

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0656 and DA 25-0072

PETRICH FAMILY LIMITED PARTNERSHIP,

Claimant, Appellee, and Cross-Appellant,

v.

TROUT UNLIMITED,

Objector, Appellant, and Cross-Appellee.

JAMES R. MELIN,

Claimant, Appellee, and Cross-Appellant,

v.

TROUT UNLIMITED,

Objector, Appellant, and Cross-Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Water Court,

Case Nos. 43B-0354-R-2021 and 43B-0148-R-2020

Hon. Stephen R. Brown, Associate Water Judge Presiding

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STATEMENT OF ISSUES

- I. Whether the Montana Water Court violated the Water Use Act, by generating new “implied rights” despite the appropriators’ failure to file water right claims within the statutory deadlines set forth in § 85-2-221.
- II. Whether the Water Court erred in granting Appellees implied rights adjunct to their decreed water rights as a remedy for overclaiming their periods of use.
- III. Whether the Water Court exceeded its ill-defined authority to recognize unfiled, implied use rights based upon a misstated element and testimony of unlawful water use.

INTRODUCTION

This appeal presents an important question of law: whether the Water Court erred in issuing implied water rights to extend claimants’ decreed periods of use without evidence of multiple rights on a statement of claim, substantive evidence of historical use, or proof that expansions would not increase the burden on the source. This appeal raises further questions regarding the authority of the Water Court to generate use rights on fully-decreed sources decades after filing

deadlines and without an express grant of authority from this Court or the Legislature.

The concept of implied water rights was created by this Court in the Water Right Claims Examination Rules, authorizing the Department of Natural Resources and Conservation (“DNRC”) to identify errors on water right claims, when more than one water right was present on a statement of claim. Rule 2(a)(33), Rule 35, W.R.C.E.R. This principle evolved into common practice of the Water Court issuing implied water right claims where claimants may have established pre-1973 water rights by use, but failed to file claims.

In the present cases, Appellees/Cross-appellants/Claimants Gerald Petrich and James Melin (hereinafter “Appellees”) each filed claims for water rights in Mill Creek.¹ Appellees originally acquired the water rights under appeal by seeking a new decree for flood waters in 1963. Since Mill Creek had been fully-allocated under *Allen v. Wampler*, Cause No. 7583, Judgment and Decree (Mont. 6th Dist. Ct. 1938) (“1938 Decree”) (MR/PR: Ex. A), laws at the time required anyone seeking

¹ Documents from the appellate records are cited as “[Either ‘MR’ (Melin record) or ‘PR’ (Petrich record)]: [docket number or exhibit], [page or paragraph].”

additional water rights to petition the court for a determination of available water. § 89-829, R.C.M. (1947). Accordingly, Appellees and a third neighbor, Malcolm, successfully petitioned and secured new decreed water rights in the “1964 Decree”. MR/PR: Ex. B. Appellees timely filed statements of claim for the water rights secured in the 1964 Decree, but claimed extended periods of use. MR: Ex. 5, 6-7; Ex. 6, 7-8; PR: Ex. 1, 2-3; PR: Ex. 2, 2-3. On Appellant Trout Unlimited’s motion, the Water Court granted summary judgment declaring the period of use of the decreed water rights was May 1 to July 15. At hearing, Appellees sought implied claims to extend their period of use.

Appellees each had the opportunity to file for additional water rights for alleged use outside the decreed period, initially by April 20, 1982, with a second opportunity to file for late claims by July 1, 1996. Mont. Code Ann. § 85-2-221(3). As a matter of law, any unclaimed water rights after those dates were forfeit. *In re Yellowstone*, 253 Mont. 167, 175, 832 P.2d 1210, 1214 (1992). Yet 42 years later, the Water Court generated new implied water rights extending periods of use both before and after the decreed period of use, but granted a priority date of June 30, 1973, the last date within its authority.

Appellant asserts that the Water Court erred by issuing implied rights, creating two additional periods of use for each of the decreed water rights. The Water Court's authority to issue implied water rights is unclear. To the extent that the Water Court's authority to issue implied water rights has never been addressed, especially in the context of period of use, this is a case of first impression before this Court.

LEGAL BACKGROUND

The 1972 Montana Constitution mandated a system to catalog and manage water rights that existed prior to July 1, 1973. Mont. Const. Art. IX, §§ 1(1), (3). The Constitution further “recognized and confirmed” only those “existing rights to the use of ... waters” that were for a “useful or beneficial purpose[,]” and directed the Montana Legislature to “provide for the administration, control, and regulation” of all such claims. *Id.* § 3(1), (4).

The Montana Legislature enacted the Montana Water Use Act (“WUA”) to implement the constitutional mandate and secure these constitutional protections. Mont. Code Ann. § 85-2-101(2). In 1979, the Water Court was created by the Legislature and charged with systematically adjudicating water rights across Montana as they

existed on July 1, 1973. §§ 85-2-212 through 282; 3-7-101 through 502 (2021). While the Water Court's authority is broad, that authority has been circumscribed by this Court, the legislature, and case law.

Upon a directive by the Legislature, the Montana Supreme Court ordered claimants of pre-1973 "existing" water rights to file a statement of claim for each water right with DNRC by April 30, 1982. § 85-2-212, 221.

Failure to timely file a claim created a “conclusive presumption of abandonment” of that right. § 85-2-226. The constitutionality of the forfeiture presumption was tested but upheld in *In re Yellowstone*. 253 Mont. 167, 832 P.2d 1210 (1992). In response, the 1993 Legislature afforded an additional, limited opportunity to file claims by July 1, 1996, though such “late claims” were penalized with restrictions. § 85-2-221(3). The WUA provides that a properly filed statement of claim constitutes prima facie proof of the claim's content. § 85-2-227(1). This presumption may be “overcome by evidence that proves by a preponderance of the evidence that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.” Rule 19, W.R.Adj.R. In defining existing water rights, a

water judge may consider all relevant evidence arising either before or after July 1, 1973. § 85-2-227(2). Rules enacted by the Supreme Court provide similar latitude. *Hoon v. Murphy*, 2020 MT 50, ¶42, 399 Mont. 110, 130, 460 P.3d 849, 861.

The Montana Supreme Court adopted the Water Right Claim Examination Rules (“W.R.C.E.R.”) to direct DNRC claims examiners to a more robust procedure than the earlier claim verification process. “The claim examination rules are applicable to the [DNRC] and specify how water right claims are examined prior to decree issuance by the department during Montana's general water rights adjudication.” Rule 1(b) W.R.C.E.R.

The first reference to implied claims appears in Rule 2, W.R.C.E.R., defined as a claim authorized by the Water Court to be separated and individually identified when a statement of claim includes multiple rights. Rule 2 (33) W.R.C.E.R.

