



Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
 UPPER MISSOURI DIVISION
 MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)

IN THE MATTER OF THE ADJUDICATION OF)	CASE NO. 41I-286
THE EXISTING RIGHTS TO THE USE OF ALL)	
THE WATER, BOTH SURFACE AND UNDERGROUND))	41I-W-036146-00
WITHIN THE MISSOURI RIVER DRAINAGE AREA)	41I-W-036147-00
INCLUDING ALL TRIBUTARIES OF THE)	41I-W-036148-00
MISSOURI RIVER IN BROADWATER, CASCADE,)	
JEFFERSON AND LEWIS AND CLARK COUNTIES,)	
MONTANA)	
_____)	

FILED

NOV 01 2000

Montana Water Court

CLAIMANT: Dennis W. Williams

OBJECTOR: United States of America (Bureau of Reclamation)
 Dennis W. Williams

**ORDER ADOPTING MASTER'S REPORT AND
 MEMORANDUM OPINION**

On July 9, 1999, Water Master Carol Brown filed her report containing Findings of Fact and Conclusions of Law. On July 15, 1999, claimant Dennis W. Williams, appearing on his own behalf, filed his Objection to Master's Report.

By Order filed September 10, 1999, the Court advised the parties that they had until September 30, 1999, to file an application for a hearing on the objections and that if no hearing was requested, the objections would be decided upon the existing record. As no party requested one, the Rule 53 M.R.Civ.P. hearing was waived.

Background

This case involves three claims currently owned by Dennis W. Williams. All three

were originally filed in 1981 by Walter F. Rauser and Anna W. Rauser.

Statement of Claim 41I-W-036146-00 claimed 10 cubic feet per second (cfs) (400 miner's inches) of Warm Springs Creek water with an August 1, 1966 priority date for irrigation of 225 acres of land. Attached to the statement of claim was a Notice of Appropriation by George J. Rauser signed on August 24, 1966 and asserting an appropriation on August 1, 1966.

Statement of Claim 41I-W-036147-00 claimed 5 cfs (200 miner's inches) of springs and seepage water found in the borrow pit along Muddy Lane with a March 13, 1959 priority date and used for irrigation on the same 225 acres of land described in claim 41I-W-036146-00. Attached to the statement of claim was a Notice signed by George Rauser on March 13, 1959.

Statement of Claim 41I-W-036148-00 claimed 8.5 cfs (340 miner's inches) of Willow Swamp decreed water with a May 1, 1872 priority date and used for irrigation on the same 225 acres of land described in claim 41I-W-036146-00. Attached to the statement of claim was a copy of page 7 of the Supplemental Decree of Smith v. Duff, Case 236, First Judicial District, Broadwater County, decreeing 340 inches of Willow Swamp, a tributary of Crow Creek, to Joseph Massa, Arthur B. Loye, and John Rothfus.

All three statements of claim identified the same 225 acres as the place of use. Those acres have since been reduced in all three statements of claim to the following place of use:

<u>ACRES</u>	<u>QTR. SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
27.00	SWNW	28	05N	02E	BROADWATER
80.00	N2SE	29	05N	02E	BROADWATER
107.00	ACRES				

In his Objection to the Master's Report, Dennis Williams limits his objection to claim 41I-W-036146-00 and argues the priority date of his Warm Springs Creek claim should be 1865 rather than 1966. Throughout these proceedings, Mr. Williams has argued for the adoption of a

variety of different priority dates earlier than 1966, to wit: May 1, 1869, August 3, 1867, and February 1865.

In His Notice of Objection filed November 28, 1995, he requested the priority date be changed to May 1, 1869.

On March 3, 1998, Mr. Williams filed his Affidavit that the priority date should be August 3, 1867. He based this date on his discovery of a notice signed on August 3, 1867 by James H. Ross, William Vantilburgh and T. E. McKoin indicating their intention to appropriate 1000 miner's inches of the waters of Crow Creek and all streams intervening between Crow Creek and the Warm Springs District (hereafter referred to as the "Ross notice"). On August 31, 1998, Kathy Arndt of the Department of Natural Resources and Conservation (DNRC), in accordance with the Water Master's request for assistance made pursuant to section 85-2-243, MCA, filed her Memorandum. Ms. Arndt advised that she could find no connection between the Ross notice and the Warm Springs Creek claim of Mr. Williams.

