

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

ORDER DENYING MOTION

I. STATEMENT OF THE CASE

The United States requests an order from the Water Court to the Department of Natural Resources and Conservation requiring investigation of water rights for post June 30, 1973 abandonment. The United States also asserts the Water Court has not been addressing post 1973 abandonment in its decisions.

According to the United States, the solution to identifying and resolving post 1973 abandonment problems is review of aerial photographs. The United States has in its possession a number of aerial photographs it thinks will be useful in establishing non-use. It requests:

- 1.) That the Water Court order the Montana Department of Natural Resources and Conservation (DNRC) to obtain copies of these photographs from the United States;
- 2.) That the DNRC interpret the photos;
- 3.) That the results of this interpretation be provided to the United States; so that,

4.) The United States can use this information in proceedings before the Water Court.

The United States asserts the Water Court has a duty to order investigation of post 1973 abandonment based on its jurisdiction and its responsibility to administer the adjudication process. In addition, the United States contends the Water Court must adjudicate post 1973 abandonment before it can issue final decrees of existing water rights. It also asserts the Water Court has not informed the public that it is not addressing post 1973 abandonment. Finally, the United States asserts that failure to address post 1973 abandonment undermines the comprehensiveness of the adjudication, as well as settlements and decrees of federal and Indian reserved rights.

The United States originally raised these issues via objections filed in Basins 42B and 42C. In the motion presently before the Court, the United States expanded its objection to "the Montana adjudication as a whole." Motion for Order Requiring DNRC to Examine for Post-June 30, 1973 Nonuse and Motion for Water Court to Adjudicate Post-June 30, 1973 Abandonment in the Montana Adjudication and Brief in Support ("United States' Motion"), January 24, 2012, p. 2. This Court expanded notice of the United States' Motion and invited interested parties to file amicus briefs or motions to intervene. Scheduling Order, October 31, 2013

Amicus briefs were filed by Montana Trout Unlimited, the Fort Belknap Indian Community, the Northern Cheyenne Tribe, the Blackfeet Tribe, Avista Corporation, the Assiniboine and Sioux Tribes, the Chippewa Cree Tribe, the Confederated Salish and Kootenai Tribes, the Apsaalooke (Crow) Tribe, the Montana Attorney General and the Montana Department of Natural Resources and Conservation.

The amicus briefs filed by Trout Unlimited, Avista, and the Tribes generally supported the motion filed by the United States. The Attorney General opposed the motion and the DNRC provided information about the potential impacts of the United States' motion if granted by this Court.

Trout Unlimited asserted failure to issue an order directing the DNRC to examine water rights for abandonment will require the DNRC to adjudicate abandonment later if the water right is part of a change application.

The Tribes filing amicus briefs have their reserved rights memorialized in Compacts. Most of these Compacts subordinate Tribal rights to existing state rights. The Tribes argue that inclusion of potentially abandoned rights in final decrees violates the terms of those Compacts.

At least one party noted that it relied on issue remarks to file objections. It asserted issue remarks were necessary for it to prepare objections on post 1973 abandonment. Several parties, including Avista Corporation, argued they might need to expend resources to identify post 1973 abandonment if the DNRC was not ordered to perform this work.

The Montana Attorney General argued that the United States' motion was an effort to relieve it and other objectors of their responsibility to formulate their own objections to water rights claimed by other parties. The Attorney General asserted there was no legal basis to impose a duty to investigate abandonment upon the Water Court, and that whether such a duty should be imposed was a policy decision best suited for the Legislature. The Montana Attorney General argued that the Water Court already has jurisdiction to address post 1973 abandonment and does so regularly. The Attorney General also argued that examination of aerial photographs is not the only way to bring issues of abandonment before the Court, and that abandonment can be asserted at any time, including after a final decree. Finally, the Attorney General noted that it was unclear whether the United States was asking for a single post 1973 examination of aerial photographs, or an ongoing process.

In its amicus brief, the DNRC estimated the cost of obtaining and scanning two statewide sets of aerial photographs from the United States Department of Agriculture would be \$901,600. Once aerials have been obtained, they must be reviewed. The DNRC estimates it would take 31 employees an additional four years to review all claims

in the adjudication using only two additional flights of aerial photos. The additional cost for just these two data sources would be \$8,439,600. DNRC Amicus Brief, p. 4.

II. ISSUES

1. Does the Water Court hear cases involving post 1973 abandonment?
2. Does the Water Court's jurisdiction impose upon it a duty to investigate potential abandonment of water rights by ordering the DNRC to review post 1973 aerial photographs?
3. Do the Water Right Claim Examination Rules adopted by the Montana Supreme Court impose a duty on the Water Court to order the DNRC to review photographs taken after June 30, 1973 for evidence of abandonment?
4. Do objectors have the ability to raise abandonment as an issue if the Water Court does not order the DNRC to examine post 1973 aerial photographs?
5. Is the Water Use Act being applied in a way that harms Indian and federal reserved rights?

III. BACKGROUND

Pursuant to the Water Use Act, Montana water rights owners were obligated to file claims for their water rights. There were over 218,000 water rights claims filed as part of Montana's statewide adjudication. The Montana Water Court has exclusive jurisdiction to adjudicate these water rights. § 3-7-501, MCA.

The adjudication process is divided into two phases. The first phase involves claims examination. Claims examination is performed by the Montana DNRC. The second phase involves litigation of objections and resolution of issue remarks. This phase occurs before the Water Court.

The First Phase—Claims Examination

Claims examination by the Montana DNRC is performed in accordance with the Water Right Claim Examination Rules. The role of the DNRC in claims examination is to assist "the water court by gathering, examining, and reporting data, facts, and issues pertaining to the claims of existing rights." Rule 1(b), W.R.C.E.R. The Water Right

Claim Examination Rules "describe how the department gathers data and facts pertinent to the claims of existing water rights." Rule 1(b), W.R.C.E.R.

If the DNRC identifies an issue with a water right, it may place a remark on the abstract of the claim. "Remarks that identify potential factual and legal issues are 'issue' remarks." Rule 2(a)(57), W.R.C.E.R..

Claims examination is a complex, expensive, and time consuming task. It has taken decades and many millions of dollars for the DNRC to undertake claims examination, and additional work is needed before the process will be complete. Depending on the type of right, the claims examination rules may require the DNRC to identify and review numerous features of a water right including the owner, purpose of use, flow rate, point of diversion, priority date, means of diversion, place of use, source, volume, climatic area, and reservoir data. Many other aspects of water rights are also reviewed during the process.

