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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
BLACKFOOT RIVER - BASIN 76F
* *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDER-GROUND, WITHIN THE BLACKFOOT RIVER BASIN (76F)	)	**CASE 76F-1**

CLAIMANT: Wales Brothers; Blackfoot Valley Ranch Foundation

MARSHALING ORDER

On September 12, 2008, this Court issued an Order Granting Motion to Strike (hereafter "September 12 Order"). The September 12 Order directed the Montana Department of Natural Resources and Conservation - Water Rights Adjudication Bureau ("DNRC") to strike the consolidation or marshaling issues remarks it had previously applied to certain claims in several basins across the state. Further, the September 12 Order directed the DNRC to review and revise its marshaling policy to more precisely identify factual and legal issues presented by irrigation systems historically employing marshaling techniques.

On January 19, 2009, Candace West, DNRC Chief Legal Counsel, emailed the DNRC's revised marshaling policy to the Court. In response, the Court issued its Notice of Comment Deadline to DNRC Draft Marshaling Remarks and set an April 13, 2009 deadline for comments. The Court served the document on a larger group of potentially

interested parties and invited comments from the larger group. Comments were received from Wales Brothers and Blackfoot Valley Ranch Foundation ("Claimants"), the Montana Department of Fish, Wildlife, and Parks ("DFWP"), the United States of America, and the law firm of Doney, Crowley, Bloomquist, Payne, & Uda, PC ("Doney firm").

Revised DNRC Marshaling Policy and Remarks

In its January 19, 2009 revised marshaling policy, the DNRC proposes two examples of consolidation issue remarks:

> G62 THERE HAS BEEN A CONSOLIDATION OF INDIVIDUAL WATER RIGHTS, LISTED BELOW, WHICH NOW REFLECT A COMBINED PLACE OF USE IRRIGATED FROM A COMBINATION OF ALL THE POINTS OF DIVERSION. A FLOW RATE ISSUE MAY EXIST.
>
> G64 THERE HAS BEEN A CONSOLIDATION OF INDIVIDUAL HISTORIC WATER RIGHTS, LISTED BELOW, WHICH NOW REFLECT A COMBINED PLACE OF USE IRRIGATED FROM A COMBINATION OF ALL THE POINTS OF DIVERSION. THIS CLAIM MAY REFLECT AN EXPANSION OF HISTORIC BENEFICIAL USE AS NOT ALL POINTS OF DIVERSION CAN DELIVER WATER TO THE PLACE OF USE.

In addition to these two issue remarks, the DNRC suggests several specific issue remarks could be applied under different scenarios. These remarks appear to already exist and would highlight priority date, flow rate, place of use, point of diversion, amendments, and post-June 1973 issues and changes.

Finally, the DNRC proposes two other issue remarks, both coded as GIIS. These two remarks appear to highlight issues related to incremental development or expansion of the historical use of a particular right involved in a marshaling irrigation practice.

> First Version: THIS WATER RIGHT AND THE WATER RIGHTS FOLLOWING THIS STATEMENT CLAIM TO MARSHAL WATER ACROSS THE ENTIRE PLACE OF USE FROM MULTIPLE POINTS OF DIVERSION. A COMMON HISTORICAL APPROPRIATION OF WATER WAS 1 TO 1 ½ MINER'S INCHES PER IRRIGATED ACRE, YET THIS CLAIMED

APPROPRIATION IS FOR 100 MINER'S INCHES TO IRRIGATE 1000 ACRES, OR 1 MINER'S INCH FOR EVERY TEN ACRES. THIS CLAIM MAY REFLECT ISSUES OF INCREMENTAL DEVELOPMENT, EXPANSION OF HISTORIC USE, AND A SINGLE PRIORITY DATE MAY BE QUESTIONABLE FOR THE ENTIRE PLACE OF USE.

Second Version: THIS WATER RIGHT AND THE WATER RIGHTS FOLLOWING THIS STATEMENT CLAIM TO MARSHAL WATER ACROSS THE ENTIRE PLACE OF USE FROM MULTIPLE POINTS OF DIVERSION. THIS CLAIM MAY REFLECT ISSUES OF INCREMENTAL DEVELOPMENT AND EXPANSION OF HISTORICAL USE, AND A SINGLE PRIORITY DATE MAY BE QUESTIONABLE FOR THE ENTIRE PLACE OF USE.

