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**Montana Water Court**

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IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
TONGUE RIVER ABOVE AND INCLUDING HANGING WOMAN CREEK-BASIN 42B  
and  
TONGUE RIVER BELOW HANGING WOMAN CREEK-BASIN 42C

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United States of America )  
General Objections to Basin 42B and 42C ) **CASE 42B-1**  
Preliminary Decrees )

**Motion for Order Requiring DNRC to Examine for Post-June 30, 1973 Nonuse and Motion for Water Court to Adjudicate Post-June 30, 1973 Abandonment in the Montana Adjudication and Brief in Support**

**I. Introduction**

The United States of America (“United States”), on behalf of its Departments and Agencies with interests in the Montana Water Rights Adjudication, hereby moves this Court to adjudicate post-June 30, 1973 abandonment in the Montana Adjudication, including but not limited to directing the Montana Department of Natural Resources (“DNRC”) to examine all existing claims in the Adjudication for nonuse and to place issue remarks on all claims that indicate potential factual and legal issues related to abandonment (collectively referred to herein as “post-1973 abandonment”).<sup>1</sup> It is the United States’ position that no Final Decrees can be

<sup>1</sup> This State-wide objection and motion is being filed in Case No. 42B-1 because this is the first basin in which the Court is addressing this issue. There is no mechanism to file a State-wide

issued in the Adjudication until the Water Court addresses the issue of post-1973 abandonment.<sup>2</sup> This motion follows the United States' filing of general objections regarding post-1973 abandonment issues presented by the Preliminary Decrees for six basins,<sup>3</sup> all of which remain pending before this Court, and expands this general objection to the Montana Adjudication as a whole, including all basins for which the Water Court has not yet issued Preliminary Decrees, all basins for which the deadline to file objections has not yet passed, all basins that were verified and not examined, and all basins for which Final Decrees have not yet been issued.

The Water Court has the duty to address post-1973 abandonment in its adjudication of all "existing water rights," in the exercise of its exclusive jurisdiction over "all matters relating to the determination of existing water rights within the boundaries of the state of Montana." Mont. Code Ann. § 3-7-224(2). By its plain meaning, an "existing water right" is one that exists when the Water Court includes it in a Final Decree. The Montana Legislature defined an "existing right" or "existing water right" as:

a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

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objection. For other general objections, the Court has opened the issue for wider participation. See *Marshaling Order* at 1-2, Case No. 76F-1 (Oct. 15, 2010). In addition, when the Court has ruled on general objections in one basin, it has determined the extent to which it will apply that ruling to the adjudication as a whole. See, e.g., *Order Sustaining USA General Objection*, Case No. 41D-3 (Feb. 12, 2010) (addressing general objections regarding DNRC's failure to identify legal description of private land to which private stockwater claims on federal lands are appurtenant, filed in Basins 41D, 42B, 42C).

<sup>2</sup> The Court has issued final decrees in Basins 42I, 42J, 40P, 38H, 39H, and 42L, although it is uncertain if these decrees will need to be reopened. See Mont. Code Ann. § 85-2-237. No final decrees have been entered in the Montana water rights adjudication since 1985. See [http://dnrc.mt.gov/wrd/water\\_rts/adjudication/adjstatus\\_report.pdf](http://dnrc.mt.gov/wrd/water_rts/adjudication/adjstatus_report.pdf) (through Nov. 30, 2011).

<sup>3</sup> The United States filed General Objections to the Preliminary Decrees in Basins 42B, 42C, 40M, 40J, 43E, and 43O that include this issue.

Mont. Code Ann. § 85-2-102 (12). Any ambiguity as to this meaning was eliminated when the Legislature clarified the Water Court's jurisdiction and duty in the Montana Water Use Act:

The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

§ 3-7-501(4), MCA. The Water Court Claim Examination Rules reflect the same duty:

"Adjudication" means the judicial determination of water rights that existed prior to July 1, 1973, including the total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

Rule 2(a)(3), W.R.C.E.R. The Water Court, however, rarely determines the total or partial abandonment of existing water rights after June 30, 1973, nor has it directed the DNRC to examine post-1973 water use systematically to identify sustained nonuse of a water right and whether a presumption of abandonment has been created. This is a significant omission because if the DNRC identifies nonuse, its practice is to place an Issue Remark on the claim, and Montana law requires the Water Court to resolve all Issue Remarks, specifically including Issue Remarks that involve abandonment. Mont. Code Ann. § 85-2-248(7). As a result, the Adjudication is incomplete because the Water Court has not determined existing water rights pursuant to § 3-7-501(4), MCA.

The failure to address post-1973 abandonment in the Adjudication has potentially serious consequences for many litigants, as core water rights adjudication principles of finality and comprehensiveness would be undermined. If the Water Court decrees existing water rights as of the date of the applicable Final Decree without examining for and determining post-1973 abandonment, the Adjudication may decree rights that have not been beneficially used for many years. Claimants may resurrect water rights that were abandoned (or unused) post-1973 to circumvent basin closures or place themselves ahead of valid existing junior water rights, or

argue that their rights are decreed as of the date of the Final Decree, even if facts show post-1973 abandonment. The failure to address post-1973 abandonment also raises potentially negative consequences for instream flows and fish and wildlife beneficial uses that depend on water being left instream, and may undermine fair implementation of carefully negotiated settlements of Indian water rights and other federal reserved water rights for which the Court has entered decrees that rely on limitations of non-Indian use. Future litigants may assert that anyone who filed or could have filed an objection in the Adjudication (and their successors) is bound by the Final Decrees and that *res judicata* and collateral estoppel bar assertions of abandonment from July 1, 1973, to the date of the Final Decree in a given basin.

The period of time to which post-1973 abandonment could apply is legally significant in light of the decades between 1973 and the completion of decrees. The presumption of intent to abandon a water right can be established by as little as nine years of non-use.<sup>4</sup> The Adjudication addresses all water rights that existed as of June 30, 1973; it is now almost forty years later and Final Decrees may not be issued for many more years. Furthermore, the Water Court has not affirmatively informed the general public, including claimants who seek to protect their valid existing water rights, that it does not routinely review for post-1973 abandonment. The primary persons and entities that would benefit from not addressing post-1973 abandonment are those who seek to skirt the established law of beneficial use.

The United States appreciates that adjudication of post-1973 abandonment of existing water rights will require additional time and resources and may threaten the DNRC's ability to meet the "benchmarks" that the State Legislature imposed in § 85-2-271, MCA, and the Water

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<sup>4</sup> *Smith v. Hope Mining Co. of St. Louis*, 18 Mont. 432, 438-9, 45 P. 632, 634 (1896), cited with approval in, e.g., *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 666 P.2d 215 (1983).

Court's ability to issue Preliminary or Temporary Preliminary Decrees for all basins in Montana by June 30, 2020. *See* § 85-2-270, MCA. But, as the Court recognized when it addressed a general challenge to the DNRC's examination of potentially marshaled claims:

Refining . . . procedures at this early stage will avoid a massive and costly claim reexamination effort years from now, promote judicial economy, expedite the determination of existing water rights, assist in avoiding protracted litigation, and is more cost effective than waiting until some later date.

