Montana Water Court
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FILED
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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA CLARK FORK DIVISION
WESTSIDE SUBBASIN OF THE BITTERROOT RIVER BASIN (76HF)

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CLAIMANTS: Lee E. Foss; Sam W. Foss; Cheryl D. Rothlisberger; Daniel L. Rothlisberger; Cindi M. Bratvold; MacGillivary Ranch LLC; Nicholas J. Spencer and Carol Whetstone-Spencer Revocable Trust; Jon W. Van Arsdale; Lisa J. Wade OBJECTORS: United States of America (USDA - Forest Service); Avista Corporation; United States of America (Bureau of Indian Affairs); Cheryl D. Rothlisberger; Lee E. Foss; Sam W. Foss INTERVENORS: Jon Van Arsdale: Lisa Wade	**CASE 76HF-580** 76H 105034-00 76H 105055-00 76H 105056-00 76H 105057-00 76H 157878-00 **Implied claims** 76H 30043197 76H 30043198 76H 30043202 76H 30043203

ORDER AMENDING AND PARTIALLY ADOPTING MASTER'S REPORT AS AMENDED

PROCEDURAL BACKGROUND

On January 20, 2009, a Master's Report containing Findings of Fact and Conclusions of Law was filed with the Clerk of Court. The Findings within the Master's Report generated implied claims 76H 30043197, 76H 30043198, 76H 30043202 and 76H 30043203. All parties were served a copy of this Report.

On January 29, 2009, Claimants Cheryl D. Rothlisberger and Daniel L. Rothlisberger filed an Objection to Master's Report (hereinafter Rothlisberger Objections) and Claimants/Intervenors Jon Van Arsdale and Lisa Wade jointly filed Objections to Master's Report (hereinafter Van Arsdale-Wade Objections). On February

23, 2009, Objector United States (USDA-Forest Service) filed an Objection to the Master's Report, and the United States Bureau of Indian Affairs joined the USDA-Forest Service (hereinafter and collectively United States Objections). Upon review of the entire record and briefing, the Court Amends and Adopts the Master's Report As Amended.

STANDARD OF REVIEW

This "court must accept the master's findings of fact unless clearly erroneous." M. R. Civ. P. 53(e)(2). The Montana Supreme Court adopted a three-part test to make this determination. *Interstate Prod. Credit Ass'n. v. Desaye,* 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). First, the Court reviews the record to see if the findings are supported by substantial evidence. *Desaye*, 250 Mont. at 323, 820 P.2d at 1287. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993) (internal citation omitted). It is more than a scintilla and less than a preponderance. *State v. Shodair Hosp.*, 273 Mont. 155, 163, 902 P.2d 21, 26 (1995). "Second, if the findings are supported by substantial evidence," the Court determines whether the Master "has misapprehended the effect of the evidence." *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287 (internal citation omitted). "Third, if substantial evidence exists and the effect of the evidence has not been misapprehended the Court may" nevertheless determine the findings 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 (internal citation omitted).

DISCUSSION

Rothlisberger Objections

The Rothlisbergers raise the following four objections to the Master's Report: (1) the priority date for water right claims 76H 105034-00 and 76H 105055-00 should not be changed as the Water Master recommends; (2) the Water Master should have clarified the

distinction between Beaver Ditch in U.S. Exhibit 2 and the Beaver Ditch identified on the worksheet for claims 76H 105034-00 and 76H 105055-00, which is (Faye) Beaver Ditch; (3) the point of diversion on water right claim 76H 157878-00 should be refined to indicate that it is East and below Faye Ditch at the NWNWSE quarter of Section 23; and (4) a remark on water right claim 76H 157878-00 erroneously refers to Claim 76H 214373-00, which was dismissed by the Water Court.

76H 105034-00 and 76H 105055-00 Priority Date

Rothlisbergers assert that the Water Master erred by recommending a priority date of December 31, 1945 for claims 76H 105034-00 and 76H 105055-00. Rothlisbergers claim June 15, 1883 is the date of first beneficial use. *Objection to Master's Report*, p. 2. The Rothlisbergers' claim for an 1883 priority date is based on a notice of appropriation filed in 1888.

Because the notice of appropriation upon which the Rothlisberger rights were based was not filed within six months of publication of section 89-813, RCM, the Water Master concluded it was inadmissible. The Water Master relied on *Holmstrom Land Company v. Newland Creek Water District.* 185 Mont. 409, 605 P.2d 1060 (1980). The *Holmstrom* Court acknowledged: "[w]e have held that any nonconformance with section 89-810 renders the notice of appropriation inadmissible as evidence ... ." *Holmstrom*, 185 Mont. at 427, 605 P.2d at 1070.

After concluding the Rothlisberger notice of appropriation was inadmissible, the Water Master decided the *prima facie* status granted to water right claims by Montana statutory section 85-2-227 no longer applied and shifted the burden of proof from Objectors to Claimants. To discharge this burden and prevent possible termination of their claims, Rothlisbergers needed to submit alternative evidence substantiating their claimed 1883 priority date. At trial, the Rothlisbergers could not find a witness to testify regarding water usage in 1883, nor could they find documentary evidence supporting that priority date. Sam Foss provided the only testimony regarding historic use of these claims. Based on the testimony of Mr. Foss, the Water Master recommended a priority

date of December 31, 1945. *Master's Report*, Finding of Fact 16, p. 11, *citing Vidal v. Kensler*, 100 Mont. 592, 598, 51 P.2d 235, 238 (1935). *See also* Rule 13(d)(12), W.R.C.E.R.

Rothlisbergers objected that the change to their priority date "would obliterate over 60 years of water rights history and is contrary to spirit and intent of pre-1973 Montana statutory law, ... case law, ... and the Montana Constitution, especially Article IX, Section 3(1), providing that 'all existing water rights ... are hereby recognized and confirmed.'" *Objection to Master's Report*, p. 2.

