DA 18-0684

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 50

DAVID M. HOON and TERI L. HOON,

Plaintiffs, Appellants, and Cross-Appellees,

v.

BETTY MURPHY, as Trustee for the In I Am We Trust, and BEAR MOUNTAIN LLC,

Defendants, Appellees, and Cross-Appellants,

BEAR MOUNTAIN LLC, PETER A. BURGGRAFF, JUDY B. BURGGRAFF,

Objectors and Appellees.

APPEAL FROM: Montana Water Court, Case No. WC-2017-02
Honorable Douglas Ritter, Associate Water Judge

COUNSEL OF RECORD:

For Appellants:

John E. Bloomquist, Bloomquist Law Firm, P.C., Helena, Montana

Holly Franz, Ryan McLane, Franz & Driscoll, Helena, Montana

For Appellees:

Matthew W. Williams, MW Law, PLLC, Bozeman, Montana

Submitted on Briefs: September 25, 2019

Decided: March 3, 2020

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 David and Teri Hoon (together, Hoon) appeal from the Water Court's November 8, 2018 Order Closing Certification Case.

¶2 We restate the dispositive issues on appeal as follows:

1. *Did the Water Court err in its determination of the water right claims that have historically used the Gibson-Reinig Ditch, and the characteristics of those rights?*

2. *Did the Water Court err by creating a junior implied claim to account for the parties' historic use of the capacity of the Gibson-Reinig Ditch?*

3. *Did the Water Court err in its determination of the priority date for claim 97014-00?*

4. *Did the Water Court err by finding that Murphy's unauthorized water use was irrelevant to the proceedings?*

5. *Did the Water Court err by separately decreeing Bay's interest?*

We affirm.

FACTUAL BACKGROUND

¶3 The South Fork of the Dearborn River (South Fork) rises on the continental divide northwest of Wolf Creek, Montana, and carries exiguous water to service modest, but meaningful, irrigation acreage. The present case originates from a distribution controversy regarding water rights sourced from the South Fork within Basin 41U. As is true for most water rights cases, the rights at issue and the parties' present entanglement arise from a complex factual and procedural history. The following facts, taken from the Water Court trial record and the Order Closing Certification Case, provide the basis for our decision.

A. Gibson-Reinig Ditch

¶4 The Gibson-Reinig Ditch diverts water from the South Fork to three claimants relevant to this proceeding—Hoon, Betty and Gary Murphy (together, Murphy),[1] and Michael and Lisa Bay (together, Bay).[2] The Gibson-Reinig Ditch bears the namesake of the two disputing parties' predecessors-in-interest: Hoon is the successor to Thomas Gibson (Gibson), and Murphy is the successor to William Reinig (W. Reinig). The point of diversion for the Gibson-Reinig Ditch is in the NWSWSW of Section 21, Township 16 North (T16N), Range 5 West (R5W) (Section 21), on the west side of the South Fork. Hoon's property is situated in Section 4, T16N, R5W (Section 4), and Section 33, Township 17 North (T17N), R5W (Section 33). Murphy's property is in Sections 2 and 3, T16N, R5W (respectively, Section 2 and Section 3), and Section 34, T17N, R5W (Section 34). From its point of diversion in Section 21, the Gibson-Reinig Ditch travels northeast for a few miles to a splitter box on the Bay property in the NWNW of Section 9, T16N, R5W (Section 9). Historically, the splitter box consisted of two culverts that divided the water flowing through the Gibson-Reinig Ditch equally: half of the water diverted to the Hoon property for irrigation in Sections 4 and 33; and the other half continued along another ditch to the Murphy property for irrigation in Sections 3 and 34.[3]

¶5 The timeline of construction and financing of the Gibson-Reinig Ditch is gleaned from evidence in the historical record, including: Gibson's desert land entry (DLE)

[1] Gary Murphy died during the pendency of this appeal.

documents; depositions filed by W. Reinig in 1894, 1895, and 1896 on Gibson's behalf confirming ditch construction progress; general land office (GLO) filings by both Gibson and W. Reinig acting as witnesses for one another; and court documents and deposition testimony from 1930s water rights litigation involving Gibson and W. Reinig, where both parties confirmed W. Reinig's involvement in the ditch's construction. The evidence shows that construction of the Gibson-Reinig Ditch was a joint effort between the parties. The historical capacity of the Gibson-Reinig Ditch is 15.48 cubic feet per second (cfs), as ascertained by a 1987 Water Master's report, trial testimony of Gary Murphy, and flow rate measurements from a flume installed below the Gibson-Reinig Ditch headgate in 2014.

B. Early Development and Historical Background

¶6 Gibson arrived in the above-specified area in the 1880s. By 1885, he established a homestead in parts of Section 4 to which he received a patent in 1898. On May 28, 1891, Gibson filed a notice of appropriation (NOA) for 300 miner's inches (MI) [4] from the South Fork, and listed Section 33 as the place of use. Then on June 15, 1891, Gibson and Daniel Pritchard (Pritchard), a neighboring homesteader, jointly filed an NOA for 500 MI from the South Fork with a June 1, 1891 priority date (Gibson-Pritchard right)—three days

[2] Bay was not a party to WC-2017-02, and their claim, 96674-00, was not before the Water Court during the underlying proceedings. Although Bay's right is historically significant, it is relatively smaller than either Hoon or Murphy's interest.

[3] Bay's claimed place of use is above the splitter box.

[4] Under § 85-2-103(2), MCA, "[w]here water rights expressed in statutory or miner's inches have been granted, 100 statutory or miner's inches shall be considered equivalent to a flow of 2.5 cubic feet (18.7 gallons) per second, . . . and this proportion shall be observed in determining the equivalent flow represented by any number of statutory or miner's inches." Therefore, 40 MI is the equivalent of 1 cfs.

junior to the May 28, 1891 NOA. Both the Gibson-Pritchard right and the May 28, 1891 NOA refer to the same point of diversion and anticipate the same ditch of identical size (later named Gibson-Reinig Ditch) as the means of conveyance, although the Gibson-Pritchard right is more particular as to the course and direction of the Gibson-Reinig Ditch. The Gibson-Pritchard right named Section 33, "and other lands in the same drainage area," as the place of use. It was not until 1893 that Gibson actually acquired Section 33 from the Northern Pacific Railway. Also in 1893, Gibson used the May 28, 1891 NOA to apply for a DLE on a large portion of Section 4, notwithstanding the fact that the May 28, 1891 NOA listed the place of use as Section 33, with no reference to other proximate lands. Gibson received a patent to that DLE in 1903.

¶7 W. Reinig first acquired land in the area in 1887 or 1888. In 1895, W. Reinig purchased Pritchard's undivided one-half interest in the Gibson-Pritchard right, although the evidence shows that W. Reinig was involved in the Gibson-Reinig Ditch construction prior to his purchase of Pritchard's interest. W. Reinig also received an "undivided one-half interest in and to the ditches, reservoirs and flumes appertaining thereto." W. Reinig sold an undivided 1/8 interest in his half of the Gibson-Pritchard right to his brother, Frank Reinig (F. Reinig), in 1903. F. Reinig subsequently sold his 1/8 interest to Adolph Burggraff (A. Burggraff); that 1/8 interest in the Gibson-Pritchard right is currently owned by Bay.[5] W. Reinig used his share of the Gibson-Pritchard right

[5] W. Reinig also sold 160 MI of the Gibson-Pritchard right to his wife Margaret on June 1, 1903, which she used to secure a DLE in the N2 of Section 34. Margaret received her patent on June 7, 1905. On July 22, 1931, Margaret sold this property in Section 34, and the appurtenant

to irrigate land in Sections 3 and 34. By 1903, the 500 MI Gibson-Pritchard right was apportioned as follows: (1) Gibson owned a 1/2 undivided interest (250 MI or 6.25 cfs) (presently held by Hoon); (2) W. Reinig owned a 7/16 undivided interest (218.75 MI or 5.47 cfs) (presently held by Murphy); and (3) F. Reinig owned a 1/16 undivided interest (31.25 MI or 0.78 cfs) (presently held by Bay). Historical evidence indicates that for the next century, Gibson, W. Reinig, F. Reinig, and their successors used the Gibson-Pritchard right as co-owners.

