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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 23-0472

DA 23-0472

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 158

CHARLES C. HILL, et al.

Plaintiff,

v.

FRED ELLINGHOUSE, et al.

Defendant.

BRADLEY LIVESTOCK, LC,

Objector and Appellant,

v.

WILLIAM FRASER,

Claimant and Appellee.

APPEAL FROM: Montana Water Court, Cause No. DCERT-0004-WC-2021
Honorable Stephen R. Brown, Associate Water Judge

COUNSEL OF RECORD:

For Appellant:

Michael J. L. Cusick, Cusick, Farve, Mattick & Michael, P.C, Bozeman, Montana

For Appellee:

Graham J. Coppes, Ferguson and Coppes, PLLC, Missoula, Montana

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Submitted on Briefs: May 8, 2024

Decided: July 30, 2024

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Bradley Livestock, LC (Bradley) appeals an adverse ruling from the Montana Water Court adjudicating water rights in Indian Creek in Madison County. Bradley argues the Water Court incorrectly interpreted a 1905 District Court decree when it determined that William Fraser (Fraser) has a senior stock use water right in Indian Creek.

¶2 We affirm.

¶3 We restate the issues on appeal as follows:

Issue One: Did the Water Court correctly determine that Fraser has a valid stock use right in Indian Creek?

Issue Two: Did the Water Court correctly interpret historical evidence supporting Fraser's claim?

FACTUAL AND PROCEDURAL BACKGROUND

¶4 This case involves a water rights dispute on Indian Creek in the Ruby Valley just west of Sheridan, Montana. Indian Creek, Mill Creek, and Wisconsin Creek are the three main tributaries flowing west from the Tobacco Root Mountains into the Ruby River, which flows northerly in Basin 41C.

¶5 The underlying litigation began in 2021 when Fraser called Water Commissioner Del Bieroth (Bieroth) to deliver Fraser's claimed stock use water right to his property in the southwest quarter of the northeast quarter of Section 30, Township 4 South, Range 5 West (Section 30). Bieroth refused to enforce Fraser's call because he had never administered the water right and was skeptical about the validity of Fraser's claim.

¶6 On August 26, 2021, Fraser filed a dissatisfied water user's complaint against Bieroth before the Fifth Judicial District Court, Madison County, seeking enforcement. Bradley objected and moved to dismiss Fraser's claim.

¶7 On November 9, 2021, the District Court certified Fraser's complaint to the Water Court to resolve the water distribution controversy, pursuant to § 85-2-406(2)(b), MCA.

¶8 On July 26, 2023, the Water Court issued its Findings of Fact, Conclusions of Law and Order (Order), decreeing Fraser's stock use claim as senior to Bradley's irrigation rights in Indian Creek.

¶9 On August 25, 2023, Bradley appealed.

¶10 Characteristic of many water rights disputes in the West, Bradley's appeal hinges on a complex chain of title and water rights that have been frustrated by inconstant water supply and periods of drought since the land was originally settled.

¶11 In the late 1800s, William Tiernan (Tiernan) settled and acquired ranchland in the Ruby Valley, including the property now owned by his successor-in-interest, Fraser. Tiernan purchased a one-third interest in "certain water rights from the Ruby River" in 1878, and the deed was recorded on January 27, 1881.

¶12 When Tiernan died in 1892, his family conveyed property comprising the north half of Section 30 to Maria Elizabeth Edelman (Edelman). The deed specifically referenced and conveyed the water rights in the Ruby River.

¶13 In 1905, the District Court held a trial to adjudicate a number of claims in Indian Creek. *Hill et al. v. Ellinghouse et al.*, No. DV-1903-741 (Mont. Fifth Judicial Dist. Aug. 30, 1905) (*Hill Decree*). As she was not a named party in the case, Edelman

intervened, asserting her own rights because her predecessors-in-interest had constructed a ditch and used a natural channel of Indian Creek as a water source as early as 1864. Edelman provided the following legal description for her land:

> The North half of Sec. 30, Township 4 South of Range 5 West; and the East half of the Northeast quarter of Section 25 in Township 4 South of Range 6 West, containing in all three hundred ninety-nine & 36/100 (399.36) acres of land.

Edelman intervened to "finally settle and determine all of the rights of all of the parties claiming an interest in and to the waters of said Indian Creek for irrigating and other useful and beneficial purposes."

