IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0712

PARROT DITCH CO.,

Claimant/Objector and Appellant,

NORMAN ASHCRAFT JR., COURTNAY O. DUCHIN, CHARLES M. MILLER, PATTY MILLER,

Objectors and Appellees,

RAFANELLI PARTNERS LLLP,

Notice of Intent to Appear.

RESPONSE BRIEF OF APPELLEES

On Appeal from the Montana Water Court, Case No,: 41G-0265-R-2019, The Honorable Stephen R. Brown, Associate Water Judge Presiding

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STATEMENT OF ISSUES

Whether the Water Court ("WC") correctly:

1) characterized the 1926 *Carney* district court decision as not instructive on PDC's water rights in 41G 195627-00 (Methodist Right) and 41G 195628-00 (Townsend Right)?

2) correctly reduced the flow for water right 41G 195631-00 (Nolte Right)?

3) correctly limited PDC's service area to locations where PDC's shares were appurtenant?

STATEMENT OF THE CASE

This is an appeal filed by Claimant/Objector and Appellant Parrot Ditch Co. ("PDC") from the Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Order entered November 13, 2023, by Associate Water Judge Stephen Brown presiding, after an evidentiary hearing held December 11-13, 2022, in Virgina City. The Order (Doc. 72, App. A to PDC's Opening Brief), granted PDC's request for a service area ("SA"), with certain limitations, and granted and denied both parties' requested modifications to rights 41G 195627-00, 41G 195628-00, 41G 195629-00, and 41G 195631-00, which divert water from the Jefferson River ("JR") for irrigation use. PDC uses the Parrot Ditch ("PD") to deliver diverted water to shareholders; AMD uses the same JR headgate to receive their water.

Objectors/Appellees Norman Ashcraft, Jr., Charles and Patty Miller, and Courtnay Duchin ("AMD") generally do not object to the Statement of the Case as recited by PDC, however, the extensive procedural and factual background of this case is recited below. PDC prevailed on several issues but appeals some of the WC's determinations as not sufficiently acceptable. Notably, however, PDC has not challenged on appeal any of the WC's specific factual findings as clearly erroneous. Absent such a challenge, these findings provide the factual record on which to assess the issues presented.

Indeed, this Court has long recognized that the water court judge (or water master) has the distinct advantage of hearing the witnesses testify, observing their demeanor on the stand, and assessing their credibility before making its factual determinations. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co*., 2014 MT 167, ¶¶ 26-27, 375 Mont. 327, 328 P.3d 644. Under such circumstances, this Cout will "substitute our judgment upon the weight of the evidence for his, even though upon the dead record we might be disposed to favor a different result. The burden is upon the appellant to show that the evidence preponderates against the finding." *Thomas v. Ball*, 66 Mont. 161, 165, 213 P. 597, 598 (1923).

PROCEDURAL BACKGROUND

The WC decreed each of the four subject claims in the February 15, 2018, Basin 41G Preliminary Decree, describing the elements of each claim on a decree

abstract. (Doc. 72). PDC self-objected to all four claims asking the WC to decree a SA place of use, to recognize stock water use as incidental to the claims' irrigation use, and to make several minor corrections to the claims. AMD objected to various elements of the four irrigation claims, the claim to a SA, and generally disputed the existing relationship between the PD and the All Nations Ditch ("AND") that AMD uses to convey their water rights. (Doc. 72).

The WC conducted an evidentiary hearing on December 11-13, 2022. (Doc. 68). The WC heard testimony from seven witnesses. AMD called Norman Ashcraft, Charles Miller, Jim Gilman, and David Amman. Gilman is a retired Department of Natural Resources and Conservation ("DNRC") bureau chief and testified as an expert. Amman is a retired DNRC hydrologist who measured the flows in the PD in his work for the DNRC. PDC called its corporate secretary John Kountz, its president Joe Schlemmer, and Deborah Stephenson who testified as an expert. (Docs. 63, 64, and 65).

Prior to the hearing, PDC moved for summary judgment. The senior water master previously assigned to the case granted the motion in part and denied it in part. (Doc. 44). The Court made a minor adjustment to flow rate, granted an implied stock claim, and denied PDC's request for a SA on the grounds that disputed issues of material fact remain. (Docs. 44, 72). The case was transferred by agreement of the parties to Judge Brown who held the evidentiary hearing.

STATEMENT OF FACTS

Parrot Ditch Background

Sometime in the 1890's the Parrot Silver and Copper Company ("PSCC") decided to build a smelter near Whitehall to process ore from the company's mine workings in Butte. (Doc. 72, FOF No. 1). Ore processing requires water so PSCC built a ditch to deliver water diverted from the JR to the Gaylord site, which is now called the PD. (FOF No. 2).

The head of the PD tapped an existing ditch, the AND several miles below its point of diversion on the JR near Silver Star. When PSCC built the PD, the AND already was in place and in use; it conveyed water from the JR to a number of appropriators, some of whom were predecessors to AMD. The AND and PD now split at a structure called the "Duffy Headgate," which raises the water level in the ditch, controlling the amount of water that flows into the AND. (FOF No. 3).

In the spring of 1895, PSCC started work on the ditch. And while the date that PSCC finished construction is not entirely clear, by October of 1897, PSCC ran water through the ditch to a power plant associated with the uncompleted smelter. The ditch immediately washed out and PSCC never finished the smelter or put to use any water diverted through the PD for mining purposes. (FOF No. 4).

To gain access to the pre-existing diversion, PSCC obtained easements and made agreements with property owners near the diversion. PSCC's acquisition

activity included filing a private condemnation lawsuit on April 22, 1895, to secure a right of way across land owned by Ludwig Dern in the area of the Duffy Headgate. PSCC's condemnation complaint against Dern alleged PSCC had "no available water facilities upon its lands" and "said canal is necessary to convey the water of the Jefferson River over said lands." (FOF No. 5). No condemnation action was filed against the predecessors of AMD.

AMD, through its witness David Amman, presented evidence of the ditch capacity near the point of diversion. Amman worked for the DNRC as a hydrologist for about 30 years and he measured water in the PD in the late 1990's and early 2000's. He personally installed a measuring site about 500 feet down ditch from the JR point of diversion. The highest flow Amman measured at this location was 236 cubic feet per second ("cfs") on July 19, 2001. Amman also observed 250 cfs at another location where the ditch was "bank full." PDC did not present any evidence of flow measurements or the ditch capacity at the point of diversion or any other location. (FOF Nos. 7-8).

Parrot Ditch Company and Predecessors

From September 1905 when PSCC stopped work on the Gaylord smelter project, the property and works passed through a series of intermediate owners until the PDC was formed on July 5, 1916. By 1916, work on the Gaylord smelter had long since stopped, and neither the Parrot Ranch Company ("PRC"), nor the

PDC were involved in any way with the appropriation of the water now claimed, or the initial development of the PD. (FOF Nos. 9-11).

The PDC was formed to acquire and operate the PD water system, which by then was owned by the PRC. PDC's Articles authorized it to issue 8,000 shares of stock, with "one share for each acre of land and major fraction thereof, to be irrigated under the Company's system." The Articles divide the stock in three classes, Class A shares are held by the company and are not appurtenant to property. Class B and C shares are appurtenant and are differentiated by the geographic location of the shareholder's irrigated land relative to the Doherty Overflow. (FOF Nos. 12-14). Class B shares are issued to and held by shareholders for irrigated land below the Doherty Overflow, and Class C shares are issued to and held by shareholders for land above the Overflow. (FOF No.15).

The issuance and allocation of PDC shares and associated distribution of water was the subject of prior district court litigation. On May 28, 1925, the president of PDC, Pat Carney and Joseph Kountz, Jr. sued PDC and numerous other parties in the case *Pat Carney, et al. v. Parrot Ditch Co*. (Case 2271, Mont. Fifth Jud. Dist., Feb. 8, 1926). The lawsuit sought court resolution of a dispute between PDC Class B and C shareholders under the provisions of section 7152, R.C.M. (1921) (now codified as § 85-5-401, MCA "determination of water rights between partners, tenants in common, and corporate stockholders").

On February 8, 1926, the court found that the PDC "appeared not and . . . were wholly in default." (App. P-068 PDC000393). On the merits of the case, it issued an order, or "ditch decree" resolving a dispute between the B and C shareholders and appointing a ditch walker to allocate water among the shareholders. The Court noted that PDC had issued 2,442.5 shares of Class B stock and 1,245 shares of C stock. (FOF Nos. 19-20). The predecessors of AMD have never been members of the PDC and were neither served nor named as parties to the suit.

The PDC increased its shares slowly over time from 2,497.5 shares of Class B stock and 1,760 shares of C stock in 1954 to 2,562.5 shares of Class B stock and 2,250 shares of C stock for a total of 4,812.5 Class B and C shares, and 3,178.5 shares of Class A in a June 7, 1972 report to the Montana Secretary of State. By 1974, PDC reported that a total of 4,812.5 Class B and C shares were issued and 3,187.5 shares of Class A stock were unissued. The total of the three classes as of that date was 8,000 shares. (FOF Nos. 21-23).

According to its rules, after PDC issues stock, it transfers from one owner to another as an appurtenance when property sells. The stock follows the sale of property as an appurtenance and at trial PDC was unable to identify any instance where a shareholder historically severed stock or used water at a location different than the original appurtenant land. (FOF No. 25).

Parrot Ditch Water Rights

PDC was formed in 1916 and acquired its four irrigation from others who either filed notices of appropriation or first placed the water to beneficial use. The claims are referred to by the names of their original appropriators: (a) the Methodist Ditch ("MD") appropriation; (b) the Townsend appropriation ; (c) the Elliot (or sometimes Elliot-Buhl) appropriation; and (d) the Nolte (or sometimes AND) appropriation. (FOF No. 28).

On March 26, 1982, PDC filed a single statement of claim for five existing water rights on a form provided for irrigation districts, although PDC is not an irrigation district. The PDC did not claim any portion of the Nolte right in 1982.

On October 17, 1989, the WC issued a temporary preliminary decree ("TPD") for Basin 41G and included abstracts of PDC's four PD claims in the TPD. The WC addressed objections to the claims in WC case no. 41G-167 and adopted the Master's Report on July 11, 1996. (FOF Nos. 30-32).

On January 13, 1997, after the close of the case, PDC moved to amend the basis of claim 41G 195631-00, increasing the flow rate from 50 cfs to 231.2 cfs, changing the priority date from 1885 to 1891 and claiming a portion of the flow rate claimed by AMD's predecessors.

On February 15, 2018, the WC issued the Basin 41G Preliminary Decree. All four of PDC's claims identified identical 6,710.78 acre place of use but

included different flow rates and priority dates based on the separate historical origin of each claim. (FOF No.33).

The Preliminary Decree abstracts for each of PDC's four claims contain an informational remark under the flow rate element to which PDC did not object. (FOF No. 34).

Place of Use Background and Objections

PDC objected to its own claims to request a SA place of use. PDC asked for 6,710.78 irrigated acres within a 7,072.53 acre SA even though the record showed incremental development.

According to the Water Resources Survey ("WRS"), published by the Montana State Engineer's Office, as of 1953, "there were 3,839 acres irrigated by the Parrot Ditch Company with 362 acres of potential irrigable land under the system." (FOF Nos. 35-36).

In 1982, PDC claimed 6,475 acres and identified a specific place of use. PDC filed numerous amendments in the years following. In 1989, PDC added 85 additional acres. In January of 1997, PDC asked the Court to increase the acres irrigated to 6,560.00 which was done by amendment. (FOF Nos. 37-41).

On February 29, 2000, PDC filed a Motion to Reopen case 41G-167, asking for an increase of the maximum number of acres irrigated from 6,560.00 acres to 6,690.78 acres. PDC supported the motion with a Notice of Objection and the

Affidavit of John Kountz. A Supplemental Master's Report filed June 12, 2001, recommended approval. On September 1, 2001, the Court adopted the recommendation. Both included all four claims, but neither mentioned a SA for the place of use, nor do they contain findings or a conclusion as to whether the amendment might adversely affect other water users. (FOF Nos. 42-43).

On May 3, 2004, PDC filed another Motion to Reopen case 41G-167 and requested an additional 20.00 acre increase to the maximum number of acres and place of use. The Water Master recommended the WC grant the motion in a Second Supplemental Master's Report issued July 1, 2013, which it did on November 6, 2013 and increased the place of use to 6,710.78 acres, but neither the Second Supplemental Master's Report nor the Order Adopting mention a SA for the place of use. The WC did not make findings or reach a conclusion as to whether the amendment might adversely affect other water users. (FOF No. 44).

On April 25, 2005, the PDC was granted a Change Authorization, 41G 30010342 to remove 406 acres of flood irrigation below the ditch and add 406 acres of sprinkler irrigation above the ditch. On July 9, 2001, the PDC was granted a Change Authorization, 41G 19562700, to add 603.4 new acres under three center pivots and remove some acres.[1]

[1] See the DNRC WRQS. https://gis.dnrc.mt.gov/apps/WRQS/?page=Page&views=Auth&WRGT_ID_SEQ=274403. (Last accessed May, 19, 2024.)

As part of its motion for summary judgment, PDC asked the WC to decree a SA with boundaries as depicted on an attached exhibit which amounted to 6,710.78 acres but contended the place of use was best described as a SA with the exterior boundaries encompassing lands susceptible to irrigation from the PD, which it maintained covered 7,072.53 acres. (FOF Nos. 46-47; Doc. 44.00).

PDC relied on its expert witness Deborah Stepheson who identified two clerical errors in the decree abstract legal land descriptions and testified that PDC seeks to retain 6,710.78 "annual acres." (FOF Nos. 48-49). For the boundary, PDC produced a map that she testified covers approximately 7,072 acres. PDC prepared the map and derived the acreage by highlighting what PDC believed was "irrigable." Stephenson then refined the highlighted area by removing land that did not appear to have been irrigated as of 1973 or was not owned by PDC shareholders and then used mapping software to calculate the adjusted irrigable land, which became its proposed SA. On cross exam, she conceded that within the proposed SA depicted on the aerial photographs as historically irrigated could have been irrigated with other water rights. PDC did not offer an exhibit that describes the legal descriptions for the full 7,072 acre proposed SA. (FOF Nos. 50-51).

AMD contended the place of use should be reduced to 4,812.5 acres, based upon the number of Class B and C shares. (FOF No. 52). AMD has not appealed from the declaration of a SA as delineated in the Preliminary Decree.

Background to AMD's Objections to Each Claim

a. Townsend appropriation 41G 195628-00.

On September 28, 1894, Taylor Townsend ("Townsend") filed a notice of appropriation claiming the right to appropriate 20,000 miner's inches (500 cfs) from the JR, pursuant to the "Act relative to Water Rights approved March 12th 1885 by Section 14 of said Act." ("1885 Act"). There was no evidence that Townsend himself did any work on the ditch or ever diverted any water and on July 27, 1895 Townsend sold the unperfected appropriation to PSCC which intended to use the water for mining purposes. (FOF No. 54-56).

PSCC purchased the Townsend appropriation because it needed water for its Gaylord smelter project which was never completed. Rather, this appropriation along with other PSCC assets passed through various holding companies to the PDC which was formed in 1916. (FOF Nos. 58-60).

The PDC's 1982 filing describes the Townsend claim as a decreed right to divert 500 cfs from the JR with a priority date of September 8, 1894. PDC based the "decreed" type of right on a finding of fact in the district court's 1926 *Carney* order describing the Townsend right. (FOF Nos. 61-62).

The claim appeared unchanged in the 2018 Preliminary Decree. AMD filed objections contending the claim should be decreed as a use right, not a decreed right and that the priority date and flow rate were incorrect.

AMD argued that Townsend did not comply with the requirements of the 1885 Act that included posting notice, filing the notice with the county clerk, commencing construction within 40 days of posting notice, and prosecuting work with reasonable diligence, and completing construction. AMD argued by failing to comply, the priority date should be the date water was actually first put to beneficial use, which its expert testified was as early as 1903, which PDC did not refute with any evidence of earlier use. With no use or measurement of flow, AMD argued the flow rate should be reduced from 500.00 cfs to 96.03 cfs based on the number of shares PDC transferred to acquire the claim. (FOF Nos. 63-65).

b. Methodist Ditch Claim 41G 195627-00.

PRC acquired its second water right through a series of deeds from private individuals, all dated August 1, 1919, which mention an appropriation made on or about January 24, 1880 and reference a "Jefferson Valley Ditch No. 1" or a "Methodist Ditch." (FOF No. 66). Although not specifically supported by any documentation, Kountz testified several grantors of the Methodist Ditch appropriation were shareholders in the Jefferson Valley Ditch Company ("JVDC"), incorporated January 16, 1883 by six persons whose articles state its purpose:

> [T]o dig, build and maintain a ditch conveying water from the east branch of the Jefferson river in section numbered thirty three, township one south of range five west in the County of Madison, Territory of Montana, to section twenty four in said township, and also to distribute and dispose of said water to stockholders.

PDC did not offer evidence as to how JVDC transferred its interest in the Methodist Ditch water rights to the individuals who later transferred the rights to PRC. (FOF Nos. 67-69). The 1925 *Carney* lawsuit alleged PDC owned the PD and the Townsend and Methodist Ditch appropriations. (FOF Nos. 70-72).

Other than these appropriations, the *Carney* court did not refer to any other water rights owned by PDC, nor did it address any rights of anyone else to use water from the JR. The documents supporting the claim indicate the "decreed" status of the claim is based on the court's reference to the Methodist appropriation in the *Carney* decision. (FOF Nos. 73-74).

The WC included claim 41G 195627-00 in both the TPD and PD with the same priority date (January 24, 1880) and flow rate (37.5 cfs) as claimed. AMD contended the evidence and testimony proved (a) the claim should be decreed as a use right with priority date of no earlier than December 31, 1883; and (b) the flow rate should be reduced to 12.0 cfs based on the number of shares PDC swapped to acquire the right. (FOF Nos. 75-77).

c. Elliot appropriation 41G 195629-00.

Sometime after the district court's 1926 *Carney* decision, PDC acquired interests in two other JR water rights, neither of which is mentioned in the decision. The first acquisition involved a water right based on an appropriation filed in the Madison County records on June 7, 1885 by Christopher Elliot.

Elliot's notice of appropriation described a 2,000 miner's inch (50.0 cfs) appropriation from the JR to irrigate 360 acres as of December 1881, claiming the Buhl Ditch. According to Kountz, over time, as the Buhl Ditch fell into disrepair, the owners of the Elliot appropriation arranged to have water delivered to them via the PD. (FOF Nos. 78-80).

PDC claimed to acquire ownership of the Elliott appropriation during the 1940's through a series of transactions with several individuals. These transactions involved PDC issuing stock to the Elliott appropriation owners in exchange for individual interests in the appropriation. PDC exchanged 115 shares prior to July 1, 1973, and 565 shares after July 1, 1973--including 490 shares to Harry Howard on May 3, 1983.

The Preliminary Decree describes claim 41G 195629-00 as a filed right to divert up to 50.00 cfs (2,000 miner's inches) with a priority date of December 31, 1881. The flow rate element is the same as what PDC included on the 1982 statement of claim and what the WC decreed in the 1989 TPD. AMD contended it overcame the prima facie status of the flow rate with evidence proving the flow rate should be reduced from 50.00 cfs to 2.88 cfs. AMD calculated this flow rate by reviewing the stock transfers related to the Elliot right with the assumption that each share of PDC stock equates to one miner's inch of flow which was supported by the PDC President at trial. (Trial Ex. A-023 at A000954; Tr. Trans. 407:12-18).

At trial, AMD showed PDC only swapped 115 shares of stock for interests in the Elliot appropriation prior to July 1, 1973, and therefore only acquired 115 miner's inches of the claim before the date of the Water Use Act. AMD's argument implied that the 565 shares traded for water after July 1, 1973, were more properly addressed through the Water Use Act change process and could not be part of PDC's existing right for claim 41G 195629-00. (FOF Nos. 83-85).

d. Nolte (AND) appropriation 41G 195631-00.

PDC's first claimed an interest in the Nolte appropriation (dated October 15, 1891) in 1997. The Nolte Appropriation was filed August 28, 1894 by Henry Nolte and six others and described a 10,000 miner's inch appropriation from the JR "made upon the 15th day of October A.D. 1891." The notice contained an allocation between the seven appropriators, both in units of miner's inches and by fractional ownership as follows: Henry Nolte 2,000 1/5; W.H.E. Dean 800 2/25; Alfred Weingart 1,600 4/25; James Hancock 800 2/25; John Stock 1,600 4/25; R. Norton 1,600 4/25; F.H. Riggins 1,600 4/25. The total miner's inches was 10,000. (FOF No. 87).

Ashcraft and Duchin are the successors in interest to the Henry Nolte ranch, which was the first ranch on the ditch of the original appropriators. Miller is a descendant of W.H.E. Dean. According to excerpts of the Madison County WRS contained in the claim file, as of 1954, PDC acquired "2800 miner's inches of

10,000 miner's inches appropriated by Henry Nolte, et al, from the Jefferson River." (FOF Nos. 88-89).

AMD's witness Jim Gilman testified that he analyzed PDC's share transfer records and documented PDC exchanged 350 shares of Class C stock prior to July 1, 1973, and 470 shares of Class C stock after July 1, 1973, for interests in the Nolte appropriation. Gilman identified the acquisitions as originating from the portions of the appropriation originally assigned to Weingart, Hancock, and Stock. Gilman attributes the post-1973 exchanges to the 1,600 miner's inches portion of the Nolte appropriation to Iron Rod Ranches, the successor to original appropriator Alfred Weingart. PDC's witness Kountz testified PDC acquired the interests of five of the seven original owners of the Nolte appropriation but did not know their names. The exhibits discussed during his testimony include the acquisition of the former Weingart, Hancock, and Stock interests, and numerous intervening owners. Significantly, PDC did not prove a chain of title to any five of the original appropriators. (FOF Nos. 90-92).

For example, PDC provided evidence of transfers of interests from parties Dawson and Tuttle but did not provide evidence or analysis as to how these parties were linked to Norton, Riggins, or Nolte, if at all. PDC also did not document acquisition of the fractional interests previously owned by Nolte, Dean, Norton, and Riggins. The evidence established that PDC acquired 4,000 miner's inches or

10/25 of the Nolte appropriation, consisting of the Weingart, Hancock, and Stock interests. 4,000 miner's inches is equivalent to 100 cfs. (FOF Nos. 92-93)

PDC included claim 41G 195631-00 on the irrigation district statement of claim form. The claim form describes it as a filed right to divert 50 cfs from the JR with a priority date of March 15, 1885. (Ex. A-014, at A000648). In the TPD, PDC objected to the decreed acres irrigated and period of use but did not object to any other elements. (FOF Nos. 94-95).

The June 13, 1996 Master's Report in case 41G-167 adopted by the Court recommended modifying the period of use and point of diversion legal description. The Master's Report did not recommend any modifications to the flow rate or priority date. (Ex. A014, at A000735). On January 13, 1997, PDC filed a letter with the WC that PDC characterized as a "request to re-open objection to claim No. 41G-W195631-00."

The letter asked the Court to make two modifications to the claim. First, it asked the Court to modify the priority date from March 12, 1885 to October 15, 1891. Second, it asked the Court to increase the flow rate from 50 cfs to 231.2 cfs (9,248 miner's inches).

PDC calculated the proposed flow rate by deducting from the original 10,000 miner's inches the flow rates claimed in three other claims owned by third parties, each of which had the same October 15, 1891 priority date based on the

same Nolte notice. The letter does not contain any indication PDC sent copies to owners of the water right claims referenced in the letter, or to anyone else. (FOF Nos. 96-98).

The April 1, 1997 Master's Report in case 41G-167 recommended modifying the priority date from March 12, 1885 to October 15, 1891, and increasing the flow rate from 50 cfs to 231.2 cfs. The Master's Report did not make findings specific as to how PDC acquired interests of any of the original Nolte appropriators. Despite the significant increase to the flow rate, the WC did not include the owners of any of the other water right claims referenced in the Report on the service list for either the Master's Report or the order adopting it. (FOF No. 99).

The Preliminary Decree describes claim 41G 195631-00 as a filed water right to divert up to 231.20 cfs with a priority date of October 15, 1891. Both the flow rate and the priority date are different than what was decreed in the TPD; rather they reflect the modifications that the Water Court approved in 1997. (FOF Nos. 100-101).

At trial, AMD contended that its prima facie burden was met, that the flow rate should be reduced, and that the priority date should be modified due to the method PDC used to modify the claim, its timing, and lack of notice. (FOF No. 103).

STANDARD OF REVIEW

PDC incorrectly characterizes the applicable standard of review. While this Court reviews legal conclusions made by the WC *de novo*, it affords discretion to findings of fact, reversing only when such findings are demonstrated to be clearly erroneous, which is "a deferential" standard of review. *Skelton Ranch, Inc.*, ¶¶ 26-27. While PDC takes issue with the WC's characterization of the 1926 *Carney* decision and evidence it presented regarding "a service area," it has not challenged any specific finding of the WC as clearly erroneous, let alone explained to this Court how.

A finding is clearly erroneous if not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if upon review of the entire evidence, the Court is left with the definite and firm conviction that a mistake occurred. *Skelton Ranch*, ¶ 27; *Little Big Warm Ranch, LLC v. Doll*, 2018 MT 300, ¶ 8, 393 Mont. 435, 431 P.3d 342. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting" and is not required to be "a preponderance of the evidence, but it must be more than a scintilla." *Skelton Ranch*, ¶ 27. This Court reviews the evidence in the light most favorable to the prevailing party and leaves to the lower court determinations regarding witness credibility. *Only A Mile, LLP v. State*, 2010 MT 99, ¶ 10, 356 Mont. 213, 233 P. 3d 320.

SUMMARY OF ARGUMENT

As is evident by the above factual background, AMD's predecessors' use of water predates PDC's use by at least 20-30 years. It is a "fundamental precept of western water law" that "first in time [is] first in right." *Kelly v. Teton Prairie LLC*, 2016 MT 179, ¶ 11, 384 Mont. 174, 376 P.3d 143. The bottom line is that PDC inherited a ditch with a use right of 1916 and has been shopping and sometimes taking water rights to improve its priority dates ever since--Nolte (1891), Methodist (1880), and Elliot (1883).

Contrary to PDC's characterization of the underlying decision, the WC did not improperly switch the burden of proof and correctly interpreted the effect of the 1926 *Carney* decision as only a ditch decree and not an actual water rights adjudication and therefore could not properly inform any subsequently decreed water right. Nor did the Court err in determining the flow rate of the Nolte right was limited by AMD's lack of notice. Last, PDC is not entitled to a broader SA and the WC's decision in this regard should be affirmed.

ARGUMENT

The WC is charged with adjudicating the historical elements of water rights through the objection and issue remark process While a properly filed statement of claim is prima facie proof of its content, § 85-2-227, MCA, the same may be contradicted and overcome by other evidence that proves an element of the prima

facie proof is incorrect. This is the standard of proof for every assertion that a claim is incorrect including claimants objecting to their own claims. Rule 19, W.R.Adj.R. Prima facie proof may be overcome by a preponderance of the evidence, or "more probable than not," which is a "relatively modest standard." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

I. THE WATER COURT'S DETERMINATION REGARDING THE METHODIST DITCH RIGHT SHOULD BE AFFIRMED.

PDC argues the WC improperly concluded AMD met its burden to prove that the Methodist and Townsend Rights are set forth in the Preliminary Decree did not accurately reflect pre-1973 water use because the WC incorrectly interpreted the *Carney* decision informed only the issue of the division of water between shareholders' rights and was not an adjudicative decree. Specifically, it challenges the WC's COL No. 23 which concluded the decision "did not involve competing rights of third parties putting at issue either priority date or the flow rate" of PDC's irrigation rights. PDC insists that the factual references in that case should control over other evidence in the record.

The procedural posture of the *Carney* decision cannot be reasonably disputed. The Complaint was brought pursuant to RCM § 7152 (1921) (now codified at § 85-5-401, MCA, determination of water rights between partners, tenants in common, and corporate stockholders) which allows the owners of a shared ditch to have their rights judicially determined when there is a dispute. The

President of the ditch company, Pat Carney sued the PDC which failed to appear and was defaulted. Clearly the suit was a mechanism to bring the shareholders under the jurisdiction of the Court to resolve the shareholder dispute. At the time of the *Carney* decision, a separate statute existed regarding the resolution of disputes between various appropriators of a common water source. This statute, RCM § 89-815 (1947) was repealed in 1973 when the Water Use Act was passed.

The critical distinction between the two historical statutes is that the former did not contemplate the adjudication of the water rights of third-parties who, if involved in the dispute, could have, and likely would have, disputed the priority dates and flow rates PDC claims were judicially decreed. While PDC disputes the WC's interpretation of the statute and the reach of the *Carney* decision itself, it cannot escape the fact that other water users of the ditch, including AMD's predecessors, were not parties to the litigation.

None of AMD's predecessors in interest were served or named in the lawsuit filed by president of the PDC against the PDC which failed to appear and was defaulted against. (For the Court's list of defendants who acknowledged service of summons and complaint as well as defendants not served and "not bound hereby" see App. C P-068 PDC000399). Nor can it be denied that common shareholders of PDC would have no reason to object, dispute, or challenge the overall rights of

PDC, making the case a simple resolution of an internecine dispute between Class B shareholders below and Class C shareholders above the Doherty Overflow.

This Court has called it a "fundamental principle of our jurisprudence that it is only against a party to the action that a judgment can be taken and that the judgment is not binding against a stranger to the action." *Pearson v. Virginia City Ranches Ass'n*, 2000 MT 12, ¶ 41, 298 Mont. 52, 993 P.2d 688 (citation omitted).

It is a "basic principle of western water law and the law of Montana" that a later appropriator of water is subservient to the rights of an earlier appropriator and is on constructive notice of the same. *Cate v. Hargrave*, 209 Mont. 265, 271, 680 P.2d 952, 955 (1984). All of the PDC rights were junior in fact to AMD's Nolte and Dean appropriations from the AND. PDC had only been in existence for eleven years and the *Carney* case makes no claim to primacy over the AND appropriators. Furthermore, it is axiomatic that any court decision does not control the water rights of appropriators who are not parties to the case.

And while the Water Act did not exist at the time of the *Carney* decision, this Court has determined that district court decisions are not controlling on a third-party's rights who were not named parties in the litigation. *Teton Coop. Reserv. Co. v. Farmers Coop. Canal Co.*, 2018 MT 66, ¶¶ 48-50, 391 Mont. 66, 414 P.3d 1249 (citing § 3-7-501, MCA) ("[t]he Water Court was free to determine based on

the evidence available whether Teton Reservoir's water right historically had been limited" and was not required to follow a contradictory district court decision).

The only water law case cited by PDC for the proposition that district decisions are presumed final and correct, *Missoula Light & Water Co. v. Hughes*, 106 Mont. 355, 77 P.2d 1041 (1938), actually assists AMD's position.

In *Missoula Light & Water*, this Court refused to void a 1953 district court decision which determined the water rights of the defendant's predecessor because the predecessor was a party to the case, even if allegedly did not participate at trial:

> Section 10561, Revised Codes, provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." This section of the statute has been interpreted to some extent in a number of opinions by this court, in a manner that would indicate that such rights as the defendants here claim were necessarily adjudicated in the decree in cause 1953.
> …
> By reason of the fact that the record shows that the defendants' predecessor appeared and answered in cause 1953, making claim to a certain water right, and the fact that the court in that case failed to make any finding or disposition of the claim of the defendants' predecessor there, we think their right to have such claim adjudicated was not barred by the decree in that action.

Missoula Light & Water, 106 Mont. at 373-375, 77 P.2d at 1050-1051.

The same cannot be said here. It is undisputed that AMD's predecessors were not parties to the *Carney* litigation. As such, the WC correctly concluded AMD met its burden:

> By proving [the *Carney* decision] was not a case decreeing water rights, AMD overcomes the prima facie statute of the priority date and the flow rate elements of the claim because PDC relies on Carney as the evidentiary basis for these elements. In other words, AMD overcomes the prima facie basis for the claim not because PDC claimed the wrong type of right, but rather because the "decreed" type of right it did claim does not provide an evidentiary basis for the January 24, 1880 priority date or the 37.5 cfs [ ] flow rate . . . [t]he evidence of the JVDC's January 16, 1883 date of incorporation is sufficient to overcome the prima facie status of the claim and requires PDC to prove the priority date is more senior than this date. Because there is no evidence of a notice of appropriation for the Methodist Ditch claim, PDC was required to provide proof of water being put to beneficial use prior to January 16, 1883.

(COL Nos. 24, 25).

Accordingly, contrary to PDC's position on appeal, the *Carney* decision is merely a ditch decree, and not a judicial adjudication of the MD rights entitled to preclusive effect against any and all water users. The WC correctly concluded that AMD's objections were established by a preponderance of the evidence, which is all that is required. *See* Rule 19, W.R.Adj.R.; *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558. There was no improper burden shifting. This Court should therefore affirm the WC's findings and conclusions regarding the MD right.

The same rationale regarding the *Carney* decision applies to the PDC's rationale and argument for reversing the WC's decision regarding the Townsend Right. As argued below, the WC's decision on the Townsend Right should also be affirmed.

II. THE WATER COURT'S DETERMINATION REGARDING THE TOWNSEND RIGHT SHOULD BE AFFIRMED.

PDC's claim to the Townsend Right is also contingent on the *Carney* decision, which as established above AMD succeeded in meeting its burden to overcome any purported decreed priority date or flow rate as declared in that decision. However, the WC reviewed the evidence in the record to conclude that the priority date for the Townsend Right is March 31, 1895, when construction of the ditch by PDC's predecessors was deemed to have commenced even though the mining purpose was never achieved and irrigation did not come for years later. (COL Nos. 38-39). It rejected AMD's argument that 1903 should be the priority date because that is date of any actual documented use and also declined to bifurcate the right. (COL Nos. 40-42).

Significantly, however, the WC did determine that AMD met the objector's burden it overcoming the prima facie statement of claim by PDC of the Townsend Right's flow rate with expert testimony of ditch capacity, which the WC found credible, and PDC offered no evidence of flow rate, save for reiterating its position regarding the *Carney* district court decision.

Accordingly, as PDC rights are limited to the historic capacity of the diversion, which the Court found to be 250 cfs, the WC's reduction of the flow rate from 500 to 250 cfs of the Townsend Right should be affirmed.

III. THE WATER COURT'S DETERMINATION REGARDING THE NOLTE RIGHT SHOULD BE AFFIRMED.

PDC objects to the WC's determination that AMD met its burden to contradict and overcome the flow rate of the Nolte right in the Preliminary Decree. The Court correctly made this determination based on the fact that neither AMD nor any water user in the basin received notice of PDC's January 1997 amendment of the use rate from 50 cfs to 231.2 cfs. PDC's position is that Senate Bill 108, created a heretofore unknown notice requirement in water adjudication is simply false. Since its creation by the Legislature, the WC has always had the jurisdiction, authority, and discretion to require notice to other water users of any amendments to water rights that have the potential to create adverse effect to other users.

The amendment to § 85-2-233(6)(a), MCA, which legislatively required newspaper notice of motions to amend, became effective in March of 1997. The import of this is that if the WC determined that an amendment created adverse effect, then standard of notice by publication (three weeks in two newspapers of general circulation) was required. In arguing a technicality—that the Water Master who approved the amendment—was not required to make PDC publish its amendment in two newspapers, PDC misses the proverbial forest for the trees. What was so outrageous about the unnoticed 1997 amendment—and what the WC recognized--is that the other owners of the water right appropriation into which PDC was claiming, the Nolte, were not given personal notice by the Court.

PDC's position is that any lack of notice to AMD of its amendment is inconsequential, even when the amendment took water that belonged to AMD. When PDC claimed all the remaining flow rate, it encompassed water taken from AMD by the DNRC standard reductions. This is water that PDC was unable to prove title to and was properly reduced from 232 cfs to 100 cfs.

PDC's argument must be rejected as absurd. Notice has always been an essential element to WC proceedings and is a decision squarely within the court's jurisdiction. Indeed, prior to 1997, both common practice and the adjudication rules required personal notice to be given to the water users who may have been affected by the change in source. *See Clark Fork River/Flathead River Basin*, 1993 Mont. Water LEXIS 12, *8, 1993 ML 24 (noting WC's order "in Case 40A-227 in which the Court allowed the amendment but required personal notice to be given to the water users who may have been affected by the change in source").

If general notice of claims is a fundamental aspect of a fair water rights adjudication, *Mont. Trout Unlimited v. Beaverhead Water Co*., 2011 MT 151, ¶ 21, 361 Mont. 77, 255 P.3d 179; *see also*, § 85-2-232, MCA; § 85-2-233(6)(a), MCA, then specific notice of claims against a senior water right holders' appropriation from the same source on the same diversion is essential to provide transparency and protection of property interests.

Notably, from 1982 until 1997 JR water users had notice that PDC's claimed right 41G 195631-00 was a 50 cfs right with a priority date of March 15, 1885. Then through an unnoticed 1997 amendment, it claimed 231.2 cfs of its neighbor's appropriation, and now argues that no notice was required and the claim as amended fifteen years after filing should be entitled to prima facie status.

To call what the PDC did in 1997 an amendment stretches the term to its limit. The Court cited the letter sent to the Court by John Kountz as evidence of the thinness of the claim. Koutz stated:

> I believe the right flow rate for claim No. 41G-W-195631-00 should be 231.2 cfs or 9248 miners inches, which is the 10,000 inch Henry Nolte appropriation minus water claim No. 41G-W-191350-00 C.D. Acres Partnership Mart and Eleda Pennie, claim No. 41G-W-035205-00 Charles & Patty Miller, claim No. 41G-W-031184-00 Russell & Edith Scruggs, which are claimed with the same priority date of 10/15/1891 -- according to the 41G Index of Claims.

Putting aside the notice question, at trial PDC could not prove up on its speculative claim to the Nolte Appropriation. Kountz could not identify the names of the alleged five of the seven original owners of the Nolte appropriation. (Tr. 275:17-19 (Kountz)). Neither Kountz nor PDC provided testimony or exhibits to establish a chain of title to any five of the original appropriators. (FOF No. 92; 275:15-281:19 (Kountz)). PDC's technical statutory notice argument is merely camouflage for its attempted grab of the full Nolte flow rate to which the WC found it was not entitled.

According to expert Gilman, if the Court allows this motion to amend to stand, then "my opinion in terms of working with water rights for forty-three years it's the most outrageous thing I've ever seen." [Tr. at 77:4-12].

Historically, the AND existed in 1891 and preceded the construction of the PD, which was constructed in 1894 or 1895, but was not used for irrigation until 1916. It is a "fundamental precept of western water law" that "first in time [is] first in right." *Kelly,* ¶ 11. PDC's position runs afoul of this fundamental principle. Indeed, it defies reason, equity, and logic for PDC to claim seniority over the AND of which AMD's predecessors' use preceded its own by a quarter of a century. Indeed, the WRS and the record indicates that there was likely a historical agreement between the parties which acknowledged such seniority, but allowed PDC's acquisition of the appurtenant properties, vis-à-vis it later asserted as a basis for its amendment. (Tr. at 193:5-198:2-8).

Yet, the WC granted PDC's motion without notice to AMD, which effectively amended the Townsend claim from a March 3, 1885, priority date for 50 cfs with an unknown basis for 231.2 cfs of the Henry Nolte, October 15, 1891 appropriation. Both the WC and Gilman found it problematic that PDC's amendment and motion used information from the Temporary Decree to assert a pre-1973 claim. In addition to the lack of notice, Gilman also faulted the "math" of how PDC arrived at 231.1 cfs.

PDC conveniently ignores the clearly inequitable result of its amendment and faults the WC only for an error of the "plain language" statutory construction rule in ignoring the language in the savings clause. "However, this is but a rule of construction and what is 'retroactive' so as to warrant application of the rule has been defined judicially by this and other courts." *C.f. State v. Coleman*, 185 Mont. 299, 317, 605 P.2d 1000, 1012 (1979).

Regardless of a statutory enactment, a party whose water rights are modified must be afforded due process. Mont. Const. Art. II, § 17; *Doll*, ¶ 11. Indeed, as this Court has stated:

> Water rights are property rights, and adjudication of property rights requires that a property owner be afforded due process. . . Due process mandates notice and the opportunity to be heard prior to modification of those rights . . . [which] must be reasonably calculated to inform parties of proceedings [that] may directly and adversely affect their legally protected interests.

Doll, ¶ 11 (internal citations omitted).

Based on its fundamental constitutional right of due process, it is evident that AMD and its predecessors were entitled to notice regardless of any statutory enactment. Indeed, rules which affect a party's substantial rights are properly retroactive, whereas rules which simply implement new procedure may be properly prospective only. *C.f. Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). The notice requirement here is both procedural and substantive regardless of any statutory savings clause.

Accordingly, the WC's decision regarding the Nolte Right must be affirmed. AMD was entitled to notice of PDC's 1997 amendment, and such omission satisfied its objector's burden.

IV. THE WATER COURT'S CORRECTLY LIMITED PDC'S SERVICE AREA.

While the Water Use Act does not specifically mention the concept of a SA to define a place of use, the Court may recognize a SA place of use when consistent with "the use of water that would be protected under the law as it existed prior to July 1, 1973." Art. IX, § 3(1), Mont. Const., *see also, Curry v. Pondera Cnty. Canal & Reservoir Co*., 2016 MT 77, 383 Mont. 93, 370 P.3d 440; § 85-2-102(13), MCA.

A service area is a common law doctrine that was announced in *Bailey v. Tintinger*, 45 Mont. 154, 171, 122 P. 575 (1912) and modernized in *Curry* to solve the issue with relation back of priority date when a company delivers water to third parties who are the beneficial users. (FOF No. 16). The other elements of a service area are based upon the circumstances and historical beneficial use. *Id*. The WC's appropriately examined the law specifically applicable to the project, the history of the project, the intent of the water right appropriators for the project, and the relationship between the Company and its shareholders. *See Curry v. Pondera Cty. Canal & Reservoir Co*., 2014 Mont. Water LEXIS 20, *33; *see also, Curry*, ¶ 41.

After reviewing the requisite elements, the WC correctly concluded that PDC had not shown the requisite historical proof of historical acreage shifting. (FOF No. 16).

In *Curry*, Pondera's bylaws contemplated the movement of water within the project's boundaries. *Curry*, ¶ 9. PDC's clearly do not. The Court found that the Doherty overflow is the dividing line between classes of shares. "Class B and Class C shares are appurtenant to property and are differentiated by the geographic location of the shareholder's irrigated land." (Ex. P-047,at PDC000194; Ex. P-068 at PDC000395). Class B shares are issued to and held by shareholders for irrigated land below the Doherty Overflow. Class C shares are issued to and held by shareholders for land above the Doherty Overflow. (FOF 14, 15).

The appurtenancy was confirmed in the Case 2271 where PDC's opening brief states that: "'B' class stock shall consist of and embrace all shares representing water rights appurtenant or attached to land lying below what is known as the Doherty over-flow. . . 'C' class stock shall consist of and embrace all shares representing water rights appurtenant or attached to land lying above said Doherty over-flow." (App. B P-067 PDC000385). PDC argued for appurtenancy of shares to land in 1925 consistent with its bylaws and the WC's finding.

On appeal, PDC now seeks to enlarge the scope of its SA designation into an entitlement to move acres around within the boundary of the project when the PDC presented no evidence to suggest that this had been the historical practice.

Here, an examination of the test is instructive because the history is backwards. Rather than a company operating under the auspices of the Carey Land Act, or even a company that filed on water rights, the PDC inherited water rights that were already perfected by Eliot and Townsend. PDC claimed no water rights as their own until 1982. Instead, the four water rights that PDC owns were appropriated by others--the Nolte by five irrigators to supply water to their farms; the Eliot by a single user; and the Townshend right for a smelter.

Secondly, PDC takes issue with the WC's determination that its SA should be limited to the lands to which its shares ultimately became appurtenant. "A service area is not entitlement to shift irrigated acreage from year to year." (FOF No. 16). And, as the Court pointed out, the PDC's own bylaws make the shares appurtenant to the land they are used on and there was no historical evidence of any movement of acres within the project, likely because of this Company prohibition. (FOF No. 15). The Articles also specify, and the *Carney* case confirms, that the B and C shares are limited to a specific geographic area and cannot be exchanged. (FOF No. 16).

It is also significant that PDC failed to act like a SA in the years preceding the adjudication particularly when it applied for DNRC change permits to move acres within its place of use. The Court can take judicial notice of these change applications pursuant to Rule 201, Mont.R.Evid., which were granted by the DNRC 41G 19522600 (2001) and 41G 30010342 (2004). *Supra.* The change applications were exhibits at trial submitted by AMD for the purpose of showing PDC's admission that one share in the Company was equal to one miner's inch of water at times of low water. *Supra.*

If PDC had historically moved acres around its place of use as its expert suggested, then it had no reason to approach the DNRC for authorization to do just this in 2001 and 2004. By applying to the DNRC for change authorizations, the PDC was admitting that it was not entitled to "move acres around" and required approval from the Department. PDC failed to produce any evidence of service area style actual acreage movement and the record shows the opposite. PDC's actions fail the test of historical beneficial use.

PDC also faults the WC's interpretation of Stephenson's testimony. PDC believes it is entitled to a SA which encompasses lands *susceptible* to irrigation from the Parrot Ditch, which historically covers 7,072.53 acres, however, PDC did not prove that these acres were irrigated with water diverted and delivered pursuant to PDC's claimed Parrot Ditch water rights. Stephenson conceded during the

hearing that some of this irrigated land could have been irrigated with private water rights. (FOF No. 50, COL No. 13).

As concluded by the WC, PDC's position that "irrigable" acreage automatically translates to its SA is not accurate:

> Even if 7,072.53 acres is "irrigable" from water delivered though the Parrot Ditch, the number of irrigable acres does not define the service area boundary. Place of use boundaries for a service area are measured by evidence of intent, not by what may be "irrigable." *In re Brady Irrigation, Co*., at *17 (denying place of use when evidence was "too ineffective to demonstrate intent to supply water for the disputed lands"); *Curry*, at ¶ 54 (limiting service area boundaries based on "issuance of shares"). PDC admitted it stopped issuing new shares in 1981 and offered no evidence it intended to continue to expand acres irrigated after that date. . .
>
> To prove shifting of acreage irrigated within a service area, the appropriator must offer separate proof as to how the system operated historically. As PDC's claims lack prima facie proof of shifting acreage, PDC bears the burden of this proof because the issue arises through PDC's self-objections. Although PDC proved the existence of a service area, it did not prove the existence of a service area boundary larger than 6,710.78 acres within which water delivered to its shareholders historically was moved around from year to year.

(COL Nos 14, 16) (emphasis added).

With respect to Amicus Three Fork's position, the cases it cites are inapposite. This Court has never held that intent alone can establish a SA and to the extent Three Forks characterizes otherwise, its position is in error. The case *In re E. Bench Irrigation Dist*., 2021 MT 319, ¶¶ 54-55, 406 Mont. 502, 501 P.3d 380, stands only for the proposition that the evidence in the record supported the

individual irrigators' intent by their actual "irrigating expanded acreage with Project water." No such evidence exists in this case.

Accordingly, both Amicus and PDC's position on appeal is without merit. This Court reviews the WC's "factual determination of the boundary [of a SA] for clear error." *Curry*, ¶ 49. PDC has not established such error. PDC did not offer any historical evidence to prove its shareholders ever historically moved the place of irrigation within the proposed 7,072.53 acres. Instead, the evidence offered at the hearing was consistent with PDC's Articles that specify water rights become appurtenant to PDC shareholder land as shares are issued.

The fact is that there is no one-size-fits-all designation for SA because the rights are based on the evidence presented about the pre-1973 historical beneficial use. In this case, there was simply no evidence that PDC had moved shares around within the place of use and in fact its Bylaws specifically prohibited the exchange of B and C shares making the shares appurtenant to the place of use. Adding in the PDC's own conduct in applying for two changed of use with the DNRC—the stated reason for obtaining a SA being the need to escape from these changes—shows that the PDC themselves did not think of themselves as a SA. Thus, evidence of PDC's intent defeats their position on appeal.

Finally, while AMD sought a reduction of PDC's place of use to 4,812.5 acres based on the number of shares of Class B and C stock issued prior to July 1,

1973, or at least 5,897.50, the number of Class B and C stock which existed in 1981, the WC determined "AMD was required to offer evidence of what PDC's shareholders irrigated under these rights, not the particular number of shares it issued" and determined to set the SA at 6,710.78, as provided in the Preliminary Decree. AMD determined not to appeal this acreage.

Accordingly, the WC's decision that PDC is not entitled to more acreage or to move acres around within its SA should be upheld.

CONCLUSION

The order of the Water Court is correct as a matter of both fact and law and should be affirmed by the Court.

Respectfully submitted this 20th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words (9,543), excluding certificate of service and certificate of compliance.

/s/ William Fanning
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CERTIFICATE OF SERVICE

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