

DA 21-0079

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 319

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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 CO.,

Intervenors and Appellees.

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APPEAL FROM: Montana Water Court, Case No. 41B-0265-P-2015,  
Honorable Russ McElyea, Chief Water Judge

COUNSEL OF RECORD:

For Appellant:

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For Appellee United States of America (Bureau of Reclamation):

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Submitted on Briefs: September 29, 2021

Decided: December 21, 2021

Filed:

  
Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Open A Ranch, Inc. (Open A) appeals from the Montana Water Court's December 24, 2020 Final Order and July 3, 2019 Summary Judgment Order adjudicating 11 U.S. Bureau of Reclamation (BOR) water rights claims in Basin 41B. The Water Court consolidated objections, counterobjections, and notices of intent to appear filed in response to the BOR's claims to direct flow from the Beaverhead River and reservoir storage in the Clark Canyon Reservoir. All claims are associated with the East Bench Unit Reclamation Project (Project). The East Bench Irrigation District (EBID) and the Clark Canyon Water Supply Company (CCWSC) have contracts with the BOR to deliver water from the Project.

¶2 Open A appeals the Water Court's decisions regarding the EBID's maximum irrigated acreage, the CCWSC's place of use and maximum irrigated acreage, and removal of a curtailment remark from CCWSC shareholders' underlying private water rights. We affirm.

¶3 We restate the issues on appeal as follows:

*Issue One: Does Open A have standing in the adjudication of the BOR's and the EBID's water rights claims?*

*Issue Two: Did the Water Court err by holding the EBID's and the CCWSC's maximum irrigated acreage were not restricted by the East Bench Unit Project's Definite Plan Report?*

*Issue Three: Did the Water Court err by not providing specific boundaries or maximum irrigated acreage for the CCWSC place of use on the BOR's Clark Canyon Reservoir storage claim?*

*Issue Four: Did the Water Court err in removing a curtailment remark from all CCWSC shareholders' private water rights in this action?*

## **FACTUAL AND PROCEDURAL BACKGROUND**

¶4 The East Bench Unit Project was originally authorized by the Pick-Sloan Flood Control Act of 1944 and was developed as part of the BOR's Missouri River Basin Project. The Project delivers water to irrigators in the Beaverhead Valley near Dillon, Montana. As built, the Project consists of three major infrastructure features: (1) the East Bench Canal; (2) Barretts Dam, which diverts water into the Canal; and (3) the Clark Canyon Dam and Reservoir.

¶5 The hydrology of the area has been described as “boom-bust” and is highly dependent upon and simultaneously threatened by spring runoffs. At the Project's inception, flood irrigation was the primary irrigation method. Prior to the Project, water supply was erratic, with high runoff years that could result in property and crop damage from excessive flooding and low runoff years that failed to provide sufficient water for crop production.

¶6 The Project was designed to stabilize water supply in the valley and thereby support economic development through increases in arable land and crop productivity. By providing reservoir storage, the Project promised to provide an expanded and more reliable water supply for existing users and to extend irrigation into previously uncultivated benchlands east of the Beaverhead River.

¶7 The Project accomplished this by providing storage at Beaverhead River's headwaters. This involved construction of the Clark Canyon Dam to capture surplus flows from the Red Rock River and Horse Prairie Creek, creating the Clark Canyon Reservoir.

Irrigators in the valley benefitted from more consistent “reservoir-regulated” flows. Over time, water in the Reservoir was also used for fish and wildlife conservation and recreation.

¶8 Financing for the Project involved federal funds and local investment. Water delivery contracts with the EBID and the CCWSC dating from 1958 outlined repayment arrangements. These 40-year delivery contracts were renewed in 2006.

¶9 Existing water users in the valley formed the CCWSC in 1956. The CCWSC contract delivers allocations of water based on both shareholders’ private natural flow rights, which preexisted the Reservoir’s construction, and supplemental irrigation determinations based on share class. The Intervenor are all CCWSC shareholders. Appellees Geoduck Land & Cattle, LLC; Madison Valley Garden Ranch, LLC; and Point of Rocks Angus Ranch, Inc. are CCWSC shareholders whose underlying private water rights have already been decreed.

¶10 Appellant Open A is a downstream user with senior private rights to the Project and is a non-signer who was offered shares in the CCWSC but declined.

¶11 The reclamation project also enabled development of a new irrigation district on the benchlands, the EBID, which receives full irrigation service from the Project. The EBID was formed in 1957 via a Madison County District Court order. The BOR operated the EBID for the first 10 years of its 40-year contract, during a statutory development period. Control was transferred to landowners and irrigators within the EBID in 1976. Claim 41B 40850-00 is co-owned by the EBID and the BOR.

¶12 In 1961, the BOR filed a notice of appropriation for the unappropriated flood flows of the Beaverhead River, stating its intent to store the water in the Clark Canyon Reservoir

and to use the water for domestic, livestock, irrigation, mining, industrial, municipal, and other purposes. When the BOR posted notice, all natural flow rights from the Beaverhead River had already been appropriated. Thus, the BOR's Reservoir storage claim is junior to almost all other water rights in the valley.

