Montana Water Court
PO Box 879
Bozeman, MT 59771-0879
1-800-624-3270 (In-state only)
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA
* * * * * * * * * * * * * * * * * * *

IN THE MATTER OF THE WATER COURT PROCEDURES IN ADDRESSING FACTUAL AND LEGAL ISSUES CALLED IN "ON MOTION OF THE WATER COURT"	**CASE NO. WC-92-3**

CLAIMANTS:
40A-21 David Pump
40A-83 Michael Bryant
40A-116 Glennie Ranches
40A-137 Glennie Ranches
40A-154 Two Dot Land & Livestock
40A-161 Mary Willis
40A-183 Elsie Bearrow
40A-229 Patricia Douglas
40A-243 American Fork Ranch
40A-245 American Fork Ranch
41G-43 Montana Dept. of Fish, Wildlife & Parks

ORDER DENYING MOTIONS TO DISMISS

For the reasons cited in the Court's Memorandum of February 8, 1995, the Motions to Dismiss or Withdraw the Motion of the Water Court filed in the 40A captioned cases by the above captioned claimants are DENIED. The cases are returned to the Water Master for further proceedings consistent with the Memorandum.

DATED this 8th day of February, 1995.

C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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DATED this 8 day of February, 1995.

Lori M. Burnham
Clerk of Court

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MEMORANDUM

The Montana Water Court called in several hundred claims on its own motion following the issuance of the Temporary Preliminary Decrees in the Musselshell and Jefferson Rivers. The Law Firm of Moore, O'Connell & Refling, on behalf of the above named claimants in Basin 40A, filed several motions and supporting briefs calling for the withdrawal or dismissal of the pending motions of the Water Court to the claims consolidated into the captioned 40A cases. The Department of Fish, Wildlife and Parks filed a brief in Case 41G-43 questioning the uniform application of the Court's "on motion" practice.

The Court issued an Order temporarily consolidating the captioned cases into this case for the purpose of reviewing its "on motion" practice and solicited briefs on certain issues. Amicus Curiae briefs were filed by Washington Water Power, the United States of America, William H. Coldiron, and a joint brief by the Department of Natural Resources and Conservation (DNRC) and the Montana Attorney General (State Amici).

Oral argument was held in Bozeman on March 24, 1994. Cindy E. Younkin and Perry J. Moore appeared for the claimants; Tim D. Hall appeared for the DNRC and the Attorney General; R. Blair Strong appeared for The Washington Water Power Company; Lynn A. Johnson appeared for the United States of America; Robert Lane appeared for the Department of Fish, Wildlife and Parks. The Court very much appreciates the time and effort expended by the parties in this case.

The issues framed by the Court in its Order are:

> a) Whether the Water Court has the authority to review factual and legal issues found in water right claims on its own motion;
>
> b) If the Water Court has such authority, what procedure, safeguards, limitations or guidelines should be followed in exercising that authority;
>
> c) If the Water Court does not have such authority, what procedure should be followed if no objection is made to a water right claim that appears to be obviously incorrect in some manner. (Examples of such possible claims would be those in which the township, range or other legal description is incorrect; "decree exceeded" situations in which two or more claimants overclaim the same previously decreed water right; claims filed after April 30, 1982; or some instream recreation or fish and wildlife claims identical to "Bean Lake" type claims.)

All nonreserved claims filed in the adjudication are reviewed or examined in some manner by the DNRC prior to the issuance of a Water Court decree. The scope, extent and quality of the review has varied over the years depending upon verification rules, examination rules, and, as in all human endeavors, the proficiency of the examination personnel.

The DNRC currently utilizes the Water Right Claim Examination Rules adopted by the Montana Supreme Court and its own three inch thick Claims Examination Manual to guide its examination efforts. Upon completion of the claims examination within a basin, the DNRC submits its Summary Report to the Water Court. Standardized issue remarks identifying significant facts, data or issues that the DNRC uncovered in its examination process are included within this report.

When the Court issues a new basin decree, these issue

remarks, with rare exception, are now listed within an "issue box" usually found on the last page of a water right claim abstract. There is a lead-in sentence prefacing the remarks in the issue box that states: "The following issues were identified by the DNRC during its examination of this water right claim. These issues may remain unresolved if no objections are filed." The issue remarks for each claim are also listed separately in claim numerical order in the decree Issue Remarks Index.

