

Montana Water Court
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FILED
MAY 17 2016

Montana Water Court

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

* * * * *

CLAIMANTS: Double Arrow Enterprises, Inc.; Double Arrow
Ranch Landowners Association

OBJECTORS: Avista Corporation; State of Montana Department of
Fish, Wildlife, and Parks

CASE 76F-61 ✓
76F 99272-00
76F 99273-00
76F 99274-00

CLAIMANTS: John W. Meyer; Joy C. Meyer; Double Arrow
Enterprises, Inc.; Double Arrow Ranch Landowners
Association; Arthur G. Croci Family Trust; Patrick
& Norma Maher Living Trust

CASE 76F-62
76F 99277-00
76F 99278-00
76F 99279-00

**ORDER REGARDING OBJECTIONS TO MASTER'S REPORT AND
ORDER SETTING FILING DEADLINE**

I. STATEMENT OF THE CASE

This matter involves an objection to a Master's Report. Double Arrow Ranch Landowners Association (DARLOA) objected to the Master's Report. The Master's Report addressed cases 76F-61 and 76F-62 jointly. The objection to the Master's Report covers claims 76F 99274-00 (case 76F-61) and 76F 99277-00 (case 76F-62). DARLOA was a claimant on both rights.

Claim 76F 99274-00 is an irrigation claim and was used for irrigation of a ranch once held in unified ownership. Claim 76F 99277-00 is a stock claim and is a multiple use of water right 76F 99274-00. The ranch was subdivided and numerous residential parcels were created. Some of the subdivided parcels include land within the place of use of claims 76F 99274-00 and 76F 99277-00.

At the start of these proceedings, the owners of claim 76F 99274-00 were shown as DARLOA and Double Arrow Enterprises, Inc.; the owners of claim 76F 99277-00 were shown as DARLOA, Double Arrow Enterprises, Inc., and the Carolyn J. Bertsch Trust. The ownership of claim 76F 99277-00 has since been updated as follows: the Croci Family Trust was added as an owner on 8/6/2013; the Maher Living Trust was added as an owner on 10/22/2014; John and Joy Meyer were added as owners on 7/23/2015; the Bertsch Trust was removed as an owner on 7/23/2015 and DARLOA was removed as an owner on 1/27/2016.

Claim 76F 99274-00 received objections from other parties which were resolved by stipulation. The parties to the stipulation agreed that Double Arrow Enterprises was the sole owner of claims 76F 99274-00 and 76F 99277-00. They also agreed to flow rates for claim 76F 99274-00 that changed at different times of the year.

The stipulation was filed with the Court on March 11, 2015 and was signed by claimants DARLOA and Double Arrow Enterprises and objectors, but not by owners of property within the subdivision. Nor was the stipulation signed by the other owners of claim 76F 99277-00, which at the time of the filing of the stipulation included the Bertsch Trust, the Croci Family Trust and the Maher Living Trust.

The Water Master asked the DNRC to identify potential owners of the rights so they could be provided notice of the stipulation and an opportunity to object to it. Once potentially interested parties were identified, the Master issued an order providing them notice of their potential water right ownership. Order Providing Potential Owners Notice, June 30, 2015. Parties receiving this notice included the Maher Living Trust, the Bertsch Trust, the Croci Family Trust, Suzanne A. Faneuff, and Tamara C. Ludwig.

The order referenced the stipulation and directed the recipients to notify the Water Court "if you wish to pursue an ownership interest in any or all claims...." The deadline for responses was July 31, 2015.

Only Suzanne A. Faneuff and Tamara C. Ludwig responded by the deadline. Both Faneuff and Ludwig later signed the stipulation, a copy of which was provided to the Court on November 10, 2015 (case 76F-62).

The Master assumed that parties who did not object to the stipulation consented to its terms. Despite this assumption, the Croci Family Trust, the Maher Living Trust and members of the Meyer family remained as owners of record for claim 76F 99277-00.

The stipulation also addressed the flow rate for claim 76F 99274-00. The maximum flow rates authorized by the stipulation vary depending on the time of year. The Master's Report and the abstract for claim 76F 99274-00 did not set forth these flow rates. The Master's Report says that "instead of enumerating the requested flow rate schedule, the Court assigned the highest claimed flow rate and referenced the other flow rates with an information remark." Master's Report, at 5. The abstract shows a flow rate of 4.0 cfs and includes the following explanatory remark:

PURSUANT TO STIPULATION, THE FLOW RATE OF THIS CLAIM VARIES DURING THE PERIOD OF USE. SEE STIPULATION IN CLAIM FILE FOR SPECIFIC FLOW RATE INFORMATION.

