

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0079

---

CLAIMANTS: East Bench Irrigation District; United States of America (Bureau of Reclamation)

OBJECTORS: East Bench Irrigation District; State of Montana Department of Fish, Wildlife, and Parks; Point of Rocks Angus Ranch Inc.

COLJNTEROBJECTORS: Madison Valley Garden Ranch, LLC; Open A Ranch, Inc.

NOTICE OF INTENT TO APPEAR: Geoduck Land & Cattle LLC; Smith's Elk Meadows Ranch, LLC; Water Users Irrigation Co.

INTERVENORS: 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 Co.

**Water Court Case No.****41B-265-P-2015**

41B 40850-00

41B 40851-00

41B 40852-00

41B 40854-00

41B 40855-00

41B 40856-00

41B 40857-00

41B 40858-00

41B 40859-00

41B 40860-00

41B 40861-00

---

**RESPONSE BRIEF OF APPELLEE GEODUCK LAND & CATTLE, LLC**

---

On Appeal from the Montana Water Court,  
the Honorable Russ McElyea, Presiding

---

**APPEARANCES:**

Michael J. L. Cusick  
Cusick, Mattick & Refling, P.C.  
P.O. Box 1288  
Bozeman, MT 59771-1288  
Telephone: (406) 587-5511  
Email: office@cmrlawmt.com  
*Attorneys for Appellant Open A Ranch, Inc.*

Walter E. Congdon  
445 Brooks Street  
Missoula, MT 59801  
Telephone: (406) 883-7231  
Email: waltercongdon@gmail.com  
*Attorney for Appellee Smith's Elk Meadows Ranch, LLC*

Jennifer Najjar and James DuBois  
U.S. Dept. of Justice  
ENRD-Natural Resources Section  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044-7611  
Telephone: (202) 305-0476  
Email: jennifer.najjar@usdoj.gov  
james.dubois@usdoj.gov  
*Attorneys for Appellee United States of  
America Bureau of Reclamation*

W. John Tietz  
Browning, Kaleczyc, Berry & Hoven, P.C.  
800 N. Last Chance Gulch, Ste. 101  
P.O. Box 1697  
Helena, MT 59624  
Telephone: (406) 443-6820  
Email: john@bkbh.com  
*Attorneys for Appellee Madison Valley  
Garden Ranch, LLC*

Max A. Hansen  
Max A. Hansen & Assoc., P.C.  
8 S. Idaho St., Suite A P.O. Box 1301  
Dillon, MT 59725  
Telephone: (800) 237-1031  
Email: max@irc1031x.com  
*Attorneys for Appellees Bar J Ranch, Baldy  
View Enterprises, LLC, William C. and  
Roxanne E. Mancoronal, Justin D. Devers,  
and William R. Grose*

John L. Smeltzer  
U.S. Dept. of Justice  
ENRD-Appellate Section  
P.O. Box 7415  
Washington, D.C. 20044  
Telephone: (202) 305-0343  
Email: john.smeltzer@usdoj.gov  
*Attorneys for Appellee United States  
of America Bureau of Reclamation*

Andrew P. Suenram  
Jean Bergeson  
Suenram & Bergeson  
P.O. Box 1366  
Dillon, MT 59725  
Telephone: (406) 683-2391  
Email: suenram@swmtlaw.com  
jbergeson@swmtlaw.com  
*Attorneys for Appellees David and  
Shelli Schuett*

Dana E. Pepper and Bina Peters  
River and Range Law, PLLC  
P.O. Box 477  
Bozeman, MT 59771-0477  
Telephone: (406) 599-7424  
Email: dana@riverandrangelaw.com  
bina@riverandrangelaw.com  
*Attorneys for Appellees Bar J Ranch,  
Baldy View Enterprises, LLC,  
William C. and Roxanne E.  
Mancoronal, Justin D. Devers,  
and William R. Grose*

William C. Fanning Esq.  
Fanning Law PLLC  
300 N. Willson Ave., Ste. 3007  
Bozeman, MT 59715  
Telephone: (406) 220-2805  
Email: [william@fanninglawpllc.com](mailto:william@fanninglawpllc.com)  
*Attorney for Appellees EBID and CCWSC*

Ryan McLane  
Franz & Driscoll, PLLP  
P.O. Box 1155  
Helena, MT 59624-1155  
Telephone: (406) 442-0005  
Email: [ryan@franzdriscoll.com](mailto:ryan@franzdriscoll.com)  
*Attorneys for Appellee Point of  
Rocks Angus Ranch, Inc.*

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
I. ISSUES PRESENTED.....	1
II. STATEMENT OF THE CASE .....	1
III. STATEMENT OF FACTS .....	2
IV. STANDARD OF REVIEW .....	17
V. SUMMARY OF ARGUMENT .....	19
VI. ARGUMENT.....	21
A. The Water Court properly rejected the DPR as the basis for EBID’s Service Area. ....	21
1. The service area of the EBU is defined by the acres irrigable upon project completion not the BOR’s intent. ....	23
2. The service area for the EBU is determined by the capability of the completed project not the projections in the DPR.....	25
B. The Water Court properly determined that place of use included all lands potentially irrigable as of the date of project completion.....	27
1. Whether an irrigation district completed construction with reasonable diligence determines priority, not acreage within the service area. ....	29
2. The service area granted by the Water Court does not constitute an increase or change in use.....	30
C. The Water Court properly conditioned the final service area for 41G 40854-00 on the complete adjudication of all water rights in Basin 41B. ....	31

D. The Water Court properly rejected Open A’s request for an information remark. ....35

VII. CONCLUSION .....36

CERTIFICATE OF COMPLIANCE.....38

## TABLE OF AUTHORITIES

### CASES

<i>Bailey v. Tintinger</i> , 45 Mont. 154, 122 P. 575 (1912) .....	22, 24, 28, 29
<i>Bergtoll v. United States</i> , 2021 WL 2946188 (Mont. Water Ct. July 9, 2021).....	36
<i>Curry v. Pondera County Canal &amp; Reservoir Co.</i> , 2016 MT 77, 383 Mont. 93, 370 P.3d 440.....	5, 21, 22, 23, 24, 25, 27, 30
<i>Danreuther Ranches v. Farmers Coop. Canal Co.</i> , 2017 MT 241, 389 Mont. 15, 403 P.3d 332.....	18
<i>Dodson Irrigation Dist. v. U.S. Bureau of Reclamation</i> , 2018 WL 7574161 (Mont. Water Ct. Nov. 16, 2018).....	22, 27, 30
<i>Eldorado Co-op Canal Co. v. Lower Teton Joint Objectors</i> , 2014 WL 7877137 (Mont. Water Ct. Nov. 21, 2014).....	22
<i>Geil v. Missoula Irrigation Dist.</i> , 2002 MT 269, 312 Mont. 320, 59 P.3d 398.....	18
<i>Heavirland v. State</i> , 2013 MT 313, 372 Mont. 300, 311 P.3d 813.....	18
<i>In re Formation of East Bench Irrigation Dist.</i> , 2009 MT 135, 350 Mont. 309, 207 P.3d 1097.....	5, 22, 29
<i>Lockwood Area Yellowstone County Water and Sewer District</i> , 2015 WL 5478235 .....	31
<i>Mont. Dep't of Natural Resources &amp; Conserv. v. Intake Water Co.</i> , 171 Mont. 416, 558 P.2d 1110 (Mont. 1976) .....	28, 30
<i>Mont. Trout Unlimited v. Beaverhead Water Co.</i> , 2011 MT 151, 361 Mont. 77, 255 P.3d 179.....	18

