

Montana Water Court
PO Box 879
Bozeman, MT 59771-0879
1-800-624-3270 (In-state only)
(406) 586-4364

FILED

FEB 11 1999

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
RUBY RIVER BASIN (41C)

Montana Water Court

* * * * *

IN THE MATTER OF THE ADJUDICATION OF) **CASE NO. 41C-184**
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND,) 41C-W-103475-00
WITHIN THE RUBY RIVER DRAINAGE AREA) 41C-W-103478-00
INCLUDING ALL TRIBUTARIES OF THE RUBY)
RIVER IN MADISON AND BEAVERHEAD)
COUNTIES, MONTANA)

CLAIMANT: Gary J. Garrett

OBJECTOR: Montana Department of Fish, Wildlife & Parks,
United States of America (USDA Forest Service),
Three Creeks Water Company

IN THE MATTER OF THE ADJUDICATION OF) **CASE NO. 41C-186**
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND,)
WITHIN THE RUBY RIVER DRAINAGE AREA) 41C-W-193844-00
INCLUDING ALL TRIBUTARIES OF THE RUBY)
RIVER IN MADISON AND BEAVERHEAD)
COUNTIES, MONTANA)

CLAIMANT: Gary J. Garrett

OBJECTOR: United States of America (USDA Forest Service)

ORDER ADOPTING MASTER'S REPORT

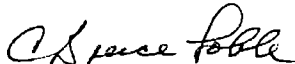
Pursuant to Montana Code Annotated, §85-2-233(5), the above entitled case was assigned to Water Master Michael J. L. Cusick. The Water Master filed a report containing Findings of Fact and Conclusions of Law with the Clerk of Court. Copies of the report were served upon the parties on December 31, 1998. Over ten (10) days have elapsed since service, and no objections to the Findings and Conclusions have been filed by any party.

The Court has reviewed the Water Master's Findings and Conclusions. Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court **ADOPTS** the Master's Report and

ORDERS that an **Abstract of Water Right Claim as Modified**

by the Montana Water Court be served with this Order to confirm that the recommendations set forth in the Master's Report have been adopted for each claim listed in the above caption.

DATED this 10 day of February, 1999.



C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER ADOPTING MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Gary J. Garrett
PO Box 60763
Savannah GA 31420

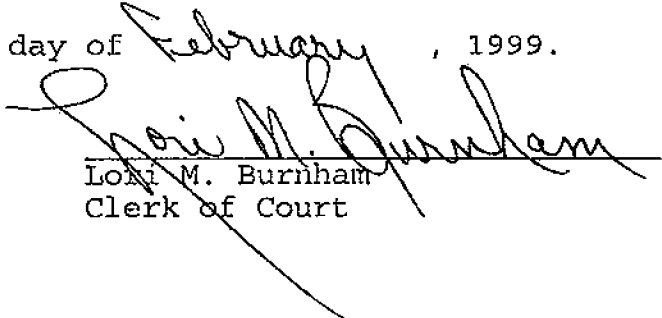
Three Creeks Water Company
c/o Harry Dunham, President
PO Box 691
Sheridan MT 59749-0691

Jody Miller, Special Ass't
United States Attorney
PO Box 7669
Missoula MT 59807-7669

W. G. Gilbert III, Attorney
PO Box 345
Dillon MT 59725-0345

G. Steven Brown, Attorney
1313 Eleventh Ave
Helena MT 59624

DATED this 11 day of February, 1999.



