

Montana Water Court
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FILED

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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
FISHER RIVER BASIN (76C)

CLAIMANT: Barbara J. Benson; David L. Neumann;
James C. Toomey and Margaret V. Toomey

CASE 76C-A2
76C 15176-00
76C 15177-00

OBJECTOR: Karen Hopseker; Mollie Kieran;
Lisel Irons; Bonnie Dawson and Ronald Dawson;
Frank Cavanaugh

NOTICE OF INTENT TO APPEAR: Harold Maxey; Karol L. Spas-Otte

ORDER ADOPTING MASTER'S REPORT

I. STATEMENT OF THE CASE

Claimants Barbara Benson and David Neumann (Claimants) filed motions to amend their Pleasant Valley Fisher River irrigation claims 76C 15176-00 and 76C 15177-00. Both motions received several objections. The Master's Report recommended several changes to both claims but did not recommend accepting all requested amendments. Both the Claimants and Objectors filed objections to the Master's Report.

II. PROCEDURAL HISTORY

The Claimants filed their first Motion to Amend Water Right Claims in 2007. The motion received a number of objections from area land owners (Objectors).¹ The Master held a hearing on the motion and objections in 2010. During the hearing, the Master

¹ While these parties filed separate objections, they acted jointly for most of these proceedings. The Objectors had joint representation through counsel for the 2010 hearing. They represented themselves for the 2013 hearing.

determined the Claimants were requesting amendments that went beyond the original motion. Accordingly, the Master ordered the Claimants to file an amended motion and provide notice of all of the amendments they were seeking.

The Claimants filed an Amended Motion to Amend in 2010. This motion was superseded by their Second Amended Motion to Amend filed September 26, 2011. The September 26, 2011 Motion requested several changes to claim 76C 15176-00 and an implied water right claims from the Pleasant Valley Fisher River and Spring Creek. This motion did not seek amendments to claim 76C 15177-00 contingent upon the Court accepting the proposed flow rate amendment for claim 76C 15176-00.

A hearing on the Second Amended Motion to Amend was held on February 27, 2013. Following the hearing, the Master, at the request of the parties, directed the Montana Department of Natural Resources and Conservation (DNRC) to conduct a field investigation. All parties filed responses to the Field Investigation Report.

A Master's Report was issued on February 5, 2014 recommending several changes to claims 76C 15176-00 and 76C 15177-00. The Master declined to recommend generating implied claims from the Pleasant Valley Fisher River or Spring Creek. The following tables show the decreed elements for claims 76C 15176-00 and 76C 15177-00, the requested changes to those claim elements, and the Master's recommendations.

| Claim 76C 15176-00 | Temporary Preliminary Decree | Second Amended Motion to Amend | Master's Report |
|--------------------------------------|---|---|------------------------|
| Flow Rate | 640.00 gpm (1.42 cfs) | 5.00 cfs | 5.00 cfs |
| Volume | 160.00 af | No Restriction | 487.00 af |
| Place of Use/ Acres Irrigated | 68.00 acres | 120.00 acres | 76.00 acres |
| Purpose | Irrigation | Irrigation/Domestic/Stock | Irrigation |
| Period of Diversion Period of Use | 5/1 to 9/30 | No restriction (year round) | 4/1 to 11/1 |
| Point of Diversion | NENESE § 28 NWNESW § 28 | NENESE § 28 NWSESW § 28 NESENE § 28 (Spring Creek) | NENESE § 28 |

| | | | |
|--|--|--|--------|
| Pleasant Valley Fisher River Implied Claims | | Imply stock and domestic claims from this source for year round use through the Lloyd Ditch. | Denied |
| Spring Creek Implied Claim | | Imply an irrigation claim from this source or add a Spring Creek point of diversion to claim 76C 15176-00. | Denied |

| Claim 76C 15177-00 | Temporary Preliminary Decree (Benson/Neumann Share)² | Second Amended Motion to Amend | Master's Report |
|--------------------------------------|--|---|------------------------|
| Volume | Remark: Limited to Historical Use | N/A | 38.00 a/f |
| Place of Use/ Acres Irrigated | 21.00 acres | N/A | 76.00 acres |
| Period of Diversion Period of Use | 5/1 to 9/30 | N/A | 4/1 to 11/1 |
| Point of Diversion | SENE § 28 NWNESE § 29 | N/A | NENESE § 28 |

III. ISSUES PRESENTED

The Claimants objected to several of the Master's recommendations. They argue the Master failed to properly weigh the evidence regarding implied claims, the need for quantified volumes, a year round period of diversion/use, and the points of diversion for both claims. While the Objectors did not file an objection to the Master's Report, their responses to the Claimants' objections in effect are objections indicating the place of use and acres irrigated, flow rates, and period of diversion/use should remain as decreed. As a result, there is an objection to all of the Master's recommendations.

Issue 1. Are the Master's flow rate, volume, point of diversion, period of diversion, period of use, place of use, and acres irrigated recommendations for claims 76C 15176-00 and 76C 15177-00 clearly erroneous?

² This claim was split following issuance of the TPD. The claim elements in this table reflect the Benson/Newmann share of the original claim following the split.

Issue 2. Is the Master's recommendation to deny implied claims from the Pleasant Valley Fisher River clearly erroneous?

Issue 3. Is the Master's recommendation to deny an implied claim from Spring Creek clearly erroneous?

IV. STANDARD OF REVIEW

The Court will accept a Master's Findings of Fact unless they are clearly erroneous. Rule 53(e)(2), M. R. Civ. P. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the Master misapprehended the effect of the evidence, or if, after reviewing the entire record, the Court is left with the definite and firm conviction that a mistake has been committed. *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644. A Master's conclusions of law are reviewed to determine if they are correct. *Eldorado Co-Op Canal Co. v. Lower Teton Joint Objectors*, 2014 MT 272, ¶ 21, 376 Mont. 420, 337 P.3d 74. Substantial evidence is "evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting. It need not amount to a preponderance of the evidence, but it must be more than a scintilla." *Skelton Ranch*, ¶ 27.

V. BURDEN OF PROOF

A properly filed Statement of Claim for Existing Water Right, is prima facie proof of its content. § 85-2-227, MCA. In order to overcome that prima facie presumption of validity, the objector must demonstrate by a preponderance of evidence that one or more elements of the prima facie statement of claim are incorrect. The same burden applies to objectors who are adverse parties or Claimants objecting to their own claims. *Burkhartsmeyer v. Burkhartsmeyer*, Case 40G-2, Memorandum Opinion and Order Adopting Master's Report (Mar. 11, 1997). The Montana Supreme Court has defined preponderance as "a relatively modest standard that [requires] the statutory criteria are 'more probable than not' to have been met." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

In this case, the Claimants are seeking to amend several elements of claims 76C 15176-00 and 76C 15177-00. Amending a claim has the same effect as filing an objection to that claim. As a result, the Claimants carry the burden to prove by a preponderance of the evidence that the amendments they are requesting are necessary to accurately reflect the historical use of these claims.

VI. ELEMENTS FOR CLAIMS 76C 15176-00 AND 76C 15177-00

Claims 76C 15176-00 and 76C 15177-00 are based on Notices of Appropriation filed by W.J. Lloyd and Donald R. Lloyd. The 76C 15176-00 notice claims a May 19, 1930 priority date. The 76C 15177-00 notice claims a September 17, 1930 priority date. The notices include identical descriptions for the point of diversion from the Pleasant Valley Fisher River. Both notices claimed a 5.00 cfs flow rate, described the means of diversion as a dam, and the means of conveyance as a ditch. (See claim files).

At the time of the appropriations, the Lloyd Ranch consisted of 160.00 acres. The notice attached to claim 76C 15176-00 claimed an 80.00 acre place of use in the SWNW Sec. 28; and SENE Sec. 29.³ The notice attached to claim 76C 15177-00 claimed the entire 160 acre ranch in the W2NW Sec. 28; and E2NE of Sec. 29. In the 1940s and 50s, the Lloyds purchased an additional 60 acres adjacent to the existing ranch, bringing the total acreage of the Lloyd Ranch to 220 acres. (Barbara Benson Testimony, 5/3/10).

The Lloyds sold the 220-acre ranch to Schmidt in 1964. Schmidt sold to Jacobsen in 1981. Jacobsen and Schmidt filed Statements of Claim for 76C 15176-00 and 76C 15177-00 in 1981.⁴ Jacobsen leased the Ranch to Merlin (Shaver) Clark for ten years beginning in 1983. Jacobsen sold the Ranch to Toomey in 1994. (See claim files and Claimants' first Motion to Amend).

In 2000, Toomey conveyed the south portion of the Lloyd Ranch, consisting of 120 acres, to the Claimants. In this transaction, the Claimants acquired 100% of claim 76C 15176-00, and a 27.3% interest in claim 76C 15177-00. (See claim file.)

³ All legal descriptions in this order are located in T27N, R28W, Lincoln County. The township, range and county are not included with each section legal description.

⁴ Jacobsen was purchasing the ranch from Schmidt on contract and included Schmidt based on that contract.

Toomey retained the northern 100 acres of the Lloyd Ranch and 72.7% of claim 76C 15177-00. He subsequently sold the 100 acres to Cavanaugh. The 72.7% interest in claim 76C 15177-00 was severed from the 100 acres and sold to John Bloodsworth, who owned property east of the Lloyd Ranch. Bloodsworth subdivided this property and sold parcels to Objectors Hopseker, Kieran, Irons, and Dawson. These conveyances included an undivided interest in 72.7% of claim 76C 15177-00.

In 2007, claim 76C 15177-00 was split between the Claimants and Objectors Hopseker, Kieran, Irons, and Dawson. The Claimants' 27.3% portion included a 175.30 gpm flow rate and a 21.00 acre place of use. The Claimants retained the 76C 15177-00 claim number. The 72.7% interest held jointly by Hopseker, Kieran, Irons, and Dawson is represented by claim 76C-30027187.

The original point of diversion for the Lloyd Ditch is located in the NENESE of Section 28. The ditch flows west for about a half mile before entering the Claimants' property. Below the Lloyd Ditch point of diversion, the river turns west and flows through several properties before crossing the Claimants' property in the N2NESE of Section 29. Both claims appeared in the Temporary Preliminary Decree for this Basin with the Lloyd Ditch point of diversion in Section 28. Claim 76C 15176-00 included a second point of diversion in the NWNESW of Section 28 for a pump site. This point of diversion is not located on the Claimants' property. Claim 76C 15177-00 included a second point of diversion in the NWNESSE of Section 29 for a pump site. This point of diversion is located on the Claimants' property.

Spring Creek rises on the north half of the Lloyd Ranch on the Cavanaugh property. The creek travels west and then southwest across the Cavanaugh property before entering the Claimants' property in approximately the NESWNW of Section 28. The creek continues flowing south and southwest across the Claimants' property before entering the Pleasant Valley Fisher River in the NENESE of Section 29. Approximately a quarter of the Claimants' property is located west of Spring Creek.

Most of the Claimants' property is relatively flat. After entering the property, the Lloyd Ditch follows the high ground above the southern boundary near the old Lloyd buildings. Most of the property slopes to the north and west towards Spring Creek.

Laterals off the ditch historically irrigated the property to the north and west including land that was part of the Lloyd Ranch but is now owned by Cavanaugh. Irrigation historically consisted of flooding land out of the laterals and sub irrigating land beyond the end of the laterals. Virtually all of the property between the Lloyd Ditch and Spring Creek was irrigated in this manner. Claimants' expert witness Kurt Hafferman described the property as between 6 inches and 24 inches of peat sitting on glacial silt. Irrigation tends to saturate the peat and hold water which slowly drains into Spring Creek. In fact, much of the property is naturally wet enough to make wheel line or center pivot sprinkler irrigation systems impractical. (Hafferman Testimony, 5/3/10).

