Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

FILED
01/03/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
41H-0034-R-2020
Nordlund, Julia
27.00

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
PRELIMINARY DECREE

* *

CLAIMANTS: Anna Deal; Glen Deal OBJECTORS: Barbara Brewster	**CASE 41H-0034-R-2020** 41H 115497-00 41H 30023115

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve 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

BACKGROUND

Claims 41H 115497-00 and 41H 30023115 appeared in the Preliminary Decree for the Gallatin River (Basin 41H) and received Objections from Barbara Brewster ("Brewster"). The claims are owned by Anna Deal and Glen Deal ("Deals"). The claims received no DNRC issue remarks, counterobjections, or notices of intent to appear. On November 10, 2020, the Court consolidated these claims into Water Court Case 41H-0034-R-2020. The case proceeded on a hearing tract. A hearing was held on April 13, 2022. Due to inclement weather, the hearing was shortened from 2 days to 1.5 days. The hearing was held in Bozeman, Montana, at the Montana Water Court Courthouse. Water Master Julia Nordlund presided; Judicial Assistant Elizabeth Draper was in attendance for the Water Court; Benjamin Sudduth represented Brewster; Rick Tappan represented Deals.

The issue at hearing was whether claims 41H 115497-00 and 41H 30023115 have been abandoned. The parties did not agree on the date the claims had last been used.

On June 30, 2022, both parties submitted their Proposed Findings of Fact, Conclusions of Law.

FINDINGS OF FACT

1. The statements of claim for each of the captioned claims were validly filed by Donald P. Ryen.

2. The Deals are now the owners/claimants of the captioned claims.

3. Claim 41H 115497-00 is a decreed right from Dry Canyon Creek for 179.52 gallons per minute to irrigate 60.00 acres.

4. Claim 41H 30023115 is a decreed right from Ross Creek for 421.87 gallons per minute to irrigate 60.00 acres.

5. Neither claim 41H 115497-00 nor claim 41H 30023115 appeared in the Preliminary Decree for the Gallatin River with issue remarks.

6. Brewster filed timely objections to claims 41H 115497-00 and 41H 30023115.

7. Donald Ryen is a predecessor in interest to the Deals. Ryen held both claims and operated the Deals' property for many years prior to filing the statements of claim. Brewster 3:26:15-3:26:33; Weed 11:10-11:10:30; Brewster-1 1-2; Brewster-3 2-3.

8. After Ryen passed away in 1983, ownership of the water rights was transferred to various persons and entities associated with Ryen's immediate family: Lillian Ryen (Ryen's wife); the Donald Ryen Estate; Lyle Ryen; the Lillian M. Ryen Estate; and the Lloyd & Doris Ryen Living Trust. The Lloyd & Doris Ryen Living Trust was the last entity to own claim 41H 115497-00, and the Lillian Ryen Estate was the last entity to own claim 41H 30023115 before the Ryen property was conveyed to the Deals. Brewster 3:28-3:28:30, 5:20:50-5:21:10; Brewster-1 35; Brewster-2 44; *see generally* Brewster-1; Brewster-2; Brewster-3.

9. The Deals purchased the Ryen property in 2017. Brewster 3:26:35-3:26:48; A. Deal 2:43:30-2:43:44; G. Deal 3:21:20-3:21:30.

10. The water rights in question function as follows:

11. Water from water rights 41H 115497-00 and 41H 30023115 is conveyed from points of diversion on Ross and Dry Canyon Creeks. Brewster 4:31:32. The Ross Creek water crosses into Dry Canyon Creek, as a natural carrier and then out the west side at the Brewster-maintained point of diversion.

12. Both Deals' claims 41H 115497-00 and 41H 30023115 use a ditch generally known as the Lee-Parker-Ryen Ditch. Brewster 3:22-3:23. The origin and initial point of diversion of the Lee-Parker-Ryen Ditch is on Ross Creek in the NENENW of Section 16 in Section 16, Twp 1N, Rge 6E in Gallatin County.

13. Brewster and Teyck Weed ("Weed") also utilize the Lee-Parker-Ryen Ditch for their Ross Creek and Dry Canyon Creek claims.

14. Brewster and Weed and the Deals all claim this location as a point of diversion. Brewster 3:22:45-3:23, 4:56-4:56:30; Weed 11:09-11:09:15; Brewster-4 8; Brewster-5 5. This initial point of diversion of the Lee-Parker-Ryen Ditch is on property owned by Mooreland Ranch, LLC ("Mooreland Ranch").

