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FILED
FEB 08 2016
Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE RIVER DIVISION
TONGUE RIVER BELOW HANGING WOMAN CREEK (42C)

* *

CLAIMANT: Coffee-Nefsy LTD Partnership; Coffee Feeders LLC OBJECTORS: Coffee-Nefsy LTD Partnership; United States of America (Bureau of Reclamation); United States of America (Bureau of Indian Affairs) NOTICE OF INTENT TO APPEAR: Northern Cheyenne Tribe	**CASE 42C-63** 42C 13100-00 42C 13101-00 42C 13104-00 42C 13105-00 42C 13106-00 42C 13107-00 42C 13108-00
CLAIMANTS: Coffee-Nefsy Limited Partnership; Coffee Feeders LLC; Cedar Hills Ranch, LLC OBJECTORS: Coffee-Nefsy Limited Partnership; United States of America (Bureau of Reclamation); United States of America (Bureau of Indian Affairs) NOTICE OF INTENT TO APPEAR: Northern Cheyenne Tribe	**CASE 42C-64** **(In part)** 42C 13102-00

ORDER ADOPTING MASTER'S REPORTS

I. STATEMENT OF THE CASE

This matter involves objections by the Northern Cheyenne Tribe ("Tribe") to Master's Reports in cases 42C-63 and 42C-64. Although both cases involve multiple water rights, only one claim from each case is at issue: 42C 13105-00 from case 42C-63 and 42C 13102-00 from case 42C-64. Both claims are co-owned by Coffee Feeders LLC and Coffee-Nefsy Ltd Partnership ("Coffee"). Both claims are based on a prior district court decree titled *Miles City Canal and Irrigating Company v. Lee*, Cause Number 2809.

The Miles City Decree was issued in 1914. The Miles City Decree is also referred to as the Tongue River Decree.

Both of Coffee's claims are irrigation rights used on the same 809.46 acre parcel of land. The combined flow rate of these two claims is 1,291.69 miner's inches.

The Miles City Decree contains the following language:

> It is stipulated and agreed by and between the respective parties hereto, that it requires one miner's inch of water to properly irrigate any of the lands affected by this decree, and the Court does therefore find that it requires one miner's inch of water per acres [*sic*] to properly irrigate any and all of the lands affected hereby.

Miles City Decree, Finding of Fact Number 4, at 2.

The Master's Reports in cases 42C-63 and 42C-64 allowed Coffee to combine its water rights for irrigation of its 809.46 acre parcel of land. The Tribe objects to combining the flow rates of these two rights for irrigation of this parcel because the combined flow rate exceeds the one miner's inch per acre standard referenced in the Miles City Decree. The Tribe contends that parties to the Miles City Decree, including Coffee, are limited to a maximum flow rate of one miner's inch per acre for irrigation. Applying this standard, the Tribe contends the combined flow rate of Coffee's water rights cannot exceed 809.46 miner's inches.

Similar issues exist in case 42C-65. Although a Master's Report has not been issued, two of the claims in that case are based on a single original right granted to Walter Wolff in the Miles City Decree. One portion of this right is owned by Coffee and the other by Felton Angus Ranch Inc. ("Felton"). Coffee is using its portion on the same 809.46 acre parcel irrigated with its other two rights which are addressed in this Order. Felton is using its portion, consisting of 97.57 inches, to irrigate 33.6 acres. The Tribe argues that Felton should be limited to a flow rate of 33.6 inches for its 33.6 acres. For this reason, the Water Court invited the parties in case 42C-65 to participate in briefing of this matter. Felton and Coffee have filed briefs in opposition to the arguments made by the Tribe.

II. ISSUE

Does the Miles City Decree limit Coffee to a flow rate of one miner's inch per acre?

III. ANALYSIS

Coffee and Felton have both changed their irrigation practices since the issuance of the Miles City Decree in 1914. Coffee is irrigating fewer acres and Felton has moved the location of its irrigation and is using water on less land than originally allowed by the Decree.

Coffee claims three water rights, each based on separate rights from the Miles City Decree. Coffee claim 42C 13102-00 was originally decreed to Ball Ranch Company for 675.45 miner's inches on 675.45 acres. Claim 42C 13105-00 was originally decreed to Coffee's predecessor, the Ball Ranch Company. It had a flow rate of 314.45 miner's inches for use on 314.45 acres. Claim 42C 13103-00 is owned by Coffee and originates from a water right originally decreed to William Wolff with a flow rate of 395 inches for use on 395 acres. Wolff's water right was eventually split between Coffee and Felton, with Coffee receiving 297.43 inches under claim 42C 13103-00, and Felton receiving 97.57 inches under claim 42C 180517-00.

