

Montana Water Court
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FILED

JUL 25 2017

Montana Water Court

**IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)**

CLAIMANTS: M Lazy D, LP; Martin Ranch Company;
M&W Ranch; C Bar J Ranch LLC;
McFarland White Ranch, Inc.; Erica
Borbe; Dennis S. Voss

OBJECTORS: McFarland White Ranch, Inc.;
Martin Ranch Co.; M Lazy D,
LP; Erica Borbe; Dennis S. Voss

NOTICE OF INTENT TO APPEAR: McFarland
White Ranch, Inc.; Martin Ranch Company

ON MOTION OF THE MONTANA WATER COURT

**CASE 40A-264
(Part Of)**

40A 201287-00	40A 201292-00
40A 201288-00	40A 201293-00
40A 201289-00	40A 201294-00
40A 201290-00	40A 201295-00
40A 201291-00	

**ORDER AMENDING AND ADOPTING MASTER'S REPORT IN PART
FOR ERICA BORBE AND DENNIS S. VOSS CLAIMS**

Pursuant to Montana Code Annotated, § 85-2-233(5), this case was assigned to Senior Water Master Kathryn L. W. Lambert. The Master issued a report containing Findings of Fact and Conclusions of Law concerning these claims on March 8, 2011. McFarland White Ranch, Inc., Erica Borbe, and Dennis S. Voss (Borbe/Voss) objected to the report.

The Borbe/Voss objections take issue with several of the Master's recommendations, including denying a request for highwater remarks on several claims, denying a request to generate two implied claims, retaining quantified volumes on several

claims, and reducing the number of acres irrigated on several claims. The highwater issue was addressed in a separate order (Order Adopting Master's Report Regarding Highwater, Issued May 4, 2017). This Order addresses the remaining Borbe/Voss objections.

On January 10, 2017, the Court held an evidentiary hearing on the objections to the Master's Report. Borbe/Voss presented testimony and exhibits supporting the historical use of their individual claims. All parties presented evidence and arguments on the highwater issue. At the close of the hearing, the Court set a deadline for filing briefs on the highwater issue. The Court also allowed Borbe/Voss to file additional evidence addressing their objections to their individual claims.

Borbe/Voss initially filed a brief addressing the highwater issue and the Master's recommendation to deny generating two implied claims. On April 7, 2017, Borbe/Voss filed the affidavit of Erica Borbe addressing the objections to acres irrigated and place of use.

Background

This Order addresses nine Borbe/Voss irrigation claims from Big Elk Creek. As filed, all nine claims included the same five points of diversion and a place of use encompassing 1,650.00 acres. Each claim is based on a water right decreed by the district court for Big Elk Creek. (*Freaser v. Graves*, 10th Judicial District, Meagher County, 1911) On February 11, 2002, the parties in case 40A-264 filed a Stipulation addressing all of the decreed rights on Big Elk Creek. Following this filing, the parties and the Water Master engaged in a lengthy process of clarifying several issues. The Master issued several orders requesting additional information and the parties responded with a variety of filings, such as proposed water right claim abstracts and copies of aerial photos that were marked to show points of diversion and places of use. The Master incorporated this information into her March 8, 2011 report. In this decision, the Stipulation itself and the various filings that clarified the Stipulation are referred to as the Stipulation.

The Stipulation, placed the Borbe/Voss claims into three groups based on place of use:

Claims 40A 201290-00, 40A 201291-00, and 40A 201295-00

Borbe/Voss use these claims east of Big Elk Creek. All three claims divert water through the Sanford Moore Ditch. The Stipulation reduced the place of use for all three claims to 191.20 acres. The Master recommended a 158.40 acre place of use for the claims. Borbe/Voss object to this recommendation.

Claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00

Borbe/Voss use these claims west of Big Elk Creek. All five claims divert water through either the Fox Replacement Ditch or the E.L, Shumaker Ditch. All diversions are transported to the Twodot Reservoir located on Alkali Creek. The reservoir stores some water but allows the majority of the flow to pass through to the Fox Reservoir located just off Alkali Creek. The Fox Reservoir also stores a small portion of the water and allows the majority to pass through to the Borbe/Voss place of use. The Stipulation reduced the place of use for all five claims to 527.00 acres. The Master recommended a 522.40 acre place of use and recommended retaining quantified volumes for all five claims. Borbe/Voss objected to these recommendations.

The Stipulation also calls for generating implied claims from Big Elk Creek for the Twodot Reservoir and Fox Reservoir. Each implied claim is based generally on Borbe/Voss claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00. The implied claims allow for diversions above Borbe/Voss decreed flow rates during the irrigation season and for diversions up to the capacity of both ditches during the non-irrigation season. The Master recommended denying the implied claims. Borbe/Voss objected to this recommendation.

