

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

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) **CASE NO. 76HF-474**
OF THE EXISTING RIGHTS TO THE USE)
OF ALL THE WATER, BOTH SURFACE AND) 76H-W-125122-00
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)

FILED
NOV 19 2004
Montana Water Court

CLAIMANT: Darrel G. Sperry and Carolyn M. Sperry

OBJECTOR: United States of America (Bureau of Indian Affairs);
United States of America (Fish & Wildlife Service);
Avista Corporation

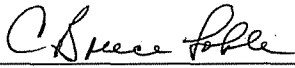
ORDER ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, §85-2-233(5), the above entitled case was assigned to Water Douglas Ritter. 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 October 19, 2004. 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 each **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 19 day of NOVEMBER, 2004.



C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Sherry Keene, Deputy 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.

Darrel G. & Carolyn M. Sperry
807 Old Corvallis Rd
Corvallis MT 59828

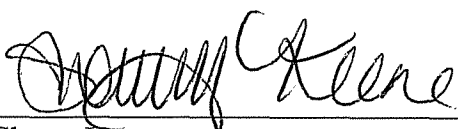
BIA Pacific Northwest Region Office
Branch of Resource Compliance
911 NE 11th Avenue
Portland OR 97232-4169

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

R. Blair Strong, Attorney
717 West Sprague Ave. Suite 1200
Spokane WA 99201-3505

US Fish and Wildlife Service
Water Resources Division
PO Box 25486, DFC
Denver CO 80225-0486

DATED this 19th day of NOVEMBER, 2004.



Sherry Keene
Deputy Clerk

**ABSTRACT OF WATER RIGHT CLAIM
AS MODIFIED BY THE WATER COURT**

**WESTSIDE SUBBASIN- BITTERROOT RIVER
BASIN 76H**

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

Water Right Number: 76H 125122-00 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: DISMISSED

Owners: CAROLYN M SPERRY
807 OLD CORVALLIS RD
CORVALLIS, MT 59828

DARREL G SPERRY
807 OLD CORVALLIS RD
CORVALLIS, MT 59828

Priority Date:

Type of Historical Right:

Purpose (use): IRRIGATION

Flow Rate:

Volume:

Source: BLODGETT 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		SENWSE	12	6N	21W	RAVALLI

Diversion Means: HEADGATE

Period of Use:

Remarks:

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

IN THE WATER COURT OF THE STATE OF MONTANA

NOTICE OF FILING OF MASTER'S REPORT

FILED
OCT 19 2004
Montana Water Court

TO: ALL PARTIES

RE: CASE 76HF-474; CLAIM 76H-W-125122-00

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 19th day of October, 2004.

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

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_____)	

FILED
OCT 19 2004
Montana Water Court

CLAIMANT: Darrel G. Sperry and Carolyn M. Sperry

OBJECTOR: United States of America (Bureau of Indian Affairs);
United States of America (Fish & Wildlife Service);
Avista Corporation

MASTER'S REPORT

FINDINGS OF FACT

1. Water Court case 76HF-474 includes a single irrigation claim, 76H-W-125122-00, claimed as a filed right from Blodgett Creek with an April 1, 1903 priority date. As a result of pre-decree examination by the Montana Department of Natural Resources and Conservation (DNRC), the claim appeared in the Preliminary Decree for this Subbasin with a remark noting that the claimed priority date predates the Blodgett Creek decree. The claim received objections from the United States of America (Bureau of Indian Affairs and Fish and Wildlife Service) and Avista Corporation based on this remark.

2. From the record before the Master, it is apparent that this claim raises several significant issues that were missed by the DNRC during the examination period and by the objectors

during the adjudication. According to the statement of claim and attachments, this claim diverts water from Blodgett Creek on the West side of the Bitterroot River through the Woodside Canal; dumps that water into the Bitterroot River; and rediverts it into a ditch on the East side of the river. The claimed place of use that appeared in the Preliminary Decree is 6.00 acres in the NWNW of Section 7, T6N, R20W. The map attached to the Statement of Claim and the legal description on the Statement of Claim do not match. Nonetheless, the examiner confirmed irrigation on the legal description place of use (NWNW Section 6), but put the mapped place of use on the claim as it appeared in the Preliminary Decree (NWNW Section 7). The NWNW of Section 6 is shown as irrigated on the 1958 Ravalli County Water Resource Survey, while the NWNW of Section 7 is shown as not irrigated. Also, the NWNW of Section 6 is West of the Bitterroot River and serviced by the Woodside Canal while the NWNW of Section 7 is East of the Bitterroot River with no apparent connection to the Woodside Canal. The file also indicates that this particular system has not been in use for decades. The Bitterroot River has shifted to the extent that it is no longer possible to redivert this water to this claimed 6.00 acres. Apparently, the claimants now assert that since about 1941, they have been using water from a pit in a slough that is located by the place of use. They indicate that the slough was part of the historical delivery system for the Blodgett Creek right.

