

RE: HB782 (5)

EXHIBIT 12
DATE 3.23.05
HB 782

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MEETING ON WATER COURT RULES

NOVEMBER 21, 2000

C. BRUCE LOBLE, CHIEF WATER JUDGE, Presiding

Recorded by:
Lori M. Burnham Beck
Clerk of Court
MONTANA WATER COURT
P. O. Box 1389
Bozeman, MT 59771-1389

1 we have these rules and we know what the rules are now, because we are wasting our time and our
2 resources. Not just the United States, but the State and everybody at this table if we don't know
3 what's going to happen if we don't resolve an issue remark. It's going to go away, if it's going to
4 somehow be called back in by the Water Court or an institutional objector. It's very important for us
5 to understand now. And, I don't think we can continue spending our resources issuing decrees and
6 objecting to claims in decrees without knowing.

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9 JUDGE LOBLE: Well, let me just address some of these. As I understand, I've been
10 in the water rights business now since 1973 is when I first started working in water rights. And, I've
11 been at the Water Court for a little over 10 years. The adjudication of water rights when it was first
12 started in 1979, Senate Bill 76, was designed to be a fast process. When people started this they
13 thought it was going to get over with very quickly and why they came to that conclusion, I have no
14 idea, having been here 10 years, but that was the concept. The concept also was that the claims were
15 prima facie proof of their contents. And the drafters of Senate Bill 76, which I think you were one of
16 them, Senator, weren't you? Okay. They were knowledgeable water users. They were not
17 subdividers in the Bitterroot. They were cowboys that have been working on their water rights for
18 years and years and years. They knew what their water rights are. My perception is that they thought
19 everyone knew their water rights as well as they did and when they started this process they said, "we
20 are going to make all these statements of claim prima facie proof," and from a lawyer's standpoint
21 and from a judge's standpoint, prima facie proof is a serious, serious evidentiary rule. And, what it
22 meant was, we were concerned there was a great deal of concern about downstream water users
23 coming up and taking Montana's water, so they made them prima facie proof and that was going to

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1 be the standard and water rights, your neighbor had to come in and object to your water right and I
2 think that's the way it was generally set up and everybody expected that they would take three years
3 to file their statements of claim. That people would know what their statements of claim were. That
4 they'd do those three years, they'd work on them, they'd go do their research and we got out of this
5 that the neighbors who had a serious objection to the water rights would file an objection. Well, as a
6 practical matter, on April 30, 1982, people were still coming into my office and asking me to fill out
7 their water right claims at 2 and 3 o'clock in the afternoon and the deadline was at 5 o'clock. They
8 didn't have a clue, some of these folks, as to what their water rights were. So, as a practical matter
9 we don't have a group of people in this state who were water users who really understand what their
10 water rights are. Many of these statements of claim are, although prima facie proof, are totally
11 inaccurate. They are filled with typographical errors, they're understated, they're overstated, they
12 claim the wrong decrees, they're claiming notices that were incorporated into a decree. I mean, there
13 are all sorts of real problems with them and as the Water Court has been going down through the
14 process, all of a sudden we started finding, well, what do you do? You've got human beings that
15 made errors. So, we, you cannot terminate somebody's water rights just because they filled out the
16 paperwork wrong. But we also have this prima facie proof concept. So, the Water Court over the
17 years has been kind of, Judge Lessley set it up as a very user friendly system so that you didn't have
18 to have lawyers in the process. So that just general people could come in and part of the concept was
19 people would come to the DNRC and deal with them and that would be helpful for people and you
20 would, other people would hire consultants, other people would hire lawyers. But, the whole
21 concept was to let people get through the system as easy as they could. And, as a practical matter,
22 people are not objecting to their neighbor's water rights and so gradually the Water Court, well the
23 DNRC made an effort to find quality to what the, find the water rights accurate and there were
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1 serious political repercussions. They lost significant staff for doing that. DFWP has made kind of an
2 effort and they get serious political repercussions come to DFWP, I suspect, and complaints about
3 what they've done, and they've all withdrawn. And, so finally, we're at the point where I watch
4 water rights cross my desk and I try to decide, well, here's a water right that's in the wrong legal
5 description. I can look at it and I can see it and we have actually contacted claimants and said, "you
6 know we think your water right is in the wrong township and range" and they get mad at you. You
7 are just one more government agency trying to take away their water right because the way their
8 ranch happens to be right on the township and range line. And, so we are constantly having to
9 struggle with how we solve this process. We could just go through the process very quickly, not
10 worry about it, but we know what's going to happen when the district court comes time to enforce
11 those decrees. We'll go on to a decreed water right stream and intermixed in all those decrees are
12 notices of appropriation, decreed water rights, and you just look at those and you think, "I'll bet all
13 those notices of appropriations were involved in the decree back in 1902." And so, what you've got
14 is a sort of doubling up or tripling up of water rights. And, we know very well that when that water
15 rights are enforced, that in all likelihood there are going to be some decreed water users who are
16 going to just scream when they find out that they had, their priority date was number five and now
17 they are going to be number ten. And so we struggle with that at the Water Court, just on a daily
18 basis, trying to figure out what to do about it. Frankly, when we went to the On Motion decision, we
19 pulled back from all those on motions. We have taken the position that by and large, that's not our
20 problem. And, except for a couple of examples, one of which is 41C-67 that Cindy was involved in,
21 in which the Water Master found somebody had claimed a water right as a decreed water right,
22 claimed it as a decreed water right. When the Water Master looked at the decree, he couldn't find it
23 in the decree. It wasn't there. So he said, well, should we let that one go through and we didn't.

1 And we've been criticized for it. What do you think we should do in that situation? I'm more
2 concerned about what we do with settlements. Because that, I think you can make a valid point that
3 people have to file objections to the water rights, if they don't do it, you want a rule, that's the rule
4 that I think the Legislature said. If the United States doesn't object to a water right, too bad. The
5 issue remarks, I don't know what to do with the issue remarks. Whether we leave them on or take
6 them off, I'm not concerned about that. I don't even know what that effect has if you leave the issue
7 remarks on. I don't know. My biggest concern is what do we do when people come in and want to
8 enlarge their water rights on a settlement and we know if somebody comes in and says "I stipulate
9 that my water right, the facts of my water rights is it has been used since 1867, even though I claimed
10 it as 1972 but it is 1867 and here's my affidavit that says I know, I talked to people, I read the record
11 and I know that my water right was used in 1867." Those are of more concern to me than almost
12 anything else. Because those stipulations aren't reviewed by anybody other than the Water Court and
13 the other water users on the stream are not going to know anything about it. We are going to finalize
14 those decrees and all of a sudden some district judge is going to be put in a position of enforcing of a
15 water right decree that has shifted the priorities on the streams from them, beyond what people
16 thought about.

17 J. STULTS: Jack Stults, again. I have this notion from the things I've read or from
18 my own business activities, personal business activities, that in class-action lawsuits the judge has a
19 role in reviewing and accepting, so it's not unheard of for courts to have that responsibility, not just
20 authority. Is that, am I correct on that?

21 JUDGE LOBLE: You're correct on that.

22 J. STULTS: And I guess, just in mulling this stuff over in my own mind, and I guess
23 I'm just, this is probably not the right place to be talking off the top of your head. Nevertheless, I'm
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