At some point, possibly in the 1960s or early 1970s, Garrison's Creeping Meadow Foxtail grass was planted on the wettest areas of the ranch. This grass is very water tolerant and does well in the conditions present on the Claimants' property. However, it requires significant water during its growing season to survive and will die if allowed to dry out for an extended period of time. (Darrell Menge Deposition). While the grass is a good producer under the right conditions, it is not natural to this property and was not present on the property when the water rights at issue were first appropriated.

Claim 76C 15176-00 has a May 19, 1930 priority date. Claim 76C 15177-00 has a September 17, 1930 priority date. The evidence before the Court indicates the two claims were historically managed together. When river flow was adequate, both claims were diverted. Diversions were dictated by available flow, not priority date. It is also apparent both claims were marshalled and used throughout the irrigated portions of the Lloyd Ranch. Based on this relationship, several claim elements, such as source, point of diversion, place of use, acres irrigated, period of diversion, and period of use are the same for both claims. Elements such as priority date, flow rate, and volume are unique to each claim. The Master's Report reflects this relationship.

Several witnesses were able to provide firsthand testimony of irrigation on the Lloyd Ranch from the late 1940s through the early 1990s. The Master placed a great deal of weight on their testimony:

Lawrence Morrell was Donald Lloyd's nephew. He was born in 1935 and spent time on the ranch as a young child and again as a teenager in 1949 and 50 working for his uncle. (Morrell Testimony, 4:13 p.m., 2/27/13).

Gene Auge began working for the Lloyd family in 1953 when he was 11 years old. He continued to work there until 1961. During that time, he helped irrigate and hay. (Auge Testimony, 9:58 a.m., 5/3/10; Auge Affidavit filed 5/31/13).

Gail Schmidt Hardman moved to the ranch with her family in 1964. She was three years old at the time. She helped with irrigation through the early 1970s. She left the ranch in 1980. Her father sold the ranch in 1981. (Hardman Deposition, 12/4/09).

Arthur "Rocky" Schauer is a local rancher and friend of the Schmidt family. He visited the Schmidt property on several occasions in the 1970s. (Schauer Testimony, 2/27/13).

Merlin "Shaver" Clark leased the Lloyd Ranch from Jacobsen from 1983 to 1994. During that time he visited with Donald Lloyd on several occasions and learned about the Lloyds' irrigation practices. He tried to follow these practices. (Clark Testimony, 5/3/10; Clark Deposition, 12/5/12).

A. Flow Rate

The original claimed flow rate for claim 76C 15176-00 was 640.00 gpm or 1.42 cfs. The 1930 Notice of Appropriation claimed 5.00 cfs. The Claimants seek to increase the flow rate to 5.00 cfs. The Master agreed and recommended that flow rate. The Objectors assert the flow rate for claim 76C 15176-00 should remain as claimed.

The testimony of Gail Schmidt Hardman, Gene Auge, and Shaver Clark indicates the historical irrigation practice was to open the Lloyd Ditch to full capacity whenever the ranch needed the water. In 2010, Claimants' expert Kurt Hafferman measured the safe capacity of the Lloyd Ditch at 10.00 cfs. The ditch was running 9.10 cfs at that time. Gene Auge and Shaver Clark were able to view the headgate and ditch in 2010. Both agreed it was the same system that was there when they were on the ranch. Both thought the ditch was running the same amount of water that they had used in the 1950s (Auge) and 1980s (Clark). This testimony supports a historical practice of diverting 5.00 cfs under claim 76C 15176-00.

The Master discussed ditch loss, DNRC flow rate standards, and crop needs to further support a 5.00 cfs flow rate. While this discussion served to provide a broader base for his recommendation, evidence supporting historical use and ditch capacity is more significant. The Master's flow rate recommendation is supported by substantial evidence. The Master did not misapprehend the effect of that evidence. The record supports a 5.00 cfs flow rate for claim 76C 15176-00.

The Claimants are not seeking a flow rate change for claim 76C 15177-00. Therefore the flow rate on this claim shall remain at 175.30 gpm or .39 cfs. The combined flow rate for both claims is 5.39 cfs.

B. Volume

The Master recommended quantified annual volumes for both claims. The Claimants argue quantified volumes are not feasible, practical, or appropriate for their claims. The Objectors favor quantified volumes, but argue the original volumes found on the Statements of Claim should be retained.

In 1984, both claims appeared in the Temporary Preliminary Decree for this Basin with quantified volumes. Since that time, the Montana legislature changed Section 85-2-234(6)(b)(iii), MCA, to end the application of quantified volumes to direct flow irrigation claims. However a quantified volume can be added to a claim at the discretion of the Water Court. This Court has recognized the value of a quantified volume in cases where future distribution may be contentious. *Eldorado Co-op Canal Company v. Lower Teton Joint Objectors* 410-129B, Order Amending and Adopting Master's Report, p. 18 (Nov. 21, 2014). ("Utilization of volumes in an area with a long history of water disputes is a practical way of assuring compliance with historic practices, and gives the court overseeing water usage a powerful and easily applied administrative tool.").

In this case, the Master determined quantified volumes are necessary based on a history of water distribution conflict between the parties and the potential for future conflict. The Master conducted two hearings and held a site inspection for these claims. He was involved with these parties for years during this process. He is in the best position to determine if the level of acrimony supports quantified volumes. The fact that the Claimants are seeking an "unrestricted" volume and period of diversion and the

Objectors contend the Claimants are already using too much water supports the Master's recommendation. The Court finds quantified volumes for these water right claims are appropriate.

The problem with quantified volumes is the limited record of historical use. In this case the evidence shows the Claimants' predecessors took water up to the capacity of their ditch at their discretion. However, this does not mean they were taking their full flow rate over the entire irrigation season. They cut back on diverted flows as the land became saturated and standing water began to appear in low spots. They stopped irrigating to dry fields for haying and did not irrigate those fields while they were haying. (Auge and Clark Testimony). They may have continued some irrigation in their pastures, but there is no record supporting the amount of this irrigation. They started irrigating again in the late summer and fall but seldom were able to fill the ditch because of lower flows in the river. In other words, there is insufficient evidence to reduce historical volume to a simple mathematical formula (flow rate x period of diversion = volume).

Faced with the lack of sufficient evidence to determine the historical volume, the Master turned to Montana Department of Natural Resources and Conservation (DNRC) volume standards. First, he determined that the historical place of use for both claims consisted of 76.00 acres. He then noted the claim abstracts indicate this property is located in climatic area 5. Climatic areas are defined by differing climatic and geographic conditions containing similar crop consumptive use data as delineated by the U.S. Department of Agriculture. (DNRC Claim Examination Manual, Section II). The DNRC has developed volume standards for different types of irrigation in each of the 5 recognized climatic areas. The DNRC volume standard for direct flow flood irrigation systems in climatic area 5 is 4.4 acre feet per acre per year (AF/YR). (DNRC Claim Examination Manual, Section VII(3)(c)). Using the acres irrigated and DNRC standard, the Master calculated a total combined volume for both claims of 334.40 AF/YR ($76 \times 4.4 = 334.40$).

The Master then compared this volume standard to the available evidence of historical use. He reviewed the testimony indicating a historical pattern of running the Lloyd Ditch at capacity; ditch loss calculations as provided by the parties' experts; the

testimony regarding the historical period of diversion and use; and the crop needs for Garrison's Creeping Meadow Foxtail grass. He determined that a 334.40 AF/YR volume allowed for approximately 30 days of continuous irrigation at a 5.39 cfs combined flow rate. Based on the available evidence, the Master determined that 30 days of continuous flow was less than historical use. He found that a better reflection of historical use was a volume based on 50 days of continuous irrigation at the full 5.39 cfs combined flow rate. To clarify, the Master did not recommend a 50 day period of use. He calculated a total volume the Claimants can manage and use throughout their amended period of use.

Based on a 525.00 AF/YR combined volume for the two claims, the Master assigned a proportional share of this volume to each claim based on flow rate:

76C 15176-00 = 487.00 AF/YR

76C 15177-00 = 38.00 AF/YR

Total 525.00 AF/YR

The Claimants dispute the validity of the Master's volume determination. They claim a volume that limits them to their full flow rate for 50 days will destroy the viability of their hay crop. The basis of this argument is their assertion that Garrison's Creeping Meadow Foxtail grass requires a great deal of water and the failure to keep the property wet, to the point of standing water in the fields, throughout the growing season will destroy this crop.

Claimants' grass expert, Darrell Menge, testified that the Garrison's Creeping Meadow Foxtail on his property "actually grows" in standing water for 2-3 months a year. This indicates the grass can tolerate standing water, not that it requires standing water. In fact, Mr. Menge testified that the grass needs 20 inches of rain a year, or its equivalent in irrigation, to survive. (Menge Testimony, 5/3/10). While there is a difference between surviving and thriving, the Master's recommended volume is far higher than survival levels. Twenty inches of rain is approximately 1.66 acre feet. ($20 \div 12 = 1.66$) Applying Menge's estimate of crop need, 76.00 acres require 126.16 AF/YR ($1.66 \times 76 = 126.16$). The 525.00 AF/YR volume recommended by the Master equals 6.90 acre feet per acre. The Master's recommendation is higher than the crop need

calculations from the U.S. Department of Agriculture and the DNRC. It is four times higher than the minimum requirement identified by the Claimants' expert Darrell Menge.

The Master's volume recommendation is based on an imperfect factual record. It was left to him to sift through the exhibits and testimony to determine volume based on historical use. As is often the case in water right adjudication, the Court must "do the best it can with what it has to work with." *Allen v. Petrick*, 69 Mont. 373, 375, 222 P. 451, 452 (1924). Calculating a volume based on DNRC standards and then comparing that standard to the evidence of historical use was the best available approach.

The Master's recommendation for a 525.00 AF/YR total volume is based on substantial evidence. The Master did not misapprehend the effect of that evidence. The record supports a 487.00 AF/YR volume for claim 76C 15176-00 and a 38.00 AF/YR volume for claim 76C 15177-00.

C. Point of Diversion/Mean of Diversion

As filed, the points of diversion for these two claims were confusing. Both claimed the Lloyd Ditch, but used different legal descriptions. Both claimed a pump for the Lloyd Ditch although the actual diversion is a dam and headgate. Both claimed a second point of diversion further down the river but identified different locations for this second site. The record indicates that Jacobsen was attempting to make changes to the irrigation system when he filed the Statements of Claim. He filed change applications for a new point of diversion at the same time. According to Claimants' expert Kurt Hafferman, who was formerly the DNRC regional manager, Jacobsen was confused with the process and apparently filed claims that included elements of historical use and elements for proposed changes. (Hafferman Testimony, 5/3/10). In any case, the points and means of diversion required clarification.

The Master found the evidence only supported historical use from the Lloyd Ditch point of diversion. The Claimants objected to the Master's findings asserting the evidence supports a second Pleasant Valley Fisher River point of diversion and a Spring Creek point of diversion. They point to several instances in the record that at least imply that these points of diversion were developed at some point in time even if the use of the diversions did not continue.