The W.R.C.E.R. identify two specific instances where an implied claim might be found, and outline a procedure where the DNRC, Water Court, and claimant could verify the existence of an implied claim: 1) where a claim identified more than one water source (Rule 11(b)), and

2) where a claim identified multiple priority dates (Rule 13(e))

W.R.C.E.R. No mention of implied claims based on a period of use is codified.

Rule 35, W.R.C.E.R. outlines a procedure by which DNRC would identify potential implied claims to the Water Court, then notify a claimant to formalize an authorized implied claim. This procedure was not invoked in either case on appeal. While the Water Court has broad authority to identify existing water rights, the link between the W.R.C.E.R and Water Court jurisprudence addressing implied water rights is a thin tendril. § 85-2-216; Stephen R. Brown, Michelle L Bryan & Russ McElyea, *Montana Water Law*, 127 (Rocky Mt. Min. L. Fdn. 2021). (“The Claim Examination Rules apply to the DNRC. They do not apply to the Water Court, although they impact the adjudication of water rights in many ways.”) Extensive review of available Water Court case law and records on appeal scarcely identify the Water Court’s authority to create implied rights. The Legislature has never codified the practice of generating implied rights.

The first appearances of implied right jurisprudence arose in 1993 and 1994. In the 1993 *Eliasson* case, the Water Master cited the

WRCER definition and process to identify an implied right, then went on to state “the Water Court has the power to create implied claims when a claim appears to have more than one right.” COL V at 6, *In re Musselshell above Roundup, Eliasson Ranch Co., Case 40A-115*.

Master's Report, October 27, 1993. The Water Master did not elaborate on the origin of that authority, but rejected the claimants' request for an implied right, cautioning against an interpretation which would render the filing deadlines in “[s]ection 85-2-227 meaningless.” *Id.* COL VII at 7.

In 1994, a Water Master rejected a request for an implied right, citing the W.R.C.E.R. process that was not followed in the case.

Musselshell River Below Roundup Basin, 1994 Mont LEXIS 18. The Water Court overruled the Water Master, citing the W.R.C.E.R. for the definition and process for identifying an implied right, but stated:

Even though DNRC did not request review for purposes of an implied claim, the rules allow a claimant to secure an implied claim when it is clear from the claim that the claimant has more than one water right. The Water Court has power to create implied claims when a claim appears to contain more than one right.

Musselshell River Below Roundup Basin. 1994 Mont LEXIS 18, *44.

The court did not cite any law or rules explicating the Water Court's

authority, but went on to establish foundational principles for implied rights. In its memorandum opinion, the court specified that evidence of more than one claim in the statement of claim and attachments was required, finding that three separate Notices of Appropriation attached to the statement of claim was adequate evidence of multiple historic rights. *Id.*, *80. These principles set the stage for the paradigm case adopting a test for adjudicating implied rights. In *In re Foss*, the Water Court reversed a Water Master who had rejected a non-timely filed Notice of Appropriation. 2013 Mont. Water LEXIS 17, *31.

The *Foss* court distinguished the W.R.C.E.R. process from Water Court practice, stating, “Not all implied claims are identified by DNRC. In some cases, they are requested by a party or they become apparent from the development of evidence during a hearing.” *Id.*, *32. Without analysis of the court’s authority to define implied rights, the court outlined a three-part test which it characterized as “common-sense guidelines to determine whether an implied claim is warranted:”

First, the implied claim must be justified by some evidence in the claim form or the documents attached thereto, although supplemental evidence can be used to explain or clarify the claim and its contents. Second, evidence must exist of actual historic use corroborating the implied claim. Third, the creation of the implied claim should not result in a change to historic water use or

increase the historic burden to other water users. The burden to meet these criteria rests on the person seeking recognition of an implied claim.

Id.

Not long after *Foss*, the Water Court began to distance itself from the rules. *S Bar B Ranch Co. v. S Bar B Ranch Co.*, 2017 Mont. Water LEXIS 16, *4-5 (the [W.R.C.E.R.] do not apply to the Water Court when making decisions about historical use of a water right).

This Court addressed implied rights in four citable cases of precedential value.² Analysis of the authority of the Water Court's emerging custom of assigning implied claims is absent from these cases.

This Court's earliest treatment of a Water Court case involving implied rights arose in 2014. *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 23, 375 Mont. 327, 334, 328 P.3d 644, 650. Claimant Skelton's timely-filed claim included two Notices of Appropriation originally filed in 1891 and 1913. The claims drew objections leading to a hearing where key evidence of an implied right was found in the capacity of a measuring flume, washed out but

² This court treated implied rights in two cases designated "not for publication": *Neumann v. Hopseker* 2016 MT 225N, and *In re Sampson*, 2019 MT 116N.

replaced in 1931. The expanded capacity of the flume established the basis for an implied right. While this Court focused on required substantial credible evidence, its holdings were silent on the Water Court's authority to create implied rights.

In *Hoon v. Murphy*, the Court upheld the Water Court's recognition of an implied right, finding substantial credible evidence in support of the appropriator's intent in an 1891 Notice of Appropriation in the statement of claim and historic use, with a priority date supported by evidence of first use. 399 Mont. 110, 119, 460 P.3d 849, 854. *Id.* 2020 MT 50, ¶ 50. Once again, this Court thoroughly analyzed the requirement for substantial credible evidence, but did not outline the Water Court's authority to create implied claims.

In *Twin Creeks I*, the Water Court found an historic water right was abandoned but issued an implied right in recognition that use of the abandoned claim had been revived by a new owner in 1968. *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2020 MT 80, ¶ 7, 399 Mont. 431, 434, 461 P.3d 91, 93. In *Twin Creeks II*, this Court revisited the Water Court's decision on remand to issue an implied right for a partially abandoned place of use revived in 1968. *Twin Creeks*

Farm & Ranch, LLC v. Petrolia Irrigation Dist., 2022 MT 19, ¶ 34, 407 Mont. 278, 289, 502 P.3d 1080, 1087. In both cases, this Court upheld the Water Court's decision to issue implied rights for abandoned rights resumed in use prior to 1973, yet it did not analyze the Water Court's authority to issue implied rights.

FACTUAL BACKGROUND

Appellee Petrich acquired property in Mill Creek in 1962. He irrigated his parcel with water from Elbow Creek, a small tributary prone to shortages. Mill Creek, south of his ranch, is a much larger stream, but water rights in Mill Creek had been fully decreed by the district court in 1938, leaving limited recourse to obtain a new water right. MR/PR: Ex. A. Montana law at the time precluded creating a new water right by use in a fully adjudicated stream § 89-829, R.C.M. Furthermore, parties to the 1938 Decree were enjoined from appropriating or interfering with water rights so decreed. MR/PR: Ex. A, COL VII.

