

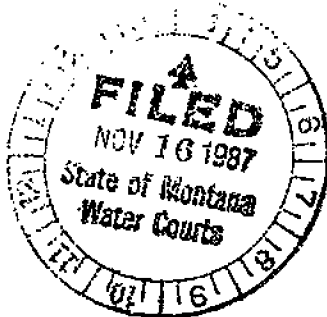
IN THE WATER COURTS OF THE STATE OF MONTANA

UPPER MISSOURI DIVISION - MADISON RIVER BASIN (41F)

* * * * *

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO THE USE)
OF ALL THE WATER, BOTH SURFACE AND)
UNDERGROUND, WITHIN THE MADISON)
RIVER DRAINAGE AREA, INCLUDING ALL)
TRIBUTARIES OF THE MADISON RIVER)
IN BEAVERHEAD, GALLATIN AND MADISON)
COUNTIES, MONTANA.)
-----)

CLAIM NO. 41F-W-117357-00
CASE NO. 41F-69



CLAIMANT: John and Donna L. Bausch
Sam P. and Sherry J. Scott

OBJECTOR: Thomas and Diana Wilson
Lewis and Mildred Hughes
Lawrence Gibbs
Robert Nelsen
J & M Land and Livestock, Inc.

Based upon review of the Statement of Claim, all other pertinent filings, and the testimony given at the hearing of this matter on December 10, 1986 in Virginia City, Montana, the following Master's Report is submitted.

MASTER'S REPORT

STATEMENT OF THE CASE

This statement of claim was filed by John and Donna L. Bausch for 250.00 miner's inches of high water from South Meadow Creek with a priority date of April 1, 1872. Amendments to the claim were made requesting a priority date of April 1, 1917 and a flow rate of 220.00 miner's inches.

In 1984 this water right and the property to which it is appurtenant were transferred to Sam P. and Sherry J. Scott d.b.a. Triple S. Ranch. In 1987, the Scotts quitclaimed the property and water rights back to the Bauschs.

The following objections were filed against this claimed right:

- A. Priority date, volume and flow rate by Robert S. Nelsen.
- B. Ownership by Lewis A. Hughes, Ora A. Megee, Thomas J. Wilson and James E. Robertson.
- C. Volume and flow rate by J & M Land and Livestock, Inc.
- D. Ownership, priority date, purpose of right, period of use, place of use, acres irrigated, source, point of diversion, means of diversion, volume and flow rate by Lawrence Gibbs.

Conditioned upon changing the priority date to April 1, 1917 as requested in one of the Amendments, a Withdrawal of Objection was filed by Ora A. Megee on September 8, 1986 and by J & M Land and Livestock on September 17, 1986.

The hearing was held on December 10, 1986 in the Madison County Courthouse, Virginia City, Montana. Loren Tucker appeared on behalf of Sam P. and Sherry J. Scott, d.b.a. Triple S Ranch. Robert S. Nelsen appeared with Rhett Hurless. Thomas J. Wilson and Lewis A. Hughes each appeared on their own behalf. Following is a brief recitation of the testimony given:

A. Robert S. Nelson, called by Loren Tucker, testified that he has been on South Meadow Creek for the last twenty-six years. Everybody takes high water that is in excess of the 1909 decreed rights. The amount of high water varies year to year. Generally there is no measurement of the water because usually there is not a ditch rider on the creek when the high water comes down.

B. John Bausch, called by Loren Tucker, testified that his father bought the ranch in 1917 and first used the high water that irrigation season. He stated that his father used the high waters openly and never asked permission to take those waters. He and his father have taken high waters every year. He stated that he and his dad have always taken high waters through the Remington Ditch. The maximum capacity of Remington Ditch before the county worked on the culvert in 1981 or 1982 was about 250.00 miner's inches. The current maximum capacity is about 200 miner's inches. He also used the Remington Ditch to convey his decreed water rights: 40.00 miner's inches 1872, 20.00 miner's inches 1876, 25.00 miner's inches 1887 and 50.00 miner's inches 1909. There is also some conveyance loss in this ditch. Last irrigation season (1985) he estimated an additional 40.00 miner's inches conveyance loss needed to convey his decreed rights to the place of use.

