

Montana Water Court  
PO Box 879  
Bozeman, MT 59771-0879  
1-800-624-3270 (In-state only)  
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
NORTH END SUBBASIN OF THE BITTERROOT RIVER BASIN (76HB)

IN THE MATTER OF THE ADJUDICATION ) CASE 76HB-11  
OF THE EXISTING RIGHTS TO THE USE ) 76H-W-000101-00  
OF ALL THE WATER, BOTH SURFACE AND ) 76H-W-118461-00  
UNDERGROUND, EXCEPT FOR THE MAIN )  
STEM OF THE BITTERROOT RIVER, BUT )  
INCLUDING ALL TRIBUTARIES OF THE )  
BITTERROOT RIVER IN THE NORTH END )  
SUBBASIN OF THE BITTERROOT RIVER )  
DRAINAGE AREA IN RAVALLI AND )  
MISSOULA COUNTIES, MONTANA. )

**FILED**

JUL 17 1998 --

Montana Water Court

CLAIMANT: Keith R. Swinger and Marie E. Swinger, Gary E. Collins,

MOTION OF MONTANA WATER COURT

OBJECTORS: Washington Water Power Company, Montana Power Company,  
Gary E. Collins, Keith R. Swinger and Marie E. Swinger

ORDER

The hearing in this case was held on January 22, 1998. Keith and Marie Swinger failed to appear at the hearing to support their objections to the Gary Collins claim 76H-W-118461-00. Gary Collins did appear to support his objections to the Keith and Marie Swinger claim 76H-W-000101-00.

For the reasons cited in the Court's Findings of Fact and Conclusions of Law and supporting Memorandum, the Court concludes that (1) the elements identified on the abstract of the Gary Collins claim 76H-W-118461-00 are accurate and (2) some of the elements identified on the abstract of the Keith and Marie Swinger claim 76H-W-000101-00 are inaccurate. Therefore, it is

ORDERED that the Collins abstract of claim 76H-W-118461-00 shall remain unchanged in the Preliminary Decree except for the removal of the issue remark concerning priority date under Case No.

575;

ORDERED that the Swinger abstract of claim 76H-W-000101-00 shall appear in the Preliminary Decree as follows:

WATER RIGHT NUMBER 76H-W-000101-00

OWNERS: KEITH R. SWINGER  
MARIE E. SWINGER

PURPOSE (USE): IRRIGATION  
TYPE OF IRRIGATION SYSTEM: SPRINKLER

SOURCE: HAYES CREEK  
SOURCE TYPE: SURFACE WATER

PRIORITY DATE: DECEMBER 31, 1958  
TYPE OF HISTORICAL RIGHT: USE

FLOW RATE: 96.00 GPM

VOLUME: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.  
  
CLIMATIC AREA: 3

MAXIMUM ACRES: 5.50

PERIOD OF USE: APRIL 15 TO OCTOBER 19

POINT OF DIVERSION AND MEANS OF DIVERSION:

LOT	BLK	QTRSEC	SEC	TWP	RGE	COUNTY	MEANS
01		NWSWNE	10	12N	20W	MISSOULA	PUMP

PLACE OF USE FOR IRRIGATION:

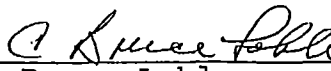
ACRES	LOT	BLK	QTRSEC	SEC	TWP	RGE	COUNTY	
001	5.50			SWNE	10	12N	20W	MISSOULA

The DNRC examination issue remarks concerning the priority date with respect to Case No. 575 decree and the flow rate shall be deleted from the Swinger abstract. The issue remarks concerning historical irrigated acreage shall remain on the Swinger abstract; and

ORDERED that the attached Abstracts of Water Right Claim

as Modified by the Montana Water Court for the above captioned claims be served with this Order to confirm the elements of these claims have been modified in accordance with the Court's findings and conclusions.

DATED this 17 day of July, 1998.

  
\_\_\_\_\_  
C. Bruce Loble  
Chief Water Judge

ABSTRACT OF WATER RIGHT CLAIM  
AS MODIFIED BY THE WATER COURT  
BITTERROOT RIVER  
BASIN 76H

WATER RIGHT NUMBER 76H -W-000101-00

IMPORTANT NOTICE

AN ASTERISK (\*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

OWNERS: SWINGER KEITH R  
6055 BITTERROOT RD  
MISSOULA MT 59801  
SWINGER MARIE E  
6055 BITTERROOT RD  
MISSOULA MT 59801

PURPOSE (USE): IRRIGATION  
TYPE OF IRRIGATION SYSTEM: SPRINKLER

SOURCE: HAYES CREEK  
SOURCE TYPE: SURFACE WATER

\* PRIORITY DATE: DECEMBER 31, 1958  
TYPE OF HISTORICAL RIGHT: USE

\* FLOW RATE: 96.00 GPM ( .21 CFS)

VOLUME: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

CLIMATIC AREA: 3

\* MAXIMUM ACRES: 5.50

\* PERIOD OF USE: APRIL 15 TO OCTOBER 19

POINT OF DIVERSION AND MEANS OF DIVERSION:

LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY	MEANS
01			N	10	12N	20W	MISSOULA	PUMP

\* PLACE OF USE FOR IRRIGATION:

	ACRES	LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY
001	5.50				SWNE	10	12N	20W	MISSOULA
TOTAL	5.50								

REMARKS:

THE PRIORITY DATE WAS AMENDED BY THE CLAIMANT ON 06/16/88.

\*\*\*\*\*  
\* THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS \*  
\* EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS. THESE \*  
\* ISSUES MAY REMAIN UNRESOLVED IF NO OBJECTIONS ARE FILED DURING \*  
\* THE NEXT OBJECTION PERIOD. \*  
\* \*  
\* \*



ABSTRACT OF WATER RIGHT CLAIM  
AS MODIFIED BY THE WATER COURT  
NORTH END SUBBASIN - BITTERROOT RIVER  
BASIN 76H

06/04/98  
PAGE 1

WATER RIGHT NUMBER 76H -W-118461-00

IMPORTANT NOTICE

AN ASTERISK (\*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

OWNERS: COLLINS GARY E  
6000 HAYES CR RD  
MISSOULA MT 59803

PURPOSE (USE): IRRIGATION  
TYPE OF IRRIGATION SYSTEM: SPRINKLER

SOURCE: HAYES CREEK  
SOURCE TYPE: SURFACE WATER

PRIORITY DATE: JUNE 19, 1881  
TYPE OF HISTORICAL RIGHT: DECREED

CASE NO. 575, MISSOULA COUNTY, DECREES A RIGHT OF 2ND USE.

FLOW RATE: 120.00 GPM (.27 CFS)

CASE NO. 575, MISSOULA COUNTY, DECREED THIS SECOND RIGHT AS ANY WATERS IN EXCESS OF THE 100 INCHES DECREED TO THE FIRST RIGHT. WATER RIGHT NO. W157350-00 IS BASED ON THE FIRST RIGHT.

