

IN THE SUPREME COURT
OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0472

CHARLES C. HILL, et al.

Plaintiff,

v.

FRED ELLINGHOUSE, et al.

Defendant.

BRADLEY LIVESTOCK, LC,

Objector and Appellant,

v.

WILLIAM FRASER,

Claimant and Appellee.

APPELLEE’S OPENING BRIEF

On Appeal from the Montana Water Court,
Case No. DCERT-0004-WC-2021
Hon. Stephen R. Brown, Associate Water Judge Presiding

Graham J. Coppes
Ferguson and Coppes, PLLC
PO Box 8359
Missoula, MT 59807
Telephone:(406) 532-2664
Facsimile: (406) 532-2663
Email: graham@montanawaterlaw.com
Attorney for Appellee William Fraser

Mike J. L. Cusick
Cusick, Farve, Mattick & Michael, P.C.
PO Box 1288
Bozeman MT 59971-1288
Telephone: (406) 587-5511
Facsimile: (406) 587-9079
Email: office@cmrlawmt.com
*Attorneys for Appellant Bradley
Livestock LC*

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ISSUES PRESENTED

1. Whether the Water Court properly concluded that Water Right Claim 41C 30133316 is appurtenant to Claimant William Fraser's property?
2. Whether the Water Court properly held that Water Right Claim 41C 30133316 is an active water right that arises from and is bound by the terms of the 1905 *Hill* Decree?

STATEMENT OF THE CASE

This certification case arose from Appellee/Claimant William Fraser's ("Fraser") effort to beneficially use water right claim 41C 30133316. This water right is a stock water claim filed pursuant to the authority of House Bill 110. Petitioner timely filed this claim on June 28, 2019 with DNRC asserting a historical right to use the waters of Indian Creek for livestock drinking directly from the source as it runs through his property. Based on that claim filing, Fraser made a legal call for water in Indian Creek, both in 2021 and 2022, to then Water Commissioner Del Bieroth. When that call for water was denied, Fraser filed a complaint in Madison County District Court.

On August 26, 2021, Fraser filed a Verified Complaint by Dissatisfied Water User against Water Commissioner Del Bieroth, seeking to enforce this claim, alleging that the Commissioner failed to deliver his stockwater right claim No. 41C 30133316 in priority. Commissioner Bieroth is the Water Commissioner appointed by the District Court to distribute water rights from Indian Creek. These waters were originally adjudicated in the 1905 decree in *Hill v. Ellinghouse*, Cause No DV-1903-741, Montana Fifth Judicial

District Court, Madison, County (August 30, 1905) (Case No. 741) and were subsequently adjudicated by this Court in the Basin 41C Temporary Preliminary Decree. As an interested party Appellee Bradley Livestock (*hereinafter* “Bradley”) filed a Notice of Appearance and Motion to Dismiss Verified Complaint in DV-1903-741, arguing that Petitioner’s claim was not enforceable because his claim had not previously been included in a Water Court Decree. In briefing at the District Court, Fraser requested that the issues be certified to the Water Court to determine the validity and enforceability of his stockwater claim. On November 09, 2021, the District Court referred the matter to the Water Court pursuant to Montana Code Annotated § 85-2-406(b).

Following certification, and over Fraser’s insistence, the Water Court identified the only issue allowed to be heard in this case was the determination of the elements of water right claim no. 41C 30133316, the water right Fraser contends supports his calls for water. On March 7, 2022, Bradley filed a Motion for Declaratory Ruling and Partial Summary Judgment on Priority Date and Burden of Proof. (Doc. 18.00). Fraser responded and cross-moved for summary judgment. (Doc. 24.00). The Court denied both motions and set the matter for hearing. Trial took place at the Madison County Courthouse in Virginia City and lasted three days.

Following trial, the Water Court issued Findings of Fact, Conclusions of Law, and Order. (Doc. 72). There, the Water Court held that water right claim 41C 30133316 is an active water right properly entitled to a priority date of April 20, 1866 for a beneficial use of livestock drinking directly from the source of Indian Creek as it flows through Fraser’s property. When Fraser tried to enforce his water right after the Water Court’s decision

was issued last fall, Bradley and the Water Commissioner continued to refuse to honor Fraser's call.

Bradley appeals that decision now.

STATEMENT OF THE FACTS

The importance of water to the history and development of Montana can hardly be overstated. This case represents a new chapter in that history. Now, for the first time, water rights claimed and filed under the House Bill 110 Process are being adjudicated by the Water Court, enforced by district courts, and administered by water commissioners.

The HB 110 Process was designed by the legislature to allow individuals to claim never-before-documented water rights that would relate back to an original priority date based on evidence of historical beneficial use of that water prior to July 1, 1973. Claimant Fraser undertook that process, diligently researched the historical use of stock on his property and timely filed a claim to reflect historical use.

More specifically, Dr. William Fraser owns 34 acres in northeast quarter portion of Section 30, Township 04 South, Range 05 West in Madison County. Indian creek bisects Petitioner's property, running east to west across his property, continuing for approximately three (3) miles to its confluence with the Ruby River. The source of Indian Creek is several miles to the east, where it arises from snowmelt high in the Tobacco Root Mountains.

When Fraser first purchased his property in September of 1992, there were cows scattered all over, and drinking directly from the free-flowing water in the channel of Indian Creek. See generally Exhibits 107-115. When first viewing the property, he

found barns and calving sheds built next to and into the stream channel. D2, 203:17-22¹. In fact, the property was overrun with livestock and the property was worse for the wear from overgrazing. D2,182:25; 183:1-6. When speaking with neighbors, this story was corroborated and the immediate neighbor/former lessee of the land was angry when her grazing rights were terminated by Fraser after taking title. D2, 205:13-23.

Over the following years, Fraser and his wife Donna diligently improved the land, restored responsible and regenerative grazing practices and generally sought to rebuild the dilapidated homestead. More specifically, the Frasers reduced the number of cattle on the land to bring back native grasses, placed the cattle they kept into a rotational grazing regime, undertook a stream restoration project to repair the extensive cattle damage to the riparian zone, and slowly but surely fixed-up the historical farmhouse where they live. D2, 185:8-21.

