

Montana Water Court
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FILED

AUG 11 2015

Montana Water Court

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

CLAIMANT: United States of America (Bureau of Land
Management)

OBJECTORS: Ron D. Korman; Maxine E. Korman

COUNTEROBJECTORS: Ron D. Korman; Maxine E.
Korman

ON MOTION OF THE MONTANA WATER COURT

Case No. 40M-230

40M 75198-00	40M 75227-00
40M 75199-00	40M 75228-00
40M 75200-00	40M 75229-00
40M 75201-00	40M 75232-00
40M 75202-00	40M 75233-00
40M 75203-00	40M 75234-00
40M 75204-00	40M 75235-00
40M 75205-00	40M 75236-00
40M 75206-00	40M 75237-00
40M 75207-00	40M 75240-00
40M 75208-00	40M 75241-00
40M 75209-00	40M 75248-00
40M 75216-00	40M 75249-00
40M 75217-00	40M 75316-00
40M 75218-00	40M 75317-00
40M 75219-00	40M 75318-00
40M 75220-00	40M 75319-00
40M 75221-00	40M 75320-00
40M 75222-00	40M 75321-00
40M 75223-00	40M 75322-00
40M 75224-00	40M 75323-00
40M 75225-00	40M 75324-00
40M 75226-00	40M 75325-00

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT
AND
ORDER REMANDING TO MASTER**

PROCEDURAL HISTORY

Water Court case 40M-230 includes 46 stock and wildlife claims filed by the United States Bureau of Land Management (BLM) on 23 reservoirs. All of the reservoirs

are located on federal land. In most cases the BLM constructed the dam. In some cases, the grazing permittee assisted in dam construction. The BLM filed stock and wildlife claims for each reservoir as multiple uses of the same historical appropriation. All 46 claims received objections from Ron D. Korman and Maxine E. Korman (Kormans).

Both the BLM and Kormans filed motions for summary judgment. On November 6, 2014, Water Master Andrew Gorder issued an Order on Summary Judgment. The Order denied Kormans' Motion for Summary Judgment, and granted the BLM's Motion for Summary Judgment for 36 claims. The Master found there were unresolved factual issues on 10 claims and denied the BLM motion for those claims.

Kormans filed an objection to the Order on November 18, 2014 and an amended objection on December 10, 2014. The BLM filed a response on January 28, 2015. Kormans filed a reply on February 17, 2015. Oral arguments on the Kormans' objections were held on February 25, 2015 in Malta, Montana.

STANDARD OF REVIEW

The Water Master's Order on Summary Judgment, is similar to a Master's Report as it makes recommendations for disposition of all issues on the claims in this case. For Master's Reports, "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 v. State*, 2013 MT 313, ¶14, 372 Mont. 300, 311 P.3d 813; *See also* Rule 23, W. R. Adj. R. However, summary judgment does not involve questions of fact. There are presumed to be no genuine issues of material fact. As a result, the Water Court applies a *de novo* review of the Water Master's decision using the criteria found in M. R. Civ. P. 56(c)(3).

Summary judgment is appropriate where the pleadings, discovery, disclosure materials on file, and any affidavits show that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *Bennett v. Hill*, 2015 MT 30, ¶9, 378 Mont. 141, 342 P.3d 691 (citations omitted); *Victory Ins. Co. v. Mont. State Fund*, 2015 MT 82, ¶10, 378 Mont. 388, 344 P.3d 977.

CLAIMS AT ISSUE

The Master determined that issues of fact precluded summary judgment on eight claims. Upon review, the Court agrees with this assessment. Therefore, the Master's decision is affirmed for the following claims:

40M 75200-00 (stock) and 40M 75201-00 (wildlife) Unnamed Reservoir
40M 75208-00 (stock) and 40M 75209-00 (wildlife) Chevy Reservoir
40M 75220-00 (stock) and 40M 75221-00 (wildlife) Poker Reservoir
40M 75248-00 (stock) and 40M 75249-00 (wildlife) Korman Pit Reservoir

These claims shall be remanded to the Master for further proceedings.

The Master's November 6, 2014 Summary Judgment Order noted two claims were withdrawn by the BLM. On January 27, 2015, the BLM filed a withdrawal of claims for two additional water right claims:

40M 75198-00 (stock) and 40M 75199-00 (wildlife) Bugger Reservoir
40M 75202-00 (stock) and 40M 75203-00 (wildlife) Stan's Reservoir

These claims will be dismissed by the Court.

The Master found summary judgment was appropriate for the remaining 34 claims:

40M 75204-00 (wildlife) and 40M 75205-00 (stock) VR-69 Reservoir
40M 75206-00 (stock) and 40M 75207-00 (wildlife) Oasis Reservoir
40M 75216-00 (stock) and 40M 75217-00 (wildlife) Alley Reservoir
40M 75218-00 (wildlife) and 40M 75219-00 (stock) Bentonite Reservoir
40M 75222-00 (wildlife) and 40M 75223-00 (stock) VR-157 Reservoir
40M 75224-00 (stock) and 40M 75225-00 (wildlife) Joes Reservoir
40M 75226-00 (wildlife) and 40M 75227-00 (stock) County Line Reservoir
40M 75228-00 (wildlife) and 40M 75229-00 (stock) Hammond Reservoir
40M 75232-00 (wildlife) and 40M 75233-00 (stock) Plymouth Reservoir
40M 75234-00 (wildlife) and 40M 75235-00 (stock) Antelope Reservoir

40M 75316-00 (wildlife) and 40M 75318-00 (stock) Apt Reservoir
40M 75317-00 (wildlife) and 40M 75319-00 (stock) Clansman Reservoir
40M 75320-00 (stock) and 40M 75321-00 (wildlife) VR-104 Reservoir
40M 75322-00 (stock) and 40M 75323-00 (wildlife) Boyson Reservoir
40M 75324-00 (wildlife) and 40M 75325-00 (stock) South Box Elder Reservoir
40M 75236-00 (stock) and 40M 75237-00 (wildlife) Grant Coulee
40M 75240-00 (stock) and 40M 75241-00 (wildlife) Sides Reservoir

These claims are addressed in this decision.

ISSUES PRESENTED

A. Korman Arguments

Kormans' arguments tended to be large in scope. They assert the BLM can never own stock or wildlife claims in Montana or any other prior appropriation state. They argue their predecessors appropriated early stock rights from each source where the 17 reservoirs are located and therefore are the proper owners of all of the BLM stock claims. Kormans assert the BLM stock claims should be transferred into their names as successors to the original appropriators. Kormans also assert the BLM has no federal authority to appropriate water for wildlife, rendering all of the wildlife water right claims invalid. Kormans argue these claims should be dismissed.

Kormans' summary judgment motion and objection to the Master's Order did not include evidence or arguments that take issue with any other elements of the BLM claims. As a result, there is no evidence questioning the priority date, source, flow rate, volume, point of diversion, place of use, period of diversion, or period of use for any of the 34 claims addressed here.

Kormans filings are prolific. Since the Master issued his Summary Judgment Order on November 6, 2014, they have made 18 separate filings with the Water Court, not counting their Objection to the Master's Order, Amended Objection to the Order, and Reply Brief. These filings are often entitled as motions for mandatory judicial notice of facts or law and tend to include a significant number of attachments. They also tend to be

repetitive and in many cases very difficult to decipher. Nonetheless, this Court has reviewed each document and attachment, and considered these filings in this decision. In that review, the Court determined that a number of the filings and attachments are not relevant to the issues presented here. This decision does not specifically discuss these filings or attachments.

B. BLM Arguments

The BLM asserts it has the right to appropriate stock and wildlife claims under Montana law and complied with the requirements of that law when it appropriated these water right claims. The BLM focused its arguments on the 34 claims at issue and articulated specific facts supporting each appropriation. The BLM requested summary judgment affirming all elements of all claims. In response to Kormans' arguments, the BLM asserts there is no legal or factual basis for transferring its stock claims to Kormans.

C. Issues

Based on the motions and briefs, the Court finds that four issues are dispositive for the summary judgment motions.

1. *Can the BLM appropriate water rights under Montana law?*
2. *Did the BLM comply with Montana law when it appropriated the stock claims at issue in this case?*
3. *Did the BLM comply with Montana law when it appropriated the wildlife claims at issue in this case?*
4. *Should the Court transfer the BLM stock claims to the Kormans as successors to earlier appropriators from the same source?*

DISCUSSION

Issue 1 *Can the BLM appropriate water rights under Montana law?*

Kormans assert the BLM cannot appropriate water rights under Montana law. This issue is not fact specific to any of the claims in this case. Rather, it is in the nature of a request for declaratory judgment. Kormans support this assertion with federal cases

and state cases from other jurisdictions. They provide no Montana authority that supports their assertion.

