

Montana Water Court
 PO Box 1389
 Bozeman MT 59771-1389
 (406) 586-4364
 1-800-624-3270 (IN-STATE)
 FAX: (406) 522-4131

IN THE WATER COURT OF THE STATE OF MONTANA

GENE R. CURRY, CHERYL S. CURRY, and)	CASE NO. WC-2006-01
CURRY CATTLE CO.)	
)	
Plaintiffs and Counterclaim-Defendants)	<u>Certified From:</u>
)	Ninth Judicial District Court
vs.)	Cause No. DV-05-32
)	
PONDERA COUNTY CANAL AND)	
RESERVOIR COMPANY,)	
)	
Defendant and Counter-Claimant.)	
_____)	

NOTICE OF FILING OF MASTER’S REPORT

This Master’s Report was filed with the Clerk of the Montana Water Court on the above stamped date. Please read this Report carefully.

If you disagree with the Master’s Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report, you may file a written objection to the Report within **60 days** from the above stamped date. (Rule 23, Water Right Adjudication Rules). If you file an objection, you must also mail a copy of the objection to all parties on the Service List found at the end of the Master’s Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master’s Report.

MASTER’S REPORT

Preliminary:

The court did not revise the abstracts of the claims involved in this case. The abstracts run to over 1,200 pages. The parties may request that the court provide specific

corrected abstracts at any time. The DNRC has not finally examined the basin. The parties will probably object to parts of this report. If the reviewing judge decides to make revisions, the abstracts would be revised again. The master's report should include a recommendation for the disposition of each of the water rights mentioned by the parties in their post-hearing submissions and some that may not have been mentioned. Revising all of the abstracts before sending out this report would delay the report too much and would not be a good use of resources. From the report, the parties can determine how the rights in this case are to be enforced. The water master will revise specific abstracts upon a showing of need by either party.

This is a certification case from the district court. The plaintiffs are Gene R. Curry, Cheryl S. Curry, and Curry Cattle Co. (Curry). The defendant is Pondera County Canal and Reservoir Co. (PCCRC). The parties each have water rights diverted from Birch Creek through the Ryan-Lauffer Ditch to serve land on the Birch Creek Flats in Pondera County. The PCCRC's B Canal is upstream of the Ryan-Lauffer headgate and has the capacity to divert the entire flow of Birch Creek except during flood stage. After several years of shared use of the Ryan-Lauffer Ditch, the PCCRC asserted the power to regulate the headgate without accommodating Curry's needs. The district court certification says, "This matter shall be certified to Chief Water Judge C. Bruce Loble for determination of the existing water rights that are involved in this matter." Basin 41M has not been opened in the Montana statewide adjudication.

The section labels are labels, not substantive descriptions of the parts of this report. The facts and legal questions are too numerous and complex for the report to be rigidly separated into findings of fact, conclusions drawn from basic facts, and conclusions of law. I generally divided the report by subject. Findings and conclusions of fact and conclusions of law are often juxtaposed with the basic facts that they are related to. It might be possible to string together hundreds of findings of fact followed by separate conclusions of law, but no reader should be expected to hold all of the facts in mind until many pages later their meaning is revealed. This is not a page-turner with the resolution hoarded until the last paragraph. The findings of fact and conclusions of law are

integrated in this report for everyone's convenience. Any item which might properly be called a finding of fact should be considered as a finding of fact. Any item which might properly be called a conclusion of law should be treated as a conclusion of law.

Findings of Fact and Conclusions of Law

1. The PCCRC is the successor in interest to a series of corporations which developed a Carey Land Act project. The PCCRC is a privately owned corporation. It is the owner of various direct flow and storage water rights, storage facilities, canals, and ditches. The company's water rights are from Birch Creek, Dupuyer Creek, Sheep Creek, and the Dry Fork of the Marias. Its shareholders are the farmers and ranchers who receive water from the company. PCCRC is not an entity created under Title 85, Montana Code Annotated, concerning irrigation districts and the like. Nothing in this report is intended to have any application to entities created under Title 85.

2. Birch Creek rises in the Rocky Mountain Front and flows generally to the northeast to its confluence with the Marias River. Along a portion of its reach, it forms the southern boundary of the Blackfeet Indian Reservation.

3. Curry owns land west of Valier in an area known as the Birch Creek Flats. Curry acquired the land beginning in 1988 when it purchased property referred to at the hearing as the Keil property. The Keil property is locally known as the Carroll property as well. In 1989 and 1990, Curry purchased adjacent land known locally as the Ryan property or Crawford property. Test. Gene Curry, D2, 2:14.¹

4. Settlers and speculators began appropriating water for use on the Birch Creek Flats in the late 19th century. The original Birch Creek appropriations for use on the Flats were diverted through several ditches. After a disastrous flood in June 1964 (see below) destroyed the diversions, many of the appropriations were relocated to the Ryan-Lauffer Ditch. The Ryan-Lauffer Ditch is physically able to deliver water to the distal reaches of the ditches which were flooded out. Curry's irrigation from Birch Creek has been through

¹The hearing lasted 5 ½ days. D2 , 2:14 refers to the second day at 2:14 p.m. Testimony was recorded. There is no official transcript.

the Ryan-Lauffer Ditch. Curry does some irrigation using water which drains from the Fagerlie Swamp which is located mostly on Curry's property in sections 25 and 36, T7N R30W, and some from Cartwright Coulee for center pivots south of Highway 44 which are not part of this case.

5. The PCCRC's diversion (other than for storage) is through the B Canal, which is upstream from the Ryan-Lauffer Ditch.

6. Generally the Birch Creek water rights claimed by PCCRC fall into these categories:

A. Water rights claimed by the Conrad Brothers and transferred to the Conrad Investment Company (CIC). The Conrads controlled thousands of acres east of Birch Creek Flats by the turn of the 20th century.

B. Water rights established as direct flow rights in the 19th century by individual appropriators and conveyed to one of PCCRC's predecessors in interest during the development of the Carey Land Act project.

C. Claims for storage in reservoirs, which are Lake Francis (which receives flow from Birch Creek by way of the B Canal and from Dupuyer Creek) and Birch Creek Reservoir (well upstream on Birch Creek), built early in the 20th century.

D. Claims were conveyed to the PCCRC by private irrigators who conveyed their claims of historical water rights to the PCCRC in return for shares of PCCRC stock.

7. The story of the PCCRC begins with the Conrad brothers and their corporation, the Conrad Investment Company, which put together a large block of agricultural land and acquired water rights to serve it. The Conrads formed the Pondera Canal Company to develop irrigation on about 13,000 acres near the City of Conrad.

8. The Conrads' project established what is now the B Canal diversion, which is upstream of the diversions through which the early Birch Creek rights were perfected. When the Conrads acquired several of the early rights, they moved the diversion points to the B Canal.

9. In the early 1900s, those in charge of the irrigation project envisioned using the Carey Land Act. See Carey Land Act, ch. 301, §4, 28 Stat. 372 and 422 (Aug. 18, 1894), as amended ch. 420, 29 Stat. 413 and 434 (June 11, 1896), 43 U.S.C. §§641-644. Beginning in 1905, Montana enacted statutes to take advantage of the Carey Land Act. R.C.M. (1935) §§ 1949 *et seq.* (establishes the Carey Land Act Board and sets the role of the State Engineer for Carey Land Act projects). There is a complete discussion of the Carey Land Act and how it operated in *Valier Co. v. State et al.*, 123 Mont. 329, 215 P.2d 966 (1950).

10. In Carey Land Act projects, the United States reviewed a state's applications for the transfer of public domain lands to be reclaimed using water supplied by a prospective project. The State of Montana sought patents from the United States for the lands to be reclaimed. Carey Land Act projects had two separate corporations. One was a construction company, which obtained water rights and built the canals and reservoirs. The other was a settlers' company, which was formed and owned by the settlers who owned land within the project. The construction company entered into contracts with Montana which required the company to finance and construct the project. The settlers' company would succeed to the ownership of the project after it was completed and would manage it thereafter.

11. When 90% of the water rights were sold and paid for by settlers or purchasers, the construction company was obligated to transfer all of its interest in the water rights, storage, diversion, and delivery works to the settlers' company. The physical project was completed in 1948. The project was accepted by the Carey Land Act Board. The settlers' corporation, by then called the PCCRC, took ownership of the project November 27, 1953. Pondera County Water Resource Survey, June, 1964, p. 38.

12. Under the contracts between Montana and the construction companies, water would be supplied to Carey Land Act lands patented to Montana and made available for sale to settlers, as well as for the irrigation of non-Carey Land Act land which could be irrigated from the system or from extensions of the system which it had the capacity to supply. Ex. P-57, p. 10.

13. Included within the contracts between Montana and the construction companies was an agreement that the construction company could supply municipal water for cities and towns, with the cities and towns to contribute to the maintenance and operation of the system in proportion to their use, and for shares in the settlers' company to be issued to the city or town. Ex. P-57, p. 21-2.

14. Development of a Carey Land Act project required independent assessment of the project's ability to provide water. The state of Montana through its Carey Land Act Board and State Engineer and the federal government were involved in determining that the water supply was adequate to supply the project. See Ex. P-26, P-28, P-52, P-55, and C-78.

15. Montana and the construction company were successful in obtaining public domain land patents from the United States for land to be reclaimed under the project. On July 7, 1909, Montana and the United States agreed upon Clear List No. 8 which identified land to be patented when an "ample supply of water is actually furnished" to reclaim the lands. The Clear List No. 8 lands were patented to Montana on January 15, 1919. Ex. P-49. List No. 12 was agreed to March 14, 1912 and patented July 3, 1923. Ex. P-50. List No. 14 was agreed to June 12, 1912 with a patent issued February 19, 1938. Ex. P-51. Of the 95,252 acres set aside from the public domain for the project, about 70,000 acres were patented to Montana. Another 50,000 acres or thereabouts of private land were included within the project.

16. The project was intended to provide a water supply system to irrigate Carey Act lands, deeded lands, and Pondera Canal Company lands in Townships 28 through 31 North, Ranges 1 through 10 West. Ex. C-78, Bates 2293. By 1920, there were about 130,000 acres within the project's boundaries of which the company believed 85,527.19 were irrigable. Ex. C-78, Bates 2295. By October 1, 1920, 113,000 acres were sold to settlers. The company believed that about 76,000 of those acres were irrigable.

17. Teton County Canal and Reservoir Company was formed May 26, 1909, as the settlers' company. In 1927, the Teton County Canal and Reservoir Company changed its name to the Pondera County Canal and Reservoir Company (PCCRC).

18. The first of the construction companies was Conrad Land & Water Company, formed March 29, 1909. The construction company had financial problems. At times, it was known as the Conrad Land & Water Company, The Valier-Montana Land & Water Company (VMLWC), and The Valier Company. The first contract between the Carey Land Act Board and the construction company (Conrad Land & Water Company) was dated July 23, 1909.

19. The PCCRC owns and manages water rights, reservoirs, canals, and ditches. Its holdings include water right claims from Birch Creek, Dupuyer Creek, Sheep Creek, the Dry Fork of the Marias, and the Lake Francis Reservoir and the Birch Creek Reservoir (Swift Dam). PCCRC water is used for irrigation, stock water, and municipal purposes. The storage, canal, and lateral distribution system that the company owns was mostly in place by 1921. The company has made minor changes since then, such as to accommodate sprinkler irrigation. PCCRC's predecessors in interest include the various construction companies and the settler's company.

20. The concepts articulated in the original 1909 contract between the State and the Conrad Land & Water Company were modified. In 1912, the construction company had become the Valier-Montana Land & Water Company (VMLWC). In 1912, the parties to the contract agreed that the project needed a storage reservoir of about 30,000 acre-feet. Ex. P-59. The reservoir was constructed. It is known as the Swift Dam which holds back the Birch Creek Reservoir.

21. By 1948, the operating (settlers') company had issued about 72,000 shares at one share/irrigated acre. Ex. P-90, p. 3.

22. In 1953, the Carey Land Act Board authorized transferring the project from the Valier Company (the construction company at that time) to the PCCRC (the re-named operating company). Ex. P-92, P-93. By deed on October 23, 1953, the Valier Company conveyed all lands, reservoirs, canals, ditches, and water rights in the system to the PCCRC. Ex. P-92.

23. The State Engineer's Office made periodic analyses of the construction company's system and reported the results to the Carey Land Act Board.

24. The Pondera County Water Resources Survey (WRS) came out in 1964. The WRS included information about some of the appropriations and lands in this case.

The Atwood Report

25. The record includes two documents prepared by the VMLWC. Both parties introduced portions of these documents.

A. Exhibit C-27 (and P-71) is the December 12, 1916 Report on the Water Supply of the Valier Project. The Water Supply Report is Bates stamped from 1721 through 1826. The Water Supply Report includes data and analysis concerning the water supply available for the Carey Land Act project using Birch Creek, Dupuyer Creek, and the Dry Fork of the Marias River.

B. Exhibit C-28, (and P-71) Bates 1827 through 2145 is entitled Birch Creek Adjudication Data Volume No. I. It contains Chapter II, Survey; Chapter III, Hydrography; Chapter IV, Duty of Water; Chapter V, Narratives (of interviews with potential witnesses); Chapter VI, History of Water Rights. Volume No. II begins on Bates 2005 and continues the history. Bates 2139 begins Chapter VII, Comparison of Water Diverted and Perfected Value of Outstanding Water Rights Covered in Chapter VI.

C. In the hearing, the reports were sometimes referred to as the Atwood Report. While that term is technically inaccurate, it is a convenient shorthand referring to the four exhibits. References to the Bates numbering will suffice to identify the location of cited evidence. The reports have accompanying maps dated July 29, 1919.

D. The reports include two tabulations of water rights, one from 1915 and one from 1921. The tabulations are not identical. Exhibit C-48, an Outline of Water Rights of Birch Creek 1921, Bates 2146 to 2202.

26. In making findings of fact using source material derived from any of the predecessors of the PCCRC, I am mindful of *Musselshell River/Roundup Basin*, 1992 Mont. Water LEXIS 15, *King v. Schultz*, 141 Mont. 94, 98; 375 P.2d 108, 109; 1962 Mont. LEXIS 9, and other Montana cases touching on the problem of self-serving statements in ancient documents. Since those cases were decided, Montana has adopted the Montana Rules of Evidence. Many of the old statutory rules of evidence have been superseded. *In*

the Matter of the Montana Supreme Court Commission on Rules of Evidence, No. 21729, July 10, 1979. There is no question of the authenticity of any of the ancient documents in this case. They are all copies of what they claim to be. Some of what they say is against the interest of PCCRC and its predecessors. Some of what they say was self-serving at the time. Some of what they say concerns water rights which the VMLWC did not own at the time but which PCCRC now owns. While the documents are admissible, the evidentiary problem goes to the weight of statements made by a PCCRC predecessor in title which owned some of the water rights included in the reports, did not own other water rights included in the reports but acquired some of them later, never owned other water rights that it comments on, and which was concerned about or preparing for a possible adjudication of the water rights on Birch Creek. Here are some of the factors to be used in assessing the weight to give assertions made in the reports:

A. Some of the self-serving material is confirmed by independent sources in the record.

B. To explain the history of the Birch Creek Flats water rights, in aid of determining their elements, we have to consider contemporary documents, even if they are self-serving, or we may have no information about what may have happened. Allegedly filed water rights which were thought to have been perfected in one place were said to be in use somewhere else by 1915, and by 1982 were claimed in yet a different location. If we disregard every potentially self-serving statement, we will have no picture at all. It is possible for information to be useful even if the meaning of that information is ambiguous and can be applied in a self-serving manner. For example, land ownership indications on maps are probably accurate (too easy to check to support a theory of deliberate falsification), even if the reports ascribe meaning to that ownership favorable to the PCCRC.

C. The PCCRC's predecessors did not create either the Water Supply Report or the Adjudication Report while owning all of the water rights in this case. The VMLWC owned some of the rights, but not all of them, in 1915. Some of the rights written about and mapped in the reports were not acquired by the PCCRC until after claims

in the statewide adjudication were filed in 1982. The reports were produced in aid of putting together a Carey Land Act project. The Water Supply Report was intended to convince the Carey Land Act Board to approve an irrigation project. The Adjudication Report was an internal document apparently intended to assess what would happen if Birch Creek water rights were adjudicated.

D. For any rights that the VMLWC owned at the time of the Atwood Report or the Adjudication Report, admissions against interest are admissible and self-serving declarations are weighed carefully. For any water rights that the VMLWC did not own, the reports are treated as any other ancient contemporaneous writing, with the caution that statements favorable to rights the VMLWC hoped to include in the project may be optimistic and statements unfavorable to rights that the VMLWC did not have an interest in may be shaded to enhance the project's appearance.

E. The Adjudication Report includes interviews with old timers, public record documents, surveying by VMLWC employees, conclusions about the validity and extent of Birch Creek water rights, and so on. The report acknowledges that it was written in anticipation of an adjudication suit in state court to determine the relative priority and amount of water that could be diverted for the company's rights and the competing rights held by individual ranchers.

F. Both parties offered the reports in evidence. The PCCRC relies on many of the report's assertions as facts. Curry says that the court may rely upon admissions against the corporation's interest and nothing else. The authenticity of the ancient document is established, that is, the document is what it purports to be, a compendium of information gathered to guide the construction company in decisions about adjudicating Birch Creek water rights. The expert witnesses for both parties relied upon the report.

27. In 1905, the Conrad Investment Company was defendant in a suit brought by the U.S. to enjoin CIC from taking water that belonged to an Indian reservation. The transcript of testimony from the trial of that suit corroborates the reports at the points where the two intersect (Ex. P-4). The overlap is not perfect, because the suit was concerned

with the Indians' use of water on the reservation north of Birch Creek while all of the water rights in our case are on the south side.

28. Some recorded deeds and notices of appropriation in the record corroborate some of the Atwood Report's details.

29. Accompanying the text of the reports are maps prepared by the VMLWC. The maps show land use along Birch Creek, including the canals and ditches, homestead settlement, ownership, crops and areas cultivated, irrigable acreage, acres irrigated before 1915, acres irrigated in 1915, homestead entries, lands used in perfection of water rights, lands allegedly irrigated by designated water rights in 1919, and land ownership. The maps are ancient documents and are authentic. Both parties' experts testified about them. They are subject to the same cautious use as the Reports.

30. At the hearing, the expert witnesses for both sides used the Water Supply Report and the Adjudication Report in preparing their exhibits and their opinions. These observations are pertinent to the experts' use of the materials:

A. The reports contain the kind of material which the water court uses every day. This case is unlike a case involving, say, a neurosurgical procedure or antitrust accounting, where the court is not learned in the field and evidence from an expert could be useful in understanding the facts and the parties' contentions. The experts on both sides relied on statements in the report about the priority dates, ownership, quantities, and use of various water rights. The experts gave their conclusions about elements of the water rights. The water court will use the same source material to calibrate an estimation of the experts' accuracy and to come to its own conclusions from information in the sources according to their worth. The court can draw its own conclusions from the evidence.

B. The self-serving statements and speculation in the VMLWC reports are not transformed into hard facts merely by the testimony of an expert who repeats or asserts reliance upon them. The expert's opinion is the evidence. The expert's use of the reports goes to the weight and credibility of the expert's conclusions.

C. Expert testimony would be more useful were the experts more inclined to untangle the facts and less inclined to advocate for the side which hired them. The candor shown in Exhibit C-64 is appreciated.

31. Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, M.R.E.

32. The PCCRC is a privately owned business corporation, successor to a corporation formed as the operating company for a Carey Land Act irrigation project. PCCRC is not an irrigation district formed under the laws concerning irrigation districts. PCCRC is not a public utility. It is a private corporation which owns water rights and a complete water distribution system of dams, 450 miles of canals, ditches, siphons, headgates, and measuring devices, operating on Birch Creek, Dupuyer Creek, Sheep Creek, and the Dry Fork of the Marias River. PCCRC is owned by its membership and distributes its water to its members on the basis of shares owned. PCCRC's water rights are appurtenant to land described in its share certificates.

33. Before the beginning of each irrigation season, PCCRC estimates the total amount of water it will have available for distribution to its shareholders, based on carryover storage, winter storage, and snow moisture data. PCCRC decides how much water it will be able to distribute per share (one share = one acre), expressed as inches per acre. The maximum a shareholder can receive is 18 inches. For example, PCCRC might calculate that it will have 6 inches to distribute this year, which would mean that each shareholder would expect to receive 0.5 acre-feet/acre in irrigation water. The shareholder can decide what crops to plant and how much to plant. He could decide to plant less acres than he has shares to irrigate and concentrate the right on a smaller area to assure enough water to mature a crop. For example, if the shareholder had shares to irrigate 120 acres, and thought he would need about one foot of irrigation water to grow his crop, he could plant 60 acres and use all of his PCCRC water to irrigate them. If natural precipitation took care of the needs of the crop, he might not use all of his entitlement. He

could come up short if the summer was unusually dry and his crop needed 15 inches to thrive.

34. According to the testimony of Fay Stokes, former manager of PCCRC, a shareholder may have shares that are appurtenant to more land than he has shares to irrigate, as, 20 shares appurtenant to 40 acres. The shareholder in that situation can decide which of the 40 acres to irrigate each year.

35. The PCCRC reacquired some of its shares and held them as treasury shares over time. The PCCRC occasionally sold treasury shares to persons who put them to use irrigating land other than the land to which they were originally appurtenant.

36. Ownership of a share carries access to PCCRC's stored water and direct flow appropriations. PCCRC decides from time to time whether it will fill its obligations using stored or direct flow water. Unlike irrigation districts, PCCRC does not sell quantities of water to be released when the purchasers call for their water. Individual shareholders cannot require the release of stored water.

37. Shareholders can request water to use as stock water. Stock water is charged to the shareholder at 2 acre-feet/day for each 1 cfs ordered.

38. Municipal water for the City of Conrad is taken from Lake Francis by pipeline. Conrad is a shareholder. Conrad's shares were originally authorized and appurtenant to land. When Conrad acquired the shares, the land they were appurtenant to was dried up, that is, no longer eligible to receive irrigation water under the shares Conrad purchased.

39. PCCRC owns two reservoirs. The Birch Creek Reservoir is behind the Swift Dam in section 27, T28N R10W. Lake Francis is south and west of Valier in T29N R5W.

40. In June, 1964, the original Swift Dam failed. The flood which followed destroyed many of the original diversions along Birch Creek. Not all of the diversions were rebuilt. The Ryan-Lauffer diversion was constructed to serve as the point of diversion for several pre-flood ditches. The topography of the Birch Creek Flats is such that combining several ditches into a single diversion worked for the appropriators.

PCCRC Claims Acquired After 1982

41. Former PCCRC manager Fay Stokes testified that all of the water use on the Flats before 1973 was non-PCCRC. TR-147²

42. Since 1982, PCCRC has acquired direct flow Birch Creek water rights which were originally established and used to irrigate land on the Birch Creek Flats by direct flow. By the time of the acquisitions, many of the direct flow rights had been converted to sprinkler irrigation.

43. PCCRC entered into agreements with owners of water rights from Birch Creek for use on the Birch Creek Flats. Each of those property owners was issued PCCRC shares as consideration for conveying direct flow water rights to PCCRC. Ex. C-58 to 61.

44. The claim owners and claims involved in the exchanges were:

A. Kingsbury Ditch Co., Ex. C-58: 41M 182051-00 through 41M 185068-00, 41M 185665-00 through 41M 185668-00, 41M 185681-00 through 41M 185684-00, 41M 185706-00 through 185708-00, 41M 199792-00 through 41M 199807-00, and 41M 199810-00 through 41M 199827-00³. Conveyance 10/18/2002.