A review of evidence confirms the Master's findings. The only evidence that supports a historical pump site on the Pleasant Valley Fisher River is the testimony of Gail Hardman. She recalled acquiring the pump in 1973. She did not state when in 1973 the pump was first put to use. This supports first use on the last day of the identified period, December 31, 1973. *Vidal v. Kensler*, 100 Mont. 592, 598, 51 P.2d 235, 238 (1935) (When the testimony of a witness is sufficient to prove an act or transaction within a certain period, but is so vague and uncertain as not to fix the time within that period, the best that can be done for the party producing such witness is to fix the date at the end of the period). As a result, Hardman's testimony does not support a second Pleasant Valley Fisher River point of diversion prior to July 1, 1973. Hardman testified that attempted use of the pump site from the river was a failure and was not continued. (Hardman Deposition). By the time Shaver Clark leased the property in 1983, there was no sign of any recent use of a pump. In the ten years Clark leased the property, he did not pump water out of the Pleasant Valley Fisher River. (Clark Testimony, 5/3/10). The evidence does not support a second point of diversion from the Pleasant Valley Fisher River.

The Claimants also assert a Spring Creek point of diversion should be added to their Pleasant Valley Fisher River water right claims. In order to claim this point of diversion, the evidence must show that Pleasant Valley Fisher River water was intentionally transported to Spring Creek through the Lloyd Ditch; intentionally turned into Spring Creek; and then re-diverted from Spring Creek. The fact that most of the irrigation on the ranch drained into Spring Creek and increased the flow in that source does not show an intent to use Spring Creek as a natural carrier. Return flows resulting from percolation or irrigation runoff are considered part of Spring Creek, not the Pleasant Valley Fisher River. *Hidden Hollow Ranch v. Fields*, 2004 MT 153, ¶¶ 31-32, 321 Mont. 505, 92 P.3d 1185. These increased flows did not give the Claimants the right to take Spring Creek water as part of their original Pleasant Valley Fisher River appropriation. *Mungas v. District Court*, 102 Mont. 533, 539, 59 P.2d 71, 13 (1936).

Ms. Hardman testified that her family pumped extensively from Spring Creek after acquiring a "Big Squirt" sprinkler. However, they used Spring Creek water, not Pleasant Valley Fisher River water, and did not begin that use until after July 1, 1973. Shaver

Clark developed a diversion from Spring Creek in the 1980s, but again, he was not using the creek as a natural carrier for Pleasant Valley Fisher River, he was diverting Spring Creek water.

In short, all of the credible evidence supports a single historical point of diversion, at the Lloyd Ditch, for claims 76C 15176-00 and 76C 15177-00. There is no credible evidence of a second point of diversion from the Pleasant Valley Fisher River. There is no evidence indicating use of Spring Creek as a natural carrier for Pleasant Valley Fisher River water. The Master's recommendation for a single point of diversion from the Pleasant Valley Fisher River is based on substantial evidence. The Master did not misapprehend the effect of that evidence.

D. Place of Use/Acres Irrigated

Claim 76C 15176-00 appeared in the Temporary Preliminary Decree with a 68.00 acre place of use. Claim 76C 15177-00 appeared in the Temporary Preliminary Decree with a 77.00 acre place of use. The Claimants' portion of that claim following the split was 21.00 acres. The Master found the claims were marshalled and used together on the same 76.00 acre place of use located east of Spring Creek. The Claimants did not object to the Master's finding on these acres but assert that an unspecified number of acres west of Spring Creek should be added to claim 76C 15176-00 and 10.00 acres in the N2NESE of Section 29 should be added to claim 76C 15177-00. In their response to the Claimants' objections to the Master's Report, the Objectors state, "there should be no change in the amount of land to be irrigated in either of the claims." (Objectors' Response to Claimants' Objections, p. 2). It is not entirely clear if the Objectors are asserting there should be no change to the Master's finding on irrigated acreage, or if they are asserting there should be no change to acres irrigated as decreed.

The evidence indicates historical irrigation on the Lloyd Ranch totaled about 109.00 acres, all located east of Spring Creek. Approximately 79.00 of these acres are located on the Claimants' property. (Perine, Hafferman, Auge, and Clark Testimony). The Master removed 3.00 acres from this total to account for buildings, roads, and corrals, and recommended a 76.00 acre place of use located east of Spring Creek.

Claimants' assertion that 10.00 acres were historically irrigated in the N2NESE of Section 29 is not supported by any credible evidence. This property, which consisted mostly of scrub brush along the river, was not historically irrigated from the Lloyd Ditch. (Auge Testimony; Hardman Deposition). Beyond the Schmidts' failed attempt, there is no credible evidence showing this irrigation ever took place. The record does not support adding 10.00 acres to claim 76C 15177-00.

There is some evidence of historical irrigation west of Spring Creek. However, none of that evidence indicates that this irrigation used Pleasant Valley Fisher River water. As a result, there is no evidence supporting the Claimants' assertion that acreage west of Spring Creek should be added to claim 76C 15176-00.

The Master's findings on place of use and irrigated acreage are supported by substantial evidence. The Master did not misapprehend the effect of that evidence. The places of use for claims 76C 15176-00 and 76C 15177-00 is limited to 76.00 acres east of Spring Creek.

E. Period of Diversion/Period of Use

Claims 76C 15176-00 and 76C 15177-00 appeared in the Temporary Preliminary Decree for this Basin with a May 1 through September 30 period of use. Pursuant to Court policy, a period of diversion matching the period of use was added to the claim abstracts in 2008. Period of use and period of diversion are typically the same for direct flow claims.

Claimants' third motion to amend requested "no restrictions" on their period of diversion/use. The Master recommended an April 1 through November 1 period of diversion/use for both claims. The Claimants' objection to the Master's Report argues that there was testimony indicating March irrigation and that the original notices of appropriation contemplated year round use for domestic and stock purposes. The Objectors argue the period of diversion/use should remain as decreed.

The witness testimony indicated the irrigation season started when the ditch was clear of snow. While this was often in May, April irrigation was also common. (Auge and Clark Testimony; Hardman Deposition) Gene Auge stated irrigation could start in March if necessary although he did not state that this was a common practice. Witness

testimony indicated irrigation continued into September or October. (Auge and Clark Testimony; Hardman Deposition). Local rancher Rocky Schauer visited the Lloyd Ranch when Schmidt was the owner. He often hunted coyotes on the Lloyd Ranch in the late fall and did not see water in the ditch on those occasions. (Schauer Testimony).

The Master's recommendation expands the period of diversion/use to include the entire months of April and October. The testimony does indicate a history of irrigating in both months. The evidence of irrigation outside the April 1 through November 1 period is either vague or speculative. In particular, the Claimants' argument that the Lloyd Ditch ran year round for stock water and to replenish a domestic well has little basis in the evidence. Use of the ditch for stock and domestic use would not apply to the period of diversion/use for these irrigation claims.

The Master's recommendation for an April 1 to November 1 period of diversion/use is based on substantial evidence. The Master did not misapprehend the effect of that evidence. While the evidence may have supported a more restrictive period of diversion/use, the Court is not left with the definite and firm conviction that a mistake has been committed. The Master presided over years of proceedings, including two hearings, and is in the best position to assess the credibility of the evidence.

VII. PLEASANT VALLEY FISHER RIVER IMPLIED CLAIMS

The Claimants' seek to add stock and domestic purposes to their irrigation claims. This argument is part of their request for a year round period of diversion for both irrigation claims. They assert the Lloyd Ditch was historically used to provide water for stock and to recharge a domestic well near the old Lloyd house. By seeking two additional purposes, the Claimants are asking the Court to imply two claims from their existing irrigation claims.

Pursuant to Rule 35 W.R.C.E.R, implied claims are used to separate multiple claims from a single statement of claim filing. Implied claims are typically identified during DNRC claim examination, but can be identified after a decree is issued through the settlement process or as a result of a hearing. The presence of multiple claims in a single filing must be based on evidence in the claim form or the attached documents.

Case 76HF-580, Order Amending and Partially Adopting Master's Report at 25 (Jan. 31, 2013). An implied claim cannot be an expansion of a water right or an attempt to circumvent claim filing requirements under Sections 85-2-221 and 85-2-224, MCA. *Eliasson Ranch Co. v. Rodeghiero*, Case 40A-115, Order Amending and Adopting Master's Report (June 28, 2004).

In regards to an implied claim for domestic use, the Claimants assert the actual source for that use is a well located near the old Lloyd house. However, they are seeking a domestic claim for Pleasant Valley Fisher River water through the Lloyd Ditch to keep the water level high in the well. Domestic claims from the well and the river are two different things.

The May 19, 1930 and September 19, 1930 Lloyd Notices added "domestic" to the "irrigation, and other useful and beneficial purposes" that was part of the form itself. (See claim files). Lloyd may well have intended to use the appropriations for more than one purpose. Therefore, attachments to the Statements of Claim include some indication of a second domestic use purpose. However, that indication of a second purpose must be corroborated by evidence of actual historic use. Case 76HF-580, Order Amending and Partially Adopting Master's Report at p. 25 (Jan. 31, 2013). There is no evidence supporting domestic use from the Pleasant Valley Fisher River through the Lloyd Ditch. Well recharge, as asserted by the Claimants, is simply speculation. In addition, the evidence does not support year round diversions through the Lloyd Ditch. Three witnesses indicated the ditch was opened each year when it was free of snow and ice. (Auge and Clark Testimony; Hardman Deposition).

In regards to an implied claim for stock use, the Claimants assert the Lloyd Ditch was often the only source of water for livestock during the winter. A review of both Statements of Claim reveals nothing supporting this use. The fact that the two notices of appropriation attached to the filings claim "other useful and beneficial purposes" is not sufficient. This standard language on nearly all notice of appropriation forms cannot serve to support a second purpose. Without some indication that the Statements of Claim intended to claim both stock and irrigation, an implied claim for stock is not appropriate.

The Master's recommendation to deny implied claims for stock and domestic use is based on the lack of substantial evidence supporting implied claims for these uses. The Master did not misapprehend the effect of the evidence. The Claimants' request for implied claims for stock or domestic use from the Pleasant Valley Fisher River through the Lloyd Ditch was properly rejected by the Water Master.

VIII. SPRING CREEK IMPLIED CLAIM

The Claimants' Second Amended Motion to Amend asserted historical use of Spring Creek for irrigation, and requested either adding Spring Creek to their existing claims or generating an implied claim for that historical use. Adding a Spring Creek point of diversion is addressed in Section VI.C. of this Order. The Master found insufficient evidence of historical use to support an implied claim. The Claimants assert the Master misapprehended the effect of the evidence.

The Master applied the following test to the Claimants' request for an implied claim from Spring Creek: (1) the implied claim must be justified by some evidence in the claim form or the documents attached thereto; (2) evidence must exist of actual historic use corroborating the implied claim; and (3) the creation of the implied claim should not result in a change to historic water use or increase the historic burden to other water users. 76HF-580, Order Amending and Partially Adopting Master's Report at 25 (Jan. 31, 2013). Since he found insufficient evidence to satisfy the second element of the test, the Master did not discuss the third element.

The Master found that the Statements of Claim and attachments did contain "very weak" evidence indicating a potential second water right from Spring Creek. A review of these filings indicates that this is an accurate description. There is little evidence in either filing supporting the intent to claim Spring Creek as the source for a second water right.

The 76C 15176-00 Statement of Claim form identified an 80.00 acre place of use in the SWNW of Section 28 and the SENE of Section 29. Attachments included a copy of the May 30, 1930 Notice of Appropriation and a topo map which both identified the same 80.00 acres. The map shows the entire legal description as irrigated rather than field boundaries. Some of the land within this legal description is located west of Spring

Creek. That is the extent of the evidence supporting a Spring Creek implied claim. Nothing on the form or attachments indicates any of this acreage was irrigated from Spring Creek. There are no points of diversion or ditches on the map indicating a Spring Creek diversion.

