

Don MacIntyre

Re: Exempt Water Right Option for consideration of the Water Adjudication Advisory Committee

I take a very straight forward view of §85-2-222. The statute provides that a limited group of *de minimis* uses, so-called exempt water rights, are free of all filing requirements, but may be voluntarily filed. The statutes do not restrict when a voluntary filing can be made. Consequently, if such a claim is filed, regardless of when it is filed, the DNRC should accept the claim, process it as with any claim, and forward it on to the Water Court.

If a person elects not to file an exempt claim and a water right controversy arise involving the exempt water right the burden of proving up the right will rest with the holder of the exempt water right without benefit of “prima facie evidence” since it was not filed as a claim under the adjudication.

If a claim for an exempt water right is filed during the adjudication process then the claim is entitled to “prima facie evidence. “ If claimed at a time that it can be put into a preliminary decree – such that objections can be made – then it should go forward in the adjudication process as would happen with any filed water right claim.

However, the filing of an exempt water right should not burden the adjudication process. If it is filed at a time such that it is disruptive of the on-going adjudication (i.e. such that it cannot be reviewed by the Court in the ordinary course of the adjudication given the status of the adjudication at the time of the filing of the exempt water right) then the exempt water right should be listed in the Final Decree, as claimed. Under § 85-2-334(6)(i) [“any other information necessary to fully define the nature and extent of the right”] the Water Court should provide a statement similar to the following, using the example of a livestock use: “This is a livestock water right filed as a voluntary claim under §85-2-222, M.C.A. The claim was not verified and was not subject to review by the Water Court under a preliminary decree. The Water Court has not fully defined the nature and extent of this right.” Should the right be contested thereafter, as allowed under the *McDonald* case, the burden should be on the holder of the exempt right to prove up the claim.

I recognize that the statement sounds like an “issue remark” and that all issue remarks are to be resolved prior to issuance of a final decree. If the statement is considered to be an issue remark, legislation may be enacted to allow inclusion of the statement in a final decree.

Thank you and the WAAC for the opportunity to provide an additional option for consideration.