*Order Granting Motion to Strike; Order to Review and Revise Remark and Reexamine Claims*, Case No. 76F-1 at 13-14 (Sept. 12, 2008) ("Marshaling Order dated Sept. 12, 2008"). As it has done with other issues, the Court should open this issue statewide to participation from other interested parties to assist in the identification of legally-sufficient procedures to ensure that post-1973 abandonment is addressed before Final Decrees are issued in each basin.

## **II. The United States' General Objection**

The United States filed a general objection<sup>5</sup> to the Preliminary Decrees in Basins 42B, 42C, 40M, 40J, 43E, and 43O regarding DNRC's failure to examine and remark for post-1973 abandonment and the impact of this failure on the Water Court's jurisdiction and authority over the "determination and interpretation of existing water rights [which] includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree." Mont. Code Ann. § 3-7-501(4). *See* n.2. The

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<sup>5</sup> General objections aggregate objections common to numerous claims on a basin or adjudication-wide basis. Absent use of general objections, broader problems with the Water Court and DNRC claims examination process may go unchallenged or require objectors to object to most or all of the claims in a basin. The Water Court has recognized and sustained use of general objections. *E.g.*, *Order Sustaining USA General Objection*, Case No. 41D-3 (Feb. 12, 2010); *Order Sustaining USA General Objection and Closing Case*, Case No. 42B-2 (Feb. 12, 2010); *Marshaling Order dated Sept. 12, 2008*, at 13-14, Case No. 76F-1.

instant filing addresses these previous filings and extends the United States' general objection to the entire Montana adjudication.

The Court has begun to address this issue in Basins 42B and 42C (consolidated as Case No. 42B-1).<sup>6</sup> Almost three years after the General Objections were filed in these two basins, the Court informed the United States that "abandonment" was not relevant to the tasks performed by the DNRC because "abandonment" is a legal finding reserved to the Court and the DNRC only reviews claims for "nonuse." *Court Minutes and Order Setting Filing Dates* (Case No. 42B-1, Nov. 15, 2011) ("Min & Order of Nov. 15, 2011"). The United States recognizes that only the Court may issue a legal determination that a water right has been abandoned, however, the identification of nonuse is an essential factual predicate to this legal determination and one that claim examination must address.<sup>7</sup> The United States' general objection to the Adjudication also includes the identification by DNRC of nonuse, which the Court recognized during the initial status conference in Case 42B-1:

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<sup>6</sup> The Court has not consolidated or addressed this general objection in any other basin. These filings raise other objections in addition to post-1973 abandonment that are not addressed herein.

<sup>7</sup> The Water Court and DNRC do not necessarily operate with a precise distinction in their use of these terms in these related tasks. For example, Montana law requires the Water Court to address unresolved issue remarks, including when "an unresolved issue remark involves nonperfection or abandonment," and defines "issue remark," in part, as "a statement added to an abstract of water right in a water court decree by the [DNRC] or the water court to identify potential factual or legal issues associated with the claim." Mont. Code Ann. §§ 85-2-250, 85-2-248(7)(a). The Water Right Claim Examination Rules and DNRC agree that the DNRC places "Issue Remarks" on claims to "identify potential factual and legal issues." Rule 2(a)(57), W.R.C.E.R.; DNRC Claim Examination Manual, Ch. 2, p. 39. The DNRC Claim Examination Manual specifically defines "legal issues" as:

unclear information of a legal nature discovered during examination of a statement of claim. For example, non-use may raise the legal issue of abandonment or no evidence of use may raise the legal issue of non-perfection of the water right being examined.

The United States presented four broad issues in its objections. The first objection asserted the DNRC examination effort was inadequate because the examination did not include a review of claims for post June 30, 1973 use or nonuse. The United States stated that other resources were available, such as 1995 and 2005 aerial photos, which would provide additional information on nonuse and raise potential abandonment issues.

*Court Minutes and Order Joining the State of Montana Through the Attorney General and Setting September 10, 2009 Deadline* (Case No. 42B-1, Jul. 16, 2009) (“Min. & Order, July 16, 2009”).

Although the Court denied the United States’ requests for discovery and for information from the DNRC in Case No. 42B-1,<sup>8</sup> it agreed to request DNRC assistance if necessary to assist the Court:

[T]he Water Court will hear the general objections of the United States filed in this forum. The Court will schedule further proceedings with the United States and begin the process of resolving the general objection. If necessary, the Court will request assistance from the DNRC Water Rights Adjudication Bureau staff pursuant to § 85-2-243, MCA.

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<sup>8</sup> The Court held the initial scheduling conference in July 2009, to “determine what type of proceedings should be scheduled to address [these] general objection[s]” and ordered the Bureau Chief for the DNRC Water Rights Adjudication Bureau to appear. *Order Consolidating Case and Setting Scheduling Conference*, Case Nos. 42B-1 & 42C-1 (June 25, 2009). The Court concluded that “the issues raised by the General Objections needed the input of the Montana Attorney General” and joined “the State of Montana through the Attorney General,” and also ordered the “Attorney General, the DNRC, the United States, and the Northern Cheyenne Tribe” to discuss the General Objections and “seek a resolution of the objections or provide joint recommendations to the Court.” Min. & Order, July 16, 2009. In December 2009, the Court acknowledged that “the parties were not able to reach a resolution of the objections during the five month informal settlement period” and issued Scheduling Orders in each case that required all discovery to be completed by May 4, 2010. *Scheduling Order* (Dec. 29, 2009). Based on the Scheduling Orders, the United States served discovery on the State, serving the Attorney General and counsel for the DNRC, who separately moved to quash on the ground that each was not a party. The United States responded and also moved to compel the State, through the DNRC, to respond or otherwise provide the information sought. In December 2010, the Court dismissed the Attorney General and DNRC from Case 42B-1, *Order Dismissing Attorney General and DNRC From General Objection Proceedings* (Dec. 27, 2010) (“Order of December 27, 1010”), and in October 2011, denied the United States’ pending Motion to Compel. Min. & Order of Nov. 15, 2011.

As recommended by the DNRC, any deficiencies in the claim examination procedures will be resolved by instructions from the Water Court.

*Order of Dec. 27, 2010*, at 5. If the Court views any factual allegation herein as deficient, it should request DNRC assistance and involve the United States in this effort. Indeed, the DNRC has repeatedly stated that it views itself as an “arm of the Court in the [adjudication] claims examination process” and “stands ready to assist the Court as it directs.” *E.g., Motion to Quash Combined Discovery Requests: Interrogatories, Requests for Admission, and Requests for Production of Documents from the United States of America, Bureau of Indian Affairs* at 2-4, 6 (Mar. 9, 2010), which underscores that the Water Court controls both the Adjudication and the scope of any claims examination. *See* Rule 1(b), W.R.C.E.R.<sup>9</sup>

### **III. Argument**

#### **A. The Water Court Must Adjudicate Post-1973 Abandonment Before It Can Issue Final Decrees of Existing Water Rights.**

The Water Court has the statutory duty to address post-1973 abandonment as part of its judicial determination of existing water rights in the Montana Water Rights Adjudication. It also determines the necessity and scope of the DNRC claim examination that is an essential factual underpinning in the Adjudication. Although the DNRC routinely investigates pre-July 1, 1973 nonuse as part of the adjudication process, it rarely investigates readily available information on post-1973 nonuse (*e.g.*, review available aerial photography subsequent to 1975-1980) and will not do so unless the Court so directs.

