Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
* *

IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G(W)209661-40A BY DARLA J. JEFFERS	Case No. WC-92-2

MEMORANDUM

On April 29, 1991 Darla J. Jeffers filed an Application for Change of Appropriation Water Right with the Montana Department of Natural Resources and Conservation (DNRC). This application was assigned the DNRC number of G(W)209661-40A. Darla J. Jeffers was seeking DNRC authorization to change the point of diversion and place of use of the existing water right represented in Statement of Claim Number 40A-W-209661-00.

Tierney Land & Livestock Co. and Fred Taber filed objections to the Jeffers' application. Prehearing motions were filed by Jeffers and Taber, including a motion by Taber to certify certain issues to the Montana Water Court pursuant to §85-2-309 MCA (1991). Tierney Land & Livestock Co. joined and adopted the Taber motions.

On March 4, 1992 the DNRC exercised its statutory discretion and filed its "Certification Under §85-2-309 MCA" with the First Judicial District Court. The District Court designated the matter as Cause No. CDV 92-304. The case was subsequently transferred to the Water Court and was designated as Case No. WC-92-2. The chief water judge has jurisdiction under §§ 3-7-223 and 3-7-224(2) MCA. The issue certified is, "Has water right claim 40A-W-209661-00 been abandoned?"

The water right claim at issue here had been the subject of an August 1990 hearing and subsequent Master's Report in Case No. 40A-102 before Water Master Edward M. Dobson of the Montana Water Court. Eugene E. Taber and his son, Fred Taber, were represented at that hearing by attorney Holly J. Franz. Tierney Land & Livestock Co. was not a participant in that hearing. From the evidence presented at the hearing, the Water Master determined that the claimed priority date of June 20, 1910 in Claim 40A-W-209661-00 should be May 1, 1950. No party to Case 40A-102 filed any objections to the Master's Report and it was adopted by the chief water judge on June 1, 1994.

Taber asserts in this certification proceeding that Lester Cavill, a predecessor in interest to Jeffers, ceased use of this water right claim sometime between 1961 and 1968 and sold the irrigation equipment in 1970. Taber contends that this right has been abandoned and asserts that the court deciding the abandonment issue must consider evidence arising both before and after July 1, 1973.

The threshold issue before the Court is as follows:

> Whether the Water Court has the requisite jurisdiction to hear post July 1, 1973 evidence relating to the abandonment of a pre July 1, 1973 existing water right.

If the Court has jurisdiction, then the next step is to determine if the water right claim has been abandoned. Briefs on the threshold question were filed by Holly J. Franz, attorney for Fred Taber, and by J. Reuss, attorney for Darla J. Jeffers. Bill Tierney of Tierney Land & Livestock Co. joined and adopted the reasoning and arguments made in Taber's Brief on Jurisdiction.

According to his brief, Taber's primary purpose in

addressing this issue is to insure that some court, whether the Water Court or a district court, assumes full jurisdiction of the case and renders a binding decision. Taber argues the Water Court has jurisdiction by virtue of the certification statute to hear post June 1973 evidence during a proceeding initiated by the certification process. The certification statute at §85-2-309((2) states in part as follows:

> (2)(a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates.

Jeffers argues that no court has the authority to alter existing rights based upon post June 1973 abandonment considerations until the right is made subject to a final decree. Jeffers relies upon subsections (1), (2) and (5) of §85-2-404 MCA (1993) which state as follows:

> (1) If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right or if he ceases using his appropriation right according to its terms and conditions, the appropriation right shall, to that extent, be considered abandoned and shall immediately expire.
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> (2) If an appropriator ceases to use all or part of his appropriation right or ceases using his appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for his use, there is a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.
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> ....
>
> (5) Subsections (1) and (2) do not apply to existing rights until they have been determined in accordance with part 2 of this chapter.

The existing right at issue here, to some extent, has

been "determined in accordance with part 2 of chapter 2 of Title 85." Part 2 does include Water Court hearings on objections to a temporary preliminary decree. See §85-2-233 (1993). This right has not been finally determined in accordance with part 2, as no final decree has been issued in the Basin of the Musselshell River Above Roundup, Basin 40A. No certification has been made under Rule 54(b), M.R.Civ.P., as anticipated in Matter of Adjudication of Sage Creek, 234 Mont. 243, 253, 763 P.2d 644 (1988). Because the right has not been finally determined, Jeffers argues that under subsection (5) of §85-2-404, subsections (1) and (2) cannot be applied to conclude an abandonment of Claim 40A-W-209661-00.

