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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)

CLAIM:ANTS: Skelton Angus Ranch, Inc.; Wayvan Campbell (deceased);
Gregory W. Duncan; Sherri L. Donovan; Terry L.
Dougherty

OBJECTOR: Skelton Angus Ranch Inc.

NOIA: Kenneth C. Rice; Elaine M. Rice; Lane Yeager; Pondera County
Canal & Reservoir Company

Case 410-35
41M 25166-00
41M 25167-00
41O 25168-00
41M 25169-00
41M 25170-00
Implied Claim
41M 30052591

Case 410-38
41M 121495-00
41M 121496-00
41M 121497-00
Implied Claim
41M 30052592

ORDER AMENDING MASTER'S REPORT AND ADOPTING AS AMENDED

PROCEDURAL HISTORY

On March 14, 2012, the Senior Water Master filed a Master's Report in the above-captioned matter. Pondera County Canal and Reservoir Company (PCCRC) filed objections to the Master's Report on April 23, 2012. Claimants filed their respective briefs on July 2, 2012. Chief Water Judge Loble assigned these matters to Associate Water Judge McElyea on July 19, 2012.

FACTUAL BACKGROUND

This matter involves water rights in the Teton River Basin 410. Each right claims water from the South Fork of Dupuyer Creek, which rises in the Two Medicine River drainage or Basin 41M. Once diverted from Dupuyer Creek, water is transported to and used within the Teton River drainage (Basin 410). Accordingly, despite having a 41M prefix, the claims are subject to adjudication in Basin 410.

The claims in this proceeding involve two cases. Case 410-35 involves claims by Skelton Angus Ranch, Incorporated (hereinafter Skelton). These claims include 41M 25166-00, 41M 25167-00, 41O 25168-00, 41M 25169-00 and 41M 25170-00. Objector is Skelton. PCCRC, Elaine M. and Kenneth C. Rice, and Lane Yeager filed Notices of Intent to Appear in this matter. Case 410-38 involves claims by Gregory W. Duncan, Sherri L. Donovan and Terri L. Dougherty (collectively Duncan). The Duncan claims are 41M 121495-00, 41M 121496-00 and 41M 121497-00. Only PCCRC filed a Notice of Intent to Appear in this case. PCCRC is referred to as "Objector" in this Order.

All claims in these cases are based upon notices of appropriation filed in what ultimately became Teton County. A listing is provided below showing each claim's flow rate and the notice of appropriation (NOA) upon which it is based. *See* Table 1.

Claim Number	Current Owner	NOA	Priority Date	NOA Flow Rate	Claimed Flow Rate	TPD Flow Rate
41M 25166-00	Skelton	W. Clark	5/25/1906	50.0 cfs	50.0 cfs	18.60 cfs
41M 25167-00	Skelton	Mustard et al	9/17/1904	50.0 cfs	50.0 cfs	18.60 cfs
410 25168-00 ¹	Skelton	Henry Moir	9/16/1913	5.0 cfs	5.0 cfs	5.0 cfs
41M 25169-00	Skelton	A. Clark	1/14/1902	50.0 cfs	50.0 cfs	18.60 cfs
41M 25170-00	Skelton	B.P. Clark	9/19/1895	25.0 cfs	25.0 cfs	18.60 cfs
41M 121495-00	Duncan	A. Clark	1/14/1902	50.00 cfs	50.00 cfs	18.25 cfs
41M 121496-00	Duncan	T. Flacker	4/8/1912	10.00 cfs	10.00 cfs	10.00 cfs
41M 121497-00	Duncan	B.P. Clark	9/12/1895	25.00 cfs	25.00 cfs	18.25 cfs

Table 1: Each Claim's Notice of Appropriation and Flow Rate

The claims far exceed the amounts of water referenced in the original notices of appropriation. The total water claimed in the original notices of appropriation is 185

¹ No objections were filed to this claim 41O 25168-00 as it involves diversion of water from Gansman Coulee.

cubic feet per second (cfs). The total water claimed in the water rights based on those notices is 335 cfs. The Thomas Ditch is capable of handling only a small fraction of the combined claimed flow of the water rights in this matter.

All claims from the South Fork of Dupuyer Creek use the same point of diversion and divert water into the Thomas Ditch. The record shows the Thomas Ditch had several names including Thomas Ditch, Bean Ditch or Clark Ditch. A lengthy wooden flume located near the point of diversion was historically used to put water into the Thomas Ditch. Once diverted, water is carried through Thomas Ditch over a divide out of the Dupuyer Creek drainage and into a portion of the Teton River drainage known as Gansman Coulee. Gansman Coulee is a tributary of Blackleaf Creek, which leads to the Teton River. Duncan Ranch is situated at the top of Gansman Coulee, and Duncan has first access to water delivered from Thomas Ditch. Skelton Ranch adjoins Duncan, but it is located further downstream.

STANDARD OF REVIEW

The Rules of Civil Procedure require this Court to accept a Master's Findings of Fact unless clearly erroneous. M. R. Civ. P. 53(e)(2). The Montana Supreme Court follows a three-part test to determine if a trial court's findings of fact are clearly erroneous. See *Interstate Production Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). The Water Court uses a similar test for reviewing objections to a Master's Findings of Fact. Rule 11(c), W.R.Adj.R. First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, this Court then determines whether the Master has misapprehended the effect of the evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, this Court may still determine that a finding is 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. This Court reviews a Master's Conclusions of Law to determine whether they are correct. *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, ¶ 22, 59

P.3d 398, ¶ 22; *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470,474-75, 803 P.2d 601,603 (1990).

