Subject: FW: Water Adj Advisory Committee Minutes and Executive Summary Option 6

From: MAXINE KORMAN [mailto:kormanmax@hotmail.com]
Sent: Thursday, January 05, 2012 7:58 PM
To: Loble, Bruce; senatorbrenden@gmail.com; iamlost@nemont.net; kellyo@ttc-cmc.net; scassel@nemont.net; spurringx2@yahoo.com; editor@glasgowcourier.com; Carolyn Dufurrena; dave pippin; Diane Rice; Erin Slivka; fran cummings; Jeff Pattison; John Fahlgren; krayton kerns; LaMae; Leann Pippin; lyle ophus; Mike & Sue; Nancy,Michael Fred Ereaux; Ramona Morrison; rick jore; Rocky Crossing Ranch/ Sam J.; Sierra Dawn Stoneberg Holt; Tom DePuydt; wagrep; warren,lori taylor; MAXINE KORMAN; Kolman, Joe
Subject: FW: Water Adj Advisory Committee Minutes and Executive Summary Option 6

Judge Loble,
I appreciate your request that if I needed to re-state Option 6, that I be brief- 5-6 sentences. I will apologize in advance for not being able to be brief. Obviously, I think that the information that I try to bring together must be thorough and I don't want to err and leave out material facts. It is still my firm opinion that the Water Use Act is flawed and it is necessary that all the points that I state be allowed to be presented in order to correct the problem.
I would appreciate having this entire email go to all the members of the water policy committee and I thank you in advance for also sending it to the adjudication advisory committee members.
Your summary stated:
6) Mandatory Refiling and Re-Adjudication of All Vested Claims Option
all water right claimants with pre July 1973 vested water rights would need to file a Declaration of Vested Water Right

1. as stated earlier Montana is a Prior Appropriation Doctrine state and that doctrine in part says "vested and accrued water right" and also "according to local law, custom and decision of courts."
2.the 1884 Constitution declared the waters to be publici juris-open to appropriation by all
3. section 6 of the enabling legislation stated claims of vested rights could still be brought into courts
4. the 1889 Constitution section 15 all water now appropriated or may hereafter be appropriated
5. earlier Montana cases: Thorp v. Freed 1 Mont 651, 1872 - statute void confers power on commissioners (officers) to determine legal rights of parties; is judicial power which is vested in courts
rights of plaintiff had become vested and accrued. Repeal of a statute will not destroy vested rights
Justice Hiram Knowles wrote that territorial statutes had changed the common law significantly to allow for vested rights to appropriations on public lands
6.Justice Knowles in Cruse v. McCauley in 1889: " ... If a person receives a patent from the United States for land subject only to accrued water rights - that is existing water rights-"
7.Smith v Denniff 24 Mont 20, 1900 - water right legally acquired nature of easement in gross; legal title to land-water right lawfully acquired by appropriation on public domain is used or intended to be used, in no wise affects appropriators title to water right
section 1078 civil code section 1882 civil code
page 2 section 1880 civil code state expressly granted right to appropriate waters of such streams, which right if properly exercised in compliance w/ requirements of statutes, vests in appropriator full legal title to use of such waters by virtue of grant made by this state as owner of water
Easement is interest in land, can't be created, granted or transferred except by operation of law, by an instrument in writing or prescription sec 1500 civil code. By section 1800 civil code right conferred to make valid appropriation on unsold state lands. Under sec 15 Article III const mt use of appropriated water is made public use. The Montana civil code was adopted from the California civil code 1871. My 1897 copy of The Code of Civil Procedure of the State of California Adopted March 11, 1872 and Amended up to and Including 1897:
page 34 Property, Real coextensive with lands,tenements,hereditaments. Page 36 Vested Rights See Sec 8 which is on page 32: also rights accrued ACCRUED RIGHT, not affected by code
8. Gila River v. Green (AZ) the court noted that the vested and accrued water right carried with it the future right of impoundment.
The court further commented upon being struck by the party defending his vested water rights every step of the way
9. Deseret Salt Co. v. Tarpey that a granting act conveys the fee the same as if land patent issued. It has been held that a land patent is perfect, indefeasible title, good even against the government; therefore a prior appropriation water right would also be good even against the government
10. 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. History: En. 26-1516 by Sec. 7, Ch.