15. Claim 41H 30023115 was decreed with a point of diversion in the SWNESW of Section 16, Twp 1N, Rge 6E. Where the Deals' point of diversion was decreed, it would not be possible to divert water from Ross Creek. Additionally, the original point of diversion identified by the statement of claim was downstream of the Deal property. The original place of use as identified by the "1923 decree" was also downstream of the Deal property. Brewster 3:23-3:25:30, 5:02-5:04. However, the parties agree that this legal land description does not accurately describe the headgate for the Lee-Parker-Ryen Ditch which both Deals' claims use.

16. Ms. Brewster lives east and south of the Ryen/Deal property, originally purchasing her property in 1966. Brewster 9:9:35-38.

17. The Gibson place also borders the Deal and Brewster properties. Patricia Gibson owned the parcel of land directly east of the Deals' place of use and south of Brewster's property where the ditch passes.

18. The current diversion and headgate structure at the initial point of diversion for the Lee-Parker-Ryen Ditch was constructed by Weed in 1975 with the assistance of Wahl Construction and Llos Parker.

19. Once water from Ross Creek or Dry Canyon Creek enters the lower Lee-Parker-Ryen Ditch, the ditch heads to the southwest through Brewster and Weed's main residence and building area. The Lee-Parker-Ryen Ditch is not very large as it crosses through the residence area, and the ditch can be seen from the kitchen window of Brewster and Weeds' house. The ditch continues south past the house to the boundary line with the parcel owned by Gibson and Llos Parker.

20. Once leaving the residence area, the extension of the Lee-Parker-Ryen Ditch that was referred to as the "Fence-line Ditch" or "Section 17 Ditch" followed the section line almost to the northeast corner of the Deals' property. Other than the fence-line stretch of the Lee-Parker-Ryen Ditch, there are no other ditches or conveyances that historically conveyed either Ross Creek or Dry Canyon Creek water to the NE corner of the Deals' place of use. Brewster 4:27:45-4:28, 4:34-4:34:30, 4:55-4:56, 4:59:45-5:01; Brewster-4 8; see also Brewster-1 6; Brewster-3 7-8; Brewster-5 5.

21. The parties dispute what happens to the water at the point after the Brewster property. Brewster asserts any overflow of the water in the Lee-Parker-Ryen Ditch in the residence area was diverted onto the Gibson/Parker parcel and none of the water flowing in the lower Lee-Parker-Ryen Ditch flowed past Brewster and Weed's barn into the Fence-line Ditch. Brewster 3:22:45-3:23, 4:26-4:28, 9:25-9:28, 10:01-10:02, 10:06-10:08, 10:55:50-10:58:30; Weed 11:18:30-11:20:39, 11:21:25-11:21:40, 11:24:15-11:24:40; Brewster-4 8; Brewster-1 6; Deal-6 3; Deal-8. Deals assert the water flows into the Fence-line Ditch and flows to the Deals' property.

22. In 1999, the DNRC conducted a field investigation on Brewster's property and the DNRC noted several issues with the Fence-line Ditch. In the report, Brewster is noted as commenting that the Ryens had not used the ditch that "runs along the north section 17 section line." The report also notes Ryen's son, Jack Ryen, stating that the Fence-line Ditch "ends as the beginning for the claimed field and no spreader ditches currently exist." In a caption to a photo of the Fence-line Ditch, Jack said "that where the brush ends so does the ditch and there are no ditches beyond that point left anymore." (The point being what is now the Deal place of use in the NW of Section 17). *See* Brewster-4 6-27; Brewster 4:49:15-4:51.

23. A hydropower facility exists on Ross Creek for the purposes of generating electricity and has been in operation since the mid-1990s. The water rights underlying the rights to divert water for the hydro plant are owned by Pat McReynolds. The facility was started by Pat McReynolds' uncle, Clark Ryen. Howe 2:17:30-2:18:10; *see* generally Brewster-12.

24. The water from Ross Creek is diverted "quite high" in the Bridger Mountains and is conveyed to the turbine plant immediately adjacent to the home of Charles "Chum" Howe. The water is returned to Ross Creek in the immediate area of the power plant which is located next to Howe's house. The point of diversion for the water rights underlying the Ross Creek hydropower plant were historically diverted near Howe's house and were associated with an old sawmill. Howe 2:18:20-2:20. In process of moving the point of diversion for the Ross Creek hydropower claims during the 1980s

and 1990s, there were a series of cases and hearings that determined the priorities of the claims involved against those water rights that were affected by the proposed change. Those water rights that were affected by the proposed change were located in the "bypass area" of the proposed hydropower plant. The "bypass area" is the stretch of Ross Creek the diverted hydropower water bypasses before being returned to the creek. There are multiple historical points of diversion of water rights in the bypass area, including the Lee-Parker-Ryen Ditch. Howe 2:21:50-2:22:30; Brewster 5:10-5:14; see also Brewster-12 30-35.

