

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

FILED

DEC 07 2015

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
RED ROCK RIVER BASIN (41A)

CLAIMANT: Hansen Livestock Co.

OBJECTOR: State of Montana, Board of Land Commisioners

CASE 41A-144

41A 94703-00

41A 94705-00

41A 94713-00

Implied Claims:

41A 30103771

41A 30103772

41A 30103773

CLAIMANT: Hansen Livestock Co.

OBJECTOR: Hildreth Livestock Co.

CASE 41A-145 ✓

41A 94689-00

41A 94690-00

41A 94691-00

41A 94692-00

41A 94695-00

41A 94696-00

41A 94709-00

**ORDER AMENDING AND ADOPTING MASTER'S REPORTS AND
ADDRESSING OBJECTION TO MASTER'S REPORTS**

I. INTRODUCTION

Hansen Livestock Company (Hansen) is the owner of the claims consolidated in cases 41A-144 and 41A-145. Hansen objected to the Master's Report in each case. While the substantive issue raised in the claimant's objections to the Master's Reports is identical, the procedural history of the two cases differs slightly and will be described separately.

II. PROCEDURAL HISTORY

Case 41A-144

Case 41A-144 was consolidated in May 2015. All three claims in the case received an objection from the State of Montana Board of Land Commissioners (TLMD) on the basis that part of the place of use of each claim included lands owned by the State. Claim 41A 94705-00 received an objection from the United States, Bureau of Reclamation, but it was withdrawn before case 41A-144 was consolidated. The claims were also subject to several issue remarks.

In September 2015, Hansen filed a Motion to Remove Issue Remarks, which included a stipulation signed by Hansen and TLMD. In the stipulation, the parties identified the portion of each place of use that was owned by the State and agreed that implied claims should be generated in TLMD's name for the portion of each water right used on State lands. In his Report, the Master concluded that pursuant to the parties' stipulation and *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985), implied claims should be generated for the portions of the places of use owned by the State. The Master further concluded that the evidence entered into the record resolved the issues noted by the remarks on the claims.

Hansen filed a timely objection to the Master's Report requesting the removal of the supplemental rights remark from all three claims in case 41A-144. Hansen's objection in case 41A-144 is not predicated on an error of fact or law by the Water Master. The request for removal of the supplemental rights remark does not assert that the Master erred by leaving this remark on Hansen's claims.

Case 41A-145

Case 41A-145 was consolidated in May 2015. Hildreth Livestock Co. (Hildreth) objected to all seven claims consolidated in the case. Additionally, several of the claims received issue remarks. The parties in case 41A-145 signed a stipulation addressing Hildreth's objections. Accompanying the filing of the stipulation was a motion by Hansen to remove the issue remarks from Hansen's water rights and to modify claim 41A

94695-00. The motion also asked for dismissal of Hildreth's objections, and for addition of an information remark provided in the stipulation.

A Master's Report was filed in September 2015, granting the requests in Hansen's motion. Hansen filed a timely objection to the Master's Report.

In its objection to the Master's Report, Hansen requests revisions to the place of use for claim 41A 94695-00. In addition, Hansen requests that the supplemental rights remark be removed from the claims in case 41A-145.

Neither of Hansen's objections in case 41A-145 is predicated on an error of fact or law by the Water Master. The request to correct the place of use for claim 41A 94695-00 is based upon a mistake regarding the place of use in an earlier filing made by Hansen. The request for removal of the supplemental rights remark does not assert that the Master erred by leaving this remark on Hansen's claims.

III. ISSUES

1. Should the place of use for claim 41A 94695-00 be modified?
2. Should the supplemental rights remark be removed from Hansen's claims?

IV. DISCUSSION

1. Should the place of use for claim 41A 94695-00 be modified?

The place of use for claim 41A 94695-00 identified in the Master's Report was based upon information supplied to the Master by the claimant. The claimant has determined that information was incorrect. On that basis, it seeks to have the place of use for claim 41A 94695-00 modified. In effect, Hansen is seeking to correct its own clerical error.

Hansen's request is reasonable. The abstract for claim 41A 94695-00 is modified in accordance with Hansen's request. Place of use ID #5, as it appeared in the Preliminary Decree, was for 5.00 acres in the E2E2SE of Section 13, T10S, R12W. The Water Master removed place of use ID #5 from claim 41A 94695-00 pursuant to Hansen's earlier request. Place of use ID #5 shall be reinstated and place of use ID #2 shall be removed. Maximum acres is modified to 161 acres, which is a reduction from the 170 acres originally claimed and the 165 acres recognized in the Master's Report.

These changes to place of use and acres irrigated are reflected on the modified abstract attached to this Order.

2. Should the supplemental rights remark be removed from Hansen's claims?

Hansen seeks removal of the supplemental rights remark for claims in both cases. Hansen makes two arguments to support removal of the remark. First, Hansen argues that such remarks do not clarify the use of these claims because each water right is already limited by flow rate, place of use, and historic volume. Neither objector has opposed Hansen's request to remove the supplemental rights remark.