Several issues pertaining to notices of appropriation are before the Court. The first is what law governs admissibility of notices of appropriation, and whether the notice of appropriation relied upon by the Rothlisbergers should have been excluded from evidence. The Court holds that admissibility of notices of appropriation is governed by the Montana Rules of Evidence, not case law interpreting procedural statutes that have been repealed. The Rothlisberger notice of appropriation should not have been excluded from evidence without first having its admissibility or inadmissibility determined using the Montana Rules of Evidence.

The next question is whether the burden of proof should have been shifted from Objectors to Claimants. This Court holds that the *prima facie* status of the Rothlisberger priority date was not overcome by Objectors, and that the burden of proof on the issue of priority date should not have been shifted.

This case has issues similar to Case 41O-209. An order in Case 41O-209 is being filed on the same date as this order. The analysis regarding notices of appropriation in Case 41O-209 is adopted herein.

Issue I: What Law Governs Admissibility of Defective Notices of Appropriation?

The Master applied outdated case law rather than the Montana Rules of Evidence to determine admissibility of the Rothlisberger notice. The case law upon which the Master relied interprets statutes enacted in 1885 under the title, "An Act Relating to Water Rights." (hereinafter the 1885 Act). The 1885 Act was almost entirely procedural

and was repealed in its entirety by the Water Use Act of 1973. Because the procedural requirements of the 1886 Act are no longer in effect, the case law construing these procedures no longer applies. The Water Court is obligated to follow the Montana Rules of Evidence, and the 1973 Water Use Act and the amendments thereto.

The Water Use Act of 1973

The Water Use Act of 1973 marked a profound change in the way Montana addressed water rights. Prior to 1973, there was no statewide adjudication of water rights, no centralized records system for identification of water rights, and no water court. Because filing of notices of appropriation was not mandatory even after passage of the 1885 Act, many water rights remained undocumented. When controversy over water flared up, rights were adjudicated on a piecemeal basis by district courts. These decrees were usually limited in scope, and often multiple decrees were issued on the same stream. *See* Stone, *Are There Any Adjudicated Streams in Montana?* 19 Mont. L. Rev. 19 (1957). The result was a confusing hodgepodge of water rights.

The 1973 Water Use Act and the 1979 amendments were an effort to establish order from chaos by creating an entirely new procedural framework for both new and old rights. A mandatory filing requirement was created for all existing water rights in the state. § 85-2-221, MCA. Rather than having rights filed with the county clerk and recorder, all rights were combined into a centralized statewide system and filed with the Department of Natural Resources and Conservation (DNRC). § 85-2-212, MCA. Failure to file a claim resulted in a conclusive presumption of abandonment. § 85-2-226, MCA. For the first time in the state's history, a water court was created to adjudicate all pre-1973 rights. *See* § 3-7-101, MCA. Post-1973 rights were regulated by a permit system under the control of the DNRC. § 85-2-302, MCA.

Additional procedures were established for issuance of new decrees on a basin wide basis, as well as for objections to those decrees. §§ 85-2-231 through -233, MCA. For the first time, the elements of a water right were standardized statewide. § 85-2-224, MCA. Unlike prior litigation over water rights where the claimant had the burden of

proof, the Legislature switched the initial burden of proof to the objector. § 85-2-227, MCA.

To facilitate the adjudication, the Montana Supreme Court created both Water Right Adjudication Rules and Water Right Claim Examination Rules to be followed by the Water Court and the DNRC. Although passage of the Water Use Act amounted to a massive procedural re-tooling for the entire state, both the framers of Montana's new constitution and the legislature were careful to avoid substantive changes to existing water rights. Article IX, Section 3(1) of Montana's Constitution and section 85-2-101(4), MCA explicitly recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.

The Water Court must follow modern procedural law. As an example, the Water Court is required by Water Rights Adjudication Rule 2(b) to follow the Montana Rules of Evidence, the Montana Rules of Civil Procedure and the Montana Uniform District Court Rules. Rule 2(b), W.R.Adj.R. All of the provisions regarding notices of appropriation contained in the 1885 Act were procedural except section 89-812, RCM, which provided the right to relate a priority date back to the posting of the notice. These procedural statutes have been repealed, and they are no longer binding. Likewise, cases interpreting procedural rules in the 1885 Act are no longer applicable because the statutes upon which they are based no longer exist.

A strong presumption exists in favor of the retroactive application of new (procedural) judicial rules of law. *Stavenjord v. Montana State Fund*, 2006 MT 257, ¶ 9, 334 Mont. 117, 146 P.3d 724. The general rule in Montana, therefore, is that judicial decisions, particularly on procedural matters, may be applied retroactively to acts or causes of action arising before the decision was issued. *Flynn v. Montana State Fund*, 2008 MT 394, ¶¶ 15-16, 347 Mont. 146, 197 P.3d 1007; *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 31, 325 Mont. 207, 104 P.3d 483, and *Haugen v. Blaine Bank of Montana*, 279 Mont. 1, 7-8, 926 P.2d 1364, 1367 (1996). The ability of Montana's Legislature and Supreme Court to apply retroactively both new procedural and

substantive rules regarding water rights has been challenged on several constitutional grounds.

