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In the Water Court of the State of Montana

**Lower Missouri Division
Big Sandy Creek - Basin 40H**

IN THE MATTER OF THE
ADJUDICATION OF THE
EXISTING RIGHTS TO
THE USE OF ALL THE
WATER, BOTH
SURFACE AND
UNDERGROUND,
WITHIN THE BIG
SANDY CREEK BASIN
(40H)

**Findings of Fact and Conclusions of Law
for the Preliminary Decree of Big Sandy Creek - Basin 40H**

These Findings of Fact and Conclusions of Law are issued by the Chief Water Judge for inclusion in the Preliminary Decree for Big Sandy Creek Basin (40H).

Findings of Fact

1. Authority to Act

These Findings and Conclusions are issued by the Chief Water Judge as authorized by Mont. Code Ann. §3-7-224(2) and §85-2-231.

2. General Adjudication of Existing Water Rights

This is a general adjudication of existing water rights. An existing water right is a right to the use of water which would be protected under the law as it existed prior to July 1, 1973 and the term "existing right" includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law. Mont. Code Ann. §85-2-102(10) (1999). This action for the adjudication of existing water rights commenced on June 8, 1979 when the Montana Supreme Court issued its Order requiring the filing of statements of claim of existing rights. Certain claims for existing rights were exempt from the filing process but could be voluntarily filed. Mont. Code Ann. §85-2-222 (1979). This decree includes those "exempt" water right claims which were voluntarily filed, but does not include those "exempt" water right claims which were not filed.

3. Reserved Water Rights

The Reserved Water Rights Compact Commission was created by the Montana Legislature to negotiate with the United States of America and with Indian tribes to conclude compacts regarding reserved water rights.

The reserved water right of the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, and of the United States of America as the trustee for such Tribes, [the Tribal Water Right] is defined in the Chippewa Cree Tribe-Montana Compact and is incorporated herein by this reference. Mont. Code Ann. §85-20-601. The Tribal Water Right is included within the Rocky Boy's Compact Subbasin Decree spanning several basins and Final Judgment was issued by this Court in Cause No. WC-2000-01. See Order Approving Chippewa Cree Tribe - Montana Compact issued May 22, 2002, Memorandum Opinion issued on June 12, 2002, and Order Granting Rule 54(b) Certification and Final Judgment issued June 13, 2002 for more information.

The reserved rights associated with the Turtle Mountain Public Domain Allotments, if any, are not included within this decree.

4. Senior Water Rights

Judicial notice is taken of the fact that water rights exist on the Milk River main stem, on its tributaries and in adjoining basins or subbasins which may be senior to some of the rights decreed in this basin. Rights decreed herein may be subject to curtailment or cessation during times of water shortage in order to satisfy senior rights on a claimant's own source of supply, on the Milk River main stem, on any tributaries of the Milk River, or in adjoining basins or subbasins.

5. Description of Basin

There are a total of 827 claims for existing rights for irrigation, stock water, domestic and other uses in this decree. This basin encompasses the drainage of Big Sandy Creek and its tributaries. This decree affects all sources of water located within the basin. The boundaries of this basin are outlined on the attached map.

6. Decree Abstracts and Indexes

In addition to these Findings and Conclusions, this decree consists of 2 bound volumes of computer-printed abstracts of each individual water right claim decreed in this basin. Accompanying the decree is an Index designed to help people research and find water rights included in the decree. The Index is composed of the following six sections:

- Source Name Index
- Owner Name Index
- Point of Diversion Index
- Priority Date Index
- Water Right Claim Identification Number Index
- Issue Remarks Index

Bound volumes of the Decree and Index are located at the Montana Department of Natural Resources and Conservation (DNRC) Water Resources Regional Office in Havre and at the Montana Water Court in Bozeman. This information is also available on the Internet.

7. Water Right Owner

A water right is decreed in the name of the claimant. If a water right transfer certificate or ownership update was properly filed and administratively processed prior to March 26, 2002, the Court issued the right in the name of the new owner. If a transfer certificate or ownership update is properly filed and administratively processed after that date, the new owner's name will appear in any subsequent decree. If a water right is split, the new owner's name will be added to the ownership record but the water right will not be split into separate ownerships until after the final decree is issued.

Some previously decreed water rights are claimed by more than one person. When the combined flow rate of such claims exceeds the previously decreed flow rate, each claimant is decreed the claimed flow rate, but a "decree exceeded" remark is added to each right noting the conflict.

8. Specifics of Examination Procedure

The DNRC examined each claim for incomplete or inaccurate information in accordance with the Water Right Claim Examination Rules originally adopted by the Montana Supreme Court on July 7, 1987. These rules were amended by the Supreme Court's Orders of July 13, 1989 and December 18, 1990.

