

Montana Water Court
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FILED

JUN 22 2016

Montana Water Court

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

CLAIMANTS: Virginia L. Koss Trust; Jeanne Mae Engebretson;
Margaret A. Bergsagel; Susan L. Snyder; Lucy W. Arnott; Thomas L.
Watson

OBJECTORS: Thomas L. Watson; Kelly C. Orahoad; James J. Orahoad;
Margaret A. Bergsagel; Virginia L. Koss; United States of America
(Bureau of Land Management)

COUNTEROBJECTORS: Thomas L. Watson; Kelly C. Orahoad; James J.
Orahoad

NOTICE OF INTENT TO APPEAR: Bruce A. Christofferson

CASE 40M-9
40M 182861-00
40M 182862-00
40M 182864-00
40M 184898-00
40M 184899-00
40M 184900-00
40M 184901-00
40M 186391-00
40M 186392-00
40M 186394-00
40M 186395-00
40M 186396-00
40M 186398-00

ORDER AMENDING AND ADOPTING MASTER'S REPORT

I. PROCEDURAL HISTORY

A Master's Report was issued in case 40M-9 on December 3, 2015. The Master's Report received objections. Several responses were filed to the objections to the Master's Report. A hearing on the objections to the Master's Report was held in Malta, Montana on April 5, 2016.

On May 10, 2016, the Court issued an Order Regarding Objections to Master's Report and Setting Filing Deadline. The order provided the parties an opportunity to "comment upon, object to, or provide additional evidence regarding the correct point(s) of diversion for claim 40M 182862-00." Responses were received from Koss-Arnott and

from Watson. Koss-Arnott stated that they did not have any substantive comments or objections to the Order.

Watson’s filing indicated that he has no objection to the point of diversion identified by the Court for claim 40M 182862-00, but reiterated a request for an additional point of diversion for either that claim or claim 40M 182861-00. Watson also objected to the addition of a point of diversion for Koss claim 40M 184900-00. The Court declines to alter its May 10, 2016 Order based on Watson’s Response.

II. STATEMENT OF THE CASE

The parties to this action own water rights on Sage Creek and its tributaries in Phillips County. This matter involves objections to a Master’s Report. The Master’s Report was issued after a three day trial in Malta, Montana. The Master’s Report addressed thirteen water rights. The objections to the Master’s Report involve six of those rights.

| Claimant | Claim | Source | Person Objecting to Master’s Report |
|-----------------|---------------|---------------|--|
| Watson | 40M 182861-00 | Sage Creek | Orahood |
| Watson | 40M 182862-00 | Sage Creek | Orahood |
| Koss | 40M 184899-00 | Gumbo Coulee | Watson |
| Koss | 40M 184900-00 | Sage Creek | Watson |
| Watson | 40M 186395-00 | Gumbo Coulee | Watson |
| Watson | 40M 186396-00 | Sage Creek | Watson |

The Watson rights are owned by Thomas L. Watson. Watson was represented by Thomas Sheehy. Watson objected to the Master’s Report and responded to Orahood’s objection.

The Koss rights are owned by the Virginia L. Koss Trust, Margaret A. Bergsagel, Susan L. Snyder, Lucy W. Arnott, and Jeanne Mae Engebretson. Koss et al. were represented by John R. Christiansen and Joseph Breitenbach. Koss did not object to the Master’s Report, but responded to Watson’s objection.

James J. and Kelly C. Orahood were represented by Holly Franz. The Orahoods objected to the Master’s Report and also responded to Watson’s objection.

The names Gumbo Coulee and Unnamed Coulee were used to describe two drainages south of Sage Creek. There was disagreement over which drainage should be called by what name. This order uses the name Gumbo Coulee to describe the drainage immediately south of Sage Creek. The same drainage is also labeled Gumbo Coulee in the Phillips County Water Resources Survey. Gumbo Coulee flows from east to west across the north half of Section 7, T25N, R32E. A second drainage, also located in Section 7 but further south, is referenced in this order as Unnamed Coulee.

A site inspection of the Sage Creek area was conducted by the undersigned judge on April 4, 2016. Most of the parties and all counsel were present. A hearing on the objections to the Master's Report occurred in Malta, Montana on April 5, 2016.

III. OBJECTIONS TO THE MASTER'S REPORT

The abstract attached to the Master's Report describes the means of diversion for claim 40M 182861-00 as a ditch. Orahod objected to the means of diversion, asserting it should have been described as a dike rather than a ditch.

Orahod also objected to the Master's findings regarding place of use and acres irrigated for Watson claim 40M 182862-00. This claim was based on a notice of appropriation filed by Patrick Wickham on June 5, 1915. The Wickham notice of appropriation was filed for irrigation of 320 acres of land in Sections 30 and 31, T26N, R32E. Watson's claim based on this notice includes 620 acres, most of which is not within the boundaries of the lands described in the Wickham notice of appropriation.

Orahod objected that Watson should only be allowed to claim irrigation for lands within the Wickham notice of appropriation. Orahod objected that recognition of Watson's 620 acre claim was an expansion the Wickham right and was not consistent with the intent expressed by Wickham.

In her Report, the Water Master recognized the acreage claimed by Watson even though it was outside the boundaries described in the Wickham notice. The Master concluded that Orahod had the burden of overcoming the prima facie status of Watson's claim, and had not shown that the Watson land was not irrigated at the time the Wickham notice was filed.

Watson objected to the Master's recognition of claim 40M 184899-00. Watson contends this claim was abandoned by Koss and should be terminated.

Watson objected to the point of diversion selected by the Water Master for Koss claim 40M 184900-00. Watson asserts that the point of diversion should be in the E2SESW of Section 6 rather than in the location selected by the Master. Orahood contends the Master's Report is correct, and Koss asserts that an additional point of diversion should be added in the location asserted by Watson.

The Master's Report assigned a 1959 priority date to Watson claim 40M 186395-00. This priority date was based on evidence of dike construction in 1959. Watson objects, contending that a lease agreement for a portion of this area, together with other evidence, justifies an earlier priority date of 1931.

Watson objected to the legal description selected by the Master for the place of use of claim 40M 186396-00. Watson contends that, although the legal description is correct, it should be refined to more accurately reflect the lands he owns and irrigates.

IV. STANDARD OF REVIEW FOR MASTER'S REPORTS

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, 820 P.2d at 1287). 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 Rule 53(e)(2), M. R. Civ. P.; *Geil*, ¶ 22).

V. ISSUES

1. Should the means of diversion for claim 40M 182861-00 be described as a dike?
2. Did the Master correctly describe the place of use and acres irrigated for Watson claim 40M 182862-00?
3. Should the Master have determined that Koss claim 40M 184899-00 was abandoned?

4. Did the Master correctly describe the point of diversion for claim 40M 184900-00?

5. Was the Master's decision to assign a 1959 priority date to claim 40M 186395-00 correct?

6. Should the place of use for claim 40M 186396-00 be narrowed to more accurately reflect lands owned and irrigated by Watson?

VI. ANALYSIS

1. Should the means of diversion for claim 40M 182861-00 be described as a dike?

The Master found that the Watson Ditch, which Watson asserted should be a point of diversion for claim 40M 182861-00, was built after July 30, 1985. Finding of Fact ("FOF") 39, Master's Report, at 12. Based on this finding, the Master concluded the Watson Ditch should not be included as a point of diversion for this claim. The Master determined the point of diversion should be as originally described in the SENENW of Section 6, T25N, R32E.

The Master also found that the original point of diversion for this claim was a dike rather than a ditch. Despite this finding, the abstract for claim 40M 182861-00 shows the point of diversion as a ditch. The abstract has been changed from ditch to dike in accordance with the Master's finding.

Although water rights in this area use dikes to spread water, those dikes are not always used to remove water directly from Sage Creek. Instead, dikes may be used to control water once it overflows the banks of Sage Creek. That means points of diversion identified for this and other rights may not be located directly on the source. Points of diversion may refer to locations where water escapes the banks of Sage Creek prior to being controlled through the use of dikes or other structures.

A visual inspection of the site indicated these characteristics apply to claim 40M 182861-00.

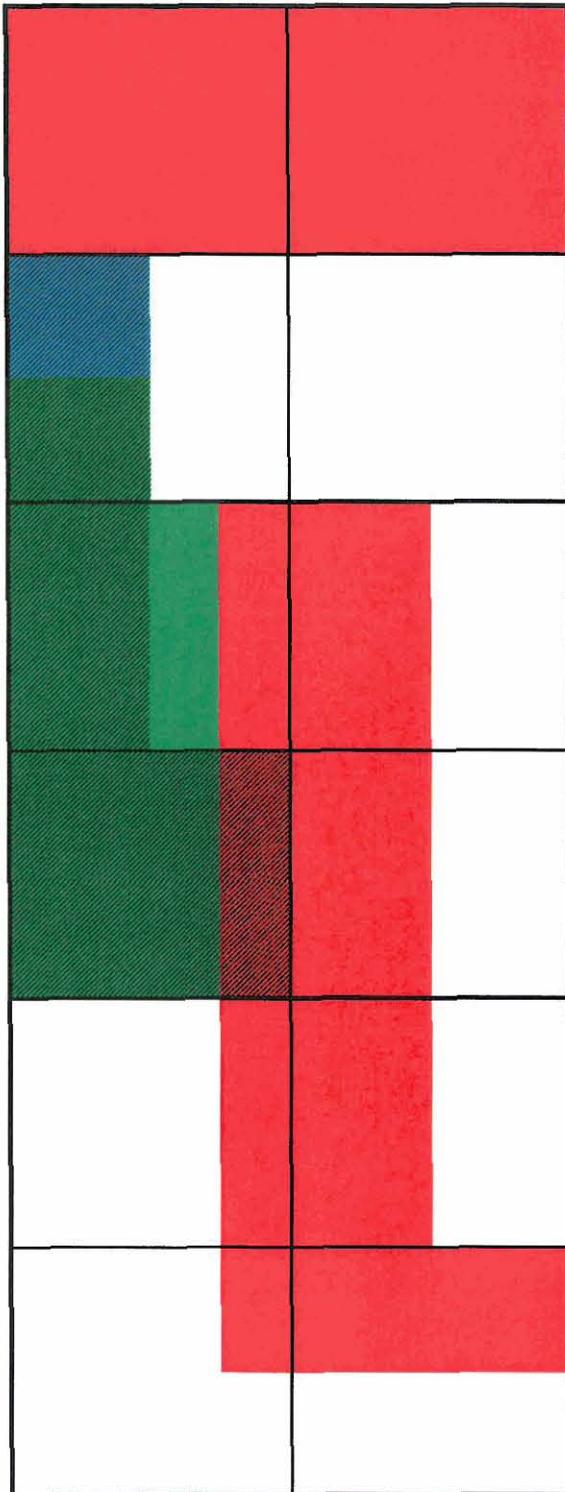
2. Did the Master correctly describe the place of use and acres irrigated for Watson claim 40M 182862-00?

