

**FILED**

MAR 24 2017

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
RED ROCK RIVER BASIN (41A)

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CLAIMANT: Matador Cattle Co.

NOTICE OF INTENT TO APPEAR: Huntsman Ranch Co.

**CASE 41A-66**

41A 88524-00	41A 88572-00
41A 88535-00	41A 95000-00
41A 88553-00	41A 95001-00
41A 88556-00	41A 95007-00
41A 88557-00	41A 95008-00
41A 88567-00	41A 95517-00
41A 88568-00	41A 110589-00
41A 88570-00	41A 117650-00

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

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 Rights Adjudication Rules requires that written objections to a 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.

## SECOND MASTER'S REPORT

### PROCEDURAL HISTORY

This case involves 16 water right claims owned by Matador Cattle Co. (Matador). A Master's Report was issued on September 27, 2016. Matador Cattle objected to the Report's conclusions regarding claim 41A 88570-00. Matador also pointed errors in the post-decree abstracts for claims 41A 88524-00 and 41A 88572-00.

The Chief Water Judge reviewed the case, and on November 16, 2016, the case was remanded to the Master to further develop the record. This Second Master's Report only addresses claims 41A 88524-00, 41A 88570-00 and 41A 88572-00. The relevant facts are as follows:

#### Claims 41A 88524-00 and 41A 88572-00

1. Claims 41A 88524-00 and 41A 88572-00 represent irrigation claims for Curry Creek. After reviewing the changes recommended in the Master's Report, the claimant objected and requested that each of these claims receive the following information remark to describe the means of diversion:

WATER DIVERTED FROM CURRY CREEK IS CONVEYED TO UNNAMED TRIBUTARY OF RED ROCK RIVER WHICH IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE SENESE OF SECTION 13, TWP 14S, RGE 3W IN BEAVERHEAD COUNTY.

2. The claimant also found that its originally requested legal description for the place of use was incorrect. The claimant requests that the place of use for both claims appear as follows:

#### Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	125.00		SW	12	14S	2W	BEAVERHEAD
2	65.00		SE	12	14S	3W	BEAVERHEAD
3	18.00		S2NW	12	14S	3W	BEAVERHEAD
4	117.00		NE	13	14S	3W	BEAVERHEAD
5	6.00		NENW	13	14S	3W	BEAVERHEAD
6	2.00		NESE	13	14S	3W	BEAVERHEAD
7	25.00		E2NW	18	14S	2W	BEAVERHEAD
<b>Total:</b>	<b>358.00</b>						

The requested changes to the place of use have already been implemented on the post-

decree abstracts for 41A 88524-00 and 41A 88572-00. The DNRC database sorts the places of use differently based on Township and Range, but the requested place of use is the same. No changes will be applied.

3. Finally, the claimant's objection notes that these two claims are missing from a supplemental rights information remark for claim 41A 88563-00. This does not appear to be accurate. No changes will be made to the 41A 88563-00 supplemental rights remark.

**Claim 41A 88570-00**

4. Claim 41A 88570-00 represents an irrigation right for an unnamed tributary of Little Sage Creek. As claimed, the right asserts two points of diversion both located in the SE of Section 33, Twp 11S, Rge 7W, in Beaverhead County. As shown on the map attached to the Statement of Claim, the claim asserts a diversion ditch located a short distance upstream from the unnamed tributary's confluence with Little Sage Creek. The claim describes flood irrigation of a 112-acre place of use in Sections 32 and 33, Twp 11S, Rge 7W. The attached map also shows a road or jeep trail that bisects the north half of the place of use. The claimed basis is a 1912 decreed right for Little Sage Creek.

5. The DNRC examined the claim and assigned issue remarks indicating that the claimed means of diversion (a ditch) could not be identified. The claim also received remarks because historical aerial photographs from 1965 and 1979 did not appear to show any irrigation on the claimed place of use. The issue remarks raised issues of potential abandonment or non-perfection.

