

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364
Fax: (406) 522-4131

FILED

JUN 08 2016

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
RED ROCK RIVER BASIN (41A)

CLAIMANTS: United States of America (Fish & Wildlife Service);
Huntsman Ranch Family, LLC

OBJECTOR: Huntsman Ranch Family, LLC

NOTICE OF INTENT TO APPEAR: Huntsman Ranch Family, LLC

CASE 41A-6
41A 94435-00
41A 94935-00
41A 94936-00
41A 94937-00
41A 94938-00
41A 94939-00
41A 94940-00

ORDER AMENDING AND ADOPTING MASTER'S REPORT

STATEMENT OF THE CASE

This matter involves an objection to the Master's Report issued in case 41A-6 filed by claimant Huntsman Ranch Family, LLC (Huntsman). Seven claims were consolidated into case 41A-6. One claim is owned by the United States, Fish and Wildlife Service (USFWS); the other six are owned by Huntsman. Huntsman filed a notice of intent to appear on the USFWS claim and objected to each of its own claims. The USFWS withdrew its claim. Huntsman is represented by Bill Hritsco. The Master's Report was issued on February 3, 2016. The Huntsman objection to the Master's Report only addressed claims owned by Huntsman.

This is one of several cases in which counsel for Huntsman has missed deadlines or failed to comply with orders of the Court. A timeline describing these problems is provided below:

➤ The Water Master issued an order directing Huntsman to meet with DNRC personnel to address issue remarks by July 9, 2015, and to work jointly with the DNRC to submit a report to the Court by August 7. Huntsman did not meet either deadline, did not request an extension, and did not otherwise contact the Court.

➤ On August 26, 2015, the Water Master received a letter from the DNRC indicating that Mr. Hritsco had arranged a meeting for September 22. The DNRC requested an extension to file a report with the Court.

➤ The Water Master issued an order extending the report deadline until October 7, 2015. No report was filed by the deadline.

➤ On October 8, Mr. Hritsco filed a request asking that the deadline for submitting information to the DNRC be extended until November 30. This request was granted and the deadline for submitting a report to the Court was extended until December 22.

➤ Mr. Hritsco and Evon W. Huntsman met with DNRC personnel on October 20, but did not file any documents by the November 30 deadline.

➤ The DNRC filed a report with the Court on December 9. The DNRC Memorandum recommended corrections to the claims based on a review of the claim files, aerial photographs, and a claimant-provided aerial map from 1942.

➤ On December 15, the Court issued a show cause order. The order included proposed corrections to the Huntsman rights and indicated Huntsman's claims would be decreed as described in the order unless Huntsman filed evidence by January 14, 2016 to address the issue remarks. Huntsman did not file any documents by the January 14 deadline.

➤ The Master's Report was issued on February 3, 2016. The Huntsman claims were described in the Master's Report as outlined in the previous show cause order.

➤ Huntsman objected to the Master's Report on February 17, 2016.

A hearing was set for the objection to the Master's Report. At the hearing, Mr. Hritsco acknowledged responsibility for failing to comply with prior deadlines and

attributed these problems to a heavy workload, medical conditions, and family obligations.

STANDARD OF REVIEW

The standard of review applicable to objections to Master's Reports is well established.

First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, even if the findings are supported by substantial evidence, this Court may determine a finding is clearly erroneous if the Master 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. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 27, 328 P.3d 644 (citing *Heavirland v. State*, 2013 MT 313, ¶ 16, 372 Mont. 300, 311 P.3d 813).

“Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting.” *Skelton Ranch*, ¶ 27 (quoting *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993)). The Montana Supreme Court has long recognized that “substantial evidence and clearly erroneous are not synonymous.” *Heavirland*, ¶ 16 (quoting *Interstate Prod. Credit Ass'n v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991)). Therefore, this Court may determine a finding clearly erroneous even though there is evidence to support it. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16).