¶13 The Clark Canyon Dam, Clark Canyon Reservoir, Barretts Diversion Dam, and East Bench Canal were constructed from 1961 to 1964. Water was first impounded in the Reservoir in 1964. In addition to the BOR's storage, the Reservoir also includes flood control storage managed by the U.S. Army Corps of Engineers. In 1965, the BOR negotiated with the Army Corps to increase the volume allocated to the BOR by 20,000 acre-feet.

¶14 Since the Project's construction, advancements in irrigation technology—principally electric pumps and sprinklers—have increased irrigation effectiveness and the irrigable acreage in the valley.

¶15 As part of their water claims investigations in the 1960s and 1970s, the Department of Natural Resources and Conservation (DNRC) mapped the irrigated acreage for the EBID based on 1965, 1972, and 1979 aerial photographs of the Beaverhead Valley. The DNRC also added information remarks to CCWSC shareholders' private claims which stated shareholders' underlying private water rights were curtailed pursuant to the 1958 CCWSC water delivery contract.

¶16 In 1981, in accordance with § 85-2-221(1), MCA, the BOR filed Statements of Claim for claims 41B 40850-00 (850) through 41B 40852-00 (852), for Beaverhead River direct flow, and 41B 40854-00 (854) through 41B 40861-00 (861) for storage in the Clark

Canyon Reservoir. In 2010, the BOR also filed an amendment to their Reservoir storage claims, consolidating all but the flood control claim into a single right with multiple uses.

¶17 The 850 and 854 claims appeared in the 41B Basin Preliminary Decree issued in 2013. On April 20, 2015, the Water Court consolidated the related objections, counterobjections, and notices of intent to appear into the underlying case. At Open A's request, the case was reconsolidated in August 2015 to adjudicate all of the BOR's claims associated with the East Bench Unit Project, including the 851, 852, and 855 through 861 claims.

¶18 The Water Court's October 10, 2017 scheduling order set the case on a hearing track, noting this case had "long been referenced as [a] seminal case in the Basin 41B adjudication."

¶19 On November 14, 2018, Madison Valley Garden Ranch, a CCWSC shareholder, filed for partial summary judgment requesting removal of the DNRC information remark from its underlying private water rights. Point of Rocks Angus Ranch joined the motion and requested the Water Court remove the curtailment remark from *all* affected claims. Geoduck Land & Cattle and the Intervenors also joined in requesting basinwide removal, as did the CCWSC. The BOR requested removal from its consolidated claims in the instant case.

¶20 The Water Court had previously denied similar requests to remove curtailment remarks from CCWSC shareholders' claims in the adjudication of Madison Valley Garden Ranch's private rights. In its August 3, 2017 Order Staying Proceedings for Madison Valley Garden Ranch's claims, the court indicated Cause Nos. 41B-265 (the instant case)

and 41B-269 would resolve the curtailment remark issue basinwide. In January 2018, the Water Court also granted Open A's motion to stay proceedings in the adjudication of Point of Rocks Angus Ranch's private rights pending resolution of the curtailment remark issue in the instant case.

¶21 In February 2019, Open A filed for partial summary judgment to limit the EBID's maximum irrigated acreage on the 850 claim to 22,722 acres, a number that arguably represented the "'as-built' irrigable acres at the end of the ten-year Project development period," and to limit the maximum irrigated acreage for the 854 claim to 50,726 combined acres for the EBID and the CCWSC service areas.

¶22 The EBID and the CCWSC also filed for partial summary judgment, requesting the Water Court declare the place of use for the East Bench Unit Project should be described by general service area pursuant to *Curry v. Pondera Cty. Canal & Reservoir Co.*, 2016 MT 77, 383 Mont. 93, 37 P.3d 440. The EBID and the CCWSC argued the question of the maximum acreage for the 854 claim could not be decided until all CCWSC members' irrigated acreage was adjudicated. The BOR's separate summary judgment request echoed the EBID's and the CCWSC's claims.

¶23 On May 15, 2019, the Water Court heard oral arguments on the motions. The Water Court issued its summary judgment decisions on July 3, 2019. The court held the DNRC information remarks referencing curtailment of the CCWSC shareholders' underlying private rights pursuant to the 1958 delivery contract were inaccurate. The court found the 1958 contract had lapsed, that the CCWSC shareholders were never parties to the contract, and that the 2006 agreement did not contain curtailment provisions. The court ordered

removal of the remark from Madison Valley Garden Ranch's claims and held the remark should be removed from all claims on which it appeared in Basin 41B. The court determined any such arrangement was contractual and was not necessary to define the BOR's Reservoir storage rights.

¶24 After the Water Court's Summary Judgment Order, the stays in Madison Valley Garden Ranch's and Point of Rocks Angus Ranch's cases were lifted. Their private rights have been decreed without the DNRC curtailment remark.

