

**FILED**  
**NOV 08 2013**

**Montana Water Court**

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)

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CLAIMANT: City of Helena

OBJECTORS: Community of Rimini; Andy R Skinner

**CASE 41I-67**

41I 89047-00

41I 89054-00

41I 89056-00

41I 89059-00

41I 89062-00

41I 89064-00

41I 89065-00

41I 89066-00

41I 89074-00

41I 89075-00

**Implied Claims:**

41I 214622-00

41I 30049883

41I 30049884

**ORDER AMENDING AND PARTIALLY ADOPTING MASTER'S REPORT  
PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

This case concerns the City of Helena's Tenmile Creek water rights, abandonment and place of use. This case involves eight claims, an implied claim and two claims for wells. Only two of these claims, 41I 89074-00 and 41I 89075-00 are at issue in this Order.

The City of Helena (hereinafter Helena) is the Claimant in this matter, and the Objectors originally included Andy R. Skinner, Community of Rimini and R. Kelly Kuntz. R. Kelly Kuntz withdrew in 2002, and the Community of Rimini settled with Helena in December 2004. The Community of Rimini and Andy R. Skinner also filed a

Stipulation and Agreement in December 2010. The remaining objector is Andy R. Skinner (Skinner) to Claimant Helena.

On December 29, 2000 following the 1999 hearing, the original Water Master filed a Memorandum and Orders with draft abstracts attached. Several attempts at settling the matter occurred between the parties over the years. The original Water Master retired on September 6, 2002. A second Water Master held a hearing on January 29, 2004, following Skinner's Motion for Entry of Master's Report and Brief. Counsel for Skinner filed this motion to inform the Court that neither he nor his client had received a settlement agreement from the other parties. Skinner requested that a Master's Report be entered since he was not inclined to settle. The Water Master held a telephonic hearing on October 5, 2004. No Master's Report was entered.

A third Water Master was appointed in May of 2008. He subsequently filed a Water Master's Draft Report in November of 2009 and allowed time for comments to be filed. Following that comment period, several orders were issued regarding status conferences and production of evidence. Ultimately, the Water Master issued an Order on Place of Use Question & Setting Hearing; the hearing was held on December 16, 2010. After the 2010 hearing, the Water Court requested more information on evidence of the historic place of use.

The Water Master issued the Notice of Filing of Master's Report on July 28, 2011 (hereafter 2011 Master's Report or Master's Report). This 2011 Master's Report supersedes the draft 2009 Report. The Master found Helena had abandoned a portion of its decreed rights by failure to put the water to beneficial use between 1903 and 1948. The Master also concluded that place of use was not limited to Helena's treatment facility. On August 31, 2011, Skinner filed his Objections to Master's Report. On that same day, Helena filed its Objections to Master's Report. The Master issued an Order for Briefs. Helena filed its Post-Hearing Memorandum on Points and Authorities on October 18, 2011. Skinner filed his Response to City of Helena's Post-Hearing Memorandum.

On January 13, 2012, the Water Master filed a Notice of Filing of Supplementary Master's Report and Supplementary Master's Report (hereinafter Supplementary

Master's Report). The Supplementary Master's Report dealt with Helena's list of documents for the Court to consider as evidence of nonabandonment. Helena filed its Objections to Supplementary Master's Report and Reassertion of Objection to Original Master's Report on February 22, 2012. Judge Ted Mizner assumed jurisdiction of the matter on May 7, 2012.

A District Court adjudicated Tenmile Creek in 1903. Only Helena's two Tenmile Creek claims, 41I 89074-00 and 41I 89075-00, are adjudicated in the 1903 Decree. The rights are as follows:

<b>Claim number</b>	<b>Name/Location (Flow rates)<sup>1</sup></b>	<b>Priority Date</b>
41I 89074-00	Tenmile Creek (225 MI) (5.62 cfs)	11/05/1864
41I 89075-00	Tenmile Creek (325 MI) (8.13 cfs)	02/10/1865

The 2011 Master's Report concluded Helena had partially abandoned claims 41I 89074-00 and 41I 89075-00, based on its limited capacity in delivering water over certain time periods. Nonuse and failure to expand the limited carrying capacity resulted in abandonment. Helena objected to these conclusions and requested a hearing.

A hearing was held in Helena on November 8, 2012. Present at the hearing were: Claimant City of Helena represented by Candace Payne and Chris Tweeten, and Objector Andy Skinner represented by John Bloomquist. Helena presented evidence that it did not intend to abandon any part of its water rights. Following the hearing, Judge Mizner set deadlines for briefing on the admissibility of the evidence presented and for filing proposed findings of fact and conclusions of law.

### **STANDARD OF REVIEW**

The Rules of Civil Procedure require this Court to accept a Master's Findings of Fact unless clearly erroneous. M. R. Civ. P. 53(e)(2). The Court may receive further evidence, if necessary. § 85-2-227(3), MCA; M. R. Civ. P. 53(e)(2); Rule 23,

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<sup>1</sup> The flow rates in cubic feet per second (cfs) have been adjusted to total 13.75 cfs, as originally claimed. Claim 41I 89075-00 has 225 miner's inches (MI) of water or 5.625 cubic feet per second. On the Department of Natural Resources and Conservation (DNRC) review sheets in the claim file, 5.63 cfs was used to reflect 225 miner's inches as the cfs calculation was rounded up. This number has been rounded down for purposes of the table so the total water claimed equals 13.75 cfs for these two rights. The second claim of 325 miner's inches or 8.125 cfs has been rounded up to 8.13 cfs.

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 Production Credit Assn. 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* M. R. Civ. P. 53(e). First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, this Court then determines whether the Master has 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. *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287. This Court reviews a Master's Conclusions of Law to determine whether the Master's interpretation of the law is correct. *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398.