Within a year of Petrich's arrival on Mill Creek, he, predecessors to Appellee Melin, and neighbor Malcolm, designed a new ditch to convey Mill Creek water across their fields to supplement their Elbow

Creek supply. The three petitioned the district court for a supplemental Mill Creek decree, asserting that surplus spring runoff was unallocated by the 1938 Decree. MR/PR: Ex. C ¶ 3. In response to the petition, nineteen Mill Creek water users cross-claimed for new rights contending they had already fully appropriated high water and none was available for the new ditch. See, e.g., MR: Ex. E, pt1, ¶¶ IV-V. The petitioners rebutted, arguing the defendants had unlawfully used surplus runoff because they had not petitioned the court for new decreed rights pursuant to § 89-829, R.C.M., “and that any diversion in excess of that allowed the defendants by the original [1938 Decree] was unlawful and void and did not create any right, title or interest or priority in the waters of Mill Creek.” MR/PR: Ex. H, ¶¶ I-II. During the proceedings, the parties stipulated, “as a matter of proof...approximately 10,000 miners inches which exists during the spring run-off between but no later than July 15.” MR/PR: Ex. D, 2.

On July 22, 1964, the Sixth Judicial District Court issued the “1964 Decree”. MR/PR: Ex. B. For conforming to Section 89-829, the district court awarded the petitioners decreed water rights with June 3, 1963 priority dates (relating to the date they filed their petition) and

June 4, 1963 priority dates, while the defendants received only June 4, 1963 priority dates. MR/PR: Ex. B, COL III.

The exercise of Appellees' newly decreed water rights between construction of the Northside Ditch, after the decree, until July 1, 1973 remains unclear. Petrich claims that he opened the ditch at ice out, between mid-April and May 1, and irrigated well into mid-September. PR: 35, COL 22. However, the over-appropriation of limited water supplies remained the reality in Mill Creek. Because Mill Creek is a heavily appropriated stream, water commissioners were regularly appointed prior to 1973. MR: 47, FOF 21; PR: 35, FOF 24. Two witnesses at hearing admitted that their water rights with 1904 priority dates were commonly shut down by commissioners prior to 1973, usually by July 4 each year. *Id.*

Sixteen years after the 1964 Decree, Appellees filed claims describing their historical water rights. § 85-2-221. Both Appellees filed claim forms detailing the elements of their rights as decreed. On October 14, 1981, Petrich filed claims for water right claims 43B 101013-00 and 43B 101014-00. PR: Ex. 1, 2-3; PR: Ex. 2, 2-3. On each claim form, he claimed a "decreed water right" and attached excerpts

from the 1964 *Decree*. PR: Ex. 1, 7-10; PR: Ex. 2, 6-9. Likewise, on April 22, 1982, Melin's predecessors filed statements of claim for water right claims 43B 194542-00 and 43B 194543-00. MR: Ex. 5, 6-7; MR: Ex. 6, 7-8. On each claim form, they claimed a "decreed water right" and attached excerpts from the 1964 *Decree*, attesting that the water rights were issued in the decree for supplemental water available "during the months of May and June and until approximately the 15th day of July." MR: Ex. 5, 12-15; MR: Ex. 6, 17-20.

To address water shortages, Mill Creek water users united behind an opportunity afforded by PL 566, through which the federal government had the authority to execute agreements with water users to improve efficiency, so long as water rights were legitimate, and a conservation benefit could be realized. 16 U.S.C. §§ 1006 1(a), 1011(c); MR: 47, FOF 23, 31; PR: 35, FOF 25. A new diversion and pipeline was designed to combine ditches conveying water across the flats south of Mill Creek, to limit conveyance losses in ditches and deliver water more efficiently to the irrigated pastures on the flats. The pipeline project was installed in the early 1990's, significantly reducing diversions by minimizing conveyance losses. The Northside Ditch used the conserved

water to extend their season of diversion, nearly two decades after July 1, 1973. MR: 47, 23; PR: 35, FOF 25. The pipeline allowed both Appellees expanded their irrigation operations without acquisition of new water rights. *See* MR/PR: EX. R, Figures 6, 13.

In 2019, the Water Court issued the Preliminary Decree of Basin 43B, the Yellowstone River above and including Bridger Creek and ordered all objections to be filed by December 5, 2019. Appellant timely filed two objections to Petrich's claims and six objections to Melin's claims, each based on unlawful expansions irrigated acreage and periods of diversion. The Water Court consolidated the water rights into case 43B-0354-R-2021 (Petrich) and case 43B-0148-R-2020 (Melin). In each proceeding, Appellant moved for summary judgment enforcing the period of diversion as decreed by the District Court in the 1964 Decree. The Water Court ruled in favor of Appellant, declaring that as a matter of law, Appellees' claims were decreed with a period of diversion from May 1 to July 15. MR: 25; PR: 18. Appellees first raised their requests for implied claims in pre-trial orders proceeding trials before the Water Court. MR: 34, 4; PR: 22, 3.

Hearings were held on December 18, 2023 (Melin) and December 20, 2023 (Petrich), where Appellant argued that Appellees had not met their burden to prove that they were entitled to implied water rights for the extended periods of diversion as a matter of law and fact.

On October 10, 2024, the Water Court issued its order granting two additional implied water rights for Petrich. This appeal was initiated pursuant to Rule 4 of the M. R. App. P. on November 6, 2024. On January 21, 2025, the Water Court issued its order granting Melin two implied water rights extending his period of use. Appellant moved to consolidate appeals of both orders in this proceeding, granted on February 12, 2025.

STANDARD OF REVIEW

The Court applies the same standards of review to an appeal from the Water Court as an appeal from District Court. *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 16, 361 Mont. 77, 83, 255 P.3d 179, 182. The Court reviews the Water Court's order *de novo* to determine whether its conclusions of law were correct. *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 335, 328 P.3d 644, 650. Likewise, the Water Court's

interpretation of a historic decree is a question of law subject to *de novo* review. *Granite Cnty. Bd. of Comm'rs v. McDonald*, 2016 MT 281, ¶ 5, 385 Mont. 262, 264, 383 P.3d 740, 742. The Court reviews mixed questions of law and fact *de novo*. *Stop Over Spending Mont. v. State*, 2006 MT 178, ¶ 10, 333 Mont. 42, 139 P.3d 788. Mixed questions of law and fact are presented to the Court when the historical facts of a case are admitted or established, the applicable law is undisputed, and the issue is whether the facts satisfy the statutory standard. *Stop Over Spending Mont.*, ¶ 10.