VOLUME: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

CLIMATIC AREA: 3

MAXIMUM ACRES: 7.10

PERIOD OF USE: APRIL 15 TO OCTOBER 19

POINT OF DIVERSION AND MEANS OF DIVERSION:

	LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY	MEANS
01				SENENW	10	12N	20W	MISSOULA	DIVERSION DAM

DITCH NAME: WARNATH-MCMAHON DITCH

PLACE OF USE FOR IRRIGATION:

	ACRES	LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY
001	4.79				NESWNE	10	12N	20W	MISSOULA
002	.96				NWSENE	10	12N	20W	MISSOULA
003	1.35				SESWNE	10	12N	20W	MISSOULA
TOTAL	7.10								

REMARKS:

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 01/18/88: MAXIMUM ACRES, PERIOD OF USE, PRIORITY DATE.

ABSTRACT OF WATER RIGHT CLAIM  
AS MODIFIED BY THE WATER COURT  
NORTH END SUBBASIN - BITTERROOT RIVER  
BASIN 76H

06/04/98  
PAGE 2

WATER RIGHT NUMBER 76H -W-118461-00 (CONTINUED)

REMARKS CONTINUED:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE  
MULTIPLE USES OF THE SAME RIGHT. THE USE OF THE RIGHT  
FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF  
THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO  
ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER  
IN ACCORD WITH HISTORICAL PRACTICES.  
W118461-00, W118462-00.

NOTICE OF WATER RIGHT TRANSFER RECEIVED 03/18/83.

NOTICE OF WATER RIGHT TRANSFER RECEIVED 12/07/94.

Montana Water Court  
PO Box 879  
Bozeman, MT 59771-0879  
1-800-624-3270 (In-state only)  
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
NORTH END SUBBASIN OF THE BITTERROOT RIVER BASIN (76HB)

IN THE MATTER OF THE ADJUDICATION ) CASE 76HB-11  
OF THE EXISTING RIGHTS TO THE USE ) 76H-W-000101-00  
OF ALL THE WATER, BOTH SURFACE AND ) 76H-W-118461-00  
UNDERGROUND, EXCEPT FOR THE MAIN )  
STEM OF THE BITTERROOT RIVER, BUT )  
INCLUDING ALL TRIBUTARIES OF THE )  
BITTERROOT RIVER IN THE NORTH END )  
SUBBASIN OF THE BITTERROOT RIVER )  
DRAINAGE AREA IN RAVALLI AND )  
MISSOULA COUNTIES, MONTANA. )

**FILED**

JUL 17 1998

**Montana Water Court**

CLAIMANT: Keith R. Swinger and Marie E. Swinger, Gary E. Collins,

MOTION OF MONTANA WATER COURT

OBJECTORS: Washington Water Power Company, Montana Power Company,  
Gary E. Collins, Keith R. Swinger and Marie E. Swinger

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The hearing in this case was held on January 22, 1998 in the Federal District Courtroom of the Russell Smith Federal Building in Missoula, Montana, C. Bruce Loble, Chief Water Judge presiding. David L. Pengelly, attorney at law, was present together with Gary E. Collins, the claimant of water right claim 76H-W-118461-00. Keith R. Swinger and Marie E. Swinger, the claimants of water right claim 76H-W-000101-00, failed to appear in person or through counsel. Witnesses testified and evidence was introduced.

The parties were required to file objections to proposed exhibits prior to the hearing. Swingers filed their evidentiary objections on October 14, 1997. Most of the objections appear to be based on relevance, the admissibility of the Missoula County Water Resources Survey and the admissibility of expert testimony



from the Department of Natural Resources and Conservation. The evidence objected to is clearly relevant under Rule 401, M.R.Evid., and the Water Resources Survey and DNRC testimony are clearly admissible under Rules 702 and 703, M.R.Evid., Rule I.II(2) Water Right Claim Examination Rules, and §85-2-243, MCA. The objections are OVERRULED and the Collins exhibits introduced at the January 22 hearing are ADMITTED into evidence.

On January 29, 1998, Gary Collins, through counsel, filed Proposed Findings of Fact and Conclusions of Law. On February 3, 1998, the Swingers filed their 7 page Refute to Collins Presentation, a 42 page Presentation Brief and 104 exhibits. On the first page of their Presentation Brief is an Affidavit of Oath by which the Swingers each swear that the facts and testimony contained in the Presentation Brief are true.

To accept facts and testimony in this fashion would violate Rule 611(e) M.R.Evid. See Marriage of Bonamarte, 263 Mont. 170, 174, 866 P.2d 1132 (1994). The opportunity to observe a witness is so critical to judicial control and effective cross-examination that its denial is manifestly prejudicial. Taylor v. Taylor, 272 Mont. 30, 35, 899 P.2d 523 (1995).

By Order filed February 4, 1998, the Court sealed the exhibits and the majority of Swinger's Presentation Brief. The sealed documents were not considered by the Court in its decision in this matter. See Marriage of Powell, 231 Mont. 72, 75, 750 P.2d 1099 (1988).

On February 9, 1998, Gary Collins filed his 6 page Revised Response to Swingers' Post-Hearing Briefs and Request for Sanctions. The Request for Sanctions is addressed in a separate

Order.

The issues for determination at the hearing were straightforward:

1) Is the Temporary Preliminary Decree of Swinger water right claim 76H-W-000101-00 correct, and if not, what are the proper elements of the Swinger claim?

2) Is the Temporary Preliminary Decree of Collins water right claim 76H-W-118461-00 correct, and if not, what are the proper elements of the Collins claim?

After careful consideration of the entire record, including the statements of claim and the evidence adduced at hearing, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Claim 76H-W-118461-00 Procedural History

1. On March 8, 1982, Agnes and John Breuer filed irrigation Statement of Claim 76H-W-118461-00. Gary Collins is the present owner of this claim. The Breuers claimed a priority date of June 9, 1884, a flow rate of 120 gallons per minute and a place of use on 9.21 acres in the NWNENE of Section 10, Township 12 North, Range 20 West, Missoula County. As filed, the claim is based on a portion of a water right from "Buckhouse Creek" (now known as Hayes Creek) decreed in Buckhouse v. Bass, Case No. 575, Missoula County (June 9, 1884).

2. This claim was examined by the DNRC in 1988 prior to issuance of the Temporary Preliminary Decree for the North End Subbasin of the Bitterroot River. During examination of this claim, Collins amended the priority date to the Spring of 1881

based on an analysis of the pleadings and decree in Case No. 575. Collins also reduced the period of use to April 15 to October 15 and reduced his acreage from 9.21 acres to 7.1 acres as recommended by DNRC.

