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FILED

AUG 07 2013

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
TETON RIVER BASIN (410)

CLAIMANT: Eldorado Co-op Canal Co.

OBJECTORS: Lower Teton Joint Objectors; Farmers Cooperative
Canal Co.; Eldorado Co-op Canal Co.

NOIA: Teton Coop Reservoir Co.; Farmers Cooperative Canal Co.

INTERVENER: Patrick Saylor

410-129
410 113467-00
410 113468-00
410 113469-00
410 113470-00
410 113472-00
410 113473-00
410 113474-00
410 113475-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court on the above stamped date. Please read this Report carefully.

If you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report, you may file a written objection to the Report within **30 days** from the above stamped date. (Rule 23, Water Right Adjudication Rules.) If you file an objection, you must also mail a copy of the objection to all parties on the Service List found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

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Master's Exhibit A

MASTER'S REPORT 41O-129

PROCEDURAL HISTORY

Water Court case 41O-129 includes eight claims owned by the Eldorado Co-op Canal Company (Eldorado). The eight claims represent four different historical water rights decreed in *Perry v. Beattie*, Case No. 371, Teton County (1908) (*Perry v. Beattie*). During the initial filing with the Montana Department of Natural Resources and Conservation (DNRC), the four irrigation claims were combined as claim 41O-Z-113471-00. The four stock claims were combined as claim 41O-Z-113466-00. During DNRC claim examination, the claims were separated into individual stock and irrigation claims reflecting Eldorado's interest in the four different decreed water rights. Four separate irrigation claims and four corresponding stock claims, with individual claim numbers, appeared in the Temporary Preliminary Decree for this Basin.

The various claims received objections from Eldorado, C Hanging L Ranch, Farmers Co-op Canal Company (Farmers), and the Lower Teton Joint Objectors and Monte Giese (LTJO). Notices of Intent to Appear were filed by C Hanging L Ranch, Farmers, and Teton Co-op Reservoir Company (TCRC). Patrick Saylor moved for and was granted intervention on all eight claims.

The C Hanging L Ranch objections and appearances were unconditionally withdrawn during the settlement period. On December 2, 2009, these objections and appearances were dismissed, and C Hanging L Ranch was removed from the case.

On November 16, 2009, Farmers withdrew its objections and appearances contingent upon the Water Court accepting the terms of an agreement between Farmers, Eldorado, and the Miller Colony (*See Case 41O-130*). A copy of the agreement was attached to this filing. The terms of the agreement are addressed below. Farmers remained in the case but took no further part in proceedings.

Cross motions for summary judgment filed by Eldorado and LTJO were denied by the Master on August 9, 2011. Objections to this ruling were reviewed by the Chief Water Judge. On December 28, 2011, the Chief Water Judge dismissed the objections to the Master's Summary Judgment ruling and recommitted the case to the Master for further proceedings.

One of the issues addressed in this case was Eldorado's claimed use of the Bateman Ditch. Issues regarding use of the ditch are currently before the Ninth Judicial District Court in Cause No. DV-11-009. On December 13, 2012, the District Court, pursuant to Section 85-2-406, MCA, entered its Order certifying the issue of historical use of the Bateman Ditch to the Water Court. This certification is addressed in Water Court case WC-2012-07. A February 4, 2013, Master's Report issued in this case addressed use of the Bateman Ditch by Eldorado. On June 5, 2013, the Water Court issued its Order Amending Master's Report and Adopting as Amended. Therefore, use of the Bateman Ditch has been addressed and is not discussed in this report.

Hearing in case 41O-129 was held June 18-21, 2012, in Choteau, Montana, before this Water Master. Following hearing, Eldorado, Saylor, LTJO, and TCRC filed proposed findings of fact, conclusions of law, and briefs on legal issues. All parties were also given the opportunity to file response briefs. The case was fully submitted on October 15, 2012. However, a Master's Report was delayed pending hearings in related cases 41O-84 (TCRC), 41O-118 (Farmers), and 41O-132 (Teton Co-op Canal Company). The final hearing, in case 41O-84, took place in December 2012.

This Master's Report is long and complicated. The findings of fact and conclusions of law are on occasion integrated in an attempt to make the report more understandable. Any item which might properly be called a finding of fact should be considered as a finding of fact. Any item which might properly be called a conclusion of law should be treated as a conclusion of law.

The exhibits entered into evidence are numerous and in some cases difficult to read. Several parties submitted a copy of the same document as an exhibit. In reviewing the exhibits, this Master concluded LTJO's organization of exhibits and the use of Bates stamp numbering made them the easiest to reference. As a result, this report cites primarily to the LTJO exhibits. The reference to a page number in an exhibit will be the Bates stamp number unless there are no bates stamps on that exhibit. In that case the page number of the exhibit itself is used as necessary.

All exhibits were exchanged prior to hearing. Following this exchange, the parties filed objections to exhibits. By agreement, all exhibits that did not receive objections are

a part of the record, even if they were not used at hearing. Objections to specific exhibits were addressed at hearing as those exhibits were offered into evidence. If the objection to an exhibit was not renewed at hearing and the exhibit was used at hearing, the exhibit is deemed admitted.

EVIDENTIARY ISSUES

LTJO and TCRC renewed objections to certain exhibits and witness testimony in its post-hearing filings:

a. Eldorado-14 (1914 General Land Office letter) LTJO filed prehearing objections to this exhibit. In its proposed findings, LTJO asserted its prehearing objections to this exhibit were never addressed and therefore the exhibit should not be part of the record. At hearing, the exhibit was referenced in testimony from LTJO expert Monte Giese and Eldorado expert John Westenberg. LTJO did object to Mr. Westenberg's testimony at the time he was addressing this exhibit. However, the objection was that Eldorado failed to identify the exhibit as a document Mr. Westenberg would rely on in his testimony. LTJO did not object to the exhibit itself. In fact, counsel for LTJO made the point at that time that the exhibit was in evidence, it speaks for itself, and does not require expert interpretation. (3:20, Day 3)

Although both Eldorado and LTJO used the document at hearing, it was never formally offered into evidence. This appears to be an oversight on the part of Eldorado. At the same time, stipulated procedure in this case was for the party who filed a prehearing objection to an exhibit to renew that objection when the exhibit was brought up in testimony. It is apparent counsel for Eldorado assumed the document was in evidence because there was no objection at hearing to the exhibit itself. It is apparent counsel for LTJO made the same assumption. Under the circumstances, Exhibit Eldorado-14 was made a part of the record at hearing and will be reviewed for this report.

b. John Westenberg Testimony LTJO and TCRC argued at hearing and in post-hearing filings that the nature and basis for Mr. Westenberg's testimony had not been properly disclosed through discovery and he testified on a number of matters that were beyond his expertise. They argue that significant portions of that testimony should be stricken from the record. In particular, the objectors assert any Westenberg testimony

offering opinions on Desert Land Act documents or on the issue of the duty of water should be stricken.

Both Eldorado and LTJO provided portions of discovery requests and answers to address the disclosure issue. Upon review of these documents, it is apparent that the nature of Westenberg's testimony was adequately disclosed. If there was a problem it was that Mr. Westenberg continued his review up until the day of hearing and continued to formulate his opinions. As a result, the subject matter he would discuss was disclosed but his final opinions were not disclosed.

Mr. Westenberg's testimony on Desert Land Act documents was limited and is of little value in this report. As counsel for LTJO stated, the documents speak for themselves. The same is true for Westenberg's testimony on the duty of water. His testimony was brief and is of limited value. The testimony was properly admitted into evidence and will be given the weight and credibility it deserves.

c. Eldorado-53gg (Map of Eldorado Place of Use) At hearing, Mr. Westenberg used a copy of Exhibit Eldorado-53g to redraw the area which in his opinion should be included in the Eldorado place of use. This new exhibit was marked as Eldorado-53gg and was accepted into evidence. The objectors argue this exhibit constitutes a new opinion by Mr. Westenberg that was not disclosed prior to hearing and should therefore be excluded from the record.

Witnesses often mark exhibits to clarify the location of headgates, ditches, and other aspects of water right claims. Eldorado-53gg is a step beyond marking an exhibit. The marking by Mr. Westenberg was extensive enough to warrant making a new exhibit to preserve the integrity of the original. Nonetheless, the Master finds the testimony and opinion reflected in Eldorado-53gg caused no undue prejudice to the objectors and was properly admitted into evidence at hearing.

As noted above, the number of exhibits submitted into evidence is extensive. While all exhibits were reviewed, not all exhibits are addressed in this report. The absence of any discussion of an exhibit indicates that it was not sufficiently relevant to use in this report.

FINDINGS OF FACT

I. Historical Background

1. The Teton River rises northwest of Choteau, Montana, on the Rocky Mountain Front. After leaving the mountains, the river travels generally east for several miles across a relatively flat valley. To the south, the land is undulating, making irrigation difficult. The 1962 Teton County Water Resource Survey shows a few ditches and limited private irrigation south of this stretch of the river. To the north, the land is relatively flat. There are more ditches and private irrigation along the north side of the river, although the amount of irrigation in close proximity to the river is still limited. About twenty miles from the mountains, the river reaches the Junction of U.S. Highway 89 and the Teton Canyon Road. At this point, the river turns southeast for several miles passing just south of Choteau. It then turns northeast and travels in this direction until it passes under Interstate 15 near Collins, Montana. The river then turns generally east and travels nearly one hundred miles to its confluence with the Marias River at Loma, Montana.

2. The headwaters of the Teton River and its tributaries are relatively small compared to its neighbors. Both the Sun River to the south and the Marias River to the north are larger rivers. Unlike its neighbors, the Teton River does not have an onstream reservoir capable of stabilizing late season flows. The river is subject to early season high flows caused by spring runoff and late season low flows as the snowpack is depleted. It is common for sections of the river to go completely dry by late summer. At the same time, the effect of large scale irrigation on river flows is undeniable, and is a factor in late season low river flows.

3. North of the river and generally east of Highway 89 lies the Burton Bench. The bench is very flat, sloping to the east and north. (Saylor-3) Early settlers identified the Burton Bench as prime farming land that would greatly benefit from irrigation. However, due to its distance from the Teton River, it was clear development would be expensive. As a result, several different private groups embarked on projects to develop ditch systems capable of servicing the Burton Bench and the surrounding area north of the Teton River. The earliest of these projects was the Eldorado Ditch Company,

predecessor to the Eldorado Co-op Canal Company. Eldorado was followed in succession by the Teton Co-op Canal Company (TCCC) and Farmers Co-op Canal Company. The final and most ambitious project was the Teton Co-op Reservoir Company. All four companies developed ditch systems capable of taking water from the Teton River and delivering it to the Burton Bench and surrounding area. Eldorado and Farmers both took advantage of a natural feature north of the river known as Ralston Gap. The Eldorado Canal and Farmers Canal both pass through the Ralston Gap and are able to service large portions of the Burton Bench. The TCCC canal has a point of diversion further down the river and is able to service only the southern-most portion of the Burton Bench. The Teton Co-op Reservoir Company canal is higher on the river. This canal takes water into the Bynum Reservoir and then north into the Muddy Creek drainage. Using Muddy Creek as a natural carrier, the TCRC ditch system services land north of the Burton Bench. In fact, the TCRC ditch system transports some water to the northeast completely out of the Teton River Basin. While there is some overlap in the land served by these companies, they all tend to have separate and distinct places of use. (Saylor-3)

4. Eldorado has historically been considered the most senior of the four companies, followed by TCCC, Farmers, and TCRC in that order. However, the actual priority dates for each company's water rights are at issue in this adjudication. The Eldorado system has no storage capability. It is a direct flow system that is completely reliant on available flows from the Teton River. Both Farmers and TCCC have limited storage capability and are able to use a combination of direct flow water and stored water. TCRC has a storage right for the Bynum Reservoir which is significantly larger than the other companies. TCRC relies almost completely on stored water during the irrigation season. In addition, Eldorado, Farmers, and TCCC all have agreements with private irrigators that allow these parties to receive their water rights through the various company canals. For example, the Miller Colony uses the Eldorado Canal for its Teton River water right. *See Water Court Case 41O-130.*

5. Eldorado claims a total of four irrigation and four stock claims from the Teton River. All claims are based on water rights that were decreed in *Perry v. Beattie*.

One claim was originally decreed to Eldorado.¹ The other three water rights were subsequently acquired by Eldorado. The claims are all diverted through the Eldorado Canal with a point of diversion located in the NWNWNW of Section 33, T25N, R6W, Teton County. All four irrigation claims appeared in the Temporary Preliminary Decree for this Basin with a claimed place of use totaling 31,905.00 acres and an annual limit on irrigated acres of 15,420.00 acres. Based on post hearing filings, Eldorado is currently claiming a 26,606.00 acre place of use.² The place of use for the stock claims is the same as the irrigation claims.

Claim Numbers/Purpose	Priority Date Original Appropriator	Flow Rate
41O 113475-00/Irrigation 41O 113470-00/Stock	May 17, 1883 Eldorado	75.00 cfs
41O 113472-00/Irrigation 41O 113467-00/Stock	December 31, 1876 Truchot	7.50 cfs
41O 113473-00/Irrigation 41O 113468-00/Stock	April 1, 1880 Dennis	5.00 cfs
41O 113474-00/Irrigation 41O 113469-00/Stock	December 31, 1882 Beattie	10.00 cfs

II. Claims 41O 113470-00 and 41O 113475-00

A. Eldorado Development 1883 to 1908

6. Most of the objections to Eldorado claims raise issues surrounding the early development of the company. This is generally specific to claims 41O 113470-00 and 41O 113475-00 which represent Eldorado's original May 17, 1883 Teton River water right. There are four points raised by these objections.

- a. Is Eldorado entitled to a May 17, 1883 priority date?
- b. Does the original Eldorado water right cover stock use?
- c. Do Eldorado claims require quantified volumes to facilitate future administration?

¹ Eldorado asserted this right in District Court on two occasions. In the first case, *Montana Land and Water Company v. Farmers Co-operative Canal Co. et al. Teton County*, June 10, 1901, the District Court did not decree specific priority dates but did find Eldorado has a senior right to 3,000 miner's inches of the Teton River as against all parties in that decree. (Eldorado-9) In the second case, *Perry v. Beattie*, Case No. 371, Teton County (1908), the District Court awarded Eldorado 3,000 miner's inches with the same May 17, 1883 priority date claimed in the original Notice of Water Right. (Eldorado-10) The *Perry v. Beattie* decree replaced *Montana Land and Water Company*. As a result *Montana Land and Water Company* is not referenced in this report.

² Master's Report Regarding the Bateman Ditch, Case 41O-129, February 4, 2013.

- d. How many irrigated acres can Eldorado claim under its earliest priority date?

Priority date, stock use, and volume are addressed in this part of this report. Place of use and acres irrigated are addressed for all claims in Section VI.

7. According to his profile in Progressive Men of Montana, Ira Myers organized Myers, Buck and Company in 1879; purchased 2,300 head of cattle in Oregon; and drove them to the “Teton country.” (LTJO-194) It seems likely that Daniel Buck was his partner in this endeavor. Four years later on May 19, 1883, Myers and Buck, along with Mathew Carroll, Alfred B. Hamilton, Samuel C. Burd, George Steell, and I. N. Hazlett, filed a document entitled “Notice of Water Right” with the County Clerk for Chouteau County, Montana. In 1883, the “Teton country” referred to in the profile was part of Chouteau County. Today it is part of Teton County. In 1883, the Montana Territory did not have statutory provisions for filing a water right notice of appropriation. Absent water right filing laws, the appropriators complied with existing mining law for mineral claim filing:

Notice is hereby given that we the undersigned having complied with the requirements of Chapter Six of Title Thirty two of the revised Statutes of the United States and the local laws rules regulations and customs of Miners have this day Located and appropriated a certain Water Right of 4,000 miners inches and being more particularly described as follows to wit: Being situated and taken out of the Teton River near or at the head of a slough which runs through what is known as the gap in a Northeastly course at which point a copy of this notice was posted the 17th day of May 1883. Said Water Right being surveyed and staked and is claimed for irrigation and Domestic purposes between Teton River and Mudey creek.”
(Eldorado-1, p 754)

This filing provided the source for the appropriation, the purpose, the name of the appropriators, the date of appropriation, and a description of the claim location using some natural or permanent monument. The affidavit portion of the filing was executed by Alfred B. Hamilton on behalf of all locators. The filing appears to comply with the requirements of Chapter Six of Title Thirty two of the revised Statutes of the United States. *Hammer v. Garfield Mining and Milling Company*, 130 U.S. 291, 9 S. Ct. 548 (1889).

