

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364
FAX: (406) 522-4131

FILED
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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
TETON RIVER BASIN (41O)

CLAIMANT: Danreuther Ranches

OBJECTORS: Farmers Cooperative Canal Company, Salmond Ranch Co., Teton Cooperative Canal Company, Eldorado Coop Canal Company, United States of America (Bureau of Indian Affairs), Teton Coop Reservoir Co., Danreuther Ranches, Montana Board of Land Commissioners (DNRC-Trust Lands Div.)

COUNTEROBJECTORS: Robert E. Stephens Jr., Priest Butte Farm Inc., Patrick Saylor, William Miller, Betty Jo Miller, Teton Coop Reservoir Co., Farmers Coop Canal Co.

NOIA: Teton Coop Reservoir Co., Brady Irrigation Co.

CASE 41O-209
41O 156801-00
41O 156802-00
41O 156804-00
41O 156805-00
41O 156806-00
41O 156807-00

ORDER REGARDING ADMISSIBILITY OF NOTICES OF APPROPRIATION AND BURDEN OF PROOF

This Case involves issues pertaining to treatment of notices of appropriation and is being decided contemporaneously with its companion Case 76HF-580. Both Cases address similar issues of law. The Court holds that admissibility of notices of appropriation filed prior to enactment of sections 89-810 through 89-814, RCM (repealed 1973) is governed by the current Montana Rules of Evidence. The Court further holds Objectors did not show a lack of a genuine issue of material fact regarding the priority dates for the claims in this Case and that the burden of proof should not have been shifted and remains with Objectors.

This Case involves two water rights from the Teton River claimed by Danreuther Ranches (Danreuther). The first claim, 41O 156802-00, is a stock water right for 200 cattle and one horse. The second, 41O 156804-00, is an irrigation claim with a flow rate of 6.9 CFS for irrigation of 183.9 acres. Both rights have claimed priority dates of February 19, 1874, and both claims were timely filed.

Claimants of water rights were required to describe the elements of their rights in conformance with section 85-2-224(1), MCA. Each Danreuther claim contains the basic information required, including name of source, quantities of water claimed, point of diversion, place of use, purpose of use and priority date. The claim form requests the claimant to state whether the claim is a use right, a filed right, or a decreed right.¹ Danreuther checked a box on the claim form for a filed right, although this distinction is not one of the elements of a water right under section 85-2-224(1), MCA. The Water Court does not distinguish between use rights, filed rights, or decreed rights when it issues final decrees. § 85-2-234, MCA.

Section 85-2-224(2), MCA further required claimants to “submit maps, plats, aerial photographs, decrees, pertinent portions thereof, or other evidence in support of his claim.” § 85-2-224(2), MCA. To satisfy this requirement, Danreuther supplied various documentary evidence with its claims.

Among the evidence supplied was a notice of appropriation filed by Nelson Vieux in the records of Teton County on February 19, 1874. The entire text of the Vieux notice of appropriation is as follows:

I Nelson Vieux hereby publish and declare to all whom it may concern that I hereby claim and appropriate for the use of myself, my heirs and representatives the waters of the Teton River or so much thereof as may be needed or required by me or my representatives for irrigating and agricultural purposes.

¹ A use right is a “water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree.” W.R.C.E.R. 2(a)(71). A filed right is defined as: “[A] water right which has been filed and recorded in the office of the county clerk and recorder as provided by statute prior to July 1, 1973.” W.R.C.E.R. 2(a)(25). A decreed right “means a claimed water right determined in a judicial decree prior to the commencement of this adjudication or after commencement of this adjudication as provided in § 85-2-216, MCA.” W.R.C.E.R. 2(a)(18).

And I do also claim the free and unobstructed use of said Stream and the channel thereof from its source or sources if necessary as far down as to my ranch thereon, for the purpose of rafting or floating of timber, wood, or logs for which object and business I am about to construct a boom for receiving as necessary the same: And notice is hereby given that any dam or dams boom or booms or other thing placed in the said Teton above my place or ranch aforesaid so as to obstruct the free passage of such wood or timber as I may desire to float or raft therein, will be deemed an infringement of my rights hereby and herein acquired in pursuance of the laws and customs of Montana Territory. Given under my hand this 19th day of February AD 1874. (Signed) Nelsen Vieux.

Recorded 19th Feb 1874 J A [illegible] Recorder.

Claimant's Brief in Support of Objections to Order Granting Partial Summary Judgment, Ex. A or Claim File 41O 156802-00. The claim files for these two rights also contain other documents, including an April 29, 1982 affidavit by Janet Danreuther which states:

In regard to the Nelsen Vieux or Capt Nelson Veilleaux water right filled [*sic* – filed] in Feb 19 1874. The spelling on the filing is misspelled probably because someone (the recorder) made out the form for him as he couldn't sign his own name. ...

Mr. Veilleaux lived on the ranch that Edward Reichelt own later owned [*sic*] by Dan Reichelt and now owned by Danreuther Ranches. The large coulee through the Ranch is named Capt Nelse coulee on maps.

Claim File 41O 156804-00. The Temporary Preliminary Decree for the Teton River Basin was issued on December 29, 2005. Both of the Danreuther claims received objections from a variety of parties.

On December 27, 2009, Farmers Cooperative Canal Company (Farmers Company) filed a motion for partial summary judgment regarding the claimed priority dates for the Danreuther stock water and irrigation claims. Farmers Company argued that the priority dates for these claims were invalid because the Nelson Vieux notice of appropriation filed on February 19, 1874 does not comply with statutes enacted in 1885 pertaining to notices of appropriation, and was therefore inadmissible as evidence.²

² In 1885, the Territorial Legislature passed legislation entitled: "An Act Relating To Water Rights," which will be referenced as the 1885 Act in this Order. All of the statutes in the 1885 Act were repealed by Montana's current Water Use Act of 1973.