Watson claim 40M 182862-00 was based on the Wickham notice of appropriation, but the majority of the lands claimed were outside the area identified by Wickham. Koss also filed a claim based on the Wickham notice, but the Koss claim lies mostly within the Wickham lands.

The lands identified as irrigated in the Wickham notice of appropriation amounted to approximately 320 acres. The lands claimed by Koss amounted to 300 acres, while Watson claimed 620 acres. The 920 acre total of the two claims substantially exceeded the original Wickham acreage.

The boundaries of the Wickham notice, and the lands claimed by Koss and Watson, are shown below.

Depiction of 40M 182862-00 and 40M 184900-00 Claimed Lands and Wickham Notice of Appropriation



Note: Only 160 acres are claimed by Watson in the N2 of Section 30. The entire N2 is shaded for ease of illustration and does not indicate Watson's irrigation of all 320 acres in the N2 of the Section.

Section 30, T26N, R32E

Section 31, T26N, R32E

Section 6, T25N, R32E



Wickham NOA Lands
Koss/Arnott Lands
Watson Lands
Lands Owned by Watson But Not Claimed

Orahood asserts that Watson's acreage should be limited to lands identified in the Wickham notice. The Master rejected this approach and declined to reduce the acreage of either the Koss or Watson claims to conform to the footprint of the Wickham right. The Master justified this decision by finding that the "evidence was insufficient to show that the acres claimed by either Watson or by Koss were not historically irrigated." FOF 53, Master's Report, at 14. This finding is based on an incorrect interpretation of the facts, and a misstatement of the burden faced by claimants and objectors when they assert ownership of the same right.

Water rights in Montana have prima facie status under Section 85-2-227(1), MCA. The effect of this statute is to place the burden of proof on the objector "to prove by a preponderance of the evidence that the elements of the original claim 'do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.'" *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558 (quoting Rule 19, W.R.Adj.R.).

The prima facie status of a water right can be overcome in a number of ways. Here, two different parties claimed the same water right. The lands irrigated by that water right were defined in the Wickham notice.

The Master's analysis was that both parties could prevail on their claims for the entirety of the Wickham right so long as there was no evidence showing that the lands they claimed were not irrigated. This analysis expanded the Wickham right by nearly three hundred percent.

Several factors operate to overcome the prima facie status of the Koss and Watson claims. First, both parties are seeking to quiet title to the same property interest. Second, both parties claim lands outside the boundaries of the Wickham notice. Third, the combined acreage claimed, and the consequent scope of irrigation, is much larger than the original right.

These factors overcome the prima facie status of both rights and shift the burden of proof to the claimants.

Other than forty acres in the E2E2SW of Section 31, T26N, R32E, there was no evidence that any of the lands claimed by Watson were irrigated by Wickham, and no

evidence that the Wickham right was severed from Wickham land and moved elsewhere. Although the Master correctly observed that the lands claimed by Watson were irrigated, there was no evidence to indicate those lands were irrigated using the Wickham right.

Because of the unique topography of this area, Watson's property may receive some benefit as dispersed water from Sage Creek crosses his land to reach lands within the original Wickham notice. Despite this arrangement, Watson does not have an ownership interest in the Wickham right enabling him to irrigate lands outside the Wickham notice.

Watson's ability to irrigate the lands outside the scope of the Wickham right is covered by other water rights. Among these is 40M 186392-00, which covers the same place of use as his claim for the Wickham right, but with a priority date of June 30, 1951.

Accordingly, it was error for the Water Master to expand the scope of the Wickham right by recognizing the entirety of Watson claim 40M 182862-00. There was no evidence the Wickham right was used on any of Watson's land other than the E2E2SW of Section 31, T26N, R32E. There is also no evidence this right was moved to other Watson land. Watson's claim for Wickham water outside the Wickham place of use is therefore invalid. Watson claim 40M 182862-00 should have been modified to reflect only the lands described in the Wickham notice and currently owned by Watson. The irrigated acreage and place of use on Watson claim 40M 182862-00 is limited to forty acres in the E2E2SW of Section 31, T26N, R32E.¹

Claim 40M 182862-00 was supplemental to 40M 186392-00, 40M 186396-00, 40M 186397-00 (in case 40M-130, which is now closed), and 40M 186398-00, meaning the claims had overlapping places of use. These claims are no longer supplemental with claim 40M 182862-00. The supplemental rights remark will be removed from 40M 182862-00, 40M 186392-00, 40M 186396-00, and 40M 186398-00. The supplemental rights remark will be removed from 40M 186397-00 (in case 40M-130) by separate order. Corrected abstracts for 40M 186392-00, 40M 186396-00, and

¹ Watson owns other lands within the Wickham notice, but did not claim these lands for water right 40M 182862-00. The lands Watson did not claim are in the NWSW of Section 30, T26N, R32E and will not be included in 40M 182862-00. This parcel is shown on the map, *supra*, in blue.

40M 186398-00 are attached to this order to reflect the removal of the supplemental rights remark.

The reduction in acreage requires a corresponding reduction in the quantified volume of Watson claim 40M 182862-00. Watson originally claimed a volume of 930.00 acre-feet for irrigation of 620 acres. This results in a ratio of 1.5 acre-feet per acre. The volume will be calculated using the same 1.5 acre-feet per acre ratio. Therefore, the adjusted volume should be 60.00 acre-feet (1.5 acre-feet per acre x 40 acres). An abstract reflecting the place of use and volume changes is attached to this order.

Likewise, it was error for the Master to allow an expansion of the Koss claim for the Wickham right by recognizing acreage outside the area defined in the Wickham notice. Koss acknowledged at the hearing on the objections to the Master's Report that removal of irrigated acreage outside the scope of the Wickham right would be appropriate. Accordingly, the irrigated acreage and place of use for Koss claim 40M 184900-00 is reduced by forty acres in the W2E2NW and a duplicative twenty acres in the W2SESW, both in Section 31, T26N, R32E.

The volume will also be reduced for Koss claim 40M 184900-00. The claim was originally filed with a volume of 409.23 acre-feet for irrigation of 272.82 acres, resulting in the same 1.5 acre-feet per acre ratio as Watson claim 40M 182862-00.² Therefore, the adjusted volume should be 360.00 acre-feet (1.5 acre-feet per acre x 240 acres). An abstract reflecting these changes is attached to this order.

The points of diversion for Watson's claim should also be changed to reflect the more limited historical place of use on Wickham land. At trial, Watson testified that the Wickham point of diversion was in the W2NE of Section 6. This point of diversion is marked with an "X" and the number "6" on Watson Exhibit 30. It appears the remaining points of diversion for this right, which were located in the SENENW and the NESE of Section 6, should be removed from this right. These changes to the point of diversion are

² The DNRC amended the claimed acreage by increasing the acreage to 310.01, thereby reducing the ratio to 1.32 acre-feet per acre. Because the claims are based on the same notice of appropriation and to maintain consistency between the Watson and Koss claims (40M 182862-00 and 40M 184900-00, respectively), the Court will use the 1.5 acre-feet per acre ratio for calculating the reduced volume for both claims.

being made to permit irrigation of Watson's piece of the Wickham land. The parties will be given a chance to comment on these changes to the point of diversion.

3. Should the Master have determined that Koss claim 40M 184899-00 was abandoned?

Koss claim 40M 184899-00 was based on a notice of appropriation filed by Anton Werginz for a water right from Gumbo Coulee with a December 5, 1934 priority date. This water right is diverted using a dike that intercepts Gumbo Coulee and diverts water northward.

Watson contends the Koss claim from Gumbo Coulee was abandoned. Watson asserts the dike across Gumbo Coulee failed shortly after construction and has not functioned for decades.

Koss asserts that problems with the dike occurred because Watson breached the dike to allow water to flow westward towards his lands in Section 12, rather than northward to Koss lands. Koss argues that damage to the dike was repaired and that it functioned as intended.

The first step in proving abandonment is to show a prolonged period of nonuse. "[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 v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983). "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 (internal citations omitted).

The Master determined that Watson did not show a prolonged period of nonuse.

The record is in conflict regarding historical use of this claim. The Master found that aerial photos showed the dike in existence in 1939, 1953, and 1959. The Master also found that the dike had been periodically maintained.

Although not cited in the Master's findings, the record also shows photos of water flowing northward along the dike. Finally, Watson claimed a portion of the 1934 Werginz right for himself by filing claim 40M 186395-00.

In contrast to this evidence, Watson asserts the ditch never functioned as intended and was not properly maintained by Koss. Watson contends the Master should have accepted his version of events over the one offered by Koss.

A Master's obligation is to base findings on substantial evidence. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Boise Cascade Corp.*, 259 Mont. at 265, 856 P.2d at 221 (internal citations omitted).

The Master's conclusion that there was not prolonged nonuse of claim 40M 184899-00 was supported by substantial evidence. Accordingly, the Master's decision on the abandonment issue will not be overturned.

