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ELECTRONICALLY FILED

43B-0055-R-2020

August 26, 2022

Montana Water Court

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Crazy Mountain Cattle Co.; Rock Creek Ranch I Ltd.

NOTICE OF INTENT TO APPEAR: Engwis Investment Co. LP; Hunter
Hot Springs Canal Co.; Wild Eagle Mountain
Ranch LLC

CASE 43B-0055-R-2020

43B 180115-00

43B 192287-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's Report. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. 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.

MASTER'S REPORT

Crazy Mountain Cattle Co. claim 43B 180115-00 appeared in the Preliminary Decree with the following issue remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 64 MINER'S INCHES DECREED IN CASE NO. 236 , SWEET GRASS COUNTY. 192287-00, 180115-00.

No objection to the claim was filed. Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC each filed a notice of intent to appear.

Rock Creek Ranch I Ltd. claim 43B 192287-00 appeared in the Preliminary Decree with the following issue remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 64 MINER'S INCHES DECREED IN CASE NO. 236 , SWEET GRASS COUNTY. 192287-00, 180115-00.

THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE MAY BE QUESTIONABLE. DOCUMENTATION TO SUPPORT THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE WAS NOT SUBMITTED WITH THIS CLAIM.

No objection to the claim was filed. Wild Eagle Mountain Ranch LLC filed a notice of intent to appear.

As there were no objections or counterobjections filed against these two claims, the only issues in this Case are the issue remarks.

On August 11, 2021 Crazy Mountain Cattle Company and Rock Creek Ranch I Ltd. filed a Joint Motion For Summary Judgment asserting that 1) the type of historical right/priority date issue remark added to claim 43B 192287-00 is incorrect and should be removed; 2) the decree exceeded issue remark added to both claims is incorrect and should be removed; 3) the multiple use remark should be added to claim 43B 192287-00 and claim 43B 192251-00 (not in this Case), and 4) the notices of intent to appear should be dismissed as there are no other proceedings left in this Case in which the notice of intent to appear parties can appear. On September 7, 2021 Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment and Motion To Strike were filed asserting that 1) the decree exceeded issue remark is correct and remains unresolved, 2) that the Romans Estate decreed right claimed by Crazy Mountain Cattle Company is abandoned, and 3) that Crazy Mountain Cattle Company is not the successor to the Romans Estate because it did not claim the Romans Estate

place of use described in *McKenzie et al. v. Francis et al.*, Cause No. 236, Sixth Judicial District in and for Sweet Grass County, dated June 25, 1903 [*McKenzie v. Francis*]. That same day, Hunter Hot Springs Canal Company filed the Foundational Affidavit of Jack G. Connors (attorney for Hunter Hot Springs Canal Company). On September 7, 2021 Engwis Investment Co., LP's Notice Of Joinder In The Response Brief Filed By Hunter Hot Springs' Canal Co. In Opposition To Claimants' Joint Motion For Summary Judgment was filed. On September 14, 2021 Wild Eagle Mountain Ranch LLC's Notice Of Joinder In Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment And Motion To Strike was filed. On September 17, 2021 Crazy Mountain Cattle Company and Rock Creek Ranch I Ltd. filed Claimants' Joint Response To Hunter's Motion To Strike And Claimants' Joint Reply To Hunter's Response In Opposition To Claimants' Joint Motion For Summary Judgment. The Motion To Strike was granted by a separate Order filed this same day.

Applicable Law

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA.

"We have repeatedly held that summary judgment is an extreme remedy and should never be substituted for a trial if a material factual controversy exists." *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶41. (Emphasis added.)

"[S]trict compliance with Rule 56(e) is required." *Smith v. Burlington Northern & Santa Fe Railway Company*, 2008 MT 225, ¶ 41. (Emphasis added.)

The movant must meet its initial burden to establish there is no genuine issue of material fact.

In order to meet this initial burden, the moving party must support its motion for summary judgment with an appropriate evidentiary basis before the burden shifts to the non-moving party to set forth facts demonstrating that a genuine issue exists. *Mathews v. Glacier General Assurance Co.* (1979), 184 Mont. 368, 381, 603 P.2d 232, 239.

Minnie v. City of Roundup, 257 Mont. 429 (1993), at 432.

"A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim." Rule 56(a), M.R.Civ.P. (Emphasis added.)

“The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Rule 56(c)(3), M.R.Civ.P. (Emphasis added.)