DISCUSSION

Objections to Flow Rate

In Findings of Fact 18 through 22, the Master determined the flow rate for the flume at the beginning of the Thomas Ditch was 7.6 cfs. This flow rate was calculated using a formula known as the Manning's Equation. The Master used a version of the Manning's Equation available on the Internet, and supplied variables such as flume size, slope, area and a roughness coefficient known as the "n" factor to calculate flow rate. A summary of the variables used by the Master, as well as calculations from various expert witnesses, together with results of these calculations are shown in Table 2.

<i>Variable</i>	Water Master	Bestor	Casne	Anderson
Size	24 x 11	24 x .6	24 x 8	Replicated Bestor
<i>Slope</i>	.003	.003	.003	
Area	1.83 s/f	1.2		
<i>n</i>	.012	.012	.012	
<i>Flow Rate (cfs)</i>	7.60	4.22	4.60	4.22

Table 2: Variables Used for Calculations Regarding Capacity of 1912 Flume

Objector contends the variables supplied by the Master to arrive at a flow rate of 7.6 cfs are not supported by the evidence. Both sides used expert witnesses and other evidence to establish the historic capacity of the Thomas flume. The first measurements of the flume and its capacity were undertaken in 1912 by an engineer named **Bestor**. Mr. **Bestor** calculated flows in the flume at 4.22 cfs. *Bestor* Report, PCCRC Ex. 13. Mr. **Bestor's** calculations were based upon a width of 24 inches, a depth of 0.6 feet, a slope of 0.003, and a roughness coefficient of 0.012. Claimants' expert engineer, Ryan Casne, testified regarding capacity of the Thomas flume. Mr. Casne used a width of 24 inches, a depth of 8 inches, a slope of 0.003, and a roughness coefficient of 0.012. He concluded the capacity of the flume was 4.6 cfs. See Table 2 for both experts' calculations.

Objector's expert, Bruce Anderson, reviewed and replicated the calculations performed in 1912 by **Bestor** and concluded they were accurate. Mr. Anderson testified

4.22 cfs was a reasonable capacity for the original Thomas flume. The range of flow rates for the Thomas flume calculated by the two experts and in the Bestor Report ranged between 4.22 cfs and 4.6 cfs. In contrast, the Master's flow rate of 7.6 cfs was 3.0 cfs higher than suggested by the evidence at trial.

The evidence indicated the Thomas flume was substantially enlarged in the early 1930s. Again, the Master performed his own calculations regarding capacity of the enlarged flume and concluded the correct flow rate was 36.32 cfs. *See* Table 3. Expert witness testimony was also taken on this issue.

As shown in Table 3 below, Claimants' expert Casne and Objector's expert Anderson used the same dimensions as the Water Master, but each relied on different slopes to produce an estimate of flow. Claimants' expert Casne testified that changing slope would produce different flow rates, and that "slope is a big factor" in determining flow. *Casne Testimony*, Day 2, 2:02:17-2:03:19 (Feb. 17, 2008). In 1912, the slope of the flume was 0.003. PCCRC Ex. 13. The next evidence of slope dates from 1921, and is substantially different than the 1912 slope. PCCRC Ex. 19. There is little direct evidence of slope for the flume after its reconstruction and enlargement in the early 1930s. In making his calculations, the Master determined that "[a]bsent a more compelling figure, the same slope as the 1912 flume is acceptable" *Masters Report, Finding of Fact 24*, p. 21. The slope selected by the Master was taken from the earliest data available and was almost twice as steep as later slope information.

<i>Variable</i>	Master	Casne	Anderson
<i>Size</i>	36 x 24	36 x 24	36 x 24
<i>Slope</i>	0.003	0.00157, 0.003, 0.01004	0.00157
<i>Area</i>	6.0	6.0	6.0
<i>n</i>	0.012	0.012	0.016
<i>Flow Rate (cfs)</i>	36.32	26.8, 36.72, 67.4	13.7 to 20.0

Table 3: Calculations Regarding Capacity of 1931 Flume if Outlet Controlled

Claimants also used an expert named Schmidt to opine on flows in the rebuilt flume. Schmidt used dimensions of 30 x 24 inches and 30 x 30 inches and a slope of 0.01 to calculate capacity. This resulted in flows much higher than those estimated by

other experts. Schmidt admitted the slope he used was incorrect, and that a slope of 0.001 would have been appropriate. Schmidt Testimony, Day 2, 12:06:19-12:07:57 and 1:12:55-1:15:21 (Feb. 17,2008). Because Schmidt used the wrong slope and because the dimensions he used were at odds with those used by other experts, his opinions were not credible; they were not depicted in the Tables, and the Court did not rely on them in this Order.

Claimants' expert Casne used two different methods to calculate flow for the flume rebuilt in the early 1930s. The first method assumed the flume's capacity was regulated by its inlet structure. This produced an estimated flow of 21.97 cfs. Casne Testimony, Day 2, 2:19:40-2:20:53 (Feb. 17, 2008). Mi. Casne also calculated flow based on an assumption the flume's capacity was regulated by its outlet.² For his outlet calculations, Mi. Casne used three different slopes, resulting in three different estimates of flow. These estimates ranged from 26.8 cfs to 67.4 cfs. Mi. Casne's calculations are summarized in Table 3. On cross-examination, Mi. Casne admitted the flume could not have supported flows of 67.4 cfs. Mi. Casne also acknowledged that changing or rebuilding the flume would change inputs including both slope and the roughness coefficient or "n" factor. Casne Testimony, Day 2, 2:15:33-2:16:44 and 2:25:34-2:26:45 (Feb. 17,2008).

