

Montana Water Court  
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**FILED**

JUN 06 2016

Montana Water Court

MONTANA WATER COURT, LOWER MISSOURI DIVISION  
MILK RIVER BETWEEN FRESNO RESERVOIR AND WHITEWATER CREEK  
BASIN 40J

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CLAIMANT: S Bar B Ranch Co.  
OBJECTORS: S Bar B Ranch Co.; Henry C. Gordon  
COUNTEROBJECTOR: Henry C. Gordon  
NOTICE OF INTENT TO APPEAR: Henry C. Gordon

**CASE 40J-4**  
**(part of)**  
40J 144993-00  
40J 144997-00

**ORDER AMENDING AND ADOPTING MASTER'S REPORT**

**I. STATEMENT OF THE CASE**

This matter involves an objection to a Master's Report. The objection to the Master's Report concerns claims 40J 144993-00 and 40J 144997-00, which are owned by claimant S Bar B Ranch Co. (S Bar B). S Bar B's president is Jack Davies. Henry C. Gordon objected to claim 40J 144997-00 and counterobjected to 40J 144993-00.

S Bar B's two claims are for irrigation water from Snake Creek, which flows into the Milk River from the south. Gordon asserts that S Bar B's claims were abandoned.

The Master determined that claim 40J 144993-00 was completely abandoned, and that claim 40J 144997-00 was partially abandoned. S Bar B objected to the Master's Report on numerous grounds.

**II. BACKGROUND**

Snake Creek flows through Gordon property before entering lands owned by S Bar B. Both Gordon and S Bar B use Snake Creek water for irrigation. Several irrigators above Gordon also use Snake Creek water.

S Bar B's claim 40J 144993-00 has a priority date of February 14, 1912. S Bar B objected to its own claim. It also received objections from the Fort Belknap Indian Community Council, and the United States Bureau of Reclamation. It received a late counterobjection from Henry Gordon and notices of intent to appear (NOIA) from Henry Gordon and the United States Bureau of Indian Affairs.

Claim 40J 144997-00 has a priority date of October 31, 1891, making it a senior right on Snake Creek. It received objections from the United States Bureau of Reclamation, and Henry Gordon. It also received an NOIA from the United States Bureau of Indian Affairs.

All the parties except S Bar B and Gordon withdrew their objections/NOIAs to claims 40J 144993-00 and 40J 144997-00, making Gordon the only adverse party at trial. The parties stipulated during trial that the S Bar B rights had not been used for 25 years.

S Bar B contends it did not use its rights because water was not available in Snake Creek. S Bar B contends this shortage was caused by drought conditions and Gordon's use of junior irrigation rights upstream. According to S Bar B, Gordon's use of his junior rights was a misappropriation of water. S Bar B asserted it had no obligation to place a call on upstream juniors in times of shortage, and asserted that Gordon should have checked to make sure downstream seniors had water before diverting his junior rights. S Bar B asserts that a water right cannot be abandoned if water is unavailable because of illegal use by an upstream junior; that Gordon's use of water was illegal; and that the doctrine of unclean hands prevents Gordon from asserting S Bar B abandoned its rights. S Bar B asserts that it never intended to abandon its rights, and that 25 years of non-use does not raise a rebuttable presumption of abandonment.

Gordon asserts that water was available in Snake Creek; that S Bar B did not fully use water when it was available; that S Bar B did not maintain its diversion structures and ditches; and that S Bar B never called junior rights for irrigation water. Gordon contends

the only call ever made by S Bar B was for stockwater. Gordon asserts S Bar B's use of water from Snake Creek was limited to a small field south of an access road.<sup>1</sup>

The Water Master rejected S Bar B's assertion that 25 years of non-use did not create a rebuttable presumption of abandonment. The Master found that failure to maintain ditches and failure to place a call on upstream juniors during times of alleged shortage was additional evidence of intent to abandon.

The Master concluded that S Bar B claim 40J 144993-00 was completely abandoned and that the portion of claim 40J 144997-00 used north of the access road was also abandoned. The Master set the flow rate for claim 40J 144997-00 based on the 23 acres that had actually been irrigated using that right. The flow rate selected was 391.00 gpm, which was derived by multiplying the DNRC standard of 17 gpm/acre by 23 acres.

S Bar B raises a multitude of objections to the Master's Report

### III. ISSUES

1. Does 25 years of non-use create a rebuttable presumption of abandonment?
2. Did the burden of proof shift to S Bar B once it stipulated that its water rights had not been used for 25 years?
3. Did the Water Master properly conclude that S Bar B did not rebut the presumption of abandonment?
  - A. Does the doctrine of unclean hands bar an upstream junior water user from arguing that downstream rights have been abandoned?
  - B. Did the Master properly reject S Bar B's arguments regarding the futile call doctrine?
  - C. Does irrigation from one source preclude an argument that rights from a different source have been abandoned?
  - D. Was the Master's decision not to rely on aerial photographic evidence offered by S Bar B appropriate?

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<sup>1</sup> The access road is a frequently referenced feature in this case. It runs west to east and divides the lands claimed by S Bar B for irrigation into a north parcel and a south parcel.

E. Did the Master err by concluding that evidence in Gordon's DNRC files did not rebut the presumption of abandonment?

4. Did the Water Master err by assigning a flow rate to claim 40J 144997-00 based on a statewide guideline?

#### IV. STANDARD OF REVIEW

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

The Montana Supreme Court follows a three-part test to determine if a trial court's findings of fact are clearly erroneous. See *Interstate Production Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). The Water Court uses a similar test for reviewing objections to a Master's findings of fact. Rule 11(c), W.R.Adj.R. (referencing Rule 53(e), M. R. Civ. P.). See *In re the Existing Rights within the Jefferson River Drainage Area, Nos. 41G-137, 41G-W-182145-00*, 1999 Mont. Water LEXIS 1 at 3-4 (Dec. 27, 1999).

First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, even if the findings are supported by substantial evidence, this Court may determine a finding is clearly erroneous if the Master misapprehended the effect of the evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, this Court may still determine that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16). "Substantial evidence is evidence which a

reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting.” *Skelton Ranch*, ¶ 27 (quoting *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993)). The Montana Supreme Court has long recognized that “substantial evidence and clearly erroneous are not synonymous.” *Heavirland*, ¶16 (quoting *DeSaye*, 250 Mont. at 323). Therefore, this Court may determine a finding clearly erroneous even though there is evidence to support it. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16).

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

## V. ANALYSIS

### 1. Does 25 years of non-use create a rebuttable presumption of abandonment?

S Bar B stipulated that its water rights had not been used for 25 years. Despite this stipulation, S Bar B contends the Master erred by concluding that 25 years of non-use created a rebuttable presumption of abandonment.

A central purpose of Montana water policy is allocation of a scarce resource. “It is the policy of this state ... to encourage the wise use of the state’s water resources by making them available for appropriation ... and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people ....” § 85-2-101(3), MCA. Abandonment law facilitates efficient resource allocation by limiting the rights of those who do not apply water to beneficial use.

“The controlling principle upon which water ‘rights’ in Montana are perfected and continue to possess legal validity is that of beneficial use; water rights cease when water is no longer applied to a beneficial use.” *Musselshell River*, 255 Mont. 43, 47, 840 P.2d 577, 579 (1992). “[I]t is a principle, quite uniformly recognized, that when once an appropriation of water has been completed, the courts will not lightly decree an abandonment of a property so valuable in a semi-arid region such as this.” *Thomas v.*

*Ball*, 66 Mont. 161, 167, 13 P. 597, 599 (1923) (citations omitted). A finding of abandonment requires a showing of both non-use and intent to abandon.

“To constitute abandonment there must be a concurrence of act and intent--the relinquishment of possession and the intent not to resume it for a beneficial use.... Neither an intention to abandon nor nonuser is sufficient; the union of both is indispensable to constitute abandonment.” *Thomas*, 66 Mont. at 167; 13 P. at 599 (citations omitted).

There is no enforceable statute defining the length of non-use required to establish a presumption of abandonment. Section 85-2-404(2), MCA references a 10 year period of non-use, but does not become enforceable until the Water Court issues final decrees. In the meantime, case law provides guidance for such decisions. The duration of non-use for establishing abandonment covers a broad range.

Nine years of non-use is “certainly very potent evidence, if it stood alone, of an intention to abandon.” *Smith v. Hope Mining Co.*, 18 Mont. 432, 438, 45 P. 632, 634 (1896). An approximately 23-year period of non-use raised a rebuttable presumption of abandonment in *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 16, 833 P.2d 1120, 1123 (1992). In *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 56, 375 Mont. 327, 328 P.3d 644, a period of non-use ranging from 18 to 29 years was sufficient to raise a presumption of abandonment. In *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983), a 40-year period raised a presumption of abandonment, and in *Holmstrom Land Co. v. Meagher County Newlan Creek Water District*, 185 Mont. 409, 424, 605 P.2d 1060, 1069 (1980) it was 75 years.

These cases show that 25 years of non-use is within the range of time required to establish a presumption of abandonment. The Water Master’s decision on this issue was correct.

