Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)
* * * * * * * * * * * * * * * * * * * *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE JEFFERSON RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE JEFFERSON RIVER IN BROADWATER, GALLATIN, MADISON, JEFFERSON AND SILVER BOW COUNTIES, MONTANA.	CASE 41G-3 41G-W-004096-00

CLAIMANT: Jessie S. Felsheim (former owner)
Huckaba Ranch, Inc. (present owner)

OBJECTOR: Golden Sunlight Mines, Inc.

MASTER'S REPORT

Procedural Background

On June 25, 1980, Jessie Felsheim filed a Statement of Claim for an existing water right with the State of Montana. On September 17, 1985, Golden Sunlight Mines objected to Mrs. Felsheim's water right claim on the basis of ownership. Golden Sunlight later filed a similar objection to the claim to the use of the same water by Felsheim's successor-in-interest, Huckaba Ranch, Inc.

On July 17, 1992, Golden Sunlight Mine filed a Motion for Summary Judgment asking this Court to "[d]isallow the water right claim of Huckaba Ranch, Inc." The court set a hearing on the Motion. Golden Sunlight failed to appear and the Court denied the Motion.

The matter came on for an evidentiary hearing on April 16, 1993, before the Court, Michael J. L. Cusick, Water Master

presiding. Brian K. Gallik of the Bozeman firm of Goetz, Madden & Dunn, P.C. represented the Claimant, Huckaba Ranch, Inc. Eric J. Fehlig, from the Whitehall firm of Jardine & Fehlig, represented the Objector, Golden Sunlight Mines, Inc.

After the hearing, the claimant introduced additional evidence, in the form of certified copies of recorded deeds from the Jefferson County Clerk and Recorder. The claimant requested the Court to take Judicial Notice of this additional evidence under Rule 201, M.R.Evid. Golden Sunlight objected to the admission of this post-hearing evidence. After careful consideration of the parties' arguments, the additional evidence is hereby admitted.

The primary legal issues before the Court at hearing were (1) whether a private landowner may claim a right to the use of water originating and used on state lands that were not transferred to the State by the Montana Enabling Act and (2) whether a private landowner may claim a right to the use of water for the purpose of livestock watering as an appurtenance to private land when the water originates on state land and is not diverted from the state land and conveyed to the private property.

The Master, being fully advised, now issues the following Findings of Fact, Conclusions of Law and Memorandum:

FINDINGS OF FACT

1. The Claimant, Huckaba Ranch, Inc., is a cattle ranch located near Cardwell, Montana. Huckaba Ranch, Inc. owns sections 22 and 15 and leases sections 16, 17, 28 and 33 in Township 2

North, Range 3 West, Jefferson County, Montana[1]. The President of Huckaba Ranch, Inc., Sonny Huckaba, purchased this property, and all associated rights, from Jessie S. Felsheim in 1980.

2. Huckaba Ranch, Inc., claims a stock use right to water from Sheep Rock Spring. The spring is located in the NW¼SW¼SE¼ of Section 17, Township 2 North, Range 3 West, Jefferson County, Montana. This claim is based upon a Statement of Claim, dated June 25, 1980, filed by Jessie Felsheim. Mrs. Felsheim claimed a stock water right with a priority date of 1947, based upon historic use, for water originating from Sheep Rock Spring. The claimed places of use are in Sections 17, 20, 21, 22, 28 and 33. Pursuant to Rule 2.VIII.(5)(c), Water Right Claim Examination Rules, the priority date was clarified to December 31, 1947. The Huckaba Ranch, Inc. claim is based on an existing use with a priority date of June 19, 1947.

3. The Objector, Golden Sunlight Mines, also referred to in these findings as "Placer Amex," is a corporation engaged in mining southeast of Whitehall, Montana. It is the owner of real property located in Township 2 North, Range 3 West, Jefferson County, Montana. Golden Sunlight also claims a water right for livestock purposes from Sheep Rock Spring.