DARLOA contends the complete flow rate schedule should have been incorporated into the abstract.

II. ISSUES

1. Does the Master's Report correctly reflect ownership of claim 76F 99277-00?
2. Should more specific flow rates be added to the abstract for claim 76F 99274-00?

III. ANALYSIS

1. Does the Master's Report correctly reflect ownership of claim 76F 99277-00?

The stipulation signed by several parties to case 76F-62 agreed the sole owner of claim 76F 99277-00 should be Double Arrow Enterprises. Other owners of record of claim 76F 99277-00, including the Bertsch Trust, the Croci Family Trust, the Maher Living Trust, and John and Joy Meyer, did not participate in the proceedings of case 76F-62 despite being provided several opportunities to either agree or disagree with the stipulation.¹ Owners of lots within the original place of use for this right were identified

¹ The Trustees of the Maher Trust filed a letter April 6, 2015 indicating that though they were not interested in the details of the case, they wished "to maintain any water and land use/property rights we currently have for the Patrick and Norma Maher Living Trust." However, the Maher Trust failed to respond to all subsequent orders of the Court.

by reviewing land ownership on Montana's Cadastral website. The Cadastral website tracks land ownership, but not the ownership of water rights.

The owners of property identified by reference to the Cadastral website were given notice of the stipulation and an opportunity to assert an ownership interest in claim 76F 99277-00. The Master was correct to make the effort to identify these potential owners and to provide them with notice and an opportunity to participate. Only two parties responded, Faneuff and Ludwig, and they ended up signing the stipulation which recognized Double Arrow Enterprises as the sole owner of claim 76F 99277-00.

The Croci Family Trust, the Maher Living Trust, and John and Joy Meyer remained owners of claim 76F 99277-00 in the abstracts attached to the Master's Report. This result conflicts with the stipulation.

However, it was not made sufficiently clear to the owners of claim 76F 99277-00 that failure to oppose the stipulation filed in case 76F-61 would lead to the loss of their claim, which is in case 76F-62.

Accordingly, the Croci Family Trust, the Maher Living Trust, and John and Joy Meyer will have 30 days to respond to this Order. If no response is received by the deadline, they will be removed as owners from claim 76F 99277-00, and any claim they may have to ownership of that water right will be lost. If any of those parties want to maintain ownership of the claim, then this matter will be set for trial, as ample time for settlement has been provided.

2. Should more specific flow rates be added to the abstract for claim 76F 99274-00?

The stipulation identifies the flow rates for claim 76F 99274-00 as follows:

April 25 to April 30 diversion rate shall not exceed 1.5 cfs.

May 1 to June 30 diversion rate shall not exceed 4 cfs.

July 1 to July 31 diversion rate shall not exceed 3 cfs.

August 1 to September 30 diversion rate shall not exceed 2 cfs.

October 1 to October 5 diversion rate shall not exceed 1.5 cfs.

The abstract attached to the Master's Report identifies a diversion rate of 4 cfs and references the stipulation for more specific flow rate information. DARLOA asks that the flow rate information on the stipulation be incorporated into the abstract.

One of the primary purposes of the adjudication is to define water rights so they can be administered by a water commissioner in the field. Water commissioners need accurate and complete flow rate information to allocate water properly. Water Commissioners do not have the ability to easily access court records in the field. Omission of complete flow rate information from an abstract forces water commissioners to locate court records before the water right can be administered. This is an impractical burden.

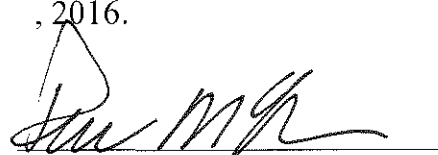
Accordingly, the abstract for claim 76F 99274-00 is modified to include the flow rates specified in the stipulation.

IV. CONCLUSION AND ORDER

1. The Croci Family Trust, the Patrick and Norma Maher Living Trust, John W. Meyer, and Joy C. Meyer have 30 days from this Order to inform the Court whether or not they wish to maintain their ownership interest in claim 76F 99277-00. Failure to respond will result in loss of ownership of that claim.

2. The abstract for claim 76F 99274-00 should have included the flow rates identified in the stipulation. The abstract has been modified to reflect this change and is attached to this Order to confirm the changes have been made in the state's centralized Water Right Record System.