2. Did the burden of proof shift to S Bar B once it stipulated that its water rights had not been used for 25 years?

S Bar B next contends it did not agree to rebut the presumption by stipulating to 25 years of non-use. “S Bar B did not stipulate to shifting the burden to itself to explain the long period of non-use.” S Bar B Objection to Master’s Report, at 12.

This argument is at odds with the law of abandonment. Although an objector asserting abandonment has the initial burden of showing prolonged non-use, the burden shifts once a prolonged period of non-use has been established. “[A] long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse.” *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218. The stipulation did not invalidate this rule, or somehow require that Gordon retain the burden of showing intent to abandon.

Once prolonged non-use was established by stipulation, there was no need for Gordon to prove non-use at trial, or to supply additional evidence of intent to abandon. The Water Master did not err by concluding that the stipulation established 25 years of non-use; that such a lengthy period of non-use created a rebuttable presumption of abandonment; and that S Bar B had the burden of proof at the start of trial. Holding otherwise would have needlessly forced Gordon to prove something already acknowledged by S Bar B.

3. Did the Water Master properly conclude that S Bar B did not rebut the presumption of abandonment?

S Bar B presented a variety of arguments to demonstrate that its water rights were not abandoned. The Master found these arguments unpersuasive and S Bar B objects.

“To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope.” *79 Ranch*, 204 Mont. at 433, 666 P.2d at 218. Owners of water rights rarely acknowledge intent to abandon their claims, and intent can therefore be difficult to prove.

Accordingly, “intent need not be proved directly but may be inferred from all the circumstances of the case.” *Denver by Bd. of Water Comm’rs v. Snake River Water Dist.*,

788 P.2d 772, 776 (Colo. 1990). “[S]tatements of intent by the owner of the water rights are insufficient by themselves to rebut a presumption of abandonment.” *Beaver Park Water, Inc., v. City of Victor*, 649 P.2d 300, 302 (Colo. 1982).

“To successfully rebut a presumption of abandonment, a claimant must produce ‘[s]pecific evidence explaining or excusing the long period of non-use of the particular water rights on the specific property ...’” *Heavirland v. State*, 2013 MT 313, ¶ 32, 372 Mont. 300, 311 P.3d 813 (quoting *Musselshell River*, 255 Mont. at 51, 840 P.2d at 582). “Conclusory statements concerning a variety of negative factors” are insufficient to meet the claimant’s burden. *Musselshell River*, 255 Mont. at 52, 840 P.2d at 582.

Abandonment is a question of fact, and “determining whether a water right has been abandoned requires weighing all the relevant factual circumstances of the case.” *Heavirland*, ¶ 32.

The arguments made by S Bar B are addressed with the foregoing principles in mind.

A. Does the doctrine of unclean hands bar an upstream junior water user from arguing that downstream rights have been abandoned?

S Bar B argues that the doctrine of unclean hands prevents Gordon from asserting abandonment. S Bar B contends that Gordon’s diversions made it impossible to get water from Snake Creek. Its theory is that a junior user like Gordon cannot dry up the creek and then assert that a senior’s rights have been abandoned through non-use. It further asserts that abandonment does not apply when water is unavailable because of unlawful diversions by an upstream junior.

The Master declined to consider the unclean hands argument on the basis that it was not raised in the pretrial order or at hearing. The Master’s conclusion was incorrect. S Bar B asserted in the prehearing order that “Gordon cannot benefit from his dewatering of S Bar B claims by declaring abandoned due [sic] his dewatering of Claim Nos. 40J 144993-00 and 40J 144997-00.” Proposed Prehearing Order, at 6. In addition, counsel for S Bar B asked a number of questions on this topic during the hearing. Accordingly,



the Master should have considered S Bar B's unclean hands argument. This was harmless error however, as the doctrine of unclean hands does not apply.

The doctrine of unclean hands is based on "a fundamental principle of equitable jurisprudence that one who seeks equity must do equity." *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 13, 307 Mont. 45, 36 P.3d 408. Simply stated, the doctrine means that "no one can take advantage of his own wrong." § 1-3-208, MCA.

S Bar B argues that Gordon's upstream use of water was unlawful, and that it deprived S Bar B of the ability to divert its rights. In effect, S Bar B argues that its non-use of water was Gordon's fault, and that Gordon cannot assert its rights have been abandoned.

There are several flaws with this argument. The first is that Gordon's diversions were not unlawful. They were made pursuant to water rights claimed by Gordon. Although S Bar B objected to many of Gordons's rights, it did not seek to enjoin their use or have them certified to the Water Court for expedited determination.

Second, Gordon was not the only upstream appropriator on Snake Creek. The evidence showed there were other upstream juniors using Snake Creek water. These users, like Gordon, were not checking to see if downstream users were getting enough water.

Third, S Bar B did not show that Gordon was exceeding his Snake Creek rights. While it appeared Gordon may have violated a permit for water from Ganty Creek, those violations consisted of failing to put a flow through device in a dam. Although such a device would have allowed water behind the dam to be released downstream if a call was placed on Ganty Creek, the evidence showed that water was only impounded behind the dam three times over a long period.

Fourth, S Bar B did not call for irrigation water from either Ganty or Snake Creek for many years, and S Bar B has only recently asserted that Gordon should send irrigation water downstream. S Bar B's call was limited to Gordon, and did not extend to other juniors upstream who were also using water. This call occurred long after S Bar B had abandoned irrigation north of the access road using water from Snake Creek. Once water

rights have been abandoned, they cannot be resurrected by making a call. S Bar B's call for irrigation water came too late to do any good.

Finally, S Bar B acknowledged it was getting water at its Snake Creek diversion and that some of the water it received leaked through an inefficient diversion dam and could not be used. S Bar B cannot demand that upstream juniors stop diverting while maintaining an inefficient diversion structure that causes part of the water that reaches its headgate to be lost.

The Water Master may have erred by failing to consider the doctrine of unclean hands, but that error was harmless.

B. Did the Master properly reject S Bar B's arguments regarding the futile call doctrine?

S Bar B argues that its inability to divert was attributable to Gordon's use of water upstream. "[T]he only reason that S Bar B has not irrigated with the water at question is due to Gordon's dewatering the stream with his junior water rights [sic] upstream from S Bar B's water rights." S Bar B's Post Trial Brief, at 1. "The evidence before the Court indicates that Gordon completely dried the source every year, supporting a finding of a complete lack of available water." S Bar B Proposed Findings of Fact and Conclusions of Law, COL 11, at 15.

S Bar B also asserts that it made calls to Gordon and other upstream appropriators. S Bar B contends these calls were ignored, and that placing additional calls would have been futile.<sup>2</sup> S Bar B Objection to Master's Report, at 22; S Bar B Amended Response to Gordon's Brief, at 7.

This argument is a mashup of two rules. The first is that abandonment cannot occur when water is unavailable, and the second is the futile call doctrine. S Bar B misstates both rules.

Although S Bar B is correct that abandonment cannot occur when water is unavailable, this exception applies to shortages caused by drought or by illegal expansion

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<sup>2</sup> S Bar B's initial calls were for stockwater, not for irrigation. The calls for irrigation water came too late to resurrect S Bar B's abandoned claims.

of upstream water rights. *Federal Land Bank v. Morris*, 112 Mont. 445, 453, 116 P.2d 1007, 1010 (1941); *Morris v. Bean*, 146 F. 423, 434 (C.C.D. Mont. 1906). Abandonment is not tolled when shortages are caused by the lawful diversions of upstream juniors.

S Bar B did not show that Gordon illegally expanded his junior water rights, or was taking more water than he was entitled to receive. Instead, S Bar B asserts Gordon used his junior rights out of priority, thereby causing shortages of water in Snake Creek. To get around this problem, S Bar B asserts that diversions by an upstream junior are illegal if they impact a downstream senior.

This argument extends the “first in time first in right” rule past its historical limits. Jack Davies, president of S Bar B, testified that he should not have to place a call on juniors upstream. Instead, Davies asserted junior users cannot divert without first determining whether downstream seniors are receiving enough water. Montana does not follow this rule.

The “doctrine of appropriation,” typically requires senior appropriators to notify junior appropriators when they are short of water if they wish junior appropriators to reduce their diversions – an action known as “calling the river.” See A. Dan Tarlock, *Law of Water Rights and Resources* § 5:33, at 5-61 (2008) (“senior right must be enforced by a call against a junior”). “Calls” ensure that water is not wasted and are therefore central to the prior appropriation doctrine. Absent a call, a senior appropriator cannot maintain an action for damages against a junior appropriator for failing to reduce his or her diversion. *Worley v. United States 50 Borax & Chemical Corp.*, 428 P.2d 651, 654-55 (N.M. 1967). Before the river is called, juniors may continue to divert their full water rights without concern for liability; once the river is called, however, juniors must reduce their diversions. Both Montana and Wyoming follow the general rule requiring senior appropriators to call the river when they are short of water.

*Montana v. Wyoming*, No. 137 Original, Second Interim Report of Special Master, at 49-50, 2014.

In addition to avoiding waste, there are other practical reasons why the rule advocated by S Bar B does not apply in Montana. Most streams have a hydrologic cycle shaped like a bell curve. Flows are low in the early spring, and increase in late spring and early summer. After peak runoff, flows decrease in July, August and September.

