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"On Motion" -- What it Means and How it Works in Montana's Water Adjudication **Krista Lee Evans, Research Analyst**

Montana's water adjudication process includes a concept known as "on motion of the Water Court" or more commonly called "on motion". In legal terms, the Court is really raising an issue "sua sponte", which according to Black's Law Dictionary means "of his or its own will or motion; voluntarily; without prompting or suggestion". Because this is an important element of the water adjudication process, it is important that the public, legislators, and water users understand what "on motion" means and how it works. This paper is an attempt to provide those answers.

"On motion" means that a court calls in some factual or legal issue on its own motion rather than addressing the issue only because it was raised by the plaintiff or defendant in a case or not addressing the issue because it was not raised by the plaintiff or defendant in a case. The more case-specific example of "on motion of the Water Court" is described below.

The authority of the Water Court to call water right claims in on its own motion is an important element in the adjudication process. A decision issued by the Chief Water Judge in 1995 that found that the Water Court does have this authority plays an important role. Prior to this decision, it was not clear whether or not the Water Court could even exercise an "on motion" policy.

Under the normal adjudication process as outlined in Montana law, a claim comes before the Water Court when an entity with an ownership interest in a water right that is affected by the claim in question objects to the claim. The objection could be based on numerous different points. However, objections are generally based on "issue remarks" or "gray area remarks" that are added to the claims by DNRC through the verification or examination process. Prior to the change to the examination process and the development of the Supreme Court Water Right Claim Examination Rules, DNRC verified claims and added "gray area remarks" to claims if there was a question. Under current law, DNRC is responsible for examining every claim and putting issue remarks on any claim that does not seem to be accurate based on DNRC's research. The examination process and resulting issue remarks are done according to the Water Right Claim Examination Rules adopted by the Supreme Court.

If no one objects to a claim that has an issue remark on it and the Water Court does not

call the claim in on its own motion, what happens to the issue remark? Is it acceptable for the issue remarks to stay on claims? If the issue remarks stay on claims does that mean that Montana's adjudication process isn't providing accurate decrees? Are the issue remarks that remain on claims going to provide an opportunity for downstream states or other interests to challenge the accuracy of Montana's water adjudication? There are players on each side of the questions outlined above. It is up to the EQC to decide if the current process is working and will result in an adjudication that is accurate enough. The most important question to ask is "what is accurate"? Until that question is answered, there is no way to determine if changes need to be made to meet an "accurate" standard.

Chief Water Judge Loble wrote a Memorandum decision to address whether or not the Water Court has the authority to call in factual and legal issues on its own motion. In *In the Matter of the Water Court Procedures in Addressing Factual and Legal Issues Called in "On Motion" of the Water Court*, Case No. WC-92-3 (1995), Judge Loble found that the Water Court does have the authority. Now, the question becomes how or if the Water Court will exercise this authority. In the "on motion" decision, Judge Loble provided the following guidance on how he views the Water Court exercising its "on motion" authority.

The Judge stated that "as a result of this 'on motion' review the Court concludes that its primary focus should be on resolving objections in an effort to prepare decrees that are enforceable by the district courts. The Court will continue to review claims and call them in on its own motion when it appears appropriate to do so. However, not every claim containing a DNRC issue remark will be called in. The Court will concentrate on calling in those claims where the probability of determining accuracy is highest, where the claimants are most willing to assist the Court and when it appears most cost effective to do so. The Court will continue to utilize DNRC regional office technical expertise."

It is clear based on the above information that the Court feels that addressing objections should take precedence over calling in claims on its own motion. However, there are currently no rules governing the implementation of an "on motion" policy, so it is not clear in what instances or if the Court will use its authority. The "Ross Report" to the Legislature in 1988 based its findings in part on the representation made to it by former Chief Water Judge W.W. Lessley that the Water Court would call all gray area remarks in on the Court's own motion. In a meeting in November of 2001, Chief Water Judge Loble said that the Water Court had pulled back from calling claims in on its own motion.

The ultimate questions in Montana's adjudication now are: If water users do not object to water right claims with issue remarks that highlight potential inaccuracies, the Water Court does not call those claims in on its own motion for resolution, and there is not some other process developed to address issue remarks, will Montana have an accurate enough adjudication for the proper enforcement of water rights according to those decrees and will Montana's adjudication be able to withstand potential challenges?