

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)

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**FILED**  
SEP 03 2004  
Montana Water Court

IN THE MATTER OF THE ADJUDICATION OF	)	<b>CASE NO. 41I-48</b>
THE EXISTING RIGHTS TO THE USE OF ALL	)	41I-W-211737-00
THE WATER, BOTH SURFACE AND UNDERGROUND)	)	41I-W-211738-00
WITHIN THE MISSOURI RIVER DRAINAGE AREA	)	41I-W-211739-00
INCLUDING ALL TRIBUTARIES OF THE	)	41I-W-211740-00
MISSOURI RIVER IN BROADWATER, CASCADE,	)	41I-W-211741-00
JEFFERSON AND LEWIS AND CLARK COUNTIES,	)	41I-W-211742-00
MONTANA	)	41I-W-211743-00
_____	)	41I-W-211744-00
	)	41I-W-215665-00
	)	41I-W-215666-00

CLAIMANT: William G. Gehring and Tracey L. Gehring

OBJECTOR: Montana Department of Fish, Wildlife, and Parks;  
United States of America (Bureau of Reclamation)  
William G. Gehring; William L. Hardie, Maurice G. Hardie, John J. Lyndes

**MEMORANDUM**

**Introduction**

Pursuant to Montana Code Annotated, Section 85-2-233(5), MCA, claims 41I-W-211737-00 through 41I-W-211744-00 ("the Jack Gehring claims"), and 41I-B-215665-00 and 41I-B-215666-00 were assigned to Water Master Carol Brown, who consolidated them into the above-entitled case. On May 10, 2000, the Water Master issued a report containing Findings of Fact and Conclusions of Law, and a Memorandum Opinion.

On September 5, 2000, the Montana Department of Fish, Wildlife and Parks ("DFWP"), through its attorney, G. Steven Brown, filed its written Objection to Master's Report. On September 6, 2000, William Hardie and Maurice Hardie ("Hardies"), through their attorney, Robert R. Throssell, filed their written Exceptions to Master's Report, and William G. and Tracey L. Gehring ("Claimants"), through their attorney, Janice L. Rehberg, filed Claimants' Objections to Water Master's Report. In addition, on September 6, 2000, the Claimants filed a Motion to Reconsider Order Denying Motion to Consolidate Late Claims and Request for Scheduling Conference, to which

all objectors filed written responses, and the Claimants filed a reply. The parties waived their right to a hearing. *See* Court Minutes and Order Setting Deadline to File Application for Hearing on Objection to Master's Report filed December 1, 2000.

The Court has reviewed the Water Master's Findings and Conclusions, Memorandum Opinion and the existing record in this case. Pursuant to Rule 53(e), M.R.Civ.P., the Court now amends and adopts the Water Master's Findings, Conclusions, and Memorandum Opinion as follows.

### **ISSUES PRESENTED**

In their Objections to Water Master's Report, the Claimants have objected to several of the Master's findings of fact and conclusions of law. In particular, they have argued that: (1) the claims in this case should be deemed timely filed, because the Department of Natural Resources and Conservation ("DNRC") did not act in accordance with the Water Use Act when it refused to assist William and Ann Gehring in filing Jack Gehring's existing water right claims in 1982; and (2) the water rights were not forfeit under 85-2-226, MCA, and should not be considered subordinate under 85-2-221(3), MCA, because no action to enforce the forfeiture was brought within the two-year statute of limitations period set forth in 27-2-211, MCA, and in any event, cannot be made subordinate to the water rights of persons not a party to this proceeding.

In their Exceptions to Master's Report, the Hardies objected to the Court's order granting an additional evidentiary hearing to consider post-hearing information submitted by the DNRC, a non-party to the case. In addition, they reasserted their motion for summary judgment that the Gehring claims be dismissed as null and void at the time of their filing in 1986 and their purported transfer in 1993. In the alternative, they asked the Court to clarify the meaning of the term "subordination" in Section 85-2-221(3)(f), MCA, vis-a-vis the administration of these late claims.

In its Objection to Master's Report, the DFWP expressed general agreement with the Master's Report and Memorandum, but objected to the Master's decision not to address how the forfeiture remission provisions of 1993, including "subordination," apply to these late claims. *See*



also John J. Lyndes' letters to the Water Court, filed October 30, 2000, and his Post-Hearing Brief, filed September 7, 1999.

The issues, as rephrased by the Court, are:

- I. Whether the Water Master erred in finding and concluding that the claims in this case were initially forfeit when Jack Gehring failed to file them on or before the statutory deadline of April 30, 1982?
- II. Whether the Water Master erred in finding and concluding that the claims in this case are valid late claims, with an effective filing date of May 15, 1986?
- III. Whether the Master erred in finding and concluding that the claims in this case are subordinate to all federal and Indian reserved water rights and all valid timely filed state-based claims, and may be subordinate to some permits and reservations of water pursuant to Section 85-2-221(3)(f), MCA?
- IV. Whether the Court erred in considering post-hearing information submitted by the DNRC, a non-party to the case, regarding Claim 41I-W-211739-00?
- V. Whether the Court should reconsider its Order Denying Motion to Consolidate Late Claims?

#### STANDARD OF REVIEW

The Water Court reviews a master's findings of fact to determine whether they are clearly erroneous. Rule 53(e)(2), M.R.Civ.P. To determine whether a master's findings are clearly erroneous, the Water Court uses a test similar to the three-part test employed by the Montana Supreme Court in *Interstate Production Credit Ass'n v. DeSaye* (1991), 250 Mont. 320, 323, 820 P.2d 1285. First, this Court reviews the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the Court then determines whether the Master has misapprehended the effect of the evidence. *Id.* at 323. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still determine that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *Id.*

The Water Court reviews a master's conclusions of law to determine whether they are correct. Rule I.II(4), Water Right Claim Examination Rules; *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 327, 59 P.3d 398; *Steer, Inc. v. Dept. of Revenue* (1990), 245 Mont. 470, 474-75, 803 P.2d 601.

The Water Court reviews a Master's discretionary decisions for an abuse of discretion. *Harwood v. Glacier Electric Co-op, Inc.* (1997), 285 Mont. 481, 492, 949 P.2d 651, 658.

## DISCUSSION

In 1979 and 1981, upon petition of the Montana Attorney General, the Montana Supreme Court authorized and ordered all persons "asserting" or "claiming an existing right, unless exempted under 85-2-222 . . . [to] "file with the department no later than [5:00 p.m., April 30, 1982] a statement of claim for each water right asserted on a form provided by the department," which the Legislature mandated was to include, among other things, "the name and mailing address of the claimant," and "the sworn statement [of the claimant] that the claim set forth is true and correct to the best of claimant's knowledge and belief." Sections 85-2-212(1), -221(1), -224(1)(a) and (g), MCA; Montana Supreme Court Order No. 14833, dated December 7, 1981; and *In re DNRC* (1987), 226 Mont. 221, 228, 740 P.2d 1096. (Conclusion of Law II)

Section 85-2-226, MCA, clearly and unequivocally states that "the failure to file a claim of an existing right as required by 85-2-221 establishes a conclusive presumption of abandonment of that right," which the Montana Supreme Court has construed to be a forfeiture by operation of law. *In re Yellowstone River* (1992), 253 Mont. 167, 832 P.2d 1210. (Conclusion of Law VIII)

### Jack Gehring

Central to the issues in this case is Jack Gehring. Although not called as a witness and not physically present during the hearing, Jack Gehring's actions were the crucial element in the proceeding. Jack Gehring's steadfast refusal to file his water right claims on or before the statutory filing date of April 30, 1982 makes this late claim case unlike any other case in the Water Court.



The Claimants do not contest, and substantial evidence supports, the Master's findings and conclusions that on or before April 30, 1982, Jack Gehring was the sole owner of the Gehring ranch and appurtenant Silver Creek and Three Mile Creek water rights at issue in this case (Finding of Fact 7 and Conclusion of Law VI); that Jack Gehring knew that Montana law required him to file statements of claim with the DNRC on or before the statutory deadline of April 30, 1982 (Finding of Fact 7); that Jack Gehring did not file statements of claim for his existing water rights on or before the statutory filing deadline (Finding of Fact 12); and that Jack Gehring was, in fact, still arguing the legality of the claim filing requirements to the DNRC and declining DNRC Chief Legal Counsel Donald MacIntyre's offer of assistance in filing the claims on the April 30, 1982 deadline (Finding of Fact 11).

