

Montana Water Court
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FILED

DEC 7 2001

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)

IN THE MATTER OF THE ADJUDICATION OF)	CASE NO. 41I-619
THE EXISTING RIGHTS TO THE USE OF ALL)	41I-W-090008-00
THE WATER, BOTH SURFACE AND UNDERGROUND,)	
WITHIN THE MISSOURI RIVER DRAINAGE AREA)	CASE NO. 41I-622 ✓
INCLUDING ALL TRIBUTARIES OF THE)	41I-W-090010-00
MISSOURI RIVER IN BROADWATER, CASCADE,)	41I-W-090011-00
JEFFERSON AND LEWIS AND CLARK COUNTIES,)	
MONTANA)	
_____)	

CLAIMANT: Round Grove Ranch Co., Inc.

OBJECTOR: Round Grove Ranch Co., Inc.

MEMORANDUM OPINION

STATEMENT OF THE CASES

Case 41I-619 involves four Round Grove Ranch Company (RGR) irrigation claims objected to by RGR. Claim 41I-W-090008-00 from Case 41I-619 is based upon a 1963 Declaration of Vested Groundwater Rights with an 1863 priority date for waters from an unnamed spring above an area called the Round Grove. Case 41I-622 involves two RGR irrigation claims objected to by RGR, based upon a 1929 appropriation for waters from unnamed springs above and in the area of the Round Grove. William Wall filed Notices of Intent to Appear on the two claims in Case 41I-622. The William W. Wall and Lucille R. Wall Trusts (Wall) intervened on claim 41I-W-090008-00 in Case 41I-619.

The hearing on claims 41I-W-090008-00, 41I-W-090010-00, and 41I-W-090011-00 was held on February 8 and 9, 2000, Water Master Carol Brown presiding. Holly Franz, attorney for RGR,

appeared with Gloria O'Connell, president of RGR, and Ms. O'Connell's nephew Kelly John Ingalls. John Bloomquist, attorney for Wall, appeared with David Rowland, attorney-in-fact for Wall. The parties conducted the Water Master on a site inspection of the Round Grove Ranch, the Broadwater-Missouri East Side Canal (Canal) where it crosses the Ranch, and the locations of the sources and places of use for these water right claims during the first day of the hearing.

RGR presented testimony by Kelly James Ingalls, John George Ingalls, and Gloria O'Connell. RGR Exhibits RG-1 through RG-13 were admitted into evidence and consist of copies of aerial photographs and maps, photographs, copies of deeds, and a 1999 video tape filmed on Round Grove Ranch. Exhibit RG-6, the 1999 video tape, was objected to on matters of relevance, but was admitted for the limited purpose of providing evidence of the flow of the springs in the Round Grove.

Wall presented testimony by David T. Rowland, Robert L. Davis, John P. Zipperian, and Sherrill Cartwright Zipperian. Wall Exhibits W-1, W-2, W-6A, W-7, W-8, W-9, W-10, W-13, W-14, W-15, W-16, and W-17 were admitted into evidence and consist of an Abstract of Title for the Wall property, a Power of Attorney to David Rowland, photographs, copies of maps and aerial photographs, and a copy of the 1955 Water Resources Survey (WRS) field notes for the Round Grove Ranch.

The parties filed post hearing briefs, proposed findings and conclusions, and replies. RGR filed a Motion and Brief for Judicial Notice of Facts of RGR stock claim 41I-W-089986-00, which is consolidated in Case 41I-376.

The Court has reviewed the claim files, pleadings, testimony and exhibits from the hearing, the parties' post hearing filings, claim 41I-W-089986-00, and applicable case law and Montana statutes in arriving at these findings and conclusions.

ISSUES

The primary issues raised by these parties are:

1. Should the Court take Judicial Notice of 41I-W-089986-00?
2. Is the 1963 Declaration of Groundwater Rights valid?
3. Is the 1929 appropriation valid and was it perfected?
4. What is the basis and extent of 41I-W-090008-00?
5. What is the basis and extent of 41I-W-090010-00?
6. What is the basis and extent of 41I-W-090011-00?
7. Has the prima facie status of these claims been overcome?

BACKGROUND

The spring for 41I-W-090008-00 rises to the east of Kelly Ingalls' house in the W2SWNW of Section 26, and drains into a ditch which flows southwest into Section 27, all in T08N, R02E. See Exhibits RG-1, RG-2, RG-4; Exhibits W-13, W-14, W-15.

The springs for 41I-W-090010-00 and 41I-W-090011-00 rise along the northern edge and to the north of the Round Grove generally in the SWSW of Section 26, and drain into ditches which flow southwest into Section 27. See Exhibits RG-1, RG-2, RG-4; Exhibits W-13, W-14, W-15.

The old county road (to Diamond City), built prior to 1869, runs north and south and to the west of the Round Grove in the E2SE of Section 27, and between the springs and the claimed places of use for 41I-W-090010-00 and 41I-W-090011-00. See Exhibits RG-1, RG-2, RG-4; Exhibits W-13, W-14, W-15.

In 1919 or 1920, J.F. O'Connell purchased the Round Grove Ranch and the O'Connell family has owned the ranch since. See: Testimony of Kelly Ingalls, John Ingalls, and Gloria O'Connell.

