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Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41N-0007-R-2019
Block, Nathaniel
55.00

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
WILLOW CREEK BASIN (41N)
PRELIMINARY DECREE

CLAIMANT: Lila Laas Irrevocable Living Trust

OBJECTOR: Eagle Creek Colony

CASE 41N-0007-R-2019
41N 41942-00

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 findings of fact, conclusions of law, or recommendations. 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 be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve 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
BACKGROUND

Claim 41N 41942-00 is owned by the Lila Laas Irrevocable Living Trust (LLIT). The claim appeared in the Basin 41N Preliminary Decree and received objections from Eagle Creek Colony (ECC) and the United States Bureau of Reclamation (BOR). On September 8, 2021, the BOR filed a Withdrawal of Objection. On October 4, 2021, the BOR objection was dismissed and the caption modified accordingly.

LLIT is the claimant of water right claim 41N 41942-00. ECC Ex. 1. ECC objected to the claim, alleging abandonment and issues with the claimed basis of the right. LLIT argues that the claim should be decreed as it appeared in the Preliminary Decree without modification.

Claim 41N 41942-00 was claimed as a filed right on Eagle Creek. Eagle Creek flows through ECC property and then LLIT property. Claim 41N 41942-00 appeared in the Preliminary Decree with a priority date of March 10, 1900, and a flow rate of 4 CFS irrigating 130 acres. A Notice of Appropriation by John E. Trommer (Trommer NOA) was filed in support of claim 41N 41942-00. Mr. Trommer sold the underlying place of use to the Laas family.

A hearing was held in Great Falls, Montana, January 9-10, 2023, at the Cascade County Courthouse. Water Master Nathan Block presided; Judicial Assistant Rebecca Rodgers was in attendance for the Water Court; Nicholas Lofing was present for LLIT; Patrick Watt and Heather Starnes were present for ECC. Lee Yellen testified on behalf of ECC and Trudy Skari, co-trustee of the LLIT, and Kirk Skari, beneficiary of the LLIT and current farm lessee/operator, testified on behalf of LLIT.

At the hearing, the issues were:

1. Is claim 41N 41942-00 based on the Trommer Notice of Appropriation?
2. Has claim 41N 41942-00 been abandoned in whole or in part?

FINDINGS OF FACT

Basis of water right

1. John E. Trommer filed a Notice of Appropriation, signed July 10, 1900, and received on July 13, 1900, for a water right with a priority date of March 10, 1900, and a flow rate of 4 cubic feet per second (CFS) from Eagle Creek. ECC Ex. 1a.

2. The place of use for claim 41N 41942-00 is listed as 130 acres in the SE1/4 of Section 10, Township 33N, Range 3E. The place of use is located on land originally obtained via the Desert Land Act. One portion was originally patented by Lydia Cherney in 1910 and another by Hannah Grove in 1900. LLIT Ex. 43. Hannah Grove filed a Notice of Appropriation for a 3 CFS appropriation made on May 1, 1900. LLIT Ex. 44. Lydia Cherney filed a Notice of Appropriation for a 5 CFS appropriation made on March 30, 1912. LLIT Ex. 43.

3. Mr. Trommer obtained portions of the place of use from Lydia Cherney sometime between 1912-1918. The land is currently held by the Laas Trust which was created by Lila Laas. ECC Ex. 1(e); LLIT Ex 43. Nick and Lizzie Laas obtained the land in question from Mr. Trommer. ECC does not dispute the various land transfers or the conveyance of appurtenant water right(s).

4. The General Land Office (GLO) conducted an examination of Lydia Cherney's Desert Land Act entry and issued a report on January 23, 1918. LLIT Ex. 43 at Patent 530.

5. The GLO report interviewed Mr. Trommer, then owner of the Cherney land. Trommer stated that the land was irrigated from 1912-1914, but no irrigation occurred from 1915-1916 due to sufficient rain and did not irrigate in 1917 due to his dams and ditches being out of repair and that he had depended on rain to furnish sufficient water for crops. These statements were corroborated by Mr. Trommer's neighbor Ben Snuffer and Mr. Trommer's ex-wife (who was also Lydia Cherney's sister). LLIT Ex. 43 at Patent 0530-0532.

6. The GLO report depicts and discusses substantial improvements to the irrigation system. The report describes a system of reservoirs and diversions from Eagle Creek. The report states that in 1917, 120 acres were put to wheat and an additional 30 acres were broken and summer fallowed. LLIT Ex. 43 at Patent 0535-0536.

7. The irrigation systems depicted in the Grove patent, GLO report and the Statement of Claim filing are consistent with the system described in the Trommer NOA.

Abandonment

8. No evidence was presented regarding usage or lack thereof of the water right from 1918 through 1957, the date of the earliest aerial photograph.

