IN THE WATER COURTS OF THE STATE OF MONTANA

CLARK FORK DIVISION -- KOOTENAI RIVER BASIN

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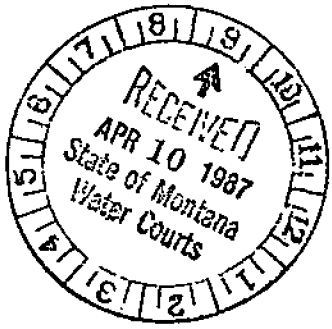
IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE KOOTENAI RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE KOOTENAI RIVER IN FLATHEAD AND LINCOLN COUNTIES, MONTANA.	Case No. 76D-55



Claimant: Cate and O'Mea, a partnership

Objector: Quirk Cattle Company

MEMORANDUM

Mr. Murray, in his objections to the Amended Master's Report, is concerned that there may be a problem with the semantics of water source and water course. He is concerned with the language in Finding of Fact I and Conclusion of Law III.

Finding of Fact I: Indian Creek is a single source of water which runs in a defined channel. There is a large group of springs arising on the 69 Ranch which is part of and adds a significant amount of water to the creek.

Conclusion of Law III: Indian Creek is a single source of water. Based on Montana case law, and with no contradictory hydrologic or expert testimony, it is impossible to find that there are two separate sources of Indian Creek, even though it may have been thought of and treated as two sources of water by many people in the area.

In his opening statement at the time of the hearing, Mr.

Murray said: "Underlying the dispute between the parties is the geographical aspect that's peculiar to Indian Creek and that Indian Creek by its major is essentially two separate sources of water which is a consideration that's essential to the resolution of the rights of Cate and O'Mea and Quirk Cattle Company."

Mr. Murray may be right in suggesting that the Findings and Conclusions should state that Indian Creek is a single water course as opposed to a single source of water. The Master understands that there can be several sources that make up a single water course. But, as it was originally stated and argued at the time of the hearing, the issue was that Upper Indian Creek be treated as one source of water and the springs be treated as a separate source. By finding that Indian Creek is a single source of water, the Master was saying that she could not find that the springs on the 69 Ranch were a separate hydrologically unrelated source in addition to or separate and distinct from those waters flowing in the channel of Indian Creek.

DATED this 8th day of April, 1987.

Linda Hickman
Water Master

ORDER

ORDERED that the Amended Master's Report and Order in Case 76D-55 remain as entered. Further ORDERED that this Memorandum be attached to the Amended Master's Report and

made a part of it.

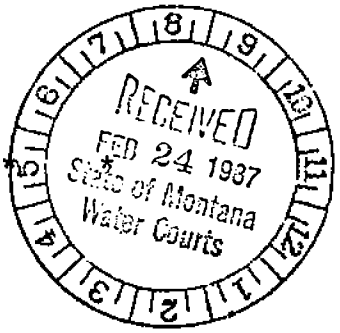
DATED this 8 day of April, 1987.

W. W. LESSLEY
Chief Water Judge

cc: Donald Murray
Patrick Springer

IN THE WATER COURTS OF THE STATE OF MONTANA

CLARK FORK DIVISION - KOOTENAI RIVER BASIN



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IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE KOOTENAI RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE KOOTENAI RIVER IN FLATHEAD AND LINCOLN COUNTIES, MONTANA.	Case No. 76D-55

OBJECTIONS TO AMENDED MASTER'S REPORT
(Of Claimant, Quirk Cattle Company)

COMES NOW the Objector, Quirk Cattle Company, and respectfully submits the following objections to the Amended Master's Report dated February 10, 1987.

THE "SEPARATE SOURCE" CONTROVERSY

Not without reluctance, and feeling rather as though I may be beating the proverbial "dead horse", I feel duty bound to urge a fresh look at what I have labeled the "separate source" aspect of this case. At the outset, it appears that the Court and the undersigned are hopelessly mired in a swamp of semantics. I fear the fault lies with me. Were I not to attempt to resolve this semantic misunderstanding, I would feel remiss. Here is the problem as I see it:

We have two concepts at work. The first is the concept of "sources" or "separate sources". The second is the concept of a "water course" or separate "water courses". The concepts are not

synonymous, and therein lies the problem. I believe that the Court and the Objector (me) have been approaching the problem without recognizing the subtle, but very significant difference between considering a flowing stream to be a single "water course" fed by or made up of numerous "sources" as contrasted with the concept of a single stream constituting two separate "water courses". I believe the Court interprets my arguments as advocating the latter when in fact I am crying out only for recognition of the former.

To begin this discussion, let us consider some fundamental and unassailable propositions. The Objector accepts the proposition that Indian Creek is a single "water course". Similarly, and by way of example, the Tobacco River is a single "water course". However, it is equally clear that Indian Creek, like the Tobacco River, is made up of, or receives its flow, from numerous "sources".[1] Among the sources of the Tobacco River are Indian Creek as well as Graves Creek, DeRozier Creek, Rich Springs, and numerous other creeks and undoubtedly springs. Thus, while the Tobacco River is a single "water course", it is made up of several "sources". Indian Creek is no different, although the manner in which Indian Creek's several "sources" come together to create Indian Creek is unusual. These propositions seem to me to be indisputable.

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[1]It should be noted that in this context I employ the term "source" to mean a place from which water originates and becomes part of a water course (e.g., runoff or springs) as opposed to a body of water from which a diversion is made (i.e., the "source" of a water right. See the discussion of this concept at p. 10, infra.