Farmers Company further argued that, because the Nelson Vieux notice was inadmissible, and there was no other evidence to corroborate the claimed 1874 priority date, the burden of proof at trial should be shifted to the claimant to provide evidence regarding the correct priority date for the Danreuther claims.

Farmers Company filed similar motions for summary judgment in other cases involving claims based on notices of appropriation. On April 15, 2010, the Water Master adjudicating claims in the Teton River Basin issued an Order Granting Partial Summary Judgment (hereinafter Omnibus Order) in this and other cases (41O-206, 41O-224, 41O-435, 41O-437 and 41O-452).

The Master generally ruled that notices of appropriation which did not comply with the 1885 Act were inadmissible under *Holmstrom Land Company v. Newland Creek Water District*. 185 Mont 409, 605 P.2d 1060 (1979). Because such notices could not be admitted as evidence, the Master reasoned “[t]he claims do not meet the minimum threshold of evidence necessary to establish the facts alleged.” *Omnibus Order*, pp. 14-15.

The Master distinguished the Danreuther’s water rights in this Case from others because the Vieux notice, unlike other notices of appropriation discussed in the Omnibus Order, was filed eleven years before the 1885 Act. “If the Claimants can fit the document in under an exception to hearsay, they may be able to have it admitted into evidence at hearing.” *Omnibus Order*, p. 15. Despite this conclusion, the Master ruled that: (1) the priority dates for the Danreuther rights were not supported by admissible evidence; (2) Farmers Company had overcome the *prima facie* status accorded to claims under section 85-2-227, MCA, and (3) the burden of proof at trial would be shifted to the claimants “to provide sufficient evidence to establish the date of first use for each of these claims.” *Omnibus Order*, p. 15.

Danreuther objected to the Master’s summary judgment ruling, arguing that the 1885 Act had been repealed; the cases the Master relied upon were no longer valid because they were based on a repealed statute; the Water Court has an obligation to follow current Rules of Evidence and Civil Procedure; Farmers Company had not

supplied any evidence to overcome the *prima facie* status of Claimants' water rights and that the burden of proof should not shift to the claimants. Claimants further argued that: (1) prior Supreme Court precedent, to the extent it remains valid, contradicts *Holmstrom* and provides justification for admission of the Vieux notice; (2) the 1885 Act does not contain any language stating that notices not in compliance with the act are inadmissible; (3) the Vieux notice has important evidentiary value because it put other water users in the Basin on notice of Vieux's claim to water; (4) many other notices in Teton County were filed late or had a defect, and (5) application of the strict rule enunciated in *Holmstrom* would deprive the Water Court of valuable evidence necessary for accurate adjudication of water rights in this and many other cases.

Farmers Company argues that defective notices cannot be relied upon by the Water Court because: (1) cases construing the 1885 Act do not allow it; (2) the definition of an existing right does not allow it; and (3) the Water Court's constitutional obligation to confirm all existing rights does not allow it. Farmers Company also argued that pre-1973 water rights should be defined by pre-1973 law and that maintaining relative priority dates in accordance with existing law is essential to upholding our Constitution's recognition and confirmation of existing rights.

Farmers Company contends that once a notice of appropriation has been determined defective, it is inadmissible as evidence and the *prima facie* status otherwise accorded to a water right claim under section 85-2-227, MCA is automatically overcome. Farmers Company asserts that *Holmstrom* invalidates any exceptions to the hearsay rule which might otherwise allow for admission of a defective notice of appropriation. At the hearing on objections to the Master's summary judgment ruling, Farmers Company also argued that this Court should rule that the Vieux notice of appropriation could not be admitted as evidence at trial.

STANDARD OF REVIEW

Motions for summary judgment are governed by Rule 56 of the Montana Rules of Civil Procedure. "The purpose of the hearing on the motion is not to resolve factual issues, but to determine whether there is any genuine issue of material fact in dispute."

Westlake v. Osborne, 220 Mont. 91, 94, 713 P.2d 548, 550 (1986). The burden of proof in motion for summary judgment proceedings is addressed in Rules 56(c) and (e), of the Montana Rules of Civil Procedure and restated by the Montana Supreme Court.

[T]he party moving for summary judgment must demonstrate that no genuine issues of material fact exist. *Hickey v. Baker School Dist. No. 12*, 2002 MT 322, ¶ 12, 313 Mont. 162, 60 P.3d 966 (citing *Casiano v. Greenway Enterprises, Inc.*, 2002 MT 93, ¶ 13, 309 Mont. 358, 47 P.3d 432, *overruled in part and on other grounds by Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134). Once this has been accomplished, the burden then shifts to the non-moving party to prove by more than mere denial and speculation that a genuine issue of material fact does exist. *Roy v. Blackfoot Telephone Co-op.*, 2004 MT 316, ¶ 11, 324 Mont. 30, 101 P.3d 301 (citing *Fulton v. Fulton*, 2004 MT 240, ¶ 6, 322 Mont. 516, 97 P.3d 573). “A ‘material’ fact is a fact that ‘involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.’” *Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, 100 P.3d 137 (citing *Mountain West Bank, N.A. v. Mine and Mill*, 2003 MT 35, ¶ 28, 314 Mont. 248, 64 P.3d 1048).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the party opposing summary judgment.

Williams v. Plum Creek Timber Co., 2011 MT 271, ¶¶ 14-15, 362 Mont. 368, 264 P.3d 1090 (internal citations omitted). In addition to a fact burden, the opposing party also has a legal burden:

“Failure of the party opposing the motion to either raise or demonstrate the existence of a genuine issue of material fact, or to demonstrate that the legal issue should not be determined in favor of the movant, is evidence that the party’s burden was not carried”

Larry C. Iverson, Inc. v. Bouma, 195 Mont. 351, 373-374, 639 P.2d 47, 59 (internal citation omitted).

