

IN THE SUPREME COURT OF THE
STATE OF MONTANA

Supreme Court Cause No. DA 21-0079

EAST BENCH IRRIGATION DISTRICT; UNITED STATES OF AMERICA (Bureau of Reclamation),

Claimants and Appellees,

EAST BENCH IRRIGATION DISTRICT; POINT OF ROCKS ANGUS RANCH, INC.,

Objectors and Appellees,

MADISON VALLEY GARDEN RANCH, LLC

Counterobjector and Appellee,

OPEN A RANCH, INC.,

Counterobjector and Appellant,

GEODUCK LAND & CATTLE, LLC; SMITH'S ELK MEADOWS RANCH, LLC,

Notice of Intent to Appear and Appellees

BAR J RANCH; DAVID E. & SHELLI SCHUETT; BALDY VIEW ENTERPRISES, LLC; WILLIAM C. MANCORONAL; ROXANNE E. MANCORONAL; JUSTIN D. DEVERS; WILLIAM R. GROSE; POINT OF ROCKS ANGUS RANCH, INC.; CLARK CANYON WATER SUPPLY,

Intervenors and Appellees.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Water Court,
Case No.: 41B-265
Hon. Russ McElyea, Chief Water Judge Presiding

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Water Court err when it concluded the Definite Plan Report for the East Bench Unit Project is not a definitive statement of the United States' intent for the Project?

2. Did the Water Court err when it concluded due diligence applies to expansions in irrigated acreage occurring after completion of the Project's storage and conveyance facilities?

3. Did the Water Court err by not describing the entire service area place of use of water right 43B 40854-00?

4. Did the Water Court err by not granting Open A's request for an information remark subordinating Project users' private water rights to Project water right 43B 40854-00?

STATEMENT OF THE CASE

On December 10, 1981, the United States of America Department of the Interior, Bureau of Reclamation (USBOR) filed statements of claim for existing water rights 41B 40850-00 through 41B 40852-00, and 41B 40854-00 through 41B 40861-00. This appeal involves direct flow claim 41B 40850-00 owned jointly by USBOR and the East Bench Irrigation District (EBID) and storage claim 41B 40854-00 owned solely by USBOR. All claims are associated with USBOR's East Bench Unit Project (EBU) .

Numerous objections, counterobjections, and Notices of Intent to Appear were filed to the Basin 41B Preliminary Decree of these claims. The parties at trial included the Claimant USBOR; the Claimant and Objector EBID; Intervenor Clark Canyon Water Supply Company (CCWSC); Objector and Intervenor Point of Rocks Angus Ranch Inc. (POR); Counterobjector Open A Ranch, Inc. (Open A); Counterobjector Madison Valley Garden Ranch, LLC (MVGR); Notice of Intent to Appear Party Geoduck Land & Cattle LLC (Geoduck); and collective Intervenors Bar J Ranch, Baldy View Enterprises LLC, William C. Mancoronal, Roxanne E. Mancoronal, Justin D. Devers, and William R. Grose (collectively the Intervenors).

Claimants USBOR and EBID and Counterobjector Open A filed cross-motions for summary judgment. On July 3, 2019, the Water Court granted USBOR and EBID's Motion in part, holding that USBOR and EBID are entitled to a service area for claim 41B 40850-00, with the boundaries and maximum irrigated acreage to be determined at trial. Doc. 309.00. The Court denied Open A's Motion on irrigated acreage, holding that fact issues regarding USBOR's intent for the EBU precluded summary judgment. Doc. 310.00.

On July 3, 2019 in Case 41B-265, the Water Court also granted MVGR, POR, and the Intervenors' Motions for partial Summary Judgment requesting the Court remove an information remark referencing curtailment of water rights under a 1958 reclamation contract between CCWSC and USBOR (the "curtailment remark") from

their individual private water right claims. Order, Doc. 311.00, Appendix 3. The remark was added to all CCWSC shareholder claims by DNRC during claims examination prior to issuance of the Preliminary Decree. *Id.*, 8; Rules 1, 5 W.R.C.E.R. On summary judgment, the Court further ordered the remark be removed from all claims in Basin 41B. *Id.*, 10-11. Open A filed an exception to the Order. Doc. 313.00.

Case 43B-265 was tried January 13-16, 2020, the Hon. Chief Water Judge Russ McElyea presiding. At trial, Open A asserted irrigated acreage for the EBU is limited by the 1960 EBU Definite Plan Report. The other parties disputed this position.

On December 24, 2020, the Court issued its Final Order in Case 41B-265 (renumbered Case 41B 0265-P-2015). Appendix 2. The Court rejected Open A's arguments and held: 1) the maximum irrigated acreage for EBID was 28,005 acres based on a 1979 aerial photo (Final Order, 9); and 2) the maximum irrigated acreage for CCWSC cannot be determined but Project water may be used on lands served by the private water rights owned by CCWSC shareholders. Final Order, 31.

Open A appeals the Final Order and the Summary Judgment Order removing the curtailment remark.

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STATEMENT OF FACTS

History of the EBU Project

The EBU Project is a flood control and irrigation project in the Beaverhead River Basin. The history and plan for the EBU Project is described in a USBOR document entitled Definite Plan Report on East Bench Unit – Montana, Three Forks Division, Missouri River Basin Project, dated April 1960 (DPR). A copy of the DPR was admitted by motion at the start of trial as Open A Exhibit 28 (OA Ex. 28), along with 22 other Open A Exhibits. Transcr. Day 1 (D1), 6:8-17, Doc. 360.00, Appendices 1, 4. Additional Open A Exhibits were admitted during trial.

The EBU is part of the Missouri River Basin Project (MRBP), which was authorized by the Flood Control Acts of 1944 and 1946. OA Ex. 28, DPR Summary Sheets, (i); *see* 43 U.S.C. §390. The plan for the MRBP is contained in an April 1944 report by USBOR and the Secretary of Interior known as Senate Document 191 (S.D 191). OA Ex. 112, Transcr. D1, 42. The 1944 Flood Control Act and S.D. 191 authorized further investigations for reclamation projects in the Missouri River Basin. Transcr. D1, 197:1-8; OA Ex. 28, 12-13.

Development of the Beaverhead River was part of the preliminary plan for the Upper Missouri River Basin contained in S.D. 191. OA Ex. 112, 61-67, BN 3728-3734; *see also In re Formation of East Bench Irrigation Dist.*, 2009 MT 135, ¶¶ 6-11, 350 Mont. 309, 207 P.3d 1097. The key to the development of the Upper

Missouri River Basin was the construction of the Canyon Ferry Reservoir. OA Ex. 112, 62, Bates Number (BN) 3729. Canyon Ferry Reservoir was designed to reregulate residual flows of the river enabling full development of upstream irrigation by maintaining water rights and power generation capacities on the Missouri River near Great Falls. *Id.*; Transcr. D1, 39-40, 199-202; OA Ex. 15, Transcr. D1, 203; OA Ex. 72, BN 2971; Transcr. D1, 185-187.