Three alternative statutory interpretations are possible.

The first interpretation would preclude the Court from hearing post June 1973 abandonment evidence until final water right decrees are entered. Jeffers argues this result. This interpretation would suspend the law of abandonment for over 216,483[1] water right claims from July 1, 1973 until some indefinite future date.

The second interpretation would preclude the Court from hearing post June 1973 abandonment evidence until final water right decrees are entered, except for those claims certified to the Court under §85-2-309. Taber supports this result. This interpretation would suspend the law of abandonment for over 216,483 water right claims from July 1, 1973 until some indefinite future date, except for one claim, the claim at issue here, and any other claim that

[1] The 216,483 figure was obtained from the DNRC prepared "Montana General Adjudication Basin Status" document dated May 25, 1994. The term "over" is used because there are an unknown number of existing water rights which were exempt from filing under section 85-2-222 MCA.

might be certified from the DNRC pursuant to §85-2-309 MCA.

The third interpretation would not preclude the Court from hearing post June 1973 abandonment evidence if the evidence was relevant to the issue before the Court. This interpretation would not result in the suspension of the law of abandonment.

SUMMARY

To accept Jeffers argument would require this Court to hold that the law of abandonment of existing water rights has been suspended from July 1, 1973 until some distant future event. Commentators have pondered the meaning of §85-2-404(5) and have recognized Jeffers position as being arguable but consider it unlikely to have been the intention of the Montana Legislature.[2] Because of the context of §85-2-404's enactment, post 1973 legislative amendments to it, the 1972 Montana Constitution, and the need to conclude a reasonable result, this Court is not persuaded by Jeffers' argument.

This Court has jurisdiction to hear post June 1973 evidence regarding abandonment of the Jeffers water right claim, notwithstanding §85-2-404(5). At the very least, the certification statute permits it to do so. Even if the certification statute were not applicable, the Water Court simply cannot conclude that the law of abandonment of existing water rights has been suspended from July 1, 1973 to some indefinite future date.

If the law of abandonment has not been suspended, some court must have jurisdiction to hear allegations of abandonment of existing water rights. Since the jurisdiction to interpret and

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[2] See Albert W. Stone, Montana Water Law for the 1980s 72 (1981); Ted J. Doney, Montana Water Law Handbook 83 (1981)

determine existing water rights rests exclusively with this Court, it follows that the Water Court has the requisite jurisdiction to hear any allegations of post June 1973 abandonment of a prior existing right. The procedure to make that determination may not have been skillfully crafted by the legislature, but, at a minimum, it can be done in this certification proceeding.

OPINION

The judicial function in construing and applying statutes is to effect the intention of the legislature. The Court's road map to this goal is set forth in Lewis & Clark County v. Montana Department of Commerce, 224 Mont. 223, 226-27, 728 P.2d 1348 (1986) as follows:

> In determining legislative intent, the Court looks first to the plain meaning of the words used in the statute. If intent cannot be determined from the context of the statute, we examine the legislative history. [Citations omitted.] It is a further fundamental rule of statutory construction that the unreasonableness of the result produced by one interpretation is reason for rejecting it in favor of another that would produce a reasonable result.

Part of the plain meaning of the words in §85-2-404 is clear and the legislative intent is partly unmistakable. This specific abandonment statute is not applicable to "existing" water rights until some future date. It is not clear what that future date is or whether the pre July 1973 law of abandonment is suspended in the interim. It is silent on those issues. This silence requires the Court to divine the legislative intent by looking beyond the plain meaning of the words. The parties did not provide the Court with any legislative history to establish actual legislative intent so the Court must use the limited resources available to it.

Subsections (1), (2) and (5) of §85-2-404 were originally enacted in 1973 as part of the Montana Water Use Act of 1973[3] and codified as the entirety of Section 89-894 R.C.M. 1947. These three subsections were recodified as 85-2-404 MCA in 1979. To embrace Jeffers' reasoning would require a finding that the 1973 Legislature intended, by its passage of the Montana Water Use Act, to suspend the law of abandonment of existing water rights from 1973 to some uncertain future date when water rights would be determined in accordance with language of that Act.[4] According to a 1977 estimate by the DNRC, this uncertain future date was over 100 years away.[5]

To hold as Jeffers argues would radically alter the law, long recognized in Montana, that the controlling and fundamental principle upon which water rights are perfected and remain valid is beneficial use, and that water rights cease when the water is no longer applied to a beneficial use. See Matter of Adjudication of Clark Fork River Above Blackfoot River, 254 Mont. 11, 15, 833 P.2d 1120 (1992), (hereinafter the Deer Lodge case); and Matter of Adjudication of Musselshell River Above Roundup, 255 Mont. 43, 47, 840 P.2d 577 (1992).

The rules of beneficial use and abandonment are

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[3] Section 89-865 RCM 1947 stated that the 1973 act shall be known and may be cited as the Montana Water Use Act. The Compiler's Comments under 85-2-101 state that although this short title clause was not codified, it was not repealed and is still valid. Supreme Court opinions sometimes refer to this act as the Surface and Groundwater Act. Reference to either act is the same.

[4] First codified at Sections 89-870 through -879 RCM 1947, then at §§ 85-2-201 through -210 MCA (1979) (repealed, 1979).

[5] See Report to Montana Legislature Interim Subcommittee on Water Rights by DNRC dated April 14, 1978 at page 1.

necessarily related. Just as a user cannot appropriate water beyond the amount beneficially used, neither can the appropriator sit on the right in nonuse.

> As a general rule the authorities hold that in all cases where water formerly appropriated, or which has been under the control of any person, is permitted to flow down the natural channel of a stream below the point of diversion of the appropriator, without any intent of recapturing it, it works an immediate and express abandonment of all the water permitted to escape; and subsequent parties cannot be deprived of their rights in and to this water appropriated by them by an attempt on the part of the first appropriator to shut off their supply by enlarging the amount diverted by him to that which he could have originally claimed had not the rights of subsequent appropriators vested. When the water of a stream leaves the possession of a party, without any intent to recapture it, all his right to and interest in it is gone, and the water becomes a part of the stream and is subject to appropriation by another.

Kinney on Irrigation § 254, pp. 409-10 (1894) (footnote omitted citing Eddy v. Simpson, 3 Cal. 249; Schultz v. Sweeney, 19 Nev. 359; Woolman v. Garringer, 1 Mont. [535]).

The doctrine of prior appropriation and its principles of beneficial use and abandonment began early in the arid West and in Montana's territorial history. A limited historical review will help the reader follow the Court's analysis.

In Irwin v. Phillips, 5 Cal. 140 (1855), the California Supreme Court first applied to water law the maxim of equity, "first in time, is first in right"[6]. No specific legislative act required the California court to do so, but it found that the rights of miners to go upon the public domain, protected in their mineral claims by their priority, carried a right by implication to divert water to their use, to the exclusion of junior claimants.

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[6] Of course, the Court said it in Latin, *Qui prior est in tempore, potior est in jure.*

That court referred to the history of mining and water usage in California and stated: "Courts are bound to take notice of the political and social condition of the country which they judicially rule." Id. Courts further developed the doctrine of prior appropriation, applying it first to waters diverted for mining, then for milling, and then for agriculture. See history discussed in Thorp v. Freed, 1 Mont. 651, 657-59 (1872).

On January 12, 1865, Montana's First Territorial Legislative Assembly entered the arena of water law and passed an Act "to protect and regulate the irrigation of land in Montana Territory." See Bannack Statutes, p. 367, cited in Mettler v. Ames Realty Company, 61 Mont. 152, 166-67, 201 P. 702 (1921). The 1865 Legislative Assembly did not codify any statute on abandonment.

In Thorpe v. Woolman, 1 Mont. 168, 171-72 (1870), the Montana Supreme Court advised that "[a]ny tribunal, governed by the established principles of law, making an apportionment of water in accordance with what is just and equitable, would be compelled to hold that the one who first located the land, and claimed the water, was entitled to sufficient to irrigate his land; for equity declares that he who is first in time is first in right."

In 1872 the Legislative Assembly codified the doctrine of prior appropriation by asserting that water controversies would be determined by the dates of appropriation. See Chapter 34, Laws of 1872. In 1877, 1879 and 1885 the Legislative Assembly augmented Montana's laws on water. The Compiled Statutes of 1887 carried forward the Laws of 1872, as amended by the Acts of 1877, 1879 and 1885. See Mettler, 61 Mont. at 167. These statutes with some additions were eventually codified at Sections 89-801 et seq.

R.C.M. 1947.

Just as Montana water law, based on the doctrine of prior appropriation, is commonly referenced as "first in time is first in right," so is it commonly referenced as "use it or lose it." This reference arose because the appropriation doctrine requires that the water be put to beneficial use. "The rule requiring beneficial use appeared in some early declarations of western appellate courts, and it is uniformly recognized by the judiciary." 1 Clark, **Waters and Water Rights**, § 19.2 at pp. 85-86 (1967) (footnote omitted citing, *inter alia*, Weaver v. Eureka Lake Co., 15 Cal. 271, 275 (1860), and Creek v. Bozeman Water Works Co., 15 Mont. 121, 128, 129, 38 P. 459 (1894)).

The Montana Supreme Court's earliest references to abandonment usually contained limited explanation of its genesis. The Court would cite California authority, a legal encyclopedia or sometimes simply conclude that any water right could be lost by surrender, nonuse or abandonment. See, for example, Woolman, 1 Mont. at 543, Barkley v. Tieleke, 2 Mont. 59, 64 (1874), and Meagher v. Hardenbrook, 11 Mont. 385, 389 (1891).

In 1885 the Territorial Legislative Assembly first codified the law of abandonment and recognized its natural relationship with beneficial use as follows:

> The appropriation 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; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

Section 89-802, R.C.M. 1947. This codification merely encourages the courts to develop the law of abandonment through case law.

When the 1973 Montana Legislature enacted the Water Use

Act, the legislature repealed the statutory codification of abandonment set forth in Section 89-802. The 1973 Legislature enacted §85-2-404, but stayed its application to existing rights pending statewide adjudication. This raises the question of whether enactment of §85-2-404 MCA and the repeal of Section 89-802, R.C.M. 1947 suspends the law of abandonment as it has historically been developed.

A long-term suspension of the law of abandonment, pending an unknown effective date, would be so drastic a reversal of the doctrine of beneficial use that it seems unlikely the legislature would intend this result without clearly annunciating the reversal. It seems particularly unlikely that the 1973 Legislature would enact an abandonment presumption based on ten successive years of nonuse when water was available (an action referred to in 79 Ranch, Inc. v. Pitsch, 204 Mont. 426, 434, 666 P.2d 215 (1983) as a "general, modern trend"), but at the same time totally suspend the law of abandonment for an unknown but apparently long time.

The unreasonableness of the result produced by an interpretation suspending the law of abandonment requires this Court to reject this interpretation in favor of another that produces a reasonable result. See Johnson v. Marias River Electric Cooperative, Inc., 211 Mont. 518, 524, 687 P.2d 668 (1984); see also Lovell v. State Compensation Mutual Insurance Fund, 260 Mont. 279, 287, 860 P.2d 95 (1993); Howell v. State of Montana, 263 Mont. 275, 286, 868 P.2d 568 (1994).

Subsections (1) and (2) of 85-2-404 must be read together and understood in the context of their enactment. These subsections were part of the most significant legislative rewrite

of Montana's water laws in the state's history. The Montana Water Use Act enacted in 1973 was comprehensive legislation designed to "provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights" and was a response to the mandates contained in the newly created 1972 Constitution. See §85-2-101 MCA and also Montana Power Company v. Carey, 211 Mont. 91, 97, 685 P.2d 336 (1984).

The historical method of appropriating water by diverting it and putting it to beneficial use was replaced with a permit system. The historical procedure for changing an appropriation right allowed a water user to make any change and then force adversely affected parties to bring suit. This procedure was modified to require the user to apply to DNRC for authorization to change prior to making the change. See Castillo v. Kunnemann, 197 Mont. 190, 198, 642 P.2d 1019 (1982), cited in Matter of the Application for Change of Appropriation Water Rights by Royston, 249 Mont. 425, 429, 816 P.2d 1054 (1991).

The Montana Water Use Act was designed to control and regulate the use of water. Subsections (1) and (2) of 85-2-404 were enacted together for prospective purposes to further control and restrict the nonuse of water rights under the new law and were not enacted to remove all restrictions for nonuse for some indefinite period of time. Subsection (1) does not change the basic law of abandonment. Subsection (2) removes the uncertainty of the effect of long periods of nonuse. Abandonment still requires intent but under the Montana Water Use Act, nonuse for ten successive years when water is available creates a presumption that abandonment has occurred.

Before enactment of the 1973 Montana Water Use Act, most Supreme Court decisions held that mere nonuse of a water right did not establish abandonment. See cases cited in the dissents of Justice Weber and District Judge Ettien in 79 Ranch, Inc. v. Pitsch, 204 Mont. 426, 436-44, 666 P.2d 215 (1983). As a result, the cases finding abandonment are extremely rare and obscure in application. See Stone, supra p. 5 n.2, at 70.

The legislature modified the effect of these judicial rulings by establishing a fixed period of nonuse as creating a presumption of an intention to abandon. Having established a more defined standard, the legislature then said that this new standard would not apply to existing rights until they have been determined in accordance with part 2 of chapter 2 of title 85 MCA. It is clear that subsections (1) and (2) of §85-2-404 do not apply to existing rights until some future date.[7] The statutory language precludes such application. See Castillo v. Kunnemann, 197 Mont. 190, 199, 200, 642 P.2d 1019 (1982). In this way, the new ten years' nonuse principle would apply to each existing water right after it is determined under the ongoing statewide adjudication.

The legislature may choose to enact a post 1973 definition of abandonment of existing water rights different from the definition followed before its enactment. See Matter of Adjudication of Yellowstone River Above Bridger Creek, 253 Mont. 167, 175, 832 P.2d 1210 (1992). The legislature may suspend the operation of the new abandonment definition until a future date. But just because it did so does not indicate the former definition

[7] Apparently, these subsections are applicable to permits and certificates issued by the DNRC under part 3, chapter 2, Title 85.

of abandonment is suspended as well.

Existing water rights were recognized and confirmed in the 1972 Constitution of the State of Montana at Article IX, Section 3. An "'[e]xisting right' means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973." §85-2-102(10) MCA. That law includes the cases and decisions of the Montana Supreme Court regarding abandonment and its interpretation of 89-802 R.C.M. 1947 (repealed, 1973).

The repeal of Section 89-802 R.C.M. 1947 on July 1, 1973, through enactment of the Montana Water Use Act, is of no consequence. Section 89-802 was mere statutory recognition that a law of abandonment is within the contemplation of the courts. Moreover, to determine the validity of "existing rights," this Court must continue to construe and apply statutes repealed by the Montana Water Use Act.

Professor Stone suggests that the common law doctrine of abandonment can be used to bridge the gap from 1973 to the date when subsections (1) and (2) of §85-2-404 become effective. See Stone, supra p. 5 n.2, at 72. The common law "has been termed the legal embodiment of practical sense whose guiding star has always been the rule of right and wrong, and whose principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs." 15A Am. Jur. 2d Common Law § 1 at 596 (1976) (footnote omitted). "The common law should not be viewed as a morass covered by a web of enlightened legislative acts; rather, it should be viewed as a living thing, filling the gaps left by the legislature in pointing the way for future legislative acts." Id. at § 2.

The early case law defining abandonment does not

specifically cite the common law as its birthplace but the Court accepts Professor Stone's suggestion if it is necessary to do so. The common law concept of abandonment of a property right may be applicable but the law of abandonment probably finds its beginning within the doctrine of beneficial use and needs no statutory enactment.

The requirement that water be used for a useful or beneficial purpose is a fundamental element of the water law of Montana. It always has been and continues to be so today. See Toohey v. Campbell, 24 Mont. 13, 17-18, 60 P. 396 (1900); McDonald v. State 220 Mont. 519, 530-532, 536, 722 P.2d 598 (1986); Matter of Adjudication of Dearborn River, 234 Mont. 331, 341-342, 766 P.2d 228 (1988); §§ 85-1-101 and 85-2-101 MCA. Section 85-2-404 MCA is not a July 1, 1973 stop sign to this controlling and fundamental principle.

As long as beneficial use remains the touchstone of a water right appropriation, ceasing to apply water to a useful or beneficial purpose for a long period of time will eventually give rise to the question of abandonment. The criteria for finding abandonment may change by legislative enactment or judicial pronouncement, but abandonment is the predictable result of failing to comply with the doctrine of beneficial use.

Though the party whose water right is challenged as having been abandoned may not appreciate it, the law of abandonment operates to protect existing water rights. The authors of 2 **Waters and Water Rights**, § 17.03, at page 436 n.41 (1991), quote Roe & Brooks, *Loss of Water Rights - Old Ways and New*, 35 **Rocky Mtn. Min. L. Inst.** 23-1 (1989) as follows:

> Because water is so scarce and essential, the fullest beneficial use of water is not advanced where a right holder is permitted to continue to hold a water [right] through long periods of nonuse when other persons could make valuable use of the water to which the dormant right related. Similarly, new appropriators who make substantial investments in reliance on another's nonuse are afforded little certainty if long unused appropriative rights...are suddenly exercised and, as a result, the junior priority appropriators' supplies of water are cut off. The development of the law with respect to the loss of water rights is, therefore, very much influenced by these two dominant themes in western water law: (1) the goal of full beneficial use of water; and (2) the need to afford vested water rights holders certainty as to the value of their rights.

As stated before at p. 6, the intention of the legislature is to be adopted if possible in the construction of a statute, and unreasonable interpretations are to be avoided. To interpret the statute as Jeffers argues would result in the suspension of the law of abandonment. That is an unreasonable interpretation. A further demonstration of the unreasonableness of the Jeffers interpretation can be found in the legislature's 1987, 1989, and 1991 amendments to §85-2-404 and the Water Use Act.

The 1987 Legislature passed House Bill 651 and amended section 85-2-404 to insert a new paragraph (3) that protected appropriation rights appurtenant to state or federal conservation set-aside programs from abandonment. Further, the legislature slightly amended the statute to its current paragraph (5) language.

The 1989 Legislature amended §85-2-404 to protect from assertions of abandonment any "existing right" leased for instream purposes. Significantly, the Compiler's Comments note that the 1989 amendment was "effective May 11, 1989, and terminates June 30, 1993." The maximum four years of instream use authorized by the 1989 amendment would not even trigger §85-2-404(2)'s requirement of 10 successive years of nonuse. Yet the legislature felt it

necessary to protect this instream use from abandonment considerations.

The 1991 Legislature amended §85-2-404 to extend to June 30, 1999, the protection against abandonment of existing rights leased for instream use. The 1991 Legislature also enacted §85-2-407 authorizing temporary changes in appropriation rights for a period not to exceed ten years and amended §85-2-404 to protect these temporary changes from abandonment considerations.

These amendments preclude the use of post 1973 evidence to establish the abandonment of an existing right. If Jeffers' argument were correct that post 1973 abandonment considerations are suspended until a challenged right is decreed in a final decree, the legislature would not have needed to amend §85-2-404 MCA as it did in 1987, 1989, and 1991 to protect instream water leases and temporary changes from abandonment considerations. The enactment of these amendments confirms the Court's belief that the 1973 Legislature did not intend to suspend the law of abandonment.

Evidence that the legislature presumed that the adjudication would be completed within a year or two of the effective date of each amendment might counter the Court's conclusion as to the legislative intent. The 1991 amendments eliminate that possible argument. The 1991 amendment of §85-2-702(3) to require all noncompacted Indian reserved water right claims to be filed within 6 months of July 1, 1999, demonstrates the legislature's recognition that the adjudication of existing water rights might not be determined in accordance with part 2 of Chapter 2 of Title 85 before the year 2000. See also

§85-2-217.[8]

Lastly, a finding that the law of abandonment is suspended until existing water rights have been finally determined leads to one more result that the legislature surely could not have intended. Under the Jeffers interpretation, some existing water rights would never be subject to abandonment allegations. An unknown number of existing water rights were exempt under §85-2-222 MCA from the filing requirements of Senate Bill 76. Unless these "exempt" rights are included within the final decree, they will never be "determined" under the adjudication statutes. Under the Jeffers interpretation, this would result in situations in which nonused "exempt" water rights could never be abandoned and could be reactivated at any time to the potential detriment of final existing rights. Such a result would reduce the certainty vested water right users are to achieve from this adjudication.

Based upon the above analysis, the Court finds no legislative intent by the enactment of §85-2-404 MCA to suspend the law of abandonment and thereby preclude the Court from hearing this certification case.

As the law of abandonment is not suspended, which court has jurisdiction to hear allegations of abandonment? "The jurisdiction to interpret and determine existing water rights rests exclusively with the water courts." Mildenberger v. Galbraith, 249 Mont. 161, 166, 815 P.2d 130 (1991) (citing §3-7-501, MCA)

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[8] The 1991 amendments indicate legislative recognition that the statewide adjudication of water rights is a long term project, and that prospect is matter of record. See generally McDonald v. State 220 Mont. 519, 722 P.2d 598 (1986); see also **Report of the Water Policy Committee to the 51st Legislature** at 26 and 27 (December 1988); and see Saunders, Snyder, Ross & Dickson, P.C., **Evaluation of Montana's Water Rights Adjudication Process** at 32 and 65 (September 30, 1988).

(emphasis added). Until the final decree, the district courts may only grant injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the issuance of the final decree. See §85-2-406(1) MCA. Therefore, this Court has jurisdiction to determine abandonment of an "existing water right" claim.

The 1985 Legislature enacted §85-2-309(2) to authorize the DNRC to "certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the [DNRC] hearing, including but not limited to issues of abandonment, quantification, or relative priority dates." (Emphasis added.) The same legislature also granted jurisdiction to the chief water judge to decide cases certified to the district court under §85-2-309. See Sections 3-7-223(2) and -224(2) MCA. There is no express legislative limitation that the Court stop at July 1, 1973 in its review of "all factual and legal issues." The word "all" needs no definition. See General Agricultural Corp. v. Moore, 166 Mont. 510, 516, 534 P.2d 859 (1975).

The Court believes that the certification process was created to solve a problem confronted by DNRC in its administrative hearings process. DNRC has no authority to determine and interpret existing water rights. If DNRC receives an application to change a water right, and the opponents claim that the water right has been abandoned, DNRC cannot fulfill its statutory duty to determine if the proposed change meets the criteria set forth in §85-2-402.[9]

[9] Probably the best reasoning for this application of the certification statute is a real life example found in Case 40A-256 of the Water Court. In 1980 the claimant, relying on an 1891 appropriation, filed with DNRC an Application for Change in the point of diversion and place of use. Opponents objected on several grounds, including that the right had been abandoned. No

Therefore, at the very least, this Court has jurisdiction by virtue of the certification statue.

Taber refers to the Supreme Court's decision in the Deer Lodge case, 254 Mont. 11, supra p. 7, as holding that post 1973 evidence is not relevant when the Water Court exercises its adjudicatory jurisdiction. Taber attempts to distinguish the Deer Lodge case by asserting that its rationale does not apply to the Court's jurisdiction to decide certification cases. Taber's effort to distinguish the Deer Lodge case would be correct if this writer agreed with Taber's basic premise.

This writer does not read the Deer Lodge opinion as a flat prohibition of the Water Court hearing post June 1973 evidence in its adjudication of existing water rights. In the Deer Lodge case, the Supreme Court did state in 254 Mont. at 17:

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certification statute existed. After a hearing, the change was authorized by DNRC without a determination of the alleged abandonment.

The claimant obtained a grant from the state to help finance the project. From 1981 to 1985 the claimant expended significant sums of his own and public money. In 1985 the Temporary Preliminary Decree for Basin 40A was issued and objections were filed asserting abandonment of the changed right. After hearing, the Court determined that the 1891 appropriation relied upon by the claimant had been abandoned long prior to the 1980 application to DNRC.