## DISCUSSION

### I. Issues:

- A. Whether the Master erred in concluding that Helena abandoned part of claims 41I 89074-00 and 41I 89075-00?
- B. Whether the Master erred regarding Helena's place of use for claims 41I 89074-00 and 41I 89075-00?

### II. 2011 Master's Report and Analysis

- A. **Whether the Master erred in concluding that Helena abandoned part of claims 41I 89074-00 and 41I 89075-00?**

#### 2011 Master's Report

The 2011 Master's Report notes that the "City has never been able to divert and put to beneficial use more Tenmile Creek water than either the Rimini's pipeline capacity or distribution line capacity." 2011 Master's Report, Finding of Fact 25 AA., p. 13. The preponderance of the evidence showed that "since 1948, the City has had capacity to divert and transmit 8.5 MGD of treated water from Tenmile treatment facility to the

distribution system in its place of use.” Master’s Report, Finding of Fact 40, p. 24. The Master continued and found that “the pipeline right was partially unused for 45 years ...”, specifically from 1903 to 1948. Master’s Report, Finding of Fact 42 A., p. 25.<sup>2</sup> “The capacity of the diversion or ditch measures the extent of the right.” *McDonald v. Lannen*, 19 Mont. 78, noted in Master’s Report, Finding of Fact 42 B., p. 25.

Based on Helena’s inability to use all its water rights under its first two earliest claims, the Water Master found that the City had not used all of its water assigned to those rights. The Master further concluded that the City of Helena had partially abandoned its water rights:

The calculations of the quantity of water that the City abandoned are:

Claim 41I-89074-00:

Decreed quantity: The lesser of 225 MI or pipeline capacity.

Pipeline capacity: 3.555 MGD or 220 MI.

Difference between decreed quantity and pipeline capacity: 5 MI.

Amount abandoned: 5 MI.

Claim 41I 89075-00:

Decreed quantity: 325 MI

Quantity diverted at Woolston pump station: 36 MI

Difference between decreed quantity and quantity used: 289 MI.

Amount abandoned: 289 MI.

Converting the abandoned quantities into cubic feet per second:

Claim 41I-89074-00:

Quantity not abandoned:  $220/40 = 5.5$  CFS.

Quantity abandoned:  $5/40 = 0.125$  CFS

Claim 41I 89075-00:

Quantity not abandoned:  $36/40 = 0.9$  CFS

Quantity abandoned:  $289/40 = 7.225$  CFS

The City retains 5.5 CFS under claim 41I 89074-00 with the original priority date.

The City retains 0.9 CFS under claim 41I 89075-00 with the original priority date.

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<sup>2</sup> The Master’s Report cites the time period of 1903-1948 while the Post-Hearing Memorandum uses the period of 1903-1949. This Order uses the time period of 1903-1948.

2011 Master's Report, Conclusions of Law 16-19, pp. 69-70. The Water Master created two implied claims for the remaining flow rate of each claim and with a priority date of December 31, 1949. Since no evidence was presented about increasing the pipelines' carrying capacity, the Master concluded that the City intended to abandon water in excess of the amount its pipelines could carry.

### **2012 Supplementary Master's Report**

Following the 2010 hearing and the 2011 Master's Report, Helena provided a list of forty-seven items from 1885 to the early 1970s chronicling the different aspects of its water acquisition and use.<sup>3</sup> "Attached to the City's memorandum is a list labeled 'Chronology of Documented Events Concerning Continued Use of Ten Mile Creek Water in City of Helena.'" Supplementary Master's Report, p. 4. The Water Master reviewed and accounted for why these items should not be admitted into evidence. The Master concluded that "[t]he material listed by the City in its Chronology, if admitted to evidence and believed, would not change the outcome." Supplementary Master's Report, p. 5. The Master concluded this evidence is not new evidence and should not be included in the record as the City could have proffered the evidence at the 1999 hearing.<sup>4</sup> Supplementary Master's Report, pp. 15-16.

The Master found in the Supplementary Master's Report that the submitted evidence would not have changed the outcome of the Master's Report. "The most favorable references do not help the City unless one accepts the City's contentions that the Growing Communities Doctrine is or should be the law in Montana." Supplementary Master's Report, p. 15. Hence, the Master concluded that since the Growing

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<sup>3</sup> Of Helena's thirty-nine exhibits admitted at the November 8, 2012 hearing, at least eighteen documents were part of this forty-seven item Chronology as reviewed in the Supplementary Master's Report.

<sup>4</sup> The Water Master addressed the notice issue raised by the City of Helena. The Master concluded the City had notice at the 1999 hearing when "both parties presented evidence concerning the capacity of the 1921 Rimini pipeline ..." and ... "until the late 1940s, the City could transmit less treated water to town than it could divert." Supplementary Master's Report, p. 4. The Master also noted the district court in the 1903 Decree was the first court to question "transmission pipeline capacity." Supplementary Master's Report, p. 5.

Communities Doctrine is not the law and not applicable to Helena's arguments and evidence, Helena abandoned part of its two water rights.

### **Objections to 2011 Master's Report**

Helena argues the issue of abandonment was raised *sua sponte* by the Water Master as the issue had not been raised before by the original Water Master or by Skinner. Helena claims municipal water rights are different from other rights, pursuant to § 85-2-227, MCA. "The presumption of non-abandonment for municipal rights came into existence through the 1999 amendment to Mont. Code Ann. § 85-2-227." Helena's Post-Hearing Memorandum of Law, p. 12. Helena argues § 85-2-227(4), MCA codifies the Growing Communities Doctrine.<sup>5</sup> This statute "would protect [a municipality's] senior rights for future uses." Helena's Post-Hearing Memorandum of Law, p. 13. Helena's Memorandum of Law details that no abandonment occurred because Helena is a municipality, and that place of use can be defined as its treatment facility. *See* Helena's Post-Hearing Memorandum of Law, pp. 14-16.