This Court reviews a Master's conclusions of law to determine whether they are correct. *Heavirland*, ¶ 14 (citing *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398). “Thus, the Water Court reviews the Water Master's findings of fact for clear error and the Water Master's conclusions of law for correctness.” *Heavirland*, ¶ 14 (citing Rule 53(e)(2), M. R. Civ. P.; *Geil*, ¶ 22).

ANALYSIS

Mr. Hritsco did not argue that the Master's findings were not based on substantial evidence, that the Master misapprehended the evidence, or that the Master's findings of fact were clearly erroneous. Instead, he argued that his client should not be punished for his failure to comply with Court orders, and asked for permission to present new evidence of historic use. He was granted permission to present such evidence with the understanding that the Court had not yet reached a decision regarding the effect of his failure to comply with Court orders.

This is not the only case in which Mr. Hritsco has failed to comply with the orders of this Court. A similar pattern occurred in case 41A-21, resulting in termination of one water right and modification of another. This Court described Mr. Hritsco's conduct in case 41A-21 as gross neglect.

The Water Court does not ordinarily include parties on service lists when they are represented by counsel. Even though Mr. Huntsman participated in a meeting with the DNRC, it appears he was unaware that his attorney had missed several deadlines, including a show cause order, and that the water rights of the Huntsman Ranch were at risk. Mr. Huntsman has now been added to the service list in this case.

Although the conduct of an attorney is generally imputed to the client, there are circumstances where a departure from this rule is warranted. Those circumstances exist where an attorney has committed gross neglect and the client is, in good faith, unaware of the attorney's inaction.

Those circumstances exist in this case. Mr. Hritsco's conduct amounts to gross neglect and it appears Mr. Huntsman was unaware of his attorney's conduct. Moreover, in this case and in case 41A-21, there are no other parties who have been subject to additional expense or delay. The absence of impacts to other parties is critical to the decision which follows.

Based on the foregoing factors, it is appropriate to evaluate Huntsman's claims using the additional evidence of historical use placed in the record during the hearing on

April 20, 2016. This decision is based in part on concern for the welfare of the Huntsman family, and in part on a preference for adjudicating water rights on the merits.

This decision should not be taken as a signal that similar leniency can be expected in the future. Mr. Hritsco has wasted substantial DNRC and Water Court resources, and the Court's patience with this behavior is at an end. Although the Master's decision to recommend termination or modification of Huntsman's water rights was fully justified, under the unique circumstances present here, the Court will adjudicate Huntsman's rights on the merits.

41A 94935-00

This right is for irrigation from Hell Roaring Creek. The claim appeared in the Basin 41A Preliminary Decree with a flow rate of 1.33 cfs. Huntsman has the burden of proof as the proponent of a modification to this right.

The flow rate claimed by Evan and Florence Huntsman was 5.0 cfs. Huntsman later amended this flow rate to 8.7 cfs. Despite this amendment, the flow rate was shown in the Basin 41A Preliminary Decree as 1.33 cfs based on multiplication of the 35 acre place of use by the DNRC 17 gpm/acre guideline. This reduction in flow rate was made pursuant to Rule 14(d), W.R.C.E.R., which mandates that flow rate be reduced to the guideline unless information in the claim file clearly substantiates the claimed flow rate, or information to support the claimed flow rate is obtained through claimant contact. The Master's Report recommended a flow rate of 1.33 cfs because Huntsman did not submit any evidence of flow rate despite having numerous opportunities to do so.

Huntsman now seeks to change the flow rate from 1.33 cfs to 8.7 cfs. The proof offered to justify the increase in flow rate is an analysis by Jana Varner, a hydrologist for the USFWS. Ms. Varner assessed the flow rate for claim 41A 94935-00 in late July and early August of 1998. She concluded that carriage losses between the point of diversion and the place of use were high and that only a small amount of the water diverted from the source reached the place of use. She determined that a flow rate of 8.7 cfs was needed for irrigation.

