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Montana Water Court

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

CLAIMANTS: Ronnie D. Korman; Maxine Korman

OBJECTORS: Ronnie D. Korman; Maxine Korman;

COUNTEROBJECTORS: Ronnie D. Korman; Maxine
Korman

CASE 40M-71

40M 164811-00	40M 164820-00
40M 164812-00	40M 164821-00
40M 164813-00	40M 164822-00
40M 164814-00	40M 164823-00
40M 164815-00	40M 164824-00
40M 164816-00	40M 164825-00
40M 164817-00	40M 164826-00
40M 164818-00	40M 164827-00
40M 164819-00	40M 164828-00

ORDER ADOPTING MASTER'S REPORT

"Why not go up to Montana? It's a cattleman's paradise..."¹

I. STATEMENT OF THE CASE

This matter involves an objection to a Master's Report. The claimants are Ron and Maxine Korman ("the Kormans"). The water rights at issue are a mix of stockwater, domestic, and irrigation claims.

The Kormans filed objections to all elements of their water rights. As they have in numerous other cases, the Kormans asked the Water Master to declare their water rights to be vested rights. The Kormans believe that describing a water right as vested enhances its status and provides additional protection against challenges from other parties, including government entities.

The Kormans' arguments regarding vested rights have been addressed by the Water Court in cases 40M-A and 40M-90. In both cases, the Court declined to issue an advisory opinion on the subject of vested rights.

¹ Woodrow Call to Gus McCrae in *Lonesome Dove*, by Larry McMurtry.

The Water Master in this case declined to address the Kormans' vested rights arguments on the grounds that the same request had been rejected in other cases.

The Kormans also seek a modification of the priority dates for water rights in this case. The Kormans' property is located on Larb Creek, which lies south of the Milk River and north of Fort Peck Reservoir. This area was unsettled open range owned by the United States prior to the advent of homesteading. Large cattle operations drove their herds into this area from as far away as Colorado and Texas to take advantage of grazing on public land. The open range era ended with the advent of homesteads. The vast tracts of lands used by large cattle operations began to disappear as patents were issued to individual homesteaders and the country became settled by small farmers and ranchers. The Kormans are successors to homesteaders who obtained land patents from the United States.

The end of the open range era is described in one of the documents filed by the Kormans pertaining to the Circle Diamond operation. The Kormans assert Circle Diamond may have appropriated stockwater on what is now the Korman ranch.

The delivery of the herds trailed from Billings in 1903, marked the beginning of the end of the cattle business on a large scale in northern Montana. The country was rapidly "settling up". More and more "nester" ranches were established along Milk River and tributary creeks, each one taking its toll of the once vast open range. Water holes and range lands were fenced, each one reducing the range once used almost exclusively by Circle Diamond cattle.

The winter of 1906-1907, one of the most disastrous ever to hit the Montana ranges, was the final, deciding blow. Circle Diamond losses ran so high that in order to continue in business a complete restocking was necessary. They never restocked. The Milk River ranch was closed down permanently in the fall of 1907.

Floyd Hardin, Campfires and Cow Chips. *Campfires, The Old Circle Diamond* at 105 (1972, Phillips County News) (Attachment to Kormans' *Supplement to Objection to Master's Report*, June 30, 2015).

Although the Kormans initially claimed priority dates generally coinciding with the homestead era or later, they now assert that their claims should all have priority dates of December 31, 1893. This priority date is tied to usage of the open range by large cattle operations prior to the start of the homestead era. The Kormans filed motions to amend their water rights in an effort to obtain uniform priority dates of December 31, 1893.

The Water Master divided the Korman claims into three categories: stockwater, irrigation, and groundwater.

The Kormans initially claimed stockwater rights based upon construction of reservoirs or stock ponds. The priority dates for these rights were based upon the dates the underlying reservoirs or stock ponds were built. In some cases, the Kormans claimed priority dates that coincided with the patent dates for the original homesteads on what is now their property.

The Water Master characterized the Kormans' efforts to obtain an earlier priority dates as follows:

Based solely on general historical information depicting cattlemen in Valley County during the 1890s, the Claimants request an 1893 priority date for all of their surface stockwater rights. The Claimants do not know who was watering the stock, where the stock was watered or when these appropriations first occurred. Further, the Claimants have not established any connection between themselves and the original appropriators. Without more, the requested 1893 priority date appears arbitrary, and the information provided by the Claimants does not overcome the prima facie proof found on the Statement of Claim.

Master's Report, at 13.

There are also three irrigation claims in this case. The Kormans asserted that these claims should have earlier priority dates based upon occupancy of the open range by cattlemen prior to the start of the homestead era.