3. The Temporary Preliminary Decree for Subbasin 76HB was issued on September 16, 1992. The decree abstract for claim 76H-W-118461-00, reflecting the Collins amendments, appeared in the temporary preliminary decree as follows:

~~WATER RIGHT NUMBER 76H-W-118461-00~~

PURPOSE (USE): IRRIGATION.  
TYPE OF IRRIGATION SYSTEM: SPRINKLER

SOURCE: HAYES CREEK  
SOURCE TYPE: SURFACE WATER

PRIORITY DATE: JUNE 19, 1881  
TYPE OF HISTORICAL RIGHT: DECREED

CASE NO. 575, MISSOULA COUNTY, DECREES A RIGHT OF 2ND USE.

FLOW RATE: 120.00 GPM (.27 CFS)

CASE NO. 575, MISSOULA COUNTY, DECREED THIS SECOND RIGHT AS ANY WATERS IN EXCESS OF THE 100 INCHES DECREED TO THE FIRST RIGHT. WATER RIGHT NO. W157350-00 IS BASED ON THE FIRST RIGHT.

VOLUME: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

CLIMATIC AREA: 3

MAXIMUM ACRES: 7.10

PERIOD OF USE: APRIL 15 TO OCTOBER 19

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
01		SENENW	10	12N	20W	MISSOULA	DIVERSION DAM

DITCH NAME: WARNATH-MCMAHON DITCH

PLACE OF USE FOR IRRIGATION:

	<u>ACRES</u>	<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001	4.79			NESWNE	10	12N	20W	MISSOULA
002	.96			NWSENE	10	12N	20W	MISSOULA
003	<u>1.35</u>			SESWNE	10	12N	20W	MISSOULA
TOTAL	7.10							

An examination issue remark on the abstract of the claim states that although Case No. 575 did not assign specific priority dates, a specific priority date was claimed.

4. Keith and Marie Swinger filed timely objections to Collins claim 76H-W-118461-00.

Claim 76H-W-000101 Procedural History

5. On December 5, 1979, Keith and Marie Swinger filed statement of claim 76H-W-000101-00. The Swingers claimed a right of 10 miner's inches of water diverted from "Hayes Creek (Buckhouse)" for irrigation purposes. The place of use was identified as a 10 acre tract located within the NWNESW of Section 10, Township 12 North, Range 20 West.

6. No priority date was specified on the claim. A copy of a Notice of Appropriation attached to the claim indicated that the claim was based on an appropriation by George A. Bennett of 100 miner's inches from Hayes Creek with a date of first use on July 8, 1926. In a November 12, 1987 letter to DNRC, the Swingers wrote that their claim dated back to water rights filed by George Bennett "May 15, 1926."

7. As noted parenthetically on their 1979 claim form, the Swinger original claim alleged that "Buckhouse Creek" and "Hayes Creek" were alternative names for the same source.

8. On June 16, 1988, the Swingers amended their priority date to May 1, 1871 and claimed a decreed right from "Buckhouse Creek." At this time, the Swingers still alleged that "Buckhouse

Creek" and "Hayes Creek" were alternative names for the same source.

9. During claims examination, DNRC changed the Swinger place of use to the SWNE of Section 10, Township 12 North, Range 20 West. Based on analysis of a September 24, 1979 aerial photo, the DNRC noted only 4 acres of irrigation within the Swinger described place of use rather than the 10 acres claimed. The DNRC further noted that the 1959 Missoula County Water Resources Survey showed zero acres of irrigation on the described place of use.

10. At the request of Mrs. Swinger, the DNRC conducted a field investigation on the Swinger property on June 16, 1988. The DNRC estimated the maximum flow rate of the Swinger irrigation system to be 96 gallons per minute (approximately 8½ miner's inches). The DNRC also noted that in addition to 4 irrigated acres of lawn, garden and pasture, the Swingers claimed to irrigate an additional 1.5 acres of timbered hillside. The field investigation notes indicate that the earliest irrigation system with which Mr. Swinger was familiar was a gravity sprinkler system installed some time in the 1950's. (See Collins' Exhibit A-4.)

11. In the Temporary Preliminary Decree for Basin 76HB issued in 1992 the Swinger claim was decreed as follows:

~~WATER RIGHT NUMBER 76H-W-000101-00~~

PURPOSE (USE): IRRIGATION  
TYPE OF IRRIGATION SYSTEM: SPRINKLER

SOURCE: HAYES CREEK  
SOURCE TYPE: SURFACE WATER

PRIORITY DATE: MAY 01, 1871  
TYPE OF HISTORICAL RIGHT: DECREED

FLOW RATE: 112.20 GPM (.25 CFS)

VOLUME: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT

EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

CLIMATIC AREA: 3

MAXIMUM ACRES: 10.00

PERIOD OF USE: APRIL 1 TO OCTOBER 31

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
01		NWSWNE	10	12N	20W	MISSOULA	PUMP

PLACE OF USE FOR IRRIGATION:

<u>ACRES</u>	<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001	10.00		SWNE	10	12N	20W	MISSOULA

Examination issue remarks on the abstract of the Swinger claim indicate that DNRC examination revealed significant issues concerning the claimed flow rate, priority date, and place of use.

12. On September 25, 1992, after the issuance of the Temporary Preliminary Decree for Subbasin 76HB, Keith and Marie Swinger attempted to file another amendment to their statement of claim. This second amendment purported to expand the purpose of use from irrigation to "stock, fire control, irrigation, domestic, fish pond, and maintaining, enjoyment and right to enlarge of [sic] dispose of as granted in appropriation of George Bennett per Homestead grant." The Swingers also purported to expand their means of diversion to include a pump, instream use for a fish pond and a dam to protect fish; their claimed flow rate from 10 miner's inches to 100 miner's inches; their claimed period of use to January 1 to December 31; and to amend their priority date to May 20, 1862 based on the U.S. Homestead Act signed by President Lincoln, [43 U.S.C. § 161 et seq]. The Swingers did not file any additional claim forms or pay any additional fees to support the

additional claimed uses. (See Collins' Exhibit A-7 and testimony of Tracey Turek.) In accordance with Water Court Rules, the respective elements of the claim were not amended by DNRC in the centralized record system. See Rule 6.III, Water Right Claim Examination Rules.

13. In 1993, Gary Collins, Washington Water Power Co. and Montana Power Company filed objections to the Swinger claim. After expiration of the September 7, 1993 extended deadline for filing objections, the Swingers filed a late objection to their own claim in June 1994. In 1995, the power companies withdrew their objection.

Case 76HB-11

14. In November 1994, Water Master Edward M. Dobson consolidated the Collins and Swinger claims and one other claim from Hayes Creek (76H-W-157350-00 - Neil and Virginia Miller) into this case. As a result of proceedings held in this case, the Miller claim 76H-W-157350-00 was terminated. See Master's Report filed May 17, 1995, adopted July 7, 1995.

