

Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
1-800-624-3270 (In-state only)  
(406) 586-4364  
FAX: (406) 522-4131

FILED

NOV 13 2015

Montana Water Court

MONTANA WATER COURT, LOWER MISSOURI DIVISION  
BEAVER CREEK TRIBUTARY OF MILK RIVER - BASIN 40M

\*\*\*\*\*

CLAIMANTS: Ron Holzhey; Von Holzhey

OBJECTORS: Ron Holzhey; Von Holzhey

NOTICE OF INTENT TO APPEAR: Lela M. French;  
William R. French

**CASE 40M-144A**

40M 6877-00

40M 6882-00

**ORDER ADOPTING MASTER'S REPORT**

**I. STATEMENT OF THE CASE**

The claimants in this case are Ron Holzhey and Von Holzhey ("the Holzheys"). The Holzheys's claims 40M 6877-00 and 40M 6882-00 received objections from a number of parties, as well as a notice of intent to appear from Lela M. French and William R. French ("the Frenches").

Trial of this matter occurred and the Water Master issued a report to which the Frenches objected.

The Frenches' objection targets the Master's Conclusion of Law number 10. The Frenches contend the Master erred by stating "no conclusive evidence was introduced to show a post-1973 increase in the volume of water being consumed by Holzhey's water spreading system." Master's Report, p. 11, Conclusion of Law ("COL") 10. The Frenches assert that Conclusion of Law number 10 is erroneous for two reasons.

First, the Frenches contend the Water Court does not have jurisdiction to consider evidence of post-1973 expansion of water rights. According to the Frenches, the

Master's comments on expansion constituted fundamental error and were "needlessly superfluous, and by definition *dicta*..." French Objection to Master's Report, p. 2.

Second, the Frenches object to the Master's determination that the record was inconclusive regarding post-1973 expansion of the Holzheys's water rights.

## II. ISSUES

1. Does the Water Court have jurisdiction to consider post-1973 evidence of water rights usage?

2. Did the Water Master err by determining there was insufficient evidence to show a post-1973 increase in the volume of water used by the Holzheys?

## III. STANDARD OF REVIEW

The Court may appoint a Water Master to prepare a report containing findings of fact and conclusions of law. Rule 53(a)(1)(c), M. R. Civ. P.; Rule 23, W.R.Adj.R. The Court reviews the Master's findings of fact for clear error and the Master's conclusions of law to determine whether they are correct. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 25, 375 Mont. 327, 328 P.3d 644 (citing *Heavirland v. State*, 2013 MT 313, ¶ 13, 372 Mont. 300, 311 P.3d 813). Based on these standards of review, the Water Judge "may adopt, modify, or reject the [master's] report, in whole or in part, or may receive further evidence or recommit it with instructions." Rule 23, W.R.Adj.R.

The Montana Supreme Court follows a three-part test to determine if a trial court's findings of fact are clearly erroneous. See *Interstate Production Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). The Water Court uses a similar test for reviewing objections to a Master's findings of fact. Rule 11(c), W.R.Adj.R. (referencing Rule 53(e), M. R. Civ. P.). See *In re the Existing Rights within the Jefferson River Drainage Area, Nos. 41G-137, 41G-W-182145-00*, 1999 Mont. Water LEXIS 1 at 3-4 (Dec. 27, 1999).

First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, even if the findings are supported by substantial evidence, this Court may determine a finding is clearly erroneous if the Master 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. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16). The Montana Supreme Court has long recognized that “[s]ubstantial evidence and clearly erroneous are not synonymous.” *Heavirland*, ¶ 16 (quoting *DeSaye*, 250 Mont. at 323). Therefore, this Court may determine a finding is clearly erroneous even though there is evidence to support it. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16).

This Court reviews a Master’s conclusions of law to determine whether they are correct. *Heavirland*, ¶ 14 (citing *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398). “Thus, the Water Court reviews the Water Master’s findings of fact for clear error and the Water Master’s conclusions of law for correctness.” *Heavirland*, ¶ 14 (citing Rule 53(e)(2), M. R. Civ. P.; *Geil*, ¶ 22).

#### IV. ANALYSIS

1. Does the Water Court have jurisdiction to consider post-1973 evidence of water rights usage?

The Frenches contend that because the Water Court does not have jurisdiction over post decree issues of water distribution, it cannot consider evidence of post-1973 water right usage, or make findings based on such evidence.