Similarly, demand for water fluctuates from year to year as cropping and irrigation practices change. Both supply and demand for water are constantly changing.

Although some streams have only a few water users, many sources are more complex. Under the rule proposed by S Bar B, a junior could be required to obtain the identity, location, and contact information of every senior user on a source. After obtaining this information, the junior could be required to constantly monitor availability of water to downstream seniors before diverting. The prior appropriations doctrine does not require junior users to verify that downstream seniors are getting enough water.

Senior users who sleep on their rights have no guarantee of receiving water. Instead, seniors are expected to enforce their priority dates during times of shortage by placing a call on juniors, or by seeking appointment of a water commissioner to administer the source in order of priority. Other than making a few calls for stockwater, there was no evidence S Bar B sought enforcement of its senior irrigation rights between the late 1980s and approximately 2011. By the time S Bar B began asking for irrigation water, its rights had been abandoned.

S Bar B attempts to get around this problem by invoking the futile call doctrine. This doctrine states that an upstream junior is not obligated to release water to a downstream senior if the water will not reach the senior's point of diversion. *Irion v. Hyde*, 110 Mont. 570, 581-82, 105 P.2d 666, 673 (1940). It is based on the practical recognition that water may not always reach a senior appropriator's headgate in times of shortage, and that priority dates should not be rigidly enforced if doing so deprives juniors of water without benefitting seniors. When such a situation arises, the doctrine is used by upstream juniors as a defense to futile calls by downstream seniors. It is not used by seniors as an excuse for failing to assert their rights.

Nevertheless, S Bar B asserts that it should be excused from placing a call on Snake Creek because Gordon was uncooperative. This interpretation is incorrect. S Bar B repeatedly asserted that water shortages on Snake Creek were caused by Gordon's use of water upstream. Accepting these assertions as true, stopping Gordon's diversions would have made water available for S Bar B. Under these circumstances, S Bar B had

an obligation to seek enforcement of its senior water rights on Snake Creek. The futile call doctrine did not exempt S Bar B from protecting its rights.<sup>3</sup>

S Bar B asserts it could not protect its rights because there was no prior district court or water court decree on Snake Creek, thereby preventing it from enforcing its senior priority dates in district court. This argument overlooks Section 85-2-406(2)(b), MCA, which allows for pre-decree enforcement by enabling a party to certify water rights to the Water Court for expedited review. S Bar B did not use this remedy.

C. Does irrigation from one source preclude an argument that rights from a different source have been abandoned?

There was some evidence at trial that land irrigated with water from Snake Creek could be irrigated with other sources such as Spring and Bean Creeks. The extent of actual irrigation from these alternate sources was not clearly established. The pretrial order does not directly address this issue, although it was raised late in post-trial briefing. S Bar B's Amended Response to Gordon's Brief, at 8.

The Water Master indicated she would not consider evidence of irrigation from an alternate source, and concluded that the mere possibility of irrigation from other sources was not enough to forestall an abandonment argument. In support of this conclusion she referenced *Beaver Park Water, Inc. v. Victor*, 649 P.2d 300 (Colo. 1982). In that case the court stated "there was no need for diverting the Altman water since an adequate water supply was available from another source." *Beaver Park*, 649 P.2d at 302. The Master distinguished *Beaver Park* from the facts of the present case, and decided it was inapplicable.

The Master's analysis showed she considered but rejected the idea that irrigation of S Bar B land using other sources rebutted the presumption that S Bar B's Snake Creek rights were abandoned. The Master's analysis was correct.

There was no evidence that S Bar B ever consistently irrigated the land covered by its Snake Creek rights using water from Spring or Bean Creeks. Moreover, a key

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<sup>3</sup> A junior using the futile call doctrine as a defense usually has the burden of proving the assertion that answering the call would be futile. That burden does not apply here, as this is not a water administration case and S Bar B's calls for water occurred after its rights were abandoned.

component of S Bar B's argument was that unavailability of water from Snake Creek made irrigation impossible.

The evidence shows that there was periodically water flowing in Snake Creek. S Bar B used this water to irrigate and allowed some of it to flow through its diversion dam. Whether there was irrigation water from another source does little to rebut the notion that Snake Creek water was abandoned. On the contrary, use of an alternate source, if such use occurred, suggests that Snake Creek was no longer important, and that S Bar B had no future plans for its use. This conclusion is corroborated by its failure to maintain ditches from Snake Creek, its inefficient diversion dam in Snake Creek, and its failure to call junior Snake Creek rights.

The Master correctly decided that irrigation of S Bar B lands with water from another source did not rebut the presumption that its Snake Creek rights were abandoned.

D. Was the Master's decision not to rely on aerial photographic evidence offered by S Bar B appropriate?

The Water Master decided not to consider evidence based on aerial photographs for the following reasons:

1. Some of the evidence predated 1990, the beginning of the stipulated period of non-use;
2. The Master did not find the testimony of the claimant's expert credible; and,
3. The exact date of an aerial photograph taken in 2005 was unclear.

Faced with these problems, the Master determined that aerial photographic evidence offered by the claimant was either not relevant or not credible. S Bar B incorrectly characterizes the Master's actions as a decision to exclude aerial photos and related testimony from evidence.

A review of the Master's Report shows this characterization is not accurate. The Master did not exclude this information from evidence; she simply found it was not useful. The Master correctly determined that photographs predating the stipulated period of abandonment were not relevant to explaining the reasons for later non-use.

The Master also found the testimony of S Bar B's expert was not credible. The Master was in the best position to judge credibility, and S Bar B has provided no basis for disturbing her judgment.

E. Did the Master err by concluding that evidence in Gordon's DNRC files did not rebut the presumption of abandonment?

S Bar B argues that the Master improperly excluded files from evidence that pertain to Gordon's prior permit applications with the DNRC. This again mischaracterizes the Master's actions. The Master did not exclude these files from evidence, she found them unhelpful.

One of the allegedly excluded files contains applications from Ganty Creek. There were no flow records from Ganty Creek included in those applications and no information showing how flows in Ganty Creek impacted water availability in Snake Creek. Moreover, S Bar B never adequately explained why these records helped rebut the presumption that its Snake Creek rights had been abandoned. The Master's reluctance to place weight on these records was reasonable.

S Bar B used Gordon's permit application on Snake Creek to demonstrate that water in Snake Creek was short. The Master concluded this file contained insufficient information to excuse non-use of Snake Creek water by S Bar B.

The DNRC files from Gordon's permit application for Snake Creek date from the beginning of the 25-year period of non-use by S Bar B. As a result, they do little to rebut the presumption of abandonment.

S Bar B has not provided a compelling rationale for overturning the Master's decision to assign these documents little weight. S Bar B simply alleges that the Master should have paid them more attention. That is not enough reason to conclude that the Master's assessment of their importance was incorrect.

4. Did the Water Master err by assigning a flow rate to claim 40J 144997-00 based on a statewide guideline?

The Master found that claim 40J 144997-00 was partially abandoned, resulting in a decrease of acres irrigated from 113 to 23 acres. The original flow rate of 4 cfs, when

divided by the 113 acres initially claimed, resulted in a ratio of 15.8 gpm/acre, an amount less than the DNRC standard of 17 gpm/acre. Leaving the originally claimed flow rate of 4 cfs intact for use on 23 acres would have increased the ratio to 78 gpm/acre.

Rather than leave an exaggerated flow rate in place, the Master applied the DNRC standard of 17 gpm/acre to the remaining 23 acres and arrived at a flow rate of 391 gpm, or 0.87 cfs.

The Master used the DNRC standard because the claimant's expert provided no flow rate information at trial and the claimant testified he didn't know how much water was needed for irrigation south of the access road.

Questions about the correct flow rate for claim 40J 144997-00 were raised prior to trial. Flow rate was discussed in an issue remark attached to the claim and was directly raised in Gordon's objection. By statute, issue remarks must be resolved by the Water Court, so all parties were on notice that flow rate would be addressed. § 85-2-248, MCA.

In the pretrial order, Gordon asserted that only twenty acres were irrigated using this right, thereby setting up a flow rate issue if Gordon's assertion was correct. S Bar B also raised flow rate in the pretrial order when it asked "[i]n what amounts and for how long has water been physically available for Claim Nos. 40J 144993-00 and 40J 144997-00." Proposed Prehearing Order, at 8.

At the beginning of trial, S Bar B stipulated that all of its land north of the access road had not been irrigated for 25 years, thereby raising the possibility that only lands south of the road would be recognized for claim 40J 144997-00. This concession suggested that flow rate would need to be addressed to conform to a reduction in acreage. As matters unfolded, this is exactly what happened.

Despite several pre-trial signals, S Bar B did not present evidence addressing the flow rate for claim 40J 144997-00. Instead, it argued after trial that "a separate hearing should be held on the reduction of acreage and any reevaluation of flow rate" if the court were to find abandonment of its rights had occurred. S Bar B Response to Gordon's Brief, at 9. The Master denied this request and observed that "[t]he hearing for claim 40J 144997-00 was the appropriate time and place to present all evidence concerning the



claim.” Master’s Report, at 4. S Bar B contends that the Master should have granted its request for an additional hearing.