To assist its staff in performing claims examination, the DNRC has developed a claims examination manual. The manual is several hundred pages long. Its length illustrates the complexity of the claims exam process.

Aerial photographs are often used during claims examination. Aerial photographs may provide information such as the location of dams or headgates, the presence or absence of water in ditches and reservoirs, and the occurrence of irrigation.

The DNRC typically uses two aerials, taken in different decades, when examining water right claims. Depending on the county in which the water right is located, the first photograph is usually from the 1940s, 1950s or 1960s. The second photo is usually from the late 1970s, with use of photographs from 1979 being common. If the DNRC believes that either photograph shows non-use of a water right, then it places a remark to that effect on the abstract of the water right.

After examination by the DNRC, the claims in each basin are sent to the Water Court where they are compiled and issued in a preliminary decree. Claims are grouped according to the hydrologic basins in which they are located. As an example, all the

claims in the Gallatin River and its tributaries are grouped together and designated as Basin 41H.

As the name implies, a preliminary decree is an interim listing of water rights for a specific basin. The abstracts for water rights in a preliminary decree may include changes to claims made by the DNRC or issue remarks placed on those claims by the DNRC during claims examination.

The Second Phase—Litigation

The issuance of a preliminary decree starts the litigation phase of the adjudication, with an objection period beginning once the preliminary decree is issued. During the objection period, water right claimants and other parties may file objections to water rights in the decree. After close of the objection period, parties have an additional opportunity to participate by filing notices of intent to appear on claims that received objections or issue remarks.

Objectors have the burden of proving their objections to water rights by a preponderance of the evidence. Objections are resolved either by settlement or trial. Resolution of objections and issue remarks often results in modification or termination of water rights. These changes are noted on the abstracts for each water right. The surviving water rights, as amended during the adjudication, are compiled by the Water Court into a final decree.

There are 85 basins in Montana. Claims examination in each of these basins occurs separately. Because there are so many basins, and so many claims in each basin, the DNRC completed examination of some basins years before examination of other basins was started. The Water Court has issued preliminary decrees in a staggered fashion following the pattern of claims examination. This means some decrees were issued in the 1980s, while others remain to be issued. The last preliminary decree should be issued before the year 2020. There will be a gap of over thirty years between the issuance of the first and last preliminary decrees by the Water Court.

In summary, the adjudication of water rights can be divided into two principal phases. The claims examination phase occurs first and is carried out primarily by the

DNRC. The litigation phase is second, and is presided over by the Water Court, with support from the DNRC.

The process is controlled by a mix of statutes, rules, and case law. Regarding the adjudication, the Montana Supreme Court wrote: "No more difficult task has ever been assigned by the legislature to the court system of this state." *McDonald v. State*, 220 Mont. 519, 525, 722 P.2d 598, 601 (1986).

IV. THE LAW OF ABANDONMENT

A finding of abandonment requires a showing of both non-use and intent to abandon.

To constitute abandonment there must be a concurrence of act and intent -- the relinquishment of possession and the intent not to resume it for a beneficial use Neither an intention to abandon nor nonuser is sufficient; the union of both is indispensable to constitute abandonment

Thomas v. Ball, 66 Mont. 161, 167, 213 P. 597, 599 (1923).

Objectors asserting abandonment have the initial burden of showing a prolonged period of non-use. "[A] long period of continuous nonuse raises the rebuttable presumption of an intention to abandon, and shifts the burden of proof onto the nonuser to explain the reasons for nonuse." *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

To successfully rebut a presumption of abandonment, a claimant must produce "[s]pecific evidence explaining or excusing a long period of non-use of the particular water rights on the specific property" *In re Adjudication of Water Rights of the Musselshell River*, 255 Mont. 43, 51, 840 P.2d 577, 582 (1992) "Conclusory statements concerning a variety of negative factors" are insufficient to meet the claimant's burden. *Musselshell River*, 255 Mont. at 52, 840 P.2d at 582. The claim is terminated if a claimant cannot rebut the presumption of abandonment.

V. ANALYSIS

I. Does the Water Court hear cases involving post 1973 abandonment?

A. The Water Court's Jurisdiction

The Water Court has unique powers. The chief water judge and the associate water judge have jurisdiction over "all matters relating to the determination of existing water rights within the boundaries of the state of Montana." 3-7-224(2), MCA. An existing right is "a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." 85-2-102(12), MCA.

The Water Court's jurisdiction extends to both pre and post 1973 abandonment of water rights. This jurisdiction includes "the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree." § 3-7-501(4), MCA. "[A] water judge may determine all or part of an existing right to be abandoned based on 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." 85-2-227(3), MCA.

B. Assertion of the United States

The United States asserts that the Water Court "rarely determines the total or partial abandonment of existing water rights after June 30, 1973." United States' Motion, p. 3. This assertion is incorrect.

The Water Court routinely hears post 1973 abandonment cases. A list of such cases was noted in the amicus brief of the Attorney General. Additional cases involving evidence of post 1973 abandonment are cited in the footnote below.¹ Many of these cases involve abandonment objections by the United States.

¹ Abandonment Objections involving the United States:

Case 76HF-70, Claim 76H 44331-00, Master's Report; Case 42B-30, Claim 42B 111608-00, Stipulation; Case 42B-47, Claims 42B 183877-00, 42B 183878-00, and 42B 183894-00, Stipulation; Case 42B-28, Claims 42B 183874-00, 42B 183879-00, 42B 183888-00, and 42B 183893-00, Stipulation; Case 42B-39, Claims 42B 183646-00 and 42B 183652-00, Amended Stipulation; Case 76HF-168, Claim 76H 120062-00, Master's Report; Case 40R-95, Claim 40R 211920-00, Order Granting Partial Summary Judgment; Claim 41T 156548-00, Master's Report; Case 76HF-499, Claim 76H 150830-00, Master's Report; Case 76FA-1, Claims 76F 40417-00, 76F 40418-00, 76F 40419-00, 76F 40421-00, and 76F 40422-00, Order Amending and Adopting Master's Report as Amended; Cases 40H-9 and 40H-58, Order Amending and Adopting Master's Report as Amended; Case 40H-57, Claims 40H 146768-00 and 40H 146769-00, Order Adopting Master's Report; Claim 40S 46434-00, Order Adopting Master's Report.

