

Montana Water Court  
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**FILED**  
**MAY 04 2017**  
**Montana Water Court**

**IN THE WATER COURT OF THE STATE OF MONTANA**  
**LOWER MISSOURI DIVISION**  
**MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)**

CLAIMANTS: M Lazy D, LP; Martin Ranch Company;  
M&W Ranch; C Bar J Ranch LLC;  
McFarland White Ranch, Inc.; Erica  
Borbe; Dennis S. Voss

**CASE 40A-264**

OBJECTORS: McFarland White Ranch, Inc.;  
Martin Ranch Co.; M Lazy D,  
LP; Erica Borbe; Dennis S. Voss

NOTICE OF INTENT TO APPEAR: McFarland  
White Ranch, Inc.; Martin Ranch Company

ON MOTION OF THE MONTANA WATER COURT

**ORDER ADOPTING MASTER'S REPORT REGARDING HIGHWATER**

This case includes several claims from Big Elk Creek. All of the claims represent water rights decreed by the District Court in *Freeser v. Graves*, 10<sup>th</sup> Judicial District, Meagher County, (1911). The current owners of the various claims include Erica Borbe and Dennis Voss; M Lazy D Partnership; Martin Ranch Company; M & W Ranch, LLC; C Bar J Ranch, LLC; and McFarland White Ranch, Inc.

This order is limited to the issue of highwater or floodwater use by all claimants. For this decision, highwater is defined as runoff flows in a source that are above the total combined flow rate for all decreed water rights in that source. All of the parties have diverted highwater from Big Elk Creek for decades. They seek to affirm their historical



use of highwater. They initially requested an information remark for all claims stating that all of their decreed rights included additional flow rates for highwater. In the alternative, they seek to amend a single claim so that it represents all highwater use by all parties. They have also suggested the Court can imply water right claims to represent their historical use of highwater.

On February 14, 1997 and February 11, 2002 the parties filed stipulations resolving all objections. The Water Master issued a report on March 8, 2011 recommending approval of nearly all of the terms of the Stipulation. However, the Master declined to recommend adding the highwater remark requested by the parties.

The report received objections from Erica Borbe, Dennis Voss, and McFarland White Ranch, Inc. asserting the Master should have added the highwater remark. Rather than address the objections, the Chief Water Judge remanded the case to the Master for further proceedings. Over the course of the next five years, the Master issued individual reports for each claimant except for Erica Borbe, Dennis Voss, and McFarland White Ranch, Inc. In each report, the Master declined to recommend adding the highwater remark. While none of these reports received objections, the original Borbe/Voss and McFarland White Ranch, Inc. objections served to preserve the highwater issue for all claims.

On June 22, 2016, the parties filed an Amended Stipulation that offered a different method for creating a highwater right. The parties agreed to amend claim 40A 110029-00 into a single highwater claim that included all parties as co-owners. The proposed amendments identified the flow rate as the combined capacity of all ditches owned by the co-owners minus their decreed flow rates. The place of use included all property irrigated by all co-owners.

On January 10, 2017, the Court held an evidentiary hearing on the objections to the March 8, 2011 Master's Report. The primary focus of the hearing was the highwater issue. The parties presented testimony and exhibits to support the historical use of highwater. They also gave oral arguments addressing the highwater issue and various options available to the Water Court to confirm this historical practice. The parties filed post-hearing briefs on the highwater issue.



### **Issues Presented**

1. *Should the Water Court add a remark to these claims that references the use of highwater?*
2. *Should the Water Court imply a highwater claim for each party?*
3. *Should the Water Court amend claim 40A 110029-00 to represent a single highwater claim co-owned by all parties?*

### **Standard of Review**

The Water Court reviews the Water Master's findings of fact for clear error and conclusions of law for legal correctness. *Heavirland v. State*, 2013 MT 313, ¶ 14, 372 Mont. 300, 311 P.3d 813; Rule 23, W.R.Adj.R. Clear error can be found by one of three ways. A factual finding may be clearly erroneous if it is not supported by substantial evidence. Even if supported by substantial evidence, the finding may be clearly erroneous if the trier of fact misapprehended the effect of the evidence. Even if supported by substantial evidence and the effect of the evidence is not misapprehended, a finding may be clearly erroneous if, in light of the evidence as a whole, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 17, 383 Mont. 205, 369 P.3d 1034.

Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting. This standard is deferential, and not synonymous with the clear error standard. A reviewing court may still find a factual finding is clearly erroneous even though there is evidence to support it. *Eldorado Coop Canal Co.* ¶ 18.

The Water Court reviews a master's conclusions of law to determine if they are correct as a matter of law. *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398.

### **Master's Report**

The facts surrounding the historical use of highwater by these claimants are not in dispute. As stated by the parties, "[t]he historical practice on Big Elk and Crooked Creeks has been that during periods of flood water all parties in case 40A-264 have



diverted and used as much as their ditches would carry.” (1997 Stipulation ¶ 5.) The Master’s findings of fact did not question this historical use. In fact, the Master agreed that diverting additional water, above decreed flow rates, during times of highwater, was the historical practice. (Finding of Fact 1.) However, the Master also found that, with a few exceptions, the claimants did not file statements of claim for highwater rights. (Finding of Fact 2.) The parties do not dispute this fact. While the parties filed statements of claim for all of their decreed rights, they did not file separate claims for their historical use of highwater.

The Master’s recommendation is not based on historical practices. It is based on her conclusion that the parties were attempting to acquire a second water right by adding a highwater remark to claims filed for their decreed rights. The Master found this attempt to add additional rights after all statement of claim filing deadlines had closed violated Section 85-2-221, MCA. In addition, since the parties had not filed statements of claim for their highwater rights, the Master found the rights were abandoned pursuant to Section 85-2-226, MCA.

### **Parties’ Arguments**

The parties argue the failure to file separate statements of claim for highwater does not violate Section 85-2-221, MCA or subject them to a finding of forfeiture under Section 85-2-226, MCA. They assert the point of the adjudication process is to recognize and confirm all historical use of water and the Water Court should do so in this case. They note the proposed highwater remark represents one term of an extensive negotiation process between all irrigators on this source. Given this background, they argue the Water Court has no reason to reject any term of the stipulations. By doing so, they assert the Master assumed the role of a litigant and based her decision on issues that were not raised by a party and were therefore not properly before the Court.

The parties contend historical practice throughout the State was to fill your ditches when water was plentiful. They assert district courts viewed highwater as a component of the decreed right and seldom included highwater in a decree. They argue the use of highwater never required a filing of any kind. They did not file statements of claim for



highwater because they saw no need to do so. In fact, the prevailing sentiment during claim filing in the early 1980s was that there was no such thing as a highwater right and no need to file a statement of claim for a highwater right. (Testimony of Perry J. Moore, 10:10, 1/10/17.)

The lack of statements of claim notwithstanding, the parties assert the law governing this adjudication should be flexible enough to recognize and confirm their use of highwater.

### Analysis

The statement of claim filing process was governed by statute. While there may have been confusion in the filing process, the statutes are clear.

85-2-221, MCA. (1) A person claiming an existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in 85-2-212, shall file with the department no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the department.<sup>1</sup>

85-2-226, MCA. The failure to file a claim of an existing right as required by 85-2-221(1) establishes a conclusive presumption of abandonment of that right.

Given this language, this Court cannot accept the argument that a large number of irrigation claims were somehow exempt from filing requirements. Highwater rights by their nature may seldom be managed by a water commissioner, but they are existing rights as defined by Section 85-2-102(12), MCA. As such, they were subject to the filing requirements in Section 85-2-221(1), MCA and a presumption of abandonment if they were not filed. Section 85-2-226, MCA.

The constitutionality of these statutes came before the Montana Supreme Court through a *sua sponte* order issued by the Chief Water Judge. The Water Court held claims that were filed after the April 30, 1982 filing deadline were conclusively abandoned under Section 85-2-226 MCA. On appeal, the Supreme Court held pre-1973 water rights were not granted indefeasible status. The Montana legislature could require

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<sup>1</sup> The actual deadline for filing statements of claim was April 30, 1982.



property owners to comply with sound regulations so long as those regulations satisfied the guarantees of substantive due process. Requiring statement of claim filings for all existing water rights was within these guidelines. The Court concluded Section 85-2-226, MCA was constitutional and failing to comply with the statute constituted a forfeiture of the water right. *In Re Matter of Adjudication of All Existing Rights to the Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992).

