

FILED

JUN 08 2020

Montana Water Court

MONTANA WATER COURT, UPPER MISSOURI DIVISION
BEAVERHEAD RIVER - BASIN 41B

CLAIMANTS: Open A Ranch Inc.; Calvin Erb; Brooke R. Erb

OBJECTORS: Clark Canyon Water Supply Co.; East Bench Irrigation
District; West Side Canal Co.; Open A Ranch Inc.

NOTICE OF INTENT TO APPEAR: Geoduck Land & Cattle LLC

CASE 41B-72

41B 10699-00

41B 10700-00

41B 10701-00

41B 10702-00

41B 10703-00

41B 10704-00

41B 10705-00

41B 10706-00

41B 10707-00

41B 10708-00

41B 10709-00

41B 10710-00

41B 10716-00

41B 10720-00

41B 88606-00

41B 88623-00

FINAL ORDER

I. INTRODUCTION

This case involves water rights in the Beaverhead River and its tributaries. The claimants are Open A Ranch and Calvin and Brooke Erb. Open A Ranch straddles the Beaverhead River north of Dillon and south of Beaverhead Rock. The Erbs adjoin Open A Ranch to the south.

The objectors are Clark Canyon Water Supply Company, (CCWSC), East Bench Irrigation District (EBID), and West Side Canal Company (WSCC). Geoduck Land and Cattle LLC filed notices of intent to appear. These parties are referenced as the objectors unless noted otherwise.

The Erbs and the objectors entered a settlement agreement to resolve 41B 88606-00 and 41B 88623-00, the only two claims owned by Erb in this case.

The Court dismissed Open A claims 41B 10716-00 and 41B 10720-00 via summary judgment. Open A's twelve remaining claims were the subject of a weeklong trial in Dillon, Montana. Following trial, the parties and the Court visited Open A Ranch and viewed its irrigation system. The findings in this order are based on testimony and evidence received at trial and observations made at the site visit.

Open A Ranch was assembled from smaller properties with separate water rights. Open A's predecessors combined water rights to irrigate larger areas as the merger of homesteads occurred. The consolidation of water rights for use on larger parcels is called marshaling. Marshaling of water rights is common in Montana.

Walter Van Deren prepared Open A's original water right claims. Open A's original claims described water use on smaller homesteads before marshaling of water rights began. Open A amended its claims prior to the Preliminary Decree to reflect marshaling and filed a second round of amendments after the Preliminary Decree to clarify its rights further.

Although the evidence in this case is voluminous, the positions of the parties are straightforward. The objectors assert Open A's rights should not reflect marshaling. They contend some of Open A's water rights should be dismissed and the rest decreed as originally claimed by Walter Van Deren. The objectors further assert Open A's rights should have volume limits. Open A generally asserts its rights should be decreed in accordance with its second set of amendments, which reflect marshaling of its rights.

Both sides agree the Preliminary Decree does not accurately describe Open A's rights. Consequently, both sides have the burden of showing the water rights described in the Preliminary Decree are incorrect.

II. ISSUES

1. Did Open A marshal its water rights?
2. Did the parties meet their burden of proof and overcome the prima facie status of Drummy 1 and 2 rights in the Preliminary Decree?

3. What water rights were historically diverted through the Hill and Saxon Ditches?
4. Did the parties meet their burden of proof and overcome the prima facie status of the Hill and Saxon rights in the Preliminary Decree?
5. What water rights were historically diverted through the River Ditch?
6. Did Open A perfect a use right for sprinkler irrigation of the bench before July 1, 1973?
7. Should Open A's rights have volume caps?
8. Should Open A's request for implied claims be approved?

III. FINDINGS OF FACT

Open A Ranch is owned by the Van Deren family and operated by Walter Van Deren and his son Robert. The Van Deren family purchased Open A Ranch in 1958 and has irrigated it since. Open A's business is forage production, and the heart of its operation is bottomland hay ground irrigated primarily from the Beaverhead River and Albers Slough.

Open A's southernmost ditch, and the one furthest upstream, is Drummy Number 1. Drummy 1 diverts water from the east bank of Albers Slough using a headgate on the Erbs' ranch. The next ditch on Albers Slough is Drummy Number 2. Drummy 2 also diverts water on the east bank and distributes it via a network of smaller ditches to lands downstream. The Hill and Saxon Ditches are furthest downstream on Albers Slough and divert water from both its west and east banks. Open A has a pump station on Albers Slough below the Hill Ditch that supplies water to a center pivot on bench land to the west.

Open A diverts water from the Beaverhead River using the Albers Ditch, also known as the River Ditch. This ditch is on the river's west bank and uses smaller ditches to carry water downstream.

Drummy 1, Drummy 2, the Hill and Saxon Ditches, and the River Ditch are the arterials for irrigation of Open A's land. Open A irrigates its bottom ground in two ways. The first consists of flood irrigation using secondary ditches to distribute water where

gravity takes it. Open A's secondary ditches are numerous and resemble a system of capillaries which spread out and deliver water to most of Open A's bottom ground. Some of these ditches allow Open A to combine water from Albers Slough and the Beaverhead River. As an example, secondary ditches from Drummy 1 move water from Albers Slough to the River Ditch, where it is combined with water from the Beaverhead River.

Open A's second method of irrigation involves closing headgates on the main channel of Albers Slough near Drummy 2 and the Hill and Saxon Ditches. Closing these headgates forces the slough to overtop its banks and flood adjoining lands. Open A uses this technique to flood irrigate ground adjacent to Albers Slough and to force water into nearby ditches and natural channels where it irrigates additional land. Open A does not use this overbank technique at Drummy 1, which is on land owned by the Erbs.

Both irrigation methods, conventional flood irrigation and overbank flooding from Albers Slough, were used by Open A Ranch before 1958, and have been used since. Open A also collects water in the Albers Swamp Ditch west of Albers Slough to irrigate a strip between the slough and bench lands to the west.

Drummy Ditch Number 1

Open A claims two rights for Drummy Number 1. These claims are 41B 10699-00 and 41B 10706-00.

Claim 41B 10699-00

Claim 41B 10699-00 is based on a right decreed to Gerhard Albers in *Morgan v. Nyhart*, Case No. 1053, February 8, 1907. Gerhard Albers was a predecessor of Open A Ranch. The Van Derens lived in Albers' house after buying the Open A in 1958.

The district court decreed claim 41B 10699-00 to Gerhard Albers with a flow rate of 400 miner's inches and a priority date of August 7, 1897. Walter Van Deren initially claimed only 405 acres for this right even though water diverted through Drummy 1 irrigated a larger area for decades.

At the time he originally filed Open A's claims, Walter Van Deren believed water rights were supposed to be claimed as used by their original appropriators. Because of this belief, Open A's original claims depicted water use on smaller homesteads rather

than water use on the Open A after it was created by consolidation of those homesteads. Van Deren's claims did not reflect historical use of water on the Open A after its creation.

Mr. Van Deren and his predecessors did not use water rights on the Open A as his claims described them. To explain how rights were used on the Open A after the homestead era, Mr. Van Deren attached a narrative statement to his claims titled *Statement of Water Management on Open A Ranch Property Along Albers Slough* ("*Statement of Water Management*"). In it, Van Deren wrote that water from Drummy 1 was mixed with water from Drummy 2 and carried to areas beyond the 405 acres identified on claim 41B 10699-00.

The consolidation of water rights to achieve more efficient irrigation is called marshaling. Mr. Van Deren's *Statement of Water Management* describes historical marshaling of water rights between Open A's ditches on Albers Slough.

[I]t has been the practice, in order to conserve water and speed up irrigation to move water up or down the slough between various diversion points to get as large a head of water as possible with the shortest length of run thru the ditches to the various points to be irrigated.

...