On April 10, 1930, J. F. O'Connell filed a Notice of Appropriation on behalf of RGR stating

On April 10, 1930, J. F. O'Connell filed a Notice of Appropriation on behalf of RGR stating that on October 18, 1929, RGR appropriated 200 Miner's Inches (MI) of the waters of springs and swamps located in the S2N2 and N2S2 of Section 26, for irrigating and other purposes on Section 27. The means of diversion was intended to be a ditch 36 inches by 36 inches to carry this 200 MI of water in a westerly direction from the springs and swamps to Section 27. No acreage is specified in Section 27. See Statements of Claim for 41I-W-090010-00 and 41I-W-090011-00.

In 1940, the Broadwater-Missouri East Side Canal (Canal) was completed to deliver Missouri River water for agricultural use and flows generally northwest through the Round Grove and the Round Grove Ranch in Sections 26 and 27. See: Exhibits RG-1, RG-5, RG-8A, RG-9L; Exhibits W-14; Testimony of David Rowland and Robert Davis.

The Broadwater-Missouri Canal Water Users Association was formed to manage the Canal and provide for the distribution of contract water to ranches along the Canal. There are at least 26 instances where the Canal intercepts and interrupts the flow of spring and creek waters for which water rights exist. The Association entered into exchange agreements with the water users in these 26 instances whereby Canal water is exchanged for the creek or spring water being intercepted by the Canal. Waste gates or take outs were installed in the Canal at or near the locations of these exchanges. See Testimony of David Rowland and Robert Davis; Exhibit W-16.

Highway 284 was constructed in 1954 to replace the old County road, and runs north and south just to the west of the section line between Sections 27 and 26, between the springs and the places of use for each of these claims. Culverts were placed under the Highway to allow for the drainage of waters arising above and to the east of the Highway in Section 26. See Exhibit RG-1, RG-5, RG-11; Exhibits W-7, W-8, W-13, W-14, W-15, W-16; Testimony of David Rowland, Robert Davis, Kelly Ingalls, and Gloria O'Connell.

The water from the spring in 41I-W-090008-00 is ditched to the "cabins pasture" above the Canal. Since 1940, the waters from the springs in 41I-W-090010-00 and 41I-W-090011-00 are ditched directly into the Canal. RGR takes these spring waters from the Canal at the waste gate for its Grainery Ditch (Grainery Check on Exhibit RG-1, or 1381+00 24" T.O. on Exhibit W-16), or at the waste gate for its Gurnett Creek water (the Gurnett Creek Check on RG-1, or Wasteway 1393+30 on Exhibit W-16). RGR has no exchange agreements with the Canal Water Users Association for the spring waters in 41I-W-090010-00 and 41I-W-090011-00. See Testimony of Robert Davis, Kelly Ingalls, and Gloria O'Connell; Exhibit RG-1; W-16.

The 1955 WRS Field Notes prepared by the State Engineer's Office for the Round Grove Ranch were based on information supplied by J. F. O'Connell, and the attached map includes the area where these springs are located. Among the water rights identified by J. F. O'Connell on this Survey, there is none for these springs, and no 1863 or 1929 water rights claimed by Mr. O'Connell. The 1956 Broadwater County WRS, developed from the WRS field notes and the aerial photographs as of 1956, shows no ditches in the areas of these springs, nor any irrigation of the place of use in 41I-W-090008-00. See Exhibit W-17; 1956 Broadwater County WRS.

On December 31, 1963, a Declaration of Groundwater Rights was filed on behalf of RGR. The copy of this Declaration attached to these claims is incomplete, and includes only the first three of six pages of this document. The individual making this Declaration is unknown from the copy available, although RGR claims it was J. F. O'Connell. In Items #5, #18, and #21, groundwater from springs in Sections 26 and 27 are claimed for subirrigation within these sections continuously by declarant and predecessors since 1863. No points of diversion or places of use are identified under these items, and none of these items appear to be for diverted surface water. See these Statements of Claim.

41I-W-090008-00

In 1982, Frances A. Ingalls timely filed **41I-W-090008-00** on behalf of RGR for 100 MI of the waters of an unnamed swamp in the W2SWNW and the NWNWSW of Section 26 and the E2SENE of Section 27, through unnamed drain ditches for the irrigation of 5 acres in the E2E2 of Section 27. The priority date claimed was 1863 based upon the 1963 Declaration of Groundwater Rights. The period of use claimed is March 1 through November 30. See this Statement of Claim.

The hand drawn map attached to 41I-W-090008-00 shows several unnamed ditches from unnamed "streams" in generally the S2NW of Section 26, culminating into one ditch at the SWSWNW of Section 26 which travels southwest under Highway 284 and the old County road to a 5 acre parcel in the E2E2 of Section 27. The two lower ditches on this map appear to be the same drain ditches claimed in 41I-W-090010-00 and 41I-W-090011-00. See these Statements of claim.

On December 7, 1988, Kelly James Ingalls filed an Amendment for 41I-W-090008-00 on behalf of RGR to change the priority date to January 1, 1863. On this same date Kathy Arndt with the DNRC filed an Interview Report of a meeting with Kelly Ingalls wherein he confirmed the source of this water as springs, and confirmed the diversion system claimed. See this claim file.

During the examination of 41I-W-090008-00, only 4 acres were found as being irrigated on the 1979 aerial photograph, and no acres were found as being irrigated on the 1956 Broadwater County WRS. Based upon information supplied by RGR, DNRC changed the source type from groundwater to surface water, and the flow rate was reduced to a standard of 17 Gallons Per Minute (GPM) per acre, or 85 GPM. See DNRC Examination Worksheets dated February 25, 1988 and July 21, 1993, in this claim file.

