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MONTANA WATER COURT

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SUPPLEMENTAL ORDER REGARDING FISH AND WILDLIFE, WILDLIFE, AND RECREATION CLAIMS

-STATEWIDE 2013-

The Water Court has received a number of inquiries from Department of Natural Resources (DNRC) personnel and Water Masters regarding examination and post-decree handling of fish and wildlife, wildlife, and recreation claims. The Water Court's December 14, 2012 *Order Addressing Reexamination* addressed some of the issues pertaining to these claims.

The purpose of this *Supplemental Order* is to provide additional guidance regarding examination and post-decree treatment of fish and wildlife, wildlife, and recreation claims. This *Supplemental Order* differs from the December 14, 2012 *Order Addressing Reexamination.* To eliminate any confusion, this *Supplemental Order* supersedes Part IV of the December 14, 2012 *Order Addressing Reexamination.*

Listed below are common variations of fish and wildlife, wildlife, and recreational claims. Some variations of these claims are covered by existing claims examination rules, while some are not. Where a rule covers a particular right and application of the rule is clear, apply the rule. Where a rule is unclear, or it does not appear to fit the claim under review, follow this *Supplemental Order.*

There will inevitably be instances where application of a rule is uncertain, and this *Supplemental Order* does not provide sufficient guidance. In these circumstances, remember that a claim is *prima facie* evidence of its content and historical beneficial use

is the measure of a water right. Apply common sense and good judgment based on your experience.

CATEGORY I. Claims diverted without a Reservoir. Rule 29(b)(1).

Examples of types of diversions falling within this category of claim may include: spring boxes, developed springs, diversion dams, headgates, wells, pumped diversions, gravity flow or other pipelines, any right using a man-made diversion resulting in a measurable flow rate, including wildlife drinking directly from any of these systems.

- How to Examine Flow Rate:

Under Rule 29(b)(1)(i), the flow rate guideline is the capacity of the diversion and conveyance system. If the capacity of the diversion and conveyance system cannot be determined, then leave flow rate as claimed and issue remark as follows:

> THE CAPACITY OF THE DIVERSION AND CONVEYANCE SYSTEM CANNOT BE DETERMINED AND THE FLOW RATE REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

If you have information on the actual capacity of the diversion and conveyance system and the flow rate is equal to or lower than the actual capacity, then leave the claimed flow rate unchanged and unremarked.

If you have information on the capacity of the diversion and conveyance system and the claimed flow rate exceeds this capacity, then consult the statement of claim or information obtained from claimant contact to determine if the claimed flow rate is justified. If it is justified, then leave the flow rate unchanged and unremarked.

If the flow rate cannot be justified after seeking additional information, reduce flow rate as required by Rule 29(g). This reduction should only occur for filed and use rights, or decreed rights with no decreed flow rate. If reduced, attach the proper flow rate remark per Rule 29(g)(2)(ii).

- How to Examine Volume:

Under Rule 29(b)(1)(ii), the volume guideline is defined as what is "reasonable and customary" for a specific purpose. Volume should remain as claimed in the absence of substantial information that claimed volume is unreasonable. If volume is left as claimed, use the following remark:

> THE VOLUME OF THIS CLAIM CANNOT BE DETERMINED FROM AVAILABLE INFORMATION, AND VOLUME REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

Do not use this remark if you have otherwise determined the claimed volume is within the "reasonable and customary" guideline.

CATEGORY II. Claims Diverted with an On-stream Reservoir. Rule 29(c).

- How to Examine Flow Rate:

Under Rule 29(c)(1), flow rates for these rights are not decreed. Add a remark stating no flow rate decreed.

> FF007: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

- How to Examine Volume:

Proceed in accordance with Rule 29(c)(1)(ii)(A) and (B).

When volume is less than 15 acre-feet, leave as claimed and do not remark.

When the claimed volume exceeds 15 acre-feet, the volume guideline is maximum storage capacity plus the estimate of evaporation. Leave the volume unchanged and unremarked if it is less than or equal to the guideline.

If volume exceeds this guideline for non-decreed rights, or decreed rights without a decreed volume, then consult the statement of claim or information obtained from claimant contact to determine if the claimed volume is justified. If it is justified, then leave the volume unchanged and unremarked.

If the volume cannot be justified after seeking additional information, then remark as follows:

> CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

Do not remark volume for decreed rights with a decreed volume.

CATEGORY III. Claims Diverted with an Off-stream Reservoir. Rule 29(c). (Also includes off-stream manmade pits).

- How to Examine Flow Rate:

Under Rule 29(c)(1)(i), the flow rate guideline is the capacity of the diversion and conveyance system.

If you have information on the actual capacity of the diversion and conveyance system and the flow rate is equal to or lower than the actual capacity, then leave the claimed flow rate unchanged and unremarked.

