

FILED

MAY 04 2017

Montana Water Court

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

CLAIMANT: Matador Cattle Co.

NOTICE OF INTENT TO APPEAR: Huntsman Ranch Co.

CASE 41A-66

41A 88524-00	41A 88572-00
41A 88535-00	41A 95000-00
41A 88553-00	41A 95001-00
41A 88556-00	41A 95007-00
41A 88557-00	41A 95008-00
41A 88567-00	41A 95517-00
41A 88568-00	41A 110589-00
41A 88570-00	41A 117650-00

ORDER ADOPTING MASTER'S REPORT IN PART

This matter involves a single water right in Water Court Case 41A-66. The claimant is Matador Cattle Company (Matador), and the claim at issue is 41A 88570-00, also known as the Cook right. The Cook right has been the subject of two Master's Reports. The first Master's Report received an objection from Matador.

Matador objected to the first Master's Report and, after review, the Chief Water Judge remanded Case 41A-66 to the Water Master with instructions to develop additional facts. The Master issued a second Master's Report after more information was received. Matador's objection to the second Master's Report is the subject of this order. There are no other parties.

The Cook right was claimed for stockwater and irrigation use out of a tributary of Little Sage Creek. It is based on a prior decree titled *Garr v. Anderson*, cause no. 4174, Fifth Judicial District, Beaverhead County, April 20, 1936 (*Garr Decree*). The Cook right was decreed a flow rate of fifty miner's inches for use on lands owned by Cook Sheep Company. The decree states that the Cook right was used for both irrigation and stockwater. The lands owned by Cook Sheep Company were not identified in the decree,

but Matador is a successor to Cook Sheep Company. The tributary of Little Sage Creek which is the source for this claim flows through former Cook Sheep Company lands.

Matador Cattle Company filed a claim for the Cook right in 1981. Matador described the Cook right as an irrigation claim for use on 112 acres in sections 32 and 33, T11S, R7W.

In 2016, approximately thirty-five years after the claim was filed, Matador filed a motion to amend the Cook right. Matador asserts that the irrigation portion of the Cook right is no longer used, and that its sole purpose is to enable livestock to drink directly from the tributary of Little Sage Creek.

The wrinkle in Matador's argument is that it wants to add new lands to the place of use for the Cook right. The lands Matador seeks to add were not identified when Matador filed its original claim and were not owned by Cook Sheep Company when the *Garr* Decree was issued. These lands were acquired by Matador or its predecessors after the *Garr* Decree and before Matador filed its claim for the Cook right.

Matador contends that part of the Cook right was converted from irrigation to instream stockwater use each time it acquired additional land adjacent to the tributary of Little Sage Creek. According to Matador, irrigation with the Cook right eventually ceased altogether and was replaced with instream stockwater use. Matador asserts this pattern of conduct justifies its request to amend the Cook right from an irrigation claim to an instream stockwater right serving an area larger than originally owned by Cook Sheep Company.

The Water Master rejected this argument. The Master determined that the irrigation portion of the Cook right was never perfected. Because Cook Sheep Company never had a right for irrigation, the Master concluded that no conversion from irrigation to instream stockwater use could have occurred. The Master also found no evidence that Matador or its predecessors made such a conversion.

Although Matador objects to the Master's Report on several factual and legal grounds, the key issues are whether Matador's irrigation right was perfected, and if so, whether it was changed from an irrigation right to an instream stock right with an expanded place of use.

I. ISSUES

1. *Was the irrigation portion of the Cook right perfected?*
2. *Did Matador or its predecessors change the irrigation portion of the Cook right to instream stockwater use on lands not originally owned by Cook Sheep Company?*

II. STANDARD OF REVIEW

The Water Court appoints Water Masters to hear cases and prepare reports containing findings of fact and conclusions of law. Rule 53(a)(1)(C), M. R. Civ. P.; Rule 23, W.R.Adj.R. The Water Court reviews findings of fact for clear error and conclusions of law to determine whether they are correct. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 25, 375 Mont. 327, 328 P.3d 644 (citing *Heavirland v. State*, 2013 MT 313, ¶ 13, 372 Mont. 300, 311 P.3d 813). Based on these standards of review, the water judge “may adopt, modify, or reject the [Master’s] report, in whole or in part, or may receive further evidence or recommit it with instructions.” Rule 23, W.R.Adj.R.

The Water Court uses a three-part test for reviewing objections to a Master’s findings of fact. *See Interstate Prod. Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991); Rule 11(c), W.R.Adj.R. (referencing Rule 53(e), M. R. Civ. P.); *In re the Existing Rights within the Jefferson River Drainage Area*, Nos. 41G-137, 41G-W-182145-00, 1999 Mont. Water LEXIS 1 at 3-4 (Dec. 27, 1999).