Jack Gehring's comments to Don MacIntyre on the April 30, 1982 deadline are the most compelling evidence in the record. The facts set forth in the unrefuted testimony of Donald MacIntyre's conversation with Jack Gehring during the last few hours of the April 30, 1982 deadline override and dispose of all the Claimants' arguments and theories in this case. No matter how Claimants argue their case, the facts are irrefutable. Jack Gehring purposely and knowingly refused to file his water right claims by the April 30, 1982 deadline.

In response to questions from attorney G. Steven Brown, attorney for DFWP, and from Janice Rehberg, attorney for the Claimants, Mr. MacIntyre testified about his conversation with Jack Gehring on April 30, 1982 as follows:

Direct examination by G. Steven Brown:

**MR. MACINTYRE:** Mr. Gehring came into my office and wanted to talk about the constitutionality of, of the adjudication and he proceeded to do that and we'd discuss it for a period sometime after three o'clock until after five o'clock that day.

**MR. BROWN:** Did you advise Mr. Gehring to file his water right claims?

**MR. MACINTYRE:** I indicated to Mr. Gehring that I thought it would be in his best interest to file those claims, even given his constitutional reservations.

MR. BROWN: Did you offer any assistance on the part of the Department to assist Mr. Gehring in accomplishing that filing?

MR. MACINTYRE: Yes, I told him we'd get a copy of the claims filings that he, that he could simply put his name on it, check off whatever boxes were relative to the kinds of uses he had, and to sign it, and that we would have it stamped in over at the field office.

MR. BROWN: Did Mr. Gehring accept your offer of assistance?

MR. MACINTYRE: No. He basically told me that he believed that the statute was unconstitutional and that he wouldn't lose his rights as a result of that.

MR. BROWN: Was he adamant? Or, I, I'm sorry, I withdraw that question. What was his demeanor when you had this discussion and advised him that he should file his claims?

MR. MACINTYRE: I thought his demeanor was, he was very cordial. He was very set in his way and he was very emphatic that he would not file the claims.

MR. BROWN: Did he make any statements to you indicating what he was going to do after he left your office?

MR. MACINTYRE: Basically, I asked him if he would, if he wanted to fill out the form and we could take it over there. He said "no." I said, you know, you, you run a terrible risk, here of, of losing your water rights if you don't file. It'd be much easier for you to file and if you prevail on your constitutional argument, then you've lost nothing. But, you will have lost your water rights if I was correct, that it was a constitutional process. He indicated to me at that time that if his rights were taken from him, he wouldn't have anything left and he would just go down onto the Last Chance Gulch and throw a rock through the biggest plate glass window down there and they could do with him what they wanted.

MR. BROWN: And, that's how the conversation ended?

MR. MACINTYRE: Yes.

MR. BROWN: Did Mr. Gehring make any filing of his water right claims on April 30, 1982?

MR. MACINTYRE: He didn't at my office and he didn't leave until after five, and I recall calling over to the field office and asking them to deliver to me claims, claim forms, which I got, and then I, I then left my office after he left to see if I could find him in the parking lot, to get him to, to sign those, and I couldn't find him, so, I went back into my office.

Tr. 171-173.

Cross examination by Janice Rehberg:

MS. REHBERG: So, when you said you followed him to see if you could get him to sign them, what was he going to sign, a blank form?

MR. MACINTYRE: I was, what I was trying to get him to do was just put as much, or as little of any information, as long as he put something on the form so that we could put it in and have it stamped and worry about whether or not it was facially or legally deficient after that, but at least have something in. And, he and I talked about that, but he simply didn't want to file or sign anything.

Tr. 175.

Redirect examination by G. Steven Brown:

MR. BROWN: Jack Gehring made it clear to you on April 30, 1982, he was not going to file his water right claims, didn't he?

MR. MACINTYRE: Very clear.

Tr. 185.

Jack Gehring's son, William, also testified about his father's views on the filing of his water right claims. During the following exchange on cross examination, William Gehring confirmed Mr. MacIntyre's crucial point as follows:

MR. BROWN: Did you discuss the Senate Bill 76 adjudication which required the filing of water right claims with your father?



MR. GEHRING: Yes.

MR. BROWN: He was not a fan of the Senate Bill 76 adjudication, was he?

MR. GEHRING: No.

MR. BROWN: He was adamant about not filing his water right claims, wasn't he?

MR. GEHRING: That's correct.

Tr. 45 (See also Ann Gehring's similar testimony at Tr. 80).

With this clear picture of Jack Gehring's state of mind on and before the April 30, 1982 deadline, the Court will now address the issues raised by the objections and exceptions.

### **I. Intent to Abandon and Forfeiture**

The Claimants object that the claims should not be considered forfeited under Section 85-2-226, MCA, because the DNRC knew Jack Gehring did not intend to abandon his existing water rights when he refused to file claims in this adjudication; he merely did not believe that Sections 85-2-221(1) or 85-2-226, MCA, were constitutionally valid.

In *Yellowstone River*, the appellant/claimants made a similar argument, contending that they were constitutionally entitled to a pre-forfeiture hearing to rebut the presumption of abandonment, or to show that their failure to timely file claims was based on excusable mistakes. The Montana Supreme Court rejected the arguments, analogized Section 85-2-226, MCA, to Section 314(c) of the Federal Land Policy and Management Act of 1976, and applied the following United States Supreme Court interpretation of Section 314(c) [43 U.S.C. 1744(c)] to decide the issue:

Although § 314(c) is couched in terms of a conclusive presumption of "abandonment," there can be little doubt that Congress intended § 314(c) to cause a forfeiture of all claims for which the filing requirements . . . had not been met.

\* \* \*

§ 314(c) presumes nothing about a claimant's actual intent; the statute simply and conclusively deems such claims to be forfeited . . . there is nothing to suggest that . . . Congress was in any way concerned with whether a particular claimant's tardy filing or failure to file indicated an actual intent to abandon the claim. *Locke*, 471 U.S. at 98, 103, 1-5 S.Ct. at 1794, 1797.



253 Mont. 167, 177, quoting *United States v. Locke* (1985), 471 U.S. 84, [1]05 S.Ct. 1785, 85 L.Ed.2d 64. In rejecting the appellant/claimants' arguments, the Montana Supreme Court specifically found that:

The appellants contend the conclusive presumption of § 85-2-226, [MCA] violates due process because it fails to provide an opportunity to rebut the presumption of abandonment. The appellants rely on the United States Supreme Court ruling that the Due Process Clause forbids denying an individual a right on the basis of an irrebuttable presumption when that presumption is not necessarily or universally true in fact. *Vlandis v. Kline* (1973), 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63.

\* \* \*

The Montana Legislature has defined, for the limited purpose of establishing existing water rights, that failure to file a claim will be construed as (conclusive) abandonment of that claim. Section 85-2-226. While this definition of abandonment does not appear to parallel this Court's previous definition of abandonment, it is within the province of the legislature to enact such a definition. Legislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment. *United States v. Locke* (1985), 471 U.S. 84, 106, 105 S.Ct. 1785, 1798, 85 L.Ed. 64, citing *Hawkins v. Barney's Lessee* (1831), 5 Pet. 457, 467, 8 L.Ed. 190. Water right claimants in Montana were all properly notified and had the opportunity to rebut the presumption of abandonment by filing a claim.

\* \* \*

[The presumptions in *Vlandis* and *Cleveland Board of Education*] created factual conclusions as a matter of law which the court ruled could only be accurately made through individualized determinations. As such, the conclusions were arbitrary and not necessarily true. In the instant case, the legislative definition of abandonment, as used in § 85-2-226, MCA, does not require any individualized determinations. The definition applies the same to all people who filed after the deadline. The only individualized determination necessary is to establish whether the deadline was met. Hearings are already provided by the Water Court for this purpose.

*Id.* at 174-176. (Emphasis added)

Like the appellants in *Yellowstone River*, Jack Gehring had ample notice and the opportunity to rebut the presumption of abandonment and forfeiture by filing statements of claim in accordance with the statutory procedures. Substantial evidence supports the Master's finding that Jack Gehring failed to file statements of claim for these water rights by the statutory filing deadline of April 30,

1982, and the Master, therefore, did not err in finding and concluding the water rights in this case were initially forfeit by operation of Section 85-2-226, MCA.