4. Did the Master correctly describe the point of diversion for claim 40M 184900-00?

The abstract attached to the Master's Report identified the point of diversion for claim 40M 184900-00 as the NWNENW of Section 6, T25N, R32E. The Master's decision was based on the original claim identifying this point of diversion. Watson objected, asserting the point of diversion should be in the E2SESW of Section 6. Koss responded that another point of diversion should be added in the location suggested by Watson. Orahood asserted the Master was correct and that no changes to the point of diversion should be made.

Watson was not able to point out credible evidence showing that the point of diversion in the NWNENW of Section 6 was incorrect. In the absence of such evidence, the Master's decision stands.

Bill Koss testified to water usage below the second bridge. The second bridge is located on Content Road south of Sage Creek and crosses a small unnamed drainage that connects to Sage Creek. This drainage receives water from overflows out of Sage Creek. Sage Creek water flows through the second bridge in Section 7, and continues downstream into Section 6. This water is dispersed below the second bridge rather than from Sage Creek directly.

The Master's findings regarding the single point of diversion identified for this claim were based on substantial evidence. However, the Koss testimony clarified historical usage of this right, and was sufficient to add a point of diversion to this claim in the E2SESW of Section 6. It appears the Master may have overlooked or misapprehended the significance of this testimony in shaping the historical use of this claim. Accordingly, this point of diversion will be added to the abstract for claim 40M 184900-00.

5. Was the Master's decision to assign a 1959 priority date to claim 40M 186395-00 correct?

The Master's assignment of a 1959 priority date to Watson claim 40M 186395-00 was based on evidence of dike construction on Watson land that year. This evidence was included in the claim file and consisted of an affidavit stating the dikes were built in 1959. The affidavit was signed by Roy A. Baeth, who built the dikes. The affidavit was attached to the claim by claimant Thomas Watson. The Baeth Affidavit constitutes substantial evidence, and supports the Master's finding regarding priority date.

Nevertheless, Watson contends the priority date should be 1931. This contention was based on a discussion between Watson and his mother in the early 1990s during which Mrs. Watson referenced a lease of lands in Section 12. Watson offered this lease as evidence that his priority date should be amended to 1931.

The lease does not mention irrigation of the leased lands or construction of dikes. Watson contends irrigation should be assumed because the lands would not have been leased unless they were irrigated. This assumption was not accepted by the Master.

Upon review, the Master's reliance on the Baeth Affidavit was proper. There was insufficient reason to accept Watson's presumption that irrigation occurred in Section 12 prior to 1959. The Master did not misapprehend the evidence or otherwise commit a mistake regarding priority date for claim 40M 186395-00.

6. Should the place of use for claim 40M 186396-00 be narrowed to more accurately reflect lands owned and irrigated by Watson?

The Master defined the place of use for this claim to include 100 acres in the N2 of Section 31, T26N, R32E. Watson objected on the basis that other persons own land in the N2 of Section 31, and that the legal description for this area should be refined to include only lands owned by him.

Watson's request is reasonable, and was not opposed by other parties. Although the Master did not err by describing Watson's place of use as the N2 of Section 31, a refinement of that legal description may avoid confusion in the future.

In his objection to the Master's Report, Watson states he irrigates approximately 100 acres in the northern portion of Section 31, but those 100 acres should be limited to the W2NE and the E2E2NW. Thomas Watson's Objections to Master's Report, January 15, 2016, at 1-2. There are 80 acres in the W2NE and 40 acres in the E2E2NW, which totals 120 acres. Watson states he does not irrigate approximately 20 acres of these lands, so the abstract should only reflect irrigation of 100 acres within these two legal descriptions. Thomas Watson's Objections to Master's Report, January 15, 2016, at 2. However, Watson does not indicate how the 100 acres should be apportioned between these two legal descriptions.

After reviewing Watson Exhibit 30, all 40 acres in the E2E2NW appear to be irrigated, but not all of the W2NE appears to be irrigated. Accordingly, the legal description for irrigation in Section 31 is changed to include 60 acres in the W2NE and 40 acres in the E2E2NW. The abstract for this right has been modified to reflect these changes.

VII. CONCLUSION AND ORDER

1. The means of diversion for claim 40M 182861-00 should be described as a dike.
2. The Master did not correctly describe the place of use and acres irrigated for Watson claim 40M 182862-00. The acreage for this claim should have been limited to lands owned and claimed by Watson that were within the Wickham notice of

appropriation. The point of diversion should be changed to reflect the diversion which delivers water to the reduced place of use. The reduced place of use eliminates the supplemental relationship between claims 40M 182862-00, 40M 186392-00, 40M 186396-00, 40M 186397-00, and 40M 186398-00. The supplemental rights remark should therefore be removed from claims 40M 182862-00, 40M 186392-00, 40M 186396-00, 40M 186397-00 (by separate order), and 40M 186398-00. The place of use and acreage irrigated for Koss claim 40M 184900-00 should also be limited in accordance with the Wickham notice. The volume of both claims 40M 182862-00 and 40M 184900-00 should be adjusted based on the reduced place of use.

3. The Master correctly determined that Koss claim 40M 184899-00 was not abandoned.

4. The Master correctly described the point of diversion for claim 40M 184900-00. However an additional point of diversion should be added to this right.

5. The Master correctly decided to assign a 1959 priority date to claim 40M 186395-00.

6. The place of use for claim 40M 186396-00 should be narrowed to more accurately reflect lands owned and irrigated by Watson.

Abstracts for the thirteen water rights consolidated in case 40M-9 are served with this order for completeness and to confirm that the changes described in the December 3, 2015 Master's Report and the May 10, 2016 Order Regarding Objections have been made in the state's centralized record system.

DATED this *22* day of *June*, 2016.



Russ McElyea
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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 read this Report carefully.

You may file a written objection to the Report if you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the report. The above stamped date indicates the date the Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to the Master's Report 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 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

I. BACKGROUND

There are thirteen claims in this case. Originally, these thirteen claims were consolidated into three separate cases, 40M-9, 40M-18, and 40M-134. The cases were reconsolidated together as case 40M-9. Nine of the claims are owned by Thomas L. Watson (Watson) and are referred to as the "Watson" claims. Although three of the remaining four claims are owned by Margaret A. Bergsagel, Jeanne Mae Engebretson, Susan L. Snyder, and Virginia L. Koss Trust (40M 184898-00, 40M 184899-00, and 40M 184900-00) and one is owned by Lucy W. Arnott and Virginia L. Koss Trust (40M 184901-00), the four claims are referred to as the "Koss" claims. The owners of the Koss claims are collectively referred to as "Koss."

Watson filed objections or counterobjections to all of the Koss claims and objected to his own claims 40M 182864-00, 40M 182391-00, 40M 182392-00, and 40M 186395-00. Koss objected to all of the Watson claims. James J. Orahod and Kelly C. Orahod (Orahod) filed objections or counterobjections to all claims except 40M 182864-00, 40M 184899-00, and 40M 186395-00. The United States of America, Bureau of Land Management (United States) objected to Watson claims 40M 186391-00 and 40M 186394-00. Bruce A. Christofferson (Christofferson) filed notices of intent to appear on all thirteen claims.

Several of the claims received issue remarks resulting from examination by the Department of Natural Resources and Conservation (DNRC), including Watson claims 40M 182864-00, 40M 186391-00, 40M 186392-00, 40M 186394-00, and 40M 186398-00 and Koss claim 40M 184901-00.

A. Family History and Prior Disputes

Watson, Koss, and Orahoods own adjacent land in Townships 25 and 26 North, Range 32 West. The claimants, Watson and Koss, are related. Watson's father, Ray Watson, was the brother in law of William A. Barnard, the father or grandfather of the various Koss parties. Christofferson is Watson's son in law. The claimants have a long history of disagreement concerning the division and use of water.

The land now owned by Watson and Koss was formerly owned and jointly operated by Anton Werginz and Mathias Martinz. (Watson, Hrg. Day 2 at 1:24.) In 1951, William A. Barnard and his brother in law Ray Watson purchased property from Werginz and Martinz. A dispute between Barnard and Ray Watson arose when Barnard transferred his interest to his three children (the predecessors of Koss) instead of to Ray Watson.

On August 19, 1965, the claimants' predecessors reached an agreement to divide the property and the water rights ("the 1965 Agreement"). (A copy of the 1965 Agreement is found in the case file and is also found at Watson Exh. 9 and Koss Exh. 29.) According to the 1965 Agreement:

It is further understood and agreed by and between the parties hereto that all water rights on the lands in question shall be divided equally between the parties of the first part herein and the parties of the second part herein so that said parties of the first part may use one-half of said water on the lands in which they will acquire an undivided interest and the parties of the second part may use one-half of the waters on lands in which they acquire an undivided interest. It is further understood and agreed by and between the parties hereto that they will file a water right on the waters of Sage Creek which are in excess of any water rights now existing on said Sage Creek and as to such water rights on the excess of the waters of Sage Creek, the parties of the first part will be entitled to one-half of such waters and the parties of the second part will be entitled to one-half of such waters.

There was immediate conflict over the interpretation of the 1965 Agreement. Litigation was filed in District Court and appealed to the Montana Supreme Court (found at *Watson v. Barnard*, 155 Mont. 75, 469 P.2d 539 (1970)). As a result of the litigation, the parties to the 1965 Agreement entered into a Stipulation on September 8, 1970 ("the

1970 Stipulation”) and executed deeds dividing the property. (The 1970 Stipulation is found in the case file and is also found at Watson Exh. 10 and Koss Exh. 30.) The 1970 Stipulation also divided the water rights and contained language similar to the 1965 Agreement.

Unfortunately, the dispute between the families continued. Through the 1990s and early 2000s, complaints were filed with the DNRC. Copies of the DNRC reports from some of the complaints are in the claim files. (Copies are also found at Orahood Exh. 1, 2, & 11 and Koss Exh. 36 & 40.) The objections to the claims, particularly the objections of Koss and Watson to each other’s claims, are the continuation of the feud.