Objector's expert Anderson, using the most recent slope information available, calculated flows were approximately 20.0 cfs. Mi. Anderson testified the capacity of the flume was limited by the amount of water that could be delivered into the flume via the headgate, and he testified the overall capacity of the flume was 13 cfs because of this limitation. See Calculations in Table 3. Mi. Anderson also performed calculations of flow based on an assumption the enlarged flume was an inlet control structure. These calculations indicated the flume had a capacity of 20.0 cfs. Both the Claimants' and

² Although he had been previously deposed, Mr. Casne's outlet calculations were not performed until the night before trial at the request of Claimants' counsel. Casne Testimony, Day 2, 2:14:21-2:15:27 (Feb. 17,2008). This suggests he did not believe the new flume was an outlet controlled structure.

Objector's experts reached nearly the same conclusions regarding the flume's capacity using the assumption it was an inlet control structure. The range of flows under this assumption was 20.0 cfs to 21.97 cfs. See Table 4.

Expert	Casne	Anderson
Flow Rate Calculations	21.97	20.0

Table 4: Calculations Regarding Capacity of 1931 Flume if Inlet Controlled

The range of flow rates widened substantially when the experts assumed the flume was an outlet control structure. Here, flows varied between 13.0 cfs and 36.72 cfs. The wider range of flows in the second scenario is attributable to use of different slopes and different roughness coefficients or "n" factors. See Table 3.

Pursuant to Montana Rules of Evidence, the Water Master qualified both Claimants' witness Casne as well as Objector's witness Anderson as experts in these cases. Once qualified, an expert's testimony should "assist the trier of fact to understand the evidence or to determine a fact in issue, ... [and this witness] may testify ... in the form of an opinion or otherwise." M.R.E. 702. In these cases, the purpose of each expert's testimony was to provide opinion evidence regarding the capacity of the Thomas flume.

The trial court must exclude expert testimony if the subject is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness, but if the matter is sufficiently beyond common experience that the opinion of the expert witness would assist the trier of fact the court must admit the evidence. *Lindberg v. Leatham Bros., Inc.*, 215 Mont. 11, 22, 693 P.2d 1234, 1242 (1985) (internal citation omitted).

By qualifying both Casne and Anderson as experts, the Master concluded, at least initially, that **their** expertise would assist in resolving the issue of the Thomas flume's capacity. After close of the record, however, the Master decided not to use the experts' testimony and performed his own calculations regarding flow.

Reliance on what is essentially an expert opinion from the Master is problematic for several reasons. First, the variables selected by the Master for use in the Manning's

Equation were not supported by the record, and these variables were different from the variables used by the experts who testified at trial. As an example, the Master initially selected a flume size that was larger than the flume size chosen by either the Claimants' or Objector's expert and larger than the flume size referenced in the 1912 Bestor Report.

Table 5 shows how the size of the Thomas Ditch flume changed over time. In 1912, the flume was eight inches (0.75 feet) tall. In 1918, the flume was 0.84 feet tall. After being replaced at least twice since its original installation, the flume grew in height to 11 inches (0.92 feet) in 1922. Thus, the Master incorporated flume dimensions in his calculations from a later version of the flume, not the dimensions of the original flume. Neither the Claimants' nor Objector's expert used the dimensions selected by the Master, nor did the 1912 Bestor Report.

Date	Slope	Size	Source
1912	0.003	24 x 8	Bestor
1918		1.94 X .84	Ex 14 Diary 2
1922	0.00157	24 x 11	Ex 19
1931		36 x 24	Duncan testimony
1936		30 x 22	Ex 21

Table 5: Evidence of Slope and Size of Flume over Various Dates

Second, the purpose in determining original flume capacity was to quantify how much water was put to beneficial use before the flume was enlarged. Use of flume dimensions larger than early historical dimensions yielded flow rates larger than those that could have been diverted when the flume was originally constructed. The Master's Conclusions regarding flow rate are not based on early historic evidence of the flume's size, and these conclusions are therefore in error. Even the Claimants, who had an obvious motivation to maximize flow rate, provided estimates of flow much lower than those suggested by the Master.

Third, by assuming the role of expert and substituting his opinions for those of the expert witnesses who testified at trial, the Master deprived the parties of the opportunity for cross-examination.

In determining whether to admit or exclude proffered expert testimony, the court must act as a "gatekeeper" to ensure that the expert is duly qualified

to render an expert opinion, that his testimony will assist the trier of fact, and that the proffered testimony is reliable. Logan et al. v. Cooper Tire & Rubber Co., 2011 U.S. Dist. LEXIS 84393, *6, citing Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579,592-93, 113 S. Ct. 2786,2796 (1993).

Cross-examination provides a mechanism for testing the reliability of evidence, and preserves the litigants' right to challenge information used against them. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596, 113 S. Ct. at 2798.

In these cases, the Water Master is highly competent, has over two decades of experience adjudicating water rights, and is thoroughly familiar with both technical and legal aspects of water use. However, the decision to undertake independent calculations of flow circumvented the adversarial process and deprived litigants of the chance to cross-examine the proponent of the flow rate information. If, upon presentation of all the evidence, the Master felt unable to reach a conclusion regarding flow rate, appropriate courses of action may have included by way of example: (1) ordering the DNRC to analyze the issue and offer supplementary testimony for the record after providing an opportunity for cross-examination to all parties, or (2) asking the parties to supplement or clarify their evidence, or (3) both options.

Fortunately, the record supplies clear evidence regarding flows, and expert witness testimony was remarkably consistent on flows in the original flume. Bestor and Anderson concluded the flow rate was 4.22 cfs. Casne concluded the flow rate was 4.6 cfs. Because it appears the Bestor measurement was based on water levels in the flume on the date they occurred, rather than maximum capacity of the flume, the Court concludes a flow rate of 4.6 cfs is an appropriate maximum capacity for the Thomas flume prior to its reconstruction in the early 1930s.³

³ Although the Court concludes the Thomas flume had a *maximum capacity* of 4.6 cfs, the flume would not have been able to carry its maximum capacity at all times. As discussed later in this Order, the portion of the Armedia Clark notice of appropriation from 1902 that was used in Thomas Ditch had a flow rate of 4.5 cfs. Therefore, the Court assigns an actual flow rate of 4.5 cfs to water right 41M 121495-00.