At the hearing of this matter, the United States was asked whether it could provide any examples of cases where the Water Court had declined to hear evidence of post 1973 abandonment. It was unable to do so. As the Attorney General indicated in its amicus brief, the United States "fails to (and cannot) identify a single instance in which this Court has not in fact addressed questions of post-1973 abandonment when evidence of post-1973 abandonment has been placed before it." State of Montana Attorney General's Amicus Brief, p. 3.

The United States' assertion that the Water Court does not hear post 1973 abandonment cases was not shared by other parties. The Crow Tribe's amicus brief states that "[c]ounsel for the Crow Tribe firmly believes that the Water Court will adjudicate all issues of abandonment of water rights, both pre and post June 30, 1973, if and when these issues are brought to the attention of the Court" Crow Tribe Amicus Brief, p. 3.

The Water Court has been careful to protect its jurisdiction to hear post 1973 abandonment cases. *In the Matter of the Application for Change of Appropriation Water Right by Darla J. Jeffers*, WC-92-2, Memorandum Opinion, p. 5, Sept 15, 1994²; *In re Plum Creek Timber Co.*, Case 76HB-62, Memorandum Opinion, p. 3, March 18, 1999. It hears post 1973 abandonment cases regularly and has done so for years. Many of these cases have been initiated by the United States. The assertion that the Court does not hear such cases, or does so only rarely, is without merit.

Abandonment Objections brought by the State of Montana or Private Parties:

Case 41QJ-48, Claim 41QJ 97472-00, Master's Report; Case 41D-224, Claim 41D 128090-00, Order Granting Summary Judgment, Case 41T-124, Claims 41T 18562-00 and 41T 43977-00, Master's Report; Case 41T-126, Claims 41T 43973-00, 41T 43976-00 and 41T 43980-00, Master's Report; Claims 41T 18559-00, 41T 18563-00 and 41T 18565-00, Master's Report; Claims 41T 160444-00 and 41T 160445-00, Master's Report; Claim 41T 121621-00, Master's Report; Case WC-2006-01, Claims 41M 131102-00 and 41M 161998-00, Order Amending and Partially Adopting Master's Report; Case 41I-623, Claim 41I 15267-00, Master's Report; Case 41I-542, Claim 41I 15265-00, Order Adopting Master's Report; Case 41O-489, Claims 41O 49695-00 and 41O 49696-00, Order Amending and Adopting Master's Report as Amended.

² The *Jeffers* case contains a useful history of the law of abandonment and of the Legislature's efforts to define the Water Court's jurisdiction.

2. Does the Water Court's jurisdiction impose upon it a duty to investigate potential abandonment of water rights by ordering the DNRC to review post 1973 aerial photographs?

A. Statutes Defining Jurisdiction of the Water Court

The United States asserts that the Water Court's jurisdiction to adjudicate existing rights creates a duty to investigate all water rights in the state of Montana for potential abandonment arising after June 30, 1973. "To adjudicate existing water rights, the Court is required to determine whether existing water rights have been abandoned post-1973 before it enters a Final Decree for the basin in which such rights are located." United States' Motion, p. 10 (emphasis in original). To reach this conclusion, the United States infers a duty from the statutes defining Water Court jurisdiction. It contends this implied duty requires the Court to order the DNRC to review post 1973 aerial photos for evidence of abandonment.

Although the statutes conferring jurisdiction upon the Court include the ability to hear evidence regarding post 1973 abandonment, the existence of this jurisdiction does not give rise to a duty to order the investigation of factual issues relating to abandonment. The duty to investigate abandonment lies with the stakeholders who are parties to the adjudication.

The statutes creating Water Court jurisdiction include Section 3-7-224(2), MCA which states the chief water judge and the associate water judge "have jurisdiction over cases certified to the district court under 85-2-309 and all matters relating to the determination of existing water rights within the boundaries of the state of Montana." An existing right "means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." § 85-2-102(12), MCA. Water judges have the same powers as a district court judge with regard to matters within their jurisdiction. § 3-7-224(3), MCA.

The statutes defining the jurisdiction of the Water Court did not refer to post 1973 abandonment when they were originally enacted. That changed in 1997 when the Legislature passed amendments to clarify the Water Court's jurisdiction to hear post 1973

evidence of abandonment and to adjudicate post 1973 abandonment cases. These amendments included the addition of a new paragraph to Section 3-7-501, MCA. It states the "determination and interpretation of existing water rights 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).

These statutory changes resulted from the *Jeffers* case, which challenged the Water Court's jurisdiction to hear abandonment cases arising after 1973. *Jeffers*, Memorandum Opinion, p. 2.

The issue in *Jeffers* was whether the Water Court has jurisdiction to hear post June 30, 1973 evidence relating to the abandonment of a pre July 1, 1973 water right. In response, the Chief Water Judge wrote "the Water Court has jurisdiction to hear post July 1, 1973 evidence relating to the abandonment of a pre July 1, 1973 existing water right..." *Jeffers*, Memorandum Opinion, p. 22.

The changes resulting from *Jeffers* also included the addition of subparts (2) and (3) to Section 85-2-227, MCA. Subpart (2) defined relevant evidence to include "admissible evidence arising before or after July 1, 1973." In subpart (3), the Legislature stated that "a water judge may determine all or part of an existing water right to be abandoned based on consideration of...evidence relating to acts or intent occurring in whole or in part after July 1, 1973." 85-2-227, MCA.

None of the statutes enacted before or after *Jeffers* referenced a duty on the part of the Water Court to order investigation of abandonment.

The Water Court's jurisdiction to hear post 1973 evidence of abandonment was again challenged in the *Plum Creek* case. *In re Plum Creek Timber Co.*, Case 76HB-62, Order Rejecting Conclusions in Master's Report and Dismissing Claim, March 18, 1999. The United States sought termination of a claim owned by Plum Creek Timber Co. for abandonment based on twenty-three years of non-use beginning in 1973. In his report on this issue, the Water Master declined to find abandonment.

The United States objected to the Master's Report, arguing that "[t]he central issue in this case is whether the Water Court has the jurisdiction to consider post-1973

evidence.” United States’ Objection to Master’s Report, p. 2, June 30, 1998. The United States relied on the *Jeffers* case and the 1997 statutory amendments in its objection. It characterized those amendments, introduced as Senate Bill 108, as follows:

[W]ith or without SB 108, the Water Court had and has jurisdiction to admit relevant post-1973 evidence, as determined by Judge Loble in the *Jeffers* case. In relevant part, Senate Bill 108 codifies conclusions Judge Loble, the Advisory Committee, and the 1997 legislature reached on the common law.