Prior to the examination rules, the DNRC used a variety of verification rules. When the verification rules were in place, water right claim abstracts often contained "gray area" remarks. These remarks were similar to but not as extensive as the current issue remarks.

Since 1985, the Water Court has called almost every claim containing a gray area or issue remark in on its own motion. These claims were identified on the decree objection list by the term "On Motion of the Water Court."

The DNRC examination of water rights under the new rules is much more detailed and expansive than its verification efforts under the former system. The issue remarks under the new rules raise more issues than were previously raised. The examination of claims by the DNRC under the new rules has apparently achieved considerable success in bringing claims to the attention of other water users. The percentage of objections filed in the basins being examined under the new rules has increased. As the number of filed objections rises, a corresponding reduction in the speed of the adjudication is probable. These issues may also prove to be more time consuming and more difficult to resolve than the gray area remarks.

SUMMARY

Claimants' motions calling for the withdrawal or dismissal of the pending motions of the Water Court in the above captioned Basin 40A claims are DENIED. The Water Court has the authority to review factual and legal issues found in water right claims on its own motion. As a result of this "on motion" review, the Court concludes that its primary focus should be on resolving objections in an effort to prepare decrees that are enforceable by

the district courts. The Court will continue to review claims and call them in on its own motion when it appears appropriate to do so. However, not every claim containing a DNRC issue remark will be called in. The Court will concentrate on calling in those claims where the probability of determining accuracy is highest, where the claimants are most willing to assist the Court and when it appears most cost effective to do so. The Court will continue to utilize DNRC regional office technical expertise.

THE WATER COURT'S AUTHORITY

Except for the claimants and the United States, all parties agree that the Water Court has the authority to review factual issues on its own motion. With respect to the Court's review of factual issues, the United States believes that ". . . in the absence of an adversarial matter, this Court's ability to function as a party or in an independent inquisitive fashion remains problematical. . . Without an objection, it is difficult to justify the Water Court assuming an independent inquisitorial role without undermining clear legislative intent that claims are entitled to a presumption of rectitude." USA brief at 3 and 4.

The United States' observation that the Water Court functioning as a party or independent inquisitive fashion is problematical is wry understatement. All Water Court staff approach the "on motion" process with trepidation. The Court understands that water rights are valuable property rights.

Except for the claimants, all parties are in general agreement that the Water Court has the authority to review legal issues on its own motion. Resolving a legal issue in a vacuum on the basis of one side's brief is as problematical as resolving factual issues. Except for a few limited issues, the Court rarely calls in claims just to resolve legal issues. Currently, the vast majority of such claims are called in to determine whether recreation or fish and wildlife claims are valid or to determine the correct priority dates on wells claimed by the United States.

The genesis of the language used by the Court to call claims in on its own motion was drawn from §3-7-224(3) MCA which states:

With regard to the consideration of a matter within his

> jurisdiction, the chief water judge has the same powers as a district judge. He may issue such orders, on the motion of an interested party or **on his own motion**, as may reasonably be required to allow him to fulfill his responsibilities . . . . (Emphasis supplied)

Water masters derive their authority to act in this adjudication, including hearing "on motion" issues, by virtue of their appointment by a water judge. Water masters serve at the pleasure of and may be removed by the chief water judge. §3-7-301 MCA. A water master has the general powers given to a master by M.R.Civ.P., Rule 53(c) and §3-7-311 MCA. The extent of a water master's powers is defined by the order of reference from the presiding water judge. The order of reference may specify or limit the master's powers. Rule 53(c) M.R.Civ.P. The orders of reference given to the water master in the captioned claims contain no limitations. Therefore, under Rule 53, the master has the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. Rule 53(c) M.R.Civ.P.