Lori M. Burnham
Clerk of Court

ABSTRACT OF WATER RIGHT CLAIM
AS MODIFIED BY THE WATER COURT
RUBY RIVER
BASIN 41C

01/06/99
PAGE 1

WATER RIGHT NUMBER 41C -O-103475-00

***** THIS WATER RIGHT CLAIM HAS BEEN TERMINATED *****

OWNERS: GARRETT GARY J
PO BOX 60763
SAVANNAH GA 31242-0763

PURPOSE (USE): MINING

SOURCE: WISCONSIN CREEK

PRIORITY DATE:

FLOW RATE:

VOLUME:

PERIOD OF USE:

POINT OF DIVERSION AND MEANS OF DIVERSION:

	LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY	MEANS
01				SESWSE	08	03S	04W	MADISON	PUMP
02				NENWNE	17	03S	04W	MADISON	DAM

RESERVOIR:

PLACE OF USE FOR MINING:

REMARKS:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT
DURING ADJUDICATION OF THE TEMPORARY PRELIMINARY
DECREE.

ABSTRACT OF WATER RIGHT CLAIM
AS MODIFIED BY THE WATER COURT
RUBY RIVER
BASIN 41C

01/06/99
PAGE 1

WATER RIGHT NUMBER 41C -O-103478-00

***** THIS WATER RIGHT CLAIM HAS BEEN TERMINATED *****

OWNERS: GARRETT GARY J
PO BOX 60763
SAVANNAH GA 31242-0763

PURPOSE (USE): MINING

SOURCE: WISCONSIN CREEK

PRIORITY DATE:

FLOW RATE:

VOLUME:

PERIOD OF USE:

POINT OF DIVERSION AND MEANS OF DIVERSION:

	LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY	MEANS
01				NWSESE	08	03S	04W	MADISON	PIPELINE
02				SWSESE	08	03S	04W	MADISON	PIPELINE
03				NENESE	08	03S	04W	MADISON	PIPELINE

PLACE OF USE FOR MINING:

REMARKS:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT
DURING ADJUDICATION OF THE TEMPORARY PRELIMINARY
DECREE.

ABSTRACT OF WATER RIGHT CLAIM
AS MODIFIED BY THE WATER COURT
RUBY RIVER
BASIN 41C

01/06/99
PAGE 1

WATER RIGHT NUMBER 41C -O-193844-00

***** THIS WATER RIGHT CLAIM HAS BEEN TERMINATED *****

OWNERS: GARRETT GARY J
PO BOX 60763
SAVANNAH GA 31242-0763

PURPOSE (USE): IRRIGATION

SOURCE: WISCONSIN CREEK

PRIORITY DATE:

FLOW RATE:

VOLUME:

MAXIMUM ACRES:

PERIOD OF USE:

POINT OF DIVERSION AND MEANS OF DIVERSION:

	LOT	BLK	QTR	SEC	SEC	TWP	RGE	COUNTY	MEANS
01				NENWNE	17	03S	04W	MADISON	DAM

RESERVOIR:

PLACE OF USE FOR IRRIGATION:

REMARKS:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT
DURING ADJUDICATION OF THE TEMPORARY PRELIMINARY
DECREE.

IN THE WATER COURT OF THE STATE OF MONTANA

FILED

* * * * *

DEC 31 1998

NOTICE OF FILING OF MASTER'S REPORT

Montana Water Court

TO: ALL PARTIES

RE: 41C-184, 41C-W-103475-00, 41C-W-103478-00
41C-186, 41C-W-193844-00

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 31st day of December, 1998.

LORI M. BURNHAM
Clerk of Court
Montana Water Court
P. O. Box 879
Bozeman, MT 59771-0879
(406) 586-4364
1-800-624-3270 (in Montana)

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DEC 31 1998

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
RUBY RIVER BASIN (41C)

Montana Water Court

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IN THE MATTER OF THE ADJUDICATION OF) CASE NO. 41C-184
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND,) 41C-W-103475-00
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CLAIMANT: Gary J. Garrett

OBJECTOR: Montana Department of Fish, Wildlife & Parks,
United States of America (USDA Forest Service),
Three Creeks Water Company