The Coffee rights are summarized as follows:

Claim Number	Priority Date	Decreed To	Flow Rate (Miner's Inches) (MI)
42C 13102-00	1/27/1897	Ball Ranch	977.6 MI[1]
42C 13103-00	12/10/1902	Wolff	297.43 MI
42C 13105-00	12/17/1908	Ball Ranch	314.45 MI
			Total Flow Rate: 1,589.48 MI

The Tribe contends that the Miles City Decree permanently established a fixed ratio of one miner's inch per acre for all water rights in the Decree. The Tribe's argument is that Coffee and Felton have either forfeited or abandoned a portion of their water rights by reducing the acreage on which those rights are used. Because Coffee is

[1] The flow rate was changed in the Master's Report from 675.45 miner's inches to 977.6 miner's inches.

only irrigating 809.46 acres, this means that Coffee would be precluded from using both of its two junior rights, as well as a portion of its senior right. This would result in a reduction in flow rate from 1,589.48 inches to 809.46 inches. Likewise Felton would be forced to reduce the flow rate for its portion of the Wolff right from 99.57 to 33.6 inches.

Prior to issuing the Master's Report, the Water Master rejected these arguments. In her May 13, 2015 Order Granting in Part and Denying in Part Motion for Ruling on Flow Rate,[2] the Water Master stated, "The language of the Tongue River Decree does not support the assertion that diverting X miner's inches to irrigate fewer than X acres is a waste of water or an unreasonable use of water." Order Granting in Part and Denying in Part Motion for Ruling on Flow Rate, at 9.

Using this rationale, the Water Master left Coffee's flow rates intact in the Master's Reports for cases 42C-63 and 42C-64.

While determination of the flow rate for a water right is an issue of fact, the interpretation of a decree is an issue of law. All parties agree the argument made by the Tribe requires interpretation of the Miles City Decree. This makes the issue one of law rather than fact. The Water Court reviews a Water Master's legal rulings to determine if they are correct.

The obligation of a court interpreting a prior decree is to give effect to the intention of the judge, not the parties to the action.

> The determinative factor in interpreting a judgment is the intention of the court, as gathered, not from an isolated part thereof but from all parts of the judgment itself. When construing written judgments, courts consider the circumstances present at the time of entry and do not consider the meaning of particular provisions of the judgment in isolation but in the context of the whole judgment. …
>
> When the language of the judgment is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used. An unambiguous judgment must be enforced according to its terms and may not be modified, enlarged, restricted, or diminished.

47 AM. JUR. 2D *Judgments* § 74 (2015) (citations omitted).

[2] The May 13, 2015 Order applied to cases 42C-63, 42C-64, and 42C-65.

The judge in the Miles City Decree found that "it requires one miner's inch of water per acres [*sic*] to properly irrigate any and all of the lands affected hereby." Miles City Decree, Finding of Fact Number 4, at 2. The Decree also included a prohibition against wasting water. The parties to the Decree were barred from "in any wise wasting the waters of said Tongue River or diverting at any time any more thereof than is reasonable [*sic*] necessary for the use to which it is applied... ." Miles City Decree, B-24.

The Decree does not say that irrigators who changed their cropping patterns were required to match their flow rates to the exact number of acres in production in any given year. Had such a rule been in effect, it would likely have been enforced sometime over the last century. There is no evidence that the Decree has ever been enforced in such a manner. Most farmers and ranchers change the amount and types of crops they grow over both the long and short term. These changes are based on a myriad of factors including market conditions, soil conditions, labor availability, changing technology, weather, and water availability.

Here, Coffee and Felton have reduced the total amount of acreage under production, but have not reduced the flow rate applied to that acreage. While that means that the ratio of miner's inches per acre has increased, the flow rates have not increased, and there is no evidence Coffee and Felton are using a greater volume of water.

Flow rate is a measurement taken at a moment in time which describes the rate at which water is diverted. It does not describe volume, which is the total amount of water diverted. Volume is determined by diverting a constant flow rate over a specific length of time. As a general rule, a higher flow rate allows irrigation of a given field more quickly than a lower flow rate. Although irrigation often occurs more quickly with a higher flow rate, a higher flow rate does not automatically translate into more water usage. Diverting five inches for one day equals the same volume of water as diverting one inch for five days. Increases in flow rate per acre often allow for more efficient irrigation because water can be spread more quickly.

These principles of irrigation are well known and have been understood since the time of the Miles City Decree. There is nothing in the Miles City Decree to indicate that the judge intended for water users to re-calculate the number of acres under production to assure the one inch per acre ratio was maintained constantly. As a practical matter, most irrigators do not operate that way. If the judge writing the Miles City Decree meant to impose a departure from conventional irrigation practices on Tongue River irrigators, he would have signaled his intentions more clearly.

There is also no evidence of waste on the part of either Coffee or Felton that would justify the reduction in flow rates requested by the Tribe. Waste is a question of fact, and the Tribe has offered no evidence of wasteful water usage by the claimants. The only assertion made by the Tribe is that use of more than one inch per acre necessarily amounts to waste under the Decree. There is no language in the Decree announcing such a rule and no evidence of intent on the part of the judge, or any party subsequent to issuance of the Decree, to enforce such a standard.