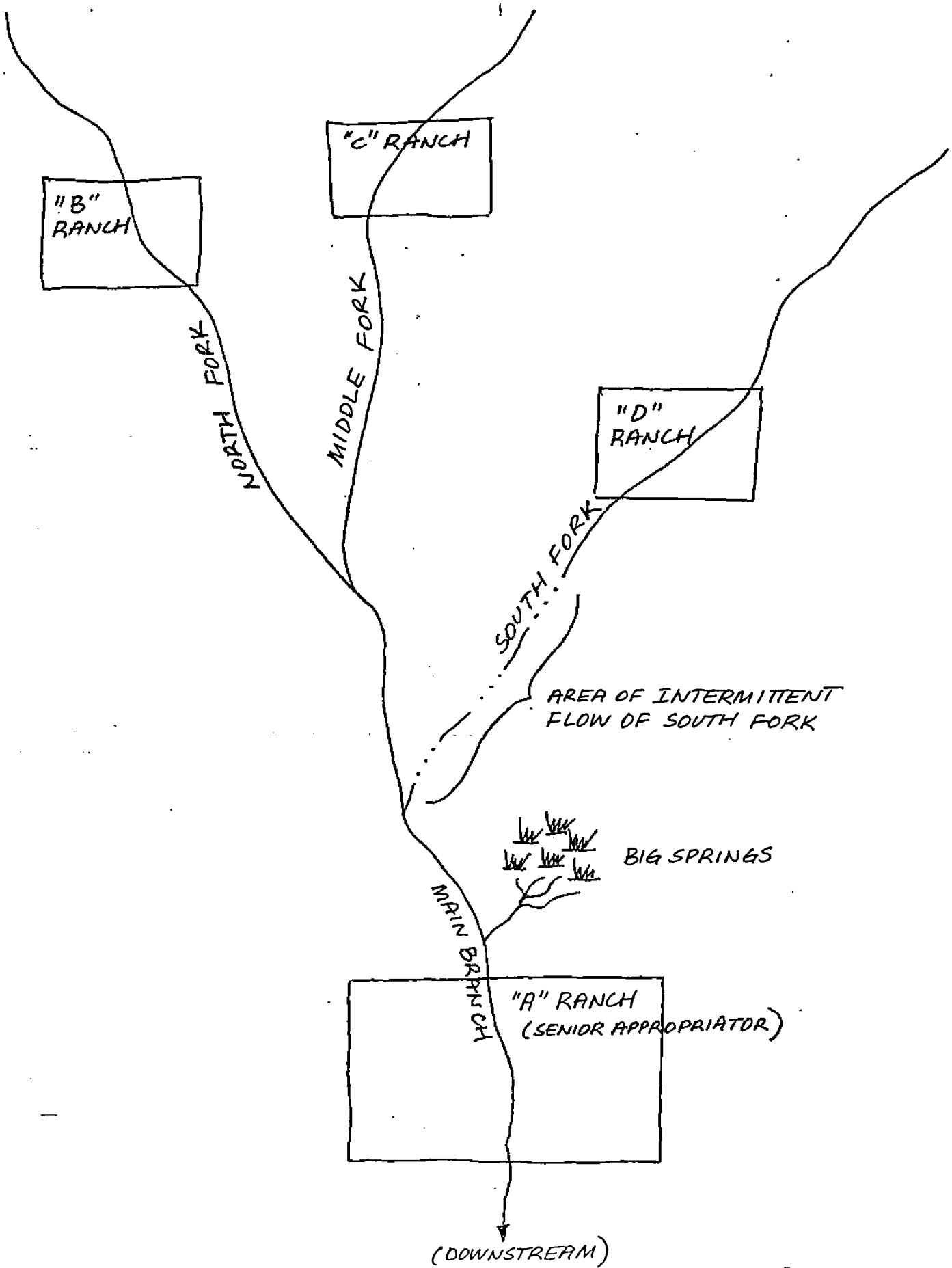
The Court explicitly recognizes (at p. 12 of its Amended Master's Report) that Indian Creek is made up of more than one "source". Indeed, the Court acknowledges that the evidence is unequivocal that Indian Creek is a composite of more than one "source". The "sources" that are relevant to the issue sub judice are on the one hand, the springs and melt water in the mountains which form the headwaters of Indian Creek, and on the other, the big springs on the 69 Ranch. Both of these features are "sources" of the "water course" known as Indian Creek. They are physically separate and they are geographically distant. Both are substantial "sources" of water for the Creek. There are probably others. It seems almost inescapable that Indian Creek has separate and distinct "sources" which contribute their share to the total flow of the "water course". Indeed, this proposition too seems self-evident. However, it is here that the semantic stumbling block seems to get in the way of a proper analysis of the facts. In its Finding of Fact I, and again in its Conclusion of Law III of its Amended Master's Report, the language employed by the Court highlights a failure to recognize and address this distinction. It is stated: "Indian Creek is a single source of water". The very words employed in that statement reflect the ambiguity visited upon the facts by the failure to make the distinction explored above. The sentence should read as follows: "Indian Creek is a single water course fed by separate sources" (namely, runoff in the mountains above and the big springs below on the 69 Ranch). Can the truth of the latter statement be argued? I think not. The facts

establish its truth unequivocally! Why does the Court refuse to make such a finding while clinging to the ambiguous and patently incorrect proposition that "Indian Creek is a single source of water". If that is true, then the statement which follows must also be true: "All the water in Indian Creek comes from only one source." We know that is not true (notwithstanding the lack of a hydrologist's testimony) and the Court's other findings establish that it isn't true.

Armed with the foregoing concepts then, that Indian Creek is 1) a single "water course", and 2) that it is made up of water flowing into it from at least two separate "sources", the question then becomes: So what? What legal effect does this set of circumstances have on the facts and the issues in the case? To answer that question, an analogy may be in order. The Court's attention is directed to the diagram of the "Main Branch" and its tributaries (sources) which appears on the following page: (See p. 5.)

MAIN BRANCH

(And Tributaries)



As with the case under consideration, the Main Branch is a single "water course". As with most water courses, it is made up of several "sources". Those sources are the North Fork, the Middle Fork, the South Fork, and Big Springs. In our example, there are four appropriators on this "water course". There is the "A" Ranch down on the Main Branch. The "A" Ranch is the senior appropriator on the stream. Upstream, there is the "B" Ranch on the North Fork, the "C" Ranch on the Middle Fork, and the "D" Ranch on the South Fork. The water rights of the "B" Ranch, the "C" Ranch, and the "D" Ranch are all junior to those of the "A" Ranch downstream on the Main Branch. In addition, an unusual hydrologic condition exists on the South Fork near its confluence with the Middle Fork. The South Fork is an intermittent stream. It has a substantial flow during early spring runoff, however, by the time the height of the irrigation season arrives, the flow of the South Fork is greatly diminished and by late summer, the South Fork's flow is so small that no water gets as far as that point where the South Fork meets the Middle Fork. Upstream on the South Fork, however, there is usually some water available for appropriation on the "D" Ranch year round.

