

DA 18-0142

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 9N

ROGER D. PETERS and CARRIE A. PETERS,

Claimants and Appellants,

v.

UNITED STATES OF AMERICA (Bureau of Reclamation),

Objector and Appellee.

APPEAL FROM: Montana Water Court, Case No. 41A-79
Honorable Douglas Ritter, Associate Water Judge

COUNSEL OF RECORD:

For Appellants:

Roger D. Peters and Carrie A. Peters, Self-Represented, Dillon, Montana

For Appellee:

Jeffrey H. Wood, Acting Assistant Attorney General, Eric Grant, Deputy Assistant Attorney General, John L. Smeltzer, Joseph H. Kim, Katherine W. Hazard, Environment & Natural Resources Division, United States Department of Justice, Washington, District of Columbia

Submitted on Briefs: November 14, 2018

Decided: January 8, 2019

Filed:

/S/ BOWEN GREENWOOD
Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Claimants Roger and Carrie Peters (collectively "Peters") appeal an order of the Montana Water Court adopting in large part the Water Master's report and recommendations on two water rights claims for flood irrigation from Nip and Tuck Creek in Beaverhead County. Both claims—one owned by Peters and one owned by the State of Montana, Board of Land Commissioners—received decree-exceeded issue remarks. The United States Bureau of Reclamation ("BOR") filed an objection to Peters's claim, Claim 41A 40254-00. The parties resolved all issues except for Peters's place of use and acres irrigated. Following an evidentiary hearing, the Water Master issued a report addressing the remaining issues, all of which were between Peters and BOR. Peters objected, BOR responded, and the Water Court considered the matter on the existing record. The Water Court adopted the Master's report and recommendations, including the number of acres irrigated, but modified the place of use. After Peters appealed, the State of Montana, Board of Land Commissioners filed a notice that it takes

no position in the appeal. BOR did not cross-appeal the Water Court's order and has briefed the case as Appellee.¹

¶3 Peters's predecessor in interest timely filed a statement of claim for flood irrigation of 135 acres located in the W2W2 of Section 24, T 11S, R 14W in Beaverhead County. During the adjudication process, Peters moved to amend the claim to reduce the number of irrigated acres to 93. This included ten acres in Section 13, T 11S, R 14W, and 83 acres in Section 24. BOR objected to both the number of acres and the place of use. After hearing evidence from both parties, the Water Master adopted the acreage calculated by BOR's expert, Kraig Van Voast, rejecting the opinion of Peters's expert, Julie Merritt. The Master explained:

The BOR conducted an extensive analysis of more than a dozen aerial photographs and was able to identify a clear pattern of historical irrigation on the claimed place of use, consisting of 58 acres located in the W2W2 of Section 24. The BOR's analysis and its site visit confirmed that while flood waters may be applied across a slightly larger area, there are some areas within the claimed place of use that are either non-irrigated or simply do not benefit from these floodwaters.

¶4 The Master noted that Merritt's analysis was more limited and that she based her assessment of additional acres on areas "hypothetically susceptible to flood irrigation" rather than confirmation of any historical irrigation. He recommended that Peters's claim be allocated 58 acres in Section 24 and no acres in Section 13, which was not part of the original claimed place of use.

¹ We have amended the caption on appeal to reflect the current status of the parties. M. R. App. P. 2(4).

¶5 On review of Peters’s objections to the Master’s Report, by which time Peters were self-represented, the Water Court denied their objection to BOR’s demonstrative hearing exhibits and their attempt to submit into the record additional photographs, maps, and materials to support their objections. On the record submitted to the Water Master, the Water Court held that the Master correctly determined the historically irrigated acres to be 58 acres in Section 24 and none in Section 13, but it altered the place of use. Although the Water Court agreed that the Master’s recommendations for place of use and acres irrigated were based on substantial evidence, the court harbored a “definite and firm conviction” that the Master erred in his location of the historical place of use. Relying on a 1955 aerial photograph referenced in the Master’s Report, the Water Court concluded that the evidence the Master used to exclude the area east of a dotted line shown on that photograph was speculative:

The actual meaning of the dotted line on the 1955 aerial photograph is not clear. Since the State never completed a water resources survey for Beaverhead County, placing significant weight on these markings has little credibility. The BOR agrees the area was historically irrigated but [argues that it] must have used some other source of water. However, no alternate source was identified.

(Internal citation omitted). The Water Court observed that Roger Peters was using the same historical ditches for irrigated pasture on both sides of the dotted line, which “is in the same field.”