4. The land upon which Sheep Rock Spring is located, Section 17, came into State ownership in 1924 when Wiley, May Ella, Irvine, and Inez Mountjoy quitclaimed their interest in Section 17, and other sections of adjacent property, to the State of Montana. The Mountjoys purchased this property from the Northern Pacific

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[1]All subsequent references to Section locations are in T2N, R3W, Jefferson County, Montana, unless otherwise noted.

Railroad in 1919. The Mountjoys then mortgaged their property to the State of Montana in return for a loan of $5,300. The mortgagee was the State of Montana Common School Permanent Fund. Apparently unable to repay the loan in time, the Mountjoys quitclaimed their interest in the property to the State of Montana in 1924.

5. From 1924 to 1985, Section 17 remained in the ownership of the State of Montana. Beginning in approximately 1948, the State classified the property as "grazing land" and leased the property to various individuals or companies, who in turn subleased the property to others, including George and Grace Elliott, Mike Quinn and Jessie Felsheim.

6. In 1979, Jessie Felsheim purchased various parcels of real property located near Sheep Rock Springs from Thomas H. Boone. The purchase included portions of sections 10, 14, 22, 28, 33 and all of Section 15. At the time of the purchase, she also became the sublessee of various state-owned properties, including Section 17. The State's lessee of these properties was Golden Sunlight Mine, then known as Placer Amex, Inc. Mrs. Felsheim immediately began grazing cattle in the area and using Sheep Rock Spring for stock watering purposes.

7. Jessie Felsheim expanded Sheep Rock Spring after she acquired her property from Thomas Boone and became the sublessee of the state lands. She applied for permission from the State of Montana to construct a pipeline system that distributed water from Sheep Rock Spring (located in Section 17) into Sections 20, 21, 22, and 28 where she located stock watering tanks. The purpose of the pipeline distribution system was to expand the place of use of the spring from Section 17 to include Sections 20, 21, 22 and 28. This

was a conservation measure designed to improve the use of grazing lands and benefit the cattle. The pipelines accomplished the latter by reducing the distance the cattle would be forced to walk for water, thus reducing stress and allowing them to maintain their weight. The stock watering system also promoted conservation because cattle would not graze as much in areas located near the spring but would instead graze a much greater area.

8. This development took place in two phases. The first phase took place in 1979. At that time, Mrs. Felsheim received permission from the State of Montana to place improvements on state lands. This phase of the project resulted in the location of stock watering tanks in Sections 17, 20 and 21. Placer Amex (Golden Sunlight) was aware of the development as evidenced by its signature on the permission form. The cost of this development was shared between the State of Montana, Jessie Felsheim and the federal government. Placer Amex did not contribute any funds to the construction of the project, and disclaimed any expectation of benefit from the development.

9. In 1980, Mrs. Felsheim received authorization for a second phase of the project--an extension of the stock watering distribution system completed in 1979. The extension of the project brought water to parcels of real property owned by Jessie Felsheim in sections 22 and 28. Once again, Jessie Felsheim expended substantial funds to construct this project and Placer Amex, now known as Golden Sunlight Mines, did not contribute any funds to the project.

10. As a result of the project, it was no longer necessary for cattle to walk from Mrs. Felsheim's property in

sections 22 and 28 to Sheep Rock Spring in Section 17. Instead, the water was brought from Section 17 to cattle grazing in Sections 22 and 28.

11. In Jessie Felsheim's Statement of Claim for stockwater from the Sheep Rock Spring the claimed places of use are Sections 17, 20, 21, 22, 28 and 33, based on the location of the stockwater tanks that are part of the Sheep Rock Spring development. Mrs. Felsheim claim a priority date of 1947, based upon the historical use of the water from Sheep Rock Spring by former lessees of the State lands in question and her predecessors-in-interest on sections 22, 28 and 33, George and Grace Elliot. Although there was some testimony that a water trough was historically located at the spring, the testimony indicated that from 1947 onward the trough was in disrepair. Between this time and prior to July 1, 1973, stock use of Sheep Rock Spring water was limited to the spring itself.