¶25 In January 2020, the Water Court held a four-day trial regarding final adjudication of the BOR's Project-related water rights. The court heard testimony from BOR employees; owners of Open A and Madison Valley Garden Ranch; the Beaverhead River Water Commissioner; the East Bench Unit Project Manager; board members and officers of the EBID and the CCWSC; EBID and CCWSC employees; a water resource specialist from the DNRC involved in the 850 claim examination; water rights specialists hired by Madison Valley Garden Ranch and Geoduck; and area farmers, some of whom were part of the Project expansion in the 1960s.

¶26 The court also reviewed a slew of evidence, including organizational documents for the EBID and the CCWSC; maps and aerial photos from the DNRC claims examinations; the 1958 and 2006 water delivery contracts; underlying private water rights abstracts; the BOR's claims filings; the 1960 Definite Plan Report; congressional records referencing Project appropriations; BOR records of irrigable acreage from the 1960s; a review of Project irrigation by BOR employee, D.M. Archibald, conducted in 1975 near the end of

the Project's prescribed development period; and Reservoir storage records and capacity reports.

¶27 The court issued a final decree of the BOR's water rights in December 2020. The Water Court's Final Order combined the BOR's multiple claims into two: (1) the 850 claim for Beaverhead River direct flow, co-owned with the EBID; and (2) the 854 claim for Clark Canyon Reservoir conservation storage water, solely owned by the BOR. The Water Court decreed the maximum irrigated acreage for the EBID to be 28,005 acres and noted this on both the 850 and 854 claims. The Water Court added a remark to the 854 claim that one 854 place of use was to be the same as lands served by the private water rights owned by the CCWSC shareholders. The court otherwise left the CCWSC's maximum irrigated acreage and place of use boundaries unspecified.

¶28 Open A appeals both the final and summary judgment orders.

### **STANDARD OF REVIEW**

¶29 We apply the same standards of review to an appeal from the Water Court as we do to an appeal from a district court. *Sunset Irrigation Dist. v. U.S. Fish & Wildlife Serv.*, 2021 MT 25, ¶ 8, 403 Mont. 123, 480 P.3d 214 (citing *Heavirland v. State*, 2013 MT 313, ¶ 15, 372 Mont. 300, 311 P.3d 813). We review the Water Court's conclusions of law de novo for correctness and its findings of fact to determine whether they are clearly erroneous. *Sunset Irrigation*, ¶ 8 (citing *Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644). A finding is clearly erroneous if not supported by substantial evidence, if the court below misapprehended the effect of the evidence, or if a review of the record leaves the reviewing court with the

definite and firm conviction a mistake has been made. *Skelton Ranch*, ¶ 27. “Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting.” *Curry*, ¶ 20.

## DISCUSSION

¶30 *Issue One: Does Open A have standing in the adjudication of the BOR’s and the EBID’s water rights claims?*

¶31 The BOR argues Open A lacks standing because its senior water rights and prospective interests as a junior appropriator are not impacted by the Water Court’s irrigated acreage limits and place of use determinations for the BOR’s 850 and 854 claims. The BOR claims Open A has no interest in the Reservoir’s stored flood water and that declaration of the quantity of the storage right does not impair Open A’s rights. Open A responds that it has standing because increases in irrigated acreage in the East Bench Unit Project have the potential to affect its water supply.

¶32 “Generally, an appropriator with a water right in a particular source has an obvious interest in any water right granted from that source and thus has standing to challenge any water right granted in that source.” *In re Application for Change of Appropriation Water Rights Nos. 101960-41S & 101967-41S (In re Royston)*, 249 Mont. 425, 430, 816 P.2d 1054, 1059 (1991) (citing *Holmstrom Land Co. v. Newlan Creek Water Dist.*, 185 Mont. 409, 425, 605 P.2d 1060, 1069 (1979)).

¶33 This Court has previously upheld Open A’s standing in the adjudication of the EBID’s boundaries based on Open A’s and the EBID’s appropriations from the shared source of the Beaverhead River. *In re Formation of East Bench Irrigation Dist.*,

2009 MT 135, ¶ 23, 350 Mont. 309, 207 P.3d 1097. Because Open A has water rights in the Beaverhead River and the claims at issue involve both the BOR's natural flow rights in the river and its storage and delivery of underlying CCWSC shareholders' natural flow rights in the river, Open A has standing in the adjudication of the BOR's 850 and 854 claims.

¶34 *Issue Two: Did the Water Court err by holding the EBID's and the CCWSC's maximum irrigated acreage were not restricted by the East Bench Unit Project's Definite Plan Report?*

¶35 Open A argues maximum irrigated acreage for the EBID and the CCWSC is limited by the East Bench Unit Project's Definite Plan Report. Specifically, Open A contends the East Bench Unit Project's maximum acreage should be restricted to the 22,722 acres "perfected" by the EBID at Project completion and the 28,004 acres originally intended to be irrigated by the CCWSC. The 22,722 EBID number comes from the 1975 BOR "Archibald memo" reviewing irrigable acreage at the end of the East Bench Unit Project's contractual development period. The 28,004 number for the CCWSC comes from the original acreage privately irrigated by the CCWSC shareholders who signed up for supplemental irrigation in 1956.

