

Montana Water Court  
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**FILED**

**APR 18 2013**

**Montana Water Court**

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
MISSOURI RIVER - FROM HOLTER DAM TO SUN RIVER - BASIN 41QJ

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CLAIMANTS: Linda M. Johns; W. Steve Johns;  
Betty L. Bicknell; Gene E. Bicknell; Diana L. Nelson;  
Sue A. Weingartner; Russell W. Weingartner; Elizabeth  
C. Dagnall; Robert G. Dagnall

OBJECTOR: United States of America (Department of  
Interior-Bureau of Indian Affairs)

**41QJ-19**

41QJ 5581-00	41QJ 97570-00
41QJ 34410-00	41QJ 97571-00
41QJ 41568-00	41QJ 97572-00
41QJ 41569-00	41QJ 143007-00

**ORDER ADDRESSING P490 ISSUE REMARKS**

This Case involves eight water rights in Basin 41QJ. Four of these claims received P490 issue remarks. Claimants seek to have these remarks removed from their claims.

The Water Court issued a Preliminary Decree for Basin 41QJ on February 6, 2008. On July 31, 2008, the United States Department of Interior, Bureau of Indian Affairs (hereinafter United States) filed objections to three claims included in this Case. No objections were filed by Indian Tribes. The United States' objections included concerns about priority date for claim numbers 41QJ 97571-00, 41QJ 97572-00, and 41QJ 143007-00.

The eight claims under consideration were consolidated into Water Court Case 41QJ-19 on January 21, 2010. On March 17, 2010, the United States filed a Notice of Participation and Offer of Settlement. The Water Master interpreted the United States' Notice of Participation and Offer of Settlement as a Motion to Intervene on Claims 41QJ 5581-00, 41QJ 34410-00, 41QJ 41568-00, 41QJ 41569-00 and 41QJ 97570-00.

The Water Master then ordered Claimants to meet with Department of Natural Resources and Conservation (DNRC) by May 31, 2010. Claimants, Robert G. and Elizabeth C. Dagnall, filed a Status Report on June 1, 2010. Their Report expressed concern about United States' objection to claim 41QJ 143007-00 and the United States' proposal to move their priority date back to July 5, 1874. These Claimants rejected the United States' proposal because "any agreement to back up our priority date could adversely affect our right to use Water Right No. 41QJ 143007-00 by making the water right subject to call by other Little Prickly Pear water users or downstream users with priority dates between July 6, 1873 and July 4, 1874." *Status Report*, p. 1. Claimants' current priority date is March 1, 1872.

On June 16, 2010, the Water Master entered an Order Setting Settlement Conference. The United States was excused from attending the settlement conference. During the settlement conference, the parties, DNRC personnel, and the Water Master resolved all issues in the Case except the P490 issue remark pertaining to the priority dates of water rights on the former Blackfeet Indian Reservation.

On February 11, 2011, Claimants Charles D. McDonald and Diana Nelson, filed a Motion and Memorandum in Support of Declaratory Judgment. Their motion asks this Court to remove the priority date issue remarks relating to Indian Reservations for statements of claim in Basin 41QJ. Over the next several months, the United States filed two requests for additional time to respond to the Claimants' Motion and Memorandum. On March 21, 2011, the Water Master issued an Order Continuing Stay of Proceedings for Indian Cessions Issue. In this Order, the Water Master noted the status of the P490 issue remark would be addressed in a separate proceeding.

Chief Water Judge Loble assumed control of this Case and entered an Order Lifting Stay and Setting Optional Briefing Dates on February 15, 2012. On July 19, 2012, Judge Loble assigned this matter to Judge McElyea.

### **REQUEST FOR DECLARATORY JUDGMENT**

The United States contends the request for a declaratory judgment is improper because it was raised by motion rather than by filing a complaint and because it does not

name the Blackfeet Tribe, which the United States contends is a necessary party.<sup>1</sup> The Uniform Declaratory Judgment Act's purpose "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations ... ." § 27-8-102, MCA. This Act allows a party to file a petition for declaratory judgment because the constitutionality of a law is questioned or a person's rights are affected. *See Estate of Marchwick*, 2010 MT 129, ¶ 7, 356 Mont. 385, 234 P.3d 879 (petition for declaratory relief granted as Marchwick declared sole lineal descendant). A court may use its discretion to refuse to render judgment. § 27-8-206, MCA. *See Skinner Enterprises, Inc., v. Lewis and Clark County Bd. of Health*, 286 Mont. 256, 277, 950 P.2d 733, 746 (1997) (review of the board's decision was not a proper subject for a declaratory judgment).