On September 25, 1998, the Court received a letter from Mr. Williams responding to the DNRC Memorandum. In part he asserted that:

[t]he original claim by Ross in 1867 was to irrigate his homestead in SW¼ of Section 28, T4N, R1E. . . . The full size 1906 map shown (sic) the ditch through Blondell's as extending to the river, presumably where the mining interests were.

The 1906 map shows Mrs. Laura Ross on the East ½ and John Rothfus on the West ½ of this quarter. Rothfus eventually owned all of the quarter and the Blondell Lands. They passed, along with most of the other Rothfus land, to his nephew, George Rauser Sr. Rauser split his ranch between his kids, George Jr., Walter and Kathryn (Johnson). The 2 Warm Springs Creek water rights were split 1/3 to each. William G. Williams now owns the George Jr. portion, Dennis Williams owns parts of Walter's with all of the 1/3 interest in the water rights, Johnson Trust has Kathryn's interests.

This land, the SW ¼ of Section 28, was shown as irrigated and cropped in the 1906 map.

Ross had no interest in the Willow Swamp Canal.

* * * *

James Ross homesteaded the SW ¼ of Section 28.

The chain of title goes from Ross to Rothfus to Rauser to Williams.
The water right follows the chain of title.

The origin of the 1906 map and the purpose of its creation is not quite clear. Most of the documents submitted by Mr. Williams referencing the 1906 map appear to indicate it was copied from the district court file of the Crow Creek decree, Case 236. However, in a letter to the Water Master dated November 26, 1997 and received by the Court on December 1, 1997, Mr. Williams transmits a copy of an “old map” which appears to be the 1906 map and he advises that “[t]here are originals at the Clerk and Recorder in Townsend.” Assuming that the 1906 map is from the Clerk of Court and not the Clerk and Recorder, there is no indication as to whether it was produced by the district court as part of its decree or whether the map was an exhibit introduced by one or more parties to that decree.

On January 19, 1999, the Water Master issued an Order directing Mr. Williams to research the documentation to support the change in priority date and then visit with Kathy Arndt about the proposed changes. On March 18, 1999, Kathy Arndt filed a Memorandum noting that she did not feel there was sufficient information to support the earlier priority date. She said that Mr. Williams provided her with a copy of a patent dated October 20, 1883 in the name of James W. Ross for the SW¼ of Section 28, T5N, R2E. She said that Mr. Williams explained the middle initial difference between James H. and James W. Ross to be a transcription error, which she recognized might be possible but which she had no support other than the explanation of Mr. Williams. She

wrote in her Memorandum that “Mr. Williams has an explanation for all the contradictions” she found, but that he was “unwilling to provide deeds or do further research” to support his explanations. She expressed a specific concern that Mr. Williams’ proposed earlier priority date would predate the 1906 decree issued in Case No. 236, Crow Creek, and that Mr. Williams’ appropriation was not part of that decree.

In his Explanation for Objection to 411-W-036146-00, attached to his Notice of Objection filed with the Court on November 28, 1995, Mr. Williams states that Warm Springs Creek was included in Case 236 as a tributary of Crow Creek but that no rights from Warm Spring Creek were decreed because the principle landowners on the creek were Massa and Rothfus. According to Mr. Williams, Massa and Rothfus were in the Willow Swamp Canal and there were no conflicts with Warm Spring Creek water. The relevant portions of the Crow Creek decree were not submitted to the Court to confirm this assertion.

On April 15, 1999, the Court received a letter from Mr. Williams that he “found another water claim for Ross” and states that Ross had two ranches, “one lower on the creek and one with the Warm Springs Creek right.” Attached to the letter is a copy of an 1864 notice that “Ross, Benson & Co” have taken up a ranch “lying on the Missouri River” and described vaguely by reference to a point of beginning “commencing at a stake where the road crosses the Flat Spring Creek.” Also attached to the letter is an 1866 notice claiming the entire flow of Warm Springs Creek for irrigation of the Warm Springs Ranch (apparently referring to the ranch described in the 1864 notice) and asserting a priority date of February 1865. Mr. Williams argues in his letter that this ranch preemption claim is for 320 acres, 160 acres each for Ross and for Benson, and that the Ross 160 acre claim corresponds with the preemption patent for 160 acres in the SW of Section 28, T5N, R2E. The preemption patent was not submitted to the Court to confirm this assertion. Mr. Williams

then states that the priority date for claim 41I-W-036146-00 should be February 1865.