The Water Master declined to grant the Kormans' request to make the priority dates of their irrigation claims more senior. The basis of the Water Master's denial was that the Kormans had not supplied any evidence showing irrigation occurred earlier than the priority dates the Kormans originally claimed.

The Water Master handled the Kormans' groundwater claims somewhat differently. With respect to the groundwater claims, the Master changed the priority date where documentary evidence such as a filed notice of completion of groundwater appropriation warranted such a modification. The result was that two of the Korman groundwater claims received priority dates approximately 5 weeks junior to those originally claimed, while one right had its priority date changed from December 31, 1950 to December 31, 1916.

The Kormans objected to the Master's Report, and filed numerous briefs and documents asserting that their claims should be described as vested rights, and that all of their water rights should have December 31, 1893 priority dates.

II. ISSUES

1. Was the Master's decision not to characterize the Kormans' claims as vested rights correct?
2. Did the Water Master correctly determine the priority dates for the Kormans' water rights?

III. STANDARD OF REVIEW

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

The Montana Supreme Court follows a three-part test to determine if a trial court's findings of fact are clearly erroneous. See *Interstate Production Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). The Water Court uses a similar test for reviewing objections to a Master's findings of fact. Rule 11(c), W.R.Adj.R. (referencing

Rule 53(e), M. R. Civ. P.). *See In re the Existing Rights within the Jefferson River Drainage Area*, Nos. 41G-137, 41G-W-182145-00, 1999 Mont. Water LEXIS 1 at 3-4 (Dec. 27, 1999).

First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, even if the findings are supported by substantial evidence, this Court may determine a finding is clearly erroneous if the Master misapprehended the effect of the evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, this Court may still determine that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16). “Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting.” *Skelton Ranch*, ¶ 27 (quoting *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993)). The Montana Supreme Court has long recognized that “[s]ubstantial evidence and clearly erroneous are not synonymous.” *Heavirland*, ¶ 16 (quoting *DeSaye*, 250 Mont. at 323). Therefore, this Court may determine a finding is clearly erroneous even though there is evidence to support it. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16).

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

IV. ANALYSIS

1. Was the Master’s decision not to characterize the Kormans’ claims as vested rights correct?

The Kormans have been involved in several cases before the Montana Water Court. In each case, they have asked the Court to describe their claims as vested rights. Both Water Court Judges have now considered and ruled on the Kormans’ requests. In

each of these cases, the Water Judge determined that the Kormans were seeking an advisory opinion and rejected their request to describe their water rights as vested. Water Court Case 40M-A, *Order Adopting Master's Order Regarding Vested Water Rights*, June 13, 2014; Water Court Case 40M-90, *Order Adopting Master's Report*, February 8, 2013.

Orders issued by Water Judges are binding precedent. Water Masters must follow this precedent when issuing Master's Reports. The Water Master properly relied on prior decisions to deny the Kormans' request to characterize their claims as vested rights.

The Water Master's decision was correct as a matter of law and will not be disturbed.

2. Did the Water Master correctly determine the priority dates for the Kormans' water rights?

Objections to water rights can be filed by their owners, as well as by third parties. The burden is the same regardless of whether the objector is the claimant seeking to clarify some aspect of her claim, or another water user who perceives the claim to be inaccurate or invalid. In either instance, the objector must overcome the prima facie validity of the claim by a preponderance of the evidence. *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558.

The Kormans have gone to extraordinary lengths to identify historical evidence pertaining to the open range era that preceded homesteading near Larb Creek. They have provided the Court with old newspaper articles, excerpts from books, maps, affidavits, and a variety of other information concerning the days of the open range. This information provides a fascinating history of an era that will not be seen again.

Stockwater Rights

For the sake of discussion, the Court presumes that stockwater sources on what is now the Korman property were used by cattlemen grazing livestock on the open range prior to the advent of homesteading.

Unfortunately, this presumption does not entitle the Kormans to claim a priority date of December 31, 1893 for their stockwater rights.

Absent from the early historical record is specific information regarding who used what water source on the Korman property, or when such use occurred. A principle reason the Kormans selected a priority date of December 31, 1893 is that some cattle operators in northeast Montana shipped cattle to Chicago in 1893. The shipping of cattle to Chicago does not support appropriation of numerous water rights on the Korman property with matching priority dates of December 31, 1893.

Assuming again, however, that operators on the open range did appropriate stockwater rights on December 31, 1893, there is no evidence those water rights were conveyed to the Kormans or their predecessors.