12. In 1981, the Department of State Lands filed two Notices of Completion of Groundwater Development for sections 17 and 20. The testimony at trial established that both Notices concerned water originating from Sheep Rock Spring. Later, Certificates of Water Right were issued to the Department of State Lands for the spring developed in Section 17. The places of use, as listed in the Certificates, include Sections 20, 21, 22, and 17. These Certificates were issued subject to "[a]ll prior existing rights in the sources of supply."

13. In 1981, Jessie Felsheim sold her real property to Huckaba Ranch, Inc. Huckaba Ranch, Inc. also became a sublessee to the various parcels of state property. Mr. Huckaba testified that

he continued to graze cattle on Sections 22 and 28 and on the leased state land. In addition, Mr. Huckaba continued to use and maintain the stock watering distribution system developed by Mrs. Felsheim.

14. In 1985, Golden Sunlight Mines entered into a land exchange with the State of Montana. In that exchange, Golden Sunlight acquired that portion of Section 17 where Sheep Rock Spring is located. In addition, Golden Sunlight acquired additional tracts of land that were formerly owned by the State. However, Section 16 (that portion of property transferred to the State by the Montana Enabling Act) remained in the ownership of the State, with the State reserving an easement for access to that property. As part of the land exchange, the State of Montana transferred to Golden Sunlight various water rights which list Sheep Rock Spring as the point of diversion. The water rights transferred included the two Certificates of Water Right issued to the State for the stockwater development, as evidenced by a water right transfer certificate filed with the Department of Natural Resources and Conservation (DNRC). Additionally, Golden Sunlight reimbursed the State of Montana for the State's share of the cost of the stock water distribution system developed by Mrs. Felsheim.

15. In 1987, Huckaba Ranch later sold its portions of Sections 28 and 33 to Golden Sunlight Mines, Inc.

16. Since Golden Sunlight acquired ownership of Section 17, and surrounding properties, it has not made any contribution to the maintenance of the stock water distribution system. Those costs have been borne solely by Huckaba Ranch, successor-in-interest to Jesse Felsheim. Nor has Golden Sunlight reimbursed

Huckaba Ranch, Inc. for the cost of the development.

17. The evidence at the hearing established that there is a long and continuous history of water use from Section 17 for cattle grazing on nearby sections of private property, more specifically, Sections 22, 28 and 33, and also adjacent sections of state land (now owned by Golden Sunlight Mines). The record establishes that ranchers grazing cattle in Sections 17, 20, 21, 22, 28 and 33 historically watered their cattle from the spring in Section 17. Witnesses from the Golden Sunlight Mine also testified that the water from Sheep Rock Spring has been put to beneficial use almost exclusively by the local cattle ranchers, i.e., Huckaba Ranch and its predecessors.

18. The Court adopts as findings of fact any matters of fact which are included in the Conclusions of Law below.

CONCLUSIONS OF LAW

I

To the extent that the foregoing Findings of Fact incorporate Conclusions of Law or the application of law to fact, they are incorporated herein as Conclusions of Law.

II

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to § 85-2-233, MCA. The Court has jurisdiction over matters relating to the determination of existing water rights. An "existing right" is a right to the use of water which would be protected under the law as it existed prior to July 1, 1973. Section 85-2-102(9), MCA, see also Article IX, § 3, Mont. Const. If the right to beneficially

use water was not perfected by an appropriator before July 1, 1973, the use is subject to the permit requirements of Title 85, Chapter 2, Part 3, MCA.

III

Generally, a water right used on a tract of land is appurtenant to that land:

> When a water right is acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, it is an appurtenance thereto and, as such, passes with the conveyance of the land, unless expressly reserved from the grant.

Maclay v. Missoula Irrigation Dist., et al., 90 Mont. 344, 353, 3 P.2d 286, 290 (1931); see also § 85-2-403(1), MCA. The determination of whether water is appurtenant to the land is one of fact. Department of State Lands v. Pettibone, 216 Mont. 361, 372, 702 P.2d. 948 (1985); Yellowstone Valley Co. v. Associated Mortgage Investors, Inc., 88 Mont. 73, 84, 290 P. 255 (1930), Smith v. Denniff, 24 Mont. 20, 29, 60 P. 398 (1900).

