

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
SUN RIVER BASIN (41K)

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF ) Case No. 41K-5  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDERGROUND, ) 41K-W-096336-00  
WITHIN THE SUN RIVER DRAINAGE AREA, ) 41K-W-096337-00  
INCLUDING ALL TRIBUTARIES OF THE SUN )  
RIVER IN TETON, LEWIS AND CLARK, AND )  
CASCADE COUNTIES, MONTANA. )

**FILED**

MAR 12 1998

CLAIMANT: Roger B. & Thelma F. Krebs (Former Owner)  
Tee Bar Ranch Co. (Present Owner)  
Oscar A. Kenck, Jr. (Former Owner)  
Mark E. Young (Present Owner)

Montana Water Court

ON MOTION OF THE WATER COURT

OBJECTOR: Tee Bar Ranch Co., Richard N. Artz, LF Ranch,  
United States of America (Bureau of Indian Affairs)  
United States of America (Bureau of Reclamation)  
Sun River Valley Ditch Co., Kelly-Moore Paint Co.

**MEMORANDUM OPINION**

On September 29, 1995, Water Master Douglas Ritter filed his report containing Findings of Fact and Conclusions of Law. Timely objections to the report were filed by claimant Mark E. Young through his attorney, David L. Pengelly, and by objector Tee Bar Ranch Co. through its attorney, Holly J. Franz. Briefs were filed. David L. Pengelly and Holly J. Franz presented oral argument by telephone conference call on November 21, 1997.

**Background**

This case involves two claims based on rights decreed in 1911 in McIver v. Campbell, Cause 4742, Cascade County. The

claimant and objector share ownership of two decreed rights. Young's portion of these two rights are at issue in this case.

Tee Bar Ranch argues that Young's portion of these two decreed rights were abandoned by his predecessor through non-use. The Master found the water rights were not abandoned and that 107 acres were historically irrigated by Oscar Kenck, a predecessor in interest to Mark E. Young, the current claimant.

Tee Bar Ranch objects to Findings of Fact 6, 7, 9, 11, 12, 13, 14, 15 and Conclusions of Law IV, V, VI and VIII of the Master's Report.

Mark E. Young objects to Findings of Fact 14 and 15. He argues that the Master's deletion of a thirty acre tract in the place of use was a clerical error and should be corrected.

#### **Issues**

The issues before the Court are:

1. Did the Master err in finding that Young's irrigation claims were not abandoned by non-use?
2. Did the Master err in determining the period of use?
3. Did the Master err in determining the place of use?
4. Did the Master err in finding that Oscar Kenck's use of the Vaughn Ditch represented a valid exercise of these water rights?

#### **Standard of Review**

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 follows 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, 250 Mont. 320, 323,

This Court uses a similar test for reviewing objections to a Master's Findings of Fact. First, this Court reviews 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.

Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting. Arnold v. Boise Cascade Corp., 259 Mont. 259, 265, 856 P.2d 217 (1993). It is more than a scintilla, but less than a preponderance of evidence. State v. Shodair, 273 Mont. 155, 163, 902 P.2d 21, 26 (1995). Legal conclusions are reviewed for their correctness.

#### **Discussion**

The two water right claims of Mark Young at issue here and some rights of the Tee Bar Ranch are diverted from Smith Creek through the Vaughn Ditch. This ditch leaves the creek on Richard Mosher's land, flows through a portion of the Tee Bar Ranch toward the southwest corner of Young's land, where a measuring device is currently located ("Young's weir"), and then winds its way north through property variously identified as the Schlepp, Bailey or Stephens place to dead end into Young's stock pond located on state

lease land. On its way north, the ditch briefly loops once in and out of Young's land but primarily follows a route west of his property at varying distances from the boundary line.

The ditch apparently suffers a sizeable water loss during its journey. One water commissioner measured 365 miner's inches at the point of diversion and then measured 81 inches at Young's weir. This 78% ditch loss was calculated while the ditch was running approximately one third to one half of its capacity.

The areas of observable ditch loss have green vegetation. Tee Bar characterizes this loss as waste and seepage. Young refers to it as "subirrigation."

