

**FILED**

JUN 09 2017

Montana Water Court

MONTANA WATER COURT, UPPER MISSOURI DIVISION  
SMITH RIVER - BASIN 41J

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CLAIMANT: Dana Ranch Co. Inc.

OBJECTOR: State of Montana Attorney General

**CASE 41J-265**

41J 193435-00

41J 193437-00

41J 193438-00

41J 193440-00

41J 193444-00

41J 193447-00

41J 195251-00

**ORDER REJECTING STIPULATION AND ORDER FOR FIELD  
INVESTIGATION**

**I. PROCEDURAL HISTORY**

This matter involves irrigation claims owned by Dana Ranch. These claims were reviewed by the DNRC as part of the claims examination process. The DNRC's review resulted in issue remarks stating that irrigation was not apparent on aerial photos, water resources survey materials, or both. Issue remarks of this type may indicate abandonment.

The Dana Ranch claims were filed by David Cameron, president of Dana Ranch Co. Inc. Mr. Cameron objected to each of the claims he filed. His objections stated: "I agree with the DNRC Issue Remarks showing zero acres irrigated." Mr. Cameron's objections show Dana Ranch was represented by counsel.

The Water Court treated those objections as withdrawals of the Dana Ranch claims. Dana's claims were terminated and this case was closed. The Dana Ranch changed ownership, and the new owner objected to termination of its claims. The Water Judge recommitted the case to the Water Master to reconsider the closing order. The Water Master recommended the closing order remain in place. Dana objected to the Master's Report on a variety of grounds.

The Water Court set aside the Master's recommendations and concluded that evaluation of Dana's claims on the merits would best serve the interests of justice. *Order Setting Aside Default Judgment, Reinstating Claims, and Setting Filing Deadlines*. July 28, 2015, p. 2. Because there were no other parties in the case, Dana Ranch was given time to review its claims and respond to the DNRC's issue remarks.

Dana responded by filing motions to amend its claims. A party seeking to amend its water right has the same burden of proof as an objector. *Nelson v. Brooks*, 2014 MT 120, ¶34-35.

Some of the motions to amend did not contain evidence needed to justify modification of the Dana Ranch claims and were denied.

Dana also asked to convert some irrigation claims to stockwater rights. These motions were denied because Dana had never filed claims for the stockwater rights it sought, and the statutory claims filing deadline had long since passed. 85-2-221, MCA. The Water Court ruled that motions to amend were intended to allow a claimant to correct properly filed rights, but could not be used to replace existing claims with water rights that had never been filed. These motions were also denied.

The Water Court concluded Dana had not provided sufficient information to resolve the DNRC issue remarks regarding potential abandonment. Dana's request to recognize water rights for sub irrigation was rejected.

Water rights with issue remarks regarding abandonment are subject to unique procedural requirements. If the abandonment issue cannot be resolved, then the Water Court "shall join the state of Montana through the attorney general as a necessary party..." MCA 85-2-248(7)(a).

Because the motions to amend filed by Dana Ranch did not contain sufficient information to allow resolution of the issue remarks attached to its claims, the state of Montana, through the attorney general, was joined as a party. *Order Denying Motion to Amend, Adding the Montana Attorney General as a Party, and Setting Scheduling Conference*, filed December 15, 2015.

After approximately eighteen months, Dana Ranch and the state of Montana filed a stipulation addressing the Dana Ranch claims. Both parties assert they have gathered

sufficient evidence to resolve the issue remarks attached to Dana's claims, and to justify the fresh modifications to those claims sought in the stipulation. Based on this evidence, the state of Montana filed a motion asking to be dismissed from the case.

## II. ISSUES

1. Whether the Dana Ranch rights should be decreed in accord with the stipulation.
2. Whether the state of Montana should be dismissed as an objector.

## III. DISCUSSION

1. Whether the Dana Ranch rights should be decreed in accord with the stipulation.

The stipulation requests amendments to four rights filed by David Cameron and withdrawal of others. The proposed amendments are based on "additional information relating to historical and current use." Stipulation, p. 2. The source of that additional information consists of affidavits by David Cameron and a "site visit." *Id.*

Water rights in the adjudication process have prima facie status, meaning that a "claim of existing right constitutes prima facie proof of its content until the issuance of a final decree." 85-2-227(1). A person seeking to modify a water right, including a claimant, has the burden of producing sufficient evidence to support the proposed modification. That burden requires the claimant to show by a preponderance of the evidence that the elements of the original claim are incorrect. *Nelson v. Brooks*, 2014 MT 120, ¶37.

