

Montana Water Court
P.O. Box 1389
Bozeman MT 59771-1389
(406) 586-4364
1-800-624-3270 (IN-STATE)
FAX: (406) 522-4131

FILED

OCT 04 2017

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
BLACKFOOT RIVER - BASIN 76F

* * * * *

| | |
|---|---|
| CLAIMANTS: Josh L. Macrow; Kelly L. Macrow; Jeanette M. Manley; Scott J. Manley (Deceased); Brittany S. Nowak; Estate of Earl Pruy; Barbara N. Sheehy; Hugh F. Sheehy; William A. Venuti; Lisa L. Wrobel; William J. Venuti; Gary Delp; Robert F. Schmidt; Debra L. Schmidt; Lacey Van Grinsven; Steven Van Grinsven; Timothy A. Wolfe; Sheehy Family Trust | CASE 76F-167 76F 99178-00 76F 118522-00 76F 118523-00 76F 147766-00 76F 147904-00 76F 147905-00 76F 148038-00 76F 148079-00 76F 148080-00 76F 149365-00 76F 149499-00 76F 151263-00 76F 151294-00 Implied Claim: 76F 30109796 |
| OBJECTORS: Avista Corporation; Hugh F. Sheehy; Wills Cattle Co. | |
| COUNTEROBJECTOR: Robert F. Schmidt | |
| NOTICE OF INTENT TO APPEAR: Wills Cattle Co. | |
| INTERVENORS: Steven Van Grinsven; Lacey Van Grinsven | |

ORDER AMENDING AND ADOPTING MASTER'S REPORT

I. INTRODUCTION

This matter involves objections to a Master's Report. Wills Cattle Co., Hugh and Barbara Sheehy ("Sheehy" or "the Sheehys"), and Steven and Lacey Van Grinsven ("Van Grinsven" or "the Van Grinsvens") objected to the Master's Report. Except for Avista Corporation, the parties in the caption claim water rights from Blixit Creek.

The claimants own land once held by the Pruy family as a single contiguous property. Several decades ago, the Pruy family subdivided and sold most of their land. The current owners of those parcels claim portions of the water rights appurtenant to the original Pruy ranch.

The task faced by the Water Master was to apportion the Pruyn water rights among the owners of Pruyn land after it was subdivided. The Master found that four water rights were historically used by the Pruyns.

Claim 76F 118523-00 was a 100 miner's inch direct flow irrigation right with a priority date of April 1, 1903. It was based on a decree of water to J. S. Bennett and F. M. Bennett in a district court action titled *Wills v. Morris*, Case No. 12038, (May 10, 1934). Claim 76F 118523-00 was diverted from the east and west banks of Blixit Creek via the Bennett Ditches. It is referred to in this order as the Bennett right.

The Master found the second and third rights were impounded in the Pruyn Reservoir and used for irrigation. Claim 76F 118522-00 had a volume of 42 acre-feet and a priority date of September 10, 1956. Claim 76F 30109796 was an implied right created from claim 76F 118522-00. It had a volume of 50 acre-feet and a priority date of December 31, 1961.

The fourth right, claim 76F 148080-00, was a use right with a May 11, 1934 priority date and a flow rate of 289 GPM.

The Master found that the owners of the Bennett right and claim 76F 118522-00 were Hugh and Barbara Sheehy, Robert and Debra Schmidt ("Schmidt" or "the Schmidts"), and Gary Delp. The Master determined that claim 76F 30109796 was owned by Hugh and Barbara Sheehy, Robert and Debra Schmidt, Gary Delp, and Steven and Lacey Van Grinsven; and that claim 76F 148080-00 was owned solely by Hugh and Barbara Sheehy. All other claims to these four water rights were dismissed.

Wills Cattle Co., the Sheehys, and the Van Grinsvens raised numerous objections to the Master's Report. These objections are summarized as follows:

Wills Cattle Co. Objections

Wills asserts that the Master should have found that all parties except the Sheehys abandoned their rights to use of the two water rights in the Pruyn Reservoir. Wills asserts that the Sump Ditch, which was originally used with both Pruyn Reservoir rights, was abandoned and should not be a secondary point of diversion for either claim. Wills asserts that the period of use for the second reservoir right should not be year-round and

that the Master granted the Sheehys the 1934 right through the Pruyn Ditch with no evidence of use. Contrary to Sheehy, Wills contends that the Reservoir Ditch should not be recognized in conjunction with either of the two reservoir rights.

Sheehy Objections

The Sheehys assert the Master granted too much irrigated acreage to Schmidt and Delp for lowland areas irrigated with claims 76F 118522-00 and 76F 118523-00, and too much acreage to Schmidt and Van Grinsven for the two Pruyn Reservoir rights delivered to bench lands by the Sump Ditch. The Sheehys also assert that the Reservoir Ditch should be added as a secondary point of diversion to the two Pruyn Reservoir rights. They assert that the correct source for claim 76F 148080-00 is an unnamed tributary of Blixit Creek and that the proper ditch name should be the Pruyn Ditch rather than the Bennett Ditch.

Finally, the Sheehys assert that Blixit Creek is not a tributary of Union Creek and that several clerical corrections to the Master's Report are needed.

Van Grinsven Objections

The Van Grinsvens assert the Master erred by finding that lands in section 21 are irrigated with the Bennett right. They contend irrigation with the Bennett right should be limited to lands in section 22, and that the Master erred by finding that the United States issued a patent to Blixt for lands in section 21.¹ The Van Grinsvens assert that the Bennett right and both Pruyn Reservoir rights were marshaled through the Sump Ditch and used on the Van Grinsvens' property. They contend the Master erred by failing to grant them an ownership interest in the Bennett right and claim 76F 118522-00. Finally, the Van Grinsvens assert the Master erred by limiting the admissibility of testimony by Lynn Sainsbury.

II. ISSUES

1. Did the Master err by determining that Schmidt, Delp, and Van Grinsven did not abandon their rights in the Pruyn Reservoir?

¹ The name Blixit Creek is a derivation of the name Blixt. Alfred Blixt was a homesteader in this area and a predecessor of some of the current landowners.