First, the Water Court reviews the record to see if the Master’s findings are supported by substantial evidence. “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)). Second, even if the findings are supported by substantial evidence, the Court may determine a finding is clearly erroneous if the Master misapprehended the effect of the evidence. *Skelton Ranch*, ¶ 27. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the 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*, ¶ 27 (citing *Heavirland*, ¶ 16). Therefore, a finding may be clearly erroneous even though there is evidence to support it. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16).

The Water 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).

III. ANALYSIS

1. *Was the irrigation portion of the Cook right perfected?*

The Water Master found the only evidence supporting historical irrigation with the Cook right was the *Garr* Decree and an affidavit from Matador's consultant referring to a ditch in a 1965 aerial photo. Second Master's Report, FOF 18, p. 6, Case 41A-66 (hereinafter Second Report). The Master also found "the claimed diversion system was never in place for the unnamed tributary of Little Sage Creek." Second Report at FOF 19, p. 6.

The Master concluded that the *Garr* Decree was not evidence that the Cook right was perfected. This assumption is contradicted by the plain language of the decree, which states that Cook Sheep Company appropriated and conducted water to its lands "by sufficient ditches" and used that water "for the irrigation of their lands..." *Garr* Decree at Finding of Fact No. III. The *Garr* Decree therefore confirms perfection of the Cook right.

The Master's conclusion that the irrigation portion of the Cook right was never perfected is incorrect as a matter of law because it fails to accord proper weight to the *Garr* Decree. Prior water rights decrees are conclusive as to all matters "actually litigated and adjudged." *Missoula Light and Water Co. v. Hughes*, 106 Mont. 355, 366, 77 P.2d 1041, 1047 (1938). *Garr v. Anderson* was tried before a District Court Judge and Cook Sheep Company was a party to that action. Absent a compelling reason, the Master was not free to disregard the *Garr* Decree.

The Water Master also declined to rely on the 1965 aerial photo offered by Matador to show evidence of an irrigation system. The Water Master's rationale is found in FOF 16:

Due to the quality of the 1965 photograph, it is difficult to see what dark line Matador's consultant is referring to. There does not appear to be any discernible line or shadow that would indicate the presence of a ditch. Further, it appears from the photograph that any alleged ditch would have to cross a road or trail and traverse the side of a hill, moving uphill from the source before reaching the edge of the claimed place of use. The claimed diversion system appears nonsensical.

Second Report, FOF 16, p.6. Based on these findings, the Water Master reached Conclusion of Law No. 12, which reads in part:

There is no credible evidence before the Court that suggests the claimed historical diversion system is valid for the unnamed tributary of Little Sage Creek. Similarly, there is no evidence of irrigation (other than natural sub-irrigation) on the claimed place of use. Matador's predecessors could not have changed a right that was never perfected.

Second Report, COL 12, p. 10. Matador objects to this conclusion of law and the findings on which it is based. Matador's objection has merit.

The 1965 aerial photograph offered by Matador clearly shows a ditch. The presence of the ditch was confirmed by Matador's expert witness, whose affidavit on this subject was not refuted. The Master discounted this evidence because he did not see the ditch, and because he apparently believed that a ditch could not function if it crossed a road.

The Master erred by concluding that a ditch and a jeep trail could not co-exist. Ditches often cross roads. The presence of a road, or the intersection of a road and ditch, does not render a ditch inoperable. Water can be conducted under or over a road using a culvert, bridge, or swale that preserves the grade of the ditch. To ignore the presence of the ditch in the 1965 aerial simply because it crossed a road is clearly erroneous. The ditch shown in the 1965 aerial is evidence that an irrigation system existed. Finally, the Master erred by finding that the ditch traveled uphill. Contour lines on the 1965 aerial show that the ditch went downhill.

Matador's objections to Findings of Fact 16, 18 and 19 are well taken and the Court declines to adopt those findings. The Water Court also declines to adopt Conclusion of Law 12, which states that the Cook right was not perfected.

Based on the *Garr* Decree, and the 1965 aerial photo showing a ditch, the Cook right was perfected.

2. *Did Matador or its predecessors change the irrigation portion of the Cook right to instream stockwater use on lands not originally owned by Cook Sheep Company?*

Matador asserts that the irrigation part of the Cook right was gradually changed to in-stream stock use as it acquired additional parcels of land adjacent to the tributary of Little Sage Creek. Under Montana's old water rights code, an appropriator could change the point of diversion, place of use, and purpose of a water right so long as others were not injured. R.C.M. 89-803.

Relying on this code section, Matador asserts that it and its predecessors changed the Cook right from irrigation to stock watering on new lands. Specifically, Matador asserts that this process expanded the Cook right to lands acquired in 1947 and 1967. In effect, Matador argues that the existence of a statute authorizing changes to water rights, coupled with deeds showing acquisition of new lands and evidence of livestock grazing in the area leads to an inference that the Cook right was converted from irrigation to stockwater use.

A party seeking to amend its water right must show by a preponderance of the evidence that the elements of its right are incorrect. *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558. The Water Master concluded that Matador did not meet this burden.