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<sup>9</sup> As stated by the DNRC’s Chief Legal Counsel at the October 17, 2011, Scheduling Conference in Case 42B-1: “If there is any way that we can assist in whatever factual investigation, that sort of thing might be ordered by the Court, just know that we’re ready to assist, Your Honor.” Case No. 42B-1, Oct. 17, 2011, Conference, Audio Recording at 4:52.

**1. The Water Court has the duty and authority to address post-1973 abandonment as part of the Adjudication of existing water rights.**

The Montana Water Court has the duty to address post-1973 abandonment in its adjudication of all water rights that existed prior to July 1, 1973, as part of its duty to “administer the adjudication of existing water rights,” § 85-7-223, MCA, and its jurisdiction over “all matters relating to the determination of existing water rights within the boundaries of the state of Montana.” Mont. Code Ann. § 3-7-224(2) (jurisdiction of Chief Water Judge and Asso. Water Judge). The Water Court has repeatedly recognized that it has “exclusive jurisdiction to interpret and determine existing water rights.” *E.g.*, Memorandum Opinion at 3, Case No. 76HB-62 (Mar. 18, 1999) (C.J. Loble), citing *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130 (1991) and § 3-7-501, MCA. *See also* § 3-7-224, MCA. “Existing water right[s]” are “right[s] to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Mont. Code Ann. § 85-2-102(9); Rule 2(a)(23), W.R.C.E.R.<sup>10</sup> The plain language of “existing” means that a water right must legally and factually exist when it is decreed in the Adjudication. Any ambiguity as to this meaning was eliminated in 1997 when the Legislature clarified the Court’s jurisdiction and what it means to adjudicate existing water rights in the Adjudication:

The determination and interpretation of existing water rights **includes, without limitation**, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

Mont. Code Ann. § 3-7-501(4) (emphasis added).<sup>11</sup>

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<sup>10</sup> The Montana State Constitution (Art. IX, Sec. 3) recognizes and confirms “existing water rights.” The “policy of the state and a purpose of [the Montana Water Act is] to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.” Mont. Code Ann. § 85-2-101(4); Rule 1(a), W.R.C.E.R.

<sup>11</sup> The Legislature also amended § 85-2-227, MCA, to clarify that the Water Court review of an existing water right can include admissible evidence arising after July 1, 1973.

In 2005, the Legislature specifically required the Water Court to resolve all Issue Remarks (which result from the DNRC claims examination process), even in the absence of objections, specifically including when “an unresolved issue remark involves nonperfection or abandonment.” Mont. Code Ann. § 85-2-248(7). By this amendment, the Legislature clearly stated that the issue of addressing abandonment is of such importance that when it has been identified in the DNRC’s investigation, but is not addressed in the objection process, the Water Court must call the claim before it and involve the Attorney General’s Office to resolve the potential that the claim is no longer an “existing water right.” *Id.* The duty placed on the Water Court in § 85-2-248(7), MCA, does not say it concerns only pre-July 1, 1973 abandonment.

The duty to resolve post-1973 abandonment as part of the adjudication of existing water rights was further clarified in 2006 when the Montana Supreme Court adopted amendments to the Water Right Claim Examination Rule’s definition of “Adjudication”:

“Adjudication” means the judicial determination of water rights that existed prior to July 1, 1973, including the total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

Rule 2(a)(3), W.R.C.E.R.<sup>12</sup> The DNRC also amended its *Water Right Claim Examination Manual*, Ch. 2 (definitions) (“DNRC Claim Examination Manual”) to include the identical definition. To adjudicate existing water rights, the Court is required to determine whether existing water rights have been abandoned post-1973 before it enters a Final Decree for the basin in which such rights are located.

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<sup>12</sup> On information and belief, these amendments were proposed by the Water Court, which can take judicial notice of its filings. The prior version of these rules, adopted in 1991, defined “Adjudication” as “the judicial determination of water rights that existed prior to July 1, 1973.” Rule 1.III(3), W.R.C.E.R. (1991).

This Court has recognized that a valid existing water right “maintain[s its] vitality after July 1, 1973 and continue[s] to be defined and protected under the law as it existed prior to July 1, 1973.” Mem. Op., Case 76HB-62 at 3-4. Existing law includes the law of beneficial use, which governs the perfection and continued legal vitality of any water right, and the law of abandonment, which “addresses the predictable result of failing to comply with the doctrine of beneficial use.” *Id.* at 3-4. It is a longstanding principle of Montana law that appropriation of water is based on beneficial use and when an appropriator or his successor abandons or ceases to use water for its beneficial purposes, the right to use the water ceases. *E.g., Power v. Switzer*, 21 Mont. 523, 529, 55 P. 32, 35 (Mont. 1898); *79 Ranch*, 204 Mont. at 432, 666 P.2d at 218. See also Mem. Op., Case 76HB-62 at 4 (“Just as a user cannot appropriate water beyond the amount beneficially used, neither can the appropriator sit on a right in nonuse.”); *In Re Application for Change of Appropriation by Darla J. Jeffers, Memorandum* at 7-8, 14, Case No. WC-92-2 (Sept. 15, 1994 ) (C.J. Loble) (“[t]he controlling and fundamental principle upon which water rights are perfected and remain valid is beneficial use....”). Because a water right ceases when it is abandoned or no longer used for beneficial purposes, it should not be decreed because the underlying right has ceased to exist at the time of enacting the Final Decree.

This Court recognizes that its “exclusive jurisdiction over existing water rights necessarily includes, among other matters, inquiry into beneficial use and abandonment issues” before and after July 1, 1973. Mem. Op., Case 76HB-62 at 3-5. The Court has long held that it may determine post-1973 abandonment issues prior to the issuance of a Final Decree. *Jeffers, Mem*, Case No. WC-92-2. Post-1973 evidence of abandonment is relevant to the Court’s adjudication of existing water rights because, among other things, it supports the presumption to abandon and “operates to protect existing water rights.” Mem. Op., Case 76HB-62 at 4, 8-9.

Eliminating abandoned water rights through the Adjudication protects existing water rights from being injured by the future reassertion of the abandoned rights, which would enjoy priority dates as of the date of original (but abandoned) appropriation. As the Court has recognized, an abandoned water right is lost and its reassertion after June 30, 1973, is simply an “effort to create a new appropriation,” which must occur through the State permit process. *Id.* at 7, citing *O’Shea v. Doty*, 68 Mont. 316, 321, 218 P. 658, 659 (1923).

Thus, Montana law and the Supreme Court-approved Water Right Claim Examination Rules require this Court to address existing water rights, which necessarily includes the examination of the total or partial abandonment of existing water rights post-1973 before it enters a Final Decree. Failure to address this issue before entry of the applicable Final Decrees means that the Court has not met its statutory duty and the Adjudication of existing water rights is incomplete and valid existing water rights are inherently diminished.