“‘Multiple Use’ means the same appropriation used for more than one purpose by a single owner.” Rule 2(a)(42), W.R.C.E.R.

A notice of intent to appear party may not raise a new issue beyond what is already raised in an issue remark, objection, or counterobjection.

In summary, the language of Rule 9(b) and Rule 10, W.R.Adj.R. prohibit an NOIA party from expanding the issues in a water rights case. Under these rules, such a party is limited to participating in resolution of issues raised by objections, counterobjections, issue remarks, or issues raised on motion of the Water Court.

In re Erb, 2016 Mont. Water LEXIS 2, *12.

Parties who choose to file an NOIA rather than an objection have a right of participation but not a right to raise new issues.

A person filing a notice of intent to appear is limited to issues already before the court but does not face counterobjections to their own claims. In summary, an objector has more freedom to define the scope of a proceeding but faces the possibility of a counter-attack, while a person filing an NOIA has narrower latitude but faces less risk.

There are important reasons to preserve the distinctions between objectors and NOIA parties. If a party filing an NOIA could raise any issues they wanted, then the objection and counterobjection process defined by statute would become meaningless. "Sophisticated litigants will avoid filing objections altogether in an effort to avoid counterobjections to their own rights. That would frustrate the legislature's intent when it designed the objection process."

In re 505 Ventures LLC, 2022 Mont. Water LEXIS 46, *3-4 (citations omitted).

* * * * *

The Trust’s greatest concern is that dismissal of its NOIA will deprive it of the opportunity to challenge claim 43B 106353-00. The Trust could have solved that problem by objecting to claim 43B 106353-00.

Order Adopting Master's Report, Case 43B-0572-R-2022 *Windbreak Ranch LLC v. Alice Laubach Trust*, June 17, 2022, *6, *7, and *12.

Analysis

The issues before the Court are the following decree exceeded issue remark which appeared on both Crazy Mountain Cattle Co. claim 43B 180115-00 and Rock Creek Ranch I Ltd. claim 43B 192287-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 64 MINER'S INCHES DECREED IN CASE NO. 236 , SWEET GRASS COUNTY. 192287-00, 180115-00.

and the following type of historical right/priority date issue remark on claim 43B 192287-00

THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE MAY BE QUESTIONABLE. DOCUMENTATION TO SUPPORT THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE WAS NOT SUBMITTED WITH THIS CLAIM.

Joint Motion For Summary Judgment asserts that these two claims are based on different water rights decreed in *McKenzie v. Francis*, and therefore, there is no decree exceeded situation, and the decree exceeded issue remark and the type of historical right/priority date issue remarks are both incorrect and should be removed with no changes made to the elements of either claim. The Joint Motion For Summary Judgment also asserts that the multiple use remark is missing from the abstract of claim 43B 192287-00 and claim 43B 180115-00 (not in this Case). The Joint Motion For Summary Judgment then asserts that because the issue remarks are incorrect and should be removed, there is nothing left to hear, the notice of intent to appear parties have no further proceedings in which they can appear, and the notices of intent to appear should be dismissed. As the Joint Motion For Summary Judgment first addresses the type of historical right/priority date issue remark on claim 43B 192287-00, this analysis will do the same.

Rock Creek Ranch I Ltd. claim 43B 192287-00 type of historical right/priority date issue remark

Exhibit A attached to the Joint Motion For Summary Judgment is a copy of the Statement of Claim and its attachments for 43B 192287-00. This stock water claim was filed by Thomas E. Lane. The claim form clearly states that the right claimed is a decreed right, Duck Creek, priority date **June** 1, 1886, for 64 miner's inches. A partial copy of the typed version of

the Decree for *McKenzie v. Francis*, is attached [“typed” is noted because the copy attached to the Statement of Claim 43B 180115-00 is the handwritten version]. In the tabulation portion of the Decree (no page number identified), the Briggs-Ellis Co. 64 miner’s inches **May 1, 1886** right is underlined. There is no Briggs-Ellis Co. **June 1, 1886** 64 miner’s inch right on this tabulation. The Romans Estate 64 miner’s inch **June 1, 1886** right also appears on this page, but it is not underlined. On the next page of the copy (no page number identified), the text in the first complete paragraph has the text “Briggs-Ellis Cattle Company” underlined. The text of the next paragraph describing the water rights for Briggs-Ellis Cattle Company includes “1st day of **June, 1886**”, “64 inches”, and “Duck Creek” which are each underlined. This paragraph also describes May 1, 1884 and June 1, 1888 water rights decreed to Briggs-Ellis Cattle Company. The clear import of the information on the Statement of Claim form and in the underlined portions of the Decree copy, is that the Briggs-Ellis Cattle Company 1886 Duck Creek right for 64 miner’s inches is the right being claimed. The only uncertainty is whether the priority date is May 1, 1886 or June 1, 1886 as both dates are stated for this Briggs-Ellis Cattle Company 64 miner’s inch Duck Creek 1886 right in the attached Decree excerpt copies; however, the priority date is not at issue.