The United States has claimed various water rights since Montana became a state in 1889. In 1905, the Montana legislature enacted a statute specifically stating that the United States may appropriate water within the state of Montana “in the same manner and subject to the general conditions applicable to the appropriation of the waters of the state by private individuals.” Section 89-808, RCM (1947) (repealed 1973). The statute required completion of a diversion within three years for filed rights. However, this condition does not apply to the use rights claimed by the BLM in this case. The BLM is claiming the date the reservoir was completed as the priority date. The ability to acquire a water right in the same manner as a corporation or individual was confirmed by the Montana Supreme Court in *Bailey v. Tintinger*, 45 Mont 154, 177, 122 P. 575, 583 (1912).

The 1972 Montana Constitution recognized and confirmed all existing water rights within the state. It directed the legislature to provide for administration, control, and regulation of water rights and to establish a system of centralized records for all water rights. Art. IX, Sec. 3, Mont. Const. In response to these mandates, the 1973 Water Use Act called for a general adjudication of all existing rights within the state of Montana. In 1979, the Legislature began the adjudication and explicitly included the United States among the parties who were eligible to file for existing water rights. Section 85-2-212 MCA; Section 85-2-102(19), MCA.

The BLM, as an agency of the United States, can appropriate water rights under Montana law.

Issue 2 *Did the BLM comply with Montana law when it appropriated the stock claims at issue in this case?*

The facts that control this question are relatively simple. All 17 BLM stock claims represent water use from reservoirs developed by the BLM on federal land. In each case, the BLM claimed the completion date of the reservoir as the priority date for that stock

right. The BLM did not own livestock at the time it completed these reservoirs and does not currently own livestock. Rather, the BLM developed the reservoirs for stockwatering by BLM permittees and others. In some cases, the BLM developed the reservoir with the financial or physical cooperation of a private party.¹ None of these private parties or their successors filed statements of claim for the reservoirs.

In order to claim these stock rights pursuant to Montana law the BLM was required to complete the elements for an appropriation, including: intent to appropriate, notice of that intent, diversion of water (where necessary), and application to beneficial use. *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, within the Missouri River Drainage Area, Including All Tributaries of the Missouri River in Broadwater, Cascade, Jefferson and Lewis and Clark Counties, Montana (Basin 41I)*, 2002 MT 216, ¶10, 311 Mont. 327, 55 P.3d 396 (*Bean Lake III*). Intent can be presumed where there is actual diversion of water. *Wheat v. Cameron*, 64 Mont. 494, 501, 210 P. 761, 762-63 (1922). The presence of a reservoir on a source is sufficient to provide notice of the intent to appropriate water. Impounding water in a reservoir is a diversion as contemplated by *Bean Lake III*. As a result, the evidence shows the BLM met the intent, notice, and diversion requirements by building the reservoirs.

Kormans argue the BLM never put water to beneficial use because it never owned livestock and therefore could not perfect a water right for stock. Kormans assert the right could only be perfected by those stockmen who put livestock on the land. Kormans cite to federal and cases from other states to support their argument.

In *United States v. New Mexico*, 438 U.S. 696, 98 S. Ct. 3012 (1978), the U.S. Supreme Court held that Congress had not implicitly reserved waters in the name of the United States for stockwatering purposes when it created the Gila National Forest. Rather, “Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators under state law.” *Id.* at 716-17, 98 S. Ct. at 3022-23. The decision held that the United States did not have reserved stockwater rights for the Gila

¹ Including: Bentonite Reservoir, County Line Reservoir, Plymouth Reservoir, Antelope Reservoir, Boyson Reservoir, South Box Elder Reservoir, and Grant Coulee Reservoir.

National Forest and that state law was controlling. The case did not hold that the United States is incapable of appropriating a stockwater right pursuant to state law. In fact, by claiming stock rights pursuant to Montana law, the BLM is complying with this decision.

Montana law does support appropriation of a water right by the party who initiates and completes a diversion and makes water available to end users. *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912). This ability for an appropriator to perfect a water right by developing the diversion and delivery system while not actually putting the water to beneficial use themselves was historically available to corporations, individuals, and the United States:

[f]or the United States must proceed in making appropriations of water (from the non-navigable streams of this state at least) as a corporation or individual.

Bailey, 45 Mont. at 177, 122 P. at 583.

Applying *United States v. New Mexico* and *Bailey v. Tintinger*, it is apparent that the BLM was following the law as stated by the U. S. Supreme Court and the Montana Supreme Court when it appropriated these stock claims.

Kormans cite to *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Id. 2007) for the proposition that stock ownership is required to appropriate a stock right. (Under Idaho law, the appropriator must actually apply water to beneficial use. If the claimed beneficial use is stockwater, the appropriator must actually water stock.) However *Joyce Livestock Co.* is distinguishable from the water right claims in this case. The Idaho Court was reviewing competing claims filed by a private party and the United States. There are no competing claims for the reservoirs at issue here. *Joyce Livestock Co.* was addressing direct from source stock claims. In this case, the BLM is claiming stock rights with reservoir diversions. More importantly, decisions by the Idaho Supreme Court can be persuasive, but are not controlling precedent for Montana courts. Each state is free to develop its own law. Montana has done so on this issue.

The BLM could appropriate stock rights by developing reservoirs and making that water available to its permittees. Owning stock was not a requirement for perfecting the water right under the facts that apply to the 17 stock claims at issue here.

The BLM did comply with Montana law when it appropriated these 17 stock claims and is the proper owner of these claims.

Issue 3 *Did the BLM comply with Montana law when it appropriated the wildlife claims at issue in this case?*

Kormans argue that the United States has no federal authority to claim wildlife water rights. They appear to argue the BLM is prohibited from claiming a wildlife right without some expressed authorization by the United States. Kormans also assert wildlife use is incidental to stock use in the reservoirs and therefore does not constitute an appropriation.

The BLM response cited to the Fish and Wildlife Coordination Act of 1934, 16 U.S.C.S. § 661 (LexisNexis, Lexis Advance through Pub. L. No. 114-30, approved July 6, 2015); the Taylor Grazing Act, 3 U.S.C. §§ 315-320 (2012); and the Federal Range Code, 43 C.F.R. § 501.5(b) (1938), as examples of the United States' general intent to manage land and water for the benefit of wildlife. The Master found these acts and codes demonstrated the United States' knowledge that wildlife used the public range and would benefit from reservoirs development. The Court agrees. The acts and codes establish the federal authority to claim wildlife water rights that Kormans allege is lacking. These acts and codes provide a general intent to manage land for both stock and wildlife. This includes a general intent to appropriate water for wildlife use.

At the same time, general expressions of intent must be accompanied by a manifestation of that intent specific to each appropriation. The 17 wildlife claims at issue here all claim use of a reservoir as a multiple use of a single historical appropriation for both stock and wildlife. Reservoir development provided a concrete expression of an intent to appropriate water for both stock and wildlife. Reservoir development also provided notice of the appropriation. The dams constitute a diversion of water. Beneficial use speaks for itself. Developing the reservoir would result in a benefit to wildlife as a source of water for survival and as improved habitat. There is no evidence indicating a complete lack of wildlife in this area and therefore no doubt that wildlife

benefitted from reservoir development. The facts and circumstances surrounding the appropriations support a wildlife claim for each reservoir. *Bean Lake III*, ¶¶ 22-23.

While the primary purpose for reservoir development was stock water, use by wildlife was also a factor. It was not an incidental use as that term is applied in this adjudication. Wildlife use was not an occasional or a rare event. Wildlife was a separate use that is entitled to its own statement of claim. More to the point, the wildlife claims are a multiple use of the corresponding stock claims. Each pair of claims has the same priority date and source. Each pair of claims is based on the same appropriation of water. Claiming wildlife water rights in addition to the stock water rights did not expand the use of the reservoirs.

BLM complied with Montana law when it appropriated the 17 wildlife claims at issue and is the proper owner of these claims.

Issue 4 *Should the Court transfer the BLM stock claims to the Kormans as successors to earlier appropriators from the same source?*

Kormans argue these reservoirs should be transferred to them for two reasons. First, they are the successors to early cattlemen who made the first stockwater appropriations from these sources. They assert these early appropriations predate the BLM reservoirs and require the transfer of the reservoir stock rights to them. Second, they claim that, in some cases, their predecessors contributed financial support and labor to construction of reservoirs and should own the stock rights in these reservoirs.

A. Previous Appropriations from the Same Sources

The BLM reservoirs constitute diversions. As a result, they are subject to the filing requirements found in § 85-2-221(1), MCA. Filing a statement of claim for the reservoirs by the original April 30, 1982 filing deadline or the July 1, 1996 late claim filing deadline was mandatory. Failing to file constituted a forfeiture of the right. Section 85-2-226, MCA; *See also, In the Matter of the Adjudication of the Water Rights Within the Yellowstone River*, 253 Mont. 167, 175, 832 P.2d 1210, 1214 (1992). Kormans can no longer file stock rights for the reservoirs. However, they argue this

Court should transfer the BLM rights to them because the BLM is not the first appropriator from these sources and Montana law dictates this result.

