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STATE OF MONTANA

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IN THE MATTER OF PROPOSED REVISIONS)
)
TO THE MONTANA RULES OF CIVIL PROCEDURE)

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**WATER COURT COMMENTS TO
PROPOSED REVISIONS TO THE
MONTANA RULES OF CIVIL PROCEDURE**

INTRODUCTION

In accordance with the Supreme Court's Order filed March 3, 2010, the Water Court, through its chief water judge, submits the following comments to the proposed revisions to the Montana Rules of Civil Procedure. The Water Court's primary concern and comments relate to Rule 53 - Masters. Following those comments, the Water Court will highlight a few typographical errors and provide some minor observations.

Primary Relief Requested

The Water Court recommends this Court specifically include in its order revising the Rules of Civil Procedure, the following or similar statement:

The revision to Rule 53 is not applicable to the Water Court. The pre-revision Rule 53, M.R.Civ.P., will continue to apply to the Water Court until the Legislature or this Court directs otherwise.

Rule 53 – Masters

Rule 53, M.R.Civ.P. is central to the Water Court's work. The appointment of water masters by water judges and the duties of water masters are authorized and addressed in § 3-7-301 and § 3-7-311, MCA. A water master has the general powers given to a master by Rule 53(c), M.R.Civ.P. Section 3-7-311(1), MCA. Unless the context of the adjudication rules requires otherwise, the Montana Rules

of Civil Procedure govern the practice of the Water Court. Rule 2 (b), Water Right Adjudication Rules (W.R.Adj.R.). Water masters have the general powers and duties granted a master by Rule 53 (c), (d), and (e), M.R.Civ.P. Rule 11, W.R.Adj.R. The lead in language of Rule 23, W.R.Adj.R., reads: “As stated in Rule 53 (e), M.R.Civ.P.” and the Rule then recites or paraphrases the language in Rule 53.

If proposed revised Rule 53 is adopted, the language of the existing statutes and Water Right Adjudication Rules addressing water masters and the newly adopted Rule 53 will need to be harmonized. Until that happens, the Court’s adoption of revised Rule 53 may create confusion as to which parts of revised Rule 53 apply to the Water Court and which parts do not. Since confusion can generate time-consuming and expensive litigation, the Water Court recommends that revised Rule 53 not be applied to the Water Court until after the Legislature has an opportunity to act, perhaps in a manner similar to the statutes addressing standing masters in § 3-5-124, 125, and 126, MCA; or this Court has an opportunity to revise the Water Right Adjudication Rules to define the role of water masters in Montana’s statewide comprehensive adjudication of water rights, or to otherwise harmonize the applicable rules. Otherwise, revised Rule 81 (b) appears to require all Water Court procedures to conform to the revised rules, insofar as practicable.

Proposed Revised Rule 53

The proposed revisions to Rule 53 contemplate the appointment of a master only under unusual circumstances. An appointment will be the exception and not the rule. Given that basic underlying concept, revised Rule 53 may make some sense in the district courts. However, in the Water Court the appointment of water masters is the rule and not the exception. If the limitations and restrictions imbedded in revised Rule 53 are applied to the Water Court, the pace of the comprehensive statewide adjudication of water rights will slow down and the expenses will go up.

Proposed Revised Rule 53 (a) (2) - Disqualification of Master

The procedure for disqualification of water judges and water masters is set forth in § 3-7-402 through 404, MCA. The disqualification procedure “is exclusive unless otherwise specifically altered by the Montana supreme court.” Section 3-7-404, MCA. If the proposed master disqualification Rule 53(2) is adopted, it might be construed as a specific alteration to the statutory disqualification procedure that has guided the Water Court since 1979.

Although the proposed rule and the existing statute are similar in some respects, the statute is more expansive. Unless this Court has concluded that the existing statute has not provided adequate guidance over the last 30 years and

should be modified, the existing disqualification statute should not be inadvertently altered by a general revision of the Rules of Civil Procedure.

Proposed Revised Rule 53 (b) - Order Appointing a Master

Revised Rule 53 (b) (1) requires “notice and an opportunity to be heard” to be provided to the “parties” before a master may be appointed.

When the Water Court is ready to work on the water rights in a drainage basin, the chief water judge appoints one water master to review the basin summary report sent to the Water Court by the Department of Natural Resources and Conservation (DNRC) in accordance with Rule 5, Water Right Claim Examination Rules (W.R.C.E.R.). The summary report is a draft decree of the water rights claimed by hundreds of water users within the specified basin. The appointment order is a short general Order of Reference.

Notice of the transfer of the summary report to the Water Court has never been provided to all the water user “parties” named in the summary report. However, under revised Rule 53 (b) (1), it appears the Water Court would need to provide all water users in a basin with “notice and opportunity to be heard” as to whether a particular water master should be appointed to review the summary report. The number of water right claims in Montana’s 85 major drainage basins vary from about 100 to almost 13,000 claims. Although multiple claims are often

owned by one entity, the cost of providing notice to all parties could be expensive for a dubious benefit.

After the summary report review has been completed, the Water Court issues a decree and provides notice to all water users in the specified basin of their right to object. The notice is mailed to all the water users named in the decree and to all water users who have water right permits or certificates issued by the DNRC. The DNRC's water right ownership records are not perfect. On occasion, 20-30% of the mailed notices have been returned by the U.S. Postal Service.