The Master found that although the documents submitted by Mr. Williams supported his claim that water was used on his land prior to 1966, the evidence did not prove that the George Rauser Notice of Appropriation was incorrect. Master's Report, p. 2. The Master's Report noted that the 1956 Water Resource Survey confirmed irrigation of Williams' land at that time. Master's Report, p. 2. However, the Master's Report found that "[t]his evidence appears to support Mr. Williams' claim that water was used on his land prior to 1966, but it does not prove that anything in the George Rauser Notice of Appropriation is incorrect." Master's Report, p. 3. The Master concluded that although Mr. Williams may be right that his land was irrigated prior to 1966, his predecessors did not file a claim for the 1865 right, perhaps because the right was abandoned. Master's Report, p. 3. The Master's Report determined that the 1966 Rauser Notice of Appropriation was separate from any right established by the earlier Notices of Appropriation, and that the priority date of claim 41I-W-036146-00 is 1966. Master's Report, p. 3.

Objections and Issues

The objector raises three issues:

1. Is it inconsistent and unjustified for the Master's Report to accept the changes to maximum acres, place of use and flow rate, and deny the proposed change to priority date?
2. Was the Master's Report correct in determining that the correct priority date of claim 41I-W-036146-00 is 1966?
3. Was the Master correct in concluding that any water rights with priority dates earlier than 1966 were abandoned?

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, 820 P.2d 1285 (1991).

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

1. Is it inconsistent and unjustified for the Master's Report to accept the changes to maximum acres, place of use and flow rate, and deny the proposed change to priority date?

Mr. Williams states that the Master accepted his changes to reducing the acres irrigated, flow rate, point of diversion and place of use, on less evidence than the Master received on the priority date. Williams asserts that the Master's Report is inconsistent and unjustified because it made these reductions in his claim and would not accept his change to the priority date. The Master's Report correctly accepted Williams' voluntary reductions to the flow rate and irrigated acreage of his claims for the following reasons.

When the Montana Legislature commenced the general statewide adjudication of water rights effort in 1979, it provided water users with a remarkable tool to expedite and facilitate the adjudication of their water rights, to wit: a timely filed statement of claim constitutes prima facie proof of its content. Section 85-2-227, MCA.

This statute represents a significant advantage for a water user. Prior to the general adjudication of water rights, any party asserting a water right had the initial burden of proving each of their material allegations in a water right suit by satisfactory evidence. Smith v. Duff, 39 Mont. 374, 378, 102 P. 981 (1909), Missoula Light & Ry. Co., 77 Mont. 91, 100, 250 P. 11 (1926), Woodward v. Perkins, 116 Mont. 46, 51, 147 P.2d 1016 (1944), Eliason and Indreland v. Evans, 178 Mont. 212, 219, 583 P.2d 398 (1978), and sections 93-1501-1, R.C.M. 1947 and 89-839, R.C.M. 1947 (repealed July 1, 1973). This is no longer the case.

In Montana's general stream adjudication, once an objection is filed and hearing requested regarding a timely filed claim, it is now the objectors (whether other parties or claimants objecting to their own claims) who have the initial burden to produce evidence that contradicts and overcomes one or more elements of the prima facie statement of claim. See analysis in Memorandum Opinion, Water Court Case 40G-2, page 11 (March 11, 1997), which is incorporated herein. The extent of the evidence required to meet the burden of proof depends on the nature of the specified changes.

As a general rule, little or no evidence is required to reduce one or more elements of a water right claim because anyone may waive the advantage of a law intended for their benefit. Section 1-3-204, MCA. Therefore, an agreement to decrease the number of claimed irrigated acres, to reduce the claimed flow rate, or to make the priority date junior to the date originally claimed is usually accepted by the Court because it reflects a voluntary waiver of the advantage of the prima

facie statute. Such agreements also constitute a voluntary reduction in the scope of the elements that are within the parameters of the original statement of claim. The smaller is within the larger. Section 1-3-227, MCA. Injury to others is also remote.