463, L. 1975; R.C.M. 1947, 26-1516. <="">
11. 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.
History: En. Sec. 6, Ch. 10, L. 1965; R.C.M. 1947, 26-1506.
12. The majority of water compacts in the Montana Code Water Title have the savings provisions protecting vested water rights. The Montana code does say that a provisional permit is not a vested water right.
13. Powell on Real Property, Watercourses & Groundwater- Appropriation RS2339 recognition of pre-existing rights Permit applications. In all jurisdictions(prior appropriation doctrine states) change is subject to limitation that vested rights of other appropriators not be injured and change in place of use not impair vested rights of others Washington Supreme Court that appropriation on public lands had by local custom a vested right in the water Vested rights Underground Water. Statutes contain statement application is subject to existing or vested rights.SD, KS, WY define term "vested right" and many states have other provisions related to a vested or existing right: WA claimant of vested right, NM statute permitting recording declaration of vested water right, WY provision a person claiming vested right file with state engineer statement.
WY,ND priority date of rights vested before passage of their permitting, regulatory acts

14. Ron and Maxine Korman tried to get HB 711 To Recognize Vested Water Rights on Federal Land through an earlier legislative session. DNRC Counsel Tim Hall faxed me a 30 page "fix" which still described these water rights as "existing" and he called repeatedly telling me to call them "existing" because that's what they are. He told me that vested didn't mean what I thought it meant and didn't do what I thought it did.
15. Correspondence from DNRC: August 16,
"The word "vested " has no significance in regard to exempt water rights not claimed in the adjudication
As far as the significance of the term "vested" it is important to note that that word cannot be found anywhere in the Montana Constitution where water is discussed and has no special meaning under Montana law. (I would like to point out that MCA contains a savings provision for vested rights when new political boundaries were created, as well, MK)
16. January 8, 2008 from Tim Hall
Montana water law requires "the impoundment or pit is 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) MeA). See the enclosed memo dated December 21, 2007 from Tim Hall, Chief Legal Counsel.
The Water Use Act at Mont. Code Ann.
§ 85-2-306 (6) & (7) has a special provision for obtaining permits for completed stockwater pits or reservoirs. If the pit or reservoir meets the following criteria, construction can begin immediately. The stockwater pit or reservoir must be located on a nonperennial stream, have a capacity of less that 15 acre-feet of water, and an annual appropriation of less than 30 acre-feet. The pit or reservoir must also be constructed on a parcel of land that is 40 acres or larger which is owned or under the control of the applicant.
The Department will not process Form 605 applications for Provisional Permit for Completed Stockwater Pit or Reservoir on federal land when the application is

received in the name of the grazing permit holder The water right must be in the name of the federal agency. The same applies for developments on state land A federal grazing permit does not constitute control of the land. The grazing permit holder does not control other individuals from entering the land for other purposes nor do they control any resources on the land .. The federal agency has control of the land, including control of the grazing. The grazing permit dictates how many animal units will occupy a pasture, when the animals will be allowed to enter the pasture, and how long they will be allowed to stay. Grazing permit holders can also be told to remove the animals at other times, such as when the condition of the pasture is severely degraded due to drought. The grazing permit holder agrees to these terms by signing the grazing permit. Failure to adhere to the terms of the grazing permit can result in cancellation of the permit and trespass charges filed against the permit holder.
anyone who filed a Form 627 has not placed their water right before the Water Court for adjudication and no such water rights claimed on that form will be included in water right decrees.