<i>Norwood v. Serv. Distrib., Inc.</i> , 2000 MT 4, 297 Mont. 473, 994 P.2d 25 .....	35
<i>Ryan v. Chicago B. &amp; Q.R. Co.</i> , 59 F.2d 137 (7th Cir. 1932).....	25, 26
<i>Skelton Ranch, Inc. v. Pondera Cty. Canal &amp; Reservoir Co.</i> , 2014 MT 167, 375 Mont. 327, 328 P.3d 644.....	18
<i>State v. Wendler</i> , 2008 MT 370, 346 Mont. 467, 197 P.3d 932.....	35
<i>Toohey v. Campbell</i> , 24 Mont. 13, 60 P. 396 (Mont. 1900) .....	24
<i>Weinheimer Ranch, Inc. v. Pospisil</i> , 2013 MT 87, 369 Mont. 419, 299 P.3d 327.....	18

**STATUTES**

43 U.S.C. § 485 .....	25, 26
Mont. Code Ann. § 85–7–1808.....	22
Rev. Codes Mont. § 89-808. ....	28
Rev. Codes Mont. § 89-811 .....	30

**OTHER AUTHORITIES**

Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944).....	2, 26
--	-------

## **I. ISSUES PRESENTED**

1. Whether the Water Court erred when it rejected the Definite Plan Report (“DPR”) as the basis for the East Bench Irrigation District’s (“EBID”) service area EBID members historically irrigated up to 28,005 acres within EBID’s service area.
2. Whether the Water Court erred when it concluded that place of use included all lands potentially irrigable as of the date of project completion.
3. Whether the Water Court erred when it conditioned the final service area for 41B 40854-00 on the complete adjudication of all underlying water rights in Basin 41B.
4. Whether the Water Court erred when it rejected Open A’s request for an informational remark on all private water rights of Clark Canyon Water Supply Co. (“CCWSC”) shareholders.

## **II. STATEMENT OF THE CASE**

Appellee Geoduck Land & Cattle, LLC (“Geoduck”) concurs with the Statement of the Case as presented by the Appellant Open A Ranch, Inc. (“Open A”) in its opening brief with two exceptions:

First, Open A states that the Water Court’s Final Order held the maximum irrigated acreage for EBID was 28,005 acres based on a 1979 aerial photo. Open A Brief at 11 (*citing* Final Order at 9). The Final Order identified that “DNRC claims

examination showed 24,824 acres of irrigation based on 1965 and 1972 aerial photos and 27,351 acres based on 1979 photos. Reclamation’s expert witness testified there were 28,005 acres irrigated within the district based on 1979 aerial photos.” No credible challenge was posed to BOR’s figure. The Court found 28,005 acres were irrigated within EBID in 1979. Final Order at 9.

Second, Open A stated at trial the irrigated acreage for East Bench Unit (“EBU”) is limited by the 1960 EBU DPR. Open A Brief at 11. In briefing prior to trial, at trial, and in post-trial briefing, Open A asserted, as it does here, that irrigated acreage for EBU should be limited by the 1960 DPR *with the modifications for EBID through the development period in 1975*. Open A Proposed Prehearing Order at 3; D1<sup>1</sup>, p. 8:18-22; Open A Findings of Fact and Conclusions of Law at 36 ¶ 54 and 55 ¶ XIX; Open A Brief at 33.

### **III. STATEMENT OF FACTS**

#### **1. History of The East Bench Unit.**

a. The Flood Control Acts of 1944 and 1946 authorized the EBU as part of the Missouri River Basin Project. *See* Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944); Open A Ex. 29 at 002351; D4 at 92:18-93:20<sup>2</sup>. Initially, the April 1944 Senate Document 191 first identified the plan for

---

<sup>1</sup> Citations to Exhibits are referenced by Bates Nos. where available. If no Bates Nos. are present, citations to exhibits are referenced by page number.

<sup>2</sup> Transcript citations are to the Evidentiary Hearing, January 13-16, 2020, and are cited by the day “D1, D2, D3, D4.”

developments proposed for the Jefferson River Basin. Therein, Senate Document 191 states that “the Dillon valley unit is one of the larger proposed developments in the Jefferson River Basin. Clark Canyon Reservoir, on Beaverhead River, below the town of Armstead, if built to a capacity of 150,000 acre-feet, will furnish a full supply of water for 25,000 acres on a bench east of Dillon, and a supplemental supply for 14,400 acres in the same general area.” Open A Ex. 112 at 003729. Senate Document 191 also shows that Bureau of Reclamation (“BOR”) originally contemplated a three-reservoir plan encompassing roughly 66,000 acres of new and supplemental irrigation. *Id.*

b. The purpose of the project was to spur economic development by providing better irrigation to the lands in the Beaverhead Valley that, while housing a large amount of historical irrigation of croplands was subject to frequent water supply shortages due to the water supply system driven by spring-flow runoff. *See* Open A Ex. 29 at 002351. In furtherance thereof, in 1950, BOR completed a field study, land classification, and water supply investigation in the Beaverhead Valley of Montana for land encompassing what became both EBID and CCWSC. D4, pp. 13:23-25, 14:1-10. These 1950 studies became part of BOR’s 1960 Revised DPR. *Id.*; D4, p. 14:11-24. The DPR was a planning document to determine the economic feasibility of the Clark Canyon Reservoir project funding by congress. *Id.* Lands were classified on the formerly unirrigated

east bench lands currently operating as the EBID and the privately irrigated farms and ranches pre-existing the reclamation project completion. D4, pp. 13:20-14:14. This suite of work between 1950-1960 concluded that the costs of construction of the project were outweighed by the benefits. D4, p. 15:8-11.

c. In 1960, 16 years after the initial scope of development was identified in Senate Document 191, the DPR, East Bench Project, and Montana Missouri River Basin Project (revised April 1960) was published. Therein, the DPR identified that the overall plan of the EBU originated from the 1944 Senate Document 191. Open A Ex. 28, p. 22 of 885. Specifically, the DPR states: “The over-all plan for the Project is contained in Senate Document 191 (78th Cong., 2d sess.), the plan of the BOR, and House Document 475 (78th Cong., 2d sess.), the plan of the Corps of Engineers, Department of the Army, coordinated in Senate Document 247 (78th Cong., 2d sess.)” *Id.*

d. Construction on the project began in 1961 and continued until 1964. D4, pp. 15:12-25, 16:1-3 (*citing* Open A Ex. 47 at 002781). The EBU, comprised of the Clark Canyon Reservoir, Barretts Diversion Dam, the East Bench Canal and other facilities were completed for provision of irrigation water to the CCWSC and EBID. Open A Ex. 31, p. 13 of 119; D4, p. 20:7-11. The Barretts Diversion Dam is a check structure in the Beaverhead River that raises the water levels so that water will go into the East Bench Canal. D4, p. 20:12-19.