¶14 The District Court decreed two rights to Edelman for the purposes of irrigation and "for other useful and beneficial purposes." One Edelman right was for "fifty inches of water as of date April 20, 1866," and the other was for "one hundred inches as of date June 1, 1896." The *Hill Decree* provided further limitations on Edelman's right:

> [W]hen the high, or flood, waters subside the waters of said Indian creek sink about two miles above the lands of the intervenor, and that after July fifteenth of each year no water if allowed to remain in said creek, after the waters needed by the prior appropriators is taken out, will reach the intervenor in any useful quantity, if any what-so-ever will reach her after that date. If, in any season, it be ascertained at any time that the amount of water properly apportioned to plaintiff and which she would be entitled to if it would reach her is so small in quantity as not to be beneficial to her, then the water is to be distributed to other appropriators who may make a beneficial use thereof.

Hill Decree, at 4.

¶15 According to a 1954 State of Montana Water Resources Survey (1954 WRS) for Madison County, Edelman also had two decreed rights in Mill Creek. The Mill Creek water rights were apparently conveyed to her property through the Thompson and/or

Duncan-Edelman Ditch, which run side-by-side and convey water north from the Ruby River and Mill Creek. The ditches both run generally parallel with the Ruby River and bisect Indian Creek in Section 29 roughly seven-tenths and nine-tenths of a mile upstream from Fraser's property, respectively.

¶16 On April 18, 1907, Edelman conveyed the north half of Section 30 and the northwest quarter of the southeast quarter of Section 30, to Homer and Alice McCullough (McCulloughs) "Together with all water, water rights, ditches, dams and ditch rights thereunto belonging or in anywise appertaining, but more especially those rights existing or heretofore used from the Ruby River, Indian Creek and Mill Creek." Notably, Edelman did not convey her property in Section 25 to the McCulloughs.

¶17 On June 25, 1907, the McCulloughs conveyed the north half of Section 30, and the northwest quarter of the southeast quarter of Section 30 to Ruby Valley Irrigated Farms Company (RVIF).[1] The conveyance included "all water, water rights, ditches, dams and ditch rights thereunto belonging or in anywise appertaining, but more especially those rights existing or heretofore used from Indian and Mill Creek and the Ruby River."

¶18 On January 23, 1915,[2] Mary Scarritt (Scarritt) and George Stearns (Stearns) acquired the RVIF property, described above, through public auction and sheriff's deed.

[1] Homer McCullough and nearby landowners formed RVIF, in part, to "purchase, raise, sell and deal in cattle, sheep, horses, and other livestock . . ." and to "construct and operate ditches, canals, dams . . . for irrigation power and other useful purposes, any waters, water rights and especially the water of Wisconsin, Indian and Mill Creeks, and the Ruby River, etc."

[2] The Water Court Order misstates the date of execution as February 13, 1916.

The deed conveyed "all water and water rights, ditches and ditch rights thereunto belonging or in any wise appertaining" to the property. Stearns died on May 23, 1915, and willed the property to Scarritt.

¶19 On April 15, 1916, Scarritt recorded three deeds conveying property to the newly formed Three Creeks Ranch Company (Ranch Company)[3] and Three Creeks Water Company (Water Company).[4]

¶20 Scarritt's first deed conveyed the northwest quarter of Section 29 and the north half and northwest quarter of the southeast quarter of Section 30 to the Ranch Company, including "all water and water rights, ditches and ditch rights thereunto belonging or in any wise appertaining, the *source of which water is the Ruby River and the ditches which convey the same but from no other source*." (Emphasis added.)

¶21 The second deed conveyed the northeast quarter of Section 29 to the Ranch Company, and reserved "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."