DISCUSSION

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.

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. Water rights' notices like the Nelson Vieux notice in this Case were often filed, but there was no recognized method for standardizing such notices, and their status in the event of a lawsuit over the validity of competing rights was not well defined.

Issue I: Whether the Definition of An Existing Right Precludes Admission of Defective Notices of Appropriation

Farmers Company argues that current procedural and evidentiary law should not be applied in determining whether notices of appropriation are admissible. Instead, Farmers Company argues that the definition of existing rights requires application of the law as it existed prior to July 1, 1973. Farmers Company bases its argument on section 85-2-102(12), MCA, which defines an existing right 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.

The 1973 Water Use Act and the 1979 amendments to the Act marked a profound change in the way Montana addressed water rights. Prior to these legislative changes, 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, 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 85-2-233, 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.

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. Despite these protections, Farmers Company contends that procedures set forth in the Water Use Act and the Montana Rules of Evidence do not apply where they conflict with pre-1973 law, even where the pre-1973 law is no longer in effect.

This argument is problematic for two reasons. As a practical matter, the Water Court is obliged 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. If the Court were to adopt Farmers Company's argument, it would have to disregard the current Rules of Evidence and apply, for example, the long abandoned rule regarding declarations of a predecessor in title, which was rejected when the Montana Supreme Court adopted Montana's current Rules of Evidence. Under the Objector's

argument, the Water Court would need to constantly check for conflict between repealed pre-1973 law and current law to determine which law had supremacy. And, because pre-1973 law itself often changed, the Court and the parties would need to make sure they were using the law that matched the priority date of the water right at issue. These constraints would place the Court and litigants in an extraordinarily difficult position and would substantially complicate an already complex body of law.

Farmers Company's argument also fails because it does not distinguish between pre-1973 substantive law and pre-1973 procedural law. During oral argument of this Case, Farmers Company correctly stated that 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 are no longer binding. The Montana Rules of Evidence and modern statutes have replaced them.

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 the Legislature and the Supreme Court to apply retroactively both new procedural and substantive rules regarding water rights has already 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 Article IX, section 3(1) of the 1972 Montana Constitution. *Dep't. of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985). 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 § 85-2-226, 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 198, 642 P.2d at 1025, *citing* § 85-2-403(3)³, MCA (emphasis in original) and (emphasis added).

Kunneman argued that the application of the statute to water rights perfected before the Act would violate Article IX, Section 3 of the 1972 Montana Constitution. 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

³ Section 85-2-403(3) was re-enacted as section 85-2-402(6) in 1983.

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 they did not exist before 1973, their application to the Vieux notice of appropriation does not destroy Farmers Company’s right to use water. It is not an unconstitutional infringement of the water rights owned by Farmers Company for the Water Court to follow the Rules of Evidence in determining the admissibility of notices of appropriation.

Issue II: Whether the Constitution’s Mandate to Recognize Existing Rights Precludes Use of Notices of Appropriation to Determine Historical Use

Farmers Company argues that the imposition of current procedural and evidentiary law is unconstitutional, because it ignores the constitutional mandate to “recognize and confirm” all existing rights. Mont. Const. Art. IX, § 3(1). Farmers Company’s rights were decreed in prior litigation in Teton County. It believes recognition of the Danreuther claims would upset the hierarchy of priority dates in the Teton Basin, thereby causing injury to Farmer Company’s rights if the Danreuther rights, which were not decreed, are recognized. This argument necessarily assumes the Danreuther claims are invalid and the Farmers Company’s rights have elevated significance because they were previously decreed in a 1908 case. *Perry v. Beattie*, Teton County, Cause No. 371, Mar. 28, 1908.

These assumptions are unsupported. Unlike the present statewide adjudication, water rights lawsuits like *Perry v. Beattie* were not always comprehensive and did not mandate that all water users in the Basin must file claims or lose them. *Pettibone*, 216 Mont. at 367, 702 P.2d at 951-52.

Moreover, Farmers Company has not established that Claimant’s predecessors were parties to *Perry v. Beattie*, the 1908 case that adjudicated water rights of Farmers Company’s predecessor. Just because Danreuthers or their predecessors were not parties to the *Perry v. Beattie* Decree, does not automatically mean the decree was enforceable against them. *See Hill v. Merrimac*, 211 Mont. 479, 496, 687 P.2d 59, 68 (1984); *State*

ex rel. Knight v. District Court, 111 Mont. 520, 524, 111 P.2d 292, 294 (1941); and *Wills v. Morris*, 100 Mont. 514, 522, 50 P.2d 862 (1935).⁴ And, even if Farmers Company's decreed water rights were *prima facie* evidence of their rights under section 89-839, R.C.M. (1947),⁵ that *prima facie* status only gave them heightened evidentiary value in subsequent litigation. It did not invalidate the water rights of parties not involved in the 1908 *Perry v. Beattie* Decree. This conflict between decreed rights, filed rights and use rights and the potential for their simultaneous co-existence is one of the primary reasons the Legislature enacted the Water Use Act of 1973 and provided for a statewide *mandatory* adjudication of *all* existing rights to the use of water.

