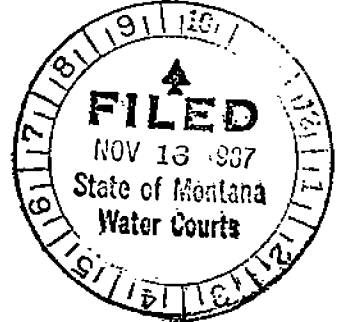


IN THE WATER COURTS OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)

* * * * *

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO THE USE) CASE NO. 76D-14
OF ALL THE WATER, BOTH SURFACE AND)
UNDERGROUND, WITHIN THE KOOTENAI) Claim 76D-W-029512-00
RIVER DRAINAGE INCLUDING ALL) 76D-W-029514-00
TRIBUTARIES OF THE KOOTENAI RIVER IN) 76D-W-129018-00
FLATHEAD AND LINCOLN COUNTIES,)
MONTANA.)

CLAIMANT: ALICE MUNRO
OBJECTOR: USDA Forest Service



MASTER'S REPORT

Pursuant to Title 85, Chapter 2, MCA, 1979, a hearing in the above-entitled matter was held in Libby, Montana on July 18, 1985, at 1:30 PM, before Linda Hickman, Water Master.

Statement of the Case

The Kootenai River Basin Temporary Preliminary Decree was issued March 22, 1984. The objection to claim number 76D-W-129018-00 was withdrawn by the objector, United States of America, Forest Service, at the time of the hearing. The point of diversion was objected to for claims 76D-W-029512-00 and 76D-W-029514-00. The objector argued that these rights had been abandoned.

The claimant, Alice Munro, filed a notice of intent to appear for claims 76D-W-029512-00 and 029514-00.

Claim numbers 76D-W-029512-00 and 029514-00 were filed by Alice Munro on August 31, 1981.

A telephone prehearing was scheduled for March 19, 1985, at 9:00 AM. The claimant was not available at the scheduled time. A hearing was then scheduled. The claimant came to the Court to talk to the Master prior to the hearing. A telephone prehearing was scheduled and took place on July 2, 1985, at 9:00 AM. The hearing was held in Libby, Montana, on July 18, 1985, at 1:43 PM. The issues raised regarding both claims 76D-W-029512-00 and 76D-W-029514-00 were similar. The issues of what constitutes a valid appropriation and the issue of abandonment were raised.

The claims are both based on a filed notice of appropriation. The validity of the notice of appropriation must be determined according to the law which was in existence at the time of the filing. That statute was 89-810, RCM, 1947 (repealed in 1973). 89-810, RCM, 1947 states:

"NOTICE OF APPROPRIATION. Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has not been an adjudication of the right to use the waters, or some part thereof, must post a notice in writing in a conspicuous place at the point of intended diversion, stated therein:

1. The quantity of water claimed, measured as hereinafter provided;
2. The purpose for which it is claimed and the place of intended use;
3. The means of diversion, with size of flume, ditch, pipe, or aqueduct, by which he intends to divert it;
4. The date of appropriation;
5. The name of the appropriator.

Within twenty days after the date of appropriation, the appropriator shall file with the county clerk of the county in which such appropriation is made a notice of appropriation, which, in addition to the

facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion of such stream, with reference to some natural object or permanent monument. The notice shall be verified by the affidavit of the appropriator or some one in his behalf, which affidavit must state that the matters and facts contained in the notice are true".

Section 89-814, RCM, 1947 made it clear that if 89-810 is followed, the record becomes prima facie evidence. In Holmstrom Land Co. v. Newlan Creek Water Dist., 185 Mt. 409, 427, 605 P.2d 1060 (1979), the Montana Supreme Court explained the relationship between these two statutes:

"If the notice provided for in Section 89-810 is duly made and filed, then it 'shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.' Section 89-814, RCM, 1947. This Court has strictly construed the provisions of Section 89-814. We have held that any nonconformance with Section 89-810 renders the notice of appropriation inadmissible as evidence".

The notice of appropriation upon which claims 76D-W-029512-00 and 029514-00 are based claims an appropriation date of June 2, 1932 and was recorded on September 24, 1934. Alice Munro testified that the water was used from 1930 until they couldn't anymore, around the mid-1940's or 1950's, due to her father's illness.

The second issue presented here is that of abandonment. There is a long line of cases which discuss the abandonment of water rights in Montana. "Abandonment of a water right is a voluntary act, to constitute it there must be a concurrence of act and intent, the relinquishment of possession

and the intent not to resume it for a beneficial use, neither alone being sufficient to bring about an abandonment". Thomas v. Ball, Price, 66 MT. 161, 213 P. 597 (1923). "The authorities are all of one accord in holding that the party claiming abandonment has the burden of proving his contentions by a preponderance of the evidence and that to establish abandonment the evidence to that effect should be clear and definite.

"The circumstances must be such as to justify an inference of intention to abandon; in other words, to leave the property to be taken by any other person who chooses to do so". Featherman v. Hennessey, McGowan, Oro Y Plata Mining Co., 42 MT. 535, 540, 113 P. 751 (1911).

