

MONTANA WATER COURT
UPPER MISSOURI DIVISION
WILLOW CREEK
BASIN (41N)
PRELIMINARY DECREE

CLAIMANT: Eagle Creek Colony

OBJECTORS: Laas Farms Inc.; Eagle Creek Colony;
United States of America (Bureau of
Reclamation)

NOTICE OF INTENT TO APPEAR: Trudy L. Skari

ON MOTION OF THE MONTANA WATER COURT

CASE 41N-0001-R-2019

41N 113493-00	41N 113503-00
41N 113496-00	41N 113505-00
41N 113497-00	41N 113507-00
41N 113499-00	41N 113508-00
41N 113500-00	41N 113509-00
41N 113501-00	41N 113510-00
41N 113502-00	

ORDER ADOPTING MASTER’S REPORT WITH MODIFICATIONS

On March 4, 2025, a Master’s Report was issued in this case. (Doc. 71.00).¹
Notice of intent to appear party Trudy L. Skari (“Skari”) objected to the Master’s Report.
(Doc. 74.00). This order addresses Skari’s objection to the Master’s Report.

BACKGROUND

Factual Background

The claims in this case are owned by Eagle Creek Colony (“ECC”) for use of water from Eagle Creek. All the claims are for irrigation purposes except 41N 113493-00, which is for stock water. The irrigation claims identified the same points of diversion, same places of use, and use of two historical reservoirs: Blair Reservoir and Bourne & Hamilton Reservoir.

¹ “Doc.” numerical references correlate to case file docket numbers in the Water Court’s Full Court case management system.

Eagle Creek is an intermittent stream that generally runs dry in the summer. The creek rises south of the Canadian border in the Sweet Grass Hills located in Liberty County. Certification Case WC 2016-09, *Order Dismissing Claim and Closing Certification Case WC 2016-09*, FOF 1-5. Eagle Creek flows south through Liberty County, through ECC, Laas Farms Inc. (“Laas”) and Skari properties, and into Tiber Reservoir. *Id.*

The ECC system historically included the Blair Reservoir and the Bourne & Hamilton Reservoir. *Id.* The Blair Reservoir is on Eagle Creek in Section 16, T34N, R4E. *Id.* “Historical practice was to first fill the Blair Reservoir and then divert all of Eagle Creek into a ditch in Section 9, T35N, R4E which conveyed that water to Little Horse Creek. Little Horse Creek was used as a natural carrier to a ditch that diverted the water to the Bourne & Hamilton Reservoir. Water stored in this reservoir was diverted back to the Blair Reservoir through another ditch and used for irrigation out of Blair Reservoir.” *Id.* at FOF 3.

The only water that returned to Eagle Creek after being diverted into Blair Reservoir was water that flowed over the spillway at the top of the dam. *Id.* at FOF 4. “When Blairs diverted into the Section 9 ditch and sent water to Little Horse Creek, it diverted all of the flow of Eagle Creek up to the full capacity of its ditch.” *Id.* at FOF 5

Procedural Background

Litigation involving these claims began prior to consolidation of this case in Montana Twelfth Judicial District Court Cause No. DV-16-03. The parties in the District Court proceeding were ECC and Laas. In 2016, DV-16-03 was certified to the Water Court and addressed in Certification Case WC 2016-09. On August 10, 2018, after an evidentiary hearing, the Water Court issued an Order Dismissing Claim and Closing Certification Case WC 2016-09 with findings of fact and conclusions of law addressing the above captioned claims (“2018 Order Closing Certification Case”).²

Prior to the 2018 Order Closing Certification Case, the claims were included in a March 29, 2018, Preliminary Decree for Willow Creek Basin 41N. In the Preliminary

² Claim 41I 113498-00 was dismissed pursuant to Case WC 2016-09.

Decree, all of ECC's irrigation claims received self-objections from ECC, objections from the United States Bureau of Reclamation ("BOR"), and objections from Laas. Laas also filed an objection to stock claim 41N 113493-00. Skari filed notices of intent to appear ("NOIA") on all the claims, including stock claim 41N 113493-00. Further, all the claims were subject to issue remarks resulting from examination by the Department of Natural Resources and Conservation ("DNRC").

