

IN THE WATER COURT OF THE STATE OF MONTANA

FILED

JUL 21 2005

NOTICE OF FILING OF MASTER'S REPORT

Montana Water Court

TO: ALL PARTIES

RE: CASE NO. 76HF-168; Claims 76H-W-050533-00, 76H-W-120062-00, 76H-B-215914-00

This is to provide you with Notice that the Water Master has filed a Master's Report (Findings of Fact and Conclusions of Law) with the Clerk of the Water Court for the water right(s) listed above. A copy of the Master's Report is enclosed with this Notice.

Please review this Master's Report carefully. If there are any corrections or changes that need to be made, you have 10 days from service of this Notice to file a written objection. You must mail a copy of your written objection to all the other parties who have been involved in this proceeding and file a certificate of such mailing with the Water Court. (This procedure is required by Rule 1.II. Water Right Claims Examination Rules and by Rules 5 and 53 of the Montana Rules of Civil Procedure.)

DATED this 21st day of July, 2005.

ANNA M. BURTON
Clerk of Court
Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270 (in Montana)

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364
Fax: (406) 522-4131

FILED

JUL 21 2005

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
WESTSIDE SUBBASIN OF THE BITTERROOT RIVER BASIN (76HF)

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO THE USE)
OF ALL THE WATER, BOTH SURFACE AND)
UNDERGROUND, WITHIN THE WESTSIDE)
SUBBASIN OF THE BITTERROOT RIVER)
DRAINAGE AREA, INCLUDING ALL)
TRIBUTARIES OF THE WESTSIDE)
SUBBASIN OF THE BITTERROOT RIVER)
IN RAVALLI COUNTY, MONTANA)

CASE NO. 76HF-168

76H-W-050533-00

76H-W-120062-00

76H-B-215914-00

CLAIMANT: United States of America (USDA Forest Service);
Big Creek Lakes Reservoir Association

OBJECTOR: Big Creek Lakes Reservoir Association
United States of America (USDA Forest Service);
United States of America (Bureau of Indian Affairs);
Avista Corporation;
MT Department of Fish, Wildlife, and Parks

MASTER'S REPORT

PROCEDURAL HISTORY

Water Court case 76HF-168 includes institutional water right claim, 76H-W-050533-00, filed by the United States Forest Service and two irrigation water right claims, 76H-W-120062-00 and 76H-B-215914-00, filed by the Big Creek Lakes Reservoir Association (Association). The single objection to claim 76H-W-050533-00, filed by the Association, has been withdrawn. All objections to claim 76H-B-215914-00 have been resolved through agreement of the parties or as the result of an Order Granting Summary Judgement issued by the Water Court. (See Order Amending and Adopting Master's Report on Late Claim Summary Judgement Motion, Case No.

76HF-168, Montana Water Court (September 25, 2003). The objections to claim 76H-W-120062-00 came on for hearing on December 12 and 13, 2004 in Missoula Montana before the Water Master. Post hearing filings were received by April 14, 2005.

MEMORANDUM

Claim 76H-W-120062-00

History of Use

The Big Creek Lakes Reservoir Association filed claim 76H-W-120062-00 for a reservoir on South Fork Lake, a natural lake located at the headwaters of the South Fork of Big Creek. The storage facility on the lake includes a small dam that raises the natural level of the lake a few feet and a headgate that allows for the release of this stored water. According to the claim abstract, the lake has approximately twenty seven acres of surface area and is capable of storing 205 acre feet of water. The main Association storage facility at Big Creek Lakes is located north of South Fork Lake on the main stem of Big Creek (Exhibit G-3). The water rights for the main storage facility are represented in claims 76H-W-120060-00 and 76H-W-120061-00 in Water Court case 76HF-159. The history of the main storage facility on Big Creek Lakes is significant to the issues before the Master on South Fork Lake.

The history of water use from South Fork Lake is sparse. There was no testimony at hearing that included first hand knowledge of the use of this right prior to the 1950s. Therefore, this early history is based on the historical record largely composed of documents kept by the Association and Forest Service. What is clear from this record is that there have been various attempts to maintain a storage facility on South Fork Lake since approximately 1897 and that the

Forest Service has been aware of the development and has attempted to control that development through permits since 1913.

The first record of use is a Notice of Appropriation filed by Lacoursier, Williams, and Beckwith in 1897. While all three of these appropriators subsequently became Association members,¹ they were apparently acting as individuals when they filed this appropriation. In 1913, the Forest Service issued a special use permit to George Brooks to store water in South Fork Lake. This permit ran through 1933. Apparently, Brooks acquired the right to the lake from Lacoursier, Williams, and Beckwith. In 1931, Smith, Chilson, and Callendar filed a special use application to reconstruct the dam, but were denied because of the existing permit to Brooks. Smith, Chilson, and Callendar applied for a special use permit again in 1939, but requested that the Forest Service take no action on the permit until they secured financial backing from the Association. This application contains two significant points: (1) as early as 1939, the Association was aware of development on South Fork Lake and was probably involved in that development through individual Association members, and (2) whatever facility had been installed on the lake prior to 1930 had fallen into disrepair and required reconstruction. The Forest Service finally issued a special use permit to Smith, Chilson, and Callendar in 1942. These owners held the permit until 1955 when they notified the Forest Service that they had transferred it to new owners, Yates, Gould, and Jaques, who then transferred their interest to the Association. The Association has claimed ownership of the water right to South Fork Lake since that time although there has been no Forest Service permit for the lake since 1957.