IN THE MATTER OF THE ADJUDICATION OF) CASE NO. 41C-186
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND,)
WITHIN THE RUBY RIVER DRAINAGE AREA) 41C-W-193844-00
INCLUDING ALL TRIBUTARIES OF THE RUBY)
RIVER IN MADISON AND BEAVERHEAD)
COUNTIES, MONTANA)

CLAIMANT: Gary J. Garrett

OBJECTOR: United States of America (USDA Forest Service)

MASTER'S REPORT

A joint hearing was held in Water Court Cases 41C-184 and 41C-186 on August 13, 1998 in the meeting room of the United States' Natural Resources Conservation Service in Sheridan, Montana, Water Master Michael J. L. Cusick presiding. Present were claimant Gary Garrett, appearing pro se; attorney Jody Miller representing the objector United States Department of Agriculture Forest Service; attorney G. Steven Brown representing the objector Montana Department of Fish, Wildlife and Parks (DFWP); and attorney

W. G. Gilbert III representing the objector Three Creeks Water Company.

At hearing, evidence was presented in the form of witness testimony and exhibits. After conclusion of the hearing, the parties were given an opportunity to submit proposed Findings of Fact, Conclusions of Law and hearing briefs. USDA and DFWP submitted combined proposed Findings of Fact and Conclusions of Law in Case 41C-184; USDA Forest Service submitted proposed Findings of Fact and Conclusions of Law in Case 41C-186.

After careful consideration of the evidence presented, the Master, being fully advised, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Joseph L. Garrett and Gary J. Garrett filed Statements of Claim for Existing Water Rights 41C-W-103475-00, 41C-W-103478-00 and 41C-W-193844-00 for water from Wisconsin Creek and Crystal Lake, tributaries of the Ruby River located in Madison County, Montana. Claims 41C-W-103475-00 and 41C-W-103478-00 are for water historically used for mining purposes at the Lakeshore Mining Camp, located on the shore of Crystal Lake. Crystal Lake (also known as Lakeshore Lake) is located high in the Tobacco Root Mountains of southwest Montana at the headwaters of Wisconsin Creek at approximately 8700 feet in elevation. Claim 41C-W-193844-00 is for water historically used for irrigation of 50 acres in the vicinity of the mining camp.

2. These claims were later transferred to sole ownership by Gary J. Garrett. The claims appeared in the Ruby River Basin Temporary Preliminary Decree as follows:

WATER RIGHT NUMBER 41C-W-103475-00

PRIORITY DATE: DEC 2, 1901

FLOW RATE: NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ON-STREAM RESERVOIR. THE FLOW RATE OR RATE OF FILLING THIS RESERVOIR SHALL NOT EXCEED HISTORIC PRACTICES.

VOLUME: 2,190 ACRE FEET PER YEAR

SOURCE: WISCONSIN CREEK
RESERVOIR LAKE NAME: CRYSTAL LAKE

PURPOSE (USE): MINING

PERIOD OF USE: JAN 1 TO DEC 31

POINTS OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
01		SESWSE	08	03S	04W	MADISON	PUMP
02		NENWNE	17	03S	04W	MADISON	DAM

RESERVOIR: QTRSEC SEC TWP RGE
ONSTREAM AT NENWNE 17 03S 04W

THE STORAGE CAPACITY OF CRYSTAL LAKE IS 44.5 ACRE FEET

PLACE OF USE FOR MINING:

	<u>ACRES</u>	<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001				SE	08	03S	04W	MADISON
002				SW	09	03S	04W	MADISON
003				NWNE	17	03S	04W	MADISON

REMARKS: THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT MAY BE ADDRESSED AT THE OBJECTION STAGE. THE VOLUME APPEARS TO BE EXCESSIVE. THERE IS A QUESTION OF WHETHER THIS RIGHT IS A DIRECT FLOW RIGHT. THERE IS ALSO A QUESTION AS TO THE CORRECT SOURCE. TO ASSURE THE ORDERLY ADJUDICATION OF WATER RIGHTS, THE WATER COURT WILL SET A HEARING TO DETERMINE THESE ISSUES IF NO OBJECTIONS ARE MADE.