#### Duties of the DNRC

The Claimants also contend that the claims should be deemed timely filed, because the DNRC breached clear statutory duties, and/or exceeded its statutory authority, when it refused to assist William and Ann Gehring in the filing of Jack Gehring's existing water right claims. Finding of Fact 14; Conclusion of Law XI. They argue that the role of the DNRC in this adjudication is purely ministerial, that it has no authority to refuse claim forms, and that Section 85-2-112(5), MCA, requires the DNRC to assist not merely owners, but any person in the filing of existing water rights.

Section 85-2-112(5), MCA, provides that the DNRC has the duty to, "upon request of any person, cooperate with, assist, and advise that person in matters pertaining to . . . filing claims of existing rights . . . under this chapter." *In re DNRC*, 226 Mont. at 228-229. Substantial evidence supports the Master's finding that although the DNRC refused to assist William and Ann Gehring in the filing of Jack Gehring's existing water rights, it did offer to assist Jack Gehring in the filing of his claims. Finding of Fact 9. As explained by the Master:

The statute does not require DNRC to merely assist people. It requires DNRC [to] cooperate with, assist, and advise any person seeking their assistance in matters pertaining to filing claims of existing rights. All evidence indicates DNRC did assist Bill and Ann Gehring in a cooperative manner each time they came into the department office, and advised both Bill and Ann Gehring about the requirements of the claim filing process, and offered to assist Jack in preparing and filing his water rights. These actions by DNRC appear to be in compliance with the statutory requirements.

Memorandum Opinion at 22. (Emphasis in original)

The Master's finding and conclusion are supported by the plain meaning of the Water Use Act, the Montana Supreme Court Orders implementing the Water Use Act, the statement of claim forms "confirmed and approved" by the Montana Supreme Court, and the instructions for completing and filing the claim forms prepared by Chief Water Judge W.W. Lessley, the four other Water Judges, and the DNRC. See Exhibits A through E, attached to the DFWP's Proposed Findings of



Fact, Conclusions of Law, Order and Supporting Brief, filed September 3, 1999 ("DFWP's Post-hearing Brief").

Sections 85-2-212 and -221(1), MCA, and the Montana Supreme Court Water Rights Order in *In the Matter of Water Courts*, Cause No. 14833, filed June 8, 1979, clearly ordered not merely "every person," but every person . . . asserting a claim to an existing right, or "a person claiming an existing water right, unless exempted under 85-2-222 . . . [to] file with the department no later than [April 30, 1982, at 5:00 p.m.] a statement of claim for each water right asserted on a form provided by the department," (emphasis added) which Sections 85-2-224(1)(a) and (g), MCA, ordered shall include, among other things, "the name and mailing address of the claimant," and "the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief." Sections 85-2-212(1), -221(1), 224(1)(a) and (g), MCA (emphasis added); Water Rights Order in *In the Matter of Water Courts*, No. 14833, filed June 8, 1979, attached as Exhibit "A" to DFWP's Post-hearing Brief; Findings of Fact 3 and 5. These Orders direct that: "For further information, contact the Department of Natural Resources and Conservation, Helena, Montana, for a copy of the law and an explanation of it." Order of June 8, 1979, in Cause No. 14833. (Emphasis added)

The claim forms filed by the Claimants in this case specifically required the name, address and telephone number of each "owner" or "co-owner" of the water right to be listed at the beginning of the form, and the following notarized statement to be signed by the claimant at the end of the form:

I (name of claimant), having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of the claim and the matters and things stated there are true and correct.

These claim forms were officially "approved and confirmed" in the Per Curiam decision of the Montana Supreme Court in *Matter of Water Courts* and widely circulated to water users throughout the state of Montana. See Exhibit "C" to the DFWP's Post-hearing Brief.



An instructional pamphlet published by the DNRC under the direction of the Montana Supreme Court and the Water Judges, entitled "How To Fill Out Your Statement Of Claim Form," stated in plain English that:

... [Q]uestions 1 and 2 on all forms ask for your name and address. Do it right, Last name first, first name next, and then middle initial. That is the way you'll get it on your Certificate of Water Right. Use your name the way you have it on your deeds -- this is no time for originality! If there is more than one owner, one owner can sign and file the claim. . . .

Exhibit "D" to DFWP's Post-hearing Brief.

The revised instructions clearly stated that:

The claim form is a court document. Each form must be filled out completely. Leave no questions unanswered. When the claim is complete, it must be signed by at least one owner and witnessed by a licensed notary of any state. . . .

\* \* \*

To complete the claim form, it must be signed by at least one owner and witnessed by a licensed notary of any state.

Exhibit "E" to DFWP's Post-hearing Brief.

The fact that these forms, orders, and instructional materials represent the understanding of the Montana Supreme Court, the Water Court, and the DNRC as to the claim filing requirements of Sections 85-2-221 through 85-2-224, MCA, cannot reasonably be disputed. As such, they are facts and law which the Master was authorized to take judicial notice of, pursuant to Rule 201(b) and Rule 202(h)(6), M.R.Evid.

#### Ownership in 1982

Substantial evidence supports the Master's finding and conclusion that on April 30, 1982, Jack Gehring was the sole owner of the eight Jack Gehring water rights at issue in this case. Finding of Fact 7; Conclusion of Law VI; Memorandum Opinion at 23-24. When William filed these eight claims in 1986, he listed "Jack Gehring" as the owner on all of the claim forms, did not list his own

name on the co-owner line, and signed the claims: "Jack B. Gehring by his agent William G. Gehring." See Statements of Claim; and Finding of Fact 22. Although William testified that he was deeded 2.7 acres of the Jack Gehring ranch in 1981, he also testified that when he went to the DNRC in 1982, he did so with the intention of filing claims on behalf of Jack Gehring. Tr. 21, 50, and 61. In the Final Prehearing Order, in fact, William characterized his 1982 interest in the Jack Gehring claims as an "inchoate future interest," based on his status as the purported future heir of Jack Gehring, and he argued only that the DNRC "wrongfully refused to assist claimants" in the filing of water right claims "known to be appurtenant to property owned by Jack Gehring," and in the filing of those claims "on behalf of his father." Contention 6. Therefore, the Court's analysis begins with the acknowledgment that Jack Gehring was the sole owner of these eight claims in 1982.

#### No Authorized Agency

The Claimants argue that even though they did not acquire ownership of Jack's water rights until 1993, William was authorized as Jack's agent to file the claims on Jack's behalf in 1982 and 1986. The record does not support the Claimants' argument.

Section 28-10-101, MCA, defines an agent as "one who represents another . . . in dealings with third persons." Section 28-10-104, MCA, provides that "any person having capacity to contract, except a minor, may appoint an agent, and any person may be an agent." However, an agent has only "such authority as the principal actually [and intentionally] or ostensibly confers upon him." Section 28-10-401, MCA. An agency relationship, whether actual or ostensible, may be created expressly, as by a written power of attorney, or implied from the conduct of the parties and all the circumstances of the case. Section 28-10-201, MCA; *See e.g., Ludwig v. Mont. Bank & Trust Co.* (1939), 109 Mont. 477, 98 P.2d 377; *Freeman v. Withers* (1937), 104 Mont. 166, 65 P.2d 601. Neither the relationship nor the authority, however, can be implied from the unsupported declarations of the agent alone. *Federal Land Bank of Spokane v. Myhre* (1940), 110 Mont. 416, 422, 101 P.2d 1017. It can only be established by tracing the agency to its source in some word or



act of the alleged principal, and the burden of proving the agency relationship, as well as its scope and extent, is on the person asserting it. *Hempstead v. Allen*, (1953), 126 Mont. 578, 255 P.2d 342.