The Water Court has exclusive jurisdiction over “all matters relating to the determination of existing water rights within the boundaries of the state of Montana.” § 3-7-224(2), MCA; § 85-2-216, MCA; *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991). Once water rights are determined by the Water Court, they are distributed by district courts. “The district courts shall supervise the distribution of water among all appropriators.” § 85-2-406(1), MCA.

The jurisdictional divide between the Water Court’s obligation to define water rights and the District Court’s obligation to distribute them does not preclude the Water Court from considering post-1973 evidence of water use.

As an example, the Water Court's jurisdiction extends to both pre- and post-1973 abandonment of water rights. This jurisdiction includes "the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree." § 3-7-501(4), MCA. "[A] water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant, including, without limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973." § 85-2-227(3), MCA.

The Water Court's ability to hear post-1973 evidence of abandonment was summarized as follows:

The Montana Legislature created the Water Court to adjudicate the existing water rights in this state. In creating the Water Court, the legislature gave it the exclusive jurisdiction to interpret and determine those rights. This includes the issue of abandonment of existing water rights even if the abandonment or evidence of abandonment occurred after June 30, 1973. Senate Bill 108 did not create jurisdiction for the Water Court to consider post-June 1973 evidence of abandonment – it simply recognized and codified that which already existed.

*In re Plum Creek Timber Co.*, Case 76HB-62, Memorandum Opinion, pp. 14-15 (March 18, 1999).

The Water Court also hears evidence of post-1973 water use when considering whether to limit water rights by volume. Order Adopting and Amending Master's Report, Case 41O-129B. Post-1973 evidence can be reviewed to determine whether a water right originating before 1973 was perfected after 1973. *Montana Dep't of Natural Resources & Conservation v. Intake Water Co.*, 171 Mont. 416, 430-31, 558 P.2d 1110, 1118d (1976).

Most importantly, the Water Court has a basic obligation to determine whether it has jurisdiction over the claims before it. That obligation requires determining whether those claims originated before or after July 1, 1973. Under the Water Use Act, water rights arising after July 1, 1973 fall outside of the Water Court's jurisdiction and must be determined by the DNRC. § 85-2-302, MCA.

Turning to the present case, the Frenches raised the issue of post-1973 expansion of the Holzheys's water rights in its pretrial order. The Frenches asserted that whether claims 40M 6877-00 and 40M 6882-00 had been expanded was an issue of fact. French Pre-Trial Order, p. 10. The Frenches' interest in expansion focused on the years 1985 and 1986. French Pre-Trial Order, p. 11.

The Frenches' stated purpose in asking the Water Court to make findings regarding expansion *after* 1973 was to force the Holzheys to obtain a new water right permit. The Frenches framed this issue as follows: "Whether the post July 1, 1973 dike additions/expansion and additional leveling requires a new permit since the work was completed in 1985 and 1986." French Pre-Trial Order, p. 11. In the alternative, the Frenches also asked whether there had been *any* valid pre-1973 use of Dog Creek. A finding that the Holzheys's water rights originated after July 1, 1973 would also have subjected the Holzheys to the permitting requirements of the Water Use Act. § 85-2-302, MCA.

In simple terms, the Frenches asked whether the Holzheys's water use was connected to the pre-1973 rights at issue before the Water Court, or to post-1973 usage either partially or entirely outside the Water Court's jurisdiction.

The Water Master determined there was not sufficient evidence to support a finding of post-1973 expansion, and that even if such evidence existed, "the Water Court lacks jurisdiction to grant relief with respect to issues of water distribution." Master's Report, p. 11, COL 10.

The Water Master's analysis of post-1973 expansion was necessary to determine whether the Court had jurisdiction over the claims before it. The Water Master's decision to address the jurisdictional question was appropriate, especially given that the Frenches posed the same question in their pre-trial order.

The Water Master's statement that the Water Court lacks jurisdiction over issues of water distribution was in response to the Frenches' assertion that they were not getting enough water. The Water Master's statement of the law is correct. The Frenches' forum

for relief from improper use of the Holzheys's rights is the district court, not the Water Court.

In summary, the Frenches asked the Water Court to assess whether the Holzheys's work on its water spreading system in 1985 and 1986 caused an expansion in water use. The Frenches also stated that a key factual issue in the case was whether the Holzheys had claims for pre-1973 use, or whether all of the Holzheys's use arose after 1973 and therefore fell within the permitting requirements of the Water Use Act. The Water Master properly answered those questions. Having raised those questions, the Frenches are not entitled to have the answers removed from the Master's Report on the grounds they are dicta.

