

January 6, 2005

Ex. No. 2

No. 86-397

IN THE SUPREME COURT
OF THE STATE OF MONTANA

IN RE THE MATTER OF THE ACTIVITIES)
OF THE DEPARTMENT OF NATURAL RESOURCES)
AND CONSERVATION)

PETITION TO REVISE WATER RIGHT CLAIM EXAMINATION RULES

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**PETITION TO REVISE
WATER RIGHT CLAIM EXAMINATION RULES**

On behalf of the Montana Water Court, the chief water judge respectfully submits the attached Water Right Adjudication Rules to the Montana Supreme Court for its consideration. If adopted, the proposed revised rules would replace the current Water Right Claim Examination Rules, which were originally issued by this Court following its decision in *Matter of Department of Natural Resources and Conservation* (1987), 226 Mont. 214, 740 P.2d 1096, and later revised on January 15, 1991.

The attached proposed rules include significant revisions to the practice and procedure rules applicable to the Water Court and to the water right claim examination rules applicable to the Department of Natural Resources and Conservation ("Department"). The proposed revisions have been the subject of extensive public comment over the last several years and many of the revisions are included as a result of that comment. The Water Court practice and procedure rules contain the most controversial revisions. Most of the proposed revisions to the claim examination rules were made at the suggestion of the Department and are less controversial.

During the last several months, the Environmental Quality Council ("EQC") has been engaged in an interim study of Montana's general water rights adjudication. *See generally*, Legislative Environmental Quality Council, *Montana's Water - Where is it? Who can use it? Who decides?*, Report to the 59th Legislature of the State of Montana

(2004) (hereinafter referred to as the "*EQC Report*") (available at <http://leg.state.mt.us/content/publications/lepo/2005waterreport.pdf>). The EQC determined that if the adjudication process is to be sped up and made more accurate it would require additional funding. *EQC Report* at 73.

The EQC established a water adjudication funding work group. The work group did not recommend infusing additional revenue into a system if there were problems. One of the issues identified as a concern was that issue remarks, generated during the Department claims examination process, may remain on claim abstracts if the issues identified by the remarks are not resolved through the objection process. *EQC Report* at 73.

The Montana Attorney General suggested a solution to the concern of leaving unresolved issue remarks on claim abstracts whereby the Water Court would exercise its *On Motion* authority and review and resolve all issues raised by the remarks on its own initiative. The Department, the Department of Fish, Wildlife, and Parks and some water users support this solution. Based on some of the comments the Water Court received during public comment periods on earlier draft rules, this solution is controversial and is not universally supported by all water users. The EQC appears to have adopted the Attorney General's suggested solution.

The EQC work group asked the Water Court to identify how much funding for

additional staff would be necessary to implement an on motion policy that insures all claims across all basins would be treated equally. *EQC Report* at 75-76. The Water Court provided that information. The work group incorporated that funding information into a proposed funding bill.

House Bill 22, sponsored by EQC Chair Walter McNutt, reflects the EQC work group's efforts. On January 6, 2005, the EQC is scheduled to make its final decision on House Bill 22 as a committee bill.

House Bill 22, as currently introduced, proposes the implementation of a water adjudication fee to generate the revenues needed to complete the adjudication in a "timely and accurate manner." The revenue generated by House Bill 22 is to be allocated to the Water Court and to the Department. The EQC staff drafted the bill with the expectation that it would produce enough revenue to add seven FTEs to the Water Court staff and with the further expectation that the Water Court would use this additional staff to issue decrees in all remaining basins in fifteen years and resolve all issue remarks in the adjudication. Additionally, the bill contemplates adding significant adjudication FTEs to the Department to complete its claims examination effort within ten years and to support the Water Court's effort to resolve all issue remarks.

To meet EQC's expectation of the Water Court resolving all issue remarks,

proposed Rule 1.II(7) is included in the attached rules.¹ This proposed rule states:

(7) Issue Remarks. If not otherwise resolved by the objection process, the water court shall review, resolve, and remove all issue remarks appearing on the abstracts of any claim in all Temporary Preliminary or Preliminary Decrees issued after March 28, 1997. All issue remarks shall be resolved prior to the issuance of the final decrees.

If the Supreme Court were to adopt this rule without the Legislature funding the additional Water Court and Department staff needed to implement the proposed rule (through the passage of House Bill 22 or otherwise), the Water Court would likely be unable to comply with the mandated issue remark resolution rule without basically ending the Department's claims examination effort or postponing the resolution of unresolved issue remarks for decades. Potentially, the overall speed of the adjudication could even be brought to a gradual halt.

Montana's general adjudication of water rights is currently at a critical crossroads. House Bill 22, and other adjudication legislation already introduced or waiting in the wings, may change the direction and the pace of the adjudication. It may be wise judicial economy to await the outcome of the 2005 Legislature before processing the attached rules.

Accordingly, the Water Court recommends that:

¹ The March 28, 1997 date in proposed Rule 1.II(7) refers to § 85-2-233(1)(c), MCA.

1) the Supreme Court delay acting on these proposed rules until the 2005 Legislature completes its consideration of House Bill 22 and other adjudication legislation in order to know whether or not to proceed with Rule 1.II(7); and

2) the Water Court be permitted to supplement this petition with a brief and exhibits addressing the background of the on motion and issue remark resolution portions of the proposed rules, together with a discussion of the possible ramifications created by the success or failure of adjudication legislation in the 2005 Legislature. Unless the legislative outcome of House Bill 22 and other adjudication legislation becomes clear before the Legislature adjourns, the brief should be filed on April 26, 2005.

DATED this 30th day of December, 2004.

C. Bruce Loble
Chief Water Judge