¶8 In the 1930s, Gibson and W. Reinig were involved in two district court actions regarding South Fork water rights. In the first proceeding of 1936, Gibson and W. Reinig were co-plaintiffs. In the second proceeding of 1939, W. Reinig was the plaintiff and Gibson was one of the defendants. For unknown reasons, neither proceeding resulted in a decision or decree by the district court. However, evidence from the proceedings yielded valuable information relevant to the present case, including: Gibson's deposition from the 1936 litigation; Gibson's answer and cross complaint in the 1939 litigation; both W. Reinig and Gibson's 1939 proposed findings of fact and conclusions of law; and W. Reinig's deposition from the 1939 litigation. In Gibson's prayer for relief in his 1939 answer and cross complaint, he asked the district court to:

> [C]ompel all parties to th[e] action to appear and set forth their respective claims, if any, in and to the waters of said South Fork of the Dearborn River or any tributary thereof and that the court fix, determine and adjudicate the water right of th[e] defendant and the water rights, if any, of all parties to th[e] action . . . .

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water rights, back to W. Reinig. This served to reunite the 160 MI with W. Reinig's share of the Gibson-Pritchard right.

Notably, Gibson did not identify the May 28, 1891 NOA in the 1930s litigation concerning use of the waters of the South Fork. Instead, Gibson stated that he used his part of the Gibson-Pritchard right to irrigate his land in Section 33 and Section 4, in conformance with the place of use listed in the Gibson-Pritchard right's NOA.[6]

¶9 W. Reinig died in 1950, and his ranch passed to his daughter and son-in-law, Gary Murphy's parents. Gary was W. Reinig's grandson, and he grew up on the ranch learning to irrigate from his grandfather. Gary eventually purchased the ranch from his parents in 1964. Gibson was grandfather to Sara Hilger. Sara and Don Hilger (together, Hilger) owned the Gibson property for several years following Gibson's death.

C. State-wide Adjudication

¶10 In the 1980s, Murphy obtained ditch measurements for Basin 41U Temporary Preliminary Decree proceedings in the Water Court. Based on those measurements and the parties' historical practice,[7] Murphy successfully argued the flow rate for his statement

[6] Notably, on May 20, 1940, Gibson, W. Reinig, and A. Burggraff filed an NOA for 500 MI from the South Fork with a May 17, 1940 priority date. The NOA named the Gibson-Reinig Ditch as the means of diversion (then referred to as the "Company ditch"), and stated that this right was "exclusive of and in addition to" any and all senior water rights, and in particular, in addition to the Gibson-Pritchard right. Although there is no evidence indicating this 1940 right was ever put to use, the existence of the NOA itself evidences continued cooperation between Gibson, W. Reinig, and A. Burggraff in the shared Gibson-Pritchard right and Gibson-Reinig Ditch nearly 50 years after the June 1, 1891 NOA.

[7] At trial, Gary Murphy testified that throughout his time on the ranch, water diverted through the Gibson-Reinig Ditch has been split 50-50 between the Hoon and Murphy properties. There have been a few instances where they rotated the use of water, but it was not a common practice. They diverted up to the Gibson-Reinig Ditch's capacity (15.48 cfs), even though their historical right is 12.50 cfs under the Gibson-Pritchard right.

of claim (designated 97016-00)[8] should be 15.48 cfs. In 1987, the Water Court increased the decreed flow rate for claim 97016-00 from 12.50 cfs to 15.48 cfs based on the Water Master's Report and Order, issued February 5, 1987.

¶11 On December 30, 1981, Hilger filed a statement of claim (designated 108084-00) under the statewide adjudication. In the filing, Hilger listed two priority dates: May 28, 1891, and June 1, 1891, and attached the two NOAs as support. Hilger claimed the Gibson-Reinig Ditch as their means of diversion, Sections 4 and 33 as their places of use, and a 250 MI flow rate—equal to their one-half undivided interest in the Gibson-Pritchard right. After reviewing Hilger's claim under then-applicable claim examination rules, the Department of Natural Resources and Conservation (DNRC), simply applied the more senior priority date to Hilger's claim—May 28, 1891—instead of inquiring further into Hilger's claim of two priority dates with a single means of diversion and flow rate.[9] In 1984, claim 108084-00 appeared in the Temporary Preliminary Decree for Basin 41U with a May 28, 1891 priority date (based on the May 28, 1891 NOA), a flow rate of 6.25 cfs (based on Hilger's one-half interest in the Gibson-Pritchard right), and the place of use as Sections 4 and 33 (also based on the Gibson-Pritchard right). Because claim

[8] All the claims discussed herein derive from Basin 41U. Therefore, we have omitted the basin designation from the claim numbers for brevity and redundancy reasons.

[9] Under current claim examination rules, two claimed priority dates could indicate two separate claims within a single filing and the potential need for an implied claim. *See* Rules 13(e), 35(a), W. R. C. E. R. That was not the case in 1983. The DNRC instead applied the more senior priority date to the claim with no notice or input from the claimant.

108084-00 did not receive any objections, it was not subject to any Water Court proceedings.

¶12 In 1988, Hoon purchased the Gibson ranch from Hilger. In 1996, Hoon discovered the Temporary Preliminary Decree statement of claim for 108084-00 as entered in 1984. In response, Hoon filed a late claim (designated 215967-00) pursuant to § 85-2-221(3), MCA, claiming the Gibson-Pritchard right's June 1, 1891 priority date and a 70 MI flow rate. Attachments to the claim indicate Hoon was aware that the Gibson-Reinig Ditch capacity was 15.48 cfs, as their claim of 70 MI would increase their total claimed flow rate from the Gibson-Reinig Ditch to roughly half of the ditch capacity. Hoon later paid to have their and Murphy's water rights examined; that review led to the motion to amend which resulted in the underlying Water Court proceeding.

PROCEDURAL BACKGROUND

¶13 Initially, this case arose before the Water Court in September 2015, when Hoon filed a combined motion seeking to amend the flow rate for claim 108084-00 from 6.25 cfs to 7.50 cfs, to reflect the May 28, 1891 NOA flow rate. Hoon also asked the Water Court to generate an implied claim for 6.25 cfs with a June 1, 1891 priority date to account for Hoon's one-half interest in the 12.50 cfs Gibson-Pritchard right. After Hoon filed the combined motion, the matter was assigned to a water master who, pursuant to § 85-2-233(6), MCA, provided notice of Hoon's claims, both by publication and by service,

to other water users on the South Fork. Murphy, Bear Mountain LLC,[10] Peter and Judy Burggraff (together, Burggraff), and John Rittel[11] filed objections. Hoon's combined motion and the correlative objections were consolidated as Water Court Case No. 41U-A1 (Case 41U-A1). After the parties engaged in initial discovery, Hoon sought to add Murphy claim 97016-00 to the proceedings. On January 24, 2017, the Water Court assumed jurisdiction of Case 41U-A1, and later issued an order denying Hoon's motion to add the Murphy claim to the case.