This opinion formed the basis of an agreement between the USFWS and Huntsman which set the flow rate at 8.7 cfs. At the hearing in April of 2016, Huntsman called an engineer named Shawn Higley to explain how Ms. Varner reached her opinion. Mr. Higley explained that Ms. Varner used the DNRC guideline of 17 gpm/acre. This was multiplied by 35 acres, the size of the place of use, to arrive at a flow rate *at the field* of 595 gpm, or 1.33 cfs. This flow rate was in turn divided by 15.3%, the amount of water actually reaching the field, resulting in a flow rate of 8.69 cfs.

The DNRC guideline for flow rate is located in Rule 14(b)(1), W.R.C.E.R. The Claim Examination Rules define a flow rate as the “rate at which water has been diverted, impounded, or withdrawn *from the source* for beneficial use.” Rule 2(a)(27), W.R.C.E.R. (emphasis added). This rule is consistent with many Montana Supreme Court cases defining flow rate at the point of diversion. *See, e.g., Caruthers v. Pemberton*, 1 Mont. 111, 117 (1869).

The problem with the analysis undertaken by Jana Varner is that she applied the DNRC guideline of 17 gpm/acre at the field, not at the point of diversion. Because the guideline already takes into account carriage losses between the point of diversion and the place of use, applying the guideline at the field causes these losses to be double counted. The consequence of this mistake is an overstatement of flow rate. The exaggeration of flow rate becomes especially significant where, as here, carriage losses between the point of diversion and the place of use are already high.

Accordingly, Jana Varner overstated the flow rate for 41A 94935-00, and her opinion is of no value in defining the flow rate for this claim. Additionally, stipulations between parties are not binding on the Water Court and are subject to review and approval of the Water Court. Rule 17, W.R.Adj.R. Because the stipulation between Huntsman and the United States was based on the report by Jana Varner, it is of no weight in determining flow rate.

The DNRC properly complied with the claim examination rules when it multiplied 35 acres by 17 gpm/acre to arrive at a flow rate of 1.33 cfs.

Although evidence of the amount actually diverted is preferable to a flow rate derived by use of a guideline, the claimant did not offer such evidence. Other than the Varner report, which is not credible, the claimant offered no evidence as an alternative to use of the guideline. Mr. Huntsman did testify that carriage losses were high and that he needed a lot of water to irrigate, but it was also apparent he did not know what flow rate he needed, and was relying on Jana Varner's report to support his assertion that 8.7 cfs was appropriate.

A challenge to use of the guideline by a claimant often results in a return to the claimed flow rate under the theory that the original flow rate has prima facie status. Here, however, the claimant asserted the claimed flow rate was inaccurate.

The Master recommended a flow rate of 1.33 cfs for this right. That flow rate was based on application of the 17 gpm/acre guideline mandated by Rule 14(b)(1), W.R.C.E.R. The claimant did not supply sufficient evidence to supplant that flow rate with something different. Accordingly, the flow rate for this right should remain at 1.33 cfs.

41A 94936-00

This claim is for irrigation water from Red Rock Creek. It was originally filed by Evan and Florence Huntsman, who claimed a flow rate of 160 inches, or 4 cfs. In 2008, Huntsman Ranch Family Limited Partnership entered an agreement with the USFWS agreeing to a flow rate of 4.3 cfs. This claim appeared in the Basin 41A Preliminary Decree with a 4.3 cfs flow rate.

Despite having claimed 4.0 cfs, and despite having agreed to a flow rate of 4.3 cfs with the United States, Huntsman now asserts the flow rate for this claim should be 8.0 cfs. Huntsman contends the claim filed by its family members was in error and that the stipulation with the United States failed to address the substantial ditch loss for this right, and that the stipulation is void because it was "entered into under mistaken facts which were a basis of the bargain...." Huntsman Objection to Claim 41A 94936-00. Huntsman "estimates" ditch losses are 50%, but supplies no credible evidence to support that estimate.

