

Re: HB 782 (3)

EXHIBIT 10
DATE 3.23.05
HB 782

EVALUATION OF MONTANA'S WATER
RIGHTS ADJUDICATION PROCESS

Prepared for the Water Policy Committee
of the Legislature of the State of Montana

by

Saunders, Snyder, Ross & Dickson, P.C.
Denver, Colorado

September 30, 1988

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September 30, 1988

Senator Jack E. Galt
Chairman, Water Policy Committee
Montana State Legislature
Capitol Station, Room 432
Helena, Montana 59620

Dear Senator Galt:

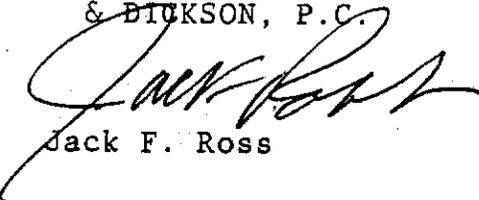
In accordance with our contract with the Water Policy Committee of the Montana Legislature, I transmit herewith the Final Report of our analysis of the Montana water adjudication system.

It has been a pleasure to have served the Committee, the Legislature and, ultimately, the people of Montana in that phase of our endeavor.

We look forward to the opportunity to work further with the Committee and the Legislature in providing counsel to them in the development of legal mechanisms for the attainment of their water policy objectives.

Very truly yours,

SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.


Jack F. Ross

JFR/emc

Enclosure

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consultant advises that such a study should examine no less than 450 to 500 randomly selected claims at an estimated cost, to do the job properly, of \$4,000 to \$5,000 per claim. We have not been persuaded from what we have seen that there is any legal necessity to spend public money to make such an inquiry.³⁴

Because of our extensive experience in the Colorado adjudication system, we knew that even attempting to achieve one hundred percent (100%) accuracy in the description of water rights created in the recent past, much less any created as long as 100 years ago, would be unattainable. We also knew from that experience and elsewhere that mechanisms for dealing with irrigated acreage and flow rate descriptions exist in every adjudication process. We therefore turned our attention to an analysis of the Montana process to examine and evaluate, to the extent possible, the efficacy of the mechanisms it provides.

The mechanisms available in the process, which remains a judicial one, include the use by the Court of the DNRC claim verification reports, optional field verification at the direction of the Court, and additional evidence presented by the claimant, if requested by the Court, or by adversaries if objections to a claim have been filed.

We understand the Water Courts now call claimants in for presentation of further evidence to resolve differences between the claims and the verification reports when those differences are flagged by "issue remarks" made by DNRC on the claims abstract.

At the preliminary and the temporary preliminary decree stage, the protest mechanism becomes available. Any other appropriator who believes a claim has been erroneously decreed may protest its issuance and set up an adversary proceeding in

which the accuracy issue may be litigated. If he fails to receive the corrective relief he seeks from the Water Court, he may perfect an appeal therefrom to the Montana Supreme Court based on whatever factual record he has been able to make before the Water Court.

All told, there are a total of six mechanisms available throughout the process which can be invoked to assure the accuracy of the descriptions of irrigated acreage and rates of flow of decreed rights. One, the DNRC claim verification, is mandatory. Two mechanisms, the call in of the claimant and the direction for a field investigation by DNRC, are available at the discretion of the water judge. Three such mechanisms, the objection, the protest and the appeal to the Supreme Court, are available at the discretion of other appropriators, including DNRC. Such a large number of corrective mechanisms would appear ample when compared with the Colorado systems, both pre-1969 and post-1969, which have never had a mandatory detailed claim verification procedure of the type in use in Montana but relied entirely on voluntary adversarial mechanisms as by objection or protest to force litigation over accuracy issues.

Critics of the process, however, charge that those mechanisms are not adequate to achieve "sufficient accuracy" because:

1. The Water Judges do not use the call in and DNRC field investigations often enough;

2. Neighbors are not policing neighbors through the objection process; and

3. The judicial system is too burdensome for affected appropriators to use.