¶6 The Water Court also faulted the Master’s decision to include acres in the northern portion of the disputed place of use in Section 24. Noting that the DNRC’s claim examination identified fewer than 40 acres irrigated in 1955 and 1979, the court found

that all of the irrigation was in the southeastern portion of the disputed place of use in Section 24. It relied on aerial photographs dating from 1942 until 1979, which the court concluded “all show considerable irrigation in the south half of Section 24 and no irrigation in the north half of Section 24 or Section 13.”

¶7 Even though the Water Court disagreed with the Master’s identification of the place of use, it determined that the area the Master erroneously included and the area the Master erroneously excluded were “approximately equal in size.” The 58-acre total accordingly did not change.

¶8 The Water Court reviews a Water Master’s findings of fact for clear error and the Master’s conclusions of law to determine whether they are correct. *Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 25, 375 Mont. 327, 328 P.3d 644. “This Court then reviews ‘the Water Court’s order de novo, to determine whether it correctly applied the clear error standard of review to the Master’s findings of fact and whether its conclusions of law were correct.’” *In re Quigley*, 2017 MT 278, ¶ 8, 389 Mont. 283, 405 P.3d 627 (quoting *Skelton Ranch, Inc.*, ¶ 26).

¶9 Peters argue that they are entitled to the ten claimed acres in Section 13 because they have used the same ditch to irrigate those acres that was in place prior to July 1, 1973, and the BOR failed to offer any evidence contradicting that historical use. Peters agree with the Water Court’s allocation of acres to the place of use in the southeastern portion on both sides of the dotted line in Section 24, but take exception to the court’s “swapping” those acres for the place of use the Master allocated in Section 24, arguing

that even the BOR acknowledged the presence of irrigated acreage in the northern portion of Section 24. Peters point out that the Water Court did not specifically identify what area in the northern part of Section 24 it found was not historically irrigated and protest that the court adopted a position they never had a chance to address. Peters also take issue with the Water Court's methodology, arguing that it considered some post-1973 photographs but not others and used their efficient use and improvement of the pre-1973 ditch against them.

¶10 The BOR responds that the Master and the Water Court correctly excluded the Section 13 acreage because Peters were seeking to add acreage not included in the original Statement of Claim and failed to meet their burden of proving historical irrigation on that acreage. BOR maintains that the aerial photographs show that, at least prior to Peters's ownership, the water source for the area they claimed in Section 13 was not the Peters's ditch.

¶11 With respect to Section 24, BOR argues that the court should accept the findings, conclusions, and recommendation of the Master's Report. BOR argues that the Water Court erred by substituting its judgment for that of the Master in determining the place of use. BOR points out that the Water Court not only included acreage in the southeastern area of the disputed place of use in Section 24—which the Master had excluded—but also excluded *all* acreage in the northern area, while the Master had excluded only the “high spots” within that area. BOR urges this Court to affirm the Water Court's judgment on the basis of the Master's correct findings and not on the basis of the Water

Court's erroneous different findings. BOR essentially urges the Court to reverse the Water Court's findings on place of use and to reinstate the Master's findings.

¶12 Addressing Section 13 first, we agree with the Water Court that the Master did not clearly err in failing to allocate any acreage to Peters's place of use. Section 13 was not included in the initial statement of claim for Peters's water right. As the proponent of their amended claim, Peters had the burden to prove by a preponderance of the evidence that the claimed ten acres in Section 13 had been historically irrigated. *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558; W. R. Adj. R. 19. Review of the record convinces us that the Water Court correctly applied the applicable standard of review when it upheld the Master's conclusion that Peters did not meet their burden. Although Peters relied on their interpretation of the aerial photographs, neither Peters nor Julie Merritt offered testimony about actual historical irrigation on Section 13 prior to July 1, 1973. As the court observed, the photos supported Peters's testimony that he had increased irrigation on the land since his 1989 purchase.

¶13 Turning to the claimed place of use in Section 24, Peters argue that the Water Court's findings should be affirmed insofar as they concern the acreage in the southeastern portion of the claimed place of use in Section 24. They challenge the Water Court's rejection of any acreage in the northern portion of Section 24, arguing that the issue before the Water Court was not whether to exclude all acreage in that portion but whether the Master erred when he excluded certain "holes" of high ground from that portion. BOR does not defend the Water Court's decision to exclude all acreage in the

northern portion of the disputed area in Section 24. It argues that the Master's findings were not clearly erroneous.

