

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)

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IN THE MATTER OF THE ADJUDICATION OF ) CASE 41H-4  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDERGROUND,) 41H-W-003805-00  
WITHIN THE GALLATIN RIVER DRAINAGE AREA )  
INCLUDING ALL TRIBUTARIES OF THE )  
GALLATIN RIVER IN GALLATIN, PARK AND )  
MADISON COUNTIES, MONTANA )

FILED

CLAIMANT: A. James Kurk and Erma H. Kurk

JAN 15 1992

OBJECTOR: Frank Morgan

Montana Water Court

ORDER ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, § 85-2-233(4), the above entitled case was assigned to Water Master Patti L. Rowland. On December 14, 1990, the Water Master issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. On December 21, 1990, an objection was filed to the Master's Report by Frank Morgan on the basis that the Master did not consider Objector's Exhibit E, "The Complaint in Intervention of Angie Reynolds." Objector requested another hearing. On December 24, 1990, a response to Mr. Morgan's objections to Master's Report was filed by A. James Kurk and Erma H. Kurk.

On November 19, 1991, the undersigned accompanied at different times by James Kurk, Erma Kurk and Frank Morgan, viewed the area in question by walking "East Spring Creek" from its confluence with Bear Creek to the southern boundary of Frank Morgan's property. Additionally, the undersigned viewed "West Spring Creek" from its confluence with Bear Creek to the southern

boundary of the Kurk property. About 2" of snow was on the partly frozen ground but the boundaries of the two creeks were clearly discernable on the Kurk property and on the northern part of the Morgan property. The separation of the confluences of West and East Spring Creek with Bear Creek appears to be less than one-half mile according to Objector's Exhibits B and G and Claimants' Exhibit 1.

The Court has reviewed carefully the Water Master's Findings and Conclusions and the objection and response filed. The Court has listened to the tape recording of the June 27, 1990 hearing and has read the complete file in this matter. A hearing on the objection was held on December 2, 1991.

Rule 53(e)(2) M.R.Civ.P. requires a Court to accept a Master's Findings of Fact unless clearly erroneous. The Court cannot conclude that the Master's Findings of Fact are clearly erroneous. Once the Findings of Fact are determined not to be erroneous, then the Master's ultimate Conclusions of Law represent a correct application of the law to the facts and should not be disturbed.

Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court adopts the Master's Report and

ORDERS that changes recommended in the Master's Conclusions of Law be made to the abstract of claim listed above as it appears in the Temporary Preliminary Decree of the Gallatin River Basin (41H).

MEMORANDUM

Rule 53(e)(2) M.R.Civ.P. requires this Court to accept a Master's Findings of Fact unless clearly erroneous. The Montana Supreme Court recently adopted a three-part test to determine if the Findings of Fact of a trial court are clearly erroneous. See Interstate Production Credit Assn. v. DeSaye, 48 St. Rep. 986 (1991).

This Court uses a similar test for reviewing a Master's Findings of Fact. First, this Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, this Court then determines whether the Master has 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. The Master's findings in this case pass this three-part test.

This case exemplifies some of the difficulties encountered during the adjudication process. The Water Court is required to adjudicate water rights that are of ancient origin with less than perfect evidence. Rarely are witness still available to testify as to the first use of these water rights. The Court is periodically presented with mutually exclusive and conflicting secondary evidence. Recognizing the potential evidentiary problems

present in adjudicating prior existing water rights, the Montana Legislature passed Section 85-2-227 MCA which states in pertinent part as follows:

"For purposes of adjudicating rights pursuant to this part, a claim of an existing right filed in accordance with 85-2-221 or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree.  
. . ."

The claim of existing right filed in this proceeding by the Kurks identifies the source of water as "A Certain Spring Creek." The aerial photo attached to the statement of claim identifies the location of "A Certain Spring" to be the same water source identified as East Spring Creek on Objector's ("Opposer's") Exhibit B. For better or for worse, Section 85-2-227 MCA places the burden on the Objector in this proceeding to overcome the presumption that the Claimants' water source is East Spring Creek. The Objector failed to overcome that burden.

