

Montana Water Court
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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

CLAIMANTS: Trilbe Fortunati; Loren C. Luthje Irrevocable Trust;
Timothy H. Luthje; Lori Ruch

CASE 76E-R82
76E 131552-00
76E 131553-00

OBJECTORS: Loren C. Luthje Irrevocable Trust; United States of
America (USDA Forest Service)

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 Trilbe Fortunati, Lori Ruch, Timothy H. Luthje, and the Loren C. Luthje Irrevocable Trust. The claims received an objection from the United States of America, USDA Forest Service ("Forest Service") and a self-objection from the Loren C. Luthje Irrevocable Trust. Claims 76E 131552-00 also received notice-type issue remarks during the DNRC's preparation of the Preliminary Decree.

The claims were consolidated into Case 76E-R82 to resolve the objections and issue remarks.

FINDINGS OF FACT

1. On December 18, 2019, the Court held a status conference in this matter. Judith Coleman appeared on behalf of the Forest Service. Claimant Timothy H. Luthje was present, and Loren Luthje appeared on behalf of the Loren C. Luthje Irrevocable Trust. Claimants Trilbe Fortunati and Lori Ruch failed to appear for the conference.

2. On December 23, 2019, the Court Ordered claimants Trilbe Fortunati and Lori Ruch to show cause why they should not be dismissed from this case. Both Claimants filed *pro se* documents explaining their absence at the conference and requesting to remain active in the case. The Court accepted both filing and retained both Claimants.

3. The Forest Service objected to all elements for the claims stating that there may also be issues with abandonment and non-perfection.

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

THE POINT OF DIVERSION AND PLACE OF USE ARE LOCATED ENTIRELY ON PRIVATE LAND.

5. On October 18, 2018, claimant Loren C. Luthje Irrevocable Trust filed a self-objection to each claim stating that the point of diversion for claim 76E 131552-00 was incorrectly modified by the DNRC from Township 9N to Township 8N. The self-

objection to claim 76E 131553-00 stated that the source name may have incorrectly been modified by the DNRC.

6. On April 3, 2020, the parties filed a *Stipulation to Resolve Objections*. In the *Stipulation*, the parties state that the modifications proposed would resolve the Forest Service's objection as well as the Loren C. Luthje Irrevocable Trust's self-objection. In the *Stipulation*, the parties state that they agreed with the addition of the above-referenced remark. The *Stipulation* also states that the flow rate for 76E 131552-00 should be reduced from 3.75CFS to 1.0CFS and the maximum acres reduced from 27.00 to 22.00. Similarly, the *Stipulation* states that the flow rate for claim 76E 131553-00 should be reduced from 3.75CFS to 1.0CFS and the maximum acres reduced from 24.00 to 19.00.

7. Additionally, the *Stipulation* states that the point of diversion and place of use for claim 76E 131552-00 should be modified as follows:

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>
1		SENWNW	33	8N <u>9N</u>	16W	Granite

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	4.00		N2SWNW	33	9N	16W	Granite
2	10.00		S2SWNW	33	9N	16W	Granite
3	8.00		NENWSW	33	9N	16W	Granite
4	2.00		SENWSW	33	9N	16W	Granite
5	3.00		SWNESW	33	9N	16W	Granite

TOTAL: ~~27.00~~ 22.00

8. Finally, the *Stipulation* states that the place of use for claim 76E 131553-00 should be modified as follows:

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	3.00		SENWSW	33	9N	16W	Granite
2	1.00		E2SWSW	33	9N	16W	Granite

3	2.00	SWNESW	33	9N	16W	Granite
4	13.00	W2SESW	33	9N	16W	Granite
5	5.00	SESESW	33	9N	16W	Granite

TOTAL: ~~24.00~~ 19.00

9. Claim 76E 131552-00 also received a notice-type issue remark regarding a DNRC modification to the ditch name. 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 remark 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 Claimants' *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. 4, 6, 7, and 8. These modification resolve the Forest Service's objections as well as claimant Loren C. Luthje Irrevocable Trust's self-objections to each claim.

2. The notice-type issue remark appearing on claim 76E 131552-00 served its notice purpose and should be removed from the claim.

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 1st day of June, 2020.



Eugene C. White
Water Master

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