Collins Claim 76H-W-118461-00

15. Prior to hearing, the Swingers changed their theory and argued that Hayes Creek is not the same source as the Buckhouse Creek described in Case No. 575. See Swingers Amended Pretrial Orders, August 25, 1997. They assert that Buckhouse Creek is actually located in Section 2, Township 12 North, Range 20 West, not Section 10. As a result, Swingers argue that Collins cannot be a successor to a decreed water right recognized in Case No. 575 because that decree concerned an entirely different source-- Buckhouse Creek--rather than Hayes Creek where the Collins and

Swinger claims are located. As a result, Swingers contend that there is no basis for the priority date claimed by Collins.

16. Case No. 575 was decided June 9, 1884 and involved Henry Buckhouse and Henry Deusehin as plaintiffs and William E. Bass and Edward Hayes as defendants. The Case No. 575 decree and place of use were abstracted as part of the Missoula County Water Resources Survey conducted by the State Engineer. (See Collins' Exhibit E-1.)

17. Tracey Turek, a DNRC Water Right Specialist who has worked in the Bitterroot River basin for many years, testified and submitted a report that Hayes Creek and Buckhouse Creek were the same source. See Collins Exhibit L-1.

18. Collins introduced Exhibit M at trial. Exhibit M is a copy of an 1870 Government Land Office (GLO) plat of Township 12 North, Range 20 West. On that plat, along the section line between Sections 2 and 3 is a wavy line with the adjacent word "Buckhouse." The Court believes the Swingers contend this line represents the location of Buckhouse Creek.

19. Ms. Turek testified that this designation on the plat refers to a fence owned by Buckhouse in 1870, not Buckhouse Creek. This testimony is corroborated by the notes to the GLO survey. The notes refer to "Buckhouse's fence N.60°W." (See Collins' Exhibits M and G-1, copies of surveyor notes corresponding to 1870 Government Land Office plat.) Tracey Turek further testified that she has never seen any maps or other documents that indicate Buckhouse Creek was or is located in Section 2 and 3 of Township 12 North, Range 20 West.

20. The Court finds Ms. Turek's testimony and the



exhibits persuasive. The Court specifically finds that Hayes Creek is the same watercourse referred to as Buckhouse Creek in the Case No. 575 decree.

21. Tracey Turek further testified that she reviewed the Temporary Preliminary Decree abstract of Claim 76H-W-118461-00 and believes it accurately reflects Gary Collins' water right. With respect to the Gary Collins property, she stated that irrigation and a ditch from Hayes Creek are visible in 1937 and 1995 aerial photos and on the Water Resources Survey map. After explaining a discrepancy discovered in the Missoula County Water Resources Survey abstract for Case No. 575, (Collins' Exhibit E-1), she testified that Edward Hayes was the original owner of the second water right mentioned in the 1884 Buckhouse Creek decree and that Gary Collins is his successor. She testified that the first decreed right on Buckhouse Creek for 100 miner's inches was abandoned. The Miller Statement of Claim 76H-W-157350-00, also part of this case and based on ownership of the first right, was terminated in 1995.

22. As the Swingers did not attend the hearing, there was no evidence submitted to contradict the testimony and evidence submitted by Collins. As a result, the Court finds that the priority date of Collins' claim 76H-W-118461-00 is properly based on the Case No. 575 decree. The Court finds that Gary Collins is the owner of the second decreed right from Buckhouse Creek with a Spring (June 19) 1881 priority date.

Swinger claim 76H-W-000101-00

24. As originally filed, the Swingers relied on the Bennett Notice of Appropriation. The Bennett Notice describes a place of use located entirely in the S½ of Section 10, Township 12

North, Range 20 West. The Swinger place of use is located in the NE of Section 10. No evidence was presented to suggest that any of the ditches described in the Bennett Notice were ever constructed, that any water from Hayes Creek was appropriated for beneficial use upon the lands described in the Bennett appropriation, or that the water was appropriated and later moved to the Swinger property. Based on the existing record, the Court finds that the Bennett Notice was never perfected on the place of use described in the appropriation or, if it was perfected, it never became appurtenant to the Swinger property.

25. The Swingers amended their claim on June 16, 1988 to assert a Hayes Creek water right with a May 1, 1871 priority date. In their amendment, Swingers asserted that "[t]he original 100 miners inches recorded on this date, first decreed to Buckhouse, was abandoned when Big Flat ditch [was] built by Fed. govt. Later same 100 miners inches awarded to our predecessor in interest, and passed to us by abstract."

26. Swingers presented no evidence to support their Big Flat Canal theory of abandonment. In 1992, the Swingers again purported to amend their claim, this time to a priority date of 1862.

27. There is no evidence in the record of any beneficial use of Hayes Creek water on the Swinger property that supports a priority date of 1862, 1871, 1881 or 1926. This lack of evidence is consistent with representations Swingers made over 20 years ago. In their sworn Declaration filed with DNRC in 1975, Swingers stated that "[p]rior to 1952 the owners of this property had a pipeline approximately 100 feet northwest - using springs feeding into Hayes

Creek and gravity flow to irrigate." (Collins Exhibit O). According to the Court's source index for this subbasin decree, no claim for springs feeding into Hayes Creek was filed. Aerial photos dated July 6, 1937 and 1955 show no irrigation on the Swingers' property. (See Collins' Exhibit F-1, Exhibits D-1 and D-2, and testimony of Tracey Turek.) If Hayes Creek or any tributary spring water rights were ever perfected on the Swinger property prior to 1952, the Court finds that they were either abandoned or of such insignificance that they left no trace.

#### CONCLUSIONS OF LAW

##### I.

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. §85-2-233.

##### II.

For purposes of adjudicating water rights, a claim of existing right filed in accordance with the statute or an amended claim of existing right constitutes *prima facie* proof of its contents until issuance of a final decree. Section 85-2-227, MCA. Thus, the burden of proof falls on an objector (whether another party or claimants objecting to their own claim) to overcome the presumption that a claim of existing right is valid and correct as filed. See Memorandum Opinion, Water Court Case 40G-2, pages 12-14 (March 11, 1997) (citing sections 85-2-231(2) and 85-2-243, MCA, and Rule 1.II(2), Water Right Claim Examination Rules).

##### III.

As the objector to Collins claim 76H-W-118461-00, the Swingers had the burden to prove that Hayes Creek was not the

source decreed in Case No. 575. The Swinger contention that Hayes Creek and Buckhouse Creek are different watercourses contradicts their original statement of claim filed in 1979, their 1988 amended statement of claim and their April 21, 1994 letter to the Water Master (See 76H-W-000101-00 claim file) that Buckhouse Creek and Hayes Creek are the same, as well as the Water Resources Survey and the testimony of DNRC water resources specialist Tracy Turek. The Swingers failed to carry their burden of proof. Without presentation by Swingers of evidence to the contrary, the Court must rely on the evidence presented by Collins and finds that Hayes Creek and Buckhouse Creek are the same source of water.