Claim, 40A 201288-00

This claim is used west of Big Elk Creek. The claim uses the Fox Replacement Ditch. The Stipulation reduced the place of use to 87.60 acres located above the Twodot

and Fox Reservoirs. The Master recommended accepting all proposed changes to this claim. Her recommendations did not receive objections.

Issues Presented

Issue 1. *Was the Master's recommendation denying implied claims for the Twodot and Fox Reservoirs correct?*

Issue 2. *Was the Master's recommendation retaining quantified volumes for claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00 correct?*

Issue 3. *Was the Master's recommendation reducing the number of acres irrigated for several Borbe/Voss claims correct?*

Standard of Review

The Water Court reviews the Water Master's findings of fact for clear error and conclusions of law for legal correctness. *Heavirland v. State*, 2013 MT 313, ¶14, 372 Mont. 300, 311 P.3d 813; Rule 23, W. R. Adj. R. Clear error can be found by one of three ways. A factual finding may be clearly erroneous if it is not supported by substantial evidence. Even if supported by substantial evidence, the finding may be clearly erroneous if the trier of fact misapprehended the effect of the evidence. Even if supported by substantial evidence and the effect of the evidence is not misapprehended, a finding may be clearly erroneous if, in light of the evidence as a whole, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 17, 383 Mont. 205, 369 P.3d 1034.

Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting. This standard is deferential, and not synonymous with the clear error standard. A reviewing court may still find a factual finding is clearly erroneous even though there is evidence to support it. *Eldorado Coop Canal Co.* ¶ 18.

The Water Court reviews a master's conclusions of law to determine if they are correct as a matter of law. *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398.

Implied Claims

The Stipulation calls for generating Big Elk Creek implied claims for the Twodot and Fox Reservoirs. Each implied claim is based generally on Borbe/Voss claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00. The elements of the implied claims, as found in the Stipulation, are:

Implied Claim 1 (Fox Reservoir)

Priority Date:	April 4, 1920
Flow Rate:	39.00 cfs
Volume:	200 AF Capacity per fill
Source:	Big Elk Creek
Period of Use:	January 1 to December 31
Point of Diversion:	Fox Replacement Ditch / E.L. Shumaker Ditch
Dam/Reservoir:	Fox Reservoir/Twodot Reservoir
Place of Use:	527.30 acres

Implied Claim 2 (Twodot Reservoir)

Priority Date:	April 1, 1955
Flow Rate:	39.00 cfs
Volume:	800 acre feet capacity per fill
Source:	Big Elk Creek
Period of Use:	January 1 to December 31
Point of Diversion:	Fox Replacement Ditch / E.L. Shumaker Ditch
Dam/Reservoir:	Fox Reservoir/Twodot Reservoir
Place of Use:	527.30 acres

The Master agreed the Borbe/Voss decreed rights from Big Elk Creek did historically use the reservoirs. She recommended adding both reservoirs to all five claims as part of the means of diversion. However, she found no evidence in the statement of claim filings supporting implied claims that expanded the use of the reservoirs. She found the proposed implied claims constituted separate water rights that were subject to claim filing requirements. She recommended denying the implied claims.

Implied claims, as provided for in Rule 35 W.R.C.E.R., are used to separate multiple claims found in a single statement of claim filing. In most cases, implied claims are identified during claim examination and are based on the statement of claim and attachments, *Eliasson Ranch Company v. Rodeghiero*, Case 40A-115 at

p. 4-5, (MT Water Court Order Amending and Adopting Master's Report Jun. 28, 2004).

On occasion, the need for an implied claim may be identified through Water Court proceedings. Evidence submitted in a proceeding can be used to explain or clarify the statement of claim and its contents, and support generating an implied claim. *Foss v. Van Arsdale*, Case 76HF-580 at p. 20, 23, (MT Water Court Order Amending and Partially Adopting Master's Report as Amended Jan. 31, 2013). However, the evidence supporting the implied claim must come from the statement of claim filing itself. Evidence submitted through subsequent Water Court proceedings cannot form the basis for an implied claim. *Eliasson Ranch Co.* at p. 4-5.