These challenges have not been successful. The Montana Supreme Court has found that the State's ability to affect existing and recognized water rights survived the adoption of the 1972 Montana Constitution's Article IX, section 3(1). *Dep't. of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985). Furthermore, those constitutional rights are "protected against unreasonable state action; however, they have not been granted indefeasible status." *Matter of Adjudication of Yellowstone River Water Rights*, 253 Mont. 167, 174, 832 P.2d 1210, 1214 (1992). "[C]onsistent with Article IX, section 3(1) of the Montana Constitution, the State Legislature may enact constitutionally sound regulations including the requirement for property owners to take affirmative actions to maintain their water rights." *Matter of Adjudication of Yellowstone River Water Rights*, 253 Mont. at 174, 832 P.2d at 1214. *See e.g.*, §§ 85-2-221 and 226, MCA, and *McDonald v. State of Montana*, 220 Mont. 519, 531, 722 P.2d 598, 606 (1986) (upholding constitutionality of law requiring quantification of water rights by volume).

The application of modern procedural law to water rights recognized under the 1972 Montana Constitution is not *per se* unconstitutional. *Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S (Roystons)*, 249 Mont. 425, 429, 816 P.2d 1054 (1991); *Castillo v. Kunneman*, 197 Mont. 190, 642 P.2d 1019 (1982). In *Castillo,* the Montana Supreme Court reviewed section 85-2-403(3) of the Water Use Act, which provides:

> *Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant*, ... [.] The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons ... .

Castillo, 197 Mont. at 200, 642 P.2d at 1026, *citing* § 85-2-403(3),[1] MCA (emphasis in original) and (emphasis added).

Kunneman argued that the statute's application to water rights perfected before the Act would violate the 1972 Montana Constitution's Article IX, Section 3. The Court disagreed. The Court distinguished between provisions that *destroy the right to use water*, thus violating the Constitution, and mere *procedures for review*. It concluded that because section 85-2-403(3), MCA does not contain specific language precluding its application to water rights perfected prior to July 1, 1973 and does not destroy the right to use water, "[w]e see nothing unconstitutional about applying the mandated procedure to rights perfected prior to the effective date of the Act." *Castillo*, 197 Mont. at 200, 642 P.2d at 1026.

The Montana Rules of Evidence are part of the procedural framework used by the Water Court to adjudicate claims. Although the Montana Rules of Evidence did not exist in their current format before 1973, their application to the Rothlisberger notice of appropriation does not destroy the rights of other water users. It is not an unconstitutional infringement of other water rights for the Water Court to follow the Rules of Evidence in determining the admissibility of notices of appropriation.

Issue II: Whether the Notice of Appropriation Upon Which the Rothlisbergers Relied Should Have Been Excluded From Evidence?

The Rothlisberger notice of appropriation is potentially admissible even without the procedural and evidentiary changes imposed by the Water Use Act of 1973. The Water Court is obligated by statute to adjudicate water rights with priority dates before 1973. § 3-7-501 and § 85-2-214, MCA. This means the Water Court defines property interests that are, at a minimum, nearly forty years old, though most are much older. It is common for the Water Court to adjudicate rights with priority dates in the 1870s.

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[1] Montana's statutory section 85-2-403(3) was re-enacted as section 85-2-402(6) in 1983.

Use of witnesses to substantiate or challenge older water rights is often impossible. Instead, the parties and the Court rely significantly on documentary evidence. This evidence includes a wide array of historical material, which can include things like "the homestead filings, governmental land office records, history book excerpts, newspaper articles, census records, a meat market ledger, and testimony by [an] historian." *Order Adopting and Amending Master's Report*, Case 41O-435, p. 3. The list of historical documents relied on by the Water Court is diverse, and the stories told by those documents vary from mundane to poignant.

In some cases, documentary evidence is abundant, and determining the contours of a water right is straightforward. But in many cases, both documentary evidence and live witnesses are nonexistent or in short supply. In such cases, each piece of information may become critical in defining a water right. Without such evidence, it can be nearly impossible to render an informed decision about the validity of claims before the Court. The difficulty inherent in adjudicating ancient property interests is not new. The Montana Supreme Court recognized this problem over eighty years ago:

> The trial court was confronted with that condition which frequently appears in water suits where old rights are involved: All or nearly all of the settlers who did the original work are gone. Those who do appear are hampered with failing memories or are unable to dissociate fact from hearsay. Neighbors testify from impressions remaining after the lapse of years; much of their testimony is guesswork. Men who were boys when the things inquired about were being done appear, and their testimony is colored by the free fancies of boyhood which memory still retains. So the appellate as well as the trial court must do the best it can with what it has to work with.

Allen v. Petrick, 69 Mont. 373, 375, 222 P. 451, 452 (1924).

Evidentiary problems associated with adjudicating water rights have become worse since *Allen*. The problem is no longer about reliability of testimony, but about the complete lack of testimony. Compounding this problem is an increasing scarcity of documentary evidence, which leaves the Water Court in the position of a paleontologist

trying to describe an ancient animal using only a few pieces of skeleton. This problem is particularly acute for water rights prior to 1885 because no formal statewide system existed to document water right claims before that time.

The notice of appropriation in this Case describes a water right with a priority date "on or about June 15, 1883." The notice was filed in 1888 and signed by James W. Lewis and Thomas Beaver. In this Case, the priority date claimed by the Rothlisbergers is June 15, 1883 – the same date shown on the notice.

In part III of the notice, Lewis and Beaver state: "we have taken said water out of and diverted it from said stream by means of a ditch and headgate which said headgate is 21 inches by 14 inches in size and carries or conducts 300 inches of water from said stream and ditch ... ." Claim Files 76H 105034-00 and 76H 105055-00, Water Right Location (notice). The flow rate claimed by the Rothlisbergers in this case is 300 miner's inches.

The water right claimed by Lewis and Beaver was for the South Fork of Gold Creek, using a point of diversion near the east line of Section 28, T5N, R21W. Rothlisbergers' claim 76H 105055-00 is made in part for water from Gold Creek using the Faye ditch along the east boundary of Section 28, T5N, R21W.