Matador introduced voluminous evidence regarding the history of the Cook Sheep Company and the patterns of livestock grazing near Little Sage Creek. This evidence establishes that both Cook Sheep Company land and other land acquired by Matador was grazed by livestock, and that livestock likely drank from Little Sage Creek and its tributaries both before and after acquisition. Matador is mistaken however, when it contends that the presence of livestock near the tributary of Little Sage Creek mandates a conclusion that the Cook right was converted from irrigation to stock watering.

The Water Master correctly framed the issue as follows: "The question before the Court, however, is not whether these stockwater appropriations existed but whether they have any relation to the 1912 decreed right that Matador claimed." Second Report, COL

10, p. 9. Having asked this question, the Master concluded that “while it is theoretically possible that Cook Sheep Company could have “marshalled” an existing stockwater right onto new lands after acquiring additional properties, Matador has not met its burden to present sufficient factual evidence for the Court to reach such a conclusion.” Second Report, COL 16. The acquisition of “additional lands along the unnamed tributary of Little Sage Creek is not in and of itself sufficient to find marshalling of stockwater.” Second Report, COL 16.

Applying this rationale, the Master concluded that the stockwater portion of the original Cook right was still appurtenant to Cook Sheep Company lands, but not to lands acquired later by Matador and its predecessors. In keeping with Matador’s acknowledgement that irrigation was no longer occurring, the Master’s recommendation was to recognize a stockwater right on Cook Sheep Company lands in the original claim filed by Matador. This recommendation makes sense, and is supported by the record.

The record does not show that Matador or its predecessors intended to change the Cook right from irrigation to instream stockwater. Nowhere in the original claim is there an indication of intent to convert from irrigation on the Cook place to stock watering on lands purchased years later. The absence of such evidence is significant because Matador filed the claim for the Cook right. The claim filed by Matador limited use of the Cook right to Cook Sheep Company land even though Matador owned the two expansion parcels at the time the claim was filed. If Matador intended to change or expand the Cook right, that goal was not revealed in the claim it filed in 1981.

The record indicates that although irrigation occurred, it was eventually discontinued. The cessation of irrigation is not evidence of intent to change the Cook right or expand its place of use. Matador’s present assertion that such a change occurred is speculative, and comes more than three decades after it filed a claim contradicting that assertion.

Matador’s motion to amend is an effort to apply the early priority date of the Cook right to lands on which it was not originally used.¹ This process is called marshalling.

¹ The Water Court rejected a similar effort in Case 41B-197. *See* ORDER REGARDING OBJECTION TO MASTER’S REPORT AND ORDER SETTING FILING DEADLINE, filed October 24, 2016.

Marshalling is often recognized with irrigation rights when the expansion from one parcel to another is supported by evidence of such use. The practice of marshalling is ripe for abuse unless limits are placed on the rights being marshalled to insure the amount of water diverted is not increased. A common method of establishing such limits is to set volume based on the amount of water originally used in conjunction with each right marshalled.

The evidence supplied by Matador indicates that stock was likely grazing the land Matador acquired in 1947 and 1967. It is also reasonable to assume that livestock on these parcels watered from the unnamed tributary of Little Sage Creek prior to acquisition, and that Matador's stock drank from the same source after acquisition. Missing from the picture however, is any evidence of a conscious effort on the part of Matador or anyone else to change the irrigation portion of the Cook right to stockwater use.

Granting Matador's motion to amend would allow any landowner to expand an early priority irrigation or stock right simply by buying adjoining property and retroactively claiming that the old right was extended to new lands. Such a practice would impose unprecedented burdens on junior water users, whose rights would become progressively less valuable.

Matador attempts to avoid this problem by asserting it has been using less water since irrigation with the Cook right stopped. While this assertion is undoubtedly true, it begs the question. That question is whether Matador or its predecessors intended to change the Cook right from irrigation on Cook Sheep Company land to stock watering elsewhere. Because Matador has the burden of proof on this issue, and because that question cannot be answered in the affirmative with available evidence, the Master was correct to limit the Cook right to stockwater use on the original Cook Sheep Company property.

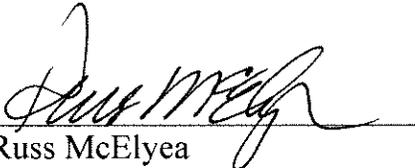
V. CONCLUSION

1. The irrigation portion of the Cook right was perfected.
2. Matador and its predecessors did not change the irrigation portion of the Cook right to instream stockwater use on lands not originally owned by Cook Sheep Company.

VI. ORDER

The Water Court declines to adopt findings of fact 16, 18, and 19 and conclusion of law 12 in the Second Master's Report filed March 24, 2017. The remaining portions of that Master's Report are adopted unless they conflict with this order. Claim 41A 88570-00 shall appear in the Final Decree for the Red Rock River, Basin 41A, in accordance with the abstract attached to the Second Master's Report.

DATED this *4* day of *May*, 2017.



Russ McElyea
Chief Water Judge

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