## **2. Bureau of Reclamation and the Formation of EBID and CCWSC.**

a. BOR created two entities, EBID and CCWSC to contract with the BOR for the management and delivery of water to the ranchers and farmers in the Beaverhead Valley. Open A Ex. 28 at 168-69. EBID is an irrigation district created under Montana law. *See In re Formation of East Bench Irrigation Dist.*, 2009 MT 135, 350 Mont. 309, 207 P.3d 1097; U.S. Ex. 22 (Findings of Fact, Concl. Of Law, Order & Decree Establishing E. Bench Irrigation Dist. (Oct. 24, 1957)); D4, p. 23:22-25. The EBID is a public service corporation (“PSC”) within the meaning in *Curry v. Pondera County Canal & Reservoir Co.*, 2016 MT 77, ¶ 43–44, 383 Mont. 93, 370 P.3d 440, and is entitled to a service area defining the boundaries within which its water rights can be used. *See Order Partially Granting and Partially Denying United States’ and EBID’s Motions for Summary Judgment* (July 3, 2019). CCWSC is a Montana corporation, created in 1956 under Montana law. Open A Ex. 40. CCWSC does not own any lands or water rights, it is a company established to manage the BOR’s water right for the benefit of the shareholders in the company. D3, pp. 286:13-25, 287:1-15.

b. BOR entered contracts with both EBID and CCWSC in 1958 for the delivery of water. *See* U.S. Ex. 006; *see also*, Open A Ex. 35. These contracts represented a means of assuring repayment to the United States for the construction of the Clark Canyon Reservoir and diversions and operation and

maintenance costs for the EBU. *Id.* The BOR's 1958 water service contracts with CCWSC and EBID specified the terms and conditions for the partial repayment of costs incurred by the United States to construct the Clark Canyon Dam but did not specify the number of irrigated acres in either contract. Open A Ex. 31, p. 16 of 119; *see generally*, Open A Exs. 35, 50. The 1958 EBID contract refers to the "irrigable lands" of the district, which are approximately 38,000 acres as approved by the district court in 1957. Open A Ex. 31, p. 16 of 119. The EBID water service contract included a 10-year development period for transfer of the project from BOR to the district once the local entity "learned how the Project ran." D4, pp. 18:21-25, 19:1-8, 35:22-25, 36:1-2 (*citing* Open A Ex. 35).

### **3. Delivery of Water and Transfer to EBU.**

a. In 1965, the Clark Canyon Reservoir was completed to a capacity of 253,442 AF of which 124,160 AF is "active," 50,207 AF is "joint use," and 79,075 AF is flood control. Open A Ex. 31, p. 14 of 119. The active and joint use pools are combined and used for flood control purposes and conservation purposes. D3, p. 271:8-14. The capacity of the joint use pool is 178,000 AF. D3, p. 272:9-11. Active conservation means that the water from these pools can be used for mining and industrial, irrigation, and wildlife purposes. D3, p. 277:2-3. Originally, Senate Doc 191 identified that the reservoir would be built to a capacity of 150,000 AF. Then, the 1960 DPR identified the conservation storage capacity of the reservoir

would be 159,000 AF. Open A Ex. 28 at v. (p. 7 of 885). Actual construction ended with a larger capacity than originally identified in either 1944 or 1960.

b. BOR does not have the means to identify how much stored or direct flow water is delivered to a particular ditch, nor does BOR have any control over how or where the water is used by either CCWSC shareholders or EBID members. D4, pp. 63:6-25, 64:1-25, 65:5-9 (*citing* U.S. Ex. 008, ¶ 10B). Instead, BOR, sells water to the CCWSC for the benefit of its shareholders without BOR contracting directly with any individual private water users. D4, p. 63:2-5. BOR delivers water to EBID via the Barretts Diversion Dam. D4, pp. 54:24-25; 55:1-2. Once delivered to the diversion, BOR relinquishes control of the water including its carriage, handling, use, disposal, and distribution beyond the point of delivery at Barretts Diversion Dam. D4, p. 56:3-10 (*citing* U.S. Ex. 006, ¶ 5B). Similarly, BOR's point of delivery to CCWSC is the Clark Canyon Dam, and below the dam, the United States does not have control over where the water goes. D4, p. 64:17-23.

c. During the first 10-years of the EBU, costs for operation and maintenance of the project were reduced to allow the farmers to learn how to operate and run the project prior to transfer of the management from BOR to the EBU. D4, p. 19:1-21. This 10-year development period was important because prior to the construction of the Clark Canyon Dam, the East Bench was all dry

ground that had never been broken. D2, p. 84:4-7. However, the 10-year development period was not expected to result in the maximum amount of irrigation that could be realized from the project, it was a mechanism to allow the farmers to break ground and get land in production, acquire capital, and defer the operation and maintenance charge during this start-up period to accommodate that process. D2, pp. 84:8-23, 85:2-14, 88:12-25, 89:1-4; D4, pp. 18:10-25; 19:1-21.

d. The operational control hand-off from BOR to the EBU was not for full operational control of the Clark Canyon Reservoir, it was limited to managing or driving releases to meet the contracts during the irrigation season. D4, pp. 19:22-25, 20:1-7. Prior to, and in anticipation of, the operational transfer from BOR to EBU, D.M. Archibald, a Natural Resource Specialist for BOR completed a memorandum assessment of the Class 1, 2, and 3 lands irrigable under the district system. *See* Open A Ex. 52. Therein, Mr. Archibald identified 22,722 Class 1, 2, and 3 acres assessed by the irrigation district. *Id.* The Archibald memorandum does not discuss or identify any assessment of Class 4 or 6 lands specifically but does identify “[a]bout 1,800 acres of assessed irrigable land is not being irrigated at the present time. However, the owners of all except 284 acres of these lands are using the water allotment on other lands within their ownership.” *See* Open A Ex. 52.

e. The acreage numbers identified in the 1960 DPR and 1975 Archibald memorandum – 21,800 acres and 22,722 acres, respectively, were not irrigated acreage totals for any given year. D4, pp. 341:18-25, 342:1-10. Instead, the 21,800 was a prospective number from a planning document written five years prior to actual diversion and use of the project water, and the 22,722-acreage number identified in the Archibald memorandum and subsequent documents reflect the allotment acres used as the basis for the volume allotment, not the actual irrigation. *Id.*

f. A mapping project within the CCWSC began prior to the 2006 contract negotiations to map all the places of use by the shareholders within CCWSC. D4, p. 317:10-18. That mapping project was placed on hold pending the adjudication of the underlying water rights. Mapping of EBID was easier due to the pre-existing district boundary and units within that boundary. *Id.* The company intends to complete the original farm units map identifying irrigated places of use, but in a simplified way since the 2006 contract is based on irrigable acres rather than Class A, B, and C share acres. D4, pp. 317:22-25, 318:1-6.

g. Prior to implementation of the 2006 contract, EBID and CCWSC paid BOR based on the allotment acres used for the volume calculations. Since 2006, neither EBID nor CCWSC have paid BOR based on allotment acres; instead CCWSC and EBID have been paying BOR on the amount represented as their

maximum irrigated acres in Exhibit C of the 2006 contract. D4, pp. 318:7-25, 319:1 (*citing* U.S. Ex. 007 at 000094-95).

**4. EBID Service Area, Maximum Irrigated Acres and Volume Allotment.**

a. The boundaries of the EBID were originally established by the Order of the Beaverhead County District Court entered October 24, 1957. D4, p. 23:22-25; U.S. Ex. 22. Thereafter, the boundaries of the district were amended pursuant to court order four times. D4, p. 24:4-18; U.S. Exs. 23, 24, 25, 26; *see also* Geoduck Exs. 9-11. Within those petitions, the language consistently and specifically recognized EBID's volume allotment methodology for limiting the storage water volumes to historical levels but contain no language or clauses limiting the number of acres that could be irrigated with said water volume allotments. *Id.*; D3, pp. 202:11-15, 203:1-14, 205:6-25, 206:1-4 (*citing* Geoduck Exs. 10 at 000889 and 11 at 000895). BOR generated a map of the district court boundary including all approved and ordered extensions through 2013. D4, pp. 24:23-25, 25:1-18 (*citing* U.S. Ex. 029).

b. The 1944 Senate Document 191 stated that the project would furnish a full supply of water for 25,000 acres on a bench east of Dillon, and a supplemental supply for 14,400 acres in the same general area. Open A Ex. 112 at 003729. The 1958 Contract between EBID and BOR did not identify a maximum acreage to be irrigated within the project. Open A Ex. 31, p. 16 of 119; *see generally* Open A