2. Did the Water Master err by determining there was insufficient evidence to show a post-1973 increase in the volume of water used by the Holzheys?

The Frenches assert the Water Master "erred by misappreciating [sic] the evidence which went into the record" on the issue of post-1973 expansion by the Holzheys. French Objection to Master's Report, p. 2.

A Water Master's findings must be supported by substantial evidence. First, this Court reviews the record to see if the findings are supported by substantial evidence. "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, 220 (1993). It need not amount to a preponderance of the evidence, but it must be more than a scintilla. *State v. Shodair*, 273 Mont. 155, 163, 902 P.2d 21, 26 (1995).

The Water Master in this case was faced with two conflicting assertions regarding the effect of changes to the Holzhey dike/water spreading system. The Master concluded that changes to the dike system did not increase the volume of water consumed by the Holzheys. That conclusion was based on testimony from Gene and Von Holzhey. The testimony of claimants with personal knowledge regarding usage of their water rights is substantial evidence.

Second, even if the findings are supported by substantial evidence, the reviewing court may determine a finding is clearly erroneous if the Water Master misapprehended the effect of the evidence. The Water Master did not misapprehend the effect of the evidence by choosing to accept the Holzheys's version of events over others. The Master's decision was corroborated by Mr. French's admission that he wasn't very familiar with the Holzhey system.

Third, even where findings are supported by substantial evidence and the Water Master has not misapprehended the effect of the evidence, the reviewing court may determine a finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Heavirland*, ¶ 16. This Court is not left with the firm conviction that the Master's decision was a mistake.

#### V. CONCLUSION

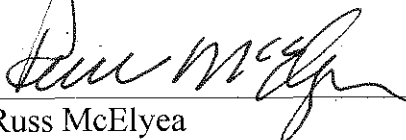
1. The Water Court has jurisdiction to consider post-1973 evidence of water rights usage.
2. The Water Master did not err by determining there was insufficient evidence to show a post-1973 increase in water use by the Holzheys.

#### VI. ORDER

The Frenches' objection to the Master's Report is DENIED.

The Master's Report is ADOPTED without modification.

DATED this *13* day of *November*, 20*15*.

  
Russ McElyea  
Chief Water Judge

W. Scott Green  
Michael F. McGuinness  
PATTEN, PETERMAN,  
BEKKEDAHN & GREEN P.L.L.C  
2817 Second Avenue North, Suite 300  
Billings, MT 59101  
(406) 252-8500  
wsgreen@ppbglaw.com  
mmcguinness@ppbglaw.com

Patrick R. Watt  
PO Box 2269  
Great Falls, MT 59403-2269

Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
1-800-624-3270 (In-state only)  
(406) 586-4364  
FAX: (406) 522-4131

**FILED**  
**SEP. 09 2015**

**Montana Water Court**

MONTANA WATER COURT, LOWER MISSOURI DIVISION  
BEAVER CREEK TRIBUTARY OF MILK RIVER - BASIN 40M

\*\*\*\*\*

CLAIMANTS: Ron Holzhey; Von Holzhey

OBJECTORS: Ron Holzhey; Von Holzhey

NOTICE OF INTENT TO APPEAR: Lela M. French;  
William R. French

**CASE 40M-144A**  
40M 6877-00  
40M 6882-00

**NOTICE OF FILING OF MASTER'S REPORT**

You may file a written objection to the Report if you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report.

The above stamped date indicates the date the Master's Report was filed and mailed. Rule 23 of the Water Rights Adjudication Rules requires that written objections to a Master's Report must be filed within 10 days of the date of the Master's Report. Because the Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10 day objection period. Rule 6(d) M.R.Civ.P. This means your objection must be received no later than 13 days from the above stamped date.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.



**MASTER'S REPORT**  
**PROCEDURAL HISTORY**

This case involves two claims – 40M 6877-00 and 40M 6882-00 – owned by Ron Holzhey and Von Holzhey. The claims received objections from the Holzheys and various other parties. William and Lela French (the Frenches) filed a Notice of Intent to Appear (NOIA) for claim 40M 6877-00. Claim 40M 6882-00 was originally consolidated into Case 40M-142 and the Frenches moved to intervene in the case. The two claims were then consolidated in Case 40M-144 with the rest of the Holzhey water rights.