For years, life was great. The Frasers raised cows and a child in small-town Montana, all the while operating and managing the world's longest-running scientific research program on the continent of Antarctica. For more than a decade after purchasing the property, the Fraser's livestock never went without water from the source on Indian Creek and water rights distribution was not even a notion they had to consider. D2, 206:11-20. During those years, Indian Creek served as the sole source of water for livestock on the property. D2, 207:11-14; 208:2-15. Beyond sufficient water for their

¹ Citations to the transcripts are used in the following format: Day __, page __: Line numbers.

cows, the year-round flows of Indian creek were sufficient to support spawning brown trout on the property between October and November. D2, 206:23-25; 207:1-10

As an ecological scientist, Fraser studied Indian Creek's hydrologic flow regime, both in its valley and its headwaters catchment. He naturally kept fastidious records of the flows of Indian Creek as it traversed his property. D2, 216:23-25; Fraser's Exhibit 24. Based on those records, about 2012, Fraser noticed the system began to change. D2, 206:11-20. His measurements indicated Indian Creek flows were reducing, even in years in which snow water equivalent² metrics were rising or remaining consistent. D2, 222:2-6. Once consistent flows began to diminish (even in spring) and baseline fall and winter flows began to all but disappear.

Fraser began to investigate. Over the years Fraser walked from his property up the Indian Creek channel to the Thompson ditch diversion hundreds of times. D2, 261:1-4. Most notably, he found that a once-seasonal dam structure, less than half a mile upstream from his property, now had become permanent and fully sealed. Where seasonal work to alter the structure had in the past, allowed year-round flows to pass down to his cattle, now, all water was being diverted. D2, 263:13-18. Fraser witnessed this structure now diverting the full flow of Indian Creek in all seasons. D2, 262:2-8; 268:11-21. Through further investigation, Fraser identified the diversion as owned by Bradley Livestock and learned that it was called the Thompson Ditch and Dam. D3, 74:21-25; 75:1-4.

² "Snow Water Equivalent (SWE) is a term used in hydrology to describe the amount of water contained in a snowpack.

Through Fraser's research he learned that Bradley claims and diverts two irrigation water rights from Indian Creek from the Thompson Ditch and Dam. Exhibits 2 and 4. These water rights claim an 1866 and 1973 priority date respectively, with a cumulative flow rate of 22.5 cfs – or the entirety of baseline flows in Indian Creek. Of particular relevance is that claim 41C 193770 is an irrigation right that pre-dates the *Hill v. Ellinghouse* decree but was not described or decreed therein. Fraser wondered how this was possible and began to inquire about the history of use at the site.

In discussing the issue with one of his elderly neighbors, David Larson, Fraser learned that the Thompson ditch was originally flumed over and across Indian Creek, but the flume was subsequently removed and replaced with the impoundment structure that exists today. D3, 206:7-19. Mr. Larson explained that his family purchased land along Indian Creek upstream from Fraser in 1968 and that his family had raised livestock on the property. D3, 199:16-24. Mr. Larson testified that water was always available for his family's livestock out of Indian Creek, including in late fall. D2, 201:18-25. Furthermore, after his family sold the ranch in 1987, he continued to work the property for the new owner, George Wold, for twenty more years who also watered livestock from Indian Creek directly above Fraser's property. D3, 202:14-24; 203:2-11. In fact, during those years, Mr. Larson would visit Indian Creek two or three times a day, and would have to break ice up so the cows could drink from the source in the winter. D3, 206:3-6; 214: 11-14. Larson explained to the Water Court that the Fraser's water availability problems stem from modern alterations to the Thompson Ditch and Dam. D3, 213:13-19

Ultimately, over time, Fraser observed the reach of Indian Creek below the Thompson ditch diversion disappear as the diversionary structure was under now-constant repair. D2; 261:12-18. In fact, over the last three years, Fraser observed the Indian Creek channel completely dry on his property, including during both the driest and wettest years on recent record for the basin. D2, 274:2-17. This new reality led Fraser to make legal calls for water for his livestock to the Water Commissioner. These calls were denied because no water right was on file with the State of Montana for a stock water right in connection with Indian Creek on the Fraser property. Coincidentally, during this same time, the legislature provided an opportunity for the filing of Fraser's claim through the passage of House Bill 110.

History of Instream Stock Water Rights in Montana

The uncodified common law of appropriation, often referred to in Montana case law as the "settlers' customs," was summarized by this Court as early as 1897 in *Murray v. Tingley*, as follows: "A person acquired a right to use the water by digging a ditch, tapping a stream, and turning water into it, and applying the water so diverted to a beneficial use. This constituted a valid appropriation of water." *Murray*, 20 Mont. 260, 268, 50 P. 723, at 725 (1897). Consequently, the Montana Supreme Court reaffirmed therein that "[t]he essence of an appropriation [is] *a completed ditch, actually diverting water, and putting it to a beneficial use....*" *Murray*, 20 Mont. at 269, 50 P. at 725.

A review of the applicable law in the decades which followed further establishes that diversion, or a form thereof, such as impoundment or capture, was a longstanding,

foundational and requisite element for early water appropriations in Montana.³ Even after amendment in 1947, Montana’s statutory scheme still had a focus on diversion, requiring all notices of appropriation to contain the means of diversion, including the size of ditch. Section 89–810, R.C.M. (1947) (emphasis added). Section 89–801, R.C.M. (1947) as amended was in force and effect until 1973 when it was repealed.

As a result, the foregoing was the state of the law pertaining to water use rights when the state constitutional convention was held in 1972. “By the adoption of Article IX, Section 3 in its present form, the Constitutional Convention left it to the legislature to provide appropriation rights for beneficial uses not theretofore recognized under our law.” *Matter of Dearborn Drainage Area*, 234 Mont. 331, 342–43, 766 P.2d 228, 235, 1988 WL 110800 (1988), overruled by *In re Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396, 2002 WL 31109914

The legislature did so with the passage of the Water Use Act in 1973. To accomplish the goal of comprehensive adjudication, the legislature passed Senate Bill 76 in 1979, which expressly provides that such non-diversionary, instream claims were

³ See *Midkiff v. Kincheloe* (1953), 127 Mont. 324, 328, 263 P.2d 976, 978 (“[t]he rule is that he who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers as here, and where there was no compliance with the statute”); *Clausen v. Armington* (1949), 123 Mont. 1, 212 P.2d 440 (“a person may make a valid appropriation of water by actual diversion and use thereof without filing a notice of appropriation as defined in sections 7100 to 7102, R.C.M.1935”); *Vidal v. Kensler* (1935), 100 Mont. 592, 51 P.2d 235 (“a valid appropriation of water may be acquired even where there has been no compliance with the statute regulating appropriations by record, where the water is actually diverted from the stream and applied to a beneficial use; compliance is important only with regard to the doctrine of ‘relation back’ ”); *Maynard v. Watkins* (1918), 55 Mont. 54, 173 P. 551 (“[t]he essential elements of an appropriation were a completed ditch and the application of water through it to a beneficial use”).

exempted from the mandatory filing requirement of Title 85, Chapter 2. (“Every person ... asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1983. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources are exempt from this requirement; however, claims for such uses may be voluntarily filed.” Section 85–2–212, MCA, Enacted by Laws 1979, ch. 697, § 11.). According to some commentators, DNRC actively discouraged people from filing exempt claims, evidently daunted by the number of claims it needed to examine and concerned about a flood of small applications.⁴

Before this statute, the first true reference to in-stream stockwater rights in Montana case law arose out of a dispute about water for fish and wildlife . In the seminal case regarding FWP’s claims of non-diversionary interests in Bean Lake, this Court scoured Montana case law for any decision which would have recognized the same. When it could not find it, the Court held that “The fact that there are no Montana decisions establishing such an instream right merely reflects the fact that that issue was not litigated, not that such a right was beyond the pale of Montana prior appropriation doctrine.” *In re Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, ¶ 26, 311 Mont. 327, 338, 55 P.3d 396, 403, (2002). “Given our history, there is

⁴ See the testimony of Jay Bodner during the House Natural Resources Committee hearing for HB 110, January 23, 2017.

every reason to believe that had the issue arisen, Montana would have followed the lead of Nevada and held that no ditch, dam reservoir or other artificial means was necessary for watering cattle. *Id.* (emphasis added).