Skinner argues that the Master's Report should be adopted as it stands. Combined Response, p. 4. Skinner reiterates the *DeSaye* test for reviewing a master's findings of fact and also relies on a Montana Supreme Court case to delineate the appropriate test for a master's evidentiary rulings. Combined Response to Claimant City of Helena's Post Hearing Memorandum of Law and Memorandum on Evidentiary Documents, pp. 3-4, *citing United Tool Rental, Inc. v. Riverside Contracting, Inc.*, 2011 MT 213 ¶ 10, 361 Mont. 493, 260 P.3d 156 (absent an abuse of discretion, a master's

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<sup>5</sup> The Growing Communities Doctrine is a policy giving municipalities special consideration regarding the perfection or "vesting" of its water rights. Two Colorado cases established the precedent for this doctrine. *City of Denver v. Sheriff*, 130 Colo. 105 Colo. 193, 96 P.2d 836 (1939) and *City and County of Denver v. No. Colo. Water Cons. Dist.*, 130 Colo. 375, 276 P.2d 992 (1954). "More than ... [fifty] years ago Frank J. Trelease sensed the power of municipalities to affect existing water use patterns and called for a reappraisal of the special privileges granted by states to municipal water suppliers. In the Northwest, the favored treatment has been called the 'growing communities doctrine.' The doctrine embraces case law and statutes that allow a municipal water supplier to hold a priority date for an unused block of water rights in anticipation of future needs. Holders of junior water rights may use the water, instream and out-of-stream, but only until trumped by the senior municipality when it needs the water." J.E. Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest*, 27 *Env'tl. L.* 127, 128 (1997) (internal footnotes omitted). *See also* 2011 Master's Report, Conclusions of Law 40-47, pp. 73-76.

evidentiary ruling shall not be overturned) (internal citation omitted). Skinner argues that the capacity of the ditch is the measure of the beneficial use. "As such, from 1903-1948 the City could only divert and convey for beneficial use approximately 6.40 cfs of its 13.75 cfs water rights to town for municipal use." Combined Response, p. 7.

Skinner also argues that § 85-2-227, MCA does not alter the result of the Master's Report. This statutory section is not applicable to Helena's use or nonuse of its water because Helena's arguments are contrary to Montana law. Combined Response, pp. 6-8. "The extent of a water right is measured by the capacity of the conveyance system putting the water to beneficial use." Combined Response, p. 7, *referencing* FOF 42.B., *citing McDonald v. Lannen*, 19 Mont. 78, 47 P. 648. Skinner continues:

In applying Montana's well-established rules and principles on abandonment, the Master ultimately found and concluded that the City had abandoned 5 miner's inches of Claim No. 41I 89074-00, and 289 miner's inches of Claim No. 41I 89075-00. *See*, COL Nos. 16-17. Applying Montana law on the resumption of water use after abandonment has occurred, the Water Master properly generated implied claims with priority dates commiserate [*sic*-commensurate] with the date the City established sufficient capacity in its conveyance system ... ."

Combined Response, p. 8.

Skinner responds the Master relied upon substantial evidence and "correctly applied the evidence presented at the 1999 hearing to the law of abandonment." Combined Response, p. 13. He also argues that non-use was part of the 1999 hearing and the Master's decision was not *sua sponte*. Combined Response, p. 10.

Helena replies not all evidence concerning intent and use was presented to the Master. Consequently, Helena wanted an opportunity to present evidence to the Judge at a hearing. Reply Brief, p. 2. "Because the Master did not allow the City an opportunity to provide evidence and argument regarding the issue of abandonment, the Master abused his discretion." Reply Brief, p. 3. Helena concludes that "consideration of the additional evidence admitted at the November 8, 2012 hearing is not governed by the standard test for reviewing the Master's Findings of Fact." Reply Brief, p. 3. Helena argues Skinner did not provide any relevant discussion on the issue of "intent" to abandon. Helena posits that

the Water Master erred in not applying the 1999 and 2005 amendments to § 85-2-227, MCA and in not using the 1903 Decree to determine place of use. Reply Brief, pp. 6-10.

### **2012 Hearing and Exhibits**

Helena requested an opportunity to present some of these items during a hearing. The Water Court held a hearing on November 8, 2012 in Helena, Montana. Pursuant to Rule 2(b) of the Water Right Adjudication Rules, the Montana Rules of Evidence apply to these proceedings. Rule 2(b), W.R.Adj.R. A Water Judge may consider all relevant evidence in a matter, especially when the matter concerns abandonment and a municipality. M. R. Civ. P. 53(e)(2); § 85-2-227, MCA.

Subject to the provisions of subsection (4), a water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant, including, without limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973.

Section 85-2-227(3), MCA. "Relevant evidence under this part may include admissible evidence arising before or after July 1, 1973." Section 85-2-227(2), MCA. The evidence presented at the November 8, 2012 hearing is admissible and admitted.

The City's historic documents were offered and accepted into evidence as records of regularly conducted activity, as public records or reports, or as statements in ancient documents, whose authenticity has been established. In its briefing, Helena argued that most of the exhibits should be relied upon by the Court to support findings regarding nonabandonment and place of use. Objector Skinner argued the exhibits should not be considered by the Water Court as the exhibits lack relevancy, have no supported connection or provide speculation for Helena's arguments. However, in his Amended Proposed Findings of Fact and Conclusions of Law, Skinner concedes the exhibits are admissible. "After consideration, Skinner's Objections are overruled and the City's exhibits are admitted and made a part of the record." Skinner Amended Proposed Findings of Fact and Conclusions of Law, #21, p. 10.