25. In a stipulation related to the one of the cases dealing with the hydropower claims, the parties agreed that the Ross Creek hydropower plant would be limited to 500 miner's inches. Brewster, the Howes, and Gibson were the only parties with water rights that were part of the associated stipulation and negotiated to have their flow rates included in the bypass area. The Deals' water rights are not defined or included with the bypass area, nor were any parties associated with the Deals' water rights part of the case. Howe 2:24:30- 2:28; Brewster 5:11:30-5:12; *see generally* Brewster-12.

Lay Witness Testimony

26. **Edward Bryan**

27. Edward "Ted" Bryan has lived in the Springhill area for the past 36 years. During his time in the Springhill area, Mr. Bryan has grazed cattle and leased grazing land from multiple landowners in the area including Brewster and the parcel just to the south of Brewster and Weed. Mr. Bryan has not leased grazing land from the Deals or their predecessors in interest, but Mr. Bryan has leased grazing ground from Brewster and Weed since approximately 1990 and continues to do so to this day. Bryan 1:16:30-38, 1:17-19; see also Brewster-15.

28. In his time grazing on the Brewster and Gibson parcels, Mr. Bryan became familiar with the Fence-line Ditch. Mr. Bryan stated that the ditch was "very large," and it was hard to say what it was used for. In all his time around the Fence-line Ditch, Mr. Bryan never saw water from Dry Canyon Creek or Ross Creek in the ditch being conveyed to the Deals' place of use. Mr. Bryan also never saw anyone working or

conducting any sort of maintenance on the ditch. Bryan 1:20-1:21:30, 1:22:50-1:23:10, 1:25:45-1:26:00, 1:32:20-1:32:40

29. **Betty Biggs**

30. Betty Biggs has lived in the Springhill area since 1955. In 1955, Ms. Biggs lived at the property now owned by Brewster. Ms. Biggs and her husband later leased the Brewster property until March of 1964. Brewster 13.

31. Ms. Biggs did not see water in the Fence-line ditch in 1955 and states there was no use or maintenance of the ditch at that time. She also never saw irrigation on the property now owned by Deals. *Id.*

32. **Charles Howe**

33. Charles "Chum" Howe has lived in the Springhill area for 39 years. Howe 2:31.

34. Mr. Howe was present in previous court proceedings involving claims in the area including Water Court case 41H-273. The Ryens were not party to this case or stipulation. *Id.*

35. As a result of one of the cases dealing with the hydropower claims, the Water Court added an information remark to each of the relevant hydropower claims that identified the specific claims that were included in the bypass area and were not to be affected by the operation of the hydropower plant. The Deals' Ross Creek claim, 41H 30023115, is not included within the information remark, and thus the claim is not included in the bypass area. As a result, there is no water available for the Deals to divert from Ross Creek in the bypass area flow. Howe 2:31-2:31:15.

36. **Rob Brownell**

37. Rob Brownell has lived in the Springhill area for 43 years. During the early 1960s, he was familiar with the area, but became more intimate with the property in the 1980s when he leased the Gibson property. Brownell 2:55-2:56,

38. Mr. Brownell recalls seeing the Fence-line Ditch, but he never saw any water in the ditch nor saw any maintenance performed on the ditch. Brownell 2:56:15-2:56, 2:57-2:58:45, 3:13:30-3:14.

39. Mr. Brownell referred to Exhibit Brewster 14 when he said the ditch appears incapable of carrying water. He stated that the ditch looks the same year after year and becomes more filled in. *Id. at* Brownell 3:01-3:02, 3:03:20-3:04:40.

40. Mr. Brownell stated that he has never seen irrigation where the Deals' property is now residence area. However, Brownell did recall seeing water in the Lee-Parker-Ryen Ditch pass through the Brewster and Weed's residence area and into the Gibson parcel to irrigate. Brownell 3:00-3:01, 3:02-3:03.

41. **Barbara Brewster**

42. Brewster has lived at her current address since 1966. She married Teyck Weed in 1974 and they ran beef cattle, hayed, and leased cattle on their property since that time. Brewster has Ross Creek and Dry Creek water rights which they have consistently irrigated with except for times when erosion and conflicts with the hydro dam prevented them from doing so.