Claims 40M 6877-00 and 40M 6882-00 were reconsolidated into 40M-144A after a portion of the Holzhey property and the appurtenant water rights were transferred to a third party. *See* Master's Report, Case 40M-144 (Jan. 21, 2015). All other objections were subsequently resolved except for those filed by the Frenches. A hearing was held August 11 and 12, 2015, at the Phillips County Courthouse in Malta, Montana. The Master's Findings of Fact are as follows:

**FINDINGS OF FACT**

1. Water right claims 40M 6877-00 and 40M 6882-00 are owned by Ron Holzhey and Von Holzhey. The claims were timely filed by Ron and Von's grandfather – Raymond J. Holzhey.

**40M 6877-00**

2. As filed, claim 40M 6877-00 represents a stock use right with a priority date of December 31, 1970. The claimed point of diversion is on an unnamed tributary of Dog Creek and the claimed place of use is a reservoir located in the SENW of Section 12, Twp 24N, Rge 31E in Phillips County. During claims examination, the DNRC apparently refined the reservoir's location to the SWSWSW of Section 1, Twp 24N, Rge 31E and added an additional point of diversion for the NWNWNW of Section 12, Twp 24N, Rge 31E. The claimed period of use is February 1 to November 30. *40M 6877-00 Claim File*, French Exh. #N-9.

3. The Frenches objected to the claim on the basis that they, not the Holzheys, owned the reservoir that was originally described under claim 40M 6877-00. Von

Holzhey also filed an objection to several elements of claim 40M 6877-00, including the point of diversion, the place of use, the period of diversion and the flow rate and volume. In his objection, Von Holzhey clarified that the correct point of diversion and place of use should be the NESWNW of Section 18, Twp 24N, Rge 32E in Phillips County. The Holzhey objection also requested that the period of use be amended to year-round (January 1 to December 31) to match the claimed period of diversion. *40M 6877-00 Claim File*, French Exh. #N-9.

4. At trial, it was apparent that the Frenches took issue with the wording of the Holzhey objection to claim 40M 6877-00. Specifically, the Frenches objected to any reference to claim 40M 6877-00 as a waterspreading claim, which they interpreted as a potential request to change the claim from a stock claim to an irrigation claim. However, Von Holzhey testified that any reference to waterspreading in his objection was an attempt to describe how water is collected for stock use. *V. Holzhey Testimony*, Hrg. Day 1 at 4:55-4:57. Von further testified that the reservoir is used exclusively for stock watering year-round and that the Holzheys are no longer contesting the flow rate and volume as they appeared in the Preliminary Decree. *Id.*

5. The Frenches did not present any evidence that the Section 18 reservoir has not been historically and continuously used for stockwatering as claimed. Further, Frenches' expert Lee Yelin confirmed that the Section 18 reservoir is visible on an aerial photograph dated August 17, 1969 (French Exh. #N-1). *Yelin Testimony*, Hrg. Day 1 at 2:16-2:17.

**40M 6882-00**

6. According to the Statement of Claim, claim 40M 6882-00 represents a "filed" irrigation right for Dog Creek with a priority date of September 10, 1959. The claimed point of diversion is the NE of Section 13, Twp 24N, Rge 31E in Phillips County. The means of diversion is described as flood waters captured and spread by dikes. The claimed place of use is described as 40 acres located in Section 12, Twp 24N, Rge 31E and 120 acres in Section 13, Twp 24N, Rge 31E – a total of 160 acres. The claim asserts a flow rate of 200 miner's inches and volume of 240 acre-feet. The claimed period of use is January 1 to December 31.

7. Claim 40M 6882-00 was originally decreed in Basin 40E. However, due to a change in the basin boundary, the claim was transferred to Basin 40M in 1988 and eventually re-decreed in that basin. *40M 6882-00 Claim File*, French Exh. #N-10. Prior to its original appearance in the 40E Decree, the DNRC refined the legal description for the claimed place of use. *Id.* The DNRC apportioned the claimed 160 acres into four parcels as follows:

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.50		E2SESE	12	24N	31E	PHILLIPS
2	122.50			13	24N	31E	PHILLIPS
3	20.00		W2NW	18	24N	32E	PHILLIPS
4	14.00		W2SW	7	24N	32E	PHILLIPS
TOTAL: 160.00							

8. Prior to the issuance of the 40M Decree, the DNRC re-examined the claim and clarified the legal description for the point of diversion as follows:

**Point of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	<u>Means</u>
1		E2	13	24N	31E	PHILLIPS	DIKES
2		W2SW	18	24N	32E	PHILLIPS	DIKES

Pursuant to the DNRC guidelines in existence at the time, the claim did not receive a flow rate but instead received a volume equal to 1.5 acre-feet per claimed acre (a total of 240 acre-feet). The claim did not receive any issue remarks, except for a remark denoting its improper designation in Basin 40E. *Id.*

**Priority Date of Claim 40M 6882-00**

9. The claim file contains an agreement reached between the original claimant – Ray Holzhey – and his neighbors – William Spencer and Rena Grimsley – related to water use on Dog Creek (the Agreement). Holzhey Exh. #C-10. William Spencer and Rena Grimsley held water rights on Dog Creek. *Id.* In sum, the Agreement allowed Ray Holzhey to construct flood dikes to capture Dog Creek water as it passed through a portion of his property known as the “Geiger Place.” *Id.* The Geiger Place is described as the “W ½ Sec. 18 Twp 24 Range 32” and the “E ½ Sec. 13 Twp 24 Range 31.” *Id.* The Agreement also called for Holzhey to construct the dikes with drain pipes “so they

will drain [the] dikes.” *Id.* The Agreement is dated September 10, 1959. At some point after the Agreement was reached, it was recorded with the Phillip County Clerk and Recorder. The date of the Agreement ultimately became the claimed priority date for 40M 6882-00.

10. At trial, the Frenches disputed the claim’s status as a “filed” right. Mr. Yelin testified that the Agreement did not contain the necessary elements or follow the proper procedures to be designated a filed water right. *Yelin Testimony*, Hrg. Day 1 at 11:48. Instead, the Frenches’ case focused on evidence of first use of the claim.

11. The earliest testimony related to use introduced at the hearing came from Ervin Crowder. Mr. Crowder – a neighboring landowner – testified that he remembered seeing a system of at least two dikes on the Geiger Place in either 1956 or 1957 when he helped hay the property. *Crowder Testimony*, Hrg. Day 2 at 8:24. Mr. Crowder further testified that the dikes were washed out at the time and were later repaired by the Holzheys. *Id.*

12. The next evidence of use is the 1959 Agreement itself, which is prospective in nature. The Agreement allowed Ray Holzhey to construct flood dikes on the Geiger Place to use Dog Creek water. Holzhey Exh. #C-10. The Agreement does not specify when the dikes were to be constructed or give any timeframe for performance of the agreed upon action. *Id.* The Agreement indicates that the Holzheys constructed their dikes (and perhaps re-constructed the previously existing, washed-out dikes) at some point after September 10, 1959.

13. Going in chronological order, the next evidence in the record is a Montana State Engineer’s map published as part of the Phillips County Water Resources Survey (WRS). French Exh. #N-15. The WRS was published in 1968, but the accompanying maps were prepared using earlier aerial photographs. Mr. Yelin testified that the aerials on which these maps were based were taken in 1965. *Yelin Testimony*, Hrg. Day 1 at 12:03. The WRS maps do not show the claimed place of use as being irrigated in 1965. The maps do show, however, a dike in place on the north end of the claimed place of use in Section 18. French Exh. #N-15.

14. The Phillips County WRS also contains notes of an interview with Don Holzhey (Ron and Von's father) regarding the water rights on the Holzhey Ranch. French Exh. #N-17. The interview was conducted October 23, 1967. *Id.* The notes do not reference a water right on Dog Creek or any tributary of Telegraph Creek. *Id.*

15. The Holzheys introduced a document titled "Record of Cooperator's Decisions and Progress in Application" and an associated map. Holzhey Exh. #C-50. The document and map were prepared as part of the USDA Soil Conservation Service's range use and planning process. *Id.* The documents and map appear to have been prepared in 1967. *Id.* The accompanying map is labeled "Conservation Plan Map" and depicts the claimed place of use in the lower right corner. *Id.* It is clear that the map is an aerial photograph with boundaries, irrigation systems and other features drawn on the photo. *Id.* On the map, the claimed place of use is divided into two, numbered fields, with the west field labeled as "38 Cropland" and the east field labeled "39 Rangeland." *Id.* The map depicts a series of dikes across the claimed place of use, but it is clear that the dikes are drawn onto the photo. Thus, Exhibit #C-50 is not helpful in clarifying the Holzhey's water use as of 1967.