### Abandonment Case Law

These admitted exhibits support Helena's rebuttal argument against the presumption of abandonment. The Montana Supreme Court has ruled on several cases of abandonment since the late 1800s.<sup>6</sup> "Abandonment of a water right is a question of fact. Section 89-802, Revised Codes of Montana, 1947, (applicable here, repealed in 1973)." *79 Ranch, Inc. et al., v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215, 217 (1983). "Two elements are necessary for the abandonment of a water right: nonuse of the water associated with the water right and intent to abandon the water right." *Adjudication of the Water Rights of the Clark Fork River*,<sup>7</sup> 254 Mont. 11, 15, 833 P.2d 1120, 1123 (1992), referencing *Shammel v. Vogl*, 144 Mont. 354, 396 P.2d 103 (1964) and *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923). The *79 Ranch* case marked a change in the approach to water rights abandonment as the burden of proof shifted to the claimant after demonstration of prolonged nonuse. See also *Heavirland*, ¶ 11.

Section 85-2-227, MCA modifies the application of traditional, abandonment case law to most abandonment cases. Pursuant to § 85-2-227, MCA and its legislative history, a municipality is viewed through a different legal lens. For a municipality, this statutory section lists what evidence may be presented by Helena to rebut the presumption of abandonment. The Master erred by failing to apply this statute to Helena's claims. Here, Claimant provided evidence of use and intent for the period of 1903 to 1948 at the November 8, 2012 hearing.

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<sup>6</sup> See, e.g., *Atchison v. Peterson*, 1 Mont. 561 (1872); *Tucker v. Jones*, 8 Mont. 225, 19 P. 571 (1888); *Smith v. Hope Mining Co.*, 18 Mont. 432, 45 P. 632 (1896); *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923); *Musselshell Valley Farming & Livestock Co. v. Cooley*, 86 Mont. 276, 283 P. 213 (1929); *St. Onge v. Blakeley*, 76 Mont. 1, 245 P. 532 (1926); *Shammel v. Vogl*, 144 Mont. 354, 396 P.2d 103 (1964); *Holmstrom Land Co. v. Meagher Cty. Newlan Creek Water Dist.*, 185 Mont. 409, 605 P.2d 1060 (1980), superseded by statute as stated in *Re Application for Change of Appropriation Water Rights Nos. 101960-41S & 101967-41S*, 249 Mont. 425, 816 P.2d 1054 (1991), and *Heavirland v. State*, 2013 MT 313, ¶¶ 18-25, 2013 Mont. LEXIS 431.

<sup>7</sup> The *Adjudication of the Water Rights of the Clark Fork River* (also known as *City of Deer Lodge*) case is distinguishable to the case *sub judice* as the Montana Supreme Court decided *City of Deer Lodge* before the specific municipality language was added to § 85-2-227, MCA. Additionally, the evidence presented in *City of Deer Lodge* concerned post-1973 activity. 254 Mont. at 16-17, 833 P.2d at 1123-24.

### **Section 85-2-227, MCA Amendments**

In 1999, the Montana Legislature amended this statutory section to address water right claims for a limited number of municipalities. Senate Bill 235 provided the new language; specifically, the title had criteria for a presumption of municipal nonabandonment. The Legislature added subsection 4, which had the following language:

In a determination of abandonment made under subsection (3), the legislature finds that a water right that is claimed for municipal use from a water classified by the board of environmental review before January 1, 1999, as A-Closed under administrative rule is a unique water suited to municipal water use and that such a claim by a city, town, or other public or private entity that operates a public water supply system, as defined in 75-6-102, is presumed to not be abandoned if the city, town, or other private or public entity has used any part of the water right or municipal water supply and there is admissible evidence that the city, town, or other public or private entity also has:

- (a) obtained a filtration waiver under the federal Safe Drinking Water Act, 42 U.S.C. 300(f), et seq.;
- (b) acquired, constructed, or regularly maintained diversion or conveyance structures for the future municipal use of the water right;
- (c) conducted a formal study, prepared by a registered professional engineer or qualified consulting firm, that includes a specific assessment that using the water right for municipal supply is feasible and that the amount of the water right is reasonable for foreseeable future needs; or
- (d) maintained facilities connected to the municipal water supply system to apply the water right to an emergency or supplemental municipal water supply.

Section 85-2-227(4), MCA (1999).

The discussion of the 1999 amendments acknowledged that municipalities are to be treated differently. During the January 25, 1999 Senate Committee on Natural Resources hearing, the sponsor, Senator Jack Wells, clarified this amendment to Title 85 in his opening statement. "It recognizes certain activities by municipal organizations that would suffice to guarantee their water rights in future years." Hearing on SB 235, Sen. Comm. on Nat. Res., 56<sup>th</sup> Legislative Session, p. 2. The 1999 amendment focused on twelve municipalities considered to be Closed-A Basins. The Senator stated that the bill

was limited in scope to only “15 sources of water” and “in the western part of Montana.” Hearing on SB 235, p. 2. Senator Cindy Younkin recognized this legislative language would “also partially codify what is known as the great and growing cities doctrine which has been espoused by the Supreme Court of other states.” Hearing on SB 235, p. 4. She also avowed that “[t]his bill will not in any way give municipalities a carte blanche permit to quit using some of their water rights or to ignore any unused water rights.” Hearing on SB 235, p. 4. However, the bill changed “the evidentiary standard.” Hearing on SB 235, p. 4. Several committee members were concerned with the breadth of the bill.<sup>8</sup>

The 1999 amendments concerning Closed-A water are not applicable to the City of Helena as it would not have qualified.<sup>9</sup> However, this argument is moot because the Closed-A Basin language was removed with the 2005 amendments. The 2005 amendments broadened the statute’s presumption of municipal nonabandonment to all municipalities as long as a municipality could provide evidence for one of the four criteria listed. *See* § 85-2-227(4)(a)-(d), MCA, 2005. The 2005 language remains in the current version of § 85-2-227, MCA.

