

FILED

AUG 15 2017

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
TWO MEDICINE RIVER – BASIN (41M)

CLAIMANTS: Hayne Family Exemption Trust; Hayne Family
Survivors Trust

NOTICE OF INTENT TO APPEAR: Susan L. Anderson; Arrow S Inc.;
Henneman Farms; Pondera County Canal & Reservoir Co

41M-147

41M 154607-00

41M 154608-00

41M 154609-00

41M 154610-00

**ORDER DENYING OBJECTION TO MASTER’S REPORT AND ORDER
ADOPTING MASTER’S REPORT**

I. INTRODUCTION

This matter involves an objection to a Master’s Report. The single claim at issue, 41M 154607-00, is owned by Hayne Family Exemption Trust and Hayne Family Survivors Trust. Susan L. Anderson, Arrow S Inc., and Henneman Farms objected to the Master’s Report.

The objectors assert the Master erred by recommending a flow rate of 6.52 cfs for claim 41M 154607-00. They contend the correct flow rate should be 4.41 cfs.

Claim 41M 154607-00 was filed by Jack and Harriet Hayne. The original flow rate was 500 miner’s inches (12.5 cfs) for use on 200 acres of land.

The DNRC was not able to identify 200 acres of irrigation during the claims examination process. A DNRC Examination Worksheet completed by Lynn Hester in 2004 shows irrigation of 172 acres on an aerial photo dated 9/22/79, and 114.5 acres on the 1964 Water Resources Survey (WRS) for Pondera County. In response, Jack and

Harriet Hayne filed an amendment of their claim reducing the acreage from 200 to 172 acres.

This right was included in the Basin 41M Preliminary Decree, which was issued after the Hayne amendment. The Preliminary Decree identified a flow rate of 6.52 cfs, and included the following information remark:

THE FLOW RATE OF THIS CLAIM HAS BEEN REDUCED TO 17 GPM PER ACRE. THE FLOW RATE MAY BE CONTESTED BY PROPER OBJECTION.

The Water Right Claim Examination Rules authorize reductions in flow rate based on application of a 17 gpm per acre standard. Rule 14(d)(2), W.R.C.E.R.

The Preliminary Decree also had an issue remark noting that the Pondera County WRS appeared to indicate 116.41 acres irrigated.

After issuance of the Preliminary Decree, the Hayne Family Exemption Trust and Hayne Family Survivors Trust filed a second amendment further reducing acreage to 116.50 acres. The second amendment was accompanied by a DNRC memorandum recommending that the Water Court adopt the amendment and decree this right with 116.50 acres. DNRC Memorandum at 3 (May 1, 2017).

The Water Master then gave the parties until June 1, 2017 to “file any comments or objections they may have to the recommendations contained in the DNRC’s Memorandum.” Order Vacating Filing Schedule and Order Setting Filing Deadline at 2 (May 16, 2017). The only party to respond was Pondera County Canal and Reservoir Company, which expressed agreement with the DNRC’s recommendations. Susan L. Anderson, Arrow S Inc., and Henneman Farms did not file a response, and the Master issued his report recommending a flow rate of 6.52 cfs for use on 116.50 acres.

Susan L. Anderson, Arrow S Inc., and Henneman Farms now assert the flow rate should have been reduced to 4.41 cfs. They contend a flow rate of 4.41 cfs is necessary to preserve a ratio of 17 gpm per acre, which was the ratio applied by the DNRC when it set a flow rate of 6.52 cfs for use on 172 acres. The objectors assert that this ratio is entitled to prima facie status, and that application of the ratio is required because acreage

was reduced from 172 acres to 116.50 acres. They contend the Master erred by failing to reduce the flow rate to reflect the change in acres.

II. ISSUE

1. Should the Master have reduced the flow rate to 4.41 cfs?

III. DISCUSSION

Claims of existing water rights, or amended claims of existing water rights, are prima facie proof of their contents until issuance of a final decree. Section 85-2-227(1), MCA. An objector seeking to overcome the prima facie status of a claim must show, by a preponderance of the evidence, that one or more elements of a water right do not reflect historical beneficial use. *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558.

The 17 gpm per acre guideline used by the DNRC during claims examination is based on commonly accepted methods of irrigation, the peak consumptive use of alfalfa during a drought year growing season, and a reasonable efficiency for the method of irrigating a field. Rule 14(b)(1)i-iii, W.R.C.E.R. Guidelines are, as their name implies, estimates of reasonable use. Rule 2(a)(29), W.R.C.E.R. Guidelines may or may not reflect actual historical use. Because they are estimates, and because they are not based on actual use, guidelines are not entitled to prima facie status.

The Hayne family originally claimed a flow rate of 500 miner's inches for claim 41M 154607-00. This flow rate was supported by numerous documents attached to the claim including multiple notices of appropriation and an affidavit, and well as the sworn and notarized statement of Jack Hayne. Nowhere in the claim file or elsewhere in the record is there information suggesting that the historical flow rate for this right was something other than 500 miners inches.

Nevertheless, the flow rate was reduced to 6.52 cfs as authorized by the Water Right Claim Examination Rules, and none of the parties, including the claimant, objected. Prior to issuance of the Master's Report, Susan L. Anderson, Arrow S Inc., and Henneman Farms did not object to flow rate or show by a preponderance of the evidence that a flow rate of 4.41 cfs was used historically.


The objectors assert the ratio of 17 gpm per acre applied by the DNRC to this right during claims examination has prima facie status, and must therefore be maintained whenever there is a change in irrigated acreage. The prima facie status granted to water rights does not extend to statewide guidelines for flow rate. Prima facie status only extends to the historical elements of a claim filed or amended by the claim's owner. While that status may apply to a flow-to-acres ratio established by a claimant, it does not grant special protection to statewide guidelines, especially where there is no evidence those guidelines reflect actual historical use.

IV. CONCLUSION AND ORDER

The prima facie status afforded to water rights under § 85-2-227(1), MCA does not apply to statewide flow rate guidelines.

The objection to flow rate filed by Susan L. Anderson, Arrow S Inc., and Henneman Farms is denied. The Master's Report filed June 22, 2017 is ADOPTED without modification.

DATED this 15 day of August, 2017.


Russ McElyea
Chief Water Judge

Hayne Family Exemption Trust
Hayne Family Survivors Trust
Jack M. & John D. Hayne, Co-Trustees
PO Box 209
Dupuyer, MT 59432-0209

John E. Bloomquist
Bloomquist Law Firm PC
3355 Colton Dr Ste A
Helena, MT 59602-0252
(406) 502-1244
blf@helenalaw.com

Stephen R. Brown
Garlington, Lohn & Robinson PLLP
PO Box 7909
Missoula, MT 59807
(406) 523-2500
srbrown@garlington.com