At the hearing, Huntsman changed its position regarding the USFWS agreement. In its objection to the Master's Report, Huntsman states its water rights were "intensively studied" and "scientifically measured;" it entered the stipulation "after much study and analysis," and "the flow rates agreed upon in the Stipulation are the most accurate and scientifically established flow rates for this group of six claims." Huntsman Objection to Master's Report, at 2-3. Despite the foregoing praise for the work of the USFWS, at the hearing Huntsman asserted the flow rate should be 8.0 cfs rather than 4.3 cfs based on the work done by Jana Varner.

The Master's Report set the flow rate for this claim at 3.1 cfs. This decision was based on identification of 82 acres of irrigation by the DNRC, rather than the 180 acres claimed originally, and the 115 requested by the claimant in an amendment. As the claim file indicates, the 82 acre figure was derived from a DNRC field inspection conducted on September 23, 1997, and an aerial photograph dated August 8, 1942. Huntsman Ex. 2, at 9. The Water Master's identification of 82 acres as the correct place of use for this right was therefore based on substantial evidence. That evidence was sufficient to overcome the prima facie status of the claim and any subsequent amendments thereto.

Mr. Huntsman testified that he thought 115 acres was the better number, but admitted his family did not buy this property until June 24, 1973, only a week before the July 1, 1973 cutoff date for analyzing existing water rights. He also testified that he did not begin irrigating this land until twenty years later when his father became too old to do so.

Huntsman testified that Jana Varner thought the correct number was 115 acres, but a letter from her to Huntsman states :

I have reviewed your water rights and the only thing I would question is that the acreage claimed in 41A-W-094936 is high. I would agree with the number of acres that Rusty Taylor indicates on the abstract, 82 acres, instead of the 115 acres claimed."¹

Jana Varner Letter, November 20, 1998, Huntsman Ex. 13.

¹ Rusty Taylor was the DNRC claims examiner for this water right.

Huntsman did not put on any credible evidence dating from before July 1, 1973 that the Master's findings on this issue were incorrect.

The flow rate was calculated by multiplying 82 acres by the DNRC guideline of 17 gpm/acre to arrive at 3.1 cfs.

A claim for a water right constitutes prima facie proof of its content until issuance of a final decree. § 85-2-227(1), MCA. The prima facie status of a claim must be overcome by a preponderance of the evidence. The flow rate claimed for 41A 94936-00 was 4 cfs, but was later amended upward by Huntsman to 4.3 cfs.

The Master used the DNRC guideline of 17 gpm/acre to change the flow rate for this right. While flow rates have frequently been changed based on this guideline if the claimant does not object, the Water Court has been reluctant to substitute the guideline for a claimed flow rate when the claimant provides evidence showing the original flow rate is correct.

Here, however, the claimant asserts the original flow rate is incorrect. In addition, this claim received issue remarks regarding maximum acres and flow rate, which placed these elements at issue and required their resolution by the Water Court. The only evidence presented by claimant to set aside the Master's flow rate recommendation was the Jana Varner study, which the claimant characterizes as unreliable in one objection and reliable in another. That report is insufficient to set aside the Master's flow rate recommendation. The Master used the guideline and further relied on a DNRC Memorandum filed December 9, 2015.

The claimant points to a notice of appropriation filed by Harvey Cole as support for an 8 cfs flow rate. While the Cole notice of appropriation mentioned a flow rate of 320 inches, *it is of little value for several reasons. First, the statute authorizing such notices required that they be filed within twenty days of the date of appropriation. R.C.M. 89-910. The Cole notice was filed late. This means it was not entitled to prima facie status under R.C.M. 89-814.*

Second, the Cole notice claimed land outside the boundaries of the claim later filed by Huntsman. Third, Huntsman claimed a lesser amount of water even though it

was aware of the Cole notice and attached it to the claim. Finally, Huntsman agreed to 4.3 cfs in the stipulation with the United States. All of these factors undercut Huntsman's claim for an 8 cfs flow rate.