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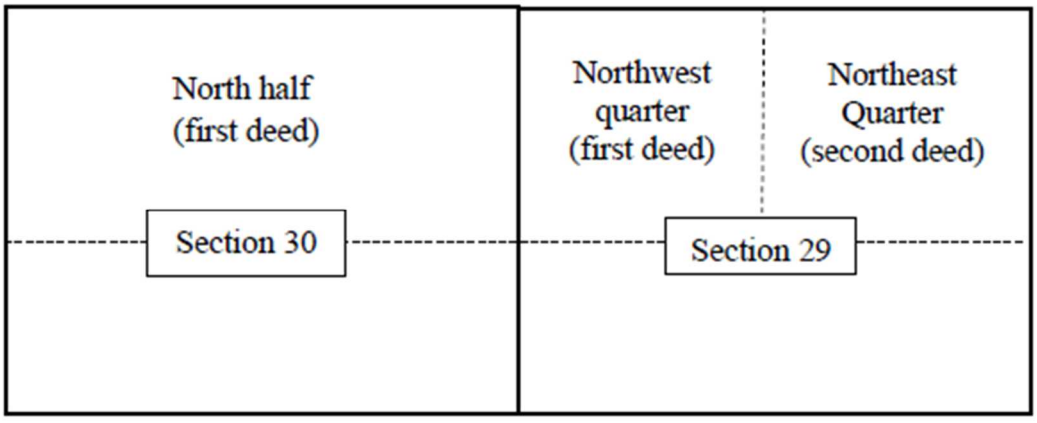
[3] Like RVIF, the Ranch Company was formed for "all kinds of commercial, industrial, manufacturing, mechanical, agricultural and mercantile" purposes, and intended to use "the waters of Wisconsin Creek, Indian and Mill Creeks and the Ruby River," for similar purposes.

[4] The sources of the Water Company's supply are "Wisconsin Creek, Indian Creek and Mill Creek . . . but more especially those waters and reservoirs heretofore owned by Ruby Valley Irrigated Farms Company, and later owned by Mary W. Scarritt."

¶22 The third deed conveyed the reserved rights to the Water Company. While the deed described the land the water rights were appurtenant to, it did not specify the source of the water rights.

¶23 The second and third deeds did not convey any of the property or water rights appertaining to property now owned by Fraser in Section 30.[5] Central to this appeal, Scarritt's first deed to the Ranch Company is the only conveyance that bears on Fraser's rights because the other two deeds did not convey interests in Section 30.

¶24 The following diagram generally illustrates the orientation of land transferred in Scarritt's conveyances to the Ranch and Water Companies:



¶25 On December 1, 1944, the Ranch Company's successor-in-interest, Three Creeks Realty Company (Realty Company), conveyed property including a triangle in the southwest quarter of the northeast quarter of Section 30 to Fraser's predecessors-in-

[5] The 1954 WRS indicates that the land conveyed in the second deed—the northeast quarter of Section 29—is the only relevant property that was irrigated with Water Company water at that time.

interest, Frank and Anna Hunter (Hunters).[6] The deed's granting clause conveyed "all and singular the tenements, hereditaments and appurtenances thereunto belonging including water rights."

¶26 Fraser purchased 34 acres in the southwest quarter of the northeast quarter of Section 30 on September 30, 1999, from the Hunters' successor-in-interest, Neil Todd. According to Fraser, he and his wife raised livestock on the property until roughly 2019, when Indian Creek's instream flows were no longer sufficient to sustain livestock. Fraser alleges that until that point, he was able to support livestock on Indian Creek year-round.[7]

¶27 Bradley, for his part, diverts two water rights just upstream from Fraser through Thompson Ditch. Thompson Ditch has a control structure at its confluence with Indian Creek that allows Bradley to divert water from Indian Creek. One of these two rights is a "use right," 41C 193770, which has a December 31, 1866 priority date.[8] Bradley's interest in this appeal stems from the Water Court's ruling that Fraser may call on 41C 193770

[6] This deed excepted a "triangle" east of Twin Bridges Road—now "Middle Road"—in the southwest quarter of the northeast quarter of Section 30, generally providing for the subdivision that created Fraser's property lines as they exist today.

[7] The Water Court's findings indicate that water typically flows through Indian Creek to Fraser's property during spring runoff. During most years, once the snowpack has melted, surface flows cease about two miles upstream from Fraser's property. The record nevertheless indicates that Indian Creek has supported livestock on Fraser's property at various points in time at least since the Molitor Ranch (the Hunters' successor) constructed a corral across Indian Creek in the 1950s, but more than likely since the property was settled by Tiernan.

[8] Historic "use rights" are rights that were used but not filed; they were typically used for instream stock watering or other individual beneficial uses. "Filed rights," by contrast, were filed with the county clerk and recorder and offered rights holders a degree of protection related to priority dates.

after July 15 because it was not decreed under the *Hill Decree*, and is thus outside the futile call limitation that the District Court placed on Edelman's rights in 1905.