Exs. 35, 50. Instead, the contract identified that 3.1 AF of water would be made available per “irrigable acre.” Open A Ex. 50 at 002803. The 1960 DPR identified the irrigable lands of EBID as 21,800 acres. Open A Ex. 31, p. 16 of 119. This number was revised to 22,722 after corrections were made based on occupancy of roads, canals, and lateral rights-of-way and then revised again to 22,689 following a subsequent recomputation of the acreage. *See* D1, p. 52:12-25; D2, p. 54:4-20; U.S. Exs. 004, 007.

c. Initially, water was only spread to a small number of acres within EBID since ground was still being broken and the project had just come online. D3, p. 42:3-19. Beginning in 1965 and continuing until today, EBID has been allotted a volume of water based off the original Class 1, 2, and 3 lands within the original district boundary (22,689 allotment acres) and multiplied by 3.1 AF per acre. D2, pp. 53:13-24, 54:1-20; U.S. Ex. 004 at 0018; Open A Ex. 31, p. 23 of 119. Prior to the 2006 contract, the allotment volume for EBID was calculated based on Class 1, 2, and 3 lands; however, irrigation within EBID was not limited to only Class 1, 2, or 3 lands. D1, p. 213:12-22. Once a shareholder reaches the allotment cap, they are shut off for the remainder of the irrigation season. D1, pp. 231:3-11, 260:1-11.

The 2006 repayment contract reinforced the long-standing computation of water supply from BOR to EBID wherein the contract recognized the historically

consistent allotment volume of 3.1 AF per acre for each of the 22,689 allotment acres “identified in Section 1 of Exhibit C of the District’s Contract with Reclamation as Class 1, 2, and 3 acres.” U.S. Ex. 007 at 0085; D2, p. 73:18-23.

The 2006 contract also identified 28,055 acres of lands within the district as eligible for receiving contract water with any increases or changes reviewed by the Joint Board and with concurrence from the Contracting Officer prior to receiving irrigation water. U.S. Ex. 007 at 0068, 0095; D2, p. 72:14-23. Finally, the 2006 repayment contract recognized and agreed that allotment water could be applied on up to 28,055 acres within the district boundaries each irrigation season. D2, p. 72:20-23 (*citing* U.S. Ex. 007 at 0095). This included the 22,722 Class 1, 2, and 3 acres that were identified in the Archibald memorandum and the Class 4 and 6 acres not originally calculated for repayment purposes. D2, pp. 72:14-25, 73:1-4 (*see also* U.S. Ex. 004 at 0018).

d. Water is delivered to individual users via the canal to their respective headgates. D3, p. 195:9-19; D4, pp. 87:15-25, 88: 1-12. The East Bench Canal has not been altered or extended since construction completion in 1965. D3, p. 195:9-19; D1, pp. 157:12-25, 158:1-6; D2, p. 33:7-20. BOR delivers water to EBID at the Barretts Diversion Dam and into the East Bench Canal. D4, pp. 54:24-25, 55:1-2.

e. The DNRC mapped the maximum acreage for EBID based on the 1965, 1972 and 1979 aerial photographs. D3, pp. 41:16-23, 43:6-11 (EBID Exs. 38, 39, 40). Therein DNRC identified 27,351 acres irrigated within the district boundary. D3, p. 41:24-25, 42:1-2. Mapping completed by DNRC using just the 1965 and 1972 aerial photographs, identified 26,987 acres irrigated within EBID. D3, pp. 42:20-25, 43:1-5. Craig Van Vost found 27,981 acres irrigated and using GIS, Rita Frasure found 28,005. D4, p. 107:7-13.

f. Geoduck, as with all members of EBID, receives 3.1 acre-feet of water per acre for a normal climatic year. D3, p. 195:20-23. The actual allotment volume fluctuates depending on climatic variables and inflow into the reservoir. D3, pp. 195:23-25, 196:1. EBID delivers water to Geoduck's headgate on the East Bench Canal for all of Geoduck's lands within EBID. D3, p. 195:5-15. EBID does not control the water once it is delivered to Geoduck, instead Geoduck determines how many, and which, acres to irrigate from the volume allotment delivered by the EBID within their farm units. D3, p. 196:2-8. EBID has never told Geoduck how many acres can be irrigated with District water; instead, EBID monitors the volume of water delivered to Geoduck's headgate and once Geoduck has reached their volume cap, the water delivery is shut off regardless of how many acres Geoduck is irrigating with that water. D3, p. 196:9-25. EBID's control and management of water is consistent among all EBID water users. D3, p. 197:1.

## 5. CCWSC Volume Limitations and Service Area.

a. The BOR contracts with CCWSC to provide supplemental water to property owners with underlying water rights. U.S. Ex. 8; Open A Ex. 35. This supplemental water is commingled with water diverted under the shareholders' existing senior water rights and beneficially used on the historic place of use of the shareholders' existing senior water rights. Open A, Ex. 5; EBID Ex. 10; D1, pp. 235:17-236:7; 242:15-244:4; D3, p. 103:8-15; U.S. Ex. 8 ¶ 10; D4, p. 35:14-19.

b. The 1958 contract between BOR and CCWSC did not specifically limit the placement of the supplemental water or define the lands upon which the supplemental water could be applied. *See generally*, D4, pp. 10-18 (Frasure testimony). The only restriction upon the distribution of the supplemental water was "all water furnished the Company hereunder shall be distributed solely to its shareholders for agricultural uses in the Beaverhead Valley of Montana." Open A Ex. 35 at 002466; D4, p. 74:2-5. Instead, the allotment of supplemental water is limited based on a volume calculation from a 1956 CCWSC list identifying the total number of Class A, B, or C stock shares shareholders signed up for as part of the project as of 1956. EBID Ex. 3. That share acre number was 25,995. *Id.* This tally of share acres became the basis for the volume allotment for the CCWSC to be distributed to the shareholders. D2, p. 57:1-6. These "allotment acres" did not represent actual historic or current irrigation for each shareholder – given the

ongoing adjudication of the historical water rights of each shareholder – they instead established an initial maximum “eligible acres” for each CCWSC shareholder in Exhibit C of the 2006 Contract. EBID Ex. 10; D4, pp. 69:1-72:12; D2, pp. 56:24-58:5, 77:1-8, 81:21-83:20; D4, p. 228:11-21.

c. As the statewide adjudication of all existing water rights from the Beaverhead River is still not yet fully complete, Exhibit C of the 2006 Contract has not yet been updated and amended to reflect the “eligible acres” reflecting the places of use of the CCWSC shareholders private underlying water rights, where Claim 40B 40854-00 contract water may be applied. D2, pp. 56:24-58:5, 77:1-8, 81:21-83:20; D4, p. 228:11-21; D4, pp. 115:24-117:5. The 2006 contract between CCWSC and BOR identified eligible acres to receive contract water at 33,706 acres. Open A Ex. 81 at 003179; D2, p. 57:7-11. Mr. Cottom identified, and Mr. Mallon confirmed, that 33,706 acres represented what people felt that had put into service pre-1973 and that they could legitimately defend in adjudication. D2, pp. 57:12-15, 103:24-25, 104:1-14.

d. CCWSC shareholders have at all times relied (and continue to rely) on natural flows within the Beaverhead River in conjunction with regulated and supplemental supplies of storage releases from Clark Canyon Reservoir. All such water was, and is, commingled. D1, pp. 242:15-243:8, 243:20-244-4; D3, pp. 103:8-15; 89:3-6.