The place of use identified in the Lewis/Beaver notice was the S2NW1/4 and the S2NE1/4 of Section 23, T5N, R21W. The place of use for Rothlisbergers' irrigation claim 76H 105055-00 is located in the S2NW1/4 and the S2NE1/4 of Section 23, T5N, R21W, plus other lands in Section 23 and 27.

Because the Rothlisberger notice was for a water right with a priority date of 1883 and before the 1885 Act, the notice fell under the provisions of section 89-813, RCM authorizing the filing of such notices. Notices filed within six months of the statute's publication in 1885 were given *prima facie* status under section 89-814, RCM. The only disadvantage of non compliance was a loss of *prima facie* status. "[A] failure to comply with the requirements of this section shall in nowise work a forfeiture of such heretofore acquired rights, or prevent any such claimant from establishing such rights in the courts."

§ 89-813, RCM, 1947. Nevertheless, because it was filed in 1888, the Water Master deemed it defective, and under *Holmstrom*, inadmissible.

Although it is almost 125 years old, the Lewis/Beaver notice of appropriation matches the irrigation water right claimed by the Rothlisbergers in several key respects. The priority date, flow rate and purpose of use are identical. The points of diversion and places of use are nearly the same, and the source is Gold Creek. The notice of appropriation appears to have been completed by the original appropriators. In these respects, it satisfies the intent of the territorial Legislature by documenting a water right in the public record.

Absent *Holmstrom*, this document would be potentially admissible under several exceptions to the hearsay rule. A deed, newspaper article, historical account, family journal, or other ancient document containing the same information would also be potentially admissible. Once admitted, its weight, credibility and usefulness could then be considered by a court in deciding the issues before it. M. R. Evid. 104.

In this Case, however, the Water Master determined *Holmstrom* operated as a complete bar to admissibility of the Lewis/Beaver notice. Having made this determination, the Water Master concluded the *prima facie* status given to the Rothlisbergers' claims by section 85-2-227, MCA, had been overcome, and it became the Rothlisbergers' obligation to prove their right using other evidence. Because trial of this matter occurred more than 120 years after the claimed priority date, the Rothlisbergers were unable to find any witnesses to confirm diversion and use of their water in 1883. The only testimony on this issue dated back to the 1940s, which resulted in a new priority date of 1945.

The *Holmstrom* rule should not apply to the current adjudication of water rights for numerous reasons.[2] First, it precludes the Water Court from reviewing documents of

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[2] An extensive analysis of the *Holmstrom* decision and prior case law is contained in companion Case 41O-209, Order Regarding Admissibility of Notices of Appropriation and Burden of Proof. That analysis is adopted fully in this Order, but is not repeated here for the sake of brevity.

potential historical significance. Application of this rule makes no sense when oral testimony about initial diversion and beneficial use is nonexistent, and documentary evidence is becoming increasingly scarce. Documentation of ancient water rights is far more important now than it was when the 1885 Act was passed or when many of the cases interpreting it were decided. Because witnesses to events now being reconstructed by the Water Court are long dead, any documents bearing on an appropriation are especially significant. In some cases, a notice of appropriation is the only document available.

Second, the Legislature has given claims in the current adjudication process several important forms of recognition. As an example, the Legislature renewed its conviction, first articulated in 1885, that records of water rights are important. Our current Water Use Act states that a centralized record system "recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana water of the state and its citizens." § 85-2-101(2), MCA. Pursuant to Article IX, section 3(1) of the Montana Constitution, the Legislature declared "it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to use of any waters for any useful and beneficial purpose." § 85-2-101(4), MCA. An "existing right" is defined as "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. As applied here, *Holmstrom* runs afoul of these legislative principles. It prohibits use of potentially important information from the public record, and it operates to repudiate rather than recognize and confirm existing rights.

Third, it is unlikely notices of appropriation will be misused. Juries are not involved in water rights trials. The water masters and judges hearing these cases have highly specialized skills and are experienced in interpreting historic documents. Because of these factors, the risk that statements in a notice of appropriation will be misinterpreted or used improperly is lower than in a normal court proceeding.

Fourth, *Holmstrom* turns the *prima facie* status of current claims on its head. When Montana's territorial Legislature passed the 1885 Act, it not only decided to accept statements of water usage, it went further and protected those statements with *prima facie* status in subsequent court proceedings. The Montana Legislature has also protected current water right claims with *prima facie* status during our statewide adjudication of existing rights. § 85-2-227, MCA. Depriving a water right of its *prima facie* status based solely on a technically deficient notice of appropriation is inconsistent with the spirit of the 1885 Act and section 85-2-227, MCA.

Fifth, *Holmstrom* elevates form over substance. Its application in this Case resulted in loss of important priority dates without advancing any clearly identifiable or compelling public interest. The Montana Supreme Court has acknowledged priority dates are an important element of a property interest in water.

> "Property rights in water consist not alone in the amount of the appropriation but, also, in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over appropriations in the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right ... ."

General Agriculture Corporation v. Moore, 166 Mont. 510, 517, 534 P. 2d 859, 863 (1975), *citing Whitmore v. Murray City*, 107 Utah 445, 453, 154 P. 2d 748, 751 (1944).

The Rothlisbergers had their priority date moved from 1883 to 1945. Objectors in this Case agreed the priority date should be July 12, 1888, the date the notice was filed.[3] The Water Master characterized the interplay between Claimant and Objectors as follows:

> The objectors and claimants framed the priority date issue as a choice between the date claimed in the defective notices and the date the notices were filed with the clerk and recorder. They apparently did not contemplate the possibility that the date of filing would be rejected as evidence supporting a priority date.

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[3] Objectors include the United States of America Bureau of Indian Affairs, the United States of America Forest Service, Avista Corporation, Cheryl D. Rothlisberger, Lee E. Foss and Sam W. Foss.

Master's Report, Finding of Fact 15, p. 9.

