26 (1995). Objectors had the obligation to refute this claim. The Water Master made a decision based on all evidence presented that the claim reflected historical use. Objectors failed to

carry the burden of proof. Substantial evidence also supports the Water Master's Conclusion that year round use was not a waste of water. The Objectors did not meet their burden to show waste of water.


CONCLUSION

Using the *Desaye* three-part test, the Court finds there is substantial evidence to support the Master's Report. The Master did not misapprehend the effect of the evidence, and the Court is not left with a definite and firm conviction that a mistake has been committed. After careful consideration of the arguments and evidence, the Master's Report is adopted.

ORDER

IT IS SO ORDERED that the Master's Report is ADOPTED.

DATED this 30 day of October, 2012.


Russ McElyea
Associate Water Judge

CERTIFICATE OF SERVICE

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

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Note: Service List Updated 10/19/2012

DATED this 30th day of October, 2012.


Swithin J. Shearer
Deputy Clerk of Court