



MEMORANDUM

The objector contends that the waters of Stucky Gulch, a tributary to Warm Springs Creek in Basin 76G, have all been previously appropriated by a Jacob Stucky based on a Filed Notice for Water Right made on July 1, 1875 and re-appropriated on December 28, 1887 as of record at page 66, of Book 2 of Water Rights, records of Deer Lodge County, Montana.

Claims for existing water rights on Stucky Gulch and its tributaries filed in compliance with Senate Bill 76 are numerous, but essentially are as follows:

<u>CLAIMANT(S)</u>	<u>BASIS OF CLAIM</u>
1) Montana Resources, Inc., Dennis Washington and predecessors. Mount Haggin Ranch and predecessors.	Previously decreed right, Case No. 2495, Deer Lodge County, 25 miners inches, Stucky Gulch, priority date June 1, 1870.
2) Rose M. and Russell J. Jones	Various filed appropriations with priority dates from April 13, 1903 through December 31, 1948.
3) Edward A. and Marjorie L. Dallaserra	Filed appropriation of Violet Vanderhule, priority dates June 25, 1954.

The claims of Edward A. and Marjorie L. Dallaserra (claims 76G-W-123344-00 and 76G-W-123346-00) were objected to by Rose M. Jones and are at issue in this case.

From the record in this case, and after review of the Decree Index for Basin 76G, no Senate Bill 76 claims for existing water rights have been made based on the Jacob Stucky notice of water right purporting to appropriate all the waters of Stucky

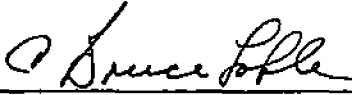
Gulch. Failure to file a claim of existing right as required in Mont. Code Ann. Sec. 85-2-221 establishes a conclusive presumption of abandonment of that right. Mont. Code Ann. Sec. 85-2-226. Therefore, the purported Jacob Stucky filing is of no consequence in the determination of this matter.

As the Master found in his Master's Report, the springs at issue in this case are tributary to Stucky Gulch. See Finding of Fact No. 5. Also, the Master found that subject to the rule of priority, late appropriations may be made on the same source. See Finding of Fact No. 10. The Master also found that water right claims 76G-W-123344-00 and 76G-W-123346-00 are based on validly filed notices of appropriation filed in compliance with Montana Law. See Findings of Fact No. 3 and 4 and Conclusion of Law III.

Based on the above, the Master concluded that claims 76G-W-123344-00 and 76G-W-123346-00 were valid claims. See Conclusion of Law V. The Master concluded that these claims are tributary to Stucky Gulch and are subject to senior claims. See Conclusion of Law IV.

Because no Senate Bill 76 claims are based on the Jacob Stucky appropriation of 1875 and 1887, and because under Montana law junior appropriators may appropriate water from the same source as senior appropriators, subject to priority, the Court shall adopt the Master's Report issued in this matter.

DATED this 15<sup>th</sup> day of November, 1990.

  
\_\_\_\_\_  
C. Bruce Loble  
Chief Water Judge

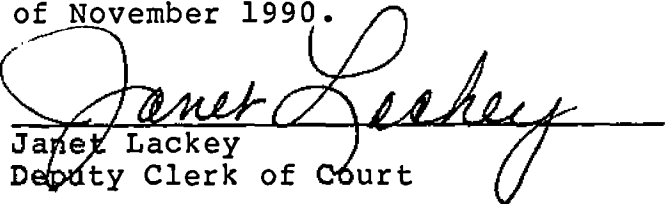
CERTIFICATE OF SERVICE

I, Janet Lackey, Deputy Clerk, Montana State Water Court, hereby certify that a true and correct copy of the above ORDER ADOPTING MASTER'S REPORT, was duly served upon the following persons listed herein, by depositing the same, postage prepaid, in the United States mail.

Marjorie L. and Edward A. Dallaserra  
1603 Cable Rd.  
Anaconda, MT 59711

Russell J. and Rose M. Jones  
2314 Cable Rd.  
Anaconda, MT 59711

DATED this 16 day of November 1990.

  
Janet Lackey  
Deputy Clerk of Court



The Court admitted into evidence objector's exhibits, marked for identification, J-4 through J-9, J-11 through J-25 and J-31 through J-33. The Court reserved judgment on the admissibility of exhibits J-2, J-3, J-10, J-26, J-27, J-28 and J-30. After further consideration by the Court the following evidentiary rulings are made:

<u>EXHIBIT NUMBER</u>	<u>RULING</u>
J-1	Inadmissible. Hearsay.
J-2	Admitted
J-3	Inadmissible. Hearsay.
J-10	Admitted
J-26	Admitted
J-27	Admitted
J-28	Admitted
J-29	Admitted
J-30	Admitted

The claimants offered ten (10) exhibits to be admitted into evidence. The objectors did not object to the introduction into evidence of any of the exhibits.