Under these circumstances, which include the claimant's failure to supply credible evidence of an actual historic flow rate, as well as the presence of issue remarks requiring resolution, the Water Master's reliance on the standard to arrive at a flow rate of 3.1 cfs was appropriate. The Water Master's description of this water right was based on substantial evidence and will not be disturbed.

41A 94937-00

This water right was terminated by the Water Master for two reasons. First, the DNRC was unable to find any evidence of irrigation with this right. Second, the claimant did not provide the Court with evidence this claim had been used.

This right was claimed for 100 inches of water from Beaver Creek for use on 56 acres. It was subsequently amended by Evon W. Huntsman to 40 inches for use on 21.5 acres.

At the hearing, Huntsman introduced photographs showing the ditches used in conjunction with this right. In addition, Mr. Huntsman testified that he had used this right for irrigation for many years, and that it was in use when his family purchased their property in June of 1973.

Based on this information, claim 41A 94937-00 should be decreed with a flow rate of 1.0 cfs for use on 21.5 acres as identified in the attached abstract. The legal description of these acres is: 5 acres in the S2S2SE of Sec.11, T14S, R1E, and 16.5 acres in the NWNW of Sec. 14, T14S, R1E. The issue remarks concerning acres irrigated, flow rate, and the conveyance ditch are removed.

41A 94939-00

The Water Master terminated this claim because the DNRC was unable to find any evidence of irrigation and the claimant did not provide evidence showing this claim had been used.

This right was claimed for 100 inches of water from Timber Creek for irrigation of 50 acres. It was later amended by Bill Huntsman to 40 inches for use on 20 acres. Huntsman introduced photographs showing the diversion point from Timber Creek. In addition, Mr. Huntsman testified that he had used this right for many years, and that it was in use when his family purchased this property in June of 1973.

Claim 41A 94939-00 should be decreed with a flow rate of 1.0 cfs for use on 20 acres described as follows: 3.3 acres in the SWSWSE of Sec. 11, T14S, R1E, and 16.7 acres in the NWNE of Sec. 14, T14S, R1E. The point of diversion is in the NWSWSE of Sec. 11, T14S, R1E. The issue remarks concerning acres irrigated, flow rate, and point of diversion are removed.

41A 94938-00 and 41A 94940-00

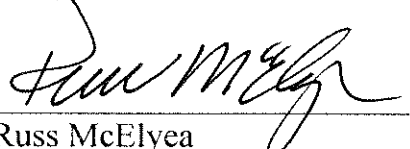
Huntsman objected to the treatment of these rights in the Master's Report, but indicated at hearing that it was withdrawing those objections.

CONCLUSION

The conduct of counsel in this case has wasted the time and resources of the DNRC and this Court. It has also placed a great deal of stress on members of the Huntsman family. The explanations offered by counsel are insufficient to excuse this conduct. In addition, the Huntsman family is now on notice of these problems and is no longer in a position to claim ignorance of the threat to its water rights if this conduct continues.

Post Decree Abstracts of the water right claims modified by this Order (claims 41A 94937-00 and 41A 94939-00) are served with the Order to confirm that the recommended changes have been made in the state's centralized record system. For Post Decree Abstracts of all other claims consolidated in case 41A-6, see the February 3, 2016 Master's Report.

DATED this 8 day of June, 2016.


Russ McElyea
Chief Water Judge

Caitlin B. Imaki, Trial Attorney
Joseph H. Kim, Trial Attorney
Joseph T. Mathews, Trial Attorney
Anna K. Stimmel, Trial Attorney
James DuBois, Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 305-0247 (Imaki)
(202) 305-0207 (Kim)
(202) 305-0432 (Mathews)
(415) 744-6480 (Stimmel)
(303) 844-1375 (DuBois)
Fax: (202) 305-0506
caitlin.imaki@usdoj.gov
joseph.kim@usdoj.gov
joseph.mathews@usdoj.gov
anna.stimmel@usdoj.gov
james.dubois@usdoj.gov