e. Geoduck has multiple historical water rights for bottom ground of the Beaverhead River that is also irrigated with CCWSC water and a small area of non-signer water. D3, p. 206:9-15. Geoduck irrigates 1848.2 acres with CCWSC water. D3, pp. 206:21-25, 207:1 (citing Geoduck Ex. 7 at 000740-741). Prior to the establishment of the Clark Canyon Reservoir, Geoduck historically irrigated 1426.2 acres from the Beaverhead River under a series of water right claims. D3, p. 210:8-14, Geoduck Ex. 7, Bates No. 741. After establishment of the Clark Canyon Reservoir and availability of share water from CCWSC, Geoduck increased its irrigation by approximately 422 acres to a total of 1848.2 acres and marshalled its water rights and share water to irrigate all those acres. D3, pp. 216:21-25, 217:1-3, 20:1-11, Geoduck Ex. 7 at 000741. Stated differently, Geoduck's direct flow rights from the Beaverhead River and supplemental water from CCWSC was and is intermingled and used on the entire 1848 acres. D3, pp. 210:20-25, 211:1-2, 250:12-18. This has been Geoduck's water use practice for over 54 years. D3, p. 250:19-21.

f. While Geoduck has marshalled and co-mingled its direct flow rights from the Beaverhead River and supplemental water from CCWSC, the increase of 422 acres after construction of the Clark Canyon Reservoir did not increase the number of shares that Geoduck was entitled to, nor the allotment volume Geoduck was entitled to. D3, p. 249:16-24. However, until Geoduck received an implied

claim through the Water Court adjudication, those 422 acres irrigated via co-mingled or marshalled water as between Geoduck's historical Beaverhead River water rights and share water from CCWSC was irrigated without any water right identifying the 422-acre place of use. D3, pp. 216:21-25, 217:1-7.

g. Final adjudication of Geoduck's direct flow and supplemental irrigation from the Beaverhead River and CCWSC share water demonstrates that Geoduck marshalled its direct flow rights prior to, and after, establishment of the Clark Canyon Reservoir; Geoduck increased its acres irrigated from 1426.2 to 1848.2 without any valid existing water right on the expanded 422 acres after 1964, and has continued irrigating within an 1848-acre place of use until today under decreed and implied water rights. *See* Geoduck Ex. 7 at 000742, 000773, 000794, 000820, 000822-23, 000851-52 and 000856.

h. Geoduck's movement of water is consistent with other shareholders of CCWSC using share water irrespective of land classification or underlying historical water right place of use within farm unit boundaries. *See* D1, pp. 235:8-19, 236:1-7, 255:15-25, 256:1-5; D4, pp. 293:10-25, 294:3-25, 295:3-18, 296:13-25, 298:7-24, 299:2-25, 300:3-18, 314:20-25, 315:1-23, 316:11-19.

#### **IV. STANDARD OF REVIEW**

The Montana Supreme Court applies the same standards of review to the Water Court as it does to an appeal from a district court. *Heavirland v. State*, 2013

MT 313, ¶ 15, 372 Mont. 300, 311 P.3d 813 (*quoting Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 16, 361 Mont. 77, 255 P.3d 179). This Court reviews for correctness the Water Court’s conclusions of law. *Weinheimer Ranch, Inc. v. Pospisil*, 2013 MT 87, ¶ 19, 369 Mont. 419, 299 P.3d 327 (*citing Geil v. Missoula Irrigation Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398).

The Supreme Court reviews the Water Court’s findings of fact under the clearly erroneous standard. *Skelton Ranch, Inc. v. Pondera Cty. 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). “‘Substantial evidence’ is evidence that a reasonable person would accept as adequate to support a conclusion, even if the evidence is weak or conflicting.” *Danreuther*, ¶ 18. “It need not amount to a preponderance of the evidence, but it must be more than a scintilla.” *Skelton Ranch*, ¶ 27. “When a reader reasonably can deduce two or more inferences from the facts, the reviewing court lacks power to substitute its deductions for those of the finder of fact.” *Weinheimer Ranch*, ¶ 19.

## V. SUMMARY OF ARGUMENT

The Water Court correctly concluded EBID is entitled to a broad service area that encompasses all lands capable of irrigation under the distribution system when it was completed. In Montana, an irrigation district's right to a service area is well established. Unlike a place of use, the service area is not limited to the lands actually irrigated on the date water is appropriated. Instead, the service area includes all lands potentially irrigable from the irrigation district's distribution system on the date the system is completed.

Open A argues, contrary to Montana law, that EBID's service area should be limited to the "intended" place of use when the project was designed. To determine intent, Open A looks to the BOR's DPR. Open A's argument has two primary flaws. First, the DPR was a scoping document prepared to assess the feasibility of the project, not define its limits. Second, intent does not define the service area. Unlike private parties who appropriate water for individual use, an irrigation district does not intend to use water on specific lands. The irrigation district's intent is limited to selling the water. The irrigation district neither controls nor cares where the water is used. The scope of the irrigation district's service area is, therefore, the land physically capable of being *served* by the distribution system, not a snapshot in time of actual acres in irrigation and not an arbitrary proposal for intended acres in irrigation.

Service areas are designed to accommodate change. Irrigation districts do not control end use, so their water rights are perfected when the distribution system is completed, and the water becomes *available* for sale and distribution. Perfection does not rely on actual irrigation by the end user because the end user is outside the irrigation district's control. An expansion in the number of acres irrigated after an irrigation district's distribution system is completed is not only allowed, but also expected. The expansion in acreage does not, however, mean an expansion in water use. The EBID creates a new water source by storing reservoir water. Regardless of how many acres the consumers place under irrigation, the volume of water EBID can distribute does not increase. Consequently, the burden EBID places on the source does not increase when more acres are placed in production. Open A's argument that EBID has unlawfully expanded its water right by placing more acres under irrigation is incorrect.

Water Right 41B 40854 00 is a supplemental water right used on the same places of use claimed for underlying direct flow irrigation rights. Because the water right is inextricably linked to the underlying direct flow rights it supplements, it must share their places of use. The places of use for many of the underlying water rights have already been fully adjudicated, others remain to be determined. The Water Court properly conditioned the final service area for 41B 40854 00 on the complete adjudication of all underlying irrigation rights. To do

otherwise would have violated *res judicata* on the claims already determined and disrupted adjudication of the water right claims that remain.

The Water Court properly rejected Open A's request for an information remark. Information remarks are appropriate only when they are necessary to administer water rights. The water rights at issue in this case are administered by internal agreement between a water supply company and its members. Those agreements are not examined or enforced by the DNRC or the Water Court. Consequently, an information remark is neither necessary nor appropriate for water right administration.

## VI. ARGUMENT

### A. The Water Court properly rejected the DPR as the basis for EBID's Service Area.

The Water Court correctly concluded the service area for the EBU includes all lands irrigable under the distribution system when it was completed. Water rights held by irrigation districts are not developed for use on land owned by the irrigation district and are not appurtenant to a historical place of use. *See Curry v. Pondera County Canal & Reservoir Co.*, 2016 MT 77, ¶ 43–44, 383 Mont. 93, 370 P.3d 440. Instead, irrigation districts own water rights and sell the use of the water to landowners within the area that can be irrigated from the irrigation district's system. *Id.* The land that can be irrigated from the irrigation district's system is the irrigation district's service area. *Dodson Irrigation Dist. v. U.S. Bureau of*

*Reclamation*, 2018 WL 7574161 \*3–4 (Mont. Water Ct. Nov. 16, 2018) (citing Mont. Code Ann. § 85–7–1808).