6. During proceedings in this case, Matador filed a motion to amend the claim's purpose from irrigation to stock use, stating that the claim is no longer used for irrigation. Matador sought to change the point of diversion and place of use to reflect stock use directly from the unnamed tributary of Little Sage Creek. The requested changes included additional points of diversion and places of use along the length of the stream in Sections 2, 3, 4, Twp 12S, Rge 7W, on lands owned by Matador.

7. In support of the motion to amend, Matador filed evidence that its predecessor in interest, Cook Sheep Company, was decreed an irrigation right for 50 inches of Little Sage Creek with a priority date of April 16, 1912 (the "Cook Right"), in Beaverhead

County District Court Case No. 4174, which was entered on April 20, 1936 (the “1936 Decree”). Finding of Fact III of the 1936 Decree states:

That on the days and dates hereinafter set out the parties hereto and herein chronologically set forth by themselves and their predecessors in interest did appropriate of the water of Sage Creek and its tributaries the quantities of water respectively set out and by sufficient ditches they have ever since the appropriations respectively conducted said waters upon their said lands and have used the same whenever the quantity of water for their purposes at all times since the respective dates of appropriation for the irrigation of their lands, the watering of stock, domestic use and other beneficial purposes...

The 1936 Decree does not give any indication as to where the Cook Right was historically used. *Motion to Amend*, Exh. #1. Cook Sheep Sheep Company’s separate Answer in the case similarly does not list the specific points of diversion or places of use for any of its claimed water rights. *Id.*, Exh. #2.

8. The Cook Sheep Company was founded by Justin Morse, one of the original founders of the town of Dillon. *Motion to Amend*, Exh. #5. Morse began his large sheep ranching operation on Sage Creek around 1913. *Id.* Morse bought other Sage Creek ranches, leased lands from the State of Montana and acquired permits to graze sheep on Forest Service lands. *Id.* By 1919, Cook Sheep Co. was the largest sheep ranch in Beaverhead County with approximately 16,000 head of sheep. *Id.*

9. By 1936, the time of the Decree, Cook Sheep Company owned or leased thousands of acres including large stretches of Sage Creek and its tributaries, such as Little Sage Creek and Basin Creek. *Motion to Amend*, Exh. #2 at 2. The Cook Sheep Company’s lands included the NESE of Section 32, and the SWSE and SW of Section 33, Twp 11S, Rge 7W, which encompass part of the channel of an unnamed tributary of Little Sage Creek, i.e. the claimed place of use for claim 41A 88570-00.

10. Eventually, Matador (or its predecessors) bought the Cook Sheep Company lands in Sections 32 and 33 along with other parcels encompassing the unnamed tributary of Little Sage Creek. Matador’s motion to amend argues that “[e]ach time one of the parcels was added to Matador ownership, Matador began using the Cook appropriation (originally for irrigation) for instream stockwatering from [the unnamed tributary of] Little Sage Creek....”

11. In the initial Report, this Master granted the motion in part, finding the evidence was sufficient to overcome the Statement of Claim and amend the use of claim 41A 88570-00 to reflect stock use in the NESE of Section 32, and the SWSE and SW of Section 33, Twp 11S, Rge 7W, Beaverhead County with a priority date of April 16, 1912.

12. Matador objected to the Master's findings as legally incorrect, arguing that pre-1973 statutory law permitted a water user to change the place of diversion, place of use and purpose of a water right so long as no other water user was injured. Section 4842, 1907 Revised Codes of Montana. Matador argued that prior to 1973, Matador and its predecessors legally changed the points of diversion, the places of use and to some extent the purpose of the Cook Right to instream stockwater for the unnamed tributary of Little Sage Creek.

13. After reviewing Matador's objection, the Chief Water Judge remanded claim 41A 88570-00 to the Master to further develop the record and answer the following specific questions:

- 1) When did claim 41A 88570-00 cease to be used for irrigation?
- 2) Has the irrigation component of claim 41A 88570-00 been abandoned?
- 3) When did stockwater use begin on the requested places of use in Sections 2, 3, 4, Twp 12S, Rge 7W in Beaverhead County, and who initiated such use?