S Bar B had notice that the flow rate for claim 40J 144997-00 would be an issue, but decided not to present evidence on this topic. The Master’s decision not to have a second trial on the issue of flow rate was correct.

There is, however, a concern about use of a flow rate guideline to define historical beneficial use. The 17 gpm/acre standard is a guideline, which is defined as “an estimate of reasonable use to be used as the benchmark for initiating further department review or claimant contact...” W.R.C.E.R. 2(a)(29). A guideline, as the name implies, is a reference point. It is not a substitute for evidence of historical use.

The Montana Supreme Court has discouraged the use of guidelines to define water rights. “Proxy approaches such as the Montana Irrigation Guide--used here by the Department--and Natural Resources Conservation Services Irrigation Water Requirements, represent at best rough estimates of historic consumptive use.” *Hohenlohe v. State of Montana*, 2010 MT 203, ¶ 60, 357 Mont. 438, 240 P.3d 628. The Montana Supreme Court’s skepticism regarding estimates of water use is sensible given that water rights are defined in accordance with actual historic use. Although estimates are useful, they are not a substitute for direct evidence when it is available.

In this case, evidence of an historical flow rate was supplied by S Bar B in its claim.

The original ratio claimed by S Bar B was 4 cfs for use on 113 acres, resulting in 15.88 gpm/acre. (4 cfs, or 1792 gpm, divided by 113 acres equals 15.88 gpm/acre). This ratio had prima facie status as part of the original claim. It was not overcome by other evidence.

The 17 gpm/acre flow rate guideline selected by the Master did not represent evidence of the flow rate used for claim 40J 144997-00. It is a statewide estimate of flow applied to all irrigation rights irrespective of variables such as climatic zone, carriage losses, irrigation efficiency, and soil types. In the absence of evidence indicating the 17

gpm/acre guideline is applicable to S Bar B's right, it does not constitute substantial evidence upon which findings regarding flow rate can be based.

The flow rate per acre ratio claimed by S Bar B was not overcome, and should have been applied to the surviving acreage for this right. It is possible that S Bar B could have overcome the prima facie status of its own claim by introducing specific evidence of actual historical use at trial, but that window of opportunity opened and closed. The Master correctly denied S Bar B's request for a second trial. The correct flow rate for claim 40J 144997-00 is 365 gpm, or .81 cfs.

## VI. CONCLUSIONS

1. Twenty five years of non-use created a rebuttable presumption of abandonment.

2. The burden of proof shifted to S Bar B once it stipulated that its water rights had not been used for 25 years.

3. The Water Master properly concluded that S Bar B did not rebut the presumption of abandonment.

A. The doctrine of unclean hands did not bar Gordon from arguing that S Bar B's downstream rights were abandoned.

B. The Master properly rejected S Bar B's arguments regarding the futile call doctrine.

C. Under the facts of this case, the potential use of an alternative source for irrigation did not preclude an argument that S Bar B's Snake Creek rights were abandoned.

D. The Master's decision not to rely on aerial photographic evidence offered by S Bar B was appropriate.

E. The Master did not err by concluding that evidence in Gordon's DNRC files did not rebut the presumption of abandonment.

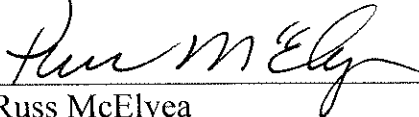
4. The Water Master erred by assigning a flow rate to claim 40J 144997-00 based on a statewide guideline, but did not err by denying S Bar B's request for a new trial on the flow rate issue. A corrected abstract for claim 40J 144997-00 is attached to confirm

the flow rate correction has been made in the state's centralized water right record system.

VII. ORDER

The Master's Report is AMENDED and ADOPTED in conformance with this order.

DATED this 6 day of June, 2016.

  
Russ McElyea  
Chief Water Judge

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FILED  
FEB 24 2016

Montana Water Court

MONTANA WATER COURT, LOWER MISSOURI DIVISION  
MILK RIVER BETWEEN FRESNO RESERVOIR AND WHITEWATER CREEK  
BASIN 40J

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CLAIMANT: S Bar B Ranch Co.  
OBJECTORS: S Bar B Ranch Co.; Henry C. Gordon  
COUNTEROBJECTOR: Henry C. Gordon  
NOTICE OF INTENT TO APPEAR: Henry C. Gordon

**CASE 40J-4**  
**(part of)**  
40J 144993-00  
40J 144997-00

**NOTICE OF FILING OF MASTER'S REPORT**

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

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

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT – CLAIMS 40J 144993-00 AND 40J 144997-00**

**PROCEDURAL HISTORY**

<b>Claim No.</b>	<b>Source</b>	<b>Type of Hist. Rt.</b>	<b>Priority Date</b>	<b>Acres Irrigated</b>	<b>Place of Use Sec, Twp, Rge</b>	<b>Point of Diversion</b>
40J 144993-00	Snake Creek	Filed (Burks)	02/14/1912	180.00	Sec 25 & 26, T31N, R19E Sec 30, T31N, R20E	NWSWNE Sec 1, T30N, R19E
40J 144997-00	Snake Creek	Filed (Sayre)	10/31/1891	113.00	Sec 25 & 26, T31N, R19E	NWSWNE Sec 1, T30N, R19E

This Master's Report addresses two of the thirteen water rights in Case 40J-4.

Claim 40J 144993-00 received objections from the United States of America (Bureau of Reclamation), Fort Belknap Indian Community, and claimant itself. Mr. Gordon filed a counterobjection and notice of intent to appear. The United States of America (Bureau of Indian Affairs) filed a notice of intent to appear. The claim also received an issue remark concerning its supplemental relationship with several other claims and the excessive flow rate per acre resulting from the supplemental relationship.

Claim 40J 144997-00 received objections from Henry C. Gordon and the United States of America (Bureau of Reclamation). The United States of America (Bureau of Indian Affairs) filed a notice of intent to appear. The claim also received issue remarks concerning its supplemental relationship with several other claims and the excessive flow rate per acre resulting from the supplemental relationship, and an overlapping place of use with another claim.

On March 23, 2015, the United States filed a Withdrawal of Objections and Withdrawal of Notice of Intent to Appear for the claims. The Withdrawal was unconditional.

On April 3, 2015, the Fort Belknap Indian Community filed a Notice of Unconditional Withdrawal of Objections.

A hearing was held for claims 40J 144993-00 and 40J 144997-00 on August 19, 2015 in Chinook, Montana.

The testifying witnesses, in order of their appearance, were:

- Henry C. Gordon, objector (9:22-11:55)
- Robert J. Lott, a ranch hand for S Bar B Ranch Co., Summer 1986 to January 1996 (11:55-12:07)
- Jim Price, a ranch hand for S Bar B Ranch Co., 1983-1991 (12:08-12:16)
- Lee Yelin, objector's expert witness (1:33-2:24; 5:21 to end)
- Deborah Stephenson, claimant's expert witness (2:33-4:29)
- Jack W. Davies, President of S Bar B Ranch Co. (4:30-5:20)

On November 23, 2015, the parties filed proposed findings of fact and principles of law and post-trial briefs. On December 7, 2015, the parties filed response briefs. On December 8, 2015, claimant filed an amended response brief.

The above proceedings are the basis for this Report. Evidence and testimony not discussed in this Report was not given any weight.

### **POST-HEARING ARGUMENTS**

Claimant made several arguments in its post-hearing briefing to rebut the presumption of abandonment that were not included in the prehearing order and were not heard during the hearing. These arguments and the evidence included in support of the arguments will not be considered in this Report as there was no implied consent at hearing to the presentation of such evidence followed by a motion to amend the pleadings. *See* Principle of Law 4.

The arguments that fall within this category are:

- The doctrine of unclean hands.
- The availability of water from an alternate source. This argument was not developed at hearing although the parties admitted it was possible for alternate sources to irrigate the northern place of use. The case discussing an alternate source of water discusses adequacy, not the mere possibility, of water supply available from another source, and the water rights at issue in that case were

“involved in constant activity during the 20 years of nonuse.” *Beaver Park Water Inc. v. City of Victor*, 649 P. 2d 300, 302-03 (1982). No such evidence was presented at hearing for the claims discussed in this Report.

- Economic/legal obstacles to exercising the rights.
- Futile call asserted as a legal obstacle. This argument is misstated. The futility of a futile call is not due to the animosity between appropriators, but the physical inability of the water to reach the senior appropriator so it may put it to beneficial use.

Claimant also argued that objector: 1) failed to prove there was an extended period of nonuse and failed to prove that claimant intended to abandon its water right, and 2) that no rebuttable presumption was created that claimant intended to abandon the use of Snake Creek water.

The parties’ stipulated to 25 years of continuous nonuse of Snake Creek water on the place of use at issue, and claimant testified that the northern place of use has not been irrigated with Snake Creek water since the late 1980s, ‘86 or ‘87. (4:39) Both periods of continuous nonuse are longer than the Court’s continuum of 10-23 years that results in raising a rebuttable presumption that a water right is abandoned. Consequently, the burden of proof shifted to claimant to provide evidence excusing the long period of nonuse. *See* Principle of Law 6 & 7.