SUMMARY OF THE ARGUMENT

The Water Court erred by generating implied rights for Appellees based only on a single overclaimed element in timely filed statements of claim seeking decreed rights, in a fully-adjudicated source. Recognizing multiple implied rights as a post-1973 expansion of Appellees' decreed rights is prohibited by the terms of the 1964 Decree. Even if Appellees were eligible to request implied rights, the Court incorrectly applied the *Foss* elements in deciding to grant that request. Recognizing implied claims long after filing deadlines threatens the integrity of the adjudication and the future of already over-appropriated waters in

Montana. Without adequate statutory safeguards from Montana's highest court, this practice is irreconcilable with the structure and purpose of the WUA.

ARGUMENT

The Water Court's recognition of unfiled use rights under the guise of implied claims—a remedy meant to correct clerical filing errors—compromises the Water Use Act and the protections to senior water rights enshrined in Montana's Constitution. It must be set aside.

I. The Water Court violated the Water Use Act by granting Appellees' requests for implied claims as a means to expand their water use.

The Appellees intent to claim decreed water rights when they filed their statements of claim is unmistakable. In the 1960s, the Appellees petitioned the district court for new decreed water rights and stipulated to the availability of water that could be allocated for new appropriations. In the 1980s, Appellees both filed claims reflecting all of the elements of the rights they acquired in the 1964 decree proceedings except over-stated periods of use. Overclaiming an element on a statement of claim is not a legitimate means to expand a decreed water right. Any use beyond the decreed right could only be lawful if claimed

as a separate water right, supported with evidence, and adjudicated accordingly. The Water Court's decision to generate new implied use rights to sanction the additional non-decreed, non-filed water use undermines the principal function of the adjudication process.

A. Appellees took the necessary steps to acquire and claim decreed water rights in Mill Creek.

Appellees Petrich's and Melin's actions illustrate their intent to secure decreed high water rights. An appropriators intent "was a most important factor in determining the validity of an appropriation of water." *Toohey v. Campbell*, 24 Mont. 13, 17, 60 P. 396, 397 (1900). An appropriator's intent is manifest in overt acts, whether it built fences around its croplands or posted notice to other water users. *Toohey*, 24 Mont.at 18, 60 P. at 397.

Prior to the Montana Legislature's July 1, 1973 enactment of the WUA, water users could appropriate water on unadjudicated sources by putting water to beneficial use. *Murray v. Tingley*, 20 Mont. 260, 268, 50 P. 723, 725 (1897). However, the "exclusive" method for water users to acquire water rights on a previously-decreed source was to petition the district court to issue a supplemental water rights decree. *See* §§ 89-829 through 89-838, R.C.M.; *Anaconda Nat'l Bank v. Johnson*, 75 Mont.

401, 411, 244 P. 141, 144 (1926). Petitioners were required to describe specific elements of the proposed appropriations, produce engineering surveys depicting the infrastructure, and name all other appropriators on the source as defendants to the action. § 89-829, R.C.M.

Appellees each timely filed statements of claim for each water right by April 30, 1982. § 85-2-221. A statement of claim was a form on which the claimant specified the water source, priority date, flow rate, place of use, point of diversion, ditch name, and period of use of the water right. Claimants also identified the type of historical water right they claimed— “decreed,” “filed,” or “use”—and attached any supporting evidence. § 85-2-224. A “decreed” water right is a “claimed water right determined in a judicial decree prior to the commencement of the [Water Court’s statewide] adjudication . . .” Rule 2(a)(18), W.R.C.E.R. A “use right” is defined as “a claimed existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree.” Rule 2(a)(71), W.R.C.E.R. A “filed right” is a water right based on a notice of appropriation “filed and recorded into the office of the county clerk and recorder as provided by statute prior to July 1, 1973.” Rule 2(a)(25), W.R.C.E.R.

Sixteen years after the 1963 Decree, Appellees filed claims describing their historical water rights, detailing precise elements of the decreed water rights for which they had petitioned in 1963. § 85-2-221. On October 14, 1981, Petrich filed statements of claim for water right claims 43B 101013-00 and 43B 101014-00 with the DNRC. PR: Ex. 1, 2-3; PR: Ex. 2, 2-3. On each claim form, he indicated he was claiming a “decreed water right”, and not a “filed appropriation right” or “use water right.” Petrich attached pages one, three, four, and ten of the 15-page 1964 Decree attesting that the basis for the elements of the water rights was the 1964 decree apportioning supplemental water available “during the months of May and June and until approximately the 15th day of July.” PR: Ex. 1, 7-10; PR: Ex. 2, 6-9.

Likewise, on April 22, 1982, Melin’s predecessors filed statements of claim for water right claims 43B 194542-00 and 43B 194543-00. MR: Ex. 5, 6-7; MR: Ex. 6, 7-8. On each claim form, they indicated they were claiming a “decreed water right”, and not a “filed appropriation right” or “use water right.” Melin attached pages one, three, ten, and fourteen of the 1964 Decree, attesting that the basis for the elements of the water rights was the 1964 decree apportioning supplemental water available

“during the months of May and June and until approximately the 15th day of July.” MR: Ex. 5, 12-15; MR: Ex. 6, 17-20.

Both Appellees expressed clear intent to obtain “decreed” water rights, duly following statutory procedures, prosecuting their petition before the district court, constructing the Northside Ditch and perfecting their decreed rights. Any intent to create or recognize use rights or to imply new rights was decades away.

B. Appellees failed to file claims for additional “use water rights” within the statutory deadlines to avoid forfeiture.

If Appellees historically appropriated water throughout the periods of use they reported on their statements of claim, it was not within legal bounds authorized by either the 1938 Decree or the 1964 Decree. Furthermore, even if it was lawful to create water rights by use, Appellees failed to timely file use rights with their decreed water rights.

Like any other water right, Appellees bore the burden to secure these rights by filing statements of claim declaring their use rights by April 30, 1982. Failure to file created a conclusive presumption of forfeiture of a right. § 85-2-226. In *In re Yellowstone*, this Court found the statutory deadline to be “a reasonable means of compelling comprehensive participation, extinguishing duplicative and exaggerated

rights, and ridding local records of stale, unused water claims. . . [which are] necessary to meet the objective of adjudicating Montana’s water.” 253 Mont. 167, 175, 832 P.2d 1210, 1214. Furthermore, the filing duty “is neither burdensome, unreasonable nor unrelated to the legitimate and proper legislative objectives.” *Id.*, 253 Mont. 167, 175, 832 P.2d 1210, 1214 (1992). Here, Appellees took no action to claim use rights that to extend their decreed period of use in the Northside Ditch.