C. Riley Wilson, called by Loren Tucker, testified that he is the current lessee of the Bausch/Scott property and uses this claimed water right through the Remington Ditch. He stated that the current maximum capacity of the ditch is about 175.00 miner's inches.

D. Thomas J. Wilson, called by Rhett Hurless, testified that he was the ditch rider for South Meadow Creek for the last irrigation season. He stated that the current maximum capacity of the Remington Ditch is about 180.00 miner's inches. If repaired, the maximum capacity of the ditch would be about 220.00 miner's inches.

FINDINGS OF FACT

I

High or flood water has been used by John Bausch and by his father every year since his father purchased and first irrigated the property in 1917.

II

The priority date should be April 1, 1917.

III

The source is high or flood water of South Meadow Creek.

IV

The means of conveyance for this high or flood water is the Remington Ditch.

V

The maximum capacity of the Remington Ditch just prior to the work done to the culvert by the county in 1981 or 1982 was approximately 250.00 miner's inches.

VI

As no evidence was submitted nor testimony given which would indicate otherwise, it is assumed that 250.00 miner's inches would also be the maximum capacity of Remington Ditch prior to July 1, 1973.

VII

The Remington Ditch is also the means of conveyance for 135.00 miner's inches of decreed water rights owned and used by Bausch.

VIII

There is also a conveyance loss in Remington Ditch which is required to insure delivery of the decreed 135.00 miner's inches to the Bausch place of use.

IX

As no evidence was submitted or testimony given which would indicate otherwise, it is assumed that the Remington Ditch has been used to convey simultaneously both the decreed rights and the high or flood water.

X

As the maximum capacity of the Remington Ditch prior to July 1, 1973 is 250.00 miner's inches and the amount of Bausch decreed rights conveyed through this ditch is 135.00 miner's inches, the maximum amount of additional water which could be conveyed through Remington Ditch is 115.00 miner's inches.

XI

The conveyance loss varies year to year. Each year an estimated conveyance loss is filed with the Clerk of Court, Madison County, Montana, as directed in Cause number 1183, Fifth Judicial District, Madison County, Montana.

XII

The amount of high or flood water taken each year is also variable due to the fluctuating conveyance loss.

XIII

The following remark should be added to clarify the quantification of this high or flood water right:

FLOW RATE: The flow rate of this right shall be calculated on a yearly basis. The flow rate shall be 115.00 miner's inches minus the estimated conveyance loss filed by the claimant with the Clerk of Court, Madison County, Montana as Ordered by Judge W. W. Lessley on June 25, 1986 and July 30, 1986 in cause number 1183, Fifth Judicial District, Madison County Montana.

XIV

The ownership, purpose of right, period of use, place of use, acres irrigated, point of diversion, means of diversion and volume do not need to be changed.

CONCLUSIONS OF LAW

I

The Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to 85-2-233, Mont. Code Anno.

II

Upon review and consideration of the Statement of Claim, the other pertinent filings and testimony given at the hearing, the changes stated in Conclusions of Law III, IV and VI below, should be made.

III

The priority date should be April 1, 1917.

IV

The source should be South Meadow Creek (high or flood water).

V

The sum total of the Bausch water rights cannot exceed the maximum capacity of the Remington ditch. See generally Bailey v. Tintinger, 45 Mont. 154, 122 Pac. 575 (1912); Wheat v. Cameron, 64 Mont. 494, 210 Pac. 761 (1922); and Jacobs v. City of Harlowton, 66 Mont. 312, 213 Pac. 244 (1923).

VI


The flow rate should be:

FLOW RATE: The flow rate of this right shall be calculated on a yearly basis. The flow rate shall be 115.00 miner's inches minus the estimated conveyance loss filed by the claimant with the Clerk of Court, Madison County, Montana as Ordered by Judge W. W. Lessley on June 18, 1986 and July 30, 1986 in cause number 1183, Fifth Judicial District, Madison County Montana.

VII

There are no other changes to be made to this claim.

DATED this 12th day of November, 1987.


Kathryn J. W. Lambert
Water Master

ORDER

After review of the Master's Report it is
ORDERED that the above changes are to be made to claim
number 41F-W-117357-00 of the Temporary Preliminary Decree of
Existing Water Rights of the Madison River Basin.

DATED this 13 day of Nov, 1987.


W. W. Lessley
Chief Water Judge

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