

MONTANA WATER COURT



STATE OF MONTANA

(406) 586-4364
1-800-624-3270 (In-State only)
FAX: (406) 522-4131

PO BOX 1389
Bozeman, MT 59771-1389

November 14, 2012

Senator Bradley Maxon Hamlett, Chair
Water Policy Interim Committee
PO Box 49
Cascade, MT 59421-0049
(406) 799-5885
wranglergallery@hotmail.com

Senator Jim Keane, Chair
Environmental Quality Council
2131 Wall Street
Butte, MT 59701-5527
(406) 723-8378

Re: Report on Exempt From Filing Claims Under Section 85-2-222

Dear Chairman Hamlett and Chairman Keane:

In May of 2011, Senator John C. Brenden asked the Chief Water Judge to convene the Water Adjudication Advisory Committee to look at issues surrounding exempt from filing rights. A copy of Senator Brenden's letter is attached. Substantial work on this issue ensued.

On September 10, 2012 Chief Water Judge Loble reported to you that the Committee had not reached a consensus, and could not recommend a proposal on the exempt from filing water right issue. At the same time, Judge Loble indicated he would convene another meeting of the Committee to see if a solution could be obtained.

On October 18, 2012, Judge Loble appointed me to serve as his designee on the Committee until his retirement.

Following Judge Loble's order, I contacted Committee members and circulated revised drafts of previously discussed options. On November 9, 2012, the Committee met to see if consensus on a proposal to the Legislature could be reached.

Subject to a short comment period, the Committee members agreed on the proposal attached to this letter. Two comments were received from Committee members regarding potential changes. One was from DNRC Counsel Anne Yates, and the other from Mike Cusick, a private water attorney. Copies of their comments are attached.

"... to expedite and facilitate the adjudication of existing water rights."
CH.697 L. 1979

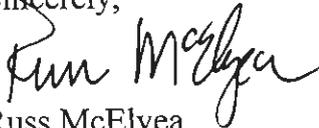
"AN EQUAL OPPORTUNITY EMPLOYER"

Both comments emphasized that exempt rights cannot place a call against other water users or be subject to a call if they are not filed or the subject of a petition. Because this concept was discussed by the Committee, the enclosed draft proposal includes a slight change from the original in furtherance of their suggestion.

Ms. Yates also made suggestions regarding fees and timing. These suggestions were not discussed by the Committee, but should be considered in any legislation drafted to implement the proposal.

Please call if you have any questions.

Sincerely,



Russ McElyea
Associate Water Judge
(406) 556-6285

Encls: Senator John C. Brenden's May 2011 Letter to Chief Water Judge Loble
Revised Draft Proposal
Anne Yates's Comments to Revised Draft Proposal
Mike Cusick's Comments to Revised Draft Proposal

Cc: Joe Kolman, Legislative Environmental Analyst, Legislative Services Division via email
C. Bruce Loble, Chief Water Judge, Montana Water Court
Sandy Palakovich, Court Administrator, Montana Water Court
Members of the Water Adjudication Advisory Committee via email

Montana State Senate



SENATOR JOHN C. BRENDEN
SENATE DISTRICT 18

HELENA ADDRESS:
MONTANA SENATE
PO BOX 200500
HELENA, MONTANA 59620-0500
OFFICE: ROOM 323
OFFICE PHONE: (406) 444-1614

COMMITTEES:
FINANCE AND CLAIMS
STATE ADMINISTRATION
FISH, WILDLIFE AND PARKS
RULES

HOME ADDRESS:
PO BOX 970
SCOREY, MT 59263
PHONE: (406) 783 5304

The Big Sky Country

Chief Water Judge
C. Bruce Loble
601 Haggerty Lane
Bozeman, MT 59715-1738

RECEIVED

MAY 03 2011

Montana Water Court

Dear Judge Loble,

This letter is to request that you exercise your authority pursuant to 3-7-103, MCA to convene the water adjudication advisory council to examine an issue of statewide importance and provide recommendations. It has come to my attention that there are an unknown number of legal, but unfiled, water claims throughout the state that may not be included in the adjudication.

Claims for existing rights for livestock and individual, as opposed to municipal domestic uses, based upon instream flow or ground water sources were exempted from filing pursuant to 85-2-222, MCA. The exemption does not include reservoirs, pits, pit-dams, or other developments for surface water. The statute notes that these claims may be voluntarily filed.