Following about two years of notice and procedural deadlines to expire, the water master (usually the same one who reviewed the summary report, but not always), begins to actively work on the water right claims. If needed, one or more other masters are appointed to assist in the work.

During the summary report review process, the decree issuance process, and the subsequent adjudication process, a period which spans several years; property and appurtenant water rights are routinely transferred to new owners. Depending on the frequency of property transfers within an individual basin and the accuracy of the DNRC's ownership update process, some percentage of the ownership of the basin water right claims is always unknown and always in flux. Water right ownership is sometimes a moving target and needs a master to pin it down.

If a water judge is required to provide notice to every water user in a basin and to hold a hearing on which water master will preside over one or more of the claims in every basin, the pace of the adjudication will slow down and the expenses will go up.

Revised Rule 53 (b) (3) (A) provides an order appointing a master may only be issued after the master files an affidavit disclosing whether there is a ground for disqualification under § 3-1-803, MCA.

As noted earlier, the number of water users within a basin are so numerous that it will be very unlikely for water masters to know who the specific parties will be until they start to work on a specific set of claims. Even then, it is not unusual to find the ownership to be incorrect. Sorting out the correct ownership of water rights is part of a water master's duties. As a practical matter, water masters will likely never know for sure prior to their appointment as to whether there is a ground for disqualification under § 3-1-803, MCA. Without 100% confidence, water masters may not be able to file the affidavit prior to their appointment.

Furthermore, if water masters find possible ownership errors or if ownerships change while they are working on a set of claims, does this rule require notice and opportunity be given to the new or prospective owners, a new appointing order to be signed, and a new affidavit to be filed before water masters

can continue to work on the claims. Revised Rule 53 (b) has the potential to reduce the pace of the adjudication and to increase the expenses.

Typographical Errors and Other Comments

Revised Rule 5 (1) (b): Typo - “holding the **state** unconstitutional” - probably should be “statute.”

Revised Rule 6(a)(4)(B): Last day ends for non-electronic filing “when the clerk’s office is scheduled to close.” Although this reflects reality, this rule seems to be in conflict with revised Rule 77(a) that “every district court is considered always open for filing any paper” Perhaps, Rule 77 (a) allows a courageous lawyer to wake a judge up at 11:20 PM to file a document at the last minute, or retiring judges to file stamp their last decision a few minutes before their term expires.

Revised Rule 7.1(a)(1): Typo - “any parent corporation **an** any publically held corporation.” The **an** should be **and**.

Revised Rule 10 (c): Typo - last word should be plural - “purposes.”

Revised Rule 26(b)(1): “Information need not be admissible at the trial” might read better as: “The information sought need not be admissible at the trial”

Revised Rule 26(f)(6): Leaves unchanged a **10-day** time period, but elsewhere in the revised rules, 10-day periods were changed to 14-days. Was this 10-day period left on purpose or is it an oversight?

Revised Rule 27(a)(2): If a court grants a request to perpetuate testimony, “The court **must** appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent” Consider modifying **must** to **may**.

Although this mandatory requirement in Rule 27 is not a change from the original rule, the rule provides no guidance as to who should pay for the lawyer’s services. Furthermore, assuming a lawyer is appointed, (1) can a lawyer ethically represent a multitude of unserved and unknown persons without potentially violating the Montana Rules of Professional Conduct (for example Rule 1.7 - conflict of interest), or (2) do so without creating a potential risk that claims will be made against a lawyer’s malpractice insurance policy for failing to ask the right questions at the deposition? If a court cannot or does not appoint a lawyer, what are the consequences?

Revised Rule 37 (f): Typo in first sentence - “a party **of** its attorney” should be “a party **or** its attorney.”

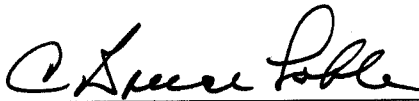
Revised Rule 38 (a): Constitutional **and** statutory rights to jury trials are “preserved to the parties inviolate,” but revised Rule 42 (b) states that when “ordering a separate trial, the court must preserve any constitutional right to a jury trial.” In revised Rule 42 (b), should the term “constitutional” be deleted or should terms “or statutory” be included to maintain consistency in the two rules?

Revised Rule 47 (b) (2) (B), (C), (D), and (E) each begin with or contain the words: “In event” or “in event.” Should they read: “In **the** event” or “in **the** event” or should the words “In [or] in event” be replaced with the word “If” or “if”?

Revised Rule 56 (c) (2): Appears to need a comma after “affidavits.”

Revised Rule 66: The Committee Notes indicate the changes are stylistic only, but deleting the current Rule’s reference to the “statutes” gives an impression that the historical local practice is more important than the statutes. The word “receiver” appears at least 58 times in the code. Since the statutes would always control in a conflict with local practice, why not continue to include a reference to them in the revised Rule? For example, the second sentence of the revised Rule might be modified to read: “But the practice of administering an estate by a receiver or . . . must accord with the Montana statutes, and the historical practice in Montana courts or ~~with a~~ local rule.”

Respectfully submitted this 28th day of May, 2010.


C. Bruce Loble
Chief Water Judge