2. Did the Master err by finding that the Sump Ditch was not abandoned?
3. Did the Master err by finding a year-round period of use for claim 76F 30109796?
4. Did the Master err by recognizing the Sheehys' 1934 right in the Pruyne Ditch?
5. Did the Master err by recognizing too much irrigated acreage for Schmidt and Delp using claims 76F 118522-00 and 76F 118523-00?
6. Did the Master err by recognizing too much acreage on the Schmidt and Van Grinsven bench lands irrigated with the two Pruyne Reservoir rights conveyed by the Sump Ditch?
7. Should the Reservoir Ditch be added as a point of diversion for the two Pruyne Reservoir rights?
8. Did the Master properly conclude that Blixit Creek is a tributary of Union Creek?
9. Did the Master err by finding that the Bennett right was used to irrigate lands in section 21?
10. Should the clerical corrections to the Master's Report raised in Sheehy's objection be made?
11. Should the Master have found that the Bennett and Pruyne Reservoir rights were marshaled through the Sump Ditch for use on lands now owned by Van Grinsven?
12. Did the Master err by limiting the admissibility of testimony by Lynn Sainsbury?

III. STANDARD OF REVIEW

The Water Court appoints Water Masters to prepare reports containing the Master's findings of fact and conclusions of law. Rule 53(a)(1)(C), M. R. Civ. P.; Rule 23, W.R.Adj.R. The Water Court reviews the Master's findings of fact for clear error and the Master's conclusions of law to determine whether they are correct. *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 25, 375 Mont. 327, 328 P.3d 644 (citing *Heavirland v. State*, 2013 MT 313, ¶ 14, 372 Mont. 300, 311 P.3d 813). Based on these standards of review, the water judge "may adopt, modify, or reject the

[Master's] report, in whole or in part, or may receive further evidence or recommit it with instructions." Rule 23, W.R.Adj.R.

The Montana Supreme Court follows a three-part test to determine if a trial court's findings of fact are clearly erroneous. See *Interstate Prod. Credit Ass'n. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). The Water Court uses a similar test for reviewing objections to a Master's findings of fact. Rule 11(c), W.R.Adj.R. (referencing Rule 53(e), M. R. Civ. P.). See *In re the Existing Rights within the Jefferson River Drainage Area*, Nos. 41G-137, 41G-W-182145-00, 1999 Mont. Water LEXIS 1 at 3-4 (Dec. 27, 1999).

First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, even if the findings are supported by substantial evidence, this Court may determine a finding is clearly erroneous if the Master misapprehended the effect of the evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, this Court may still determine that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the Court with the "definite and firm conviction that a mistake has been committed." *Skelton Ranch*, ¶ 27 (quoting *Heavirland*, ¶ 16). "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Skelton Ranch*, ¶ 27 (quoting *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993)). The Montana Supreme Court has long recognized that "substantial evidence and clearly erroneous are not synonymous." *Heavirland*, ¶16 (quoting *DeSaye*, 250 Mont. at 323). Therefore, this Court may determine a finding is clearly erroneous even though there is evidence to support it. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16).

This Court reviews a Master's conclusions of law to determine whether they are correct. *Heavirland*, ¶ 14 (citing *Geil v. Missoula Irrigation Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398). "Thus, the Water Court reviews the Water Master's findings of fact for clear error and the Water Master's conclusions of law for correctness." *Heavirland*, ¶ 14 (citing Rule 53(e)(2), M. R. Civ. P.; *Geil*, ¶ 22).

IV. BACKGROUND

Understanding this case requires familiarity with the location of key features. These features are depicted on a map identified as Ex. SH-12, which is attached to this order.

Blixit Creek has several forks which together constitute the sources of water for the claims in this case. The two Bennett Ditches diverted water on the east and west banks of Blixit Creek and delivered water to lands now owned by Sheehy, Schmidt and Delp. These low land areas, or bottom lands, were served with the 1903 Bennett right.

The Pruyn Reservoir was constructed above the Bennett Ditches after the Bennett right was appropriated. It is located on the Main Fork of Blixit Creek, and was initially supplied with Main Fork water until construction of the Reservoir Ditch. The Reservoir Ditch enabled flows from the East Fork of Blixit Creek to be diverted to the reservoir until the ditch was cut by Sheehy in 2001. After the Reservoir Ditch was disabled, flows in the East Fork could not be directed to the reservoir.

The Sump Ditch was constructed shortly after the Pruyn Reservoir was built. The head of the Sump Ditch is below the reservoir, and was used to transport water to bench lands above Blixit Creek now owned by Schmidt and Van Grinsven. The purpose of moving water to the bench was to supply a gravity-operated sprinkler system that serviced the lowland areas originally flood irrigated using the Bennett Ditches. The gravity-fed sprinkler system operated until the early 1970s when it failed. The gravity sprinkler system was not used after the early 1970s.

Water delivered to the bench beyond the amount required to operate the gravity sprinkler system was distributed via lateral ditches on what is now the Schmidt and Van Grinsven properties. The Sump Ditch was the only way to convey water to the Van Grinsven property and the bench land owned by Schmidt. The Sump Ditch fell into disrepair in the 1990s and did not carry water to the Schmidt and Van Grinsven properties for many years.

Sheehy, who owns most of the bottom ground originally irrigated by Bennett, no longer uses the Sump Ditch or the Bennett Ditches. Instead, he uses a pump site located downstream of the original Bennett Ditches.

V. ANALYSIS

1. Did the Master err by determining that Schmidt, Delp, and Van Grinsven did not abandon their rights in the Pruyn Reservoir?

Wills asserts the Master made a factual error by finding that portions of the first and second Pruyn Reservoir rights owned by Schmidt, Delp, and Van Grinsven were not abandoned.

Wills asserts that there was no unity of possession among the parties who bought parcels subdivided by Pruyn, and that each landowner claiming a water right for their property “must prove their lack of intent to abandon their own proportionate share of the water right.” Wills Cattle’s Objections to Master’s Report and Request for Briefing Schedule and Oral Argument, at 7 (April 24, 2017). Wills points to Conclusion of Law 16, where the Master stated that proof of non-use between 1999 and 2015 “shifted the burden to Sheehy to introduce evidence that would explain or excuse the non-use.” Master’s Report (“MR”), Conclusion of Law (“COL”) 16, at 36 (March 27, 2017). Wills contends this conclusion of law is incorrect because it places the burden of rebutting non-use entirely on Sheehy, but not on Schmidt, Delp, and Van Grinsven, who also claimed portions of the same rights.