Comments on Revised DNRC Marshaling Policy and Remarks

The comments from the United States and DFWP were in general agreement and the comments from the Claimants and the Doney firm were in general agreement.

The Claimants and the Doney firm both take the general position that any attempt by the DNRC to define marshaling of water rights as creating factual or legal issues is unwarranted, unauthorized, and ignores pre-1973 Montana water law to such an extent that it violates the Constitutional recognition and validation of existing water rights. (Claimant Comments pgs. 2-9; Doney Comments pgs. 1-2) The Claimants have maintained throughout this proceeding that the DNRC lacks authority to implement a marshaling policy through revisions to its claims examination policy. As the Claimants pointed out in their brief, the Court did suggest the DNRC examine the variety of specific factual or legal issues that might arise from a marshaled group of water rights. (Claimant Comments pg. 3)

The Claimants' argument that specific marshaling issue remarks will violate the Constitutional recognition and confirmation of existing water rights is based on their contention that prior to July 1, 1973, appropriators were free to change their point of diversion and place of use, effectively marshaling their rights, subject only to the 'no injury rule', where the burden was on any party alleging injury to demonstrate that injury to the District Court. (Claimant Comments pgs. 4-7). The Claimants argue placing

marshaling issue remarks on their claims would impose a burden on them to prove there was no injury to other appropriators when the marshaling first occurred. (Claimant Comments pgs. 4-5) Since any pre-1973 changes were specifically authorized by Section 89-803 R.C.M. 1947, Claimants argue they should not have that burden placed on them by a DNRC claim examiner. (Claimant Comments pg. 6)

The Claimants contend each proposed marshaling remark could be replaced by existing issue remarks found in the DNRC Claims Examination Manual. (Claimant Comments pgs. 11-15) Although Claimants agree that post-1973 marshaling changes represent a valid issue, they contend these issues are not unique to the concept of marshaling and that specific marshaling remarks are unnecessary. (Claimant Comments pg. 13-14)

The Doney firm sets forth the same basic argument. The Doney firm argues the application of marshaling issue remarks ignores the fact that pre-1973 Montana water law set forth the criteria by which other appropriators could challenge changes in water use amounting to marshaling and water users seeking to challenge the practice at this late date have long since missed their opportunity to do so. (Doney Comments pgs. 1-2) The Doney firm further argues that the proposed marshaling remarks are vague and do not allow for accurate conclusions to be drawn. (Doney Comments pgs. 2-3) In elaborating on this position, the Doney firm states that the remarks suggest that marshaling is the cause of the stated issue, whatever the specific issue might be, and that for DNRC to draw that conclusion within the remark itself is not appropriate. (Doney Comments pg. 3) The Doney firm suggests no marshaling policy is needed, and suggests the main issue it sees with marshaling relates to post-1973 expansions in place of use.

The United States and DFWP generally support DNRC's efforts to address marshaling as a specific form of water use and also endorse the proposed marshaling remarks. (DFWP Comments pg. 1 & USA Comments pg. 2) The United States suggested the remarks would help identify and refine the issues raised by specific

instances of marshaling. (USA Comments pg. 2) The United States asserts that post-1973 changes involving marshaling are a problem and encouraged the DNRC to identify those situations with appropriate issue remarks. Otherwise, the United States argues, water users will be encouraged "to amend claims to 'marshaled' status in order to surreptitiously expand their rights." (USA Comments pg. 2) Both DFWP and the United States of America agree that pre-1973 marshaling which leads to an expansion of irrigated acres is an issue that should be highlighted. (DFWP Comments pg. 2 & USA Comments pg. 3) The DFWP and the United States assert that applying volume limits on marshaled rights would help limit the individual marshaled claims to their original appropriations, attributing any additional volume to a junior, implied right with a priority date tied to any expansion of irrigated acreage. (DFWP Comments pg. 2 & USA Comments pg. 5)

Marshaling - What is it?

The terms "marshaling" or "marshalling" (as either word might be applied to water rights) do not appear as if they have ever been used or defined by the Montana Supreme Court. In a Lexis search, the Court did find a reference to "stacking" of water rights in *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1440 (9th Cir. Ariz. 1994) in which the 9th Circuit Court cited to the lower court decision of *United States v. Gila Valley Irrigation Dist.*, 804 F. Supp. 1, 18, and summarized that court's definition of "stacking" as follows:

> [t]he district court noted that the Article XI of the Decree allows "stacking" of water by permitting all water allocated to several fields to be stacked together and applied to one field at a time, in order to obtain an adequate head of water for efficient irrigation, so long as the users are in fact entitled to that water.