¹ The Association was originally incorporated on March 26, 1915

Prior to issuing the 1942 permit, the Forest Service had inspected the South Fork Lake facility and found it to be in disrepair. A 1937 inspection (Exhibit G-14) indicates that the lift gate and head wall were ineffective and that the area was covered with driftwood. During the thirteen years that Smith held the permit, he agreed to several repairs but apparently did not complete them. Inspections in 1946 and 1948 indicate the dam was in disrepair and that driftwood was a mounting problem. (Exhibits G-31 & G-32). By 1955, the dam was still in disrepair and did not appear to have been used for several years (Exhibit 40). At this point, the Smith, Chilson, and Callendar properties had been sold to Yates, Gould, and Jaques respectively. These new owners were able to reach an agreement that transferred ownership of the South Fork Lake facility to the Association in exchange for additional lake shares.

At some point in time, it appears that the original dam and headgate on South Fork Lake may have been either improved or replaced by the Association or its members. There is no record indicating if or when these improvements took place or who did the work. However, testimony from Dean Jaques indicates that there was a functioning headgate on the South Fork Lake dam in the early 1960s. Mr. Jaques grew up on the family property in this area. His father, Paul Jaques, was one of the parties that transferred the South Fork Lake water right to the Association in 1955. Paul Jaques was president of the Association for several years in the 1950s and 1960s. Dean Jaques testified that he has been to South Fork Lake many times beginning in the mid 1950s. In about 1963, he traveled to the lake in the late fall specifically to shut the headgate. Life long area resident Jack Buker testified that he was at the South Fork Lake dam in 1958 when he was seventeen years old. He recalls seeing a functioning headgate, but could not recall much more than that. Although Mr. Buker has been involved with the Association for

most of his adult life and is the current Association president, this 1958 trip is the only time he has actually been to the dam on South Fork Lake. Based on this testimony, it appears that the South Fork Lake reservoir facility was in functioning condition for at least a period of time in the late 1950's and early 1960's. There is no evidence establishing the date when the control structure ceased to function. Mr. Jaques recalled seeing the headgate on the South Fork Dam on occasion in the 1960's and early 1970's. He acknowledged that the headgate was gone by 1980.

On February 20, 1957, Forest Service Forester Carl W. Wetterstrom issued a Memorandum stating that the permit for South Fork Lake had been cancelled. The Memorandum goes on to state that there would be no further consideration of a permit for South Fork Lake until the Association's main reservoir on Big Creek Lakes was placed in the "required condition." The Memorandum indicates that the South Fork Lake reservoir could be considered in conjunction with the Big Creek Lakes Reservoir at that time. (Exhibit G-41) This condition was underscored in a September 18, 1958 Memorandum from Ranger McDonald to Forest Supervisor Thurman E. Trospen stating in part:

The South Fork Reservoir is not under permit at this time, although the previous permittee for the South Fork Reservoir relinquished it with the understanding that a permit for its repair and operation would be considered for issuance when the Big Creek Reservoir was finally maintained to an acceptable standard, including debris.

(Exhibit G-91)

The Association's reservoir on Big Creek Lakes is significantly larger than South Fork Lake with a surface area of 241 acres and a capacity of 2,781 acre feet. By the mid 1930's, the Forest Service was concerned about the condition of this facility and began to demand that the Association take steps to rectify the situation, including repairs to the dam and removal of drift-

wood. The dialogue between the Forest Service and Association continued for several years with some improvements but no real solution to the chronic problems with this dam. Finally, a joint project with the Association, Forest Service and Soil Conservation Service led to the installation of a completely new dam in 1977. While this resolved the issues regarding the condition of the dam, it did not end the driftwood problem. In fact, controlling driftwood and debris in Big Creek Lakes continues to be an issue that requires significant time and effort by the Association. Each fall, Association members spend several days clearing and burning driftwood and debris from this reservoir.²

Since the mid 1950's, the Association has focused all of its attention on Big Creek Lakes reservoir. Any mention of South Fork Lake in its dealings with the Forest Service or in the minutes of Association meetings were afterthoughts that led to no action (See e.g. Exhibit G-100; G-109; G-133; C-55; C-56; C-57). After the Big Creek Lakes Dam was replaced in 1977, the Association did little more in regards to South Fork Lake. While the subject of the South Fork Lake reservoir often came up at board meetings, there is no evidence that any of these discussions ever led to any significant action by the Association. In fact, the only record of action by the Association is a 1990 request to the Forest Service for work on the South Fork trail (Exhibit G-134). The Forest Service response was that work on this trail was not in its budget for that season but that it could possibly get some attention the next year. (Exhibit G-134). It does not appear that there was any followup by the Association.

² The 1964 Wilderness Act is a significant factor in the Association dealings with the Forest Service on the Big Creek Lakes Reservoir and on South Fork Lake. Both lakes are within the Selway Bitterroot Wilderness and are subject to several restrictions because of this location. For example, the Association was not allowed to use chainsaws for debris cleanup for several years because Big Creek Lakes Reservoir is inside the wilderness.