A master's powers are derived from the order of reference and in matters such as the taking of evidence can be as broad as the court's. 76 C.J.S. References §§ 75 and 92; 9A Wright & Miller, Federal Practice and Procedure, Civil § 2609 (1995). Beyond that, Rule 614 of the Montana Rules of Evidence explicitly provides that "[t]he court may interrogate witnesses, whether called by itself or a party; provided that in trial before a jury, the court's questioning must be cautiously guarded so as to not constitute express or implied comment." See also State v. Hibbs, 239 Mont. 308, 780 P.2d 182 (1989); Fed. R. Civ. P. 614 (Advisory Comm. Notes); United States. v. Brandt, 196 F.2d 653 (2d Cir. 1952); 33 Fed. Proc. L. Ed. § 80:47 (1985); Improper questioning by a judge or a master may be objected to and made a part of the record. 33 Fed. Proc. L. Ed. § 80:50 (1985).

There is no merit to the contention that a judge becomes a "prosecutor" or an "adversary" by calling a witness to testify on

his own motion. See State v. Sullivan, 197 Mont. 395, 404, 642 P.2d 1008 (1982) citing Rule 614(a), M.R.Evid.; sections 3-1-111(6) and 3-1-402(3), MCA. Well-established principles of law provide the Court with the power to effectively utilize masters and evidence generated by court-appointed experts to most efficiently and accurately conduct the adjudication. Aside from being specifically authorized by statute and rule, the use of masters in complex cases such as those involving water rights is well established. See, e.g., Oklahoma & Texas v. New Mexico, 484 U.S. 1023 (1988); Arizona v. California, 376 U.S. 340 (1963).

Accordingly, the Water Court, whether water judge or water master, has the authority to review factual and legal issues found in water right claims on its own motion. The next matter is to establish the guidelines the Court should follow when it calls claims in on its own motion.

Guidelines for Exercising the "On Motion" Authority

Claimants argue that it is not the role of the courts to ensure the existence of a perfect world; that independent evaluation of legal and factual issues without an adverse party exceeds the scope of the Court's duty and jeopardizes its impartiality; and that this adjudication is based upon the premise that those holders of water rights whose interests are placed in jeopardy by an invalid or exaggerated claim of another will file objections thereto. Claimants finally argue that if claims to which no objections were filed are suspect, then the DNRC or the Attorney General should undertake the role of institutional objector. Claimants' Reply Brief at 8 and 14.

The State Amici reject the concept proposed by the claimants that DNRC or the Attorney General act as an institutional objector to ensure the accuracy and validity of the decrees. The State Amici say this concept was tried by DNRC and met with limited success and eventually required DNRC to engage four attorneys nearly full time in objecting to and resolving objections to water right claims. They assert that if DNRC continued to act as a general statewide objector it would have required a staff of 20 or

more attorneys.[1] Joint State Amicus Brief at 11-15. The State Amici forcefully argue that the Court must take a proactive role in adjudicating claims and that the state's resources should only be expended if the effort leads to an accurate decree.

A review of the initial legislative enactments creating this process lends some credence to the claimants' arguments. The very purpose of Senate Bill 76 as expressed in section 1 thereof was "to expedite and facilitate the adjudication of existing rights." It was designed to avoid the dire prediction of the DNRC that the adjudication efforts under the former statutes would take over 100 years and cost over fifty million dollars.[2] There can be no doubt that Chief Water Judge W. W. Lessley took the legislature at its word. If he had been permitted to expedite and facilitate the adjudication in the manner in which he was proceeding, it most assuredly would be much further along than it is now.

The pace of the adjudication process has been slowed significantly and purposely over the years. Petitions for Writs of Supervisory Control, budget reductions, legislatively directed studies (the Ross Report), legislative amendments (pursuant to the Ross Report), the MAPA litigation and the implementation of the claims examination rules, most of which were detailed in the State Amici's brief, have taken their toll on the speed of this process.[3]

The State Amici, although recognizing that the Court should be concerned with the expediency of the adjudication process, assert that the Court's primary considerations should be

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[1] The Amici apparently believe that the Court with its full time staff of eleven (six water masters, four clerical staff and one chief water judge) can accomplish what DNRC could not do without twenty or more attorneys and support staff.

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

[3] In the Evaluation of Montana's Water Rights Adjudication Process, prepared for the Water Policy Committee of the Legislature by Saunders, Snyder, Ross & Dickson, P.C. (the Ross Report), the legislature was advised that adoption of the amendments proposed in the Report and implementation of the claims examination rules would lengthen the adjudication process by several years. See pages 5, 32, 65, 79 of the Report.

the fairness of the adjudication process, the efficient use of public resources, and the accuracy and ultimate validity of the decrees finally issued.