As proposed in S.D. 191, the Dillon Valley Unit included four reservoirs. OA Ex. 112, 62, BN 3729. Clark Canyon Reservoir would furnish a full supply of water for 25,000 acres “on a bench east of Dillon and a supplemental supply for 14,500 acres in the same general area.” *Id.* The three other reservoirs would provide full-service irrigation to an additional 5,100 new acres and provide supplemental water to 3,300 acres in the Beaverhead Valley. *Id.* Of the four proposed reservoirs, only Clark Canyon Reservoir has been constructed. Transcr. D1, 41:10.

Following S.D. 191, more detailed investigations were begun throughout the Missouri River Basin. OA Ex. 28, 12-13; App. A, A20.¹ Detailed investigations were completed on the EBU, and an initial DPR was prepared in 1956. *Id.* The Revised DPR was issued in April 1960. OA Ex. 28.

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¹ Page numbers in the DPR preceded by a letter refer to that letter appendix; e.g., G40 is page 40 in Appendix (App.) G.

Definite Plan Report

The DPR Summary Sheets comprehensively describe the EBU Project:

Development of the East Bench Unit will provide for irrigation of 21,800 acres of irrigable land requiring a full supply of water and 28,004 acres of presently irrigated land, of which 24,848 acres will receive a supplemental supply of water and 3,156 acres will receive no additional water because early priority water rights provide an adequate supply. The irrigable land lies on a bench above the Beaverhead Valley, and the presently irrigated land lies in the valley along the Beaverhead River.

Clark Canyon Dam will be constructed at the head of the Beaverhead River to impound surplus flows of the Red Rock River and Horse Prairie Creek, which join to form the Beaverhead River. Water stored in Clark Canyon Reservoir formed by the dam will be released during the irrigation season into the Beaverhead River for irrigation of Unit land.

OA Ex. 28, DPR Summary Sheets, (i).

The 21,800 acres of irrigable land requiring a full supply are lands contained within EBID; the 28,004 acres of presently irrigated land are lands that have mostly been subscribed by shareholders to CCWSC. OA Ex. 31, Final Environmental Assessment, Conversion of Long-Term Water Service Contracts to Repayment Contracts, Clark Canyon Water Supply Company, East Bench Irrigation District, (2006) (Final EA), 5-6; Transcr. D1, 46-47, 50.

The EBU Project plan as described in the DPR called for users of existing water rights to sign their historically irrigated acres up for a regulated and supplemental water supply of up to 4 acre-feet per acre. OA Ex. 28, Appendix B,

B44. At the sign-up in 1956, USBOR and CCWSC shareholders determined and agreed there were approximately 28,004 acres of land irrigated from the Beaverhead River in the Beaverhead Valley. *See* OA Ex. 28, 47, G41; Transcr. D1, 33. These lands are specifically described in Land Classification Tables G-23 and G-24 of DPR Appendix G. OA Ex. 28, Table G-23, G48-G59. The original 24,848 subscribed acres was increased to 25,995 acres shortly before CCWSC’s first payment was due under the 1958 contract. OA Ex. 31, 5; Transcr. D1, 227. The owners of 3,156 acres were offered A shares or opted out of the Project. *See* OA Ex. 31, 5. Open A is a “non-signer” that opted out of the Project. Transcr. D2, 168-171. Through their subscription agreements with the company, CCWSC shareholders agreed to curtail the exercise of their rights, thus allowing USBOR to store the waters of the Beaverhead River in the Clark Canyon Reservoir under its 1961 priority date. OA Ex. 35, 1958 Contract between USBOR and CCWSC, 1, ¶ c; 3, ¶ 3; Transcr. D1, 6:8-17, Appendix 4. In exchange for limiting the use of their senior rights, CCWSC shareholders received a reservoir-regulated supply of natural flow and supplemental storage water of 4 acre-feet per acre on the subscribed acres of existing irrigation as a first priority. *Id.*, 3, ¶ 3.

The 21,800 acres of full-service irrigable land in EBID are described in Land Classification Table G-25 of DPR Appendix G as the total class 1, 2, and 3 arable acres in EBID. OA Ex. 28, G67; Transcr. D2, 223-225. Only Class 1, 2, and 3 lands

were considered irrigable acreage for EBID. OA Ex. 28, 46-47, G38, G20b, G44-G45; OA Ex. 33, BN 2400, BN 2418, BN 2434-2435, Transcr. D3, 149.

CCWSC shareholders agreeing to limit their use was an important component of the Project plan:

Plan of Development

Beaverhead River offers little opportunity for expansion under present conditions. Nearly all practicable developments for use of natural flow have been made. With 150,000 acre-feet of conservation storage at proposed Clark Canyon Reservoir, water resources of the river can be utilized to the fullest extent that is economically feasible. The limiting factor here is water – not land.

Location

East Bench Unit lands consist of two separate and distinct areas. The first is the supplemental irrigation service area of 28,004 acres of presently irrigated land lying along the valley of Beaverhead River from a point 20 miles southwest of Dillon to the mouth of Ruby River. This area has been irrigated for the past 90 years, but has suffered chronic water shortages. Irrigators on most of these lands are now incorporated into the Clark Canyon Water Supply Company and are prepared to participate in the plan proposed by the Bureau of Reclamation. It is expected that the remaining land will also join the company. The company has agreed to limit the use of water to 4.0 acre-feet per acre annually.

The other area is the full irrigation service area containing 21,800 irrigable acres (20,470 productive acres) lying in a relatively long narrow strip east of and adjacent to the irrigated valley lands. This is the East Bench and consists of dry, largely non-cultivated lands lying on smooth, gently sloping benches overlooking the valley. These lands have been organized into East Bench Irrigation District.

OA Ex. 28, App. B, B44.

Analyzing an alternative plan, USBOR determined that without CCWSC shareholders agreeing to limit their water use, only 17,000 acres of full-service bench land, as opposed to 21,800 acres, could be developed with the water supply. *See* OA Ex. 28, DPR, 37. Setting a definite acreage for CCWSC was necessary for proper sizing and development of the EBU. OA Ex. 38, BN 2710, Transcr. D1, 55-59.

Creation of EBID

District Court proceedings were initiated in 1957 to create EBID and a hearing was held in Cause No. 5228, *In the Matter of the Formation of East Bench Irrigation District*, on September 27, 1957 in Virginia City, Montana. OA Ex. 32, Transcr. D2, 189; *see generally* § 85-7-104 through 106, MCA. USBOR engineers testified concerning the water supply for EBID. OA Ex. 32, 15-16. USBOR engineers testified that limiting CCWSC shareholders to 4 acre-feet per acre on existing lands would satisfy their needs and provide enough additional supply to fully irrigate new EBID lands with 3.1 acre-feet per acre of water:

Q. Did your studies of the availability of water of lands of the East Bench include allowance for the filling of prior established water rights below Clark Canyon Dam?

A. Well, I can't answer that yes or no but could I explain a little bit?

Q. Surely.

A. We allowed for the water rights downstream all right, but the majority of the lands below Clark Canyon Dam have formed themselves into this – or I guess their shareholders into this Clark Canyon Water Supply Company and they have agreed to

relinquish a small part of the water that could have been taken out of the stream early in the year and they have relinquished enough of their water right to fulfill their requirement, 4 acre-feet annually, and then give a little bit of that water which they have had to the East Bench area until they have satisfied 3.1 acre feet per acre annually and then any water in excess of that would go back to the older lands and be divided up again.

OA Ex. 32, 36.

Creation of EBID was approved by the Montana State Engineer's office as required by law. § 89-1201(3), RCM 1947 (now codified at § 85-7-103, MCA).

OA Ex. 64, Transcr. D1, 6:8-17, Appendix 4. The State Engineer's approval was based on the DPR. OA Ex. 64, BN 2925.

Congressional Record

In the early 1960s, officials of USBOR, promoters of the Project and congressional representatives from Montana appeared before Congress to obtain money to construct the Clark Canyon Reservoir and the EBID Canal and Diversion Dam. OA Ex. 70; OA Exs. 72-77, Transcr. D1, 183-190. The congressional record indicates the appropriations of money were based on the acreage figures and Project size stated in the DPR. OA Ex. 70, BN 2947, BN 2949; OA Ex. 72, BN 2966-2967, 2971; OA Ex. 73, BN 2975; OA Ex. 74, BN 2980, 2987-2988; OA Ex. 75, BN 2992; OA Ex. 76, BN 2997; OA Ex. 77, BN 3001; *see also* OA Ex. 46; Transcr. D1, 175-179.

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Reclamation Contracts

Historically, the use of EBU Project water by CCWSC shareholders was governed by the 1958 Reclamation Contract between USBOR and CCWSC and the individual subscription agreements of CCWSC shareholders. In the Contract, CCWSC agreed to curtailment of its shareholders' water rights:

3. During each year of the term of this contract, the United States shall store all flows of the Beaverhead River entering Clark Canyon Reservoir with the exception of amounts that must be released for maintenance of stream flow, to supply downstream rights of persons not shareholders of the Company and to provide flood storage space. From the conservation storage, the United States shall furnish water during the irrigation season for use of this Company's shareholders and for use of lands to be newly irrigated on the East Bench of the Dillon Valley... in accordance with the following priorities:

(1) First Priority: 4 acre-feet of water for each acre of land now irrigated by shareholders of the Company and for such additional acres with valid water rights on the date of the execution of this contract as may be owned by persons now or hereafter shareholders of the Company, to be measured at the River headgates to which it is distributed.

(2) Second Priority: 3.1 acre-feet of water per acre for each of the irrigable acres included in the East Bench Irrigation District to be measured at Barratts Diversion Dam.

(3) Third Priority: Such water in excess of 4 acre-feet per acre as can be beneficially used during the irrigation season under subsisting water rights on lands of the Company's shareholders to the extent it is available.

OA Ex. 35, BN 2459-2460, ¶ 3 (emphasis added). Under the 1958 Contract, curtailment was applicable throughout each year of the 40-year term. *Id.*, BN 2458,

¶ 3. The Contract gave USBOR the right to regulate and store all flows of the Beaverhead River as a priority senior to CCWSC shareholders' ability to exercise their rights. OA Ex. 35, BN 2459. Nearly identical language has been incorporated into the 2006 Reclamation Contract. OA Ex. 81, BN 3148-3149. The 2006 Contract acknowledges the water furnished by USBOR is a combination of storage and natural flow. *Id.*, BN 3148.

CCWSC Subscription Agreements

The Articles of Incorporation of CCWSC provide one share of Class A stock is the equivalent of one historically irrigated acre; one share of Class B or C stock is equal to one acre-foot of water. OA Ex. 40, 4-6; Transcr. D1, 6:8-17, Appendix 4; Transcr. D2, 98-101. The Articles further provide: 1) Class A stock is “inseparably appurtenant” to the lands subscribed, and 2) “water furnished to owners of Class B stock shall be applied only to Class B lands,” and 3) “water furnished to owners of Class C stock shall be applied only to Class C lands.” *Id.* For Class B and C stock “one share of stock shall be purchased for each acre-foot of supplemental water required to furnish such lands a full supply of water which shall be four (4) acre-feet of water per acre of land.” The CCWSC Board could refuse to issue stock in quantities greater or less than the Board determined adequate. OA Ex. 40, 5-6; Transcr. D2, 99-100. Shareholders with poor water rights were required to buy more

shares. Transcr. D3, 106; Transcr. D4, 309-310; *see also*, 43 U.S.C. §462 (purpose of land classification is to equitably apportion construction charges).

CCWSC subscription agreements identify the number of Class A, B and C acres subscribed and the number of acres irrigated with that class of shares. MVGR Exs. 15, 16; Transcr. D3, 160-161, 168-171, 173-178, 180-181. Class A stockholders limited their use to 4.0 acre-feet per acre. MVGR Ex. 15.003-15.004. For Class B and C stock, the number of shares represents the amount of water in acre-feet required to furnish a full supply of 4 acre-feet of water per acre to the acres in that class. MVGR Ex. 15.001-15.002. Paragraph 14 of the 1958 Contract provided that Class B shares correspond to Class 1, 2, or 3 lands classified by USBOR and delineated under “Net Irrigated Acres” on Table G-23 of the DPR, and Class C shares correspond to Class 4P and 6W lands on Table G-23. OA Ex. 35, 10, ¶ 14.c.; OA Ex. 28, G48, Table G-23; Transcr. D3, 168-171. The bottom of each page of Table G-23 notes: “The acreage was determined by field review and confirmed with the water users as the land actually irrigated with Beaverhead River water.” OA Ex. 28, G48, Table G-23; OA Ex. 28, 47. The total net irrigated acres in Table G-23 is 28,004 acres. OA Ex. 28, G48-G59, Table G-23, 12. Table G-23 is generally consistent with the acres CCWSC shareholders signed up in their subscription agreements. Transcr. D3, 169-171.

The subscribed acres in CCWSC upon which water allotments are based is 25,995 acres. OA Ex. 31, 5; Transcr. D1, 46, 205-207, 226-227, 261. Allotments are implemented by multiplying the shareholder's subscribed acres by 4 acre-feet of water per acre. Transcr. D1, 207. Allotments were enforced through a Water Commissioner hired to distribute water to shareholders; when shareholders used all their allotment the Commissioner shut off the shareholders' headgate. Transcr. D1, 231, 234, 252-253, 261; Transcr. D2, 105-109, 145-146; OA Ex. 99, BN 3498-3499, 20-22, Transcr. D3, 19-21. CCWSC allotments consist of a blend of water from both natural flow and storage. Transcr. D1, 231; Transcr. D2, 107; OA Ex. 81, BN 3148, Transcript D1, 6:8-17, Appendix 4. There is no method for determining the amount of storage versus natural flow at the shareholders' diversion points. Transcr. D1, 231-232; Transcr. D2, 108.

EBID Development Period

CCWSC shareholders were delivered water via their existing canals; the reservoir and the EBID diversion and canal had to be constructed. OA Ex. 28, DPR Summary Sheets, (i). Once construction of these facilities was completed and water was available for delivery, the 1958 Contract provided for a ten-year development period for lands in EBID. OA Ex. 50, BN 2806; Transcr. D1, 6:8-17, Appendix 4; 43 U.S.C. §485h(d)(1). USBOR operated the Project during the development period before transferring operations to the district. OA Ex. 50, BN 2807; OA Ex. 85.

Water was available for delivery in 1965 and the development period ended in 1975. OA Ex. 53, BN 2823; Transcr. D1, 6:8-17, Appendix 4; Transcr. D4, 58. In December 1974, USBOR employee D.M. Archibald conducted an inspection of EBID and issued a Memorandum on April 18, 1975. OA Ex. 52, BN 2821, Transcr. D1, 51-54. The Archibald Memorandum indicates 22,722 Class 1, 2 and 3 acres were developed for irrigation within the district. OA Ex. 52, BN 2821.

EBID meeting minutes from March 11, 1974 indicate EBID was irrigating 22,565 acres near the end of the development period. EBID Ex. 29, Appendix 1, Doc. 359.00, 3 (EBID exhibit list). USBOR's annual Project histories document the development of the irrigable acreage in EBID from 1965 through 1971 as follows: 1965 – 8,491 acres; 1966 – 16,307 acres; 1967 – 18,750 acres; 1968 – 20,274 acres; 1969 – 20,806 acres; 1970 – 20,941 acres; 1971 – 21,012 acres. MVGR Exs. 9.001, 10.001, 11.001, and 12.001; Transcr. D4, 344-347.

CCWSC Irrigated Acreage

USBOR's annual Project histories also provide information concerning both the intended and the actual irrigated acreage for CCWSC. MVGR Exs. 9.001, 10.001, 11.001, and 12.001. For the years 1967 through 1971, 27,090 acres were irrigated in CCWSC, which constitutes an additional 1,095 acres irrigated in CCWSC beyond the 25,995 acres subscribed in the Project. MVGR Ex. 12.001, OA

Ex. 31, 5. This figure is still within the 28,004 acres identified in the DPR. OA Ex. 28, DPR Summary Sheets, (i).

On January 21, 1976 USBOR and EBID entered a supplemental agreement for operation of EBID facilities after the development period. OA Ex. 85, Transcr. D1, 6:8-17, Appendix 4. The agreement included a Joint Transfer Inspection Report. OA Ex. 85, BN 3211. The Report still referred to the 21,800 Class 1, 2 and 3 acres discussed in the DPR rather than the 22,722 as-built acres described in the Archibald Memorandum. OA Ex. 52. The Report indicated the Project provided supplemental water for 25,958 acres in CCWSC. OA Ex. 85, BN 3211.

Increased Acres and Contract Renewal

The 1958 Reclamation Contracts between USBOR, CCWSC and EBID were set to expire in 40 years. OA Ex. 35, BN 2458; OA Ex. 50, BN 2803. New contracts between USBOR, EBID and CCWSC were entered in 2006. OA Ex. 81, BN 3170-3180, Transcr. D1, 6:8-17, Appendix 4; Transcr. D2, 52-58; EBID Ex. 33, Appendix 1, Doc. 359.00, 3 (EBID exhibit list). The Final EA on the new contracts states the irrigated acreage in EBID increased from the 22,722 as-built acres in the Archibald Memorandum to 28,055 acres identified as eligible lands in the 2006 contract. OA Ex. 31, 5; OA Ex. 81, BN 3180. The 22,722 acres was subsequently reduced to 22,689 acres due to more accurate GIS measuring and the loss of acreage when the Dillon Airport was constructed. Transcr. D2, 54; Transcr. D4, 240. The irrigated

lands in CCWSC increased from the 25,995 acres subscribed in 1965, and the 27,090 acres irrigated in 1971, to the 33,706 acres identified as eligible lands in the 2006 contract. OA Ex. 31, 5; OA Ex. 81, BN 3179; MVGR Ex. 12.001.

Prior to entering the 2006 contract, USBOR expressed concerns about the acreage increases that occurred under the 1958 contract. Three letters from USBOR to Project manager Dennis Miotke in 2003-2004 stated these concerns. OA Exs. 43, 44, 38; Transcr. D1, 56-66. USBOR summarized its position on the irrigated acreage in a September 3, 2004 letter:

[W]ater delivered under either the Clark Canyon Water Supply contract, or the East Bench Irrigation District contract, can only be applied to lands duly authorized by Reclamation. For the Clark Canyon Water Supply Company, the lands authorized by Reclamation are the specific 28,004 acres of land which were irrigated at the time the contract was executed in 1958.

Reclamation's present understanding is that the Company is authorized to provide irrigation water for 28,004 acres to subscribers of stock in the Company, as referenced in the Definite Plan Report on East Bench Unit, Three Forks Division, Missouri River Basin April 1960. Of the 28,004 acres, 24,848 acres were identified as needing a supplemental supply to reach the 4 ac-ft per acre, and 3156 acres were identified as having senior water rights and have no supplemental requirement to reach 4 ac-ft per acre. It is our understanding that the 24,848 acres were issued Class B & C stock and the 3156 acres were issued Class A stock in the company.

...

It is also Reclamation's understanding that the original intent of both Reclamation and the Company was to fix the number of acres served by the Company in the contract. This limitation on the use of water under existing water rights was a prerequisite for proper sizing and

development of the East Bench Unit. This understanding is derived from a collective reading of section 3.1 of the contract, the supporting documents referencing irrigated acres, and the subscription agreement.

OA Ex. 38.

A USBOR memo entitled Beaverhead River Operations also discussed the increased acreage issue:

It is alleged that both the District and the Company are serving lands in excess of their authorized acres. The proliferation of center-pivot and other sprinkler irrigation methods have allowed for irrigation of lands that were previously not irrigated. It is possible that irrigators have pursued appropriate actions under the State's water rights processes. *While this may be valid under State law, it is illegal to utilize Federal facilities, including distribution or storage facilities, to serve lands in excess of their authorized acres.*

OA Ex. 45, BN 2762; Transcr. D1, 66-75 (emphasis added).

EBID received no water during the 2004 irrigation season. Transcr. D2, 63.

In response, EBID President, Steve Cottom, sent a letter to CCWSC requesting that the priorities and acres in the 1958 Contract be strictly enforced:

Given the severe water shortage affecting our area and the hardship it is causing irrigators on the EBID who had very little water last year and no water this year. We feel the need for provisions in the existing contract, "Section 3, Furnishing and Regulation of Water", to be enforced for the 2005 water season. More specifically, we would like the CCWS to irrigate only that acreage, originally signed up, under the contract as first priority. The Second priority would be water for the EBID as stated in the contract, not water for excess or expanded acres in the CCWS. We would also like to find a workable solution for the new contract with respect to water priorities and contract acres.

OA Ex. 84; Transcr. D2, 62-64.

Other than the 2006 Contract, all literature promulgated by USBOR concerning the EBU, from the DPR through the time of trial, identifies the Project as providing supplemental water to approximately 28,000 acres and full-service irrigation to 21,800 acres. OA Exs. 47, 48; Transcr. D2, 194-198. At trial, USBOR's website still stated the same maximum acreage figures for the Project. Transcr. D1, 27-28.

STANDARD OF REVIEW

This appeal is from a Final Order issued after a trial conducted by the Chief Water Judge. The Supreme Court applies the same standards of review to the Water Court as it does to an appeal from a district court. *Sunset Irrigation Dist. v. United States (Fish & Wildlife Serv.)*, 2021 MT 25, ¶ 8, 403 Mont. 123, 480 P.3d 214.

The Supreme Court reviews for correctness the Water Court's conclusions of law. *Hoon v. Murphy*, 2020 MT 50, ¶ 24, 399 Mont. 110, 460 P.3d 849.

The Supreme Court reviews the Water Court's findings of fact under the clearly erroneous standard. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644. A finding of fact may be clearly erroneous if it is not supported by substantial evidence; if the Water Court misapprehended the effect of the evidence; or if a review of the record demonstrates that a mistake has been made. *Danreuther Ranches v. Farmers*

Coop. Canal Co., 2017 MT 241, ¶ 18, 389 Mont. 15, 403 P.3d 332 (citing *Skelton Ranch*, ¶ 27).

The Supreme Court reviews mixed questions of law and fact *de novo*, including the lower court’s application of controlling legal principles to its factual findings. *BNSF Ry. Co. v. Cringle*, 2012 MT 143, ¶ 16, 365 Mont. 304, 281 P.3d 203.

The Supreme Court reviews a court’s orders related to trial administration, for an abuse of discretion. *In re Crow Water Compact*, 2015 MT 217, ¶ 20, 380 Mont. 168, 354 P.3d 1217.

SUMMARY OF ARGUMENT

The maximum irrigated acreage for the EBU Project water rights is limited to the amount contemplated in a USBOR planning and authorization document for the EBU Project known as the Definite Plan Report (DPR) – 22,722 acres for EBID and 28,004 acres for CCWSC – for a total of 50,726 irrigated acres. The Water Court erred when it held the DPR did not define USBOR’s intent for the Project, did not limit Project acres, and did not define the service area for CCWSC shareholders’ historical water use. The Court also erred when it held Project water users could increase irrigated acreage after completion of the Project facilities and perfection of the water rights, effectively exempting the Project from the Water Use Act. Finally, the Court erred when it removed the CCWSC “curtailment remark” on summary

judgment with no factual record, and abused its discretion by not considering Open A's request for a replacement remark.

ARGUMENT

I. The Water Court Erred When It Concluded the DPR Does Not Limit Maximum Acreage for the EBU.

The Water Court erred when it concluded the DPR did not limit irrigation using Project water to a maximum number of acres. Final Order, 22, 24. First, the Court erred when it concluded the DPR was not a limitation on maximum irrigated acreage by failing to recognize the DPR is a statement of USBOR's intent when it appropriated water for the EBU Project. Second, the Court erred when it held that Project authorization through the DPR did not require implementation and development of the Project consistent with the DPR.

A. Appropriation of Water for Future Use in the EBU was Controlled by USBOR's Intent When the Project Was Initiated.

The Water Court held that the intent of USBOR in appropriating water for the EBU Project could be determined "not only by actions at the time of the appropriation, but also by subsequent acts of the appropriator." Final Order, 21. The Court further held that USBOR's inaction by not imposing and enforcing acreage limitations established in the DPR, and the irrigators' resulting actions in increasing their irrigated acreage, constitutes evidence of USBOR's intent when it appropriated water for the Project. Final Order, 23.

Pursuant to *Curry v. Pondera County Canal & Reservoir Co.*, 2016 MT 77, 383 Mont. 93, 370 P.3d 440, the Water Court’s conclusions are errors of law. The intent of an appropriator such as USBOR, when acting as a “public service corporation” and appropriating water for future use, must be based on the intent of the appropriator at the time of the appropriation; intent cannot be determined by the subsequent acts of third parties, such as EBID and CCWSC water users, who are strangers to the initial undertaking of the Project. *Bailey v. Tintinger*, 45 Mont. 154, 177-178, 122 P. 575, 583 (1912), cited in *Curry*, ¶ 29.

Montana law governs appropriations of water by USBOR for reclamation projects. 43 U.S.C. §383; *California v. United States*, 438 U.S. 645, 665 (1978) (Secretary must follow state law in appropriating water); *see also* § 89-808, RCM (1947). The elements of an appropriation of water are intent, notice, diversion, and application to beneficial use. *In re Adjudication of Existing Rights to the Use of All Water Within the Missouri River Drainage Area*, 2002 MT 216, ¶ 10, 311 Mont. 327, 55 P.3d 396. Whether an appropriation is made for a beneficial or useful purpose is a question for the courts to determine based on the appropriator’s intent and contemplated and actual use. *Curry*, ¶ 25, citing *Toohey v. Campbell*, 24 Mont. 13, 17-18, 60 P. 396, 397 (1900).

Appropriations of water for future sale or distribution by a “public service corporation” are governed by *Bailey* and *Curry*, which hold that appropriations made

for future prospective uses are controlled by the *bona fide* intent of the appropriator at the time the appropriation was made. *Bailey*, 45 Mont. at 177-178, 122 P. at 583; *Curry*, ¶¶ 25, 29, 46-47. In *Curry*, the Montana Supreme Court affirmed the Water Court’s determinations concerning 1) the suitability of a service area decree for a Carey Land Act irrigation project, and 2) a decree of maximum irrigated acreage based on project planning by the authorizing entity, the Montana Carey Land Board and the State Engineer. *Curry*, ¶¶ 32, 35, 48, 67.

When the appropriation is for future sale or distribution, the intent of the appropriator is paramount:

When the beneficial use of the water covered by an appropriation is not immediate, but prospective or contemplated, the intention of the party becomes of prime importance, because the privilege of making contemplated beneficial use of water is accorded only so long as there is a *bona fide* intention to make the contemplated use. It is therefore necessary to ascertain the claimant's intent, and this is done from an examination of his acts and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof.

Hutchins, Wells, *The Montana Law of Water Rights*, USDA Bulletin 545, August, 1958, pp. 51-52 (internal citations omitted) (emphasis in original)

Curry v. Pondera County Canal & Reservoir Co., 2014 Mont. Water LEXIS 20, 61-62 (Mont. Water Ct. April 25, 2014). The intent must be *bona fide*:

“At the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose . . . [Citations omitted] The law will not encourage anyone to play the part

of the dog in the manger, and therefore the intention must be *bona fide* and *not a mere afterthought.*”

Bailey, 45 Mont. at 178, 122 P. at 583 (emphasis added). *Bailey* further holds the existence of the right cannot be made to depend on the acts of third parties who are strangers to the undertaking. *Bailey*, 45 Mont. at 178, 122 P. at 583; *Curry*, ¶ 29. Similarly, ultimate perfection of the right cannot be affected by actions of strangers to the undertaking, because their actions cannot be known or intended by the appropriator when *bona fide* intent is formed at the initiation of the Project. The increased irrigated acreage by EBID and CCWSC end-users exceeds USBOR’s intent as stated in the DPR. The Final Order allows USBOR to incorporate this unintended increase in the Project water rights even though the increase is not part of USBOR’s initial *bona fide* intent and is a “mere afterthought.” *Bailey*, 45 Mont. at 178, 122 P. at 583.

Citing *Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909), the Water Court held intent may be determined from subsequent acts of the appropriator. Final Order, 21. *Smith* is distinguishable from this case. *Smith* involved private appropriations of water for individual users. *Smith*, 39 Mont. at 385, 386, 102 P. at 984. *Curry* notes that unlike appropriations for future sale or distribution, water rights appropriated by individual users require actual use for perfection. *Curry*, ¶ 46. Thus, the subsequent acts of individual appropriators after their ditches are completed are material and relevant to the issue of actual beneficial use. *Smith*, 39 Mont. at 389,

102 P. at 986. Actual use, and the subsequent acts that prove it, do not apply to future use appropriations under *Curry*, because completion of the system satisfies the beneficial use requirement. *Curry*, ¶ 46.

USBOR is a “public service corporation” providing water to the EBU. *Bailey*, 45 Mont. at 177, 122 P. at 583; *Curry*, ¶ 33. Appropriations for future use have their place of use determined by the lands irrigable under the system when it was completed. *Curry*, ¶ 47. CCWSC historically contracted with USBOR for a regulated supply of 4 acre-feet per acre for use on the subscribed existing irrigated acres determined by USBOR and the individual shareholders in DPR Table G-23 to be in need of supplemental water. OA Ex. 28, G48-G59. The only new lands intended for a full supply in the Project were EBID lands. OA Ex. 28, App. B, B44. Accordingly, the total lands irrigable under the system when it was completed at the end of the development period in 1975 are the 22,722 “as built” acres in EBID and the 28,004 pre-existing acres of CCWSC shareholders, for a total of 50,726 Project acres.

Under *Curry* and *Bailey*, the maximum acreage for the Project is limited to the intended acreage identified in the DPR, with modifications for EBID through the development period. The Court erred when it decreed EBID a maximum acreage larger than the irrigable acreage in EBID at the end of the development period, and

erred when it decreed irrigated acres for CCWSC other than the 28,004 acres identified in the DPR.

B. The DPR Authorized the Project Consistent with the Findings of the DPR.

The Water Court recognized the purpose of the DPR was to obtain Congressional authorization for the EBU. Final Order, 24. However, the Court erred by not recognizing the authorization for the EBU is limited to the express findings in the DPR.

Quoting the first portion of 43 U.S.C. §485h(a), the Court correctly recognized that the statute provides for authorization of reclamation projects through a DPR based on project feasibility. Final Order, 24. The latter portion of §485h(a) provides:

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply or other miscellaneous purposes found by the Secretary to be proper, together with any allocation to flood control or navigation made under subsection (b) of this section, equal the total estimated cost of construction as determined by the Secretary, *then the new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary.* If all such allocations do not equal said total estimated cost, then said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefor has been made by Act of Congress enacted after the Secretary has submitted to the President and the Congress the report and findings involved.

43 U.S.C. §485h(a) (emphasis added). Once the Secretary finds that a new project will pay for itself, the statutory language indicates the portions of the project “deemed authorized” are those portions “covered by his findings.” 43 U.S.C. §485h(a). When probable repayments exceed costs, the project is automatically authorized. But when expected payments fall short of project costs, the Secretary cannot proceed without specific Congressional authorization. *Carson-Truckee Water Conservancy Dist. v. Watt*, 537 F. Supp. 106, 111-112 (D. Nev. 1982) (court relied on a DPR to conclude that municipal and industrial uses were authorized); *see also Env'tl. Def. Fund, Inc. v. Morton*, 420 F. Supp. 1037, 1041-1042 (D. Mont. 1976) (court interpreted a DPR to determine specific purposes authorized by Congress for the Yellowtail Dam Project).

Pursuant to 43 U.S.C. §485h(a), a favorable DPR is used in lieu of specific Congressional authorization. “The definite plan report is used by all Bureau administrative officials and technical personnel as the authoritative, detailed plan and specification, and, if favorable, as the basic guide for carrying out plans for proper and orderly development of a project, division, or unit.” OA Ex. 46, BN 2771-2772; Transcr. D1, 177-179.

The DPR is the basis for the authorization and appropriation of funds for the EBU Project. OA Exs. 70, 72, 73-77; Transcr. Day 1, 179-190. USBOR has no authority to vary that authorization without express congressional approval. *Dalles*

Irrigation Dist. v. United States, 82 Fed. Cl. 346, 358-359 (2008) (Secretary breached irrigation pumping contract because Secretary's changing of power rates was contrary to authorization for irrigation project); *see also Ryan v. Chicago B. & Q.R. Co.*, 59 F.2d 137, 143 (7th Cir. 1932) (holding once Congress has authorized a project for construction of a dam according to detailed plans any subsequent material change by Secretary must be approved by Congress.)

USBOR can only intend to do what Congress has authorized it to do. *Dalles Irrigation Dist.*, 82 Fed. Cl. at 358 (an agency is a creature of statute and its authority to act must be grounded in an express grant from Congress). USBOR can only intend to provide water for irrigation of lands as found by the Secretary and authorized by Congress. 43 U.S.C. §485h(a). The DPR included specific findings about Project feasibility based on classification of irrigable acreage for EBID and classification of pre-existing irrigated acreage for CCWSC. Classifications of productive and nonproductive acreage are described in tables and maps with the specific locations of the classified acreage. OA Ex. 28, App. G, G38-G47; Table G-23 at G48-G59; Table G-25 at G67-G127. "Full service" and "supplemental service" areas are specifically described in Appendix G, Tables G-23 and G-25.

Only those portions of the Project *covered by the Secretary's findings* for classified acreage are authorized under 43 U.S.C. §485h(a), and only those portions were intended for irrigation by Congress. Those classified acres are from the DPR

– 22,722 in EBID and 28,004 for CCWSC. The Water Court erred when it omitted part of 43 U.S.C. §485h(a) and concluded Project authorization was not limited to the specific findings concerning classified acreage. § 1-2-101, MCA (in statutory construction court should not omit language).

II. Reasonable Diligence Does Not Allow Project Water Users to Continually Enlarge the Place of Use of the Project Rights.

A. Reasonable Diligence Only Applies to Construction of Project Facilities.

Citing *Montana Dep't of Natural Resources & Conservation v. Intake Water Co.*, 171 Mont. 416, 558 P.2d 1110 (1976), the Water Court erroneously held that USBOR and the EBU users acted with diligence when they continued to expand irrigated acreage after the end of the development period. Final Order, 25-26. The Court erred because reasonable diligence only applies to construction of the Project facilities; it does not apply to increases in irrigation after the water rights are perfected. *Intake Water Co.*, 171 Mont. at 430-432, 558 P.2d at 1118-1119.

Intake Water Co. interpreted Montana's 1885 territorial statute concerning notices of appropriation, §§ 89-810 through 89-814, RCM (1947). The statutes authorized appropriators to initiate and perfect a water right by: 1) posting a notice describing the intended appropriation at the point of diversion; 2) recording the notice within 20 days after posting; 3) proceeding to prosecute the excavation or construction of the work by which the water appropriated is to be diverted within 40

days after posting the notice; and 4) prosecuting the construction of such work with reasonable diligence to completion. If the appropriator complied with these steps, the right to use the water relates back to the date of posting the notice of the appropriation. §§ 89-810, 89-812, RCM (1947); *Intake Water Co.*, 171 Mont. at 430, 558 P.2d at 1118 (1976). The statute provided:

Diligence in appropriating. Within forty days after posting such notice, the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion.

§ 89-811, RCM (1947). Section 89-808, RCM (1947) enlarged the time for USBOR to commence construction to three years.

Intake Water Co. holds that diligence under the statute requires a steady application of effort that is usual, ordinary, and reasonable under the circumstances. So long as the applicant prosecutes the construction of works in good faith with a steady effort, the appropriation will relate back to the date of posting. *Intake Water Co.*, 171 Mont. at 434, 558 P.2d at 1120.

Intake Water Co. is not applicable in this case. The statutorily required diligence approved in *Intake Water Co.* applies to construction of diversion facilities – the “works” that divert and deliver water. *Intake*, 171 Mont. at 430, 558 P.2d at 1118-1119. Similarly, the good-faith steady effort applies to prosecution of construction of the diversion and conveyance facilities by the appropriator. *Intake*,

171 Mont. at 434, 558 P.2d at 1120. After those facilities are completed, the doctrine of relation back applies, and the appropriation is perfected consistent with the appropriator's original *bona fide* intent with a priority date as of the date of posting. § 89-812, RCM (1947); *Bailey*, 45 Mont. at 173-174, 122 P. at 581-582; *Intake Water Co.*, 171 Mont. at 430, 558 P.2d at 1118.

Here, the reservoir and EBID canal were completed in 1965. The 1958 contract and 43 U.S.C. §485h(d)(1) provided a ten-year period to develop irrigated lands in EBID; no development was needed in CCWSC since its lands consisted of 28,004 acres of pre-existing irrigation. Once the facilities were built and the appropriation was perfected at the end of the development period, subsequent actions by the EBU water users increasing irrigated acres are not part of USBOR's diligence constructing the facilities. Subsequent increases in irrigated acreage by EBU end-users were not contemplated at the time of initiating the Project, are "mere afterthoughts" by "strangers to the undertaking," and are excluded from the appropriator's priority. *Bailey*, 45 Mont. at 178, 122 P. at 583.

EBU water users' actions increasing irrigated acreage after the Project was completed do not constitute reasonable diligence. *Intake*, 171 Mont. at 430, 558 P.2d at 1118; *Bailey*, 45 Mont. at 174 -176, 122 P. at 582-583.

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B. The Water Court’s Holding on Reasonable Diligence Exempts USBOR, EBID and CCWSC Water Users from the Requirements of the 1973 Water Use Act.

USBOR’s water rights are existing water rights recognized and confirmed by Article IX, Section 3 of the 1972 Montana Constitution. An “existing water right” is “a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” § 85-2-102(13), MCA. Existing water rights are defined by the pre-July 1, 1973 law under which the water rights were perfected and used. *Hoon*, ¶¶ 33-34.

After adoption of the Water Use Act on July 1, 1973, all new uses of water are subject to the permitting requirements of the Act. *Hoon*, ¶ 34; § 85-2-301(1), MCA. Any changes in purpose, point of diversion, place of use, or place of storage of existing water rights after July 1, 1973 are also subject to the Act. §§ 85-2-102(7) and 85-2-402, MCA. Changes involving addition of irrigated acreage based on the alleged use of salvage water are also subject to the Act. §§ 85-2-102(23) and 85-2-419, MCA; *Hohenlohe v. State*, 2010 MT 203, ¶ 48, 357 Mont. 438, 240 P.3d 628 (applicant who wishes to change to more efficient form of irrigation and irrigate a larger acreage may do so on making the required statutory showing).

The Final Order exempts USBOR and the EBU Project water users from the requirements of the Act. EBID consisted of 22,722 as built irrigated acres at the end of the development period in 1975. OA Ex. 52, BN 2821. The Final Order decrees

EBID 28,005 acres. Final Order, 41. This is an increase of 5,283 acres occurring after July 1, 1973 and the development period with no DNRC permits or change authorizations as required by §§ 85-2-301 and 85-2-402, MCA.

The Final Order does not determine a total acreage irrigated by CCWSC shareholders. Final Order, 31. The DPR contemplated providing supplemental water to 28,004 acres in CCWSC; USBOR documents indicate slightly less historical irrigated acreage – 27,090 acres irrigated in 1971 (MVGR Ex 12.001), and 25,958 acres irrigated in 1976. OA Ex. 85, BN 3211. The 2006 Contract asserts there are 33,706 CCWSC acres eligible to receive contract water. OA Ex. 31, 5; OA Ex. 81, BN 3179. This is an increase of 5,702 acres beyond the contemplated DPR acres occurring after July 1, 1973 with no permits or change authorizations as required by the Act.

Combining the EBID and CCWSC increases results in the Final Order effectively exempting 10,985 additional acres of EBU irrigation from the requirements of the Water Use Act.

A change in the use of a water right cannot effect an enlargement in the use of that right. *Farmers Reservoir & Irrigation Co. v. City of Golden*, 44 P.3d 241, 246 (Colo. 2002); *Hohenlohe*, ¶ 43. Montana cases recognize an increase in irrigated acreage beyond the original beneficial use results in an unlawful expansion of a water right. *Quigley v. McIntosh*, 110 Mont. 495, 510, 103 P.2d 1067, 1074 (1940)

(one using a certain flow rate but an insignificant volume of water to irrigate a garden patch cannot expand use of the flow rate to irrigate a complete ranch). *Quigley* recognizes an increase in irrigated acreage results in an increase in consumptive use of water. *Quigley*, 110 Mont. at 505, 103 P.2d at 1072. Consumptive use constitutes the volume of water used annually for a beneficial purpose, “such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that does not return to ground or surface water.” A.R.M. 36.12.101(15); *Hohenlohe*, ¶ 69. The amount of water historically consumed is linked to the amount of water re-entering a stream as return flow. *Hohenlohe*, ¶ 42. Irrigating additional acres increases consumptive use, enlarges the water right, and is prohibited. *Quigley*, 110 Mont. at 510, 103 P.2d at 1074 (allowing holders of established rights to increase the application of irrigation water to a larger number of acres would revolutionize the water law).

Under the Final Order, the final cutoff date for the development of the EBU Project water rights is not clear. The Final Order holds that development of additional acreage could continue after the end of the development period in 1975. Final Order, 25-26. The Final Order appears to hold the effective cutoff date for “development” of additional acreage for the Project is the execution of the 2006 Contract, 30 years *after the end of the development period*. If so, the Final Order grants USBOR and the EBU water users an exclusive 30-year exemption from the

Water Use Act.

The Court's holding that diligence continued past the development period is error.

III. The Water Court Erred by Not Specifically Delineating the Entire Service Area of Water Right 43B 40854-00.

The Final Order notes that not all the private water rights of CCWSC shareholders have been adjudicated. Final Order, 30. At trial, USBOR requested the Water Court to take judicial notice of the final adjudication orders, including future orders, for all claims of CCWSC shareholders as a means of determining the CCWSC component of the place of use for 41B 40854-00, by combining places of use for CCWSC shareholders' private water rights. Transcr. D4, 118. At trial, the Court declined to take judicial notice of future decisions concerning CCWSC shareholders' water rights. Final Order, 31. Instead, the Court added an information remark to the place of use element for 41B 40854-00 stating storage water may be used on lands served by water rights owned by CCWSC shareholders. *Id.*

Ironically, the Water Court effectively took the action in the Final Order that at trial it stated it could not take. Transcr. D4, 139-140. By decreeing a remark referencing a general place of use on lands served by CCWSC shareholders' rights – some of which have not yet been adjudicated – the court effectively took notice of future decisions contrary to the notice requirements of Rule 202(d)(2) and (e), M.R.Evid., and the requirements of due process.

