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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA

GENE R. CURRY, CHERYL S. CURRY, and)
CURRY CATTLE CO.)

CASE NO. WC-2006-01

Plaintiffs and Counterclaim-Defendants)

Certified From:
Ninth Judicial District Court
Cause No. DV-05-32

vs.)

PONDERA COUNTY CANAL AND)
RESERVOIR COMPANY,)

Defendant and Counter-Claimant.)
_____)

ORDER AMENDING AND PARTIALLY ADOPTING MASTER'S REPORT

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INTRODUCTION

This is a certification case. Certification cases originate from distribution controversies in district courts. Distribution controversies may arise in areas where water rights have not been determined by the Water Court. When this occurs:

[A]ny party to the controversy may petition the district court to certify the matter to the chief water judge. If a certification request is made, the district court shall certify to the chief water judge the determination of the existing rights that are involved in the controversy After determination of the matter certified, the water judge shall return the decision to the district court with a tabulation or list of the existing rights and their relative priorities.

Section 85-2-406(b), MCA.

This distribution controversy originated on Birch Creek, a tributary of the Marias River. The parties to the controversy are plaintiffs: Gene Curry, Cheryl Curry, and Curry Cattle Company (hereafter collectively Curry). Curry diverts water from Birch Creek via the Ryan-Lauffer Ditch.

The defendant is Pondera Cooperative Canal and Reservoir Company (hereafter PCCRC or Company). PCCRC also owns water rights in Birch Creek. PCCRC is owned by, and delivers water to, irrigators in the Valier and Conrad areas. Like Curry, these irrigators are successors to original settlers. PCCRC relies on a combination of direct flow and storage rights. Its two storage facilities are Birch Creek Reservoir and Lake Francis.

Some of PCCRC's rights are impounded by the Swift Dam and held in Birch Creek Reservoir at the upper end of Birch Creek. PCCRC also diverts water via the B Canal and other ditches on Birch Creek. Water diverted by the B Canal is used for direct irrigation and is also impounded in Lake Francis near Valier, Montana. The Swift Dam, the B Canal, and the Kingsbury Ditch are upstream of Curry's diversion in the Ryan-Lauffer Ditch. Curry sued PCCRC in District Court over administration of water on Birch Creek.

The District Court certified this matter to the Water Court for determination of rights owned by Curry and PCCRC. Over 150 water right claims are involved in this case.

Trial of this matter occurred before a Water Master in August of 2009. Substantial testimony was taken, and several thousand pages of exhibits and maps were introduced. On April 3, 2013, the Water Master issued a Master's Report. Both Curry and PCCRC objected to the Report.

Curry filed general objections to broad factual and legal issues, as well as objections to specific Findings of Fact and Conclusions of Law. PCCRC objected to the entirety of the Master's Report and argued that none of the Master's Report should be adopted. PCCRC also objected to broad factual and legal issues, as well as specific Findings of Fact. PCCRC's objection to the entirety of the Master's Report is denied.

By statute, a primary purpose of a certification case is to provide the District Court with a tabulation of water rights to facilitate distribution of those rights. The Master's Report does not contain a tabulation of rights. Accordingly, this Court approaches the objections to the Master's Report with the objective of: (1) creating the tabulation of existing rights required by § 85-2-406, MCA; and (2) resolving legal and factual questions that will facilitate administration of the claims in this case.

The water rights in this proceeding are all located in Basin 41M, which includes the Marias River and its tributaries. A Preliminary Decree has not been issued in Basin 41M, and the water users in that Basin have not had an opportunity to file objections to the claims in this certification case, or to other water rights in the Basin. As a consequence, it is likely additional litigation will occur regarding some or all of these claims, and that other parties in addition to Curry and PCCRC will be involved. That means the Court and the parties may again face many of the issues raised in this case.

Because of these problems, the Court will not resolve all of the objections to the Master's Findings of Fact and Conclusions of Law. Likewise, the Court will not resolve all of the issue remarks placed on claims in this case. Resolution of unaddressed objections and issue remarks will occur in the ordinary course of the adjudication process

after the Preliminary Decree has been issued and all water users in the Basin have had a chance to object and participate.

This Order first addresses objections to general issues of fact and law, then objections regarding specific water rights. Appendix A to this Order is a tabulation of Birch Creek water rights belonging to Curry and PCCRC.

Claims that do not appear in the tabulation should not be considered terminated unless they are expressly terminated in this Order, or they were recommended for termination in the Master's Report and that recommendation was adopted in this Order. Some PCCRC claims were addressed in this Order, but were omitted from the tabulation because they were not included in the tabulation proposed by PCCRC in its Proposed Findings of Fact and Conclusions of Law. These claims have not been terminated.

This Court felt an obligation to issue a decision as soon as possible after submittal. This Order makes changes to many of the abstracts for claims in this case. Changes to those abstracts require substantial time and would have delayed the issuance of this Order. A separate Order with changes to abstracts will be issued as soon as those changes are complete.

STANDARD OF REVIEW

The Rules of Civil Procedure require this Court to accept a Master's Findings of Fact unless clearly erroneous. M. R. Civ. P. 53(e)(2). The Court may receive further evidence, if necessary. § 85-2-227(3), MCA; M. R. Civ. P. 53(e)(2); Rule 23, W.R.Adj.R. The Montana Supreme Court follows a three-part test to determine if a trial court's Findings of Fact are clearly erroneous. *See Interstate Production Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). The Water Court uses a similar test for reviewing objections to a Master's Findings of Fact. Rule 11(c), W.R.Adj.R., *referencing* M. R. Civ. P. 53(e).

First, this Court reviews the record to see if the Findings are supported by substantial evidence. Second, if the Findings are supported by substantial evidence, this Court then determines whether the Master has misapprehended the effect of the evidence. Third, if substantial evidence exists and the effect of the evidence has not been

misapprehended, this Court may still determine that a Finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287.

This Court reviews a Master's Conclusions of Law to determine whether the Master's interpretation of the law is correct. *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398. "Thus, the Water Court reviews the Water Master's findings of fact for clear error and the Water Master's conclusions of law for correctness. M. R. Civ. P. 53(e)(2); *Geil*, ¶ 22." *Heavirland v. State*, 2013 MT 313, ¶ 14, 372 Mont. 300, 311 P.3d 813.

DISCUSSION

Part I: DUTY OF WATER

Since the beginning of water law, courts and legislatures have struggled to supply a definition for the duty of water. A good working definition of duty is the amount of water reasonably necessary to accomplish a specific task. In the context of irrigation, the Montana Supreme Court has defined duty as "the quantity which is essential to irrigate economically but successfully the tract of land to be irrigated." *Allen v. Petrick*, 69 Mont. 373, 380, 222 P.451, 453 (1924). The duty for a particular right may vary based on many factors including soil type, crop, length of ditch, rain fall, method of application, and climatic zone.

Because the term duty connotes identification of an amount, duty is expressed by flow rate or volume, or both. As an example, the duty of water for a municipal right is often expressed in terms of gallons per citizen per day, whereas duty for an irrigation right is expressed in terms of flow rate per acre or volume per acre. Some states establish duty by statute. Montana does not.

There are a variety of Montana Supreme Court cases discussing duty for irrigation rights in terms of flow rate per acre. These cases range from approximately one to two miner's inches per acre. *Conrow v. Huffine*, 48 Mont. 437, 445-446, 138 P. 1094, 1096-1097 (1914) and *Worden v. Alexander*, 108 Mont. 208, 212-216, 90 P.2d 160, 162-163

(1939). Water Court cases on the same topic cover such a wide range that generalization is unproductive.

The flow rate guideline for irrigation in Montana's Water Right Claim Examination Rules is 17 gallons per minute per acre. Rule 14(b)(1), W.R.C.E.R. This equals 1.5 miner's inches per acre.

The Master's Report applied a duty of one cubic foot per second (cfs) per 80 acres to some PCCRC claims in this case. This duty is equal 0.5 miner's inches or 5.6 gallons per minute per acre. The Master applied a more liberal duty of 17 gallons per minute (gpm) or 1.5 miner's inches per acre to some Curry claims.

The duty of one cfs per 80 acres was derived from a number of documents and reports drafted by predecessors of PCCRC which applied this duty to water rights throughout the Birch Creek area. For the most part, this duty appeared to be based on calculations rather than measurement of actual water used.

Where possible, this Court defined flow rates based on measurements of ditch capacity, as this better reflects historic use. However, use of ditch measurements to determine flow rate was not always possible. Where ditch measurements could not be used, the one cfs per 80 acres duty was applied.

PCCRC argues that use of such a restrictive duty is unfair. The Court acknowledges such a duty is restrictive, but it was also the duty applied by PCCRC's predecessors to define both its rights and the rights of others. In the absence of better evidence of historical use, the Master's decision to rely on a duty of one cfs per 80 acres was based on substantial evidence and was not clear error.

There was considerable evidence in the record concerning the volumetric duty of water applicable to lands within the project. Many documents referred to an obligation on the part of the Company to provide 1.5 acre-feet per acre to shareholders at their property. These documents often referred to this amount as the net duty of water, or the amount of water delivered to the field. Net duty does not include losses associated with getting water to the irrigator's property.

Such losses may include evaporation from reservoirs, and seepage loss in canals and ditches.

Documents in this case use the term gross duty and net duty of water. The gross duty of water is the amount that needs to be diverted from the source for the net duty to be available at the field. It consists of net duty plus delivery losses.

A December 28, 1920 supplemental report by C. E. Atwood, Chief Engineer for the Valier-Montana Land and Water Company, a predecessor of PCCRC, references usage of between 4.1 acre-feet per acre in 1916 to 1.8 acre-feet per acre in 1920. Ex. C-78, p. 6 (Bates Stamp 2298). Atwood also estimated in other documents that between 1.875 and 2.0 acre-feet per acre was the gross duty of water for the project. Ex. C-28, Bates Stamp 1841.¹

In his testimony, Vernon Stokes, the PCCRC Project Manager, stated project efficiency was 63% to 67%. Stokes Test. Day 4, 10:40:00-10:40:12. Assuming a net duty of 1.5 acre-feet at the field, this would result in a gross duty of water equal to between 2.23 and 2.38 acre-feet per acre. A project efficiency of 65% would result in a gross duty of 2.3 acre-feet per acre.

In summary, a duty of one cfs per 80 acres, and 2.3 acre-feet per acre was applied in this Order unless otherwise specified.

Part II: GENERAL OBJECTIONS

A. Use of Direct Flow Rights for Storage Where PCCRC Acquired Those Rights Before Construction of Its Storage Reservoirs

PCCRC uses two reservoirs to store water diverted from Birch Creek. The first is Birch Creek Reservoir located behind the Swift Dam in the main channel of Birch Creek. The second is Lake Francis. Water is diverted from Birch Creek via the B Canal into Dupuyer Creek and from there stored in Lake Francis.

¹ C. E. Atwood worked for the Company and prepared reports regarding water rights and water availability. Two reports are known as the Atwood Report and the Adjudication Data Report. This Order refers to these reports collectively as the Atwood Report.

The Master concluded Birch Creek Reservoir was constructed in 1912. In Findings of Fact 165 and 241, the Master determined that water rights with priority dates before 1912 could not be used for storage of water in Birch Creek Reservoir. Master's Report, pp. 64 & 97.

The Master concluded Lake Francis was constructed in 1902. In Findings of Fact 165 and 239, the Master determined that PCCRC water rights with priority dates before 1902 could not be used for storage in Lake Francis. Master's Report, pp. 64 & 96-97.

PCCRC objected to these findings.

Curry argues the Master's decision was correct, or in the alternative, that PCCRC's storage of its early rights must be limited to the historic volume used in connection with those rights. *Curry Response Brief to PCCRC's Objections to Master Report*, pp. 13-15.

Both parties cite *Whitcomb v. Helena Water Works* and *Bagnell v. Lemery* in support of their respective positions. 151 Mont. 443, 444 P.2d 301 (1968); 202 Mont. 238, 657 P.2d 608 (1983). *Whitcomb* involved diversions by the City of Helena into reservoirs. The water rights used for this purpose were decreed in 1903, and were originally established for use as direct flow rights. After the decree, the City converted its direct flow rights into storage rights. Downstream junior appropriators did not object to the City's conversion to storage in the spring when runoff was high, but they objected to storage later in the season when water was short.

The *Whitcomb* Court cited authority recognizing the right to use direct flow rights for storage subject to a showing of non-injury, and concluded "the rule allowing storage is dependent upon the lack of interference with other rights." *Whitcomb*, 151 Mont. at 449, 444 P.2d at 304. The implication of this statement was that storage was permissible when it did no harm, thereby opening the door for conversion of direct flow rights to storage when no injury occurred.

Unfortunately, this ruling left several important questions unanswered. There was no discussion in *Whitcomb* regarding the amount of water used by the City either before or after conversion of its senior direct flow rights to storage. It was therefore unclear

whether *Whitcomb* was intended to preclude any injury caused by storage, or was limited to injury caused by storage of water in excess of the amounts allowed by the City's original water rights.

Whitcomb was followed by *Bagnell v. Lemery*, which involved a direct flow right with a 1917 priority date. 202 Mont. at 240, 657 P.2d at 609. The owner of that right began construction of a dam in 1956, and a neighbor with a junior right downstream complained. Unlike *Whitcomb*, the *Bagnell* Court specifically found that the amount of water used by the senior right holder did not change after conversion of the direct flow right to storage and upheld the right to make the conversion. 202 Mont. at 245-46, 657 P.2d at 611-12. In reaching its determination that no injury occurred, the *Bagnell* Court quantified flow and volume both before and after conversion to storage. This quantification placed clear and enforceable limits on use of the converted right.

Bagnell is consistent with similar cases from other states. *Seven Lakes Reservoir Co. v. New Loveland and Greeley Irrigation & Land Company* involved conversion of a direct flow irrigation right to storage. 40 Colo. 382, 93 P. 485 (1907). The Court wrote:

This change is in no manner detrimental to the rights of the appellee. It is not therefore deprived of any water which it would have had the right to divert and apply to lands during the irrigating season, as against the rights of the appellant. By the change no greater burden is imposed upon the common source of supply of the respective ditches. It must, therefore, logically follow, that the appellant is entitled to divert the water represented by its purchase, and store for use later in irrigating crops, measured by volume and time, which it would have the right to apply directly to lands for purposes of irrigation at the time of such diversion.

...

We are of the opinion that the appellant is entitled to so utilize these priorities; that is to say, entitled to store, during the direct irrigation season, the quantity of water, *measured by volume and time*, which it would be entitled to divert during that period for the purpose of direct irrigation.

Seven Lakes Reservoir, 40 Colo. at 385, 387, 93 P. at 486 (emphasis added).

Bagnell and Seven Lakes stand for the common law rule that conversion of direct flow irrigation rights to storage was permissible, provided the direct flow rights were not expanded. This rule applied when PCCRC's predecessor began storing direct flow rights in Birch Creek Reservoir and Lake Francis.

The Master's decision to prohibit conversion of direct flow rights to storage was legal error.

The right to use direct flow rights for storage has limits. Curry correctly argues that storage should be limited to the volume historically diverted. In addition, these rights should be limited by period of diversion and flow rate so that PCCRC does not exceed the scope of historic use established by its predecessors. These limits prevent enlargement of the original direct flow rights and thereby prevent injury to Curry and other users.

PCCRC has the ability to use rights it acquired before completion of Birch Creek Reservoir and Lake Francis for storage provided use of those rights complies with the rule in *Bagnell and Seven Lakes*. This means the flow rate, period of diversion and volume for these rights cannot exceed historic use.

As an additional practical matter, it was apparent from a review of the entire record that PCCRC and its predecessors have been using direct flow rights for storage for nearly a century. This Court is reluctant to reverse such a long-standing pattern of usage. If other parties were injured by this practice, they have had a remedy available for decades. To engage in an analysis of injury years after it allegedly began, and after decades without protest, is a waste of judicial resources and disturbs a long-established status quo.

B. Whether PCCRC is Entitled to a Place of Use Based on a Service Area

1. PCCRC's Claims and the Master's Report

PCCRC claimed a service area as the place of use for its water rights. A service area is different than an historic place of use. Service areas include lands potentially irrigable within project boundaries. Service areas may encompass an area greater than the footprint of historic irrigation. Movement of water between parcels within service

area boundaries is common, but may be subject to limits. Limits may be imposed by state law, as well as bylaws, share certificates, or water delivery contracts unique to the project. A place of use reflecting a service area is often claimed by entities that complete their delivery systems before knowing where their water rights will be used.

The definition of an historic place of use is more limited than a service area. An historic place of use means the lands, facilities, or sites where water is beneficially used. Rule 2(a)(52), W.R.C.E.R. Absent a claim for a service area, the place of use for a water right is usually based on historic use.

PCCRC initially claimed a service area for its rights that included 377,813.5 acres. Curry objected and filed a motion for summary judgment on August 25, 2008 asking the Court to limit PCCRC's place of use to lands upon which water was beneficially used prior to July 1, 1973. On November 25, 2008, the Water Master issued an order removing 377,813.5 acres from the description of the place of use, but declining to rule on whether the service area concept was applicable to PCCRC's rights. This left PCCRC's claim for a service area unresolved.

At trial, PCCRC proposed a service area based on lands set aside under the Carey Act and identified in various PCCRC notices of appropriation. Ex. P-5, Attachment 1. Curry opposed use of a service area, and argued PCCRC's place of use should be limited to acreage listed on PCCRC's share certificates as of July 1, 1973. Curry's Proposed Findings of Fact and Conclusions of Law, Proposed Finding 38, p. 18.

The Water Master concluded PCCRC was a private corporation, and therefore ineligible to claim a service area. Master's Report, Finding of Fact 167C, p. 63.

The Master found that the place of use for PCCRC water rights should be lands identified in shareholder certificates in existence on July 1, 1973. Master's Report, Finding of Fact 175, p. 66. The Master concluded: "PCCRC should be required to supplement the record with a list of the appurtenant acres listed on PCCRC's share certificates as of July 1, 1973. Curry should be permitted a reasonable time to review and respond to the list." Master's Report, Finding of Fact 179, p. 67.

Finally, the Master concluded that any changes in location of water use outside the lands described on the 1973 share certificates would require a change in use authorization from the Department of Natural Resources and Conservation (DNRC). Master's Report, Findings of Fact 180 & 184, p. 69.

Although the Master rejected use of a service area for a private corporation, he acknowledged that basing place of use on legal descriptions in share certificates would result in a "place of use ... larger than the number of historically irrigated acres..." because the legal descriptions in share certificates often allowed for more irrigated acres than the number of shares issued. Master's Report, Findings of Fact 179 & 180, pp. 67-68. As an example, a share certificate for forty shares might describe an eighty acre parcel when only forty acres, or one acre per share, could be irrigated. Master's Report, Finding of Fact 180, p. 68.

Based on records of past irrigation, the Master found that the maximum number of acres irrigated by PCCRC was 56,556 acres plus 517 acres for the city of Conrad for a total of 57,073 acres. Master's Report, Finding of Fact 167G, p. 64. In Finding of Fact 176, the Master recommended that a remark be added to each PCCRC right as follows:

A MAXIMUM OF 57,073 ACRES MAY BE IRRIGATED DURING ANY IRRIGATION SEASON WITHIN THE PLACE OF USE DESCRIBED UNDER THIS RIGHT.

Master's Report, p. 68.

The Master's decision amounted to creation of a service area based on legal descriptions in share certificates dated July 1, 1973, with use inside that service area limited to 57,073 acres in any given year. No subsequent hearing occurred to identify lands described in share certificates as of July 1, 1973. As a consequence, the place of use for PCCRC's rights remains undefined. The conflict between the Master's determination that PCCRC could not claim a service area because it was a private corporation and the Master's recognition of a service area based on share certificates was also unresolved.

PCCRC objected to the Master's findings. It argued that its status as a private corporation did not preclude it from claiming a service area, and further objected to use of share certificates as a mechanism for determining place of use. PCCRC also objected to the Master's conclusion that change in use approvals were required from DNRC for transfers of water or shares to lands not listed on share certificates as of July 1, 1973.

Curry supported the Water Master's position. Considerable briefing ensued.

2. Appurtenance

The general rule in Montana is that water becomes appurtenant to the land upon which it is used. *Smith v. Denniff*, 24 Mont. 20, 23-24, 60 P. 398, 399 (1900); *Leggat v. Carroll*, 30 Mont. 384, 387, 76 P. 805, 807 (1904). This rule most often applies where the title to land and water are unified in the same owner. A common example is when an appropriator develops a water right for use on his property. Once the appropriator applies the water to his land, it becomes appurtenant to that land.

A water right perfected in this manner remains appurtenant to the land unless it is reserved by the seller when the land is sold, or severed and moved to another property prior to sale. *Hays v. Buzard*, 31 Mont. 74, 82, 77 P. 423, 426 (1904); Shields River Basin, 2000 ML 5999, 2000 Mont. Water LEXIS 1, *29-*30. Without a reservation, it is deemed appurtenant to the land sold. *Yellowstone Valley Co. v. Associated Mortgage Investors, Inc.*, 88 Mont. 73, 84, 290 P. 255, 258-59 (1930); *MacLay v. Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 P.2d 286, 290 (1931).

Water can also be appurtenant to land which does not belong to the owner of the water right. *St. Onge v. Blakely*, 76 Mont. 1, 18, 245 P. 532, 537 (1926); *Hays*, 31 Mont. at 82, 77 P. at 425-26.

The issue of appurtenance becomes complicated when the water right is held by an entity such as an irrigation district, state water project, or corporation. Although these entities may own water rights, they often do not own land on which the water rights are used. With a corporation, the relationship between the water right owner/entity and the water user/landowner is governed by bylaws, issuance of shares of stock, or water delivery contracts.

The nuances of these relationships are illustrated by the following passage:

Shares of stock in a mutual company may or may not be attached to specific tracts of land. Attachment to land may result either by way of “location” on specific tracts – resulting from contract between company and shareholders evidenced by articles of incorporation, bylaws, and stock certificates – or by representing the right to receive water considered appurtenant to such tracts. If not attached to specific tracts, they are known as “floating” shares. These floating shares may pass freely from one holder to another and may be used for irrigation of any tract that can be served from the irrigation system as normally operated. ...

...

If changes of place of use of water are permitted by law or by company policy, the water right in the stock which it represents may be transferred to other land.

On the other hand, the water rights may be appurtenant to the general service area of the company by reason of its appropriating water for the area as a whole, and the company may not take action in “locating” its shares on specific parcels. In such case, within the limits of transferability set by operational needs, any farmer may transfer his floating stock and the right to water service to any other part of the service area. The only attachment to land that is involved is a temporary one”

Hutchins, Wells A., *Water Rights in the Nineteen Western States*, Vol. 1, pp. 478-479, USDA Misc. Publication 1206 (1971).

Whether a water right evidenced by shares of stock is appurtenant to land is a question of fact. *Yellowstone Valley*, 88 Mont. at 83-84, 290 P. at 258. *Yellowstone Valley* addressed transfer of shares of stock that were not reserved by the seller in a real estate transaction. It did not address whether a corporation could claim a service area, or whether shares issued by a corporation could be moved within a service area.

By statute, the Water Court is obligated to describe the elements of a water right. One of the elements of a water right is its place of use. Section 85-2-234(6)(e), MCA provides a final decree of this Court must state “the place of use and a description of the land, *if any*, to which the right is appurtenant” (emphasis added). Use of the qualifier, *if any*, indicates that a water right may not always have lands to which it is appurtenant.

3. Application of a Service Area in Montana

The Water Court has recognized service areas for water rights based on boundaries that included lands that were potentially irrigable, but not historically irrigated. In case 76HE-166, the Water Court defined a service area for the Painted Rocks Reservoir Project owned by the State of Montana and administered by the Montana DNRC.

State water projects were created for the sale of water to water users. Section 89-101, *et. seq.*, RCM (1947) (repealed). Painted Rocks was built by the State of Montana using federal funds allocated for development of such projects. The purpose of these projects, many of which were built in the Depression era, was to stimulate the economy, provide jobs, and promote the irrigation of arid lands.

The Painted Rocks Project consisted of a reservoir that impounded water for sale to users throughout the Bitterroot River Basin. The State of Montana argued that the place of use for the project was the dam, but that water could be used along the length of the West Bitterroot and Bitterroot Rivers from the Painted Rocks Dam to the confluence of the Clark Fork River.

The Water Court agreed and recognized a service area encompassing a large portion of the Bitterroot River Basin. Master's Report, Case 76HE-166, filed March 9, 2000. Only a fraction of the lands within this service area actually received project water. Painted Rocks is not the only Montana case recognizing that a water right can be perfected without application to a specified place of use.

The seminal case on this issue is *Bailey v. Tintinger*. 45 Mont. 154, 122 P. 575 (1912). In *Bailey*, the appropriators based their water right on what is commonly referred to as the 1885 statute, codified at § 89-801, RCM (1947). Pursuant to this statute, they posted a notice of appropriation and built a diversion and ditch system for irrigation of their own property and for sale of water to others. The water they intended to sell was for use on land they did not own, including lands then in the public domain.

The original appropriators in *Bailey* sold their interest to a corporation called the Glass-Lindsay Land Company. As of 1910, the Glass-Lindsay Land Company had irrigated 1,000 acres from its canal, "and there are substantially 3,450 acres more arid

land which can be irrigated from it.” *Bailey*, 45 Mont. at 161, 122 P. at 577. The water right claimed by Glass-Lindsay covered lands it had irrigated, as well as lands it planned to irrigate in the future.

Glass-Lindsay was a corporation formed under the Carey Act.² Glass-Lindsay claimed its water right was perfected not by application to beneficial use, as was normally the case under the common law, but upon completion of its irrigation system. It also asserted a priority date that related back to the date it posted a notice of appropriation, not the date the project was completed.

In considering this argument, the Montana Supreme Court reaffirmed several important rules applicable to water rights. First, they emphasized that ownership of land was not necessary to appropriate an irrigation water right. Second, they noted that “the use to which the water is to be applied need not be immediate, but may be prospective or contemplated.” *Bailey*, 45 Mont. at 175, 122 P. at 528 (internal citations omitted).

The Court also focused on prospective appropriations by corporations.

To deny the right of a public service corporation to make an appropriation independently of its present or future customers, and to have a definite time fixed at which its right attaches, would be to discourage the formation of such corporations and greatly retard the reclamation of arid lands in localities where the magnitude of the undertaking is too great for individual enterprise, if, indeed, it would not defeat the object and purpose of the United States in its great reclamation projects, for the United States must proceed in making appropriations of water ... as a corporation or individual. ...

It is clearly the public policy of this state to encourage these public service corporations in their irrigation enterprises, and the courts should be reluctant to reach a conclusion which would militate against that policy.

Bailey, 45 Mont. at 177, 122 P. at 583 (internal citations omitted).

² The *Bailey v. Tintinger* case does not identify the Glass-Lindsay corporation as having been formed for irrigation of Carey Act lands. However, in a later case discussing *Bailey*, the Montana Supreme Court wrote: “... the water decreed to Glass-Lindsay Land Co. was alleged to be for the purpose of reclaiming arid lands under the Carey Land Act and other private lands.” *Bruffey v. Big Timber Creek Canal Co.*, 137 Mont. 339, 341, 351 P.2d 606, 607 (1960).

Recognition of a water right for prospective use necessarily meant that it could not be defined based on past irrigation. Instead, such a right was defined based on what the appropriator intended to irrigate.

Having recognized that water rights could be developed for future use, the *Bailey* Court imposed limits on such rights. To relate the priority date back to the notice of appropriation, the claimant had to develop their irrigation system with reasonable diligence. And, although the water right was perfected upon completion of the system, it could be lost by abandonment if not placed to beneficial use within a reasonable time. *Bailey*, 45 Mont. at 178, 122 P. at 583.