Case 41N-0001-R-2019 was consolidated by the Water Court to address the objections, NOIA, and issue remarks. (Doc. 1.00). During case proceedings, ECC and BOR filed a Stipulation to Resolve Objections ("Stipulation"). (Doc. 19.00). On April 10, 2024, a hearing was held to address Laas' unresolved objections and Skari's unresolved NOIA. A Master's Report was issued recommending the Stipulation be adopted, determining Laas and Skari failed to meet their burden of proof, and concluding all issues were resolved.³ (Doc. 71.00). Pursuant to the Master's Report, claims 41N 113500-00, 41N 113501-00, 41N 113502-00, 41N 113503-00, 41N 113507-00, 41N 113508-00, 41N 113509-00, and 41N 113510-00 were recommended to be dismissed, modifications were recommended to elements of claims, 41N 113496-00, 41N 113497-00, 41N 113499-00, and 41N 113505-00, and the following information remark was recommended to be added to the abstracts of claims 41N 113493-00, 41N 113496-00, 41N 113497-00, 41N 113499-00, and 41N 113505-00:

THIS CLAIM IS SUBJECT TO A PRIVATE WATER USE AGREEMENT DATED JULY 5, 1983.

Id.

The recommendations reflect the terms of the Stipulation between ECC and BOR. The most significant modifications recommended in the Master's Report were to claim 41N 113496-00. The claim was modified from a "filed" right to a "use" right, the flow rate was increased from 4.00 CFS to 20.00 CFS, the volume was reduced from 1,483.28 AF to 132.00 AF, and the maximum acres and place of use were reduced from 363.00 to 131.00 acres. *Id.* at Recommendation Nos. 2-9.

³ The Master's Report also addressed claim 41N 113507-00, owned by ECC. Although the claim was not consolidated in the case and did not receive any objections, notices of intent to appear, or issue remarks, ECC withdrew the claim pursuant to the terms of the Stipulation.

Based on the Stipulation and subsequent Master’s Report, the following claims were dismissed. *Id.* at Recommendation No. 1.

CLAIM	PRIORITY DATE	FLOW RATE
41N 113500-00	April 2, 1904	5.00 CFS
41N 113501-00	August 16, 1900	3.00 CFS
41N 113502-00	July 3, 1901	3.00 CFS
41N 113503-00	June 17, 1900	3.00 CFS
41N 113507-00	March 10, 1910	2.50 CFS
41N 113508-00	June 28, 1909	5.00 CFS
41N 113509-00	May 10, 1909	5.00 CFS
41N 113510-00	November 7, 1903	3.00 CFS

Based on the Stipulation and subsequent Master’s Report, the remaining irrigation claims with the stipulated flow rate and priority date modifications are shown below. *Id.* at Recommendation Nos. 2, 4, 6, & 8.

CLAIM	PRIORITY DATE	FLOW RATE
41N 113496-00	July 3, 1901	4.00 CFS 20.00 CFS
41N 113497-00	May 10, 1909 May 18, 1911	6.00 CFS No quantified flow rate
41N 113499-00	November 2, 1892	13.76 CFS 7.30 CFS
41N 113505-00	June 1, 1892	12.5 CFS No quantified flow rate

On April 3, 2025, NOIA party, Skari, filed an objection to the Master’s Report. (Doc. 74.00). Skari objected to the recommendations on: (1) the increased flow rate of claim 41N 113496-00 from 4.00 CFS to 20.00 CFS; (2) the expanded period of diversion of claims 41N 113496-00, 41N 113497-00, and 41N 113505-00 from April to October to year-round; and (3) the identification of the purpose of claims 41N 113496-00, 41N 113497-00 and 41N 113505-00 as irrigation rather than storage. *Id.*

While Skari filed an objection to the Master’s Report, Skari is not an objector in this case. Skari filed a NOIA to each claim in this case. Pursuant to Rule 9(b), W.R.Adj.R., a NOIA party may appear and participate in proceedings on resolution of issues raised by objection or issue remark. A NOIA is distinct from an objection and is limited to participating in issues already raised in the case. *In re Erb*, 2016 Mont. Water LEXIS 2 *12 (citing Rule 9(b) and Rule 10, W.R.Adj.R.).