B. Summary of Case Proceedings

On February 6, 2014, the United States filed a Motion for Summary Judgment based on Watson’s responses to the United States’ Discovery Requests. The United States’ motion requested that the point of diversion in Section 5, T25N, R32E on claims 40M 186391-00 and 40M 186392-00 be removed. On September 30, 2014, the Water Master granted the United States’ motion and ordered the point of diversion removed. After its motion for summary judgment was granted, the United States confirmed that its objections were resolved.

On January 14, 2014, Watson filed a motion for summary judgment for a determination that the water rights should be divided in half between Watson and Koss. On March 27, 2014, the Master issued an order denying Watson’s motion because there were issues of fact concerning the appropriate division of the water rights.

Watson appeared for the majority of the proceedings pro se. However, prior to hearing, he hired counsel. Koss was represented by counsel for most of proceedings. Orahoods were represented throughout proceedings. Christofferson was not represented by counsel and had a very limited amount of participation in the case proceedings. A hearing was held on September 1st, 2nd, and 3rd, 2015 at the Phillips County Courthouse in Malta, Montana.

C. Issues

To resolve this case, the Master’s Report will address the following issues:

- What is the effect of the 1965 Agreement and 1970 Stipulation on defining the historical use of Watson and Koss?
- Do the Notices of Appropriation support or limit the claims? What was the actual historical beneficial use of the claims and was there sufficient evidence to overcome the Statements of Claim?

II. FINDINGS OF FACT

1. Koss and Watson own adjoining land, including land in Sections 30 and 31, T26N, R32E and Section 6, T25N, R32E. Watson owns property directly east of Koss.

2. Orahoods also own property in the NE of Section 6, T25N, R32E. The Orahood property is adjacent to Watson's property in Section 6. (See Watson Exh. 23, which is the same as Orahood Exh. 13; See also Watson Exh. 39.)

3. All of the claims in this case, except claim 40M 182864-00, are irrigation claims for water spreading or natural overflow from Sage Creek, Unnamed Tributary of Sage Creek, or Gumbo Coulee.

4. Watson claim 40M 182864-00 is for stock water from an Unnamed Tributary of Sage Creek.

5. Claimants provided conflicting testimony on almost every subject, including whether Unnamed Coulee, Unknown Coulee, and Gumbo Coulee are the same source or separate sources and whether Sage Creek and Old Sage Creek are the same source, different sources, or different channels. This Report refers to "Sage Creek" as the source that flows northwest entering the SE of Section 6, T25N, R32E. This Report refers to "Gumbo Coulee" as the source located south of Sage Creek that flows west through Section 7, T25N, R32E. (See the 1968 Water Resource Survey Map for T25N, R32E, found at Koss Exh. 18.)

6. During most times, Sage Creek and Gumbo Coulee flow very little water. However, the sources are subject to extensive flooding during precipitation and snow melt. (Orahood, Hrg. Day 1 at 10:01-10:02; Bergsagel, Hrg. Day 1 at 4:02-4:03; Christofferson, Hrg. Day 2 at 11:07.)

7. The parties have varying levels of personal knowledge about the property and the historical use of water. Watson, Christofferson, and former DNRC engineer Marvin Cross testified for Watson. Watson was born in 1936. (Watson, Hrg. Day 1 at 12:23.) Watson's family began leasing the property in 1943. Watson has personal knowledge since at least 1943. (Watson, Hrg. Day 2 at 1:17.) Bruce Christofferson is 54 years old. He became familiar with the property and water rights sometime after 1982, when he married Watson's daughter. Christofferson began leasing the property from Watson in 1998. (Christofferson, Hrg. Day 2 at 10:42-10:43.)

8. William Koss and Peggy Bergsagel testified for Koss. William Koss is 64 years old and has lived on or near the property his whole life. (Koss, Hrg. Day 2 at 10:04.) Peggy Bergsagel is 62 years old. She never lived on the property, but she visited family on the property during most summers and holidays. (Bergsagel, Hrg. Day 2 at 3:57-3:59.)

9. James J. "Jim" Orahood and former DNRC Adjudication Bureau Chief Jim Gilman testified for Orahood. Jim Orahood's parents and grandparents owned the Orahood property. Jim Orahood's age is not in the record. However, he appears to be middle aged and testified he has been familiar with the land his whole life. (Orahood, Hrg. Day 1 at 9:22.)

A. What is the effect of the 1965 Agreement and 1970 Stipulation on defining the historical use of Watson and Koss?

10. The 1965 Agreement and 1970 Stipulation did little to quell the dispute between the families. The 1965 Agreement attempted to divide the waters of Sage Creek and Gumbo Coulee between the two sides of the family.

11. However, continued disputes and litigation over division of property and water resulted in the 1970 Stipulation. Similar to the 1965 Agreement, the 1970 Stipulation attempted to clarify the division of property between the sides of the family. The 1970 Stipulation had similar language to the 1965 Agreement concerning the division of water rights.

12. Since entering into the 1965 Agreement, the families have argued over the meaning and intent of the agreement and how it affected the division of water. Not surprisingly, many of the objections filed by both Koss and Watson involve the division of water and how the 1965 Agreement should be interpreted and implemented.

13. Watson believes the agreement means all rights should be divided 50/50 and admits he doesn't know what was meant by the provisions dividing excess water. (Watson, Hrg. Day 1 at 11:54-11:59; 2:06-2:34.)

14. Koss argues that based on the 1965 Agreement and 1970 Stipulation, claims to Sage Creek and Gumbo Coulee can only be used on the lands divided pursuant to the 1965 Agreement and 1970 Stipulation and that no other land should have been irrigated. (Koss Exh. 44; Watson, Hrg. Day 3 at 9:24-9:26.)¹

15. No evidence was presented on how the claimants or their predecessors attempted to divide or manage the claims to reflect the 1965 Agreement or 1970 Stipulation.

16. The extent of a water right is defined by its historical beneficial use. While Koss and Watson have been arguing for the past several decades about how water use should be divided, they have been using water for irrigation and/or stock purposes, apparently without regard to the 1965 Agreement and 1970 Stipulation.

17. There is no evidence claimants have attempted to abide by the 1965 Agreement or 1970 Stipulation. Therefore, the 1965 Agreement and 1970 Stipulation had little effect on defining the actual historical beneficial use of the water.

B. Do the Notices of Appropriation support or limit the claims? What was the actual historical beneficial use of the claims and was there sufficient evidence to overcome the Statements of Claim?

18. Prior to the Water Use Act, the filing of a Notice of Appropriation (NOA) was a way to document use of water. There were strict statutory requirements for filing NOAs. Those requirements were found at Sections 89-810 to 89-812, RCM (repealed

¹ Much of the Koss argument concerning the effect of the 1965 Agreement and 1970 Stipulation was made during Koss's attorneys' cross examination of Watson.

1973). If the statutes were complied with, the priority date related back to the date of the posting of the notice instead of the first day of beneficial use.

19. Statements of Claim were often filed based on NOAs. Since Statements of Claim or amended claims of existing rights constitute prima facie proof of their content, the burden of proof is on the objector to overcome the claim. § 85-2-227, MCA.

20. When the Statements of Claim for the irrigation claims in this case were filed, the claimants attached NOAs. The following table reflects the NOAs that Watson and/or Koss filed with each Statement of Claim:

| NOA | SOURCE | WATSON CLAIM | KOSS CLAIM |
|---|--|----------------------------------|-------------------|
| Patrick Wickham 6/1/1914 (Filed 6/5/1915) | Sage Creek | 40M 182862-00 | 40M 184900-00 |
| Anton Werginz 12/5/1934 | Unnamed Coulee | 40M 186395-00 | 40M 184899-00 |
| Ray Watson 6/1935 (Filed 8/6/1971) | Sage Creek Overflow | 40M 186391-00 | 40M 184901-00 |
| Valentine Kandutsch 4/24/1936 | Sage Creek | 40M 186396-00 | None |
| Anton Werginz 6/17/1936 | Sage Creek | 40M 182861-00 | 40M 184898-00 |
| Martinz 8/24/1937 | Sage Creek ² Overflow & Waste | 40M 186398-00 | None |
| Ray Watson 6/1951 | Sage Creek Overflow | 40M 186392-00 & 40M 186394-00 | None |

² The source was identified on the Martinz NOA as “drainage off Sections 29, 30, 31, and 32, the E2 of Section 25, and E2 of Section 35, T26N, R32E.” The Statement of Claim filed based on the NOA was for Sage Creek.

21. Orahood objected that many of the NOAs do not match the claims in that the places of use, points of diversion, and names of sources do not match those identified in the NOA. Orahood argues this indicates expansion, nonperfection, or abandonment.

22. At hearing, Koss and Watson provided conflicting testimony about almost everything including the names of sources; whether sources, roads, bridges, and points of diversion changed locations; what land was irrigated and when; where diversions were located; and whether construction of, maintenance of, and/or interference with diversions, ditches, and dikes occurred. The conflicting testimony on such basic issues indicates a lack of credibility for both Koss and Watson. Because of such conflicting testimony, and the fact that for many claims little other evidence was introduced other than what was in the claim files, the question was whether the burden was met by the objector to overcome the Statement of Claim.

i. Watson Claim 40M 182861-00 and Koss Claim 40M 184898-00

a. Application of the Werginz 6/17/1936 NOA

23. Watson claim 40M 182861-00 and Koss claim 40M 184898-00 were based on the Werginz June 17, 1936 NOA. The NOA identified a dike in the SW of Section 31, T26N, R32E and the place of use as the SW of Section 31, T26N, R32E and all of Section 6, T25N, R32E.

24. Watson claimed 460 acres of irrigation in Section 6, T25N, R32E and Section 31, T26N, R32E. Watson claimed more acreage in Section 31 than identified in the NOA.

25. A 1991 DNRC report noted that an examination of the aerial photos indicated Watson had not expanded his place of use and was not irrigating more acreage. (The 1991 report is located in the claim files and is included at Orahood Exh. 2.)