Bailey and other cases decided by the Water Court and the Montana Supreme Court establish that places of use for water rights developed for eventual sale can be defined by service areas as opposed to lands upon which water has been actually used. These service areas are the equivalent of the places of use commonly employed to define traditional irrigation rights in Montana, except that they encompass the lands within project boundaries upon which water was intended to be used, not exclusively lands that were actually irrigated. Use of a service area is a practical way to define a place of use for a water right that has been developed for sale to others.

To determine whether a service area can be used to define a place of use for the claims made by PCCRC, this Court must examine the law specifically applicable to the project, the history of the project, the intent of the water right appropriators for the project, and the relationship between PCCRC and its shareholders.

a. The Legal Framework for Carey Act Projects

The Valier Project now operated and owned by PCCRC was a Carey Act project. Carey Act projects were creatures of both federal and state statutes. They were part of broader efforts by the federal government to promote settlement and irrigation of public lands in the West.

The Carey Act was passed in 1894 to aid western states “in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers” 43 U.S.C. § 641. The Act provided a grant of up to one million acres

of federal land to each western state “free of cost” if the state could cause such lands to be “irrigated, reclaimed, occupied and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers.” 43 U.S.C. § 641.

Before the state could obtain title to any federal land, it was required to “file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation ... and shall also show the source of the water to be used for irrigation” 43 U.S.C. § 641.

The Act did not require states to do the work needed to prepare lands for irrigation, or that such work be financed by the states. Instead, the Act authorized the states “to make all necessary contracts to cause the lands to be reclaimed.” 43 U.S.C. § 641.

In 1903, Montana enacted legislation to implement reclamation of public lands under the Carey Act. Section 81-2001, *et seq.*, RCM (1903). The legislation provided for creation of a Carey Land Act Board consisting of the Governor, the Secretary of State and the Attorney General. Section 81-2003, RCM (1903).

Montana’s Carey Land Act Board had the power to submit proposals to the United States for irrigation of public lands and to enter contracts with private parties to develop those lands. Sections 81-2101 through 81-2102, RCM (1905).

To obtain land from the United States, the Board solicited proposals from persons or corporations “desiring to construct ditches, canals, or other irrigation works to reclaim land under the provisions of this act” Section 81-2105, R.C.M. (1905). The person making such a proposal was required to:

state the source of an available and adequate water supply, the location and dimensions of the proposed works, the estimated cost thereof and that perpetual water rights inseparable from the land reclaimed and to embrace a proportionate interest in the canal or other irrigation works will be sold or leased to settlers on the land to be reclaimed, and be accompanied by a map of the lands to be reclaimed, and the route of the ditches or canals to be constructed.

Section 81-2105, RCM (1905).

The builder of the project had the obligation to operate and maintain it until sale to settlers of water rights appurtenant to ninety percent of the lands to be reclaimed. At that time, the company building the project could turn it over to the settlers who would thereafter have the right to maintain and operate it. Section 81-2111, RCM (1905).

Once a project had been approved by the Carey Land Act Board, prospective settlers could submit an application to the state for a patent for up to 160 acres. The application had to be accompanied by a contract "for a perpetual water right" with the company authorized by the Board to furnish the project with water. Section 81-2115, RCM (1905). That proof was made in the form of shares of stock issued by the development corporation.

Implementation of the federal government's plan for settlement and irrigation of lands under the Carey Land Act required the coordinated actions of five parties. These parties were the United States, the State of Montana, the private development companies which built the projects, the settlers, and the corporations formed for the settlers to assume ownership and operation of the projects.

Each party played a separate role. The United States created the statutory framework and furnished land to the states. The United States' objectives were to benefit settlers, reclaim arid lands through irrigation, and promote economic development of the western states.

The State of Montana applied to the United States for grants of land to be irrigated under proposed projects. Rather than finance and build the projects itself, the State solicited proposals from private entities. The State, through the State Engineer's Office and the Carey Land Act Board, reviewed those proposals. If the proposals passed muster, the State entered contracts for construction of the projects. Once a contract was entered, it was overseen and monitored by the State Engineer's Office and the Carey Land Act Board.

The State controlled the scope of the project through its contracts with the developer. The State also oversaw issuance of patents to the settlers for the lands it received from the United States. Finally, the State oversaw and approved the transfer of

project assets and water rights to the settler's corporation, in this case, PCCRC. As acknowledged by our Supreme Court in *Bailey*, the objective of the State of Montana was "to encourage these public service corporations in their irrigation enterprises," and in so doing, to benefit its citizens and promote development. *Bailey*, 45 Mont. at 177, 122 P. at 583.

Under the State of Montana's supervision, private development companies built the projects and secured the water rights for their operation. In return, these companies received the exclusive right to sell shares of stock for irrigation of Carey Act lands. The objective of these companies was profit. For the companies to be profitable, revenues from sales of shares for water had to exceed project costs.

After purchasing shares of stock, the settlers obtained patents from the State for the land they wanted to irrigate. A patent could not be obtained without proof of share ownership. The settlers' objective was to generate enough income to pay for their land and water and have enough left over for a living.

Upon sale of water rights for ninety percent of the project, all of the project water rights and infrastructure was turned over to a company comprised of the settlers, who owned and operated the project thereafter. These companies were operated for the communal benefit of their settlers/shareholders, who paid annual operating and maintenance expenses in return for a dividend in the form of water. The amount of operating and maintenance costs paid, and water received, was determined *pro rata* based on share ownership.

PCCRC is a successor to the company formed for ownership and operation of the project by the settlers. Its members/shareholders are successors to the original settlers.

**b. The History of the Project and the Intent of the Appropriators
Regarding Service Area and Acres Irrigated**

The PCCRC project began as a private irrigation company formed by the Conrad brothers, who irrigated several thousand acres of land near the present town of Valier. Their initial enterprise was called the Conrad Investment Company, or CIC. CIC and its numerous successors are hereafter referred to as the Company.

In addition to the Company, the Conrads also formed another private irrigation enterprise, the Pondera Canal Company, which sold shares of stock to settlers for irrigation of about 13,000 acres near Conrad. This land was ultimately incorporated into the PCCRC project, and was irrigated using the PCCRC system. Thus, the project encompassed both Carey Act lands and private lands settled outside the Carey Act.

On September 19, 1908, the Company filed a proposal with Montana's Carey Land Board for the Valier Project. Ex. C-68, p. 1. On July 7, 1909, the United States and the State of Montana entered a contract setting aside certain federal lands as Carey Act lands for eventual grant to the State of Montana. Ex. C-68, p. 1.

Montana's Carey Land Board and PCCRC's predecessor entered into the first contract on July 23, 1909. This contract obligated the Company to procure settlement of Carey Act lands; to build an extensive network of dams, reservoirs, and canals; to deliver water to those lands; to obtain water rights for the project; to sell shares of stock for water to the settlers of those lands; and to provide for transfer of the management and ownership of the irrigation project to the settlers. Ex. C-68, p. 2.

Under its contract with the State of Montana, the Company received the exclusive right to sell water from the project. The State agreed not to patent any land until proof of a contract to purchase shares had been provided by the prospective settler.

The shares of water purchased by the settler were intended "for the irrigation of the lands applied for, and to become inseparably appurtenant to said lands" Ex. C-68, p. 8. The cost of the shares far exceeded the cost of the land.³

The shares purchased by early settlers did not give them a prior right to receive water over later arrivals. Instead, each settler was "entitled to his proportionate interest only in the right to the use of water from said system, *which shall be constructed for the benefit of the entire tract of land to be irrigated therefrom.*" Ex. C-68, p. 8 (emphasis added). This provision had several important meanings.

³ The July 23, 1909 agreement (first contract) had a price of fifty cents per acre for land. Ex. C-68, p. 8. The price for shares could not exceed forty dollars per share. Ex. C-68, p. 10.

The first part established that the settler did not receive an individual water right for their land, or a priority date for use of their water that coincided with their first date of use. Instead, their share of stock represented a right to receive water held in common with other settlers, regardless of the date their shares were purchased or their lands first irrigated.

The second and italicized part of the provision referenced a service area that encompassed the project as a whole rather than individual parcels of land within it. In keeping with the concept of a service area, the Company had the authority to sell shares for use on non-Carey Act lands “situated under and susceptible of irrigation from said system.” Ex. C-68, p. 10.

The Company formed to issue shares of stock and eventually take over ownership of the project for the benefit of the settlers was the Teton Cooperative Canal and Reservoir Company (TCCRC). TCCRC became PCCRC when Teton County was split into Teton, Pondera, Glacier and Toole Counties.

TCCRC initially had 160,000 shares of stock “intended to represent one (1) share for each acre of land to be irrigated from said system.” Ex. C-68, p. 11. The irrigation of 160,000 acres of land proved to be ambitious, and the amount of acreage proposed for irrigation was reduced as the project evolved.

Shares had no voting power until they were issued to a purchaser “and applied to and made appurtenant to the land” Ex. C-68, p. 12. Sale of water to a purchaser was intended to be “a dedication of the water to the land to which the same is applied.” Ex. C-68, p. 18.

On September 24, 1912, the State of Montana entered a second contract with the Valier-Montana Land and Water Company, successor to CIC. The second contract also referenced the concept of delivering water to a service area encompassing all lands under the system. As an example, Title 1 of the agreement, PURPOSES OF THE CONTRACT, stated the agreement was intended to supply water to “lands situated under said irrigation works, or any extension thereof, which are susceptible of irrigation

therefrom.” Ex. C-72, p. 3. This language reinforced the concept of a service area for project water rights.

The agreement again authorized sale of shares of water to other than Carey Act lands “situated under, and susceptible of irrigation from, said system, or any extension thereof.” Ex. C-72, p. 13. As before, the chairman of the Carey Land Act Board signed the agreement on behalf of the State of Montana.

On May 7, 1913, another agreement was entered which focused on water availability and lands to be irrigated within the project. Ex. P-60. The agreement stated that the combined storage capacity of Lake Francis and Birch Creek Reservoir, together with direct flow from Birch Creek and other sources was “estimated to be sufficient” to deliver a fixed quantity of water “during each and every irrigation season, *for each acre of irrigable land under the Company’s system.*” Ex. P-60, p. 2 (emphasis added). The agreement further provided that if insufficient water was available “for each acre of land to be served from said system,” the Company would agree to “promptly relinquish any and all parcels of land for which said State Engineer finds no sufficient water supply available.” Ex. P-60, p. 3. This provision gave the State Engineer’s office the ability to regulate the lands to which project water could be applied.

Like many federal and state efforts to promote reclamation of arid western lands, the Valier Project did not evolve as rapidly as envisioned. The Company went bankrupt, as did several of its successors. Settlers did not flock to Carey Act lands, and many who did failed.

Numerous amendments to contracts were entered between the State, the Company, and its successors as it became apparent that the scope of the project and the timelines for its development were too ambitious. In all, there were at least eight agreements between the State of Montana and the Company between approximately 1909 and 1930.

The original goal of irrigating 160,000 acres was reduced over time. Exhibits P-52 through P-54. By 1914, the number of acres within project boundaries was 199,324, but the irrigable acreage within that area had been reduced to 115,100.82 acres. Ex. P-28, p. 8.

The State Engineer for Montana, now the DNRC, made regular reports to the Carey Land Act Board regarding the project. The role of the State Engineer was to serve as the eyes and ears of the Board, and to report to the Board regarding the project's development and the Company's adherence to its contractual obligations with the State.

The annual report of the Montana State Engineer for 1921-1922 states: "because of the limited water supply we have had to limit the acreage for which water may be sold to 80,000 acres, although considerably more of the land is irrigable. Water stock has been sold for over 75,000 acres." Ex. C-72, Attachment A-5, p. 16.

A similar report dated 1930 also identified approximately 80,000 acres of irrigable land associated with the project. Ex. C-72, Attachment A-6. Other water supply studies evaluated the amount of water available to the project and concluded there was only sufficient water to irrigate up to 80,000 acres. Ex. P-56, p. 10.

Review of these reports indicates the infrastructure for the project was largely complete by the early 1920s. A map of the project dated 1921 depicts this system. Ex. P-83. Despite financial difficulties, the 1921 project map showed a system capable of irrigating a large area within Pondera County. Witness testimony at trial indicated the system has not changed materially since 1921. Vern Stokes Test., Day 4, 10:27:32-10:28:05.

The State Engineer performed a final evaluation in 1948 as part of the turnover of the project to the settlers' operating company, PCCRC. The State Engineer concluded there was enough water for only 72,000 acres. Ex. P-37, p. 39. The report also noted that

the irrigation right being represented by the same stock in the Pondera County Canal and Reservoir Company for all lands, it is considered that *the same provisions must apply to all lands as the project must be considered as a whole*. Therefore, all canals and structures are considered as under the contract alike, whether serving Carey lands or other lands to which is applied stock in the Pondera County Canal and Reservoir Company.

Ex. C-72, Attachment A-6 (emphasis added).

This language indicates the State Engineer looked at the entirety of the lands under the project as capable of being serviced by the water rights developed for the project.

Within that area, the State Engineer decided a maximum of 72,000 acres of land was irrigable with available water supplies.

In 1948, the Company applied for transfer of assets to PCCRC. This request was approved by the Carey Land Act Board on September 16, 1953. Ex. C-73.

c. Appurtenance of Water to Land and the Relationship Between the Company and the Settlers/Shareholders

The bylaws of PCCRC address the issue of appurtenancy. Article 5, Section 2 of the bylaws reads as follows:

The records of this Company, and every certificate of stock under which water shall be delivered for the irrigation of land, shall contain a description of the land entitled to be irrigated thereunder, and, when said description is inserted in said Certificate, the shares and water rights evidenced thereby shall become and forever be inseparably appurtenant to such lands, subject, nevertheless, to the power of the Board of Directors of this corporation, for good cause shown, at the request and with the consent of the owner thereof, to make said certificate of stock appurtenant to other land which is so located that the Irrigation System as then and now constructed can readily and efficiently serve the same.

Ex. C-74, pp. 9-10 (emphasis added).

The purpose of the bylaws and of other documents referencing appurtenance of shares to particular parcels of land, was for the protection of both the settlers and the Company. The bylaws affirmed the settlers' entitlement to receive water for their property and precluded the arbitrary severance of shares from the settlers' land. The italicized portion of the bylaws also protected the settlers' investment by enabling them to sever shares of stock from their property, and sell them to other landowners within the boundaries of the PCCRC irrigation system.

The appurtenance language protected the Company by preventing shares from being sold separately from the land until the settler had paid for the shares. This protected the Company's lien on the shares by keeping them affixed to the land.

The provisions in the bylaws pertaining to appurtenance and transfer of shares were intended to provide the Company and the settlers with protections up to the point

the settler had paid for his land and water. After that, the bylaws were intended to provide the Company and the settlers with the flexibility to move water within the general service area of the project, *provided* both parties agreed the move was in their mutual interest. According to the testimony of witnesses at trial, it was common for shares to be traded and water to be moved between landowners within PCCRC project boundaries.

In 1995, counsel for PCCRC asked the DNRC whether the practice of moving shares within project boundaries was permissible under Montana law. Under provisions of the Water Use Act effective on July 1, 1973, the DNRC became responsible for reviewing change applications to move water rights from one place of use to another. The DNRC was also the successor to the State Engineer's Office, which had, for over forty years, overseen the development and final approval of the project for Montana's Carey Land Act Board.

Chief Legal Counsel Don McIntyre responded to PCCRC's request for clarification of this issue. Mr. McIntyre framed the situation as follows:

Throughout its operational history, predating enactment of the Water Use Act, shareholders have rotated water use from acreage to acreage and throughout the general and undefined boundaries of the project.

Ex. P-48, p. 1.

Mr. McIntyre wrote that the DNRC recognized the general rule "that water delivered under contract to defined project lands did not require a change approval where contracts were transferred within the project area." Ex. P-48, p. 1. He noted that this rule was applicable to both public and private water companies and associations. He concluded that "[a]s long as the area where water contracts are being transferred are arguably within the historical delivery system, then the above rule applies." Ex. P-48, p. 2.

Mr. McIntyre's opinion was consistent with the language of PCCRC's bylaws, which authorized movement of shares from one parcel of land to another upon request of the shareholder/owner and approval of the Board of Directors. It was also consistent with

the State Engineer's earlier position that the water rights for the project were for use on all the lands within the project area, and with decisions by this Court and the Montana Supreme Court recognizing the creation of service areas.

4. The Master's Findings on Service Area

The Master's Report contains numerous Findings regarding the nature of PCCRC and whether it was entitled to claim a service area. Master's Report, Finding of Fact 32 and Findings of Fact 166-180, p. 12 and pp. 63-68, respectively.

The Master concluded that because PCCRC was a private corporation rather than an irrigation district or a state water project, its "property rights and water rights are no different than those of any other privately owned entity." Master's Report, Finding of Fact 167F, p. 64.

PCCRC objected to the Master's Findings and argued that PCCRC and its predecessors were public service corporations within the meaning of *Bailey v. Tintinger*, and that the place of use for PCCRC's water rights should be lands capable of being serviced by PCCRC's delivery system.

The Master cited *McDonald v. State*, 220 Mont. 519, 722 P.2d 598 (1986) and *Schwend v. Jones*, 163 Mont. 41, 515 P.2d 89 (1973) for "authority that appurtenance does not distinguish between water represented by shares of stock and other water rights." Master's Report, Finding of Fact 167J, p. 65.

The citation to *McDonald* was error, as nothing in that case pertains to shares of stock or appurtenance. *Schwend* stands for the same unremarkable rule as *Yellowstone Valley*, namely that the transfer of a thing transfers all its incidents unless they are reserved. See *Yellowstone Valley Co. v. Assoc. Mortgage Inv., Inc.*, 88 Mont. 73, 81, 290 P. 255, 257 (1930). In both *Schwend* and *Yellowstone Valley*, this meant that water rights evidenced by shares of stock passed with a conveyance of the land upon which they were used, if not reserved by the seller.

Both cases recognized that the owner of shares of stock in an irrigation company could "transfer the water right by mere assignment of the stock to one person and may

convey the land by deed to another person.” *Yellowstone Valley*, 88 Mont. at 84, 290 P. at 259. *See also Schwend*, 163 Mont. at 45, 515 P.2d at 91.

The Master also cited *Billings Bench Water Association v. Yellowstone County* for the proposition that PCCRC’s property, including its water rights, are no different than any other privately owned entity. 70 Mont. 401, 410-11, 225 P. 996, 999 (1924).

Billings Bench involved a Carey Act project. A settler’s corporation, Billings Bench Water Association, was formed to assume ownership of the project and oversee its operation. In 1919, the Yellowstone County Commissioners created a special improvement district to improve a public road. The boundaries of the special improvement district included property owned by Billings Bench Water Association. Billings Bench argued that its property was wrongfully included within the boundaries of the special improvement district.

The *Billings Bench* Court held:

Plaintiff’s property is no different than other privately owned property; the plaintiff being a corporation organized under the laws of the state of Montana for the purpose of acquiring and perpetually maintaining the irrigation system for the benefit of landowners who are stockholders therein.

Billings Bench, 70 Mont. at 410-11, 225 P. at 999.

Billings Bench did not involve water rights; it involved assessments of property for a special improvement district. The Master’s interpretation of *Billings Bench* stretches the holding of that case too far and conflicts with other cases such as *Bailey v. Tintinger*.

Billings Bench does not preclude perfection of a water right by a Carey Act corporation in the manner prescribed in *Bailey*, nor does it preclude recognition of a general service area for a water right.

5. Whether PCCRC is a Public Service Corporation

The question is whether PCCRC is a public service corporation within the meaning of *Bailey v. Tintinger*. If so, then PCCRC and its predecessor, the Company, were eligible to perfect a water right upon completion of their irrigation system. If actual

irrigation did not occur before that water right was perfected, then the only way to define a place of use in the absence of such irrigation would be through use of a general service area.

As discussed above, the Carey Act was a federal initiative to facilitate settlement of the western states and to promote irrigation and agriculture. PCCRC and its predecessor, the Company, would not have existed except for the Carey Act. The actions of the Company were shaped by federal and state law, as well as by contracts between the Company and the State of Montana. While the motive of the Company may have been profit, it was an instrument used by federal and state government to implement a policy of western settlement.

PCCRC succeeded the Company as owner of project assets, but unlike the Company, its reason for existence was operation of the project for the benefit of the settlers. And, while PCCRC is also a private entity, it is a not-for-profit operation. It assesses its members for operation and maintenance expenses. In exchange for payment of these expenses, the members receive water in proportion to the shares of stock they own. PCCRC can be described as an irrigation cooperative.

Curry asserts that an entity can only qualify as a public service corporation if it meets the definition of a public utility. Section 69-3-101(2)(a), MCA states that public utilities do not include "privately owned and operated water, sewer, or water and sewer systems that do not serve the public." Curry contends that because PCCRC does not serve the public, it is not a public utility, and therefore not a public service corporation within the meaning of *Bailey*.

The purpose of defining a public utility in § 69-3-101(2)(a), MCA, is to identify which entities fall within the regulatory powers of the Public Service Commission (PSC). Determining whether an entity can be regulated by the PSC has nothing to do with deciding whether its water right claims are valid, and if so what their place of use or service area should be.

Bailey did not reference or discuss public utilities. Instead, the discussion in *Bailey* was about corporations "organized for the purpose of selling or renting water to

settlers to irrigate arid lands" *Bailey*, 45 Mont. at 175, 122 P. at 582. Specifically at issue in *Bailey* were the water rights claimed by a Carey Land Act corporation like PCCRC. The *Bailey* Court used the term public service corporation, not the term public utility, to refer to these corporations. "The appellant here is a public service corporation" *Bailey*, 45 Mont. at 178, 122 P. at 583 (internal citations omitted).

Curry did not cite case law requiring that PCCRC first meet the statutory definition of a public utility before it could qualify as a public service corporation.

Both versions of Montana's Constitution recognize that development of water for sale is a public use.⁴ A corporation engaged in a constitutionally-recognized public use of water should not be precluded from being recognized as a public service corporation.

The Carey Land Act corporations that built irrigation projects often owned little or no land, and often did not control where their water rights would be used. Although vast tracts of land were set aside by the federal government for settlement, the decision about when and where water would be used was made by the settlers.

According to *Bailey*, an entity that had built its project "and is ready and offers to supply water to settlers upon demand ..." was entitled to have its water rights recognized because "it has performed every act which it can perform. It cannot use the water itself, for it has no land or other means of use. Any further acts must be performed by its customers who are to be the users." *Bailey*, 45 Mont. at 176, 122 P. at 582.

This observation became more important when federal land was involved.

If the land sought to be reclaimed should be government land, the corporation would be confronted with the additional difficulty that it cannot compel people to settle upon such lands, and its appropriation would depend on the tide of immigration and the wishes of the settlers when they do come in, if use is necessary to complete the appropriation.

⁴ Article III, Section 15 of Montana's first Constitution provided: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution or other beneficial use ... shall be held to be a public use."

Article IX, Section 3(2) of Montana's current Constitution provides: "The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use ... shall be held to be a public use."

Bailey, 45 Mont. at 176, 122 P. at 583. The *Bailey* Court rejected the notion that water rights developed for sale needed to be used for irrigation before they could be recognized:

[S]uch a result is a denial of the right of the corporation to make an appropriation, a result which cannot be reached in this state, where our Constitution and laws specifically recognize the right of a corporation to make an appropriation, unaided by the acts of third parties.

Bailey, 45 Mont. at 176, 122 P. at 582.

The Master's conclusion that a private corporation like PCCRC did not fit the definition of a public service corporation, and therefore could not qualify for a general service area, is directly contrary to *Bailey* and to constitutional provisions recognizing development of water for sale as a public use. It is also runs contrary to the unique statutory framework of Carey Act projects, the federal and state policy of using public service corporations to settle and irrigate public land, and the cooperative nature of the settler corporations, which own and operate those projects.

Because PCCRC and its predecessors were Carey Land Act corporations, and because the Montana Supreme Court has already concluded that such organizations are public service corporations, this Court concludes that PCCRC is a public service corporation. The Master's determination to the contrary was legal error.

This means that some of PCCRC's water right claims were perfected upon project completion, without application of water to specific tracts of land. Because these rights were developed for future use on lands within the area covered by the project, it also means that such rights may rely upon a general service area for a place of use, rather than a specific tract of land where irrigation might later have occurred. This rule also applies to water rights acquired for use within the project before July 1, 1973.

**a. Whether Water Rights Should be Defined Based on Usage
Occurring on July 1, 1973**

The Master found that PCCRC did not "present any evidence of a place of use based upon the acreage actually irrigated as of July 1, 1973." Master's Report, Finding of Fact 175, p. 66. Based on this Finding, the Master concluded: "The appurtenant acres

described in the share certificates as of July 1, 1973 are PCCRC's place of use." Master's Report, Finding of Fact 175, p. 66. No case law was cited to support use of share certificates to determine place of use for a Carey Act project, and no law was cited to support July 1, 1973 as the date a snapshot of PCCRC's water rights should be taken.

The Master's recommendation conflicts with the rule in *Bailey* that rights developed for future sale have their place of use determined by the lands irrigable under the system when it was completed, not by lands described in share certificates issued decades later. Acceptance of the Master's recommendation would perpetuate a legal error. PCCRC is entitled to claim a service area for its rights.

Likewise, this Court is not required to adjudicate water rights exactly as they existed on July 1, 1973. The Water Court has jurisdiction over "all matters relating to the determination of existing water rights within the boundaries of the state of Montana." Section 3-7-224(2), MCA. An existing water 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." Section 85-2-102(12), MCA. This definition requires application of pre-July 1, 1973 substantive law, but it does not require the Water Court to define rights exactly as they were being used on July 1, 1973.

Most rights addressed by the Water Court are defined according to events that occurred before July 1, 1973. The Montana Supreme Court has also recognized that the elements of water rights with pre-July 1, 1973 priority dates can be based on events occurring after July 1, 1973. *Montana DNRC v. Intake Water Co.*, 171 Mont. 416, 558 P.2d 1110 (1976). Finally, Montana statutes recognize the ability of the Water Court to rely on events occurring after 1973 to define or even terminate water right claims. Section 85-2-227(2), MCA.

July 1, 1973 is an important date for water rights because the Water Use Act established that the DNRC has jurisdiction over permit and change applications filed after that date. This milestone does not mean that the Water Court can ignore substantive law relied on by water users for more than a century in favor of defining claims only as they existed on the day the Water Use Act became effective. Historical use can and does

occur both before and after 1973, and the Water Court has the ability to look at evidence of that use in defining existing rights.

The Water Court's obligation to apply substantive law in existence before 1973 is consistent with the Montana Constitution, which states: "All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." Mont. Const. Art. IX, § 3(1).

C. The Issue of Change Applications

The Master also determined that irrigation of any land not identified in shares of stock in existence on July 1, 1973 would require a change proceeding before the DNRC. Master's Report, Findings of Fact 167G, 171, 184 and 185, pp. 64, 66 and 69-70.

This statement of law is incorrect. The DNRC has jurisdiction over changes to existing rights occurring after July 1, 1973. As the DNRC has already acknowledged, movement of water *within* PCCRC's service area is not a change of an existing right. It is nothing more than use of water within the place of use recognized by the Water Court. Use of a water right in conformance with a Water Court decree does not constitute a change of that right.

The DNRC recognized this distinction when its Chief Legal Counsel issued a letter to PCCRC acknowledging movement of water within its service area.