Because it is the senior appropriator, the "A" Ranch has the right to demand that the "B" Ranch, "C" Ranch and "D" Ranch allow the waters of the North, Middle and South Forks to flow downstream and into the Main Branch in order that the "A" Ranch can fulfill its senior rights ahead of the junior appropriators upstream. By the middle of the irrigation season, however, no water from the

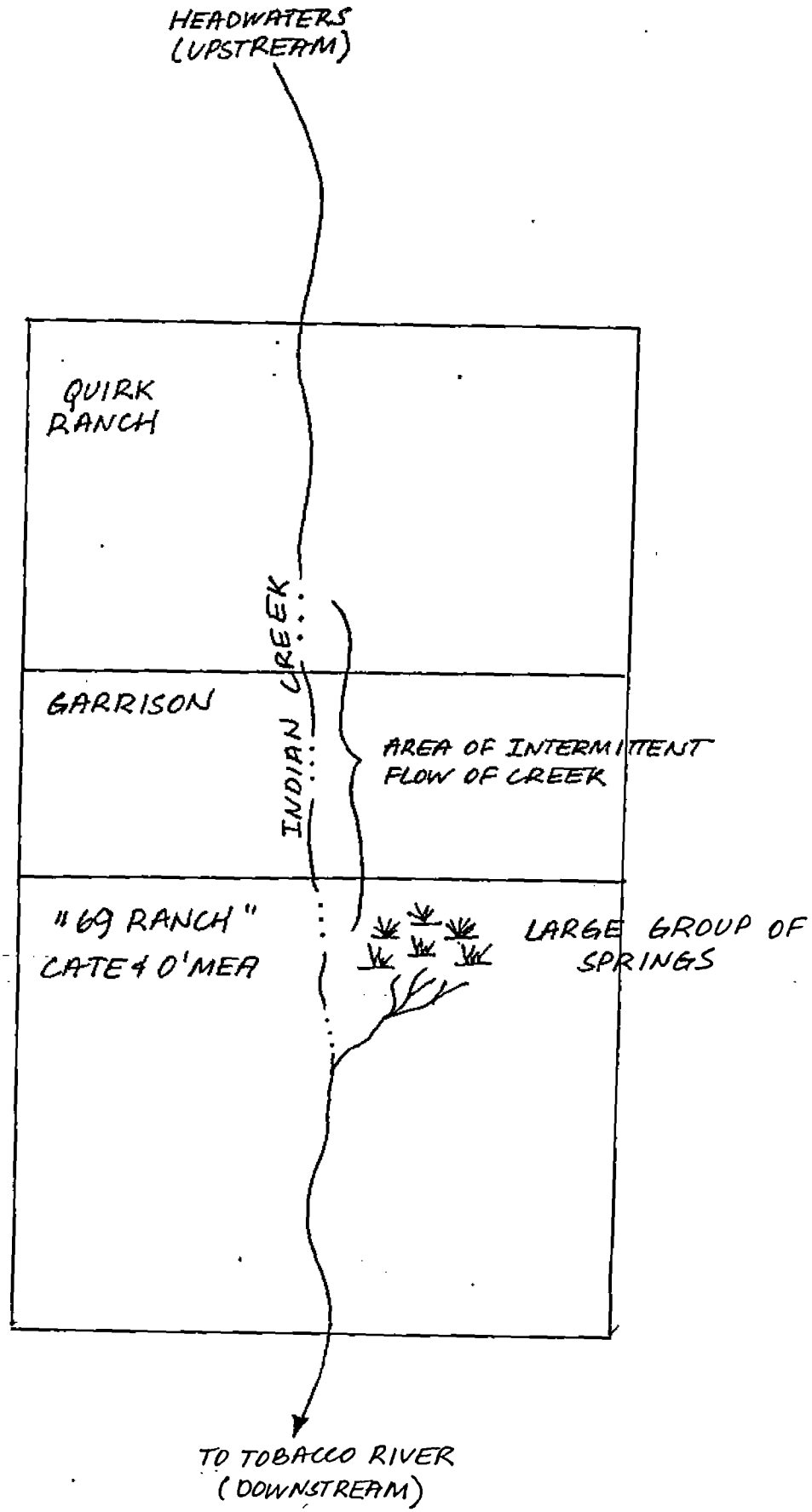
South Fork (even if the "D" Ranch discontinued irrigating) would ever reach the Middle Fork and find its way down to the Main Branch and the "A" Ranch. Because of this fact, through historical practices and loose-knit understandings between ranchers, the "D" Ranch has always taken what water it could get out of the South Fork ahead of any other appropriator on the stream, including the "A" Ranch with its senior right. The reason is simple and the exigencies of a scarce resource dictate the result. If the water isn't used on the "D" Ranch, it is lost to all and wasted. This is not an uncommon circumstance in Montana. Indeed, it is quite similar to the conditions at work in the instant case.

Now, the significance of this analogy comes into play when the "A" Ranch is sold to someone not familiar with the historic allocation of water in the area coupled with the institution of a procedure to adjudicate the rights of all water users on the water course. If there is nothing in the "final decree" reflecting the historic treatment of the South Fork, then the "A" Ranch, because its right is senior, will be able to demand that the "D" Ranch up on the South Fork use no water until the "A" Ranch has fulfilled its senior rights. South Fork water that could be used on the "D" Ranch is thus wasted. The result, especially where a water course is "over-appropriated", is tragic and unjust. In our example, the waters of the South Fork are lost to everyone, water is wasted, and the established historical practices (which truly are the parties' "water rights") are disrupted by a "final decree" that doesn't reflect the real water rights of the appropriators on the water course.

In the case at hand, the same problem is presented. The water rights of all the affected appropriators, Garrisons, Quirk Cattle Company, Cate & O'Mea and the other appropriators on the stream, are all rights on the same "water course" - Indian Creek. However, like the "Main Branch" in our analogy, those appropriators take water from the "water course" (Indian Creek), both above and below its various "sources".

The simplified drawing which appears on the following page depicts how the situation under consideration is analogous to the example discussed above: (See p. 9.)

INDIAN CREEK



Like the South Fork of our example, Indian Creek dwindles on the lower reaches of the Quirk Ranch. Generally, only a small amount, and oftentimes no Indian Creek water at all, makes it as far as the Garrison/69 Ranch boundary. Downstream, however, Indian Creek gets another good dose of water from another of its "sources" - the big springs on the 69 Ranch just inside, or downstream from, the Garrison/69 Ranch boundary. It is from below that point where the 69 Ranch makes its diversions from Indian Creek. If it weren't for the springs - that supplemental "source" of Indian Creek water - there would very simply be little or no water in Indian Creek for the 69 Ranch to appropriate. (Whether there was irrigation being undertaken upstream by junior appropriators or not.)