26. Koss claimed 300 acres of irrigation in Sections 30 and 31, T26N, R32E. The acreage in Section 30 was not identified in the original NOA.

27. The objectors had the burden to prove the claims do not reflect historical use. Although more acreage was claimed than identified on the NOA, no testimony was

presented showing that the claimed acreage was not historically irrigated and testimony was insufficient to prove whether or when the claim was expanded.

b. Watson Claim 40M 182861-00: Validity of Watson Ditch and the Point of Diversion in Section 6

28. Other issues concerning Watson claim 40M 182861-00 involve the point of diversion and “Watson Ditch.”

29. The point of diversion originally claimed was the SENENW of Section 6, T25N, R32E. As noted on the map filed with the Statement of Claim, Sage Creek traveled in a northwesterly direction from the SE corner of Section 6 through Watson’s property, passing through a corner of Orahoods’ property in approximately the SENE of Section 6, and flowing back into Watson’s property. The originally claimed point of diversion was downstream from where Sage Creek exited Orahoods’ property.

30. On November 10, 1993, Watson amended the point of diversion to the NENESE of Section 6, T25N, R32E. The point of diversion appeared in the Preliminary Decree as amended. The ditch associated with the amended point of diversion will be referred to as “Watson Ditch.” The location of Watson Ditch is upstream from where Sage Creek enters Orahood’s property.

31. Orahood asserted that the Watson Ditch was added in the early 1990s and that, as a result of this new diversion, Sage Creek flows into the Watson Ditch instead of continuing through the main channel. (Orahood, Hrg. Day 1 at 9:43, 9:50.) Because of Watson Ditch, Sage Creek now bypasses Orahoods’ property.

32. Prior to the 1990s, there was a ditch system in Section 6, T25N, R32E. (Orahood Exh. 3, p. 2; Orahood Exh. 4, p. 2; Orahood Exh. 7.) Watson testified he constructed the ditch system in Section 6 with his father in 1949. (Watson, Hrg. Day 2 at 1:25.)

33. According to Watson, the Watson Ditch is a result of a natural cutout in Sage Creek that has been in existence for many years. (Watson, Hrg. Day 1 at 12:41; Watson, Hrg. Day 2 at 2:07.) Watson testified that he did not construct the ditch to connect to the creek, but that the natural flow of Sage Creek eventually eroded into his existing ditch

system and silt buildup blocked the main channel through Orahoods' property. (Watson, Hrg. Day 2 at 11:57.) As a result of the silt buildup, water no longer runs through Orahoods' property; water instead goes through the cutout and into Watson's ditch. *Id.*

34. In 1991, complaints were filed with DNRC by Adam and Virginia Koss. The complaints alleged, among other things, that work had been performed by Watson on the Sage Creek streambank and that dike work had been done in Sections 5, 6, 7, and 8, T25N, R32E. (Orahood Exh. 1 & 2.)

35. In 1993, a complaint was filed by Jim Orahood's parents, Marlyn and Wesley Orahood, concerning Watson Ditch. (Orahood Exh. 1.)

36. At the time of the complaints, Marvin Cross was an engineer with DNRC. Cross conducted the field investigation and filed reports resulting from complaints filed with DNRC. (Cross, Hrg. Day 2 at 3:32.) Cross testified Watson Ditch looked like it was caused by overflow. (Cross, Hrg. Day 2 at 4:11.) However, he admitted it had been a long time since the investigations and that he couldn't recall all of the details. (Cross, Hrg. Day 2 at 4:20.) Some of Cross's testimony appeared to conflict with reports he filed after the field investigation. The Master finds the reports and correspondence in 1991 and 1993 to be more credible than Cross's recollections at hearing.

37. Correspondence after the 1991 field investigation indicated a new ditch and dike system was diverting water from Sage Creek for use in Section 6. (Orahood Exh. 1, Bates Stamp 2.) DNRC noted that a substantially larger portion of Sage Creek was flowing down the Watson Ditch than the original creek channel, resulting in an expansion of the claim. (Orahood Exh. 1, Bates Stamp 2; Koss Exh. 40.) "Not only is this erosion threatening the integrity of your ditch, but it is also by-passing the primary creek flow around Orahood's diversion." (Orahood Exh. 1, Bates Stamp 2.)

38. Jim Gilman was employed with DNRC for 30 years in various positions, including as former Adjudication Bureau Chief. Based on Gilman's analysis of aerial photos and the Water Resource Survey, he concluded that Watson Ditch was not in use prior to 1973 and that Watson Ditch was constructed sometime between July 30, 1985 and August 18, 1991. (Orahood Exh. 3 & 4; Gilman, Hrg. Day 1 at 11:35-11:37.) He

testified that the ditch is not visible on the Water Resource Survey Map, not referenced in the Water Resource Survey field notes, and is not visible on the October 1980 and July 30, 1985 aerial photos. (Gilman, Hrg. Day 1 at 11:19-11:35.)

39. The objectors had the burden of proof to show Watson Ditch was not historically used. That burden was met; the record does not support the historical use of Watson Ditch. Watson Ditch was added between July 30, 1985 and August 18, 1991. The construction of the ditch contributed to a change in the flow of Sage Creek away from Orahood's property and onto Watson's property.

c. Koss Claim 40M 184898-00: Source and Alleged Abandonment of West Dike

40. The other issues concerning Koss claim 40M 184898-00 involve the source and the potential abandonment of "West Dike."

41. The Werginz 1936 NOA identified the source as Sage Creek. On the 40M 184898-00 Statement of Claim, Sage Creek was also identified as the source. During examination of the claim, DNRC corrected the source to Unnamed Tributary of Sage Creek. Thus, the source of the claim appeared in the Preliminary Decree as Unnamed Tributary of Sage Creek.

42. The parties appear to agree that the source should be Sage Creek.

43. Watson and Orahood filed objections to this claim. The testimony at hearing concerning the objections involved the point of diversion and alleged abandonment of the "West Dike."

44. The point of diversion associated with West Dike is located in W2W2SW of Section 31, T26N, R32E.

45. Testimony reflects that West Dike has been in existence since at least 1943. Although it had a history of breaches and holes, repairs were done. Watson testified West Dike was already in existence when he first came to the property in 1943. (Watson, Hrg. Day 2 at 1:20.) William Koss testified he fixed the west dike in the 1970s. (Koss, Hrg. Day 2 at 9:17.) Peggy Bergsagel testified that repairs were made to the dike in 2009 or 2010. (Bergsagel, Hrg. Day 1 at 4:25.)

46. Although there was testimony that the West Dike has been in various stages of repair or disrepair, Watson failed to present enough evidence to meet the first element of abandonment, a long period of nonuse. However, it appears the source should be Sage Creek, as originally claimed.

ii. Watson Claim 40M 182862-00 and Koss Claim 40M 184900-00

a. Application of the Wickham 6/1/1914 NOA

47. Watson claim 40M 182862-00 and Koss claim 40M 184900-00 were based on the Wickham NOA filed June 5, 1915 for a June 1, 1914 priority date. The NOA was for Sage Creek with use in the SW and W2NW of Section 31 and the W2SW of Section 30, T26N, R32E. The acreage identified in the NOA totaled approximately 320 acres.

(Watson, Hrg. Day 1 at 12:07.)

48. Koss claimed 300 acres of irrigation. Most of the acreage was included in the Wickham NOA.

49. Watson claimed 620 acres, most of which was not included in the Wickham NOA. At hearing, Watson also requested to add 40 acres in the NWSW of Section 30, T26N, R32E, land he did not claim, but that was identified on the NOA. (Watson, Hrg. Day 2 at 2:38-2:39.)

50. Orahood argued there was an expansion of the original appropriation, specifically as to the acreage of Watson's claim. A 1933 Land Classification Record for Phillips County (Watson Exh. 29), identified Nellie Pennington as the owner of 115 acres in Sections 30 and 31, T26N, R32E. A handwritten note on the record indicates 39 acres of irrigation.

51. Although Watson admitted the Wickham appropriation was for Sections 30 and 31, (Watson, Hrg. Day 1 at 12:13), he asserted water had always been flooding over the land that he claimed as his place of use. (Watson, Hrg. Day 1 at 12:19.)

52. It is unlikely that all of the land claimed by Watson and Koss was irrigated by June 1, 1914. However, the 1933 Land Classification does not provide sufficient evidence to overcome the Statements of Claim. Nellie Pennington apparently owned 155 acres in Sections 30 and 31, but it is unclear who else owned land in those sections and

whether irrigation was occurring on other acres within Sections 30 and 31. It is also unclear whether Nellie Pennington owned property now owned by Watson or by Koss. Finally, it is not clear who added the indication that 39 acres were irrigated.

53. Although the NOA does not appear to match Watson's claim, evidence was insufficient to show the acres claimed by either Watson or Koss were not historically irrigated.

54. Based on William Koss's testimony, Koss believes claim 40M 184900-00 has a 1915 priority date, a later priority date than Watson's claim 40M 182862-00. (Koss Hrg. Day 2 at 9:01.) Koss wanted both the Koss and Watson claims to reflect the June 5, 1915 priority date. However, this appears to be based on the assumption that the NOA would be challenged or that the claims have differing priority dates. There was little testimony to challenge the NOA and both claims appeared in the Preliminary Decree with a June 1, 1914 priority date. The Master sees no reason to change both claims from June 1, 1914 to June 5, 1915.

55. Although the Wickham NOA may not have complied with the statutory requirements for filing the NOA, in that it appears it was not filed with the County Clerk within 20 days of the appropriation, the objectors did not provide sufficient evidence to show irrigation was not occurring by June 1, 1914.

b. Watson Claim 40M 182862-00: Point of Diversion and Amendment to the Place of Use

56. Like claim 40M 182861-00, Watson amended claim 40M 182862-00 to add Watson Ditch. As previously discussed, Watson Ditch was not historically part of Watson's claims.

