

**FILED**

DEC 7 2001

**Montana Water Court**

Montana Water Court  
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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	)	<b>CASE NO. 41I-622</b>
THE EXISTING RIGHTS TO THE USE OF ALL	)	
THE WATER, BOTH SURFACE AND UNDERGROUND,	)	41I-W-090010-00
WITHIN THE MISSOURI RIVER DRAINAGE AREA	)	41I-W-090011-00
INCLUDING ALL TRIBUTARIES OF THE	)	
MISSOURI RIVER IN BROADWATER, CASCADE,	)	
JEFFERSON AND LEWIS AND CLARK COUNTIES,	)	
MONTANA	)	
_____	)	

CLAIMANT: Round Grove Ranch Co., Inc.

OBJECTOR: Round Grove Ranch Co., Inc.

**MASTER'S REPORT**

STATEMENT OF THE CASE

The Round Grove Ranch Company (RGR) filed Notices of Objection against the RGR irrigation claims captioned above. William W. Wall (Wall) filed Notices of Intent to Appear against both claims.

The hearing in this case was held on February 8 and 9, 2000. The parties presented evidence on the extent and validity of these water rights, and during the first day of the hearing conducted the Water Master on a site inspection of the source, points and means of diversion, and places of use.

RGR presented testimony by Kelly J. Ingalls, John G. 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. 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 field notes for 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 water claim 41I-W-089986-00, which is consolidated in Case 41I-376. This motion is addressed in the attached Memorandum Opinion.

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 its findings and conclusions, which are set out in the attached Memorandum Opinion. Due to the extent of this Memorandum Opinion and Report, these parties should be allowed additional time to respond. The parties shall have 30 days from the date of this Report to file any objections they may have.

#### FINDINGS OF FACT

1. The springs which are the source of these water right claims rise along the northern edge and to the north of the Round Grove in the W2NWSW and the S2N2SW of Section 26, and drain into ditches which flow southwest to the Broadwater-Missouri Canal (Canal) in the SENESE of Section 27, all in T08N, R02E, Broadwater County.

2. The source of these water right claims are undeveloped springs and the source type

is surface water.

3. Prior to 1869, the old county road (to Diamond City) was built and runs north and south between the springs and the claimed places of use. There are no culverts under this road to carry these spring waters to the claimed places of use.

4. On April 10, 1930, J. F. O'Connell filed a Notice of Appropriation on behalf of RGR, which states 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 west from the source to Section 27. No acreage is specified in Section 27.

5. Only 10 acres in the SESE of Section 27 could have been irrigated by these spring waters prior to 1940. These 10 acres were and are subirrigated by other spring waters from the Round Grove.

6. The claimed application of diverted surface water to the subirrigated 10 acres in the SESE of Section 27 is not a reasonable and beneficial use of water.

7. In 1940, the Broadwater-Missouri East Side Canal was completed and flows northwest through the Round Grove Ranch in Sections 26 and 27, between these springs and the claimed places of use. RGR uses contract water from the Canal to irrigate the claimed places of use.

8. Since 1940, the Canal has intercepted the waters from these springs located above the Canal, and they flow directly into the Canal through the existing drain ditches. RGR takes its Canal water and these spring waters from the Canal at either the waste gate for its Grainery Ditch in the NESWNE of Section 27, or at the waste gate for its Gurnett Creek water in the SENWNE of Section 27 for the irrigation of the 265 acres claimed.

9. In 1954 Highway 284 was constructed 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 these springs and the claimed places of use. Culverts were placed under the Highway to allow for the drainage of waters arising above and to the east of the Highway, which have been used by RGR since to convey these spring waters into the Canal.

10. The 1955 Water Resources Survey (WRS) Field Notes for the Round Grove Ranch do not include any water rights from these springs, nor any water rights with 1863 or 1929 priority dates, but do include contract water from the Canal.

11. The 1956 Broadwater County WRS and the 1979 aerial photographs show the places of use claimed being irrigated by contract water from the Canal.

12. As no ditch 36 inches by 36 inches exists in the S2N2 and N2S2 of Section 26 which would take these spring waters to Section 27, and as no evidence exists that these springs were ever used for irrigation purposes prior to 1940, the 1929 Notice of Appropriation was never perfected.

13. On December 31, 1963, a Declaration of Groundwater Rights was filed on behalf of RGR for the subirrigation of lands from springs in sections 26 and 27, and the date of first use is claimed to be 1863.

14. As the copy of the 1963 Declaration of Groundwater Rights in evidence is incomplete, and this Declaration is for non diverted groundwater rather than the diverted surface water claimed, this 1963 Declaration is not a proper basis for these water right claims.

15. As the claimed declarant J.F. O'Connell was too young to have personal knowledge of the events of 1863, the 1963 Declaration of Vested Groundwater Rights is not valid.

16. No means of diversion existed for the beneficial use of these spring waters for the irrigation of the acreage claimed until after the installation of the Broadwater-Missouri Canal in 1940.

17. The priority date for **41I-W-090010-00** should be December 31, 1940, and the type of historical right should be use.

18. These springs produce, and the drain ditches for these springs have the capacity to convey 50 MI, or 1.25 Cubic Feet per Second (CFS).

19. RGR uses these spring waters before the Canal is turned on in the spring, and after the Canal is turned off in the fall. The claimed period of use reasonably exceeds the normal period of use for this climatic area, and resolves the period of use potential issue remarks.