Appellees cannot claim ignorance of the law. The record shows that they understood the option to claim non-decreed use water rights.³ In addition to claiming his two decreed water rights for the Northside Ditch issued in the 1964 proceedings, Appellee Melin filed for a use right in 1982 for Mill Creek floodwater. MR: Ex. 1, 6-7. He attached a 1984 affidavit in support, indicating his family received decreed water rights in the 1938 *Wampler* and 1964 Decrees, and that they “ha[d] used all of [their decreed] water rights and *additional flood water* to properly irrigate the lands *during the flood water season*.” The affidavit

³ Notice of the filing deadline was published in every newspaper in the state, and also mailed with each statement of property taxes in 1979, 1980, 1981 and 1982. Jack F. Ross, *Evaluation of Montana’s Water Rights Adjudication Process*, 73, Sept. 30, 1988. <https://courts.mt.gov/external/water/A-Legal%20Resources/Ross.pdf>.

further states: “Mill Creek always has *flood waters* each irrigation season and the affiants and their predecessors in interest have used *200 miners inches or more of said flood waters* since the first appropriation of waters of Mill Creek for affiants’ lands.” MR: Ex. 1, 10-11 (emphasis added).

In response, Appellee Petrich, along with ten other water users, objected to Melin’s use claim, contending that use rights were not permitted in a fully-adjudicated source and Melin, as a party to that proceeding, should have claimed it with the other decreed rights. MR: Melin Ex. 1, 21-55. Eventually, the parties stipulated to withdraw their objections on the condition that Melin’s use right receive a 1965 priority date and a period of use of April 1 to July 15. Later, the court approved an amendment to “April 1 to September 24. ‘However th[e] period of use shall not be used adversely against any flood water claims based on the 1964 Mill creek flood water decree.’” MR: Ex. 1, 69-72.

In 1993, four years after Melin and Petrich resolved objections to Melin’s use right claim, the Appellees had a second opportunity to file for use rights. The Legislature had amended § 85-2-221 to allow a limited remission from forfeiture in which water users were given three

years to report any additional claims for water used prior to July 1, 1973 not reported by the original 1982 filing deadline. § 85-2-221(3). Here, the Appellees could have secured use rights for any days they diverted water beyond the runoff period decreed in 1964, but they made no such claims.

In 2019, Appellant filed objections to the periods of use associated with the Appellees' decreed water rights, contending the 1964 Decree clearly identified a period of use, and "prior water right decrees are conclusive as to all matters 'actually litigated and adjudged.'" *Missoula Light and Water Co. v. Hughes*, 106 Mont. 355, 366, 77 P2d. 1041, 1047 (1938). Contrary to their earlier petition and admissions, Appellees asserted that the 1964 Decree was not limited to a May 1 to July 15 period. While they did not contest that the 1964 "decree identified thirty-five claims for water rights based on [the] excess waters the court found to be available . . . until approximately July 15", they argued that their statements of claim created a material fact as to how the water users *interpreted* the decree. MR: 22, 6-7; PR: 15, 7-8. In both cases, the Water Court confirmed that the 1964 Decree issued water rights for use from May 1 to July 15, and the Appellees' periods of use must be

amended as a matter of law. Further, the Water Court pointed to the Appellees' missed opportunity to file use rights. In *Melin*, the Court stated:

[i]f the Melins and others contended additional water was used outside what the District Court determined was available in its decree, they could have (and apparently did [referring in a footnote to Melin's use right claim 43B 194537-00]) file a claim for a use right to cover that use. However, *there is no foundational fact in the decree cited as the evidentiary basis for the claims to support water use beyond the dates in the District Court's finding of fact*, so any use outside those facts is not part of the right the District Court decreed. . . If Melin intended to claim such water beyond the decree, it only could do so as a use right, with the requisite evidence to support such a right.

MR: 25, 9-10 (emphasis added).

At this point—over 60 years after stipulating to the period of use water was available for 1964-decreed water rights, over 40 years after filing their decreed water right claims, and over 30 years since the last late-claim filing deadline—the Appellees pivoted to implied claims to justify their expanded water use beyond their decreed rights.

Appellant's objections to Appellees' expanded water use contested ongoing injury their expanded use has caused to the instream flow reservation held by FWP on Mill Creek. By attempting to bootstrap their expanded use to their decreed rights, Appellees sidestepped the

legal avenue available to them to secure new water rights under the WUA's permit or change process. Rather, the DNRC-led permit process would require notice and an analysis of injury to existing water rights, including the instream reservation. §§ 85-2-302 *et seq.*, 402 *et seq.*

The Water Court erred by recognizing Appellees' expanded water use through the creation of new post-1973 implied water rights in the adjudication context, rather referring them to the DNRC permit or change processes outside the Water Court's jurisdiction. If claimants can obtain a post-hoc "implied right" to counter objections to illegal, expanded water use, then filing deadlines and objections will be meaningless. Instead, requests for post-hoc implied rights will continue to multiply to justify expanded water use and risk Montana's multi-decade investments in an accurate adjudication.

II. The Water Court cannot generate implied rights on a fully-adjudicated source as a remedy to recognize expanded water use because the requirements of *Foss* were not met.

By generating implied rights acknowledging water use that defied historic decrees and Appellees' own intent, the Water Court erred as a matter of law. Its legal errors are apparent in its application of its own test for implied rights.

A. The Water Court's generation of implied claims to bookend decreed rights with decreed periods of use fails under *Foss*.

As a matter of law, the Water Court erred in generating implied claims, a remedy to a claim filing error, to accommodate Appellees' expanded and illegal use. The Water Court's generation of implied claims in these cases does not comport with the *Foss* test and prior applications of implied claims: to rectify mistakes in the claim filing process. To the extent this Court finds *Foss* applicable, the Water Court's identification of multiple water rights on the statements of claim, failure to consider adverse impacts to other water users on the source, and failure to mandate substantial credible evidence of when use rights were first appropriated are errors of law that preclude the generation of implied claims and warrant reversal.

The first error is that the records do not indicate multiple rights as required by *Foss*. *In re Foss*, 2013 Mont. Water LEXIS 17, *32. An implied claim is "a claim authorized by the Water Court to be separated and individually identified when a statement of claim includes multiple rights." Rule 2(a)(33), W.R.C.E.R. Claimants seeking implied rights bear the burden of establishing each factor under *Foss*. *In re Foss*, 2013 Mont. Water LEXIS 17, *32. In *Melin* and *Petrich*, Appellees did not

identify which elements of their statements of claim qualified under the first prong of *Foss* in the pretrial orders, instead requesting that the Water Court generate implied claims or find adverse possession for “all portions of the captioned claims that are determined by the court to be in excess or in disaccord with any decree on Mill Creek.” MR: 34, 4; PR: 22, 3.