Declaratory relief is unnecessary here because the Montana Water Court resolves issue remarks under section 85-2-248, MCA. If an issue remark is not resolved through an objection, the Water Court refers the claimant to work with DNRC to resolve the remark. §§ 85-2-248(5)(a)-(c), MCA. If the remark cannot be resolved with DNRC assistance, then the Water Court can resolve the remark with a hearing. §§ 85-2-248(6)-(12), MCA. The Water Court may also address issue remarks independently, if needed. § 85-2-248(3), MCA. *See also In the Matter of the Water Court Procedures in Addressing Factual and Legal Issues Called in "On Motion of the Water Court,"* 1995 ML 108, 1995 Mont. Water LEXIS 7. This issue remark was referred to DNRC and remains unresolved. Because the P490 issue remark can be resolved using the Court's authority under 85-2-248(3), the Claimants' request for declaratory judgment is moot.

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<sup>1</sup> The United States asked for significant extensions to respond to the Motion for Declaratory Judgment. As a basis for this additional time, the United States asserted it "has a trust responsibility to all federally-recognized Indian tribes and Alaska Natives, and an obligation to consult with tribes when the actions of the government may impact tribal interests. ... The United States has determined that matters raised in Claimants' Motion -- including but not limited to the interpretation of Treaties concluded between the United States and Indian tribes in 1851 and 1855 -- potentially affect the rights and interests of [*sic - a*] number of Indian tribes, as well as one tribe in Idaho. At a minimum, it is incumbent upon the United States to make some effort to notify these potentially affected tribes, given that they are almost certainly unaware of Claimant's Motion." *United States of America Request for Enlargement of Time*, p. 2.

## PROCEDURAL HISTORY

The question is whether the P490 issue remark should be removed from the abstracts for Claimants' rights. Claimants contend that because water rights are property interests, the perpetuation of such a remark is tantamount to a cloud on the title to their water right claims. Claimants Nelson and McDonald also argue the issue remark is incorrect as a matter of law. Claimants assert Basin 41QJ is not within an Indian Reservation and that a reservation did not exist prior to cession. They argue any Indian title existing prior to cession was merely a right of occupancy. According to Claimants, the Treaty of 1855 did not preclude adjudication of rights in Basin 41QJ or justify attachment of issue remark number P490 to water rights in the Basin. Finally, Claimants argue the Treaty of 1855 (hereinafter 1855 Treaty or Treaty) authorizes appropriation of water within the boundaries of a reservation.

The United States argues the 1855 Treaty established a reservation for the Blackfeet Tribe. The United States contends Article 7 of the Treaty did not carve out an exception enabling the State of Montana to award pre-cession water rights on lands described in the Treaty. According to the United States, the Treaty precluded non-Indian settlement and precluded appropriation of non-reserved state law based water rights on the Blackfeet Reservation so long as it existed.

On September 24, 2012, this Court issued an Order titled, *Order Addressing P490 Issue Remark*. This Court concluded the P490 issue remarks should be removed from all claims in this Case as well as all claims in Basin 41QJ. The basis for this decision was two-fold. First, this Court agreed with the United States that a Reservation for the Blackfeet Tribe had been created by treaty in 1855. This Court also concluded that, based on the information before it, the treaty had not reserved all the waters within the boundaries of the Reservation for the Tribe's use. Given that the lands in Basin 41QJ had been removed from the Reservation shortly after its creation, this Court determined that settlers could have appropriated water in that area and that the P490 issue remark was unnecessary.

Second, the Court determined that the rights claimed by the Blackfeet Tribe in its Compact were geographically and hydrologically remote from the claims at issue in this Case, and that water in Basin 41QJ was not physically available for use by the Blackfeet Tribe.<sup>2</sup> Accordingly, application of the P490 issue remark to the claims in this Basin served little practical purpose.

The United States filed a motion to revise this Court's September 24, 2012 *Order*. In its Motion, the United States argued that lands within the original boundaries of the Blackfeet Reservation were not open to settlement or appropriation of water by non-Indians until after the Reservation boundaries were modified by Federal action. The United States asserted that this Court's Order "... impacts numerous Tribes and Allottees ... " and "... will upset the adjudication and prejudice future proceedings." *United States' Motion to Revise Interlocutory Order*, p. 6.

The Assiniboine and the Gros Ventre Tribes as well as the Blackfeet Tribe joined the United States' motion. The Assiniboine and Gros Ventre Tribes, now known as the Fort Belknap Indian Community (FBIC), argued that "[a]ll reservations in Montana have the same set of facts, whereby large reservations were reduced time after time by treaty and/or executive order to make way for non-Indian settlement of the west." *FBIC Motion to Appear as Amicus Curiae*, p. 3. FBIC asserted "this Court's *Order* does not appear to be limited to just the effect of this adjudication on the Blackfeet Tribe's reserved water rights. Therefore, the Applicant desires to be heard on this matter to protect its *Winters* reserved water rights." *FBIC Motion to Appear as Amicus Curiae*, p. 3.

The Blackfeet Tribe adopted the arguments of the United States and additionally asserted this Court's Order conflicted with its previous Order staying adjudication of the Tribe's Federal reserved rights and that determination of the Blackfeet Reservation's purposes is a significant and fact-intensive issue that can only be made "... after development of a full and complete record, and with the participation of the Blackfeet

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<sup>2</sup> The Blackfeet Tribe, the United States, and the State of Montana entered into the Blackfeet Compact, which the Montana Legislature ratified. The Compact is codified in section 85-2-1501, MCA.

Tribe, which is a party in the adjudication of its rights.” *Amicus Brief of the Blackfeet Tribe*, p. 4.

As noted in footnote 1, the United States asked for and received considerable time to notify potentially-impacted Indian Tribes of Claimants’ request to remove the P490 issue remark. Claimants’ request included the assertion that “ ... none of the land encompassed in Basin 41QJ was ever reserved for any of the Montana Tribes as reservation property.” *Claimants’ Motion and Memorandum in Support of Declaratory Judgment*, p. 4. The *Winters* Doctrine arose from creation of a reservation, and Claimants’ argument was that no reservation had been created. Claimants’ argument was therefore a challenge to Indian reserved rights. The United States was on notice this issue was before the Court. It is not clear whether this information was shared with the Blackfeet or other Tribes.

Regardless of notification by the United States, the Tribe’s interests were potentially impacted. Accordingly, the Court concurs with the Blackfeet Tribe that judicial resolution of Tribal water right claims, if the need for such resolution arises in the future, is best undertaken when all parties have a more complete opportunity to develop their arguments and evidence.

To avoid any uncertainty about the status of Tribal claims, this Court’s September 24, 2012 Order Addressing P490 Issue Remark is hereby superseded by this Order, and may not be cited as authority by any party in the future.

This leaves the question initially presented by Claimants: whether the P490 issue remark should be removed from their claims. This Court concludes the P490 issue remark should be removed from the abstracts for Claimants’ water rights.

### **DISCUSSION**

Issue remarks are defined as “a statement added to an abstract of water right in a water court decree by the department or the water court to identify potential factual or legal issues ... .” § 85-2-250, MCA. Issue remarks are products of the claims examination process conducted by the DNRC prior to issuance of a Preliminary Decree. Claims examination consists of “examining, gathering information, and reporting data,

facts, and issues pertaining to the claims of existing water rights.” W.R.C.E.R. 2(a)(21). Issue remarks cover a wide range of topics and take a variety of forms.

The claims examination’s purpose is to provide “technical assistance and information to the water court subject to the direction of water judges pursuant to 85-2-243, MCA.” W.R.C.E.R 1(b). This process is controlled by rule and by the Water Court. “The water court determines the necessity and scope of any preliminary department examination as set out in these rules ... .” W.R.C.E.R 1(b).<sup>3</sup> Once examination of claims is complete, the Water Court issues a Temporary or Preliminary Decree of the claims in a basin. These decrees usually contain issue remarks, although not all claims have such remarks.

After the Decree is issued, individuals potentially impacted by claims in the Decree may file objections. § 85-2-233, MCA. Objections to claims are sometimes based on issue remarks attached to those claims. One purpose of issue remarks is to provide notice of potential issues to claimants and other water users in a basin.

[Issue] remarks alert the claimant to potential issues during claimant contact prior to the Water Court issuing a decree. The issue remarks are also utilized by other parties reviewing claims. DNRC CEM,V.B.

This notice affords claimant an informal opportunity to resolve problems with their claims and other water users the opportunity to object to water rights of concern. The Water Court has removed remarks from claims after notice has been provided if those claims have not received objections. *Matter of the Adjudication of Existing Rights to the Use of All the Water*, Case 41E-13, 1994 ML 22, 1994 Mont. Water LEXIS 13.

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<sup>3</sup> The Water Court has recently issued two orders regarding the scope of the claims examination process. In its *Order Readdressing Reexamination*, dated December 14, 2012, the Court established parameters for dealing with discrepancies between verified and examined basins. Resolution of this issue was a recommendation of the Montana Legislative Audit Division Report. *See Water Rights Adjudication, Performance Audit, Department of Natural Resources and Conservation, Reserved Water Rights Compact Commission, Montana Water Court, A Report to the Montana Legislature*, June 2010, <http://leg.mt.gov/content/Publications/Audit/Report/09P-09.pdf>, last visited April 2, 2013.

On March 29, 2013, the Court issued its *Order Establishing Procedures for Examination of Claims Located within the Exterior Boundaries of the Blackfeet Indian Reservation*. These Orders impact the review of thousands of water rights claims.

Issue remarks deal mostly with factual issues. Factual issues, such as discrepancies in flow rate or irrigated acreage, involve readily measurable elements of a water right. The DNRC routinely undertakes this empirical analysis, and compares the results to claims under examination. Where a large enough difference exists, remarks on factual issues are common. Because of their factual nature, these remarks are frequently resolved between DNRC and claimants long before claims reach the water court.

The DNRC completed claims examination of the water rights in this Case in 2005. The DNRC placed various issue remarks on these claims including P490, which states:

P490. AT THE TIME OF THE CLAIMED PRIORITY DATE, IT APPEARS THAT THE PLACE OF USE WAS PART OF AN INDIAN RESERVATION.

The DNRC uses a Claims Examination Manual to guide its staff when reviewing water rights. The Claims Examination Manual is not binding on the Water Court. The Claims Examination Manual states:

k. Priority Date Precedes Indian Cession: The boundaries of most Indian reservations in Montana were originally larger than present day reservation boundaries. Over the years, Indian reservations were reduced in size by various treaties and Congressional acts.

Many water rights claims were submitted with claimed priority dates which are earlier than the date on which portions of reservation land was ceded from Tribal ownership. In other words, on the date of the priority claimed, it appears the land was under Indian ownership.

Each office has been provided with a map showing successive changes in Indian reservation boundaries. See exhibit VI-15 for an explanation of the dates on the Indian lands Cession map. When a claim has a priority date preceding the Cession date for the area, add a priority date remark to the examination report. CEM, VI.J.3.k.

The P490 issue remark is heavily freighted with legal issues. Determining whether a reservation has been created and what its boundaries might be require careful interpretation of treaties and application of both federal statutes and case law. Treaties

vary widely as to date, purpose, and language. Some treaties have already been interpreted in prior cases. As noted by the Blackfeet Tribe in its briefing, “ ... the issue of whether the P490 issue remark is proper in connection with the above claims can be resolved as a legal matter ... .” *Supplemental Amicus Brief of the Blackfeet Tribe*, p. 1.

The legal issues inherent in deciding whether a P490 remark should be placed on a claim are complex, and are much different than the routine factual issues usually encountered by the DNRC during claims examination. As the procedural history of this Case has shown, resolution of P490 remarks once they have been created is also complex. Resolution can have far reaching implications for many parties, and, as a judicial institution, the Water Court is not well situated to resolve complex legal issues on its own where no parties have objected to a claim.

Finally, unlike many factual issue remarks, there is no statute or rule requiring placement of a P490 issue remark on any water rights in Basin 41QJ or any other basin.

Although one purpose of issue remarks is to provide notice to other water users of potential factual issues, the notice value provided by the P490 issue remark is questionable. It is unlikely parties interested in water rights developed within the boundaries of former Indian reservations need the P490 remark to assist them in making objections to those claims.

This is especially true where the United States and Indian Tribes are involved. These parties are sophisticated entities represented by experienced counsel. The United States and the Tribes were parties to treaties and agreements creating and re-shaping reservations in Montana. They are uniquely positioned to analyze when or if reservations were created and when or if cessions of those reservations occurred. Even without the P490 remark, these parties have the knowledge and opportunity to object to claims within former reservation boundaries. The absence of a P490 remark does not limit the ability of any party to pursue objections to protect its interests.

As an additional practical matter, waters in Basin 41QJ are not physically available for diversion or use by the Blackfeet Nation. The Blackfeet Tribe has not made a claim to water from Basin 41QJ in their Compact with the State of Montana and the

United States. The Tribe has not objected to the water rights in this Case. No injury has been demonstrated to the Tribe or its members if these or any water rights in Basin 41QJ are diverted in accord with their actual priority dates. The United States concedes the priority dates of the Claimants' water rights are valid and enforceable against other non-Indian water rights. *United States' Response to Motion and Memorandum in Support of Declaratory Judgment and Opening Memorandum Re: Questions Posed by the Water Court Re: Article 7 of the 1855 Treaty*, p. 13. "While the claimed priority dates at issue (1859-1872) are not binding upon the United States (or the Blackfeet Nation), Claimants can still assert their senior rights as against each other based upon the 1905 adjudication." *United States' Response to Motion and Memorandum*, p. 13.