¶28 On June 28, 2019, Fraser timely filed water right claim 41C 30133316 under House Bill (HB) 110 (codified at §§ 85-2-221-226, MCA), seeking the protection afforded a valid, filed senior water right.[9] Fraser claimed a stock use right in Indian Creek with a June 11, 1865 priority date.

¶29 In its July 26, 2023 Order, the Water Court determined that Fraser has a valid stock use right with an April 20, 1866 priority date.[10] *Hill v. Ellinghouse*, DCERT-0004-WC-2021, 2023 Mont. Water LEXIS 638, *20 (Mont. Water Ct. July 26, 2023). The Water Court reasoned that Fraser holds title to the right because the *Hill Decree*, at 4, provided Edelman a right for "other useful and beneficial purposes," which had historically been used for stock watering, and the chain of title leading to Fraser was unbroken. *Hill*, 2023 Mont. Water LEXIS at 20. Citing language limiting Edelman's rights in the *Hill Decree*, the Water Court further provided the following:

> [The condition] precludes using the right to make a call on junior appropriators after July 15, absent proof by the owner of the right that the call would result in a measure of water that could be put to beneficial use . . . The condition leaves in place the common law futile call doctrine prior to July 15 of each year, with the burden on junior appropriators to prove futility, but shifts the burden to the owner of the Edelman right after July 15 . . . This limitation exists only as to "other appropriators," meaning appropriators addressed in the *Hill Decree*.

[9] As discussed below, HB 110 provided a process by which "exempt rights" relating to beneficial uses existing prior to July 1, 1973, could be claimed and filed.

[10] The Water Court determined Fraser's claimed June 11, 1865 priority date was unsupported by the record, which is not at issue in this appeal.

Hill, 2023 Mont. Water LEXIS at *33.

¶30 Bradley's overarching argument in this appeal is that the Water Court incorrectly interpreted the *Hill Decree* and language conveying water rights in Scarritt's first deed to the Ranch Company. Specifically, Bradley argues the chain of title supporting Fraser's claim was broken because Scarritt's first deed only granted rights in the Ruby River, and reserved additional appertaining rights in Indian Creek, Mill Creek, and Wisconsin Creek. Further, Bradley contends the Water Court erred in decreeing a year-round right to Fraser and by providing the condition that the July 15 limitation only applies as it concerns appropriators whose rights were decreed in the *Hill Decree*.

STANDARD OF REVIEW

¶31 We review the Water Court's findings of fact for clear error and its conclusions of law de novo, for correctness. *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644. We also review a Water Court's interpretation of a decree de novo. *Granite Cnty. Bd. of Comm'rs v. McDonald*, 2016 MT 281, ¶ 19, 385 Mont. 262, 383 P.3d 740.

¶32 A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the Water Court misapprehended the effect of the evidence, or if a review of the record demonstrates that a mistake was made. *Skelton Ranch*, ¶ 27.

DISCUSSION

¶33 Montana water law is rooted in the Prior Appropriation Doctrine, which recognizes the priority of water rights according to the order in which they were first put to beneficial

use. *Mettler v. Ames Realty Co.*, 61 Mont. 152, 159-60, 201 P. 702, 703-4 (1921). Historically, a water right was perfected when a claimant intended to use water for a beneficial purpose, then provided some form of public notice and subsequently diverted and applied water to that end. *In re Missouri River Drainage Area*, 2002 MT 216, ¶ 10, 311 Mont. 327, 55 P.3d 396; *see also Toohey v. Campbell*, 24 Mont. 13, 17, 60 P. 396, 397 (1900); *Murray v. Tingley*, 20 Mont. 260, 269, 50 P. 723, 725 (1897) ("The essence of an appropriation [is] a completed ditch, actually diverting water, and putting it to a beneficial use.").

¶34 In 1973, the Legislature passed the Montana Water Use Act (MWUA), Title 85, Chapter 2, implementing the Montana Constitution's directive to "provide for the administration, control, and regulation of water rights," and to "establish a system of centralized records." Mont. Const. art. IX, § 3(4). While the MWUA recognized "existing rights" as rights "to the use of water that would be protected under the law as it existed prior to July 1, 1973," § 85-2-102(13), MCA, it required individuals claiming pre-1973 water rights to file them with the Department of Natural Resources and Conservation by April 30, 1982, "or be conclusively presumed abandoned." *In re Yellowstone River*, 253 Mont. 167, 171, 832 P.2d 1210, 1212 (1992) (citing § 85-2-226, MCA).

