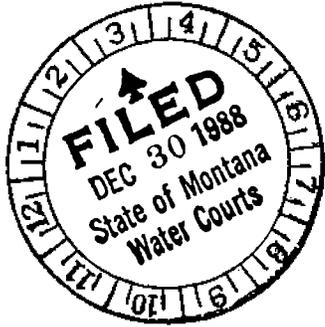


IN THE WATER COURTS OF THE STATE OF MONTANA

UPPER MISSOURI DIVISION - DEARBORN RIVER BASIN

* * * * *

IN THE MATTER OF THE ADJUDICATION)	CASE 41U-6
OF THE EXISTING RIGHTS TO THE USE)	41U-W-096875-00
OF ALL THE WATER BOTH SURFACE AND)	
UNDERGROUND, WITHIN THE DEARBORN)	
DRAINAGE AREA, INCLUDING ALL)	
TRIBUTARIES OF THE DEARBORN RIVER)	
IN CASCADE AND LEWIS AND CLARK)	
COUNTIES, MONTANA.)	



CLAIMANT: Levine Land and Cattle Company

OBJECTOR: Dearborn Canal & Water Company
 D. Michael Curran
 Daniel A. Levine

MASTER'S REPORT

STATEMENT OF THE CASE

This Levine Land and Cattle Company irrigation claim is for 4.00 cubic feet per second (160.00 miners inches) from Flat Creek, priority date December 28, 1881 based on the E. P. Chandler Notice of Appropriation.

Daniel A. Levine objected to the flow rate. D. Michael Curran objected to the priority date, acres irrigated, volume and flow rate. The Dearborn Canal and Water Company objected to the ownership, priority date, place of use, acres irrigated, volume and flow rate.

The Masonic Home of Montana filed a Notice of Intent to Appear but did not participate in any of the proceedings.

Appearing at the consolidated hearing for Cases 41U-6, 41U-21 and 41U-22 were David Moon, attorney for the Dearborn Canal and Water Company; Gary Bjelland, attorney for D. Michael

Curran; Philip Strobe, attorney, and Margie Thompson on behalf of Arthur and Margie Thompson; and C. W. Leaphart, attorney, Dan Levine and Roy Levine for Levine Land and Cattle Company. The witnesses who testified were Margie Thompson, Dan Levine, Roy Levine, William J. Barrett and Joe Barrett. Testimony was given and argument was made concerning the validity of the E. P. Chandler Notice of Appropriation, whether the right was ever perfected and if perfected, whether it was abandoned. Judicial notice was taken of Cause No. 7608, entitled Andrew G. Levin vs. W. C. Gillette Company, et al., First Judicial District, Lewis and Clark County, Montana, and its court file, which resulted in a decree of Flat Creek dated March 4, 1915. The Water Master later reviewed the file for Cause No. 7608 on microfiche at the Lewis and Clark County Clerk of Court, Helena, Montana.

FINDINGS OF FACT

1. The E. P. Chandler Declaration of Water Right is for 160.00 miners inches (4.00 cubic feet per second) from Flat Creek "said waters to be used for agricultural purposes." The date of appropriation is August 1, 1881.
2. The filing date of the E. P. Chandler Declaration is December 28, 1881, almost four months past the date of appropriation.
3. The requirement of filing a notice of appropriation was not codified until 1885, four years after this Chandler appropriation and filing.

4. The place of use specified in the Chandler Declaration is currently owned by Levines. They purchased it from the Dearborn Livestock Company.

5. This property has not been irrigated by the Levines and the water right has not been used by the Levines. Roy Levine testified that he did not know when it was last used but it has not been used since he came to the area in 1925.

6. There is evidence of an old ditch off the north side of Flat Creek which may have provided irrigation for 25-27 acres within the property specified by the Chandler Declaration.

MR. MOON: Now, have you ever personally irrigated any of the lands that are mentioned in those two filings?

MR. DAN LEVINE: No.

MR. MOON: So, you don't personally know of any use that's taken place on the lands mentioned in those claims?

