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

CLAIMANT: United States of America (Bureau of Land Management); Barthelmess Ranch Corporation; Lela M. French; William R. French

OBJECTORS: Barthelmess Ranch Corporation; United States of America (Bureau of Land Management); Double O Ranch, Inc.; Lela M. French; William R. French; Conni D. French; Craig R. French; M Cross Cattle Company

Case No. 40M-199
Case No. 40M-200
Case No. 40M-201
Case No. 40M-208
Case No. 40M-209
Case No. 40M-210
Case No. 40M-211
Case No. 40M-212
Case No. 40M-213
Case No. 40M-214
Case No. 40M-300

ORDER ON SUMMARY JUDGMENT

PROCEDURAL BACKGROUND

Case 40M-300 consolidated ten cases in Basin 40M. The ten cases encompass 167 claims for reservoirs, pothole lakes or springs located on federal lands managed by the Bureau of Land Management (BLM) and filed by the United States for either stock or wildlife uses. The claims received objections from a number of private parties. While the objections vary slightly, the objections can be summarized as follows: 1) the United States' stock claims are invalid and should be terminated; 2) ownership of the stock claims should be transferred from the United States to a private party; and 3) the United States' wildlife claims are invalid and should be terminated.

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. On June 30, 2014, the United States filed a Motion for Summary Judgment with respect to the twelve test claims. The United States' Motion states that there are no genuine issues of fact related to its claims and that it is entitled to judgment as a matter of law. The United States requests that its claims be upheld and that all objections be dismissed. The objectors in this case, the South Phillips Water Users Group or SPWG (Objectors), filed their response on July 28, 2014.

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Objectors argue that they are entitled to judgment as a matter of law and that the claims should be transferred to private ownership. The motion has been fully briefed, and oral arguments were heard on October 8, 2014. This Master's Report addresses the United States' Motion for Summary Judgment with respect to the 12 test claims.

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 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. *Id.* 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

For the purposes of summary judgment, the United States has the initial burden of showing the absence of any genuine issue of material fact with regard to its 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 elements of the United States prima facie claims are as follows:

Claims 40M 74654-00 and 40M 74655-00

These two claims represent stock (40M 74655-00) and wildlife (40M 74654-00) uses for Funnells Reservoir. The diversion dam for Funnells Reservoir is located in the SWSWNW of Section 12, Twp 26N, Rge 33E in Phillips County, but the reservoir itself spans part of Sections 11 and 12.[1] This reservoir was constructed at some point prior to August 12, 1945. It is unknown who constructed the reservoir, but the reservoir was constructed before the BLM acquired the property by deed in 1951. The BLM reconstructed the reservoir in 1983.

The reservoir sits on the BLM's Spring Creek grazing allotment and since its construction has consistently been used for stockwatering purposes by BLM grazing permittees and others. The reservoir provides habitat and water for wildlife. The BLM claimed stock and wildlife use rights for the reservoir asserting a priority date of August

[1] Objector Barthelmess Ranch Corporation (BRC) owns Section 11 and thus owns part of the land underlying Funnells Reservoir. BRC filed a separate claim for the reservoir. As discussed below, BRC's claim is not at issue in this case.

12, 1945. 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 74594-00 and 40M 74595-00

These two claims represent stock (40M 74594-00) and wildlife (40M 74595-00) uses for Windy Day Reservoir. Windy Day Reservoir is located in the NESWNE of Section 11, Twp 26N, Rge 31E in Phillips County. The reservoir was completed on August 11, 1955 and sits on federally owned lands comprising the Beaver Creek grazing allotment. The reservoir was built by the United States with the cooperation and assistance of the former grazing permittee.

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 August 11, 1955. The capacity of the reservoir is approximately 1.5 acre-feet. The BLM claimed .69 acre-feet for stock uses, with the remaining .81 acre-feet being claimed for wildlife use.

Claims 40M 74590-00 and 40M 74591-00

These two claims represent stock (40M 74590-00) and wildlife (40M 74591-00) uses for a reservoir known as PR-141. PR-141 is located in W2SWNE of Section 9, Twp 26N, Rge 31E, in Phillips County. The reservoir was constructed by the United States. The reservoir was completed on March 31, 1937 and sits on federally owned lands comprising the North Flat Creek grazing allotment.

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 March 11, 1937.[2] The capacity of the reservoir is approximately 40.10 acre-feet. The BLM claimed .69 acre-feet for stock uses, with the remaining 39.41 acre-feet being claimed for wildlife use.

[2] Objectors William and Lela French filed a separate claim for PR-141. As discussed below, the French's claim is not at issue in this case.

Claims 40M 74670-00 and 40M 74671-00

These two claims represent stock (40M 74670-00) and wildlife (40M 74671-00) uses for a reservoir known as PR-19. The dam for PR-19 is located in S2SWSE of Section 30, Twp 26N, Rge 33E, in Phillips County. The reservoir was constructed by the United States. The reservoir was completed on June 10, 1936 and sits on federally owned lands comprising the Tallow Creek and Lower Tallow Creek grazing allotments.

Since its construction, the reservoir has consistently been used for stockwatering purposes by BLM grazing permittees and others. 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 June 10, 1936. The capacity of the reservoir is approximately 343.60 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 342.98 acre-feet being claimed for wildlife use.

Claims 40M 74882-00 and 40M 74883-00

These two claims represent stock (40M 74883-00) and wildlife (40M 74882-00) uses for Sharon Reservoir. The reservoir is located in SWSENW of Section 8, Twp 27N, Rge 33E, in Phillips County. The reservoir was built by the United States with the cooperation and assistance of the former grazing permittee. The reservoir was completed on July 11, 1961 and sits on federally owned lands comprising the West Albert Coulee grazing allotment.

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 July 11, 1961. The capacity of the reservoir is approximately 4.30 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining 3.68 acre-feet being claimed for wildlife use.

Claims 40M 74579-00 and 40M 74583-00

These two claims represent stock (40M 74579-00) and wildlife (40M 74583-00) uses for a small pothole lake. The lake is located in SWSWNE of Section 7, Twp 26N, Rge 31E, in Phillips County. The natural lake sits on federally owned lands comprising the North Flat Creek grazing allotment.

The lake has consistently been used for stockwatering purposes by BLM grazing permittees. The lake also provides habitat and water for wildlife. The BLM claimed a stock use right for the lake with a priority date of May 1, 1888. The BLM also claimed a reserved right for wildlife uses, asserting a priority date of April 17, 1926. The capacity of the lake is approximately 1.13 acre-feet. The BLM claimed .62 acre-feet for stock uses, with the remaining .51 acre-feet being claimed for wildlife use.

There Are No Genuine Issues of Material Fact

The United States' claims constitute prima facie proof of their content. The above-detailed elements of the United States' prima facie claims are supported by the record. Therefore, the burden shifts to the Objectors to introduce evidence sufficient to overcome the prima facie validity of the claims.

Objectors do not directly challenge the prima facie elements of the United States' claims and have not introduced any evidence contradicting the claims. Instead, the Objectors assert that the United States is not the owner of the stockwater rights because it did not appropriate the water for stock use. Objectors also argue that the wildlife claims should be dismissed because the United States did not intentionally appropriate the water for wildlife use. The Master has conducted a thorough review of all of the briefing, exhibits and other arguments and has not found any evidence that contradicts the prima facie elements of the United States 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, and the question becomes whether the United States is entitled to judgment as a matter of law.

UNITED STATES' STOCKWATER CLAIMS

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

Objectors argue that they, not the United States, own the stockwater rights at issue in this case. Objectors 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. In support, Objectors point to chain of title evidence, tax records and other circumstantial evidence to

support the existence of cattle on the same sections of land now claimed under the United States' stock rights.

