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**FILED**

JUN 12 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
MAINSTEM BITTERROOT RIVER AND EAST SIDE SUBBASIN (76HA)

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CLAIMANTS: William L. Bodle; Earth & Sky Circle; Edward L. Merrifield; Raymond H. Hill; Susan L. Hill; United States of America (USDA Forest Service); Bradley D. Collins; Ellison Cattle Co.; Jean H. Ellison; Bitterroot Spirit LLC; Triple D Land LLC; Vicki L. Stewart; Walter A. Stewart; Alison R. Cluff; David W. Cluff; James EC Lotan; John R. Rizzuti; Catherine Coulon; William Coulon; Paul Kink Trust; Diane Thomas-Rupert Trust; Karen Smith; Town of Stevensville; Edgar L. Powell; Linda M. Powell; Helen H. Rude; Keith L. Marchuk; Tandy Sopeland; Chad Sopeland; Caleb O. Troyer; Kaylene A. Troyer; MGY Ranch LLC; Larry Luporini; Lori Luporini	<b>CASE 76HA-74</b> 76H 25726-00 76H 25750-00 76H 50560-00 76H 50570-00 76H 104536-00 76H 104544-00 76H 104546-00 76H 104959-00 76H 104960-00 76H 105006-00 76H 107664-00 76H 107665-00
OBJECTORS: Diane Thomas-Rupert; United States of America (Fish and Wildlife Service); Roy A. Capp; Avista Corporation; Karen Smith; Richard E. Smith	76H 119948-00 76H 128517-00 76H 128519-00 76H 147922-00
NOTICE OF INTENT TO APPEAR: United States of America (Fish and Wildlife Service); Lee Yelin; Susan J. Brown	76H 150065-00 76H 150969-00 76H 151736-00 76H 151740-00
ON MOTION OF THE MONTANA WATER COURT	76H 214149-00 76H 214379-00 76H 30067661

**ORDER APPROVING STIPULATION AND CLOSING CERTAIN CLAIMS**

**INTRODUCTION**

This order addresses whether the Court should grant a motion to adopt a stipulation that seeks to resolve the issue remarks and objections to claims to use water from Burnt Fork Creek under a July 1, 1852 priority date.

## PROCEDURAL BACKGROUND

The Water Court issued the Preliminary Decree for the Mainstem Bitterroot River and East Side (Subbasin 76HA) on December 4, 2015. Each water right claim in this case was included in the Preliminary Decree as a claim to use water from Burnt Fork Creek with a July 1, 1852 priority date. The claims all received a decree exceeded issue remark based upon district court findings and conclusions in *Cowell v. Julian*, Cause No. 556 (Mont. Fourth Jud. Dist., Ravalli County, Apr. 19, 1905) (“Case 556”), and a subsequent state district court decision titled “Amended and Updated Decree of Distribution of the Waters of the Burnt Fork Watershed,” (Mont. Fourth Jud. Dist., Ravalli County) (“Sept. 1, 1978 Decision”). All of the claims also received objections. On July 24, 2017, the Water Court consolidated the claims into this case and commenced proceedings.

Following a settlement period, the Water Court put this case on a hearing track and issued a scheduling order. The Court held a status conference on February 6, 2020. At the conference, the parties participating advised the Court that a settlement was in process and they anticipated filing a settlement stipulation.

On February 10, 2020, counsel for Ellison Cattle Co. and Jean H. Ellison filed a Stipulation to Resolve Objections (“Stipulation”), together with a motion requesting that the Court approve the Stipulation. The Stipulation was signed by some, but not all of the parties. After receiving the Stipulation and motion, the Court issued an order setting a February 28, 2020 deadline for any party to object to the Stipulation or oppose the motion. No party objected. Therefore, the issue of whether to resolve the decree exceeded issue remarks and objections based upon the terms of the Stipulation is now before the Court. Also still pending before the Court is a motion to amend claim 76H 128517-00 filed by Kevin and Traci Mytty on October 22, 2019, the predecessors in interest to Triple D Land, LLC.

On April 7, 2020, the Court issued an order removing claim 76H 3250-00 from this case and assigning it a modified priority date as requested in the Stipulation.

## FINDINGS OF FACT

### Background.

1. Burnt Fork Creek has its headwaters in the Sapphire Mountains in Ravalli County and flows generally northwest to its confluence with the Bitterroot River near Stevensville, Montana. In its lower reaches, the Burnt Fork braids into several channels.

2. In the early 1850s, Major John Owen established a fort and opened a trading post near what is now Stevensville. Major Owen purchased the land from a Jesuit mission, in what reportedly is Montana's earliest recorded land transaction between two private parties. (Ravalli County Water Resources Survey ("Ravalli County WRS") at 7.) The site of Fort Owen is located in Section 22, Township 9 North, Range 20 West.<sup>1</sup>

3. Water rights on Burnt Fork Creek were litigated in Case 556. The district court found that the predecessors of Kate H. McCormick and Maria T. Higgins appropriated 507 inches of Burnt Fork Creek as of "about July 1st, 1852." (Case 556, Findings of Fact, ¶ 1.) Based on this finding, the district court concluded that McCormick and Higgins "are entitled to the use and enjoyment of 507 inches of the waters of said Burnt Fork Creek, statutory measure of date July 1, 1852." (Case 556, Conclusion of Law, ¶ 1.)

4. The July 1, 1852 water right decreed to McCormick and Higgins is referred to in various documents as the "Fort Owen Right." The Fort Owen Right's historically decreed priority date is the most senior of any water right claimed in the Burnt Fork Drainage and in Subbasin 76HA.

5. Sometime after the district court's 1905 decree in Case 556, a ditch known as the Supply Ditch was constructed. The Supply Ditch diverts water from the Bitterroot River and conveys it north for distribution to various water users.<sup>2</sup> The ditch crosses

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<sup>1</sup> Although not necessarily germane to the disposition of this case, Fort Owen has a colorful background and is the apparent location of many "firsts" in Montana history. *See, e.g.*, "Frontier Life at Fort Owen," Ravalli Republic (Apr. 12, 2020) (available at: [https://ravallirepublic.com/news/local/article\\_0e5c6b5e-9ae0-5f38-8fe5-f41ae75da385.html](https://ravallirepublic.com/news/local/article_0e5c6b5e-9ae0-5f38-8fe5-f41ae75da385.html)); M. Malone, "Montana: A History of Two Centuries" 62 (Rev. 1991).