Determination of an appropriate flow rate for the flume after its reconstruction in the early 1930s presents a more difficult challenge because there is no evidence of slope after it was rebuilt. The Master used a slope of 0.003, which was the slope of the original flume measured in 1912. The record shows the latest available information on slope dates from 1922. See Table 5. Unfortunately, this slope information predates reconstruction of the flume in the early 30s, and there is no reliable information on slope of the flume after it was enlarged.

Matters are further complicated by a lack of information regarding the flume's length. Evidence regarding length of the flume is critical to determine whether its capacity was controlled by the inlet or the outlet, and whether the Manning's Equation could be used to calculate flow. If the flume was too short, use of the Manning's Equation might be improper. Both experts addressed this issue by performing calculations which assumed both inlet and outlet control. See Tables 3 and 4. The difference of opinion regarding flows using inlet control was negligible. Claimants' opinion was 21.97 cfs, while Objector's opinion was 20.0 cfs. The range of opinion regarding flow using outlet control was much greater, resulting in a range of flows between 13.7 cfs and 36.72 cfs.

As noted in *Logan v. Cooper Tire & Rubber Company*, the court must determine if expert testimony is reliable. 2011 U.S. Dist. LEXIS 84393, at *5. The consistency of the flow rates estimated using inlet control calculations suggests reliability, whereas the nearly 300% variation in flows estimated using outlet control calculations suggests unreliability. Accordingly, the Water Court finds flows for the larger flume reconstructed in the early 1930s to be 20.0 cfs.

In summary, maximum capacity of the flume prior to reconstruction in the 1930s was 4.6 cfs. The Master correctly concluded that expansion of the flume in the 1930s resulted in creation of additional water rights with a priority date equal to the date of expansion. The Master appropriately concluded the priority date of the second water right, or rights, should be December 31, 1931. Capacity of the newly reconstructed flume was 20.0 cfs. To determine the flow rate of any new water rights appropriated on that

date, water rights in the old flume must be subtracted from the capacity of the new flume. As shown below, water rights in the old flume equal 4.5 cfs. See Footnote 3 above. Twenty cfs minus 4.5 cfs equals 15.5 cfs. Accordingly, combined flow rates of any water rights in the new flume are 15.5 cfs.

Perfection and Privity of Title for the 1895 B.P. Clark Water Right

Objector contends the Master erred by concluding both Duncan and Skelton received a portion of the 1895 B.P. Clark water right. Objector's argument has two parts. First, they assert there is no evidence the B.P. Clark water right was ever perfected on lands owned by either Duncan or Skelton. Second, they assert there is no evidence either Duncan or Skelton have privity of title with the 1895 B.P. Clark water right.

Objector takes issue with Findings of Fact 31 and 37 through 39, which determined Skelton was entitled to 7.25 cfs of water based on the Clark notice of appropriation and that Duncan was entitled to 0.35 cfs of the same right. Duncan and Skelton contend there is ample evidence of perfection of the 1895 B.P. Clark right. The evidence they cite includes Exhibits: 5d, 20(a), 14, 20(b) and 9. Claimants' Answer Brief Opposing *PCCRC's* Objections to Master's Report, pp. 4-5 and Claimant Skelton's Answer Brief Opposing *PCCRC's* Objections to Master's Report, p. 2. Only three of the exhibits relied on by Claimants contain information regarding the Clark right, and two of these provide only a weak connection.

Exhibit 5d is the original B.P. Clark notice of appropriation. PCCRC Ex. 5d. In this notice, B. Percy Clark claimed to have diverted 1,000 inches of water from Dupuyer Creek for use on lands including sections 29 and 30, Township 27 North, Range 8 West, and sections 7, 8, 17, 31, and 32 in Township 26 North, Range 7 West. None of the lands referenced in the Clark notice of appropriation are now owned by Skelton. The only lands owned by Duncan, and covered by the B.P. Clark notice, are located in sections 29 and 30, Township 27 North, Range 8 West.⁴

⁴ Exhibit 5d suggests perfection of the B.P. Clark right on lands now owned by Duncan in sections 29 and 30. Other documents contradict this suggestion, and the Armedia Clark deed to Adolph Aman is silent regarding this right. PCCRC Ex. 10j.

Exhibit 20a contains conflicting information regarding perfection of the Clark right and is of little value. Although it mentions the B.P. Clark right, Exhibit 20a raises more questions than it answers. This exhibit, which is a questionnaire, paradoxically references the B.P. Clark appropriation both as having been perfected and as not perfected. It does not say where water was used other than a general reference to Gansman and Blackleaf Coulees, and the identity of the person answering the questionnaire is unknown. It does not reference lands owned by Duncan or Skelton or their predecessors. PCCRC Ex. 20a.

On page 11 of Exhibit 14, the document references use of water by Mr. Amon for 25 years.⁵ Mr. Amon was a predecessor of the Duncan Ranch. PCCRC Ex. 14, p. 11. This exhibit's page is dated November 2, 1921, meaning irrigation 25 years prior would have coincided roughly with the date of the 1895 B.P. Clark notice of appropriation. The information in Exhibit 14 came from a Mr. Hamann, who was a purchaser of the Amon Ranch. Mr. Hamann had only been on the Amon Ranch for one year, and there is no indication he had personal knowledge regarding use of water stretching back 25 years. No reference is made in Exhibit 14 to any perfection of the B.P. Clark right on lands owned by Skelton or his predecessors. Other than the original B.P. Clark notice of appropriation, no documents convincingly support perfection of the B.P. Clark right.