It is obvious that tensions exists between fairness, speed, efficient use of resources, and accuracy. All four cannot be achieved with equal success. Efforts to increase accuracy will invariably increase the expenditure of public and private resources, and, depending upon the degree of accuracy sought, may reduce the efficient use of those resources, and the fairness and speed of the process. Various permutations vary the mix of these considerations. A balance must be struck.

In determining that balance, the Court believes that concern for private resources and the legislature's charge "to expedite and facilitate" should also be included within this equation even though the legislative amendments have lengthened the process. The Court must also include in its deliberations the two most significant objectives considered by the Legislative Subcommittee on Water Rights when it proposed the current adjudication system. Those objectives are set out in the November 1978 Report to the Forty-Sixth Legislature, at page 5, as follows:

> Most important: Quantify water use rights to protect users in our jurisdiction from claims exerted by other jurisdictions and out-of-state interests.
>
> Second: Provide a basis for better internal administration by (1) resolving disputes among rivals; and (2) provide base knowledge from which to determine availability of waters for future appropriation.

Although protecting Montana water rights from out-of-state interests was a significant consideration and listed as "most important," the Water Rights Subcommittee was very concerned with the effective administration of the state's water rights. At pages nine and ten of the Subcommittee's Report, ten advantages were listed for adjudicating the state's water rights. At least seven of the ten listed advantages relate to better internal administration. It is evident that a fundamental purpose of this adjudication is to establish a framework enabling the appropriate water users to receive their appropriate water rights in times of water scarcity.

The importance of this latter objective is underscored by the 1989 legislative enactment of Senate Bill 166. Senate Bill 166 authorized the district courts to enforce the Water Court's decrees once those decrees had been modified after objections and hearings. See sections 3-7-211, 3-7-212, 85-2-406, 85-5-101 MCA.

Decrees are enforceable after objections have been heard. Motions of the Water Court do not need to be resolved before a decree is enforceable. Therefore, the Court's primary goal will be to hear and resolve all objections because that will lead to enforceable decrees.

The significance of creating water right decrees that are enforceable is that the accuracy and reliability of the adjudication can be tested under actual conditions before the water rights are made final. Almost all Water Court decisions are interlocutory. See Matter of Sage Creek Drainage Area, 234 Mont. 243, 248, 763 P.2d 644 (1988) and 85-2-237 MCA. The benefit of a pause before the issuance of a final decree was recognized in McDonald v. State, 220 Mont. 519, 531, 722 P.2d 598 (1986) as follows:

> The case before us illustrates the wisdom of the legislature in providing for preliminary decrees. Section 85-2-231, MCA. By the use of a preliminary decree, the Water Court, over a period of one or more seasons may test the provisions of its decree to determine that it works fairly and properly as between appropriators and between appropriators and those with other interests. Such other modifications as may be necessary can be made before the entry of the final decree.

If during the enforcement of a Water Court decree, it is determined that one or more water rights were incorrectly decreed, the affected water users can petition the appropriate district court judge or water judge for relief. See §85-2-406 MCA and 1989 Mont. Laws Ch. 604, Section 11. The district court may grant injunctive or other relief necessary and appropriate to preserve property rights or the status quo pending the issuance of the final decree. Supra. If the circumstances are appropriate, the district court could also request the Water Court for its assistance. Generally, a court has plenary power over its interlocutory orders

and may revise such orders when it is consonant with justice to do so. Smith v. Foss, 177 Mont. 443, 447, 582 P.2d 329 (1978). Therefore, the Water Court could hear the controversy and revise its previous orders if necessary or address previously unaddressed issues on its own motion.

The Court will still review claims on its own motion but that review will be secondary to hearing and resolving objections. In retrospect, the terms "on motion of the Water Court" may have been an unfortunate choice of words. After these words have appeared on numerous objection lists over the years, they begin to convey an impression that the Court will solve all problems with water right claims even when an objection is not filed. As a result, it is possible that potential objectors have been dissuaded from filing objections under the belief that the Court would take care of all problems.