43. Brewster testified she has no personal knowledge of the Deal property prior to 1966 and no evidence WRS is not accurate. *See* Brewster 9:5:32-36; 9:6:00-8:45. Brewster got divorced in 1971 or 1972 and at that time split her herd of 100 pairs with her ex-husband. *Id.* at 9:13:43-14:13. In 1974 or 1975, Brewster and her new husband Weed moved to the east coast for Weed's job. Brewster 9:28:00-29:55. Weed would come back to Montana for approximately 1 months during the year, whereas Brewster would spend 4-6 months of each year in Montana. *Id.* This lasted until 1981. Brewster 9:30:48-56.

44. From 1974-1981, Brewster lived on and off out of Montana, on the East Coast. During this time, Rob Brownell was leasing the Brewster place. *Id.*

45. Brewster's claim on Dry Creek is junior to Deals' claim, however Brewster uses it and has never received a call from Deals or Ryens. Brewster 5:20:20-5:35:35.

46. When Brewster and Weed maintained the headgate at the point of diversion for their claims, Ryens declined to contribute financially or physically. Brewster 4:16:45-4:17:10.

47. In the hydro power case, Brewster's claim received an information remark stating several claims could not be deprived of water through the hydro dam's usage. Deal's claim numbers are not included in the list of claims. Brewster 5:12:30-5:14,5:18:30-5:20, 5:28:45-5:29:30

48. There is only one ditch that could convey water from Dry Canyon and Spring Creek to the Deals' property, the Fence-line Ditch. The Fence-line Ditch travels through Brewster's property. Brewster stated that the ditch stops at her barn and any overflow water flows directly south, to the Gibson place. Brewster 3:22:45-3:23, 4:26-4:28, 9:25-9:28, 10:01-10:02, 10:06-10:08, 10:55:50-10:58:30;

49. **Walker "Teyck" Weed**

50. Mr. Weed is married to Brewster and has lived in the Springhill area for 49 years. Weed 11:05-11:08.

51. Weed echoed Brewster in that when he has maintained ditches and cleans Dry Creek, Ryens would not help out or pitch in. Weed 11:09:30-11:10, 11:12:40-11:14, 11:27-11:28, 12:09-12:10;

52. Weed has never witnessed irrigation from or water in the Fence-line Ditch and stated that the ditch is incapable of holding any water. Weed also stated that the Deals have no other way of getting water from Dry Canyon without the Fence-line Ditch. Weed 11:18:30-11:20:39, 11:21:25-11:21:40, 11:24:15-11:24:40.

53. Weed also stated that the Deals had never spoken to him regarding irrigation prior to this case. Weed 11:12:30-11:14, 11:21-11:21:15, 12:07-12:09.

54. **Lloyd Ryen**

55. Lloyd Ryen is one of Don Ryen's sons. He grew up on Deals' property.

56. Mr. Ryen left the property in 1964, came back for 2 years for college, was drafted into the Vietnam War, and then returned in 1970. L. Ryen 1:16:00-18:25.

57. Mr. Ryen recalls some irrigation on their crops when he was young. When he was growing up his family tried irrigating the property, raising wheat, hay, barley, grains. *Id.* at 1:18:50. Ryen testified that his father tried raising peas in the early 1950s

but doesn't know why that was terminated. *Id.* at 1:18:50-19:33. He stated that they attempted to flood irrigate, but the ground was sloped.

58. Mr. Ryen's parents got a divorce in 1981. L. Ryen 1:21:00-07. The divorce had an effect, splitting the family up over the divorce; his father sided with a couple of the brothers and wrote the rest of the family out of his will. *Id.* at 1:21:05-32. His mother kept the property owned by the Deals under the divorce settlement. Ryen 1:21:33-55.

59. Mr. Ryen testified his father left the property on his own accord, prior to his death in 1983. L. Ryen 1:23:47. His brother Lyle was working the property, and Lyle inherited the machinery. *Id.* at 1:24:05. Mr. Ryen similarly testified that Lyle entered into a lease agreement with his mother to work her property and raise crops as best he could. *Id.* at 1:24:29. However, Lyle is dyslexic, and reading manuals and corresponding them to herbicides and planting techniques was not his way. *Id*. at 1:25:29.

60. After the father died, Lyle's lease with his mother ran out. The oldest brother, Robert, lived in Arizona, and neither he nor Lloyd had any farm equipment. Ryen 1:25:30-27:04. Mr. Ryen testified his brother Lyle got a divorce with his wife Megan, and that was when he stopped farming the property. *Id.* at 1:29:20. At that point, another brother Jack got involved with planting crops until approximately 1991. *Id*. at 1:29:51. Jack and his son tilled the ground and planted crops and hayed for a few years. *Id*. at 1:27:04. Jack sold his property in 1999 and moved to South Dakota and subleased the ground to the neighbor. *Id*. at 1:27:31 50. The haying was done by Robert Biggs in the last years before the mother's passing in 1999 and for a couple of years after that. *Id*. at 1:30:52.

