

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BOULDER RIVER—TRIBUTARY OF THE JEFFERSON RIVER (BASIN 41E)
PRELIMINARY DECREE

* * * * *

CLAIMANT: 2-E Inc.

OBJECTOR: United States, DOA Forest Service

CASE 41E-0092-R-2024

41E 94312-00

41E 94313-00

41E 94316-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. 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 the 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 United States of America (USDA Forest Service) objected to each of these claims. At the first scheduling conference held on January 26, 2024, William Cummins and Tara Cummins appeared for 2-E Inc.

After nine months of settlement effort, the Rule 16(c), W.R.Adj.R. Hearing Track Order and Order Setting Deadline For Filing Notice Of Appearance was issued on October 29, 2024. It set a November 29, 2024 deadline for 2-E Inc. to retain counsel and file a notice of appearance for that counsel. No notice of appearance was filed. On December 5, 2024 the Order Determining That Claimant Is Prohibited From Appearing In Ongoing Proceedings and Scheduling Order were issued. On February 14, 2025 the United States' Motion For Summary Judgment And Memorandum In Support and the Declaration Of Thor Burbach were filed. These documents are viewable in the Court's FullCourt Enterprise case management system.

Despite being served with the December 5, 2024 Order and the February 14, 2025 Motion For Summary Judgment, Claimant 2-E Inc. did not file a notice of appearance for an attorney to appear and act on its behalf.

APPLICABLE LAW

"We have repeatedly held that summary judgment is an extreme remedy and should never be substituted for a trial if a material factual controversy exists." *Williams v. Plum Creek Timber Co.*, 2011 MT 271, P41.

The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Rule 56(c)(3), M.R.Civ.P.

The first analysis is whether the movant has shown that there is no genuine issue of material fact.

Summary judgment may be granted only when there is a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c); *LaTray*, P 14. The party seeking summary judgment bears the initial burden of establishing a complete absence of genuine issues of material fact. *LaTray*, P 14. **To satisfy this burden, the moving party must "exclude any real doubt as to the existence of any genuine issue of material fact" by making a "clear showing as to what the truth is."** *Toombs v. Getter Trucking, Inc.*, 256 Mont. 282, 284, 846 P.2d 265, 266 (1993). In doing so,

the moving party must contend with our rules which favor the party opposing summary judgment.

In determining whether genuine issues of material fact exist, we must view all evidence in the light most favorable to the non-moving party. *LaTray*, P 15. Therefore, all reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. *LaTray*, P 15. If there is any doubt as to whether a genuine issue of material fact exists, that doubt must be resolved in favor of the party opposing summary judgment. *Newbury v. State Farm Fire & Cas. Ins. Co.*, 2008 MT 156, P 14, 343 Mont. 279, P 14, 184 P.3d 1021, P 14; *Krusemark v. Hansen*, 186 Mont. 174, 177, 606 P.2d 1082, 1084 (1980); *Mathews v. Glacier Gen. Assurance Co.*, 184 Mont. 368, 379, 603 P.2d 232, 238 (1979).

Lorang v. Fortis Insurance Company, 2008 MT 252, ¶ 37 and 38. (**Emphasis** added)

The Montana Supreme Court has stated that:

The case law is explicit and the citations abound that the burden shifts to the party opposing the motion to present material and substantial facts to oppose the motion. *Harland v. Anderson* (1976), 169 Mont. 447, 548 P.2d 613; *Taylor v. Anaconda Federal Credit Union* (1976), 170 Mont. 51, 540 P.2d 151; *Rumph v. Dale Edwards, Inc.* (1979) Mont., 600 P.2d 163, 36 St. Rep. 1022; 6 Moore's Fed. Prac. § 56.16. In *State ex rel. Burlington Northern v. District Court* (1972), 159 Mont. 295, 496 P.2d 1152, we affirmed the rule that:

“Failure of the party opposing the motion to either raise or demonstrate the existence of a genuine issue of material fact, or to demonstrate that the legal issue should not be determined in favor of the movant, is evidence that the party's burden was not carried. Summary judgment is then proper, the court being under no duty to anticipate proof to establish a material and substantial issue of fact.”

Iverson v. Bouma (1981), 195 Mont. 351, 373-374.

A valid appropriation of a water right prior to July 1, 1973 required 1) an intent to appropriate a water right, 2) an actual diversion, impoundment or withdrawal of water, and 3) beneficial use of the water diverted, impounded, or withdrawn. See *Murray v. Tingley*, 20 Mont. 260 (1897), *Power v. Switzer*, 21 Mont. 523 (1898), *Bailey v. Tintinger*, 45 Mont. 155 (1912), and *Wheat v. Cameron*, 64 Mont. 494 (1922). If all three requirements are met, the appropriation is made or “perfected”. If all three requirements are not met, the appropriation is not perfected.

In its 1983 decision *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, the Montana Supreme Court stated the following concerning abandonment of water rights in Montana:

The appropriation of water is based on its beneficial use. When the appropriator or his successor in interest abandons or ceases to use the water for

its beneficial use, the water right ceases. Section 89-802, R.C.M., 1947 (repealed 1973). This fundamental principle has long governed the determination of water rights in Montana. In *Power v. Switzer* (1898), 21 Mont. 523, 55 P. 32, this controlling policy of beneficial use was explained:

“ . . . It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or 'claimed' and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases.”

* * * * *

[A] long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse.

* * * * *

To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope.

Id. at 431- 433.

Montana Code Annotated sections 85-2-227(2) and (3) state:

(2) A water judge may consider all relevant evidence in the determination and interpretation of existing water rights. Relevant evidence under this part may include admissible evidence arising before or after July 1, 1973.

(3) Subject to the provisions of subsection (4), a water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant, including, without limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973.

Subsection (4) concerns municipal claims and is not pertinent to these claims.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed

prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect.
Rule 19, W.R.Adj.R.

DISCUSSION

2-E Inc. irrigation claims 41E 94312-00 and 41E 94316-00, and stockwater claim 41E 94313-00 each claim a place of use in section 21, T6N, R7W, Jefferson County. The Declaration Of Thor Burbach [“Burbach Declaration”] provides the following evidence:

Paragraph 4: Based on the maps in the claim files, the claimed place of use for each claim is the Dry Cottonwood Placer, or Mineral Survey 7347, located in Section 21, Township 6N, Range 7W (“Section 21”). The Dry Cottonwood Placer is a 38-acre patented inholding encompassed entirely by federal land in the National Forest.

Irrigation claim 41E 94312-00 is for an October 19, 1905 filed right on Little Cottonwood Creek diverted by headgate in the SWNENW of section 21, T6N, R7W, Jefferson County, to irrigate 33.00 acres in the W2NE section 21, T6N, R7W, Jefferson County. The Burbach Declaration provides the following evidence:

Paragraph 9: Claim 41E 94312-00 claims an irrigation right with a point of diversion on Little Cottonwood Creek, in the SWNESW Section 21. This description identifies land in the National Forest. A permit or other authorization is required to maintain a diversion on the National Forest. Claimant does not have a permit or authorization to maintain a diversion at this location.

Paragraph 10: I visited the claimed point of diversion on Little Cottonwood Creek on May 1, 2024. I found no diversion or conveyance infrastructure in the area. I also did not observe any remnants of diversion or conveyance infrastructure in the area. The Little Cottonwood Creek drainage has steep topography that would have made any diversion from that source extremely difficult in the early 1900s.

Irrigation claim 41E 94316-00 is for an October 19, 1905 filed right on Rock Creek diverted by dike in the SWNESE of section 20, T6N, R7W, Jefferson County, to irrigate 38.00 acres in the W2NE and E2E2NW section 21, T6N, R7W, Jefferson County. The Burbach Declaration provides the following evidence:

Paragraph 12: Claim 41E 94316-00 claims an irrigation right with a point of diversion on Rock Creek, in the SWNESE Section 20, Township 6N Range 7W, Jefferson County. This description identifies land in the National Forest. Claimant does not have a permit or authorization to maintain a diversion at this location.

Paragraph 13: I visited the claimed point of diversion for claim 41E 94316-00 on May 1, 2024. I found no diversion or conveyance infrastructure at this location or in the vicinity of it. I also did not observe any remnants of diversion or conveyance infrastructure in the area.