Evaluation of the amendments proposed in the stipulation requires analysis of each water right to determine if sufficient evidence exists to support the modifications requested.

### *Claim 41J 193440-00*

This claim was originally filed for 1.9 cfs of irrigation water from Whitetail Creek. A hand drawn map attached to the claim showed a ditch in the S2 of Section 20 used to pull water from one coulee to another, where it was diverted again for irrigation.

During claims examination, the DNRC reviewed aerial photographs taken in 1947 and 1979. The DNRC concluded that each photo "appears to show 0.00 acres irrigated" and placed issue remarks stating that conclusion on the claim. The DNRC also placed a

remark on the claim stating that “flow rate may require modification based on resolution of maximum acres issue.”

The claim was signed by David Cameron, President of Dana Ranch Co. Inc. Mr. Cameron swore under oath “that the contents of this claim and the matters and things stated are true and correct.” Mr. Cameron signed this statement before a notary on April 23, 1982.

Approximately thirty years later, Mr. Cameron filed an objection to the place of use/maximum acres for this water right. That objection stated: “I agree with the DNRC Issue Remarks showing zero acres irrigated.” The Water Master concluded this statement was an acknowledgment that the claim had been abandoned and recommended termination of the right.

After the Dana Ranch sold, and the water right was reinstated for review on the merits, the new owners hired a water rights consultant to review its claims. The consultant’s evaluation included a review of aerial photos, interviews with ranch staff, and a visit to the site.

Based on a review of aerial photos, the consultant wrote that “[t]his claim needs to be inspected more closely.” Draft letter/report to Brion Lindseth from Lee Yelin dated June 10, 2015, attached as Exhibit B to Dana Ranch objection to Master’s Report filed June 12, 2015.

After visiting the site, Mr. Yelin reached the following conclusion:

This claim needs to be amended to stock water and/or sub-irrigation natural flooding. The claimed POU is entirely sub-irrigated and stock drink from various springs and the draw. Id.

Mr. Yelin’s conclusion suggests there was no diversion of water using headgates or ditches, and no active irrigation with claim 41J 193440-00. After Mr. Yelin’s report was issued, Dana Ranch filed a motion to amend this claim, asserting it should be converted to a right for sub-irrigation. Motion to amend, filed October 30, 2015.

The DNRC filed a memorandum in response to Dana Ranch’s motion to amend. The DNRC concluded that “[m]ost of the land claimed as the place of use for this right in the proposed amendment does not appear to be irrigated, even by natural sub-irrigation.”

DNRC Memo, p. 4. This conclusion was based on review of additional aerial photos supplied by Dana Ranch with different dates than those originally reviewed by the DNRC. This brought the total of aerial photos reviewed by the DNRC to four. The dates of these photos were 1947, 1961, 1971, and 1979.

This Court denied Dana's request to convert claim 41J 193440-00 from flood irrigation to sub-irrigation. Sub-irrigation is "a naturally occurring high water table condition that supplies water for crop use." Rule 2(a)(44), W.R.C.E.R. The rationale supplied for denial of Dana's motion to convert to sub-irrigation was as follows:

The requested shift to natural subirrigation has two potential consequences. First, it suggests that the underlying flood irrigation rights were either never perfected, or were abandoned. Second, the claimants are requesting recognition of a property interest arising from a natural event caused without human intervention. Although a man-made diversion is not a prerequisite for all water rights, Montana law requires intent to appropriate, communication of adequate notice of that intent, and actual beneficial use. *In re Adjudication of Existing Rights to the Use of all Water*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396. The Dana Ranch motion to amend does not address these criteria using evidence developed prior to July 1, 1973.

The present factual record is inadequate to support conversion of Dana Ranch's flood irrigation rights to natural subirrigation. As an example, there is no information indicating how or when such rights were perfected, which leaves the correct priority for such rights undefined. There is no information indicating how such rights might be quantified, if at all. And finally, aerial photos cast doubt about whether subirrigation has occurred as asserted by the claimant. *Order Denying Motions to Amend*, filed December 15, 2015, p. 6.