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 Appropiative 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 alterattion 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

From: kormanmax@hotmail.com
To: senatorbrenden@gmail.com; iamlost@nemont.net; kellyo@ttc-cmc.net; scassel@nemont.net; spurringx2@yahoo.com; editor@glasgowcourier.com; cduff22@yahoo.com; dpippin@valleycountymt.net; drice@3rivers.net; eslivka@mtintouch.net; larbcrkcat@nemont.net; pattison@nemont.net; fahlgren.john@gmail.com; drkerns@rbbmt.org; lacockst@nemont.net; lmpippin@yahoo.com; lyleophus14@yahoo.com; msw@mtintouch.net; 7mfe7195@mtintouch.net; rhmorrison@sbcglobal.net; rickjore@hotmail.com; rcrc@ttc-cmc.net; sierra@nemont.net; 4bard@mtintouch.net; editor@imt.net; wltaylor@mtintouch.net; kormanmax@hotmail.com
Subject: FW: Water Adj Advisory Committee Minutes and Executive Summary
Date: Sun, 1 Jan 2012 09:30:23 -0700

From: bloble@mt.gov
To: kormanmax@hotmail.com
Subject: RE: Water Adj Advisory Committee Minutes and Executive Summary
Date: Thu, 29 Dec 2011 16:53:21 +0000

As you requested, I have forwarded this email to the members of the Water Adjudication Advisory Committee and I have requested the email be posted as a public comment on the Water Court website. It probably won't be posted on the website until January 3.

From: MAXINE KORMAN [mailto:kormanmax@hotmail.com]
Sent: Thursday, December 29, 2011 8:33 AM
To: Loble, Bruce; senatorbrenden@gmail.com; iamlost@nemont.net; Carolyn Dufurrena; dave pippin; fran cummings; Jeff Pattison; John Fahlgren; kellyo@ttc-cmc.net; krayton kerns; LaMae; Leann Pippin; lyle ophus; Mike & Sue; Nancy,Michael Fred Ereaux; rick jore; Rocky Crossing Ranch/ Sam J.; scassel@nemont.net; Sierra Dawn Stoneberg Holt; spurringx2@yahoo.com; Tom DePuydt; warren,lori taylor; editor@glasgowcourier.com; wagrep; Don & Polly Taylor; Erin Slivka
Subject: RE: Water Adj Advisory Committee Minutes and Executive Summary

Judge Loble,
I would ask that my entire email, including the Dec. 22 email below be sent to the entire advisory committee list. I would also request that this entire email be posted on the water court website - maybe the public comment link would be appropriate.

I have a few more things, in addition to the 13 questions below.
14. In order to have an accurate adjudication, according to the McCarran Amendment, do all water right owners have to be included in the adjudication?
15. In order to have an accurate adjudication, according to the McCarran Amendment, do all water rights have to be included in the adjudication?
16. In order to have an accurate adjudication, according to the McCarran Amendment, do all water rights have to show up in a final decree?
17. Why are "exempt rights" in Idaho not acceptable to the federal government (to meet standards of McCarran Amendment), but "exempt rights" in Montana are?
18. Can the McCarran Amendment be applied in ceratin states, but be ignored in others?
19. With respect to the International Boundary Water Treaties, did Montana become a signatory to the 1905 treaty?
20. Did Montana become a signatory to the 1967 treaty that affects Washington, Idaho and Montana?
21. The Prior Appropriation Doctrine Vested and Accrued Appropriative water right is a vested property, protected

