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IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
WHITEWATER CREEK - BASIN (40K)

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IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND WITHIN THE WHITEWATER CREEK DRAINAGE DRAINAGE AREA INCLUDING ALL TRIBUTARIES OF THE WHITEWATER CREEK IN PHILLIPS COUNTY, MONTANA.	**CASE NO. 40K-38** 40K-W-070583-00 40K-W-070584-00 40K-W-070897-00 40K-W-070898-00 40K-W-189792-00

CLAIMANTS: United States of America (Bureau of Land Management)
United States of America (Department of Justice, Immigration, & Naturalization

OPINION ON GROUND WATER CODE OF 1961 AND ORDER AMENDING AND ADOPTING MASTER'S REPORT

This case resolves the question as to whether the United States of America was required to comply, between January 1, 1962 and July 1, 1973, with the statutory procedures for appropriating ground water in Montana. This Court finds that it was required to comply.

Factual and Procedural History

The United States Department of the Interior, Bureau of Land Management (BLM), and the United States Department of Justice, Immigration and Naturalization Service (INS) (together referred to as the United States), timely filed statements of claim for the above-referenced water rights for ground water appropriated by means of wells or developed springs, and described the priority dates as between January 1, 1962 and July 1, 1973, the dates the wells or developments

were purportedly constructed.[1] No notices of appropriation, completion, or well logs were filed.

In the Temporary Preliminary Decree for Basin 40K, the priority dates were changed to the 1981 and 1982 statement of claim filing dates, and the following issue remark was added to the abstracts of the claims:

> The water court cannot enter a final decree of this right without further presentation of evidence concerning the priority date. To assure the orderly adjudication of water rights, the water court will set a hearing to determine these issues if no objections are made.

This remark appeared because the claims did not include any documentation indicating they were appropriated in compliance with the provisions of the Montana Ground Water Code of 1961 set forth in Chapter 29, Title 89, R.C.M. 1947.

The claims were assigned to Water Master Michael J. L. Cusick, who consolidated them into the present case. At the first status conference, the United States objected to the corrected priority dates and issue remarks. At the request of the Water Master, the United States filed a brief on the priority date issue. At the request of the United States, Claim 40K-W-189792-00 was consolidated into the case. No other objections to the claims were filed.

On April 28, 1992, the Master issued a Master's Report finding that the provisions of the Montana Ground Water Code of 1961 and the Montana Water Use Act of 1973 govern the priority dates of these claims. The Master concluded that the priority dates should be the dates the statements of claim were filed and therefore remain as set forth on the Temporary Preliminary Decree abstracts.

On June 4, 1992, the United States filed a fifteen page objection to the Master's Report, together with a fifty page exhibit,[2] contending that the Water Master had erred, and essentially arguing that prior to its joinder in this general water right adjudication, by virtue of its waiver of

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1 Water right claims 40K-W-070583-00 and 40K-W-070898-00 were claimed by the BLM for wildlife purposes; Water Right Claims 40K-W-070584-00 and 40K-W-070897-00 were claimed for stockwater purposes; and, Water Right Claim 40K-W-189792-00 was claimed by the INS for use at a Boundary Inspection Station.

2 Exhibit "A" attached to the United States' objections consists of documents submitted by Richard T. Wirner, Hatfield Chilson, and Perry W. Morton, to the Chairman of the House Committee on Interior and Insular Affairs.

sovereign immunity under the McCarran Amendment, 43 U.S.C. § 666, the United States was not required to comply with Montana law in perfecting water rights on federal lands.[3]

Finding that the issue raised by the United States posed a significant issue regarding the applicability of state law in a general adjudication under the McCarran Amendment, and in order to facilitate a full resolution of the issue in an adversarial context, the Court elected to pursue a procedure proposed by the United States in its amicus brief in Water Court Case WC-92-3 ("On Motion" Case), filed February 8, 1995. Thus, on April 6, 1995, the Water Court filed a Notification and Request for Montana Attorney General's Comments on Significance of Legal Issue.

On May 25, 1995, the Montana Attorney General accepted the Request, and on October 23, 1995, filed the Answer Brief of the State of Montana, together with an 84 page exhibit,[4] stating its opinion that the Water Master had "correctly decided the issue" in this case, and "did so, for the most part, for the correct reasons." Brief of State of Montana, p. 2. The Montana Attorney General opined that the McCarran Amendment is irrelevant to the question of federal compliance with State law in the acquisition of appropriative water rights, and that the United States had failed to overcome the presumption that Congress intended federal agencies to comply with State law in the acquisition of those rights.

The United States did not reply to the Answer Brief of the State of Montana, and on March 26, 1997, withdrew its objections to the claims.

In light of the potentially large number of federal claims involving the same issue in this general water right adjudication, and the history of inconsistent and postponed rulings involving the issue, the Court decided that the issue needed a final resolution that could and would be applied to all similarly situated federal claims in the adjudication. Therefore, on May 6, 1997,

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dated March 1, 1960, regarding "Federal Water Rights Legislation."

3 This same priority date issue was called in on motion of the Water Court in Cases 40C-49 and 40C-56. In the absence of an objector, the Water Master in those cases declined to resolve the issue. The Court's Opinions amending those Master's Reports to conform with this Opinion will soon be issued.