Objectors rely heavily 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. Objectors urge that 40E-A and 41G-190 control the disposition of the stockwater claims in this case.

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 Objector's 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. The Master finds that cases 41G-190 and 40E-A do not control the disposition of this case.

Should this Report Address Objectors Potential Claims for the Same Sources?

As noted, Objectors urge the Court to transfer ownership of the United States stockwater claims to Objectors. 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 the timely file water claims and to file objections to claims. Section § 85-2-233, MCA. As Objectors point out, "[w]hen BLM filed its statements of claim, it initiated proceedings in the Montana Water Court for the adjudication of the claims." Obj. Brf. at 38. "This adjudication allows objections, which may result in adjustments to existing rights." *Id.* at 39.

In this case, Objectors filed timely objections to the United States' claims, arguing that they own the stockwater rights at issue. As evidence, Objectors point to a variety of circumstantial evidence placing cattle owned by Objectors' predecessors in interest on or near the claimed places of use "long before BLM existed or the Taylor Grazing Act had been passed." Obj. Brf. at 18. For each of the sources at issue, Objectors point to evidence indicating the presence of cattle in the vicinity of the source at some date preceding the priority date claimed by the United States. *Id.* at 3-12. Except for competing claims filed for Funnells Reservoir and PR-141, Objectors did not file claims for these sources. Nonetheless, Objectors argue that the United States' ownership interest should be terminated and ownership of the claims should be transferred to Objectors.

Transfer of ownership is not appropriate in this case because if in fact Objectors' predecessors did graze cattle on the exact same water sources before the existence of the BLM, the result would be a separate and unique water right, with a senior priority date. To decree separate water rights to Objectors in this case 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.

Objectors claim that they "do not seek the creation of new claims" but only to "correct the ownership element" of the claims. Obj. Brf. at 41. They further argue that the Court "regularly, based on objections, corrects water right ownership, either by generating implied claims or changing ownership." Obj. Brf. at 40. However, Objectors are in fact arguing that ownership of the United States' claims should be transferred

based on evidence indicating potential unique and senior water rights.[4] This would not be appropriate, especially for the two sources where Objectors have actually filed competing claims. It appears that Objectors are seeking an ownership correction only because they have not, for the most part, filed their own claims. More importantly, even where the Objectors did file competing claims, this does not automatically preclude the existence of separate claims in the name of the United States for the same sources. *St. Onge v. Blakely*, 76 Mont. 1, 23, 245 P. 532, 536 (1926).

Implied claims address those situations where a single statement of claim contains more than one separate water right. Rule 6 IV, W.R.C.E.R. An implied claim should not be an attempt to circumvent claim filing requirements under Sections 85-2-221 and 85-2-225, MCA. *Order Amending and Adopting Master's Report, Case 40A-115*, (June 28, 2004). In all cases, information supporting generation of implied claim must have been filed with original statement of claim. Objectors do not argue that the United States statements of claim include information supporting the generation of implied claims in the name of the Objectors. All the information potentially supporting the existence of separate claims comes from extraneous sources.

In summary, the fact that Objectors' predecessors in interest grazed stock in the vicinity of these sources prior to the existence of the reservoirs or prior to the BLM 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. This inquiry differs slightly depending on the factual circumstances surrounding the water source.

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*

[4] Even if it was appropriate to decree separate rights to the Objectors in this case, Objectors 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...).

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 PR-19 and PR-141 reservoirs. The United States also constructed the Windy Day and Sharon reservoirs with assistance of the former grazing permittees. The United States bore all or the majority of the costs in constructing these four reservoirs. The reservoirs impound water that is then made available to stock owned by the grazing permittees, including the Objectors. The United States claimed "use rights" for these reservoirs.

Objectors 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." Obj. Brf. at 18. In Objectors view, all the water impounded in these reservoirs was already appropriated by the owners of the stock that grazed the open range. *Id.* at 20. Therefore, when the United States constructed the reservoirs, it merely "facilitated" the use of previously appropriated water. *Id.* at 21. The United States counters that ownership of the stock is not relevant to whether it appropriated these stockwater claims. U.S. Brf. at 14.

Objectors 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. The only relevant authority cited by Objectors 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' stock 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.[5] 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, except for the two claims filed for Funnells Reservoir and PR-141, Objectors 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

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

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 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 the 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. Objectors argue that the "BLM did not garner the benefits of stockwater appropriations" (Obj. Brf. at 18), but Objectors do not contest that water is put to beneficial use. Further, the use of federal rangelands in conjunction with the BLM grazing permit system does provide 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.*

When the United States Purchased the Spring Creek Allotment, Did It Obtain the Appurtenant Stockwater Rights?

The United States acquired property underlying Funnells Reservoir by deed in 1951. The reservoir was apparently constructed by the United States predecessor at some point prior to August 12, 1945. The reservoir sits on the BLM's Spring Creek grazing allotment and since its construction has consistently been used for stockwatering purposes by BLM grazing permittees and others. The BLM claimed a stockwater right for the reservoir asserting a priority date of August 12, 1945.

It is well settled that a water right is appurtenant to the land where it is used, "and, as such, passes with the conveyance of the land . . . even though the grant does not specifically mention the water right." *Maclay v. Missoula Irrigation Dist.* 90 Mont. 344, 353, 3 P.2d 286, 290 (1921); see also *Schwend v. Jones*, 163 Mont. 41, 44, 515 P.2d 89, 91 (1973). Thus, a deed passing ownership of a tract of land effectively conveys ownership in the appurtenant water rights unless the deed explicitly reserves or severs those water rights. *Id.*

Here, the deed passing title of the land to the United States contains no reservation of water rights. 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. The fact that Objectors own the land underlying a portion of the reservoir does not defeat the United States claim, and ownership of the stock is not relevant. The United States is entitled to stockwater right for this reservoir. *See* Water Court Case 40C-13, Conclusion of Law II

(1993) ("The United States, as landowner, may not be deprived of an appurtenant water right on the ground that it is not an owner of certain watering stock.").

Does the United States Have a Reserved Stockwater Right for the Pothole Lake?

As filed, claim 40M 74579-00 represents a stockwater use right for a pothole lake with a priority date of May 1, 1888. The United States now asserts that this right actually represents a federally reserved right pursuant to an Executive Order commonly known as Public Water Reserve No. 107 (PWR 107).

In 1916, Congress enacted the Stock Raising Homestead Act (SRHA), 43 U.S.C. §§ 291, *et. seq.* (repealed 1976), which authorized homesteading of designated stock raising lands. Section 10 of the Act withdrew from homestead entry land containing water holes or other bodies of water needed for use by the public and gave the President the discretion to reserve such lands. 43 U.S.C § 300. Section 10 of the Act stated:

> That lands containing waterholes or other bodies of water needed or used by the public for watering purposes shall not be designated under [this Act] but may be reserved under the provisions of [the Pickett Act] and such lands, prior to December 29, 1916, or thereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

43 U.S.C. § 300. Pursuant to the authority found in the SRHA, on April 17, 1926, President Calvin Coolidge signed PWR 107, which provided that:

> [E]very smallest legal subdivision of the public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter mile of every spring or water hole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the Act of December 29, 1916 (39 Stat. 862) [SRHA], and in aid of pending legislation.

Other courts have concluded that the purpose of PWR 107 "was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering." *United States v. Idaho,* 959 P.2d 449, 453 (Idaho 1998), *cert. denied,* 143 L.Ed2d 233 (1999); *United States v. City and County of Denver*, 656 P .2d 1, 31-32 (Colo. 1982). "Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees

would not have water needed for stockwatering purposes." *United States v. Idaho,* 959 P.2d at 453.

However, PWR 107 was not a blanket withdrawal of all water sources on unreserved public lands. As pointed out by Objectors, PWR 107 has been interpreted as applying to only "important" water sources capable of providing enough water for general use.