The Chief Water Judge found that “[w]ithout this information, the Court cannot determine whether the irrigation claim was abandoned or whether it was lawfully changed to stockwater under the pre-1973 statute.” *Order Remanding Case to Master*, at 2 (Nov. 16, 2016). The Water Master then set a deadline for Matador to file evidence answering the questions listed above. Matador filed a Response on January 13, 2017.

**Has the Irrigation Component of 41A 88570-00 Been Abandoned, and if so, When?**

14. With respect to the issue of irrigation under claim 41A 88570-00, Matador agrees that this practice has been abandoned. In its objection to the Master's Report, Matador surmised that the Cook Sheep Company was using the Cook Right for “both irrigation and stock, if not entirely stock by the 1930s.” *Objection* at 4. In recent filings, Matador states that the right has not been used for irrigation purposes for approximately 50 years; “[a]s such, the irrigation component of the claim has been abandoned.”

Matador, *Additional Evidence...*, at 6. (Jan. 13, 2017).

15. The question of *when* the claim ceased to be used for irrigation is much foggier. As noted by Matador, “[t]he extent that [Matador’s predecessors] alternated use of the Cook Right between irrigation and stockwater, or used the right for both purposes simultaneously, is unknown.” *Id.* at 5. Matador’s water rights consultant reviewed aerial photographs from 1953, 1964, 1965 and 1979 and concluded that none of the photos show distinct irrigation patterns. The consultant identified a ditch (appearing as a “dark line”) on a 1965 aerial photograph. Therefore, Matador concluded that the last attempt to use the right for irrigation occurred in 1965. *Id.*; *Additional Evidence*, Exh. #1.

16. Due to the quality of the 1965 photograph, it is difficult to see what dark line Matador’s consultant is referring to. *Id.*; Exh. 1. There does not appear to be any discernible line or shadow that would indicate the presence of a ditch. *Id.* Further, it appears from the photograph that any alleged ditch would have to cross a road or trail and traverse the side of a hill, moving uphill from the source before reaching the edge of the claimed place of use. *Id.* The claimed diversion system appears nonsensical.

17. In examining the claim, the DNRC also reviewed aerial photographs from 1965 and 1979. The DNRC did not identify any irrigation and did not see any signs of a diversion system. The DNRC examiner’s notes state: “No indication of flood irrigation, possibly some sub irrigation by creeks. Cannot see any diversions or ditches on photos.” *41A 88570-00 Claim File.*

18. The only evidence that supports any historical use of claim 41A 88570-00 for irrigation on the claimed tributary of Little Sage Creek is: 1) the Decree in Case No. 4174, which decreed a 50-miner inch right for Little Sage Creek but did specify where or how the right was diverted; and 2) Matador’s consultant’s conclusion that a ditch is visible on the 1965 aerial photograph.

19. The evidence before the Court suggests that the claimed diversion system was never in place for the unnamed tributary of Little Sage Creek. Similarly, there is no evidence of irrigation (other than sub-irrigation) on the claimed place of use.

**When Did Stockwater Use Begin on the Requested Places of Use, and Who Initiated Such Use?**

20. At the time the Cook Right was decreed, Cook Sheep Company owned the NESE of Section 32, and the SWSE and SW of Section 33, Twp 11S, Rge 7W. The District Court's Decree specifically stated that the Cook Right included the right to divert water from Little Sage Creek for "the watering of stock." Therefore, circumstantial evidence suggests that Cook Sheep Company was using the tributary of Little Sage Creek for stockwatering on its property by at least the date of the Decree – 1936 – and possibly prior to that.

21. Matador's motion to amend requested to add additional places of use for stockwater use in the NWSW of Section 2, S2NW of Section 3, and the NE of Section 4, all in Twp 12S, Rge 7W in Beaverhead County. The Chief Water Judge directed the Master to develop the record regarding stockwater use on the requested places of use to determine whether the Cook Right was legally expanded to new places of use pursuant to pre-1973 statutory law.

22. Matador filed chain of title information showing that Cook Sheep Company purchased the S2NW of Section 3 and the NE of Section 4 from Richard P. and Montana W. Garr in 1947. Therefore, in Matador's view, "[u]tilization of the Cook Right in Sections 3 and 4 [...] began in 1947..." *Additional Evidence*, at 2.