4 Exhibit 1 attached to the State of Montana's brief consists primarily of a *Memorandum re Federal Non-Reserved Water Rights*, from Theodore B. Olson, Assistant Attorney General, United States Department of Justice, Office of Legal Counsel, to Carol E. Dinkins, Assistant Attorney General, United States Department of Justice, Land and Natural Resources Division, 6 Op. O.L.C. 328 (June 16, 1982).

the Court served the United States and the Montana Attorney General with notice of their opportunity for oral argument on the issue. The Court advised the parties that if no request was filed, the Court would conclude the parties waived the hearing contemplated under Rule 53(c), M.R.Civ.P. No requests were filed.

Jurisdiction

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees under the authority granted in § 85-2-233, MCA. It has concurrent jurisdiction to adjudicate federal rights to the use of water and to review federal objections to state-based water right claims filed in comprehensive state water rights adjudications under the authority granted by the McCarran Amendment of 1952 (43 U.S.C. § 666); §§ 85-2-231, 85-2-233, and 85-2-234, MCA. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 549, 103 S.Ct. 3201, 77 L.Ed. 2d 837 (1983); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 812, 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes* (1985), 219 Mont. 76, 84, 86, 712 P.2d 754; and *State ex rel. Greely v. Water Court* (1984), 214 Mont. 143, 691 P.2d 833.

Standard of Review

The Water Court reviews a master's conclusions of law to determine whether they are correct. Rule 1.II(4), Water Right Claim Examination Rules (1995); *Steer, Inc. v. Dept. of Revenue* (1990), 245 Mont. 470, 474-75, 803 P.2d 601; *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398.

Discussion

The United States argues that federal agencies were not required to comply with state water right appropriation and perfection laws prior to joinder in general stream adjudications, pursuant to the McCarran Amendment of 1952. It argues that under the Supremacy Clause of the United States Constitution, federal activities are immune from regulation by the States, unless Congress clearly and unambiguously authorizes such regulation, citing *Hancock v. Train*, 426 U.S. 167, 178-81, 96 S.Ct. 2006, 48 L. Ed. 555 (1976); *EPA v. Calif.*, 426 U.S. 200, 211 (1976); *Cappaert v. United States*, 426 U.S. 128, 145-146, 96 S.Ct. 2062, 48 L. Ed.2d 523 (1976).

The Water Court concludes otherwise. Montana's authority to regulate the appropriation and perfection of water rights by federal agencies on unreserved federal lands within the State did not begin with passage of the McCarran Amendment, or joinder in this general water right adjudication, but is rooted in other federal law and policies that have historically deferred to state law with respect to the allocation and appropriation of water rights on unreserved federal lands. Although the three documents attached as Exhibit A to the United States Objections may have expressed the desire of a minority in Congress at the time to assert its power and "clarify" federal law with respect to the ownership of all water rights appropriated on federal lands, the majority in Congress did not agree and ultimately chose to continue Congress' long-standing deference to the States with respect to the appropriation of water rights on all federal lands, unless it explicitly, or by necessary implication, provides otherwise by legislative act.

Concurrent Authority Over Water

The Property Clause of the United States Constitution invests Congress with the authority "to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States," Art. IV, § 3, U.S. Const., a power which the United States Supreme Court has traditionally construed as "plenary," with the authority "to control their occupation and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them. . . ." *United States v. Locke*, 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed. 2d 64 (1985); *Kleppe v. New Mexico*, 426 U.S. 529, 540, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405, 37 S.Ct. 387, 61 L.Ed. 791 (1917); and *Camfield v. United States*, 167 U.S. 518, 525-526, 17 S.Ct. 864, 42 L.Ed. 260 (1897).

Montana, however, in its inherent and sovereign capacity, also has dominion and control over the land and waters within its borders. Tenth Amendment, U.S. Const. Absent consent or cession, that includes federal lands and the waters on or adjacent to them. *Kansas v. Colorado*, 206 U.S. 46, 93, 27 S.Ct. 655, 51 L.Ed. 956 (1907); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 228-229, 3 How. 212, 11 L.Ed. 565 (1845); *Shively v. Bowlby*, 152 U.S. 1, 48-50, 14 S.Ct. 548, 38 L.Ed. 331 (1894); Art. IX, § 3(3), Mont. Const. (1972); and *In re Adjudication of the*

Yellowstone River (1992), 253 Mont. 167, 179, 832 P.2d 1210.

Only when the federal government properly asserts its authority to control the use of federal property, and State law conflicts with that authority, does federal authority preempt State law under the Supremacy Clause of the United States Constitution. Art. VI, Cl. 2, U.S. Const.; *California v. United States*, 438 U.S. at 668-678; *Kleppe*, 426 U.S. at 543. The Water Court analyzed these concepts at length in its decision in Water Court Case 40E-A. *See* Opinion, Order Amending and Adopting Master's Report, Water Court Case 40E-A (June 29, 2005). Rather than burden this Opinion with a similar and lengthy analysis, the Court simply adopts the 40E-A analysis and incorporates it herein.

Presumption of State Control over Water

This Court was not presented with sufficient evidence demonstrating Congress' clear intent to preempt Montana water law, either explicitly or by necessary implication. Therefore, based on its analysis in Case 40E-A, this Court begins with the presumption that Montana law controls the appropriation of the water rights on the federal lands involved in this case. *See* Case 40E-A Opinion, pp. 15-20.