16. Holzhey's Exh. #C-50 also contains a page of "Conservation Practices Planned & Applied prior to development of this plan." Holzhey Exh. #C-50 at 0061. The page contains a column for "planned" practices and another column for "applied" practices, along with the field number and the year of application. *Id.* Field #39, which depicts the claimed place of use, is noted as having 48 acres of applied irrigation. *Id.* The type of land use is labeled as "waterspreading," and the year of application is labeled as "[b]efore 1967." *Id.*

17. Gene, Von and Ron Holzhey each testified at trial about their understanding of historic irrigation on the claimed place of use and the historic dike system. Gene Holzhey testified that he could remember anywhere from five to seven dikes on the claimed place of use during his youth. *G. Holzhey Testimony*, Hrg. Day 1 at 4:23-4:24. Gene was born in 1962 and testified that he could remember going down to pull boards on the dike system with his father when he was around 8 years old. *Id.* at 4:35. Von and Ron (who are twins) were born in 1967 and were approximately 6 years old by July 1,

1973. *R. Holzhey Testimony*, Hrg. Day 2 at 8:46. Von Holzhey testified that his understanding was that the family began to irrigate the claimed place of use with their dike system in 1967 or perhaps a little before 1967. *V. Holzhey Testimony*, Hrg. Day 1 at 5:06-5:07.

18. Mr. Yelin testified that he reviewed the claim file for 40M 6882-00 along with the WRS Survey, Field Notes and Maps and available aerial photographs. *Yelin Testimony*, Hrg. Day 1 at 12:10. Based on his review, Mr. Yelin concluded that the first evidence of use for claim 40M 6882-00 is an aerial photograph dated August 17, 1969. *Id*; French Exhibit #N-1. Yelin testified that his review of the 1969 photo revealed four dikes and an irrigated area of approximately 50.7 acres. *Id*.

#### **Irrigated Acreage of Claim 40M 6882-00**

19. As noted above, claim 40M 6882-00 originally claimed 160 acres of historical irrigation. The Frenches dispute this number. Testimony at trial related to the number of historically irrigated acres was relatively consistent, at least with respect to the drainage actually containing the Holzhey's dike system. Holzhey's Exhibit #C-50 indicates that by 1967, there were approximately 48 acres being irrigated on the claimed place of use. Holzhey Exh. #C-50 at 0061.

20. Ron Holzhey testified that although he could not say exactly how many acres are irrigated under claim 40M 6882-00, the historically irrigated field itself is accurately depicted in the outlined areas on Frenches' Exhibits #N-1 and #N-2. *R. Holzhey Testimony*, Hrg. Day 2 at 8:59. Mr. Yelin testified that his review of the 1969 aerial photo revealed an irrigated area of approximately 50.7 acres. French Exhibit #N-1. More recent aerial photos introduced by the Frenches show a similar area of irrigation, ranging from approximately 50 to 60 acres, depending on the year. French Exhs. #N-2, N-3, N-5.

21. Testimony was conflicting with respect to a large field located to the west of the Holzhey's dike system in the N2E2 of Section 13. Mr. Yelin testified that the field is likely a grain field that, due its elevation in relation to the dike system, was not irrigated. *Yelin Testimony*, Hrg. Day 1 at 2:30. The testimony of Gene and Von Holzhey seemed to indicate that the field was historically irrigated; however, Ron Holzhey testified that the

field depicted in the N2E2 of Section 13 is a dry land field that is not irrigated. *R. Holzhey Testimony*, Hrg. Day 2 at 8:59.

22. In April of 2012, Ron and Von Holzhey submitted a Verified Motion to Correct Water Right Claim for claim 40M 6882-00. French Exh. #N-14. The Motion seeks to correct the place of use to 10 acres in the W2NW of Section 18 and 35 acres in the E2 of Section 13, for a total of 45 acres and a requested volume of 103.50 Acre-Feet. *Id.*

### **Changes in Holzhey Dike System**

23. At trial, the Frenches' attempted to show that changes in the Holzhey dike system over time had contributed to less water being available for use by the Frenches. In general, the evidence related to the Holzhey's re-construction of their dike system following a major flood event in the mid-1980s.