57. Watson also requested to amend the claim to add 40 acres of land in Section 30, T26N, R32E. Those acres were included in the Wickham NOA, but were not described on Watson's Statement of Claim. Watson testified he inadvertently left them off the claim. (Watson, Hrg. Day 2 at 2:39.)

58. There was no other evidence to support adding acreage to this claim other than the acres were included on the NOA and Watson inadvertently left them off.

Watson did not meet his burden to overcome the Statement of Claim and add acreage to the claim.

c. Koss Claim 40M 184900-00: Source

59. Like Koss claim 40M 184898-00, the source of claim 40M 184900-00 appeared in the Preliminary Decree as Unnamed Tributary of Sage Creek. However, the Statement of Claim specified the source as Sage Creek.

60. Claimants agreed the source should be Sage Creek. (Koss, Hrg. Day 2 at 8:54; Christofferson, Hrg. Day 2 at 10:47; Watson, Hrg. Day 2 at 2:35.)

iii. Watson Claim 40M 186395-00 and Koss Claim 40M 184899-00

a. Application of the Werginz 12/5/1934 NOA

61. The Werginz December 5, 1934 NOA for all of the flow of Unnamed Coulee (Gumbo Coulee) was filed with Watson claim 40M 186395-00 and Koss claim 40M 184899-00. The NOA was for use in Section 6, T25N, R32E.

62. Koss claimed acreage in Section 6, T25N, R32E and Watson claimed acreage in Sections 7 and 12, T25N, R32E.

63. Watson's claim does not match any of the places of use described in the NOA. Although there was a question about the type of right and priority date of Watson's claim, objectors did not provide evidence to show the place of use was not historically irrigated. However, based on the issues addressed in the next subsection of this Report, there was testimony to show the NOA may not be a credible basis for the claim based on evidence of when dikes were built.

b. Watson Claim 40M 186395-00: Type of Right and Priority Date

64. The claimed type of right and priority date of Watson claim 40M 186395-00 were also at issue. Watson's claim appeared in the Preliminary Decree as a "use" right with a January 6, 1931 priority date. Although the Werginz NOA was filed with his claim, he asserted this claim is a "use" right not a "filed" right. (Watson, Hrg. Day 2 at 2:27, 2:29.)

65. The claim file indicates DNRC categorized the claim as a “filed” right, likely because Watson filed the Werginz 1934 NOA with the Statement of Claim. The 1931 priority date was based on an amendment filed by Watson in 1995.

66. Watson asserted he did not intend to base this claim on the 1934 NOA but that he intended it to be a “use” right. (Watson, Hrg. Day 2 at 2:27, 2:29.)

67. Watson based the 1931 priority date on a 1931 lease and a 1994 affidavit by his mother, Laura Watson. (Both the lease and the affidavit are in the claim file with the 1995 amendment.) Laura Watson’s affidavit stated her family used “gumbo coulee drainage” since 1931 and “all I can say to this is the area I have mentioned, has always gotten the water and produced hay... .”

68. In an area where land is generally flooded during times of precipitation and runoff, Laura Watson’s affidavit is unclear as to whether there was intent to irrigate in 1931. Her affidavit is also not specific enough to tell whether the land she refers to is the land Watson claimed in Section 12. Additionally, the 1931 lease does not refer to irrigation.

69. Filed with the Statement of Claim was the affidavit of Roy A. Baeth. The affidavit stated the dikes in Section 12 were constructed in 1959.

70. Claim 40M 186395-00 is for water spreading. Water spreading, as opposed to natural overflow, includes systems of dams, dikes and/or ditches. The record does not indicate there was any intended irrigation as early as 1931. The earliest indication of an intent to irrigate through a water spreading system correlates with the construction of dikes in 1959.

71. The claim appears to be a “use” right for water spreading with a 1959 priority date.

c. Koss Claim 40M 184899-00: Alleged Abandonment of Werginz Dike

72. The other issue concerning the Koss claim was whether the point of diversion and dike associated with the point of diversion, “Werginz Dike,” was abandoned.

73. Watson asserted the claim was abandoned and was not historically used because the Werginz Dike never worked and always had holes. (Watson, Hrg. Day 1 at 12:23, 3:38.) Koss testified that Watson interfered with the dike and made cuts in it. (Koss, Hrg. Day 2 at 3:42; Orahoo Exh. 2.) Watson, on the other hand, testified Koss dug the dike open in 1988 and that Watson simply plugged Koss's construction. (Watson, Hrg. Day 1 at 3:39.)

74. Koss testified that he performed work on the dike in 1970. (Koss, Hrg. Day 2 at 9:16.) Watson testified no repairs were made prior to 1970. (Watson, Hrg. Day 2 at 2:24.)

75. Werginz Dike is visible on the 1939, 1953 and 1959 aerial photos. (Koss Exh. 28, Bates Stamp 807-808; Orahoo Exh. 6.)

76. Based on aerial photos, the Werginz Dike has existed since at least 1939. There may have been holes in the dike and Watson may have interfered with the dike. However, the dike has been periodically maintained and used. Watson did not provide enough evidence to establish the first element of abandonment, a long period of nonuse.

iv. Watson Claim 40M 186391-00 and Koss Claim 40M 184901-00

a. Application of the Ray Watson 1971 NOA

77. Watson claim 40M 186391-00 and Koss claim 40M 184901-00 were based on a NOA filed by Ray Watson on August 6, 1971 for all of the overflow of Sage Creek with a June 30, 1935 priority date.

78. According to objections, Ray Watson's 1971 NOA was not a credible filing and appeared to duplicate other earlier NOAs.

79. Watson confirmed that Ray Watson was not in the area in 1935. (Watson, Hrg. Day 2 at 2:40.) Watson testified he believed when his father filed the NOA in 1971, he relied on conversations with Werginz and Martinz. *Id.* However, Werginz and Martinz filed their own NOAs for Sage Creek in the 1930s.

80. At hearing, Watson testified his claim 40M 186391-00 should be a "use" right with a June 30, 1935 priority date. *Id.*

81. Both Watson and Koss filed claims based on NOAs actually filed in the 1930s, as well as claims based on the NOA filed in 1971. The claimed places of use for Watson claim 40M 186391-00 and Koss claim 40M 184910-00 are also included on other claims that are based on earlier NOA filings.

82. Other than the Ray Watson NOA, filed thirty years after the supposed appropriation, there is no evidence supporting a 1935 priority date for claims 40M 186391-00 and 40M 184901-00.

83. Because Ray Watson was not on the land in 1935 and Werginz (on June 17, 1936) and Martinz (on August 24, 1937) had already filed NOAs for uses of water from Sage Creek in the 1930s, the NOA does not provide a credible basis for claims 40M 186391-00 and 40M 184901-00.

b. Watson Claim 40M 186391-00: No Supporting Evidence

84. Watson did not provide any evidence to support a “use” right with a 1935 priority date. Additionally, other than the priority date, claim 40M 186391-00 appears to duplicate claims with later priority dates, including claim 40M 186392-00 which was based on the Ray Watson 1951 NOA.

c. Koss Claim 40M 184901-00: Other Supporting Evidence

85. Koss provided evidence of water use beginning in the 1950s.

86. Claim 40M 184901-00 appeared in the Preliminary Decree as a natural overflow claim for irrigation of 727.82 acres, with a point of diversion in the N2 of Section 8, T25N, R32E and a June 30, 1935 priority date. On July 26, 2011, Koss filed a request to amend the claim to 552.82 acres of water spreading with three points of diversion. The means of diversion was amended to include dikes. Content Road, a portion of which runs through the SESE of Section 6, T25N, R32E, was identified as being used as the dike in the E2NE of Section 7, T25N, R32E. (Koss Exh. 38.)

87. During hearing, William Koss clarified the claim should be a “use” right with a June 30, 1951 priority date, around the date when his grandfather purchased the property. (Koss, Hrg. Day 2 at 9:39-9:43.) He also testified that water comes from the “second bridge” (also called “middle bridge”) on Content Road and that Content Road

acts as a dike. (Koss, Hrg. Day 2 at 9:43, 10:27.) During larger flows, the creek bottlenecks at the Content Road and flows through the second bridge. (Koss, Hrg. Day 2 at 8:48.)

88. Watson asserted that prior to 1973, water did not flow to Koss' land as claimed because the second bridge did not exist in 1973. (Watson, Hrg. Day 2 at 10:49.) Based on Watson's testimony, originally water flowed over the road. The road tended to wash out and be rebuilt. Eventually the road ended up higher and a bridge was added. (Watson, Hrg. Day 2 at 10:07.) It is unclear when the bridge was constructed. While Watson claimed the bridge did not exist until after 1973, Koss stated it was before 1973. (Watson, Hrg. Day 2 at 10:27.)³

89. In an August 10, 2011 memorandum (filed in case 40M-18 and found at Koss Exh. 39), DNRC Water Resource Specialist Craig Karge concluded that there was a water spreading system and that the claim should be a "use" right. Karge stated that during years of good spring runoff, the place of use could be irrigated by water from Sage Creek.

90. Even though the Ray Watson 1971 NOA for a 1935 priority date does not provide a credible basis for this claim, Koss presented sufficient evidence to show an irrigation system in place around 1951.

v. Watson Claim 40M 186396-00

a. Application of the Kandutsch 4/24/1936 NOA

91. Watson claim 40M 186396-00 was based on the Kandutsch NOA for a 1936 priority date from "Old Sage Creek." The NOA described a dike in the SW of Section 31, T26N, R32E.

92. The Statement of Claim identifies the source as Old Sage Creek Coulee and the point of diversion as W2 of Section 32, T26N, R32E. A map filed with the Statement of Claim identified Old Sage Creek Coulee as a source that flowed northeast from Section 5, T25N, R32E into Section 32, T26N, R32E. (Koss Exh. 13, Bates Stamp 696-

³ The Master notes that the parties could have introduced county records or other documentary evidence to establish when the second bridge and Content Road were constructed. However, neither Watson nor Koss introduced any documentary evidence to support their assertions.