In response to this decision, the legislature amended Section 85-2-221, MCA to allow for remission of the forfeiture resulting from the failure to comply with the April 30, 1982 deadline. The amended statute provided for a July 1, 1996 deadline for filing "late claims." Section 85-2-221(3), MCA. The parties in this case did not file highwater rights by either deadline.

Since the statutory filing requirements apply, the only alternative available to the parties is to show they complied with the filing requirements. They must show their previous statement of claim filings included the highwater rights they are seeking.

1. *Should the Water Court add a remark to these claims that references the use of highwater?*

The original statements of claim identified a specific decreed flow rate for each claim at issue. That decreed flow rate is a limit on the amount of water that can be diverted by that right. The decreed flow rate cannot be expanded.

The parties' stipulations call for adding the following remark to all their decreed irrigation claims.

THE DITCHES AND POINTS OF DIVERSION FOR THIS WATER RIGHT HAVE HISTORICALLY BEEN USED TO CONVEY WATER TO THE FULLEST CAPACITY THEREOF DURING PERIODS OF FLOODWATER FOR BENEFICIAL USE, WHICH MAY BE IN EXCESS OF THE DECREED FLOW RATE.

The remark adds an unquantified amount of additional flow rate to every decreed right and concedes this additional flow rate will exceed the decreed flow rate. Historical use notwithstanding, that is clearly an expansion of the original statement of claim



filings. The remark gives the impression that this use of additional water is part of the decreed right. However, a review of the District Court Decree does not support this assumption. The District Court decreed specific flow rates and indicated these flow rates are the limit of each water right. As a result, the remark is misleading and appears to convey the authority to divert additional water. This amounts to a second water right that is subject to filing requirements. The parties cannot avoid the filing requirement by adding a remark to their claims. The Master's recommendation rejecting the remark is based on the facts in this case and a correct interpretation of controlling law.

2. *Should the Water Court imply highwater claims for each party?*

An alternative to the remark proposed by the parties is generating implied claims for highwater. Implied claims are used to separate multiple claims that were included in a single statement of claim filing. Rule 35, W.R.C.E.R. Implied claims allow the Court to correct a filing error and provide for separate administration of that party's historical water rights. If the criteria for an implied claim are met, the filing requirements in Section 85-2-221(1), MCA are satisfied - the party did not fail to file the water right, they simply included two or more separate water rights in a single filing.

Generating an implied claim depends on the information in the timely filed statement of claim. The statement of claim and attachments must contain some evidence indicating multiple water rights are included in a single filing. Without evidence in the statement of claim filing supporting the existence of multiple water rights, an implied claim is not appropriate. Implied claims are not a way to expand the terms of a water right or to circumvent claim filing requirements under Sections 85-2-221 and 85-2-224, MCA. *Eliasson Ranch Co. v. Rodeghiero*, Case 40A-115 at p. 5, (Order Amending and Adopting Master's Report Claim 40A 151880-00 Jun. 28, 2004).

The evidence supporting an implied claim is typically identified by the DNRC during pre-decree claim examination. However, evidence showing an implied claim may only become clear as a result of Water Court proceedings, up to and including hearing. The evidence submitted during Water Court proceedings can clarify the evidence



submitted with a statement of claim and show the implied claim requirements are satisfied.

In this case, the Court reviewed the claim files to determine if there was any evidence indicating a second water right claim for highwater. Without exception, there was no such evidence in the statement of claim forms or attachments. Each claim is based on a water right decreed by the District Court in *Freeser v. Graves*, 10<sup>th</sup> Judicial District, Meagher County, (1911). Each statement of claim is based on the flow rate decreed by the District Court for a particular historical water right. There is no indication in the statement of claim filings of any additional water diverted by that party. The statement of claim filings do not meet the criteria for implied claims.