Taylor Grazing Act Lands

Four of the five ground water right claims in this case were appropriated from wells constructed by the United States on land owned by the United States and administered by the Department of the Interior pursuant to the Taylor Grazing Act of 1934, 48 Stat. 1269, 43 U.S.C. § 315 et seq.[5] The federal courts, the Department of the Interior, and most commentators have consistently taken the position that the Taylor Grazing Act did not effect a permanent reservation or dedication of land or water for specific public purposes and was intended by Congress to be a land classification and management statute only.[6] Therefore, it did not provide the United States

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5 Claim 40K-W-189792-00 was appropriated on land owned by the United States and administered jointly by the Department of Justice, Immigration and Naturalization Service, and the United States Treasury, Bureau of Customs, for use as a Border Inspection Station. The United States did not file the claim as a federal reserved water right and has taken the position that a determination of its priority date should be governed by the same rules applicable to the other four claims.

6 *See, e.g., Kidd v. United States* 756 F.2d 1410, 1411 (9th Cir. 1985); Olson Memorandum at 332, supra n. 4; Solicitor's Op. M-36914 (Supp. III), 96 I.D. 211 (1988); Solicitor's Op. M-36914 (Supp.), 88 I.D. 253, 256 (1981); Solicitor's Op. M-36914, 86 I.D. 553, 592 (1979); George Cameron Coggins et al., *The Law of Public Rangeland*

with an independent statutory basis for the appropriation of water rights inconsistent with the substantive and procedural requirements of Montana law. *Kidd v. United States*, 756 F.2d 1410, 1411 (9th Cir. 1985); Solicitor's Opinion M-36914 (Supp. I), 88 I.D. 253 (January 16, 1981).

Nor did the Act explicitly amend or repeal the Acts of 1866, 1870 or 1877, or abandon Congress' historical deference to state control over the appropriation of waters on unreserved federal lands. *See Kidd*, 765 F.2d at 1411; *U.S. v. Fallbrook Public Utility Dist.*, 165 F. Supp. 806, 839-40, 841-42 (D.C.Cal. 1958); and *In re Green River Drainage*, 147 F. Supp. 127, 134 (D.C.Utah 1956). To the contrary, Section 2 of the Act expressly provided that:

> [N]othing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

43 U.S.C. 315(b) (emphasis added).

With no clear directive to the contrary, either explicit or implicit, the inference or presumption is that Congress intended for State law to control the appropriation of all federal and non-federal water rights on lands administered by the Department of the Interior under the Taylor Grazing Act. *See* Opinion, Water Court Case 40E-A (June 29, 2005), pp. 27-30.

The McCarran Amendment

In the process of reviewing the tradition of federal deference to state water law in *California v. United States*, the Supreme Court noted that:

> Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States to state-court jurisdiction for general stream adjudications: 'In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.' * * * 'Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years. S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951).'

Management I: The Extent and Distribution of Federal Power, 12 Envtl. L. 535, 584 (1982).

438 U.S. at 678-679 (emphasis added).

This was of vital concern to western States, because the federal government was the largest landholder in the West and potentially a major water user. Yet, prior to 1952, the doctrine of sovereign immunity barred the involuntary joinder of the United States as a party in state court water right adjudications.[7] Although the States had developed procedures for the appropriation, perfection, and determination of water rights within their borders, the true extent and priority of those water rights, including federal reserved and state-based water rights, could not be finally adjudicated or effectively enforced. Many in Congress believed that the inability to join the United States in those adjudications rendered them nearly worthless.[8] Senator Patrick McCarran of Nevada, chief sponsor and advocate of what would become the McCarran Amendment, observed that:

> Under the laws of many States, in order that an adjudication of the water rights of a stream may be had, it is necessary to join all the parties owning or claiming to own any rights to the stream. If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill, and confusion results.

97 Cong. Rec. 12948 (1951). *See also United States v. District Court in and for The County of*

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[7] The doctrine of sovereign immunity makes the United States and its agencies immune from suits to which it has not consented. *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L. Ed. 235 (1939); *United States v. Lee*, 106 U.S. 196, 204, 1 S.Ct. 240, 27 L. Ed. 171 (1882); *Hill v. United States*, 50 U.S. (9 How.) 386, 389, 13 L. Ed. 185 (1850); *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444, 8 L. Ed. 1001 (1834); and *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 411-412, 5 L. Ed. 257 (1821)(wherein Chief Justice John Marshal declared that universally received opinion is that no suit can be commenced or prosecuted against United States); and 5 Kenneth Culp Davis, Administrative Law Treatise 6-7 (2d ed. 1984), and 2 Charles H. Koch, Jr., Administrative Law and Practice 210 (1984)(wherein author traced doctrine of sovereign immunity to English common law which assumed "the King can do no wrong.")

[8] Senate Report No. 755 for Senate Bill No. 18 expressed the concern that: "[B]y reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly, all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States." 82d Cong., 1st Sess. 2, 5 (1951). Subcommittee hearings on Senate Bill No. 18 revealed many of the problems perceived to be associated with federal immunity from suit and Congress' perception that the States essentially faced a "Hobson's Choice" when it came to protecting state-based water rights. Hearings Before Subcommittee of the Senate Committee on the Judiciary on Senate Bill No. 18, 82d Cong., 1st

Eagle, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L. Ed.2d 278 (1971).

To resolve this jurisdictional dilemma, Congress passed the McCarran Water Right Suit Act of July 10, 1952 (McCarran Amendment), which provided in relevant part as follows:

> (a) . . . Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgment, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, that no judgment for costs shall be entered against the United States in any such suit. * * * *

66 Stat. 560, 43 U.S.C. § 666 (2005) (emphasis added).[9]

The United States contends that under the rule that waivers of sovereign immunity must be unequivocally expressly and narrowly construed, the waiver of sovereign immunity found in the second full sentence of the McCarran Amendment must be construed to apply only after the United States has first been joined in an appropriate suit.