97.) The Water Resource Survey identifies Old Sage Creek as the same source Watson identified on the map filed with the Statement of Claim as Old Sage Creek Coulee. The claim appeared in the Preliminary Decree as corrected by DNRC, with the source as Sage Creek.

93. Orahood asserted that since Watson claimed Old Sage Creek, he did not intend to claim Sage Creek. Therefore, the claim for Sage Creek is not credible.

94. Testimony concerning Old Sage Creek is unclear. Watson testified water has shifted and that Old Sage Creek was an old channel of Sage Creek. (Watson, Hrg. Day 2 at 2:05.) He also testified that in the 1950s, someone put a dike across Old Sage Creek Coulee which changed the flow of water. (Watson, Hrg. Day 2 at 2:06.) However, Watson also referred to a channel in Section 6, T25N, R32E, as Old Sage Creek or the old main channel. (Watson, Hrg. Day 1 at 11:50.)

95. Old Sage Creek may have been a separate source or an old channel of Sage Creek. There was no clear evidence that what was originally filed as Old Sage Creek was not the same as Old Sage Creek Coulee and is not what is now referred to as Sage Creek. Therefore, there is insufficient evidence to support any change.

b. Watson Claim 40M 186396-00: Amendment to Place of Use

96. Watson's Amended and Supplemental Proposed Findings of Fact and Conclusions of Law requested to add land in the W2E2 and E2E2W2 of Section 31, T26N, R32E. However, the Master cannot find a record of a motion to amend nor any testimony or documentary support for the amendment.

97. Watson did not provide sufficient support to add additional acreage to the claim.

vi. Watson Claim 40M 186398-00

a. Application of the Martinz 8/24/1937 NOA

98. Watson claim 40M 186398-00 is based on the Martinz August 24, 1937 NOA for waste and overflow from the drainage off Sections 29, 30, 31, and 32, the E2 of

Section 25, and E2 of Section 36, T26N, R31E. Watson filed the Statement of Claim for “Sage Creek.”

99. Orahood asserted there was no relationship between the place of use on the NOA and the claimed right and that the claim should be dismissed.

100. The place of does not match the Martinz August 24, 1937 NOA. However, there was little testimony and evidence presented on this claim. Objectors did not meet their burden to overcome the Statement of Claim and show the claimed place of use was not historically irrigated.

b. Watson Claim 40M 186398-00: Amendment to Point of Diversion

101. On March 5, 2012, Watson filed a motion to amend to remove the point of diversion in the W2NW of Section 30, T26N, R32E.

102. Except the assertion that the claimed place of use did not match the NOA, there was no significant testimony on this claim.

103. There is not enough evidence to support any corrections other than to remove the point of diversion as requested by Watson.

vii. Watson Claims 40M 186392-00 and 40M 186394-00

a. Application of the Ray Watson 1951 NOA

104. Watson claims 40M 186392-00 and 40M 186394-00 were based on the Ray Watson 1951 NOA. Claim 40M 186394-00 was withdrawn as a duplicate of claim 40M 186392-00. The testimony and evidence did not specifically address whether the NOA matched claim 40M 186392-00.

b. Watson Claim 40M 186392-00: Summary Judgment and Amendments to Place of Use and Volume

105. Based on the September 30, 2014 Order Granting Summary Judgment, the Point of Diversion in the SWSW of Section 5, T25N, R32E was removed.

106. On March 5, 2012, Watson filed a motion to amend to include the portions of claim 40M 186394-00 that were not duplicated on claim 40M 186392-00. The

amendment increased the acreage of claim 40M 186392-00 from 620.00 acres to 997.00 acres. Watson also requested to amend the volume from 930.00 Ac-Ft to 1,994.00 Ac-Ft.

107. A March 2, 2012 DNRC memorandum indicated data sources supported irrigation of 997.00 acres and the 1,994.00 Acre-Ft volume represented the DNRC guideline for water spreading at 2.00 Ac-Ft per acre. (The memorandum was filed in case 40M-134 and is also found at Watson Exh. 27.)

108. No testimony or evidence was presented disputing the proposed acreage and volume. Based on the Statement of Claim for 40M 186394-00 which included the proposed added acreage, Watson's amendment, and the DNRC memorandum, the corrections may be made.

viii. Watson Stock Claim 40M 182864-00

109. Claim 40M 182864-00 is a stock claim. On March 5, 2012, Watson filed a motion to amend the point of diversion and place of use to the NWNWSE of Section 32, T26N, R32E.

110. A March 5, 2012 DNRC memorandum indicated the amendment would resolve the issue remark on the claim concerning the reservoir. (The memorandum was filed in case 40M-134 and is also found at Watson Exh. 27.)

111. There was no significant testimony concerning this claim. The amendment may be accepted to resolve the issue remarks.

III. PRINCIPLES OF LAW

1. The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights. § 3-7-224, MCA.

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to § 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 the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

3. 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.

4. The weight of evidence and the credibility of witnesses are exclusively within the province of the trier of fact. *Garrett v. State*, 2005 MT 197, ¶ 35, 328 Mont. 165, 119 P.3d 55.

5. In a determination of abandonment, the objectors bear 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. *In re the Adjudication of Water Rights of the Clark Fork River*, 254 Mont. 11, 15, 833 P.2d 1120, 1123 (1992); *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983). The finding of abandonment depends upon the entire factual circumstances surrounding the case. *Heavirland v. State*, 2013 MT 313, ¶ 36, 372 Mont. 300, 311 P.3d 813.

6. Claims classified as water spreading do not receive a quantified flow rate. However, they receive a quantified volume. Claims classified as natural overflow do not receive a quantified flow rate or volume. The classification of the claims as water spreading and natural overflow reflect that the claims are “dependent on the availability of water through natural runoff rather than the need of the crops. In other words, there is no control of what is coming into the delivery system.” DNRC Water Right Claim Examination Manual, Chapter VII., Part B. 3. (b) & (c).

7. Prior to the Water Use Act, there was a statutory procedure by which water users could document their existing water rights. Section 89-810, RCM (repealed 1973) provided for the filing of a Notice of Appropriation. Section 89-810 placed several requirements on the acquisition of a filed water right. For example, the appropriator was required to post a notice at the intended point of diversion with the quantity of water claimed, purpose, intended place of use, means of diversion, date of appropriation, and name of appropriator. Within 20 days of the date of appropriation, a notice of appropriation was required to be filed with the county clerk and recorder. Compliance

with the statutory requirements yielded several benefits, including the benefit of relating the priority date back to the date of posting the notice. § 89-812, RCM (repealed 1973).

8. Admissibility of Notices of Appropriation filed prior to enactment of Sections 89-810 through 89-814, RCM (repealed 1973) is governed by the current Montana Rules of Evidence. Many notices lack specific information regarding historic water usage, or they conflict with other evidence, or they grossly overstate the extent of historic beneficial use. These defects may render a notice valueless, but they pertain to the weight and credibility of the notice rather than its admissibility. They should be treated as any other prospective exhibit, with their admission governed by the rules of evidence. If admitted, their weight and ultimate value should be measured like any other document before a court. *Danreuther Ranches v. Farmers Cooperative Canal Company et al.*, Case 41O-209, (MT Water Court Order Regarding Admissibility of Notices of Appropriation and Burden of Proof Jan. 31, 2013).

9. Prior to July 1, 1973, when the Montana Water Use Act became law, a water user could change the point of diversion, place of use, or purpose of a water right by simply implementing the change. The only restriction was that the change could not cause injury to other water users. § 89-803 (repealed 1973). The burden was on the party claiming an injury to prove that the change to the water right at issue adversely impacted their ability to exercise their water rights. *Hansen v. Larsen*, 44 Mont. 350, 353, 120 P. 229, 231 (1911).

10. Issues remarks must be resolved as part of the adjudication process. § 85-2-248, MCA. 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. § 85-2-248(3), MCA.

IV. CONCLUSIONS OF LAW

1. The claimants likely expanded their use of water over the years by diverting more water, adding acreage, and constructing additional diversions. Claimants essentially moved as much water as they could to their respective properties.

2. Although water use has probably been expanded, the burden is on the objectors to overcome the Statements of Claim and present evidence that the claims do not accurately reflect the historical beneficial use. To a great extent, the recommendations in this Report reflect the objectors' failure to meet their burden of proof.

3. The Water Court is obligated by statute to adjudicate water rights with priority dates before 1973. § 3-7-501 and § 85-2-214, MCA. The Water Court is limited by the documentary evidence and live witnesses available. In this case, Watson has personal knowledge dating back to the 1940s and William Koss has personal knowledge from the mid-1950s. However, due to the family dispute between Watson and Koss, the credibility of the claimants' testimony at hearing was weak. The conflicting testimony on every subject reflects the family feud as well as the effort of each side to spin the facts to their own benefit. As a result, the Master placed little weight on this testimony.

4. As emphasized above, the Water Court is limited by the available evidence. To the extent the evidence showed the claims did not reflect the historical use, the Master will recommend those changes and expansions be eliminated. However, to the extent evidence failed to overcome the Statements of Claim, the Master will recommend claims remain as they appeared in the Preliminary Decree.

5. Despite the 1965 Agreement or the 1970 Stipulation, the claimants used water on their respective properties and filed Statements of Claim for their use. There is no history of abiding by either agreement and the Statements of Claim do not reflect either agreement. The existence of the 1965 Agreement and 1970 Stipulation does not provide evidence concerning the actual beneficial use of the water.

6. The Master does not make any determination on whether the 1965 Agreement and the 1970 Stipulation have any legal effect on the division of water other than to determine that they do not have an effect on the determination of the actual historical beneficial use of the claims. Since the 1965 Agreement and 1970 Stipulation do not provide insight on how the claims were actually used, they are not sufficient to overcome the Statements of Claim.

7. As reflected in their objections, one of the main contentions for Koss and Watson is how water from Sage Creek and Gumbo Coulee is divided. The testimony and filings of Koss and Watson show that the issues between the claimants involve not only how the elements of the claims are defined, but how water is divided and managed on the ground. It is doubtful that defining the historical use and the elements of the water rights will resolve any of the issues between the claimants.