¶14 Hoon initially appealed the Water Court's denial of their motion, but then withdrew that appeal. Instead, Hoon filed a water distribution complaint in the First Judicial District Court seeking distribution of water among appropriators on the South Fork pursuant to § 85-2-406(2)(b), MCA. Upon the request of Hoon, claims 97016-00 and 97014-00 (each owned by Murphy), together with claims 108084-00 and 215967-00 (each owned by Hoon), were certified to the Water Court for adjudication and tabulation. The certification case and Case 41U-A1 were consolidated and designated as Case No. WC-2017-02 (WC-2017-02). Hoon and Murphy engaged in discovery and prehearing procedures, and a trial was conducted on April 17 and 18, 2018.[12] At trial, the

[10] Bear Mountain LLC is comprised of the children and grandchildren of Murphy. Murphy and Bear Mountain appeared jointly in the preceding action and the present proceeding and are referred to in this opinion collectively as "Murphy."

[11] During the preceding action, John Rittel died, and the Estate of John Rittel was substituted.

[12] Two additional parties, Burggraff and Estate of John Rittel, filed objections in Case 41U-A1, and the Water Court included these parties as objectors in WC-2017-02. On November 29, 2017, Burggraff filed a conditional withdrawal of their objections based on a stipulation agreement with Hoon. The Water Court's order closing case WC-2017-02 resolved the Burggraff condition to their withdrawal. The Estate of John Rittel did not take part in Case 41U-A1 or WC-2017-02. On

Water Court was tasked with determining three issues related to the four certified claims: (1) which water right claims historically used the Gibson-Reinig Ditch, and priority dates and flow rates for those claims; (2) the places of use and acres irrigated for claims 108084-00 and 97016-00; and (3) the priority date for claim 97014-00. On appeal, the parties challenge the Water Court's rulings on the first and third issues; therefore, we will address the Water Court's findings and conclusions regarding the priority date for claim 97014-00, and the priority dates and flow rates of the claims that historically used the Gibson-Reinig Ditch.

a. Water Court Findings on Priority Date for Claim 97014-00

¶15 Murphy claim 97014-00 represents irrigation on 73 acres in Sections 2 and 3, with a December 1, 1889 priority date based on an NOA filed by William Pritchard.[13] Claim 97014-00 uses water diverted from the South Fork, downstream from the Gibson-Reinig Ditch diversion. At trial, both Hoon and Murphy agreed that this NOA cannot form the basis for a water right on Sections 2 and 3, because William Pritchard never owned this property; instead, that property was homesteaded by Nathan Silverman. Hoon and Murphy also agreed that the claim's 4.38 cfs flow rate is historically accurate, and that amending the claim from a filed right to a use right with a priority date based on actual historical use was appropriate. However, the parties disagreed on whether the

April 20, 2018, the Water Court issued an order dismissing the Estate of John Rittel's objection for failure to participate in the proceedings.

[13] At trial, an expert for Hoon testified that it is unclear whether William Pritchard, a homesteader in the area, was related to Daniel Pritchard of the Gibson-Pritchard right.

evidence corroborates a December 1, 1889 priority date. The Water Court found that Murphy's evidence supported a finding of a December 1, 1889 priority date and determined that Hoon failed to provide sufficient evidence showing that a priority date later than December 1, 1889, would be more historically accurate. As a result, the Water Court amended claim 97014-00 to a use right with a priority date of December 1, 1889, as this date was a reasonable reflection of actual historical use on Sections 2 and 3.

b. Water Court Findings and Conclusions on Historical Use of Gibson-Reinig Ditch

¶16 Hoon made several assertions regarding historical use of the Gibson-Reinig Ditch, including that: (1) Gibson perfected both the May 28, 1891 NOA and his undivided one-half interest in the June 1, 1891 Gibson-Pritchard right, and that both rights were consistently used by Hoon's predecessors through the Gibson-Reinig Ditch; (2) neither Pritchard nor W. Reinig ever perfected their undivided interest in the Gibson-Pritchard right; (3) W. Reinig only perfected other, more junior, NOAs for use from the Gibson-Reinig Ditch; (4) the shared use of the Gibson-Reinig Ditch was acceptable to Hoon and their predecessors because they received sufficient water to meet their needs; and (5) Hoon always had the senior right to the fill of the Gibson-Reinig Ditch, to the exclusion of Murphy's junior rights.

¶17 The Water Court reviewed the evidence submitted and determined that Gibson's use of the May 28, 1891 NOA for a DLE in Section 4, and Hilger's identification of the May 28, 1891 NOA in the 1956 Water Resources Survey (WRS) field notes, "lack[ed] credibility as support for a May 28, 1891 priority date" given the "wealth of

evidence supporting actual historical use." Accordingly, the Water Court found a preponderance of historical evidence revealed that Gibson never perfected the May 28, 1891 NOA.

¶18 Regarding the Gibson-Pritchard right, the Water Court found it "perfected through the efforts of several people" including Gibson and W. Reinig. The Water Court held that, although late claim 215967-00 was "Hoon's attempt to claim an increased interest in the Gibson-Pritchard water right," claim 108084-00 "more properly reflected" Hoon's interest in the Gibson-Pritchard right because of the original flow rate claimed (250 MI), the point of diversion (Gibson-Reinig Ditch), and the place of use (Sections 4 and 33). Therefore, the court simply amended the priority date of claim 108084-00 from May 28, 1891, to June 1, 1891. Claim 215967-00 was dismissed as unnecessary. As corrections to claim 108084-00 reflected Hoon's one-half interest in the Gibson-Pritchard right, Hoon's request for an implied claim of 6.25 cfs for their half of the Gibson-Pritchard right was also negated.

¶19 The Water Court amended the flow rate for Murphy claim 97016-00 to correct the Water Court's 1987 order. The Water Court found that its previous ruling "must be amended to comply with the law" because the limit of 97016-00 should be Murphy's interest in the Gibson-Pritchard right's NOA. Since Murphy owned a 7/16 undivided interest in the Gibson-Pritchard right, the measure of their flow rate was amended from 15.48 cfs to 5.47 cfs, with a June 1, 1891 priority date.

¶20 The evidence showed that the parties had been diverting the full 15.48 cfs capacity of the Gibson-Reinig Ditch from its headgate on the South Fork throughout Murphy's time

on the ranch. Therefore, their use of water extended beyond the 12.50 cfs contemplated in the Gibson-Pritchard right, necessitating the need for an implied claim (designated 30117667) by the Water Court. Implied claim 30117667 represented a junior use right for 2.98 cfs to account for the additional ditch capacity used by the parties in excess of the Gibson-Pritchard right, with Hoon and Murphy as co-owners. The court affixed a priority date of December 31, 1949, based on the best evidence of first use available.

¶21 The Water Court disagreed with Hoon's assertion that only Gibson's half of the Gibson-Pritchard right was perfected, finding that "Hoon's contention that Gibson acted alone in developing the Gibson-Reinig Ditch and only perfected his half of the Gibson-Pritchard water right lacks credibility." Considering the evidentiary support, and the cost and time involved in developing a ditch of its size, the Water Court found that a preponderance of the evidence showed ditch construction was a joint effort and the entire 12.50 cfs flow rate was perfected within a reasonable time of the original filing. Hoon's arguments regarding which of W. Reinig's claims were perfected—whether more junior NOAs or the Gibson-Pritchard right—were untenable due to a lack of credible evidence.

¶22 Hoon's insistence that the parties and their predecessors accepted shared use of the Gibson-Reinig Ditch because they received sufficient water to meet their needs, while also asserting that Hoon always had the senior right to the fill of the Gibson-Reinig Ditch to the exclusion of Murphy's rights, lacked plausibility when viewed in light of evidence of actual historic use. The Gibson-Reinig Ditch has been capable of carrying 15.48 cfs since at least the 1940s. The Water Court found that if Pritchard, and later W. Reinig, had failed to participate in ditch construction and never put their half of the water right to beneficial use,

Gibson, as a tenant-in-common, could have claimed the entire right for himself. However, neither Gibson nor his successors ever questioned the Reinig interest in the Gibson-Pritchard water right.