24. The Frenches contend that the Holzheys added new dikes to the system and gradually filled in the stream channel, arguably resulting in a higher volume of water being consumed by the system. *Yelin Testimony*, Hrg. Day 1 at 12:44; *deArrieta Testimony*, Hrg. Day 2 at 9:57. William French ranches property north of the Holzhey property. Mr. French testified that – due to changes in the Holzhey system and/or lack of necessary maintenance by the Holzheys – he suspected he was getting less water than he used to. *French Testimony*; Hrg. Day 1 at 3:29. French said he has seen water sitting in the Holzhey system but admitted he was not very familiar with the Holzhey system itself. *Id.*; Hrg. Day 1 at 3:51.

25. For their part, the Holzheys argued that they merely reconstructed existing dikes following the flood event and argued that any changes to the system over time have resulted in a greater efficiency. *G. Holzhey Testimony*, Hrg. Day 1 at 4:31-4:33. Von Holzhey testified that at least some of the changes that were made over time were designed to satisfy the concerns of neighboring landowners, including senior water right holders. *V. Holzhey Testimony*, Hrg. Day 2 at 10:40-10:41. Aerial photographs introduced by the Frenches appear to show improvements in the Holzhey dike system over time. French Exhs. #N-2, N-3.

**CONCLUSIONS OF LAW**

1. In order to ensure historical accuracy, the Water Court is required to address all issue remarks that appear on a claim as well as any objections the claim receives.

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

3. Therefore, the overarching legal issue in this case is whether the evidence before the Court overcomes the prima facie proof found on the Statements of Claim.

**40M 6877-00**

4. The Holzheys moved to amend the claimed point of diversion and place of use for the stock reservoir claimed under 40M 6877-00. The Holzheys also requested that the period of use be amended to January 1 to December 31 to match the claimed period of diversion. The evidence before the Court, as outlined in the above Findings of Fact, is sufficient to overcome the prima facie proof found on the Statement of Claim and correct the claim as requested by the Holzheys. The claim abstract should be changed as follows:

**40M 6877-00**

**Point of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
<del>1</del>	<del>                    </del>	<del>SWSWSW</del>	<del>1</del>	<del>24N</del>	<del>31E</del>	<del>PHILLIPS</del>
1		NESWNW	18	24N	32E	PHILLIPS

Period of Use: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
<del>1</del>	<del>                    </del>	<del>SWSWSW</del>	<del>1</del>	<del>24N</del>	<del>31E</del>	<del>PHILLIPS</del>
1		NESWNW	18	24N	32E	PHILLIPS

Diversion to Reservoir: DIVERSION #1

Period of Use: ~~FEBRUARY 1 TO NOVEMBER 30~~ JANUARY 1 TO DECEMBER 31



Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWNWNW	12	24N	31E	PHILLIPS
2			SWSWSW	1	24N	31E	PHILLIPS
1			NESWNW	18	24N	32E	PHILLIPS

**40M 6882-00**

5. Claim 40M 6882-00 was claimed as a “filed” right. A filed right is defined as “a water right which has been filed and recorded in the office of the county clerk and recorder as provided by statute prior to July 1, 1973.” W.R.C.E.R. 2(a)(25). The statutes referenced in this definition are Sections 89-810, 89-813, and 89-814, RCM (1947) (repealed 1973). They were first enacted in 1885 and remained in place until enactment of the Montana Water Use Act on July 1, 1973.

6. Section 89-810 provided for the filing of “notices of appropriation.” Section 89-810 places several requirements on the acquisition of a filed water right. The appropriator begins by posting a notice at the intended point of diversion. This notice must include the quantity of water claimed, purpose, intended place of use, means of diversion, date of appropriation, and name of appropriator. Within 20 days of the date of appropriation, a notice of appropriation must then be filed with the county clerk and recorder. This notice of appropriation must include all of the posted information plus the name of the stream (or description) and a description of the point of diversion. The filing must be verified by the affidavit of the appropriator or someone on their behalf.

7. The 1959 Agreement relied upon in the Statement of Claim for claim 40M 6882-00 does not meet the pre-1973 statutory requirements for a “filed” right. The Agreement does not appear to have been posted and does not include many of the necessary elements of the appropriation (flow rate, point of diversion, date of appropriation, etc...). Instead, the Agreement reflects a contractual arrangement made between neighbors for the use of Dog Creek water.