United States’ Objections to Master’s Report, p. 4.

In response to those arguments, the Chief Water Judge wrote:

The Montana Legislature created the Water Court to adjudicate the existing water rights in this state. In creating the Water Court, the legislature gave it the exclusive jurisdiction to interpret and determine those rights. This includes the issue of abandonment of existing water rights even if the abandonment or evidence of abandonment occurred after June 30, 1973. Senate Bill 108 did not create that jurisdiction for the Water Court to consider post-June 1973 evidence of abandonment – it simply recognized and codified that which already existed.

Plum Creek Memorandum Opinion, pp. 14-15.

Plum Creek is another example of a case in which the United States successfully challenged a water right based on abandonment occurring after 1973.

Like the statutes creating Water Court jurisdiction, Water Court cases discussing those statutes do not expressly reference a duty on the part of the Water Court to order investigation of post 1973 abandonment. The Montana Supreme Court has discussed the statutes defining Water Court jurisdiction many times, but has never referenced a duty to order investigation of post 1973 abandonment. As with any litigation, the duty to identify evidence and present issues falls on the participants.

B. Statutes Defining Management Authority of the Water Court

The United States seeks to absolve itself of this duty by shifting it to the Water Court. To that end, it argues that, in addition to jurisdiction, the Water Court’s statutory responsibility to manage the adjudication process also requires the Court to order the identification and dissemination of evidence regarding post 1973 abandonment. It cites

Section 85-7-223, MCA for the proposition that the Water Court has such a duty. United States' Motion, p. 9.

Because there is no such code section, the Court presumes the United States meant to cite Section 3-7-223, MCA. This section states:

3-7-223. Duties of chief water judge. The chief water judge shall:

- (1) administer the adjudication of existing water rights by:
 - (a) coordinating with the department of natural resources and conservation in compiling information submitted on water claim forms under Title 85, chapter 2, part 2, to assure that the information is expeditiously and properly compiled and transferred to the water judge in each water division;
 - (b) assuring that the water judge in each water division moves without unreasonable delay to enter the required preliminary decree;
 - (c) assuring that any contested or conflicting claims are tried and adjudicated as expeditiously as possible;
- (2) conduct hearings in cases certified to the district court under 85-2-309;
- (3) assign court personnel to divisions and duties as needed;
- (4) assign the associate water judge to divisions and cases as needed; and
- (5) request and secure the transfer of water judges between divisions as needed.

This section, like those pertaining to the Water Court's jurisdiction, contains no mention of a duty to investigate post 1973 abandonment. This Court will not read such a duty into the statute.

C. Statutes Regarding Resolution of Issue Remarks

Finally, the United States cites Section 85-2-248(7), MCA as additional support for the proposition that the Court has a duty to investigate post 1973 abandonment. United States' Motion, p. 10. This section states "the water court shall join the state of Montana through the attorney general as a necessary party" to address unresolved abandonment issues. Once the attorney general becomes an objector, he has the duty to investigate facts regarding potential abandonment. The purpose of adding the attorney general is to insure potentially abandoned water rights are challenged by a qualified advocate.

To shift the investigative duty away from the attorney general would leave him with a diminished advocacy role and defeat the purpose of including him as a party. If the Legislature intended for the Water Court to order the DNRC to obtain abandonment evidence for the attorney general, it could have said so. No such requirement is written into the statute.

D. Additional Policy Considerations

The United States' conflation of jurisdiction with a duty to investigate abandonment demonstrates a misunderstanding of the adjudication process, and the roles of the Water Court and the stakeholders in that process.

The state of Montana, like other western states, elected to define water rights using a judicial rather than a ministerial procedure. The heart of a judicial process is the development of the truth through conflict between parties with adverse interests. "Ours is a system that seeks the discovery of truth by means of a managed adversarial relationship between the parties." *Lussier v. Runyon*, 50 F.3d 1103, 1114 (1st Cir. 1995). "Our adversarial system of justice ... is premised on the well-tested principle that truth ... is best discovered by powerful statements on both sides of the equation." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal quotations omitted).

To set the stage for that conflict, the Water Court issues preliminary decrees. These decrees are a compilation of water right claims in a basin. By statute, the water right claims in those decrees have prima facie status. A claim for an existing right "constitutes prima facie proof of its content until the issuance of a final decree." § 85-2-227(1), MCA. The prima facie statute places the burden of proof on the objectors, not the DNRC or the Water Court.

Parties who believe a claim adversely impacts their interests may file an objection to that claim after issuance of a preliminary decree. The burden of proof for an objector seeking to overcome the prima facie status of a water right is a preponderance of the evidence.

The success of the adjudication process depends on objections by parties seeking to protect their interests. "The Montana Water Use Act anticipates there will be

disagreements over the use of water among varying interests” *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 42, 361 Mont. 77, 255 P.3d 179. “[T]he integrity of Montana’s adjudication process depends upon the assertion and ultimate resolution of these varying interests.” *Trout Unlimited*, ¶ 42, citing *In re Dearborn Drainage Area (Bean Lake II)*, 240 Mont. 39, 42, 782 P.2d 898, 900 (1989). “This Court has recognized the importance of an adjudication process to firmly establish existing water rights and the necessity of ‘comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims.’” *Trout Unlimited*, ¶ 42, citing *Adjudication of Rights in the Yellowstone River*, 253 Mont. 167, 179-180, 832 P. 2d 1210, 1217 (1992).

To promote accuracy, the DNRC coordinates claims examination pursuant to rules adopted by the Supreme Court. The claims examination process results in development of information that helps the Water Court identify flaws or deficiencies in claims included in preliminary decrees. This information can be, and often is, used by objectors to formulate objections to water rights in a decree.

Despite the value of the claims examination process in developing such information, it is not a substitute for the participation of objectors, most of whom are water users. Objectors have much wider access to evidence regarding historic use of water rights than the DNRC. Because their interests are at stake, they also have a strong motivation to organize and present such evidence in the most persuasive manner possible.

Ultimately, the adjudication process exists to recognize and confirm existing rights. The beneficiaries of this process are water right owners. Their interests are protected not only through the recognition of valid claims, but also through modification or termination of inaccurate claims. The burden to provide evidence regarding those water rights rests on the beneficiaries of that process, not the Water Court. “The provisions of the Act charge all water users with the duty of asserting and defending their interests.” *Trout Unlimited*, ¶ 42, citing *In re Dearborn Drainage Area (Bean Lake II)*, 240 Mont. 39, 42, 782 P.2d 898, 900 (1989).