However, a settlement agreement between a few select water users or an affidavit or letter from a claimant which simply lists changes to be made to expand a water right claim, or make it more senior than originally claimed without an adequate foundation demonstrating personal knowledge of the underlying facts or the production of satisfactory evidence to support the change, is generally insufficient to contradict and overcome the sworn prima facie statement of claim. Thus, any proposed expansion of a statement of claim, presented individually or by stipulated agreement, must be supported by evidence showing that the proposed change reflects the actual, historical beneficial use of the claimed right within a reasonable period of time prior to July 1, 1973. See analysis in Memorandum on Anderson and Harms Amended Stipulation, Water Court Case WC-90-1, September 7, 2000, which is incorporated herein.

The Williams claim 41I-W-036146-00 has a priority date of 1966. Changing a claim to make a priority date over 100 years earlier is a significant expansion of the claim and must be supported by sufficient evidence. The Master's Report correctly found sufficient evidence to support the reductions in the claims and correctly required the claimant to provide sufficient evidence to support the proposed change in priority date. Mr. Williams did not produce sufficient evidence to contradict and overcome the 1966 priority date contained in his own prima facie statement of claim. Simply stated, Mr. Williams failed to sustain his burden of proof.

2. Was the Master's Report correct in determining that the correct priority date of claim 41I-W-036146-00 is 1966?

Mr. Williams argues in his Objection to Master's Report that his predecessor, George

Rauser, incorrectly prepared the statement of claim by basing the priority date on the 1966 Notice of Appropriation. Mr. Williams states that George Rauser hired an attorney in 1966 to assist with his estate planning and that the attorney and Rauser could not find the earlier, 1865 notice because it was difficult to find in the Jefferson County/Broadwater County records. Mr. Williams further states that George Rauser and his children employed a water rights expert to file his claims and that the expert did not research his rights.

Mr. Williams' statements about the reasons for George Rauser's filing of the 1966 Notice, standing alone, lack a proper foundation of personal knowledge and appear to be based either on hearsay, speculation, or conjecture. No evidence was submitted to support these assertions. With respect to George Rauser and his children employing a "water rights expert" to file his claims, the statement of claim for 41I-W-036146-00 does not support Mr. Williams. The claim was filed in 1981 in the name of Walter F. Rauser and Anna W. Rauser and, at paragraph 2 thereof, it identifies the "person completing form" to be Walter F. Rauser.

Mr. Williams relies a great deal on documents he found referencing the name of Ross. For example: the 1867 Ross notice filed by James H. Ross, the 1864 and 1866 Ross, Benson & Co. notices, the 1883 James. W. Ross patent, and the reference to Mrs. Laura Ross on the 1906 map. He draws significant conclusions from these documents but did not provide the Court with a chain of title to supply any proof of privity with the various Ross documents.

Having alleged himself to be the owner of an 1865 water right, the burden was on Mr. Williams to prove it. Smith v. Duff, 39 Mont. 374, 378, 102 P. 981 (1909). The claimed possession by one person of a water right originated by another does not show the necessary ownership, no matter how vigorous the argument. In order to make good his claim to the right as of the date the water right was initiated, Mr. Williams must show some contractual relation between himself and

the original appropriation. Kenck v. Deegan, 45 Mont. 245, 249, 122 P. 746 (1912) and St. Onge v. Blakely, 76 Mont. 1, 19, 245 P. 532 (1926). The documentation provided by Mr. Williams was not sufficient to establish the needed contractual relationship between himself and Ross.

Interestingly, the Montana Supreme Court in its 1909 Smith v. Duff opinion discussed a “Ross” water right in its review of an appeal of the Swamp Creek water right currently jointly owned by Mr. Williams and others. (The Williams interest in the Swamp Creek right is represented in statement of claim 41I-W-036148-00.) In the Smith case, the Supreme Court discussed the testimony and water right of a witness identified only as Ross. As will be recalled from the Williams letter received by the Water Court on September 25, 1998 and set forth in part earlier on page 4, Mr. Williams affirmatively states that “Ross had no interest in the Willow Swamp Canal.” In reference to the Willow Swamp Canal and a Ross water right, the Supreme Court states:

When the canal was constructed it absorbed a ditch belonging to the witness Ross, which had been dug in 1871. According to his statement the diggers of the canal used the water it diverted in subordination to the right he claimed. He had been irrigating about fifteen acres by the means of his ditch. . . . Ross diverted what water he needed from the canal at pleasure. He seems to have been recognized as an owner in it. After its completion the greatest amount of land he farmed in any year was eighty acres, but in what year this was done it is not possible to say from the record.