¶23 The Water Court determined that, based on a preponderance of the evidence, the following claims, as amended, historically used the Gibson-Reinig Ditch:

Claim/Owner	Priority Date	Flow Rate
108084-00 / Hoon	~~May 28, 1891~~ June 1, 1891	6.25 cfs
97016-00 / Murphy	June 1, 1891	~~15.48 cfs~~ 5.47 cfs
96674-00 / Bay	June 1, 1891	0.78 cfs
30117667 (Implied) / Hoon and Murphy	December 31, 1949	2.98 cfs
		Total 15.48 cfs

STANDARD OF REVIEW

¶24 This Court applies the same standards of review to the Water Court as it does to an appeal from a district court. *Heavirland v. State*, 2013 MT 313, ¶ 15, 372 Mont. 300, 311 P.3d 813 (quoting *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 16, 361 Mont. 77, 255 P.3d 179). We review for correctness the Water Court's conclusions of law. *Weinheimer Ranch, Inc. v. Pospisil*, 2013 MT 87, ¶ 19, 369 Mont. 419, 299 P.3d 327 (citing *Geil v. Missoula Irrigation Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398). We review the Water Court's findings of fact under the clearly erroneous standard. *Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644. A finding of fact may be clearly erroneous if it is not

supported by substantial evidence; if the Water Court misapprehended the effect of the evidence; or if a review of the record demonstrates that a mistake has been made. *Danreuther Ranches v. Farmers Coop. Canal Co.*, 2017 MT 241, ¶ 18, 389 Mont. 15, 403 P.3d 332 (citing *Skelton Ranch*, ¶ 27). "'Substantial evidence' is evidence that a reasonable person would accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Danreuther*, ¶ 18. "It need not amount to a preponderance of the evidence, but it must be more than a scintilla." *Skelton Ranch*, ¶ 27. "When a reader reasonably can deduce two or more inferences from the facts, the reviewing court lacks power to substitute its deductions for those of the finder of fact." *Weinheimer Ranch*, ¶ 19.

DISCUSSION

¶25 Hoon alleges the Water Court's order contains both factual and legal errors. Most of their arguments rest on assertions that the Water Court misapprehended the effect of the historical evidence in making its findings. Murphy cross-appeals, alleging that the Water Court's severing of the co-tenancy between Murphy and Bay was in error because it displaces 0.78 cfs of the water historically used by Murphy. We address each dispositive issue in turn.

¶26 *1. Did the Water Court err in its determination of the water right claims that have historically used the Gibson-Reinig Ditch, and the characteristics of those rights?*

¶27 Hoon asserts that "[i]n one sentence the Water Court found Gibson's May 28, 1891[] water right was 'abandoned.'" This was error, Hoon contends, because Murphy never asserted abandonment of this right, and the basis for the abandonment finding was unclear. Furthermore, Hoon argues that the Water Court misapprehended the

evidence of the underlying water rights historically used on the Murphy property. Hoon separately argues that the Water Court did not afford the rights listed in Hilger's 1981 statement of claim the prima facie status required pursuant to § 85-2-227(1), MCA. Each of these assertions ultimately involves the propriety of the Water Court's findings and conclusions regarding the historical use of the Gibson-Reinig Ditch, and are interrelated in terms of the applicable law.

a. Perfection of the May 28, 1891 NOA

¶28 Hoon contends that the Water Court's jurisdiction to dismiss the May 28, 1891 NOA for abandonment was not properly invoked, because abandonment was not specifically raised by Murphy. They imply that they were caught off guard by the Water Court's abandonment finding and characterize the Water Court's application of abandonment to the May 28, 1891 NOA as a "sua sponte" determination. Hoon further opines that the basis for the Water Court's abandonment finding was unclear, and that it should have applied the test for abandonment and made specific findings in accordance with its examination. To start, we disagree with Hoon's selective representation of the Water Court's factual finding as to the historical use of the May 28, 1891 NOA. The complete Water Court finding provides that "[i]f the Gibson May 28, 1891 water right *was ever perfected*, it has been abandoned. The [e]ffect of this is that the current priority date for claim 41U 108084-00 should be corrected to June 1, 1891." (Emphasis added). It would have been a wasted effort to address in detail the abandonment of a right never actually put to use, given the Water Court's finding that the May 28, 1891 NOA was never perfected. In

spite of this, we will briefly address Hoon's abandonment arguments before discussing perfection of the May 28, 1891 NOA.

¶29 In 1979, the Montana Legislature established a system of water courts, providing for water divisions, water judges, water masters, disqualification of judges and masters, and jurisdiction. *In re Dep't of Nat. Res. & Conservation*, 226 Mont. 221, 228, 740 P.2d 1096, 1100 (1987) (citing Title 3, ch. 7, parts 1-4, MCA). Jurisdiction for the determination and interpretation of existing water rights was placed exclusively in the water courts. Section 3-7-501(3), MCA. "The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree." Section 3-7-501(4), MCA. Section 85-2-227(3), MCA, provides that "a water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant, including, without limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973."

¶30 The fundamental principle governing the Water Court's determination of water rights in Montana is that of beneficial use: "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." *79 Ranch v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215, 217 (1983) (citing § 89-802, R.C.M. (1947) (repealed 1973)). So long as beneficial use remains the basis, measure, and limit of a water right appropriation, ceasing to apply water to a beneficial use for a long period of time will eventually give rise to the question of abandonment. Although the criteria for finding

abandonment may change by legislative enactment or judicial pronouncement, abandonment remains the predictable result of failing to comply with the doctrine of beneficial use.

¶31 Therefore, by virtue of seeking certification to the Water Court under § 85-2-406(2)(b), MCA, so that a determination of the existing rights of the parties could be made, Hoon invoked the jurisdiction of the Water Court to adjudicate the May 28, 1891 NOA's validity, including, without limitation, whether the claim was totally or partially abandoned. The prospect that Murphy would argue and present evidence that might lead to an abandonment finding on the May 28, 1891 NOA was apparent throughout the entire Water Court proceeding. Any suggestion by Hoon that the Water Court's findings were a surprise is without merit. The evidence presented at trial showed that the water claimed in the May 28, 1891 NOA was never put to use, and if it ever was, it had not been used since the 1930s at the latest. Our review of the record makes clear that the Water Court based its findings on substantial evidence that none of the water claimed in the May 28, 1891 NOA was ever put to use prior to July 1, 1973.

¶32 Regarding perfection of the May 28, 1891 NOA, the Water Court was tasked with determining: (1) whether the Gibson-Reinig Ditch diversion was intended to supply the water for the May 28, 1891 NOA; or (2) alternatively, whether the Gibson-Reinig Ditch was actually intended as the means of diversion for the Gibson-Pritchard right, and the water claimed under the May 28, 1891 NOA never resulted in actual water use. Despite Hoon's assertions to the contrary, the premise of the Water Court's finding regarding

non-perfection of the May 28, 1891 NOA was grounded in an abundance of evidence presented by both Hoon and Murphy.

¶33 To determine whether the May 28, 1891 NOA was perfected, we look to the law existing at the time of the appropriation. Prior to 1973, there were two ways of perfecting a water right. The first method was achieved simply by putting the water to use. *In re Powder River Drainage Area*, 216 Mont. 361, 367, 702 P.2d 948, 951 (1985); *Murray v. Tingley*, 20 Mont. 260, 268, 50 P. 723, 725 (1897). The other method was provided for by statute, which included posting a notice at the point of diversion and filing an NOA with the county clerk.[14] Sections 89-810 to -814, R.C.M. (1947). Use rights and filed rights remained the means to develop a water right in Montana until passage of the Montana Water Use Act (WUA) in 1973. *Powder River*, 216 Mont. at 367; 702 P.2d at 951. Those use rights and filed rights in existence prior to passage of the WUA were referred to as "existing rights" under the new law. Section 85-2-102(13), MCA ("'Existing right' or 'existing water right' means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.").