#### **Application of § 85-2-227(4), MCA and Exhibits**

Pursuant to § 85-2-227(4), MCA, the presumption of abandonment does not apply if a municipality has used any part of its water right and it meets any of the statutory criteria. These criteria require a showing that Helena:

In a determination of abandonment made under subsection (3), the legislature finds that a water right that is claimed for municipal use by a city, town, or other public or private entity that operates a public water supply system, as defined in 75-6-102, is presumed to not be abandoned if

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<sup>8</sup> Senator Grossfield stated: “[H]e was a little troubled by the broadness of the bill.” Hearing on SB 235, p. 6. He further remarked: “We are almost creating something equivalent to a federal reserved water right in the sense of for an Indian Tribe.” Hearing on SB 235, p. 6. Other members and attendees qualified the bill’s scope and how it only applies to the twelve municipalities. Hearing on SB 235, pp. 6-7.

<sup>9</sup> Closed-A water is defined in the Administrative Rules of Montana, and it comes from the Federal Clean Water Act, 33 U.S.C. § 1341. *See* Admin. R. M. 17.30.101 and 17.30.621 (2013). As noted above, these two claims at issue are from Tenmile Creek. Tenmile Creek drainage is referred to an A-1 Basin, not a Closed-A. Admin. R. M. 17.30.610.

the city, town, or other private or public entity has used any part of the water right or municipal water supply and there is admissible evidence that the city, town, or other public or private entity also has:

(a) obtained a filtration waiver under the federal Safe Drinking Water Act, 42 U.S.C. 300(f), et seq.;

(b) acquired, constructed, or regularly maintained diversion or conveyance structures for the future municipal use of the water right;

(c) conducted a formal study, prepared by a registered professional engineer or qualified consulting firm, that includes a specific assessment that using the water right for municipal supply is feasible and that the amount of the water right is reasonable for foreseeable future needs; or

(d) maintained facilities connected to the municipal water supply system to apply the water right to:

(i) an emergency municipal water supply;

(ii) a supplemental municipal water supply; or

(iii) any other use approved by the department under Title 85, chapter 2, part 4.

Section 85-2-227(4)(a)-(d), MCA (emphasis added).<sup>10</sup> The 2005 amendments apply to Helena's water rights. A municipality may rebut the presumption of abandonment if it shows that it has used any of its water and provides admissible evidence to meet any of these four criteria.

The Master's conclusion of law that Helena had partially abandoned its water rights is in error in light of the legislative intent and history of § 85-2-227, MCA.<sup>11</sup> The preponderance of the evidence shows Claimant did not intend to abandon its water right during the time period of 1903 to 1948. Moreover, because of the applicability of § 85-2-227(4), MCA, a municipality can rebut this presumption by proffering specific admissible evidence.

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<sup>10</sup> Section 75-6-102, MCA provides: "'Public water supply system' means a system for the provision of water for human consumption from a community well, water hauler for cisterns, water bottling plant, water dispenser, or other water supply that has at least 15 service connections or that regularly serves at least 25 persons daily for any 60 or more days in a calendar year." Section 75-6-102(14), MCA.

<sup>11</sup> The 1989 version of § 85-2-227, MCA included a comment about the statute's retroactive and prospective applicability. However, this statutory version was limited in scope as it dealt with a claim constituting *prima facie* evidence in relation to the decrees issued by the Water Court. Section 85-2-227, MCA (1989) and Section 11, Ch. 604, L. 1989.

“A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.” M. R. Evid. 301(a). Presumptions, unless conclusive, are disputable and “may be overcome by a preponderance of evidence contrary to the presumption.” M. R. Evid. 301(b)(2). Here, the presumption arose because of the prolonged period of nonuse. The Water Master found no evidence to overcome the presumption and consequently concluded Helena had abandoned part of its water.

At the 2012 hearing, Helena presented more evidence to rebut this presumption of abandonment. “[D]etermining whether a water right has been abandoned requires weighing all of the relevant factual circumstances of the case.” *Heavirland*, ¶ 32 (internal citations omitted). Additionally, Helena’s subsequent briefing outlined how this evidence was sufficient under the criteria listed in § 85-2-227(4), MCA to rebut the presumption of abandonment or find nonabandonment for a municipality.

For Helena, the evidence presented and admitted to the Court supports Helena’s argument that rebuts the presumption in this case. This admissible evidence, as considered by a water judge pursuant to § 85-2-227(3), supports the conclusion that Helena did not abandon its water right. Helena is a municipality as the Master found in the 2011 Master’s Report. Helena claims municipal water use and has “acquired, constructed, or regularly maintained diversion or conveyance structures for the future municipal use of the water right.” Section 85-2-227(4)(b), MCA. The evidence to support this criterion was found in the exhibits admitted at the November 8, 2012. *See* Exhibits AP, AQ, AR, AS, AT, AU, AV, AX, AZ, BA, BE, BG-1, BG-2, BH, BI, BJ, BK1-5, BM, BN, BP.

Helena provided two engineer reports, which focused upon the current water system at the time as well as recommendations for improvement. This evidence shows that Helena “conducted a formal study, prepared by a registered professional engineer or qualified consulting firm, ... that using the water right for municipal supply is feasible and that the amount of water is reasonable for foreseeable future needs.” Section 85-2-227(4)(c), MCA. The 1929 Report on water supply is the complete version of the

information found in Exhibit S-1. The Report has recommendations for system improvements to address Helena's supply of adequate water for periods of peak consumption and for fire protection. This evidence shows that Helena used part of its water and conducted a formal study on its feasibility and foreseeable future needs.

