

Exhibit Number: 11

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CERTIFICATE OF SERVICE

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

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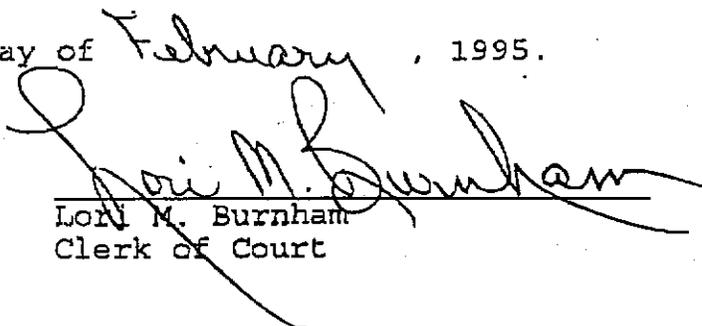
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DATED this 8 day of February, 1995.


Lori M. Burnham
Clerk of Court

Re: HB 7824

EXHIBIT 11
DATE 3.23.05
HB 782

Montana Water Court
PO Box 879
Bozeman, MT 59771-8879
1-800-624-3270 (In-state only)
(406) 586-4364

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

IN THE MATTER OF THE WATER COURT)
PROCEDURES IN ADDRESSING FACTUAL)
AND LEGAL ISSUES CALLED IN)
"ON MOTION OF THE WATER COURT")

CASE NO. WC-92-3

FILED

FEB 8 1995

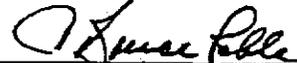
Montana Water Court

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

ORDER DENYING MOTIONS TO DISMISS

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

DATED this 8th day of FEBRUARY, 1995.


C. Bruce Loble
Chief Water Judge

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

The issues framed by the Court in its Order are:

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

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

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

When the Court issues a new basin decree, these issue

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MEMORANDUM

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

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

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

THE WATER COURT'S AUTHORITY

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

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

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

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

With regard to the consideration of a matter within his

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

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

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

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

SUMMARY

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

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

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

Guidelines for Exercising the "On Motion" Authority

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

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

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

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

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

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

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

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

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

Most important: Quantify water use rights to protect users in our jurisdiction from claims exerted by other jurisdictions and out-of-state interests.

Second: Provide a basis for better internal administration by (1) resolving disputes among rivals; and (2) provide base knowledge from which to determine availability of waters for future appropriation.

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

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

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

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

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

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

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

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