In United States v. Idaho, however, the United States Supreme Court cautioned that:

> There is no doubt that waivers of federal sovereign immunity must be "unequivocally expressed" in the statutory text. (citations omitted) "Any such waiver must be strictly construed in favor of the United States," (citations omitted), and not enlarged beyond what the language of the statute requires, (citations omitted). But just as 'we should not take it upon ourselves to extend the waiver beyond that which Congress intended . . . neither, however, should we assume the authority to narrow the waiver that Congress intended.' (citations omitted)."

508 U.S. at 6-7 (emphasis added).

The sole purpose for enacting the McCarran Amendment was to waive federal sovereign

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Sess., 2-5.

[9] The McCarran Amendment was enacted as a rider to the Department of Justice Appropriations Act, §§ 208(a)-(c), 66 Stat. 560 (1952).

immunity so that the United States could be joined as a defendant in judicial proceedings (including state court proceedings) to adjudicate or administer all outstanding private and public water right claims in a particular water source. *United States v. District Court of County of Eagle*, 401 U.S. at 525.[10] Thus, it extended even to the adjudication of federal reserved water rights. *Id.* at 524. Although the waiver of sovereign immunity in the Amendment was intended to apply to both procedural and substantive law, *United States v. Idaho*, 508 U.S. at 8, it was not intended to affect or change either the substantive law on which federal water right claims are based, or the procedural law by which they must be adjudicated. *See e.g., Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569-71, 103 S.Ct. 3201, 77 L. Ed.2d 837 (1983); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed. 483 (1976); *Greely v. Confederated Salish & Kootenai Tribes* (1985), 219 Mont. 76, 99, 712 P.2d 754; *United States v. City and County of Denver*, 656 P.2d at 9.

In *Idaho v. United States*, for example, the Court stated that "we accept the proposition that the critical language of the second sentence of the McCarran Amendment submits the United States generally to . . . state substantive law of water rights. . . ." 508 U.S. at 8. In addition, the Court observed that to conclude that the waiver did not extend to State procedural law would "render the amendment's consent to suit largely nugatory, allowing the Government to argue for some special federal rule defeating established state-law rules governing pleading, discovery, and the admissibility of evidence at trial. We do not believe that Congress intended to create such a legal no-man's land in enacting the McCarran Amendment." *Id.*

In *Shamberger v. United States*, the federal district court found that federal claims could be based on either federal or State law, and both must be considered insofar as they are relevant and enforceable. 165 F. Supp. 600, 604 (D.C. Nev. 1958). In *San Carlos Apache*, the Court expressly emphasized and held that those federal claims based on federal law must be determined by federal law, while those claims based on state law must be determined by state

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10 *See also*, Senate Report No. 755, 82d Cong., 2d Sess., pp. 2, 9 (1951), stating that: "The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water..." *See also* quotation of Senator McCarran in Report that the legislation was "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 808 (1976).

law, to the extent that state law does not conflict with federal law. 463 U.S. at 570-71. *See generally California v. United States*, *Cappaert v. United States*, *Greely II*, and *City of Denver*, *supra*.

The United States' suggestion that the retroactive application of federal laws is not favored misapprehends the doctrine of retroactive application. As a jurisdictional and procedural statute, the McCarran Amendment was intended to operate prospectively on the parties and the rights being adjudicated. *See generally*, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946, 17 S.Ct. 1871, 38 L. Ed.2d 135 (1997); *Landgraf v. USI Film Products*, 511 U.S. 244, 264, 114 S.Ct. 1483, 128 L. Ed.2d 229 (1994); and Justice Rehnquist Dissent in *Lindh v. Murphy*, 521 U.S. 320, 344-45, 117 S.Ct. 2059, 138 L. Ed.2d 481 (1997). A law does not operate retrospectively, however, merely because it is applied in a case arising from conduct antedating a statute's enactment or a judicial ruling. *Landgraf v. USI Film Products*, 511 U.S. at 269-70. Adjudications authorized by the McCarran Amendment "obviously include [existing] water rights previously acquired by the United States through appropriation or presently in the process of being so acquired." *County of Eagle*, 401 U.S. at 524.[11] Moreover, although the federal claims in this case were necessarily appropriated prior to joinder of the United States, they were appropriated after passage of the McCarran Amendment and after passage of the Montana Ground Water Code of 1961.

Accordingly, the Court concludes that the United States was required to comply with Montana law in the appropriation and perfection of state-based water rights both before and after its joinder under the McCarran Amendment in this comprehensive water right adjudication.

The Montana Ground Water Code of 1961

In 1961, after nearly two decades of heated debate and compromise, the Montana legislature fundamentally changed the law and regulation of ground water rights in Montana by

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[11] During the floor debate on Senate Bill No. 18, Senator McCarran observed that: "[A]ll the western arid and semi-arid States...are interested in the bill, because the Government of the United States, during the past 15 or 18 years has acquired on the various natural streams of the West holdings in real estate which was [sic] formerly taken up by private citizens and in connection with which they, as private citizens, diverted water from the natural streams and applied it to the land. The Government acquired the land and the water rights." 97 Cong. Rec. 12948 (1951). These private rights were, of course, acquired under state law. The Committee believed that the government had obtained rights no better than the seller possessed and should be subject to the same adjudicatory procedures. Thus its Report concluded that adjudications should proceed as if the persons from whom the United States had purchased the rights still owned them.