To avoid that impression, objection lists will no longer refer to a claim as being called in "on motion" of the Court. Instead, the objection list will reference the DNRC examination report issues. Notices of Intent to Appear may be filed on these claims. The motion of the Water Court may be made at a later date as time and resources permit and particularly if a district court requests assistance.

The Court is not shrinking from an independent review of claims when it seems appropriate. The Court is merely recognizing reality. The resources for accomplishing the adjudication in a timely manner are dwindling. The DNRC adjudication staff has shrunk by 8 employees since the 1993 Montana Legislature adjourned. It now has only 13 adjudication staff operating in its regional offices. DNRC's adjudication staff in its Miles City and Glasgow regional offices no longer exist and its adjudication staff in Lewistown and Bozeman only total 1.5 FTE. The Water Court budget in the current legislature is under pressure. As Governor Racicot is fond of saying, "government must do more with less" and the effort to adjudicate Montana's water rights appears to be no exception.

The results of continuing reductions in adjudication budgets are obvious. The speed of the adjudication declines. The

ultimate goal of finalizing Montana's water rights is postponed for years and witnesses die and evidence is lost in the interim. A slow and lethal strangulation of the entire adjudication effort may eventually result from such actions.

The Water Court can only resolve a certain number of claims per year. It can resolve claims with objections only, claims "on motion" only, or a combination of the two. Historically the Court has chosen the combination approach and focused its attention on resolving all claims in a basin that received an objection or were before the Court by virtue of the "on motion" process. If the adjudication must do more with less, then the Court must expend its efforts in areas that are most beneficial to the goals of the adjudication. It must focus and set priorities.

In establishing priorities, it must be recognized that not every claim containing a DNRC issue remark needs the issue to be immediately resolved. A significant percentage of "on motion" claims are (1) "decree exceeded" claims resulting from the post 1973 subdivision of irrigated ranches that presently are no longer extensively irrigated, (2) claims with junior priority dates and therefore useful only for short periods of time, (3) claims with overlapping places of use on the claim abstracts that don't in reality overlap on the ground, or (4) claims used in a location far removed from other water users and unlikely to prove injurious to other users. Expending scarce public resources to resolve issues that marginally improve a water right is not cost effective and detracts from resolving serious objections.

The best decision makers on which issues are important are the local water users. They will live with the decreed water rights long after the Water Court has disappeared. If the issue is not important enough to generate an objection within the objection period or if water users have consciously decided to wait until the preliminary decree to file an objection, then the Water Court should not automatically and prematurely preempt the issue. Since the Court approaches an issue on its own motion with less vigor than most objectors bring to the process, an "on motion" resolution of the issue at the temporary preliminary decree stage and the subsequent deletion of the issue remark triggering that "on motion"

inquiry could prove premature and actually result in a less accurate decree. Therefore, the Water Court will focus on resolving objections.

When the Court does call in a claim with factual issue remarks on its own motion, the Court will use DNRC regional office technical expertise where it can do the most good. The Court will concentrate on those claims where the probability of determining accuracy is highest and where the claimants are willing to assist the Court. The Court will first request claimants to contact the DNRC in an effort to resolve the issue. Historically, the DNRC adjudication staff has achieved considerable success in informal meetings with claimants. If DNRC and the claimant reach agreement, then DNRC shall assist the claimant in preparing any appropriate documents such as an affidavit, map, or other document needed to resolve the issue. DNRC will advise the Court by written memorandum that it agrees with the claimant's resolution of the issue or that it appears reasonable and will forward the prepared documents to the Court.

If DNRC and a claimant cannot jointly resolve the issue or the claimant does not wish to meet separately with DNRC, then the *claimant may request* and, assuming budgetary considerations permit, the Court will convene an informal, in depth and off the record conference with a settlement master[4] and a DNRC resource specialist. If the facts developed at this conference resolve the issue, then a record will be made, a Mater's Report issued and appropriate corrections made to the abstract.