. . . .

As noted above, the record does not show when Ross irrigated his maximum amount of land; whether it was before or after appellants’ appropriation. What were his intentions when he made his appropriation? How large was his ditch? How much land did he possess, and how much did he contemplate using the water upon? How soon did he carry out his contemplated use, and to what extent? What diligence did he employ? These questions, too, we are compelled to leave unanswered.

. . . .

A final conclusion of this case by this court would be based, not only upon conjecture to a considerable extent, but also upon the assumption that there is no evidence obtainable upon which to adjudge rightly the Ross and MacFarlane rights. The paucity of facts

to sustain their rights is attributable to respondents, and probably they could not be heard to complain if we should pass a final judgment upon the record as it stands. However, we think the interests of justice will be subserved best by giving them and their adversaries, the appellants, an opportunity to dissipate the mist which permeates the record now, and have concluded to remand the case for further proceedings.

Smith v. Duff, 39 Mont. at 386, 387, 388 and 390.

The questions asked by the Supreme Court about the Ross water right are just as pertinent today as they were in 1909. It appears the Ross water right claims were to be addressed by the district court following remand from the Supreme Court. Apparently after 91 years, the mist has yet to be dissipated.

The concern that Kathy Arndt of the DNRC expressed in her Memorandum filed March 18, 1999 about changing a priority date on Warm Springs Creek to predate the Crow Creek decree is warranted and shared by this Court. There is a significant relationship between water rights and tributary water sources in the Crow Creek drainage. This relationship is noted in the Supreme Court decision of Smith v. Duff, 39 Mont. 382, 386, 102 P. 984 (1909) when it stated that Willow Swamp and Marsh Creek “are important tributaries of Crow Creek” and that any diversion taking the “water of either of these streams lessens the quantity flowing in Crow Creek.”

The 1906 map indicates that Marsh Creek and Warm Springs Creek combine flows just prior to joining Crow Creek. Therefore, changing the priority date of Mr. Williams’ Warm Springs Creek claim to make its priority date over one hundred years more senior and prior to the rights of some or all of the other Crow Creek drainage water users has the potential to lessen the quantity of water flowing in Crow Creek to the detriment of those other water users.

The complexity of water usage within the Crow Creek drainage is also evident in other Water Court cases, such as Case 41I-201, involving Mr. Williams as an objector, and other

claimants of Warm Springs Creek, Spring Creek, and waste water from the U. S. Bureau of Reclamation Crow Creek Pump Unit Toston Canal project.

One of the “Ross” contentions argued by Mr. Williams involves the SW $\frac{1}{4}$ of section 28. For example, in his letter received by the Court on September 25, 1998, set forth earlier on pages 3-4, Mr. Williams writes that James Ross homesteaded the SW $\frac{1}{4}$ of section 28, T4N, R1E and that the chain of title goes from Ross to Rothfus to Rauser to Williams. Apparently, Mr. Williams contends that one of the early Ross water rights, which he argues became appurtenant to the SW $\frac{1}{4}$ of section 28, was carried through the chain of title to his land.

Mr. Williams does not appear to use water on the SW $\frac{1}{4}$ of any section 28 land or even own any such land. His only place of use in section 28 for the claims in this case include 27 acres in the NW $\frac{1}{4}$ of section 28, T5N, R2E. Since Mr. Williams did not provide a chain of title, it is impossible to know if his earlier reference to the Ross homestead in T4N, R1E was a typographical error or not. If it was not a typographical error, then the record does not reflect how water appropriated for use on land in the T4N, R1E became appurtenant to land in the T5N, R2E. If it was a typographical error, the SW $\frac{1}{4}$ of section 28, T5N, R2E appears to be owned by Patricia A. Baker (E2SW) and William G. and LaRee L. Williams (W2SW). See Claim 41I-W-003793-00 in Water Court Case 41I-284 and Claim 41I-W-003395-00 in Water Court Case 41I-250.