8. On August 29, 1883, three months after filing the Notice of Water Right, all seven of the individuals listed as appropriators filed Articles of Incorporation for the Eldorado Ditch Company. The listed objectives of the company were:

“To build, purchase and maintain a ditch, or ditches from the Teton River, in the said County of Choteau, Mt, for irrigating, manufacturing and mining purposes, to acquire by appropriation or purchase all necessary water rights, and to sell water therefrom for any and all of said purposes, and to let, lease or use the same as to said Company may be most beneficial.” (Eldorado-2)

Capital stock of the company was set at \$60,000 with 1,200 shares worth \$50.00 each. The company commenced existence on September 1, 1883, and continued in existence for a period of twenty years. (Eldorado-2) Three months after this filing, on November 18, 1883, the original appropriators and several of their spouses (Susan Buck, Annie M. Steell, Susanna Burd, and Rosa Hazlett) conveyed the water right identified in the Notice of Water Right to the Eldorado Ditch Company. (Eldorado-1 p 753)

9. For the next twenty years, Eldorado shares were used extensively to acquire land under the 1877 Desert Land Act. The act allowed an entryman to acquire designated federal land by complying with certain requirements. The most significant requirement was to conduct water onto the land within three years of making first entry. The water used for this purpose must be based on a bona fide prior appropriation and was limited to the amount necessary for irrigation and reclamation. Acquiring water for this purpose through an existing ditch company was a logical way to acquire a Desert Land Act patent. In fact, acquiring land through the Desert Land Act was the major factor in the formation of the Eldorado Ditch Company. Between 1884 and 1902, nearly all of the land within the Eldorado place of use was transferred from the U.S government to private individuals. The great majority of this land was acquired through the Desert Land Act. (LTJO-291)

10. Of the seven original principals in Eldorado, it appears only Daniel Buck and Ira Myers acquired Eldorado stock and land through the Desert Land Act. George Steell never purchased stock or acquired desert land within the Eldorado place of use. Matthew Carrol, I. N. Hazlett, Alfred Hamilton, and Sam Burd acquired stock but never acquired desert land within the Eldorado place of use. Carrol, Hazlett, and Hamilton had

sold all of their stock by 1890. Other original stock purchasers included Daniel Weston, Myron Burd, Ernest Crucher, John Ellis, and Samuel Mitchell. Of these stockholders, Weston, Ellis, and Mitchell acquired desert land within the Eldorado place of use. By 1902, three of the original eleven stockholders, Buck, Myers, and Ellis, still owned stock and land.³ (LTJO-291 pp 2605-2621)

11. The 1883 Notice of Water Right indicates preliminary work on the Eldorado Ditch had started at that time: “Said Water Right being surveyed and staked and is claimed for irrigation and Domestic purposes between Teton River and Mudey creek.” (Eldorado-1 p 754) Work on the ditch progressed for a time before some of the original investors became “financially embarrassed” and were unable to fulfill their obligations. Work on the ditch was temporarily suspended. Unfortunately, several people had already filed Desert Land entries and were now unable to irrigate their land and receive a patent. These applications were cancelled by the Government Land Office (GLO). When Eldorado obtained new financing, work on the ditch system continued. By 1889-90, significantly more of the main ditch and two branch ditches had been completed. Several of the original entrymen petitioned the GLO to set aside the cancellations and allow them to file final proof documents. The GLO allowed them to renew their applications; file final proof documents; and receive patents. A good example of this is Daniel Buck. His original declaration, for all of Section 7, T25N, R4W, was filed on March 17, 1884. (LTJO-70 p 630) Buck’s petition to set aside the cancellation of his application stated in part:

He (Buck) further says that after making said entry and before the cancellation thereof, said company proceeded to construct said land canal and prosecuted the work with diligence, and prior to the expiration of three years from the date of his said entry, had expended the sum of not less than Four Thousand Dollars (\$4000.) and since said date, has expended the further sum of not less than Three Thousand, Two-hundred Dollars (\$3200.) of which this applicant contributed his proper and proportionate share. He says, however that the said amount expended, before the expiration of the time for making his final entry, was wholly insufficient to complete said canal. And when the sum had been expended, three of the members of said company and the large [st] owners of the stock thereof, and upon whom the company was very largely dependent for the raising of funds for the completion of the canal, became financially embarrassed

³ Daniel Buck sold 32 of his original 112 shares to Leisure in 1886. He sold the remaining 80 shares to his wife Susan Buck by 1891. Mr. and Mrs. Buck acquired adjoining sections within the Eldorado place of use through the Desert Land Act. In 1902, all 80 shares were held in Susan Buck’s name. (LTJO-291)

and failed in business, so that it was impossible for the company or any of the members thereof to continue work upon the canal, and from absolute necessity, the further continuation of the ditch had to be temporarily suspended, and before the company could secure the funds to proceed with the work, the time for making final entry had expired and said entry was canceled as above stated. He further says, that notwithstanding the difficulties encountered and the unavoidable delay in the completion of said canal, the same was not abandoned, but work was restored as soon as it could be done; and now that the work is so far completed that water can be brought into the immediate vicinity of the land embraced in said entry, and by the construction of some lateral and distributing ditches, he will be able to irrigate and reclaim said land, which he is ready and willing to do. (LTJO-70 p 636-637)

Similar statements are included in several other Desert Land filings such as Ira Myers (LTJO-81), Daniel Weston (LTJO-80), John Ellis (LTJO-72), Edgar Maclay (LTJO-73), Lansing Wells (LTJO-78), J.B. Wells (LTJO-77), and Cornelia Weston (LTJO-79). All of these individuals received Desert Land patents. At the same time, Desert Land documents indicate none of these parties lived in the Choteau, Montana area. Daniel Buck, Daniel Weston, Cornelia Weston, Lansing Wells, and J.B. Wells all lived in Helena, Montana. Ira Myers and Edgar Maclay lived in Great Falls, Montana. John Ellis lived in Sun River, Montana. It is doubtful any of these individuals irrigated their own land. Rather, they leased the land and Eldorado shares to others, such as Francis Truchot.

12. According to Ira Meyers' testimony in *Perry v. Beattie*, "Frank" Truchot was the principal irrigator in the Eldorado system for many years:

"I leased these sections of mine from almost the time we completed the ditch, from time to time, and had the water run over them to produce more grass, and also quite a number of other sections (681). The Lansing Wells land was sold almost from the start; it belongs to the Episcopal Church and they have had a revenue from it for years (684); for a great many years, Truchot used most of the Eldorado Ditch on land he had leased and lands he owned himself (685). Mr. Truchot was using quite a lot of water prior to '89; he owned land and got water from the Eldorado before he became a stockholder. I first began to spread water on my land in '85 for purpose of making grass (694)" (LTJO-6 p 34 & LTJO-154)

Myers apparently acted as a leasing agent for several land owners and "gave them the benefit of whatever was got off from the lands." Some of Myer's recollections are not supported by other evidence. For instance, he did not acquire his desert land until after

1889. The Eldorado Canal did not reach the Myers property until 1889. (LTJO-81) Therefore, he could not have started irrigating this particular land with Eldorado water in 1885. At the same time, construction on the Eldorado Ditch began in 1883 or 1884. It is likely some irrigation occurred along the first part of the ditch before 1889. In any case, the evidence before the Court shows Frank Truchot was the principal irrigator within the Eldorado system for several years.

13. According to excerpts from a History of Montana, placed into evidence by LTJO, Frank Truchot first arrived in Montana in 1859. After ranching in the Deer Lodge area, Truchot moved to the Dearborn River sometime after 1874. In 1881, he moved to the Teton River where he was a rancher. (LTJO-195) In 1889, Frank Truchot acquired twenty four shares of Eldorado stock. By 1895, Truchot was the largest single shareholder with 131 shares. (LTJO-291 pp 2605-2621) When the Eldorado Ditch Company reincorporated as the Eldorado Co-op Canal Company in 1903, Truchot was one of the incorporators. The Articles of Incorporation listed Frank Truchot as owning 351 shares. (Eldorado-3) Research by LTJO expert witness Monte Giese indicates Truchot owned over 3,900.00 acres within the Eldorado place of use in 1902. (LTJO-291 p 2621)

14. The apparent disconnect between land ownership and stock ownership was the emphasis of the expert testimony of objector Monte Giese. Mr. Giese, is a managing director of corporate finance for D.A. Davidson Company in stock transactions and corporate structure. He was qualified as an expert in this area. His research and testimony is reflected in LTJO-291. Giese reviewed all available documents regarding Eldorado stock transactions and Desert Land Act acquisitions that related to those stock transactions between 1884 and 1902. Giese testified he found several years where most Eldorado stockholders owned little or no land within the Eldorado system. He also found that the combined amount of water claimed by various parties on desert land entry documents greatly exceeded the 4,000 miner's inch flow rate in Eldorado's 1883 Notice of Water Right. Giese estimated the total flow rate of water through the Eldorado Ditch that was claimed in desert land documents exceeded 10,000 miner's inches. Giese used stock transactions between Ira Meyers and J. R. Hooker, E. F. Hooker, and Catherine

Myers as examples of apparent fraud aimed at acquiring property through the Desert Land Act without actual irrigation. The point of Mr. Giese's testimony was to show that very few acres were actually irrigated with Eldorado water until after 1902. In the "Opinions." section of his report, Giese states:

- a. Eldorado water was not put to beneficial use until April 23, 1890.
- b. Eldorado's main water right, claim 41O 113475-00, should be limited to irrigation on 2,952.00 acres
- c. All additional irrigated acres should be placed in implied claims with progressively junior priority dates. (LTJO-291 p 2592)

15. Mr. Giese was qualified as an expert in stock transactions. His testimony in that area was helpful in creating a picture of early development of the Eldorado system. In that development, stock transactions were part of the process of acquiring land under the Desert Land Act. However, it is apparent that stock transactions were not the measure of the actual amount of irrigation taking place. The evidence does not support the opinion that the Eldorado Ditch Company was simply set up to defraud the government with minimal irrigation actually taking place. The value of acquiring land within the Eldorado project was the ability to gain revenue over time from irrigated land. Acquiring the land and not irrigating would do nothing to increase the value of the land or the revenue generated from the land. Land owners were looking for a return on their investment. For example, the Episcopate Fund acquired land in 1897 and Eldorado shares in 1898 (LTJO-291 pp 2616-17); leased its land and shares; and "had a revenue from it for years." (LTJO-6 p 34)

16. The better conclusion is that the Eldorado system was expanding rapidly. Land was acquired and irrigated. That irrigation did not strictly follow stock or land ownership. Irrigators such as Frank Truchot were involved in irrigating a combination of their own land and land they were leasing from others. It appears water use was not limited by the number of shares that may or may not have been associated with a particular property. In its post-hearing brief in *Perry v. Beattie*, Eldorado acknowledged that irrigation had not been limited by land ownership;

[t]he water was used upon all these lands from 1885 on, and increased the growth of grass upon them for grazing purposes and hay, and that they were

leased for grazing purposes and hay cut thereon, establishes a valid appropriation of the water, irrespective of the time when title was acquired to the lands.

(citation omitted) (LTJO-6 p 42)

While this is clearly advocacy by Eldorado and should be viewed as such, it nonetheless seems to fit with the majority of the evidence regarding the development of irrigation on the Burton Bench.

17. Eldorado first incorporated in 1883 (Eldorado-2) and reincorporated in 1903 (Eldorado-3). In each case, the Articles of Incorporation and bylaws do not state how much water is represented by each share.⁴ References to stock ownership in Desert Land filings are too varied and vague to discern any actual Eldorado policy that set a flow rate limit on a share of stock. In addition, it appears Eldorado did not concede its total flow rate was limited to 3,000 miner's inches until the district court decrees set that flow rate. In 1911, the Eldorado board of directors, referencing the *Perry v. Beattie* Decree, passed a resolution setting the flow rate value of each share at 2.5 miner's inches per share (LTJO-184 pp 4-5). At the same time, Eldorado continued to allow those stockholders and lessees who were using water to use all available water. This policy was made part of the bylaws in 1925:

29. Each share of stock in the Company represents a proportionate share of the water rights, and flow of water in the Company ditch, together with the right to use the same; any water when not in use, shall be apportioned to those using the water.

(Eldorado-5a emphasis added)

This language acknowledges the practice of diverting the full amount of flow rate available to Eldorado throughout the irrigation season. That water could be used by those who were irrigating at the time, even if that resulted in those shareholders exceeding their 2.5 miner's inch per share entitlement. This seems to confirm the practice that would have allowed Frank Truchot to take substantially all available water during the early development of the Eldorado system. As a shareholder in his own right and a lessee, Truchot could have used all his shares, all shares held by owners where he was leasing

⁴ Bylaws associated with the 1883 incorporation were not placed into evidence. It is assumed that they no longer exist.

land, and the water represented by all shares not in use at that time.

18. By the time the District Court issued the *Perry v. Beattie* Decree, Eldorado had reached its original goals for developing a ditch system to provide water to shareholders on the Burton Bench. While the Eldorado place of use would continue to expand, it is apparent the intent expressed in the Original Notice of Water Right had been achieved by 1908.

19. In *Perry v. Beattie*, Eldorado addressed arguments indicating that it abandoned a certain amount of the irrigation system it had constructed. Apparently, there was some testimony indicating ditches were either enlarged over time or were allowed to fill in and lose a considerable amount of their original capacity. In addition, testimony at hearing indicated some of the original place of use was not irrigated for many years. (LTJO-6 p 40) While the District Court decision did not address these issues directly, it did find that Eldorado acquired a 3,000 miner's inch water right on May 17, 1883 and the right was valid in 1908. (LTJO-34) It is apparent the District Court did not find sufficient evidence to conclude Eldorado was entitled to less than 3,000 miner's inches or that it had abandoned any of its May 17, 1883 water right. In addressing the assertion of abandonment Eldorado provided a clear statement that the May 17, 1883 right had been perfected and was in use:

In the absence of anything to indicate an intention on the part of the stockholders or of the Company to abandon their water right thus perfected, and in view of the affirmative evidence of their intention to hold and use the same in connection with the land, there would seem to be no basis for finding an abandonment of the rights thus acquired.

(LTJO-6 p 42 emphasis added)

The key to this statement is that Eldorado considers its May 17, 1883 water right to be fully perfected. Eldorado asserts that by 1908 it had:

- a. completed and maintained a ditch system capable of serving a large area,
- b. sold all the company shares to parties who used them to acquire thousands of acres on the Burton Bench and irrigate those acres,
- c. and consistently provided 3,000 miner's inches of the waters of the Teton River to these shareholders and their lessees every year.

This is clearly an assertion the water right had been perfected through application to beneficial use as contemplated the May 17, 1883 notice of water right. While Eldorado would go on to acquire three additional Teton River decreed rights, and thereby increase the flow rate it could provide to shareholders, the original intent expressed twenty-five years earlier in 1883 had been completed.

20. As a perfected water right, Eldorado is entitled to the terms of the water right at the time it was perfected. While it could make certain types of changes to the water right until 1973, it could not increase the burden it placed on the source. Section 89-803, RCM (1947) (repealed 1973).

B. Priority Date

21. The best evidence of the priority date for claims 41O 113470-00 and 41O 113475-00 is the *Perry v. Beattie* Decree. This Decree was the result of a lengthy and contested court proceeding. It must be presumed that the District Court took all arguments into account and determined that the evidence supported a May 17, 1883 priority date for the Eldorado water right. The District Court was familiar with the facts and aware of controlling law. Although LTJO and TCRC are not bound by the District Court decision, they have not provided evidence sufficient to show this District Court Decree is wrong.

22. The contention that Eldorado did not apply water to beneficial use until 1890 is not compelling. Work on the project began in 1883. Desert Land entry documents a certain amount of the ditch had been completed before poor finances resulted in a suspension of work. (LTJO-70, p 636-637) It is likely Eldorado was delivering some water within a year or two of that date. The remainder of the project was completed over the next several years. Given the scope of the project, the work was completed with reasonable diligence. Therefore, the water right can relate back to May 17, 1883. *Murray v. Tingley*, 20 Mont. 260, 268, 50 P. 723, 725 (1897). Again, it is presumed the District Court was aware of the facts concerning the development of Eldorado and controlling pre and post 1885 law as it related to the relation back doctrine.⁵

23. The original Eldorado Ditch Company was formed in 1883 for a period of

⁵ In 1885, the Montana Territorial legislature enacted statutes providing for the filing of Notices of Appropriation for water rights [Section 89-810-814, RCM 1947 (repealed)].

20 years. (LTJO-170) It reincorporated in 1903 as the Eldorado Co-op Canal Company for another twenty years. (Eldorado-3a) In 1923, the corporation lapsed. The lapse was an oversight by Eldorado that was soon resolved. Eldorado reincorporated with the same board and shareholders on October 29, 1924. (LTJO-171) The lapse had no affect on Eldorado's use of water. Commissioner records indicate Eldorado was using its water rights before the lapse and continued to use the same water rights after it reincorporated in 1924. (Saylor-7) There is no other evidence indicating a possible abandonment of the water rights through nonuse.

24. LTJO argues the water rights remained with the lapsed corporation. After a period of time, the rights were abandoned through nonuse by the lapsed corporation. LTJO asserts the new Eldorado, formed in 1924, did not acquire the water rights from the lapsed corporation and therefore was entitled to use rights with 1924 priority dates. LTJO first made this argument in a summary judgment motion filed after the close of discovery. On August 9, 2011, this Master denied the summary judgment motion. This Master found the corporate lapse by itself was not sufficient to support a finding of abandonment through nonuse. At the same time, this Master indicated that if the evidence at hearing showed the corporate lapse was one of many factors indicating Eldorado engaged in conduct supporting an intent to abandon these rights, LTJO could be entitled to a finding of abandonment. The summary judgment ruling received objections and was reviewed by the Chief Water Judge.

25. On December 28, 2011 the Water Court issued its Order Dismissing Objection to Order Denying Summary Judgment. The Water Court did not find the argument of abandonment based on corporate lapse to be compelling. However, the Chief Water Judge indicated a more complete record and a more detailed analysis of 1923-1924 corporate law might command a different result.

26. The evidence at hearing showed the corporate lapse was an oversight that was corrected and had no affect on Eldorado's actual use of water. No evidence was presented indicating any stockholder or creditor of either the old or new Eldorado was injured by the corporate change. No evidence presented at hearing showed the corporate lapse was one of many factors indicating Eldorado engaged in conduct supporting an

intent to abandon these rights. The Objectors have not shown 1923-1924 era corporate law commands a different result. Therefore, the summary judgment ruling on this issue stands. Eldorado did not abandon its water right claims in 1923.

27. Based on the record before the Master, Eldorado claims 41O 113475-00 and 41O 113470-00 are entitled to a May 17, 1883 priority date.

C. Stock Use

28. LTJO and TCRC assert stockwater was never a part of the original Eldorado appropriation. In support of this assertion, they provided tax records from 1876 to 1884. (LTJO-320-328) They also note that none of the original documents that form the basis for the Eldorado May 17, 1883 water right list stockwater as one of the contemplated uses. Tracking livestock through tax records was used extensively in lower Teton River cases. Showing a land owner was paying taxes on a specific number of livestock tended to support a stock claim for that land owner. In this case, LTJO submitted tax records to show the apparent lack of livestock ownership by certain Eldorado shareholders. Based on the tax records, LTJO argues there was little or no stock present in the Eldorado system at the time the water right was appropriated in 1883. Monte Giese testified his review of tax records indicates Eldorado shareholders owned no more than 800 head of livestock in 1884. (Testimony of Monte Giese, Day 1) At the same, the Eldorado system was in the early stages of development in 1884. No desert land patents were obtained for at least three years.⁶ In addition, when a significant amount of the Eldorado system was patented, the majority of land owners leased their property. Tax records would not show stock ownership under their names. As a result, tax records would not provide an accurate picture of stock use.

29. The objectors are correct that none of the original Eldorado documents, such as the Notice of Water Right and Articles of Incorporation, specifically reference stockwater. At the same time the record is full of references to stock use. Original appropriators Myers and Buck were running stock before they started the Eldorado project. (LTJO-194) Growing grass for pasture is often stated as one of the great benefits derived from irrigation in the project. Concluding that the water was only used

⁶ Samuel Mitchell obtained the first patent in 1887. Several additional patents were obtained in 1889.

to improve pasture for livestock but not to provide a water source for the livestock makes no sense. The paraphrased testimony of Frank Truchot in Eldorado's post-hearing brief in *Perry v. Beattie* indicates water was left in the ditch rather than spread when land was leased to sheepmen. (LTJO-6 p 35) The only logical reason to do this is to provide stockwater for the sheep without causing damage to the pastures. Eldorado documents notwithstanding, there is a sufficient record to support stock use of Eldorado water from the beginning of the project. The lack of reference to stockwater seems to reflect the common assumption that livestock drinking from a source or ditch system is simply a fact of life. The same sentiment carried through to the current adjudication process. Direct from source stock claims are exempt from filing. Section 85-2-222, MCA.

30. Even if stock use was not contemplated as an original purpose of the Eldorado right, it is clear providing stockwater through the Eldorado ditch system quickly became one of the beneficial uses of the water rights. Testimony from several Eldorado shareholders shows that stockwater was a common use of all Eldorado water rights well before 1973. Prior to 1973, when the state implemented the Water Use Act, the purpose of a water right could be changed so long as the change did not cause injury to other water users. Section 89-803, RCM (1947) (repealed 1973). There is no evidence that any other water user ever claimed the historical use of Eldorado's water rights for stock caused them injury. Stock use only became an issue in this adjudication.

31. Eldorado stock claim 41O 113470-00 is a valid water right claim. Stock right 41O 113470-00 and irrigation right 41O 113475-00 are multiple uses of the same historical right. The combined use of the corresponding stock and irrigation claims is limited to historical use.

D. Volume

32. Eldorado's filings in *Perry v. Beattie* asserted its May 17, 1883 water right claim was perfected before 1908. However, evidence shows Eldorado continued to expand its use of Teton River water. That expansion is apparent in the annual volume calculations compiled by current Eldorado President Ross Salmond. (Eldorado-48) Expanding the number of acres irrigated and the period of use resulted in an increase in the total volume diverted each year. The most significant increases came after 1980. To

address that increase, a quantified volume reflecting use at the time of perfection is appropriate.