23. Matador filed chain of title information showing that William Koch (then owner of Rock Island Oil and Refining Company and Matador Cattle Company) purchased the NWSW of Section 2, Twp 12S, Rge 7W in 1967. "This purchase incorporated Section 2 into Koch/Rock Island/Matador's livestock grazing practices." *Additional Evidence*, at 3. Thus, Matador implies that it began to use the Cook Right in Section 2 in 1967.

24. Because Matador's additional evidence did not directly answer the question remanded to the Water Master, the Court set an additional deadline for the claimant to file evidence to answer the question of when stockwater use begin on the requested places of use in Sections 2, 3, 4, Twp 12S, Rge 7W, and who initiated such use. Matador filed a response relying on the information already presented to the Court.

## CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact incorporate Conclusions of Law or the application of law to fact, they are incorporated herein as Conclusions of Law.

2. To ensure historical accuracy, the Water Court is required to address all issue remarks that appear on a claim as well as any objections the claim receives. Sections 85-2-247, -233, MCA.

3. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

### Claims 41A 88524-00 and 41A 88572-00

4. The DNRC reviewed the proposed changes to point of diversion and place of use for these claims and found the evidence was sufficient to resolve the issue remarks related to those elements. Therefore, the Court finds that the prima facie proof of those elements has been overcome by a preponderance of the evidence.

### Claim 41A 88570-00

5. Claim 41A 88570-00 received issue remarks indicating that the DNRC could not confirm the claimed diversion system or any historical irrigation on the claimed place of use. These issue remarks raise the possibility of non-perfection or abandonment.

6. The Water Court is obligated to resolve all issue remarks. §§ 85-2-247, -248, MCA. So long as the issue remark itself – and the evidence resulting in the remark – meets the “relatively modest” preponderance of the evidence standard, the claimant is compelled to participate in resolving the identified issue. *Hohenlohe v. State*, 2010 MT 203, ¶ 33; *Lockwood*, 43Q 200996 et al, *Order Establishing Volume and Order Closing Case* at 18 (May 29, 2015).

7. To address the issue remarks, Matador filed a motion seeking to amend irrigation claim 41A 88570-00 to a stockwater claim. Motions to amend water rights are authorized by Section 85-2-233(6), MCA and by Rule 10, W.R.Adj.R. A party seeking to amend its water right has the same burden of proof as an objector. That burden



requires a showing by a preponderance of the evidence that the elements originally claimed for a water right are incorrect. *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558. Parties seeking to amend water rights typically rely on facts showing a pattern of historical beneficial use that differs from, and justifies modifications to, the original claim.

8. “Motions to amend are intended to provide water right claimants with an opportunity to modify the elements of a previously filed water right. They are not intended to enable claimants to obtain water rights that were not timely filed.” 41J-265, *Order Denying Motions to Amend* (Dec. 15, 2015). Therefore, for claim 41A 88570-00, the question is whether Matador has presented sufficient factual evidence to overcome its own Statement of Claim and justify the proposed modifications to the original claim. *Nelson*, 2014 MT at ¶ 37.

9. Matador has the burden of overcoming the elements of its own claim by a preponderance of the evidence. *Nelson*, 2014 MT at ¶ 37. In this case, Matador has the burden of introducing sufficient evidence to show that claim 41A 88570-00 was not used for irrigation purposes but was instead historically used for stockwater purposes on a larger place of use but with the same priority date. As noted below, Matador’s theory is that the irrigation right was gradually converted from irrigation to stockwater use as additional lands were consolidated into a single ownership.

10. Matador introduced circumstantial evidence to support stockwater use on the requested places of use in Section 32, 33, Twp 11S, Rge 7W as well as Sections 2, 3, and 4, Twp 12S, Rge 7W. By 1919, Cook Sheep Company owned or leased thousands of acres and was the largest sheep ranch in Beaverhead County, with somewhere in the neighborhood of 16,000 head of sheep. It seems evident that Cook likely moved its animals between its private lands and public lands so long as there was a sufficient carrying capacity. The animals were likely consuming water from Sage Creek and its tributaries, along with other available water sources. The question before the Court, however, is not whether these stockwater appropriations existed but whether they have any relation to the 1912 decreed right that Matador claimed. 41J-265, *Order Denying Motions to Amend* (Dec. 15, 2015).