Wills asserts that Schmidt, Delp, and Van Grinsven each had an obligation to rebut the presumption of abandonment once it was established. Wills contends this obligation existed regardless of whether the parties were tenants in common or held ownership separately. Wills argues that Sheehy’s efforts to protect his rights did not relieve other parties from their obligation to do the same.

Case law supports the arguments made by Wills. In *Meagher v. Hardenbrook*, 11 Mont. 385, 28 P. 451 (1891), the water right at issue was appropriated for mining and held by 24 owners as tenants in common. All the owners discontinued use of the right except Hardenbrook, who converted 400 inches to irrigation.

The district court held that everyone but Hardenbrook abandoned their shares. The Montana Supreme Court affirmed, noting that a single tenant in common could preserve either all or part of the common estate. *Meagher*, 11 Mont. at 390, 28 P. at 452-53. A similar ruling was issued in *Brighton Ditch Co. v. Englewood*, 124 Colo. 366, 373, 237 P.2d 116, 120 (1951), where the Court noted that “[e]ach of several water appropriators using a ditch in common may separately abandon his right thereto... .” See also *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 53, 375 Mont. 327, 328 P.3d 644 (“Partial use of a water right does not necessarily show intent to use the entire right or prevent a finding of partial abandonment.”).

The Master found that a prolonged period of non-use occurred with all the rights in the Pruyn Reservoir, including those claimed by Schmidt, Delp, and Van Grinsven. “Sheehy and the other (non-Pruyn) owners of water rights from the Pruyn Reservoir did not use stored water from the Pruyn Reservoir from 1999 through 2015.” MR, COL 15, at 36. The Master then determined that this period of prolonged non-use “shifted the burden to Sheehy to introduce evidence that would explain or excuse the non-use.” MR, COL 16, at 36. Wills correctly contends that the burden of rebutting the presumption of abandonment was not limited to Sheehy, but applied equally to other users of the same rights.

This requirement makes sense because a shared water right can be abandoned by one owner, but not another. In this case, land ownership and water use were divided among multiple owners after Pruyn subdivided his land. Sheehy did not divert and use water in the same way or in the same places as his neighbors. Sheehy undertook a series of actions to protect his water rights when they were threatened, but did not act on behalf of anyone but himself. His actions showed he did not intend to abandon his rights, but they did not indicate the state of mind of others. This distinction is important because both non-use and intent remain the foundations of abandonment law.

As an example, the Sump Ditch was the sole method of conveyance to the bench lands owned by Schmidt and Van Grinsven. The Sump Ditch was in a state of disrepair for years, and there is no evidence it was used by Schmidt or Van Grinsven or their

predecessors between at least 1999 and 2015.² Because the Sump Ditch was the only method of conveying water to the bench lands owned by these parties, their lands went unirrigated for many years. In contrast, Sheehy irrigated his land during that time by using a different point of diversion. Sheehy had no reason to maintain the Sump Ditch because it no longer served his land.

Sheehy went to extraordinary lengths to protect the right to irrigate his property. His actions included consultations with lawyers, multiple attempts to secure easements, a change application, and ultimately, purchase of the land where the Pruyn Reservoir is located. Sheehy's neighbors did not make similar efforts to protect their water rights until after abandonment occurred.

In at least one instance, Sheehy's actions were adverse to his neighbors. That action occurred in 2001 when he cut the Reservoir Ditch supplying water to Pruyn Reservoir. By cutting this ditch, Sheehy routed East Fork water around the Pruyn Reservoir and directly to his point of diversion downstream. Had the Sump Ditch been in operating condition, this re-routing would have prevented others, including Schmidt and Van Grinsven, from impounding East Fork water in Pruyn Reservoir and releasing it for use on their properties. Schmidt, Van Grinsven, and their predecessors did not act to prevent this additional loss. Failure to keep critical infrastructure in working condition is classic evidence of abandonment.

In summary, Sheehy's conduct does not reveal his neighbors' intentions. Each claimant owns a separate parcel of land, and each is individually responsible for irrigating his or her own property. Once a prolonged period of non-use was shown for each water user, the burden of overcoming the presumption of abandonment applied to each user separately. Sheehy's actions cannot be used by his neighbors to rebut the presumption of abandonment applicable to their water rights.

The evidence showed that the control system for the reservoir was disabled for many years, and the Reservoir and Sump Ditches were not capable of conveying water to

² There is evidence the Sump Ditch was not used after 1993, but this difference is not material.

Schmidt and Van Grinsven lands on the bench. These problems persisted for sufficient time to create a rebuttable presumption of abandonment. The only party to rebut this presumption was Sheehy. The Master did not separately analyze whether other users rebutted the presumption of abandonment applicable to their rights.

The right to use water held in shared ownership may be abandoned by some owners but not others. For years, Sheehy was the only person who made an effort to protect his rights. It was error for the Master to conclude that Sheehy's actions rebutted the presumption of abandonment applicable to the water claimed by his neighbors. There was no substantial evidence that Schmidt, Van Grinsven, or their predecessors took any action to avoid abandonment of either Pruyn Reservoir right until recently. Those actions came after abandonment had already occurred.

Wills contends that Sheehy is only entitled to retain his pro rata share of water rights in the Pruyn Reservoir. Wills proposes reducing Sheehy's rights by subtracting the amounts abandoned by others.

Little evidence was offered regarding the type of ownership interest held by successors of Pruyn after subdivision of his lands. Without such evidence, the default presumption is that Pruyn's successors held their interests as tenants in common. *See University of Montana v. Coe*, 217 Mont. 234, 239, 704 P.2d 1029, 1033 (1985).

As a tenant in common of the Pruyn Reservoir rights, Sheehy had the right to use all the water from those rights. There is no evidence he intended to forego that privilege and take less water than the reservoir could provide. Moreover, there is no evidence to show the flow rate or volume of water used on the Schmidt and Van Grinsven properties. Without this evidence, it is not possible to effectuate the partition and partial abandonment of these rights urged upon the Court by Wills. Accordingly, Sheehy is entitled to retain an undivided interest in the entirety of the Pruyn Reservoir rights.