Finally, claimant requested an additional hearing to determine the flow rate of and acres irrigated by claim 40J 144997-00. This request is denied. The hearing for claim 40J 144997-00 was the appropriate time and place to present all evidence concerning the claim. Implied consent was given to present evidence concerning the flow rate as no objections were made to the introduction of evidence concerning the flow rate. Adjustment of the number of acres irrigated in the southern place of use for claim 40J 144997-00 was not raised at hearing. *See* Principle of Law 4.

### ISSUES

1. Is claim 40J 144993-00 completely abandoned?
2. Is claim 40J 144997-00 partially abandoned?

3. What flow rate should be identified by claim 40J 144997-00?
4. Is there sufficient evidence to resolve the issue remarks appearing on claims 40J 144993-00 and 40J 144997-00?

### **FINDINGS OF FACT**

1. Claimant, Jack W. Davies (S Bar B Ranch Co.), and objector, Henry C. Gordon (Gordon Cattle Co.), own ranches with property along Snake Creek, the source at issue.

2. Snake Creek flows in a northeasterly direction beginning in Township 29 North, Range 18 East, eventually flowing into the Milk River in Township 32 North, Range 22 East. (Gordon Ex. 3) Snake Creek flows northeast from objector's ranch to claimant's ranch and then on into the Milk River somewhere around 18 miles to the north. (9:26-27; Gordon Ex. 3)

3. Mr. Davies testified that he has lived and worked on his ranch since 1972. In 1978 he started managing the ranch and overseeing irrigation on the ranch. (4:31)

4. Mr. Gordon testified that he took over his ranch in 1978 from his parents, and has been running it continuously since. (9:23)

5. Both claims identify the same point of diversion, a diversion dam located in the NWSWNE of Section 1, Township 30 North, Range 19 East. Both claims also rely on a ditch to convey water from the claimed point of diversion to the claimed places of use. The ditch runs generally north from the claimed point of diversion. When the ditch enters the south half of Section 36 it forms the eastern boundary of the southern place of use identified by claim 40J 144997-00. After traversing the north end of the "southern place of use," the ditch passes under a private road ["access road"] that accesses private buildings known as the "Snake Creek Place" on land owned by S Bar B Ranch Co. From the access road, the ditch runs generally north through section 36 between Highway 240 and Snake Creek. The ditch then crosses a drainage referred to as Spring Coulee before running west and adjacent to the "northern place of use." (Gordon Exs. 6 & 12)

6. At the outset of the hearing, the parties stipulated to 25 years of continuous nonuse of Snake Creek water, from the years 1990 to 2015, on the "northern place of



use.” The northern place of use is identified as parcel ID nos. 1-7 by claim 40J 144997-00 and is the entire place of use identified by claim 40J 144993-00. (9:16-18)

The access road delineates what is referred to as the “northern place of use” v. the “southern place of use” throughout this Report. (9:32; Gordon Ex. 6, Access Road marked in red ink) Underneath the access road is a culvert. (9:31-32)

#### **CLAIMANT’S ARGUMENT - LACK OF AVAILABLE WATER IN SNAKE CREEK**

7. Claimant presented one argument at hearing to rebut the presumption that it intended to abandon use of Snake Creek water on its northern place of use - lack of available water in Snake Creek.

In order to support the argument that there was a lack of available water in Snake Creek, testimony and evidence was presented concerning: 1) aerial photographs; 2) Department of Natural Resources and Conservation (DNRC) letters sent to post-July 1, 1973 new appropriation holders between the 1990s and 2006 concerning the shortage of water in the Milk River basins and the possibility that they would be requested to forego usage of their claims due to the shortage; 3) two post-July 1, 1973 applications for new appropriations filed by objector; and 4) the filed notices of appropriation used as the historical basis of claims 40J 144993-00 and 40J 144997-00.

#### **Aerial Photograph Interpretation**

8. No aerial photograph evidence or testimony concerning whether the northern place of use was irrigated will be considered in this Report for the following reasons:

- a. Testimony was given concerning whether or not the northern place of use was irrigated based upon interpretation of aerial photographs taken between 1954 and 1987. This testimony is not relevant as the aerial photos predate 1990, the start of the stipulated period of nonuse.
- b. Issues of credibility are raised concerning the testimony based upon interpretation of the post-1990 aerial photographs, dated 1991 and 2005, and the 2005 aerial photograph itself.
  - i. Upon cross examination, claimant’s expert, Ms. Stephenson, testified she had no aerial photography interpretation training and had never prepared an

expert report for a water rights case, nor testified in any other Water Court case. (3:57-58) Ms. Stephenson's aerial photograph interpretation is not credible.

ii. The 2005 aerial photograph presents special concerns of its own. Upon cross examination, Ms. Stephenson testified that the 2005 aerial photograph (S Bar B Ex. 15) was created by her GIS specialist and she did not know the date or month the aerial photograph was taken. (4:14) There is no assurance that the 2005 aerial photograph is authentic. The aerial photograph itself and the testimony based on the aerial photograph are not credible.

iii. Objector's expert, Mr. Yelin did not give his opinion concerning the 1991 aerial photograph.

9. Relevant testimony given during the aerial photograph interpretation portion of the hearing concerned the possibility that the northern place of use could be irrigated by sources other than Snake Creek. Both experts agreed the northern place of use could be irrigated with two additional sources of water, Spring Coulee and Bean Creek.

a. Upon cross examination, claimant's expert Ms. Stephenson agreed the northern place of use could be irrigated by Snake Creek and two other sources of water, Spring Coulee and Bean Creek, both of which intersect the ditch at issue in these proceedings. (4:01-02; 4:08-10; 4:12-14; *See* S Bar B Ex. 11)

b. Objector's expert, Mr. Yelin, testified that since at least 1986, he believed the property north of the road was not irrigated with Snake Creek water, but with two sources not at issue in these proceedings – Spring Coulee and Bean Creek. (1:53-54; 2:10-16; *See* S Bar B Ex. 8)

10. The supposition that other sources irrigate the northern place of use is corroborated by: 1) testimony or evidence from all witnesses that the culvert under the access road was not in usable condition/plugged, thereby disallowing Snake Creek water to reach the northern place of use (*See* Finding of Fact 19); 2) the fact that claimant has supplemental water right claims for Bean Creek water on the majority of the northern

place of use (*See* supplemental claims 40J 145007-00, 40J 145008-00, and 40J 145012-00); 3) claimant's own testimony that the northern place of use could be irrigated with Spring Coulee and Bean Creek water (4:33-34); and 4) objector's testimony that Spring Coulee runs west to east under Highway 240 and that water from Spring Coulee falls into S Bar B's ditch north of the access road. (9:30; *See* Gordon Exs. 6 & 12)

### **Approval/Denial of Mr. Gordon's New Appropriations**

11. Post-July 1, 1973 new appropriations are granted or denied by the DNRC based upon several factors including the physical availability of water and whether the new appropriation will adversely affect existing (pre-July 1, 1973) water rights holders. § 85-2-311(1)(a)-(b), MCA.

12. One of Mr. Gordon's applications for a new appropriation was granted on a tributary to Snake Creek – Ganty Creek. (S Bar B Ex. 19) However, a clear record was not developed during the hearing to link the new appropriation on Ganty Creek to the lack of available water in Snake Creek. No water measurement records were presented concerning the flow rate or size of Ganty Creek. In addition, Ganty Creek's connectivity to Snake Creek was not established. Therefore, its influence on Snake Creek is unknown. Accordingly, the testimony concerning this permit and the permit record itself are given no weight in these proceedings.

13. Another of Mr. Gordon's applications for a new appropriation was denied. This proposed new appropriation was on Snake Creek. (S Bar B Ex. 20) The reason for denial was "Snake Creek water users with very early claimed priority dates are being deprived of their claimed waters, to allow a new right on this stream would only worsen the situation." (S Bar B Ex. 20, Bates No. 398-99, ¶10 of Proposal for Decision, adopted by Final Order, Bates No. 353-54) Once again, there are no specific water measurements concerning Snake Creek included in the DNRC's record. This is a general, conclusory statement. Such a statement is not specifically related to the nonuse of Snake Creek water on claimant's northern place of use. General, conclusory statements do not rebut the presumption that claimant intended to abandon the use of Snake Creek water on its northern place of use. *See* Principle of Law 8.

## **DNRC Letters to Post-July 1, 1973 New Appropriation Holders**

14. Testimony was presented concerning DNRC letters sent to post-1973 new appropriation holders from the 1990s to 2006 (10:09-12) (S Bar B Ex. 19, Bates No. 227-43, 245-51). Objector's expert Mr. Yelin testified about these letters. Based upon his personal experience, gained while working at the Glasgow Regional office of the DNRC, Mr. Yelin testified that DNRC had an agreement with the United States of America (Bureau of Reclamation). Anytime snow pack was below 100% in the Milk River basins, letters were sent to post-July 1, 1973 new appropriation holders. These letters were sent as a warning to post-July 1, 1973 new appropriation holders that they could be shut off. (2:17-19)

15. A review of these letters reveals that they were not specific to any source and corroborates the testimony of Mr. Yelin that the purpose of these letters was to protect existing pre-July 1, 1973 water rights by alerting post-July 1, 1973 new appropriation holders that they may not be able to divert their water right claims.