Finally, the Decree does not contain language requiring an irrigator to forfeit a portion of his or her flow rate based on a reduction in irrigated acreage. The Tribe has not tendered any evidence that either Coffee or Felton has abandoned any portion of their water rights by reducing their irrigated acreage.

The cases cited by the Tribe do not support its assertion that Coffee and Felton have forfeited a portion of their water rights by reducing their irrigated acreage. Although many Montana Supreme Court cases have recognized a one inch per acre ratio for water rights, there is not and has never been a rule requiring that a specific ratio be applied to all water rights. Actual beneficial use is the measure of a water right, and beneficial use is a question of fact to be decided on a case by case basis. *McDonald v. State*, 220 Mont. 519, 722 P.2d 598 (1986).

The Tribe cites *McDonald* for the proposition that "if the beneficial use required a lesser amount than the acre feet fixed therein, the appropriator holds no title or right to the excess volume of water over and above the requirements of his beneficial use." *McDonald*, 220 Mont. at 532, 722 P.2d at 606. The purpose of this rule is to prevent an

appropriator from taking more water than is needed, to stop water rights from being expanded, and to prevent waste. As already noted, there are no facts indicating that Coffee and Felton are taking more water than is necessary to irrigate their land. Without such evidence, mere recitation of the rule in *McDonald* is not adequate to justify a reduction in the flow rate for the Coffee and Felton claims.

In addition, the *McDonald* case focuses on volume, and the rule in that case was intended to prevent unwarranted increases in volume. Here the issue is flow rate, and Coffee and Felton are not seeking an increase in either flow rate or volume.

The Tribe also cites *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428 (9th Cir. 1994) for the assertion that flow rates must be calibrated to acres irrigated. *Gila Valley* involved interpretation of the language of a consent decree which provided that water could be diverted from the Gila River only for lands "then being irrigated." The issue in that case was whether irrigators could divert water based on their full decreed acreage without considering whether those lands actually required irrigation water. The consent decree also fixed the flow rate per acre. This limitation, together with the additional restriction that water could only be diverted for lands "then being irrigated," resulted in a ruling that flow rates should be adjusted to reflect irrigated acreage actually in production, as opposed to including lands that were lying fallow.

Because *Gila Valley* involved a consent decree negotiated between the Apache Indian Tribe and local irrigators, the Court applied canons of construction used to interpret treaties. "These canons call for promoting the treaties' central purposes; construing treaties as they were originally understood by the tribal representatives, rather than according to legal technicalities; resolving ambiguities in favor of the Indians; and interpreting the treaties in the Indians' favor." *Gila Valley*, 31 F.3d at 1437.

The canons of construction used in *Gila Valley* are not applicable here. The Miles City Decree was the product of both stipulations and a trial. The Tribe has not cited any case law requiring that a decree issued as the result of a trial must be construed in the same manner as a treaty. Accordingly, the standard applicable here is to determine the intent of the judge who issued the Miles City Decree.

In addition, the language of the consent decree in *Gila Valley* and the language of the Miles City Decree are not the same. The Miles City Decree does not contain the additional requirement that flow rates be adjusted in accordance with the number of acres "then being irrigated." Had such language been included in the Miles City Decree, the analysis might be different. In the absence of such language, such a standard cannot be added to the Miles City Decree.

IV. CONCLUSION

The Water Master correctly interpreted the Miles City Decree, and correctly determined that the Decree does not require a reduction in the flow rates claimed by Coffee based on the number of acres it is irrigating.

V. ORDER

The Tribe's objections to the Master's Reports are DENIED. The Master's Reports in cases 42C-63 and 42C-64 are adopted without change.

DATED this 8th day of February, 2016.

Russ McElyea
Chief Water Judge

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NOTICE OF FILING OF MASTER'S REPORT

You may file a written objection to this Master's 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 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

Ball Ranch, the United States of America (Bureau of Reclamation), the United States of America (Bureau of Indian Affairs), and the Apsaalooke (Crow) Tribe each objected to Ball Ranch irrigation claim 42C 13100-00. John E. Hamilton, Victoria L. Hamilton, and the Northern Cheyenne Tribe filed notices of intent to appear.

Ball Ranch and the United States of America (Bureau of Indian Affairs) objected to Ball Ranch irrigation claim 42C 13101-00. John E. Hamilton, Victoria L. Hamilton, the Northern Cheyenne Tribe, and the Apsaalooke (Crow) Tribe filed notices of intent to appear. In addition, on August 30, 2011 John Peterson, Water Adjudication Bureau Chief, Department of Natural Resources and Conservation [DNRC], filed a Memorandum stating that some of the irrigation claims in Basins 42B and 42C were changed during examination from flood irrigation to water spreading. Claim 42C 13101-00 is identified as a changed claim. The claimant was not contacted by the DNRC prior to the change from flood irrigation to water spreading.