If you have information on the capacity of the diversion and conveyance system and the claimed flow rate exceeds this capacity, then consult the statement of claim or information obtained from claimant contact to determine if the claimed flow rate is justified. If it is justified, then leave the flow rate unchanged and unremarked.

If the flow rate cannot be justified after seeking additional information, reduce flow rate as required by Rule 29(g). This reduction should occur only for filed and use rights, and decreed rights with no decreed flow rate. If reduced, attach the proper flow rate remark per Rule 29(g)(2)(ii).

If there is no information concerning capacity of diversion and conveyance system, or the system is shared by more than one claimant, the flow rate guideline is that which is reasonable and customary for the specific purpose. Under these circumstances, flow rate should remain as claimed. If flow rate is left as claimed, use the following remark:

THE CAPACITY OF THE DIVERSION AND CONVEYANCE SYSTEM CANNOT BE DETERMINED AND THE FLOW RATE REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

- How to Examine Volume:

Proceed in accordance with Rule 29(c)(1)(ii)(A) and (B).

When volume is less than 15 acre-feet, leave as claimed and do not remark.

When the claimed volume exceeds 15 acre-feet, the volume guideline is maximum storage capacity plus the estimate of evaporation. Leave the volume unchanged and unremarked if it is less than or equal to the guideline.

If volume exceeds the guideline for non-decreed rights, or decreed rights without a decreed volume, then consult the statement of claim or information obtained from claimant contact to determine if the claimed volume is justified. If it is justified, then leave the volume unchanged and unremarked.

If the volume cannot be justified after seeking additional information, then remark as follows:

CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

Do not remark volume for decreed rights with a decreed volume.

CATEGORY IV. Instream Flow Claims. Rule 29(d). (Also includes undeveloped springs).

- How to Examine Flow Rate and Volume:

The guidelines in Rule 29(d) state that flow rate and volume are the minimum amounts necessary to sustain the specific purpose.

Determining the minimum amount necessary to sustain a specific purpose can be subjective. In the absence of substantial evidence that claimed flow rate or volume departs from the guideline, flow rate and volume should remain as claimed. If flow rate and volume are left as claimed, use the following issue remark:

> A GUIDELINE FOR THE FLOW RATE AND VOLUME OF THIS CLAIM CANNOT BE DETERMINED FROM AVAILABLE INFORMATION, AND FLOW RATE AND VOLUME REMAIN AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE AND VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE AND VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

Do not use this remark if you have otherwise determined that the claimed flow rate and or volume are correct.

CATEGORY V. Inlake Claims. Not Covered by Rule. Apply Rule 29(c).

- How to Examine Flow Rate:

These claims are not specifically covered by rule. Treat these claims the same as on-stream reservoir claims in CATEGORY II. Proceed by applying Rule 29(c)(1). Because these claims are instream, no flow rate will be decreed.

- How to Examine Volume:

These claims are not specifically covered by rule. Treat these claims the same as on-stream reservoir claims in CATEGORY II. Proceed in accordance with Rule 29(c)(1)(ii)(A) and (B).

CATEGORY VI. Pothole lakes. Not Covered by Rule.

This category generally covers impoundments without surface inflow and includes natural pits, manmade pits without surface inflow, and groundwater pits.

- How to Examine Flow Rate:

Not Covered by Rule. Potholes do not have a flow rate. No flow rate should be decreed for these claims.

- How to Examine Volume:

An Order issued by Judge Lessley on August 7, 1987 provides volume should be quantified as claimed on federal wildlife pothole lake claims. Volume for these rights is not otherwise covered by rule. Judge Lessley's August 7, 1987 Order is hereby expanded to include all wildlife pothole claims, not just wildlife pothole claims made by the United States. This means all wildlife pothole lake claims should have volume decreed as claimed.

Application of Judge Lessley's 1985 and 1987 Orders.

As discussed in CATEGORY VI above, the Order issued by Judge Lessley on August 7, 1987 pertaining to federal claims for wildlife water rights in pothole lakes will remain in effect, and should continue to be applied.

Judge Lessley issued a related Order on June 17, 1985. It specifies that volumes will be established as claimed for federal wildlife claims for all lakes and reservoirs. The Water Right Claim Examination Rules cited above were adopted by the Montana Supreme Court after Judge Lessley's 1985 Order. In some instances, those Rules, and the provisions of this Supplemental Order, contradict Judge Lessley's June 17, 1985 Order. Accordingly, Judge Lessley's June 17, 1985 Order is partially superseded and no longer applies to federal fish and wildlife, wildlife, and recreation claims with a lake or reservoir.

IT IS SO ORDERED.

DATED this 17 day of April, 2013.

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