B. Alfred B. Guthrie, III and Margaret Guthrie, and Birch Creek Water Company, Ex. C-61: 41M 120066-00 through 41M 120076-00. Conveyance 4/20/2006.

C. Two Medicine Ranch South, LLC, Ex. C-62: 41M 185666-00, 41M 185667-00, 41M 185668-00, 41M 185683-00, 41M 185707-00, 41M 185708-00, 41M 182052-00 through 41M 182067-00, 41M 185665-00, 41M 185681-00, 41M 185682-00, 41M 185684-00, and 41M 185706-00. Conveyance 10/7/2002.

D. Birch Creek Colony, Ex. C-59: 41M 113451-00, 41M 113459-00. Conveyance 8/8/2005.

E. Birch Creek Water Co., Ex. C-61: 41M 120066-00 and 41M 120068-00 through 41M 120076-00. Ex. C-6. Conveyance 4/20/2006.

² Curry furnished a partial transcript which is in the case file. There is no official transcript.

³ In Ex. C-58, the list of rights transferred includes 41M 119815-00. That claim number is for a withdrawn claim in Basin 76F. The correct claim number is 41M 199815-00, which the DNRC database shows as transferred to PCCRC from Kingsbury Ditch Co. on 12/14/2004.

F. K. Wallace Bradley, Ex. C-60: 41M 42049-00 through 41M 42051-00. Conveyance 10/22/2004.

45. The number of shares which each seller received was based upon the number of cfs transferred, using a duty of water of 1 cfs/80 acres. Test. Fay Stokes, D1 p.m.

46. The agreements provide that if the water rights are reduced in the Montana adjudication, the number of shares belonging to the seller will be proportionately reduced.

47. The agricultural operations from which the water rights were acquired were not part of the original Carey Land Act project. According to Fay Stokes, all water use on the Flats before July 1, 1973 was non-company.

48. Montana law allows water rights to be transferred and places of use, points of diversion, and means of conveyance to be changed as long as there is no injury to other appropriators. *Bruffey v. Big Timber Creek Canal Co.*, 137 Mont. 339, 351 P.2d 606 (1960). *Bruffey* involved Carey Land Act Water. The court in *Bruffey* said that after the construction company's lien for payment of the purchase price is discharged, Carey Land Act project water can be transferred as other water rights can, "so long as the rights of others are not adversely affected." 137 Mont. at 345. PCCRC has the same transfer rights and duties as any other water right holder. It may change its water rights in ways that do not injure other appropriators. Montana law has a procedure for giving notice and an opportunity to be heard to other appropriators in water right change proceedings. Section 85-2-402(2), MCA.

49. There is evidence that the PCCRC accommodated other water users on the Flats from time to time. PCCRC asserts that it released water to non-project users in order to be a good neighbor, without regard for priority dates, and that it did not distinguish whether it was using direct flow water or stored water. PCCRC has the ability to divert the entire flow of Birch Creek into the B Canal after flood stage each year. The ditches which supplied users on Birch Creek Flats before and after the 1964 flood are all downstream of the B Canal diversion. Whether articulated or not, PCCRC's concession of a few cfs to its downstream neighbors may have saved it the problem of dealing with an adjudication and an enforcement action which might have jeopardized the way it managed

Birch Creek, a means of delaying a reckoning, allowing PCCRC to operate Birch Creek with a free hand. *See* Ex. P-89, State Engineer's September 30, 1949 report to the Carey Land Act Board.

50. In 1948, the B Canal had a capacity of 150 to 200 cfs or thereabouts because one reach of the B Canal was unsafe to operate above that flow rate. Ex. P-89, p. 5, State Engineer's Report to Carey Land Act Board. PCCRC argues that it should be able to hold on to claims in excess of its diversion capacity because today it can marshal the rights to equal the as-built capacity of 700 cfs or less at all times. That statement is appealing, but from the evidence it is equally possible that the PCCRC historically took all of the water it could without regard to priority date, until someone complained, then it allowed its diversion to bypass enough water downstream to quiet the complainer. There is evidence in the record of written agreements for the PCCRC to allow its system to be used by non-shareholders for compensation (see the 41M 120069-00 claim file), which does not establish those claims as having a permanent right transferrable to the PCCRC. While PCCRC characterizes this behavior as being a good neighbor, it is equally possible to view the behavior as that of a de facto monopoly trying to protect the status quo without litigation. One might view the current litigation as the natural consequence of the reversal of the good neighbor policy with respect to Curry's desire to use the Ryan-Lauffer Ditch for early season irrigation. The lists of water rights which PCCRC's managers kept were used to decide if PCCRC should allow a complaining downstream water user a little water, not to regulate PCCRC's intake. There is no criticism of PCCRC to be inferred from this finding, as PCCRC engaged in the common practice in prior appropriation states of taking all you can get until a regulator turns down your headgate.

51. Alva L. Armstrong and Pete Walley made an affidavit on October 24, 1984, to say that they are shareholders of Birch Creek Water Company. They claimed to have a turnout on the B Canal in Cartwright Coulee. The Company "could use or store the water if not used by Armstrongs; the Armstrongs would get their water uninterrupted during the irrigation season." That affidavit is an exact expression of the problem with the post-1973 acquisitions by the PCCRC. PCCRC expanded the use of the water rights it traded for by

storing direct flow water when it is not needed for irrigation. The use pattern changes without an impartial determination of the effect on others' rights. This kind of change needs to go through the Department of Natural Resources and Conservation (DNRC) change procedure to give potentially affected water users the opportunity to have notice and be heard.

52. When the PCCRC accommodated its neighbors, at times it was effectively honoring their senior rights. Senior direct flow rights in priority are by definition using the unstored flow of the source. PCCRC may have voluntarily substituted stored water from Swift Dam. That practice did not create storage rights for the neighbors who were accommodated. PCCRC may have had no idea what the instantaneous natural flow of Birch Creek was at the time. In comparison to the size of the PCCRC enterprise, the few second feet needed by a user on the Flats were minimal.

53. The PCCRC's practice of accommodating non-PCCRC water users on the Flats from time to time did not make the users' ditches on the Flats part of the PCCRC's historical delivery system.

54. Exhibit P-91 is a copy of a letter of attorney Hjalmar B. Landoe⁴ dated October 7, 1949, to the Carey Land Act Board. Mr. Landoe says that some prior appropriators who do not have water for stock allowed their water to be stored, then turned out to them when needed. The letter is not specific as to quantities, place, or dates, and is too frail a piece of evidence on the subject to allow creation of storage rights held by non-shareholders and now claimed by PCCRC after the trades for shares.

55. State Engineer Fred Buck reported to the Carey Land Act Board on September 30, 1949. Ex. P-89. Mr. Buck's report, p. 22, says that the PCCRC was "inclined to satisfy [non-shareholder water users] in every way possible to prevent controversies over these rights." Mr. Buck is quoting Oscar Moberg's February 11, 1948 memorandum to him. Ex. P-90, p. 2. The statement is consistent with the company acting in its own self-interest to avoid an adjudication.

⁴ Attorney for the Carey Act Land Board. See Ex. P-94.

56. At the December 19, 1950 meeting in Valier attended by the Valier Company, the PCCRC, and a water users committee, the subject of adjudication came up. The minutes say, “It seemed to be the opinion of some men who were well versed with the activities of the project, that if a suit was instituted to adjudicate the water rights the Valier Company might find difficulty in proving that it has put to beneficial use all the water it claims. Furthermore, there is no opportunity to expand the irrigable area outside of the Valier Project.” Ex. P-90, p. 4.

57. The Carey Land Act Board minutes of December 19, 1950, say, “Mr. Ebner⁵ . . . doubted the advisability of a suit as it might create discontent [among the non-company water users] . . . no opportunity to expand irrigation development of private lands. Mr. Landoe expressed an opinion that there was plenty of water and doubted whether the entire water supply claimed for the project had ever been beneficially used.” Ex. P-90, p. 4.

58. When the company did allow water to bypass the B Canal diversion for a downstream user, it did not account for stream or ditch losses. If the company thought the downstream user was entitled to divert 2 cfs, it allowed 2 cfs past its diversion. This policy contrasted with the company's practice with its shareholders, where it delivers the full appropriation to the shareholder while the company absorbs transportation losses.

59. The exchange of historical water rights for shares in the company could injure other water rights holders if the company manages those rights without strict conformity to historical use. Before the trade of shares for water rights, the water was theoretically available when the right was in priority and the user either took water or not as the weather, crop needs, and his agricultural practices dictated. After the trade, the right has the added possibility of being diverted at the B Canal upstream of the Flats, or stored without regard to historical use patterns. Formerly, on a joint ditch, if one person on the ditch wanted water and the other did not, the ditch was turned on and the laterals to the one who did not want water were closed. That practice allowed independent use of the water rights. What the PCCRC apparently wants (as shown by its resistance to Curry's desire for early

⁵ George Ebner began operating the project in 1918. Ex. P-93.

season irrigation) is the ability to control the Ryan-Lauffer Ditch as if it were part of the PCCRC system. If its shareholder does not want water, or if the PCCRC thinks it is too early or too late to irrigate, the PCCRC keeps the ditch shut off and may even believe that it can store the appropriation. With the Ryan-Lauffer Ditch shut off, the PCCRC's only acknowledged Birch Creek obligation below the B Canal is to bypass enough water to satisfy the Blackfeet Tribe's rights. It may believe that it can store the rest, either in Swift Reservoir, or by diverting it at the B Canal for storage in Lake Francis, or send it somewhere else in its operation.

60. Any change of periods of use, irrigation patterns, and the storage of direct flow rights on Birch Creek Flats, insofar as it is attributable to the post-1973 trades, may or may not interfere with Curry's water rights. Unless Curry has notice of the changes and an opportunity to be heard, the changes to the water rights that formerly belonged to his neighbors could adversely affect his water rights without due process of law. Montana law has a statutory procedure for changes which might adversely affect other water users. That procedure was not followed by PCCRC. Until it has been followed, and unless Curry has due process and the decisions are against Curry, PCCRC's use of the Birch Creek Flats rights it has purchased should be limited to direct flow diversions when those rights are in priority, to irrigate the lands that were irrigated before it purchased the rights.

61. Fay Stokes testified that when Kingsbury Ranch joined the PCCRC, it purchased some shares from people down on the east end of the project (near Conrad) where it was hard to irrigate and moved the shares upstream to the flats. TR-155. Moving shares around within the project perimeter has the potential to disrupt a non-shareholder irrigator's water rights. This finding is not intended to imply that a change of use proceeding is required when a shareholder moves water within the acreage listed on his share certificate.

62. This report does not conclude that Curry will be injured by the PCCRC's acquisition of water rights on the Birch Creek Flats by trading water right claims for shares, or by the use of those rights in the PCCRC system. This report does conclude that it is possible that Curry would be injured by one or more of the transactions or the use PCCRC

makes of the water rights transferred to it. Therefore, due process requires that Curry be given notice and a meaningful opportunity to be heard in DNRC change proceedings.

63. With respect to the water rights involved in the post-1973 transactions, the PCCRC is the real party in interest. Each of the sellers transferred water rights in return for shares. The agreements provided for a reduction in the number of shares held by the seller if upon adjudication the number of acres irrigated under the right was reduced from the number of acres claimed. PCCRC's sellers conveyed their water rights to PCCRC unconditionally.

64. The lands and water rights involved in the post-1973 trades were not within the PCCRC's historical place of use for its historical direct flow and storage claims.

65. The claims in this case that were acquired by the PCCRC after June 30, 1973, must be confined to irrigation or stock use on the land to which they were appurtenant as originally claimed, unless using the originally filed priority dates and periods of diversion and use, with no storage at any time and no diversion except for delivery when in priority to the lands to which they were historically appurtenant, using their historical diversions or diversions established in change of use proceedings.

66. The originally claimed places of use remain as claimed, except as allowed by the DNRC in the First Continental (Greytak) proceedings. Any post-1982 amendments that sought to change the places of use of the post-1982 acquired rights or add storage based on those claims are not valid because they should have been made through a DNRC change proceeding. Any amendments which seek to change the place of use of an irrigation claim must respect Montana law. *See Quigley v. McIntosh*, 110 Mont. 495, 505, 103 P.2d 1067, 1072; 1939 Mont. LEXIS 66 (1940):

. . . seems indisputable that a water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial use has been proven, cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was decreed, to the injury of subsequent appropriators.

And, from Water Court Case 76F-1, Marshaling Order, October 15, 2012,

If one or more current supplemental rights were in separate ownership after June 1973, but have since been combined into a unified ownership and then into a supplemental relationship, there is a potential for the water use associated with one or more of the supplemental claims to have been changed without compliance with the Water Use Act.

If the PCCRC wishes to make changes in those rights, it may seek relief in a DNRC change proceeding.

67. The claims which are involved in the trades are:

Bought from Birch Creek Water Company:

41M 120069-00	41M 120073-00
41M 120070-00	41M 120074-00
41M 120071-00	41M 120075-00
41M 120072-00	41M 120076-00

Bought from Kingsbury Ditch Company:

41M 199792-00	41M 199806-00
41M 199795-00	41M 199807-00
41M 199797-00	41M 199817-00
41M 199798-00	41M 199822-00
41M 199799-00	41M 199804-00 (Messecar)
41M 199803-00	41M 199823-00 (Messecar)

Bought from Birch Creek Colony:

41M 113451-00
41M 113459-00

Bought from Kingsbury Colony:

41M 48236-00
41M 48237-00

Bought from Bradley:

41M 42049-00
41M 42050-00
41M 42051-00
41M 42052-00

Bought from Two Medicine Ranch South:

41M 185666-00

The disposition of those claims should be:

A. Any claims which are not dismissed and which claim an April 9, 1864 priority date should be changed from filed rights to use claims.

B. Birch Creek Water Company (BCWC) Claims:

1) BCWC used two points of diversion, the Hall-Stewart-Leech Ditch and Kingsbury Ditch. Before 1962, BCWC was no longer using Kingsbury (for the Cowgill Ranch, at least). From 1962, the Cowgill Ranch took its water through the B Canal to Cartwright Coulee to the Cowgill branch of the Hall-Stewart-Leech Ditch. After the 1964 flood, BCWC took its water through the B Canal. The abstract of claim 41M 120066-00 should be changed to reflect its status as a use right.

2) Claim 41M 120070-00 is attributed to Jerry Mongon's 10/14/1895 notice. This claim is part of Right No. 11, analyzed below, and should be dismissed.

3) Right No. 22, Claim 41M 120071-00, is based on the Calvin Stewart appropriation. The evidence is that the half of the appropriation now claimed by PCCRC was not used from 1900, when Stewart conveyed it to Cowgill, or after 1909, when Cowgill conveyed it to the BCWC. Ex. C-28, Bates 2069. This claim should be dismissed.

4) Claim 41M 120072-00 is based on the Right No. 23 claim of Stewart and Gardner, analyzed below. See Ex. C-28, Bates 2095. The right was not perfected. Claim 41M 120072-00 should be dismissed.

5) All BCWC claims: See Ex. C-28, Bates 2114 ff. The VMLWC had no information older than 1909 on use of the rights that BCWC acquired. It attempts to conclude that the rights were worthless by an analysis that is not completely convincing. The VMLWC's analysis made from 1915 on, 6 years after BCWC was incorporated, used ditch measurements to demonstrate that the capacity of the BCWC ditches at that time was 22.32 cfs. While it appears that Leech and Cowgill, the BCWC founders, watered their operations, the Atwood Report is unequivocal that they did so with use rights acquired after 1898 and that the water rights claimed by the BCWC were not used.

At this time, the court should limit the flow rate of the perfected BCWC rights to 22.32 cfs, which was the capacity of its ditches in 1915. All of the abstracts of claims which the PCCRC obtained by trade with the BCWC should have a supplemental rights remark which says that their combined flow rate shall not exceed 22.32 cfs.

C. Kingsbury Ditch Company Claims:

- 1) Claim 41M 199792-00 is said to be derived from Right No. 1. The abstract should be changed from a filed right to a use right.
- 2) Claim 41M 199795-00 is derived from McGovern, Potter, & McKnight right, which is limited to a total of 7.18 cfs. See Right No. 15 analysis below. Other claims which share this right are 41M 162003-00 (483.75 cfs for irrigation), 41M 162112-00 (483.75 cfs for municipal purposes).
- 3) Claim 41M 199797-00 is based on the June 4, 1897 Morgan-Steel appropriation and is a duplicate of the Right No. 1 use claim. Claim 41M 199797-00 should be dismissed.
- 4) Claim 41M 199798-00. See the Right No. 19 analysis below. After deducting what the Conrad Investment Company owned of the 9.99 cfs available ditch capacity, $9.99 - 6.5 = 3.49$ cfs, which is the amount available for this claim. The flow rate should be changed accordingly.
- 5) Claim 41M 199799-00 is based on the F. D. Cooper notice which claims 12.5 cfs with a priority date of June 30, 1897. See the Right No. 20 analysis below. PCCRC claims two water rights, 41M 199799-00 and 41M 199818-00, based upon the Cooper notice. There is no evidence of any ditch or water use under the Cooper claim. The Atwood Report concludes that this right was never perfected. Ex. C-28 at 2062. Claims 41M 199799-00 and 41M 199818-00 should be dismissed.
- 6) Claim 41M 199803-00 is based on the John Hall notice of appropriation. Exhibit C-48, the 1921 Outline of Water Rights of Birch Creek, Bates 2178, credits F. D. Kingsbury & Co. with 315 MI under this appropriation. Claim 41M 199803-00 therefore has a flow rate of 7.75 cfs.

7) Claim 41M 199804-00 is based on the John Monnette notice of appropriation of October 20, 1900. This appropriation, which would be Right No. 31, is not mentioned in Exhibits C-28 or C-48. The notice of appropriation is consistent with the Messecar Ditch. The land claimed to have been irrigated was land that eventually belonged to Jere Walley. Mr. Walley testified, D1 12:00, that when he bought the land in 1958, it was not irrigated. He built border dikes to control the water. He testified that he was using Thomas-Williamson water. Mr. Kingsbury did not irrigate east of Highway 89 and south of Highway 44 when Jere Walley was out there, from 1958 to 1977. Mr. Walley testified that he recalled “no irrigation out there whatsoever.” Claim 76F 199804-00 is not valid as a filed right. On the strength of Mr. Walley’s testimony, it should be a use right with a priority date of December 31, 1958 and a flow rate sufficient to irrigate the area shown on the WRS, which is what Mr. Walley testified he irrigated. Scaling the area off yields an irrigated area of 300 acres, which at 17gpm/acre (there is no evidence about flow rate for this claim, so we use the W.R.Adj.R. standardized flow rate because the right was established well after the VMLWC’s early calculations using 1:80) yields a flow rate of 11.4 cfs. This disposition is consistent with Ray Middlesworth’s affidavit in the claim file. The Kingsbury affidavits in the claim file are not specific enough to support any findings about this claim or to overcome the unambiguous testimony given by Mr. Walley.

8) Claim 41M 199806-00 is based on the notice filed by Thomas N. Stimson on August 25, 1906. Stimson claimed a priority date of October 15, 1903. The notice is invalid because it was not filed on time. The evidence does not show when, if at all, this right was perfected. It is possible that the Kingsbury Ditch Co. established a use right at a later date which could be an implied right based on this claim, but the evidence does not clearly show when that right would have been established. Ex. C-48, Bates 2185. This claim should be dismissed.

9) Claim 41M 199807-00 is based on the Clack-Shields-Magee notice which asserts a priority date of August 8, 1904. The evidence does not show when, if at all, this right was perfected. Exhibit C-48, Bates 2188, has a list of many conveyances to and from the Kingsbury interests. It is possible that the Kingsbury Ditch

Co. or a predecessor established a use right for some of this claim at a later date which could be an implied right based on this claim, but the evidence does not clearly show when that right would have been established or what its flow rate would be. This claim should be dismissed.

10) Claim 41M 199817-00 is based on Right No. 19. Elsewhere in this report, the portion of this right acquired by the VMLWC is shown to have been 6.5 cfs. The flow rate of this claim should be reduced to 6.5 cfs.

11) Claim 41M 199822-00 is based on the John Hall notice of appropriation with a claimed priority date of July 7, 1900. It is a stock water claim for stock drinking directly from the source. According to Exhibit C-48, Bates 2178, F. D. Kingsbury & Co. had a valid water right for 7.88 cfs as of 1921. The abstract of this claim does not need to be changed.

12) Claim 41M 199823-00 is a stock water claim based on the John Monnette October 20, 1900 notice of appropriation. The notice was filed January 14, 1902, well beyond the time for filing a valid claim. This claim is not subject to the same evidence of nonuse that affects the companion irrigation claim, 41M 199804-00. The abstract of this claim does not need to be changed.

D. Claims from K. Wallace Bradley:

1) Claim 41M 42049-00 is derived from the J. M. Angell, Jr. notice of water right with a priority date of September 20, 1939. It has a flow rate of 1.29 cfs. This claim does not require further action until Basin 41M is adjudicated.

2) Claim 41M 42050-00 has a priority date of October 7, 1937 and a flow rate of 1.29 cfs for irrigation. This claim does not require further action until Basin 41M is adjudicated.

3) Claim 41M 42051-00 is based on the John Hunter notice of appropriation. The appropriation is dated February 27, 1896. The notice was filed December 17, 1906. The Atwood Report, Exhibit C-28, Bates 1979-80, says that this right was never perfected. Affidavits in the claim file show that John M. Angell saw the land irrigated from this source from 1911 to 1964, while Wm. A. Wentworth saw the land

irrigated from November 1915 to May 1928. Based on those affidavits, and on the WRS verified acreage, this claim should have a priority date of December 31, 1911 for a maximum of 90 acres.

4) Claim 41M 42052-00 was withdrawn on June 5, 2006.

E. Claims from Birch Creek Colony:

1) Claim 41M 113451-00 is a stock water claim based on Right No. 1. Right No. 1 is extensively analyzed elsewhere in this report. Claim 41M 113451-00 should be changed to a use right.

2) Claim 41M 113459-00 was filed for land in Section 25, T29N R7W. The claim says it is derived from Right No. 1. Exhibit WC-1 shows 19 acres of irrigation in the NWNW of Section 25 as of 1915 and does not show any connection to the Kipp Ditch. Section 25 is about 6 miles south of the trace of the Kipp Ditch. The evidence does not adequately explain the connection between Right No. 1 and Section 25. The notes on Exhibit WC-1 might support a claim based on the Stewart and Gardner appropriation or Mary Leech, but not on the Kipp Ditch. If this claim relies on the 1897 Raphael Morgan conveyance (Right No. 17), it is subject to the problem analyzed elsewhere in this report and meets the same fate. This claim should be dismissed.

F. Claim from Two Medicine Ranch South:

1) Claim 41M 185666-00 is based on the Stewart and Gardner appropriation of August 31, 1897. The analysis in the Atwood Report, Exhibit C-28 Bates 2095, shows that this claim was never perfected. Claim 41M 183666-00 should be dismissed.

G. Claims from Kingsbury Colony:

1) Claim 41M 48236-00 is based on the Charles Buckley filed notice of April 12, 1898. (Right No. 25) The notice was filed for irrigation. According to Exhibit C-28, Bates 2111, this claim was never perfected for irrigation. The diversion was through the Ryan-Lauffer Ditch and some laterals. Buckley was a homesteader. While the irrigation claim was probably not perfected, one can reasonably conclude that

Buckley and his successors watered some livestock from the ditch. The abstract of this claim should not be changed.