> The Executive order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.

Denver, 656 P.2d at n. 49 (citing 43 C.F.R. § 2311.0-3(a)(2) (1980)); *see also* Office of State Engineer of Nevada, *State Engineer's Ruling No. 5729*, Finding of Fact X (April 27, 2007). The Secretary of Interior has not defined what makes a water source "important" or how much water constitutes enough "for general use for watering purposes." Instead, in Nevada for example, state court analysis focused on estimating how much water a single family and its domestic animals would have required in the arid climate of Nevada in 1926. Office of State Engineer of Nevada, *State Engineer's Ruling No. 5729*, Finding of Fact VII (April 27, 2007). The Nevada approach seems both speculative and excessively rigid. As a practical matter, the question of whether of a source provides enough water for general stockwatering purposes should be answered by examining both the capacity of the source and its historic use.

In this case, the capacity of the contested pothole lake is estimated at 1.2 acre-feet. A 1.2 acre-foot water source holds approximately 391,021 gallons of water. Montana's general guideline for stockwater consumption is 30 gallons per day (10,950 gallons per year) per animal unit. Rule 24(c), W.R.C.E.R. One cow and calf pair is equal to one animal unit, and one horse is equal to 1.5 animal units. Rule 2(a)(5), W.R.C.E.R. Thus, assuming each animal unit consumed 30 gallons from the source every day, a 1.2 acre-

foot source would support approximately 36 animal units (72 cows and calves or 24 horses) for one year.

Objectors argue that this source is enough to provide for one family and its domestic animals and but does not qualify for reservation under PWR 107. Objectors do not cite any Montana standard or guideline stating that a 1.2 acre-foot water source does not provide enough water for general stockwatering purposes. More importantly, Objectors do not contest that the pothole lake has been historically and consistently used for general stockwatering by BLM grazing permittees.

This Master finds that the pothole lake provides enough water for general watering purposes and thus qualifies for reservation pursuant to PWR 107. *United States v. Idaho*, 959 P.2d at 453. The United States is entitled to a reserved stockwater right for the pothole lake with a priority date of April 17, 1926.

UNITED STATES' WILDLIFE CLAIMS

In addition to its claims for stock purposes, the United States filed wildlife claims for each of these sources. Like the stock claims, the Court's inquiry into these claims must begin with whether the United States appropriated water for a beneficial use. Again, this inquiry differs slightly depending on the factual circumstances surrounding the water source.

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

When the United States constructed the PR-19, PR-141, Windy Day and Sharon Reservoirs, it impounded water for a beneficial use. The reservoirs are used now and have historically been used by wildlife.[6] There is no question that wildlife use constitutes a beneficial use in Montana. *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. Therefore, the only remaining question raised by Objectors is whether the United States **intended** to appropriate water for wildlife use when it constructed the reservoirs.

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[6] Objectors at one point argue that there is "no indication that wildlife even existed on the places of use associated with the above-captioned reservoirs and potholes." Obj. Brf. at 24. This statement is unsupported, and wildlife generally subsist wherever there is an accessible water source.

"The intention of the claimant is ... a most important factor in determining the validity of an appropriation of water." *Toohey 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.[7] 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 evidence of 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. Reply Brf. at 14. The United States argues that it "formalized its intent to permanently manage the public domain [...] for wildlife," in the 1930s. U.S. Brf. at 25. 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.

[7] 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).

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 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)).

As Objectors point out, the United States does not allege that it consulted with any appropriate agency before it constructed these reservoirs. Rather, the FWCA "directed federal agencies to give wildlife equal consideration in water resource development programs." U.S. Brf. at 25. At most, 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 by the United States 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. Obj. Exh.-CC. 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." *Id.*

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. 43 at 05583. 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. at 05613. Finally, the United States points to a Badlands Program Area Detailed Analysis prepared by the BLM on April 19, 1963 to show that its water resources in the South Phillips area did provide a "substantial and favorable" impact on species such as antelope, grouse and waterfowl. U.S. Exh. 47 at 9, 11. Together, these documents show that at the very least, 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, and that the water resources did in fact provide a benefit to specific wildlife species.

Objectors argue that even if the United States was authorized to manage for wildlife or concerned about wildlife on the places of uses, there is no evidence that the United States took any action associated with wildlife management. Obj. Brf. at 32-33. Objectors' argument fails because it creates a burden on the appropriator that is not based in Montana law. All an appropriator need establish is that at the time of the appropriation

he or she possessed the intent to apply the water to "a useful and beneficial purpose." *Bailey*, 154 Mont. at 179; *Toohey*, 24 Mont. at 18. To find intent, courts should look at a number of factors, including the appropriator's "acts, the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof." *Toohey*, 24 Mont. at 18 (citations omitted).

Under Objectors view, the only relevant factor in determining the United States intent is its failure to take action to manage the wildlife using its reservoirs. This is problematic because such action was not (and was never) required in order for wildlife to actually make beneficial use of the impounded waters. 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 wildlife to use the sources in common with livestock. Thus, the facts and circumstances indicate that at the time it constructed the reservoirs, the United States possessed the requisite intent to appropriate water for wildlife use. *In re Adjudication of Existing Rights to the Use of all Water*, 2002 MT 216, ¶ 40.

Objectors argue that a previous Water Court opinion in the Powder River Basin establishes that United States is not entitled to wildlife water rights for stockwater reservoirs. *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 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 four reservoirs it constructed. As claimed, the priority date for these rights should be the date the reservoirs were completed.

Can the United States Claim a Wildlife Use Right for a Reservoir It Obtained from a Private Appropriator?

The United States acquired property underlying Funnells Reservoir by deed in 1951. The reservoir was apparently constructed by the United States predecessor at some point prior to August 12, 1945. The reservoir sits on the BLM's Spring Creek grazing allotment and since its construction has consistently been used for stockwatering purposes and wildlife purposes. The BLM claimed a wildlife use right for the reservoir asserting a priority date of August 12, 1945.

As detailed above, the United States became entitled to the appurtenant stockwater right when it purchased the property underlying Funnells Reservoir. *Maclay,* 90 Mont. at 353. The United States argues that after it acquired the reservoir, it expanded the use of the water to include both stockwater and wildlife uses. U.S. Reply Brf. at 15. Thus, they argue, they are entitled to a separate wildlife right for the source. *Thomas v. Ball,* 66 Mont. 161, 166, 213 P. 597, 599 (1923).

Wildlife historically used Funnells Reservoir, and that use is a beneficial one. Further, 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 acquired the reservoir, the United States intended wildlife to use the sources in common with livestock. Thus, the Master finds that the United States is entitled to a junior wildlife right for the reservoir with the priority date being the date the United States acquired the reservoir – in this case December 31, 1951. Rule 13(f)(3)(iii), W.R.C.E.R.

Does the United States Have a Wildlife Use Right for the Pothole Lake?

The BLM originally claimed a reserved right for wildlife use for the pothole lake, asserting a priority date of April 17, 1926. The United States agrees that it cannot claim a reserved wildlife right for the pothole lake pursuant to PWR 107. U.S. Reply Brf. at 12 (citing *Denver,* 656 P.2d at 31-32). From the briefing, it is apparent that the United States now wishes to claim a wildlife use right for the pothole lake with a priority date of June 28, 1934.