The facts recited above are, for the most part, not controverted. Most of them are either explicitly or implicitly recognized by the Court in its Amended Master's Report. Those facts are also underscored by the circumstantial evidence in the case - principally that the 69 Ranch has historically left the upstream appropriators alone. The evidence was unequivocal that there had never been a demand made by the 69 Ranch upon upstream appropriators, whether they be junior or otherwise, to permit water from above to flow down for use on the 69 Ranch. This was so whether the property was owned by the Quirks, Johnsons, Brinton or Cate & O'Mea and continued until the summer of 1985 when the long-standing water-allocating practices on the stream were upset by Gilbert Cate's demand that Garrisons and Quirks stop diverting

until he could fill what he claimed was his "senior" appropriation. Moreover, even when the matter was argued before the Court during the course of the recent telephone conference hearing of January 26, 1987, counsel for Cate & O'Mea could advance no specific opposition to these propositions. Nevertheless, and with all due respect, the Water Master seems bent on disregarding the facts and neatly sweeping the whole problematic situation under the rug under the guise that it is duty bound to find that Indian Creek is a "single source of water". Also with all due respect, it is submitted that referring to a stream as a "single source" or "separate sources" not only misses the mark but is an improper and inaccurate manner of characterizing a stream or "water course".

By way of further attempting to free ourselves from the bondage of semantics, consider the following: A "water course" is itself a "source" insofar as it is a body of water from which appropriations are taken out. It is a "source" of water from which a diversion can be made. Thus, when we refer to a body of water as a "source" it is in the context of taking water out. As for the water that goes in - which is a critical component of what we are talking about in the instant case - the body of water or "water course", is made up of the "sources" which feed it. Indian Creek is indeed a "source" of water from which ranchers make diversions, however, it is also a "water course" made up of water rising from several distinct "sources". It is this latter concept (indeed uncontroverted fact) that the Water Master refuses

to acknowledge. It is also the crux of the issue here under consideration. It is axiomatic that a "water course" such as Indian Creek can be (and usually is) made up of water from several "sources". It is when the makeup - or "sources" - of a "water course", by their topographic and hydrologic nature have a profound effect on how the water is diverted and appropriated by those who use it, that it ought to be recognized by the Water Court in adjudicating the rights on the water course. Again, with all due respect, that is what the Master's Report in this case fails to recognize or accomplish. The fact that Indian Creek is largely "dried-up" above the 69 Ranch, the fact that it is then "recharged" downstream by the big springs on the 69 Ranch, the fact that the 69 Ranch (in truth probably one of the senior appropriators on the stream) takes its water from below this point of "recharge", together have a profound effect on the historic use and allocation of Indian Creek water. Simply stated, the Court's refusal to recognize this situation carries with it a ruinous potential for the upstream appropriators on Indian Creek.

The facts are ignored. Instead, the Water Court has assigned a priority date to Cate & O'Mea's water rights fully cognizant that there is not one lousy shred of evidence to support it. Indeed, the Court acknowledges: "The only plausible date based on the record is October 24, 1884." I would like to know what evidence there is in the record which makes that date "plausible". Cate & O'Mea can't tell us, nor can the Court, because there is none. The choice of that date is guesswork, pure and simple. There just is

no evidence in the record to support it. For some administrative reason, beyond my comprehension, the Court is bent on neatly categorizing every water right on its preprinted forms and any facts not fitting neatly into the prescribed columns are ignored.

There is little more I can say that I have not already said (probably at least twice) except to reiterate that I cannot comprehend how the Court can engage in the exercise of assigning to a water right a priority date when there is absolutely no basis for it either in the facts or the law, while completely ignoring those uncontroverted facts which explain how the waters of Indian Creek are appropriated by its users. Reflective of this "form over substance" approach to the problem by the Court is this apparent inconsistency: In its Finding of Fact I, at p. 15 of its Amended Master's Report, the Court states: "There is a large group of springs arising on the 69 Ranch which is part of and adds a significant amount of water to the Creek." If the water from the springs "adds" to the Creek, then obviously, there was something already in it to which the spring water was added. The Court thus, at least implicitly, recognizes there are at least two sources to Indian Creek - the "large group of springs" and the source of the water that was already in the Creek to which the water from the springs was added. (From the record, we know this is runoff from above in the high country.) Clearly then, from the Court's own findings, we have two separate sources of Indian Creek water. Nonetheless, in Amended Conclusion of Law III, at p. 17, the Court states: ". . . it is impossible to find that

there are two separate sources of Indian Creek . . ." The Court's propositions are simply irreconcilable. They are diametrically opposed. I implore the Court to correct this patent inconsistency and right the injustice in which it has resulted.

CONCLUSION

I can but reiterate that which I previously suggested to the Court as the proper resolution to this case - one which seems to me to be a very simple, honest and just solution to the matter and that is this: Put a footnote in the Final Decree that reflects that the rights of the 69 Ranch (and the other downstream appropriators) which are filled from points of diversion downstream from this "large group of springs" - whatever their priority date - do not entitle the appropriator to demand that appropriators upstream from the springs discontinue their appropriations to permit the water to flow downstream for the purpose of filling rights below the springs.

DATED this 23rd day of February, 1987.

MURPHY, ROBINSON, HECKATHORN & PHILLIPS, P.C.