8. The irrigation claims in this case are for water spreading from Sage Creek or Gumbo Coulee, meaning water is used when it is available and is not defined by a flow rate. Besides constructing larger dikes or dike systems that circumvent each other, the claimants have no real way of controlling the amount of water in the system. Therefore, the claimants are primarily jockeying for the earliest priority date.

9. The NOAs were filed for either waste, overflow, or excess from Sage Creek or Gumbo Coulee or simply for Sage Creek or Gumbo Coulee. The 1965 Agreement and 1970 Stipulation also appear to make the same distinction. The sources listed on the abstracts are either Sage Creek or Gumbo Coulee. Although the priority dates of the claims based on NOAs for waste, overflow, or excess may be more junior, there is no other distinction between them. Therefore, disagreement about who gets what amount of the creek or coulee versus the overflow, waste, or excess from the creek or coulee, does not affect how the claims are defined.

10. The NOAs filed to support the claims do not match many of the elements of the claims. The NOAs offer evidence of use of water occurring from Sage Creek and Gumbo Coulee by particular dates. While the NOAs do not provide strong evidence to support the use of water as claimed, there was little other credible evidence in the record to overcome the claims.

11. Although the points of diversion and places of use conflict with the NOAs, appropriators were allowed to change the points of diversion and places of use prior to 1973. § 89-803, RCM (repealed 1973). The evidence presented indicates that is exactly what the claimants did.

12. In both Sage Creek and Gumbo Coulee, patterns of flow have changed naturally over time and have also changed due to intentional modifications made by both claimants. The claimants have taken advantage of flows by modifying ditches and dikes to direct water to their property. What one party sees as maintenance of a diversion system, the other party sees as an interference with their water supply.

13. The Water Court has the jurisdiction make determinations on the claims as they existed prior to July 1, 1973. Those determinations are as follows:

Watson 40M 182861-00

The objectors met their burden and provided sufficient evidence to overcome the Statement of Claim and prove the Watson Ditch was not historically part of the claim. Therefore, the point of diversion shall be corrected back to what was originally claimed.

Point of Diversion:

| <u>ID</u> | <u>Qtr</u> | <u>Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|------------|------------|------------|------------|------------|---------------|
| 1 | NENESE | SENENW | 6 | 25N | 32E | Phillips |

Koss 40M 184898-00

Although the place of use does not match the NOA, the objectors failed to meet the burden to show the acreage claimed was not historically irrigated. Watson failed to provide enough evidence to overcome the Statement of Claim and show the West Dike was not used and that the claim was abandoned. The evidence was sufficient to correct the source to Sage Creek as originally claimed.

| | | |
|----------------|--|------------|
| Source: | Unnamed Tributary of Sage Creek | Sage Creek |
|----------------|--|------------|

Watson 40M 182862-00

Although the place of use does not match the NOA, the objectors failed to meet the burden to show the acreage claimed was not historically irrigated. Watson did not introduce enough evidence to add acres to the claim. Acres should remain at 620.00. The objectors met their burden and provided sufficient evidence to prove Watson Ditch was not historically part of the claim and should be removed.

Point of Diversion:

| <u>ID</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|----------------|------------|------------|------------|---------------|
| 1 | NENESE | 6 | 25N | 32E | Phillips |
| 2 | SENENW | 6 | 25N | 32E | Phillips |
| 3 | W2NE | 6 | 25N | 32E | Phillips |
| 4 | NESE | 6 | 25N | 32E | Phillips |

Koss 40M 184900-00

Although the place of use does not match the NOA, the objectors failed to meet the burden to show the acreage claimed was not historically irrigated. Acres should remain at 300.00. The evidence was sufficient to correct the source to Sage Creek as originally claimed.

Source: ~~Unnamed Tributary of~~ Sage Creek
 ~~Sage Creek~~

Watson 40M 186395-00

Although the place of use does not match the NOA, the objectors failed to meet the burden to show the acreage claimed was not historically irrigated. Acres should remain at 290.00. Watson failed to provide enough evidence to support a water spreading “use” right with a 1931 priority date. The evidence supports a “use” right with a 1959 priority date.

Priority Date: ~~January 6, 1931~~ December 31, 1959

Koss 40M 184899-00

Watson failed to provide enough evidence to overcome the Statement of Claim and show the Werginz Dike was not used and that the claim was abandoned. No corrections should be made to this claim.

Watson 40M 186391-00

The Ray Watson 1971 NOA does not provide a credible basis for this claim. Watson did not provide sufficient evidence to support a “use” right with a 1935 priority date. Therefore, claim 40M 186391-00 should be dismissed.

Koss 40M 184901-00

The Ray Watson 1971 NOA does not provide a credible basis for this claim. Koss provided sufficient evidence to support a “use” right with a 1951 priority date.

Therefore, the July 26, 2011 motion to amend should be accepted. The claim received an issue remark because the method of irrigation claimed was natural overflow. The issue remark should be removed.

Priority Date: ~~June 30, 1935~~ June 30, 1951
Type of Right: Filed Use
Volume: ~~THE TOTAL AMOUNT OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.~~ 1105.64 Ac-Ft
Irrigation Type: ~~Natural Overflow~~ Water Spreading
Maximum Acres: ~~727.82~~ 552.82

Point of Diversion:

| | <u>ID</u> | <u>Qtr</u> <u>Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----|-----------|----------------------------|------------|------------|------------|---------------|
| | 1 | N2 E2NW | 8 7 | 25N | 32E | Phillips |
| | | Means of Diversion: | | Dike | | |
| Add | 2 | SWNE | 7 | 25N | 32E | Phillips |
| | | Means of Diversion: | | Dike | | |
| Add | 3 | E2NE | 7 | 25N | 32E | Phillips |
| | | Means of Diversion: | | Dike | | |

Place of Use: For corrections to the place of use, please refer to the Post Decree Abstract filed with this report.

Watson 40M 186396-00

Objectors did not provide sufficient evidence to overcome the Statement of Claim to correct any elements of the claim. Watson failed to provide enough evidence to support adding acreage to the claim. Therefore, no corrections should be made and the acreage should remain at 300.00.

Watson 40M 186398-00

Although the place of use does not match the NOA, the objectors failed to meet the burden to show the acreage claimed was not historically irrigated. Acres should remain at 200.00. Watson’s March 5, 2012 motion to remove the point of diversion in

the W2NW of Section 30, T26N, R32E should be accepted. Removing the point of diversion in the W2NW of Section 30, T26N, R32E resolves the issue remark.

Point of Diversion:

| <u>ID</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-------------------------|------------|------------|------------|---------------|
| 1 | SWNW | 30 | 26N | 32E | Phillips |
| | Diversion Means: | | Dike | | |

| | | | | | |
|--------------|------------------------------------|---------------|-----------------|----------------|---------------------|
| 2 | W2NW | 30 | 26N | 32E | Phillips |
| | Diversion Means: | | Dike | | |

Watson 40M 186392-00

The withdrawal of claim 40M 186394-00 resolves the issue remark on 40M 186392-00. There was sufficient evidence to implement the amendments requested by Watson. Pursuant to the Grant of Summary Judgment, the point of diversion in Section 5, T25N, R32E was removed.

Volume: ~~930.00 Ac-Ft~~ 1,994.00 Ac-Ft

Maximum Acres: ~~620.00~~ 997.00

Point of Diversion:

| <u>ID</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|----------------------------|------------|------------|------------|---------------|
| 1 | E2SE | 6 | 25N | 32E | Phillips |
| | Means of Diversion: | | Dike | | |

| | | | | | |
|---|----------------------------|---|------|-----|----------|
| 2 | W2NE | 6 | 25N | 32E | Phillips |
| | Means of Diversion: | | Dike | | |

| | | | | | |
|---|----------------------------|---|------|-----|----------|
| 3 | NENW | 6 | 25N | 32E | Phillips |
| | Means of Diversion: | | Dike | | |

| | | | | | |
|---|----------------------------|---|------|-----|----------|
| 4 | N2NW | 8 | 25N | 32E | Phillips |
| | Means of Diversion: | | Dike | | |

| | | | | | |
|--------------|---------------------------------------|--------------|-----------------|----------------|---------------------|
| 5 | SWSW | 5 | 25N | 32E | Phillips |
| | Means of Diversion: | | Dike | | |

Place of Use: For corrections to the place of use, please refer to the Post Decree Abstract filed with this report.

Watson 40M 186394-00

This claim was withdrawn as a duplicate of claim 40M 186392-00.

Watson 40M 182864-00

The motion to amend the point of diversion and place of use resolves the issue remarks and should be accepted. The source of this claim appeared in the Preliminary Decree as Unnamed Tributary of Sage Creek. Like claims 40M 184898-00 and 40M 184900-00, it appears the source should also be Sage Creek.

Source: Unnamed Tributary of Sage Creek Sage Creek

Point of Diversion:

| <u>ID</u> | <u>Qtr Sec</u> | | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|----------------|--------|------------|------------|------------|---------------|
| 1 | SWNWSE | NWNWSE | 6 32 | 25N 26N | 32E | Phillips |

Reservoir:

| <u>Qtr Sec</u> | | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|----------------|--------|------------|------------|------------|---------------|
| SWNWSE | NWNWSE | 6 32 | 25N 26N | 32E | Phillips |

Place of Use:

| <u>ID</u> | <u>Qtr Sec</u> | | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|----------------|--------|------------|------------|------------|---------------|
| 1 | SWNWSE | NWNWSE | 6 32 | 25N 26N | 32E | Phillips |

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends the Court make the changes specified to correct the Preliminary Decree for this Basin.

Post Decree Abstracts of Water Right Claims are served with this Master's Report to confirm that the recommended changes have been made in the state's centralized record system.

DATED this 3 day of December, 2015.



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Water Master

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Note: Service List Updated 11/24/2015