The Kormans have two responses to this problem. First, they acknowledge that their exhaustive search of courthouses, historical society records, and libraries did not produce evidence showing conveyances of water rights from early cattlemen to the Kormans' predecessors. They assert this lack of documentary evidence is attributable to the passage of time, flooding in courthouse basements, and other causes. They assert that the lack of written conveyances is not fatal to their case, because such conveyances could have been made verbally.

The historical records produced by the Kormans were voluminous. This evidence does not support either written or verbal conveyances of water rights from open range operators to the Kormans' predecessors.² Moreover, it is not likely such conveyances occurred as a matter of course because large cattle operations using the open range were in competition with, and were ultimately displaced by, the waves of homesteaders who transformed the western landscape. It strains common sense to believe that cattle operators who lost use of the open range sought out numerous homesteaders occupying small parcels of land for the purpose of making oral conveyances of stockwater rights. In addition, the evidence supplied by the Kormans indicates that many open range operators were gone before homesteading of land in northeast Montana was complete.

² The Kormans submitted an affidavit from David Pippin, a resident of Valley County who was born in 1947. Mr. Pippin grew up on the Pippin Ranch near the Kormans' property. Mr. Pippin testified that he learned Pippin family history from his father and grandfather. According to Mr. Pippin, his grandfather "acquired part of Milner's Square customary range by verbal conveyance and a handshake." The Square was a large open range cattle outfit owned by Milner. Mr. Pippin's affidavit does not discuss conveyances to Kormans' predecessors.

In summary, there is no documentary evidence that the water rights claimed by the Kormans were conveyed by identifiable grantors to the Kormans' predecessors. It is also unreasonable to assume that large cattle operators verbally conveyed their stockwater rights to the settlers whose presence brought the open range era to a close.

Second, the Kormans assert early stockwater rights appropriated by cattlemen using the open range became appurtenant to the public domain, and passed to the Kormans' predecessors via patents when the open range was homesteaded.

Their assertions are contrary to Montana law which provides, "[c]laimant must establish privity with original owner... it is not enough to prove claimant's present ownership of a tract of land and then establish that that same land was irrigated at an early date." *Wills v. Morris*, 100 Mont. 514, 50 P.2d 862 (1935) (citing *Head v. Hale*, 38 Mont. 302, 308-09, 100 P. 222, 224 (1909)).

It is well established that water rights can be appropriated by private individuals on public land. However, assuming appropriations of water by early stockmen occurred, whatever water rights they appropriated on public land would not have automatically passed to later homesteaders upon issuance of a patent.

Contrary to the Kormans' assertions, homesteaders took their patents *subject to* prior appropriations of water. *Cruse v. McCauley*, 96 F. 369, 374 (1899) (finding that patents to lands of the United States were subject to water rights existing at the time the patent took effect). This means the Kormans' predecessors took ownership of their homesteads subject to any water rights previously appropriated by cattlemen using the open range. The only way for title to the land and water rights to merge was for the owners of the water rights to convey those rights back to the United States prior to patent, or directly to the homesteaders either before or after patent. The Kormans have not been able to produce evidence of such conveyances for the water rights they now claim.

The Kormans assert that water rights appropriated by squatters on the public domain could later be conveyed to successors. The Kormans' citation to this rule of law is correct. "[O]ne who has settled upon and is in possession of public lands of the United States may convey his right in the same, together with a water right appurtenant thereto,

orally and for or without consideration, to one who takes possession thereof.” *St. Onge v. Blakely*, 76 Mont. 1, 14, 245 P. 532, 536 (1926). The question presented here is whether the Kormans have presented sufficient evidence to show such conveyances occurred between operators on the open range and the Kormans’ predecessors. There is no direct evidence that the Kormans’ predecessors received title to their water rights via such conveyances.

In response to this problem, the Kormans assert evidence of conveyances should be presumed because they now own land originally used by open range operators. In support of this assertion, they cite *Wills v. Morris*, 100 Mont. 514, 50 P.2d 862 (1935). In *Wills*, it was asserted “that there was no evidence in the record connecting the water right notice filed by John Donlan with the defendant Albee or his predecessors in interest.” *Wills*, 100 Mont. at 531, 50 P.2d at 869. Nevertheless, the Montana Supreme Court stated that “the trial court could presume that the transfer of the possession from Donlan to Terry was lawful.” *Wills*, 100 Mont. at 532, 50 P.2d at 869.

The water right at issue in *Wills* was an irrigation claim that had already been decreed in a prior case. That water right was further supported by significant evidence of actual use by the original appropriator and his successors. These factual distinctions were used by the Montana Supreme Court to reject adoption of a general rule that oral conveyances of water rights from squatters on the public domain could be presumed in all cases. “We did not in the case of *Wills v. Morris*, supra, nor do we now, intend to depart from the doctrine of the *St. Onge Case*... .” *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 291, 62 P.2d 206, 209 (1936).