The B.P. Clark Right Was Severed from Lands Owned by Duncan

The lands claimed to have been irrigated by the B.P. Clark right were also the subject of a notice of appropriation by Armedia Clark. Armedia Clark filed a notice of appropriation for 50.0 cfs of water from the South Fork of Dupuyer Creek on January 14, 1902. PCCRC Ex. 5a. The notice states "... this appropriation is additional to the 1,000 inches of said waters appropriated and diverted at same place by B. Percy Clark, September 19, 1895, as appears of record in Book 9, page 25 records, of said county." The legal description for the notice included "... portions of Secs 29 & 30, Tp 27 N R 8

⁵ Documents in the record refer to a Mr. Amon and a Mr. Aman. They appear to be the same person. Legal documents such as deeds use the Aman spelling. The Court uses both spellings in this Order depending on the cited document.

W” The B.P. Clark right also included the same lands in sections 29 and 30 Township 27 North, Range 8 West. These lands are now owned by Duncan.

Although Duncan claims the B.P. Clark right, there is also evidence Duncan's predecessors owned only a portion of the Armedia Clark right. Based on this evidence, Objector contends Duncan is not entitled to any portion of the B.P. Clark right and should be limited to ownership of the Armedia Clark right alone. For reasons set forth below, the Objector's contention is correct.

Exhibit 10j is a deed from Armedia Clark to Adolph Aman. The lands conveyed included all of the property in sections 29 and 30 (T27N, R8W) that were previously described as irrigated in the B.P. Clark notice of appropriation. PCCRC Ex. 10j. The deed also conveyed to Aman a portion of the Armedia Clark appropriation. PCCRC Ex. 10j. The deed granted:

... an undivided interest in and to four and one-half (180 miner's inches) cubic feet per second of the waters of a certain water right and appropriation for 50 cubic feet of the waters of the South Fork of Dupuyer Creek made by the grantor herein on the 14th day of January 1902 and recorded in the office of the County Clerk of said Teton County, Montana, in Book 9A of Water Rights on page 105, to be used on none other than the lands hereinabove described however together with said proportionate interest in all dams, ditches and rights of way necessary and appurtenant thereto. The party of the first part *reserving* however the right to herself her heirs and grantees to maintain the ditch which carries said waters through the above described land *and to flow all excess water over that herein conveyed to the full capacity of said ditch* through said lands and also reserves the right to maintain an easement over said lands to the extent of a strip seventy-five feet wide one half thereof being on each side of the center of said ditch or water way carrying said waters across said lands. PCCRC Ex. 10j (emphasis added).

The deed from Armedia Clark to Aman is dated August 8, 1903, approximately eight years *after* B.P. Clark filed his 1895 notice of appropriation for the same lands referenced in the deed. Had Armedia Clark owned a portion of the B.P. Clark right, and had she intended to convey it to Aman, she would have said so in the deed. The deed clearly indicates only one water right was transferred to Aman, and it reserves both a ditch easement and all water rights except the 4.5 cfs of the Armedia Clark 1902 right to

the grantor. "Where the water right intended to be conveyed with the land is stated in express terms, the grantee takes only that which is expressly conveyed. He does not take any additional rights by implication. In such case the grantor reserves what he does not convey." *Kofoed v. Bray*, 69 Mont. 78, 84, 220 P. 532, 534 (1923); see also *Castillo v. Kunemann*, 197 Mont. 190, 197, 642 P.2d 1019, 1024 (1982).

If the B.P. Clark right were perfected, it was reserved by Armedia Clark when she sold her property to Aman. Duncan cannot now claim ownership of the B.P. Clark right based on the deed from Armedia Clark. Other evidence reinforces this conclusion. Exhibit 17 is a list of historic landowners and the water rights they owned during or after 1921. Amon is listed, but only as owner of the Armedia Clark right and not the B.P. Clark right. PCCRC Ex. 17.

Duncan water right Claim 41M 121497-00 is for 1,000 miners inches of water with a priority date of September 19, 1895 for use on 482 acres of land in Section 30, Township 27 North, Range 8 West. Claim 41M 121497-00 was an effort by Duncan to claim the entirety of the 1895 B.P. Clark notice of appropriation. Claim 41M 121497-00 is invalid and should be terminated.

Skelton's claim for the 1895 B.P. Clark right, claim 41M 25170-00, is also invalid. No evidence shows the B.P. Clark right was ever perfected on property now belonging to Skelton. Skelton is not a successor to this right, as no evidence connects Skelton directly to B.P. Clark.

Despite this lack of evidence, the Water Master concluded Skelton obtained an interest in the 1895 Clark water right from a conveyance of land from Blackleaf Land and Cattle Company to Rosenfield in 1910. Master's Report, Finding of Fact 35, p. 26. In Finding of Fact 31, the Master determined that B.P. Clark sold a portion of his 1895 right to Max Grotthus, John Shields, and Cora H. Clark, and explains how Blackleaf could have received a portion of the Clark right:

The Grotthus and Cora Clark transactions probably never left the control of the Clark family. B. Percy Clark was the administrator for the estate of Max Grotthus. In 1900, the Estate sold land and presumably this share of the 1895 appropriation to Armedia Clark (PCCRC 11f). Cora Clark was a

family member and shareholder of the Blackleaf Land and Cattle Company. On the other hand, the Shields transaction was actually removed from the Thomas Ditch and used elsewhere (PCCRC 14 #51). In any case, when the Blackleaf Land and Cattle Company sold its Gansman Coulee property to Rosenfield in 1910, what remained of the 1895 appropriation transferred as part of that sale. ... *Master's Report, Finding of Fact 31*, p. 24 (emphasis added).