The United States points out that the Water Court has previously decreed wildlife use rights in the name of the United States based upon the authority found in the TGA.[8] However, more often than not these claims did not receive objections, except for occasional objections from the United States seeking to correct certain elements of the claims. In these instances, the Court has concluded, for example, that "the Bureau of Land Management's mandate to manage wildlife extends to the Taylor Grazing Act, which would put the priority date for these claims at June 28, 1934." Case 41J-5, Master's Report, Finding of Fact No. 6. (April 19, 2013). The Court has also decreed 1934 wildlife use rights to the United States in instances where no man-made appropriation has occurred. Case 40P-2, Master's Report, Conclusion of Law No. 2 (March 5, 1985). In this instance, the Court reasoned that "[s]ince June 28, 1934, it has been Congress' intention that the Department of Interior Bureau of Land Management cooperate in the conservation and propagation of wildlife on the Public Domain." *Id.* In other words, while the Water Court's previous analysis on this issue has been sparse, its conclusions have been consistent.

In this case, the United States did not impound the water in the pothole lake or otherwise divert the water. The lake is an uncontrolled water source that naturally collects water for wildlife and stock use. Wildlife have historically used the lake for drinking and for habitat, and that use constitutes a beneficial use. The source was apparently in existence prior to the Taylor Grazing Act. Nonetheless, the authorities and documents cited by the United States – including the 1934 TGA, the 1938 Federal Range

[8] *See e.g.* Case 41E-14, Master's Report (August 20, 2013) (decreeing 39 BLM wildlife claims with priority date of TGA); 41T 78882-00 et al, Closing Order (October 25, 2013) (decreeing 137 wildlife claims in the name of the United States, including claims with priority date of TGA).

Code, the BLM Range Manual and other documents– establish that since at least the passage of the TGA, the United States intended to manage the source for wildlife as well as livestock. For the foregoing reasons, this Master finds that the United States is entitled to a wildlife use right for the pothole lake with a priority date of June 28, 1934.

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 Master finds no genuine issues of material fact and that the United States is entitled to judgment as a matter of law. The United States' Motion for Summary Judgment is **GRANTED.**

Upon entry of a final Master's Report, each claim should be modified as shown to resolve all issue remarks and objections, and to accurately reflect historical use:

40M 74654-00	**Priority Date: ~~August 12, 1945~~ December 31, 1951**
40M 74655-00	**NO CHANGE**
40M 74594-00	**NO CHANGE**
40M 74595-00	**NO CHANGE**
40M 74590-00	**NO CHANGE**
40M 74591-00	**NO CHANGE**
40M 74670-00	**NO CHANGE**

40M 74671-00	**NO CHANGE**
40M 74882-00	**NO CHANGE**
40M 74883-00	**NO CHANGE**
40M 74579-00	**Type of Right: ~~USE~~ RESERVED**
	Priority Date: ~~May 1, 1888~~ April 17, 1926
40M 74583-00	**Type of Right: ~~RESERVED~~ USE**
	Priority Date: ~~April 17, 1926~~ June 28, 1934

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

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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: Barthelmess Ranch Corporation; Double O Ranch, Inc.; Lela M. French; William R. French; Conni D. French; Craig R. French; M Cross Cattle Company

CASE 40M-300
(Test Claims)

40M 74579-00	40M 74654-00
40M 74583-00	40M 74655-00
40M 74590-00	40M 74670-00
40M 74591-00	40M 74671-00
40M 74594-00	40M 74882-00
40M 74595-00	40M 74883-00

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND ORDER REMANDING TO MASTER

PROCEDURAL HISTORY

Water Court case 40M-300 was consolidated to address specific issues on twelve "test claims". These claims represent six stock and six wildlife claims held by the United States Bureau of Land Management (BLM). Each stock claim has a corresponding wildlife claim from the same source. Prior to this consolidation, the claims were part of ten different cases. On June 30, 2014, the BLM filed a motion for summary judgment for all twelve test claims in the original cases. These motions precipitated consolidation of the claims into case 40M-300. Proceedings in the original cases were stayed pending resolution of specific issues on the test claims in case 40M-300.

On November 6, 2014 Water Master Andrew Gorder issued an Order on Summary Judgment that found all twelve claims were valid and properly owned by the BLM. The Master's order recommended priority date changes to three claims as requested by the BLM, and a change in "type of right" for two claims, also as requested by the BLM. The Master found that all other elements of the claims were correct as they appeared in the

Preliminary Decree for this Basin. As a result, the Master's order was dispositive on all issues on all claims.

The Order received an objection from a group of objectors acting collectively as the South Phillips Water Users Group (SPWG). The BLM filed an answer supporting the Master's Order. SPWG filed a reply brief. Oral arguments on the SPWG objection were held on February 25, 2015 in Malta, Montana. On March 23, 2015, SPWG filed a Notice of Supplemental Authority referencing a Chief Water Judge Order in case 41R-200.

The BLM Motion for Summary Judgment requested a judgment "recognizing the water rights described in the captioned claims." (BLM Brief, 6/30/14, p. 29) Arguments in the summary judgment proceedings focused on ownership of the stock claims and non-perfection of the wildlife claims. In its brief supporting the summary judgment motion, the BLM framed the issue as follows:

> The issue before the Court is whether the United States is entitled to obtain water rights in its own name in order to protect federal interests and to prevent monopolization of water sources on public land. (BLM brief, 6/30/2014, p. 2)

In its response brief to the summary judgment motion, SPWG framed the issue as one of fact that applies to individual water right claims. SPWG did not assert the BLM cannot own water rights:

> There is no question that BLM is entitled to obtain water rights in its name on federal lands. The question at issue is whether BLM has, in these cases, under applicable state and federal laws, actually made appropriations for beneficial use. (SPWG brief, 7/28/14, p. 2)

In other words, SPWG argues that controlling law provides for BLM ownership of water right claims, but the facts in this case do not support BLM ownership of these claims. SPWG seeks to have all stock claims transferred to the current grazing permittee and all wildlife claims terminated.

This order does not address each of SPWG's arguments. Those arguments that are not addressed were reviewed and found to be without merit. The Court finds the Master's recommendations are correct regarding BLM ownership of eleven of the twelve

claims. The BLM has appropriated these eleven claims pursuant to Montana law and is entitled to maintain the claims in its name. The twelfth claim, 40M 74583-00, presents factual issues that preclude summary judgment. In addition, SPWG raised sufficient procedural issues to preclude summary judgment on the volume element for all twelve claims. These issues are remanded to the Master for further proceedings.

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

Group 1, Claims for Reservoirs Developed by the BLM on Federal Land

Source	Claim	Priority Date
Windy Day Reservoir	40M 74594-00 (Stock) 40M 74595-00 (Wildlife)	August 11, 1955
Reservoir PR-141	40M 74590-00 (Stock) 40M 74591-00 (Wildlife)	March 31, 1937
Reservoir PR-19	40M 74670-00 (Stock) 40M 74671-00 (Wildlife)	June 10, 1936

Sharon Reservoir	40M 74883-00 (Stock) 40M 74882-00 (Wildlife)	July 11, 1961

Group 2, Claims for an Existing Reservoir Acquired by the BLM

Source	Claim	Priority Date
Funnells Reservoir	40M 74655-00 (Stock) 40M 74654-00 (Wildlife)	August 12, 1945

Group 3, Claims for a Natural Pothole Lake Located on Federal Land

Source	Claim	Priority Date
Pothole Lake	40M 74579-00 (Stock) 40M 74583-00 (Wildlife)	April 17, 1926 (amended) June 28, 1934 (amended)

BLM STOCK CLAIMS

The Master's summary judgment order found the BLM was the owner of all six stock claims. SPWG raised two issues that question the Master's ruling:

Issue 1. *Could the BLM historically appropriate stockwater rights for reservoirs and natural sources located on federal land without owning livestock?*

Issue 2. *Should these stockwater rights be transferred to the grazing permittees as successors to the original stockmen who appropriated instream stock rights from these sources?*

A. Appropriation by the BLM

The BLM stock claims fall into three factual groups. Since each group presents different factual backgrounds, they are reviewed separately.