MR. DAN LEVINE: Well, there are ditches there that are obvious, so there must have been at one time I would imagine.

MR. MOON: There are old ditches on the property?

MR. DAN LEVINE: That's right.

MR. MOON: So, you know that there were at one time ditches built. Is that correct?

MR. DAN LEVINE: That's correct.

MR. MOON: But you have no knowledge that there was ever any irrigation on those lands, personally, do you, Mr. Levine?

MR. DAN LEVINE: No, I don't.

MR. MOON: Do you know Mr...if you don't know that there was any use on those lands, then there's no way that you could tell whether or not a predecessor had ever actually irrigated those lands?

MR. DAN LEVINE: No, I couldn't say that.

MR. MOON: Isn't it also true that you don't know whether or not any predecessors had ever abandoned any irrigation that might have taken place?

MR. DAN LEVINE: I can't say.

MR. MOON: You have no personal knowledge of use by predecessors of yourself?

MR. DAN LEVINE: No.

Transcript, page 76 and 77.

CONCLUSIONS OF LAW

I

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

II

The E. P. Chandler appropriation and Declaration of Water Right are from 1881, prior to the codification of R.C.M. sec. 89-810 in 1885.

Section 6 of R.C.M. sec. 89-810 states:

Any person hereafter desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: First, the number of inches claimed, measured as

hereinafter provided; second, the purpose for which it is claimed and place of intended use; third, the means of diversion, with size of flume, ditch, pipe, or aqueduct, in which he intends to divert it; fourth, the date of appropriation; fifth, the name of the appropriator. Within twenty days after the date of appropriation the appropriator shall file with the county recorder 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 on such stream with reference to some natural object or permanent monument. The recorded notice shall be verified by the affidavit of the appropriator, or some one in his behalf, which affidavit must state that the matters and things contained in the notice are true.

Section 9 of R.C.M. sec. 89-810 states:

Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this act, file in the office of the recorder of the county in which the water right is situated a declaration in writing, except notice be already given of record as required by this act, the same facts as required in the notice provided for record in section 6 of this act, such declaration shall be verified as required in section 6 of this act, in cases of notice of appropriation of water: Provided, that a failure to comply with the requirements of this section may in nowise work a forfeiture of such heretofore acquired rights, nor prevent any such claimant from establishing such rights in the courts.

Section 10 of R. C. M. sec. 89-810 states:

The record provided for in sections 6 and 9 of this act, when duly made, shall be taken and received in all the courts of this territory as prima facie evidence of the statements therein contained.

When read together, Sections 9 and 10 of R.C.M. sec. 89-810 specify that those who had appropriated water rights prior to the date the statute was enacted could file a Notice of Appropriation within six months after the enactment. If some notice had already been filed prior to 1885 and that notice complied with the requirements of the section 6, then that notice would be given prima facie status in all Montana courts. But, those who held pre-1885 water rights and chose not to file a notice did not forfeit their rights by not filing a notice.

III

A copy of the E. P. Chandler Declaration was attached to the Statement of Claim 41U-W-096875-00. That Declaration and a certified typed version are hereby specifically incorporated and made a part of this report.

IV

Following is an analysis of whether the E. P. Chandler Declaration meets the requirements of sections 6, 9 and 10 and can thereby be accorded prima facie status:

1. Number of inches claimed - 160 inches of waters of Flat Creek.
2. Purpose for which it is claimed and place of intended use - for agricultural purposes in SE4 of Section 23, T10, R4 West.
3. Means of diversion, with size of flume, ditch pipe, or aqueduct, in which he intends to divert it - conveyed by ditch.
4. The date of appropriation - August 1, 1881.
(note: specified in the verification note not in the notice text)
5. The name of the appropriator - E. P. Chandler.

6. The name of the stream - Flat Creek.
7. An accurate description of the point of diversion - to be diverted at a point in the SW₄ of Section 23, T18N, R4 West.
8. Recorded notice verified by affidavit of the appropriator or someone on his behalf stating that the matters and things contained in the notice are true - sworn statement by E. P. Chandler that the waters and things set forth in the foregoing notice by him published are true.
9. Notice filed within twenty days after the date of appropriation - the Declaration was filed almost four months after the date of appropriation.