2) Claim 41M 48237-00 is based on a filed notice of appropriation filed by W. G. Collins & Co with a priority date of August 26, 1919. The PCCRC amended this claim from irrigation to livestock drinking directly from the source. There are no changes to the abstract of this claim.

The Curry Claims

68. The Curry claims were filed by predecessors in interest Keil and Crawford.

The claims are for irrigation except where noted:

Keil/Carroll Property

- 41M 159114-00
- 41M 159115-00
- 41M 159116-00
- 41M 159117-00
- 41M 160284-00
- 41M 159103-00 (stock water)

Crawford/Ryan Property

- 41M 131100-00
- 41M 131101-00
- 41M 131102-00
- 41M 131103-00

Curry filed amendments to each set of claims while the DNRC was examining them as part of this case.

69. Lewis Carroll testified at the hearing. Mr. Carroll has no stake in the present controversy. His testimony was credible.

70. Mr. Carroll's testimony established these facts:

A. His father homesteaded the W2SW of section 25 and E2SE of section 26, T30N R7W. His father had an irrigated alfalfa field and a garden of a couple of acres.

B. Irrigation was through the Taylor Ditch, sometimes called the Thomas-Williamson Ditch.

C. On the county WRS in the SE section 26, T30N R7W, the red indication shows his father's alfalfa field. Ex. C-54. The acreage is based on a 1957 air photo.

D. Lewis Carroll bought the homestead from his mother on May 16, 1961.

E. Mr. Carroll added to the alfalfa field. He had over 30 acres of irrigated alfalfa. He set the edge of his improved ground along the line where subirrigation ended.

F. Mr. Carroll irrigated every year after he purchased the ranch.

G. Mr. Carroll bought the Wheeler place in 1959 (N2N2 section 35 and NWNW section 36). When he bought it, the Wheeler place had 30 acres of irrigated land in NWNW section 35. When Mr. Carroll bought the Wheeler land, he found that a lot of it was subirrigated and that there were ditches through the land and signs of previous irrigation. Mr. Carroll developed 40 more acres of irrigation on the NENW of section 35. He did not know which water right the Wheelers used to irrigate. Mr. Carroll irrigated the Wheeler ground every year after he bought it.

H. Mr. Carroll did not differentiate which water rights he was using to irrigate out of the Taylor Ditch. Except for the circumstance related in the next subparagraph, no one prevented him from irrigating when he wanted to.

I. In 1964, Bernice Kingsbury, who controlled land up the ditch from the Carroll property, put dams in the ditch and ran water out on a gravel flat, not irrigating anything. She was using a ditch that the Kingsbury Ranch had not used before during Mr. Carroll's lifetime. Mrs. Kingsbury shut off Mr. Carroll's water and he had "a little set-to" about that. The Kingsbury episode ended when the 1964 flood came three days later.

J. In 1966, Mr. Carroll bought six 40 acre parcels (W2SE and SW section 26) from Ray Middlesworth. Test. L. Carroll, D1, 9:49. Mr. Carroll had "all the water we needed in those days." In 1967 he leveled two forties and built border dikes. The next two forties were used for irrigated pasture. There were already ditches in the area from when George Taylor had irrigated, a culvert into the property, and the ground had been plowed.

K. It is more likely than not that the Wheeler and Middlesworth land that Mr. Carroll testified had ditches on it when he bought it was irrigated long before he

purchased it. The record contains evidence that the Wheeler and Middlesworth land was irrigated in the 19th century. Ex. C-31.

L. The Wheeler place (N2N2 section 35, T30N R7W) and the Middlesworth property were formerly owned by the VMLWC. When the VMLWC conveyed this land, the deeds included a covenant running with the land that waived all rights to use or claim water from VMLWC for irrigation of the lands. Ex. P-2. Any irrigation water used after then on land described in Exhibit P-2 must have come from a source not owned or controlled by the VMLWC or PCCRC. The WRS (Ex. C-54) shows that as of the date of the survey field checks (summer 1963) the irrigation on the Carroll homestead was about 30 acres and that on the Middlesworth property about 30 acres. There is an unexplained gap in irrigation between 1926 and Mr. Carroll's redevelopment of irrigation.

M. Except for the 70 irrigated acres on the Wheeler place and the 160 acres that Mr. Carroll developed on the Middlesworth place, the rest of the irrigated land Mr. Carroll owned was subirrigated.

N. In June 1964, Swift Dam broke and Birch Creek was flooded. The flood did extensive damage to land and improvements on Birch Creek Flats. Ditches were filled in and points of diversion were destroyed. After the flood, some of the points of diversion were combined into the Ryan-Lauffer Ditch diversion. Water was sent from the Ryan-Lauffer Ditch into the Taylor Ditch and others which conveyed the water to its places of use. Mr. Carroll used the changed diversion and ditches from when they were reconstructed until he sold the property. To irrigate his property, he continued to use the lower part of the Taylor Ditch.

O. PCCRC asserts that Mr. Carroll established use rights as of the dates he developed irrigation on the Carroll and Middlesworth places. Curry asserts that the correct priority for that ground is Right No. 24, the Lena Taylor right.

P. Mr. Carroll had nothing to do with the PCCRC. He opened and closed his headgates when he needed water. The Company was not involved with that. Until

Mr. Greytak's First Continental Corporation came along, Mr. Carroll had no trouble getting enough water.

Q. The irrigated land on the Ryan (now part of the Curry) property was irrigated through the Ryan-Lauffer Ditch. Mr. Carroll worked there as a hay hand in 1945. He observed haystacks in the meadows along the ditch thereafter.

R. Mr. Carroll bought other land in 1972 and moved away from the Flats.

71. From Mr. Carroll's testimony, the most reasonable conclusions are:

A. The acreage irrigated by Mr. Carroll's father and the acreage irrigated on the Wheeler property before Mr. Carroll acquired it was irrigated under the Lena Taylor right (Right Nos. 22a and 24). The priority date for the irrigation of that acreage is August 27, 1897. The evidence is insufficient to determine the flow rate. The Court should apply the W.R.C.E.R. Rule 14(b)(1) standard flow rate of 17 gpm/acre. The flow rate should be enough to irrigate a total of 60 acres at the 17 gpm/acre, which is 2.27 cfs.

B. The acreage Mr. Carroll developed has use rights through the Taylor ditch with priority dates as of the date when he developed the irrigation. Where there is a period beginning in 1926 of decades with no irrigation proven, it is not possible to determine which early rights would be appurtenant to that land.

C. Therefore, the land Mr. Carroll developed on the Carroll homestead property has a priority date of June 21, 1961. The land Mr. Carroll developed on the Wheeler place has a priority date of June 21, 1964. The land Mr. Carroll developed on the Middlesworth place has a priority date of June 21, 1967.

D. The subirrigated land was subirrigated when Mr. Carroll purchased the properties. While the source of the subirrigation was not the subject of his testimony, it is probable that the source is the same as for the Fagerlie Swamp, which cannot be regulated. See the relationship between this land and the swamp on Exhibit WC 2006-01 Attachments 10 and 13. Assigning a priority date to the subirrigated land would not assist the district court in administering the parties' water rights because there is no diversion or means of conveyance which can be regulated.

E. The use rights mentioned above are consistent with Mr. Carroll's testimony that he regulated the flow from Birch Creek into the ditch he used and that no one interfered with his use until Mrs. Kingsbury briefly interrupted the flow in 1964 just before the flood.

72. A. Curry's expert witness was David Schmidt, who reviewed the Atwood Report, the Adjudication Data, and the mapping associated with the Atwood Report.

B. The Carroll property and the Upper and Lower Ryan property, all now owned by Curry, are outlined in yellow on Ex. C-29. The base map was prepared in 1916. The map bears a legend which identified irrigable land (denoted R), possibly irrigated before 1915 (P), and irrigated in 1915 (V). The legend shows land owned by the VMLWC. The map does not identify which water rights were associated with land shown as irrigated.

C. Exhibit C-29 shows a total of 137 acres of what is now Curry's land as irrigated.

D. Mr. Schmidt testified about Exhibit C-31, a map dated July 29, 1919. This exhibit purports to show the history of Right No. 1 (Barron & Upham notice of appropriation). On this exhibit, land thought to have been used in the original perfection of Right No. 1 is outlined in green. Land outlined in blue is land on which the right was subsequently used by Raphael Morgan and Anna M. Steele. The land outlined in green includes the Carroll homestead, the Middlesworth property, the Wheeler property, and parts of the Upper Ryan property. The Fagerlie Swamp and drain ditches leading to the northeast are shown on the exhibit.

E. Exhibit C-31 shows that in 1919, Right No. 1 was not being used on the land where it was originally perfected.

F. By the time the Adjudication Data were compiled, the portion of Right No. 1 once owned by the CIC was being diverted into the B Canal, which had no connection to the land where the right was originally perfected.

G. Mr. Schmidt asserted that the Adjudication Data support a use right for the Curry land outlined in blue on Exhibit C-31. While there is some evidence from the

US v. CIC trial (*United States v. Conrad Inv. Co.*, 156 F. 1233, 1907 US App. LEXIS 4692 (1907)) that Charles P. Thomas irrigated some of the land in that area at about the time Right No. 1 was removed from it, there is no evidence to support Mr. Schmidt's theory of a use right going back to 1883. The only quantifiable evidence of use rights in that area comes from the homestead patent dates. To obtain a desert entry patent, the entryman had to show evidence of irrigation, giving us as reliable an indication as we are likely to find of the date use rights were established.

H. For the Carroll portion of the Curry property, excluding land where the chain of title includes the VMLWC deed restriction, the patent dates are:

<u>Patentee</u>	<u>Description</u>	<u>Date</u>
George Edwards	Sec. 35: N2NE, NENW	8/15/1897
Daniel Foust	Sec 30: NESW, S2SW Sec. 31: NENW	3/15/1898
Thomas R. Hill	Sec. 30: SE	12/17/1900
John Monette	Sec. 25: NWNE	1/17/1902
John Monette	Sec. 25: NENE Sec. 30: NWNW	2/18/1903
Frank Pias	Sec. 26: W2SW	10/9/1906
Edwin R. Carroll	Sec. 25: W2SW Sec.26: E2SE	6/18/1910
Charles P. Thomas	Sec. 25: E2SW, W2SE	12/12/1901

I. The homestead patent dates establish the earliest use right dates for the land described. As the entryman was not required to irrigate all of the land on his homestead, the exact irrigated acreage cannot be determined from the patent. We know from Lewis Carroll's testimony that Edwin R. Carroll was absent from Montana for many years after his homestead was patented to him, that the Conrads forged his signature on a deed and probably occupied his homestead during the time he was gone, and that he

returned to Montana and recovered his homestead. We do not have any evidence about what use the Conrads made of the Carroll homestead during the time that they wrongfully possessed it.

J. According to the testimony at the hearing, and the county WRS, there was some irrigation on the Carroll homestead and the Middlesworth property when Lewis Carroll acquired them, and he developed more. Without contrary evidence, it is reasonable to presume that the irrigation shown on the county WRS was irrigated at the time of homestead and continued to be irrigated.

73. Curry therefore has use rights as follows:

T30N R7W

Sec. 26: 30 acres in NENE, priority date 6/19/1910

Sec. 35: 20 acres NWNW, priority date 8/15/1897.

74. The VMLWC restrictive covenant included the NWNW of section 35. A careful reading of the covenant shows that the grantee and successors could not claim a water right through the company. The covenant does not say that the land shall remain forever dry. The land was irrigated at the time of the WRS (field checked 1963). There is no evidence that any of the irrigation on the Wheeler and Carroll properties at the time of the WRS was using water derived in ownership from the PCCRC (as VMLWC's successor). At the time of the WRS, the PCCRC did not claim to own any rights for water in the ditches supplying the Wheeler and Carroll properties, and both properties were served by diversions downstream of the PCCRC's B Canal. There can be no serious claim that any of the land subject to the covenant cannot be irrigated because of the covenant.

75. Some of the Carroll and Middlesworth land has a later priority date than the original homestead patent, but that later priority date is a consequence of having no demonstrable irrigation at the time of the WRS, whether the land is subject to the covenant or not.

Claims in Order of Priority

Right No. 1:

Claims: PCCRC: 41M 161998-00

Curry: 41M 159115-00

76. A. The history of the first right is found beginning on page 1902 of the Adjudication Data, Exhibit C-28. On April 9, 1884, George Barron and Hiram D. Upham filed a claim for 1500 MI (miner's inches, equal to 37.5 cfs) from Birch Creek. In the record, the first right is frequently called the Joe Kipp right. There is evidence (testimony in the US v. CIC trial, Ex. P-4) that Kipp was involved in constructing the ditch from the beginning. There is no recorded conveyance of this right from either Barron or Upham to anyone. The Adjudication Report, Bates 1906, says that Joe Kipp acquired Upham's rights to the ditch by oral transfer. Both Barron and Upham were reported as deceased in the Adjudication Report. The U. S. land patent records do not list any patent in Montana to Hiram D. Upham. There are patent records from 1922 and later for a Hiram Upham, a member of the Blackfeet Tribe, in Glacier County. There is a patent to a George Barron in 1917 in Daniels County. Neither of the patents supports an hypothesis about anyone's presence or activities on Birch Creek Flats in the 1880s.

B. Exhibit C-28, Bates 1904, says that there is no evidence on the ground that either Barron or Upham were squatters. There is no evidence that Barron or Upham made any use of the water they had claimed.

C. There is no record of a patent to Joe Kipp for land in the Flats. There is a patent record from 1891 showing a patent to a Joseph Kipp of section 1, T29N R6W, which is on both sides of Dupuyer Creek just upstream of its confluence with Birch Creek a few miles east of the Flats. (<http://www.glorerecords.blm.gov>). The Right No. 1 ditch does not serve the land patented to Kipp.

D. The US surveyed the Birch Creek Flats in 1892 (survey adopted 1895). (<http://www.glorerecords.blm.gov>). The survey plats of T30N R6W and R7W show that, as of 1892, persons named Thomas, Fagerlie, Edwards, Buckley, Winkley, Burd, and Faust had structures (cabins, livestock shelters) in sections 25, 26, (T30N R7W) 35, and 36

(T30N R6W). The plat shows the trace of what is labeled “Kipp and Upham’s Irr’g Ditch” running northeasterly through sections 31, 32, 33, and 28, T30N R7W; then entering section 27 from the southwest and continuing on toward the northeast. The trace of the Kipp Ditch does not connect to Birch Creek but is on a course to intersect the creek in section 31, T30N R7W, or section 1 of T29N R8W. The plat shows another irrigation ditch running SSE from the E2E2 of section 27 into the SWSW of section 26 labeled “Edwards Irr’g Ditch.” Both traces end in arrowheads indicating that they may continue on. The Edwards trace points toward the Edwards structure half a mile to the southeast in the NWNE of section 35. The plat does not show irrigation laterals. The plat does not show how water was delivered to the individuals named above in this paragraph.

The surveyor, Bickel, later recalled that the homesteads had gardens.

E. Exhibit C-28, Bates 1906, reports a 1919 interview of George Stevenson in which Stevenson said, “One day at the store in Robare, while sitting on the counter with Joe Kipp, Hiram Upham and a man named Tingle, Joe Kipp purchased from Hiram Upham all his rights to water and ditch out of Birch Creek.” The interview was at least 23 years after the reported event (assuming that the purchase pre-dated Kipp’s written conveyances in 1897).

F. The Atwood Report, Bates 1903-4, uses interview reports and the measured slope to calculate a ditch capacity for Right No. 1 of 22.04 cfs. That number is supported by the testimony of Charles P. Thomas at the US v. CIC trial (Ex. P-4 Trial Tr. p. 450), where Thomas estimated the Kipp Ditch’s capacity at 25 cfs. Given the difficulty of estimating ditch and stream flows, Thomas’ figure supports the calculated capacity but should not displace it. The most reasonable number for the original capacity of the Kipp Ditch is 22.04 cfs. The Adjudication Report, Bates 1905, lists 1,759 irrigable acres under the Kipp Ditch. By the duty of water used in preparing the Atwood Report, 1,759 acres would require 21.99 cfs to irrigate.

G. The recorded conveyances of Right No. 1 in the PCCRC’s chain of title are:

1) (i) Kipp to Anna M. Steell. May 31, 1897. Quitclaim of an undivided one-half interest in the irrigation ditch and “in the number of miners inches of water that will flow through said ditch. . .” Recites \$2,000 consideration.

(ii) Kipp to Raphael Morgan. May 31, 1897. Quitclaim of an undivided one-half interest in the ditch and “in the number of miners inches of water that will flow through said ditch. . .” Recites \$2,000 consideration.

(iii) In the deeds to Steele and Morgan, Kipp described the ditch as having a headgate near the west line of section 31, T30N R7W, and extending eastward through sections 31, 32, 33, 28, 27, 26, 25, 34, 35, and 36 of T30N R7W. The Adjudication Report, Bates 1903, says the intake is in section 1, T29N R7W, which is where it is mapped (as the Morgan & Steele Ditch Intake) on Exhibit P-5, Attachment 6.

2) Annie M. Steell to William Robidaux, August 23, 1897. Quitclaim of 160 MI out of the same ditch. Recites \$500 consideration.

3) Millien [probably William] Robidaux to Daniel F. Hagerty. February 1, 1898. Warranty deed to an undivided 160 MI out of the same ditch. Recites \$850 consideration.

4) Daniel F. Hagerty to Annie M. Steell. April 1, 1898. Warranty deed includes undivided 160 MI out of the same ditch. Recites \$900 consideration.

5) Annie M. Steell and George Steell to Conrad Investment Company. November 8, 1905. The warranty deed includes “all water and water rights appropriated or purchased including the Joe Kipp right.” At the time Annie M. Steell conveyed her water rights to CIC, she owned an undivided 11.02 cfs through the Kipp and Upham Ditch.

6) The CIC’s water rights through the Kipp Ditch became the PCCRC’s.

77. There are defects in the early chain of ownership of the right. The Notice of Appropriation preceded the 1885 statute and is therefore of no legal effect. There is no evidence that Barron ever transferred his interest in the right to anyone else. There is no written transfer from Upham to Kipp, and only anecdotal evidence of an oral transfer from

Upham to Kipp with inadequate evidence that Upham was a squatter who could make an oral transfer valid under Montana law. In the Atwood Report, there is but one report that Upham was a squatter against several reports that he had nothing to do with the ditch. See endnote on rights jointly owned. ⁱ

78. The Curry land in the described perfection area can be divided into two subgroups: Land not in the Steele 1905 deed to Conrad Investment Company, and land included in the Steele 1905 deed. Of the land described in the perfection area (Ex. C-31), these tracts now belong to Curry (Ex. C-17):

T30N R7W

- Sec. 25: SWSE, SESE, NESE, NWSW, SWSW, SESW, SWNE, SENW, NWSE, NESW
- Sec. 26: NESE, SESE, NWSE, SWSE, NESW, NWSW, SWSW, SESW
- Sec. 35: N2N2
- Sec. 36: N2 (except NWNW)

All tracts shown in underlined italics are subject to the deed restriction in favor of VMLWC. If any of those tracts were irrigated after 1926, the irrigation would have to come from acquisition of an earlier right not owned by VMLWC which was transferred to the tracts, or be a use right established after the tracts left VMLWC ownership.

79. The reputation in the community at the time was that Joe Kipp owned the ditch. The trace of the ditch is shown on the 1892 GLO survey plat (approved 1895) labeled with Kipp's name. The Adjudication Report includes transcribed notes from interviews with old timers. While the editorial comments and conclusions in the Report are self-serving and questionable, the interview notes are more likely than not trustworthy. The interviews were done in the field by several persons. No one person was present for all of the interviews. The interview notes have the flavor of authenticity, not of contrived writeups which are favorable to any one conclusion. The VMLWC had no incentive in an internal document to fabricate interview reports of persons who might be called as witnesses should the rights on Birch Creek be adjudicated. The Report analyzes the raw material and draws conclusions from it which are more favorable to the VMLWC than not.

We can be skeptical of the Report's conclusions and consider the facts reported in the interviews for what they are worth.

80. A. Exhibit P-104 contains affidavits from persons who lived in the vicinity at the time the ditch was constructed. Some of them said that they worked on the ditch and were paid by Joe Kipp. The affidavits are unanimous that Barron and Upham had nothing to do with it. The affidavits were notarized by lawyer J. A. McDonough who had ties to the Conrads and their nascent irrigation project, then to the Carey Land Act project. The affidavits do not read as would literal transcriptions of what the affiants said. The affidavits are in lawyerese purporting to be the sworn statements of men who signed their names with Xs, but retain enough original flavor to sound truthful. The affidavits must have been intended to shore up the VMLWC's claim to have succeeded to the Joe Kipp right. As corroboration for other evidence of Kipp's control of the water right, they add weight.

B. In the entire record, there is no suggestion, hearsay or otherwise, that Joe Kipp did not own and control the Kipp Ditch and the water in it.

81. The interviews are corroborated by testimony given in *US v. CIC* (Ex. P-4). Charles P. Thomas testified (TR-585 ff.) that he had known Joe Kipp since 1863. After the Robare Ditch (then defunct, destroyed by the creation of the Kipp Ditch), the next ditch taken out was Kipp-Upham and Barron. They were the three men interested in it. As of the trial in 1905, it was called the Steele and Morgan Ditch. Work began on the ditch early in the spring of 1883. Morgan and Steele bought from Upham, Barron, and Kipp. Thomas had a place bordering on Birch Creek at Robare, which was near the Kipp Ditch diversion. He had another place on the Birch Creek Flats bordering the old Steele place.

82. Mr. Thomas testified that Barron "didn't have no place much," and was a manager or foreman for the TL Cattle Company. Kipp had a store at Fort Conrad on the Marias and later moved up to what was referred to as Peegan where he had a store in partnership with Upham, trading with the Indians.

83. Edgar Steele, the 23-year-old son of Major Steele, testified (Ex. P-4 TR-991 ff.) that he lived on the Steele place on Birch Creek from 1891 or 1892 until his father sold

out to CIC in November of 1905. He testified that his father used the Kipp right and that Steeles owned 9/18 of the right and Morgan owned the other 9/18.

84. There is testimony that the Kipp Ditch was used “right along” and every year, and that Charles P. Thomas used some himself. Mr. Thomas had a homestead patent for the E2SW and W2SE of section 26, T30N R7W. That land is subject to the VMLWC covenant about no water supply from the company.

85. The PCCRC claims a one half interest in Right No. 1 based on the 1905 Steele deed to the CIC. Any direct flow right that the PCCRC now owns under Right No. 1 is derived from that ownership. The conclusion from the above, without relying exclusively on the Adjudication Report, is that as of November 8, 1905, the CIC owned a use right with an April 9, 1884 priority date, for an undivided 11.02 cfs of direct flow irrigation water through the Kipp Ditch. See endnote 2 concerning the Statute of Frauds.ⁱⁱ

86. The Kipp right was established for direct flow irrigation. There was no storage of the Kipp right until after VMLWC acquired it. The Swift Dam was built in 1912. The PCCRC storage right under the Right No. 1 claim is a use right with a priority date of December 31, 1912. An implied claim should be generated for that storage right.⁶

87. In 1905, Major Steele sold deeded land served by the Morgan-Steele (Kipp) Ditch to the Conrad Investment Company. That conveyance did not include these lands which lie within the area where Right No. 1 was perfected and which now belong to Curry:

T30N R7W

Sec. 25: NWSW, SWSW

Sec. 26: NESE, SESE, NWSE, SWSE, NESW, NWSW, SWSW, SESW

(total 396 acres)

88. Exhibit P-6 contains copies of Curry’s chain of title documents. Document 4349 is a copy of the Warranty Deed of December 9, 1919, from VMLWC to George W. Taylor, which contains this condition: “Grantee irrevocably waives any and all rights to the use or claim from the Grantor any water for the irrigation of said lands . . . will be held . . .

