

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
FLINT CREEK BASIN (76GJ)

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF ) Case No. 76GJ-6  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDERGROUND, ) 76GJ-W-027384-00  
WITHIN THE FLINT CREEK DRAINAGE AREA ) 76GJ-W-027385-00  
INCLUDING ALL TRIBUTARIES OF THE FLINT ) 76GJ-W-027386-00  
CREEK IN GRANITE AND DEER LODGE )  
COUNTIES, MONTANA )

**FILED**

JUL 3 1 1992

CLAIMANT: Bernhardt S. and Agnes Hendrickson

OBJECTOR: Esther J. McDonald  
United States of America (USDA Forest Service)

**Montana Water Court**

MASTER'S REPORT

STATEMENT OF THE CASE

These Bernhardt S. Hendrickson and Agnes B. Hendrickson ("Hendricksons") claims are for different uses of the 1866 California Ditch Company water right from the North Fork of Flint Creek.

Claim 76GJ-W-027384-00 is for the mining use of this claimed water right. The United States of America objected to the volume, flow rate and consumptive use remark. Esther McDonald objected to the priority date and purpose of right.

Claim 76GJ-W-027385-00 is for the power generation use of this claimed water right. The United States of America objected to the volume, flow rate and consumptive use remark. Esther McDonald objected to the priority date, purpose of right and volume.

Claim 76GJ-W-027386-00 is for the domestic use of this claimed water right. Esther McDonald objected to the priority date

and purpose of right.

The Hendricksons filed a Notice of Intent to Appear on each of these claims.

On August 30, 1989 John Westenberg, Adjudication Specialist for the Montana Department of Natural Resources and Conservation, filed his Field Investigation Report concerning these claims.

On October 26, 1989 the United States of America, Bernhardt S. Hendrickson, on his own behalf and as power of attorney for Agnes B. Hendrickson, and Lisa Kay Swan Semanskey, attorney for the Hendricksons, filed a Stipulation specifying changes to the point of diversion legal descriptions, the consumptive use remark, flow rate, and priority date of each of these claims.

Esther McDonald's Motion to Strike Defective Notices of Appropriation was heard on November 15, 1989 just prior to the hearing of her objections to these claims. The Motion was denied.

The Hearing of Esther McDonald's objections to these claims was held on November 15, 1989. Bernhardt S. Hendrickson appeared with counsel Lisa Kay Swan Semansky and Marshall Mickelson. Testifying for Hendricksons were Billy T. Flynn, Bernhardt S. Hendrickson, Louis Schwartzans, Steve Lane, Jr., Michael A. Hendrickson, and Jean M. Hendrickson. Exhibits A through Y, GG through KK, NN through ZZ, and AAA through DDD were admitted into evidence. Exhibits DDD, EEE, FFF and GGG were refused. It is

noted that two exhibits were marked DDD - the photo exhibit was refused, the demonstrative timeline exhibit was admitted. Attorneys Richard Josephson and Mark Josephson appeared on behalf of Esther McDonald. Testifying for McDonald were Robert J. Sullivan, John Westenberg, John "Pat" McDonald, and Peggy Johnson. Exhibits 1, 2.1 through 2.27, 4A, 4B, 4C, 7, 7A, 8, 9A, 9B and 10 were admitted into evidence.

On November 13, 1989 Lisa Swan Semansky and Richard W. Josephson filed a Stipulation for Admission of Additional Evidence offering a certified copy of the "Notice Luxemburg Millsight". It is ORDERED that this certified copy of the "Notice Luxemburg Millsight" is admitted into evidence and, for identification, shall be marked as Exhibit 20.

On November 27, 1989 the letter from William D. Bayer to Lisa Swan Semansky dated November 20, 1989 was filed by the parties. Mr. Bayer, a professional land surveyor, reviewed the various documents in evidence and made some conclusions concerning the mill and mill site. It is ORDERED that this letter and its attachments are admitted into evidence, and, for identification, shall be marked as Exhibit 21.

The parties filed proposed findings of fact and conclusions of law, trial briefs and reply briefs.

Upon review of the claim and case files, the evidence submitted and the post trial filings of the parties, the Water Master enters the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CONCLUSION OF LAW 1) The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. §85-2-233.

FINDING OF FACT 1) These three claims represent multiple uses of a single water right. Claim 76GJ-W-027384-00 is for the mining use, claim 76GJ-W-027385-00 is for the power generation use, and claim 76GJ-W-027386-00 is for the domestic use of this claimed water right.

FINDING OF FACT 2) The W. K. Hysett, G. W. Ramsey, J. Stough and C. Johnson doing business as the California Ditch Co. notice of appropriation is for of all the water of the "main or right hand fork of Flint Creek" for mining purposes appropriated and filed on August 7, 1866. (Exhibit B). The Deed dated October 25, 1866 transferred the one quarter interest of W. K. Hysett in the California Water Ditch to John Caplice and Charles H. Smith (this exhibit was admitted for the limited purpose of showing that the ditch existed in 1866). (Exhibit D). The July 1, 1868 notice of appropriation filed by the Hot Springs Mining Company is for "... all the Surplus Water of Flint Creek not conveyed by the Ditch of the California Ditch Company...". (Exhibit T). As the appropriation claimed in California Ditch Company notice was generally corroborated by the October 25, 1866 deed and the July 1, 1868 notice, it is credible evidence that an appropriation was made.

FINDING OF FACT 3) This water right was perfected as it was appropriated and used for mining purposes beginning in 1866.

FINDING OF FACT 4) Salton Cameron built the ten stamp Luxemburg Mill in 1884 to process ore from the Southern Cross Mine. (Exhibit X). Through the years the mill has also been called the Cameron Mill, Oro Fino Mill and the Glenn Mill. (Exhibit 21). Power for the mill was generated by a steam boiler.

FINDING OF FACT 5) On September 12, 1885 Robert S. Kelley and Salton Cameron filed a Declaration of Water Right for 1350.00 miner's inches of the North Fork of Flint Creek for "... mining, milling, and other uses and purposes, and especially for water power and milling purposes, and for Placer Mining in the vicinity of Georgetown, by right of prior appropriation made by our predecessors in interest W. K. Hysett, G. W. Ramsey, J. Stough and C. Johnson, styling themselves the, 'California Ditch Company' - on the 7th day of August A.D. 1866." The Declaration states that the ditch was variously known as the California Ditch, the Jameson and Mussel Ditch, and the Georgetown Ditch. (Exhibit A). This Declaration is for the 1866 California Ditch Company water right and it specifically expands the use of this water right to include milling, power generation and other beneficial uses. As the assertions in this Declaration have been generally corroborated by the existence of the ditch and the use of the water for mining, milling and power generation, it is credible evidence of the 1866 appropriation and its subsequent uses.

Throughout the remainder of these Findings of Fact and Conclusions of Law the water right will be referred to as the "Kelley-Cameron water right" and the ditch will be referred to as

the "Kelley- Cameron ditch".

FINDING OF FACT 6) On March 22, 1889 the Notice of Luxemburg Millsight was filed by Salton Cameron. This Notice states that the 5 acres were located on March 7, 1889 and provides a description which states that it is situated on the Kelley-Cameron Ditch. (Exhibit 20)

FINDING OF FACT 7) Water was used for domestic purposes at the cabins located near the mill which were used to house the single men working at the mill and the mill foreman. (Exhibits NN, OO, RR, TT, UU, VV, WW, and ZZ)

FINDING OF FACT 8) The current ditch dimensions are roughly the same as those described in the California Ditch Company notice. The ditch was later extended past the Luxemburg Mill site to the Georgetown Placers. Culverts and bridges have been replaced through the years as the need arose. The ditch has been somewhat maintained.

FINDING OF FACT 9) As the maximum flow rate which can be carried through the ditch is 6.70 cfs (268.00 miner's inches), the historical flow rate of this right would be some quantity equal to or less than this ditch capacity. Historically this ditch also carried water to the Georgetown Placers which were located to the east of the Mill, farther down the ditch. The October 26, 1989 Stipulation filed by the Hendricksons and the United States of America specifies a flow rate of 3.00 cfs (120.00 miners inches) for the mining and hydropower uses.

There was no evidence submitted concerning the actual

flow rate perfected and used. Although the California Ditch Company Notice specifies all the flow of the North Fork of Flint Creek and the Kelley and Cameron Declaration specifies a flow rate of 1350.00 miners inches, the apparent limitations of the ditch and culvert capacities indicate that the larger claimed flow rates were not ever used through the Kelley-Cameron ditch.

The historical flow rate of this water right was 3.00 cfs as specified in the October 26, 1989 Stipulation.

FINDING OF FACT 10) The evidence submitted does not provide a complete chain of title but it appears that the Luxemburg Mill site and the Kelley-Cameron water right went through a series of transfers from Kelley and Cameron to Helen Glenn. (Exhibits E, I, J, K, L, M, N, and O)

As the objector McDonald raised the issue of chain of title, McDonald had the burden of proving that the chain was defective. McDonald argued that the chain was defective but did not submit any evidence to prove that argument.

FINDING OF FACT 11) John Westenberg, Adjudication Specialist, Montana Department of Natural Resources and Conservation, testified concerning his August 3, 1989 field investigation. The high water mark was obscured by nonriparian grasses and there is a thick layer of soil and duff in the bottom of the ditch. He also testified that there are old growth conifers in meadows along the ditch which would not have been there without a ditch to supply water. His conclusion was that the ditch had been historically used but not recently used.

FINDING OF FACT 12) Robert J. Sullivan, Forest Hydrologist for the Deer Lodge National Forest, testified that he visited the Luxemburg Mill site and walked the ditch 2 or 3 times in 1985 and 1987. He stated that the ditch is an obvious feature, no brush or trees fallen in but there is some soil development and needle cast in the bottom of the ditch from which he concluded that water had not flowed in the ditch in the recent past. There were no signs of aquatic plant growth.

FINDING OF FACT 13) In 1935 and 1936 Helen Glenn leased the Kelly-Cameron water right to the Montana Fish and Game Commission to provide adequate flows for their spawning station. (Exhibits S, U, V, and W)

FINDING OF FACT 14) On August 25, 1935 an indenture was filed by which Helen Glenn leased the Kelley-Cameron ditch and water right to E. R. Borchert et al. The lease specifies that exclusive use of the water right is granted except for as much spring high water as might be needed by the State for maintaining the spawning station. (Exhibit S)

FINDING OF FACT 15) Except for 1935 and 1936 the Kelley-Cameron water right was used for mining, milling, hydropower and domestic purposes until 1939 when the mill stopped operating. The domestic use may have ceased as early as 1928. (Exhibits E, F, G, H and I)

FINDING OF FACT 16) The Kelley-Cameron water right has not been used since 1939 for mining, milling, hydropower, or domestic use.



A. The Kelley-Cameron water right has not been used for mining since 1939. A small amount of water was used by Bernhardt Hendrickson's brother in 1957, 1958 or 1959 to launder mercury from the tailings under the floorboards of the Mill. As Hendrickson did not own the Mill or water right at that time, and as no evidence was submitted that his brother had owner Helen Glenn's (or her Estate's) permission to work the tailings of her Mill or use water, and as no evidence was submitted to determine if there were other water rights through the ditch which he might have been using rather than the Kelley-Cameron right (such as water for the Georgetown Placers), it is not persuasive that this "use" should be credited as use by Helen Glenn. Bernhardt Hendrickson testified that he might have done some jigging for sulfides in the 1960s. If he did any jigging then, he would have used water through a handheld box while standing in the ditch.

B. There was no definite evidence submitted proving when the Luxemburg Mill was last used but the general consensus was that operations had ceased by 1939. As the Mill has not operated since 1939, the Kelley-Cameron water right has not been used for milling purposes since 1939.

C. The Kelley-Cameron water right has not been used for hydropower purposes since at least 1939 when the mill operations, and therefore, the need for power production, ceased.

D. The last known resident in the cabins and user of the Kelley-Cameron water right for domestic purposes was Bud Knerk who left in 1928. The only other evidence submitted was

Steve Layne's testimony that he remembered drinking water from the ditch when he was a boy in about 1935. While water is critical to human survival, the minute quantity of water which would have been used is so trifling that it cannot be credited as a domestic use of the Kelley-Cameron water right.

FINDING OF FACT 17) The period of continuous nonuse from 1939 to July 1, 1973 is between 33 and 34 years.

CONCLUSION OF LAW 2) "In effect, such a long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse." *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 433 (1983).

CONCLUSION OF LAW 3) As there has been a continuous period of nonuse for 33 to 34 years there is a rebuttable presumption of intent to abandon and the burden of proof shifts to the Hendricksons to explain the reasons for nonuse which might rebut this presumption.

CONCLUSION OF LAW 4) "To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope." *79 Ranch, Inc.*, 204 Mont. at 433.

FINDING OF FACT 18) No evidence was submitted explaining why the Mill stopped operating. The 1942 moratorium on nonessential mining imposed by Congress and the President explains some nonuse at that time. There was no evidence submitted as to the duration of the moratorium. No evidence was submitted explaining

why Helen Glenn never reactivated the Mill and used the water right after the moratorium. No evidence was submitted explaining why the Hendricksons have not reactivated the Mill and used the water since acquiring the Mill site, ditch and water right in 1959.

FINDING OF FACT 19) From 1939 to 1956 Helen Glenn hired Bernhardt Hendrickson and his father to maintain the ditch and the Mill site. They cleaned the ditch, maintained the diversion dam and did some maintenance work on the Mill itself. They also hired others to do some carpentry and heavy equipment work. The first two paragraphs of Bernhardt Hendrickson's December 4, 1956 letter to Frederick Dohrman, Helen Glenn's banker, state:

Recently, I learned that Mrs. Helen Glenn has passed away and that you are taking care of her estate. I have been looking after her mining property here and last heard from her, early in 1954. For years I kept the Kelley & Cameron ditch in repair and looked after the mill and mining claims. She paid me \$15.00 (dollars) a month for the care of the property and extra wages for work on the ditch. After I failed to hear from her, although my letters were not returned, I contacted her son, Mr. Ward. He said she was ill but could not advise me as to payment for my services.

Mrs. Glenn was concerned over her water right and learned from an attorney that the ditch would have to be kept up and that the ditch should be ready to turn water into, if the right was contested. The mill is old and obsolete. I have propped some of the main timbers so that the heavy snows would not cause a collapse. As to the value of the claims, who can say? They haven't been prospected. I paid the taxes on this property last year in order to protect my interest and have looked after and maintained the ditch up to the present time. The first half of the taxes are now due.

(Exhibit Y).

Bernhardt Hendrickson paid Helen Glenn's delinquent taxes and acquired the Mill site, ditch and water right by tax deed

dated November 16, 1959. (Exhibit P). On August 31, 1960 Judge Sid G. Stewart entered a Decree Quieting Title in Bernhardt S. Hendrickson to the various Glenn mining claims including the Luxemburg Mill site, the ditch and water right. (Exhibit Q). From 1959 until 1973 Bernhardt Hendrickson and his son Michael Hendrickson continued to do some maintenance on the mill, ditch, culverts, bridges and even considered replacing the diversion dam with a headgate. Hendricksons have hired others to assist in the maintenance of the ditch. Hendricksons had some ore samples tested for sulfide content in 1968 and 1973.

It is clear that Helen Glenn and the Hendrickson's have gone to some lengths through the years to protect and preserve the water right in hopes of someday reviving its use.

FINDING OF FACT 20) John McDonald observed the Luxemburg Mill in 1941 and he described the Mill at that time as "worn out".

FINDING OF FACT 21) John McDonald observed the Kelly-Cameron Ditch for the first time in 1966 and it was his opinion then that the ditch was not capable of conducting water. He testified that he took photo Exhibits 2.1 through 2.27 and that although these photos were taken in the 1980s, they accurately reflect the ditch as he observed it in 1966 except that some of the brush and trees he observed in 1966 had been removed and the pipes were not there in 1966.

CONCLUSION OF LAW 5) The Montana Supreme stated in *In the Matter of the Adjudication*, \_\_\_ Mont. \_\_\_, 49 St. Rptr. 591, 593 (1992):

Deer Lodge's evidence that it carried the water rights as assets on its books is not sufficient to rebut the presumption of abandonment. It does not meet the requirement in *79 Ranch* of explaining the reasons or excuse for long periods of nonuse. Indeed, Deer Lodge's evidence, by itself, reflects nothing more than a "gleam-in-the-eye philosophy" regarding future use of the water which, as stated in *79 Ranch*, "is not consistent with the protection and preservation of existing water rights." *79 Ranch*, 204 Mont. at 434, 666 P.2d at 219. To find otherwise would be inconsistent with the "[f]undamental policy that a water right does not mean possession of a quantity of water, but its beneficial use." *79 Ranch*, 204 Mont. at 433, 666 P.2d at 218 (emphasis in original).

Hendricksons' and their predecessor Helen Glenn's attempts to preserve this unused water right do not qualify as more than a "gleam-in-the-eye" regarding a future use of this water right.

CONCLUSION OF LAW 6) As stated by the Montana Supreme Court in 1898 in *Power v. Switzer*, 21 Mont. 523, 529, and as reiterated by Montana Supreme Court in the 1985 decision *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 431-432, and again in the 1992 decision *In the Matter of the Adjudication*, \_\_\_ Mont. \_\_\_, 49 St. Rptr. 591, 592:

It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or "claimed" and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases.

This statement and its reference in the cases above injects a policy determination that claimants are not allowed to sit on a perfected water right without using it while hoping or planning to use it at a later date. Unless the claimant can provide cogent reasons for nonuse, this failure to use the water evidences abandonment of the water right.

CONCLUSION OF LAW 7) The Hendricksons have not given a reason or excuse which justifies nonuse for 33 to 34 years, the presumption of intention to abandon this water right has not been rebutted, and the various activities of Helen Glenn and the Hendricksons do not constitute more than a "gleam-in-the-eye" for future use.

CONCLUSION OF LAW 8) There are two elements for abandonment - intention to abandon and actual nonuser. "Neither an intention to abandon nor nonuser is sufficient: the union of both is indispensable to constitute abandonment." *Thomas et al. v. Ball et al.*, 66 Mont. 161, 167 (1923), and Section 89-802 (7094) R.C.M. enacted in 1885 and effective until June 30, 1973).

CONCLUSION OF LAW 9) As there is an unrebutted presumption of intent to abandon this water right and actual nonuser of this water right for mining, milling, power generation and domestic purposes, the use of the Kelley-Cameron water right for these purposes has been abandoned.

CONCLUSION OF LAW 10) As claims 76GJ-W-027384-00, 76GJ-W-027385-00, and 76GJ-W-027386-00 have been abandoned they should be dismissed and should not appear in the Preliminary or Final

Decrees of the Flint Creek Basin.

DATED this 31 day of July, 1992.

  
Kathryn I. W. Lambert  
Senior Water Master

CERTIFICATE OF SERVICE

I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

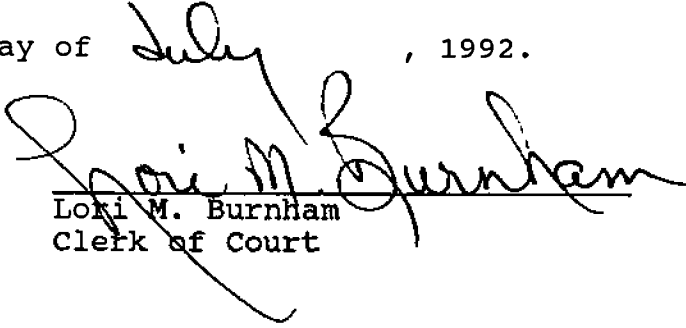
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P. O. Box 1047  
Big Timber, MT 59011

Jody Miller, Special Assistant  
United States Attorney  
P. O. Box 7669  
Missoula, MT 59807

DATED this 31 day of July, 1992.

  
Lori M. Burnham  
Clerk of Court



IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
FLINT CREEK BASIN (76GJ)

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IN THE MATTER OF THE ADJUDICATION OF ) Case No. 76GJ-6  
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CREEK IN GRANITE AND DEER LODGE )  
COUNTIES, MONTANA )  
\_\_\_\_\_ )

**FILED**

JUL 31 1992

CLAIMANT: Bernhardt S. and Agnes Hendrickson

OBJECTOR: Esther J. McDonald  
United States of America (USDA Forest Service)

Montana Water Court

FILING OF TRANSCRIPT, EVIDENCE AND EXHIBITS

In accordance with Rule 53(e)(1) Mont. R. Civ. P. the following items are filed by Senior Water Master Kathryn L. W. Lambert:

1. The tape transcript of the hearing held on October 30, 1989 consisting of ten tapes located in the tape storage chest in the courtroom of the Montana Water Court, Bozeman, Montana.
2. The exhibits admitted into evidence are filed with the case files in a brown expanding file marked "EXHIBITS FOR CASE 76GJ-6" except for Exhibits DDD, 7, 7A, and 10 which are located in the oversized exhibit portfolio kept in the vault of the Montana Water Court, Bozeman, Montana.
3. There was no other evidence submitted.

DATED this 31 day of July, 1992.

*Kathryn L. W. Lambert*  
\_\_\_\_\_  
Kathryn L. W. Lambert  
Senior Water Master

Bernhardt S. & Agnes Hendrickson  
Lisa Semansky, Attorney  
R. Mark Josephson, Attorney  
Jody Miller, Special Assistant

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
FLINT CREEK BASIN (76GJ)

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CREEK IN GRANITE AND DEER LODGE )  
COUNTIES, MONTANA )

**FILED**

JAN 20 1993

CLAIMANT: Bernhardt S. and Agnes Hendrickson

OBJECTOR: Esther J. McDonald  
United States of America (USDA Forest Service)

Montana Water Court

ORDER ADOPTING MASTER'S REPORT

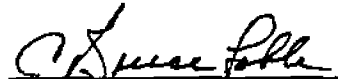
Pursuant to Montana Code Annotated, §85-2-233(4), the above entitled case was assigned to Senior Water Master Kathryn L. W. Lambert. On July 31, 1992 the Senior Water Master issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. On August 18, 1992 Marshall L. Mickelson, Attorney for claimants, filed a Motion for Extension of Time to File Objections to Water Master's Decision. On August 18, 1992 the Court issued an Order Extending the Objection Period to September 21, 1992. No objections to the Findings and Conclusions have been filed by any party.

The Court has reviewed carefully the Senior Water Master's Findings and Conclusions. Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court adopts the Master's Report and

ORDERS that changes recommended in the Master's Conclusions of Law be made to the abstract of claim(s) listed above

as they appear in the Temporary Preliminary Decree of the Flint Creek Basin (76GJ).

DATED this 20<sup>th</sup> day of JANUARY, 1993.

  
C. Bruce Loble  
Chief Water Judge

CERTIFICATE OF SERVICE

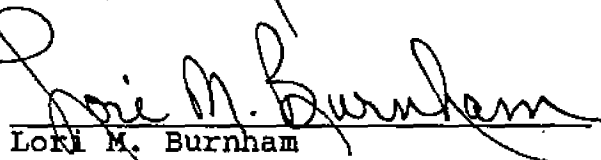
I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER ADOPTING MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Bernard and Agnes Hendrickson  
3459 Dunkirk Drive  
Anchorage, Alaska 99502

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P. O. Box 1047  
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Jody Miller, Special Assistant  
United States Attorney  
P. O. Box 7669  
Missoula, MT 59807

DATED this 20 day of January, 1993.

  
Lori M. Burnham  
Clerk of Court