#### **Abandonment**

Tee Bar argues the two decreed water claims of Mark Young at issue here, totaling 374 miner's inches, were historically used only for stock purposes during the spring and fall by the former owner, Oscar Kenck, and that the irrigation component was lost by abandonment long ago.

There are two essential elements for the abandonment of a water right: nonuse and intent to abandon, and the initial burden of proving a period of nonuse sufficiently long to raise a rebuttable presumption of an intent to abandon falls on the objector. See In the Matter of the Adjudication of the Clark Fork, 274 Mont. 340, 344, 908 P.2d 1353 (1995).

Tee Bar's evidence of non-use was presented through several witnesses. Roland Mosher and Gerald Mosher, long time area residents and former or current principles in the Tee Bar Ranch, testified from their years of experience working the Tee Bar side of the fence line they shared with Oscar Kenck. They testified that

they could not recall seeing Mr. Kenck irrigate his property during their over sixty years on the Tee Bar Ranch and they were not aware of any turnouts or laterals from the Vaughn Ditch onto the Kenck property.

Roy Coghill leased the neighboring Bailey place from 1964-1977 and testified in a similar fashion. Mr. Coghill did say he "never paid much attention to Oscar" and that he "didn't come down much in the summer" because by the middle of June, he was gone on pack trips.

Although the Moshers and Mr. Coghill could not recall seeing Oscar Kenck irrigate his property, they did not discount the possibility that he did. They admitted that hay was harvested most years from the Kenck property and that water was required in the form of rain or irrigation to do so. Kenck's hay was usually in the north and south portions of the ranch. Gerald Mosher testified that Oscar Kenck asked him for water but he did not know if Mr. Kenck used it for irrigation.

Water right consultant Allen Kuser testified for Tee Bar. Based upon his review of aerial photographs of 1938, 1955, 1964 and 1978 and information from the 1957 Water Resource Survey of Cascade County, he concluded that irrigation had not taken place on the Kenck property for years. Mr. Kuser did not consider subirrigation from a ditch to be an acceptable means of irrigation, although, he recognized that a land owner gets some beneficial use of subirrigation from a ditch.

Mark Young presented testimony by John Westenberg, a water consultant. Mr. Westenberg's testimony conflicted with Allen Kuser's aerial photo interpretation. Mr. Westenberg reviewed aerial

photographs from 1938, 1966 and 1978 and concluded that 90 to 138 acres exhibited signs of subirrigation. Oscar Kenck testified that he irrigated his property when he could but he repeated several times that irrigation water was hard to get. The difficulty in obtaining irrigation water was mostly attributed to the Moshers not permitting it to flow down the ditch past the Tee Bar property. Mr. Kenck further testified to the benefits his property received from subirrigation.

Mr. Kenck testified he was 86 years old, recently suffered a stroke and had some memory losses, but his testimony was clear that either direct irrigation or subirrigation had taken place during his approximately 55 years on this ranch. He said the water was beneficially use and that he put up about 100 ton of hay each year.

The Master was required to determine whether these vested decreed rights were abandoned by non-use. The Master concluded Tee Bar Ranch failed to carry its initial burden of showing a long period of continuous non-use sufficient to indicate an intent to abandon. Conflicts in the evidence over non-use were resolved by the Master in favor of Mark Young. Substantial evidence supports the Master's findings.

Although irrigation was difficult, not constant, and, at times, seemingly incidental to stock use, there is sufficient evidence for a reasonable mind to accept as adequate support for the Master's conclusion that the irrigation rights were not abandoned.

#### **Period of Use**

Although substantial evidence supports a finding of no

abandonment, Mr. Kenck's testimony clearly reveals that these rights were not historically used in July and August. The Master's finding to the contrary is clearly erroneous. The period of use should be restricted to reflect the historical use of the water rights. The months of July and August are deleted from the period of use.