<sup>2</sup> The Supply Ditch as it existed as of 1958 is described at page 61 of the Ravalli County WRS, and is depicted on the various maps contained in the document.

channels of the Burnt Fork east of Stevensville and upstream from the original place of use of the Fort Owen Right. (Ravalli WRS at 29; 1978 Decision, at 12:18-35 (¶ 4).) The Supply Ditch Association, which is commonly known as the “Supply Ditch Company,”<sup>3</sup> owns and operates the ditch for the benefit of its members.

6. The Supply Ditch Company claims various water rights, including claim 76H 107459-00,<sup>4</sup> which is a claim to divert water from the Bitterroot River for beneficial use. The company conveys water through ditch systems on the east side of the Bitterroot Valley including the Supply Ditch. (Ravalli County WRS at 60-61.)

7. The Supply Ditch Company’s members historically included persons owning land in the Burnt Fork drainage above and east of the Supply Ditch. Water from the ditch cannot reach these lands by gravity flow. However, the lands can be irrigated with water diverted from various Burnt Fork channels and tributaries.

8. The Burnt Fork loses surface water to subsurface flow in certain reaches during certain times of the year. As a consequence, upstream junior water users sometimes must curtail diversions so sufficient water remains instream to satisfy the Fort Owen Right. When the stream loses water to the subsurface, the amount of water that must be curtailed may exceed the decreed flow rate of the Fort Owen Right. (1978 Decision at 14.)

9. At some point water users along the Burnt Fork devised a water exchange arrangement that allowed certain Supply Ditch Company shareholders (“Share Owners”) owning land in the Burnt Fork drainage upstream from the historical place of use of the Fort Owen Right to use their ditch company shares to receive Burnt Fork water. In exchange, these shareholders agreed to ensure that the owners of the Fort Owen Right received an equivalent amount of Bitterroot River water delivered from the Supply Ditch. This arrangement reduced water use curtailment otherwise necessary on the Burnt Fork to satisfy the Fort Owen Right.

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<sup>3</sup> According to the Montana Secretary of State’s website, the legal name of the entity is “Supply Ditch Association.” However, because the Stipulation refers to it as the “Supply Ditch Company” that naming convention will be used in this Order.

<sup>4</sup> This claim is being addressed in case 76HA-576.

10. On June 30, 1933, the Share Owners and owners of the Fort Owen Right memorialized this exchange arrangement in a written contract (the “Exchange Agreement”). The Exchange Agreement provides the Share Owners with a contractual right to use the July 1, 1852 Fort Owen Right to divert water from Burnt Fork Creek. As consideration, the Share Owners agreed to purchase stock in the Supply Ditch Company in an amount necessary to secure rights to water at a flow rate at least equivalent to the flow rate of the Fort Owen Right. The Share Owners agreed to deliver to the owners of the Fort Owen Right 507 miner’s inches of Bitterroot River water the Share Owners were entitled to receive based upon shares they owned in the Supply Ditch Company. As part of the Exchange Agreement, the Share Owners agreed to pay any charges assessed by the ditch company in connection with the delivery of the water to the owners of the Fort Owen Right. So long as the Share Owners secured Supply Ditch Association shares sufficient to satisfy this obligation, the Share Owners received the benefit of a contractual right to use the Fort Owen Right and its July 1, 1852 priority date.

11. The 1978 Decision contains a number of elements, including instructions for the distribution of water to decreed users on Burnt Fork Creek and its various channels and tributaries. The 1978 Decision also confirmed the elements of the Exchange Agreement and identified the successor parties to the agreement and its water distribution elements. (1978 Decision at 17-19.)

12. As part of the 1978 Decision, the district court found that 512 miner’s inches actually was being used in the Exchange Agreement rather than the 507 miner’s inches decreed in Case 556. (1978 Decision at 16:10-18.)

**The Claims.**

13. After the removal of claim 76H 3250-00 and claims withdrawn in the Stipulation, the remaining claims in this case fall into two categories. The first category are claims (“Fort Owen Claims”) associated with the Fort Owen Right. The Fort Owen Claims currently are owned by MGY Ranch, LLC (“MGY Ranch”) and the United States Forest Service (“Forest Service”) (collectively, the “Fort Owen Claim Owners”). The

claims are included in the Preliminary Decree with the following elements relevant to this Order:

Claim No.	Owner	Purpose	Flow Rate
76H 50570-00	Forest Service	Irrigation	56.10 gpm
76H 104536-00	MGY Ranch	Stock	
76H 104544-00	MGY Ranch	Irrigation	12.68 cfs
Total			12.81 cfs

14. In the Preliminary Decree abstract, claim 76H 104544-00 has a 734.05 acre place of use. The claim includes a primary point of diversion and two secondary points of diversion on the Supply Ditch. The flow rate for claim 76H 104544-00 originally was claimed with a flow rate of 507 miner's inches. Other than converting the flow rate units from miner's inches to cubic feet per second ("cfs"), the flow rate in the Preliminary Decree is the same as what originally was claimed.<sup>5</sup>

15. The Forest Service filed claim 76H 05070-00 as a claim for 0.13 cfs, which is equivalent to five miner's inches and the 56.10 gallons per minute ("gpm") flow rate set forth in the Preliminary Decree.<sup>6</sup> The Preliminary Decree abstract has a 5.00 acre place of use adjacent to the place of use for claim 76H 104544-00. The primary point of diversion is the Supply Ditch headgate on the Bitterroot River and the claim has one secondary point of diversion on the Supply Ditch, which is the same as one of the secondary points of diversion for claim 104544-00.