Group 1, Reservoirs Developed by the BLM on Federal Land

Claim	Reservoir	Priority Date
40M 74594-00	Windy Day Reservoir	August 11, 1955
40M 74590-00	Reservoir PR-141	March 31, 1937
40M 74670-00	Reservoir PR-19	June 10, 1936
40M 74883-00	Sharon Reservoir	July 11, 1961

Undisputed Facts:

1.) All four claims represent water use from reservoirs developed by the BLM on federal land. The Windy Day Reservoir is located on federal land. Reservoir PR-141, Reservoir PR-19, and the Sharon Reservoir are located on land the United States acquired by deed from private parties in 1935. The claimed priority date for each stock claim is the date the reservoir was completed.

2.) The BLM did not own livestock at the time it completed these reservoirs and does not currently own livestock. Rather, the BLM developed reservoirs on federal land for stockwatering by BLM permittees and others. The reservoirs have been consistently used for stockwatering since they were completed.

3.) In some cases, the BLM developed the reservoir with the financial or physical cooperation of a private party. Marie Karstens-Reddin was involved with developing the Windy Day Reservoir and assumed all responsibility for maintaining the reservoir upon completion. The Oxarat Brothers were involved with developing the Sharon Reservoir. However, the successors to these private parties did not file statements of claim for stockwater from these reservoirs. In fact, the only private parties that filed a statement of claim for stockwater from one of these reservoirs are Lela and William French who filed claim 40M 169526-00 for Reservoir PR-141.[1]

The common law elements of a valid appropriation are intent to appropriate, notice of the appropriation, diversion (if necessary), and 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

[1] Claim 40M 169526-00 and BLM claims 40M 74590-00(st) and 40M 74591-00(w) appeared in the Preliminary Decree with an associated use remark indicating they share the same reservoir. All three claims were originally consolidated into case 40M-212 which is stayed pending proceedings in case 40M-300.

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. It is the fourth element, application to beneficial use, that is contested.

Both parties cite to cases from other jurisdictions to support their position on beneficial use. The BLM argues its ability to perfect a water right on public land without owning livestock is supported by *Nevada v. Morros*, 766 P.2d 263, 268 (Nev. 1988). (The United States benefitted from development of new water sources on federal land without owning stock.) SPWG relies on *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Id. 2007). (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.) While both cases are informative, they are not controlling precedent concerning the historical appropriation of water rights in Montana.

In *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912), the Montana Supreme Court held that water rights owned by a public service corporation could be perfected by completing a diversion system and making water available to end users. The corporation did not need to actually divert water and put it to beneficial use. The Court noted that Montana law provided that a person, association of persons, or corporation could appropriate water to sell, rent, or otherwise dispose to others. *Bailey*, 45 Mont. at 166-67, 122 P. at 579. The appropriator itself was not required to put water to beneficial use to perfect the right. In its decision, the Court rejected Colorado's requirement for actual beneficial use which would result in the stock owners, not the appropriator, owning the water right. *Bailey*, 45 Mont. at 176-77, 122 P. at 582-83. The Court made it clear the same ability extended to the United States:

> To deny the right of a public service corporation to make an appropriation independently of its present or future customers and to have a definite time fixed at which its right attaches, would be to discourage the formation of such corporations and greatly retard the reclamation of arid lands in localities where the magnitude of the undertaking is too great for individual enterprise, if, indeed, it would not defeat the object and purpose of the United States in its great reclamation projects, <u>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</u>. (citations omitted)

Bailey, 45 Mont. at 177, 122 P. at 583 (emphasis added).

If the United States "must proceed in making appropriations as a corporation or individual," it has the same obligations and requirements of a corporation or individual. It has the same ability to sell, rent, or otherwise dispose of water to others. This includes the ability to perfect a water right by completing a diversion system and making water available to the end users, without putting that water to beneficial use itself. In this case, the end user is the grazing allotment permittee. Therefore, the United States could perfect a water right without owning and watering stock.

Permittee contributions to reservoir development do not prevent BLM from claiming stock use from a reservoir. Multiple water right claims from the same reservoir do not necessarily raise an issue. In fact, multiple water right claims from a single source is common. *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.) For example, Lela and William French filed claim 40M 169526-00 for Reservoir PR-141. The presence of BLM and private stock claims from the same reservoir does not indicate the BLM claims are invalid or should be transferred to the private party.

Based on the undisputed facts and controlling law, the United States complied with all requirements when it developed the reservoirs and appropriated the water rights represented by claims 40M 74594-00, 40M 74590-00, 40M 74670-00, and 40M 74883-00. Stock ownership was not required for appropriating these water right claims. SPWG failed to raise any genuine issues of material fact on the ownership issue and failed to show the BLM is not entitled to ownership as a matter of law. The BLM is the owner of all four claims.

Group 2, Existing Reservoir Acquired by the BLM

Claim	Reservoir	Priority Date
40M 74655-00	Funnells Reservoir	August 12, 1945

Undisputed Facts:

1.) The Funnells Reservoir is located generally in the SWSWNW of Section 12 and the SESENE of Section 11, T26N, R33E. The Section 12 property was purchased by the BLM on August 16, 1951. The deed is silent concerning water rights. The dam, which is located in Section 12, was in place at the time of purchase. The BLM asserted the reservoir was developed prior to August 12, 1945 and claimed that date as its priority date.

2.) The portion of the reservoir in Section 11 is on property owned by SPWG objector Barthelmess Ranch Corporation. Barthelmess filed stock claim 40M 182857-00 for the reservoir. The Barthelmess claim and BLM claims 40M 74654-00 and 40M 74655-00 appeared in the Preliminary Decree with associated use remarks noting this shared reservoir use.

3.) The BLM did not own livestock at the time it acquired this property and the appurtenant reservoir, and does not currently own livestock. Rather, the BLM acquired the reservoir when it purchased the land and made the water in the reservoir available for stockwatering by BLM permittees and others. Since the BLM acquired the property, the reservoir has been consistently used for stockwatering.

Pursuant to § 85-2-403(1), MCA, "The right to use water shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority." When a deed is silent, the appurtenant water rights pass with the conveyance. *MacLay v. Missoula Irrigation Dist.* 90 Mont. 344, 353, 3 P.2d 286, 290 (1921).

When the BLM acquired land that included the dam and the majority of the Funnells Reservoir, it acquired any appurtenant water rights to that reservoir, unless the deed explicitly reserved or severed those water rights. The deed conveying the land to the BLM was silent on water rights. Therefore, the rights passed with the conveyance.

SPWG argues the BLM failed to "meet its prima facie burden of proving that a right was appropriated on Funnells Reservoir and passed as an appurtenance to land purchased." (Objection to Summary Judgment Order, 12/15/14, p. 19) Apparently,

SPWG asserts the BLM must show who specifically developed the reservoir, when it was constructed, and for what purpose. These arguments are misplaced. A properly filed Statement of Claim or an Amended Statement of Claim (amended prior to issuance of a Water Court Decree) for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. Objectors carry the burden of proving, by a preponderance of the evidence, that one or more elements of the prima facie statement of claim are incorrect. In other words, the BLM does not have the burden of proving that its predecessors appropriated a stockwater claim when they developed the Funnells Reservoir, SPWG has the burden of proving that they did not. SPWG provided no evidence demonstrating the reservoir was not used for stock prior to the BLM purchase of the property. Given SPWG's argument that stock began using all water sources in this area well before reservoir development, it is difficult to find that this reservoir was constructed for some other reason or that stock failed to use the reservoir.