Therefore water from Drummy Ditch #2 is sometimes taken out at Drummy Ditch # 1 diversion point to start irrigation in Drummy Ditch # 1 portion of sections 10 and 11 T6S R8W when irrigation water reaches to the areas that can also be irrigated by Drummy Ditch # 2, Drummy Ditch # 1 is shut off and water is moved down and added to water at Drummy Ditch # 2 to Speed [sic] up irrigation....

Van Deren also describes marshaling of water rights in the Hill and Saxon ditches. He explained "[t]his irrigation plan cuts about 7 to 10 days time per irrigation over that of taking water at only the designated diversion points...." *Statement of Water Management*.

Van Deren learned to irrigate the Open A from people who worked there before his family bought it. Van Deren's *Statement of Water Management*, combined with his

testimony, indicates he and his predecessors marshaled water rights between ditches on Albers Slough before and after 1958. The Van Derens continued these historical irrigation practices, including the marshaling of water rights between ditches on Albers Slough. The same practices continue today.

Mr. Lee Yelin, an expert witness for Geoduck, determined that staining on the Drummy 1 flume showed an *average* diversion of approximately 27.21 cfs. Obj. Ex. 9, p. 12. An average flow of 27.21 cfs equals 1088.4 miner's inches, more than twice the amount of the 400 inch right initially claimed by Van Deren for Drummy 1. Staining on the flume showed *peak* water levels were substantially higher than the average flows calculated by Yelin. Evidence of peak flows on the flume corroborates Van Deren's testimony that other water rights were marshaled through this diversion.¹

Diversions further downstream such as Drummy 2 and the Hill Ditch also show evidence of flows in excess of the individual rights appropriated for those ditches by original homesteaders. This evidence, and testimony from the water commissioner and Walter and Robert Van Deren, indicate Open A's water rights in Albers Slough were combined and used wherever they were needed. Jim Gilman, one of the objector's experts, acknowledged that Open A marshaled its rights even though he asserted they should be decreed in the limited manner claimed by Van Deren.

Open A did not marshal its Albers Slough rights all the time. Walter Van Deren testified that marshaling was infrequent and employed only when necessary. Although marshaling did not occur frequently, the evidence showed Albers Slough rights were combined and used interchangeably through multiple points of diversion for many years, including prior to July 1, 1973. The Drummy 1 decreed right, denominated claim 41B 10699-00, was diverted through the Drummy 1, Drummy 2, and the Hill/Saxon Ditches when larger heads of water were required.

¹ Open A shares this diversion with the Erbs, who have separate water rights. The Erbs and Open A use a water rotation system so their respective rights are not diverted through Drummy 1 simultaneously. The Erbs' flow rate for the irrigation claim using Drummy 1 is 6.36 cfs.

Drummy 1 is the furthest upstream ditch on the Open A and irrigates a much larger area than Drummy originally owned and Walter Van Deren initially claimed. Water can be carried from Drummy 1 to the River Ditch and in turn distributed from that system to lands outside the reach of Drummy 1. The Drummy 1 right was also diverted through Drummy 2 and the Hill/Saxon Ditches and distributed through those ditch systems to reach additional lands downstream. Except for land west of Albers Slough, water from the Drummy 1 right has been used to irrigate most of Open A's bottom ground.

Direct observation of Open A's irrigation system confirmed the feasibility and utility of this practice. This inspection also showed that water turned loose for flood irrigation cannot be easily stopped at the legal boundaries which separated early homesteads.

Water respects gravity, not boundaries on a map. Walter Van Deren claimed the Drummy 1 decreed right for what he thought was its original footprint, rather than describing its use on the Open A Ranch after boundaries between homesteads became meaningless. Gerhard Albers and his successors combined this right with others to irrigate much larger areas than Van Deren claimed. That pattern of use began many years before Van Deren claimed water rights for the Open A Ranch.

There is no practical way for a water commissioner to limit use of water diverted via Drummy 1 to the original boundaries Van Deren claimed, and water commissioners have never attempted to do so. Walter Van Deren knew Open A's claims were not used in the narrow manner he described them and discussed this issue in his *Statement of Water Management*.

Open A eventually decided to address the contradictions between its original claims and the *Statement of Water Management* by amending its rights. Some of these amendments described historical use more accurately, while others created new problems. As an example, the Preliminary Decree, which was based on Open A's 2009 amendments, listed 2,997.25 irrigated acres for the Drummy 1 right even though no one, including Open A, thought this acreage was correct.

Because of this and other problems, this Court ordered the DNRC to perform a field investigation of Open A's water rights. Myles VanHemelryck, DNRC Water Resources Specialist, conducted the field investigation on June 5, 2018. Mr. VanHemelryck inspected Open A's points of diversion and places of use and reviewed its claims and amendments.

Mr. VanHemelryck concluded Open A's primary ditches "re-supply other ditches, which convey and distribute the water to be reused again from other diversions further downstream. Most of the place of use was being irrigated at the time of the field investigation. This appeared to be a very complex operation that utilizes the water very well to cover the place of use efficiently." Field Investigation Report, at 4 (July 12, 2018).

Mr. VanHemelryck concluded the Drummy 1 right should be reduced from the 2,997.25 acres described in Open A's 2009 amendments to 2,522 acres. He based this conclusion on his visit to the Open A Ranch and aerial photographs. Open A's expert, Tracy Turek, conducted a similar evaluation and concluded Open A irrigated 2,507.6 acres. The figures generated by Mr. VanHemelryck and Ms. Turek are close enough to be within the margin of error for existing mapping techniques and the differences between them are immaterial. Both figures are consistent with the Van Derens' testimony and this Court's first-hand observations of Open A's irrigation system. Open A's assertion that 2,507.6 acres were historically irrigated using claim 41B 10699-00 is credible and conform with the layout of its irrigation system, which has not changed for many years.

The objectors introduced evidence that Open A irrigated less land than the amounts identified by the DNRC and Turek. The most notable conflicting evidence was generated by the DNRC's water resources survey work in 1973. This evidence was based in part on work by T.J. Reynolds, an employee of the DNRC who visited the Open A Ranch on April 11, 1973. Mr. Reynolds concluded Open A was irrigating less land than it claims now.

Mr. Reynolds' visit was early in the season, when most irrigators are either not irrigating, or irrigating less aggressively than later in the year. Irrigation intensity increases during the summer months when soil moisture is lower and crop needs are higher. There was also testimony indicating Mr. Reynolds limited irrigated acres based on his personal opinions regarding what he thought should have been irrigated rather than documenting what was actually irrigated.

The assessment of irrigation later conducted by the DNRC and Tracy Turek covered a broader timeframe, was more consistent with other evidence, and fit better with this Court's observation of Open A's system on the ground. The opinions of Mr. VanHemelryck and Ms. Turek were more credible than those of Mr. Reynolds.

Claim 41B 10706-00

Open A's second claim for Drummy 1 is 41B 10706-00 and is based on a notice of appropriation filed by Nathaniel Wood. Wood claimed water from two ditches out of Spring Creek for irrigation of land in section 10. Albers Slough was also known as Spring Creek, although it is not clear whether the Spring Creek in Wood's notice is Albers Slough or another source. The two ditches described in the notice of appropriation were Ditch No. 1 and Ditch No. 2.

According to the notice, these two ditches were located on the west bank of Spring Creek, rather than the east bank where Open A's ditches are located today. Nathaniel Wood owned most of section 10, and ditches on the west side of the slough could not have effectively irrigated much of his land if the Spring Creek referenced by Wood was indeed Albers Slough. There is no current evidence of ditches on the west side of Albers Slough at this location, which raises the possibility Wood was talking about a different source and different ditches.

Open A speculates there was a mistake in transcription when the Wood notice was written, and that Wood meant to claim ditches on the east side of what is now Albers Slough. The penmanship on the Wood notice is remarkable for its precision and elegance. The notice appears to have been written by Phil D. McGough, the County Recorder who notarized it. Notices of Appropriation were often written by third parties

when the water right owner was illiterate. It is unknown whether Wood was literate or whether he intended something other than what his notice of appropriation stated.