⁶ For the law on implied claims, see Water Court Case 40C-47. The Court cannot use implied claims to resurrect unfiled forfeited claims.

without claiming from Grantor any right to irrigate an part of the same and without claiming any water or water supply from said Grantor for use upon an part of said lands.. .”

The restriction applies to

Sec. 25: SWNE, SENW, SE, E2SW

Sec. 26: E2SW, W2SE

Sec. 36: N2NE, NENW

and Lot 1, Sec. 31, T30N R6W.

89. Curry contends that he owns a use right with a priority date equal to that of Right No. 1 based on ownership of part of Right No. 1’s original perfection area acreage. Steele and Morgan irrigated land to the west of the original perfection area as well as land within the original perfection area. The PCCRC contends that Morgan and Steele changed the place of use of all water under Right No. 1. The relevant exhibit is C-31.

90. Curry’s expert witness Schmidt testified on cross examination (D3, 1:05) that he believes there was an 1883 use right based on the assertion in the Atwood Report that Kipp and Upham started a ditch in the spring of 1883. Ex. C-28, Bates 1903. The Atwood Report does not say that water was used that year. On Bates 1904, the Report says that the original appropriators owned no land of record, there is no evidence on the ground of their occupancy, and no information showing that they used water on that land. The Report suggests the water may have been lent or rented to others. We know there was some water use when Bickel surveyed the Flats in 1892, because Bickel said there were gardens and irrigated hay meadows near the places occupied by Fagerlie, Winkley, Edwards, and Buckley. We do not know where those men obtained their water, in what quantity, and only vaguely where they used it. There is not enough evidence to support, let alone quantify, a use right going back to 1883 or 1884.

91. The homestead patents for the land Curry now owns show when use rights were most likely to have been established. While it could be that the land where the Kipp right was first perfected was not deprived of water after Steele, Morgan, Cowgill, and Leech began to use the appropriation elsewhere, it is equally possible that all of the appropriation was used on the Steele and Morgan places (which were up the ditch from the

perfection ground) or that part of the appropriation remained in the ditch and was used by homesteaders in the original perfection area. The evidence does not unambiguously show that water continued to be used in the original perfection area before the dates of the homestead patents.

92. Given that there were homesteads in the original perfection area with patent dates after 1884, the most probable scenario is that after Steele 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.

93. The original perfection area is (Ex. C-31):

- T30N R6W Sec. 31: Lot 1 (NWNW)
- T30N R7W Sec. 25: S2SWNE, SENW
- Sec. 26: S2, S2NE
- Sec. 27: E2SE
- Sec. 35: All
- Sec. 36: N2

94. The homestead patents for the part of the Right No. 1 perfection area now owned by Curry are:

<u>Description</u>	<u>Patent Date</u>	<u>Patentee</u>
T30N R6W		
Sec. 31 NWNW	12/10/1897	Charles Buckley
T30N R7W		
Sec. 25 SWNE, SENW, N2SW	8/27/1898	Millien Robidaux
NESE, NESW, N2SE	8/15/1896	Rasmus Fagerlin
W2SW	6/18/1910	Edwin R. Carroll
Sec. 26 E2SE	6/18/1910	Edwin R. Carroll
W2SE, E2SW	12/12/1901	Charles P. Thomas
W2SW	12/17/1900	Thomas R. Hill
Sec. 35 N2N2	8/15/1897	George Edwards
Sec. 36 N2NE, NENW	12/10/1897	Charles Buckley

95. Of those lands, the following are not included in the VMLWC's deed restriction:

T30N R7W

Sec. 25: NENE, W2SW

Sec. 26: E2SE, W2SW

Sec. 35: N2NE, NENW

96. Putting the homestead patent dates together with the Curry land that does not have a deed restriction gives us these priority dates for water rights used on those lands:

T30N R7W

Sec. 25:	NENE	9/16/1902
	W2SW	6/18/1910
Sec. 26:	E2SE	6/18/1910
	W2SW	12/17/1900
Sec. 35:	N2NE	8/15/1897
	NENW	8/15/1897

97. Exhibit WC-1 shows almost no irrigation in the original perfection area as of 1915. That date is 18 years after Steele and Morgan acquired Right No. 1. WC-1 supports the proposition that Steele and Morgan moved some of Right No. 1 up the ditch to the west.

98. We cannot accept the Adjudication Report's equation of irrigable acres with irrigated acres. Even if the Kipp Ditch could carry enough water to irrigate 1,759 acres, there is no proof that those acres were irrigated as of 1884, or were contemplated to be irrigated when the ditch was constructed.

99. A bit of Montana case law is apt: *Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist.*, 185 Mont. 409, 418-419, 605 P.2d 1060, 1065-1066, 1979 Mont. LEXIS 980.

As we stated in *Irion v. Hyde* (1938), 107 Mont. 84, 95, 96, 81 P.2d 353, 358, statements made in notices of appropriation are not completely dispositive for purposes of decreeing the amounts of a water right:

"The rights of the parties were not to be measured entirely by what they claimed in their appropriation notices. They were to be measured and gauged by their beneficial use over a reasonable period of time after they initiated the appropriations. In establishing the prior right of the plaintiffs consideration must be given to the extent and manner of their use, the character of their

land, and the general necessities of the case. 'To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snowfall, or by springs or seepage which directly contribute.' *Beaverhead Canal Co. v. Dillon etc. Co.*, 34 Mont. 135, 85 P. 880, 882. It does not follow that plaintiffs were entitled to 1,000 inches because they designated that amount in their appropriation. Neither does it follow that defendants were of necessity entitled to the full amounts designated in their appropriation notices. All of these matters were subject to proof of use. See *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575; *Peck v. Simon*, 101 Mont. 12, 52 P.2d 164."

The Irion decision requires that Ward, in addition to establishing a prima facie case through the notices, must also prove a "beneficial use over a reasonable period of time." Inherent in this burden of proof is the responsibility to prove the amount of water beneficially used. Ward proved a beneficial use and also provided the trial court with sufficient evidence to establish the [***14] amount of water beneficially applied. However, the District Court granted rights larger than Ward's evidence would support.

100. None of the WRS field notes concerning what is now Curry property make mention of the Barron and Upham appropriation. For the Middlesworth property, Archie Campbell (who owned it in 1963) referred to the Lena Taylor right, Right No. 24. Curry claims a portion of the Lena Taylor right.

101. The NWNW of section 35 is shown on Exhibit WC-1, p. 3 as having 40 acres irrigated before 1915 and 38 acres irrigated in 1915.

102. Concerning the Keil land, the evidence supports these conclusions:

A. The land may have been irrigated under the Joe Kipp right as far back as 1884. Kipp conveyed the right to Morgan and Steele, who removed the right to land which is not part of the Keil property.

B. Before Lewis Carroll bought the Wheeler place (N2N2 sec. 35) in 1959, the NW was irrigated. PCCRC argues that the irrigation was under no identifiable water right. The water came by way of the Taylor Ditch. The most reasonable conclusion is that irrigation was under the Taylor right. After Mr. Carroll bought the Wheeler place, he developed more irrigation which should have a priority of Spring 1959.

C. When Lewis Carroll bought the Carroll homestead, irrigation included 38 acres developed by his father. That irrigation used the Lena Taylor right. Lewis Carroll increased the irrigation with a priority date of Spring 1961.

D. The Middlesworth place was shown as not irrigated in the WRS. Lewis Carroll bought the place in 1966 and developed irrigation. Irrigated land on the Middlesworth place has a priority of Spring 1966.

E. It is possible that some or all of the original perfection ground for Right No. 1 was irrigated after Kipp sold the right to Morgan and Steele. The evidence of water use there is ambiguous at best (for example, Charles P. Thomas' testimony in US v. CIC (Ex. P-4) that water was continuously used through the Kipp Ditch, without saying where it was used). We can fairly conclude that some of the ground was irrigated at the time of the homestead patents, but with the exception of the land shown on the WRS as irrigated, irrigation had ceased before Lewis Carroll combined the three properties and began to develop them.

103. Claim 41M 159114-00: This irrigation claim was filed by Keil Land and Cattle Company for 400 acres in sections 25 and 26, T30N R7W. The claimed priority date is June 14, 1898.

104. Claim 41M 159115-00: This irrigation claim was filed by Keil Land and Cattle Company for 120.24 MI with a priority date of April 9, 1884. See elsewhere for the findings concerning the Joe Kipp right. Curry filed an amendment to assert a use right with the same priority date. See elsewhere for the findings concerning Curry's use right theory. This claim should be dismissed.

105. Claim 41M 159116-00 was filed by Keil Land and Cattle Company for 400.81 MI with a priority date of June 4, 1897 (Right No. 17). The claim is based on the Steel-Morgan (Right No. 17) appropriation.

A. The Steeles conveyed their interest in this right to the Conrad Investment Company. Morgan conveyed his interest to F. D. Kingsbury and Company. The subsequent transfers of this right are the same as those of Right No. 1, the Joe Kipp right. Mr. Schmidt testified that any claim Curry would have to Right No. 17 would be

based on Curry's ownership of land within the Exhibit C-31 Adjudication Data map of the original perfection area.

B. The WRS field notes concerning what is now the Curry land do not show any reference to the Morgan-Steele notice.

C. Curry has a use right for the land where Lewis Carroll developed irrigation. The elements of the use right are:

Priority date: June 1, 1967

Type: Use

Flow Rate: 7.57 cfs (17 gpm/acre x 200 acres)

Ditch: Ryan-Lauffer Ditch

POU:

1	80	E2SW	26	30N	7W
2	80	W2SW	26	30N	7W
3	40	NENW	35	30N	7W

The abstract should be changed to reflect the use right and the DNRC issue remark which says that there is no irrigation shown in the WRS should be removed because the right was developed after the WRS was published.

106. Claim 41M 159117-00 is a claim for natural subirrigation of the entire Carroll property, with a priority date of May 26, 1864. Mr. Schmidt testified that the priority date was selected based on when livestock first came into the country. He testified that there is no diversion connected with this claim. The subirrigation is the result of other irrigation in the vicinity. Some years the ground is wet. Some years it is dry. The selected priority date is arbitrary but harmless because of the nature of the claim. Because this claim is for subirrigation and has no real point of diversion of its own, its owner should not have the ability to call out other water rights. The abstract should have an information remark which says that the claim is for natural subirrigation and does not allow the owner to call out other claims. At the time of the claimed priority date, the place of use was within an Indian reservation. The land was not ceded to the United States until August 19, 1874. We will leave it to the general adjudication of Basin 41M to sort out the correct priority date for this right.

107. Claim 41M 160284-00 is an irrigation claim filed as a use right by Keil Land and Cattle Company. It claims the same priority date as the Chas. P. Thomas March 18, 1893 right (Right No. 3). The claim is for 10 cfs for the irrigation of 400 acres in sections 26 and 35, T30N R7W.

A. In 2005, Curry filed amendments to the period of use and period of diversion.

B. The Thomas March 18, 1893 right was conveyed to the CIC on April 14, 1906, including all of the 500 MI which Thomas appropriated. In the US v. CIC case, Mr. Thomas testified that he sold the land and the water rights to the CIC.

C. Mr. Schmidt advanced the theory that Curry owns a use right with the same priority date as Right No. 3 because (according to Mr. Schmidt) Curry owns land in the area where the right was originally perfected. Exhibit P-82a (map prepared in 1919) shows the perfection area of Right No. 3 to be in the part of section 31, T30N R6W where Curry does not own property. Curry owns the E2SE of section 31 (which is under the Ryan-Lauffer appropriation), but none of the original perfection area. The use right theory is therefore not tenable. Mr. Schmidt's testimony concerning this right can be found on Day 3 at about 2:12.

D. Claim 41M 160284-00 should be dismissed.

108. Claim 41M 159103-00 is for stock water diverted from the Taylor Ditch. After the 1964 flood, the Taylor Ditch appropriations have been diverted into the Ryan-Lauffer Ditch. The point of diversion of this claim should be changed accordingly. PCCRC urges Mr. Curry's testimony that he waters stock in the spring and fall as a reason to reduce the period of use and period of diversion to April 1 to November 1. The original statement of claim filed by Keil said the period of use was April 1 to October 31. Curry filed an amendment in 2005 to change the period of use to January 1 to December 31. Curry's testimony at the beginning of his cross-examination on D2 undermines the longer period of use. It is doubtful that the Ryan-Lauffer Ditch would be carrying flowing water during the winter months. There is no proof that the historical use of this stock water right was year around. The period of use should be April 1 to October 31.

Curry's Ryan (Crawford) Property:

109. Mr. Curry's testimony concerning the Ryan portion of the ranch was based on his experience since Curry purchased the place. Witnesses Carroll and Walley were familiar with the property generally but had few specifics about its historical irrigation.

110. Mr. Carroll worked for Bob Ryan in 1945. He put up hay in section 32 and on irrigated land to the south of section 32. In later years, he was aware that there were haystacks along the length of the Ryan-Lauffer Ditch when Lightner and Crawford owned the property.

111. The land which the parties referred to as the Lower Ryan property has been historically irrigated using the Ryan-Lauffer appropriation (Right No. 16). The parties addressed three issues concerning Right No. 16:

A. What portion of the Ryan-Lauffer appropriation does Curry own?

B. Should Curry's use of the right be restricted to prevent unauthorized use of Birch Creek water for center pivots that were not part of the historical use of this claim?

C. What is the proper period of use for the Curry appropriation through the Ryan-Lauffer Ditch?

112. The Ryan-Lauffer appropriation was historically shared between the Ryan property and the Lauffer property. Today, the Ryan property includes about 80% of the irrigated acreage and the Lauffer property includes about 20% of the irrigated acreage. PCCRC argues that it has an interest in the division because the Lauffer portion of the appropriation (once owned by the Kingsbury Colony) was conveyed to PCCRC in return for shares in PCCRC.

113. Curry's expert David Schmidt testified that the correct split would be 80-20 based on the proportionate acreage. PCCRC's expert witness John Westenberg testified that the proper split should be 50-50.

114. Mr. Schmidt's opinion was based on his reading of Exhibit C-40, which is 1919 mapping. The 1919 mapping shows that the Right No. 16 acreage was 319 acres for Lauffer and 392 acres for Ryan.

115. The original mapping identified irrigated ground in sections 31 and 32 as irrigated under Right No. 34 (appropriated by Philippine Harris, May 20, 1901) using the Ryan-Lauffer Ditch; and Right No. 33 (appropriated by Carl Harris, May 20, 1901) for the NE of section 32. The irrigated acreage in those two sections is not attributable to the Ryan-Lauffer appropriation for the purposes of determining the correct division of the right between the parties.

116. The Adjudication Data said that the capacity of the Ryan-Lauffer Ditch was 13.92 cfs. Exhibit C-28, Bates 2011 says that the ownership of the right was $\frac{1}{4}$ Henry Ryan, $\frac{1}{4}$ Maggie Ryan, and $\frac{1}{2}$ Jacob Lauffer. That division is found in the WRS field notes as well, where the ownership is shown as $\frac{1}{2}$ for Lauffer and $\frac{1}{2}$ for Lightner (who was Ryan's successor). Ex. P-77(A). The WRS said that each party had 750 MI. When Ted Crawford filed for a change authorization in 1982, the flow rate used was 750 MI of a 1500 MI right. Ex. P-44.

117. Exhibit C-27, Bates 1806 is Table 8 (Table 8 is in the Water Supply Report based on data taken from the Atwood Report) which says "Lauffer owns half interest in the canal. When there is sufficient water in the creek to cover appropriation No. 16, Lauffer is entitled to one-half the carrying capacity." At the time of the Adjudication Report and the Water Supply Report, the VMLWC had no interest in the Ryan-Lauffer appropriation and had no reason to report other than the facts as it knew them about how the appropriation was used.

118. The preponderance of the evidence of historical use of Right No. 16 is that it was divided $\frac{1}{2}$ each to the Ryan lands and the Lauffer lands.

119. Curry amended claim 41M 131103-00 to claim 945 irrigated acres under the Ryan-Lauffer appropriation. The DNRC found that the WRS showed 482 irrigated acres and the USDA aerial photo showed 695 irrigated acres.

120. Ted Crawford, who owned the Ryan place before Curry, obtained a DNRC permit to appropriate water from Cartwright Coulee to irrigate land in sections 5 and 8. Those lands are now irrigated with three pivots. Curry has an unpermitted (application pending as of the hearing) reservoir in Cartwright Coulee in section 5. PCCRC raised the

issue of the possible misuse of the Ryan-Lauffer appropriation to fill those reservoirs to supply the pivots.

121. Kory Kovatch, who worked for Curry for four years and afterwards as a ditch rider for the PCCRC, testified that return flows from the Ryan-Lauffer irrigated land would flow into Cartwright Coulee. The implication of his testimony, never directly stated, was that Curry was irrigating the Ryan-Lauffer lands in such a way as to create return flows which would fill a reservoir used to irrigate land not under the Ryan-Lauffer Ditch. Test. Kory Kovatch, D4, 2:12. Mr. Kovatch testified that Cartwright Coulee can have flowing water from rainfall and that it does not flow all year long. He said that 99% of the time, Cartwright Coulee will not supply water to operate all of Curry's pivots.

122. Exhibit P-44 is a DNRC change authorization which added two additional points of diversion for the Ryan-Lauffer right: SESESW section 31 and W2SESE section 32. The authorization was for irrigation of 375 acres in section 32. The section 32 point of diversion is for a 750 af permitted reservoir. The irrigation type was changed from flood irrigation to sprinkler irrigation.

123. Cartwright Coulee is tributary to Birch Creek. Its confluence with Birch Creek is in the SWSW section 33, T30N R6W, just east of Curry's property.

124. The PCCRC suggests that Curry may have diverted Birch Creek through the Ryan-Lauffer Ditch water into Cartwright Coulee for use in center pivot irrigation in sections 5 and 8 or section 32.

125. During the PCCRC's cross-examination of Mr. Curry, the PCCRC expressed that it has no objection to the use of Ryan-Lauffer water in the ordinary course of normal flood irrigation, nor does it object to Curry's picking up return flows in Cartwright Coulee for use on ground served by the Ryan-Lauffer appropriation.

126. Mr. Curry testified on cross examination that he understands that Birch Creek water is not to be stored in the permitted reservoir north of Highway 44 for use on the section 32 pivot.

127. On cross-examination, Mr. Curry said that he would agree to a limitation which allows him to pick up return flows in Cartwright Coulee but not to divert Birch

Creek water directly into Cartwright Coulee and not to waste water by applying in excess of normal irrigation water. The PCCRC is agreeable to the same limitation. D2.

128. The abstract of claim 41M 131103-00 should have an information remark as follows:

WATER DIVERTED UNDER THIS CLAIM IS FOR IRRIGATION OF THE PLACE OF USE AND MAY NOT BE CONVEYED DIRECTLY TO CARTWRIGHT COULEE FOR STORAGE, NOR MAY IT BE USED TO SUPPLY WATER TO PIVOTS IN SECTIONS 5 AND 8, T29N R6W. BIRCH CHEEK WATER MAY NOT BE UNNECESSARILY WASTED FROM THE PLACE OF USE AND ALLOWED TO ENTER CARTWRIGHT COULEE.

In this remark, the word “unnecessarily” is intended to acknowledge that in flood irrigation, irrigators commonly apply enough water to cover and saturate the ground, that return flows can be recaptured and re-used before they enter a natural drainage, and that applying more water than the calculated agronomic amount does not of itself always constitute waste.

129. The portion of the Curry property known as the Upper Ryan place in sections 25 and 30 includes most of what is known as the Fagerlie Swamp. The Fagerlie Swamp is an area of subirrigation. Curry has drain ditches running from the swamp to the Messecar Ditch for the irrigation of land to the east and north of the swamp.

130. The property in the E2 of section 25, T30N R7W, and in section 30, T30N R6W, appears to be served by the Messecar Ditch (Right No. 10). Since purchasing the Upper Ryan property, Mr. Curry has not gone to the headgate of the Messecar Ditch. The Messecar Ditch has not been used to divert water from Birch Creek to serve the Upper Ryan property since before the Adjudication Data and Atwood Report were compiled.

131. Claim 41M 159117-00 claims Fagerlie Swamp as natural subirrigation. The WRS shows no irrigation in sections 25 and 30. The land is extensively subirrigated. It should have the same limiting language as other subirrigation claims, not allowing them to call out other water right claims.

132. PCCRC's expert witness Westenberg testified that the area claimed as irrigated from the Messecar Ditch is physically above the Ditch. Mr. Curry testified that the drainage in that part of section 30 is to the south and east and that Mr. Westenberg's

conclusion was erroneous. The contour lines on Exhibit C-1a are consistent with Mr. Curry's testimony.

133. Jere Walley testified that he did not know if Crawford (a Curry predecessor on the Upper Ryan place) irrigated using the Messecar Ditch. PCCRC's Vern Stokes testified that he knew that the Messecar Ditch was used in 1978 and that since then the ditch is not intact and there is no Messecar diversion at Birch Creek.

134. The preponderance of the evidence is that part of the Upper Ryan property is naturally subirrigated (the Fagerlie Swamp) and the irrigated land outside of the swamp is irrigated using water collected in drain ditches from the swamp which intersect with the reach of the Messecar Ditch which is on the Upper Ryan. The Upper Ryan property is not irrigated with water taken directly from Birch Creek.

135. Curry's claims for irrigation on the Crawford property should be modified.

A. Claim 41M 131100-00: This claim was filed by Ted Crawford for irrigation water diverted from Morgan Coulee. Curry amended the claim in 2005 to change the source to waste water from an unnamed tributary of Birch Creek diverted by dikes and drain ditches to irrigate 397 acres in sections 25, 30, and 36. This claim has a priority date of March 26, 1898. Because this claim is for waste and seepage water, it does not carry the ability to call for regulation of junior water rights. The amendment should be allowed and an information remark should be added to the claim concerning its character as waste and seepage water.

B. Claim 41M 131101-00: Ted Crawford filed this irrigation claim for water from Fagerlie Swamp based on the Daniel Foust notice of appropriation of October 19, 1895. Curry amended the claim in 2005 to change the source to waste and seepage diverted by dikes and ditches from an unnamed tributary of Birch Creek for the irrigation of 279 acres in section 30. Because this claim is for waste and seepage water, it does not carry the ability to call for regulation of junior water rights. The amendment should be allowed and an information remark should be added to the claim concerning its character as waste and seepage water.

C. Claim 41M 131102-00: Ted Crawford filed this irrigation claim based on Right No. 10 out of Birch Creek, the Messecar-Foust notice of appropriation with a priority date of October 12, 1895. It names the Messecar Ditch as the means of conveyance. The Messecar-Foust notice was not recorded within 20 days of the date of the appropriation. Curry filed an amendment in 2005 to change the point of diversion from NENWSE of section 23 to SESWNE of section 23. The new point of diversion appears to be from an old stream channel. Co-owner Gaylord, Inc. did not sign the amendment. The preponderance of the evidence is that the Messecar diversion has not been used by Curry or his predecessors for decades. Co-owner Gaylord, Inc. has not had notice and an opportunity to be heard concerning the viability of this claim. Gaylord has a pump in Birch Creek which may service this right. While the evidence shows that Curry has not used the point of diversion into the ditch, this right should not be changed without due process for all owners. This report makes no recommendation about this claim.

