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AND CONSERVATION



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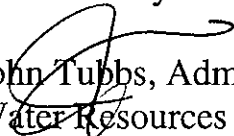
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MEMORANDUM

To: Jim Elliott, Chair  
Water Policy Interim Committee

From:  John Tubbs, Administrator  
Water Resources Division, DNRC

Date: February 29, 2008

Re: Enforcement

As the Water Policy Interim Committee continues to discuss water policy, the question of does the Department enforce water rights in the state has come up numerous times. The attached compilation of Regional Managers reports on complaints and the attached memorandum documenting the assistance we are giving district courts in enforcing decrees in Montana is intended to give the Committee some insight into the enforcement activities the Department is conducting.

Enforcement requires substantial resources, time and effort. What may appear to be a "clear violation" often becomes very complex as the case is developed. The Department is committed to pursuing enforcement actions where resources allow. However, the Legislature needs to remind itself that the investment of \$25 million in the accelerated statewide adjudication last session is a tremendous step towards enforcement.

## Regional Office Complaints

### Billings R.O.

- Sharbono & Cole – Issue with flow from springs and Cole’s pond. Cole cut his pond. Resolved to us; she is still not happy.
- Kandle & Jacobson – illegal pond was filled in and resolved.
- Kandle & Ericsmoen – small pond and blockage in creek was removed and resolved.
- Hornberger & Taylor – dispute over ditch rights referred to water courts.
- Hoffert & Greinsteiner – dispute over pond & access – 602 filed.
- Schaff & Krug – pond constructed in an irrigation ditch; filed 602 and 600; objections and waiting for hearing on 600 to use return flows.
- Joey Deeg & Tillotts – work in stream referred to Carbon CD and on a decreed stream, so need to appoint a water commissioner.
- Scott & Riverside – road construction project; ceased using temporary permit and leased irrigation water from Jacobson for highway project.
- Lanager & Carbon CD – leaking headgate causing icing problems in a ditch near Roberts in the winter months and flooding in the town during high flows. Presently working on a new diversion & where to locate it.
- Heiken & Young – difference of opinion with ownership of shares in an existing irrigation ditch and when each can irrigate. Met with them to separate ownership concerns and felt that was resolved and referred them back to the water courts to resolve irrigated acres issues.
- Herman & Peitte – over pumping a stock water well caused concerns for aquifer levels, educated the well owner with stock needs and waste and was resolved.
- Howland & Gustad – dispute over ditch rights and conflict over what pastures were irrigated from what ditches historically and was referred to water courts.
- Weast Ditch & Simmons – Sr call made for water on a junior water user. Weast Ditch shut their diversion down to allow enough water to flow to Simmons. We also contacted other junior users in between to aide this water downstream to them.
- Brockway & Goodheart – Illegal water use for a center pivot; sent certified letter to cease irrigating and he complied and filed a 606 again.
- Auer started to construct a fish pond with no permits. Investigated and he ceased construction.
- Lebsock & Lots-A-Water – investigated and he filed proper forms for compliance.
- Austin & Burleson – fish pond constructed without measuring device. Permittee installed measuring devices.
- Austin & Hurling – misuse of water. Investigated and found Hurling was not diverting water from the creek for his pond.
- Davenport & Engle – irrigating wrong fields with no water rights. Investigated complaint found they were irrigating fields with no water rights and stopped, so complied.

## Bozeman RO

These are by no means all inclusive but what I could put together in short time. I have highlighted the ones that I would consider having a resolution per our involvement. I would consider 6 of the 11 as having some type of resolution.

- **Illegal diversion to a pond from a surface source in Park Co. (resolved via letters on need for a permit)**
- **Possible illegal pond on small trib. of Jefferson River (water commissioner handled it after consultation)**
- Flooding of subdivision from a ditch that takes more water than rights are for during spring runoff. County and DEQ investigating.
- **Several complaints regarding de-watering of pits for mining of gravel. No water rights needed for this practice.**
- Taking water from a spring with no water right and affecting other spring users, affected party not willing to file a formal complain, options were explained.
- Water distribution complaint on a decreed stream in Madison County, complainant does not trust water commissioner or District Judge. Explained options to file a dissatisfied water user complaint or even go to another court for relief.
- Water distribution complaint and alleged permitted pond use violation on Middle Cottonwood Creek. Appointment of a water commissioner usually takes care of this but users not satisfied and filed a complaint in District Court. I have heard nothing from the court on this yet. Permit verification is in progress.
- **Possible illegal ponds reported by the Gallatin Cons. District. One was filed on and other is pending.**
- **Complaint of use of exempt wells at over 35g/10af for irrigation via hand lines. Investigation found the system was manifolded and violation letter sent. System has been modified to limit output of each well.**
- Numerous complaints in Spring when ditches start to run about lack of maintenance and flooding. We try to identify the responsible party and pass that along to the complainant. We make no contacts.
- Gallatin County planner reported what looked like a suspicious pump and skating rink setup near a local stream. A **Zamboni** was reported at the site. Pending investigation.