The statement of claim filings for claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00 are very similar. In each case, the statement of claim identified the decreed flow rate. Four of the five claims identified a March 31 to October 31 period of use.¹ The fifth claim, 40A 201289-00, identified a March 1 to October 31 period of use. All five claims included an attached "statement" indicating they were "[a]t times used to fill the reservoirs for purposes of improving the availability of water for irrigation purposes when the need demands water." While this statement does connect the reservoirs to the claims, it does not identify an increased flow rate or longer period of use. Absent this kind of evidence, there is nothing in the claims that supports an implied claim, much less two implied claims with a combined flow rate of 78 cfs and a year-round period of diversion.

The implied claims Borbe/Voss are requesting amount to a significant expansion over the five claims identified by them. There is no evidence in these statements of claim or the attached documents supporting the implied claims. Absent this evidence, the Court cannot generate implied claims. The claims Borbe/Voss are seeking were subject to the filing requirements found in Sections 85-2-221 and 85-2-226, MCA. The failure to comply with these filing requirements cannot be circumvented through implied claims.

¹ The Court subsequently began placing a separate period of diversion on all claims. Since these are direct flow claims, the period of diversion and period of use are the same.

The Master's recommendation denying the implied claims is based on a correct review of the facts and a correct application of the law.

Volume

The Master recommended adding the Twodot and Fox Reservoirs to claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00. The Court agrees with this recommendation. The evidence shows each reservoir was historically used as part of the Borbe/Voss irrigation system. As the reservoirs became part of the system, water from these five claims ran through the reservoirs.

The Master found adding the reservoirs changed the rights from direct flow irrigation rights to reservoir storage rights which require quantified volumes. Since these claims appeared in the Temporary Preliminary Decree for this Basin with quantified volumes, she recommended retaining those volumes. With this recommendation, all five claims have quantified flow rates and volumes.

The combined storage capacity of the Twodot and Fox Reservoirs is 800.00 acre feet. The total combined volume for claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00, that appeared in the Temporary Preliminary Decree, is 9,852.63 acre feet per year. Reservoir storage is a very small component of these water rights.² In fact, storage is a small enough component that it does not change the character of the claims. The great majority of the water is used to irrigate at the time it is diverted, it is not stored in the reservoirs. These are still direct flow irrigation claims susceptible to measurement by flow rate.

Diversions from Big Elk Creek were historically managed by flow rate, not volume. There is no evidence indicating the rights cannot be managed by flow rate or that a flow rate and volume are both required for future administration.

The Master's recommendation to retain quantified volumes misapprehends the totality of the evidence and is clearly erroneous. While claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00 have historically used

² Borbe/Voss filed claims 40A 201274-00 and 401A 201277-00 from Alkali Creek for the two reservoirs. Adding these claims to the review further reduces the amount of Big Elk Creek water stored in the reservoirs.

the Twodot and Fox Reservoirs, they are direct flow irrigation rights historically managed through quantified flow rates. They do not require quantified volumes in addition to flow rates. The quantified volumes should be removed from all five claims and replaced with the standard volume remark.

Acres Irrigated

The Master's recommendation to reduce the acres irrigated from the terms of the Stipulation is based on her review of copies of aerial photographs provided by Borbe/Voss.

Irrigation West of Big Elk Creek

Borbe/Voss provided a copy of an aerial photograph that was altered to show the outline of the claimed place of use for claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00 west of Big Elk Creek. The Master's review of the photo indicated a 4.90 acre parcel in the NW of Section 3, T7N, R13E was not marked as irrigated. Borbe/Voss did not address this discrepancy. As a result, the Master relied on the aerial photograph rather than the Stipulation and recommended reducing the acres irrigated from 527.30 acres to 522.40 acres.

Erica Borbe purchased property irrigated by Big Elk Creek in 1987. She learned the irrigation system for the property from long time area resident and ranch manager Charlie Martin. (Borbe testimony 1/10/17) At hearing, Ms. Borbe introduced Borbe/Voss Exhibit 2 through her testimony. This exhibit is a copy of a map that was filed as an attachment to statement of claim 40A 201288-00. This map includes portions of two pages from the Wheatland County Water Resource Survey with outlines showing all Borbe/Voss irrigation from Big Elk Creek. The outline includes land in the NW of Section 3, T7N, R13E. Ms. Borbe testified all land claimed through the Stipulation was historically irrigated.

Irrigation East of Big Elk Creek

Borbe/Voss provided a copy of an aerial photograph as part of the Stipulation. The photo was altered to show the outline of the claimed place of use for claims 40A 201290-00, 40A 201291-00, and 40A 201295-00 east of Big Elk Creek. Each outlined

field included a handwritten number that appears to represent the irrigated acres in that field. These numbers were on the copy of the aerial photograph, they were not added by Borbe/Voss. There is no evidence indicating the source of the numbers. The Master added the numbers for all fields and found it totaled 158.40 acres. Borbe/Voss did not address this discrepancy. The Master relied on the aerial photograph numbers rather than the Stipulation and recommended reducing the acres irrigated from 191.20 acres to 158.40 acres.

On April 7, 2017, Borbe/Voss filed the affidavit of Erica Borbe. Copies of the same aerial photographs reviewed by the Master were attached to the filing. The photo showing irrigation east of Big Elk Creek included a legend listing the acres irrigated in each field. The acres irrigated in the legend totaled 191.20 acres. The affidavit states the map is an accurate reflection of historical irrigation west of Big Elk Creek.

The Master's recommendation to reduce the number of acres irrigated for several Borbe/Voss claims was based on some evidence. Borbe/Voss have provided additional evidence that contradicts and overcomes that evidence. The totality of the evidence supports the acres irrigated asserted in the Stipulation. The Court is left with a definite and firm conviction that a mistake has been made. The Master's recommendations reducing the number of acres irrigated on several Borbe/Voss claims are clearly erroneous.

The place of use for claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00 should total 527.30 acres.

The place of use for claims 40A 201290-00, 40A 201291-00, and 40A 201295-00 should total 191.20 acres.

Conclusion

The Master's recommendation denying Big Elk Creek implied claims for the Twodot and Fox Reservoirs is supported by the evidence and is a correct application of law. The objection to this recommendation is denied.

The Master's recommendations regarding acres irrigated and volume are clearly erroneous. The objections to these recommendations are granted.

Order

Pursuant to Rule 53(e), Montana Rules of Civil Procedure,

The Court Adopts the Master's recommendations denying implied claims.

The Court Adopts the Master's recommendations for claim 40A 201288-00.

The Court Adopts the Master's recommendations for the remaining Borbe/Voss claims with the following amendments:

Claim 40A 201287-00

Acres Irrigated:	522.40 acres	527.30 acres ³
Volume :	1,513.03 af/yr	Volume Remark ⁴

Claim 40A 201289-00

Acres Irrigated:	522.40 acres	527.30 acres
Volume:	2006.50 af/yr	Volume Remark

Claim 40A 201292-00

Acres Irrigated:	522.40 acres	527.30 acres
Volume:	3,004.44 af/yr	Volume Remark

Claim 40A 201293-00

Acres Irrigated:	522.40 acres	527.30 acres
Volume:	734.90 af/yr	Volume Remark

Claim 40A 201294-00

Acres Irrigated:	522.40 acres	527.30 acres
Volume:	2,593.76 af/yr	Volume Remark

Claim 40A 201290-00

Acres Irrigated:	158.40 acres	191.20 acres
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Claim 40A 201291-00

Acres Irrigated:	158.40 acres	191.20 acres
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Claim 40A 201295-00

Acres Irrigated:	158.40 acres	191.20 acres
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Basin 40A was issued as a Preliminary Decree on June 7, 2017. The changes mandated by this order were not included in that Decree. To provide notice, the claims

³ The place of use legal descriptions are found on the attached claim abstracts.

⁴ Volume Remark: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

will be called in on motion of the Water Court and the elements changed by this Order will appear on the Basin Objection list. Pending resolution of all objections and issue remarks in this Basin, the following information remark will be added to the claims:

Claims 40A 201287-00, 40A 201289-00, 40A 201292-00, 40A 201293-00, and 40A 201294-00:

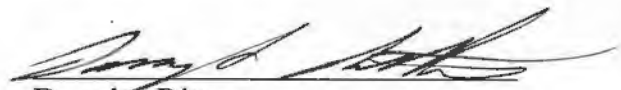
THE VOLUME, PLACE OF USE, AND ACRES IRRIGATED ELEMENTS OF THIS CLAIM WERE CHANGED BY ORDER OF THE WATER COURT AFTER ISSUANCE OF THE PRELIMINARY DECREE FOR THIS BASIN. SEE CLAIM FILE FOR MORE INFORMATION.

Claims 40A 201290-00, 40A 201291-00, and 40A 201295-00:

THE PLACE OF USE AND ACRES IRRIGATED ELEMENTS OF THIS CLAIM WERE CHANGED BY ORDER OF THE WATER COURT AFTER ISSUANCE OF THE PRELIMINARY DECREE FOR THIS BASIN. SEE CLAIM FILE FOR MORE INFORMATION.

Post decree water right claim abstracts served with this order confirm the state's water right record system now includes these changes.

DATED this 25 day of July, 2017.


Douglas Ritter
Associate Water Judge

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