Regardless of whether the correct date is May 1 or June 1, 1886, the prima facie claim is for the Briggs-Ellis Cattle Company 64 miner’s inch 1886 Duck Creek right. Regardless of whether the priority date is May 1 or June 1, 1886, because the Decree excerpts include both dates for the same decreed right, documentation to support the type of historical right and priority date *was submitted* with this claim. The issue remark stating that documentation was not submitted with the claim to support the type of historical right and priority date is factually incorrect. The Joint Motion For Summary Judgment has established there is no genuine issue of material fact that this issue remark is incorrect. The burden now shifts to Wild Eagle Mountain Ranch LLC to establish that there is a genuine issue of material fact concerning this issue remark.

The Wild Eagle Mountain Ranch LLC’s Notice Of Joinder In Hunter Hot Springs’ Response In Opposition To Claimants’ Joint Motion For Summary Judgment does not include evidence or argument concerning the type of historical right/priority date issue remark. The Hunters Hot

Springs Response in which Wild Eagle Mountain Ranch LLC joined does not mention this type of historical right/priority date issue remark. Wild Eagle Mountain Ranch LLC has not met its burden to establish that there is a genuine issue of material fact concerning whether the type of historical right/priority date issue remark is incorrect. The next analysis is whether Rock Creek Ranch I Ltd. is entitled to judgment as a matter of law as asserted in the Joint Motion For Summary Judgment.

There is no cited law in the Joint Motion For Summary Judgment on this specific point. However, the type of historical right/priority date issue remark is clearly factually incorrect and is not supported by a review of Statement of Claim 43B 192287-00 and its attachments. As a matter of fact and law, there is nothing more for the Court to address concerning this issue remark. Therefore, the Joint Motion For Summary Judgment should be granted in part concerning the type of historical right/priority date issue remark on claim 43B 192287-00 and the remark should be removed without further proceedings as clearly incorrect and not relevant to the claim.

The Joint Motion For Summary Judgment assertion that the decree exceeded issue remark on both Crazy Mountain Cattle Co. claim 43B 180115-00 and Rock Creek Ranch I Ltd. claim 43B 192287-00 is incorrect and should be removed

As stated above, the Joint Motion For Summary Judgment asserts that these two claims are based on different water rights decreed in the 1903 *McKenzie v. Francis* Decree and therefore, there is no decree exceeded situation. It asserts that Crazy Mountain Cattle Co. claim 43B 180115-00 is for the Romans Estate June 1, 1886 Duck Creek right for 64 miner's inches, that Rock Creek Ranch I Ltd. claim 43B 192287-00 is for the Briggs-Ellis Cattle Co. June 1, 1886 Duck Creek right for 64 miner's inches, and therefore the decree exceeded issue remark is incorrect and should be removed. The evidence and arguments concerning Rock Creek Ranch I Ltd. claim 43B 192287-00 are addressed first.

Rock Creek Ranch I Ltd. claim 43B 192287-00

The Joint Motion For Summary Judgment asserts that this claim is for the Briggs-Ellis Cattle Company 64 miner's inch 1886 Duck Creek right. As already analyzed and determined above, the Briggs-Ellis Cattle Company 1886 Duck Creek 64 miner's inch right is the right

claimed on 43B 192287-00. The Joint Motion For Summary Judgment has established there is no genuine issue of material fact that claim 43B 192287-00 claims the Briggs-Ellis Cattle Company 1886 Duck Creek right for 64 miner's inches. The burden now shifts to Wild Eagle Mountain Ranch LLC to establish that there is a genuine issue of material fact concerning whether claim 43B 192287-00 is for the Briggs-Ellis Cattle Company 1886 Duck Creek 64 miner's inch right.

The Wild Eagle Mountain Ranch LLC's Notice Of Joinder In Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning claim 43B 192287-00, so the Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment is reviewed as Wild Eagle Mountain Ranch LLC's answer to the Motion.