A fundamental mission of the Water Court is to adjudicate all existing rights without granting favor to any particular class of claims. This effort will inevitably result in the recognition, termination or modification of all rights involved in the process. The yardstick for determining the validity of claims is historical beneficial use. *McDonald*, 220 Mont. at 530, 722 P.2d at 605. The Water Court is obligated to apply current law to

⁴ See e.g. *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 16, 331 Mont. 281, 130 P.3d 1267; *Olympic Coast Inv., Inc. v. Wright*, 2005 MT 4, ¶ 26, 325 Mont. 307, 105 P.3d 743; *Bragg v. McLaughlin*, 1999 MT 320, ¶ 16, 297 Mont. 282, 993 P.2d 662; *State ex rel. Harlem Irr. Dist. v. District Court*, 271 Mont. 129, ---, 894 P.2d 943, 944 (1995); *Berlin v. Boedecker*, 268 Mont. 444, 452, 887 P.2d 1180, 1185 (1994); *Wellman v. Wellman*, 205 Mont. 504, 507, 668 P.2d 1060, 1061-62 (1983); *Western Mont. Prod. Credit Ass'n v. Hydroponics, Inc.*, 147 Mont. 157, 161, 410 P.2d 937, 939 (1966); *Brannon v. Lewis and Clark County*, 143 Mont. 200, 208, 387 P.2d 706, 711 (1963); *Kramer v. Deer Lodge Farms Co.*, 116 Mont. 152, 156, 151 P.2d 483, 484 (1944); *State ex rel. Sullivan v. School Dist.*, 100 Mont. 468, 472, 50 P.2d 252, 253 (1935) (adopting *res judicata* criteria applied by Oklahoma Supreme Court in *Alfrey v. Colbert*, 44 Okla. 246, 144 P. 179 (1914)); and *State ex rel. Reeder v. District Court*, 100 Mont. 376, 381, 47 P.2d 653, 655 (1935).

⁵ Section 89-839, R.C.M. (1947) provided: “**Effect of decree upon subsequent appropriations.** Whenever there shall have been an adjudication of the rights between appropriators or claimants to any stream or any other water supply in this state, *in any district court of the state, or the United States court*, in an action prosecuted in good faith between such appropriators or claimants to determine their respective rights to the use of such waters, and *which decree is based upon evidence introduced, and not upon stipulations or admissions of the parties*, such adjudication and decree ..., shall, as against all persons appropriating or diverting any of the waters of the said stream or other water supply, after the date of such decree, in an action relating to such waters, be *prima facie evidence* of the facts therein found, determined, and decreed, *respecting the rights of parties to said action* to the use of the waters of said stream or other water supply.” (emphasis added). Whether *Perry v. Beattie* involved stipulations or admissions that would remove the *prima facie* status of the decree, and whether this repealed statute applies to decreed water rights filed in the present adjudication, were not addressed by the parties in their briefs or oral argument, or by the Master in his Order.

to determine what evidence it can review. Application of a contrary rule conflicts with the Court's obligation to define rights according to historical beneficial use.

Farmers Company would understandably like to restrict the amount of historical evidence available to support competing water rights. However, review of admissible evidence based on current law does not undermine the rights held by Farmers Company if the result is to define competing rights according to historical use. Restricting the evidence used to prove the Danreuther rights to protect those held by Farmers Company is not consistent with the constitutional mandate to "recognize and confirm existing rights." Mont. Const. Art IX, § 3(1).

The Montana Supreme Court has previously recognized the inherent need to rely upon historical material in certain types of cases. In *PPL Montana v. State of Montana*, the Court faced issues dealing with historical navigation on the Clark Fork, Madison, and Missouri Rivers. 2010 MT 64, 355 Mont. 402, 229 P.3d 421, *rev'd on other grounds* 2012 U.S. LEXIS 1686. In its review of objections to several exhibits, the Court cited two previous decisions:

Furthermore, we agree with the State that reliance upon historical works, including newspaper accounts, is well-accepted and proper when applying the navigability for title test. Courts applying this test are often required to arrive at factual determinations regarding matters outside the recall of any living witnesses, thus requiring a higher degree of reliance upon historical material than in the run of the mill civil dispute. *See Montana Power*, 185 F.2d at 498 ("[I]t is settled that historical works generally considered authentic are admissible in evidence, especially in cases such as this one which must delve into the relatively ancient and obscure origins of commerce on the nation's rivers."); *Conn. Light & Power Co. v. Federal Power Commn.*, 557 F.2d 349, 354-56 (2d. Cir. 1977).

PPL Montana, ¶ 96. Like the *PPL Montana* case, water rights adjudication shares a similar "higher degree of reliance upon historical material than in the run of the mill civil dispute." Ancient documents such as notices of appropriation should be screened using the modern rules of evidence and, if admitted, given whatever weight they deserve. The Water Master properly decided that admissibility of the Vieux notice of appropriation

should be determined through application of Montana's current rules of evidence. The Master's decision on this issue is affirmed.

Issue III: Whether the Burden of Proof Should Have Been Shifted

Danreuther objected to the Master's decision to reverse the burden of proof at trial.

The Master's Omnibus Order held:

The claims do not meet the minimum threshold of evidence necessary to establish the facts alleged. The evidence supporting the claimed priority dates is flawed. As a result, Farmers has overcome the prima facie proof of content as it applies to the priority date for those claims and has shifted the burden to the claimants to provide sufficient evidence to establish the date of first use for each of these claims.

Omnibus Order, pp. 14-15. Although the Master appeared to carve out a partial exception for the Danreuther claims because they were based on a pre-1885 notice, he nonetheless held that both of these claims "still fail as filed rights." *Omnibus Order*, p. 15. On this basis, he determined that "Farmers has overcome the prima facie proof of contents given to the statements of claim and shifted the burden to the Claimants to provide sufficient evidence to establish a priority date for each claim." *Omnibus Order*, p. 16.

As discussed above, 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, times of use, purpose of use, priority date, legal descriptions for the point of diversion and place of use. 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 defined in section 85-2-224(1), MCA.