The United States argued injury might arise to its interests if those issue remarks which did not receive objections are removed without a hearing by the Water Court. The United States contends parties may elect not to object to water rights with issue remarks because they rely on the Water Court to resolve those remarks when no objections are filed. In effect, the United States is asserting the Water Court has a duty to resolve this remark independently, and without participation of the United States or the Tribes, if those parties elect not to object to a claim with a P490 issue remark. This argument is misplaced for a number of reasons.

First, it contradicts the assertion of the United States and the Tribes that the issues raised by the P490 remark impact their interests and require their participation in any proceeding to resolve the remark. Second, section 85-2-248(3), MCA allows the Court to resolve issue remarks when no objection is filed. Resolution does not require a substantive hearing, nor does it require alteration of a water right to conform the claim to the remark.

Finally, in the absence of a rule requiring placement of an issue remark on a claim, the Water Court has both the power and the obligation to control issue remarks. *Order Denying Claimant Motion to Strike and U.S.A Motion to Alter or Amend Marshalling Order*, Case 76F-1. "The water court determines the necessity and scope of any preliminary department examinations set out in these rules, but in no way influences the

results of the directed examination.” W.R.C.E.R. 1(b).<sup>4</sup> No rule requires placement of P490 issue remarks on claims in this Case. Accordingly, the existence of this remark, from its initial placement on the claim to its removal, is within this Court’s discretion.

The Montana adjudication process and the claims examination which precedes issuance of a decree are extraordinarily complicated and thorough. Since its inception, the process has focused on completeness and accuracy, and examination of claims has become more complex and exhaustive over time. An objective of claims examination is to provide other water users with information necessary to file objections. Although enormous effort in resources and manpower have gone into examining claims, and the Water Court often independently resolves issue remarks without an objector, the adjudication process remains essentially a judicial proceeding.

As such, the success of the adjudication process depends on objections by parties seeking to protect their interests to assure resolution of important issues. The Montana Supreme Court has consistently emphasized “ ... the importance of broad rather than narrow rights of participation in water adjudications.” *Montana Trout Unlimited v. Beaverhead Water Company*, 2011 MT 151, ¶ 41, 361 Mont. 77, 255 P.3d 179. “The Montana Water Use Act anticipates there will be disagreements over the use of water among varying interests ... .” *Trout Unlimited*, ¶ 42. “[T]he integrity of Montana’s adjudication process depends upon the assertion and ultimate resolution of these varying interests. 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). “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,

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<sup>4</sup> The Water Court’s discretion to resolve issue remarks under section 85-2-248, MCA has limits. In cases involving “nonperfection or abandonment, the water court shall join the state of Montana through the attorney general as a necessary party to resolve the issue remark.” § 85-2-248(7), MCA.

*citing Adjudication of Rights in the Yellowstone River*, 253 Mont. 167, 179-180, 832 P. 2d 1210, 1217 (1992).

The Water Court has also emphasized the importance of participation in the adjudication process. “[W]ater rights claimants, such as the United States, have an independent responsibility to review the decrees issued by the Montana Water Court and to object to erroneous or exaggerated claims that may adversely affect their use of water.” § 85-2-233, MCA and Rule 5, W.R.Adj.R. Water users who forsake their duty to assert and defend their interests by electing not to file objections do so at their peril and undermine the adjudication’s integrity.

### CONCLUSION

Claimants have asked for removal of the P490 issue remark from their claims. Claimants’ request is GRANTED.

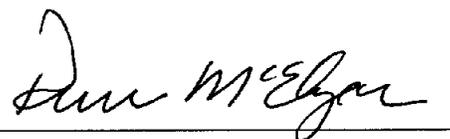
### ORDER

IT IS ORDERED that the P490 issue remark shall be removed from the claims in this Case.

IT IS FURTHER ORDERED that the Water Master remove the P490 issue remark from all claims in Basin 41QJ.

IT IS FURTHER ORDERED that the DNRC stop placement of P490 issue remarks on claims in the future.

DATED this 18 day of April, 2013.



Russ McElyea  
Associate Water Judge

**CERTIFICATE OF SERVICE**

I, Swithin J. Shearer, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER ADDRESSING P490 ISSUE REMARKS** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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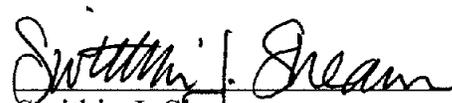
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**Note: Service List Updated 4/17/2013**

DATED this 18<sup>th</sup> day of April, 2013.

  
Swithin J. Shearer  
Deputy Clerk of Court