61. Mr. Ryen knew of no attempts by Lyle to irrigate. He explained that Jack dryland farmed and had no interest in irrigating because he did not like irrigation. Of the Ryen brothers, Lyle and Jack were the only ones that used the Deal property for agricultural purposes. None of the crops that were raised on the Deal property were irrigated because getting the water to the place of use was a "horrendous job." The only time that any Ryen tried to irrigate the place of use was 1966 or 1967 when Donald Ryen "attempted to irrigate." Mr. Ryen never saw any irrigation equipment on the Deal parcel

such as handlines or wheel lines. L. Ryen 1:47:08-1:47:20, 1:51:20-1:52, 1:53:30-1:54, 1:54:45-1:55, 1:55:30-1:56, 2:01-2:01:30; Brewster 3:28:30-3:29:05.

62. Mr. Ryen testified remembering his father filing the 1981 statements of claim. *Id*. at 1:31:00-35. However, his father didn't discuss a lot of the farming business with the kids. *Id*. at 1:31:50.

63. Mr. Ryen testified he has spent upwards of $10,000 in 1996 to defend the water rights when the subdivision at Springhill school had filed suit for the Ross Creek water rights the Ryen's had filed for. *Id*. at 1:32:52. Mr. Ryen testified he retained counsel during 1996 into 1997. *Id*. at 1:33:30-34:00.

64. **Megan Spring**

65. Megan Spring lived at the Deal's property in the early 1980s when she was married to Lyle Ryen. Ms. Spring was married to Lyle Ryen from 1984 to 1996.

66. Ms. Spring testified that the Ryen brothers did not get along.

67. Ms. Spring recalls seeing irrigation pipes and handlines on the property, but she testified that they were never used while she lived and worked there. Because milking was Lyle's primary occupation, Lyle "did not have the time to farm"—it was too much work. Lyle never irrigated because he had no time to irrigate. Megan did not see any irrigation on the Deal property while see lived on it. Spring 2:27- 2:28, 2:31-2:32.

68. Ms. Spring Testified that Lyle Ryen never told her he intended to not use irrigation water on the property and never intended to get rid of irrigation water on the property. Spring 2:26:10-40. It is Ms. Spring's understanding the Ryen family never sought to abandon their water rights, they just had a hard time getting the operation going, because there was not enough manpower or time to irrigate during the 1980s. With no children to help, there was no time to irrigate. Spring 27:07-28:12.

69. **Anna Deal**

70. Anna and Glen Deal moved to the Springhill property, purchased from the Ryens, in 2017. The property had been listed for sale for quite some time.

71. Deals purchased the property to plant apple trees for their cider business.

In 2021, Ms. Deal walked the Fence-line ditch and noted the Fence-line ditch was muddy and grass appeared to be laying down. However, Ms. Deal never saw actual water standing or flowing in the ditch.

72. Ms. Deal also explained the Deals believed that "garbage" had accumulated in one of their ditches. All ditches south of the property line with Brewster and Weed were "faint." Deal 2:54:45-2:57:30. 2:58:20-2:59, 3:07:30-3:08; *see also* Deal-18.

73. Ms. Deal never visited the Dry Canyon Creek headgate nor the Ross Creek headgate.

74. **Glenn Deal**

75. Mr. Deal confirmed that their property was on the market for approximately 4 years before the Deals purchased it. G. Deal 3:21:15-58.

76. Mr. Deal testified that they decided to drill a well to irrigate their apple trees. G. Deal 3:28:06-29:32.

77. Mr. Deal testified he has been up to the corner of the Section 17 ditch as it enters the Deal property; the ditch is very obvious, and water is making it through the area and branching when it hits the Deal property corner and fans into ditches on the Deal property across the 78 acres. Additionally, when walking across the property, small ditches fan across the area, "deep spokes" ditches. G. Deal 3:30-31:50.

78. Mr. Deal went up to the Ross Creek point of diversion with Pat McReynolds in approximately 2018. G. Deal 3:34:00-25. He went up prior to receiving Ms. Brewster's objection. G. Deal 34:30-35:00. At the Ross Creek diversion Mr. Deal testified he did not see a weir or any type of staff gauge or water measurement device. G. Deal 3:35:47-36:11.

79. Mr. Deal testified it was obvious water flows onto the property in the springtime given the "spokes" into the property at the end of the Section 17 ditch. G. Deal 3:37:33-59. He assumes the water moves around the property via the "spokes" that are prominent on the property with a "main fork that gets more water than the other spokes" and travels along a contour across the property. G. Deal 3:38:00-48.