**2. As part of its duty to determine existing water rights, the Water Court should direct the DNRC to examine post-1973 nonuse of existing water rights.**

The Water Court cannot exercise its exclusive jurisdiction to interpret and determine existing water rights without technical assistance and information. Because the Water Court has a duty to “administer the adjudication of existing water rights,” § 85-7-223, MCA, and the “determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree,” § 3-7-501, MCA, the Water Court can and should direct the DNRC to examine existing water rights for post-1973 abandonment, just as it does for pre-1973 existing water use.

**a. The DNRC claim examination process helps identify legal and factual issues, including nonuse, raising a presumption of abandonment.**

The Water Court acknowledges that it “relies heavily on the [DNRC’s] unbiased examinations to verify that the statements made are correct, and to identify potential factual and legal issues with respect to the claims.” *Order Adopting Master’s Report* at 5, Case No. 43D-301 (C.J. Loble) (Feb. 6, 2004), citing WC-92-3 at 15, § 85-2-243, MCA, and Rule 1.II, W.R.C.E.R. (1991). The adjudication statutes “direct the Water Court to consider ‘all relevant evidence in the determination and interpretation of existing water rights,’” *Montana Trout Unlimited v. Beaverhead Water Co.*, 361 Mont. 77, 88, 255 P.3d 179, 186 (2011), and require the DNRC, subject to Water Court direction, to “provide such information and assistance as may be required by the water judge to adjudicate claims of existing rights.” § 85-2-243(1)(a), MCA.

The Water Court Claim Examination Rules and the DNRC Claim Examination Manual echo these requirements:

*Throughout the adjudication process, the [DNRC] is an executive agency providing technical assistance and information to the water court subject to the direction of water judges, pursuant to § 85-2-243, MCA. The department assists the water court by gathering, examining, and reporting data, facts, and issues pertaining to the claims of existing rights. In examining claims, the [DNRC’s] role is limited to factual analysis and the identification of issues. The water right claim examination rules describe how the department gathers data and facts pertinent to the claims of existing water rights. The water court determines the necessity and scope of any preliminary [DNRC] examination as set out in these rules, but in no way influences the results of the directed examination.*

Rule 1(b), W.R.C.E.R. (emphasis added). The Water Court directs the necessity and scope of the DNRC “examination” of claims to existing water rights, which is “the process under the [W.R.C.E.R.] of examining, gathering information, and reporting data, facts, and issues pertaining to the claims of existing water rights.” Rule 2(a)(21), W.R.C.E.R.; DNRC Claim

Examination Manual, Ch. 2 (definitions). None of the above requirements state that they are limited to the pre-July 1, 1973 status of existing rights.

The DNRC examination process is intended to identify if a claim to an existing water right has potential factual and legal issues, including non-perfection or abandonment (generally referring to “nonuse”). After the examination, the DNRC may place “Issue Remarks” on the claim, which are “statement[s] added to an abstract of water right in a water court decree by the [DNRC] or the water court to identify potential factual or legal issues associated with the claim.” Mont. Code Ann. § 85-2-250. *See also* Rule 2(a)(57), W.R.C.E.R. and DNRC Claim Examination Manual, Ch. 2 (both stating that Issue Remarks “identify potential factual and legal issues.”). According to the DNRC:

“Factual Issues” means unclear information or issues with a statement of claim that are factual in nature, such as numbers of acres irrigated or quantity of water used. Such issues result in issue remarks being added to claims during examination.

“Legal Issues” means unclear information of a legal nature discovered during examination of a statement of claim. **For example, non-use may raise the legal issue of abandonment or no evidence of use may raise the legal issue of non-perfection of the water right being examined.**

DNRC Claim Examination Manual, Ch. 2 (emphasis added).

Montana law requires the Water Court to resolve all Issue Remarks, even in the absence of objections, specifically including when “an unresolved issue remark involves nonperfection or abandonment.” Mont. Code Ann. § 85-2-248(7). Montana law makes clear that issues identified as a result of claims examination should be resolved before a final decree is issued:

Because the state of Montana is the owner of all water in the state, pursuant to Article IX, section 3, of the Montana constitution, the legislature recognizes that it is in the state’s best interest to ensure that valid issues raised as a result of claims examination in the statewide adjudication of pre-July 1, 1973, water rights are resolved before a final decree is issued.

Mont. Code Ann. § 85-2-247(1). If a DNRC Issue Remark identifies potential nonuse/abandonment, the Water Court must address the Issue Remark. Although Montana law allows the Water Court to add Issue Remarks to claims, to our knowledge it rarely does so, and never as to factual issues. The only Issue Remarks about factual issues on Preliminary or Temporary Preliminary Decree water right abstracts are those that the DNRC identifies in its examination process. The Court would need facts regarding specific claims to place factual Issue Remarks on claims and it does not undertake the kind of factual inquiry to allow it to do so. Thus, the DNRC's assistance is essential to the Water Court's ability to adjudicate all existing water rights properly.

If the DNRC does not investigate post-1973 nonuse, there will be no Issue Remarks for the Court to address. If the DNRC does not investigate post-1973 nonuse, there will be no relevant evidence before the Court from the DNRC to allow the Court to determine whether the water right is existing at the time of the Final Decree. Montana law requires that the Final Decree "must state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person . . . named in the decree are based." Mont. Code Ann. § 85-2-234(5). Without investigating post-1973 abandonment, the Court cannot make the required findings of fact or conclusions of law to decree existing water rights as of the date of the Final Decree. *See also* Mont. Code Ann. § 85-2-234(1) (The Water Court shall enter a Final Decree on the basis of the preliminary decree, any hearings held, and "on final resolution of all issue remarks.").

The DNRC Claim Examination Manual identifies a range of potential Issue Remarks for the identification of nonuse. For example, Standard Examination Remark P271 reads:

USDA AERIAL PHOTOGRAPH NO(S) [.....] DATED MM/DD/YYYY,  
MM/DD/YYYY, APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

DNRC Claim Examination Manual, at 189. This remark would allow DNRC to identify post-1973 nonuse of an irrigation claim based on a review of post-1973 USDA aerial photographs. In practice, however, if there are ten or more years of nonuse before July 1, 1973, or possibly before the date of the examined photograph, DNRC will remark on nonuse. But if the nonuse extends, for example, from 1996 to 2006, or for any ten year period after 1973 (or possibly after an aerial photograph in 1980), DNRC does not look for nonuse, let alone remark on it. By eliminating the most recent 30 or more years from the DNRC claim examination, DNRC and the Court have drawn arbitrary lines as to when they examine for beneficial use.