Although Objectors agreed the priority date should be the date of filing of the notice, the Water Master concluded that under *Holmstrom*, "defective notices of appropriation do not exist. The fact that they were eventually filed with the clerk and recorder does not change this. The filing of the statements of claim does not change this." *Master's Report*, Finding of Fact 13, p. 9. Based on *Holmstrom*, the Water Master then selected 1945 as the correct priority date as "there was almost no testimony that specifically addressed the date of first use for these three claims." *Master's Report,* Finding of Fact 15, p. 10. Thus, admittedly marginal evidence was used to establish a new priority date, even though the notice itself stated the date of first use was in 1883.

No compelling public interest justifies such an outcome. Objectors did not seek such a result, but received a windfall because of it. Claimants have suffered a significant change in their priority date, which may impact the productivity of their ranch, and ultimately its value. These costs are not offset by any corresponding benefit to the public or the adjudication process.

Sixth, there is no reason to make notices automatically inadmissible in the absence of significant historic conflict over use of the water right at issue. In this Case, there was no evidence of challenges to the 1883 priority date claimed for this right before the current adjudication process began. The absence of such a challenge suggests a lack of local concern over use of this right up to the start of the adjudication.[4] Given this lack of conflict, it is unnecessary to alter radically the priority date for this claim.

Seventh, *Holmstrom* conflicts with section 85-2-227(2), MCA, which provides "a water judge may consider all relevant evidence in the determination and interpretation of existing rights. Relevant evidence may include admissible evidence arising before or after July 1, 1973." § 85-2-227, MCA. This spirit of this rule was followed in the

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[4] Lack of conflict can also indicate a reliable supply of water or a lack of awareness on the part of neighbors over the actual priority date claimed, and it is not always an indicator of community acceptance.

Sweetland and *Floyd* cases, and it now has added force because of the Legislature's decision to include it in a modern statute targeted specifically at adjudication of water rights. Notices of appropriation are by definition relevant if they are connected to the water right claims at issue. Categorically preventing them from consideration is contrary to the purpose of section 85-2-227(2), MCA.

Eighth, application of the *Holmstrom* rule on admissibility will produce unintended and indefensible consequences in the current adjudication process. As an example, expert witnesses are often used in water rights cases. Because expert opinions can be based on evidence otherwise inadmissible, it is foreseeable that expert witness opinions will be based on review of notices of appropriation inadmissible under *Holmstrom*. This means expert witnesses can review notices of appropriation and form opinions based on them, but Water Masters and Judges cannot. This result becomes even more bizarre when competing experts on opposite sides of the same case form conflicting opinions based on the same inadmissible notice of appropriation.

Thousands of water rights in the current adjudication are based on notices of appropriation. Many water users in the adjudication process are sophisticated or represented by competent counsel. In basins where decrees have not yet been issued, these claimants will likely try to amend their water rights from filed rights to use rights to reduce the risk of their claims losing *prima facie* status if the notices upon which they are based are inadmissible.[5]

Had the Rothlisbergers taken this step with their water rights, and successfully amended them from filed rights to use rights, they would no longer have been reliant upon a notice of appropriation to support their claimed 1883 priority date. Ironically, this may have prevented the loss of their claim's *prima facie* status and subsequent shift of the burden of proof. Also, the Rothlisbergers would have been much better off by simply claiming a use right initially, rather than attaching a notice of appropriation to their claim.

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[5] By anticipating that claim amendments may occur, the Court makes no pronouncement regarding the propriety or impact of such amendments on claims or objections thereto.

In effect, they are being penalized because their predecessors attempted to place evidence of their water right in the public record in 1888, an action encouraged by the Legislature then and now.

Issue III. Whether the Burden of Proof should have been shifted?

Water rights in Montana are described according to certain key elements or characteristics. These elements are described in section 85-2-224(1), MCA and include information such as the name and address of the claimant, the name of the water source, quantities of water and times of use, legal descriptions for the point of diversion and place of use, purpose of use, and priority date. The forms supplied by the State of Montana for claiming water rights included the foregoing information, plus additional information including whether the claim was a use right, a filed right, or a decreed right. The latter three categories are not included among the elements of the water right claim as defined in section 85-2-224(1), MCA.

The Rothlisbergers presumably identified their irrigation claim as a filed right because of the notice of appropriation attached to their claim. The Master concluded the Rothlisberger's claim was not a filed right because it did not comply with the 1885 Act. The Master then concluded the burden of proof shifted to the Rothlisbergers to show the date of first use for their right. The issue before this Court is whether the Master's decision to shift the burden of proof from Objectors to Claimants was proper. The Court finds that it was not proper.

In 1979, the Montana Legislature amended the 1973 Water Use Act by giving water rights claims *prima facie* status. Montana's statutory section 85-2-227(1) provides: "... a claim of existing right filed in accordance with 85-2-221 or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree." § 85-2-227(1), MCA.

The Water Court has interpreted this statute to mean that "[a] prima facie claim meets the minimum threshold of evidence necessary to establish the facts alleged and shifts the burden of production to an objector to overcome that threshold." *Memorandum*

Opinion, Case 40G-2, p. 12 (*Sage Creek Basin*, 1997 Mont. Water LEXIS 1). "Without evidence to the contrary, the prima facie claim may satisfy a claimant's burden." *Memorandum Opinion*, p. 12. "[O]nce an objection is filed and hearing requested, objectors ... have the initial burden to produce evidence that overcomes one or more elements of the prima facie statement of claim." *Memorandum Opinion*, p. 13. "A prima facie case must be overcome, not placed in mere equilibrium." *Memorandum Opinion*, p. 13. The weight of evidence needed to overcome the *prima facie* proof statute is a preponderance of the evidence. *Memorandum Opinion*, p. 13. Case 40G-2 has governed the burden of proof and the weight of evidence required in water rights trials since it was decided in 1997. It is consistent with Water Rights Adjudication Rule 19.