80. However, Mr. Deal stated that he never actually saw water flowing in the ditches on his property.

Expert Testimony

81. **Benjamin Davis**

82. Ben Davis (Davis), a former Adjudication Specialist with the DNRC and current water right consultant, is an expert witness hired by the Deals to investigate the water rights objected to by Brewster, support the litigation effort, and prepare a proposed change application for moving the point of diversion to a lower point on the Deal property from the current and historical location of the diversion. Davis 4:12:50-17:30

83. Mr. Davis conducted 3-4 site visits of the Deal Property. Davis 4:17:49-18:07. Davis testified that water is conveyed to the Deal property via a ditch along the Section 17 east-west line and also south to north via a ditch between the Gibson and Deal properties. Davis 4:19:50-20:09. Ditches, laterals and undulations on the Deal property are used to convey water across the Deal property for irrigation without significant work. Id. at 4:20:10-59.

84. Davis explained that the Fence-line Ditch had historically delivered water to the Deals place of use. Davis also described a ditch along the fence line between the Deal and Gibson parcels. There were lateral ditches and "natural undulations" on the Deals' place of use. Davis acknowledged that the northern branch of the Lee-Parker-Ryen Ditch identified by the Water Resources Survey on Brewster and Weed's property no longer existed. Davis 4:19:55-4:21, 4:22-4:23, 4:39:30-4:40:30; Deal-5 5.

85. Davis confirmed that the Deals have not diverted water from either Ross Creek or Dry Canyon Creek. However, he asserted that water "flowed" in the Fence-line Ditch and was conveyed to the Deals place of use "somehow, someway."

86. Mr. Davis testified as to the consistent irrigation present on the Deal property as evidenced by the aerial imagery consistently depicting irrigated ground between 1947 and 2020. Mr. Davis testified that there is evidence of changing crops, recent cuts late in the season consistent with irrigated property and consistent with the irrigation depicted on the Brewster property. Davis 26:38-26:44.

PRINCIPLES OF LAW

Abandonment

There are two elements for abandonment - intent to abandon and actual nonuser. "Neither an intention to abandon nor nonuser is sufficient: the union of both is indispensable to constitute abandonment." *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923). In *79 Ranch*, *Inc. v. Pitsch*, 204 Mont. 426, 431-32, 666 P.2d 215, 217-18 91983), the Montana Supreme Court stated:

> The appropriation of water is based on its beneficial use. When the appropriator or his successor in interest abandons or ceases to use the water for its beneficial use, the water right ceases. Section 89-802, R.C.M., 1947 (repealed 1973). This fundamental principle has long governed the determination of water rights in Montana. In *Power v. Switzer* (1898), 21 Mont. 523, 55 P. 32, this controlling policy of beneficial use was explained:
>
> ". . . It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or 'claimed' and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases. (Sections 1880, 1881, Civil Code.)"

The Court employs a two-step process for determining abandonment of a water right claim. The objector bears the initial burden of showing a long period of continuous nonuse of the water right claim. This showing raises a rebuttable presumption that the claimant intended to abandon the claim. The burden then shifts to the claimant to explain the long period of nonuse. *Heavirland v. State of Montana*, 2013 MT 313, ¶¶19, 32, 372 Mont. 300, 311 P.3d 813; *In re the Adjudication of Water Rights of the Clark Fork River*,

254 Mont. 11, 15, 833 P.2d 1120, 1123 (1992)*; 79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218.

While the "Water Court cannot specify a minimum number of years that must elapse before the burden shift [to the party opposing abandonment] will occur, the continuum stretches from 10-23 years." *Hardwig v. Taylor Land & Livestock Company, LLC,* Case WC-2005-01 at p. 4, (MT Water Court Order Establishing Standard of Proof and Assigning Burdens of Proof Jul. 31, 2006).

The presumption of abandonment that arises from a long period of continuous nonuse cannot be rebutted by simply expressing a hope or desire reflecting a "gleam in the eye philosophy" regarding the future use of water. *Heavirland,* ¶19; *Clark Fork River*, 254 Mont. at 15, 833 P.2d at 1123; *79 Ranch*, 204 Mont. at 433-34, 666 P.2d at 219. To successfully rebut a presumption of abandonment, a claimant must produce "[s]pecific evidence explaining or excusing a long period of non-use of the particular water rights on the specific property …" *Heavirland*, ¶32; *Musselshell River*, 255 Mont. at 51, 840 P.2d at 582. "Conclusory statements concerning a variety of negative factors" are insufficient to meet the claimant's burden. *Musselshell River*, 255 Mont. at 52, 840 P.2d at 582.