Danreuther presumably identified their irrigation claim as a filed right because of the Vieux notice of appropriation. Although the Vieux notice relied on by Danreuther was filed eleven years before the 1885 Act became law, the Master concluded

Danreuther's claim was not a filed right because it did not comply with the 1885 Act. The Master then concluded: "... the water right becomes a use right with the evidentiary obligations associated with that type of water right under pre-July 1, 1973 law. The appropriator claiming a use right has the obligation to provide evidence sufficient to establish the date of first use." *Omnibus Order*, p. 13. The issue before the Court is whether the Master's decision to shift the burden of proof from Objectors to Claimants was proper.

In 1979, the Montana Legislature amended the 1973 Water Use Act by giving water rights claims *prima facie* status. Section 85-2-227 provides "a claim of existing right filed in accordance with section 85-2-221, MCA 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 (*Sage Creek Basin*, 1997 Mont. Water LEXIS 1), p. 12. "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 decreed and 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 Danreuther irrigation claim was

overcome because Danreuther checked the “filed” box on their water rights claim form, rather than the “use” box.

The issue raised by Objectors was the priority date of the Danreuther irrigation claim. The Objector’s burden when moving for summary judgment was to demonstrate no genuine issue of material fact regarding priority. Farmers Company did not produce any evidence contradicting the priority date for Danreuther’s irrigation claim in its motion for summary judgment. Farmers Company’s motion for summary judgment was limited solely to attacking the admissibility of the Vieux notice of appropriation. In effect, their motion for summary judgment was a motion *in limine*.

Even if the Vieux notice had been ruled inadmissible by the Master, Farmers Company would still be affirmatively obligated to show no genuine issue of material fact regarding priority date. It can only meet this burden by using other evidence of first use that contradicts the claimed priority date. Because Farmers Company did not do this, it did not satisfy the standard under Rule 56 of Civil Procedure and was not entitled to have the burden of proof shift to Claimants.

Issue IV: Whether Notices of Appropriation Are Inadmissible under the 1885 Act and Related Case Law

The parties and the Water Master devoted considerable effort to reviewing case law arising from the 1885 Act. For the reasons set forth above, this now-repealed, procedural law does not apply to admissibility of pre-1885 notices of appropriation. However, because this issue received so much attention below, this Court provides the following analysis of the 1885 Act and the cases arising from it. As is shown by this analysis, admissibility of pre-1885 notices of appropriation would remain subject to review under the current Rules of Evidence, even without the significant changes to procedural law that followed repeal of the 1885 Act by the Water Use Act of 1973.

Background of the 1885 Act

The Montana Territorial Legislature attempted to address problems with lack of witness testimony and lack of a procedure for documenting water rights by passing the Water Rights Act of 1885. §§ 89-810 through -814, RCM (repealed 1973). In the early

years of Montana's history, water rights were appropriated through diversion and beneficial use. If litigation arose over these water rights, a record of the claims was created. Otherwise, many claims were used for decades without any documentary evidence of their existence.

Even though courts adjudicating water rights a century ago were much closer in time to the events leading to creation of water rights, a lack of documentary evidence was still a problem.

Questions of priority, however, as well as of the original capacity, etc., of ditches, depended chiefly on oral testimony, -- on the memory of eyewitnesses, often at fault through lapse of time. Confusion and insecurity to vested rights resulted. To obviate this as much as possible, the statute was enacted.

Murray v. Tingley, 20 Mont. 260, 268, 50 P. 723, 725 (1897).

The 1885 Act created incentives for appropriators to document their intention to claim future water rights and to memorialize existing water rights. §§ 89-810 through 89-814, RCM, 1947. These statutes governed notices for water rights with priority dates both before and after 1885. The statutes began by setting forth a procedure by which new water rights with priority dates after 1885 could be established. To perfect a claim, an appropriator was required to "post a notice in writing in a conspicuous place at the point of intended diversion" § 89-810, RCM, 1947. The notice was required to include the quantity of water claimed, the purpose for which it was claimed, the place of intended use, the type of diversion, the date of the appropriation, and the name of the appropriator. § 89-810, RCM, 1947.

Unlike the common law in existence prior to its enactment, section 89-810, RCM did not require actual diversion to start the process of obtaining a water right. Instead, it enabled a prospective appropriator to signal his intent simply by posting a notice along the creek bank, subject to later perfection as provided by section 89-811, RCM. After the date of appropriation, the water user had twenty days to file a notice of appropriation with the county clerk. The filed notice of appropriation needed to include the same information as the posted notice, plus additional information describing the point of

diversion and stream from which water was to be taken. The notice of appropriation needed to be verified by an affidavit of the appropriator.

Compliance with these requirements yielded several important benefits, including the ability to relate a priority date back in time. Section 89-812 provided:

A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this chapter the right to the use of the water shall relate back to the date of posting the notice.

§ 89-812, RCM, 1947 (emphasis added).

Relating the priority date back to the posting of the notice provided an advantage over the law in existence before the 1885 Act and represented a powerful new incentive to file a notice of appropriation.

For years before the statute was enacted the rule of law was “that the appropriation of water by persons who prosecute the work on their ditch with reasonable diligence dates back to the commencement of the work.” Therefore, as between two persons digging ditches in the same time, and prosecuting work thereon, with reasonable diligence, to completion, the one who first began work had the prior right, even though the other had completed his first. This was the doctrine of “relation back.”

Murray, 20 Mont. at 268, 50 P. at 725 (internal citation omitted). A significant additional benefit of compliance was that properly recorded notices acquired enhanced evidentiary status if a dispute later arose over the claim. Section 89-814 provided: “The record provided for in sections 89-810 and 89-813, when duly made, shall be taken in all courts of this state as prima facie evidence of the statements therein contained.” § 89-814, RCM, 1947. Thus, a person filing a notice could not only relate his priority date back to posting of the notice, but his notice also had heightened evidentiary status in any subsequent court action with other competing water users.