WATER RIGHT NUMBER 41C-W-103478-00

PRIORITY DATE: DEC 31, 1894

FLOW RATE: 3.00 CFS

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

SOURCE: WISCONSIN CREEK

PURPOSE (USE): MINING
LAKESHORE MINING CAMP

PERIOD OF USE: JAN 1 TO DEC 31

POINTS OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
01		NWSESE	08	03S	04W	MADISON	PIPELINE
02		SWSESE	08	03S	04W	MADISON	PIPELINE
03		NENESE	08	03S	04W	MADISON	PIPELINE

PLACE OF USE FOR MINING:

<u>ACRES</u>	<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001			SWSESE	08	03S	04W	MADISON
002			SESWSE	08	03S	04W	MADISON
003			NENESE	08	03S	04W	MADISON

WATER RIGHT NUMBER 41C-W-193844-00

PRIORITY DATE: SEPT 28, 1930

FLOW RATE: NO FLOW RATE HAS BEEN DECREED FOR THIS USE FROM THIS ON-STREAM RESERVOIR. THE FLOW RATE OR RATE OF FILLING THIS RESERVOIR SHALL NOT EXCEED HISTORIC PRACTICES.

VOLUME: 250.00 ACRE FEET PER YEAR

STANDARDS ON VOLUMES FOUND IN THE FINDINGS OF FACT ARE ONLY GUIDELINES. CLAIMED VOLUMES MAY BE MODIFIED BY THE COURT

THE CAPACITY OF CRYSTAL LAKE IS 44.5 ACRE FEET

CLIMATIC AREA: 5

SOURCE: WISCONSIN CREEK
RESERVOIR LAKE NAME: CRYSTAL LAKE

MAXIMUM ACRES: 50.00

PURPOSE (USE): IRRIGATION

PERIOD OF USE: MAY 1 TO NOV 4

POINTS OF DIVERSION AND MEANS OF DIVERSION:

<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	
		NENWNE	17	03S	04W	MADISON	DAM

RESERVOIR: QTRSEC SEC TWP RGE

ONSTREAM AT NENWNE 17 03S 04W

PLACE OF USE FOR MINING:

	<u>ACRES</u>	<u>LOT</u>	<u>BLK</u>	<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
001	25.00			SWSE	08	03S	04W	MADISON
002	<u>25.00</u>			NWNE	17	03S	04W	MADISON
	50.00							

REMARKS: THE WATER COURT CANNOT DECREE THIS RIGHT WITHOUT FURTHER PRESENTATION OF EVIDENCE CONCERNING THE NUMBER OF ACRES IRRIGATED. IT APPEARS THAT 10.00 ACRES ARE ACTUALLY IRRIGATED AND PROBLEMS MAY EXIST WITH VOLUME AND PLACE OF USE. TO ASSURE THE ORDERLY ADJUDICATION OF WATER RIGHTS, THE WATER COURT WILL SET A HEARING TO DETERMINE THESE ISSUES IF NO OBJECTIONS ARE MADE.

3. The Montana Department of Fish, Wildlife and Parks (DFWP) and the Three Creeks Water Company objected to mining water right claims 41C-W-103475-00 and 41C-W-103478-00. USDA Forest Service objected to claim 41C-W-103475-00. The objections to these two claims were consolidated as Case 41C-184.

4. USDA Forest Service also objected to irrigation water right claim 41C-W-193844-00. This objection was consolidated as part of Case 41C-186.