Several Association witnesses testified that the relationship with the Forest Service has been difficult over the years. Brian Langton testified that he has been involved with the Association most of his life, first through his father who was Association secretary for many years and then as an Association board member himself. His grandfather was a founding member of the Association. Mr. Langton testified that the Association's relationship with the Forest Service was often strained due to constant demands for maintenance and improvements to the Big Creek Lakes reservoir. He stated that some of the Forest Service rangers were difficult to work with. The constant fear that the water from the reservoirs could be in jeopardy was very stressful for his father. At the same time, Mr. Langton testified that he was a member of the Association board of directors through the 1970's when the Big Creek Lakes dam was replaced. He acknowledged that the Forest Service and Soil Conservation Service were instrumental in designing and financing the project. He testified that after the dam was replaced, the Forest Service would not allow the use of chainsaws in debris cleanup. This caused a great deal of difficulty for the Association. Although he was a board member for many years, Mr. Langton had no official contact with the Forest Service concerning either the Big Creek Lakes or South Fork Lake.

Access to South Fork Lake has been an issue for 100 years. The South Fork trail goes through heavy timber, bogs, and avalanche chutes that all create huge trail access problems. According to testimony, it is a tough trail under the best of circumstances. In describing the trail, Jack Buker stated "Some people said that the only reason they'd take a horse up the South Fork trail was if they was mad at it." (T p148) Trail user Steven Rickart testified that he usually left his horses about two miles short of South Fork Lake and walked the rest of the way because of

trail conditions. Chinook Swindle testified that he would not call the South Fork trail "stock passable." Other access to the lake from Bear Creek or over Packbox Pass from Big Creek Lakes is just as arduous. While the Forest Service does maintain the South Fork trail, it does not get the level of attention given to more popular trails such as the trail to Big Creek Lakes.

William Goslin has been a wilderness ranger in the Bitterroot National Forest since 1988. He testified that during that time, he has been to South Fork Lake nearly every year. Mr. Goslin stated that the Forest Service will clear heavily used trails such as the Big Creek trail twice in most years. The Forest Service clears lesser used trails such as the South Fork trail about every three years. They are cleared more often if time and resources allow. He testified that the Forest Service cleared the South Fork trail in 1991 as a response to the Association request. It was cleared at least two more times during the 1990's and in 2001. In 2003, the trail was cleared to stock specifications. During his several trips to South Fork Lake, Mr. Goslin has inspected the dam on a regular basis. He confirmed that the diversion structure has never been operational. In his opinion, the lake has been operating in a natural manner for years. He also testified that in the eighteen years he has been in his current position he has worked with the Association on several occasions to address issues regarding their use of the wilderness. He has been to Big Creek Lakes during the fall debris cleanup. Although Association members have discussed the situation on South Fork Lake with him, he has never seen an actual proposal from the Association for rehabilitation of the dam and diversion structure.

Beyond the issue of trail maintenance, there is little evidence of any dialogue between the Association and the Forest Service regarding South Fork Lake. Dale Thacker, Forest Service district ranger in the Stevensville district from 1975 to 1989, supervised all dams in the district.

During this period of time, he was very involved with the replacement of the Big Creek Lakes dam. He worked closely with the Association throughout this project. Mr. Thacker testified that he met with Association members at least once a year to discuss the dam and maintenance issues. He testified that during the entire period of time that he worked as a district ranger, the Association never brought the South Fork Lake reservoir to his attention. He also testified that any dialogue between the Association and other Forest Service employees concerning the South Fork reservoir would have been brought to his attention.

David Bull, current Forest Supervisor of the Bitterroot National Forest, testified that he reviewed all documents in the Forest Service's possession concerning the South Fork reservoir in preparation for this hearing. Mr. Bull confirmed that the last permit for the reservoir was terminated in 1957. Since that time, there has been no new application for a permit filed by the Association for the reservoir. While several instances of correspondence between the Forest Service and Association that reference South Fork Lake were brought to his attention on cross examination, he testified that none of these documents would be viewed as a permit application for the reservoir. Mr. Bull acknowledged that the Forest Service policy on dam permits has evolved over the years particularly after enactment of the 1964 Wilderness Act. At the same time, there has been a policy for dam repair within the wilderness area. He noted Canyon Creek, Tin Cup Creek, and Bass Lake as local examples.

Based on the record before the Master, it is apparent that the history of the water right represented by claim 76H-W-120062-00 has been one consisting of more nonuse than use. At one point, someone took the time and effort to put a dam and control structure on South Fork Lake. It is not clear if this took place in 1897, 1913, or at some other point in time. There have

been a series of interested users who appear to have had the intention to develop the right but an inability to keep the right going. The three original 1897 appropriators, Lacoursier, Williams, and Beckwith, were apparently out of the picture by 1913 when George Brooks got the permit for the lake.

By 1931 when Smith, Chilson, and Callendar first applied for a permit, they were either unaware that the Brooks permit was still in place; assumed that Brooks no longer had an interest; or had an agreement to proceed as Brook's successor. In their applications, Smith, Chilson, and Callendar were requesting a permit to *rebuild* the dam and control structure. So, between 1897 and 1931, the dam was developed and fell out of use for enough time for the system to require rebuilding.³

What work was done to the dam and control structure after the permit was issued to the Smith group is unknown. But, based on several exhibits offered at hearing, it is apparent that there was minimal use and upkeep on the dam through the 1940's and early 1950's. On several occasions, the Forest Service pushed the permit holders to fix the control system and clean up debris on the dam and in the spillway. It is doubtful that the new steel control structure had been installed by the time that Smith, Chilson, and Callendar transferred the permit to Yates, Gould, and Jaques. If it had been, the Forest Service was apparently unaware when it canceled the permit in 1957.

The control structure was functioning in 1963 when Dean Jaques closed it for the season. When he visited the lake in 1980, the structure was gone. There has been no functioning control structure and therefore no diversion of water since at least 1980.