Notices filed for water rights with priority dates *before* 1885, like the one in this Case, were controlled by section 89-813, RCM, which specified such notices could be voluntarily filed within six months of publication of the Act. Compliance with the statute

was optional, and no forfeiture occurred if a water right owner did not file a notice, or elected to file a late notice. Section 89-813, titled Record of Declaration, provided:

Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this chapter, file in the office of the county clerk of the county in which the water right is situated, a declaration in writing, except notice be already given of record as required by this chapter, or a declaration in writing be already filed as required by this section, containing the same facts as required in the notice provided for record in section 89-810 of this chapter, and verified as required in said last-mentioned section, in cases of notice of appropriation of water; provided, that *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 (emphasis added).

In keeping with the Act's purpose of encouraging documentation of claims in the public record, this section gave appropriators with pre-existing use rights a chance to file notices of appropriation to memorialize their claims. Because such notices describe a right already in existence, they did not provide the ability to relate a priority date back in time. This section also recognized notices filed before passage of the Act, and section 89-814 gave both pre- and post-1885 notices *prima facie* status if they complied with the Act's requirements. No forfeiture of a right occurred if a notice was not filed, or if a notice was filed but did not meet all the requirements of the Act. Nothing in the Act provided that previously-filed notices that did not comply with the Act were inadmissible.

Numerous Montana Supreme Court cases have interpreted the 1885 Act and notices of appropriation filed in connection with it. These cases express a broad range of opinions and support for both admissibility and inadmissibility of notices of appropriation can be extracted from them.

One case, *Holmstrom v. Newlan Creek Irrigation District*, interprets the 1885 Act narrowly by holding that notices with any defect are inadmissible for any purpose. 185 Mont. 409, 427, 605 P.2d 1060, 1070 (1979). The Water Master relied on *Holmstrom* to exclude a number of water rights notices from evidence in the Omnibus Order. The

Master distinguished the Danreuther water rights in this Case from others because the Vieux notice, unlike other notices of appropriation discussed in the Omnibus Order, was filed eleven years before the 1885 Act. The Master found Claimants may be able to find a hearsay exception that would enable the document to be admitted as evidence. *Omnibus Order*, p. 15.

Another line of cases makes determinations about the evidentiary value of defective notices based on their content. In these cases, content of the notice is weighed in determining its usefulness and in some instances its admissibility. Several cases cited in *Holmstrom* fall into this category. A third line of cases indicates that defective notices can be used for whatever purposes their contents might serve, except for relating a priority date back in time. Each line of cases is discussed below starting with *Holmstrom*.

The *Holmstrom* Decision

The Master correctly determined that *Holmstrom* does not apply to the Case *sub judice* because *Holmstrom* did not discuss notices filed before 1885. These notices were discussed in section 89-813, RCM, which was not at issue in *Holmstrom*. *Holmstrom* only involved notices filed *after* 1885. These notices were treated differently than pre-1885 notices and were governed by section 89-810, RCM rather than section 89-813, RCM.

Although Farmers Company asserts that *Holmstrom* is controlling in this Case, the usefulness of *Holmstrom* is undercut by its improper citation to a number of older cases for the blanket rule that “... a party cannot rely on defective notices of appropriation to prove the extent of his water rights or their priority dates.” *Holmstrom*, 185 Mont. at 427, 605 P.2d at 1070.⁶ A careful review of these cases shows they do not stand for the rule articulated in *Holmstrom*. Many of these cases actually form a second line of authority distinguishable from the *Holmstrom* holding.

⁶ These cases include: *Wills v. Morris*, 100 Mont. 514, 50 P.2d 862 (1935); *Peck v. Simon*, 101 Mont. 12, 52 P.2d 164 (1935); *Galahan v. Lewis*, 105 Mont. 294, 72 P.2d 1018 (1937), and *Shammel v. Vogl*, 144 Mont. 354, 396 P.2d 103 (1964).

Cases Cited in *Holmstrom*

Among the cases cited by *Holmstrom* was *Peck v. Simon*. 101 Mont. 12, 52 P.2d 164 (1935). In *Peck*, the notice of appropriation at issue did not indicate “on what lands or for what purpose the waters appropriated were to be used.” 101 Mont. at 18, 52 P.2d at 166. After expressing some doubts, but no conclusion regarding the notice’s admissibility, the Court stated: “... the reception of the notice of appropriation is of no avail to defendant, as the only intention evidenced therein is to apply the waters of the creek to a beneficial use at some time in the future, without designation of the proposed place of use.” *Peck*, 101 Mont. at 18-19, 52 P.2d at 166 (internal citations omitted). This dicta indicates the Court reviewed the content of the notice, weighed the value of that content, and determined the content was not helpful in deciding whether water was beneficially used. Distilled to its essence, the general concern about notices expressed in *Peck* focused on a specific document’s lack of evidentiary value rather than its admissibility. *Peck* did not state that notices were inadmissible if they did not comply with all requirements of the 1885 Act.

Holmstrom also relied on *Galahan v. Lewis*. 105 Mont. 294, 72 P.2d 1018 (1937). Because the notices in *Galahan* were filed by second generation water rights owners who were not familiar with original use of the rights at issue, the *Galahan* Court recognized the notices were of “no evidentiary value in proving the amount or date of appropriation.” 105 Mont. at 299, 72 P.2d at 1020 (internal citation omitted). The Montana Supreme Court did not state the notices were inadmissible, although such an interpretation was ascribed to *Galahan* in subsequent cases.