2. Did the Master err by finding that the Sump Ditch was not abandoned?

Wills asserts the Master's findings regarding use of the Sump Ditch were not sufficiently clear. Wills contends that Finding of Fact ("FOF") 40 incorrectly states a "preponderance of the evidence shows that there was irrigation on the VanGrinsven [sic]

and Schmidt properties on the bench dating from the time the Sump Ditch was constructed” in 1961. MR, FOF 40, at 12.

The evidence shows the Sump Ditch was constructed after the Pruyne Reservoir, and was used to convey water to a sump located on the southern boundary of parcels now owned by Schmidt and Van Grinsven. Once water reached the sump, it was collected in a pipeline and delivered via gravity flow to sprinklers on lands below the bench. Surplus water arriving from the Sump Ditch was used to flood irrigate land owned by Schmidt and Van Grinsven’s predecessors for several years, but this practice eventually ceased.

Testimony from Sheehy indicated that Cromwell was the last person to irrigate what is now Schmidt and Van Grinsven land. Cromwell purchased his land in 1989 and sold it in 1997. After that, the Sump Ditch fell into disrepair and could not carry water to the Schmidt and Van Grinsven parcels. Sheehy testified that he only saw water in the Sump Ditch twice after 1993. On both occasions, water only ran a short distance down the ditch, and did not reach the Schmidt or Van Grinsven properties.

Finding of Fact 40 could be interpreted to mean that irrigation of the Schmidt and Van Grinsven properties was continuous after the Sump Ditch was constructed. That interpretation is not supported by the evidence, and to the extent it was reinforced by FOF 40, it is corrected here.

Wills asserts the Sump Ditch should be removed as a diversion for the 1961 Reservoir right. This assertion is correct given that the only remaining owners of this right, the Sheehys, do not use the Sump Ditch.

3. Did the Master err by finding a year-round period of use for claim 76F 30109796?

Diversion of water into Pruyne Reservoir consisted of two separate events. The first occurred when it was built and began impounding water from the Main Fork of Blixit Creek. The second occurred when the Reservoir Ditch was built, and water was routed directly from the East Fork into the reservoir.

Despite these two phases, only one water right was filed. The Water Master determined there were two water rights, one with a priority date reflecting initial

construction of the dam, and a second with a priority date reflecting later construction of the Reservoir Ditch. The second right, known as an implied claim, was created from the first and given claim number 76F 30109796.

The Master issued abstracts for each claim. The abstract for the first right showed a period of use from June 1 to September 1. The period of use for the implied claim was year-round. There was no evidence to justify different periods of use for these rights. In the absence of such evidence, the best guide is the period of use for the original claim from which the implied claim was derived. Accordingly, the period of use for claim 76F 30109796 is June 1 to September 1.

4. Did the Master err by recognizing the Sheehys' 1934 right in the Pruyn Ditch?

The Sheehys assert ownership of claim 76F 148080-00, which was filed by the First National Montana Bank in 1982. This claim was based on a notice of appropriation filed by Thomas E. Evans on April 8, 1905. Thomas E. Evans was a predecessor of the Sheehys, but the Evans right was not recognized in the 1934 *Wills v. Morris* decree of Union Creek and its tributaries.

The Master's Report states that Sheehy asked to convert this claim to a use right with a priority date of May 11, 1934. MR, FOF 122, at 33. The Master agreed and changed the priority date to May 11, 1934.

The claim appeared in the 76F Preliminary Decree with a reference to the Bennett Ditch. The reference to the Bennett Ditch is singular, and the abstract does not state whether the west or east branch was the point of diversion.

Wills objected, asserting there was no evidence showing development of a use right through the Bennett Ditches in 1934, and that claim 76F 148080-00 should be dismissed. Sheehy also objected, asserting the source should be the unnamed tributary of Blixit Creek lying west of the Main Fork, and that the name and location of the point of diversion should be the Pruyn Ditch.

Findings of fact in Master's Reports must be supported by substantial evidence. There is no evidence that either branch of the Bennett Ditch was used to appropriate a new water right from Blixit Creek in 1934. The Master erred by making this finding.

There was, however, evidence that the Pruyn Ditch was used to divert water from the West Fork of Blixit Creek. That evidence consisted of testimony from Sid Wills and Julie Merritt, both of whom confirmed diversion of water from the Pruyn Ditch. Additional evidence of use is found on the Water Resources Survey Map for Missoula County (Wills Ex. W-6), the Water Resources Survey Field Notes (Sheehy Ex. SH-8), and the DNRC claims examination materials in the claim file.

The foregoing evidence establishes use of West Fork water diverted via the Pruyn Ditch. The question remaining is what priority date should be attached to this use. The Master selected a priority date of May 11, 1934 not because it was the date of first historical use, but because it was one day after issuance of the *Wills v. Morris* decree.

There is a shortage of evidence in the record regarding first use of the Pruyn Ditch, although there are clues from which a date can be inferred. Sid Wills testified that the Bennett brothers only used the Bennett Ditches. The Bennetts sold to the Pruyn family in 1955, and the first documentary evidence of the Pruyn Ditch is found on the Water Resources Survey map and field notes dated June 3, 1959.

A reasonable conclusion from this evidence is that the Pruyns built the Pruyn Ditch sometime after purchasing their property from the Bennetts in 1955, and before June 3, 1959. Because the earliest confirmation of this right is the Water Resources Survey field notes, the priority date for this claim is June 3, 1959.

5. Did the Master err by recognizing too much irrigated acreage for Schmidt and Delp using claims 76F 118522-00 and 76F 118523-00?

Schmidt and Delp both own lowland property that was historically irrigated using the easternmost Bennett Ditch. The Master recognized 3 acres of irrigation on Schmidt's property, and 11 acres on Delp's. The Master relied on an aerial photo taken in 1940 to support his finding of 3 irrigated acres on the Schmidt property. The basis for the

Master's finding of 11 acres on Delp's land is not stated, although aerial photos support irrigation of Delp's property.