If the issues are not resolved at this conference, then the *claimant may request* a hearing to place evidence or testimony in the record that will support the claim or perpetuate a knowledgeable water user's testimony. DNRC technical assistance may again be requested at this juncture to assist the Court. Based

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[4] To eliminate any impression of impropriety or bias, in the event settlement is unsuccessful, the settlement master will not participate further in the proceedings and will not disclose any information obtained during the conference to any other water master or water judge. See Schellin v. North Chinook Irrigation Association, 257 Mont. 262, 848 P.2d 1043 (1993).

on the Statement of Claim and the evidence presented, the Master will determine whether the issue remark has been resolved and will file a Master's Report detailing this determination. Claimants may object to this report in accordance with Rule 53(c) Mont.R.Civ.P.

If a claimant is unwilling to assist the Court in resolving possible claim problems in the manner outlined above, then the Court, except in very unusual circumstances, will not force the issue and will move on to other claims and will leave the issue remarks intact. With less resources, the Court cannot become entangled with a resistent claimant. If the claim is inaccurate, then subsequent enforcement proceedings will likely highlight the problem areas and precipitate petitions for relief or prompt objections to the claim in the preliminary decree.

Accuracy is an important goal in this adjudication. The problem of reaching the goal of accuracy is that different groups have different definitions. DNRC believes that accuracy is attainable if the Court would accept its verification and examination results as the defining factor. Claimants believe that accuracy will be achieved if the statement of claim or the affidavit of the water user is accepted as prima facie proof. Neither method will deliver 100% historical accuracy. In reality there is no definitive way to establish the accuracy of a water right that has been in existence for over 100 years.

Defining a water right is not a precise science. A water right is based upon historical beneficial use. The difficulty of precisely defining a water right appropriation has been discussed in a variety of Montana Supreme Court decisions.

In Worden v. Alexander, 108 Mont. 208, 213-215, 90 P.2d 160 (1939) the Court, citing a variety of authorities, stated in pertinent part as follows:

> In *Joerger v. Pacific Gas & Elec. Co.*, supra, it was said: "The question of what quantum of water is reasonably required for irrigation is necessarily a complicated one, depending, as it does, upon many different conditions. The character of the soil, the area sought to be irrigated, the climatic conditions, the location, quality, and altitude of the lands, the kinds of crops to be raised, and the length of the irrigation season, must all be taken into consideration and weighed, as well with such other conditions as may be peculiar to

each particular case. (*Pabst v. Finmand*, 190 Cal. 124, 211 Pac. 11.) Under such circumstances it is apparent there can be no exact uniform rule for computing the duty or reasonable quantity of water for irrigation to be applied in all cases alike. (*Witherill v. Brehm*, 74 Cal. App. 286, 240 Pac. 529; *California Pastorial & Agricultural Co. v. Madera Canal & Irr. Co.*, 167 Cal. 78, 138 Pac. 718.)"

In 2 Kinney on Irrigation and Water Rights, second edition, section 904, page 1594, the author says: "In determining the duty of water, or the quantity essential to successfully irrigate a definite tract of land, many questions must be taken into consideration. Among these questions are the character of the soil, * * * and the necessary manner of diverting the water from the source of supply, carrying it to the place of use and the final application to the land, as well as many other questions which constantly arise in connection with the subject. The 'head' of water, or the quantity entering the intake of any canal or ditch, and the distance which the water has to be carried to the place of use, and the necessary loss in the carrying of the water, may also be considered. * * * Therefore, the proper duty of water can only be determined from all the facts surrounding each particular case. What may be the proper quantity of water for one tract, might not be the proper quantity to be awarded to another tract adjoining." (See, also, 1 Wiel on Water Rights, 3d ed., sec 488, p. 525)

...

"In determining the amount of water which a user applies to a beneficial use and to which he is entitled as against a subsequent appropriator, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions is to be taken as the standard, although a more economical method might be adopted." (Wiel on Water Rights in Western States, 3d ed., sec. 481, p. 509.) And an appropriator cannot be compelled to divert according to the most scientific method known. (*Joerger v. Pacific Gas & Elec. Co.*, supra.)

See also McDonald v. State, supra.

