

## Water Policy Interim Committee Testimony

I would like to thank the Chairman of the Water Policy Interim Committee and members for allowing me to speak regarding the study presented by the Land Use and Natural Resources Clinic in the Water Rights in Montana report. I am excited that this committee, participating agencies, water court and the judicial system are evaluating the issues as outlined by the Clinic. My testimony today will largely address the points that were outlined in Parts 1 and 2 of the report.

My name is Tim Schaff. My wife and I live on a 150 acre irrigated farm in south central Montana located in Fishtail or 21 miles south of Columbus. My folks purchased the property in 1954 and my wife and I purchased the farm from my folks in 1983. I am a retired Agriculture Education instructor of 30 years and also worked at the Stillwater Mine as an underground operator and as an environmental specialist responsible for water and water quality compliance on the mine property. I was also instrumental in helping start the Stillwater Watershed Council with a focus on noxious

weeds, water and water quality, forestry and education. The organization now has approximately 300 members.

Our ditch and water right legal issue began in October of 2004 when a property owner on a small subdivision to our south, whom is an out of state oil lawyer, began having a large pond built in the middle of an Unnamed Tributary which served as a delivery ditch for our historic domestic, livestock, irrigation and waste/seepage water rights. The individual did not have a water right on the Unnamed Tributary nor received permission from us to interfere with the ditch and or our water rights. The individual had applied for a preliminary surface and groundwater permits from the DNRC during the construction process. Our senior water rights were supported with 1894 priority dates.

For the past eleven years our legal case has gone in many, many different directions. For the first four years it was with the DNRC and Army Corp of Engineers. The next three years it was certifying our water rights with the Montana Water Court. Since 2010 the case has been in and out of the District Court at least six times. Although, the case might be getting closer to some

resolution in District Court there is still a strong possibility that it will be appealed to the Supreme Court. We are looking at probably another two to three years before the case is finally resolved. As you might imagine our legal fees and appropriate expert hydrologist /engineering costs will be approaching \$300,000.

My purpose today is not to complain about what has happened in our case, not to point fingers as to what should have been or could have been but to give you the committee a real sense of how water and ditch right legal issues are working “on the ground”, in our case and one other I am familiar with. Agencies and the legal system have been an avenue in helping resolve our case but as one of the statements stated in the report “Looking toward the future, our courts and agencies seek to insure that the legal process for water rights remain relevant and are proficient, fair, effective, and efficient”. I would venture to say this has not been the case in our situation. It is my hope with testimony and whatever help I can provide, our story will give some insight in helping this committee achieving your ultimate goals.

In order to be specific and not go into lengthy details of what has happened to us over the past eleven years, I will address key issues that caused hurdles which I hope will be addressed in the committee's final recommendation.

First: There is the issue in which ditch right and water rights are treated separately. Montana State Statute: 70-17-112 states "you cannot change alter or impede an irrigation ditch without written consent. Attorney fees and costs can be awarded". A simple rule but there was no enforcement in the early stages of our case. DNRC had no enforcement authority, therefore just dealt with the issues pertaining to the fact "if we were getting water". In the first four years a lot of time and money was spent but not one issue was resolved. Ditch rights and Water Right Issues Need to Be Under the same authoritative branch of enforcement!!! The Clinic's report briefly mentioned the possibility of entwined conflicts between ditch right and water rights. This is one that is a real big issue "out on the ground".

Secondly: The education of ditch and water right users is important to help them know and understand how and

where to find important information. It was a positive step when the DNRC and Montana Water Court coordinated efforts to house the water right abstracts and history in the present centralized data base. Accurately finding our information and history was a problem in 2005. Making the information available electronically has definitely improved access to important information over the past ten years. A continued educational outreach program will help resolve many issues before they reach the degree which we found ourselves. I personally have been very active in chairing educational forums on water rights and related issues in our Stillwater Watershed over the past five years in helping educate the public. I am encouraged with the Clinic's awareness, as stated in the report, to an educational approach in helping inform the public and making critical information more readily available. A "one-stop-shop" for ascertaining water right information is important for the future and I would add; "to provide a list of competent resource information such as lawyers, hydrologists, and engineers whom are very knowledgeable on Montana ditch and water rights". A lot of time and money is wasted by landowners who do

not know where to look for qualified resources and information.

Thirdly: To coordinate responsibility and efforts between the DNRC and Water Court in making the process of clarifying and amending water abstracts more efficient. In our case we got very little accomplished in dealing with the DNRC for the first four years. There needs to be some “streamlining of authority” in resolving unlawful use of, or impeding on ditch and senior water rights. It seems our first seven years could have been resolved into two years having saved thousands of dollars in repeated discovery costs and the fact that DNRC had no jurisdiction over ditches. In addition, for whatever reason DNRC is unable to impose authoritative action when necessary. Streamlining some authority between DNRC, Water Court and District Court could resolve many minor issues between landowners before they get out of hand. This was pretty evident in our case.

Fourthly: The defendant in our case challenged our senior water rights; therefore they had to be certified by the Montana Water Court by a ruling from the District Court. After three years of further discovery and two

days of trial, our water rights were certified in 2010. From that point in time the case went back to District Court for the past five years. At the time the Chief Water Judge investigated our water rights; he had personally walked and evaluated the points of interest. If the Water Judge would have had the judicial authority, he could have made a legal decision saving yet another four to five years of time and thousands of dollars in costs. . It is important to 'stream line' the involvement of all agencies and judicial branches so the process is fair, effective and efficient. Yes, as mentioned in the report, "the phenomenon of being caught in a jurisdictional seam" is real "out on the ground".

Lastly: Even though our legal case, which is still in District Court, is seeing some light at the end of the tunnel; the case is somewhat dealing with legal conflicts removed from the ditch and water rights which were the main issues in the beginning. It is not that I do not think District Judges are not competent, I just do not think, on the most part, they understand ditch and water right issues. Additionally, given District Judges caseloads, they do not have the time to effectively hear and understand

the real issues. This then makes the legal process less effective and much more costly and time wasting.

In Conclusion: Subdivisions in Montana are rapidly taking what was once primarily agriculture land and turning into smaller acreages with homes. In so doing historical ditches and senior water rights are being challenged and impeded upon. The development of ponds appears to be the status quo. Within two miles of our property there are nearly 20 small ponds and I know of only two which support a fishery yet all support mosquitos and loose a great deal of water to evaporation. The future for a comprehensive look at enforcing historical ditches and protecting senior water rights is ever more important.

After reading Part 3 of the commissioned Report, I would support the findings by the Clinic as recommended. Each of the proposed suggestions is with merit and would have made our case more effective and efficient. I would ask that this committee seriously consider including ditch rights as a part of this process. Otherwise, in some cases such as ours, an effective and efficient resolution will be difficult.

Thank you for the opportunity to present this testimony.  
If I can be of any further assistance as this process moves  
forward, I would be more than happy to assist.

Are there any questions???

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