The extent of each water right claim in this decree is further defined by these Findings of Fact and Conclusions of Law. The specifics of each claim appear in the abstract of the water right. Each abstract of the claimed right includes (when the information was available):

- (a) The name and mailing address of the owner of the right;
- (b) The amount of water included in the right (all flow rates and volumes are measured at the point of diversion unless otherwise noted on the abstract);
- (c) The priority date of the right;
- (d) The purpose for which the right is used;
- (e) The place of use and a legal description of the land to which the right is appurtenant;
- (f) The source of water included in the right;
- (g) The point of diversion and means of diversion;
- (h) The inclusive dates during which the water is used each year;
- (i) Any other information necessary to define the nature and extent of the right.

If the claim did not include all the information required by Mont. Code Ann. §85-2-224 and the information was not provided to the DNRC prior to issuance of this decree, the right was decreed within the limits of the information submitted. Remarks were added to the abstracts flagging any unresolved issues.

In light of the Chippewa Cree Tribe-Montana Compact referenced in Finding 3, the Court established special procedures for the examination of Basin 40H claims located on the Rocky Boy's Indian

Reservation. See Order Establishing Procedures for Examination of Basin 40H Claims located on the Rocky Boy's Indian Reservation filed October 11, 2001.

By letter dated March 29, 2002, the DNRC reported to the Court that 30 of the 827 claims in Basin 40H were not examined. These claims were filed as state-based water right claims owned by either the Chippewa Cree Tribe of the Rocky Boy's Reservation or the United States on behalf of the Tribes, with the place of use on Tribal lands. Although these 30 claims were not examined by the DNRC, they are included in this decree and are subject to the objection process and the review of this Court.

Where a claimant filed two or more water rights on the same claim form, each right was separated and assigned an individual water right number. These additional claims are called "implied claims."

9. Multiple Uses of a Water Right

Historically, when a water right was decreed, a single water right may have been used for several purposes or uses. In this adjudication, the claimants were to file separate claims for each use of the water right. Special claim forms were used for irrigation, stock water, domestic use and a catch-all form for all "other uses". As a result of this specific filing, each use of a water right will be decreed separately. Therefore, a water right might be represented by two or more claims for these multiple uses. A remark noting the multiple use of a water right appears whenever an irrigation, stock, domestic and an "other use" claim are for the same right. The use of the right for several purposes does not increase the extent of the right, rather it decrees the right to alternate and interchange the use (purpose) of the water in accord with historical practices.

10. Source Name

Although some sources were claimed under several names, the source is generally designated by the name listed in the most recent United States Geological Survey (U.S.G.S.) quadrangle maps. If the source has not been designated by the U.S.G.S., the source name most commonly recognized in the locality may be used, or the source may be designated as an "Unnamed Tributary of _____" or "Spring, Tributary of _____."

The source for claims associated with lakes and reservoirs is generally decreed under the name of the inflowing stream. If the lake or reservoir has a commonly recognized name, this name is also noted. The Source Name Index of the Decree cross-indexes both the inflowing stream name and the lake or reservoir name for easy identification.

When more than one source is claimed for a water right, the Water Court determines the primary source, lists that source in the decree and notes the secondary source in a remark. Frequently multiple sources actually represent separate water rights for which "implied claims" may be generated.

11. Priority Date

The priority date is decreed as claimed except where it is incomplete or it contradicts the claim's supporting documentation. Where a claimed priority date included only a year, or a year and a month, the last day of the year or the last day of the month are decreed as the priority date.

Priority dates for groundwater rights after 1961 are reviewed for compliance with the Groundwater Act and decreed accordingly. If a claim to groundwater after 1961 did not comply with the Groundwater Act, the priority date is decreed as claimed and an issue remark is added noting the problem.

12. Guidelines

Guidelines were established in the Water Right Claim Examination Rules to aid in the examination of certain claimed flow rates and volumes. These guidelines are merely estimates of reasonable water use. Flow rates and volumes decreed according to these guidelines are not absolute; they are not unchangeable. They are subject to modification to accurately reflect a claimant's water right in its true and historical sense. "The quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . the principle of beneficial use [being of] paramount importance." *Allen v. Petrick, et al.* (1924), 69 Mont. 373, 376-77, 222 P. 451, 452 as cited in *McDonald v. State* 220 Mont. 519, 536, 722 P.2d 598 (1986). There is no exact uniform rule for computing the duty or reasonable quantity of water to be applied for all cases alike.