The Hunter Hot Springs Canal Co. Response In Opposition To Claimants' Joint Motion For Summary Judgment notes that Rock Creek Ranch I Ltd. claim 43B 192287-00 is for the Briggs-Ellis Cattle Company right. This Response states: "[H]unter Hot Springs has valuable water rights downstream, which would be impacted *if Crazy Mountain is allowed to double-dip on the Brigg-Ellis right*; therefore, it filed a NOIA to make sure the issue remark is properly resolved." (page 3, *emphasis added*) The focus of the Response is on the merits of *Crazy Mountain Cattle Co. claim 43B 180115-00*, not on Rock Creek Ranch I Ltd. claim 43B 192287-00. This Response also affirms the multiple use remark should be added to claim 43B 192287-00 to include the Rock Creek Ranch I Ltd. irrigation claim based on the same Briggs-Ellis Cattle Company 1886 Duck Creek right.

Wild Eagle Mountain Ranch LLC has not met its burden to establish that there is a genuine issue of material fact concerning whether claim 43B 192287-00 is for the Briggs-Ellis Cattle Company 1886 Duck Creek 64 miner's inch right. Quite the opposite – it agrees that claim 43B 192287-00 is properly based on the Briggs-Ellis Cattle Company 1886 Duck Creek 64 miner's inch right. The next analysis is whether Rock Creek Ranch I Ltd. is entitled to judgment as a matter of law as asserted in the Joint Motion For Summary Judgment.

There is no cited law in the Joint Motion For Summary Judgment on this specific point. However, there is no contest, much less any genuine issue of material fact, that Rock Creek

Ranch I Ltd. Claim 43B 192287-00 is for the Briggs-Ellis Cattle Company 1886 Duck Creek right for 64 miner's inches. This is the prima facie claim and it is not contested by the notice of intent to appear party. As a matter of fact and law, there is nothing more for the Court to address concerning what water right is claimed on 43B 192287-00. Therefore, the Joint Motion For Summary Judgment should be granted in part that Rock Creek Ranch I Ltd. claim 43B 192287-00 is for the Briggs-Ellis Cattle Company 1886 Duck Creek right for 64 miner's inches.

Crazy Mountain Ranch LLC claim 43B 180115-00

The Joint Motion For Summary Judgment asserts that this claim is for the Romans Estate 64 miner's inch June 1, 1886 Duck Creek right.

Exhibit C attached to the Joint Motion For Summary Judgment is a copy of the Statement of Claim (AMENDED) and its attachments for 43B 180115-00 plus additional documents which were stricken in the Order Granting Motion To Strike. This irrigation claim was filed by Jarrett Brothers. The claim form clearly states that the right claimed is a decreed right, East Duck Creek, priority date June 1, 1886, for 64 miner's inches. A partial copy of the handwritten version of the Decree for *McKenzie v. Francis* is attached. In the tabulation portion of the Decree (page 346), the Romans Estate 64 miner's inches June 1, 1886 right is underlined. The Briggs-Ellis Co. 64 miner's inch May 1, 1886 right also appears on this page, but it is not underlined. On what appears to be page 351, Mrs. Emma M. Romans is identified as the Administratrix of Lewis C. Romans, deceased. The following text is marked with a bracket and with the flow rate underlined:

That thereafter, on June 1st 1886, her predecessors in interest diverted 64 inches (or a flow equivalent to 1 3/5 cubic feet per second of time of the waters of said Duck Creek with which to irrigate said land.

This paragraph also describes a June 1, 1885 Duck Creek 54 miner's inch water right decreed to Mrs. Emma M. Romans, Administratrix of the Romans Estate, but none of the text for this right is underlined. The clear import of the information on the Statement of Claim form and in the underlined portions of the Decree copy, is that the Romans Estate June 1, 1886 Duck Creek 64 miner's inches right is the right being claimed.

The Joint Motion For Summary Judgment has established there is no genuine issue of material fact that claim 43B 180115-00 claims the Romans Estate June 1, 1886 Duck Creek right for 64 miner's inches. The burden now shifts to Hunter Hot Springs Canal Co. LLC, Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC to establish that there is a genuine issue of material fact concerning whether claim 43B 180115-00 is for the Romans Estate June 1, 1886 Duck Creek right for 64 miner's inches.

The Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment does not contest that claim 43B 180115-00 claims the Romans Estate June 1, 1886 Duck Creek right for 64 miner's inches. "Nevertheless, in 1982, Jarrett Brothers filed a Statement of Claim based on the Romans' Estate right, which was assigned claim number 43B 180115-00. The right is now owned by Crazy Mountain Cattle Company." (Page 2). On page 5, Hunter Hot Springs states that it does not dispute the Undisputed Facts 1-15 in the Claimants' Joint Motion For Summary Judgment. Undisputed Fact number 15 states:

15. Claim 43B 180115-00 is the only water right based on the Romans Estate decreed right for 64 miner's inches and a June 1, 1886 priority date.

The Engwis Investment Co. LP's Notice Of Joinder In The Response Brief Filed By Hunter Hot Springs' Canal Co. In Opposition To Claimants' Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning claim 43B 180115-00.

The Wild Eagle Mountain Ranch LLC's Notice Of Joinder In Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning claim 43B 180115-00.

Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC have not met their burden to establish that there is a genuine issue of material fact concerning whether Crazy Mountain Ranch claim 43B 180115-00 is for the Romans Estate June 1, 1886 Duck Creek right for 64 miner's inches. In fact, they affirm that claim 43B 180115-00 is for the Romans Estate June 1, 1886 Duck Creek right for 64 miner's inches. The next analysis is whether Crazy Mountain Ranch LLC is entitled to judgment as a matter of law as asserted in the Joint Motion For Summary Judgment.

There is no cited law in the Joint Motion For Summary Judgment on this specific point. However, there is no contest, much less any genuine issue of material fact, that Crazy Mountain

Ranch LLC claim 43B 180115-00 is for the Romans Estate June 1, 1886 Duck Creek right for 64 miner's inches. This is the prima facie claim and it is not contested by the notice of intent to appear parties. As a matter of fact and law, there is nothing more for the Court to address concerning what water right is claimed on 43B 180115-00. Therefore, the Joint Motion For Summary Judgment should be granted in part that Crazy Mountain Ranch LLC claim 43B 180115-00 is for the Romans Estate June 1, 1886 Duck Creek right for 64 miner's inches.

The decree exceeded issue remark should be removed as incorrect

A decree exceeded issue remark is added when all of the claims for the same right previously decreed in a District Court decree have a combined total flow rate that exceeds the amount awarded in the District Court decree. The standard decree exceeded issue remark text is modified by inserting the flow rate and case number variables for each situation, plus adding all the claim numbers for the same decreed right after the remark text. For these two claims, the remark states:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 64 MINER'S INCHES DECREED IN CASE NO. 236 , SWEET GRASS COUNTY. 192287-00, 180115-00.

The Joint Motion For Summary Judgment asserts that the claims are not based on the same previously decreed right, and therefore, the remark was added in error and should be removed. As determined above, Rock Creek Ranch I Ltd. claim 43B 192287-00 is for the Briggs-Ellis Cattle Company 1886 Duck Creek 64 miner's inch right, and Crazy Mountain Ranch LLC claim 43B 180115-00 is for the Romans Estate June 1, 1886 Duck Creek 64 miner's inch right. These are two different decreed rights. There is no over-claiming of the same previously decreed right.

The Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment asserts that 1) the decree exceeded issue remark is correct and remains unresolved, 2) that the Romans Estate decreed right claimed by Crazy Mountain Cattle Company is abandoned, and 3) that Crazy Mountain Cattle Company is not the successor to the Romans Estate because it did not claim the Romans Estate place of use described in *McKenzie v. Francis*.

As determined above, the decree exceeded issue remark added to these two claims is factually and legally incorrect, and therefore, should not have been added to these two claims. The decree exceeded issue never actually existed.

It is clear the concerns of Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC, are that the Romans Estate decreed right claimed by Crazy Mountain Cattle Company on 43B 180115-00 is abandoned, that Crazy Mountain Cattle Company is not the successor to the Romans Estate because it did not claim the Romans Estate place of use described in *McKenzie v. Francis*, and if the claim is allowed, any water diverted under color of the Romans Estate 1886 right is actually a “double dip” of the Briggs-Ellis Cattle Co. 1886 decreed right. Regardless of whether these assertions have merit, there is no objection or counterobjection filed against Crazy Mountain Cattle Company claim 43B 180115-00 challenging its validity.

The Engwis Investment Co. LP’s Notice Of Joinder In The Response Brief Filed By Hunter Hot Springs’ Canal Co. In Opposition To Claimants’ Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning whether the decree exceeded issue remark is incorrect and should be removed.