Not only was this decision paramount to the interests of Montana's fish, but also to Montana's stock growers. Fundamentally, it published a holding for the first time that in-stream flows for stock use could form the basis for a valid water right, under which legal calls for water could be made and protected. As the adjudication proceeded over the decades, concern arose that claimants who had declined to file their exempt water rights might eventually be disadvantaged by that choice. Although failure to file an exempt claim did not result in forfeiture of the right, it did result in a potentially negative consequence: an unfiled claim would be subordinated to all timely filed rights, groundwater certificates, and permits. In 2013, Senate Bill 355 was enacted to create a process for claimants to file exempt rights in the general adjudication. This was followed up by HB 110 in 2017, which imposed a final deadline in order to create a "date certain" by which all exempt claims would need to be filed to avoid losing their priority date. In its published instructions to the public on how to file these claims, DNRC including the following flow chart:

<p>SURFACE WATER</p> <p>4. Were livestock (cows, horses, pigs, goats, etc.) watered directly from a creek, coulee, draw, river, etc. (but not ditch, canal or reservoir) located on your property prior to July 1, 1973?</p> <p>a. If Yes, you may complete the <u>Exempt Stockwater Statement of Claim</u> form and submit to DNRC.</p> <p>i. NOTE: to file this form, there cannot be a diversion by any means except the animal's lips touching and drinking from the source. Dam, pit, pipeline, headgate, pump, etc. do not qualify as direct.</p> <p>b. If No. no further action is needed.</p>

The result was over 25,000 new and additional claims being added to the statewide adjudication.

Fraser's HB 110 Claim

Claim 41 C 30133316 was exempt from the water adjudication claim filing process pursuant to § 85-2-222, MCA and HB 110 was timely filed by Fraser on June 28, 2019. Claim 41C 30133316 is entitled to prima facie validity. § 85-2-227, MCA and Rule 19, W.R.Adj.R. Statement of Claim 41 C 30133316 claims a place of use for livestock watering off Indian Creek in SW1/4NE1/4 of Section 30, T 4S, R5W.

The general basis for Fraser's claim is that historical use of livestock drinking from Indian Creek began with the original settlers of his property. In support of his statement of claim, Fraser submitted a narrative account of his research including historical records, deeds, homestead patents, a Declaration of Homestead, newspaper clippings, and DNRC documents, among other information. Exhibit 8.

It is common knowledge that livestock owned by settlers of the early Montana territory in the mid-1800's drank from any stream water sources accessible to livestock. D2, 123:7-9. Thus, like the vast majority of livestock direct from source claims in Montana, Fraser's claimed priority date was based on the presence of settlers on his property at the time period in question. More specifically, prior to filing his HB 110 claim, he conducted extensive research into the backgrounds of the individuals who homesteaded his property. This research led him to determine that he is the successor in interest to William and Ellen Tiernan. FOF 7.

Through his research, Dr. Fraser learned that the Tiernans had arrived by wagon train from Denver to Bannack in 1863, unmarried at the time. As to his research, Claimant Fraser testified as follows:

“Plus, just to be sure, I did a lot of research into the background of these homesteaders. And it turned out they arrived in a wagon train from Denver to Bannack in 1863. They were not married to each other which made a lot of sense. 1863, they’re homesteaders. By 1864 they've staked out a place in the Ruby Valley. By 1865 they got really busy and produced a daughter that I believe was born on that homestead. D2, 234:8-17.

Fraser’s research was guided by a historian in Ennis to which he was referred by the Twin Bridges Historical Society. The historian, in turn, led him to a book in the Sheridan, Montana Public Library titled “They Shall Not Be Forgotten.” In that book, the historical research confirmed Mr. Fraser’s understanding that the Tiernans were in the Ruby Valley in the 1860s, with children, and William identified his occupation as a Farmer, making \$500. D2, 237:19-23. Fraser’s research confirmed that Ellen Tiernan liquidated some of her ranch livestock in 1887 following her husband’s death, including 81 horses and 44 horned cattle. Exhibit 8, pg. 23, D2, 245:20-25. Fraser’s research further uncovered that the Jenkins Ranch operated one of the largest sheep operations in Montana at the time, which included grazing the Fraser property in connection with the Tiernan ranch. D2, 296:2-8; 349:1-25; 350:1-5.

Fraser further sought out the help of a professional historian and water right expert through Ben Davis. Mr. Davis is a trained historian who previously worked for the Bozeman Regional Office of the Department of Natural Resources and Conservation

and while working for the DNRC, he was primarily involved with the House Bill 110 filing process. D3, 8:11-18. Part of his specialty as a historian is to review ancient or historical deeds and other land conveyance documents including land patents. D3, 15:8-15. Mr. Davis conducted additional research at the request of Dr. Fraser and identified the following relevant facts:

- a) That the General Land Office did not survey this section of Montana until 1870 and so no legal land description existed for the property in 1868, D3, 29:18-24.
- b) That inconsistencies in legal land descriptions prior to 1870 were common before the USGS implemented maps and naming conventions. D3, 28:20-25; 30:3-10.
- c) That homesteaders such as William Tiernan often filed historical deeds and titles to land or water rights with the county or territorial courthouse but may not have filed them with the United States government due to the rural nature of the territory at that time. D3, 33:3-25; 34:1-14.
- d) That in order for someone to start irrigating on a piece of property and digging a ditch, they would have had to have livestock on the property to help build the improvements, meaning that instream stock use would likely have occurred before any diversionary water right could be claimed. D3, 35:7-15.
- e) After reviewing thousands of HB 110 files, Mr. Davis testified that Claimant Fraser's HB 110 claim file is "one of the best, if not the best, House Bill 110 claim filings" he had ever seen. D3, 20:5-7.