D. Claim 41M 131103-00: Ted Crawford filed this irrigation claim for 1500 MI to irrigate 890 acres from Birch Creek through the Ryan-Lauffer Ditch based on the Ryan-Lauffer May 19, 1897 appropriation (Right No. 16). At the time the claim was filed, Kingsbury Colony was co-owner of the right. DNRC Water Resource Specialist Lynn Hester examined the claims in this case. In August 2004, she wrote to Curry, saying that the USDA 1979 air photo shows 585 irrigated acres and the 1964 WRS shows 485 irrigated acres on what is now the Curry property. In 2005, Curry filed an amendment to the claim which would increase the irrigated acreage to 945.

1) The preponderance of the evidence is that the right was shared equally between Jacob Lauffer and Henry Ryan and that the 50-50 sharing continued through their successors. See above. The Lauffer half is now owned by the PCCRC and is handled elsewhere in this report. The Ryan half is now owned by Curry.

2) The preponderance of the evidence is that the historical use of claim 41M 131103-00 on the Lower Ryan property is as found by Ms. Hester on her May 11, 2005 DNRC examination worksheet (see claim file):

ID#	Acres	QtrSec	Sec	Twp	Rge	County
1	32.9	NENE	6	29N	6W	Pondera
2	66.8	W2NE	6	29N	6W	Pondera
3	5.9	SENE	6	29N	6W	Pondera
4	4.8	E2NENW	6	29N	6W	Pondera
5	54.5	S2NW	6	29N	6W	Pondera
6	54.3	E2SW	6	29N	6W	Pondera
7	17.0	W2SW	6	29N	6W	Pondera
8	12.6	NWSE	6	29N	6W	Pondera
9	2.4	W2SWSE	6	29N	6W	Pondera
10	20.3	SESE	31	30N	6W	Pondera
11	10.7	E2NESE	31	30N	6W	Pondera
12	31.8	NE	32	30N	6W	Pondera
13	27.9	SENW	32	30N	6W	Pondera
14	10.5	SWNW	32	30N	6W	Pondera
15	33.3	NESW	32	30N	6W	Pondera
16	26.0	NWSW	32	30N	6W	Pondera
17	20.8	SWSW	32	30N	6W	Pondera
18	3.0	SESW	32	30N	6W	Pondera
19	41.9	N2SE	32	30N	6W	Pondera
20	<u>4.6</u>	S2SE	32	30N	6W	Pondera

Total: 482Acres

3) The irrigated area from the Ryan-Lauffer Ditch on the Lower Ryan appears to have expanded since 1973. See the 1941, 1957, 1966, and 1979 air photos in the record and the Pondera County WRS. There may well be more acreage under irrigation today than was the case in 1973. If so, the solution does not lie with an amendment to the historical acreage. Note: The three center pivots south and east of Cartwright Coulee are irrigated using Cartwright Coulee water, not Ryan-Lauffer water. This report does not treat them as being under the Ryan-Lauffer appropriation.

4) The originally claimed period of diversion for the Ryan-Lauffer right was April 1 to September 1. Curry's 2005 amendment and the 2005 DNRC claim examination worksheet show a period of diversion of April 15 to October 15, which generally conforms to the irrigation season in much of the state. The present controversy includes PCCRC's desire to delay turning on the Ryan-Lauffer Ditch until about May 1 while Curry wants to start irrigating in mid-April.

5) Curry is the owner of half of the Ryan-Lauffer flow. The historical use pattern of the Ryan-Lauffer Ditch allowed the owner of the Ryan property to use up to the entire appropriation if the owner of the Lauffer half did not choose to take it out of the ditch. The PCCRC does not have an historical storage right to any of the Ryan-Lauffer appropriation. The 19th century priority date applies to direct flow use only.

6) Mr. Curry testified that the PCCRC honored a 1-share stock right for 1 acre-foot to fill a pond on leased state ground using the Ryan-Lauffer Ditch. Filling the stock pond was used as a justification for blocking the entire flow of the Ryan-Lauffer Ditch above the Curry property. When the entire Ryan-Lauffer diversion (per the current abstract) is in the ditch, 35.80 cfs provides 1 acre-foot of water in about 20 minutes ($35.8 \text{ cfs} \times 1.984 \text{ af/d/cfs} / 24 \text{ h} = 2.96 \text{ af/h}$) assuming no ditch loss. While it is beyond the water court's authority to regulate the ditch, the Curry half of the Ryan-Lauffer appropriation could be left in the ditch past the Lauffer turnouts and the stock pond turnout. According to Exhibit C-37, the state has a high water permit to fill the reservoir and moved one PCCRC share in 2004 from another location to allow a late-season filling. That share does not represent historical use of the Ryan-Lauffer appropriation and must have approval of the change of place of use through the DNRC before it can be used.

7) According to the Adjudication Report, Exhibit C-28, Bates 2009, the VMLWC took a profile of the Ryan-Lauffer Ditch in 1919. The VMLWC calculated the ditch capacity at 13.92 cfs. Mr. Westenberg testified that the parties should split that amount, giving each a flow rate of 6.96 cfs. At the guideline rate of 17gpm/acre, Curry's 482 acres would have a flow rate of 18.26 cfs. The claimed flow rate of 35.8 cfs is about twice that amount. The Adjudication Report may have nudged its analysis of rights the VMLWC did not own in the direction favored by the company. It is possible that since 1919, the ditch was enlarged to deliver more water to the Ryan and Lauffer lands. In the adjudication of Basin 41M, Right No. 16 should receive special attention to protect the rights of appropriators who are not parties to this case. For the purposes of this case, on the evidence presented, the flow rate should remain as claimed.

PCCRC's Historical Irrigation

136. PCCRC issued about 72,000 shares, theoretically equal to 72,000 acres of irrigation. When the State of Montana determined that the irrigation project was complete, 17,786.59 shares were not being used and were therefore not appurtenant to any land.

137. Doing the subtraction, $72,000 - 17,786.59 = 54,213.41$ acres under irrigation when the project was determined to be complete.

138. The claim file for 41M 161998-00 contains a copy of the PCCRC's operation and maintenance (O & M) records from 1930 through 1982. The records include tallies of seeded acres, irrigable acres, and irrigated acres going back to 1918⁷. For the purposes of determining water right use, we look at the places where beneficial use was made, the total irrigated acres. Here is a tabulation of the irrigated acres, taken from those records:

Year	Irrigated Acreage
1918	49,278
1919	47,993
1920	37,118
1921	56,556
1922	44,110
1923	17,246
1924	40,888
1925	43,434
1926	38,487
1927	14,563
1928	19,583
1929	39,433
1930	44,014
1931	39,391
1932	35,178
1933	39,988
1934	32,107
1935	43,877
1936	46,517
1937	41,528
1938	21,457
1939	44,112

⁷ Some of the same information is found in Ex. P-95.

Year	Irrigated Acreage
1940	42,804
1941	27,708
1942	32,488
1943	17,837
1944	30,449
1945	28,134
1946	27,079
1947	26,685
1948	4,819
1949	34,037
1950	16,709
1951	11,208
1952	25,941
1953	12,862
1954	24,905
1955	9,401
1956	14,294
1957	21,060
1958	13,981
1959	18,436
1960	28,162
1961	29,258
1962	32,703
1963	37,378
1964	14,875
1965	13,123
1966	20,191
1967	19,355
1968	23,186
1969	22,703
1970	18,252
1971	26,277
1972	25,293
1973	35,680
1974	40,688
1975	23,513
1976	37,572
1977	44,505
1978	35,338
1979	42,193
1980	38,636
1981	45,717
1982-Current	N/A

139. The PCCRC tables in the annual reports in the claim file contain higher figures for irrigable acres and seeded acres. Not all irrigable acres and not all seeded acres were irrigated. We cannot use irrigable or seeded acres to determine the number of acres where water was applied to beneficial use each year.

140. There is no reason to distrust the annual report records in the claim file. The PCCRC was reporting its condition to its shareholders and had no reason for deceit. Any different figures in any of the parties' exhibits must come from errors in the selection or transcription of the data. This master's report will use the irrigated acres numbers that the PCCRC itself reported to its shareholders. The numbers are admissible under Rule 803(6) and (16), M.R.Evid. The court can take judicial notice of the PCCRC reports under Rule 201, M.R.Evid.

141. Both parties made errors in their tabulations of the PCCRC's irrigated acres. The errors are significant.

142. Exhibit P-103 reports that for 1938 that the B Canal diverted 78,265 acre-feet for 66,477 irrigated acres. In the claim file for 41M 161998-00, the tabulation of Birch Creek Reservoir Monthly Storage reports 78,265 af diverted through the B Canal. The 1938 Crop Census lists 66,477 irrigable acres, including 16,968 acres of summer fallow.⁸ The text of the 1938 O & M Report says, "Dividing the farm delivery run of 35,565 acre feet by the 21,457 acres irrigated gives us a duty of 1.66 acre feet per acre." For 1938, Exhibit P-103 uses the irrigable acres number, 66,477, when it should have used the irrigated acres number, 21,457.

143. Exhibit P-103 has a similar error in its assertion of 68,111 acres irrigated for 1955. Here are two entire paragraphs from the 1955 O & M Report:

The total number of working irrigable acres was 68,111. The acreage irrigated was 9,400 acres.

⁸ The record contains no evidence that summer fallow is irrigated. The court should take notice that summer fallow ground is usually not irrigated. The PCCRC's breakout of summer fallow as a separate category in its annual reports and use of the irrigated acres in its calculations of the duty of water shows that summer fallow ground was not included in the irrigated acreage.

The total diversion and storage use was 39,200 acre feet including reservoir losses. Dividing 68,111 by 9,401, the acres irrigated, gives us a gross duty on this basis of 7.24 acre feet per acre. There is very little connection between the reservoir losses and the acres irrigated and this gross duty is of little value from the standpoint of water supply. The operation waste was very excessive. The reservoir loss of 14,060 acre feet computed on a basis of 80,000 acres is 0.18 acre feet per acre. Dividing the farm delivery run of 36,895 acre feet by the 9,401 acres irrigated gives us a duty of 3.92 acre feet per acre. Adding the distribution duty of 3.92 to 0.18 gives us a gross duty figure of 4.10 acre feet per acre. (my emphasis)

144. Curry's exhibits had similar errors. Exhibit C-49 purports to show total annual diversions into the B Canal from Birch Creek and total PCCRC acres irrigated. For 1938, Exhibit C-49 shows 78,265 af diverted to the B Canal and 66,477 irrigated acres. The source of the exhibit's numbers is not shown. At the hearing, the 66,477 number was considered anomalously high by both parties. Claim files 41M 161997-00 and 41M 161998-00 contain copies of PCCRC's O & M reports. The 1938 crop census shows a total of 66,477 irrigable acres (49,509 if summer fallow is excluded). Page 5 of the 1938 report shows that the total acres irrigated that year was 21,457. The report describes a wet summer with the entire quantity of water sent to the distribution laterals being 35,560 af, or about 1.6 af/acre for the irrigated acres.

145. The 66,477 number for 1938 irrigated acres on Exhibit C-49 is in error. The correct 1938 irrigated acres number is 21,457.

146. Exhibit C-49 contains a similar error for 1955, where the exhibit shows 68,111 irrigated acres. According to PCCRC's 1955 O & M Report, that is the number of irrigable acres. The year 1955 had a wet spring and much summer rain, including 4 inches at Valier over an 18-day period in July. Total farm water delivery for that year was 36,895 af. Page 4 of the 1955 O & M Report says that the total acres irrigated for 1955 was 9,401.

147. Comparison of the Exhibit C-49 numbers with PCCRC's 1957 O & M Report (the last year for which it is available in claim file 41M 161998-00) shows 16 years from 1918 to 1981 where the numbers do not agree. Several of them are off by only a few acres, which we will disregard. Others have significant differences, shown in this table:

<u>Year</u>	<u>Ex. C-49</u>	<u>O & M Report</u>
1918	49,000	44,063
1919	55,844	47,993
1921	59,179	56,566
1936	46,517	26,517
1938	66,477	21,457
1955	68,111	9,401

Note that in every case, the exhibit overstated the irrigated acreage.

148. This master's report uses the numbers from the PCCRC O & M reports, shown in the court's tabulation above.

149. For 1983 through 2003, Exhibit P-103 gives us these numbers of irrigated acres:

Year	Irrigated Acres
1983	44,490
1984	47,665
1985	46,573
1986	50,996
1987	48,774
1988	51,006
1989	41,255
1990	50,593
1991	42,436
1992	55,513
1993	22,903
1994	58,185
1995	24,387
1996	54,137
1997	56,122
1998	56,617
1999	61,422
2000	52,118
2001	52,118
2002	49,711
2003	70,030

150. For the years 1973 and following, the evidence does not provide a way to crosscheck the numbers. While the absolute numbers may or may not be accurate, the parties are agreed upon the general trend of increased irrigated acreage since 1973.

151. When the correct numbers are used, the anomalously high numbers from 1938 and 1955 disappear. The numbers show a wide diversity in the number of acres irrigated within the project from year to year. At no time before 1999 did the irrigated acres number reach 60,000. From about 1981 to the present, while there are two low years (1993, with 22,903 irrigated acres; and 1995, with 24,387 irrigated acres), there has been a steady trend upward in the number of irrigated acres until it reaches 70,030 in 2003, the last year for which the evidence provides a number.

152. The maximum acres irrigated in any single year before 1998 was from 1921, when 56,556 acres were under irrigation. The year 1921 establishes the highest number of historically irrigated acres.

153. In 1940, there were 42,804 irrigated acres. It was 34 years before that number was even closely approached again, with 40,688 acres in 1974; and another 3 years before it was exceeded, with 44,505 acres in 1977. The parties did not raise or brief the partial abandonment issue that 34 years of non-use of several thousand acre-feet suggests, along with possible late-priority use rights, but it could become an issue when Basin 41M is adjudicated.

154. The Valier Company itself held 17,786.59 shares of stock during 1948. These shares were not appurtenant to any land and were held as treasury shares. Fay Stokes testified that the company owned treasury shares because shares were not in demand until sprinkler irrigation became common. The treasury shares were sold to fill in areas that could be irrigated with sprinklers.

155. The evidence does not support PCCRC's claim of 85,357.8 irrigated acres.

156. The maximum historical irrigated acres for PCCRC's claims 41M 161998-00 through 41M 162028-00 is 56,556 irrigated acres. To that we add the irrigation equivalent of 1,239 shares held by the City of Conrad.

City of Conrad

157. The City of Conrad does not irrigate. Conrad had 2,770 residents in 1970, for a total daily guideline demand $250 \text{ gpcpd} \times 2,770 = 776 \text{ afy}$ (gpcpd = gallons per capita per day) (afy = acre-feet per year). To arrive at the historical acreage equivalent of

Conrad's water use, we divide its guideline demand by the 1.5 afy maximum per-share volume used for irrigation, with this result: $776/1.5 = 517.33$ acreage equivalent. The maximum historical irrigated acres, adjusted to include the City of Conrad's consumption, is therefore $56,556 + 517.33 = 57,073.33$ acres. This outcome is consistent with Exhibit C-64, Mr. Westenberg's April 26, 2001 report to the PCCRC, ¶ 6.

158. One might argue that the City of Conrad's shares should represent a use right for municipal purposes established at the time the shares were issued to the City. In the overall context, the City's shares replace shares appurtenant to acres that could otherwise be irrigated with the same water. Municipal use follows a different pattern from agricultural use. A city has a constant demand all year, plus enhanced demand in the warmer months, while agricultural demand is seasonal and can vary within the season. Conrad's shares provided it access to up to 1,858 afy ($\leq 1.5\text{afy} \times 1,239$ shares), while at 250 gpcpd Conrad's historical annual use was most likely about 700 acre-feet. This report will treat Conrad's shares as a part of PCCRC's general water rights and not as a special case. Pipeline capacity from Lake Francis to City of Conrad has been increased since the first municipal use, but the record does not show when or how much. The City has never taken even close to the volume of water it could based on its share ownership. Fay Stokes Testimony on cross examination, D1 p.m.

159. All of the PCCRC claims for municipal water should have their volume reduced to the historical maximum of 776 af.

Cautionary Notes

160. PCCRC's expert witness Westenberg testified that photointerpretation of PCCRC shareholder irrigation is difficult because grain crops will turn green (or dark on black and white aerial photos) whether irrigated or not, and may appear light colored after they have matured. There is variation due to fallowing. Grain crops can be moved around within acreage that has shares. Irrigated pasture is irrigated every year. The preponderance of the evidence is that one cannot draw firm conclusions concerning the PCCRC irrigated acreage from air photos.

161. The claims in this case all divert from Birch Creek. The PCCRC has water rights from Birch Creek, Dupuyer Creek, Bullhead Creek, Cartwright Coulee, Lone Tree Coulee, and the Dry Fork of the Marias. The shareholders' irrigated acreage receives water from multiple sources. When Basin 41M is adjudicated, the court should look at the propriety of placing supplemental rights remarks on PCCRC abstracts.

PCCRC Claims

162. The PCCRC claims include claims originally filed by PCCRC and claims filed by property owners from whom PCCRC acquired the claims by exchange for shares in 1993 and after.

163. PCCRC's original claims were for irrigation, stock, and municipal uses. All of those claims include storage at Lake Francis and Swift Dam and assert diversion at the B Canal. There are 14 irrigation filed rights, 41M 161998-00 through 41M 162011-00, which assert priority dates from 1884 to 1904; 14 irrigation use rights, 41M 162014-00 through 41M 162027-00, with the same flow rates as the filed claims but asserting a priority date of January 14, 1913; an irrigation use right, 41M 162028-00, with an asserted priority date of December 31, 1902; and an irrigation filed right, 41M 162012-00, asserting a July 1, 1912 priority date.

164. The January 14, 1913 use priority date relates to when water was first diverted for use on the project. Ex. P-2, affidavit of Fay Stokes. The December 31, 1902 use priority date corresponds with the date that construction was started on the Lake Francis dam. The 1912 filed priority date relates to the notice of appropriation for the construction of Swift Dam (Birch Creek Reservoir) Exhibit P-2, 51st notice of appropriation.

165. PCCRC's originally filed rights all claim the right to store water in Swift Reservoir and Lake Francis. Most of these water right claims predate the construction of both reservoirs. Swift Reservoir should be removed as a place of storage from the abstracts of all water rights with a priority date before December 31, 1912. Lake Francis should be removed as a place of storage from the abstracts of all water rights with a priority date before December 31, 1902. In place of storage under earlier direct flow claims,

PCCRC should have implied claims for storage in the reservoirs with priority dates as of the date storage began in each reservoir. The parent claims will be the original direct flow claims. The priority dates will be the later of the date storage began in the reservoirs or the date the PCCRC acquired the rights.

PCCRC Place of Use

166. The PCCRC argues that it is entitled to have the court declare a service area within which PCCRC and its shareholders can freely move water around without going through DNRC transfer or change of place of use procedures. In other cases, the court has delineated service areas for statutory irrigation districts and for cities. For the purposes of this report, a service area is an area of land which can be reached by an entity's water distribution system, within which water may be applied to beneficial use at any location, and at different locations from time to time, without change of use proceedings.

167. With respect to the service area argument:

A. PCCRC argues that it is entitled to have a service area, not a specific place of use determined by historic use. PCCRC proposes a large general area within which its water could be used anywhere (377,813.5 acres).

B. PCCRC cites Water Court Case 76HE-166 (March 9, 2000), which involved the DNRC's claims for storage in the Painted Rocks Reservoir. The DNRC sought to amend its claims to a purpose of sale of water. The place of use was a storage reservoir, the water rights were junior storage rights that did not depend on natural flows at any specific time, the stored water was sold for use, and the reservoir was subject to a volume cap. Painted Rocks was a state water project. The project did not own any distribution works. Water from the Painted Rocks project was for sale without being appurtenant to the property where it was used.

C. PCCRC is not a state water project. It is a private corporation created to use a government program designed to foster the settlement of public lands by developing irrigated land with appurtenant water rights. It owns storage facilities, diversions, canals, and ditches. PCCRC's water is specifically made appurtenant to the land where it is used. The various contracts between the State of Montana and PCCRC's construction company

predecessors require that each share of water be appurtenant to one acre owned by a contracting settler. The PCCRC has not been subject to a volume limitation.

D. PCCRC's argument that it is entitled to a general service area is not persuasive. With neither a volume limit nor a specific list of acreage with appurtenant water rights, other water users whose rights may be adversely affected by a change have no means of determining the lawfulness of use of PCCRC's water, whether a change in place of use in fact has adverse effects upon other water rights, or whether the PCCRC's use has expanded.

E. The Water Court has the authority to determine the place of use of an irrigation district. *Matter of the Formation of East Bench Irrigation District*, 2009 MT 135, 350 Mont. 309, 207 P.3d 1097, 2009 Mont. LEXIS 150 (2009). The exterior boundaries that PCCRC seeks are convenient in the sense that they include all of the land where PCCRC's canals and ditches will reach. Those boundaries enclose far more land than the acreage with appurtenant shares described in PCCRC's share certificate records.

F. PCCRC is a private corporation under Montana law. Its purpose is to acquire and maintain an irrigation system for the benefit of its shareholders. PCCRC's property rights and water rights are no different from those of any other privately owned entity. *Billings Bench Water Ass'n v. Yellowstone County*, 70 Mont. 401, 225 P. 996, 1924 Mont. LEXIS 69 (1924).

G. Before July 1, 1973, the maximum number of acres irrigated by shareholders through the PCCRC system in any year was 56,556 acres in 1921. That is the maximum acres which can be irrigated by PCCRC shareholders in any given year, not including water rights which PCCRC purchased after 1973. (The scope of the post-1973 acquisitions will have to be determined in a DNRC change of use proceeding. See elsewhere in this report.) When adjusted to include the City of Conrad's acreage-equivalent historical usage of 517 acres, the PCCRC's historical maximum irrigated acres is $(56,556 + 517 =) 57,073$ acres.

H. PCCRC shareholders are entitled to irrigate any land within the legal land description of irrigable acres which appears on their share certificates, using up to the quantity of water available that year under the one share per acre limit.

I. The Court is required to include in the final decree “the place of use and a description of the land, if any, to which the right is appurtenant.” § 85-2-234(6)(e), MCA.

J. The place of use should include land on which there is beneficial use. Land which has appurtenant water rights as described on PCCRC share certificates is land where beneficial use can be made. Land without appurtenant water rights as described on PCCRC share certificates cannot be irrigated with PCCRC water. The ability to make beneficial use is the limit on the place of use. The PCCRC’s service area, if it must be called that, is the land with appurtenant water rights under its system. *See McDonald v. State*, 220 Mont. 519, 722 P.2d 598, 1986 Mont. LEXIS 987 (1986); *Schwend v. Jones*, 163 Mont. 41, 515 P.2d 89, 1973 Mont. LEXIS 439 (1973) for authority that appurtenance does not distinguish between water represented by shares of stock and other water rights.

168. The maps in evidence in this case show that Curry’s historical predecessors were not physically able to rely upon return flows from PCCRC shareholder irrigation to maintain or enhance stream flow above their diversions. Water diverted into the B Canal was used or stored and later used downstream of the other Birch Creek Flats diversions.