The 76C 15177-00 Statement of Claim form identified a 107.00 acre place of use in the NWNW and W2E2NW of Section 28 and the NENE and N2NESE of Section 29. This place of use did not match the place of use on the September 17, 1930 Notice of Appropriation attached to the filing. It did match the acres identified on an attached topo map and the Affidavit of Clarence R. Schmidt stating he had irrigated all 107.00 acres since 1964. Again, some of this land is located west of Spring Creek. Nothing on the form or attachments indicates any of this acreage was irrigated from Spring Creek. There are no points of diversion or ditches on the map indicating a Spring Creek diversion.

The Schmidt Affidavit is particularly interesting given Gail Schmidt Hardman's testimony. While she stated the family did irrigate west of Spring Creek, she testified this practice began in 1973, not 1964. The Schmidts moved to the property in 1964. Hardman was 3 years old at that time and likely would not have been aware of irrigation practices for the next few years. At the same time, she was very clear in her testimony that it was impractical to flood irrigate from Spring Creek and the family never did so. She had vivid memories of moving pipe after they purchased the Big Squirt sprinkler in 1973. (Hardman Deposition). The Court is at a loss to rectify Schmidt's affidavit and Hardman's testimony. However, Hardman's testimony was subject to cross examination which makes it more credible than Schmidt's affidavit.

The Master found insufficient evidence of actual historic use corroborating the implied claim. He relied heavily on the testimony of witnesses who had worked on the Lloyd Ranch prior to July 1, 1973 and placed little weight on the Water Resources Survey and expert testimony. To clarify, historic use in this context is evidence of use prior to July 1, 1973. This is the date the Water Use Act became law and is the cutoff date for an "existing water right" as defined by Section 85-2-103(12), MCA.

The 1965 Lincoln County Water Resources Survey (WRS) includes a map showing irrigation on the Lloyd Ranch in Section 28. While nearly all of the irrigated

area identified on the WRS map is east of Spring Creek, a very small area, is west of the creek. It is not clear if this is intentional or simply imprecise coloration on the map. The map shows two "check" dams on Spring Creek in this irrigated area. There are no ditches leading from either check dam. (Exhibit 0.4, attachment D). There is no information showing how the dams may have served to irrigate land west of Spring Creek. Nonetheless, the map provides some evidence indicating use of Spring Creek.

The WRS field notes for the Lloyd property indicate Donald Lloyd had a Spring Creek water right. However, the notes did not provide a priority date, flow rate, means of diversion, or number of acres irrigated for the right. (Exhibit 0.4, attachment D). While the form stated the right was "in use" there is no way to know what that means. Nonetheless, the field notes provide evidence indicating use of Spring Creek.

Two witnesses supported historical irrigation from Spring Creek. Shaver Clark testified at the first hearing and gave a deposition prior to the second hearing. At hearing, he testified that he would block a culvert on the Claimants' property and divert water to the west of Spring Creek. In his deposition, Clark testified he had some success reopening an old ditch west of Spring Creek that originated on what is now Cavanaugh property. He speculated that Don Lloyd probably had installed the ditch. Clark was a friend of Don Lloyd and took direction from him in irrigating the ranch. He thinks his irrigation was the same as Lloyd's although he did agree the advice he received may have reflected things Lloyd wanted to do but never did. Clark had never been on the property prior to 1983.

At the second hearing Claimants' expert witness, Kurt Hafferman, testified about his investigation into historical irrigation west of Spring Creek. As a result of that review, he opined that the WRS check dams may have diverted water into a ditch system west of Spring Creek capable of irrigating most of the Claimants' land. He questioned the validity of the WRS, stating that these maps tended to include hay land but not irrigated pasture. Hafferman assisted the Claimants in designing a ditch system west of Spring Creek originating at the culvert crossing identified by Shaver Clark. (Hafferman Testimony, 2/27/13). The Claimants subsequently installed the ditch. While this confirms that it is possible to divert Spring Creek water to the west, it does not support

this diversion as a historical practice. Much of Hafferman's testimony on historical use was speculation.

Three witnesses who helped irrigate the Lloyd Ranch between 1949 and 1980 stated there was no flood irrigation west of Spring Creek before 1973. Lawrence Morrell worked for his uncle Donald Lloyd in 1949. He recalled no activity or development west of Spring Creek. (Morrell Testimony, 2/27/13). Gene Auge worked for Lloyd in the 1950s and early 60s. He recalled no irrigation west of Spring Creek while he was on the ranch. (Auge Testimony, 5/3/10). Gail Hardman lived on the ranch from 1964 to 1980. She testified that her father never flood irrigated west of Spring Creek.⁵ In 1973, Clarence Schmidt purchased a Big Squirt sprinkler system and began to irrigate extensively from Spring Creek. However, Hardman only stated they acquired the sprinkler in 1973. (Hardman Deposition). This supports first use on the last day of the identified period, December 31, 1973. *Vidal v. Kensler*, 100 Mont. 592, 598, 51 P.2d 235, 238 (1935). As a result, Hardman's testimony does not support diversions from Spring Creek prior to July 1, 1973.

Following the second hearing, the parties requested time to submit additional evidence. The Master agreed and set a schedule for filings. The Master also ordered a DNRC field investigation and set a deadline for responses to the DNRC report.

On May 31, 2013, the Claimants filed an Affidavit executed by Gene Auge addressing various issues from the second hearing. Objector Mollie Kieran filed a response to the Affidavit on June 4, 2013 but did not object to the Affidavit. In his report, the Master found the Affidavit contained several statements that conflicted with Mr. Auge's previous testimony. He also found the Objectors had no opportunity to cross examine Mr. Auge. As a result, the Master refused to consider the Affidavit. The Claimants take issue with this ruling.

The Master found the Affidavit lacked credibility. Nonetheless, it was the type of post-hearing evidence contemplated by the parties. The Objectors were aware of the

⁵ Hardman's testimony is conflicting on this point. She first states they did flood irrigate west of Spring Creek (Deposition, pp. 34-35) but then corrects herself and states they never flood irrigated west of the creek. (Deposition, p. 38). Given the totality of her testimony, it appears she misunderstood the earlier question. Her second answer is followed by a discussion as to why it is not possible to flood irrigate west of the creek. (Deposition, pp. 38-39).

Affidavit but did not object to it. As a result, the Court used the Affidavit as part of the review of this case. That review found little in the Affidavit supporting irrigation west of Spring Creek. Auge stated the culverts that Clark used as a headgate were there in the 1950s.⁶ However, he never helped irrigate west of the creek and never saw the culverts used as a headgate. He referred to the culverts as the creek crossing used when working west of the creek. Auge stated he cleared land and hayed west of the creek. This would require regular use of the culvert crossing. If Lloyds' irrigation originated at the culvert crossing and included a ditch, Auge should have seen this system when he used the crossing. Auge also stated the lower lying land west of Spring Creek was always wet. Given the wealth of testimony on the nature of this property, wet ground along Spring Creek is predictable and not an indicator of irrigation. Cutting hay west of the creek may or may not indicate irrigation.⁷ Auge's Affidavit does not change the impact of his actual testimony or provide significant support for historical irrigation west of Spring Creek.

As directed by the Master, the DNRC conducted a field investigation to determine the number of acres west of Spring Creek that could be irrigated by simply blocking the culverts on the Claimants' property. In an April 17, 2013 Memorandum, DNRC Regional manager Marc Pitman found a total 0.23 acres qualified under the conditions set by the Master. The Claimants took issue with this finding and responded with an additional assessment from Kurt Hafferman. Mr. Hafferman identified 12.75 acres that could be irrigated by simply blocking the culverts. He noted this irrigation was confirmed by irrigation through the ditch completed by Claimants.

The evidence supporting irrigation west of Spring Creek was conflicting. There was evidence indicating some irrigation may have occurred prior to July 1, 1973. The Master found that better evidence did not support this irrigation as a historical practice. His recommendation to deny an implied claim for Spring Creek is supported by substantial evidence. *Skelton Ranch*, ¶ 27. (Defining substantial evidence as "evidence which a reasonable mind might accept as adequate to support a conclusion, even if the

⁶ If the culverts were there in the 1950s and were used as a check dam, why were they not included in the WRS?

⁷ Frank Cavanaugh testified he cuts hay on his adjacent property without irrigation and claims to nearly equal the Claimants' production. (Cavanaugh Testimony, 2/27/13).

evidence is weak or conflicting.”) The Master did not misapprehend the effect of the evidence or err by finding the Morrell, Auge, and Hardman testimony was the most credible evidence. The Court is not left with the definite and firm conviction that a mistake has been committed. The Claimants have failed to support an implied claim from Spring Creek.

IX. EXEMPT STOCK RIGHT

In their objection to the Master’s Report, the Claimants contend the Master indicated at hearing that he would address the exempt stock right they apparently claim from Spring Creek. (Claimants’ Objections to Master’s Report, p. 10). A review of the hearing record confirms discussion concerning this exempt right. The Master’s Report did not address the right.

Stock and domestic water rights based on instream flow are exempt from the filing requirements that apply to other water right claims. Section 85-2-222(1), MCA. The failure to file an exempt right did not affect the validity of that right. However, unfiled exempt rights injected a certain amount of uncertainty into the adjudication process. In 2013, the Montana legislature created a process for filing exempt rights. Filing the rights remains voluntary. The failure to file an exempt right does not result in the forfeiture of that right. However, an unfiled exempt right is subordinate to other water rights. Section 85-2-222(6), MCA.

The Master’s failure to address an exempt stock right from Spring Creek has no effect on that right. The Claimants are still required to follow the statutory process and file an exempt right if they choose to do so. While the record from this case can be used as support for an exempt right, the Court declines to generate that claim for the Claimants.

ORDER

The Master’s reliance on the testimony of witnesses with firsthand knowledge of historical irrigation on the Claimants’ property was justified. *Federal Land Bank v. Morris*, 112 Mont. 445, 453, 116 P.2d 1007, 1010 (1941). (“The testimony of the men on the land, who know the soil, the kind of crops that can be raised on it, and who have

spread the water and dug into the soil, and watched the effect during the entire growing season, brings in evidence of considerable weight.”) As the trier of fact, the weight attached to different evidence is within the Master’s discretion. *Grimsley v. Spencer*, 206 Mont. 184, 203, 607 P.2d 85, 95 (1983) (“We have often recognized that the claims and observations of those who work the land may be more important than the assessments of expert technicians.”)

The Court finds that all of the Master’s recommendations for amending claims 76C 15176-00 and 76C 15177-00 are supported by substantial evidence. The Master did not misapprehend the effect of the evidence. The Court is not left with the definite and firm conviction that a mistake has been committed.


The Court finds the Master’s recommendations to deny an implied irrigation claim from Spring Creek and implied stock and domestic claims from the Pleasant Valley Fisher River are supported by substantial evidence. The Master did not misapprehend the effect of the evidence. The Court is not left with the definite and firm conviction that a mistake has been committed. It is therefore

ORDERED that the Master’s Report is Adopted in Whole.

Post Decree Water Right Abstracts are attached to this Order to confirm the recommended changes have been applied to both claims in the state’s centralized water right record system.

An exempt right filing form is attached for the convenience of the Claimants.

DATED this 12 day of November, 2015.


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FILED

FEB 05 2014

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
FISHER RIVER BASIN (76C)

C LAIMANT: Barbara J. Benson; David L. Neumann;
James C. Toomey and Margaret V. Toomey

CASE 76C-A2
76C 15176-00
76C 15177-00

OBJECTOR: Karen Hopseker; Mollie Kieran;
Lisel Irons; Bonnie Dawson and Ronald Dawson;
Frank Cavanaugh

NOTICE OF INTENT TO APPEAR: Harold Maxey;
Karol L. Spas-Otte

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court on the above stamped date. Please carefully review this Report.