It is well established that whether a water right is abandoned is a question of fact. *E.g.*, *79 Ranch*, Mont. at 431, 666 P.2d at 217. Nonuse of a water right, while not conclusive evidence of abandonment, is evidence of intent to abandon a water right, and an extended period of nonuse is “strong,” “potent” or “clear” evidence of intent to abandon. *Id.*, 204 Mont. at 432, 666 P.2d at 218; *South Fork Lake Decision* at 4, Case No. 76HF-168 (Dec. 11, 2007) (C.J. Loble) (“South Fork Decision”). The current DNRC claim examination of beneficial use of a water right claim during the time period prior to June 30, 1973, which may extend to 1975-1980 (*see* discussion below), is an inextricable and essential part of the Water Court’s adjudication of existing water rights. DNRC’s pre-1973 examination helps identify claims that appear to be abandoned (nonused), raising potential factual and/or legal issues for public review and objection, Claimant response, and Water Court resolution. DNRC examination for beneficial use over the last 39 years, or up until the time the Water Court issues a Final Decree, is no less important.

**b. The DNRC does not routinely or consistently examine claims for existing water rights for abandonment/nonuse.**

**1. Although the DNRC does not routinely examine existing water rights for post-1973 abandonment/nonuse, the DNRC claims examination process can identify post-1973 nonuse and should include “available” post-1973 data sources.**

The DNRC rarely examines claims for existing water rights for nonuse that has occurred in whole or in part after July 1, 1973, except to the extent that it examines aerial photos from 1975-1980. The Water Court and the DNRC assert that the DNRC claims examination is generally limited to two post-priority date data sources. The Water Court acknowledges that “[t]he DNRC does not routinely examine all claims for nonuse issues after 1980:”

DNRC’s general examination practice is to use two data sources, one being the Water Resource Survey (WRS) data and materials (including any WRS aerial photos), and one being a circa 1975-1980 USDA aerial photo.

Min. & Order at 5-7 (Nov. 15, 2011).<sup>13</sup> According to one DNRC Water Right Informational Brochure, the DNRC typically relies on two data sources to examine the claimed place of use, the latest of which is one USDA aerial photograph from the period of 1975-1980. DNRC Water Right Informational Brochure, *Claim Examination - Acreage Issues* (Feb. 2008) (attached as Exhibit A). According to the Water Court:

[The] practice [of using two data sources] is authorized in Rule 12(b), W.R.C.E.R. The application of the rule is discussed in the Place of Use text set forth in Chapter VII (D)(2) of the [DNRC Claim Examination] Manual. As noted in the Manual, two data sources are not always available, particularly if the claimed priority date is from 1970 to June 1973. If a claimant brings another data source to the attention of the DNRC, the claims examiner **may** rely on that third source. Sometimes, the DNRC uses a 1981 photo or later data source, depending on the county and photo availability.

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<sup>13</sup> The Montana Water Resource Surveys are a collection of one-time surveys conducted on a county by county basis, for which data was collected and published at various times during the periods of 1943 – 1965 and 1966 – 1971.  
[http://dnrc.mt.gov/wrd/water\\_rts/survey\\_books/default.asp](http://dnrc.mt.gov/wrd/water_rts/survey_books/default.asp).

Min. & Order at 6 (Nov. 15, 2011) (emphasis added).<sup>14</sup>

The DNRC Claim Examination Manual articulates why the Court and the DNRC must review additional data sources to examine for post-1973 abandonment/nonuse:

Using two data sources, one earlier than the other, illustrates the changes taking place over time such as significant acreage taken out of, or put into, production between the two snapshots in time. For example, if the WRS [Water Resources Survey] data indicate that 50 of the claimed acres were irrigated in 1968, but a 1978 photo shows only 20 acres being irrigated, a non-use issue may exist.

*Id.* at 425. The example in the DNRC Claim Examination Manual identifies a non-use issue based on the difference between two aerial photographs taken 10 years apart.<sup>15</sup> Without reviewing one or more data sources after the period of 1970-1980, there are no later “snapshots in time” and the Water Court cannot know if there is a post-1973 nonuse/abandonment issue.

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<sup>14</sup> The DNRC Claim Examination Manual states: “For each claimed POU parcel, review the two principal data sources – the 1975-1980 USDA aerial photographs and the WRS data listed above – for evidence that the claimed acreage was being irrigated at the time the data source was compiled. If a third data source is available, review the claimed POU in the same manner.” DNRC Claim Examination Manual, Ch. 7 at 426.

<sup>15</sup> The post-1973 abandonment period already includes more than enough time to establish abandonment as a factual and legal matter and the possibilities are only increasing. Montana courts have determined that the rebuttable presumption of intent to abandon a water right can be raised by a period of nonuse of nine years. *See Smith v. Hope Mining*, 18 Mont. at 438-39, 45 P. at 634 (nine years of nonuse “is certainly very potent evidence, if it stood alone, of an intention to abandon.”), cited with approval in *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218. *See also Axtell v. M.S. Consulting*, 288 Mont. 150, 160, 955 P.2d 1362, 1369 (1998). Moreover, under certain circumstances, abandonment is immediate and it is not necessary to establish a period of nonuse to establish abandonment. *In the Matter of the Adjudication of the Musselshell River/Roundup Basin*, Case 40C-12, 1994 ML 6; 1994 Mont. Water LEXIS 1, 2-3 (1994). *quoting Order and Memorandum* at 5, Case 40A-7 (July 2, 1993). In addition, the Montana Supreme Court “appears to have signaled its endorsement of the ‘general modern trend’ and ‘express intent of our legislature’ that ten years of nonuse may result in a *prima facie* presumption of abandonment.” *South Fork Decision* at 11, *citing 79 Ranch*, 204 Mont. at 434, 666 P.3d at 219. While Montana law establishes a rebuttable presumption of abandonment of a water right after a period of ten years of nonuse of water, this provision does not apply to existing water rights until they have been finally determined in the Adjudication. §§ 85-2-404(2) & (5), MCA.

Rule 12(b), W.R.C.E.R., does not limit the DNRC examination to two data sources nor is use of other data sources merely discretionary. Rule 12(b) states:

The claimant's map *and two or more post-priority data data sources, if available, will be used to examine the claimed irrigated acreage.*"

Rule 12(b), W.R.C.E.R. (emphasis added). The plain language of the rule makes use of readily available information mandatory, not discretionary. Moreover, the DNRC Claim Examination Manual does not limit its examination to two post-priority data sources, but requires "**two or more** data sources per rule 12(b), W.R.C.E.R.," that "**may include but are not limited to . . .** USDA aerial photographs taken between 1975 and 1980." DNRC Claim Examination Manual, Ch. 7(D)(2)(a) at 424 (emphasis added). *See also id.* at 425 ("use a minimum of two data sources to determine whether the claimed acreage is actually irrigated from the claimed POD."). In addition, Rule 6, W.R.C.E.R., which itemizes the data and facts that the DNRC examination "shall" provide to the Water Court concerning the purpose of a right, does not distinguish a specific timeframe for reporting potential nonuse of irrigation claims. Rule 6(e)(5)(i), W.R.C.E.R., requires the DNRC to report if "the right apparently has not been used for the claimed purpose for 10 or more consecutive years." Plainly, by stopping its review of the beneficial use of existing water rights for irrigation in 1975-1980, the DNRC is violating this rule.