In the 40A-256 example, the abandonment took place prior to 1973 and one might argue that it is not relevant to the instant case. However, the longer it takes to adjudicate Montana's water rights and the farther we travel from July 1, 1973, the more likely it is that DNRC will be faced with post 1973 abandonment issues.

Also of significance is the increasing tendency of the legislature to close or to consider closing basins from further appropriation. See sections 85-2-319, -321, -328, and -330. Without the ability to acquire new appropriations, it is reasonable to presume that water users will seek to change existing water rights that opponents might argue have been abandoned either before or after 1973. This Court believes the legislature created the certification process to give water users a forum to resolve issues, such as abandonment, before significant sums of money were expended in change applications.

> "[T]he clear purpose of statewide adjudication is to adjudicate water rights as they existed on July 1, 1973. Given this background, the Water Court correctly determined that only the pre-July 1, 1973 time frame was relevant on the abandonment question and evidence relating to intent to abandon which reflected Deer Lodge's post-1973 actions was not persuasive."

The Deer Lodge case was unusual. The facts of the case indicate that the proffered post 1973 evidence was composed of supplemental exhibits identified as relating to a city-owned right-of-way easement for a water pipeline. The Water Court held that evidence of Deer Lodge's continued protection of its easement was **not relevant** to the issue of whether it abandoned its water rights. See id. The Supreme Court upheld the Water Court's decision that the post 1973 engineering reports were not sufficiently persuasive to rebut the presumption of abandonment.

It seems unlikely that the Supreme Court intended in the Deer Lodge case to preclude all post June 1973 evidence from being considered by the Water Court. The Water Right Claim Examination Rules adopted by the Montana Supreme Court expressly authorize DNRC to "gather further facts and data" when a water right claim cannot be substantiated during DNRC's examination of the claim file and to conduct post June 1973 field investigations. See Rules 2.I(2), 2.III(1)(b), 2.IV(2), 2.VII(1)(b), 2.IX(3), and 6.XIV, Water Right Claim Examination Rules. DNRC regularly uses post June 1973 aerial photos, along with other post 1973 information, to verify information entered by the claimant on a Statement of Claim.

These same Rules require DNRC to prepare and submit a "summary report" to the Water Court for its review and use in adjudicating existing rights. See id. at Rule 1.VI(1). Exhibit A attached to the Rules, and specifically referenced in Rule 1.VI(1), sets forth an example of the summary report. That example contains

post June 1973 information. It refers to a 1979 ASCS aerial photograph and a field investigation conducted on 3/12/86. Under certain restrictions, all investigative reports, data or other written information produced or promulgated by DNRC under the direction of the Water Court are admissible without further foundation. See id. at Rule 1.II(2). If the Supreme Court intended to preclude the Water Court from using all post June 1973 information, it would not have adopted these Rules.

As with all evidence, a fundamental consideration is relevancy. See Rule 401, M.R.Evid. Simply put, post June 1973 evidence is relevant and admissible in the adjudication of existing water rights if it has any tendency to make more probable or less probable the existence of any fact that is of consequence to the determination of a claim for an existing right. Questions of relevancy must be determined on a case-by-case basis.

Accordingly, the Deer Lodge case is not applicable here. Moreover, the certification statute itself allows the Water Court to look beyond June 30, 1973. If the Deer Lodge case precludes the Water Court from looking beyond June 30, 1973, in its adjudication jurisdiction and its certification jurisdiction, the practical result suspends the law of abandonment for some indefinite period. As previously discussed, this Court does not believe the 1973 legislature intended to suspend the law of abandonment when in 1973 it enacted Section 89-894, R.C.M. 1947 as part of the Montana Water Use Act.

ANSWER TO THRESHOLD QUESTION

The threshold question of whether the Water Court has jurisdiction to hear post July 1, 1973 evidence relating to the abandonment of a pre July 1, 1973 existing water right is answered

in the affirmative for this certification case. A scheduling conference will be held to set a hearing date for presentation of evidence to resolve the question posed by the DNRC as to whether water right claim 40A-W-209661-00 has been abandoned.

DATED this 15 day of September, 1994.

C. Bruce Loble
Chief Water Judge

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