9. Mr. Yelin stated that he had identified 115 acres of “cultivated” land in the 1957 aerial, 112 acres being “cultivated” in the 1966 aerial photograph, and 107 acres being “cultivated” in 1979. Transcript (Tr.) Day 1 1:45-1:50.

10. Mr. Yelin stated that his “biggest problem” with the claim was the elevation of the point of diversion which in his opinion was unable to convey water to portions of the place of use. Tr. Day 1 1:48-1:49.

11. The expert testimony regarding “active irrigation” and evapotranspiration interpretation of the aerial photographs from 1957, 1966 and 1979 was generally unpersuasive and failed to show a continuous period of non-use.

12. The Liberty County Water Resources Survey field notes (WRS field notes) dated April 25, 1968, indicates that the Trommer Notice of Appropriation was in use for stock. An asterisk placed next to the Trommer Appropriation is explained as “from NLD list”. No evidence was presented confirming the meaning of the note. LLIT Ex. 34.

13. The WRS field notes indicate that neither the landowner nor the operator were interviewed by the field examiner. LLIT Ex. 34; Tr. Day 2, 9:28-9:29. ECC’s expert testified that interviewing the owner or operator was important for accuracy. Tr. Day 2 9:26.

14. Testimony regarding elevation and the difficulty of irrigating the place of use from the point of diversion was unpersuasive and failed to overcome the prima facie status of the claim. Mr. Yelin had no firsthand knowledge of the topography in question and confirmed that interpretation of topographic maps was insufficient to determine whether the point of diversion could service the place of use. Tr. Day 1, 4:19-4:20. Additionally, the testimony was belied by historical evidence depicting the ditch system servicing the claimed place of use. LLIT Ex. 43 at Patent 0536; Patent 0573; Patent 0590; Patent 0597; *see also* LLIT Ex. 44 at Patent 0179 and Patent 0206.

15. On July 5, 1983, the parties or their predecessors in interest entered into a Water Use Agreement whereby all parties to the agreement recognized that the other parties had been using water from Eagle Creek “for agricultural purposes for a number of years”. LLIT Ex. 24 at 4.

16. The place of use associated with claim 41N 41942-00 was placed in the Conservation Reserve Program (“CRP”) from 1987 to 2013. LLIT Ex. 13; Tr. Day 2, 12:04-12:05.

17. Mr. Skari testified that it was unlikely time and resources had been expended maintaining ditches and diversions since the mid-1980s due to CRP enrollment until 2013. Tr. Day 2, 12:11-12:12.

18. Mr. Skari testified that there was water available in 2016 and 2018 and that the ditch system was in use during those two years. Tr. Day 2, 12:16-12:18.

PRINCIPLES OF LAW

1. The Water Court adjudicates existing water rights as they were used historically. An existing right is a “right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” § 85-2-102(12), MCA. Existing water rights are defined by the substantive law in effect when they were appropriated.

Claimant: Lockwood Area Yellowstone County Water & Sewer Dist., 2015 Mont. Water LEXIS 12, *7 (June 8, 2015). They can also be defined in accord with lawful changes that occurred before July 1, 1973.

2. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

3. The law in Montana has always contemplated that the extent of a water right is “such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use.” *McDonald v. State*, 220 Mont. 519, 529, 722 P.2d 598, 604 (Apr. 8, 1986). “Beneficial use shall be the basis, the measure and the limit of all rights to the use of water.” *Id.* at 530, 722 P.2d at 605 (emphasis omitted). Historical beneficial use is the yardstick by which all claims are judged.

4. A filed notice of appropriation may be evidence of a priority date even if the notice was not timely filed in compliance with the Montana laws applicable as of the date of the filing. *In re Lee E. Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17, *29 (Jan. 31, 2013); *In re Danreuther Ranches*, Case 41O-209, 2013 Mont. Water LEXIS 5, *44 (Jan. 31, 2013).

5. Prior to implementation of the Change Authorization Process under the Water Use Act of 1973, water right owners could move their points of diversion, change or extend their ditches, move their place of use, or use the water for a purpose other than that originally appropriated. Water right owners could make such changes so long as the change did not adversely affect other water users. The burden of proof was on those claiming to be adversely affected. *Thompson v. Harvey*, 164 Mont. 133, 136, 519 P.2d 963, 965 (1974); Section 89-803, RCM (1947).

6. An appropriation of water is not impaired by the fact that the appropriator did not hold legal title to the land upon which the water was used. *Thomas v. Ball* (1923), 66 Mont. at 166, 213 P. at 599 (citing *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396; *Bailey v. Titingner*, 45 Mont. 154, 122 P. 575). Unity of title between the owner of a water right and owner of the land is required before a water right becomes appurtenant to land. *Smith v. Deniff* (1900), 24 Mont. at 27-28, 60 P. at 400-401.

7. Prior to July 1, 1973, the burden was on a water user who alleged injury to protest and seek redress for an injury caused by another's water use. *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 37, 383 Mont. 205, 369 P.3d 1034.