20. The Temporary Preliminary Decree states the source, priority date, flow rate, and points of diversion on claim **41I-W-090010-00** are:

SOURCE: SPRING, TRIB OF MISSOURI RIVER  
SOURCE TYPE: SURFACE WATER

SOURCE IS COMPOSED OF SEVERAL UNDEVELOPED SPRINGS WITHIN THE POINT OF DIVERSION LEGAL LAND DESCRIPTION.

PRIORITY DATE: OCTOBER 18, 1929  
TYPE OF HISTORICAL RIGHT: FILED

FLOW RATE: 2.50 CFS

POINTS OF DIVERSION AND MEANS OF DIVERSION:

	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
01	N2SW	26	08N	02E	BROADWATER	DRAIN DITCH
02	SENESE	27	08N	02E	BROADWATER	DRAIN DITCH

The source, priority date, flow rate, and points of diversion on this claim should be:

SOURCE: SPRING, TRIB OF MISSOURI RIVER  
SOURCE TYPE: SURFACE WATER

SOURCE IS COMPOSED OF SEVERAL UNDEVELOPED SPRINGS WITHIN THE POINT OF DIVERSION LEGAL LAND DESCRIPTION ALONG AND ABOVE THE NORTHERN EDGE OF THE ROUND GROVE.

PRIORITY DATE: DECEMBER 31, 1940

TYPE OF HISTORICAL RIGHT: USE

FLOW RATE: 1.25 CFS

POINTS OF DIVERSION AND MEANS OF DIVERSION:

	<u>QTR</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
01	W2N	WSW	26	08N	02E	BROADWATER DRAIN DITCH
02	S2N	2SW	26	08N	02E	BROADWATER DRAIN DITCH

THE BROADWATER-MISSOURI EAST SIDE CANAL IS USED AS A NATURAL CARRIER FOR THIS WATER RIGHT WHERE IT ENTERS THE CANAL IN THE SENESE OF SECTION 27, AND EXITS THE CANAL AT CLAIMANT'S GRAINERY DITCH IN THE NESWNE OF SECTION 27, OR EXITS AT CLAIMANT'S GURNETT CREEK DITCH IN THE SENWNE OF SECTION 27, ALL IN TWP 08N, RGE 02E.

21. The following clarification remark should be added to the abstract of claim **41I-W-090010-00**:

CONTRACT WATER FROM THE BROADWATER-MISSOURI CANAL IS USED TO SUPPLEMENT THIS RIGHT.

22. As the period of use, acres irrigated, and duplicate claim potential issue remarks have been resolved they should be removed from the abstract of **41I-W-090010-00**.

23. As Claim **41I-W-090011-00** is duplicate of claim 41I-W-090010-00, it should be terminated.

24. Claim number 41I-W-090011-00 should be removed from the list of claims following the multiple use and supplemental rights remarks on the abstract of claim **41I-W-090010-00**.

CONCLUSIONS OF LAW

I.

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

II.

As the ditch specified in the RGR 1929 Appropriation was never completed, and the water could not be reasonably or beneficially used for irrigation on the land intended prior to 1940, the 1929 Appropriation was never perfected. See McDonald v State, 220 Mont. 519, 722 P.2d 598 (1986).

III.

As the declarant J.F. O'Connell was incompetent by lack of personal knowledge to make the 1963 Declaration of Vested Groundwater Rights, this Declaration is invalid. See King v Schultz, 141 Mont. 94, 375 P.2d 108 (1962).

IV.

As the claimed spring water is undeveloped surface water and not groundwater, the RGR 1963 Declaration of Vested Groundwater Rights is not the proper basis for these water right claims. See Sections 89-801, 89-810, 89-2911 through 89-2913, RCM (1947); Rules 1.III and 2.VIII.(4)(f), Water Right Claim Examination Rules (1991).

V.

Where no month or day are specified, the Water Right Claim Examination Rules require that the last day of the last month be used for a priority date. See Rule VI (J)(2)(c), Water Right Claim Examination Rules (1991).

VI.

The measure of a water right is not how much water was claimed, but how much was reasonably and beneficially used. See §85-2-101, MCA.

VII.

A properly filed statement of claim for existing water right is prima facie proof of its content.

§85-2-227, Mont. Code Ann.(1997). Prima facie proof may be overcome by other evidence entered into the record. See Memorandum Opinion, Montana Water Court Case No. 40G-2 at page 13 (March 11, 1997).

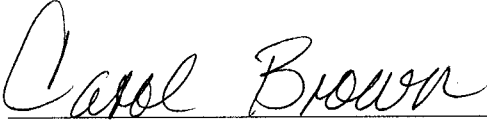
VIII.

The evidence entered into this record is sufficient to contradict and overcome the prima facie claims.

IX.

The changes stated in the Findings of Fact should be made to correct the Temporary Preliminary Decree in this Basin.

DATED this 7<sup>th</sup> day of December, 2001.

  
\_\_\_\_\_  
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 **MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Round Grove Ranch Co., Inc.  
642 Monroe Ave  
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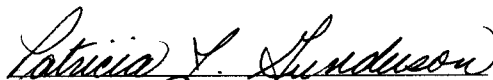
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DATED this *7<sup>th</sup>* day of *December*, 2001.

  
Patricia J. Gunderson  
Deputy Clerk of Court