As will be discussed in the accompanying **Memorandum**, it is clear from the record and the applicable law that the existing water right to Sheep Rock Spring with a priority date of December 31, 1947 claimed by Jesse Felsheim has at all times since that date remained appurtenant to the immediate vicinity of the spring location in section 17. This land, formerly owned by the State, is now owned by Golden Sunlight Mines. As such, claimant Jesse Felsheim had no existing right to the use of the water of Sheep Rock Spring, and therefore had no rights in Sheep Rock Spring that could be transferred to Huckaba Ranch, Inc. Furthermore, because the water right claimed by Felsheim is appurtenant to

section 17, the objector Golden Sunlight Mines is the actual owner of the 1947 water right rather than Felsheim's successor, Huckaba Ranch, Inc.

IV

For purposes of adjudicating water rights, a claim of existing right filed in accordance with the statute or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree. Section 85-2-227, MCA. Thus, the burden of proof falls on the objector to overcome the presumption that a claim of existing right is valid and correct as filed. In this case the objector's have met their burden.

V

Based on the foregoing Findings of Fact and Conclusions of Law, the point of diversion, place of use and current ownership record of this water right claim is incorrect. The DNRC's records should be corrected to show ownership of water right claim 41G-W-004096-00 by Golden Sunlight Mines, Inc. The elements of this claim should be decreed as follows:

WATER RIGHT NUMBER 41G-W-004096-00

PRIORITY DATE:	DECEMBER 31, 1947
FLOW RATE:	NO FLOW RATE HAS BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE
VOLUME:	30 GALLONS PER DAY PER ANIMAL UNIT NO VOLUME HAS BEEN DECREED BECAUSE THE USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE. THE RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON THE REASONABLE CARRYING CAPACITY AND HISTORIC USE OF THE AREA SERVICED BY THIS WATER SOURCE.

SOURCE: SPRING, TRIBUTARY OF JEFFERSON SLOUGH
ALSO KNOWN AS SHEEP ROCK SPRING

PURPOSE (USE): STOCK

PERIOD OF USE: APRIL 15 TO NOV 19

POINTS OF DIVERSION AND MEANS OF DIVERSION:

LOT	BLK	QTRSEC	SEC	TWP	RGE	COUNTY
		NWSWSE	17	02N	03W	JEFFERSON

PLACE OF USE FOR STOCK:

LOT	BLK	QTRSEC	SEC	TWP	RGE	COUNTY
		NWSWSE	17	02N	03W	JEFFERSON

MEMORANDUM

I. Introduction

Golden Sunlight argues that as lessees of state land, the predecessors of Huckaba Ranch, Inc. were legally incapable of establishing a use right to the waters of Sheep Rock Spring under Department of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948 (1985). Golden Sunlight further contends that because the lands at issue were state school trust lands at the time the claimed water rights were perfected, and were eventually transferred to Golden Sunlight, under Pettibone title to any water rights perfected on these state school trust lands first vested with the State and was later transferred as an appurtenance to Golden Sunlight Mines.

II. Discussion

A. State Lands v. School Trust Lands

Pettibone, supra, concerned lands granted to the State of Montana by the Federal Government in the Montana Enabling Act. These state lands are "school trust" lands and were expressly

granted to the States for the support of public schools. The origin of school trust lands in Montana was explained in Pettibone:

> The lands upon which these water rights lie are those that were granted to the State of Montana by the Federal Government in the Montana Enabling Act. Act of February 22, 1889, ch.180, 25 Stat. 676. Originally, these lands were set aside in the Montana Territory Organic Act, Act of May 26, 1864, ch.95, 13 Stat. 85, which provided that said lands were "reserved for the purpose of being applied to schools" ch.95, section 14, 13 Stat. 91 in the Montana Territory. The Enabling Act granted these lands to the state on the following terms:
>
> > Section 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools.
> >
> > . . .
>
> The 1889 Montana Constitution accepted these lands and provided that they would be held in trust consonant with the terms of the Enabling Act, Montana Constitution of 1889, art. XVII, section 1. The 1972 Montana Constitution continued these terms. Mont. . art. X, section 11, . 1. See also Section 77-1-202, MCA (school lands held in trust for the support of education).