16. The second category includes claims owned by current Share Owners<sup>7</sup> and are referred to as the "Exchange Claims." As set forth in the Preliminary Decree (with certain updates to ownership), the Exchange Claims include:

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<sup>5</sup> Montana law provides that "100 statutory or miner's inches shall be considered equivalent to a flow of 2.5 cubic feet (18.7 gallons) per second." Section 85-2-103(2), MCA. Cubic feet per second is the legal standard for water measurement in Montana. Section 85-2-103(1), MCA. When the flow rate is less than one cfs, gallons per minute is used as the measurement unit for flow rate. Rule 4(b)(1)(i), W.R.C.E.R.

<sup>6</sup> The Forest Service originally claimed a priority date of April 10, 1905, but in December 2014 amended it to July 1, 1852.

<sup>7</sup> The Stipulation assumes that the parties claiming Exchange Claims are proper successors in interest to the rights of the original Share Owners, and no one has raised an issue to the contrary.

Claim No.	Owner	Purpose	Flow Rate
76H 25726-00	Merrifield/Boadle/Earth & Sky Circle	Irrigation	280.50 gpm
76H 25750-00	Hill/Sopeland/Troyer	Irrigation	280.50 gpm
76H 104959-00	Collins	Stock	
76H 104960-00	Collins	Irrigation	189.62 gpm
76H 105006-00	Ellison	Irrigation	2.25 cfs
76H 107665-00	Bitterroot Spirit, LLC	Irrigation	50.49 gpm
76H 107644-00	Bitterroot Spirit, LLC	Stock	
76H 119948-00	Marchuk	Irrigation	1.25 cfs
76H 128517-00	Triple D Land, LLC <sup>8</sup>	Irrigation	1.25 cfs
76H 128519-00	Stewart	Irrigation	1.00 cfs
76H 147922-00	Cluff/Lotan/Rizzuti	Irrigation	1.31 cfs
76H 150065-00	Cluff/Lotan/Rizzuti	Stock	
76H 150969-00	Kink Trust/Thomas-Rupert Trust	Irrigation	1.43 cfs
76H 151736-00	Luporini/Smith	Irrigation	1.25 cfs
76H 151740-00	Luporini/Smith	Stock	
76H 214149-00	Town of Stevensville	Municipal	1.25 cfs
76H 30067661	Thomas-Rupert / Kink	Stock	
Total			12.78 cfs

17. The Preliminary Decree abstracts for the Exchange Claims identify a number of different points of diversion on the various Burnt Fork channels and tributaries, and places of use associated with the lands owned by the various Share Owner claimants in the Burnt Fork drainage east of the Supply Ditch.

18. Other than claim 76H 119948-00, the flow rates for each of the irrigation claims on the list of Exchange Claims originally were filed in units of miner's inches. The flow rates for the Exchange Claims set forth in the Preliminary Decree are the same as those originally claimed by the Share Owners or their predecessors, but were converted to cfs or gmp to conform to current standards. Section 85-2-103(1), MCA.

19. In addition to irrigation and municipal claims, several parties also claim associated water rights for stock water use. The stock water claims and their respective current owners include 76H 104536-00 (MGY Ranch, LLC); 76H 104959-00 (Collins);

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<sup>8</sup> The Stipulation was signed by Kevin and Traci Mytty, the predecessors to Triple D Land, LLC.

76H 107664-00 (Bitterroot Spirit, LLC); 76H 150065-00 (Rizzuti/Lotan/Cluff); 76H 151740-00 (Luporini/Smith); and 76H 30067661 (Thomas-Rupert/Kink).<sup>9</sup>

### **Issue Remarks and Objections**

18. The Preliminary Decree abstracts for all of the claims in this case received a decree exceeded issue remark in the Preliminary Decree. The Department of Natural Resources and Conservation (“DNRC”) adds a decree exceeded remark when two or more claims are filed on the same decreed right, and the combined claimed flow rates of the claims exceed what was determined in a prior court decree. Because the cumulative flow rates of the Fort Owen Claims and the Exchange Claims exceed what was determined by the district court in the Case 556 decree, and the amount found to be historically used in the 1978 Decision, the DNRC included a decree exceeded remark on each of the claims in this case.

19. All of the claims in this case received objections based upon the decree exceeded issue remark.

20. In addition to the decree exceeded issue remark, some of the claims in this case received other issue remarks that are specific to those claims and unrelated to the decree exceed remark. These claims also received objections based upon those issue remarks.

### **Terms of the Stipulation.**

21. The Stipulation requests that the Court address the motion related to claim 76H 3250-00, which it has done, and also requests the withdrawal of claims 76H 50560-00, 76H 104546-00, and 76H 214379-00. Other than these four claims, the Stipulation proposes that all other claims in this case be retained.

22. The Stipulation proposes that the flow rate for claim 76H 50570-00 be decreed as 4 miner’s inches (44.88 gpm), which is a one miner’s inch (11.22 gpm) reduction from the 56.10 gpm (5 miner’s inches) flow rate in the Preliminary Decree. The

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<sup>9</sup> Claim 76H 30067661 was filed as an exempt stock right along with a Petition for Judicial Determination of Exempt Water Rights. The Water Court granted the petition in an order dated December 17, 2014.

Stipulation does not propose any reductions to the amount of water decreed to any of the other claims in this case.

23. Under the terms of the Stipulation, the sum of the flow rates of all of the individual claims will continue to exceed the amount decreed in Case 556, as modified by the findings in the 1978 Decision. To address this issue, the Stipulation proposes a mechanism to ensure that actual water use under the July 1, 1852 priority date does not exceed what was historically decreed and used. It does so by allowing the Share Owners to divert water from Burnt Fork Creek only if they maintain sufficient Supply Ditch Company shares to supply water to the Fort Owen Claim Owners at a flow rate that does not exceed what was historically decreed and used. The terms of the Stipulation reflect the contractual arrangement between the parties memorialized in the Exchange Agreement.