The Chandler Declaration text does not meet the notice requirements of priority date or ditch size, the legal description for the place of use is insufficient (Township 10 North or South?) and it was filed more than twenty days after the date of appropriation. So, the Chandler Declaration cannot be accorded prima facie status.

V

Sweetland v. Olsen, 11 Mont. 27, 27 P.339 (1891) involved declarations of water rights filed in 1882 for water rights appropriated in 1882. The declarations were offered to prove the intentions of the parties in making their appropriations and the quantity of water each intended to claim.

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 question 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. We think that character of evidence is of the best type always preferable if it can be had. The objection made to the introduction of those declarations, on the ground that no statute required the same to be made, would apply with equal force to all documentary evidence, except in the small number of cases where a statute requires that a writing shall be made upon the subject. 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 a beneficial and lawful purpose. The objection of defendant to the introduction of said writings proceeded upon the ground that it was the actual appropriation and use of waters which matured a right thereto, and not the making and recording of a declaration. 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. (emphasis added).

Id. at 31.

In 1964, the Montana Supreme Court held that notices filed prior to 1885 which did not comply with the requirements of sections 6 and 9 of R.C.M. sec. 89-810 were not simply lacking prima facie status; such notices could not be used as evidence at all. Shammel v. Vogl, 144 Mont. 354, 396 P.2d 103 (1964). In Shammel, the water was appropriated on August 22, 1882 and filed on August 17, 1883. The notice's verification which is specifically required in the statute, was defective; therefore,

no prima facie status. Relying on the 1937 decision in Galahan et al. v. Lewis, et al., 105 Mont. 294, 72 P.2d 1018, the court went further: the notice was not only not prima facie, it was not admissible as any evidence of the right. "Since these notices did not comply with the statute as to the time of their recording, they are of no evidentiary value in proving the amount or date of an appropriation (Peck v. Simon, 101 Mont. 12, 52 Pac. (2d) 164)." (emphasis added). Galahan at 299. In Peck, the controlling case cited in Galahan, the notice was very vague. The purpose of use and place of use were not specified. The Court concluded that, on its face, the Peck notice failed to establish an appropriation and was therefore useless as evidence. Peck does not say that the evidence is inadmissible; it simply states that, in that case, it was not dispositive. So the Galahan construction of Peck is erroneous. Galahan is not controlling due to its misconstruction of Peck and 89-810 R.C.M. and, in turn, Shammel is not controlling due to its reliance on Galahan.

Although the Chandler Declaration does not qualify for prima facie status, it is nonetheless evidence of the appropriation and is admissible for what it is worth. As cautioned in Sweetland v. Olsen, prior to 1885 simply filing a notice or declaration was not sufficient to establish a bona fide water right. "Such right could only be acquired by the actual appropriation, diversion and use of a quantity of the waters of the stream for a beneficial and lawful purpose." Sweetland, 11 Mont. 31.

VI

The only evidence submitted to show that the water right specified in the E. P. Chandler Declaration was ever perfected is the existence of an old ditch from the north side of Flat Creek which could have provided water to irrigate 25-27 acres within the lands specified in the Declaration. The person most familiar with the past irrigation practices in the area who testified is Roy Levine. He has been there since 1925 and knows of no irrigation ever having taken place on the Chandler place nor of this Chandler Declaration right ever having been used.

VII

There is insufficient evidence to substantiate that the water right specified in the E. P. Chandler Declaration of Water Right has ever been used and thereby perfected.

VIII

Claim 41U-W-096875-00 which is based upon this E. P. Chandler Declaration of Water Right shall be removed from the Decree of the Dearborn River as this is not an existing water right.

DATED this 30 day of December, 1988.


Kathryn W. Lambert
Water Master

CERTIFICATE OF SERVICE

I, Janet Lackey, Deputy Clerk of Court, Montana State Water Court, hereby certify that a true and correct copy of the above FINDINGS OF FACT AND CONCLUSIONS OF LAW for claim 41U-W-096875-00 was duly served upon the following persons listed herein, by depositing the same, postage prepaid, in the United States mail.