under the Constitution.
Under an adjudication under the Water Use Act and any of these proposals, how are appropriative rights that are eligible to be filed for a takings claim under the Tucker Act in the United States Court of Claims if adversely affected by any International Boundary Water Treaty, identified under current required filings ("Statement of Claim", "Exempt",
"Provisional Permit"? (MCA states a Provisional Permit is not a vested right.)
22. Am Jur Waters ADJUDICATION OF PRIORITY An adjudication must be reasonably construed, however and cannot be held ordinarily to apply to approrpiations which at the time have not been made nor to diversions not applied to beneficial use.
Obviously, a decree based upon indefinite findings, which does not determine the essential rights of all the parties, and leaves a material part of the controversy undetermined, cannot be upheld on appeal.
23. Will an adjudication produced under any of these proposals and the Water Use Act, that refuses to recognize vested pre-existing water rightsas vested pre-existing water rights, and leaves a material part of the controversy undetermined, be upheld on appeal?
24. Will an adjudication produced under any of these proposals and the Water Use Act that leaves out water right owners and leaves a material part of the controversy undetermined be upheld on appeal?
25. Will an adjudication produced under any of these proposals and the Water Use Act that leaves out water rights and leaves a material part of the controversy undetermined be upheld on appeal?

I thank you in advance for sending my email to all and posting this to the Water Court website
Maxine Korman

From: kormanmax@hotmail.com
To: bloble@mt.gov; senatorbrenden@gmail.com; iamlost@nemont.net; cduff22@yahoo.com; dpippin@valleycountymt.net; larbcrkcat@nemont.net; pattison@nemont.net; fahlgren.john@gmail.com; kellyo@ttc-cmc.net; drkerns@rbbmt.org; lacockst@nemont.net; lmpippin@yahoo.com; lyleophus14@yahoo.com; msw@mtintouch.net; 7mfe7195@mtintouch.net; rickjore@hotmail.com; rcrc@ttc-cmc.net; scassel@nemont.net; sierra@nemont.net; spurringx2@yahoo.com; 4bard@mtintouch.net; wltaylor@mtintouch.net; kormanmax@hotmail.com; editor@glasgowcourier.com; editor@imt.net
Subject: RE: Water Adj Advisory Committee Minutes and Executive Summary
Date: Thu, 22 Dec 2011 13:07:04 -0700

Judge Loble,
thank you for the update. I will respond as soon as I can and try to be to the point, without leaving out relevant material facts.

I would ask that you "circulate" this email to all the members of the water advisory committee.
At the Nov conference call I read the following from Water Rights Laws in the Nineteen Western States by Wells Hutchins and published by the United States Department of Agriculture Economic Research Service:
Back to the UN, it is recognized in Wells Hutchins Water Rights Laws in the Nineteen Western States volume 3. example page 120 Boundary Waters Treaty of 1909 with U.S. and Canada (67 western rivers cross the boundary) Treaty created International Joint Commission to investigate and resolve issues. Investigations that might be requested under the treaty could affect rights to use surface and ground water. A use substantially conflicting with a use of higher preference must not be allowed. Most preferred are uses for domestic and sanitary, next navigation;lowest in preferences are uses for power and irrigation.
132 Columbia River Treaty (Wa, Or, Id, Mt) treaty affects water available for appropriation under state-created rights and state-created rights of appropriation are not property when in conflict with activities authorized by treaty.
page 139 Conclusions. Treaties of U.S. with Canada and Mexico have not explicitly pre-empted private water rights created by States adjoining the 2 frontiers. However, by apportioning the waters of international and transboundary streams and by establishing CLASSES OF PREFERRED WATER USES (emphasis added is mine) the treaties do limit the States ability to create water rights. Only uses fitting within the national share of water and within the hierarchy of uses may be effectively established by the States. any State-based right to use water is susceptible to obliteration should it conflict with future treaty provisions. Whether private owners of such rights

are compensated for their loss depends on the terms of the treaty, or separate congressional action- there is no constitutional requirement that they be paid. To the extent the international agencies refine the treaty-established preferences in water use, the possibility exists for planning water uses of an entire river basin without regard to State or national boundaries.
Intro International Law affecting water rights on page 116 " riparian" and "coriparian" " system of international waters" refers to inland watercourse or lake,tributaries and distributaries any part of which lies within the jurisdiction of two or more states, and "riparian" and "coriparian" refer to states having jurisdiction over parts of the same system of international waters
on page 118 3.(b) If the coriparian in good faith, objecs and demonstrates its willingness to reach a prompt and just solution envisaged in article 33(1) of the CHARTER OF THE UNITED NATIONS (emphasis added is mine) a riparian is under a duty to refrain from making, or allowing, such change pending agreement or other solution
Treaties take precedence over state law to the extent there is a conflict and customary international law also supplants conflicting State law
The power of western states to create water rights is limited by treaties with Canada and Mexico