## Havre & Glasgow RO's

Dave Harmon vs. Knudsen, Granley, & Berwick	Resolved
Bill Schenk vs. Colin Pippis	Resolved
John Hayne vs. Colin Pippis	Resolved
FWP vs. Priest Butte Farms	Resolved
Ken Rice vs. Dellwo & Son Partership	District Court
Lyle Opus vs. Chauvett	Civil water law case
IX Ranch vs. Lyle Opus	Water Rights Hearing
John Hayne vs. Don Anderson	Resolved
Timothy McNaboe vs. Wetlands banking on Milk River	Application Pending
Baltrusch Construction vs. USBR Contracts	Resolved
Miller Colony vs. Salmond	Resolved
Robert Sill vs. Gene Curry	Application Pending
BLM vs Alberta Reservoir Development	Resolved
Lower Teton Water Users vs Upper Teton Water Users	Pending Decree
Vicki Baker vs. Brown	Pending Application
Pat Saylor vs FWP	Pending Application
USBR Tiber Dam vs. FWP	Resolved
Green Fields Irr. District J-Lake storage	Pending Policy
BIA vs. City of Cutbank construction on Tribal Lands	Tribal Resolution
Herb Briese vs. Choteau County	Civil water law case
Raines vs. Sill	WCourt Resolution
Earl Bahr vs. Unruh	Resolved

### **Helena RO**

In addition to written complaints we get many complaints that are resolved before they get that far. Once the complainant is aware of the ability to make call and the requirements of a written complaint we often do not hear back from them. Often times we are able to get the parties together before a written complaint is filed. I do not keep a log on complaints which do not proceed to the written stage.

As far as I can tell, we only received four actual written complaints in 2007.

- Tyrrel vs. Wright: this was determined to be a complaint involving pre 1973 water rights. Tyrrel was advised to call the Water Court.
- Miller vs. Jany: this complaint was field investigated with all parties present. Recommendations were made and we have received no further inquiries.
- Dearborn Information Service vs. Archer: this was resolved
- Dreschler vs. McCallum: this was resolved
- Taft vs. USFWS: this complaint was filed and field investigated in 2006. Recommendations were made. This complaint is ongoing as the alleged violator has not followed said recommendations. USFWS is considered federal court.

### **Kalispell RO**

- Six complaints were all taken care of via phone call or bringing people together to better understand the water right system.
- One complaint was headed to district court but was resolved.
- Two more complaints, one was a written complaint about a subdivision and the owner turning the water rights over to the home owner association. They also had issues with water quality and well construction which I met with DEQ and they took lead to resolve. The other was recent when a person filed a complaint in this office where a person built a road over a creek without a culver that changed the water course and changed the dynamics of the pond. This is being dealt with through the conservation service and a consultant. So both recent ones have been resolved via other methods however they did require action from this office and site visit for confirmation and discussions.

### **Lewistown RO**

In 2007 we addressed at least 12 complaints. These include complaints where substantial resources were expended in resolving, such as research, meeting with the parties and their attorneys, requests made of Department technical staff, field investigations, etc. The list does not include simple complaint inquiries that were handled relatively quickly through records research a phone call or two.

10 of the 12 complaints were resolved. Of the two complaints that weren't resolved, one is a flowing well that cannot be fixed, and the other is the Catlin Ranch (Smith River basin) which will likely eventually result in court litigation.

#### Comments:

1. Last year was a relatively calm year for complaint activity.
2. The number of complaints in the Lewistown region has dwindled significantly since the Musselshell River Enforcement Project was initiated (2000).

### **Missoula RO**

I reviewed the 32 complaint files for calendar year 2007. In my initial recollection I had trouble coming up with 3 that would be worth pursuing with further action by the Department, so I did a more comprehensive review. I found the outcome interesting and summarized it as follows:

- 8 were settled through agreement to cease use or reduce use to prescribed quantity.
- 5 were determined to not involve a violation.
- 2 were resolved with submittal of a water right application.
- 4 were determined to be outside of DNRC jurisdiction – ditch easement or trespass issues.
- 4 were determined to be the jurisdiction of a water commissioner or District Court
- 1 was determined to be outside DNRC jurisdiction – interference between wells with GW Certificate.
- 2 were judged to include inadequate information and no additional information was provided.
- 1 is currently in litigation filed by the complaining parties.
- 5 are pending.

The three most likely suspects for enforcement are from the pending category:

07-01: Illegal pond. Approximately 0.1 acre feet. Constructed by former landowner. Current owner is seeking relief through realtor's errors and omissions insurance to cover cost of filling in. Haven't spoken to parties since August. Need to update status before proceeding. May already be filled in, but I doubt it.

07-03: Georgetown Lake development planning to put 10 homes on a 602 well. Subdivision is approved. Lots are platted and roads built. No homes as of October 2007. Violation technically won't occur until they start pumping at +35 gpm or add enough homes to exceed 10 acre feet. Owner and consultant have been evasive. I am watching this one and intend to re-surface the issue when building starts. Will ask for pump information to determine flow rate. Don't think they can do this on 35 gpm. Only storage is provided by pressure tanks.

07-20: Illegal ponds along Clark Fork near Harpers Bridge. Landowner is a developer/land manager who has promised to bring the ponds into compliance. Lack of progress to date. I suggest giving him until this spring to get the applications in. If not submitted, I will pursue enforcement action. Ponds have been in place for several years and are used by the YMCA day camp for canoeing, etc. Diversion to ponds affects water availability for down-ditch water users.