

IN THE WATER COURT OF THE STATE OF MONTANA  
 CLARK FORK DIVISION  
 WESTSIDE SUBBASIN OF THE BITTERROOT RIVER BASIN (76HF)

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IN THE MATTER OF THE ADJUDICATION	)	<b>CASE NO. 76HF-378</b>
OF THE EXISTING RIGHTS TO THE USE	)	
OF ALL THE WATER, BOTH SURFACE AND	)	76H-W-107741-00
UNDERGROUND, WITHIN THE WESTSIDE	)	76H-W-107822-00
SUBBASIN OF THE BITTERROOT RIVER	)	76H-W-131022-00
DRAINAGE AREA, INCLUDING ALL	)	76H-W-151450-00
TRIBUTARIES OF THE WESTSIDE	)	76H-B-210942-00
SUBBASIN OF THE BITTERROOT RIVER	)	
IN RAVALLI COUNTY, MONTANA	)	

**FILED**  
 JAN 22 2003  
 Montana Water Court

CLAIMANT: Daniel J. Bell and Sally L. Bell; Mario Locatelli; Chester D. Herbert;  
 Dwight Partin; Donald M. Fullerton and Jeanie EA Fullerton;  
 Fred C. Vaughn and Doug Vaughn; Gary L. Stubblefield; Steven F. Halama

OBJECTOR: United States of America (USDI Fish & Wildlife Service);  
 United States of America (USDA Forest Service);  
 United States of America (Bureau of Indian Affairs); Avista Corporation;  
 Montana Department of Fish, Wildlife & Parks

**ORDER RECOMMITTING CLAIMS TO WATER MASTER**

Pursuant to Montana Code Annotated, §85-2-233(5), the claims in the above-entitled case were assigned to Water Master Douglas Ritter. The Water Master filed a report containing Findings of Fact and Conclusions of Law with the Clerk of Court. Copies of the report were served upon the parties on October 29, 2002.

In Finding of Fact 6 and 12 of the report, the Master recommends adding a ditch remark proposed by the United States Forest Service. The proposed remark reads as follows:

THE NORMAL COMBINED FLOW OF WATER RIGHTS CONVEYED BY THE WALDHERR-MOORE-HINRICKS DITCH DOES NOT EXCEED 6.60 CFS, EXCEPT DURING TIMES OF HIGH SPRINGTIME RUNOFF IN MILL CREEK AND DURING PERIODS WHEN STORED WATER FROM MILL LAKE IS BEING RELEASED INTO MILL CREEK AND CONVEYED BY THIS DITCH. DURING THESE PERIODS, THE COMBINED FLOW RATE OF WATER RIGHTS CONVEYED BY THE DITCH MAY REACH 9.50 CFS.

On November 13, 2002, Daniel J. and Sally L. Bell, filed their written objection to including the ditch remark on their claim. On November 25, 2002, the Court issued its Order Setting Briefing Schedule and Deadline to File Application for Hearing on Objection to Master's Report. On December 23, 2002, the United States of America (USDA-Forest Service) filed its Answer Brief on Claimant Bells' Objection the Master's Report. No further briefs were filed.

In its Answer Brief, the USDA-Forest Service expressed concern over the lack of specificity in the Bells' objection, but stated that the issue of whether the Water Court should include a ditch capacity remark on the Bell claim was not ripe for a decision on the merits at this time. The USDA-Forest Service requested the Court to remand the case to the Water Master for further proceedings. The Court will do so.

The Forest Service appears to have adopted a policy designed to insert ditch capacity remarks on claim abstracts. Since this case is being returned to the Water Master, the Master should review the benefits and disadvantages of this policy. To guide the Master's review, the following comments are offered.

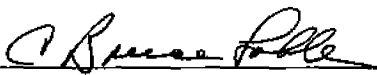
The Water Court should not routinely add remarks to claim abstracts just because parties ask the Court to do so. Any remark inserted on an abstract should provide a tangible benefit to the claim. Straight forward remarks that facilitate the administration and distribution of water rights by the water users or water commissioners, or that identify the existence of a private agreement are appropriate. For example, inserting a remark specifying that certain claims, by agreement, have been voluntarily subordinated to other specific claims would be appropriate. Remarks that give an impression that they represent a judicial decision on some issue (when no such decision was made) or that they are binding on other water users not in privity to a stipulated remark, or that are simply too vague are not appropriate.

It needs to be remembered that the abstract of water right claim is the document that most future water users and water commissioners will follow. The reports and opinions authored by water masters and water judges will rarely be reviewed once the time for appeal has elapsed. Therefore, each abstract issued by the Water Court must make sense.

The remark proposed by the Forest Service in this case could give the impression that the Water Court, after a thoughtful consideration of evidence presented to it, has adjudicated a “normal” ditch capacity and a “high springtime runoff” ditch capacity, when, in fact, this remark is merely the product of an agreement that the Forest Service thought it had with some of the parties in this case, but not all of the water users using this ditch. Since not all of the water users on this ditch are parties in this case or have their claims before the Court, the purpose and utility of the proposed remark is not obvious. If this remark is intended to affect non-party water users on the Waldherr-Moore-Hinricks ditch, then the insertion of this remark on some water right claims raises Due Process considerations for the non-party water users.

Accordingly, the Master should determine whether the proposed remark is appropriate under the circumstances of this case. With these comments and pursuant to Rule 53(e)(2), M.R.Civ.P, this matter is recommitted to the Water Master for further proceedings.

DATED this 22 day of JANUARY, 2003.

  
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C. Bruce Loble  
Chief Water Judge

**CERTIFICATE OF SERVICE**

I, Sherry Ford, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER RECOMMITTING CLAIMS TO WATER MASTER** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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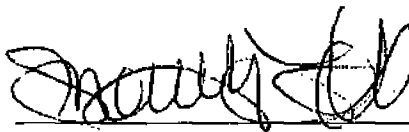
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DATED this 22<sup>nd</sup> day of January, 2003.



Sherry Ford  
Deputy Clerk