By Donald R. Murray

Donald R. Murray
PO Box 759
Kalispell, Montana 59903-0759
ATTORNEYS FOR QUIRK CATTLE COMPANY

Certificate of Service

I, DIANA ALLEN, one of the secretaries of the law firm of MURPHY, ROBINSON, HECKATHORN & PHILLIPS, do hereby certify that on the 23rd day of February, 1987, I served a copy of the foregoing document in the above case by mailing a copy thereof, first class postage prepaid, to:

Patrick M. Springer
PO Box 1112
Kalispell, Montana 59901

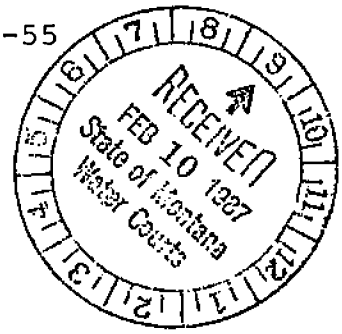
Diana Allen

IN THE WATER COURTS OF THE STATE OF MONTANA

CLARK FORK DIVISION -- KOOTENAI RIVER BASIN

* *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE KOOTENAI RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE KOOTENAI RIVER IN FLATHEAD AND LINCOLN COUNTIES, MONTANA.	)	Case No. 76D-55



Claims: 76D-W-025302-00, 025311-00, 025312-00, 025313-00 025314-00, 025315-00, 025316-00, 025317-00, 025318-00, 025319-00, 025328-00, 025329-00, 025330-00, 025331-00, 025332-00, 025333-00, 025334-00, 025335-00 and 025336-00

Claimant: Cate & O'Mea, a partnership

Objector: Quirk Cattle Company

AMENDED MASTER'S REPORT

Pursuant to Title 85, Chapter 2, MCA, 1979, a hearing in the above entitled matter was held in Kalispell, Montana on January 28, 1986 at 8:30 a.m. before Linda Hickman, Water Master. On December 31, 1986 Mr. Donald Murray, attorney for the objector Quirk Cattle Company, made a written motion to reconsider. This motion was argued on January 26, 1987 at 8:30 a.m. by telephone conference call.

Statement of the Case

The Kootenai River Basin Temporary Preliminary Decree was issued on March 22, 1984. The objector, Quirk Cattle Company, objected to the priority date and source of claims 76D-W-025302-00, 025311-00, 025312-00, 025313-00, 025314-00, 025315-00, 025316-00, 025317-00, 025318-00, 025319-00, 025328-00, 025329-00, 025330-00, 025331-00, 025332-00, 025333-00, 025334-00, 025335-00

and 025336-00.

No other party filed a Notice of Intent to Appear and Participate at the hearing.

A first prehearing was held in Libby, Montana on January 22, 1985. A second prehearing was held in Libby, Montana on September 24, 1985.

At the time of the hearing, Mr. Springer made a motion for the introduction of a filing of appropriation of water rights by Mr. William Ferguson in 1883. Mr. Murray objected to the admissibility of the filed appropriation. The grounds for the objection were that it contained no description of the lands upon which the water was to be used; it does not say that the water was ever actually used; it speaks only to future use; it was not verified; it was signed on July 17, 1883 and not recorded until October 24, 1884.

Mr. Springer countered by arguing that the law in effect at the time the filing was made provided that anyone desiring to appropriate water must post a notice showing the intent of the appropriator. Mr. Springer also argued that Mr. Ferguson filed two years before there was a statute requiring the filing of notices with the county clerk.

At the time that the Ferguson filing was offered into evidence and the objection was made to its admissibility, the Court questioned the proponent, Mr. Springer, regarding the reasons for offering it.

"THE COURT: Mr. Springer, in offering this filing, what is your purpose? What are you using it to do?

MR SPRINGER: Just to have it in the record where it belongs. I haven't . . . you know, you have Exhibit B which shows the continuing of the filing that apply to the 69 Ranch. It is no different in my view, Your Honor, than Exhibit 2 offered and admitted by the objector. Strictly to go into admission for the Court. I see no real difference between those two documents.

THE COURT: Your purpose in offering this document is not to prove the priority date of the water right claimed?

MR. SPRINGER: Certainly, it has that effect. Otherwise, there's nothing here to be arguing about. You have to recognize that the document itself states, the date of filing and the date of priority. They are recognized by the statute. I don't know how else to prove it, Your Honor, I don't know that as Don so eloquently states, he doesn't know what Ferguson did, he doesn't know what he didn't do. We have but before us the full record with nothing else to present to this Court except the records as they exist in the official in the State of Montana. So, to that extent, yes, I'm offering it to prove that priority date. There is nothing else."[1]

The Court ruled that the document could not be admitted for the purpose of proving the validity of the priority of Cate and O'Mea's water rights. Motion sustained.

The case law in Montana provides that where the statute requiring one to file a notice of appropriation had not yet been passed, but where the appropriator went ahead and filed such a notice of appropriation, the requirements of the statute would apply. "A notice of appropriation filed before the 1885

[1]Transcript of hearing held June 3, 1986 at Council Chambers, City Hall, 312 1st Ave. E., Kalispell, MT at page 199.

Act has been held to be defective in that it did not comply with the notice requirements of R.C.M. 1947, Section 89-810 . . ." in Stearns v. Benedick, 126 Mt. 272, 274-275, 247 P.2d 656; cited in Shammel v. Vogl, 144 Mt. 103, 111, 396 P.2d 103 (1964).

Prior to the enactment of 89-810 R.C.M., the way to get a water right was to divert the water and to then apply it to a beneficial use.

There are two unresolved opinions regarding whether a legally defective notice of appropriation may still be used for any purpose in establishing a water right. In Sweetland v. Olsen, 11 Mt. 27, 31, 27 P. 339 (1891), the Court stated:

> "It is true there was no statute of Montana at the time requiring the execution and recording of a declaration of the appropriation and claim of water rights. But if parties voluntarily make, subscribe, and verify declarations of their respective claims, or appropriations of certain quantities of the waters of a certain creek, the questions before us is as to the admissibility of such declaration as evidence tending to show the intention of such appropriators as to quantity and time of the appropriation, as well as the understanding of the parties respecting each other's rights in and to any of the waters of the stream in question, if such matters are explained by the writing offered. . . . It is true, also, that the making and recording of a declaration was not sufficient in itself to establish the right of declarant to the use of the water therein described. Such right could only be acquired by the actual appropriation, diversion and use of a quantity of the waters of the stream for any beneficial and lawful purpose. . . . But the declarations were offered as evidence tending to show what the intention, understanding and action of the original appropriators was in relation to the waters in dispute, and for such purpose were admissible."

The second case is Peck v. Simon, 101 Mt. 12, 18, 52 P.2d 164 (1935). There the Court discussed the filing of a notice of appropriation even though it was not required by statute.