The only material elements of a water right required by statute, and the only characteristics that matter when water rights are administered, are the elements contained in section 85-2-224(1)(a)-(f), MCA. Nevertheless, the Master determined that the *prima facie* status attached to the irrigation claim was overcome because they checked the "filed" box on their water rights claim form, rather than the "use" box.

Objectors did not produce any evidence contradicting the priority date for the Rothlisberger irrigation claim. On the contrary, Objectors agreed the priority date should be the date of filing of the notice, and it was only after trial that the Master ruled the notice was inadmissible and shifted the burden of proof to Claimants. The Rothlisbergers had no way to know they were expected to provide evidence of priority date at trial because they had settled that issue with objectors before trial. Because they did not learn until after trial that they had the burden of proof, the Rothlisbergers had no notice of what was expected of them, and no chance to adequately prepare or present evidence on the issue of priority date. Because Objectors did not produce evidence overcoming the priority date of the Rothlisberger right, the burden of proof should not have shifted to Claimants.

Accordingly, the Court will set a hearing on the narrow issue of admissibility of the Lewis/Beaver notice of appropriation and, if admissible, its effect or lack of effect on

the priority dates for claims 76H 105034-00 and 76H 105055-00. After that hearing, the Court will issue an order establishing the correct priority date for these claims and any other claims implied therefrom.

None of the foregoing is meant to suggest all notices of appropriation are essential for the adjudication of water rights, or that all notices are admissible simply because they are old. Many notices lack specific information regarding historic water usage, or they conflict with other evidence, or they grossly overstate the extent of historic beneficial use. These defects may render a notice valueless, but this pertains to the weight and credibility of the notice rather than its admissibility. Where, as here, the notice's only deficiency is its filing date, there is simply no reason to automatically reject such a notice as inadmissible. This notice should be treated as any other prospective exhibit with its admission governed by the current rules of evidence. If admitted, its weight and ultimate value should be measured like any other document before the Court.

Clarification of Beaver Ditch Name

The Rothlisbergers seek clarification to the Master's Report, Finding of Fact 47, pp. 25-26. The Rothlisbergers assert the last sentence in paragraph 47 is ambiguous. The United States agrees and asks on pages 6, 7, 9, 26, and 40, the name "Beavers" Ditch be amended to "Beaver." This Court welcomes clarity in defining water rights. Therefore, the mention of "Beavers" in the Master's Report is replaced with "Beaver" and the last sentence of paragraph 47 in the Master's Report is **AMENDED** as follows:

> The worksheet lists a 300 miner's inch Lewis and Beavers right from Gold Creek, but lists the ditch used by the right as the Beaver Ditch **(Faye). The Beaver Ditch identified on the worksheet for water rights 76H 105034-00 and 76H 105055-00 is not the same Beaver Ditch shown in US Exhibit 2.** (emphasis added to show amended language).

Rothlisbergers' third objection is to the point of diversion for claim 76H 157878-00. Rothlisbergers contend the point of diversion for this claim should be described as below and down gradient from the Faye Ditch on the North Fork of Gold Creek. An informational remark shall be **ADDED** to this claim stating:

THE POINT OF DIVERSION FOR CLAIM 76H 157878-00 IS THE UPPER HAACKE DITCH, LOCATED EAST AND DOWNSTREAM OF THE FAYE DITCH ON THE NORTH FORK OF GOLD CREEK.

Rothlisbergers' fourth objection requests reference to claim 76H 214373-00 be deleted from the remarks section for claim 76H 157878-00. The basis of this request is that claim 76H 214373-00 was dismissed by Order of the Water Court dated December 7, 2005. This request is **GRANTED**. The abstract for claim 76H 157878-00 shall be changed in conformance with this request.

Van Arsdale-Wade Objections

Van Arsdale-Wade object to the Master's recommendation to generate implied claims from 76H 105055-00. They argue these implied claims create new water rights not previously described in the parent claim. They further contend the Water Master should not have relied on testimony at trial to create implied claims; that an implied claim must be apparent solely from a review of the original claim filing; that the Water Master improperly used the 300 miner's inches claimed in the original right as a basis for generation of an implied claim; that the Water Master should not have relied on the Lewis/Beaver notice of appropriation in generating an implied claim, and that generation of an implied claim in this Case conflicts with Montana's forfeiture statutes.

Objection to Implied Claims

Implied claims are a practical solution to errors commonly found in claims filed as part of the general adjudication process. Claims now being adjudicated were filed thirty years ago in 1982. At the time of filing, Claimants were new to the process and substantial confusion surrounded correct filing procedures. A common mistake in claim filing was inclusion of more than one water right in a single claim. Implied claims are a mechanism for dealing with this problem.

Multiple water rights in the same claim are often, but not always, identified during claims examination. Water Rights Claim Examination Rule 2(a)(33) defines an Implied Claim as "a claim authorized by the water court to be separated and individually

identified when a statement of claim includes multiple rights." Rule 2(a)(33), W.R.C.E.R. Water Rights Claim Examination Rule 35 describes procedures followed by the DNRC regarding implied claims identified during the claims examination process.

Not all implied claims are identified by the DNRC. In some cases, implied claims are requested by a party, or they become apparent from the development of evidence during a hearing. In these circumstances the Water Court applies several common sense guidelines to determine whether an implied claim is warranted. First, the implied claim must be justified by some evidence in the claim form or the documents attached thereto, although supplemental evidence can be used to explain or clarify the claim and its contents. Second, evidence must exist of actual historic use corroborating the implied claim. Third, the creation of the implied claim should not result in a change to historic water use or increase the historic burden to other water users. The burden to meet these criteria rests on the person seeking recognition of an implied claim.