D. Place of Use

1. Determining the Correct Place of Use and the Maximum Amount of Irrigation Within the Place of Use

Intent is an important factor in determining the scope of a water right developed for future use. "[T]he claimant must have an intention to apply the water to a useful or beneficial purpose." *Bailey*, 45 Mont. at 178, 122 P. at 583.⁵ This is especially true

⁵ Other cases which reference intent include: *Sweetland v. Olsen*, 11 Mont. 27, 27 P. 339 (1891); *Power, et al. v. Switzer*, 21 Mont. 523, 55 P. 32 (1898); *Toohy v. Campbell*, 24 Mont. 13, 60 P. 396 (1900); *Miles v. Butte Electric & Power Co.*, 32 Mont. 56, 79 P.549 (1905); *Smith v. Duff*, 39 Mont. 382, 102 P.984 (1909); *Maynard v. Watkins*, 55 Mont. 54, 173 P. 551 (1918); *Wheat v. Cameron*, 64 Mont. 494, 210 P. 761 (1922); *Gilcrest, et al. v. Bowen*, 95 Mont. 44, 24 P.2d 141 (1933); *Peck v. Simon*, 101 Mont. 12, 52 P.2d 164 (1935); *Irion v. Hyde*, 107 Mont. 84, 81 P.2d 353 (1938); *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940); *Montana Dep't of Natural Resources & Conservation v. Intake*

when the water right has been perfected by completion of a distribution system, but use of water has not been fully developed.

When the beneficial use of the water covered by an appropriation is not immediate, but prospective or contemplated, the intention of the party becomes of prime importance, because the privilege of making contemplated beneficial use of water is accorded only so long as there is a *bona fide* intention to make the contemplated use. It is therefore necessary to ascertain the claimant's intent, and this is done from an examination of his acts and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof.

Hutchins, Wells, *The Montana Law of Water Rights*, USDA Bulletin 545, August, 1958, pp. 51-52 (internal citations omitted) (emphasis in original).

PCCRC identified a place of use for its claims encompassing a service area of over 377,000 acres. PCCRC was a public service corporation within the meaning of *Bailey* and was therefore entitled to claim water rights for prospective use.

This leaves two questions to be answered. First, what is the correct service area for PCCRC? Second, what is the maximum number of acres that can be irrigated within that service area?

To determine the correct service area, this Court must review the intent of the parties with control over the project.

The Company was not the sole influence on the evolution of the project. The State of Montana also played a role by reviewing water availability, project size, and by controlling the number of shares issued to settlers. The State exercised control over the project through its contracts with the project developer, and by its approval of the project's transfer to PCCRC.

The settlers also had an impact on the project and its water rights. By choosing their homesteads, they determined which land would be developed for irrigation. The

Water Co., 171 Mont. 416, 558 P.2d 1110 (1976); *Bagnell v. Lemery*, 202 Mont. 238, 657 P.2d 608 (1983); *Montana Power Co. v. Carey*, 211 Mont. 91, 685 P.2d 336 (1984); *In re Adjudication of Dearborn Drainage Area*, 234 Mont. 331, 766 P.2d 228 (1988); and *Montana v. Wyoming*, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (U.S. 2011).

location of that irrigation changed over time as settlers and their successors moved water from one location to another within project boundaries.

As the history of the project indicates, the initial intent was to irrigate large amounts of both Carey Act and private lands. The system needed for this purpose was completed by the 1920s. Completion of infrastructure within approximately fifteen years was evidence of sufficient diligence considering the project's size, complexity and remoteness.

Numerous documents reflect intent to irrigate lands within the project boundaries. As an example, the 1909 Articles of Incorporation of the Teton County Canal and Reservoir Company, after describing the project's water delivery system, state that the purpose of water used in connection with the project was: "to irrigate all lands lying in Teton County, Montana, below said canals and reservoirs, and to furnish water to occupants of said land" Ex. P-119, p. 4.

Similar intent is reflected in contracts between the State of Montana and the Company. The initial contract entered in 1909 indicates a desire to facilitate irrigation not only on Carey Act lands within the project boundaries, but also other lands. The Company was obligated to:

provide for the sale of shares or water rights in said irrigation system ... to persons filing upon or purchasing said "Carey Act Lands," and to the purchasers or owners of other lands situated under said irrigation works, or any extension thereof, which are susceptible of irrigation therefrom

Ex. P-57, p. 2.

Other provisions of the contract allowed the Company to sell shares of water "for the irrigation of other than 'Carey Act Lands,' situated under, and susceptible of irrigation from, said system, or any extension thereof, within the limits of its capacity... ." Ex. P-57, p. 10. The lands within the project boundaries included Carey Act lands, private lands, and lands owned by the Company. Ex. P-37, Water Resources Survey, Pondera County, June 1964, p. 38.

The project boundaries have remained essentially unchanged since project completion. And, aside from an assertion by Curry that land in the Birch Creek Flats should not be included in the service area, little other evidence exists that the original intent of the Company and the State with respect to service area has changed over time.

Because service areas are limited by project boundaries, the starting point for determination of service area should be identification of the lands irrigable under the project upon completion of construction. The exact number of acres initially claimed by PCCRC for its service area was not identified. Instead, PCCRC claimed land by section, township and range. The same method was used by the DNRC when it described the service area for the Painted Rocks Project.

PCCRC amended its service area on February 5, 2007. The amendment included legal descriptions for each parcel within the service area, but also included acreage figures for each parcel. The total acreage for all parcels was 377,813.5 acres. According to correspondence in the claim file, the DNRC was able to verify a service area of 377,255.5 acres during examination of PCCRC's claims. Letter from Lynn Hester to Julie A. Merritt, March 22, 2007, in Claim File 41M 161998-00.

The difference of 558 acres was apparently caused by PCCRC's use of 640 acres for each whole section claimed, rather than the actual number of acres in each section.

Prior to trial, Curry moved for summary judgment, asking that PCCRC be precluded from claiming a service area. In response, PCCRC argued in support of its claim for a service area, but did not oppose removal of the 377,813.5 acreage total from its claim, apparently because it was satisfied that the legal descriptions it provided were sufficient.

In his Order regarding service area, the Senior Water Master initially assigned to this case wrote:

There being no objection to the removal of the 377,813.5 acres from the description of the service area, the number shall be removed. The master has not determined whether or not the service area approach is correct in this case, or what the boundaries of the service area are, if the service area approach is correct.

Order on Curry's Motion For Partial Summary Judgment And To Compel Discovery, Case WC-2006-01, November 25, 2008.

At trial, Curry had the burden of proof regarding its objections to PCCRC's rights, including the burden on the service area issue. Section 85-2-233(4), MCA; *Memorandum Opinion*, Case 40G-2, p. 12.

This Court has determined there was no legal basis for the Master's conclusion that the service area for PCCRC's rights should be the lands identified on share certificates as of July 1, 1973. That means PCCRC remains entitled to the general service area it claimed in its February 5, 2007 claim amendments unless Curry was able to meet its burden of proof with evidence of a different service area. Curry did not produce such evidence and did not satisfy his burden of proof.

In the absence of such evidence, the service area remains the area claimed by PCCRC and refined by the DNRC during claim examination. The gross acreage figure for that service area is 377,255.5 acres based on the DNRC's review of PCCRC's claims. Use of water within that area is consistent with the intent of the original appropriators of project water rights and the State of Montana.

The Court recognizes that the service area is large relative to the amount of historic irrigation within the service area. It is possible that a smaller service area could have been defined with better evidence. Given that this proceeding is a certification action and not a final determination of the water rights at issue, and given that claims and amendments thereto are afforded *prima facie* status by statute, the service area described in this order is sufficient to address the Water Court's obligations under § 85-2-406, MCA.

The next question is whether the Master erred by setting irrigable acreage within the service area at 57,073 acres. This figure was based on irrigation of 56,556 acres in 1921, plus 517 acres belonging to the City of Conrad. Prior to trial, PCCRC claimed irrigation of 85,357.8 acres within its service area. *See* Claim File for 41M 161998-00. This area was based on DNRC examination of 1979 aerial photographs. PCCRC later reduced its claim to 72,000 acres.

Curry initially asserted PCCRC should be limited to 37,378 acres, but did not object to the Master's Finding.

The contract between the State of Montana and PCCRC stated that each share of stock entitled the owner to irrigate one acre of land. Ex. P-57, p. 8. The Carey Land Act Board fixed the number of shares that could be sold at 72,000. Ex. P-92. At a ratio of one share per acre, this meant that the State authorized irrigation of 72,000 acres for the project in 1953. At the time the State's 72,000 share per acre limit was imposed, 69,257 shares had been sold to landowners. Ex. P-92.

Establishing irrigated acreage at an amount less than the number of shares authorized was contrary to the one acre per share ratio approved by the State of Montana in its contracts with the Company. Under the Master's decision, PCCRC could irrigate only 57,073 acres even though it was authorized to irrigate 72,000 acres. The Master's reduction in acreage meant each share was diluted from one acre per share to 0.79 acres per share.

Conversely, recognizing acreage in excess of shares recognized by the State would convey a windfall to those shareholders, and potentially impact other water rights owners who were not shareholders. For this reason, irrigated acreage within the service area should not exceed the 72,000 acre cap established by the State of Montana in 1953.⁶

The record indicates that the number of acres irrigated by shareholders in a given year generally did not equal the total of shares outstanding. This means shareholders were not irrigating the full amount of acres authorized by the shares they owned. There are several explanations for this difference.

The Company did not decide how many acres would be irrigated within the project each year. That decision was made by hundreds of individual shareholders acting independently from each other. These operators decided how many acres would be irrigated on their respective farms. The cumulative total of irrigation on all farms represented total annual irrigation for the project.

⁶ This limit would not apply to water rights acquired later by PCCRC. The acreage under those rights should be added to the 72,000 acre cap imposed by the State.

No shareholder was obliged to irrigate a minimum number of acres. Shareholders who were not current on payment of their annual assessments for operation and maintenance were not entitled to receive any water. Ex. P-119, 1909 Articles of Incorporation of Teton Canal and Reservoir Company, pp. 4 & 7.

Thus, the amount of acreage irrigated within the project was determined by the shareholders based on many factors including water availability and whether they were current on payment of their assessments.

The Master's decision to establish an upper limit of 57,073 acres based on irrigation in 1921 appears to be based on the maxim that beneficial use is the measure of a water right.

This case involves water rights developed by public service corporations for sale to the public. Water rights developed for sale to third parties contemplate a reasonable period of development. The evidence in this case suggests that development of the project infrastructure was essentially complete by 1921. In contrast, sale of land and shares of water for use on that land occurred for years afterwards.

By statute, the State of Montana could not approve transfer of the project infrastructure and water rights to the settler corporation, PCCRC, until the project was more than ninety percent developed. Section 81-2111, R.C.M. (1905). That milestone was not reached until 1953, when the State of Montana fixed PCCRC's right to irrigate 72,000 acres within its service area.⁷ This Court will not undo the decision the State of Montana made in 1953, and force the PCCRC shareholders back into the position they occupied in 1921. PCCRC is entitled to irrigate up to 72,000 acres within its service area/place of use using water rights it acquired prior to July 1, 1973.

The water rights PCCRC is claiming fall into several broad categories. These include water rights acquired by the Company prior to completion of construction; rights

⁷ By 1953, when the Carey Act Land Board concluded only 72,000 acres could be irrigated, the project had not yet developed irrigation of that many acres. That figure was intended to be a future limit on the size of the project. Ex. P-92. As such, it contemplated development of additional acres after 1953.

claimed by the Company for the project; and rights acquired from other irrigators after project completion. Some of the latter acquisitions occurred as late as the 1990s.

Rights acquired by PCCRC after July 1, 1973 are not granted a general service area in this Order. Those rights are limited to use in the areas historically irrigated prior to acquisition.

2. Inclusion of the Birch Creek Flats Within PCCRC's Service Area/Place Of Use

The Birch Creek Flats is an area lying north of the B Canal, east of Birch Creek, and west of Dupuyer Creek. Part of Curry's land is in the Birch Creek Flats, and a number of water rights claimed by both parties were used there.

Curry contends the Birch Creek Flats should not be included in PCCRC's place of use or service area because PCCRC water was not used there before 1973. PCCRC contends the Flats were supplied with water by PCCRC for many years.

The Master reached contradictory Findings on use of water in the Birch Creek Flats. The Master found that PCCRC water had not historically been used on the Flats. Master's Report, Findings of Fact 41, 47 and 64, pp. 14-15 & 20. The Master also found that PCCRC delivered water to the Flats for use by non-shareholder private irrigators. Master's Report, Findings of Fact 49, 50 and 52, pp. 15-17.

3. Use of PCCRC Storage Water on the Flats

Former PCCRC manager Fay Stokes testified that water usage on the Flats was pursuant to private water rights. Partial Written Transcript, p. 147. He also testified that PCCRC historically used its storage water to supply water to the Flats. Partial Written Transcript, pp. 184-185. Curry's expert witness also acknowledged use of PCCRC storage water on the Flats. Schmidt Test., Day 3, 4:25:44-4:25:58.

Although the Master initially found that the only pre-1973 use on the Flats was pursuant to private use, he acknowledged delivery of water by PCCRC to Flats' users. Master's Report, Findings of Fact 49, 50 and 52, pp. 15-17. The testimony of Stokes and Curry's experts supports this Finding.

The Master's Findings can be harmonized by clarifying that both PCCRC storage water and private water rights were used on the Birch Creek Flats before 1973. This usage was within the service area identified by PCCRC in its claims and within the area that could be reached by delivery of water from PCCRC's system. Accordingly, inclusion of Birch Creek Flats within PCCRC's service area was appropriate.

E. Use of Private Water Rights

A number of water users on the Flats traded their rights for shares of PCCRC stock. These rights include claims formerly owned by Birch Creek Water Company, Kingsbury Colony, Wallace Bradley, and Birch Creek Colony. These trades are memorialized in various contracts and deeds between the water users and PCCRC. Exhibits C-58, C-59, C-60, C-61, C-62, P-38, P-39 and P-40.

The Master made numerous Findings regarding the water rights received by PCCRC pursuant to its agreements with water users on the Flats, as well as Findings about the trades themselves. These Findings are in two locations in the Master's Report. Findings of Fact 67 and 245, pp. 21-27 & 96.

Curry asserts PCCRC cannot issue shares of stock to landowners in the Birch Creek Flats. Curry also objected to portions of Finding of Fact 67 describing specific water rights.

PCCRC objected to Findings that the Flats were not within its service area and that change applications were needed for its trades with other water users. Like Curry, it also objected to the Master's Findings regarding water rights traded for shares. PCCRC also contends the Master erred by concluding that trades of water rights for shares of stock required DNRC approval.

F. Issuance of Shares to Landowners in the Birch Creek Flats

Because the Flats are within PCCRC's service area, PCCRC may issue shares of stock to customers within that area and deliver water to those customers without exceeding the parameters of its existing rights as they are defined in this Order. This rule applies regardless of whether the compensation it receives for those shares was monetary or in the form of water rights.

Curry is concerned that PCCRC not be allowed to expand the rights it received from the parties to whom it issued shares. As an example, Curry opposes capture of these rights in any of PCCRC's storage facilities or use of these rights on lands other than those upon which they were perfected. Curry's concerns have merit.

PCCRC's rights to use of the claims it received is no greater or less than the rights originally enjoyed by the grantors. Because none of those rights were originally developed for use by PCCRC, or acquired and changed by PCCRC before July 1, 1973, their elements remain the same as before their transfer to PCCRC. PCCRC may divert these claims, but only in accordance with their historic attributes.

PCCRC only got what the grantors had to give. The rights it received after July 1, 1973 may not be expanded beyond the limits of their historic use. PCCRC may not use those rights for storage unless it receives approval to change them.

Part III: CURRY CLAIMS

A. Curry Claim 41M 131100-00

This claim is discussed in Finding of Fact 135A. Master's Report, p. 51. It is for waste and seepage water from dikes and drain ditches. The Master recommended this right not be able to call on junior rights. No objection was filed by any party to the Master's recommendation.

Accordingly, the following remark shall be placed on claim 41M 131100-00:

NOTWITHSTANDING ITS PRIORITY DATE, THIS CLAIM MAY NOT BE USED TO PLACE A CALL ON ANY OTHER WATER RIGHT.

B. Curry Claim 41M 131101-00

This claim is discussed in Finding of Fact 135B. Master's Report, p. 51. It is for waste and seepage water from Fagerlie Swamp. The Master recommended this right not be able to call on junior rights. No objection was filed by any party to the Master's recommendation.

Accordingly, the following remark shall be placed on claim 41M 131101-00:

NOTWITHSTANDING ITS PRIORITY DATE, THIS CLAIM MAY NOT BE USED TO PLACE A CALL ON ANY OTHER WATER RIGHT.

C. Curry Claim 41M 131102-00 (Right Number 10)

This claim is discussed in Finding of Fact 135C. Master's Report, p. 52. It is co-owned by Curry and Gaylord Incorporated (hereafter Gaylord). According to the Master's Report, Gaylord did not receive notice of this case and did not have an opportunity to defend the validity of this claim. The Master determined "the Messecar diversion has not been used by Curry or his predecessors for decades." Master's Report, Finding of Fact 135C, p. 52. Despite this Finding, the Master decided not to make a recommendation regarding this claim.

Curry objected to the Master's conclusion that Curry and his predecessors had not used the Messecar Ditch for many decades. *See* Master's Report, Findings of Fact 130 and 135A, pp. 50-51. PCCRC objected to Finding of Fact 135C on the grounds the Master should have recommended termination of this claim given its long history of nonuse.

The threshold issue posed by both the Curry and PCCRC objections is whether the Master's finding of nonuse was supported by substantial evidence. *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287. *See also Fielder v. Fielder*, 266 Mont. 133, 138, 879 P.2d 675, 678 (1994).

There was substantial evidence in the record that Curry's portion of this right had not been used for many years. Most compelling was Curry's admission that he had not used the right since buying the property in 1988. Curry Test., Day 1,⁸ 4:54:15-4:54:30 and Day 2, 2:24:26-2:15:36. Curry testified he only used the Ryan-Lauffer Ditch to irrigate his place. Test., Day 2, 2:45:08-2:45:58. This created a twenty year period of nonuse.

Other evidence also supports the Master's conclusions regarding nonuse. The 1964 Pondera County Water Resources Survey (hereafter WRS) showed the Messecar Ditch was not in use, as do earlier documents from the Atwood Report and the

⁸ The 2009 hearing for this matter covered six days, Monday through Saturday morning. Day 1 is Monday, August 24th and Day 6 is Saturday, August 29th.

Adjudication Study. Exhibits P-77C, C-28, Bates Stamp 1963-1965, and C-27, Bates Stamp 1748 and 1805.

Jere Walley, a neighbor to the north of the Curry property, testified that he observed use of the Messecar Ditch. Walley sold his place in 1978. Thus, even if water had been used on the Curry place during the time referenced by Jere Walley, that use occurred before Curry quit using this right in 1988, and did not rebut the long period of nonuse by Curry. Curry's testimony alone showed the Master was correct in determining that this right had not been used for many years.

Despite this Finding, the Master did not make a recommendation regarding disposition of this right. This decision was made in part because the claim is co-owned by Gaylord, who was not a party to this action.

PCCRC asserts the Master should have terminated this right on the basis of abandonment. The absence of Gaylord from this matter prevents modification of Gaylord's interest in this claim. It does not, however, preclude a finding that Curry has abandoned his right to use of this claim.

The standard for abandonment of a water right is set forth in *79 Ranch v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215, 217 (1983). In *79 Ranch*, the Montana Supreme Court held:

. . . a long period of nonuse is strong evidence of an intent to abandon the water rights. *In effect*, such a long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse. . . .

To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope. *CF & I Steel Corporation v. Purgatoire River Water Conservation District* (Colo. 1973), 183 Colo. 135, 515 P.2d 456; *Cundy v. Weber* (S.D. 1941), 68 S.D. 214, 300 N.W. 17; *City of Anson v. Arnett* (Tex. 1952), 250 S.W.2d 450).

79 Ranch, 204 Mont. at 432-433, 666 P.2d at 218 (emphasis added).

In *Clark Fork River II*, the Montana Supreme Court described the procedural model set forth in *79 Ranch* as follows:

There are two essential elements for the abandonment of a water right: nonuse of the water associated with the water right and intent to abandon the water right. In *79 Ranch ...*, we set forth the criteria for determining whether a water right has been abandoned. The objectors have the initial burden of proving that a water right has not been used for a sufficiently long period of time to raise a rebuttable presumption of an intent to abandon that right. *79 Ranch*, 666 P.2d at 218. Once a period of nonuse sufficient to raise the presumption of an intent to abandon has been established, the burden shifts to the claimant of the water right to explain the reasons for nonuse. *79 Ranch*, 666 P.2d at 218. To rebut the presumption of abandonment, the claimant must establish “some fact or condition excusing the long period of nonuse, not mere expressions of hope or desire reflecting a ‘gleam-in-the-eye philosophy’ regarding future use of the water.”

274 Mont. 340, 344, 840 P.2d 1353, 1355 (1995) (internal citations omitted).

Curry has done nothing to rebut the twenty-year period of nonuse established by his testimony. Accordingly, the Court finds that Curry’s interest in claim 41M 131102-00 has been abandoned, and that he is no longer an owner of this right. The Court draws no conclusions regarding the validity of Gaylord’s interest in this right.

In his objection to the Master’s Report, Curry asserts that because the Master did not make a recommendation regarding this right, “there is no reason for the water judge to rule on this matter at this time.” Curry’s Objections to Master’s Report, p. 5.

This assertion is contrary to the statutes governing this Court’s obligations in a certification action. The purpose of this certification action was to “certify to the chief water judge the determination of the existing rights that are involved in the controversy” Section 85-2-406(2)(b), MCA. Upon conclusion of this task the chief water judge is obliged to “return the decision to the district court with a tabulation or list of the existing rights and their relative priorities.” Section 85-2-406(2)(b), MCA. Claims that have been abandoned should not be included in that tabulation.

The Chief Water Judge referred this matter to a Master. The Master’s lack of a recommendation regarding this claim does not prevent the water judge from making a decision regarding abandonment. Curry’s interest in claim 41M 131102-00 has been

abandoned. Curry's name shall be removed from the abstract for this right. Curry has no further right to receive water under this claim.

D. Curry Claim 41M 131103-00 (Right Number 16 – The Ryan-Lauffer Right)

This right is discussed in Findings of Fact 109 through 130, 135D1-7 and 226A-G. Master's Report, pp. 47-50, 52-54 & 86-87. It is for water from Birch Creek via the Ryan-Lauffer Ditch.⁹ This claim is based on the Ryan-Lauffer right, which was memorialized by a notice of appropriation filed by Henry Ryan and Jacob Lauffer for 1,500 inches of water with a May 19, 1897 priority date. Both Curry and PCCRC claim ownership of portions of this right. Curry's claim is 41M 131103-00, and is based on Curry's ownership of land formerly owned by Henry Ryan. PCCRC's claim 41M 199796-00 is for the Jacob Lauffer portion of this right. The Lauffer portion of this right was conveyed to PCCRC by the Kingsbury Colony.

Curry claim 41M 131103-00 was filed by Ted Crawford, who was a successor to Ryan. Despite acknowledging Kingsbury Colony as an owner of the portion originally owned by Lauffer, Crawford claimed the entire 1,500 inches flow rate of the original Ryan-Lauffer right.

Crawford originally claimed 890 acres. Only 482 acres were identified as irrigated in the WRS and 585 acres in a 1979 aerial photo. Claim File 41M 113103-00.

⁹ There is conflict in the record regarding the point of diversion for the Ryan-Lauffer Ditch. As an example, Curry's predecessors identified a point of diversion for this Ditch in Section 31, T30N, R7W. Claim File 41M 131103-00. The same Ditch was located in the NE quarter of Section 1, T29N, R8W in claim 41M 159114-00. During claim examination, the DNRC erroneously located the Ryan-Lauffer Ditch several miles to the north in Section 6, T30N, R7W. This error was perpetuated by Curry when he filed amendments to his claims. PCCRC located the Ryan-Lauffer Ditch in the NE quarter of Section 1, T29N, R8W.

The best evidence available suggests the Ryan-Lauffer Ditch is located in either the NE quarter of Section 1, T29N, R8W or the NW quarter of Section 6, T29N, R7W. The parties are encouraged to precisely identify the correct point of diversion and advise the Water Court and the District Court of this location. In the meantime, this Order and the attached tabulation (Appendix A) will refer to the Ryan-Lauffer Ditch with the assumption the point of diversion for this Ditch is either in the NE quarter of Section 1, T29N, R8W or the NW quarter of Section 6, T29N, R7W.

An affidavit by Crawford attached to the claim stated he expanded acreage for this claim over time. Curry filed an amendment to the claim in 2005 seeking to increase acreage from 890 acres to 945 acres.

The Master concluded the best evidence of historical use for the Curry portion of this right was the DNRC Examination Worksheet in the claim file, which established the place of use at 482 acres. This acreage was described in Finding of Fact 135D2. Master's Report, pp. 52-53.

The Master's decision to reduce the acreage for this right is consistent with the evidence in the WRS and the DNRC's report on acreage. Curry contends the acreage should be much higher, but the evidence relied on by the Master was substantial and the decision to recognize 482 irrigated acres for this right was not clear error.

The acreage should be 482 acres as specified in Finding of Fact 135D2 in the Master's Report. pp. 52-53. Usage of this right by Curry is limited to those lands, except where authorized otherwise by the DNRC via an approved change application. There was no historical evidence Curry or his predecessors used the Ryan-Lauffer right to irrigate lands east of Cartwright Coulee. The priority date should remain May 19, 1897 as set forth in the original claim.

The Master's Report contained three separate and inconsistent Findings regarding flow rate. In Finding of Fact 118, the Master acknowledged use of half the right on Ryan land and half on Lauffer. Master's Report, p. 48. Under this finding, the flow rate would have been divided evenly with each party receiving 18.75 cfs.

Subsequent findings reached a different result. In Finding of Fact 135D7, the Master set the flow rate at 37.5 cfs, resulting in allocation of all the Ryan-Lauffer right to Curry, and no flow rate for PCCRC. Master's Report, p. 54.

A third allocation of flow rate occurred in Finding of Fact 226G. Master's Report, p. 87. There, the flow rate for Curry was set at 35.80 cfs, with the balance of 1.7 cfs presumably allocated to PCCRC.

The selection of three conflicting flow rates was clearly error, and leaves this Court with the task of ascertaining the correct flow rate for both Curry and PCCRC.

PCCRC objected to Findings of Fact 118, 135D7 and 226. See Master's Report, pp. 48, 51, and 86 and Pondera County Canal and Reservoir Company's Objections to Master's Report, p. 43. PCCRC contends the Master should have divided the flow rate evenly between Curry and PCCRC. Curry objected that his flow rate should be the full 37.5 cfs for the original Ryan-Lauffer right. Curry Objections to Master's Report, p. 5. Curry's claimed flow rate of 37.5 cfs was disputed by PCCRC using evidence that the Ryan-Lauffer Ditch only had a capacity of 13.92 cfs in 1919. Ex. C-28, p. 200 9. PCCRC proposed this flow rate be divided evenly between Curry and PCCRC at 6.96 cfs apiece.

The 13.92 cfs flow rate for the Ryan-Lauffer Ditch was calculated several miles below the point of diversion for this right. Westenberg Test., Day 6, 10:20:15-10:23:08. Flow rates for water rights in Montana are typically measured at the headgate. *Wheat v. Cameron*, 64 Mont. 494, 501-502, 210 P. 761, 763 (1922). Because of carriage loss and other factors, defining a flow rate of 13.92 cfs several miles down ditch is of little value in determining the amount of water at the headgate.

At trial, Curry claimed he was entitled to 80% of the original flow rate based on an allocation of irrigated acreage. Curry contends his predecessors irrigated 80% of the land serviced by the Ryan Lauffer right, thereby entitling him to 80% of the flow rate. This theory was advanced by Curry's expert, Dave Schmidt. It was not supported by testimony from other witnesses, and was undercut by maps prepared in 1919 showing irrigation of 312 acres by Lauffer and 392 acres by Ryan. Ex. C-40; Schmidt Test., Day 3, 3:04:20-3:07:34. PCCRC contends the right should be divided 50-50 based on the original appropriation by Ryan and Lauffer.