The supplemental rights remark which is the subject of Hansen's request extends to a number of claims which are not included in cases 41A-144 and 41A-145. Claims with the same remark have been consolidated in cases 41A-143 and 41A-146, while other claims have not been consolidated in any case, and have not received objections or issue remarks.

Hansen's objection to the Master's Report does not specify whether the supplemental rights remark should be removed from claims in cases 41A-143 and 41A-146, as well as from other claims that are not consolidated in cases. Hansen's request to remove the remark from the claims in cases 41A-144 and 41A-145 comes after issuance of a Master's Report.

Although Hansen is correct that supplemental rights remarks may not make administration of water rights more efficient, it is also true that removal of supplemental rights remarks confers little meaningful benefit to the claimant. Administration of water will be not be enhanced by either the presence or absence of the remarks.

Although the benefits associated with removal of such remarks are questionable, the costs are real. To remove such remarks, the Water Court must forward the abstracts to the DNRC, which makes changes to the claims in the database. This process consumes the Water Master's time, the DNRC's staff time, and in this instance, the time of a Water Judge. Those costs may be worthwhile when such remarks are removed prior to or as part of a Master's Report, but they are hard to justify when the request comes for the first time in an objection to a Master's Report.

The return on investment for removal of supplemental rights remarks late in the adjudication process is low. This Court will not, as a general practice, entertain objections to Master's Reports seeking removal of supplemental rights remarks unless the remarks are inaccurate or misleading.

Hansen's second argument¹ is that the attachment of the supplemental rights remark is inappropriate because two of the water rights listed do not have overlapping places of use. This argument has merit. The existence of a supplemental rights remark on claims that do not have overlapping places of use is misleading. Because removal of one water right from a supplemental rights remark requires modification of all other claims referenced in the remark, the path of least resistance here is to remove the supplemental rights remark from all the claims referenced in the remark.

Accordingly, the supplemental rights remark will be removed from all claims with the remark, including the claims that are not consolidated in cases 41A-144 and 41A-145. A tabulation of claims from which the remark will be removed is provided below.²

41A 94689-00 (Case 41A-145)
41A 94690-00 (Case 41A-145)
41A 94691-00 (Case 41A-145)
41A 94692-00 (Case 41A-145)
41A 94693-00 (Case 41A-146)
41A 94694-00 (Not currently involved in Water Court proceedings)
41A 94696-00 (Case 41A-145)
41A 94703-00 (Case 41A-144)
41A 94705-00 (Case 41A-144)
41A 94706-00 (Not currently involved in Water Court proceedings)
41A 94707-00 (Not currently involved in Water Court proceedings)
41A 94708-00 (Case 41A-146)
41A 94711-00 (Case 41A-143)
41A 94712-00 (Case 41A-146)
41A 94713-00 (Case 41A-144)
41A 94715-00 (Case 41A-146)
41A 94716-00 (Case 41A-146)
41A 94724-00 (Case 41A-146)

¹ It should be noted that Hansen raises this argument only in case 41A-144. However, the reasoning of the argument applies to all claims containing the supplemental rights remark at issue.

² The supplemental rights remark on the claims that are currently involved in proceedings in cases 41A-143 and 41A-146 will be removed by the Master during the course of those proceedings.

V. CONCLUSION AND ORDER

The Master's Report in case 41A-144 is ADOPTED;

The Master's Report in case 41A-145 is AMENDED to incorporate Hansen's clerical correction to the place of use and is ADOPTED as amended;

Hansen's request to remove the supplemental rights remark from its claims in cases 41A-144 and 41A-145 is GRANTED. That request is expanded to remove the remark from all claims on which it appears, though the remark on the claims in cases 41A-143 and 41A-146 will be removed pursuant to the Master's Report in those proceedings; and

Cases 41A-144 and 41A-145 are CLOSED.

DATED this 7th day of December, 2015.



Russ McElyea
Chief Water Judge

Kirsten Madsen
Montana Attorney General
Agency Legal Services Bureau
PO Box 201440
Helena, MT 59620
(406) 444-5850
kmadsen@mt.gov

Joe Fairbank
Max A. Hansen & Associates, PC
8 South Idaho Street, Suite A
PO Box 1301
Dillon, MT 59725
(406) 683-4301
joe@irc1031x.com

Dana E. Pepper
Pepper Law Firm, PLLC
PO Box 477
Bozeman, MT 59771-0477
(406) 599-7424
dana@pepperlawfirm.com

W G Gilbert III
W.G. Gilbert III, P.C.
15 South Idaho Street
PO Box 345
Dillon, MT 59725
(406) 683-6116

Note: Service List Updated 11/16/2015

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

FILED

SEP 29 2015

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
RED ROCK RIVER BASIN (41A)

CLAIMANT: Hansen Livestock Co.

OBJECTOR: Hildreth Livestock Co.