Because numerous post-1973 aerial photograph sets of the State of Montana are "available" to the DNRC, reasonable claims examination could readily establish whether a valid post-1973 nonuse issue exists. Between 1990 and 2009, there are at least three sets of aerial photographs that cover the entire State. The existence of these additional data sources is well-known to the DNRC and there is absolutely no reason for a claimant or objector or anyone to

bring them to the DNRC's attention. Aerial photographs of Montana were prepared by or through the United States Department of Agriculture ("USDA") and the United States Geological Survey ("USGS") for the years 1990-2003, 2005 (color), 2005 (infrared),<sup>16</sup> and 2009 (color). USDA aerial photographs from 1990-2003, 2005, and 2009, as well as USGS digital orthophotographs from 1990-2003, are found on the Montana State Natural Resource Information System ("NRIS") database (<http://nr.is.mt.gov/nsdi/orthophotos/>) and are also available to the DNRC at or through its own library (This Montana State government website includes many other aerial photographs and sources for photographs.). *See* Exhibit B. The Water Court acknowledges that "information on the NRIS website is available to the DNRC and anyone else with access to an Internet connection." Min. & Order at 6 (Nov. 15, 2011).

**2. Claims that were verified, but not examined, were not reviewed for abandonment/nonuse.**

The failure to address post-1973 nonuse/abandonment extends to basins that were verified pursuant to the Water Court Verification Manual and not examined pursuant to the Water Right Claim Examination Rules. In 1987, the DNRC issued a report comparing the Water Court verification procedures to the Supreme Court Examination Procedures for Basin 40C and ascertained that verification did not address abandonment/nonuse and expansion:

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 the claimant's [sic] in the basin to discover and object to these issues.

DNRC, Comparison of the Water Court Verification Procedures to the Supreme Court Examination Procedures for Musselshell River Below Roundup Drainage – 40C at 12 (Sept. 4,

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<sup>16</sup> The 2005 infrared photographs are available through the USDA, for which there is a "link" on the NRIS website.

1987). Although a subsequent Temporary Preliminary Determination was issued in 1990 for Basin 40C that may have addressed these issues to some extent, it appears that for basins that were verified and not examined, the Court has not judicially determined abandonment either before or after July 1, 1973. *See also* Mont. Code Ann. § 85-2-237.<sup>17</sup>

**B. The Water Court's Failure to Address Post-1973 Abandonment Has Potentially Serious Consequences.**

Almost forty years have passed since the initial 1973 cut-off for the Adjudication and it is unlikely that Final Decrees will be issued in the many outstanding basins for an unknown number of additional years.<sup>18</sup> As a result, if the Water Court decrees "existing" water rights as of the date of some future Final Decree and does not routinely examine and judicially determine if existing rights have been abandoned after June 30, 1973, it has the potential to decree abandoned water rights and will have failed to exercise its duty under § 3-7-501(4), MCA. Indeed, this Court has recognized that "the longer we travel from July 1, 1973, the more likely it is that DNRC will be faced with post 1973 abandonment issues." *Jeffers, Mem.*, Case No. WC-92-2 at 19-20, n.9. If the Court, which has both exclusive jurisdiction over the adjudication of existing rights and the duty to administer the adjudication, does not require the DNRC to examine claims for post-1973 abandonment, it places itself, the DNRC, and the public in a position where they

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<sup>17</sup> In 2010, a Report to the Montana Legislature recommended that the Water Court avoid further re-examination of verified claims, but did not address the failure of the verification process to examine for nonuse. Report to the Montana Legislature, Montana Legislative Audit Division, Water Rights Adjudication, June 2010, 09P-09, Ch. II.

<sup>18</sup> The Legislature directed the DNRC to examine or reexamine all claims by June 30, 2015, and directed the Water Court to issue all preliminary or temporary preliminary decrees by June 30, 2020, §§ 85-2-270, 85-2-271, MCA, which means the Water Court may not be in a position to issue Final Decrees for possibly another decade. It is not unreasonable to assume that Final Decrees will be issued for fifty to sixty -- or more -- years after June 30, 1973. "[T]he litigation phase of the adjudication is likely to continue until 2028 or later." Water Rights Adjudication Report, June 2010, 09P-09 at S-2.

will be unaware of and unable to resolve issues of post-1973 abandonment that are legitimately part of the Adjudication.

**1. Failure to address post-1973 abandonment does not protect existing water rights.**

The Montana Adjudication is intended to “comprehensively adjudicate [the] existing water rights” of its “citizens living on and off reservations,” and provide enforceable legal protection for existing rights. Mont. Code Ann. § 85-2-101(6). This Court has recognized that the law of abandonment “operates to protect existing water rights:”

Because water is so scarce and essential, the fullest beneficial use of water is not advanced where a right holder is permitted to continue to hold a water [right] through long periods of nonuse when other persons could make valuable uses of the water to which the dormant right related. Similarly, new appropriators who make substantial investments in reliance on another’s nonuse are afforded little certainty if long unused appropriative rights . . . are suddenly exercised and, as a result, the junior priority appropriators’ supplies of water are cut off. The development of water with respect to the loss of water rights is, therefore, very much influenced by these two dominant themes in western water law: (1) the goal of full beneficial use of water; and (2) the need to afford vested water rights holders certainly as to the value of their rights.

76HB-62 at 4-5, *Jeffers, Mem.*, Case No. WC-92-2 at 15-16, both citing 2 Waters and Water Rights, § 17.03 at 436 n.41 (1991), quoting *Roe & Brooks, Loss of Water Rights – Old Ways and New*, 35 Rocky Mtn. Min. L. Inst. 23-1 (1989).

The Court cannot protect existing water rights in the Adjudication if it ignores post-1973 abandonment and decrees water rights that no longer exist. Such Decrees could allow moribund claims to survive, to the potential detriment of water users throughout Montana who have diligently applied their rights to beneficial use. Even though abandonment is a legal determination for the Court to make, the failure to review post-1973 abandonment would shirk a substantial part of its duty to determine existing water rights and deprive itself and the public of DNRC’s review of relevant facts that would serve as the basis for it to determine abandonment.

## **2. Failure to address post-1973 abandonment effectively suspends the law of abandonment.**

In *Jeffers*, the Water Court rejected arguments that it had no jurisdiction to address abandonment between July 1, 1973 and the Final Decree, because it would create an open-ended suspension of the law of abandonment and effectively reverse the doctrine of beneficial use. *Jeffers, Mem*, Case No. WC-92-2; Mem. Op. Case 76HB-62 at 5-6. The Court recognized it was unlikely that the Legislature would intend such a result without clearly stating so. *Id.* When the Legislature addressed the issue in 1997, it made clear that there should be no gap in the application of the laws of beneficial use and abandonment. See § 3-7-501(4), MCA; Mem. Op., Case 76HB-62.

The Court's failure to address examination of post-1973 nonuse and abandonment condones the same situation as the one the Court chastised in *Jeffers*.<sup>19</sup> The failure of DNRC to

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<sup>19</sup> *Jeffers* arose when private objectors filed objections to a change application before the DNRC. Previously, the same water right claim that was the subject of the change application had received objections in the Water Court adjudication of claims in Basin 40A. Although objections to the claim during the Water Court adjudication process did not identify abandonment as an issue, the objections to the change application did raise abandonment. No Final Decree had been issued for this basin and DNRC certified the matter under § 85-2-309, MCA, and transferred the objections to the change application to the Water Court for review.