enacting the Montana Ground Water Code of 1961. Title 89, Chapter 29, R.C.M. 1947. *See* Robert G. Dunbar, Montana University Joint Water Resources Research Center Completion Report No. 76: "Groundwater Property Rights and Controversies in Montana, Montana State University (April 1976)."[12] Section 89-2912 of the new Ground Water Code provided in relevant part that:

> The application of ground water to a beneficial use *prior to* January 1, 1962 is hereby recognized as a water right. Beneficial use shall be the extent and limit of the appropriative right. As to appropriations of ground water completed *on and after January 1, 1962*, any and all rights must be based upon the filing provisions hereinafter set forth, and as between all appropriators of surface or ground water on and after January 1, 1962, the first in time is first in right. (Emphasis added)

Section 89-2913, R.C.M. (1947) provided in relevant part that;

> (b) On and after January 1, 1962, any person desiring to appropriate ground water may complete a notice of appropriation and file it with the county clerk in the county in which the appropriation is located.
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> * * *
>
> (d) After filing a notice of appropriation, in order to acquire a right based thereon, the person must, within ninety (90) days, commence actual excavation and diligently prosecute construction of a well and upon, its completion, file a notice of completion with the county clerk of the county in which the appropriation is located. . . .
>
> (e) A failure to file a notice of appropriation deprives the appropriator of his right to relate his date of appropriation back, and results in the dating of his appropriation as of when he files a notice of completion. Until a notice of completion is filed with respect to any use of ground water instituted after January 1, 1962, no right to that use of water shall be recognized. However, in the case of uses instituted *prior to* January 1, 1962 and diligently prosecuted to completion on or after that date, the date of appropriation shall relate back to the date of commencement of construction, upon the filing of a notice of completion.

Senate Report No. 755, 82d Cong., 1st Sess. 5-6 (1951).

[12] "Their creation was not easy. Legislation to regulate the English property right was proposed in 1941 and led to the passage of an act six years later to conserve artesian flows. Realizing, however, that effective regulation of the use of groundwater was dependent upon a change in the property right, far-sighted citizens sought to effect that metamorphosis. In doing so, they encountered opposition from other Montanans who had differing views on the nature of institutions for the control of groundwater. Nevertheless, in the crucible of debate and controversy, the English property right was replaced by the appropriative right and new institutions forged and tested to enforce it. As is the case with all institutions, their effectiveness in the coming years of water scarcity will depend upon the character and ability of those who administer them." Dunbar, supra, pp. 56-57.

* * *

(h) Persons who have put ground water to a beneficial use . . . prior to January 1, 1962, shall, within two (2) years after January 1, 1962, file a declaration in the office of the county clerk of the county in which the claimed right is situated. . . .

The declaration of vested ground water rights herein provided for shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.

Failure to comply with this requirement shall in no wise work a forfeiture of such rights, or prevent any such claimant from establishing such rights in the courts, but he must maintain the burden of proving such unrecorded rights. Provided, however, that persons who have filed the water well log form, provided for in sections 1 and 2 of chapter 58, session laws of Montana, 1957 (repealed by Sec. 28, Ch. 237, L. 1961), shall be deemed to have complied with the requirements of this section. (Emphasis added)[13]

The new Code protected rights to the use of ground water applied to beneficial use prior to January 1, 1962, by providing that such rights could be established by filing a prima facie declaration of vested ground water rights pursuant to § 89-2913(e), or water well log forms pursuant to §§ 1 and 2 of Chapter 58 of the Laws of Montana (1957), or other proof of completion and application to beneficial use. The new Code was equally clear, however, that no such "use" rights would be recognized for ground water rights "instituted" on or after January 1, 1962. §§ 89-2912 and 89-2913(e), R.C.M. 1947. *See also* 36 Op. Att'y Gen.527 (Mont. 1976). The failure to file a notice of appropriation after January 1, 1962, did not result in forfeiture of the water right, but the claimant did forfeit the right to relate the date of appropriation back, and the priority date then became the date the claimant filed a notice of completion.

In construing a statute, the intention of the legislature is always to be pursued if possible. *State ex rel. Krona v. Holmes* (1943), 114 Mont. 372, 376, 136 P.2d 220. In determining legislative intent, one must first resort to the plain meaning of the words used. *State ex rel. Cashmore v. Anderson* (1972), 160 Mont. 175, 184, 500 P.2d 921, 924. Section 89-2911(e), R.C.M. 1947, specifically defined "person" to include "the United States or any agency thereof." *See generally Burley v. United States*, 179 F. 1 (9th Cir. 1910); *United States v. Burley*, 172 F. 615 (9th Cir.1909) *Mettler v. Ames Realty Co.* (1921), 61 Mont. 152, 201 P. 702; and

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[13] Subsection (h) was subsequently amended to a four (4) year period, which expired on January 1, 1966. *See* Section 1, Ch. 21, L. 1965 and Sec. 2, Ch. 307, L. 1971.

Bailey v. Tintinger (1912), 45 Mont. 154, 122 P. 575.[14] In addition, the new statutory procedures were not merely an additional method of appropriating a ground water right, but the exclusive method of appropriating a ground water right on and after January 1, 1962, until their repeal in 1973.[15] Under the 1961 statute, no ground water right was acquired until a notice of completion was filed pursuant to § 89-2913(d), R.C.M. 1947. No exception was made for the United States or its agencies. This interpretation is manifest in the textual language of the Act and was so construed by the Montana Attorney General. 36 Op. Att'y Gen. 527, 530, 532-533 (1976).

The Montana Water Use Act of 1973

Sections 89-2912 and 89-2913 of the Montana Ground Water Code of 1961 were repealed and superceded by §§ 89-880 to 89-889 of the Montana Water Use Act of 1973, which set forth a new and again exclusive method for acquiring water rights (both surface and ground) within the State of Montana after July 1, 1973.[16] Contrary to the assertion of the United States, however, the Montana Water Use Act was not intended to regulate the perfection of ground water withdrawn by means of a well or developed spring and first put to beneficial use between January 1, 1962 and July 1, 1973. *See* 36 Op. Att'y Gen. at 528, 530. After July 1, 1973, such claimants held "existing rights to perfect" their inchoate or contingent water rights pursuant to the law as it existed when the ground water was appropriated. 36 Op. Att'y Gen. at 528-529.[17]

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[14] As the Montana Attorney General noted in his Brief, "§ 89-2913 contains neither a scienter requirement nor a proviso which would allow the Court to relieve a water user from its operation due to legal uncertainty or lack of knowledge." Brief of State of Montana, p. 6.

[15] In contrast, in *Tintinger v. Bailey*, the Montana Supreme Court concluded, with respect to a much earlier statute, that: "We are of the opinion that the Act of 1885 intended: (1) To preserve the right that the appropriator had theretofore; and (2) to provide an *additional* method of making an appropriation. In other words, during the first period of our history . . . there was but one method of making an appropriation, and that was by complying with the rules and customs of the pioneer settlers; while during the period since 1885, two distinct methods are prescribed, – the first by complying with the rules and customs of the early settlers, and the second by complying with the terms of the statute." 45 Mont. 154, 171-72 (1912) (emphasis added).

[16] Although a permit was not required to appropriate ground water outside the boundaries of a controlled ground water area from wells pumping less than 100 GPM, the 1973 Act continued to require the filing of a notice of completion in order to perfect a right to the use of the water, with the priority date being the date of filing the notice of completion. 36 Op. Att'y Gen. at 528-529; § 85-2-306, MCA.

[17] Citing *Holmstrom Land Co. v. Newlan Creek Water Dist.* (1980), 185 Mont. 409, 434, 605 P.2d 1060 and *General Agriculture Corp. v. Moore* (1975), 166 Mont. 510, 534 P.2d 859, for the proposition that "use" is not limited to perfected or actual use but that the inception of an existing right occurs when the first step is taken to establish such use -- otherwise the existing right of priority of appropriation would be nullified. *Cf. DNRC v. Intake Water Co.* (1976), 171 Mont. 416, 430-434, 558 P.2d 1110.

As stated above, under that law, the owner of a well completed between January 1, 1962 and July 1, 1973, for which no previous filing had been made, could perfect a ground water right by filing a form "GW-2" or "602" notice of completion, with the priority date being the date the notice of completion was filed. *Id.* Thus, the failure to file a notice of appropriation or completion as required by the old Montana Ground Water Code of 1961 did not result in a forfeiture of the claimed right under the new Montana Water Use Act of 1973, but effectively held the inchoate right and priority date "in limbo" until a notice of completion was filed, which apparently could occur on any subsequent date. *Id.* at 531-32.

In 1979, § 89-880 was recodified §85-2-306(1), M.C.A. In 1981, § 85-2-306 was amended to add subsection (2), which made explicit what the Attorney General had previously found to be implicit in Montana law:

> An appropriator of ground water by means of a well or developed spring, first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (1) of this section, with the department to perfect the water right. The priority date of the appropriation shall be the date of the filing of a notice [of completion]. An appropriation under this subsection is an existing right, and a permit is not required. . . . (Emphasis added)

In 1983, § 85-2-306(2) was amended to provide that:

> The filing of a claim of existing water right pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation shall be the date of the filing of a notice [of completion] . . . or the date of the filing of the claim of existing water right. (Emphasis added)[18]

In accordance with these Montana statutes, the Court concludes that the correct priority date for ground water claims filed by the United States from wells or developed springs constructed between January 1, 1962 and July 1, 1973, for which no notice of notice of completion was filed, is the date the statements of claim were filed.

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[18] Section 85-2-306 has since been amended numerous times and subsections (1) and (2) are now found in substantially the same form in § 85-2-306(4), MCA (2005).

The Colorado Cases

Finally, the United States argues that the Montana Water Court should follow the reasoning of the Colorado Supreme Court in *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982), and *United States v. Bell*, 724 P.2d 631 (Colo. 1986), and "antedate" the priority date of these federal claims to their "true priority date" of first beneficial use.

In *City of Denver*, the Colorado Supreme Court upheld the Master-Referee's ruling that the United States was entitled to "antedated" priority dates for its claims appropriated under Colorado law, so that the claims would reflect their "true priority" date of first beneficial use. 656 P.2d at 15. In Colorado, however, water right decrees are re-opened and updated periodically in supplemental adjudications to add new water uses. *See* Water Right Determination and Administration Act of 1969, § 148-21-1 et seq., C.R.S. (1973 and 1985 Supp.), recodified as § 37-92-101 et seq.; *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 804, n. 5 (1976). Under Colorado's "postponement" doctrine, no priority date can be awarded in a subsequent adjudication earlier than the latest right adjudicated under a prior decree.[19] *Bell*, 724 P.2d at 641-642, 644-645. As the United States was immune from joinder in state adjudications prior to 1952, federal water rights reserved or appropriated prior to 1952, but adjudicated after 1952, could have been prejudiced by the Colorado "postponement" doctrine. To avoid this statutory anomaly, the Court in *City of Denver* upheld the Master-Referee's ruling which "antedated" the federal claims to the date of first beneficial use, which was earlier than the Colorado doctrine of postponement would otherwise have recognized. *See Bell*, 724 P.2d at 635 n. 6, citing § 37-92-306, 15 C.R.S. (1973).