The fact that there may have been earlier appropriations from the same sources does not prevent the BLM from developing reservoirs and claiming stock and wildlife rights for those reservoirs. *St. Onge v. Blakely*, 76 Mont. 1, 23, 245 P. 532, 536 (1926). (Two parties may at the same time be in possession of water from a creek and neither hold adverse to the other; each may justly claim the right to use the water he is using, without affecting the rights of the other.) In fact, multiple water right claims from a single source, large or small, is common. These early appropriations asserted by Kormans must stand or fall on their own merits.² They are separate and distinct appropriations from the BLM reservoir stock rights.

Kormans cite to Water Court cases 41G-190 and 40E-A as authority requiring their ownership of all 17 stock claims. These cases addressed private ownership of stockwater claims on federal land. The decisions held that a private party could appropriate a water right on non-reserved federal land. Further, the water right appropriated on non-reserved federal land benefitted private land owned by that appropriator and was therefore appurtenant to that private land. *Edwards v. U.S. Bureau of Land Mgmt.*, Case 40E-A at p. 33, (MT Water Court Opinion, Jun. 29, 2005); *Hamilton Ranches Partnership v. U.S. Bureau of Land Mgmt.*, Case 41G-190 at p. 22 (MT Water Court Opinion Jul. 19, 2005). Neither case placed any restriction on BLM ownership of stock claims on federal land or found that stock rights on federal land must be owned by permittees. In fact, 40E-A recognizes that stock rights on federal land are routinely owned by the BLM. *Edwards*, Case 40E-A at p. 33. In short, 41G-190 and 40E-A do not provide authority for transferring BLM stock claims to grazing permittees.

Kormans cite *Dept. of St. Lands v. Pettibone*, 216 Mont 361, 702 P.2d 948 (1985) as authority for transferring a water right claim from one party to another party without consent. In *Pettibone* the Supreme Court held that water rights developed on state school trust land by a lessee were subject to the State's fiduciary duty under the school trust and

² A great deal of the evidence provided by Kormans serves to support these early appropriations. They would be appropriate attachments to statement of claim filings for exempt instream stock rights.

must be held in the name of the State, even when the lessee developed the water right. *Id.* at 376, 702 P.2d at 957. This ruling is specific to school trust lands. It provides no authority to transfer water rights to BLM permittees simply because their predecessors may have appropriated instream stock rights prior to BLM reservoir development.

Kormans also assert they were prevented from filing stock claims based on the earliest appropriations. Through the affidavits of Ron Korman and Terry Korman they allege information they received from Montana Department of Natural Resources and Conservation (DNRC) in 1982 convinced them not to file the stock claims. (Objection to Summary Judgment Order, pp. 2-5) They argue this conduct caused them sufficient injury to justify awarding them the BLM stock claims as successors to the original appropriators on these sources.

The water rights Kormans identify predate the BLM reservoirs. It is apparent they are claiming instream stock claims. As a result, the claims they assert are exempt rights as defined by § 85-2-222(1), MCA. Under the statute, filing instream stock claims was optional. Failing to file did not affect the validity of the claim. In fact, under § 85-2-222(2)-(6), MCA, Kormans can still voluntarily file exempt rights. As a result, they have not lost the ability to file their instream stock rights. The BLM reservoir claims do not prevent them from filing instream stock rights from the same sources. *St. Onge* 76 Mont. at 23, 245 P. at 536. They have suffered no injury and have not justified transferring the BLM reservoir rights to them as compensation for alleged DNRC misconduct.

B. Contributions to Reservoir Development

According to evidence submitted by both parties, the Bentonite, County Line, Plymouth, Antelope, Boyson, South Box Elder, and Grant Coulee Reservoirs were all developed with the financial or physical cooperation of private parties. This could raise a potential ownership issue and possibly lead to joint ownership of the stock claims for these reservoirs.

The BLM submitted exhibits documenting the construction, permitting, and maintenance of the reservoirs. For example, in the application for Grant Coulee Reservoir, applicants Earl Korman and Alma McCuin agreed to the following provision:

V.(a) "Title to the said improvements in place together with all labor and materials furnished by either party and used in the construction and maintenance thereof, shall be in the United States of America."
(BIA Motion and Brief, Exhibit. 18, July 21, 2014).

This language is typical for co-operative agreements between the BLM and grazing permittees. Range Improvement Permits and Cooperative Management Agreements contain language clearly limiting the permittees rights in the improvements. The agreements do not indicate that permittees like Korman or McCuin acquired any claim to the water rights. In fact, the evidence provided by the BLM shows the opposite result. The BLM retained ownership of the improvement.

Kormans state Earl Korman made "financial contributions to construct three reservoirs under the authority of the Taylor Grazing Act." (Korman Motion, Jul. 1, 2014 and Korman Objection, Feb. 17, 2015). They do not explain how the contribution supports an independent right for Earl Korman or supports transferring the BLM reservoir claim to them. The evidence provided by the BLM shows the opposite result. The BLM retains all ownership interests. As a result, Kormans fail to raise any genuine issue of material fact resulting from joint development of the reservoirs. There is no evidence supporting the transfer of the BLM stock rights to Kormans based on joint reservoir development.

There is no factual or legal basis that supports transferring the 17 BLM stock claims to Kormans.

CONCLUSION

The BLM, as an agency of the United States, can appropriate water rights under Montana law in the same manner as a corporation or individual. Where the BLM is developing reservoirs for stock use through its permittees, livestock ownership by the BLM is not a prerequisite for appropriating and perfecting stock claims.

The BLM can claim stock and wildlife rights from the same historical appropriation. The BLM complied with Montana law when it appropriated the 17 stock claims and 17 wildlife claims at issue here and is the proper owner of all 34 claims.

A senior appropriation on a source does not prevent subsequent junior appropriations. The senior right holder or his successors are not automatically entitled to ownership of the subsequent appropriations. Based on the evidence before the Court, financial and labor contributions to reservoir development by permittees did not create an ownership interest. There is no factual or legal basis that supports transferring the 17 BLM stock claims to Kormans.

ORDER

ORDERED that the Ronald D. and Maxine E. Korman Motion for Summary Judgment is DENIED.

ORDERED that the BLM Motion for Summary Judgment is GRANTED on all elements of the following claims:

40M 75204-00 (wildlife) and 40M 75205-00 (stock)	VR-69 Reservoir
40M 75206-00 (stock) and 40M 75207-00 (wildlife)	Oasis Reservoir
40M 75216-00 (stock) and 40M 75217-00 (wildlife)	Alley Reservoir
40M 75218-00 (wildlife) and 40M 75219-00 (stock)	Bentonite Reservoir
40M 75222-00 (wildlife) and 40M 75223-00 (stock)	VR-157 Reservoir
40M 75224-00 (stock) and 40M 75225-00 (wildlife)	Joes Reservoir
40M 75226-00 (wildlife) and 40M 75227-00 (stock)	County Line Reservoir
40M 75228-00 (wildlife) and 40M 75229-00 (stock)	Hammond Reservoir
40M 75232-00 (wildlife) and 40M 75233-00 (stock)	Plymouth Reservoir
40M 75234-00 (wildlife) and 40M 75235-00 (stock)	Antelope Reservoir
40M 75316-00 (wildlife) and 40M 75318-00 (stock)	Apt Reservoir
40M 75317-00 (wildlife) and 40M 75319-00 (stock)	Clansman Reservoir
40M 75320-00 (stock) and 40M 75321-00 (wildlife)	VR-104 Reservoir
40M 75322-00 (stock) and 40M 75323-00 (wildlife)	Boyson Reservoir
40M 75324-00 (wildlife) and 40M 75325-00 (stock)	South Box Elder Reservoir
40M 75236-00 (stock) and 40M 75237-00 (wildlife)	Grant Coulee

40M 75240-00 (stock) and 40M 75241-00 (wildlife) Sides Reservoir

As recommended by the Master, the "Bean Lake" issue remarks are removed from the wildlife claims. There are no element changes to any of these 34 claims.

A Post Decree Abstract of Water Right Claim, for each of these claims is served with this Order to confirm the remarks have been removed in the state's centralized water right record system.

ORDERED that the BLM Motion for Summary Judgment is DENIED on all elements of the following claims:

40M 75200-00 (stock) and 40M 75201-00 (wildlife) Unnamed Reservoir

40M 75208-00 (stock) and 40M 75209-00 (wildlife) Chevy Reservoir

40M 75220-00 (stock) and 40M 75221-00 (wildlife) Poker Reservoir

40M 75248-00 (stock) and 40M 75249-00 (wildlife) Korman Pit Reservoir

These claims are remanded to the Master for further proceedings.