In *Jeffers*, the Water Court discusses the history and application of the law of abandonment at length, and addresses the potential suspension of the law of abandonment in both "its adjudication jurisdiction and its certification jurisdiction." *Jeffers, Mem*, Case No. WC-92-2 at 22 (emphasis in the original).

Even if the certification statute were not applicable, the Water Court simply cannot conclude that the law of abandonment of existing water rights has been suspended from July 1, 1973 to some indefinite future date.

*Id.* at 5. Moreover, while the DNRC caught this particular problem, it only did so because a change application was filed before issuance of a Final Decree. The case also shows that the adjudication process did not identify the abandonment issue and that it is harder to fix problems after the Water Court addresses claims, even if there is no Final Decree.

examine post-1973 nonuse and the issuance of Final Decrees without the benefit of such examination effectively suspends the law of abandonment up to the date of the Final Decrees.<sup>20</sup> This will allow Claimants to resurrect water rights that were abandoned post-1973, to circumvent basin closures, to place themselves ahead of valid existing water rights or to argue that their rights are decreed as of the date of the Final Decree, even if facts conclusively show post-1973 abandonment. Such a situation would:

establish[] dormant rights as being indefeasible and does not protect valid existing rights. It potentially endangers existing rights and creates a situation in which dormant water rights can be reactivated after years of nonuse with impunity, to the detriment of junior water rights, and with no judicial recourse.

Mem. Op., Case 76HB-62 at 15. Entry of Final Decrees for abandoned water rights will enable future litigants to argue that under §§ 3-7-501(4) and 85-2-237(b), MCA, *res judicata* and collateral estoppel bar raising evidence of abandonment prior to the date of the Final Decree.

**3. The Court has not informed the public that it is not addressing post-1973 abandonment.**

The Court may respond that it is objectors' responsibility to bring evidence of post-1973 abandonment to the Court. Such a position would be a clear departure from the examination process implemented in the Water Right Claim Examination Rules and would revert to the manner in which claims were previously verified, *see* III.A.2.b.2, above, and contradicts the clear language of § 3-7-501(4), MCA. Certainly, if a potential objector knows it can object to post-1973 abandonment and has the ability to investigate the issue for some unknown number of claims and comprehend the results of that investigation, it can object to an existing water right on

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<sup>20</sup> As set out more fully below, an objector can file objections to claims in Preliminary or Temporary Preliminary Decrees on the basis of post-1973 abandonment, and the Water Court will hear the objections. But without the DNRC examination of post-1973 use, the likelihood of such objections is diminished.

the basis of post-1973 abandonment in the objections process for Preliminary Decrees. At best, however, these objections would extend to the date the objections were filed and would not include post-1973 abandonment up to the date of the Final Decree. This task, under any circumstances, is neither practical, easy, nor affordable, since it would require potential objectors to investigate whether the use of claims existing as of June 30, 1973, has somehow ceased. This would require review of all claims remaining after June 30, 1973, or the date of the last aerial photograph reviewed in the initial DNRC examination, and places work such as the interpretation of aerial photography on the public. Rather, this burden should primarily reside with DNRC, which has the resources and expertise to review such data and report its findings to the Court.

There is also no indication that the Water Court or the DNRC have affirmatively informed the public that they are not routinely addressing post-1973 abandonment (nonuse) and that, by silent default, the burden to do so effectively rests with the public. As the United States asserted during the initial status conference in Case No. 42B-1:

In general, the United States asserted that it did not have the resources to review every claim and that it and other water users relied upon the DNRC claim examination efforts to highlight claims that might need further scrutiny and the filing of objections. The U.S. reminded the conference participants that Court personnel, during public meetings, encourage water users to first review claims with issue remarks.

Min. & Order at 2-3, July 16, 2009. The DNRC Water Right Informational Brochure cited above in Ex. A, is also important for what it does not say – it does not explain that examination of existing rights does not include post-1973 abandonment. Although the Water Court provides a significant amount of information to the general public about the Adjudication, including at public meetings, on its website, and on a tape and in a guide book (“A Water User’s Guide Through the Montana Water Court”) that the public may obtain from it for a small fee, none of

these materials identifies or addresses the issue of post-1973 abandonment. The Court can take judicial notice of the contents of its website. *See also* Exhibit C. It is only by omission from these sources and the 640+ page DNRC Claim Examination Manual that anyone would know that the Water Court and DNRC are not addressing the issue of post-1973 abandonment. Furthermore, the Legislature never shifted the burden of examining claims for post-1973 abandonment from the Water Court and DNRC to the general public nor does State law or the Water Right Claim Examination Rules allow the Water Court to direct the public or any potential objector to fill the DNRC's claims examination role.

**4. Failure to address post-1973 abandonment undermines the comprehensiveness of the Adjudication, as well as settlements and decrees of federal reserved rights.**

The United States appears in the Montana Water Court and is a party in the Montana Water Rights Adjudication pursuant to the waiver of its sovereign immunity in 43 U.S.C. § 666(a)(1), commonly known as the McCarran Amendment. The statutory prerequisite for this waiver is that the state proceeding must be a "comprehensive" determination of all water rights, sometimes called a general stream adjudication. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 548-52 (1983); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976). Such a proceeding must be an "adjudication of the rights of all claimants to a river or stream," in which "**all existing water rights** claims in the river system will have been determined when the adjudication is finished." *United States v. Oregon Water Resources Dept.*, 44 F.3d 758, 764, 768 (9<sup>th</sup> Cir. 1994) (emphasis added).

The clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system. . . . [A]ctions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment

bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

*Colorado River Water Conservation*, 424 U.S. at 819 (citation omitted). See also *The Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Sults*, 312 Mont. 420, 431, 59 P.3d 1093, 1099-1100 (2002) (“The stated purpose of the McCarran Amendment is to prevent piecemeal water rights adjudications by requiring determination of all water rights in a given river system in a single proceeding.”).

The “comprehensiveness standard requires the consolidation of existing controversies, not the reopening of settled determinations.” *United States v. Oregon*, 44 F.3d at 768. The problem presented in the Montana Adjudication is that the Court is not addressing an essential element of a water right – its continued beneficial use after 1973 and whether it “exists” as of the time of the Final Decree. As this Court has recognized:

The requirement that water be used for a useful or beneficial purpose is a fundamental element of the water law of Montana. It always has been and continues to be so today. Section 85-2-404, MCA [addressing post adjudication-abandonment], is not a July 1, 1973 stop sign to this controlling and fundamental principle.

*Jeffers, Mem*, Case No. WC-92-2 at 15 (citations omitted). Once the Water Court issues its Final Decrees, Montana law limits the ability to challenge existing water rights as abandoned to the DNRC, see §§ 85-2-404, 85-2-405, MCA, and does not implement comprehensive supplemental adjudications that would be “inclusive[] in the[ir] totality,” *United States v. Oregon*, 44 F.3d at 768, quoting *United States v. Dist. Court in and for Water Div. No. 5*, 401 U.S. 527, 529 (1971). This raises concerns about the scope of the adjudication and whether it will be sufficiently comprehensive for purposes of the waiver of the United States’ sovereign immunity in the McCarran Amendment. See *Dugan v. Rank*, 372 U.S. 609, 617-619 (1963) (McCarran waiver applies only after a comprehensive general stream adjudication under 43 U.S.C. § 666(a)(1)).