This finding depends on several assumptions. First, Armedia Clark somehow obtained ownership of the B.P. Clark right originally sold to Grotthus. Second, Armedia Clark sold her interest in the Grotthus share to Cora Clark. Third, either the Grotthus share or the share independently purchased by Cora Clark must have been conveyed by Blackleaf Land and Cattle Company to Rosenfield solely on the basis Cora Clark was a shareholder in Blackleaf. Finally, for the Skelton claim to be valid, someone must have perfected the B.P. Clark water right on Blackleaf land now owned by Skelton. None of these assumptions are directly supported by the record. The evidence does not show privity of title between B.P. Clark and Skelton, nor does it show perfection of the B.P. Clark right on Skelton land. There is no evidence connecting Skelton to B.P. Clark. The Objector successfully met its burden to overcome the *prima facie* status of Skelton's claim for the B.P. Clark right. Skelton's claim 41M 25170-00 should be terminated.

In summary, the original historic capacity of Thomas Ditch was approximately 4.6 cfs. Prior to the 1930s, the only water right that could be connected to the Thomas Ditch was the 4.5 cfs portion of the Armedia Clark right purchased by Adolph Aman. The B.P. Clark right, assuming it was ever perfected, was severed from Duncan lands by the deed from Armedia Clark to Aman. Therefore, Duncan's claim 41M 25170-00 for the water right based on the B.P. Clark notice of appropriation is invalid and should be terminated. There is no clear chain of title connection between Skelton and the 1895 B.P. Clark right, nor is there any compelling or direct evidence the right was used on Skelton lands. Finally, because the ditch's capacity was limited to 4.6 cfs, the only right which could have been delivered through it was the 4.5 cfs share of the Armedia Clark right now

owned by Duncan. The Armedia Clark right is the only right clearly tied to land now owned by Duncan.

Duncan's Claim based on the Flacker Notice of Appropriation

Duncan claim 41M 121496-00 is for 10 cfs based on the Theresa Flacker notice of appropriation or Flacker right. In Findings of Fact 33 and 34, the Master determined Duncan was entitled to 3.1 cfs based on the Flacker notice of appropriation. The Master found that Flacker sold her land and water right to Adolph Aman in 1915. Aman was Duncan's predecessor. The Master did not recommend Duncan receive the full 10 cfs under the Flacker right. Instead, the Master determined that because the Thomas Ditch was already carrying 4.5 cfs of the Armedia Clark right purchased by Aman earlier, and because the ditch's capacity was 7.6 cfs, Duncan should only receive 3.1 cfs of the Flacker right. The remaining portion of the latter right was presumably unused and therefore abandoned because there was no room for it in the Thomas Ditch flume. PCCRC objected to these findings on the basis no evidence existed that the Flacker right had ever been perfected and because the flume was not large enough to hold both the Flacker right and Aman's 4.5 cfs share of the Armedia Clark right.

The Master's recommendation regarding Duncan's ownership of the Flacker right must be revisited in light of this Court's determination that the capacity of the Thomas Ditch was 4.6 cfs, rather than 7.6 cfs. It appears Aman became the owner of the Flacker right by purchasing the land upon which it was used. Exhibit 17, which discusses the Flacker right, supports this conclusion and indicates it was owned by Aman. Because the Thomas Ditch flume could only hold an amount of water nearly identical to the flow rate of 4.5 cfs share of the Armedia Clark right previously purchased by Aman, there was no additional room in the flume for the Flacker right. PCCRC Ex. 17. The record supports this conclusion. Exhibit 14 indicates the Flacker ditch was used for one year and "was never rebuilt or used again." PCCRC Ex. 14, p. 24. Accordingly, Duncan's claim to a portion of the Flacker right is invalid, and claim 41M 121496-00 should be terminated.

Use Rights in the Thomas Ditch After Flume Reconstruction and Enlargement

The evidence indicates that prior to enlargement of the Thomas Ditch flume in the early 1930s, Duncan's predecessors routinely used most of the water from the Thomas Ditch other than return flows or wastewater. Although there was an ebb and flow of conflict and cooperation between Duncan and Skelton's predecessors, the record generally shows dominant water use by Duncan's predecessors.

Numerous exhibits contain references to conflict between predecessors of Duncan and Skelton. Exhibit 17 provides: "... Bean or Clark flume (1.65 s.f.) is considered as belonging to Adolph Aman, who uses it. Rosenfield has an interest in the same right as Aman but does not use it." PCCRC Ex. 17, p. 25. Exhibit 21 reveals: "Mr. Cook who has the upper ranch has been taking all the water, has refused to let the lower Rosenfield properties have any" PCCRC Ex. 21, p. 1. Exhibit 14 provides: Hamann, successor to Aman, used water and told Campbells "they could have the water that Hamann didn't use." Ex. 14, p. 11. This exhibit also provides:

1916 when the big flood washed out the flume used as intake to Bean or Clark #284. ... In 1918 the flume was rebuilt, Mr. Amon doing the work and Mr. Rosenfield furnishing the material. Since then more or less water has been used every year, most of it going on the Amon Ranch where Hamann has been a tenant. PCCRC Ex. 14, p. 15.

Regarding the Bean or Clark ditch number 284, this same exhibit further provides: "At this time (1906) Aman owned the ditch and was using it extensively." PCCRC Ex. 14, p. 20.