On January 6, 1995, 41I-W-090008-00 was decreed as amended, with the reduction in flow rate noted above, and with the following potential issue remarks:

THE BROADWATER COUNTY WATER RESOURCES SURVEY (1956)
APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF
MAXIMUM ACRES ISSUE.

THE CLAIMED PERIOD OF USE EXCEEDS THE USUAL GROWING SEASON
FOR THIS CLIMATIC AREA WHICH IS APRIL 15 TO OCTOBER 15.

See the Abstract of this claim.

41I-W-090010-00 AND 41I-W-090011-00

In 1982, Frances A. Ingalls timely filed **41I-W-090010-00** and **41I-W-090011-00** on behalf of RGR based upon the 1929 RGR appropriation. 41I-W-090010-00 was filed for 50 Miner's Inches (MI) of the waters of a swamp and springs in the N2NWSW and the SWNWSW of Section 26 and the SENESE of Section 27, for the irrigation of 258 acres in Section 27, through a drain ditch. 41I-W-090011-00 was filed for 150 MI of the waters of the same swamp and springs, for the irrigation of the same 258 acres, through the same drain ditch. Both claims specified a period of use of March 1 to November 30. See these Statements of Claims.

The hand drawn map attached to 41I-W-090010-00 identifies a drain ditch running along the northern edge of the Round Grove. The hand drawn map attached to 41I-W-090011-00 identifies a drain ditch running from just to the north of the Round Grove into the drain ditch running along the northern edge of the Grove. These ditches also appear on the map attached to 41I-W-090008-00. See these Statements of Claim.

When 41I-W-090010-00 and 41I-W-090011-00 were examined by the DNRC, 258 acres were found to be irrigated on the 1956 Broadwater County WRS, and 265 acres were found to be irrigated on the 1979 aerial photograph. See DNRC Examination Worksheets dated February 25, 1988, in these claim files.

On December 7, 1988, Kelly James Ingalls filed Amendments to 41I-W-090010-00 and 41I-W-090011-00 on behalf of RGR to change the source to spring on 41I-W-090010-00, to change the source to swamp on 41H-W-090011-00, to change the two points of diversion on both claims in Section 26 to one point of diversion (the N2SW of Section 26), and to change the flow rate on both claims to 100 MI each. On January 25, 1989, Gloria O'Connell filed Amendments to both claims on behalf of RGR to change the acres irrigated in Section 27 from 258 to 265. See these claim files.

Based upon information supplied by the claimants, DNRC determined the source type for 41I-W-090010-00 and 41I-W-090011-00 to be surface water from undeveloped springs. See the DNRC Examination Worksheets dated July 21, 1993, in these claim files.

On March 8, 1995, 41I-W-090010-00 and 41I-W-090011-00 were decreed in the Temporary Preliminary Decree as amended with the following potential issue remarks:

THIS CLAIM APPEARS TO BE DUPLICATED BY WATER RIGHT NO. W090011-00 (or W090010-00).

THE CLAIMED PERIOD OF USE EXCEEDS THE USUAL GROWING SEASON FOR THIS CLIMATIC AREA WHICH IS APRIL 15 TO OCTOBER 15.

See Abstracts of these claims.

Objections to These Claims

On January 9, 1996, Gloria O'Connell filed a Notice of Objection to **41I-W-090008-00** in support of the claimed period of use, and to resolve the potential issues raised in the remarks. Included was an Affidavit by Gloria O'Connell dated January 5, 1996, in support of the claimed period of use. On November 16, 1998, Gloria O'Connell filed an additional Affidavit in support of the claimed flow rate and period of use. See the case and claim files for this right.

On May 10, 1999, Wall filed a Motion to Intervene on **41I-W-090008-00** on the grounds that

Wall also claims water from the Round Grove springs. On May 21, 1999, RGR filed a Brief Opposing Motion to Intervene, claiming the source for 41I-W-090008-00 does not include the springs along the northern edge of the Round Grove, but rather is for a separate spring further north of the Round Grove, contrary to the decreed points of diversion and the map attached to the Statement of Claim. The Motion to Intervene was granted on June 18, 1999. See case file for 41I-619.

RGR filed Notices of Objection against **41I-W-090010-00** and **41I-W-090011-00** to change the priority dates to 1863, to resolve the potential issues, and in support of the decreed periods of use. Wall filed Notices of Intent to Appear against both claims, questioning RGR's interest in the sources claimed. See these claim files.

DISCUSSION

ISSUE #1 **Should the Court take Judicial Notice of 41I-W-089986-00?**

Yes, but not based on the authority, nor the reason requested by RGR. RGR moves the Court to take Judicial Notice of 41I-W-089986-00 pursuant to Rule 201 of the Montana Rules of Evidence.

No objections have been filed to this Motion. Rule 201 states:

Rule 201. Judicial notice of facts.

(a) Scope of rule. This rule governs judicial notice of all facts.

(b) Kinds of facts. A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. (emphasis added)

Stock claim 41I-W-089986-00 is for springs and swamps on the Round Grove Ranch, and includes the lower springs arising in Section 27 below the Canal. RGR argues this right is not in dispute and should therefore be judicially noticed. RGR has itself objected to this claim, which also has potential issue remarks. This claim has been consolidated into Case 41I-376, and is on hold for

the resolution of other RGR cases. The facts of 41I-W-089986-00 are in dispute. The Court will not take judicial notice of this claim as an undisputed fact.

However, 41I-W-089986-00 is a water right decreed in this Basin. The Statement of Claim with attachments is part of the Water Court record, and a court may take judicial notice of records of any court of this state, including its own, pursuant to Rule 202, Montana Rules of Evidence. Therefore, this Court hereby takes judicial notice of the record for 41I-W-089986-00, but notes the facts of this claim are in dispute.