The Court admitted into evidence claimant's exhibits, marked for identification, D-9 and D-10. The Court ruled that exhibits D-1, D-2, D-6, D-7 and D-8 were inadmissible as the exhibits are irrelevant. The Court reserved judgment on the inadmissibility of exhibits D-3 through D-5. After further consideration the exhibits D-3 through D-5 are admitted.

Rose M. Jones, Joseph Struznik, and Isabel Sarena testified on behalf of the objector. Edward A. Dallaserra testified on behalf of the claimants.

The objector contends that the two springs at issue in this case are naturally tributary to Stucky Gulch, a tributary of Warm Springs Creek. The objector contends that the waters of Stucky Gulch have been previously appropriated and that the water from these springs should be allowed to flow their natural course and add to the flow of Stucky Gulch.

The claimants contend that their predecessors have used this water for irrigation purposes, since June 25, 1954, the date of appropriation, and that the claimants have continued the use of the waters without objection.

After careful consideration and review of the relevant testimony and exhibits, and after review of the claim files and case files in this matter, the Court makes the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

1. Water right claims 76G-W-123344-00 and 76G-W-123346-00 were filed by Marjorie L. and Edward A. Dallaserra for irrigation purposes. The claims are decreed for unnamed springs located in the Northwest Quarter of Section 20, Township 5 North, Range 11 West, Deer Lodge County.

2. Russell J. and Rose M. Jones filed objections to claim 76G-W-123344-00 concerning ownership and priority date. The objectors' also filed objections to claim 76G-W-123346-00 concerning volume, flow rate and the right not being a decreed water right.

3. Based on the testimony at the hearing and the exhibits offered, water right claim 76G-W-123344-00 is based on a Filed Notice of Appropriation of Water Right filed by Violet Vanderhule, the predecessor in interest to the claimants. A certified copy of this filing is admitted as claimants' exhibit D-10.

4. Based on the testimony at hearing and the exhibits offered, water right claim 76G-W-123346-00 is based on a Filed Notice of Appropriation of Water Right filed by Violet Vanderhule, the claimants predecessor. A certified copy of the filing is admitted as claimants exhibit D-9.

5. After review of the testimony, photographic and demonstrative evidence presented at hearing, the Master finds that both of the above-mentioned springs arise in Section 20, Township 5 North, Range 11 West, Deer Lodge County. The Master finds that these springs are located in the Northwest Quarter of Section 20 and are naturally tributary to Stucky Gulch, a tributary of Warm Springs Creek.

6. The Master finds that the waters of Stucky Gulch have been the subject of filings made previous to those made by the claimants' predecessors.

7. The objector offered Exhibit J-4 as evidence that all the waters of Stucky Gulch were appropriated by Jacob Stucky on July 1, 1875, and re-appropriated on December 28, 1887. After review of the exhibit, it appears that the Filed Notice of Water Rights purported to appropriate "all the waters of Stucky Gulch..." The means of diversion only conducted about "4 miner's



inches" of water. This is apparent from the face of the filed notice. The capacity of the conveyance system is a limitation on any water right. See Bailey v. Tintinger, 45 Mont. 154, 178, 122 P. 575 (1912); Jacobs v. City of Harlowton, 66 Mont. 312, 319, 213 P. 246 (1923). Therefore, based on the above, the Master finds that the above-mentioned appropriation of Jacob Stucky did not appropriate all the waters of Stucky Gulch as the objector contends.

8. The objector offered exhibits J-5 and J-6 as evidence to again establish that the waters of Stucky Gulch had been fully appropriated prior to the claimants' predecessor's filings. After review of the exhibits the Master finds that these filings made May 15, 1885 and May 21, 1885, respectively, were for waters from Warm Springs Creek and tributaries thereto. No mention is made of the springs located in Section 20 which are the source of the claims at issue.

9. The objector offered Exhibits J-8 and J-9 to show that certain waters of the Stucky Gulch drainage had been appropriated prior to claimants' predecessor's filings. After review, the Master finds that these filings were made for springs located in Section 18 and Section 19, respectfully, Township 5 North, Range 11 West. The filings are not for springs located in Section 20 which are the source of the claims at issue.

10. The objector offered Exhibit J-25 as evidence that the springs in Section 20, Township 5 North, Range 11 West had been appropriated prior to claimants' predecessor's filings. After review, the Master finds that the Filed Notice of

Appropriation of Water Right filed by Hattie A. Lakovich, dated November 27, 1911, was for a spring located in the Northwest Quarter of Section 20.