The implied claims at issue here were requested by Claimants in 2006. Two of these claims were implied from irrigation claim 76H 105055-00. Claim 76H 105055-00 originates on Gold Creek where water is turned into the Faye Ditch and carried northward across the Middle and North Forks of Gold Creek before being delivered to its place of use. The Faye Ditch drops water into the Middle and North Forks, and all water from each fork, together with water originally diverted from the south fork of Gold Creek is accumulated in the ditch for delivery to the final place of use. The Water Master found: "All parties agree that the Faye Ditch historically diverted all of the natural flow of the Middle Fork of Gold Creek and the North Fork of Gold Creek." *Master's Report*, Finding of Fact 35, p. 20.

As a result, historic evidence exists to corroborate the implied claim, and no assertion exists, which will cause an increase to the historic burden imposed on competing water users. The only issue for consideration is whether the claim or attachments to the claim support creation of an implied claim and whether the Water

Master properly used evidence developed at trial to clarify information already in the claim.

Objectors contend that the original claim does not contain evidence of more than one water right. Objectors contend that Claimants forfeited their water rights to the Middle and North forks of Gold Creek by not describing them more fully in the original claim. Both parties called experts in claims examination to provide opinions on whether a claim could be generated from 76H 105055-00. The experts provided conflicting testimony with no particular view emerging as compelling.

Fortunately, expert testimony is not required to determine whether claim 76H 105055-00 suggests the existence of more than one water right. The map attached to the claim raises an issue about the existence of multiple rights by identifying a ditch that crosses three separate sources of water. At trial, the evidence also showed that Gold Creek, where the Faye Ditch initially diverts, produces about 130 miner's inches of water, less than the 300 inches claimed. On this basis, the Water Master found the original right to be over claimed with room for recognition of water from the Middle and North Forks of Gold Creek without exceeding the original claimed flow rate of 300 inches.

Objectors contend the claim for 300 inches is based on a defective and therefore inadmissible notice of appropriation, and that the original claim for 300 inches should be ignored. This argument would have some merit if the notice was unequivocally inadmissible, but admissibility remains an open issue based on the Court's opinion above.

Objectors contend the evidence of multiple rights evident from the claim alone is weak and that the Water Master improperly supplemented this evidence with testimony at trial. Objectors believe claims should only be implied from the four corners of the claim, related attachments and no other evidence. Doing otherwise, they contend, violates Montana's late claim forfeiture statute.

Objectors are correct the evidence of implied rights in this Case is not strong. It takes some familiarity with water rights and their use to conclude that a ditch crossing

multiple sources might imply more than one water right. The DNRC did not identify implied claims from its examination; experts on the subject disagreed, and reasonable people might reach different conclusions if called to identify multiple rights embedded in the Rothlisbergers' claim.

But the purpose of the adjudication is not to eradicate claims or to punish claimants confused by a complicated and often intimidating claim filing process. One of the adjudication's purposes is to decree rights in accordance with historic use. As part of this process, the Legislature has favored claims with *prima facie* status and created a statutory framework to recognize and confirm existing rights. § 85-2-227, MCA and § 85-2-101(4), MCA. These legislative protections tip the balance in favor of recognizing otherwise historically defensible claims even in circumstances where the body of available facts could be used to support differing outcomes. This conclusion is consistent with the standard of review applicable to water master's reports, which requires that a water master's findings be based on substantial evidence. Substantial evidence is defined as more than a scintilla but less than a preponderance, and is evidence a reasonable person might find "adequate to support a conclusion, even if the evidence is weak or conflicting." *Memorandum Opinion*, Case 41G-2, Sage Creek Basin, p. 4, *citing Arnold v. Basin Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993).

Substantial evidence in this Case supports the Water Master's recommendation to imply additional claims. Part of that evidence was obtained at trial. There is no rule or statute prohibiting use of evidence at trial to explain or clarify an implied claim. One of the purposes of a trial is to clarify or augment existing evidence so an informed decision about a claim can be made. Evidence at trial can be used to create implied claims, where the claim or its attachments already suggest the existence of more than one water right.

Objectors argue recognition of implied claims using evidence beyond the claim alone will encourage circumvention of Montana's late claim forfeiture statute by those who did not file claims for all their water rights. The late claim statue provides "failure

to file a claim of an existing right ... establishes a conclusive presumption of abandonment of that right." § 85-2-226, MCA.

Here, the Water Master identified elements of the claim suggesting more than one right and relied on evidence from trial to clarify those rights. Had the Water Master not begun his analysis by looking for evidence of multiple rights in the claim itself, any claims for water from the Middle Fork and North Fork of Gold Creek would have been lost under section 85-2-226, MCA. Claimants seeking an implied claim must satisfy the three prong test discussed above. This requirement establishes an appropriate balance between recognition of legitimate claims and upholding the substance of the forfeiture statute. Failure to meet this burden results in loss of water rights, even where ample evidence of historic use otherwise exists.

Other Van Arsdale-Wade Objections

Van Arsdale-Wade assert two additional objections. If the Court recognizes implied claims from parent claim 76H 105055-00, they contend the flow rate remark on these claims 76H 30043202 and 76H 30043203 should be amended to note "above Faye Ditch." They also assert the source name on claim 76H 157878-00 should be "Springs and North Fork Gold Creek." Both of these requests are **GRANTED** and incorporated into the abstracts for these claims. The following is added as an information remark to the flow rate for these implied claims. For claim 76H 30043202, the remark reads:

> THIS CLAIM HAS HISTORICALLY TAKEN THE ENTIRE FLOW OF THE MIDDLE FORK OF GOLD CREEK ABOVE FAYE DITCH.