"The nonuser of water for so long a period, and especially a period longer than the statute of limitations, is certainly very potent evidence, if it stood alone, of an intention to abandon. Abandonment is a question of intention. But whatever the force the fact of nonuse for nine years may have had in showing an intention to abandon, the force was wholly offset and contradicted by the other evidence in the case, so as to leave, in our opinion, not even a conflict of testimony. It appears that, when the Algonquin Mill was shut down in 1883, a man was employed to drain all the pipes and oil the machinery, for the reason that the company could not use the water when the Mill was shut down. The water was a necessary appurtenance to the Mill, necessary, as appears by the testimony, as a matter of fact, and an appurtenance as a matter of law in this jurisdiction". Smith v. Hope Mining Co., 18 Mt. 432, 45 P. 632 (1896).

"Abandonment of a water right is a question of fact. Forty years of nonuse is strong evidence of an intent to abandon a water right, and, in effect, raises a rebuttable presumption of abandonment". 79 Ranch, Inc. and Harry Vandervoort v. Rueben C. Pitsch, ___ Mt. ___, ___ P. 2d ___ (1983).

"Here the evidence clearly shows at least forty years of continuous nonuse of the water rights claimed by Pitsch and the 79 Ranch. ...In effect, such a long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reason for nonuse. Id.

Alice Munro testified that the irrigation claim was disbanded by logging and other factors which destroyed the ditch. She went on to testify that nothing has been done since that time to repair the ditch, first because of her father's illness and then due to her own illness, and then she and Mr. Munro decided to wait until the adjudication took place. Alice Munro testified that if the water right were recognized she would gather family members together to restore the ditch and the flow of water. She made no estimate as to how long this process would take.

The claim constitutes prima facie evidence of its contents, but that evidence is overcome by the following:

- (1) The testimony of Alice Monroe that the priority date claimed is based on an inadmissible notice of appropriation, that she did not know how the flow rate was determined.
- (2) Evidence that there has been no diversion since about 1940's.
- (3) Uncertainty as to the dates of first and last use.

Exhibits

John R. Hill, Jr., Attorney, on behalf of the United States of America Forest Service, offered two photographs for claim number 76D-W-129018-00 which were admitted without objection. John R. Hill, Jr., also introduced a series of seven photographs for claims 76D-W-029512-00 and 029514-00 which were admitted without objection. There were no other exhibits offered.

FINDINGS OF FACT

I.

The objector presented evidence pertaining to claims 76D-W-029512-00 and 029514-00 regarding the filed appropriation and its validity. On its face, the appropriation claimed a date of June 2, 1932 and was recorded on September 24, 1934.

II.

The objector presented evidence that the water rights for claims 76D-W-029512-00 and 029514-00 had not been used for a long period of time.

III.

The claimant, Alice Munro, testified that the water rights for claims 76D-W-029512-00 and 029514-00 have not been used since the 1940's or 1950's. She also testified that the reasons for nonuse were her father's illness and her own illness as well. Alice Munro testified that if the water right was recognized she would have family members help her repair the ditch through which the water would travel.

IV.

The objector, USDA Forest Service, withdrew its objection to claim number 76D-W-129018-00.

CONCLUSIONS OF LAW

I.

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

II.

The filed notice of appropriation did not conform to the statute in effect at the time of the filing, 89-810, RCM, 1947. Accordingly, the filing is not admissible into evidence.

III.

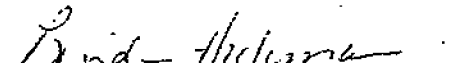
The notices of appropriation accompanying claims 76D-W-019152 and 029514 as supporting evidence did not meet the requirements of the law in effect at the time the notices were filed, and were not admissible as evidence to prove the date or the amount of the appropriations claimed. Those claims, therefore, must be established by proof of use.

IV.

The Court finds no right for claims 76D-W-019152 and 029514.

V.

Claim number 76D-W-129018-00 should remain as decreed.
DATED this 16th day of November, 1987.


Linda Hickman
Water Master

O R D E R

After review of the Master's Report, it is ORDERED, that the foregoing changes be made to the Temporary Preliminary Decree of existing water rights of the Kootenai River Basin and be included in the Preliminary Decree of such Basin, in accordance with the Master's Report.

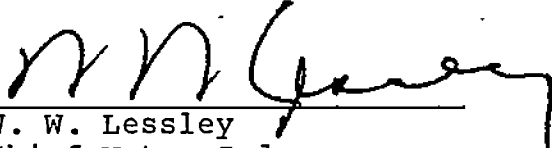
I.

Claims numbered 76D-W-029512-00 and 029514-00 be stricken from the decree.

II.

Claim number 76D-W-129018-00 remain as decreed in the Temporary Preliminary Decree.

DATED this 16 day of Nov, 1987.


W. W. Lessley
Chief Water Judge

Alice J. & Henry J. Munro
Box 543
Libby, MT 59923

John R. Hill, Jr., Attorney
Department of Justice
1961 Stout St., Drawer 3607
Denver, CO 80294

Kenneth Pitt, Special Assistant
United States Attorney
P. O. Box 7669
Missoula, MT 59807