William A. Hritsco
Davis, Warren & Hritsco
PO Box 28
Dillon, MT 59725
(406) 683-2363
hritsco@qwestoffice.net

DNRC-Helena Regional Office
Water Resources Division
1424 9th Ave.
PO Box 201601
Helena, MT 59620-1601

Huntsman Ranch Family, LLC
PO Box 240086
Dell, MT 59724-0086

Note: Service List Updated 6/2/2016

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
RED ROCK RIVER
BASIN 41A
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41A 94937-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE
Status: ACTIVE

Owners: HUNTSMAN RANCH FAMILY LLC
PO BOX 240086
DELL, MT 59724 0086

Priority Date: JUNE 1, 1930

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.00 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 21.50

Source Name: UNNAMED TRIBUTARY OF RED ROCK CREEK

Source Type: SURFACE WATER
ALSO KNOWN AS BEAVER CREEK

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NW	SE	11	14S	1E	BEAVERHEAD

Period of Diversion: MAY 15 TO OCTOBER 15

Diversion Means: OTHER
THE MEANS OF DIVERSION IS A CULVERT.

Period of Use: MAY 15 TO OCTOBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1	5.00		S2	S2	SE	11	14S	1E	BEAVERHEAD
2	16.50		NW	NE	14	14S	1E	BEAVERHEAD	

Total: 21.50

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

94937-00 94939-00

THE FLOW RATE WAS AMENDED BY THE CLAIMANT ON 10/13/2004.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
RED ROCK RIVER
BASIN 41A
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41A 94939-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: HUNTSMAN RANCH FAMILY LLC
PO BOX 240086
DELL, MT 59724 0086

Priority Date: JUNE 1, 1930

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.00 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 20.00

Source Name: UNNAMED TRIBUTARY OF RED ROCK CREEK

Source Type: SURFACE WATER

ALSO KNOWN AS TIMBER CREEK.

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		N	W	SW	11	14S	1E BEAVERHEAD

Period of Diversion: MAY 15 TO OCTOBER 15

Diversion Means: DIKE

Period of Use: MAY 15 TO OCTOBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.30		S	W	SW	11	14S	1E BEAVERHEAD
2	16.70		N	W	NE	14	14S	1E BEAVERHEAD

Total: 20.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

94937-00 94939-00

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 09/23/1997: MAXIMUM ACRES, PLACE OF USE.

THE FLOW RATE WAS AMENDED BY THE CLAIMANT ON 10/13/2004.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

Montana Water Court
PO Box 1389
Bozeman, MT 59711-1389
1-800-624-3270 (In-state only)
(406) 586-4364
Fax: (406) 522-4131

FILED

FEB 03 2016

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
RED ROCK RIVER BASIN (41A)

CLAIMANTS: United States of America (Fish & Wildlife Service);
Huntsman Ranch Family, LLC

OBJECTOR: Huntsman Ranch Family, LLC

NOTICE OF INTENT TO APPEAR: Huntsman Ranch Family, LLC

CASE 41A-6
41A 94435-00
41A 94935-00
41A 94936-00
41A 94937-00
41A 94938-00
41A 94939-00
41A 94940-00

NOTICE OF FILING OF MASTER'S REPORT

You may file a written objection to the Report if you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report.

The above stamped date indicates the date the Master's Report was filed and mailed. Rule 23 of the Water Rights Adjudication Rules requires that written objections to a Master's Report must be filed within 10 days of the date of the Master's Report. Because the Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10 day objection period. Rule 6(d) M.R.Civ.P. This means your objection must be received no later than 13 days from the above stamped date.

If you file an objection, you must 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
FINDINGS OF FACT

1. The above-captioned water right claims are owned by the Huntsman Ranch Family LLC (Huntsman) and the United States Fish & Wildlife Service (FWS). The claims appeared in the Preliminary Decree for Basin 41A and were consolidated into this case based on the common link between Huntsman claim 41A 94936-00 and FWS claim 41A 94435-00.