In the Ross Report at page 58, the author stated as follows:

Even more significant in evaluating the practical realities of the problem is their recognition and confirmation of what we as lawyers working in the water right adjudication field have long known. We know that two competent, honest engineers who have studied the same irrigation system with the same care can and often do honestly differ in their conclusions by as much as thirty

> percent (30%). In our experience in contested water right matters, if two such engineers are as close as fifteen percent (15%) apart we consider that they have essentially checked each other with respect to accuracy.

When the Montana Legislature crafted the current adjudication in Senate Bill 76, it was undoubtedly familiar with the difficulty of precisely defining a water right. The legislature recognized that if a Court were forced to examine and hear evidence on all the various attributes discussed in Worden, supra, then a general adjudication of water rights would be extraordinarily difficult. The legislature had a choice when it began this adjudication. It could require water users to prove up every element of their water right or it could provide that the statement of claim was prima facie proof of its contents. It chose the latter course and required other water users to file objections to contradict and overcome that prima facie proof.

The DNRC at considerable cost verifies or examines the statements of claim and provides assistance to the water judges in accordance with §85-2-243 MCA. We know from past experience that statements of claim are not infallible. That is the reason for the objection period. Previously decreed water rights are overclaimed, points of diversion and places of use are incorrectly described, and flow rates are too high or too low. The results of DNRC's efforts spare other water users the significant expense of examining a basin's decreed water rights prior to formulating an objection. The DNRC identifies possible problems.

The DNRC's total adjudication efforts have cost approximately $13 million since 1974. This Court is not willing to ignore DNRC's efforts. We rely extensively on DNRC's technical assistance and will continue to do so. But we must recognize that DNRC's best efforts are also not infallible. As the claimants in this proceeding have pointed out, DNRC's examination relies primarily on paper resources and uses maps and other documents in its possession to prepare its issue remarks. DNRC personnel rarely walk the ditches, view the fields, measure the flow rates, and rarely have any personal knowledge of pre July 1973 water use.

Water usage fluctuates from year to year for a variety of

reasons. Rain fall and water supply are important, of course, but other reasons play a part as well. Rising or falling agricultural markets, debt levels, repayment schedules, ranch sales, probate and estate proceedings, family disputes and uncertain labor forces will influence where producers direct their efforts. Accepting DNRC conclusions generated by the interpretation of a 1979 aerial photo or an earlier Water Resource Survey focuses on a snap shot of time and excludes the totality of water right usage.

DNRC's issue remarks simply highlight possible problems that may or may not exist. This Court doesn't know whether DNRC's issue remarks or the statements of claim are correct. When an independent objector was not present, the Court historically has called the claims in on its own motion to resolve the basis of the issue remark. In the typical "on motion" proceeding, the Court usually requests the claimant and the DNRC to meet and if that meeting is unsuccessful, then the Court meets with the claimant and requests evidence to resolve the apparent difference between the statement of claim and the DNRC issue remarks.

The Water Court's "on motion" procedure is not designed to crush water rights. Contrary to the concern of the claimants voiced at oral argument, the "on motion" procedure does not mean the Court disbelieves a claimant. Its purpose is to resolve the differences between the right as claimed and the right as examined and provide a solid record of evidence that supports the water right. If the right as claimed represents the accurate historical use of the water, then testimony or other evidence presented by the claimant can resolve the question created by the issue remark.

If water users with years of experience do not wish to provide sworn testimony and other evidence of historical water usage to the Water Court to support their claim and thereby provide the Court with sufficient evidence to delete the DNRC issue remarks, they do not have to do so at this time. There is some risk in that course of action.

The risk is that water users will lose a rare opportunity to place testimony and other evidence in a court record to support their claimed historical use of water. In the preliminary decree an objection may be filed against these rights. In that future

event, the most knowledgeable water user of the right may no longer be available to testify in opposition to that objection.

If an "on motion" proceeding is held, the Court will review the DNRC issue remarks and listen carefully to DNRC testimony on the subject. It must be remembered, however, that statements of claim come to the Court with a statutory presumption of prima facie validity. Additionally, the Water Court will follow the advice of the Montana Supreme Court stated in Federal Land Bank v. Morris, 112 Mont. 445, 453, 116 P.2d 1007 (1941) that while the evidence of experts is very valuable on location and measurements, "still the testimony of the men on the land, who know the soil, the kind of crops that can be raised on it, and who have spread the water and dug into that soil, and watched the effect during the entire growing season" is evidence of considerable weight.