There was no evidence introduced at the June 27, 1990 hearing indicating the prior existence of any ditch out of West Spring Creek. Mr. Kurk said that in the 40 years he has been on the property that he has not seen an indication of any ditches coming out of West Spring Creek to irrigate the Kurk property. Mrs. Kurk testified that she has lived her entire life on the property, that she is the third generation in her family to do so, and that she knows of no water right out of West Spring Creek. There simply was no specific evidence introduced which could specifically pinpoint the original source of supply.

The major evidence presented by Objector of the original

source of supply for the Angie Reynolds Spring Creek right required the source to be divined from the introduced pleadings of the case of Lee v. Wolverton, the original 1903 decree. The Objector asserts that the Master did not give the Complaint in Intervention of Angie Reynolds (Objector's "Opposer's" Exhibit E) any consideration in reaching her conclusion.

The Angie Reynolds' Complaint and the subsequent Bear Creek Decree refer to broad legal descriptions which identify Spring Creek in a manner that fits both East and West Spring Creek. Either source could have been the original source of supply according to the descriptions set forth. Consequently, the Court agrees with the Water Master that the Lee v. Wolverton decree is inconclusive as to whether the water source for Angie Reynolds was "East" or "West" Spring Creek. Objector's reliance on the language in the Complaint could very well be a correct interpretation but, then again, Claimants' interpretation might also be correct. Since the Court cannot conclusively establish which interpretation of an ambiguous decree is correct, it must primarily rely on the "prima facie" statute in deciding that the original source of supply was East Spring Creek.

Further buttressing the Claimants' position, however, is the unrebutted testimony presented by Claimants that no water has been used out of West Spring Creek in the sixty years that Erma Kurk has been on the property, that West Spring Creek does not have sufficient water flowing in it to irrigate more than 2 acres and that it often runs dry during the summer. It seems unlikely that

the District Court in Lee v. Wolverton would have decreed 50" out of a creek which only irrigates 2 acres. Without more definitive evidence in the record, the "prima facie" statute dictates that this Court accept the source of supply as set forth in the Statement of Claim.

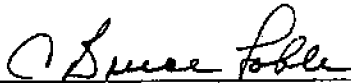
This Court has reviewed the record. Based upon the prima facie proof statute (Section 85-2-227 MCA) this Court concludes that the Master's findings are supported by substantial evidence. The Master has not misapprehended the effect of the evidence or of the prima facie statute. Furthermore, a review of the evidence does not leave this Court with a definite and firm conviction that a mistake has been committed.

This Court adopts the Master's Report in whole.

A final point should be made here regarding the Claimants' diversion of Spring Creek water from Bear Creek. East Spring Creek water flows into Bear Creek upstream of the Claimants' Bear Creek point of diversion. Bear Creek is used by Claimants as a natural conveyance for Claimants' Spring Creek water. Such use of a natural channel was permitted by Section 89-804 RCM 1947 and is still permitted under the Montana Water Use Act. The fact that Claimants divert their Spring Creek water right out of Bear Creek does not authorize them to divert Bear Creek water (except for their previously decreed Bear Creek right) when the flow of East Spring Creek into Bear Creek is insufficient to satisfy all or a portion of Claimants' 50" East Spring Creek right. Claimants are not to make up any East Spring Creek water deficiency with Bear

Creek water. Claimants may divert their East Spring Creek water right out of Bear Creek only in the amount that East Spring Creek water actually flows into Bear Creek.

DATED this 15<sup>th</sup> day of January, 1992.

  
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C. Bruce Loble  
Chief Water Judge


CERTIFICATE OF SERVICE

I, Melody J. Colwill, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER ADOPTING MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

A. James and Erma H. Kurk  
433 Bear Canyon Road  
Bozeman, MT 59715

Frank Morgan  
1300 Mount Ellis Road  
Bozeman, MT 59715

DATED this 15<sup>th</sup> day of January, 1992.

  
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Melody J. Colwill  
Deputy Clerk