

Montana Water Court
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FILED

JUN 20 2014

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
BLACKFOOT RIVER - BASIN 76F

* * * * *

CLAIMANTS: Gordon Jones; Vicki Jones

OBJECTORS: Avista Corporation;
United States of America
(USDA Forest Service)

CASE 76F-110
(Part of)
76F 97781-00
76F 97782-00
76F 97783-00

NOTICE OF FILING OF MASTER'S REPORT

You may file a written objection to the Report if you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report.

The above stamped date indicates the date the Master's Report was filed and mailed. Rule 23 of the Water Rights Adjudication Rules requires that written objections to a Master's Report must be filed within 10 days of the date of the Master's Report. Because the Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10 day objection period. Rule 6(d) M.R.Civ.P. This means your objection must be received no later than 13 days from the above stamped date.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Findings of Fact

1. Objector Avista Corporation's March 3, 2014 status report says that Avista will withdraw its objections to claims 76F 97781-00, 76F 97782-00, and 76F 97783-00 if claimants' motion to amend those claims is granted.
2. The United States withdrew its objection to all three claims without condition.
3. Claimants filed a motion to amend claims 76F 97781-00, 76F 97782-00, and 76F 97783-00 on July 30, 2012, before this case was consolidated. Claimants filed another motion to amend the claims, asking for the same relief, on January 31, 2014. This report addresses the 2014 filing. Aside from Avista's status report, the objectors did not respond to the motion.
4. Claimants ask that each of the three claims be amended to fit what claimant says is its historical and beneficial use and to change the priority date from November 5, 1964, to June 1, 1890.

Purpose:

5. The three claims have an issue remark which says that the purpose is unclear because the claimed purposes include both domestic and mining. Claimant Gordon Jones' affidavit, attached to the motion to amend, says that historically the only purpose of the claims has been for mining purposes.

Flow Rate:

6. The three claims have flow rate issue remarks. Each claim has a decreed flow rate of 2.50 cfs. The DNRC claims examiner calculated the average annual flow of the sources of each of the claims. Claim 76F 97781-00 is on a stream which has a drainage area of 485 acres (0.75 square mile). Applying the Orsborne formula, the average annual flow of 76F 97781-00 is 0.4 cfs. Claim 76F 97782-00 has a stream which drains 122 acres (0.19 square mile) and an average annual flow of 0.1 cfs. Claim 76F 97783-00 drains 544 acres (0.85 square mile) and an average annual flow of 0.5 cfs.
7. The claim numbers in section IV(A) through (C) of claimants' motion are inaccurate. The best reading of what claimants intended is that claimant moved to amend the flow rate of claim 76F 97782-00 from 2.50 cfs to 2.35 cfs and the flow rate of 76F

97783-00 to 2.25 cfs.

8. The points of diversion of these claims are in an area of heavy winter snow. The period of use (April 1 to November 1) of these claims shows that water was diverted during the warmer months.

9. While the flow rate issue remark is correct, it is based on a calculation of average annual flow. Claimants' measurements show that during some times of year, Wilson Creek can flow the claimed amount of 2.50 cfs.

Priority Date:

10. The priority date November 5, 1964, is the date the mining claims were patented by the United States. Claimants moved to change the priority dates of all three claims to June 1, 1890.

11. The exhibits attached to claimants' motion show that there has been mining in the vicinity of their places of use since about 1890. Most of the claims mentioned in the historical articles are not on claimants' land. Many are lode claims which have different water requirements from placer mining. The historical use of water on what is now claimants' land was for placer mining.

12. Exhibit C to the motion is an undated historic narrative from the Montana Department of Environmental Quality. Most of the narrative is not relevant to this case. The narrative mentions the Hopkins placer which was located near or upon the land claimants now own. The narrative does not give a start date for the Hopkins placer. The narrative mentions that some of the previous owners used dry land washing plants (which use air instead of water) to recover values. The narrative about the Hopkins placer does not attempt to trace a continuous chain of operation or ownership.

13. Claimants' exhibits do not show an unbroken chain of ownership or water use on their property running back to 1890. Asserting that the mining claims have been in operation since the 1890s is not proof of historical beneficial use by claimants' predecessors in ownership.

14. Claimants withdrew their objections to these claims.

Conclusions of Law

1. The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees. Section 85-2-233, MCA.
2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves an element of the prima facie claim is incorrect. This is the standard of proof whether the objectors are adverse to the claimants or are the claimants objecting to their own claim. Rule 19, W.R.Adj.R.
3. The Water Court may resolve issue remarks based upon information in the claim file and obtained by the Court. Section 85-2-248(3), MCA.
4. The Water Court is required to weigh the information resulting in an issue remark and the issue remark against the claimed water right in adjudicating the claim. §85-2-247(2), MCA.
5. For the flow rates, for claim 76F 97781-00, claimant did not move to change the flow rate. Although the average annual flow of Wilson Creek will not allow the use of 2.50 cfs year round, there are times when that much water is available. The flow rate issue remark should be removed from the abstract of claim 76F 97781-00.
6. Concerning the flow rates of claims 76F 97782-00 and 76F 97783-00, claimants' motion asks for a reduction in that element of the claims and can be granted without further proof. Rule 17(c), W.R.Adj.R.
7. Concerning the motion to change the priority date, claimants have not proven a clear or unbroken chain of title or historical use of water for mining purposes before the decreed priority date of November 5, 1964.
8. The court is not bound by stipulations or assertions of counsel or witnesses. See *Allen v. Petrick*, 69 Mont. 373, 380 (1924).
9. The motion to change the priority dates fails for lack of substantial evidence.

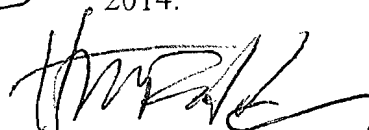
Recommendations

Change the flow rates of claims 76F 97782-00 and 76F 97783-00 as stated above.

Remove the issue remarks from the abstracts of the claims.

Post-decree abstracts of the claims are served with this report to confirm that the recommended changes have been made in the state's centralized record system.

DATED this *20* day of *June*, 2014.



Hugh B. McFadden, Jr.
Water Master

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BLACKFOOT RIVER
BASIN 76F
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 76F 97781-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: GORDON JONES
PO BOX 8492
BOISE, ID 83707 8492

VICKI JONES
PO BOX 8492
BOISE, ID 83707 8492

Priority Date: NOVEMBER 5, 1964

Type of Historical Right: USE

Purpose (use): MINING

Flow Rate: 2.50 CFS

Volume: THIS RIGHT IS LIMITED TO THE VOLUME OF WATER HISTORICALLY USED FOR MINING PURPOSES.

Source Name: WILSON CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENWNW	22	13N	10W	POWELL

Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO NOVEMBER 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NENWNW	22	13N	10W	POWELL

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

97781-00 97784-00 97785-00

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 08/18/2006: PURPOSE,
VOLUME.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING
THIS ONE.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BLACKFOOT RIVER
BASIN 76F
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 76F 97782-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: VICKI JONES
PO BOX 8492
BOISE, ID 83707 8492

GORDON JONES
PO BOX 8492
BOISE, ID 83707 8492

Priority Date: NOVEMBER 5, 1964

Type of Historical Right: USE

Purpose (use): MINING

***Flow Rate:** 2.35 CFS

Volume: THIS RIGHT IS LIMITED TO THE VOLUME OF WATER HISTORICALLY USED FOR MINING PURPOSES.

Source Name: UNNAMED TRIBUTARY OF WILSON CREEK

Source Type: SURFACE WATER

ALSO KNOWN AS NORTH WILSON CREEK

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSESW	15	13N	10W	POWELL

Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO NOVEMBER 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWSESW	15	13N	10W	POWELL

Remarks:

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM

BLACKFOOT RIVER
BASIN 76F

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 76F 97783-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: GORDON JONES
PO BOX 8492
BOISE, ID 83707 8492

VICKI JONES
PO BOX 8492
BOISE, ID 83707 8492

Priority Date: NOVEMBER 5, 1964

Type of Historical Right: USE

Purpose (use): MINING

*Flow Rate: 2.25 CFS

Volume: THIS RIGHT IS LIMITED TO THE VOLUME OF WATER HISTORICALLY USED FOR MINING PURPOSES.

Source Name: UNNAMED TRIBUTARY OF WILSON CREEK

Source Type: SURFACE WATER
ALSO KNOWN AS SOUTH WILSON CREEK

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWNW	22		13N	10W	POWELL

Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO NOVEMBER 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
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