The following claims have been withdrawn by the BLM:


40M 75198-00 (stock) and 40M 75199-00 (wildlife) Bugger Reservoir

40M 75202-00 (stock) and 40M 75203-00 (wildlife) Stan's Reservoir

ORDERED that these claims are DISMISSED and shall appear as withdrawn in the next decree for this Basin.

A Post Decree Abstract of Water Right Claim, for each of these claims is served with this Order to confirm that the claims appear as withdrawn in the state's centralized water right record system.

DATED this *11* day of *August*, 2015.


Douglas Ritter
Associate Water Judge

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40M 75219-00	40M 75318-00
40M 75220-00	40M 75319-00
40M 75221-00	40M 75320-00
40M 75222-00	40M 75321-00
40M 75223-00	40M 75322-00
40M 75224-00	40M 75323-00
40M 75225-00	40M 75324-00
40M 75226-00	40M 75325-00

ORDER ON SUMMARY JUDGMENT

PROCEDURAL HISTORY

The above-captioned 46 claims were filed by the United States and encompass a mix of stock and wildlife uses for 23 reservoirs. The reservoirs are located on federal public lands held in title by the United States and administered by the United States Bureau of Land Management (BLM). Ron and Maxine Korman (the Kormans) filed timely objections and counterobjections to the claims. In sum, the Kormans' objections

assert that: 1) these water rights were previously “vested” in private ownership and are appurtenant to the Kormans privately owned lands; 2) that the United States cannot appropriate stockwater or wildlife claims; and 3) that ownership of the stock claims should be transferred from the United States to the Kormans.¹

On May 15, 2012, an “Order Consolidating Case and Setting Filing Deadline” was issued by Water Master Dana Pepper. Numerous cases, including this case, were consolidated into case 40M-A. Each of these cases had one or more claims that were objected to “on the basis that the claim is a vested water right.” *Order Consolidating Case and Setting Filing Deadline*, at 2. The parties to the consolidated case – including claimants, objectors, counter-objectors, and appearing parties – were instructed to brief the issue of “whether these claims are vested water rights.” *Id.* The issue was fully briefed and oral argument was heard.

On October 31, 2013, Water Master Pepper issued an Order dismissing all objections regarding vested water rights and closed case 40M-A. The Order received objections from several parties. On March 5, 2014, a hearing was held by the Court on the objections to the Order closing case 40M-A. On June 13, 2014, the Master’s Order was adopted in whole by Associate Water Judge Douglas Ritter. On August 12, 2014, the Kormans filed a Motion to Reconsider the June 13, 2014 Order. The Motion to Reconsider was denied on September 11, 2014. Meanwhile, both the Kormans and the United States filed Motions for Summary, on July 1, 2014 and July 21, 2014, respectively. The parties’ motions have been fully briefed, and neither party has requested a hearing on the motion.

STANDARD OF REVIEW

Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620, [citing M. R. Civ. P. 56(c)]. To determine the existence or nonexistence of a genuine issue of material fact, the Court

¹ Due to the large number of such claims that received similar objections in Basin 40M, the United States and objecting parties identified 12 test claims to address the underlying legal issues presented in the objections. Those 12 test claims were consolidated into Case 40M-300, and an Order on Summary Judgment was recently issued in that case. The Order in 40M-300 addresses many of the same legal issues as this case.

looks to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Lee v. USSA Cas. Ins. Co.*, 2001 MT 59, ¶ 4, 304 Mont. 356, 22P.3d 631. All reasonable inferences that might be drawn from the offered evidence will be drawn in favor of the party opposing the summary judgment motion. *Lee*, ¶ 17. The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *Lee*, ¶ 25. Where the moving party is able to demonstrate that no genuine issue as to any material fact remains in dispute, the burden then shifts to the party opposing the motion. *Lee*, ¶ 26.

To raise a genuine issue of material fact, the party opposing summary judgment must present material and substantial evidence rather than merely conclusory or speculative statements. *Lee*, ¶ 26. Proof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel. *Montana Metal Buildings, Inc. v. Shapiro*, 283 Mont. 471, 476, 942 P.2d 694, 697 (1997). The power of the Court to render summary judgment in favor of the moving party includes the power to render summary judgment for the non-moving party provided the case warrants that result. *Hereford v. Hereford*, 183 Mont. 104, 598 P.2d 600 (1979).

The United States' Prima Facie Claims

Section 85-2-227, MCA, states that a timely filed Statement of Claim is prima facie proof of its content. The definition of prima facie evidence is "that which proves a particular fact until contradicted by other evidence." Section 26-1-102(6), MCA. In the context of this adjudication, prima facie proof means that a timely filed Statement of Claim, including the name and address of the claimant, the historical basis for the claimed right, the source, the quantities of water and times of use, the legal descriptions of the point of diversion and place of use, the purpose of use, the approximate date of first use, a sworn statement that contents are true and correct to the best of claimant's knowledge and belief, and the required supporting documents, present all the necessary information to prove a valid water right. In other words, the evidence presented on the Statement of Claim is prima facie proof of a valid water right.

Prima facie proof is not unassailable. Rather, it means that all necessary components have been specified, that the claim is complete and that the prima facie case has been made. Whether the validity of the entire claim or just one element is at issue, this prima facie proof must be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the claim does not accurately reflect the beneficial use of the claimed existing water right. Rule 19, W.R.Adj.R. The relevant facts regarding the United States' prima facie claims are as follows:

Claims 40M 75198-00 and 40M 75199-00

These two claims represent stock (40M 75198-00) and wildlife (40M 75199-00) uses for an onstream reservoir known as Bugger Reservoir. The diversion dam for Bugger Reservoir is located in the NWSWNE of Section 3, Twp 27N, Rge 34E in Valley County. This reservoir was constructed by the United States and is located on federal lands. The reservoir was completed on February 28, 1950.

Since its construction, the reservoir has consistently been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of February 28, 1950. The capacity of the reservoir is approximately 5.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 4.38 acre-feet being claimed for wildlife use.

Claims 40M 75200-00 and 40M 75201-00

These two claims represent stock (40M 75200-00) and wildlife (40M 75201-00) uses for an unnamed onstream reservoir. The diversion dam for the reservoir is located in the S2SWSE of Section 3, Twp 27N, Rge 34E in Valley County. The reservoir is located on federal lands. It is unknown who constructed the reservoir or when it was constructed.

The reservoir is used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of December 31, 1969, which is apparently the year of the aerial photo on which the reservoir was first located. The

capacity of the reservoir is approximately 1.54 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 0.92 acre-feet being claimed for wildlife use.

Claims 40M 75204-00 and 40M 75205-00

These two claims represent stock (40M 75205-00) and wildlife (40M 75204-00) uses for an onstream reservoir known as VR-69. The diversion dam for VR-69 is located on federal lands in the SENWSE of Section 6, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed in 1937.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of December 31, 1937. The capacity of the reservoir is approximately 10.38 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 9.76 acre-feet being claimed for wildlife use.

Claims 40M 75206-00 and 40M 75207-00

These two claims represent stock (40M 75206-00) and wildlife (40M 75207-00) uses for an onstream reservoir known as Oasis Reservoir. The diversion dam for Oasis Reservoir is located in the NWSESW of Section 14, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed in March or April of 1973.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of April 5, 1973. The capacity of the reservoir is approximately 3.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 2.38 acre-feet being claimed for wildlife use.

Claims 40M 75208-00 and 40M 75209-00

These two claims represent stock (40M 75208-00) and wildlife (40M 75209-00) uses for an onstream reservoir known as Chevy Reservoir. The diversion dam for Chevy

Reservoir is located in the SENENW of Section 9, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the former BLM grazing permittee pursuant to a permit issued by the BLM. The reservoir was completed on November 14, 1960.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of October 28, 1960. The capacity of the reservoir is approximately 2.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 1.38 acre-feet being claimed for wildlife use.

Claims 40M 75216-00 and 40M 75217-00

These two claims represent stock (40M 75216-00) and wildlife (40M 75217-00) uses for an onstream reservoir known as Alley Reservoir. The diversion dam for Alley Reservoir is located in the NWNENW of Section 14, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed in March or April of 1973.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of April 5, 1973. The capacity of the reservoir is approximately 3.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 2.38 acre-feet being claimed for wildlife use.

Claims 40M 75218-00 and 40M 75219-00

These two claims represent stock (40M 75219-00) and wildlife (40M 75218-00) uses for an onstream reservoir known as Bentonite Reservoir. The diversion dam for Bentonite Reservoir is located in the NWSWSE of Section 14, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States with the cooperation and assistance of the former grazing permittee. The reservoir was completed on November 13, 1959.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of November 13, 1959. The capacity of the reservoir is approximately 8.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 7.38 acre-feet being claimed for wildlife use.

