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

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE MADISON RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE MADISON RIVER IN BEAVERHEAD, GALLATIN AND MADISON COUNTIES, MONTANA.	)	**CASE NO. 41F-90** 41F-W-037104-00 41F-W-101052-00 41F-W-101054-00 41F-W-211018-00

CLAIMANT: Helen O. Portmann and Martin E. Portmann, Alvin E. Kephart, Samuel R. Kephart, James W. Kephart

OBJECTOR: Martin E. Portmann, Alvin E. Kephart

MEMORANDUM OPINION

Pursuant to Montana Code Annotated, § 85-2-233(4), the above entitled case was assigned to Senior Water Master Kathryn L. W. Lambert. On November 8, 1993, the Water Master issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. On December 20, 1993 and December 23, 1993, objections were filed to the Master's Report by Martin E. Portmann through counsel and by A. Evans Kephart, pro se and for other specified Kephart claimants. A Scheduling Conference was held, a briefing schedule on the issue of estoppel established and the Rule 53 M.R.Civ.P. hearing waived by the parties.

Procedural History & Factual Background

The Master sets forth this case's unusual procedural history in her six page Statement of the Case. In brief, this case was first begun before District Judge W. W. Lessley in 1975. After his retirement from the district court and his appointment as chief water judge, Judge Lessley was recalled to active service to hear

this case by order of Chief Justice Frank Haswell. Judge Lessley filed his Interlocutory Order and Memorandum on November 17, 1983 in district court Cause No. 22481. Citing § 85-5-216 MCA, Judge Lessley placed the district court case on hold pending issuance of the Madison River Basin Water Court decree, the service of objections to water right claims contained in that Water Court decree and the issuance of further orders in the adjudication of Basin 41F.

The Madison River Basin Temporary Preliminary Decree was issued in 1984. Two Buttermilk Creek irrigation claims (one of which includes incidental stock use) and two Denny Creek irrigation claims were decreed to Martin and Helen Portmann for use on their Diamond P Ranch (formerly known as the Murray Ranch). Only the two Portmann Buttermilk claims received a Kephart objection and are at issue here: 41F-W-037104-00 and 41F-W-211018-00.

Several claims for Denny and Buttermilk Creek water rights were decreed to the Kepharts for use on their respective Bar N Ranch and their Fuller Ranch. Only two of Kepharts' eleven Fuller Ranch Buttermilk Creek claims received a Portmann objection and are at issue here: an irrigation claim (41F-W-101052-00) and a commercial ice making claim (41F-W-101054-00).

The two Portmann and two Kephart Buttermilk Creek claims at issue here are based on the same 1913 Notice of Appropriation filed by Mabel Murray for 200 miner's inches of the waters of Trapper Creek (now known as Buttermilk Creek). Both Kepharts and Portmanns claim the exclusive use of this Mabel Murray right.

The Master found that the Portmanns were the exclusive owners of the Mabel Murray right. The Master recommends that (1)

the two Kephart Buttermilk Creek claims based upon the Mabel Murray Notice of Appropriation be terminated and that (2) the number of acres irrigated by each Portmann Buttermilk Creek claim be reduced from 78 to 53 acres.

Objections and Issues

Portmanns assert that the Master erred by reducing Portmanns' two irrigation claims from 78 acres to 53 acres and that Findings of Fact 15 and 16 of the report are erroneous.

In general, the Kepharts assert that no Portmann Buttermilk Creek water rights exist. Specifically, Kepharts object, in the alternative, that the Mabel Murray appropriation forming the basis of Portmanns' two Buttermilk Creek irrigation claims was never perfected by a Portmann predecessor (Mabel Murray); or if it was perfected that it was later abandoned by a Portmann predecessor; or if not abandoned that it became appurtenant to the Kepharts' Fuller Ranch property by virtue of its diversion into the Fuller Pond by another Portmann predecessor (L. A. Murray) at some time during the period from about 1924 through 1938. Kepharts assert that the Master's dismissal of the Kephart claims was erroneous.

No objection was filed by any party to the Master's evidentiary rulings set forth on pages six and seven of her report.

Standard of Review

Rule 53(e)(2) M.R.Civ.P. requires this Court to accept a Master's Findings of Fact unless clearly erroneous. The Montana Supreme Court follows a three-part test to determine if the Findings of Fact of a trial court are clearly erroneous. See Interstate Production Credit Assn. v. DeSaye, 250 Mont. 320, 323,

820 P.2d 1285 (1991).

This Court uses a similar test for reviewing objections to a Master's Findings of Fact. First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, this Court then determines whether the Master has misapprehended the effect of the evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, this Court may still determine that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed.

Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting. Arnold v. Boise Cascade Corp., 259 Mont. 259, 265, 856 P.2d 217 (1993). It is more than a scintilla, but less than a preponderance, of evidence. State v. Shodair, 902 P.2d 21, 26, 52 St. Rep. 879, 882 (1995).

Discussion

The first Kephart objection is that the Master failed to conclude that the Portmann Buttermilk claims had never been perfected or had been abandoned and that the Master's Finding of Fact 4 that "Mabel Murray perfected and used her Buttermilk Creek appropriation on the Murray Ranch" in 1913 is erroneous. This objection also indicts Findings 10, 11, 14, 15, 16 and 17.