In 1935, tensions between Duncan's predecessor and Skelton's predecessor over use of water from the Thomas Ditch blossomed into litigation. Rosenfield, a predecessor of Skelton, sued Cook, a successor of Aman and predecessor of Duncan. In his complaint, Rosenfield claimed the entirety of the 1895 B.P. Clark appropriation for 50 cfs. Rosenfield acknowledged Cook was entitled to 9% or 4.5 cfs of the 1902 Armedia Clark right, but he claimed the rest of it. PCCRC Ex. 22g, pp. 4-6. He further alleged that Cook had been interfering with his right to the delivery of water through Thomas Ditch. PCCRC Ex. 22g, pp. 7-8. Both of these statements are admissions against

Rosenfield's interests and work to the detriment of Skelton's claims.⁶ In his answer, Cook acknowledged interfering with Rosenfield's use of water, and Cook alleged Rosenfield's rights had been abandoned as Cook himself had used the water "for a period of 30 years or more." PCCRC Ex. 22c, p. 3. In 1937, these parties filed a stipulation (PCCRC Ex. 22a), but no evidence exists of a written settlement or an order concluding the litigation.

The Master's Report acknowledges this history of conflict, but concludes the parties were each entitled to implied claims for use rights with priority dates of 1931. The Master determined the amount of the claims was equal to the additional capacity created when the flume was expanded in size. The Master further concluded that both Skelton and Duncan were entitled to use rights equal to the full amount of the increase in capacity, so that one party could use their right when the other was not irrigating. On this basis, the Master awarded 29.07 cfs via implied claim 41M 30052591 to Skelton. The Master awarded 28.37 cfs to Duncan via implied claim 41M 30052592.

Other than the amounts of the implied claims, the Master's rationale is sound. According to the evidence at trial, the new capacity of the Thomas Ditch after enlargement was 20.0 cfs. Duncan's previously existing water right of 4.5 cfs left 15.5 cfs for use rights to be allocated to Duncan and Skelton. Accordingly, the flow rate for Skelton's implied claim 41M 30052591 is reduced from 29.07 cfs to 15.5 cfs. The flow rate for Duncan's implied claim 41M 30052592 is reduced from 28.37 cfs to 15.5 cfs.

In keeping with historical practice, the combined flow rates of all three water rights decreed in this case may not exceed 20.0 cfs. This means that although both Skelton and Duncan are receiving use rights with 1931 priority dates for 15.5 cfs each, they may only divert the full amount of their individual water rights if the other party does not need any portion of their 15.5 cfs. If both Skelton and Duncan wish to use their

⁶ Rosenfield's claims of interference by Cook are corroborated by other evidence that Cook, Aman and Hamann, all of whom were Duncan's predecessors, used water in priority over Rosenfield. Rosenfield also acknowledged the Cook/Duncan claim to 4.5 cfs of the Armedia Clark right.

1931 rights simultaneously, their combined diversions of these two rights may not exceed 15.5 cfs. A remark to this effect will be added to the abstract for each claim.

PCCRC also raised an objection that the capacity of the Thomas Ditch at two locations downstream of the flume was less than the capacity of the flume itself. As a consequence, PCCRC argues the flow rate of any rights associated with enlargement of the flume in the early 1930s should be limited by the ditch rather than the flume if the ditch was smaller than the enlarged flume.

PCCRC expert Anderson testified the Thomas Ditch had been excavated or cleaned, but he could not find evidence of historic ditch dimensions in the upper sections of the ditch. Anderson Testimony, Day 2, 8:34:50-8:35:46 and 8:42:00-8:43:33 (Feb. 17, 2008). About 800 feet below the diversion he found two locations he thought to be representative of an original cross section. Anderson Testimony, Day 2, 8:34:50-8:37:20 (Feb. 17, 2008). He determined the capacity of these sections to be about 12 cfs. PCCRC Ex. 28, p. 2. Based on this information, PCCRC contends the flow rate of any post-expansion rights should be no more than 12 cfs.

The Master apparently did not find this information on ditch capacity useful in determining the flow rate of the 1931 use rights, as there is no discussion of this issue in the Master's Report. Although the measurements taken are relatively close to the point of diversion, the significant changes to the ditch raise some doubts about the Objector's flow measurements. The Master's decision not to use this evidence was not clear error.

CONCLUSION

The Water Master correctly concluded expansion of the flume in the 1930s resulted in creation of additional water rights with a priority date equal to the date of expansion. The Master correctly concluded the priority date of the second water right or rights should be December 31, 1931. However, using the *DeSaye* three-part test, the Water Master misapprehended the evidence regarding flow rate and supplied a set of flow calculations not presented at trial. These findings are not supported by the evidence, and the parties were deprived of the right to cross-examination on these calculations. There is insufficient evidence to support either perfection of the B.P. Clark

right or privity of title between B.P. Clark and Claimants. The three water rights justified by the evidence are shown in the attached abstracts. All other claims in this case are terminated, with the exception of 410 25168-00, which will be amended as recommended in the Master's Report.

The Court approves and adopts the Master's Findings and Conclusions regarding the dismissal of claims 41M 25166-00, 41M 25167-00 and 41M 25169-00 in Case 410-35 as abandoned. The Court approves and adopts the Master's Findings and Conclusions regarding the changes made to claim 41M 121495-00 in Case 410-38. The abstract for implied claim 41M 30052591 contains a typographical error regarding the Point of Diversion legal land description, which needs to be corrected as shown below.

ORDER

IT IS ORDERED that Skelton's claim 41M 25170-00 should be dismissed;

IT IS FURTHER ORDERED that Duncan's claim to a portion of the Flacker right is invalid, and claim 41M 121496-00 should be dismissed;

IT IS FURTHER ORDERED that Duncan's claim to the entire B.P. Clark right is invalid, and claim 41M 121497-00 should be dismissed;

IT IS FURTHER ORDERED that the flow rate for Skelton implied claim 41M 30052591 is reduced from 29.07 cfs to 15.5 cfs. The point of diversion for this claim shall be changed from NWSWSE section 25, to the NESESW section 25, T27N, R9W;

IT IS FURTHER ORDERED that the flow rate for Duncan implied claim 41M 30052592 is reduced from 28.37 cfs to 15.5 cfs;

IT IS FURTHER ORDERED that a remark be added to the abstracts of implied claims 41M 30052591 and 41M 30052592 noting the combined flow rate for these two water rights cannot exceed 15.5 cfs, and

IT IS FURTHER ORDERED that a remark be added to the abstracts of claim 41M 112495-00 and implied claims 41M 30052591 and 41 M 30052591 noting the combined flow rate for these three water rights cannot exceed 20.0 cfs.