SPWG also argues, " . . [t]he validity of any stockwater appropriation allegedly made by the BLM upon its receipt of the reservoir in 1951 is subject to the intent, beneficial use, and appropriation arguments previously discussed." (Objection to Summary Judgment Order, 12/1/5/14, p. 19) This argument appears to assert the BLM did not acquire an existing water right when it purchased the land. Rather, it appropriated, or failed to appropriate, a new water right when it acquired the land. This argument misstates the law. The purchaser in a land conveyance acquires the existing water rights from the grantor without loss of priority. They are not required to appropriate a new right at the time of the conveyance. Section 85-2-403(1), MCA.

As discussed above, the Barthelmess claim to the reservoir has no effect on the ability of the BLM to claim ownership of water rights from the same source. *St. Onge,* 76 Mont. At 1, 245 P. at 536. Two parties can claim independent rights from the same source.

The BLM stockwater right from the Funnells Reservoir is prima facie proof of its content. SPWG failed to raise any genuine issues of material fact on the ownership issue and failed to show the BLM is not entitled to ownership as a matter of law.

The BLM met the factual and legal criteria for appropriating stockwater right 40M 74655-00. The BLM acquired a stock right from the reservoir when it purchased the property and has maintained the right since that time.

Group 3, Natural Pothole Lake Located on Federal Land

Claim	Source	Priority Date
40M 74579-00	Pothole Lake	April 17, 1926

Undisputed Facts

1.) This natural pothole lake is located on federal land managed by the BLM.

2.) The BLM has never owned livestock that accessed this lake. Rather, the BLM made lake water available for stockwatering by BLM permittees and others.

3.) Stock claim 40M 74579-00 appeared in the Preliminary Decree as a "use" right with a May 1, 1888 priority date. The BLM now asserts a "reserved" right with an April 17, 1926 priority date.

Although there is no specific request in its filings, it is apparent in the summary judgment briefing that the BLM was requesting changes to the historical type of right and priority date for this claim. The Master's Order on Summary Judgment recommends amending the priority date to April 17, 1926 and the type of right to reserved. These recommendations are based on BLM arguments regarding the application of the Stock Raising Homestead Act (SRHA) passed by Congress in 1916 and Public Water Reserve No. 107 (PWR 107), authorized by SRHA and signed by the president on April 17, 1926. The SRHA allowed the United States to reserve "lands containing waterholes or other bodies of water needed or used by the public for watering purposes," at the discretion of the Secretary of the Interior. 43 U.S.C. § 300 (2012). PWR 107 is a reservation of all springs and watering holes on unsurveyed public land that is vacant, unappropriated, and unreserved. In its summary judgment briefing, the BLM asserted that PWR 107 provided the basis for claim 40M 74579-00. The Master accepted that premise and recommended the necessary changes to priority date and type of right.

SPWG was aware of the proposed changes and addressed them in its brief opposing summary judgment. SPWG does not challenge application of PWR 107 as the basis for a reserved stock right. Rather, it argues this pothole lake is exempt from PWR 107 due to its size. This argument is based on 43 C.F.R. § 2311.0-3(a)(2) (1980) which states:

> The Executive order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.
>
> *See United States v. City and County of Denver*, 656 P.2d 1, at n-49, (Colo. 1982).

This lake is located on unreserved public land. SPWG provided no evidence showing any kind of entry on the land or a history of use of the lake by a family and its domestic animals. In fact, SPWG argues the claim should be transferred to the current permittee as the successor to the original stockmen who first used this source for livestock. This indicates the lake was historically providing "enough water for general use for watering purposes." While it is a small lake, SPWG's argument that the BLM claim should be held by the permittee supports a history of general public use.

The lack of evidence of any entry removing the land from the public domain and the history of general use for stock demonstrate the lake qualifies as a reserved right under PWR 107. It was not excluded from reservation by 43 C.F.R. § 2311.0-3(a)(2) (1980).

SPWG also argued the BLM's failure to include this lake in its 1981 water use inventory for Montana raises factual issues regarding the historical basis for the claim. However, SPWG's own cite to this inventory refutes this argument. According to language from the inventory quoted by SPWG, the BLM was aware that several public water reserves were unidentified at the time of the inventory. The BLM inventory states these sources must be identified and formally noted on the Master Title Plats. (SPWG

Brief, p 35) This language cannot be taken as a failure to claim this pothole lake under PWR 107. It simply indicates that the BLM had incomplete information in 1981. Failure to identify the lake in this inventory does not equal a lack of intent to claim a reserved right for the lake. The inventory does not raise genuine issues of material fact.

After the Master issued his decision, SPWG argued that amending claim 40M 74579-00 to a reserved right raised inherent procedural and legal questions. The objection indicates the BLM is required to negotiate its reserved rights pursuant to Sections 85-2-701 et. seq., MCA. This section of the code establishes a Reserved Water Rights Compact Commission charged with the task of negotiating settlements with the various Tribal and Federal interests claiming reserved water rights within the state. However, negotiating reserved rights was not mandatory. While the Tribes and Federal government were required to participate in the adjudication process, they were free to forgo negotiation and simply file their reserved rights. The BLM had limited ability to claim reserved rights and chose to file their claims under state law. Pursuant to statute, the BLM is free to request amendments to its claims and can seek to amend claim 40M 74579-00 to a reserved right. The BLM decision to file this claim as a use right and subsequently amend it to a reserved right does not raise procedural or legal issues.

SPWG was aware of the priority date and type of right the BLM was asserting for claim 40M 74579-00. SPWG had the opportunity to raise factual and legal arguments precluding summary judgment on the ability of the BLM to claim this stock right as a reserved right. SPWG failed to raise any genuine issues of material fact on the ownership, priority date, or type of right issues, and failed to show the BLM is not entitled to ownership as a matter of law.

The BLM met the factual and legal criteria for appropriating stockwater right 40M 74579-00 as a reserved right with an April 17, 1926 priority date.

B. Transferring All BLM Stock Claims to Permittees

With the exception of claim 40M 74579-00 (Pothole Lake), all of the stock claims at issue are diverted rights as opposed to instream rights. Constructing the reservoirs constitutes a diversion. The prior rights identified by SPWG members are instream stock

rights, meaning, the rights are for stock drinking directly from the source with no manmade diversion. Section 85-2-222(1), MCA. The Water Master correctly found that any early, direct from source, water right claims asserted by SPWG predecessors were separate and unique from the BLM reservoir water rights. (Summary Judgment Order, 11/6/14, p. 8) The earlier rights are not based on the same facts. In addition, the existence of prior rights does not preclude appropriation of subsequent rights from the same sources. *St. Onge* 76 Mont. at 23, 245 P. at 536

SPWG argued the reservoirs simply enhance the original direct from source rights by stabilizing flow. This argument has no merit. By their nature, direct from source stock claims depend on the natural flow in the river. Developing a reservoir that allows stock to access water year round is far more than a simple flow stabilizer for a direct from source stock right, it is a separate and unique water right.

As a diverted right, the reservoirs are subject to the filing requirements found in § 85-2-221(1), MCA. Those SPWG members who failed to file statements of claim for the reservoirs by the original April 30, 1982 deadline or the July 1, 1996 late claim filing deadline, lost the ability to do so. 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). (Failing to file constitutes a forfeiture of the right.)

SPWG argues that Water Court decisions allow a party to assert ownership of a claim through an objection. According to SPWG, its members did not miss the claim filing deadlines, they chose to pursue ownership through the objection process. SPWG argues the Water Court has not only confirmed private water right ownership on federal land, it has ordered ownership changes to water rights through the objection process.

SPWG asserts Water Court cases 41G-190 and 40E-A support its arguments and require transferring the BLM claims to current permittees. 41G-190 and 40E-A addressed private ownership of stockwater claims on federal land. These decisions held that a private appropriator could acquire a water right on non-reserved federal land. Further, the water right 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 addressed 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.