The service area for an irrigation district consists of the lands that were susceptible of irrigation on the date the project was completed. *Id.* at 6 (quoting *Curry*, ¶ 46). The project is considered complete when the irrigation company has completed construction of the diversion system and has either carried the water to its place of intended use “or is ready and willing to do so” and offers it for that purpose. *Bailey v. Tintinger*, 45 Mont. 154, 177, 122 P. 575, 583 (Mont. 1912). Lands “susceptible of irrigation” are lands “that physically can receive irrigation water from the [district’s] works” as of the date of completion. *Dodson Irrigation Dist.* 2018 WL at \*3 (quoting *In re Formation of East Bench Irrigation Dist.*, 2009 MT 135, ¶ 32, 350 Mont. 309, 207 P.3d 1097). Courts consider whether lands are “potentially irrigable” not whether they are actually irrigated. *Dodson Irrigation Dist.*, 2018 WL at \*4 (quoting Order Amending and Partially Adopting Master’s Report, Water Court Case WC-2006-01, at 14–15 (Apr. 25, 2014)). Consequently, the “reach and capacity of [the irrigation district’s] system at the conclusion of construction” determines the scope of the service area. *Eldorado Co-op Canal Co. v. Lower Teton Joint Objectors*, 2014 WL 7877137 \*20 (Mont. Water Ct. Nov. 21, 2014).

The parties in this case agree BOR is entitled to a service area for water right claims 41B 40850-00 and 41B 40854-00. *See* Final Order at 18 and 28. The parties disagree as to the scope of the service area. Open A argues the service area for the two water rights is defined by the BOR’s intent before the project began and as stated in its prospective DPR. The Water Court disagreed and, consistent with caselaw, found the service area to be the land potentially irrigable under the completed project. The Water Court’s holding is correct and should be affirmed.

**1. The service area of the EBU is defined by the acres irrigable upon project completion not the BOR’s intent.**

An irrigation district does not receive a specific place of use because, as stated above, the irrigation district does not control where the water is used. Instead, irrigation districts are assigned a service area, which means the *area* that can be *served* by the irrigation system. The number of acres actually irrigated within the broad description are irrelevant for purposes of establishing a service area. *See e.g., Curry*, ¶ 35 (holding that a service area is not limited by actual acres irrigated by shareholders in a public service corporation). Open A seeks to overturn caselaw and redefine “service area” by moving away from the area *capable* of being served and focusing instead on an arbitrary area *intended* for irrigation. The area is arbitrary because the public service company does not know and therefore cannot have a specific intent as to where water will ultimately be used by purchasers.

Intent does not establish a service area. Intent is a factor in determining whether an appropriation was made for beneficial use. *See Curry*, ¶ 25. The BOR's intent is evident in its claimed volume, which is capped and does not rely on acreage. U.S. Ex. 007 at 0085; D2, p. 73:18-23; EBID Ex. 3; D2, p. 57:1-6. Open A's reliance on "intent" is misplaced. When a private right is involved, the amount of water the appropriator *could* put to beneficial use (his intent) is an "important factor" in defining the scope of the water right and preventing a water user from acting as the "dog in the manger." *See Toohey v. Campbell*, 24 Mont. 13, 60 P. 396, 397 (Mont. 1900). Unlike private users whose intent can be tied to the amount of irrigable acres they own when water is appropriated, *see Toohey*, 60 P. at 397, irrigation districts do not own the lands on which the water is used, *Curry*, ¶ 44. A court cannot, therefore, use intent to define beneficial use with an irrigation district in the same way it is used for a private party. The intent defining beneficial use for an irrigation district is the intent to *sell* water for irrigation, not to use it on a defined area. *Curry*, ¶¶ 43-44. The irrigation district, unlike a private appropriator, does not control who purchases the water or where it is used, *Bailey*, 45 Mont. at 175-76, 122 P. at 582, so there can be no "intended" place of use as the concept was envisioned in *Toohey*. The service area is determined by the number of acres that *can* be irrigated under the completed project, not the number of acres that *are* irrigated or that were *intended* for irrigation.

The Water Court in this case correctly determined the service area for 41B 40850-00 and 41B 40854-00 encompasses the acreage “potentially irrigable” under the completed project. *See* Final Order at 20. Open A’s arguments regarding intent are misplaced and irrelevant. Montana law has established that the area actually serviceable by a completed project defines the service area, not an entities’ speculation as to what the project will include before construction has begun. *See Curry*, ¶ 48. The Court should affirm the Water Court’s service area determination.

**2. The service area for the EBU is determined by the capability of the completed project not the projections in the DPR.**

The Water Court correctly found the DPR does not limit the service area of 41B 40850-00 or 41B 40854-00. Open A, citing 43 U.S.C. § 485h(a), argues a reclamation project cannot expand beyond the scope of the DPR. The statute, however, does not support Open A’s argument. Nowhere does 43 U.S.C. § 485h(a) state a reclamation project must be built and used exactly as envisioned in its initial plan or DPR. Section 485h simply requires the Secretary of the Interior to submit a plan to the President and Congress for approval before beginning project construction, not that the project be limited to the scope of that initial plan.

Congress does not ordinarily insert itself into the details of a project. Rather, the agency carrying out the project has discretion to work out the details as it sees fit. *Ryan v. Chicago B. & Q.R. Co.*, 59 F.2d 137 (7th Cir. 1932). “[I]f Congress so

desires[,] it may limit the project as to details, and, if it does so, the [agency submitting the plan] has no authority to ignore or change those details,” otherwise the agency retains its discretion. *Ryan v. Chicago B. & Q.R. Co.*, 59 F.2d 137 (7th Cir. 1932). Congress did not prescribe specific details for the EBU project. *See generally*, Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944). Congress reviewed and approved the general DPR, leaving the details to the BOR to sort out as the project was completed. Those details included the number of acres to be placed in irrigation.

The DPR was submitted to determine project feasibility. D4, pp. 14:15-15:11; *see also* U.S. Mot. for Summ. J. Ex. 13 (Feb 22, 2019) (letter from Solicitor Harper, dated Sept. 29, 1944, explaining the nature of Definite Plan Reports). Feasibility, for an irrigation project, turns on how much good the project will do or how much revenue it can raise. *See* Order Den. Open A Ranch Mot. for Partial Summ. J. at 5 (July 3, 2019). Stated differently, the project’s feasibility turns on how many acres can be brought into production with the water available. *See* 43 U.S.C, § 785h(a). If amount of land that can be irrigated using the water available is too small, the benefits do not outweigh the cost of the project. *Id.* As a result, any concern Congress would have had in authorizing the project would have been having too few acres served by the project, not too many. Open A’s argument that the DPR limited acreage runs counter to the purpose for the DPR.

Finally, Open A's own proposed acreages contradict its assertion that the DPR provides the final word on acreage. The DPR estimated the irrigation project would provide for 21,800 acres of new irrigation on the EBU and 28,004 acres of supplemental irrigation on lands already under irrigation. Open A Ex. 28, DPR Summary Sheets (i). Open A nonetheless admits the 22,722 acres actually irrigated in the first ten years of development are a valid portion of the service area. Open A Opening Brief at 33. If Open A were correct in arguing the BOR could not do more with its project than what was authorized in the DPR, the 922 acres of actual irrigation that Open A acknowledges are part of the service area would be an unlawful expansion of the acres authorized under the DPR. Open A's argument that the DPR provides the bounds of project authority is, therefore, both internally inconsistent and at odds with Montana law. The Court should reject Open A's argument and affirm the Water Court's finding of a service area.

**B. The Water Court properly determined that place of use included all lands potentially irrigable as of the date of project completion.**

An irrigation district's service area includes all lands "susceptible of irrigation" when the project is completed. *See Dodson Irr. Dist.* at \*6 (quoting *Curry*, ¶ 46). The number of acres actually irrigated upon project completion is irrelevant. At the time of the BOR's appropriation, Montana law provided the United States three years after the Notice of Appropriation was filed to begin construction on a reclamation project to preserve the claimed priority date. Rev.

Codes Mont. § 89-808 (1947). Once construction was begun, the BOR, like all other appropriators, was required to “prosecute the excavation or construction of the work by which the water appropriated is to be diverted [with] reasonable diligence to completion.” Rev. Codes Mont. § 89-811. Completion of the project construction marks completion of the reasonable diligence requirement. *See Mont. Dep’t of Natural Resources & Conserv. v. Intake Water Co.*, 171 Mont. 416, 430, 558 P.2d 1110, 1118 (Mont. 1976) (explaining that the appropriation becomes complete when the project construction is completed and water is actually diverted).