24. The Stipulation quantifies these terms by requiring the Share Owners to deliver 507 miner's inches (12.675 cfs) to the owner of claim 76H 104544-00 (currently MGY Ranch, LLC), and 4 miners inches (44.88 gpm) to the owner of claim 76H 50570-00 (currently the United States Forest Service), for a total of 511 miner's inches (12.78 cfs).

25. The Stipulation requires the Share Owners to acquire and maintain a sufficient number of Supply Ditch Company shares to satisfy their water delivery obligations. The Stipulation provides a table that lists the number of shares allocated to each Exchange Claim. The Stipulation states that if sufficient shares are not maintained by a particular claim, the other Share Owners may arrange with the Supply Ditch Company to maintain the shares and the contractual right to water supplied by the company at the amounts specified in the Stipulation. The Supply Ditch Company signed the Stipulation confirming its recognition and acceptance of this contingency.

26. The Stipulation specifies conditions under which the owners of the Fort Owen Claim Owners may exercise call rights against junior Burnt Fork water users utilizing the July 1, 1852 priority date in the event they are not receiving their full measure of water from the Supply Ditch. (Stipulation, ¶ 7.)

27. The Stipulation proposes information remarks for the various claims to disclose the arrangement and provide instructions for its implementation. The Stipulation contains contractual remedies in the event of noncompliance.

28. The Stipulation also contains references to an Implied Claim with a flow rate of 12.34 gpm (1.1 MI), that apparently is affiliated with someone named “Oligee.” The Stipulation does not contain a specific request for the Court to create an implied claim, nor does it contain facts beyond a numeric flow rate regarding any implied claim.

### ISSUES

The terms proposed in the Stipulation raises several issues, including: (1) the determination of the correct flow rate for the July 1, 1852 Fort Owen Right; (2) whether the terms of the Stipulation sufficiently resolve the decree exceeded issue as to the Fort Owen Right; (3) the terms of an information remark that ensures water is distributed consistent with this Order; (4) whether the Court should create an implied claim; and (5) how associated stock water rights in this case should be addressed. The motion to amend claim 76H 128517-00 also is pending.

### ANALYSIS

#### A. Standard for Approving Stipulations.

The Water Court encourages parties to resolve objections and address issue remarks through settlement. Rule 16(a), W.R.Adj.R. In Water Court proceedings, parties often use a stipulation to memorialize their agreements to address issue remarks and settle objections. *E.g., In re Pondera Cty. Canal & Reservoir Co.*, Case 41M-202, 2020 Mont. Water LEXIS 19 (Jan. 9, 2020).

The contractual agreements made by parties in stipulated settlement agreements are not binding on the Water Court. Instead, the Court must review and approve all settlement agreements to ensure the contractual commitments properly address the issue remarks. Section 85-2-233(5)(b), MCA, Rule 17(a), W.R.Adj.R. Settlement agreements which seek to enlarge an element of a water right must be supported by sufficient evidence to meet the burden of proof applicable to that right. Rule 17(b), W.R.Adj.R. The

burden of proof does not need to be met where changes proposed in a settlement agreement reduce or limit an element of a water right. Rule 17(c), W.R.Adj.R.

In reviewing a stipulation, the Court must remain mindful of its obligation to weigh the information that resulted in the issue remark, and the remark itself, against the claimed water right. Section 85-2-247(2). The Court also must find that the settlement meets the standard of § 85-2-248(3), MCA (requiring the court to “review each factual or legal issue remark not resolved as a result of the filing of an objection to determine if information in the claim file or information obtained by the court provides a sufficient basis to resolve the identified issue remark or to determine if the issue remark can be corrected as a clerical error”). Factual stipulations contrary to evidence also are not binding on the Court. *Allen v. Petrick*, 222 P. 451, 454, 69 Mont. 373 (1924). Stipulations that do not meet these standards may be rejected by the Court. *See Dana Ranch Co. v. State AG*, 2017 Mont. Water LEXIS 13; *In re Argabright*, Case 41I-265, 2014 Mont. Water LEXIS 9 (Dec. 12, 2014)

**B. Analysis of Issues.**

The Water Court adjudicates various elements of water rights so they may be included in a final decree. The amount of water authorized to be used is one of the elements of a water right subject to Water Court determination. Section 85-2-234(6) & (7), MCA. Adjudication includes resolution of objections and issue remarks. Sections 85-2-233; 85-2-248, MCA. A decree exceeded issue remark is one that must be resolved by the Water Court. *E.g., In re Peterson Ranch LLC*, Case 41C-260, 2017 Mont. Water LEXIS 5 (Feb. 15, 2017).

**1. What is the historically decreed flow rate?**

The decree exceeded issue remark on the claims in this case states that “sum of the claimed flow rates exceeds the 512 miner's inches decreed in Case No. 556.” The issue remark implicitly assumes the district court properly decreed 512 miner’s inches (12.80 cfs) as the flow rate associated with the Fort Owen Right and the July 1, 1852 priority date.

The 512 miner's inch flow rate figure cited in the remark is based on the 1978 Decision, not the 1905 Decree. The 1905 Decree decreed 507 miner's inches. While the difference between the two figures is slightly less than one percent, the difference raises the question as to which flow rate is correct for purposes of resolving the decree exceeded issues for the non-dismissed claims in this case. In the 1978 Decision, the district court explained its rationale for adding five additional miner's inches as follows:

Under the transfer the upstream users have been taking five inches more water than the 507 inches decreed. Because of the many years this has continued, and because the amount involved is so negligible in relation to the total right and, finally, because it would be almost impossible to determine where any cuts should be made, this Court in this Decree will describe the transfer rights in the number of inches the parties have used for these many years.

(1978 Decision at 16:10-18.)

No objector challenged the district court's jurisdiction to modify the decreed flow rate from 507 miner's inches to 512 miner's inches. The Stipulation assumes the proper maximum cumulative flow rate to resolve the decree exceeded issue is the 512 miner's inches set forth in the 1978 Decision. The time to object to the Stipulation has expired. Moreover, as a matter of evidence, the district court found that the additional five miner's inches was being used long before the Water Use Act was adopted in 1973.<sup>10</sup> (1978 Decision at 16.) Thus, 512 miner's inches is the ceiling for purposes of determining whether the Stipulation resolves the decree exceeded issue remark.