Case 41O-35 (Skelton)

Based on the record and applicable law, the following changes should be applied to claims in Case 41O-35:

41M 25166-00

Priority Date: May 25, 1906 **Terminate as Abandoned**

41M 25167-00

Priority Date: September 17, 1904 **Terminate as Abandoned**

41O 25168-00 (Gansman Coulee)

Priority Date: September 16, 1913

Acres Irrigated: ~~527.00 acres~~ **454.00 acres**

Issue Remarks: **Remove all issue remarks**

The supplemental water right remark is not relevant and is removed.

All remaining elements of the claim are correct as they appear in the Temporary Preliminary Decree for this Basin.

41M 25169-00

Priority Date: January 14, 1902 **Terminate as Abandoned**

41M 25170-00

Priority Date: September 19, 1895 **Dismiss as Invalid**

Implied Claim 41M 30052591

Priority Date: **December 31, 1931**

Type Of Right: **Use**

Flow Rate: ~~29.07 cfs~~ **15.5 cfs**

Point of Diversion: ~~NWSWSE~~ **NESESW**

Information Remarks:

THE FOLLOWING WATER RIGHTS SHARE THE SAME POINT OF DIVERSION.
THE COMBINED FLOW RATE FOR THESE **TWO** RIGHTS CANNOT EXCEED
~~36.32~~ 15.5 CFS. ~~25170-00~~ 30052591 121495-00 ~~121496-00~~ ~~121497-00~~
30052592

THE FOLLOWING WATER RIGHTS SHARE THE SAME POINT OF DIVERSION.
**THE COMBINED FLOW RATE FOR THESE THREE RIGHTS CANNOT
EXCEED 20.0 CFS.** 121495,30052591,30052592

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT DURING
**ADJUDICATION OF THE BASIN 410 TEMPORARY PRELIMINARY
DECREE.**

Case 410-38 (Duncan)

Based on the record and applicable law, the following changes should apply to
claims in Case 4.10-38:

41M 121495-00

Priority Date: January 14,1902

Flow Rate: ~~18.25 cfs~~ **4.50 cfs**

Ditch Name: **THOMAS DITCH**

Acres Irrigated: ~~482.00 acres~~ **436.00 acres**

Issue Remarks: **Remove all issue remarks**

Information Remarks:

~~THE FOLLOWING WATER RIGHTS SHARE THE SAME POINT OF DIVERSION.
THE COMBINED FLOW RATE FOR THESE RIGHTS CANNOT EXCEED 36.32-15.5
CFS. 25170-00 30052591 121495-00 121496-00 121497-00 30052592~~

~~THE FOLLOWING WATER RIGHTS SHARE THE SAME POINT OF DIVERSION.
THE COMBINED FLOW RATE FOR THESE RIGHTS CANNOT EXCEED 7.60 CFS.
25170-00 121495-00 121496-00 121497-00~~

THE FOLLOWING WATER RIGHTS SHARE THE SAME POINT OF DIVERSION.
**THE COMBINED FLOW RATE FOR THESE THREE RIGHTS CANNOT
EXCEED 20.0 CFS.** 121495,30052591,30052592

All remaining elements of the claim are correct as they appear in the Temporary
Preliminary Decree for this Basin.

41M 121496-00

Priority Date: April 8, 1913 **Dismiss as Invalid**

41M 121497-00

Priority Date: September 19, 1895 **Dismiss as Invalid**

Implied Claim 41M 30052592

Priority Date: **December 31,1931**

Type Of Right: Use

Ditch Name: **THOMAS DITCH**

Flow Rate: ~~28.37 cfs~~ **15.5 cfs**

Remar

THE FOLLOWING WATER RIGHTS SHARE THE SAME POINT OF DIVERSION.
THE COMBINED FLOW RATE FOR THESE **TWO** RIGHTS CANNOT EXCEED
36.32 15.5 CFS. ~~25170-00~~ 30052591 ~~121495-00~~ ~~121496-00~~ ~~121497-00~~
30052592


THE FOLLOWING WATER RIGHTS SHARE THE SAME POINT OF DIVERSION.
**THE COMBINED FLOW RATE FOR THESE THREE RIGHTS CANNOT
EXCEED.20.0CFS.** 121495,30052591,30052592

THIS APPROPRIATION OF WATER TAKES WATER FROM THE TWO MEDICINE
RIVER DRAINAGE (BASIN 41M) AND USES IT IN THE TETON RIVER
DRAINAGE (BASIN 410) AND THE MARIAS RIVER DRAINAGE (BASIN 41P).
ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION
PERIODS FOR EITHER THE POINT OF DIVERSION OR PLACE OF USE BASIN.

All remaining elements of this implied claim are identical to parent claim 41M 121495-
00 as corrected by the Master's Report.

A Post Decree Abstract of Water Right Claim for each claim addressed above (pages 20-23) in this Order is attached to confirm that the above changes have been made in the State's centralized water right record system.

DATED this 19 day of October, 2012.


Russ McElyea
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 AMENDING MASTER'S REPORT AND ADOPTING AS AMENDED** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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"Service list updated 7-18-2012

DATED this 19th day of October, 2012.


Swithin J. Shearer
Deputy Clerk of Court