

# MEMORANDUM

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**To:** Water Adjudication Advisory Committee;  
Honorable C. Bruce Loble, Chief Water Judge

**From:** Michael J.L. Cusick

**Date:** June 15, 2011

**Re:** Options for Filing and Determining Previously Unfiled Claims for Existing Water Rights Exempt from Filing Under § 85-2-222, MCA  
File No.: 66060\001

## Background

Section 85-2-222, MCA provides an exemption from the claim filing requirements of § 85-2-221, MCA for existing rights for livestock and individual from instream flow or groundwater sources. Such rights are exempt from the filing requirements of § 85-2-221, MCA, but “such claims may, however, be voluntarily filed.”

In approximately the early to mid-1990s, the DNRC created Form 627 to allow for the continuation of voluntary filings of exempt rights. During the initial stages of the adjudication, it appears that the voluntary filing allowance for exempt rights was interpreted to mean that such claims could be voluntarily filed in accordance with § 85-2-221, MCA; that is, such claims could only be voluntarily filed by the claim filing deadline. When DNRC created Form 627, it interpreted § 85-2-222, MCA to mean that exempt rights could be voluntarily filed at any time and there was no time limitation in § 85-2-222, MCA for the voluntary filings.

The creation of Form 627 raised the issue of whether an exempt claim that was voluntarily filed after the claim filing deadline is entitled to the *prima facie* status enjoyed by timely filed claims under § 85-2-227, MCA. Section 85-2-227, MCA provides that claims filed in accordance with § 85-2-221, MCA are entitled to *prima facie* evidence status. Under the statute, only claims filed in accordance with § 85-2-221, MCA are entitled to *prima facie* status and the claimant of an exempt right will always bear the burden of establishing the right even if the claimed right was registered on Form 627.

Exempt right holders that did not voluntarily file in accordance with § 85-2-221, MCA did not forfeit their existing water rights. They still have water rights recognized by Article IX Section 3 of the 1972 Constitution, and as part of those rights, they have the right to assert priority over junior competing water rights. Accordingly, there should be a mechanism to determine their priority if the need arises on a case by case basis. This committee member would recommend a variation of option number two from the Court's Memorandum identifying four possible options. This option is as follows:

1. Legislatively re-institute DNRC Form 627 for DNRC to continue to accept voluntary exempt right filings. Clarify legislatively that such filings are not entitled to *prima facie* evidence statute under § 85-2-227, MCA. The Form 627 would simply be a registration of a claim to provide notice to other individuals that a potential claim for an exempt right exists.
2. Clarify legislatively that the Water Court has jurisdiction to adjudicate claims for exempt water rights. Because such claims are not entitled to *prima facie* status, the burden of proof will always be on the claimant. Further clarify that all exempt right determinations shall be certified to the Water Court under § 85-2-406(2)(b), MCA if such determinations arise in a water distribution controversy, or § 85-2-309, MCA, if they arise in change proceedings. (Also clarify that certification under § 85-2-309, MCA is to the Water Court, not the district court).

3. In cases of disputes between claims for exempt rights not previously filed, provide a mechanism for those claimants to have the determination of the relative priorities and other attributes of those rights included in the Water Court's decree at the exempt right claimants' expense. The notice procedures could be similar to the notice procedures set forth in the post-decree amendment of claim statute, § 85-2-233(6), MCA. If the parties elect to have their rights as determined included in the decree, the determination of the exempt rights should be subject to objection by other water users after notice is provided so that all water users in the decree are bound by it.
4. In cases involving disputes between a claim for an exempt right not previously filed under § 85-2-221, and a timely claim filed in accordance with § 85-2-221, enact legislation to clarify that such disputes must be determined by the Water Court. In the event the determination of such dispute includes a determination of the relative priority of a previously unfiled and non-decreed exempt right with respect to a water right that has appeared in a Water Court decree, the Water Court should provide notice of the relative priority determination, and provide other water users with an opportunity to object. The Court should provide such notice whenever at least one of the water rights involved in the dispute has appeared or will appear in a Water Court decree. Such notice is necessary to avoid inconsistent priority determinations between parties that claim exempt water rights and parties with rights in the decree. If the determination of relative priority involves an exempt right and a decreed right, all parties should be notified and given an opportunity to object to the determination. Such procedures would make the determination binding on all water users in the decree, and avoid the possibility of inconsistent results in the event of a future dispute involving the exempt right's relative priority and a different right in the decree.

For a recent example of the problems arising from inconsistent priority determinations in piecemeal water adjudications, see e.g., Hill v. Merrimac, 211 Mont. 479, 687 P.2d 59 (1984) and the Water Court continuation of *Hill*, Case WC-2001-02, Order Denying Cross Motions for Summary Judgment (November 4, 2004)(copy attached).

For disputes involving only exempt right claims that have not appeared in a Water Court decree and will not appear in the decree, the determination will only be binding upon those parties to the case unless they jointly elect to have their determination noticed to other users in the decree, provide other users with an opportunity to object to the determination and pay for such notice. On the other hand, if at least one of the claims to the dispute will appear in a Water Court decree, all water

users must be noticed to avoid the possibility of inconsistent determinations of relative priority.

5. In the alternative, the committee should recommend alternative no. 1 from the Court's May 26, 2011 Memorandum, which is to take no further action on the issue of exempt rights, and provide no mechanism for inclusion of the exempt rights in a Water Court decree. However, this alternative does not address the problem of potential inconsistent priority determinations that already exist under the current law.

The committee should not recommend a new mandatory filing deadline for all exempt rights that would result in a forfeiture of claims that are not filed. At this time there does not appear to be some compelling state interest in having a record of such claims. As a practical consideration, very few exempt rights have been involved in disputes or litigation since the beginning of the adjudication. Water users already had two opportunities to file such claims and have them included in the Water Court's decree back in 1982 and 1996. It would likely be necessary to subordinate such claims to claims that were timely filed in 1982 and also to forfeited late claims that were redeemed in 1996. The statutory subordination scheme would likely be complex and difficult for water users to understand. Providing another mandatory claim filing deadline for exempt rights will unnecessarily prolong the adjudication by allowing the addition of an unknown number of claims to the process when the claimants of those claims have already had an opportunity to file and did not avail themselves of that opportunity. Owners of exempt rights will still have the ability to assert their rights as needed in the district courts and in the certification process.

Additionally, the only practical way to compel the filing of exempt claims is to penalize non-filers with forfeiture of the right. Providing for forfeiture of *de minimus* uses

that are in some instances necessary to sustain human life is too harsh a result when balanced against the need for a mandatory inclusion of such claims in the adjudication.



These early holdings were consolidated into larger parcels owned by the three claimants in this case. The current claimants, or their predecessors, were involved in two separate court proceedings that both resulted in partial decrees for Davis and Martin Creeks. The District Court first reviewed the Harlow and Broadbent claims in 1929, about forty years after the earliest priority dates claimed. *Spencer v. Silve* (1929), Cause No. 489 Judith Basin County, decreed several water rights for the predecessors of Broadbent and Harlow. Merrimac was not a party to this case.

The second court proceeding took place fifty three years later, in 1982, before the District Court judge sitting as the Water Court. Unlike the first case, the parties appealed the second case to the Montana Supreme Court resulting in a decision affirming certain parts of the Water Court decision; reversing certain parts of the decision; and remanding still other parts for further proceedings. Neither party pursued the remand. *Hill v. Merrimac Cattle Co.* (1984) 211 Mont. 479, 687 P.2d 59. The second case involved Merrimac and the predecessor to Harlow, resulting in a water right decree for these two parties. Broadbent's predecessors were not a party to this case.

Harlow's predecessors were party to both cases but received very different results, thereby presenting a significant problem with the two decrees. In the *Spencer* case, the District Court decreed Harlow's predecessor the first three rights from Martin Creek. This gave Fergus (Harlow's predecessor) the first 740 miner's inches on this source in relation to Spencer and Silve who were both predecessors of Broadbent. In 1982, Harlow's predecessor, Hill (successor to Fergus), sued Merrimac over water rights to Martin and Davis Creek. The Water Court decision rejected the priority dates and flow rates for the Harlow claims as decreed in *Spencer*

and decreed rights for Harlow with different, more junior priority dates and different flow rates.

The Montana Supreme Court affirmed the priority date portion of the case. *Hill v. Merrimac*

*Cattle Co.*, 211 Mont at 505-508.

**Decreed rights according to *Spencer***

**Decreed Rights according to *Hill***

1.	June 1, 1886	320 mi	Harlow	1.	May 1, 1895	100 mi	Harlow
2.	May 1, 1888	300 mi	Harlow	2.	May 1, 1896	57.3 mi	Merrimac
3.	June 1, 1888	120 mi	Harlow	3.	May 1, 1897	120 mi	Merrimac
4.	August 27, 1894	800 mi	Broadbent	4.	May 1, 1898	320 mi	Harlow
5.	September 1, 1895	200 mi	Broadbent	5.	May 1, 1899	300 mi	Harlow
6.	October 7, 1897	320 mi	Broadbent	6.	May 1, 1900	160 mi	Harlow
7.	November 1, 1897	160 mi	Broadbent	7.	May 1, 1900	30 mi	Merrimac
8.	May 15, 1898	160 mi	Broadbent				
9.	June 1, 1898	60 mi	Broadbent				
10.	June 15, 1899	200 mi	Broadbent				
11.	June 1, 1902	600 mi	Broadbent				
12.	June 15, 1903	200 mi	Broadbent				
13.	July 6, 1908	200 mi	Broadbent				

Harlow's predecessors chose to file statements of claim in this adjudication for the *Hill* decreed rights rather than the *Spencer* decreed rights. Conversely, Broadbent's predecessor filed statements of claim for their *Spencer* decreed rights. Although its filings are confusing and not completely in line with the terms of the decree, it appears that Merrimac filed statements of claim based on the *Hill* decree.

**Decreed rights in order of priority as claimed in this adjudication.**

1.	August 27, 1894	800 mi	Broadbent	41R-200712-00
2.	May 1, 1895	100 mi	Harlow	41R-202533-00
3.	September 1, 1895	200 mi	Broadbent	41R-200714-00
4.	May 1, 1896	57.3 mi	Merrimac	41R-125876-00
5.	May 1, 1897	120 mi	Merrimac	41R-125872-00

6.	October 7, 1897	320 mi	Broadbent	41R-200716-00
7.	November 1, 1897	160 mi	Broadbent	41R-200710-00
8.	May 1, 1898	320 mi	Harlow	41R-202539-00
9.	May 15, 1898	160 mi	Broadbent	41R-200707-00
10.	June 1, 1898	60 mi	Broadbent	41R-200713-00
11.	May 1, 1899	300 mi	Harlow	41R-202541-00
12.	June 15, 1899	200 mi	Broadbent	41R-200708-00
13.	May 1, 1900	160 mi	Harlow	41R-202538-00
	May 1, 1900	30 mi	Merrimac	41R-125877-00
14.	June 1, 1902	300 mi	Broadbent	41R-200709-00
	June 1, 1902	300 mi	Broadbent	41R-200711-00
15.	June 15, 1903	200 mi	Broadbent	41R-200715-00
16.	July 6, 1908	200 mi	Broadbent	41R-200706-00

Based on the statements of claim as filed in this adjudication, Broadbent now has the first priority date from the Martin/Davis Creek system. Both Harlow and Merrimac take issue with this situation. Merrimac notes that it was not a party to the *Spencer* case, and is therefore not bound by that decree. It has filed priority date objections to all of the Broadbent claims and intends to contest these *Spencer* based priorities. The claimed priority dates notwithstanding, Harlow asserts that their claims, to the extent of 720 miner's inches, should still be viewed as senior to Broadbent claims based on *Spencer* even though Harlow no longer claims priority dates under *Spencer*. Harlow argues they and Broadbent are both successors to the parties in *Spencer*, and are therefore bound by that decision to the extent it still applies given the *Hill* decision. Harlow argues that the Water Court must reconcile the two decrees and that *Spencer* still gives them senior rights to Broadbent even though *Hill* decreed different priority dates for their claims.