DATED this 17 day of May, 2016.



Russ McElyea
Chief Water Judge

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Patrick & Norma Maher Living Trust
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Trustees
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Potential Owners:
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Tamara C. Ludwig
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CLAIMANTS: Double Arrow Enterprises, Inc.; Double Arrow
Ranch Landowners Association

OBJECTORS: Avista Corporation; State of Montana Department
of Fish, Wildlife, and Parks

CASE 76F-61 ✓
76F 99272-00
76F 99273-00
76F 99274-00

CLAIMANTS: ~~Carolyn J. Bertsch Trust~~; **John W. Meyer; Joy C.
Meyer**; Double Arrow Enterprises, Inc.; Double
Arrow Ranch Landowners Association; Arthur G.
Crocchi Family Trust; Patrick & Norma Maher Living
Trust

CASE 76F-62
76F 99277-00
76F 99278-00
76F 99279-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules (W.R.Adj.R) requires that written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure (M.R.Civ.P.) provides an additional 3 days to the 10-day objection period. 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 this 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

These claims appeared in the Preliminary Decree for the Blackfoot River (Basin 76F). The three claims captioned in Case 76F-61 are irrigation claims, and the three claims captioned in Case 76F-62 are stock claims. The claims in both cases are three pairs of irrigation/stock multiple uses.

The claimants to all or some of these claims were as follows: Double Arrow Enterprises Inc.; Double Arrow Ranch Landowners Association (DARLOA); the Carolyn J. Bertsch Trust; the Patrick & Norma Maher Living Trust; and the Arthur G. Croci Family Trust. As of July 23, 2015, ownership of claims 76F 99277-00 and 76F 99278-00 was updated to Joy C. and John W. Mayer in place of the Carolyn J. Bertsch Trust.

Each claim was decreed with multiple issue remarks. *See* 76F Preliminary Decree Abstracts (February 11, 2011). In addition to the issue remarks, Avista Corporation and the State of Montana (Department of Fish, Wildlife and Parks) objected to claims 76F 99272-00, 76F 99273-00, and 76F 99274-00 (all in Case 76F-61). The issue remarks and objections placed all elements of each claim at issue. *See* Objections to Blackfoot River Preliminary Decree – 76F (May 31, 2012).

To resolve the issue remarks and objections, this case proceeded on a settlement track. The parties filed a stipulation that addressed the issue remarks and objections to claims in both cases. Case 76F-61 Settlement Stipulation (March 11, 2015) (Stipulation). The Stipulation requested that four of the six claims be withdrawn and the remaining two claims be corrected.

During the Court's review of the Stipulation, the Court discovered that several potential owners likely did not have notice of the settlement proceedings in this case. The places of use for these claims were subdivided and there are numerous plots within the

historical places of use. To produce a comprehensive list of the potential owners, the Court requested the assistance of the DNRC. *See* DNRC Memorandum (June 11, 2015) (providing comprehensive list of potential owners). Based upon the DNRC's potential owner list, the Court sent a notice of these proceedings and a description of the Stipulation's proposed corrections to all potential owners. Order Providing Potential Owners Notice of Potential Water Right Ownership (June 30, 2015).

Of all the potential owners noticed, only two parties indicated their desire to pursue ownership of these claims—Suzanne A. Faneuff and Tammy C. Ludwig. No other subdivision landowners filed a statement indicating their desire to assert ownership. To allow Faneuff and Ludwig—as well as the Maher Living Trust, the Bertsch Trust, and the Croci Family Trust—an opportunity to review and execute the Stipulation, the Court set a filing deadline.

Faneuff and Ludwig were the only parties that executed the Stipulation. The Court assumed that the Mayers, in place of the Bertsch Trust; the Maher Trust; and the Croci Family Trust consent to the terms of the Stipulation.

FINDINGS OF FACT

1. The Stipulation requested the withdrawal of four claims: 76F 99272-00, 76F 99273-00, 76F 99278-00, and 76F 99279-00. Stipulation 2. Additionally, DARLOA withdrew their interest in claims 76F 99274-00 and 76F 99277-00. *Id.*; DARLOA's Conditional Withdrawal of Claims (March 9, 2015) (in Case 76F-62).