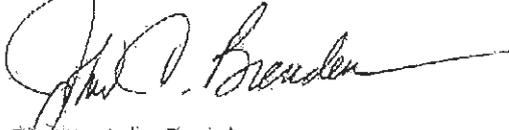
However, the process and venue for proving unfiled claims in court was not addressed three decades ago when the exemption became law. Because these claims were not filed, they are not included in a temporary preliminary or preliminary decree. Therefore, the Water Court cannot consider objections to these claims because they are not included in the decree.

The issue has been brought before the legislature as well as legislative interim committees without resolution. I request that the water adjudication advisory council examine this issue, in particular unfiled exempt claims for water on federal land.

Please convene the advisory council at your earliest convenience and provide updates and recommendations to the Environmental Quality Council and the Water Policy Interim Committee. Also, please provide notice of these proceedings to interested parties or organizations and provide an opportunity to participate or provide comments on any prospective council recommendations.

Thank you for your consideration of this request. Contact me if you have questions or concerns.

Sincerely,



Senator John Brenden

cc: Scott Cassel
Maxine Korman
Joe Kolman

Revised Draft Proposal Based on 11/9/2012 Conference Call (History Tracking)

85-2-222. Exemptions. “(1) Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or groundwater 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). Such claims may, however, be voluntarily filed pursuant to 85-2-221(1), or may be determined pursuant to subsection (2) below ~~until~~ (a) until issuance of a final decree pursuant to 85-2-234 or (b) upon re-opening of a final decree pursuant to 85-2-237, whichever occurs later.

(2) The owner of an existing water right exempt from filing under subsection (1) above may file a petition in the Water Court requesting a determination of the exempt water right provided that the owner of the right publish notice of a motion to amend the temporary preliminary or preliminary decree to include the exempt right determined pursuant to the provisions of 85-2-233(6).

- (a) The costs of the notice must be borne by the petitioner requesting determination of the exempt right. The Water Court may set a reasonable filing fee for such petitions.
- (b) Exempt water rights filed under this subsection are not accorded prima facie status under 85-2-227.
- (c) Any petition filed under this subsection (2) shall include the information identified in 85-2-224(1) and (2) and shall be submitted on a form provided by the department.
- (d) Exempt water rights filed under this subsection are subject to examination by the department under 85-2-243 and rules adopted by the Montana supreme court. Issue remarks shall be resolved as provided for under 85-2-233 or 85-2-248.

(3) Any claims for existing rights that are exempt from filing under subsection (1) and that are not voluntarily filed under 85-2-221(1) or determined as provided for in subsection (2) above are not forfeited but such uses may not assert priority, or have priority asserted against the use in ~~are deemed de minimus uses of water. Such de minimus uses of water are not subject to administration under 85-2-406.~~

(4) If the water judge finds that the right asserted in a petition under subsection (2) is invalid as asserted or otherwise without merit, the water judge shall may award costs and reasonable attorney fees to any party opposing the petition.

85-2-233(6) as follows:

“(6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend such decree to include claims exempt from filing under 85-2-222, (or to amend) a statement of claim or a timely filed objection [~~that may adversely affect other water rights~~] must be published once a week for three consecutive weeks in two newspapers of general circulation in the basin for which the particular decree was issued, or where the statement of claim or objection was filed. The notice must specify that any response or objection to the proposed amendment must be filed within 45 days of the date of the last notice. The water judge may order any additional notice of the motion as the water judge considers necessary. The costs of the notice required pursuant to this section must be borne by the moving party.

Revised Draft Proposal Based on 11/9/2012 Conference Call

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(2) The owner of an existing water right exempt from filing under subsection (1) above may file a petition in the Water Court requesting a determination of the exempt water right provided that the owner of the right publish notice of a motion to amend the temporary preliminary or preliminary decree to include the exempt right determined pursuant to the provisions of 85-2-233(6).

- (a) The costs of the notice must be borne by the petitioner requesting determination of the exempt right. The Water Court may set a reasonable filing fee for such petitions.
- (b) **Exempt water rights filed under this subsection are not accorded prima facie status under 85-2-227.**
- (c) **Any petition filed under this subsection (2) shall include the information identified in 85-2-224(1) and (2) and shall be submitted on a form provided by the department.**
- (d) **Exempt water rights filed under this subsection are subject to examination by the department under 85-2-243 and rules adopted by the Montana supreme court. Issue remarks shall be resolved as provided for under 85-2-233 or 85-2-248.**

(3) Any claims for existing rights that are exempt from filing under subsection (1) and that are not voluntarily filed under 85-2-221(1) or determined as provided for in subsection (2) above are not forfeited but such uses may not assert priority, or have priority asserted against the use in administration under 85-2-406.

(4) If the water judge finds that the right asserted in a petition under subsection (2) is invalid as asserted or otherwise without merit, the water judge may award costs and reasonable attorney fees to any party opposing the petition.

85-2-233(6) as follows:

“(6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend such decree to include claims exempt from filing under 85-2-222, (or to amend) a statement of claim or a timely filed objection must be published once a week for three consecutive weeks in two newspapers of general circulation in the basin for which the particular decree was issued, or where the statement of claim or objection was filed. The notice must specify that any response or objection to the proposed amendment must be filed within 45 days of the date of the last notice. The water judge may order any additional notice of the motion as the water judge considers necessary. The costs of the notice required pursuant to this section must be borne by the moving party.

McElyea, Russell

From: Yates, Anne
Sent: Tuesday, November 13, 2012 3:26 PM
To: Moore O'Connell & Refling; McElyea, Russell; goffenaar@midrivers.com; bhedrich@ttc-cmc.net; james.dubois@usdoj.gov; Weiner, Jay; jlbloomquist@doneylaw.com
Cc: Davis, Tim
Subject: RE: Comments to Revise Draft Proposal 11/9/2012; Our File No. 66066-001

The Department has the following comments on the 11/9/2012 draft.

- It should be made very clear to holders of these rights that if they do not file under the petition process, they cannot enforce/call their right.
- Under 85-2-222(2)(a), the petitioners should bear the costs of examination in addition to costs of notice.
- Logistically, for the purposes of Department examination and Water Court resolution of Issues Remarks, a deadline (90 days) prior to issuance of the final decree should be set to allow processing of the claims. A specific deadline in 2015 could also be considered to ensure enough resources to process and incorporate the claims.

Thanks.

Anne W. Yates
Legal Counsel
Department of Natural Resources and Conservation
1625 Eleventh Ave.
Helena, Montana 59620-1601
tel. (406) 444-0503
fax (406)444-2684
ayates@mt.gov

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From: Moore O'Connell & Refling [<mailto:morlaw@gwestoffice.net>]
Sent: Tuesday, November 13, 2012 2:58 PM
To: McElyea, Russell; goffenaar@midrivers.com; bhedrich@ttc-cmc.net; james.dubois@usdoj.gov; Weiner, Jay; Yates, Anne; jlbloomquist@doneylaw.com
Subject: Comments to Revise Draft Proposal 11/9/2012; Our File No. 66066-001

In subsection (3) of § 85-2-222, MCA, I think the proposal should refer to administration generally under § 85-2-406 and not specifically § 85-2-406(1). The proposal should provide an exclusive method to have exempt rights incorporated into decrees and enforced. I believe the reference to subsection (1) of 85-2-406 was included in the proposed language because it refers to the principle of "first in time is first in right." However, the specific reference to administration under 406(1) in proposed 85-2-222(3) could be interpreted to mean that administration under other subsections of 406 is still available. For example, administration under 406(2)(b) would still arguably provide for certification of a water distribution controversy involving unfiled exempt rights, with no petition pending, prior to final decree. Determination of such a controversy would only bind the parties to it. The proposal should not continue to allow unfiled exempt claims this piecemeal enforcement option under § 85-2-406(2).

McElyea, Russell

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Sent: Tuesday, November 13, 2012 2:58 PM
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The reference to subsection (1) of 85-2-406 makes the proposal ambiguous. I suggest striking the reference to subsection (1) of § 85-2-406 and referencing the entire statute. This should make it clear that such uses may not assert priority, or have priority asserted against the use, unless the use is decreed or a timely claim or petition is pending.

Thanks for the opportunity to comment. Keith Suta,
Legal Assistant to

Moore, O'Connell & Refling PC
PO Box 1288
Bozeman MT 59771-1288

e-mail: morlaw@qwest.net
Phone: (406)587-5511
Fax: (406)587-9079

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