#### Place of Use

The place of use determined by the Master was based upon a stipulation between Mark Young and parties no longer actively involved in this case. Young is correct that the Master made a 30 acre clerical error in identifying the place of use in Findings 14 and 15. However, the legal descriptions in the stipulation are not entirely consistent with the evidence submitted at the hearing. A major portion of the place of use, including the area of clerical error, is clearly erroneous.

The place of use on the south half of the former Kenck property in Section 24 is the most readily identifiable. The aerial photos (particularly Exhibits O-7 and O-8) introduced through Allen Kuser outline seepage, cultivated and hayed acres in the south half. Although no testimony was presented as to the amount of acreage outlined on any of these exhibits (and the lands outlined are in slightly different locations), about 30 acres appear outlined on Exhibits O-7 (a 1955 aerial) and O-8 (a 1964 aerial).

This is consistent with Mr. Kenck's testimony that about 30 acres were subirrigated in the south half. Gerald Mosher testified that in this southern area of the Kenck property that "most every year he [Oscar Kenck] had hay unless there was a particularly dry year" and there was "seepage the full length [of

the Vaughn Ditch] from Tee Bar's check point [at the southwest corner of the Young property] to all the way through there, there was seepage."

The acres outlined on Exhibit O-8 represent the cropping patterns in 1964, a particularly wet year according to Ronald Mosher. Such a year would likely identify the maximum acreage that enjoyed the beneficial use of water. A copy of Exhibit O-8 with the acres outlined is attached.

The legal description of the place of use in the south half appears, from Exhibit O-8, to be about 24 acres in the NENW of Section 24 and about 6 acres in the S½SESW of Section 13. The place of use is amended to reflect that identified in the 1964 aerial photo, the most recent pre 1973 identifiable acreage.

With respect to the north end of the Young property, establishing a place of use is very difficult because the evidence of water usage in this area is tenuous. It consists of the prima facie claim that 680 acres were irrigated (conceded to be an overstatement), the verification of 470 acres by the Department of Natural Resources and Conservation (conceded to be a liberal review), the testimony of Mr. Westenberg that 90 to 138 acres of the Young property appears subirrigated (specific legal descriptions were not given), the stipulation, and the testimony of Mr. Kenck.

The testimony of Mr. Kenck and Mr. Westenberg conflicted to some extent. Much of Mr. Kenck's testimony dealt with actual irrigation efforts. Mr. Westenberg focused on subirrigation rather than actual irrigation.

Although the evidence presented satisfies the substantial

evidence test, it is very weak. After reviewing all the evidence, this Court is left with the definite and firm conviction that the Master made a mistake in establishing the place of use on the north end of the Young property.

Mr. Kenck testified that the Kenck Ditch connected with the Vaughn Ditch until Shorty Stephens plowed the ditch under "six or seven years ago." Mr. Kenck testified he "irrigated when I could, but which was very seldom" and that he irrigated "a little every year, probably, but it would have to be in the early spring or fall or otherwise you couldn't get it from Moshers." In July and August he couldn't get water to irrigate. When he irrigated, it was about 60 acres mostly north of the Kenck Ditch and about 20 acres south of the ditch that he "could kind of get to . . . but it was pretty rough, but I could irrigate a little."

The 1957 Water Resource Survey identifies no irrigation on the Young property. The Survey also indicates the Kenck Ditch was not in use at the time of the Survey and the Survey's supporting documentation identifies only stock water use. Mr. Coghill's testimony, covering 1964-1977, was that water was pretty short, and that Mr. Kenck declined to help clean the ditch because "as long as he had stock water, he had plenty."

The 1964 aerial photo (Exhibit O-8) does not depict ground being hayed on the north end as it does in Section 24. Mr. Westenberg did not identify much area as being irrigated. He confined his testimony mostly to subirrigation. Finally, the evidence of significant ditch loss makes it seem likely that water would be in short supply by the time it flowed past the north end of the Young property on the way to the stock pond in Section 13.