3. On April 29, 2003, the claimants and the USA filed a Stipulation purporting to address the objections to this claim. Under the terms of the Stipulation the source for the claim is changed from Blodgett Creek to “groundwater”, and the means of diversion is changed from headgate to pump. On May 15, 2003, Avista Corporation filed a Contingent Withdrawal of Objection adopting the terms of the Stipulation.

4. Because this Stipulation did not resolve what appeared to be significant issues on this claim, on May 1, 2003 the Master sent a letter to all parties requesting further information addressing the priority date. On June 4, 2003, the Court received a letter from counsel for the USA indicating that all parties agree that the priority date for this right as a groundwater right from a manmade pit is April 1, 1941.

5. The Master then issued a Request for Assistance directing the DNRC to review the claim and make recommendations for the claim based on the Stipulation. On June 30, 2004, DNRC Water Resource Specialist Gerald B. Reddig filed a Memorandum stating that his review of the claim, including a site visit, found no connection between the claimed place of use and Blodgett Creek; no connection between the claimed pump site and the claimed place of use, and no evidence of historical irrigation or current irrigation on the claimed place of use. He recommended that the Water Court terminate the claim. The Master then issued a Order directing claimants Darrel G. Sperry and Carolyn M. Sperry to file a response to the Reddig Memorandum. The Sperrys have not complied with this Order.

6. At this point, administration of the case was transferred to a second Water Master and a Show Cause Hearing was set for September 22, 2004 in Corvallis, Montana. The Hearing took place as scheduled, but claimants Darrel G. Sperry and Carolyn M. Sperry failed to appear and therefore failed to show cause why Default Judgement should not be entered against them. Based on the Reddig Memorandum, Avista Corporation withdrew its contingent withdrawal of objection and requested termination of the claim as a Default Judgement.

7. In addition to the finding of a lack of use for this claim, the Reddig Memorandum notes that Darrel G. Sperry and Carolyn M. Sperry claim a second right from the same slough. This claim, 76H-W-125123-00, is a part of Subbasin 76HA and will be a part of the decree

for this Subbasin. Mr. Reddig asserts that any Sperry right to use the water from this slough is contained within this claim. The existence of this claim is part of the basis for the recommendation that claim 76H-W-125122-00 be terminated.

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, § 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.

In the present case, the record before the Master is sufficient to contradict and overcome the content of the prima facie claim. In fact, the record shows that claim 76H-W-125122-00 was completely inaccurate as filed. The right was probably never a valid appropriation from Blodgett Creek, (*See Granite Ditch Co. v. Anderson*, (1983) 204 Mont. 10, 662 P.2d1312). The source for any claim for irrigation on the place of use should have been from the slough that is identified in claim 76H-W-125123-00. However, the pump site that is used for this second claim does not access the 6 acre claimed place of use found on claim 76H-W-125122-00. The historical record and current investigation both indicate that this 6 acre parcel has not been irrigated. The

Stipulation filed by the claimants and the BIA is laughable. It solved nothing and raises as many issues as it purports to resolve. The Stipulation should be rejected by the Court.


IV

Given the significant issues facing this claim, it was incumbent upon the claimants to provide evidence of the historical use. The Stipulation notwithstanding, they have done nothing to provide this evidence in spite of repeated opportunities provided by the Master. All parties that are subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with the Orders of this Court, including Orders issued by a Master appointed by the Court. When a party fails to comply with these orders, they are subject to Default Judgement under Rule 55 of the Montana Rules of Civil Procedure. Claimants Darrel G. Sperry and Carolyn M. Sperry have failed to comply with Orders issued by the Water Master and are in default. The default judgement requested by Avista Corporation and recommended by DNRC Water Resource Specialist Gerald B. Reddig is termination of the claim. Given the clear record calling the validity of this claim into question and the failure of the claimants to comply with the Orders issued by the Master, termination of the claim is an appropriate result.

RECOMMENDATIONS

1. Claim 76H-W-125122-00 should be DISMISSED and should not appear in the next decree for this Subbasin or in any other Subbasin of the Bitterroot River.

DATED this 19 day of October, 2004.


Douglas Ritter
Water Master

CERTIFICATE OF SERVICE

I, Sherry Keene, 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.

Darrel G. & Carolyn M. Sperry
807 Old Corvallis Rd
Corvallis MT 59828

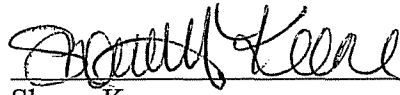
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US Fish and Wildlife Service
Water Resources Division
PO Box 25486, DFC
Denver CO 80225-0486

DATED this 19th day of October, 2004.



Sherry Keene
Deputy Clerk