

ANNE W. YATES
Special Assistant Attorney General
Montana Department of Natural Resources
and Conservation
1625 Eleventh Ave.
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-0503
ayates@mt.gov

E-MAIL FILED

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Montana Water Court

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

**United States of America (USDI-Bureau of
Indian Affairs) – General Objection to Basin
42B and 42C Preliminary Decrees.**

CASE 42B-1

DNRC AMICUS CURIAE BRIEF

The Department of Natural Resources and Conservation (DNRC or Department) hereby files its *Amicus Curiae* Brief in this matter pursuant to the Court's December 27, 2013, *First Amended Scheduling Order*. The purpose of the Department's Brief is to inform the Court and the Parties as to the logistics and costs of fulfilling the United States' Motion of January 23, 2012, (Motion) and to clarify any expectations. The Department's Brief is broken down into two parts: acquisition of data sources and claim examination staffing and workload.

BACKGROUND

The Department has an Adjudication Bureau which provides technical services, including claims examination, to the Water Court. Montana Code Ann. §85-2-243. The Department currently has 31 FTEs (full-time equivalents) dedicated to claims examination. The Department also has benchmarks for claims examination that it must meet as set forth in Montana Code Ann. §85-2-271, MCA. Failure to meet the required benchmarks jeopardizes the Department's funding. As recently reported to the Water Policy Interim Committee of the Montana

Legislature at its January 2014 meeting, the Department has 679 claims remaining to be examined to meet the last benchmark for claims examination. However, the Department will then commence re-examination of approximately 90,000 claims in verified basins pursuant to order of the Water Court.

At present, the 31 FTE are funded only through June 30, 2015. The funding is scheduled to drop to 12 FTE as of July 1, 2015. The Department intends to seek funding in the 2015 Legislature for the full 31 FTE. This additional funding is not secure.

DISCUSSION

The United States' Motion seeks to have water right claims examined for post-1973 abandonment. The extent of its United States' request for re-examination/examination as stated in the Court's October 31, 2013 *Scheduling Order* is:

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.

Because the request could potentially require re-examination of most water right claims in the adjudication, the Department offers information on various scenarios. The costs of the data sources would remain constant regardless of the number of claims examined. The cost for staffing and the additional time required for examination would vary depending on the number of claims examined. The costs and time periods are approximate and are the best estimates of the Department with current information. Importantly, the Department's obligation to perform claims examination extends only so far as its budget provides. Montana Code Ann. §85-2-243(2).

DATA

The Department assumes that at least two data sources would be required by the Water Court for examination. The Water Court could require more data sources such as at intervals of

every 10 years (ex. 1983, 1993, 2003, 2013), or some other variation of years. The specific years and number of sources would be based upon order of the Water Court. Parties may wish to examine the Montana law regarding the presumption of abandonment for non-use. The number of data sources to review will affect the length of staff time to examine.

The estimate to acquire two hard copy sets of USDA aerial photographs for the entire state is approximately \$721,600 (approx. \$360,800 for each set) and \$180,000 to scan and register the photographs. The total estimate is \$901,600.

Electronic data is available from the Natural Resource Information System at the Montana State Library. The list of the data available can be found on the State Library website at <http://geoinfo.montanastatelibrary.org/data/aerialphotos/>. The listed resources include, for example, statewide black and white photographs for 1990-2003, and statewide color photographs for 2005, 2009, and 2011. These resources are free, but they are online only. These sources would not be placed as a hard copy in the examination file. Water Right Claims Examination Rule 5(b), however, requires that examination materials, including data and facts be maintained in the claim file. Hard copy acquisition would have additional costs.

STAFFING COSTS AND TIME TO COMPLETE EXAMINATION
FOR POTENTIAL POST -1973 ABANDONMENT

The Department provides the following estimates based on certain assumptions, varying staff levels and varying claim scenarios. The estimates for staffing costs and times to complete the examination are based on two assumptions: two data sources are examined; and approximately 8 claims per day per person are examined. The Department also provides estimates with 31 FTE and with 12 FTE, and with examining all claims in the adjudication (approximately 214,000) or only irrigation claims (approximately 54,000).

A. Examination of All Claims in the Adjudication (214,000)

1. 31 FTE

If the Department is able to retain the funding for the full 31 FTE to complete its current work, the examination of all of the claims in the adjudication for potential post-1973 abandonment would take an additional 4 years to complete and an additional approximate \$8,439,600 to fund. The 4 years and \$8.4 million are additional to the Department's current workload and proposed request to the 2015 Legislature.

2. 12 FTE

If the Department does not receive funding in the 2015 Legislature for 31 FTE, the examination for potential post-1973 abandonment would take approximately 12 years additional to current workload. The timeframe for completion of the current workload with only 12 FTE funded would likely be extended by decades, the extent to which the Department cannot estimate.