There is only limited circumstantial evidence to support the theory that Wood erred by claiming ditches on the wrong side of Albers Slough. The credibility of Open A's assertion that Wood meant to claim water from Drummy Ditches 1 and 2 is further undercut by the four-year gap between Wood's claimed priority date in 1879, and the date he filed his notice in 1883. In the absence of more evidence to explain Wood's intent, the Court is left to interpret the Wood notice based on the information it contains. That information does not support the water rights from Albers Slough now claimed by Open A.

Wood and his wife conveyed land in Section 10 to Sarah Ames in 1886. Bliven Livestock Company acquired this land in 1888 and conveyed it to William F. Drummy on January 2, 1903. Drummy conveyed it to Gerhard Albers on November 30, 1907. When and how Albers Slough received its name is obscured by time, although Albers Slough is mentioned in the *Morgan v. Nyhart* decree.

The *Morgan v. Nyhart* decree was issued February 8, 1907. Drummy was not a party to the decree, but he owned Wood's land in section 10 when the decree was issued. The district court did not grant rights to Drummy, but recognized his right to divert water from Albers Slough using Drummy 1 and Drummy 2. The decree states:

Gerhard Albers, together with one William F. Drummy, or his predecessor in interest, on the seventh day of August, 1897, did divert from and appropriate eight hundred (800) inches of the waters of the "Albers" slough by means of a certain ditch known as the "Drummy" ditch No 1 for the purpose of irrigating their lands, and for other useful and beneficial purposes, and ever since, at all proper times and seasons, the defendant Albers has owned, used and needed one-half of said ditch and water right for such purposes.

Open A Ex. 67, Bates 3931.

The district court made it clear Albers and Drummy each owned one half of an 800 inch right from Drummy 1. Both Albers and Drummy were Open A's predecessors, and Open A claimed the Albers portion via 41B 10699-00. Open A tried to use the Wood

notice of appropriation to claim an earlier priority date for 41B 10706-00, its second right in Drummy 1, but the Wood notice, is simply too unreliable to support such a right, especially when compared to the more specific and more recent language of the decree.

The district court's reference to ownership of a 400-inch right by Drummy in Drummy 1 is more recent and more specific than the Wood notice. Although Open A did not initially set out to claim the Drummy right mentioned in the decree, the water right it described closely resembles Drummy's 400 inch share of the right from Drummy 1, and Open A clearly intended to claim a second right from Drummy 1.

In accord with the court's statements in *Morgan v. Nyhart* and the evidence on the ground, claim 41B 10706-00 should have a priority date of August 7, 1897 and a flow rate of 400 miner's inches. The place of use for claims 41B 10699-00 and 41B 10706-00 should be the same, as both rights are diverted from the same ditch and now irrigate the same lands. Like claim 41B 10699-00, claim 41B 10706-00 was marshaled through Drummy 2 and the Hill and Saxon Ditches. Accordingly, both claims share the same points of diversion.

Drummy Ditch Number 2

The district court also addressed water rights from Drummy 2 in the *Morgan v. Nyhart* decree. The court stated that Albers and Drummy appropriated 1000 inches of water using the Drummy 2 Ditch from Albers Slough on May 1, 1891. Based on this appropriation, the Court decreed Albers a half-interest in this right but did not decree Drummy's half because he was not a party.

As with Drummy 1, Open A claimed two rights for Drummy 2. The first, claim 41B 10704-00, was based on Albers' half interest from the *Morgan v. Nyhart* decree. The second, claim 41B 10705-00, was based on the same Nathaniel Wood notice of appropriation discussed above. For reasons already given, the Wood notice does not support Open A's second right from Drummy 2.

Nevertheless, it is clear Drummy owned half of the right he shared with Albers in Drummy 2 and claim 41B 10704-00 closely resembles the second Drummy right described in the decree. Open A was a successor to both Albers and Drummy, and it

owns both halves of the 1000 inch right recognized in *Morgan v. Nyhart*. Claim 41B 10704-00 represents Albers' half, and 41B 10705-00 represents Drummy's half. Both rights were used interchangeably with others on Albers Slough and share the points of diversion of Open A's other Albers Slough rights.

Water is diverted into Drummy 2 using a control structure located in the main channel of Albers Slough. Open A Ex. 63, Photoplate No. 10, Bates 3844. This same structure is used to force overbank flooding upstream of the Drummy 2 point of diversion and should be separately identified as a point of diversion for the Drummy 2 rights as well as Open A's other rights from Albers Slough.

The culvert through which Drummy 2 rights are diverted has a capacity of 57.82 cfs, which is more than twice the combined flow rate of the Drummy 2 rights. Open A Ex. 63, Photoplate No. 13, Bates 3846. This means Open A has marshaled and diverted other water rights through this culvert.

Irrigated acreage for the Drummy 2 rights is the same as for other Albers Slough rights. Drummy 2 rights have been used to irrigate the same 2,507.6 acres irrigated with the Drummy 1 rights.

The Hill and Saxon Ditches

There are multiple diversion and control structures located near the Hill and Saxon Ditches. The Hill Ditch diverts water on the west side of Albers Slough, while the Saxon Ditch diverts water on the east side just across from the Hill Ditch. Both ditches, and overbank flooding in the vicinity of these ditches, are controlled by a structure in Albers Slough.

Open A filed claim 41B 10700-00 for the Hill Ditch. It is based on an Albers Slough right decreed to Gerhard Albers in *Morgan v. Nyhart*, Case No. 1053. Albers was granted 100 inches in the Hill Ditch with a priority date of May 1, 1870.

The *Statement of Water Management* was included with 41B 10700-00 to explain how water was diverted from Albers Slough. In this *Statement*, Walter Van Deren indicated rights were marshaled among the diversions on Albers Slough to irrigate Open A's bottom ground. The Hill Ditch right has been diverted through all the Albers Slough

ditches for decades, and it shares points of diversion with those rights. Conversely, water rights from Drummy 1 and 2 and the Saxon Ditch have also been diverted through the Hill Ditch. All of these rights have been marshaled and used together.

As with Drummy 2, water backs up in Albers Slough using the diversion dam for the Hill Ditch to cause overbank flooding upstream. This diversion has a seven-foot steel arch culvert that can be incrementally blocked until closed. When this culvert is closed, water backs upstream for 3/8 of a mile and overflows into a series of ditches and swales that distribute water across Open A's land, principally on the east side of the slough. This same structure is used to divert water into the Hill Ditch to the west and the Saxon Ditch to the east.

Based on historical practices, the correct points of diversion for the Hill right include Drummy 1 and 2, the Saxon Ditch directly east of the Hill Ditch, and the diversion structure in Albers Slough used for overbank flooding. Because the footprint of all the Albers Slough rights has been the same for many years due to marshaling, the Hill right should have a place of use consisting of 2,507.6 irrigated acres.

Open A filed claims 41B 10701-00 for Saxon 2 Ditch and 41B 10702-00 for Saxon 1. Both rights were originally decreed to Gerhard Albers in *Morgan v. Nyhart*. The objectors do not contest the existence of either right. According to the Van Derens, Saxon 1 and the Hill Ditch were merged years ago. Saxon 2, also known as the Saxon Ditch, still diverts water. Like the other rights diverted from Albers Slough, the Saxon 1 right, 41B 10702-00, has been marshaled and used interchangeably up and down the slough, through the diversions used for other Albers Slough rights. Accordingly, 41B 10702-00 shares the same points of diversion and places of use as these rights.

The River Ditch

The River Ditch is on the west bank of the Beaverhead River. The parties agree that at least one decreed right has been diverted through the River Ditch, although they disagree regarding its elements. This right is 41B 10708-00. It is based on 300 miner's inches decreed to Gerhard Albers with a priority date of August 1, 1877. (*Morgan v. Nyhart*, Case No. 1053)

As with other ditches on the Open A, the River Ditch is connected to a system of laterals designed to spread water over an area larger than originally claimed by Walter Van Deren. The objectors contend claim 41B 10708-00 should be decreed as claimed by Walter Van Deren, with its place of use limited to 310 acres. This limitation would restrict this right to a smaller area than was historically irrigated.