Ball Ranch, the United States of America (Bureau of Reclamation), the United States of America (Bureau of Indian Affairs), and the Apsaalooke (Crow) Tribe each objected to Ball Ranch irrigation claim 42C 13104-00. John E. Hamilton, Victoria L. Hamilton, and the Northern Cheyenne Tribe filed notices of intent to appear.

Ball Ranch, the United States of America (Bureau of Reclamation), the United States of America (Bureau of Indian Affairs), and the Apsaalooke (Crow) Tribe each objected to Ball Ranch irrigation claim 42C 13105-00. John E. Hamilton, Victoria L. Hamilton, and the Northern Cheyenne Tribe filed notices of intent to appear.

Ball Ranch, the United States of America (Bureau of Indian Affairs), and the Apsaalooke (Crow) Tribe objected to Ball Ranch irrigation claim 42C 13106-00. John E. Hamilton, Victoria L. Hamilton, and the Northern Cheyenne Tribe filed notices of intent to appear.

Ball Ranch, the United States of America (Bureau of Reclamation), the United States of America (Bureau of Indian Affairs), and the Apsaalooke (Crow) Tribe each objected to Ball Ranch irrigation claim 42C 13107-00. John E. Hamilton, Victoria L. Hamilton, and the Northern Cheyenne Tribe filed notices of intent to appear.

Ball Ranch, the United States of America (Bureau of Indian Affairs), and the Apsaalooke (Crow) Tribe objected to Ball Ranch irrigation claim 42C 13108-00. John E. Hamilton, Victoria L. Hamilton, and the Northern Cheyenne Tribe filed notices of intent to appear.

On September 20, 2010 the Apsaalooke (Crow) Tribe filed an unconditional withdrawal. On January 31, 2013 Ball Ranch, the United States of America (Bureau of Indian Affairs), and the United States of America (Bureau of Reclamation) filed a Stipulation partially resolving the United States objections to claim 42C 13105-00 and other claims in Case 42C-64 and Case 42C-65. On June 3, 2013 the United States of America (Bureau of Reclamation) and the United States of America (Bureau of Indian Affairs) filed a Motion For Summary Judgment. On September 2, 2014 Coffee-Nefsy Limited Partnership was substituted as claimant of the Ball Ranch claims and as objector for the Ball Ranch objections. On September 2, 2014 the Order Granting In Part And Denying In Part Motion For Summary Judgment was issued. As to claim 42C 13101-00, it determined that the type of historical right must be a use right as the various notices of appropriation attached to the Statement of Claim were each deficient and did not accomplish an appropriation by the statutory filing method. On September 16, 2014 John E. Hamilton and Victoria L. Hamilton filed an unconditional withdrawal of their notices of intent to appear. On November 5, 2014 Coffee-Nefsy Limited Partnership filed a document entitled "Filing Of DNRC Memo And Status Report" to address the issue remarks on claims 42C 13106-00 and 42C 13108-00. On November 5, 2014 Coffee-Nefsy Limited Partnership also filed a Request To Withdraw Statement Of Claim for claims 42C 13100-00, 42C 13104-00, and 42C 13107-00. On December 15, 2014 the United States of America (Bureau of Indian Affairs) and United States of America (Bureau of Reclamation) filed an Amended Notice Of Conditional Withdrawal In Case 42C-63.

The conditions specified are the withdrawal of claims 42C 13100-00, 42C 13104-00, and 42C 13107-00, and the changes to the rest of the claims in this Case as depicted on the redlined abstracts attached to Coffee-Nefsy Limited Partnership's November 5, 2014 Filing. On December 15, 2014 the Northern Cheyenne Tribe filed its Conditional Withdrawal of its notices of intent to appear for all of the claims in this Report except 42C 13105-00. The conditions specified are the withdrawal of claims 42C 13100-00, 42C 13104-00, and 42C 13107-00, and Court approval of the changes to claims 42C 13101-00, 42C 13106-00, and 42C 13108-00 as depicted on the redlined abstracts attached to Coffee-Nefsy Limited Partnership's November 5, 2014 Filing.

On January 27, 2015 the Court sent a letter to Coffee-Nefsy Limited Partnership with various questions concerning the changes requested in the Coffee-Nefsy Limited Partnership's November 5, 2014 Filing. On February 25, 2015 Coffee-Nefsy Limited Partnership filed a Withdrawal Of Objections for all claims in this Case and a letter answering the Court's various questions including a retraction of the request to add "and sprinkler/flood' to the irrigation type on claim 42C 13101-00.