Fraser also uncovered more recent evidence of livestock use on his property while researching his statement of claim. He found and ordered historical aerial photographs from the 1950's from the United States Department of Agriculture. Exhibits 45-48. These photos showcase livestock corrals built directly into the stream channel next to the Frasers home. Order, FOF 45. From the 1970s and 80's, Fraser's research led him to DNRC's field

examination letters which document employee-verified livestock use from Indian Creek on his property. More specifically, both in 1977 (Exhibit 8, pg. 14) and in 1986 (Exhibit 8, pg. 16), DNRC employees visited Fraser's predecessors in interest to verify their water use. In February of 1977, that field inspector documented his findings stating that the owner of the Fraser property at that time, Clarence Eudaily "presently waters his sheep and cows from ... from Indian Creek, which runs through his land. Exhibit 8, at pg. 14. The 1986 report similarly found that not only were livestock present on the property but that they "water only from Indian Creek." Exhibit 8, pg. 16, see also testimony D2, 243:18-20. There were no stock tanks or other visible means for livestock to be watered from a well at that time (*Id.*), which is the way Fraser found the property when he took title. D2, 245:3-9.

Fraser watered his livestock year-round and exclusively from the source of Indian Creek from 1999 until 2019, when a lack of water made that use no longer possible. D2, 182:2-7. He then made call for water, which was denied, and initiated these proceedings.

Chain of Title to the Fraser Property:

"The Tiernans acquired their property in Section 30 through two direct patents from the United States, and by a deed from the grantee of a third patent from the United States." FOF 7. The earliest document in Fraser's chain of title is a deed from George Orr and Andrew McCune (sic) to Ellen Tiernan for 320 acres of land dated December 10, 1868. This deed does not include a legal land description for the property, because the public land survey did not yet exist in Madison County. D3, 29:18-24. However, the deed does describe land in the immediate vicinity of the Fraser property (Section 30,

Township 4 South, Range 5 West, Madison County). On its face, that deed also states that the Grantors are conveying “all the improvements on and right of possession to 320 acres of land ... said ranch being formerly occupied by George Orr and Andrew McCune.” Exhibit 8, pg. 18. The very next year, on June 11, 1869, William Tiernan executed a “Declaration of Homestead” that also describes 320 acres of land in Madison County in the same vicinity. FOF 12. Three years later, On July 30, 1872, the United States issued a patent to Andrew McCenan (sic) for land which specifically described the property Fraser now owns. FOF 8, citing (Ex. 8, p. 18; Ex. B-1).

Together, these documents evidence that Andrew McCune and later William and Ellen Tiernan owned a 320-acre homestead in the north ½ of Section 30, Township 4 South, Range 5 West, in Madison County. 26. Following Mr. Tiernan’s death in 1887, Mrs. Ellen Tiernan conveyed the homestead to Maria Elizabeth Edelman in 1892. Ex. 8, p. 22. The deed did not reserve any water rights to the Tiernans as grantors. FOF 14.

The Water Court described a series of transactions that followed Ms. Edelman’s ownership in detail. FOF 22-32. The import of that series of transactions is at issue in the instant appeal, with the greatest focus by Appellant as to the specific language of one deed conveyed by Mary Scaritt in 1916. The Water Court found that the language was relevant to the transactions both before and after.

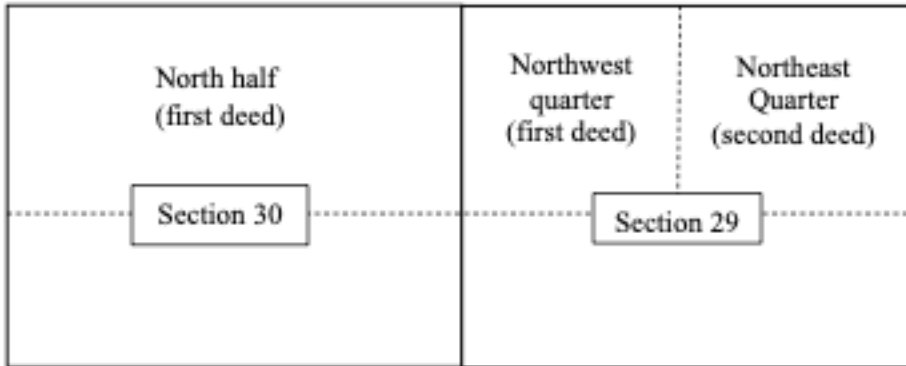
On April 18, 1907 Edelman conveyed to Homer McCullough the north half of Section 29 and the north half of Section 30, “together with all water ... in anywise appertaining , but more especially those rights existing or heretofore used from Indian Creek and Mill Creek and the Ruby River.” (Ex. B-7). Only Section 30 held water

decreed by the Court in *Hill*. FOF 22. On June 25, 1907, McCullough conveyed to the Ruby Valley Irrigated Farms Company the north half of Section 29 and the north half and the northwest quarter of the southeast quarter of Section 30. The conveyance included “all water, water rights, ditches, dams and ditch rights there unto belonging or in anywise appertaining, but more especially those rights existing or heretofore used from Indian Creek and Mill Creek and the Ruby River.” (Ex. B-8). Mary Scarritt then acquired the north half of Section 30 along with other property on February 13, 1916. (Ex. B-9). Then in March, Scarritt sold the land in three transactions. The Water Court described the Scarritt deeds as follows:

“On March 25, 1916, Scarritt executed three deeds and recorded them the next day in succession. In the first deed, Scarritt conveyed to Three Creeks Ranch Company (the “Ranch Company”) property that included the northwest quarter of Section 29, and all of the north half of Section 30... The granting clause includes a provision that says:

[T]ogether with all water and water rights, *ditches and ditch rights thereunto belonging or in any way appertaining*, the source of which water is the Ruby River and the ditches which convey the same but from no other source.

(Ex. B-10, at BL 037) (emphasis added). Scarritt’s second deed also conveyed land to the Ranch Company, but did not include any land in Section 30, or claimed by Fraser. It did include the northeast quarter of Section 29, which was part of the convenience from Edelman to McCullough, immediately east of the portion of Section 29 described in the first deed. The following diagram generally illustrates the orientation of the parcels referenced in Sections 29 and 30 for the first deed and the second deed:



“Unlike the first deed, the second deed to the Ranch Company specifically and expressly reserved to Scarritt the water rights appurtenant to the land described in the deed by stating: “Excepting and reserving to the grantor, however, all the water, water rights...” FOF 29, citing (Ex. D). “Scarritt’s third deed conveyed to the Three Creeks Water Company (the “Water Company”) water rights appurtenant to certain property (recorded April 15, 1916 at 1:10 P.M.). (Ex. E). The deed describes the land to which the water rights were appurtenant to at the time of the conveyance. The deed does not describe the water source or sources for water rights. The land described in the deed for purposes of identifying water rights conveyed to the Water Company does not include any of the land Scarritt described in the first deed to the Ranch Company. The water rights Scarritt conveyed to the Water Company include only the water rights Scarritt severed and reserved in the second deed to the Ranch Company.” FOF 31, citing (Ex. E). The legal description used in the third deed to identify the water rights conveyed to the Water Company does not include any of the land Edelman described in her Complaint in the Hill Decree. FOF 32.