The Master takes judicial notice of water right claim 76G-W-091080-00, filed by Russell J. and Rose M. Jones. This claim is made for irrigation purposes and is based on the above Hattie A. Lakovich filing for the spring located in Section 20. From the map attached to this claim, and from objector's Exhibit J-27, the spring which is the source of water for claim 76G-W-091080-00 and claim 76G-W-123346-00, appear to be the same spring located in the Northwest Quarter of Section 20.

At the hearing in this matter, both parties were shown Exhibit J-27 and both parties agreed that the spring marked "A" on said exhibit was the source of claim 76G-W-123344-00 and the spring "B" on the exhibit was the source of claim 76G-W-123346-00. Water right claim 76G-W-091080-00 is decreed with a flow rate of 1.00 cfs, and a priority date of November 27, 1911, based on the Hattie Lakovich filing. Water right claim 76G-W-123346-00 is decreed with a flow rate of 1.02 cfs, and a priority date of June 25, 1954, based on the Violet Vanderhule filing. No evidence has been offered to show the amount of water available from this spring.

Subject to the rule of priority, late appropriations may be made on the same source, with each succession being required to respect senior appropriations. See Custer v. Missoula Public Service Co., 91 Mont. 136, 142, 6 P.2d 131 (1931); Quiqley v. McIntosh, 88 Mont. 103, 290 P. 266 (1930).

In the case at hand, the Master finds that water right claim 76G-W-123346-00 may be junior to water right claim 76G-w-091080-00. The validity of water right claim 76G-W-091080-00 is not at issue in this case.

11. The Court takes judicial notice of Case No. 2495, Deer Lodge County, judgment entered December 27, 1912. Case No. 2495 decreed certain waters of Warm Springs Creek as well as various tributaries. In Conclusion of Law number 56, the Anaconda Copper Mining Company (ACM) was decreed 25 miner's inches of water from Stucky Gulch with a priority date of June 1, 1870.

The master finds that this previously decreed water right has been the subject of Statements of Claim filed by the ACM successors under the present Senate Bill 76 water right adjudication process. The validity of these claims is not at issue before the Court.

12. Water right claim 76G-W-123344-00 and 76G-W-123346-00 are direct flow irrigation claims.

#### CONCLUSIONS OF LAW

##### I

The Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. Sec. 85-2-233.

##### II

A Statement of Claim filed in accordance with Mont. Code Ann. Section 85-2-221 constitutes prima facie proof of its

content until the issuance of a final decree. Mont. Code Ann. Section 85-2-227. Pursuant to 85-2-227 the burden of proof is on the objector as to any issue raised by an objection.

### III

Water right claims 76G-W-123344-00 and 76G-W-123346-00 are based on valid, filed notices of appropriation filed in compliance with R.C.M. 89-810 (1885 as amended). As such, the record provided by the previous filings are prima facie evidence of the statements contained therein. R.C.M. 89-814 (1885 as amended). R.C.M. 89-810 and R.C.M. 89-814 were repealed by the 1973 Water Use Act.

### IV

The waters of Stucky Gulch and its tributaries are the source of water right appropriations made prior to the filings of Violet Vanderhule of June 25, 1954, upon which water right claims 76G-W-123344-00 and 76G-W-123346-00 are based. These claims may be subject to the priority of any valid Stucky Gulch water right claims, or claims from sources tributary to Stucky Gulch which are prior in time.

### V

Water right claim 76G-W-123344-00 and 76G-W-123346-00 are valid claims. The ownership, flow rate and priority date of these claims do not require change as the objectors have not met their burden of proof by the evidence presented to the Court.

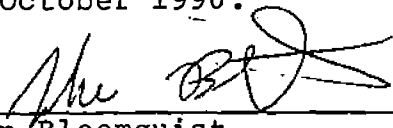
These claims shall appear in the Preliminary Decree of the Clark Fork River Basin Above The Blackfoot River (76G).

### VI

The volume quantification shall be removed from these

direct flow irrigation claims as specified by Mont. Code Ann.  
Sec. 85-2-234(6)(b)(i).

DATED this 16th day of October 1990.

  
\_\_\_\_\_  
John Bloomquist  
Water Master

CERTIFICATE OF SERVICE

I, Janet Lackey, Deputy Clerk of Court, Montana State Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT, FINDINGS OF FACT, was duly served upon the following persons listed herein, by depositing the same, postage prepaid, in the United States mail.

Marjorie L. and Edward A. Dallaserra  
1603 Cable Rd.  
Anaconda, MT 59711

Russell J. and Rose M. Jones  
2314 Cable Rd.  
Anaconda, MT 59711

DATED this 19 day of October 1990.

  
\_\_\_\_\_  
Janet Lackey  
Deputy Clerk of Court