If you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report, you may file a written objection to the Report within **10 days** from the above stamped date. (Rule 23, Water Right Adjudication Rules.) If you file an objection, you must also mail a copy of the objection to all the other parties on the Service List found at the end of the Master's Report. The original objection and a certificate of mailing to the 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

These claims were included in the Temporary Preliminary Decree for the Fisher River (Basin 76C) issued on February 28, 1984 and received no initial objections. On January 23, 2008, Claims 76C 15176-00 and 76C 15177-00 were consolidated into Case

76C-A2. This case was initiated by the filing of a Motion to Amend Statement of Claim by Claimants Barbara Benson and David Neumann on March 1, 2007. During the course of this proceeding, the Claimants filed two additional Motions to Amend and this Court held two hearings.

On March 1, 2007, Barbara Benson and David Neumann filed a Motion to Amend Statements of Claim 76C 15176-00 and 76C 15177-00, seeking the following corrections:

76C 15176-00:

Irrigation Type: Flood
Flow Rate: 1503 gpm
Diversion Means: Dam and Headgate

76C 15177-00:

Irrigation Type: Flood and Sprinkler
Flow Rate: 464.65 gpm
Diversion Means: Dam and Headgate

This Court ordered the Claimants to publish notice of the requested amendments due to the potential for harm to other Fisher River water users if the amendments were granted without notice to them. The notice period for the Claimant's first Motion to Amend elicited multiple objections from local landowners and neighbors to the Benson/Neumann property.

After an extended and prolonged discovery period, an Evidentiary Hearing took place on May 3-4, 2010, at the Lincoln County Courthouse in Libby, Montana. In addition to both parties presenting their cases, a field investigation was conducted for the purpose of familiarizing the Master with the diversion, ditch, and place of use at issue in this case. At the conclusion of the Hearing, this Master requested that both parties produce 1) post-Hearing briefs on the volume issue that was raised in closing arguments and 2) Findings of Fact and Conclusions of Law addressing the issues related to the Hearing and the Benson/Neumann Motion to Amend.

After extensively reviewing the record from the Hearing and the post-Hearing submissions from the parties, this Master determined that the Claimants were arguing a different case from the one originally filed in 2007 and noticed in 2008. The relief that the

Claimants requested at the Hearing and in post-Hearing filings exceeded the scope and quantity of relief originally requested and noticed by Claimants. In particular, the Master found the inclusion of a diversion and irrigation from Spring Creek had the potential to harm the Cavanaughs, a neighboring Spring Creek water user who was not given personal notice of the amendment requests. The Claimants were ordered to file a revised Motion to Amend Claims to address issues regarding Spring Creek water use, flow rate, volume, and any other relevant claim elements. The Spring Creek issue was also ordered to be re-noticed to give the Cavanaughs a chance to object and give existing objectors the full notice of the amendments sought for Spring Creek.

On December 6, 2010, the Claimants filed an Amended Motion to Amend Claims. This second Motion to Amend requested the following amendments:

40M 15176-00:

Priority Date: May 19, 1930
Flow Rate: 5 CFS
Volume: None Specified
Max. Acres: 108
Purpose: Irrigation—flood
Period of Use: March 10-November 30
Diversion: Primary—dam and headgate; secondary—culvert and headgate on Spring Creek
Place of Use: 108 acres

40M 15177-00:

Priority Date: September 17, 1930
Flow Rate: 5 CFS
Volume: None Specified
Max. Acres: 175
Purpose: Flood irrigation, stockwater
Period of Use: March 1-November 30
Diversion: Primary—dam and headgate; secondary—culvert and headgate on Spring Creek
Place of Use: 175 acres

This amendment request was noticed pursuant to an order from this Court. The notice for the Claimant's second Motion to Amend elicited multiple objections from the original

objectors and the Cavanaughs, neighbors to the Claimants and Spring Creek water users. The parties attempted to move toward a settlement track but ultimately decided that a second evidentiary hearing was necessary.

On September 26, 2011, the Claimants filed another, unsolicited Motion to Amend Claims. This third Motion to Amend claims proposed the following changes:

76C 15176-00:

| | |
|----------------|---|
| Priority Date: | May 19, 1930 |
| Flow Rate: | 5 CFS |
| Volume: | None Specified |
| Max. Acres: | 120 |
| Purpose: | Domestic irrigation and other useful and beneficial purposed |
| Period of Use: | No restrictions |
| Diversion: | Primary—dam and headgate; secondary—culvert and headgate on Spring Creek |
| Place of Use: | 175 acres |

76C 15177-00:

No changes requests if proposed changes to Claim 76C 15176-00 are made.

During a telephone status conference, this Master notified all parties that this Motion to Amend Claims would trigger another round of notice pursuant to the amendment statute. The Claimants agreed to publish additional notice in a timely manner. Again, the same group of interested landowners objected to this Motion to Amend. With respect to the relief sought during the second evidentiary hearing, the December 6, 2010 Motion to Amend was fully superceded by the September 26, 2011 Motion to Amend.

On February 27, 2013, after another round of discovery and depositions were completed, a second Evidentiary Hearing took place at the Flathead County Health Building in Kalispell, Montana. In addition to requesting post-Hearing filings, this Master allowed both parties to perform post-Hearing evidence development, provided that both sides would have the opportunity to comment and object to any additional evidence. Also, this Master ordered that the Kalispell DNRC office conduct a site visit and file a Memorandum regarding Spring Creek irrigated acres. Per the Court's request, the DNRC site visit by Marc Pitman and Wes McAlpin determined that only .23 acres west of Spring

Creek could be irrigated with water diverted by the culverts on Spring Creek. The Claimants vigorously objected to the DNRC's finding. Numerous additional post-hearing filings were submitted to the Court by both the Claimants and the Objectors in response to the DNRC site visit.

FINDINGS OF FACT

1. Statement of claim 76C 15176-00 is based on a filed notice of appropriation dated May 19, 1930, filed by W.J. Lloyd and Donald R. Lloyd. The declared flow rate on this notice of appropriation was 5.00 cubic feet per second (cfs). The 1930 notice of appropriation contained language suggesting the appropriation was for domestic, irrigation, and other useful and beneficial purposes. Statement of claim 76C 15176-00 was filed in the statewide water right adjudication with a flow rate of 640 gallons per minute (gpm) for the purpose of irrigation alone. The original notice of appropriation was attached to the statement of claim when filed by Clarence Schmidt and Rolf Jacobsen on April 20, 1981.

2. Statement of claim 76C 15177-00 is based on a filed notice of appropriation dated September 17, 1930, filed by W.J. Lloyd and Donald R. Lloyd. The declared flow rate on this notice of appropriation was 5.00 cubic feet per second (cfs). The 1930 notice of appropriation contained language suggesting the appropriation was for domestic, irrigation, and other useful and beneficial purposes. Statement of claim 76C 15177-00 was filed in the statewide water right adjudication with a flow rate of 642 gallons per minute (gpm) for the purpose of irrigation alone. The original notice of appropriation was attached to the statement of claim when filed Clarence Schmidt and Rolf Jacobsen on April 20, 1981.

3. Kurt Hafferman, the Claimants' expert witness, testified that the filings were in error and appeared to be part of a misconceived effort to add a point of diversion for a pump, rather than document the historical use of the two 1930 notices of appropriation. *Hafferman Testimony at 1:28pm (May 3, 2010).*

4. It is notable that a change authorization was granted by the DNRC, for which no issue date exists, to add the same pump site point of diversion as was claimed for claim 76C 15177-00. *See DNRC Change Application 76C 3457998.* A letter from the DNRC to Rolf Jacobsen in June 1981 dates the change application effort to contemporaneous with the date of filing for the statements of claim. *See attachment P – Claimants' Original Motion to Amend, March 1, 2007.*

Point of Diversion and Means of Diversion – Fisher River

5. The original point of diversion for claims 76C 15176-00 and 76C 15177-00 was a diversion dam on the Pleasant Valley Fisher River, located in the SENE of Section 28, T27N, R28W. This point of diversion is shown on the map introduced as Objectors' exhibit O-1.5 as a pink dot on the eastern edge of the map. *Notices of Appropriation dated May 19, 1930 and September 17, 1930.* The diversion was via a stone and concrete headgate and ditch, which subsequently became known as the Lloyd Ditch, approximately one foot wide at the bottom, five feet wide at the top, and two and a half feet deep. *Id.*

6. Claims 76C 15176-00 and 76C 15177-00 were decreed with points of diversion in the NENESE and the NWNESW of Section 28, T27N, R28W. The NENESE of Section 28 is the approximate location of the Fisher River diversion dam and headgate described in Finding of Fact No. 5. The NWNESW of Section 28 is an aliquot that is located on the Fisher River near the mouth of Spring Creek and in the very southwestern portion of the Claimants' property.

7. Gene Auge, who lived and worked on the Lloyd Ranch in the 1950's and 1960's, testified after a recent inspection of the headgate and ditch that the capacity of the diversion works are the same now as when he worked the property. *Auge Testimony at 10:08 (May 5, 2010).*

8. While the Fisher River pump site in the NWNESW of Section 28 was potentially used by the Schmidt family during the 1970's and early 1980's and claimed on the statements of claim, by the time Claimants' witness Shaver Clark began irrigating the

property in 1983, he could see no significant sign of the pump site and never used it himself. *Shaver Clark Testimony at 11:33.00 (May 3, 2010)*.

9. Based on testimony and evidence submitted to the Court, the Master finds the historical Fisher River point of diversion and means of diversion for claims 76C 15176-00 and 76C 15177-00 is the headgate and diversion dam located in the NENESE of Section 28, T27N, R28W and the Lloyd Ditch.

Acres Irrigated – Fisher River Water

10. Claim 76C 15176-00 was decreed with a maximum irrigated acreage of 68.00 acres in Sections 28 and 29, T27N, R28W. After splitting out the Objectors' interest in claim 76C 15177-00, it was decreed with a maximum irrigated acreage of 21 acres in the same sections.

11. The Claimants September 26, 2011 Motion to Amend request a 120 acre place of use for claim 76C 15176-00 and 76C 15177-00.

12. Adam Perine, the Objectors' expert witness, testified on cross-examination and confirmed in his report (Objectors' Exhibit 4) that it was physically possible to flood irrigate all of the Claimants' property east of Spring Creek with Fisher River water. Kurt Hafferman, Claimants' expert witness, confirmed this and testified the acreage amounted to approximately 100 acres. *Hafferman Testimony at 1:38pm (May 3, 2010)*.

13. On April 26, 2010, Mr. Perine submitted a report interpreting Gail Hardman's deposition testimony and exhibits. In this report, confirmed by testimony on cross-examination, Mr. Perine stated that there was a total of 109 acres shown as irrigated by Fisher River water on an aerial photograph submitted by the Objectors' as deposition witness Gail Hardman's Exhibit 2.