Helena had concerns about an emergency water supply for fire prevention and control. Under § 85-2-227(4)(d)(i), MCA, municipal rights are not presumed abandoned if Helena "... maintained facilities connected to the municipal water supply system to apply the water right to: ... an emergency municipal water supply." Section 85-2-227(4)(d)(i), MCA. A July 1930 map revealed the Helena Water Works' Yaw Yaw pipelines to the City. Ex. AY. The pumping station affiliated with these pipelines was designated to be used for emergencies.

The August 1939 Fire Defense System Report provides evidence of the need for improvement and fire mitigation strategies. Ex. BL. "This Report also recommends ... that the City should install a conduit of permanent construction from the Ten Mile settling reservoir of a capacity sufficient to provide ten hour fire flow of 3,500 gallons per minute at times of maximum consumption." Post-Hearing Memorandum, p. 21. This language comes from the Report and supports the evidence needed to meet the criterion in § 85-2-227(4)(d)(i), MCA. This Report confirms Helena did not intend to abandon its water right as this evidence rebuts the presumption.

A separate 1925 Report recommends that the Yaw Yaw Ditch was appropriate for use in emergencies since the water is not potable for municipal use after 1919. Ex. C-F. The first two pages list the water system's fire-fighting facilities, including the Yaw Yaw Pumping Station. "This station is used only in cases of extreme emergency on account of polluted supply, station has not operated since 1919. Would take about twelve hours to place equipment in service." Ex. C-F, p. 2. This evidence supports the emergency municipal water supply criterion in § 85-2-227(4)(d)(i), MCA.

Helena has met at least three criteria under § 85-2-227(4), MCA. Where Helena needed to meet only one criterion, Helena has shown substantial evidence that it maintains a public water system, that it has used parts of its water rights, that it has

acquired, constructed, or regularly maintained diversion or conveyance structures for the future municipal use of the water right, and that it has maintained facilities connected to the municipal water supply system to apply the water right to an emergency municipal water supply or a supplemental municipal water supply. Therefore, the City of Helena has not abandoned any part of its 1903 Ten Mile Creek decreed water rights.

**B. Whether the Master erred regarding Helena's place of use for claims 41I 89074-00 and 41I 89075-00?**

**2011 Master's Report**

The Master's Report had several pages of findings on the issue of place of use. *See* Master's Report, Findings of Fact 76E.-107, pp. 35-50. These findings explained why the City's place of use should be where the water is delivered as opposed to the treatment facility. The Master based his rationale on the record and the evidence presented.

The City's 2010 objection to having any areal limits placed on its water rights is treated elsewhere. The City has an obligation to the water court to assist in the creation of an accurate and useable place of use description. Should a reviewing authority disagree with the inclusion or omission of areas from the place of use, the record will be sufficient to accommodate any desired changes without yet another evidentiary hearing.

The place of use recommended in this report is based upon the record as supplemented in 2010 and the evidence required to be produced in 2011.

...

Basin 41I is under a Temporary Preliminary Decree. Helena will have an opportunity to raise issues about its claims at the time of the Preliminary Decree.

*Master's Report*, Findings of Fact 76 E.-F. and 76 I., pp. 35-36. The Master continued to explain why the Claimant should not have a limited place of use.

The City's statements of claim all describe a place of use of 30 full sections which roughly coincided with its distribution system as of 1973.

...

The place of use is a place where the water is used beneficially. The treatment facility used some water for cleaning and sanitary purposes. To that extent, there was historical municipal use of the City's water rights at the treatment facility. The treatment facility site should be included in the place of use.

The court takes notice of the contents of the claim files for the claims of Billings, Bozeman, Butte, Missoula, Kalispell, Shelby, Havre, Glasgow, Miles City, and Glendive. All of those cities made municipal claims with legal descriptions that appear to coincide with their respective city limits. None of those cities claim that treatment is a beneficial use or that the locus of the treatment plant is the only place of use.

Definition from the DNRC Water Right Claims Examination Manual, Chapter X, subsection B.2.B., p. 516:

Municipal. Municipal uses are generally associated with towns and cities providing water within a service area. The specific purposes are varied and could include households, businesses, parks, golf courses, cemeteries, industrial, treatment plants, etc.

This is the only use of the term "service area" in the DNRC examination manual, W.R.C.E.R., or W.R.Adj.R. Since the service area concept in the municipal water context is a means of delineating the area where the city must allow service connections, a service area is not an element of the water right.

*Master's Report*, Findings of Fact 89, 95, 96 and 97, pp. 38, 39-40.

#### **2012 Supplementary Master's Report**

The Supplementary Master's Report did not address any issue related to the place of use.

#### **Objections to Master's Report**

The City argued that the place of use should be the treatment plant, where the City actually uses the water as diverted from the Tenmile Creek.

The City's position is that its place of use is the municipal water treatment plant, and after the water is treated it is appropriate for municipal use in the City's service area as identified by the Gilman 2002 Report. Pre-1973

district court orders provide that the first two decreed rights on Tenmile are without a specifically designated place of use . . . .

Reply Brief, pp. 8-9. The City also referenced the 1903 Decree from *Whitcomb* to argue the City has no restriction as to place of use. *Whitcomb v. The Helena Water Works Company*, 151 Mont. 443, 446, 444 P.2d 301, 303 (1968). “Historically, the City made beneficial use of Tenmile Creek water at the water treatment facility (for drinking, sanitation and cleanup, if no other uses) in addition to preparing it for municipal consumption.” Proposed Findings of Fact and Conclusions of Law, p. 43. The City avers the Master erred with his findings of fact concerning place of use.

Concerning place of use, Skinner responds that municipal rights should not be differently than other water rights. Combined Response, p. 13. “The place of use determined by the Water Master should be adopted by the Division Water Judge.” Combined Response, p. 13. Skinner defines place of use as where the water is beneficially used. Combined Response, p. 14. Skinner also cites Water Right Claim Examination Rule 2(a)(9) where beneficial use also has municipal use. Combined Response, p. 14.