Dan A. Levine
Roy Levine
Levine Land and Cattle Company
Wolf Creek, MT 59648

C. W. Leaphart, Attorney
1 Last Chance Gulch
Helena, MT 59601

Arthur and Margie Thompson
Wolf Creek, MT 59648

Philip Strobe, Attorney
501 N. Sanders
Box 874
Helena, MT 59624

Dearborn Canal and Water Co.
Joe Barrett
Box B
Augusta, MT 59410

David C. Moon, Attorney
P.O. Box 1288
Bozeman, MT 59771-1288

D. Michael Curran
Suite 500, FNB Building
Great Falls, MT 59401

Gary Bjelland, Attorney
P.O. Box 2269
Great Falls, MT 59401

DATED this 30th day of December, 1988.


JANET LACKEY
Deputy Clerk of Court

Filed & recorded Dec 28¹⁸⁸¹ at 3⁰⁰ O'Clock PM
Blotum 379
96875
County Recorder

Location of Water Right 160 acres Sec. 23
By E. L. Chandler

I know all men by these
promises: that I E. L. Chandler hereby declare and
publish as a legal notice to all the world that I
have a valid right to the use, occupation and
possession and hereby claim and appropriate the
following described water right: One
hundred and sixty (160) inches of the waters
of Flat Creek Spring and claim named Mountain
Springs said water to be diverted at a point in the
SW⁴ of Section 23 T. 18. N. R. 4 West. thence to be
conveyed by ditch to and upon the SE⁴ of
Section 23 T. 18. N. R. 4 West. said water to be used
for agricultural purposes
E. L. Chandler
Dec 28¹⁸⁸¹

Mounting of Mountain
County of Idaho & Idaho
E. L. Chandler being duly
sworn says that he is the
locator and appropriator of said water right - that
said location is made in good faith and that he has
been in the peaceful possession and enjoyment of said
water since August 1st 1881 and that the
waters and things set forth in the foregoing notice by
him published and true.
E. L. Chandler

Subscribed & sworn to before me this 28th December 1881
County
Seal
Blotum
County Clerk

Filed & recorded Dec 28¹⁸⁸¹ at 3⁰⁰ O'Clock PM
Blotum
County Recorder

Location of Water Right
By EP Chandler

Know all men by these presents:
that I EP Chandler hereby declare and publish as a legal notice
to all the world that I have a valid right to the use occupation
and possession and hereby claim and appropriate the following
described Water Right viz: One hundred and sixty (160) inches of
the waters of Flat Creek Lewis and Clark County Montana Territory
said water to be diverted at a point in the SW⁴ of Section 23 T
18N R 4 West, thence to be conveyed by ditch to in and upon the
SE⁴ of Section 23 T10 R 4 West, said water to be used for
agricultural purposes.

Located Dec. 28, 1881.

EP. Chandler

Territory of Montana
County of Lewis and Clark
EP Chandler being duly
sworn says that he is the locator and
appropriator of said water right, that said location is made in
good faith, and that he has been in the peaceable possession and
enjoyment of said water priority since August 1, 1881 and that
the waters and things set forth in the foregoing notice by him
published are true.

EP Chandler

Subscribed and Sworn to before me this 28 December 1881.

County)
Seal)

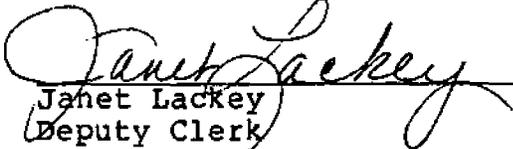
S/OB Tatum
County Clerk

Filed & recorded Dec 28, 1881. at 4:00 O'Clock P.M.

S/OB Tatum
County Recorder

I hereby CERTIFY that the above is a true and correct
copy as typed by me from a photocopy of the original handwritten
Declaration of E. P. Chandler.

DATED this 28th day of December, 1881.


Janet Lackey
Deputy Clerk

Montana State Water Court