¶34 If the right to beneficially use water was not perfected by an appropriator before July 1, 1973, that right is not an "existing right" "under the law as it existed prior to July 1, 1973"; therefore, that appropriator's use is subject to the permit requirements of

[14] The 1885 law provided that any person thereafter desiring to appropriate water must post an NOA stating: (1) the quantity of water claimed; (2) the purpose for which the water is claimed and the place of intended use; (3) the means of diversion, with the size of the flume, ditch, pipe, or aqueduct by which they intend to divert the water; (4) the date of appropriation; and (5) the name of the appropriator. Section 89-810, R.C.M. (1947).

Title 85, chapter 2, part 3, MCA. *See* § 85-2-102(13), MCA; *In re Adjudication of the Existing Rights to the Use of all the Water (41E)*, Case No. 41E-93, at 10 (Mont. Water 1993). Since the May 28, 1891 NOA was an attempt to create a valid filed right, we will examine applicable law to determine whether the May 28, 1891 NOA was an existing right, and whether the Water Court's non-perfection finding was supported by substantial credible evidence.

¶35 The 1885 legislature promulgated filing procedures for post-1885 appropriations in an effort to improve reliability of priorities and quantities claimed by appropriators. Section 89-810, R.C.M. (1947); *Shammel v. Vogl*, 144 Mont. 354, 367, 396 P.2d 103, 110 (1964). A person claiming an existing water right can introduce an NOA filed under the requirements of the 1885 statutes, and that NOA is "taken and received . . . as prima facie evidence of the statements therein." *Holmstrom Land Co. v. Meagher Cty. Newlan Creek Water Dist.*, 185 Mont. 409, 427, 605 P.2d 1060, 1070 (1979) (quoting § 89-810, R.C.M. (1947)). However, this prima facie showing does not completely discharge the claimant's burden of proof. As this Court stated in *Irion v. Hyde*, 107 Mont. 84, 95-96, 81 P.2d 353, 358 (1938), statements made in NOAs are not completely dispositive for purposes of establishing perfection of a water right. *See also Holmstrom Land Co.*, 185 Mont. at 418, 605 P.2d at 1065. The claimant still has the burden of showing that all the water claimed was put to a beneficial use over a reasonable period of time. *79 Ranch*, 204 Mont. at 432, 666 P.2d at 218 ("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." (citing

Conrow v. Huffine, 48 Mont. 437, 444-45, 138 P. 1094, 1096 (1914); *Peck v. Simon*, 101 Mont. 12, 18-19, 52 P.2d 164, 166 (1935); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927))). "Inherent in this burden of proof is the responsibility to prove the *amount* of water beneficially used." *Holmstrom Land Co.*, 185 Mont. at 419, 605 P.2d at 1066 (emphasis in original). A party's rights are not to be measured only by what was claimed in appropriation notices. The fact that the May 28, 1891 NOA claimed 300 MI does not automatically entitle Hoon to that amount without first proving that the water was ever actually used.

¶36 In usual cases involving water rights, witnesses are seldom able to testify as to the appropriative intent and first use of their claimed water rights. *See, e.g.*, *Allen v. Petrick*, 69 Mont. 373, 375, 222 P. 451, 452 (1924); *Murray*, 20 Mont. at 268, 50 P. at 725. So, the appellate as well as the trial court must do the best it can with what it has to work with. *Allen*, 69 Mont. at 375, 222 P. at 452. In contrast to the usual evidentiary problems which so often plague courts attempting to adjudicate water rights of ancient origin with less-than-perfect evidence, the documentation in the present case included deposition testimony from the original appropriators discussing the very water rights involved. During the trial, the Water Court judge commented on the rarity of this type of evidence, stating: "What I see here is probably the only time that I've seen, you know, the two major players that are on both sides of a split water right having been deposed in their lifetimes on the very issue of the water right involved."

¶37 At trial, Hoon introduced the May 28, 1891 NOA as prima facie evidence of the existence of a water right. Although the May 28, 1891 NOA was valid on its face, this

prima facie showing did not completely discharge Hoon's burden of proof. To bolster Hoon's argument that the waters claimed in the May 28, 1891 NOA were put to beneficial use, they submitted copies of 1956 WRS field notes to establish that, in spite of cooperation between Hilger and Murphy, the water rights "in use" by Hilger included the May 28, 1891 NOA and the Gibson-Pritchard right.[15] Hoon also submitted Gibson's DLE documents, in which Gibson listed the May 28, 1891 NOA, as further support that the right was perfected. Hoon asserts that these documents are sufficient to establish that the water claimed under the May 28, 1891 NOA was put to a beneficial use. We disagree. Although these documents incorporate the assertions made in the May 28, 1891 NOA, they do not, in light of the abundant evidence to the contrary, establish that Hoon's predecessors-in-interest ever used the water claimed in the May 28, 1891 NOA.

¶38 The Water Court's finding that the May 28, 1891 NOA was never perfected was based on a "wealth of evidence," including, among other support: (1) Gibson's deposition from the 1936 litigation; (2) Gibson's answer and cross complaint in the 1939 litigation; (3) both W. Reinig and Gibson's 1939 proposed findings of fact and conclusions of law; (4) W. Reinig's deposition from the 1939 litigation; (5) direct testimony from Gary Murphy and David Hoon at trial; (6) depositions filed by W. Reinig in 1894, 1895, and 1896 on Gibson's behalf confirming progress in the Gibson-Reinig Ditch construction; and (7) GLO

[15] Although the field notes state that both rights were "in use," the surveyor's remarks provide that Gibson only owned 8/16 of the Gibson-Reinig Ditch, and the ditch was "not large enough to carry a full supply" of the rights claimed.

filings from both before and after W. Reinig acquired the Pritchard interest in the Gibson-Pritchard right, in which Gibson and W. Reinig acted as witnesses for one another.

¶39 The Water Court examined the above evidence and found overwhelming support for its holding that the May 28, 1891 NOA was never perfected. A review of the evidence in the record—and applying simple arithmetic—makes implausible Hoon's assertions to the contrary. The earliest evidence shows that the capacity of the Gibson-Reinig Ditch was 15.48 cfs, and testimony and documents from both parties confirmed that the water was always evenly split between them. In spite of this, Hoon argues that they are entitled to 13.75 cfs of the water flowing through the Gibson-Reinig Ditch: 7.50 cfs under the May 28, 1891 NOA, in addition to 6.25 cfs under their half of the Gibson-Pritchard right. Hoon asserts that their predecessors always used 13.75 cfs of the Gibson-Reinig Ditch's 15.48 cfs capacity, while simultaneously agreeing with Murphy that the parties and their predecessors always shared in the water and the cost of most major expenses for ditch maintenance, and never asserted priority against one another before 2012 because the need never arose. Hoon tries to maneuver around the issues with their assertions by arguing that W. Reinig never perfected the Pritchard portion of the Gibson-Pritchard right, and that Gibson acted alone in developing the Gibson-Reinig Ditch.