Claims 40M 75220-00 and 40M 75221-00

These two claims represent stock (40M 75220-00) and wildlife (40M 75221-00) uses for an onstream reservoir known as Poker Reservoir. The diversion dam for Poker Reservoir is located in the NWSWNW of Section 15, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the former BLM grazing permittee pursuant to a permit issued by the BLM. The reservoir was completed in 1966.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of September 16, 1966. The capacity of the reservoir is approximately 1.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining .38 acre-feet being claimed for wildlife use.

Claims 40M 75222-00 and 40M 75223-00

These two claims represent stock (40M 75223-00) and wildlife (40M 75222-00) uses for an onstream reservoir known as VR-157. The diversion dam for VR-157 is located in the NWSENE of Section 16, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed in 1947.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of December 31, 1947. The capacity of the reservoir is approximately 5.0 acre-feet. The

BLM claimed .62 acre-feet for stock uses, with the remaining 4.38 acre-feet being claimed for wildlife use.

Claims 40M 75224-00 and 40M 75225-00

These two claims represent stock (40M 75224-00) and wildlife (40M 75225-00) uses for an onstream reservoir known as Joes Reservoir. The diversion dam for Joes Reservoir is located in the SWNESE of Section 17, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed in March or April of 1973.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of April 5, 1973. The capacity of the reservoir is approximately 6.6 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 5.98 acre-feet being claimed for wildlife use.

Claims 40M 75226-00 and 40M 75227-00

These two claims represent stock (40M 75227-00) and wildlife (40M 75226-00) uses for an onstream reservoir known as County Line Reservoir. The diversion dam for County Line Reservoir is located in the NENESW of Section 18, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States with the cooperation and assistance of the former grazing permittee. The reservoir was completed on November 3, 1959.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of November 3, 1959. The capacity of the reservoir is approximately 5.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 4.38 acre-feet being claimed for wildlife use.

Claims 40M 75228-00 and 40M 75229-00

These two claims represent stock (40M 75229-00) and wildlife (40M 75228-00) uses for an onstream reservoir known as Hammond Reservoir. The diversion dam for

Hammond Reservoir is located in the NESENE of Section 19, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed on October 15, 1946.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of October 15, 1946. The capacity of the reservoir is approximately 3.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 2.38 acre-feet being claimed for wildlife use.

Claims 40M 75232-00 and 40M 75233-00

These two claims represent stock (40M 75233-00) and wildlife (40M 75232-00) uses for an onstream reservoir known as Plymouth Reservoir. The diversion dam for Plymouth Reservoir is located in the SESESW of Section 23, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States with the cooperation and assistance of the former grazing permittee. The reservoir was completed in 1966.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of September 16, 1966. The capacity of the reservoir is approximately 1.0 acre-feet. The BLM claimed .40 acre-feet for stock uses, with the remaining .60 acre-feet being claimed for wildlife use.

Claims 40M 75232-00 and 40M 75233-00

These two claims represent stock (40M 75235-00) and wildlife (40M 75234-00) uses for an onstream reservoir known as Antelope Reservoir. The diversion dam for Antelope Reservoir is located in the SWNWSE of Section 24, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States with the cooperation and assistance of the former grazing permittee. The reservoir was completed in on December 8, 1959.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of December 8, 1959. The capacity of the reservoir is approximately 3.0 acre-feet. The BLM claimed .39 acre-feet for stock uses, with the remaining 2.61 acre-feet being claimed for wildlife use.

Claims 40M 75316-00 and 40M 75318-00

These two claims represent stock (40M 75318-00) and wildlife (40M 75316-00) uses for an onstream reservoir known as Apt Reservoir. The diversion dam for Apt Reservoir is located in the E2NENE of Section 29, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed in March of 1973.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of March 21, 1973. The capacity of the reservoir is approximately 4.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 3.38 acre-feet being claimed for wildlife use.

Claims 40M 75317-00 and 40M 75319-00

These two claims represent stock (40M 75319-00) and wildlife (40M 75317-00) uses for an onstream reservoir known as Clansman Reservoir. The diversion dam for Clansman Reservoir is located in the SWNESE of Section 29, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed in March of 1973.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of April 5, 1973. The capacity of the reservoir is approximately 2.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 1.38 acre-feet being claimed for wildlife use.

Claims 40M 75320-00 and 40M 75321-00

These two claims represent stock (40M 75320-00) and wildlife (40M 75321-00) uses for an onstream reservoir known as VR-104. The diversion dam for VR-104 is located in the NWNWSE of Section 32, Twp 28N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed on March 23, 1939.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of March 23, 1939. The capacity of the reservoir is approximately 4.1 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 3.48 acre-feet being claimed for wildlife use.

Claims 40M 75322-00 and 40M 75323-00

These two claims represent stock (40M 75322-00) and wildlife (40M 75323-00) uses for an onstream reservoir known as Boyson Reservoir. The diversion dam for Boyson Reservoir is located in the SENENE of Section 3, Twp 28N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States with the cooperation and assistance of the former grazing permittee. The reservoir was completed on August 1, 1954.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of August 1, 1954. The capacity of the reservoir is approximately 5.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 4.38 acre-feet being claimed for wildlife use.

Claims 40M 75324-00 and 40M 75325-00

These two claims represent stock (40M 75325-00) and wildlife (40M 75324-00) uses for an onstream reservoir known as South Box Elder Reservoir. The diversion dam for South Box Elder Reservoir is located in the NWNWSE of Section 33, Twp 28N, Rge

34E in Valley County. This reservoir is located on federal lands and was constructed by the United States with the cooperation and assistance of the former grazing permittee. The reservoir was completed on October 25, 1959.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of October 25, 1959. The capacity of the reservoir is approximately 4.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 3.38 acre-feet being claimed for wildlife use.

Claims 40M 75236-00 and 40M 75237-00

These two claims represent stock (40M 75236-00) and wildlife (40M 75237-00) uses for an onstream reservoir known as Grant Coulee Reservoir. The diversion dam for Grant Coulee Reservoir is located in the NESWSE of Section 25, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States with the cooperation and assistance of the former grazing permittee. The reservoir was completed on November 30, 1959.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of November 30, 1959. The capacity of the reservoir is approximately 3.0 acre-feet. The BLM claimed .39 acre-feet for stock uses, with the remaining 2.61 acre-feet being claimed for wildlife use.

Claims 40M 75240-00 and 40M 75241-00

These two claims represent stock (40M 75240-00) and wildlife (40M 75241-00) uses for an onstream reservoir known as Sides Reservoir. The diversion dam for Sides Reservoir is located in the SWNESE of Section 29, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands and was constructed by the United States. The reservoir was completed in 1951.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of February 28, 1951. The capacity of the reservoir is approximately 5.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 4.38 acre-feet being claimed for wildlife use.

Claims 40M 75248-00 and 40M 75249-00

These two claims represent stock (40M 75248-00) and wildlife (40M 75249-00) uses for an onstream reservoir known as Korman Pit Reservoir. The diversion dam for Korman Pit Reservoir is located in the W2SENW of Section 34, Twp 27N, Rge 34E in Valley County. This reservoir is located on federal lands. It is unclear who constructed the reservoir, but it was completed on April 14, 1960.

Since its construction, the reservoir has been used for stockwatering purposes by BLM grazing permittees. The reservoir also provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of April 14, 1960. The capacity of the reservoir is approximately 3.0 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 2.38 acre-feet being claimed for wildlife use.

Claims 40M 75202-00 and 40M 75203-00

These two claims represent stock (40M 75202-00) and wildlife (40M 75203-00) uses for a reservoir known as Stan's Reservoir. The United States acknowledges that Stan's Reservoir is not on federally owned lands and has opted to withdraw these two claims.

Genuine Issues of Material Fact

Because both parties moved for summary judgment, it appears that the parties agree that there are no genuine issues of material fact. The above-detailed elements of the United States prima facie claims are, for the most part, supported by the record. The Kormans do not directly challenge the prima facie elements of the United States' claims. The Kormans do, however, argue that the United States did not, as it has claimed,

construct all of the reservoirs that are at issue. This is a factual issue and should be discussed before reaching any issue of law.

There appear to be two types of reservoirs at issue. The first category consists of reservoirs constructed by the United States, including some reservoirs that were constructed with the cooperation and assistance of the former grazing permittee.² The Kormans do not contest that the United States constructed these reservoirs. Rather, they point out that their predecessor in interest Earl Korman made some financial contribution to three of the reservoirs at issue. Obj. Brf. at 4. The United States does not deny that in some instances grazing permittees contributed money or materials toward reservoir projects, but states that in those instances, the bulk of the cost was borne by the United States. U.S. Brf. at 23. Accordingly, the Master finds that there are no genuine issues of material fact as to the first category of reservoirs.