2. The claims also received issue remarks based on pre-decree examination by the State Department of Natural Resources and Conservation (DNRC). Huntsman Ranch Family objected to its own claims.

3. Proceedings in this case began in April of 2015. Huntsman and FWS were ordered into settlement regarding claims 41A 94936-00 and 41A 94435-00. FWS filed a withdrawal of claim 41A 94435-00 on July 8, 2015. Meanwhile, Huntsman was ordered to consult with a representative of the DNRC and attempt to resolve the issue remarks that appeared on the claims. At the request of the claimant, the applicable deadlines were extended on August 31, 2015 and again on October 9, 2015.

4. On December 9, 2015, the DNRC filed a memorandum with the Court. According to the memorandum, the claimant met with the DNRC in October but never filed the documents necessary to resolve the issue remarks. The DNRC was able to make recommendations for resolving the issues with some of the claims.

5. On December 15, 2015, the Court issued a Show Cause order, which stated that if nothing was filed by the deadline, the claims would be amended or dismissed as follows:

41A 94435-00 WITHDRAWN

41A 94935-00 NO CHANGE

41A 94936-00

Flow Rate:	4.30 CFS	3.10 CFS
-------------------	----------	----------

Maximum Acres:	115.00	82.00
-----------------------	--------	-------

Place of Use:

<u>ID</u>	<u>Acres</u>		<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	26.00	29.00	SWNW	13	14S	1E	Beaverhead
2	89.00	53.00	NE	14	14S	1E	Beaverhead
Total:		115.00	82.00				

41A 94937-00 DISMISSED

41A 94938-00

Maximum Acres: 21.00 10.00
Flow Rate: 1.00 CFS 213.70 GPM

Place of Use:

<u>ID</u>	<u>Acres</u>		<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	21.00	10.00	NW	13	14S	1E	Beaverhead

41A 94939-00 DISMISSED

41A 94940-00

Flow Rate: 3.20 CFS 1.40 CFS
Maximum Acres: 84.30 37.00

Place of Use:

<u>ID</u>	<u>Acres</u>		<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	8.30		E2SESE	9	14S	1E	Beaverhead
2	37.00		N2NW	10	14S	1E	Beaverhead
3	39.00		S2SW	10	14S	1E	Beaverhead
Total:		84.30	37.00				

6. Nothing was filed by the deadline. The relevant facts are as follows:

41A 94435-00

7. Claim 41A 94435-00 is an irrigation claim. The claim received issue remarks indicating, among other things, that the right may have been abandoned or was never perfected. On July 8, 2015, the claim was withdrawn by FWS. The claim should be withdrawn.

41A 94935-00

8. Claim 41A 94935-00 represents an irrigation claim. The claim received issue remarks questioning the number of historically irrigated acres. The claim also received a remark indicating the flow rate may need to be reduced consistent with any change in

acreage. The DNRC reviewed the claim file and a historical aerial photograph and was able to confirm the claimed irrigation. The DNRC recommended that the claim remain unchanged and that all issue remarks be removed.

41A 94936-00

9. Claim 41A 94936-00 represents a claim for irrigation use. The claim received issue remarks questioning the number of historically irrigated acres. The claim also received a remark indicating the flow rate may need to be reduced consistent with any change in acreage. The DNRC reviewed available information and concluded that the claimed acreage and flow rate should be reduced as outlined above in Finding of Fact #5. If those changes were implemented, the DNRC recommended removing all issue remarks.

41A 94937-00

10. Claim 41A 94937-00 represents an irrigation claim. The claim received issue remarks indicating that the claimed conveyance ditch could not be identified. The claim also received remarks indicating that the DNRC was unable to find any evidence of historical irrigation on the claimed place of use. Huntsman objected to the claim but failed to provide any evidence in support of the claim and failed to respond to repeated orders from the Court. The claim should be dismissed.