“Beneficial Use” means a use of water recognized as beneficial prior to July 1, 1973 and used for the benefit of the appropriator, other persons, or the public and may include but not be limited to irrigation, stock, domestic, fish and wildlife, industrial, mining, municipal, power generation, and recreational uses.

Rule 2(a)(9), W.R.C.E.R. Relying on the definition in § 85-2-102, MCA, Skinner posits that the place of use should be where the water is beneficially used. Skinner argues that the place of use should be the City of Helena.

This supports what the Master found in the 2011 Master’s Report:

The City’s place of use should include all of the city limits as of the date of original incorporation.

The City’s place of use should include all land annexed to the City before July 1, 1973. The names of the subdivisions, dates of annexation, and legal land descriptions below were taken from Exhibit AB, pp. 13-15, and the

materials produced by the parties in April 2011. Exhibit AB is the February 6, 1976 Annexation Study prepared for the City of Helena by Urban Management Consultants of San Francisco, Inc. Skinner objects to the inclusion of any annexed land unless “the areas in fact were supplied water from the City’s Ten Mile System.”

Rule 2(a)(52), W.R.C.E.R., “‘Place of Use’ (POU) means the lands, facilities, or sites where water is beneficially used.”

...

The lands and sites where water was beneficially used by the City of Helena are the lands within its corporate limits on July 1, 1973, and lands outside the corporate limits where it is shown that there was City water service historically available.

The City argues that the prima facie showing made by its statements of claim has not been overcome by the evidence. The City’s statements of claim describe 30 complete sections. The evidence at the December 16, 2010 hearing was sufficient to establish by a preponderance of the evidence that the place of use is as described below. The descriptions were refined using the evidence produced by the parties in response to the court’s order in April 2011.

Master’s Report, Findings of Fact 104, 105 A. & F., and 108, pp. 41-42, 44. The Master then delineated the lands for Claimant’s place of use.

#### **Place of Use Law and Application**

The Master did not err in his findings concerning the place of use for the City of Helena. Place of use’s definition includes lands, facilities or sites where water is beneficially used. Rule 2(a)(52), W.R.C.E.R. The City of Helena may consider the facility as part of its place of use, but it is not the sole location. The Master correctly determined that the place of use is where the water is beneficially used. Additionally, the Master relied on the City’s statement of claim where the place of use had thirty sections. As detailed above, a statement of claim is *prima facie* proof of its contents. Section 85-2-227(1), MCA. The City timely filed its statement of claim and referenced its place of use as having thirty different sections. The Master relied on that information and

proceeded to detail all of the sections in Lewis and Clark County, which would encompass the City's place of use or service area.

Additionally, the Master found that all other municipal uses by other cities have an encompassing list of land descriptions to define the place of use. Claimant did not offer a reason why its municipal use should have such a limited place of use. The place of use remains as the Master found, and that portion of the Master's Report is adopted.

### **III. Other Errors in the Master's Report**

In its Amended Proposed Findings of Fact and Conclusions of Law, the City noted corrections which are needed in the Master's Report. A court may correct mistakes in orders or other parts of the record " ... on motion or on its own, with or without notice ... ." M. R. Civ. P. 60(a). See also *Muri v. Frank*, 2001 MT 29, §11, 304 Mont. 171, 18 P.3d 1022; *Estate of Swandal*, 179 Mont. 429, 436, 587 P.2d 368, 372 (1978). The clerical error mentioned is corrected.

- The correct date for the second appropriation is February 10, 1865 for Finding of Fact 2, p. 5.

### **IV. Abstract Corrections**

These abstracts will have the following corrections:

#### **411 89074-00**

FLOW RATE: 5.62 CFS

VOLUME: 4,061.57 ACRE-FEET

THE MUNICIPAL SYSTEM IS MADE UP OF SEVERAL INTAKES LOCATED ON TENMILE CREEK. THE TOTAL AMOUNT DIVERTED FROM ONE OR A COMBINATION OF INTAKES IS LIMITED TO ~~43.45~~ 13.75 CFS. SEE THE CLAIM FILE FOR FURTHER INFORMATION.

WATER MAY BE DIVERTED UNDER THIS CLAIM DURING HIGH WATER FOR STORAGE IN CHESSMAN RESERVOIR AND SCOTT RESERVOIR BETWEEN APRIL 1 AND AUGUST 13 IF THE OTHER CONDITIONS CONCERNING DIVERSION FOR STORAGE UNDER THIS CLAIM ARE MET. SEE CLAIMS 89056-00, 89059-00, 89062-00, 89064-00, 89065-00, 89066-00, 89075-00, [AND] 214622-00, [.]~~30049883, AND 30049884.~~

BY AGREEMENT WITH THE CITY OF HELENA, THE COMMUNITY OF RIMINI IS ENTITLED TO USE UP TO 70 AFY FOR DOMESTIC, LAWN AND GARDEN, AND FIRE PROTECTION USES. THE TERMS OF THE AGREEMENT AND A LEGAL LAND DESCRIPTION OF THE PLACE OF USE FOR THIS 70 AFY CAN BE FOUND IN THE CLAIM FILES. THE 70 AFY COMES OUT OF THE CITY'S APPROPRIATIONS UNDER CLAIMS 41I 89059-00, 41I 89074-00, 41I 89075-00, [AND] 41I 214622-00[.] ~~30049883, AND 30049884.~~

~~SPLIT CLAIM NO. 30049883 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.~~

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL 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. 089047-00, 089048-00, 089050-00, 089054-00, 089056-00, 089059-00, 089062-00, 089064-00, 089065-00, 089066-00, 089074-00, 089075-00 [AND] 214622-00 [.]~~30049883, AND 30049884.~~

#### **41I 30049883**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT ON 11/08/2013 DURING ADJUDICATION OF THE TEMPORARY PRELIMINARY DECREE.