Sheehy contends that Schmidt should be limited to 1 acre and Delp to 7. The basis of this assertion is analysis of aerial photos that Sheehy claims warrant lower numbers than those selected by the Master.

The question is whether the Master's findings are supported by substantial evidence. Aerial photos are commonly used to evaluate irrigated acreage, and a review of aerials in this case supports the Master's findings. The Master also visited the area and had a chance to observe irrigated acreage first-hand. The Master's findings regarding the amount of irrigated acreage on lowland areas of the Schmidt and Delp properties are appropriate.

6. Did the Master err by recognizing too much acreage on the Schmidt and Van Grinsven bench lands irrigated with the two Pruyn Reservoir rights conveyed by the Sump Ditch?

This question is moot because the Pruyn Reservoir rights used on the Schmidt and Van Grinsven benchlands were abandoned.

7. Should the Reservoir Ditch be added as a point of diversion for the two Pruyn Reservoir rights?

The Master's Report does not identify the Reservoir Ditch as a point of diversion for either of the two Pruyn Reservoir rights. Wills asserts the Reservoir Ditch was abandoned and that, regardless, it was not included as a point of diversion on either of the two Pruyn Reservoir claims. Because of this omission, Wills asserts the claimants had the burden of proving the Reservoir Ditch was a legitimate point of diversion for both claims, and that the claimants failed to meet their burden.

Sheehy asserts the Reservoir Ditch was built in conjunction with the first Pruyn Reservoir right, and that it served as a historical point of diversion for both rights.

The Missoula County Water Resources Survey published in 1960 shows the Reservoir Ditch. Sheehy Ex. SH-8, at 1. Sid Wills testified that the Reservoir Ditch was built after the Pruyn Reservoir at about the time the Reservoir was expanded from 42

acre-feet to 92 acre-feet. That timeline coincides with the development of the second Pruyn Reservoir right, which was the implied right given claim number 76F 30109796 by the Water Master.

The Reservoir Ditch was discussed several times in the Master's Report, and the Master was clearly aware that it conveyed water to the Pruyn Reservoir. The Master specifically found the Reservoir Ditch was not abandoned and that Sheehy intended to use it to convey water from the East Fork of Blixit Creek to the reservoir. MR, FOF 103.D, at 28. It appears the Master simply forgot to include the Reservoir Ditch as a point of diversion for the second Pruyn Reservoir right. This omission is corrected in the revised abstract of claim 76F 30109796 attached to this order.

8. Did the Master properly conclude that Blixit Creek is a tributary of Union Creek?

The connection between Blixit Creek and Union Creek has been a controversial issue for decades. The district court in *Wills v. Morris* found that Blixit Creek was a tributary of Union Creek, and that "the waters of said Blix Creek naturally flow into said Union Creek." *Wills Ex. W-3*, at 4. The district court decreed numerous rights to Union Creek and its tributaries and enjoined all parties from interfering with each other's water. F. M. Bennett appealed the district court's decision to the Montana Supreme Court. Bennett asserted there was no evidentiary support for the district court's finding that Blix Creek was a tributary of Union Creek, and suggested the decree be modified with the following language: "That Blix Creek, mentioned in the pleadings and the testimony herein, is a dry course, except in springtime, of Union Creek, and the waters of said Blix Creek flow into said Union Creek in a freshet in the spring." *Wills v. Morris*, 100 Mont. 504, 510-11, 50 P.2d 858, 861 (1935).

The Supreme Court concluded that the record was "barren of any direct testimony to the effect that if the waters of Blix Creek were not used for the irrigation of the Bennett lands during the normal flow in the irrigation season, any perceptible portion of the water would flow into Union Creek... ." *Wills*, 100 Mont. at 511, 50 P.2d at 861. The Supreme

agreed with Bennett and remanded with directions to modify the *Wills v. Morris* decree in accordance with Bennett's suggestion. *Wills*, 100 Mont. at 513, 50 P.2d at 862.

Based in part on the Supreme Court's ruling, the Master in the present case dismissed Wills' objections to claims in this case. The Master's decision received an objection, and was overturned. Prior to trial, the Master conducted a site visit of the area and observed Blixit Creek flowing into a tributary of Union Creek which in turn flowed into Union Creek. MR, FOF 5, at 5.

This finding was supported by the testimony of Sid Wills, who stated that Blixit Creek was a tributary of lower Arkansas Creek, which flowed into Union Creek. Mr. Wills testified that expansion of water rights on Blixit Creek would harm his rights on Union Creek. Mr. Wills' observations are based on his life-long residency in the area and are corroborated by maps such as the Water Resources Survey, which establish a connection between the two sources.

Sheehy asserts that Blixit Creek cannot be tributary to Union Creek because of the Supreme Court's decision in *Wills v. Morris*. Sheehy contends the Master erred by finding the two streams were connected.

A careful review of *Wills v. Morris* shows the Master did not err. The Supreme Court found a tributary relationship between the two creeks in the spring, but questioned the evidentiary support for such a connection during the irrigation season.

In the present case, the Master was careful to distance his own observations from whatever might have been the situation in 1934 when *Wills v. Morris* was decided. Although the Master described Blixit Creek as a perennial stream, he did not opine on whether downstream seniors on Union Creek could call for Blixit Creek water if a shortage of water arose during the irrigation season.

The real issue before the Master was whether the owners of Union Creek water rights had standing to object to water rights on Blixit Creek. Both the Montana Supreme Court and the Water Master found a connection between Blixit Creek and Union Creek. In either case, that connection was enough to establish a Union Creek water user's

standing to object to Blixit Creek water rights. The Master's findings on this issue were supported by substantial evidence and will not be overturned.

9. Did the Master err by finding that the Bennett right was used to irrigate lands in section 21?

The Van Grinsvens assert the Master erred by failing to support his finding that the 1903 Bennett right was used to irrigate lands in section 21. They contend that a finding that the Bennett right was used in section 21 cannot coexist with COL 6, which states that no water rights beyond those in the *Wills v. Morris* decree should be recognized unless the new rights had priority dates after the decree was issued.

The Master's finding that the Bennett right was used in section 21 did not conflict with COL 6. Sheehy, who owns former Bennett lands in section 21, is not claiming a new water right outside of the *Wills v. Morris* decree. He is claiming that the Bennett right in the decree was used for decades in section 21. That assertion does not run afoul of COL 6 because Sheehy does not claim a new water right.