On February 6, 2015 the Northern Cheyenne Tribe filed a Motion For Ruling On Flow Rate For Claims 42C 13102-00, 42C 13103-00, 42C 13105-00, and 42C 180517-00 which includes claims in Cases 42C-64 and 42C-65. On May 13, 2015 the Order Granting In Part And Denying In Part For Ruling On Flow Rate was issued. On June 3, 2015 the Northern Cheyenne Tribe's Conditional Withdrawal In Claims 42C 13102-00, 42C 13103-00, 42C 13105-00, and 42C 180517-00 was filed. For claim 42C 13105-00 the conditions specified are Court approval of the redlined abstract for the claim attached to the Coffee-Nefsy Limited Partnership's November 5, 2014 Filing and the terms of the January 31, 2013 Ball Ranch, the United States of America (Bureau of Indian Affairs), and the United States of America (Bureau of Reclamation) Stipulation. On July 6, 2015 the claimant filed the July 5, 2015 Memo of Tracey Turek, Turek Water Right Research, LLC, providing additional information.

FINDINGS OF FACT

1. Claim 42C 13100-00 should be dismissed as withdrawn by the claimant.

2. For claim 42C 13101-00, the Preliminary Decree states the priority date is March 21, 1893 and the type of historical right is filed. The type of historical right should be use. The priority date should remain as March 21, 1893. Although the William Wolff Notice of Water Right filed in 1895 does not meet the statutory requirements of sections 89-810 *et seq.*, RCM, it does provide credible evidence that an appropriation was made by William Wolff from Beaver Creek in 1893 to irrigate what is now part of the place of use.

The Preliminary Decree states that the period of use is January 1 to December 31. The period of use and period of diversion should be March 15 to November 19 as requested in Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report.

As requested in Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report, the following clarification remark should be added to the place of use description:

> THE FOLLOWING REMARK IS ADDED AS REQUESTED BY THE PARTIES IN CASE 42C-63: THE PLACE OF USE QUARTER SECTION LEGAL LAND DESCRIPTION FOR SECTION 27, TOWNSHIP 1N, RANGE 44E, IS FOR GENERAL LOCATION PURPOSES. THE PLACE OF USE FOR LANDS IN SECTION 27 INCLUDE THE SESE 1/4 AND GOVERNMENT LOTS 9 AND 10. RIVER MIGRATIONS OVER TIME MAY HAVE ALTERED ACREAGES AND CONFIGURATIONS OF THE GOVERNMENT LOTS. THEREFORE A DETERMINATION OF EXACT ACREAGE IN EACH LOT HAS NOT BEEN MADE. SEE MAPS FOR MORE INFORMATION.

It is noted that no additional maps were filed. The only maps in the record for this claim are the marked topographic map attached to the Statement of Claim and the two marked topographic maps prepared by the DNRC claim examiner included in the Examination worksheets for the claim and for the 2007 amendment.

3. Claim 42C 13104-00 should be dismissed as withdrawn by the claimant.

4. For claim 42C 13105-00, the Preliminary Decree states that the priority date is

December 12, 1908 based on a pre-decree amendment by the claimant. The following issue remark appeared on the abstract of claim: CLAIMANT CONTACT HAS REVEALED THAT CLAIMANT HAD INTENDED TO AMEND THE PRIORITY DATE TO DECEMBER 17TH, 1908. THIS DATE COINCIDES WITH HOW THE DECREE READS. This claim is for the December 17, 1908 right decreed to Ball Ranch Company in Cause No. 2809, *Miles City Canal and Irrigating Company and the Northwestern Trust Company v. Erasmus E. Lee etc.*, entered May 20, 1914. The priority date should be December 17, 1908 and the issue remark should be stricken as addressed and resolved.

The Preliminary Decree states that the irrigation type is flood. The irrigation type should be sprinkler/flood.

The Preliminary Decree states that the flow rate is 7.86 cfs. The following issue remark appeared on the abstract of claim: THE LOW FLOW RATE TO ACRES RATIO FOR THIS CLAIM, 3.56 GPM/ACRE, MAY INDICATE AND EXPANSION OF THE HISTORICAL RIGHT. As the maximum acres/place of use was changed by agreement of the parties, as the flow rate is based on a prior decree, and as multiple water rights provide water to irrigate the common place of use, the issue remark should be stricken as addressed and resolved.

The Preliminary Decree states that the period of use is January 1 to December 31. The period of use and period of diversion should be March 15 to November 19 as requested in Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report.