Following these transactions the property was conveyed from one owner to another “together with all appurtenances” to Fraser.

SUMMARY OF ARGUMENT

Bradley Livestock seeks to use this case to undermine the very opportunity the legislature provided with HB 110. With HB 110, the legislature designed a process by which individuals could (up until 2019) claim never-before-documented water rights that would relate back to an original priority date based on evidence of historical beneficial use of that water prior to July 1, 1973. Although there may be a variety of reasons historical water right claims are undocumented (i.e. historical water adjudications were *in personam* not *in rem* proceedings), the reason in the case at hand is simple: there has always been sufficient water for livestock to drink from the stream on the Fraser property. To that end, livestock consume a tiny fraction of the water needed for irrigation and thus, even meager flows were sufficient historically for this beneficial use.

However, Claimant and Appellee Bill Fraser noticed this all change during his time on the property as Bradley began taking more and more water immediately upstream Fraser’s property. When the stream began to go dry and his livestock could no longer drink, Fraser finally felt the need to intervene.

For the entirety of these proceedings, Bradley argued that Fraser’s right was precluded by *res judicata* from asserting a claim with a priority date prior to the *Hill* decree, because it would create an unlawful exceedance of that decree and because there was never water available. However, at trial Fraser was able to dispel both claims,

proving that Bradley's own water right claims 41C 193770 and 41C 210696 from the Thompson Ditch and Dam are not only operating outside the authority of *Hill*, but more importantly are the direct physical cause of the water availability issue Fraser is experiencing.

This reality leaves Bradley with little choice but to attack ancient language in Fraser's chain of title. To that end, Bradley Livestock asks this Court to reverse the Water Court's opinion that Appellee William Fraser owns a livestock direct from source water right appurtenant to his property in Madison County.

Bradley's arguments are premised on two distinct fallacies: (a) that in 1916 Mary Scarritt silently intended to reserve and sever the right for livestock to drink from Indian Creek in the North half of Section 30 an instream stock water right on Indian Creek; and (b) that the evidence in the record prove stock water use on Fraser's property ceased after the 1916 transaction because it was not physically possible. The Water Court analyzed both of these issues directly and provided a firm foundation of both fact and law for this Court to affirm.

For all of the following reasons, Fraser respectfully request that the Court affirm the Water Court .

STANDARD OF REVIEW

Appellee agrees with and incorporates the standards of review provided by Appellant.

ARGUMENT

1. The Water Court properly concluded that Water Right Claim 41C 30133316 is appurtenant to Claimant William Fraser's property?

Bradley's primary argument on appeal is that "[r]egardless of the rights decreed to Fraser's predecessor Edelman, the 1916 deed from Scarritt to the Ranch Company conveying the Edelman tract in Section 30 and the NW¼ of Section 29 reserved all water rights from any source, other than the Ruby River from these lands." Br. at 23. In making this argument Bradley wrongly asserts that it was Fraser's burden of proof at trial to prove the appurtenance of water to Fraser's land. Br. at 25. Bradley alleges Fraser could not meet this burden because the plain language of Scarritt's 1916 deed specifically "excluded and reserved" the instream stock water right at issue. Br. at 26.

At the outset, it is important to rectify Bradley's error as to the burden of proof at trial. Bradley, not Fraser, had the burden to prove Fraser's water right was specifically severed from the property. Unambiguous statutory language and well-settled precedent instruct this conclusion.

Under the Water Use Act, Fraser's claim is "prima facie proof *of its content* until the issuance of a final decree." Section 85-2-227(1), MCA, (emphasis added). The prima facie standard applies to all water right claims filed in the statewide adjudication, including exempt claims filed authorized by HB 110. Section 85-2-222(3), MCA. "The

effect of § 85–2– 227(1), MCA is to place the burden of proof *on the objector* “to prove by a preponderance of the evidence that the elements of the original claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.” *Marks v. 71 Ranch, LP*, 2014 MT 250, ¶ 15, 376 Mont. 340, 343–44, 334 P.3d 373, 376, (2014) (emphasis added). This Court could not be clearer on this point, holding just recently again that “[u]nder Montana statutes, Water Court rules, and this Court's precedent, a properly filed water right claim serves as prima facie evidence of its contents; *unless an objector can overcome the presumption that the claim is valid, it stands as filed.*” *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, ¶ 17, 407 Mont. 278, 283, 502 P.3d 1080, 1083, (2022), citing Section 85-2-227, MCA; W. R. Adj. R. 19; *Weinheimer Ranch, Inc. v. Pospisil*, 2013 MT 87, ¶ 27, 369 Mont. 419, 299 P.3d 327.

As to whether Bradley met its burden, the Water Court correctly held that it did not. More specifically, the Water Court held that on its own the plain language of the deeds did not support Bradley’s theory of expressed reservation. COL 29. Thus, in order to analyze whether an implied reservation had been made, the Water Court correctly looked to extrinsic evidence.

Simply put, even if this Court finds that the intention of the parties to the first Scarritt deed to sever and reserve Indian Creek water rights cannot be ascertained from the written terms of the deed, when read together, *Kofoed*, *Castillo* and *Skelton* do not dictate the implied reservation theory Bradley asserts. None of the three cases involve

the question of whether the express grant of water rights from one source impliedly means whatever appurtenant water rights from other sources are not mentioned are reserved to the grantor.

In *Kofoed v. Bray*, 69 Mont. 78, 84, 220 P. 532 (1923), a fractional portion of a larger water right was conveyed with land. There, this Court held that “where the water right intended to be conveyed with the land is stated in express terms, the grantee takes that only which is expressly conveyed. He does not take any additional rights by implication.” *Id.* But the deed at issue, unlike in *Kofoed*, does not involve the split of a flow rate of a previously decreed water right.

In a more recent case, the Supreme Court interpreted *Kofoed* and *Castillo* as standing for the proposition that “[w]here a particular quantity of water is specified in a land sale deed, the presumption is that the seller retains any water it owns in excess of that quantity.” *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 50, 375 Mont. 327, 342, 328 P.3d 644, 655. In *Skelton*, the Court upheld the Water Court’s determination that a deed conveying a specific quantity of water reserves the remainder. These cases also all dealt with water rights “of the same class.” § 28-3-702, MCA codifies that that “all things that in law or usage are considered as incidental to a contract or as necessary to carry it into effect are implied therefrom unless some of them are expressly mentioned therein, in which case all other things *of the same class* are considered to be excluded. (emphasis added.) *Kofoed*, *Castillo* and *Skelton* each dealt

with irrigation class water rights, whereas here, the question before the court is where an express grant of irrigation and ditch rights impliedly reserves water for livestock.