Pettibone, 702 P.2d at 950-51, 216 Mont. at 366. These lands were withdrawn from the public domain, and were specifically designated to be administered for the purpose of the school trust. Pettibone held that the title to the water appurtenant to such lands vests in the State of Montana. The Court saw the lessees of school trust lands as acting on behalf of the State, and under the terms of the

lease, the lessee was simply entitled to the use of the water appurtenant to the school trust land. Pettibone, 216 Mont. at 368. The court expressly distinguished school trust lands from other public lands, stating that "[s]chool trust lands are subject to a different set of rules than other public lands." Pettibone, 216 Mont. at 372 (emphasis added).

The property at issue here, Section 17, was not set aside by the Montana Territory Organic Act, but came into state ownership through a quit claim deed based upon the State's foreclosure of private property. Although at one time state land, these lands are not the same as the school trust lands at issue in Pettibone. Because Pettibone was limited to school trust lands, Golden Sunlight cannot assert an existing right to Sheep Rock Spring water simply on the rule of Pettibone.

B. Appurtenance to Section 17

If the rule of Pettibone regarding state school trust lands does not apply, what is the applicable law in this case? Claimant urges the Court to apply the rule of law recognizing that the right to use water may be owned without regard to the title to the lands upon which the water is to be used. See, e.g. Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900): Smith v. Denniff, 24 Mont. 20, 60 P. 398 (1900); Hayes v. Buzzard, 31 Mont. 74, 77 P. 423 (1904). Under this rule, Huckaba Ranch must establish two prerequisites for its claim to be valid: (1) First, the law must allow that claimant's predecessors, as sublessee of non-school trust state lands, could make a valid appropriation of stockwater on those leased state lands and (2) second, the law must provide that such an appropriation can become appurtenant to some land--

whether state land or privately owned--so that the right would eventually be conveyed by deed to Jesse Felsheim and later to Huckaba Ranch. If Huckaba Ranch can satisfy both prerequisites, their claim to an existing right to Sheep Rock Spring as of 1947 is valid, although the claimed place of use would be incorrect. If it can only satisfy the first prerequisite, neither Huckaba Ranch nor Golden Sunlight can claim an existing water right with a 1947 priority date. Finally, if Huckaba Ranch cannot satisfy either prerequisite, then Golden Sunlight Mine is the proper owner of this claimed right.

It is well established that private appropriators may acquire water rights on the public domain, without regard to ownership:

> The legal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right, for the bona fide intention which is required for an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other that those for which the right was originally appropriated.

Smith, supra, 24 Mont. at 29, quoted in Hayes, supra, 31 Mont. at 81. The rule set forth in this line of cases was also argued to the Pettibone court. In both Smith and Hayes the court noted that where the appropriator is merely possessed of the lands upon which the appropriation is used, i.e., is not the fee owner of the lands, the water right is not appurtenant to the lands. It can only become an appurtenance to such lands upon a grant of title to such lands from the government. Smith, 24 Mont. at 26-28. Applying this rule to this case, each successive tenant appropriator would acquire a right to the use of the spring at the start of his or her

tenancy and, absent a transfer by instrument in writing, keep that right in his or her possession upon giving up possession of the property. Thus, the Elliots would have perfected a 1947 stockwater right, but retained it upon vacating the premises. The earliest priority date that Jesse Felsheim could claim under this rule is 1979, the year she took possession of section 17 under the sublease from Placer Amex.

Although Pettibone dealt specifically with school trust lands, the result outlined above was nevertheless specifically rejected in Pettibone: "It does not make sense for each succeeding tenant to walk off with one water right after another." Pettibone, 216 Mont. at 372. Moreover, in distinguishing Smith and Hayes because they did not involve state school trust lands, the Pettibone Court specifically noted that those cases involved appropriations perfected on the public domain. Smith dealt with "water appropriations made by squatters on the federal lands who diverted water for use on the public domain." Pettibone, 216 Mont. at 372; construing Smith, supra. In Hayes, the water right involved was used by a lessee on the lessor's land, but the original appropriation "arose on public domain land" prior to the existence of the lease. Pettibone, 216 Mont. at 372; construing Hayes, supra.