The Wild Eagle Mountain Ranch LLC’s Notice Of Joinder In Hunter Hot Springs’ Response In Opposition To Claimants’ Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning whether the decree exceeded issue remark is incorrect and should be removed.

Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC have not met their burden to establish that there is a genuine issue of material fact concerning whether the decree exceeded issue remark is incorrect and should be removed from the abstracts of Rock Creek Ranch I Ltd. claim 43B 192287-00 and Crazy Mountain Ranch claim 43B 180115-00. The next analysis is whether Rock Creek Ranch I Ltd. and Crazy Mountain Ranch LLC are entitled to judgment as a matter of law as asserted in the Joint Motion For Summary Judgment.

There is no cited law in the Joint Motion For Summary Judgment on this specific point. The Court cannot ignore the fact that there is no basis for adding the decree exceeded issue

remark in order to maintain a false controversy so the notice of intent to appear parties can pursue their assertions concerning the validity of Crazy Mountain Cattle Company claim 43B 180115-00. As a matter of law and fact, there is no decree exceeded issue between these two claims. Therefore, the decree exceeded issue remark added to the abstracts of Rock Creek Ranch I Ltd. claim 43B 192287-00 and Crazy Mountain Ranch claim 43B 180115-00 is incorrect and should be removed. Therefore, the Joint Motion For Summary Judgment should be granted in part that the decree exceeded issue remark should be removed as incorrect and not relevant to these two claims.

The Joint Motion For Summary Judgment assertion that the Multiple Use Remark should be added to Rock Creek Ranch I Ltd. claims 43B 192287-00 and 43B 192251-00

The Joint Motion For Summary Judgment asserts that the Multiple Use Remark should be added to Rock Creek Ranch I Ltd. stock claim 43B 192287-00 and Rock Creek Ranch I Ltd. irrigation claim 43B 192251-00 (not in this Case) as both claims are for the Briggs-Ellis Cattle Co. 1886 Duck Creek 64 miner's inch right decreed in *McKenzie v. Francis*. Although claim 43B 192251-00 is not in this Case, the parties did address the claim in their briefs.

As already analyzed and determined above, the Briggs-Ellis Cattle Company 1886 Duck Creek 64 miner's inch right is the right claimed on stock claim 43B 192287-00.

Exhibit B attached to the Joint Motion For Summary Judgment is a copy of the Statement of Claim and its attachments for 43B 192251-00. This irrigation claim was filed by Thomas E. Lane. The claim form clearly states that the right claimed is a decreed right, Duck Creek, priority date June 1, 1886, for 64 miner's inches.

The Joint Motion For Summary Judgment has established there is no genuine issue of material fact that irrigation claim 43B 192251-00 claims the Briggs-Ellis Cattle Company 1886 Duck Creek right for 64 miner's inches. The burden now shifts to Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC to establish that there is a genuine issue of material fact concerning whether claim 43B 192251-00 is for the Briggs-Ellis Cattle Company 1886 Duck Creek 64 miner's inch right.

The Hunter Hot Springs Canal Co. Response In Opposition To Claimants' Joint Motion For Summary Judgment notes that the Court should call in Rock Creek Ranch I Ltd. irrigation claim

43B 192251-00 on its own motion and add the claim to this Case so the Multiple Use Remark can be added to both claims. On page 5, Hunter Hot Springs states that it does not dispute the Undisputed Facts 1-15 in the Claimants' Joint Motion For Summary Judgment. Undisputed Facts number 10 through 13 state:

10. Claim 43B 192251-00 -- not in this case -- is a decreed irrigation claim with a June 1, 1886 priority date and a 1.6 CFS flow rate.
11. The statements of claim for both claims 43B 192287-00 and 43B 192251-00 were filed by Thomas Lane.
12. Claim 43B 192287-00 and 43B 192251-00 are multiple use rights, of the same decreed right.
13. Claims 43B 192287-00 and 43B 192251-00 are the only water rights based on the Briggs-Ellis decreed right for 64 miner's inches and a June 1, 1886 priority date.

This Response concurs that the Multiple Use Remark should be added to claims 43B 192287-00 and 43B 192251-00.

The Wild Eagle Mountain Ranch LLC's Notice Of Joinder In Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning the requested addition of the Multiple Use Remark.

The Engwis Investment Co. LP's Notice Of Joinder In The Response Brief Filed By Hunter Hot Springs' Canal Co. In Opposition To Claimants' Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning the addition of the Multiple Use Remark.

Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC have not met their burden to establish that there is a genuine issue of material fact concerning whether claims 43B 192287-00 and 43B 192251-00 should have the Multiple Use Remark added to their abstracts of claim. Quite the opposite – they agree the Multiple Use Remark should be added. The next analysis is whether Rock Creek Ranch I Ltd. is entitled to judgment as a matter of law as asserted in the Joint Motion For Summary Judgment.

There is no cited law in the Joint Motion For Summary Judgment on this specific point but there is reference to the DNRC Claims Examination Manual /Section VI.C.4 concerning multiple use claims. Claims 43B 192287-00 and 43B 192251-00 clearly fit the definition of multiple use. Rule 2(a)(42), W.R.C.E.R. Rather than call claim 43B 192251-00 in on motion of

the Montana Water Court and consolidate it into this Case, the addition of the multiple use remark will be accounted for in the Closing Order for claim 43B 192251-00 which will be prepared after this Case is closed. Therefore, the Joint Motion For Summary Judgment should be granted in part that the Multiple Use Remark should be added to the abstract of claim 43B 192287-00 identifying claim numbers 43B 192287-00 and 43B 192251-00.

The Claimants' Joint Motion For Summary Judgment assertion that the notices of intent to appear should be dismissed as there are no other proceedings left in this Case in which the notice of intent to appear parties can appear

The Joint Motion For Summary Judgment asserts that notice of intent to appear parties Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC "are limited to participating on issues already raised", "may not use their appearance to raise additional issues", and "[a]s all issue remarks in this case are resolved, the notices of intent to appear are also resolved and should be dismissed." Page 7, Joint Motion For Summary Judgment.

As already determined above, the type of historical right/priority date issue remark on claim 43B 192287-00 is incorrect and should be removed, and the decree exceeded issue remark on claims 43B 192287-00 and 43B 180115-00 is incorrect and should be removed. There are no other issue remarks on either claim. There are no objections or counterobjections filed against either claim.

The Joint Motion For Summary Judgment has established there is no genuine issue of material fact, that there are no remaining issue remarks for the Court to address and resolve, and no objections or counterobjections for the Court to hear concerning these two claims. The burden now shifts to Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC to establish that there is a genuine issue of material fact concerning whether there are still any matters pending before the Court in this Case.

The Hunter Hot Springs Canal Co. Response In Opposition To Claimants' Joint Motion For Summary Judgment asserts that the Romans Estate decreed right claimed by Crazy Mountain Cattle Company on 43B 180115-00 is abandoned and that Crazy Mountain Cattle Company is not the successor to the Romans Estate because it did not claim the Romans Estate place of use

described in *McKenzie v. Francis*. These are serious concerns raised about the validity of Crazy Mountain Cattle Company claim 43B 180115-00. However, these concerns are not rooted in an objection or counterobjection to claim 43B 180115-00 filed by Hunter Hot Springs Canal Co., Engwis Investment Co. LP, or Wild Eagle Mountain Ranch LLC. As asserted on page 10 of this Response:

On the last page of Claimants' Motion for Summary Judgment, they attempt to limit the scope of the issue that Hunter Hot Springs may litigate in this matter based on its NOIA. However, issues such as the historical use of the relevant water rights is directly relevant to the issue remark and whether the Romans' Estate water right was abandoned and both Claimants are not attempting to claim the Briggs–Ellis right. Historical evidence regarding the use of the water right(s), such as flow rates, volumes of water diverted, and the place of use are directly relevant to the question posed by the DNRC issue remark and thus properly within the scope to the Hunter Hot Springs' NOIA.

These concerns were raised as responsive arguments to a decree exceeded issue which, it is now clear, never actually existed.

The Engwis Investment Co. LP's Notice Of Joinder In The Response Brief Filed By Hunter Hot Springs' Canal Co. In Opposition To Claimants' Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning whether there are any remaining proceedings in which they can pursue their challenge to the validity of claim 43B 180115-00.

The Wild Eagle Mountain Ranch LLC's Notice Of Joinder In Hunter Hot Springs' Response In Opposition To Claimants' Joint Motion For Summary Judgment does not include additional factual or legal assertions concerning whether there are any remaining proceedings in which they can pursue their challenge to the validity of claim 43B 180115-00.

Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC have not met their burden to establish that there is a genuine issue of material fact concerning whether there is a remaining issue remark concerning the validity of claim 43B 180115-00, or objection or counterobjection concerning the validity of claim 43B 180115-00 by which they may pursue their concerns.

