September 10, 2004

C. Bruce Loble
Chief Water Judge
Montana Water Court
P.O. Box 1389
Bozeman, MT 59771-1389

RE: Draft On-Motion Water Court Rules

Dear Judge Loble:

Thank you for providing a copy of your proposed on-motion rules for review prior to presenting your proposal to the Environmental Quality Council. As you know the Advisory Committee worked extensively on drafting a simple and workable process that would use issue remarks from the Montana Supreme Court Claims Examination as the basis for calling in all claims with outstanding legal or factual matters that necessarily should be resolved prior to a final decree in the statewide adjudication. The Advisory Committee Adjudication Accuracy Work Group submitted a simple two-step process for consideration of the entire committee. Although a subsequently scheduled advisory committee meeting was cancelled and no other meeting of the committee has been called by the Court, the minutes of the February meeting in Bozeman reflect an agreement that the advisory committee would have an opportunity to review and work with the court on the draft rules.

During the seven months since our last meeting, the Adjudication Advisory Committee work group's on-motion process was been presented and extensively discussed with the EQC Interim Committee, along with proposals for increased fee-based funding for the on-going adjudication. With accuracy of the final decrees brought before the EQC along with the need to increase the speed at which the adjudication is proceeding, the proposed fee-based funding appears to have been structured on the assumption that a simple, but certain, review of each significant issue remark would be included in a more efficient examination and court review of the claims. It does not appear that a process such as the one proposed in your recent draft was made a part of the assumptions considered when the calculations of funding needs were made.

Addressing some, but not all, issue remarks that are significant enough to have been attached as a result to the Supreme Court's Claims Examination process will leave inaccuracies in final decrees. Leaving the determination of what issue remarks (beyond those listed in proposed rule (7)(a)) are to be reviewed to a "steering committee" as proposed at (7)(d)(iv) allows for disparity across basins and uncertainty in the outcome. In reviewing the possible disparity among basins, concern arises over the apparent disregard for the accuracy of decrees issued prior to March 28, 1997. All issue remarks on decrees issued prior to or subsequent to that date should be considered under a mandatory on-motion process to assure that all matters significant to the claims are resolved prior to a final decree.

Examination under the Supreme Court Claims Examination Rules provides the court with sufficient evidence to warrant a mandatory on-motion review of the prima facie claim in light of the issue remark. A determination of which *de minimus* remarks may be omitted from an on-motion process (because they are merely ministerial in nature or insignificant for the purpose of administration or distribution of water) will serve all basins equally and consistently and remove the need for unnecessary on-motion cases. The determination by the Court of which *de minimus* remarks need not be included in an on-motion process should be specifically submitted to the Supreme Court within the rules.

The Water Court Adjudication Advisory Committee remains available to assist the Court with preparing workable rules. I once again forward the Adjudication Accuracy Work Group's January draft of the "Proposed Process for Examination and Water Court Resolution of Supreme Court Issue Remarks" for the Court's reconsideration of a simple, workable, affordable review of issue remarks.

Yours truly,

Candace F. West
Assistant Attorney General

Cc: Water Court Advisory Council
Environmental Quality Council

Enc: Dec. 17, 2003 Draft

ADJUDICATON ADVISORY COMMITTEE

Adjudication Accuracy Work Group's

PROPOSED PROCESS FOR EXAMINATION AND WATER COURT RESOLUTION OF SUPREME COURT ISSUE REMARKS

December 17, 2003

The examination of water rights in Montana's statewide adjudication is controlled by the Montana Supreme Court Water Right Claim Examination Rules (Supreme Court Rules). An "examination manual" sets out the procedures to implement the Supreme Court Rules. The DNRC Water Resources Specialist in the Regional Offices then examines each claim in accordance with the examination manual. Supreme Court "issue remarks" are added to water right claims to point out issues of fact or law (or to clarify a specific element of a claim).

The process is as follows (proposed additions to the present process are highlight in *italics*):

Claims are examined a basin at a time, and within the basin, by ownership.

Claimant Notification and Meeting # 1

Once all of a water right owner's water right claims are examined, if any one of the water right claims in the group requires contact, the claimant is notified by the DNRC.