11. Matador argues the claimed water right and the requested water right are sufficiently related because its predecessors intentionally changed the purpose, points of diversion and places of use prior to 1973. Matador states “pre-1973 statutory law expressly permitted a water right owner to change the use, place of use, or points of diversion so long as nobody else was injured, which was exactly what Matador and its predecessor did with water right 41A 88570-00.” *Objection* at 5. Matador relies on § 4842 of the 1907 Revised Codes of Montana, which stated:

The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

12. Matador is correct that pursuant to pre-1973 law, a water right could lawfully be changed from irrigation to stock use, but only if the underlying right existed. If such a conversion took place, Matador has the burden of introducing evidence to show this change occurred. There is no credible evidence before the Court that suggests the claimed historical diversion system is valid for the unnamed tributary of Little Sage Creek. Similarly, there is no evidence of irrigation (other than natural sub-irrigation) on the claimed place of use. Matador’s predecessors could not have changed a right that was never perfected.

13. Matador concedes that irrigation under claim 41A 88570-00 was abandoned but argues that abandonment did not take place until 1965, which would have allowed its predecessors to gradually and intentionally convert the Cook Right from irrigation to stockwater use along the source as new parcels in Sections 3 and 4 were consolidated under a single owner. In Matador’s view, addition of these points of diversion and places of use “result[ed] in something akin to marshalling stockwater.” *Additional Evidence* at 3.

14. Matador’s argument is flawed for two reasons. First, as noted above, the totality of the evidence before the Court suggests that Cook Right was never used for irrigation purposes as claimed by Matador. Therefore, the irrigation portion of the Cook Right could not have been lawfully converted to a different use.

15. Second, any support for historical direct-from-source stockwater use on the

claimed unnamed tributary of Little Sage Creek stems from the language of the 1936 Decree itself. The 1936 Decree affirmed Cook Sheep Company's practice of using Sage Creek and certain tributaries for irrigation, the "watering of stock" and other useful and beneficial purposes. The District Court articulated that these rights were for "their lands" i.e. the lands owned by the parties to the case. At the time of the Decree, Cook owned NESE of Section 32, and the SWSE and SW of Section 33, Twp 11S, Rge 7W, in Beaverhead County. Therefore, the only place at which Cook Sheep Company could have used the claimed tributary of Little Sage Creek for direct from source stockwatering was on these lands in Sections 32 and 33.

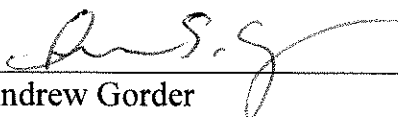
16. Finally, while it is theoretically possible that Cook could have "marshalled" an existing stockwater right onto new lands after acquiring additional properties, Matador has not met its burden to present sufficient factual evidence for the Court to reach such a conclusion. The fact that Matador's predecessors subsequently purchased additional lands along the unnamed tributary of Little Sage Creek is not in and of itself sufficient to find marshalling of stockwater.

17. For all of the above-mentioned reasons, the Court finds that the evidence is sufficient to overcome the Statement of Claim and partially grant Matador's motion to amend in part to change 41A 88570-00 to reflect stock use in the NESE of Section 32, and the SWSE and SW of Section 33, Twp 11S, Rge 7W, Beaverhead County with a priority date of April 16, 1912.

### RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified above to correct the Preliminary Decree for this Basin. Post Decree Abstracts of Water Right Claim are served with this Report to confirm that the recommended changes have been made in the state's centralized record system.

DATED this 29 day of March, 2017

  
Andrew Gorder  
Water Master

Patti L. Rowland  
Bloomquist Law Firm, P.C.  
PO Box 1418  
Dillon, MT 59725-1418  
(406) 683-8795  
[prowland@helenalaw.com](mailto:prowland@helenalaw.com)