8. Nonetheless, the evidence before the Court establishes that the Holzheys perfected a use right for Dog Creek water prior to July 1, 1973. A “use” right is defined as a “a claimed existing water right perfected by appropriating and putting water to

beneficial use without written notice, filing, or decree.” W.R.C.E.R. 2(a)(71). As noted above in the Findings of Fact, there is evidence to support approximately 48 acres of waterspreading on the claimed place of use by 1967. Holzhey Exh. #C-50 at 0061. The fact that the right was omitted from the 1967 WRS is not conclusive, particularly given the informal nature of the Agreement that resulted in the Holzhey dike system. The Master finds that the evidence overcomes the prima facie proof of the Statement of Claim. The evidence tends to support a first beneficial use of water via the claimed dike system as of January 1, 1967.

9. The Master also finds that the evidence with respect to historically irrigated acreage overcomes the prima facie proof of the Statement of Claim. The evidence supports a consistently and historically irrigated place of use of approximately 50 acres. The Holzheys appear to have acknowledged this with their 2012 Motion to Correct, which seeks to change the claimed place of use from 160 acres to 45 acres. The place of use should be corrected as requested by the Holzheys. Rule 15(e), W.R.C.E.R., dictates that for Climatic Area I the volume for waterspreading claims without reservoirs should be standardized to 2.3 acre-feet per acre. Thus, the volume of claim 40M 6882-00 should be reduced to 103.50 acre-feet as requested.

10. With respect to changes in the Holzhey system, the evidence was conflicting. However, there does not appear to be any question that irrigated acreage has remained consistent over the years, and no conclusive evidence was introduced to show a post-1973 increase in the volume of water being consumed by the Holzhey’s waterspreading system. Furthermore, even if such evidence were present, the Water Court lacks the jurisdiction to grant relief with respect to issues of water distribution. *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991). If the Frenches seek to show that the Holzheys have expanded the volume of claim 40M 6882-00 to the detriment of the Frenches’ senior claim, the appropriate venue is the District Court. *Baker Ditch Co. v. District Court*, 251 Mont. 251, 255, 824 P.2d 260, 262-63 (1992).

11. The claim abstract should be changed as follows:

40M 6882-00

Priority Date: ~~September 10, 1959~~ January 1, 1967

Type of Historical Right: ~~FILED~~ USE  
 Volume: ~~240.00~~ Acre-Feet 103.50 Acre-Feet

Maximum Acres: ~~160.00~~ 45.00

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		E2	13	24N	31E	PHILLIPS

Period of Use: JANUARY 1 TO DECEMBER 31  
 Diversion Means: DIKE

2	W2NW	W2SW	18	24N	32E	PHILLIPS
---	------	------	----	-----	-----	----------

Period of Use: JANUARY 1 TO DECEMBER 31  
 Diversion Means: DIKE

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
<del>1</del>	<del>3.50</del>		<del>E2SESE</del>	<del>12</del>	<del>24N</del>	<del>31E</del>	<del>PHILLIPS</del>
<del>2</del>	<del>122.50</del>			<del>13</del>	<del>24N</del>	<del>31E</del>	<del>PHILLIPS</del>
<del>3</del>	<del>20.00</del>		<del>W2NW</del>	<del>18</del>	<del>24N</del>	<del>32E</del>	<del>PHILLIPS</del>
<del>4</del>	<del>14.00</del>		<del>W2SW</del>	<del>7</del>	<del>24N</del>	<del>32E</del>	<del>PHILLIPS</del>
<b>1</b>	<b>10.00</b>		<b>W2NW</b>	<b>18</b>	<b>24N</b>	<b>32E</b>	<b>PHILLIPS</b>
<b>2</b>	<b>35.00</b>		<b>E2</b>	<b>13</b>	<b>24N</b>	<b>31E</b>	<b>PHILLIPS</b>
Total:	<del>160.00</del>						<b>45.00</b>

11. For the above-mentioned reasons, each claim should be modified as shown on the attached abstracts to resolve all Notices of Intent to Appear and objections, and to accurately reflect historical use.

**RECOMMENDATIONS**

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified above to correct the Preliminary Decree for this Basin. Post Decree Abstracts of Water Right Claim are served with this Report to confirm that the recommended changes have been made in the state's centralized record system.

DATED this 9 day of September, 2015

  
 Andrew Gorder  
 Water Master

W. Scott Green  
Michael F. McGuinness  
PATTEN, PETERMAN,  
BEKKEDAHN & GREEN P.L.L.C  
2817 Second Avenue North, Suite 300  
Billings, MT 59101  
(406) 252-8500  
wsgreen@ppbglaw.com  
mmcguinness@ppbglaw.com

Patrick R. Watt  
PO Box 2269  
Great Falls, MT 59403-2269