Under the first requirement of *Foss*, an implied claim must be justified by evidence in the claim form or the attached documents. 2013 Mont. Water LEXIS 17, *32. In both *Melin* and *Petrich*, Appellees first addressed *Foss* and its application to their respective cases in post-trial briefing, claiming “[a]s both claims identified longer period of use[sic], it is evident from the face of the statements of claim that more than one water right was intended to be claimed.” See, e.g., PR: 33, COL 5a. The Water Court’s acceptance of this argument ignores that each water right, Melin’s use right excepted, was claimed as a decreed right and that the testimony produced at both evidentiary hearings never addressed any water rights beyond those claimed. In *Melin*, the Water Court found that “by describing both decreed rights and use right with *potentially* different priority dates on the same statement of claim, the

claim forms each identify at least two claims.” MR: 54, COL 23 (emphasis added). However, the court’s implication of a potential second priority date is directly at odds with the Appellees’ testimony, claiming they had “always” diverted water beyond the decreed period of use, referring to a timeframe that matches the priority of the decreed rights. MR: 47, FOF, 22; PR: 33, FOF 26, 42.

In *Petrich*, the Water Court employed similarly loose logic: “to the extent the claim forms identify claimed water use before May 1 and after July 1[sic], they describe use rights for this period.” PR: 38, COL 17. The court continued “by describing both decreed rights and use rights on the statement of claim, the claim forms each identify at least two claims, because as described below, the claims have different priority dates.” *Id.* In both orders, the Water Court’s conclusions of law omit that Appellees did not indicate that they were claiming both use and decreed rights or point to any evidence in the documents attached to the statement of claim substantiating multiple rights. Similarly, the court failed to note that these unclaimed implied rights bore the exact same elements as Appellees’ decreed rights, excepting period of use. The Water Court’s recognition of multiple rights in Appellees’ statements of

claim circularly relies upon its own determination that Appellees' decreed rights were limited by law and fact to the May 1-July 15 period of use of the 1964 decree, rather than substantial evidence indicating the existence of multiple rights on the statements of claim.

Neither Appellee, either individually, through counsel, or through their shared witnesses, suggest that they had in fact intended to claim two or more rights under each statement of claim. Instead, both Appellee's arguments for implied claims were proposed as a catch-all solution for any water use the Water Court found not to be justified under the previous decrees on Mill Creek. MR: 34, 4; PR: 22, 3. These late-stage attempts fail their burden under *Foss* and commonsense scrutiny of Appellees' claims.

The Water Court also erred in determining that the second prong of *Foss* had been satisfied without substantial credible evidence of when Appellees began to use water outside their decreed period of use. *Hoon v. Murphy*, 2020 MT 50, ¶ 54, 399 Mont. 110, 460 P.3d 849. Neither Petrich nor Melin offered proof of when that use began, only that it had been done so "historically." MR: 54, COL 28; PR: 38, COL 18. Neither Petrich nor Melin offered any documentation of prior use in the form of

ditch records, affidavits, or other tangible evidence; the Water Court found in both cases that the standard of substantial credible evidence was met through only the testimony of Appellees and their shared witnesses. MR: 54, COL 26; PR: 38, COL 18. Not once did this testimony—in either case—differentiate between Appellees’ use of water during the decreed periods of use and outside those periods. The records do not indicate that Appellees ever believed that they claimed multiple rights, nor is there evidence that they trifurcated use of their water throughout the irrigation season to reflect the use of multiple rights.

The absence of substantial credible historical evidence is implicit in both Appellees’ arguments and the Water Court’s resulting orders. In recognition of the absence of concrete historic evidence, Appellees requested priority dates of June 30, 1973, to immediately predate the effective date of the Water Use Act. MR: 54, COL 28; PR: 38, COL 18. The Water Court’s orders in both *Petrich* and *Melin* are identical in that the Water Court grants the requested priority date, citing the penalty provision of § 89-837, R.C.M. and this Court’s holding in *Twin Creeks II*: “the Water Court was correct to establish an implied claim dating to the

[date the] the appropriation began.” *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19 at ¶ 34, 407 Mont. 278, 288, 502 P.3d 1080, 1086. In *Twin Creeks II*, this Court affirmed the generation of implied claims because the record indicated that after an ownership change, irrigation on the parcel in question was resumed as of 1968. *Id.* at 33. This finding was based on the new pattern of use after the ownership change and was corroborated by oral testimony and the Water Resources Survey. *Id.* at 33, referencing *Twin Creeks Farm & Ranch LLC v. Petrolia Irrigation Dist.*, 2021 Mont. Water LEXIS 425, *19. Here, Appellees did not establish when their implied rights were appropriated, and the Water Court’s findings are predicated entirely on often conflicting witness testimony. The Water Court’s generation of Appellees’ implied claims without substantial credible evidence of when the appropriations began, their duration, what amounts were actually diverted, and whether these diversions were consistent is an error of law at odds with the historical use requirement of *Foss* and basic principles of prior appropriation. In effect, the Water Court’s ruling relied upon Appellees’ contention that water was used outside the decreed period of use sometime prior to July 1, 1973, without any

tangible evidence, independent corroboration or flow data to support that proposition.

The Water Court's treatment of the third element of *Foss* is also deficient. The final requirement of *Foss* is that generating an implied claim should not result in a change to historical water use or increase the historical burden on other water users. 2013 Mont. Water LEXIS 17, *32. In both cases, the court glossed over whether the generation of implied claims would increase the burden on other water users, stating that "[t]he Court recognizes the implied claim because of the testimony about how water was historically used and administered on Mill Creek." MR: 54, COL 27. PR: 38, COL 19. Additionally, the court justified its finding that the implied claims would not increase the historical burden through the junior priority date requested by Appellees, stating that "[u]sing the most junior priority dates available for pre-1973 rights avoids conflicts with other Mill Creek water users holding existing rights with periods of use and diversion outside the May 1 to July 15 period litigated and decreed in the *Petrich Decree*." MR: 54, COL 27; PR: 38, COL 19.

Therefore, under the Water Court's logic, generating implied claims does not increase the burden on the source because these claims are the most junior claims in the adjudication. However, this ignores that water rights have been perfected since the adjudication began. The Water Court's invented "implied" claims are now senior to rights legally appropriated in the last 50 years. Additionally, senior users will now have to place a call on the new implied rights to obtain their water. This ruling fails to consider how the implied claims would actually affect other water rights, including instream flow rights established before and after June 30, 1973.

Failing to consider the impacts to junior users ignores the bedrock principle of western water law that junior users are entitled to "have the water flow in the same manner as when he located" and that junior users may accordingly insist that senior users do not adversely affect their rights. *Hohenlohe v. State*, 2010 MT 203, ¶ 43, 357 Mont. 438, 450, 240 P.3d 628, 636, citing *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 351, 96 P. 727, 731 (1908). For both Appellees, the Water Court generated implied claims for the same flow rates and same places of use as the decreed rights. However, the court noted in its findings of

fact that neither Appellee provided data as to flow rates for their requested implied rights. MR: 54, FOF 44; PR: 38, FOF 22. Further, the court found that the testimony regarding water availability was “somewhat unclear because at some point a pipeline was installed to more efficiently deliver water to other water users on Mill Creek. MR: 54, FOF 43; PR: 35, FOF 21. Testimony indicated that the Mill Creek Pipeline was installed around 1990-1991. MR: 47, 13, PR: 35, 11.