The rule in *St. Onge* is as follows: “Mere possession by one person of a water right originated by another does not show such privity. In order to make good his claim to the right as of the date at which it was initiated the possessor must show some contractual relation between himself and the original appropriator.” *St. Onge*, 76 Mont. at 19, 245 P. at 538 (quoting *Kenck v. Deegan*, 45 Mont. 245, 249, 122 P. 746, 748 (1912)). The existence of a contractual relationship cannot be presumed where no evidence to support it exists.

The Water Master concluded that the lack of evidence showing privity of title prevented the Kormans from overcoming the prima facie status of their claims. On this basis, the Water Master concluded that the priority dates for the Kormans' stockwater claims should remain as the Kormans described them in their original claim filings.

The Water Master's decision was correct. The Kormans did not show by a preponderance of the evidence that the priority dates for their stockwater rights should be changed.

There are important practical and policy implications associated with the Master's decision. Recognition of the Kormans' request to advance the priority dates of their water rights based only upon assumed appropriation of water rights on the open range and assumed conveyance of those rights to their predecessors would open the door to similar requests by many other water users. The result would be a wholesale modification of priority dates based upon nonspecific information regarding open range usage by individuals who are not connected by chain of title to current water right claimants.

The Water Master correctly recognized that the Kormans were not entitled to claim priority dates for their stockwater rights based upon prior usage of the open range absent more specific evidence of actual usage and establishment of privity of title between the users of the open range and the Kormans' predecessors.

Irrigation Rights

The same result applies to the Kormans' irrigation claims, although the analysis is much simpler. There is no evidence that early cattlemen using the open range undertook any irrigation on what is now the Korman property. Absent such evidence, the Kormans are not entitled to make their irrigation rights more senior.

Groundwater Rights

The Master's Report addresses three groundwater rights. The Master slightly modified the priority dates of claims 40M 164817-00 and 40M 164824-00 to conform to the requirements of the 1961 Groundwater Code. §§ 89-2911 through 89-2936, R.C.M., 1961. This modification is consistent with the Groundwater Code and the Montana Code

Annotated and will not be disturbed. § 85-2-306(4), MCA. The Kormans did not produce evidence of earlier priority dates for these rights, and the Master's Report in this regard will not be modified.

The Master also changed the priority date of claim 40M 164820-00 from December 31, 1950 to December 31, 1916. This change was based on substantial evidence and will not be disturbed.

V. CONCLUSIONS OF LAW

1. The Master's decision not to characterize the Kormans' claims as vested rights was correct.
2. The Water Master correctly determined the priority dates for the Kormans' water rights.

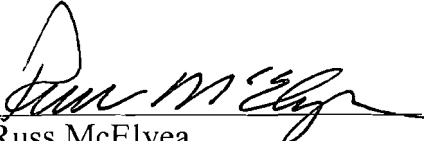
VI. SUMMARY AND ORDER

The issues presented in this case are interesting and complex. The Kormans are commended for the extraordinary efforts they have undertaken to participate in the adjudication process. They have presented an extensive body of evidence regarding the history of the area in which they live. This Court respects the hard work the Kormans have put into their case, and has enjoyed reading the history of northeast Montana.

Ultimately, however, this Court must render decisions that follow the facts and the law.

Accordingly, the Kormans' objection to the Master's Report is DENIED. The Master's Report is ADOPTED without modification.

DATED this *19* day of *November*, 2015.


Russ McElyea
Chief Water Judge

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	40M 164818-00	40M 164827-00
	40M 164819-00	40M 164828-00

NOTICE OF FILING OF MASTER'S REPORT

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

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

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

MASTER'S REPORT
PROCEDURAL BACKGROUND

The above-captioned 18 claims were filed by Ron and Maxine Korman (the Claimants) and encompass a mix of stock and irrigation uses. The United States filed an objection to one of the claims – 40M 164823-00. The Claimants filed timely objections and counterobjections to all of the claims. Some of the claims received issue remarks based on pre-decree examination by the State Department of Natural Resources and Conservation (DNRC).

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

On October 31, 2013, Water Master Pepper issued an Order dismissing all objections regarding vested water rights and closing case 40M-A. The Order received objections from several parties, and a hearing was held by the Court on the objections. On June 13, 2014, the Master’s Order was adopted in whole by Associate Water Judge Douglas Ritter. Thereafter, Water Master Pepper placed this case on hearing track and issued a Scheduling Order. On August 12, 2014, the Claimants filed a Motion to Reconsider the June 13, 2014 Order. The Claimants’ Motion to Reconsider was denied on September 11, 2014.¹

On November 6, 2014, the United States withdrew its objection to claim 40M 164823-00. At this point, it was unclear what changes were needed in order to resolve the Claimants’ objections. Therefore, the Water Master issued an order directing the Claimants to file motions to amend their water right claims pursuant to Section 85-2-233(6), MCA and Rule 10, W.R.Adj.R. The Order stated that the motions should specify

¹ Water Master Pepper left her position with the Water Court in October of 2014, and this case was subsequently assigned to this Master.

the requested amendment, the evidence that supports the amendment and should include all proposed changes necessary to resolve the Claimants' objections. The Order also stated that any request to change the name of the water rights from "Statement of Claim" to "Declaration of Vested Water Right" or "Pre-Existing Vested Water Right" will be ignored, as this issue was settled in Case 40M-A.

Thereafter, the Claimants filed motions to amend each of the claims along with thousands of pages of affidavits, letters, maps, transcripts, and various historical documents. The relevant facts for each of the claims are as follows:

FINDINGS OF FACT

40M 164811-00

1. Claim 40M 164811-00 represents a stockwater right for an onstream reservoir with a priority date of December 31, 1934. The source of the water is an unnamed tributary of the South Fork of Box Elder Coulee in Valley County. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to "Declaration Vested Water Right" [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

2. According to the motion to amend, the Claimants originally claimed a priority date of 1934 because the reservoir was constructed in 1934. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164811-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164812-00

3. Claim 40M 164812-00 represents a stockwater right for an onstream reservoir with a priority date of December 31, 1963. The source of the water is an unnamed tributary of Larb Creek in Valley County. The Claimants objected to all elements of the

claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to "Declaration Vested Water Right" [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

4. According to the motion to amend, the Claimants originally claimed a priority date of 1963 because the reservoir was constructed in 1963. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164812-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164813-00

5. Claim 40M 164813-00 represents a stockwater right for a well with a priority date of December 31, 1953. The Claimants objected to all elements of the claim. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to "Declaration Vested Water Right" [SIC].

40M 164814-00

6. Claim 40M 164814-00 represents a stockwater right for an onstream reservoir with a priority date of December 31, 1932. The source of the water is an unnamed tributary of Larb Creek in Valley County. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to "Declaration Vested Water Right" [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

7. According to their motion to amend, the Claimants originally claimed a priority date of 1932 because the reservoir was constructed in 1932. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164814-00* at 4-5, Exh.-B, -

C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164815-00

8. Claim 40M 164815-00 represents a stockwater right for an onstream reservoir with a priority date of December 31, 1934. The source of the water is the South Fork of Unnamed Tributary of Box Elder Coulee in Valley County. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

9. According to their motion to amend, the Claimants originally claimed a priority date of 1934 because the reservoir was constructed in 1934. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164815-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164816-00

10. Claim 40M 164816-00 represents a stockwater right for an onstream reservoir with a priority date of December 31, 1934. The source of the water is an unnamed tributary of Larb Creek in Valley County. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

11. According to their motion to amend, the Claimants originally claimed a priority date of 1934 because the reservoir was constructed in 1934. However, the Claimants now believe that the priority date should be earlier because the source was

appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164816-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164817-00

12. Claim 40M 164817-00 represents a stockwater right for a well with a priority date of February 19, 1971. The Claimants objected to all elements of the claim. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC].

13. The claim also received an issue remark stating that the priority date may be questionable. The Statement of Claim lists the priority date as February 19, 1971, representing the day the well was completed. However, the Notice of Completion of Groundwater Appropriation (GW2 Form) was filed on March 29, 1971.

40M 164818-00

14. Claim 40M 164818-00 represents a stockwater right for an onstream reservoir with a priority date of December 31, 1957. The source of the water is an unnamed tributary of Larb Creek in Valley County. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

15. According to their motion to amend, the Claimants originally claimed a priority date of 1957 because the reservoir was constructed in 1957. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164818-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164819-00

16. Claim 40M 164819-00 represents a stockwater right for Larb Creek with a priority date of December 31, 1915. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

17. According to their motion to amend, the Claimants originally claimed a priority date of 1915 because that signified their predecessors’ date of entry. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to 1915. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164819-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164820-00

18. Claim 40M 164820-00 represents a stockwater right for a well with a priority date of December 31, 1950. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC]. The motion also seeks to amend the priority date to December 31, 1916.

19. In support of the 1916 priority date, the Claimants attached a Declaration of Vested Groundwater Rights form filed by their predecessors in interest, Myron and Dan Hammond.