"The only other rebutting testimony, if at all, if the water right notice of Carver, which referred to the construction of a ditch in the future. It will be observed that this notice in no way indicates on what lands or for what purpose the waters appropriated were to be used - whether on lands in question or other lands does not appear; and for aught that appears from the notice, it may have been an intended appropriation in addition to existing appropriations, if any. At the time this notice was filed, there was no statute authorizing such filing. (Gilcrest v. Bowen, 95 Mt. 44, 24 p.2d 141). The force and effect of such a document was considered by this Court in the Gilcrest Case and therein it was said: 'At the time Croke filed his notice of appropriation there was no statute authorizing such filing. Mr. Justice Harwood, speaking for this Court, declared in Sweetland v. Olsen, 11 Mt. 27, 27 Pac. 339, that where a party voluntarily files such a declaration, none being required, although it is not sufficient in itself to establish a right, the declaration is admissible as evidence of the intention of the party. The soundness of this holding is doubtful; the declaration is in the same category as that declared inadmissible in Spellman v. Rhode, 33 Mt. 21, 81 Pac. 365, and falls within no one of the recognized exceptions to the general rule that self-serving declarations are inadmissible set out at length in 93 Am. Dec. 279. . .'."

During the course of the trial, there were several objections made which the Court took under advisement. The first was when Mr. Brinton was being examined by Mr. Springer:

"MR. SPRINGER: The issue of the prior water right. Until Mr. Gilbert raised the issue in 1985, had there ever been a contest over it?

MR. BRINTON: No, not that I know of.

MR. SPRINGER: Do you think that because there was no contest that you would have in any manner waived any right that you had?

MR. MURRAY: Oh, I object to that, Your Honor. It's speculation.

THE COURT: Mr. Springer.

MR. SPRINGER: I don't believe there could be anybody besides Mr. Brinton that can answer that. That's not speculation.

THE COURT: Please restate your question.

MR. SPRINGER: Do you think that by not having raised that issue, the issue that you had the prior water right, even when you needed the water, was there in any way a waiver of the rights you had?

MR. MURRAY: Again, I object. It's just a minute, Mr. Brinton. Not only on the grounds that it's speculative but waiver is a legal question and it calls for a conclusion that this witness lacks the competence to make."[2]

At this time, the Water Court finds that this question and answer may be considered part of the record under the MRE 701, Opinion Testimony by Lay Witnesses.

The second objection to which the Court reserved its ruling was during the cross-examination of Mr. Brinton by Mr. Murray:

"MR. MURRAY: So, in the event that Mr. Cate or Cate and O'Mea default in their payments to you, one of your remedies is to take back the property. Correct?

MR. BRINTON: I guess so very indirect, maybe so.

MR. MURRAY: Okay. Is Cate and O'Mea in default right now?

MR. SPRINGER: Objection, Your Honor, totally immaterial.

MR. MURRAY: Well, it's impeachment, Your Honor. It goes to his interest in the outcome of the litigation."[3]

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[2]Transcript at 146.

[3]Transcript at 146.

At this time, the Water Courts finds that this question and answer may be considered as part of the record under the MRE 607, Who May Impeach, Party Not Bound by Testimony.

The third objection to which the Court reserved its ruling was again during the cross-examination of Mr. Brinton by Mr. Murray:

MR. MURRAY: Now is . . . did Cate and O'Mea ever threaten to sue you over this representation without water rights?

MR. BRINTON: No.

MR. MURRAY: There's never been any talk about that?

MR. BRINTON: As a direct . . . well, I don't know how to answer that one.

MR. MURRAY: Why don't you just go ahead and try your best. Apparently there has been some discussion about it.

MR. BRINTON: Give it my best shot, huh? Gilbert did mention that the possibility that my representing it, I could be sued. I, in turn, could sue Johnsons. That's about as far as it ever went. There was no . . . he didn't take it any further than that at all.

MR. SPRINGER: Your Honor, I certainly question the relevancy of this line of questioning to the issue of the priority of the water rights. We're talking about the interference with contract here that has no place in this hearing.

THE COURT: Mr. Murray.

MR. MURRAY: Well, Your Honor, the latitude that I'm allowed for cross-examination for the purpose of impeachment is great. Any evidence that I can muster to show that this man has an

interest in the outcome of this litigation is appropriate. I've shown that he's in . . . that his sellers, . . . or his purchasers are in default and that one of his remedies is to take the property back. In which case, he gets it right along with whatever water rights it has. In addition, I'm going to show that Gilbert Cate has threatened to sue him if Cate doesn't win in this lawsuit and therefore, he has an interest in assuring that Mr. Cate prevails.

THE COURT: Mr. Springer.

MR. SPRINGER: I restate the relevancy. And impeachment, I don't think covers the grounds that he is wishing to walk on. I don't particularly mind this line of testimony for informational purposes of the Court but to imply that the claimant is somehow suborning this witness' testimony is totally in error, not factually, not morally or anything else. So, let the objection stand, then the Court's ruling. This thing is improper."[4]

At this time the Water Court finds that this question and answer may be considered part of the record under the MRE 607, Who May Impeach, Party Not Bound by Testimony.

The priority date question involves Finding of Fact VII and Conclusions of Law V and VI. The Court was mistaken in Finding of Fact VII in stating that Cate and O'Mea's water right claims, 76D-W-025314, 025315, 025316, 025317, 025318, 025332, 025333, 025334, 025335 and 025336 were based on a filing made by Mr. William Ferguson on October 24, 1884. Upon closer examination it is apparent that claims 76D-W-

[4]Transcript at 154.

025316, 025317, 025334 and 025335 are based on an appropriation made by a person other than Ferguson. This person's name may have been Butler, but the copies of that appropriation that were given to the Court are illegible.

Conclusions of Law V and VI are similarly affected, in that claims 76D-W-025316, 025317, 025334 and 025335 should not be included, as they were not part of the Ferguson filing.

Mr. Murray, in his brief in support of the motion to re-consider, goes on to discuss the 1884 priority date assigned to all of the claims filed under the Ferguson filing. He says:

> "In the instant case, there isn't any more evidence to support October 24, 1884 as the priority date of these water rights than there is to support July 17, 1883."

While there is no direct evidence showing the diversion of water on the 69 Ranch in 1884, Mr. Emmett Quirk, a witness called by Mr. Murray, did testify about his recollection of water usage.

"MR. MURRAY: Okay, Emmett, when you say the upper ranch, is that the present Quirk Cattle Company Ranch?

MR. QUIRK: That's right.

MR. MURRAY: Okay and was that ranch founded or started or homesteaded by Thomas Quirk?

MR. QUIRK: That's right.

MR. MURRAY: All right, and was that in approximately 1884 that he started ranching the area?

MR. QUIRK: Yes, and maybe before.