169. Changes in PCCRC’s storage or diversion patterns have the potential to injure Curry and other water users. PCCRC’s B Canal is said to have a capacity of 700 cfs. The PCCRC has the capacity to take all of the flow of Birch Creek for most of the year, theoretically to store 30,000 afy behind Swift Dam and 115,000 afy in Lake Francis, while diverting 700 cfs from Birch Creek above the Ryan-Lauffer Ditch and dividing that 700 cfs between Lake Francis storage, municipal use, and shareholder irrigation. PCCRC has the physical ability to dewater Birch Creek below the B Canal creek at will except perhaps during flood stage.

170. PCCRC shareholders each have an area within which to use water without changing the place of use. For each shareholder, that area is described as the legal land description of the lands appurtenant to PCCRC shares as of July 1, 1973. We can call a

compilation of those appurtenant acres a service area if that shorthand will assist in conversation, but it is not a service area in the same sense that a state reservoir project with a volume cap and no water rights are appurtenant to land has a service area.

171. If a shareholder wishes to irrigate land which does not have historically (before July 1, 1973) appurtenant shares (whether by moving shares or acquiring treasury shares, or if PCCRC acquires new water rights or seeks to add land where it will deliver its water), then the statutory change of use proceeding must be followed.

172. The PCCRC should be required to compile a list of the lands which had appurtenant shares as of July 1, 1973 for use in deciding when a change proceeding is required. The list should be revised as land with appurtenant water as represented by shares is added or removed.

173. The irrigation rights originally claimed by PCCRC all list a place of use of 377,813.5 acres. This place of use is what PCCRC says is its service area, not actual irrigated use. The order on Curry's motion for partial summary judgment removed the 377,813.5 number and reserved ruling on whether the service area approach is correct.

174. PCCRC is a private corporation which owns many water right claims. It has no special statutory standing similar to that applicable to state storage projects and irrigation districts to exempt it from the appurtenance requirements of Montana law and to allow the designation of a service area.

175. PCCRC did not present evidence of a place of use based upon the acreage actually irrigated as of July 1, 1973. Fay Stokes testified that each share is appurtenant to one acre of irrigation. The PCCRC share certificates list for each share the number of appurtenant acres and the legal description of appurtenant lands. The appurtenant acres described in the share certificates as of July 1, 1973 are PCCRC's place of use.

176. The PCCRC suggests that this information remark be placed on each of its irrigation claims: "A maximum of 72,000 acres may be irrigated during any irrigation season within the service area described under this right." The justification for using 72,000 acres is the 1953 Carey Land Act Board approval of that number. The problem is that at no time before 1973 did the PCCRC shareholders or their predecessors historically

irrigate 72,000 acres. The maximum acres irrigated before 1973 was 56,556 in 1921. Claim file 41M 161998-00. Ex. C-64 p. 3 ¶6. After 1973, even with the expansion, the maximum irrigated acres shown by the record was 70,030 in 2003. That number must have included irrigation on the properties on the Birch Creek Flats which had traded their water rights to the PCCRC for shares. Until and unless the DNRC approves the transfer of those rights under the statutory procedure, they should not be counted toward PCCRC's maximum acres irrigated, and even then their historical scope must be determined. The remark suggested should be used, but substituting the maximum historical irrigated acres (57,073 adjusted to include municipal use) in place of 72,000:

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

177. According to the DNRC verification of acres that had been irrigated, there were 85,296 acres from WRS mapping and 85,357 acres calculated from USDA data. Neither of those figures is an irrigated acres figure for any single year. Rather, they are an identification of the acreage that physically could receive water from the PCCRC. As the company's own annual reports show, the irrigated acres in any given year has always been less.

178. If this were a case of one ranch with one water right which it could physically use to irrigate, say, 120 acres, and it actually irrigated 80 acres one year and a different 80 acres the next, and yet a different 80 acres within the 120 acre field the third year, we would have little trouble limiting the flow rate to the amount needed to irrigate 80 acres. The sheer scale of the PCCRC should not be used to change the rules.

179. 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. If necessary after Curry's response, the court should schedule further proceedings on the question of PCCRC's historical place of use. When the historical place of use is accurately specified, PCCRC's claims should be modified to include the description. The place of use so delineated will be larger than the number of historically irrigated acres, because shareholders have the

flexibility to irrigate less than all of their acreage at any time. Test. Lynn Hester, D2, 9:25:40 and John Westenberg, D4, 4:52:10. The DNRC verified 85,296 irrigable acres using WRS data and 85,357 irrigable acres using USDA data. Any number substantially varying from 85,000 irrigable acres is probably in error.

180. For example, if a share certificate is for 40 shares and describes the S2SE section 17 (80 acres), the place of use will be S2SE of section 17. The shareholder may use the allotment of 40 shares' water on any of the 80 acres described in any given year. If the shareholder wishes to use those shares to irrigate land in the N2SE of section 17, a DNRC change authorization is required. This is no more and no less than is required of any other water right holder in Montana.

181. The claims for municipal use should have a place of use described as:

A. The City of Conrad Water Treatment plant in SW section 8 T28N R3W.
B. The P-O Missile Control Center in SESW section 6, T28N R2W.
C. Land within the City of Conrad July 1, 1973 corporate limits and area one mile surrounding, including parts of sections 10, 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, and 27, T29N R3W, and sections 18 and 19, T28N R2W.

D. PCCRC argued for a larger area for the City of Conrad's municipal place of use because some water users buy municipal water by the tankload and haul it up to 30 miles for domestic use. Claim file 41M 162106-00. PCCRC proposes a circle with a radius of 30 miles. That circle includes the municipalities of Dutton, Choteau, and Shelby.

E. Conrad's municipal use of the water is complete when it sells the water to its domestic use customer. One use that some Montana municipalities make of water is to sell it in bulk to people who do not have a reliable domestic water supply. That use of water is within the definition of municipal use and should not be used to justify adding another 2,827 or so square miles to the City of Conrad's place of use.

F. The Conrad Brothers' engineer M. S. Darling laid out the townsite of Conrad in 1902 when the settlement consisted of a few shacks. The City of Conrad was

incorporated on September 24, 1908. (Internet search). The municipal rights should have a priority date of September 24, 1908.

182. Stock water delivered to PCCRC shareholders flows through the same storage and delivery system as irrigation water. Livestock will drink from ditches which flow through fields where they are confined. One might find that the place of use for the PCCRC stock water claims includes all of the 10-acre PLSS subdivisions where ditches and laterals flow, plus any stock ponds. Livestock requirements (30 gpd/au) are minimal compared to irrigation requirements. One acre-foot is enough to supply over 10,000 au/day if completely consumed. The place of use for stock water can be adequately described using the place of use for irrigation and adding any stock water ponds not within shareholders' irrigable land descriptions and allowing for stock drinking from PCCRC and shareholder storage and distribution facilities.

183. PCCRC suggests that at one time part of the Birch Creek Flats was within its service area. Exhibit P-83 is a map of the Valier Project prepared in 1913. It shows that PCCRC's predecessor owned some land in the Flats area. When the land was sold (some of which now belongs to Curry) the deeds included a restriction which said it was sold without water rights. In the 1916 Atwood Report, the Birch Creek Flats land was not included within the project. Ex. C-27, Bates 1725.

184. Upon approval of a change application, the land from which the shares were removed shall be deleted from the PCCRC's place of use.

185. PCCRC introduced Donald D. MacIntyre's⁹ letter to K. Dale Schwanke, counsel for PCCRC, dated July 10, 1995, Exhibit P-48. Mr. MacIntyre wrote, “. . . water delivered under a contract to defined project lands did not require a change approval where contracts were transferred within the project area. . .As long as the area where water contracts are being transferred are arguably within the historical delivery system, then the above rule applies.” Mr. MacIntyre's interpretation of the facts and law is not binding on the court. The lands on the Birch Creek Flats to which water was historically applied by

⁹ Mr. MacIntyre was chief legal counsel to the DNRC at the time.

the persons and entities who exchanged their rights for PCCRC shares were not within the project area. Land which did not have appurtenant shares on the company books as of July 1, 1973, is subject to the DNRC change in place of use procedure if it is to be added to the PCCRC's place of use.

186. The PCCRC claims which were originally filed for the Kingsbury Ranch, Broken Pick Ranch, Birch Creek Water Company, Kingsbury Colony, Birch Creek Colony, Lauffer Ranch, Jere Walley Ranch, and Wally Bradley Ranch are limited to historical direct flow to irrigate the place of use and maximum acres claimed. Those claims were not originally filed to include storage and consequently are direct flow rights only.

The Birch Creek Rights in Order:

187. Special note: The inaccuracies in the PCCRC's claims may lead to extensive changes in the claims' elements to fit the reality of its historic use of its water rights. The PCCRC has adequate rights of fortunate priority to continue to serve its agricultural and municipal customers as it historically did. Making the abstracts fit the reality is challenging and may need to be revisited as part of the general adjudication.

Right No. 1

188. The PCCRC claims based on the Barron and Upham notice of appropriation are 41M 161998-00 and 41M 162107-00. Curry has one claim, 41M 159115-00.

189. The Carroll homestead and the Wheeler and Middlesworth tracts are within the Right No. 1 original area of perfection. Portions of the Carroll homestead and Wheeler place have been continually irrigated, and those portions are where Curry has a valid claim to older water rights. The VMLWC's 1926 transfer of the NWNW section 35 to Wheeler included a restriction which cuts off Curry's ability to claim a right before then for that 40 acres. For the Carroll homestead, Curry can claim the date of the Carroll homestead for the original 24 acre alfalfa field shown on the county WRS.

190. The abstract for 41M 159115-00 should be amended as follows:

Priority date: 6/18/1910

Maximum acres: 24

Ditch Name: Ryan-Lauffer Ditch

Period of Diversion: April 1 to October 14

Period of Use: April 1 to October 14

Place of Use: 21.5 acres E2SE section 26, T30N R7W
2.5 acres NWSW section 25, T30N R7W

191. PCCRC claims 41M 161998-00 (irrigation) and 41M 162017-00 (municipal) were filed for 18.75 cfs of Right No. 1. These claims rely on the November 8, 1905 deed from Anna M. Steele to the CIC. That deed transferred property and the Joe Kipp Right. Ex. P-17e.

192. After Joe Kipp sold land and a share of Right No. 1 to Anna M. Steele, Steele continued to operate the place until she sold it to the CIC in 1905. The land she sold to CIC is shown on Exhibit C-31, Sheet 2, outlined in blue. The area includes the Carroll homestead. By 1915, according to Exhibit C-27, 57 acres of this land were irrigated. The irrigated land was in the Wheeler property referred to above (38 acres in NWNW section 35, 19 acres in NENW section 35). The property was transferred to the VMLWC, which sold the NWNW of section 35 to Wheeler in 1926, reserving all water rights. Ex. P-6. The PCCRC sold NENW of section 35 to Archie Campbell in 1954 without reservation of water rights.

193. PCCRC's share of Right No. 1, claims 41M 161998-00 and 41M 162017-00, was historically appurtenant to 38 acres in NWNW section 35 but was moved to the B Canal before July 1, 1973. At the adjudication guideline of 17 gpm/acre, the flow rate would be 1.4 cfs. The PCCRC claims the right to use this claim anywhere under its system, not confining it to a particular 38 acres which would be irrigated off and on, then left to dry for haying, then perhaps irrigated again for aftermath, so a volume is necessary to administer the right. PCCRC administers its deliveries on the basis of 1.5 af/a per year. Based on 38 irrigated acres under Right No. 1, the volume for these water rights is 57 afy. The City of Conrad did not exist in 1884, therefore no municipal claim with that priority

date is valid. The municipal claim will have a priority date as of the City of Conrad's incorporation, September 24, 1908.

194. The abstract of claim 41M 161998-00 should be amended as follows:

Priority Date: April 9, 1884

Flow Rate: 1.4 cfs

Volume: 57 acre-feet per year

Point of Diversion NENWNW section 27, T29N R8W

Ditch Name: B Canal

Diversion Means: Headgate

Reservoir: None

Place of Use: Within PCCRC System

195. The abstract of claim 41M 162107-00 should be amended as follows:

Priority Date: September 24, 1908

Flow Rate: 1.4 cfs

Volume: 57 acre-feet per year

Maximum acres: 37,378 acres

Point of Diversion: NENWNW section 27, T29N R8W

Ditch Name: B Canal

Diversion Means: Headgate

Reservoir: None

Period of Diversion: April 1 to October 14

Period of Use: April 1 to October 14

Place of Use: Corporate limit of the City of Conrad

Right No. 3

196. PCCRC claims 41M 161999-00 for irrigation and 41M 162108-00 for municipal purposes are based on the Charles P. Thomas notice of appropriation which claimed 12.5 cfs with a priority date of March 18, 1893. Thomas conveyed the right to the CIC on April 14, 1906. The Atwood Report says that Thomas received a patent that included 124 irrigable acres in 1898 and calculates 1.55 cfs for the flow rate. The reported information from outsiders varies from "Thomas had a small ditch which was washed out in the Nineties." to "It was a plow furrow." to "Garden growing in both the places where Thomas was camped." Ex. C-28, Bates 1926-8. The Atwood Report demonstrates that Thomas had a ditch which various people saw with water in it, then makes an unsubstantiated assumption that all 124 irrigable acres were under irrigation and awards

the company 1.55 cfs on that basis. The 1915 map, Exhibit WC-1, shows a total of 10 acres irrigated in the area where this claim was perfected. Five of those acres were under irrigation in 1915. The other five are shown as irrigated before 1915. The map is credible because it shows areas where crops that usually require irrigation were planted (spuds, hay, garden).

197. PCCRC claim 41M 161999-00 is for 12.5 cfs, which is not supported by the record. Even if there was a time when someone used all the water that Thomas claimed, by 1915 it was no longer in use above 10 acres' worth, which would be 0.125 cfs at the 1:80 duty of water used by the VMLWC at the time. The flow rate of this claim should be reduced to 0.125 cfs (56.1 gpm). The point of diversion is the B Canal. As a direct flow irrigation claim, it has no storage component.

198. The municipal claim, 41M 162108-00, is problematic. PCCRC has amended this claim so that it includes all of its claimed water rights at their full flow rates. Claiming hundreds of second-feet for a town the size of Conrad is untenable. Under the Montana practice, the claim should be given a volume cap of 776 af, which is the calculated amount at 250 gpcpd for the largest pre-1973 population, which was 2,770 in 1970. The abstract should have a multiple use information remark.

Right No. 4

199. Patrick Gray claimed 12.5 cfs with a priority date of December 18, 1894. The account of this right is found beginning on page 1932 of the Atwood Report. The right apparently was diverted through what became the Messecar Ditch and was conveyed to several others before the VMLWC acquired it. The Atwood Report says there were 76 irrigable acres, which fits with those portions of sections 23 and 26 of T30N R7W that lie downhill of the Messecar Ditch. At the 1:80 duty of water applied at the time, this water right should have a flow rate of 0.95 cfs (427.3 gpm). PCCRC has claimed 12.5 cfs, a flow rate which cannot be sustained on the evidence.

A. Gray sold his land to Charles Davlin on February 15, 1899. Davlin had a homestead adjoining the Gray place on the west. There is no information to show that Davlin used Right No 4. Ex. C-28, Bates 1934. The Davlin homestead is

topographically above the Messecar Ditch. The Atwood Report expresses belief that Davlin used the Gray right but diverted it through the Thomas Ditch.

B. Davlin sold out to John Ziegler on April 2, 1907. The deed specifically mentions the Gray right. Ex. C-28, Bates 1938. Through mesne conveyances, the Gray right belonged to the VMLWC as of September 14, 1917.

C. Claims 41M 162000-00 and 41M 162109-00 should be modified to reflect the perfected flow rate of this claim, 0.95 cfs (427.3 gpm).

200. A. Throughout the Atwood Report there is the supposition that if X acquired a water right carried by the Alpha Ditch from Y, and then X later irrigated a different piece of land through the Beta Ditch, X was using the Alpha Ditch right. Belief is the acceptance of the truth of an assertion without proof. The Atwood Report's frequent use of "we believe" following quotations from interview reports (we may trust the bare reports of the interviews, if not the conclusions) shows that the author is stretching to derive conclusions which favor the VMLWC. Thus the Atwood Report weaves a tale where the older rights have value when they become company property without an unequivocal demonstration of where or how they were used.

B. It is at least equally probable based on the evidence that when an irrigator such as Charles Davlin started to irrigate his property uphill of the Messecar Ditch he took water from the Thomas Ditch because it was there, without any thought to the relative priority dates. He owned the former Gray property below the Messecar Ditch at the same time. No one was regulating Birch Creek based on priority dates (there has never been any regulation of Birch Creek under state law; only the informal regimen followed by the PCCRC based on its lists) so there was no incentive for Davlin or anyone else to differentiate between the water rights that he could use. Davlin still owned the Gray property and perhaps chose not to irrigate it for any of half a dozen reasons. Non-irrigation of the Gray property does not prove that the Gray right appeared in the Thomas Ditch for use on another property.

Right No. 6

201. Annie M. Steele filed a notice of appropriation for what is known as Right No. 6 on October 16, 1895. She claimed 500 MI with a priority date of May 1, 1895. The diversion was said to be 200 feet east of the mouth of Birch Creek Canyon, which is immediately downstream of where Swift Dam was built. Steele had property in that location. The notice is defective on its face for failure to file within 20 days of the date of appropriation.

A. Claim 41M 162001-00 for 12.5 cfs is based on this Steele appropriation. Claim 41M 162002-00 for 31.25 cfs is based on this appropriation.

B. According to the Atwood Report, there is no information about the size of the ditch when it was built. The Atwood Report, Exhibit C-28, Bates 1946, gives a calculated capacity of 2.69 cfs as of 1919. Exhibit C-28, Bates 1950 shows copies of two photographs of the ditch from 1919. The photographs are credible because the bottom one shows the Swift Dam with the ditch intake at the location described in the Steele notice. While the ditch appears large enough to carry more than 0.97 cfs, the date is 24 years after the right was established and there is no showing of where the right was being used by then. PCCRC did not claim a later priority use right from this location.

C. The Atwood Report says that the old timers interviewed said that Steele grew timothy and irrigated it for hay. The Report, Exhibit C-28, Bates 1946, says that Steele had a total of 77.5 irrigated acres, for an originally perfected flow rate of 0.97 cfs (435.3 gpm). The limitation on this water right is the irrigated acreage upon which the right was perfected. Claims 41M 162001-00 and 41M 162002-00 should have a combined flow rate of 0.97 cfs (435.3 gpm) with a priority date as of the date that Steele recorded her notice, October 16, 1895. They are duplicate claims and should have duplicate claim issue remarks.

Right No. 10

202. This appropriation was Lewis A. Messecar's and Daniel Faust's filed notice with an October 23, 1895 priority date. See above for the Curry claim based on this notice.

Right No. 11

203. Jerry Mongon filed a notice of appropriation for what is known as Right No. 11. The notice claimed that the appropriation was made October 14, 1895 for 125 cfs. The notice was dated October 14, 1895 and was filed October 15, 1895.

204. PCCRC has two claims which it says are derived from the Mongon claim: 41M 162110-00, and 41M 162111-00. (41M 120070-00 purchased from Birch Creek Water Co. after 1982 is considered elsewhere.)

205. Mongon's claim was for irrigation "especially for land lying along Sheep Creek" The diversion was to be near Birch Creek Canyon, which is several miles west of Birch Creek Flats.

206. Exhibit C-28, Bates 1971-3 reports several interviews with persons familiar with Mongon's project. Mongon's ditch was never completed. The part that was constructed was acquired by Griff Jones. Although the VMLWC owned an interest in the right by the time of the Atwood Report, the company concluded that the Mongon right was never perfected. The report says,

No record or information can be located showing that any lands were ever irrigated through this right, or that ownership in any form was vested in lands located under the partially completed section of ditch heretofore described. . . it is therefore apparent that no use was made of the filing by the original appropriator or his associates, as originally intended. * * * perfection never was attained, either in part or in total.

The Atwood Report concludes that this right is null and void because there was no means of diversion, no beneficial use, and after stopping work on the ditch, no attempt to perfect the right.

207. The PCCRC filed an amendment for these claims seeking to describe the place of use as land lying under current Birch Creek diversions. The court should not permit PCCRC to amend an unperfected claim into existence more than 100 years after it was filed and not developed.

A. Claims 41M 162110-00 and 41M 162111-00 should be dismissed.

Right No. 13

208. PCCRC Claim 41M 42051-00 was purchased from K. Wallace Bradley after 1982. This claim will not be further considered in this report.

Rights 14, 12, 7, and 5

209. Rights Nos. 5, 7, 12, and 14 were for rights which diverted from the left bank of Birch Creek onto the Blackfeet Indian Reservation. They are not a part of this case.

Right No. 15

210. Right No. 15 was filed by Thomas McGovern, Samuel L. Potter, and J. W. McKnight for 500 cfs from Birch Creek claiming a priority date of April 20, 1897. The notice was filed June 25, 1897. Section 89-810, RCM 1947 required the notice to be filed with the county clerk within 20 days of the appropriation. Development of this appropriation led to one or more use claims with a later priority date.

A. PCCRC has the following claims which rely on the McGovern notice: 41M 162003-00 (483.75 cfs for irrigation) and 41M 162112-00 (483.75 cfs for municipal purposes).

B. Claim 41M 162003-00 is based upon Thomas McGovern's 1897 filing for 500 cfs. PCCRC contends that McGovern envisioned a large irrigation project and began a canal which became the Kingsbury Ditch. The notice says that the purpose was for irrigation especially in Townships 27, 28, 29, and 30 North of Ranges 4, 5, 6, 7, and 8 West.

C. The priority date was claimed as April 20, 1897. The notice of appropriation says that the appropriation was made April 20, 1897. The notice was filed June 25, 1897, well beyond the 20-day filing period allowed by §89-810, RCM 1947. Relation back is unavailable for filed claims where the notice did not meet the statutory requirements. This claim should have the priority date established by use.

D. The CIC acquired part of McGovern's right. CIC's engineer, M. S. Darling, determined that there was a better diversion site upstream. In 1898, the CIC began work on what is now the B Canal. Four years later, in 1902, the first irrigation was accomplished out of the B Canal.

E. The notice was filed by Potter, McGovern, and McKnight. Potter did not have any land irrigable from extant canals in 1897 or at the time of the Atwood Report. Ex. C-28, Bates 1986. McKnight was deceased at the time of the Atwood Report. He at one time owned part of the Dupuyer townsite, which was never serviceable by the proposed project. Ex. C-28, Bates 1987. Ex. P-83. Potter and McKnight transferred their interest to McGovern on February 24, 1898. Ex. C-28, Bates 1983.

F. McGovern's money ran out before he could put his plan into action. Ex. C-28, Bates 1983. He sold 19,350 MI (483.75 cfs) of his claim to the CIC on July 16, 1898. At that time, there was but one small ditch at McGovern's diversion site and no specific account of any water use. McGovern's wife and three minor children had Indian allotments on the Flats. They never perfected the allotments. McGovern himself testified in *US v. CIC* that he was never on the property. The government canceled the allotments January 12, 1901. Ex. C-86, Bates 563. Ex. C-28, Bates 1992. McGovern's diversion eventually became the Kingsbury Ditch.