**2. Do the terms of the Stipulation resolve the decree exceeded issue?**

Decree exceeded problems arise when the combined flow rates of two or more water rights exceed the flow rate of the underlying decreed right upon which they are based. Because the cumulative flow rates of the claims in this case exceed 512 miner's inches, the decree exceeded issue is resolved only if the Stipulation contains sufficiently

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<sup>10</sup> The 1978 Decision was issued after the adoption of the Montana Water Use Act, but before the Legislature established the Montana Water Court in 1979 as the sole venue to determine the elements of existing water rights. Section 85-2-216, MCA. Additionally, the district court upheld a challenge to its authority to issue the decision in *In re Admin. of the Burnt Fork Watershed*, Cause No. DV 98-556, Mont. 21<sup>st</sup>. Jud. Dist, Ravalli County, 2004 Mont. Dist. LEXIS 3105.

administrable and enforceable curtailment provisions that limit water use under the July 1, 1852 priority date to not more than the decreed limit.

The Stipulation meets this test. For the Fort Owen Claims, the Preliminary Decree flow rate for claim 76H 104544-00 is 12.68 cfs, which is the conversion of 507 miner's inches originally claimed. The Preliminary Decree flow rate for claim 76H 50570-00 is 56.1 gpm, which is the same as 0.13 cfs originally claimed, and also is equivalent to 5 miner's inches. The Stipulation does not propose any changes to the flow rate of claim 76H 104544-00, and proposes to reduce the flow rate of claim 76H 50570-00 to 4 miner's inches (44.88 gpm). Thus, when the Stipulation authorizes the Fort Owen Claim Owners to use Burnt Fork water, the maximum flow rate is 511 miner's inches, which will not result in multiple water rights exceeding the terms of the underlying decree on which they are historically based.

A similar situation exists for the Exchange Claims. The sum of the Exchange Claim flow rates in the Preliminary Decree is 12.78 cfs, which is equivalent to 511 miner's inches when converted. Even if all of the Exchange Claims are used simultaneously, the cumulative Preliminary Decree flow rates are within the historical decreed limits.

The key to the Stipulation is whether it contains sufficient measures to prevent both the Fort Owen Claims and the Exchange Claims from using Burnt Fork water simultaneously and thereby exceed the terms of the underlying decree. The Stipulation accomplishes this task by providing for water use under several scenarios. The default baseline water use is the distribution methodology historically used under the Exchange Agreement, as updated by the Stipulation. So long as the Share Owners satisfy whatever contractual or corporate obligations they have to the Supply Ditch Company and can supply up to 511 miner's inches (12.78 cfs) of water from the Supply Ditch to the owners of the Fort Owen Right (claims 76H 50570-00 and 76H 104544-00), the Share Owners may use water under their respective claims pursuant to the July 1, 1852 priority date. Even if a particular Share Owner fails to uphold an obligation to the Supply Ditch

Company, the other Share Owners have a contractual mechanism in place to ensure the conditions precedent to water delivery remain uninterrupted.

The Stipulation also limits the call rights of the Fort Owen Claim Owners to situations when Supply Ditch water cannot be delivered to the Fort Owen Claim Owners when needed for beneficial use, either because diversions from the Bitterroot River to the Supply Ditch have been curtailed, or because some contractual, corporate or other condition has occurred causing interruption in the delivery of some or all of the water from the Supply Ditch. If Supply Ditch water is curtailed, the Stipulation provides that the Fort Owen Claim Owners may use the July 1, 1852 priority date to call rights “on junior priority rights in the Burnt Fork drainage.” (Stipulation, ¶ 7.) The Stipulation does not expressly state what happens to the Share Owners’ rights if the Fort Owen Claim Owners exercise their contingent rights to make calls on the Burnt Fork under the July 1, 1852 priority date. However, by expressly recognizing this contingent call right, the Share Owners implicitly agree to curtail their rights to water as necessary to accommodate diversions of Burnt Fork Creek water to the Fort Owen Claim Owners. In no circumstance where the Fort Owen Claim Owners are using water from Burnt Fork Creek may the Share Owners also use water at flow rates that will cause the cumulative amount of water used from Burnt Fork Creek at any time to exceed 511 miner’s inches (12.78 cfs).<sup>11</sup> These provisions provide the necessary assurances to prevent water use in excess of what was decreed, which resolves the decree exceeded issue remark.

**3. What information remarks are necessary to ensures water is distributed consistent with this Order?**

In addition to the specific water right elements that must be included in a final decree, the Water Court also may include “any other information necessary to fully define the nature and extent of the right.” Section 85-2-234(6)(i), MCA. This information

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<sup>11</sup> The Stipulation does not provide a formula for spreading curtailment between the Share Owners if their rights under the claims in this case are partially curtailed as a result of the Fort Owen Claim Owners’ receiving some, but not all, of their requested water from the Supply Ditch. If such a situation were to occur, determining relative curtailment as between the various Share Owners would be a matter of administration and distribution under § 85-2-406, MCA.

typically takes the form of an “information remark.” The purpose of an information remark is to “provide facts regarding prior use of a right that are critical to its administration in accord with historical use.” *In re Clark Fork Coal.*, Case 76G-A8, 2014 Mont. Water LEXIS 15, \*10 (Oct. 29, 2014).

The Preliminary Decree abstract for each claim in this case contains an information remark stating that the claim is part of a water exchange involving water diverted from the Bitterroot River to the Supply Ditch and the July 1, 1852 water right from Burnt Fork Creek. The Stipulation proposes to replace this remark with information remarks more specific to the limitations associated with the claims.

For the Exchange Claims, the Stipulation proposes a remark that states the conditions under which Burnt Fork Creek water may be used by each Share Owner under the July 1, 1852 priority date. The proposed remark describes the joint obligation to own and maintain 2,560 shares in the Supply Ditch Company to supply 512 miner’s inches to claims 76H 50570-00 and 76H 104544-00. The proposed remark then references the 1978 Decision and “agreements on file with the Montana Water Court in Case 76HA-74.”

While the proposed remark accurately states that the Share Owners’ rights to use the Burnt Fork Creek water under the July 1, 1852 priority date is conditional, the remark should be clarified for legal accuracy and to simply future administration. To align with the Stipulation’s provision that the Share Owners hold and maintain “a total of 2,560 shares of the Supply Ditch Company, *or the necessary equivalent of such shares*” (Stipulation, ¶ 4, emphasis added), and to avoid a water commissioner from having to police share ownership, there is no need to reference a specific share number in the remark so long as the obligation to maintain enough shares to satisfy the Fort Owen Claims is recognized. Additionally, because the commissioner will be enforcing the provisions of the decree issued by the Water Court, not the prior district court decree and decision, the reference in the remark should be to orders of the Water Court. Sections 3-7-212 and 85-2-406(4), MCA. Finally, because cfs is the legal unit of measurement, the remark also should contain references to flow rate limits in cfs units. Section 85-2-

103(1), MCA. Therefore, the proposed information remark for the Exchange Claims should be modified as follows:

USE OF WATER UNDER THIS CLAIM SHALL BE ADMINISTERED AND DISTRIBUTED UNDER THE PRIORITY DATE OF JULY 1, 1852, PROVIDED THE OWNERS(S) OF THE FOLLOWING CLAIMS OWN AND MAINTAIN A ~~MINIMUM OF 2,560~~ SUFFICIENT NUMBER OF SHARES IN THE SUPPLY DITCH COMPANY TO SUPPLY THE FULL MEASURE OF WATER AUTHORIZED UNDER CLAIM NOS. 76H 50570-00 AND 76H 104544-00, NOT TO EXCEED 512511 MINER'S INCHES (12.78 CFS) OF WATER TO CLAIM NOS. 76H 50570-00 AND 76H 104544-00, AS RECOGNIZED IN THE 1978 AMENDED DECREE IN CAUSE NO. 556, RAVALLI COUNTY, MONTANA AS PROVIDED BY THE MONTANA WATER COURT IN ITS ORDER ADOPTING STIPULATION IN CASE NO. 76HA-74, AND AS RECOGNIZED AND CONFIRMED BY AGREEMENTS A STIPULATION ON FILE WITH THE MONTANA WATER COURT IN CASE 76HA-74.

The second set of remarks applies to the Fort Owen Claims. Those remarks also should be modified to include references to the statutory units of water measurement, and the Water Court's orders:

76H 50570-00:

USE OF WATER UNDER THIS CLAIM INCLUDES THE RIGHT TO RECEIVE UP TO 4 MINER'S INCHES (44.88 GPM) OF EXCHANGE WATER SUPPLIED UNDER THE WATER RIGHTS AND DISTRIBUTION SYSTEM OF THE SUPPLY DITCH COMPANY AS PROVIDED ~~IN THE 1978 AMENDED DECREE IN CAUSE NO. 556, RAVALLI COUNTY BY THE~~ MONTANA WATER COURT IN ITS ORDER ADOPTING STIPULATION IN CASE NO. 76HA-74, AND AS RECOGNIZED AND CONFIRMED BY AGREEMENTS A STIPULATION ON FILE WITH THE MONTANA WATER COURT IN CASE NO. 76HA-74.

76H 104544-00:

USE OF WATER UNDER THIS CLAIM INCLUDES THE RIGHT TO RECEIVE UP TO 507 MINER'S INCHES (12.68 CFS) OF EXCHANGE WATER SUPPLIED UNDER THE WATER RIGHTS AND DISTRIBUTION SYSTEM OF THE SUPPLY DITCH COMPANY AS PROVIDED ~~IN THE 1978 AMENDED DECREE IN CAUSE NO. 556, RAVALLI COUNTY BY THE~~ MONTANA WATER COURT IN ITS ORDER ADOPTING STIPULATION IN CASE NO. 76HA-74, AND AS RECOGNIZED AND CONFIRMED BY

AGREEMENTS A STIPULATION ON FILE WITH THE MONTANA WATER COURT IN CASE NO. 76HA-74.

Although not proposed in the Stipulation, to make it clear that the claims are limited to no more than the historically decreed flow rate, the following remark should appear on all of the claims in this case, together with a list of all the claims:

THE CUMULATIVE AMOUNT OF WATER USED AT ANY ONE TIME UNDER THE FOLLOWING CLAIMS MAY NOT EXCEED THE SUM OF 511 MINER'S INCHES (12.78 CFS).<sup>12</sup>

**4. Should the Court create an implied claim?**

The Stipulation refers to an implied claim in various sections and appears to propose to allocate to the implied claim the difference between 512 miner's inches recognized in the prior decree and decision, and the approximately 511 miner's inches allocated to both the Fort Owen Claims and the Exchange Claims in the Stipulation. The Stipulation suggests that the Court create a new implied claim to fill this gap.

The Water Court recognizes implied claims in certain circumstances. *In re Musselshell River below Roundup*, Case 40C-47, 1994 Mont. Water LEXIS 18, \*78 (July 14, 1994); *Hoon v. Murphy*, 2020 MT 50, ¶ 54, 2020 Mont. LEXIS 669, 2020 WL 1024736 (upholding Water Court creation of implied claim). Before the Court will recognize an implied claim, a claimant must prove that several factors exist. These include: (1) proof of two or more water rights in the original claim form or the material submitted with the claim form; (2) proof of historic use corroborating the implied claim; and (3) proof that recognizing the implied claim(s) will avoid causing a change to historic water use or increase the historic burden to other water users. *In re Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17, \*32 (Jan. 31, 2013); *In re Martinell*, Case 41A-148, 2018 Mont. Water LEXIS 3, \*6 (June 14, 2018). These standards prevent claimants from seeking an implied claim to revive a claim that was forfeited as a matter of law by

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<sup>12</sup> Even though 512 miner's inches is the ceiling for purposes of evaluating whether the decree exceeded remarks should be removed, the Forest Service's reduction from 5 miner's inches to 4, and the failure to prove the validity of the implied claim means the maximum summed flow rate under the claims in this case is 511 miner's inches.

missing the filing deadline. Section 85-2-226, MCA (establishing conclusive presumption of abandonment of for claims not timely filed); *In re Climbing Arrow Ranch*, Case 41F-A19, 2019 Mont. Water LEXIS 1 (Mar. 6, 2019). The implied claim process also cannot be used to expand the elements of a statement of claim. *In re Eliasson Ranch Company*, Order Amending and Adopting Master's Report, Case 40A-115, 2004 Mont. Water LEXIS 2, \*6 (Jun. 28, 2004).

The Stipulation does not cite or apply the applicable standard, and does not contains sufficient evidence to support an implied claim. The Stipulation refers to a party named "Olgee" but no party by that name signed the Stipulation, nor is there any information provided to suggest that Olgee owns or is the successor owner of a properly filed statement of claim. For an implied claim to exist, there must be some properly filed claim from which the implied claim is derivative. No such claim is identified in the Stipulation. Instead, the amount of water proposed in the Stipulation for each Exchange Claim is the same as what appears in the Preliminary Decree and the original claim filings. There also is no suggestion in any of the claim filings that more than one right was intended. It is not enough that the claim fits within what historically was decreed under the July 1, 1852 priority date. Therefore, the Stipulation lacks a sufficient basis to recognize an implied claim.

**5. Are modifications necessary to the stock water claims?**

Each of the six stock water claims in this case also contain the decree exceeded issue remark. Although the Stipulation does not address the stock water claims directly, the same limitations apply to them as to their associated irrigation claims. Therefore, the information remarks on the stock claims also should be modified, and a multiple use remark should be included to make clear that the stock rights cannot be used to expand the limitations associated with the irrigation rights.

**6. Should the motion to amend claim 76H 128517-00 be granted?**

The owners of claim 76H 128517-00 seek to amend the claim to add a second point of diversion as follows:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
2		SENWSW	11	8N	19W	RAVALLI

Period of Diversion: May 1 to October 1  
 Diversion Means: Headgate  
 Ditch Name: Baker Ditch (Headgate 3)  
 Period of Use: May 1 to October 1

The October 22, 2019 motion to amend was served on all parties and no party objected. The motion does not seek to amend any other element of the claim.

Claim 76H 128517-00 originally was filed with two points of diversion. At some point during the claim review process, the DNRC removed one of the points of diversion. The motion seeks to restore the claim to how it was originally filed.

The claim file does not explain why the DRNC removed the second point of diversion. While the Preliminary Decree abstract does contain an asterisk in the point of diversion element, putting the parties on notice of the change, no objection was filed. However, the motion is consistent with the prima facie evidentiary status of the claim as filed. Section 85-2-227, MCA. Granting the motion is unlikely to adversely affect any other water rights because the claim will remain subject to the terms of this order and no other element is being changed. Section 85-2-233(6).

**C. Unresolved Issues.**

The provisions of the Stipulation do not fully resolve issues with claims 76H 25750-00 (Troyer/Hill/Sopeland), 76H 104536-00 and 76H 104544-00 (MGY Ranch), 76H 104959-00 and 76H 104960-00 (Collins), 76H 128519-00 (Stewart), 76H 147922-00 (Rizzuti/Lotan/Cluff), 76H 151736-00 and 76H 151740-00 (Luporini/Smith), and 76H 214149-00 (Town of Stevensville). While these claims are bound by the terms of this Order and the decree exceeded issue remark will be removed and the information remarks modified, they have unresolved issue remarks and objections. Therefore, additional proceedings will be necessary to address the remaining issues and objections. In no case may future proceedings seek to disturb the terms of this Order without notice to all parties and the opportunity to object.

## CONCLUSIONS OF LAW

1. The Court takes judicial notice of Case 556, the 1978 Decision, and the Ravalli County WRS.
2. Each of the findings of fact is supported by a preponderance of evidence.
3. Proper foundation exists for the documents filed as evidentiary support of the Stipulation.
4. The Stipulation is not contrary to law, court rule, or public policy. Because all parties were given notice and the opportunity to object to the Stipulation, both by way of the Stipulation itself and also by the motion to approve the Stipulation, the Stipulation is binding on and enforceable by and against each of the parties, including objectors and appearing parties.
5. The provisions of the Stipulation, as incorporated and subject to this Order, and the provisions of this Order establish that the decree exceeded issue remark should be removed from each remaining claim in this case. The decree exceeded issue remark, and all objections based on that remark, are resolved. Pursuant to § 85-2-248(12), MCA, the decree exceeded issue remark is removed from each remaining claim in this case and all objections based upon the decree exceeded remark have been resolved.
6. The following flow rate information remark is necessary on each of the Exchange Claims to fully define the nature and extent of the rights:

USE OF WATER UNDER THIS CLAIM SHALL BE ADMINISTERED AND DISTRIBUTED UNDER THE PRIORITY DATE OF JULY 1, 1852, PROVIDED THE OWNERS(S) OF THE FOLLOWING CLAIMS OWN AND MAINTAIN A SUFFICIENT NUMBER OF SHARES IN THE SUPPLY DITCH COMPANY TO SUPPLY THE FULL MEASURE OF WATER AUTHORIZED UNDER CLAIM NOS. 76H 50570-00 AND 76H 104544-00, NOT TO EXCEED 511 MINER'S INCHES (12.78 CFS), AS PROVIDED BY THE MONTANA WATER COURT IN ITS ORDER ADOPTING STIPULATION IN CASE NO. 76HA-74, AND AS RECOGNIZED AND CONFIRMED BY A STIPULATION ON FILE WITH THE MONTANA WATER COURT IN CASE 76HA-74.
7. The following flow rate information remark is necessary on claim 76H 50570-00 to fully define the nature and extent of the right:

USE OF WATER UNDER THIS CLAIM INCLUDES THE RIGHT TO RECEIVE UP TO 4 MINER'S INCHES (44.88 GPM) OF EXCHANGE WATER SUPPLIED UNDER THE WATER RIGHTS AND DISTRIBUTION SYSTEM OF THE SUPPLY DITCH COMPANY AS PROVIDED BY THE MONTANA WATER COURT IN ITS ORDER ADOPTING STIPULATION IN CASE NO. 76HA-74, AND AS RECOGNIZED AND CONFIRMED BY AGREEMENTS A STIPULATION ON FILE WITH THE MONTANA WATER COURT IN CASE NO. 76HA-74.

8. The following flow rate information remark is necessary on claim 76H 104544-00 to fully define the nature and extent of the right:

USE OF WATER UNDER THIS CLAIM INCLUDES THE RIGHT TO RECEIVE UP TO 507 MINER'S INCHES (12.68 CFS) OF EXCHANGE WATER SUPPLIED UNDER THE WATER RIGHTS AND DISTRIBUTION SYSTEM OF THE SUPPLY DITCH COMPANY AS PROVIDED BY THE MONTANA WATER COURT IN ITS ORDER ADOPTING STIPULATION IN CASE NO. 76HA-74, AND AS RECOGNIZED AND CONFIRMED BY AGREEMENTS A STIPULATION ON FILE WITH THE MONTANA WATER COURT IN CASE NO. 76HA-74.

9. The following flow rate information remark is necessary on all of the claims in this case to fully define the nature and extent of the rights:

THE CUMULATIVE AMOUNT OF WATER USED AT ANY ONE TIME UNDER THE FOLLOWING CLAIMS MAY NOT EXCEED THE SUM OF 511 MINER'S INCHES (12.78 CFS).

10. The information remarks on the Preliminary Decree abstracts that are unrelated to the limitations agreed to by the parties are not necessary to fully define the nature and extent of the rights and should be removed.

11. The Stipulation properly establishes that the flow rate for claim 76H 50570-00 should be reduced from 56.10 gpm (5 miner's inches) to 44.88 gpm (4 miner's inches).

12. Amending claim 76H 128517-00 to restore the second point of diversion, as claimed, is unlikely to adversely affect any other water rights.

13. All issue remarks and objections for claims 76H 25726-00 (Merrifield/ Boadle/ Earth & Sky Circle), 76H 50570-00 (Forest Service), 76H 105006-00 (Ellison), 76H 107664-00 and 76H 107665-00 (Bitterroot Spirit), 76H 119948-00 (Marchuk), 76H 128517-00 (Triple D Land (formerly Mytty)), 76H 150065-00 (Cluff/ Rotan/ Rizzuti), 76H 150969-00 (Kink Trust/Thomas-Rupert Trust), and 76H 30067661 (Thomas-Rupert / Kink) have been resolved.

14. The remaining issue remarks and objections for claims 76H 25750-00 (Troyer/ Hill/ Sopeland), 76H 104536-00 and 76H 104544-00 (MGY Ranch), 76H 104959-00 and 76H 104960-00 (Collins), 76H 128519-00 (Stewart), 76H 147922-00 (Rizzuti/ Lotan/ Cluff), 76H 151736-00 and 76H 151740-00 (Luporini/ Smith), and 76H 214149-00 (Town of Stevensville) will be addressed in further proceedings.

15. Except as modified by this Order, the remaining elements of the claims consolidated in this case are unchanged from what appear in the Preliminary Decree.

16. To the extent any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated into these Conclusions of Law.

### **ORDER**

Based upon the foregoing, it hereby is ORDERED that:

1. The Stipulation is APPROVED subject to the provisions of this Order.
2. The request to withdraw claims 76H 50560-00, 76H 104546-00, and 76H 214379-00 is GRANTED and these claims are DISMISSED.
3. The motion to amend claim 76H 128517-00 is GRANTED.
4. The remaining claims are modified as provided in this Order. The decree exceeded issue remark is removed from each claim and the information remarks are retained, modified, or removed as provided in this Order.
5. To the extent the Stipulation requests that the Court create an implied claim, the request is DENIED.
6. All objections to claims 76H 25726-00, 76H 50570-00, 76H 105006-00, 76H 107664-00 and 76H 107665-00, 76H 119948-00, 76H 128517-00, 76H 150065-00,

76H 150969-00, and 76H 30067661 are DISMISSED. These claims are CLOSED and removed from this case.

7. A status conference will be set by separate order of the Court to discuss a process and schedule for resolving the remaining issue remarks and objections for claims 76H 25750-00, 76H 104536-00, 76H 104544-00, 76H 104959-00, 76H 104960-00, 76H 128519-00, 76H 147922-00, 76H 151736-00, 76H 151740-00, and 76H 214149-00.

8. A copy of the Stipulation shall be placed in the claim file for Fort Owen Claim 76H 104544-00 and Exchange Claim 76H 105006-00. The Stipulation shall be deemed to be included in the claim files for the remaining claims by reference in this Order. The Stipulation shall be maintained in the referenced files as part of the permanent water rights record.

Modified post-decree versions of the abstracts for claims 76H 25726-00, 76H 50560-00, 76H 50570-00, 76H 104546-00, 76H 105006-00, 76H 107664-00, 76H 107665-00, 76H 119948-00, 76H 128517-00, 76H 150065-00, 76H 150969-00, 76H 214379-00, and 76H 30067661 are included with this Order to confirm that the changes identified in this Order have been made in the State's centralized water right record system.

Modified post-decree versions of claims 76H 25750-00, 76H 104536-00, 76H 104544-00, 76H 104959-00, 76H 104960-00, 76H 128519-00, 76H 147922-00, 76H 151736-00 and 76H 151740-00, and 76H 214149-00 will be included in the order(s) closing those cases once the remaining issue remarks and objections are resolved.

DATED this 12<sup>th</sup> day of June, 2020.



Digitally signed by  
Stephen R. Brown

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Stephen R. Brown  
Associate Water Judge

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