5. Prior to the hearing, the claimant admitted that water right claims 41C-W-103475-00 and 41C-W-103478-00 have not been used since some time prior to 1957. See Order Denying Motion for Summary Judgment, Granting Motion for Default Judgment in Part, and Setting Scheduling Conference, Montana Water Court Case 41C-

184, October 14, 1997, p. 4. Because nonuse of these claims since some time prior to 1957 was conclusively established prior to hearing, the sole issue for hearing in Case 41C-184 was whether some fact or condition exists excusing this long period of nonuse of these claimed water rights under Montana law. See Order Denying Motion for Summary Judgment, Granting Motion for Default Judgment in Part, and Setting Scheduling Conference, Montana Water Court Case 41C-184, October 14, 1997, pp. 8-9.

6. The evidence at hearing demonstrated that Joseph Garrett, the father and predecessor-in-interest of claimant Gary Garrett, obtained title to the patented mining claims and appurtenant water rights at issue in this matter from the Gladstone Mining Company via tax deed in 1966. The evidence further showed that the last large-scale mining activity that occurred at Crystal Lake was in 1928.

7. At hearing, the United States introduced Exhibit M-3. Exhibit M-3 consists of several Forest Service memoranda concerning special use permits for Crystal Lake. The exhibit demonstrated that Joseph Garrett explored the possibility of repairing the Crystal Lake Dam in the 1970's. Exhibit M-3 indicates that Joseph Garrett's desire to maintain existing reservoir levels in 1970 was "for recreational purposes only" and that Joseph Garrett "seemed to have no intentions of using the water for mining or milling." Exhibit M-3, p. 3. Joseph Garrett's interest in preserving reservoir levels in 1977 was "primarily for aesthetic purposes." Exhibit M-3, p. 1.

8. On April 20, 1977 Joseph Garret and Gary Garrett filed a special use permit application with the Forest Service for

répairs to Crystal Lake Dam. Contrary to Exhibit M-3, the permit application indicated that the proposed use of water was "[t]o capture a reservoir of water for mining, milling, irrigation, recreation and other beneficial purposes on private land; and to achieve a year round stabilized reservoir water level beneficial for the environmental improvement of the area." These permit applications are attached to the original statements of claim for existing water right. The special use permit was approved for these purposes on February 27, 1979.

9. The evidence also demonstrated that the last use of water right claims 41C-W-103475-00 and 41C-W-103478-00 for mining purposes was in 1957. Gary Garrett testified that this use of water involved a "couple of" 55 gallon drums of mine tailings suspended in water that were sent to Pennsylvania for analysis. He testified that part of the tailings dump at the mining camp sits in Crystal Lake. Water was taken from Crystal Lake along with the tailings and stored in the 55 gallons drums to ensure that the tailings stayed wet. No water has been used for any purpose associated with mining since that time.

10. The claimant Gary Garrett testified that he has not used any water for mining purposes since acquiring title to the Crystal Lake property in 1988. He further testified that he had no intention of allowing future lode mining on his Crystal Lake property. Rather, he testified that it was his desire to process the existing tailings that were left from earlier mining operations when the price of gold makes it economically feasible to do so. He testified that the low price of gold has prevented both his father and him from processing the mine tailings at their Crystal Lake

property. Mr. Garrett testified that gold prices must reach \$500.00 per ounce before processing the gold from the tailings at Crystal Lake would be economically feasible. Testimony at hearing indicated that the price of gold at the time of hearing was below \$300.00 per ounce.

11. Gary Garrett also testified at hearing concerning the historical use of water for irrigation purposes under water right claim 41C-W-193844-00 in Case 41C-186. The testimony concerning use of water from Crystal Lake for irrigation purposes and the information in claim 41C-W-193844-00 is conflicting. Mr. Garrett testified that a property owner named Schulz used water from the Crystal Lake reservoir on his ranch 11 miles downstream in the Wisconsin Creek Drainage from the 1940's to the 1960's. After Joseph Garrett acquired the Lakeshore Mining Camp claims in 1966, Schulz and his successors no longer used the Crystal Lake water to irrigate.