Irrigation ditches leak. Unless leaks become excessive, any pasture or crop land beneath a ditch will enjoy some benefit from waste, seepage or subirrigation. As long as Young diverts water to the stock pond at the end of the ditch, the ditch will probably continue to leak for the incidental benefit of some land below the ditch. Presumably the land benefiting from that seepage will be the same land that benefitted when Oscar Kenck ran water down the Vaughn Ditch. Precisely identifying those lands (beyond the 30 acres previously identified) is not possible on the existing record. If it were possible, the incidental benefits these lands receive from the seepage is not sufficient, on the existing record, to conclude the water right claims in this case are appurtenant thereto.

Mr. Kenck testified that he seldom irrigated the north end. That testimony and other evidence supports a conclusion that Mr. Kenck's water usage on the north end was seldom more than incidental to his stock water usage.

#### **Efficiency and Beneficial Use**

Citing Worden v. Alexander, 108 Mont. 208, 90 P.2d 160, 163 (1939), Tee Bar argues that using the Vaughn Ditch to seep water as it travels past the Young property is not a method of irrigation commonly used in the locality and is not reasonable or proper under the existing circumstances.

This argument raises two issues. First, is the Vaughn Ditch so inefficient that it should not be permitted as a means of diversion by Tee Bar or by Young? Second, is subirrigation or waste and seepage from a leaky ditch so inefficient that it should not be recognized as a beneficial use of water?

Not much evidence was produced on these points and the Court is unable to conclude that the Master findings were clearly erroneous.

The water commissioner testified the ditch lost 284 out of 365 inches of water from its point of diversion to the Young weir. This loss apparently occurs while the ditch travels past or through Richard Mosher's land and on or past the Tee Bar's land. No measurements were submitted as to the ditch loss from the Young weir north.

Mr. Westenberg testified that the capacity of the Vaughn Ditch was around 1100 inches and that ditch efficiencies work better as the capacity fills up. Gerald Mosher guessed the ditch capacity was about 900 inches. Although Gerald Mosher said it was a "dirty ditch" and took lots of water, no evidence was presented as to whether or not the Vaughn Ditch leaks more than other ditches in the locality. Based on this record the Court cannot conclude that use of the Vaughn Ditch is an unreasonably inefficient irrigation system.

As to the second issue, Exhibit O-2 refers to subirrigation beneath the Vaughn Ditch in the W2NW of section 24. Roland Mosher testified that some areas on the Tee Bar see a limited increase in Tee Bar's hay production because of subirrigation. Witnesses for Young testified in a similar fashion.

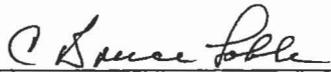
The Court finds that approximately 30 acres of Young land are subirrigated and receive a definite benefit from the water diverted through the Vaughn Ditch. Based on the existing record, the Court is unable to conclude that Young's system of irrigation for these 30 acres is unreasonable or that the Water Master's

Finding of Fact 12 is clearly erroneous.

**Conclusion**

Applying the three-part test from DeSaye, the Court concludes that: the water right claims in this case were not abandoned; Young's period of use of these claims should be amended to delete July and August; the place of use should be amended to 30 acres; and Oscar Kenck's use of the Vaughn Ditch represents a beneficial use of the water right claims in this case. The Master's Report is amended and adopted to conform to this opinion.

DATED this 11 day of *MARCH*, 1998.

  
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C. Bruce Loble  
Chief Water Judge

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Strip  
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Ditch

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KEY

PLACE OF USE IDENTIFIED  
IN ORDER AMENDING AND ADOPTING  
MASTER'S REPORT

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CERTIFICATE OF SERVICE

I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MEMORANDUM OPINION was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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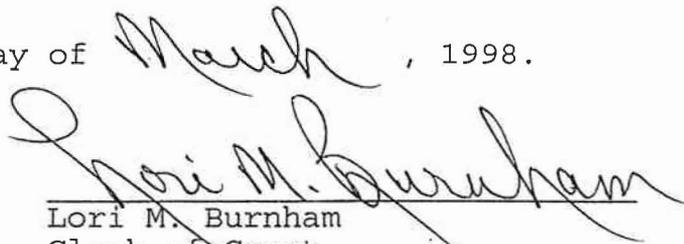
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DATED this 12 day of March, 1998.

  
Lori M. Burnham  
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