ISSUES

1. *Is there an error in the Master's Report recommendation to increase the flow rate of claim 41N 113496-00 to 20.00 CFS?*
2. *Is there an error in the Master's Report recommendation of a year-round period of diversion for claims 41N 113496-00, 41N 113497-00, and 41N 113505-00?*
3. *Is there an error in the Master's Report's lack of recommendation to modify the purpose of claims 41N 113496-00, 41N 113497-00, and 41N 113505-00 to "storage"?*

STANDARD OF REVIEW

The Water Court reviews a water master's findings of fact for clear error and the water master's conclusions of law for correctness. *Klamert v. Iverson*, 2019 MT 110, ¶ 11, 395 Mont. 420, 443 P.3d 379 (citing *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167 ¶ 25, 375 Mont. 327, 328 P.3d 644).

"Findings of fact are clearly erroneous if (1) substantial evidence does not support the findings of fact; (2) the fact-finder misapprehended the effect of the evidence; or (3) a review of the record leaves the court with the 'definite and firm conviction that a mistake has been committed.'" *In re Quigley*, 2017 MT 278, ¶ 10, 389 Mont. 283, 405 P.3d 627; *Skelton*, ¶ 27. In reviewing a Water Master's factual findings, the Water Court cannot simply substitute its judgment. *Id.* In reviewing the master's conclusions of law, the standard of review is plenary, and the Water Court determines whether the Master's conclusions are correct as a matter of law. *Heavirland v. State*, 2013 MT 313, ¶ 14, 372 Mont. 300, 311 P.3d 813 (citing *Geil v. Missoula Irrigation Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398). Based on these standards of review, the Court may adopt, modify, or reject the report, in whole or in part, or may receive further evidence and recommit it with instructions. M.R.Civ.P. 53(e)(2); Rule 23, W.R.Adj.R.

DISCUSSION

1. *Is there an error in the Master's Report's recommendation to increase the flow rate of claim 41N 113496-00 to 20.00 CFS*

Skari's objection to the Master's Report asserts the Master erred in adopting the Stipulation's increased flow rate for claim 41N 113496-00. (Doc. 74.00 at 1-9). Pursuant

to the Stipulation, the flow rate of 41N 113496-00 was increased from 4.00 CFS to 20.00 CFS. (Doc. 19.00). Skari makes several arguments, including that there is no historical or independent support for the increase, a 1985 change application used as evidence for increase does not support the flow rate, and that the ditch capacity does not justify the expansion. (Doc. 74.00 at 1-9).

Many of the Master's Report's findings of fact are taken from the prior findings in the 2018 Order Closing Certification Case. In the 2018 Order Closing Certification Case, this Court found that ECC's predecessors took all of the flow of Eagle Creek to fill the Blair Reservoir. *Order Dismissing Claim and Closing Certification Case WC 2016-09*, at FOF 5. The Court also found that when the Blair Reservoir was full water was diverted up to the capacity of the Section 9 ditch and conveyed to Bourne & Hamilton Reservoir. *Id.* at FOF 5 & 6. The Master's Report found all of Eagle Creek was diverted into Blair Reservoir and once Blair Reservoir was full, water was diverted in the Section 9 ditch, up to the capacity of the ditch. (Doc. 71, at FOF 6). Thus, in the present case, the Master's Report finding of fact 6 reflects the prior findings in the 2018 Order Closing Certification Case.

Other evidence presented at hearing also provided support for the recommendation to increase the flow rate of 41N 113496-00. The testimony supported that the Blair family diverted the entire flow of Eagle Creek. (Doc. 86.00, Ex. D-1, ECC Ex. C at 4-5; ECC Ex. E at 21-22, 37-41). The flow rate is further supported by documentation introduced by Skari from a 1987 DNRC Change Authorization following from the 1985 Change Application, indicating the Section 9 ditch had a 20 CFS carrying capacity. Skari Ex. 3 at 8 (*Final Order*, In the Matter of the Application for Change of Appropriation Water Right No. G223493-41N By Eagle Creek Colony, Feb. 11, 1987).

In 1987, ECC received a DNRC Change Authorization that allowed significant changes to use of Eagle Creek. *Order Dismissing Claim and Closing Certification Case WC 2016-09*; Skari Ex. 3.