The failure to address post-1973 abandonment will undermine the fair implementation of carefully negotiated settlements of Indian water rights and other federal reserved water rights, which are also “existing water rights” and entitled to the same protection from illegal encroachment as State-based existing water rights. Mont. Code Ann. §§ 85-2-102(12), 85-2-101(6). This approach would also be in sharp contrast with § 85-2-228, MCA, which requires all Federal reserved water rights with a priority date after June 30, 1973, to be subject to the same adjudication process as a federal right with a priority date before July 1, 1973.

**a. Failure to address post-1973 abandonment undermines the fair implementation of Indian reserved water rights settlements and decrees.**

While the Montana Supreme Court held that the Montana Adjudication was “adequate on its face to allow the Water Court to adjudicate federal reserved rights,” it reserved “ruling on whether the Act is adequate as applied” because “federal law controls federal reserved rights and challenges to the manner in which the Water Court adjudicates these rights turns upon the facts of each adjudication.” *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 219 Mont. 76, 99, 712 P.2d 754, 768 (1985). As to Indian water rights, the Montana Supreme Court reserved ruling on all challenges whether the “Water Court abridge[d] Indian reserved water rights by improperly applying the Act and the federal law that protects those rights,” noting “that failure can be appealed to this Court as well as to the Supreme Court of the United States for ‘a particularized and exacting scrutiny.’” *Id.*, 219 Mont. at 95-96, 712 P.2d at 766, quoting *San Carlos Apache*, 463 U.S. at 571. Because the failure to address post-1973 abandonment allows resurrection of non-Indian water rights that have been

abandoned, the Montana Water Use Act and federal law will have been applied in a way that does not protect Indian reserved water rights.<sup>21</sup>

The Indian water rights settlements that the Court has entered, as well as settlements approved by or pending before Congress and not yet before the Court, require users of the Tribal Water Right to subordinate to or share shortages with valid existing State-based water rights. The State has insisted on these and similar provisions in many settlements to protect certain State-based water users who are junior to the rights of the applicable Tribe. For example, the water rights settlement for the Chippewa Cree Tribe of the Rocky Boy's Reservation, *Chippewa Cree Tribe – Montana Compact*, § 85-20-601, MCA, which Congress approved in 1999 and this Court decreed in 2002, subordinates the Tribal Water Right to water rights recognized under State law with a priority date before the ratification date of the Compact. *Id.*, at Art. III.A.1.b. & Art. IV.A.8. The Compact adds: "It is the intent of the parties that this subordination extends only to valid water rights, and not to statements of claim filed pursuant to 85-2-221, MCA." *Id.* at Art. IV.A.8. The Compact includes a list of claimed State-based rights that is to be modified "by any final decree resolving claims on the affected drainages," or for clerical error or omission. Art. IV.A.8(a). If the applicable Final Decrees do not address post-1973 abandonment, they will

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<sup>21</sup> The Court summarized the position of the United States and Northern Cheyenne Tribe, as stated during the July 2009 initial status conference in Case 42B-1:

The U.S. further asserted that compact negotiations generally begin with an effort to subordinate federal and Indian reserved rights to state based rights and that some of the compacts have significant subordination provisions included within their terms. Given those subordination provisions, the United States and the Northern Cheyenne Tribe asserted the state based water right claims should be consistently examined to raise issues, such as abandonment, that might adversely affect any subordinated reserved rights.

Case 42B-1, Min. & Order at 2-3, July 16, 2009.

not correct the list of claims appended to the Compact to reflect only valid existing water rights and the parties' intent that subordination extends only to valid water rights, will not be met. The result will be that the Tribal Water Right may be required to subordinate to abandoned water rights that could be resurrected.

Another example is found in the Crow Tribal water rights settlement that is not yet before the Court. The *Crow Tribe-Montana Compact*, § 85-20-901, MCA, provides for shared shortages when water availability is insufficient to satisfy both the Tribal Water Right and "all water rights Recognized Under State Law within the Reservation with a priority date before this Compact has been ratified by the Montana legislature." *Id.*, at Art.IV.A.4.a. The Montana legislature ratified Crow Tribal Compact in June 1999. The Compact defines "Recognized Under State Law" as "a water right arising under Montana law or a water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a tribal member." *Id.*, at Art. II.19. If the Court decrees existing State-based water rights that are abandoned post-1973, such rights might be resurrected in the future and seek the protection of these provisions. As a general matter, if the validity of State-based existing water rights is not determined through this Court in the same or equivalent manner used to determine pre-1973 existing water rights, the fairness of these settlements and their related decrees, which are negotiated and entered pursuant to the Montana Water Act and implemented by the Water Court, comes into question.

**b. Failure to address post-1973 abandonment will undermine other federal reserved rights settlements and decrees.**

The failure to address post-1973 abandonment also raises potentially negative consequences for instream flows and fish and wildlife beneficial uses. For example, as part of

the negotiated settlement of USDA-Forest Service reserved water rights, the State of Montana agreed to create Forest Service instream flow water rights under state law for fishery and wildlife purposes. *United States of America, Department of Agriculture, Forest Service – Montana Compact*, Mont. Code Ann., § 85-20-1401, Art. V. These State-based instream flow rights have the very junior priority date of April 17, 2007, which is the effective date of the Compact. The Compact also created an expedited process for the Forest Service in certain circumstances to obtain State water reservations under § 85-2-316, MCA, to maintain minimum flow, volume, level, or quality of water on National Forest System lands. *Id.* at Art. VI. The priority date for these reservations will be the date the Forest Service files the reservation application, which will be junior to all other uses on the water source at the time of filing. If the Court does not address partial or total abandonment of existing water rights post-1973, all of which will be senior to the Forest Service instream rights or reservations, these Forest Service instream rights and reservations could be compromised.

#### IV. CONCLUSION

For the foregoing reasons, this Court must determine and implement legally-sufficient procedures to ensure that post-1973 abandonment is addressed before Final Decrees are issued in each basin, including directing the DNRC to examine water rights claims for post-1973 nonuse.

Dated this 23~~rd~~ day of January, 2012.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Motion for Order Requiring DNRC to Examine for Post-June 30, 1973 Nonuse and Motion for Water Court to Adjudicate Post-June 30, 1973 Abandonment in the Montana Adjudication and Brief in Support** was served upon the following persons by first class mail on the 23<sup>rd</sup> day of January, 2012.

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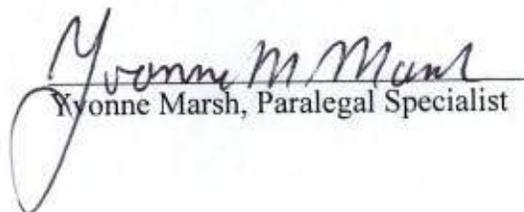
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