8. A statement of claim for an existing water right or an amended claim of an existing right "constitutes prima facie proof of its content until the issuance of a final decree." § 85-2-227(1), MCA. Anyone seeking to modify a claim or amended claim has the burden of showing by a preponderance of the evidence that the elements of the claim are incorrect. Preponderance of the evidence is a relatively modest standard that requires a party to prove the existence of a fact is more probable than not. *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628. This is the applicable burden of proof for every assertion that a claim is incorrect, regardless of whether the party seeking the modification is an adverse party or the claimant objecting to its own claim. Rule 19,

W.R.Adj.R.; *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558; *Dana Ranch Co. v. Montana Attorney Gen.*, 2017 Mont. Water LEXIS 13, *4.

9. The two elements of abandonment are nonuse of and intent to abandon a water right claim. *In re the Adjudication of Water Rights of the Clark Fork River*, 254 Mont. 11, 15, 833 P.2d 1120, 1123 (1992); *79 Ranch v. Pitsch*, 204 Mont. 426, 432, 666 P.2d 215, 218 (1983). The objector bears the initial burden of showing a long period of continuous nonuse of the water right claim. *In re Clark Fork River*, 254 Mont. at 15, 833 P.2d at 1123; *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218. This showing raises a rebuttable presumption that the claimant intended to abandon the claim. *In re Clark Fork River*, 254 Mont. at 15, 833 P.2d at 1123; *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218. The burden then shifts to the claimant to explain the long period of nonuse. *In re Clark Fork River*, 254 Mont. at 15, 833 P.2d at 1123; *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218. The Water Court has not specified a certain number of years of continuous nonuse causing the burden shift. However, the Montana Legislature has determined that 10 successive years of non-use of an appropriation right will raise a presumption of abandonment after a final decree. *79 Ranch*, 204 Mont. At 434, 666 P.2d at 219; Section 85-2-404, MCA.

10. Enrollment in the CRP program does not represent an intent by the appropriator to wholly or partially abandon a water right. The period of nonuse that occurs as a result of the contract may not create or be added to any previous period of nonuse to create a prima facie presumption of abandonment. Mont. Code Ann. §85-2-404.

CONCLUSIONS OF LAW

1. ECC failed to overcome the prima facie status of the claim as it related to the validity of the underlying Notice of Appropriation (Trommer NOA) and failed to meet its burden to prove by a preponderance of the evidence that the Trommer NOA is not the basis of the water right claimed by 41N 41942-00.

The statement of claim filing for claim 41N 41942-00 identifies the priority date, flow rate and source claimed by the Trommer NOA, identified the right as a 'filed' right and attached the Trommer NOA to the statement of claim.

Appropriators were not required to own the underlying land to perfect a water right claim. The March 10, 1900, appropriation by John Trommer became appurtenant to the claimed place of use when Mr. Trommer obtained title to the land. When Mr. Trommer sold the place of use to the Laas family the water right conveyed with the sale.

While the Trommer NOA was not timely filed in compliance with the Montana laws when it was filed on July 10, 1900, it remains the best evidence that the water was appropriated on March 10, 1900.

2. ECC failed to meet its burden to show a continuous period of non-use of the water right.

ECC was unable to show that the water right had not been put to use prior to the issuance of the 1918 GLO report. The report stated that irrigation had occurred in the years prior to 1915, and while irrigation did not occur from 1915-1917 there was insufficient evidence to establish a long period of continuous nonuse.

The expert testimony regarding the aerial photographs from 1957, 1966 and 1979 was generally unpersuasive and failed to show a continuous period of non-use.

ECC did not establish that there were ten successive years of nonuse outside of the years the place of use was enrolled in CRP. When the place of use was enrolled in CRP, the nonuse may not be added to or create a prima facie presumption of abandonment pursuant to §85-2-404.

To the extent that the ditches and diversion works of the irrigation system are in disrepair, the evidence was insufficient to show either nonuse or intent to abandon.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court decree the claim without modification and dismiss ECC's objection. The issue remark on the claim has served its purpose and should be removed.

A post decree abstract of each water right claim reflecting the recommended changes is attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WILLOW CREEK
BASIN 41N**

Water Right Number: 41N 41942-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: LAAS, LILA IRREVOCABLE LIVING TRUST
BURNETT, DARLENE & SKARI, TRUDY TRUSTEES
PO BOX 112
BIG ARM, MT 59910-0112

Priority Date: MARCH 10, 1900

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 4.00 CFS

Volume: 502.00 AC-FT

Climatic Area: 3 - MODERATE

***Maximum Acres:** 130.00

Source Name: EAGLE CREEK

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		NESENE	10	33N	4E	LIBERTY

Period of Diversion: JUNE 1 TO AUGUST 31

Diversion Means: HEADGATE

Period of Use: JUNE 1 TO AUGUST 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	130.00		SE	10	33N	4E	LIBERTY

Total: 130.00