Curry and PCCRC were each successors to one-half of this right. The division of this right between the two parties was properly acknowledged by the Master in Finding of Fact 118, which stated "the evidence of historical use of Right Number 16 is that it was divided $\frac{1}{2}$ each to the Ryan lands and the Lauffer lands." Master's Report, p. 48.

The Master's Finding is supported by: (1) The original Ryan-Lauffer notice of appropriation (Claim File 41M 113103-00); (2) WRS Field Notes which describe each

party as having 750 miner's inches (Ex. P-77(B)); and (3) The Adjudication Data Report which described ownership after the turn of the century as $\frac{1}{4}$ to Henry Ryan, $\frac{1}{4}$ to Maggie Ryan, and $\frac{1}{2}$ to Jacob Lauffer (Ex. C-28, Bates Stamp 2011). This information existed before PCCRC became an owner of any portion of this claim.

Confirmation of an even split between the parties can also be found in DNRC records of change applications for this right. The predecessors of Curry and PCCRC both filed separate change applications for their respective half interests in this water right.

The DNRC approved both change applications. Both were for 750 inches of water, or one-half of the Ryan-Lauffer right each. These filings are an admission by both parties that the flow should be evenly split.

Accordingly, the flow rate for Curry claim 41M 131103-00 should be 750 inches or 18.75 cfs. PCCRC shall receive 18.75 cfs for its claim 41M 199796-00.

E. Curry Claim 41M 159103-00

This right is discussed in Finding of Fact 108. Master's Report, p. 46.

It is a use right for stockwater from the Taylor Ditch filed by Keil Land and Cattle Company. The Master recommended changing the point of diversion to the Ryan-Lauffer Ditch and leaving the period of use as April 1 to October 31. Neither party objected to the Master's recommendations.

The Court adopts the Master's recommendations.

F. Curry Claim 41M 159114-00 (Right Number 24)

This claim is discussed in the Master's Report in Findings of Fact 71A, 103, and 232A-D. Master's Report, pp. 30, 44, 92-93. It is based on a notice of appropriation filed by Lena Taylor (Right Number 24). The original Taylor notice was for 1,000 miner's inches. Although the Taylor notice did not include lands now owned by Curry, the claim file contains documents showing a conveyance from George Taylor to Edwin Carroll of what is referenced as the Taylor right. The amount conveyed is not specified.

Edwin Carroll's land was eventually acquired by Keil Land and Cattle Company, which filed a claim for 5 cfs or 200 inches of the Taylor right. A portion of the Taylor right is also claimed by PCCRC via its claim 41M 199801-00.

Although the original claim specified irrigation of 400 acres, the Master determined this claim should be limited to use on lands identified in the 1964 WRS. The Master also determined that the lands on which it had been used were subject to the Valier-Montana Land and Water Company (VMLWC) deed restrictions, which precluded Curry's claim for the Taylor right. Master's Report, Finding of Fact 232D, p. 93 and Ex. P-6, December 24, 1926 Deed.

Accordingly, the Master established a priority date of April 1, 1927 based on the assumption a use right was first developed on this date after sale of the underlying land by VMLWC to Curry's predecessors. The Master also reduced the flow rate of this right to 2.25 cfs and amended the ditch name to the Ryan-Lauffer Ditch.

Curry did not object to the Master's Findings regarding this right. PCCRC objected that the Master's Report contained contradictory conclusions regarding priority date. Finding of Fact 71A established a priority date of August 27, 1897, whereas Finding of Fact 232D established a priority date of April 1, 1927. Master's Report, p. 30 and p. 93, respectively. PCCRC did not object to the 1927 priority date selected by the Master for this right. PCCRC also objected that it should have received a portion of the Taylor right (Right Number 24).

The identification of two separate priority dates by the Master was clear error. Because the April 1, 1927 date did not receive an objection from either party, that date will be assigned to this right. Claim 41M 159114-00 is defined as follows:

Priority Date:	April 1, 1927
Type of Right:	Use
Flow Rate:	2.25 cfs
Ditch Name:	Ryan-Lauffer
Period of Use:	April 1 to October 14
Place of Use:	25 Acres in the NESE Section 26, T30N, R7W 35 Acres in the NWNW of Section 35, T30N, R7W

Because PCCRC did not object, the thirty-five acre parcel in the NWNW of Section 35 referenced in Finding of Fact 232C has been left in place. PCCRC's claim to ownership

of a portion of the Taylor right by virtue of its claim 41M 199801-00 is discussed elsewhere in this Order.

G. Curry Claim 41M 159115-00 (Right Number 1)

This right is discussed at several locations throughout the Master's Report including Findings of Fact 90, 104, 188, 189, 190 and in the Endnotes. Master's Report, pp. 40, 44, 70-71, and 100-101. This right and claim 41M 159116-00 were both filed for irrigation of lands in the N2NE and the NENW of Section 35, T30N, R7W.

This irrigation claim was filed by Keil Land and Cattle Company. The priority date claimed was April 9, 1884. This is the same priority date as the Barron-Upham or Joe Kipp right, which is known as the earliest notice of appropriation right on Birch Creek.

Despite having a priority date in common with the Barron-Upham or Joe Kipp right, this claim was based on a notice of appropriation by Anna Steell¹⁰ and Raphael Morgan. The Morgan Steell notice of appropriation claimed 5,000 miner's inches from Birch Creek with a priority date of June 4, 1897. The Morgan Steell priority date does not match the priority date claimed by Keil, thereby causing confusion as to which right Keil intended to claim.

The claim asserts a flow rate of 120.4 miner's inches. The basis of this flow rate is not clear. The point of diversion claimed by Keil was in Lot 1, Section 1, T29N, R8E. The place of use claimed by Keil was in the N2NE and the NENW of Section 35, T30N, R7W.

On April 1, 2005, Curry amended this claim changing it from a filed right to a use right, but maintaining the April 9, 1884 priority date. This amendment amounted to a withdrawal by Curry of his claim for a water right based on either the Barron-Upham/Joe Kipp right or the Morgan notice of appropriation. Curry also amended the point of

¹⁰ Anna M. Steell is also referred to as Anna Steele or Annie M. Steele. The Master's Report first references Annie M. Steell in Finding of Fact 76. p. 34. Alternate spellings of Steele and Steell exist in deeds, the WRS and other documents. For purposes of clarity, this Order uses the Steell spelling.

diversion. *See* Footnote 10 above. Curry did not amend the place of use, which remained entirely in Section 35.

The Findings of Fact regarding this right are inconsistent. The Master's Report makes three conflicting recommendations. Finding of Fact 104 states this claim should be dismissed. Master's Report, p. 44. Finding of Fact 190 states the claim should be recognized, but with the priority date amended from April 9, 1884 to June 18, 1910, and the place of use modified to include 24 acres in Sections 25 and 26, T30N, R7W. Master's Report, p. 71. No irrigation was claimed in Sections 25 and 26 by either Keil or Curry. The original claim filed in 1982 and the amendments filed by Curry in 2005 claim irrigation only in Section 35.

Finally, the endnotes in the Master's Report conclude that Right Number 1 should have a priority date of April 9, 1884; a flow rate of 22 cfs; and that Morgan and Steell ended up with all of this right. The conflicts in the endnotes and Findings of Fact cannot be harmonized.

Curry objected to Finding of Fact 104 recommending dismissal, as well as Finding of Fact 190, which changed the priority date to June 18, 1910. Curry argued that claim 41M 159115-00 should have a priority date of April 1, 1883. Curry tendered no other objection to the Master's Findings.

Curry's desire for a priority date of 1883 is based on testimony of Curry's expert witness Dave Schmidt, who testified that 1883 was the date construction of the Kipp Ditch began. Schmidt Test., Day 3, 1:52:12-1:53:10. *See also* Ex. C-17. There was no evidence to support irrigation of Curry's property on this date and therefore no way to substantiate a use right with that priority date.

Curry's contention that he is entitled to an 1883 priority date was discussed and rejected by the Master in Finding of Fact 90. Curry's Objections to Master's Report, p. 4. Curry's theory that he is entitled to a large senior use right that would predate most other rights on Birch Creek is not tied to any credible evidence and is based on speculation by his expert. There was no evidence the claimed place of use for this right was irrigated in 1883. The Master's refusal to recognize an 1883 priority date for this

right was based on sound rationale, conforms to available evidence, and is adopted by the Court.

That means the priority date for claim 41M 159115-00 must be addressed. The question is whether the Master's decision to change the priority date to June 18, 1910 was correct. This priority date was apparently selected because the Master shifted the place of use from Section 35 to Section 26. It is not clear why this shift occurred as Curry did not claim any irrigated land in Section 26 for this right.

PCCRC objected to all of the Master's Findings regarding this right on the grounds they conflicted with each other. PCCRC asserted that if the Master's conclusion in the Endnotes was true, then PCCRC would own all of Right Number 1 because it, and not Curry, was a successor to Morgan and Steell.

PCCRC's objections require a review of the Master's decision to add new unclaimed lands to the place of use, and to remove the lands that were claimed in Section 35. Finally, the correct flow rate for this claim needs to be determined.

On November 8, 1905, Annie and George Steell sold the N2NW and the N2NE of Section 35 to CIC, a predecessor of PCCRC. Deed in Claim File 41M 159115-00.

This deed included the following language: "also all water and water rights appropriated or purchased including the Joe Kipp right". 1905 Deed in Claim File 41M 159115-00. This language meant PCCRC became the owner of all water rights appurtenant to lands in Section 35 included in claim 41M 159115-00.

The water rights purchased by CIC, including the Steell portion of the Joe Kipp right, were later incorporated into the Carey Act project, and are now owned by PCCRC. On March 29, 1954, the Valier Company, a successor to CIC, sold the N2NE and the NENW of Section 35 to Archie Campbell. No water rights were mentioned or reserved in this deed. These were the same lands described as the place of use for claim 41M 159115-00. Campbell later sold to Wheeler.

The purpose of the Water Resources Survey was to identify water rights appurtenant to lands reviewed by the Survey. The WRS Field Notes for this area discuss water rights appurtenant to lands in Section 35. Ex. P-77D.

The WRS Field Notes for this area do not identify any water rights with a priority date of April 9, 1884, or a priority date of 1883 that fit the place of use for this claim. Ex. P-77D. The Field Notes were dated 1963.

The WRS maps, dated 1964, do not show any irrigation in the N2NE and the NENE of Section 35, T30N, R7W, which was the place of use identified for this right in both the claim filed by Keil and the amendment filed by Curry. Ex. P-77D.

Although the WRS maps show irrigation in the *NWNW* of Section 35, that area is not within the claimed place of use for this right. Ex. P-77(D) (emphasis added). Lewis Carroll, Curry's predecessor, testified regarding irrigation of the Wheeler place in Section 35. He bought the Wheeler place in 1959. Test. Day 1, 9:35:55-9:36:03. Ex. P-6, December 3, 1959 Deed from Wheeler to Carroll.

The Wheeler place is identified on Curry Exhibit C-1a, and includes the *NWNW* of Section 35 as well as the N2NE and the NENW of Section 35. The latter two parcels are included within the place of use for this claim. Again however, the *NWNW* of Section 35 is not included.

Carroll testified Wheeler was only irrigating about thirty acres in the westernmost forty acre parcel, but as soon as Carroll bought the Wheeler place he put in a lot of extra irrigation. Test. Day 1, 9:39:35-9:39:44 and 9:39:55-9:40:13. The westernmost forty acre parcel referenced by Carroll was the *NWNW* of Section 35 – outside the place of use for claim 41M 159115-00.

Carroll testified that he began expanding irrigation on the Wheeler place by leveling land and constructing border dikes in the forty acre parcel immediately east of the originally irrigated Wheeler land. This work occurred in the NENW of Section 35 after 1959. Test. Day 1, 9:40:09-9:40:30; 9:44:16-9:44:50; and 9:45:07-9:45:30. He said there were signs of old irrigation ditches in this area. Wheeler used the Taylor Ditch to irrigate his place. Test. Day 1, 9:40:58-9:41:02. Carroll also testified that a lot of the Wheeler place was subirrigated. Test. Day 1, 9:41:44-9:41:56.

Curry's Exhibit C-29 is a series of maps prepared by the VMLWC, dated November 17, 1916. Page 2275 of that Exhibit covers the lands claimed for this water

right. The map shows nineteen acres of land irrigated in the NENW of Section 35 in 1915, apparently out of a ditch named the Taylor Ditch. This depiction of irrigation is consistent with Carroll's testimony that he found old ditches in the area before he began leveling and construction of dikes in the NENW of Section 35. The remaining lands for this claim are shown as irrigable, but not irrigated in 1915.

Curry's expert, Dave Schmidt, testified that aerial photos suggested irrigation of the claimed place of use, but Schmidt also admitted to finding irrigation where Carroll said it did not occur, and stated that testimony of people on the ground should be given more weight than paper analysis. Schmidt Test., Day 3, 11:20:03-11:20:32.

There are several historic water rights that could have been appurtenant to the place of use for this right in the N2NE and the NENW of Section 35. The first was the April 9, 1884 Joe Kipp or Barron-Upham Right, also known as Right Number 1. This right was shown to have been perfected in the area now claimed by Curry. Ex. C-31. In 1905, these lands and all water rights upon them, including the Joe Kipp right, were sold to CIC and were subsequently absorbed into the PCCRC system. There is no evidence the Joe Kipp right was ever subsequently used on lands now owned by Curry in the N2NE and the NENW of Section 35.

The Water Resources Field Notes from 1963 mention several water rights based on notices of appropriation as potentially appurtenant to the claimed place of use, but they all have priority dates before the 1905 conveyance from the Steells to CIC and would have been sold to CIC in that transaction.

More importantly, Curry did not claim any of these rights as part of claim 41M 159115-00, and specifically amended this claim to change it from a filed right to a use right. For these reasons, rights based on notices of appropriation cannot be used to support this claim.

Based on the testimony of Lewis Carroll, claim 41M 159115-00 should be a use right as specified by Curry. The correct priority date should be June 1, 1960, based on Carroll's testimony that he first leveled, border diked, and irrigated this property soon after buying it in December of 1959.

Carroll testified there was no irrigation on the Wheeler place when he bought it, other than the thirty acres in the NWNW of Section 35. The only additional lands he developed for irrigation were forty acres in the NENW of Section 35. Carroll Test., Day 1, 11:06:40-11:07:30. The correct place of use is therefore forty acres in the NENW of Section 35, T30N, R7W. Applying a standard of 17 gpm per acre pursuant to Water Right Claims Examination Rule 14(b)(1), the flow rate for this right should be 680 gpm or 1.5 cfs. The Court declines to adopt the Master's recommendation to add lands in Sections 25 and 26 because Curry did not claim a right to irrigate those lands with this right.

As noted above, the amended point of diversion in the NWNWNW Section 6, T30N, R7W does not match the location of the Ryan-Lauffer Ditch used by Curry to divert his water. Accordingly, the point of diversion should be changed to the Ryan-Lauffer headgate. *See* Footnote 10.

H. Curry Claim 41M 159116-00 (Right Number 17)

This claim and claim 41M 159115-00 are both for irrigation of the same lands in the N2NE and the NENW of Section 35, T30N, R7W. Although they were filed for irrigation of the same land, the basis for each claim is different. This claim is discussed in Findings of Fact 105A-C and 228A-B of the Master's Report, pp. 44-45 & 88.

Keil Land and Cattle Company filed this claim for irrigation from Birch Creek based on the Morgan Steell notice of appropriation. Findings of Fact 105A-C and 228A-B contain conflicting information concerning this right. The priority date was June 1, 1967 in Finding of Fact 105C and April 1, 1959 in Finding of Fact 228B. Master's Report, pp. 45 & 88. The Master's Finding of two different priority dates for this right was error.

Curry did not object to any of the Findings of Fact for this right. PCCRC objected that Findings of Fact 105A-C and 228A-B contradicted each other and that the Master's Findings regarding PCCRC's ownership of a portion of the Morgan Steell Right Number 17 were incorrect. The latter issue will be addressed in the portion of this Order covering PCCRC's claims.

This leaves the discrepancy between the Master's Findings for resolution by the Court.

The history of irrigation in the N2NE and the NENW of Section 35 has already been discussed above in the portion of this Order relating to claim 41M 159115-00. Because claim 41M 159116-00 is for irrigation of the same land, that discussion will not be repeated here. Curry did not amend the acreage on either claim.

Claim 41M 159116-00 was initially based on a notice of appropriation filed by Anna Steell and Raphael Morgan on June 8, 1897. Curry acknowledges in his Proposed Findings of Fact that the Morgan Steell notice does not provide a proper basis for this right. Curry's Proposed Findings of Fact and Conclusions of Law, p. 38.

Curry also stated this claim should have a forty acre place of use in the NENW of Section 35, with a priority date of April 1, 1959. Curry's Proposed Findings of Fact and Conclusions of Law, p. 38. Curry's proposal would duplicate the use right already recognized by this Court for 41M 159115-00. At trial, Curry did not argue for two separate use rights on this land, and did not cite evidence to justify recognition of two rights in his objection.

The history of irrigation in the NENW of Section 35 is well established by testimony from Lewis Carroll, Curry's predecessor.

Credit for the history of irrigation described by Carroll has already been given via recognition of claim 41M 159115-00, thereby rendering this claim duplicative. Accordingly, claim 41M 159116-00 is dismissed.

I. Curry Claim 41M 159117-00

This claim is discussed in Finding of Fact 106. Master's Report, p. 45. Keil Land and Cattle Company filed this claim for subirrigation as "natural subterranean water" (sic) tributary to Birch Creek. Total irrigated acres for the claim was 560 acres. The claimed priority date was based on an affidavit by Edgar Keil from April 29, 1982. Mr. Keil speculated the entire 560-acre place of use was subirrigated on May 26, 1864. Mr. Keil was fifty-one years old when he signed his affidavit and did not have personal knowledge of irrigation on the subject property in 1864.

The Pondera County WRS only references fifty acres as being irrigated in 1964. An amendment to this claim filed by Curry in 2005 indicates the water used on the 560 acre place of use was "Subirrigation collected in ditches." Claim File 41M 159117-00. Given the history of this area and the relatively late development of irrigation, it is unlikely there were ditches in place in 1864 to permit subirrigation of 560 acres.

In Finding of Fact 106, the Master concluded that this right should have no ability to place a call on other claims because there was no actual diversion of water by the Claimant. Master's Report, p. 45. There was no objection to the Master's Finding by any party.

Accordingly, the following remark shall be placed on claim 41M 159117-00:

NOTWITHSTANDING ITS PRIORITY DATE, THIS CLAIM MAY NOT BE USED TO PLACE A CALL ON ANY OTHER WATER RIGHT.

J. Curry Claim 41M 160284-00

This claim is discussed in Findings of Fact 107A-D. Master's Report, p. 46. It was filed by Keil Land and Cattle Company for 10 cfs from Birch Creek with a priority date of March 18, 1893. This right has the same priority date as the Charles Thomas right (Right Number 3) addressed later in this Order.

The place of use encompasses 160 acres in the N2N2 of Section 35, 160 acres in the SW of Section 26, and 80 acres in the W2SE of Section 26. The Master concluded this right should be dismissed because the entirety of the Thomas right with the same priority date was severed from its original place of use and conveyed to CIC on April 14, 1906.

PCCRC did not object to the Master's Findings regarding this right. Curry objected and asserted "[t]he evidence supports a 1927 priority date for claim 41M 160284-00." Curry's Objections to Master's Report, p. 5.

Curry's expert's report explains Curry's position on most of his claims. Ex. C-17. The report does not take a position regarding claim 41M 160284-00, except to generally discuss the Charles P. Thomas notice of appropriation of the same date. No assertion is

made in the report that Curry is entitled to the Charles Thomas right, and Curry's shift to a use right with a later priority date acknowledges that reality.

The Charles P. Thomas notice of appropriation was filed for lands in Section 31, T30N, R7W. Ex. C-28, Bates Stamp 1924. Thomas patented his lands in 1898 and sold his land and water right to CIC in 1906. Exhibits C-28, Bates Stamp 1928 and P-18. None of the lands owned by Thomas in Section 31 are now owned by Curry. The Thomas homestead was several miles west of the Curry property.

In his Proposed Findings of Fact, Curry further acknowledged no basis existed for an 1893 priority date for this claim, but asserted an April 1, 1927 right should be recognized. The basis of this assertion was that Wheeler bought the NWNW of Section 35 from VMLWC on December 24, 1926. Ex. P-6. The deed contains covenants stating that Wheeler could not claim any water rights belonging to Grantor, Valier Montana Land and Water Company.

The covenants in the deed did not prevent Wheeler from developing his own water rights after purchasing his property. Ex. P-6. Although no water rights were transferred to Wheeler, irrigation later occurred on about thirty to thirty-two acres in the vicinity of the Wheeler place in the NWNW of Section 35. The assumption made by Curry is that Wheeler began irrigating his newly acquired land the next spring after buying it from CIC.

This argument is partially supported by testimony from Lewis Carroll, who recalled irrigation on about thirty acres of land by Wheeler using the Taylor Ditch for years before he bought the place in 1959. It is also supported by the WRS maps showing irrigation in the same area. The WRS maps were based on photos taken in 1957. It is not clear from Carroll's testimony how early he recalled irrigation by Wheeler, although he described it as occurring regularly. Carroll Test., Day 1, 9:40:32-9:40:44.

There is no direct evidence of irrigation of the Wheeler place in the NWNW of Section 35 in 1927.

Curry's expert reviewed aerial photographs and found extensive irrigation on virtually all of Curry's property in the area of this claim reaching as far back as 1941.

His testimony regarding the scope of historic irrigation exceeded that of Lewis Carroll, who grew up next door to this property and farmed it for many years.

PCCRC's expert did not find evidence of irrigation in the 1941 aerial, but did find evidence of a ditch in the 1957 photo. Westenberg Test., Day 5, 11:54:30-11:54:47.

The earliest credible evidence of irrigation on this parcel is 1957. This evidence comes from Lewis Carroll; the WRS, which was based on the 1957 aerial photo; and the testimony of PCCRC expert John Westenberg. Accordingly, the priority date for this right is June 1, 1957.

The Master was correct in finding that Curry was not entitled to a use right with the same priority date as the Charles P. Thomas notice of appropriation. On this basis, he recommended termination of the claim in its entirety. Termination does Curry a disservice by not recognizing Wheeler's historical irrigation of the NWNW of Section 35 using the Taylor Ditch. Termination was also inconsistent with Lewis Carroll's testimony of irrigation in this area.

Claim 41M 160284-00 is recognized for irrigation of thirty-five acres in the NWNW of Section 35 using the Taylor branch of the Ryan-Lauffer Ditch. The priority date is June 1, 1957. Applying a standard of seventeen gpm per acre using Water Right Claims Examination Rule 14(b)(1), the flow rate for this right should be 595 gpm or 1.33 cfs.

Claim 41M 160284-00 also identifies irrigation of 160 acres in the SW of Section 26, T30N, R7W. This land was part of the Middlesworth property purchased by Lewis Carroll. Lewis Carroll testified that he first irrigated this land in 1967. Carroll Test., Day 1, 9:49:09-9:51:33 and 11:02:08-11:04:48. The right to irrigate in the SW of Section 26 was also claimed in other water rights now owned by Curry, including 41M 159114-00.

The inclusion of the SW of Section 26 in multiple claims makes it clear Curry meant to assert a right to irrigation of this land. Carroll's testimony that it was not irrigated until 1967 precludes it from being piggy-backed onto another water right with an earlier priority date.

The question is whether Curry is entitled to an implied claim for irrigation of the SW of Section 26. The answer to this question is yes.

[T]he Water Court applies 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 the implied claim.

Order Amending and Partially Adopting Master's Report as Amended, Case 76HF-580, filed January 31, 2013, p. 20.

Irrigation of the SW of Section 26 is referenced in this claim, as well as others. Lewis Carroll's testimony supports irrigation of this land in 1967. Recognition of a right memorializing this irrigation will not increase the burden to other water users.

Curry has an implied claim for irrigation of 160 acres in the SW of Section 26, T30N, R7W. The priority date is June 1, 1967. The point of diversion is the Ryan-Lauffer Ditch. The flow rate is 6.0 cfs. (17 gpm multiplied by 160 acres divided by 448 gpm.) The claim number is 41M 30066093.

Part IV: WATER RIGHTS

A. Analysis of Rights Conveyed to PCCRC After July 1, 1973 and Objections to Master's Report

The Master Report's does not accurately list water rights received by PCCRC in exchange for shares of stock. Findings of Fact 44A-F and 67 contain lists of these rights. *See* Master's Report, pp. 14-15 & 21-27. The list conveyed by Kingsbury Ditch Company and Birch Creek Water Company in Findings of Fact 44A and 44E does not match the claims listed in the contracts between those entities and PCCRC. The list in Finding of Fact 67 does not match the list in Findings of Fact 44A-F, nor does it match the list of claims identified in contracts between the grantors and PCCRC.

According to contracts between the grantors and PCCRC, the claims transferred are as follows:

41M 182051-00, 41M 182052-00, 41M 182053-00, 41M 182054-00, 41M 182055-00, 41M 182056-00, 41M 182057-00, 41M 182058-00, 41M 182059-00, 41M 182060-00, 41M 182061-00, 41M 182062-00, 41M 182063-00, 41M 182064-00, 41M 182065-00, 41M 182066-00, 41M 182067-00, 41M 185665-00, 41M 185666-00, 41M 185667-00, 41M 185668-00, 41M 185681-00, 41M 185682-00, 41M 185683-00, 41M 185684-00, 41M 185706-00, 41M 185707-00, 41M 185708-00, 41M 199792-00, 41M 199793-00, 41M 199794-00, 41M 199795-00, 41M 199796-00, 41M 199797-00, 41M 199798-00, 41M 199799-00, 41M 199800-00, 41M 199801-00, 41M 199802-00, 41M 199803-00, 41M 199804-00, 41M 199805-00, 41M 199806-00, 41M 199807-00, 41M 199808-00, 41M 199809-00, 41M 199810-00, 41M 199811-00, 41M 199812-00, 41M 199813-00, 41M 199814-00, 41M 199816-00, 41M 199817-00, 41M 199818-00 and 41M 199819-00 (Kingsbury Ditch Company, Ex. C-58).

41M 120066-00, 41M 120067-00, 41M 120068-00, 41M 120069-00, 41M 120070-00, 41M 120071-00, 41M 120072-00, 41M 120073-00, 41M 120074-00, 41M 120075-00, 41M 120076-00 (Birch Creek Water Company, Ex. C-61).

41M 182052-00, 41M 182053-00, 41M 182054-00, 41M 182055-00, 41M 182056-00, 41M 182057-00, 41M 182058-00, 41M 182059-00, 41M 182060-00, 41M 182061-00, 41M 182062-00, 41M 182063-00, 41M 182064-00, 41M 182065-00, 41M 182066-00, 41M 182067-00, 41M 185665-00, 41M 185666-00, 41M 185667-00, 41M 185668-00, 41M 185681-00, 41M 185682-00, 41M 185683-00, 41M 185684-00, 41M 185706-00, 41M 185707-00, 41M 185708-00 (Two Medicine South Ranch, Ex. C-62).