¶36 Open A asserts the Definite Plan Report is dispositive because it represents the United States' bona fide intent and the maximum acreage authorized by Congress in its approval of the East Bench Unit Project. Open A argues the BOR cannot intend or act beyond what Congress authorized.

¶37 The Water Court held that the maximum irrigated acreage for the EBID was 28,005 acres and did not define maximum irrigated acreage for the CCWSC. Pursuant to

*Smith v. Duff*, 39 Mont. 382, 102 P. 984 (1909), the court concluded that proper analysis of intent required evaluating the entire history of the Project, including the actions of appropriators before, during, and after project completion.

¶38 The Water Court concluded the Definite Plan Report was a feasibility study that did not require the EBID water users limit themselves to irrigated acreage in strict accordance with its estimates. The court noted that, while public funds supported infrastructure construction for the East Bench Unit Project, the financial burden for actual irrigation was assumed by the irrigators. The court found the development of irrigation and investments in new irrigation technology by water users continued after the Project's development period. The court held that 28,005 acres was a reasonable maximum irrigated acreage for the EBID considering the Project's intent and the diligence the BOR and relevant parties applied to project development over time.

¶39 In 1978, the Department of the Interior issued an opinion indicating definite plan reports can be dispositive when the congressional legislation authorizing a project specifically limits acreage to that identified by the report. *Westlands Water Dist.*, 85 Interior Dec. 297, 302-07 (1978). However, the Solicitor noted that, "Many Acts of Congress authorizing reclamation projects do not even refer to a service area, much less state its approximate acreage. Some authorizing Acts refer to a service area only by reference to the project feasibility report. . . . Some contain no reference to either a service area or the project's feasibility report." 85 Interior Dec. at 303.

¶40 Here, the authorizing legislation contains no specific limitation to the acreage in the Definite Plan Report. The East Bench Unit Project was authorized by the Flood Control

Acts of 1944 and 1946. Pub. L. No. 78-534, 58 Stat. 887, 891 (1944); Pub. L. No. 79-526, 60 Stat. 641, 648 (1946). Senate Document 191, the Department of Interior's report on development of the Missouri River Basin, laid out initial plans for the East Bench Unit Project. S. Doc. No. 191 (1944). These were later harmonized, in Senate Document 247, with the Army Corps of Engineers' flood control plans from House Document 475. S. Doc. No. 247 (1944). These reports date from 1944. As the Water Court observed, funding for the Missouri River Basin projects was thus partly authorized over a decade before the East Bench Unit Project's revised Definite Plan Report was written in 1960.

¶41 The Water Court correctly concluded that the East Bench Unit Project's Definite Plan Report was, under 43 U.S.C. § 485h(a), a cost estimate and feasibility study to determine whether sufficient repayment from contracted irrigators could be reasonably expected from the Project's projected capacity.

¶42 The statute reads in relevant part as follows:

No expenditures for the construction of any new project, new division of a project, or new supplemental works on a project shall be made, nor shall estimates be submitted therefor, by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on—

- (1) the engineering feasibility of the proposed construction;
- (2) the estimated cost of the proposed construction;
- (3) the part of the estimated cost which can properly be allocated to irrigation and probably be repaid by the water users. . . .

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation . . . together with any allocation to flood control or navigation . . . 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.

Reclamation Project Act of 1939, 43 U.S.C. § 485h(a) (2018).

¶43 As the Water Court noted, by the express language of the statute, if probable repayment exceeded construction cost estimates, project approval was automatic. The Water Court correctly held that congressional authorization of the East Bench Unit Project did not specifically limit the Project's water to the estimated irrigable acreage in the Definite Plan Report. Further, it is clear from the record that the Definite Plan Report numbers represent estimated irrigable acreage based on conditions expected to change and evolve over the course of project completion and development.

¶44 In terms of the BOR's intent, the Water Court correctly applied the law as to intent and due diligence. Here, the Water Court weighed Senate Document 191 and the Definite Plan Report feasibility study along with the BOR's 1961 notice of appropriation and other evidence in the record to determine the BOR's intent under Montana water law.

¶45 To be valid, an appropriation of water must be for a beneficial or useful purpose and ascertaining the claimant's intent is fundamental to this determination. *Smith*, 39 Mont. at 387-88, 102 P. at 985 (citing *Power v. Switzer*, 21 Mont. 523, 530, 55 P. 32, 35 (1898); *Toohey v. Campbell*, 24 Mont. 13, 17, 60 P. 396, 397 (1900); *Miles v. Butte Elec. & Power Co.*, 32 Mont. 56, 67, 79 P. 549, 553-54 (1905)).