The Preliminary Decree states that the maximum acres irrigated is 991.00 acres and the place of use is:

ACRES	QTRSEC	SEC	TWP	RGE	COUNTY
135.00	N2	27	1N	44E	ROSEBUD
200.00	E2	22	1N	44E	ROSEBUD
5.00	SESW	22	1N	44E	ROSEBUD
130.00	W2	23	1N	44E	ROSEBUD
109.00	E2	15	1N	44E	ROSEBUD
36.00	NE	14	1N	44E	ROSEBUD

156.00	E2	11	1N	44E	ROSEBUD
105.00	W2	12	1N	44E	ROSEBUD
12.00	E2E2SE	2	1N	44E	ROSEBUD
103.00	SW	1	1N	44E	ROSEBUD
991.00					

The following issue remarks concerning the maximum acres and place of use appeared on the abstract of claim:

> USDA AERIAL PHOTOGRAPH NO(S). 278-185 AND 478-115, DATED 09/15/1978. APPEARS TO INDICATE 737 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.
>
> AERIAL PHOTOGRAPH NO(S). MA-28-129, MA 28-190, AND MA-29-29 DATED 1944, APPEARS TO INDICATE 754 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

The Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report requests that the legal description in the section 2 parcel be changed to the E2SESE. A review of the marked aerial photograph accompanying this Filing and claim 42C 13106-00 which includes the same parcel, indicate that the legal description should remain as E2E2SE. The maximum acres should be 809.46 and the place of use should be:

ACRES	QTRSEC	SEC	TWP	RGE	COUNTY
66.67	SW	1	1N	44E	ROSEBUD
11.98	E2E2SE	2	1N	44E	ROSEBUD
142.56	E2	11	1N	44E	ROSEBUD
40.13	W2	12	1N	44E	ROSEBUD
48.41	NE	14	1N	44E	ROSEBUD
75.51	E2	15	1N	44E	ROSEBUD
182.80	E2	22	1N	44E	ROSEBUD
116.41	W2	23	1N	44E	ROSEBUD
124.99		27	1N	44E	ROSEBUD
809.46					

The acreage totals listed in the issue remarks, 737 acres and 754 acres, do not fall within the allowed variance range for 809 acres (764.7 acres to 853.3 acres). The five separate fields identified on the Statement of Claim as amended in 2007 are the same five fields described above. A comparison of the marked aerial photograph filed with the 2007

amendment and the marked aerial photograph filed with the 2013 Stipulation clearly show reductions in the perimeters of three of the fields. On page 2 of the Memo, Ms. Turek notes that acreage was removed as some land was not "irrigated after the historic ditch systems were replaced with the pumps", and that during settlement discussions, the various consultants for the parties "all agreed that each field would be mapped using the 1978 aerial photographs, while confirming each field had been irrigated on the 1944 aerial photographs." They then mapped the field boundaries on the 1978 aerial photographs "and the total number of acres calculated by the Arcview GIS totaled 809.46 which was the confirmed irrigated acres on both the 1978 and 1944 aerial photographs." Her explanation as to why measuring the same fields on two different aerial photographs results in two different acreage totals and as to why measurements done by the claim examiner and the group of party consultants are different is generally explained on page 1 of the Memo:

> The DNRC utilized two data sources, 1978 aerial photographs and 1944 aerial photographs. The two data sources are not in the same scale and have different levels of distortion which are inherent in any aerial photographs. The DNRC scanned both sets of photographs and then geo-referenced them into Arcview GIS. Both processes create additional distortion. The difference in scale and distortion create a situation that when the photographs are overlayed with each other, the 1944 aerial photographs do not properly align with the 1978 aerial photographs or other data sources, including section and property lines. Therefore, the examination of historically irrigated acres is subjective as to calculating the exact number of irrigated acres.

It is clear that the parties have determined the acres which were irrigated as shown on both the 1944 and 1978 aerial photographs and that the measurement of that acreage is 809.46 acres. The issue remarks concerning the maximum acres and place of use should be stricken as addressed and resolved.

As requested in Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report and accepted by the other parties, the following clarification remark should be added to the place of use description:

> THE FOLLOWING REMARK IS ADDED AS REQUESTED BY THE PARTIES IN CASE 42C-63: THE PLACE OF USE QUARTER SECTION LEGAL LAND DESCRIPTIONS ARE FOR GENERAL

LOCATION PURPOSES. LANDS IN ALL SECTIONS EXCEPT SECTION 2, TOWNSHIP 1N, RANGE 44E, INCLUDE MULTIPLE GOVERNMENT LOTS. RIVER MIGRATIONS OVER TIME MAY HAVE ALTERED ACREAGES AND CONFIGURATIONS OF THE GOVERNMENT LOTS. THEREFORE A DETERMINATION OF EXACT ACREAGE IN EACH LOT HAS NOT BEEN MADE. SEE MAPS FOR MORE INFORMATION.

The marked aerial photograph copy attached to the Stipulation filed January 31, 2013 has been added to the claim file for future reference.