³ It is not clear how a permit issued to J.H. White in 1933 that expired in 1936 fits into the picture.

Standard of Review

The Water Court employs a two-step process for determining abandonment of a water right claim. The objectors bear the initial burden of showing a long period of continuous non-use of the water right claim. If the objector meets this burden, it raises a rebuttable presumption that the claimant intended to abandon the claim. The burden then shifts to the claimant to explain the long period of non-use. *In re the Adjudication of Water Rights of the Clark Fork River* (1992), 254 Mont. 11, 15, 833 P.2d 1120, *79 Ranch v. Pitsch* (1983), 204 Mont. 426, 432-33, 666 P.2d 215. The presumption of abandonment that arises from a long period of continuous non-use cannot be rebutted by simply expressing a hope or desire reflecting a "gleam in the eye philosophy" regarding the future use of water. *79 Ranch v. Pitsch* at 433-34. The claimant must introduce specific evidence explaining or excusing the long period of non-use, *In re the Adjudication of Water Rights of the Musselshell River* (1992), 255 Mont. 43, 51, 840 P.2d 577.

The Forest Service asserts that this history of inconsistent use from 1897 to about 1970 and no use from about 1970 to 2004, is sufficient to constitute an abandonment of the water right claim for South Fork Lake as represented in claim 76H-W-120062-00. The Association counters that it has continued to receive a benefit from the lake, and therefore use the water right, in spite of the condition of the facility and that in the alternative, any nonuse of the right is the result of Forest Service actions blocking its use.

Lack of Beneficial Use

The Association first argues that the driftwood and debris that has pushed up against the dam on South Fork Lake over the years has served to hold water back above the natural level of the lake and then slowly release the water thereby performing the same function as a dam and

control structure. By allowing this situation to continue, the Association asserts that it receives essentially the same benefit it did from operating the control structure. The Association also notes that it uses water from South Fork Lake every year simply from the fact that this lake drains into a tributary of Big Creek and that South Fork Lake water co-mingles with Big Creek water. Therefore, South Fork Lake water is part of the water that is diverted through the various diversions used by the Association.

The Association has not maintained a dam and control structure to impound and store water in South Fork Lake since at least 1980. It has not released stored water and put it to beneficial use. The fact that the old spillway is clogged with debris that may slow water as it flows out of the lake does not constitute a diversion that the Association can claim as part of the exercise of a water right. Forest Service expert witness Jed Simon presented unrefuted testimony stating that the South Fork Lake is functioning as a natural lake and that the debris and driftwood in the lake even acting in conjunction with the old dam does not serve to impound water. If the Water Court accepted this logic, the Association could have saved itself the trouble of placing the dam and control structure on South Fork Lake in the first place and simply claimed a right to storage in the lake because the natural accumulation of debris and driftwood tends to slow water release from the lake.

Montana law prior to July 1, 1973, required three basic elements to establish a valid appropriation of water: (1) an intent to appropriate water; (2) an actual diversion, withdrawal, or capture of water from a source; and (3) the application of the diverted, withdrawn, or captured water to a beneficial use. See generally, *Murray v. Tingley* (1897), 20 Mont. 260, 50 P. 723; *Bailey v. Tintinger* (1912), 45 Mont. 154, 122 P. 575; *Wheat v. Cameron* (1922), 64 Mont. 494,

210 P. 761; *Warren v. Senecal* (1924), 71 Mont. 210, 228 P. 71; *Sherlock v. Greaves* (1938), 106 Mont. 206, 76 P.2d 87. While the Association's predecessors met these requirements at some point in time, the Association itself has not sustained the requirement to continue to divert water and put it to a beneficial use. The Association has not diverted water from South Fork Lake for several years. In fact, it is questionable that the Association, itself, ever diverted water from South Fork Lake. Dean Jaques' testimony that he closed the control gate, as instructed by his father, in the fall of 1963 is the only evidence supporting actual use of this water right claim. There is no evidence that the right has been used by the Association or by any other water users since that time. This nonuse, beginning in 1964, has continued through the 2004 irrigation season, a period of 40 years.

Lack of Justification for Nonuse

The Association argues that it has been prevented from repairing and using the South Fork Lake reservoir by the Forest Service in several ways. It contends that the Forest Service first informed the Association in the 1950's that it would not consider any new permit for South Fork Lake until Big Creek Lakes reservoir was placed in acceptable condition. It then argues that the Forest Service has blocked any attempts to rehabilitate the South Fork Lake dam by failing to place the South Fork trail in a reasonable condition for access to the lake. Finally, the Association asserts that the Forest Service would not allow work on the South Fork dam until it had developed and implemented a policy for dam repair within the wilderness area. The Association claims that the Forest Service did not have this policy in place until 1996. Because it was prevented from maintaining and using this water right, the Association maintains that any nonuse that may have occurred is justified by the circumstances surrounding the water right.

The evidence at hearing does support the argument that the Forest Service restricted the use of this right for a significant period of time. In 1957, the Forest Service cancelled the permit for South Fork Lake and stated that it would not allow use of that reservoir until the Big Creek Lakes reservoir was "placed in the required condition" (Exhibit G-41). This restriction on use of South Fork Lake lasted until the dam on Big Creek Lakes was replaced in 1977. At that point, the Association had complied with this Forest Service condition and was arguably free to pursue whatever permit was necessary for South Fork Lake. However, the Forest Service had no obligation to simply re-issue a permit for South Fork Lake. The Association had the obligation to actively maintain its water right. It has provided no evidence to show that it took any reasonable steps to obtain or even apply for a new permit.

The assertion that Forest Service requirements for debris control on Big Creeks Lakes extended this ban on a new permit is also not persuasive. Controlling debris on Big Creek Lakes is clearly time consuming and difficult. However, the fact that Big Creek Lakes has continuing maintenance issues cannot be used to excuse the lack of attention to South Fork Lake. Debris removal under the conditions dictated by the Forest Service is simply a fact of life for maintaining the Big Creek Lakes water right. It cannot be used as a condition explaining the nonuse of South Fork Lake. There is no evidence supporting the argument that the Forest Service continued to withhold a permit for South Fork Lake until the debris problem was solved. The Association never applied for a permit. The Master finds that any Forest Service imposed restriction on the exercise of claim 76H-W-120062-00 ended in 1977 when the Big Creek Lakes Dam was replaced.

One of the few affirmative steps the Association took after 1977 in regards to this claim was filing the Statement of Claim in 1982. However, this filing amounts to little more than carrying the right on the Association books. Simply keeping a record of the right is not sufficient to explain nonuse of the right. *In re the Adjudication of Water Rights of the Clark Fork River* (1992), 254 Mont. 11, 15, 833 P.2d 1120.

When the Preliminary Decree for the Westside of the Bitterroot River was issued on January 14, 1998, the Association claim for South Fork Lake was subject to objections. The Forest Service filed an objection to the claim on October 9, 1998. Although the Association did not assert this point, this objection and the other objections filed against this claim can be viewed as a form of restriction on the exercise of the right. Once the validity of the claim was challenged in this adjudication, it was reasonable for the Association to put its efforts into defending the claim. There is little sense in spending Association time and money working on the physical components of the claim until the allegations of abandonment are resolved. Therefore, the Master agrees that a new restriction on use of the claim began in 1998.

The condition of the South Fork trail and the alleged lack of Forest Service trail maintenance is not a compelling argument. There is no evidence showing that the Forest Service had a special duty to put the time and effort into the South Fork trail that the Association apparently thought was necessary. All parties acknowledge that the trail is hardly fit for horses under the best of circumstances. It is simply difficult to get to South Fork Lake. According to testimony at hearing, the Forest Service repaired the trail on at least a few occasions between 1990 and 1998. In 2001, it did extensive work to the trail. Curiously, the first and only request by the Association for trail maintenance came in 1990, thirteen years after the Big Creek Lakes

dam was replaced. In response to that request, the Forest Service cleared the trail the next year. If access to the lake was a problem, the single Association request for trail work does not substantiate a pattern of non-cooperation by the Forest Service rising to the level of restricting use of the water right, particularly when the Forest Service responded to the only trail maintenance request by clearing the trail. In short the condition of the South Fork trail does not constitute a Forest Service restriction of use of claim 76H-W-120062-00. If access to the lake was a problem, the Association was far from diligent in addressing that problem.

The Association argument that the Forest Service had no policy for working on dams within wilderness areas is based on testimony in Water Court case 76HB-48 regarding the Carlton Creek drainage. In that case, claim 76H-W-119992-00, representing a stored right in Little Carlton Lake, appeared in the Temporary Preliminary Decree with remarks noting potential abandonment issues. All objections to the claim, including Forest Service objections, were subsequently withdrawn. A Stipulation filed in the case called for removal of the issue remarks, but provided no evidence supporting their removal. As a result, the Master refused to remove the remarks based on the Stipulation. The claimant, Carlton Creek Irrigation Company, responded by requesting a hearing on the issue remarks.

At hearing, the Carlton Creek Irrigation Company provided testimony indicating that the Forest Service had breached the dam on Little Carlton Lake in 1960 thereby ending use of the water right. The Irrigation Company then provided unrefuted testimony indicating that it had been attempting to repair the dam for years but that the Forest Service would not issue a permit for the work until it had developed a policy for dam work within wilderness areas. The Irrigation Company asserted that this policy was not in place until 1996. Based on this alleged lack of a

policy resulting in the inability to obtain a permit, the Irrigation Company successfully argued that any nonuse of the claim was excusable. The Master found that the nonuse of the claim had been explained by the Irrigation Company and recommended removal of the remarks.

Although the Carlton Creek case presents a similar situation, it does not provide support for the Association argument. If anything, the record before the Master in this case calls the result in 76HB-48 into question. The Carlton Creek Irrigation Company requested the hearing in that case, there were no adverse parties. As a result, the record for a decision in case 76HB-48 was clearly one sided. There is no question that the Forest Service had a policy for dam work within the wilderness area by 1977 when the Big Creek Lakes dam was replaced. There has also been work on other dams on Bass Creek, Tin Cup Creek, and Canyon Creek during the same time period, all within the wilderness area in this National Forest. None of this information came before the Master in case 76HB-48.

Given the evidence presented in this case, much of it by the Association itself, the argument that the Association could not obtain a permit for South Fork Lake because the Forest Service had no policy for work on dams within the wilderness and was not issuing permits because of this lack of a policy, is baseless.

Using a time frame that is most favorable to the Association, any nonuse or use of claim 76H-W-120062-00 prior to 1957 will not be considered due to lack of a clear record showing continuous nonuse. The nonuse from 1957 until 1977 is excused by the restriction on use imposed by the Forest Service. Similarly, the nonuse that occurred after 1998 is excused by the restriction imposed by challenges to the validity of the water right in the form of objections to the claim in this adjudication. This leaves a period of continuous nonuse from 1977 to 1998, twenty one years.

In *79 Ranch v. Pitsch* (1983), 204 Mont. 426, 431, 666 P.2d 215, the Montana Supreme Court found that a forty year period of nonuse was strong evidence of abandonment. At the same time, the Court cited section 85-2-404 MCA, which creates a prima facie presumption of abandonment after ten years of nonuse for all final decree claims, and noted that the “general, modern trend” and legislative intent supports a presumption of abandonment after ten years of continuous nonuse. *79 Ranch v. Pitsch* at 434. In this case, the evidence supports a find that there has been a forty year period of continuous nonuse beginning in 1964 and continuing through the 2004 irrigation season. This is sufficient to raise the presumption of abandonment and shift the burden to the Association to excuse or explain that nonuse. Reviewing the facts in this case in a light that is most favorable to the Association, there is still a twenty one year period of continuous nonuse from 1977 to 1998 that would by itself be sufficient to raise the presumption of abandonment. (See *In re the Adjudication of Water Rights of the Clark Fork River* (1992), 254 Mont. 11, 16, 833 P.2d 1120, where the Court found that 23 years of continuous non use was sufficient to raise the presumption of abandonment.) Based on the record before the Master, the Association has failed to meet that burden. Between 1977 and 1998, the Association did on occasion discuss the South Fork Lake water right and the need to do something about it, but nothing of any significance was ever done. The Association never filed a permit application and never attempted to work on the structure with or without a permit. It simply carried the water right claim on its books as an unused asset. There may have been a considerable amount of worry about the future of the right, but there was no action.

Conclusion

The water right represented by claim 76H-W-120062-00 has been out of use for at least forty one years. This is a sufficiently long period of nonuse to create a presumption that the claimant intended to abandon the claim and to shift the burden to the claimant to present evidence to excuse or explain that nonuse. While the Association has presented evidence that could be accepted to explain some of that nonuse, it has failed to present evidence to explain or excuse the nonuse from 1977 to 1998, a period of twenty one years. This twenty one year period of nonuse by itself is sufficient to raise a presumption of abandonment. The Association has failed to refute this presumption. Beyond this twenty one year period, it is apparent that the history of this claim is one of minimal use with long periods of nonuse from 1897 to the present. It has simply never been a water right where the benefit justified the effort. Based on the record before the Master, water right 76H-W-120062-00 has been abandoned.

Findings of Fact

1. Water Court case 76HF-168 includes an institutional claim, 76H-W-050533-00, filed by the United States Forest Service and two irrigation claims 76H-W-120062-00 and 76H-B-215914-00 filed by the Big Creek Lakes Reservoir Association (Association). All three claims appeared in the Preliminary Decree for this Subbasin with remarks noting potential issues and all three received objections based on these remarks.

Claim 76H-W-050533-00

2. The single objection to claim 76H-W-050533-00, filed by the Association, has been withdrawn. The issue remark that appeared on this claim notes that it is a use right with a

priority date postdating the district court decree for Big Creek. This remark reflects Section 89-835 of the Revised Codes of Montana, (1947), governing the appropriation of junior water rights from a decreed stream. The statute allows the appropriator to petition the district court to open the decree, add the new appropriation, and establish its relation to the other rights affected by the decree. If an appropriator fails to follow this procedure, that water right cannot be exercised against any appropriator mentioned in or bound by that decree. *See also* Section 89-837 RCM. In other words, any appropriator who failed to follow these statutes would become junior to a subsequent appropriator who did follow the statutes. The remark identifies this possibility.

3. On July 1, 1973, these statutes were replaced by the Montana Water Use Act. Under this act, appropriators could no longer obtain a decreed right by petitioning the district court. When the Preliminary Decree was issued for this Subbasin, the Source Index identified all claims from this source that have a priority date post dating the district court decree. This index shows that claim 76H-W-050533-00 is the most junior claim on Big Creek. Therefore, there are no junior claims that petitioned the district court to be added to the decree and no claims that can assert a priority date senior to this claim based on compliance with § 89-835 RCM. As a result, the post-decree remark does not raise a valid issue and should be removed from this claim.

Claim 76H-B-215914-00

4. Claim 76H-B-215914-00 appeared in the Preliminary Decree for this Subbasin with remarks noting several potential issues and received objections based on these remarks. The claim itself is a late claim as provided for in Section 85-2-221 (3) MCA. The Montana Department of Fish, Wildlife and Parks (DFWP) filed objections to the claim to address issues raised by this late claim status. The DFWP then filed Motions for Summary Judgement in

several Subbasin 76HF cases, including this case, to address these issues. The Water Court granted the Summary Judgement Motion in this case on September 25, 2003 and on October 1, 2003, issued a general Order directing that all late claim information and issue remarks be changed to reflect the Summary Judgement ruling. Therefore, the information remark that appears under the priority date element on claim 76H-B-215914-00 has been corrected to reflect the current remark:

CLAIM FILED LATE 06-28-96. AS MANDATED BY SECTION 85-2-221(3) MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL FEDERAL AND INDIAN RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW

The late claim issue remark that appeared on these claims gave notice that the claims could be subordinate and therefore junior to certain permits and reservations of water. Any party asserting a superior claim to water based on a permit or reservation was required to file an objection to that late claim during the Subbasin 76HF objection period. Because no such objections were filed, this remark should now be removed from this claim.

6. On October 14, 2003, the claimant and objector United States of America (Bureau of Indian Affairs) filed a Stipulation addressing the remaining objections to claim 76H-B-215914-00. The terms of the Stipulation were adopted by Avista Corporation on December 12, 2003. The United States Forest Service had previously withdrawn its objection to this claim contingent upon the Water Court adopting certain changes to the claim. These changes are incorporated into the Stipulation. The Preliminary Decree for this Subbasin includes the following specific elements for this claim:

Priority Date: May 1, 1871

Flow Rate: 139.10 CFS

Maximum Acres: 3,672.11

Point of Diversion and Means of Diversion:

LOT/BLK QTR SEC SEC TWP RGE COUNTY MEANS
The Point of Diversion for this claim includes sixteen separate diversions from Big Creek. All diversions use headgates and ditches. The specific legal descriptions for these diversions and the name for each ditch can be found in the Preliminary Decree for this Subbasin.

Place of Use for Irrigation:

ACRES QTR SEC SEC TWP RGE COUNTY
The Place of Use for this claim totals 3,672.11 acres in thirty two parcels. The specific legal description for each parcel can be found in the Preliminary Decree for this subbasin.

Under the terms of the October 14, 2003 Stipulation, these elements of this claim should be:

Priority Date: December 31, 1928

Flow Rate: 25.00 CFS

Maximum Acres: 4,960.00

Point of Diversion and Means of Diversion:

	<u>LOT/BLK</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
01		NWSWSE	11	8N	21W	RAVALLI	HEADGATE
02		SENESE	11	8N	21W	RAVALLI	HEADGATE
03		NESWSE	11	8N	21W	RAVALLI	HEADGATE
04		SWNESE	11	8N	21W	RAVALLI	HEADGATE
05		NESWSW	12	8N	21W	RAVALLI	HEADGATE
06		SWSWSE	12	8N	21W	RAVALLI	HEADGATE
07		SWSWSE	12	8N	21W	RAVALLI	HEADGATE
08		SWSESE	12	8N	21W	RAVALLI	HEADGATE
09		NESESW	12	8N	21W	RAVALLI	HEADGATE
10		SESESE	12	8N	21W	RAVALLI	HEADGATE
11		SWNWNE	18	8N	20W	RAVALLI	HEADGATE
12		SWSENE	18	8N	20W	RAVALLI	HEADGATE
13		NWNENW	18	8N	20W	RAVALLI	PUMP

Ditch Names 01 Cole Ditch
 02 Big Ditch
 03 Clark-McCune Ditch
 04 Humble Ditch

- 05 Buker "B" Ditch
- 06 Strange "A" Ditch
- 07 Strange "B" Ditch
- 08 Park Hill Ditch
- 09 Sanders-Mittower-Nichols "A" Ditch
- 10 Sanders-Mittower-Nichols "B" Ditch
- 11 Langton "A" Ditch
- 12 Langton "B" Ditch
- 13 Langton Pump

Place of Use for Irrigation:

	<u>ACRES</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001	80.00	E2SE	11	8N	21W	RAVALLI
002	640.00		12	8N	21W	RAVALLI
003	640.00		13	8N	21W	RAVALLI
004	160.00	E2E2	14	8N	21W	RAVALLI
005	640.00		24	8N	21W	RAVALLI
006	160.00		25	8N	21W	RAVALLI
007	80.00	S2SE	6	8N	20W	RAVALLI
008	640.00		7	8N	20W	RAVALLI
009	320.00	W2	8	8N	20W	RAVALLI
010	320.00	W2	17	8N	20W	RAVALLI
011	640.00		18	8N	20W	RAVALLI
012	640.00		19	8N	20W	RAVALLI
013	80.00	W2NW	20	8N	20W	RAVALLI
TOTAL	4,960.00					

THE LISTED PLACES OF USE DESCRIBE THE HISTORICAL GENERAL SERVICE AREA OF THE BIG CREEK LAKES RESERVOIR ASSOCIATION. WITHIN THIS SERVICE AREA, WATER HAS BEEN DELIVERED ANNUALLY TO A MAXIMUM NUMBER OF ACRES NOT EXCEEDING 3,200 ACRES.

All of the remaining elements of the claim should appear in the next decree for this Subbasin with no changes.

7. An ownership remark that appears on the claim suggests that historical highwater rights were owned by individual land owners, not the Association. The remark implies that the only reason for this particular claim is to avoid late claim filing fees for each individual owner. In the Stipulation, the USA states that its review of the Association's Articles of Incorporation;

By-Laws; minutes from Special Meetings; and minutes from the May 5, 2001 annual meeting support the Association claim to ownership of this water right. Based on this representation and the lack of evidence supporting the allegation that this claim is simply a way to avoid paying fees, the Master finds that the record supports removing this remark from the claim abstract.

8. The claim also received remarks noting 2,765.00 acres confirmed as irrigated in the 1958 Ravalli County Water Resource survey and 3,205.00 acres confirmed as irrigated in a 1979 USDA aerial photograph. The Stipulation follows the second remark and limits annual irrigation to 3,200.00 acres. It addresses the lower acreage figure by stating that the USA conducted a four day field investigation of the irrigation system at issue and confirmed each point of diversion and the aggregate place of use. Based on this review and representations by the parties that the Stipulation is an accurate reflection of historical use, the Master finds that the record is sufficient to remove both acreage remarks.

Claim 76H-W-120062-00

9. Claim 76H-W-120062-00 was filed for a reservoir on South Fork Lake, a natural lake located at the headwaters of the South Fork of Big Creek. The claim appeared in the Preliminary Decree for this Subbasin with remarks noting potential place of use, acres irrigated, flow rate, and abandonment issues. The claim received objections from the United States of America (Bureau of Indian Affairs), United States Forest Service, and Avista Corporation based on these remarks. The claim also received objections from the claimant. The BIA objection was subsequently withdrawn. The Forest Service, Avista Corporation, and Association objections were heard by a Water Master on December 12 and 13, 2004.

10. At hearing, the parties addressed the priority date for this claim and the alleged abandonment of the claim. Because the Master finds that the abandonment issue is dispositive, the priority date issue is not addressed in this report. The Forest Service presented evidence at hearing establishing a period of nonuse for this claim of approximately 40 years. The Association argued that any nonuse should be excused because of Forest Service actions preventing use of the right. The Master finds that the conduct of the Forest Service was responsible for at least some of the nonuse but that nonuse between 1977 and 1998 has not been excused or explained by the Association. These issues are addressed at length in the Memorandum that is part of this report.

CONCLUSIONS OF LAW

I.

The Montana Water Court has jurisdiction to review all objections to preliminary decrees pursuant to § 85-2-233, MCA.

II.

A properly filed Statement of Claim for existing an water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by other evidence that proves that one or more elements of the prima facie statement of claim are incorrect. This is the applicable standard of proof regardless of whether the objectors are adverse parties or the claimants objecting to their own water right claims. *See* Memorandum Opinion, Order Adopting Master's Report, Water Court Case 40G-2 (March 11, 1997).

III.

There are no required element changes for claim 76H-W-050533-00. However, the priority date issue remark has been addressed and should therefore be removed from the claim.

IV.

In the present case, the record before the Master is sufficient to contradict and overcome the content of the prima facie claim and justifies the changes to claim 76H-B-215914-00 stated in the Findings of Fact. These changes constitute a voluntary reduction in the elements that comprise this water right claim and are within the parameters of the original Statement of Claim as filed for this water right. In addition, the proposed changes to this claim address and resolve the potential issues noted by remarks that appeared on the claim in the Preliminary Decree.

V.

The Water Court employs a two-step process for determining abandonment of a water right claim. The objectors bear the initial burden of showing a long period of continuous non-use of the water right claim. If the objector meets this burden, it raises a rebuttable presumption that the claimant intended to abandon the claim. The burden then shifts to the claimant to explain the long period of non-use. *In re the Adjudication of Water Rights of the Clark Fork River* (1992), 254 Mont. 11, 15, 833 P.2d 1120, *79 Ranch v. Pitsch* (1983), 204 Mont. 426, 432-33, 666 P.2d 215. The presumption of abandonment that arises from a long period of continuous non-use cannot be rebutted by simply expressing a hope or desire reflecting a "gleam in the eye philosophy" regarding the future use of water. *79 Ranch v. Pitsch* at 433-34. The claimant must introduce specific evidence explaining or excusing the long period of non-use, *In re the Adjudication of Water Rights of the Musselshell River* (1992), 255 Mont. 43, 51, 840 P.2d 577.


VI

In regards to claim 76H-W-120062-00, the objectors have established a forty year period of nonuse. This is a sufficient amount of time to shift the burden to the claimant to explain or excuse this nonuse. The claimant has presented evidence to explain and excuse a portion of that nonuse, but has failed to excuse or explain the nonuse from 1977 to 1998. It is therefore presumed that claim 76H-W-120062-00 has been abandoned through an unexplained and unexcused twenty one year period of nonuse. The basis for this finding of abandonment and the controlling law is addressed in depth in the Memorandum that is part of this report.

RECOMMENDATIONS

1. Claim 76H-W-050533-00 should appear in the next decree for this Subbasin with no changes. The issue remark should be removed from this claim.
2. The changes to claim 76H-B-215914-00, as stated in the Findings of Fact, should be adopted by the Water Court to correct the Preliminary Decree for this Subbasin. All of the issue remarks should be removed from this claim.
3. Claim 76H-W-210062-00 should be dismissed and should not appear in the next decree for this Subbasin.

DATED this 21 day of July, 2005.


Douglas Ritter
Water Master

CERTIFICATE OF SERVICE

I, Patricia J. Gunderson, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Big Creek Lakes Reservoir Association
% Kay Neal
2850 Rippling Woods
Victor MT 59875

Alison Roberts, Attorney
2596 S Lewis Way
Lakewood CO 80227

K.D. Feedback, Attorney
PO Box 1715
Helena MT 59624-1715

Land and Water Consulting, Inc.
PO Box 8254
Missoula MT 59807

Jody Miller, Special Assistant
United States Attorney
PO Box 7669
Missoula MT 59807

Roselyn Rennie, Attorney
Office of the Billings Field Solicitor
316 North 26th Street
Billings MT 59101

BIA Pacific Northwest Region Office
Branch of Resource Compliance
911 NE 11th Avenue
Portland OR 97232-4169

R. Blair Strong, Attorney
717 West Sprague Ave. Suite 1200
Spokane WA 99220

G. Steven Brown, Attorney
1313 Eleventh Avenue
Helena MT 59601

DATED this *21st* day of *July*, 2005.

Patricia J. Gunderson
Patricia J. Gunderson
Deputy Clerk of Court