¶46 The claimant's intent dictates the quantity of water attributed to the claim. *Smith*, 39 Mont. at 387-88; 102 P. at 985. A filed notice of appropriation provides other water users with notice of an appropriator's intent, *Teton Coop. Canal Co. v. Teton Coop. Reservoir Co.*, 2015 MT 344, ¶ 33, 382 Mont. 1, 365 P.3d 442, and, under the pre-1973 statutory scheme, properly filed notices are prima facie evidence of the statements

therein, *Holmstrom*, 185 Mont. at 417-18, 605 P.2d at 1065 (citing § 89-814, RCM (1947)). However, a filed notice is not dispositive as to the extent of the right. *Holmstrom*, 185 Mont. at 418-19, 605 P.2d at 1065-66. Water rights “were to be measured and gauged by their beneficial use over a reasonable period of time after they initiated the appropriations. In establishing the prior right . . . consideration must be given to the extent and manner of their use, the character of their land, and the general necessities of the case.” *Holmstrom*, 185 Mont. at 418, 605 P.2d at 1065-66. *See also Irion v. Hyde*, 107 Mont. 84, 95-96, 81 P.2d 353, 358 (1938).

¶47 Montana law recognizes that appropriation of water for sale or distribution to other users qualifies as a beneficial use. *In re U.S. Bureau of Land Mgmt.*, 2016 MT 348, ¶ 34, 386 Mont. 121, 386 P.3d 952. *See also Curry*, ¶ 25; *Bailey v. Tintinger*, 45 Mont. 154, 175-77, 122 P. 575, 582-83 (1912). Thus, water may be appropriated for prospective or future uses. *Curry*, ¶ 47; *Bailey*, 45 Mont. at 173-75, 122 P. at 581-82 (both cases specifically addressing appropriations for future sale by “public service corporations”).

¶48 While completing diversion construction and actual diversion is necessary for valid appropriation, *Mont. Dep’t of Nat. Res. & Conservation v. Intake Water Co.*, 171 Mont. 416, 430, 558 P.2d 1110, 1118 (1976), the extent of a right is not always limited by actual use, *Curry*, ¶ 47. When diverted for future sale, “Actual use was represented only by a bona fide intention; it *did not have to be immediately accomplished* to create a right.” *Bailey*, 45 Mont. at 173-74, 122 P. at 582 (quoting 1 Samuel C. Wiel, *Water Rights in the Western States* § 139 (3d ed. 1911)) (emphasis added); *see also Curry*, ¶ 46.

¶49 Senate Document 191 imagined a Reservoir capacity of only 150,000 acre-feet and speculated that, “if built to . . . capacity,” it would supply new irrigation to 25,000 acres on the East Bench. S. Doc. No. 191, at 62. It proposed irrigation of 48,000 total acres from projects in the Dillon Valley. S. Doc. No. 191, at 62, 66.

¶50 The BOR issued its first East Bench Unit Project Definite Plan Report in 1956 and a revised Definite Plan Report in 1960. The 1960 Definite Plan Report described the East Bench Unit Project as providing irrigation for “21,800 acres of irrigable land requiring a full supply of water [the EBID] and 28,004 acres of presently irrigated land, of which 24,848 acres will receive a supplemental supply of water [the CCWSC shareholders’ land].” U.S. Bureau of Reclamation, Region 6, Definite Plan Report on East Bench Unit—Montana, Apr. 1960, at 1.

¶51 The BOR’s 1961 notice of appropriation stated the BOR’s intent as follows:

[T]o regulate waters appropriated by various water users in the Beaverhead Valley . . . to store, utilize, and administer under the Federal Reclamation laws all of the unappropriated and undecreed flood flows of the Beaverhead River but not in excess of the amount of water required to fill, at any given time, the said reservoir of 261,000 acre-feet capacity.

¶52 The notice also listed the place of use for the BOR’s claim as “generally within the Beaverhead Valley in Beaverhead and Madison Counties, Montana, in the general vicinity of Dillon, Montana.”

¶53 The Water Court noted that the BOR did not identify specific acreage or cite to the Definite Plan Report in the notice of appropriation it filed for the EBID. The Water Court held that the evidence demonstrated the BOR’s intent was to broadly define the place of use for its water rights because practically it did not control usage—individual irrigators

did—and the Project’s overall objective was maximum economic benefit for the Beaverhead Valley. Notably, the canal diverting water for the EBID constituted an expansion into new acreage at the time of its construction. The record demonstrates that the purpose driving the Project was to increase arable land in the valley.

¶54 The Water Court was correct in concluding that the BOR’s intent and the extent of its appropriations were not limited to the irrigable acreage listed in the Definite Plan Report or already under irrigation by the CCWSC shareholders at the time of the East Bench Unit Project’s completion. Because the BOR was entitled to file notice of an appropriation that contemplated its future uses and needs, which included the expansion of irrigable lands in the valley as articulated in the East Bench Unit Project planning documents, its perfected rights were not legally circumscribed by the Definite Plan Report feasibility document. The Definite Plan Report was only one piece of evidence necessary to the broader consideration of the circumstances surrounding the East Bench Unit Project and the BOR’s related water rights.

¶55 The Water Court also found evidence in the record clearly demonstrated that the BOR and individual irrigators acted with diligence over time, including throughout the statutory contractual development period, by irrigating expanded acreage with Project water.

¶56 Open A argues the Water Court erred by evaluating third-party diligence and appropriator acts after project completion.