In *United States v. Bell*, the Colorado Supreme Court declined to antedate a federal reserved water right claim only because the right claimed was an amendment to a prior federal reserved water right claimed in a different water source. 724 P.2d at 640-45. As explained by the Court:

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19 Section 37-92-306, C.R.S. (1973) set forth the "postponement doctrine," which provided that: "The priority date awarded for water rights or conditional water rights adjudged and decreed on applications for a determination of the amount and priority thereof filed in such division during each calendar year shall establish the relative priority among other water rights or conditional water rights awarded on such applications filed in that calendar year; but such water rights or conditional water rights shall be junior to all water rights or conditional water rights awarded on such applications filed in any previous calendar year and shall also be junior to all priorities awarded in decrees entered prior to June 7, 1969, or decrees entered in proceedings which were pending on such date. . . ."

> Because the United States was not subject to joinder prior to the McCarran Amendment and its absence from previous adjudications was privileged, once it is properly joined and provided the opportunity to adjudicate its claims, it may be decreed reserved water rights with priorities that antedate other adjudicated water rights to the date of the reservation. To that extent the postponement doctrine does not prevent the United States from receiving the priorities to which it would otherwise have been entitled. However, the postponement doctrine does apply to the United States' amendment claiming water from the mainstem of the Colorado River. Were the amendment to relate back to the original application, and thus antedate prior claims, the purposes of the McCarran Amendment would be frustrated, and the United States would have avoided the equivalent of a filing deadline. * * * We believe the certainty that the McCarran Amendment attempts to provide by allowing joinder of the United States in water adjudications would be destroyed if, under the reserved rights doctrine, the United States were able to add a separate claim for mainstem Colorado River water rights through an amendment with relation back to the original application for water rights made thirteen years before for water from a different source. . . . Moreover, if the United States' claims to water in or on the reserved lands had already been adjudicated, the United States could not now seek antedated priority for a new claim. The doctrine of res judicata bars the United States from reopening reserved water rights adjudications even where prior claims have not been adjudicated or the United States erroneously has omitted certain claims.

Bell, 724 P.2d at 642, 643 (emphasis added). The Court observed that: "[U]nless the new claim added by the amendment is subject to the postponement doctrine in section 37-92-306 the United States would have no incentive to file all claims to reserved water rights at one time." *Id.* at 645. The Court acknowledged, however, that had the United States asserted its claim to mainstem Colorado River water in its initial application, it may well have decreed the water right with an antedated priority date. *Id.*

Unlike Colorado, the State of Montana has never enacted or recognized a "postponement" doctrine with respect to the priority dates of water right claims. Nor, therefore, has it ever required or recognized Colorado's converse practice of "antedating" water right claims. In Montana, the rule of priority is that "as between appropriators, the first in time is the first in right," § 85-2-401(1), MCA, and "time" for ground water appropriations made by means of a well and first put to beneficial use on or after January 1, 1962, is not determined by the date of first beneficial use, but by compliance with statutory filing procedures.

While the doctrine of sovereign immunity effectively prevented or excused the adjudication of federal water right claims in state courts prior to passage of the McCarran

Amendment, neither the Amendment, nor any other federal law, precluded or prevented federal compliance with state law in the appropriation and perfection of water rights on unreserved federal lands. The State of Montana has explicitly required federal compliance with Montana law in the appropriation and perfection of water rights since at least 1905. *See e.g.*, § 1, Ch. 44, Laws of Montana (1905, repealed 1973); *Mettler v. Ames Realty Co.*, *Bailey v. Tintinger*, *Burley v. United States*, and *United States v. Burley*, *supra*.[20] To find that the United States was privileged to avoid such compliance, therefore, would be contrary to the express will of the Montana Legislature, essentially create an unreserved federal water right where the federal courts and the Department of the Interior have found none exists, and disrupt the settled expectations of all other water users in the State of Montana.[21] These important distinctions and implications make application of the Colorado Court's rationale in *City of Denver* and *Bell* particularly inappropriate in this case.

Conclusion

Accordingly, as these ground water rights were purportedly appropriated by the United States from wells or developed springs and first put to beneficial use between January 1, 1962 and July 1, 1973, without the filing of any notices of appropriation or completion, the Court finds that under the Montana Water Use Act, as amended, the correct priority dates for the claims are the dates the Statements of Claim were filed. The Court notes that these priority dates would effectively be the same priority dates that the United States would have been entitled to under the old Ground Water Code of 1961 -- the date the notices of completion (statements of claim) were filed.

Order Amending and Adopting Master's Report

With the participation of the United States and the Montana Attorney General's Office, the Court is satisfied that this priority date legal issue was placed in the proper adversarial context and the Court sufficiently briefed to make an informed decision. Pursuant to the Court's notice and order of May 6, 1997, therefore, the decision will be applied to all similarly situated

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[20] As the State of Montana observed in its Brief, in many instances the United States in fact complied with the Ground Water Code of 1961. *See e.g.*, BLM Water Right Claim 40C-W-062769-00 decreed with a priority date of August 13, 1964, with a Notice of Appropriation dated August 13, 1964, and a Notice of Completion filed April 29, 1965.

[21] *See e.g.*, decisions in Water Court Cases 40D-W-038880-00 (August 26, 1986); 40D-W-169322-00

federal claims in this comprehensive state-wide adjudication.

Upon careful review of the record and the briefs of the United States and the State of Montana, the Court now ORDERS that:

1. With respect to Stock Water Claims 40K-W-070584-00 and 40K-W-070897-00, and Domestic Claim 40K-W-189792-00, the Master's Report, as supplemented and AMENDED by this Opinion, is ADOPTED.

2. With respect to wildlife Claims 40K-W-070583-00 and 40K-W-070898-00, the priority date issue remark is DELETED and Conclusion of Law IV of the Master's Report is STRICKEN. The validity and remaining elements of these two claims will be reviewed at some future date, pursuant to the instructions of the Montana Supreme Court articulated *In re Adjudication of Existing Water Rights (Bean Lake III)*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396. To provide notice of further hearings, the Court will add the following or a similar issue remark to the abstract of these two wildlife claims:

   THE MONTANA SUPREME COURT HAS INSTRUCTED THE WATER COURT TO HOLD A HEARING ON THIS CLAIM TO DETERMINE ITS VALIDITY. *In the Matter of the Missouri River Drainage Area,*, 2002 MT 216, 311 Mont. 327.

3. A Post Decree Abstract for these five claims be served with this Order to confirm that the recommendations set forth in the Master's Report, as amended herein, have been adopted for each claim listed in the caption of this case.

DATED this 21 day of December, 2005.

C. Bruce Loble
Chief Water Judge

(August 29, 1986); 40A-69 (December 6, 1988); 76G-W-09060-00 (September 27, 1990); and 40K-20 (April 24, 1997).

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM

WHITEWATER CREEK
BASIN 40K

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 40K 70583-00 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Version Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
PO BOX 36800
BILLINGS, MT 59107 6800

Priority Date: NOVEMBER 17, 1981

Enforceable Priority Date: NOVEMBER 17, 1981

Type of Historical Right: USE

Purpose (use): WILDLIFE

Flow Rate: 2.96 GPM

Volume: 4.17 AC-FT

Source: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NENE	28	34N	32E	PHILLIPS

Diversion Means: WELL

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1			NENE	28	34N	32E	PHILLIPS

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

70583-00 70584-00

Remarks:

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS. THESE ISSUES MAY REMAIN UNRESOLVED IF NO OBJECTIONS ARE FILED DURING THE NEXT OBJECTION PERIOD.

THE MONTANA SUPREME COURT HAS INSTRUCTED THE WATER COURT TO HOLD A HEARING ON THIS CLAIM TO DETERMINE ITS VALIDITY. IN THE MATTER OF THE MISSOURI RIVER DRAINAGE AREA, 2002 MT 216, 311 MONT. 327.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM

WHITEWATER CREEK
BASIN 40K

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 40K 70584-00 STATEMENT OF CLAIM
Version: 1 -- ORIGINAL RIGHT
Version Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
PO BOX 36800
BILLINGS, MT 59107 6800

Priority Date: NOVEMBER 17, 1981

Enforceable Priority Date: NOVEMBER 17, 1981

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: 2.96 GPM

Volume: THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NENE	28	34N	32E	PHILLIPS

Diversion Means: WELL

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1			NENE	28	34N	32E	PHILLIPS

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

70583-00 70584-00

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES. W070583-00, W070584-00.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM

WHITEWATER CREEK
BASIN 40K

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 40K 70897-00 STATEMENT OF CLAIM
Version: 1 -- ORIGINAL RIGHT
Version Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
PO BOX 36800
BILLINGS, MT 59107 6800

Priority Date: APRIL 21, 1982

Enforceable Priority Date: APRIL 21, 1982

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: 0.99 GPM

Volume: THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NWNESE	9	35N	32E	PHILLIPS

Diversion Means: WELL

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1			NWNESE	9	35N	32E	PHILLIPS

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

70897-00 70898-00

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES. W070897-00, W070898-00.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM

WHITEWATER CREEK
BASIN 40K

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 40K 70898-00 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Version Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
PO BOX 36800
BILLINGS, MT 59107 6800

Priority Date: APRIL 21, 1982

Enforceable Priority Date: APRIL 21, 1982

Type of Historical Right: USE

Purpose (use): WILDLIFE

Flow Rate: 0.99 GPM

Volume: 0.99 AC-FT

Source: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		NWNESE	9	35N	32E	PHILLIPS

Diversion Means: WELL

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1			NWNESE	9	35N	32E	PHILLIPS

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

70897-00 70898-00

Remarks:

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS. THESE ISSUES MAY REMAIN UNRESOLVED IF NO OBJECTIONS ARE FILED DURING THE NEXT OBJECTION PERIOD.

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM

WHITEWATER CREEK
BASIN 40K

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 40K 189792-00 STATEMENT OF CLAIM
Version: 1 -- ORIGINAL RIGHT
Version Status: ACTIVE

Owners: USA (DEPT OF JUSTICE)
IMMIGRATION & NATURALIZATION
425 I ST NW
WASHINGTON, DC 20001

Priority Date: APRIL 29, 1982

Enforceable Priority Date: APRIL 29, 1982

Type of Historical Right: USE

Purpose (use): INSTITUTIONAL
BORDER INSPECTION STATION

Flow Rate: 12.00 GPM

Volume: 3.50 AC-FT

Source: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	3	NW	6	37N	30E	PHILLIPS

Diversion Means: WELL

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		3	NW	6	37N	30E	PHILLIPS
2		4	NW	6	37N	30E	PHILLIPS