#### **41I 89075-00**

FLOW RATE: 8.13 CFS

VOLUME: 5,875.55 ACRE-FEET

THE MUNICIPAL SYSTEM IS MADE UP OF SEVERAL INTAKES LOCATED ON TENMILE CREEK. THE TOTAL AMOUNT DIVERTED FROM ONE OR A COMBINATION OF INTAKES IS LIMITED TO ~~13.15~~ 13.75 CFS. SEE THE CLAIM FILE FOR FURTHER INFORMATION.

WATER MAY BE DIVERTED UNDER THIS CLAIM DURING HIGH WATER FOR STORAGE IN CHESSMAN RESERVOIR AND SCOTT RESERVOIR BETWEEN APRIL 1 AND AUGUST 13 IF THE OTHER CONDITIONS CONCERNING DIVERSION FOR STORAGE UNDER THIS CLAIM ARE MET. SEE CLAIMS 89056-00, 89059-00, 89062-00, 89064-00, 89065-00, 89066-00, 89075-00, [AND] 214622-00, [.]~~30049883, AND 30049884.~~

BY AGREEMENT WITH THE CITY OF HELENA, THE COMMUNITY OF RIMINI IS ENTITLED TO USE UP TO 70 AFY FOR DOMESTIC, LAWN AND GARDEN, AND FIRE PROTECTION USES. THE TERMS OF THE AGREEMENT AND A LEGAL LAND DESCRIPTION OF THE PLACE OF USE FOR THIS 70 AFY CAN BE FOUND IN THE CLAIM FILES. THE 70 AFY COMES OUT OF THE CITY'S APPROPRIATIONS UNDER CLAIMS 41I 89059-00, 41I 89074-00, 41I 89075-00, [AND] 41I 214622-00[.] ~~30049883, AND 30049884.~~

~~SPLIT CLAIM NO. 30049884 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.~~

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL 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. 089047-00, 089048-00, 089050-00, 089054-00, 089056-00, 089059-00, 089062-00, 089064-00, 089065-00, 089066-00, 089074-00, 089075-00 [AND] 214622-00 [.]~~30049883, AND 30049884.~~

#### **41I 30049884**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT ON 11/08/2013 DURING ADJUDICATION OF THE TEMPORARY PRELIMINARY DECREE.

The following claims will have the implied claim numbers removed in this information remark: 41I 89059-00, 41I 89074-00, 41I 89075-00, and 41I 214622-00.

BY AGREEMENT WITH THE CITY OF HELENA, THE COMMUNITY OF RIMINI IS ENTITLED TO USE UP TO 70 AFY FOR DOMESTIC, LAWN AND GARDEN, AND FIRE PROTECTION USES. THE TERMS OF THE AGREEMENT AND A LEGAL LAND DESCRIPTION OF THE PLACE OF USE FOR THIS 70 AFY CAN BE FOUND IN THE CLAIM FILES. THE 70 AFY COMES OUT OF THE CITY'S APPROPRIATIONS UNDER CLAIMS 41I 89059-00, 41I 89074-00, 41I 89075-00, [AND] 41I 214622-00[.] ~~30049883, AND 30049884.~~

The following claims will have the implied claim numbers removed in this information remark: 89047-00, 89048-00, 89050-00, 89054-00, 89056-00, 89059-00, 89062-00, 89064-00, 89065-00, 89066-00, and 214622-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL 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. 089047-00, 089048-00, 089050-00, 089054-00, 089056-00, 089059-00, 089062-00, 089064-00, 089065-00, 089066-00, 089074-00, 089075-00 [AND] 214622-00 [~~30049883, AND 30049884.~~]

The two claims, 41I 89048-00 and 41I 89050-00, are not part of this case; however, the Master recommended in the 2011 Master's Report that the new implied claim information be added to this remark on these claims. The addition of the two implied claims was never added to claims 41I 89048-00 and 41I 89050-00. Therefore, the claims do not need to be corrected. These two claims appear as the original rights in the State's centralized water right record system and are not attached to this Order.

#### **CONCLUSION**

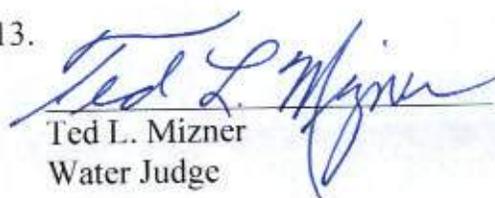
Based on the foregoing record and evidence presented, the Water Master erred in concluding that Helena abandoned part of its two water rights. Helena, as a municipality, provided evidence to support its argument of nonabandonment. Pursuant to § 85-2-227(3) and (4), MCA, the Water Court concludes the City did not abandon any portion of claims 41I 89074-00 and 41I 89075-00 during the period of 1903 to 1948. The evidence presented showed efforts in system improvements, reliance on engineer's reports for foreseeable future needs and its use of its facilities and system for an emergency municipal water supply. The Master did not err regarding the place of use for these water rights as the place of use encompasses lands as well as facilities. Accordingly, the Court enters the following:

**ORDER**

IT IS ORDERED that the Master's Report is AMENDED and PARTIALLY ADOPTED as AMENDED; and

IT IS FURTHER ORDERED that the water right abstracts for all claims are corrected as reflected by the abstracts attached to this Order. A Post Decree Abstract of Water Right Claim is attached to confirm that the above changes have been made in the State's centralized water right record system.

DATED this 8<sup>th</sup> day of November, 2013.

  
Ted L. Mizner  
Water Judge

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**Honorable Ted L. Mizner**  
**Water Judge**  
**313 Missouri Avenue**  
**Deer Lodge MT 59722**

**Note: Service List Updated 10/23/2012**