There are good reasons for placing the burden of producing evidence on water users. They are best positioned to obtain evidence relating to historic use of water rights, and the evidence they introduce is vital to the accuracy and success of the adjudication. Limiting incentives to produce such evidence by shifting more of the evidentiary burden to the Water Court or DNRC will undermine the integrity of the adjudication and decrease both the amount and quality of historic information needed to accurately define water rights.

The creation of any duty on the part of the Water Court to investigate water rights is problematic for several reasons. The existence of such a duty will make the Water Court continually subject to challenges by parties asserting the duty had not been met. Rather than deciding cases involving disputed water rights, the Court will become mired in resolving challenges to process. In addition, recognition of a duty to investigate abandonment could be expanded to include a duty to investigate *all* potential water right problems.

The issue of flow rate is a good example. At present, the DNRC does not take measurements in the field to verify flow rates for all water rights. Some claims are based on actual measurements, while others are based on estimates. In accordance with the burden of proof established by the Legislature, objectors are expected to develop their own evidence if they believe a claimed flow rate is inaccurate. If they do not mount such a challenge, there is potential for an inaccurate flow rate to be decreed by the Court.

The arguments in favor of investigating abandonment and measuring flow rate are nearly the same. Once a duty to order investigation of abandonment is imposed on the Court, it would be easy to expand that duty to include measurement of flow rates for all water rights in Montana. Duties could also be created to measure volume, place of use, or a multitude of other issues. If a duty to investigate one aspect of a water right is imposed on the Court, there are few credible reasons to limit expansion of that duty to include all aspects of a water right.

Recognition of any duty to investigate fundamentally alters the nature of the adjudication by shifting the burden of developing factual information from the parties to

the Water Court. The accuracy of the adjudication will suffer if the adversary system is compromised and the incentive for parties to protect their own interests is diminished. As the accuracy of the adjudication diminishes, the value of stakeholders' water rights is correspondingly diminished.

This does not mean examination of aerial photos and other evidence is unimportant. Examination of such photos has been, and will continue to be, an important part of the adjudication. But the question posed by the United States' motion is not whether such examination is valuable, but who should pay for it.

The United States contends that a party should not be expected to review or use aerial photos for evidence of post 1973 abandonment unless three criteria are met. These criteria are:

1. The party must know it can object to post 1973 abandonment;
2. The party must have the ability to investigate post 1973 abandonment; and,
3. The party must be able to comprehend the results of its investigation. United States' Motion, p. 24.

None of these criteria are persuasive.

Knowledge of the Right to Object

The United States asserts the objector must be aware it can object to post 1973 abandonment. United States' Motion, p. 24. Statutes and case law make it clear the Water Court has jurisdiction to hear cases involving post 1973 abandonment. Many parties, including the United States, object to water rights using post 1973 evidence of abandonment. The Water Court should not be subject to a duty to investigate and develop evidence for parties who are unaware they can object to abandonment arising after 1973. Likewise, the Court should not have to differentiate between parties having knowledge of the law of abandonment from those who do not.

The Ability to Investigate

Second, the United States argues that the duty to investigate abandonment should not apply to any party who does not have "the ability to investigate." It asserts the task of such an investigation "is neither practical, easy, nor affordable, since it would require

potential objectors to investigate whether the use of claims existing as of June 30, 1973, has somehow ceased.” United States’ Motion, p. 25.

While the adjudication process incorporates many features designed to reduce the burden on potential objectors, the burden of participation can not be eliminated, nor should it be. The right to use water is a property interest. Ownership of a property interest brings with it responsibilities. These responsibilities are heightened with water rights because the resource is scarce and the water itself belongs to Montana for the benefit of its people.

Water right owners have thus been accorded a unique privilege. They have the ability to use a valuable and limited public resource for their personal benefit. That privilege requires participation in the process of defining water rights accurately. Without such participation, the value of the adjudication is diminished. Achieving an accurate definition of water rights cannot happen if the stakeholders are released from their responsibility to participate, or if incentives to participate are reduced.

The United States has demonstrated it has the ability to analyze aerial photographs for evidence of post 1973 abandonment. It has taken aerial photographs of Montana for many years spanning multiple decades. It has examined those photographs and presented evidence of its examination to the Water Court on many occasions. It can mitigate the harm it alleges it will suffer if the DNRC does not review these photographs. The State of Montana does not have an obligation to mitigate this alleged harm for the United States or any other party.

The review of aerial photographs by the United States is consistent with its obligations to protect water rights for Indian Tribes and federal interests. “The federal government is responsible for litigating tribal rights to water. Under its general trust obligation, the government has the authority both to bring water rights claims on behalf of the tribes and to bind the tribes in litigation.” Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D.L.REV. 327, 349 (1995). “The trust doctrine that emerges from treaties, federal statutes and the Supreme Court’s jurisprudence

acknowledges the United States' duty to protect tribal rights." Rebecca Tsosie, *The Indian Trust Doctrine After the 2002-2003 Supreme Court Term: The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines*, 39 TULSA L. REV 271, 274 (2003). "The federal government is also responsible for litigating the water rights of federal projects and federal lands." Royster, *supra*, at 349. The existence of these responsibilities, coupled with the United States' assertion that failure to adjudicate post 1973 abandonment will harm Tribal and federal interests, suggests an obligation on the part of the United States to pursue its own enquiry into post 1973 abandonment.

The Ability to Comprehend an Investigation

Finally, the United States asserts that a potential objector should not have the obligation to investigate aerial photos if it cannot comprehend the results of that investigation. United States' Motion, p. 24. The likelihood that an objector would undertake an investigation knowing it could not comprehend the outcome is remote. Moreover, an objector unable to understand its own investigation is not likely to understand the results of an investigation by the Water Court or the DNRC.

And, just because a particular litigant does not have expertise interpreting aerial photographs does not mean the Court should be obliged to supply that expertise, or that the litigant cannot develop proof of abandonment using other evidence.

3. Do the Water Right Claim Examination Rules adopted by the Montana Supreme Court impose a duty on the Water Court to order the DNRC to review photographs taken after June 30, 1973 for evidence of abandonment?

The United States cites the Water Right Claim Examination Rules as additional support for its argument that the Water Court has a duty to investigate post 1973 abandonment.