The stipulation filed by Dana Ranch and the state of Montana contains a re-formulated amendment of claim 41J 193440-00. Unlike the previous amendment which sought a right for subirrigation, the new amendment seeks recognition of a right for flood irrigation using a "man-made ditch system that diverts water to feed this POU." Stipulation, p. 5. Support for this amendment rests principally on a pair of affidavits written by David Cameron, the original claimant and objector.

Affidavits are commonly used by claimants to address unresolved issue remarks or support a proposed amendment. The Water Court may suspend application of the

hearsay rule where there are no opposing parties, or the parties agree on the proposed outcome, and there is no reason to doubt the affiant's knowledge or veracity.

The usefulness of affidavits varies widely depending on the information they contain and the credibility and knowledge of the affiant. Some affiants hit relevant issues directly by giving the reader specific and detailed information about historical use of a water right based on first hand observation. Some affidavits are notable because they do not contain such information. The two most recent affidavits by Mr. Cameron fall into the latter category.

Mr. Cameron's first affidavit, dated March 24, 2017, establishes that he was absent from the property for lengthy periods. It stops short of stating that he used the point of diversion or conveyance system for claim 41J 193440-00; that he irrigated with this right; or that he directed others to do so. There is no confirmation that the 28 acres now claimed are accurate, that those acres are in the correct location, or that they were historically irrigated using the diversion identified on the revised abstract. Mr. Cameron's affidavit does not explain or rebut the conflicting statements of Dana Ranch's expert, who concluded after visiting the property that this right was based on passive sub-irrigation and had not been actively diverted as Mr. Cameron now claims.

Mr. Cameron stated in his objection that he agreed with the DNRC's conclusion that zero acres had been irrigated. He expends considerable effort in his March 24, 2017 affidavit attempting to minimize the impact of this statement. He claims the objection was drafted by the DNRC and "is a completely inaccurate portrayal" of the discussions between him and the DNRC. Affidavit, p. 2. He claims that although he stated Dana Ranch had not abandoned any water rights, these "statements were not incorporated or acknowledged by DNRC personnel in the Notice of Objection submitted." *Id.*, p.3.

In effect, Mr. Cameron asserts he made inaccurate statements because he was manipulated by DNRC personnel. This assertion strains the bounds of credibility for several reasons. First, Mr. Cameron claims to have knowledge of the Dana Ranch, and is a well-educated person. It is not clear why he signed a pleading containing statements of fact with which he now so vigorously disagrees. Second, the objection signed by Mr. Cameron states he was represented by counsel. While it might be possible to give a self-

represented litigant some leeway, it is difficult to do so when the party filing a pleading is the president of corporation represented by counsel.

These shortcomings are especially troubling when Dana Ranch is advancing the third version of this claim, Mr. Cameron has given prior contradictory statements regarding historical use, and there is substantial evidence of non-use from other sources, including Dana Ranch's expert.

Rather than simply state that the proposed point of diversion and place of use were historically used, Mr. Cameron makes indirect statements such as "the Dana Ranch Company harvested every bit of irrigated property" and "at times would chose (sic) to harvest the production by grazing instead of plowing or physically haying the property..." <sup>1</sup>Affidavit, p. 2. These statements lack the precision needed to support the specific point of diversion and place of use now asserted by Dana Ranch. They also fail to address Dana's prior claim that this right was not irrigated using a diversion and ditch, but was instead sub-irrigated.

The lack of specificity in Mr. Cameron's affidavits is also insufficient to overcome multiple years of aerial photos showing non-use, coupled with statements by Dana Ranch's expert that this claim should be for subirrigation rather than flood irrigation. Mr. Cameron's first affidavit leaves the impression that he has little firsthand knowledge regarding historical use of this right.

Mr. Cameron's second affidavit reinforces this perception. Again, Mr. Cameron does not state that he personally irrigated or saw irrigation using claim 41J 193440-00. Instead, he "recalls enquiring about the ditch in water claim 41J 193440 00" and that a former manager told him it carried water in a manner "consistent with the claim as filed and as currently used." Affidavit dated November 29, 2016, p. 2. In addition to being double hearsay, this is not the affirmative statement one would expect from a ranch owner with personal knowledge of ranch operations. It shows Mr. Cameron needed to turn elsewhere for information regarding irrigation of the ranch he managed.

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<sup>1</sup> Crops are not harvested by plowing. Statements like this further undercut Mr. Cameron's credibility.

Mr. Cameron's statement that someone told him the claim was used "as filed" undercuts the version of the claim described in the stipulation, which is different than the original claim. This statement suggests the version of the claim for which Dana Ranch now seeks approval is incorrect.

The pictures supplied with Mr. Cameron's affidavit show no headgates, no ditches, and no flowing water or active irrigation. The lack of such features, which are easily and commonly photographed, suggests they do not exist, and supports non-use of this claim as advanced by the DNRC and Mr. Yelin. The presence of haying, and of a hay crop, does not prove irrigation. Many unirrigated areas in Montana are hayed.

Dana Ranch has not substantiated historical use of claim 41J 193440-00 with either photographic evidence or credible eyewitness testimony. The failure to produce such evidence precludes removal of the issue remarks on this claim. Moreover, there are now four aerial photos showing non-use. These photos span more than thirty years, and are corroborated by Lee Yelin who was unable to confirm use of this right for flood irrigation.

Mr. Cameron's conflicting statements about this claim have increased doubt about its historical use. The additional photos supplied by Dana Ranch reinforce this concern because they do not show irrigation or irrigation infrastructure.

All the foregoing evidence in combination is sufficient to establish that claim 41J 193440-00 has not been used for decades. A prolonged period of nonuse gives rise to a rebuttable presumption of abandonment.

Dana Ranch will have an opportunity to rebut that presumption at the hearing set for this matter. In the meantime, the DNRC will conduct a field investigation of this right and the other rights in this case.

*Claim 41J 193444-00*

This irrigation claim is for 300 inches of water from the North Fork of Allen Creek, also known as Fourteen Creek. It received several issue remarks during claims examination. These remarks were based on Water Resources Survey field notes dated 1960, and an aerial photo dated 1977, which shows 0.00 acres irrigated. It also received an issue remark regarding flow rate.



Mr. Cameron filed an objection to the place of use/maximum acres for this water right. That objection stated: "I agree with the DNRC Issue Remarks showing zero acres irrigated."

After a site visit, Dana Ranch's expert Mr. Yelin concluded the point of diversion and place of use were inaccurate and needed to be corrected. Draft letter/report to Brion Lindseth from Lee Yelin dated June 10, 2015, attached as Exhibit B to Dana Ranch objection to Master's Report filed June 12, 2015.

Dana Ranch filed a motion to amend this claim in October of 2015. That motion was denied because it was not supported by sufficient evidence of historical use. Dana's recently filed stipulation seeks approval of a third version of this water right. This third version seeks to reduce the points of diversion from two to one, and to change the place of use. It is supported by an affidavit from Mr. Cameron and by photographs.

The evidence offered in support of this amendment is more helpful than that offered for 41J 193440. The photographs show a headgate, tarps, and ditches. Mr. Cameron's affidavit states that "the headgate, diversion and ditch for claim 444 were in good working order." This statement addresses current conditions, but does not explain the long period of non-use shown in prior aerial photos.

The DNRC examined additional aerial photos dated 1957 and 1966, and concluded that while a portion of this right was in use, "most of the land claimed as the place of use for this right in the proposed amendment does not appear irrigated."<sup>2</sup>

The problem identified in the issue remarks is non-use. Lack of use, or partial use, has been documented in three aerial photos and in the Water Resources Survey from 1960. Mr. Cameron's states in his affidavit that he recalled the place of use for claim 444 being irrigated and green during the late spring and summer months.

There are two problems with Mr. Cameron's testimony. First, Mr. Cameron has described this water right three different ways. The claim he filed, which was sworn to under oath, was different than the latest version of this right described in his affidavit.

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<sup>2</sup> The DNRC remarks were directed to Dana Ranch's second proposed version of this right, not the third version outlined in the stipulation presently under review. That distinction is immaterial, as the DNRC's review of aerial photos is applicable to resolution of the issue remarks on this right in either event.

Between these events, Mr. Cameron filed an objection agreeing that the DNRC's finding of zero acres irrigated for this right was correct.

The second problem with Cameron's testimony is that it does not address the lack of irrigation shown in aerial photos and in the WRS. For example, he states "[m]y observations during the 2016 Site Visit are consistent with my memory of the Claim 444 diversion and place of use during my time as President prior to 1973." October 21, 2016 affidavit p. 4. This statement suggests Mr. Cameron was an observer of activity on his ranch, but was not directly involved with irrigation. Most ranch operators can state with authority whether their place was irrigated, how it was irrigated, and when. In comparison, Mr. Cameron's testimony lacks the detail typical of witnesses familiar with their subject matter.

There are many sources of information used in water rights cases to support claims. These include tax records showing classification of land as irrigated, recollections of ranch employees and neighbors, Water Resources Survey field notes and maps, USGS Surveys and topographic maps, and aerial photos showing irrigation in years other than those examined by the DNRC. Most of these resources are available on-line. Except for aerial photos with different dates, none of these resources were used to address the DNRC's issue remarks regarding abandonment. Mr. Cameron even criticized the DNRC for failing to use infrared photography. After leveling this criticism, both Mr. Cameron and Dana Ranch failed to use this resource.

The shortage of credible information regarding historical use makes it difficult to resolve the issue remarks on this claim. The failure to use readily available resources to address the abandonment issue suggests either that the claimant or its advisors were unaware of this potential evidence, or that it was reviewed and found to be unfavorable.

Regardless, the evidence offered is weak. "If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of a party to introduce, then the evidence offered should be reviewed with distrust." *Application for Beneficial Use by Harms Livestock*, Montana Water Court, Case No WC-90-1, September 7, 2000, p. 23. "More satisfactory evidence would

be adverse if weaker and less satisfactory evidence is offered and it is within the power of the party to offer more satisfactory evidence.” MCA 26-1-602(1)(6).

There are three aerial photos and Water Resources Survey field notes showing either partial or total non-use of this right. Dana Ranch has tried to address this problem in part with a reduced version of the original right. The difficulty with the new version is the lack of evidence confirming that its new point of diversion or place of use were historically used as claimed.

The well documented pattern of non-use and the lack of information to support the revised version of this right leads to the conclusion that this claim was not used, or only partially used, for a prolonged period. This establishes a rebuttable presumption of abandonment. Although Cameron’s affidavit suggests this claim may have been used recently, a water right cannot be resurrected once abandoned.

Dana Ranch will have the opportunity to rebut the presumption of abandonment at trial.

*Claim 41J 193447-00*

This irrigation claim was filed for 2 cfs from the West Fork of Whitetail Creek, also known as Hines Creek or Spring Creek. The DNRC placed issue remarks on this right based on review of a 1947 aerial photo showing 0.00 acres irrigated. Mr. Cameron filed an objection agreeing “with the DNRC Issue Remarks showing zero acres irrigated.”

After a site visit, Dana Ranch’s water rights consultant concluded this right “appears to be sub-irrigation and should be corrected accordingly and/or changed to stockwater.” Later in the report he states that claim 41J 193447 00 “appear[s] to no longer be used for irrigation and should be changed to stockwater.”

In 2015, Dana filed a motion to amend this right to sub-irrigation. The reason given was to “reflect actual historical and beneficial use.” Motion to Amend filed October 30, 2015, p. 1.

The DNRC looked at this right and noted a ditch system, but concluded most of the place of use for this right did not appear to be irrigated.

The stipulation now seeks recognition of a flood irrigation right like the one originally claimed, but with less acreage in a slightly different location. As with the two preceding rights, the proposed revision is accompanied by two affidavits from Mr. Cameron and some photos taken during a site inspection. Mr. Cameron's affidavits do not provide effective support for the requested revisions.

The photographs attached to the motion show haying, but not active irrigation. Haying often occurs on unirrigated ground. Even if these photos depicted recent irrigation, they do not address the apparent lack of irrigation with this right in previous decades. Nothing attached to the motion enables this court to resolve the issue remarks attached to this right. These remarks suggest a prolonged period of non-use, which remains unrebutted. The issue remarks are consistent with the statements of Dana's expert, who indicated this right was no longer in use.

*Claim 41J 195251-00*

This irrigation claim was filed for 486 gallons per minute for water from Spring Creek also known as Allen Creek. The DNRC reviewed the 1961 Water Resources Survey and a 1977 aerial photo and concluded each of these resources indicated zero acres irrigated. Issue remarks to this effect were placed on this right, together with an additional remark stating that the flow rate might require modification based on resolution of the irrigated acres issue.

David Cameron filed an objection stating that he agreed with the DNRC issue remarks showing zero acres irrigated. Dana Ranch's expert conducted a site visit and concluded this right was in use, and was being irrigated with two separate ditches.

The stipulation seeks approval of an irrigation right with a single point of diversion for use on 30 acres. Photos attached to Mr. Cameron's latest affidavits show diversion structures and portable dams.

Although it appears this right has been recently used, there was no credible evidence offered to rebut the showing of prior non-use. In addition, the version of this right described in the stipulation differs from the version described by Dana's expert.

#### IV. CONCLUSION AND ORDER

Review of settlement agreements is governed by W. R. Adj. R. 17. The Water Court is not bound by settlement agreements, and all agreements are subject to review and approval. W. R. Adj. R. 17(a).

In many cases, the Court accepts settlement agreements without the need for supporting evidence where the claimant has agreed to reductions in a water right. W. R. Adj. R. 17(c). This practice does not apply when unresolved issue remarks suggest abandonment. In addition, the practice of accepting reductions in a water right should be exercised cautiously where multiple conflicting versions of a right have been offered by the claimant.

For these reasons, the request for approval of the stipulation is denied.

The state of Montana has asked to be dismissed from this case. As grounds, it asserts “the stipulation and its exhibits provide a reasonable basis for the resolution of these issues and concludes the State’s need to participate as an objector in this case.”

The stipulation and attached exhibits do not provide a reasonable basis for resolution of the issue remarks in this case. Resolution of such remarks rests with the discretion of the Water Court as part of its obligation to adjudicate existing rights.

What is not discretionary, however, is the Court’s obligation to join the state of Montana as a party to cases involving unresolved issue remarks raising questions of abandonment or nonperfection. 85-2-248(7)(a), MCA. The State must remain a party as long as those remarks remain unresolved.

For that reason, the Attorney General’s motion to dismiss the state of Montana is denied.

As explained above, the claimant Dana Ranch has not marshalled the evidence to rebut the presumption of non-use for the four rights addressed in its stipulation. Dana Ranch also agreed to conditionally withdraw claims 41J 193435-00, 41J 193437-00, and 41J 193438-00, if the stipulation was approved. The stipulation has not been approved, and Dana Ranch now faces a choice: it must either address the issue remarks for all its claims or withdraw them unconditionally.

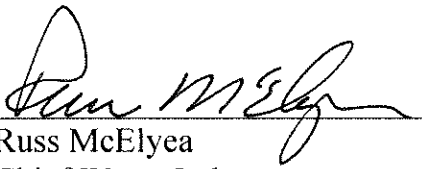
The shortage of credible evidence warrants a field investigation by the DNRC. Accordingly, the DNRC is ordered to undertake a field investigation of all rights in this case.

The purpose of the field investigation is to develop evidence to either support or rebut issue remarks regarding abandonment. If the DNRC finds additional evidence of non-use, it should identify that evidence. Conversely, if the DNRC finds evidence that the water rights in this case have not been abandoned, it should identify that evidence and the relevant points of diversion, places of use, flow rates, and acres irrigated for each claim.

The DNRC's field investigation shall be completed by **August 30, 2017**, and a report of that field investigation shall be filed with the court and mailed to all parties by **September 20, 2017**.

The DNRC's conduct of the field investigation and all actions relating thereto shall be in conformance with W.R. Adj. R. 12(c).

DATE: this 9 day of June, 2017.

  
Russ McElyea  
Chief Water Judge

Brion C. Lindseth  
Jennifer Hepp  
Jardine, Stephenson, Blewett & Weaver,  
P.C.  
PO Box 2269  
Great Falls, MT 59403  
(406) 727-5000  
jhepp@jardinelaw.com

Jeremiah D. Weiner, Esq.  
Melissa Schlichting  
Assistant Attorney General  
State of Montana  
215 North Sanders  
PO Box 201401  
Helena, MT 59620-1401  
(406) 444-2026  
jweiner2@mt.gov

DNRC – Water Rights Adjudication Office  
PO Box 201602  
Helena, MT 59620-1602