Substantial evidence supports the Master's finding that William Gehring had no authority to file these claims for existing water rights on behalf of Jack Gehring in 1982 or 1986, and that the claims were therefore improperly filed:

- During the claim filing period between 1979 and April 30, 1982 Jack Gehring owned all of the land described as the place of use for the water rights at issue, except for 2.7 acres that he conveyed to the Claimants in 1981 for a homesite. (Claimant's Exhibit G-1; Tr. 9-10)
- Jack Gehring had notice and knew of the water right claim filing deadline. Tr. 13 and 50.
- William Gehring, the purported agent, testified that Jack told him that his water rights were constitutionally protected, and that he did not need to file his water rights; that Jack was adamant about not filing his water rights and would not give William a power of attorney to do so; and that William had no document authorizing him to file water right claims on Jack's behalf. Tr. 13, 41, 45, 46, 49, and 60.
- Jack Gehring did not discuss what he was doing to challenge Senate Bill 76 with William. Tr. 53 - 54. William Gehring testified that Jack "never really discussed everything with me." Tr. 70-71.
- William confirmed that "Jack Gehring was a very obstreperous person who created a tremendous amount of hostility and frustration in his dealings with people," and that he was "strong-willed," "stubborn," "opinionated," and could be "hostile toward those who disagreed with him." Tr. 37. The Claimants acknowledged that "Jack Gehring was well known in the Helena community as a tax objector with a history of resisting governmental authority," that he had a "volatile nature", and that he "was often involved in verbal and sometimes physical altercations." Claimants' Brief in Support of Judgement on Behalf of William G. And Tracey L. Gehring, filed September 7, 1999, at p. 2; Claimants' Proposed Finding of Fact 8, filed September 7, 1999; Tr. 29.
- William further testified that when he went to the DNRC field office prior to the April 30, 1982 deadline, he did so with the intention of filing Jack's water rights. Tr. 21, 50, and 62. The record does not reflect any assertion by William to the DNRC that he owned any part of Jack's water rights prior to 1993.



- The Helena DNRC staff knew that Jack had publically announced to the Supreme Court that he did not intend to file statements of claim for his water rights. Tr. 17.<sup>1</sup> Without evidence of an agency relationship, the DNRC staff, therefore, took the position that only Jack could file statements of claim for his water rights. Tr. 51.
- Ann Gehring testified that a DNRC employee told her that the landowner was required to sign the claim forms, and that if Jack signed the forms, the DNRC would accept them, and that they would not accept them with her signature alone. Tr. 84. William Gehring testified to similar statements made to him by the DNRC staff. Tr. 51.
- As late as April 30, 1982, Jack was still unequivocally asserting his ownership of the water rights in this case to Don MacIntyre, asserting his conviction that the statutory filing requirement violated his constitutional rights, and refusing MacIntyre's offer of assistance in filing the claims. Tr. 171-172, 175, 185; Finding of Fact 11.
- Even after April 30, 1982, Jack was vigorously asserting his ownership of the water rights and his firm conviction that the statutory filing requirement violated his constitutional rights in a dissatisfied water user proceeding before the district court and the Montana Supreme Court. In 1989, Jack Gehring conceded that he did not file a statement of claim but that under the Constitution, "he did not have to do so." See Memorandum and Order in Cause No. 4999 in District Court for Lewis & Clark County, dated August 22, 1989, affirmed by Montana Supreme Court in Gehring v. Cassidy, Cause No. 89-448, June 28, 1990 (unpublished); Findings of Fact 28, 29, 30.
- The Claimants did not acquire the Jack Gehring ranch land until May 4, 1993, when the land and appurtenant water rights were conveyed to them by Pegasus Gold Corporation. See Claimants' Exhibits G-2, G-3, and G-4; Tr. 9-10 and 42-44; Finding of Fact 34. William testified that even then, it was "literally like pulling teeth" to get Jack to quitclaim the land to William and Tracey Gehring in order to help them redeem the ranch from Pegasus Gold Corporation. Tr. 42-44, and 49.

The Claimants failed to meet their burden of proving an agency relationship in 1982 or 1986. The record establishes that Jack Gehring had the reputation of saying what he meant, and meaning what he said. He consistently, vehemently, and publicly voiced his opinion that the claim filing procedures ordered by the Legislature and the Montana Supreme Court were a violation of his constitutional rights and that he would not comply. To imply from this conduct and the

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<sup>1</sup> Jack Gehring had filed a petition for reconsideration before the Montana Supreme Court in 1981 contending that the law requiring him to file a water right claim was unconstitutional. See *In Re Jack Gehring*, Opinion and Order, Supreme Court Cause No. 89-448, filed June 28, 1990, attached to the Hardies' Brief in Support of Motion for Judgment on the Pleadings or in the Alternative Motion for Summary Judgment filed August 14, 1998.

circumstances of this case that Jack Gehring nevertheless conferred upon William, or anybody else, the authority to file statements of claim on his behalf -- actually, ostensibly or by ratification -- would be contrary to both the law of agency and substantial evidence to the contrary.

#### The 2.7 Acres

In 1981, Jack Gehring transferred 2.7 acres of his land to the Claimants, William and Tracey Gehring. At page 23 of her Memorandum Opinion, the Master states: the "Claimants argue Bill should have been allowed to file the irrigation claims appurtenant to the 2.7 acres deceded to Bill and Tracey Gehring in 1981."

The Court found no legal argument in the Claimants' briefs or any contention in the Final Pretrial Order to support the Master's thesis that the Claimants were arguing that the DNRC refused to allow William Gehring the opportunity of filing any personal water right claims that might have been appurtenant to his 2.7 acres. In fact, on November 18, 1981, the Claimants' filed for water rights on their 2.7 acres and apparently did so without any difficulty from DNRC. Tr. 22. (Exhibits G-11 and G-12).

The Master appears to have been speculating that the Claimants were asserting that some portion of the Jack Gehring claims were historically appurtenant to the Claimants' 2.7 acres and that under the principle set forth in *Spaeth v. Emmett* (1963), 142 Mont. 231, 237, 383 P.2d 812, the Claimants were entitled to file on a pro rata 2.7 acre portion of the Jack Gehring claims.

The Master should have confined herself to the issues presented by the parties and should not have speculated on what the Claimants' argument could or might have been. See e.g., *Kinsey-Cartwright v. Brower*, 2000 MT 198, 300 Mont. 450, 454-455, 5 P.3d 1026. Therefore, the portion of the Master's Memorandum Opinion relative to the 2.7 acres is not adopted by this Court.

#### Statute of Limitations

Citing Section 27-2-211, MCA, the Claimants also argue an unusual statute of limitations theory that, because the Montana Supreme Court held in *Yellowstone River* that a failure to timely



file water right claims resulted in a conclusive presumption of abandonment of the water right, which in effect is a forfeiture, and that a separate action to enforce the forfeiture and to subordinate the claims under Section 85-2-221, MCA, was required to be filed within two years of the statutory filing deadline. At page 14 of their Objections, the Claimants argue:

To protect the due process rights of individuals subject to forfeiture proceedings, the Montana Legislature has specifically adopted a statute of limitations period for forfeiture actions. Section 27-2-211, MCA, reads:

**27-2-211. Actions to enforce penalty or forfeiture or other statutory liability.** (1) Within 2 years is the period prescribed for the commencement of an action upon: (a) a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state, except when the statute imposing it prescribes a different limitation. . . .

Jack Gehring failed to file his claim by the deadline of April 30, 1982. Therefore, an action to enforce any forfeiture of these water rights had to have been commenced prior to April 30, 1984. Neither the state nor any of the objectors acted with this time period. Therefore, the current claims of forfeiture should be rejected.

The exception within Section 27-2-211(1) resolves this objection. Section 27-2-211(1) expressly states that when the statute containing a penalty or forfeiture imposes a different limitation, as do Sections 85-2-212, 85-2-226, and 85-2-233, MCA, then Section 27-2-211 is not applicable. The specificity of the latter statutes controls over the generality of Section 27-2-211. Sections 1-2-102 and 1-3-225, MCA.

The Montana Supreme Court has held that since the forfeiture is nondiscretionary and occurs by operation of law, "good cause for late filing" is generally irrelevant, and "the only individualized determination necessary is to establish whether the deadline was met." *Id.* at 176. (Emphasis added)

The Court reasoned that:

All of the claimants had 35 months to file their claim. The filing requirements were straightforward, and demanded only that a water user document historical use. Adequate opportunity was provided each of the claimants to show that they did not intend to abandon or forfeit their water rights. Furthermore, the Water Court provided an opportunity for all late claimants to request an evidentiary hearing to determine if the deadline had in fact been missed. We conclude that § 85-2-226, MCA, complies with the requirements of procedural due process.

*Yellowstone River* at 179.



The Claimants' argument also flies in the face of the intent so obvious in the legislative history of Montana's comprehensive statewide adjudication. One of the primary reasons for the 1979 passage of Senate Bill 76 ("SB 76") was legislative frustration and concern over the extremely slow pace of the initial efforts to adjudicate water rights under the Water Use Act of 1973, because the DNRC, among other things, was required to "physically discover all of the unrecorded, unasserted, and unknown water rights." See Senate Joint Resolution No. 48, approved April 19, 1977, and *In re DNRC*, 226 Mont. at 227-228, citing Stone, *Montana Water Law for the 1980's*, Univ. of Montana (1981).