¶35 The presumption of abandonment had an outsized impact on pre-1973 use rights. Historically, use rights to groundwater and instream flows for individual use, stock use, and the public trust were ordinarily not filed because they did not involve surface water diversions via ditches. *See, e.g.*, *In re Missouri River Drainage Area*, ¶ 23. Use rights existed somewhere outside the express contours of the Prior Appropriation Doctrine and

consciousness of water users, so many valid claims were not filed before the 1982 deadline. When the deadline passed, the presumption of abandonment was hotly contested by water users claiming the law was an unconstitutional taking, among other alleged defects. The Water Court initiated an action sua sponte to address those issues.

¶36 In 1992, we affirmed the Water Court's ruling that the presumption of abandonment was constitutional as applied to late-claim pre-1973 rights, and that the Legislature may "mandate that rights be terminated if their holders do not take the affirmative actions required by the legislature." *In re Yellowstone River*, 253 Mont. at 179, 832 P.2d at 1217.

¶37 The 1993 Legislature then recognized the impact that the presumption of abandonment had on use right-holders with valid claims, but who did not file or filed late because it was unclear whether the law provided for it. Sections 85-2-221 and -226, MCA, were thus amended to provide an extended filing period for "existing rights" on or before July 1, 1996. 1993 Mont. Laws ch. 629. The amendments failed to specify, however, whether use rights constituted "existing rights" under the 1993 amendments. Again, many valid use right-holders failed to file their claims as a result of the lack of clarity.

¶38 The 2017 Legislature passed HB 110, 2017 Mont. Laws ch. 338 (codified at §§ 85-2-221-234, MCA), extending the filing period again to June 30, 2019. HB 110 clarified that late claims could be filed for "exempt rights," meaning "those claims for existing rights for livestock and individual uses as opposed to municipal domestic uses based upon instream flow or ground water sources."

¶39 Fraser's stock use claim illustrates why the Legislature provided filing extensions for late claims presumed abandoned under § 85-2-226, MCA. Fraser used Indian Creek

for stockwater, and physical evidence on the property indicated that his predecessors had used the property for similar purposes prior to 1973. Like many stock use claims across Montana, Fraser's claim was never filed. Nor was the right expressly mentioned in the *Hill Decree*, even though it was circumscribed by the broad language describing Edelman's right: "for other useful and beneficial purposes." The validity and priority date of Fraser's claim have understandably caused friction with water users who were previously unaware of the water right, hence Bradley's objection to Fraser's claim.

¶40 The validity of a late-filed, exempt stock use right is a case of first impression for us, although we have opined on the propriety of stock use claims generally. *In re Missouri River Drainage Area*, ¶ 26 ("Given our history, there is 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.").[11] Here, the Water Court correctly interpreted Fraser's chain of title when it ruled that he has a valid stock use claim pursuant to the MWUA and the *Hill Decree*.

¶41 *Issue One: Did the Water Court correctly determine that Fraser has a valid stock use right in Indian Creek?*

¶42 When he filed with evidence supporting his claim, Fraser's claim was prima facie proof that it was valid, and objectors bore the burden of proof to overcome its validity. "A

[11] The Water Court has concluded on several occasions that "for other useful and beneficial purposes" is broad enough to include stock use. *See, e.g.*, *In re Granger Ranches LP*, No. 41F-6024-A-2021, 2022 Mont. Water LEXIS 699 (Mont. Water Ct. Aug. 9, 2022); *In re Tucker*, 2019 Mont. Water LEXIS 59 (Mont. Water Ct. Oct. 22, 2019); *In re Red Dog Ranch LLC*, 2020 Mont. Water LEXIS 682 (Mont. Water Ct. Nov. 30, 2020).

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.

¶43 Bradley objected, arguing before the Water Court that Scarritt's first deed to the Ranch Company only granted rights in the Ruby River and "from no other source," and thus impliedly reserved all other water rights appertaining to the Edelman property. Bradley contended that Scarritt then granted the remaining rights to the Water Company in the third deed, which he argued were appurtenant to the northeast quarter of Section 29 as a result of the Edelman-McCullough conveyance. Bradley's overarching argument was that the reservation in Scarritt's first deed so clearly articulates the rights at issue that it would be error to look to extrinsic evidence of Scarritt's intent.