Project completion marks the end of the diligence period and perfects the water right. *See Intake*, 171 Mont. at 430, 558 P.2d at 1118. Perfection does not, however, dictate acreage. Where a water supply company is involved, the company can do nothing more than to perfect its right than “completes it[] distributing system, and [be] ready and offer[] to supply water to settlers upon demand.” *Bailey*, 122 P. at 582. At that point, as this Court explained in *Bailey*, the company “has performed every act which it can perform.” *Id.* The company “cannot use the water itself, for it has no land or other means of use. Any further acts must be performed by its customers who are to be users.” *Id.* Since the company has no acreage and cannot use the water itself, the place of use cannot be established based on the acreage under irrigation upon project completion. Open A’s argument

that the BOR is limited to the acres under irrigation when the project was completed is, therefore, inconsistent with Montana law and should be rejected.

**1. Whether an irrigation district completed construction with reasonable diligence determines priority, not acreage within the service area.**

As explained in *Bailey*, a water supply company's control over the water it has appropriated ends on the date the project is completed, and the water is offered for sale. *Bailey*, 122 P. at 582. Third parties must apply the water to the land and the company can neither force them to take the water or tell them where to use it. The place of use cannot, therefore, be determined by the number of acres under irrigation on the date the project is completed, it must instead be determined by the number of acres that *can potentially* be irrigated by the completed project. *See In re East Bench Irrigation Dist.*, 2009 Mont. 135, ¶ 32, 350 Mont. 309, 207 P.3d 1097 (finding that the term "susceptible of irrigation" means physically capable of receiving water from the public supply company's works). As this Court explained in *In Re East Bench*, nothing illustrates better what acres are susceptible to irrigation under the completed system than evidence of which acres have actually been put into irrigation from the system over the years. *In re East Bench Irrigation Dist.*, ¶ 32 ("Open A in fact implicitly concedes that the land physically is susceptible of irrigation when it argues that Petitioners have illegally irrigated the land with EBID water in the past").

Open A argues the BOR was required to place in irrigation all of the lands to which project water would ultimately apply with reasonable diligence before the project was completed. Open A Brief at 39. This is not the law. The law requires the BOR to act with reasonable diligence in completing construction of its project and offering its water for use. Rev. Codes Mont. § 89-811; *Intake*, 171 Mont. at 430. This is the most it can do to perfect its right. The application of the water to land within the service area can, and frequently does, come later. The reasonable diligence requirement does not apply to the use of water within the service area.

**2. The service area granted by the Water Court does not constitute an increase or change in use.**

A service area consists of acreage susceptible to irrigation on the date the project is completed. *Dodson Irr. Dist.* at \* 6 (*quoting Curry* ¶ 46). An increase or change in which acres are irrigated within the service area does not, therefore, constitute a change in use in violation of the Water User Act. Open A asks the Court to restrict the BOR's water rights to a snapshot showing actual acreage as of a specific date. Open A Brief at 39, 45. Despite acknowledging the BOR is entitled to a service area, Open A effectively argues for a narrowly defined place of use in lieu of a service area. Open A Brief at 30-31. Montana law is well established that public service corporations are entitled to service areas. EBID is a public service corporation, so a service area is appropriate. *See Order Partially Granting and Partially Denying United States' and EBID's Motions for Summary*

Judgment (July 3, 2019). End users within an irrigation district's service area can move and expand acreage under irrigation so long as the volume of water taken does not increase. *See Lockwood Area Yellowstone County Water and Sewer District*, 2015 WL 5478235, A7; *see also, Dodson Irr. Dist.*, at \* 4 (quoting Order Amending and Partially Adopting Master's Report, Water Court Case WC-2004-01, at 14-15 (April 25, 2014)). Open A has not argued that the volume of water taken has increased impermissibly. The Court should reject Open A's effort to deprive EBID of a service area.

**C. The Water Court properly conditioned the final service area for 41G 40854-00 on the complete adjudication of all water rights in Basin 41B.**

Water Right 41B 40854-00 is supplemental to and shares a place of use with existing irrigation rights, so the place of use is necessarily dependent on full adjudication of the underlying existing rights. The BOR stores water in Clark Canyon Reservoir for use on lands in the Beaverhead Valley. U.S. Exs. 011, 039. Part of the water is managed by the EBID for use within the 28,005-acre service area to irrigate lands that had previously benefited from little to no irrigation. Open A Ex. 29 at 002351; U.S. Ex. 006. A second portion of the water is used for fish and wildlife, recreational, and institutional purposes around the Clark Canyon Reservoir. U.S. Ex. 011; D4, p. 30:2-11. The final portion is sold to CCWSC for

use as supplemental water on lands historically irrigated from the Beaverhead River. U.S. Ex. 008; Open A Ex. 35.

CCWSC is a water delivery company with a unique purpose. Unlike many water delivery companies, CCWSC delivers and regulates both direct flow and stored water distribution on the Beaverhead River. U.S. Exs. 008, 010; Open A Ex. 42; D4, p. 35:14-19. Prior to Clark Canyon Reservoir and the formation of CCWSC, water users with Beaverhead River irrigation rights struggled annually to maintain enough water in the source to irrigate throughout the season. Open A Ex. 29 at 002351. The river generally provided excess water in the spring and ran low mid-summer. *Id.* CCWSC was formed to manage water use and help irrigators have more consistent water use throughout the irrigation season. *Id.* With few exceptions (one of which is Open A), all water users with direct flow irrigation rights from the Beaverhead River joined CCWSC. Open A Exs. 5, 31; D2, pp. 168-171. In return for a share in the stored water, water users relinquished their right to take their direct flow rights separately. Open A Ex. 35. Instead, members of CCWSC have their direct flow irrigation rights and stored water delivered simultaneously by the company. D4, p. 35:14-19.

Although CCWSC delivers the direct flow and supplemental storage water simultaneously, the individual water right holders retain ownership and control over the elements of their direct flow irrigation rights. D4, pp. 63:24-64:23.

Consequently, each member of CCWSC holds at least one direct flow irrigation right that must be fully adjudicated by the Water Court. EBID Exs. 6, pp. 3-4; 10. The supplemental storage water delivered by CCWSC is directly related to the elements of the direct flow irrigation rights. *Id.*; D4, p. 61:5-12. In particular, a water user may not use the supplemental storage water anywhere other than the place of use authorized for their direct flow irrigation rights. *Id.* Consequently, the place of use for the portion of 41B 40854-00 that is used by CCWSC is directly linked to the places of use for each water user's individual, direct-flow irrigation right. The Water Court cannot determine the place of use for 41B 40854-00, therefore, until it has fully adjudicated and established places of use for all of the underlying direct flow water rights.

The direct flow irrigation rights are currently undergoing adjudication in Basin 41B. Final Order at 30. All of the rights were submitted for public notice. Open A had an opportunity to review and object to any element of the Beaverhead River rights, including their places of use. Many of those direct flow irrigation rights, including the rights owned by Geoduck, have now been fully adjudicated and are ready for final decree. Geoduck, in particular, has incurred substantial expense defending its rights, establishing its places of use, and resolving all objections and issue remarks. Open A had its opportunity to, and did in several cases, appear, and challenge the elements of Geoduck's claims. *See e.g.*, 41B-41

Order Adopting Master's Report (March 29, 2017); 41B-42 Order Adopting Master's Report (June 22, 2016); 41B-69 Order Adopting Master's Report (September 15, 2015). Those cases have been resolved and were not appealed.