41M 113459-00, 41M 113451-00 (Birch Creek Colony, Ex. C-59)

41M 42049-00, 41M 42050-00, 41M 42051-00 (K. Wallace Bradley, Ex. C-60)

1. Objections to Finding of Fact 67

Both parties posed numerous objections to Finding of Fact 67 and its subparts. Master's Report, pp. 21-27. These objections are addressed below.

a. Master's Report, Finding of Fact 67A, p. 22; PCCRC Objection

This Finding makes reference to a priority date of April 9, 1864. It also changes all rights with a priority date of April 9, 1864 from filed rights to use rights. This Finding is not supported by substantial evidence. However, the only rights in this case with an 1864 priority date have issue remarks prohibiting them from being used to place a call on other rights. The Court declines to adopt this recommendation.

b. Master's Report, Finding of Fact 67B1, p. 22; PCCRC Objection

The reference in this Finding of Fact should be changed from water right claim 41M 120066-00 to 41M 120069-00. Claim 41M 120069-00 does not appear in the tabulation attached to this Order, because it was not included in the tabulation proposed by PCCRC.

c. Master's Report, Finding of Fact 67C1, p. 23; PCCRC Objection

Claim 41M 199792-00 was based on a filed notice of appropriation. It was changed from a filed right to a use right by the Master without explanation. It should remain a filed right. The volume for this claim is not defined in this Order, but use of this right should not exceed the volume historically used in connection with this claim.

Claim 41M 199792-00 was also part of a change authorization approved by the DNRC. DNRC Final Order, Ex. P-14, p. 1. The DNRC approved a change of the point of diversion for this claim to include the NENENE of Section 1, T29N, R8W.

PCCRC amended the point of diversion, period of use, and the place of use for claim 41M 199792-00 on June 2, 2006. The points of diversion are the SWNENE of Section 1, T29N, R8W and the SENWNE of Section 1, T29N, R8W. The period of use is April 20 through October 14. The acres irrigated total 3,804.6, and the place of use should be as follows:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	226.5		N2	3	29N	7W	PONDERA
	530			4	29N	7W	PONDERA
	595.6			5	29N	7W	PONDERA
	99.5		E2E2	6	29N	7W	PONDERA
	2		S2SWSE	6	29N	7W	PONDERA
	45.3		E2E2	7	29N	7W	PONDERA
	2.5		NENWNE	7	29N	7W	PONDERA
	513.6			8	29N	7W	PONDERA
	211.9		N2	9	29N	7W	PONDERA
	109.2		SW	9	29N	7W	PONDERA
	74.3		N2NE	17	29N	7W	PONDERA
	14		N2NENW	17	29N	7W	PONDERA
	201.5		S2	32	30N	7W	PONDERA
	538.7			33	30N	7W	PONDERA
	640			34	30N	7W	PONDERA

3,804.6

The foregoing legal description shall be the place of use for this right.

d. Master's Report, Finding of Fact 67C2, p. 23; Curry Objection

This Finding of Fact pertains to claim 41M 199795-00. This claim and objections to the Finding are discussed in detail later in this Order.

e. Master's Report, Finding of Fact 67C3, p. 23; PCCRC Objection

The Master concluded claim 41M 199797-00 was a duplicate of Right Number 1 even though it was based on the Morgan Steell notice of appropriation dated June 4, 1897. The Master dismissed this claim.

A claim is *prima facie* proof of its contents. Section 85-2-227(1), MCA. The Water Court has previously 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. “Without evidence to the contrary, the *prima facie* claim may satisfy a claimant’s burden.” *Memorandum Opinion*, p. 12 (internal footnote omitted). “[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. The burden of proof described above applies to any objection to a water right including a claimant objecting to his own claim.

No basis was provided by the Master for the conclusion that this right was a duplicate of another earlier right. Absent such evidence, the *prima facie* status of the claim was not overcome, and dismissal of claim 41M 199797-00 was error.

This claim was part of a change authorization approved by the DNRC. DNRC Final Order, Ex. P-14. The DNRC approved a change of the point of diversion for this claim to the NENENE of Section 1, T29N, R8W.

PCCRC amended the point of diversion, period of use, and the place of use for claim 41M 199797-00 on June 2, 2006. The points of diversion are the SWNENE and the SENWNE of Section 1, T29N, R8W. The period of use is April 20 through October 14. The acres irrigated total 3,804.6, and the place of use should be as follows:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	226.5		N2	3	29N	7W	PONDERA
	530			4	29N	7W	PONDERA
	595.6			5	29N	7W	PONDERA
	99.5		E2E2	6	29N	7W	PONDERA
	2		S2SWSE	6	29N	7W	PONDERA
	45.3		E2E2	7	29N	7W	PONDERA
	2.5		NENWNE	7	29N	7W	PONDERA
	513.6			8	29N	7W	PONDERA
	211.9		N2	9	29N	7W	PONDERA
	109.2		SW	9	29N	7W	PONDERA
	74.3		N2NE	17	29N	7W	PONDERA
	14		N2NENW	17	29N	7W	PONDERA
	201.5		S2	32	30N	7W	PONDERA
	538.7			33	30N	7W	PONDERA
	640			34	30N	7W	PONDERA
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	3,804.6						

The foregoing legal description shall be the place of use for this right. No volume is specified for this water right; however, the amount diverted should not exceed historic use.

The flow rate claimed for this water right was initially 62.5 cfs. PCCRC reduced this flow rate to 11.02 cfs in its Proposed Findings of Fact. Post-Trial Proposed Findings of Fact, Conclusions of Law and Recommendations of PCCRC, p. 106. The flow rate for this claim is 11.02 cfs.

f. Master's Report, Finding of Fact 67C4, p. 23 and Findings of Fact 229A-K, pp. 88-90. Claims 41M 199798-00, 41M 162005-00, and 41M 162114-00 (Right Number 19). Curry and PCCRC Objections

Gardner, Lutz, Crain and Thomas filed a notice of appropriation for 4,000 miner's inches of Birch Creek water with a priority date of June 18, 1897.

Claim 41M 199798-00 was one of four PCCRC claims based on Right Number 19. It is an irrigation claim. On June 2, 2006, PCCRC amended this claim and reduced the flow rate to 10 cfs and the irrigated acreage from 8,283.7 acres to 268.9 acres. The Master reduced the flow rate for this right to 3.49 cfs.

The other claims are 41M 162005-00, 41M 199817-00, and 41M 162114-00. PCCRC claims for Right Number 19 are discussed in two locations in the Master's Report, and are addressed below.

i. Claim 41M 199798-00 (Irrigation)

Curry contends this right should be dismissed because the original claimants were either dead or had sold their lands by the time of the Atwood Report, and that the Atwood Report did not confirm irrigation of their property. Curry's Objection to Master's Report, p. 2; Ex. C-28, Bates Stamp 2054.

The Atwood Report does not support Curry's argument that this claim should be dismissed. Exhibit C-28 references 763 acres held by the original appropriators Gardner, Lutz, Crain and Thomas. Ex. C-28, Bates Stamp 2054. The Report states: "[t]hat these lands were actually irrigated in total is a matter for which we have no information." However, the Report also stated that "several features found on the area indicate the use of water at some time." These features included heavy sod, plant growth, and ditches. "Hence we believe that until further information is obtained, it is right and proper to

contend that the entire irrigable area was supplied with water.” Ex. C-28, Bates Stamp 2054.

The Atwood Report is consistent with the 1964 Pondera County Water Resource Survey (WRS), which confirmed irrigation of the lands identified in PCCRC’s amended claim. Exhibits C-28, Bates Stamp 2052-57 and C-54.

Curry’s expert witness prepared a summary of the Atwood Report. Ex. C-17. This summary acknowledged use of Right Number 19 filed by Gardner, Lutz, Crain and Thomas. Ex. C-17, p. 9. Curry’s expert even asserts Curry is entitled to a portion of this right. Ex. C-17, p. 9. This assertion undercuts Curry’s claim that Right Number 19 should be dismissed.

For the reasons listed above, Curry’s assertion that claim 41M 199798-00 should be dismissed is not persuasive.

PCCRC generally objected that the Master erred in Findings of Fact 67C4-12, but does not mention claim 41M 199798-00 specifically, and offers no objection to the change in flow rate to this right.

In its Proposed Findings of Fact, however, PCCRC did address the flow rate for claim 41M 199798-00. From that document, PCCRC suggested the flow rate should be 0.70 cfs, not the 3.49 cfs determined by the Master. Post-Trial Proposed Findings of Fact, Conclusions of Law, and Recommendations of PCCRC, pp. 82-83. Accordingly, the flow rate for claim 41M 199798-00 should be 0.70 cfs.

The volume of this claim is 268.9 acres multiplied by 2.3 acre-feet/acre, or 618.5 acre-feet.

ii. Claims 41M 162005-00 (Irrigation), 41M 199817-00 (Stockwater), and 41M 162114-00 (Municipal)

These claims are based on the remaining portion of Right Number 19, and two of them, 41M 162005-00 and 41M 162114-00 are discussed in Finding of Fact 229. Master’s Report, pp. 88-90.

The Master concluded the maximum combined flow rate of claims 41M 162005-00 and 41M 162114-00 was 6.5 cfs, and suggested a remark be added to each claim to

limit the combined flow of both claims to this amount. Master's Report, Finding of Fact 229K, p. 90. He also concluded the flow rate for claim 41M 199817-00 should be 6.5 cfs. Master's Report, Finding of Fact 67C10, p. 10.

PCCRC's Exhibit P-5 suggests the flow rate for claim 41M 162005-00 should be 6.6 cfs. Ex. P-5, p. 21. PCCRC objected to Finding of Fact 229, but did not supply a specific rationale for its objection.

The Master's Findings regarding claims 41M 162005-00, 41M 162114-00 and 41M 199817-00 appear to be based on substantial evidence and are adopted by the Court.

The maximum combined flow rates for claims 41M 162005-00, 41M 162114-00, 41M 199798-00 and 41M 199817-00 may not exceed 6.5 cfs.

The following remark will be added to these rights:

THE MAXIMUM COMBINED FLOW RATES FOR CLAIMS 41M 162005-00, 41M 162114-00, 41M 199798-00 AND 41M 199817-00 MAY NOT EXCEED 6.5 CFS.

There was not sufficient evidence to determine a volume for claim 41M 162005-00. The points of diversion are as amended in 2006, unless otherwise specified in the tabulation.

g. Master's Report, Finding of Fact 67C5, p. 23. Claims 41M 199799-00 and 41M 199818-00 (Right Number 20)

The Master determined Right Number 20 was never perfected. PCCRC's Proposed Findings of Fact make the same statement. Post-Trial Proposed Findings of Fact, Conclusions of Law, and Recommendations of PCCRC, p. 83. The Master's recommendation to dismiss claims 41M 199799-00 and 41M 199818-00 is adopted, and these claims are dismissed.

h. Master's Report, Finding of Fact 67C6, p. 23. Claim 41M 199803-00 (Right Number 30). Curry and PCCRC Objections

The Master established a flow rate of 7.75 cfs for this right based on an outline of water rights for Birch Creek dated 1921. Ex. C-48, pp. 2177-78. Curry objects that there was no evidence regarding use of this right and that it should be dismissed. The PCCRC objection is unclear.

The DNRC verified a portion of the place of use for this claim in the WRS. Although Curry asserts there was no evidence introduced at trial regarding use of this right, it was Curry's burden to produce such evidence, not the claimant's. A claim is *prima facie* proof of its contents. Section 85-2-227(1), MCA. The Master's decision regarding this right is adopted. The flow rate shall remain at 7.75 cfs.

This claim was part of a change authorization approved by the DNRC. Ex. P-14, DNRC Final Order. The DNRC approved a change of the point of diversion for this claim to the NENENE of Section 1, T29N, R8W.

PCCRC amended the point of diversion, period of use, and the place of use for claim 41M 199803-00 on June 2, 2006. The points of diversion are the SWNENE and the SENWNE of Section 1, T29N, R8W. The period of use is April 20 through October 14. The acres irrigated total 3,804.6, and the place of use should be as follows:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	226.5		N2	3	29N	7W	PONDERA
	530			4	29N	7W	PONDERA
	595.6			5	29N	7W	PONDERA
	99.5		E2E2	6	29N	7W	PONDERA
	2		S2SWSE	6	29N	7W	PONDERA
	45.3		E2E2	7	29N	7W	PONDERA
	2.5		NENWNE	7	29N	7W	PONDERA
	513.6			8	29N	7W	PONDERA
	211.9		N2	9	29N	7W	PONDERA
	109.2		SW	9	29N	7W	PONDERA
	74.3		N2NE	17	29N	7W	PONDERA
	14		N2NENW	17	29N	7W	PONDERA
	201.5		S2	32	30N	7W	PONDERA
	538.7			33	30N	7W	PONDERA
	640			34	30N	7W	PONDERA
	<hr/>						
	3,804.6						

The foregoing legal description shall be the place of use for this right. No volume is decreed for this water right claim. The amount diverted should not exceed historical use.

i. Master's Report, Finding of Fact 67C7, p. 24. Claim 41M 199804-00. PCCRC Objection

This right was originally claimed by Kingsbury Ditch Company for irrigation of 8,283.70 acres of land with a flow rate of 12.5 cfs and a priority date of October 20, 1900. The Master's Report assigned this claim a priority date of December 31, 1958 based on testimony of Jere Walley. Acreage was adjusted to 300 acres and flow rate reduced to 11.4 cfs based on the application of the 17 gpm/acre standard to 300 acres. (17 gpm X 300 = 5,100 gpm/448 = 11.4 cfs).

The Master's Report does not take account of PCCRC's Proposed Findings of Fact and the testimony of its expert, both of which indicated claim 41M 199804-00 should be terminated. Post-Trial Proposed Findings of Fact, Conclusions of Law, and Recommendations of PCCRC, p. 100. Westenberg Test., Day 5, 9:51:00-9:53:00. The Master's decision to recognize this right gave PCCRC a windfall it did not seek and was therefore error. Claim 41M 199804-00 is terminated.

j. Master's Report, Findings of Fact 67C8 and 67C9, pp. 24-25. Claims 41M 199806-00 and 41M 199807-00.

Both of these claims were based on late filed notices of appropriation that did not comply with the twenty day filing deadline in the 1885 statute. Section 89-810, R.C.M. (1947). The Master concluded these claims should be dismissed because the claims were not perfected.

Dismissal of these claims conflicts with the *prima facie* statute and was legal error. The burden to show that a claim should be dismissed rests with the objector, not the claimant. Until that burden is shifted, the claimant is not obligated to produce evidence to support his claim. The burden of proof does not shift simply because a claim is based on a noncompliant notice of appropriation. Accordingly, the absence of evidence regarding an alternative priority date for these rights should not have resulted in their dismissal.

The pertinent elements of these rights are as follows:

Claim 41M 199806-00

PRIORITY DATE: OCTOBER 15, 1903
FLOW RATE: 5.0 CFS

The remaining elements of this right will remain as amended by Claimant on June 2, 2006 and as set forth in the review abstract.

Claim 41M 199807-00

PRIORITY DATE: AUGUST 8, 1904
FLOW RATE: 50.0 CFS

The remaining elements of this right will remain as amended by Claimant on June 2, 2006 and as set forth in the review abstract.

k. Master's Report, Finding of Fact 67C10, p. 25. Claim 41M 199817-00 (Right Number 19). Curry and PCCRC Objections

This was one of four PCCRC claims based on Right Number 19. It is a stockwater claim. The other claims are 41M 162005-00, 41M 199798-00, and 41M 162114-00. Curry maintains this claim should be dismissed, making the same objection to this right as it did against claim 41M 199798-00 in the Master's Report, Finding of Fact 67C4. As explained above, dismissal of this claim is not warranted.

Claims 41M 199798-00, 41M 162005-00, 41M 199817-00 and 41M 162114-00 are all based on Right Number 19 and are therefore multiple uses of the same right. Their combined flow rates may not exceed 6.5 cfs, regardless of the point of diversion used to divert these rights. Finding of Fact 67C10 is adopted by this Court subject to the limitation on use of this right set forth in the preceding sentence.

l. Master's Report, Finding of Fact 67C11, p. 25. Claim 41M 199822-00. PCCRC Objection

This claim is the stockwater companion claim to irrigation right 41M 199804-00. Claim 41M 199804-00 was terminated because PCCRC indicated it had not been perfected.

The Master decided to recognize claim 41M 199822-00, apparently not realizing that PCCRC had acknowledged its companion irrigation right should be terminated. PCCRC objected to the Master's Findings on this claim, but did explain its objection.

Curry objected that this right should also be terminated. The Court agrees. Claim 41M 199822-00 is terminated.

m. Master's Report, Finding of Fact 67C12, p. 25. Claim 41M 199823-00. PCCRC Objection

The Master recommended this right should remain as set forth in the abstract. PCCRC objected to the Master's Findings on this claim, but did explain its objection. The Court adopts the Master's recommendation. This right should remain as set forth in the abstract.

n. Master's Report, Finding of Fact 67D3, p. 25. Claim 41M 42051-00. PCCRC Objection

This claim is based on the John Hunter notice of appropriation. This notice claimed a water right dated February 17, 1896, but was not filed until December 17, 1906. It does not qualify for relation back under the 1885 statute. Section 89-810, RCM (1947).

The Master concluded the priority date for this right should be December 31, 1911 based on an affidavit in the claim file describing irrigation with this right from 1911 to 1964. The Master set acreage at 90 acres.

Citing its Proposed Finding of Fact 173a, PCCRC objected that the Master should have acknowledged evidence confirming use of this right in conformance with the notice of appropriation and acreage irrigated based on evidence at trial.

As acknowledged by PCCRC, the Adjudication Data Report indicated this claim was not valid, at least not with its originally claimed priority date. Ex. P-71, Various Interviews with: Louis Lenoir, Nov. 6th, 1922, p. 2; Sam Potter, Oct. 31st, 1922, p. 1; R.E. Shields, Nov. 6th, 1922, p. 1, and Nick Dodds, Nov. 23rd, 1922, p. 1. Post-Trial Proposed Findings of Fact, Conclusions of Law, and Recommendations of PCCRC, p. 86.

The priority date selected by the Master is based on an affidavit in the claim file. The Master's decision to set back the priority date for this right based on information

supplied by the claimant is reasonable. The priority date will remain December 31, 1911 as determined by the Master. PCCRC's objection regarding priority date is denied.

The ninety acre place of use selected by the Master did not take into account the change application approved for this right or the changes made to the place of use after the 1964 flood.

The correct acreage should be as follows:

<u>ID</u>	<u>Acres</u>	<u>Govt. Lot</u>	<u>Qtr. Sec.</u>	<u>Sec.</u>	<u>Township</u>	<u>Range</u>
1	1.00	1		31	30N	7W
2	41.00	2		31	30N	7W
3	8.50	3		31	30N	7W
4	21.50	4		31	30N	7W
5	9.00	5		31	30N	7W
6	23.00		SENE	31	30N	7W
7	16.50		SWSE	31	30N	7W
8	1.50	4		6	29N	7W
Total:	122.00					

All other elements of this right shall remain as set forth in the abstract. The volume cap should be 280.6 acre-feet (122 acres X 2.3 acre-feet).

o. Master's Report, Finding of Fact 67E2, p. 26. Claim 41M 113459-00 (Right Number 1). PCCRC Objection

This claim is based on a portion of Right Number 1, also known as the Joe Kipp or Baron and Upham right.

PCCRC asserts claim 41M 113459-00 is based on a 2.5 cfs portion of the Joe Kipp right conveyed from Raphael Morgan to Cowgill in 1905. Cowgill's portion of that right was later conveyed to Leech, then to Birch Creek Colony, and eventually to PCCRC.

The Water Master dismissed this right. The basis for dismissal was the six mile distance between the lands upon which the claim was filed in Section 25 and the location of the Kipp Ditch. The Master stated "[t]he evidence does not adequately explain the connection between Right No. 1 and Section 25." Master's Report, Finding of Fact 67E2, p. 26.

This statement is incorrect.

Documents in the claim file indicate the Birch Creek Colony sought permission to move its place of use to Section 25 by filing a change application with the DNRC. The DNRC granted the change application on May 24, 1977, approximately five years before the statewide claim filing deadline. When the filing deadline arrived, the Birch Creek Colony claimed lands in Section 25, rather than the original place of use several miles to the west. A copy of the change application, the DNRC Order approving the change application, and maps and correspondence discussing the change application are all included in the claim file.

Contrary to the Master's Finding, the "connection between Right No. 1 and Section 25" is explained by the DNRC's approval of a change application to establish irrigation in Section 25. This Court does not adopt the Master's Finding that claim 41M 113459-00 should be dismissed.

Claim 41M 113459-00 is discussed more fully below.

**p. Master's Report, Finding of Fact 67F, p. 26. Claim 41M 185666-00
(Right Number 23). PCCRC Objection**

The Master dismissed this claim because the Atwood Report indicated it was not perfected. Ex. C-28, Bates Stamp 2095.

PCCRC objected to the claim's dismissal, claiming that other evidence confirmed use of this right. The evidence cited by PCCRC was the WRS and related Field Notes, the Atwood Report, and the testimony of PCCRC's expert witness, John Westenberg.

Claim 41M 185666-00 is based on a notice of appropriation filed by Stewart and Gardner on Sept. 1, 1897 for a right appropriated on August 31, 1897.

The Atwood Report discusses the portions of the Stewart and Gardner right owned by the Birch Creek Water Company. The Report states: "The actual use of water during the period prior to the incorporation of this company is a subject on which we have no direct information. All conclusions reached must therefore be based on the indications on the ground at present." Ex. C-28, Bates Stamp 2119.

The Atwood Report indicates the Birch Creek Water Company was incorporated in 1909. Ex. C-28, Bates Stamp 2121. The Stewart and Gardner water right had a priority

date of August 31, 1897. Thus, the author of the Atwood Report had no information on use of the Stewart and Gardner water right for the first twelve years of its existence. This is a marginal basis for concluding the claim was never perfected, a point acknowledged in the Atwood Report where the author described at least partial use of this right. Ex. C-28, Bates Stamp 2121.

At the conclusion of the section discussing this and other rights of the Birch Creek Water Company, the author of the Atwood Report wrote: "The above information is all that can be given concerning the early use of water. It is not conclusive nor is it founded on the results of interviews with parties who lived in that vicinity during the period in question." Ex. C-28, Bates Stamp 2121.

Exhibit C-28 references twenty-seven separate conveyances of portions of the Stewart and Gardner water right. Bates Stamp 2096-2107. While these conveyances do not explicitly reference use of the right, they are not consistent with a water right that has not been used or has no perceived value to the grantors or grantees.

The WRS and its Field Notes reference use of the Stewart and Gardner water right. Pondera County WRS, June 1964, p. 31. There is no indication that use of this right first occurred after issuance of the Atwood Report.

The Master based his decision to terminate claim 41M 185666-00 on statements in the Atwood Report. Ex. C-28, Bates Stamp 2095. These statements are not reliable. The speculative comments made in the Atwood Report were not sufficient to overcome the *prima facie* status of this claim, and the Master's conclusion to the contrary was error. The Court will not adopt the Master's Finding that this claim should be dismissed.

The elements of this claim are discussed later in this Order.

2. Other Objections to Findings of Fact

a. Master's Report, Finding of Fact 70M, p. 29

This Finding pertains to testimony provided by Lewis Carroll. It states: "Except for the 70 irrigated acres on the Wheeler place and the 160 acres that Mr. Carroll developed on the Middleworth place, the rest of the irrigated land Mr. Carroll owned was subirrigated." Master's Report, p. 29.

Curry objects to this Finding, asserting the Master should have recognized irrigation in the E2SE of Section 26 and the NWSW of Section 25, T30N, R7W.

The extent of irrigation on the Carroll place is discussed elsewhere in this Order and in the Master's Report. Accordingly, Finding of Fact 70M is not required to resolve the issues before the Court, and the Court declines to adopt it.

b. Master's Report, Finding of Fact 71, pp. 30-31

This Finding has several parts relating to the testimony of Lewis Carroll. Master's Report, pp. 30-31. Both parties objected. Curry objects that the Master should have granted Curry a portion of Right Number 1. The Master's decision not to grant Curry a portion of Right Number 1 was correct and is discussed elsewhere in this Order.

PCCRC objected that the priority date assigned to Curry's portion of the Lena Taylor right should have a priority date of January 14, 1898 rather than the August 27, 1897 date assigned by the Master.

The correct priority date for Curry's claim to the Lena Taylor right is discussed in the portion of this Order pertaining to Curry claim 41M 159114-00 and will not be repeated here. Finding of Fact 71 is not adopted.

c. Master's Report, Finding of Fact 72, pp. 31-33

Curry again objects that the Master should have granted Curry a portion of Right Number 1. The Master's decision not to grant Curry a portion of Right Number 1 was correct and is discussed elsewhere in this Order.

PCCRC objected to the Master's creation of what amounts to new water rights for Curry based on analysis of homestead patent dates for lands formerly owned by Carroll and outside the deed restrictions imposed by VMLWC.

Finding of Fact 72H depicts homestead patentees and patent dates for these lands although no citation to the record is provided, and the source of the Master's information is unclear. Master's Report, p. 32.

Finding of Fact 72I states that the homestead patent dates in Finding of Fact 72H "establish the earliest use right dates for the land described." There is no evidence in the record to support this Finding. Master's Report, pp. 32-33.

The Court recognizes that the Master may have felt challenged to define water rights in this case with less than adequate information. However, the use of homestead patent dates to support priority dates without corroborating evidence of actual irrigation is speculative.

Neither party suggested such a procedure to establish priority dates. In the absence of corroborating evidence of irrigation, this Court will not recognize the use of homestead patent dates alone to create priority dates for irrigation water rights in this case. The Court declines to adopt Findings of Fact 72H and 72I.

d. Master's Report, Finding of Fact 73, p. 33

This Finding established use rights for Curry based on homestead patent dates. Master's Report, p. 33. For the reasons set forth in the discussion of Master's Report, Findings of Fact 72H and 72I above, the Court declines to adopt Finding of Fact 73.

e. Master's Report, Finding of Fact 77, pp. 36-37

This Finding pertains to Right Number 1, which was based on a notice of appropriation. It states that the notice of appropriation precedes the 1885 statute and is therefore of no legal effect. Master's Report, pp. 36-37. PCCRC objects to this statement.

Although there was no statutory provision for filing notices of appropriation before 1885, such notices were filed by water users and are encountered in the adjudication. Their effect, legal or otherwise, depends on the contents of the notice, the admissibility of the notice, and the context in which it is sought to be used.

The Supreme Court of the Montana Territory, in one of its first water rights cases, ruled that notices filed before 1885 could be sufficient to put other water users on notice of an appropriation, and that later appropriators who ignored such notices proceeded "at their own option and peril." *Woolman v. Garringer*, 1 Mont. 535, 545, 1872 Mont. LEXIS 19, **17.

This Court declines to adopt that portion of Finding of Fact 77 stating that the notice for Right Number 1 had no legal effect because it was filed before 1885.

B. Analysis of Rights Acquired by PCCRC and Objections to Master's Report

The Court will address the various Findings of Fact regarding rights acquired by PCCRC. If one or both of the parties objected to a Finding, it is noted in the subheading.

