FILED

NOV 17 1997

Montana Water Court

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
GALLATIN RIVER BASIN (41H)

* * * * * * * * * * * * * * * * * * * *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE GALLATIN RIVER DRAINAGE AREA INCLUDING ALL TRIBUTARIES OF THE GALLATIN RIVER IN GALLATIN, PARK AND MADISON COUNTIES, MONTANA	**CASE NO. 41H-116** 41H-W-009357-00 41H-W-031243-00 41H-W-101004-00 41H-W-125510-00

CLAIMANT: Harvey J. & Viola M. Moss; Sherman J. Smith; Sherman B. & Grace R. Smith, (Former Owners), Smith Land Co., (Present Owners); Richard E. & Susan J. Duncan

ON MOTION OF THE WATER COURT

OBJECTOR: Richard E. Duncan

MEMORANDUM OPINION

On March 7, 1991, Water Master John Bloomquist filed his report containing Findings of Fact and Conclusions of Law. On March 13, 1991, claimants Richard and Susan Duncan, through their attorney Matthew W. Williams, filed Exceptions and Objections to Master's Report and a supporting brief. On March 19, 1991, claimants Harvey J. and Viola M. Moss, through their attorney Michael D. Cok, filed a brief and supported a portion of the Duncan objections.

By Order filed January 24, 1992, the Court advised the parties that they had until February 7, 1992, to file an application for a hearing on the objections and that if no hearing was requested, the objections would be decided upon the existing record. As no party requested one, the Rule 53 M.R.Civ.P. hearing

was waived.

Background

The Statement of the Facts set forth by the Water Master in his Memorandum filed March 7, 1991, details the facts and only a brief summary is needed here.

This case involves four claims based on a right decreed to John Robinson in Bell v. Armstrong, Cause 3850, Gallatin County. In this 1909 West Gallatin River decree, Robinson received 44 miner's inches with a June 15, 1872 priority date. In 1937 Robinson conveyed this water right and the appurtenant property to Ezra Allsop. On May 1, 1938, Ezra Allsop executed three quitclaim deeds purporting to convey 22 miner's inches of the June 15, 1872 Robinson right to each of his three sons, Charlie, Elmer and Roy. As a result, a total of 66 miner's inches was purportedly conveyed, 22 inches in excess of the decreed right. The three deeds were filed for record on December 31, 1952, and are the source of controversy in this case.

The successors to the three brothers: Sherman and Grace Smith (now Smith Land Co.) and John Smith (claim 41H-W-031243-00 and 41H-W-125510-00 through Charlie Allsop), Harvey and Viola Moss (claim 41H-W-009357-00 through Elmer Allsop), and Richard and Susan Duncan (claim 41H-W-101004-00 through Roy Allsop) filed separate statements of claim, each for 22 miner's inches of the Robinson 44-inch decreed right. Because the Robinson right was for 44 miner's inches and the four claimants claimed 66 miner's inches, the claims were reviewed by the Water Court on its own motion in order to resolve the "decree exceeded" issue.

The Master found that the parties were each entitled to

an equal share of the John Robinson decreed water right or 14.67 miner's inches[1]. He then recommended giving each party an implied right for 7.33 miner's inches with a May 1, 1938, priority date. The result is that each party receives a total flow rate of 22 miner's inches, but only a portion of that flow rate carries the June 15, 1872 priority date.

Objections and Issues

The objectors raise two issues in their objection:

1. Did the Master err in his interpretation of the quitclaim deeds by giving all three claimants an equal share of the 44 miner's inch Robinson right?

2. Have the parties acquired a prescriptive right to the 22 miner's inches erroneously deeded to the three Allsop siblings by Ezra Allsop?

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

[1] The Smiths filed two claims for a total of 22 miner's inches. The Master recommended reducing each of these claims to 7.33 miner's inches for a total of 14.66 miner's inches.

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, 273 Mont. 155, 163, 902 P.2d 21, 26 (1995). Legal conclusions are reviewed for their correctness.

Discussion

The parties proposed three options to resolve the overclaim of the decreed right. One option was to distribute the 44 inches to the parties in accordance with the recording sequence of the deeds to Elmer (11:15 a.m.) (Moss claim), Charlie (11:17 a.m.) (Smith claims) and Roy (11:20 a.m.) (Duncan claim).. This option would benefit Moss and Smith, but Duncans would lose their 22 inches of 1872 water.

A second option was to distribute the 44 inches to the two parties who received the land to which the water rights were originally decreed. This option, termed the "appurtenance theory" by the Master, would benefit Moss and Duncan, but Smiths would lose their 22 inches.

A third option was to distribute the 44 inches equally. The 22 inches lost under this option would be granted all parties through a finding of prescriptive use or by implying "use" rights

for the remainder. All parties would benefit under this option if the 22 inches of water recognized by prescriptive use carried an 1872 priority date. If the priority date were established as 1938, the implied claim would only be useful during the high water season.

During the hearing, counsel for Sherman, Grace, and John Smith and counsel for Harvey and Viola Moss stated that their clients believed the intent of Ezra Allsop was to divide the 44 inches of 1872 water equally between his three sons and that a mistake was made in preparing the deeds. Although they preferred the third option with a finding of prescriptive use, they believed a reformation of the deeds to reflect an equal division of the 1872 water rights was in line with Ezra's true intent. They took this position even though it could result in a loss of water rights to them. Their candor is admirable.

The Water Master rejected the first two options and chose the third option. He concluded that Ezra's intent was to distribute the 44 inches of 1872 water equally to his three sons. The Master divided the water equally between the three lines of succession from each Allsop son and implied claims with 1938 priority dates to make up the remaining 22 inches.

None of the parties objected to the Master's rejection of the first option. The Duncan objection favors the second option or the third option (if a prescriptive right carries the 1872 priority date). The Moss objection favors the third option with a finding of prescriptive use.

Duncans argue that the true intent of Ezra Allsop cannot be determined and that under the circumstances, the Master's

determination of that intent is no more valid that any number of other available interpretations. They contend that it is just as possible that Ezra Allsop intended to divide his 44 inch water right in half and give 22 inches to two of his three sons, but that he inadvertently added the same 22 inch language to the third deed. (Parenthetically, this possibility was not argued to the Master as an option except tangentially as part of the appurtenance theory argument.)

Duncans argue that the proper solution under the circumstances is to ignore the deeds and apply the common law. In other words, the water right should go to the parties that owned the land where this particular water right was appurtenant prior to the execution of the 1938 deeds.

Duncans cite Sweetland v. Olsen, 11 Mont. 27, 27 P. 339 (1891), and Brennen v. Jones, 101 Mont. 550, 55 P.2d 697 (1936), for the proposition that water rights pass with the land upon which they are used unless explicitly reserved in the document of title. They offer no authority for the more important issue: should the Court ignore the deeds and apply the law as if the deeds did not exist?

The Statement of Agreed Facts filed October 16, 1990 states in paragraph 11 that there is no evidence of the intent of Ezra Allsop in conveying any property interest to his sons beyond that apparent from the face of the deed. Therefore, the Court cannot simply ignore the deeds.

The three quitclaim deeds are subject to the general rules of interpretation codified in Mont. Code. Ann. §§ 28-3-201 through -704. See Section 70-1-513 MCA. Based on these statutes

and the case law developed under them, it appears that the interpretation of the deeds in the Master's Report is reasonable.

The three deeds were executed at the same time and all relate to the same subject matter. They should be viewed as a single transaction. See § 28-3-203 MCA.

In Riss v. Day, 188 Mont. 253, 613 P.2d 696 (1980), the Montana Supreme Court addressed interpretation of a lease agreement and stated: "A contract is to be construed so as to make provisions effective, if possible. Repugnant provisions should be interpreted in such a way as will give them some effect, subordinate to the general intent and purpose of the entire contract." Id at 257.

Ezra's deeds conveyed his 1872 water equally to each son but a mistake was made. Was the mistake in the number of inches of 1872 water conveyed or was the mistake in the conveyance of a specific water right, the 1872 water right? The Water Master concluded that Ezra's mistake was in the number of inches conveyed and that his intent was to distribute the 1872 water equally.

Duncans assert the Master was wrong in his interpretation and argue that because of the 22-inch ambiguity, the Court should accept the appurtenance theory and find that the 1872 water should remain with the land to which it was appurtenant. To accept that theory, the Court must disregard the deeds and conclude that Ezra's intent was to maintain the integrity of his decreed rights with the lands to which they were appurtenant.[2]

---

[2] A decision which would also ignore a long series of water right severance cases of which Castillo v. Kunneman, 197 Mont. 190, 642 P.2d 1019 (1982), is one of the more recent.

But clearly, Ezra's intent was not to maintain that integrity. In the same quitclaim deeds in which he conveyed his 1872 water, he divided his 1865 water (originally decreed to John Robinson's section 29 land) into three substantially equal parts and deeded 49 inches to Charlie for use on section 16 land. (See Claimant's Exhibit A.) This equal division of Ezra's earliest right is evidence of his intent to divide his early water rights equally among his three sons.

Either Ezra made a mathematical error in his attempt to divide his 1872 water equally among his three sons or Ezra made a mistake in deeding 22 inches to one of those sons. Duncans only advanced the latter argument in conjunction with their appurtenance theory (option 2) arguments. Having eliminated that theory and the relief that would accompany it, all that remains for the Court to determine is the magnitude of the mathematical error made by Ezra and to apply an appropriate remedy.

No evidence was introduced regarding the value of the lands or the number of irrigated acres deeded to the sons in 1938. Such evidence would have helped determine whether the 1938 deeds of land and water rights represented an equal distribution of Ezra's land and water rights. The only evidence of Ezra's intent is found in the three deeds.

Pursuant to those deeds, Elmer received 180 acres and 48 inches of 1865 water, 22 inches of 1872 water and 1/3 of 5/6 share of West Gallatin Canal water.[3] Charlie received 160 acres and 49 inches of 1865 water, 22 inches of 1872 water and 2/3 of a 5/6

[3] One share of West Gallatin Canal water equals 150 inches of water. Of this, about 75 inches has an 1883 priority date and the remainder has an 1901 priority date. See Water Resources Survey for Gallatin County published by the State Engineer's Office in January, 1953 at pages 46 and 47. Rule 201 M.R.Evid.

share of West Gallatin Canal water. Roy received 227 acres of land and 48 inches of 1865 water, 22 inches of 1872 water and 44 inches of 1888 water.

Thus the deeds reflect that Ezra deeded Elmer 180 acres with 111 inches of water, Charlie 160 acres with 113 inches of water, and Roy 227 acres with 114 inches of water. Although the acreage varies, the quantity of water is almost equal. Without evidence that one of the sons received a larger share of irrigated lands or more valuable property, the Court is more inclined to believe Ezra intended to distribute the water rights in relatively equal shares than to believe he intended to discriminate among the three sons.

Duncans argue that equal treatment by the grantor is not a valid presumption. They cite section 72-2-206 MCA (now 72-2-119 MCA) of the Uniform Probate Code for authority that property given to heirs during their lifetime is not treated as an advancement against their share of the estate absent a writing to that effect. From this statute they make the assertion that "a parent does not necessarily intend equal treatment of his offspring, unless there is independent evidence attesting to such an intent."

Duncan's citation to section 72-2-206 and argument is not helpful or persuasive in determining Ezra's intent in 1938. Other aspects of the probate code presume that parents intend equal treatment of children unless there is independent evidence to the contrary. See sections 72-2-113 MCA and 91-403 RCM 1947.

In order to reform the deeds to comply with the actual amount of water available from the Robinson decreed right, the amount of flow rate conveyed must be reduced. Duncans argue that

the reduction should come at the expense of a single claimant. The other claimants suggest a more equal treatment.

The Master was required to determine the intent of the grantor in 1938 so far as that intent was ascertainable. Statutory and common law guidelines were used to help determine that intent, but in the final analysis, after 53 years, the Master had to make an educated guess. Courts must do the best they can with what they have to work with. Allen v. Petrick, 69 Mont. 373, 375, 222 P. 451 (1924).

Out of several possible interpretations, the claimants offered three options to solve the problem. The Master was obligated to choose the best alternative to bring this matter to a close. He determined that an equal reduction for all claimants was more in line with the apparent intent of the grantor. A reasonable mind can accept the available evidence of intent as being adequate to support that conclusion.

Prescriptive Use and Adverse Possession

Duncan and Moss argue that the Water Master should have found a prescriptive right to 22 inches. They argue that an extra 22 inches has been distributed by a water commissioner since 1938 and that all water users with priority dates after June 15, 1872 have been deprived of some portion of their water right, that their rights were adversely possessed as a portion of the 22 inches.

There is a question as to whether the doctrine of prescriptive use is even available for the claimants to argue. In Woodward v. Perkins, 116 Mont. 46, 54, 147 P.2d 1016 (1944), the Montana Supreme Court stated that water users, whose predecessors were a party to a previous decree, are estopped from claiming any

right by prescription against any of the rights established by a previous decree.

The reasons such a conclusion might be applicable here are found within paragraphs X and XIII of the 1909 Decree. Paragraph X forever enjoins and restrains all parties and their successors, employees, agents and attorneys "from interfering in any manner with the rights of the parties to that action. . . ." To do so is a contempt of Court according to paragraph XIII. We need not decide whether such estoppel applies here because the elements of prescriptive use were not proved.

One claiming rights by adverse possession has the burden of proving every element of the claim: continuous, exclusive (uninterrupted, peaceable), open (notorious), under claim of right (color of title) and an invasion of another's rights which he has a chance to prevent and no doubtful inference will suffice. See Smith v. Duff, 39 Mont. 374, 378, 102 P. 981 (1909) and Smith v. Krutar, 153 Mont. 325, 329, 330, 457 P.2d 459 (1969). In Irion v. Hyde, 107 Mont. 84, 91, 81 P.2d 353, 357 (1938), our Court stated:

> The rule adhered to in this state is that, "No adverse user can be initiated until the owners of the superior right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded. (Boehler v. Boyer, supra.) [72 Mont. 472, 477]. The natural and necessary corollary to that rule is that, "Proof of the mere use of the water during the statutory period is not sufficient."

The claimants presented no proof that any actual identified water users were deprived of their rights by claimants' use of an extra 22 inches. They argue such proof was unnecessary because the insertion of an additional 22 inches into the ladder of

priority in the West Gallatin decree naturally bumps some unidentified water user or users by 22 inches.

Claimants only proved the mere use of the extra 22 inches. They did not prove anyone was deprived of the benefit of their water right in such a substantial manner as to notify them that their rights were being invaded.

The extra 22 inches was not diverted at one location. A little over seven inches was diverted for Charlie Allsop's section 16 land and a fraction over 14 inches was diverted for Elmer and Roy Allsop's land in section 29, a distance of ten river miles according to the testimony. Over 97,000 miner's inches were decreed in the 1909 West Gallatin decree.[4] The flows of the West Gallatin historically have varied from a maximum of 6800 c.f.s. (272,000 miner's inches) in 1892 to a minimum of 117 c.f.s. (4,680 miner's inches) in 1935.[5]

A gradual enlargement of a water right on a stream with a large fluctuation of flow rate places a burden on prescriptive use claimants to establish that a prescriptive right has been acquired by clear proof. Morris v. Bean, 146 Fed. 423, 433 (1906), affirmed, Bean v. Morris, 159 Fed. 651, 86 C.C.A. 519 (1908), 221 U.S. 485. The diversion of an extra 7-plus or 14-plus inches of water from the West Gallatin is so small that its absence would not likely be noticed by subsequent and superior water users to be anything but the natural and seasonal variation of stream flow. Clear proof of prescriptive use was not provided.

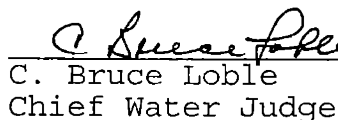
[4] The Court has the authority to take judicial notice of facts established in related prior litigation. Peschel v. Jones, 232 Mont. 516, 522, 760 P.2d 51 (1988).

[5] Gallatin County Water Resources Survey, page 16.

Conclusion

Applying the three-part test from DeSaye, the Court finds substantial evidence to support the Master's findings on deeds and prescriptive use. The Master did not misapprehend the effect of the evidence and the Court is not left with the definite and firm conviction that a mistake has been committed. After careful consideration of the arguments and the evidence, the Master's Report is adopted in whole.

DATED this 17 day of November, 1997.



C. Bruce Loble
Chief Water Judge

Harvey J. & Viola M. Moss
921 Thorpe Road
Belgrade, MT 59714

Michael Cok, Attorney
P.O. Box 1105
Bozeman, MT 59771-1105

S. John Smith
PO Box 1008
Three Forks MT 59714

Sherman B. & Grace R. Smith
Smith Land Co.
4849 Blackwood Rd
Bozeman MT 59715

Richard E. and Susan J. Duncan
1050 Thorpe Road
Belgrade, MT 59714

Matthew Williams, Attorney
506 E. Babcock
Bozeman, MT 59715

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
* * * * * * * * * * * * * * * * * * * *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE GALLATIN RIVER DRAINAGE AREA INCLUDING ALL TRIBUTARIES OF THE GALLATIN RIVER IN GALLATIN, PARK AND MADISON COUNTIES, MONTANA.

CASE NO. 41H-116

FILED
MAR 7 1991
Montana Water Court

COURT'S MEMORANDUM

STATEMENT OF FACTS

The underlying facts involved in Water Court Case No. 41H-116 are not in dispute. Pursuant to Senate Bill 76 requirements, all the claimants in this proceeding filed claims for existing water rights on the West Gallatin River, Gallatin County, Montana. These claims are located within Basin 41H, the Gallatin River Basin.

All the claims were assigned claim numbers and included in the Basin 41H Temporary Preliminary Decree. Each claim in this matter was based on a previously decreed water right. From the face of the filings, and from the documentation submitted with the Statements of Claim, each claimant based their filing on a water right decreed to one John Robinson in Cause No. 3850, Gallatin County, dated October 7, 1909. Within Cause 3850 John Robinson was decreed the right to use 44 miner's inches of the West Gallatin River, with a priority date of June 15, 1872. It is from this June 15, 1872 right that the parties assert their claims for existing water rights under Senate Bill 76.

The sum total of the filings made by the claimants based on the June 15, 1872 decreed right is 66 miner's inches. As a result, these claims were called in On Motion of the Montana Water Court to address the decree exceeded issue.

The claimants in this case derive their "chain of title" as follows. Cause No. 3850, Bell v. Armstrong, decreed certain waters of the West Gallatin River to John Robinson. Judgment in Cause No. 3850 was entered on October 7, 1909. On October 9, 1937, John Robinson conveyed to Ezra Allsop various lands and water rights decreed in Cause 3850. Of importance to this action is the conveyance of the right to the use of 44 miner's inches of the West Gallatin River with a priority date of June 15, 1872.

By quitclaim deeds executed on March 1, 1938, Ezra Allsop conveyed to three of his sons various lands and water rights. From the face of the deeds the conveyances were for "love and affection". By these deeds Ezra Allsop purportedly conveyed to each of the three sons' 22 miner's inches of West Gallatin River water rights with a priority date of June 15, 1872.

On December 31, 1953, these deeds were recorded in the following order:

1. quitclaim deed to E. E. Allsop.
2. quitclaim deed to C. W. Allsop.
3. quitclaim deed to R. A. Allsop.

The claimants Harvey J. and Viola M. Moss are the successors in interest to E. E. Allsop. The claimants Sherman J. Smith and Sherman B. and Grace R. Smith are successors in interest to C. W. Allsop. The claimants Richard E. and Susan J. Duncan are the successors in interest to R. A. Allsop.

ISSUES PRESENTED

I. Whether Ezra Allsop made a valid conveyance of the June 15, 1872 water right upon which all claimants base their Senate Bill 76 filings.

II. Whether the recording statutes control this case and preclude recognition and adjudication of any water right conveyed by Ezra Allsop.

III. Whether the June 15, 1872 water right previously decreed to John Robinson is an inseparable appurtenance to certain lands in Section 29, Township 01 North, Range 04 East, Gallatin County.

IV. Whether each of the claimants have acquired by prescription the right to each use 22 miner's inches of West Gallatin water with a priority date of June 15, 1872.

DISCUSSION

I. EZRA ALLSOP MADE A VALID GIFT OF THE JUNE 15, 1872 WATER RIGHT TO HIS THREE SONS, C. W., E. E., AND R. A. ALLSOP.

The transfers of property by quitclaim deed from Ezra Allsop to his three sons based upon "love and affection" should be construed as a valid gift. From the face of the quitclaim deeds, and the subsequent activities, it appears as though the essential elements of a valid gift have occurred. Baird v.

Baird, 125 Mont. 122, 138, 232 P.2d 348(1951). Also, as pointed out by counsel, transfers between parents and children are presumed to be gifts. Detra v. Bartoletti, 150 Mont. 210, 217, 433 P.2d 485(1967).

No indication of the order of conveyance from Ezra Allsop to his sons is apparent from the face of the deeds, or any other evidence before the Court. It is hornbook law that a transferor by quitclaim deed can only transfer his interest to a transferee. In this case Ezra Allsop owned the right to use 44 miner's inches of the West Gallatin River with a priority date of June 15, 1872. This is the extent and limit of any interest Ezra Allsop could transfer to the three sons.

In construing deeds the intent of the grantor must be sought from consideration of the entire instrument(s). See City of Missoula v. Mix, 123 Mont. 365, 214 P.2d 212(1950); Henningsen v. Stromberg, 124 Mont. 185, 221 P.2d 438(1950). From the face of the quitclaim deeds it is apparent that Ezra Allsop intended to convey to each son a portion of the June 15, 1872 water right. This construction is supported by the fact that Ezra Allsop conveyed to his sons, in addition to the June 15, 1872 water right, his 145 miner's inches right with a priority date of June 15, 1865. The 1865 water right was essentially divided three ways. No overconveyance occurred with the 1865 water right.

In analyzing the overconveyance of the June 15, 1872 water right it appears as though Ezra Allsop made a mistake in calculating the amount of water he could convey to each son. By

attempting to convey 22 miner's inches to each son it is reasonable to conclude that Ezra Allsop intended each son to have an equal portion of the June 15, 1872 water right. This interpretation is consistent with how the above-referenced 1865 water right was split.

Since the June 15, 1872 water right was limited to 44 miner's inches, this was the amount which Ezra Allsop could gift to his three sons. As mentioned above, this 44 miner's inches appears to have been intended to be split equally among the three sons. Ezra Allsop simply made a mistake in the amount of water he could convey to his three sons.

II. THE RECORDING ACTS DO NOT CONTROL THE DISPOSITION OF THIS MATTER AS NONE OF THE PARTIES ARE WITHIN THE CLASS INTENDED TO BENEFIT FROM THE RECORDING STATUTES.

Certain parties have asserted that the recording acts apply to the recordation of the quitclaim deeds in 1953 to preclude recognition of other competing claims involved in this case. It is argued that E. E. and C. W. Allsop recorded their deeds prior to R. A. Allsop on December 31, 1953, and therefore the 44 miner's inches passes to the successors of E. E. and C. W. Allsop. This argument misapplies the recording statutes and their intended purpose.

Initially, recordation is a device to serve notice to subsequent purchasers of intervening interests, and does not convey title unless so intended. Blakely v. Kelstrup, 218 Mont. 304, 306, 708 P.2d 253(1983). In this case any conveyance of the June 15, 1872 water right from Ezra Allsop to his three sons occurred in some type of uncertain order on May 1, 1938.

The reason that none of the claimants may find refuge within the recording acts is that none can be said to have taken their interests without notice of other competing interest to the June 15, 1872 water right. From the time of recordation, all subsequent parties are on constructive notice of the contents of the recorded instruments. _See_ Mont. Code Ann. section 70-21-302. In this case all successors to the three Allsop sons were on constructive notice of the overconveyance of the June 15, 1872 water right. _Tillotsen v. Frazier_, 199 Mont. 342, 350, 649 P.2d 744(1982). As a result, none of the claimants may be said to be good faith purchasers and accorded the protection of the recording statutes. _See_ Mont. Code Ann. section 70-21-304.

Furthermore, as donees under a gift neither C.W., E.E. or R. A. Allsop could be said to be bona fide or good faith purchasers. _See_ _Kelly V. Grainey_, 113 Mont. 520, 129 P.2d 619(1942). Therefore, protection under the recording acts is unavailable to the successors of the three sons to preclude competing claims made on the June 15, 1872 water right.

III. <u>NO EVIDENCE HAS BEEN OFFERED TO SHOW THAT THE JUNE 15, 1872 WATER RIGHT IS AN INSEPARABLE APPURTENANCE TO THE LANDS OWNED BY JOHN ROBINSON IN SECTION 29, TOWNSHIP 01 NORTH, RANGE 04 EAST, GALLATIN COUNTY</u>.

In the alternative, the Duncans have argued that the 44 miner's inches should pass to the Duncans' claim and the Moss' claim under an appurtenance theory. Duncans' Trial Brief, pg. 11. This position is crabbed given the facts of this case and Montana law.

In Montana a water right is not an inseparable appurtenance and may be disposed of apart from the the land upon which it has been used. Brennan et al. v. Jones et al., 101 Mont. 550, 567, 55 P.2d 697(1936). In this case the owner of the June 15, 1972 water right, Ezra Allsop, conveyed to his son C. W. Allsop a portion of the 1872 water right, a portion of an 1865 water right, and certain lands in Section 16, Township 02 South, Range 05 East, Gallatin County, along with shares in the West Gallatin and Farmer's Canal Companies. This is strong evidence of an intent by Ezra Allsop to sever a portion of the 1865 and 1872 water rights from lands owned by him in Section 29, Township 01 North, Range 04 East, Gallatin County.

No evidence has been introduced concerning injury, nor have any parties previously complained of the change in point of diversion or place of use of the C. W. Allsop portion of the 1872 water right. See R.C.M. 89-803(repealed 1973); Hanson v. Larson, 44 Mont. 350, 353, 120 P. 229(1911); Forrester v. Rock Island Oil & Refining, 133 Mont. 333, 323 P.2d 597(1958). As a result, the Duncans and the Moss's cannot be heard to divest the Smiths of a portion of the 1872 water under an appurtenance theory.

IV. THESE CLAIMANTS HAVE NOT ACQUIRED BY PRESCRIPTION THE RIGHT TO EACH USE 22 MINER'S INCHES OF THE WEST GALLATIN RIVER WITH A PRIORITY DATE OF JUNE 15, 1872.

All parties have taken the position that under Montana law, as it existed prior to 1973, each claimant should be decreed 22 miner's inches with a priority date of June 15, 1872. This

position is asserted under the doctrine of prescriptive use. While the arguments are compelling they are not in accordance with the law of prescriptive use.

The elements of acquiring a water right by prescriptive use are set forth in Smith v. Kruter, 153 Mont. 325, 457 P.2d 459(1969), quoting King v. Schultz, 141 Mont. 94, 375 P.2d 108(1962), as follows:

The use must be:

1. continuous for statutory period
2. exclusive (uninterrupted, peaceable)
3. open (notorious)
4. under claim of right or color of title
5. hostile (invasion of another's rights which he has a chance to present)

Smith, supra, at 330.

From the evidence and testimony produced at hearing it appears as though 66 miner's inches of West Gallatin water have been administered to the parties under a June 15, 1872 priority date. Water Commissioners have delivered the water to the lands described in the Temporary Preliminary Decree under this priority date.

Based upon the above it appears as though the elements of prescriptive use have been complied with. However, the Court does not agree with the claimants that they have acquired the right to use 66 miner's inches of water where only 44 miner's inches existed with a June 15, 1872 priority date. By simply delivering 66 miner's inches of water under a June 15, 1872 priority date, the Water Commissioner did not create an additional 22 miner's inches of June 15, 1872 water where only 44

miner's inches existed as a result of Cause No. 3850. No evidence has been offered to show that 22 miner's inches of additional West Gallatin River water has been used since June 15, 1872.

This analysis is supported by Montana case law on prescriptive use. In Forrester v. Rock Island Oil, supra, the District Court found that the defendant obtained the use of a certain water right by adverse use, and granted the previously decreed priority date. The Montana Supreme Court held that this was in error. A water right acquired by adverse possession should have a priority date of the time the right was possessed adversely. Id. at 602-603.

In this case no evidence has been presented that 66 miner's inches of June 15, 1872 water was used prior to the date of the overconveyance, May 1, 1938. Therefore, any claim to water in excess of 44 miner's inches based on a prescriptive right theory should have a priority date of May 1, 1938 at the earliest. Under the Forrester rationale this would be the date of priority for waters acquired by prescription.

CONCLUSION

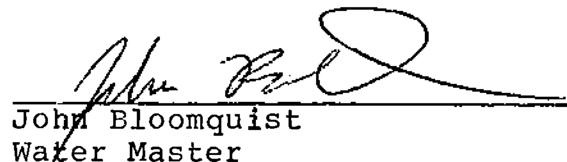
Ezra Allsop made a valid gift of his June 15, 1872 water right to each of his three sons. In making this gift Ezra Allsop made a mistake in the amount he could convey to each son by attempting to transfer 66 miner's inches where only 44 miner's inches existed. Evidence that a mistake was made is apparent from the face of the deeds.

Since a mistake had been made in the deeds, equity may intervene to reform the deeds. See Voyta v. Clonts, 134 Mont. 156, 328 P.2d 655(1958); Heckman and Shell v. Wilson, 158 Mont. 47, 487 P.2d 1141(1971). Since, from the face of the deeds, an equal portion of the 1872 water was conveyed to each son, the Court should find that Ezra Allsop conveyed to each son a one-third interest in the 1872 water right, or one-third of 44 miner's inches.

Also, it is clear that each party has used 22 miner's inches of water on their claimed places of use for irrigation. Therefore, the Court should decree to the parties a proportionate share of West Gallatin River water with a June 15, 1872 priority date based upon a decreed right, and also imply claims for the balance, up to the 22 miner's inches, with a May 1, 1938 priority date.

Neither the recording statutes nor the doctrine of appurtenance control the outcome of this matter. The parties should have a portion of their water with a June 15, 1872 priority date, and implied claims generated for the balance with a priority date of May 1, 1938.

DATED this 25th day of Febuary, 1991.



John Bloomquist
Water Master

FILED
MAR 7 1991
Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)

* * * * * * * * * * * * * * * * * * * *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE GALLATIN RIVER DRAINAGE AREA INCLUDING ALL TRIBUTARIES OF THE GALLATIN RIVER IN GALLATIN, PARK AND MADISON COUNTIES, MONTANA.	CASE NO. 41H-116 41H-W-009357-00 41H-W-031243-00 41H-W-101004-00 41H-W-125510-00

CLAIMANT: Harvey J. & Viola M. Moss, Sherman J. Smith, Sherman B. & Grace R. Smith, Richard E. & Susan J. Duncan

ON MOTION OF THE WATER COURT

OBJECTOR: Richard E. Duncan

MASTER'S REPORT

STATEMENT OF THE CASE

A hearing in the above entitled matter was held on October 18, 1990 before John Bloomquist, Water Master. Appearing for the claimants, Sherman J. Smith, and Sherman B. and Grace R. Smith, was Carol Brown, Attorney. Appearing for the claimants/objectors, Richard E. and Susan J. Duncan, was Matthew Williams, Attorney. Appearing for the claimants, Harvey J. and Viola M. Moss, was Michael Cok, Attorney.

The parties submitted stipulated facts and filed them with the Court on October 16, 1990. The hearing was held to receive any exhibits or testimonial evidence the parties wished to produce. Also, legal arguments were entertained by the Court on the issues presented in the case.

At hearing, all exhibits were admitted without

objection, and all testimony was received without objection. After hearing the Court ordered post-hearing briefs. Upon an extension of the deadline to file said briefs all parties filed post-hearing briefs as requested.

After careful consideration of the evidence offered at hearing and after review of the claim files, case file and briefs filed by the parties, and for the reasons set forth in the accompanying Memorandum, the Master makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Water right claim number 41H-W-009357-00 was filed by Harvey J. and Viola M. Moss. Water right claim number 41H-W-101004-00 was filed by Richard E. and Susan J. Duncan. Water right claim number 41H-W-031243-00 was filed by Sherman B. and Grace R. Smith. Water right claim number 41H-W-125510-00 was filed by Sherman J. Smith. All the above referenced water right claims were filed for irrigation purposes.

2. All these claims have been called in On Motion of the Montana Water Court due to a decree exceeded remark which appears on the Temporary Preliminary Decree abstracts for each of the claims.

3. Richard E. Duncan filed an objection to claim 41H-W-101004-00 concerning place of use and acres irrigated.

4. After review of the claim files, the Master finds that each of these claims is based on a previously decreed water right. Cause No. 3850, Gallatin County, decreed to John Robinson on October 7, 1909, the right to the use of 44 miner's inches of

West Gallatin River water with a priority date of June 15, 1872.

5. After review of the claim files, and the Temporary Preliminary Decree for Basin 41H, the Master finds that the decree exceeded remark contained in the abstracts to these claims occurs as follows:

Water Right Claim No.	Claimant	Flow Rate
41H-W-009357-00	Harvey & Viola Moss	0.55 CFS (22 Miner's Inches)
41H-W-101004-00	Richard & Susan Duncan	0.55 CFS (22 Miner's Inches)
41H-W-031243-00	Sherman B. & Grace Smith	0.28 CFS (11 Miner's Inches)
41H-W-125510-00	Sherman J. Smith	0.28 CFS (11 Miner's Inches)
	Total Claimed:	66 Miner's Inches
Total Decreed to John Robinson, Cause 3850:		44 Miner's Inches

6. The claimants' chain of title to the previously decreed water right is derived as follows:

a. Cause 3850, Bell v. Armstrong, decreed on October 7, 1909, to John Robinson the right to use 44 miner's inches of the West Gallatin River, priority date June 15, 1872.

b. October 9, 1937. John Robinson conveyed to Ezra Allsop certain lands located in Section 29, Township 01 North, Ranch 04 East, along with various water rights, including the 44 miner's inches June 15, 1872 right.

c. May 1, 1938. Ezra Allsop quitclaimed to three of his sons various lands and water rights for "love and affection".

1. To C. W. Allsop - Land in Section 16, Township 02 South, Range 05 East; 49 miner's inches June 15, 1865 water right decreed to John Robinson, cause 3850; 22 miner's inches June 15, 1872 water right decreed to John Robinson, Cause 3850; shares West Gallatin Canal Company and Farmer's Canal Company.

2. To E. E. Allsop - Land in Section 29, Township 01 North, Range 04 East; Land in Section 20, Township 02 South, Range 05 East; 48 miner's inches June 15, 1865 water right decreed to John Robinson, Cause 3850; 22 miner's inches June 15, 1872 water right decreed to John Robinson, Cause 3850; shares West Gallatin Canal Company.

3. To R. A. Allsop - Lands in Section 29, Township 01 North, Range 04 East; 48 miner's inches June 15, 1865 water right decreed to John Robinson, Cause 3850; 22 miner's inches June 15, 1872 water right decreed to John Robinson, Cause 3850; 44 miner's inches June 15, 1888 water right decreed to John Robinson, Cause 3850.

d. Harvey and Viola Moss are successors in interest to E. E. Allsop. Sherman J. Smith, and Sherman B. and Grace Smith are successors in interest to C. W. Allsop. Richard and Susan Duncan are successors in interest to R. A. Allsop.

7. After review of the evidence before the Court, the Master finds that Ezra Allsop made a valid gift to his sons C. W. Allsop, E. E. Allsop and R. A. Allsop of the water right for 44 miner's inches with a June 15, 1872 priority date, by the quitclaim deeds dated May 1, 1938.

8. From the face of the deeds the Master finds that Ezra Allsop intended to convey to each son an equal portion of the June 15, 1872 water right.

9. Based on the facts and evidence before the Court, the Master finds that Ezra Allsop made a mistake in conveying 66 miner's inches of the June 15, 1872 water right. Ezra Allsop owned the right to use 44 miner's inches under a June 15, 1872 priority date.

10. The quitclaim deeds executed by Ezra Allsop which conveyed the June 15, 1872 water right were recorded by the sons on December 31, 1953 as follows:

a. E. E. Allsop - 11:15 AM

b. C. W. Allsop - 11:17 AM

c. R. A. Allsop - 11:20 AM

11. From the face of the deeds the Master finds that any title to the June 15, 1872 water right was conveyed on May 1, 1938, the date Ezra Allsop quitclaimed to his sons the 44 miner's inches water right.

12. From the facts of this case, the Master finds that any successors in interest to the three Allsop sons was on constructive notice of the overconveyance of the June 15, 1872 water right from the time of recordation.

13. The Master finds that a portion of the June 15, 1872 water right was severed from the lands to which the water was originally used in Section 29, Township 01 North, Range 04 East. By conveying a portion of the June 15, 1872 water right along with lands in Section 16, Township 02 South, Range 05 East, to C. W. Allsop, Ezra Allsop severed a portion of the June 15, 1872 water right from lands upon which it was originally used.

14. The Master finds that no evidence has been submitted concerning any injury in changing the point of diversion or place of use of the C. W. Allsop portion of the June 15, 1872 water right referred to in Finding of Fact number 13.

15. Based on the testimony offered at hearing, the Master finds that 66 miner's inches of West Gallatin River water has been administered by water commissioners in the past under the June 15, 1872 priority date on the lands of the present day claimants and their predecessors.

16. The Master finds that no evidence has been offered to show that more than 44 miner's inches of West Gallatin River water was administered or used under the June 15, 1872 priority date prior to the date of the conveyances from Ezra Allsop to his sons. Said conveyance occurred on May 1, 1938.

17. Based on Findings of Fact number 15 and 16 above, the Master finds that the claimants have each used their proportionate share of the 44 miner's inches, June 15, 1872, water right on the lands described in the Temporary Preliminary Decree. Furthermore, the Master finds that the claimants or their predecessors have each used a proportionate share of West Gallatin River water up to an additional 22 miner's inches as of May 1, 1938.

18. Because a mistake was made in the conveyances dated May 1, 1938 from Ezra Allsop to his sons concerning the 44 miner's inches, June 15, 1872 water right, and because the evidence presented to the Court indicates that 66 miner's inches of West Gallatin River water has been used by the claimants and their predecessors, the Master finds that the flow rates associated with these claims should be decreed as follows:

Water Right Claim No.	Flow Rate	Priority Date
41H-W-009357-00	0.367 CFS (14.67 Miner's Inches)	June 15, 1872
41H-W-101004-00	0.367 CFS (14.67 Miner's Inches)	June 15, 1872
41H-W-031243-00	0.183 CFS (7.33 Miner's Inches)	June 15, 1872
41H-W-125510-00	0.183 CFS (7.33 Miner's Inches)	June 15, 1872

19. The Master finds that implied claims should be generated based on use rights or prescriptive use as follows:

Claimant(s)	Flow Rate	Priority Date
Harvey & Viola Moss	0.183 CFS (7.33 Miner's Inches)	May 1, 1938
Richard & Susan Duncan	0.183 CFS (7.33 Miner's Inches)	May 1, 1938
Sherman B. & Grace Smith	0.092 CFS (3.67 Miner's Inches)	May 1, 1938
Sherman J. Smith	0.092 CFS (3.67 Miner's Inches)	May 1, 1938

20. The Master finds that the above-mentioned implied claims should be decreed with points of diversion and places of use identical to the base claims from which they are generated.

21. From the evidence and testimony offered at hearing the Master finds that the acres irrigated and place of use for claim number 41H-W-101004-00 should be changed to add the following parcels:

ACRES	QTR.SEC.	SEC.	TWP.	RGE.	COUNTY
0.16	NWSENE	29	01N	04E	GALLATIN
7.33	SWSENE	29	01N	04E	GALLATIN
6.24	SESWNE	29	01N	04E	GALLATIN
2.18	NESWNE	29	01N	04E	GALLATIN

The maximum acres and total acres should be increased by 15.91 acres.

22. The Master finds that all the water right claims included in this case are direct flow irrigation claims.

CONCLUSIONS OF LAW

I.

The Montana Water Court has jurisdiction to review all

objections to temporary preliminary decrees pursuant to Mont. Code Ann. section 85-2-233.

II.

The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider a matter within the Court's jurisdiction on its own motion. Mont. Code Ann. section 3-7-224.

III.

The Chief Water Judge has the powers of a District Judge. Mont. Code Ann. section 3-7-224(3). A District Judge has equitable powers in civil matters. A Water Master has the general powers of a Master under Rule 53(c), M.R.Civ.P. _See_ Mont. Code Ann. section 3-7-311(i). By order of reference the Chief Water Judge confers upon the Water Master the power necessary to perform their duties. Therefore, a Water Master may exercise equitable powers in adjudicating existing water rights.

IV.

The quitclaim deeds executed by Ezra Allsop to his sons C. W. Allsop, E. E. Allsop, and R. A. Allsop were valid gifts to each son of a portion of the June 15, 1872 water right for 44 miner's inches of the West Gallatin River. _See_ _Baird v. Baird_, 125 Mont. 122, 232 P.2d 348(1954); _Detra v. Bartoletti_, 150 Mont. 210, 433 P.2d 485(1967).

V.

On October 9, 1937, Ezra Allsop acquired 44 miner's inches of June 15, 1872 West Gallatin River water rights from John Robinson. This is the limit and extent of the June 15, 1872 water right he could gift to his three sons by quitclaim deed.

VI.

From the face of the quitclaim deeds it is apparent that Ezra Allsop intended to convey to C. W., R. A., and E. E. Allsop an equal portion of the June 15, 1872 water right. See City of Missoula v. Mix, 123 Mont. 365, 214 P.2d 212(1950); Henningsen v. Stromberg, 124 Mont. 185, 221 P.2d 438(1950).

VII.

In analyzing the overconveyance of the June 15, 1872 water right it is reasonable to conclude that Ezra Allsop made a mistake in the amount of the property interest he could convey. Therefore, because a mistake has been made equity may intervene. See Voyta v. Clonts, 134 Mont. 156, 328 P.2d 655(1958); Heckman and Shell v. Wilson, 158 Mont. 47, 487 P.2d 1141(1971).

VIII.

From the face of the deeds, and from analysis of the surrounding circumstances, Ezra Allsop intended to convey to each son a one-third (1/3) interest in the 44 miner's inches West Gallatin River water right with the June 15, 1872 priority date.

Therefore, on May 1, 1938 Ezra Allsop was able to gift to each son 14.67 miner's inches (0.367 CFS) of June 15, 1872 water rights.

IX.

As a result of conveyances made by C. W., R. A. and E. E. Allsop, the various one-third interests in the June 15, 1872 water right presently are owned as follows:

1. Harvey & Viola Moss - 1/3 of 44 miner's inches = 14.67
2. Richard & Susan Duncan - 1/3 of 44 miner's inches = 14.67

3. Sherman B. & Grace Smith - 1/6 of 44 miner's inches = 7.33

4. Sherman J. Smith - 1/6 of 44 miner's inches = 7.33

X.

The Montana recording statutes do not control the adjudication and disposition of the June 15, 1872 water right. Donees under a gift are not said to be bona fide or good faith purchasers accorded protection under the recording act. See Kelly v. Grainey, 113 Mont. 520, 129 P.2d 619(1942); Mont. Code Ann. section 70-21-304.

Furthermore, by recording the quitclaim deeds on December 31, 1953, all successors in interest to C. W., R. A., and E. E. Allsop were on constructive notice of the overconveyance of the June 15, 1872 water right. See Mont. Code Ann. section 70-21-302.

XI.

In Montana a water right is not an inseparable appurtenance and may be disposed of separately. See Brennan et al. v. Jones et al., 101 Mont. 550, 55 P.2d 697(1936). By conveying a portion of the June 15, 1872 water right to C. W. Allsop along with certain lands, Ezra Allsop severed a portion of the June 15, 1872 water right from lands in Section 29, Township 01 North, Range 04 East.

No evidence of injury has been presented by the above-mentioned severence. See R.C.M. 89-803 (repealed 1973); Hanson v. Larson, 44 Mont. 350, 120 P. 229(1911).

XII.

66 miner's inches of West Gallatin River water has

historically been used by the claimants and their predecessors for irrigation. 44 miner's inches of June 15, 1872 decreed water has been used by the parties and their predecessors.

22 miner's inches of West Gallatin River water has been used since May 1, 1938 by the parties and their predecessors. Therefore, the claimants in this case are successors to their proportionate share of the 44 miner's inches of June 15, 1872 water right, and to 22 miner's inches of water as of May 1, 1938 by prescription. See Forrester v. Rock Island Oil, 133 Mont. 333, 323 P.2d 597(1958).

XIII.

The flow rate for these claims shall appear in the Preliminary Decree for Basin 41H as follows:

Claim Number	Flow Rate
41H-W-009357-00	0.37 CFS
41H-W-101004-00	0.37 CFS
41H-W-031243-00	0.19 CFS
41H-W-125510-00	0.19 CFS

XIV.

Implied claims shall be generated from the above referenced base claims as follows:

Owner	Base Claim	Flow Rate	Priority Date
Harvey & Viola Moss	41H-W-009357-00	0.19 CFS	May 1, 1938
Richard & Susan Duncan	41H-W-101004-00	0.19 CFS	May 1, 1938
Sherman B. & Grace Smith	41H-W-031243-00	0.10 CFS	May 1, 1938
Sherman J. Smith	41H-W-125510-00	0.10 CFS	May 1, 1938

The above referenced implied claims shall be identical to the base claims concerning points of diversion, acres irrigated and places of use. A supplemental rights remark shall be added to the base and implied claims.

XV.

The place of use and acres irrigated for water right claim number 41H-W-101004-00 shall be changed to add the following parcels:

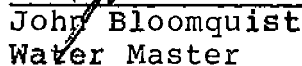
	ACRES	QTR.SEC.	SEC.	TWP.	RGE.	COUNTY
007	0.16	NWSENE	29	01N	04E	GALLATIN
008	7.33	SWSENE	29	01N	04E	GALLATIN
009	6.24	SESWNE	29	01N	04E	GALLATIN
010	2.18	NESWNE	29	01N	04E	GALLATIN
	76.41	Total				

The maximum acres shall be changed to 76.41 acres.

XVI.

The volume quantification for these direct flow irrigation claims shall be removed as specified in Mont. Code Ann. section 85-2-234(6)(b).

DATED this 25th day of February, 1991.



John Bloomquist
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.

Harvey J. & Viola M. Moss
921 Thorpe Road
Belgrade, MT 59714

Richard E. & Susan J. Duncan
1050 Thorpe Road
Belgrade, MT 59714

Michael Cok, Attorney
P. O. Box 1105
Bozeman, MT 59771-1105

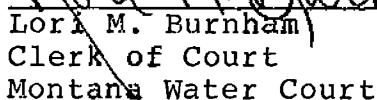
Matthew Williams, Attorney
506 East Babcock
Bozeman, MT 59715

S. John Smith
P. O. Box 1008
Three Forks, MT 59752

Sherman B. & Grace R. Smith
4849 Blackwood Road
Bozeman, MT 59715

Carol Brown, Attorney
2770 Outlaw Drive
Belgrade, MT 59714

DATED this 7th day of March, 1991.



Lori M. Burnham
Clerk of Court
Montana Water Court