The Water Right Claim Examination Rules provide claims examination guidance to the DNRC. Rule 1(b), W.R.C.E.R. states:

Rule 1(b). Role of the department. These water right claim examination rules are applicable to the Department of Natural Resources and Conservation (department) and specify how water right claims are examined prior to decree issuance by the department during Montana's

general water rights adjudication. Throughout the adjudication process, the department is an executive agency providing technical assistance and information to the water court subject to the direction of water judges, pursuant to § 85-2-243, MCA. The department assists the water court by gathering, examining, and reporting data, facts, and issues pertaining to the claims of existing rights. In examining claims, the department's role is limited to factual analysis and the identification of issues. The water right claim examination rules describe how the department gathers data and facts pertinent to the claims of existing water rights. The water court determines the necessity and scope of any preliminary department examination as set out in these rules, but in no way influences the results of the directed examination.

As with statutes pertaining to jurisdiction, the United States argues this rule creates a duty on the part of the Water Court to order review of aerial photographs.

By their plain language, the W.R.C.E.R. logically apply to the DNRC because it alone performs claims examination. Although the rules reference Water Court authority to determine the necessity and scope of claims examination, they do not impose an obligation on the Court to order particular factual investigations.

The United States argues that DNRC has not complied with the claim examination rules. Specifically, the United States asserts the DNRC needs to review more than two data sources, with the additional sources being more recent than 1973. In support of this contention, it cites the rules applicable to examination of irrigation claims.

Rule 12(b), W.R.C.E.R. pertaining to examination of irrigation claims states: "The claimant's map and two or more post priority date data sources, if available, will be used to examine the claimed irrigated acreage." The rule does not specify that the "post priority date data sources" be aerial photographs, nor does it specify that either or both sources should originate after 1973.

Pursuant to this rule, the DNRC typically analyzes two sets of aerial photographs, with the latest often taken between 1975 and 1980. By implementing this practice, the DNRC has complied with its obligations under Rule 12(b), W.R.C.E.R.

The only reference to abandonment of irrigation claims is found at Rule 6(e), W.R.C.E.R. pertaining to summary reports. Summary reports are pre-decree

compilations of abstracts provided to the Water Court by the DNRC before issuance of a preliminary decree. Rule 6(e)(5)(i), W.R.C.E.R. states that the DNRC shall note on each abstract in the summary report whether "the right apparently has not been used for the claimed purpose for 10 or more consecutive years."

This rule does nothing more than obligate the DNRC to report evidence of non-use discovered during the claims examination process. It does not impose an additional obligation on the DNRC to identify abandonment issues. The DNRC complies with this rule by placing issue remarks on a claim abstract whenever it identifies evidence of non-use. While these issue remarks are frequently based on post 1973 aerial photos, they are also based on other information in the claim file as well as information obtained via claimant contact with the DNRC.

The United States expands Rule 6(e)(5)(i), W.R.C.E.R. by asserting it requires the DNRC to examine water rights for abandonment in increments of ten years or less. The United States argues this examination should begin after 1973. However, if rooting out abandoned water rights is the objective, the rationale supplied by the United States logically requires investigation of a water right in ten year increments for the entirety of its existence.

As an example, many irrigation water rights date back to the 19th century. An irrigation claim with a priority date of 1884 would be 130 years old today. Under the United States' interpretation of Rule 6(e)(5)(i), W.R.C.E.R., the DNRC would need to undertake an abandonment evaluation every ten years for the life of the water right. This would involve over thirteen separate evaluations of abandonment. Given that aerial photos are generally not available earlier than the 1930s, this would require review of other evidence and would present a formidable and impractical challenge. Rule 6(e)(5)(i), W.R.C.E.R. does not create a separate obligation to search for evidence of abandonment in increments of ten years.

The United States also places undue reliance on the utility of aerial photos. Aerial photos, even when they are available, are not always an evidentiary magic bullet. They only depict water use on the day they were taken. Thus, an aerial taken in May does not

portray irrigation beginning in June. Interpretation of aerials is subjective, and many water cases involve the use of expert witnesses who disagree over both the existence and amount of irrigation portrayed by such photos. As an example, an un-irrigated small grain crop can appear irrigated in a photo taken in the summer, while an irrigated grain crop can appear un-irrigated in a photo taken in the fall after harvest. It is common for the testimony of experts examining aerial photographs to differ from the testimony of individuals farming the land when the photos were taken.

Aerial photos play a valuable role in reconstructing past events, but they have limitations. They may or may not be determinative in establishing the prolonged period of non-use required to create a presumption of abandonment.

The cost of obtaining these photographs is also significant. The DNRC estimates the cost of obtaining and scanning just two statewide sets of aerial photographs from the United States Department of Agriculture would be \$901,600. DNRC Amicus Brief, p. 3.

Once aerials have been obtained, they must be reviewed. The DNRC estimates it would take 31 employees an additional four years to review all claims in the adjudication using only two additional flights of aerial photos. The additional cost for these two data sources would be \$8,439,600. DNRC Amicus Brief, p. 4. Given that abandonment can arise in less than ten years³, the DNRC would need more than two sets of aerials to cover the time frame from 1973 to the present, as well as additional sets to completely cover the time span before 1973.

There is no guarantee the Legislature will appropriate the funds needed for such an expensive undertaking. Section 85-2-280(2)(b), MCA allocates the DNRC and the Water Court up to \$1 million from the water adjudication account for each fiscal year beginning July 1, 2015. This is not adequate funding to continue the adjudication process in its current configuration, much less undertake the substantial additional investigation work requested by the United States. Moreover, expenses incurred by the DNRC in complying with Water Court orders must be paid from the money appropriated to the DNRC by the

³ In *Smith v. Hope Mining Co.*, 18 Mont. 432, 438-439 (1896), the Montana Supreme Court determined that nine years of non-use was potent evidence of intent to abandon a water right.

Legislature. "When that appropriation is expended then the department is no longer required to provide further assistance." 85-2-243(2), MCA. The Legislature will need to appropriate the funds to undertake the investigation requested by the United States even if the Water Court were to issue an order requiring such an investigation.

4. Do objectors have the ability to raise abandonment as an issue if the Water Court does not order the DNRC to examine post 1973 aerial photographs?

The United States and various amicus parties assert that abandoned rights will be inadvertently decreed if the Water Court does not order the DNRC to review additional aerial photographs for abandonment. Once this occurs, the United States contends that res judicata will prevent it and other parties from addressing abandoned water rights. This argument is based on several flawed assumptions.

First, abandonment issues are frequently raised by objectors without reliance on aerial photos. Evidence such as changes in land use, property tax records, federal farm program records and payments, usage of water in a manner inconsistent with old district court decrees, water commissioner records, water resources survey notes, and personal observations of neighbors represent a few of the many factors used to establish abandonment cases.

