

Montana Water Court  
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**FILED**

**APR 07 2017**

**Montana Water Court**

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
SUN RIVER BASIN (41K)

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CLAIMANTS: Broken O Land & Livestock LLC

**CASE 41K-A3**

OBJECTORS: Tee Bar Ranch Co.; Medicine River  
LLC; Thomas R. McCall; Christine McCall;  
Greenfields Irrigation District; State of Montana  
Department of Fish, Wildlife and Parks; United States  
of America (Bureau of Reclamation); United States of  
America (Bureau of Indian Affairs)

41K 49404-00    41K 49406-00  
41K 49405-00    41K 49407-00

**ORDER DENYING IMPLIED CLAIMS  
AND  
ORDER ADDING REMARKS**

**Procedural History**

This case addresses four irrigation claims owned by Broken O Land and Livestock LLC (Broken O). All four claims were part of Joint Proceeding 41K-A for the Sun River and received acres irrigated and volume changes in this proceeding (Master's Report issued November 17, 2015; Order Amending and Adopting Master's Report, In Part, issued April 14, 2016).

On August 3, 2016, Broken O filed a motion to add multiple use remarks to the claims as a way to acknowledge stock use. All parties in 41K-JP-A received notice of the motion. Several parties elected to participate in proceedings on the motion.

Following an initial telephone conference, Broken O filed a motion for implied claims that replaced the original motion. The Montana Department of Fish, Wildlife, and Parks (DFWP) filed a response opposing the motion. The Court held a second telephone conference on February 15, 2017. Based on discussion at this conference, all parties agreed to submit the case for a decision on the current record. Since proceedings in 41K-JP-A were completed, the Court closed that proceeding and re consolidated the claims into case 41K-A3 to address the motions.

### **Issues Presented**

1. *Do Broken O's irrigation claims meet the requirements for implied stock claims?*
2. *Are remarks noting incidental stock use appropriate for these claims?*

### **Standard of Review**

#### **Implied Claims**

Implied claims are used to separate multiple claims that are included in a single statement of claim filing. Rule 35, W.R.C.E.R. The statement of claim and attachments must contain some evidence indicating multiple water rights are included in a single filing. Without evidence in the statement of claim filing supporting the existence of multiple water rights, an implied claim is not appropriate.

An implied claim is not a way to expand the terms of a water right or to circumvent claim filing requirements under Sections 85-2-221 and 85-2-224, MCA. *Eliasson Ranch Co. v. Rodeghiero*, Case 40A-115 at p. 5, (Order Amending and Adopting Master's Report Claim 40A 151880-00 Jun. 28, 2004). Generating an implied claim cannot change the historical use of water or adversely affect other water users. When the Court implies a claim, it creates a distinct water right that is separate from the parent claim and may be exercised independently.

#### **Incidental Stock Use**

It is a common practice for livestock to access irrigation ditches while diversions are taking place for irrigation. If the stock use is limited and not exercised independently from the irrigation claim, it can be considered incidental to that primary use.

If the claim is not in use for irrigation, the stock use cannot take place. Unlike an implied claim, the incidental use is not separate from the primary use and does not provide a basis for a call on other water rights.

The final decree for an existing water right can include “information necessary to fully define the nature and extent of the right.” Section 85-2-234(6)(i), MCA. When the historical use of an irrigation right includes incidental stock use, a remark noting this use can be appropriate.

### Arguments

Broken O points to evidence showing all four claims were historically used for both irrigation and stock. None of the parties in this case dispute this historical use. However, Broken O does not identify anything in the statements of claim indicating multiple rights within these filings.

DFWP asserts there is no evidence of a second claim for stock use in any of the statement of claim filings. DFWP argues this lack of evidence precludes generating any implied claims. At the same time, DFWP acknowledges historical stock use through these irrigation claims and supports the addition of incidental stock use remarks to all four claims. In fact, all parties have expressed support for incidental stock use remarks.

### Analysis

#### Implied Claims

1. *Do Broken O's irrigation claims meet the requirements for implied stock claims?*

All four statements of claim were filed by David D. Freeman and Wyona D. Freeman. They all represent decreed rights from the Sun River. They share the same point of diversion and use the Company Ditch as the means of diversion. The same attachments were used for all four filings, including, a copy of the appropriate portion of the 1911 *McIver v. Campbell* Decree, an aerial photograph marking the point of diversion, and a hand drawn map of the Company Ditch and place of use. The only differences between the filings were the claimed priority dates, flow rates, and periods of use.

The four statement of claim filings were simple and clear. The Court's review of the statements of claim and attachments did not identify any evidence of multiple rights within a single filing. Therefore, the Court will not generate implied claims for stock use.

Incidental Stock Use Remarks

2. *Are remarks noting incidental stock use appropriate for these claims?*

In the present case, Broken O is seeking remarks noting incidental stock use as an alternative to implied claims. The record supports stock use as a historical practice within these irrigation claims. That stock use only occurs when water is diverted for irrigation and does not increase the amount of water diverted. Adding a remark acknowledging the historical practice would serve to more fully define the nature and extent of the rights.

At the same time, a remark noting incidental stock use must clearly state the inherent limitations that apply to this use. Incidental stock use does not expand the use of the original irrigation claim and can only take place when Broken O is diverting water for irrigation. Incidental stock use through these claims does not provide an independent basis for a call on other water rights.

Order

These matters having come before the Court, it is


ORDERED that the Broken O motion for implied claims is denied.

ORDERED that the following remark be added to all four claims:

THE INCIDENTAL USE OF THIS RIGHT FOR STOCK IS LIMITED TO TIMES WHEN WATER IS DIVERTED FOR IRRIGATION AND DOES NOT PROVIDE AN INDEPENDENT BASIS FOR A CALL ON OTHER WATER RIGHTS.

Water right claim abstracts are attached to this Order to confirm the addition of the remark in the State's centralized database.

DATED this 7 day of April, 2017.

  
Douglas Ritter  
Associate Water Judge

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