ISSUE #2. Is the 1963 Declaration of Groundwater Rights valid?

No, Wall correctly argues the evidence herein does not support the 1963 Declaration as the basis for any of these water rights. There are several problems with the 1963 Declaration. The first concerns the evidentiary value of this declaration. It was filed in 1963, apparently by J. F. O'Connell. In this Declaration, Mr. O'Connell swears that he and his predecessors have used spring water for the sub-irrigation of lands in Section 26 since 1863. To have personal knowledge of the use of this water in 1863, and be competent to swear to its use, Mr. O'Connell would have to have been 115 to 120 years old in 1963 when he made this Declaration. In King v Schultz, 141 Mont. 94, 375 P.2d 108 (1962), the court held that in order for an ancient document to be admissible, the writer must have been competent to testify to the facts. Pursuant to Rule 602, M.R.Evid., competence means firsthand knowledge. It is highly unlikely that J. F. O'Connell had firsthand knowledge of the water use on the Round Grove Ranch in 1863.

Secondly, RGR witnesses have identified the source of these water rights as springs. See Affidavits of Gloria O'Connell filed November 16, 1998; DNRC Interview Reports dated December 7, 1988; Testimony of Kelly Ingalls, John Ingalls, and Gloria O'Connell. The 1963 Declaration is for groundwater and not for surface water. Between 1921 and 1973, springs were subject to

appropriation as specified in Section 89-801 (7093), R.C.M., which stated:

What waters may be appropriated. The right to the use of the unappropriated water of any river, stream, ravine, coulee, **spring**, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same. (emphasis added)

See also Section 89-810, R.C.M., which includes springs in its directions for filing notices of appropriations.

In 1961, the legislature enacted Sections 89-2911 through 89-2913, R.C.M., concerning the appropriation of groundwater. These sections refer to groundwater using the terms "wells", "subirrigation", or "other natural processes", and springs remained part of the Section 89-801, R.C.M. et seq., appropriation process. Which means, an appropriation from a spring between 1921 and 1973 is governed by Sections 89-801, R.C.M. et seq., and is not governed by the groundwater Sections 89-2911 through 89-2913, R.C.M., enacted in 1961.

Rule 1.III. of the Water Right Claim Examination Rules (1991), states: "Undeveloped spring" means surface water if its natural flow is not increased by some development at its point of extrusion from the ground. This same Rule states: "Developed spring" means groundwater if its natural flow is increased by some development at its point of extrusion from the ground, such as simple excavation, cement encasement, or rock cribbing.

There is no evidence herein that RGR has done anything to increase the flow of these springs. The springs drain into the ditches and the resulting water is carried thence to culverts under Highway 284. There was no excavation, cement encasement, or rock cribbing observable at these springs during the site inspection on the day of the hearing in this case. Rule 2.VIII.(4)(f), Water Right Claim Examination Rules, states: "For purposes of this examination, springs will be presumed to be undeveloped, unless documentation shows otherwise." Pursuant to this directive and the information

provided by RGR, DNRC correctly listed the source type for these claims as surface water rather than groundwater. Since these claims are for surface water, the 1963 Declaration does not apply.

Thirdly, Wall correctly argues the rights specified in this Declaration are for sub-irrigation, and not irrigation by diverted surface water. Appropriate means to divert, impound, or withdraw a quantity of water for a beneficial use. Natural sub-irrigation means irrigation resulting from a naturally occurring high water table condition that supplies water for crop uses. Sub-irrigation does not require a diversion of water. See Rule 1.III., Water Right Claim Examination Rules (1991).

RGR has failed to establish the 1963 Declaration of Ground Water Rights is the appropriate basis for these diverted surface water rights.

ISSUE #3. Is the 1929 appropriation valid and was it perfected?

No, Wall correctly argues the evidence submitted does not support the perfection of this appropriation. RGR admits to inconsistencies between the evidence and the rights as decreed. Both parties suggest changes to be made based upon differing interpretations of the evidence. See the parties post hearing filings in Cases 41I-619 and 41I-622.

In 1929, the laws governing the filing of notices of appropriation required that all elements of the water right be identified, including the size and a description of the means of conveyance. The 1929 RGR appropriation includes all required elements. A notice of appropriation was required to be filed within six months of the date of first use. The RGR appropriation claims an October 18, 1929 date of first use and was filed on April 10, 1930, within six months. The 1929 appropriation appears to be valid on its face. See RGR 1929 Notice of Appropriation; Sections 7093 through 7103, RCM (1921).

This appropriation has been very perplexing. On the one hand, we have what appears on its face to be a valid appropriation, with witnesses swearing it was perfected, and a ditch existing today

in the general area specified in the appropriation. On the other hand, we have physical evidence and old records indicating this water was never put to use until at least 11 years later.

Neither J. F. O'Connell, or his son George O'Connell are with us today to describe the events of 1929 through 1940. Kelly Ingalls (born in 1952), and John Ingalls (born in 1949) provided the majority of the testimony for RGR. They are too young to have any firsthand knowledge of the events surrounding this appropriation. RGR's eldest witness, Gloria O'Connell, was only 4 years old when her father filed the 1929 appropriation.