For claim 76H 30043203, the remark is:

> THIS CLAIM HAS HISTORICALLY TAKEN THE ENTIRE FLOW OF THE NORTH FORK OF GOLD CREEK ABOVE FAYE DITCH.

United States Objections

Both the United States Bureau of Indian Affairs and the USDA-Forest Service objected to creation of implied claims and to the Water Master's Findings suggesting that the United States silently acquiesced to creation of implied claims or agreed the Faye

Ditch historically diverted all of the natural flow of the Middle and North Forks of Gold Creek. The United States' objections to implied claims are the same as those raised by other Objectors and are discussed above. To the extent the Master's Report suggests acquiescence to creation of implied claims, the United States' objections to the contrary and their desire to correct the record in this regard are noted by the Court.

The United States also notes typographical errors in claims 76H 105034-00 and 76H 105055-00. Specifically, in Finding of Fact 35, the Water Master finds the point of diversion for Faye Ditch is on Gold Creek in the NESWNE quarter of Section 28. However, the Post Decree abstract has a different point of diversion and needs to be corrected to **NESWNE 1/4 of Section 28**. The United States' objections regarding typographical errors are incorporated into the Master's Report and subsequent abstracts.

76H 157878-00 Point of Diversion, Source, and Remark Corrections

On claim 76H 157878-00, the Rothlisbergers and Van Arsdale-Wade seek refinement of the point of diversion, source and overlapping place of use remark. Point of diversion issues have been addressed previously in this Order. *See* pp. 18-19.

Van Arsdale-Wade also seeks refinement of the source name in Claim 76H 157878-00. Instead of the Water Master dubbing the source "Spring, UT North Fork, Gold Creek," Van Arsdale-Wade assert that "Springs and North Fork, Gold Creek" is more accurate. Additionally, based on the evidence and testimony, the Court concludes that the Source Name is further refined as two sources:

SPRING, UNNAMED TRIBUTARY OF GOLD CREEK, NORTH FORK

GOLD CREEK, NORTH FORK ABOVE UPPER HAACKE DITCH.
(emphasis added to show additional language.)

Lastly, the Rothlisbergers indicate water right claim 76H 157878-00 includes an information remark for a supplemental water right claim having an overlapping place of use with claim 76H 214373-00, which was dismissed. The Water Court dismissed claim 76H 214373-00 by Order on December 7, 2005. For this reason, claims 76H 157878-00

and 76H 214373-00 no longer have overlapping places of use. Therefore, the Rothlisbergers are correct, and the following remark is stricken from water right claim 76H 157878-00:

~~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. 157878-00 214373-00~~

ORDER

IT IS ORDERED that the Master's Report is AMENDED as set forth above; and

IT IS FURTHER ORDERED that the Master's Report is ADOPTED AS AMENDED, and that, with the exception of the priority dates for claims 76H 105034-00 and 76H 105055-00, the water rights claimed in this Case shall be set forth in the preliminary decree for Basin 76H.

IT IS FURTHER ORDERED that a hearing on the admissibility of the Lewis/Beaver notice of appropriation and its potential effect or lack of effect on the priority dates for claims 76H 105034-00 and 76H 105055-00 will be set for Thursday, March 7, 2013 at 10:00 A.M. in the conference room of the Montana Water Court, 601 Haggerty Lane, Bozeman, Montana.

After that hearing, the Court will issue an order regarding priority dates for these claims and any other claims implied therefrom. Abstracts for claims 76H 105034-00 and 76H 105055-00 and any implied claims therefrom will be attached to the Court's upcoming Order.

DATED this 31st day of January, 2013.

Russ McElyea
Associate Water Judge

CERTIFICATE OF SERVICE

I, Swithin J. Shearer, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER AMENDING AND PARTIALLY ADOPTING MASTER'S REPORT AS AMENDED** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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Hamilton, MT 59840-1975

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Daniel L. Rothlisberger
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***Service list updated 9-6-2012**

DATED this 31st day of January, 2013.

Swithin J. Shearer
Deputy Clerk of Court

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM

WESTSIDE SUBBASIN- BITTERROOT RIVER

BASIN 76H

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: **76H 157878-00** STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: JON W VAN ARSDALE
436 WHISPERING PINES
HAMILTON, MT 59840

LISA J WADE
436 WHISPERING PINES
HAMILTON, MT 59840

Priority Date: FEBRUARY 2, 1961

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 135.00 GPM

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

Climatic Area: 2 - MODERATELY HIGH

Maximum Acres: 12.00

***Source Name:** GOLD CREEK, NORTH FORK

Source Type: SURFACE WATER

***Source Name:** SPRING, UNNAMED TRIBUTARY OF GOLD CREEK, NORTH FORK

Source Type: SURFACE WATER

ABOVE UPPER HAACKE DITCH

***Point of Diversion and Means of Diversion:**

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NENESW	22	5N	21W	RAVALLI

***Source Name:** SPRING, UNNAMED TRIBUTARY OF GOLD CREEK, NORTH FORK

Period of Diversion: APRIL 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: UPPER HAACKE DITCH

***Point of Diversion and Means of Diversion:**

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
2		NENESW	22	5N	21W	RAVALLI

***Source Name:** GOLD CREEK, NORTH FORK

***Period of Diversion:** APRIL 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: UPPER HAACKE DITCH

Period of Use: APRIL 1 TO OCTOBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	12.00		S2SWSE	22	5N	21W	RAVALLI
Total:	12.00						

Remarks:

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 06/01/93: SOURCE, PERIOD OF USE, FLOW RATE.

THE POINT OF DIVERSION FOR CLAIM 76H 157878-00 IS THE UPPER HAACKE DITCH, LOCATED EAST AND DOWNSTREAM OF THE FAYE DITCH ON THE NORTH FORK OF GOLD CREEK.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.