14. Of the 109 acres identified by Mr. Perine, 79 acres are located on what is now the Claimants' property. The remaining 30 acres are north of the Claimants' property and are owned by Objector Frank Cavanaugh. Mr. Perine also testified that approximately three of the 79 acres were not historically irrigated as they were part of the homestead and

farm buildings in the immediate surrounds. *Hardman Exhibit 2; Table 1 and Figure 1 of Objectors' Exhibit 5; Perine Testimony at 11:17am (May 4, 2010).*

15. Shaver Clark, who leased and irrigated the entire Lloyd ranch from approximately 1983 to 1994, testified as to Mr. Perine's observations, stating that following Donald Lloyd's pre-1973 irrigation practices, he was able to irrigate approximately 80 acres on the Claimants' property south and east of Spring Creek. *Clark Testimony at 11:48am (May 3, 2010).*

16. Gene Auge testified, based on his own observations and irrigation efforts while working on the Lloyd ranch during the 1950's and 1960's, that all of the land described by Gail Hardman and confirmed by Adam Perine were irrigated for hay production or pasture by Fisher River water through the Lloyd Ditch. *Auge Testimony at 10:03am (May 3, 2010).*

17. Based on Findings of Fact 10 through 14, the Master finds 76 acres of the Claimants' property to the east and south of Spring Creek were historically irrigated by Fisher River water. The place of use legal descriptions covering Fisher River irrigation should be as follows, and are entirely supplemental on the two claims:

| <u>ID</u> | <u>Acres</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|---------------|--------------|----------------|------------|------------|------------|---------------|
| 1 | 37.00 | SWNW | 28 | 27N | 28W | Lincoln |
| 2 | 18.00 | W2SENW | 28 | 27N | 28W | Lincoln |
| 3 | 21.00 | E2E2E2 | 29 | 27N | 28W | Lincoln |
| Total: | 76.00 | | | | | |

Historical Use of Spring Creek

18. Spring Creek is a naturally occurring spring creek that arises to the north of the Claimants' property. It flows generally in a southwesterly direction until its confluence with the Fisher River in the NWNESE of Section 29, still on the Claimants' property. Spring Creek constitutes a natural stream channel drain for both Objector Cavanaughs' and the Claimants' property to the Fisher River.

19. Spring Creek has historically played a role in the irrigation system on the Lloyd Ranch since irrigation began in the 1930's. Exactly what that role has been over the

decades is highly contentious and appears to have changed some over the decades. At the very least, it has served as a principle drain for irrigation return flows to the Fisher River.

20. The Claimants have alternatively argued that they have either an implied claim to irrigate out of Spring Creek to the west, or that Spring Creek was used as a natural carrier of Fisher River irrigation water, also to irrigate acreage to the west of Spring Creek. *Claimants' Amended Motion to Amend (December 6, 2010); Claimants' 2nd Amended Motion to Amend September 26, 2011.*

21. The statements of claim for 76C 15176-00 and 76C 15177-00 appear to contain claimed irrigated acreage to the west side of Spring Creek in Section 29 on both statements of claim. The attached maps are not clear as to the exact acreage claimed in Section 29, but the acreage totals and legal descriptions suggest irrigation to the west of Spring Creek. *See Statements of Claim 76C 15176-00 and 76C 15177-00 and attachments thereto.*

22. In addition, the Water Resources Survey map depicts two check dams on Spring Creek, suggesting the possibility of historical irrigation from Spring Creek as part of the irrigation efforts when Survey personnel visited the historical place of use. *Claimants' Exhibit MC-9.*

23. Claimants' witness, Gene Auge, provided testimony on direct examination about Spring Creek's role in irrigation during his tenure on the ranch thru 1961. He clearly stated that no irrigation took place to the west side of Spring Creek when he was working on the ranch. *Auge Testimony at 10:13.30 (May 3, 2010).* Mr. Auge also testified that irrigation from the Lloyd Ditch would supplement the flows in Spring Creek, but he could not say how much. *Auge Testimony at 10:08.00 (May 3, 2010).*

24. Objectors' witness, Laurence Morrell, worked on the Lloyd Ranch for his uncle, Donald Lloyd, in 1949. *Laurence Morrell Testimony at 4:18.00 (February 27, 2013).* Mr. Morrell testified that when he was on the ranch in 1949, all the land to the west of Spring Creek was undeveloped for irrigation and the two track path where the culvert on Spring Creek now sits did not exist. *Laurence Morrell Testimony at 4:23.00 through 4:25.00 and 4:32.00 through 4:34.00 (February 27, 2013).*

25. Gail Hardman lived on the ranch from 1964, when her father Clarence Schmidt bought the ranch from the Lloyds, until 1980, when she moved away for college. *Gail Hardman Deposition Pgs. 6 & 20.* Ms. Hardman testified to flood irrigating prior to the 1973 irrigation season and that her father acquired a "Big Squirt" mobile sprinkler system in that year. *Gail Hardman Deposition Pgs. 15 & 31.* Ms. Hardman also testified that prior to acquiring the Big Squirt sprinkler, no irrigation occurred from Spring Creek, but that Spring Creek became a central source for irrigation water after acquiring the sprinkler. *Gail Hardman Deposition Pgs. 38-39.*

26. Shaver Clark, who first began irrigating the Claimants' property in 1983 or 1984, testified that he flood irrigated the property. Mr. Clark also stated that he developed a Spring Creek diversion dam by plugging a culvert and cutting a ditch allowing for irrigation of 10-15 acres of ground west of Spring Creek. *Clark Testimony at 11:29.00 (May 3, 2010).* Mr. Clark then stated he thought Mr. Lloyd might have started the effort to develop this Spring Creek diversion, but did not finish the effort, only to have Clarence Schmidt undo the effort and never make use of Spring Creek water through flood irrigation, as testified to by Gail Hardman in her deposition. *Clark Testimony at 11:42.00 (May 3, 2010); Gail Hardman Deposition Pg. 39.*

27. The Water Master was guided on a site visit by all involved parties on the afternoon of May 3, 2010. During the site visit, the Master personally observed the plugged culvert diversion dam and ditch described by Shaver Clark in his testimony. *Clark Testimony at 11:35.00 (May 3, 2010).* It appeared to have been recently excavated based on the Master's personal observations.

28. Based on Findings of Fact 21 through 25, the Master finds that irrigation from Spring Creek did not begin until the 1973 irrigation season and that Clarence Schmidt's use of Spring Creek for irrigation was largely independent of his irrigation efforts from the Fisher River. Specifically, Gail Hardman's statements about her father's primary use of Spring Creek to irrigate significant amounts of acreage impossible to flood irrigate from as many as ten different pumping locations on Spring Creek lead the Master to believe this

first use represents a separate water right, not re-use of Fisher River waste water that relates back to the 1930 appropriations. Mrs. Hardman even identified it as her father's primary source of irrigation water when using the Big Squirt sprinkler. *Gail Hardman Deposition Pgs. 16-17.*

29. Based on the vague evidence included in the statement of claim filing itself and attachments, contradicted by the direct testimony of Gene Auge, Gail Hardman, and Laurence Morill, the evidence required to support the generation of an implied claim, or an amendment for pre – July 1, 1973 wastewater use, has not been presented. The Master finds that any use out of Spring Creek was unrelated to the original filing and required a separate filing for sprinkler irrigation out of Spring Creek. Any subsequent and/or continuing use out of Spring Creek by Mr. Clark is irrelevant to this finding. Any future irrigation from Spring Creek will require a permit from the DNRC as a new use of water or a change permit if appropriate.

Period of Use and Period of Diversion – Implied Stock Claim

30. In their final motion to amend, filed on September 26, 2011, the Claimants request an amended period of use and diversion of January 1 to December 31, or as they described it: “No Restrictions”. *See Page 2, 9-26-11 Motion to Amend.* The Claimants expound on their request stating:

“Claimants should not be restricted as to when irrigation waters can be beneficially applied to their acreage in the spring or how late they can irrigate into the fall. Dependent on the weather, each year is different, and Claimants should be allowed to apply water as early as can be beneficially applied, or as late in the season as can be beneficially applied.” *Id. at Pg. 3.*

31. Both claims have claimed and decreed periods of use of May 1 to September 30. Period of diversion was added to the claims in 2008, and was set out with the same dates due to the direct flow nature of the Fisher River means of diversion to the place of use. *See Statements of Claim and Claim Abstracts 76C 15176-00 and 76C 15177-00.*

32. Gene Auge, testifying based on his experience irrigating the Lloyd Ranch, stated that the earliest he ever saw water get turned on in the spring was sometime in April. *Auge*

Testimony at 9:59.00 (May 3, 2010). Mr. Auge also stated that some years, there would be five to six feet of snow on the ground, so he would not start irrigating until much later in the spring. *Auge Testimony at 10:07.00 (May 3, 2010).*

33. Gail Hardman expounded on the difficulties of early irrigation in her deposition, stating snows and cold weather often kept her father from beginning to irrigate until sometime in May, but always by the end of May. Mrs. Hardman also stated her father usually stopped irrigating in September sometime. *Gail Hardman Deposition Pg. 22-23.*

34. Shaver Clark confirmed Gene Auge's testimony regarding period of use, stating that during his tenure in the 1980's, he also would begin irrigating in April and conclude irrigating in October. *Shaver Testimony at 11:27.00.*

35. Rocky Schauer, Claimants' expert witness, has many years of ranching experience, including scientific aspects of raising cattle as they developed mid-century. *Schauer Testimony at 10:35.00.* Mr. Schauer also confirmed testimony from the pre-1973 witnesses in this case, stating that he visited the ranch to hunt coyotes in late fall and the ditch was not in use at that time. *Rocky Schauer Testimony at 10:39.00.*

36. The Lloyd Ranch was decreed with a climatic area of five, which is the wettest, shortest growing season of any in Montana, short of areas designated "Mountainous". *See Claim Abstracts 76C 15176-00 and 76C 15177-00 and Rule 16(a)(1), (2), W.R.C.E.R.*

37. No witness with knowledge of pre - July 1, 1973 irrigation and general water use practices spoke of year round water use, whether for irrigation or any other use, including the diversion of water for stock from the Fisher River outside the irrigation period of use and diversion set out below. Based on the evidence and testimony submitted regarding historical irrigation practices, the period of use and period of diversion for claims 76C 15176-00 and 76C 15177-00 should be corrected to read **April 1 to November 1.**

Flow Rate

38. Claim 76C 15176-00 has a claimed and decreed flow rate of 640 gallons per minute (gpm). Claim 76C 15177-00, after splitting the claim post-decree, has a flow rate of 175.30 gpm. The combined decreed flow rate between the two claims is 815.30 gpm.

This flow rate converts to approximately 1.82 cubic feet per second (cfs). This is the amount of flow currently decreed and available to the Claimants for irrigation through the Lloyd Ditch. *See Statements of Claim and Claim Abstracts for 76C 15176-00 and 76C 15177-00.*

39. In their most recent motion to amend filed on September 26, 2011, the Claimants requested the flow rate for claim 76C 15176-00 be corrected to the full 5.00 cfs filed on the May 19, 1930 notice of appropriation. If the Court granted that amendment request, they requested no correction to the flow rate for claim 76C 15177-00. *See 2nd Amended Motion to Amend, Pg. 4, pp 17 – September 26, 2011.*

40. Per DNRC standards, 17 gpm/acre is the amount of flow rate suggested for filed and use rights that have not had their flow rates previously decreed by a District Court of competent jurisdiction. *Rule 14(b)(1) W.R.C.E.R.* Per Finding of Fact No. 17, applying the 17 gpm/acre standard to the Claimants' 76 acre place of use would amount to a combined flow rate for claims 76C 15176-00 and 76C 15177-00 of 1292.00 gpm, or approximately 2.88 cfs.