Ultimately, the language in the first Scarritt Deed does not say anything about reserving water rights and thus, at best, is ambiguous. Therefore, looking to extrinsic evidence and based on that evidence as presented by the parties at trial, the Water Court correctly held that an implied reservation of rights was also not made by the deed. In doing so, the Water Court looked at the series of transactions as a whole, the purposes of the companies involved in those transactions, and the practical effect of water rights administration through various ditches. COL 32. Furthermore, the Water Court found it highly relevant that the second 1916 Scarritt deed (filed almost simultaneously) includes an unambiguous express reservation of water rights (not related to Fraser's property), which shines bright light on the reality that Scarritt knew exactly how to draft an accomplish a water rights severance and reservation. COL 34.

Bradley fully omits to rebut the propriety of this holding in its brief. More specifically, Bradley offers no argument as to why Scarritt would rely on the silence of an implied reservation to effectuate her master plan in the first deed, but utilize a clear express reservation in her second deed five minutes later. Instead, Bradley argues to this Court that the Water Court's analysis is in error because "*Lensing* holds that the intention of the parties must control" Br. at 28. This theme is woven throughout as Bradley further argues that the deed must be interpreted "in favor of Scarritt as grantor, who intended by

the language to reserve all water rights from all sources except the Ruby River, and later conveyed the water rights reserved to the Water Company.” Br. at 29.

There simply is no evidence of Scarritt’s sprawling scheme as Bradley theorizes. In contrast, Bradley’s conjecture is directly contradicted by the fact that Three Creeks Water Company now claims ownership to and in fact utilizes Edelman’s Indian Creek Water Rights which were decreed in *Hill*. In fact, based upon its production under subpoena and testimony at trial, Three Creeks believes it took title to the Edelman claim by way of the exact deed Bradley decries. At trial, when the President of Three Creeks Water Company was asked about under what deed the Company claimed ownership of Edleman’s companion irrigation rights, he indicated it was based on the exact deed Bradley argues excluded it. D1, 302:13-23. Thus, the Water Court found that the evidence presented at trial does not support a finding that Scarritt intended to reserve Indian Creek Water from her transaction to Land Company so she could later convey them to the Water Company. COL 35.

Scarritt’s second deed was a conveyance five minutes after the first, to the same grantee, but for different land in NE Quarter of Section 29. However, unlike the first deed, the second deed to the Ranch Company specifically and expressly reserved to Scarritt the water rights appurtenant to the land described in the deed by stating:

Excepting and reserving to the grantor, however, all the water, water rights, ditches and ditch rights, dams, reservoirs and reservoir sites in any wise thereunto belonging or appertaining to the real estate hereinbefore described.

FOF 29, citing (Ex. D). Because Edelman did not claim any water rights in Section 29 as a part of her intervention in the *Hill* decree, there was no portion of the Edelman claims that were appurtenant to Section 29 to be reserved in the first place. Thus, any water reserved in Scarritt's second deed was from another source.

Bradley again misconstrues deed language to reach its desired result. In the alternative to his implied reservation argument, he next asserts that a different deed - the 1907 Deed from Edelman to McCullough - is the catalyst by which water was severed and "changed the place of use". Br. at 32. However, the 1907 McCullough deed describes nothing of that nature which could support Bradley's narrative. In contrast, it merely conveys the land at issue "together with all water rights" "especially those rights existing or heretofore used from the Ruby River, Indian Creek and Mill Creek." Bradley provides no basis or citation for his proposition that Edelman intended to sever water rights from the decreed lands in Section 25 and convey them away to McCullough as a "changed place of use", thereby making that water now appurtenant to land in Section 29 for the first time. Bradley also offers no evidence from the record which supports that Edelman's stock water right ever actually changed the place of use on the ground. In fact, the record supports the opposite – continuing stock water use in the N ½, Section 30.

This extreme stretching results in a calculation so convoluted it is almost impossible to follow. Yet, follow the Water Court did. See COL 31. Because Scarritt's third deed conveys only the water rights severed and reserved by the express language in the second deed – which thereby did not include Fraser's property – Edelman's stock

water right remained appurtenant to those lands where it was first perfected at decreed (N1/2 Section 30).

2. The Water Court properly held that Water Right Claim 41C 30133316 is an active water right that arises from and is bound by the terms of the 1905 Hill Decree?

Bradley is correct that Fraser's water right is an "existing right" as defined in statute and in the Constitution. § 85-2-102(13), MCA. The Water Court conducted an evidentiary trial to adjudicate the elements of that claim pursuant to its mandate. *Little Big Warm Ranch, LLC v. Doll*, 2024 MT 3, ¶ 20, 541 P.3d 104, 108, (2024). Following that trial, the Water Court issued findings of fact and conclusions of law which address, analyze, and conclude the correct priority date for Fraser's claim as well as historical use of the water and seasonal scarcity. The Water Court ultimately concluded that water has historically been beneficially used by livestock watering out of Indian Creek on the Fraser property. COL 37.

Bradley now alleges that the Water Court committed reversible error for decreeing Fraser a water right that has not been delivered by past water commissioners on the stream. Br. at 37-39. As a result, Bradley argues that recognition of Fraser's HB 110 claim now, "effectively recognizes a 'new' stockwater right with an 1866 priority date and inserts the early priority of this "new" water right into the hierarchy of priority administration on Indian Creek established by *Hill*." Br. at 39.

Bradley bases this argument in large part on the fact that past water commissioner Yency and current water commissioner Beiroth testified that they have never delivered or

administered the water right at issue. Br. at 38. In doing so, Bradley overlooks the testimony of each who testified that they have *never* distributed any in-stream stock claim to anyone on Indian Creek, whether pursuant to *Hill* decree or otherwise. Water Commissioner Todd further testified that he would not deliver such a claim even if a call was made. See generally D1, 66, 116, 118, 166, and 267. Thus, of the dozens of stock water rights filed on Indian Creek, not a single one has ever been administered by a water commissioner. Therefore, according to Bradley, this reality invalidates this entire class of water rights and there are no lawful in-stream stock water rights on Indian Creek, including its own.

Bradley misconstrues the effect of a call in relation to the existence of a water right in Montana. Water rights exist by beneficial use, not by court decision or decree, although a court may later recognize and confirm such rights. “The basis, measure, and limit of all existing water rights in Montana is beneficial use.” *McDonald v. State*, 220 Mont. 519, 532, 722 P.2d 598, 606 (1986). The Water Court found that the evidentiary record supports historical beneficial use on the Fraser property, regardless of whether call had been made for the water historically.