¶40 The evidence in the record simply does not support Hoon's assertions. Gibson could not have perfected the 7.50 cfs claimed under the May 28, 1891 NOA, while splitting evenly the 12.50 cfs from the Gibson-Pritchard right, given the parties' historic sharing of the water received through the Gibson-Reinig Ditch. Accordingly, the Water Court's

finding that the May 28, 1891 NOA was never perfected was supported by substantial credible evidence, properly apprehended by the Water Court.

b. Murphy Claim 97016-00 and the Underlying Water Rights

¶41 Hoon also argues that the Water Court misapprehended the effect of the evidence submitted regarding the water rights used on the Murphy property in Sections 3 and 34. They argue that evidence presented at trial demonstrated that claim 97016-00 was improperly based on the Gibson-Pritchard right's June 1, 1891 NOA. Hoon reiterates the same arguments and evidence submitted to the Water Court, and attempts to weave together other, more junior, NOAs as the basis for the water used on Sections 3 and 34. They again assert that the Water Court "ignored the historical evidence" from DLE records and 1956 WRS field notes, and attack the veracity of the evidence upon which the Water Court did rely, including documents from the 1930s litigation involving Gibson and W. Reinig. Hoon asserts that, by relying on documents from the 1930s litigation, including admissions by Gibson in his 1939 answer and cross complaint, the Water Court erroneously treated those documents as judicial admissions against Hoon in the present case. This was in error, Hoon contends, because statements in pleadings may only be used as judicial admissions against the pleader.

¶42 We disagree with Hoon's characterization of the Water Court's treatment of the 1930s litigation documents as judicial admissions. "In Montana, a judicial admission 'has a conclusive effect upon the party who makes it, and prevents that party from introducing further evidence to prove, disprove, or contradict the admitted fact.'" *Stevens v. Novartis Pharms. Corp.*, 2010 MT 282, ¶ 74, 358 Mont. 474, 247 P.3d 244 (quoting *In re*

Raymond W. George Trust, 1999 MT 223, ¶ 36, 296 Mont. 56, 986 P.2d 427). Had the Water Court treated the statements made by Gibson as judicial admissions against Hoon, those statements would be deemed conclusive and no other fact finding, or analysis of the parties' historical use, would have occurred. This Court and the Montana Legislature have given the Water Court broad discretion to review evidence. The legislature has stated: "A water judge may consider all relevant evidence in the determination and interpretation of existing water rights." Section 85-2-227(2), MCA. Rules enacted by this Court provide similar latitude. For example, the Water Court must follow the Montana Rules of Evidence, "[u]nless the context of these Rules requires otherwise." Rule 2(b), W. R. Adj. R.

¶43 Here, the Water Court evaluated the 1930s statements, together with all other evidence presented, as indications of the actual historical use of water from the Gibson-Reinig Ditch. The Water Court did not misapprehend the effect of the evidence, nor was the Water Court's selection of the Gibson-Pritchard right's June 1, 1891 NOA as the basis for claim 97016-00 a mistake. Murphy's 7/16 interest in the Gibson-Pritchard right, and its June 1, 1891 priority date, shall remain the basis of claim 97016-00 as set forth in the abstract of the claim.

c. Prima Facie Status of Hilger's 1981 Statement of Claim

¶44 Hoon also argues that the Water Court erred as a matter of law by failing to afford Hilger's 1981 statement of claim prima facie status. They assert that the evidence in the record shows that claim 108084-00 should be amended to reflect the 7.50 cfs claimed in the May 28, 1891 NOA. We disagree. The record and the Water Court's conclusions do

not support Hoon's contention. Section 85-2-227(1), MCA, provides that a properly filed statement of claim constitutes prima facie proof of the claim's content. *Weinheimer Ranch*, ¶ 21; Rule 19, W. R. Adj. R. "A party may rebut this presumption through other evidence that proves by a preponderance of the evidence that the elements of the claim 'do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.'" *Weinheimer Ranch*, ¶ 21 (quoting Rule 19, W. R. Adj. R.).

¶45 The Water Court considered Hilger's 1981 statement of claim as prima facie proof of the claim's contents; however, it found that presumption rebutted by the evidence put on by both Hoon and Murphy. As discussed above, the evidence in the record showed that the water claimed in the May 28, 1891 NOA was never put to actual use; therefore, the elements in claim 108084-00 did not accurately reflect the water right as it existed prior to July 1, 1973. The Water Court thus amended claim 108084-00 to reflect the June 1, 1891 priority date from the Gibson-Pritchard right. This conclusion as drawn by the Water Court was correct under the law.

¶46 *2. Did the Water Court err by creating a junior implied claim to account for the parties' historic use of the capacity of the Gibson-Reinig Ditch?*

¶47 The Water Court found that the record supported an implied claim for the water historically used by the parties in excess of the Gibson-Pritchard right. Hoon claims that the Water Court erred by creating a junior implied claim to reflect the parties' historic use of the Gibson-Reinig Ditch's capacity. Murphy disagrees with Hoon and says the Water Court's finding was proper under the law. We agree with the Water Court's creation of an implied claim to account for the historic water use of the parties.

¶48 The intent of an appropriator has been described by this Court as "a most important factor in determining the validity of an appropriation of water." *Toohey v. Campbell*, 24 Mont. 13, 17, 60 P. 396, 397 (1900) (quoting *Power v. Switzer*, 21 Mont. 523, 530, 55 P. 32, 35 (1898)). "A claimant's intent at the time of appropriation must be determined by his [or her] acts and by surrounding circumstances, its actual and contemplated use, and the purpose thereof." *In re Adjudication of Existing Rights in the Missouri River Drainage Area*, 2002 MT 216, ¶ 22, 311 Mont. 327, 55 P.3d 396 [hereinafter, *Bean Lake III*] (quoting *Wheat v. Cameron*, 64 Mont. 494, 501, 210 P. 761, 763 (1922)). For filed rights like the Gibson-Pritchard right, the posting and filing of an NOA with the county clerk was a manifestation of an intent to appropriate. Section 89-810, R.C.M. (1947); *see also Bean Lake III*, ¶ 23. "The appropriator's needs and facilities, if equal, measure the extent of his [or her] appropriation. . . . If his needs exceed the capacity of his means of diversion, then the capacity of [the] ditch . . . measures the extent of his right. . . . If the capacity of his ditch exceeds his needs, then his needs measure the limit of his appropriation." *Bailey v. Tintinger*, 45 Mont. 154, 178, 122 P. 575, 583 (1912) (internal citations omitted).

¶49 The Water Court found that at the time of filing the Gibson-Pritchard right, the intention of Gibson and Pritchard was to divert and use 500 MI of water, as stated in the June 1, 1891 NOA. That June 1, 1891 NOA is prima facie proof of its contents, and evidence in the record establishes that the water claimed was beneficially used. Any water used in excess of the 500 MI claimed in the Gibson-Pritchard NOA prior to July 1, 1973,

was developed as a use right. The Water Court looks to evidence of the date the water was first put to beneficial use to establish the priority date. Rule 2(a)(71), W. R. C. E. R.

¶50 When Hoon and Murphy claimed water rights based on the Gibson-Pritchard NOA, they accepted 500 MI as the limit for their combined flow rates under the June 1, 1891 priority date. Historical evidence established that the capacity of the Gibson-Reinig Ditch was 15.48 cfs.[16] The evidence also established that Gibson and W. Reinig shared in ditch construction costs, worked together to build and maintain the Gibson-Reinig Ditch, and always split the water flowing through the ditch evenly. Gibson and W. Reinig intended to own the Gibson-Reinig Ditch—and the water flowing through it—as tenants-in-common. Hoon and Murphy have continually diverted the full 15.48 cfs capacity of the Gibson-Reinig Ditch. However, the water used in excess of the Gibson-Pritchard right's 12.50 cfs cannot come under claims 108084-00 and 97016-00. Instead, the excess 2.98 cfs must be accounted for in a more junior claim based on the date of first use.