¶44 The Water Court disagreed, ruling that that the reservation in Scarritt's first deed to the Ranch Company—"from no other source"—specifically regarded ditches and ditch rights and was otherwise silent as to Indian Creek water rights.[12] Acknowledging that the language may be open to both interpretations, the Water Court looked to extrinsic evidence to evaluate the chain of title to Fraser's property. The Water Court concluded that Bradley offered no evidence supporting his theory that the Edelman-McCullogh conveyance severed her water rights from Sections 25 and changed the place of use to Sections 29 and

[12] For the reader's benefit, we again quote the following language in the first deed: "all water and water rights, ditches and ditch rights thereunto belonging or in anywise appertaining, the source of which water is the Ruby River and the ditches which convey the same but from no other source."

30. The Water Court next examined the context of Scarritt's conveyances and determined the practical outcome under Fraser's interpretation of the decrees was the most logical, particularly because Edelman's water rights in Sections 25 and 30 never became appurtenant to Section 29.

¶45 On appeal, Bradley asserts essentially the same arguments he made below. We find nothing in the record to suggest that the Water Court erred. *Skelton Ranch*, ¶ 27. We address each facet of the Water court's ruling on this issue in turn.

¶46 The Water Court properly considered extrinsic evidence because Scarritt's first deed was ambiguous. "When a contract is ambiguous, a court may consider extrinsic evidence of the parties' intent []. An ambiguity exists when the wording of the contract is reasonably subject to two different interpretations." *Little Big Warm Ranch, LLC v. Doll*, 2020 MT 198, ¶ 30, 400 Mont. 536, 469 P.3d 689 (citation omitted). The deed is subject to two different meanings: either (1) Bradley's interpretation that the deed only granted water rights and ditch rights from the Ruby River, or (2) Fraser's position that the deed granted *all* water rights, but reserved ditch rights other than those from the Ruby River. The Water Court did not err in determining that the deed was ambiguous.

¶47 Bradley argues that caselaw involving implied reservations mandates a finding that Scarritt's intent is clear from the language of the deed alone and that the Water Court erred as a matter of law by looking outside its four corners. Indeed, an express grant of water rights *may* mean that rights not mentioned are impliedly reserved. *Skelton Ranch*, ¶ 50 (citing *Castillo v. Kunneman*, 197 Mont. 190, 197, 642 P.2d 1019, 1024 (1982); *Kofoed v. Bray*, 69 Mont. 78, 84, 220 P. 532, 534 (1923)). As the Water Court opined, however, we

have never held that it *must* be so. Not only did *Skelton*, *Castillo*, and *Kofoed* deal with distinctly different sets of facts,[13] we looked beyond the deed in each of those cases to determine the grantor's intent. We hold that it was, and is, proper to do so here, too.

¶48 Nor do *Skelton, Castillo,* or *Kofoed* help to illuminate Scarritt's intent. Bradley asserts that Scarritt's alleged express grant of Ruby River water rights means that Scarritt intended to convey the other Edelman water rights to the Water Company through her third deed. Bradley's argument is circular, given it presumes that Scarritt only conveyed rights in the Ruby River when that very question is the crux of our inquiry. If we instead presume, for example, that Scarritt conveyed all rights *less* Mill Creek and Indian Creek ditch rights, as the Water Court concluded, then there is no question about an implied reservation at all, and *Skelton*, *Castillo*, and *Kofoed* are not instructive. Scarritt expressly reserved all water rights in her second deed to the Ranch Company, indicating that she knew how to reserve water rights and would have done the same in the first deed had she intended to. That fact is sufficient to expand our inquiry beyond the plain language of the deed. As we did in each of the latter cases, we thus turn to the context surrounding Edelman's and Scarritt's conveyances.

¶49 The Water Court concluded that there is no basis in the record for Bradley's assertion that the water rights decreed to Edelman in the *Hill Decree* ever became

[13] The Water Court thoughtfully distinguished these cases below. *Hill v. Ellinghouse*, Order on Pretrial Motions, DCERT-0004-WC-2021, 2022 Mont. Water LEXIS 544, *9-14 (Mont. Waer Ct. July 17, 2022). We find no need to do so here because they are not helpful in resolving ambiguity in Scarritt's deed.

appurtenant to Section 29. Bradley claimed that Edelman's decreed rights were severed from Section 25 when she conveyed the north half of Section 30 to the McCulloughs *without* Section 25, but including "all water, water rights, ditches, dams and ditch rights thereunto belonging or in anywise appertaining, but more especially those rights existing or heretofore used from Indian Creek and Mill Creek and the Ruby River." The Water Court disposed Bradley's theory because "[t]he evidentiary record does not contain any instrument by which Edelman or her successors severed the water rights decreed as appurtenant to her property and conveyed them to [Section 29]." We agree. There is no evidence indicating that Edelman or any of her successors ever used the decreed water rights from Sections 25 and 30 in Section 29. Nor did the Water Company or its predecessors ever file a stock use right reflecting the purported change in use, even though the Water Company did file the irrigation rights it received under the third deed.

¶50 Bradley's argument on this point unconvincingly focuses on the fact that "a change in the place of use and appurtenance of water rights was allowed and commonplace under the law existing at the time." (Citing § 89-803 R.C.M. (1947); *Marks v. 71 Ranch, LP*, 2014 MT 250, ¶ 18, 376 Mont. 340, 334 P.3d 373.) Whether or not Edelman *could* change the place of use is immaterial—the Water Court correctly determined that there was insufficient evidence to determine that she did. The only evidence regarding Edelman's and McCullough's intent is in the *Hill Decree* and the deed itself, which Bradley concedes. Edelman did not claim rights to Indian Creek in Section 29 in her complaint before the District Court, even though she intended it to "finally settle and determine all of the rights of all of the parties claiming an interest in and to the waters of said Indian Creek for

irrigating and other useful and beneficial purposes." In so doing, the District Court did not mention Section 29. Edelman transferred the north half of Section 30 to McCullough "together with all water, water rights . . . but more especially those rights existing or heretofore used from the Ruby River, Indian Creek, and Mill Creek." The water rights from the *Hill Decree*, which included rights in the Ruby River, Indian Creek, and Mill Creek, remained appurtenant to Section 30, and Bradley failed to meet his burden showing otherwise.

¶51 Finally, the Water Court's interpretation of the Scarritt conveyance is consistent with the Water Company's Articles of Incorporation (Articles) and operations. The Articles provide that the Water Company uses water from "Wisconsin Creek, Indian Creek and Mill Creek . . . but more especially those waters and reservoirs heretofore owned by Ruby Valley Irrigated Farms Company, and later owned by Mary W. Scarritt." The Articles do not indicate that the Water Company ever intended to use Ruby River water. Scarritt thus conveyed the Ruby River ditch rights to the Ranch Company in the first deed and reserved all other ditch rights, which she subsequently granted to the Water Company in the third deed. Those rights would have included Edelman's rights in Mill Creek, which were clearly within the Water Company's stated scope of operations, thus it would have been in the Water Company's interests to receive them. Moreover, as the Water Court noted, the Water Company probably would not have been interested in acquiring a water

right with the low-water condition that was imposed on Edelman's rights in Sections 25 and 30.[14]

¶52 Based on the record before us, we are not convinced that a mistake was made. *Skelton Ranch*, ¶ 27. Edelman's stock use right stems to Fraser along an unbroken chain of title.

¶53 *Issue Two: Did the Water Court correctly interpret historical evidence supporting Fraser's claim?*

¶54 Regarding the scope of Fraser's right, Bradley argues that the period of use should not be year-round. He further contends that the futile call limitation should apply to *all* junior water users, not just those who were decreed in the *Hill Decree*.

¶55 The *Hill Decree* limited Edelman's water rights in Indian Creek as follows:

> [W]hen the high, or flood, waters subside the waters of said Indian creek sink about two miles above the lands of the intervenor, and that after July fifteenth of each year no water if allowed to remain in said creek, after the waters needed by the prior appropriators is taken out, will reach the intervenor in any useful quantity, if any what-so-ever will reach her after that date. If, in any season, it be ascertained at any time that the amount of water properly apportioned to plaintiff and which she would be entitled to if it would reach her is so small in quantity as not to be beneficial to her, then the water is to be distributed to other appropriators who may make a beneficial use thereof.

Hill Decree, at 4.