40M 164821-00

20. Claim 40M 164821-00 represents a stockwater right for an onstream reservoir with a priority date of December 31, 1936. The source of the water is an unnamed tributary of Larb Creek in Valley County. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

21. According to their motion to amend, the Claimants originally claimed a priority date of 1936 because that signified the date the reservoir was constructed. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164821-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164822-00

22. Claim 40M 164822-00 represents a stockwater right for an onstream reservoir with a priority date of December 31, 1948. The source of the water is an unnamed tributary of Larb Creek in Valley County. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

23. According to their motion to amend, the Claimants originally claimed a priority date of 1948 because that signified the date the reservoir was constructed. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164822-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164823-00

24. Claim 40M 164823-00 represents a stockwater right for an onstream reservoir with a priority date of May 9, 1952. The source of the water is an unnamed tributary of Larb Creek in Valley County. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to

change the title of the paper water right to “Declaration Vested Water Right” [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

25. According to their motion to amend, the Claimants originally claimed a priority date of 1952 because that signified the date the reservoir was constructed. However, the Claimants now believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to the existence of the reservoir. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164823-00* at 4-5, Exh.-B, -C. The only reference to the proposed priority date of 1893 is that the historic N-N Ranch – which apparently grazed cattle in Valley County – shipped 23,000 head of cattle to Chicago markets in 1893. *Id*; Exh.-C.

40M 164824-00

26. Claim 40M 164824-00 represents a domestic use right for a well with a priority date of February 17, 1971. The Claimants objected to all elements of the claim. The Claimants filed a motion to amend the claim, seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC].

27. The claim also received an issue remark stating that the priority date may be questionable. The Statement of Claim lists the priority date as February 15, 1971, representing the day the well was completed. However, the Notice of Completion of Groundwater Appropriation (GW2 Form) was filed on March 29, 1971.

40M 164825-00

28. Claim 40M 164825-00 represents a domestic right for a well with a priority date of December 31, 1915. The Claimants objected to all elements of the claim. The Claimants filed a motion to amend the claim seeking to change the title of the paper water right to “Declaration Vested Water Right” [SIC].

40M 164826-00

29. Claim 40M 164826-00 represents an irrigation right with a priority date of December 31, 1936. The Claimants objected to all elements of the claim. The claim also received an issue remark indicating that the claimed period of use (January 1 to December 31) exceeds the normal growing season for the area, which is April 1 to

October 31. The Claimants filed a motion to amend the claim seeking to change the title of the paper water right to "Declaration Vested Water Right" [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

30. According to their motion, the Claimants believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to 1936. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164826-00* at 4-5, Exh.-B, -C. The motion does not include any evidence of irrigation practices occurring prior to 1936, nor does the motion address the period of use of the claim.

40M 164827-00

31. Claim 40M 164827-00 represents an irrigation right with a priority date of April 30, 1932. The Claimants objected to all elements of the claim. The Claimants filed a motion to amend the claim seeking to change the title of the paper water right to "Declaration Vested Water Right" [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

32. According to their motion, the Claimants believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to 1932. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164827-00* at 4-5, Exh.-B, -C. The motion does not include any evidence of irrigation practices occurring prior to 1932.

40M 164828-00

29. Claim 40M 164828-00 represents an irrigation right with a priority date of May 9, 1952. The Claimants objected to all elements of the claim. The claim also received an issue remark indicating that the claimed period of use (January 1 to December 31) exceeds the normal growing season for the area, which is April 1 to October 31. The Claimants filed a motion to amend the claim seeking to change the title of the paper water right to "Declaration Vested Water Right" [SIC]. The motion also seeks to amend the priority date to December 31, 1893.

30. According to their motion, the Claimants believe that the priority date should be earlier because the source was appropriated by cattlemen for stock use prior to 1952. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County as early as the 1890s. *Motion to Amend, 40M 164828-00* at 4-5, Exh.-B, -C. The motion does not include any evidence of irrigation practices occurring prior to 1952, nor does the motion address the period of use of the claim.

CONCLUSIONS OF LAW

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

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

3. Therefore, the overarching legal issues in this case are: 1) whether the Claimants' motions to amend and supporting evidence overcomes the prima facie proof found on the Statements of Claim; and 2) whether the proposed amendments resolve the issue remarks and objections.

4. The legal questions surrounding the Claimants' proposed amendments differ depending on the type of water source. Therefore, the following analysis is divided into a discussion of surface water claims, irrigation claims and groundwater claims.

Vested Water Rights

5. The issue in Case 40M-A was whether the claimants' water rights were "vested" and whether the addition of the term "vested" to the paper water right would somehow elevate the status of the claims in the context of this statewide adjudication. The Claimants argue that their water rights are vested and are therefore unassailable. They also argue that the statewide adjudication process is unconstitutional because it may result in changes to their vested rights.