1. Master's Report, Findings of Fact 85, 86, 91, 92, and 188-195, pp. 39-41 & 70-72 Claims 41M 113459-00, 41M 120069-00, 41M 161998-00 and 41M 199792-00 (Right Number 1 – Kipp Right). Curry and PCCRC Objections

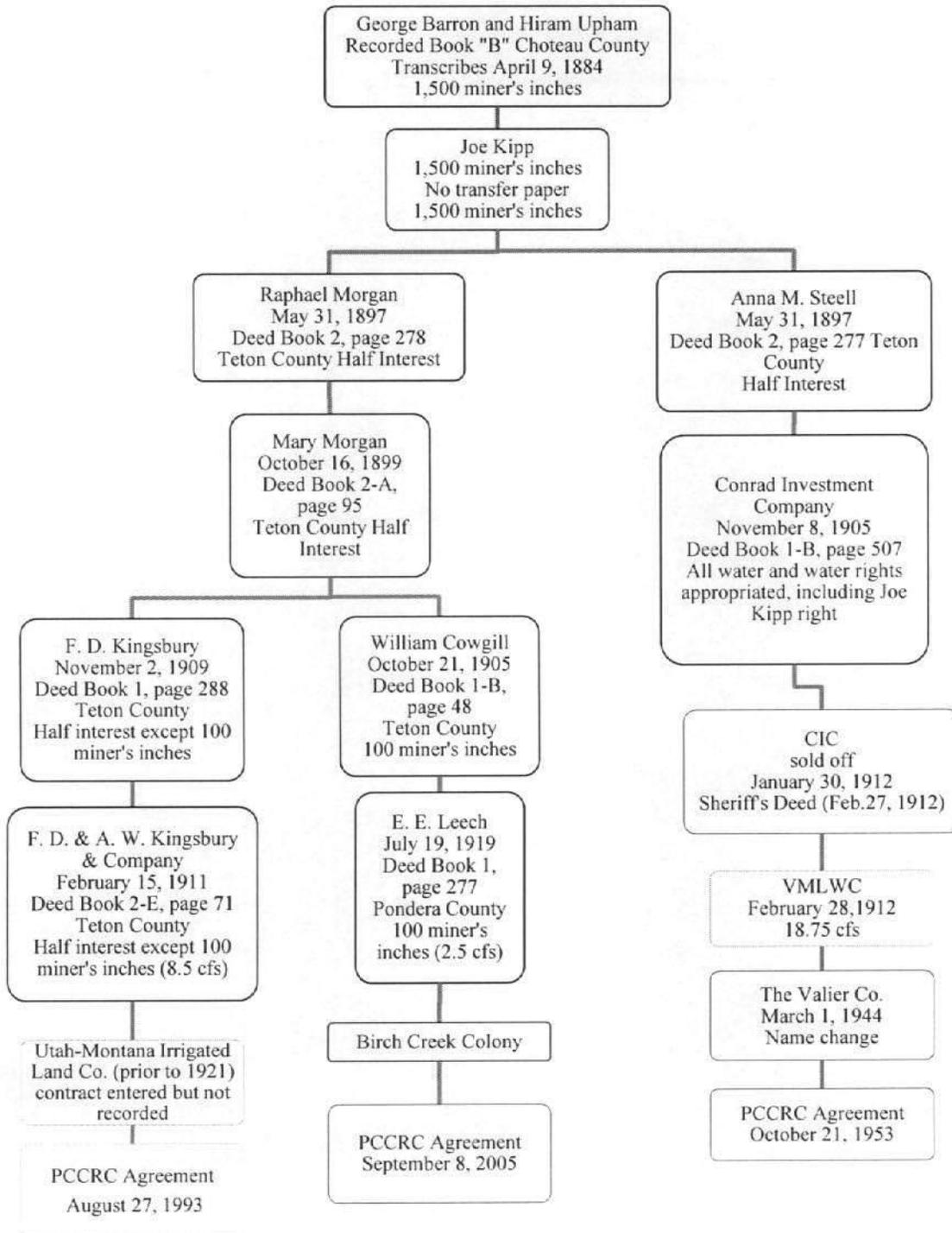
These Findings of Fact pertain to PCCRC's claims for water under Right Number 1, also known as the Joe Kipp or Kipp right, or the Barron and Upham right after its two original appropriators. Other Findings addressing PCCRC's claims for Right Number 1 include Findings of Fact 188-195. This Order refers to Right Number 1 as the Kipp right.

PCCRC filed four claims based on the Kipp right. Claim 41M 161998-00 is based on a conveyance from Joe Kipp to the Steells. PCCRC is a successor to the Steells.

Claim 41M 199792-00 is based on an 8.5 cfs portion of the Kipp right conveyed from Joe Kipp to Morgan and from Morgan to Kingsbury. PCCRC is a successor to Kingsbury.

Claims 41M 120069-00 and 41M 113459-00 are based on a 2.5 cfs portion of the Kipp right conveyed from Morgan to Cowgill. PCCRC is a successor to Cowgill.

A diagram of the chain of title for the Kipp right is shown below.



The Master determined in Finding of Fact 85 that PCCRC was only entitled to that portion of the Kipp right conveyed from Kipp to Steell and from Steell to the Company. Master's Report, p. 39. In Finding of Fact 86, the Master determined that the Kipp right could not be used by PCCRC for storage. Master's Report, p. 39.

In Findings of Fact 192 and 193, the Master determined that the Steell portion was only appurtenant to 38 acres and assigned a flow rate of 1.4 cfs to PCCRC claim 41M 161998-00. Master's Report, pp. 71-72.

Curry contends the title to the Kipp right is unclear and that the true owners of the right were unspecified settlers on the Birch Creek Flats, not PCCRC or its predecessors. Curry objects to the Master's decision to award any portion of the Kipp right to PCCRC.

PCCRC objects that the Master failed to recognize its claims from the Morgan side of the Kipp chain of title, thereby depriving it of half the Kipp right. PCCRC further objects that the Master ignored ditch capacity and applied an overly restrictive duty of water to PCCRC claims covered by Findings of Fact 187-207, which included the Kipp right. Master's Report, pp. 70-76.

Curry's assertion that the chain of title for the Kipp right is unclear is understandable. There is no written document in evidence conveying Barron and Upham's interest in their filed notice of appropriation to Kipp. The only reference to such a conveyance is an oral grant made by Upham to Kipp in the Robare store. Ex. C-28, p. 1906. Early deeds such as the one from Kipp to Steell and from Steell to CIC also contain inexact descriptions of the right conveyed, although the latter refers to the Joe Kipp right. Ex. P-17(E).

The Master did not find these shortcomings sufficient to deny PCCRC's claim for the Steell portion of the Kipp right. The Master's conclusion is supported by later evidence in the form of the WRS, which references PCCRC's claim to 750 miner's inches of the 1,500 inch Barron and Upham right.¹¹ Ex. P-37, p. 40. The Master's

¹¹ At the time of the 1964 Water Resources Survey, Kingsbury and Birch Creek Canal Company had not yet deeded their claims for the Kipp right to PCCRC.

conclusion that PCCRC is a successor to Steell's one-half interest in the Kipp right is based on substantial evidence and will not be disturbed.

The next question is whether the Master's decision to reduce the flow rate for the Steell portion of the Kipp right was correct. PCCRC's claim for this portion of the Kipp right is 41M 161998-00. The flow rate initially claimed for this right was 18.75 cfs or 750 miner's inches, an amount equal to half of the Kipp right, as described in the Barron and Upham notice of appropriation. At trial, PCCRC asserted the flow rate for this right should be 11.00 cfs. Ex. P-5, p. 21.

In Finding of Fact 76F, the Master stated "[t]he most reasonable number for the capacity of the Kipp Ditch is 22.04 cfs." Master's Report, p. 35. This Finding was based on a thorough review of the evidence and is adopted by this Court. After reviewing the chain of title for the Steell half of the Kipp right, the Master concluded "[a]t the time Annie M. Steell conveyed her water rights to CIC, she owned an undivided 11.02 cfs through the Kipp and Upham Ditch." Master's Report, Finding of Fact 76G5, p. 36.

The Master then reduced this flow rate to 1.4 cfs based on a determination that only 38 acres had been irrigated on the Steell property in 1915. Master's Report, Findings of Fact 192 and 193, p. 71.

The citation for this finding was Exhibit C-27, a document titled: Report on the Water Supply of the Valier Project (December 12, 1916). Although unstated, the Master's reduction of the flow rate amounts to a finding that most of the Kipp right was abandoned, and that its use was confined to the Steell property after its acquisition by PCCRC. There is no evidentiary support for either of these assumptions.

The conveyance from Steell to CIC occurred on November 8, 1905, ten years *before* the Master determined use of this right was limited to 38 acres on the Steell property in 1915. Ex. P-17(E). There are numerous documents in the record indicating the Company acquired water rights for the entire project, not solely for irrigation of lands belonging to the original appropriators. Curry acknowledged this point when it opposed use of such rights for storage in Birch Creek Reservoir and Lake Francis. Accordingly, the amount of irrigation occurring on the Steell property in 1915, ten years after the sale

to CIC is irrelevant. By that time, the Kipp right was being used on the project as a whole, not the Steell property alone.

The Master's determination that a portion of the Steell right was abandoned after its conveyance to CIC is unsupported by the evidence. The flow rate for 41M 161998-00 is 11.00 cfs.¹² The evidence indicates 729 acres of irrigation with this right on the Steell property. Ex. C-28, p. 1910. Because this right can be used on the entire project, its place of use is the service area for the project. However, the amount of water diverted in connection with this right should be limited to the volume used at the time the right was perfected. The volume for 41M 161998-00 is 1,676 acre-feet (729 acres X 2.3 acre-feet/acre).

Although the Master states in Finding of Fact 85 that PCCRC is only entitled to a one-half interest in the Kipp right, he also acknowledged PCCRC claim 41M 199792-00 in Finding of Fact 67C1. Master's Report, pp. 39 and 23, respectively. Claim 41M 199792-00 is for part of the half interest in the Kipp right conveyed to Morgan.

At trial, PCCRC indicated the flow rate for this right should be 8.50 cfs. This flow rate is based on Morgan having received half of a 22.00 cfs right from Kipp and then conveying 2.5 cfs to Cowgill. This split in the flow rate is supported by the chain of title. The flow rate for claim 41M 199792-00 should remain 8.5 cfs.

The evidence indicates 1,945 acres of irrigation with the Morgan half of the Kipp right. Ex. C-28, Bates Stamp 1910.

The total volume allocable to the Morgan half of the Kipp right is 4,473.5 acre-feet (1,945 acres X 2.3 acre-feet/acre). The percentage allocable to claim 41M 199792-00 based on ownership of 8.5 cfs of 11.00 cfs is 77.2% or 3,453 acre-feet.

PCCRC amended the point of diversion, period of use, and the place of use for claim 41M 199792-00 on June 2, 2006. The points of diversion are the SWNENE and the SENWNE of Section 1, T29N, R8W. The period of use is April 20 through October 14. The acres irrigated total 3,804.6, and the place of use should be as follows:

¹² Half of 22.04 is 11.02; however, these numbers have been rounded to 22.00 and 11.00, respectively.

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	226.5		N2	3	29N	7W	PONDERA
	530			4	29N	7W	PONDERA
	595.6			5	29N	7W	PONDERA
	99.5		E2E2	6	29N	7W	PONDERA
	2		S2SWSE	6	29N	7W	PONDERA
	45.3		E2E2	7	29N	7W	PONDERA
	2.5		NENWNE	7	29N	7W	PONDERA
	513.6			8	29N	7W	PONDERA
	211.9		N2	9	29N	7W	PONDERA
	109.2		SW	9	29N	7W	PONDERA
	74.3		N2NE	17	29N	7W	PONDERA
	14		N2NENW	17	29N	7W	PONDERA
	201.5		S2	32	30N	7W	PONDERA
	538.7			33	30N	7W	PONDERA
	640			34	30N	7W	PONDERA

3,804.6

The volume allocable to the place of use recognized for this claim remains limited to historic use as identified above: 3,453 acre-feet.

Claim 41M 113459-00 was amended to 332 acres on March 5, 2004. The volume for this right is 763.6 acre-feet (332 acres X 2.3 acre-feet/acre). The point of diversion is the NENWSW of Section 27, T29N, R8W.

PCCRC objects to Finding of Fact 86 because it precludes use of the Kipp right for storage and creates an implied claim for storage. Master's Report, p. 39. As discussed elsewhere in this Order, PCCRC had the right to convert certain of its rights to storage. Accordingly, Finding of Fact 86 is incorrect. Claim 41M 161998-00 may be used in storage for Birch Creek Reservoir and Lake Francis because this right was acquired by PCCRC before July 1, 1973 and was used for storage prior to that time. Claims 41M 199792-00 and 41M 113459-00 may not be used for storage because they were not acquired until after July 1, 1973.

No implied claim for storage will be created as PCCRC already has claims filed for that purpose. The Court declines to adopt Finding of Fact 86.

Claim 41M 120069-00 was also filed for the portion of the Morgan half of the Kipp right deeded to Cowgill. At trial, PCCRC argued it should have flow rate of 2.5 cfs for claim 41M 120069-00.

Claim 41M 120069-00 was deeded to PCCRC by Birch Creek Water Company. The chain of title does not indicate a conveyance from Cowgill or his successors to Birch Creek Water Company. The chain of title does indicate a conveyance from Cowgill to Leech and from Leech to Birch Creek Colony, which filed claim 41M 113459-00.

Recognition of claim 41M 120069-00 would duplicate claim 41M 113459-00. Because claims 41M 120069-00 and 41M 113459-00 are both duplicates of the 2.5 cfs right deeded to Cowgill, and because Birch Creek Water Company, which filed claim 41M 120069-00, does not appear in the chain of title for the Cowgill right, claim 41M 120069-00 is terminated.

2. Master's Report, Findings of Fact 87-96, pp. 39-42; PCCRC Objection

These Findings in the Master's Report create a number of new water rights for lands owned by Curry.

The Master correctly determined that a portion of Curry land was formerly owned by the Company and conveyed to George Taylor many years before Curry entered title. Master's Report, Finding of Fact 88, pp. 39-40. The conveyance to Taylor was subject to a deed restriction which amounted to a severance of water rights from the land he received. Ex. P-6, Warranty Deed, Dec. 9. 1919.

This deed restriction covered some but not all of the lands Curry asserts were irrigated with an 1883 use right. The Master rejected Curry's claim to an 1883 use right. Rejection of Curry's claim for an 1883 use right for these lands was correct.

In an effort to determine the priority date for irrigation of lands not subject to the Taylor deed restriction, the Master looked at the homestead patent dates for those lands. The Master made the following conclusion:

Given that there were homesteads in the original perfection area with patent dates after 1884, the most probable scenario is that after Steell and Morgan irrigated their fields, enough water remained in the ditch to support down ditch homesteads. This conclusion gives us the problem of assigning a number of irrigated acres to each homestead but is otherwise in accord with the landmarks of fact that we have in the evidence.

Master's Report, Finding of Fact 92, p. 41.

After identifying homestead patent dates for Curry lands that did not have a deed restriction, the Master determined priority dates for various parcels of land in Finding of Fact 96. Master's Report, p. 42. Although new water rights were recognized, no implied claims were created as a consequence of identification of these new priority dates. Thus, although the Master created new rights, none of them are identified by claim number or flow rate.

The Court is unable to determine what the Master intended as the final result of his Findings regarding homestead patent dates, or how these Findings would be translated into water rights available for use by Curry.

There are numerous additional problems with creation of new water rights based on homestead patent dates. First, Curry does not assert any claims for irrigation of this area based on homestead patent dates. Second, there is no evidence to support the Master's assumption that sufficient water was available to irrigate these homesteads after use by Steell and Morgan.

Third, there is no evidence to support irrigation of any of these properties with water rights having priority dates that coincided exactly with the dates of homestead patent issuance. This Court has already stated that it will not base irrigation water rights on homestead patent dates unless there is corroborating evidence showing actual irrigation on those dates.

Fourth, the Master reached contradictory Findings regarding historic irrigation of the same properties elsewhere in the Master's Report.

For these reasons, the Court declines to adopt Findings of Fact 91-96.

3. Master's Report, Finding of Fact 97, p. 41; Curry Objection

This Finding supports the notion that Steell and Morgan moved at least a portion of the Kipp right upstream after purchasing it. Curry objects that Morgan did not own any of the lands upon which the Kipp right was perfected.

Whether Morgan owned any of the lands upon which the Kipp right was originally perfected is immaterial if, as the Master concluded, the Kipp right was moved from its original location to lands owned by Steell and Morgan. It makes sense that Steell and

Morgan would have moved the Kipp right to their own lands once they purchased it. They would not likely have purchased the Kipp right and then continued to allow Kipp to irrigate other lands with the Kipp right.

For these reasons, the Court adopts Finding of Fact 97.

4. Master's Report, Findings of Fact 98-99, pp. 42-43; PCCRC Objection

In these Findings, the Master notes there was no evidence of irrigation of 1,759 acres in 1884, nor contemplation that such acres would be irrigated when the Kipp Ditch was constructed. This Finding quotes *Holmstrom Land Company v. Meagher County Newlan Creek Water District*. 185 Mont. 409, 418-19, 605 P.2d 1060, 1065-66 (1979).

PCCRC objected to these Findings, but supplied no specific evidence to support its objection. In the absence of a more specific objection, there is no basis for concluding the Master's Findings were erroneous. PCCRC's objection is denied.

5. Master's Report, Finding of Fact 103, p. 44; PCCRC Objection

This Finding and the objection to it are addressed in part in the discussion of Curry claim 41M 159114-00 or Right Number 24 contained in Part III of this Order. PCCRC also asserts the Master did not address PCCRC's claim to a portion of the Taylor right and that the Master's Finding is therefore incomplete.

The Taylor right is also discussed in Finding of Fact 232, although no mention is made of PCCRC's claim for a portion of this right in that Finding. Master's Report, pp. 92-93. PCCRC's objection to Finding of Fact 232 is essentially the same as its objection to Finding of Fact 103.

PCCRC's claim for a portion of Right Number 24 is based on ownership of claim 41M 199801-00 conveyed to it by Kingsbury. In its original configuration, this claim was for 18.75 cfs. PCCRC reduced its claimed flow rate to 8.76 cfs. Absent a discussion of this water right by the Master, PCCRC's claim to a portion of Right Number 24 is entitled to *prima facie* status. Section 85-2- 227(1), MCA.

The Master's decision not to address this right does not mean it is lost. The Court will, however, accept PCCRC's reduced flow rate.

The flow rate for claim 41M 199801-00 is 8.76 cfs.

6. Master's Report, Findings of Fact 104-105, pp. 44-45. Curry Claims 41M 159115-00 and 41M 159116-00 (Right Number 1). Curry and PCCRC Objections

The status of Curry claims 41M 159115-00 and 41M 159116-00 is discussed extensively in Part III of this Order. The objections of the parties to Finding of Fact 104 are resolved as part of that discussion.

7. Master's Report, Finding of Fact 115, p. 48; Curry Objection

This Finding states that lands in Sections 31 and 32 should not be used to calculate division of the flow rate for the Ryan-Lauffer right between the parties. Curry objected that these lands should be included in the Ryan-Lauffer appropriation since Ryan controlled these lands. Curry does not specify what evidence supports his contention that Ryan controlled lands in Sections 31 and 32.

Accordingly, Finding of Fact 115 shall remain unmodified. Master's Report, p. 48.

8. Master's Report, Finding of Fact 130, p. 50; Curry Objection

This finding pertains to use of the Messecar Ditch. There was considerable testimony and documentary evidence at trial regarding nonuse of the Messecar Ditch. This Finding is based on substantial evidence and will remain unmodified.

9. Master's Report, Finding of Fact 135C, p. 52; Curry and PCCRC Objections

This Finding pertains to Curry claim 41M 131102-00. Disposition of this claim, the Master's Findings regarding this claim, and the parties' objections to those Findings are discussed extensively elsewhere in this Order and will not be repeated here.

10. Master's Report, Finding of Fact 135D, pp. 52-54; Curry and PCCRC Objections

This Finding pertains to Curry claim 41M 131103-00 and PCCRC claim 41M 199796-00. Disposition of these claims, the Master's Findings regarding these claims, and the parties' objections to those Findings are discussed extensively elsewhere in this Order and will not be repeated here.

11. Master's Report, Findings of Fact 136-156, pp. 52-55; PCCRC

Objection

These Findings pertain to historical irrigation by PCCRC. This topic is discussed extensively elsewhere in this Order. The Master made numerous Findings on this topic. Some are unsupported by substantial evidence, were clearly erroneous, or incorrect as a matter of law. These Findings are mixed with Findings that are accurate.

Parsing accurate sentences from inaccurate sentences within a single finding of fact is unnecessary given the treatment these issues received in Part II above. Accordingly, the Court declines to adopt Findings of Fact 136-156.

C. Analysis of Storage Rights and Objections to Master's Report

The Court will address the various Findings of Fact regarding storage rights. If one or both of the parties objected to a Finding, it is noted in the subheading.

1. Master's Report, Findings of Fact 157-159, pp. 60-61 and Finding of Fact 165, pp. 62-63; PCCRC Objection

In these Findings, the Master determined that PCCRC claims predating construction of Swift Reservoir or Lake Francis could not be used for storage. The ability of PCCRC to use its rights for storage has been addressed elsewhere in this Order. Finding of Fact 165 is not consistent with Montana case law, and the Court does not adopt it.

2. Master's Report, Findings of Fact 166-186, pp. 63-70; PCCRC Objection

These Findings of Fact pertain to the service area for PCCRC claims. Finding of Fact 186 also discusses storage. Master's Report, p. 70. This Court has determined that PCCRC is entitled to a general service area. The Master's Finding to the contrary was legal error. As a consequence, the Court declines to adopt Findings of Fact 166-186.

3. Master's Report, Finding of Fact 187, p. 70; PCCRC Objection

This Finding is a general statement of opinion intended to apply to all PCCRC water rights in this proceeding. It probably reflects the Master's views regarding the difficulty of the case he was charged with deciding. The Master's opinion is

understandable, but it amounts to a one-size-fits-all statement regarding PCCRC water rights, which have different histories and pedigrees. While Finding of Fact 187 may be an accurate statement with respect to some of those rights, it cannot be applied accurately to all rights. The Court declines to adopt Finding of Fact 187.

4. Master's Report, Findings of Fact 188-195, pp. 70-72. (Right Number 1 – Kipp Right). Curry and PCCRC Objections

This portion of the Master's Report pertains to Right Number 1, also known as the Kipp right. The disposition of this right, and of the claims and objections made by Curry and PCCRC to it, have been addressed elsewhere in this Order.

These Findings contain a number of errors including incorrect assignment of flow rates and failure to recognize PCCRC's claim to the one-half interest of the Kipp right conveyed to Raphael Morgan. Not every sentence in each of these Findings is incorrect; however, judicial economy suggests that replacement of Findings of Fact 188-195 with this Order will produce a clearer result for the parties than attempting to parse each line of those Findings. Accordingly, the Court declines to adopt Findings of Fact 188-195.

5. Master's Report, Findings of Fact 196-197, pp. 72-73. (Right Number 3). Curry and PCCRC Objections

Both Curry and PCCRC filed water right claims related to Right Number 3, which was for 500 inches of water based on the Charles P. Thomas notice of appropriation. Charles P. Thomas and his wife conveyed their lands and the Charles P. Thomas water right to CIC on April 14, 1906. Curry filed a use right, claim 41M 160284-00, with the same priority date as the Charles P. Thomas notice of appropriation.

PCCRC also filed a claim based on the Thomas notice. Its claim is 41M 161999-00. Curry's claim 41M 160284-00 is discussed elsewhere in this Order.

Findings of Fact 196 and 197 address PCCRC claim 41M 161999-00 for the Thomas right. Master's Report, pp. 72-73. The Water Master determined that the Thomas right had only been used to irrigate approximately ten acres. Using this acreage figure, he applied a flow rate standard of one cfs to 80 acres to impute a flow rate of 0.125 cfs for this claim.

PCCRC generally objected to Findings of Fact 187-207, but did not submit a specific objection regarding the Master's Findings for claim 41M 161999-00.

The primary source of information for historic use of this claim is Exhibit C-28, Bates Stamp 1924-1931. A review of the narrative regarding this right shows commentary from a number of witnesses familiar with its early use. They generally indicated the ditch for this claim was small and usage was minimal. There was no credible evidence of ditch capacity specific to this right. The Master's conclusions regarding irrigated acreage are consistent with this evidence.

Exhibit WC-1 depicted five to ten acres of irrigation using the Thomas right prior to 1915. The value of this information is subject to question given that the Thomas right was conveyed to CIC in 1906. Nevertheless, the Master's Findings regarding historic irrigated acreage for the Thomas right are based upon the best available evidence and will not be disturbed.

The Master assigned a flow rate to this claim using a standard of one cfs to 80 acres. This standard is referenced on several occasions throughout documents produced by PCCRC's predecessors. It is lower than the flow rate generally assigned to water rights in Montana.

The current standard utilized in the Water Right Claim Examination Rules is 17 gallons per minute per acre. Rule 14(b), W.R.C.E.R. In comparison, a standard of one cfs for 80 acres equals 5.6 gallons per minute.

There is no useful evidence of flow rate pertaining to this right. Lacking such evidence, the Master's application of the one cfs to 80 acres standard was appropriate. The flow rate for this claim is 0.125 cfs. Given the low flow rate, no volume was decreed for this right.

In keeping with subsequent use of this right for storage, the points of diversion are Swift Dam and the B Canal.

**6. Master's Report, Findings of Fact 199A-C, pp. 73-74. PCCRC Claims 41M 162000-00 and 41M 162109-00 (Right Number 4 – Gray Right).
Curry and PCCRC Objections**

The Gray right was based upon a notice of appropriation by Patrick Gray for 12.5 cfs with the priority date of December 18, 1894. The Master found 76 acres irrigated based upon a review of the Atwood Report. From there, the Master computed a flow rate of 0.95 cfs based upon a 1:80 duty of water.

Curry asserts this right should be dismissed for lack of evidence regarding actual use. PCCRC filed a general objection to the Master's Findings of Fact 187-207, but did not supply any specific objection to the Findings regarding this water right. There is sufficient evidence to support the Master's Findings regarding usage of this claim on 76 acres. That Finding will not be disturbed.

The Court is concerned about the use of a duty of water equivalent to one cfs for 80 acres for the Gray right. Unlike other rights subject to this standard, there was credible evidence of ditch capacity for the Gray right. Exhibit C-28 identifies a ditch capacity of 5.67 cfs. Ex. C-28, Bates Stamp 1933. Although the same document identified ditch capacity for the Thomas right, that figure was an estimate contradicted by other information in the Report. Here, the estimate of ditch capacity is more in line with acreage and is not contradicted by other descriptions of the ditch.

Application of a flow rate standard is less desirable than applying evidence of actual ditch capacity when available. The flow rate for claims 41M 162000-00 and 41M 162109-00 is 5.67 cfs.

Claim 41M 162000-00 is for irrigation, and claim 41M 162109-00 is for municipal use. Both claims are based on the Gray right. A remark shall be added to each claim stating:

THE COMBINED FLOW RATE OF CLAIMS 41M 162000-00 AND 41M 162109-00
MAY NOT EXCEED 5.67 CFS.

The Gray right was transferred to predecessors of PCCRC, which claims it was used for storage in Birch Creek Reservoir and Lake Francis. Using 76 acres as the

historic baseline for the irrigation claim based on this right, the volume associated with this right is 174.8 acre-feet (76 acres X 2.3 acre-feet/acre). The points of diversion for this claim should be Swift Dam and the B Canal.

Claims 41M 162000-00 and 41M 162109-00 should each have the following remark added regarding volume:

THE COMBINED VOLUME OF CLAIMS 41M 162000-00 AND 41M 162109-00
MAY NOT EXCEED 174.8 ACRE-FEET.

Claim 41M 162109-00 is not included in the tabulation as it was not included in PCCRC's proposed tabulation.

**7. Master's Report, Finding of Fact 201, p. 75. Claims 41M 162001-00
and 41M 162002-00 (Right Number 6). Curry and PCCRC Objections**

PCCRC filed two claims based upon a notice of appropriation filed by Annie M. Steell for 500 inches of water from Birch Creek on October 16, 1895. The Water Master recognized both rights. He fixed irrigated acreage at 77.5 acres. Because these claims are duplicates of each other, the Master limited their use to a maximum of 0.97 cfs.

Curry contends that the place of use for this right is known as the Cote Ranch, which is near the headwaters of Birch Creek, and that there is no evidence of actual use of this water right.