13. Reservoirs and Storage of Water

Reservoirs and other storage facilities incident to the beneficial use of water are noted on the abstract of a water right for which such facilities are utilized.

A flow rate is decreed for off stream reservoirs. This flow rate represents the rate at which water is withdrawn or diverted from the source. The flow rate guideline for off stream reservoir claims is the capacity of the diversion and conveyance system. In most cases, if the claimed flow rate exceeds the guideline and if the accompanying documentation or other data do not substantiate the flow rate, the flow rate is decreed as claimed and an issue remark is added noting the problem.

Volume may or may not be quantified for reservoirs depending on the purpose for which the water is stored and used. See the Findings of Fact concerning each purpose for further discussion.

Historically the Court has found that the right to store water in a reservoir is a storage right separate from a water right and that the actual beneficial use of stored water creates a water right. Disagreement exists in Montana over the precise nature of reservoir storage. The resolution of such a significant issue should not be determined in the general findings of a preliminary decree. The scope and extent of reservoir storage rights should be resolved in a future adversarial proceeding in which all interested parties would have an opportunity to participate.

14. Irrigation Rights

Flow Rate.

Direct flow irrigation rights are decreed by flow rate.

Flow rate is decreed in gallons per minute (gpm) or in cubic feet per second (cfs) instead of the traditional miner's inches. Mont. Code Ann. §85-2-103. One miner's inch is equivalent to 11.22 gpm; forty miner's inches is equivalent to one cfs. The flow rate of a previously decreed water right is decreed as claimed although miner's inches are converted in the manner described.

Flow rates of rights based on a filed notice of appropriation or based on use shall not exceed a reasonable application rate. Based upon information and a recommendation provided by the DNRC, the Water Court finds that a reasonable application rate for direct flow irrigation is 17.00 gpm per acre (1.50 miner's inches per acre). On every claim where the submitted documentation clearly substantiates a flow rate in excess of 17.00 gpm per acre, it was so decreed. If a flow rate in excess of 17.00 gpm per acre was claimed but not clearly substantiated, the flow rate was reduced to 17.00 gpm per acre and a remark noting the reduction was added to the water right claim abstract.

Water spreading and other irrigation systems not susceptible to measurement by flow rate are generally decreed by volume only. Natural subirrigation and natural overflow were not decreed a flow rate or volume, but the right is limited to the amount of water historically used for a beneficial use.

A flow rate is decreed for off stream reservoirs but is not decreed for on stream reservoirs. However, if it is determined that the on stream reservoir is not a significant part of the irrigation system, flow rate is decreed and a remark is added noting the system is primarily a direct flow irrigation system.

Volume.

Volume is not decreed for direct flow irrigation rights unless a volume was established in a prior court judgment or decree, or where the Water Court determines that volume is necessary to adequately administer the particular water right. Mont. Code Ann. §85-2-234(6)(b).

Volume is decreed for rights which involve a reservoir. However, if it is determined that a reservoir is not a significant part of an irrigation system, volume is not decreed and a remark is added noting the system is primarily a direct flow irrigation system.

When volume is decreed it is decreed in acre-feet per year. An acre-foot of water will cover one level acre to a depth of one foot.

Period of Use.

Because the period of use can vary widely for each individual user, a claimed period of use that is reasonable is accepted unless it contradicts a previously decreed or documented period of use. If a period of use was not designated by the claimant or was not within the appropriate climatic zone guideline, an issue remark was added noting the problem.

Place of use.

A. Examination of Place of Use. The place of use of the right is designated by legal land description. Aerial photographs, Water Resource Surveys, field investigations and data submitted by the claimant are used by the DNRC to examine the claimed place of use. The resources actually used are specified on the Department's work sheet which is located in the claim file. The place of use for irrigation is decreed as claimed. If upon examination the land did not appear irrigated or irrigable, a remark was added to the abstract noting the acreage discrepancy.

B. Supplemental Water Rights and Place of Use. Several water rights with different priority dates or different sources may be combined to supplement the irrigation requirements of all or part of the same acreage. Each right is limited to the flow rate and place of use of that right. The sum total flow rate of these rights shall not exceed the amount historically used for a beneficial purpose.

Point of Diversion and Means of Diversion.

The point of diversion and means of diversion are decreed. The point of diversion is specifically designated by legal land description. Secondary points of diversion are noted in a remark when possible or necessary. In many cases, the claim and claimant's map will more specifically define the points of diversion. The means of diversion is reviewed and decreed as claimed unless a different means of diversion is apparent.

15. Domestic Rights

Flow Rate. Domestic rights with a claimed flow rate of 35.00 gpm or less are decreed as claimed. If the claimed flow rate exceeds 35.00 gpm and the accompanying documentation or other data does not substantiate the flow rate, the flow rate is decreed as claimed and an issue remark is added noting the problem. When a flow rate claimed had been previously decreed, the flow rate is not changed. A flow rate is decreed for off stream reservoirs but is not decreed for on stream reservoirs.

Volume.

The volume guideline for domestic use is 1.00 acre foot per year per household and two acre feet per year per acre of lawn and garden. A volume is decreed for both on stream and off stream reservoirs.

Place of Use.

Land irrigated as part of the domestic use is decreed as part of the place of use. If a claim for domestic use included irrigation separate from the domestic use, an "implied claim" was generated for the separate irrigation use.

Period of Use.

The period of use claimed is the period of use decreed.

16. Stock Water Rights

Volume.

Unless otherwise directed by the Water Court, stock water claims are not decreed a specific volume. The limit of the right is based on a consumptive use of 30 gallons per day per animal unit. An animal unit is described as a cow/calf pair or equivalent. The number of animal units is limited to the reasonable carrying capacity of the area historically serviced by the water source. Such rights are limited to their historical beneficial use.

The claimed volume was decreed for all stock water claims filed by the United States of America which involve pothole lakes and reservoirs pursuant to the August 7, 1987 Order of the late Chief Water Judge W. W. Lessley.

Flow Rate.

The flow rates for stock water rights from wells, developed springs, pumps and gravity flow pipelines are governed by the diversion's capacity. If the claimed flow rate exceeds 35 gpm and the accompanying documentation or other data do not substantiate the flow rate, the flow rate is decreed as claimed and an issue remark is added noting the problem.

Rights involving stock drinking directly from surface water sources or a ditch system are not decreed a specific flow rate. Although not quantified by flow rate, such rights are limited to their historical beneficial use.

A flow rate is decreed for off stream reservoirs but not for on stream reservoirs.

Point of Diversion.

When a stock water use is direct from a surface water source, the legal land description for the point of diversion will be the same as that for the place of use. Where there is a ditch, pipeline or off stream storage the legal land description for the point of diversion may differ from that for the place of use.

17. Other Use Rights

In this basin, water right claims were submitted for the following other uses: commercial, fire protection, fish and wildlife, flood control, industrial, lawn and garden, multiple domestic, municipal, storage, and wildlife.

Flow Rate and Volume.

Except for one direct from source fish and wildlife claim and one fire protection claim, the flow rate and volume of these other use rights were decreed as claimed. If the accompanying documentation or other data did not substantiate the flow rate or volume of these other uses, an issue remark was added noting the problem. A flow rate is decreed for off stream reservoirs but not for on stream reservoirs. A volume is decreed for both on stream and off stream reservoirs.

Other Elements.

The remaining elements of "other use" claims are generally treated the same as on irrigation claims.

Recreation, Fish and Wildlife claims. There are 17 active claims in this decree for fish and wildlife purposes. On September 24, 2002, the Montana Supreme Court overruled its 1988 decision, *In the Matter of Dearborn Drainage Area* (1988), 234 Mont. 331, 766 P.2d 228 (Bean Lake), that "Montana, prior to 1973, did not recognize fish, wildlife and recreation appropriations, whether diversionary or non-diversionary." *In the Matter of the Missouri River Drainage Area* , 2002 MT 216 ¶40, 311 Mont. 327, 55 P.3d 396.

In its September 24, 2002 opinion, the Montana Supreme Court stated at ¶40:

[w]e hold that Montana recognized fish, wildlife and recreation uses as beneficial and that valid instream and inlake appropriations of water existed in Montana prior to 1973 where the intended beneficial use did not require diversion, and when the facts and circumstances indicate that notice of the appropriator's intent had been given.

In its opinion at ¶41, the Supreme Court instructed the Water Court:

to identify, review and hold hearings in a manner similar to *Adjudication of Water Rights of Yellowstone River* (1992), 253 Mont. 167, 832 P.2d 1210, on all pre-1973 recreation, fish and wildlife claims, both diversionary and non-diversionary, and determine the validity of such claims under the holding herein.

In accordance with these instructions and to provide notice to all other water users in this decree, each fish and wildlife claim in this Decree carries the following issue remark:

The Montana Supreme Court has instructed the Water Court to hold a hearing on this claim to determine its validity. *In the Matter of the Missouri River Drainage Area*, 2002 MT 216, 311 Mont. 327.

