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FILED

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Montana Water Court

MONTANA WATER COURT - YELLOWSTONE DIVISION
TONGUE RIVER ABOVE AND INCLUDING HANGING WOMAN CREEK-BASIN 42B
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

SCHEDULING ORDER

BACKGROUND

This case originated with the filing of basin-wide objections in Basins 42B and 42C by the United States of America, Bureau of Indian Affairs. The objections were filed February 25, 2009 and raised four issues regarding the adjudication process. Three of these issues have been resolved between the United States and the Montana Department of Natural Resources and Conservation (DNRC). A fourth issue remains unresolved.

The unresolved issue pertains to post-1973 abandonment of existing rights. In its February 25, 2009 objection, the United States asserted:

The United States objects to the Montana Department of Natural Resource's [*sic-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* MCA § 85-2-227(3).

...

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 been long abandoned.

United States of America's General Objections to Preliminary Decree, p. 2 (emphasis in original).

On July 16, 2009, Chief Water Judge Loble joined the State of Montana through the Attorney General as a party in this Case. Minutes included with that Order stated the United States considered the abandonment issue "to be the most important of its four general objections and that a failure to remedy the alleged deficiency could have McCarren [*sic*] Amendment implications." *Court Minutes and Order Joining the State of Montana through the Attorney General and Setting September 10, 2009 Deadline*, p. 2.

On December 27, 2010, the Chief Water Judge issued an Order dismissing the Attorney General and the DNRC from further proceedings in this Case. *Order Dismissing Attorney General and DNRC from General Objections*, p. 5.

On January 23, 2012, the United States filed a motion for an order requiring the DNRC to examine water rights claims for post-1973 nonuse. The motion also requested the Water Court to adjudicate post-1973 abandonment as part of the Montana general stream adjudication.

In support of its Motion, United States made the following arguments:

- The Water Court must adjudicate post-1973 abandonment before it can issue final decrees of existing water rights.
- The Water Court has the duty and authority to address post-1973 abandonment as part of the adjudication of existing water rights.
- 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 Court has not informed the public that it is not addressing post-1973 abandonment.
- Failure to address post-1973 abandonment undermines the comprehensiveness of the adjudication, as well as settlements and decrees of federal reserved rights.

Motion for Order Requiring DNRC to Examine for Post-June 30, 1973 Nonuse and Motion for Water Court to Adjudicate Post-June 1973 Abandonment in the Montana Adjudication and Brief in Support (hereafter Motion), pp. 1-4.

As part of the latter argument, United States raised “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.” Motion, p. 27.

The United States’ objection on the abandonment issue was initially limited to Basins 42B and 42C. In its subsequent motion, the United States expanded its 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.” Motion, p. 2.

Although the United States expanded the scope of its general objection, it did not expand the scope of its notice. Because the United States asserts its motion raises issues of importance to the adjudication as a whole, broader notice is warranted.

In past cases where statewide issues pertaining to the adjudication have arisen, the Water Court has provided expanded notice of those issues and offered an opportunity for other parties to participate.

The scope of notice provided by the Water Court has varied depending on the matter at hand. In what is known as the Late Claims case, the validity of numerous late filed claims was at issue, and forfeiture of those claims was a possibility.

In that case, Judge Lessley issued a Notice to All Water Users Regarding Late-Filed Claims On August 3, 1988. He directed notice to all water users with late filings, numerous governmental agencies, and all seven Indian Tribes. He created a list of

interested parties to whom notice was provided and published notice twice in larger newspapers around the state. Case 43B-LC-1, *Order*, pp. 3-4.

The scope of notice in other cases of statewide importance has been more limited. Where the issues have involved changes to procedure of the Water Court as opposed to forfeiture of property interests, notice has been provided to a broad list of interested parties and stakeholders in the adjudication process, but not to specific claimants, and not via newspaper publication. Examples include the Marshalling case, 76F-1 and the On Motion case, WC-92-3.

Given that United States' Motion focuses on procedural or administrative issues rather than specific water right claims, the scope of notice as provided in Cases 76F-1 and WC-92-3 is appropriate here.

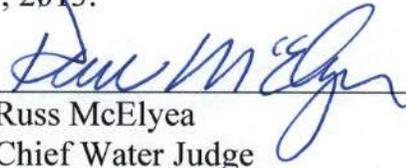
Attached to this Order is a list of persons and entities who may be interested in this matter. These parties are being provided a courtesy copy of this Order. In addition, a copy of this Order and the United State's motions are being placed on the Water Court's website. Substantive filings and orders will be added to the website in the future as the case progresses. Any party who wants to participate in this case is invited to do so by filing amicus briefs or motions to intervene. Persons who do not file amicus briefs or motions to intervene will be removed from the notice list after service of this Order. Persons who do not wish to participate may monitor the case via the Water Court's web site.

Accordingly, it is ORDERED:

- 1) A copy of this order shall be provided to the parties on the attached service list.
- 2) Parties wishing **to intervene or file amicus curiae briefs** in this case must file appropriate motions by **December 20, 2013**.
- 3) The Court Administrator for the Water Court shall place on the Water Court's website a copy of the United States' original objection in Basins 42B and 42C, and United States' January 23, 2012 Motion.
- 4) A **hearing** on United States' January 23, 2012 Motion will be held before the Montana Water Court on **February 14, 2014 at 1:00 P.M.** The location of the

hearing shall be in Bozeman, Montana with a specific venue to be identified in a subsequent order.

DATED this 31st day of October, 2013.


Russ McElyea
Chief Water Judge

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