Accordingly, the Water Court interpreted the *Hill Decree* in full context and provided:

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[14] Bradley refutes the Water Court's conclusion, averring that the Water Company would have wanted to secure these rights so that it did not have to send water any further downstream than Thompson Ditch. While that would be logical, it is equally plausible that Edelman simply did not want to convey them so that they would remain appurtenant to Section 30 and continue to be used for stock.

> The condition leaves in place the common law futile call doctrine prior to July 15 each year, with the burden on junior appropriators to prove futility, but shifts the burden to the owner of the Edelman right after July 15 based on the District Court's findings as to the stream conditions, which the court confirms . . . [t]his limitation exists only as to "other appropriators," meaning appropriators addressed in the *Hill Decree*. The condition is not applicable to appropriators who do not trace their rights to the *Hill Decree* unless and until any such party proves entitlement to the protection of the condition in some other future proceeding before the Water court.

Hill, 2023 Mont. Water LEXIS at *33.

¶56 To ensure a claim is used consistently with a historical beneficial use, the Water Court may include information remarks in the claim when "necessary to fully define the nature and extent of the right." Section 85-2-234(6)(i), MCA. The information remark under Fraser's right thus reflects the Water Court's ruling:

> AFTER JULY 15 THIS RIGHT MAY NOT BE USED TO MAKE A CALL ON JUNIOR WATER USERS WITHOUT FIRST SHOWING THAT CURTAILMENT OF SUCH USERS WOULD RESULT IN WATER REACHING THE PLACE OF USE IN AMOUNTS THAT CAN BE PUT TO BENEFICIAL USE.

¶57 The limitation in Fraser's water right accords with the *Hill Decree* and the futile call doctrine, under which "[a] call for water is deemed futile if the amount of water necessary to meet an appropriation will not reach a senior appropriator's point of diversion because of carriage losses." *See generally*, *Kelly v. Teton Prairie LLC*, 2016 MT 179, ¶ 19, 384 Mont. 174, 376 P.3d 143. The *Hill Decree* established that "if, in any season" water would not reach Edelman's property in usable volumes (given all junior users curtailed their appropriations), then she could not make a call. It follows that if she could establish that doing so would not be futile, she could. Photos in evidence indicate that surface flows in Indian Creek may periodically run through Fraser's property after July 15 and before spring

runoff. Record testimony indicates that landowners along Fraser's chain of title likely watered their cattle in the creek, after July 15, as long as water was available in usable quantities. Fraser is legally entitled to do so as well. The Water Court did not err in making that determination.

¶58 Finally, the Water Court correctly determined that the futile call limitation should only apply to water users decreed under the *Hill Decree*. Bradley may be correct that administering water this way could become complicated. However, it is not the job of the Water Court, nor this Court, to adjudicate water rights for ease of administration. Our role in this proceeding is to ascertain the nature and scope of historical beneficial use in order to "fully define the nature and extent" of Fraser's water right so that it may be decreed and enforced consistent with historical use. Section 85-2-234(6)(i), MCA. Here, the Water Court reasoned that the condition only applies to rights falling under the *Hill Decree* because the District Court intended the *Hill Decree* to adjudicate all rights in Indian Creek.

¶59 The Water Court appropriately narrowed its holding: "The condition is not applicable to appropriators who do not trace their rights to the *Hill Decree* unless and until any such party proves entitlement to the protection of the condition in some other future proceeding before the Water Court." Until the Water Court enters a final decree for Basin 41C, there may be junior water users outside the *Hill Decree* that could demonstrate they are afforded protection. Bradley has not met his burden to demonstrate that here. *Twin Creek*, ¶ 17. While Bradley is correct that we may never know exactly how Fraser's property and stock claim were used 100 years ago, it does not stand to reason that the

absence of evidence should overcome Fraser's claim. *Danreuther Ranches v. Farmer's Coop. Canal Co.*, 2017 MT 241, ¶ 22, 389 Mont. 15, 403 P.3d 332.

CONCLUSION

¶60 The Water Court correctly determined that Fraser has a valid stock use right, 41C 30133316. The period of use is January 1 through December 31 of each year, and the right is limited pursuant to the conditions ascribed to the Edelman rights under the *Hill Decree* and in the information remarks. Fraser's stock use right comports with the MWUA, the rights the Legislature sought to protect under HB 110, and with historical beneficial uses on Indian Creek.

¶61 Affirmed.

/S/ MIKE McGRATH

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON