

## **Summary of exempt rights** (exempt from filing in the adjudication)\*

When Senate Bill (SB 76) was enacted in 1979, the adjudication statutes required water users to file a statement of claim on all water rights which were in use prior to July 1973. By order of the Supreme Court, claims had to be filed by April 30, 1982 (this was later extended by the legislature, subject to certain conditions, to July 1, 1996. § 85-2-221(3). Failure to file the statement of claim created a conclusive presumption of abandonment. § 85-2-226, MCA. The Supreme Court later held the failure to file was a forfeiture.

A DNRC report in 1978 to the Montana Legislature Interim Subcommittee on Water Rights had revealed that the scope of the adjudication could be greatly reduced by postponing adjudication of certain rights by providing for certain exemptions from the mandatory filing requirement:

Increasing the existing adjudication budget and proceeding under the existing statute but exempting adjudication of groundwater domestic and stock rights should be considered. The DNRC estimates that this would reduce the total number of existing water rights perfected prior to July 1, 1973 and needing adjudication from an estimated 500,000 to around 275,000. Postponing adjudication of stock and domestic rights until later or until a time when a controlled groundwater area is specified would eliminate a significant amount of paper work and reduce a large portion of the claimants who are unfamiliar with water rights, but could meet the public and private benefits of an adjudication of existing water rights. Such modification would have reduced the number of claims by about one-half in the Powder, and subsequently eliminated about 30% of the time required by the adjudication crew there.

Id. at 3-4. (Emphasis added).

The 1979 legislature thereafter as part of SB 76 provided that claims for livestock and individual, as opposed to municipal domestic uses, based upon instream flow or ground water sources were exempt from the filing requirements, but they could be voluntarily filed. § 85-2-222, MCA. Since these claims were exempt from the SB 76 filing requirements, they are often referred to as “exempt” claims. (The exempt from filing claims should not be confused with the other “exempt” well issue which was the subject of House Bill 602 passed in the 2011 Legislature. The Water Policy Interim Committee will study the other exempt well issues discussed in HB 602 over the interim before the next legislative session.)

With regard to the exempt from filing claims, they have been a topic of periodic discussion for many years. What was not addressed in 1979 was any kind of process that described where and how such exempt rights could be established later as the adjudication progressed, which court had jurisdiction, and what the process was for adjudicating the exempt rights. A water user who did not file claims for exempt water rights faces the issue of how to judicially establish their exempt water right. Exempt claims not filed were not forfeited, but a process to validate those rights later was also not provided; currently there is no designated forum in which such non-claimed, exempt rights can be proved and adjudicated and placed in

decrees. The question is what, if anything, should be done about exempt claims which were not voluntarily filed in order to get them adjudicated?

About 20 some years ago, the DNRC created Form No. 627, a *Notice of Water Right (Exempt from the Adjudication Filing Requirements)*. As stated on the face of the form, water users who did not voluntarily file their exempt claims could for a fee file the Form No. 627 with the DNRC for the purpose of receiving *notice* of other water right proceedings:

A person who claims to have a water right that is exempt may file this form for the purpose of receiving notice from the Department of permit applications, change authorizations, or reservations that may affect the owner's water right. Filing this notice does not relieve a person of the responsibility of establishing the existence of the water right. Acceptance of this form by the Department does not constitute a recognition by the State of Montana that the right is a valid existing water right.

(Emphasis added).

Upon receipt, the DNRC assigned a number to each Form No. 627 and added its information into the DNRC's water right centralized record system. While the DNRC allowed exempt water users to file a Form No. 627, it was simply a piece of paper on file with the DNRC. It allowed those who claimed exempt water rights to be personally noticed of DNRC proceedings on the source. It was not a claim in the adjudication, and the DNRC's acceptance of the Form No. 627 did not establish or confirm a water right (this is noted in a disclaimer on exempt rights in the data base); DNRC lacks jurisdiction to validate exempt rights. However, since many water users were under the mistaken impression that filing a Form No. 627 confirmed or established an exempt water right, the DNRC in 2008 discontinued use of the Form No. 627. The form simply created too much confusion with the public as to its purpose. Data from a number of these exempt filings still remains in the centralized record system. (Historical Note: When the Water Court first began providing tabulations to district courts for enforcement proceedings, these exempt from filing Form No. 627 claims were sometimes inadvertently included in the enforceable tabulations because the enforcement tabulations are produced from the DNRC water right centralized record system.)

Occasionally, an exempt claim becomes involved in a water distribution controversy before a district court and is certified to the Water Court (the district courts do not have jurisdiction to adjudicate water rights). The Water Court has concluded that it has jurisdiction to resolve disputes involving exempt from filing claims. Because the exempt claim was not voluntarily filed in the statewide adjudication, the Court has held that the exempt claim is not prima facie proof of its contents. Therefore, in any certification case, the water user claiming an exempt from filing claim has the burden of proof to establish all elements of the claim. Once the Water Court resolves the exempt claim issues, the results are not folded into the general adjudication of water rights and will not appear in final decrees. The Water Court believes its decision is only binding on the parties in the certification proceeding. Its decision is not binding on all water users involved in the statewide adjudication because they had no notice of the claim. Unless the exempt claim has a water right number assigned to a previously filed Form No. 627

Form, the Water Court does not assign a number to the exempt claim or create a claim abstract for it.

The DNRC allows water users claiming exempt rights to go through the change process to change the purpose, place of use, or point of diversion of the exempt right. Although the DNRC has approved changes of exempt rights, the change of the exempt right is still subject to how the exempt right is ultimately adjudicated.

During the 2011 Legislature, there was a bill draft to authorize the filing of exempt claims in the statewide adjudication. It was never introduced. Instead, the bill sponsor requested the Water Adjudication Advisory Committee be convened to consider the issue and provide recommendations to the Environmental Quality Council.

\*October 3, 2011, draft summary by Tim Hall for the Water Adjudication Advisory Committee based on the Water Court's web page summary of exempt rights.