CASE 41A-145

41A 94689-00

41A 94690-00

41A 94691-00

41A 94692-00

41A 94695-00

41A 94696-00

41A 94709-00

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

FINDINGS OF FACT

1. The above-captioned claims are owned by Hansen Livestock Co. The claims appeared in the Preliminary Decree for the Red Rock River Basin (Basin 41A) and were subject to issue remarks resulting from pre-decree examination by the State Department of Natural Resources and Conservation (DNRC). The claims received objections from Hildreth Livestock Co.

2. The Court set deadlines for the parties to discuss the objections to the claims and potentially reach an informal resolution. On September 18, 2015, Hansen Livestock filed various motions to amend along with a supporting affidavit and a Stipulation between Hansen Livestock and Hildreth Livestock (Stipulation). The Stipulation resolves the objections to the claims, and Hansen Livestock believes its additional filings address all issue remarks. The relevant facts are as follows:

Hildreth Livestock Objections

3. Hildreth Livestock Co. objected to claims 41A 94689-00, 41A 94690-00, 41A 94691-00, 41A 94692-00, 41A 94695-00, 41A 94696-00 and 41A 94709-00 in order to have an information remark added to each claim referencing a July 30, 1924 Stipulation from Case No. 3405, Beaverhead County. According to the Stipulation, the parties agree that the following information remark should be added to the seven claims listed above:

THIS CLAIM IS SUBJECT TO A JULY 30, 1924 STIPULATION, WHICH WAS EXPRESSLY MADE PART OF THE DECREE IN CASE NO. 3405, BEAVERHEAD COUNTY.

Addition of the information remark will resolve all of Hildreth Livestock's objections.

Claim 41A 94689-00

4. Claim 41A 94689-00 received a single issue remark noting that part of the place of use appears to be on lands owned by the State. On August 5, 2013, the State of Montana, Board of Land Commissioners filed a Sworn Statement of Non-Interest in the claim. A copy of the statement is in the claim file. Therefore, the ownership issue remark should be removed.

Claim 41A 94690-00

5. Claim 41A 94690-00 represents an irrigation right for a 129 acres utilizing water from Medicine Lodge Creek. The claim received issue remarks questioning the number of historically irrigated acres. Historical aerial photographs appear to show between 112 and 113 acres of irrigation.

6. In support of the claimed acreage, Hansen Livestock filed the affidavit of Paul Hansen. As president of Hansen Livestock Co., Mr. Hansen has personal knowledge of the historical and contemporary use of this water right. Mr. Hansen's affidavit supports the claimed acreage of 129 acres. The issue remark should be removed.

Claim 41A 94692-00

7. Claim 41A 94692-00 represents an irrigation right for a 32 acres utilizing water from Medicine Lodge Creek. The claim received an issue remark questioning the number of historically irrigated acres. One historical aerial photograph appears to show 23 acres of irrigation. The claim also received a remark noting that the flow rate may need to be reduced depending on the resolution of the acreage issue.

8. In support of the claimed acreage, Hansen Livestock filed the affidavit of Paul Hansen. As president of Hansen Livestock Co., Mr. Hansen has personal knowledge of the historical and contemporary use of this water right. Mr. Hansen's affidavit supports the claimed acreage of 32 acres. The flow rate and acreage issue remarks should be removed.

Claim 41A 94695-00

9. Claim 41A 94695-00 received an issue remark noting that a portion of the claimed place of use appears to be owned by William Wellborn. The claimants agreed and submitted a motion to remove place of use #5 from the claimed place of use. The total claimed acreage should be reduced from 170 acres to 165 acres. An updated map depicting the claimed place of use has been added to the claim file for future reference.

10. Based upon the foregoing, each claim should be modified as shown on the attached abstracts to resolve all issue remarks and objections and to accurately reflect historical use.

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 proposed actions resolve all issue remarks and objections; and 2) whether the evidence before the Court overcomes the prima facie proof found on the Statements of Claim.

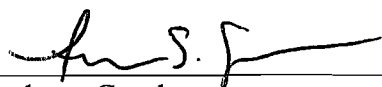
4. The settlement documentation filed by the parties constitutes a voluntary addition of an information remark to claims 41A 94689-00, 41A 94690-00, 41A 94691-00, 41A 94692-00, 41A 94695-00, 41A 94696-00 and 41A 94709-00. The information remark does not change the substance of the claims; therefore, no additional analysis is required. All objections to the claims have been resolved.

5. As requested by the claimant, place of use #5 should be removed from claim 41A 94695-00. With respect to the remaining issue remarks, the evidence entered into the record is sufficient to resolve the issues noted by remarks on the claims. Rule 17, W.R.Adj.R.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact 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 29 day of September, 2015.



Andrew Gorder
Water Master

Joe Fairbank
Max A. Hansen & Associates, PC
8 South Idaho Street, Suite A
PO Box 1301
Dillon, MT 59725
(406) 683-4301
joe@irc1031x.com

W G Gilbert III
W.G. Gilbert III, P.C.
15 South Idaho Street
PO Box 345
Dillon, MT 59725
(406) 683-6116

Dana E. Pepper
Pepper Law Firm, PLLC
PO Box 477
Bozeman, MT 59771-0477
(406) 599-7424
dana@pepperlawfirm.com