18. Interbasin Transfer Claim

Claims having a point of diversion in one basin and place of use in another basin are called interbasin transfers. An interbasin transfer claim will be decreed fully in the point of diversion basin. However, an interbasin transfer claim will only be given legal notice in the decree of the basin(s) where the place of use is located. Objections to interbasin transfers may be filed during the objection periods for either the point of diversion basin or the place of use basin. There is one interbasin transfer claim (41P-W-040767-00) contained in this decree where the point of diversion is located in another basin.

19. Unresolved Factual and Legal Issues

The objection period provides an opportunity for all the parties in this decree proceeding to raise any issue which needs to be resolved. All such issues may also be reviewed on Motion of the Water Court. See In re "On Motion of the Water Court," Case WC-92-3, Order and Memorandum dated February 8, 1995.

Unresolved factual and legal issues have been noted by remarks on the individual claim abstracts. The Issue Remarks Index combines all these remarks into one index which is arranged numerically by water right claim number. Searching the Issue Remarks Index by water right claim number will identify all issue remarks that are noted on the individual claim abstracts.

Water users within this basin and other interested persons will be mailed a Notice of Entry of Preliminary Decree and Notice of Availability contemporaneously with the filing of these Findings and Conclusions. This "Notice of Availability" explains the objection process and sets a deadline for filing objections with the Montana Water Court.

If a water right claim receives no objection and is not reviewed by the Water Court on its own initiative, it may remain unchanged and be entered in the Final Decree. In addition, this Preliminary Decree, as modified after objections and hearings, will be enforceable and administrable in accordance with Montana Code Ann. §85-2-406.

20. Terminated Claims

Nineteen (19) water right claims have been withdrawn by the claimants and terminated in this basin. An abstract of each of these terminated claims is found in the bound volumes of the computer-printed abstracts and are listed in the decree indexes described in Finding 6. A terminated claim is noted with the letter "O" rather than the letter "W" preceding the water right identification number.

21. Late Claims

The Montana Supreme Court ordered the deadline for filing claims of existing water rights as 5:00 PM on April 30, 1982. Claims filed after this time and date were forfeited. See Matter of the Adjudication of Yellowstone River Water Rights, 253 Mont. 167, 832 P.2d 1210 (1992). Three (3) claims were filed after 5:00 PM on April 30, 1982 and are included in this decree.

The 1993 Montana Legislature provided for the conditional remission of the forfeiture of late claims to existing rights. See Montana Code Ann. § 85-2-221(3). Any remission of forfeiture will be conditioned upon the claimant meeting the requirements set by the Montana Legislature. See, generally, Order Setting Late Claim Administrative Costs and Expenses filed September 24, 1997, and Order Establishing Water Court Procedures on Late Claims filed December 8, 1997.

A late claim is noted with the letter "A" or "B" rather than the letter "W" preceding the water right identification number. Objections may be filed on all issues as to these claims.

22. Water Right Claim Identification Numbers

The computer system containing the State's centralized water right database has undergone a major modification by the DNRC. In DNRC's old database system, water right claim numbers contained a letter identification code, such as W, A, B, U, or O. The letter identification code identified the claim as an "existing right" (W), a "late claim" (A or B), a "reserved" right (U), or a "terminated" claim (O).

In DNRC's new database, letter identification codes are no longer included in water right claim numbers. Each abstract generated by the new database identifies the type or the status of the right by a

word or phrase. The term "Statement of Claim" replaces the "W" letter code. The term "Late Claim" followed by the designation of "A" or "B" identifies the existence and type of late claim. The term "Reserved" replaces the "U" letter code. The terms "Withdrawn" or "Dismissed" replace the "O" letter identification code.

This decree for Basin 40H was produced from DNRC's old database. Therefore, the water right claim numbers contain water right identification codes. Eventually, these codes will be phased out and replaced with the identification system used in the DNRC's new database.

Based on these Findings of Fact, the Chief Water Judge makes the following:

Conclusions of Law

I

The Montana Water Court has jurisdiction to enter a Preliminary Decree for the Big Sandy Creek Basin (40H) pursuant to Mont. Code Ann. Title 85, Chapter 2. *San Carlos Apache Tribe v. Arizona and Montana v. Northern Cheyenne Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 and *State ex Rel. Greely v. Conf. Salish & Kootenai Tribes*, 219 Mont. 76, 98-99, 712 P.2d 754 (1985).

II

These Findings of Fact, Conclusions of Law and Abstracts define the nature and extent of each claimed existing water right under Montana law in the Big Sandy Creek Basin (40H) and comprise a Preliminary Decree in accordance with Mont. Code Ann. §85-2-231 and Rule 1.II(7) of the Water Right Claims Examination Rules adopted by the Montana Supreme Court.

DATED this day of , 2003.

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