Broadbent acknowledges that *Spencer* did not bind Merrimac and fully expects to defend its priority dates and flow rates against Merrimac objections. At the same time, Broadbent asserts that the priority dates Harlow received in *Spencer* have been replaced by the

priority dates Harlow received in *Hill* and that there is nothing left for Harlow to assert from *Spencer*. Broadbent argues that the Water Court should acknowledge *Spencer* only to affirm their priority dates and flow rates. Broadbent asserts that the actual priority date for each claim as found by the *Spencer* and *Hill* decrees must control, not the relative priority date as argued by Harlow, particularly in light of the scope and requirements of this general adjudication.

#### Standard of Review

The issues currently before the Master come in the form of cross motions for summary judgement. Summary judgement under Rule 56, M.R.Civ.P. is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgement as a matter of law. *Cereck v. Albertson's, Inc.*(1981), 195 Mont. 409, 637 P.2d 509. The party moving for Summary Judgement has the burden of establishing the absence of any genuine issue of material fact. If that moving party makes that initial showing, the party opposing the motion must then supply evidence supporting the existence of a genuine material fact issue. *Pretty on Top v. Hardin* (1979), 182 Mont. 311, 597 P.2d 58.

#### Discussion

Harlow asserts that Harlow and Broadbent are bound to the terms of the *Spencer* decree by res judicata and collateral estoppel, meaning that Harlow has an interest senior to Broadbent to the first 740 miner's inches from Davis and Martin Creeks. Harlow requests the addition of a subordination remark to Broadbent claim 41R-200712-00, and corresponding Harlow claims, stating that claim 41R-200712-00 must be administered as junior to these Harlow claims to the extent of the first 740 miner's inches from Martin and Davis Creeks. Harlow argues that the decision in *Hill* does not affect the relative priorities granted to Broadbent and

Harlow in *Spencer* and that both parties are still bound by these relative priorities. Harlow acknowledges that they must use the priority dates they received in *Hill* and that these priority dates set their position on these sources in relation to all other parties. Nonetheless, the Water Court can reconcile the two decrees by adding the subordination remarks even though it will result in one priority system governing the relation between Harlow and Broadbent and a second priority system in relation to all other water users.

Broadbent asserts that the *Hill* decree governs the Harlow claims, not the *Spencer* decree. As a result, any attempt to impose some kind of senior status by Harlow over Broadbent in the form of subordination language is not appropriate and will lead to an unworkable result. Broadbent argues that Harlow's predecessor chose to bring its *Spencer* decreed rights back before the court and that they must now live with the consequences. They assert that actual priority dates, not relative priority dates, are a requirement in this general adjudication and that res judicata and collateral estoppel cannot be strictly applied. Therefore, they are entitled to the actual priority date they received in *Spencer* while Harlow is entitled to the actual priority dates they received in *Hill*.

The Water Court does acknowledge prior decrees and has applied res judicata on several occasions (*See e.g.*, 41S-11, 76G-17 and 40A-117). At the same time, one of the goals of this general adjudication process is to replace all prior decrees with a single consistent form of water right administration applied throughout the state. This general stream adjudication addresses all historical water rights and the relationship of all water users over a much broader area. As a result, the application of the elements of res judicata in any particular case may not be as clear, and both res judicata and collateral estoppel may have limited application in some

circumstances.

Although the results can be of limited value, the Water Court can also attempt to reconcile the terms of two conflicting water right decrees. In *Gans & Klein Investment Co. v. Sanford* (1932), 91 Mont. 512, 2 P.2d 808, the Supreme Court attempted to do just that. The Court meshed a total of three prior decrees into a single system for administration. In the process, it used portions of the first decree even though the two subsequent decrees changed the flow rates certain parties received under specific priority dates. The resulting distribution system is complicated and subject to alteration based on the amount of available flow. While it appears to work on paper, the system more than likely presents a chronic source of problems for a water commissioner. This adjudication endeavors to replace gerrymandered distribution schemes with a single consistent system. To that end, prior decrees may be helpful evidence in some cases and controlling law in other situations.

All three parties argue that there is no genuine issue of material fact in regards to application of the *Spencer* and *Hill* decrees to the claims in this case. However, it is apparent that there are factual issues concerning the priority dates for Broadbent's claims that, at a minimum, affect the propriety of making a decision on these issues at this time. Arguably, the priority dates claimed by all three parties are open to objection. Broadbent is not bound by the *Hill* decree, at least in regards to Merrimac priority dates and possibly in regards to the Harlow priority dates as well.<sup>1</sup> Merrimac is not bound by the *Spencer* decree and has indicated that it will pursue objections to the Broadbent priority dates. Therefore, none of the claims reflecting

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<sup>1</sup> Based on current claimed priority dates, it does not appear that Broadbent would have reason to challenge Harlow's *Hill* decreed rights on this issue. However, this may not be the case if Broadbent anticipates possible changes to their priority dates as a result of Merrimac objections.

decreed rights from Martin and Davis Creeks have settled priority dates. The priority date for Broadbent claim 41R-200712-00 is the central issue in both summary judgement motions. Is that priority date August 27, 1894, as Broadbent is claiming under the *Spencer* decree, or is it a more junior date as asserted by Merrimac? The same can be said for the Merrimac claims. Do the priority dates from *Hill* control or will proceedings in this case lead to different priority dates and flow rates? If so, how will that affect the order of priority between these three parties? Until these issues are resolved, the Master need not, and in any practical sense cannot, determine how the claims are affected by the *Spencer* and *Hill* decrees.

In fact, there are other genuine issues of material fact before the Master that relate to the priority dates for the Broadbent, Harlow, and Merrimac claims. In *Hill*, the Supreme Court remanded several Harlow and Merrimac claims to the water court for further proceedings. The remand identifies three issues:

1. Should the flow rates for these claims be based on the application of a 1.25 miner's inch per acre standard?
2. If the flow rates are based on a flow rate per acre standard, the acres irrigated must be determined. Therefore, how many acres did Hill (Harlow) historically irrigate?
3. What is the appropriate place of use for the Hill (Harlow) water rights?

*Hill*, 211 Mont at 513-16. All of these questions can apply equally to the Harlow, Broadbent, and Merrimac claims and potentially affect the priority date issue. Part of the relief requested in the Harlow motion is remarks on their own claims stating that they should be administered as senior to Broadbent claim 41R-200712-00. Until the flow rates for these claims are determined, it is not possible to know how subordination remarks apply. If there is any lesson to be learned from past decrees, it is that failure to address all elements of the water right claims involved can

and will lead to further litigation. Although the cross motions are for partial summary judgement are specific to the priority date issue as it relates to a single Broadbent claim and the affect of *Spencer* and *Hill* on this priority date, it is clearly inappropriate for the Master to weigh in on this issue at this time.

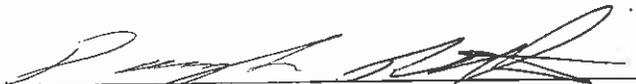
### Conclusion

These water right claims and their previous encounters with the judicial system present the best possible lesson on the danger of piecemeal adjudications and the need to include all parties on a source and all elements of all claims to assure a complete and workable system for administering the use of water. Summary judgement favoring either Harlow or Broadbent is not appropriate in this case at this time. There are genuine issues of material fact that must be resolved before issues of law can or should be addressed. A determination of significant legal issues concerning the application of res judicata and collateral estoppel are simply not ripe for a decision at this time.

These matters having come before the Master, it is

ORDERED that both motions for summary judgement on the issue of the priority date for Broadbent claim 41R-200712-00 and its relationship to specific Harlow claims are DENIED. Further proceedings will be set by separate Order.

DATED this 4 day of November, 2004.



Douglas Ritter  
Water Master

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