Kephart cites Holmstrom Land Co. v. Meagher County Newlan Creek Water District, et al., 185 Mont. 409, 418, 605 P.2d 1060 (1979) for the proposition that a prima facie showing requires more

than a mere statement of claim and that water rights must be measured and gaged by their beneficial use over a reasonable period of time after an appropriation was initiated. Kepharts suggest May 15, 1913 to May 15, 1915 as such a reasonable time period.

Kepharts then argue that a Buttermilk Creek diversion dam constructed by a Portmann predecessor (Mabel Murray) washed out, that no testimony was presented as to how much land was irrigated on the Murray Ranch, that the "left side" of Buttermilk Creek on the Murray Ranch was wet, sloppy and marshy and did not need irrigation, and that Portmanns' Denny Creek decreed right satisfied all of the irrigation needs on the Murray Ranch.

This case exemplifies some of the difficulties encountered during the adjudication process. The Water Court is required to adjudicate water rights that are of ancient origin with less than perfect evidence. Recognizing the potential evidentiary problems present in adjudicating prior existing water rights, the Montana Legislature passed Section 85-2-227 MCA which states in pertinent part as follows:

> "For purposes of adjudicating rights pursuant to this part, a claim of an existing right filed in accordance with 85-2-221 or an amended claim of existing right constitutes **prima facie proof** of its content until the issuance of a final decree. . . ." [Emphasis supplied]

For better or for worse, § 85-2-227 MCA places the burden on the Objector to overcome the presumption that a Claimant's statement of claim is correct. The burden was on Kepharts to prove their objections.[1]

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[1] This Court has not yet decided whether the phrase "prima facie evidence" used in the statute referenced in the Holmstrom opinion is a different standard than "prima facie proof" used in §85-2-227 MCA. If prima facie proof creates a higher hurdle for an

Kepharts' reference to the Holmstrom case as support for the 1913-1915 period of reasonable use theory is misplaced. The Holmstrom case does not require an appropriator to prove up the first two years use of a claimed appropriation. That case merely requires some proof of the beneficial use of the water claimed over a reasonable period of time.

Although Kepharts interpretation of the Holmstrom case is misplaced, evidence of early use of the Portmann Buttermilk Creek rights is present through the testimony of Frank Murray whose parents previously owned the Portmann property. Evidence of later use is present through the testimony of Mr. Portmann.

Mr. Murray's testimony is a little vague on precise dates but during cross examination it was established that he was born around 1908 and lived on the Portmann property at least until his mid teenage years or about 1923. (1983 Tr. pp. 17-19) During Frank Murray's early years when his parents owned the Portmann property, Buttermilk Creek was used for irrigation purposes on that property. (1983 Tr. pg. 17) Mr. Portmann testified that he used Buttermilk Creek water for irrigation and stock purposes continuously since 1954. (1983 Tr. pp. 24, 73, 79) Finding of Fact 4 is not clearly erroneous.

Although Kepharts dispute the Portmann use of Buttermilk Creek, the Master was not persuaded to ignore the Portmann testimony and found in Finding 10 that Mr. Kephart was not present

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objector to overcome, then the Holmstrom case language is inapplicable. The parties did not brief this issue and it is unnecessary to decide here. Without further guidance, it is arguable that prima facie proof is a somewhat different standard than prima facie evidence. This is an issue that may be addressed in Water Court Case 40G-2.

during the early irrigation season and had no actual knowledge of the past irrigation practices during early irrigation. Kepharts argue that the Master's Finding of Fact 10 to this effect is erroneous and that there was no testimony that Mr. Kephart was not in the area during the early irrigation season or that he had no actual knowledge of early irrigation practices. Referring to Buttermilk Creek, Mr. Kephart is on record as saying the following:

> A. . . . Of course, I haven't been there at the time of spring runoff. (1982 Tr. p. 13)
>
> Q. How often each year would you stay out at the ranch?
> A. . . . at least four weeks and some times six.
>
> A. [Regarding Mr. Kephart's observations of Mr. Murray's use of water out of Buttermilk Creek] No, I was not there during the entire irrigation season. I was there the latter part of July on through September. (1982 Tr. p. 46)

The Master could readily conclude from this that Mr. Kephart had no actual knowledge of early irrigation. Finding 10 is not clearly erroneous.

Kepharts next say that the Denny Creek water satisfied the irrigation requirements of the Murray Ranch and that Buttermilk Creek water was unnecessary. Kepharts' theory is that (1) Denny Creek has a "minimum" summer flow rate of 400 inches by court decree; (2) Kepharts divert the first Denny Creek decreed right of 200 inches; (3) the Murray Ranch would always receive its 150 inch decreed right (the second Denny Creek decreed right) for 120 acres; and (4) since irrigation requirements, as a rule of thumb, are one inch per acre, then Denny Creek water mathematically satisfies all Portmanns' water needs and Buttermilk Creek water is unnecessary.

Kepharts' repeated representations of a court determined

"minimum" flow rate are erroneous.[2] The District Court, the Honorable W.W. Lessley presiding, did state in Finding VI of its 1963 "Proposed" Findings and Conclusions in Cause 10558 that Denny Creek has a "normal summer flow of approximately 400 miner's inches," [emphasis supplied] but this Court could find no reference to any finding of a "minimum" flow in Cause 10558 or 10170. Since minimum and normal are not synonymous and since Judge Lessley's reference to a summer flow of 400 inches is only approximate, Kepharts' assertions constitute a misrepresentation of the Court's findings and their mathematical argument fails.