#### IV.

The Swingers relied on a number of different documents and different theories to claim a series of priority dates from July 8, 1926 to May 1, 1871 to May 20, 1862. The Swinger's initial theory claimed a 1926 priority date based on the George L. Bennett Notice of Appropriation. On June 16, 1988, the Swingers properly amended their priority date to May 1, 1871 and claimed a decreed right from "Buckhouse Creek." This amended claim is *prima facie* proof of its contents under § 85-2-227, MCA. The initial burden is on the objector to present evidence that the statement of claim is inaccurate.

#### V.

Collins as the objector, presented evidence to overcome the *prima facie* 1871 priority date. Even without this evidence, the theory behind this date must be rejected as a matter of law. The claim to the 1871 priority date (based on the Buckhouse and Deusehin Notice of Location of Water Right filed in 1885) conflicts

with the prior Case No. 575 decree of first use in the "Spring of 1881." Because the Swingers claim privity of title with the litigants in the 1884 Case No. 575 decree, they are subject to the common law principles of issue or claim preclusion. See Missoula Light & Water Co. v. Hughes, 106 Mont. 355, 363, 374, 77 P.2d 1041 (1938) and Peschel v. Jones, 232 Mont. 516, 521, 760 P.2d 51 (1988). Thus, they are precluded from claiming a right earlier in priority to the right awarded their predecessor.

#### VI.

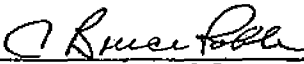
Once the *prima facie* claim of the 1871 priority has been overcome, there remains little evidence as to the first use of water on the Swinger property. Collins suggests that the Swinger priority date should be April 15, 1952 but there is no evidence to support such a date. The Missoula County Water Resources Survey was based upon a 1955 aerial photo and it depicts no irrigation on the Swinger property. The only evidence of Hayes Creek water usage on the Swinger property before July 1, 1973 is their 1975 Declaration of Existing Water Right. (See Collins' Exhibit O).

The Declaration was a form primarily used in the Powder River Adjudication to declare existing water rights after the passage of the Montana Water Use Act of 1973. Declarations from other areas of the state were occasionally filed with the DNRC on a voluntary basis. After passage of Senate Bill 76 in 1979, Declarations were replaced with Statements of Claim for Existing Water Rights.

In their 1975 Declaration, Keith and Marie Swinger claim to have used Hayes Creek water for irrigation, livestock and domestic purposes since purchasing their property in 1958. Where

the evidence produced concerning priority date is insufficient to set a date within a certain period, the last date of the period [December 31, 1958] becomes the date of the appropriation. Vidal v. Kensler, 100 Mont. 592, 598, 51 P.2d 235 (1935) and Rule 2.VIII(5) Water Right Claim Examination Rules. The Court concludes that the Swinger priority date for irrigation use from Hayes Creek is December 31, 1958.

DATED this 17 day of July, 1998.

  
\_\_\_\_\_  
C. Bruce Loble  
Chief Water Judge

CERTIFICATE OF SERVICE

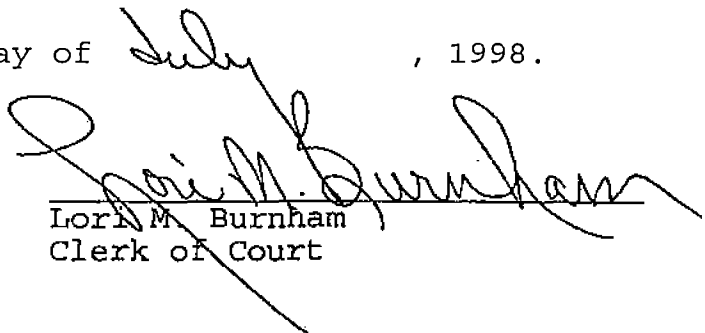
I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER; MEMORANDUM IN SUPPORT OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND ORDER ON COLLINS MOTION FOR SANCTIONS was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Keith R. and Marie E. Swinger  
6055 Bitterroot Road  
Missoula, MT 59801

Gary E. Collins  
6000 Hayes Creek Road  
Missoula, MT 59803

David Pengelly, Attorney  
PO Box 8106  
Missoula, MT 59807

DATED this 17 day of July, 1998.

  
Lori M. Burnham  
Clerk of Court

Montana Water Court  
PO Box 879  
Bozeman, MT 59771-0879  
1-800-624-3270 (In-state only)  
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
NORTH END SUBBASIN OF THE BITTERROOT RIVER BASIN (76HB)

IN THE MATTER OF THE ADJUDICATION ) CASE 76HB-11  
OF THE EXISTING RIGHTS TO THE USE ) 76H-W-000101-00  
OF ALL THE WATER, BOTH SURFACE AND ) 76H-W-118461-00  
UNDERGROUND, EXCEPT FOR THE MAIN )  
STEM OF THE BITTERROOT RIVER, BUT )  
INCLUDING ALL TRIBUTARIES OF THE )  
BITTERROOT RIVER IN THE NORTH END )  
SUBBASIN OF THE BITTERROOT RIVER )  
DRAINAGE AREA IN RAVALLI AND )  
MISSOULA COUNTIES, MONTANA. )

**FILED**

JUL 17 1998

**Montana Water Court**

CLAIMANT: Keith R. Swinger and Marie E. Swinger, Gary E. Collins,  
MOTION OF MONTANA WATER COURT

OBJECTORS: Washington Water Power Company, Montana Power Company,  
Gary E. Collins, Keith R. Swinger and Marie E. Swinger

MEMORANDUM IN SUPPORT OF  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The history in this case is lengthy and complicated, but the issues are not. The actions of Keith and Marie Swinger turned a relatively minor case into a complex and confusing one.

Beneficial Use of Water

The principle of water law involved here is simple and straight forward: beneficial use forms the basis and measure of a water right. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598 (1986) This concept forms the backbone of Montana water law and has been reiterated by the Montana Supreme Court for decades.

Beginning in 1992, the Swingers began a persistent effort to claim the absolute ownership of 100 miner's inches of water regardless of the fact that the historical beneficial use of water on their ten acre tract of land was less than 10% of the claimed



100 inch right. They asserted their limited historical use was not relevant to their ownership of the rights they "purchased" in 1958.

Similar ownership theories have been routinely rejected by the Montana Supreme Court. See Allen v. Petrick, 69 Mont. 373, 376-380, 222 P. 451 (1924) and Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 100-102, 250 P. 11 (1926). In 79 Ranch Inc. V. Pitsch, 204 Mont. 426, 431, 666 P.2d 215 (1983) the Montana Supreme 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 the 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.)" 21 Mont. at 529, 55 P.32.