41A 94938-00

11. Claim 41A 94938-00 represents an irrigation claim. The claim received issue remarks questioning the number of historically irrigated acres. The claim also received a remark indicating the flow rate may need to be reduced consistent with any change in acreage. The DNRC reviewed available information and concluded that the claimed acreage and flow rate should be reduced as outlined above in Finding of Fact #5. If those changes were implemented, the DNRC recommended removing all issue remarks.

41A 94939-00

12. Claim 41A 94939-00 represents an irrigation claim. The claim received issue remarks indicating that the claimed diversion facility and conveyance ditch could not be identified. The claim also received remarks indicating that the DNRC was unable to find any evidence of historical irrigation on the claimed place of use. Huntsman objected to

the claim but failed to provide any evidence in support of the claim and failed to respond to repeated orders from the Court. The claim should be dismissed.

41A 94940-00

13. Claim 41A 94940-00 represents an irrigation claim. The claim received issue remarks questioning the number of historically irrigated acres. The DNRC reviewed available information and was able to confirm 37.00 acres of historical irrigation. The Master finds that the claim should be changed as outlined above in Finding of Fact #5. If those changes are implemented, all issue remarks will be resolved.

CONCLUSIONS OF LAW

1. In order to ensure historical accuracy, the Water Court is required to address all issue remarks that appear on a claim as well as any objections the claim receives.

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

3. Therefore, the overarching legal issues in this case are: 1) whether the proposed changes resolve all issue remarks and objections; and 2) whether the evidence before the Court overcomes the prima facie proof found on the Statements of Claim.

4. Huntsman Ranch Family LLC filed objections and a NOIA on their own claims. They were ordered to provide the DNRC and the Water Court with the information necessary to address the issue remarks on the claims and the objections. The objectors failed to comply with repeated orders from the Court and have not filed any motions or evidence related to their objections.

5. When objections/NOIA are not resolved, the next procedural step is generally to put the case on hearing track. Section 85-2-233, MCA. However, the right to a hearing can be lost and objections can be dismissed if a party fails to comply with repeated orders from the Court. In this case, the Court has repeatedly ordered the objectors to provide the information necessary to resolve their objections, and they have failed to do so.

6. Pursuant to Rule 22, W.R.Adj.R., an objector/NOIA who fails to comply with an order issued by the Court is subject to sanctions, including dismissal of the objections. The appropriate sanction in this case is to dismiss Huntsman Ranch's objections and NOIA.

7. In resolving issue remarks other than through the objection process, the Court shall determine if the issue remarks can be resolved using information available in the claim file. In this case, the evidence gathered from the claim files supports amending the claims as detailed above in Findings of Fact #5. The record before the Master is sufficient to overcome the prima facie status of the claims. Rule 19, W.R.Adj.R.

8. For the above-mentioned reasons, the claims should be modified as shown on the attached abstracts to resolve all issue remarks and to accurately reflect historical use.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified above to correct the Preliminary Decree for this Basin. Post Decree Abstracts of Water Right Claim are served with this Report to confirm that the recommended changes have been made in the state's centralized record system.

DATED this 3 day of February, 2016



Andrew Gorder
Water Master

Caitlin B. Imaki, Trial Attorney
Joseph H. Kim, Trial Attorney
Joseph T. Mathews, Trial Attorney
Anna K. Stimmel, Trial Attorney
James DuBois, Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 305-0247 (Imaki)
(202) 305-0207 (Kim)
(202) 305-0432 (Mathews)
(415) 744-6480 (Stimmel)
(303) 844-1375 (DuBois)
Fax: (202) 305-0506
caitlin.imaki@usdoj.gov
joseph.kim@usdoj.gov
joseph.mathews@usdoj.gov
anna.stimmel@usdoj.gov
james.dubois@usdoj.gov

William A. Hritsco
Davis, Warren & Hritsco
PO Box 28
Dillon, MT 59725
(406) 683-2363
hritsco@qwestoffice.net

DNRC-Helena Regional Office
Water Resources Division
1424 9th Ave.
PO Box 201601
Helena, MT 59620-1601