Second, the harm forecast by the United States will only materialize if it fails to act. As already established by the Legislature and the Montana Supreme Court, claimants of water rights have a duty to participate in the adjudication. This duty includes an obligation to identify and object to abandoned water rights that threaten their interests. The probability of abandoned water rights making it into final decrees will be sharply reduced if the United States simply acts to protect its interests and the interests of those to whom it owes a trust obligation. It has already proven it can do so by objecting to numerous water rights on the basis of post 1973 abandonment.

Third, the United States implies that res judicata acts as a bar to raising abandonment once a water right has been recognized by the Court. While this may be true in some circumstances, the Water Court has jurisdiction to adjudicate "total or partial abandonment of existing water rights *occurring at any time before the entry of the final*

decree.” § 3-7-501(4), MCA (emphasis added). Most Water Court orders are interlocutory until final decrees are issued. *In re Adjudication of Sage Creek*, 234 Mont. 243, 248 (1988).

Orders of the Water Court other than final decrees are interlocutory for good reason.

By the use of a preliminary decree, the Water Court, over a period of one or more seasons, may test the provisions of its decree to determine that it works fairly and properly as between appropriators and between appropriators and those with other interests. Such other modifications as may be necessary can be made before entry of the final decree. *McDonald v. State*, 220 Mont 519, 531-32 (1986).

Interlocutory orders provide the parties and the Court with an opportunity to address problems arising after orders are issued.

If, during the enforcement of a Water Court Decree, it is determined that one or more water rights were incorrectly decreed, the affected users can petition the appropriate district court judge or water judge for relief. *Matter of Water Court Procedures*, 1995 ML 108, (Mont. Water Ct. 1995), p. 17.

This means that the Court has the ability to hear cases involving abandonment arising after issuance of preliminary decrees, and after issuance of orders recognizing water rights in those decrees as valid.⁴

The opportunity to raise abandonment in basins involving two decrees is even broader than in single decree basins. Forty-two of Montana's eighty-five basins will have two interim decrees. The second decrees in each of those basins will have an additional objection period, during which time fresh issues of abandonment may be raised. None of these forty-two basins have yet had second decrees issued. The United States and other parties have the opportunity to raise abandonment issues in these basins if they have not already done so.

⁴ The United States has not identified any case in which the Water Court declined to hear an objection to abandonment based on evidence arising after recognition of a claim in an interlocutory order. The Court typically rejects late objections filed after the close of the first objection period in two decree basins, but these objections may be re-filed during the objection period following issuance of the second decree.

Fourth, the United States asserts there is no mechanism for termination of abandoned water rights after issuance of final decrees. This statement overlooks both substantive and procedural law on this issue and is therefore incorrect. The Legislature has already anticipated and addressed the need to deal with abandonment of water rights after final decrees are issued.

Statutes provide two alternatives for pursuing abandonment after issuance of a final decree. One is through proceedings initiated by the DNRC, and the other through water distribution controversies before district courts. Section 85-2-404, MCA states the substantive law on abandonment after issuance of a final decree:

Abandonment of appropriation right.

(1) If an appropriator ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately expire.

(2) If an appropriator ceases to use all or part of an appropriation right or ceases using the appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for use, there is a prima facie presumption that the appropriator has abandoned the right for the part not used. ...

(5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined in accordance with part 2 of this chapter.

The procedural mechanism for dealing with abandonment issues after issuance of a final decree is found in Section 85-2-405, MCA:

Procedure for declaring appropriation rights abandoned. (1) When the department has reason to believe that an appropriator may have abandoned an appropriation right under 85-2-404 or when another appropriator in the opinion of the department files a valid claim that the appropriator has been or will be injured by the resumption of use of an appropriation right alleged to have been abandoned, the department shall petition the district court that determined the existing rights in the source of the appropriation in question to hold a hearing to determine whether the appropriation right has been abandoned. Proceedings under this section must be conducted in accordance with the Montana Rules of Civil Procedure, and appeal must be taken in accordance with the Montana Rules of Appellate Procedure.

The judicial determination of abandonment after issuance of final decrees is also addressed in Section 85-2-406(3), MCA. It provides:

A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the district court. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree *except to the extent the court alters rights based on abandonment, waste, or illegal enlargement or change of right* (emphasis added).

The United States can ask the DNRC to initiate the petition process available under Section 85-2-405, MCA. It can also raise abandonment in the context of a district court distribution controversy under Section 85-2-406, MCA.

In summary, the United States and other parties have multiple options for addressing post 1973 abandonment of water rights. Some of those options have been used, while others remain available but unexploited. The existence of these options invalidates the argument that there is no mechanism for keeping abandoned water rights from being included in final decrees of this Court.

5. Is the Water Use Act being applied in a way that harms Indian and federal reserved rights?

The United States and the Tribes have entered a number of Compacts resolving disputes over Indian and federal reserved water rights. The Compacts define those reserved rights for inclusion in final decrees of the Water Court. A common feature of these Compacts is subordination of Indian and federal reserved rights to claims held by non-Indians based on state law. The United States and the Tribes contend that resurrection of previously abandoned non-Indian state law based water rights “will undermine the fair implementation of carefully negotiated settlements of Indian water rights and other federal reserved water rights” and result in an application of the Montana Water Use Act and federal law “in a way that does not protect Indian reserved water rights.” United States’ Motion, pp. 28-29.

Because defining water rights is a human endeavor, no statewide general adjudication of water rights will be perfect. Nevertheless, the United States, the Tribes,

and other amicus parties are correct when they assert that working to eliminate abandoned water rights from final decrees is an important objective of the adjudication. This point was first recognized by the Water Court in the *Jeffers* and *Plum Creek* cases, and has been re-affirmed in many subsequent cases. See *Jeffers*, Memorandum Opinion; *Plum Creek*, Memorandum Opinion.

The Apsaalooke (Crow) Tribe contends that the DNRC must undertake a more comprehensive examination of post 1973 use so that the Tribe can more easily file objections to potentially abandoned water rights.

Having the DNRC perform such work might make the process of filing objections easier for the Tribe and other water users. However, the brief filed by the Tribe shows it has already been successful in identifying and objecting to rights with abandonment issues. The Tribe's brief contains several examples of water rights that were withdrawn because of its abandonment objections.⁵

The Tribe has also identified and objected to numerous other water rights with abandonment issues.