Again, these letters do not provide specific proof that there was a lack of available water in Snake Creek for senior appropriators such as S Bar B Ranch Co. The testimony concerning DNRC letters sent out to post-July 1, 1973 new appropriation holders in the Milk River basins and the evidence provided does not rebut the presumption that claimant intended to abandon the use of Snake Creek water on its northern place of use.

## **Filed Notices of Appropriation**

16. Testimony concerning the filed notices of appropriation upon which claims 40J 144993-00 and 40J 144997-00 are historically based focused on information contained in the United States of America (Bureau of Reclamation's) Milk River Report.<sup>1</sup>

Claim 40J 144993-00 is based upon a Lorena Burks notice of appropriation.<sup>2</sup>  
Claim 40J 144997-00 is based upon an Eli F. Sayre notice of appropriation.<sup>3</sup>

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<sup>1</sup> The two appropriations at issue here are identified by the Milk River Report in "Certificate No. 2372, E. F. Sayre, et al. and Certificate No. 3050, Chas. J. Kelly, et al." (S Bar B Ex. 22) It is noted that Burks is spelled "Burke," "Burkes," and "Burks" throughout the Milk River Report. For purposes of this Report, it is spelled "Burks" based upon the spelling and signature included in the filed notice of appropriation.

<sup>2</sup> Certificate No. 3050 was compiled by Walter N. Hill, Assistant Engineer, United States Reclamation Service. Mr. Hill certifies that he was employed on the Milk River Project from August to December 1912, and conducted field investigations and personally investigated both recorded, and unrecorded, appropriations of water. Mr. Hill signed Certificate No. 3050 on October 20, 1913. (S Bar B Ex. 22, Bates Nos. 631-641 and 629-630) A recital at the beginning of this certificate states that, because the Burks D.L.E. is irrigated by the Bean Creek system

17. As pointed out during testimony, the Milk River Report is a description of conditions as they existed at that time of its preparation – it is a snapshot, not a historical recount. (4:17-18) Based upon this Master’s review of the Milk River Report (S Bar B Ex. 22), and the testimony from the experts at trial, little is proven other than: 1) Snake Creek water has always been used on the Sayre D.L.E. identified as the SWSE of Section 36, Township 31 North, Range 19 East – the southern place of use claimed and agreed upon by the parties as being actively irrigated by claim 40J 144997-00 (2:00-01), and 2) a combination of Snake Creek and Bean Creek water was used at one point in time on the Burks D.L.E. identified as the SWSE, Section 19 and the N2NW, SWNW of Section 30, Township 31 North, Range 20 East (2:01-03; 4:18-25) (a place of use initially claimed by 40J 144993-00, but amended pre-decree to a different location with no explanation in the record).

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discussed in this certificate and Snake Creek, and because Lorena Burks’ Snake Creek appropriation was not recorded at the time Cert No. 2372 (see discussion below of Cert No. 2372) was completed, it is included in the list of appropriations identified by Cert No. 3050 but is described by Cert. No. 2372. (S Bar B Ex. 22, Bates No. 633, ¶1)

According to Certificate No. 3050, an upper reservoir fed by Bean Creek is diverted by a system of ditches that “cover a considerable portion of the R.Z. Stam and Lorena Burks desert claims.” (S Bar B Ex. 22, Bates Nos. 633-634, Last ¶ on Bates No. 633 – First ¶ on Bates No. 634)

In a December 5, 1912 interview, Charles Kelly, a construction foreman for Mr. Sprinkle, states that the upper reservoir was put in in 1910 and is filled by Bean Creek. (S Bar B Ex. 22, Bates No. 639, ¶¶ 3-6) In a January 14, 1913 interview, James L. Sprinkle states Mrs. Burks filed on Bean Creek to make use of water through two reservoirs [the upper and lower mentioned in this certificate]. (S Bar B Ex. 22, Bates No. 639, ¶¶ 8-10)

The Burks D.L.E. was made on August 28, 1908 for the SWSE, Section 19 and the N2NW, SWNW of Section 30, Township 31 North, Range 20 East. (S Bar B Ex. 22, Bates No. 641, ¶6) The Lorena Burks appropriation for Snake Creek is for 10 second feet with a priority date of February 14, 1911[sic], for irrigation of the SW, SWSE of Section 19 and the N2NW, SWNW Section 30 Township 31 North, Range 20 East. (S Bar B Ex. 22, Bates 631) It is noted, according to the certificate, that the February 14, 1911 Lorena Burks notice of appropriation for Snake Creek was recorded at page 7-38. Reviewing the February 12, 1912 Lorena Burks notice of appropriation for Snake Creek attached to statement of claim 40J 144993-00, it is “Transcribed from Book of Water Right No. 7, Page 38.” Based upon this comparison, the certificate included in the Milk River Report appears to contain a typographical error for the priority date of the Lorena Burks notice of appropriation. The notice of appropriation in the certificate is the same Lorena Burks notice of appropriation at issue in this case and used as the historical basis for claim 40J 144993-00.

<sup>3</sup> Certificate No. 2372 was compiled by I. B. Hosig, Assistant Engineer, United States Reclamation Service. Mr. Hosig certifies that he was employed on the Milk River Project from June to December 1911, and conducted field investigations and personally investigated both recorded, and unrecorded, appropriations of water. Mr. Hosig signed Certificate No. 2372 on March 21, 1912. (S Bar B Ex. 22, Bates Nos. 594-606 and 630A-C) This certificate discusses irrigation of the E. F. Sayre Desert Land Entry [“Sayre D.L.E.”] with Snake Creek water. The Sayre D.L.E. is identified as the SWSE of Section 36, Township 31 North, Range 19 East. (S Bar B Ex. 22, Bates 596, ¶2) The Sayre D.L.E. includes what is identified as the southern place of use in these proceedings. The certificate also discusses the existence of a rock dam in a ditch that is 3 miles long and irrigates land included in the Sayre D.L.E. and the Burks Desert Land Entry [“Burks D.L.E.”] with Snake Creek water. (S Bar B Ex. 22, Bates 596, ¶4)

In a December 20, 1911 interview, James Sprinkle of Sprinkle Brothers stated: 1) they own the Sayre D.L.E. and the Burks D.L.E., and 2) part of the Burks D.L.E. is irrigated from a ditch from Bean Creek. (S Bar B Ex. 22, Bates 597, ¶¶4-8)

Based upon the foregoing, this evidence is not relevant to the question of whether or not claimant intended to abandon the use of Snake Creek water on its northern place of use.

**OTHER EVIDENCE PRESENTED AT HEARING CONCERNING CLAIMANT'S INTENT TO  
ABANDON ITS USE OF SNAKE CREEK WATER**

18. The record contains several other pieces of evidence supporting the presumption that claimant intended to abandon its use of Snake Creek water to irrigate its northern place of use. This evidence is: 1) the lack of use and maintenance of the conveyance system to the northern place of use, 2) the lack of call by claimant against junior appropriators, and 3) the lack of specific water measurements.

**Conveyance System – Lack of Use/Maintenance**

19. The most relevant and credible testimony concerning whether claimant intended to abandon its claims to Snake Creek water for irrigation of the northern place of use concerned the condition and lack of maintenance of the conveyance system to the northern place of use from every witness who took the stand - the two ranch hands, the experts, the claimant, and the objector. Each witness testified or prepared evidence establishing that the culvert under the access road and the ditch that would have allowed Snake Creek water to flow to the northern place of use was not in working condition for at least the stipulated 25 year period of continuous nonuse – 1990 to 2015. Indeed, the record establishes period of continuous nonuse from 1986 to 2015. This is strong evidence that claimant intended to abandon its use of Snake Creek water for irrigation of the northern place of use. *See* Principle of Law 9.

- Henry C. Gordon, objector (9:32-34) Mr. Gordon remembers the culvert under the access road as a kid, but the culvert was not visible during the 2012 site visit, it was plugged.
- Henry C. Gordon (9:29-30; 9:36-39) Over the years, Mr. Gordon personally observed, while driving the Cleveland Road (Highway 240) (*See* Gordon Ex. 6) 1-3 times a day, wash outs in the ditch and a plug in the ditch north of the access road due to S Bar B Ranch Co. travelling over the ditch.