Pursuant to the Change Authorization, the Colony stopped all diversions to Little Horse Creek and stopped using the Bourne & Hamilton Reservoir. The capacity of the Blair Reservoir increased from 80.00 acre feet to 207.00 acre feet...The DNRC authorization included several conditions,

restrictions, and limitations including releasing water from the Blair Reservoir for downstream users under certain conditions.

Order Dismissing Claim and Closing Certification Case WC 2016-09, at FOF 8 (citing *Final Order*, In the Matter of the Application for Change of Appropriation Water Right No. G223493-41N By Eagle Creek Colony, Feb. 11, 1987).

Skari asserts 20 CFS was used by DNRC as a limiting factor and is not evidence supporting a 20 CFS flow rate. (Doc. 74.00 at 4-5). While the 20 CFS ditch capacity was used as a limitation to assure other downstream water users would not be adversely affected, the Water Court also previously found that when ECC's predecessor "diverted into the Section 9 ditch and sent water to Little Horse Creek, it diverted all of the flow of Eagle Creek up to the full capacity of its ditch." *Order Dismissing Claim and Closing Certification Case WC 2016-09*, FOF 5. Thus, while Skari is correct that the 20 CFS ditch capacity is a limiting factor, it is also an indication of a maximum flow rate, as the maximum amount of water that was diverted up to the capacity of the ditch. (Doc. 86.00, at 5-6). Further, no other appropriators were identified as diverting from the Section 9 ditch. (Doc. 86.00). The Master's Report findings of fact 6-8 addressing ditch capacity and historical use related to flow rate reflect the Water Court's prior findings, testimony, and prior DNRC determinations used in the 1987 Change Authorization.

Despite there being sufficient evidence to support the Water Master's finding of facts 6-8 concerning the ditch capacity and flow rate of claim 41N 113496-00, findings of fact 9 and 10 confuse matters. In findings of fact 9 and 10, the Master's Report states there was "no evidence indicating that there was less than 50.5 CFS being diverted from Eagle Creek" as of the priority date of 41N 113496-00, July 3, 1901. The Master's Report does not provide any cites to the record for findings of fact 9 and 10, and the findings appear to unnecessarily infer that claims 41N 113496-00, 41N 113499-00, 41N 113501-00, 41N 113502-00, and 41N 113503-00 were simultaneously combined and used.

While there is sufficient evidence to support the claims' common diversion through Section 9, common use of the Blair and Bourne & Hamilton Reservoirs by claims 41N 113496-00, 41N 113499-00, 41N 113501-00, 41N 113502-00, and 41N

113503-00 and the 20 CFS flow rate, findings of fact 9 and 10 are not clearly supported, appear to rely on assumptions, and are not necessary to the conclusions and recommendations.

Findings 6-8 are supported by substantial evidence, including this Court's prior findings, testimony, and documentation from the 1987 DNRC Change Authorization. Conclusion of law 1 states, "at least 20 CFS was being appropriated under claim 41N 113496-00 and the senior co-equal claims. The available evidence supports at least 20 CFS being appropriated by July 3, 1901." (Doc. 71.00 at COL 1). Conclusion of law 1 is correct. The Water Master did not err in increasing the flow rate of claim 41N 113496-00. However, findings of fact 9 and 10 are not clearly supported, are not necessary to the conclusions and recommendations, and should be stricken.

2. Is there an error in the Master's Report's recommendation of a year-round period of diversion for claims 41N 113496-00, 41N 113497-00, and 41N 113505-00?

As included in the Preliminary Decree, the periods of diversion matched the periods of use and reflected April 1 to October 4. Pursuant to the Stipulation, ECC and the BOR agreed the period of diversion for claims 41N 113496-00, 41N 113497-00, and 41N 113505-00 should be increased from April 1 to October 4 to year-round. (Doc. 19.00). A preponderance of the evidence was the burden of proof for ECC to show that the year-round period of diversion accurately reflects beneficial use of the claims prior to July 1, 1973. Rule 19, W.R.Adj.R.