On the other hand, water rights should not be granted for use on lands that have never been irrigated or with flow rates that have never been diverted. The Water Court does not wish to issue bogus or exaggerated claims. If the testimony of a claimant at an "on motion" hearing is not persuasive and if the evidence of the DNRC staff convinces the Court that a water right is not accurate, the Court has the authority to revise a water right claim to conform to the evidence.

Our purpose is to provide the claimant with an opportunity to support the claimed right with evidence that disposes of the DNRC remark. Accepting this opportunity may remove the uncertainty generated by the remark. A separate affidavit affirming the original statement of claim, although sufficient under the prima facie statute, does not provide any tangible evidence that the issue remark is wrong. Testimony or evidence presented by a knowledgeable water user of the historic use of the water provides a much more solid record to support the water right.

Addressing the DNRC legal issue remarks requires a different approach. The Court historically has not called in very many pure legal issues on its own motion.

In 1991, however, the Court did call in approximately 352 recreation and fish and wildlife claims in Basin 40C, the Lower Musselshell. The 40C claims were called in because of the "Bean

Lake" decision issued by the Montana Supreme Court in Matter of Dearborn Drainage Area, 234 Mont. 331, 766 P.2d 228 (1988). The Supreme Court held in this precedent-setting pothole lake case that "[I]t is clear therefore that under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute." Supra, 234 Mont. at 343.

There are hundreds of "nondiverted" pothole lake claims scattered across Montana that are probably identical to the Bean Lake factual situation. There are probably hundreds of "diverted" recreation or fish and wildlife claims across the state that are potentially indicted by the broad language employed in the Bean Lake decision.

Presumably the parties invested their time, effort and resources into the Bean Lake case to establish a precedent that could be followed throughout the state. The Water Court called the 40C claims in "on motion" to determine whether those claims were valid under the Bean Lake decision. Claimants argue that the Court should not resolve legal or factual issues unless an objection is filed. If the Court follows this advice then water users or intervenors, such as the Montana Stockgrowers Association, would have to file objections to each claim in every basin throughout the state to avail themselves of the Bean Lake precedent.

Although for reasons different than claimants advance, the Court is persuaded that it need not immediately revisit the diverted/non diverted legal issue discussed in the Bean Lake case. As discussed before, the Court's primary focus will be on resolving objections. If the Court's resources permit, however, the Court may address claims involving the specific Bean Lake factual situation. Additionally, it may also convene a conference of interested parties for advice on whether the issue of diverted recreation or fish and wildlife claims is a real or illusionary issue and whether it should be or can be resolved.

Legal issues will still appear on the basin objection lists under the terms "DNRC examination report issues" or similar language, but pure legal issues will not be routinely called in by the Court on its own motion until later in the adjudication. Legal

issues requiring a factual inquiry will be called in even less frequently than pure legal issues. Creating legal precedent in the absence of legal contest will not expedite the issuance of enforceable decrees. If claims involving legal issues interfere with the enforcement of a decree the Court can call the claims in on its own motion when the issue is ripe for resolution.

With respect to the claims in the captioned 40A cases, if claimants file affidavits merely reaffirming the original statement of claim or otherwise indicate that they will not voluntarily assist the Court in resolving the issue remarks, then the claims will remain as they are. The issue remarks will remain on the claim abstract and the Court will move on to other claims.

CONCLUSION

The Montana Legislature granted the Water Court exclusive jurisdiction over the interpretation and determination of existing water rights and invested significant authority and confidence in the Court to perform those duties. The procedure outlined in this Memorandum is the Court's proposal to balance the competing factors involved in this adjudication and accomplish the goal assigned to it by the Montana Legislature in a cost-effective and realistic manner.

The Motions to Dismiss filed in the above captioned 40A cases are DENIED. If the claimants in the above captioned claims wish to stand pat on their statements of claim and present no further evidence, they are free to do so. The issue remarks will remain on the claim abstracts and the Water Court will move on to other claims. If claimants wish an informal conference with a settlement master then they should file that request with the Court.

DATED this 8th day of February, 1995.

C. Bruce Loble
Chief Water Judge