In this case, the original appropriators of the 1947 water right claimed by Jesse Felsheim were neither "squatters" nor was the right perfected on the public domain:

> The terms "public lands" and "public domain" are synonymous. Although the term is sometimes used in varying senses, depending largely on the special circumstances or the legislation in which, or in respect in which, it is used, the term "public lands" usually

> signifies such government or state lands as are open to public sale or other disposition under general laws, and are not held back or reserved for any governmental or public purpose. The term does not include all lands that are owned by the United States or the states. Land to which any claims or rights of others have attached does not fall within this designation. . . .

63A Am.Jur.2d Public Lands §1 (1984), p. 486. (Emphasis added.) At all times relevant to this matter, Huckaba Ranch and its alleged predecessors-in-interest to this water right were utilizing the water from Sheep Rock Spring as sublessees of state land designated for grazing purposes. Although such land was not school trust land set aside by the Organic Act, it was nevertheless managed as grazing land as part of the Common School Permanent Fund. The claimant has not established that its predecessors-in-interest made a valid appropriation on these subleased state lands (prerequisite no. 1, discussed earlier). And even if claimant could establish this first prerequisite, the claim would still fail, because according to the authorities relied upon, such rights were personal to the appropriators and never became appurtenant to section 17 (prerequisite no. 2.) See Smith and Hayes,[2] supra.

Implicit in this analysis is a general rule regarding water rights perfected on state lands by a lessee or sublessee, regardless of school trust status: the water right becomes appurtenant to the land, inuring to the benefit of the lessor, in

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[2]It is questionable whether the rule set forth in Smith v. Denniff and Hayes v. Buzzard is still good law. In Cook v. Hudson, 110 Mont. 263, 278, 103 P.2d 137 (1940), the Court stated that "[t]here are textwriters who lay down the rule that a water right taken out to irrigate public lands is not appurtenant to such lands except where and until the appropriator brings the land to patent, but lapses with the sale or release of the squatter's right, but the rule is to the contrary in this jurisdiction."

this case the State, and absent a specific severance, remains appurtenant, following title. See Pettibone, 216 Mont. at 372; see also A. Stone, 1988 Supplement Montana Water Law: Recent Changes and Current Trends Supplementing Montana Water Law For the 1980's, pp. 6-8 (1988 supp). While on its facts Pettibone applied only to school trust lands, the result must be the same. Thus, Pettibone does not apply to the lands in this case by virtue of school trust status; rather, Pettibone applies because the lands involve water rights perfected by a tenant on leased state land as opposed to a squatter on the public domain. The Pettibone court specifically rejected any other result as an absurdity with respect to leased state lands. Pettibone, 216 Mont. at 372.

C. Appurtenance to Non-riparian Lands

Claimant also asserts a right to the use of Sheep Rock Spring that is appurtenant to the sections adjacent to section 17 that were not formerly owned by the State--namely section 22 owned by Huckaba Ranch and sections 28 and 33 transferred by Huckaba Ranch to Golden Sunlight. The evidence established that the water from Sheep Rock Spring has long been used to water cattle and some of the cattle so-watered graze on Section 22, as well as sections 28 and 33. Additionally, there was testimony that without water from Sheep Rock Spring, it is not possible to graze on at least one-half of Section 22.

Generally, when water originates on state land, but is put to beneficial use on private property, the use of the water appurtenant to the private property is owned by the private landowner, not the State of Montana. Where water from State land is appurtenant to both private property and state property, the

water right from the single source is split between the private land owner and the State. Pettibone, 216 Mont. at 368, 372, 376. Furthermore, where a stockwater right consists of a man-made diversion (such as the post-1973 pipeline and stockwater tank development in this case) the corresponding water right can become appurtenant to outlying sections of land where that water is delivered and consumed by the cattle. See e.g., First State Bank of Alamogordo v. McNew, ___ N.M. ___, 269 P. 57 (1928); see also, § 85-2-403(1), MCA. Combining these principles, a stockwater system located on both state and private land (such as the one installed by Jesse Felsheim) would be appurtenant to both and would be split according to the location of and amount of water used at each tank or trough.