Bradley’s argument that call is a pre-requisite to establishment of a water right is analogous to claiming that enforcement Fraser’s water right is barred by the doctrine of laches. In order to determine the “diligence” of Fraser’s predecessors in interest the Court must analyze the equity of holding past individuals to the standards of the law today. Both legal recognition of in-stream flow water rights and the claim filing period for HB 110 rights are a relatively new evolution within Montana’s long history of water

law. It is a safe assumption that for the vast majority of HB 110 claims there exists no record of their assertion. This may be for several reasons, each of which are unique to water resources and Montana's general stream adjudication.

First and foremost, because of the legal history of Montana water law and its original requirements for diversion, calling for water to be left in-stream as a beneficial use was simply not contemplated. As a result, application of the doctrine of laches to claims individuals did not know they could make is inapposite of the equity the doctrine seeks to protect. The testimony of the area's water commissioners is instructive of this reality. Del Beiroth testified as follows:

Q. Has anyone, any of the other instream stock water right owners, have they ever made call on their stock rights?

A. Not to me.

D1: 67:2-6. Kenneth Yencny echoed this fact and testified to the same issue as follows:

Q. So, were all of the water rights that you administered as your time as water commissioner diversionary water rights, meaning they took water out of the stream and the ditch?

A. Yes.

Q. You didn't administer any instream flow water rights; is that correct?

A. That's correct.

Q. Were you aware of anybody that claimed an instream water right for livestock during your time?

A. I do not. When I started on the creek, I was told there was no filed water rights -- stock water rights on Indian Creek.

D1, 118:1-14. Finally, Ty Todd (Wisconsin Creek Commissioner) testified that this is the same situation on Wisconsin Creek which he serves, stating:

Q. Okay. And so, if somebody made a call on Wisconsin Creek where you're the water commissioner for an instream stock water right, what would you do?

A. I've never had anyone call, so I—

Q. Okay.

A.--don't know exactly what I would do.

Q. Would you shut off an irrigation right?

A. No.

D1, 267:4-12. What this testimony highlights is that, at the very least, Bradley's argument extends to every other in stream stock water user on Indian Creek who have never made call to these commissioners

But, Bradley also attacks the Water Court's determination that Fraser's water right can, in fact, be beneficially used. Along this line, Bradley asserts that "the Water Court misapprehended the effect of the overwhelming evidence demonstrating a lack of available water after high water season." Br. at 40. In support, Bradley relies on the testimony of his local witnesses, but fails to account for the personal knowledge of others. To be sure, the parties presented conflicting evidence as to whether water has historically been available for use by livestock year-round.

Specific factual evidence is required to overcome the prima facie proof of content given to a properly filed statement of claim. Water Court Case No. 40G-2, *Memo. Op. at 13* (Mar. 15, 1997). This standard requires that the prima facie case be fully overcome by

the evidence and not simply placed in equilibrium. The trier of fact balances contradictory evidence against the prima facie claim (and any other evidence presented by the Claimant) to determine whether a preponderance exists. *Id.* The initial burden of producing evidence as to a particular fact rests with the party defeated if no evidence were given on either side. Section 26-1-401, MCA.

Here, the burden of proof was on Bradley and there is substantial evidence in the record to support the Water Court's findings. Bradley fails to offer any explanation as to how the Water Court misapprehended the effect of relevant evidence. In addition to the patents and deeds, the claim file includes a public record of the sale of livestock from Fraser's predecessor Ellen Tiernan from October 29, 1887. Exhibit 8, pg. 23. Later, Homer McCullough then conveyed to Ruby Valley Irrigated Farms, together with Indian Creek water rights. *Id.* Ruby Valley Irrigated Farms Company filed its Articles of Incorporation on June 13, 1907, specifically detailing its primary business operation was "to purchase, raise, sell and deal in cattle, sheep, horses and other livestock." Exhibit 102, pgs. 1-2. Expert witness Ben Davis further testified that he was able to cross-reference research at the Historical Society and locate a recorded livestock brand for the Company. D3, 122-123. The corporate entities that followed in the chain of title, each had a primary stated business purpose was verbatim the same as Ruby Valley Irrigated Farms Co., "to purchase, raise, sell and deal in cattle, sheep, horses and other livestock." Exhibit 103, D3, 48:7-14. When asked about whether these documents corroborated historical use of livestock on the property, Mr. Davis answered:

With without a doubt. I mean this shows consistent historical use which is extremely hard to find for livestock use on pieces of property throughout time. It's just -- it's one of those things where it's kind of a needle in a haystack. A lot of times we can make assumptions about land use, but very rarely do I run into pieces of evidence that specifically put livestock on the land like this does.

D3, 49:12-20.

This Court previously upheld the Water Court for issuing a similar determination in *Danreuther Ranches v. Farmers Coop. Canal Co.*, 2017 MT 241, ¶ 22, 389 Mont. 15, 21, 403 P.3d 332, 337. There the Court explained an analogous situation to the case at hand, stating “[t]his Court has recognized that proof of precise facts as to persons’ activities over one hundred years ago is often not possible, even where written records are kept. This Court continued its analysis, which is applicable here, in holding,

In this case, not only do we recognize the difficulty of proving precise facts and dates of activities that took place over 140 years ago, but also the express requirement noted above that the contents of a statement of claim are to be presumed true unless overcome by a preponderance of the evidence. Section 85-2-227(1), MCA; *Weinheimer Ranch*, ¶ 21.

Here the objectors rely primarily upon an absence of evidence showing exactly what Vieux did and when he did it. However, the evidence that Vieux was cropping a precise number of acres in 1880 and in 1887, coupled with the unassailable fact that crops will not grow in that area without irrigation, firmly support the Water Court's conclusion regarding Claim No. 41O 156804-00. The Water Court properly concluded that the Objectors failed to show by a preponderance of the evidence that the claim should be rejected.

Id. Here, just as in *Danreuther Ranches*, here Bradley attempts to argue that conflicting historical information re Bradley argues that water simply was never available for livestock on Fraser’s property “after high water.” Br. at 40. Yet, beyond corporate

records, Fraser introduced and the Water Court took into evidence the following: (a) 1950's historical aerial imagery showing permanent livestock infrastructure and use in-stream on the Fraser property (Exhibits 45-48); (b) the testimony of Dave Larson as a disinterested witness with personal knowledge of year-round historical stream conditions and beneficial use by livestock; (c) administrative records of the state of Montana DNRC which verify year-round use of water by livestock (Exhibit 8, pgs. 14 and 16); and (d) photographs and testimony provided by Claimant Fraser indicating use by livestock during the very times of year Bradley argues the use is impossible. (Exhibits 105-115) D2, 182:2-7.