¶14 BOR instead urges this Court to reverse the court's decision to include acreage in the southeastern portion and devotes considerable briefing to why the Water Court's findings on that point are clearly erroneous. As noted, BOR did not file a notice of cross-appeal following entry of the Water Court's judgment. "[As a] general rule . . . a cross-appeal is not necessary to enable a prevailing party 'to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court.'" *Nasca v. Hull*, 2004 MT 306, ¶ 18, 323 Mont. 484, 100 P.3d 997 (quoting *City of Missoula v. Robertson*, 2000 MT 52, ¶ 20, 298 Mont. 419, 998 P.2d 144). But when an appellee "seeks review of rulings on matters separate and distinct from those sought to be reviewed by an appellant, a cross-appeal is necessary." *Silva v. City of Columbia Falls*, 258 Mont. 329, 332-33, 852 P.2d 671, 674 (1993) (internal quotations omitted). Peters seek review only of the Water Court's decision to exclude acres the Master allocated in the northern portion of Section 24. BOR briefs an argument that Peters have not raised: the allocation of additional acres by the Water Court in the southeastern portion of Section 24 that the Master excluded. By raising this argument, BOR goes beyond "defend[ing] its judgment," *Nasca*, ¶ 18, seeking instead to partially reverse that judgment. Because BOR did not cross-appeal the Water Court's decision to include acres in the southeastern portion of the disputed area in Section 24, its arguments are not properly before the Court.

¶15 In any event, upon de novo review of the Water Court’s ruling, we conclude that it did not misapply the standard of review in rejecting the Master’s findings with respect to the southeastern portion of the disputed area in Section 24. The State never completed a water resources survey for the area and, as Peters pointed out during argument on their objections, there is no explanation in the record of what was depicted by the dotted line the State’s surveyor appeared to have drawn in his 1973 overlay on the 1955 aerial photograph. “[T]he Water Court may correct the Water Master’s findings if the findings were not supported by substantial evidence, which ‘need not amount to a preponderance of the evidence, but it must be more than a scintilla.’” *Quigley*, ¶ 24 (quoting *Skelton Ranch, Inc.*, ¶ 27). And “[a] reviewing court may still find a factual finding is clearly erroneous even though there is evidence to support it.” *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 18, 383 Mont. 205, 369 P.3d 1034 (internal citation omitted). As the objector, BOR had the burden of proving that the place of use was different from that in the Statement of Claim. *See Nelson*, ¶ 34. In the absence of evidence in the record explaining the dotted line, and given the testimony and other evidence, including the topography of the area and the photographs suggesting the same amount of irrigation on both sides of the dotted line, the Water Court did not depart from the standard of review when it found clear error in the Master’s findings on the southeastern portion of the disputed area in Section 24.

¶16 The Water Court did err, however, in rejecting the Master’s findings with respect to the northern portion of Section 24. The only objection before the court to those

findings was the objection Peters raised—that the Master erred by excluding the high-ground “holes” Van Voast had determined were not irrigated. Neither BOR nor Peters objected to the inclusion of the remaining acreage the Master awarded in the northern portion of the disputed place of use. We have made clear that a court may not modify a master’s findings and conclusions not specifically objected to by either party. *Scrantom v. Masters*, 2018 MT 109, ¶ 9, 391 Mont. 251, 417 P.3d 339; *In re Marriage of McMichael*, 2006 MT 237, ¶ 15, 333 Mont. 517, 143 P.3d 439. BOR presented no evidence and made no argument before either the Master or the Water Court to exclude the entire northern portion of Peters’s claimed place of use in Section 24.

¶17 On the other hand, we reject Peters’s claim to error in the Master’s exclusion of the high-ground “holes” that Van Voast identified. The evidence regarding the “holes” was a key point of dispute, and the parties’ experts reached conflicting opinions. “The Water Court may not simply substitute its judgment for the Water Master’s when reviewing the Master’s factual findings.” *Quigley*, ¶ 24. “Although conflicts may exist in the evidence presented, it is the duty of the trial judge to resolve such conflicts. Due regard is to be given the trial court’s ability to judge the credibility of the witnesses.” *Quigley*, ¶ 24 (internal citation omitted).

¶18 Finally, we will not disturb the Water Court’s rulings on Peters’s evidentiary objections. The court correctly considered BOR’s demonstrative “B” exhibits after the parties referred to them during the hearing on Peters’s objections, and it concluded within

its discretion not to receive further evidence in its review of the Master's Report. See M. R. Civ. P. 53(e)(2).

¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. In summary, we uphold the Water Court's determination to exclude the ten acres Peters claimed in Section 13 and to include the disputed southeastern portion in Section 24. We reverse the Water Court's decision to exclude the entire northern portion of Peters's claimed place of use in Section 24 and remand for the court to reinstate the Master's findings that exclude only the areas of high ground Van Voast identified in that portion of the disputed area. The Water Court's order is affirmed in part and reversed in part. The case is remanded for further proceedings to determine the number of acres irrigated and the place of use in accordance with this Opinion.

/S/ BETH BAKER

We Concur:

/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ JIM RICE