In this case, while 1947 Sheep Rock Spring water did become appurtenant to the location of the spring in section 17, it did not become appurtenant to the outlying sections of privately owned land. A non-diverted stockwater right, where the livestock drink directly from the source (whether it be a reach of stream, the shore of a lake or pond, or a spring as a single point source, as is the case here) is essentially a riparian right. This principle is recognized by the Supreme Court's Water Right Claim Examination Rules.[3] Such an appropriation depends largely on the

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[3]Rule 4 of the Water Right Claim Examination Rules provides in pertinent part:

> Rule 4.II. POINT OF DIVERSION (P.O.D.)
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> . . .
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> (2) For direct instream surface water stock use, the legal land description of the P.O.D. will be the same as the legal land description of the P.O.U.

actions of the cattle. If the right is established by use, notice to other appropriators of such right is provided by the fact that cattle are pastured next to the source, i.e. on riparian lands. A subsequent appropriator can conclude from a physical inspection that the right is put to beneficial use on the riparian lands where and when the livestock actually drink the water.

The same conclusion cannot be made for non-riparian lands not serviced by a diversion and conveyance system. The right cannot become an appurtenance to such lands. To hold otherwise would lead to absurd results and cause much confusion in the transfer of property and water rights. This can be demonstrated with a simple, yet common, factual situation. If A, the owner of several adjoining tracts, one of which borders a stream, grazes cattle on these tracts, by claimant's argument A's right to the use of the water for livestock watering would become appurtenant to all the lands where cattle graze. The distance of these lands to the source of supply would be immaterial, the sole inquiry would be whether cattle from these outlying lands utilize the stream for water. If A then sells the tract adjoining the stream to B, with no specific reference to the water right in the deed, A would retain that portion of the water right appurtenant to the non-riparian land still owned by A. In other words, A's portion of the original right would be for watering A's livestock on B's riparian

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Rule 4.III. PLACE OF USE (P.O.U.)

(1) The place of use for stock purposes will be identified and described by the nearest reasonable and concise legal land description. The P.O.U. is the actual place where the stock drink the water.

property, and would require some type of easement--perhaps an easement by necessity--for A to trail his livestock across B's property to the stream in order for A to exercise his water right.

This scenario has never been recognized in law or custom and clearly would lead to uncertainty and confusion. Without a man-made diversion or a specific reservation in the deed, the new owner would have little or no notice that the seller intended to reserve a right to water his stock with water originating on the transferred property. Accordingly, the 1947 water right to Sheep Rock Spring only became appurtenant to the immediate vicinity of the spring in section 17. Absent an actual man-made diversion of this water prior to July 1, 1973, the place of use of this claim of existing right utilized by livestock drinking directly from the source is identical to the point of diversion, i.e. the spring itself.

III. Conclusion

"One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior appropriator." Smith, 24 Mont. at 29. Claimant has not presented evidence connecting it to the title to the water right on section 17 of the prior appropriators, in this case the 1947 right perfected by the Elliots on behalf of the State. Objector Golden Sunlight Mines, on the other hand, has met its burden of connecting itself to the title of the prior appropriator, in this case the State of Montana as lessor of the property. Water right claim 41G-W-004096-00 should be decreed in the name of Golden Sunlight Mines, Inc., and the point of diversion and place of use changed to

correspond to the location of Sheep Rock Spring.

DATED this 28th day of September 1993.

Michael J. L. Cusick
Water Master

CERTIFICATE OF SERVICE

I, Janet Fulcher, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT, FINDINGS OF FACT, CONCLUSIONS OF LAW was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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DATED this 30 day of September 1993.

Janet Fulcher
Deputy Clerk of Court