12. Gary Garrett also testified that a cook at the Crystal Lake mining camp had used water from the lake to water a garden at the mining camp. The garden was located behind the miner's cabins slightly above and adjacent to the lake. He testified that this took place from about 1925 until 1928.

13. Gary Garrett also testified that his father, Joseph Garrett, had done some irrigating on a patented mining claim he owned just below Crystal Lake sometime between 1984 and 1987. Gary Garrett did not actually see this irrigation; his testimony merely recounted what his father had told him about his father's attempts at irrigation near Crystal Lake. Gary Garrett did not know the extent of his father's attempt at irrigated agriculture near

Crystal Lake, but guessed that it may have consisted of a plot approximately 20 by 40 feet long. The location of this plot was different than the location of the garden associated with the mining camp.

14. Gary Garrett also testified that sometime before he was 14 years old, he planted some radish seeds up by Crystal Lake on his fishing trips to the lake. He occasionally would fill his canteen with water from Crystal Lake to water the seeds, if it appeared that they were in need of water. Mr. Garrett was 14 years old in 1953.

15. Bill Avey, a fifteen-year employee of the Forest Service currently working as a Resource Assistant at the Sheridan Work Center, testified for the United States. Mr. Avey testified that Crystal Lake dam and part of the lake are located on National Forest System lands. Through Mr. Avey, the United States introduced into evidence Exhibit M-2, a videotape of the Crystal Lake area taken by him during a field visit to the area.

16. Mr. Avey testified that during his two field visits to Crystal Lake, he saw no evidence of any diversion for Claim 41C-W-193844-00.

17. The Court adopts as Findings of Fact any matters of fact which are included in the Conclusions of Law below.

CONCLUSIONS OF LAW

I.

To the extent that the foregoing Findings of Fact incorporate Conclusions of Law or the application of law to fact, they are incorporated herein as Conclusions of Law.

II.

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to § 85-2-233, MCA. The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider a matter within the Court's jurisdiction on its own motion. Section 3-7-224, MCA. An existing water right is a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.

III.

For purposes of adjudicating rights, a properly filed Statement of Claim for Existing Water Right, or an amended Statement of Claim, constitutes *prima facie* proof of its content until the issuance of a final decree. Section 85-2-227, MCA. In order to overcome the *prima facie* validity that accompanies a properly filed Statement of Claim for Existing Water Right, or an amended Statement of Claim, the objector must demonstrate by a preponderance of evidence that one or more elements of the *prima facie* statement of claim are incorrect. See Memorandum Opinion, Order Adopting Master's Report, Water Court Case 40G-2, (March 11, 1997).

IV.

Montana law holds that a long period of continuous nonuse of a water right establishes a rebuttable presumption of abandonment of the water right. *79 Ranch Inc. v. Pitsch*, 204 Mont. 426, 666 P.2d 215 (1983). More recently, the Montana Supreme Court has declared that:

It is a fundamental principle in Montana that

appropriation of water is based on its beneficial use; when the owner of the water right abandons or ceases to use the water for its beneficial use, the right ceases. 79 Ranch, 204 Mont. at 431, 666 P.2d at 217.

Two elements are necessary for the abandonment of a water right: nonuse of the water associated with the water right and intent to abandon the water right. *Shammel v. Vogl* (1964), 144 Mont. 354, 396 P.2d 103; *Thomas v. Ball* (1923), 66 Mont. 161, 213 P. 597. We stated in 79 Ranch that evidence of a long period of continuous nonuse of a water right raises a rebuttable presumption of an intent to abandon that right and shifts the burden of proof to the nonuser to explain the reasons for nonuse. 79 Ranch, 204 Mont. at 432-33, 666 P.2d at 218. To rebut the presumption of abandonment, there must be established some fact or condition excusing the long period of nonuse, not mere expressions of hope or desire reflecting a "gleam-in-the-eye philosophy" regarding future use of the water. 79 Ranch, 204 Mont. at 433-34, 666 P.2d at 218. . . .