Generating implied claims in the full amounts requested based on these shifting sands ignores any impact that the difference between the actual amounts diverted prior to 1973 and the amounts granted through the implied claims may have on both junior and senior water users. Had Appellees submitted motions to amend their claims under § 85-2-233(6)(c), or change applications through the DNRC process under § 85-2-402, they would have been required to demonstrate by a preponderance of evidence that the generation of implied rights would not affect other users. Importantly, they would also have been mandated to provide notice to other water users. Instead, Appellees summarily ignored any adverse impacts that the generation of implied rights would cause. The Water Court’s brief treatment of the last

element of *Foss* is legally deficient in that it equates juniority with no adverse effect and wholly ignores impacts to junior users in its calculation. Appellees' failure to meet the three requirements of *Foss* precludes their request for implied claims, and the Water Court's order should therefore be set aside.

B. The Water Court erred in generating implied claims on behalf of Mill Creek water users because Mill Creek decrees and the R.C.M. precluded expanded use.

In addition to bypassing the impact to junior and senior water users, the Water Court's generation of implied claims ignores the lack of legal availability of Mill Creek water, and the limiting effect of the 1964 decree. Precedent across Montana stands for the proposition that historic decrees are strengthened by the passage of time, and that subsequent appropriators take water subject to historic decrees on the source. *Anaconda Nat'l Bank v. Johnson*, 75 Mont. 401, 410, 244 P. 141, 144 (1926). In *Anaconda Nat'l Bank*, the Court affirmed the lower court's rejection of a water claim, noting specifically the lower court's holding that plaintiff's claim was barred for lack of compliance with the statute governing appropriations on decreed sources. *Id.* at 411, 244 P. 141 at 141. In *Missoula Light and Water Co. v. Hughes*, the Court

upheld a historic 1953 decree and its injunction against future interference by any water user or its successors in the “waters so decreed, and they, and each of them, shall be perpetually restrained and enjoined from ever, at any time, interfering or intermeddling with the water or water rights mentioned and described in the pleadings in this action.” *Missoula Light*, 106 Mont. at 366, 77 P.2d. at 1047. The Court held that the 1953 decree remained in force, and that “the running of time tends to *strengthen* rather than destroy title determined by decree.” *Id.* (*emphasis added*). “The effect of the decree must be declared in light of the literal meaning of the language used when the decree is clear and unambiguous - is consistent with the general rule for construing judgments.” *Harland v. Anderson Ranch Co.*, 2004 MT 132, ¶ 24, 321 Mont. 338, 92 P.3d 1160, *citing Quigley v. McIntosh*, 110 Mont. 495, 10, 103 P.2d 1067, 1069 (1940).

The strength of the 1938 Mill Creek Decree was upheld as late as 1963. In *Allen v. Wampler*, this court revisited the 1938 Decree after water users challenged a water commissioner who allowed others to switch ditches contrary to the 1938 decree. *Allen v. Wampler*, 143 Mont. 486, 489, 392 P.2d 82, 83 (1964). Despite written agreements between

some water users consenting to the change in ditches, this Court upheld the 1938 Decree and ordered the water commissioner to distribute water in accordance with the “rights as fixed” in the 1938 Decree. *Id.*, 85. Indeed, the Court expressed concern that such informal modifications to the decree would allow:

any party by his own acts, like those of the appellants in the present instance, [to] oust the old decree and force the persons adversely affected to institute a new action and seek a new adjudication. We have been able to find no authority for such contention, and can imagine none under our system of judicature and the principles relevant thereto.

Id., 86.

On summary judgment in both cases, Appellant argued that language of the 1964 decree barred petitioners from using Mill Creek water outside the scope of the decree, relying on the injunction provision that states parties to the decree and their successors are:

forever barred and perpetually restrained and enjoined from asserting any claim to, or any right, title or interest in or to, the rights to the use of the said stream elsewhere herein awarded and decreed, and from interfering in any way with the use and enjoyment by such parties and their successors in interest of the said rights as herein awarded and decreed.

MR/PR: Ex. B, COL ¶ V.

The Water Court ruled that the injunction clause was not necessary to TU's motion and that the clause did not bar uses outside the scope of the decree, referencing the penalty provision of § 89-837, R.C.M. MR: 25, 13; PR: 18, 12. This ruling fails to address the fact that the 1964 Decree caused Mill Creek to be a fully adjudicated source; there was no unallocated water after two Mill Creek decrees. Accordingly, any uses outside of the scope of the decreed rights necessarily involved water that was already allocated and protected from interference.

In *Melin*, Appellant argued that use rights on a fully-adjudicated stream were barred under the R.C.M., citing this Court's holdings in *Anaconda*, *Donich* and *Quigley II*. MR: 28, 9-13; MR: 32, 5-13.⁴ The Court noted that prior Water Court holdings had interpreted § 89-837 as not barring use rights. MR: 33, 6. The Water Court dismissed Appellant's argument differentiating between this Court's interpretation of the R.C.M. and its own, stating that "[t]he Montana Supreme Court has not addressed the issue of whether noncompliance

⁴ See *Anaconda Nat'l Bank v. Johnson*, 75 Mont. 401, 411, 244 P. 141, 144 (1926); *Donich v. Johnson*, 77 Mont. 229, 246, 250 P. 963, 968 (1926); *Hanson v. S. Side Canal Users' Ass'n*, 167 Mont. 210, 216, 537 P.2d 325, 328 (1975).

with the 1921 statutes' procedural provision bars the Water Court from recognizing a use right on a pre-1973 decreed stream." MR: 33, 7. In so doing, the Water Court declined to address whether Appellee Melin's assertion of a use right was illegal and void under the statutes in effect prior to 1973, counter to its mandate to adjudicate water rights as they would be "protected under the law as it existed prior to July 1, 1973". § 85-2-102(13). The Water Court's generation of implied claims in both cases validates use rights that were barred by the terms of the 1964 Decree, void under the R.C.M., and should therefore be set aside.

III. The Supreme Court is the appropriate arbiter to narrow the scope and authority to recognize implied right.

As a matter of public policy, expanding decreed water rights into multiple claims based solely on exaggerated periods of use and self-serving testimony sanctions illegal expansions and exacerbates over-allocation of Montana's waters. Further, raising implied claims in the late stages of claim adjudication evades notice to senior and junior users who could otherwise object to a claim amendment or change in a right and demand evidence that their rights would not be affected. Water Court custom of generating implied rights has evolved from its procedural origins to a position that is ripe for abuse.