Just over 200,000 claims were filed by the April 30, 1982 deadline. In a 1978 Legislative interim study, prepared by the DNRC prior to enactment of SB 76, the DNRC estimated that as many as 500,000 water right claims would ultimately be filed in the adjudication, and that its experience in the Powder River basin indicated that 70% of the declared water rights could be totally undocumented. See DNRC April 14, 1978 Report to the Montana Legislature Interim Subcommittee on Water Rights at page 1 and the Subcommittee's November 1978 report at page 18. Rule 202, M.R.Evid.

To accept Claimants' argument would mean that the state or some other entity was required to bring an "enforcement of forfeiture action" within two years of the filing deadline to clear the docket of an estimated 300,000 unasserted and unknown water rights, 70% of which were estimated to be unrecorded and undocumented. That added complexity is precisely what the 1979 Legislature was attempting to avoid with enactment of Senate Bill 76. See *Yellowstone River*, 253 Mont. 179-180.

Substantial evidence establishes that the due process rights of the Claimants were protected with an "individualized hearing" to determine whether the original statutory filing deadline of April 30, 1982, was met. The deadline was not met. Objections to the Jack Gehring claims were timely filed in accordance with the statutory deadline. No further "process" was required to enforce the forfeiture or protect the due process rights of the Claimants.

## II. Late Claims

The Hardies object to the Master's finding and conclusion that the Jack Gehring claims are valid late claims with an effective filing date of May 15, 1986. (Conclusion of Law XIX). They argue that because the Jack Gehring claims were forfeit by operation of Section 85-2-226, MCA, they were "null and void" after April 30, 1982 and, therefore, no Jack Gehring water right claims were in existence to be filed on May 15, 1986. Furthermore, since there were no claims in existence to file in 1986, they argue there can be no interest in 1993 to which the Claimants can be substituted under Rule 17, M.R.Civ.P. But for the Legislature's enactment of the forfeiture remission statute in 1993, the Hardies would be correct.

### Section 85-2-221(3), MCA

The constitutionality of the presumption of abandonment provision of Section 85-2-226, MCA, was challenged and upheld by the Montana Supreme Court in 1992 in *Yellowstone River*. Shortly after that decision, the Montana Legislature amended Section 85-2-221 (effective July 1, 1993) to provide for the partial remission of forfeitures resulting from 85-2-226, and to extend the claim filing deadline to July 1, 1996, subject to certain conditions and subordination provisions expressly set forth in the statute. See Compiler's Comments to Section 85-2-221(3), MCA. The amendment provided that:

(3) Subject to certain terms and conditions, the legislature intends to provide for the remission of the forfeiture of existing rights to the use of water caused by the failure to comply with subsection (1). Accordingly, with respect only to a basin that has not been closed to further appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter prior to July 1, 1993, a claim of an existing water right not filed with the department on or before April 30, 1982, may be filed with the department on or before July 1, 1996, on forms provided by the department. . . . Claims must be physically submitted to the department or sent by United States mail, postmarked on or before [July 1, 1996], in order to be considered timely. The claims are then subject to adjudication by the . . . courts as any other claim of existing right. Section 85-2-221(3), MCA. (Emphasis added)

William Gehring filed the Jack Gehring claims on May 15, 1986, prior to passage of the forfeiture remission statute. Like all claims filed after April 30, 1982, the validity of these claims was suspect, but like all other late claims accepted by the DNRC, they were assigned claim numbers



and entered into the state centralized record system in accordance with established procedures. The record does not indicate that Jack Gehring ever knew of these claims. If he did, the record does not indicate he adopted them. As noted earlier, as late as 1989, Jack Gehring advised the First Judicial District Court that he did not file statements of claim. Nevertheless, the claims were filed and they were of record.

On May 4, 1993, the Claimants acquired title to the former Gehring ranch and its appurtenant, but suspect water right claims. On July 1, 1993, the effective date of the forfeiture remission statute, the Claimants could have availed themselves of the benefits of the statute by re-filing their statements of claim, but there was no need to do so. The statute did not require claims filed after April 30, 1982, but before July 1, 1993, to be re-filed. The statute simply states that "a claim of an existing water right not filed with the department on or before April 30, 1982, may be filed with the department on or before July 1, 1996." Section 85-2-221(3), MCA. The claims filed in 1986 comply with the plain language of the forfeiture remission statute. They were filed "on or before July 1, 1996."

The plain language of the forfeiture remission also integrates the policies and procedures established by the Montana Supreme Court and the Montana Water Court prior to 1993 which directed that claims submitted to the DNRC after April 30, 1982, should be processed as late claims. By mid-1986, the DNRC had already processed over 2600 "late claims" pursuant to those procedures.<sup>2</sup> Dismissing all those late claims and requiring their owners to re-file the same claims on or after the July 1, 1993 effective date of the statute just to bring themselves within the forfeiture

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<sup>2</sup> *In re Late Water Claims*, dated April 1982. See also §§ 3-7-501 and 85-2-243, MCA; Order of *In re Matter of Water Courts* in Cause 14833, filed in the Montana Supreme Court on September 5, 1979; Rule 6.V(1), Water Right Claim Examination Rules; DNRC Policy and Procedure Manual at 282, revised March 21, 1985 and November 29, 1985 at 282 ("The department has been ordered by the Court to accept and process these [late] claims."); Memorandum from Bob Arrington, DNRC Adjudication Program Manager, to DNRC Regional Office Managers and Staff and Water Rights Bureau Staff, June 7, 1993, re/Implementation of S.B. 310 - Late Claim Bill ("[§ 85-2-221(3), MCA] applies to all claims received by the Department after April 30, 1982 through July 1, 1996); and Letter from Rusty Taylor, Bozeman Field Office, to Montana Water Courts - Honorable Judge W.W. Lessley, approved by Larry Holman, Bureau Chief, dated September 20, 1988 ("The same basic claim receiving procedure used prior to April 30, 1982 has been used for all claims received after the filing deadline.").



remission statute would be an idle act. The law neither does nor requires idle acts. Section 1-3-223, MCA.

As the lack of William Gehring's authority to file these late claims in 1986 was cured by his acquisition of the Gehring ranch in 1993, the Master did not abuse her discretion in substituting the "real party in interest" and relating the substitution back to the date the claims were actually filed in 1986. Rule 17(a), M.R.Civ.P., provides that: "Every action shall be prosecuted [or claimed] in the name of the real party in interest. . . ." See also Section 85-2-424(1), MCA, and Rule 6.VII, Water Right Claim Examination Rules.

As a practical matter, whether the filing date is 1986 or 1993 is immaterial. The filing date is significant only for purposes of determining the scope of remission to which a late claim is entitled pursuant to Section 85-2-221(3), MCA. Whether filed in 1986 or 1993, the late claims of the Claimants are entitled to the same level of remission.

Accordingly, the Master correctly found and concluded that the claims were valid "late claims," entitled to the forfeiture remission provisions of Section 85-2-221(3), MCA. The Court strikes Finding of Fact 27 and Conclusion of Law XIII as they are unnecessary for a decision in this case.

### **III. Subordination**

The Claimants have objected to the Master's finding and conclusion that the claims in this case are "subordinate" to certain water rights, pursuant to Section 85-2-221(3), MCA, and the Hardies, John Lyndes, and the Department of Fish, Wildlife, and Parks, have requested that the Court address how the forfeiture remission provisions of 1993, including the subordination provisions, apply to these late claims.

In 1993, Section 85-2-221(3), MCA, was amended to provide that:

\* \* \*

- (c) a right represented in a late claim is subordinate to all federal and Indian reserved water rights established by compact or decree under this chapter;

- (f) unless a late claim either was placed in the United States mail and postmarked on or before April 30, 1982, or, if there is no evidence of the date of mailing, there is evidence of execution on or before April 30, 1982, and actual receipt by the department on or before May 7, 1982, the right represented in the claim is, in addition, subordinate to:
- (i) rights represented in all valid, timely filed claims; and
  - (ii) rights represented in a permit or reservation of water issued under this chapter if and to the extent that the person holding the permit or reservation files an objection under this part and proves that the person holding the permit or reservation reasonably relied to the detriment of the person holding the permit or reservation upon the failure of the claimant to file a claim on or before April 30, 1982.