Adjudication of Clark Fork River Drainage Area, 254 Mont. 11, 15, 833 P.2d 1120 (1992) (*Clark Fork River I*). Because nonuse of water right claims 41C-W-103475-00 and 41C-W-103478-00 since 1957 was conclusively established through the claimant's admissions prior to hearing, the burden had shifted to the claimant at hearing to establish some fact or condition excusing the long period of nonuse. See Order Denying Motion for Summary Judgment, Granting Motion for Default Judgment in Part, and Setting Scheduling Conference, Montana Water Court Case 41C-184, October 14, 1997, pp. 8-9.

V.

Although the evidence is somewhat conflicting, maintenance and reconstruction of the Crystal Lake dam appears to have been primarily for aesthetic, recreation and fishery purposes. While the special use permit for the dam indicates that mining and

milling are purposes of the dam, the claimant Gary Garrett testified that he had no intention of allowing future lode mining on his Crystal Lake property. Exhibit M-3 indicates that Joseph Garrett likewise did not intend to use water from the reservoir for lode mining purposes.

Gary Garrett testified that it was his desire to process the existing tailings that were left from earlier mining operations when the price of gold makes it economically feasible to do so. Claimant's desire to hold on to his mining water rights in the event that processing these tailings becomes feasible is the same argument specifically rejected by the Montana Supreme Court in *Adjudication of the Clark Fork River*, 274 Mont. 340, 347, 908 P.2d 1353 (1995) (*Clark Fork River II*). In *Clark Fork River II* the Court held that the argument that "mining rights might someday become economically viable reflects nothing more than this 'gleam-in-the-eye philosophy' of hope [of future water use] . . . specifically rejected in both *79 Ranch* and *In re Clark Fork River (Clark Fork River I)*." *Clark Fork River II*, 274 Mont. at 347. Gary Garrett did not establish any other fact or condition at the hearing, other than this hope, to excuse the approximately forty years of nonuse of these water rights. Garrett failed to rebut the presumption that his claimed water rights for mining purposes have been abandoned.

VI.

The evidence at hearing also established that the water right claimed by Garrett for irrigation purposes under 41C-W-193844-00 has not been used for at least thirty years and possibly longer. The use of water from Crystal Lake reservoir further down

the Wisconsin Creek drainage begun in the 1940's by the Schulz Ranch ended after Joseph Garrett acquired the Crystal Lake mining claims in 1966. Young Mr. Garrett's sporadic use of Crystal Lake water from a canteen to water a few radish seeds while on childhood fishing excursions to Crystal Lake is insufficient to sustain the use of water under the right claimed or to ripen into a separate and distinct water right. The law disregards trifles. Section 1-3-224, MCA. Prior to July 1, 1973, the last use of water for irrigation on lands adjacent to Crystal Lake on a scale remotely comparable to the one claimed in 41C-W-193844-00 was at the Lakeshore Mining Camp in approximately 1928, when a cook used water from the lake to irrigate a vegetable garden used to feed the miners at the camp. This irrigation was for considerably less than the 50.00 acres of irrigation claimed and was discontinued over 70 years ago.

VII.

Hearsay testimony indicated that Joseph Garrett may have done some irrigating on a patented mining claim he owned just below Crystal Lake sometime between 1984 and 1987. Even if this evidence were competent to support a finding that irrigation actually occurred during these years, it is insufficient to rebut the presumption of abandonment arising from prolonged continuous nonuse. Assuming *arguendo* that the right claimed under 41C-W-193844-00 is the same right used for irrigation of gardens at the Lake Shore Mining Camp until 1928, nonuse and abandonment of that right was fully established prior to July 1, 1973. Evidence of resumption of use after July 1, 1973, introduced to rebut the presumption of abandonment raised by 70 years of nonuse occurring

entirely before July 1, 1973, is not relevant toward rehabilitation of the claimed right. See e.g., *Clark Fork River I*, 254 Mont. at 16-17. Once the right was abandoned through nonuse prior to July 1, 1973, it cannot be resurrected by evidence of use after that date. *O'Shea v. Doty*, 68 Mont. 316, 319-321, 218 P. 658 (1923).