¶51 The Water Court reviewed the evidence in the record and found the trial testimony of Gary Murphy to be the most substantial evidence of first use of the excess 2.98 cfs. Gary first observed the Gibson-Reinig Ditch with his grandfather, W. Reinig, and he testified that the ditch's capacity had not changed since that time. There is little evidence that places

[16] Hoon attempts to avoid this fact by arguing that the Gibson-Reinig Ditch's capacity could be increased to anywhere between 17.50 cfs and 20.00 cfs, and thereby accommodate all the rights claimed by Hoon, if points restricting water flow in the ditch were corrected. However, this assertion is not relevant to the Water Court's determination of the historic use of the ditch, and it is not relevant to our review of the claims herein.

an exact date on Gary's observations, beyond the 1950 death of W. Reinig.[17] Since Gary must have encountered the Gibson-Reinig Ditch prior to that time, the Water Court designated a priority date of December 31, 1949, using claims 108084-00 and 97016-00 as the basis for implied claim 30117667. This implied claim accounts for the disparity between the amounts claimed by Hoon, Murphy, and Bay in claims 108084-00, 97016-00, and 96674-00 (which together make up the 12.50 cfs Gibson-Pritchard right), and the historic capacity of the Gibson-Reinig Ditch, 15.48 cfs.[18] Because both Hoon and Murphy benefit from the additional flow rate from implied claim 30117667, the Water Court named them as co-owners.

¶52 Hoon argues that the basis for the Water Court's creation of an implied claim was incorrect, because creation of a separate water right to account for ditch loss is not a proper use of an implied claim. In its findings for implied claim 30117667, the Water Court stated, "The evidence indicates th[e] additional ditch capacity served to offset ditch loss between the headgate and the splitter box. However, if either party is not diverting, the other party could still benefit from this additional flow rate." Hoon advances our decision in *Wheat v. Cameron*, 64 Mont. 494, 210 P. 761 (1922), in support of their assertion that "the appropriator must make allowance for such [ditch] losses in making the appropriation."

[17] Although Gary Murphy's testimony established that, from his memory, the parties had diverted the full capacity of the Gibson-Reinig Ditch and split the water evenly, there is insufficient evidence that the full capacity of the Gibson-Reinig Ditch was always diverted and used prior to December 31, 1949.

[18] The Water Court acknowledged that generating an implied claim from 97016-00 alone was "not a perfect fit with claim examination rules." However, the court found there was support for generation of an implied claim when claims 97016-00 and 108084-00 were viewed together, so that the records more accurately reflect the total flow rate used through the Gibson-Reinig Ditch.

Hoon selectively represents the record and the purpose behind the generation of implied claim 30117667.

¶53 In *Wheat*, 64 Mont. at 501-02, 210 P. at 763, we stated:

> The amount of an appropriation is gauged by the amount of water taken in at the head of the ditch, rather than by the amount actually delivered at the place of beneficial use. The appropriator must make allowance for evaporation and seepage, and, whatever his needs at the place of use, he is limited in his appropriation to the amount of water his ditch will actually deliver, to be gauged at the head of the ditch.

(citing *Caruthers v. Pemberton*, 1 Mont. 111 (1869); *Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909); *Bailey*, 45 Mont. at 178, 122 P. at 583). Our decision in *Wheat* reiterated the principle that the amount claimed in an appropriation cannot exceed the capacity of the diversion; the historical capacity of the ditch operates as a limiting restriction on the appropriation. *Wheat*, 64 Mont. at 502, 210 P. at 763.

¶54 In contrast to the facts in *Wheat*, here the Gibson-Reinig Ditch capacity exceeded the amount claimed in the Gibson-Pritchard right. However, the parties diverted the full capacity of the ditch, and split the water flowing through it evenly. The Water Court's generation of implied claim 30117667 was its method of accounting for the water historically diverted from the South Fork into the Gibson-Reinig Ditch. Evidence of the date water is first put to beneficial use establishes the date of priority. Contrary to Hoon's assertions, the implied claim was not created to ensure that the parties received the full 500 MI of the Gibson-Pritchard right at their places of use. Therefore, the Water Court's generation of implied claim 30117667 was based on substantial credible evidence

submitted by the parties to establish the historic use of the water flowing through the Gibson-Reinig Ditch.

¶55 *3. Did the Water Court err in its determination of the priority date for claim 97014-00?*

¶56 The Water Court found that the December 1, 1889 NOA filed by William Pritchard could not form the basis for a water right on Sections 2 and 3, because William Pritchard never owned the property. Therefore, Murphy claim 97014-00 was amended by the Water Court, changed from a filed right to a use right, and the Water Court was tasked with affixing a priority date based on the date of first use. Reviewing the evidence submitted, the Water Court determined that December 1, 1889, was a reasonable reflection of the date water was first used on Murphy's property in Sections 2 and 3.

¶57 Hoon disputes the Water Court's finding of a December 1, 1889 priority date for claim 97014-00. They say that after the December 1, 1889 NOA was declared invalid, Murphy then had the burden to establish the priority date by competent evidence. Hoon alleges that Murphy failed to meet this burden. Hoon relies on this Court's decision in *Vidal v. Kensler*, 100 Mont. 592, 51 P.2d 235 (1935), to advance their challenge to the evidence put on by Murphy in support of the affixed priority date. Hoon submits that our decision in *Vidal* stands for the proposition that witnesses must offer collateral facts to reinforce statements on dates and timing before the court can accept the statements as valid. Without such a collateral showing, Hoon opines, such evidence should be regarded as highly suspect when setting priority dates for water rights. Hoon effectively asks this Court to heighten the standard for claimants when establishing the date of first use and require

relatively little of their opponents attempting to rebut the same. *Vidal* does not stand for such a proposition, and, at any rate, the facts in *Vidal* are distinguishable from those of the present case.

¶58 In *Vidal*, the two parties each submitted NOAs to the district court detailing their respective filed rights, and those NOAs were considered prima facie evidence. Vidal's NOA listed a priority date of March 30, 1905; Kensler's NOA provided a priority date of May 22, 1906. *Vidal*, 100 Mont. at 594, 51 P.2d at 236. Kensler asserted that his priority date was earlier than May 22, 1906, and submitted one witness in district court in an attempt to overcome the prima facie evidence in his own NOA. *Vidal*, 100 Mont. at 595, 51 P.2d at 237. The district court, in hearing the witness's testimony, decreed the rights of the parties as follows: (1) Kensler's priority date was changed from May 22, 1906, to June 15, 1904, and became senior to Vidal's right; and (2) Vidal's priority date was changed from March 30, 1905, to May 18, 1905. *Vidal*, 100 Mont. at 594, 51 P.2d at 236. On appeal, this Court was asked to review the district court decision decreeing the priority dates of Vidal and Kensler and determine whether the testimonial evidence submitted by Kensler successfully rebutted his own prima facie NOA. *Vidal*, 100 Mont. at 597, 51 P.2d at 238. At trial, Kensler's witness had admitted that he was unsure as to the exact date that he observed work on Kensler's property, and that the date could just as well be fixed in 1905 as in 1904. *Vidal*, 100 Mont. at 595-96, 51 P.2d at 237. Kensler submitted no other evidence supporting the 1904 priority date. As to evidence of this type, when used to rebut a prima facie NOA, we stated:

> To sustain the decree, based on oral testimony, as against the [prima facie NOA], the testimony should be clear, unambiguous and convincing, and yet it is apparent that here the witness had no distinct recollection of the date fixed by adroit examination, and was in the possession of no knowledge of any collateral fact by which he could ascertain or fix the time of his visit to the premises.