Water rights have therefore been limited to the amount of water actually put to a beneficial use, despite the amount of water diverted or claimed under a notice

of appropriation. See also, *Conrow v. Huffine* (1914), 48 Mont. 437, 138 P.1094; *Peck v. Simon* (1935), 101 Mont. 12, 52 P.2d 164; *Galiger v. McNulty* (1927) 80 Mont. 339, 260 P.401.

The evidence presented at the hearing proved Swinger's historical beneficial use of water to be 96 gallons per minute.

#### Unnecessary Delay and Failure to Appear

Getting this case to hearing has been exceedingly difficult. In June 1995, the Swingers began filing a series of Motions which delayed resolution of the underlying issue in this case. The Motions consisted of three requests for summary judgment, disqualification of counsel, sanctions, judgment on the pleadings, enforcement of the Freedom of Information Act, attorney fees, evidentiary rulings and other matters. All Motions were denied. See the Court's Orders filed June 5 and July 2, 1997.

The issuance of these two Court Orders precipitated another round of multi-page Swinger filings objecting to the Court's rulings. See Swinger's Objection to Order and Responses to Motion and Memorandum (11 pages) and Swinger's Motion for Sanction Per Rule 11 M.R.Civ.P (4 pages) filed June 10, 1997; Swinger's Objection to Each of Chief Water Judge C. Bruce Loble's Orders (14 pages) filed July 3, 1997, and Swinger's Objection to Chief Water Judge C. Bruce Loble's Orders Received July 5, 1997 (7 Pages) filed July 10, 1997.

In their filings, Swingers often make erroneous summations of the Court's prior rulings and the law, reargue any previous motion denied by the Court, and randomly ignore the Rules of Civil Procedure while insisting on their strict observance when

it was to their perceived advantage. See, for example, the Court's Orders of June 5, July 2, July 14, September 26, October 20, 1997, and January 20, 1998.

Delay in the Water Court apparently also brought delay in a district court proceeding initiated by Collins to enforce a ditch easement across the Swinger property. The district court action was stayed pending the Water Court's determination of the Collins water right claim. See, Swinger Objections filed July 3, at page 6, and July 10, 1997, at page 3.

For the purpose of judicial economy, the original reference of these claims to the Water Master was formally rescinded and the Chief Water Judge assumed adjudication of the claims in the case. See Order filed July 14, 1997.

On August 15, 1997, a hearing date was set for October 22, 1997. Amended Proposed Pre-hearing Orders were filed with attached exhibit lists. Objections to the exhibits were filed. The Swingers filed further Motions and briefs and reargued their various contentions again. On October 17, 1997, 5 days before the scheduled hearing date, the Swingers filed a new exhibit list and rearranged their exhibit name and exhibit numbering system, to the confusion of their opponent and the Court. See Order Denying All Remaining Swinger Motions filed October 20, 1997 at page 2 and Order filed November 7, 1997.

On October 14, 1997, the Swingers filed "Swinger's Objections to Collins Proposed Exhibits" and indicated at page 3 that they filed an amended statement of claim with 44 exhibits attached thereto with the DNRC on September 30, 1997.

On October 20, 1997, Swingers filed their Swinger's

Corrections & Motions. In this document, they attempted to support their September 30, 1997 purported amended filing with the DNRC by arguing that "Senate Bill 108 passed this year 'allowed Claimants and Objectors to amend their claim or objections at the initial decree stage.'" Swingers further argued that their newly amended statement of claim was "*prima facie* evidence of Swinger's water right ownership," that the exhibits are "now a part of their water right claim, and Swingers shall not be required to subpoena fourteen or more witnesses to have them [exhibits] entered under the Montana Rules of Evidence at a hearing, to prevent these exhibits from 'standing on their own.'"

The Swingers made no effort in 1992 or 1997, under Rule 15 M.R.Civ.P., to obtain leave of court or written consent of the adverse party to amend their statement of claim. The purported 1997 amendment and accompanying exhibits apparently were not served on Gary Collins and the originals were not filed with the Court. Notice of the purported 1997 amendment was not published in the manner specified in § 85-2-233(6), MCA.

In their October 20 Corrections and Motions, the Swingers requested the Court to vacate the October 22 and 23 hearing. In an October 20, 1997 Order Denying All Remaining Swinger Motions, the Court advised that the matter needed to be tried and that additional postponements would not solve anything. On October 21, Marie Swinger advised the Court by telephone that they would not appear at the October 22 hearing because their son was in the hospital. The hearing was then vacated.

A new hearing date was scheduled for January 22, 1998. On January 20, the Swingers filed their Response to Latest Pre-Hearing

Order and advised that they would not attend the scheduled hearing. Although the Swingers mentioned the death of a sister-in-law, they specifically stated they were not requesting a postponement. As no postponement was requested, the hearing was held as scheduled. See Order filed January 20, 1998. The Swingers did not appear at the January 22, 1998 hearing.

Apparently, Swingers were considering a boycott of the eventual hearing for some time. In his September 13, 1995 letter to the Swingers, Water Master Dobson responded to the Swinger's prior letter regarding their intention to boycott the proceedings:

Your letter expresses great dissatisfaction at the result in denial of your motion for summary judgment. You seem to interpret that ruling to mean that the Court has already decided against you on the merits of your case but is holding a trial as a mere formality. Your letter indicates that you intend to boycott the prehearing (pretrial) conference and the hearing (trial). If you do, default judgment will be entered against you, and the Court will resolve Case 76HB-11 on the record existing after the trial, unilaterally influenced by Mr. Collins. His participation will not be *ex parte* if you throw away your opportunity to participate.

The Swingers responded to this correspondence with their Request for Water Court Clarification filed September 20, 1995 asking, at page 2, the following question:

Therefore, if they do not continue with pre trial orders and pre trial hearing, the "Plaintiffs" testimony shall be accepted unilaterally and the "Defendants" shall loose [sic] by Default Judgment. Is this assumption correct?

In his September 20, 1995 Order of Clarification, Water Master Dobson responded:

When a party fails to attend the hearing (trial), the absent party may be subjected to a motion for entry of default judgment. The

court may proceed at the hearing and allow the parties attending to establish the record for decision.

The Swingers further recognized in a 1997 filing that sanctions or termination of their water right claim could occur for failing to timely attend the hearing in this matter. See Swinger's Objections to Collins' Filings Dated August 25, 1997 and Requests for Orders filed August 29, 1997 at page 1.

In their Response to Latest Pre-Hearing Order filed January 20, 1998, the Swingers advised the Court that they were not attending the hearing. They stated unequivocally, at page 1, that "this is not stalling tactic, nor a request for a postponement, as Swingers notified the Water Court January 5th there was no basis for a hearing."