The second category of reservoirs includes those constructed by the former grazing permittee pursuant to a permit issued by the United States.³ In this case, the Chevy and Poker reservoirs were subject to Range Improvement Permits (RIPs) issued by the United States. U.S. Exh. 6, 9. The RIPs state that the permits do not “accord to the permittee any preference, privilege, or consideration of any kind except as expressly provided herein.” *Id.* The RIPs do not mention water rights. Further, it does not appear from the record that these reservoirs were subject to Cooperative Agreements with the United States. This is factually relevant because such agreements (as their name implies) constitute a *cooperative* arrangement between the United States and the permittee for the construction and management of the reservoir. *See e.g.* U.S. Exh.-8. Here, the United States has failed to establish that there are no genuine issues of fact with respect to the Chevy and Poker Reservoirs, which were constructed solely by former grazing permittees.

The United States claimed stockwater (40M 75200-00) and wildlife (40M 75201-00) uses for an unnamed reservoir located on federal lands. According to the United

² Bigger, VR-69, Oasis, Alley, Bentonite, VR-157, Joes, County Line, Hammond, Plymouth, Antelope, Apt, Clansman, VR-104, Boyson, South Box Elder, Grant Coulee, and Sides Reservoirs.

³ Chevy and Poker Reservoirs.

States, this reservoir was “located during review of BLM lands using a topographic quadrangle created from a 1969 aerial photo.” U.S. Brf. at 6. It is unknown who constructed the reservoir or when it was constructed. Without this factual information, it is not possible to determine whether the United States (and not a private individual) appropriated this water for a beneficial use. Thus, the United States has failed to establish the absence of any genuine issue of fact for the unnamed reservoir.

Additionally, the United States claimed stockwater (40M 75248-00) and wildlife (40M 75249-00) claims for the Korman Pit Reservoir. However, the information supplied by the United States to verify the claimed elements of the reservoir actually refers to a different reservoir known as the Korman Retention Reservoir. U.S. Exh. 16. The Korman Retention Reservoir has a different place of use, point of diversion, volume and priority date than the Korman Pit Reservoir. *Id.* Without the required information, it is not possible to determine whether the United States (and not a private individual) appropriated this water for a beneficial use. Thus, the United States has failed to establish the absence of any genuine issue of fact for the Korman Pit Reservoir.

As to the first category of claims, the Master has conducted a thorough review of all of the briefing, exhibits and other arguments and has not found any remaining evidence to contradict the prima facie elements of the claims. The only remaining questions relate to whether the United States *legally* appropriated the water described in these claims. In sum, there are no genuine issues of material fact with respect to 18 of the 22 reservoirs, and the question becomes whether the United States is entitled to judgment as a matter of law for these claims.

Do Water Court Cases 41G-190 and 40E-A Control the Issues in This Case?

The Kormans argue that they, not the United States, own the stockwater rights at issue in this case. The Kormans assert that their predecessors in interest began grazing stock on or near the claimed places of use when the land was public domain; therefore, their predecessors obtained stockwater rights for these sources on federal lands.

The Kormans rely in part on previous Water Court opinions issued in cases 40E-A and 41G-190 for the proposition that stockmen whose livestock grazed and drank water

on federal lands appropriated water for a beneficial use that resulted in a perfected water right in accordance with Montana law. Cases 40E-A and 41G-190 addressed the issue of whether a private appropriator could secure a stockwater right on non-reserved federal lands and, if so, whether the right was appurtenant to private property or the public domain. The holding in case 40E-A was fairly broad, concluding that:

[T]his Court cannot conclude, as a universal principle, that Montana or federal law prohibited private livestock owners from acquiring state based water rights for the use of their livestock on the public domain prior to July 1, 1973; or that title to the rights to the use of water for livestock on the public domain and reserved lands should **always** be in the name of the United States.

40E-A at 39 (emphasis added). Case 41G-190 went further, holding that:

[W]ater rights appropriated [on the public domain] became the property of the claimant's predecessors rather than an appurtenance to the public domain ... and that water right – used for the benefit of the claimant's privately owned lands – is appurtenant to the claimant's privately owned lands.

41G-190 at 22.

Cases 41G-190 and 40E-A support the possibility that Kormans' predecessors in interest appropriated stockwater rights on federal public lands. However, cases 41G-190 and 40E-A did not address whether the United States can hold title to stockwater or wildlife rights on federal public lands. In fact, Case 40E-A distinctly recognizes the fact that such rights are routinely decreed in the name of the United States. 40E-A at 39. This Master finds that cases 41G-190 and 40E-A do not control the disposition of this case.

Should this Report Address the Kormans' Potential Claims for the Same Sources?

As noted, the Kormans urge the Court to invalidate the United States claims and transfer ownership of the United States' stockwater claims to the Kormans. The United States argues that this would be improper for a number of reasons. Pursuant to the Montana Water Use Act, the water rights adjudication process relies on interested parties to both the timely file water claims and to file objections to claims. Section § 85-2-233, MCA. When the United States filed its statements of claim, it initiated proceedings in the

Montana Water Court for the adjudication of those claims. This adjudication allows objections, which may result in adjustments to existing rights. *Id.*

In this case, the Kormans filed timely objections to the United States claims, arguing that they own the stockwater rights at issue. The Kormans allege that their predecessors in interest “went out on the then open, unsurveyed, unreserved public domain and with the government’s consent acquired vested water rights.” Obj. Reply Brf. at 11. In short, the Kormans allege that their appropriations existed before the Taylor Grazing Act (TGA) and that those existing rights were protected by the terms of the TGA. *Id.*; Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C. §§ 315-320 (2000)). The Kormans did not file competing claims for these sources. Instead, the Kormans argue that ownership of the claims should be transferred.

Transfer of ownership is not appropriate in this case because if Kormans’ predecessors did graze cattle on the same places of use prior to the existence of the TGA, the result would be a separate and unique water right with a senior priority date.⁴ Further, to decree the Kormans a right for these reservoirs would defeat the purpose behind the filing requirement (§ 85-2-221, MCA) and circumvent the notice and objection requirements provided for by statute. Sections 85-2-231, -232, -233, MCA. Finally, even if the Kormans do have separate, senior claims for these reservoirs, this does not automatically preclude the existence of claims in the name of the United States. *St. Onge v. Blakely*, 76 Mont. 1, 23, 245 P. 532, 536 (1926).

In summary, a claim that the Kormans’ predecessors in interest grazed stock in the vicinity of these sources prior to the existence of the reservoirs or prior to the TGA should not affect the Court’s analysis of the United States’ claims. Pursuant to the Water Use Act, individual claims are evaluated on their own merits and altered only to reflect their historical beneficial use. Accordingly, the Court’s inquiry should begin with whether the United States appropriated water for a beneficial use.

⁴ Even if it was appropriate to decree separate rights to the Kormans in this case, the Kormans have not presented clear evidence as to how the elements of those rights would be defined (point of diversion, place of use, priority date, etc...).

Did the United States Appropriate Water for a Beneficial Use When It Constructed Reservoirs on Federal Grazing Allotments?

In Montana, the true test of appropriation has always been the successful application of water to a beneficial use. *In re Adjudication of the Existing Rights to the Use of the Missouri River*, 2002 MT 216, ¶ 10 (citing *Thomas v. Guiraud*, 6 Colo. 530, 533 (1883) (“the true test of appropriation of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same, or making such application, is immaterial.”)). “[T]he flexibility of the prior appropriation doctrine has allowed acquisition of the right to use a specific amount of water through application of the water to a beneficial use.” *Id.*

Prior to 1973, there were two possible ways of perfecting a water right. First was the method provided for by statute, which required posting at the point of diversion and filing a notice with the county clerk. Second was simply by applying the water to a beneficial use. *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 367, 702 P.2d 948, 951 (1985); *Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897). This second method creates what is known as a “use” right. A use right is defined as “a claimed existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree.” Rule 2(a)(71), W.R.C.E.R.

Even with the passage of the Water Use Act in 1973, the Montana Legislature recognized the flexibility of the prior appropriation doctrine in the Water Use Act's definitions. The Water Use Act defines “appropriate” as to “divert, impound, or withdraw, including by stock for stockwater, a quantity of water for a beneficial use.” Section 85-2-102(1)(a), MCA. “Beneficial use” means “a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stockwater, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.” Section 85-2-102(4)(a), MCA.

With regard to the United States stock reservoirs, the material facts are not in dispute. The United States constructed the Bugger, VR-69, Oasis, Alley, VR-157, Joes, Hammond, Apt, Clansman, VR-104 and Sides reservoirs. The United States also

constructed the Bentonite, County Line, Plymouth, Antelope, Boyson, South Box Elder and Grant Coulee reservoirs with assistance of the former grazing permittees. The United States bore all or the majority of the costs in constructing these 18 reservoirs. The reservoirs impound water that is then made available to stock owned by the grazing permittees. The United States claimed use rights for these reservoirs.

The Kormans argue that the United States could not have appropriated these stockwater rights because it never owned the livestock that appropriated the water or grazed federal lands. In the Kormans view, all the water impounded in these reservoirs was already appropriated by the owners of the stock that grazed the open range. The United States counters that ownership of the stock is not relevant to whether it appropriated these stockwater claims.