PCCRC filed a generalized objection to this Finding of Fact, but did not make a specific objection to the Master's Findings regarding either of the PCCRC claims. In its Proposed Findings of Fact, PCCRC asserted the priority date for claim 41M 162001-00 should be May 1, 1895, and the flow rate 2.69 cfs. Post-Trial Proposed Findings of Fact, Conclusions of Law, and Recommendations of PCCRC, p. 79.

Neither Objector has a completely correct position regarding these claims. The Master's Findings are based upon a discussion of this water right in the Atwood Report. Ex. C-28, Bates Stamp 1945-1949. The Master's Findings are based upon substantial evidence and will not be disturbed. The flow rate for claim 41M 162001-00 should be 0.97 cfs.

The Master found this water right had originally been used on 77.5 irrigated acres before it was converted for use within the Valier Project. Accordingly, the volume for claim 41M 162001-00 is 178.25 acre-feet per year (77.5 acres X 2.3 acre-feet/acre). The points of diversion are Swift Dam and B Canal. Claim 41M 162002-00 is a duplicate of claim 41M 162001-00. Claim 41M 162002-00 is dismissed.

8. Master's Report, Findings of Fact 203-207, p. 76. Claims 41M 162110-00 and 41M 162111-00 (Right Number 11). PCCRC Objection

These claims are based upon a notice of appropriation filed by Jerry Mongon. The Water Master determined both of these claims should be dismissed.

PCCRC filed a generalized objection to the Findings of Fact pertaining to these water rights, but did not offer specifics to support its objection. In its Proposed Findings of Fact, however, PCCRC indicated rights based on the Jerry Mongon notice of appropriation were invalid and should be dismissed.

The Master's decision to dismiss claims 41M 162110-00 and 162111-00 was correct and will not be disturbed. These claims are dismissed.

9. Master's Report, Finding of Fact 210, pp. 77-79. PCCRC Claims 41M 199795-00 and 41M 162003-00 (Right Number 15 – McGovern Right). PCCRC Objection

Right Number 15 was based on a notice of appropriation filed by McGovern, Potter, and McKnight for 500 cfs from Birch Creek with a priority date of April 20, 1897. The notice of appropriation for this right was filed June 25, 1897, making it noncompliant with the 1885 statute. Section 89-810, RCM (1947). This claim will be referenced as the McGovern right or McGovern notice of appropriation.

PCCRC initially asserted two rights based upon the McGovern notice of appropriation.

After the McGovern notice of appropriation was filed, McGovern became the sole owner of this water right. He retained 650 inches of water for irrigation of lands belonging to his family, and sold the balance to CIC. The portion he retained was

eventually conveyed to Kingsbury. The portion conveyed to CIC was later conveyed to PCCRC.

During the claims' filing process, Kingsbury filed claim 41M 199795-00 for its portion of the McGovern right. The Kingsbury claim was also conveyed to PCCRC after it was filed. Thus, by conveyances from Kingsbury and CIC, PCCRC became sole owner of the entire McGovern right.

a. The CIC Portion of the McGovern Right

PCCRC filed claim 41M 162003-00 for the CIC portion of the McGovern right. Despite owning claims for the entirety of the McGovern right, PCCRC filed Proposed Findings of Fact maintaining a claim for the Kingsbury portion only. Post-Trial Proposed Findings of Fact, Conclusions of Law, and Recommendations of PCCRC, p. 90. Its Proposed Findings relinquished its claim for the CIC portion. Accordingly, claim 41M 162003-00 for 483.75 cfs based on the CIC portion of the McGovern right is terminated.

b. The Kingsbury Portion of the McGovern Right

The McGovern right is discussed in Exhibit C-28, Bates Stamp 1986-1995. From this discussion, it appears McGovern began construction of what later became the Kingsbury Ditch in April of 1897. This date of construction is corroborated by testimony of McGovern in *U.S. v. Conrad Investment Company*. Ex. P-4, pp. 552 & 555. Although the head of this Ditch was over twenty feet in width, McGovern ran out of money and eventually constructed a smaller ditch for a distance of five or six miles. Ex. C-28, Bates Stamp 1989.

In 1898, Potter and McKnight transferred their interest in this right to McGovern who became the sole owner. On July 16, 1898, McGovern and his wife sold 19,350 inches of this water right to CIC, leaving McGovern with the remaining 650 inches. Ex. C-28, Bates Stamp 1996. Two years later, the McGovern's sold their 650 inch share to Kingsbury. Ex. C-28, Bates Stamp 1997.

There was conflicting information in the Atwood Report regarding the size of the Kingsbury Ditch constructed by McGovern. Sizes ranged from a bottom width of

between four and eight feet. The VMLWC undertook measurements of the Ditch in June of 1915, and determined it had a depth of one and a half feet and a bottom width of five feet with a capacity of 17.14 cfs. Ex. C-28, Bates Stamp 1990. The Ditch was enlarged to a width of twelve feet in 1919. Ex. C-28, Bates Stamp 1990.

The Atwood Report states that McGovern's wife and children settled on Indian allotments in Sections 5, 6, 7, and 8 in T29N, R7W. According to the Report, McGovern testified in federal court that he originally appropriated his right to irrigate these allotments and other lands. The Report states that the extent of irrigation on these lands was not definitely known, but concludes that "indications on the ground point to the fact that water has been used for many years." Ex. C-28, Bates Stamp 1991. The Report contains maps and a tabulation of irrigated acreage totaling 572 acres. Ex. C-28, Bates Stamp 1991.

After acquiring the McGovern right in 1900, F.D. Kingsbury conveyed his interest in the right to Minnie Kingsbury, Bessie Kingsbury, Edward D. Forrest, and Ophelia M. Forrest, each of whom received a one-quarter share. Ex. C-28, Bates Stamp 1992.

In total, the Atwood Report identified 1,140 acres irrigated with the Kingsbury portion of the McGovern right by 1915. Ex. C-28, Bates Stamp 1993. Despite having concluded that the capacity of the Kingsbury Ditch was 17.14 cfs, the Atwood Report recognized a flow rate of only 7.15 cfs. This conclusion was based on the one cfs per 80 acre duty of water. It was applied only to the 572 acres irrigated by McGovern's family, even though the Atwood Report recognized substantial additional irrigation by Kingsbury.

Kingsbury Ditch Company filed claim 41M 199795-00 for this right on April 30, 1982. The claimed flow rate was 16.25 cfs for use on 8,283.7 acres. Subsequent to the claim filing by Kingsbury, this water right was the subject of a change application approved by the DNRC. On April 18, 1995 the DNRC issued an order changing the place of use to 3,400 acres. Ex. P-14.

On June 2, 2006, PCCRC, by then the owner of this claim, filed an amendment changing the place of use to 3,804.6 acres. Claim File 41M 199795-00.

The Master made substantial changes to claim 41M 199795-00. The Master declined to recognize any irrigation by McGovern. The irrigation undertaken by Kingsbury and Forrest was recognized, but the priority date was amended to reflect the date those lands were patented, which was August 7, 1906.

The result of these changes was a water right with a flow rate of 7.18 cfs and a priority date of August 7, 1906 for use on the Kingsbury and Forrest lands.

There are problems with the Master's analysis that amount to clear error.

The Master's Report ignores evidence of irrigation in the Atwood Report, and replaces that evidence with speculation that irrigation occurred much later, and began on the exact day these lands were patented by Kingsbury and Forrest. Speculation is not substantial evidence.

The Master's Report also ignores McGovern's testimony in federal court regarding use of his right, and his construction of five to six miles of ditch in 1897. Ex. P-4, p. 555. The Master's Report does not address why someone would build a ditch five to six miles long in 1897 and not use it until 1906.

The Master's Report ignores the *prima facie* status of the claim, and does not explain what evidence overcame that status. Because there was no evidence to support the Master's Findings regarding priority date and no evidence to overcome the *prima facie* status of the claim, the Master's decision to alter the priority date, flow rate, and place of use for claim 41M 199795-00 was clearly erroneous.

As an example, Exhibit C-28 identifies a ditch capacity of 17.14 cfs, an amount nearly identical to the 16.25 cfs claimed for this right. Ex. C-28, Bates Stamp 1990.

The same exhibit acknowledges irrigation of 1,140 acres using this right at a time when the preparer of this document, PCCRC's predecessor, did not own this claim and was in a position of adversity to it. Ex. C-28, Bates Stamp 1993.

The elements of the claim are as follows:

FLOW RATE:	16.25 CFS
PRIORITY DATE:	SEPTEMBER 1, 1897
VOLUME:	2622 ACRE-FEET (1142 acres X 2.3 acre-feet)

PLACE OF USE:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	226.5		N2	3	29N	7W	PONDERA
	530			4	29N	7W	PONDERA
	595.6			5	29N	7W	PONDERA
	99.5		E2E2	6	29N	7W	PONDERA
	2		S2SWSE	6	29N	7W	PONDERA
	45.3		E2E2	7	29N	7W	PONDERA
	2.5		NENWNE	7	29N	7W	PONDERA
	513.6			8	29N	7W	PONDERA
	211.9		N2	9	29N	7W	PONDERA
	109.2		SW	9	29N	7W	PONDERA
	74.3		N2NE	17	29N	7W	PONDERA
	14		N2NENW	17	29N	7W	PONDERA
	201.5		S2	32	30N	7W	PONDERA
	538.7			33	30N	7W	PONDERA
	640			34	30N	7W	PONDERA

3,804.6

POINTS OF DIVERSION: SWNE SECTION 1, T29N, R8W
 SENWNE SECTION 1, T29N, R8W

PCCRC amended several claims to include the same 3,804.6 acre place of use identified above. These claims were 41M 199792-00, 41M 199797-00, 41M 199804-00,¹³ 41M 199795-00, and 41M 199801-00. These amendments appear to have been made because these rights were marshaled for use on this acreage. Despite now being marshaled for use on the same parcel, not all of these rights were historically used on the entirety of this amended place of use.

Where the evidence permitted, volume for these rights was calculated from the historical acreage upon which these rights were initially used. These volumes were established to insure the historical use of these claims would not be exceeded as a consequence of marshaling.

10. Master's Report, Findings of Fact 211-225, pp. 79-86. McGovern B Canal Water Rights (Right Number 15). PCCRC Objection

Findings of Fact 211 through 225 pertain to use of the McGovern right in the B Canal. The portion of the McGovern right discussed in these Findings was purchased by CIC from McGovern shortly after it was filed.

¹³ Claim 41M 199804-00 was terminated earlier in this Order.

As noted above, PCCRC withdrew its ownership interest in the portion of the McGovern claim sold to CIC. Accordingly, the Master's Findings regarding use of this portion of the McGovern right are unnecessary and the Court will not adopt them.

11. Master's Report, Findings of Fact 226-227, pp. 86-87. (Right Number 16 – Ryan-Lauffer Right). Curry and PCCRC Objections

The objections to Findings of Fact 226 and 227 are discussed previously in this Order and do not require repetition here.

12. Master's Report, Finding of Fact 228, p. 88. PCCRC Claims 41M 162004-00 and 41M 162113-00 and Curry Claim 41M 159116-00 (Right Number 17 – Morgan Steell Right). PCCRC Objection

The Master determined that both PCCRC claims for Right Number 17 should be dismissed. This determination was based on information contained in Ex. C-28. p. 2028. PCCRC objected to the Master's Finding, asserting the decision to dismiss PCCRC claims based on Right Number 17 was clearly erroneous. The Court does not agree. The Master's decision to dismiss PCCRC claims 41M 162004-00 and 41M 162113-00 was correct.

As indicated by the Atwood Report, Right Number 17 was a duplicate of Right Number 1. It was filed because concerns about the chain of title for Right Number 1 made it unsuitable to prove irrigation of desert land claims. The Atwood Report states:

We contend that this right was never perfected but is only a paper appropriation, on account of no ditch capacity having been provided, that it was only appropriated for the purpose of being used as a citation in connection with the filings on desert claims, and never was actually placed to beneficial use by the original appropriators or the entrymen.

Ex. C-28, p. 2031. PCCRC's predecessors wrote these words. PCCRC's objection to dismissal of claims 41M 162004-00 and 41M 162113-00 is denied. These claims are dismissed.

13. Master's Report, Finding of Fact 229, pp. 88-90

A discussion of objections to this Finding of Fact is provided earlier in this Order.

**14. Master's Report, Finding of Fact 230, pp. 90-91. PCCRC Claim 41M
162006-00 (Right Number 21). PCCRC Objection**

Claim 41M 162006-00 was filed for 250 cfs from Birch Creek. PCCRC claims it for use in the B Canal.

According to the Master's Report, the notice of appropriation for this claim described a point of diversion located twelve air miles upstream of the B Canal. The notice also specified that water was to be diverted from Birch Creek into Sheep Creek and then into Dupuyer Creek. As constructed, the B Canal did not divert water into Sheep Creek, and it was not located near the point of diversion described in the notice.

The Master found that the final surveys for the B Canal were begun the same month the notice of appropriation for Right Number 21 was filed. The Master also found that W. G. Conrad, who filed the notice, could have specified the B Canal as the point of diversion rather than the diversion actually specified, which was many miles upstream. On this basis, the Master found that the water right specified in the notice was never perfected, and that any claims based on Right Number 21 should be dismissed.

PCCRC contends the Master's Finding ignores other evidence in the record, and that it should have a right for 250 cfs from the B Canal. In support of this contention, it cites documents referenced in its Proposed Finding of Fact 173C. Post-Trial Proposed Findings of Fact, Conclusions of Law, and Recommendations of PCCRC, p. 90. These documents consist of the Atwood Report and various affidavits executed years after the notice of appropriation for Right Number 21 was filed.

The test for review of a Master's Findings is whether they are based on substantial evidence. *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287. The Master's Findings are based on the notice of appropriation filed by the Claimant's predecessor. This notice does not support a water right for the B Canal.

Evidence dated years after the original appropriation suggests that PCCRC's predecessors eventually intended to use this right in the B Canal, but the existence of conflicting evidence does not invalidate the Master's Findings. *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287.

PCCRC does not explain why its predecessors did not simply amend their existing notice to include the B Canal, or file an entirely new notice to protect their investment in the B Canal. The affidavits relied upon by PCCRC to support a right for the B Canal were signed years after the original notice was filed. The urgency of the language in these affidavits conveys the impression the affiants knew there was a problem with their original notice and were attempting to rectify it after the fact.

The Master's Findings that claims based on Right Number 21 should be dismissed are based on substantial evidence, and the Court is not left with the impression they are clearly erroneous. PCCRC claim 41M 162006-00 is dismissed, as are any other claims based on Right Number 21, including claim 41M 162115-00 which is the companion municipal claim based on the Conrad notice of appropriation.

15. Master's Report, Finding of Fact 231, p. 92. PCCRC Claims 41M

120072-00, 41M 185666-00, 41M 199800-00, and 41M 199819-00 (Right Number 23 – Stewart and Gardener Notice of Appropriation).

PCCRC Objection

The Water Master found the Stewart and Gardener water right was never perfected and recommended termination of all four PCCRC claims based on it. PCCRC objected that the Master ignored evidence regarding use of this right, including references to it in the Pondera County WRS.

Claim 41M 120072-00 was originally filed by Birch Creek Water Company for 62.5 cfs for irrigation of 9,841.7 acres. It was amended by PCCRC on June 2, 2006. The amendments changed the point of diversion to the B Canal, reduced the flow rate to 41.68 cfs, and reduced acreage to 669.5 acres. At trial, PCCRC reduced the flow rate for this claim to 6.62 cfs. Ex. P-5, p. 21.

Claim 41M 185666-00 was originally filed by First Continental Corporation for 62.5 cfs for irrigation of 665 acres. PCCRC amended this claim to 12.83 cfs on 213.3 acres and specified the B Canal as the point of diversion. At trial, PCCRC reduced the flow rate for this claim to 4.0 cfs. Ex. P-5, p. 21.

Claim 41M 199800-00 was filed by the Kingsbury Ditch Company for 21 cfs for irrigation of 8,283.7 acres. It was amended by PCCRC to 8.0 cfs for irrigation of 3,804.6 acres. PCCRC also included two points of diversion in its amendment located in Section 1, T29N, R8W. This right was previously the subject of a change application.

Claim 41M 199819-00 was filed by the Kingsbury Ditch Company for stockwater. It is a companion claim to 41M 199800-00. Curry asserted the Stewart and Gardener right was never perfected and that all four PCCRC claims based on it should be dismissed. The Master's decision to dismiss PCCRC's claims for non-perfection was based on the Atwood Report. Ex. C-28, Bates Stamp 2092.

The Atwood Report had the following statement about the Stewart and Gardener right:

Rights No. 19 and 22 we found were more than sufficient to supply the lands for these appropriators. In fact the amount of perfected right was not sufficient to fill the ditch the capacity of which would not permit the total diversion of the amount of water called for from the creek. Therefore this right could not have been used except at the exclusion of Right No. 19 and 22. That this was done is very improbable for no sane individual will give up an earlier right for a later one unless he performs the act under pressure. Hence we do not believe that the original appropriators used or perfected this right in part or in total.

Ex. C-28, Bates Stamp 2093.

This passage indicates the Atwood Report's conclusions regarding nonuse were based on the assumption that the Stewart and Gardener right could not have been used because the owners of it had better rights to satisfy their needs. It does not state a conclusion based on personal observation of nonuse.

In contrast to the statement on Bates Stamp 2093, Bates Stamp 2094 of the Atwood Report includes an extensive discussion of the chain of title for the Stewart and Gardener right. This section references irrigation with portions of the right after it was sold in pieces to different owners. This section also contains an additional explanation of the basis for the Report's conclusions regarding nonuse, which are mostly based on the timing of transfers of ownership, and which are acknowledged to be speculative.

As a whole the Atwood Report contained conflicting statements regarding use of the Stewart and Gardiner right. Although the statements made in the Atwood Report predated PCCRC's eventual ownership of claims for this right, much of this portion of the Report has the flavor of opinion rather than fact.

There are several references to use of this right subsequent to the Atwood Report. Field notes for the Pondera County WRS show use of $12 \frac{5}{6}$ cfs by Sadie McDonald on 228 acres delivered via the Stewart-Hall Ditch. Ex. P-77. The date of these notes is July 23, 1963.

McDonald was a predecessor of First Continental, which filed claim 41M 185666-00 for nearly the same acreage as that identified by the State Engineer's Office on Sadie McDonald's property. Over forty years after issuance of the WRS, the DNRC verified 213.5 acres of irrigation during claims examination on October 13, 2005. The 213.5 acres of irrigation found by the DNRC was based on an aerial photo taken in 1979. WRS Field Notes dated August, 1963 reference 320 miner's inches of the Stewart Gardiner right in connection with property owned by Mary Kingsbury and Clark Whitcomb, but the right is shown as not in use. The ditch used to deliver the right is identified as the Hall Stewart. Ex. P-77.

The text of the Pondera WRS also references the Stewart Gardiner right. It states that Birch Creek Water Company was deeded 1,250 inches of this right from E.E. Leech, and 417 inches from William Cowgill. Ex. P-37, p. 31. The combined flow of these two portions equals 41.675 cfs, which matches the 41.68 cfs claimed by PCCRC in its amendment to claim 41M 120072-00. As noted above, PCCRC later reduced this flow rate to 6.62 cfs.

The place of use/acres irrigated for this right was examined by the DNRC on June 9, 2006. The DNRC verified 669.5 acres in connection with this claim. All three of the modern irrigation claims for portions of the original Stewart Gardiner right are supported by multiple forms of evidence showing usage after the Atwood Report was issued.

The Master's Report did not acknowledge or address this evidence, nor did it address the inconsistencies in the Atwood Report. The Master's Report did not

acknowledge that all three claims were owned and used by different entities and therefore required separate analysis. The analysis of these rights was confined to three sentences in a single finding of fact.

The Court declines to adopt the recommendation of dismissal for several reasons. First, the portion of the Atwood Report discussing the Stewart Gardiner right is simply too speculative to warrant overcoming the *prima facie* status afforded to claims by § 85-2-227(1), MCA. Second, the Master's Report does not acknowledge or address other conflicting evidence of historical use, thereby leaving the Court in doubt as to whether the Master was aware of or considered such evidence before recommending dismissal. Finally, the Master treated each claim as if it was owned by the same person, when the record, including the Atwood Report, indicated separate ownership and use of portions of the original right for many years.

The Court declines to adopt the Master's recommendation of dismissal.

The elements of these claims are as follows:

41M 120072-00

PRIORITY DATE:	AUGUST 31, 1897
FLOW RATE:	6.62 CFS
IRRIGATED ACREAGE:	669.5 ACRES
VOLUME:	1,539.8 ACRE-FEET (669.5 acres X 2.3 af/acre)
POINT OF DIVERSION:	NENWSW SECTION 27, T29N, R8W.

41M 185666-00

PRIORITY DATE:	AUGUST 31, 1897
FLOW RATE:	4.0 CFS
IRRIGATED ACREAGE:	213.3 ACRES
VOLUME:	490.5 ACRE-FEET (213.3 acres X 2.3 af/acre)
POINT OF DIVERSION:	NENWSW SECTION 27, T29N, R8W

41M 199800-00

PRIORITY DATE:	AUGUST 31, 1897
FLOW RATE:	8.0 CFS
THE COMBINED FLOW RATE FOR CLAIMS 41M 199800-00 AND 199819-00 MAY NOT EXCEED 8.0 CFS.	
IRRIGATED ACREAGE:	3, 804.6 ACRES (PER CHANGE APPLICATION)
VOLUME:	NOT QUANTIFIED IN THIS ORDER
POINT OF DIVERSION:	SWNE SECTION 1, T29N, R8W SESWNE SECTION 1, T29N, R8W

41M 199819-00 (Stockwater)

PRIORITY DATE: AUGUST 31, 1897

FLOW RATE: 8.0 CFS

THE COMBINED FLOW RATE FOR CLAIMS 41M 199800-00 AND 199819-00 MAY NOT EXCEED 8.0 CFS.

VOLUME: 27 ACRE-FEET

POINT OF DIVERSION: SWNE SECTION 1, T29N, R8W
SESWNE SECTION 1, T29N, R8W

This water right claim is not included in the tabulation as it was not listed in PCCRC's proposed tabulation.

16. Master's Report, Finding of Fact 232, pp. 92-93. PCCRC Claims 41M 199801-00 and 41M 199820-00 (Right Number 24 – Lena Taylor Right). PCCRC Objection

Both Curry and PCCRC claimed portions of the Lena Taylor right. The Curry claim is discussed elsewhere in this Order. *See* Part III. PCCRC filed claim 41M 199801-00 for 8.76 cfs of the original 25 cfs claimed by Lena Taylor. Claim 41M 199820-00 is the stockwater companion claim for the irrigation right.

Curry asserted that PCCRC's claims for part of the Taylor right were invalid because Kingsbury, Taylor's successor, never irrigated with his portion of the right before it was conveyed to PCCRC. Curry contends that Kingsbury's interest was therefore abandoned. The evidence cited in support of abandonment is the Atwood Report. Ex. C-28, Bates Stamp 2080-2081.

The Master's Report did not address PCCRC's claims or Curry's objections to those claims. It is not clear why the Master did not address these claims or objections in his Report. PCCRC's objection to Finding of Fact 232 contends the Master should have recognized its claims, and that failure to do so was error. PCCRC's Objections to Master's Report, p. 48.

The language of the Atwood Report does not support a claim of abandonment with sufficient strength to overcome the presumption of validity for the Kingsbury portion of the right. References to the Kingsbury portion of the Taylor right infer abandonment, but are not based upon actual evidence of nonuse.

Instead, the inference of abandonment was based on a belief that the land under the Taylor right was not Kingsbury's most productive, and that he would have had to do extra work to make it easily irrigable. Absent actual evidence of nonuse, such speculation alone is too weak to create a presumption of abandonment.

Regardless, the Field Notes for the Pondera County WRS reference use of the Lena Taylor right for irrigation of 530 acres on the Kingsbury property. Ex. P-77, Part D. These Field Notes indicate use of water on the same land the Atwood Report claimed was too unproductive to irrigate, thereby creating doubt about the conclusions in the Report.

Claim 41M 199801-00 has the following elements:

PRIORITY DATE: JANUARY 14, 1898
 FLOW RATE: 8.76 CFS
 VOLUME: 1,219 ACRE-FEET (530 acres in WRS X 2.3 af/acre)
 POINT OF DIVERSION: SWNE SECTION 1, T29N, R8W
 SESWNE SECTION 1, T29N, R8W
 PERIOD OF USE: APRIL 20 TO OCTOBER 14

Irrigated acreage was amended to 3,804.6 acres on June 2, 2006. Although this and other rights may have been marshaled for use on the amended acreage, volume is limited to the amount of acreage in the WRS Field Notes. The place of use shall remain as amended, which is described below:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
226.5			N2	3	29N	7W	PONDERA
530				4	29N	7W	PONDERA
595.6				5	29N	7W	PONDERA
99.5			E2E2	6	29N	7W	PONDERA
2			S2SWSE	6	29N	7W	PONDERA
45.3			E2E2	7	29N	7W	PONDERA
2.5			NENWNE	7	29N	7W	PONDERA
513.6				8	29N	7W	PONDERA
211.9			N2	9	29N	7W	PONDERA
109.2			SW	9	29N	7W	PONDERA
74.3			N2NE	17	29N	7W	PONDERA
14			N2NENW	17	29N	7W	PONDERA
201.5			S2	32	30N	7W	PONDERA
538.7				33	30N	7W	PONDERA
640				34	30N	7W	PONDERA
<hr/>							
	3,804.6						

PCCRC amended claims 41M 199792-00, 41M 199797-00, 41M 199804-00, 41M 199795-00, and 41M 199801-00 to include the same 3,804.6 acre place of use identified above. These amendments appear to have been made because these rights were marshaled for use on this acreage. Despite now being marshaled for use on the same parcel, not all of these rights were historically used on the entirety of this amended place of use.

Where the evidence permitted, volume for these rights was calculated from the historical acreage upon which these rights were initially used. These volumes were established to insure the historical use of these claims would not be exceeded as a consequence of marshaling.

Water right claim 41M 199820-00 is not included in the tabulation, because it was not listed in PCCRC's proposed tabulation.

**17. Master's Report, Finding of Fact 234, p. 94. (Right Number 35 –
Ingram and Thomas Notice)**

There are four claims based on this notice. Claims 41M 162008-00 and 41M 162117-00 were filed by PCCRC for irrigation and municipal use. Claim 41M 199805-00 was filed by Kingsbury for irrigation. Claim 41M 199824-00 was filed by Kingsbury for stockwater. Curry objected.

The Master elected not to make any changes to the PCCRC claims based on the Ingram and Thomas right. The basis for the Master's decision was that "[t]here was no evidence which contradicts their prima facie showing." Master's Report, p. 94. Curry objected that this right was not in use when Jere Walley bought his property in 1959.

Mr. Walley lived in the Birch Creek area from 1958 to 1977. Walley Test., Day 1, 11:47:37-11:47:51. He owned lands in Sections 22 and 23. He testified these lands were not irrigated when he bought them. Test., Day 1, 11:49:40-11:49:43. He obtained water from the Thomas Williamson Ditch and was the only person using the Ditch. Test., Day 1, 11:53:10-11:53:15 & 11:54:25-11:54:34. He leveled about 50-60 acres and installed border dikes. Test., Day 1, 11:49:56-11:51:14.

The Pondera County WRS shows irrigation of lands in Sections 22 and 23 under the Thomas Williamson Ditch. During claims examination, the DNRC confirmed 268.9 acres as irrigated in the WRS. Claim File 41M 199805-00. WRS Field Notes for the Walley property show the Ingram and Thomas right was not in use in July of 1963. Ex. P-77, Part D. These notes contradict both the WRS and the testimony of Jere Walley.

Jere Walley's testimony indicates the Thomas Williamson Ditch served land in Sections 22 and 23 before he bought it. The existence of a ditch suggests irrigation prior to his ownership. Walley's testimony established that irrigation was not taking place before he came into possession, but does not establish how long nonuse may have occurred before his occupancy.