Lack of efforts to use water rights and the failure to maintain conveyance systems are indicators a water right has been abandoned. *Clark Fork River*, 254 Mont. at 16, 833 P.2d at 1123.

"[S]tatements of intent by the owner of the water rights are insufficient by themselves to rebut a presumption of abandonment." *Beaver Park Water, Inc., v. City of Victor,* 649 P.2d 300, 302 (1982).

The determination of whether a water right has been abandoned "requires weighing all of the relevant factual circumstances of the case." *Heavirland*, ¶32. In weighing the *totality* of those facts and circumstances, objective evidence of the claimant's conduct during the period of nonuse carries more weight than mere subjective expressions of intent or the desire or hope to use the water at some time in the future. *Heavirland v. State of Montana*, Case 41O-97 at p. 11-12 (MT Water Court Order

Regarding Abandonment of Claim 41O 47356-00 Sept. 19, 2012) *Heavirland v. State of Montana*, 2013 MT 213, 372 Mont. 300, 311 P.3d 813.

CONCLUSIONS OF LAW

Non-use

1. To constitute abandonment, there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use. Neither an intention to abandon nor non use is sufficient, the union of both is indispensable to constitute abandonment. *Thomas*, 66 Mont. at 167. There is no enforceable statute defining the length of non-use required to establish a presumption of abandonment. Section 85-2-404(2) Mont. Code Ann. References a 10 year period of non-use, but does not become enforceable until the Water Court issues final decrees.

2. Nine years of non-use is "certainly very potent evidence, if it stood alone, of an intention to abandon." *Smith v. Hope Mining Co*., 18 Mont. 432, 438, 45 P. 632, 634 (1896). An approximately 23-year period of non-use raised a rebuttable presumption of abandonment in *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 16, 833 P.2d 1120, 1123 (1992). In *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 56, 375 Mont. 327, 328 P.3d 644, a period of non-use ranging from 18 to 29 years was sufficient to raise a presumption of abandonment. In *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983), a 40-year period raised a presumption of abandonment, and in *Holmstrom Land Co. v. Meagher County Newlan Creek Water District*, 185 Mont. 409, 424, 605 P.2d 1060, 1069 (1980) it was 75 years.

3. At the very least in this case, no one witnessed water in the Fence-line ditch or irrigation on the place of use between 1955 and recent years. Several lay witnesses testified regarding their recollections of the Fence-line Ditch, and not a single lay witness, including Deals could attest to seeing water from either Ross Creek or Dry Creek conveyed in the Fence-line Ditch.

4. While Mr. Davis and Deals have speculations based on aerial photographs that there may have been water in the ditch and irrigation, they provided no evidence that

outweighed the testimony of several witnesses from the area that there was irrigation on the place of use from these water rights.

5. In Water Court case *40B-1*, 2018 Mont. Water LEXIS, the Water Court upheld a Water Master's findings despite that Master placing more weight on lay witness testimony "reflecting actual knowledge" of the property in question than expert testimony "of limited value." *Knight*, 2018 Mont. Water LEXIS at *9. Similarly, in *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.,* the Montana Supreme Court determined that the Chief Water Judge correctly regarded an expert's testimony as "unreliable" in a case where the facts could support several conclusions. 2014 MT 167, ¶ 46, 375 Mont. 327, 328 P.3d 644. The credibility of witnesses and the weight of their testimony are matters for the district court to determine. *Hidden Hollow Ranch v. Fields*, 2004 MT 153, ¶ 41, 321 Mont. 505, 92 P.3d 1185.

6. In 1999, the DNRC conducted a field investigation on Brewster's property and the DNRC noted several issues with the Fence-line Ditch. In the report, Brewster is noted as commenting that the Ryens had not used the ditch that "runs along the north section 17 section line." The report also notes Ryen's son, Jack Ryen, stating that the Fence-line Ditch "ends as the beginning for the claimed field and no spreader ditches currently exist." In a caption to a photo of the Fence-line Ditch, Jack said "that where the brush ends so does the ditch and there are no ditches beyond that point left anymore." The point at which there were no longer any ditches was referring to Deal place of use in the NW of Section 17. See Brewster-4 6-27; Brewster 4:49:15-4:51. No testimony contradicted this evidence from DNRC or Jack Ryen's statement admitting that he did not use the Fence-line Ditch.