The Van Grinsvens also assert the Master erred by failing to explain his finding that the 1903 Bennett right was appurtenant to Sheehy's section 21 land. This argument upends the burden of proof.

Water right claims have prima facie status under § 85-2-227(1), MCA. Under this statute, the burden falls on the objector to show that a water right is invalid. *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558. The claim filed for the Bennett right included irrigated lands now owned by Sheehy in section 21. Under the prima facie statute and *Nelson v. Brooks*, it was the Van Grinsvens' burden to prove that the Bennett right was not used to irrigate land in section 21. Sheehy had no obligation to prove use in section 21 until the burden shifted. To shift the burden, the Van Grinsvens needed to show by a preponderance of the evidence that irrigation in section 21 was illegitimate.

The record is full of evidence that the Bennett right was used to irrigate land in section 21. In addition to the claim itself, there was confirmation by the DNRC, evidence of use in the Water Resources Survey and in aerial photos, confirmation of use by Wills and Sheehy, chain of title evidence showing ownership of land in section 21 by Sheehy's

predecessors, and expert witness testimony. No one testified that the Bennett right was not used in section 21, and no credible documentary evidence raised doubt on that issue.

The Van Grinsvens assert that the *Wills v. Morris* decree limited irrigation to lands in section 22, and that adding lands in section 21 amounted to a modification of the decree. The difficulty with this argument is that the Bennett right was used to irrigate lands in section 21 for over six decades, if not longer. Statutes in effect prior to passage of Montana's current Water Use Act allowed a water user to change the place of use of a right without seeking permission first. Section 89-803, RCM (1947) (repealed 1973). Anyone who believed this irrigation practice adversely impacted their interests had the burden of proving injury. *Thrasher v. Mannix & Wilson*, 95 Mont 273, 276, 26 P.2d 370, 371 (1933). The Bennett right was used to irrigate land in section 21 for years and no one claimed injury until now.

The purpose of the adjudication process is not to revise patterns of conduct that have become accepted practice. Absent a compelling reason, the Water Court will not retroactively address changes to water rights that have gone unchallenged for decades. The Master did not err by affirming Sheehy's right to use the Bennett water right on land in section 21. With one exception, the Master's findings regarding such use are supported by substantial evidence.

The exception was the Master's finding that Blix acquired lands in section 21 via a patent from the United States. The patent from the United States to Blix did not include lands in section 21. The first reference to section 21 was the Evans notice of appropriation filed in 1905.

10. Should the clerical corrections to the Master's Report raised in Sheehy's objection be made?

The Sheehys raise several clerical issues in their objection to the Master's Report. Corrections to clerical errors are as follows:

The reference to the West Fork of Blixit Creek in the second sentence of FOF 31 is changed to the East Fork. The Reservoir Ditch diverts from the East Fork, not the West Fork.

The last sentence of FOF 52 should state that Exhibit VG-46 shows irrigation in the NWNWSW rather than the NENWSW of section 22.

11. Should the Master have found that the Bennett and Pruyn Reservoir rights were marshaled through the Sump Ditch for use on lands now owned by Van Grinsven?

The Van Grinsvens assert the Master erred by finding that the Bennett right was used on lands served by the Bennett Ditches. Lands served by the Bennett Ditches were limited to bottom ground, and did not include bench lands later served with water from the Sump Ditch.

The Van Grinsvens believe the Bennett right was expanded to include higher elevation bench lands after the Pruyn Reservoir and Sump Ditch were built. They assert that water is fungible, and that the Bennett right could not be segregated from rights later developed in the Pruyn Reservoir. They contend all rights from Blixit Creek were mixed in the Pruyn Reservoir and delivered where needed.

This argument is based on assumption rather than fact. No witness testified to use of the Bennett right to irrigate bench lands. Julie Merritt testified that irrigators typically save their earliest water rights for use on their best ground—an observation that applies in many water rights cases.

Pruyn's claim for the Bennett right included bench lands, but Pruyn also claimed most of the real estate he previously owned in the area, whether it was irrigated with the Bennett right or not. Pruyn claimed benchlands now owned by Van Grinsven, even though Pruyn did not own those lands when he filed the Bennett claim.³

This expansive approach to filing claims based on total land ownership rather than historical use is common. The challenge when this type of claim filing occurs is to

³ The record includes a Notice of Purchasers' Interest between Earl Pruyn as trustee for the estate of Ruth G. Pruyn as seller, and James L. Lee and Fred G. Carl as buyers. Ex. VG-21. The NPI references a Contract for Deed entered on July 14, 1977. The lands covered by the NPI included the NWSW of section 22, now owned by Schmidt and Van Grinsven. By the time Earl Pruyn filed his claim for the Bennett right in 1982, what is now the Van Grinsven property was owned by Davis O. Clapp. There is no evidence Pruyn was claiming the Bennett right for the benefit of Clapp, which undercuts the prima facie status that would otherwise attach to irrigation of land in the NWSW of section 22. If anything, Pruyn was claiming the Bennett right for himself, not Clapp.

reduce the place of use to what was historically irrigated. Evidence such as the Water Resources Survey, aerial photos, topographic maps, and testimony from witnesses showed that actual use of the Bennett right was much more limited than Pruyn's claim suggested.

The Master's finding that the Bennett right was used on bottom lands served by the Bennett Ditches is supported by substantial evidence and makes practical sense. The Bennett right was a flood irrigation right for many years, and gravity dictated where water could flow. It was logical that the initial place of use for the Bennett right was on bottom lands served by the Bennett Ditches.

Pruyn eventually decided that sprinkler irrigation of his bottom ground was preferable to flood irrigation with the Bennett Ditches. To get the pressure necessary to operate his sprinklers, Pruyn routed water onto the bench and into a sump that fed a pipeline running downhill to his sprinkler system.

The Bennett right was diverted via the Sump Ditch and dropped into the pipeline until the pipeline failed in the early 1970s. The pipeline was built to deliver water to the same bottom lands supplied by the Bennett Ditches, and there is no evidence that Pruyn or his successors intended to expand the Bennett right to include higher-elevation bench lands now owned by Schmidt or Van Grinsven.