- A. The Water Court custom of issuing implied rights has evolved beyond the procedural means of correcting filing errors without clear authority.

Whereas recognition of implied rights originated in a process to identify and address filing errors where more than one right could be found on a statement of claim, it was not intended to create new water rights as a substitute for timely-filed claims. *In re Martinell*, 2014 Mont. Water LEXIS 3, *11-12. As this Court promulgated the W.R.C.E.R rules, it should limit the reach of Water Court authority to avoid generating implied rights that circumvent filing deadlines and upset prior appropriations.

Appellant was able to identify approximately 28 cases addressing implied rights reported since 1993, revealing that the Water Court's custom of creating implied rights appears to have been developed primarily after 2013, when *Foss* was issued. Among the caselaw Appellant reviewed, it appears that the Water Court expanded its practice of finding implied claims after 2018, when the bulk of implied claims were recognized (23 of 28– 82%), 28 years after filing deadlines.

Water Court cases treating implied rights fall loosely into four categories: (1) implied rights requested by claimants through motions to

amend timely-filed claims; (2) implied rights generated by stipulation between parties; (3) implied rights created based on partial resumption of claims ruled to have been abandoned; and (4) implied rights identified during litigation.

Implied rights created by motions to amend are subject to deeper scrutiny than those created after litigation. Motions to amend timely-filed pre-1973 claims are authorized in Rule 10, W.R.Adj.R. with DNRC guidance set forth in Rules 34(a)-(f), W.R.C.E.R. Motions to amend are subject to a public notice period and objections if they may adversely affect other water rights. § 85-2-233(6)(a)(i). The movant bears the burden of overcoming *prima facie* status of the original claim by a preponderance of evidence. Rule 19, W.R.Adj.R. Ironically, while the burden of proof for a motion to amend is a preponderance of evidence, the Water Court custom is to only require substantial credible evidence for implied rights generated at trial. In *Foss*, the court found that maps included in statements of claim showing a ditch crossing three sources of water was “not strong” but sufficient to support an implied claim. 2013 Mont. Water LEXIS 17, *35. In contrast, on remand from an earlier case, *Open A* sought two implied claims, which the court

rejected, finding implied claims “cannot resurrect late-filed claims” and that historic use alone is not sufficient evidence of intent to claim multiple rights. *Open A Ranch v. Clark Canyon Water Supply Co.*, 2020 Mont. Water LEXIS 356, *56-57.

The *Petrich* and *Melin* cases fall within the category of implied rights generated after a hearing. In Water Court precedent, intent of the claimant appears as a critical theme in cases where implied rights were created after hearings. *In re Doll*, 2019 Mont. Water LEXIS 12, **24,30; *Open A Ranch v. Clark Canyon Water Supply Co.* 2020 Mont. Water LEXIS 356 *56-57; *Hoon v. Murphy*, 220 MT 50, ¶ 49. As in *Doll* and *Open A*, Water Court precedent should have led the court to deny implied claims where neither Appellee expressed clear intent to claim anything but their decreed rights. In securing implied claims, Appellees’ actions and intent appear entirely in the arguments of counsel, rather than actual evidence of contemplation or historic use supporting separate rights. Appellant was unable to find any Water Court precedent recognizing implied rights based solely on an overstated period of use and testimony of putative pre-1973 use. These cases on

appeal are outliers in Water Court jurisprudence and stretch the bounds of Water Court custom.

Appellees' implied claims also depart from a second theme established in Water Court cases: the requirement that substantial evidence prove that no expansion of historic use or increased burden on the source occurred. *In re Paulson*, 2020 MT Water LEXIS 254, *6; *Curry v. PCCRC*, 2014 Mont. Water LEXIS 20, *107. In *Paulson*, the Water Court approved a settlement agreement supported by “substantial historical evidence in the original claim files and throughout the proceedings” in granting implied claims. *Paulson*, 2014 MT LEXIS *6-7. However, in *Curry*, the Water Court rejected an implied claim supported only by Homestead Act patents and a second implied right for storage already identified in a separate claim *Curry*, 2014 Mont. Water LEXIS 20, *141-143.

B. The Supreme Court is the proper venue to define Water Court authority and sideboards limiting the Water Court's practice of recognizing implied claims.

Although the Water Court clearly possesses broad authority to identify water rights as they existed prior to July 1, 1973, the bounds of its authority to recognize implied rights remain unclear. In the four

cases where this Court has reviewed appeals of Water Court orders contemplating implied rights, the Court did not outline the authority to issue implied rights. While the question of whether the Water Court has authority to issue implied claims is valid, for this appeal the more pertinent question is: when is it appropriate for the Water Court to generate implied rights?

Sideboards on the Water Court's authority have taken shape since the practice emerged in the WRCER first promulgated by this Court. *Foss* provides structure, but its "common sense guidelines" are indefinite enough to invite conflict with existing Montana law. *Hoon* mandated substantial credible evidence, but only for the historic use burden. *Hoon v. Murphy*, 220 MT 50, ¶¶ 39-40. The Water Court recognizes that implied claims cannot be used to circumvent filing deadlines, expand the right, or revive abandoned claims. *In re Climbing Arrow Ranch*, 2019 Mont. Water LEXIS 1, *15-16. Even *Foss* recognizes that "failure to meet [the three prong test] results in loss of water rights, even where ample evidence of historic use exists." *In re Foss*, 2014 Mont. Water LEXIS 17, *37.

Appellant urges this Court to impose some definition to the implied rights analysis, and to require that, at minimum: the substantial credible evidence standard of proof for historic use be applied to each *Foss* requirement; that notice be afforded to other water users when expanding decreed rights; and, implied rights cannot be created for unfilled uses from fully-decreed sources. Unless the Water Court's authority to issue implied claims is articulated along with clear sideboards, its untethered discretion to issue implied rights is ripe for abuse, defeating filing deadlines and upending prior appropriations.

CONCLUSION

The Water Court erred in issuing implied water rights allowing Appellees to expand the periods of use of their decreed water rights. Such expansions violated governing statutes at the time of the decree and a decreed injunction against expansions. The Water Court failed to require substantial credible evidence for each of the *Foss* factors. This Court should reverse the Water Court's final decisions and uphold the judgments limiting Appellees' water rights to the decreed period of use.

Respectfully submitted this 7th day of April, 2025.

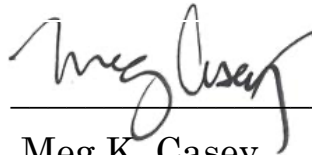


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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that the foregoing brief is double spaced and printed with a 14-point, proportionately spaced typeface, Century Schoolbook. I further certify that the brief contains 9,952 words.

Dated this 10th day of April, 2025.

A handwritten signature in black ink, appearing to read "Meg Casey", is written over a horizontal line.

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CERTIFICATE OF SERVICE

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