33. The volume Eldorado can receive for all uses under its May 17, 1883 priority date should reflect the amount of water it was receiving when it had perfected the water right by 1908. The problem is finding an accurate way to determine that historical volume. Three alternatives are available:

- a. Volume based on actual diversions at the time of perfection.
- b. Volume based on historically irrigated acres at the time of perfection and a volume per acre standard.
- c. Volume based on the decreed flow rate, the number of irrigated acres that flow rate could reasonably service, and a volume per acre standard.

a. Volume Based on Actual Diversions

34. The only evidence of actual diversions and therefore actual historical volume is the water commissioner records. Eldorado President Ross Salmond reviewed all available water commissioner records from 1910 to 2006. He used those records with sufficient information to calculate a total volume delivered to Eldorado that year.

(Eldorado-48) Salmond noted the records were incomplete and measurements prior to 1964 are less reliable due to the lack of a good measuring device on the Eldorado Ditch. (Testimony of Ross Salmond, Day 1) In addition, the volume figure includes all water rights diverted into Eldorado's canal. The water commissioner did not separate volume as Eldorado acquired additional water rights. This complicates a review of the volume and requires separating the percentage of total volume that can be attributed to Eldorado's May 17, 1883 right. A different calculation is required each time additional flow is added to the total diverted into the ditch:

- a. 1921, Eldorado acquires two rights that add 425 miner's inches to its total diverted flow rate.
- b. 1937, Eldorado acquires a right that adds 400 miner's inches to its total diverted flow rate.
- c. 1963, Eldorado reached an agreement with the Miller Colony by

which the Colony's 500 miner's inch water right is diverted through the Eldorado Ditch. *See* Water Court Case 41O-130.

In addition, Eldorado is claiming it acquired the remaining 75 miner's inches of the Truchot right that it did not purchase in 1921. Eldorado claimed all 300.00 miner's inches of the Truchot right in Statements of Claim 41O 113472-00 and 41O 113467-00. This issue is addressed in Section III.A. of this report. With these limitations, Salmond's volume calculations are of limited value.

35. Salmond found three years prior to 1921 where he could calculate an annual volume. (Eldorado-48) This is the only documentation available near the 1908 date of perfection:

<u>Year</u>	<u>Total Volume</u>	<u>Number of Days</u>
1914	7,085 acre feet	54 days starting July 9
1915	3,906 acre feet	62 days starting July 1
1919	1,026 acre feet	27 days starting June 23

Given the fact that irrigation in each year did not start until late June or early July and the period of use is short, these were probably wet years. In addition, Eldorado took nearly twice as much water in 1914 than in 1915, but was receiving water for eight fewer days. With the inconsistent volumes, late starting dates, and relatively short periods of diversion, these records do not appear to represent an accurate picture of Eldorado's water use in an "average" year.

36. After 1921, Salmond's calculations show an increase from the early years, but a relatively stable volume through 1973. The high volume was 15,896 acre feet in 1938. The low volume was 2,080 in 1929. The average volume was about 9,500 acre feet.⁷ (Eldorado-48) After 1980, the high volume was 25,974 acre feet in 2000. The low volume was 16,425 in 1989. While this shows a clear increase in diverted volume it does not provide sufficient information to determine the volume at the time the claim was perfected. Therefore, a volume based on actual diversions is not possible.

b. Volume Based on Historically Irrigated Acres

⁷ Salmond's volume figures were reduced to reflect the percentage of total volume attributable to Eldorado's May 17, 1883 water right; 1911-1921= 100%; 1922-1937= 86%; 1938-1962= 77%; 1963-1973= 70%. The 75 miner's inches of the Truchot right that Eldorado did not acquire in 1921 were not included in the calculations. All calculations are general in nature and should be viewed as such.

37. Evidence supporting the actual number of acres irrigated with Eldorado water by 1908 is little better than the evidence of diverted volume. The only evidence that directly addresses acres irrigated is Eldorado's filings in *Perry v. Beattie*. While this information is helpful, it must be viewed as self-serving and cannot receive a great deal of weight. Nonetheless, Eldorado did provide some actual figures for acres irrigated. In its post-hearing brief, Eldorado divided the total acres into four groups:

- a. 5,520.00 acres acquired by Eldorado shareholders in 1890 through the Desert Land Act. (LTJO-6 p 33)
- b. 5,120.00 acres acquired by Eldorado Shareholders between 1891 and 1895 through the Desert Land Act. (LTJO-6 p 33)
- c. 2,560.00 acres owned by Carlos Warfield at the time of the hearing in *Perry v. Beattie*. Warfield was a successor to Samuel Mitchell. Mitchell was an early Eldorado shareholder with 60 shares. Mitchell received his Desert Land patent in 1887 which predates all other Eldorado shareholders and the date when the Eldorado Ditch could have reached his property in Sections 25 & 26, T26N, R5W. (Eldorado-53e) According to a note in Exhibit LTJO-291 p 2605, Mitchell claimed Muddy Creek water in his Desert Land filings. Muddy Creek crosses Sections 25 and 26, placing this property in the northwest corner of the Eldorado system. Mitchell owned Eldorado shares when he acquired his desert land property. He apparently used Muddy Creek to acquire the patent, but intended to also access Eldorado water.⁸ Eldorado's post-hearing brief states Warfield testified to using Eldorado water on four sections ($640 \times 4 = 2,560$ acres). (LTJO-6 p 36)
- d. 1760.00 acres acquired by the wife and children of Frank Truchot in 1890 as an Indian land allotment. There is no evidence explaining how this acquisition took place or the location of the property. (LTJO-6 p 37).

The total of these four acreage groups is 14,960.00 acres. There is no way to determine how accurate this total may be. It is doubtful that all 640.00 acres of each section

⁸ This property is currently owned by the Flying U Ranch Company. Flying U is an Eldorado stockholder and also claims several individual water rights from Muddy Creek and Foster Creek.

acquired under the Desert Land Act was susceptible to irrigation. As discussed below, Eldorado's filings go on to contradict its ability to service this many acres with 3,000 miner's inches. This may represent the land Eldorado could irrigate rather than the land that had been irrigated by 1908. Therefore, the 14,960.00 acre figure is suspect and cannot be used to support a quantified volume.

38. The testimony and expert report of Monte Giese provided some acreage figures, but only to show the number of acres in certain years that had been acquired through the Desert Land Act. These figures are not sufficiently supported by other evidence to use as part of the process of setting a quantified volume.

39. The objectors also point to a 1932 Inventory of Montana Irrigation Projects published by the Montana Extension Service. (TCRC-14) The inventory states Eldorado has a very large area under the canal but averages about 3,000.00 acres irrigated. Objectors argue this report tends to confirm their assertion that Eldorado irrigated about 3,000.00 acres as early as 1890 and was still irrigating the same number of acres in 1932. However, the period of time covered by the report is not clear. It is reasonable to assume it covered a few years preceding 1932. Ross Salmond's volume calculations (Eldorado-48) from this time period show significant swings in volume from year to year:⁹

1926: 12,520 acre feet per year
1929: 2,419 acre feet per year
1930: 12,644 acre feet per year
1931: 6,510 acre feet per year

It does not seem reasonable to assume each of these volumes indicates about 3,000.00 acres irrigated that year. If 3,000.00 was the average, it was a very rough average. In 1937, five years after the report was published, aerial photos of this area indicate 7,290.00 acres irrigated according to LTJO expert witness Jay Johnson. (LTJO-250 p 2988) Again, this brings the Extension Service number into question. Finally, this Master has found Eldorado perfected its right in 1908. The number of acres Eldorado may have been irrigating in 1932 is not important to a determination of historical volume.

40. Given the lack of credible evidence, a quantified volume based on the

⁹ Volume calculations include the main Eldorado right (3,000 mi), the Dennis right (200 mi), and part of the Truchot right (225 mi).

number of acres irrigated at the time of perfection in 1908 is not possible.

c. Volume Based on the Decreed Flow Rate

41. A volume based on flow rate relies on standards applied to irrigated land rather than actual diversions or the actual number of acres irrigated. The amount of land a particular flow rate can serve is often referred to as the “duty of water.” The idea is that a certain amount of flow rate is necessary to adequately irrigate land. When the amount of flow rate is limited, only a certain amount of land can be irrigated by that flow rate. After the number of acres irrigated is determined using this standard, a second standard for acre feet of water per acre per year is applied to determine a quantified volume. The acre feet per year standard is typically based on crop need and climatic area. DNRC Water Right Claim Examination Manual, Chapter VII.C.3.d.

i. Acres Irrigated Based on Flow Rate

42. LTJO notes that references to a one miner’s inch per acre standard are common in Desert Land documents placed into evidence. This seems to show applicants and witnesses acknowledged that one inch per acre was necessary for adequate irrigation. However, Desert Land filings were intended to accomplish a specific goal, receiving a patent to land from the Federal government. Answers to questions on the various forms follow a clear pattern, such as a reference to using “at least one inch per acre.” It is apparent the representation is simply something applicants know is acceptable to the GLO. In addition, Desert Land documents often contain references to other flow rates. For example, Daniel Buck did state he had used over one inch per acre. (LTJO-70 p 655 Question #9) On the previous page of the same document Buck stated he had a clear right to 480 miner’s inches. (LTJO-70 p 654 Question #5) Assuming he intended to irrigate all 640.00 acres he was acquiring, Buck was indicating he could do so with .75 miner’s inches per acre. Answering the same question #5, Ira Myers stated he had a clear right to 10,000 miner’s inches. (LTJO-81 p 263 Question #5) This is apparently based on the assumption the Eldorado Canal would be able to carry that amount of water and Eldorado would acquire additional water rights. In any case, Myers did not limit himself to a one miner’s inch per acre standard. References to one inch per acre in Desert Land filings are simply a response to GLO requirements. They are not sufficient to use as a

flow rate per acre standard in this case.

43. In 1910, the GLO began a review of irrigation companies that were selling stock to Desert Land applicants. The apparent goal was to determine the amount of water actually available to each company and the duty of water in the area serviced by that company. The Eldorado Co-op Canal Company was addressed in a February 26, 1914 letter from the GLO Commissioner to the Great Falls, Montana Office of the Registrar and Receiver. (Eldorado-14) The letter discussed reviews of Eldorado conducted by a GLO office examiner and the Geological Survey. In these reviews, the GLO examiner determined 40 miner's inches of water was sufficient to irrigate 160.00 acres in the vicinity of the Eldorado System. This equals 0.25 inches per acre. The Geological Survey found 60 miner's inches was a high figure for 160.00 acres and could safely be used as a standard for final proof documents based on Eldorado shares. The Commissioner found the 40 miner's inch standard to be acceptable and directed the Great Falls office to require proof of Eldorado share ownership at this rate on final proof documents. In other words, anyone filing a final proof based on ownership of Eldorado shares, valued at 2.5 miner's inches per share, must show ownership of a sufficient number of shares for the irrigated land they were claiming. The bottom line is that the GLO found land on the Burton Bench within the Eldorado system could be irrigated with 0.25 miner's inches per acre, at least for purposes of acquiring a Desert Land patent.

44. The 0.25 miner's inch per acre standard adopted in the GLO letter was applied to Desert Land entries. As was often the case with federal land acquisition acts like the Homestead Act and the Desert Land Act, the standard was very user friendly. Even though the Geological Survey proposed a more conservative standard, the Commissioner chose the lowest standard recommended to him. Meaning, applicants could acquire land with less water available to them. This made it easier to acquire land in areas with limited available water. In addition, Exhibit Eldorado-14 is the letter from the GLO Commissioner to the Great Falls office. The actual reports that are referenced in the letter were not placed in evidence. As a result, the validity of the quarter inch per acre standard cannot be determined. When the commissioner was adopting this standard in 1914, virtually all land within the Eldorado system had already passed into private

ownership. It is doubtful the GLO ever applied this standard to any land serviced by the Eldorado system. The 0.25 miner's inches per acre standard discussed in this exhibit is not sufficiently credible to use for Eldorado's water rights.

45. LTJO also asserts the *Perry v. Beattie* Decree applied the inch per acre standard. Expert witness Jay Johnson calculated the number of acres historically irrigated on the three decreed rights Eldorado acquired (Dennis and Truchot in 1921 and Beattie 1937) and compared that acreage to the flow rate decreed to each right. In each case, Johnson found the decreed flow rate provided about one inch per acre for that water right. (Testimony of Jay Johnson Day 2 and LTJO-256, 257, and 258) Johnson based his opinion on the land each appropriator identified in their *Perry v. Beattie* filings and his estimate of the number of irrigable acres within that legal description.¹⁰ At the same time, Johnson acknowledged he was only able to determine the District Court awarded flow rates based on historical use that "roughly equated" one inch per acre. The *Perry v. Beattie* Decree itself makes no reference to a flow rate to acre standard.

46. Johnson's testimony may support this standard for the Dennis, Truchot, and Beattie rights. At the same time, all three of these water rights were originally located in close proximity to the Teton River and used on much smaller places of use. In each case, the appropriator provided a sufficiently detailed place of use legal description for Johnson to complete his calculations. That is not the case for Eldorado. The Eldorado place of use has always been much larger and farther from the river. Eldorado did not provide a detailed legal description in its answer in *Perry v. Beattie*. Rather, it simply stated the water was conducted ". . . to and upon certain lands situated in said Teton County, held, possessed, owned and intended to be acquired by said appropriators . . ." (LTJO-3 p 54) As a result, Johnson could not perform the same calculation for the Eldorado water right. Had he been able to do so, there is little chance he would have reached the conclusion that the District Court applied an inch per acre standard to Eldorado. Other evidence in this case, such as Desert Land filings, party filings in *Perry v. Beattie*, and stock transaction analysis, indicate Eldorado was consistently irrigating more than 3,000.00 acres by 1908.

¹⁰ Dennis was a plaintiff in the case. He identified his property in the complaint. (LTJO-1) Beattie and Truchot were defendants who identified their property in their answers. (LTJO-26 & -27)

47. Eldorado did address the duty of water in its proposed findings of fact in *Perry v. Beattie*:

“7. That said lands require one miner’s inch of said waters per acre to properly irrigate the same for the first two or three years, and after that time one-half inch per acre is sufficient for that purpose (Tr. 672); and that ever since 1884 the lands held and owned by the stockholders of said Eldorado Co-Operative Canal Company and its predecessor in interest, the Eldorado Ditch Company, have required all of said 3000 miner’s inches of water, or 75 cubic feet, to properly irrigate the same.” (LTJO-7 p 48)

This indicates Eldorado, at the time it filed its proposed findings of fact in *Perry v. Beattie*, believed the 3,000 miner’s inch flow rate it was seeking in that case was capable of servicing 6,000.00 acres. While this statement conflicts with other assertions Eldorado made in the same filing and in its post-hearing brief, it is nonetheless significant and could be viewed as a statement against interest. It is the clearest statement by Eldorado addressing how much land it could irrigate with 3,000 miner’s inches. It is also the most credible standard when viewed in conjunction with the other relevant evidence presented in this case.

48. Based on the record before the Master, the 0.5 miner’s inch per acre standard asserted by Eldorado in its *Perry v. Beattie* proposed findings of fact is the most credible flow rate per acre standard to apply to the May 17, 1883 water right. (LTJO-7) There is sufficient evidence to find Eldorado was irrigating well in excess of 3,000.00 acres by 1908. Exactly how many acres cannot be determined. While Eldorado was eventually able to greatly expand the acres it could service, much of that appears to be the result of the additional flow rate acquired in 1921 and 1937. Given the lack of credible evidence supporting the actual number of acres irrigated in 1908, a half inch per acre standard as asserted by Eldorado itself is the most reasonable alternative. Therefore, for purposes of identifying a quantified volume, the Master finds that at the time the May 17, 1883 right was perfected in 1908, Eldorado was using 3,000 miner’s inches to irrigate about 6,000.00 acres. Therefore, 6,000.00 acres irrigated will be used to determine a volume for claims 41O 113470-00 and 41O 113475-00.

ii. Volume Based on Estimated Acres Irrigated

49. Volume standards are typically based on the amount of water needed for adequate irrigation. This is often based on plant need and associated factors specific to a climatic area. The record in this case includes references to three different standards. At the same time, application of any standard must take the limited record of actual diversions into account.

50. District Judge R. D. McPhillips, testifying by deposition, stated he applied a one acre foot - per acre - per year standard to Eldorado. Although his memory was vague, he based this standard on conversations with either the “ASCS or soil conservation” where he was informed an acre foot per acre was all the water that could be beneficially used in Teton County. Although he applied this standard, Judge McPhillips did not give it an unconditional endorsement:

“I did end up with an acre foot. Whether that’s reasonable or unreasonable, I don’t know. But we - - that was the rule until somebody squawked.”
(Eldorado-62 p 17)

Given his own testimony, Judge McPhillips’ use of this standard is not particularly credible.

51. In 1981, Eldorado filed a single Statement of Claim for all of its decreed water right claims. The original filing listed all four decreed rights with individual flow rates; 15,420.00 total acres irrigated; and a volume of 15,000 acre feet per year. This appears to indicate Eldorado accepted a standard of one acre foot per acre as a total volume for all of its water right claims. How Eldorado reached that figure is unknown.

52. As discussed above, LTJO expert witness Jay Johnson calculated the number of acres historically irrigated on the three decreed rights Eldorado acquired after 1908 (Dennis and Truchot in 1921 and Beattie 1937). When he reached a conclusion on the number of acres originally irrigated by each claim, Johnson calculated a volume for each claim. In each case, Johnson used a 1.5 acre feet per acre standard. (Testimony of Jay Johnson Day 2 and LTJO-256, 257, and 258) In his expert reports for all three decreed rights, Johnson stated: “The DNRC has found that 1.5 acre-feet of water per acre can be put to beneficial use.” (LTJO-256, 257, and 258) Johnson did not provide the

specific DNRC source, such as the Claim Examination Rules or Claim Examination Manual, for this statement. This Master was not able to confirm this standard in DNRC examination material. It may be a standard applied by the new appropriations section of the DNRC.

53. Eldorado expert witness John Westenberg testified the commissioner records indicate Eldorado volumes have been well within the DNRC 3.1 acre foot per acre standard for sprinkler irrigation. (Testimony of John Westenberg, Day 4) Although he did not refer to the DNRC Claim Examination Manual, that is the source for the 3.1 acre foot per acre standard. DNRC Water Right Claim Examination Manual, Chapter VII.C.3.d., Table VII-3. Mr. Westenberg referenced the standard for sprinkler irrigation systems in climatic area IV, which includes the Teton River. The standard is no longer routinely applied to direct flow irrigation claims, but is still included in the Manual for decree exceeded situations.¹¹ At the same time, the DNRC volume standard for flood irrigation is 4.6 acre feet per acre. Given the fact there was no sprinkler irrigation taking place in 1908, the 4.6 acre feet per acre standard appears to be more appropriate based on the DNRC Examination Manual.

54. Applying the volume standards discussed above to the 6,000.00 acres Eldorado had perfected by 1908 yields the following results:

1.0 Acre Feet Per Acre x 6,000 Acres = 6,000 af/yr (McPhillips)

1.5 Acre Feet per Acre x 6,000 Acres = 9,000 af/yr (Johnson)

3.1 Acre Feet per Acre x 6,000 Acres = 18,600 af/yr (Westenberg)

4.6 Acre Feet per Acre x 6,000 Acres = 27,600 af/yr (Manual)

The 3.1 af/yr and 4.6 af/yr standards yield a volume that is significantly higher than the combined volume Eldorado claimed for all four of its decreed water rights. These volumes are also higher than the historical volumes calculated by Ross Salmond.

(Eldorado-48) Therefore, the 3.1 and 4.6 acre feet per acre standards are not within what

¹¹ Statement of claim forms for irrigation required a quantified volume. During the original “verification” process, the DNRC developed volume standards as part of the claim review process. The standards are based on water requirements for alfalfa which is a high water use plant. During verification, the standards were used to check claimed volumes. If a claimed volume was within the standard, it was considered acceptable. When quantified volumes were no longer required for direct flow irrigation claims in the claim “examination” process, the DNRC stopped using the standards for these claims. On rare occasions, district courts quantified volumes as part of a water right decree. If statements of claim are based on a decreed right and the claimed volume exceeds that decreed volume, the DNRC may use the old verification standards as part of its examination.

was originally claimed or a realistic reflection of historical use. The 1.0 af/yr standard has a basis in historical use. It has been a common rule of thumb and may have been a factor for the District Court decision in *Perry v. Beattie*. At the same time, there is no clear basis for this standard. Judge McPhillips applied the standard but was never sure if it was valid. It appears Eldorado used the standard in its original Statement of Claim, but Salmond's volume calculations indicate it was never followed. According to the testimony of Jay Johnson, a 1.5 acre foot – per acre – per year standard is currently used by the DNRC. While he did not reference the source for the standard in DNRC documents, his expertise places him in the position to know the standards the DNRC is using. His expertise also gives him the ability to determine if that standard is reasonable. Mr. Westenberg did not address volume. He simply testified the DNRC Manual includes standards and the one he referenced appears to apply to this situation. On the issue of volume, Johnson's testimony and the exhibits used with that testimony is the most compelling evidence of an appropriate acre foot – per acre – per year standard to apply to Eldorado's May 17, 1883 water right.

55. A volume based on actual historical use is preferable. However, there is an insufficient record in this case to accurately determine that historical volume. As a result, the volume must be based on the limited historical record and accepted standards. The Master finds the record in this case supports a 9,000 acre feet per year combined total annual volume for Eldorado claims 41O 113475-00 and 41O 113470-00.

E. Summary for Claims 41O 113470-00 and 41O 113475-00

56. Based on the record in this case:

- a. Claims 41O 113470-00 and 41O 113475-00 are entitled to a May 17, 1883 priority date.
- b. Stock claim 41O 113470-00, as modified by this report, is a valid reflection of historical use.
- c. Claims 41O 113470-00 and 41O 113475-00 should receive a 9,000 acre foot per year total quantified volume as multiple uses of the same historical water right. The combined volume diverted under both claims cannot exceed 9,000 acre feet per year.

III. Claims 41O 113467-00 and 41O 113472-00 (Truchot)

A. Priority Date

57. As discussed in Finding 13, Frank Truchot moved to the Teton River in 1881. In 1887, Truchot acquired approximately 160.00 acres originally settled by John Miller. According to Truchot's answer in *Perry v. Beattie*, Miller was the owner of and in possession and control of this land in 1880. Truchot's answer goes on to assert Miller appropriated 500 miner's inches from the Teton River in 1881, constructed a ditch, and commenced to put the water to beneficial use on the 160.00 acres. Following his purchase in 1887, Truchot extended the ditch to adjacent property he owned, and increased the number of acres served by the appropriation. (LTJO-27) In the *Perry v. Beattie* Decree, Truchot was awarded a right to 300 miner's inches with an 1876 priority date. (LTJO-34 p 83) Given the lack of a specific month and day, the right has been administered as December 31, 1876. Claims 41O 113467-00 (stock) and 41O 113472-00 (irrigation) are claimed as multiple uses of the December 31, 1876 Truchot right.

58. LTJO provided alternative arguments for a priority date for the Truchot right. First, LTJO asserts Eldorado lost the right in the 1923 corporate lapse and is entitled to a use right with a 1924 priority date. The argument is addressed in Section II.B. of this report and will not be restated here. LTJO also argues Truchot's answer in *Perry v. Beattie* entitles claims 41O 113467-00 and 41O 113472-00 to a priority date no earlier than December 31, 1881. This argument is not compelling. Truchot's answer is a pleading. It does not reflect the evidence presented at trial. If Truchot originally asserted an 1880 priority date and an 1881 date of first use, he was obviously able to provide evidence at hearing supporting an earlier priority date. It is apparent the District Court received evidence supporting the priority date and flow rate that were decreed. Using LTJO's logic, Truchot should also receive the 500 miner's inch flow rate he asserted in his answer rather than the 300 miner's inches decreed by the District Court.

59. The Master finds the most credible evidence of the priority date for claims 41O 113467-00 and 41O 113472-00 is the *Perry v. Beattie* Decree. Based on the Decree, as administered by the District Court, both claims are entitled to the December 31, 1876 priority date originally claimed.

B. Volume

60. Jay Johnson reviewed the legal descriptions in Truchot's answer and determined the entire property totaled 360.00 acres. Johnson then determined that approximately 245.00 of these acres could be irrigated from the Teton River. (LTJO-257) Johnson excluded land west of the Teton River and land east of the railroad track that crossed the property. Based on this determination, Johnson opined the district court had applied an inch per acre standard in *Perry v. Beattie* and that it was reasonable to assume the Truchot right historically irrigated about 300.00 acres. Johnson then applied a 1.5 acre foot per acre standard to 300.00 acres to determine a volume for the claim of 450 acre feet per year. (LTJO-257) As discussed above, Eldorado expert John Westenberg suggested a different volume standard which was not compelling for the Eldorado decreed right. The same conclusion applies to the Truchot decreed right. A 450 acre foot quantified volume is an appropriate reflection of the historical use of the Truchot December 31, 1876 decreed right as originally perfected.

C. Ownership/Flow Rate

61. In 1921, a portion of the Frank Truchot 1876 water right was sold to Eldorado by the Truchot Land and Cattle Company. The deed conveyed 225 miner's inches to Eldorado. Seventy five miner's inches were reserved by Truchot Land and Cattle Company. (LTJO-167 p 214) The fate of the remaining 75 miner's inches is a matter of much speculation.

62. Although Eldorado claims all 300 miner's inches of the 1876 Truchot right, it has been unable to provide any document referencing its acquisition of the 75 miner's inch portion of the right. (Testimony of Ross Salmond, Day 1) If there was a deed, it is lost. There is no written record of a transaction acquiring the 75 inches in any of the board of director or stockholder meetings of the company. Nonetheless, Eldorado has claimed the right to use all of the 1876 Truchot right since at least the 1950s.

63. Tracking that 75 miner's inches in the record before the Court is difficult. The 1921 deed shows the 75 miner's inches was reserved by the Truchot Land and Cattle Company. (LTJO-167) The right does not appear in commissioner records in an identifiable way until 1946. In that year, the commissioner records include an index of

all decreed rights with current ownership. The index shows 75 miner's inches from the 1876 Truchot right were owned by the Coffee Brothers and 225 miner's inches were owned by Eldorado. (LTJO-63 p 145)¹² There is no record showing how or when the Coffee Brothers acquired the right or where the Coffee Brothers used the right. The Coffee Brothers, or at least someone named Coffee, is listed as a water user on the commissioner records from 1931, 1932, 1935, 1937, 1938, 1939, and 1940.¹³ It is reasonable to presume this inclusion was based on ownership of 75 miner's inches from the Truchot right. The 1946 report is the last listing of the Coffee Brothers as a water right owner. There is no record showing who succeeded the Coffee Brothers. Commissioner records from 1961 to 1973 indicate Eldorado owned all 300 miner's inches of the Truchot Right. (Saylor-7)

64. If there was a competing interest in this 75 miner's inches after the Coffee Brothers faded from the records it may have been Hamilton Ranch.¹⁴ Hamilton Ranch is listed as the owner of the 75 miner's inches in an index developed by the State Engineer as part of the 1962 Teton County Water Resource Survey and in water commissioner records from the late 1970s and 1980s.

65. In 1962, the State Engineer's Office issued the Water Resource Survey for Teton County. The survey is in two parts. Part one is a history of land and water use in Teton County. Part two is color maps of irrigated areas of the county. The history portion of the survey includes a brief profile of the Eldorado Co-op Canal Company. In that section, the survey lists all water rights owned by Eldorado. The Truchot right is listed with all 300 miner's inches credited to Eldorado. Teton County Water Resource Survey, Part I, p 41. In addition to the published survey, the State Engineer generated a considerable amount of data that was archived and made available to the public. This is the field work that led to the published survey. For this survey, the field work included

¹² Saylor Exhibit 7 is purported to be all available water commissioner records from the *Perry v. Beattie* decree. Other exhibits such as LTJO-63 are portions of the commissioner records. Saylor-7 did not include the decree index from 1946 that is included in LTJO-63. The parties have not addressed this discrepancy.

¹³ Coffee Brothers are not included in the 1923 commissioner report which is the only commissioner report between 1921 and 1931 that is part of the record for this case.

¹⁴ Hamilton Ranch is the predecessor to the Choteau Cattle Company. Donald McGillis was a principal in both entities. In various exhibits before the Court, particularly commissioner records, ownership may be listed as Hamilton Ranch, Choteau Cattle Company, McGillis, or DeBrucker (lessee). In this report references are to Hamilton Ranch or simply Hamilton.

an index of all rights decreed in *Perry v. Beattie* with the current ownership. In this index, the Truchot right is listed with 225 miner's inches currently owned by Eldorado and 75 miner's inches owned by Hamilton Ranch Company. (TCRC-13) The field work was completed before the published survey and was used to generate that survey. This seems to indicate the field notes were corrected for the published survey. The survey itself should be the more accurate of the two documents. In any case, the conflict between the field work and the published survey limits the value of the survey on this issue.

66. Water commissioner records after 1962 typically included a record of daily diversions to various water users. Given the variety of factors that can influence these numbers, it is difficult to draw much from them in regards to the issue of ownership of the Truchot 1876 right. Nonetheless, the objectors have pointed to the commissioner records as evidence showing Eldorado never acquired the remaining 75 inches of the Truchot right. Commissioner records from 1963 to 1978 do not indicate any issue regarding the Truchot right. In fact, 1979 is the only year where commissioner records of daily distributions arguably show Hamilton was receiving 75 miner's inches of the Truchot right and Eldorado was receiving 225 inches of the Truchot right.¹⁵ Commissioner records from 1981-83 are too varied to show the same distributions. The 1984 records and all subsequent records, with one brief exception, show Hamilton (Choteau Cattle Company) consistently received no more than 300 miner's inches. From this it can only be concluded there was some confusion on the part of the commissioner that was resolved by the water users. Commissioner records of daily distributions are not sufficient to support a finding that Hamilton rather than Eldorado owned the 75 miner's inches at issue here.

¹⁵ This conclusion is based on daily distributions records from 1979. In this single year, on three days, Hamilton is receiving 375 inches, Eldorado is receiving 4,325 inches, and Jack Salmond is receiving 100 inches at the same time. Other more junior rights are also receiving water on these same days. This indicates Hamilton, Salmond, and Eldorado are all receiving all of their available flow rate. From this it appears the Commissioner is delivering the 75 miner's inches to Hamilton not Eldorado. Prior to 1979, Hamilton owned the Salmond right and was entitled to a total flow rate of 400 miner's inches based on ownership of the Burd water rights. As a result, any daily distribution to Hamilton before 1979 that totaled 375 miner's inches cannot be viewed as evidence Hamilton was receiving a portion of the Truchot right rather than its Burd rights. In addition, the Truchot right is Eldorado's most senior right. Therefore, it can only be assumed Eldorado is being denied the 75 inches of its most senior right when it is receiving 4,325 inches and more junior rights are receiving water at the same time. The 1979 daily distribution records from June and July show three days where all of these factors are in place.

67. On August 4, 1981, Eldorado filed its initial Statements of Claim using the irrigation district claim form. As a result, all four Eldorado claims are listed on a single form. In this filing, Eldorado claimed all 300 miner's inches of the Truchot 1876 decreed right. This right was subsequently reassigned to claims 41O 113467-00 and 41O 113472-00 by the DNRC. Irrigation claim 41O 113472-00 appeared in the TPD with a 7.5 cfs (300 miner's inches) flow rate. Stock claim 41O 113467-00 appeared in the TPD with the standard stock flow rate remark and no quantified flow rate.

68. Attachments to Eldorado's original Statement of Claim 41O-Z-113471-00 include a letter from Jesse Malone, Sr. to the Eldorado Board of Directors dated December 21, 1981. Malone states he requested a list of priority date distribution from the ditch rider when he was doing maintenance work on the Eldorado Canal in the summer of 1981. The index, which is also an attachment to the Statement of Claim, listed Hamilton Ranch as owning 375 miner's inches of 1876 water and Eldorado as owning 225 miner's inches of 1876 water. Malone stated this was incorrect and must be addressed by the Eldorado Board of Directors. Based on commissioner records after 1983, it appears Eldorado was able to convince the commissioner that it was entitled to all 300 miner's inches of the 1876 Truchot right.

69. On April 29, 1982, the Choteau Cattle Company filed a Statement of Claim for the Hamilton Ranch Teton River water right claim (41O 187182-00). The filing claimed a 400 miner's inch flow rate based on the two Burd Estate decreed rights (300 inches/1876; 100 inches/1883). In an affidavit attached to this filing, Donald McGillis stated he has been associated with the Hamilton Ranch and the Choteau Cattle Company for 29 years and that the Statement of Claim reflects Hamilton Ranch's use of the claimed water rights throughout that period of time. This seems to indicate Hamilton Ranch had been the owner of the two Burd Estate decreed rights since at least 1953 and had made no claim of ownership of the 75 miner's inches of the Truchot right through this period of time. On March 4, 2003, Choteau Cattle Company amended the Statement of Claim to reflect a 300 miner's inch flow rate based on the 1876 Burd Estate decreed right. The amendment affectively ended any claim Choteau Cattle Company had to the 1883 Burd right. This 100 miner's inch, May 21, 1883, right was claimed by John C. and

Myrtle B. Salmond in Statement of Claim 41O 177932-00. As discussed above, it appears Salmonds acquired the 1883 Burd right from Hamilton Ranch in the 1970s. By amending its statement of claim, Choteau Cattle Company resolved any potential issue regarding the 1883 decreed right.

70. Based on the record before the Master, it is more probable than not that Eldorado acquired the 1876 Truchot water right in two parts. Two hundred and twenty five inches were acquired in 1921. The remaining 75 miner's inches were acquired at some point after 1946, but well before 1973. There are no other water users since the Coffee Brothers that appear to have claimed this 75 miner's inches. This lack of a competing interest is significant. Also, the lack of a document confirming Eldorado's acquisition of the 75 miner's inches is not sufficient to show it did not acquire the right. The preponderance of evidence before the Master shows Eldorado claimed and used all of the Truchot 1876 water for decades prior to 1973. Pursuant to Section 85-2-227(1), MCA statements of Claim 41O 113467-00 and 41O 113472-00 are prima facie proof of their content. It is the objectors' burden to show Eldorado is not entitled to the flow rate claimed by these claims. They have failed to do so. The Master finds Eldorado is the owner of all 300 miner's inches of the December 31, 1876 Frank Truchot water right.

D. Place of Use

71. Eldorado acquired 225 miner's inches of the 1876 Truchot right in 1921. If the right was still being used on the original place of use at that time, it was moved to the Eldorado Canal and used throughout the Eldorado place of use. The deed (LTJO-167) and corporate minutes from 1921 (TCRC-12), show that John Truchot was president of the Truchot Land and Cattle Company (seller) and president of Eldorado (purchaser) at that time. It is just as likely that right was already being used on Truchot land within the Eldorado place of use. In any case, the right has been used within the Eldorado place of use since that time.

72. Eldorado also acquired the remaining 75 miner's inches of the 1876 Truchot right after 1946, moved it to the Eldorado Canal, and has been using it on the Eldorado place of use since that time.

73. There is no evidence showing that any party took issue with the point of

diversion and place of use change or made any assertion that the change caused them injury until objections were filed as part of the current adjudication of Basin 41O. Based on the law as it existed prior to July 1, 1973, Eldorado could make this kind of change subject to a claim of injury by another water user. Section 89-803, RCM (1947) (repealed 1973). Absent a claim of injury, the change was allowed. Eldorado could purchase the Truchot right, move it to the Eldorado headgate, and use it throughout the Eldorado place of use. At the same time, the changes allowed by pre-1973 statutes were limited to point of diversion, place of use, and purpose. In other words, Eldorado can use the Truchot right throughout its place of use, but cannot increase the burden on other water users in doing so. This is accomplished with a quantified volume.

E. Stock Use

74. Stock use of Eldorado's water right claims at the time of appropriation and from the time of appropriation until 1973 is discussed in Section II.C. of this report. The same discussion applies to stock use of the 1876 Truchot water right. It is reasonable to assume the Truchot right was used for stockwater from its beginning or that stockwater became a common use of the right before 1973.

75. Eldorado stock claim 41O 113467-00 is a valid water right claim. Stock right 41O 113467-00 and irrigation right 41O 113472-00 are multiple use of the same historical right. The combined use of the corresponding stock and irrigation claims is limited to historical use.

F. Summary for Claims 41O 113467-00 and 41O 113472-00

76. Based on the record in this case:

- a. Claims 41O 113467-00 and 41O 113472-00 are entitled to a December 31, 1876 priority date.
- b. Eldorado is entitled to a 300 miner's inch flow rate for these claims.
- c. Stock claim 41O 113467-00, as modified by this report, is a valid reflection of historical use.
- d. Claims 41O 113467-00 and 41O 113472-00 should receive a 450 acre foot per year total quantified volume as multiple uses of the same historical water right. The combined volume diverted under both claims cannot

exceed 450 acre feet per year.

e. Eldorado is entitled to use both claims throughout its place of use.

IV. Claims 41O 113468-00 and 41O 113473-00 (Dennis)

A. Priority Date

77. On December 8, 1921, Eldorado acquired the Dennis water right. (LTJO-167 p 215) In *Perry v. Beattie*, Dennis was decreed 200 miner's inches with an April 1, 1880 priority date. (LTJO-34 p 77 & 82) Eldorado received the entire right with no restrictions. Claims 41O 113468-00 (stock) and 41O 113473-00 (irrigation) are claimed as multiple uses of the April 1, 1880 Dennis right.

78. As with Eldorado's 1876 and 1883 rights, LTJO asserts the 1880 Dennis right was abandoned through the 1923 corporate lapse. LTJO asserts Eldorado is entitled to a 1924 priority date use right. The argument is addressed in Section II.B. of this report and will not be restated here. This argument is not compelling. Claims 41O 113468-00 and 41O 113473-00 are entitled to an April 1, 1880 priority date.

B. Volume

79. Jay Johnson reviewed the legal descriptions for the Dennis property in the Amended Complaint in *Perry v. Beattie* and determined the entire property totaled 300.00 acres.¹⁶ Johnson then determined that approximately 200.00 of these acres could be irrigated from the Teton River. (LTJO-256) Johnson excluded land west of the Teton River and east of Spring Creek. Based on this determination, Johnson opined the District Court had applied an inch per acre standard in *Perry v. Beattie*. Johnson then applied a 1.5 acre foot per acre standard to 200.00 acres to determine a volume for the claim of 300 acre feet per year. (LTJO-257) As discussed above, Eldorado expert John Westenberg suggested a different volume standard which the Master did not find compelling for the Eldorado decreed right. The same conclusion applies to the Dennis decreed right. The Master finds a 300 acre foot quantified volume is an appropriate reflection of the historical use of the April 1, 1880 Dennis right.

C. Place of Use

¹⁶ There is a discrepancy in Johnson's report. He indicates the Dennis property totaled 300 acres. Based on the legal descriptions Johnson used, the property totaled 320 acres. Johnson's map of the property includes all 320 acres. This discrepancy does not appear to affect his opinion that the Dennis property included 200 irrigable acres from the Teton River.

80. Eldorado acquired all 200 miner's inches of the 1880 Dennis right in 1921. The right was moved to the Eldorado Canal and used throughout the Eldorado place of use. The right has been used within the Eldorado place of use since that time.

81. Prior to this adjudication, there is no evidence showing that any party took issue with this change or made any assertion that the change caused them injury. Based on the law as it existed prior to July 1, 1973, Eldorado could make this kind of change subject to a claim of injury by another water user. Section 89-803, RCM (1947) (repealed 1973). Absent a claim of injury, the change was allowed. Eldorado could purchase the Dennis right, move it to the Eldorado headgate, and use it throughout the Eldorado place of use. At the same time, the changes allowed by pre-1973 statutes were limited to point of diversion, place of use, and purpose. In other words, Eldorado can use the Dennis right throughout its place of use, but cannot increase the burden on other water users in doing so.

D. Stock Use

82. Stock use of Eldorado's water right claims at the time of appropriation and from the time of appropriation until 1973 is discussed in section II.C. of this report. The same discussion applies to stock use of the 1880 Dennis water right. It is reasonable to assume the Dennis right was used for stockwater from its beginning or that stockwater became a common use of the right before 1973.

83. Eldorado stock claim 41O 113468-00 is a valid water right claim. Stock right 41O 113468-00 and irrigation right 41O 113473-00 are multiple uses of the same historical right. The combined use of the corresponding stock and irrigation claims is limited to historical use.

E. Summary for Claims 41O 113468-00 and 41O 113473-00

84. Based on the record in this case:
- a. Claims 41O 113468-00 and 41O 113473-00 are entitled to an April 1, 1880 priority date.
 - b. Eldorado is entitled to a 200 miner's inch flow rate for these claims.
 - c. Stock claim 41O 113468-00 is a valid reflection of historical use.
 - d. Claims 41O 113468-00 and 41O 113473-00 should receive a 300 acre

foot per year total quantified volume as multiple uses of the same historical water right. The combined volume diverted under both claims cannot exceed 300 acre feet per year.

e. Eldorado is entitled to use both claims throughout its place of use.

V. Claims 41O 113469-00 and 41O 113474-00 (Beattie)

A. Volume

85. On October 16, 1937, the stockholders of Eldorado voted to purchase the George Beattie decreed water right. (TCRC-12) In *Perry v. Beattie*, Beattie was decreed 400 miner's inches with a December 1882 priority date. (LTJO-34 p 81 & 85) Absent a more specific date, the Beattie right has been administered with a December 31, 1882 priority date since that time. Eldorado received the entire right with no restrictions. Claims 41O 113469-00 (stock) and 41O 113474-00 (irrigation) are claimed as multiple uses of the December 31, 1882 Beattie right.

86. Jay Johnson reviewed the Beattie's answer in *Perry v. Beattie* and determined the entire property included 400.00 irrigable acres. (LTJO-258) Beattie had asserted the right to 1750 miner's inches in *Perry v. Beattie*, but was decreed 400 miner's inches. Johnson opined the District Court concluded Beattie was irrigating about 400.00 acres and applied an inch per acre standard. Johnson then applied a 1.5 acre foot per acre standard to 400.00 acres to determine a volume for the claim of 600 acre feet per year. (LTJO-258) As discussed above, Eldorado expert John Westenberg suggested a different volume standard which the Master did not find compelling for the Eldorado decreed right. The same conclusion applies to the Beattie decreed right. The Master finds a 600 acre foot quantified volume is an appropriate reflection of the historical use of the December 31, 1882 Beattie right.

B. Place of Use

87. Eldorado acquired all 400 miner's inches of the 1882 Beattie right in 1937. (TCRC-12) The right was moved to the Eldorado Canal and used throughout the Eldorado place of use. The right has been used within the Eldorado place of use since that time.

88. Prior to this adjudication, there is no evidence showing that any party took

issue with this change or made any assertion that the change caused them injury. Based on the law as it existed prior to July 1, 1973, Eldorado could make this kind of change subject to a claim of injury by another water user. Section 89-803, RCM (1947) (repealed 1973). Absent a claim of injury, the change was allowed. Eldorado could purchase the Beattie right, move it to the Eldorado headgate, and use it throughout the Eldorado place of use. At the same time, the changes allowed by pre-1973 statutes were limited to point of diversion, place of use, and purpose. In other words, Eldorado can use the Beattie right throughout its place of use, but cannot increase the burden on other water users in doing so.

C. Stock Use

89. Stock use of Eldorado's water right claims at the time of appropriation and from the time of appropriation until 1973 is discussed in section II.C. of this report. The same discussion applies to stock use of the 1882 Beattie water right. It is reasonable to assume the Beattie right was used for stockwater from its beginning or that stockwater became a common use of the right before 1973.

90. Eldorado stock claim 41O 113469-00 is a valid water right claim. Stock right 41O 113469-00 and irrigation right 41O 113474-00 are multiple use of the same historical right. The combined use of the corresponding stock and irrigation claims is limited to historical use.

D. Summary for Claims 41O 113469-00 and 41O 113474-00

91. Based on the record in this case:

- a. Stock claim 41O 113469-00 is a valid reflection of historical use.
- b. Claims 41O 113469-00 and 41O 113474-00 should receive a 600 acre foot per year total quantified volume as multiple uses of the same historical water right. The combined volume diverted under both claims cannot exceed 600 acre feet per year.
- c. Eldorado is entitled to use both claims throughout its place of use.

VI. Place of Use/Acres Irrigated, All Claims

92. Eldorado was originally incorporated as a ditch company. (Eldorado-2) It

has always been owned by shareholders and was developed to serve the needs of the shareholders. A share in the company entitles that shareholder to a certain amount of water delivered through the Eldorado system of canals and ditches. Shareholders are charged for water they receive and may also be subject to special assessments as the need arises. For example, each share was subject to a \$2.00 assessment in 1937 to purchase the Beattie water right. (TCRC-12) Eldorado developed and maintains a single point of diversion from the Teton River. The main Eldorado canal and various ditches have always serviced the same general area in the Ralston Gap and on the Burton Bench. Eldorado does not provide water on demand to anyone other than shareholders and their lessees. Eldorado has only made water available to the public in the sense that any member of the public could acquire an interest in land serviced by the ditch system, acquire Eldorado shares, and request water at their turnout. Eldorado did not construct its ditch system in hopes of finding customers, it was meeting the needs of its shareholders. Eldorado is not an irrigation district. It is not a state water project created pursuant to §§ 89-101, et seq., RCM (1947) (repealed 1973). Eldorado is a corporation started by a group of investors who saw the advantage of this business model. It was created for the benefit of its shareholders. To that extent, Eldorado is no different from any other private water right owner.

93. At the same time, Eldorado owns water rights and a canal system. It does not own land. Its sole purpose is to maintain a delivery system and deliver water to shareholders. As a result, Eldorado has minimal control over the actual location where water is used within the property of a shareholder. Once the shareholder takes control of water, they have historically exercised full discretion over where on their property water is used. (Testimony of Ross Salmond, Day 1) Shareholders also have discretion to decide how many acres they irrigate in any given year. They could increase or decrease irrigation depending on their needs and available water. Since 1911, water has been delivered at a rate of 2.5 miner's inches per share. (LTJO-184 p 5) There are significant differences in the number of shares owned by shareholders. For example, in 2010, Rodney Cole owned five shares. Flying U Ranch owned 260 shares. (Eldorado-7) This can result in a different flow rate to acres ratio for each shareholder. A shareholder could

have several shares irrigating relatively few acres or a few shares spread over several acres. Testimony from several Eldorado shareholders and company officers indicates Eldorado has never dictated where water could be used or limited the number of acres irrigated by a shareholder. The only restriction is that water must be used on land owned by a shareholder. (Eldorado-5b)

94. If Eldorado is required to limit its diversions with a quantified annual volume, the total number of acres it can service and the number of acres irrigated in any given year is less significant. All of the land Eldorado services is several miles from the Teton River. Water makes its way through the system of ditches and laterals. This ditch system ends near Muddy Creek. Ross Salmond owns property at the end the Eldorado system in Section 34, T26N, R4W. He testified that any water at the end of the Eldorado ditch system does not flow into Muddy Creek. Rather, it enters Spring Coulee which eventually meets the Teton River in Section 4, T24N, R3W.¹⁷ Salmond stated there is no Eldorado return flow to the Teton River. (Testimony of Ross Salmond, Day 3) With this lack of return flow, changes in the location of irrigation within the Eldorado system and the number of acres irrigated have little affect on flows in the Teton River. Once Eldorado takes its water from the river, it is gone.

95. Eldorado's original Statement of Claim filing, 41O 113471-00, claimed a 15,420.00 acre place of use. During the DNRC claim examination process, claim examiner Jay Johnson, sent a letter to Eldorado raising the idea of a service area for the company. Johnson's review of the Eldorado Articles of Incorporation indicated to him that one of the objectives of the company was to sell water. Based on this, Johnson determined a service area including all land that could be serviced by Eldorado's ditch system might be appropriate. *See* 41O 113475-00 claim file. Eldorado responded by amending its place of use to greatly increase the total number of acres irrigated. All Eldorado irrigation claims appeared in the Temporary Preliminary Decree (TPD) with a 31,905.00 acre place of use. Based on post-hearing filings, Eldorado is currently claiming a 26,606.00 acre place of use.¹⁸ All Eldorado irrigation claims appeared in the

¹⁷ It is roughly 12 miles from Salmond's property to the confluence of Spring Coulee and the Teton River.

¹⁸ By disclaiming any right to use the Bateman Ditch or to irrigate any land serviced by the Bateman Ditch with its water rights, Eldorado reduced its place of use by 5,299.00 acres.

TPD with a 15,420.00 acre annual limit on irrigated acres. This is the same number of acres Eldorado originally claimed as a place of use. Based on his review, Eldorado expert witness John Westenberg testified that a more accurate figure for annual historical irrigation is 12,550.00 acres. (John Westenberg Testimony, 9:42, Day 4)

96. Application of a “service area” to the Eldorado claims has been a point of contention. Eldorado asserts it is entitled to a broadly defined service area that encompasses all land within a general boundary that is currently serviced by Eldorado ditches or was historically serviced by Eldorado ditches. This argument stems from Eldorado’s contention that it is a public service company that perfected its water right upon completion of its ditch system and is not limited by the actual location where water is used. Based on this argument, Eldorado asserts it could continue to expand the number of acres served by its ditch system and allow shareholders to change the location where their water is actually used. In this case, the term service area has come to represent these arguments. The Master finds these arguments are misplaced. Eldorado is a private irrigator. It is unique in that it owns and provides water but does not own the land where the water is used. Nonetheless, Eldorado’s water rights should reflect the historical place of use where that water was used and continues to be used by its shareholders.

97. Both expert witnesses reviewed aerial photographs from 1937 and 1957 to determine the number of acres historically irrigated by the Eldorado ditch system. In addition, both experts reviewed the Water Resource Survey and related documents. LTJO expert Jay Johnson did not testify in regards to the Eldorado place of use, but did generate several opinion papers and maps that are part of the record. (LTJO-250 & -261) Eldorado expert John Westenberg took Johnson’s work and generated maps that show the progression of historical irrigation. In the process, Westenberg generally accepted the number of historically irrigated acres Johnson had found in the data sources. Westenberg simply put a different perspective on this data. (Eldorado-53j & -53n)

98. For his review, Johnson used the hand colored map attached to the original Eldorado Statement of Claim as the boundary of the place of use. He then reviewed 1937 and 1957 aerial photos to determine the number of irrigated acres within this area. From this, Johnson determined Eldorado was irrigating about 7,290.00 acres in 1937 and about

8,875.00 acres in 1957. (LTJO-250 p 2988) Westenberg recreated the Johnson maps for 1937 (Eldorado-53n) and 1957 (Eldorado-53m). He then created a third map showing the combined irrigated acres from both 1937 and 1957. (Eldorado-53l) From this, Westenberg showed that the place of use was the same in most cases, but there was a certain amount of shifting over the years.

99. Mr. Johnson determined the Water Resource Survey field notes and maps showed about 12,220.00 acres irrigated in the Eldorado system.¹⁹ (LTJO-250 p 2988) Westenberg varied from Johnson's assessment of the Water Resource Survey. He determined the survey field notes and maps showed about 12,500.00 acres. He found an additional 1,000.00 acres the survey listed as potential irrigation within the Eldorado system. Finally, he identified 1,440.00 acres served by Eldorado through the Gamble Ditch that the survey failed to credit to Eldorado. The Gamble Ditch is a lateral off of the Eldorado Canal. Historical use of the Gamble Ditch by Eldorado was confirmed by the testimony of Rodney Cole. (Testimony Day 3) Westenberg's total acres irrigated from the Water Resource Survey was 14,940.00 acres.

100. Mr. Westenberg created a single map overlaying the 1937 photo, 1957 photo, and the Water Resource Survey. He included the current boundaries of the Eldorado place of use on the map. (Eldorado-53j) From this he opined that nearly all of the land within the place of use as it appeared in the TPD had been historically irrigated. The majority of the land appears as irrigated on all three data sources. However there are differences from one source to another. Westenberg's point is that all of the place of use Eldorado is claiming was historically irrigated. He concedes the location of that irrigation varied over time and only a portion of the place of use was irrigated in any given year. He also agrees that some of the place of use has not been irrigated for several years. He would nonetheless retain this land as historically irrigated.

101. Mr. Westenberg provided the following criteria for the Eldorado place of use:

¹⁹ The issue remark on all Eldorado irrigation claims state 11,976.50 acres appear as irrigated in the Water Resource Survey and an additional 994.00 acres were potentially irrigated under the existing ditch system but were not irrigated at the time of the survey. These remarks were generated by Mr. Johnson while he was employed by the DNRC. It is presumed his more recent work as a consultant for LTJO expanded on his previous work at the DNRC and is more accurate.

- 1.) Pre-1973 ditches capable of servicing the land.
- 2.) Pre-1973 irrigation on the land.
- 3.) Simple legal land descriptions.

Applying these criteria, Westenberg determined the current boundary of Eldorado's place of use is not accurate. Using a copy of Exhibit Eldorado-53g, which was marked as Eldorado-53gg, Westenberg marked several areas he would exclude from the place of use because the land can no longer be serviced by an Eldorado ditch or is not irrigable land. Mr. Westenberg also found a boundary with simple legal descriptions was more functional. As a result, he followed straight lines rather than natural features. (Eldorado-53gg) With his proposed changes, Mr. Westenberg opined the Eldorado place of use should include a total of about 22,000.00 acres with an annual limit of irrigation of 12,550.00 acres irrigated. (Testimony of John Westenberg, 9:42, Day 4) Although Mr. Westenberg's company did draft preliminary legal descriptions for the 22,000.00 acres, he did not provide this information in his testimony or in an exhibit.

102. During cross examination, Mr. Westenberg acknowledged that some of the land he included in his proposed place of use did not appear as irrigated in any of the three data sources. Nonetheless he included the land if it had been claimed in a Desert Land filing or if he found other indications of at least some historical irrigation.

103. In exhibit Eldorado-53gg, Mr. Westenberg excluded a significant amount of the non-shareholder land in his proposed place of use. However he included several parcels that according to the current list of Eldorado shareholders (Eldorado-7) and his own map showing non-shareholder land (Eldorado-53r), are not owned by an Eldorado shareholder:

Section 11 T25N, R5W	(Miller Colony)	640.00 acres
Section 12 T25N, R5W	(15 parcels, various owners)	640.00 acres
Section 14, T25N, R5W	(William & Agnes Leys)	640.00 acres
SE, Section 16, T25N, R4W	(State of Montana*)	160.00 acres
SW & W2E2, Section 20, T25N, R4W	(Bar TC Properties, Inc.*)	320.00 acres
E2E2, Section 20, T25N, R4W	(Albert & Beverly Carlson)	<u>160.00 acres</u>
	Total	2,560.00 acres

* Exhibit 53r did not include ownership for these parcels. The ownership listed here is based on the Montana Cadastral Survey.

Although parts of these Sections may have been historically irrigated with Eldorado water, only 40.00 acres in the NENE of Section 12, T25N, R5W, is currently owned by an Eldorado shareholder. The remaining acres are owned by non-shareholders and who have no right to use Eldorado water. With the exception of the NENE of Section 12, T25N, R5W all of this property, a total of 2,520.00 acres, should be removed from the Eldorado place of use.

104. The place of use for any irrigation claim must be a reflection of historical use. However, it is common for water users to move the exact location of that irrigation within their place of use. The larger the place of use, the more common it may be to move water from year to year. It is clear that Eldorado shareholders have engaged in this practice for years. Given the location of Eldorado's place of use and the absence of return surface flows, changing the annual irrigation within the place of use has no affect on other water users. Therefore, a place of use based on historical use can include land that is owned by Eldorado shareholders even though that land is not currently irrigated. In addition, some of the land within the Eldorado place of use can also be irrigated from other sources or from water delivered from another ditch company. This ability does not diminish the use of Eldorado water on that particular property.

105. None of the parties provided a suggested legal description for any changes to the place of use required by the evidence presented at hearing. The place of use recommended in this report is based on Eldorado-53gg with all non-shareholder land removed. This place of use, as determined by this Master, is represented by Master's Exhibit A which is attached to and by reference made part of this report. Legal descriptions were calculated based on the land identified on Master's Exhibit A. These legal descriptions were compared to the legal descriptions that currently appear on the Eldorado claim abstracts. Any legal description on the current claim abstracts that is not within the area identified on Master's Exhibit A was removed from those abstracts. With these corrections, the Eldorado place of use totals 18,742.00 acres. The complete parcel listing for the place of use is found on the attached claim abstracts.

106. Eldorado had previously agreed to a 15,420.00 acre annual limit on the number of acres irrigated. Based on the testimony of Eldorado expert witness John

Westenberg, that annual limit should be set at 12,550.00 acres. (John Westenberg Testimony, 9:42, Day 4) Based on the evidence presented at hearing, a 12,550.00 acre annual limit on irrigated acres within an 18,742.00 acre place of use is an accurate reflection of Eldorado's historical irrigation practices.

VII. Period of Use/Period of Diversion, All Claims

107. Eldorado stock claims 41O 113467-00, 41O 113468-00, 41O 113469-00, and 41O 113470-00 all appeared in the TPD with an April 15 to November 19 period of use/period of diversion.²⁰ Eldorado irrigation claims 41O 113472-00, 41O 113473-00, 41O 113474-00, and 41O 113475-00 all appeared in the TPD with an April 15 to September 19 period of use/period of diversion. On November 16, 2009, Eldorado, Farmers, and the Miller Colony filed an agreement addressing period of use/period of diversion for all Eldorado claims. Under the terms of the agreement, Eldorado proposes the following changes to these elements of its claims:

	<u>Current POU/POD</u>	<u>Proposed POU/POD</u>
All Irrigation Claims:	April 15 to September 19	April 15 to <u>October 1</u>
All Stock Claims:	April 15 to November 19	April 15 to <u>October 20</u>
		<u>Remark:</u> Stock diversions between October 1 and October 20 are limited to no more than 25 cfs (1,000 miner's inches).

108. In its post-hearing filings, TCRC asserted commissioner records do not support the terms of this agreement as it relates to the Eldorado stock claims. TCRC tracked the commissioner records from 1965 to 1973 and found that Eldorado was never diverting 1,000 miner's inches as late as October 20. In addition, TCRC asserts that former Eldorado ditch rider and board member Darrell Stott testified that water could only be used for stock in conjunction with irrigation diversions. From this, TCRC argues Eldorado has conceded it ceases irrigation diversions on October 1 and should therefore be required to end all diversions on that date.

109. Darrell Stott testified that it was his impression that Eldorado water must be

²⁰ The period of use and period of diversion on direct flow claims is typically the same period of time. This applies to all eight Eldorado claims.

requested for irrigation. He did not think a shareholder could request only stock water. At the same time, he stated that he did not know if this was correct or just his impression. He also testified that water was diverted for stock. He did not testify that he ever denied stockwater to a shareholder when he was the ditch rider. (Testimony of Darrell Stott, 2:07, Day 3) Evidence from the early development of the Eldorado system, as discussed in Section II.C. of this report, indicates water was diverted for stock use only when land was leased to stockmen. (LTJO-6 p35)

110. Concerning the 1965 to 1973 commissioner records cited by TCRC, Eldorado diverted water into mid-October 6 out of these 9 years. (Saylor-7) Eldorado diverted water through nearly all of October in 1964 and 1963. Prior to 1963, diversion records only provide the total number of days water was diverted. A start date and end date are not provided. However, given the typical start date in other years, it appears Eldorado probably diverted well into October in several early years. Based on this record, an October 1 end date for Eldorado's irrigation claims and an October 20 end date for Eldorado's stock claims is within historical use. (Saylor-7)

111. The terms of the November 16, 2009 agreement constitute an overall reduction from what appeared in the Temporary Preliminary Decree for Eldorado's water right claims. Prior to the agreement, Eldorado had not accepted any limit on its flow rates. Further restricting Eldorado's stock claims, as asserted by TCRC, is not supported by the record.

VIII. Implied Claims

112. Both objectors assert that Eldorado's irrigation claims could be limited to a relatively small number of acres irrigated based on early use. For example, claim 410 113475-00 would be limited to a 3,000 acre place of use. The objectors make no recommendation for the actual location of these 3,000.00 acres. The objectors then assert that the incremental increase in the number of acres irrigated should be represented by implied claims with more junior priority dates. Presumably, various sections of the Eldorado place of use would not receive water as the implied claims went out of priority and were cut off by the water commissioner.

113. Implied claims are contemplated by Rule 35, W.R.C.E.R. They serve to

separate multiple water rights found in a single filing. Arguably, they could be applied to the Eldorado claims to reflect the increase in the number of acres irrigated between 1908 and 1973. However, the application of quantified volumes is a far more functional way to administer these water rights. ~~In addition,~~ ^{keep} the total quantified volume for all four ^{NO- OK as is} irrigation claims and the corresponding stock claims are relatively close to the total volume Eldorado was diverting prior to 1973:

Claim Numbers/Purpose	Master's Recommended Volume
41O 113475-00/Irrigation 41O 113470-00/Stock	9,000 A/F
41O 113472-00/Irrigation 41O 113467-00/Stock	450 A/F
41O 113473-00/Irrigation 41O 113468-00/Stock	300 A/F
41O 113474-00/Irrigation 41O 113469-00/Stock	600 A/F
Total	10,350 A/F

According to the volume calculations provided by Eldorado president Ross Salmond, the company did not divert more than 9,691.00 A/F in any of the ten years leading up to 1973.²¹ (Eldorado-48) To be fair, commissioner records indicated Eldorado did divert more than 10,350 acre feet several times prior to 1964. However, it is generally accepted that records prior to 1964 are much less reliable. A 10,350 total volume for all Eldorado Teton River water right claims appears to be a reasonably accurate reflection of historical use.

114. A quantified volume is a far more functional way to administer the Eldorado water right claims. Implied claims would serve only to complicate that administration and are therefore inappropriate.

CONCLUSIONS OF LAW

I. Jurisdiction/Burden of Proof

²¹ As discussed in Section II.D. Salmond's calculations were adjusted to remove the 500 miner's inch Miller Colony water right that began using the Eldorado ditch in 1963. The Miller Colony right was included under the Eldorado claims in commissioner records. The 9,691 A/F volume for Eldorado diversions was achieved only in 1966.

1. The Montana Water Court has exclusive jurisdiction to interpret and determine all existing water rights. *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991). An “existing water right” is defined as “a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Section 85-2-102(12), MCA. This includes jurisdiction to review all objections to preliminary decrees, § 85-2-233, MCA, and all issue remarks resulting from DNRC claim examination, § 85-2-248, MCA.

2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content, § 85-2-227, MCA. This prima facie validity may be overcome by other evidence that proves that one or more elements of the prima facie statement of claim are incorrect. A prima facie claim meets the minimum threshold of evidence necessary to establish the facts alleged, and shifts the burden of production to an objector to overcome that threshold. The burden of persuasion remains ultimately with the claimant to prove up a water right claim. Section 26-1-402, MCA. Without evidence to the contrary, the prima facie claim may satisfy a claimant's burden. However, the Court is not compelled to accept the prima facie statement of claim as true. *Burkhartsmeier et al. v. Burkharmsmeier et al.*, Case 40G-2, (MT Water Court Memorandum Opinion and Order Adopting Master's Report Mar. 11, 1997).

3. If a claim appears in a Water Court decree with issue remarks resulting from DNRC claim examination, the information resulting in the issue remarks and the issue remarks themselves must be weighed against the claimed water right. Section 85-2-247, MCA. The issues raised by the remarks must be resolved as part of the adjudication process. Section 85-2-248(2), MCA.

4. The degree or weight of evidence needed to contradict or overcome the prima facie presumption that a Statement of Claim is correct as filed is a preponderance of the evidence. *Burkhartsmeier et al. v. Burkharmsmeier et al.*, Case 40G-2, (MT Water Court Memorandum Opinion and Order Adopting Master's Report Mar. 11, 1997). The Montana Supreme Court has defined preponderance as “a relatively modest standard that the statutory criteria are more probable than not to have been met.” *Hohenlohe v. State*, 2010 MT 203 ¶ 33, 357 Mont. 438, 240 P.3d 628.

II. Priority Date/Flow Rate

A. Application of *Perry v. Beattie*

5. All eight Eldorado claims are based on water rights decreed in *Perry v. Beattie*. LTJO, TCRC, and their predecessors were not a party to the *Perry v. Beattie* Decree.²² As strangers to the litigation, LTJO and TCRC are not bound by the decree. *Hill v. Merrimac Cattle Co.*, 211 Mont. 479, 495-496, 687 P.2d 59, 68 (1984). At the same time, the Decree is at least “some evidence of the water right.” *Hill*, 211 Mont at 495-496, 687 P.2d at 68 (citing *Wills v. Morris*, 100 Mont. 514, 50 P.2d 862 (1935)). In this case, the *Perry v. Beattie* Decree is compelling evidence of the priority date and flow rate for all Eldorado claims. It is reasonable to assume the trial court was well versed in the facts of that case and controlling law. *Bailey v. Tintinger*, 45 Mont. 154, 165-166, 122 P. 575, 578-579 (1912).

6. All eight Eldorado claims have priority dates earlier than 1885. It is apparent the trial court in *Perry v. Beattie* properly applied the doctrine of relation back as that doctrine applies to claims initiated prior to 1885.²³ *Woolman v. Garringer*, 1 Mont. 535, 543-45, (1872). Prior to 1885, relation back was governed by the common law rules and customs of the pioneer settlers. Under those rules, an appropriator could relate their priority date back to the date when work was commenced on the ditch or canal, so long as that work was pursued with reasonable diligence. *Woolman* at 544. Eldorado’s predecessors posted notice on May 17, 1883 and commenced work on the ditch at that time. Given the scope of the project, work on the ditch was pursued with reasonable diligence. It is apparent the trial court in *Perry v. Beattie* found Eldorado’s predecessors complied with the rules and customs of the pioneer settlers and were entitled to a May 17, 1883 priority date for the water right represented by claims 41O 113470-00 and 41O 113475-00. It is further apparent the trial court applied the same

²² While TCRC was not a party to the *Perry v. Beattie* litigation, its Teton River water rights have been administered as part of that Decree for decades. This report does not address the ramifications of that involvement. TCRC’s rights are addressed in case 41O-84.

²³ In 1885, the Montana legislature enacted legislation governing the ability of an appropriator to employ the relation back doctrine. Under the statute, posting a notice, filing that notice, and commencement of work on the appropriation had specific requirements. Sections 89-810 to -814, RCM (1947) (repealed 1973). In *Bailey* the Court ruled that a water right initiated after enactment must comply with the statute in order to relate its priority date back to the date of posting. *Bailey*, 45 Mont. at 166, 122 P. 575 at 579. However, the Court also confirmed that appropriations prior to 1885 were governed by the rules and customs of the pioneer settlers. *Bailey*, 45 Mont. at 166, 122 P. 575 at 579.

it decreed the priority dates for the Truchot, Dennis, and Beattie water rights. The objectors have not presented sufficient evidence to show by a preponderance of the evidence that the decreed priority dates are incorrect.

7. The Objectors have not questioned the flow rates for the Eldorado, Dennis, and Beattie water rights. They have argued that Eldorado only acquired 225 miner's inches of the Truchot water right. The record shows that Eldorado asserted ownership of all 300 miner's inches of the Truchot right for several years prior to July 1, 1973. Objectors carry the burden to show Statements of Claim 41O 113467-00 and 41O 113472-00, which represent the Truchot right, are not prima facie proof of their content. They have failed to do so. Eldorado is entitled to all 300 miner's inches of the Truchot right.

B. Perfection

8. Perfection is typically defined as an actual diversion of water and application of that water to a beneficial use, *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 204, 62 P.2d 206, 210, (1936). The Objectors have not questioned perfection of the Truchot, Dennis, and Beattie water rights.²⁴ They make the point that these water rights were perfected, but only to the extent originally intended by Truchot, Dennis, Beattie, and their predecessors. Eldorado has not disputed these allegations. Therefore, perfection is not an issue for these claims. The Truchot, Dennis, and Beattie rights were perfected at the time the *Perry v. Beattie* Decree was issued.

9. The original Eldorado water right, as represented by claims 41O 113470-00 and 41O 113475-00, presents a different situation. Eldorado argues it is a public service corporation and therefore perfected the water right when it had completed its ditch system and made water available to the public. Eldorado asserts this perfection did not require actual application of water to a beneficial use, and allowed it to continue to add additional acres over time so long as it was land serviced by its ditch system. The actual number of irrigated acres and the exact location need not be quantified. Once the right was perfected, Eldorado argues it could continue to move and expand its system under Section 89-810, RCM (1947) (repealed 1973) until the Water Use Act became law in

²⁴ LTJO does assert the Truchot right is entitled to a later priority date, but agrees the right was perfected.

1973. This apparently provided a seamless period of expansion from 1883 to 1973 with all development relating back to 1883.

10. The public service corporation argument is misplaced. As discussed in *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912), the unique nature of a public service corporation is that it is developing a water delivery system to attract water users who may or may not purchase water from that company. When a company is ready, willing, and able to provide water to users upon demand, its right may be considered perfected. The company “. . . cannot be made to depend for its existence in the first instance upon the voluntary acts of third parties--strangers to its undertaking.” *Bailey*, 45 Mont. at 178, 122 P. at 583. In Eldorado’s case, the water users were not third party strangers to the undertaking, they were shareholders who in most cases acquired shares as part of the process of acquiring the land. Eldorado did not complete a ditch system and then make water available to users upon demand. It had a number of shareholders who had already acquired a financial stake in the company and had been waiting for the ditch system to be completed to their property (for example, Daniel Buck). Eldorado is not a public service company as contemplated by *Bailey*. It is a company who provides water exclusively to its shareholders and their lessees. It is not exempt from the requirement to diligently complete a ditch system and put water to beneficial use. Its water rights must be perfected through application of water to beneficial use.

11. The common law elements of a valid appropriation are intent, notice, diversion, and application to beneficial use. *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, within the Missouri River Drainage Area, Including All Tributaries of the Missouri River in Broadwater, Cascade, Jefferson and Lewis and Clark Counties, Montana* (Basin 41I), 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (*Bean Lake III*). That is exactly what Eldorado did. Beginning in 1883 it commenced to develop a ditch system with the intention of supplying water “for irrigation and Domestic purposes between Teton River and Mudey creek.” (Eldorado-1, p 754) Although Eldorado suffered some delays in construction, by the mid 1890s, most if not all of the main system had been completed. By the time Eldorado was involved in the *Perry v. Beattie* litigation, it was asserting its

system of ditches and laterals was completed and it was providing water to shareholders throughout the Burton Bench. In other words, by 1908 Eldorado was asserting its 1883 water right had been perfected through diversion and application of water to a beneficial use.

C. Corporate Lapse

12. There is no question that the original Eldorado Co-op Canal Company lapsed in 1923 and was reformed in 1924. The shareholders in the new company were identical to the shareholders in the lapsed company. According to the limited water commissioner records from that time, the lapse caused no change in Eldorado's irrigation practices. Nonetheless, LTJO argues Eldorado's failure to follow proper procedure in transferring assets from the lapsed company to the new company constitutes an intent to abandon all water rights held by the company at that time.

13. As a result of the lapse, Eldorado's board of directors assumed the position of trustees charged with full power to settle and liquidate the company's affairs. *Mieyr v. Federal Surety Co.*, 97 Mont. 503, 507, 34 P.2d 982, 985 (1934). These trustees formed a new corporation with the same shareholders and continued to provide water to these shareholders through the water commissioner. While Eldorado could not produce documents showing the transfer of assets, it is apparent it took place and has not been questioned until LTJO filed its summary judgment motion. As noted by the Water Court's December 28, 2011 Order Dismissing Objection to Order Denying Summary Judgment, there is no evidence showing any stockholder or creditor was injured by the corporate change. There is also no evidence showing that any other water user, including the water users that comprise LTJO, were injured by the corporate change.

14. LTJO argues that corporate formalities are important and Eldorado should pay the price for its apparent lax practices. Put another way, LTJO saw an opportunity to upend the water distribution system that has been in place on this part of the Teton River for the last 100 years. An opportunity based on the fact that a group of irrigators inadvertently allowed their ditch company to lapse; corrected the error as soon as it was discovered; but may not have followed all of the technical requirements in the process. The Utah Supreme Court faced a nearly identical situation in *St. George City v. Kirkland*,

409 P.2d 970 (Utah 1966). In that case, a mutual water company allowed its charter to lapse thereby opening it to claims the water rights administered by the company were abandoned. The Utah Supreme Court noted there was no showing of nonuse and found the lapse of the first company followed by reformation of the second company did not cause an abandonment of the water right claims. The Utah Court found the abandonment argument was little more than an opportunistic attempt to acquire water:

“It seems obvious that everyone innocently forgot about the date the charter lapsed. But the formation of the new corporation gave a number of people a number of ideas about getting hitherto unclaimed rights to the water.”

St. George, 409 P.2d at 971.

The Utah Court decision is persuasive. The same logical analysis applies to this case. Eldorado did not abandon any of its water rights based on its conduct in 1923 and 1924.

15. Based on the record before this Master, the priority dates and flow rates for the four Eldorado irrigation water right claims are correct as they appeared in the Temporary Preliminary Decree. The four corresponding stock claims did not appear in the TPD with a quantified flow rate. Rather, these four claims received the standard flow rate remark for stock drinking directly from a source or ditch system. However, the place of use for the stock claims is a significant distance from the Teton River. Both the evidence presented in this case and the agreement filed by Eldorado and Farmers indicate that stockwater was at times diverted by itself when no irrigation was taking place. This pattern of historical use gives rise to the need for a quantified flow rate for the stock claims. That quantified flow rate should be the same as the flow rate that appears on the corresponding irrigation claims. The multiple use remark that appears on all of the Eldorado claims serves to control flow rate. Each corresponding irrigation and stock claim can jointly use that available flow rate at the discretion of the claimant. In addition, Eldorado has agreed to a flow rate limit on its stock claims. This limit should be reflected in a remark that appears on the claims.

III. Volume

16. Quantified volumes are appropriate when a water judge has determined both a quantified flow rate and volume are necessary for administration of the water right claims involved. Section 85-2-234(6)(b)(iii), MCA. and *Wales Brothers, et al.*, Case

76F-1 (Marshaling Order Oct. 15, 2010, at p. 12). That is the case with all eight of the Eldorado claims. Evidence before the Water Court, specifically water commissioner records (Saylor-7), shows that Eldorado has increased the annual amount of water it diverted since the various water right claims were perfected. The fact that much of that increase happened after 1973 underscores the need for quantified volumes.

17. Montana's current statutory preference for managing direct flow irrigation claims by flow rate reflects a long history of district court decrees that only proved quantified flow rates. The *Perry v. Beattie* Decree is a good example of that preference. At the same time, the lack of a quantified volume did not mean the total amount of water diverted was not a consideration in administration of that right:

The mere fact that the decree awarding a water right in miners' inches or other flow measurement fails to describe the acreage actually irrigated or the time of flow or the volume of water actually used, cannot serve to remove all limitations upon its use in point of time or volume, and thus substantially to expand the early appropriations, to the detriment of subsequent appropriators. If a decree had that effect, there would be few adjudicated streams in the state in which any but the first few appropriations would be of any substantial value.

Quigley v. McIntosh, 110 Mont. 495, 510, 103 P.2d 1067, 1074 (1940).

The fact that the commissioner may not have historically applied a quantified volume to the water rights in the *Perry v. Beattie* Decree does not remove volume as a valid, and in this case, an essential part of administration.

18. The alternative to quantified volumes is to limit the number of acres irrigated in some way or assign more junior priority dates to portions of the place of use. This would not result in a functional system of enforcement. In fact, given the structure of the company, Eldorado itself would have difficulty policing the number of acres irrigated by its shareholders. In post-hearing arguments, objector TCRC expressed a preference for quantified volumes and succinctly characterized the futility of attempting to limit the place of use: "Any acreage restriction put on ECCC's water right would be nothing but an illusion." (TCRC's Post Hearing Brief, p6.) The only reasonable way to assure Eldorado diversions do not exceed historical use is to place quantified volumes on all eight claims.

19. Setting a historical volume for these claims required a certain amount of conjecture. However, that is the nature of cases seeking a factual answer to events that took place over 100 years ago. There are no witnesses. The written record, while extensive, could never be complete and is often open to more than one interpretation. Nonetheless, the court must “do the best it can with what it has to work with.” *Allen v. Petrick*, 69 Mont. 373, 375, 222 P. 451, 452 (1924). In this case, the decreed flow rates were the only reasonable starting point for establishing a quantified volume. The flow rates were used to establish historically irrigated acres. These acres were then used to calculate a volume. Not a perfect method, but the best available method in the circumstances presented here.

IV. Place of Use/Acres Irrigated

A. Application of Section 89-803, RCM (1947) (repealed 1973)

20. By July 1, 1973, Eldorado shareholders were irrigating about 12,550.00 acres annually within an 18,742.00 acre place of use. This represents a significant increase from the number of acres each individual Eldorado water right was servicing in 1908 when the District Court issued the *Perry v. Beattie* Decree. Nonetheless, with the application of quantified volumes, Eldorado can continue to provide water to this place of use without increasing the burden it places on the Teton River. Given Eldorado’s location in relation to the Teton River, the number of acres irrigated is less important than the amount of water diverted from the river. Since surface water return flows to the river are not a factor, moving the location of the irrigation and increasing the number of acres irrigated does not affect return flows. The expansion in the number of acres irrigated between 1908 and 1973 is within historical use.

21. Any changes to Eldorado’s water rights between 1908 and July 1, 1973 were governed by § 89-803, RCM (1947) (repealed 1973):

Point of diversion may be changed—change of use. The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

Eldorado’s expansion in acres irrigated comes under this statute. Changes to place of use

and acres irrigated are acceptable if others are not thereby injured. In *Hansen v. Larsen*, 44 Mont. 350, 120 P. 229 (1911), the Montana Supreme Court held that water users who changed their use of water were not required to prove the lack of injury to other water users. Rather, the burden of proof to show that injury rested with any other appropriator who claimed they were injured by the change. *Hansen*, 44 Mont. at 353, 120 P. at 231. See also *Tucker v. Missoula Light & Railway Co.*, 77 Mont. 91, 99, 250 P. 11, 14 (1926). In this case it is apparent that any injury would result from an increase in total diversions rather than an increase in acres irrigated or changes to place of use.

22. Stockwater was one of the original uses of Eldorado's water rights. At the same time if stock use is considered a change in use it is still valid under the statute. Eldorado should be free to divert water for irrigation or stock within the confines of its flow rates and volumes. Each corresponding irrigation and stock claim must include remarks identifying them as multiple uses of the same historical water right and limiting them to a single quantified flow rate and volume.

B. Marshaling

23. Between 1921 and 1937, Eldorado acquired the Truchot, Dennis, and Beattie water rights and began to use those rights throughout the Eldorado place of use. Arguably, it is the acquisition of this additional 900 miner's inches from the Teton River, with very senior priority dates, that allowed Eldorado to expand its place of use. Acquiring the rights and moving them was governed by Section 89-803, RCM (1947) (repealed 1973). There is no evidence indicating other water users objected to the change in 1921 when the Truchot and Dennis rights were moved or in 1937 when the Beattie right was moved. In fact, there is no evidence indicating any other water user asserted that adding these rights to the Eldorado system caused them injury. The first claim of injury came from LTJO and TCRC in objections filed in this adjudication.

24. After acquiring each right, Eldorado used that additional water throughout its place of use. All Eldorado rights were simply combined at the headgate and used as a group. This process of combining various water rights for use on an entire place of use is referred to as Marshaling. *Wales Brothers, et al.*, Case 76F-1 (Marshaling Order Oct. 15, 2010, at p. 12) (*Marshaling Order*). The practice of marshaling does not in itself indicate

an expansion of the water rights involved. *Marshaling Order* at p. 7-8.

25. There is no question that moving the Truchot, Dennis, and Beattie rights to the Eldorado system and marshaling these rights throughout that system could result in an expansion of these rights that could injure other water users. LTJO asserts this expansion could be addressed by limiting each right to a place of use equal in acres irrigated to that claim's original place of use. For example, the Truchot right (41O 113467-00 and 41O 113472-00) would be limited to use on no more than 300.00 acres. As discussed above, this kind of limit would be virtually impossible to enforce. The simple answer to marshaling that increases the burden on the source is quantified volumes. *Marshaling Order* at p. 12.

26. Based on the record before the Master, all eight Eldorado claims in this case are entitled to a place of use that includes land meeting the following criteria:

- a. Land serviced by the Eldorado ditch system.
- b. Land that was irrigated by Eldorado prior to July 1, 1973.
- c. Land that is currently owned by an Eldorado shareholder.

With these criteria, Eldorado's place of use totals 18,742.00 acres as represented by Master's Exhibit A. Eldorado has acknowledged that less than all 18,742.00 acres are irrigated during any given irrigation season. The evidence supports a 12,550.00 acres annual limit on all Eldorado irrigation claims. All Eldorado irrigation claims should receive remarks identifying this annual acres irrigated limit.

V. Period of Use/Period of Diversion

27. On November 16, 2009, Eldorado, Farmers, and the Miller Colony filed an agreement addressing period of use/period of diversion for all Eldorado claims. Under the terms of the agreement, the end date for Eldorado's irrigation claims is extended from September 19 to October 1. The end date for Eldorado's stock claims is reduced from November 19 to October 20. In addition, stock diversions between October 1 and October 20 are limited to no more than 1,000 miner's inches (25 cfs).

28. The terms of the November 16, 2009 agreement constitute an overall reduction in the period of use/period of diversion for Eldorado's water right claims. This use is within the historical use of these water right claims.

VI. Implied Claims

29. Implied claims are contemplated by Rule 35, W.R.C.E.R. They serve to separate multiple water rights found in a single filing. Arguably, they could be applied to the Eldorado claims to reflect the increase in the number of acres irrigated between 1908 and 1973. However, the application of quantified volumes is a far more functional way to administer these water rights. Implied claims are not appropriate for the claims in this case.

VII. Issue Remarks

30. The record before the Water Court is sufficient to address and resolve all issue remarks that appeared on claims in this case. All issue remarks should be removed from all claims.

RECOMMENDATIONS

Based on the above Findings of Fact and Conclusions of Law, the following changes should be applied to the claims in this case:

Claim 41O 113467-00 (Truchot) December 31, 1876 Stock

<u>Flow Rate:</u>	Standard Remark	7.50 cfs
<u>Volume:</u>	Standard Remark	450.00 af/yr
<u>Period of Use/Diversion:</u>	4/15 to 11/19	4/15 to 10/20

Remark: Between October 1 and October 20, the combined flow rate for claims 41O 113467-00, 41O 113468-00, 41O 113469-00, and 41O 113470-00 is limited to no more than 25 cfs.

Place of Use: See Attached Claim Abstract

Claim 41O 113468-00 (Dennis) April 1, 1880 Stock

<u>Flow Rate:</u>	Standard Remark	5.00 cfs
<u>Volume:</u>	Standard Remark	300.00 af/yr
<u>Period of Use/Diversion:</u>	4/15 to 11/19	4/15 to 10/20

Remark: Between October 1 and October 20, the

combined flow rate for claims 41O 113467-00, 41O 113468-00, 41O 113469-00, and 41O 113470-00 is limited to no more than 25 cfs.

Place of Use: See Attached Claim Abstract

Claim 41O 113469-00 (Beattie) December 31, 1882 Stock

Flow Rate: ~~Standard Remark~~ 10.00 cfs
Volume: ~~Standard Remark~~ 600.00 af/yr
Period of Use/Diversion: ~~4/15 to 11/19~~ 4/15 to 10/20

Remark: Between October 1 and October 20, the combined flow rate for claims 41O 113467-00, 41O 113468-00, 41O 113469-00, and 41O 113470-00 is limited to no more than 25 cfs.

Place of Use: See Attached Claim Abstract

Claim 41O 113470-00 (Eldorado) May 17, 1883 Stock

Flow Rate: ~~Standard Remark~~ 75.00 cfs
Volume: ~~Standard Remark~~ 9,000.00 af/yr
Period of Use/Diversion: ~~4/15 to 11/19~~ 4/15 to 10/20

Remark: Between October 1 and October 20, the combined flow rate for claims 41O 113467-00, 41O 113468-00, 41O 113469-00, and 41O 113470-00 is limited to no more than 25 cfs.

Place of Use: See Attached Claim Abstract

Claim 41O 113472-00 (Truchot) December 31, 1876 Irrigation

Volume: ~~Standard Remark~~ 450.00 af/yr
Period of Use/Diversion: ~~4/15 to 9/19~~ 4/15 to 10/1
Acres Irrigated: ~~26,606.00~~ 18,742.00
Annual Acres Limit: ~~15,420.00~~ 12,550.00
Place of Use: See Attached Claim Abstract

Claim 41O 113473-00 (Dennis) April 1, 1880 Irrigation

<u>Volume:</u>	Standard Remark	300.00 af/yr
<u>Period of Use/Diversion:</u>	4/15 to 9/19	4/15 to 10/1
<u>Acres Irrigated:</u>	26,606.00	18,742.00
<u>Annual Acres Limit:</u>	15,420.00	12,550.00
<u>Place of Use:</u>	See Attached Claim Abstract	

Claim 41O 113474-00 (Beattie) December 31, 1882 Irrigation

<u>Volume:</u>	Standard Remark	600.00 af/yr
<u>Period of Use/Diversion:</u>	4/15 to 9/19	4/15 to 10/1
<u>Acres Irrigated:</u>	26,606.00	18,742.00
<u>Annual Acres Limit:</u>	15,420.00	12,550.00
<u>Place of Use:</u>	See Attached Claim Abstract	

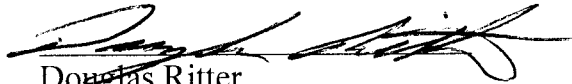
Claim 41O 113475-00 (Eldorado) May 17, 1883 Irrigation

<u>Volume:</u>	Standard Remark	9,000.00 af/yr
<u>Period of Use/Diversion:</u>	4/15 to 9/19	4/15 to 10/1
<u>Acres Irrigated:</u>	26,606.00	18,742.00
<u>Annual Acres Limit:</u>	15,420.00	12,550.00
<u>Place of Use:</u>	See Attached Claim Abstract	

All other elements of these claims are correct as they appeared in the TPD.

A Post Decree Abstract of Water Right Claim for each claim addressed in this Report, is served with the Report to confirm that the recommended amendments have been made in the state's centralized water right record system.

DATED this 7th day of August, 2013.


Douglas Ritter
Senior Water Master

CERTIFICATE OF SERVICE

I, Carol A. Bertke, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **NOTICE OF FILING OF MASTER'S REPORT AND MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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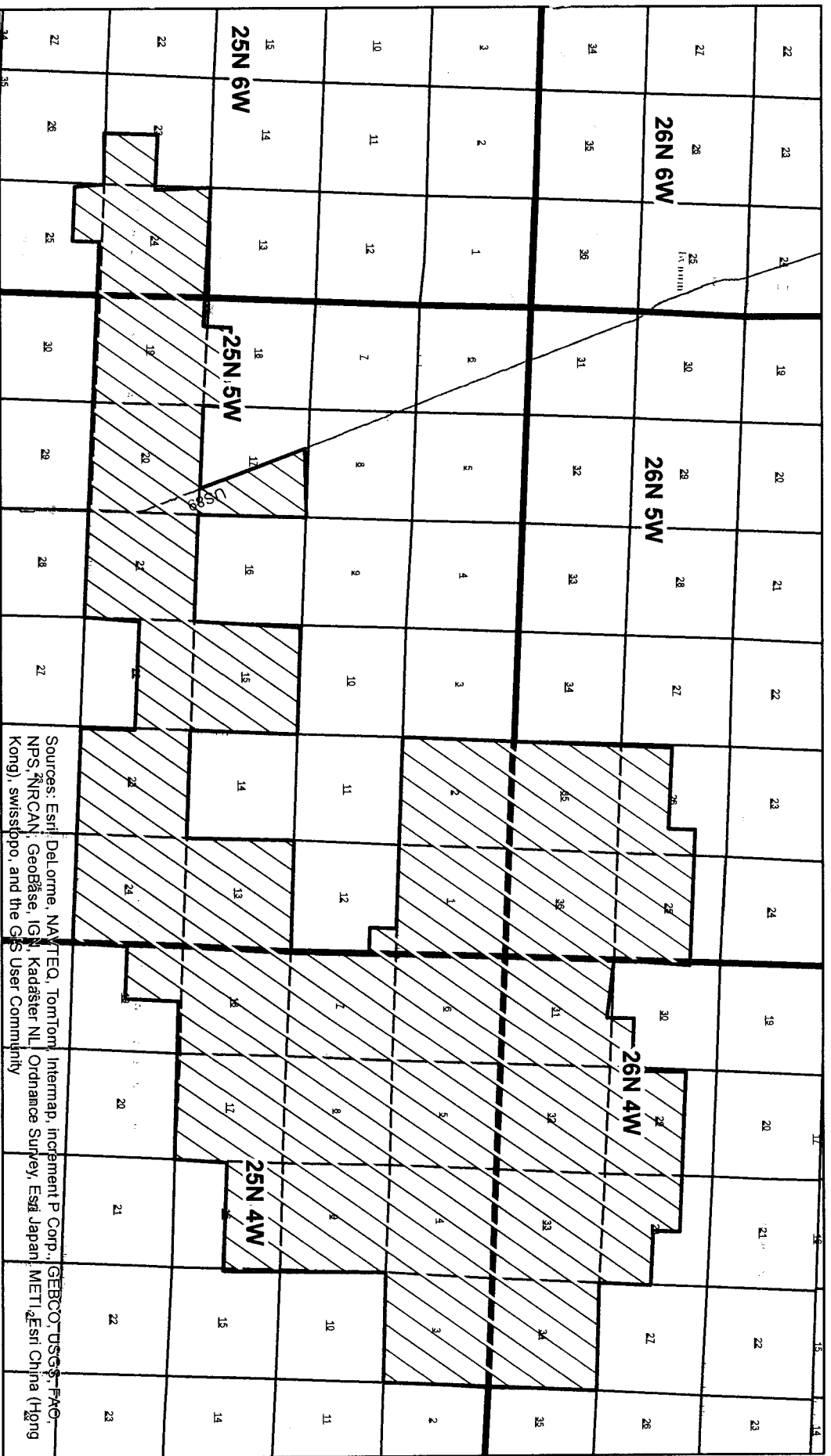
DATED this 7th day of August, 2013.






Carol A. Bertke
Deputy Clerk of Court

Case 410 129 - Master's Exhibit A

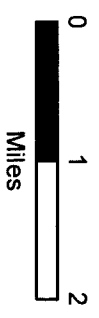
Eldorado Co-op Canal Company Place of Use



 Place of Use
 TWP
 Sections

1:85,000

Sources: Esri, DeLorme, NAVTEQ, TomTom, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, Geobase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, and the GIS User Community



Data:
MT NRIS
MT DNRC

Map by
Dan T. Cole
MT Water Court
7-18-2013

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TETON RIVER
BASIN 41O
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41O 113467-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ELDORADO CO-OP CANAL CO
% RODNEY COLE
PO BOX 783
CHOTEAU, MT 59422

Priority Date: DECEMBER 31, 1876

Type of Historical Right: DECREED

Purpose (use): STOCK

***Flow Rate:** 7.50 CFS
BETWEEN OCTOBER 1 AND OCTOBER 20, THE COMBINED FLOW RATE FOR CLAIMS 41O 113467-00, 41O 113468-00, 41O 113469-00, AND 41O 113470-00 IS LIMITED TO NO MORE THAN 25 CFS.

***Volume:** 450.00 AC-FT

Source Name: TETON RIVER
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWNW	33	25N	6W	TETON

***Period of Diversion:** APRIL 15 TO OCTOBER 20

Diversion Means: DIVERSION DAM

Ditch Name: ELDORADO COOP CANAL

***Period of Use:** APRIL 15 TO OCTOBER 20

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1				3	25N	4W	TETON
2				4	25N	4W	TETON
3				5	25N	4W	TETON
4				6	25N	4W	TETON
5				7	25N	4W	TETON
6				8	25N	4W	TETON
7				9	25N	4W	TETON
8			N2	16	25N	4W	TETON
9				17	25N	4W	TETON

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
10				18	25N	4W	TETON
11			NW	19	25N	4W	TETON
12				1	25N	5W	TETON
13				2	25N	5W	TETON
14			NENE	12	25N	5W	TETON
15				13	25N	5W	TETON
16				15	25N	5W	TETON
17			NE	17	25N	5W	TETON
18			E2NENW	17	25N	5W	TETON
19			SE	17	25N	5W	TETON
20			S2SE	18	25N	5W	TETON
21			SESW	18	25N	5W	TETON
22				19	25N	5W	TETON
23				20	25N	5W	TETON
24				21	25N	5W	TETON
25			N2	22	25N	5W	TETON
26				23	25N	5W	TETON
27				24	25N	5W	TETON
28			SE	23	25N	6W	TETON
29				24	25N	6W	TETON
30			N2NW	25	25N	6W	TETON
31			S2NW	28	26N	4W	TETON
32			SE	28	26N	4W	TETON
33			SW	28	26N	4W	TETON
34			S2	29	26N	4W	TETON
35			S2N2	29	26N	4W	TETON
36			S2SE	30	26N	4W	TETON
37				31	26N	4W	TETON
38				32	26N	4W	TETON
39				33	26N	4W	TETON
40				34	26N	4W	TETON
41			S2	25	26N	5W	TETON
42			S2N2	25	26N	5W	TETON
43			S2	26	26N	5W	TETON
44			SENE	26	26N	5W	TETON
45				35	26N	5W	TETON
46				36	26N	5W	TETON

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

113467-00 113472-00

THE PLACE OF USE WAS AMENDED BY THE CLAIMANT ON 05/13/2002.

THE PLACE OF USE WAS AMENDED BY THE CLAIMANT ON 10/23/2003.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 03/17/2004: POINT OF DIVERSION, PLACE OF USE.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

PARENT FILE FOR THIS RIGHT IS 113466-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 113467-00, 113468-00, 113469-00, 113470-00.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**TETON RIVER
BASIN 41O**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41O 113468-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ELDORADO CO-OP CANAL CO
% RODNEY COLE
PO BOX 783
CHOTEAU, MT 59422

Priority Date: APRIL 1, 1880

Type of Historical Right: DECREED

Purpose (use): STOCK

***Flow Rate:** 5.00 CFS

BETWEEN OCTOBER 1 AND OCTOBER 20, THE COMBINED FLOW RATE FOR CLAIMS 41O 113467-00, 41O 113468-00, 41O 113469-00, AND 41O 113470-00 IS LIMITED TO NO MORE THAN 25 CFS.

***Volume:** 300.00 AC-FT

Source Name: TETON RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWNW	33	25N	6W	TETON

***Period of Diversion:** APRIL 15 TO OCTOBER 20

Diversion Means: DIVERSION DAM

Ditch Name: ELDORADO COOP CANAL

***Period of Use:** APRIL 15 TO OCTOBER 20

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1				3	25N	4W	TETON
2				4	25N	4W	TETON
3				5	25N	4W	TETON
4				6	25N	4W	TETON
5				7	25N	4W	TETON
6				8	25N	4W	TETON
7				9	25N	4W	TETON
8			N2	16	25N	4W	TETON
9				17	25N	4W	TETON

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
10				18	25N	4W	TETON
11			NW	19	25N	4W	TETON
12				1	25N	5W	TETON
13				2	25N	5W	TETON
14			NENE	12	25N	5W	TETON
15				13	25N	5W	TETON
16				15	25N	5W	TETON
17			NE	17	25N	5W	TETON
18			E2NENW	17	25N	5W	TETON
19			SE	17	25N	5W	TETON
20			S2SE	18	25N	5W	TETON
21			SESW	18	25N	5W	TETON
22				19	25N	5W	TETON
23				20	25N	5W	TETON
24				21	25N	5W	TETON
25			N2	22	25N	5W	TETON
26				23	25N	5W	TETON
27				24	25N	5W	TETON
28			SE	23	25N	6W	TETON
29				24	25N	6W	TETON
30			N2NW	25	25N	6W	TETON
31			NW	28	26N	4W	TETON
32			SE	28	26N	4W	TETON
33			SW	28	26N	4W	TETON
34			S2	29	26N	4W	TETON
35			S2N2	29	26N	4W	TETON
36			S2SE	30	26N	4W	TETON
37				31	26N	4W	TETON
38				32	26N	4W	TETON
39				33	26N	4W	TETON
40				34	26N	4W	TETON
41			S2	25	26N	5W	TETON
42			S2N2	25	26N	5W	TETON
43			S2	26	26N	5W	TETON
44			SENE	26	26N	5W	TETON
45				35	26N	5W	TETON
46				36	26N	5W	TETON

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

113468-00 113473-00

THE PLACE OF USE WAS AMENDED BY THE CLAIMANT ON 05/13/2002.

THE PLACE OF USE WAS AMENDED BY THE CLAIMANT ON 10/23/2003.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 03/17/2004: POINT OF DIVERSION, PLACE OF USE.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

PARENT FILE FOR THIS RIGHT IS 113466-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 113467-00, 113468-00, 113469-00, 113470-00.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**TETON RIVER
BASIN 41O**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41O 113469-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ELDORADO CO-OP CANAL CO
% RODNEY COLE
PO BOX 783
CHOTEAU, MT 59422

Priority Date: DECEMBER 31, 1882

Type of Historical Right: DECREED

Purpose (use): STOCK

***Flow Rate:** 10.00 CFS
BETWEEN OCTOBER 1 AND OCTOBER 20, THE COMBINED FLOW RATE FOR CLAIMS 41O 113467-00, 41O 113468-00, 41O 113469-00, AND 41O 113470-00 IS LIMITED TO NO MORE THAN 25 CFS.

***Volume:** 600.00 AC-FT

Source Name: TETON RIVER
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWN	WNW	33	25N	6W TETON

***Period of Diversion:** APRIL 15 TO OCTOBER 20

Diversion Means: DIVERSION DAM

Ditch Name: ELDORADO COOP CANAL

***Period of Use:** APRIL 15 TO OCTOBER 20

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1				3	25N	4W	TETON
2				4	25N	4W	TETON
3				5	25N	4W	TETON
4				6	25N	4W	TETON
5				7	25N	4W	TETON
6				8	25N	4W	TETON
7				9	25N	4W	TETON
8			N2	16	25N	4W	TETON
9				17	25N	4W	TETON

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
10				18	25N	4W	TETON
11			NW	19	25N	4W	TETON
12				1	25N	5W	TETON
13				2	25N	5W	TETON
14			NENE	12	25N	5W	TETON
15				13	25N	5W	TETON
16				15	25N	5W	TETON
17			NE	17	25N	5W	TETON
18			E2NENW	17	25N	5W	TETON
19			SE	17	25N	5W	TETON
20			S2SE	18	25N	5W	TETON
21			SESW	18	25N	5W	TETON
22				19	25N	5W	TETON
23				20	25N	5W	TETON
24				21	25N	5W	TETON
25			N2	22	25N	5W	TETON
26				23	25N	5W	TETON
27				24	25N	5W	TETON
28			SE	23	25N	6W	TETON
29				24	25N	6W	TETON
30			N2NW	25	25N	6W	TETON
31			S2NW	28	26N	4W	TETON
32			SE	28	26N	4W	TETON
33			SW	28	26N	4W	TETON
34			S2	29	26N	4W	TETON
35			S2N2	29	26N	4W	TETON
36			S2SE	30	26N	4W	TETON
37				31	26N	4W	TETON
38				32	26N	4W	TETON
39				33	26N	4W	TETON
40				34	26N	4W	TETON
41			S2	25	26N	5W	TETON
42			S2N2	25	26N	5W	TETON
43			S2	26	26N	5W	TETON
44			SENE	26	26N	5W	TETON
45				35	26N	5W	TETON
46				36	26N	5W	TETON

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

113469-00 113474-00

THE PLACE OF USE WAS AMENDED BY THE CLAIMANT ON 05/13/2002.

THE PLACE OF USE WAS AMENDED BY THE CLAIMANT ON 10/23/2003.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 03/17/2004: POINT OF DIVERSION, PLACE OF USE.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

PARENT FILE FOR THIS RIGHT IS 113466-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 113467-00, 113468-00, 113469-00, 113470-00.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TETON RIVER
BASIN 41O
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41O 113470-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ELDORADO CO-OP CANAL CO
% RODNEY COLE
PO BOX 783
CHOTEAU, MT 59422

Priority Date: MAY 17, 1883

Type of Historical Right: DECREED

Purpose (use): STOCK

***Flow Rate:** 75.00 CFS
BETWEEN OCTOBER 1 AND OCTOBER 20, THE COMBINED FLOW RATE FOR CLAIMS 41O 113467-00, 41O 113468-00, 41O 113469-00, AND 41O 113470-00 IS LIMITED TO NO MORE THAN 25 CFS.

***Volume:** 9,000.00 AC-FT

Source Name: TETON RIVER
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWNW	33	25N	6W	TETON

***Period of Diversion:** APRIL 15 TO OCTOBER 20

Diversion Means: DIVERSION DAM

Ditch Name: ELDORADO COOP CANAL

***Period of Use:** APRIL 15 TO OCTOBER 20

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1				3	25N	4W	TETON
2				4	25N	4W	TETON
3				5	25N	4W	TETON
4				6	25N	4W	TETON
5				7	25N	4W	TETON
6				8	25N	4W	TETON
7				9	25N	4W	TETON
8			N2	16	25N	4W	TETON
9				17	25N	4W	TETON

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
10				18	25N	4W	TETON
11			NW	19	25N	4W	TETON
12				1	25N	5W	TETON
13				2	25N	5W	TETON
14			NENE	12	25N	5W	TETON
15				13	25N	5W	TETON
16				15	25N	5W	TETON
17			NE	17	25N	5W	TETON
18			E2NENW	17	25N	5W	TETON
19			SE	17	25N	5W	TETON
20			S2SE	18	25N	5W	TETON
21			SESW	18	25N	5W	TETON
22				19	25N	5W	TETON
23				20	25N	5W	TETON
24				21	25N	5W	TETON
25			N2	22	25N	5W	TETON
26				23	25N	5W	TETON
27				24	25N	5W	TETON
28			SE	23	25N	6W	TETON
29				24	25N	6W	TETON
30			N2NW	25	25N	6W	TETON
31			S2NW	28	26N	4W	TETON
32			SE	28	26N	4W	TETON
33			SW	28	26N	4W	TETON
34			S2	29	26N	4W	TETON
35			S2N2	29	26N	4W	TETON
36			S2SE	30	26N	4W	TETON
37				31	26N	4W	TETON
38				32	26N	4W	TETON
39				33	26N	4W	TETON
40				34	26N	4W	TETON
41			S2	25	26N	5W	TETON
42			S2N2	25	26N	5W	TETON
43			S2	26	26N	5W	TETON
44			SENE	26	26N	5W	TETON
45				35	26N	5W	TETON
46				36	26N	5W	TETON

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

113470-00 113475-00

THE PLACE OF USE WAS AMENDED BY THE CLAIMANT ON 10/23/2003.

THE PLACE OF USE WAS AMENDED BY THE CLAIMANT ON 05/13/2002.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 03/17/2004: POINT OF DIVERSION, PLACE OF USE.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

PARENT FILE FOR THIS RIGHT IS 113466-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 113467-00, 113468-00, 113469-00, 113470-00.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**TETON RIVER
BASIN 410**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 410 113472-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ELDORADO CO-OP CANAL CO
% RODNEY COLE
PO BOX 783
CHOTEAU, MT 59422

Priority Date: DECEMBER 31, 1876

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 7.50 CFS

***Volume:** 450.00 AC-FT

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 18,742.00

Source Name: TETON RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWNW	33	25N	6W	TETON

***Period of Diversion:** APRIL 15 TO OCTOBER 1

Diversion Means: DIVERSION DAM

Ditch Name: ELDORADO COOP CANAL

***Period of Use:** APRIL 15 TO OCTOBER 1

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	640.00			3	25N	4W	TETON
2	640.00			4	25N	4W	TETON
3	640.00			5	25N	4W	TETON
4	640.00			6	25N	4W	TETON
5	640.00			7	25N	4W	TETON
6	640.00			8	25N	4W	TETON
7	640.00			9	25N	4W	TETON
8	320.00		N2	16	25N	4W	TETON

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
9	640.00			17	25N	4W	TETON
10	640.00			18	25N	4W	TETON
11	160.00		NW	19	25N	4W	TETON
12	640.00			1	25N	5W	TETON
13	640.00			2	25N	5W	TETON
14	40.00		NENE	12	25N	5W	TETON
15	640.00			13	25N	5W	TETON
16	640.00			15	25N	5W	TETON
17	145.00		NE	17	25N	5W	TETON
18	8.00		E2NENW	17	25N	5W	TETON
19	91.00		SE	17	25N	5W	TETON
20	80.00		S2SE	18	25N	5W	TETON
21	40.00		SESW	18	25N	5W	TETON
22	507.00			19	25N	5W	TETON
23	472.00			20	25N	5W	TETON
24	479.00			21	25N	5W	TETON
25	320.00		N2	22	25N	5W	TETON
26	640.00			23	25N	5W	TETON
27	640.00			24	25N	5W	TETON
28	160.00		SE	23	25N	6W	TETON
29	640.00			24	25N	6W	TETON
30	80.00		N2NW	25	25N	6W	TETON
31	80.00		S2NW	28	26N	4W	TETON
32	120.00		SE	28	26N	4W	TETON
33	160.00		SW	28	26N	4W	TETON
34	320.00		S2	29	26N	4W	TETON
35	160.00		S2N2	29	26N	4W	TETON
36	80.00		S2SE	30	26N	4W	TETON
37	640.00			31	26N	4W	TETON
38	640.00			32	26N	4W	TETON
39	640.00			33	26N	4W	TETON
40	640.00			34	26N	4W	TETON
41	320.00		S2	25	26N	5W	TETON
42	160.00		S2N2	25	26N	5W	TETON
43	320.00		S2	26	26N	5W	TETON
44	40.00		SENE	26	26N	5W	TETON
45	640.00			35	26N	5W	TETON
46	640.00			36	26N	5W	TETON

Total: 18,742.00

ONLY 12,550.00 ACRES (MORE OR LESS) ARE IRRIGATED DURING ANY GIVEN SEASON WITHIN THE 18,742.00 ACRES DESCRIBED UNDER THIS RIGHT.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

113472-00 113473-00 113474-00 113475-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

113467-00 113472-00

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 10/23/2003: MAXIMUM ACRES, PLACE OF USE.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 05/13/2002: MAXIMUM ACRES, PLACE OF USE.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 03/17/2004: POINT OF DIVERSION, MAXIMUM ACRES, PLACE OF USE.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

PARENT FILE FOR THIS RIGHT IS 113471-00.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**TETON RIVER
BASIN 41O**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41O 113473-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ELDORADO CO-OP CANAL CO
% RODNEY COLE
PO BOX 783
CHOTEAU, MT 59422

Priority Date: APRIL 1, 1880

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 5.00 CFS

***Volume:** 300.00 AC-FT

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 18,742.00

Source Name: TETON RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWNW	33	25N	6W	TETON

***Period of Diversion:** APRIL 15 TO OCTOBER 1

Diversion Means: DIVERSION DAM

Ditch Name: ELDORADO COOP CANAL

***Period of Use:** APRIL 15 TO OCTOBER 1

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	640.00			3	25N	4W	TETON
2	640.00			4	25N	4W	TETON
3	640.00			5	25N	4W	TETON
4	640.00			6	25N	4W	TETON
5	640.00			7	25N	4W	TETON
6	640.00			8	25N	4W	TETON
7	640.00			9	25N	4W	TETON
8	320.00		N2	16	25N	4W	TETON

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
9	640.00			17	25N	4W	TETON
10	640.00			18	25N	4W	TETON
11	160.00		NW	19	25N	4W	TETON
12	640.00			1	25N	5W	TETON
13	640.00			2	25N	5W	TETON
14	40.00		NENE	12	25N	5W	TETON
15	640.00			13	25N	5W	TETON
16	640.00			15	25N	5W	TETON
17	145.00		NE	17	25N	5W	TETON
18	8.00		E2NENW	17	25N	5W	TETON
19	91.00		SE	17	25N	5W	TETON
20	80.00		S2SE	18	25N	5W	TETON
21	40.00		SESW	18	25N	5W	TETON
22	507.00			19	25N	5W	TETON
23	472.00			20	25N	5W	TETON
24	479.00			21	25N	5W	TETON
25	320.00		N2	22	25N	5W	TETON
26	640.00			23	25N	5W	TETON
27	640.00			24	25N	5W	TETON
28	160.00		SE	23	25N	6W	TETON
29	640.00			24	25N	6W	TETON
30	80.00		N2NW	25	25N	6W	TETON
31	80.00		S2NW	28	26N	4W	TETON
32	120.00		SE	28	26N	4W	TETON
33	160.00		SW	28	26N	4W	TETON
34	320.00		S2	29	26N	4W	TETON
35	160.00		S2N2	29	26N	4W	TETON
36	80.00		S2SE	30	26N	4W	TETON
37	640.00			31	26N	4W	TETON
38	640.00			32	26N	4W	TETON
39	640.00			33	26N	4W	TETON
40	640.00			34	26N	4W	TETON
41	320.00		S2	25	26N	5W	TETON
42	160.00		S2N2	25	26N	5W	TETON
43	320.00		S2	26	26N	5W	TETON
44	40.00		SENE	26	26N	5W	TETON
45	640.00			35	26N	5W	TETON
46	640.00			36	26N	5W	TETON

Total: 18,742.00

ONLY 12,550.00 ACRES (MORE OR LESS) ARE IRRIGATED DURING ANY GIVEN SEASON WITHIN THE 18,742.00 ACRES DESCRIBED UNDER THIS RIGHT.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

113472-00 113473-00 113474-00 113475-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

113468-00 113473-00

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 05/13/2002: MAXIMUM ACRES, PLACE OF USE.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 10/23/2003: MAXIMUM ACRES, PLACE OF USE.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 03/17/2004: POINT OF DIVERSION, MAXIMUM ACRES, PLACE OF USE.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

PARENT FILE FOR THIS RIGHT IS 113471-00.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**TETON RIVER
BASIN 410**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 410 113474-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ELDORADO CO-OP CANAL CO
% RODNEY COLE
PO BOX 783
CHOTEAU, MT 59422

Priority Date: DECEMBER 31, 1882

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 10.00 CFS

***Volume:** 600.00 AC-FT

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 18,742.00

Source Name: TETON RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWNW	33	25N	6W	TETON

***Period of Diversion:** APRIL 15 TO OCTOBER 1

Diversion Means: DIVERSION DAM

Ditch Name: ELDORADO COOP CANAL

***Period of Use:** APRIL 15 TO OCTOBER 1

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	640.00			3	25N	4W	TETON
2	640.00			4	25N	4W	TETON
3	640.00			5	25N	4W	TETON
4	640.00			6	25N	4W	TETON
5	640.00			7	25N	4W	TETON
6	640.00			8	25N	4W	TETON
7	640.00			9	25N	4W	TETON
8	320.00		N2	16	25N	4W	TETON

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
9	640.00			17	25N	4W	TETON
10	640.00			18	25N	4W	TETON
11	160.00		NW	19	25N	4W	TETON
12	640.00			1	25N	5W	TETON
13	640.00			2	25N	5W	TETON
14	40.00		NENE	12	25N	5W	TETON
15	640.00			13	25N	5W	TETON
16	640.00			15	25N	5W	TETON
17	145.00		NE	17	25N	5W	TETON
18	8.00		E2NENW	17	25N	5W	TETON
19	91.00		SE	17	25N	5W	TETON
20	80.00		S2SE	18	25N	5W	TETON
21	40.00		SESW	18	25N	5W	TETON
22	507.00			19	25N	5W	TETON
23	472.00			20	25N	5W	TETON
24	479.00			21	25N	5W	TETON
25	320.00		N2	22	25N	5W	TETON
26	640.00			23	25N	5W	TETON
27	640.00			24	25N	5W	TETON
28	160.00		SE	23	25N	6W	TETON
29	640.00			24	25N	6W	TETON
30	80.00		N2NW	25	25N	6W	TETON
31	80.00		S2NW	28	26N	4W	TETON
32	120.00		SE	28	26N	4W	TETON
33	160.00		SW	28	26N	4W	TETON
34	320.00		S2	29	26N	4W	TETON
35	160.00		S2N2	29	26N	4W	TETON
36	80.00		S2SE	30	26N	4W	TETON
37	640.00			31	26N	4W	TETON
38	640.00			32	26N	4W	TETON
39	640.00			33	26N	4W	TETON
40	640.00			34	26N	4W	TETON
41	320.00		S2	25	26N	5W	TETON
42	160.00		S2N2	25	26N	5W	TETON
43	320.00		S2	26	26N	5W	TETON
44	40.00		SENE	26	26N	5W	TETON
45	640.00			35	26N	5W	TETON
46	640.00			36	26N	5W	TETON

Total: 18,742.00

ONLY 12,550.00 ACRES (MORE OR LESS) ARE IRRIGATED DURING ANY GIVEN SEASON WITHIN THE 18,742.00 ACRES DESCRIBED UNDER THIS RIGHT.

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

113472-00 113473-00 113474-00 113475-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

113469-00 113474-00

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 10/23/2003: MAXIMUM ACRES, PLACE OF USE.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 05/13/2002: MAXIMUM ACRES, PLACE OF USE.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

PARENT FILE FOR THIS RIGHT IS 113471-00.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**TETON RIVER
BASIN 410**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 410 113475-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ELDORADO CO-OP CANAL CO
% RODNEY COLE
PO BOX 783
CHOTEAU, MT 59422

Priority Date: MAY 17, 1883

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 75.00 CFS

***Volume:** 9,000.00 AC-FT

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 18,742.00

Source Name: TETON RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWNW	33	25N	6W	TETON

***Period of Diversion:** APRIL 15 TO OCTOBER 1

Diversion Means: DIVERSION DAM

Ditch Name: ELDORADO COOP CANAL

***Period of Use:** APRIL 15 TO OCTOBER 1

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	640.00			3	25N	4W	TETON
2	640.00			4	25N	4W	TETON
3	640.00			5	25N	4W	TETON
4	640.00			6	25N	4W	TETON
5	640.00			7	25N	4W	TETON
6	640.00			8	25N	4W	TETON
7	640.00			9	25N	4W	TETON
8	320.00		N2	16	25N	4W	TETON

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
9	640.00			17	25N	4W	TETON
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113472-00 113473-00 113474-00 113475-00

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113470-00 113475-00

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STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

PARENT FILE FOR THIS RIGHT IS 113471-00.