The following issue remarks concerning possible future distribution and marshaling concerns also appeared on the abstract of claim:

> THERE HAS BEEN A CONSOLIDATION OF INDIVIDUAL HISTORIC WATER RIGHTS, LISTED BELOW, THAT NOW ALL REFLECT A COMBINED PLACE OF USE OF THESE WATER RIGHTS TO BE IRRIGATED FROM A COMBINATION OF ALL THE POINTS OF DIVERSION. THERE MAY BE A DISTRIBUTION ISSUE AS NOT ALL POINTS OF DIVERSION CAN DELIVER WATER TO ALL OF THE COMBINED PLACE OF USE.
>
> THERE HAS BEEN A CONSOLIDATION OF INDIVIDUAL HISTORIC WATER RIGHTS, LISTED BELOW, WHICH NOW REFLECT A COMBINED PLACE OF USE TO BE IRRIGATED FROM MULTIPLE POINTS OF DIVERSION. THERE MAY BE A DISTRIBUTION ISSUE AS THIS CONSOLIDATION IMPLIES A SHARING OF PRIORITY DATES AT EVERY POINT OF DIVERSION. THIS CLAIM MAY ALSO REFLECT AN EXPANSION OF HISTORIC BENEFICIAL USE.

Neither remark includes the other claims numbers referenced as "listed below". The Marshaling Order entered in Case 76F-1, dated October 15, 2010 directs the DNRC to cease adding such issue remarks. Instead, specific issue remarks raising specific concerns about specific elements are to be added. These two issue remarks should be stricken as no longer authorized.

The following issue remark concerning the combined flow rates of the supplemental rights appeared on the abstract of claim:

> THE COMBINED CLAIMED FLOW RATE FOR THIS GROUP OF SUPPLEMENTAL RIGHTS IS 70 GPM PER ACRE. THE FLOW RATE GUIDELINE FOR INDIVIDUAL CLAIMS IS 17 GPM PER ACRE.

The supplemental rights are 42C 13100-00, 42C 13102-00, 42C 13103-00, 42C 13104-00, 42C 13105-00, 42C 13106-00, 42C 13107-00, and 42C 13108-00. Three of the claims have been withdrawn. One has had a flow rate reduction. Two are for water spreading which do not include quantified flow rates. The combined flow rate total for the remaining claims with quantified flow rates is 40.07 cfs, the equivalent of 17,985 gpm. This results in 22 gpm per acre which is not excessive. The issue remark should be stricken as addressed and resolved.

5. For claim 42C 13106-00, the Preliminary Decree states that the maximum acres irrigated is 115.00 and the place of use is:

ACRES	QTRSEC	SEC	TWP	RGE	COUNTY
12.00	E2E2SE	2	1N	44E	ROSEBUD
102.00	SW	1	1N	44E	ROSEBUD
1.00	NWNWNW	12	1N	44E	ROSEBUD
115.00					

The following issue remarks concerning the maximum acres and place of use appeared on the abstract of claim:

> USDA AERIAL PHOTOGRAPH NO(S). 478-115, DATED 05/07/1980, APPEARS TO INDICATE 85 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.
>
> AERIAL PHOTOGRAPH NO(S). MA-29-29, DATED 1944, APPEARS TO INDICATE 63 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

The maximum acres irrigated should be 78.65 and the place of use should be:

ACRES	QTRSEC	SEC	TWP	RGE	COUNTY
66.67	SW	1	1N	44E	ROSEBUD
11.98	E2E2SE	2	1N	44E	ROSEBUD
78.65					

As the allowable variance for 79 acres ranges from 68 acres to 90 acres, the 1980 aerial photograph measurement falls within this range. Therefore, the 1980 aerial photograph issue remark should be stricken as addressed and resolved. It is noted that the priority date for this claim is December 31, 1950. What does or does not appear on a 1944 aerial photograph is not relevant to an appropriation not yet made when the photograph was

taken. The 1944 aerial photograph issue remark should be stricken as irrelevant.

As requested in Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report and accepted by the other parties, the following clarification remark should be added to the place of use description:

> THE FOLLOWING REMARK IS ADDED AS REQUESTED BY THE PARTIES IN CASE 42C-63: THE PLACE OF USE QUARTER SECTION LEGAL LAND DESCRIPTION FOR SECTION 1, TOWNSHIP 1N, RANGE 44E, IS FOR GENERAL LOCATION PURPOSES. THE PLACE OF USE FOR LANDS IN SECTION 1 INCLUDE GOVERNMENT LOTS 12, 13 AND 14. RIVER MIGRATIONS OVER TIME MAY HAVE ALTERED ACREAGES AND CONFIGURATIONS OF THE GOVERNMENT LOTS. THEREFORE A DETERMINATION OF EXACT ACREAGE IN EACH LOT HAS NOT BEEN MADE. SEE MAPS FOR MORE INFORMATION.

Copies of the marked aerial photographs attached the Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report have been added to the claim file.

The Preliminary Decree states that the volume is 218.50 acre feet. The following issue remark concerning volume appeared on the abstract of claim: VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE. The volume should be 180.89 acre feet and the issue remark should be stricken as addressed and resolved.