In the absence of a precise Montana definition of marshaling, each party advanced its own. The common denominator to the definitions advanced by the parties appears to include some change in the manner of historical water use.

According to the United States, "[b]y definition, marshaling means consolidation of claims, such that one or more of the claims in the marshaled group (most commonly, *all* of the claims in the group) has a larger place of use and, sometimes more points of diversion, than historically used for the individual claim or claims." (USA Comments pg. 3, italics in original) Although less common, marshaled rights "could all use a single diversion." (USA Comments pg. 4) For the United States, the very concept of marshaling appears to require a larger place of use following the consolidation of rights. For example, if three or more water rights historically diverted through three or more ditches to irrigate the same place of use were combined and diverted into a single ditch or two ditches to irrigate the same exact place of use and without an increase in the use of water, then under the United States' definition, marshaling would not exist.

The DFWP states that marshaling is the "co-mingling and consolidation of water rights." (DFWP Comments pg. 2) Under DFWP's definition, the example in the previous paragraph would represent marshaling.

The Blackfoot River ranch group characterized marshaling in an earlier brief as changes to water rights which resulted in "the stacking of water rights to service lands to which rights were not historically appurtenant." (September 12 Order pg. 5) Under this definition, the previous example would not represent marshaling because all the water rights in the example were appurtenant to the place of use prior to the "stacking."

The Doney firm states that "[m]arshaling is nothing more than the commingling of water in one ditch." (Doney Comments pg. 1) Under this definition, the earlier example would represent marshaling because multiple water rights were commingled into one or two ditches from three or more ditches.

The DFWP asserts that from "the perspective of other water users, the real issue with marshaling is the expanded use of water." (DFWP Comments pg 2) Doney asserts that equating marshaling, *per se*, to expansion and increased consumption is a fallacy because marshaling is simply an irrigation technique that is no different from any other

water right and that marshaling "simply allows a water user to distribute water where it is most needed and, consequently, allows that water user to achieve the most beneficial use of the claimed water." (Doney Comments pg. 1)

Whether water rights are consolidated or commingled and diverted through fewer or more points of diversion or whether water rights are consolidated or commingled and used to irrigate a new or expanded place of use, the common denominator in all of the definitions advanced by the parties, as previously noted, is that a change in historical water usage has taken place. Although a change in water use has the potential to be detrimental to other water users, it is not an automatic result. The Supreme Court has reported several cases in which water rights have been changed, consolidated, commingled, or marshaled in one degree or another, and our high court has found no fault with the practice.

In *Head v. Hale*, 38 Mont. 302, 308, 100 P. 222 (1909), the Supreme Court stated that a "person entitled to the use of water may change the point of its diversion, and may use it for other purposes than that for which it was originally appropriated, provided always, however, other parties are not injured thereby. (Revised Codes, sec. 4842.)" In *Hansen v. Larsen* 44 Mont. 350, 353, 120 P. 229 (1911), the Court concluded that the burden of proof was not on those water users who changed their use of water to affirmatively prove that their modification did not adversely affect any other appropriator, but, instead, the burden was on those other appropriators to prove any impairment to their own rights. See also *Thrasher v. Mannix & Wilson*, 95 Mont. 273, 276, 26 P.2d 370 (1933). In *Tucker v. Missoula Light & Railway Co.*, 77 Mont. 91, 99, 250 P. 11, 14 (1926), the Court stated that the plaintiff had a right to use his water through his upper ditch, but that he "claimed the right to use his water through any of his ditches, and, in the absence of a showing that others were injured thereby, our Codes accord him that right."

As the Water Court noted in its September 12 Order, pre-July 1973 marshaling of water rights, including any of the definitions advanced by the parties in this case, is not, *per se*, questionable.

However, according to the Supreme Court, a constant cause of friction between water users since the beginning of western irrigation has been changes to a place of use and manner of use to the detriment of another water user. *Quigley v McIntosh*, 110 Mont. 495, 503 103 P.2d 1067, 1071 (1940). In *Quigley*, the Court stated at 110 Mont. at 505 that it:

> seems indisputable that a water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial use has been proven, cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was decreed, to the injury of subsequent appropriators.

Therefore, pre-July 1973 changes in water usage (which could include marshaling) might be a problem if they resulted in detriment or injury to other appropriators.