So, if Mr. Williams’ theory that Warm Springs Creek water was appropriated by Ross for use on the SW $\frac{1}{4}$ of section 28, T5N, R2E was correct, such an early Ross water right would be appurtenant to the Patricia Baker and William and LaRee Williams property and not to the Dennis Williams property unless there is evidence of intent to the contrary. As a general rule, when a water right is acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, it is an appurtenance thereto and, as such, passes with the conveyance of the

land, unless expressly reserved from the grant. Lensing v. Day & Hansen Security Co., 67 Mont 382, 384, 215 P. 999 (1923) For a more in depth analysis of this issue, see Findings of Fact, Conclusions of Law and Memorandum, Water Court Case 43A-A, pages 16-18, which is incorporated herein. The record does not contain any evidence that the general rule is not applicable here.

As the record currently stands and given the complexity of the Crow Creek drainage, without specific evidence linking the 1865 Ross, Benson & Co. notice to claim 41I-W-036146-00, the Master was correct in refusing to change the priority date of the claim from 1966 to 1865.

3. The failure of the predecessor of Dennis Williams to file on the earlier Ross notices by the required filing deadline works not as an abandonment, but as a forfeiture of the water right.

In her report, the Water Master notes that the problem faced by Mr. Williams is that his predecessors failed to file claims in the current adjudication that were based upon the Ross and Ross, Benson & Co. notices of earlier water usage. The Master suggests, as a reason for this omission, that the claims were perhaps abandoned at some point. In his Objection to Master's Report, Mr. Williams states there is no evidence any right was abandoned and notes that the Master's Report recognizes the 1956 Water Resource Survey shows irrigation on his property prior to 1956. The Master's discussion in this area is not very precise and that portion of her report is not adopted by the Court.

Whatever reasons might exist for the Rausers not filing on the Ross notices is immaterial. Any speculation by the Water Master or by Mr. Williams on this point is not fruitful. The fact is that no statement of claim was filed in accordance with section 85-2-221, MCA on these early notices by the early deadline of April 30, 1982 or the extended "late claim" filing deadline of

July 1, 1996.

Section 85-2-226, MCA provides that a failure to file a claim of an existing right as required by section 85-2-221 establishes a conclusive presumption of abandonment of that right. The Supreme Court upheld the constitutionality of this statute, but concluded that a failure to file a claim by the required deadline worked as a forfeiture of the water right rather than an abandonment. Adj. Of Water Rights of Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992). Although the practical result is the same, statements of claim for the 1865 Ross, Benson & Co. notice and the 1867 Ross right notice were not filed in this adjudication and, if they ever existed, they have now been forfeited.

Finally, the 1965 Water Resource Survey does not indicate that Warm Springs Creek irrigated any portion of Mr. Williams' property in 1956. The survey only indicates that some portion of the property on the east side of Warm Springs Creek, now owned by Mr. Williams, was irrigated. The obvious source for the irrigation depicted in the Water Resource Survey for the SWNW of Section 28, T5N, R2E is Mr. Williams' decreed 1872 Willow Swamp water right claim 41I-W-036148-00. Mr. Williams' 1998 affidavit says this claim was used, prior to 1973, to irrigate 107 acres of his property. These 107 acres include the Williams land depicted in the Water Resource Survey as being irrigated in 1956.

The apparent expansion of irrigated acres from the 85 acres noted by the DNRC (in its issue remark on the abstracts of the three Williams claims) as being irrigated on the 1956 Water Resource Survey to the 107 acres claimed by Mr. Williams in his 1998 affidavit is consistent with a post 1956 new appropriation, i.e. the George J. Rauser 1966 Warm Springs Creek Notice of Appropriation.

Conclusion

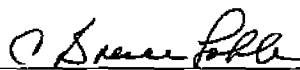
Applying the three-part test from DeSaye, the Court finds substantial evidence to support the Master's findings. The Master did not misapprehend the effect of the evidence and the Court is not left with the definite and firm conviction that a mistake has been committed. After careful consideration of the arguments and the evidence, the findings of fact and conclusions of law in the Master's Report are adopted. The Objection to Master's Report is **DENIED**.

ORDER

Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court has reviewed the Master's findings and conclusions, adopts them, and

ORDERS that an abstract of Water Right Claim as Modified by the Montana Water Court be served with this Order and Memorandum to confirm that the recommendations set forth in the Master's Report have been adopted for claims 41I-W-036146-00, 41I-W-036147-00, and 41I-W-036148-00.

DATED this 30 day of OCTOBER, 2000.



C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

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

Dennis W. Williams
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DATED this *1st* day of *November*, 2000.

for Jackie Billings

Lori M. Burnham Beck
Clerk of Court