Vidal, 100 Mont. at 597, 51 P.2d at 238. We determined that since the testimony of Kensler's witness was "sufficient to prove an act or transaction within a certain period, but [was] so vague and uncertain as not to fix the time within that period, the best that can be done for the party producing such witness is to fix the date at the end of the period." *Vidal*, 100 Mont. at 598, 51 P.2d at 238. In applying this rule, this Court determined that Kensler's right could not be given a date earlier than 1905. The district court therefore erred by awarding Kensler a right of June 15, 1904, and because that date was prior to the date accorded to the Vidal right, the error was prejudicial.[19] *Vidal*, 100 Mont. at 598, 51 P.2d at 238.

¶59 In contrast to *Vidal*, here, the December 1, 1889 NOA was declared invalid by the Water Court and was therefore not afforded prima facie status. Murphy was not charged with overcoming the prima facie presumption for their own NOA; instead, Murphy had the burden of establishing the date of first use of the right. Murphy submitted deposition testimony from W. Reinig in which he states he saw ditches diverting water to Sections 2 and 3 as early as 1887 or 1888; deposition testimony from Gibson providing for

[19] "There is . . . no valid objection to the fixing of an arbitrary date of appropriation, and, if an incorrect date is given, the error is harmless unless the objecting claimant can show that his right antedates the date fixed for another instead of being subsequent thereto, as appears from the decree." *Vidal*, 100 Mont. at 594, 51 P.2d at 236.

ditches diverting water to Sections 2 and 3 as early as 1883; and Gibson's answer and cross complaint in which he says that Sections 2 and 3 were being irrigated "prior to the year 1884." As the December 1, 1889 right was senior to any of Gibson's claims from the South Fork, it was not in Gibson's interest to admit that W. Reinig had a senior right on the source. The Water Court found that this fact lent a great deal of credibility to first use of the December 1, 1889 right prior to Gibson's 1891 priority.

¶60 The evidence submitted by Murphy established that water was in use on Sections 2 and 3 prior to 1889, and Murphy accepted the previously decreed date of December 1, 1889, as their priority date for claim 97014-00. Hoon submitted insufficient evidence to rebut the December 1, 1889 priority date established by Murphy. The issue before this Court is whether the Water Court relied upon substantial evidence that water was used on or before December 1, 1889, in Sections 2 and 3. We conclude that it did.

¶61 *4. Did the Water Court err by finding that Murphy's unauthorized water use was irrelevant to the proceedings?*

¶62 Hoon's final argument asserts that the Water Court erred in finding that Murphy's unauthorized water use was not relevant to its determination of the historical use of existing rights involved. We agree with the Water Court that complaints about enforcement of the WUA were not relevant to the Water Court's adjudication and determination of existing rights for the claims certified in WC-2017-02.

¶63 In 2013, Hoon filed a water use complaint with DNRC, containing allegations of unpermitted water use changes by Murphy. DNRC investigated the matter, and sent Murphy a written notice, instructing them to "not appropriate water outside the constraints

authorized by the [WUA] until the time that a change authorization is issued by [DNRC]." DNRC informed Murphy that, should they continue their unauthorized water use, DNRC could seek judicial enforcement of the WUA as authorized by § 85-2-114, MCA. *See Lyman Creek, LLC v. City of Bozeman*, 2019 MT 243, ¶ 11, 397 Mont. 365, 450 P.3d 872. Upon receipt of this notice from DNRC, Murphy shut down the unauthorized water use listed by Hoon in their complaint. DNRC did not pursue an enforcement action against Murphy. By 2015, Hoon alleges they continued to experience water shortages. Instead of filing another water use complaint with DNRC, Hoon initiated Case 41U-A1 to address Murphy's use, which was later consolidated as certification case WC-2017-02.

¶64 The District Court certified claims 97014-00, 97016-00, 108084-00, and 215967-00 to the Water Court for adjudication and determination pursuant to § 85-2-406(2)(b), MCA. At trial, the Water Court was charged with the "determination of the existing rights that are involved in the controversy." Section 85-2-406(2)(b), MCA. Upon making this determination, the water judge is required to "return the decision to the [certifying] district court with a tabulation or list of the existing rights and their relative priorities." Section 85-2-406(2)(b), MCA. Although it was Murphy's conduct which ultimately led to the certification case, the role of the Water Court in determining the characteristics of existing rights involved in a controversy under § 85-2-406(2)(b), MCA, does not involve coincident authority for enforcement of the WUA's change of appropriation permitting requirements. *Lyman Creek*, ¶ 13. It is the function of the district courts to supervise the distribution of water among appropriators, which necessarily involves the ordering of water

distribution in accordance with a district court decree entered prior to July 1, 1973, or an enforceable decree entered by the Water Court under Title 85, chapter 2, part 2, MCA. Section 85-2-406(1), (2)(a), MCA. Section 85-2-114(1), MCA, in turn, expressly authorizes DNRC to seek enforcement of the WUA in the district courts supervising the distribution of water among appropriators.

¶65 The Water Court made its determination concerning the relevancy of Murphy's unauthorized water use based on the foregoing statutory scheme, and its role is to decide the existing rights of the parties to the controversy. As the Water Court's role in a certified controversy does not include enforcement of the WUA provisions involving unpermitted water use, it was correct in determining that evidence concerning post-2002 water use by Murphy was irrelevant. As such evidence provided no information to the Water Court regarding the historical water use of Murphy and their predecessors, it is of little help in making determinations of existing rights as required by § 85-2-406(2)(b), MCA. We therefore affirm the Water Court's judgment regarding the relevancy of evidence of Murphy's post-2002 unauthorized water use.

¶66 *5. Did the Water Court err by separately decreeing Bay's interest?*

¶67 On cross appeal, Murphy argues that the Water Court erred by allotting Bay a 1/16 interest in the Gibson-Pritchard right. Murphy asserts that the Water Court should have treated the interests of Murphy and Bay as a single undivided one-half interest in the Gibson-Pritchard right, decreed Murphy's interest as 6.25 cfs, and noted in the decree remarks that Murphy's use must reduce when Bay diverts water under claim 96674-00. Such a ruling, Murphy insists, would ensure that Murphy could continue using the full

6.25 cfs until they "can address the continuing vitality" of Bay's claim "at future stages of the adjudication."

¶68 Bay was not a party to WC-2017-02, and their claim, 96674-00, was not before the Water Court during the underlying proceedings. However, 96674-00 was referenced by the Water Court to provide a complete picture of historic use. Although the Hoon, Murphy, and Bay rights were all based on their interests in the same June 1, 1891 NOA, the Water Court chose not to express the parties' rights under a single claim with remarks noting each party's respective interest in the claim. Instead, the Water Court chose to decree the rights of Hoon, Murphy, and Bay individually, attributing each their share of the original 12.50 cfs appropriation. We will not disturb the Water Court's findings as to Murphy claim 97016-00 or Bay claim 96674-00, particularly where Bay was not party to the proceedings and did not put on evidence of their use of the 1/16 interest in the Gibson-Pritchard right.

CONCLUSION

¶69 In summary, we conclude that the Water Court did not err in holding that: (1) the May 28, 1891 NOA was never perfected; (2) Murphy claim 97016-00 was correctly based on the Gibson-Pritchard right, instead of other, more junior, NOAs; (3) Murphy successfully rebutted the prima facie status of claim 108084-00 by evidence that the elements in the claim did not accurately reflect the water right as it existed prior to July 1, 1973; (4) an implied claim was needed to account for the water historically used by the parties in excess of the Gibson-Pritchard right; (5) the appropriate priority date for claim 97014-00 is December 1, 1889; and (6) the Bay interest in the Gibson-Pritchard right

should be separately decreed at 0.78 cfs. We affirm the Water Court's findings and conclusions in the 2018 Order Closing Certification Case.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JIM RICE
/S/ INGRID GUSTAFSON