One of the cases cited by *Holmstrom* flirts with the issue of admissibility, but does not articulate a rule prohibiting admission. In *Shammel v. Vogl*, the notice at issue was filed in August 1882, three years before the 1885 Act was passed. 144 Mont. 354, 1964 Mont. LEXIS 137, **. The notice did not include an affirmation that the matters and facts contained therein were true, as later required by section 89-810, RCM. The Court in *Shammel* reviewed the *Galahan* decision and concluded: “This case would seem to be holding that not only would such defective notice not be prime [*sic-prima*] facie

evidence, it would not be admissible into evidence at all.” *Shammel*, 144 Mont. at 369-70, 1964 Mont. LEXIS 1737, ** 25.⁷

A principle problem with the *Holmstrom* line of cases is they apply old rules of evidence, some of which are no longer in effect. These cases address admissibility under section 93-401-2, RCM (1947) (the hearsay rule), section 93-1301-7(34), RCM (1947) (the ancient document rule), and section 93-401-6, RCM (1947) (declarations of predecessor in title evidence). To be admissible as an exception to the general hearsay rule, the declaration of a predecessor in title had to be against interest. “The reason for the rule was explained as being that declarant was so situated, and his interests were such, that he would not have made the admissions to the prejudice of his right unless they were true.” *King v. Schultz*, 141 Mont. 94, 98, 375 P.2d 108, 110 (1962).

The rule that declarations of a predecessor in title had to be against interest was not adopted in the modern Rules of Evidence. Section 93-401-6 (10510), RCM (1947) was superseded by the Montana Rules of Evidence adopted by Supreme Court Order dated December 29, 1976. To remove any doubt about the demise of the rule regarding declarations of a predecessor in title, the Montana Supreme Court issued an Order on July 10, 1979 stating:

- I. Pursuant to Article VII, Section 2, of the 1972 Montana Constitution, the following sections of the Revised Codes of Montana, 1947, *are declared to have been superseded* by the provisions of the Montana Rules of Evidence:
Sections ... 93-401-6
- II. The foregoing superseded sections were *superseded* upon the adoption of the Montana Rules of Evidence by order of the Court dated December 29, 1976, and were thereby *rendered obsolete, unnecessary and redundant; and the continued presence of said sections as a part of the law of Montana tends to lead to confusion, uncertainty and conflict in the law,*

⁷ Two other cases dealt with pre-1885 statutory claims: *Gilcrest v. Bowen*, 95 Mont. 44, 24 P.2d 141 (1933) and *Stearns v. Benedick*, 126 Mont. 272, 247 P.2d 656 (1952). Both cases rejected use of notices, but only after reviewing their content and concluding they had limited evidentiary value. The *Gilcrest* Court criticized but did not overrule *Sweetland*, and ultimately concluded the notice was not useful because it only evidenced an intention “to apply the waters of the creek to a beneficial use at some time in the future” 95 Mont. at 50, 44 P.2d at 144. In *Stearns*, the claimed place of use and point of diversion in the notice did not match the characteristics of the claim at issue.

all of which are contrary to the spirit and purpose of the Montana Rules of Evidence and the ends of justice.

Montana Supreme Court Order No. 12729 (emphasis added). Because the cases leading up to *Holmstrom* were decided before this rule was superseded, the value of these cases is questionable. Their continued use promulgates exactly the “confusion, uncertainty and conflict in the law” the Montana Supreme Court sought to avoid with its July 10, 1979 Order.

Cases Admitting Noncompliant Notices of Appropriation

A third line of cases allowed the admission of notices of appropriation, but recognized that noncompliance with the statute prevented the ability to relate the priority date back to the first date of posting of the notice. In *Vidal v. Kensler*, the Court held:

... a valid appropriation of water may be acquired even where there has been no compliance with the statute regulating appropriations by record, where the water is actually diverted from the stream and applied to a beneficial use; compliance is important only with regard to the doctrine of “relation back,” on due compliance.

100 Mont. 592, 594-95, 51 P.2d 235, 236-37 (1935).

The Montana Supreme Court has affirmed admission of defective notices of appropriation in at least two prior decisions. In *Floyd v. Boulder Flume and Mercantile Company*, the appellant alleged a defective notice should not have been admitted because it referenced two sources, thereby creating ambiguity about means of diversion, flow rate, and priority date for each source. 11 Mont. 435, 437, 28 P. 450, 451 (1892). Despite acknowledging the notice’s shortcomings, the Court declined to find it inadmissible and decided “[t]he notice was sufficient to put all parties upon inquiry concerning the rights of the respondents to use for a common purpose the waters of both creeks” *Floyd*, 11 Mont. at 438, 28 P. at 451. The Court upheld the priority date and determined that having the claimant take water from one source before the other would “cure the obscurity in the notice.” *Floyd*, 11 Mont. at 438, 28 P. at 451.⁸

⁸ See *Missoula Light & Water Co. v. Hughes* 106 Mont. 355, 77 P.2d 1041 (1938). A notice claiming priority on the “ day of , 1871,” filed on September 28, 1885, was found to be prima facie

A similar ruling occurred in *Sweetland v. Olsen*. 11 Mont. 27, 27 P. 339 (1891). *Sweetland* involved a pair of notices filed in 1882 before passage of the 1885 Act. At trial, the notices were admitted into evidence over objection. The *Sweetland* Court framed the issue on appeal as follows:

[T]he question before us is as to the admissibility of such declaration as evidence tending to show the intention of such appropriators as to the quantity and time of the appropriation, as well as the understanding of the parties respecting each other's rights in and to any of the waters of the stream in question

Sweetland, 11 Mont. at 31, 27 P. at 340. The Court held the notices were admissible to show “the intention, understanding, and action of the original appropriators” *Sweetland*, 11 Mont. at 31 27 P. at 340-41. *Sweetland* was decided after passage of the 1885 Act. The foregoing cases provide an alternative to *Holmstrom* in determining how notices of appropriation should be handled at trial.