¶57 The extent of an appropriation is measured by an appropriator’s needs and capacity. *Hoon v. Murphy*, 2020 MT 50, ¶ 48, 399 Mont. 110, 460 P.3d 849 (citing *Bailey*, 45 Mont.

at 178, 122 P. at 583); *Curry*, ¶ 30; *Skelton Ranch*, ¶ 55. A water-appropriating entity's reasonable diligence is assessed in determining validity of its appropriation, and appropriators are required to demonstrate progress toward project completion. *Intake*, 171 Mont. at 434, 440, 558 P.2d at 1120, 1123 (interpreting § 89-811, RCM (1947)). *See also In re Musselshell River Drainage Area*, 255 Mont. 43, 53-54, 840 P.2d 577, 583-84 (1992). Diligence post-completion is relevant as to continued beneficial use and nonabandonment, particularly in weighing an appropriator's needs relative to system capacity. *Skelton Ranch*, ¶ 56; *see also Curry*, ¶¶ 31, 34.

¶58 An appropriator's current and future needs, diligence in proceeding to actual use, extent of use, and the circumstances surrounding these factors must be considered in decreeing a right. *Smith*, 39 Mont. at 389, 102 P. at 986. *See also Bailey*, 45 Mont. at 177-78, 122 P. at 583. However, a water user may not expand a decreed right by subsequently extending water use to additional lands not under actual or contemplated use at the time *the water was decreed*. *Quigley v. McIntosh*, 110 Mont. 495, 505, 103 P.2d 1067, 1072 (1940).

¶59 Here, the BOR's water rights were being considered for final decree. They were not yet decreed. Expansion of irrigable acreage after the East Bench Unit Project infrastructure was completed does not represent illegal expansion of an already decreed right.

¶60 *Curry* recognized that public service corporations may not own the land upon which water from a claim might be used for irrigation, therefore making application of the water by third-party users necessary to effecting beneficial use. *Curry*, ¶¶ 33, 41.

¶61 Under *Curry*, perfection of the public service corporation's associated water right occurs when the water is ready and available for sale. *Curry*, ¶ 35; *Bailey*, 45 Mont. at 175-76, 122 P. at 582. Open A misunderstands such perfection and proof of valid appropriation as dictating the extent of the underlying water right.

¶62 The Water Court correctly determined the reasonable diligence of third-party irrigators was relevant to determining the extent of the BOR's water right because expanded irrigated acreage in the EBID was indicative of the East Bench Unit Project's capacity and needs.

¶63 The Project's relevant needs included the future needs contemplated in the BOR's original intent. The Water Court's comprehensive look at irrigator diligence over time properly evaluated the historic evidence showing manifestation of the BOR's bona fide intent to expand irrigated acreage and increase productivity in the valley. The record demonstrates that improved irrigation technology extended the reach of the Project's water over time. Evaluating irrigator diligence and appropriator acts after infrastructure completion was necessary to the court's determination that the BOR's initial project assessments were substantive rather than speculative. Review of the Project's evolution and expanded irrigation over time was not error. It demonstrated the East Bench Unit Project's needs and capacity and thereby the extent of the BOR's water rights.

¶64 According to the BOR expert's testimony, the BOR was aware of increases in irrigated acreage in the EBID from 1964 to 1974. BOR employee D.M. Archibald conducted a review of irrigation near the end of the Project's prescribed 10-year development period. In his 1975 memo, Archibald found 22,722 irrigable acres within the

EBID, an increase from the original Definite Plan Report projections. With the implementation of improved irrigation technology, expansion of irrigable acreage in the EBID continued until 1979. In recognition of the expanded acreage, the EBID's boundaries have been redefined over time by several district court orders.

¶65 The DNRC claims examinations showed 24,824 acres of irrigation in the EBID based on the 1965 and 1972 aerial photos and 27,351 acres based on the 1979 photos. At trial, the BOR expert, relying on GIS, testified there were 28,005 acres historically irrigated within the EBID based on the 1979 aerial photos.

¶66 The Water Court based its final determination of maximum irrigated acreage for the EBID, listed on both the 850 and 854 claims, on evidence in the record including the Definite Plan Report, the BOR's filed notice of appropriation, witness testimony, the BOR Archibald memo, and the DNRC claim examinations. Based on the evidence, it held the maximum irrigated acreage the EBID achieved in 1979 was 28,005 acres. The Water Court decreed the maximum irrigated acreage for the EBID to be 28,005 acres.

¶67 The Water Court's findings of fact regarding the maximum irrigated acreage for the EBID are supported by substantial evidence in the record and are therefore not clearly erroneous.

¶68 *Issue Three: Did the Water Court err by not providing specific boundaries or maximum irrigated acreage for the CCWSC place of use on the BOR's Clark Canyon Reservoir storage claim?*

¶69 Analogizing to its previous ruling, *Painted Rocks*, Case No. 76HE-166, in its final order, the Water Court left the place of use boundaries for the CCWSC undetermined but added a remark to the BOR's 854 Reservoir storage claim indicating the CCWSC place of

use was the same as that of the private water rights of the CCWSC shareholders. The court did not define maximum irrigated acreage for this area nor provide an explicit land description or boundary.