The water right claims in this case were received by the DNRC after May 7, 1982, but before the statutory forfeiture remission filing deadline of July 1, 1996. Therefore, the Master correctly concluded that "these late filed claims should be subordinate to all federal and Indian reserved water rights and all timely filed claims based on state law, and may be subordinate to certain permits and reservations of water pursuant to Section 85-2-221(3)(i), MCA." Conclusion of Law XIII.

Although the Claimants have argued that the Court is without jurisdiction to subordinate the water rights in this case to those of claimants not a party to the case, the Claimants overlook the fact that these water right claims were partially remitted from forfeiture and subordinated to federal and Indian reserved water rights and all valid timely filed state-based claims by operation of statutory law, not by decree of this Court. But for enactment of the forfeiture remission statute, these late claims would be "null and void." For Claimants to accept the benefits of the forfeiture remission statute, they must also bear the burdens. Section 1-3-212, MCA.

#### Abstract Remarks

Pursuant to policies in effect at the time the Master's Report was filed, the Master found that the claim numbers on the abstracts of the claims should be amended to contain the letter "B," (Finding of Fact 51), and that the following clarification remark and potential issue remarks should be added to the claims:



CLAIM FILED LATE. THIS CLAIM IS SUBORDINATE TO ALL FEDERAL AND INDIAN RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

CLAIM FILED LATE. IN ADDITION TO BEING SUBORDINATE TO ALL FEDERAL AND INDIAN RESERVED RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS CLAIM MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221, MONTANA CODE ANNOTATED.

(Findings of Fact 52 and 53).

The Master declined to clarify the administration and enforcement issues with respect to the subordination of claims, stating that the district court has exclusive jurisdiction to administer and enforce valid existing water rights, pursuant to Section 85-2-216, MCA, and *Mildenberger v. Galbraith* (1991), 249 Mont. 161, 815 P.2d 130. See discussion of Issue #8 in the Master's Memorandum Opinion at 38-44.

While district courts have jurisdiction over the distribution of water, pursuant to Section 85-2-406, MCA, the Montana Water Court has exclusive jurisdiction over the adjudication of existing rights, pursuant to Section 3-7-501, MCA, which includes the authority to find that late claims are subordinate, and therefore junior, to certain other types of claims, and to dictate how that finding should be related to district courts for purposes of administering and enforcing the water rights. Providing decrees to district courts in a form that is understandable and enforceable is vital to the ultimate success of this adjudication.

After the Master filed the Master's Report in the present case, the DNRC implemented a new computer program for administering water right claims and modified its numbering system for identifying claims. Under the current numbering system, the previous letter designations have been removed from the actual claim number and placed in what is referred to as the "extended information portion" of the claim number. Under this system, for example, claim 411-B-211737-00 becomes:

411 211737-00 STATEMENT OF CLAIM  
STATUS: ACTIVE  
LATE CLAIM: 0

With respect to the Subordination issues, Water Master Douglas Ritter resolved those issues when he granted several motions for summary judgment filed by the DFWP in other cases. In Water

Court Case No. 76HF-500 and in several other cases, the DFWP requested clarification of the subordination provisions of Section 85-2-221(3), MCA, and clarification of other issues relating to the administration and enforcement of late claims in this general adjudication. In the Master's Reports granting the motions for summary judgment, Water Master Ritter concluded that:

The term "subordinate" as used in Section 85-2-221(3), MCA, means that all "A" and "B" late claims filed in accordance with this section are junior, by statute, [to all] Federal and Indian reserved water rights. It means that all "B" late claims filed after May 7, 1982, but on or before July 1, 1996 are junior to all valid timely filed claims, and may be junior to specific permits or reservations of water. The priority date remarks that appear on all "A" and "B" late claims, and the issue remarks that appear on "B" late claims should be amended to reflect the conclusion that subordinate means junior in its application to water rights in this adjudication.

See e.g., Master's Report in Water Court Case No. 76HF-500, filed August 5, 2003, at 16. (Emphasis added) The Master's Report was adopted on September 25, 2003.

Although all "B" late claims are subordinate, and therefore junior, to all federal and Indian reserved water rights, and all valid timely filed claims based on state law, they may or may not be subordinate to specific permits and state law based reservations of water. Section 85-2-221(3)(f)(ii), MCA. The Master explained that:

The person claiming the permit or reservation of water must file objections to the late claim under Section 85-2-212 and prove that they obtained the permit or reservation of water based on the absence of a timely filed claim for a specific existing water right. If a "B" late claim was subsequently filed for that same existing water right, the permit or reservation of water owner is entitled to take as senior to that "B" late claim. This situation has not yet presented itself in this adjudication. Therefore, it is not possible or necessary to attempt to plan for this possibility in priority date indexes. When and if this situation arises, the Water Court or the district court can make the necessary corrections to the priority date index.

Master's Report in Case 76HF-500 at 15. The Master therefore also recommended that an issue remark should be added to the decree abstracts of "B" late claims to alert the owners of water right permits and state reservations of water that subordination of late claims to their water rights was not a foregone conclusion. Master's Report in Water Court Case 76HF-500 at 12 and 15.

Water Master Ritter also concluded that:



In order to facilitate the future administration of all existing water right claims, any priority date index issued by the Montana Water Court as part of a Final Decree or an enforceable Temporary Preliminary Decree or Preliminary Decree should list all "B" late claims at the end of that priority date tabulation.

*Id.* at 16.

The Master's above recommendations were adopted by the Water Court on September 24 and 25, 2003. On October 1, 2003, the Water Court issued a special Order confirming that:

[T]he late claim remarks that currently appear on the abstracts of water right claims in the Department of Natural Resources and Conservation computerized centralized record system for existing rights shall be modified as follows:

\* \* \*

2. The following remark shall appear under the priority date element on all "B" late claim abstracts:

CLAIM FILED LATE (DATE). AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL FEDERAL AND INDIAN RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

3. The following remark shall appear in the issue remark section on all "B" late claim abstracts:

CLAIM FILED LATE (DATE). THIS CLAIM MAY BE SUBORDINATE, AND THEREFORE JUNIOR, TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221(3), MCA.

Order on Late Claim Remarks, *In re Late Claim Remarks*, filed October 1, 2003. There have been no further changes in these policies for late claims.

Accordingly, Finding of Fact 51 should be stricken and replaced with the following:

51. The claim numbers for these claims should be changed as follows:

411-W-211737-00    to    41I 211737-00 STATEMENT OF CLAIM  
STATUS: ACTIVE  
LATE CLAIM: B

411-W-211738-00    to    41I 211738-00 STATEMENT OF CLAIM  
STATUS: ACTIVE  
LATE CLAIM: B

41I-W-211739-00	to	41I 211739-00 STATEMENT OF CLAIM STATUS: ACTIVE LATE CLAIM: B
41I-W-211740-00	to	41I 211740-00 STATEMENT OF CLAIM STATUS: ACTIVE LATE CLAIM: B
41I-W-211741-00	to	41I 211741-00 STATEMENT OF CLAIM STATUS: ACTIVE LATE CLAIM: B
41I-W-211742-00	to	41I 211742-00 STATEMENT OF CLAIM STATUS: ACTIVE LATE CLAIM: B
41I-W-211743-00	to	41I 211743-00 STATEMENT OF CLAIM STATUS: ACTIVE LATE CLAIM: B
41I-W-211744-00	to	41I 211744-00 STATEMENT OF CLAIM STATUS: ACTIVE LATE CLAIM: B
41I-W-215665-00	to	41I 215665-00 STATEMENT OF CLAIM STATUS: ACTIVE LATE CLAIM: B
41I-W-215666-00	to	41I 215666-00 STATEMENT OF CLAIM STATUS: ACTIVE LATE CLAIM: B

In addition, Finding of Fact 52 and 53 should be stricken and replaced with the following:

52. The following clarification remark should be added to the abstracts of these claims under priority date to denote the subordination of these late claims as specified in Section 85-2-221, MCA:

CLAIM FILED LATE 05/15/86. AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL FEDERAL AND INDIAN RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

53. The following late claim potential issue remark should be added to the abstracts of these claims:



CLAIM FILED LATE 05/15/86. THIS CLAIM MAY BE SUBORDINATE, AND THEREFORE JUNIOR, TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221(3), MCA.