VIII.

On the other hand, if the right claimed under 41C-W-193844-00 is the right historically used by the Schulz Ranch until 1966 for lands further down Wisconsin Creek, beginning July 1, 1973 Joseph Garrett could not resume use of this right on different lands without applying for a permit to change the place of use of the right under § 85-2-402, MCA. Any such use of water by Joseph Garrett on lands different than those where the right was perfected was unauthorized and cannot be connected to this right.

IX.

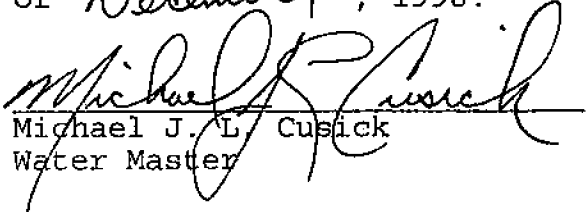
Claim 41C-W-193844-00 was claimed and decreed for use on 50.00 acres adjacent to Crystal Lake. Gary Garrett testified that he wishes to obtain land further down the Wisconsin Creek drainage for the purpose of irrigating a particular kind of nut tree that he hopes to raise. He testified that he has not been able to obtain the necessary land. Garrett testified that he wants to resume use of stored water in Crystal Lake for use further down Wisconsin Creek, an irrigation system that appears similar to the one formerly employed by the Schulzes. Even if Garrett were to try to obtain the same land once irrigated by Schulz, this "gleam-in-the-eye" hope for a prospective use is insufficient to overcome the presumption of abandonment arising from continuous prolonged nonuse of this right on the lands on which it was claimed and decreed.

"In viewing the issue of abandonment, one must look to the water right as decreed and not to some possible hoped for future use at some undetermined place." *Clark Fork River II*, 274 Mont. at 347; citing *CF&I Steel Corporation v. Purgatoire River Water Conservancy District*, 515 P.2d 456, 459 (Colo. 1973).

X.

Mining water right claims 41C-W-103475-00 and 41C-W-103478-00 and irrigation water right claim 41C-W-193844-00 have been abandoned. These claims should be terminated and should not appear in the Preliminary or Final Decrees of the Ruby River Basin (41C).

DATED this 30th day of December, 1998.


Michael J. L. Cusick
Water Master

CERTIFICATE OF SERVICE

I, Lori M. Burnham, 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.

Gary J. Garrett
PO Box 60763
Savannah GA 31420

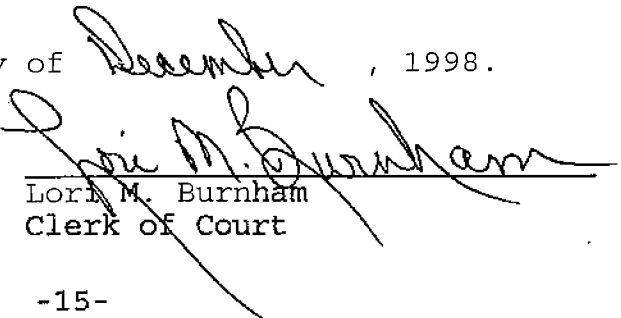
Three Creeks Water Company
c/o Harry Dunham, President
PO Box 691
Sheridan MT 59749-0691

Jody Miller, Special Ass't
United States Attorney
PO Box 7669
Missoula MT 59807-7669

W. G. Gilbert III, Attorney
PO Box 345
Dillon MT 59725-0345

G. Steven Brown, Attorney
1313 Eleventh Ave
Helena MT 59624

DATED this 31 day of December, 1998.


Lori M. Burnham
Clerk of Court