¶70 The Water Court admittedly adopted this solution in part to address the fact that some of the CCWSC shareholders' underlying private rights have yet to be finally adjudicated.<sup>1</sup>

¶71 Open A argues that the CCWSC place of use boundaries should be set and that its maximum irrigated acreage should be determined by the original acreage irrigated by potential CCWSC shareholders in 1956. Open A also argues leaving the acreage description for the CCWSC open-ended violates due process because water users such as itself remain without notice of the actual place of use for the BOR's 854 claim. Open A would strictly construe § 85-2-234(6)(e), MCA, to require the final decree of the BOR's 854 claim state specific land and boundary descriptions for the CCWSC. Madison Valley Garden Ranch sides with Open A solely on this point.

¶72 The BOR contends the CCWSC shareholders' contractual acreage limits are a contractual repayment structure and do not preclude the CCWSC users from using their allocated water beyond their "share acres."

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<sup>1</sup> Intervenor Geoduck agreed with the Water Court that the 854 claim as it relates to the CCWSC is a supplemental right and must be used on the same place of use claimed for the underlying direct flow rights of the CCWSC shareholders. However, Geoduck argued Open A's request to cap acreage for the CCWSC in this action was barred by claim preclusion for already decreed CCWSC shareholder rights. Because the Water Court crafted a flexible solution without an acreage cap in recognition of the continued adjudication of underlying shareholders' rights, we decline to consider the claim preclusion question.

¶73 In issuing a final decree for pre-1973 irrigation water rights, the Water Court must determine the beneficial use to which an appropriator is entitled and, based on such beneficial use, include in the final decree the amount of water, rate, and volume included in the respective water right. *McDonald v. State*, 220 Mont. 519, 530, 532, 722 P.2d 598, 605-06 (1986) (interpreting § 85-2-234(5), MCA). By statute, the Water Court must include in its final decree for an existing right “the place of use and a description of the land, *if any*, to which *the right is appurtenant*” and “any other information necessary to fully define the nature and extent of the right.” Section 85-2-234(6)(e), (i), MCA (emphasis added).

¶74 In *Painted Rocks*, the Water Court explained that a primary consideration under § 85-2-234, MCA, is the sufficient description of a water right so that other water users and courts may determine if the right is being exercised in compliance with the final decree. *In re the Adjudication of the Existing Rights to the Use of All the Water Within the South End Subbasin of the Bitterroot River (Painted Rocks)*, No. 76HE-166 (Mont. Water Ct., Mar. 9, 2000). *Painted Rocks* concerned the DNRC’s reservoir storage rights in the Painted Rocks Reservoir on the West Fork of the Bitterroot River. *Painted Rocks*, at 1. As in the instant case, the Painted Rocks Reservoir storage water is distributed to water users according to contractual agreements. *Painted Rocks*, at 4-5.

¶75 In its *Painted Rocks* decision, the Water Court examined what information was relevant for enforcement and would logically meet the reasonable expectations of other water users. *Painted Rocks*, at 7-9. The Water Court observed that the most salient information for junior and senior appropriators is claim priority date and sources of natural

flow. *Painted Rocks*, at 7-8. The Water Court also recognized that volume was the most significant factor for reservoir storage claims, noting that “place of use and purpose [were] still not significant factors” because “[w]here the project water goes and how many acres it irrigates . . . does not adversely change the condition of the source or cause potential injury to junior appropriators.” *Painted Rocks*, at 8-9. The Water Court also determined that project water users’ expectations were that they would receive reservoir-stored water according to their contracts. *Painted Rocks*, at 9.

¶76 Here, as with the Painted Rocks Reservoir, the Water Court found that the Clark Canyon Reservoir storage water was appropriated with the intent to sell the water to others. As such the storage right is not strictly appurtenant to the property where the water is used. *See Curry*, ¶¶ 41, 43. “These entities [holding water out for sale] define the relationship between the water right owner and the water user in their organization’s documents (i.e. bylaws, contracts, shares of stock, etc.).” *Curry*, ¶ 41. A service area is the proper method for defining place of use in such contexts. *Curry*, ¶ 48.

¶77 Delivery of Clark Canyon Reservoir water has historically not been based on priority but instead on contractual allotments reflected in agreements with the EBID and the CCWSC. All shareholders in the CCWSC had underlying private water rights. Share classes relied on the scope of these underlying rights. The CCWSC shareholders receive undifferentiated allocations that include their underlying private rights and the supplemental irrigation allocations based on CCWSC share class. The 1958 and 2006 delivery contracts with the BOR reflect this allocation determination. Because some

CCWSC shareholder rights are still subject to final determination, the underlying acreage and boundaries of the CCWSC's place of use is currently imprecise.

¶78 Given this history, the Water Court held that the place of use intended for the supplemental storage water was the lands irrigated by the CCWSC shareholders' preexisting rights. This is also reflected in the 2006 CCWSC water delivery contract with the BOR. However, the Water Court found that, because of the lack of differentiation between stored water allocations and private rights, irrigators had used their received allocations interchangeably, and as such, precise identification of the lands irrigated with storage water was impossible. The Water Court held that the information remark it added to the 854 claim, indicating storage water was to be "used on lands served by water rights owned by shareholders of Clark Canyon Water Supply Company," was more accurate than the incomplete places of use offered by the parties and that it satisfied the needs of the affected water users.