After a Water Court decree is modified after objections and hearings, it is enforceable and administrable according to its terms. See Sections 3-7-212, 85-2-406(4), and 85-5-101, MCA. After the issues in this case have been resolved, the Water Court will provide the First Judicial District Court with a tabulation of existing rights in Silver Creek and Three Mile Creek and their relative priorities. In doing so, all the "B" type late claims will be placed in a junior position to the timely filed existing rights, but senior to the permits and state reservations of water. Although the specific priority date of these "B" type late claims will not change, the subordination provisions create a practical priority date of June 30, 1973. Establishing priority relationships is more important than establishing specific priority dates. *Vidal v. Kensler* (1935), 100 Mont. 592, 594, 51 P.2d 225.

#### **IV. DNRC Post-Hearing Information**

Statement of Claim 411-W-211739-00 for the Gehring/Hardie Upper Three Mile onstream reservoir on Three Mile Creek initially was filed by William Gehring without a designated volume. It was later amended to reflect a volume of 275 acre feet. During the DNRC pre-decree claims' examination effort, the claim was modified to reflect a dam height of 25 feet, and a reservoir capacity of 49.0 acre feet. On the Temporary Preliminary Decree Abstract of the claim, the following issue remark was added:

The claimed volume appears to be excessive for the claimed purpose. The claimed volume equals 5.6 times the capacity of the reservoir.

No one filed objections to the description of the reservoir in the Temporary Preliminary Decree for claim 411-W-211739-00. However, at the beginning of the hearing on other objections in this case, William Gehring and the Hardies stipulated to change the surface area of the dam from 4 acres to 8.70 acres, and the capacity of the reservoir from 49 acre feet to 267.00 acre feet. Court Minutes and Order Setting Deadlines, filed March 30, 1999. In Finding of Fact 50, the Master found that the reservoir information for Claim 411-W-211739-00 should be modified to reflect a dam

height of 25 feet, a surface area of 8.70 acres, and a reservoir capacity of 276.00 (probably a typographical error) acre feet. In Finding of Fact 54, the Master found that the issue remark with respect to volume should be removed. See also Conclusion of Law XXV.

On June 1, 2000, after the Master's Report was issued, Jim Gilman of the DNRC sent a Memorandum to the Chief Water Judge advising the Court that the technical data recommended by the Water Master to describe the reservoir would not work in the standard formula for calculating reservoir capacity. Mr. Gilman advised the Court that the Upper Three Mile Creek Reservoir has been monitored by the DNRC as part of its Dam Safety Program, and that based on an onsite visit and measurements, the correct dam height is 70 feet, the surface area is 9 acres, and the reservoir capacity is 180 acre feet. See Jim Gilman Memorandum of June 1, 2000 and attachments. This Memorandum, therefore, merely expanded upon an issue previously noted by the DNRC during its previous examination of the claim.

Upon a review of the claim files for 411-W-211739-00 and Hardie claim 411-W-025392-00 and the record in this Case, this Court ordered that:

... by **September 5, 2000**, the Hardies and Gchrings either (1) provide the Court with the most reliable figures of the dam's height and reservoir capacity available to them together [with] a written explanation of their methodology and, if necessary, an explanation as to why those figures differ from the 1966 Reservoir Easement and Use Agreement, or (2) serve a request for hearing under Claim Examination Rule 1.II(2) by the same date.

Order Granting Request for Hearing in Case No. 411-48, filed July 31, 2000.

Rather than comply with the Court's request, the Claimants and the Hardies filed objections to the Order. They argue that an additional hearing to consider the post-hearing evidence of the DNRC, a non-party to the action, is unnecessary and would violate the due process rights of the stipulating parties. In particular, the Hardies argue that: "Had the DNRC believed the Hardies' reservoir claim was improper, it should have filed an objection, just like all other interested parties were required to do. It is no longer the Hardies responsibility to justify their claim." Hardies' Exceptions to Master's Report and Brief, filed September 6, 2000, at 7.



The Claimants and the Hardies are correct that if the DNRC were a party to this action, it would have been required to file an objection to the Temporary Preliminary Decree “just like all other interested parties were required to do.” However, as the stipulating parties recognize, the DNRC is not a party to this case. The letter from the DNRC was not an objection filed pursuant to 85-2-233(2), MCA, or an objection to the Master’s Report filed pursuant to Rule 53(e)(2), M.R.Civ.P., or Rule 1.II(4) of the Water Right Claim Examination Rules, but data and information relevant to an accurate adjudication of both claims, provided by the DNRC to the Water Court, pursuant to Section 85-2-243, MCA, and Rule 1.II(2) of the Water Right Claim Examination Rules.

Section 85-2-227(2), MCA, provides that “a water judge may consider all relevant evidence in the determination and interpretation of existing water rights, and Section 85-2-243(1)(a) and (d), MCA, directs the DNRC to “provide the water judge with all information in its possession bearing upon existing rights.” This includes information provided in accordance with Section 85-2-243, MCA, Rule 1.II(2), attachments to the claim, and any other data obtained by the water judge under Section 85-2-231(2), MCA, to evaluate the claims.

The Montana Supreme Court has specifically instructed that:

In the adjudication process, the [DNRC] is an executive agency providing technical assistance and information to the water court subject to the direction of water judges, pursuant to § 85-2-243, MCA. The [DNRC] assists the water court by gathering, examining, and reporting data, facts, and issues pertaining to the claims of existing rights. In examining claims, the [DNRC] role is limited to factual analysis and the identification of issues.

Rule 1.I(4), Water Right Claim Examination Rules. (Emphasis added) It has further directed that:

Investigation reports, data or other written information produced or promulgated by the [DNRC] under the direction of the water courts pursuant to § 85-2-243, MCA, shall be admissible without further foundation and not subject to the hearsay objection in any proceedings before the water court, in situations where the [DNRC] is not itself a claimant. . . .

Rule 1.II(2), Water Right Claim Examination Rules. (Emphasis added) To protect the due process rights of claimants, such information is, however, “. . . subject to the rights of any party or claimant to cross-examine the producer or drafter of the written material and to controvert the same by other evidence.” *Id.*

By ordering the Claimants to file a report harmonizing the differences, or to request an evidentiary hearing on the evidence, the Court was protecting, not violating, the Claimant's due process right to examine and contradict the evidence.

The Hardies are also mistaken in their belief that it is no longer their "responsibility to justify their claim." The Temporary Preliminary Decree of this water right is an interlocutory decree, pursuant to Section 85-2-231, MCA, which will not become final until the Water Court issues its Final Decree, pursuant to Section 85-2-234, MCA. While a prima facie statement of claim was intended by the Legislature to have a significant measure of rectitude, it was not intended to place claims beyond the review of the Water Court, or for water judges to act as mere rubber stamps in their review of the claims.

Montana Courts are not bound by stipulations between parties as to the elements of a water right. *Allen v. Petrick* (1924), 69 Mont. 373, 378, 222 P. 451; *Perkins v. Kramer* (1966), 148 Mont. 355, 360, 423 P.2d 587; and *Grimsley v. Spencer* (1983), 206 Mont. 184, 200-201, 670 P.2d 85. Private agreements between a few select water right users have the potential to mislead the Court and to mislead and adversely affect other unsuspecting water users, or to avoid civil and criminal penalties for violations of the Water Use Act. See e.g. Memorandum on Anderson and Harms Amended Stipulation in Water Court Case WC-90-1, filed September 7, 2000.

The Water Court has concluded that parties who stipulate to "change" some element of a water right claim, whether before or after issuance of a temporary preliminary decree, are effectively objecting to an element of the prima facie statement of claim. Section 85-2-227, MCA. Accordingly, stipulating parties bear the burden of contradicting and overcoming the prima facie statement of claim by a preponderance of evidence. See analysis in Memorandum Opinion in Water Court Case No. 40G-2.

The character and extent of the evidence required to meet this burden depends on the nature of the stipulated changes. As a general rule, little or no evidence is required to reduce one or more elements of a claim, because anyone may waive the advantage of a law intended for his benefit. Section 1-3-204, MCA. Proposed expansions of a prima facie statement of claim, on the other hand,



could adversely affect other water users and must, therefore, be supported by a preponderance of evidence establishing that the proposed change reflects the actual historical beneficial use of the claimed right. See analysis in Anderson and Harms Memorandum at 2-5.

Here, the stipulating parties have through private agreement settled on expanding the reservoir capacity from the 49 acre feet decreed, to 267 acre feet. That expansion of reservoir capacity has a potential of adversely affecting other water users not a party or privy to the stipulation, and/or serve to mask a violation of the Water Use Act. The Claimants and the Hardies, therefore, have the burden of supporting that stipulated change by a preponderance of evidence establishing that it reflects the actual historical beneficial use of the water right prior to July 1, 1973.

As this Court stated in its July 31, 2000 Order in this case:

Unless there is more than one dam and reservoir being measured and observed, this is one remarkable vacillating dam. In 1966, its original builders said it was 70 feet high. In 1971, a district judge said it was 20 feet high. At the 1999 hearing, the successors to the original builders said it was 25 feet high. During an unstated period, DNRC measured it to be 70 feet high. The capacity apparently only fluctuates between two figures: 180 to 267 acre feet. If all these measurements refer to the same dam and reservoir, there is an obvious error.

(Emphasis added)

Thus, in order to assure greater accuracy in the adjudication of claims 41I-W-211739-00 and 41I-W-025392-00, this Court once again advises Counsel to:

... review the district court file, consult with their clients, consult with DNRC, possibly even view and measure the dam and its capacity and file a report with this Court harmonizing the differences, if that is possible. If [it] is not possible to harmonize the difference, the Court may hold a hearing on the issue. The hearing would be limited to the size and capacity of the Upper Three Mile Creek Dam and Reservoir, and would not involve the volume of the water right claim.

#### **V. Statewide Consolidation of Late Claims**

On August 14, 1998, the Claimants filed a Motion to Consolidate Late Claims in which it requested the Court to provide notice to all late claimants and other interested parties, and to convene a conference to identify the issues related to the late claim statutes and develop procedures for the efficient consideration of those issues. In the Final Prehearing Order of March 22, 1999, the Water

Master took the motion under advisement, pending the outcome of the hearing. On July 31, 2000, this Court issued an Order Denying Motions to Stay and To Consolidate Late Claims, because of the unique facts involved in this case not common to any other late claimant, the small number of objections filed to the forfeiture remission statute, the increased cost in time and money to the Court and other water users without much of a corresponding reduction against the Claimants. Scheduling Order and Order Denying Motions to Stay and to Consolidate Late Claims, filed July 31, 2000.

On September 6, 2000, the Claimants filed a Motion to Reconsider Order Denying Motion to Consolidate Late Claims and request for Scheduling Conference, requesting "that the Order be withdrawn" and "that a scheduling conference be held for the purposes of (1) exploring methods by which parties can be notified of the pending proceedings, and (2) developing a reasonable schedule for resolution of the late claim issues on their merits, including development of a discovery schedule, hearing and full briefing opportunities." Motion to Reconsider at 4 and 5. The Claimants identified several constitutional late claim issues previously identified in the Claimants' Proposed Pre-hearing Order, and constitutional and interpretation issues pertaining to Section 85-2-221(3), MCA.

While the DFWP, the Hardies, and Mr. Lyndes all agree that the Court should clarify the subordination provisions of Section 85-2-221(3), MCA, they all filed briefs opposing the Claimants' Motion to Consolidate and Motion to Reconsider.

As discussed earlier, in 2003, the Water Court adopted several Master's Reports which clarified most if not all of the late claim issues raised by the parties in the present case, including the meaning of "subordination" as used in Section 85-2-221(3), MCA, and in September of 2003, the Water Court incorporated the recommendations into a specific Order. *In re Late Claim Remarks*, filed October 1, 2003.

The Water Court has now applied those new rules to the unique facts of the present case, and no further clarification of the forfeiture remission provisions of Section 85-2-221(3), MCA, is necessary to resolve the late claim objections in this case.



## CONCLUSION

The Montana Supreme Court has upheld the constitutionality of Section 85-2-221(1) and -226, MCA, laying to rest many of the same objections raised by the Claimants in the present case. *Yellowstone River* (1992), 253 Mont. 167, 832 P.2d 1210. In response to the *Yellowstone River* decision, the Legislature enacted Section 85-2-221(3), MCA, which provided for the partial remission of forfeiture and an extended opportunity to file claims of existing rights in this general adjudication, subject to the specific terms and conditions set forth in the statute. Without enactment of that statute, the Gehring late claims would have been terminated by the Water Court.

After careful consideration of the arguments and the evidence, and after applying the three-part test from *DeSaye*, the Water Court finds that, except as otherwise specified herein, substantial evidence supports the Master's findings, the Master has not misapprehended the effect of the evidence, and the Court is not left with the definite and firm conviction that a mistake has been made. Except as otherwise specified herein, the Master's Conclusions of Law are correct.

The Court will schedule a telephone conference of the parties and their attorneys to determine the next step in these proceedings.

DATED this 3 Day of SEPTEMBER, 2004.



C. Bruce Loble  
Chief Water Judge

CERTIFICATE OF SERVICE

I, Patricia J. Gunderson, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **MEMORANDUM** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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G. Steven Brown, Attorney  
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DATED this *3rd* day of *September*, 2004.

*Patricia J. Gunderson*  
Patricia J. Gunderson  
Deputy Clerk of Court



IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
MISSOURI RIVER ABOVE HOLTER DAM BASIN (411)

\*\*\*\*\*

**FILED**  
SEP 03 2004  
Montana Water Court

IN THE MATTER OF THE ADJUDICATION OF	)	<b>CASE NO. 411-48</b>
THE EXISTING RIGHTS TO THE USE OF ALL	)	411-W-211737-00
THE WATER, BOTH SURFACE AND UNDERGROUND)	)	411-W-211738-00
WITHIN THE MISSOURI RIVER DRAINAGE AREA	)	411-W-211739-00
INCLUDING ALL TRIBUTARIES OF THE	)	411-W-211740-00
MISSOURI RIVER IN BROADWATER, CASCADE,	)	411-W-211741-00
JEFFERSON AND LEWIS AND CLARK COUNTIES,	)	411-W-211742-00
MONTANA	)	411-W-211743-00
	)	411-W-211744-00
	)	411-W-215665-00
	)	411-W-215666-00

CLAIMANT: William G. Gehring and Tracey L. Gehring

OBJECTOR: Montana Department of Fish, Wildlife, and Parks;  
United States of America (Bureau of Reclamation)  
William G. Gehring, William L. Hardie, Maurice G. Hardie, John J. Lyndes

**ORDER AMENDING AND ADOPTING  
MASTER'S REPORT AND MASTER'S MEMORANDUM OPINION**

Pursuant to Montana Code Annotated, Section 85-2-233(5), MCA, claims 411-W-211737-00 through 411-W-211744-00 and 411-B-215665-00 and 411-B-215666-00 were assigned to Water Master Carol Brown, who consolidated them into the above-entitled case. On May 10, 2000, the Water Master issued a report containing Findings of Fact and Conclusions of Law, and a Memorandum Opinion. Objections were filed.

For the reasons expressed in the Court's Memorandum filed contemporaneously with this Order, it is hereby ORDERED that:

1. Except where it conflicts with the analysis set forth in the Court's Memorandum, and with the following exceptions, the Master's Report and the Master's Memorandum Opinion are adopted by the Court;

2. Findings of Fact 14 and 27 and Conclusion of Law XIII of the Master's Report are stricken;
3. Finding of Fact 50 and 54 of the Master's Report are stricken;
4. Findings of Fact 51, 52, and 53 of the Master's Report are amended to conform to Section III (Subordination section) of the Court's Memorandum;
5. Conclusion of Law XXIV of the Master's Report is amended to reflect the Court's current Late Claim Assessment in the amount of \$10,337.38, a copy of which is attached hereto and incorporated herein; and
6. By November 17, 2004, William Hardie and Maurice Hardie, and William G. Gehring and Tracey L. Gehring, shall provide the Court with the most reliable figures of the dam height and reservoir capacity associated with the Upper Three Mile dam and reservoir (discussed in Section IV of the Court's Memorandum) available to them, together with a written explanation of their methodology, and, if necessary, an explanation of why those figures differ from the 1966 Reservoir Easement and Use Agreement and the DNRC Dam Safety Program information.

DATED this 3 Day of SEPTEMBER, 2004.



---

C. Bruce Loble  
Chief Water Judge



CERTIFICATE OF SERVICE

I, Patricia J. Gunderson, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER AMENDING AND ADOPTING MASTER'S REPORT AND MASTER'S MEMORANDUM OPINION** 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 3 day of September, 2004.

  
Patricia J. Gunderson  
Deputy Clerk of Court