Pre-July 1973 Marshaling Remarks are Unnecessary

The revised DNRC marshaling policy appears to be designed to highlight claims which have been marshaled or consolidated at any time prior to July 1973, but the policy provides no criteria to identify which claims might have been changed prior to July 1973 to the detriment of other appropriators. The DNRC policy assumes that any pre-July 1973 marshaling or claims consolidation could have been detrimental and then places the burden on the claimant (by issue remarking the claim) to prove the negative during a future § 85-2-248, MCA, issue remark resolution process.

Pre-July 1973 Montana water law recognizes that a water right holder could change a water right's point of diversion or place of use and that it was the responsibility of other water users to prove an adverse effect to their water rights by any changes to the points of diversion and place of use. Section 89-803, R.C.M. 1947 (repealed 1973); *Head v. Hale* (1909), 38 Mont. 302, 100 P. 222; *Quigley v. McIntosh* (1940), 110. Mont. 495, 103 P.2d 1067. The Court is not persuaded that the affirmative burden which existed on other appropriators prior to July 1973 to prove detriment should now be shifted to a claimant decades later to prove "no detriment." The Court directs the DNRC to eliminate general issue remarks G60, G62, and G64, from its examination manual and refrain from adding either version of the proposed GIIS marshaling remark.

However, if the DNRC examination identifies the existence of flow rate, diversion capacity, place of use, and other specific factual issues and does so without relying solely on the assumption that pre-July 1973 marshaling is to blame, then an appropriate issue remark (without a marshaling or consolidation remark) may be added to the claim abstract.

Post-June 1973 Marshaling

The Court noted in its September 12 Order that if the DNRC claims examination effort identifies post-June 1973 water use changes that potentially violate the Water Use Act of 1973, DNRC could place a clearly stated issue remark on the claim to highlight the perceived issue or issues. It appears all the commenting parties agree with this proposition. Therefore, all claims should continue to be examined to determine whether they reflect unauthorized post-June 1973 water use changes. This would include claims which may have been marshaled or consolidated within the last 37 years.

The main concern over consolidated or marshaled claims appears to be the potential for increasing the historical use of water, usually through an expansion of irrigated acres. In determining whether post-June 1973 marshaling efforts may be in violation of the Water Use Act, the DNRC has at least one tool to facilitate its review of post-June 1973 marshaled claims. That tool is supplemental rights. Supplemental rights are separate water rights for the same purpose, owned by the same claimant, and used on overlapping places of use. Rule 2(a), 67 W.R.C.E.R. Although not all supplemental rights are marshaled rights, most post-June 1973 marshaled rights are probably supplemental.

If one or more current supplemental rights were in separate ownership after June 1973, but have since been combined into a unified ownership and then into a supplemental relationship, there is a potential for the water use associated with one or more of the supplemental claims to have been changed without compliance with the Water Use Act.

Except in the Powder River basins, the DNRC is not likely to have water right ownership records between July 1, 1973 and May 11, 1979, the respective effective dates

of the Water Use Act of 1973 and of Senate Bill 76. However, DNRC does have a record of the ownership of the statements of claim filed in compliance with § 85-2-221, MCA. These ownership records would likely begin after November 15, 1979, the date Senate Bill 76 forms generally became available. If the DNRC were to compare the ownership of every current supplemental right as it existed during the claim filing period with the current claim ownership, it would likely discover claims which were filed as separately owned claims, but which are now in a unified ownership. If amendments to those previously separately owned claims were filed subsequent to the transfer of the claims into a common ownership and if those amendments created a supplemental relationship, then the DNRC would be within its authority to examine for post-June 1973 water use changes.

The language contained in paragraphs 4 and 5 of the DNRC revised marshaling policy and the issue remarks identified thereafter (unnumbered pages 3 and 4 of the revised marshaling policy), appears to be suitable to highlight issues surrounding potential post-June 1973 changes, either due to post-June 1973 marshaling or otherwise. The last sentence on unnumbered page 4 and the GIIS remarks on unnumbered page 5 of the revised marshaling policy would not be suitable in this effort.

Incremental Development

The Supreme Court recently stated:

> An appropriator historically has been entitled to the greatest quantity of water he can put to use. *Sayre v. Johnson*, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. *In re Adjudication of Existing Rights to the Use of All Water*, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; *see also* § 85-2-311(1)(d), MCA. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator "is entitled to have the water flow in the same manner as when he located," and the appropriator may insist that prior appropriators do not affect adversely his rights. *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 351, 96 P. 727, 731 (1908).