MR. MURRAY: Okay. Emmett, going back to when the upper ranch and the 69 Ranch were both owned by the Quirk Cattle

Company and I take it that was the same year you were born that they were . . .

MR. QUIRK: . . . before.

MR. MURRAY: Quirks acquired the 69 Ranch?

MR. QUIRK: Yes.

MR. MURRAY: Okay. How was the water divided between the two properties, how was it used?

MR. QUIRK: Well, just the same as it's been explained here. In the early season when there was some water in the creek but it was sinking and wouldn't go down, we always started irrigating on the upper place until there was enough water to carry on through.

MR. MURRAY: All right.

MR. QUIRK: Then they'd be on the floodwaters come why there'd be plenty of water for both places.

MR. MURRAY: Okay and how about after the floodwaters subsided?

MR. QUIRK: Well, then it just depended on the spring at the lower place and whatever was in the creek at the upper place.

MR. MURRAY: So, the creek water then, was used on the upper place to the exclusion of the lower place whenever it was needed on the upper place?

MR. QUIRK: Yes.

MR. MURRAY: Okay. Was that the case as far back as you know?

MR. QUIRK: The . . . what date's that?

MR. MURRAY: Was that situation that we just talked about

with the use of the water from the upper creek on the upper ranch and the spring on the lower ranch the way it was as far back as you can remember?

MR. QUIRK: Yes.

MR. MURRAY: All right. Emmett, did you hear Leland describe how the water is used and distributed on the upper ranch?

MR. QUIRK: Yes I did.

MR. MURRAY: Okay. And were the things he said about the upper ranch in the spring on the 69 Ranch. . . well, let me ask it this way. Is the way Leland described it the way it is at present, the way it was as far back as you can remember?

MR. QUIRK: Yes.

MR. MURRAY: Okay. Emmett, did the use of the waters of Indian Creek on the two ranches that we've talked about, did that continue after the 69 Ranch was sold by the Quirk family?

MR. QUIRK: Yes.

MR. MURRAY: Okay. So, when the property was owned by the Johnsons, that . . .

MR. QUIRK: Same way.

MR. MURRAY: Same way, okay. Now do you know anything from talking to your uncle or other members of the Quirk family about how things were before you were old enough to actually irrigate yourself?

MR. QUIRK: It's the same way.

MR. MURRAY: It's always been the same way on the two ranches?

MR. QUIRK: Yes."[5]

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[5]Transcript at 111.

This exchange tells the Court several things. First, Mr. Thomas Quirk homesteaded in 1884 or earlier. Secondly, sometime before 1907 the Quirk Cattle Company bought the 69 Ranch. Third, for at least as long as the Quirk Cattle Company owned both ranches, the irrigation practices were the same. The upper ranch would use Indian Creek waters first and whatever remained would be used on the 69 Ranch several days later. It is unfortunate that the date that the 69 Ranch was purchased by the Quirks was not established. The Court does know that the above described irrigation practices were in existence prior to 1907.

The question of whether Indian Creek should be one or two sources involves Findings of Fact I, II, III, IV and Conclusions of Law III. At the time of the hearing, Indian Creek was described in some detail. Several witnesses described a typical year. There was no dispute that during spring runoff, water flows from the head of the creek somewhere in the Whitefish Mountain Range down to and past the springs on the 69 Ranch. Nor was there any dispute over the fact that during late summer or dry periods what water is left in the creek sinks, leaving the creek bed dry from Section 29 to the center of Section 30 where the springs are located on the 69 Ranch. The issue then is whether or not the springs on the 69 Ranch are in fact a separate source from the upper creek. There are a couple of cases in Montana that talk about this issue.

In Woodward v. Perkins, 116 Mt. 46, 53, 147 P2d 1016(1944). the Court said:

"Seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to that stream as part of its source of supply, same as feeder springs. An appropriator on the stream has the right to all such tributary flow even as against the owner of the land. This is the general rule supported by Court decisions in a number of states. (Annotations in 89 ALR 218). The decision of this Court in Beaverhead Canal Co. v. Dillon Electric Light and Power Co., which has been repeatedly referred to with approval, is to that effect. In Colorado, a statute gives the person on whose lands seepage waters first arise the prior right and use thereof on his lands. This statute has been construed as applying where the waters form no part of a natural stream; where they are naturally tributary to a stream, they do not belong to the land owner, regardless of the statute, but are subordinate to the stream appropriations. (Nevins v. Smith, 86 Colo. 178, 279, Pac. 44.)"

In Beaverhead Canal Co. v. Dillon Electric Light and Power Co., 34 Mt. 135, 136, 85 Pac. 880 (1906) the Court said:

"Where in a water right suit it did not appear that certain spring or seepage water having its rise in the bed of a creek, was so made to rise by artificial means, and in the absence of a finding to that effect, the presumption will obtain that such water forms a part of the natural supply of the creek."

At the hearing Mr. Murray was questioning Mr. Miles Garrison who owns land between the Quirk Cattle Company and the 69 Ranch.

"MR. MURRAY: Okay, well I'm going to get to that next but we've established that there is a lot of sinking in this area. Then the creek rises again in this big spring and flows constantly downstream from this point does it not?

MR. GARRISON: Right."[6]

A Washington case, In re. Johnson Creek Water Rights, Wn. , 294 Pac. 566 (1930) discussed whether or not a certain water course could be considered to be a stream.

[6]Transcript at 104.

"It often happens, as is well known, that during long periods with but little rainfall streams of considerable magnitude or their several channels become nearly dry in summer, and yet no one would hesitate to call them water courses. It is immaterial that the flow may be intermittent, or even that at certain seasons of the year there may be little or even no flow of water. A most common definition of a water course is:'it must appear that the water usually flows therein in a certain direction, and in a regular channel with banks and sides. It may not flow, continuously, and it may at times by dry. It must have, however, a substantial existence.'."

Citing Rigney v. Tacoma Light and Water Co., 9 Wash. 576, 38 P. 147, 26 LRA 425 says:

"And, while the source of a stream must have a well defined existence, its flow need not be continual and the fact that the source of supply is intermittent and its flow interrupted during certain periods of the year in no way detracts from its character as a stream."

Mr. Murray expresses concern that if the Court finds Indian Creek is a single source of water it will change the way the water has historically been used. This Court does not have jurisdiction to decide that issue. The proper forum for raising that issue is the District Court under a dissatisfied water user's action. There are cases in Montana that have similar factual backgrounds. See Raymond v. Wimsett, 12 Mt. 551 (1892).