Counsel for the Crow Tribe has personal knowledge of numerous additional claims in Basins 43E and 43O where no issue remarks regarding extended periods of non-use were placed on the abstracts, nor were any issue remarks placed on the abstracts regarding the present conditions of the diversion structures and conveyance systems. For these claims [the Tribe] reviews and subsequent site visits clearly demonstrated extended periods of non-use post June 30, 1973. These claims are still pending before the Water Court and the details of them should not be disclosed at this time, but will be over time as settlements are filed or litigation commences.

Crow Tribe Amicus Brief, pp. 6-7.

This statement indicates the Crow Tribe is successfully preventing abandoned water rights from being included in final decrees. Although this effort may consume resources, it shows that a water user committed to protecting its interests can effectively

⁵ These rights include claims 43E 20199-00, 43E 201089-00, and 43E 201142-00.

challenge abandoned rights. This was the result envisioned by the Legislature when it framed the adjudication process.

The Northern Cheyenne and Blackfoot Tribes also filed an amicus brief. They contend their interests as defined in their respective Compacts will be harmed if water rights abandoned since 1973 are included in final decrees. If this happens, the Tribes assert they "will be in the position of having to challenge the validity of those water rights in order to exercise [their] own rights." Northern Cheyenne and Blackfoot Amicus Brief, p. 5.

The Tribes will always be in a position of having to challenge other rights because water is a scarce resource. That obligation will exist whether or not this Court orders the DNRC to look at post 1973 aerials for evidence of abandonment. Regardless of who analyzes these photographs, water users will remain obligated to protect their interests by objecting to invalid or abandoned water rights.

All of the Tribes assert that the Compacts they entered subordinate their reserved rights to valid existing state based rights. They contend that recognition of abandoned rights in decrees will result in subordination of Tribal reserved rights to invalid claims that might later be resurrected. "If this Court were to enter a decree recognizing abandoned rights, that would violate the Compact by purporting to enlarge the subordination the Tribes made beyond the intent of the Tribes and the State." Assiniboine, Sioux, Chippewa Cree, and Confederated Salish and Kootenai Tribe's Amicus Brief, p. 9.

This argument lacks merit for several reasons. First, the Court cannot violate an agreement to which it was not a party.

Second, all of the Compacts were negotiated after 1973, with most of them negotiated many years after 1973. Despite being formed in the post 1973 era, none of those Compacts obligate the Water Court or anyone else to undertake the post 1973 abandonment analysis now requested by the Tribes. Furthermore, none of the Compacts were expressly conditioned on the occurrence of such analysis in the future.

Third, the state based water rights to which the Tribes subordinated their reserved rights are already included in lists attached to the Compacts. Leaving abandoned water rights on those lists will not enlarge the universe of claims to which the Tribes have subordinated their interests *unless* those claims are placed back into use after having been abandoned. The Tribes have multiple remedies to prevent abandoned rights from being resurrected.

If the Tribes wish to *reduce* the universe of claims to which they have subordinated their interests before final decrees are issued, they may raise objections to those abandoned rights using any of the multiple pre-decree remedies described in this Order. They may also avail themselves of several post decree remedies if abandonment does not arise until after final decrees are issued.

These remedies give the Tribes control over the risk they allege will materialize from potential recognition of abandoned rights. If they take action, they can mitigate those risks. If they do nothing, then their interests may be adversely impacted.

The United States and the Tribes do not offer any examples of water rights abandoned after 1973 that have been or may be incorporated into final decrees.⁶ Likewise, they do not offer examples of any abandoned rights that were included in final decrees and later resurrected. Even if the latter rights exist, it would be the obligation of the water users, not the Court, to challenge those rights.

VI. CONCLUSION

Montana's statewide water rights adjudication is an extraordinarily complex undertaking. It is a large lawsuit involving tens of thousands of parties, most of whom have adverse interests. Its purpose is to define over two hundred thousand conflicting property rights. Managing such an endeavor requires balancing three primary factors: accuracy, speed, and cost. The responsibility for balancing these factors has historically been shared by the Legislature, the Montana Supreme Court, the DNRC, and the Water Court.

⁶ Providing such examples would confirm the ability of the United States and the Tribes to identify water rights with potential abandonment problems.

The United States acknowledges its request will decrease the speed of the adjudication and increase its cost. To offset these impacts, there must be a corresponding increase in accuracy. Participants in the adjudication have already proven they can identify and eliminate abandoned rights. The request made by the United States will decrease the accuracy of the adjudication by shifting responsibility for development of evidence away from these stakeholders.

The state of Montana has made an exceptional effort to review and examine water rights. The purpose of this examination is to make the adjudication more accurate and to provide water users and participants with useful information. Despite the enormous volume of information generated by claims examination, the United States is asking that more be produced. It asserts the DNRC must examine and summarize photographs taken by the United States so the United States can use this information to formulate objections to other water rights. The United States asserts this information must be generated pursuant to a Water Court duty that is not defined by statute or rule, and that has never been recognized in a prior decision of any court.

Generation of information used to produce accurate decrees is not the sole province of the state of Montana, nor is the state the most important producer of such information. Participants in the adjudication process are charged with responsibility for gathering evidence needed to protect their interests. Without participation by water users and other stakeholders, the process would fail. The adversary system remains the best way of gathering and presenting information regarding water rights.

The United States' Motion is about who bears responsibility for proving abandonment of water rights. In considering this issue, the Court has reached the following conclusions:

1. The Water Court routinely hears cases involving post 1973 abandonment.
2. The Water Court's jurisdiction does not impose upon it a duty to order the DNRC to review aerial photographs taken after June 30, 1973 for evidence of abandonment.

3. The Water Right Claim Examination Rules adopted by the Montana Supreme Court do not impose a duty on the Water Court to order the DNRC to review photographs taken after June 30, 1973 for evidence of abandonment.

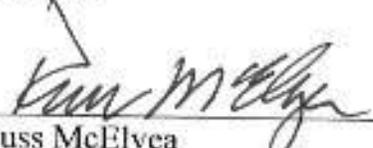
4. Objectors have multiple opportunities to raise abandonment issues. These opportunities exist with or without examination of post 1973 aerial photographs.

5. The Water Use Act is not being applied in a way that harms Indian or federal reserved rights. The Tribes and the United States have both the capability and the opportunity to challenge water rights using post 1973 evidence.

VII. ORDER

IT IS ORDERED the United States' Motion is DENIED.

DATED this 27th day of June, 2014.


Russ McElyea
Chief Water Judge

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