Part of my question was the nature of a Montana water right and how secure it is in light of Hutchins. An unidentified conference call participant said that the international boundary water treaties didn't affect Montana water rights. I would ask that participant to identify himself and then verify that my note on this are correct that the international boundary water treaties don't affect Montana water rights.

I would also like all the conference call participants(advisory committee, DNRC participating members) to review my 13 questions that follow:

First, we all start from the premise that the water rights under discussion and being affected are Prior Appropriation Doctrine Water Rights; that is within the meaning of vested and accrued water rights created on "public domain" of a government (Montana, like the federal government, granted water rights on unsold state lands) Public domain/ public land being synonymous and defined as land open for sale, entry, disposal or settlement under general law.
Public land, as recognized by United States Supreme Court decisions as land to which no private rights or claims have attached; " It is well-settled that lands to which private rights or claims attach is not public land." The Prior Approrpiation Doctrine, as a granting act, conveyed the "FEE" the same as if land patent had issued. The United States Court of Federal Claims Hage v. U.S. Case No.: USCC91-1470L The Court found that Plaintiff Hage owned vested water rights and the fee to those lands the waters serviced

Defendant federal government argued that until Nevada completes the Monitor Valley adjudication, plaintiffs Hage water rights taking claim is unripe because plaintiffs' alleged water rights are not ascertainable or quantifiable.

Plaintiff Hage that Nevada law recognizes rights established prior to 1905 as vested water rights. Nevada courts recognize that vested water rights are outside the framework of statutory water law and are not affected by water laws enacted after 1905.

The court said that the Monitor Valley stream adjudication began fifteen years ago and may take decades to complete. Such a delay would make a mockery of the Constitution's guarantee of both due process and just compensation. Title to water rights has monetary value independent of the adjudication procedure. In Nevada, parties have bought and sold unadjudicated water rights for over a century.

The Monitor Valley stream adjudication, therefore does not determine who has title to the water rights at issue, but defines the parameters of property interests in relation to other water rights. Using the analogy of land, the adjudication process determines the boundaries of the lot. The adjudication process does not determine where file lot exists as defendant and amici argue.
Pre-existing vested water rights are also water rights that pre-date a water permitting law or constitution

Water Rights: Division of Water Resources - U.S. Fish and Wildlife Service

VESTEDRIGHT An appropriative right established by actual use of water prior to enactment of a State water right permit system is known as a vested right.
BLM.gov Western States Water Laws **Prior Appropriation:**
. According to
the rules of prior appropriation, the right to the full volume of water "related back" or had the priority date as of the time of first diverting the water and putting it to beneficial use. In other words, those with earliest priority dates have the right to the use of that amount of water over others with later priority dates
. An appropriative right does not depend on land ownership, but some states do require that the water is appurtenant to the land on which it is
used.
I have consistently requested that all pre-existing water rights be recognized and filed as DECLARATION OF WATER RIGHT.
From AM JUR LEGAL ENCYCLOPEDIA: VOLUME WATERS

VOLUME WATERS

APPROPRIATION (page 741,2)

has reference to a means or method of acquiring a vested and continuing right to take a definite quantity of water from a natural watercourse or other body of water, known as the " doctrine of prior appropriation ."