According to the U.S. Geological Survey, the term "normal" is applied to a streamflow range that is 80% to 120% of average.[3] Whether Judge Lessley had this definition of "normal" in mind when he signed the "Proposed" findings is unknown, but applying this definition to the Denny Creek normal summer flow of approximately 400 inches would result in an approximate summer flow range of between 320 inches to 480 inches.

Portmann says they are short of water most of the time except in the spring runoff. (1983 Tr. pg.74) If the USGS definition of normal is applied to Denny Creek, then Portmanns

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[2] Kepharts or their counsel, at different times, cite (without internal citation) either case 10558 or 10170 for the "minimum" flow proposition. (See, for example, Kephart's Objections to Master's Report at page 5 citing case 10558; the Kephart "Memorandum Re: Legal Basis of Kephart Claim" at page 4 thereof which is attached and referenced in Kephart's Water Court Prehearing statement filed July 12, 1985 and which appears to cite Cause 10170; and Plaintiffs' Proposed Findings of Fact and Conclusions of Law filed October 11, 1983 in district court Cause No. 22481 at page 4, paragraph 22 thereof citing case 10170.)

[3] See, (2) of Notes to Editor in U.S. Department of Interior, USGS November 1995 press release on October streamflows being mostly normal or above normal, copy attached.

could readily receive less than their decreed 150 miner's inch right even when a "normal" flow is present. Montana stream flows vary considerably from year to year.

Kepharts' miner's inch per acre rule of thumb argument also fails because, as the Master states in her Finding 12, the Denny Creek decree makes no determination of the irrigation needs of the Murray Ranch. While one inch per acre has been cited as a rule of thumb, even in cases supporting that rule, substantial amounts in excess of that amount have been awarded. See, cases cited by Albert W. Stone, Montana Water Law for the 1980s, p. 49 (1981) and particularly Worden v. Alexander, 108 Mont. 208, 213-216, 90 P.2d 160 (1939). As a comparison, the Water Court uses 17 gallons per minute (1½ inches) per acre as an irrigation flow rate guideline. Rule 2.IX(2)(a) Water Right Claims Examination Rules.

The demise of the "minimum" flow rate argument also results in the demise of Kepharts' election of water source argument based on O'Shea v. Doty, 68 Mont. 316, 218 Pac. 658 (1923). This "election" theory only works if it is clear that (1) the Denny Creek water rights fully satisfied the Murray Ranch's irrigation needs and that (2) the Murray Ranch always received its full Denny Creek water rights. As mentioned previously there is no substantial evidence of either of these two events.

Mr. Kephart testified that the Buttermilk Creek flow is reduced to as little as 7-20 inches during the latter part of August and September. (1982 Tr. pg. 9) If so, then it is probable that Denny Creek waters were used to supplement Murray's use of dwindling Buttermilk Creek waters and not to supplant them. Findings of Fact 11, 14, 15 and 17 are not clearly erroneous.

A final irony of Kepharts' miner's inch per acre argument is found in Kepharts' own water right claims on Buttermilk Creek. As will be mentioned on page 15 and 16, Kepharts filed 3 Buttermilk Creek irrigation claims asserting the use of 6 cfs on 50 acres. This amounts to 4.8 miner's inches per acre. The temporary preliminary decree reduced these 50 acres to 30 acres.

Kepharts' second objection relates to the Master's dismissal of the Kephart claims that were based upon the Mabel Murray Notice of Appropriation. Kepharts say the dismissal was erroneous.

The Master found in Finding 6 that L. A. Murray began diverting the Mabel Murray appropriation from Buttermilk Creek into Fuller Pond at an unspecified date. Although not precisely indicated it appears the Master believes the date was on or around the time when L.A. Murray was purchasing the Fuller Ranch from Conrad Wenderoth pursuant to an installment payment contract. The Master then engaged in a legal analysis of the concepts of unity of title and appurtenancy of water rights and concluded that the Murray Buttermilk Creek water right was not appurtenant to the Fuller Ranch. She then dismissed the Kephart claims.

The Court agrees with the dismissal of the Kephart claims but for reasons different than found by the Master. The Court is unable to find any evidence that the 1913 Mabel Murray water right was diverted into the Fuller Pond.

Frank Murray testified that Denny Creek was the only source of supply for Fuller Pond when it was first constructed and when he lived on the Murray Ranch. (1983 Tr. pp 16-20) Buttermilk Creek water is presently diverted into this pond. When Buttermilk

Creek was first diverted into the Fuller Pond is unknown. Kephart says it happened at least by 1926 and that Buttermilk Creek water rights are now appurtenant to the Fuller Ranch.

No evidence substantiates a finding that the 1913 Mabel Murray irrigation right was diverted into the Fuller Pond for irrigation and ice making purposes during the period when L. A. Murray was attempting to purchase the Fuller Ranch from Conrad Wenderoth. Evidence is present that a combination of water from Denny and Buttermilk Creek was used on the Fuller Ranch, but to state that the specific 1913 Murray Right was moved from the Murray Ranch and then used briefly thereon is only speculation. Kepharts' Objections to Master's Report at pages 11 and 12 somewhat agree with this point.

Accordingly, the second sentence in Finding of Fact 6 that "L. A. Murray began diverting the Murray appropriation from Buttermilk Creek into Fuller Pond" is clearly erroneous and is deleted from Finding of Fact 6. The last eight words in Conclusion of Law X i.e. "which was briefly used on the Fuller Ranch" are not adopted and are deleted from that conclusion.

The two Kephart claims in this case are for commercial ice making and for irrigation purposes and are based upon the Mabel Murray appropriation. The only evidence that the Mabel Murray irrigation claim was diverted into the Fuller Pond for ice making or irrigation purposes is the prima facie claims themselves. These two prima facie claims collide head on with the Portmann prima facie claims that the Mabel Murray right was used on the Murray Ranch.

Whose prima facie claims prevail? Obviously, both cannot

as their claims are mutually exclusive. This issue was not briefed and has not been previously addressed by this Court. Without any law being offered on this issue and without any evidence that a water right was severed from the place of original use, this point is resolved in favor of the claim that asserts the place of original use. In this case it is the Portmann claim. The analysis set forth in the Master's Conclusions of Law IV, VI and VII is unnecessary, the conclusions are not adopted and are deleted.

Kepharts assert that Findings of Fact 14 and 15 regarding Portmanns' use of Buttermilk Creek water for pasture, stock and hay irrigation are erroneous. Kepharts argue that the Murray Ranch was wet, sloppy and marshy on the "left side" of the creek and needed to be drained, not irrigated, and that Mr. Portmann testified he really only needed water for stock purposes. Although there was some discussion of water being drained from the Portmann property, the testimony was not specific enough to identify its location and amount. Mr. Portmann volunteered during cross examination to "draw it up" but Kepharts' counsel did not take him up on that offer. (1983 Tr. pg. 75)

If the marshy area is on the north side of the creek then that is not where Portmanns use Buttermilk Creek water. As recognized by the briefs of both parties, Mr. Portmann testified that Buttermilk Creek waters are used on "the area between Buttermilk Creek and the timberline" which is on the south side of the creek. That is the area identified by the Master as Portmanns' place of use in Finding 16.

Portmanns assert Finding 16 is erroneous for reducing the place of use to 53 acres and that it should remain at 78 acres as

specified in their prima facie statement of claim. The 78 acres identified on the Portmann statement of claim are located north of Buttermilk Creek. Mr. Portmann's testimony that the place of use was south of Buttermilk Creek overcomes the prima facie claim identifying the place of use as north of Buttermilk Creek.

Without any precise evidence presented, the Master did the best she could to identify the place of use. However, the 53 acres identified by the Master as irrigated includes 20 acres that are not owned by Portmanns. Based upon Plaintiff's Exhibits 9 and 10 (Portmann deeds) the 5 acres listed in the NESESW and the 15 acres listed in the N2SWSE of section 22 T 13S, R 4E should be deleted as the Portmanns do not own these described lands. Including these 20 acres in the Portmann place of use identified in Finding 16 is clearly erroneous.

Deleting these 20 acres leaves 33 acres as irrigated. The 1953 Gallatin County Water Resources Survey at page 53 identifies an area south of Buttermilk Creek as irrigated. The Court takes Judicial Notice of this map. A copy is attached. This map reveals that Buttermilk Creek flows through four "quarter quarter" sections (the NWSW, NESW, NWSE and NESE) and irrigates a portion of the NESW and NWSE quarter-quarter sections contained in section 22. Each quarter-quarter section usually contains about 40 acres. The acres depicted as irrigated on Portmanns' land south of Buttermilk Creek appear to be approximately 30 and 45% of each respective quarter-quarter. Although the evidence supporting the 33 irrigated acres is weak, there is no evidence to the contrary. The 33 acres is more than a scintilla, appears reasonable and is not clearly erroneous.

Adverse Possession, Laches and Estoppel

Finding of Fact 9 refers to Kepharts' argument on adverse possession, laches and estoppel. This finding is actually a conclusion of law and is not adopted.

Kepharts did not prove the three basic prerequisites for establishing adverse user discussed in Smith v. Krutar, 153 Mont. 325, 330, 457 P.2d 459 (1969). The proof is not adequate to find that prior to July 1, 1973 the Kepharts deprived Portmanns of any or all of the Buttermilk Creek waters to which Portmanns were entitled. Kepharts' appropriations made subsequent to Mabel Murray's 1913 appropriation are not, by themselves, notice of an adverse claim. Sherlock v. Greaves, 106 Mont. 206, 216, 76 P.2d 87 (1937). Evidence of adverse use after June 1973 is not relevant because no water right may be acquired by adverse use, adverse possession, prescription or estoppel after June 1973. Section 85-2-301 MCA.

The record is weak with respect to the "normal summer flow" of Buttermilk Creek and any party's use of it. What is clear is that if enough water is present, the flow of Buttermilk Creek continues through the Fuller Pond and is available at Portmanns' property. (1983 Tr. pg. 7) Mr. Kephart does not know whether the Portmanns used water for irrigation from Buttermilk Creek or not. (1982 Tr. pg. 31 and 1983 Tr. pg.7) Mr. Kephart stated that from 1954 through 1974 Mr. Portmann never complained about the lack of water. (1982 Tr. pg. 36) The essential elements of adverse possession, including deprivation of water, were not established.

Kepharts estoppel or laches argument is also without merit. Portmanns did stipulate in 1963 that they would not

interfere with Kepharts' right to the waters of Buttermilk Creek "which waters are used on lands belonging to the [Kepharts] in Section 21 and 22. . . ." (Plaintiff's Exhibit 12) Kepharts argue that this 1963 stipulation gives them a superior right to all Buttermilk Creek waters.

But what is Kepharts' right to use the waters of Buttermilk Creek? Kepharts never filed the memorandum of water rights mentioned in the 1963 stipulation. The records of the Water Court indicate that for purposes of the state wide adjudication, Kepharts filed and were decreed 11 Buttermilk Creek water right claims, all diverted from an identical point of diversion.[4] These 11 claims follow:

Priority Date	Flow Rate Claimed	F.R. Decreed	Purpose	Claim No. 41F-W-
7/2/1908	6.375 gpm	30 gpd per AUM	Stock	031339-00
5/15/1913	2 cfs	1.14 cfs	Irrigation	101052-00
5/15/1913	½ to 3.75 cfs	Non-Consumptive	Fish & Wild	101053-00
5/15/1913	3.75 cfs	3.75 cfs	Commercial Ice Making	101054-00
5/28/1913	6.375 gpm	30 gpd per AUM	Stock	101051-00
11/1/1924	2 cfs	2 cfs	Commercial Ice Making	031306-00
11/1/1924	?[5]	Non-Consumptive	Fish & Wild	031307-00
11/1/1924	2 cfs	1.14 cfs	Irrigation	031318-00
7/14/1960	2 cfs	Non-Consumptive	Fish & Wildlife	031305-00
7/14/1960	2 cfs	1.14 cfs	Irrigation	031316-00
7/14/1960	6.375 gpm	30 gpd per AUM	Stock	031338-00

[4] Kepharts have 3 other Buttermilk Creek claims that are diverted further downstream from Portmanns.

[5] The Court's microfiche copy of this claim does not contain page 2 of this claim which would identify the asserted flow rate. Therefore, the Court is uncertain of the precise flow rate asserted for this claim.

Some of these Kephart claims appear to be duplicative or inconsistent with the proof presented by Kepharts in this case. Some examples follow.

First, the combined maximum flow rate of these eleven Kephart Buttermilk Creek claims, claimed under oath in 1981, to have been historically diverted by the Kepharts, exceed 17.50 cfs (700 miner's inches). In contrast, a 1981 affidavit of Alvin Evans Kephart attached to claim 41F-W-101052-00 states at paragraph 15 that the average spring run-off is approximately 3.75 cfs (150 inches) and that approximately 7/40 cfs to ½ cfs (7-20 inches) flows during the summer irrigation season. Also A. E. Kephart's testimony emphasizes the limited summer flow rate of 7-20 inches available in Buttermilk Creek. (1982 Tr. pp. 13, 23, 24)

Second, Kepharts admit that the irrigation requirements of their own Fuller Ranch require 1¼ -1½ miner's inches of water per acre. (See, paragraph 18 of the 1981 Alvin Evans Kephart affidavit attached to 41F-W-101052-00) They argue at length that Portmanns' water usage should be limited to 1¼ miner's per acre. Yet, Kepharts filed three water right claims to irrigate an identical 50 acres with a total combined flow rate of 6 cfs (240 miner's inches). This amounts to 4.8 inches per acre.

Third, the two claims filed for commercial ice making purposes are based upon the same ice making activities that began around 1924 but which were discontinued "prior to 1937." See, page 4 of the 1980 affidavit of A. Evans Kephart attached to claim 41F-W-101054-00.

In 1974 the only use that the Kepharts made of these 11 Buttermilk Creek water rights was to divert them into a storage

reservoir for fish and wildlife purposes. (1982 Tr. pp. 40-43) According to the 1980 and 1981 A. Evans Kephart affidavits (pages 4 and 13 respectively) attached to claim 41F-W-101054-00, Fuller Pond has been use by Kepharts and several guests for fishing purposes for years.

Kepharts argue that the 1963 stipulation grants them superior rights and that it should be construed in a manner similar to the 1960 Irrigation Ditch Agreement referenced in the recent ditch easement lawsuit between these two parties. See, Kephart v. Portmann, 259 Mont. 232, 855 P.2d 120 (1993). The Court declines to do so for the following four reasons.

First, only a clairvoyant would have known in 1963 that Kepharts claimed 11 water rights to divert more than 17.50 cfs (700 inches) from Buttermilk Creek. The 1963 stipulation permitted Kepharts to file a memorandum of their rights but they never did. There was no "meeting of the minds" as to the Kephart water rights and the Court does not believe Portmanns signed a "blank check."

Second, in 1974 Kepharts did not divert Buttermilk Creek waters which were ". . . used on lands belonging to the [Kepharts] in Section 21 and 22. . . ." as set forth in the stipulation. Kepharts diverted Buttermilk Creek into a storage reservoir for their fishing purposes.

Third, there is no language in the 1963 stipulation by which the parties agreed that Buttermilk Creek waters could be diverted into a storage reservoir and be used by Kepharts and their guests for recreation, fish and wildlife purposes. The absence of such language contrasts with the specific language agreeing to the diversion of Denny Creek waters into a storage reservoir (page 2,

lines 6 and 7 of the 1963 stipulation). The Court concludes that storage for recreation, fish and wildlife purposes was not an obvious part of the 1963 bargain.

Kepharts would argue otherwise because their sole use of Buttermilk Creek and possibly Denny Creek water on the Fuller Ranch has apparently been limited for many years and certainly in 1974 to storage for a recreational or fish and wildlife use. (1982 Tr. pg 41, 42 and 1983 Tr. pg. 6 & 7, Plaintiffs' Proposed Findings of Fact 11, 30, and 38 filed Oct. 11, 1983 in Cause 22481) The 1963 stipulation says nothing about such use and it is doubtful Portmanns would have realized and thereby recognized the extent of Kepharts' claims to such use under the 1963 stipulation.

Fourth, whether such storage rights would have been recognized in 1963 is problematic. In the Supreme Court decision of In the Matter of Dearborn Drainage Area, 234 Mont. 331, 340, 343, 766 P.2d 228 (1988), the "Bean Lake" case, the Court stated that:

> In truth, no Montana legal authority, deriving either from common law or statute, acknowledged that recreational, fish or wildlife uses, even though beneficial, gave rise to any water rights by appropriation under Montana law.
> ....
> It is clear therefore that under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute. . . . [and] adverse appropriators could not have had notice of such a claim. [Emphasis supplied]

When the 1963 stipulation was signed, there was no Montana authority acknowledging the validity of recreation, fish and wildlife or the storage of such rights. The 1963 stipulation

did not even mention Buttermilk Creek storage. The recognition by Portmann of such rights in 1963 is an essential element of the equitable estoppel and laches theories. Under the facts here, this Court concludes that Portmann did not "interfere" with Kepharts' right to use Buttermilk Creek waters in 1974 as the term is used in the 1963 stipulation.

The question of storage, recreational use or fish and wildlife purposes of the remaining Kephart Buttermilk Creek water right claims was not raised by an appropriate objection to those claims by Portmann or any other party. Without an objection, the claims retain a certain prima facie validity. See, §85-2-227 MCA. However, the 1963 stipulation should not be enforced against Portmann if Kepharts merely store Buttermilk Creek waters to augment their fish and wildlife reservoir.

Kepharts cite federal authority regarding the protection of wetlands and suggest that a wetlands caveat be placed on the Portmann abstracts of water right claims. The Court declines to do so. See, 33 U.S.C 1251(g).

The process of adjudicating the water rights of the parties is complicated by the 1975 district court lawsuit. This Court's first task is to resolve the objections filed by the parties to the four water right claims in this case. But once the Court has accomplished that initial task, it must integrate the 1963 stipulation into the water rights and resolve the case brought before the district court in 1975. This Court has jurisdiction to accomplish the latter task in this particular case under 85-2-216 MCA.

The primary rights to the use of water in a stream belong

to appropriators of natural flow and the burden is upon a subsequent storage claimant affirmatively to disprove interference with prior rights. Allendale Irrig. Co. v. Water Cons. Bd., 113 Mont. 436, 440, 127 P.2d 227 (1942). Kepharts assert that they have been diverting Buttermilk Creek waters into the Fuller Pond for years without significant interference from Portmanns. Except for 1974, the flow through nature of Kepharts' use of Fuller Pond has not interfered significantly with Portmanns' stock and irrigation water usage from Buttermilk Creek because those waters flow through and eventually exit the Fuller Pond and flow towards the Portmann property.

Neither party has demonstrated a right to monopolize the flow of Buttermilk Creek to the exclusion of the other party. The parties must work together to use Buttermilk Creek waters efficiently and in accordance with the water right claims as they have been decreed in the temporary preliminary decree.

Kepharts filed their Buttermilk Creek fish and wildlife statements of claim with the notation of "flow through, non-consumptive use" typed thereon. Portmanns agreed that they could accept such a flow through, non-consumptive use provided the waters flowed onto their property. (March 1, 1985 brief filed in Cause 22481, at page 4 thereof.) Judge Lessley's November 17, 1983 Interlocutory Order and Memorandum recognized this flow pattern. The abstracts for the Kephart fish and wildlife claims set forth in the temporary preliminary decree recognize fish and wildlife as a beneficial use but presume it is non-consumptive and limit it to the minimum amounts necessary to sustain the purpose.

Although Portmanns testified that their use of Buttermilk

Creek waters included irrigation, a significant concern was water for their stock. (1983 Tr. pp. 78 & 79) Unless and until the parties provide this Court with an alternative method to provide water for Portmanns' stock, the Court will impose conditions on the enforcement of the 1963 stipulation. These conditions are listed in the Order Adopting and Amending the Master's Report.

This case is complex and this writer has spent more than 160 hours reviewing it. The Court has reviewed carefully the Water Master's Findings and Conclusions, the objections and briefs filed. The Court has read the transcripts of the July 20, 1982 and September 7, 1983 hearings several times, reviewed all evidence submitted[6], listened to the tape recording of the December 19, 1985 Prehearing conference, read the 1993 Supreme Court ditch easement decision of *Kephart v. Portmann* which was attached to the Kepharts' Supplemental Brief on Estoppel and has read the complete files in this matter. The Court has reviewed the Gallatin County District Court files identified by Cause Numbers 10170, 10558 and 22481 to which the Court was requested to take judicial notice. Kepharts requested the Court to take judicial notice of several of their claims. The Court takes judicial notice of the 11 Kephart Buttermilk Creek claims identified on page 15.

This Court has reviewed the entire record. Except as noted above, this Court concludes that the Master's findings are supported by substantial evidence, the Master has not

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[6] The Court was unable to locate and did not review the following exhibits: Plaintiff's Exhibit 16 identified as an aerial map when it was introduced on July 20, 1982 and Plaintiff's Exhibit 1 identified as a map when it was introduced on September 7, 1983. It appears that Plaintiff's Exhibit 1 is the same exhibit introduced as Plaintiff's Exhibit 17 ("Papke Survey") on July 20, 1982.

misapprehended the effect of the evidence and the Court does not have a definite and firm conviction that a mistake has been committed. Accordingly, this Court Amends and Adopts the Master's Report as noted.

DATED this 5TH day of MARCH, 1996.

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 MEMORANDUM OPINION was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Helen O. and Martin E. Portmann
Diamond P Ranch
West Yellowstone, MT 59758

David Weaver, Attorney
Box 1168
Bozeman, MT 59715

Alvin E. Kephart, Attorney
100 Grays Lane, Apt. 101
Haverford, PA 19041

Samuel R. Kephart
526 Gardendale Rd
Encinitas, CA 92024

James W. Kephart
441 N. Fifth St., Ste 201
Philadelphia, PA 19123

DATED this 5th day of March, 1996.

Lori M. Burnham
Clerk of Court

United States Department of the Interior

U.S. GEOLOGICAL SURVEY
Water Resources Division
428 Federal Building, Drawer 10076
301 South Park Avenue
Helena, Montana 59626-0076

For release: Immediately

Mailed: November 7, 1995

For information call:
Mel White or Pat Ladd
406-449-5263

OCTOBER STREAMFLOWS AND RESERVOIR STORAGE MOSTLY NORMAL OR ABOVE NORMAL

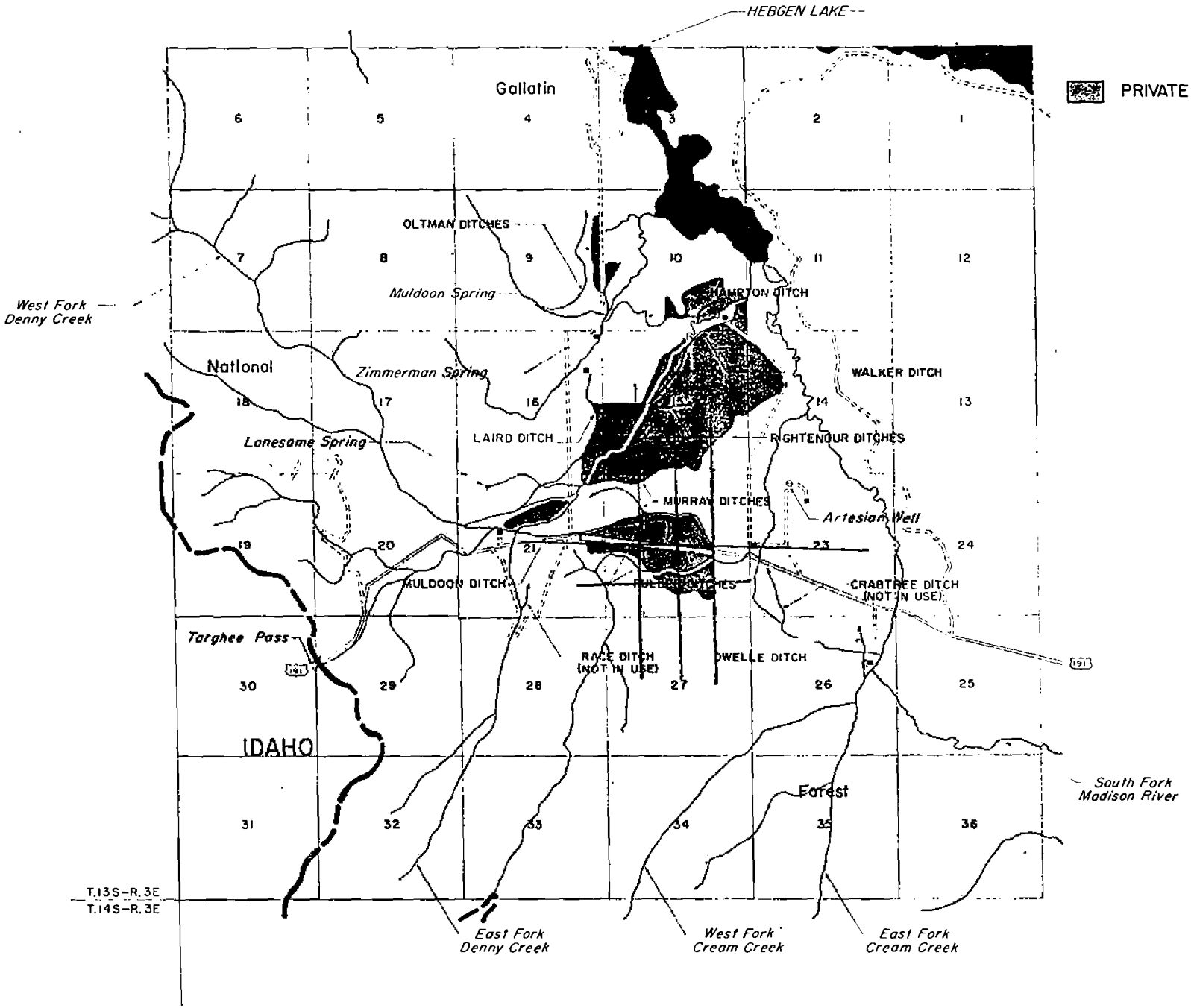
The monthly mean streamflows for the month of October were normal at three and above normal at two of five long-term streamflow-monitoring stations operated by the U.S. Geological Survey. Of 56 reporting reservoirs, the October contents at 21 were normal, 25 were above normal, and 10 were below normal of the long-term mean monthly content.

Streamflows of the Clark Fork at St. Regis, Yellowstone River at Corwin Springs, and Yellowstone River at Billings were normal for the month of October. Streamflow of the Middle Fork Flathead River near West Glacier and Marias River near Shelby were above normal.

The monthend contents for October were normal at all five of the major hydroelectric reservoirs in Montana (Bighorn Lake, Canyon Ferry Lake, Flathead Lake, Fort Peck Lake, and Hungry Horse Reservoir). Of the major irrigation reservoirs in Montana, the Lima, Clark Canyon, and Gibson Reservoirs were above normal and the Fresno Reservoir was normal.

Data in this release are preliminary. Final data will be published in the yearly publication WATER RESOURCES DATA, MONTANA.

NOTES TO EDITOR: (1) ft^3/s is an abbreviation for cubic feet per second.
(2) the "normal" range is 80 to 120 percent of average.


HEBGEN LAKE
PRIVATE IRRIGATION
Gallatin
6
5
4
3
2
1
OLTMAN DITCHES
7
8
9
10
11
12
West Fork
Denny Creek
Muldoon Spring
HAMPTON DITCH
National
Zimmerman Spring
WALKER DITCH
18
17
16
14
13
Lonesome Spring
LAIRD DITCH
RIGHTENOUR DITCHES
MURRAY DITCHES
Artesian Well
19
20
21
23
24
MULDOON DITCH
CRABTREE DITCH
(NOT IN USE)
Targhee Pass
RACE DITCH
(NOT IN USE)
30
29
28
27
26
25
IDAHO
Forest
South Fork
Madison River
31
32
33
34
35
36
T.13S-R.3E
T.14S-R.3E
East Fork
Denny Creek
West Fork
Cream Creek
East Fork
Cream Creek
T.13S-R 4E

Montana Water Court
PO Box 879
Bozeman, MT 59771-0879
1-800-624-3270 (In-state only)
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MADISON RIVER BASIN (41F)

* *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE MADISON RIVER DRAINAGE AREA, INCLUDING ALL TRIBUTARIES OF THE MADISON RIVER IN BEAVERHEAD, GALLATIN AND MADISON COUNTIES, MONTANA.	)	**CASE NO. 41F-90** 41F-W-037104-00 41F-W-101052-00 41F-W-101054-00 41F-W-211018-00

CLAIMANT: Helen O. Portmann and Martin E. Portmann, Alvin E. Kephart, Samuel R. Kephart, James W. Kephart

OBJECTOR: Martin E. Portmann, Alvin E. Kephart

ORDER AMENDING AND 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 November 8, 1993, the Water Master issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. Objections were filed through counsel by Martin E. Portmann and by A. Evans Kephart. For the reasons set forth in the accompanying Memorandum Opinion, the Master's Report is amended as follows:

The second sentence in Finding of Fact 6 that states: "L. A. Murray began diverting the Murray appropriation from Buttermilk Creek into Fuller Pond" is not adopted and is deleted;

The last eight words in Conclusion of Law X that state "which was briefly use on the Fuller Ranch" are not adopted and are deleted;

Conclusions of Law IV, VI and VII are not adopted and are deleted;

In Finding of Fact 16, the 5 acres listed in the NESESW and the 15 acres listed in the N2SWSE of section 22 T 13S, R 4E are not adopted and are deleted from the place of use;

Finding of Fact 9 is not adopted and is deleted;

In Finding of Fact 19, the Master sets forth a remark that is to be inserted on the Portmann claims. This remark shall be modified to include at the end of the remark, the following sentence: IN AN ORDER FILED MARCH 5, 1996 IN CASE 41F-90, THE WATER COURT ESTABLISHED CONDITIONS FOR THE ENFORCEMENT OF THIS STIPULATION.

ORDER

The conditions that must be met in order for the 1963 stipulation to be enforced are as follows:

1. Kepharts shall install and maintain a suitable headgate and measuring device as near as practical to the Kephart point of diversion on Buttermilk Creek;

2. Kepharts shall install and maintain a suitable outlet and measuring device on Fuller Pond and will thereafter release a flow of water from Fuller Pond that equals the concurrent inflow from Buttermilk Creek or the flow of water Portmanns require for stock purposes from Buttermilk Creek, whichever flow rate is less;

3. When conditions 1 and 2 are met, Portmanns shall not interfere with Kepharts' diversion of Buttermilk Creek water into Fuller Pond;

4. The 1963 stipulation shall not be enforced if Kepharts impound Buttermilk Creek waters in a "non flow through" storage

reservoir and thereby prevent Portmanns from using stock water from Buttermilk Creek.

DATED this 5th day of March, 1996.

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 MEMORANDUM OPINION was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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526 Gardendale Rd
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James W. Kephart
441 N. Fifth St., Ste 201
Philadelphia, PA 19123

DATED this 5th day of March, 1996.

Lori M. Burnham
Clerk of Court