Hohenlohe v. DNRC, 2010 MT 203, 357 Mont. 438, 2010 Mont. Lexis 324, 43¶.

Section 89-803, R.C.M. 1947 provides that the person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any other place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated. While this statutorily granted, pre-July 1973 right to change the purpose, point of diversion, or place of use may be recognized as a pre-July 1973 use of water, if such changes increase the flow rate or volume diverted from the source, or increase the burden on the source, there may be a problem. *Quigley v. McIntosh* (1940), 110. Mont. 495, 505-506, 103 P.2d 1067.

In those circumstances, examining claims for incremental development is appropriate. Based on such past examination, the Water Court has recognized implied claims in some situations where water users have increased their use of water from a source. The recognition of an implied claim usually generates a claim with a priority date associated with the date an expansion in water use occurred, not the priority date of the original claimed appropriation. (*See*, e.g., Memorandum Opinion in Water Court Case 40C-47).

However, recognizing implied claims has limitations. As noted in Case 40C-47, an implied claim is appropriate only where information supporting the claim can be found within the Statement of Claim itself or supporting documentation submitted with and attached to the original Statement of Claim. Implied claims may not be recognized to resurrect a claim which was not timely filed in the adjudication process and therefore forfeited. *In the Matter of the Adjudication of the Yellowstone River Above and Including Bridger Creek* (1992), 253 Mont. 167, 832 P.2d 1210.

Volume

Both the United States and DFWP suggest the DNRC develop a policy for decreeing volumes for marshaled claims where it appears marshaling has enabled an expansion of the place of use. (USA Comments pgs. 4-5, DFWP Comments pg. 2). In view of *McDonald v. State*, 220 Mont. 519, 522, 722 P.2d 598 and the Legislature's

response, a quantified volume is only required to be decreed where a water judge determines it is necessary to effectively administer the right. Section 85-2-234(6)(b), MCA. It has since become the standard procedure in the DNRC examination process to not include a quantified volume for direct flow irrigation rights. Rule 15(c), W.R.C.E.R. and DNRC Claims Examination Manual Chp. 7, Sec. C. Although a volume determination may be useful for some claims and perhaps even necessary for other claims, the intent of the Legislature appears to discourage the use of blanket volume caps on all direct flow irrigation claims. However, where warranted, the Court will decree a quantified volume on a direct flow irrigation claim pursuant to § 85-2-234(6)(b), MCA.

Conclusion and Direction to DNRC

The consolidation or commingling of water rights associated with marshaling might result in friction, but not all pre-July 1973 changes in water use result in adverse consequences to other users. Without a definition commonly accepted by water users or one established by the Supreme Court and without precise tools to identify those specific marshaled claims which need targeting, it is difficult to define specific criteria to guide the DNRC in examining claims for marshaling practices which began prior to July 1973 or to guide water users who will eventually be required to present evidence to resolve such a remark. Accordingly, the DNRC revised marshaling policy targeting every consolidated or marshaled claim is unsupportable.

The DNRC claims examination effort to highlight issues created by marshaling of water right claims should be directed to post-June 1973 occurrences, except in situations in which a pre-July 1973 change might have been attempted, appropriately challenged and enjoined. Any effort to resurrect an enjoined pre-July 1973 change through the adjudication process would be governed by the principles of *res judicata* and collateral estoppel. Any such effort should be appropriately remarked with a citation to and brief description of any prior district court determination enjoining the effort.

The Claimants provided several suggestions in their Comments for claims examiners to gather information on potential unauthorized post-June 1973 changes in

water use, including consolidation or marshaling of water right claims. (Claimant Comments pg.13-14) Comparing amendments to water right transfer dates, requesting chains of title, comparing Water Resource Survey information or pre-July 1973 aerial photos with post-June 1973 aerial photos, and claimant contact are all legitimate inquiries into post-June 1973 water use.

Accordingly, it is

ORDERED that the DNRC review and revise its guidelines, procedures, and claim examination manual to comply with this Order; and

ORDERED that the DNRC use the revised guidelines, procedures, and manual to reexamine claims in Basin 76F and any other basin in which the consolidation or marshaling remarks at issue here have been applied.

Dated this 15 day of October 2010.

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