The notification will include a statement that all Supreme Court issue remarks raised as a result of the claims examination process will be resolved through:

1) a voluntary amendment by the claimant resolving the issue remark prior to going before the Water Court;
2) ***an adversary objection proceeding before the Water Court; or***
3) ***an "on-motion" proceeding before the Water Court.***

A meeting between the water right claimant and the DNRC is scheduled to discuss the claims.

In a Meeting with the claimant:

1. DNRC explains the examination process and the Water Court process, and how the Water Court will address unresolved factual issues.

The claimant is responsible for amending the claim or providing additional evidence to support the claim sufficient to resolve the issue remark. (Claimant must bring forward the same information that would have been required to not have the remark put on in the first place.)

2. At to factual issues, DNRC presents its examination findings and supporting documents to the claimant, and attempts to work with the claimant to resolve Supreme Court issue remarks and clarify elements of the claims.

3. *DNRC informs Claimant that any unresolved Supreme Court issue remarks remain on the water right abstract until resolved through objection by other parties or by "on motion" proceedings before the Water Court.*

Potential Meeting #2 - Additional Claimant Contact regarding decree exceeded remarks and ownership remarks

Prior decreed rights are indexed, and claims based on these old decrees are matched and logged in. Decree exceeded situations can occur if the total claims based on a specific prior decreed right exceed the amount of water originally decreed for that right.

Overlapping ownership occurs when the claimed place of use by one entity overlaps onto the claimed place of use of another entity.

Once all claims in a basin are examined, the DNRC Water Resources Specialist looks for decree exceeded issues and overlapping ownership issues. Contact is made with a claimant again in an attempt to resolve these types of issues. If the claimant declines to meet with DNRC to resolve claims examination or factual issues, or if the claimant is unable or unwilling to provide documentation in support of the original claim, the Supreme Court decree exceeded and ownership remarks remain on the decree abstracts.

Next step: *DNRC informs Claimant that any unresolved Supreme Court issue remarks remain on the water right abstract until resolved through objection by other parties or by "on motion" proceedings before the Water Court.*

Completion of Examination

Once all response timeframes have been met the basin is considered fully examined. The main office then runs a set of indexes to complete an error check of the entire basin. These checks look for consistency in remarks, source names, ditch names and location, points of diversion to the nearest 1/41/41/4, priority dates, reserved rights, late claims, multiple uses, reservoirs, owners, flow rates, volumes, springs, subdivisions, etc. Corrections are then made if necessary and a Summary Report (basically a draft decree) is sent to the Water Court.

After minor corrections, if needed, the Water Court issues the decree.

Water Court Resolution of Supreme Court Issue Remarks Not Addressed Through Claim Examination Process or Through Objection

Pre-hearing Procedures

1) The Water Court will call in on its own motion *all* claims containing Supreme Court "issue remarks" that have not been resolved through objections. The objection list would read "On Motion of the Water Court."
2) A "pre-hearing conference" or "status conference" is set up for claims with "issue remarks" before a Water Master *who will ultimately not hear the case at trial.* The claimant and the DNRC claims examiner are both present. The Water Master asks the DNRC examiner to briefly discuss the basis of the Supreme Court issue remarks. The claimant is then asked to briefly discuss the claim as filed and respond to the Supreme Court issue remarks. The Water Master would ask that the claimant and the DNRC examiner continue to meet, if necessary, to further discuss the claim and the Supreme Court issue remarks and report back by a certain date as to whether the Supreme Court issue remarks can be resolved.
3) The Water Master would review and approve any amendments the claimant makes in regard to resolving the Supreme Court issue remarks, *or would set the case for hearing in front of another Water Master if resolution is not possible.*

Hearing Procedures

1) *A new impartial Water Master is called in to hear the "on motion" case.*
2) A pretrial hearing would be held to set the hearing date, explain the process to claimants and answer any procedural questions so claimants are not intimidated by the process.
3) At the hearing, the DNRC examiner testifies as to the basis of the Supreme Court issue remark. The examiner can be asked questions by the claimant and the Water Master. The claimant then testifies regarding their claim and responds to the questions raised by the Supreme Court issue remark, and can be questioned by the Water Master.
4) The Water Master issues a Master's Report recommending to the Chief Water Judge how the claim should be decreed.