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FILED

JUN 01 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
ROCK CREEK BASIN (76E)  
PRELIMINARY DECREE

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CLAIMANT: Vivian E. Erickson

OBJECTOR: United States of America (USDA Forest Service)

**CASE 76E-R58**

76E 26308-00

76E 26309-00

76E 26310-00

**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 requires 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 provides an additional 3 days to the 10-day objection period.

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

The above-captioned claims are owned by Vivian Erickson. The claims received an objection from the United States of America, USDA Forest Service. Claims 76E 26308-00, 76E 26309-00, and 76E 26310-00 also received notice-type issue remarks during the DNRC's preparation of the Preliminary Decree.

The claims were consolidated into Case 76E-R58 to resolve the Forest Service's objection.

### FINDINGS OF FACT

1. On November 12, 2019, the Court held a status conference in this matter. Judith Coleman appeared on behalf of the Forest Service and claimant Vivian Erickson was present at the conference.

2. The Forest Service objected to the place of use for each of the claims, stating that quarter sections described encompass federal lands, and the priority date for claim 76E 26310-00.

3. The Forest Service also stated that the following remark should be placed on the abstracts:

THE PLACE OF USE IS IN HOMESTEAD ENTRY SURVEY NO. 54.

4. On March 16, 2020, the parties filed a *Stipulation to Resolve Objections*. In the *Stipulation*, the parties state that they agreed with the addition of the above-referenced remark to claims 76E 26308-00 and 76E 26310-00. The parties further agree that claim 76E 26309-00 should be dismissed and removed from the supplemental rights remark on claim 76E 26308-00 and 76E 26310-00.

5. The *Stipulation* also states that the point of diversion for claim 76E 26308-00 should be modified to NWNWSE Section 19, Township 10N, Range 16W, Granite County and the ditch name modified to "Miller-Norton-West Ditch."

6. Finally, the *Stipulation* states that elements for claim 76E 26310-00 should be modified as follows:

Priority Date: NOVEMBER 5, 1910 ~~JUNE 5, 1898~~

Source Name: BREWSTER CREEK ~~ROCK CREEK~~

**Add Remark:**

ROCK CREEK IS USED AS A NATURAL CARRIER TO CONVEY WATER FROM BREWSTER CREEK TO A SECONDARY POINT OF DIVERSION, POINT OF DIVERSION NO. 2.

**Add Point of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
<u>1</u>		<u>NWNE</u>	<u>19</u>	<u>10N</u>	<u>16W</u>	<u>Granite</u>

**Period of Diversion: APRIL 15 TO OCTOBER 19**

<u>ID</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
<u>2 - SECONDARY</u>		NWNESE	18	10N	16W	Granite

Period of Diversion: APRIL 15 TO OCTOBER 19

Means of Diversion: PUMP

**Add Remark:**

THE USE OF THIS RIGHT IS LIMITED TO DAYS WHEN BREWSTER CREEK IS FLOWING INTO ROCK CREEK.

7. Claim 76E 26310-00 received an issue remark stating that the type of right and priority date were in question because water from the claimed source, Brewster Creek, was never diverted to this property.

8. Claims 76E 26308-00, 76E 26309-00, and 76E 26310-00 also received a notice-type issue remark regarding a DNRC modifications to the ditch name and points of diversion. The remark states that if no objections are filed regarding that element, the remark should be removed from the claims.

## PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.
2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.
3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.
4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).
5. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.
6. If a claimant fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R.
7. Sanctions applied against a claimant may include modification of a claim to conform with data provided by the DNRC, information obtained by the Court, or information included in an objection, or the entry of default and termination of a water right claim. Rule 11, W.R.Adj.R.
8. If a claimant agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remains. Rule 17(c), W.R.Adj.R.
9. The Water Court is not bound by parties’ settlement agreements. Any settlement reached by the parties is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

## CONCLUSIONS OF LAW

1. Based on the Forest Service's and Claimant's *Stipulation*, the parties have met the burden of proof by a preponderance of the evidence that each claim should be modified as described in Findings of Fact Nos. 3, 4, 5, and 6. These modifications resolve the Forest Service's objections to each claim.

2. The issue remark on claim 76E 26310-00 pertaining to the type of right and priority date is resolved through the modification described in Finding of Fact No. 6. The remark should be removed.

3. The notice-type issue remarks appearing on claims 76E 26308-00 and 76E 26310-00 served their notice purpose and should be removed from the claims.

## RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of the water right claims reflecting the recommended changes is attached to this Report.

DATED this 1<sup>st</sup> day of June, 2020.

  
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Eugene C. White  
Water Master

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