Open A's argument in this case is untimely and barred by *res judicata*. By arguing the place of use for 41B 40854-00 should be fully established in this case, Open A is arguing to reexamine the places of use of every direct flow irrigation right that forms the basis for the CCWSC shareholders' shares. Open A's argument is an effort to get around the objection period for the direct flow claims and reopen cases that have been fully adjudicated. As Open A admits, it seeks to have the Court reexamine place of use through this case to avoid Open A having to incur the time and expense every other water user incurred of going through the proper channels to object and adjudicate individual water rights. Open A Brief at 44. The Water Court should not grant Open A its end run around the rules.

Open A complains it has not had notice of the place of use where 41B 40854-00 will be used. Open A Brief at 44. It has. The place of use for Water Right 41B 40854-00 is the place of use for its underlying direct flow claims. *Id.*, D4, p. 61:5-12. Open A, like every other member of the public, received ample notice of the places of use claimed under those existing irrigation rights and had the opportunity to object to any places of use it believed were incorrect. Open A either chose not to object or failed in its objections on those underlying existing

rights. It cannot use this supplemental right as an opportunity to reopen those cases and get a second bite at the apple. If this Court were to grant Open A's request to examine the place of use for the portion of 41B 40854-00 that serves as supplemental water, the Court would cause the water court case for every underlying water right to be reopened and re-adjudicated. Doing so would be a violation of *res judicata* and would be unfair to the water users who followed the appropriate steps in the adjudication.

**D. The Water Court properly rejected Open A's request for an information remark.**

The Water Court acted properly and within its discretion by removing the curtailment information remarks and disregarding Open A's request for a replacement information remark. A court may not adopt a party's proposed finding of fact or conclusion of law unless the finding or conclusion is "supported by the evidence and law of the case." *State v. Wendler*, 2008 MT 370, ¶ 23, 346 Mont. 467, 197 P.3d 932 (citing *Norwood v. Serv. Distrib., Inc.*, 2000 MT 4, ¶ 39, 297 Mont. 473, 994 P.2d 25). Open A's proposed conclusion of law would have required the Water Court to add an information remark to the water rights of every member of the CCWSC, most of whom were not party to case 41B-0265-P-2015 and who had no opportunity to respond. Open A Brief at 47. The Water Court determined the proposed remark was both inaccurate and inappropriate and therefore disregarded the proposed conclusion.

The Water Court’s use of information remarks is limited. The Court has explained that, although information remarks are useful to adjudicate water rights, the Court “generally removes [them] during the adjudication process because they are not necessary to administer water rights.” *Bergtoll v. United States*, 2021 WL 2946188 \*11 n.7 (Mont. Water Ct. July 9, 2021). The standard the Water Court applies when considering whether to retain or attach information remarks is, therefore, whether a remark is “necessary to administer the water right[.]” *In re Forbes*, 2019 WL 8223666 \*1 (Mont. Water Ct. Aug. 23, 2019).

Neither the information remark removed by the Water Court, nor the information proposed by Open A, are “necessary to administer the water rights” to which they would attach. *See id.* The subordination or curtailment of CCWSC members’ private water rights is determined by internal agreement with the CCWSC and its members. Those agreements are not examined or enforced by the DNRC or the Water Court and references to them are not necessary for an accurate administration of water rights. The Water Court was, therefore, correct to remove the existing information remark and reject Open A’s request for a replacement.

## **VII. CONCLUSION**

Open A attempts to challenge the BOR’s service area from multiple sides, each time ignoring the basic principle that a service area includes all land susceptible of irrigation on the date the project is completed. Open A’s arguments

are without merit and contrary to Montana law. The Water Court properly determined the service area for the water rights at issue in this case using established Montana law. The Water Court's decision should be affirmed.

Respectfully submitted this 23rd day of August, 2021.

BLOOMQUIST LAW FIRM

By: /s/ Rick C. Tappan  
Rick C. Tappan  
*Attorney for Geoduck Land & Cattle, LLC*

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,033, excluding Table of Contents, Table of Authorities, Certificate of Compliance, and Appendices.

*/s/ Rick C. Tappan*

Rick C. Tappan

*Attorney for Geoduck Land & Cattle, LLC*

## CERTIFICATE OF SERVICE

I, Richard Charles Tappan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-23-2021:

Bina Ruth Peters (Attorney)

PO Box 477

Bozeman MT 59771

Representing: Baldy View Enterprises, LLC, Bar J Ranch, Justin Devers, William R. Grose, William C. and Roxanne E. Mancoronal

Service Method: eService

Dana Elias Pepper (Attorney)

PO Box 477

Bozeman MT 59771

Representing: Baldy View Enterprises, LLC, Bar J Ranch, Justin Devers, William R. Grose, William C. and Roxanne E. Mancoronal

Service Method: eService

William Cardiff Fanning (Attorney)

300 N. Willson Ave.

Suite 3007

Bozeman MT 59715

Representing: Clark Canyon Water Supply Co., East Bench Irrigation District

Service Method: eService

John E. Bloomquist (Attorney)

3355 Colton Drive

Suite A

Helena MT 59602

Representing: Geoduck Land & Cattle, LLC

Service Method: eService

William John Tietz (Attorney)

P.O. Box 1697

800 N. Last Chance Gulch Ste. 101

Helena MT 59624

Representing: Madison Valley Garden Ranch, LLC

Service Method: eService

Michael Cusick (Attorney)

P.O. Box 1288  
Bozeman MT 59771  
Representing: Open A Ranch, Inc.  
Service Method: eService

Andrew Paul Suenram (Attorney)  
PO Box 1366  
117 S. Idaho St Fl2  
Dillon MT 59725  
Representing: David and Shelli Schuett  
Service Method: eService

Roberta Jean Bergeson (Attorney)  
Suenram & Bergeson  
117 South Idaho, 2nd Floor  
P O Box 1366  
Dillon MT 59725  
Representing: David and Shelli Schuett  
Service Method: eService

Walter E. Congdon (Govt Attorney)  
106 4th Avenue East  
Polson MT 59860  
Representing: Smith's Elk Meadows Ranch, LLC  
Service Method: eService

Ryan P. McLane (Attorney)  
21 N. Last Chance Gulch, Ste. 210  
P.O. Box 1155  
Helena MT 59624-1155  
Representing: Point of Rocks Angus Ranch, Inc.  
Service Method: Conventional

James J. DuBois (Attorney)  
U.S. Department of Justice  
Natural Resources Section  
999 18th Street, South Terrace, Suite 370  
Denver CO 80202  
Representing: United States of America, Bureau of Reclamation  
Service Method: Conventional

Max A. Hansen (Attorney)  
8 S. Idaho, Ste. A  
P.O. Box 1301  
Dillon MT 59725-1301  
Representing: Baldy View Enterprises, LLC, Bar J Ranch, Justin Devers, William R. Grose, William  
C. and Roxanne E. Mancoronal  
Service Method: Conventional

John L. Smeltzer (Attorney)  
Environment & Natural Resource Div.  
U.S. Department of Justice  
P.O. Box 7415  
Washington DC 20044  
Representing: United States of America, Bureau of Reclamation  
Service Method: Conventional

James C. Kilbourne (Attorney)  
Acting Deputy Assistant Attorney General  
P.O. Box 7415  
U.S. Department of Justice  
Washington DC 20044  
Representing: United States of America, Bureau of Reclamation  
Service Method: Conventional

Holly Franz (Attorney)  
21 N. Last Chance Gulch, Ste. 210  
P.O. Box 1155  
Helena MT 59624-1155  
Representing: Point of Rocks Angus Ranch, Inc.  
Service Method: Conventional

Electronically signed by Marlana Reichert on behalf of Richard Charles Tappan  
Dated: 08-23-2021