The Water Court has ordered a change in water right ownership in several cases. These cases fall generally into two general categories: 1.) uncontested cases where an ownership change is the result of an agreement of the parties (*E.g.* 41H-124), and 2.) cases where the change was required by *Dept. of St. Lands v. Pettibone*, 216 Mont 361, 702 P.2d 948 (1985). (Water rights developed on state school trust land were subject to the State's fiduciary duty under the school trust and must be held in the name of the State [*E.g.* 41O-255].)

Ownership changes based on an agreement of the parties provide no authority for requiring the change over the objection of the current owner. The fact that parties submit this type of agreement to the Water Court does not create precedent that applies here. With the exception of water rights subject to *Pettibone*, SPWG provides no cases where the Water Court has ordered a change in ownership over the objection of the claimant.

Pettibone does require an ownership change under specific circumstances. However, *Pettibone* only applies to State ownership of water rights developed by a lessee on school trust land. SPWG provided no other authority for taking a valid claim from one party and transferring that claim to a new owner over the objection of the current owner.

Finally, SPWG asserts its members were prevented by the DNRC from filing stock claims by the April 30, 1982 filing deadline. SPWG argues this raises factual issues on the ability of SPWG members to claim stock rights from these sources. This argument has no merit. Even if SPWG members were misled by the DNRC in 1982, taking claims from the BLM and giving those claims to SPWG members is not an

available remedy. Again, SPWG members have not lost the ability to file exempt instream stock rights, they have suffered no injury. The quality of the advice they received in 1982 is not relevant to BLM ownership of stock claims.

SPWG's members seek to acquire the BLM rights and amend those rights to reflect far more senior instream stock rights. As instream stock rights, the claims asserted by SPWG members 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, SPWG members can still voluntarily file exempt rights.

There is no basis in fact or law for taking the BLM claims and giving them to SPWG members.

BLM WILDLIFE CLAIMS

The Master's summary judgment order found the BLM had perfected all six wildlife claims. The Master also found the claims were distinct water rights as opposed to minor incidental uses under the stock claims. SPWG raised two issues that question the Master's ruling:

Issue 1. *Did the BLM perfect these wildlife claims?*

Issue 2. *Is wildlife use incidental to stock watering and not sufficient to constitute an existing water right?*

SPWG argues the BLM never had the requisite intent to appropriate water for wildlife; never provided any notice of an intent to appropriate water for wildlife; and never took any steps to put water to beneficial use for wildlife. Without intent, notice, and application to beneficial use, SPWG asserts there can be no appropriation and therefore, the wildlife claims were never perfected. Further, SPWG asserts any benefit to wildlife resulting from reservoir development or BLM management of a natural pothole lake was incidental to the primary stock water function of that source. SPWG argues this incidental use is not sufficient to actually perfect a separate water right.

In *Bean Lake III*, 2002 MT 216, the Montana Supreme Court addressed two general issues - the validity of fish, wildlife, and recreation water right claims appropriated prior to July 1, 1973, and the need for an actual diversion of water for an appropriation. The Court found that fish, wildlife, and recreation were recognized beneficial uses prior to July 1, 1973 and that a diversion is not required when none is necessary for beneficial use. The Court stated that intent and notice, which are often implied by a diversion, are still required. For a use right with no diversion, such as instream or inlake wildlife use, intent and notice must be supported by the specific facts and circumstances surrounding the appropriation. *Bean Lake III*, ¶40.

Bean Lake III did not address any specific water right claims and did not provide any guidance on what constitutes sufficient facts and circumstances supporting the intent to appropriate, or notice of that intent where no diversion is required. Instead, the Supreme Court directed the Water Court to "identify, review, and hold hearings" on all pre-1973 recreation, fish, and wildlife claims, both diversionary and non-diversionary. *Bean Lake III*, ¶41.

This underscores that proof of the required intent, notice, and beneficial use of a non-diverted right depends on the specific facts surrounding that claimed appropriation. As the Master noted, this can be challenging,

> Finding a historical intent to use water for wildlife purposes is inherently difficult because wildlife use differs from other beneficial uses. 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. (Summary Judgment Order, 11/6/14, at p. 17)

Nonetheless, *Bean Lake III* requires sufficient facts and circumstances surrounding each claimed appropriation to support an intent to appropriate, notice of that intent, and application to beneficial use, with or without a diversion.

The wildlife claims fall into the same groups as the corresponding stock claims. The same undisputed facts that applied to the stock claims apply to the corresponding wildlife claims.

Group 1, Reservoirs Developed by the BLM on Federal Land

Claim	Reservoir	Priority Date
40M 74595-00	Windy Day Reservoir	August 11, 1955
40M 74591-00	Reservoir PR-141	March 31, 1937
40M 74671-00	Reservoir PR-19	June 10, 1936
40M 74882-00	Sharon Reservoir	July 11, 1961

To demonstrate the BLM's intent, the Master relied on congressional acts and land codes that reference United States management for the benefit of wildlife.[2] The Court agrees these documents show the BLM was directed to manage land to benefit wildlife as well as livestock. They provide a general intent for these claims and support specific intent when the BLM developed each reservoir. In addition, all of these documents appear in the Federal Register. Pursuant to 44 U.S.C.S. § 1507 (LexisNexis, Lexis Advance through Pub. L. No. 114-30, approved July 6, 2015), the Federal Register provides constructive notice of congressional mandates to a person subject to or affected by the mandates. SPWG members received notice of the general intent through the Federal Register and notice of the specific intent through BLM's reservoir development. Developing each dam constitutes a diversion that served as notice of an intent to appropriate water. *Bean Lake III*, ¶22. Intent, notice, and diversion have been satisfied for all four wildlife claims.

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.

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[2]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). (U.S. government agencies must consult with the Fish and Game Service and State Wildlife Agencies prior to appropriating water.)

Taylor Grazing Act, 3 U.S.C. §§ 315-320 (2012). (Mandated, in part, that the BLM cooperate with states and other local groups in the conservation and propagation of wildlife on the public domain.)

Federal Range Code (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) (1938).

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. It was simply a use that may have required less water. 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.

Since all four claims are prima facie proof of their content, SPWG had the burden of showing that the claims were not put to beneficial use for wildlife. It not only failed to present sufficient evidence to overcome the prima facie presumption that the claims are valid, it failed to show any genuine issues of material fact.

Based on the undisputed facts and controlling law, the United States complied with all requirements when it appropriated the water rights represented by wildlife claims 40M 74595-00, 40M 74591-00, 40M 74671-00, and 40M 74882-00.

Group 2, Existing Reservoir Acquired by the BLM

Claim	Reservoir	Priority Date
40M 74654-00	Funnells Reservoir	August 12, 1945

The Funnells Reservoir was in place and impounding water when the BLM acquired the property. The reservoir had provided notice of an intent to appropriate and divert water for a beneficial use. When the BLM acquired this land and appurtenant reservoir it was required by the same congressional acts and land codes noted above to manage the property and water resources for the benefit of both livestock and wildlife. As a result, it filed statements of claim for stock and wildlife.

The BLM claimed the same August 12, 1945 priority date for its stock claim and wildlife claim from Funnells Reservoir. The Master found that the priority date for wildlife claim 40M 74654-00 should be changed to December 31, 1951, the date the BLM acquired the reservoir. The Master's Order provided no authority supporting this change. In its response to SPWG's objection to the Master's summary judgment ruling,

the BLM cited § 89-803, RCM (1947) (repealed 1973) and argued that the addition of the wildlife claim did not serve to expand the amount of water diverted by the reservoir. (BLM Response Brief, p. 19-20)

Section 89-803, RCM (1947) (repealed 1973) governed changes to water right claims prior to enactment of the 1973 Water Use Act. The statute allowed an appropriator to change certain elements of a water right, including point of diversion, place of use, and purpose, if others were not injured by the change. Those claiming injury had the burden of proving that injury at the time the change was implemented. *Hansen v. Larsen,* 44 Mont. 350, 120 P. 229 (1911). Changing a water right under the statute did not require a new priority date equal to the time the change was implemented. The change related back to the original priority date.