Farmers Company attempts to minimize these cases by arguing they were decided at a time when live witness testimony could be used to corroborate the information in the notice. Farmers Company argues the notices would not have been admitted without live testimony to support them. This rationale is inapplicable for two reasons. First, the availability of a witness is immaterial under Rule 803 of the Montana Rules of Evidence. *See Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 2008 MT 2, ¶¶ 79-81

evidence of the date of appropriation, but was not of evidentiary value as to amount of water diverted and used, where notice claimed 504 inches of Rattlesnake Creek “... for the purpose of furnishing water power for mills and other machinery, booming logs, irrigating and ornamenting lands and grounds and for domestic and other useful and beneficial purposes and to be used on sections 23 and 26 Tp. 13 N. R. 19W.” 105 Mont at 369, 77 P.2d at 1049. A primary issue in the case involved ditch ownership, and the Court found that the claimant's claim of ownership of the ditch and water right in the notice of appropriation was “not in harmony with the recitals in the deed by which he acquired the land and interest in the ditch.” 105 Mont at 370, 77 P.2d at 1049. *See also Musselshell Valley Farming & Livestock Co. v. Cooley*, 86 Mont. 276, 283 P. 213 (1929). Although the notice of appropriation was invalid because it was notarized by one of the claimants, the court awarded the successors to the water rights the date of appropriation claimed in the recorded notice. *Musselshell Valley*, 86 Mont. at 296, 283 P. at 219. “Where work was not completed within statutory framework, claimants could not relate back, but the notice was not deemed inadmissible.” *Clausen v. Armington*, 123 Mont. 1, 14, 212 P.2d 440, 447-48 (1949).

(Court applies Rule 803(8) of the Montana Rules of Evidence) and *State v. Baze*, 2011 MT 52, ¶ 12, 359 Mont. 411, 251 P.2d 122 (Court applies Rule 803(6)).

Second, the Courts in *Salazar* and *Sweetland* did not condition admissibility of notices on corroborating testimony, and the conclusion that defective notices were only admissible because of such testimony is entirely conjectural. The *Floyd* Court provided “[t]his notice is drawn in uncertain terms, but, in light of the testimony, the objection to its introduction cannot be sustained.” 11 Mont. at 437, 28 P. at 451. The *Floyd* Court did not delineate *what* testimony it found useful in admitting the notice, nor did it reference corroborating testimony, although it could have done so if corroboration was actually a predicate to admission.

CONCLUSION

Thousands of water rights in the current adjudication are based on notices of appropriation. Many of Montana’s early water rights date to the 1800s. The time has passed when water users could support historical documentary evidence of these claims with direct testimony. The law has also changed, and the Water Court is obliged to respect and follow those changes.

The Master correctly determined that admissibility of the Vieux notice of appropriation should be determined according to the Montana Rules of Evidence. *Holmstrom* and the cases that precede it are not applicable to determining admissibility of pre-1885 notices. The Master also determined that the burden of proof shifted to Claimants because they checked the box for a filed right on their claim form. Whether a right is based on use, a filing or a prior decree is not a final objective of the adjudication process.

The important issue for this Court is whether the Danreuther rights are based on historic beneficial use. That enquiry requires the Court to evaluate and weigh evidence of such use, or the lack thereof. The law regarding summary judgment required the objectors to show an absence of a genuine issue of fact regarding the priority date for the Danreuther claims. Other than attacking the Vieux notice of appropriation, Objectors have not supplied any evidence showing that the priority date for these claims is

something other than what was claimed. In the absence of such evidence, Objectors cannot satisfy the requirements for summary judgment, which is to show that the priority was something other than what was claimed, and that there is no genuine issue of fact regarding the alternative date. The burden of proof remains on the objectors to overcome the priority date for the Danreuther rights with a preponderance of the evidence.

The Court's decision in this Case does not mean all notices of appropriation are essential for the adjudication of water rights. 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 they pertain to the weight and credibility of the notice rather than its admissibility. They should be treated as any other prospective exhibit, with their admission governed by the rules of evidence. If admitted, their weight and ultimate value should be measured like any other document before a court.

ORDER

The Master's decision that admissibility of the Vieux notice is controlled by the Montana Rules of Evidence was correct.

The burden of proof has not shifted to Claimants and remains on Objectors.

Accordingly, it is ORDERED that this matter is remanded to the Water Master for further proceedings.

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 REGARDING ADMISSIBILITY OF NOTICES OF APPROPRIATION AND BURDEN OF PROOF** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Stephen R. Brown
Attorney-at-Law
PO Box 7909
Missoula, MT 59807-7909
(406) 523-2500
srbrown@garlington.com

John J. Ferguson
Ferguson Law Office, PLLC
116 West Front Street
Missoula, MT 59802
(406) 532-2664
johnf@fergusonlawmt.com

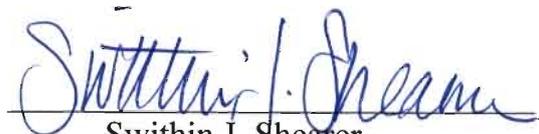
Michael J.L. Cusick
Moore, O'Connell & Refling, PC
PO Box 1288
Bozeman, MT 59771
(406) 587-5511
morlaw@qwestoffice.net

Holly Franz
Franz & Driscoll, PLLP
PO Box 1155
Helena, MT 59624
(406) 442-0005
hollyjo@franzdriscoll.com

John E. Bloomquist
Doney | Crowley | Payne | Bloomquist P.C.
PO Box 1185
Helena, MT 59624-1185
(406) 443-2211
jbloomquist@doneylaw.com

Christopher H. Buslee
Andres N. Haladay
Assistant Attorney General
Agency Legal Services Bureau
PO Box 201440
Helena, MT 59620-1440
(406) 444-2026
Cbuslee@mt.gov
Ahaladay2@mt.gov

DATED this 31st day of January, 2013.


Swithin J. Shearer
Deputy Clerk of Court