The Court also reviewed the record of these proceedings for evidence that could serve to clarify the statements of claim and show there was evidence in these filings that supports implied claims. The Court was unable to identify any evidence that served this purpose. While there is evidence supporting highwater use as a historical practice, there is no evidence that serves to clarify the statement of claim filings and supports implied claims for highwater. Without this kind of evidence, the Court is unable to generate highwater claims through the implied claim process.

*3. Should the Water Court amend claim 40A 110029-00 to represent a single highwater claim co-owned by all parties?*

On June 22, 2016, the parties filed an Amended Stipulation that took a different approach to creating highwater rights. The Amended Stipulation calls for amending claim 40A 110029-00 to represent all highwater use by all parties. Claim 40A 110029-00 was filed by McFarland White Ranch, Inc. for irrigation on 12.00 acres from Bear Creek. McFarland withdrew the claim on February 11, 2002 as part of the settlement in this case. The Stipulation calls for the following amendments to claim 40A 110029-00:

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| 1. Add all parties as co-owners of the claim.                              |
| 2. Add all of the irrigated land owned by the parties to the place of use. |
| 3. Add all points of diversion and ditches used by the parties.            |



4. Change the flow rate from 16.00 miner's inches to the combined capacity of all ditches minus the combined flow rate of all decreed rights.
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5. Change the source from Bear Creek to Big Elk Creek.
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6. Change the priority date from July 15, 1900 to July 12, 1911.
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A claimant can amend a statement of claim after it has appeared in the temporary preliminary decree or a preliminary decree. Section 85-2-233(6), MCA. A motion to amend is not treated as a repudiation of the original claim. The point of a motion to amend is to correct the original statement of claim to more accurately reflect the historical use identified in that filing. *Nelson v. Brooks*, 2014 MT 120, ¶37, 375 Mont. 86, 329 P.3d 558. Proposed amendments must relate back to the original statement of claim filing. Amendments cannot be used to replace the original filing with a completely different water right.

Creating a single right representing all highwater use from Big Elk Creek has nothing to do with claim 40A 110029-00. The amendments do not relate back to the original statement of claim filing. Rather, the proposed amendments represent a number of water rights that were appropriated by several different parties. Unfortunately, these parties or their predecessors did not file statements of claim for these water rights as required by statute. The Water Court cannot correct that oversight through the amendment process. Therefore, the Court cannot accept this term of the Amended Stipulation and will not apply the proposed amendments to claim 40A 110029-00.

### **Conclusion**

The role of the Water Court, or any court for that matter, is to apply the law to the facts presented. The Court is not bound by the terms of any agreement reached by the parties and can reject the terms of an agreement when those terms are not within the law. Rule 17, W.R.Adj.R. By rejecting portions of the parties' stipulations, the Master did not assume the role of an advocate. She applied the law to the facts. That law is clear. Anyone claiming an existing water right had the obligation to file a statement of claim for that existing water right. If a statement of claim was not filed, that existing water right is presumed abandoned.



In this case, the parties seek to avoid this result by asserting the filing requirement should not apply to highwater rights that are only used when enforcement is unnecessary. They provide no credible basis for this assertion other than suggesting the filing requirement and forfeiture for failing to file are unconstitutional. The Montana Supreme Court held these statutory requirements are constitutional.

The parties are understandably frustrated with this process because there is an undeniable record of historical use of highwater and no one in case 40A-264 opposed their agreement. Nonetheless, this Court must apply the statutory mandates that require claim filing. The Court cannot create exceptions to the filing requirements because all parties in a case support a solution that is to their mutual benefit.

The record in this case and the controlling law does not allow the Court to apply any of the changes proposed by the parties. The information remark serves to create additional, poorly defined water rights that were not filed as required by statute. There is no basis for implied claims. The proposed changes to claim 40A 110029-00 are not amendments to that claim. They are an attempt to create a group of new water rights under the umbrella of a single claim number. The Court cannot accept the proposed changes as amendments to the claim.

### Order

These matters having come before the Court, it is  
ORDERED that the Court ADOPTS the Master recommendation to reject placing highwater remarks on the claims in this case.

ORDERED that the request for implied claims for highwater is DENIED.

ORDERED that the request to amend claim 40A 110029-00 is DENIED.

DATED this 4<sup>th</sup> day of May, 2017.



Douglas Ritter  
Associate Water Judge



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