The Kormans do not cite any Montana authority for the proposition that a stockwater right can only be appropriated by the owner of the stock that drink from the source.⁶ The Kormans cite the U.S. Supreme Court's decision in *United States v. New Mexico* for the proposition that the federal government cannot put water to actual beneficial use for stockwatering purposes. 438 U.S. 696 (1978). In that case, the Supreme Court held that in creating the Gila National Forest, Congress had not implicitly reserved waters in the name of the United States for stockwatering purposes. *Id.* at 716-717. Rather, "Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators under state law." *Id.* at 717. The Supreme Court's decision in *U.S. v. New Mexico* did not hold that the United States is incapable of appropriating a stockwater right pursuant to state law; it held that the United States did not have reserved stockwater rights for the Gila National Forest and that state law was controlling. In this case, the United States is attempting to secure stockwater rights pursuant to Montana state law.

⁶ The Kormans' voluminous filings with the Water Court contain large number of authorities, affidavits and other filings that support the Prior Appropriation doctrine as the law of the land in Montana. This is not in dispute, and thus these authorities will not be discussed. Further, the issue of whether the Kormans' alleged "vested" water rights have greater significance than other types of existing water rights or are exempt from the adjudication process was settled in Case 40M-A and will not be discussed in this case.

The only relevant authority cited by the Kormans is the Idaho Supreme Court's decision in *Joyce Livestock Co. v. United States*. 144 Idaho 1, 156 P.3d 502 (2007). In that case, Joyce Livestock claimed instream stockwater rights for Jordan Creek, a stream on federal rangeland. 144 Idaho at 4. The United States claimed overlapping stockwater claims for the stream with a priority date of 1934, the year of the adoption of the Taylor Grazing Act [43 U.S.C. §§ 315 *et. seq.* (1934)]. *Id.* In holding that the United States claims were invalid, the Idaho Court focused on the fact that, pursuant to Idaho law, the United States was attempting to secure water rights via the "constitutional" method of appropriation.⁷ 144 Idaho at 19. The constitutional method "requires that the appropriator actually apply the water to a beneficial use." *Id.* "If that use is stock watering, then the appropriator must actually water stock." *Id.* The Idaho Court concluded that "because the United States has not done so, the district court did not err in denying its claimed water rights." *Id.*

Joyce Livestock is distinguishable from this case. First, *Joyce Livestock* dealt exclusively with overlapping claims filed by a private party and the United States. Here, the Kormans have not filed overlapping claims for these sources. Second, unlike the direct from stream sources in *Joyce Livestock*, in this case the United States has constructed the impoundments that allow for an application of water to a beneficial use. Third, and most important, Montana law has never required that only the appropriator can make beneficial use of the appropriated water in order to perfect a water right.

Montana courts have long recognized that certain kinds of appropriations, such as those made by public service corporations and governments, do not require that beneficial use be made by the appropriator himself. *Bailey v. Tintinger*, 45 Mont. 154 (Mont. 1912). *Bailey* addressed a claimant corporation that constructed a diversion and ditch system with the intent of irrigating its own property and selling water to others. The claimant corporation argued that its water right was perfected not upon application to a beneficial use, but upon completion of its system. In finding for the claimant, the Montana Supreme Court noted that "[i]n cases of appropriation for the purpose of

⁷ The "constitutional" method of appropriation appears to be recognition of the prior appropriation doctrine in the Idaho Constitution. *Joyce Livestock*, 144 Idaho at 7-8.

supplying water to others, we do not understand how it can be said that the use of the water is an essential element of its appropriation.” *Id.* at 177 (quoting *Nevada Ditch Co. v. Bennett*, 45 P. 472 (1896)).

Under these circumstances of *Bailey* – where water is appropriated for beneficial use by another – the water right is perfected upon completion of the system and may contemplate a future beneficial use. *Id.* at 179. The *Bailey* Court also compared the claimant’s appropriation to similar appropriations made by the United States, arguing that to deny such a right would “defeat the object and purpose of the United States in its great reclamation projects, for the United States must proceed in making appropriations of water (from the non-navigable streams of this state at least) as a corporation or individual.” *Id.* at 177.

Here, the United States has constructed reservoirs that impound a volume of water. As intended, this water is used by stock for the benefit of the public, specifically BLM grazing permittees. The Kormans do not contest that water is put to beneficial use. Further, the use of federal rangelands in conjunction with the BLM grazing permit system provides a benefit to the United States, as well as the public at large. *United States v. Morrell*, 331 F.2d 498, 501 (10th Cir. 1964). This benefit is made possible by the development of water sources for public use on the federal range. *Nevada v. Morros*, 766 P.2d 263, 268 (Nev. 1988) (“the United States benefits from the development of new water sources on federal land.”).

Under Montana law, when the United States constructed the reservoirs, impounded the water and made it available for stock use, the United States appropriated the water for a beneficial use. *In re Adjudication*, 2002 MT 216, ¶ 10; *Bailey*, 45 Mont. at 179. Thus, the United States is entitled to stockwater rights for these reservoirs. *Id.*

Did the United States Appropriate Water for Wildlife Use When It Constructed Reservoirs on Federal Grazing Allotments?

When the United States constructed the 18 reservoirs at issue, it impounded water for a beneficial use. The reservoirs are used now and have historically been used by wildlife. Therefore, the United States claimed wildlife use rights for these reservoirs.

The Kormans argue that the United States “has no federal authority/law to claim wildlife water rights and that wildlife using water is merely an incidental use.” Obj. Brf. at 3. Though not entirely clear, it appears that the Kormans argue that wildlife does not constitute a beneficial use and that, even if it is a beneficial use, the United States cannot claim wildlife uses for these specific reservoirs.

In 2002, the Montana Supreme Court clarified that Montana state law historically recognized fish, wildlife and recreation appropriations of water as beneficial uses of water. *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, ¶40, 55 P.3d 396, 407. The Court held that such uses “existed in Montana prior to 1973 where the intended beneficial use did not require diversion, and the facts and circumstances indicate that notice of the appropriator’s intent had been given.” *Id.*

The United States is treated as a “person” for the purposes of this adjudication. Section 85-2-102(4)(a), MCA. The United States is entitled to equal treatment under state water law and “is not to be feared, given preferential treatment and certainly not discriminated against.” *Morros*, 104 Nev. at 717. Therefore, where the United States claims an appropriation of water for wildlife use, the United States must, like any other appropriator, establish the required elements of the claim. In this case, the United States has claimed “use” rights. A “use right” is defined as “a claimed existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree.” Rule 2(a)(71), W.R.C.E.R. As noted above, the Montana Supreme Court has specifically recognized that for pre-1973 wildlife uses of water that did not require a diversion, the appropriator must establish the element of intent. Therefore, question becomes whether the United States intended to appropriate water for wildlife use when it constructed the reservoirs.

“The intention of the claimant is ... a most important factor in determining the validity of an appropriation of water.” *Toohy v. Campbell*, 24 Mont. 13, 17 (1900). “As every appropriation must be made for a beneficial or useful purpose ... it becomes the duty of the courts to try the question of the claimant’s intent by his acts and the

circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof.” *Id.* at 18 (citations omitted). “[A]t the time of taking the initial steps [to appropriate], the claimant must have an intention to apply the water to a useful or beneficial purpose.” *Bailey*, 45 Mont. at 178 (citations omitted). The appropriator’s intent “must be bona fide and not a mere afterthought.” *Id.* The Montana Supreme Court has also held that intent can be presumed where there is actual diversion paired with a beneficial use. *Wheat v. Cameron*, 64 Mont. 494, 501 (Mont. 1922) (“Actual diversion and beneficial use existing or in contemplation constitute an appropriation.”).

Finding a historical intent to use water for wildlife purposes is inherently difficult because wildlife use differs from other beneficial uses.⁸ Unlike digging a ditch, drilling a well or setting cattle out to graze, there is no affirmative action that easily signifies an appropriator’s intent to facilitate wildlife use of a water source. So long as the water is available and the source is accessible, wildlife will use it. Given these difficulties, both parties point to wildlife management, or a lack thereof, to determine whether the United States possessed the requisite intent to appropriate water for wildlife purposes.

The United States argues that it appropriated the water in these reservoirs with the intent to use the water for wildlife drinking and habitat. U.S. Brf. at 23-24. The United States argues that it “formalized its intent to permanently manage the public domain [...] for wildlife,” in the 1930s. U.S. Brf. at 29. The United States points to the Fish and Wildlife Coordination Act, the Taylor Grazing Act, the Federal Aid in Wildlife Restoration Act, the Bankhead-Jones Farm Tenant Act and other documents to establish its intent to manage public grazing allotments and appurtenant water sources for wildlife purposes. The authorities cited by the United States are discussed, in part, below.