G. The Atwood Report asserts 572 acres of irrigation on the allotments before 1915, but says "No specific information is in existence concerning the use of water during McGovern's period of ownership. There is plenty of evidence on the land showing that irrigation has been carried on for a good many years, but whether any or all of this evidence is in the form of ditches, hay land, seeped land, etc., is the result of McGovern's efforts has not been disclosed." Mr. Atwood said that he saw hay being raised on the place in 1909. Ex. C-28, Bates 1991-2. Long before then, McGovern had transferred his interest in the water right to F. D. Kingsbury (August 16, 1900).

H. F. D. Kingsbury transferred his interests to others in 1904. There is no evidence that he used any water during his ownership. Transferees Bessie and Minnie Kingsbury made desert land entries on 320 acres each, lands which had not been irrigated before. The Bessie and Minnie Kingsbury irrigation amounted to perhaps 557 acres with each person receiving 1.78 cfs. Transferees Edward and Ophelia Forrest had desert claims which they transferred to F. D. Kingsbury in 1907. They had irrigated perhaps 28 acres.

I. The Atwood Report assigns 572 acres of irrigation to the McGovern family Indian allotments on the basis of speculation. The evidence including the Atwood Report does not support a finding of any 19th century irrigation on the McGovern allotment acreage.

J. Based on the Kingsbury Ditch account in Exhibit C-28 and other evidence, the court should find that there are use rights as of the dates of the Kingsbury and Forrest patents for a total of 1.78 cfs per patentee. The patented areas and dates were:

Bessie Kingsbury, August 7, 1906.

T29N R7W: Sec. 8: N2NE, N2SW, SWNE, SWSW, NWSE

Sec. 9: NWNW

Minnie Kingsbury, August 7, 1906

T29N R7W: Sec. 8: S2SE, SENE, SESW, NESE

Sec. 17: N2NE, NENW

Edward D. Forrest, August 7, 1906

T29N R7W: Sec. 5: S2NW, Lot 3, Lot 4

Sec. 6: E2SE, SENE

Sec. 7: NENE

Ophelia Forrest, August 7, 1906

T29N R7W: Sec. 5: SW

Sec. 8: NW

K. The total original appropriation derived from the McGovern diversion into the Kingsbury Ditch should be 7.18 cfs with a priority date of August 7, 1906.

L. Claim 41M 162112-00 is for municipal use for the City of Conrad. It should have a priority date as of the incorporation of the City, September 24, 1908.

B Canal Portion of the McGovern et al. Appropriation, Right No. 15

211. The B canal history is provided in the History of the Valier Project, Exhibit C-76. The CIC purchased most of the McGovern right on the theory that it could use that right for the construction of the B Canal. The B Canal appropriation cannot assume the priority date of the McGovern notice of appropriation because the notice was not filed in accordance with the requirements of the statute. There is no relation back available for the B Canal. Where the History of the Valier Project is inconsistent with the claims PCCRC filed, the History establishes the facts of the B Canal rights. The History speaks for itself

and does not need interpretation. Use rights should be created for the B Canal appropriations.

A. The evidence is inconsistent on the subject of when the B Canal was begun. The Atwood Report says that the CIC's engineer M. S. Darling confirmed that work was not begun on the B Canal, which was intended to carry the part of the McGovern appropriation purchased by CIC, until after the construction contract was let on June 1, 1899. Exhibit P-87 contains a copy of the contract. The History of the Valier Project says construction started in April 1899. Practically, it makes no difference because the priority dates of use rights from the B Canal will be the dates water was applied to beneficial use.

B. The first irrigation out of the B Canal was about 1,500 acres irrigated in 1900 (the report says "this season").¹⁰ The irrigated land was in sections 26 and 27, T29N R7W, sections 20, 21, 28, 29, and 30, T29N R6W, and sections 23, 25, and 26, T29N R8W. At the 1:80 duty of water applied in the Atwood Report, 1,500 acres would require 18.75 cfs. The court should allow a priority date of April 1, 1900 for the first B Canal claim with a flow rate of 18.75 cfs

C. In 1901, about 1,000 acres were added under the B Canal in sections 27 and 28, T29N R7W, and sections 2, 3, 10, and 30, T29N R6W. The court should create an implied claim out of the B Canal claims with a priority date of April 1, 1901, for 12.5 cfs.

D. Exhibit P-87 contains copies of the B Canal construction contracts and engineer's pay estimates with distances and quantities specified. It contains a copy of a news article about the US v. CIC case in which the US alleged that CIC began diverting from Birch Creek in 1900. The exhibit supports the History's reports about when the canal was first used.

¹⁰ April 1 is the most probable date of first use because the irrigators were likely growing at least some native hay. Mr. Curry testified that native hay requires an early start to irrigation and wants to begin irrigation on April 1. Using April 1 for that reason rather than some later arbitrary date will make no difference in the overall regulation of Birch Creek. From Exhibit P-87 we know that work on the B Canal had progressed to Sober Up Coulee by the end of October, 1899. That distance is sufficient to reach the lands described.

E. The account of the B Canal has a gap from 1901 until 1907. In 1907, the History says that the B Canal has been eroding since completion and needed maintenance work to stay within its banks. The History of the Valier Project (Ex. C-76) does report increases in irrigated land, 500 acres in 1902 from the A Canal, 1,000 acres in 1903 from the C Canal, 5,000 acres in 1905 from the P and P-6 Canals, and 3,500 acres in 1906 from the P and P-6 Canals. Those increases are below the place where the B Canal joins Dupuyer Creek, and are below Lake Francis. It is not possible to determine what share, if any, of the increased acreage is attributable to direct flow diversions from Birch Creek, or from water supplied by Dupuyer Creek, or from water stored in Lake Francis. In the general adjudication of Basin 41M, all of the rights derived as implied claims from Right No. 15 can be given supplemental rights remarks related to the PCCRC claims from other sources. For the purposes of this report, the court should generate an implied claim for each year's reported increase in the total acreage under irrigation using the Atwood Report's duty of water to set the flow rate and the arbitrary but otherwise harmless priority date of April 1 of the year in which the land was put into production (the priority date can be changed during the general adjudication of the basin if needed). The implied claims would be:

1902	500 acres	6.25 cfs
1903	1,000 acres	12.5 cfs
1905	5,000 acres	62.5 cfs
1906	3,500 acres	43.75 cfs

F. Claim 41M 162003-00 claims a flow rate of 483.75 cfs and a priority date of April 20, 1897. The PCCRC filed a blanket amendment which included this claim, seeking a period of use of April 1 to October 14 with point of diversion as the B Canal and describing a service area of 377,813.5 acres of which it says 85,357.8 acres were irrigated during any given season.

G. The problem which all of the Right No. 15 claims based on the McGovern-Potter-McKnight notice is that the notice is invalid because it was recorded more than 20 days after the date of the appropriation. The notice is void. There is no

relation back based on a void notice. Any right that PCCRC's predecessors developed must stand on its own merits as a use right. Mr. McGovern could not transfer to the Conrads his dreams of doing more than he had done. He had no 483.75 cfs of beneficial use to transfer. After the 1885 enactment of what became §§ 89-810-812, RCM 1947, relation back was controlled by statute. If an appropriator desired the benefit of the statute, he had to comply with it strictly. He could thereby obtain as his priority date the date he posted the notice. If the appropriator chose to proceed without filing a notice, or if he filed a defective notice or filed his notice late, he could obtain a water right by completing a ditch, diverting water, and applying it to beneficial use. For a use right, the priority date is the date of beneficial use. If there are rival claimants, neither of whom has an effective notice, the first one to make beneficial use has the senior priority. Here is the rule in Montana from *Murray v. Tingley*, 10 Mont. 260, 269, 50 P 723, 725, 1897 Mont.

LEXIS 130 (1897):

[Neither complied with the notice statute] but as between Charles Murray and the defendant appellants, the right of defendant appellants is a superior one. The latter had their ditch completed, and water flowing over their land, a year before the former did. Defendant appellants and Charles Murray both acquired valid water rights, despite a noncompliance with the statute; but the right of defendants is superior to that of Charles Murray, although he commenced work on his ditch first.

212. For the claims connected to Right No. 15, PCCRC has a series of use rights with priority dates as of when its predecessors were able to bring land under the system. It has not structured its claims that way, which is unfortunate; nor did it provide specific evidence which would allow the determination of priority dates and amounts for use rights. The evidence we need for a complete reconstruction may not exist. We have a few landmarks in the evidence we do have which show incremental development, culminating in the irrigation in 1921 of over 56,000 acres, a number which was not again reached until after 1973.

Incremental Development Under the 15th Right Claims

213. The VMLWC did not begin to use all of its water rights to their full extent in a single year. From the biennial reports of the Carey Land Act Board, (see Ex. P-98) we can see the progress. Exhibit P-98 does not follow the same reporting format from year to year, making exact comparison difficult. The gradual increase in number of acres in the project is evident.

1909-1910: Carey Act Lands sold and occupied by settlers: 21,000 acres

1913-1914: Total approved Carey Land sales: 32,760.49 acres

1915-1916: Carey Act Land sold: 35,150.91 acres

1917-1918: Acres sold irrigable: 43,150.21

1919-1920: Total sold irrigable: 43,443.21 acres

1923-1924: 16,622.82 acres relinquished.

1925-1925: "Co. has sold water rights for about 67,000 acres..."

Irrigable acres and acres sold are not the same as irrigated acres. Settlers came. Some thrived, some were mediocre, and some failed and left. The construction company complained that clerks, dentists, and dry land farmers did not know how to irrigate.

214. A. For historical irrigated acres, we go to the VMLWC annual reports. The first year of record is 1918, with 49,278 irrigated acres. Subtracting the 12,500 acres which have 1900 to 1906 use rights (which were CIC rights originally), we have $(49,278 - 12,500 =)$ 36,778 new acres. At the 1:80 duty of water, there is a use right for 459.73 cfs with a priority date of June 21, 1918.

B. The next year with more than 49,278 irrigated acres was 1921, with 56,556 irrigated acres, an increase of $(56,556 - 46,778 =)$ 9,778 irrigated acres. At the 1:80 duty of water, there is a use right for 122.23 cfs with priority date of June 21, 1921.

C. The June 21 priority date comes from the probability that irrigation began in the spring of the year, no exact date being clear from the evidence. The exact date probably makes no practical difference.

215. The reconstruction of the B Canal's incremental development might be refined when Basin 41M is adjudicated.

216. An accurate analysis of the direct flow diversions from Birch Creek after 1902 cannot be derived from the irrigated acreage numbers because reservoir water was available from Lake Francis. After 1912, stored water was available from Swift Reservoir too. The VMLWC annual report for 1931-1932 reports that the farm use in 1921 was 106,960 af for a duty of water of 1.81 af/a¹¹. That year, Birch Creek flows at the B Canal headworks are reported as 98,500 af. The annual reports do not have the information needed to make allowance for irrigation using water from Dupuyer Creek, which flows into Lake Francis and was used along with Birch Creek water to meet the project's needs. In 1921, Dupuyer Creek produced 19,700 af. Using the period of record reported in the annual reports, Dupuyer Creek's annual average runoff as of 1931 was 39,920 af. Birch Creek's annual average runoff was 116,000 af.

More on Gradual Development

217. There is some suggestion from the PCCRC that the early rights of its predecessors were acquired for gradual development of what became the Carey Land Act project. Senator Carey introduced his bill in 1892. The bill passed on August 18, 1894. No claim with a priority date before then can be credibly urged as intended to take advantage of the act. Even after the act's passage, the state had to set up the Carey Land Act Board and work out segregation lists of public domain land with the US. No one in the Valier area formed a construction company (needed to comply with the act) until 1908. Attribution of any intention in the mind of an earlier homesteader on Birch Creek Flats to take advantage of that legislation is speculative.

218. The reports about the project from the beginning are a chronicle of successive construction contracts from 1909 to 1948 (Ex. P-89 has a chronology), bankruptcies, and failures to attract and hold competent farmers to use the project's water. Ex. P-97. The J. A. McDonough affidavit of 1916, Exhibit P-104A, shows that the Conrad Brothers' intention was to serve their own empire. The Carey Land Act idea came later. The

¹¹ Which would calculate to about 59,093 irrigated acres, against the 56,556 irrigated acres reported. The report does not explain the variance.

McDonough 1916 affidavit was written to dispel any idea that Conrad or his companies retained any interest in the water rights that were transferred to CIC, especially the 10,000 MI appropriation. CIC incorporated March 26, 1898 to hold all of the Conrads' assets. All of the Conrad Brothers' land and water assets were transferred to the CIC by instruments dated April 12, 1898. Hjalmar B. Landoe's October 7, 1949 letter to the Carey Land Act Board mentions eight consecutive agreements between the construction companies and the State of Montana, from July 23, 1909 to December 23, 1925.

219. The B Canal was intended to carry Birch Creek water to Dupuyer Creek, from which the combined flow would be used to irrigate CIC lands. The CIC lands to be irrigated were in sections 5, 6, 7, 8, 9, 10, 15, and 17, T29N R5W; sections 1 and 12, T29N R6W; and sections 19, 20, 21, 27, 28, and 30 of T30N R5W. That is a total of about 9,600 acres.

220. Mr. McDonough made no mention of irrigation out of Birch Creek or on the Flats. Conrad sold CIC to Cargill and Withee (on August 15, 1908), who appear to have conveyed the water rights to the Conrad Land & Cattle Co. (which was the same corporation with a name change. See P-104E, affidavit of attorney James T. Stanford.), which went into receivership in 1910. The CIC went broke, as did its successors. Competing irrigation projects intercepted settlers before they arrived in Valier or drew them away to places where they thought they could find better soil. Settlers did not pay for their land and were dispossessed. The irrigation works fell into disrepair and had to be reconstructed. It took from 1900 to after 1950 for the project to be accepted as complete.

221. The evidence leaves a puzzle: Why did the PCCRC need to store about 150,000 afy plus use direct flow rights in order to provide 1.5 af/acre for the actual acres irrigated before 1973? Based on the acres irrigated, about 85,000 af should do the job. The project's structures were oversized because in the early days the developers believed that they could put over 120,000 acres under cultivation. Ex. P-97, 1926 MacMillan-Hawley Report.

222. Perhaps the system has large transmission losses. The gap between what PCCRC claims and what its shareholders have been able to put to beneficial use is

unexplained. Both in 1950 and 2001, persons familiar with the project expressed doubt that the project had ever made beneficial use of all of the water it claimed. Ex. P-90 (“Mr. Landoe expressed an opinion that there was plenty of water and doubted whether the entire water supply claimed for this project had ever been beneficially used.”); Ex. C-64 (“Past district court adjudications have generally resulted in significant reductions in the diversion rates listed on the original filings. The PCCRC should not assume that the Water Court will leave the flow rates listed on the PCCRC claims intact.”)

223. The Montana law of gradual development is stated in *St. Onge v. Blakely*, 76 Mont. 1 at 23, 245 P.532, 539 (1926):

It is not requisite that the use of water appropriated be made immediately to the full extent of the needs of the appropriator. It may be prospective and contemplated, provided there is a present ownership or possessory right to the lands upon which it is to be applied, coupled with a bona fide intention to use the water, and provided that the appropriator proceeds with due diligence to apply the water to his needs.

224. One element lacking for the project was the present ownership or possessory right to the lands that became the project. The appropriators were either homesteaders on small tracts or speculators (as Kipp and his colleagues may have been) who sought control over the water in hopes of selling it to settlers on the public domain. The nearest anyone came to meeting the present ownership test was the Conrad appropriation for the B Canal. Even if the present possessory interest test is met, the Conrad interests were looking to irrigate 9,600 acres, not 72,000.

225. A use right’s priority date is the date the appropriation is completed by application to beneficial use. *Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897).

Right No. 16

226. Henry Ryan and Jacob Lauffer filed their notice of appropriation on May 24, 1897, claiming 1500 MI from Birch Creek with an appropriation date of May 19, 1887. This notice is valid. The parties share ownership of claim 41M 131103-00 (35.80 cfs claimed for irrigation). The PCCRC acquired its part of this claim by conveyance from

Kingsbury Colony in 2004. Although the PCCRC's ownership comes from a post-1982 transfer, its interest will be considered here because of the joint ownership of the claim.

A. Curry's predecessor Ted Crawford claimed 890 irrigated acres under claim 41M 131103-00.

B. Ernest Lauffer signed an affidavit in 1982 which says that he irrigated 200 acres out of the ditch before 1973 and in 1973 he received a permit to pump water for 200 more acres. "This is all of the water used except for stock purposes." Claim file.

C. Mr. Crawford signed an affidavit in 1982 which said that he irrigated 890 acres for pasture and hay. "All land south of Birch Creek, owned by Ryan and Lauffer, is to be watered."

D. In his deposition, Butch Lauffer testified that the Ryan-Lauffer right is shared with each party owning an undivided one-half. Either party is entitled to the full flow rate if the other is not using the water. When both parties are using the water, the historical limitation of one-half to each applies.

E. PCCRC owns the Kingsbury Colony part of this right.

F. The right is a jointly owned direct flow right.

G. Each party should be restricted to the guideline standard of 17gpm/acre flow. On that basis, the flow rate for 41M 131103-00 should be 35.80 cfs. By a preponderance of the evidence, based on the historical practice, when the Ryan-Lauffer Ditch does not have enough flow to satisfy both rights at the specified flow rates and the owners of both parties want irrigation water, the rights share the available flow 50-50 up to 20.28 cfs. At a flow rate of 20.28 cfs, the PCCRC portion of the right is receiving 17 gpm/acre. Curry should have the flow above 20.28 cfs up to its full flow. This right does not have a storage component.

227. Curry urges that the right be divided 80/20 based on irrigated acres numbers. The preponderance of the evidence is that the historical use of Right No. 16 was shared 50-50 in the manner described above.

Right No. 17

228. Anna M. Steele and Raphael Morgan claimed 125 cfs from Birch Creek with a priority date of June 4, 1897. The PCCRC bases two claims on this notice, 41M 162004-00 (60.50 cfs for irrigation) and 41M 162113-00 (62.50 cfs for municipal purposes); Curry has one claim for a use right, 41M 159116-00, with the same priority date as the Morgan-Steele notice of appropriation.

A. According to the Atwood Report, Exhibit C-28, Bates 2028, this appropriation seeks to duplicate Right No. 1. Right No. 1 already occupied the full capacity of the ditch (Kipp Ditch, a/k/a Morgan-Steele Ditch) leaving no room for Right No. 17 to be perfected. The Atwood Report suggests that Right No. 17 was filed because the chain of title to Right No. 1 was clouded and could not be used to prove up Steele's and Morgan's homestead claims. Whatever the reason, the analysis above of Right No. 1 takes care of the valid portions of the claims through the Kipp (Morgan and Steele) Ditch claims. The claims based on the Morgan-Steele notice of appropriation should be dismissed.

B. Curry's claim to a use right from the 1884 Kipp Ditch has been handled elsewhere. At the hearing, Curry contended that his claim 41M 159116-00 should be through the Ryan-Lauffer Ditch with a period of use and diversion of April 1 to October 14. A preponderance of the evidence shows that claim 41M 159116-00 can be traced back to development by Lewis Carroll and should have these elements:

Priority Date: April 1, 1959
Maximum Acres: 40
Ditch: Ryan-Lauffer Ditch
Period of Diversion: April 1 to October 14
Period of Use: April 1 to October 14
Place of Use: 40 acres in NENW section 35, T30N R7W.

Right No. 19

229. Right No. 19 comes from a notice of appropriation filed June 24, 1897 for 4,000 MI with a priority date of June 18, 1897. The appropriators were Alfred Gardner, David Lutz, Horace G. Crain, and Charles P. Thomas. Ex. C-28, Bates 2051. PCCRC

bases claim 41M 162005-00 (90 cfs for irrigation) and 41M 162114-00 (90 cfs for municipal purposes), on this notice.

A. The notice of appropriation for Right No. 19 was timely filed.

B. The four appropriators had homesteads and received patents with these dates (from GLO Website):

Gardner: June 17, 1898

Lutz: April 22, 1901

Thomas: December 12, 1901

Crain: September 15, 1902

C. The Atwood Report, Exhibit C-28, Bates 2054, says that the desert claims and homestead entries of these four homesteaders had a total of 763 irrigable acres.

D. The Desert Land Act required irrigation as a condition of obtaining a patent. The Homestead Act (1862) required improvement of the land but did not specify irrigation. The Lutz patent for 155 acres in section 28, T30N R7W and the Thomas patent of 160 acres in section 26, T30N R7W, were desert claims. The other entries were homestead entries.

E. Exhibit C-31 (from 1919) shows ditches and laterals running into the land supposedly served by Right No. 19.

F. The Atwood Report, Exhibit C-28, Bates 2054, describes the patented lands, then says, "That these lands were actually irrigated in total is a matter for which we have no information."

G. The Atwood Report, Exhibit C-28, Bates 2053, quotes interviews of old timers who said that the ditch was built. None of the reports on the size of the ditch were thought to be reliable. The Atwood Report concluded that after enlargement and extension of the ditch, it could carry 11.54 cfs. After deducting 1.55 cfs for Thomas' Right No. 3, which was already in the ditch, the maximum amount available for perfection of Right No. 19 was 9.99 cfs.

H. Gardner sold an undivided 1/4 interest in the right to Thomas Brooks, who sold to F. L Buzzell, who sold his 1/4 interest to the Conrad Investment Company on

June 20, 1907. An undivided 1/4 of 9.99 cfs is 2.5 cfs. The CIC changed the point of diversion to its B Canal.

I. Lutz conveyed a 1/5 interest in the right to J. W. McKnight, who transferred it to F. L Buzzell on April 3, 1902. Buzzell transferred this 1/5 interest to the Conrad Investment Company on June 20, 1907. An undivided 1/5 of 9.99 cfs is 2 cfs.

J. Charles P. Thomas transferred an undivided 1/5 interest in this right to the Conrad Investment Company on April 14, 1906. This undivided 1/5 interest is 2 cfs.

K. The preponderance of the evidence is that the Conrad Investment Company acquired 6.5 cfs of Right No. 19 ($1/4 + 2/5 \times 9.99$) and began to divert the water into the B Canal at the time it purchased the interests. The preponderance of the evidence, considering the independently corroborated information in the Atwood Report and the admissions against interest, is that the appropriators of Right No. 19 had a diversion and a ditch which was capable of carrying far less than their stated appropriation; the ditch capacity therefore becoming the limitation upon the right; and the CIC was entitled to relate the irrigation right back to the notice of appropriation. The PCCRC's claims 41M 162005-00 and 41M 162114-00 have a direct flow rate of 6.5 cfs. The agricultural right has a priority date of June 18, 1897. There is no evidence to establish when the PCCRC's predecessors began to furnish municipal water. We can be reasonably certain that the original appropriators of this right did not furnish municipal water to anyone. These claims can for now be regarded as multiple uses of the same appropriation. The abstracts of claims 41M 162005-00 and 41M 162114-00 should contain a remark indicating that they are multiple uses of one appropriation.

Right No. 21

230. Right No. 21 is based on the notice of appropriation filed July 21, 1897 by W. G. Conrad for 10,000 MI. The notice was filed within 20 days of the date of the appropriation, which was said to be July 20, 1897. The notice itself said that the diversion was from the southeastern bank of Birch Creek. There is a copy of the notice in claim file 41M 161998-00 (Teton County Records, Miscellaneous Book 5-A, page 286). The PCCRC bases claim 41M 162006-00 (250 cfs for irrigation) on this notice.

A. The notice of appropriation describes the diversion as located at the mouth of Birch Creek Canyon “about one mile and a half west [of] George Steells Ranch on unsurveyed land.” George Steele had a ranch near the Birch Creek Canyon. (US v. CIC, Tr. 991 ff., testimony of Edgar J. Steele, son of George Steele, who testified that Major Steele had a ranch up at the mountains and moved downstream in 1898.) The diversion location described in Conrad’s notice is just downstream of where the Birch Creek Dam was built fifteen years later. The location is 12 air miles from the B Canal diversion. The ditch described was to take water to Sheep Creek, thence down Sheep Creek to Dupuyer Creek, from which the water would be rediverted to the Conrad holdings which were in T29N and T30N R5W and R6W.

B. The Atwood Report, Exhibit C-28, Bates 2065, claims that the point of diversion was the B Canal. According to the History of the Valier Project, Exhibit C-76, construction of the B Canal started in April 1899.

C. The final surveys for the B Canal began in the same month that the Right No. 21 notice of appropriation was filed. Had Mr. Conrad intended to use the B Canal to divert and convey the water he claimed, he could have described the B Canal rather than the ditch farther upstream. Water was first turned into the B Canal in July, 1899. The first year that B Canal water was used for irrigation was 1900. Ex. C-76.

D. Right No. 21 was never perfected. The diversion ultimately used by the Conrads to supply Birch Creek water for their enterprise was miles downstream of the one described in the notice. The statute required the appropriator to “post a notice in writing in a conspicuous place at the point of intended diversion. . .” §89-810, RCM 1947. In order to claim the right to relate a right back to the date claimed in a notice of appropriation, the appropriator must construct a diversion and means of conveyance. Posting a notice miles upstream of the place where a diversion was constructed two or three years later will not support this claimed right. The means of conveyance mentioned in the Right No. 21 notice of appropriation was never constructed.

E. All claims based on Right No. 21 should be dismissed. The B Canal claims are handled elsewhere in this report.

Right No. 23:

231. Claims 41M 120072-00, 41M 185666-00, 41M 199800-00 and 41M 199819-00 are all based on the Stewart-Gardner notice of appropriation. The Atwood Report shows that the claim was never perfected. Ex. C-28, Bates 2092 ff. These claims should be dismissed.

Right No. 24 (a/k/a Right No. 22a):

232. Right No. 24 is based on a notice of appropriation filed by Lena Taylor claiming 25 cfs with a priority date of January 14, 1898. Ex. C-28, Bates 2108. The notice was filed within twenty days of the claimed priority date. Curry bases claim 41M 159114-00 (5.00 cfs for irrigation) on the same notice.

A. The Atwood Report considers this notice of appropriation as Right No. 22a, with Right No. 24 being supplemental to No. 22a. The Atwood Report's Right No. 22a notice of appropriation was never filed with the county recorder. The Right No. 24 notice was filed. The Atwood Report's text about this right is under No. 22a beginning on Exhibit C-28 at Bates 2077. This master's report will retain the parties' usage and call this notice Right No. 24.

B. Exhibit C-2, a copy of a statement made by George Taylor (husband of Lena Taylor) says that Taylor had an agreement for a water right with Edwin Carroll in 1916. The claim file contains a copy of an affidavit that Taylor signed in 1936 to the same effect. Curry amended claim 41M 159114-00 to change the priority date from the claimed June 14, 1898 to January 14, 1898, which coincides with the Lena Taylor notice.

C. The abstract of 41M 159114-00 should be modified to show the place of use as the land irrigated by Edwin Carroll as shown in the WRS and accompanying field notes. Ex. P-77D. The place of use and acres irrigated should be 35 acres in NWNW section 35 and 25 acres in NESE of section 26, T30N R7W. The flow rate should be as shown in the WRS field notes, 2.25 cfs. The ditch name should be changed to the Ryan-Lauffer Ditch because the Taylor Ditch diversion was destroyed by the 1964 flood. The period of diversion and period of use are April 1 to October 14.

D. Both the NWNW section 35 and the NESE section 26 are subject to the VMLWC deed restriction. Mr. Carroll testified that these parcels were irrigated when he acquired them. In the absence of evidence about when irrigation was resumed after the VMLWC sold them without the right to claim irrigation water through the company, considering that the WRS shows them as irrigated, and in the absence of proof that the parcels were deprived of irrigation water, it is more likely than not that after the company sold them they continued to be irrigated. Curry should have a use right for them with a priority date matching the most likely first irrigation use after the conveyance date of December 24, 1926, which would be April 1, 1927.

Right No. 26

233. Right No. 26 was filed by the CIC for 500 cfs for irrigation with priority date of July 16, 1898. Ex. C-28, Bates 2113. PCCRC claims 41M 162007-00 and 41M 162116-00 are based on this notice. The notice does not include a storage use. The notice specifies that it is for sale, rental, irrigation, mining and milling and says that it is to irrigate 10,000 acres in T29N R5W and T30N R5W. The notice coincides with W. G. Conrad's decision to proceed with the B Canal.

A. Curry would have these claims dismissed because the notice “does not accurately described (sic) the irrigation project as it exists now and is set forth in the statements of claim.”

B. The CIC filed a supplement to the notice of appropriation. The supplement appears in Miscellaneous Book 5-A, pages 121 and 122. It describes the point of diversion by metes and bounds which match exactly the B Canal diversion.

C. The supplemental notice is consistent with continuing development of the B Canal, which we know from the evidence including Mr. Darling's testimony in *US v. CIC* to have begun with surveys in 1898 and construction in 1899 as a large canal intended to convey water for use several townships to the east of the point of diversion. The CIC prosecuted work on the B Canal diligently. Right No. 26 is entitled to relate back to the priority date stated in the notice of appropriation.

D. The evidence shows 12,500 acres under irrigation as of 1906, including land which had water available from Dupuyer Creek and the Lake Francis Reservoir as well as Birch Creek. The 1918 VMLWC annual report shows that the irrigated acreage had increased by nearly 38,000 acres in 12 years. The Carey Land Act contracts and segregation lists support a finding of continuous effort to develop the use of this water right. The preponderance of the evidence is that even with the troubled history of the project, this claim was diligently developed.

E. Right No. 26 should have a flow rate of 500 cfs with a July 16, 1898 priority date.

Right No. 35:

234. Right No. 35 comes from the Joseph A. Ingram and Isabell Thomas notice of appropriation for 12.5 cfs diverted through the Thomas Williamson Ditch with a priority date of September 18, 1901. PCCRC original claims 41M 162008-00 (irrigation) and 41M 162117-00 (municipal) were filed based on the Ingram-Thomas appropriation. There was no evidence which contradicts their prima facie showing. The abstracts of these claims are not changed except as mentioned elsewhere for all municipal claims.

Right No. 37:

235. Right No. 37 comes from the Conrad Investment Co. notice of appropriation for 500 cfs with a priority date of December 9, 1902. This notice appears to be a supplement or duplicate of Right No. 26, mentioned above. No action is necessary concerning this notice of appropriation.

Storage Claims

236. According to the History, Exhibit C-76, construction of the first impounding dam for Lake Francis began in 1902. Lake Francis was said to have a capacity of 112,000 acre-feet.

237. The PCCRC has irrigation claims for filed rights, 41M 161998-00 through 41M 162001-00, based on notices of appropriation with priority dates from 1884 to 1904. To some extent, these claims have been handled elsewhere in this report. The PCCRC filed claims for 14 irrigation use rights, 41M 162014-00 through 41M 162027-00, with the same

flow rates as the filed claims but with a priority date of January 14, 1913; an irrigation use right, 41M 162028-00 with a priority date of December 31, 1902; and an irrigation filed right, 41M 162012 claiming to have a July 1, 1912 priority date.

238. The January 14, 1913 use right priority date relates to when water was first diverted for use on the PCCRC project. Ex. P-2. The 1902 use priority date relates to the date that construction began on the Lake Francis dam. The 1912 filed right priority date relates to the construction of Swift Reservoir. Ex. P-2, 51st notice of appropriation.

239. The water rights originally filed by PCCRC all claim storage rights in Lake Francis. Because Lake Francis was not constructed until 1902, it must be removed as a place of storage from all water rights with a priority date before 1902.

240. The court should create an implied claim for the storage of 112,000 af in Lake Francis with a priority date of December 31, 1902.

241. The water rights originally filed by PCCRC all claim storage rights in Swift Reservoir. Because Swift Reservoir was not constructed until 1912, it must be removed as a place of storage from all direct flow water rights with a priority date before 1912.

242. Swift Dam was completed in the fall of 1912. Ex. P-98. The court should create an implied claim for the storage of 30,000 af in the Swift Reservoir (properly, the Birch Creek Reservoir behind the Swift Dam) with a priority date of December 31, 1912.

243. In its examination of the PCCRC claims, the DNRC chose to treat the system as primarily a direct flow system and disregarded the reservoir storage. That decision was most likely made because the PCCRC was claiming a service area of over 377,813.5 acres. With PCCRC's storage capacity of over 142,000 af, labeling the system as primarily direct flow is incomprehensible. The highest historical irrigated acreage being 56,556 acres irrigated in 1921, all rationale for that decision has vanished. The PCCRC's system is not primarily a direct flow system. It may store Birch Creek flows in its reservoirs under rights which allow storage when they are in priority. The Primarily a Direct Flow System information remark should be removed from the abstracts.

244. Water rights with a priority date later than the date the reservoirs began storage may include a storage component with a priority date no earlier than the right's

direct flow priority date. It would take a detailed analysis of Birch Creek flows, PCCRC diversions, PCCRC deliveries, and perhaps other factors, to know which rights were being stored in any given year. That kind of analysis is part of enforcement and is beyond the scope of this report.

245. Water rights acquired by the PCCRC after 1973 do not have a storage component. Water being fungible, it is impossible to reconstruct the past in detail so fine as to discern when the PCCRC could have been storing water against the eventual needs of a non-shareholder. If PCCRC provided storage water to satisfy the needs of non-shareholders (the calculations to demonstrate the truth of that assertion would require detailed knowledge of the continuous inflow to Swift Reservoir, the stream's gain or loss between Swift Dam and the water user's headgate, continuous records of all diversions above the non-shareholder's headgate, return flows above the non-user's headgate, bank storage, and other factors which cannot be known at this distance) then it did so voluntarily for its own reasons and did not thereby establish a storage component for rights it did not own. If the PCCRC wants to add a storage component to those rights, it must do so in a lawful DNRC change proceeding. Until DNRC change proceedings are completed, all of the claims which the PCCRC purchased after 1982 by exchange for shares must be used as they were historically used according to the filed claim. That means that PCCRC's post-acquisition amendments do not apply. All elements of those claims remain as stated in the original statements of claim. If any original claimants filed amendments before the transfer to the PCCRC, those claims may be operated according to those amendments.

246. The quantity of water that PCCRC is entitled to divert is problematic. The PCCRC has established an upper boundary on its deliveries. Rancher X may have a right which entitles him to divert 17 gpm/acre, which is a duty of water of about 1cfs/26 acres or 1:26. PCCRC has an upper boundary of 1.5 af/acre. PCCRC's history goes back to VMLWC's premise of a duty of water of 1:80. PCCRC seldom delivers the entire allotment. Natural precipitation, crop needs, soil moisture profile, heat, wind, and other factors control the demand for PCCRC water. PCCRC has share certificates which theoretically allow the irrigation of about 72,000 acres with up to 1.5 acre-feet per acre, or

108,000 total acre-feet per year. PCCRC has storage of about 142,000 af. It has direct flow rights which are not stored. The most acres ever irrigated before 1973 was 56,556 acres, for which maximum delivery would have been 83,334 acre-feet. Even if we assume a 30% conveyance loss¹², the total water requirement for the district would have been 108,334.2 af, which is less than the capacity of Lake Francis. For the purposes of this case, the problems with the quantity of water that the PCCRC historically diverted and put to beneficial use probably do not have to be solved. When Basin 41M is adjudicated, those problems can be addressed.

247. The PCCRC argues against the duty of water of 1:80. Chapter 4 of the Adjudication Report, Exhibit C-28, Bates 1837 ff., is the analysis and explanation of the duty of water used by the VMLWC as the premise for calculations in the Adjudication Report. At 1:80, it may be thought a bit short by some, but it is not that far from the 1:70 duty of water which Wyoming uses statewide. Wyo. Stat. § 41-3-113. The construction contracts required The Valier Company to construct an irrigation system which would allow for the simultaneous delivery of 1 cfs/100 acres of irrigated land. Ex. P-89, p. 12. Where 1:80 was the duty of water that the VMLWC used in calculating the flow rate and beneficial use of water rights that it analyzed in the Adjudication Report, that is the duty of water we should use for rights established at that time. The PCCRC used the 1:80 ratio in calculating the number of shares it would exchange for water rights in the post-1982 transfers from irrigators on the Flats. Test. Fay Stokes, D1 p.m. The PCCRC has storage capacity of over twice the water needed to provide 1.5 af/acre for the maximum acreage historically irrigated. The evidence does not show, on balance, that the 1:80 duty of water used by the VMLWC to analyze the early rights should be discarded.

Other Conclusions of Law

1. The Montana Water court has jurisdiction over the subject matter of this case and over the water rights claims of the parties.

¹² Conveyance losses on a large irrigation project are difficult to measure. I chose 30% because it is a high number. The real number could be from 20% to over 30%. The use of a conveyance loss here is illustrative and does not affect the recommended decision.

2. The parties were present and represented by counsel. Each party had a full and fair opportunity to present evidence, argument, and proposed findings of fact and conclusions of law.

3. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves an element of the prima facie claim is incorrect. This is the standard of proof whether the objectors are adverse to the claimants or are the claimants objecting to their own claim. Rule 19, W.R.Adj.R.

4. The Water court may resolve issue remarks based upon information in the claim file and obtained by the Court. § 85-2-248(3), MCA.

5. The Water Court is required to weigh the information resulting in an issue remark and the issue remark against the claimed water right in adjudicating the claim. §85-2-247(2), MCA.

6. This report recommends interlocutory disposition of these water rights claims. The claims will be visited again in the general adjudication of Basin 41M.

Recommendations

Make the changes noted above to the water right claims in this case.

Require the PCCRC to furnish a tabulation of all land with appurtenant shares as of July 30, 1973, to be used as its place of use.

Modify the place of use for the PCCRC irrigation water rights claims by inserting this paragraph in place of a PLSS designation:

THE PLACE OF USE FOR THIS WATER RIGHT CLAIM CONSISTS OF ALL LAND ACRES WHICH HAD APPURTENANT WATER RIGHTS EVIDENCED BY SHARES IN THE PCCRC AS OF JUNE 30, 1973. A COPY OF THE LIST CAN BE OBTAINED FROM THE DNRC.

Place a supplemental rights remark on each of PCCRC's irrigation and storage claims.

Place a multiple use remark on each of PCCRC's stock water claims, irrigation claims, and municipal claims to indicate that they are multiple uses of the same rights.

Endnotes

i. Endnote on Rights Jointly Owned

For claims where some of the original owners conveyed water rights by recorded conveyances and some of them did not, in the absence of other evidence, the rights will be treated as owned by tenants in common. The conveying party can therefore convey his interest in the whole (as, an undivided $\frac{1}{2}$ of 10 cfs) but cannot convey a discrete moiety (as, 5 cfs free of any other interest). While it is unlikely, it is possible that in the general adjudication of basin 41M someone not a party to this case may assert an interest in water based on the same underlying whole of one or more of the rights we consider here.

Each cotenant is permitted to deal with the whole. Cotenants must account to each other but not to outside persons. Therefore a conveyance by a cotenant of a part of that cotenant's interest will be treated as creating a new cotenancy in which the grantor has diminished his undivided interest by the fraction conveyed to the new owner, who becomes a cotenant to the extent of the interest purchased. For example, if A and B have a filed right for 20 cfs, and B conveys 5 cfs to C, B and C are each the owners of a $\frac{1}{4}$ undivided interest in 20 cfs and A remains owner of an undivided $\frac{1}{2}$ interest in 20 cfs.

The operative conveyances of rights now in dispute were made over a century ago. There are no record conveyances from some cotenants. For others, there is no proof of the use of all of the water claimed in the notice of appropriation. This case does not require a decision about the about the fate of the moiety of a vanished owner who made no recorded conveyance. The action of one tenant in common to preserve the right is valid against all but his cotenants. The amount preserved is the amount which remained in use. Whether the balance was abandoned is not germane to this case.

This analysis leaves us here: To the extent that we can trace the ownership of an undivided moiety of a water right to one of the parties, that party owns a right for that quantity of water. If the ditch could carry more than that amount, there are other possibilities. In the case of the first right, where Mr. Barron was not heard from after he signed the notice of appropriation in 1884, the un conveyed moiety could have been abandoned by the original appropriator and a use right established by another person for its proportion of the ditch capacity. We are reasonably sure that the Kipp Ditch would carry 22 cfs. We have Kipp's conveyances to Morgan and Steele for what he said were 11 cfs each. It is a reasonable assumption that Kipp succeeded to Upham's moiety, based on reputation in the community, grantees' apparent willingness to pay for the right (although one should not accept at face value recitations of consideration recited in deeds), and the anecdotal account of an oral conveyance to Kipp from Upham, who were partners in other ventures at the time. Kipp either owned an undivided one-half of Right No. 1 as grantee of Upham's interest as a tenant in common, or possibly all of Right No. 1 because Barron had abandoned his share and others had been using it with Kipp's consent (if without Kipp's consent, we get into adverse possession questions which are not part of this controversy and do not need to be resolved here). In the latter case, sometime between 1884 and 1897, Kipp succeeded to Barron's interest. The exact date will not affect the relative priorities in this case.

After comparing the Adjudication Report's account of Right No. 1 with the testimony in *US v. CIC*, and accepting as true those parts of the Adjudication Report which are corroborated or which have internal indicia of trustworthiness, I conclude that the priority date for Right No. 1 should be April 9, 1884, it should be a use right for 22 cfs of direct flow during the irrigation

season, and that Joe Kipp's deeds to Morgan and Steele conveyed all 22 cfs. While I am aware that it is possible to reach other conclusions, I do not find the support for them persuasive. We must make the best of what evidence we have and minimize the guesswork.

ii. Statute of Frauds Analysis

A. I considered the effect of the statute of frauds on the validity of the oral conveyance. We have a 100+ year old oral conveyance of real property reported in a self-serving document. See *Cook v. Hudson*, 110 Mont. 263, 278, for authority that a settler upon public land may convey his right to the land and appurtenant water rights orally with or without consideration to one who takes immediate possession. The question becomes, Was Barron a settler? The answer is that Barron was not a settler on the Flats. It may be that Upham, Barron, and Kipp had in mind selling water to settlers on the Flats.

B. The statute of frauds in effect between 1884 and 1897 said,
No estate or interest in lands other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent hereunto authorized by writing. Sec. 160, 5th Div. Rev. Stat. 1879, Sec. 217, 5th Div. Comp. Stat. 1887, Sec. 3274, C. Civ. Proc. 1895.

C. The rule that a squatter can make an oral conveyance does not apply except in the instance of squatters who are conveying a water right as an appurtenance to land that they are attempting to gain title to from the United States under one of the homestead acts.

The defendant asserts that even though Croke did acquire a right, its date is immaterial as it could not pass by "verbal transfer." This contention is based upon the fact that, under the Act of 1872, above, "possessory title" to public lands could pass only by deed. The question as to whether Croke's right to the land passed to Reiley by the verbal transfer need not be decided. This court has long been committed to the holding, in effect, that the "possessory title" entitling a party to appropriate water for use on a part of the public domain is not confined to a right acquired by the compliance with the provisions of the above Act, but that any person who occupies land, fences and improves it with the bona fide intention of acquiring title from the United States at some time, has such title as will support a water appropriation--in common parlance, a "squatter's right" is sufficient--and that such a water right may be orally conveyed with his right in the land so held. [citing cases] Counsel for plaintiffs urge that in all of these decisions the court overlooked the Act of 1872, but at this late date we are not disposed to overthrow the rule announced.

Gilcrest v. Bowen, 95 Mont. 44, 52, 24 P.2d 141, 144, 145, 1933 Mont. LEXIS 114 (1933).

D. The statute of frauds required that conveyances of real property be in writing. The exception carved out by the Montana Supreme Court for the transfer of squatter's rights in land and water should not be expanded to include all water rights conveyances. Neither Kipp nor Barron nor Upham were known to be homesteaders who used water from this ditch. Adjudication Data, Bates 1904. The exception allowing oral conveyance of a squatter's water right does not apply to them.

E. One policy reason behind the statute of frauds is the extraordinary difficulty of proving oral conveyances. We have the Adjudication Report, a document prepared in anticipation of litigation, which contains the report of an interview with George Stevenson who says he observed an incident in which Upham orally sold his share in the first right to Joe Kipp. There is no date mentioned. It is reasonable to presume that the transfer was sometime after the notice of appropriation was filed in 1884 and likely that it was before 1897 when Kipp signed deeds to portions of the first right in favor of Anna M. Steele and Raphael Morgan.

F. Applying the statute, we will analyze the first right without including the alleged Upham-Kipp oral transaction. The facts we know without reference to the Adjudication Report are:

1) Barron, Upham, and Kipp took out a ditch in 1884 to irrigate land on the Birch Creek Flats. None of them were homesteaders in that area at the time. It is probable that they intended to make water available to people who were settling in that area. Barron's and Upham's interest is known from their filed notice. Kipp's interest is known from the general reputation in the community at the time (see the original survey plat) and testimony at the US v. CIC trial.

2) By the time of the 1892 survey, the general reputation in the community allowed surveyor Paul Bickel to name the ditch the Kipp and Upham Ditch.

3) The 1892 surveyor reported gardens and crops grown in the area, indicating irrigation.

4) Testimony at the US v. CIC trial established that there had been continuous irrigation on the Birch Creek Flats since the time the Kipp and Upham Ditch was constructed.

5) The irrigation from the Kipp and Upham ditch established a use right as of April 9, 1884 up to the capacity of the ditch, for the land described as the perfection area for the water rights based on the Kipp and Upham Ditch appropriation.

6) In 1897, Kipp sold by written recorded instrument undivided portions of the water right to Anna M. Steele and Raphael Morgan.

7) Steele and Morgan used their rights out of the Kipp and Upham Ditch to irrigate land outside of the original perfection area.

8) There is no evidence that the original perfection area ceased to be irrigated. There is credible evidence that irrigation continued there after the conveyances to Steele and Morgan. The testimony of Charles P. Thomas at the US v. CIC trial corroborates some of what the Adjudication Report says. Mr. Thomas' testimony begins on p. 582 of the transcript. He lived in the Birch Creek area for 20 years. At one time, he had 160 acres on the Flats next to the Steele place. Thomas testified that what he called the Kipp-Baron-Upham ditch was taken out beginning in 1873 and was used for irrigation every summer since.

9) The statute allows for estates in land to be created by operation of law. It appears that Right No. 1 was created by operation of law, that is, by the prescriptive right which we call a use claim. Thus the preponderance of the evidence is that Kipp had a use claim by the time he made the written conveyances to Morgan and Steele.

10) The claims which are derived from the irrigation of the Right No. 1 perfection area should all have the same priority date, which is the date that water was first put to beneficial use from the Barron-Upham-Kipp Ditch, April 9, 1884.

11) Irrigation on the Curry place from Right No. 1 that is not shown on the WRS cannot reliably be shown to have continued from the date of perfection until the WRS was published. We know that some of the land was irrigated by Lewis Carroll's father. For the land that Mr. Carroll put under irrigation, we have an unknown period with no irrigation which goes back at least to the time Mr. Carroll was first on the land in the 1940s. We have no way of fixing the dates of irrigation at that location before Mr. Carroll began to redevelop it.