The Preliminary Decree states that the period of use is January 1 to December 31. The period of use and the period of diversion should be March 15 to November 19.

The following issue remark concerning the combined flow rates of the supplemental rights appeared on the abstract of claim:

> THE COMBINED CLAIMED FLOW RATE FOR THIS GROUP OF SUPPLEMENTAL RIGHTS IS 70 GPM PER ACRE. THE FLOW RATE GUIDELINE FOR INDIVIDUAL CLAIMS IS 17 GPM PER ACRE.

As stated in Finding of Fact 4 above, this issue remark should be stricken as addressed and resolved.

6. Claim 42C 13107-00 should be dismissed as withdrawn by the claimant.

7. For claim 42C 13108-00, the Preliminary Decree states that the maximum acres irrigated is 140.00 and the place of use is:

ACRES	QTRSEC	SEC	TWP	RGE	COUNTY
5.00	E2SESW	22	1N	44E	ROSEBUD
105.00	N2	27	1N	44E	ROSEBUD
30.00	N2N2S2	27	1N	44E	ROSEBUD
140.00					

The following issue remarks concerning the maximum acres and place of use appeared on the abstract of claim:

> USDA AERIAL PHOTOGRAPH NO(S). 278-185, DATED 09/15/1978, APPEARS TO INDICATE 104 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.
>
> AERIAL PHOTOGRAPH NO(S). MA-28-190, DATED 00/00/1944, APPEARS TO INDICATE 121 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

The maximum acres irrigated should be 124.99 and the place of use should be:

ACRES	QTRSEC	SEC	TWP	RGE	COUNTY
124.99		27	1N	44E	ROSEBUD
124.99					

The allowable range of variance for 125 acres is 110.5 acres to 139.5 acres. As 121 acres referenced in the 1944 aerial photograph issue remark falls within this range. As this 124.99 acre parcel is included in the place of use for claim 42C 13105-00, Ms. Turek's July 5, 2015 Memo discussed in Finding of Fact 4 above explains why the measurements of the same field by the claim examiner and by the parties' consultants in this matter are different. The maximum acres irrigated and place of use issue remarks should be stricken as addressed and resolved.

As requested in Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report and accepted by the other parties, the following clarification remark should be added to the place of use description:

> THE FOLLOWING REMARK IS ADDED AS REQUESTED BY THE PARTIES IN CASE 42C-63: THE PLACE OF USE QUARTER SECTION LEGAL LAND DESCRIPTION FOR SECTION 27, TOWNSHIP 1N, RANGE 44E, IS FOR GENERAL LOCATION

PURPOSES. THE PLACE OF USE FOR LANDS IN SECTION 27 INCLUDE THE SESE 1/4 AND GOVERNMENT LOTS 9 AND 10. RIVER MIGRATIONS OVER TIME MAY HAVE ALTERED ACREAGES AND CONFIGURATIONS OF THE GOVERNMENT LOTS. THEREFORE A DETERMINATION OF EXACT ACREAGE IN EACH LOT HAS NOT BEEN MADE. SEE MAPS FOR MORE INFORMATION.

Copies of the marked aerial photographs attached the Coffee-Nefsy Limited Partnership's November 5, 2014 Filing Of DNRC Memo And Status Report have been added to the claim file.

The Preliminary Decree states that the volume is 192.00 acre feet. The volume should be 287.48 acre feet.

The Preliminary Decree states that the period of use is January 1 to December 31. The period of use and the period of diversion should be March 15 to November 19.

The following issue remark concerning the combined flow rates of the supplemental rights appeared on the abstract of claim:

> THE COMBINED CLAIMED FLOW RATE FOR THIS GROUP OF SUPPLEMENTAL RIGHTS IS 70 GPM PER ACRE. THE FLOW RATE GUIDELINE FOR INDIVIDUAL CLAIMS IS 17 GPM PER ACRE.

As stated in Finding of Fact 4 above, this issue remark should be stricken as addressed and resolved.

CONCLUSIONS OF LAW

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

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to 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 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 notice of appropriation which does not meet the requirements of section 89-810, RCM, is not prima facie evidence of the described appropriation per section 89-814, RCM; however, a defective notice may be evidence of intent to appropriate a water right. Such notices of appropriation 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." Order Regarding Admissibility of Notices of Appropriation and Burden of Proof, Case 41O-209, dated January 31, 2013, p. 27. For claim 42C 13101-00, the 1895 William Wolff Notice of Water Right is credible and should be accorded the weight stipulated by the parties. This Notice is evidence of a use right appropriation made on March 21, 1893.

4. The settlement documentation and supporting evidence entered into the record are sufficient to contradict and overcome the prima facie claims and sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3), (5), and (11) MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court accept the settlement filed in this matter and make the changes, including the dismissal of claims, specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

DATED this 3 day of Aug 2015.

Kathryn L. W. Lambert
Senior Water Master

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