The first authority cited by the United States is the Fish and Wildlife Coordination Act (FWCA) of 1934. Act of Mar. 10, 1934, 48 Stat. 401, Pub. L. No. 73-121 (codified at 16 U.S.C. § 661). “The basic requirement of the [FWCA] is that before the waters of any stream are diverted or impounded by any agency of the United States or by any entity

⁸ The Montana Supreme Court hinted at a similar problem in requiring a diversion with intent to appropriate water for instream stock use. *In re Adjudication of Existing Rights to the Use of all Water*, 2002 MT 216, ¶ 26, quoting *Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163, 295 P. 772, 775 (Nev. 1931) (“If there must be a diversion with intent to apply water to a beneficial use, then ‘the drinking by cattle constitutes a diversion, [and] **the necessary intent must be that of the cattle.**’”) (emphasis added).

operating under a federal permit or license, the agency must first consult with the Fish and Game Service of the Department of the Interior and with the Wildlife Agency of the State in which the diversion or impoundment is to be constructed.” *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037, 1049 (D. Mont. 1976) (overruled on other grounds, *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 849 (9th Cir. 1979)).

The United States does not allege that it consulted with any appropriate agency before it constructed these reservoirs. Rather, it points out that the FWCA “directed federal agencies to give wildlife equal consideration in water resource development programs.” U.S. Brf. at 25. The FWCA establishes that at the time of its passage (1934), the United States was generally aware that its water-related projects could have a potential impact on wildlife resources.

The next authority cited is the Taylor Grazing Act (TGA). Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C. §§ 315-320 (2000)). The public’s free and unregulated use of the public domain for grazing purposes came to an end when Congress passed the TGA. The purpose of the TGA was to stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; and to stabilize the livestock industry dependent upon the public range. 43 U.S.C. § 315(a) (2000); *Public Lands Council v. Babbitt*, 529 U.S. 728, 733 (2000). The TGA mandated, in part, that the BLM cooperate with states and other local groups in the conservation and propagation of wildlife on the public domain. 43 U.S.C. § 315(h). Sections 1 and 6 of the TGA also provide for access over public lands for hunting and fishing purposes. 43 U.S.C §§ 315, 315(e).

Here again, the TGA shows that United States intended to cooperate with state and local groups to promote wildlife on the public range, but there is no evidence that the BLM formalized this cooperative relationship until it entered into a Memorandum of Understanding (MOU) with the Montana State Department of Fish and Game on July 9, 1971. The MOU was updated in 1977 and acknowledges that the BLM “has the responsibility for maintaining optimum habitat conditions for wildlife on the public lands

as determined through Bureau planning procedures and must be compatible with other recognized uses of the lands and waters concerned.”

In 1938, the Secretary of Interior promulgated rules governing the federal range. The Federal Range Code states that “[i]n each grazing district a sufficient carrying capacity of Federal range will be reserved for the maintenance of a reasonable number of wild game animals, to use the range in common with livestock grazing in the district.” 43 C.F.R. § 501.5(b). Similarly, the BLM Range Manual (effective 1954-1962) states that the BLM is “directly concerned with protection, development, and management of the habitat used by wildlife.” U.S. Exh. 30. The Manual states that water development on the public range provides benefits to wildlife in the form of:

- (a) drinking water for all forms of wildlife;
- (b) nesting areas for upland birds and waterfowl;
- (c) feeding and nesting areas for waterfowl ...
- (d) the possible use of additional forage areas not formerly used because of lack of water.

Id.

Together, these documents show that, the United States knew that wildlife used the public range in common with livestock, that it was concerned with maintaining wildlife habitat on the range, including water resources, that the United States intended for these improvements to provide water and habitat for wildlife, and that water resources did in fact provide a benefit to wildlife.⁹ It is undisputed that wildlife historically used these sources, and that wildlife use constitutes a beneficial use. The authorities and documents cited by the United States – including the 1934 Taylor Grazing Act, the 1938 Federal Range Code and the BLM Range Manual – establish that at the time it appropriated these sources, the United States intended to appropriate water for wildlife.

The Kormans argue that wildlife life use is an incidental use and does not create a valid water right. Although not cited by the Kormans, a previous Water Court opinion in the Powder River Basin reached a similar conclusion and will therefore be briefly

⁹ Although not dispositive of the issue, it is worth noting that several of the documents provided by the United States show that at the time of construction the United States intended for these reservoirs to provide water to wildlife and improve wildlife habitat. *See e.g.* U.S. Exh. 5, Oasis Reservoir (“Project is necessary to provide water for livestock and wildlife on federal land.”); U.S. Exh. 10, Joes Reservoir (“Project is necessary to provide water for livestock and wildlife ...”); U.S. Exh. 11, County Line Reservoir (Project Improvement Report noting that reservoir provides “excellent” waterfowl habitat.); U.S. Exh. 17, Apt Reservoir (Reservoir “may also provide additional habitat, especially for waterfowl.”).

discussed. *Powder River Preliminary Decree*, Water Right Declarations 3443-01, 6339-01, 6431, 6433-01, 6498-02, 6508-01, 7473-01, 7716-01, 7731-01 and 10248 (March 7, 1983). In the Powder River case, the United States argued that it was entitled to wildlife claims for reservoirs constructed by private appropriators on public lands. The Water Master found that although fish and wildlife benefited from these impoundments, the benefit was “incidental” to the private stockwater appropriations and did not ripen into a water right vesting in the United States. *Memorandum* at 8.

The Powder River decision is unpersuasive. First, the decision was written before the Montana Supreme Court’s decision in *In re Adjudication of Existing Rights to the Use of all Water*, which recognized fish and wildlife uses (diversionary and non-diversionary) as historical, beneficial uses of water in Montana. 2002 MT 216, ¶ 40. Indeed, the Powder River decision focused on the fact that the United States “did not take the water and divert it pursuant to the appropriation doctrine,” and refused to “reach a decision regarding the beneficial use of water for fish and wildlife.” *Memorandum* at 9. Second, the decision did not, as here, involve impoundments constructed by the United States or prima facie wildlife claims filed by the United States.

Given the facts and circumstances, this Master finds that the United States possessed the requisite intent to appropriate water for wildlife use. The United States is entitled to wildlife use rights for the 18 reservoirs it constructed. The priority date for these rights should be the date the reservoirs were completed.

The *Bean Lake* Remark Should Be Removed from the Claims

Each of the United States wildlife claims received an issue remark (commonly referred to as the *Bean Lake* remark) indicating that, due to its status as a fish and wildlife claim, a hearing may be held to determine its validity. On December 6, 2006, the Supreme Court adopted Amended Water Right Claim Examination Rules for this adjudication. Rule 27(h) of these rules attempts to address the *Bean Lake* issue by placing one of two different issue remarks on these claims, depending on the situation. The intent appears to be that recreation and fish and wildlife claims should be treated like any other claim. If they receive factual or legal objections, or issue remarks, they will be subject to proceedings before the Water Court, up to and including evidentiary hearings.

In this case, the claims received objections and were subject to Water Court proceedings culminating in this Summary Judgment order. Further proceedings based on the claimed purpose are not required, and the issue remark should be removed from the claims.

CONCLUSION

The Kormans' Motion for Summary Judgment is **DENIED**;

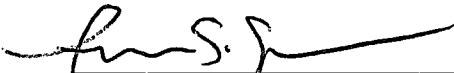
The United States Motion for Summary Judgment is **GRANTED** as to claims 40M 75198-00, 40M 75199-00, 40M 75204-00, 40M 75205-00, 40M 75206-00, 40M 75207-00, 40M 75216-00, 40M 75217-00, 40M 75218-00, 40M 75219-00, 40M 75222-00, 40M 75223-00, 40M 75224-00, 40M 75225-00, 40M 75226-00, 40M 75227-00, 40M 75228-00, 40M 75229-00, 40M 75232-00, 40M 75233-00, 40M 75234-00, 40M 75235-00, 40M 75236-00, 40M 75237-00, 40M 75240-00, 40M 75241-00, 40M 75316-00, 40M 75317-00, 40M 75318-00, 40M 75319-00, 40M 75320-00, 40M 75321-00, 40M 75322-00, 40M 75323-00, 40M 75324-00 and 40M 75325-00;

The United States Motion for Summary Judgment is **DENIED** as to claims 40M 75200-00, 40M 75201-00, 40M 75202-00, 40M 75203-00, 40M 75208-00, 40M 75209-00, 40M 75220-00, 40M 75221-00, 40M 75248-00 and 40M 75249-00.¹⁰

Due to the number of cases in Basin 40M that have raised similar issues, the parties are free to object to this decision and seek a review by a Water Judge. Objections must be filed no later than 13 days from the date this Order was filed.

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 Order. 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 Order.

DATED this 6th day of November, 2014.



Andrew Gorder
Water Master

¹⁰ Final abstracts for all claims will be issued with the final Master's Report in this case.

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