As an example, the deeds from Pruyn to Schmidt and Van Grinsven's predecessors do not expressly convey a portion of the Bennett right. After the pipeline served by the Sump Ditch failed, Sheehy discontinued use of the Bennett Ditches, and diverted the Bennett right via a pump located downstream on Blixit Creek.

There was some evidence of irrigation on the benches, but none specifically using the Bennett right, and none after the prolonged period of non-use that began in the 1990s when the Sump Ditch became inoperable. Thus, even if the Bennett right was used on the bench, its use in that area was abandoned along with rights to water from the Pruyn Reservoir.

Given these facts, the Master's finding that marshaling did not occur with the Bennett right was reasonable. Reaching a different conclusion would have required assumptions not supported by facts in evidence.

12. Did the Master err by limiting the admissibility of testimony by Lynn Sainsbury?

Lynn Sainsbury is an employee of the DNRC in Missoula. Ms. Sainsbury undertook a limited evaluation of claims in this case at the request of the Van Grinsvens. Ms. Sainsbury was identified by the Van Grinsvens as an expert witness and called to testify at trial.

Ms. Sainsbury's testimony drew several objections, most of which focused on failure to adequately disclose the scope of her opinions before trial. The Master took the objections under advisement and allowed her testimony subject to a later ruling on admissibility.

The Master eventually excluded several parts of Sainsbury's testimony. These exclusions included testimony on title to real property and deeds, the duty of water, rebuttal testimony, and testimony referencing her site visit. MR, FOF 108.A-D, at 29-30. The reason given for these limitations was failure to disclose, and lack of credentials to testify regarding real property instruments.

Van Grinsven contends the Master's decision to exclude Sainsbury's testimony was improper. A ruling regarding the Master's decision is not required because Sainsbury's testimony would not have changed the outcome.

The chain of title evidence already in the record was sufficient to permit the Master to draw whatever conclusions were required on that subject, and Sainsbury's testimony was not additive. Likewise, Sainsbury's opinions on the duty of water, her rebuttal testimony, and testimony regarding her site visit were not helpful in resolving the issues in this case.

As an example, Sainsbury's testimony regarding her site visit established that she was less familiar with the area than other witnesses. Her credibility was further undermined by her opinion that bench lands on the Schmidt and Van Grinsven properties

were irrigated before the Sump Ditch was built. There was no way to convey water to this area prior to construction of the Sump Ditch. Sainsbury's opinion that irrigation occurred before water could be conveyed to the bench lands was simply not believable. Her lack of credibility on this issue undercut the reliability of her testimony on other topics.

The Master generally disregarded Sainsbury's testimony because he did not find it helpful. A review of the entirety of her testimony supports the Master's decision. Whether the Master erred by later excluding portions of her testimony was immaterial. Inclusion of her testimony would not have changed the outcome.

VI. CONCLUSIONS OF LAW

1. The two Pruyn Reservoir rights used on the Schmidt and Van Grinsven bench land properties were abandoned. Non-use of these rights on the Schmidt and Van Grinsven properties went on for many years. The Master correctly determined that this prolonged period of non-use created a rebuttable presumption of abandonment. The Master properly found that Sheehy did not abandon these rights.

There was no evidence that Schmidt or Van Grinsven's predecessors engaged in any activity to protect their bench land rights during that same period of non-use. Sheehy's actions to preserve his rights were not intended to benefit his neighbors, and did not rebut the presumption of abandonment applicable to their water rights.

Use of claims 76F 118522-00 and 76F 30109796 on the Schmidt and Van Grinsven properties was abandoned before Schmidt and Van Grinsven became owners.

2. The Sump Ditch was not used for many years and the water rights conveyed to the Schmidt and Van Grinsven properties using that ditch were abandoned. The Sump Ditch is not a point of diversion for claims 76F 118522-00 and 76F 30109796.

3. The Master's finding of a year-round period of use for claim 76F 30109796 was not supported by substantial evidence, and the correct period of use for this right should be the same as for claim 76F 118522-00, from which it was implied.

4. The Master erred by recognizing a 1934 use right in the Bennett Ditch. There was no evidence in the record to support such a right. There was evidence to support a

use right diverted from the West Fork of Blixit Creek by the Pruyne Ditch with a priority date of June 3, 1959. The abstract for claim 76F 148080-00 has been modified accordingly.

5. The Master's findings regarding irrigated acreage for Schmidt and Delp using claims 76F 118522-00 and 76F 118523-00 were supported by substantial evidence and will not be disturbed.

6. The Master's findings regarding irrigated acreage on the Schmidt and Van Grinsven bench lands are moot because irrigation of those lands was abandoned.

7. The Master properly found that the Reservoir Ditch was not abandoned, but did not add a point of diversion for the Reservoir Ditch to the later Pruyne Reservoir right. This correction has been made to the abstract for claim 76F 30109796.

8. The Master properly concluded that Blixit Creek is a tributary of Union Creek.

9. The Master did not err by finding that the Bennett right was used to irrigate lands in section 21.

10. The clerical corrections to the Master's Report raised in Sheehy's objection have been made to the abstracts attached to this order.

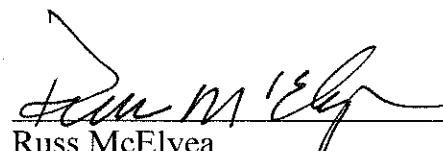
11. The Master properly found that the Bennett and Pruyne Reservoir rights were not marshaled through the Sump Ditch for use on lands owned by Van Grinsven.

12. Whether the Master erred by limiting the testimony of Lynn Sainsbury is immaterial as her opinions would not have changed the outcome of this case.

VII. ORDER

The Master's Report is adopted in part and amended in part. Claims 76F 118522-00, 76F 118523-00, 76F 148080-00, and 76F 30109796 shall appear in the Final Decree for Basin 76F in accordance with the abstracts attached to this order.

DATED this 4th day of October, 2017.