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Geil v. Missoula Irrigation Dist.*, 2002 MT 269, ¶ 61, 312 Mont. 320, 59 P.3d 398. At this time, Open A still has not had notice of the actual place of use where USBOR claims Project water may be used by CCWSC shareholders under 41B 40854-00. The Court’s information remark purports to decree an amalgamated place of use based on place of use rulings from multiple cases, some undecided at this time. These places of use have never been disclosed to any of the other parties in this proceeding. A process that does not provide disclosure of the claim or the evidence in support of the claim before trial deprives objecting parties of the ability to rebut the evidence supporting the claim with contrary evidence and to controvert the claim at trial.

Open A did not have a meaningful opportunity at trial to controvert USBOR’s “amalgamated” place of use claim. Even USBOR experienced what the Court described as a “chicken or egg conundrum;” at trial USBOR claimed it could not know the extent of the CCWSC place of use component of 43B 40854-00 because adjudication of CCWSC shareholders’ rights is not finished. Final Order, 30.

The Court’s information remark approach to this perceived conundrum is error. Section 85-2-234(6)(e), MCA provides that the final decree must state “the place of use and the description of the land, if any, to which the right is appurtenant.” Reclamation law specifically provides that project water is appurtenant to the lands

irrigated. 43 U.S.C. §372. The Court’s decree for 41B 40854-00 describes the EBID portion of the place of use but does not describe the CCWSC place of use or the CCWSC shareholder lands to which the water is appurtenant, contrary to both § 85-2-234(6)(e), MCA and 43 U.S.C. §372.

Moreover, the Court’s attempt to resolve this perceived conundrum with an information remark is unnecessary – it is a solution without a problem. DPR Table G-23 provides a legal description of the 28,004 acres USBOR intended for delivery of supplemental water in the Project. OA Ex. 28, G48-G59. Table G-23 describes the 28,004-acre supplemental service area in detail, by township, range and section, consists of all the lands intended for supplemental water at the outset of the Project, and is what Congress specifically authorized for supplemental irrigation in the EBU. *Id.* Had the Court simply determined USBOR’s intent for CCWSC from the DPR, there would be no problem to resolve.

“A delineated place of use has historically been necessary for perfection” of a water right. *Curry*, ¶ 40. The Water Court erred by not decreeing a delineated place of use for CCWSC shareholders and the CCWSC lands to which Project water is appurtenant based on Table G-23. § 85-2-234(6)(e), MCA; 43 U.S.C. §372.

IV. The Water Court Erred by Not Granting Open A’s Request for an Information Remark Subordinating CCWSC Shareholders’ Private Water Rights to 43B 40854-00.

On July 3, 2019 the Court granted summary judgment to MVGR, POR, and

the Intervenor in Case 41B-265, ordering removal of an information remark placed on the water rights of CCWSC shareholders by DNRC. Although CCWSC shareholders' rights are not part of Case 41B-265, the Court held consideration of the remark was appropriate. Doc. 311.00, 4, Appendix 3. The remark states:

This water right is subject to certain curtailment provisions as detailed in the 1958 contract (No. 14-06-600-3592) between the United States (BOR) and the Clark Canyon Water Supply Company. A copy of the contract is available from the DNRC Helena Water Resources Regional Office.

Doc. No. 311.00, 3, Appendix 3. The Court based its decision in part because the 1958 contract has expired. *Id.*, 10. The Court further held that neither the 1958 nor 2006 contract contain curtailment provisions. *Id.*

The Water Court erred in its interpretation of both contracts. CCWSC shareholders' rights are "curtailed" under both contracts. The operative "curtailment" provision is language allowing USBOR to store *all flows* of the Beaverhead River except for water necessary to satisfy non-shareholders, minimum stream flows, and to provide flood storage space. OA Ex. 35, BN 2459-2460, ¶ 3; OA Ex. 81, BN 3148-3149. This curtailment is applicable throughout the entire year for each year of the 40-year term. *Id.*, BN 2458, ¶ 3; OA Ex. 81, BN 3147. Since 1958, there has never been a time when CCWSC shareholders could exercise their priority dates; the Contracts provide USBOR the ability to store and regulate *all flows* of the river year-round as a priority senior to CCWSC shareholders' natural

flow rights. OA Ex. 35, BN 2459; OA Ex. 81, BN 3148-3149. CCWSC enforced curtailment by setting allotments and hiring a water commissioner. Transcr. D2, 107. The water commissioners testified they do not deliver water to shareholders based on priority dates; delivery is based solely on allotments. Transcr. D1, 230; OA Ex. 99, BN 3498-3499. Both contracts subordinate the senior water rights of CCWSC shareholders to the storage right of USBOR. *Id.*

In its Pretrial Order Contentions (Doc. No. 359.00, 7, Contention 18) and its Proposed Findings of Fact and Conclusions of Law (Doc. No. 375.00, 65, COL XXX) Open A requested the Court replace the “curtailment” remark removed on summary judgment with a new remark stating:

THE OWNER OF THIS WATER RIGHT IS A MEMBER OF THE CLARK CANYON WATER SUPPLY COMPANY. THE PRIORITY DATE OF WATER RIGHTS OF SHAREHOLDERS IN THE CLARK CANYON WATER SUPPLY COMPANY ARE SUBORDINATE TO THE PRIORITY DATE OF WATER RIGHT 41B 40854-00.

The Water Court did not rule on this request.

The final decree statute, § 85-2-234, MCA, provides that in addition to decreeing specific elements of the water right, the decree must also state “any other information necessary to fully define the nature and extent of the right.” § 85-2-234(6)(i), MCA. The remark requested by Open A describes information necessary to fully define the nature and extent of CCWSC shareholders’ water rights and the water rights of USBOR for purposes of water administration. The remark is

necessary because CCWSC shareholders are not administered water by priority date, and CCWSC shareholders no longer exercise their underlying water rights. The remark should be added to all private water rights of CCWSC shareholders to replace the original curtailment remark removed by the Court on summary judgment.

The Water Court erred when it 1) held neither the 1958 nor 2006 contract contain curtailment provisions, 2) removed the original DNRC curtailment remark from CCWSC shareholder rights on summary judgment before development of a factual record, and 3) did not replace the original remark with the remark offered by Open A at trial. Additionally, the Court abused its discretion by not addressing Open A's request to add the remark. § 85-2-234(6)(i), MCA; *In re Crow Water Compact*, ¶ 20.

CONCLUSION

The Water Court's Final Order should be reversed and remanded with instructions to decree:

- 1) The maximum irrigated acreage for 41B 40850-00 as 22,722 acres irrigated by EBID;
- 2) The maximum irrigated acreage for 41B 40854-00 as 50,726 acres – 22,722 acres perfected for irrigation by EBID plus 28,004 acres intended for irrigation in CCWSC;

- 3) A description of the CCWSC portion of the service area of 43B 40854-00 based on the 28,004 acres described in Table G-23; and
- 4) The addition of the information remark requested by Open A.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is double-spaced; is printed with a proportionately spaced Times New Roman text typeface of 14 points using Microsoft Word 2010; and has a word count of 9,994, excluding the table of contents, table of authorities, certificate of compliance, and certificate of service.

Dated this 21st day of May, 2021.

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