B. Examination of Irrigation Claims (54,000)

Although Montana has not historically created a preference for any particular water right based on purpose, the Department provides an estimate to review only the irrigation claims in the adjudication.

1. 31 FTE

With 31 FTE, the examination of all of the irrigation claims in the adjudication for potential post-1973 abandonment would take an additional 1 year to complete and an additional approximate \$2,068,637 to fund. The 1 year and \$2 million is additional to the Department's current workload and proposed funding request to the 2015 Legislature.

2. 12 FTE

With 12 FTE, the examination for potential post-1973 abandonment would take approximately 3 years additional to current workload. As stated above, the Department does not have an estimate of the time to complete the current workload with 12 FTE.

CONCLUSION

The Department provides the above calculations as a rough estimate based on current information. The Department can provide additional estimates of other scenarios if the Court believes it to be beneficial.

Respectfully submitted this 24th day of January 2014.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By: Anne W. Yates

ANNE W. YATES
Special Assistant Attorney General
1625 Eleventh Ave.
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-0503

CERTIFICATE OF SERVICE

I hereby certify that on a true and correct copy of the *DNRC Amicus Curiae Brief* was served via US Mail or e-mail as indicated on the service list.

Laura L. Maul
U.S. Department of Justice
Indian Resources Section, ENRD
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 305-0486
laura.maul@usdoj.gov

James J. DuBois
U.S. Department of Justice
Environment & Natural Resources Division
999 18th Street South Terrace, Suite 370
Denver, CO 80202
(303) 844-1375
james.dubois@usdoj.gov

Roselyn Rennie
Office of the Solicitor
2021 4th Ave North, Suite 112
Billings, MT 59101
(406) 247-7545
roselyn.rennie@sol.doi.gov

John Chaffin
Office of Field Solicitor
2021 4th Ave North, Suite 112
Billings, MT 59101
john.chaffin@sol.doi.gov

Patrick Barry
U.S. Department of Justice
Indian Resources Section, ENRD
PO Box 7611
Ben Franklin Station
Washington, DC 20044-7611
(202) 305-0269
patrick.barry@usdoj.gov

Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302
(303) 444-2549
jwhiteing@whiteinglaw.com

Hertha L. Lund
Breeann M. Johnson
Lund Law PLLC
502 South 19th Avenue, Ste. 306
Bozeman, MT 59718
(406) 586-6254
lund@lund-law.com
Johnson@lund-law.com

Nathan A. Espeland
Espeland Law Office, PLLC
PO Box 1470
Columbus, MT 59019
(406) 322-9877
espelandnathan@gmail.com

Laura Ziemer
Patrick Byorth
Trout Unlimited's Montana Water Project
321 East Main Street, Ste. 411
Bozeman, MT 59715
(406) 522-7291
lziemer@tu.org
pbyorth@tu.org

R. Blair Strong, Attorney
Paine Hamblen LLP
717 West Sprague Ave. Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
r.blair.strong@painehamblen.com

Timothy C. Fox
Attorney General
Cory J. Swanson
Deputy Attorney General
Jeremiah D. Weiner
Assistant Attorney General
215 North Sanders
PO Box 201401
Helena, MT 59620-1401
(406) 444-2026
CoSwanson@mt.gov
JWeiner2@mt.gov

Sandra K. Watts
Blackfeet Legal Department
P.O. Box 849
Browning, MT 59417
swatts2008@yahoo.com

Reid Peyton Chambers, Esq.
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240
Fax (202) 682-0249
rchambers@sonosky.com

Ryan C. Rusche
ASSINIBOINE & SIOUX TRIBES OF
THE FORT PECK RESERVATION
P.O. Box 1027
Poplar, MT 59255
(406) 890-8450
Fax (406) 768-5478
rrusche@fortpecktribes.net

Daniel J. Decker
CONFEDERATED SALISH &
KOOTENAI TRIBES OF THE
FLATHEAD INDIAN RESERVATION
Tribal Legal Department
P.O. Box 278
Pablo, MT 59855-0278
(406) 675-2700
Fax (406) 675-4665
danield@cstkt.org

Daniel D. Belcourt
Attorney for Chippewa Cree Tribe
BELCOURT LAW, P.C.
120 Woodworth Avenue
Missoula, MT 59801
(406) 265-0934
Fax 406) 926-1041

Thomas W. Fredericks
Jeremy P. Patterson
Eduardo A. Provencio
Christopher J. Reagen
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, CO 80027
(303) 673-9600
tfredericks@ndnlaw.com
jpatterson@ndnlaw.com
eprovencio@ndnlaw.com
creagen@ndnlaw.com

James L. Vogel
Law Offices of James L. Vogel
PO Box 525
Hardin, MT 59034
(406) 665-3900
jimvmt@email.com

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