Taken together, the record includes substantial and compelling evidence that livestock have historically and consistently used the source of Indian Creek for watering as it runs through Claimant Fraser's property. However, even assuming, *arguendo*, that there were portions of the year throughout history where water did not reach the Fraser property in useable quantities for animals to drink, such an interruption in beneficial use caused by natural conditions does not defeat Fraser's claim or undermine the Water Court's holding.

In *McDonald v. State*, the Montana Supreme Court reviewed the issue of constitutionally imposing new restrictive elements on statements of claim, which the Montana Water Court was directed to recognize and confirm by Article IX, Section 3(1) of the Montana Constitution. 220 Mont. 519, 530, 722 P.2d 598, 605 (1986). There, the Court explained "an appropriator, who in wet years, though entitled to 400 miners inches of water for 60 days, used only 200 inches for 30 days. There is no doubt that he would

have the right to return in dry years to the full extent of his appropriation provided he was putting the water to a beneficial use.” *Id.* As the Water Court later held, no artificial limitations, such as "consistently" or "generally", appear to apply. Water Court Case 76G-A8. "The measure of an appropriation of water is not made to depend upon the average amount of the water flowing in the stream, but upon the greatest amount; reference being had to the appropriator's needs for the water, and his facility for conducting it to the place of intended use." *Sayre v. Johnson*, 33 Mont. 15, 18-19, 81 P. 389, 390 (1905).

This notion, first set out in *Sayre*, was then qualified in the case *Bailey v. Titinger*: "The appropriator's need and facilities, if equal, measure the extent of his appropriation. (citing to *Sayre v. Johnson*, 33 Mont. 15, 81 P. 389.) If his needs exceed the capacity of his means of diversion, then the capacity of ditch, etc., measures the extent of his right. (citing to *McDonald v. Lannen*, 19 Mont. 78, 47 P. 648.) If the capacity of his ditch exceeds his needs, then his needs measure the limit of his appropriation." *Bailey v. Titinger*, 45 Mont. 154, 178, 122P. 575, 583 (1912). Similarly, the current version of the DNRC Claims Examination Rules directs that “[t]he period of use will be identified by the earliest month and day to the latest month and day that water has been used within a calendar year.” Rule 16(a).

The evidence before the Water Court demonstrated that water was available and was used by livestock on Indian Creek in the spring, summer, fall and winter, regardless of whether in certain years flows were better or worse in Indian Creek. As described in detail above, testimony and photographs establish this fact beyond the substantial

evidence threshold. It also is true that there is inconsistency with water availability in Indian Creek, like many streams in Montana. As described in *McDonald* and *Sayre*, inconsistency in flow, even if shown in the record, does not undercut the Water Court's decision or mean that it misapprehended the effect of the evidence. In contrast, the Water Court weighed the evidence and properly concluded historical use by livestock occurred year-round on the Fraser property. COL 26.

Finally, Bradley propounds that the Water Court erred when it concluded that the call protections described in the *Hill* decree (as applied to Fraser's predecessor Edelemann's claims) only protect those other water rights that arise out of the *Hill* decree. This argument brings to the forefront a significant source of disagreement in the evidence – whether the lack of available water for livestock at the Fraser property is the result of Bradley's own making. Said another way, because Bradley's two largest diversions from Indian Creek (diverted unlawfully year-round just above the Fraser property) do not arise out of the *Hill* decree, the Water Court held that those water rights *are* subject to call by Fraser at all times. COL 26.

As detailed above, Bradley claims and diverts two irrigation water rights with a source on Indian Creek just upstream from Fraser's property, both diverted from the Thompson Ditch and Dam. Exhibits 2 and 4, D2, 86:1-14; 102:15-18; 261-262. These water rights claim an 1866 and 1973 priority date respectively, with a cumulative flow rate of 22.5 cfs just over ½ mile above Fraser's property. Of particular relevance is that claim 41C 193770 is a "use right" with an active priority date of December 31, 1866 and a flow rate of 15 cfs. Yet, it was never described or decreed by the court in *Hill*. This

right therefore exceeds the *Hill* decree and is arguably prohibited from asserting a date prior to the decree by *res judicata*. While the Water Court denied Fraser the ability to make that argument as a part of this case (Doc. 9) the evidence in the record supports this Court affirming that the use and diversion of claim 41C 193770 and 41C 210696 are not protected by the Water Court's information remark which arises from *Hill*.

Photographs in the record show this site as a very large diversion structure, couple with plastic tarps and boards. Exhibits 38, 43, 94 and 97. Photographs and testimony in the record indicate that this structure used to be opened during the winter months allowing flow to pass by, at least at certain times of year. Exhibits 34-36. This practice allowed for wintertime flows in Indian Creek to Claimant Fraser's property that no longer exist. D2, 210-212. Thus, the testimonial and the documentary evidence in the record both support the Water Court's finding that the changes to Indian Creek, which have rendered it currently dry at Claimant Fraser's property are not properly entitled to the call protections awarded to those water rights that were claimed and adjudicated as a part of the *Hill* decree.

Ultimately, the Water Court balanced its application of the physical water limitations described by the Court in *Hill*, against the substantial evidence in the record that Bradley's year-round non-decreed diversion just above Fraser's property is *the* source of Fraser's water availability issue. D2, 261-262; 263:13-18. Bradley's last argument underscores the blatant hypocrisy of the position which it now asks this Court to adopt – that the 1905 *Hill* decree itself is preclusive evidence of water availability at the Fraser property for livestock, but not Bradley's irrigation right for 22.5 cfs directly

upstream.

The Water Court properly weighed the evidence against the preclusive *res judicata* effect of *Hill*'s findings - as to the water rights described therein - and found that the call limitations imposed against Edelmann's and now Fraser's claims only serve to protect those whose water rights that arise out of that decree. COL 26 and 27.

CONCLUSION

For the foregoing reasons, Claimant Fraser respectfully requests that this Court uphold and affirm the Water Court's Findings of Fact, Conclusions of Law, and Order.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellee's Response Brief is double-spaced; is printed with a proportionately spaced Times New Roman text typeface of 13 points, and has a word count of 9892, excluding the table of contents, table of authorities, certificate of compliance, and certificate of service.

Respectfully submitted this 20th day of February, 2024.

FERGUSON & COPPES, PLLC

A Natural Resource Law Firm

/s/ Graham J. Coppes .

CERTIFICATE OF SERVICE

I, Graham J. Coppes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-20-2024:

Michael J.L. Cusick (Attorney)
P.O. Box 1288
Bozeman MT 59771
Representing: Bradley Livestock, LC
Service Method: eService

Electronically signed by Taylor Haas on behalf of Graham J. Coppes
Dated: 02-20-2024