In Allen v Petrick, 69 Mont. 373, 222 P. 451 (1924), the Supreme Court stated at page 375: "After a further study of the record together with the supplemental briefs we are unable to reach conclusions which are satisfactory to us; but, as the parties seem to have produced all the evidence within their command no good purpose would be served by sending back the case, or any part of it, for a new trial. The trial court was confronted with that condition which frequently appears in water suits where old rights are involved: All or nearly all of the settlers who did the original work are gone. Those who do appear are hampered with failing memories or are unable to dissociate fact from hearsay. Neighbors testify from impressions remaining after the lapse of years; much of their testimony is guesswork. Men who were boys when the things inquired about were being done appear, and their testimony is colored by the free fancies of boyhood which memory still retains. So the appellate as well as the trial court must do the best it can with what it has to work with." We are now in the year 2000, and even farther from the "original work."

In deciding cases, a court must ascertain as many facts as possible from the evidence presented, and then weigh the facts according to their reliability. Old documents and records are frequently more reliable than old memories, because they were made during, or immediately after, the old event. A court must try to reconcile conflicting evidence, which frequently requires filling

in the gaps.

The drain ditches in existence today are within the legal description stated in the 1929 Notice of Appropriation (the S2N2 and the N2S2 of Section 26). The current ditch runs along the northern edge of the Round Grove springs from east to west, with a branch from springs to the north of the Grove and behind John Ingalls's home (Pat Doherty's House on Exhibit RG-2). However, the current ditch is much smaller than the ditch contemplated in the appropriation. See Exhibits RG-1, RG-7A & 7B, RG-8A, RG-9L; Exhibit W-6A.

According to Kelly Ingalls' testimony, from the confluence of the two branches of this drain ditch, it proceeded southwest approximately 300 yards, where it ended in the E2E2SE of Section 27. Only approximately 10 acres in the SESE of Section 27 are below this ditch, and could have been irrigated by water from the ditch described. These 10 acres are bounded by the Round Grove on the East, the old County road on the west, and the southern section line for Section 27 to the south. There is no evidence of ditches within this 10 acres, or of a culvert under the old County road which would have taken this water southwest beyond this 10 acres. The southern boundary of the Round Grove Ranch is the southern section line for Section 27. See Exhibits W-6A, W-13, and W-14; Exhibits RG-1, RG-4, RG-5, RG-7A, RG-7B, RG-8A, and RG-9L; Testimony of Kelly Ingalls.

No ditch appears along and above the Round Grove on the 1938 or 1955 aerial photographs. Any possible traces of such a ditch on the 1979 aerial photograph are obliterated by claimant's drawings on Exhibit RG-1. The 10 acres identified at hearing as being originally irrigated by this ditch do appear dark on the aerial photographs, which is usually an indication of irrigation. However, according to the testimony of RGR's witnesses and the 1963 Declaration of Groundwater Rights, this 10 acres is naturally subirrigated. Subirrigated land will also appear dark on an aerial photograph, and this would explain why this land appears dark on the aerial photographs absent any

ditches. See Exhibits RG-1, RG-4; Exhibits W-13, W-14; Testimony of Kelly Ingalls.

RGR witnesses testified these 10 acres have not been irrigated with surface water since the Canal was installed in 1940. J. F. O'Connell never requested an exchange agreement for this water from the Water Users Association when the Canal was installed. If he had been using such water prior to the construction of the Canal, surely he would have requested an exchange agreement to avoid paying for the distribution of his own water. RGR has been taking these spring waters out of the Canal at its Grainery Ditch (Grainery Check on Exhibit RG-1), or at Gurnett Creek (Gurnett Check on Exhibit RG-1) for the irrigation of different land to the west of these 10 acres. See Exhibit RG-1; Exhibit W-16; Testimony of Kelly Ingalls and Gloria O'Connell.

J. F. O'Connell did not claim the 1929 appropriation, or any water rights from the Round Grove springs in the 1955 WRS Field Survey Notes, and the drain ditch was not included in the 1956 Broadwater County WRS. If Mr. O'Connell had been using water from these springs in 1955, surely he would have reported such use to preserve and continue a record of his appropriation. See Exhibit W-17; 1956 Broadwater County WRS.

In spite of RGR's testimony and arguments, there is no evidence that J. F. O'Connell ever built the 3 foot by 3 foot ditch specified in the 1929 appropriation. No ditch of such proportions was evident on the site inspection, except for the Canal. But, why would Mr. O'Connell build a 3 foot by 3 foot ditch for 200 MI of water just to irrigate 10 acres of land that are already being sub-irrigated? This makes no sense. Mr. O'Connell's intent was more likely the irrigation of the 265 acres decreed for 41I-W-090010-00 and 41I-W-090011-00. Perhaps because he knew the Canal was coming, J. F. O'Connell never built the ditch specified in the 1929 appropriation. The current drain ditch appears to have been developed after the Canal to supplement the contract water from the Canal on the acreage claimed.

The 10 acres capable of being irrigated by the waters from the intended ditch were already being sub-irrigated as implied in the 1963 declaration, and as evidenced in the aerial photographs. Additional diverted water was not necessary for the irrigation of these 10 acres. See Exhibits RG-1, RG-4; Exhibits W-13, W-14.

The addition of diverted water to sub-irrigated ground, where it is not needed, does not amount to a beneficial use. The measure of a water right is not how much water was claimed, but how much water was reasonably and beneficially used. The controlling principle upon which water rights in Montana were perfected and continue to possess legal validity is that of beneficial use. See §85-2-101, MCA.

In McDonald v. State, 220 Mont. 519, 525-532, 722 P.2d 598 (1986), the Court stated an appropriator "is entitled to only the beneficial use of the amount of water called for by his appropriation or decree when he has need therefore, and providing his distributing system has a sufficient capacity to carry such an amount of water." "So long as a party has all the water his necessity requires or that his ditches will carry, it is immaterial that he has a right under decree or otherwise, to a greater flow from the creek." Id.

The weight of the evidence herein fails to support RGR's claim that the 1929 appropriation was perfected or beneficially used.

ISSUE #4. What is the basis and extent of 41I-W-090008-00?

Priority date and basis of the right

Wall argues the priority date for 41I-W-090008-00 should be December 31, 1914, apparently based upon the testimony of Kelly Ingalls that his father dug this ditch after World War I. However, Kelly Ingalls was not born until 1952. Mr. Ingalls' knowledge of events before his birth are based entirely on hearsay. Furthermore, it is unlikely Mr. Ingalls' father was old enough to have dug this

ditch in 1914. If Mr. Ingalls' father dug this ditch, he likely did so much later than 1914. See Testimony of Kelly Ingalls.

All of RGR's witnesses testified that spring water from 41I-W-090008-00 was used to irrigate a field called the cabins pasture as far back as 1863, but the physical evidence does not support this testimony. The cabins pasture clearly does not appear irrigated on the 1938 aerial photograph. See Exhibits RG-4; W-13; Testimony of Kelly Ingalls, John Ingalls, and Gloria O'Connell.

The copy of the 1955 aerial photograph entered into evidence is so dark in the area of the cabins pasture and the spring for 41I-W-090008-00 that no detail is evident. The cabins pasture does not appear irrigated on the 1956 Broadwater County WRS, and there is no ditch for this spring identified. The Court concludes that neither this ditch, nor the irrigation of the cabins pasture were evident on the 1955 aerial photograph. See Exhibit W-14; 1956 Broadwater County WRS.

There is no evidence of this ditch on the 1979 aerial photograph, even though the place of use appears dark as if irrigated. However, if the cabin pasture was sub-irrigated as implied in the 1963 Declaration, it would appear dark on an aerial photograph. See Exhibit RG-1.

The location and construction of Highway 284 between the spring in 41I-W-090008-00 and the cabins pasture may have destroyed any natural sub-irrigation of this field. If so, then it is reasonable to assume that the application of surface water would be necessary to continue the irrigation of this field. That would make the construction of this ditch more likely sometime after the completion of Highway 284 in 1954. See Testimony of Gloria O'Connell.

J. F. O'Connell did not claim the spring in 41I-W-090008-00, or any 1863 rights in the 1955 WRS Field Survey Notes. In spite of RGR's testimony and arguments, the evidence does not support the priority date claimed for 41I-W-090008-00. The swells and bumps observed in the

cabins pasture were too irregular to be conclusive evidence of ditches. Nor does the evidence support the Wall willingness to settle for a 1914 priority date. The earliest priority date supported by the evidence is sometime after the 1956 Broadwater County WRS, and the ditch for this right was likely dug by Kelly Ingalls' father as Mr. Ingalls has testified.

Standard DNRC policy requires where a month and day are not specified, the last day of the month and the last month of the year shall be used for the priority date. The earliest date of first use for 41I-W-090008-00 should be December 31, 1956, and the type of historical right should be "use." See Water Right Claim Examination Rule VI (J) (2) (c), (1991).

Flow rate and acres irrigated

On the first day of the hearing, the ditch and spring for 41I-W-090008-00 were clearly visible from the old county road in front of Kelly Ingalls' house during the site inspection. However, the culvert under Highway 284 used to convey this water to the cabins pasture was so plugged up with debris that no water was evident flowing out of the culvert. Based on the testimony of Kelly Ingalls, this culvert has been generally impassible for a "few" unspecified number of years. Mr. Ingalls testified RGR has been getting only a "little dab of water" through this culvert, and that most of this spring water flows down the burrow pit on the east side of Highway 284 to the culvert where the ditch for 41I-W-090010-00 and 41I-W-090011-00 takes those spring waters under the Highway and into the Canal. The flow of the spring in 41I-W-090008-00 has never been measured. This evidence contradicts RGR's arguments and the prima facie flow rate of 100 MI. See Testimony of Kelly Ingalls; Post hearing filings of RGR.

The acreage for the cabins pasture was claimed and decreed as five acres. Kelly Ingalls testified that the acreage for the cabins pasture prior to the Canal was 9.8 acres based upon his calculations from the 1938 aerial photograph. RGR argues that the acreage on this claim should

therefore be changed to 9.8 acres as the maximum acres historically irrigated. The 9.8 acres Mr. Ingalls found for the cabins pasture on the 1938 aerial photograph may have been sub-irrigated, but was not irrigated by surface water from this spring until after 1956. In order to determine the number of acres irrigated under this right, we must review the evidence after 1956. Kelly Ingalls testified he originally based his calculation of the five acres for the cabins pasture on the 1979 aerial photograph. However, DNRC found the cabins pasture to consist of 4 acres on the 1979 aerial photograph, 1 acre in the S2SENE and 3 acres in the N2NESE, all in Section 27. The Court finds the DNRC measurements to be more reliable than Mr. Ingalls' measurements.

While the standard flow rate per acres ratio utilized by the courts prior to the current adjudication was one MI per acre, the current claim examination standard is one and one half MI, or 17 gallons per minute per acre. See Water Right Claim Examination Rule 2.IX. (1991). Using the 4 acres found to be irrigated in the examination of this claim, the 100 MI claimed appears excessive for the use and necessity thereof. At 17 gallons per minute per acre, RGR has only beneficially used 68 gallons per minutes, or 6 MI for the irrigation of the cabins pasture. See Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914); Jacobs v. City of Harlowton, 66 Mont. 313, 213 P. 244 (1923); McDonald v State, Id.

RGR argues that it needs 100 MI of water for the irrigation of this field due to conveyance losses, but Kelly Ingalls testified that the distance from the culvert under the old county road to the field is only 150 yards. The rest of the ditch is less than a quarter of a mile in length. There is no evidence to support such a large conveyance loss, nor does the ditch appear large enough to carry 100 MI. 68 GPM appears to be a sufficient quantity of water for the beneficial irrigation of the cabins pasture.

Point of diversion

Based upon the testimony of RGR witnesses, 41I-W-090008-00 includes only the spring in the W2SWNW of Section 26, and not the springs along the northern edge of the Round Grove and immediately to the north of the Round Grove. The second and third claimed points of diversion should be removed from this claim. See Testimony of Kelly Ingalls, John Ingalls, and Gloria O'Connell.

Period of use

RGR witnesses testified RGR uses its water early in the spring before the Canal is turned on, and late in the fall after the Canal is turned off. The period of use on the Canal claim 41I-W-119460-00 is April 1 to October 31. As there is no conflicting evidence on the period of use, it should remain as claimed on 41I-W-090008-00. See Testimony of Kelly Ingalls, John Ingalls, and Gloria O'Connell.

The Montana Constitution preserves to owners of appropriated water rights such amount of water as owners or their predecessors put to beneficial use. The evidence supports a flow rate of 6 MI on 41I-W-090008-00 for this spring located in the W2SWNW of Section 26, as the maximum amount of water beneficially used to irrigate the 4 acres in the cabins pasture, with a priority date of December 31, 1956. As the potential period of use, flow rate, and acres irrigated issue remarks have been resolved on 41I-W-090008-00, they should be removed from the abstract of this claim. See McDonald v. State, Id at page 529; Irion v. Hyde, 107 Mont. 85, 95, 81 P.2d 353 (1938).

ISSUE #5. What is the basis and extent of 41I-W-090010-00?

The evidence supports RGR's development of the drain ditches in 41I-W-090010-00 some time after the completion of the Canal, which was in 1940. Wall argues RGR should have a 1940 use right for less than 200 MI.

Priority date and Basis of the Right

Wall has successfully argued the 1963 Declaration of Ground Water Rights is not the appropriate basis for these diverted surface water rights, nor is the 1929 appropriation. The Canal provided RGR with the means to beneficially use water from these springs after 1940. However, none of the evidence indicates when in 1940 the Canal was completed.

Standard DNRC policy requires where a month and day are not specified, the last day of the month and the last month of the year shall be used for the priority date. The date of first use for these drain ditches should be December 31, 1940. See Water Right Claim Examination Rule VI (J) (2) (c), (1991).

Source

RGR argues these springs should be categorized as developed groundwater rather than undeveloped surface water, yet Gloria O'Connell admits in her November 16, 1998 Affidavit that these springs simply flow into the drain ditches. These springs do not fit the definition of developed groundwater as discussed under Issue #2 above. No evidence has been submitted that RGR has done anything to increase the natural flow of these springs. No development was observed on the site inspection of these springs. The source type should remain as surface water and these springs should continue to be identified as undeveloped. See these Statements of Claim; DNRC Examination Worksheets dated July 21, 1993; Rules II and VI.D.3.c., DNRC Water Right Claim Examination Manuel (1995); Exhibits RG-7A, RG-7B.

Flow Rate

RGR argues Exhibit RG-10#13 shows the claimed 200 MI in this drain ditch, but this Exhibit is a picture of a flood. No ditch is evident in this picture. At most, this is a picture of flood or high water, but RGR did not claim these spring waters as flood rights. See Exhibits RG-5, RG-7A, RG-

7B, RG-9L, RG-10#13; Exhibit W-6A; Statement of Claim 41I-W-090010-00.

The photographs of the drain ditch where it exits the culvert under Highway 284 show a wide flat bottomed short channel into the Canal. According to the testimony, the land here is practically level, and Canal water backs up into this channel when the Canal is open, which likely accounts for the width. If the drain ditch were producing 200 MI of water, one would expect this channel to be less flat bottomed. When the Canal is turned off, there is very little water in this channel. See Exhibits RG-7A, RG-7B, RG-9L, RG-8A; and Exhibit W-6A.

The existing drain ditch appears to be capable of diverting the 25 MI actually measured by Kelly Ingalls in December of 1981 (Exhibit RG-5). Mr. Ingalls testified that the springs produce more water during the irrigation season. Most of the photographs of this ditch, taken in the fall, winter, or spring, show a flow close to the 25 MI measured by Kelly Ingalls in December of 1981. See Testimony of Kelly Ingalls and John Ingalls; Exhibits RG-5, RG-7A & B, RG-8A, RG-9L; and Exhibit W-6A.

RGR argues that 200 MI is not excessive for the 265 acres claimed for this appropriation, but admits that these 265 acres could not be irrigated with this drain ditch water absent the means of diversion provided by the Canal in 1940. RGR cites McDonald v State, Id., at pages 528 and 529, in support of its argument, where the Court states essentially that an appropriator can incrementally develop an appropriation within a reasonable time by adding acreage and laterals to his main ditch, so long as the capacity of the original first ditch is not exceeded. As it has been determined that the 1929 appropriation was never perfected, this argument no longer applies. Even if it did, RGR does not own and did not develop the Canal, and therefore cannot claim the Canal facility as RGR's own incremental development. There is no evidence these springs produce 200 MI. Allowing for seasonal variation in flow and the ditch capacity, the evidence supports a flow rate of 50 MI for these

springs.

Point of Diversion

Using a standard grid on the 1979 aerial photograph, it appears that these springs are located in the W2NWSW and the S2N2SW of Section 26, rather than in the N2SW of Section 26 and the SENESE of Section 27 as decreed. No evidence was presented, nor argument made, that these springs arise in any portion of Section 27. The drain ditches end at the culvert under Highway 284, just to the west of the section line between Sections 26 and 27. See Testimony of Kelly Ingalls, John Ingalls; Exhibit RG-1, RG-9L; these Statements of Claim.

Acres Irrigated and Period of Use

RGR claims it uses the Canal to carry this spring water west to the waste gate for its Grainery Ditch (1381+00 - 24" T.O. on Exhibit W-16), or further west to the waste gate at Gurnett Creek (1393+30 wasteway on Exhibit W-16), for irrigation of the 265 acres decreed in predominantly the S2 of Section 27. These acres appear irrigated on the 1955 aerial photograph, and on the 1979 aerial photograph, and are identified on the 1956 Broadwater County WRS as being irrigated with contract water from the Canal, J.F. O'Connell claimed contract water from the Canal on the 1955 WRS Field Notes. Parties are allowed to claim the maximum acreage irrigated under a water right. See Galahan v. Lewis, 105 Mont. 294, 301, 302, 72 P.2d 1018 (1937). As the 265 acres are supported by the evidence, they should remain as decreed. See Testimony of Kelly Ingalls, John Ingalls, Gloria O'Connell, Robert Davis; Exhibits RG-1, RG-5, RG-7A, RG-7B, RG-8A, RG-9L; Exhibits W-6A, W-13, W-14; 1956 WRS.

RGR witnesses testified these rights are used in the early spring before the Canal is turned on, and late in the fall after the Canal is turned off. This use coincides with the Canal Users Association policy of opening the exchange portions of the waste gates during the off season to

allow for the natural drainage of the springs and creeks intercepted by the Canal. The evidence herein supports the claimed period of use and resolves the period of use potential issue remarks. See Testimony of Kelly Ingalls, John Ingalls, and Robert Davis.

41I-W-090010-00 should be based upon a use right with a priority date of December 31, 1940 for 50 MI of undeveloped spring water arising in the W2NWSW and S2N2SW of Section 26, TWP 08N, RGE 02E, for use on the decreed 265 acres, for the period of use claimed. As the basis for this claim has changed, the multiple use remark is no longer applicable. Remarks should be added to the abstract to explain the use of the Canal as a carrier for this water, and that contract water from the Broadwater-Missouri Water Users Association is used to supplement this right.

ISSUE #6 What is the basis and extent of claim 41I-W-090011-00?

This claim appears to be identical to 41I-W-090010-00. The only difference is how the source is described. 41I-W-090010-00 specifies springs and 41I-W-090011-00 specifies a swamp. But, the points of diversion on both claims are identical, and are included on the maps attached to the both Statements of Claims. The means of diversion for both claims is the same ditch, with a fork to the more northern spring. There is no evidence to distinguish the flow rate of the northern spring from the springs along the grove. When Kelly Ingalls measured the flow rate, he did so after the confluence of the two forks.

RGR has agreed that 41I-W-090010-00 and 41I-W-090011-00 represent the same water right, and it appears that one claim should be sufficient. 41I-W-090011-00 should be dismissed as it is duplicative of 41I-W-090010-00.

ISSUE #7 Has the prima facie status of these RGR claims been overcome?

The Statements of Claim of existing water rights filed in this adjudication were given prima facie proof of their contents pursuant to section 85-2-227, MCA. This means an objector has the

burden of producing sufficient evidence to overcome the prima facie status of a Statement of Claim. See analysis in Memorandum Opinion, Water Court Case No. 40G-2 (March 11, 1997). Both parties herein have produced sufficient evidence to contradict and overcome the claimed priority date, type of historical right, flow rate, maximum acres, points of diversion, and places of use of 41I-W-090008-00, and to contradict and overcome the claimed priority date, type of historical right, flow rate, and points of diversion on 41I-W-090010-00 and 41I-W-090011-00. Based upon the foregoing, the elements of these claims should be changed as specified in Issues #4, #5 and #6 above.

CONCLUSIONS

As the parties have provided sufficient evidence to overcome the prima facie status of RGR irrigation claim 41I-W-090008-00, changes should be made to this claim to conform with the findings herein. The potential issue remarks have been resolved and should be removed from the abstract for this claim.

As the parties have provided sufficient evidence to overcome the prima facie status of RGR irrigation claims 41I-W-090010-00 and 41I-W-090011-00, changes should be made to claim 41I-W-090010-00 to conform with the findings herein, and claim 41I-W-090011-00 should be dismissed. Point of diversion and supplemental rights clarification remarks should be added to the abstract of claim 41I-W-090010-00 to more fully describe its use as specified herein. The potential issue remarks have been resolved and should be removed from the abstract of 41I-W-090010-00, and the multiple use remark should be removed.

DATED this *7th* day of *December*, 2001.

Carol Brown

Carol Brown
Water Master

CERTIFICATE OF SERVICE

I, Patricia J. Gunderson, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **MEMORANDUM OPINION** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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DATED this *7th* day of *December*, 2001.

Patricia J. Gunderson
Patricia J. Gunderson
Deputy Clerk of Court