6. In his Order Adopting the Master's Report in 40M-A, Judge Ritter found that "[w]hile [the Claimants] have provided a wealth of citations to a variety of documents, they have provided no actual authority that requires the ruling they seek. [...] Designating water rights as vested and changing the name to declaration of vested water right would not change their status in this adjudication." Case 40M-A *Order Adopting Master's Order Regarding Vested Water Rights*, at 6-7 (June 13, 2014). The Claimants filed a Motion to Reconsider this Order, which was rejected. The Claimants did not appeal the Order.

7. Despite the fact that the issue was settled in Case 40M-A, the Claimants continue to insist that the title of each of their paper water rights in this case be changed to "Declaration Vested Water Right" [SIC]. As consistently stated by this Master, this request will be ignored, as the issue has been resolved.

Surface Water Stock Claims

8. The Claimants claimed numerous stockwater rights for onstream reservoirs on their property.² In each case, they claimed the date the reservoir was constructed as the priority date. They now seek an earlier priority date. It appears the Claimants' argument in favor of amendment is as follows: the source of water was appropriated for stock use prior to the existence of the reservoir; so therefore, the priority date should be the date of the original appropriation – in this case 1893. The Claimants do not point to a specific individual or entity that appropriated the claimed sources of water for stockwater use in 1893. Instead, they provide anecdotal evidence of open-range stock use in Valley County in the 1890s. The Claimants also fail to provide any chain of title evidence to establish privity between themselves and the original appropriators of the water.

9. Under some factual circumstances, a claimant may establish a priority date for an onstream reservoir that predates the reservoir. In *Bagnell v. Lemery*, the Montana Supreme Court recognized that the incorporation of storage under a previously appropriated right does not alter the priority date of the underlying right, as long as the added storage does not enlarge the underlying right. 202 Mont. 238, 244, 657 P. 608, 622

² Claims 40M 164811-00, 40M 164812-00, 40M 164814-00, 40M 164815-00, 40M 164816-00, 40M 164818-00, 40M 164821-00, 40M 164822-00 and 40M 164823-00.

(1983). However, it would not be possible for the Court to make the proposed changes in this case unless the Claimants draw a clearer picture of the historical use of water on their property.³

10. For example, it appears that the Korman Ranch is comprised of several parcels originally homesteaded by various parties. If the Claimants introduced evidence to show that their predecessors-in-interest began watering stock on a given source in a given year (say 1915), the Claimants could potentially establish that a stock reservoir that was subsequently constructed on the same source should have a priority date of 1915. To do so, the Claimants would need to show that the reservoir did not increase the stock use but just stabilized the water, making it available at later and drier times of the year. *Bagnell*, 202 Mont. at 244, 657 P. at 622.

11. Unfortunately, that is not the situation currently before the Court. Based solely on general historical information depicting cattlemen in Valley County during the 1890s, the Claimants request an 1893 priority date for all of their surface stockwater rights. The Claimants do not know who was watering the stock, where the stock was watered or when these appropriations first occurred. Further, the Claimants have not established any connection between themselves and the original appropriators. Without more, the requested 1893 priority date appears arbitrary, and the information provided by the Claimants does not overcome the prima facie proof found on the Statement of Claim. Section 85-2-227, MCA.

12. The same analysis applies to claim 40M 164819-00, which represents direct from source stock use for Larb Creek. According to their motion to amend, the Claimants originally claimed a priority date of 1915 because that signified their predecessors' date of entry. However, the Claimants now believe that the priority date should be earlier because the source was appropriated for stock use by someone else in 1893. For the same reasons outlined above, the information provided does not overcome the prima facie proof found on the Statement of Claim. Section 85-2-227, MCA.

³ This evidentiary problem has been compounded by the form and manner of the Claimants' filings with the Water Court. Throughout the proceedings, the Claimants have submitted thousands of pages of affidavits, letters, maps, transcripts, statutes, court filings, e-mails and various historical documents. The filings are duplicative, unorganized and cover a variety of subjects that are often entirely unrelated to the case.

Surface Water Irrigation Claims

13. The Claimants request that the priority date for three irrigation claims – 40M 164826-00, 40M 164827-00 and 40M 164828-00 – be amended to December 31, 1893. According to their motion, the Claimants believe that the priority dates should be earlier because the sources were appropriated by cattlemen for stock use prior to the claimed priority dates. In support, the Claimants point to general historical evidence of large scale cattle operations occurring in Valley County in the 1890s. The Claimants do not claim that irrigation was occurring prior to the claimed priority dates for these rights, nor do they present any evidence in support of an earlier priority date. The prima facie proof of the Statement of Claim has not been overcome, and the priority dates should remain as claimed. Section 85-2-227, MCA.