Skari disputes the Master's Report's recommendation of the increased period of diversion. (Doc. 74.00 at 9-10). Skari points out that the Water Master made one finding, finding of fact 12, to support the increase. Finding of fact 12 states:

Given the 'flashy' nature of the stream, the intermittent flow of Eagle Creek, the 'onstream' nature of the Blair Reservoir and Blairs practice of diverting the entire flow of the river when water was available the period of diversion of the claims filling the Blair Reservoir and Bourne-Hamilton Reservoir was very likely year-round.

There is no cite to the record for this finding of fact, and there are no conclusions of law regarding the increase to the period of diversion.

Based on the findings in the 2018 Order Closing Certification Case, this Court previously found that Eagle Creek is an intermittent stream, that Blair Reservoir is an onstream reservoir on Eagle Creek, and that the entire flow of Eagle Creek flowed into Blair Reservoir. *Order Dismissing Claim and Closing Certification Case WC 2016-09*, at FOF 1-5. This Court also found the only water that flowed out of Blair Reservoir during the year was water diverted into the Section 9 ditch or water that flowed over the top of the spillway during high water. *Id.* The testimony in this case confirmed diversion into storage anytime water was present. ECC Ex. D (Affidavit of Clifford Blair); ECC Ex. E (Deposition of Floyd Blair); ECC Ex. C.

Although the periods of use appropriately reflect irrigation from April 1 to October 4, the evidence here and prior findings of the Court support that water flowed into the onstream reservoir at various times throughout the year, outside the irrigation season. The preponderance of the evidence supported a year-round period of diversion.

While the Water Master did not misapprehend the effect of the evidence, the findings of fact should have more clearly cited to and reflected the evidence supporting the year-round period of diversion. Additionally, the Master's Report should contain a conclusion of law concerning the year-round period of diversion.

The Water Master did not err in the recommendation of a year-round period of diversion for claims 41N 113496-00, 41N 113497-00, and 41N 113505-00. However, the findings of fact neglected to cite to the record. Further, the Master's Report had no conclusions concerning the period of diversion. Therefore, modifications to the Master's Report are needed to provide a citation to findings in the 2018 Order Closing Certification Case, testimony in this case, and to provide a conclusion of law that the period of diversion should reflect historical use and be corrected to year-round.

3. *Is there an error in the Master's Report's lack of recommendation to modify the purpose of claims 41N 113496-00, 41N 113497-00, and 41N 113505-00 to "storage"?*

The irrigation purpose of claims 41N 113496-00, 41N 113497-00, and 41N 113505-00 was not modified by the Master's Report. Although claims 41N 113496-00, 41N 113497-00, and 41N 113505-00 utilize reservoirs as identified on the abstracts of the

claims, the water associated with the three claims is ultimately used for irrigation. The Water Master did not err in identifying the purpose of the claims as irrigation.

CONCLUSION AND ORDER

Based on the standard of review, the Court may adopt, modify, or reject the Report, in whole or in part, or may receive further evidence and recommit it with instructions. Rule 53(e)(2), M.R.Civ.P.; Rule 23, W.R.Adj.R. The Court adopts the Master's Report with modifications.

The conclusions and recommendations are correct. Although most of the findings are supported by substantial evidence, findings of fact 9 and 10 are not supported and otherwise lack citation to the record. Findings of fact 9 and 10 do not affect the correctness of the conclusions of law nor the recommendations. Finding of fact 12, which provides the basis for the recommended year-round period of diversion lacks citation to the record. The finding is supported by prior findings in the 2018 Order Closing Certification Case, as well as testimony. The Master's Report also fails to provide a conclusion of law for the year-round period of diversion. To explain the recommendation of a year-round period of diversion, a conclusion of law should be added. The Master's Report did not err in maintaining the irrigation purpose of the claims.

Therefore, it is

ORDERED that the Master's Report is ADOPTED with the following modifications:

- Findings of fact 9 and 10 are stricken.
- Finding of fact 12 is modified to include citation to the 2018 Order Closing Certification Case and ECC Ex. D (Affidavit of Clifford Blair); ECC Ex. E (Deposition of Floyd Blair); ECC Ex. C.
- A conclusion of law is added to state the year-round period of diversion for claims 41N 113496-00, 41N 113497-00, and 41N 113505-00, as agreed pursuant to the Stipulation, reflects historical beneficial use.

ORDERED that proceedings in this case are CLOSED.

ELECTRONICALLY SIGNED AND DATED BELOW.

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