

REPLACES FAX

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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**

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO THE USE OF)
ALL THE WATER, BOTH SURFACE AND)
UNDERGROUND, WITHIN THE TONGUE) **BASIN 42B** ✓
RIVER ABOVE AND INCLUDING HANGING) **BASIN 42C**
WOMAN CREEK DRAINAGE AREA (42B))

**UNITED STATES OF AMERICA’S GENERAL OBJECTIONS
TO PRELIMINARY DECREE**

The United States of America (“United States”), on behalf of the Bureau of Indian Affairs, objects to the Preliminary Decree of the Tongue River above and including Hanging Woman Creek (Basin 42B) and the Preliminary Decree of the Tongue River below Hanging Woman Creek (Basin 42C) with regard to the following general or “blanket” objections. These objections are based on a review of the Findings of Fact and Conclusions of Law for the Preliminary Decree of the Tongue River above and including Hanging Woman Creek (Basin 42B) and the Findings of Fact and Conclusions of Law for the Preliminary Decree of the Tongue River Below Hanging Woman Creek (Basin 42C) (collectively “Findings and Conclusions”) and on the Decrees as a whole.

1. **Failure to examine claims for abandonment post-1973.**

The United States objects to the Montana Department of Natural Resource's ("DNRC") failure to examine claims for abandonment after July 1, 1973. DNRC's failure to do so violates Water Right Claim Examination Rule 2(a)(3), which defines "Adjudication" to mean "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. (emphasis added). DNRC's failure to examine claims for post-1973 abandonment contradicts the Water Court's 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." MCA § 3-7-501(4). *See also* § 85-2-227(3) ("Subject to [unrelated provision], a water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant, including, without limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973."). As a result, because DNRC has ignored possible abandonment issues in this basin over the last 35 or more years, the adjudication may decree claims to water that have long been abandoned.

2. **General application of "waterspreading" and "natural overflow."**

Finding of Fact 14 (¶ 3) in the Findings and Conclusions does not distinguish between the terms and application of the terms "water spreading" (with or without a headgate) and "natural overflow." The United States objects to DNRC's use of the term "waterspreading" as applied to an irrigation system that has a headgate and conveyance system. Historically, "waterspreading" has been used to describe lands that were naturally flood irrigated with the use of dikes across the

creek and/or dikes present in the flooded lands. The United States further objects to the removal of a flow rate under these circumstances because a flow rate is an important defining element of an irrigation claim needed to adequately administer the right.

3. **Inconsistent and missing notations regarding the basis for claim confirmation.**

The United States objects to all claims in which the DNRC used historical aerial photographs and other sources to verify the claim but did not identify the source used, including the year of any aerial photograph consulted.

4. **Failure to identify claims in excess of decreed rights as decree exceeded claims.**

The United States objects to all claims in which the DNRC failed to include issue remarks that identify when the claim exceeds an applicable decreed right.

By filing these general objections, the United States does not waive its right to file other objections or notices of intent to appear to individual claims in this basin.

Dated this 23rd day of February, 2009.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following persons by first class mail on the 23rd day of February, 2009.

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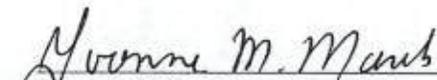
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