7. Ms. Biggs did not see water in the ditch or irrigation between 1955 and 1964. Ms. Brewster did not see water in the ditch or irrigation from 1966 to the present. Mr. Weed did not see water in the ditch or irrigation from 1974 to present. Mr. Brownell did not see water in the ditch or irrigation from the early 1980s to present. Mr. Bryan did not see water in the ditch or irrigation since 1990 to present. Mr. and Mrs. Deal have seen evidence of water in the ditch, but admitted that they did not irrigate from the ditch.

8. Brewster has shown, by a preponderance of the evidence, that both claims 41H 114597-00 and 41H 30023115 have not been used since at least 1955. Brewster met her burden of proof and established a 67-year period of nonuse of claims 41H 115497-00 and 41H 30023115.

9. Sixty-seven years (from 1955-2022) of non-use creates a rebuttable presumption of abandonment.

Intent

10. "To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope." *79 Ranch*, 204 Mont. at 433, 666 P.2d at 218. Owners of water rights rarely acknowledge intent to abandon their claims, and intent can therefore be difficult to prove. Accordingly, "intent need not be proved directly but may be inferred from all the circumstances of the case." *Denver by Bd. of Water Comm'rs v. Snake River Water Dist.*, 788 P.2d 772, 776 (Colo. 1990).

11. "[S]tatements of intent by the owner of the water rights are insufficient by themselves to rebut a presumption of abandonment." *Beaver Park Water, Inc., v. City of Victor,* 649 P.2d 300, 302 (1982). While the current owners, Deals, have expressed an interest in using these claims, their predecessors on the other hand never moved passed the "expressions of desire or hope."

12. Mr. Ryen and his family members spent significant amounts of money to defend their water rights, however they never spent that money on any improvements or maintenance of the water rights. They never put any funds or effort towards irrigation pipes or digging and cleaning out the ditch.

13. Lack of efforts to use water rights and the failure to maintain conveyance systems are indicators a water right has been abandoned. *Clark Fork River*, 254 Mont. at 16, 833 P.2d at 1123. Brewster and Weed both state that Ryens never offered to help maintain the ditches or the headgate either financially or physically.

14. During the period of non-use, water was available in both Ross Creek and Dry Canyon Creek. There was no testimony that evidenced a lack of supply in either Dry

Canyon Creek or Ross Creek during the 67 years of nonuse. Brewster, Weed, and Gibson have all benefitted from water under their water rights from the same creeks during the period of nonuse.

15. Mr. Davis provided aerial photograph analysis wherein he concluded the Deal property appeared to be irrigated at various times between 1947 and 2020 based on the presence of vegetation late in the irrigation season. All of these photos were taken in late season (August or later). Credibility issues arise given that Mr. Davis found irrigation present in the 1985 aerial photograph when Ms. Spring specifically said there was no irrigation on the property during that time. The Court gives the aerial photos much less weight given contradiction between the eye-witness testimony and the aerial photograph analysis.

16. While Deals point to a time of family turmoil from the Ryen divorce and disagreements, this does not explain why no one irrigated the property for such a significant amount of time after the divorce proceedings were finalized.

17. The Ryens were seemingly very busy, and money was tight, according to Ms. Spring, but this was and is still the case for many farmers and ranchers in Montana who make an active effort to manage and utilize their water rights.

Recommendation

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that claims 41H 115497-00 and 41H 30023115 be dismissed because both claims have been abandoned. Post Decree Abstracts of Water Right Claims are served with the Report to confirm that the claims have been terminated in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail:

Benjamin Sudduth
Sudduth Law PLLC
PO Boz 507
Bozeman, MT 59771-0507
(406)272-2390
benjamin@sudduthlaw.com

Rick C. Tappan
Tappan Law Firm, PLLC
7 West 6th Avenue, Suite 516
Helena, MT 59601
(406)-449-3383
rdtappan@tappanlawfirm.com

Electronically Signed By:
Hon. Judge Julia Nordlund
Tue, Jan 03 2023 09:17:09 AM

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H

Water Right Number: **41H 115497-00** STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: **DISMISSED**

Owners:

GLEN DEAL
16641 E HELMAUR PL
PALMER, AK 99645 7512

ANNA DEAL
16641 E HELMAUR PL
PALMER, AK 99645 7512

Priority Date:

Type of Historical Right:

Purpose (use): IRRIGATION

Flow Rate:

Volume:

Source Name: DRY CANYON CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H

Water Right Number: **41H 30023115** STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: **DISMISSED**

Owners: GLEN DEAL
16641 E HELMAUR PL
PALMER, AK 99645 7512

ANNA DEAL
16641 E HELMAUR PL
PALMER, AK 99645 7512

***Priority Date:**

Type of Historical Right:

***Purpose (use):** IRRIGATION

Flow Rate:

Volume:

Source Name: ROSS CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.