The thrust of Curry's objection is that the Ingram and Thomas right was abandoned before Walley became an owner of Sections 22 and 23, and that his usage of water in 1959 or later gave rise to a new use right with a 1959 priority date.

A presumption of abandonment arises if there is a prolonged period of nonuse. *79 Ranch*, 204 Mont. at 432-433, 666 P.2d at 218. Walley's testimony establishes he was only familiar with water usage on Sections 22 and 23 beginning in 1958 or 1959. It does not establish a prolonged period of nonuse prior to that time. As a consequence, it did not provide justification for a presumption of abandonment.

The Master's decision not to modify or terminate claims based on abandonment of the Ingram and Thomas right was correct.

The question remaining is whether PCCRC is entitled to four claims with combined flow rates that exceed the flow rate of the Ingram and Thomas right, which was 12.5 cfs. The flow rates claimed for PCCRC rights are set forth below:

<u>Claim</u>	<u>Flow Rate</u>
41M 162008-00	6.25 cfs
41M 162117-00	4.46 cfs
41M 199805-00	12.5 cfs
41M 199824-00	<u>12.5 cfs</u>
Total Flow Rate	35.71 cfs

This Court cannot simultaneously recognize claims totaling 35.71 cfs for an original water right of 12.5 cfs. This issue will need to be resolved after issuance of the preliminary decree for these rights.

Accordingly, the following issue remark will be added to claims 41M 162008-00, 41M 162117-00, 41M 199805-00 and 41M 199824-00.

THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41M 162008-00, 41M 162117-00, 41M 199805-00 and 41M 199824-00.

The following remark shall also be added to each claim to prevent diversion of more than 12.5 cfs under the original Ingram and Thomas right. This remark will also be added to the tabulation of water rights attached to this Order.

THE TOTAL COMBINED FLOW RATE FOR CLAIMS 41M 162008-00, 41M 162117-00, 41M 199805-00 AND 41M 199824-00 SHALL NOT EXCEED 12.5 CFS.

The elements of these claims are as follows:

41M 162008-00

PRIORITY DATE: SEPTEMBER 18, 1901
FLOW RATE: 6.25 CFS
THE TOTAL COMBINED FLOW RATE FOR CLAIMS 41M 162008-00, 41M 162117-00, 41M 199805-00 AND 41M 199824-00 SHALL NOT EXCEED 12.5 CFS.

IRRIGATED ACREAGE:
VOLUME: NOT DETERMINED
POINT OF DIVERSION: GOVT LOT 1, SECTION 27, T28N, R10W (BIRCH CREEK RESERVOIR)
NENWSW SECTION 27, T29N, R8W (B CANAL)
PERIOD OF USE: APRIL 1 TO OCTOBER 14

41M 162117-00 (Municipal)

PRIORITY DATE: SEPTEMBER 18, 1901
FLOW RATE: 4.46 CFS
THE TOTAL COMBINED FLOW RATE FOR CLAIMS 41M 162008-00, 41M 162117-00, 41M 199805-00 AND 41M 199824-00 SHALL NOT EXCEED 12.5 CFS.

IRRIGATED ACREAGE:
VOLUME: NOT DETERMINED
POINT OF DIVERSION: NENWSW SECTION 27, T29N, R8W (B CANAL)
PERIOD OF USE: APRIL 1 TO OCTOBER 14
THE PERIOD OF USE FOR THIS RIGHT IS RESTRICTED TO THAT OF THE ORIGINAL IRRIGATION CLAIM UPON WHICH IT IS BASED.

Water right claim 41M 162117-00 is not included in the tabulation, because it was not listed in PCCRC's proposed tabulation.

41M 199805-00

PRIORITY DATE: SEPTEMBER 18, 1901
FLOW RATE: 12.5 CFS
THE TOTAL COMBINED FLOW RATE FOR CLAIMS 41M 162008-00, 41M 162117-00, 41M 199805-00 AND 41M 199824-00 SHALL NOT EXCEED 12.5 CFS.

IRRIGATED ACREAGE: 268.9 ACRES
VOLUME: 618.47 ACRE-FEET (268.9 acres X 2.3 af/ac)
POINT OF DIVERSION: (RYAN-LAUFFER DITCH)
PERIOD OF USE: APRIL 20 TO OCTOBER 14 (AMENDED)

41M 199824-00 (Stockwater)

PRIORITY DATE: SEPTEMBER 18, 1901
FLOW RATE: 12.5 CFS
THE TOTAL COMBINED FLOW RATE FOR CLAIMS 41M 162008-00, 41M 162117-00, 41M 199805-00 AND 41M 199824-00 SHALL NOT EXCEED 12.5 CFS.

VOLUME: 27 ACRE-FEET
POINT OF DIVERSION: (RYAN-LAUFFER DITCH)
PERIOD OF USE: JANUARY 1 TO DECEMBER 31

18. Master's Report, Finding of Fact 245, p. 96

This Finding pertains to water rights acquired by PCCRC after July 1, 1973. These rights include claims formerly owned by Birch Creek Water Company, Broken Pick Land and Cattle, Kingsbury Colony, Wallace Bradley, and Birch Creek Colony. These claims were obtained by PCCRC in exchange for shares of stock in PCCRC. Limits on PCCRC's ability to use these rights have already been addressed in this Order.

Finding of Fact 245 goes beyond earlier Findings in the Master's Report on this issue in two important respects. First, the Master determined that use of rights obtained by PCCRC for storage would require a change application and approval by the DNRC. Second, the Master determined that PCCRC could not amend any of these rights after acquisition, and that all elements of each right would need to remain as described in the original claims. These claims were filed in 1982.

A careful reading of Finding of Fact 245 suggests the Master's decision to prohibit such amendments may have been based on an erroneous assumption that PCCRC was using these rights for storage. This assumption is contradicted by PCCRC's Proposed Finding of Fact, which provides:

the agreements which resulted in the acquired rights being transferred to PCCRC in exchange for shares of the Company does not result in any change of historic use or practice of the water involved. The underlying rights transferred by each party will retain their historic elements, including place of use and acres historically irrigated.

Post-Trial Proposed Findings of Fact, Conclusions of Law, and Recommendations of PCCRC, p. 73.

By making this statement, PCCRC cemented its obligation to obtain approval from the DNRC for any post-July 1, 1973 changes to these rights. As noted previously in this Order, usage of these rights by PCCRC is limited to the pattern of historic usage established by the parties from whom the rights were received.

There is no evidence that PCCRC is attempting to use the rights it acquired after 1973 for storage. It has not amended those claims to facilitate such use, and its agreements with the grantors of those rights do not provide for conversion to storage.

Whether PCCRC can deliver storage water to users on the Birch Creek Flats pursuant to its other water rights is a separate issue. PCCRC can make such deliveries because the landowners who gave up their rights are within PCCRC's service area. PCCRC would have the ability to deliver storage water to its shareholders with or without having received water rights in trade for shares.

Because the Master's determinations regarding the need for a change application were decisions for the DNRC, and were not necessary for disposition of this case, the Court declines to adopt them.

The determination that claims acquired after July 1, 1973 cannot be amended was also legal error. Most water rights with priority dates before July 1, 1973 are no longer owned by the original appropriators. Water rights, like the lands upon which they are used, pass from one owner to another over time.

Amendment of water rights is common and is not limited to original owners of those rights. The ability to amend a water right is provided by statute and rule. Water Right Adjudication Rule 10 states:

Pursuant to § 85-2-233(6), MCA, claimants may file motions to amend their own claims and objectors may file motions to amend their own objections. A motion to amend must specify the requested amendment and the grounds for such amendment. Upon review, the water court will determine the notice required pursuant to § 85-2-233(6), MCA, and issue an appropriate order.

Rule 10, W.R.Adj.R.

The water right claims acquired by PCCRC from other parties were amended after acquisition and before issuance of the preliminary decree for Basin 41M. Such amendments are a routine part of the adjudication process, and often result in more accurate claims, thereby making the adjudication process as a whole more accurate.

Unless otherwise specifically addressed in this Order, this Court takes no position on the legitimacy of claim amendments made by PCCRC. However, § 85-2-227(1), MCA provides “an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree.” In conformance with this statute, the Water Court affords amendments made before issuance of a preliminary decree *prima facie* status. This is because notice of the amended claim will be provided to all water users in the basin via issuance of the preliminary decree. After issuance of the preliminary decree, those water users have the right to object to the amended claim.

Provided amendments are not an effort to circumvent the change process, there is no statute or rule prohibiting amendment of claims acquired after July 1, 1973. The decision to bar such amendments has no legal foundation, and is contrary to long accepted practice of this Court and the claimants and objectors appearing before it. That determination was legal error.

Finding of Fact 245 is not adopted because it is based on the incorrect assumption that amendments to the rights at issue were an attempt to obtain post-July 1, 1973 storage

rights. In addition, it contains unnecessary or incorrect statements of the law pertaining to change applications and amendments.

19. Master's Report, Finding of Fact 246, pp. 96-97; PCCRC Objection

Finding of Fact 246 contains speculation by the Master regarding issues such as total historic volume for the Valier project, as well as assumptions regarding carriage loss. This Finding concludes that resolution of total historic volume and carriage loss is not required because the claims in this case will all be adjudicated after the preliminary decree for Basin 41M is issued.

The Court agrees. Finding of Fact 246 is not needed for decision of this case and is not adopted.

Part V: OTHER ISSUES

A. PCCRC Municipal Rights

PCCRC's municipal claims fall into two broad categories. The first group consists of claims based on filed rights. These claims are based on the same notices of appropriation used by PCCRC to support some of its irrigation rights. The result is separate irrigation and municipal claims filed on the same original notices of appropriation.

The second group of municipal claims consists of ten use rights, all with a priority date of January 14, 1913. PCCRC indicated in its Proposed Findings that use rights generally did not need to be addressed in this case. None of its ten municipal use rights are included in the tabulation or modified by this Order.

The group of municipal rights based on filed notices is modified as follows:

1. A municipal right was terminated if its underlying notice of appropriation was found to be invalid, or the irrigation right on which it was based was invalid.
2. If the elements of the companion irrigation claim were changed, the elements of the companion municipal right were also changed where appropriate.
3. The following remark shall be added to all municipal rights with companion irrigation claims where applicable.

THIS CLAIM AND CLAIM X ARE MULTIPLE USES OF THE SAME UNDERLYING NOTICE OF APPROPRIATION. THE COMBINED FLOW RATE AND VOLUME OF THESE CLAIMS SHALL NOT EXCEED -----CFS AND -----ACRE-FEET.

4. The service area for municipal use rights shall be as established in claim 41M 162106-00 and shall include a thirty-mile radius around the City of Conrad.

5. Municipal use rights were not included on the tabulation if they were not listed on the tabulation proposed by PCCRC.

The Master selected a smaller service area for municipal use rights than the area claimed by PCCRC. Master's Report, Findings of Fact 181A-C, p. 68. The rationale supplied by the Master for selection of this service area makes logical sense, but evidentiary support for it was not provided.

In addition, the legal descriptions supplied by the Master are insufficiently clear to establish a service area with precision. As an example, the Master extended the service area one mile beyond the corporate limits of the city. The basis in the record for this one mile limit is not clear, and the exact location of this boundary cannot be determined from the language of the Master's Report. In the absence of evidence overcoming the *prima facie* status of PCCRC's municipal places of use, the place of use for PCCRC's rights will remain as claimed.

6. The Master established a volume cap of 776 acre-feet for the City of Conrad. Master's Report, Findings of Fact 159 and 198, pp. 61 and 73. This cap was based on an assumption of 250 gallons per citizen per day, and a population of 2,770. No citation to the record was made for use of these numbers in the Master's Report.

The Master's decision to change PCCRC's municipal rights runs afoul of the *prima facie* status afforded to all water rights claims by § 85-2-227(1), MCA. Because the basis of the 776 acre-feet cap for the City of Conrad is not supported by citations in the record, the Court declines to adopt Findings of Fact 159 and 198. Ultimately, the volume of water the City of Conrad is entitled to receive depends on the number of shares it owns multiplied by the 1.5 acre-feet per share

volume applicable to all PCCRC shareholders. If less than that amount is available to shareholders in a particular year, then the city's volume entitlement would be reduced on a pro-rata basis with other shareholders.

7. The Master established an irrigation equivalent for the City of Conrad. Master's Report, Finding of Fact 157, pp. 60-61. This irrigation equivalent was apparently calculated to enable the Master to establish a maximum irrigable acreage for all PCCRC claims. This approach has already been discussed and rejected in this Order.

As set forth in paragraph number 5 above, the City of Conrad is entitled to 1.5 acre-feet per share. PCCRC's claims for municipal use are already limited by the size of the original notices of appropriation on which they are based. No further limits on those rights are required. The Court declines to adopt Finding of Fact 157.

8. The Master established a priority date of September 24, 1908 for all PCCRC municipal rights. Master's Report, Finding of Fact 181F, pp. 68-69. The citation for this date was an internet search, not the record. The date selected was the date of incorporation of the City of Conrad. It is not clear if municipal water use occurred before incorporation, and if so, for how long.

PCCRC claims that some of its early irrigation rights were used to deliver water to Conrad even though those rights have priority dates before the City was incorporated. The record supports the use of these rights for municipal purposes, just as it supports conversion of these rights to storage. The evidence indicates water from these rights was diverted and stored in Lake Francis. Lake Francis supplies water to the City of Conrad.

The Master's decision to revise the priority dates for all of PCCRC's municipal claims is not supported by evidence in the record, and is contradicted by other evidence. The Court declines to adopt Finding of Fact 181F.

B. PCCRC Storage Rights

PCCRC claimed two rights for storage based on notices of appropriation that were defective because they were not timely filed. These claims were 41M 162010-00 for Lake Francis and 41M 162012-00 for Birch Creek Reservoir.

In its Proposed Findings of Fact, PCCRC recognized that claims based on defective notices were not entitled to take advantage of the doctrine of relation back. Proposed Post-Trial Findings of Fact, Conclusions of Law and Recommendations of PCCRC, pp. 93-96. PCCRC suggested the priority dates of these two rights be made more junior to conform to the dates of completion of the two reservoirs, rather than the start of construction. The Court agrees. PCCRC's storage rights shall be use rights with the following elements:

41M 162010-00

PRIORITY DATE:	DECEMBER 31, 1913
FLOW RATE:	700 CFS
POINT OF DIVERSION:	B CANAL
VOLUME:	130,000 ACRE-FEET
PLACE OF USE:	SERVICE AREA
PERIOD OF DIVERSION:	JANUARY 1 TO DECEMBER 31

41M 162012-00

PRIORITY DATE:	DECEMBER 31, 1915
FLOW RATE:	5,000 CFS
POINTS OF DIVERSION:	SWIFT DAM, KINGSBURY & RYAN-LAUFFER DITCHES
VOLUME:	60,000 ACRE-FEET
PLACE OF USE:	SERVICE AREA
PERIOD OF DIVERSION:	JANUARY 1 TO DECEMBER 31

C. Stockwater Rights

Stockwater rights were a part of this case, but they received little attention either in briefing or via introduction of explanatory evidence. For this reason, stock rights have generally been omitted from the tabulation. If either party wishes to have stock rights added to the tabulation, they may request further action from the Court on this issue.

CONCLUSION

The purpose of a certification proceeding is to provide assistance to the District Court in resolving a distribution controversy. In keeping with this objective, the focus of

this Order has been to produce a tabulation of major disputed rights important to both sides. This Order also resolves most of the larger legal issues raised by the parties.

Because of its size, this case presents a unique logistical challenge to the parties and the Court.

Many issues pertaining to claims in this case were not addressed by the parties or the Master's Report and are not resolved by this Order. In addition, some of the concerns raised by the parties have not been addressed because this is a certification action rather than a complete adjudication, or because the record was not adequate to resolve those issues.

An example is issue remarks. Most of the issue remarks in this case remain to be addressed during the normal adjudication of Basin 41M. Some of the language in this Order will help with resolution of those remarks in the future.

Preparation of the tabulation attached to this Order started with all the claims in this case. Subtracted from that list were claims withdrawn voluntarily by the parties, claims terminated by the Court, and PCCRC use rights that were duplicates of filed rights recognized by this Order. PCCRC rights that were not part of the tabulation requested by PCCRC in its Proposed Findings of Fact and Conclusions of Law are not part of the tabulation attached to this Order.

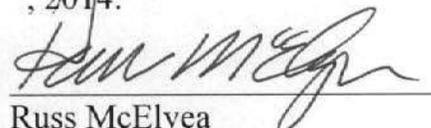
The tabulation prepared by this Court is labeled Appendix A and is part of this Order.

There is a possibility this Court made clerical errors in defining the claims in this Order. The parties may seek correction of clerical errors using the procedures described in MRCP Rule 60(a).

All of the claims in this case are potentially subject to objection and subsequent litigation by other parties after issuance of a preliminary decree in Basin 41M. Accordingly, this Order is interlocutory.

DATED this 25th day of April

, 2014.



Russ McElyea
Chief Water Judge

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Note: Service List Updated 4/25/2014

Appendix A: Water Right Tabulation

WC 2006-01: WATER RIGHT TABULATION									
Claim Number	Priority Date	Flow Rate	Type	Point(s) of Diversion	Diversion Name	Period of Diversion	Volume	Information Remark	
41M 159117 00 Curry	1864-05-26		Irrigation	NENESE, Sec 27, T30N, R7W SENESE, Sec 34, T30N, R7W	UT Birch Creek Wastewater	04/15 to 10/15		NOTWITHSTANDING ITS PRIORITY DATE, THIS CLAIM MAY NOT BE USED TO PLACE A CALL ON ANY OTHER WATER RIGHT.	
41M 113459 00 PCCRC	1884-04-09	2.50 CFS	Irrigation	NENWSW, Sec 27, T29N, R8W	B Canal	5/15 to 10/19	763.60 acre-feet		
41M 161998 00 PCCRC	1884-04-09	11.02 CFS	Irrigation	NE, Sec 27, T28N, R10W NENWSW, Sec 27, T29N, R8W	Swift Dam B Canal	04/01 to 10/14 04/01 to 10/14	1676.00 acre-foot		
41M 199792 00 PCCRC	1884-04-09	8.5 CFS	Irrigation	SWNESE, Sec 1, T29N, R8W SEWNE, Sec 1, T29N, R8W	Ryan Lauffer Ditch Kingsbury Ditch	04/20 to 10/14 04/20 to 10/14	3453.00 acre-foot		
41M 161999 00 PCCRC	1893-03-18	170 gpm (.37 CFS)	Irrigation	NE, Sec 27, T28N, R10W NENWSW, Sec 27, T29N, R8W	Swift Dam B Canal	04/01 to 10/14 04/01 to 10/14	23.00 acre-foot		
41M 162000 00 PCCRC	1894-12-18	5.67 CFS	Irrigation	NE, Sec 27, T28N, R10W NENWSW, Sec 27, T29N, R8W	Swift Dam B Canal	04/01 to 10/14 04/01 to 10/14	174.80 acre-foot	1) THE COMBINED FLOW RATE OF CLAIMS 41M 162000-00 AND 41M 162109-00 MAY NOT EXCEED 5.67 CFS. 2) THE COMBINED VOLUME OF CLAIMS 41M 162000-00 AND 41M 162109-00 MAY NOT EXCEED 174.8 ACRE-FEET.	
41M 162001 00 PCCRC	1895-05-01	.97 CFS	Irrigation	NE, Sec 27, T28N, R10W NENWSW, Sec 27, T29N, R8W	Swift Dam B Canal	04/01 to 10/14 04/01 to 10/14	178.25 acre-foot		
41M 131101 00 Curry	1895-10-19	12.12 CFS	Irrigation	SWNWNW, Sec 36, T30N, R7W	UT Birch Creek Wastewater	04/15 to 10/15		NOTWITHSTANDING ITS PRIORITY DATE, THIS CLAIM MAY NOT BE USED TO PLACE A CALL ON ANY OTHER WATER RIGHT.	
41M 131103 00 Curry	1897-05-19	18.75 CFS	Irrigation	SWNESE, Sec 1, T29N, R8W	Ryan Lauffer Ditch	04/15 to 10/15			
41M 199796 00 PCCRC	1897-05-19	18.75 CFS	Irrigation	NE, Sec 1, T29N, R8W	Ryan Lauffer Ditch	04/20 to 10/14			
41M 199797 00 PCCRC	1897-06-04	11.02 CFS	Irrigation	SWNESE, Sec 1, T29N, R8W SEWNE, Sec 1, T29N, R8W	Ryan Lauffer Ditch Kingsbury Ditch	04/20 to 10/14 04/20 to 10/14			
41M 199798 00 PCCRC	1897-06-18	.70 CFS	Irrigation	SWNESE, Sec 1, T29N, R8W	Thomas-Williamson Ditch	04/20 to 10/14	618.50 acre-foot	THE MAXIMUM COMBINED FLOW RATES FOR CLAIMS 41M 162005-00, 41M 162114-00, 41M 199798-00, AND 41M 199817-00 MAY NOT EXCEED 6.5 CFS.	
41M 162005 00 PCCRC	1897-06-18	6.50 CFS	Irrigation	NE, Sec 27, T28N, R10W	Swift Dam	04/01 to 10/14		THE MAXIMUM COMBINED FLOW RATES FOR CLAIMS 41M 162005-00, 41M 162114-00, 41M 199798-	

Appendix A: Water Right Tabulation

41M 120071 00 PCCRC	1897-07-24	4.00 CFS	Irrigation	NENWSW, Sec 27, T29N, R8W	B Canal	04/01 to 10/14		00, AND 41M 199817-00 MAY NOT EXCEED 6.5 CFS.
41M 120072 00 PCCRC	1897-08-31	6.62 CFS	Irrigation	NENWSW, Sec 27, T29N, R8W	B Canal	04/20 to 10/14	1539.80 acre-feet	
41M 185666 00 PCCRC	1897-08-31	4.00 CFS	Irrigation	NENWSW, Sec 27, T29N, R8W	B Canal	4/20 to 10/14	490.50 acre-feet	
41M 199795 00 PCCRC	1897-09-01	16.25 CFS	Irrigation	SWNENE, Sec 1, T29N, R8W	Ryan Lauffer Ditch	04/20 to 10/14	2622.00 acre-feet	
41M 199801 00 PCCRC	1898-01-14	8.76 CFS	Irrigation	SWNENE, Sec 1, T29N, R8W	Kingsbury Ditch	04/20 to 10/14	1219.00 acre-feet	
41M 159103 00 Curry	1898-01-26		Stock	SWNENE, Sec 1, T29N, R8W	Ryan-Lauffer Ditch	04/01 to 10/31		
41M 131100 00 Curry	1898-03-26	5.00 CFS	Irrigation	SWNWNW, Sec 36, T30N, R7W	UT Birch Creek Wastewater	04/15 to 10/15		NOT WITHSTANDING ITS PRIORITY DATE, THIS CLAIM MAY NOT BE USED TO PLACE A CALL ON ANY OTHER WATER RIGHT
41M 162007 00 PCCRC	1898-07-16	500.00 CFS	Irrigation	NE, Sec 27, T28N, R10W	Swift Dam	04/01 to 10/14		
41M 199802 00 PCCRC	1900-04-25	50.00 CFS	Irrigation	NENWSW, Sec 27, T29N, R8W	B Canal	04/01 to 10/14		
41M 120073 00 PCCRC	1900-06-21	25.00 CFS	Irrigation	SWNENE, Sec 1, T29N, R8W	Ryan Lauffer Ditch	04/20 to 10/14		
41M 120074 00 PCCRC	1900-07-07	23.75 CFS	Irrigation	SESWNE, Sec 1, T29N, R8W	Kingsbury Ditch	04/20 to 10/14		
41M 199803 00 PCCRC	1900-07-07	7.75 CFS	Irrigation	NENWSW, Sec 27, T29N, R8W	B Canal	04/20 to 10/14		
41M 120075 00 PCCRC	1901-05-11	25.36 CFS	Irrigation	NENWSW, Sec 27, T29N, R8W	B Canal	04/20 to 10/14		

Appendix A: Water Right Tabulation

41M 162008 00 PCCRC	1901-09-18	6.25 CFS	Irrigation	Govt Lot 1, Sec 27, T28N, R10W	Birch Creek Reservoir	04/01 to 10/14		1) THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41M 162008-00, 41M 162117-00, 41M 199805-00, AND 41M 199824-00. 2) THE TOTAL COMBINED FLOW RATE FOR CLAIMS 41M 162008-00, 41M 162117-00, 41M 199805-00, AND 41M 199824-00 SHALL NOT EXCEED 12.5 CFS.
41M 199805 00 PCCRC	1901-09-18	12.5 CFS	Irrigation	SWNE, Sec 1, T29N, R8W	Ryan Lauffer Ditch	04/20 to 10/14	618.47 acre-feet	1) THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 41M 162008-00, 41M 162117-00, 41M 199805-00, AND 41M 199824-00. 2) THE TOTAL COMBINED FLOW RATE FOR CLAIMS 41M 162008-00, 41M 162117-00, 41M 199805-00, AND 41M 199824-00 SHALL NOT EXCEED 12.5 CFS.
41M 162009 00 PCCRC	1902-12-09	500.00 CFS	Irrigation	NE, Sec 27, T28N, R10W	Swift Dam	01/01 to 12/31		
41M 199806 00 PCCRC	1903-10-15	5.00 CFS	Irrigation	NENSW, Sec 27, T29N, R8W	B Canal	04/01 to 10/14		
41M 162011 00 PCCRC	1904-04-04	25.00 CFS	Irrigation	NE, Sec 1, T29N, R8W	Ryan Lauffer Ditch	04/20 to 10/14		
41M 199807 00 PCCRC	1904-08-08	50.00 CFS	Irrigation	SESWE, Sec 1, T29N, R8W	Kingsbury Ditch	04/20 to 10/14		
41M 120076 00 PCCRC	1906-04-12	5.00 CFS	Irrigation	NE, Sec 27, T28N, R10W	Swift Dam	04/01 to 10/14		
41M 42051 00 PCCRC	1911-12-31	2.92 CFS	Irrigation	NENSW, Sec 27, T29N, R8W	B Canal	04/01 to 10/14		
41M 162010 00 PCCRC	1913-12-31	700.00 CFS	Irrigation	NE, Sec 1, T29N, R8W	Ryan Lauffer Ditch	04/20 to 10/14	280.60 acre-feet	
41M 162012 00 PCCRC	1915-12-31	5000.00 CFS	Irrigation	SESWE, Sec 1, T29N, R8W	Kingsbury Ditch	04/20 to 10/14		
				NENSW, Sec 27, T29N, R8W	B Canal	01/01 to 12/31	130,000.00 acre-feet	
				SWNE, Sec 1, T29N, R8W	Ryan Lauffer Ditch	01/01 to 12/31	60,000.00 acre-feet	

Appendix A: Water Right Tabulation

Water Right ID	Priority Date	Flow Rate (CFS)	Purpose	Section	Ditch		Effective Date	Notes
					Primary	Secondary		
41M 159114 00 Curry	1927-04-01	2.25 CFS	Irrigation	SWNE, Sec 1, T29N, R8W	Ryan Lauffer Ditch			
41M 160284 00 Curry	1957-06-01	1.2 CFS	Irrigation	SESWNE, Sec 1, T29N, R8W	Kingsbury Ditch			
41M 159115 00 Curry	1960-06-1	1.50 CFS	Irrigation	SWNE, Sec 1, T29N, R8W	Ryan-Lauffer Ditch		04/1 to 10/14	
41M 30066093 Curry	1967-06-01	6.00 CFS	Irrigation	SWNE, Sec 1, T29N, R8W	Ryan-Lauffer Ditch		04/15 to 10/15	