In previous filings, Swingers also advised that hearings were unnecessary and that they rested their case on the Supreme Court decisions which were in their favor. See, e.g., Swinger's Answer to Judge Loble's Order to Employ an Attorney filed July 25, 1997 at page 3. The various reasons advanced by Swingers to avoid attending the hearing resemble some of those set forth in Fields v. Wells, 239 Mont. 392, 395, 780 P.2d 1141 (1989).

Regardless of the Water Master's warnings and with recognition of the consequences, the Swingers did not attend the January 22 hearing. They concluded unilaterally that a hearing was unnecessary. The law dictates otherwise. Fields at 395.

Due provision was provided the Swingers to controvert any written report, data or information promulgated by the DNRC or presented by the other party and accepted as evidence in this case. See Rule I.II(2) Water Right Claim Examination Rules. The only

evidence submitted at the hearing was introduced by Collins. The Court had no choice but to decide this case on the existing record.

#### Priority Date for Swinger Claim

The Swingers relied on a number of different documents and different theories alleging a series of priority dates of July 8, 1926, May 1, 1871, and May 20, 1862. Their initial Statement of Claim asserted a 1926 priority date based on the Notice of Appropriation of George L. Bennett. On June 16, 1988, the Swingers properly amended their priority date to May 1, 1871 and claimed a decreed right from Buckhouse Creek. This amended claim became their *prima facie* claim under § 85-2-227, MCA. The Court rejected the 1871 priority date. See Conclusion of Law V.

Because the Swingers repudiated their 1871 priority date theory and attempted to amend their claim in 1992 to assert an 1862 priority date, a discussion of their various amendment efforts is appropriate.

In their 1992 effort to amend their claim, the Swingers discarded their 1871 theory in favor of an 1862 Homestead Act theory. They assert their priority date should be the date the original Homestead Act was signed into law by President Lincoln. This theory is without merit. Indeed, to accept this premise would result in 1862 water rights being granted to the successor of every Homestead Act entryman in the state. Thousands of people with Homestead Act predecessors, including Gary Collins, would have water rights with the same 1862 priority date.<sup>1</sup>

---

<sup>1</sup> Although the Court did not conduct extensive research into Swinger's Homestead theory, if the Swinger property was homesteaded under the Enlarged Homestead Act of February 19, 1909, the Act apparently only applied to lands designated by the Secretary of Interior as not being susceptible of successful

The Swinger 1862 theory appears to be similar to the riparian argument rejected in Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921). After an extensive review of territorial and state water legislation and several United States Supreme Court decisions, the Mettler Court enunciated several provisions of public policy on Montana water law. The Court held in its 4th provision that "an appropriator derives his right from the state, and not from the national government, and the use of waters flowing in natural streams in this state is subject to state regulation and control." Mettler, 61 Mont. at 169.

Since Mettler was decided, the United State Supreme Court has continued to recognize that Congress delegated broad power to the states in regulating water resources on the lands within the western states. See California-Oregon Power v. Beaver Portland Cement Co., 295 U.S. 142, 151, 158-63, 55 S.Ct. 725, 79 L.Ed. 1356 (1935). Justice Sutherland, writing on behalf of the majority in the California-Oregon Power case, wrote that the Desert Land Act of 1877 severed riparian rights from all unpatented federal lands in the thirteen western states without substituting anything in its place. See 1 Robert E. Beck, Waters and Water Rights, § 8.02(c) at 367 (1991). This is consistent with the rule enunciated in Mettler.

Montana law governs the appropriation of water by its citizens and beneficial use forms the basis, measure and the limit of all rights to the use of water. See McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598 (1986) and Toohey v. Campbell, 24

---

irrigation. First State Bank v. Bottineau County Bank, 56 Mont. 363, 367, 185 P. 162 (1919). If the intent of the Act was to homestead lands that were not susceptible of successful irrigation, the Swinger theory obviously fails.



Mont. 13, 17, 60 P. 396 (1900).<sup>2</sup>

More recently, the Montana Supreme Court has implicitly denied the Swinger theory. In Hill v. Merrimac Cattle Company, 211 Mont. 479, 496-497, 687 P.2d 59 (1984), the Court relied upon circa 1880 documents filed in accordance with the 1862 Homestead Act to overturn a lower court determination that water was first used in 1886 shortly after homestead entries were filed in 1885. If water rights naturally accrued on Homestead lands in 1862 as Swingers argue, the Hill Court would have recognized earlier 1862 "Homestead" rights rather than denying the later 1886 rights.

When the Swingers filed their statement of claim in 1979, they attached a copy of a Homestead Act Certificate from the United States to George A. Bennett, dated 1912, granting specified Homestead lands to George Bennett. The Homestead grant was "subject to vested and secured water rights . . . as may be recognized and acknowledged by the local customs, laws and decisions of courts." The reference by the United States to "local" customs, laws and decisions of courts further underscores the fallacy of Swinger's contention that a federal Homestead grant takes precedence over state decrees.

As the 1862 and 1871 priority date theories are not applicable, the only remaining priority date theory urged by the Swingers is the 1926 date originally set forth in their 1979 statement of claim. Since the Swingers amended their 1926 priority date to 1871, they cannot receive the benefit of the *prima facie* statute to support the 1926 priority date. The Swingers repudiated

---

<sup>2</sup> A further discussion of the doctrine of beneficial use can be found in the Court's Memorandum filed September 15, 1994 in Water Court Case No. WC-92-2 at pages 7-10, 15, and 16.

their reliance on this notice by their 1988 amendment. As a result of their own assertions, their original claim to the 1926 priority date is no longer *prima facie* proof of its contents.

Without the benefit of the *prima facie* statute, Swingers had the burden to prove a beneficial use over a reasonable period of time, including the amount of water beneficially used. Holmstrom Land Co. v. Newland Creek Water District, 185 Mont. 409, 419, 605 P.2d 1060 (1980).

Absent evidence demonstrating the 1926 Bennett appropriation was subsequently moved and made appurtenant to the Swinger lands, Swingers cannot rely on the 1926 Bennett appropriation to support their water right claim. See Lensing v. Day & Hansen Security Co., 67 Mont. 382, 215 P. 999 (1923), Castillo v. Kunneman, 197 Mont. 190, 642 P.2d 1019 (1982). Absent the protection of the *prima facie* statute, Swingers have the burden of demonstrating privity of title to the original appropriator. St. Onge v. Blakely, 76 Mont. 1, 18-20, 245 P. 532 (1926). The Swingers failed to satisfy these burdens.

The only evidence presented at the hearing to establish a water right claim for the Swingers was a Declaration of Existing Water Right originally filed with the DNRC in 1975. The DNRC suggested in 1975 that the Swingers file the Declaration rather than an Application for Beneficial Water Use Permit. See Collins Exhibit O. Ironically, if Swingers had not followed the 1975 advice of the DNRC, an agency which Swingers scorn at every opportunity, the Swinger claim would have been terminated.