2. As to claims 76F 99274-00 and 76F 99277-00, the Stipulation requested the following corrections:

Claim 76F 99274-00:

Flow Rate:

~~10.61 CFS~~ 4.00 CFS

PURSUANT TO STIPULATION, THE FLOW RATE OF THIS CLAIM VARIES DURING THE PERIOD OF USE. SEE STIPULATION IN CLAIM FILE FOR SPECIFIC FLOW RATE INFORMATION.

Maximum Acres:

~~280.00~~ 75.00

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
*1	NENENW	12	16N	15W	MISSOULA
	SWNWNENW				

(*Point of Diversion Nos. 2 & 3 Removed)

Period of Diversion: ~~APRIL 1 TO OCTOBER 31~~
APRIL 25 TO OCTOBER 5

Diversion Means: HEADGATE

Ditch Name: MUCKLER DITCH

Period of Use: ~~APRIL 1 TO OCTOBER 31~~
APRIL 25 TO OCTOBER 5

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	40.00	E2NE	11	16N	15W	MISSOULA
	12.00	E2E2SW				
2	100.00	SE	11	16N	15W	MISSOULA
	61.00					
3	100.00	NW	42	16N	15W	MISSOULA
	1.00	NENENW	11			
4	40.00	N2NE	44	16N	15W	MISSOULA
	1.00	NWNWNE	11			
Total:	75.00					

Claim 76F 99277-00:

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
*1	NENENW	12	16N	15W	MISSOULA
	SWNWNENW				

(*Point of Diversion Nos. 2 & 3 Removed)

Ditch Name: MUCKLER DITCH

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		E2NE	11	16N	15W	MISSOULA
		E2E2SW				
2		SE	11	16N	15W	MISSOULA
3		NW	42	16N	15W	MISSOULA
		NENENW	11			
4		N2NE	44	16N	15W	MISSOULA
		NWNWNE	11			

Stipulation 2-3.

3. For claim 76F 99274-00, the Stipulation incorrectly summed the place of use acres to total 78.00. The requested corrections actually total 75.00, and that amount is

reflected above. Also, instead of enumerating the requested flow rate schedule, the Court assigned the highest claimed flow rate and referenced the other flow rates with an information remark.

4. The place of use corrections for claim 76F 99277-00 were not specifically requested by the Stipulation. However, claims 76F 99274-00 and 76F 99277-00 are multiple uses utilizing the same ditch. The places of use were decreed the same for both claims, and the proposed place of use corrections for claim 76F 99274-00 should be applied to claim 76F 99277-00 as well.

5. In addition to the claim withdrawals and corrections listed above, the Stipulation contained additional clauses:

- a. Statement divesting DARLOA of flow management of claims (§ 18)
- b. Double Arrow Enterprise's claim maintenance responsibilities (§ 19)
- c. DARLOA water right and diversion liaison (§ 20)
- d. Flow rate limitation schedule (§22)
- e. Water measurement device installation (§ 23)
- f. Abandonment clause (§ 27)

Id. at 2-4.

CONCLUSIONS OF LAW

1. The Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

2. The Montana Water Court has jurisdiction to hear all objections to preliminary decrees. Section 85-2-233, MCA.

3. Any settlement reached by the parties is subject to review and approval by the Court. Rule 17(a), W.R.Adj.R. If a claimant agrees to reduce or limit an element of a claim, the Court does not need to determine if the burden of proof is met. Rule 17(c), W.R.Adj.R.

4. The Stipulation resolves the issue remarks and objections and should be approved by the Court. Four of the six claims were withdrawn and should be dismissed.

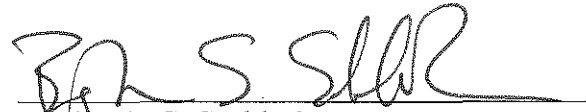
The remaining claims, 76F 99274-00 and 76F 99277-00, were corrected in conformance with issue remarks and accurately reflect historical use. All claimants and potential owners received sufficient notice of the claim withdrawals and claim corrections.

RECOMMENDATION

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the corrections described in Findings of Fact Nos. 1, 2, and 3 be applied.

Post decree abstracts of the water right claims addressed in this Master's Report are attached to confirm that the above corrections have been made in the state's centralized water right record system.

DATED this 28 day of January, 2016.


Benjamin S. Sudduth
Water Master

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Patrick & Norma Maher Living Trust
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Trustees
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Carolyn J. Bertsch, Trustee
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Kirkland, WA 98034-3558

NOTE: Caption and Service List updated 1-25-16.