

Montana Water Court  
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**FILED**

NOV - 4 1993

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
BOULDER RIVER, TRIBUTARY OF THE JEFFERSON RIVER (Montana Water Court  
\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF ) Case No. 41E-24  
THE EXISTING RIGHTS TO THE USE OF ALL ) 41E-W-093880-00  
THE WATER, BOTH SURFACE AND UNDERGROUND ) 41E-W-093881-00  
WITHIN THE BOULDER RIVER, TRIBUTARY OF ) 41E-W-093883-00  
THE JEFFERSON RIVER DRAINAGE AREA, ) 41E-W-093885-00  
INCLUDING ALL TRIBUTARIES OF THE )  
BOULDER RIVER, TRIBUTARY OF THE )  
JEFFERSON RIVER IN JEFFERSON COUNTY, )  
MONTANA. )

CLAIMANT: Thomas H. Boone, Trustee for Delos E. Robbins

MOTION OF THE MONTANA WATER COURT

OBJECTOR: John Carey Ranch, Inc., Tom Carey Cattle Company,  
George Dawson Ranch

ORDER TO PERMIT ADDITIONAL EVIDENCE  
AT REVIEW HEARING

Pursuant to § 85-2-233(4), MCA, and Rule 53, M.R.Civ.P., the objections to the above claims were referred to Water Master Patrick Sheridan. After hearing, the Master issued reports in accordance with Rule 53(e), M.R.Civ.P. on December 28, 1990. The objectors Tom Carey Cattle Co. and John Carey Ranch, Inc. filed objections to the Master's Reports on these three claims.

The Water Court, the Honorable Roy C. Rodeghiero, Water Judge, presiding, set a hearing date on the objections to the Master's Reports. On August 12, 1993 Tom Carey Cattle Company filed its Motion to Permit Additional Evidence at the Review Hearing. The parties submitted briefs on the Motion and the Court conducted a telephonic hearing of the Motion on September 20, 1993. At the hearing objector John Carey Ranch joined in the Motion.

Claimants Thomas H. Boone and Delos E. Robbins opposed the Motion.

After careful consideration of the arguments made at hearing and in the briefs filed, it is

ORDERED that the Motion of the Tom Carey Cattle Company is GRANTED with respect to claims 41E-W-093881-00 and 41E-W-093885-00 for the reasons stated in the accompanying Memorandum.

#### MEMORANDUM

Objector's Motion raises issues regarding the scope of review of a Water Master's Report by a Water Judge. This review is governed by Rule 53(e)(2), M.R.Civ.P. The Rule provides:

In nonjury actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

See also Mehl v. Mehl, 241 Mont. 310, 314-15, 786 P.2d 1173 (1990).

(Emphasis added.) The scope of review stated in the rule is the "clearly erroneous" standard. Generally, the following three part test is used by the Water Court when reviewing a Master's findings of fact under this standard:

First, the 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.

Order Adopting Master's Report, Case 41H-4, Montana Water Court, January 15, 1992; citing Interstate Production Credit Association v. DeSaye, 250 Mont. 320, 323, 820 P.2d 1285 (1991). The first step of this test requires the court to review the record made at hearing before the Master. See, generally 5A Moore's Federal Practice, § 53.13(2), p. 53-131, citing B. F. Sturtevant Co. v. Massachusetts Hair and Felt Co., 122 F.2d 900, 915 (1st Cir. 1941); see also, e.g., Corporacion Salvadorena de Calzado, S.A. v. Injection Footwear Corporation, 533 F.Supp. 290, 299 (Fla.1982.), Halderman v. Pennhurst State School and Hospital, 533 F.Supp. 660, 664-5 (Pa.1982), Robinson v. Central Loan and Finance Corp., 609 F.2d 170 (5th Cir. 1980), D.M.W. Contracting Co. v. Stolz, 158 F.2d 405 (D.C.Cir. 1946); cf. DeHaan v. Gallatin-Madison Ranch, 250 Mont. 304, 308, 820 P.2d 423 (1991) (holding that where there is substantial evidence to support the referee's report, it is to be confirmed by the Court).

If the Court finds the Master's findings clearly erroneous under any of the three parts of the test, subsection (e)(2) of the Rule provides the Court with several options, including receiving further evidence or recommitting the case to the Master with instructions. The test ensures that a party is not deprived of the opportunity to present its case fully; and, at the same time, it prevents unduly burdening a faultless party who has already met its evidentiary burden at the first hearing.

Thus, as a general rule, the clearly erroneous test is

the applicable standard for the taking of additional evidence under Rule 53. However, an exception to the test exists where a Master's findings are conclusory and, as a result, the reviewing court is unable to follow the Master's reasoning. In United States v. Merz, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629, 634 (1964), the United States Supreme Court held that where the findings of a commission appointed for eminent domain proceedings and subject to Rule 53 review are conclusory and do not indicate the reasoning or process used in deciding on particular awards, the clearly erroneous standard does not apply. The Court reasoned that conclusory findings are normally not reviewable by the "clearly erroneous" standard, even when the trial court reads the record, for it has no way of knowing what path the trier of fact took through the maze of conflicting evidence. United States v. Merz, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629, 634 (1964). The Court held that "the District Court in each of these cases should have the opportunity under Rule 53(e)(2) to make its decision afresh, in light of this opinion. . . . [a]nd in light of the exigencies of the particular case, the court should itself resolve the disputes on the existing records, (citations omitted) . . . or on those records as supplemented by further evidence." Merz, 11 L.Ed.2d at 635.


In this case, the Master's findings of fact on claims 41E-W-093881-00 and 41E-W-093885-00 merely state how the claims appeared in the temporary preliminary decree and what changes should be made to them as the result of the hearing. There is no discussion of what evidence the master considered in making these findings. The findings are conclusory with respect to these two claims, and it is within this Court's discretion to base its

decision on the existing record as supplemented by further evidence. Merz, 11 L.Ed.2d at 635.

The findings in the Master's Report for claim 41E-W-093883-00, on the other hand, consist primarily of a discussion of legal issues concerning the admissibility of a Notice of Appropriation and are not conclusory. Thus, at the outset, the Court will be able to review the Report to determine if a mistake in law has been committed regarding this claim. Further evidence with respect to this claim does not appear to be necessary at this time.

Therefore, for the reasons discussed above, objectors Motion to Permit Additional Evidence at Review Hearing is GRANTED with respect to claims 41E-W-093881-00 and 41E-W-093885-00. Further evidence regarding claim 41E-W-093883-00 does not appear necessary at this time. Additional evidence as is determined necessary in the Court's discretion may be allowed in accordance with Rule 53(e) M.R.Civ.P.

Dated this 29<sup>th</sup> day of October 1993

  
Roy C. Rodeghiero  
Water Judge

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