#### Purported Amendments to Claim

The Swingers purported to amend their Statement of Claim

in 1992 and 1997. The 1992 amendment was an effort to expand their right beyond the single purpose associated with their originally filed claim. Multiple uses of rights were to be filed on separate claim forms. See §85-2-224 and 225 MCA. Statements of claim were to be filed by April 30, 1982. Claims filed after that date are considered late and forfeited. Section 85-2-226 MCA; Adjudication of Water Rights of Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992).

When they filed their claim, Swingers admit that they knew "they had purchased 100 inches filed upon by George Bennett for many uses." They assert they "presumed the adjudication was necessary for irrigation only" and that the filing "cost would have been ridiculous - up to \$480.00 per 85-2-224." See Swinger Brief Covering Issues of Law Regarding the Motion for A Judgement on the Pleadings filed August 30, 1996 at page 5. Their 1975 Declaration also references three uses.

Section 85-2-224(1)(e) MCA, cited by Swingers in their August 30, 1996 brief, clearly reveals that statements of claim were to include "the purpose of use, including, if for irrigation, the number of acres irrigated." The Swingers purposely did not file on these other uses. The alleged additional uses of water claimed by the Swingers in their purported 1992 amendment, if they ever existed, were to be filed by April 30, 1982 or forfeited. As they were not filed, they were forfeited.

In 1993, the Montana Legislature provided for the conditional remission of forfeited water rights and allowed until July 1, 1996 to file late claims. See §§ 85-2-221(3) and 85-2-225(3) MCA. The Swingers did not avail themselves of this

opportunity to redeem these forfeited uses pursuant to the 1993 legislation. The Swinger effort to circumvent the late claim process by amending their claim must fail because forfeited claims cannot be resurrected through the amendment process.

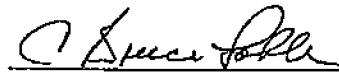
Their amendment efforts also fail because they did not follow a procedure designed to give due process to other water users in the source area. Except where specified otherwise, Water Court practice is governed by the Montana Rules of Civil Procedure. See Rule 1.II Water Right Claims Examination Rules and Rule 81, M.R.Civ.P. Amendments to a claim prior to a decree being issued are freely accepted and implemented. See Rule 6.III, Water Right Claims Examination Rules. After a decree is issued, leave of Court or consent of the adverse party is required. See Rule 15, M.R.Civ.P.

All parties to an adjudication of water rights on a stream are adverse to each other. Osnes Livestock Co. v. Warren, 103 Mont. 284, 305, 62 P.2d 206 (1936). In this statewide general adjudication, an adverse party may be someone other than the opponent in a particular case. Amendments to claims after issuance of a decree must be scrutinized with care as they may effect other water users on the source who have no knowledge of the purported amendment. Rule 15(d) M.R.Civ.P. permits service of supplemental pleadings upon proper motion, reasonable notice and upon such terms as are just. See also §85-2-233(6) MCA.

As the Swingers did not comply with the proper procedure, their 1992 and 1997 purported amendments fail. As the Swingers did not appear at the hearing, the Court relied on the available record, as developed by Collins, to determine the validity of the

Swinger claim.

DATED this 17 day of July, 1998.



---

C. Bruce Loble  
Chief Water Judge

Montana Water Court  
PO Box 879  
Bozeman, MT 59771-0879  
1-800-624-3270 (in-state only)  
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
NORTH END SUBBASIN OF THE BITTERROOT RIVER BASIN (76HB)

IN THE MATTER OF THE ADJUDICATION )  
OF THE EXISTING RIGHTS TO THE USE )  
OF ALL THE WATER, BOTH SURFACE AND )  
UNDERGROUND, EXCEPT FOR THE MAIN )  
STEM OF THE BITTERROOT RIVER, BUT )  
INCLUDING ALL TRIBUTARIES OF THE )  
BITTERROOT RIVER IN THE NORTH END )  
SUBBASIN OF THE BITTERROOT RIVER )  
DRAINAGE AREA IN RAVALLI AND )  
MISSOULA COUNTIES, MONTANA. )

CASE 76HB-11  
76H-W-000101-00  
76H-W-118461-00

**FILED**

JUL 17 1998

**Montana Water Court**

CLAIMANT: Keith R. Swinger and Marie E. Swinger, Gary E. Collins,

MOTION OF MONTANA WATER COURT

OBJECTORS: Washington Water Power Company, Montana Power Company,  
Gary E. Collins, Keith R. Swinger and Marie E. Swinger

ORDER ON COLLINS MOTION FOR SANCTIONS

During the course of these proceedings, Gary Collins and his attorney have made several requests that sanctions be imposed against Keith and Marie Swinger. The most recent is contained in the Collins Revised Response filed February 9, 1998 in which strenuous objections were lodged against the baseless accusations made by Swingers against David Pengelly, attorney for Gary Collins.

During these lengthy proceedings, the Swingers have portrayed any perceived opponent as being engaged in collusion; conspiracy, fraud or criminal acts, or as issuing falsehoods or committing perjury. The Swingers apparently believe it is permissible to disregard any of society's normal conventions on civility and politeness when engaged in Water Court proceedings.

Because the Swingers appeared mostly *pro se*, the Court was reluctant to admonish them for their boorish behavior. The

Court tolerated their outbursts and denied the several requests for sanctions by Collins so that Swingers could present their case at hearing with a vigor they felt necessary. In retrospect, the Court may have been in error by not awarding sanctions against the Swingers under Rule 11 M.R.Civ.P. and § 37-61-421 MCA.

David Pengelly is commended for not responding in a similar fashion to the taunts and insults aimed at him by the Swingers.

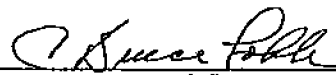
The most recent complaint by Collins is well taken. The Swinger suggestions and innuendos are baseless and unnecessary. However, compared to their previous outpourings of inflammatory rhetoric, their most recent comments are tame. They deserve admonishment but not formal sanctions. Therefore it is

ORDERED that the Collins' Motion for Sanctions is DENIED;

ORDERED that Keith and Marie Swinger are ADMONISHED to eliminate their use of inflammatory rhetoric in any future documents filed with this Court.

Failure to heed this admonishment may subject the Swingers to sanctions under Rule 11 M.R.Civ.P. and § 37-61-421 MCA.

DATED this 17 day of July, 1998.

  
\_\_\_\_\_  
C. Bruce Loble  
Chief Water Judge

Keith R. and Marie E. Swinger  
6055 Bitterroot Road  
Missoula, MT 59801

Gary E. Collins  
6000 Hayes Creek Road  
Missoula, MT 59803

David Pengelly, Attorney  
PO Box 8106  
Missoula, MT 59807