Paragraph 14: The claimed point of diversion on Rock Creek is approximately 1.1 miles southwest of the Dry Cottonwood Placer. Given the terrain and large wetland areas adjacent to the Boulder River, it would be difficult and uneconomical to construct and maintain a ditch to take water from Rock Creek to the claimed place of use.

For both irrigation claims, the Burbach Declaration provides the following evidence:

Paragraph 15: I reviewed aerial photographs taken in 1952 and 1980. Maps based on these photographs are attached as **Exhibit 5** and **Exhibit 6**. . . . There is no diversion or conveyance infrastructure evident on the photographs.

Paragraph 16: There are no field notes or maps for the Dry Cottonwood Placer in the Jefferson County Water Resources Survey materials. In my experience, the county water resources surveys did not include field notes or maps for areas where there was no irrigation.

(Emphasis in original)

There is no doubt - no genuine issue of material fact exists - that these two irrigation claims have not been diverted and used for irrigation since sometime before 1952, or alternatively, have never been diverted and used for irrigation.

Stockwater claim 41E 94313-00 is for an October 19, 1905 filed right on Little Cottonwood Creek for livestock drinking directly from the source in the SWNENW of section 21, T6N, R7W, Jefferson County. The Burbach Declaration provides the following evidence:

Paragraph 11: Claim 41E 94313-00 asserts a stockwater right at the same point of diversion as 41E 94312-00. A permit is required to maintain livestock access to a source on the National Forest. This source is in the Lockhart-Whitehouse Range Management Unit. My staff reviewed grazing records since 1997. Claimant does not have a permit to graze stock on this allotment. The permit for this allotment has been associated with individuals and entities unrelated to Claimant since at least 1997.

There is no doubt - no genuine issue of material fact exists - that this stockwater claim has not been used for stockwatering since sometime before 1997, or alternatively, has never been used for stockwatering.

FINDINGS OF FACT

1. Irrigation claims 41E 94312-00 and 41E 94316-00 have not been diverted and used for irrigation since sometime before 1952, or alternatively, have never been diverted and used for irrigation.

2. Stockwater claim 41E 94313-00 has not been used for stockwatering since sometime before 1997, or alternatively, has never been used for stockwatering.

CONCLUSIONS OF LAW

1. The evidence provided by the Burbach Declaration is sufficient to contradict and overcome each of these prima facie claims.

2. There is no evidence on the ground, in the various aerial photographs reviewed, or in the Jefferson County Water Resources Survey that any of these three claimed appropriations were ever made as asserted. It appears these claimed rights were never perfected.

3. If the rights claimed on irrigation claims 41E 94312-00 and 41E 94316-00 were ever perfected, they have not been diverted and used for irrigation since sometime before 1952, a period of 73 years (1952 to 2025). This long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the claimant to explain the reasons for nonuse.

4. If the right claimed on stockwater claim 41E 94313-00 was ever perfected, it has not been used for stockwatering since sometime before 1997, a period of 28 years (1997 to 2025). This long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the claimant to explain the reasons for nonuse.

5. Claimant 2-E Inc. did not retain counsel to appear on its behalf and thereby, never provided any evidence or rationale explaining the reasons for nonuse of these three claimed rights.

6. If ever perfected, 2-E Inc. claims 41E 94312-00, 41E 94313-00, and 41E 94316-00 were abandoned.

7. The United States has established there are no genuine issues of material fact and it is entitled to judgement as a matter of law.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the United States' Motion For Summary Judgment be GRANTED and 2-E Inc. claims 41E 94312-00, 41E 94313-00, and 41E 94316-00 each be dismissed as never perfected, or alternatively, as abandoned. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the claims have been dismissed in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

2-E Inc.
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Service Via Electronic Mail:

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOULDER RIVER, TRIBUTARY TO JEFFERSON RIVER
BASIN 41E**

Water Right Number: **41E 94312-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: **DISMISSED**

Owners: 2-E INC
 6230 142ND ST SW
 EDMONDS, WA 98026-3634

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: LITTLE COTTONWOOD CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOULDER RIVER, TRIBUTARY TO JEFFERSON RIVER
BASIN 41E**

Water Right Number: **41E 94316-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: **DISMISSED**

Owners: 2-E INC
 6230 142ND ST SW
 EDMONDS, WA 98026-3634

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: ROCK CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.