Although Walter Van Deren only claimed irrigation in sections 2 and 11, Gerhard Albers, to whom this right was decreed, owned additional lands irrigable from the River Ditch at the time of the decree, and the district court did not limit the place of use for this right to sections 2 and 11 as Van Deren claimed. Moreover, there is no credible evidence Gerhard Albers, or any of his successors including Open A, limited use of this right to the 310 acres claimed by Van Deren.

The evidence on the ground indicates such a limitation would be nearly impossible to enforce, given that this is a flood irrigation right, and the ditches used to distribute it carry water beyond sections 2 and 11. Those ditches cover more land than Van Deren identified in his original claim, and early irrigators, like those who followed them, had incentives to push water as far as possible to extract maximum beneficial use from their rights.

The DNRC identified 1,842.00 acres historically irrigated with this right. The DNRC found its source was the Beaverhead River and its point of diversion the River Ditch. The DNRC's findings are generally consistent with both the decree in *Morgan v. Nyhart* and other evidence of historical use.

Open A also contends this right should have one diversion and one source, both from the Beaverhead River. Open A asserts the place of use covers 1,426.54 acres, 400 fewer than identified by the DNRC. Although there is no reason to doubt the accuracy of the DNRC's recommendations, Open A's place of use is more conservative than the area identified by the DNRC. Accordingly, the Court finds this right was historically used to irrigate 1,426.54 acres.

There is no evidence this right was ever diverted at a location other than the River Ditch. The correct source is the Beaverhead River, and the historical point of diversion is the River Ditch.

Claim 41B 10701-00 was filed for a 400 inch right decreed to Gerhard Albers. The court in *Nyhart v. Morgan* decreed this right from Albers Slough with a diversion via Saxon Ditch No. 2. *Nyhart v. Morgan*, Case 1053, decree, p. 47. Although this right was not decreed for the Beaverhead River, and Open A did not initially claim it for the Beaverhead River, Open A contends this right was moved from Albers Slough to the Beaverhead River sometime before 1973, and likely before 1958, when the Van Deren family bought the Open A.

The objectors contend no one from the Open A testified this right was intentionally shifted from one source to another. They point out that the claim filed by Walter Van Deren shows this right was diverted from Albers Slough as decreed in *Morgan v. Nyhart*, and that the Van Derens did not assert this claim was moved to the River Ditch until recently.

Despite the objectors' arguments, the evidence shows diversion of 700 inches by Open A via the River Ditch from the 1950s or 1960s to present. This practice occurred during administration of the Beaverhead River by water commissioners appointed at the request of several objectors. The flow rate of Open A's other right for the Beaverhead is only 300 inches, so an additional right for 400 inches was diverted at this location during administration by multiple water commissioners. There was no evidence Open A historically received less than 700 inches at the River Ditch.

The BOR undertook a survey of water rights on the Beaverhead River and prepared a document summarizing its findings. This document was titled Method of Determining Delivery of Water to Non-Signers Beaverhead River, and was referred to as the Method Document at trial. Open A Ex. 43. The Method Document shows Earl Van Deren, Walter's father, as the owner of two water rights from the Beaverhead. One right has a flow rate of 300 inches and a priority date of August 1, 1877. That right, 41B 10708-00, is discussed above. The second right was for 400 inches with a priority date of

May 1, 1876. The only water right in the area with the same flow rate and priority date was the decreed right from Albers Slough, which Open A contends was moved to the Beaverhead River.

Although Open A diverted 700 inches through the River Ditch for decades, EBID opposes Open A's claim for a May 1, 1876, 400-inch right from the Beaverhead River. Until this litigation, EBID did not assert the Method Document was incorrect, nor did it oppose Open A's diversion of 700 inches at the River Ditch. EBID has not received its full allotment of water every year, and according to EBID water users these shortages caused significant problems. The recurrence of water shortages gave EBID a powerful incentive to identify and prevent unlawful use of water on the Beaverhead River. Despite this incentive, EBID never previously asserted Open A did not have two rights totaling 700 inches at the River Ditch.

Water commissioners who testified at trial recalled diverting 700 inches at the River Ditch. These commissioners administered the Beaverhead River from 2004 to present. No other water user in the area filed a dissatisfied water users petition alleging Open A is not entitled to take 700 inches at the River Ditch. There is no evidence Open A has taken less than 700 inches at the River Ditch since the Van Derens bought the ranch in 1958.

When the Van Derens bought the ranch, the Hill Ditch was out of commission because of a landslide. Unavailability of the Hill Ditch explains why prior owners moved claim 41B 10701-00 to the River Ditch, and why the BOR listed the River Ditch as the point of diversion for that right in the Method Document. It further explains why the Van Derens could not testify from personal knowledge about the transfer of this right to the River Ditch, which occurred before their family acquired the Open A Ranch.

The objectors contend Open A did not claim the May 1, 1876 400-inch Albers Slough right through the River Ditch until recently, thereby rendering the lack of historical challenges to either the Method Document or Open A's diversion of 700 inches moot. This argument overlooks diversion of 700 inches at the River Ditch headgate for decades, a practice the objectors did not dispute. After reviewing all the evidence, the

sensible conclusion is that the 400-inch May 1, 1876 Albers Slough right was moved to the River Ditch sometime before the Method Document was prepared, and that 700 inches has been diverted through that ditch since.

Irrigation on the Bench

Open A claims a right for irrigation on bench land west of Albers Slough. This land was developed for sprinkler irrigation and is served by pumping water uphill from the Hill Ditch through a buried mainline. Open A has used various sprinkler systems to irrigate this area and part of the claimed place of use is irrigated with a center pivot.

Walter Van Deren hired a contractor to install the sprinkler system on the bench in March of 1973. Walter used Open A's dozer to back fill ditches for the pipeline to the bench. He turned on the sprinkler system and began irrigating with it in May of 1973.

Robert Van Deren was a boy at the time the system was installed, and he and his brother moved pipe for hand lines before July 1, 1973. Open A also hired local high school kids to move pipe and paid them with checks. These checks were dated prior to July 1, 1973. Open A Ex. 10, Bates 885-889. The testimony of both Van Derens regarding operation of the sprinkler system was detailed and credible. Documentary evidence indicates power was connected to the system on May 15, 1973. Open A Ex. 10, Bates 883.

DNRC employee T.J. Reynolds who visited the Open A Ranch in 1973, prepared maps intended for the Beaverhead Water Resources Survey. The purpose of the WRS was to document existing irrigation systems. Mr. Reynolds drew maps showing the sprinkler system on the bench. Open A Ex. 40, Bates 3520. Mr. Reynolds' drawings match the system described by the Van Derens and viewed by the Court during site inspection. Mr. Reynolds' drawings corroborate the existence of a system near the time of his visit in the spring of 1973.

Open A hired Hansen Irrigation as the project contractor because that company had a good reputation, and the system had to be operational before July 1, 1973. Open A kept records of progress payments it made to Hansen for construction of the system. Open A made an advance payment of \$10,000 to Hansen Irrigation on March 13, 1973.

Obj Ex. 82, Bates 2553. Thereafter, payments were made upon completion of various phases of the project. Obj Ex. 82, Bates 2562 and 2564. Open A paid for most of the project before July 1, 1973, although smaller payments occurred later. Most of these later payments were for parts and supplies to operate the system.

There was considerable debate between experts regarding interpretation of aerial photos of the bench lands claimed by Open A for its sprinkler system. The objectors contend aerial photos do not show irrigation using Open A's sprinkler system until after 1973. An aerial photo dated August 29, 1973 shows mainlines and laterals, with some dark shading that could be irrigation, although that shading is not conclusive.

Another photo taken September 6, 1977 shows a field boundary, which is often regarded as evidence of irrigation, but does not show any shading suggesting irrigation at the time the photo was taken. Open A leased its sprinkler ground to neighboring farmers who planted malting barley in 1977. Small grains like barley must dry before they can be harvested. To ensure low moisture levels, farmers stop irrigating barley earlier than alfalfa and grass hay, which typically show evidence of irrigation much later in the season. Darker shading is caused by moisture in the soil and the presence of active chlorophyll in plants. Shading diminishes once irrigation stops and crops dry out. Shading can disappear altogether when irrigation of small grains ceases and photographs of those crops are taken later in the season. The lack of shading in malting barley photographed in September does not prove the absence of irrigation that year.

Although some photos appeared to show little or no irrigation in some years, the narrow factual issue before the Court is when the Open A began irrigating the bench, not how often it irrigated afterwards. The evidence shows Open A began using its sprinkler system in May of 1973. Open A's priority date is based on the date it connected its system to electrical power and turned on its pump. The objectors assert Open A built an expensive irrigation system but didn't use it for years. This assertion lacks adequate evidentiary support and makes little practical sense given the magnitude of Open A's investment in its system.

Open A argues claim 41B 10707-00 should be used to memorialize a water right for its sprinkler project. Open A filed this claim for a water right decreed to Gerhard Albers in a district court case titled *Staudaher v. Selway*, Case No. 828, June 30, 1894. The court decreed Albers a 482 inch right for the Beaverhead River diverted through the Albers Ditch. Walter Van Deren did not identify lands on the bench irrigated with this right when he prepared claim 41B 10707-00, but those lands were included in Open A's 2009 amendments, which were incorporated into the Preliminary Decree for the Beaverhead River basin.

Open A filed a second motion to amend in 2018, in which it asked that claim 41B 10707-00 be decreed as a May 15, 1973 use right with a place of use consisting of the 336.2 acres irrigated with the sprinkler system it built in the spring of 1973.

The DNRC recommended recognition of Open A's claim for sprinkler irrigation on the bench, but suggested an implied claim be created for this purpose using a different Open A right. The DNRC recommended using 41B 10716-00 to generate the implied claim, but this Court dismissed 41B 10716-00 before trial.

Claim 41B 10707-00, as described in the Preliminary Decree, is an appropriate vehicle for recognition of Open A's irrigation on the bench because it includes irrigation in that area as part of its place of use. The correct priority date for this right, based on the date of first use, is May 15, 1973. The source for this right is Albers Slough and the point of diversion is the Hill Ditch.

The Swamp Ditch

Open A filed 41B 10703-00 for water from the Swamp Ditch. It claimed a right decreed to Gerhard Albers in the *Morgan v. Nyhart* decree, Case No. 1053. The district court decreed Gerhard Albers a 100-inch right with a priority date of June 1888. The source was decreed as "water arising in certain swampy or marshy ground situated in the western portion of section 9..." Decree, p. 47. The court stated the source for this right was not tributary to the Beaverhead River.

Walter Van Deren claimed a point of diversion in the SWNWNW of section 9, T6S, R8W. The ditch for this right carries water north-northeast, parallel to and west of

Albers Slough. Open A has historically dropped water from this ditch into Albers Slough and rediverted it through the Hill and Saxon diversions. Walter Van Deren referenced this practice on the claim when he filed it in 1981. Open A used this right to irrigate a strip of land between the Swamp Ditch and Albers Slough, and additional lands via the Hill and Saxon Ditches.

The Preliminary Decree for this right identified 1,612.5 irrigated acres. The DNRC recommended recognition of 1,104 acres, and Open A identified a place of use consisting of 1,096.1 acres. Both the latter recommendations were based on extensive review of aerial photographs and a site visit to the property. The 1,096.1-acre place of use identified by Open A is the most conservative and is consistent with historical use and the layout of the irrigation system on the ground. Although this claim, as described in the Preliminary Decree, included sprinkler irrigated land on the bench, that place of use is covered by 41B 10707-00 and should not be part of 41B 10703-00.

The Preliminary Decree identifies two sources for 41B 10703-00: Albers Slough and Black Slough. The parties disagree over the source for this right. Walter Van Deren stated Albers Slough should not be a source. The objectors contend Black Slough should not be a source because Open A has not historically received water from Black Slough.

Both the original claim filed by Walter Van Deren and the 2009 amendments in the Preliminary Decree reference a point of diversion in section 9. Black Slough is connected to the swampy area in the east half of section 9 where the Swamp Ditch gathers water. That connection has existed since at least 1951 when it was documented by a Bureau of Reclamation Survey in the area. Open A Ex. 67, Bates 3978. The map prepared by the Bureau of Reclamation shows a direct connection between Black Slough and the Swamp Ditch, with a point of diversion in the NESENE Sec 9, T6S, R8W. Given the topography of the area, it is likely a hydrologic connection existed between Black Slough and the Swamp Ditch even before a direct surface connection was established. Regardless, the evidence does not support an arbitrary distinction between Black Slough and other sources down gradient. Black Slough has historically been a source of water for 41B 10703-00.

Claim 41B 10709-00

Open A filed claim 41B 10709-00 for tail water from irrigation in section 15, T6S, R8W. The DNRC reduced the flow rate for this right during claims examination and Open A filed an objection to have the original flow rate reinstated. Open A was the only objector to this right.

The original claim had a flow rate of “up to 1000 miner’s inches for very short periods of time on very erratic schedule.” Original claim form for 41B 10709, ¶ 10. This description makes sense given that section 15 is upstream of Open A and irrigated by the Erbs. Open A’s ability to use wastewater, and the amount of wastewater available, would have depended heavily on the upstream neighbor’s irrigation practices.

The DNRC’s decision to reduce the flow rate was based on application of a statewide standard and was unrelated to actual historical use. No evidence suggests Open A’s original claimed flow rate was inaccurate, and no measurements were taken by the DNRC to justify a flow rate reduction. Accordingly, the 1,000-inch flow rate originally claimed by Open A should be reinstated.

Claim 41B 10710-00

Open A filed claim 41B 10710-00 for tail water running into the Swamp Ditch. The original flow rate for this right was 300 inches. DNRC reduced this flow rate based on the statewide flow rate standard and its assessment of irrigated acreage, which DNRC concluded was less than Open A claimed. CCWSC objected to flow rate and acres irrigated and Geoduck filed an NOIA. Open A contends the original flow rate should be reinstated.

Open A originally claimed 100 acres for this right, but that number is not justified by historical use. Myles VanHemelryck of the DNRC performed a Court-ordered review of this right that included a field inspection. His conclusion was that Open A irrigated 71 acres. Open A’s expert concluded her client irrigated 63.14 acres. The Court finds Open A historically irrigated 63.14 acres using claim 41B 10710-00.

The DNRC reduced the flow rate for this claim from 300 inches to 3.79 CFS (151.6 inches) based on application of a statewide guideline. Claim 41B 10710-00 is

diverted through the Swamp Ditch, which is also used to divert 41B 10703-00, a decreed right for 100 inches. Measurements in the Swamp Ditch show diversion of 300 inches using both claims 41B 10703-00 and 41B 10710-00. Open A contends its claimed flow rate of 300 inches for 41B 10710-00 was overstated and should be reduced to 200 inches to reflect maximum diversion of 300 inches in the Swamp Ditch. Water measurements on the Swamp Ditch show the flow rate of claim 41B 10710-00 is 200 inches.

The period of use and period of diversion for this claim should be April 15 to October 15, in keeping with Open A's other rights diverted from Albers Slough.

Erb Claims

On March 25, 2019, the Erbs filed a *Stipulation and Agreement Regarding Erbs' Claims 41B 88606-00 & 41B 88623-00*. Open A Ranch did not object to the Erbs' claims, so Open A did not sign the agreement. All other parties in this case executed the agreement. The Court issued an order approving the settlement on August 29, 2019.

Erb claims 41B 88606-00 and 41B 88623-00 were added to this case on February 21, 2018 to address a potential decree-exceeded situation with some of Open A's claims. The stipulation amends the priority date and type of right for both 41B 88606-00 and 41B 88623-00 and resolved the decree-exceeded issue with Open A's claims.

The Erbs also request a second point of diversion for 41B 88606-00 to reflect the historic practice of livestock drinking directly from Albers Slough as well as from Drummy 1.

The Erbs attached patents, chain of title research, and various other supporting historical documentation to the stipulation. This documentation provided sufficient evidence to support the requested change of priority date for both claims and the additional point of diversion for 41B 88606-00. The Erb claims should be modified in accordance with the March 25, 2019 stipulation.

V. ANALYSIS

1. Did Open A marshal its water rights?

The term marshaling describes the consolidation of water rights to achieve more efficient irrigation. Many present-day ranches in Montana were assembled from smaller

homesteads. As water users increased the size of their operations, they combined, or marshaled, their newly acquired water rights with their old ones to push larger heads of water more quickly over larger areas.

Although the practice of marshaling water rights is common, it is not frequently discussed in case law. A federal appeals court in Arizona described the process as follows:

[t]he district court in Arizona noted that the Article XI of the Decree allows “stacking” of water by permitting all water allocated to several fields to be stacked together and applied to one field at a time, in order to obtain an adequate head of water for efficient irrigation, so long as the users are in fact entitled to that water.

United States v. Gila Valley Irrigation Dist., 31 F.3d 1428, 1440 (9th Cir. 1994).

Marshaling may involve combination of multiple water rights from different ditches into a single ditch; combination of water rights from different places of use on a single place of use; or use of multiple rights with formerly distinct places of use on the combined places of use for all those rights. Regardless of how marshaling is defined, “the common denominator in all the definitions...is that a change in historical water usage has taken place.” Case 76F-1, Marshaling Order, p. 6, (Oct. 15, 2010).

Changes that occurred before July 1, 1973 were treated differently than today. Until the Water Use Act took effect on July 1, 1973, water users could freely change certain elements of their water rights simply by implementing the change:

The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

§ 89-803, R.C.M. (1947). The Supreme Court has long approved these types of changes. *Head v. Hale*, 38 Mont. 302, 308, 100 P. 222, 224 (1909); *Hansen v. Larsen*, 44 Mont. 350, 353, 120 P. 229, 231 (1911).

The only limitation on pre-July 1, 1973 changes was that they could not cause injury to other water users. The burden of demonstrating was on the party claiming the

injury rather than on the person making the change. *In re Allen*, 2013 Mont. Water LEXIS 6, *7 (Dec. 30, 2013) (quoting *In the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S*, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (1991)). In accord with this rule, modern-day claimants of marshaled water rights do not have the burden of proving lack of injury to someone else, provided marshaling occurred before July 1, 1973. Case 76F-1, Marshaling Order, at 8.

There is substantial evidence Open A marshaled its rights. Staining on most of Open A's flumes shows flow rates well in excess of those initially appropriated at each point of diversion. The *Statement of Water Management* regarding water usage Walter Van Deren attached to his claims references the practice of combining multiple rights at single points of diversion to cover more ground faster. It is well accepted that larger heads of water permit more efficient flood irrigation. Like many irrigators, Open A combined its rights to increase hydraulic head. This practice saved time and reduced labor.

Both Van Derens testified they marshaled their rights. Although this practice was not common, it was common enough to warrant recognition as an established practice resulting in pre-July 1, 1973 modification of Open A's rights. Marshaling occurred among the rights with points of diversion on Albers Slough, between the two rights on the River Ditch, and between Drummy 1 and the River Ditch. This practice occurred for decades, and amounted to a permanent change in irrigation method.

The objectors do not dispute marshaling occurred, but they assert Open A's claims should be decreed as if it did not. Jim Gilman, one of the objector's experts, conceded Open A marshaled its rights but asserted Open A's rights should be decreed as originally claimed by Walter Van Deren.

The objectors offer several arguments to support their contention that Open A's rights should be limited in the manner Walter Van Deren initially claimed them. First, the objectors' experts testified that these statements of claim were among the best they had ever seen. The Court agrees.

Walter Van Deren did a thorough job of preparing claims for the Open A. He attached maps and supporting documentation and was conscientious in his approach to claim preparation. He depicted these rights based on his understanding of how they were used on original homesteads.

Despite this narrow approach, Mr. Van Deren knew his claims did not reflect historical use after the Open A was created from smaller homesteads. To address this problem, he attached a narrative *Statement of Water Management* to each claim. That *Statement* describes how water was used on the Open A after merger occurred and constitutes a more complete description of historical use, including marshaling, than the claim forms alone.

The objectors seek to exploit Mr. Van Deren's approach to claim preparation by limiting Open A to irrigation practices of original homesteaders. While the objectors' argument may be appropriate in cases where land ownership and irrigation practices have not changed over time, that situation does not apply here.

Open A was consolidated from smaller properties before the Van Deren family bought it in 1958. As part of that consolidation, water rights were marshaled and used together to cover more ground than they covered individually. The Van Derens continued this historical practice after 1958 and it continues today. The objectors failed to produce compelling evidence that Open A's rights have been used for the last sixty years in the restrictive way Van Deren filled out his claim forms. They also ignore the *Statement of Water Management* attached to the claims that clearly describes the marshaling of Open A's rights.

The Water Court adjudicates existing water rights as they were used historically. An existing right is a "right to the use of water that would be protected under the law as it existed prior to July 1, 1973." § 85-2-102(12), MCA. Existing water rights are defined by the substantive law in effect when they were appropriated. *Claimant: Lockwood Area Yellowstone County Water & Sewer Dist.*, 2015 Mont. Water LEXIS 12, *7 (June 8, 2015). They can also be defined in accord with lawful changes that occurred before July 1, 1973.

The law in Montana has always contemplated that the extent of a water right is “such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use.” *McDonald v. State*, 220 Mont. 519, 529, 722 P.2d 598, 604 (Apr. 8, 1986). “Beneficial use shall be the basis, the measure and the limit of all rights to the use of water.” *Id.* at 530, 722 P.2d at 605 (emphasis omitted). Historical beneficial use is the yardstick by which all claims are judged. Open A’s rights were marshaled to achieve more efficient irrigation. They should be decreed as they were used.

The two water rights claimed for use through Drummy 2 were 41B 10704-00 and 41B 10705-00. The comments made above about marshaling of Albers Slough water rights in Drummy 1 apply equally to water use through Drummy 2. Because most of Open A’s Albers Slough rights have been used in the same way, they share the same points of diversion and places of use as other rights from that source.

2. *Did the parties meet their burden of proof and overcome the prima facie status of Drummy 1 and 2 rights in the Preliminary Decree?*

Burden of Proof

A statement of claim for an existing water right or an amended claim of an existing right “constitutes prima facie proof of its content until the issuance of a final decree.” § 85-2-227(1), MCA. Anyone seeking to modify a claim or amended claim has the burden of showing by a preponderance of the evidence that the elements of the claim are incorrect. Preponderance of the evidence is a relatively modest standard that requires a party to prove the existence of a fact is more probable than not. *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628. This is the applicable burden of proof for every assertion that a claim is incorrect, regardless of whether the party seeking the modification is an adverse party or the claimant objecting to its own claim. Rule 19, W.R.Adj.R.; *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558; *Dana Ranch Co. v. Montana Attorney Gen.*, 2017 Mont. Water LEXIS 13, *4.

Pre-Decree Amendments

Pre-decree amendments can be made freely before claims have been issued in a Water Court decree. Claimants can make pre-decree amendments without meeting the burden of proof that applies after a decree has been issued. *In re Doll*, 2019 Mont. Water LEXIS 12, *36-38. Claimants seeking a pre-decree amendment are only required to comply with the process described in Rules 34(a)-(f), W.R.C.E.R.

Liberal treatment of pre-decree amendments allows claimants the opportunity to clean up statements of claims that may have been filed incorrectly or with insufficient supporting information and helps the Court issue better decrees with more accurate water rights. All water users are provided with notice of these amendments via the decree and can object to pre-decree amendments during the objection period. *In re Doll*, 2019 Mont. Water LEXIS 12, *36-38. After a decree has been issued, amendment can only occur by filing an objection or a motion to amend.

The pre-decree amendment process is intended to provide water right owners with an opportunity to modify their claims to better reflect historical use. It is not intended to enable claimants to obtain water rights that were not timely filed. *In re Dana Ranch Co.*, 2015 Mont. Water LEXIS 6, *5-6. Water users were required to file statements of claims describing existing water rights before July 1, 1996. § 85-2-221, MCA. Failure to file a statement of claim by the deadline resulted in a conclusive presumption the water right was abandoned. § 85-2-212, MCA; *In re Dana Ranch Co.*, 2015 Mont. Water LEXIS 6, *5. The amendment process does not create a back door allowing claimants to circumvent this filing deadline.

The Preliminary Decree did not accurately describe water rights diverted through Drummy 1 or 2. The most significant problem was irrigated acreage, which Open A exaggerated in its 2009 amendments and sought to correct in its 2018 amendments. Despite problems with the 2009 amendments, Open A provided substantial evidence at trial to support its contention that the correct acreage for the Drummy 1 and 2 rights was 2,507.6 acres. This acreage figure was conservative and credible and fits the boundaries of the system Open A uses for irrigation. This evidence was corroborated by the report

and testimony of DNRC employee Myles VanHemelryck, which was thorough and credible.

Open A's reliance on the Wood notice of appropriation for rights in Drummy 1 and 2 was misplaced. As already discussed above, the Wood notice of appropriation described something other than what the Open A claimed, was not consistent with language in the *Morgan v. Nyhart* decree, and did not match landmarks on the ground. Open A's attempt to hitch its wagon to the Wood notice is based on speculation. Open A's alternative claim for the Drummy rights referenced in the *Morgan v. Nyhart* decree was more credible. The decree references Albers Slough and the Drummy 1 Ditch. The decree was born of conflict between parties competing for water from Albers Slough and represents a more reasonable basis for the second Drummy 1 right than the Wood notice.

3. What water rights were historically diverted through the Hill and Saxon Ditches?

Although the two rights initially used through the Hill and Saxon Ditches were 41B 10701-00 and 41B 10702-00, water rights in these ditches were marshaled with others from Albers Slough and share points of diversion and places of use with those rights. The discussion of marshaling in the Findings of Fact above applies equally to diversion of water through the Hill and Saxon Ditches and does not need to be recited again here.

4. Did the parties meet their burden of proof and overcome the prima facie status of the Hill and Saxon rights in the Preliminary Decree?

Open A proved that marshaling occurred on its property both before and after 1958. As with other Albers Slough rights, the objector's assertion that Open A should be limited to use only on the homesteads for which these rights were originally appropriated is not supported by historical use. Open A's assertions regarding the place of use for the Hill and Saxon rights were supported by a preponderance of the evidence and overcame the prima facie status of the 2009 amendments. That evidence is discussed at length in the Findings of Fact supplied above.

5. *What water rights were historically diverted through the River Ditch?*

Open A claimed two rights in the River Ditch totaling 700 inches. Both are based on rights decreed to Gerhard Albers in *Morgan v. Nyhart*. The objectors challenged 41B 10708-00, decreed to Albers for use of the Beaverhead River, because they thought the place of use too large. The objectors asserted this right was limited to lands owned by Albers at the time of the decree. As already discussed, this attempt to return water usage on the Open A to homestead-era practices ignores the marshaling of water rights that has been occurring for decades. Open A Ranch supplied compelling evidence to support its contentions regarding the place of use for both rights.

The objectors challenged the legitimacy of the second River Ditch right, claim 41B 10701-00. They asserted it was not decreed for water from the Beaverhead, and that Open A was not aware of its existence until after its original claims were filed. These arguments were offset by several important considerations.

The first was the Method Document prepared by the BOR, which showed a May 1, 1876 right for 400 inches being diverted through the River Ditch. The only right in the vicinity with this priority date and flow rate was the Albers right originally decreed for Albers Slough. Water commissioners administering the Beaverhead acknowledged diversion of 700 inches by Open A at the River Ditch for many years, and there was no evidence these diversions were ever curtailed at the request of the present objectors, or anyone else. The continuous, uninterrupted beneficial use of a May 1, 1876 400-inch water right at the River Ditch for many years supports Open A's claim.

Finally, the objectors' arguments were did not overcome the prima facie status of the 2009 claim amendments, which, like the Method Document, identified the Beaverhead River as a source for the May 1, 1876 Albers right. The prima facie status of amended claims is conferred by statute, which provides "an existing right...or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree." § 85-2-227(1), MCA.

The battle over claim 41B 10701-00 was typical of many water rights cases. Conflicting evidence was woven into different stories by gifted narrators. Ultimately

however, Open A produced enough evidence to show it diverted and used 700 inches at the River Ditch and this fact, combined with the Method Document and the legislature's decision to cloak water rights and pre-decree amendments thereto with prima facie status, was sufficient to prevent termination of claim 41B 10701-00.

6. *Did Open A perfect a use right for sprinkler irrigation of the bench before July 1, 1973?*

Prior to July 1, 1973, there were two methods of perfecting a water right: (1) a claimant could post a notice at the point of diversion and file a notice with the county clerk pursuant to statute, or (2) the claimant could simply put the water to beneficial use. *Montana Trout Unlimited v. Montana Dep't of Natural Res. & Conservation*, 2006 MT 72, ¶ 5, 331 Mont. 483, 133 P.3d 224; *Murray v. Tingley*, 20 Mont. 260, 268-269, 50 P. 723, 725 (1897). The latter is commonly referred to as a "use right."

Use rights were perfected when the claimant actually diverted water and put it to beneficial use. *Murray*, 20 Mont. at 268-269, 50 P. at 725. Use rights perfected after 1885 do not "relate back" to the date the claimant began work on the ditch, headgate or other infrastructure. *Id.* Use rights are the purest example of a water right created through beneficial use.

The Water Use Act took effect July 1, 1973 and prescribed the exclusive means to appropriate water thereafter. As a result, use rights could not be perfected after that date. *See*, § 85-2-301, MCA.

Open A asserts a right to use water on the bench west of the Beaverhead. It contracted for construction of a sprinkler system in the spring of 1973 and began irrigating with that system on May 15, 1973. The objectors assert Open A built the system but did not use it for years.

The evidence supports substantial completion of construction and use of water on the bench before July 1, 1973. Open A kept records of its payments to the irrigation contractor and records of payments to high school-age laborers who moved pipe after the system was in operation. Most of these payments occurred before July 1, 1973. Both Robert and Walter Van Deren testified that they moved pipe or irrigated using the system

before July 1, 1973. DNRC personnel drew a map of the system for the water resources survey based on a visit in the spring of 1973. Although there was evidence the system might not have been used in some years, that evidence was not strong enough to overcome proof that the system was constructed and put into operation before the July 1, 1973 deadline.

7. *Should Open A's rights have volume caps?*

Montana does not require placement of a volume on water rights quantified in the adjudication. Nevertheless, volume can be decreed where a water judge determines it is necessary “to adequately administer the right...” § 85-2-234(6)(b)(iii). Under this statute, “a water judge has the discretion to determine whether volume is necessary.” *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 25, 383 Mont. 205, 369 P.3d 1034. Determination of volume is a question of fact, not law. *Eldorado*, ¶ 21.

The objectors, particularly Geoduck, argue Open A should have volume limits attached to its rights. The Water Court has used volume limits to prevent unlawful expansion of marshaled rights. Expansion can occur when: i) senior rights are combined with other rights; ii) the combined rights are used on areas larger than their original footprint; and iii) the amount of water diverted in conjunction with senior rights is increased beyond historical limits to cover the larger area. Such an expansion may cause hardship for neighboring junior users, hence the need for volume caps in some cases.

Here, however, Open A's rights have been marshaled for years without complaint from neighbors and without imposition of volume limits by water commissioners who oversaw distribution. Open A claimed volume for some of its rights but did so based on estimates rather than actual measurement. The objectors attempted to quantify volume using similar techniques and reached different results. Although volume can be calculated or inferred from less-than-perfect evidence, such an approach should be used cautiously in the absence of prior disputes over distribution, or a clear history of expansion which requires imposition of limits on volume.

Volume limits are a double-edged sword. Properly defined and supported, they prevent impacts to other water users. Conversely, arbitrary use of volume injures a

claimant and confers a windfall to neighbors by imposing limits on use that did not exist historically. The risk of harm increases where volumes are calculated arbitrarily.

For these reasons, the Court declines to limit use of Open A's rights by volume. Volume limits have never previously been imposed and selection of volume limits in this case would be arbitrary.

8. *Should Open A's request for implied claims be approved?*

Open A seeks approval of two implied claims. The first was for water from Black Slough for irrigation of its sprinkler ground on the bench and the second was for additional water from the Beaverhead River at the River Ditch.

Implied claims may be generated from a single original claim if three criteria are met. A party seeking recognition of an implied claim must (1) show evidence of two or more water rights in the original claim form or the material submitted with the claim form; (2) show evidence of historic use corroborating the implied claim; and (3) avoid causing a change to historic water use or increase the historic burden to other water users. *In re Climbing Arrow Ranch*, 2019 Mont. Water LEXIS 1, *4-5 (citing *In re Foss*, Order Adopting and Amending Master's Report, Case 76HF-580, 2013 Mont. Water LEXIS 17, *32 (Jan. 31, 2013)).

The implied claim test strikes a balance between recognizing existing water rights and forbidding the creation of water rights that were forfeited by missing the statutory claim filing deadline. *In re Climbing Arrow Ranch*, at *5. Missing the claim filing deadline results in a conclusive presumption of abandonment. § 85-2-226, MCA; *Matter of the Adjudication of Water Rights in the Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992).

Open A demonstrated that it historically used the additional water it is seeking via its two implied claims. The problem is that the original claims filed by Walter Van Deren do not contain enough information to suggest he was seeking additional water rights from either Black Slough or the River Ditch. Van Deren's claims did not describe the two additional water rights Open A now seeks.

Open A tries to get around this problem by pointing to the amendments which followed their original claims. The latter argument can be disposed of easily. Pre-decree amendments, even though they have prima facie status, cannot be used to resurrect late-filed claims, and the Water Court does not look to such amendments to determine whether an implied claim should be recognized. To do so would render the prohibition against late-filed claims meaningless by allowing litigants to revive lost claims using amendments made long after the filing deadline passed. Accordingly, the narrow enquiry before the Court is whether the original claim, or its supporting documents, reference two water rights rather than one.

Open A diverted additional water at the River Ditch when it could, but that historical practice is not enough to recognize an implied claim. If it were, then any evidence of historical use would result in an implied claim regardless of the claimant's intent at the time of the statutory claim filing deadline.

To get around the prohibition against late-filed claims, Open A needed to show that it owned an additional right from the River Ditch using evidence in one of its original, timely filed claims. There is no credible evidence in its original claims that Open A intended to assert multiple rights in a single claim.

None of Open A's claims from the Beaverhead reference an additional right from that source, nor do they refer to diversion of extra water from the Beaverhead River. There is no credible evidence that Open A's original claims or supporting documents combined two water rights into a single claim. In practical terms, the test for an implied right is whether the original claim or the documents filed to support it demonstrate an intent to claim two distinct water rights. Open A fails this test.

The same analysis applies to Open A's claim for an implied right from Black Slough. Although Open A asserts that three of its rights reference sprinkler irrigation of benchlands, none of these rights suggest Open A owned, or intended to claim, an additional right for Black Slough.

As an example, one of the three rights relied on by Open A, claim 41B 10700-00, was for a May 1, 1870 right decreed to Gerhard Albers from Albers Slough via the Hill

Ditch. Although documents attached to the claim reference other rights, none of them are from Black Slough. Claims 41B 10701-00 and 41B 10702-00 tell the same story. Both are for decreed rights from other sources and neither mention a separate right from Black Slough.

Although all three of the foregoing claims reference sprinkler irrigated lands on the bench, that reference is not enough to infer that Open A intended to assert, or had, an additional right from Black Slough.

VI. CONCLUSIONS OF LAW

Open A historically marshaled its rights.

Four water rights were originally appropriated for use through Drummy 1 and 2. These rights were marshaled with other Albers Slough rights and used interchangeably through multiple points of diversion. Abstracts describing these rights are attached to this order.

The Hill and Saxon Ditches were also used to divert water from Albers Slough. The Albers Slough rights used in these ditches were also diverted through Drummy 1 and Drummy 2.

Open A met its burden of proof regarding irrigated acreage for its rights. Abstracts describing these rights are attached to this order.

Two water rights were historically diverted and used through the River Ditch. The first was 41B 10708-00, which had a flow rate of 300 inches. The second, 41B 10701-00 was moved from Albers Slough to the River Ditch before completion of the Method Document. The objectors who sought termination of this right did not meet their burden of proof. Like Albers Slough, water rights in the River Ditch were marshaled and used on the same place of use. Abstracts describing both rights are attached to this order.

The historical source of water for 41B 10703-00 was Black Slough.

The correct elements for claims 41B 10709-00 and 41B 10710-00 are set forth in the abstracts attached to this order.

Open A perfected a use right for sprinkler irrigation of the bench before July 1, 1973.

Volume is not a required element for water rights in Montana, and the objectors did not prove that volumes are necessary for proper administration of Open A's rights.

Open A's request for recognition of implied claims is denied because it could not credibly connect those claims to its original claims or supporting documentation.

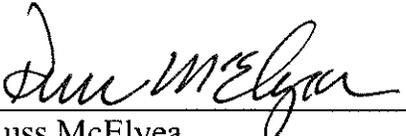
The Erbs supplied sufficient evidence to overcome the prima facie status of their claims by a preponderance of the evidence. Their claims should be amended to reflect March 29, 1884 filed rights and 41B 88606-00 should have an additional point of diversion to reflect historic use of Drummy 1 for livestock watering.

VII. CONCLUSION AND ORDER

Open A's water rights will appear in the Final Decree for Basin 41B as shown on the abstracts attached to this order. Open A claims 41B 10716-00 and 41B 10720-00 are dismissed in keeping with this Court's previous summary judgment decision.

Erbs' claims should be amended in accordance with the March 25, 2019 stipulation.

DATED this 8th day of June, 2020.



Russ McElyea
Chief Water Judge

Service Via Email:

William C. Fanning Esq.
Fanning Law PLLC
300 N Willson, Suite 3007
Bozeman, MT 59715
(406) 220-2805
william@fanninglawpllc.com
becki@fanninglawpllc.com
accounts@fanninglawpllc.com

Abigail R. Brown
ARB Law Group
7 West 6th Avenue, Suite 512
Helena, MT 59601
(406) 457-5494
(406) 206-5165 (Fax)
office@mtwaterlaw.com
abby@mtwaterlaw.com

John E. Bloomquist
Rick C. Tappan
Bloomquist Law Firm, PC
3355 Colton Drive, Suite A
Helena, MT 59602
(406) 502-1244
blf@helenalaw.com

Michael J. L. Cusick
Cusick, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
(406) 587-9079 (Fax)
office@cmrlawmt.com