14. Additionally, claims 40M 164826-00 and 40M 164828-00 also received an issue remark indicating that the claimed period of use (January 1 to December 31) exceeds the normal growing season for the climatic area, which is April 1 to October 31. In their motions to amend, the Claimants did not address the period of use for these claims. However, on their original objections to the two claims, they noted that the claimed period of use was correct because irrigation “may occur year round.” It is possible that Claimants use flood waters to irrigate their place of use outside the normal growing season, and no other parties objected to a year-round period of use. The Claimants’ objection form indicates support for a year-round period of use. Therefore, the Master recommends that period of use remain as claimed, and that the issue remark be removed from the claims.

Groundwater Claims

15. Claim 40M 164817-00 received an issue remark stating that the priority date may be questionable. The Statement of Claim for claim 40M 164817-00 lists the priority date as February 19, 1971, representing the day the well was completed. However, the Notice of Completion of Groundwater Appropriation (attached to the Statement of Claim) was filed on March 29, 1971.

16. Pursuant to the 1961 Groundwater Code, the proper priority date of a groundwater well completed between 1961 and 1973 is the filing date of the Notice of

Completion of Groundwater Appropriation form. *See* Section 85-2-306(4), M.C.A.; Senior Water Master Kathryn Lambert, *Memorandum to Chief Water Judge RE: 1961 Groundwater Code* (March 23, 2011). Therefore, the evidence is sufficient to overcome the prima facie proof of the Statement of Claim, and the priority date for the claim should be changed to March 29, 1971. The issue remark should be stricken from the claim.

17. Claim 40M 164820-00 represents a stockwater right for a well with flow rate of 20 GPM and a priority date of December 31, 1950. The Claimants objected to all elements of the claim, including priority date. The Claimants filed a motion to amend the claim, seeking to change the priority date to December 31, 1916. In support of the 1916 priority date, the Claimants attached a Declaration of Vested Groundwater Rights form filed by their predecessors in interest, Myron and Dan Hammond.

18. The Hammond Declaration appears to support the proposed changes, however, the Declaration claims a flow rate of 12 GPM. Thus, the priority date of claim 40M 164820-00 should be amended to December 31, 1916, and the flow rate should be amended to 12 GPM.

19. Claim 40M 164824-00 received an issue remark stating that the priority date may be questionable. The Statement of Claim for claim 40M 164824-00 lists the priority date as February 15, 1971, representing the day the well was started. However, the Notice of Completion of Groundwater Appropriation (attached to the Statement of Claim) was filed on March 29, 1971.

20. Pursuant to the 1961 Groundwater Code, the proper priority date of a groundwater well completed between 1961 and 1973 is the filing date of the Notice of Completion of Groundwater Appropriation form. *See* Section 85-2-306(4), M.C.A.; Senior Water Master Kathryn Lambert, *Memorandum to Chief Water Judge RE: 1961 Groundwater Code* (March 23, 2011). Therefore, the evidence is sufficient to overcome the prima facie proof of the Statement of Claim, and the priority date for the claim should be changed to March 29, 1971. The issue remark should be stricken from the claim.


21. For the above-mentioned reasons, each claim should be modified as shown below to resolve all issue remarks and to accurately reflect historical use:

<u>40M 164811-00</u>	NO CHANGE
<u>40M 164812-00</u>	NO CHANGE
<u>40M 164813-00</u>	NO CHANGE
<u>40M 164814-00</u>	NO CHANGE
<u>40M 164815-00</u>	NO CHANGE
<u>40M 164816-00</u>	NO CHANGE
<u>40M 165817-00</u>	Priority Date: February 19, 1971 March 29, 1971
<u>40M 164818-00</u>	NO CHANGE
<u>40M 164819-00</u>	NO CHANGE
<u>40M 164820-00</u>	Priority Date: December 31, 1950 December 31, 1916 Flow Rate: 20 GPM 12 GPM
<u>40M 164821-00</u>	NO CHANGE
<u>40M 164822-00</u>	NO CHANGE
<u>40M 164823-00</u>	NO CHANGE
<u>40M 164824-00</u>	Priority Date: February 17, 1971 March 29, 1971
<u>40M 164825-00</u>	NO CHANGE
<u>40M 164826-00</u>	NO CHANGE
<u>40M 164827-00</u>	NO CHANGE
<u>40M 164828-00</u>	NO CHANGE

RECOMMENDATIONS

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

DATED this *13* day of *MARCH*, 2015


 Andrew Gorder
 Water Master

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