BLM reliance on § 89-803, RCM (1947) (repealed 1973) is persuasive. Adding a second use for wildlife when the BLM acquired the land and began to manage the reservoir did not serve to expand the water right. The dam was not enlarged and the pattern of use did not change. There is little doubt that wildlife had already been benefiting from the reservoir. Adding a second purpose under the statute without expanding the water right allowed that change to relate back to the original priority date. The Master's recommendation to change the priority date based on the date the BLM acquired the reservoir is not supported by law. Therefore, the Court rejects that recommendation. The priority date for claim 40M 74654-00 shall remain as claimed, August 12, 1945.

Stock and wildlife use from the Funnells Reservoir are multiple uses of the same appropriation. The wildlife use was not an occasional or rare event. While wildlife use may not have been the primary reason for acquiring the reservoir, it was nonetheless a part of the reason. Wildlife use is not incidental to the stock use. It is properly claimed as a separate water right claim.

Based on the undisputed facts and controlling law, wildlife claim 40M 74654-00 is valid. The United States could add a second purpose without expanding the original

appropriation when it acquired the reservoir. The second purpose is entitled to the same priority date. The change did not expand the burden on the source.

Group 3, Natural Pothole Lake on Federal Land

Claim	Source	Priority Date
40M 74583-00	Pothole Lake	June 28, 1934

Wildlife claim 40M 74583-00 appeared in the Preliminary Decree as a reserved right with an April 17, 1926 priority date. The BLM now seeks to change the claim to a use right with a June 28, 1934 priority date. This date is based on implementation of the Taylor Grazing Act. The Master noted that the Water Court has decreed numerous wildlife claims based on the Taylor Grazing Act and should accept the implementation of the act as the basis for this claim. The Master recommended accepting the type of right and priority date changes. The Master found that the BLM was entitled to summary judgment on all elements of the claim.

While congressional mandates appear to provide a general intent and notice of that general intent, they are not sufficient to show conduct specific to a particular appropriation. The Water Court has accepted a June 28, 1934 priority date based on implementation of the Taylor Grazing Act on several occasions. Accepting this priority date has typically been based on the prima facie presumption that attaches to a statement of claim and the absence of any party questioning that priority date or any other element of that BLM claim. Absent an objection to priority date, or issue remarks, the Water Court need not question the claimed priority date.

At the same time, *Bean Lake III* states that intent, notice, and application to beneficial use must be supported by the facts and circumstances surrounding the appropriation. Implementation of the Taylor Grazing Act is not specific to any particular appropriation. Given SPWG's objections and the lack of evidence supporting intent, notice, and application to beneficial use that is specific to this appropriation, the Taylor Grazing Act is not sufficient to support summary judgment.

The Court does not accept the Master's summary judgment ruling on 40M 74583-00. Issues of fact remain that affect the actual appropriation of a wildlife water right claim from this natural lake. Therefore, all elements of the claim are remanded to the Master for further proceedings.

VOLUME, ALL CLAIMS

Issue 1. *Was the issue of volume properly before the Master in the summary judgment proceeding?*

The original BLM Motion for Summary Judgment requested a judgment "recognizing the water rights described in the captioned claims." (BLM Brief, p. 29) The brief provided the claimed volume for each claim but did not specifically argue that there were no factual issues on the volume element. In its Response Brief, SPWG asked the Court to change the ownership of all stock claims to SPWG members and terminate all of the wildlife claims. SPWG did not address volume. The Master's Summary Judgment Order listed the claimed volume for each water right, but made no specific finding regarding outstanding factual issues on any of the volumes. Rather, the Master found that there were no genuine issues of material fact on any element of any claim and the BLM was entitled to summary judgment for all elements of all claims.

In its objection to the Master's Summary Judgment Order, SPWG argues that volume was not at issue before the Master. SPWG asserts the BLM's motion for summary judgment focused on the intent to appropriate, notice, and beneficial use, not volume. SPWG alleges it was never given the opportunity to present evidence on the historical volume for each claim. SPWG did not seek to pursue objections to any other claim element such as point of diversion or place of use.

The BLM counters that SPWG has provided no evidence that tends to bring the claimed volumes into question. This misses the point. SPWG asserts it was never given the opportunity to present that evidence.

Summary judgment is not appropriate where the opposing party has not had a full and fair opportunity to meet the proposition that there are no genuine issues of material

fact and judgment is appropriate as a matter of law. *Hereford v. Hereford*, 183 Mont. 104, 107-08, 598 P.2d 600, 602 (1979). In this case, it does not appear SPWG had a full and fair opportunity to present any factual issues on the claimed volumes in the summary judgment proceeding. The BLM did not specifically raise volume as an issue. Addressing ownership and nonperfection did not necessarily end all objections to other claim elements. While the Master did expand the issues to priority date and type of right for three claims, SPWG had the opportunity to address the factual and legal issues surrounding these recommendations and did address these issues. That is not the case with volume.

Based on the record, it does not appear that volume was an issue before the Master in the summary judgment proceeding. SPWG has not received a full and fair opportunity to pursue its volume objections. The volume issue for all twelve claims is therefore remanded to the Master for further proceedings.

CONCLUSION

The record before the Court supports the majority of the Master's summary judgment rulings. The issues that are not appropriate for summary judgment will be remanded for further proceedings.

1. The BLM appropriated stockwater right claims 40M 74594-00, 40M 74590-00, 40M 74670-00, 40M 74883-00, 40M 74655-00, and 40M 74579-00 for reservoirs and natural sources located on federal land without owning livestock.
2. The proposed priority date and type of right changes for claim 40M 74579-00 are supported by the record.
3. The stockwater rights will not be transferred to the grazing permittees as successors to the original stockmen who may have appropriated instream stock rights from these sources.
4. The BLM appropriated wildlife claims 40M 74595-00, 40M 74591-00, 40M 74671-00, 40M 74882-00, and 40M 74654-00 for reservoirs located on federal land.
5. The priority date for claim 40M 74654-00 shall remain as claimed.

6. Wildlife is a recognized beneficial use that is appropriately filed as a separate statement of claim rather than an incidental use to another claim. The size of the right does not dictate its validity.

7. There are factual issues that preclude summary judgment on all elements of wildlife claim 40M 74583-00.

8. There are procedural issues that preclude summary judgment on the volume element for all twelve claims.

ORDER

ORDERED that summary judgment is GRANTED on all elements of claims 40M 74594-00, 40M 74590-00, 40M 74670-00, 40M 74883-00, 40M 74655-00, 40M 74579-00, 40M 74595-00, 40M 74591-00, 40M 74671-00, 40M 74882-00, and 40M 74654-00 except for volume. The Court adopts the priority date and type of right changes for claim 40M 74579-00 as recommended by the Master. The priority date for claim 40M 74654-00 shall remain as claimed.

ORDERED that summary judgment is DENIED on claim 40M 74583-00. The claim is remanded to the Master for further proceedings on all claim elements. The Court takes judicial notice of the Chief Water Judge's Order in Case 41R-200 and the Master's Report and Order Adopting Master's Report in case 76G-505. These Orders provide some guidance on the issues on claim 40M 74583-00.

ORDERED that summary judgment is DENIED for the volume issue on all twelve claims. The claims are remanded to the Master to determine the appropriate volume. Proceedings should take into account the historical use of each claim; the multiple use nature of the various stock and wildlife claim pairs; and how that relationship affects the volume that should appear on each claim.

DATED this 11 day of August, 2015.

Douglas Ritter
Associate Water Judge

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Service List updated 8/10/15