¶79 The Water Court correctly determined that, pursuant to § 85-2-234(6), MCA, its obligation was to define the nature and extent of the BOR's water rights to satisfy the reasonable expectations of other water users and so that compliance with the final decree could be enforced. The statute does not require specific land descriptions for places of use when a water right is not appurtenant to the land on which the water is used.

¶80 The information remark on the 854 claim sufficiently provides the information necessary to define the nature of the BOR's water right pursuant to § 85-2-234(6)(i), MCA. It is consistent with the intent of the BOR to impound the water for sale and delivery for

supplemental irrigation within a general service area in accordance with contractual agreements with the CCWSC.

¶81 Substantial evidence in the record supported the Water Court’s findings regarding the CCWSC shareholders’ allocations and the nature of the Project’s water delivery and irrigation patterns. The Water Court did not misapprehend the effect of the evidence in ruling that describing the CCWSC place of use with a specific land description was unreasonable given the record. Such a specific description was unnecessary to define the extent of BOR’s 854 right.

¶82 The Water Court’s decision to add an information remark to the BOR’s 854 claim defining the CCWSC place of use as the lands served by the CCWSC shareholders’ underlying water rights without further delineating the specific lands served was not in error.

¶83 *Issue Four: Did the Water Court err in removing a curtailment remark from all CCWSC shareholders’ private water rights in this action?*

¶84 Open A argues the Water Court erred in removing curtailment remarks from the CCWSC shareholders’ private water right claims in its summary judgment order. The reference to curtailment in the 1958 CCWSC water delivery contract indicated water users had to comply with contractually agreed upon delivery of their existing and supplemental water rights from the Reservoir. The subscription agreements referenced indicated water application was limited to contractual share allotments “in times of water shortage.”

¶85 Open A contends the Water Court misinterpreted the underlying delivery contracts and failed to address its request to add an alternate subordination remark.<sup>2</sup> Open A argues the original water delivery contract with the CCWSC required CCWSC shareholders to subordinate their private water rights to the BOR Reservoir storage claims in exchange for reservoir-regulated flows. Open A asserts subordination is the historic practice of the CCWSC users under their delivery contracts and that CCWSC shareholders have ratified this through acquiescence. Neither the BOR, the EBID, nor the CCWSC are demanding continuation of the curtailment remark on CCWSC shareholders' private rights.

¶86 The Water Court held that, though the 1958 contract referred to curtailment provisions in CCWSC subscription agreements, that contract had expired and was no longer in effect. This is undisputed.

¶87 The Water Court also found there was no evidence that any CCWSC shareholder had ever been required to curtail the use of their water rights related to the BOR's Reservoir storage. Open A's counsel conceded this at oral argument. As noted above, the CCWSC users have historically gotten both their shareholder-based and private right-based water from the Reservoir without differentiation. To date, water commissioners have not determined allocations from the Reservoir by priority but instead by contractual allotments.

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<sup>2</sup> Point of Rocks Angus Ranch argues only the BOR's and the EBID's rights are at issue here. Thus, Point of Rocks asserts Open A cannot collaterally attack CCWSC shareholders' underlying private rights by requesting subordination remarks be added to those claims in this action. Because the Water Court did not alter the CCWSC shareholders' private claims other than to remove the DNRC information remark related to the CCWSC delivery contract, we decline to address Point of Rocks Angus Ranch's argument that the Water Court had no jurisdiction over the CCWSC shareholders' claims in this action.

¶88 Here, the Water Court correctly determined that the BOR's 2006 water delivery contract with the CCWSC contains no curtailment provisions. The BOR's 854 storage right is for unappropriated flood flow junior to and separate from the CCWSC shareholders' private rights. The 2006 contract expressly provides that the BOR will furnish allotments to the EBID and the CCWSC "[f]rom Conservation storage, in combination with natural flow rights" in accordance with contractual priorities. The 2006 contract also expressly excludes shareholders' underlying natural flow rights from its definitions of "project water" and "contract water."

¶89 While the CCWSC shareholders' private rights water is delivered according to the 2006 contractual agreement between the CCWSC and the BOR, the contract does not have bearing upon the priority or extent of the CCWSC shareholders' private rights.

¶90 The Water Court correctly concluded that the curtailment remarks on CCWSC shareholders' underlying private water rights were not necessary to the proper enforcement of the BOR's water rights claims and were factually inaccurate. Resolution of issue remarks is a principal step toward a final decree for the basin. *See* § 85-2-234(1), MCA. Removal of the curtailment information remarks from the CCWSC shareholders' underlying private water rights was properly granted in the court's summary judgment order.

## **CONCLUSION**

¶91 For the reasons set forth above, the Water Court's final order and summary judgment order decreeing the BOR's 850 and 854 water rights are affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ INGRID GUSTAFSON

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE