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COMPARISON OF THE WATER COURT VERIFICATION PROCEDURES  
TO THE SUPREME COURT  
EXAMINATION PROCEDURES FOR  
MUSSELSHELL RIVER BELOW ROUNDUP DRAINAGE - 40C

Prepared By

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\*\*Appendices C and D are not attached but are available. Appendix B is not yet finalized, but will be made available. These materials may be viewed at the local water rights field office, or can be obtained upon request by writing:

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## I. PURPOSE

This report for the Musselshell River drainage below Roundup, Basin 40C, is designed to describe the major differences between the Water Court Verification Manual used to review claims in this basin and the Water Right Claims Examination Rules adopted by the Montana Supreme Court on July 7, 1987. In addition, the report estimates how much time would be required to re-examine Basin 40C claims using the Supreme Court Rules.

This report is written by the Department of Natural Resources and Conservation (Department) in response to the August 6 and August 19, 1987 orders from Chief Water Judge W. W. Lessley, and to the February 19, 1986 stipulation between the Montana Water Court and several parties before the Montana Supreme Court (Cause Nos. 85-345, 85-468, and 85-493.) The orders, attached to this report, address the issue of re-examination of basins already reviewed by the Department.

Basin 40C claims have not been fully reviewed using the Water Court verification procedures. A temporary preliminary or preliminary decree has not been issued. The basin has not been examined using the newly adopted Supreme Court rules.

Based on the information presented in this comparison report, the Water Court may require re-examination by the Department of a portion or all of this basin before issuing a temporary preliminary or preliminary decree.

## II. SUMMARY

This report outlines areas of the procedures used to examine claims in the Musselshell River drainage below Roundup, Basin 40C, that have significantly changed as a result of the Supreme Court Water Right Claim Examination Rules. Over one-half of the new procedures are significantly different from past procedures. This means that if the water right claims in this basin were to be re-examined under the new procedures, the information reported to the Water Court - the information it uses in preparing the decree - would be substantially different. The consistency and accuracy of the decree should be improved using the new procedures.

This report provides information needed to decide if Basin 40C claims should be re-examined. The report identifies the claim review procedures into three categories - Substantial Differences, Minor Differences, and Substantially Equivalent. Substantially different procedures would change decree information critical to the water right, e.g., flow rate. Procedures listed as minor differences would not have a significant effect on critical water right information. All procedures not fitting the first two categories were listed as substantially equivalent. The comparison of procedures for Musselshell River drainage below Roundup, Basin 40C, shows 53% substantial differences, 26% minor differences, and 21% substantially equivalent.

The phrase "water right claim review procedures" covers a broad area. In the past, the process was titled "verification." Under the new rules, the process is called "examination." Regardless of title, the process includes two broad categories. First, "claim review procedures" covers the process by which the Department gathers information about the claimed water rights. Second, it covers the process by which that information is reported to the Water Court and, ultimately, to the public.

In the area of collecting data, the Department's ability to gather information from claimants has been greatly expanded under the new Supreme Court rules. Generally, when Basin 40C was verified, the Department's ability to contact claimants was limited by the Water Court to those situations specified in its Water Right Claim Verification Manual. Since the manual did not anticipate every situation where communication with the claimant was needed, the claim review was restricted. In the future, the department may contact claimants whenever issues on claims are unresolved by routine examination procedures.

The Water Court's verification procedures used in reviewing claims in this basin allowed the Department to change many key items of the water right claim without notifying the claimant. Under the new procedures, the Department will not change claimed items, unless the claimant is notified or there is an amendment to the claim.

Also, the Department may now have greater authorization to conduct field investigations. In Basin 40C, no field investigations were requested because the Water Court made it clear it was reluctant to authorize any.

The second major change in claim review procedures is in reporting information to the Water Court. When Basin 40C was verified, much information was gathered which, at the direction of the Water Court, was not reported as issues. Under the new procedures, such information will be reported to the Court. For example, in checking irrigated acres, the reviewer had two choices - listing acreages as irrigated or not. There was no direction to report to the Court additional information such as instances of obvious prolonged non-use or apparent incremental development, except for possibly noting it in the claim file. In the future, issues such as these will be reported to the Water Court.

Under the new Montana Supreme Court examination rules much more information may be requested from the claimant. This is likely to result in more and better information to report to the Water Court and potential objectors. It may also result in amendments from claimants to correct errors.

Increased freedom to communicate with the claimants during the examination of this basin is likely to result in more accurate data, may result in more amendments to claims, and therefore, may reduce objections to the decree when it is issued. There are many issues involving claimed water rights in Basin 40C which are yet undiscovered, unreported, or unresolved. More issues would have been identified had the claims been reviewed under the new rules with increased claimant involvement. A re-examination of the basin under the new rules would have the same benefits.

### III. COMPARISON OF PROCEDURES

Water right claims in the Musselshell River drainage below Roundup, Basin 40C, were reviewed by the Department from July, 1984 to December, 1985 using the Water Court verification procedures. This basin is not considered fully verified.

Differences between the past verification procedures and the new examination procedures are identified in Table 1. The table lists the various elements and issues involved in the review of each water right claim. Three columns categorize the levels of difference which the Department perceives exist between the past and new procedures. The three categories are as follows:

- Substantial Differences: Application of substantially different examination procedures may have a major impact on the information provided to the Water Court.
- Minor Differences: Application of examination procedures with minor differences is not likely to change the information provided to the Water Court.
- Substantially Equivalent: Application of examination procedures in these areas would not change the information provided to the Water Court.

The examination of any element or issue which is substantially different from past verification procedures is discussed in this section. Procedures with minor differences and procedures substantially the same are not discussed.

Also provided as Appendix A is a list of statistics on the claims in this basin. Three other appendices are available upon request from the Department. Appendices B and C provide detailed discussions on the Water Court verification procedures and the examination procedures adopted by the Supreme Court. Appendix D provides a general history of Montana's adjudication program.

TABLE 1. COMPARISON OF PROCEDURES FOR BASIN 40C

	<u>Substantial Differences</u>	<u>Minor Differences</u>	<u>Substantially Equivalent</u>
<b>Background</b>			
1. DNRC Purpose And Role.....	X		
2. Examination vs. Verification.....	X		
<b>General Provisions</b>			
Public Meetings			X
3. Claimant Contact.....	X		
4. Field Investigations.....	X		
5. Clarification.....	X		
6. Amendments To Claims.....	X		
Implied Claims			X
Late Claims		X	
Terminating Claims			X
Multiple Use Of A Right		X	
7. Transfers.....	X		
8. Change In Appropriation Right.....	X		
9. No Rights.....	X		
<b>Procedures For All Claims</b>			
10. Owner Name And Address.....	X		
11. Point Of Diversion.....	X		
12. Means Of Diversion.....	X		
13. Reservoirs.....	X		
Source			X
Priority Date		X	
<b>Procedures For Specific Claims</b>			
<b>Irrigation Claims</b>			
Purpose		X	
14. Type Of Irrigation System.....	X		
15. Place Of Use .....	X		
Flow Rate		X	
16. Volume.....	X		
Period Of Use			X
Irrigation District		X	
<b>Domestic Claims</b>			
Purpose		X	
Place Of Use			X
17. Flow Rate.....	X		
Volume		X	
Period Of Use			X
<b>Stock Claims</b>			
Purpose		X	
Place Of Use			X
18. Flow Rate.....	X		
19. Volume.....	X		
Period Of Use			X
<b>Other Uses Claims</b>			
20. Purpose.....	X		
Place Of Use		X	
21. Flow Rate.....	X		
22. Volume.....	X		
Period Of Use		X	

## 1. DNRC PURPOSE AND ROLE

The purpose and role of the Department in claim examination has been to assist the Water Court by providing information for the adjudication of water rights. In the past, the Department was restricted to providing only the information the Water Court requested. In the future under the new rules adopted by the Supreme Court, the Department will conduct a considerably more thorough factual review and will report any information that appears pertinent to the full understanding of the water right.

## 2. EXAMINATION VS. VERIFICATION

In the past, the limits of verification procedures had been established by the Water Court and were constantly changing without a formal process. Now the limits of factual examination procedures have been established by Supreme Court rules and will be implemented by the Department with the Water Court's guidance. The new rules involve public review and a more formal process required for changing them.

The new examination procedures will be consistently applied within a basin as well as between basins. In the past, procedures which changed during the course of a basin verification were generally not retroactively applied, resulting in unequal treatment in reviewing and objecting to the claims in this basin.

During the course of applying the Water Court verification procedures in this basin, five procedural updates occurred containing clerical, processing, and substantive policy changes. The substantive policy changes will be addressed under the respective water right elements affected. These changes resulted in a variation of procedures within and between basins.

The new Supreme Court rules will encourage consistency of the review process, increase water user participation in the process, and promote greater accuracy in the resulting decrees.

## 3. CLAIMANT CONTACT

Past Water Court verification policy limited claimant contact to specific situations, and in some situations only with Water Court approval. Items on claims were changed without notifying the claimant of the alterations.

The new procedures greatly expand the use of claimant contact. Claimants may be contacted by the Department whenever any element of a water right is unclear, questionable, or contains discrepancies that cannot be resolved by routine examination methods. This procedure will increase efficiency,

save time, provide equal treatment to all claimants, and increase the accuracy of the information presented to the Water Court.

With more claimant contact before decree issuance, the number of inaccuracies and inconsistencies should be reduced. Information presented to the Water Court will be better understood by the parties prior to the objection stage. The necessity of objections by claimants to their own claims or others should be reduced.

#### 4. FIELD INVESTIGATIONS

Under past policy, field investigations were to be conducted only with Water Court approval. The Water Court's verification manual insisted that field investigations be kept to a minimum.

Due to the Water Court's reluctance to authorize field investigations, none were requested, even though situations were encountered where field investigations appeared necessary. In these situations, the claims were assumed to be correct without supporting documentation, or in some cases at the direction of the Water Court, a remark was added to the abstract of the claim. This may result in the decreeing of inaccurate claims based on incorrect assumptions which may not be addressed during the objection process.

In the future, a blanket authorization may be issued by the Water Court allowing the Department to conduct field investigations. Field investigations would then be conducted when a claimed right appears to be erroneous, exaggerated, or nonexistent, and routine examination procedures fail to resolve the discrepancies.

#### 5. CLARIFICATION

Clarification is the process by which elements of a water right are made more complete, clear, concise and interpretable without changing the intent of the claimed information. Most clarification changes involve making legal land descriptions more correct and concise according to the claimant's map and other reference data, making owner names and addresses consistent, and standardizing source names.

In the past, items were generally clarified without claimant contact when the claimed intent was reasonably clear. More accurate clarification could have been made if claimant contact had been encouraged. In the future, the claimant will be contacted whenever the claimed intent is unclear. The chance of making incorrect assumptions will be reduced.

Items which are clarified under the new rules will be noted in the decree as having been changed, whereas in the past no notation was used. Without going through the claims again and marking the clarified items, people reviewing the decree, if issued under the past procedures, would not know which claimed items were changed through the clarification process.

#### 6. AMENDMENTS TO CLAIMS

Under the past verification procedures, claimants could amend their claims at any time prior to the issuance of a temporary preliminary or preliminary decree. When the amendment was received, the claim was updated to reflect the amendment.

Under the new rules, an amendment to a claim requires a written request. The request must include the amended information, the date, the reason for the amendment, and the notarized signature of at least one claimant. When the Department receives the amendment, the information in the claim file will be updated. A remark will be added to the decree noting the amendment. Example: "The flow rate was amended by the claimant on 4/15/87."

This procedure will alert people reviewing the decree that the claim has been amended. The reviewer will then be able to evaluate the submitted amendment.

#### 7. TRANSFERS

Previously, when a water right transfer was received prior to final decree, the ownership was not updated to show the new owner of the water right. The integrity of the centralized record system mandated by the state constitution and law was not accurately maintained.

Under the new procedures, the ownership will be changed as soon as a transfer is received. The new owner will be listed as the owner of the right and the old owner will be maintained for notice purposes.

#### 8. CHANGE IN APPROPRIATION RIGHT

Past Water Court verification policy provided that a pre-July 1, 1973 existing water right with an associated Authorization To Change attached would be reviewed as claimed. This often meant the post-June 30, 1973 change was reviewed and decreed with no examination of the underlying historical right.

The new procedures state that the Department will attempt to examine a claim involving an Authorization To Change as it historically existed prior to July 1, 1973. The claimant may be

contacted and a field investigation may be conducted. The original claim will not be updated to reflect the change until after the final decree. If the claimed right reflects a post-June 30, 1973 change, this will be reported in the Department's report, whereas in the past this issue was not addressed. The new procedure should result in equal treatment of all historical water rights.

#### 9. NO RIGHT

Claims were "no righted" i.e. initially denied, by approval of the Water Court under past verification procedures in situations such as blank claims, grossly deficient claims, apparently nonperfected claims, future use claims, and duplicated claims. This "no right" assessment by the Water Court generally meant that the claimed water right had no legal basis in fact. Claimants could only object to the decree as an avenue for relief if they felt this assessment by the Water Court was incorrect.

Under new procedures, claims will not be "no righted" during the Department's examination. The claimant will be contacted for an explanation if a claim indicates one of the discrepancies stated above, or is of questionable beneficial use. If claimant contact is inconclusive, the issue will be noted, generally stating that beneficial use of water prior to July 1, 1973 is questionable. This will result in eliminating the possibility of misinterpreting the claimant's intent and incorrectly "no righting" a claim where the claimant does not review the decree or participate in the objection process.

#### 10. OWNER NAME AND ADDRESS

Past Water Court verification policy limited claimant contact regarding ownership issues. For example, if the claims by more than one party exceeded a formerly decreed flow rate, the Water Court authorized a remark for each claim indicating the overclaimed status of the formerly decreed right.

Under the new rules, ownership issues, such as an overclaimed formerly decreed flow rate or a place of use claimed by more than one claimant, will be researched. This may include ownership checks at the county courthouse, more precise mapping, and contacting the various claimants involved. Unresolved issues regarding ownership of property will be reported to the Water Court.

#### 11. POINT OF DIVERSION

Checking the point of diversion (POD) using the past verification procedures was not considered a major production. If the claimed POD could not be substantiated from the claimant's

map and other data sources, it was accepted as claimed. There was generally no claimant contact when the claimed POD was questionable. When the claimed POD was inconsistent with the data sources, the claimed information was changed to what appeared correct, without contacting the claimant.

The result was that many PODs used in common by more than one claimant may have received different legal land descriptions. No attempt was made to determine the actual condition or operating status of the diversion.

The new procedures require checking the claimed POD against the claimant's map as well as other references. If the POD cannot be substantiated or appears to be in error, the claimant may be contacted or a field investigation conducted. In certain situations where the entire right is unclear, a questionnaire may be sent requesting information regarding the right including information on the POD such as its condition, size, and operating status.

An effort will be made to assure that common POD's used for more than one claim are identified consistently. Unresolved issues regarding discrepancies in the claimed POD will be reported to the Water Court.

## 12. MEANS OF DIVERSION

In the past, the means of diversion was checked primarily to confirm that the claimed means of diversion was correctly denoted in the centralized record system. The review was not extensive. The claimed means of diversion was generally accepted as claimed and usually no claimant contact was conducted. Minimal effort was made to consistently identify similar means of diversion.

As a result, a wide range of descriptions were used to describe identical or very similar systems for diverting water.

The new rules call for checking the claimed means of diversion against the claimant's map as well as other references, including when necessary, claimant contact or a field investigation. An effort will be made that similar types of diversion means are identified consistently. Unresolved issues regarding discrepancies in the claimed means of diversion will be reported to the Water Court.

## 13. RESERVOIRS

Reservoirs were verified in the past using aerial photographs and USGS topographic maps. If the reservoir was not visible on the reference data, it was generally accepted as claimed. Unclaimed reservoirs that appeared to be associated

with the right were added to the right without claimant contact. Information was not gathered on the size, condition, or other characteristics of the reservoir.

This procedure resulted in adding reservoirs to a water right, whether it was claimed or unclaimed, without regard for its use, date of development, or other data about the reservoir.

Reservoirs will be reviewed more closely in the future. If the reservoir cannot be substantiated from the data sources, or is identified but not claimed, the claimant will be contacted and a field investigation may be conducted. If the claimed volume is greater than 15 acre-feet, a questionnaire may be sent requesting information regarding the reservoir. Generally, questionnaires will not be sent for reservoirs when the claimed volume is less than 15 acre-feet. Any reservoir found to be breached, washed out, in a state of nonuse, or to have other anomalies, will be reported to the Water Court.

#### 14. TYPE OF IRRIGATION SYSTEM

In the past, the claimed type of irrigation system was generally accepted. Very little effort was allowed to determine the accuracy of the claim, whether the claimed system was the historic system, or whether the historic system had been changed to the present system being used. If the decree were issued using the past procedures, the type of irrigation system would not be identified in the decree.

The new rules dictate a more careful scrutiny of the type of irrigation system in use presently and historically. The accuracy of the claimed flow rate and volume may be determined by the type of system. Several data sources may be used to check the claimed type of system. The claimant may be contacted for an explanation if questions arise. The type of irrigation system will be identified in the decree.

#### 15. PLACE OF USE (IRRIGATION CLAIMS)

In verifying the claimed irrigated acres in this basin,

- the claimed place of use (POU) had to appear irrigable from the claimed POD using the claimed method of irrigation; and
- aerial photographs had to show either present irrigation or acreage with indications of past irrigation; or
- the Water Resources Survey (WRS) materials had to indicate irrigation.

Minor POU discrepancies in the claimant's file were not resolved due to limited claimant contact allowed under the previous verification procedures. Only large discrepancies were handled by claimant contact. Evidence of prolonged nonuse of an irrigation right or distinct evidence of incremental development was not reported to either the Water Court or the public. The Water Court orally instructed the Department to ignore such situations - that it was up to other claimant's in the basin to discover and object to these issues.

Under the new procedures, at least two outside data sources are to be used in examining the claimed POU. A data source must show evidence of present irrigation for the claimed irrigated acres to be counted. If differences between the claimed POU and either data source exist, the claimant will be contacted and a field investigation may be conducted.

The Department will also contact claimants when their intent is unclear or when other POU discrepancies occur. When the review of the claimed POU shows evidence of nonuse, incremental development, or other discrepancies, these issues will be reported to the Water Court.

In the past, no field investigations were conducted to help resolve POU problems. In the future, field investigations may be conducted to gather more facts.

In summary, there are numerous irrigation claims that under re-examination would be "verified" with a much higher degree of accuracy due primarily to increased claimant contract, increased field investigations, and increased identification of issues. A wider range of data and issues would be reported to the Water Court.

#### 16. VOLUME (IRRIGATION CLAIMS)

Under past procedures, the Water Court established maximum volume standards based on the method of irrigation and the climatic area. When the claimed volume was greater than the standards, a remark was added to the claim stating that the Water Court would set a hearing to determine the issue. Claims for less than the standard volume were generally accepted as claimed. Volumes could not be changed unless the claimant requested an amendment in writing. On claims exceeding the Water Court standard, no claimant contact was pursued to determine the actual volume.

In the future, a volume will not be decreed for direct flow irrigation claims, but three other groups of irrigation claims will be decreed volumes.

- Waterspreading systems will be decreed the claimed volume. These systems will be compared to consumptive use guidelines established in the new rules. For volumes exceeding the guidelines an attempt will be made to identify the actual volume.
- Irrigation systems using stored water from reservoirs will be decreed the claimed volume. When the claimed volume exceeds 15 acre-feet, data will be gathered concerning the reservoir for the Water Court's analysis.
- Direct flow irrigation claims previously decreed by volume in district court decrees will be decreed the claimed volume. A remark will be added to the decree citing the former decree.

Unresolved issues regarding discrepancies in the claimed volume will be reported to the Water Court.

The verification in this basin was conducted using volume standards based on a 1973 climatic area map for Montana compiled by the USDA Soil Conservation Service. Future claim examination will use an updated USDA climatic area map published in 1986. In certain areas of the basin, the crop water use requirements are different between the two maps as the climatic area designations have changed.

#### 17. FLOW RATE (DOMESTIC CLAIMS)

Under the past procedures, the Water Court established a flow rate guideline for domestic use of 40 gpm. Claims were reviewed against this guideline as follows.

- Claimed flow rates less than or equal to 40 gpm were accepted as claimed.
- Claimed flow rates over 40 gpm were checked for supporting documentation of the actual flow rate, including claimant contact. If the flow rate was undocumented, the flow rate was reduced to 25 gpm without notifying the claimant. If the flow rate was documented, it was left as claimed.
- If no flow rate was claimed, the Department automatically assigned 25 gpm without notifying the claimant.
- For domestic claims with reservoirs, a flow rate would not be decreed. No flow rate figure would appear in the decree.

Under the new procedures, domestic flow rates less than 35 gpm will be decreed as claimed. The Department will contact claimants claiming a flow rate greater than 35 gpm or claiming flow rates that appear to be insufficient to satisfy the purpose. Claims involving onstream reservoirs will not be decreed a flow rate. For offstream reservoir claims, the flow rate will be examined using a guideline determined by the capacity of the diversion and conveyance system.

Claimed flow rates will not be changed unless amended by the claimant. Unsubstantiated claimed flow rates greater than 35 gpm will be reported to the Water Court.

#### 18. FLOW RATE (STOCKWATER CLAIMS)

Under the past procedures, the Water Court established a guideline for stockwater use of 40 gpm. Claims were reviewed against this guideline as follows.

- Claimed flow rates less than or equal to 40 gpm for wells, pumps, or gravity flow pipelines were accepted as claimed.
- Claimed flow rates over 40 gpm for wells, pumps, or gravity flow pipelines were checked for supporting documentation of the actual flow rate, including claimant contact. If the flow rate was undocumented, it was reduced to 25 gpm without notifying the claimant. If the flow rate was documented, it was left as claimed.
- If no flow rate was claimed for wells, pumps, or gravity flow pipelines, the Department automatically assigned 25 gpm without notifying the claimant.
- Claimed flow rates for stock drinking direct from surface water, including reservoirs, and for springs were reduced to zero. No flow rate figure would appear in the decree.

Under the new rules, the flow rate guideline for stockwater claims using wells, pumps, gravity-flow pipelines, or springs is 35 gpm. All claims below 35 gpm will be decreed as claimed. The claimants of claims exceeding the guideline or claiming a very low flow rate will be contacted and requested to submit additional documentation. Claims involving direct surface water stock use and onstream reservoirs will not be decreed a flow rate. For offstream reservoir claims, the flow rate will be examined using a guideline determined by the capacity of the diversion and conveyance system.

The Department will no longer reduce or increase claimed flow rates without an amendment submitted by the claimant. Unsubstantiated claimed flow rates above the 35 gpm guideline will be reported to the Water Court.

#### 19. VOLUME (STOCK CLAIMS)

In Basin 40C, volumes on stock claims were not reviewed and were not to be decreed an acre-foot volume figure. Instead, all stockwater claims would receive two remarks generally defining the volume for stock at 30 gallons per day per animal unit.

In the future, a volume will not be decreed for direct surface water stock use including headgate-ditch diversions but a remark will appear on the decree abstract limiting the volume to 30 gallons per day per animal unit. Two groups of stockwater claims will be decreed volumes.

- Wells, springs, pumped diversions, and gravity flow pipelines will be decreed the claimed volume. These systems will be compared to a guideline of 1.5 acre-feet per stock tank or point of use.
- Stockwater claims involving reservoirs will be decreed the claimed volume. When the claimed volume exceeds 15 acre-feet, data will be gathered concerning the reservoir for the Water Court's analysis.

Unresolved issues regarding discrepancies in the claimed volume will be reported to the Water Court.

#### 20. PURPOSES (OTHER USE CLAIMS)

Under the previous procedures, the Water Court determined "no right" on certain claimed purposes, e.g., erosion control claims, and recreation, fish & wildlife and wildlife claims with no diversion, impoundment, or withdrawal. This was done without prior notification or discussion with the claimant.

When more than one purpose was indicated on the claim form, the Water Court verification manual provided instructions for subordinating uses as incidental, or procedures for generating implied claims. The claimant was not consulted.

In the future, claims for purposes previously labeled "no right" would be decreed as claimed with a remark reporting the legal issue to the Water Court. Claimants will be contacted to resolve multiple claimed uses on one form. Greater effort will be expended to consistently identify similar claimed purposes.

Unresolved issues regarding discrepancies in the claimed purpose will be reported to the Water Court.

## 21. FLOW RATE (OTHER USE CLAIMS)

Under the past procedures, with a few exceptions, flow rates were decreed as claimed without review by the Department. The exceptions were

- when no flow rate was claimed for a purpose that would be decreed a flow rate, the Water Court was contacted;
- when evidence in the claim cast doubt on the claimed flow rate, the Water Court was contacted;
- mining, power generation, and fish raceways claimed flow rates more than 100 miners inches were compared with the average annual flow of the claimed source. If the claimed flow rate was greater than the average annual flow, it would be reduced to the average flow rate (regardless of the period of diversion, system capacity, or peak discharge) with no claimant contact; and
- flow rates were not to be decreed for recreation, fish & wildlife, wildlife, and navigation excepting "Murphy Rights" and certain recreation uses involving a diversion.

The new rules require an examination of the claimed flow rates. The claimed flow rates, which will be decreed, will be compared to what is customary and reasonable for the specific purpose. Claims involving onstream reservoirs will not be decreed a flow rate. For offstream reservoir claims, the flow rate will be examined using a guideline determined by the capacity of the diversion and conveyance system. The claimant may be contacted if the claimed flow rate differs from the identified guideline for the purpose claimed.

There will be no flow rate examination for recreation, fish & wildlife, wildlife, or navigation purposes except when a pumped diversion, headgate, or gravity flow pipeline is involved. The fact of no examination for these purposes will be reported to the Water Court.

Unresolved issues regarding discrepancies in the claimed flow rate will be reported to the Water Court.

## 22. VOLUMES (OTHER USE CLAIMS)

During the past verification, volumes were not critically reviewed, but were accepted as claimed. No claimant contact was

conducted concerning volumes. Water Court standards would have been applied automatically when the volumes were decreed.

- Claimed volumes for agricultural spraying greater than 5 AF/yr would be reduced to 5 AF/yr.
- Claimed volumes for industrial, commercial, and mining uses would be limited to the amount the flow rate could deliver for twelve hours a day for the claimed period of use. Claimed volumes exceeding the standard would be reduced, unless documentation substantiated a greater volume.
- Volumes were not to be decreed for recreation, fish & wildlife, wildlife, and navigation claims excepting "Murphy Rights" and certain recreation uses involving a diversion. For these rights not to be decreed a volume, a remark would appear in the decree defining them as nonconsumptive uses of water.

Under the new rules, volumes will be decreed as claimed. The claimed volume will be examined and compared to what is customary and reasonable for the specific purpose. The claimant will be contacted if the claimed volume differs from the identified guideline.

- There will be no volume examination for recreation, fish & wildlife, wildlife, or navigation purposes as no guidelines have been identified in the Montana Supreme Court Claim Examination Rules. The fact of no examination for these purposes will be reported to the Water Court.
- Other use claims involving reservoirs will be decreed the claimed volume. When the claimed volume exceeds 15 acre-feet, data will be gathered concerning the reservoir for the Water Court's analysis.
- There will be no use of the nonconsumptive use remark to define claimed purposes as nonconsumptive uses of water.

Unresolved issues regarding discrepancies in the claimed volume will be reported to the Water Court.

IV. ESTIMATED TIME FOR RE-EXAMINATION

The estimated time required to fully re-examine the Musselshell River drainage below Roundup, Basin 40C, utilizing two full-time Department personnel is 1.5 years. To the extent that Department personnel are used to re-examine claims, those personnel will not be available for initial examination.

The formula used to estimate time required to re-examine claims is:

$$\text{Years} = \frac{\text{ST claims} + \text{IR claims} + \text{DM claims} + \text{OT claims}}{\frac{8 \text{ claims/day} + 2 \text{ claims/day} + 6 \text{ claims/day} + 2.5 \text{ claims/day}}{250 \text{ working days year}}}$$

Six references were used to estimate the time frame to re-examine this basin.

1. A letter dated August 18, 1987 addressed to the Water Court from Gary Fritz, Administrator, Water Resources Division, DNRC.
2. A review of the monthly progress reports for the Lewistown Water Rights Field Office Adjudication staff.
3. A discussion with the Records Section Supervisor, Water Rights Bureau, DNRC, concerning the time needed to process the re-examined claims.
4. A review of Basin 40C claims.
5. A review of the new Supreme Court rules.
6. The time taken for the original verification of Basin 40C with a full staff of three persons as compared to the time needed for re-examination with a staff of two persons.

The time required to complete re-examination is only an estimate, since extensive re-examination has not taken place previously, and because no re-examination with the new Supreme Court rules has been done. This estimate does not account for other duties and activities required of the Department Adjudication Program staff, such as public assistance, Water Court assistance involving post-decree activities, water right transfers processing, and new appropriations program assistance.

## APPENDIX A. BASIN 40C STATISTICS

<u>Type of Claim</u>	<u>Number of Claims</u>	<u>Total Claims*</u>			
		<u>Filed</u>	<u>Type of Right Use</u>	<u>Decreed</u>	<u>Other</u>
Irrigation	439	227	197	13	2
Domestic	142	57	85	0	0
Stock	2779	453	2312	2	12
Other Uses	399	42	354	1	2
Commercial ( 6)					
Fish and Wildlife ( 23)					
Industrial ( 3)					
Lawn and Garden ( 2)					
Municipal ( 3)					
Oil Well Flooding ( 17)					
Recreation ( 1)					
Wildlife (341)					
Flood Control					
Total	3759	779	2948	16	16

Late Claims

Forty-three (43) claims have been submitted after the 5:00 p.m., April 30, 1982 filing deadline. One (1) of these claims is an implied claim, based on a late claim.

Implied Claims

Six (6) implied claims have been generated in this basin.

Filing Fee Not Received

Filing fees have not been received for five (5) claims. None of these claims are implied claims. All other claims in this basin were accompanied by the proper fee.

Interbasin Transfers

There were thirty-one (31) interbasin transfer claims in Basin 40C. All of these claims took water from either Basin 40A or 40C and used it in Basins 40A, 40C, or 40EJ.

Terminated Claims

There were twenty-five (25) claims terminated by the Department during the filing period which have not been examined. There are ten (10) additional claims that have been terminated by claimants.

\*Includes late claims and implied claims.

IN THE WATER COURTS OF THE STATE OF MONTANA  
\* \* \* \* \*

IN RE: RESUMING ISSUANCE OF BASIN DECREES  
AND ALLOWING MOTIONS FOR RE-EXAMINATION

\* \* \* \* \*

O R D E R

It is this Court's intent to proceed fully with the adjudication of pre-July 1, 1973 existing water rights as the Legislature has authorized and directed.

As part of the ongoing adjudication, it is now necessary for the Department of Natural Resources & Conservation to resume the claim examination activities performed under Section 85-2-243 MCA. Since July 15, 1987, this claim examination process has been governed by the Water Right Claim Examination Rules, issued by the Montana Supreme Court on July 7, 1987.

The issue remains, however, of the course to be followed in those basins already examined by the Department under the previous examination procedures, but not yet issued as the appropriate temporary preliminary or preliminary decree. The question is whether there is a need for these basins to be re-examined, either partially or wholly, under the new Water Right Claim Examination Rules.

The determination of whether any re-examination is necessary to a proper adjudication will be made by this Court, subject to review by the Montana Supreme Court. As the Supreme Court has recently stated:

"It has been suggested to us by counsel for the Washington Water Power Company and for the Montana Power Company, that the verification process that has been used heretofore is inadequate to insure accuracy in the water rights decrees and fairness to all claimants. These parties suggest that the new verification rules should be applied equally to all water rights claims, including those water rights claims which have been the subject of temporary preliminary decrees heretofore entered by the water courts.

As we have interpreted (Section) 85-2-243, MCA, and do now interpret it, the DNRC is required to 'conduct field investigation of claims that the water judge in consultation with the Department determines warrant investigation;....' It is clearly the statutory intent, that as to past verified claims or those to be verified under the rules now promulgated, DNRC may consult with the water judge about such verification but the final determination is to be made by the water judge. The role of DNRC is consultatory only. The DNRC, under (Section) 85-2-243, MCA, is 'subject to the direction of the water judge' in all matters pertaining to the adjudication of existing water rights."

Order Adopting Water Right Claim Examination Rules, page 2, (July 7, 1987) (Emphasis supplied).

The Department has recently informed this Court that legislative reductions in operating budget will drastically reduce the level of field office claim examination services and personnel, apparently by as much as two-thirds. Under these conditions it is logical that any substantial re-examination of claims will impact the examination of new basins.

On the basis of information provided by the DNRC, there are currently five basins in which the claim examination process under the previous "verification manual" has been fully completed but no decree has yet been issued. Those basins are:

1. Basin 40K - Whitewater Creek
2. Basin 43A - Shields River
3. Basin 40C - Musselshell River below Roundup
4. Basin 41G - Jefferson River
5. Basin 41C - Ruby River

These basins are essentially ready to be issued as the appropriate temporary preliminary or preliminary decree. Any decision to re-examine these basins now, considering the DNRC's limited examination resources, should be made only where there is a clear necessity for such re-examination.

To assist this Court in determining the need for re-examination, it is hereby,

ORDERED, that the DNRC may, within 30 days from the date of this Order, prepare and file with the Water Court, a "Motion for Order to Re-Examine" in any of the five basins addressed by this Order. Any such motion shall be filed in accordance with the Montana Rules of Civil Procedure and Rule 1.II of the Water Right Claim Examination Rules, issued by the Montana Supreme Court, July 7, 1987.

FURTHER ORDERED, that any such Motion to Re-Examine shall include:

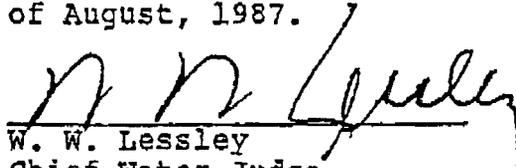
1. A precise and detailed explanation of any alleged deficiencies in the previous DNRC examination of claims under the old "verification manual."
2. A precise and detailed explanation of how such alleged deficiencies would be addressed and corrected by re-examination under the new Water Right Claim Examination Rules.
3. A reasonable, good-faith estimate of how long any such re-examination would take, and how many, full-time field office personnel would be committed to the re-examination efforts.

4. A precise statement detailing how any such re-examination efforts would affect the examination of new claims.

FURTHER ORDERED, that if no Motion to Re-examine is filed in a particular basin within the 30 day time frame, the Water Court will conclude that the DNRC could find no need to re-examine that basin.

FURTHER ORDERED, that the DNRC shall not take action to re-examine any claims in any basin without the express authorization and approval of this Court.

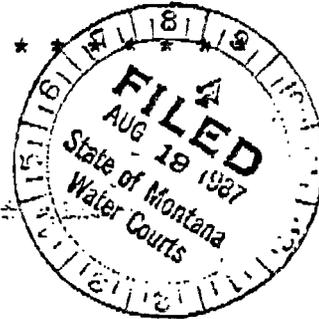
DATED this 6 day of August, 1987.

  
W. W. Lessley  
Chief Water Judge

IN THE WATER COURTS OF THE STATE OF MONTANA

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IN THE MATTER OF THE ADJUDICATION )
OF THE EXISTING RIGHTS TO THE USE )
OF ALL THE WATER, BOTH SURFACE AND )
UNDERGROUND, WITHIN ALL WATER BASINS )
IN THE STATE OF MONTANA. )



O R D E R

On the basis of information supplied by the Department of Natural Resources and Conservation, (Department), it appears that claim examination under the "verification manual" procedures has been fully completed in the following five basins:

- Basin 40K - Whitewater Creek
Basin 43Q - Shields River
Basin 40C - Musselshell River Below Roundup
Basin 41G - Jefferson River
Basin 41C - Ruby River

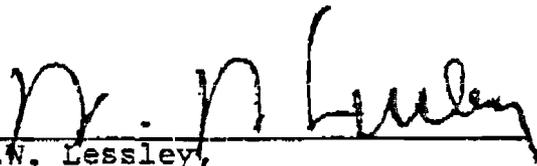
Before these basins are issued as temporary preliminary or preliminary decrees, the necessity of re-examining these basins under the Water Right Claim Examination Rules shall be considered.

To assist the Water Court in determining such necessity, and under the authority of Sec. 85-2-243, MCA, it is HEREBY

ORDERED that the Department shall, within 30 days from the date of this Order, submit to the Water Court a statement detailing any substantial differences between the claim examination procedures set forth in the Water Right Claim Examination Rules and those conducted in the five basins pursuant to the "verification manual".

FURTHER ORDERED that the Department shall, for each basin listed in this Order, provide a good-faith estimate of the time which would be required to fully examine each basin under the procedures set forth in the Water Right Claim Examination Rules.

DATED this 19 day of August, 1987.

  
\_\_\_\_\_  
W.W. Lessley,  
Chief Water Judge

cc: Honorable Justice John Sheehy