- Henry C. Gordon (9:38-39) Mr. Gordon recalls that maintenance was performed on the system in the early 1970s, 1972-75, after he got out of the Army. He remembers a grader tipped over in the main ditch. However, he observed no further maintenance until after the site visit in 2012.
- Robert J. Lott, ranch hand (11:55-57) Mr. Lott worked for S Bar B Ranch Co. from the summer of 1986 to January 1996, and has worked for Mr. Gordon since April of 1996. His tasks included flood irrigating, farming, and swathing for both employers.
- Robert J. Lott (11:59-12:00; 12:02) Mr. Lott was told that there was a culvert under the access road at one time, but he never saw it - although he wasn't paying attention because he would water to the south [of the access road], but evidently the culvert was plugged because he could never get water to the north.
- Robert J. Lott (12:02) Mr. Lott stated that no maintenance of the ditch north of the access road was done during his time.
- Jim Price, ranch hand (12:09) Mr. Price worked for S Bar B Ranch Co. from 1983-1991 as a ranch hand. His tasks included calving, haying, fencing, irrigating, and working on ditches with a shovel.
- Jim Price (12:09-10) Mr. Price lived in the house at the access road from 1983-1991 and drove across the ditch, using the access road, 2-3 times a day.
- Jim Price (12:10-12) Mr. Price repaired ditches and worked on the ditch in question, which would take a day or two to fix once water was in the ditch and the dirt was soft enough to work.
- Jim Price (12:13-14; 12:16) Mr. Price pulled a ditcher down the ditch in mid-June 1983, but after that there was no maintenance of the ditch. This was the only maintenance work done on the ditch in question. He does not recall water flowing through the culvert under the access road after 1983.
- Lee Yelin, objector's expert (1:48; Gordon Ex. 12) Mr. Yelin attended and photographed the 2012 field investigation. He prepared the explanations under

each photoplate in Exhibit 12. The photographs, and explanations of the photographs, show that the culvert under the access road, if still in place, is silted in (Photoplate Nos. 17 & 18), and that there are numerous plugs and blowouts in the ditch north of the access road (Photoplate Nos. 20-23).

- Deborah Stephenson, claimant's expert (2:47-48) Ms. Stephenson testified that during the 2012 site visit, she saw the location of the culvert under the access road. However, the culvert was not visible, was not functional, and was silted in with dirt.
- Deborah Stephenson (3:35) Ms. Stephenson testified that during the 2012 site visit that south of the [access] road ditches could carry water, but north of the [access] road, the ditches could not carry water due to a plug in the ditch.
- Deborah Stephenson (2:47-48; 3:52-57) Ms. Stephenson testified that the main ditch was in good condition with only a few spots needing maintenance. However, of the 2 miles of ditch discussed (from the POD in Section 1 to the middle of section 25) - 2/3 of which is north of the access road - she walked only a couple hundred yards – less than a ¼ mile of the ditch. Ms. Stephenson did not take any field notes or photographs during the 2012 site visit. Ms. Stephenson stated that north of the road the ditch had some plugs, but she was not sure how many as she did not walk it. Ms. Stephenson also testified upon cross examination that she had not walked through the northern place of use so she did not know about any spreader ditches, cross ditches, or leveling. (4:05-06)
- Jack Davies, claimant (4:38; 5:16) Mr. Davies testified that he personally did the initial work and cleaned out the culvert under the access road after the 2012 site visit. This took him about 1 hour with a shovel.
- Jack Davies (4:35-37; 5:17) Mr. Davies testified that historically, they would drive over the ditch, or around the ditch to observe livestock. In 2012 a culvert was placed in the ditch north of the access road so there was access to the other side of the ditch to observe livestock and an original culvert (30 some years



old) further north was replaced. These culverts are downstream [north] of the access road.

- Jack Davies (4:37; 4:41-42; 5:18) Mr. Davies testified that no routine maintenance of the system had occurred over the past 20 years because there was no water available so there was no need to spend resources on it. The lateral ditches were removed in the late 1980s, but the main ditch remained. He also testified that he agreed with Mr. Lott's testimony concerning the condition of the culvert and ditch between 1986 and 1996, and also with Mr. Price's testimony concerning maintenance of the system. Mr. Davies stated that the only ditch maintenance completed in the north field in the past 10-15 years was replacing the culvert in the south end of the field. (see bullet above this one)
- Jack Davies (4:55-56) Mr. Davies said no maintenance of a ditch is completed if there is questionable water availability, only those ditches where there is a dependable supply of water are maintained as needed.
- Jack Davies (4:56-57) The culvert under the access road was flushed in 2015.

### **Claimant's Lack of Call**

20. Claimant, Mr. Davies, testified he has no understanding of the doctrine of prior appropriation and believes it is the responsibility of the junior appropriator to check with the senior appropriator before taking water – in other words, the senior appropriator should not have to call for water. (5:08-10; 5:20). Mr. Davies also testified that S Bar B Ranch Co. only became aware a number of years ago that it had a claim senior to that of objector, Mr. Gordon. (4:59-5:00) Mr. Davies' statements are discounted by evidence in the record discussed below. Mr. Davies clearly understands the prior appropriation doctrine.

21. During the early 1990s, Mr. Gordon, filed an application for a new appropriation, 40J 71680. (S Bar B Ex. 20) S Bar B Ranch Co. (Jack W. Davies, President) filed an objection to Mr. Gordon's permit application. The permit application record demonstrates that Mr. Davies knew he was a senior appropriator on Snake Creek.

The DNRC Proposal for Decision concerning permit 40J 71680 states “Mr. Davies believes S Bar B is entitled to at least the stock water even though it does have a prior right for irrigation water also. In the last 20 years, Mr. Davies believes that Mr. Gordon has irrigated 19 out of the 20 years and many of those years S Bar B did not have sufficient water to irrigate.” (S Bar B Ex. 20, Bates No. 390, Proposal for Decision Finding of Fact 22, adopted by Final Order, Bates No. 353-54)

The DNRC Proposal for Decision concerning permit 40J 71680 also states, “The adverse effects have not all been caused by Applicant [Henry C. Gordon], rather it is the cumulative effect of all the upstream diversions [on Snake Creek].” (S Bar B Ex. 20, Bates No. 398-99, Proposal for Decision Principle of Law 10, adopted by Final Order, Bates No. 353-54)

22. The above statements indicate water would have been available if S Bar B Ranch Co. had defended its water rights against the illegal (out-of-priority) diversions. Yet, S Bar B Ranch Co. did not investigate whether upstream junior appropriators other than Mr. Gordon were using water at a time that S Bar B Ranch Co. needed Snake Creek water. (5:06-08) Nor did S Bar B Ranch Co. make a call in the past 25 years on junior appropriators such as H & K Cattle and Swansons who are upstream of its ranch on Snake Creek - the only call made was upon Mr. Gordon. (10:41, 5:06-08) And even then the call was made only for stockwater, not for irrigation water. (9:39-40; S Bar B Ex. 20, Bates No. 390-91, Finding of Fact 22)

23. Furthermore, Robert J. Lott, ranch hand, testified that during the ten year period he worked for S Bar B, 1986 to 1996, Snake Creek did have water running in it – it was not dry for the entire 10 year period. (12:04-05) He also testified that the land south of the access road was irrigated with Snake Creek water so there was water available to irrigate with during that period. (12:06-07)

24. The lack of investigation and lack of call made by S Bar B Ranch Co. for its irrigation water, in conjunction with Mr. Lott’s testimony that Snake Creek water was available, evidences an intent on the part of S Bar B Ranch Co. to abandon the use of Snake Creek water to irrigate its northern place of use. *See* Principle of Law 10.

### **Lack of Water Measurements**

25. No specific water measurements were presented. The only evidence concerning water measurements was a generalization provided by objector's expert Mr. Yelin. Mr. Yelin reviewed measurements from Milk River gauging stations above and below Havre, upgradient and downgradient of the properties discussed in this report and based some opinions on this information about water availability in Snake Creek. (2:05-07) However, given the distance until Snake Creek flows into the Milk River, and the number of other sources flowing into the Milk River between the gauging stations, extrapolating availability of water in Snake Creek based upon Milk River measurements is tenuous at best. No weight is given to this testimony.

### **Claimant's Stated Intent**

26. Although claimant unequivocally stated it did not intend to abandon its use of Snake Creek water on the northern place of use (4:57-58), such statements on their own are not enough to rebut the presumption of abandonment. *See* Principle of Law 11.

### **CONCLUSION CONCERNING ABANDONMENT**

27. Abandonment of a water right is a fact specific analysis based upon the totality of the factual record – not just one fact standing alone. *See* Principle of Law 12.

28. Based upon the totality of the factual circumstances and evidence before this Master:

- a. Claim 40J 144993-00 is abandoned and should be dismissed from the adjudication.
- b. Claim 40J 144997-00 is partially abandoned. Parcel ID nos. 1-7 should be removed from the place of use legal land description identified by claim 40J 144997-00.

29. The dismissal of claim 40J 144993-00 moots the issue remark appearing on the claim.

30. The issue remarks appearing on claim 40J 144997-00 are resolved.

The other claim identified by the overlapping place of use issue remark, claim 40J 215225-00, was withdrawn earlier in the adjudication. No overlapping place of use issue exists.

Due to the modified place of use, claim 40J 144997-00 is no longer supplemental to any other claims. Therefore, the issue remark concerning an excessive flow rate for the supplemental rights is no longer relevant. The issue remarks should be removed from the abstract. The supplemental rights information remark should also be removed from the abstract.

#### **FLOW RATE - CLAIM 40J 144997-00**

31. As this Master finds that claim 40J 144997-00 is partially abandoned, the flow rate should be adjusted based upon the record currently before the Master.

32. It appears claimant's counsel, claimant's expert, and claimant itself came unprepared to address this issue at hearing. Ms. Stephenson had no water measurement records, and took no ditch loss measurements or measurements of ditch capacity for either claim involved at hearing. (3:51-52) Claimant testified he didn't know the CFS needed for irrigation south of the road, or the amount of water needed in Snake Creek to irrigate south of the road. (5:02-04) Claimant testified that no actual water measurements or means of conveyance measurements had been taken. (5:02)

33. The GPM/acre ratio established by the statement of claim is 15.88 GPM/acre.

34. Objector argued in its post-hearing briefing that the DNRC's 17.00 GPM/acre guideline should be applied to claim 40J 144997-00. The 17.00 GPM/acre flow rate guideline is more than the GPM/acre ratio (15.88 GPM/acre) established by the *prima facie* statement of claim. The 17.00 GPM/acre flow rate guideline is reasonable to apply in this situation.