41. The Claimants' proportional interest in the original claim 76C 15177-00 represented 21 irrigated acres out of a total 77 claimed irrigated acres. This translated into a 175.30 gpm proportional interest out of a total 640.00 gpm claimed flow rate. If the Claimants' proportional interest in claim 76C 15177-00 was extrapolated to the full 5.00 cfs flow rate filed on in the original September 17, 1930 Notice of Appropriation, the Claimants' proportional flow rate would be 1.36 cfs, or an increase of 435.06 gpm over what is currently decreed. This amount of flow represents the maximum amount that could be awarded to the Claimants under claim 76C 15177-00. *See Claim Abstracts 76C 15177-00 – Version 1 Original Right and Version 3 Post Decree Split.*

42. The Claimants' expert, Kurt Hafferman, testified that the headgate and ditch had the capacity to carry approximately 10.00 cfs and the actual flow in early May was 9.10 cfs. *Hafferman Testimony at 1:31.00 (May 3, 2010).*

43. Gene Auge testified that he also had observed the ditch in May, 2010, just prior to the hearing, and determined that it was approximately the same capacity now as it was during his tenure on the ranch in the 1950's. *Auge Testimony at 10:12.00 (May 3, 2010).*

44. Mr. Auge also testified that when the Lloyds were running the ditch for irrigation, they ran it wide open. This methodology was confirmed by both Gail Hardman and Shaver Clark during their respective times on the ranch.

45. On July 7, 2005, Kurt Hafferman, in his capacity as Regional Manager for the Kalispell office of the DNRC – Water Resources Division, measured ditch leakage over the entire length of the Lloyd Ditch and calculated it to be approximately 5%. *See Objectors' Exhibit O.4, at pg. 2, pp. and Attachment C to Exhibit O.4.*

46. On May 2, 2010, the day before the first hearing in this case, the Lloyd Ditch was first turned on for the irrigation season. On this day, Kurt Hafferman, in his capacity as paid consultant for the Claimants, measured ditch leakage in the Lloyd Ditch and calculated it to be approximately 25% within hours of first being turned on. *Hafferman Testimony at 1:31.00 - 1:35.00 and 2:03.00 (May 3, 2010).*

47. Prior to turning water into the Lloyd Ditch on May 2, 2010, the Claimants disturbed and cleaned the ditch, removing fine grain sediments on the ditch bottom, thereby exposing coarser grain material below, and possibly removing the ditch seal and exacerbating ditch leakage. This may have elevated Mr. Hafferman's ditch leakage calculation made that same day. *Perine Testimony at 9:31.00 – 9:34.00 (May 4, 2010).*

48. Ditch maintenance and cleaning occurs over the decades of historical water use on a more or less consistent basis. It is reasonable to expect that any effort to maintain a clear ditch, free from impediments, plant overgrowth, etc. will necessarily disturb the ditch and enhance ditch loss for a time. Given the representative amounts in the preceding Findings of Fact from an undisturbed Lloyd Ditch and a Lloyd Ditch recently disturbed, it is reasonable to find the historical average for the Lloyd Ditch's loss to leakage over its nearly two-thirds of a mile, is approximately 15%.

49. Rocky Schauer, Claimants' expert witness, explained his many years of ranching experience and his familiarity with scientific developments to cattle ranching as they developed mid-century. *Schauer Testimony at 10:35.00.* Mr. Schauer testified that he first became familiar with the Lloyd Ranch during the Schmidts' ownership of the property. *Id.* In his testimony, Mr. Schauer identified the majority of feed grass on the Lloyd Ranch as Garrison's Creeping Meadow Foxtail, and that he first witnessed it there in the early 1970's. He also stated that it appeared to have been there for a good while, because it was well established by that time. Mr. Schauer also stated that Garrison's Creeping Meadow Foxtail does very well in wet conditions; will out-compete lesser desired grasses, such as Reed Canary, in those conditions; and that the Lloyd ranch, he observed, had a good amount of ideal marshy bottom ground for the Garrison's grass to flourish. *Schauer Testimony at 10:36.00 thru 10:40.00.*

50. Based on the evidence and testimony submitted on the historical flow rates utilized by pre - July 1, 1973 irrigators on the Lloyd Ranch, the flow rates on claims 76C 15176-00 and 76C 15177-00 should be corrected to the amounts sought in the Claimants' September 26, 2011 amendment filing. Claim 76C 15176-00 should have a flow rate of 5.00 cfs. The flow rate for claim 76C 15177-00 should remain unchanged at 175.30 gpm. This means a combined flow rate of 5.39 cfs shall be the maximum allowable flow rate diverted at the dam and headgate on the Fisher River, the only legal pre - July 1, 1973 historical diversion for the claims.

Volume for Distribution

51. The Objectors have filed numerous complaints with the DNRC over the years to stop the Claimants from excessively diverting, based on their decreed statements of claim 76C 15176-00 and 76C 15177-00, and wasting water from the Fisher River while irrigating their property.

52. A volume determination is only appropriate when it is required to adequately administer a right. Section 85-2-234(6)(b)(iii), MCA.

53. The Objectors have demonstrated an ongoing distribution controversy during the two evidentiary hearings, some instances of which the Master was directly involved in. Granted, the Claimants were expected to irrigate under insufficient, erroneous claims, but given the history of removing measuring devices and outright hostilities between the parties, the Master has no doubt the Objectors will seek enforcement of these claims after the conclusion of this case. A quantified volume will be required to ensure Fisher River water is not unnecessarily wasted for spite.

54. As noted in Finding of Fact No. 28, this Master has found no legal basis for a historical water right claim to irrigate from Spring Creek belonging to the Claimants. Any volume calculation for claims 76C 15176-00 and 76C 15177-00, shall only take into account the beneficial use of flood irrigation waters for the 76.00 acre place of use east and south of Spring Creek, as set out in Finding of Fact No. 17.

55. Volume standards for a flood irrigation system in climatic area 5, per DNRC Examination Guidelines, suggest a volume of 4.4 Acre-Feet per irrigated acre. This number is based on peak consumptive uses of alfalfa in a drought year growing season. This would support finding a combined volume for both claims of 334.40 Acre-Feet. See DNRC Claims Examination Manual Section 7(3)(c).

56. Finding of Fact No. 49 acknowledged the Claimants' historical practice of growing a water thirsty grass, Garrison's Creeping Meadow Foxtail, as the ranch's primary feed crop. Darrell Menge, Claimants' witness in support of quantifying volume required to grow Garrison's grass, stated the grass needed a minimum of 20 inches of rain or 1.66 Acre-Feet to survive. *Darrell Menge Deposition, Pg. 8*. Mr. Menge also testified that Garrison's can benefit from 2-3 months of growth inundated with standing water. *Id. at Pgs. 8-9*.

57. In Findings of Fact Nos. 30 through 37, regarding the period of use for irrigation on the Lloyd Ranch, the Claimants established beneficial use for irrigating a fall pasture well into the month of October. This should be taken into account for a volume calculation.

58. Finding of Fact No. 49 indicated a ditch loss of 15%, which should also be taken into account for a volume calculation.

59. The DNRC volume guideline of 4.4 Acre-Feet per acre, or 334.40 Acre-Feet for the irrigation season, would allow the claimants to irrigate at 5.39 cfs flow rate, continuously, for approximately 30 days. The amended period of use in Finding of Fact No. 36, allows for a seven month irrigation season, or approximately 210 days. This does not appear as though it would be sufficient irrigation water volume to support the ditch loss and crop necessity of the Lloyd Ditch and Ranch, allowing the Claimants to only irrigate one day out of seven averaged throughout the season.

60. It also does not appear reasonable, despite the somewhat convoluted and contradicting testimony on irrigation practices for Garrison's Creeping Meadow Foxtail, that the Claimants' contention that the grass must sit in standing water for two months of the growing season to effectively mature for harvest is anywhere near accurate. While the grass may be able to survive in standing water, and flood irrigation often results in ponding of water on the field for short periods of time, claiming that it requires constant, 24 hour a day, flooding of the Claimants' field to survive is not supported by the testimony of either Mr. Menge or Mr. Schauer.

61. Without precise evidence about just how much Garrison's Creeping Meadow Foxtail requires in the way of consistent irrigation over the span of a drought year irrigation effort, but receiving much first hand testimony about how it requires more water than alfalfa, and taking into account the previously determined 15% ditch loss, the previous Findings of Fact Nos. 52 through 61 support finding a total combined volume for claims 76C 15176-00 and 76C 15177-00 of 525.00 Acre-Feet. This volume supports approximately 50 days of constant irrigation flows at a rate of 5.39 cfs during the entire period of use from April 1 to November 1, a total of approximately 210 days.

62. Given a total volume of 525.00 Acre-Feet, the proportional volume for claim 76C 15176-00 should be 487.00 Acre-Feet, and for claim 76C 15177-00 the volume should be 38.00 Acre-Feet.

CONCLUSIONS OF LAW

1. The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider any matter within the Court's jurisdiction on its own motion, or on the motion of an interested party. Section 3-7-224, MCA.

2. Montana law allows claimants to amend their statements of claim, and objectors to amend their timely filed objections after the objection period in a basin has closed.

Motions to Amend a claim or objection are governed by Section 85-2-233(6), MCA:

(6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend a statement of claim or a timely filed objection that may adversely affect other water rights must be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the statement of claim or objection was filed. The notice must specify that any response or objection to the proposed amendment must be filed within 45 days of the date of the last notice. The water judge may order any additional notice of the motion as the water judge considers necessary. The cost of notice required pursuant to this subsection must be borne by the moving party.

3. 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 status 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.

4. In a motion to amend proceeding, the movant/claimant has the initial burden to prove, by a preponderance of the evidence, that a mistake was made in the original claim filing and that the correct historical use of the claim is accurately reflected by the requested amendment(s). Evidence and testimony submitted by objectors in a motion to amend proceeding can serve to increase movant's burden in that they must contradict the Objector's relevant offerings in addition to overcoming the prima facie status of the claim filing. Section 85-2-227, MCA; Rule 19, W.R.Adj.R.; Section 85-2-233(6), MCA.

5. Preponderance of the evidence is

...evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not....[this] does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony.

Black's Law Dictionary 1182 (6th ed. 1998).

6. Pursuant to § 85-2-227(2)-(3), MCA:

(2) A water judge may consider all relevant evidence in the determination and interpretation of existing water rights. Relevant evidence under this part may include admissible evidence arising before or after July 1, 1973.

(3) Subject to the provisions of subsection (4) [concerning municipal water right claims], a water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant, including, without limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973.

7. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence. Rule 401, M.R.Evid.

8. Several objections were made during the two evidentiary hearings about the relevance and foundation of testimony made and the admissibility of various documents offered by both the Claimants and the Objectors. As noted in the Conclusion of Law 5 above, the Court can review post-1973 evidence it finds relevant to the accurate determination of pre-July 1, 1973 water use and evidence relevant to the issue of post-1973 abandonment or non-use. This is especially so when the factual record is short on pre-1973 testimony and evidence, which is not so much case in this instance.

With the exceptions reflected in the Findings of Fact above, the parties' objections regarding the relevance and admissibility post-1973 testimony and evidence are SUSTAINED as the Master found most of it to be irrelevant to arriving at an accurate depiction of pre-July 1, 1973 water use for the claims at issue in this case.

9. The first legal issue the Movants need to overcome is to prove they made a mistake in their original claim filings as set out in the Temporary Preliminary Decree for

Basin 76C. A review of the original claim filings in this case, along with the testimony and evidence submitted by the Claimants, provides convincing evidence that the original claim filers, Clarence Schmidt and Rolf Jacobsen, filed these claims to reflect the current use of a mobile sprinkler first introduced to the Lloyd Ranch in 1973. No objections were filed to these claims during the Temporary Preliminary Decree and addressing the errors alleged in this case is the primary function of the motion to amend statute, Section 85-2-233(6), MCA.