Exhibits

The initial determination of the water right declarations issued in the Kootenai River Temporary Preliminary Decree was based on the claimant's original declarations and Department of Natural Resources and Conservation verification. All such documentation was submitted to the Water Courts and is part of the record.

The objector, Quirk Cattle Company, introduced the following exhibits:

1 - Map of Indian Creek and Environs - no objections

2 - Thomas Quirk filing on Indian Creek - no objections

3 - Letter from Patrick Springer to Don Murray - no objections

The claimant, Cate and O'Mea, introduced the following exhibits:

A - Ferguson Filing - offered but not admitted upon objection

B - Water Resource Survey - no objections

Findings of Fact

I.

Indian Creek is a single source of water which runs in a defined channel. There is a large group of springs arising on the 69 Ranch which is part of and adds a significant amount of water to the creek.

II.

Based on this historic use, the Quirk Cattle Company has always made first use of the waters of Indian Creek.

III.

At no time before 1985 had any of the water users on Indian Creek below the Quirk Cattle Company asked the Quirks to turn water down.

IV.

The Quirk Cattle Company and the 69 Ranch were under single ownership at one time. During that time the upper ranch, or what is now Quirk Cattle Company, was irrigated first each year and the lower ranch, the 69 Ranch, was irrigated shortly after irrigation on the upper portion had been started.

V.

Cate and O'Mea's predecessor in interest, Mr. Brinton,

believed he had the first rights on Indian Creek. Mr. Brinton represented to Mr. Cate that he had the first rights on Indian Creek.

VI.

Cate and O'Mea have diversions from Indian Creek below the springs arising on the 69 Ranch.

VII.

Cate and O'Mea's water right claims 76D-W-025314-00, 025315-00, 025318-00, 025332-00, 025333-00 and 025336-00 were based on a filing made by Mr. William Ferguson on October 24, 1884.

VIII.

The Court received a letter from Mrs. Brockman, for Shea Ranch, Inc., on January 30, 1987. The Master did not read this until after considering the arguments on the motion to reconsider and making her Findings. The Shea Ranch is a claimant in the Basin and had the opportunity to come into this case, but chose not to. The Court must make its Findings based on the record before it, and has done so.

AMENDED CONCLUSIONS OF LAW

I.

The Water Court has jurisdiction to review all objections to Temporary Preliminary Decrees pursuant to 85-2-233 MCA.

II.

The Water Court has jurisdiction to make clerical corrections pursuant to Water Court Rule 4.

III.

Indian Creek is a single source of water. Based on Montana

case law, and with no contradictory hydrologic or expert testimony, it is impossible to find that there are two separate sources of Indian Creek, even though it may have been thought of and treated as two sources of water by many people in the area.

IV.

The William Ferguson filing cannot be used to establish a prima facie proof of the right it claims to purport. It fails on several grounds: no description of the land to be irrigated, describes a future use, it was not verified, it purportedly was signed one year before it was filed.

V.

The claimant, Cate and O'Mea, does have use water rights for claims 76D-W-025314-00, 025315-00, 025318-00, 025332-00, 025333-00 and 025336-00. The priority date of a use right stems from the day the water was first applied to beneficial use on the land. The only plausible date based on the record is October 24, 1884.

VI.

The priority date of the Cate and O'Mea water rights 76D-W-025314-00, 025315-00, 025318-00, 025332-00, 025333-00 and 025336-00 should be October 24, 1884.

VII.

Claims 76D-W-025314-00, 025315-00 and 025318-00 are identical. The following remark should be added to each of the claims: THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT WILL BE ADDRESSED AT THE PRELIMINARY DECREE OBJECTION STAGE. IT APPEARS THAT

CLAIMS W-025314-00, 025315-00 AND 025318-00 ARE DUPLICATES. Claims 76D-W-025332-00, 025333-00 and 025336-00 are identical. The following remark should be added to each of the claims: THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT WILL BE ADDRESSED AT THE PRELIMINARY DECREE OBJECTION STAGE. IT APPEARS THAT CLAIMS W-025332-00, 025333-00 AND 025336-00 ARE DUPLICATES.

VIII.

Claims 76D-W-025302-00, 025311-00, 025312-00, 025313-00, 025319-00, 025328-00, 025329-00, 025330-00 and 025331-00 should remain as decreed in the temporary preliminary decree.

IX.

Claims 76D-W-025314-00, 025318-00, 025332-00 and 025336-00 should remain as decreed in the temporary preliminary decree except for the remark in Conclusion VII above that is to be added.

X.

The priority for claim 76D-W-025315-00 is listed as July 17, 1883. It should be October 24, 1884. The duplicate claim remark cited in Conclusion VII. above is also to be added. All other elements of 76D-W-025315-00 should remain as decreed in the temporary preliminary decree.

XI.

The priority date for claim 76D-W-025333-00 is listed as July 17, 1883. It should be October 24, 1884. The duplicate claim remark cited in Conclusion VII. above is also to be added. All other elements of 76D-W-025333-00 should remain as

decreed in the temporary preliminary decree.

DATED this 10th day of February, 1987.

Linda Hickman
Water Master

ORDER

After review of the Findings of Fact and Conclusions of Law, it is ORDERED that the following changes be made to the Preliminary Decree of Existing Water Rights in the Kootenai River Basin.

I.

Indian Creek is a single source of water.

II.

The priority date for claims 76D-W-025315-00 and 025333-00 is changed to October 24, 1884.

III.

The following remark is to be added to claims 76D-W-025314-00, 025315-00 and 025318-00: THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT WILL BE ADDRESSED AT THE PRELIMINARY DECREE OBJECTION STAGE. IT APPEARS THAT CLAIMS W-025314-00, 025315-00 AND 025318-00 ARE DUPLICATES.

IV.

The following remark is added to claims 76D-W-025332-00, 025333-00 and 025336-00: THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT WILL BE ADDRESSED AT THE PRELIMINARY DECREE OBJECTION STAGE. IT APPEARS THAT CLAIMS W-025332-00, 025333-00 AND 025336-00 ARE DUPLICATES.

DATED this 10th day of February, 1987.

W. W. LESSLEY
Chief Water Judge

cc: Patrick Springer
Donald Murray