Russ McElyea
Chief Water Judge

Josh L. Macrow
Kelly L. Macrow
26815 Blixit Creek Rd
Bonner, MT 59823

Jeanette M. Manley
Scott J. Manley (Deceased)
c/o James Worbel
9755 Waldo Williams Rd
Missoula, MT 59808-8528

Brittany S. Nowak
~~27350 Blixit Creek Rd~~
~~Bonner, MT 59823~~
Mail Undeliverable-9/29/15

Robert F. Schmidt
Debra L. Schmidt
27289 Blixit Creek Rd
Potomac, MT 59823
(406) 244-5986

Timothy A. Wolfe
PO Box 3851
Missoula, MT 59806

Lisa L. Wrobel
William J. Venuti
27597 Blixit Creek Rd
Bonner, MT 59823

William A. Venuti
~~Box 641~~
~~Saint Regis, MT 59866~~
Mail Returned as Undeliverable 6/26/2017

Gary Delp
27341 Blixit Creek Rd
Bonner, MT 59823

Note: Service List Updated 9/11/2017

John J. Ferguson
Graham J. Coppes
Ferguson Law Office, PLLC
PO Box 8359
Missoula, MT 59807
(406) 532-2664

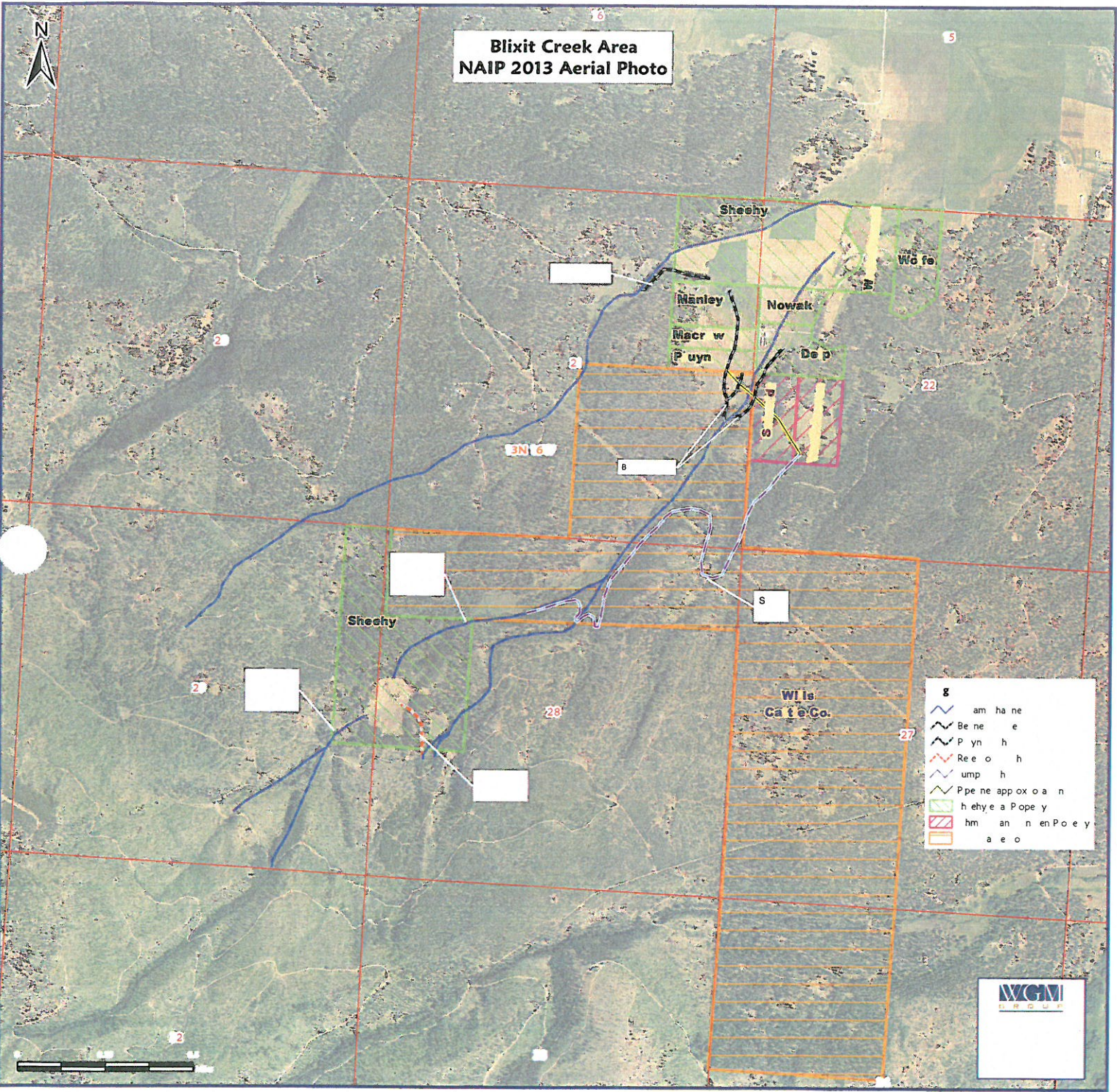
R. Blair Strong
Ramlow & Rudbach, PLLP
542 Central Ave
Whitefish, MT 59937
(406) 862-7503
rbs@ramlowrudbach.com

Holly Franz
Franz & Driscoll, PLLP
PO Box 1155
Helena MT 59624-1155
(406) 442-0005
holly@franzdriscoll.com

W. Carl Mendenhall, Esq.
Ross P. Keogh, Esq.
WORDEN THANE P.C.
PO Box 4747
Missoula, MT 59806-4747
(406) 721-3400
cmendenhall@wordenthane.com
rkeogh@wordenthane.com

**Last Order (Represented by Counsel
Mendenhall and Keogh):
Sheehy Family Trust
% Hugh F. and Barbara N. Sheehy,
Trustees
27430 Blixit Creek Rd
Bonner, MT 59823**

**Blixit Creek Area
NAIP 2013 Aerial Photo**



| Symbol | Description |
|--------------------|---------------------|
| Blue wavy line | am ha ne |
| Black wavy line | Be ne e |
| Black zigzag line | P yn h |
| Red zigzag line | Ree o h |
| Purple zigzag line | ump h |
| Black zigzag line | Ppe ne app ox o a n |
| Green hatched box | h ehy e a Pope y |
| Pink hatched box | hm an n en P o e y |
| Orange hatched box | a e o |