The next analysis is whether Rock Creek Ranch I Ltd. and Crazy Mountain Ranch LLC are entitled to judgment as a matter of law as asserted in the Joint Motion For Summary Judgment.

The Joint Motion For Summary Judgment supports its assertions with citation to *In re Erb*, 2016 Mont. Water LEXIS 2, *12. The quotation from *In re Windbreak Ranch LLC* included in the Applicable Law portion of this Report, bears repeating:

Parties who choose to file an NOIA rather than an objection have a right of participation but not a right to raise new issues.

A person filing a notice of intent to appear is limited to issues already before the court but does not face counterobjections to their own claims. In summary, an objector has more freedom to define the scope of a proceeding but faces the possibility of a counter-attack, while a person filing an NOIA has narrower latitude but faces less risk.

There are important reasons to preserve the distinctions between objectors and NOIA parties. If a party filing an NOIA could raise any issues they wanted, then the objection and counterobjection process defined by statute would become meaningless. "Sophisticated litigants will avoid filing objections altogether in an effort to avoid counterobjections to their own rights. That would frustrate the legislature's intent when it designed the objection process."

In re 505 Ventures LLC, 2022 Mont. Water LEXIS 46, *3-4 (citations omitted).

* * * * *

The Trust's greatest concern is that dismissal of its NOIA will deprive it of the opportunity to challenge claim 43B 106353-00. The Trust could have solved that problem by objecting to claim 43B 106353-00.

There is no leeway afforded in this situation. The issue remarks were the only justiciable controversies in this Case. There is no remaining issue remark, objection, or counterobjection through which Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC can pursue their concerns about the validity of Crazy Mountain Cattle Company claim 43B 180115-00.

The Hunter Hot Springs Canal Co. Response In Opposition To Claimants' Joint Motion For Summary Judgment presses the Court to conclude the decree exceeded issue remark is a live issue remark through which their concerns may be addressed. As previously stated, the Court cannot overlook the fact that there was no basis for adding the decree exceeded issue remark in order to facilitate hearing the Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC concerns about the validity of Crazy Mountain Cattle Company

claim 43B 180115-00. There are no outstanding issues remaining in this Case in which Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC can appear. There are no more proceedings in this matter. Therefore, the Joint Motion For Summary Judgment should be GRANTED IN PART that the Hunter Hot Springs Canal Co., Engwis Investment Co. LP, and Wild Eagle Mountain Ranch LLC notices of intent to appear should be dismissed as there are no further proceedings for the issue remarks in this Case.

Recommendations

Based upon the above, this Master recommends that the Court grant the Joint Motion For Summary Judgment in full and make the changes specified above to correct the Preliminary Decree for this Basin. In addition, the notice remark concerning the point of diversion legal description and ditch name appearing on the abstract of claim 43B 192287-00 should be removed as having served its notice purpose. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

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Senior Water Master

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WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 180115-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: CRAZY MOUNTAIN CATTLE CO
696 N YELLOWSTONE TRAIL
BIG TIMBER, MT 59011 7766

Priority Date: JUNE 1, 1886

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 1.60 CFS

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

Climatic Area: 3 - MODERATE

Maximum Acres: 203.40

Source Name: DUCK CREEK, EAST FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNESW	35	1N	12E	SWEET GRASS

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: ENNIS DITCH

Period of Use: MAY 1 TO OCTOBER 31

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	80.00		NE	1	1S	12E	SWEET GRASS
2	31.00		SE	1	1S	12E	SWEET GRASS
3	52.40		SW	6	1S	13E	SWEET GRASS
4	40.00		NW	1	1S	12E	SWEET GRASS
Total:	203.40						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

180110-00 180113-00 180114-00 180115-00 180116-00

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 192287-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ROCK CREEK RANCH I LTD
100 WAUGH DR, SUITE 400
HOUSTON, TX 77007 5962

Priority Date: MAY 1, 1886

Type of Historical Right: DECREED

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name DUCK CREEK, EAST FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSE	35	1N	12E	SWEET GRASS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

Ditch Name: ENNIS DITCH

2		SWNW	26	1N	12E	SWEET GRASS
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DITCH

Ditch Name: CLARK DITCHES

Period of Use: JANUARY 1 TO DECEMBER 31

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			SW	26	1N	12E	SWEET GRASS
2			N2	35	1N	12E	SWEET GRASS
3			S2	35	1N	12E	SWEET GRASS

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

192251-00

192287-00