10. The second legal issue the Movants need to overcome is the prima facie status accorded to the contents of the statements of claim 76C 15176-00 and 76C 15177-00 as decreed in the Temporary Preliminary Decree for Basin 76C. With respect to the period of use, place of use (irrigated acreage), point of diversion, and flow rate, the relevant evidence and testimony met the Claimants' burden of proof only to the extent set out in the Findings of Fact in this report. Accordingly, the Claimants' failed to meet their burden beyond what is set out in the Findings of Fact and reflected on the claim abstracts.

11. With respect to volume, the Court shall not grant the Claimants' request. To give the Claimants a free hand to continuously divert their historical flow rate would allow for demonstrated irrigation so excessive that, while it does not destroy the crop, it far and away exceeds the reasonable amount needed to sustain the purpose of irrigation as historically practiced.

McDonald v. State, 220 Mont. 519 (1986) is the seminal Montana Supreme Court decision on imposing volume restrictions for historical water rights in the statewide adjudication effort. The Court was very explicit in setting out how the Water Court should treat volume in cases where quantified volumes were deemed necessary.

Citing *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935), 3 Cal.2d 489, 45 P.2d 972, the Court incorporates the following legal principals into the Montana statewide adjudication effort:

"The rule which will serve to guide [Montana] courts and appropriators before and after the decrees of the Water Courts is...

‘An appropriator, as against subsequent appropriators, is entitled to the continued flow to the head of his ditch of the amount of water that he, in the past, whenever that quantity was present, has diverted for beneficial purposes, plus a reasonable conveyance loss, subject to the limitation that the amount be not more than is reasonably necessary, under reasonable methods of diversion, to supply the area of land theretofore served by his ditch. The appropriator is limited to reasonable beneficial uses....

If the appropriator uses more than the amount so required, he gains no right thereto. An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use. Insofar as the diversion exceeds the amount reasonably necessary for beneficial purposes, it is contrary to the policy of the law and is a taking without right and confers no title, no matter for how long continued.’” *Id.* at Pg. 531.

12. Quantified volumes are appropriate when a water judge has determined both a quantified flow rate and volume are necessary for administration of the water right claims involved. Section 85-2-234(6)(b)(iii), MCA and *Wales Brothers, et al.*, Case 76F-1 (Marshaling Order Oct. 15, 2010, at p. 12). Montana’s current statutory preference for managing direct flow irrigation claims by flow rate reflects a long history of district court decrees that only proved quantified flow rates. At the same time, the lack of a quantified volume does not mean the total amount of water diverted is not a consideration in administration of that right:

The mere fact that the decree awarding a water right in miners’ inches or other flow measurement fails to describe the acreage actually irrigated or the time of flow or the volume of water actually used, cannot serve to remove all limitations upon its use in point of time or volume, and thus substantially to expand the early appropriations, to the detriment of subsequent appropriators. If a decree had that effect, there would be few adjudicated streams in the state in which any but the first few appropriations would be of any substantial value.

Quigley v. McIntosh, 110 Mont. 495, 510, 103 P.2d 1067, 1074 (1940).

13. Given the discretion the Water Court has per statute and previous Montana case law, it is the conclusion of this Master that quantified volumes are required in this case. The quantified volumes are necessary because of the nature and extent of the ongoing

dispute between the Claimants and Objectors for, at minimum, the seven years this case has taken to conclude. The Claimants have repeatedly demonstrated they will irrigate so continuously as to double the flow of their primary irrigation water drain, Spring Creek. This is an unacceptable wasting of water that goes far beyond what is reasonably required to adequately irrigate their yearly crop of Garrison's Creeping Meadow Foxtail grass.

14. It is the conclusion of this Master that the quantified volumes set out in Findings of Fact Nos. 62 and 63 are accurate reflections of the reasonable, historical amount of water required to irrigate this 76 acre portion of the Lloyd Ranch now owned by the Claimants, Barbara Benson and David Neumann, during drought years throughout the over 80 years since the Lloyds perfected the rights.

15. A final binding conclusion of law on volume pertains to beneficial use as the legal limitation on water diversion should the Claimants find themselves in a wet year, not the quantified volume. In *McDonald v. State*, the Supreme Court had this to say about the wasting of water:

“We hold therefore that the Water Courts in rendering a preliminary decree under Section 85-2-231, MCA, or a final decree under Section 85-2-234, MCA, must as to each pre-1973 irrigation water right state the amount of water, rate and volume included in the right; but that the amount, rate and volume must at all times be subject to the requirement of beneficial use...if the beneficial use required a lesser amount than the acre feet fixed therein, the appropriator holds no title or right to the excess volume of water over and above the requirements of his beneficial use.”
McDonald v. State, 220 Mont. 519, 532 (1986).

16. Implied claims are a practical solution to errors commonly found in claims filed as part of the general adjudication process. Claims now being adjudicated were filed thirty years ago and, at the time of filing, there could be confusion as to claims should be correctly filed. A common mistake was the inclusion of more than one water right in a single claim filing. The generation of an implied claim is a mechanism for dealing with this problem. Water Rights Claims Examination Rule 2(a)(33) defines an implied claim as “a claim authorized by the Water Court to be separated and individually identified when a statement of claim includes multiple rights.”

In this case, no such implied claim was identified by the DNRC during their examination. Only now, thirty years later, as a part of the motions to amend in this case, do the Claimants allege mistakes were made that should amount to generating an implied claim for irrigation from Spring Creek to the west of that source.

17. Where an implied claim is requested by a Claimant in circumstances such as a post-decree motion to amend, the Water Court has applied several binding legal and factual guidelines to determine whether or not an implied claim is warranted or a failure to file said claim has occurred. In Water Court case 76HF-580, Chief Water Judge Russell McElyea enumerated three legal hurdles a claimant seeking an implied claim must overcome: **first**, the implied claim must be justified by some evidence in the claim form or the documents attached thereto, although supplemental evidence can be used to explain or justify the claim and its contents; **second**, evidence must exist of actual historic use corroborating the implied claim; **and third**, the creation of the implied claim should not result in a change to historic water use or increase the historic burden to other water users. *Lee E. Foss, et al.*, Case 76HF-580 (Order Amending and Partially Adopting Master's Report Jan. 31, 2013, at p. 20).

18. Further restricting review of potential implied claims in this case is the following analysis by Chief Water Judge Bruce Loble:

"The generation of an implied claim must come from the statement of claim as it was originally filed on or before the filing deadline. A statement of claim cannot be amended after the filing deadline or changed through the objection process to expand the elements of the filed statement of claim and thereby create the groundwork to add additional water rights through the implied claim process. The implied claim process cannot be used to circumvent the claim filing process in order to cure a failure to file a water right claim in a timely fashion. That practice would be contrary to the late claim provisions of the statutes. Section 85-2-221 and 85-2-225, MCA." *Adjudication of Water Rights of the Yellowstone River*, 253 Mont. 167 (1992).

See *Eliasson Ranch Company*, Case 40A-115 (Order Amending and Adopting Master's Report for Claim 40A 151882-00 April 14, 2004, at pg. 5).

19. Evidence of an implied claim out of Spring Creek, within the confines of the actual statements of claim themselves for claims 76C 15176-00 and 76C 15177-00, is weak. Only the acreage figures and legal descriptions give one the vague impression that the claim filers, Clarence Schmidt and Rolf Jacobsen, meant to include irrigation from Spring Creek on its west side. No diversions were claimed in Spring Creek. Nor was Spring Creek designated as part of the Lloyd Ditch system. The supplemental filings attached to the statements of claim did little more to clarify exactly what acreage was being claimed. Only one map, with a square grid overlay and certain squares cross hatched to indicate irrigation, gave the impression that a portion of the claimed place of use was on the west side of Spring Creek, and therefore, must have been irrigated from Spring Creek. Again, no designation was made on that map indicating Spring Creek was being used in any fashion. The Master concludes that while the evidence is very weak, evidence within the statement of claim and attachments does exist to support an implied use right from Spring Creek mistakenly combined with the Lloyds' earlier Fisher River appropriations.

20. The second legal requirement the Claimants were required to prove in order to establish an implied claim for Spring Creek irrigation was demonstrating actual historical use corroborating the implied claim. To this end, no witness with actual knowledge of the pre - July 1, 1973 historical irrigation practices spoke to ANY irrigation efforts from Spring Creek until Gail Hardman's testimony regarding her father's purchase of a mobile sprinkler during the 1973 irrigation season. Ms. Hardman did not qualify that time period enough to discern whether or not the sprinkler was first put to use before or after July 1, 1973. It appears Mr. Schmidt continued his irrigation from Spring Creek until his departure around the claim filing period. Shaver Clark attempted to irrigate from Spring Creek in the 1980's, but admitted his attempt fell short. It was apparent from the site visit conducted in 2010, given the amount of fresh debris, that the ditch recently cut from Spring Creek had only just been dug. It is the Master's conclusion that the evidence presented regarding continuing historical use of Spring Creek was NOT sufficient to corroborate the generation of an implied claim.

21. It is worth noting that the Claimants filed an affidavit from Gene Auge after the second hearing was conducted, on May 31, 2013. This affidavit explicitly contradicted Mr. Auge's testimony during the first hearing in 2010. In 2010, Mr. Auge was directly asked about Spring Creek irrigation and said there was none. In his affidavit, Mr. Auge supports the levels of irrigation the Claimants seek from Spring Creek. Further, the Objectors have had no opportunity to ask Mr. Auge about these discrepancies. For these reasons, the Master finds the affidavit to be of no evidentiary value.

22. The procedural circumstances of the implied claim request in this case present yet another bar to the Claimants' attempt to generate an implied irrigation claim for Spring Creek. Because they are seeking relief through Section 85-2-233(6), MCA, the Claimants are barred from altering the decreed claims to account for the generation of an implied claim. In this instance, the most important element of a water right, flow rate, has already required a significant upwards correction of approximately 4 cfs just to account for flood irrigation from the Fisher River. They seek even more additional flow to account for their recent irrigation efforts from Spring Creek. It is clear to the Master that the bar set by the Chief Water Judge in case 40A-115 to implied claim generation was meant to apply in circumstances exactly like this one. The Master concludes that this presents a second bar to the Claimants efforts at creating an implied claim from Spring Creek.

23. No implied claim from Spring Creek shall be granted; the Claimants' predecessors in interest failed to file sufficient information to support such a claim, nor was there sufficient continuing historical use to support such a claim.

24. It is also worth noting the Claimants have attempted to argue alternating theories to support irrigation from Spring Creek. In the event that they failed in generating an implied claim, they argue Spring Creek was used to carry Fisher River waste water to a secondary diversion, from which acreage to the west could be irrigated. Evidence during the first hearing established that no waste water was used from Spring Creek until sometime during 1973 and that its use was incidental to the purchasing of a new sprinkler. Given Gail Hardman's description of irrigation practices after the sprinkler arrived, it

appear to be wholly independent of Fisher River irrigation and changed historical irrigation practices significantly during the remainder of Mr. Schmidt's tenure on the ranch. Given the general lack of evidence of historical Spring Creek irrigation, the Master concludes the Claimants have also failed to establish a historical practice of waste water re-use from Spring Creek that would relate back to the 1930 Lloyd appropriations from the Fisher River.

RECOMMENDATIONS

Therefore, pursuant to Section 85-2-233(6), MCA and Rule 15, M.R.Civ.P., it is recommended that

1. The Motion to Amend Statements of Claim 76C 15176-00 and 76C 15177-00 be GRANTED IN PART and that the corrections recommended in this Report be made to these claims in the Temporary Preliminary Decree for Basin 76C;
2. **Post Decree Abstracts of Water Right Claims** be served with this Report to confirm that the modifications set forth above have been properly identified in the state's centralized record system.

DATED this 5 day of FEBRUARY, 2014.



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