35. Based upon the modified place of use, 23.00 acres were irrigated pre-July 1, 1973, and still are irrigated, by claim 40J 144997-00. At 17.00 GPM/acre, the flow rate should be reduced to 391.00 GPM or 0.87 CFS.

#### **PRINCIPLES OF LAW**

1. A properly filed Statement of Claim for Existing Water Right is *prima facie*

proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that demonstrates the fact to be proved is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶33, 357 Mont. 348, 240 P.3d 628.

2. 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.

3. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

4. A judgment of a court is limited to the pleadings and evidence before it. *Ryan v. City of Bozeman*, 279 Mont. 507, 511, 928 P.2d 228, 230 (1996); *Old Fashion Baptist Church v. Montana Dept. of Revenue*, 206 Mont. 451, 457, 671 P.2d 625, 628 (1983); *National Surety Corp. v. Kruse*, 121 Mont. 202, 205-07, 192 P.2d 317, 318-19 (1948). Presentation of evidence not included in the pleadings/prehearing order is not considered by a Court unless implied consent is given at the hearing to the presentation of such evidence, followed by a motion to amend the pleadings. Rule 15(b), M.R.Civ.P.; *Bates v. Neva*, 2013 MT 246, ¶15, 371 Mont. 466, 308 P.3d 114; *Ryan* 279 Mont. at 512-13, 928 P.2d at 231-32; *McJunkin v. Kaufman and Broad Home Systems, Inc.*, 229 Mont. 432, 437-38, 748 P.2d 910, 913-14 (1987). To allow presentation of evidence outside of the

pleadings or to consider evidence where there was no implied consent at hearing to the presentation of such evidence results in prejudice to the other parties involved in a proceeding as they cannot cross examine or develop any kind of case concerning such evidence. *McJunkin*, 229 Mont. at 437-38, 748 P.2d at 913-14.

5. There are two elements for abandonment - intent to abandon and actual nonuser. "Neither an intention to abandon nor nonuser is sufficient: the union of both is indispensable to constitute abandonment." *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923). In *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 431-32, 666 P.2d 215, 217-18 (1983), the Montana Supreme Court stated:

The appropriation of water is based on its beneficial use. When the appropriator or his successor in interest abandons or ceases to use the water for its beneficial use, the water right ceases. Section 89-802, R.C.M., 1947 (repealed 1973). This fundamental principle has long governed the determination of water rights in Montana. In *Power v. Switzer* (1898), 21 Mont. 523, 55 P. 32, this controlling policy of beneficial use was explained:

". . . It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or 'claimed' and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases. (Sections 1880, 1881, Civil Code.)"

6. The Court employs a two-step process for determining abandonment of a water right claim. The objector bears the initial burden of showing a long period of continuous nonuse of the water right claim. This showing raises a rebuttable presumption that the claimant intended to abandon the claim. The burden then shifts to the claimant to explain the long period of nonuse. *Heavirland v. State of Montana*, 2013 MT 313, ¶¶19, 32, 372 Mont. 300, 311 P.3d 813; *In re the Adjudication of Water Rights of the Clark Fork River*,

254 Mont. 11, 15, 833 P.2d 1120, 1123 (1992); *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218.

7. While the “Water Court cannot specify a minimum number of years that must elapse before the burden shift [to the party opposing abandonment] will occur, the continuum stretches from 10-23 years.” *Hardwig v. Taylor Land & Livestock Company, LLC*, Case WC-2005-01 at p. 4, (MT Water Court Order Establishing Standard of Proof and Assigning Burdens of Proof Jul. 31, 2006).

8. The presumption of abandonment that arises from a long period of continuous nonuse cannot be rebutted by simply expressing a hope or desire reflecting a "gleam in the eye philosophy" regarding the future use of water. *Heavirland*, ¶19; *Clark Fork River*, 254 Mont. at 15, 833 P.2d at 1123; *79 Ranch*, 204 Mont. at 433-34, 666 P.2d at 219. To successfully rebut a presumption of abandonment, a claimant must produce “[s]pecific evidence explaining or excusing a long period of non-use of the particular water rights on the specific property ... .” *Heavirland*, ¶32; *Musselshell River*, 255 Mont. at 51, 840 P.2d at 582. “Conclusory statements concerning a variety of negative factors” are insufficient to meet the claimant’s burden. *Musselshell River*, 255 Mont. at 52, 840 P.2d at 582.

9. Lack of efforts to use water rights and the failure to maintain conveyance systems are indicators a water right has been abandoned. *Clark Fork River*, 254 Mont. at 16, 833 P.2d at 1123.

10. “Attributing the lack of available water to unauthorized use by others implies water was available. Failing to assert a water right against these unauthorized uses indicates an intent to abandon the water right.” *Mues v. State of Montana*, Case 41O-238 at p. 10 (MT Water Court Order Terminating Claim 41O 109644-00 Nov. 7, 2013).

11. “[S]tatements of intent by the owner of the water rights are insufficient by themselves to rebut a presumption of abandonment.” *Beaver Park Water, Inc., v. City of Victor*, 649 P.2d 300, 302 (1982).

12. The determination of whether a water right has been abandoned “requires weighing all of the relevant factual circumstances of the case.” *Heavirland*, ¶32. In

weighing the *totality* of those facts and circumstances, objective evidence of the claimant's conduct during the period of nonuse carries more weight than mere subjective expressions of intent or the desire or hope to use the water at some time in the future. *Heavirland v. State of Montana*, Case 41O-97 at p. 11-12 (MT Water Court Order Regarding Abandonment of Claim 41O 47356-00 Sept. 19, 2012) *aff'd Heavirland v. State of Montana*, 2013 MT 213, 372 Mont. 300, 311 P.3d 813.

13. 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.

14. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

15. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

### **CONCLUSIONS OF LAW**

1. Claimant argued that the lack of available Snake Creek water rebutted the presumption that it intended to abandon the use of Snake Creek water on its northern place of use. While lack of available water can rebut the presumption that an intent to abandon a water right exists, there must be specific evidence establishing the lack of available water for the particular place of use as a fact. Claimant failed to present specific evidence concerning the lack of available Snake Creek water to irrigate its northern place of use. Instead, the evidence presented at hearing concerning lack of available Snake Creek water was too general in nature, not relevant, not credible, and/or not clearly or fully developed. Therefore, claimant failed to carry its burden of proof and did not rebut the presumption that it intended to abandon the use of Snake Creek water on its northern place of use due to the lack of available Snake Creek water.

2. Claimant did not maintain/use its conveyance system to the northern place of use from at least 1986 to 2012. Some maintenance of the conveyance system to the



northern place of use occurred after the 2012 site visit, but the evidence does not demonstrate that the 2012 maintenance, or the subsequent 2015 flushing of the culvert under the access road, would achieve conveying water to the northern place of use. The only reason justifying the lack of maintenance/use was a conclusory statement that Snake Creek water was not available so no maintenance/use occurred. A statement not proven at hearing and a statement contradicted by ranch hand Robert J. Lott's testimony that Snake Creek water was available because he could irrigate the southern place of use.

3. Claimant understands the prior appropriation doctrine. Claimant states objector is to blame for the lack of available water in Snake Creek. However, claimant never made a call for its senior irrigation right from Snake Creek on the objector or any other upstream junior appropriator. Claimant did not investigate the use of Snake Creek water by other upstream junior appropriators other than objector. Claimant did not seek placement of a water commissioner on the source nor did claimant certify a case to the Water Court. Claimant's lack of effort and action to enforce its seniority on upstream junior appropriators on Snake Creek evidences an intent to abandon the use of water from Snake Creek for the irrigation of its northern place of use.

4. The evidence offered by claimant to explain its long period of continuous nonuse was not specific, not credible, and/or not relevant. Accordingly, claimant's evidence is not sufficient. Claimant did not carry its burden of proof, and therefore, it did not rebut the presumption that it intended to abandon the use of Snake Creek water to irrigate its northern place of use identified entirely by claim 40J 144993-00 and partially by claim 40J 144997-00. Instead, other evidence developed by the record supports the contention that claimant intended to abandon the use of Snake Creek water to irrigate its northern place of use identified entirely by claim 40J 144993-00 and partially by claim 40J 144997-00.

5. Based upon the totality of factual circumstances and the evidence before this Master:



6.00	NESESW	36	31N	19E	BLAINE
<u>2.00</u>	SESESW	36	31N	19E	BLAINE
TOTAL: <del>13.00</del> 23.00					

**REMARKS:**

~~THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 144993-00, 144996-00, 144997-00, 145000-00, 145005-00, 145006-00, 145007-00, 145008-00, 145009-00, 145012-00, 145013-00.~~

DATED this 24<sup>th</sup> day of February, 2016.

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 Senior Water Master

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