



To: The Water Policy Interim Committee
P.O. Box 201704, Helena, MT 59620-1704

Re: The Water Policy Interim Committee (WPIC) reports and draft legislation and legislation related to its study of the future of the Montana Water Court.

I am submitting these comments on behalf of Citizens for a Better Flathead (CBF). Since 1992, Citizens for a Better Flathead (CBF) has been a leader at the forefront of addressing the challenges that rapid growth is bringing to our region. We work to protect the valley's clean water, natural beauty, and friendly communities through sound planning and policy solutions. We believe in the power of collaboration and consensus building, and work to inform and engage broad-based public participation in planning for the future of the Flathead. We represent 1500+ members who support our work.

1. **Exempt Wells:** We ask that the WPIC to support proposed legislation known as ("LCwp20") which would close the exempt well loophole once and for all, that currently allows large developments with multiple proposed lots to avoid securing a new water use permits when proposed projects would exceed established water use thresholds.

2. **Significant groundwater extraction wells for Water Bottling Plants:** We ask the WPIC, as the siting and permitting of Water Bottling Plants are a new issue facing the Flathead and the state, to take what ever action may be needed to ensure that any legislation you are proposing does not in any way:

- allow for a written waiver, or waiving of any adverse effects on an existing water right,
- allow for a certificate, permit, or state water reservation

that would diminish the public input or the comprehensive agency review needed to consider the potential impacts and water rights appropriate for such facilities.

We ask that under any additional legislation the WPIC will be proposing, which might provide for approval of a water rights permit or a change in water right under certain conditions, that this legislation not allow for any approval of a water rights permit or change in water right for applications for a permit for groundwater extraction for proposed Water Bottling facilities in the state until further study is done on this issue.

Finally, we ask that the WPIC devote staff time to researching and identifying issues and impacts associated with the permitting and permitting process for significant groundwater extraction wells for Water Bottling Plants so that much needed safeguards can be put in place to address and avoid these impacts.

Sincerely,
Mayre Flowers, Executive Director

From: Joy Claar

To: Mohr, Jason

Subject: water courts

Date: Sunday, August 07, 2016 8:43:55 AM

Do not touch our water courts or our water laws. Montana State Citizen.

Joy

From: Joy Claar

To: Mohr, Jason

Subject: water court

Date: Sunday, August 07, 2016 8:35:54 PM

Please do not touch, change or mess with our great water courts and judges.

Joy Claar

PO Box 339

Ronan 59864

From: Deirdre Coit

To: Mohr, Jason

Subject: Future of Water Court Comments

Date: Friday, August 12, 2016 1:34:45 PM

Significant groundwater extraction wells for Water Bottling

Plants:

Please, as it is not easily clear from the legislation proposed how broadly it may be applied, take what ever action may be needed to ensure that any legislation you are proposing does not in any way allow for a written waiver, waiving any adverse effects on an existing water right, certificate, permit, or state water reservation associated with an application for a permit for groundwater extraction for a proposed Water Bottling Plant in the state until further study is done on this issue. And I ask that under additional legislation the WPIC will be proposing that would provide for approval of a water rights permit or a change in water right under certain conditions, that this legislation not allow for any approval of a water rights permit or change in water right for applications for a permit for groundwater extraction for a proposed Water Bottling Plant in the state until further study is done on this issue. Please devote staff time to researching and identifying issues and impacts associated with the permitting and permitting process for significant groundwater extraction wells for Water Bottling Plants so that much needed safeguards can be put in place to address and avoid these impacts.

We, in the Flathead Valley, are working against the DNRC and DEQ with regard to a proposed water bottling plant, in Creston, so Water Bottling Plant extraction of water is very concerning to us. Water is the new oil, please be very cautious when dealing with these issues. We don't need industrial water bottling in Montana.

Deirdre Coit

406-755-1006

450 Sonstelie Road

Kalispell, MT 59901

From: Rita Hall

To: Mohr, Jason

Subject: Future of the Water Court comments

Date: Monday, August 15, 2016 12:36:35 PM

Please give careful consideration to all comments regarding the control of

water rights within the state of Montana, esp the future of the MT Water Court.

Water is vital to the health and prosperity of the land of MT. Even the MT Constitution spells out that water within the state of MT belongs to the state

for the use of its people. This is for ALL people of Montana, not a select group

to hold the reins of control over the rest of us. Our water is crucial for our state's economy on many levels, for health of all the citizens living here, and

for countless applications for recreation and conservation. How water is managed should truly remain at the state level.

We need the state Water Court. Do not bypass state control! State legislation

should play a significant role in managing the resources within the state's borders, esp water resources. The mechanics in place need edifying and rectifying, not restructuring at a federal level. This matter must remain within

the confines of state control.

Respectfully yours,

Rita C. Hall

406-890-9996

ritahall@hotmail.com

August 14,2016

Ron Korman; Maxine Korman

Box 162

Hinsdale, Montana 59241

Ph. (406) 648-5536

kormanmax@hotmail.com

To: Water Policy Interim Committee

c/o Jason Mohr, WPIC staff

jasonmohr@mt.gov.

RE: COMMENTS ON THE FUTURE OF THE MONTANA WATER COURT

We, (Ron Korman and Maxine Korman) submit these comments after having 4 cases in the Water Court. We filed objections and requested hearings for previously filed Statements of Claim as well as Exempt Form 627s on the basis that since the priority date is pre July 1,1973, they be declared vested water rights. The Water Court refused a hearing on the Exempt rights as to the issue of whether they are vested or not. The Water Court created Case 40M-A “To Address the Legal Question of Vested Water Rights” involving water rights on patented land as well as adjudicated grazing allotments. We raised the issue that the definition of ‘existing water right’ was ambiguous. The Montana Supreme Court in General Agriculture Corporation v. Moore explained the meaning of the term “Existing water right” in Article IX, Section 3 of the 1972 Montana Constitution, that ‘existing’ included those water rights already vested as well as the right to acquire a vested water right. Delegate Davis is cited in the Verbatim Transcript of the 1972 Constitutional Convention that he wanted the record to show that no one was trying to take anyone’s existing or vested water rights. Water Master Dana Elias Pepper issued an order quoting from the Montana Supreme Court Pettibone decision, that rights vested at the time the Constitution was adopted were protected from State action affecting them; but then stated that

we couldn't ask for vested now, but perhaps in the future if the need arises. Associate Water Judge Douglas Ritter repeated and affirmed the Pettibone citation and that we couldn't ask for vested now but perhaps in the future if the need arises.

Our vested water rights on our patented lands were consolidated into Water Court case 40M-71 before Chief Water Judge Russell McElyea and is presently before the Montana Supreme Court as DA 16-0071. Our pre-Water Use Act vested water rights would retain all of the original elements and would have to be adjudicated according to the laws at the time they were perfected and vested. It has been held that a change in mode, method, place, purpose, use is not a new appropriation and not a new priority date and to hold otherwise is a retroactive alteration of appropriative rights and the Prior Appropriation Doctrine. Ramsay v. Gottsche, 51 Wy. 516; Lindsay v. McClure, 136 Fed. 2d. 65, 69-70 (10th Cir. 1943). The element of priority date was not adjudicated by that legal principle which raises the issue of destruction of an element of our vested water rights; hence our appeal.

The Water Court has jurisdiction over adjudication of water rights with a pre- Montana Water Use Act priority date of July 1, 1973 which were filed as Statement of Claim to an Existing Water Right. The exception to that are water rights such as livestock in-stream direct from source and certain wells exempt from the adjudication filing requirement under 85-2-222.

Water Court Case 40M-230, now before the Montana Supreme Court as DA 16-0019 is based on our objections to Bureau of Land Management claiming wildlife and stockwater rights to our lawfully adjudicated grazing allotment. BLM withdrew its appeal of the Powder River decision to the Montana Supreme Court in 1983. In our case, 40M-230 and DA 15-0533; also in Basin 40M Milk River Basin, Associate Water Judge Ritter applied the Reclamation Act which governs the United States Bureau of Reclamation and irrigation projects to support his position that BLM is leasing the water to those of us who own our adjudicated grazing allotment. Associate Water Judge Ritter applied Montana Supreme Court case Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912) to support his position that BLM is leasing the water to those of us who own our adjudicated grazing allotment. The Bailey case was necessary because the *water delivery companies* were unable to own water rights as the law and interpretation of the law was at that time. Neither the Reclamation Act, Bureau of Reclamation Service, nor Bailey were

relevant to DA 16-0019 and DA 15-0533. Associate Water Judge Ritter applied post-1973 Pub.L. No. 114-30, approved July 6, 2015. That law was not in existence pre-July 1, 1973. It cannot be applied to pre-July 1, 1973 water rights.

The Water Court is charged with adjudicating pre-Water Use Act water rights. Water Court judges should know and confirm that those water rights are vested now- not that owners of vested existing appropriative rights can't ask for vested now but perhaps in the future if the need arises. Water Court judges should know and adjudicate pre-Water Use Act water rights according to the laws applicable to those water rights at the time they were perfected and thus vested. That would include adjudicating the element of priority date. If livestock put water to beneficial use direct from source (any stream, creek, ravine, coulee, pothole or other natural depression; 89-801 R.C.M.); then subsequent impoundment or addition of or change to irrigation would not as a matter of pre-1973 Montana water law be a new appropriation or later priority date but retain the original priority date. To hold otherwise is a retroactive alteration of the appropriative right and Prior Appropriation Doctrine. See also *Woolman v. Garringer*, 1 Mont. 535, (1872); citing: The prior appropriator and owner of a ditch has the exclusive control and right of enjoyment of the water diverted therein; and he may change the place of use at pleasure without forfeiting the right. *Maeris v. Bicknell*, 7 Cal. 261; He can change the use of same. *Davis v. Gale*, 32 Cal. 26. Appropriation and use and nonuse are the tests of right, and place and character are not. After appropriation a party is entitled to use the amount appropriated at any place where he may convey it for a useful purpose. *Davis v. Gale*, 32 Cal. 34; *Weaver v. Eureka L. Co.*, 15 id. 273; *Kidd v. Laird*, id. 161. *Smith v. Denniff*, 24 Mont. 20, (1900) A legal appropriator of water may change the place of its use, and may use the water for other purposes than that for which it was originally appropriated. (Section 1882 of the Civil Code; *Woolman v.*

Garringer, 1 Mont. 535; Wimer v. Simmons, 27 Ore. 1, 39 P. 6; Fuller v. Swan River P. Mining Co., 12 Colo. 12, 19 P. 836.)

[“Every judge is bound to know the history and the leading traits which enter into the history of the country where he presides and it is also an admitted doctrine of the common law. It is a common – law principle that established customs are judicially noticed, and presumed, because of firm establishment, to be lawful.” Judge Heydenfeldt, *Conger v. Weaver*, 6 Cal. 548. Korman Case 40M-A “To Address the Legal Question of Vested Water Rights” Opening Brief at 3,4.]

Water Court Judges Ritter have not, in Cases 40M-A 40M-71 and 40M-230 demonstrated to us that knowledge required to adjudicate pre-Water Use Act water rights without retroactive alteration of appropriative rights and the Prior Appropriation Doctrine. We were also left with the clear impression that Judge Ritter was not impartial with respect to United States of America, Bureau of Land Management; but rather made clear errors of law in reaching conclusions to grant BLM’s claims for wildlife and stockwater rights.

We ask that the attached Chronological Affidavit of Maxine Korman be made a part of our record. It is included in the record of Case DA 16-0071 and DA 16-0019. We provided certified copies of state-trust lands patents in Case 40M-90 in which the state we agreed we, not the state, own “existing” water rights on State-Trust lands; see also WC 41G-190 Hamilton Ranch Partnership. Agency Legal Services attorneys of the State’s Attorney General’s Office argued that we don’t know if there are vested water rights in Montana- the Montana Supreme Court will have to decide that; even though each land patent had the federal statute RS 2339 language “subject to vested and accrued water rights” on the face of each land patent. During CMR Water Compact public meetings, DNRC attorney Chris Tweeten said that we don’t know if there are vested water rights in Montana- the Montana Supreme Court will have to decide that; although

the CMR Water Compact did include the “savings provision for vested water rights”. DNRC then-chief legal counsel Tim Hall wrote that vested had no meaning in regard to Montana water rights and that vested is nowhere in the Constitution where water is concerned. Prior to the July 1, 1973 Water Use Act, Montana’s legal history recognized the ownership of vested water rights on “public domain” or “public lands”. DNRC then-chief legal counsel Tim Hall wrote that under 85-2-306(6)(d) water rights must go to the state on state-trust lands or BLM on “BLM lands”. We tried to get vested water rights on federal lands recognized in HB 711. DNRC then-chief legal counsel Tim Hall told me to call the water rights existing; I didn’t want “vested”; it didn’t mean what I thought it meant and didn’t do what I thought it did. Then-Senator McNutt killed HB 711 in committee. BLM provided the HB 711 documents to the Water Court in Case 40M-A “To Address the Legal Question of Vested Water Rights.”

I received the following email from then-Valley County Commissioner Dave Pippin on July 2, 2014 : Fwd: vested water rights

From: **Tubbs, John** <JTubbs@mt.gov>
Date: Wed, Jul 2, 2014 at 10:24 AM
Subject: Re: vested water rights
To: David Pippin <dpippin@valleycountymt.gov>
Cc: "Davis, Tim" <TimDavis@mt.gov>

Mr. Pippin –

Thank you for the email. In response to your email I wanted to make sure that you knew about actions the last legislature took to allow water right holders to file what are known as exempt from filing water rights. Specifically, if you have a pre-1973 water right that was exempt from filing for in-stream stock or groundwater domestic wells then you can now file those under SB 355 that passed in 2013. If you have questions about how to do so and what are the restrictions under SB 355 then you should contact Denise Biggar in my Glasgow Regional Office.

Thanks

John Tubbs, Director
Montana DNRC

On Jun 23, 2014, at 10:02 AM, David Pippin <dpippin@valleycountymt.gov> wrote:

Mr. Tubbs, Just a quick note to see if any action is being done on vested water rights. Are you seeing any signs that this could be something that would be legislature? Any thoughts or information on this would be appreciated.

Thanks Dave Pippin

Chief Water Judge McElyea appeared before this committee and Senator Fielder asked him whether the exempt rights were vested. The record shows that Chief Water Judge McElyea declined to answer Senator Fielder's question before the committee. Prior to that, then-Chief Water Judge Bruce Loble stood before the water policy committee and told them about our case and the issue that we were seeking vested water rights. He told the committee that he would have to research the issue. The Water Court has not included WC Case 40M-90, Korman v. Mt. Board Land Commissioners in the significant case search.

VESTED WATER RIGHTS CITED IN MONTANA CODE ANNOTATED:

75-7-104. Vested water rights preserved. This part shall not impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States.

87-5-506. Vested water rights preserved and emergency actions excepted. This part shall not operate or be so construed as to impair, diminish, divest, or control any existing or vested water rights under the laws of the state of Montana or the United States or operate in emergencies such as floods, ice jams, or other conditions causing emergency handling.

85-20-201. Fort Peck-Montana compact ratified. ARTICLE VIII DISCLAIMERS AND RESERVATION OF RIGHTS

A. Disclaimers. Nothing in this Compact shall be so construed or interpreted:

6. to authorize the taking of a water right which is vested under state or federal law;

85-20-1001. Fort Belknap-Montana compact ratified. ARTICLE V - DISCLAIMERS AND RESERVATION OF RIGHTS

B. General Disclaimers. Nothing in this Compact may be construed or interpreted:

6. To authorize the taking of a water right which is vested under State or federal law;

85-20-1701. United States of America, fish and wildlife service, Charles M. Russell national wildlife refuge-Montana compact ratified. ARTICLE V GENERAL PROVISIONS

C. General Disclaimers. Nothing in this Compact may be construed or interpreted:

6. To authorize the taking of a water right that is vested under state or federal law;

Water Master Dana Elias Pepper created WC 40M-70 “To Address the Legal Question of Vested Water Rights” and later issued an Order that we could not ask for our water rights to be declared vested now but perhaps in the future if the need arises. This was repeated by Associate Water Judge Ritter. Dana Elias Pepper had the attached article “Heads up, Montana... Do you need to file on your water rights? in the Thursday July 7,2016 Western Ag. Reporter. Attorney Pepper touched on Senate Bill 355 for filing pre July 1,1973 exempt rights individual domestic or stock water rights from instream or groundwater sources. Attorney Pepper recognized the fact that these are rights with a priority date that precedes the Water Use Act but does not indicate if SB 355 plainly and unambiguously states that the filing is for a Vested Existing Water Right.

Prior to this: *DNRC Mildenerger amicus brief* (“ Rights to surface water where the date of appropriation precedes January 1,1962, shall take priority over all prior or subsequent groundwater rights. The application of groundwater to a beneficial use prior to January 1,1962 is hereby recognized as a water right.). P.29: Exemptions allowed a significant number of claims to be excluded from the state’s written record of existing water rights. P.30: If the exemption statute is not liberally construed to provide for existing water rights exempt from the adjudication, many farmers, ranchers and other water users who did not file exempt rights will lose valuable water

rights inextricably tied to their livelihoods after they were informed such rights were not required to be filed.

3-1-102. Courts of record. The court of impeachment, the supreme court, the district courts, the workers' compensation court, the municipal courts, the justices' courts of record, and the city courts of record are courts of record. Is the Water Court a court of record? If not, what is the effect on Water Court Orders and Decrees?

As to the future of the Montana Water Court- We think this committee should, based on this information, attached article and chronological affidavit, ask the Chief Water Judge to provide a written memorandum to this committee and legislature responding to the legal issues:

Are these pre- July 1,1973 water rights, whether filed as Statement of Claim to an 'Existing' "vested?" Water right under 85-2-221 or exempt under 85-2-222 and now provided for filing under SB355 a Vested Water Right. If the Water Court refuses to provide the "answer to the legal question of vested water rights" then there should be a written memorandum laying out the legal reasoning for that refusal.

Is the Water Court a court of record under **3-1-102 Courts of record.?** The court of impeachment, the supreme court, the district courts, the workers' compensation court, the municipal courts, the justices' courts of record, and the city courts of record are courts of record. Is the Water Court a court of record? If not, what is the effect on Water Court Orders and Decrees?

It is our opinion, based upon our experiences that the Montana Water Court and owners of vested appropriative rights would better have those rights adjudicated by a (water) judge who has shown the knowledge that those rights are vested, the meaning of 'existing water right' and that those vested appropriative rights must be adjudicated according to the laws then so as to not

retroactively alter their elements and the earlier law of the Prior Appropriation Doctrine without due process and just compensation.

Respectfully,

Ron Korman and Maxine Korman

Fwd: vested water rights

David Pippin

Wed 7/2/2014 2:11 PM

To: MAXINE KORMAN <kormanmax@hotmail.com>

Thought you should see this Thanks Dave

----- Forwarded message -----
From: Tubbs, John <jtubbs@mt.gov>
Date: Wed, Jul 2, 2014 at 10:24 AM
Subject: Re: vested water rights
To: David Pippin <dpippin@valleycountymt.gov>
Cc: "Davis, Tim" <TimDavis@mt.gov>

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Thank you for the email. In response to your email I wanted to make sure that you knew about actions the last legislature took to allow water right holders to file what are known as exempt from filing water rights. Specifically, if you have a pre-1973 water right that was exempt from filing for in-stream stock or groundwater domestic wells then you can now file those under SB 355 that passed in 2013. If you have questions about how to do so and what are the restrictions under SB 355 then you should contact Denise Biggar in my Glasgow Regional Office.

Thanks

John Tubbs, Director
Montana DNRC
(406) 444-1948 Direct
(406) 444-0505 Office
jtubbs@mt.gov

On Jun 23, 2014, at 10:02 AM, David Pippin <dpippin@valleycountymt.gov> wrote:

Mr. Tubbs, Just a quick note to see if any action is being done on vested water rights. Are you seeing any signs that this could be something that would be legislature? Any thoughts or information on this would be appreciated.

Thanks Dave Pippin

406-228-6219 Please note my new email is
406-263-7171 cell dpippin@valleycountymt.gov

--
Thanks Dave

406-228-6219 Please note my new email is
406-263-7171 cell dpippin@valleycountymt.gov

dial bypass. When we challenged this proposal in court, we won a court-mandated time-out. The court halted construction of the dam, at

One busload of the bypass channel supporters headed for the Billings meeting paused for a photo. LG photo.

www.westernagreporter.com
Thurs, July 7, 2016

Heads up, Montana... Do you need to file on your water rights?

By Dana Elias Pepper

In the 1980s and 1990s, farmers and ranchers across Montana filed Statements of Claim with the Department of Natural Resources & Conservation (DNRC) on their pre-1973 water rights. Water Users who failed to file Statements of Claim by the filing deadlines lost their water rights. An exception to this filing requirement was that water users could voluntarily, but were not required to, file on their individual domestic or stock water rights from instream or groundwater sources.

SB 355...

Senate Bill 355 was passed in the 2013 legislative session. This bill opened up another filing period for individual domestic or stock water rights from instream or groundwater sources. In other words, if you have individual domestic or stock water rights from instream or groundwater sources that were put to beneficial use prior to July 1, 1973, NOW is the time to file on them. Here are two important advantages to filing on these rights:

- First, by filing your

or stock water rights from instream or groundwater sources) entered into the DNRC database so the water users could receive notice of water right proceedings in their basin. These 627 Forms have NOT been recognized as a proper mechanism for filing on these claims. Thus, if you filed a 627 form, you NEED TO REFILE these claims.

Note: Dana Elias Pepper served as a Water Master at the Montana Water Court for six years prior to starting a private practice. Pepper can be reached by phone at 406-599-7424 or by email at dana@pepperlawfirm.com

The process...

Like all pre-1973 water rights, these claims will be examined by the DNRC and may go through judicial proceedings at the Water Court before they are included in a Final Decree. Thus, it is important that your filings and their supporting documentation be accurate and consistent.

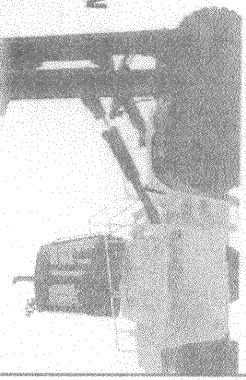
The Montana legislature

Form 627...

You should also be aware that you may have been one of the people that filed a 627 Form. 627 Forms were used by the DNRC for a period of time as a way of getting these claims (individual domestic

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AFFIDAVIT OF Maxine Korman

STATE OF MONTANA)

) ss:

VALLEY COUNTY)

Maxine Korman, hereinafter affiant, being first duly sworn, deposes and says:

1. I am a resident of Valley County, Montana, having lived in Valley County most of my adult life.
2. I am an adult and competent to make this Affidavit.
3. I am submitting this AFFIDAVIT as a Pro Se Litigant and am relying on *Caldwell v. Miller* (790 F. 2d. 589, 595, 7th Cir. 1986) that Pro Se litigants are not held to the same stringent standards applied to formally trained members of the legal profession and are to be liberally construed. I also cite *Haines v. Kerner* (404 U.S.519520 – 521, 1972) that Pro Se Complaints are to be liberally construed and should be dismissed for failure to state a claim only if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

4. [http://search.leg.mt.gov/search?q="Maxine+Korman](http://search.leg.mt.gov/search?q=) Attachment 1 search results for “Maxine Korman” in the legislative record I obtained on January 29,2015 shows:

... MAXINE KORMAN [kormanmax@hotmail.com] Saturday, September 11,2010

leg.mt.gov/.../Committees/Interim/2009_2010/Environmental_Quality_Council/Minutes/eqc09142010_ex24.pdf - 18k - 2011-01-26 - Text Version

... OF VESTED WATER RIGHTS Maxine Korman ...

leg.mt.gov/content/committees/interim/2007_2008/water_policy/meetings/minutes/wpic03122008_ex14.pdf - 455k - 2012-06-18 - Text Version

Water Policy Interim Committee required all water users to ...

... 6) Mandatory Refiling and Re-Adjudication of All Vested Claims Option: Maxine

Korman, a member of the public who has been attending the ...

leg.mt.gov/content/committees/interim/2011-2012/Water-Policy/minutes/January-11-2012/Exhibit04.pdf - 39k - 2012-02-10 - Text Version

... MAXINE KORMAN [kormanmax@hotmail.com] Saturday, September 11,2010

leg.mt.gov/.../Environmental_Quality_Council/Meeting_Documents/September2010/caps-public-comment.pdf - 87k - 2011-01-26 - Text Version

S:\LEPO\EQC 2005-06 INTERIM\MINUTES\EQC MINUTES ...

... Public Comment 00:39:09 Maxine Korman, Hinsdale, asked if there were claims examination rules for stock water for federal agencies. ...

leg.mt.gov/.../Interim/2005_2006/environmental_quality_council/meetings/minutes/eqc09122006.pdf - 159k - 2008-08-10 - Text Version

030225FIS_Sm1.wpd MINUTES MONTANA SENATE 58th ...

Maxine Korman, Hinsdale, Montana ...

leg.mt.gov/bills/2003/minutesPDF/030225FIS_Sm1.pdf - 74k - 2006-10-20 - Text Version

EQC MINUTES SEPTEMBER 14, 2010.WPD

... Letter from Maxine Korman (EXHIBIT 24). CI2244 1145mtxc.

leg.mt.gov/.../Committees/Interim/2009_2010/Environmental_Quality_Council/Minutes/eqc09142010.pdf - 119k - 2011-05-26 - Text Version

S:\LEPO\WPIC 2007-08\Minutes\WPIC MINUTES MARCH 12 ...

... 06:04:53 Maxine Korman, a rancher near Hinsdale, submitted written testimony regarding her difficulties with her water rights (EXHIBIT 14). ...

leg.mt.gov/content/Committees/Interim/2007_2008/water_policy/meetings/minutes/wpic03122008.pdf - 92k - 2008-08-05 - Text Version

5. [http://search.leg.mt.gov/search?q="Maxine+Korman](http://search.leg.mt.gov/search?q=) Attachment 2 search results for “vested water rights” in the legislative record I obtained on January 29,2015 show Results **1 - 10** of about **66** for "**vested water rights**" including 87-5-506. Vested water rights preserved and emergency actions excepted. ...

leg.mt.gov/bills/mca/87/5/87-5-506.htm - 3k - 2014-10-15 – Cached

75-7-104. Vested water rights preserved. This part shall not impair, diminish, divest, or control any existing or vested water ...

leg.mt.gov/bills/mca/75/7/75-7-104.htm - 3k - 2014-10-15 – Cached

6. Written testimony of Kormans' turned in for the official record to Water Policy Interim Committee on March 12, 2008:

leg.mt.gov/content/committees/interim/2007_2008/water_policy/meetings/minutes/wpic03122008_ex14.pdf - 455k - 2012-06-18. ABBREVIATED TESTIMONY TO THE INTERIM WATER POLICY COMMITTEE MONTANA WATER USE ACT & RETROACTIVE DESTRUCTION OF VESTED WATER RIGHTS. Attachment 3 Testimony included that of all of the prior appropriation doctrine states Montana was the last state to pass permitting law and that was the Water Users Act July 1, 1973. No water rights before that date are recognized as vested under the Water Users Act. Nevada recognizes water rights before 1904 as vested and provides for adjudication of vested rights, New Mexico recognizes water rights before 1907 as vested, provides for recording as and adjudicating as and South Dakota passed permitting law in 1955 and water rights before that are recognized as vested. We had provided then DNRC Director Sexton state-trust land patents showing "subject to vested and accrued water rights". Beginning at page 13 is Affidavit recorded with Valley County Clerk and Recorder document# 136208 MRE about correspondence with DNRC and our affidavits of vested water rights. The testimony included statements of then Chief Water Judge Loble to the committee. The testimony included statements from then DNRC Chief legal Counsel Tim Hall, regarding letters from water users asking DNRC to recognize their "vested" water rights; including that vested is nowhere to be found in the Constitution in the section related to water. The State Land patents show the state took title "subject to vested and accrued water rights". The document Assignment of Range Improvements show Kormans bought the range improvements; fences and reservoirs in the grazing allotment when they bought the Hammond Ranch. The affidavit also included our corrected Forms 627s and Amendment to Statement of Claim forms showing we were trying to correct the water right form to vested.

7. leg.mt.gov/content/committees/interim/2011-2012/Water-Policy/minutes/January-11-2012/Exhibit04.pd Attachment 4 January 11, 2012 Report of Water Court Judge Loble to the Interim Water Policy Committee regarding filing Exempt claims. 6) Mandatory Refiling and Re-Adjudication of all Vested Claims Option: Maxine Korman, a member of the public who has been attending the

Committee meetings appears to support this option, but I am not absolutely certain. Mrs. Korman has provided the Committee with extensive materials and comments and it appears she contends that if Montana's water right adjudication is to be supportable, it needs to be started over and that all water right claimants with pre-July 1973 vested water rights would need to file a Declaration of Vested Water Right of all their water right claims. Mrs. Korman's materials are posted on the Water Court website at <http://courts.mt.gov/water/WAAcornnittee/>

8. We worked with Rep. Rick Jore in 2007 on HB711 "To Recognize Vested Water Rights on Federal Lands" The bill was killed in committee. Before the hearing, then DNRC Chief Legal Counsel Tim Hall called several times asking me to settle for 'existing' water rights because that's what they are; telling me I didn't want 'vested' because vested didn't mean what I thought it meant and didn't do what I thought it did. He faxed his "fix" to the bill and the water rights were still called 'existing'. leg.mt.gov/bills/2007/BillHtml/HB0711 HOUSE BILL NO. 711 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT ALL WATER RIGHT CLAIMS THAT WERE EXEMPT FROM THE CLAIMS FILING REQUIREMENTS ARE VESTED; AND AMENDING SECTION 85-2-222, MCA." BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA: **Section 1.** Section 85-2-222, MCA, is amended to read: "**85-2-222. Exemptions.** Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources and claims for rights in the Powder River basin included in a declaration filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of 85-2-221(1) and are vested. Such However, these claims may, however, be voluntarily filed with the department."

9. In Case 40M-A "To Address the Legal Question of Vested Water Rights"; the United States provided EXHIBITS IN SUPPORT UNITED STATES' BRIEF RE: OBJECTORS' VESTED WATER RIGHTS CLAIMS AND UNITED STATES' REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT. Attachment 5 "Exhibit: Testimony To Committee Re HB711 USA1121; USA 1122- USA1128, written testimony of Maxine Korman. USA1129-1136 exhibits submitted by Korman with the testimony; USA1139-USA1167 exhibits submitted by Korman with the testimony. As of 2/3/2015, I was unable to locate the testimony and exhibits from the LAWS leg.site. (Attachment 6 email to Susan Byorth Fox, Executive Director Legislative Services Division).

10. leg.mt.gov/content/committees/interim/2007_2008/water_policy/meetings/minutes/wpic_03122008
TESTIMONY BY Ron Korman TO WATER POLICY INTERIM. Attachment 7. I was present at the committee meeting when Ron read his testimony. He said in part: This is the 3rd time that I have come to a legislative Committee to tell the legislators that there is a flaw in the Montana Water User Act. The granting by The United States in the Act of 1866 granted appropriative vested water rights on the then public domain. This act and the following Livestock Reservoir Site Act in 1897 confirmed ownership of vested water rights to my predecessors as a granting act by congress is the same as issuance of a patent. We have been told by the dnrc that we cannot file a vested water right or any water right on my fee land. U.S. v New Mexico, United States Supreme Court, 1978, has said that under the prior appropriation doctrine, a federal agency cannot own a stockwater right on federal land and that water right belongs to the stockman. Bear in mind, this is the 3rd time that this has been pointed out .First at the EQC in September of 2006 AND the second time was at the hearing for HB 711 TO RECOGNIZE VESTED WATER RIGHTS ON FEDERAL LAND. The BLM has been going back as far as 1934 for a priority date filing with the dnrc for stockwater rights and wildlife water rights over my vested water rights and I am told by the dnrc that it is the government's land and water and I can't file. In February of 2007 the Idaho Supreme Court ruled in LU Ranching and Joyce Livestock that the ranchers were owners of senior vested water rights. It took LU Ranching and Joyce Livestock 10 years and a million dollars each to get that ruling. Maxims in the Montana Code, such as consent: A person who consents to an act is not wronged by it. Does that mean that if I don't object to these classes of water use not showing vested and it turns out I come out with some form of contract water privilege from the state that will now be under the authority of the dnrc to administer, control and regulate, including revoke? I can't later claim a damage or takings? Another maxim is Acquiescence in error takes away the right of objecting to it. Once again, if I agree to all the parts of this Water Users Act then does that mean I can't object? My predecessors acquired vested water rights before the legislature created these laws and classes of water users of exempt, statement of claim and provisional permit.

11. In Case 40M-A "To Address the Legal Question of Vested Water Rights" I filed an Affidavit In Support of Verified Motion For Exceeding Page Limits which accompanied the Motion To Exceed Page Limits and Brief In Support. Attachment 8; the Affidavit stated the following facts:

1. Maxine Korman does state that the facts stated do support the MOTION FOR EXCEEDING PAGE LIMIT

2. Maxine Korman does state that the facts stated are admissible and relevant according to her understanding of the applicable **Montana Rules of Evidence** and the stated assertions and facts are necessary to support Kormans' case that they are the owners of Vested Water Rights and those rights vested before the June 6, 1972 Constitution and July 1, 1973 **WATER USE ACT**.
3. Maxine Korman does state that being prevented from presenting Kormans' case in its entirety by limiting the number of pages allowed in the **ORDER** will prejudice Kormans' case.
4. Maxine Korman states she attended the Sept. 12, 2006 Environmental Quality Council and entered oral testimony and turned in written testimony to be entered into the official record. Korman gave testimony that her understanding of the Act of 1866 and United States Court of Claims in Hage v. U.S. was that Hage owned vested water rights and the fee to the land those waters serviced. Korman questioned the Montana **WATER USE ACT** and adjudication not recognizing vested water rights.
5. Maxine Korman states she is in possession of a memorandum by Greg Petesh, **Legal Services Office** to Environmental Quality Council RE: Stock Water Claims Acquired Through Use of Federal Land. It is her understanding Mr. Petesh wrote in paragraph three that Nevada law provides that a vested water right becomes fixed and established either by actual diversion and application to beneficial use or by appropriation.
6. Maxine Korman states she is in possession of written Questions from the EQC. This was obtained from Legislative Services. Her understanding is page 5 reads Judge Loble added when the water court gets the final decree the rancher will get a certificate. Judge Loble believed water rights are already vested to some extent and when water rights are put to a beneficial use and the statutes have been complied with there is a certain vested property right. The adjudication process will define what that right is.
7. Maxine Korman states she is in possession of Draft Minutes Environmental Quality Council. This was obtained from Legislative Services. On page 4, Korman stated her understanding was ranchers with grazing allotments would not have a vested water right until adjudication process is complete. Judge Loble added when the water court gets the final decree the rancher will get a certificate. Judge Loble believed water rights are already vested to some extent and when water rights are put to a beneficial use and the statutes have been complied with, there is a certain vested property right. The adjudication process will define what that right is.

8. Maxine Korman states she is in possession of audio tape and dvd copies provided by legislative services of the EQC session. Maxine Korman's understanding of what Judge Loble said is 1) stockwater right is already vested to some extent. 2) Judge Loble said he is not sure of what the legal significance of the term vested is. 3) Judge Loble said in the Hage decision he was struck by Judge Smith of the Court of Claims that the water rights had become vested before the Nevada adjudication had been completed and he has the same question in his mind. It is Korman's understanding that Judge Loble said, on dvd 2, there is a question of what court to go to if there is a dispute about an Exempt right. It is Korman's understanding Judge Loble said you can't get into the Water Court with an Exempt right and you can't go to the District Court with an Exempt right.

9. Maxine Korman states that Chief Legal Counsel Petesh testimony to the EQC regarding the Hage decision and Montana water adjudication follows Judge Loble on dvd 1.

Maxine Korman's understanding of Mr. Petesh' response to a question from Co-Chair Harris is Mr. Petesh said we have no way of knowing the quantification of water because these claims weren't required to be filed. For those claims that were not filed, they are just out there. If the federal government decides to change the use of the land, we may not know an individual is losing a water right because it was never filed.

Korman's understanding of DNRC Chief Legal Counsel Tim Hall response is an Exempt right is not in the decree so it can't be administered and is an issue of remedy, tell this person which court to go to to solve the problem and adjudicate the water right. If you go to the Water Court, as you heard Judge Loble say today the Water Court will say we can't adjudicate it and District Court will say we can't adjudicate it so you have to go to the Water Court.

10. Maxine Korman then read into the record the findings from the United States Court of Claims in Hage v. U.S. that plaintiffs and their predecessors-in-interest acquired and maintained vested water rights in the following bodies of water; had title to the fee land where the following bodies of water were located. Korman also read into the record about the Act of 1866, cases about vested water rights and property citations about vested.

11. Maxine Korman does state that in February of 2007 she worked with Representative Rick Jore to carry HB 711, To Recognize Vested Water Rights on federal land. Maxine Korman does state that then Chief Legal Counsel Tim Hall faxed to the Korman home a 30 page "fix" that referred to those water rights as "existing."

Maxine Korman does state that her

understanding of Mr. Hall's comments to her in his phone calls that took place before the bill's hearing were that the water rights should be referred to as "existing" because that's what they are and that I didn't want "vested" because vested doesn't mean what I think it means and doesn't do what I think it does.

12. Maxine Korman does state that she gave oral testimony and submitted written testimony into the official record at the HB 711 bill hearing on February 19, 2007 in the HOUSE COMMITTEE ON NATURAL RESOURCES. The written testimony raised the issue of vested water rights, the United States Court of Claims in *Hage v. U.S.*, vested water rights were created by the Act of 1866, re-stated the language of the Act of 1866. Testimony also stated it was brought out during the Environmental Quality Council meeting that the Exempt right is outside of the water court and there is no court to go to. Korman also stated in testimony Wells Hutchins raised the issue in his work about the value of an adjudication where an unknown number of unquantified rights impair the value of an adjudication and that rights that were unrecorded would be denied legal protection later. Korman stated this raises a concern on our part that by "settling" for the "exempt" right we will have impaired or forfeited the protections of the vested water right. Korman noted in that testimony that earlier territorial documentation recognized vested rights and made allowance for vested rights to be brought before the court, current MCA VESTED WATER RIGHTS PRESERVED and Montana Water court cases 40-E and 41-G give recognition to vested water rights and state the water right vests with the appropriator. Language that is included on patents issued by the United States say: "subject to vested and accrued water rights..."

Korman concluded her testimony with "It appears to us that it is a valid question to ask if the state of Montana recognizes the vested water right? If so, it needs to be recognized in the water law and with that recognition is a method of making it public record. If the state does not recognize it, then the question we would have to ask is has there been a destruction of that right.

13. Maxine Korman does state that she has written documentation as well as dvds of the legislative session in her possession.

14. Maxine Korman does state that she appeared before the INTERIM WATER POLICY COMMITTEE ON March 12, 2008 and gave oral testimony before the committee and submitted written testimony into the official record and has dvds of that session in her possession. Korman testimony (dvd # 3) stated that since Sept. 12, 2006, they had been trying to find out why Montana, one

of the Prior Appropriation Doctrine states does not recognize nor make provision for adjudication of vested water rights. Korman stated the United States Fish & Wildlife Service website has a water rights definition page which says an appropriative right established by actual use of water prior to enactment of a State water permit system is known as vested. Korman testimony questioned if the **WATER USE ACT** impairs, diminishes, divests or destroys vested water rights. The water court judge is on record that exempt water rights don't show up on a decree and can't be brought into any court. Korman stated American Jurisprudence had this to say about exemption: "NOT A VESTED RIGHT, BUT ONE THE VALIDITY OF WHICH IS TO BE DETERMINED IN MOST INSTANCES BY THE CONDITIONS WHICH EXIST AT THE TIME WHEN THE PRIVILEGE IS CLAIMED. IT IS A RIGHT MOROVER, WHICH IS PURELY PERSONAL TO THE ONE IN WHOSE FAVOR IT EXISTS AND HE MAY WAIVE IT OR BE ESTOPPED TO ASSERT IT. Maxims in MCA apparent non-existence: that which does not appear to exist is to be regarded as if it did not exist.

Korman stated the necessity of the federal McCarran amendment so that federal reserved water rights could be adjudicated in state courts; until then those rights were not formally listed and were phantom. But it is apparently appropriate and acceptable to do that to Montana ranchers and their ownership of vested water rights. That seems to be a denial of due process and equal protection. Korman, in testimony further stated that DNRC Counsel Tim Hall is also on record saying that they have known for a long time that this law leaves a certain group of people without a court to go to. Both Mr. Hall and Director Sexton are in agricultural publications that are in the possession of Maxine Korman, stating that "these people need to find a court to go to." That would seem to be an admission that they have known that this law violates both the federal and state constitutions with respect to denial of due process and equal protection. The testimony also stated that when we tried to get the law fixed, Mr. Hall called repeatedly asking me to agree to call them existing because that is what they are and telling me I didn't want vested because it didn't mean what I thought it meant and didn't do what I thought it did.

Korman further gave testimony that she had been told by legislative policy analyst that BLM has reserved water rights when in fact they don't and Mr. Petesh had told her before the Taylor grazing act a rancher could acquire water rights on the public domain but after the Taylor grazing act they were a lessee – JUST LIKE ON STATE LANDS and couldn't have a water right. The Taylor grazing act has a savings provision with the exact language as the Act of 1866. State grant patents show the date of survey and show the clause SUBJECT TO VESTED AND ACCRUED WATER RIGHTS – Act of

1866. Korman stated they were not attempting to file as lessees but they were trying to file under the Prior Appropriation Doctrine. The statement concluded with: “ I would like to obtain the following information: an estimate of the number of claims that would be brought against the state for those parts of the **WATER USE ACT** that retroactively impair or destroy vested water rights, an estimate of the cost to the state in litigation expense and an estimate of payments the state will be making for violations of federal and state constitutionally secured rights.”

15. Maxine Korman does state that she submitted written comments into the official record and has the DVDs of the July 9, 2009 Water Policy Committee session in possession. Korman comments stated she enclosed a letter dated February 4, 2008 to DNRC Director Sexton, as well as a letter dated June 29, 2009. Korman states that she informed this committee as well that they had said on numerous occasions that Kormans were of the opinion this water law is actually and operates as a retroactive alteration, destruction of appropriative rights which are vested property protected under the federal Constitution. Korman states she submitted a copy of a 98 page affidavit that they had recorded with the Valley County Clerk and Recorder and had provided a copy to the DNRC Director. Korman states she also provided a copy of a letter that was given to Kormans by Larry Pippin that he received from DNRC. Korman stated she knew the same letter was received by Rose Stoneberg and Chet and Francine Cummings and noted the section; “Montana water law requires the impoundment or pit to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant” See enclosed memo dated December 21, 2007 from Tim Hall, Chief Legal Counsel. Korman included a copy of that memo. Korman stated they had recorded affidavits to show they own vested water rights and not existing.

Korman does state that her understanding of reviewing the #3 DVD that Senator Murphy indicates the committee did get the letter and he did discuss it.

16. Maxine Korman does state that from reviewing her emails and written notes that from about May 2011 through January 2012 she did participate in the telephone conferences with the Water Advisory Committee and emailed the Supplements that Kormans filed with their NOTICE OF OBJECTION AND REQUEST FOR HEARING so they would be posted on the Water Advisory Committee site. Maxine Korman does state that her recommendation was consistent that all the pre-existing water rights be recognized as vested water rights and provision be made they be filed as a DECLARATION OF VESTED WATER RIGHT. Part of Korman January 5, 2012 email to Judge Loble : “**Point One- this is prima facie evidence that the Water Use Act is in contradiction with the earlier case law,**

both Montana and United States Supreme Court.

The Appropriative right is a possessory interest elevated to the fee (fee is ownership of the inheritable right to use and is the highest form of ownership) and the Appropriative right is a vested property protected under the federal Constitution

Point Two- this is prima facie evidence that the Water Use Act is in constitutional law, a retroactive alteration of the nature of property. As a matter of constitutional law, a law that retroactively alters the nature of property, is a denial of due process, is an illegal law and cannot stand, can impose no burden, can impose no penalty, is null and void and is as if it had never been passed.

Point three- two of the multitude of findings with regard to vested rights and vested property are that a vested right cannot be taken without the owner's consent.

A vested right cannot be denied due process. Denying a vested water right legal protection as a vested water right, and/or denying a vested water right being presented as a vested water right (and exempt from adjudication requirements) are illegal. If the result is that the vested water right does not show up on a final decree when the law says that the only existing water right is listed on the final decree, then that is a denial of due process. If the vested water right cannot be defended in a court against an "adjudicated" water right, then that is a denial of due process. If by law, a vested water right cannot be proven to exist, be defended, be enforced, then that is a denial of due process.

Redefining a vested water right as an existing water right (existing water right being defined as a water right that is protected as it would have been protected before the water use act- (what does that even mean?) is an alteration of a vested property in a vested water right.

Either water rights that pre-date are a vested water right or they have, by law, been retroactively altered and are not vested water rights anymore. That would be an illegal law.

Respectfully,

Maxine Korman

17. Maxine Korman does state that she has **FINAL AGENDA WATER POLICY INTERIM COMMITTEE January 10-11, 2012** and dvds of that session. It is my understanding of watching the dvd # 2 that Judge Loble reviewed the options for correcting the Exempt water right; reviewed exempt and that some thought filing the Form 627 was proof of a vested water right and that it meant something legally. I understood the Judge to say the 627 was a form for the DNRC database for notice.

I understood Judge Loble to say if there's a dispute involving an Exempt right, it is certificated to the District Court and then back to the Water Court, however the Exempt right will not be in the final decree because it wasn't filed. Judge Loble presented the Korman recommendation of filing and adjudication of all vested claims. Judge Loble read to the committee the Korman email where it said **Either water rights that pre-date are a vested water right or they have, by law, been retroactively altered and are not vested water rights anymore. That would be an illegal law.**

18. Maxine Korman does state that she has **DRAFT AGENDA WATER POLICY INTERIM COMMITTEE March 6, 2012** and dvds of that session. Korman does understand Judge Loble to say that 85-2-270 the product of adjudication is enforceable decrees. Judge Loble informed the committee that he had gotten an email from Kormans with extensive questions; extensive unresolved questions of law. One of their questions is now in the Water Court and that is what the vested rights are, what that term means. Kormans asserted that water rights claimed by DNRC Trust Lands Division belong to them and Trust Lands said they did belong to Kormans. Kormans objected to the Masters Report and want the Water Court to recognize them as a vested water right and not an existing water right. Judge Loble stated he would research and write a decision on vested rights. It is Korman's understanding that Judge Loble also told the committee that the federal government had filed objections to Exempt water rights and the federal government was probably concerned about the effect of those Exempt water rights on its water rights.

19. Maxine Korman does state they recorded document # 136208MRE AFFIDAVIT OF VESTED WATER RIGHT, and 134496MRE, 133467MRE and 134497MRE, all AFFIDAVIT OF PUBLICATION VESTED WATER RIGHT in the Valley County Clerk and Recorder.

20. Maxine Korman recorded AFFIDAVIT Document #139854 in Valley County Clerk and Recorder. In this Affidavit, Maxine Korman stated the Prior Appropriation Doctrine is codified in Revised Statute 2339; they had tried to use DNRC forms to correct their ownership to vested water rights; pre-**WATER USE ACT 89-801 R.C.M.**, certain correspondence and documents we sent to DNRC Director Sexton, including earlier provision for **DECLARATION OF VESTED GROUNDWATER RIGHT**, reference to articles in which Director Sexton and DNRC Counsel Tim Hall stated exempt rights can't be brought into a court, that the law leaves a certain group of people without a court to go to and the law needs fixed before the adjudication is completed. It was stated that Director Sexton failed to acknowledge or refute the Korman assertion of a retroactive destruction of Prior Appropriation Doctrine and an application of the Riparian Doctrine. The Director failed to

acknowledge or refute the DNRC application of 85-2-306(6) was a benefit to Department of Interior. The Director failed to acknowledge and respond or refute Montana can violate the federal McCarran Amendment by having “exempt rights”

21. Maxine Korman has certified copy of Document # 140562 NOTICE recorded by Rose Stoneberg. The NOTICE has a letter directed to Ms. Stoneberg and is from the DNRC concerning application for Provisional Permit for Completed Stockwater Pit or Reservoir Form 605) The letter reads: Montana water law requires the impoundment or pit to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant (85-2-306(6)(d)MCA) See enclosed memo dated December 21, 2007 from Tim Hall, Chief Legal Counsel. The applications you submitted do not meet this statutory requirement and have been terminated. Maxine Korman asserts that is prima facie evidence of the retroactive destruction of Prior Appropriation Doctrine Vested and Accrued Water Rights under 85-2-306(6)(d) and is an application of the Riparian Doctrine.

23. Maxine Korman states that Kormans have provided significant information to legislative committees, DNRC Director and Water Policy Advisory Committee concerning the Prior Appropriation Doctrine, the term vested, Prior Appropriation case law and that their water rights that pre-date 1972 Constitution and **WATER USE ACT** are vested water rights. Mr. James DuBois is an attorney for the United States Department of Justice and participated as a member of the Water Policy Advisory Committee recommending legislative action regarding “Exempt” water rights. Mr. DuBois served as Counsel for the United States in Case 40M-A. Kormans provided much of the same legal history and research with the **NOTICE OF OBJECTION AND REQUEST FOR HEARING** forms and attached Supplements entered into the Water Court record. Kormans entered that as evidence submitted into the record without objection when the attorneys for the state failed to raise any objections to any of the facts stated in the objections and Supplement to the Trust Land Division claiming the water rights on Trust Lands. We had specifically asserted that we were the owners of the vested water rights under the Prior Appropriation Doctrine and that the state took title to the land subject to pre-existing vested water rights.

24. Maxine Korman states that this Affidavit in Support of Motion to Exceed Page Limits states facts and assertions that are necessary, relevant and admissible in proving Kormans’ assertions of ownership of Vested Water Rights that were pre-existing and pre-date the June 6, 1972 Constitution and

Montana's first water permitting law, the July 1, 1973 **WATER USE ACT**. The Case 40M-A motion to exceed page limits was denied; all supporting documents were returned.

12. Attachment 9 Sept. 7, 2012 email to Interim Water Policy Committee (and I also emailed to Judge Loble): good morning Mr. Kolman,

The interim water policy committee is meeting Sept. 10 and 11. Could I ask you to provide this email to the committee members?

I would like the committee to determine if there is any responsibility anywhere to determine if a law violates constitutional law principles.

For example, 1) does a law (Water Use Act) retroactively alter the vested nature of a vested water right? If so, is that a denial of due process? If so, is that illegal?

2) If a part of the Water Use Act (exempt right) retroactively altered a vested water right to a statutory privilege, without public disclosure, would that be illegal?

3) If the definition of "existing water right" creates an ambiguity, does that ambiguity work in favor of the state or in favor of the owner of vested water rights?

4) Under the Water USE Act, is a "water user" the same as "owner of a vested water right"?

5) If a part of the Water Use Act that only recognizes a "statement of claim" , rather than a " declaration of vested water right" to an "existing water right" ; where the definition provided in the Water Use Act for " existing water right" retroactively altered "vested water right" to a statutory privilege, without public disclosure, would that be illegal?

thank you,

Maxine Korman

From: bloble@mt.gov

To: kormanmax@hotmail.com; larberkcat@nemont.net; fahlgren.john@gmail.com;
drkerns@rbbmt.org; lmpippin@yahoo.com; 7mfe7195@mtintouch.net; rickjore@hotmail.com;
scassel@nemont.net; sierra@nemont.net; 4bard@mtintouch.net; wltaylor@mtintouch.net;
clardon@centurytel.net; bharris@midrivers.com; senatorbutcher@gmail.com;
senatorbrenden@gmail.com; wranglergallery@hotmail.com

Subject: RE: Water Adjudication Advisory Committee - August 10 Meeting - Exempt from Filing

Claims Proposal

Date: Fri, 10 Aug 2012 18:49:54 +0000

Mrs. Korman:

We cannot perform the legal research involved in your questions in the context of appearing before the Water Policy Committee, the EQC, or the Water Adjudication Advisory Committee.

To the extent some or all of your questions need to be answered to resolve the objections involved in the claims before Water Master Pepper, the Water Court will likely include some type of analysis in its decision on the relevant issues raised in those proceedings. In resolving issues of law in Water Court proceedings, we rely on the parties to raise issues relevant to the objections filed and to provide legal research supporting their contentions. If the briefs are not adequate, we sometimes ask for additional research or sometimes we supplement the parties' research with our own.

I have advised both the Water Policy Committee and the EQC that you have raised vested right issues in the Water Court. I recommended to both legislative committees that they should consider waiting until we have issued our decisions before addressing your questions in this legislative interim or the next legislative session. I do not know if they will accept my recommendation or not.

Bruce Loble

Montana Water Court

From: MAXINE KORMAN [mailto:kormanmax@hotmail.com]

Sent: Thursday, August 09, 2012 10:00 PM

To: Loble, Bruce; fran cummings; John Fahlgren; krayton kerns; Leann Pippin; Nancy,Michael Fred Ereaux; rick jore; scassel@nemont.net; Sierra Dawn Stoneberg Holt; Tom DePuydt; warren,lori taylor; clardon@centurytel.net; bharris@midrivers.com; senatorbutcher@gmail.com; senatorbrenden@gmail.com; wranglergallery@hotmail.com; MAXINE KORMAN

Subject: RE: Water Adjudication Advisory Committee - August 10 Meeting - Exempt from Filing Claims Proposal

Judge Loble,

I would like to ask either confirmation or correction to some questions with regard to "exempt" class water use right. I had emailed questions to you and the water policy committee before their last

meeting and I really think the committee should research and respond with a legal analysis to each question before proceeding further.

I would specifically ask for confirmation or correction as to whether any "exempt" water right is a "vested" water right at this point

I assume you are going to inform the interim water policy committee about the consolidation of cases into 40M-A to address the legal question of vested water rights. I would specifically ask for confirmation or correction that an exemption is not a vested right, but a privilege; purely personal to the one who asserts it and he may waive it or be barred from asserting it. This is what I found in American Jurisprudence legal encyclopedia constitutional law as well as the following.

I would specifically ask for confirmation or correction that a citizen has no vested rights in statutory privileges and exemptions; the exempt right is a statutory privilege

I would specifically ask for confirmation or correction that the right of exemption is not a vested right; a mere gratuity which may be withdrawn at the pleasure of the legislature

I would specifically ask confirmation or correction that the exemption is a right given by law; privilege; so long as the law exists by which the exemption is granted, the exemption should have the same protection

exemption is not a vested right but one the validity of which is to be determined by the conditions which exist at the time the privilege is claimed

Wells Hutchins Water Rights Laws in the Nineteen Western States that when the water title was in 89 R.C.M. revised codes of Montana that the only existing water rights would be listed on the final decree. Is that still accurate now that the water title is in 85 MCA Montana Code Annotated - the only existing water rights would be listed on the final decree?

If an exempt right is not listed then it does not exist?

thank you very much in advance for providing my earlier questions and these to the committee and having a legal research analysis to each question provided.

Maxine Korman

13. Case 40M-90, which was consolidated into Case 40M-A involved stock-water rights direct from source. We filed Objections to the state claiming the water rights; asserting that under the Prior Appropriation Doctrine we owned the direct from source vested stockwater rights and that the water rights were vested because they pre-dated the Water Use Act and originated on land that was then open, unreserved public domain prior to the state receiving land patent. Kormans entered evidence

submitted into the record without objection when the attorneys for the State-Trust Lands failed to raise any objections to any of the facts in Korman Objections and Supplement. Kormans had specifically asserted that they were the owners of the vested water rights under the Prior Appropriation Doctrine; the State took title to the land subject to vested and accrued water rights and the express language on the face of the certified trust-land patents entered as exhibits into evidence, without objection.

Kormans did object to the resulting Masters Report because the water rights should have been defined as a Vested Water Right. During the course of 40M-90, agency legal services attorneys argued that it was unknown if Montana had vested water rights- that it would have to be decided by the Montana Supreme Court. The attorneys threatened to take the water rights back if Kormans pursued the priority date and vested. Kormans did file Motion to Reconsider and brief in support, accompanied by affidavits anyway. The Motion to Reconsider was denied by the Water Court. Chief Water Judge McElyea's Order stated the court did not deal with definitions and what words mean; it adjudicated "Existing" water rights; Kormans could not ask for vested now, but perhaps in the future if the need arises.

14. Ron and I participated in the Charles M. Russell National Wildlife Refuge Water Compact negotiations. At the first session held at Fort Peck, Solicitor Chaffin, in front of the people in attendance, said he was familiar with my theory of vested water rights and would be interested in getting off in a corner afterward to discuss it. At the session held in Malta, Montana on January 31, 2013 Water Compact Attorney Chris Tweeten responded to my comments about vested water rights, that we don't even know if we have vested water rights in Montana. We have to have the Montana Supreme Court decide that.

15. I asked Senator Jennifer Fielder if she could ask Chief Water Judge McElyea questions when he appeared before the Water Policy Committee as he is required to by 85-2-281,MCA. The video of the morning Sept. 10,2013 session; available at <http://www.leg.mt.gov/css/committees/interim/2013-2014/Water-Policy/>; at the 12:03 mark, I understand Senator Fielder to ask Judge McElyea that she had a constituent ask if exempt rights perfected before the Water Use Act were vested and because vested, were exempt from adjudication requirements? At the 12:25 mark, I understand Chief Water Judge McElyea to answer the theory on exempt rights they are pre-73; hesitate to use the word vested to describe those rights; have and expect to have more cases in front of me that seek to apply that term in some way or another; don't want to legally opine on the term vested; general understanding exempt rights are property interest just like other rights are and are part of the adjudication process; that was

intent to bring them in with SB 355(end 13:07 mark). Chief Water Judge McEya earlier comment at 37:56 about the Water Advisory Committee needed time to address issues and at 52:00 the court defines property interests.

16. Attachment 11 Oct. 27, 2014 email to the Water Policy Committee and EQC regarding their proposed “fixing” the “exempt filing.” We attached our 8 page letter and the hearing transcript from Case 40M-A. We again asked about remedial legislation not being ambiguous by inserting “vested” and not being a retroactive alteration of Prior Appropriation Doctrine appropriative vested water rights that were vested under earlier law and case law, prior to being repealed by the Water Use Act. We pointed out that DNRC Chief Legal Counsel Tim Hall, Chief Water Judge Loble and McElyea refused to verify to these committees that these “exempt” rights were vested water rights. The letter at page 6 that change in mode, method, place, purpose is not a new appropriation. Page 7 asked if this committee has an obligation to determine if these “exempt pre-existing vested water rights”; including stockwater, although stockwater is not a recognized use in the treaty; that pre-date the 1909 International Boundary Water Treaty are protected from retroactive alteration, impairment, destruction or divestment when the State of Montana and United States of America comply with the terms of the Treaty? We asked if this committee has an obligation to determine if these “exempt pre-existing vested water rights” are compensable property in which the State of Montana would be required to pay owners of vested appropriative rights if they are not protected from retroactive alteration, impairment, destruction or divestment when the State of Montana and United States of America comply with the terms of the Treaty?

17. We included a Supplement with all of our Notices of Objection and Request For Hearing and also Counterobjections and included issues from the beginning and continued throughout Case 40M-A.

18. Attachment 12 United States Case 40M-A Sept. 18,2012 brief footnote at page 8 states: “The USA does not seek dismissal of any objections that are not based on these vested rights ownership claims.” Page 9 USA states: “As a matter of law, the Montana Water Court does not have jurisdiction over the Objectors’ “vested” private water rights claims which are not justiciable under the Water Use Act.

19. Affidavits of Ron Korman and Maxine Korman in Case 40M-A document interaction with DNRC that they cannot file for water rights on “state-lands” or “BLM lands”; that those water rights must be in the name of the state or BLM; then- DNRC Chief Legal Counsel Tim Hall that vested has no significance and cannot be found in the Montana Constitution where water is concerned; under 85-2-

From: Clarice Ryan

To: Mohr, Jason

Subject: Future of the Water Court Comments

Date: Monday, August 15, 2016 4:18:37 PM

TO: Members of the Water Policy Interim Committee:

Due to the apparent extent of proposed change in laws and legislative procedures and

policy, (90 pages) I urge special attention be given to property owners involved in food

production: crops and livestock raising. In times of drought we cannot allow claims of

environment, fish and wildlife, to take precedence over the needs of humans. We must

all share equally and fairly in times of shortage and need.

Maintaining high levels of In-stream flows draining fresh water to the salinity of the

oceans while depleting stored reserves is particularly impractical and damaging.

As an

example we cannot subject foreclosure on rural property owners active in an essential

industry, or obliteration of portions there-of, in preference to a single fish not proven to

be on the brink of extinction. Such claims should make sound scientific evidence a

requirement.

Care must be taken when developing changes in process and procedure to not negatively

impact critical water needs. The Montana legislative body must protect Montana citizens

and taxpayers against federal and tribal over-reach supported by complicit state policy

(likely illegal and unconstitutional). WPIC committee members must abide by Article IX

of the Mt. state constitution which states that all water within the state is the property

of the state for the use of its people. The "state" is responsible for its control and regulation.

It is quite apparent that the provision of a UMO board comprised primarily of tribal

officials is being authorized control over the allocation of water not only on the reservation but indirectly throughout the state. We must protect the functions and responsibility of a centralized water board with trained, qualified and unbiased lawyers.

We cannot allow erosion of authority to local levels with untrained, unknowledgeable

implementers or to tribal governments with duplicity of citizenship and objectives.

Please accept my comments intended to be constructive and in the best interests of

**all
Montanans.
Clarice Ryan
253 Pine Needle Lane
Bigfork, Montana 59911
406-837-6929**

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August 12, 2016

Water Policy Interim Committee
PO Box 201704
Helena, MT 59620

Via email only: jasonmohr@mt.gov

RE: Future of Water Court Comments and Comments on LCwp07 and LCwp20

Dear Chair Hamlett and Committee Members:

Thank you for the opportunity to comment on bill drafts currently under consideration by the Water Policy Interim Committee ("WPIC"). These comments are provided on behalf of the Montana Association of REALTORS® ("MAR") and the Montana Building Industry Association ("MBIA"), both of which have been active participants in the work of WPIC throughout the 2015-2016 interim. Water use, and particularly the permitting process for new water rights and changes to existing water rights, are of vital interest to MAR and MBIA, as members of both associations regularly avail themselves of such processes as they work to provide housing to all Montanans and help grow our state economically.

As you are aware, WPIC in particular and the legislature in general have been dealing for quite some time with the issue of exempt wells and especially what the appropriate definition of "combined appropriation" should be. As Chair Hamlett pointed out to the committee at a recent meeting, much of the current controversy over the meaning of "combined appropriation" resulted because the legislature has not definitively spoken on the issue, and even when the legislature did pass a statutory definition of "combined appropriation" in 2013 with SB 19, that effort was vetoed. WPIC now has before it two draft bills to address the meaning of "combined appropriation," LCwp07 and LCwp20. These two draft bills are, as the committee has recognized, fundamentally incompatible—either one moves forward or the other does, but it makes little sense to advance both. MAR and MBIA support LCwp07 as the codification of the long-standing definition of "combined appropriation" that was predictable and relatively easy to administer. The definition of "combined appropriation" suggested in LCwp20 perpetuates the same definition that was rejected by the Department of Natural Resources and Conservation ("DNRC") in 1993 as difficult to administer and requiring too much interpretation by the department. With the 2014 decision from Judge Sherlock temporarily re-instituting the language contained in LCwp20 and the resulting two multi-page guidance documents issued by DNRC to assist water users, the complications of administering the definition of "combined appropriation" contained in LCwp20 have once again revealed themselves.

In addition to draft bills addressing the definition of "combined appropriation," under the heading of "Future of the Water Court," WPIC is considering LCwp03, LCwp04, and LCwp11. MAR and MBIA wish to provide comment on LCwp03 and LCwp04. MAR also has relevant comment on LCwp11.

LCwp03 would definitively codify in statute that a change in irrigation method is not a change in a water right that requires a change authorization from DNRC. As the committee has heard from water right holders who have considered or actually gone through the change application process, although DNRC is not supposed to subject changes in irrigation method to analysis under the change process, when a change in irrigation method accompanies another change, such as a change in the place of use or point of diversion, which does require a change authorization, DNRC often takes that opportunity to evaluate consumptive and historical use as it relates to irrigation methods. This analysis may result in a permanent reduction in a water right.

MAR and MBIA are concerned with analysis under the change application process that may reduce a water right because MAR and MBIA members often work with existing water right holders to change water rights for mitigation purposes. When changes in irrigation methods occur, that may result in a water savings, and that savings may then be applied to mitigation purposes. However, existing water right holders are hesitant to change portions of their water rights to mitigation when they may face a reduction in the overall water right. MAR and MBIA are hopeful that the clarification provided by LCwp03 will alleviate that concern and open up more water rights for mitigation purposes.

LCwp04 applies to both the change and new permit application processes and would allow for private negotiations to allay concerns over potential adverse effects and provide a way for potentially affected existing water right holders to waive adverse effect analysis by DNRC. As the committee has heard in testimony, at present, there have been and continue to be situations where applicants and potentially affected parties have negotiated agreements to mitigate adverse effect, but DNRC has still denied permit applications based on the department's independent determination of adverse effect on those water rights holders who have reached negotiated settlements. LCwp04 provides a way to sidestep this unfortunate situation and clear a smoother path towards permitting while still providing adequate protections for existing water rights. One suggested change to LCwp04 concerns language on pages 14 and 46 requiring DNRC to "subsequently condition the water right to reflect the waived portion of the right affected by the exercise of that permit." This language implies that the existing water rights would be in some way permanently affected by a waiver applicable to a single application. MAR and MBIA suggest removing this language due to the potential impact on existing water rights.

Finally, MAR wishes to provide comment on LCwp11, which concerns responsibility for updates to water right ownership records and consequences for not doing so. MAR and its members realize the vital importance of an accurate database of water right ownership for all those involved in the sale and transfer of real property and associated water rights. As MAR has previously testified to the committee, MAR supports efforts to make that database as accurate as possible. However, MAR is concerned that the enforcement mechanism to ensure timely updates to ownership records provided for in LCwp11 is too extreme and requests that the committee consider another "hammer" other than termination of water rights.

Thank you again for the opportunity to provide comment on the bill drafts under consideration by WPIC. MAR and MBIA remain committed to working with committee members and other concerned parties to develop sound water policy for Montana that both protects existing users and facilitates the development for Montana's water resources to the benefit of all Montanans. If you require any further information on any of the comments provided herein, please do not hesitate to contact me. Otherwise, representatives of MAR and MBIA will attend the upcoming WPIC meeting and will be available to respond to questions.

Sincerely,



Abigail J. St. Lawrence

Cc (via email only): Amy Fisher, Montana Association of REALTORS®
Steve Snezek, Montana Building Industry Association

3053.001.01 - PL 234920

August 15, 2016

Senator Bradley Maxon Hamlett, Chair
Water Policy Interim Committee

Jason Mohr, WPIC Staff
Montana State Legislature
Water Policy Interim Committee
P.O. Box 201704
Helena, MT 59620-1704
Via e-mail to jasonmohr@mt.gov

Re: Trout Unlimited Comments on Future of the Water Court Study and draft bills

Dear Mr. Chairman:

Trout Unlimited (TU) has reviewed the Water Policy Interim Committee's (WPIC) draft study on the Future of the Water Court, and the associated draft bills. We applaud the WPIC taking a forward-looking approach to water management in Montana at the conclusion of the state-wide adjudication. The draft study on the Future of the Water Court does a commendable job of describing the history and current structure of water management between the Water Court and the Montana Department of Natural Resources and Conservation (DNRC).

TU is a national coldwater conservation organization comprised of 140,000 member-conservationists committed to protecting, restoring, and sustaining coldwater fisheries. In Montana, Montana TU and its 13 chapters represent approximately 4,200 anglers dedicated to the conservation of Montana's wild and native trout. TU has been active in partnerships with ranchers to restore flows to dewatered streams and rivers, and has been an active voice in Montana water policy. Looking to the role of the Water Court post-adjudication, TU has the following comments.

1. Maintain the Expertise of the Water Court Staff Post-Adjudication.

Certainly, everyone would agree that the expertise of the Water Court's staff should be incorporated into post-adjudication water management. The State of Montana has invested years of funding into developing staff with this expertise, and it only makes sense to capitalize on the staff's expertise in water rights analysis and their familiarity with Montana river basins. The Water Court as it exists now, however, does not need to continue in order to retain the expertise of the Water Court staff. The staff can become an arm or part of the DNRC, be re-organized into a part of a State Engineer's Office, or become Special Masters supporting Montana's district courts—all are options without continuing the institution of the Water Court per se. This means

that the State of Montana's interest in maintaining the expertise of the Water Court staff does not require a permanent role for a special-jurisdiction Water Court post-adjudication.

2. Examine Alternative Scenarios for Post-Adjudication Water Management Before Adding Post-Adjudication Jurisdiction to the Water Court.

The draft study on the Future of the Water Court (“draft study”) did a commendable job explaining the current administrative structures for water management in Montana. What the draft study did not analyze was different, future water management alternatives or scenarios for when Montana has completed the adjudication. Just in the Northern Rockies, Montana has a range of alternatives among our neighboring states:

- **Colorado—is a judicial model**, consistent with expanding post-adjudication jurisdiction of the Water Court as several of the draft WPIC bills do. The up-side of the Colorado system is that it keeps more water lawyers busy than in the rest of the West combined—good news for future water lawyers in Montana—the downside is that changes in water use, water right transactions, and water administration are highly contentious, very expensive, slow, and has an inability to respond quickly to changing circumstances.
- **Wyoming and Utah—have State Engineers’ Offices**, which function as hybrids between an administrative agency and a judicial model. Wyoming and Utah also have different administrative structures around the Office of the State Engineer, demonstrating the range of potential decision-making structures.
- **Idaho—is an administrative example**, where the state agency, Idaho Department of Water Resources, is mostly responsible for water management in the state with some oversight responsibilities delegated to the Idaho Water Resource Board, who are appointed by the Idaho Governor for 4-year terms.

Before making legislative changes to add post-adjudication jurisdiction to the Water Court, it would make sense to first study different models for post-adjudication water administration and then decide in what direction Montana should head.

3. Draft Bills LCwp06 and LCwp05—Creating Post-Adjudication Water Court Jurisdiction is Not Necessary, But Could Amend MCA § 85-2-406.

LCwp06, is a draft bill that expands the Water Court's jurisdiction beyond adjudication matters—and therefore requires state funding of the Water Court beyond the end of the adjudication—without a tie to any demonstration of need in the draft study. The draft study does not identify a strong public interest or interest in state water management that is addressed by funding the Water Court beyond the end of the adjudication. While Montana may ultimately choose to maintain a special-jurisdiction water court, the draft study did not analyze the pro's

and con's of this decision, nor look to Colorado's relevant experience in creating courts with special water jurisdiction.

In addition, LCwp06's expansion of Water Court jurisdiction does not tie into or rely on the Water Court's areas of expertise. LCwp06's expands Water Court jurisdiction by allowing a petitioner to choose either the Water Court or a state district court for review of a contested case hearing arising from a decision by the DNRC on a permit or water right change application. *See*, LCwp06's changes to MCA §§ 2-4-702 and 85-2-310. The Water Court's adjudication does not consider changes-in-use of water rights, new groundwater pumping applications, water right transfers, or new surface water right applications. The Water Court does not have expertise in these matters. Moreover, in the course of the adjudication, the Water Court does not examine water right claims for volume, let alone the often-contentious issues of historic consumptive use, current consumptive use, return flow regime, deficit irrigation, and partial irrigation. The Water Court does not have expertise in these matters. These are the matters that would be the subject of contested case hearings arising from a DNRC decision. Finally, the Water Court does not have the expertise of the state district courts in applying the required standard of review under the Montana Administrative Procedures Act, (MAPA), which state district courts routinely apply to their review of agency decision-making across many different agencies. Although counter-intuitive, the Water Court actually has less relevant experience than the state district courts in a review of a DNRC contested case hearing.

For these reasons, TU believes that LCwp06 is not a necessary piece of legislation at this time.

If the WPIC does nevertheless want to create jurisdiction for the Water Court post-adjudication at this time, changes to MCA § 85-2-406 instead would draw on the expertise of the Water Court. For example, MCA § 85-2-406 could be amended to allow the Water Court to be an alternative forum for water distribution disputes among water users, complementing the role currently played by the state district courts. The Water Court does have expertise in analyzing the historic use of existing water rights, and has staff familiar with the water rights across a particular river basin. In addition, post-adjudication, Water Court staff could become Special Masters to the existing district courts, so an expansion of Water Court jurisdiction through an amendment to MCA § 85-2-406 would not necessarily require state funding of the Water Court indefinitely.

Similarly, LCwp05 is not a necessary bill at this time for the same reasons detailed above for LCwp06. However, if LCwp06 is changed to amend MCA § 85-2-406, allowing the Water Court a more primary role in resolving water right disputes, then LCwp05 could similarly allow a water master to be appointed by a district court to serve as a special master for actions brought pursuant to MCA § 85-2-406. If amended in this way, LCwp05 would not make reference to MCA § 85-2-310, nor amend MCA § 85-2-310 ("Action on application for permit or change in appropriation right" after a DNRC decision).

4. Draft Bills LCwp03—Changes in Appropriation Rights—A Good Clarification.

Draft bill LCwp03 clarifies that a change in an appropriative water right does not include “a change in water use related to the method of irrigation,” by adding a definitional section to MCA § 85-2-102.

This is a good clarification from the draft bill language formerly considered by the WPIC in its July 2016 meeting. This new definitional section should help clarify that a switch from flood to pivot irrigation, for example, without changing the irrigation footprint or point of diversion, does not require a change in use application.

The amendment to MCA § 85-2-402(1)(c) in draft bill LCwp03 should further clarify the change application process. The proposed amendment states:

“For the purposes of this part, the department shall consider only current water use when analyzing the consumptive use portion of any appropriation right.”

This amendment is a good simplification of the change process, so that applicants do not have to provide affidavits from increasingly-difficult-to-find people who can describe in detail irrigation practices from 40, 50, or 60 years ago on a particular piece of ground.

We would recommend additional clarification in the draft bill of what “current water use” means with regard to calculation of consumptive use. An irrigator would likely not want to be limited to just one, recent year because of the variability in water supply, and the risk of having consumptive use be calculated under dry-year conditions.

a) Define “Current Water Use” As a 10-year Window.

A ten-year window within which to analyze “current water use” would help even out the differences in variable water supply, and serve as a better estimate of consumptive use under current irrigation practices. In this case, exceptions under which the ten-year use would be tolled would be necessary to preserve the state’s strong interest in drought response plans and other land conservation practices.

b) Exceptions to Toll the 10-Year Consumptive Use.

TU would recommend that draft bill LCwp03 set out the conditions under which the ten-year consumptive use would be tolled. This would mean that certain drought or atypical water years would be excluded to prevent diminishment of a water right, so that decreased water use in those years would not lower their consumptive use calculation. Below is suggested bill draft language:

“Current water use means typical maximum consumptive use during a ten-year period. The non-use or decrease in use of water under a water right claim during this ten-year period is exempt from the calculation of current water use if the non-use or decrease in water use is a result of:

- (a) A dedication of all or a portion of the water right claim to instream flow;

- (b) The voluntary participation in a drought response plan;
- (c) Participation in a water-sharing agreement;
- (d) Participation in a flow restoration or flow protection agreement;
- (e) Enrollment of irrigated acres in a land fallowing agreement with a federal, state, or local government entity; or,
- (f) The land on which the water from the water right claim has been historically applied is enrolled in a federal land conservation program.”

5. LCwp04—Adverse Effects Waiver—Needs Alternative Approach Such As Provided by LCwp44.

Draft bill LCwp04 provides a mechanism for an appropriator to waive an adverse effect on its water right claim or reservation, and thereby exclude that portion of adverse impact in the DNRC’s adverse effects analysis. The waiver applies across the DNRC’s requirements to analyze adverse effects, such as in a new permit application under MCA § 85-2-311 or in a change-in-use application under MCA § 85-2-402.

Draft bill LCwp04 amends MCA § 85-2-311 to allow an adverse effects waiver as follows:

(9) For purposes of this section, an appropriation may file a written waiver with the department, waiving any adverse effects on an existing water right, certificate, permit, or state water reservation resulting from an application for a permit. The department shall subsequently condition the water right to reflect the waived portion of the right affected by the exercise of that permit. The department may use the waived portion of an appropriator's existing water right affected by the exercise of the permit for determinations of physical and legal availability under subsection (1)(a)."

Because the waiver acts broadly to completely exclude all adverse effects on an existing water right arising from a permit application or application for a change-in-use, LCwp04 requires that the water right holder filing the written waiver with the DNRC to condition their water right “to reflect the waived portion of the right,” which means for all practical purposes subtracting the “waived portion of the right” from the flow and volume of their water right claim, thus reducing their water right and diminishing its priority .

The Department of Fish, Wildlife, and Parks (FWP), however, cannot legally enter into such a waiver agreement with an applicant for a permit or change. FWP is required to maintain and protect its instream flow reservations and Murphy Rights for the benefit of Montana’s fisheries. FWP cannot simultaneously uphold this mandatory duty and enter into agreements to subtract water from its Murphy Rights and instream reservations. The logical conclusion of such a course of action would be that once FWP entered into many years of waiver agreements, FWP would not have any water left to protect instream from junior appropriators through its

compromised Murphy Rights or instream reservations. In addition, such a requirement for subordinating a senior water right could be perceived as an unconstitutional diminishment of a water right, or a readjudication of a water right outside the proper venue of the Water Court.

There is an alternative to LCwp04's approach of a blanket adverse effects waiver. An alternative would be to require that any adverse effects due to a surface stream depletion be mitigated. In other words, require that the volume of water remain the same in a basin before and after a new permit or water right change. Then an objection as to local effects due to the timing or location of the adverse impact could be waived. This limited waiver would not require the subordination or conditioning of a water right "to reflect the waived portion of the right," as would be required under LCwp04. Rather, by allowing only a limited waiver for the local effects due to the timing or the location of the adverse impact, alternatives to alleviate those localized impacts could be developed. In the case of FWP's instream reservations and Murphy Rights, for example, such alternatives might include such actions as riparian wetland restoration to increase bank-full water storage for release of water later in the irrigation season or during fall and winter, or restoring channel structure to minimize the impact of decreased flow during a particular, limited time of year.

This more flexible approach is provided by LCwp44. This bill draft relies on case-by-case determinations of conditions under which a new permit or change can be valid, where the water right holder works out those conditions with the DNRC and the permit or change applicant. The approach in LCwp44 provides a more workable approach because it provides the flexibility to work out case-by-case appropriate solutions that respect property rights in water while incentivizing localized water balance.

Please don't hesitate to contact me at lziemer@tu.org or (406) 522-7695 if I can answer any questions or otherwise clarify Trout Unlimited's comments.

Yours truly,



Laura Ziemer

From: Weiner, Jay
To: kathleenhd61@bresnan.net
Cc: cvvincent@hotmail.com; Mohr, Jason
Subject: Comments on the draft Considerations for the Future of Water Rights Report
Date: Sunday, July 31, 2016 6:21:44 PM

Hi Kathleen—

At the close of the last WPIC meeting you asked me to take a careful look at the draft Considerations for the Future of Water Rights report with an eye toward preparing some comments on it for your and the Committee's consideration. I appreciate the invitation and have tried to do so diligently.

I think the draft report really reflects the challenges the Committee has faced this interim, as it quickly discovered that the seemingly single question "what is the future of the Water Court?" quickly branches off into a host of discrete yet fundamentally interrelated questions. (How could the change process work better? How can the water commissioner process be improved? What's the right balance between the duties of the district courts and those of the Water Court? How does the Water Court-run adjudication synch up with the DNRC permit and change process?) The draft report, I think, could benefit from more context about how Montana law evolved to bring us to this point (an evolution the Legislature has been the driving force behind, as with the fundamental distinction between the exclusive authority of the Water Court to adjudicate pre-7/1/1973 water rights and that of the DNRC to be the gatekeeper of all post-6/20/1973 new uses and changes). This is certainly so if the report is intended to be a document on which future Legislatures or interim committees choose to build.

Alternately, if the Committee's intent is for the report to be more of summation of the different topics the Committee canvassed, perhaps with some findings and recommendations concerning whatever bill drafts the Committee chooses to advance as committee bills for the 2017 session, then the report could profitably be scaled back simply to do those things without trying to characterize Montana water law more broadly, something which I think should be done with a greater degree of detail and precision than the report currently contains. The Report also has some basic factual errors in it. Montana has recognized the doctrine of appropriation since at least the territorial code of 1885, not only since 1921, as the report states on pages 4 and 7. Saying that the "first real effort" after 1939 to investigate and adjudicate the state's waters didn't occur until the 1972 constitution – also on page 7 – ignores, among other things, the extensive Water Resources Survey process that was undertaken at significant legislatively-funded expense from the 1950s through the early 1970s.

The section dealing with water rights compacts on page 10 is also not quite right. The Water Court's task is to decree the water rights recognized in compacts, a process of which the resolution of objections is a part. Also, the first Water Court approval of a compact was of the Northern Cheyenne Tribe Compact in 1995. The Fort Peck Compact, while ratified by the Legislature in 1985, was only finally decreed by the Water Court in 2001. (The Rocky Boys Compact was finally decreed in 2002 and the Crow Tribe Compact in 2015.) Too, the C.M. Russell Wildlife Refuge compact is the only federal compact still pending at the Court (the rest having been approved). And none of the three other Indian compacts (Blackfeet, Ft. Belknap, CSKT) are pending at the Water Court yet as they have not been finally approved by Congress or the respective tribes.

In addition, water rights have always been a source of controversy and litigation in Montana – Brian Shovers wrote a great article about this ("Divisions, Ditches, and District Courts: Montana's Struggle to Allocate Water") in the Spring 2005 edition of the Montana historical society magazine– so the language on page 4 about how "[d]efending a water right that may have been previously done with something as simple as a shovel and (hopefully) a handshake..." just doesn't accurately reflect Montana history. Ultimately, though, rather than flyspecking the draft report, I would instead suggest that the most valuable thing that could come out of this interim is a finding by the Committee that discrete questions about individual aspects of Montana's water rights adjudication, administration and enforcement processes very quickly get bound up with the overarching question of how Montana wants to handle the administration and enforcement of water rights when the adjudication is completed. As it stands now, the statutory scheme the Legislature has created envisions enforcement and administrative authority to be divided between the district courts and the DNRC, with minimal if any continued role for the Water Court. Obviously, no one wants to lose the institutional knowledge and capacity the Water Court has built up during the course of the adjudication. But at the same time, that knowledge and capacity is about the *adjudication* (and to a lesser extent the *enforcement*) of water rights, which is significantly different than the institutional knowledge and capacity that has built up at DNRC in the course of that agency carrying out its legislatively-assigned tasks. The Committee has heard extensively this interim expressions of both dissatisfaction and praise with how aspects of the current process work. But because

it's such an intertwined system, pulling on one strand of it quickly entangles the others. Which is why I would also encourage the Committee, building on the finding I suggested at the start of the last paragraph, to make the recommendation to the 2017 Legislature to enact a funded study bill providing for a thorough look at how Montana's water rights system arrived at where we are and, after extensive engagement with a broad cross section of water users and other interested parties – as well as the governmental institutions with roles to play in our water rights system (including but not necessarily limited to the Legislature, the Water Court, interested district court judges, the DNRC and the Attorney General's Office) - to propose some possible alternatives for where Montana might choose to go in the future.

The 1988 Evaluation of Montana's Water Rights Adjudication Process (more commonly known as the "Ross Report") is an excellent example of the caliber of document that I would hope could come out of this study bill. A Son-of-Ross-Report would provide future Legislatures, interim committees and the entire water use community with a strong foundation to engage – well in advance of the projected 2028 completion of the adjudication – in the important conversation about the future direction of Montana's water rights system that, as this interim has highlighted, is so necessary as we plan for the postadjudication future.

Thanks again for the opportunity to weigh in on this. I am going to be on vacation and out of the country until the eve of WPIC's end-of-August meeting. But I will be at that meeting and look forward to participating in it however may be most helpful to you and the Committee as a whole.

Sincerely,

Jay Weiner

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MONTANA LAND AND WATER ALLIANCE, INC.

**P.O. Box 1061
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August 28, 2016

Senator Bradley Hamlett, Chairman
Water Policy Interim Committee
P.O. Box 201704
Helena, MT 59620-1704

Dear Chairman Hamlett:

The Montana Land and Water Alliance (Alliance) offers the following comments and suggestions to the Committee's *Considerations for the Future of the Water Court* and related proposed legislation under consideration for the August 29 and 30 meeting of the Water Policy Interim Committee (WPIC)

1. Report on the Future of the Water Court

We applaud the WPIC study looking at the future of the Montana Water Court pending the completion of the Montana General Stream Adjudication in 2028. We raise the following issues for your further consideration:

- Election of Water Court Judges: The Committee addressed whether unelected Water Court Judges could be allowed to expand their jurisdiction, and specifically whether the Montana Constitution prohibits the legislature from expanding the Water Court's jurisdiction. The WPIC legal staff concluded that the legislature did have the authority to expand the jurisdiction of Water Court judges based in part on the fact that there have been no successful legal challenges to the judicial structure for the adjudication and administration of water rights.
 - Comment: *The Alliance suggests that this "finding" be revisited and reviewed in light of Article III Section 1 of Montana's Constitution, the Separation of Powers.* Section 4 of Article III states that the District Court --with elected judges--shall have "such additional jurisdiction as may be delegated by the laws of the United States and the State". While the legislature may establish courts and determine qualifications for judges, there is no provision in Montana's constitution for the legislature to determine whether an unelected judge can expand its jurisdiction. *The Alliance suggests that the expansion of jurisdiction is a matter belonging to the Montana Supreme Court, not the legislature.* In any case, just because there has not been a 'successful legal challenge' to the structure for adjudication and administration of water rights in Montana is not a constitutional reason for the legislature's action.

2. Related Proposed Legislation

The Alliance has specific comments to proposed legislation LCwp04 as follows.

- LCWP04, Limit Analysis of Adverse Effect of Water Right Permit or Change: Section I. (9). LCWP04 intends to amend 85-2-306. Part 9 of Section 1 suggests that provisions of this title do not apply within the exterior boundaries of the Flathead Indian Reservation. Likewise Section 2 provides an exception to permit requirements proposed in the bill within the exterior boundaries of the Flathead Indian Reservation. Section 4 of LCWP04 provides that the state or federal government can apply for reservation of state waters, addresses limits to the reservation of waters in any stream course, and part 5(b) of this section limits instream flow reservations to 50% of the average annual flow on record. In Section 14 of LCWP04, which addresses temporary leases of state water, part 17 also creates an exception for applicability of state law within the exterior boundaries of the Flathead Indian Reservation
 - Comment on Section 1 and 2: *Because more than 23,000 non-Indians live within the exterior boundaries of the Flathead Indian Reservation, the Alliance suggests that Section 1(9) and 2(4) will draw legal and constitutional challenges under various provisions of the Montana Constitution, and recommends that these provisions be struck from the proposed bill.* In addition, on its face the administrative provisions of MCA 85-20-1902 are *not enforceable* until the Compact is approved by Congress, the Montana Water Court, and the Tribes. That approval is likely years away and there is no guarantee that what returns from Congress will be anything like the administrative provisions 85-20-1902. Finally, there are provisions within the administrative portions of 85-20-1902 that, if approved by Congress and the Water Court which already exempt the Flathead Indian Reservation from all current and future provisions of Montana water law.
 - Comment on Section 4: The state of Montana has already proposed instream flow reservations in the CSKT Compact for streams off the Flathead Indian Reservation that are more than the 50% limit, for example, in the Kootenai and Swan Rivers. *The Alliance suggests that the 50% limitation be applicable only where the Department of Natural Resources and Conservation can prove no adverse impact to current water users or future uses in the watershed in accordance with the Private Property Protection Act, relevant provisions of the Montana Environmental Quality Act, and required NEPA/MEPA studies before the commencement of implementation of the CSKT Compact.*
 - Comment on Section 14. *Because the provisions of the CSKT Compact that permit the leasing of water are not enforceable until the Compact has received Congressional, Water Court, and Tribal approval, the Alliance suggests that this provision be struck from the proposed bill.* As stated in our comments to section 1 and 2 of this bill above, there is already a provision in the CSKT Compact that disallows the application of current and future revisions of Montana water law to the waters governed under the CSKT Compact.

In general, we would advise the WPIC to eliminate any provision that specifically applies to the proposed and congressionally non-ratified CSKT Compact. Not only will these provisions jeopardize the passage of this legislation because of the likely constitutional and legal challenges, but are patently irrelevant to state law at this time. Moreover, if the Compact is ratified in its present form by Congress and the Montana Water Court, there are already provisions in MCA 85-20-1920 that exempt the CSKT from the application of all Montana water laws, present or future.

Finally, we note for the record that the WPIC's report fails to acknowledge that the CSKT Compact or SB 262 is currently in litigation with a direct challenge to the constitutionality of the legislature's vote. As such, no legislation exempting the waters, lands, or water rights of the CSKT Compact is relevant at this time.

Sincerely,

/s/ Catherine Vandemoer

Catherine Vandemoer, Ph.D.
Chair, Montana Land and Water Alliance
Polson, MT