PUBLIC AUTHORIZATION AND REGULATION (page 744)

Has frequently been stated that every state is free to change its laws governing rights in respect of its natural watercourses and to permit the appropriation of flowing water for such purposes as it may deem wise, and such constitutional or statutory declarations have generally been upheld as valid and effective in so far as they do not interfere with existing vested rights

Provisions will not be permitted to operate to the impairment or destruction of vested rights
State of New Mexico 72-1-3. Declaration of water rights vested prior to 1907 Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907
Nevada Revised Statutes:CHAPTER 533 - ADJUDICATION OF VESTED WATER RIGHTS; APPROPRIATION OF PUBLIC WATERS
NRS **533.085 Vested rights to water not impaired.**
1. Nothing contained in this chapter shall impair the vested right of any person to the use of water,
Blm.GOV Western States Water Law
Vested rights are rights that do not have to go through the application process. Vested rights to surface water are those rights for which the work to establish beneficial use was initiated prior to March 1, 1905 (the date of adoption of Nevada's water law). Vested rights from underground sources are those rights initiated prior to March 22, 1913, for artesian water and prior to March 22, 1939 for percolating water. The extent of all vested rights on a water source is determined through the adjudication process (see below).
South Dakota In 1907, the state legislature affirmed the doctrine of prior appropriation by enacting legislation authorizing the state engineer to administer appropriation of surface water. A major addition to the water rights laws occurred in 1955. Legislation was enacted making use of ground water also subject to the doctrine of prior appropriation. In addition, a provision was inserted allowing anyone to claim a vested water right for water uses predating March 2, 1955.

DECLARATION OF VESTED GROUNDWATER RIGHTS (Under Chapter 237, Montana Session Laws, 1961) This is a confirmation of the legal principle that a water right that pre-dates a new law is a vested water right.
1.Are the water claims required to be filed as a "Statement of Claim" a filing of an "existing vested right"?
2.Are water right claims still only going to be offered to be filed as "EXEMPT"?
3.Are the water rights claims only offered to be filed as "EXEMPT" a filing of an "existing vested right"?
AM JUR EXEMPT - NOT A VESTED RIGHT, BUT A PRIVILEGE PURELY PERSONAL TO THE ONE WHO ASSERTS IT; MAY LATER WAIVE IT OR BE ESTOPPED FROM ASSERTING IT
4.Are those water right claims going to be included in a Final Decree?
5.Are the only "existing water rights" those water rights that show up on a final decree?
6.Are those "EXEMPT"/VESTED water right claims going to have the same standing as an "Adjudicated Water Right"?
7.Are those "EXEMPT"/VESTED water rights claims able to be brought into court/have standing against an "Adjudicated Water Right in case of a controversy or a damage?
8.Is my understanding correct that the court has been trying to tell me that before a Montana water adjudication is completed, that there are no vested water rights?
9.Is my understanding correct that the court has been trying to tell me that water rights that pre-exist the Water Use Act are not vested?
10.Is my understanding correct that the court has been trying to tell me that there can only be vested water rights after Montana completes a water adjudication?
11.Is my understanding correct that the court has been trying to tell me that water rights that pre-exist the 1973 Constitution are not vested?
12.Is my understanding correct that "existing" in the 1973 Constitution with respect to waters is not synonymous with " (pre-) existing vested" water right?
13.Is my understanding correct that "existing" as used in "existing water right" in the Water Title of the Montana Code Annotated is not synonymous with
"(pre-) existing vested" water right?

From: bloble@mt.gov
To: kormanmax@hotmail.com
Subject: Water Adj Advisory Committee Minutes and Executive Summary
Date: Wed, 21 Dec 2011 00:07:54 +0000

Mrs. Korman:

Attached is a copy of the proposed Minutes of the December 19, 2011 telephone conference of the Water Adjudication Advisory Committee. I drafted the minutes in the fashion I did so that I could copy and paste the six proposals and present them to the Water Policy Interim Committee. Please pay particular attention to the sixth proposal which is what my perception of your proposal. If I have not captured it correctly, please send me a revision, but please make it short, no more than 5 or 6 sentences if possible. Thanks.

Bruce Loble
Montana Water Court