

MONTANA WATER COURT



STATE OF MONTANA

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September 10, 2012

Senator Bradley Maxon Hamlett, Chair
Water Policy Interim Committee
Montana Legislature
Capitol Building
Helena, Montana 59601

RECEIVED

SEP 10 2012

LEGISLATIVE ENVIRONMENTAL
POLICY OFFICE

Senator Jim Keane, Chair
Environmental Quality Council
Montana Legislature
Capitol Building
Helena, Montana 59601

Re: Report on Exempt from Filing Claims Under Section 85-2-222, MCA.

Dear Chairman Hamlet, Chairman Keane, Committee and Council Members:

In May 2011, Senator John C. Brenden requested the chief water judge to convene the Water Adjudication Advisory Committee and to examine the issues of livestock and domestic water right claims based upon instream flow or ground water sources which were not voluntarily filed during the claim filing process. Under §85-2-222, MCA, these types of claims were exempt from the mandatory filing requirements, but they could be voluntarily filed. For purposes here, these claims will be referenced as "exempt from filing claims." They should not be confused with the "exempt claims" which are the subject of a study initiated by House Bill 602 of the 2011 Legislature.

In response to the Senator's letter, the Water Adjudication Advisory Committee held several public meetings, exchanged and studied several proposals, and eventually settled, by a plurality of the Committee members, on a draft proposal. The proposal contemplated legislation to authorize water users to file voluntary petitions with the Water Court to include non-filed exempt from filing claims in Water Court decrees. The petitioner would have the burden of proving the historical beneficial use of the claim and would also be responsible for any publication or notice costs. Failing to file such a petition would not result in the forfeiture of any exempt from filing claim. If the filing of

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

a petition was determined to be without merit, the water judge would be authorized to award costs and reasonable attorney fees to any party who objected to the claim.

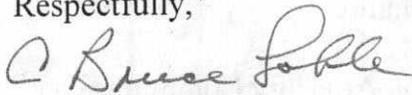
The Advisory Committee is composed of seven members. Three members represent the United States, the Department of Natural Resources and Conservation (DNRC), and the Montana Attorney General's office; three members are water lawyers; and two members are water users. The members representing the United States, the DNRC, and the Attorney General did not want to take a specific position on the issue, but they did participate in the research and discussion of the various options, and worked on the draft proposal. The draft proposal appeared to have tentative support from the three water lawyers and one water user, so some draft statutory amendments were circulated to implement the proposal.

On August 27, 2012, after reviewing the draft amendments, two of the water lawyer members withdrew their support from the tentative proposal. They advised that the latest proposal creates a situation that is no different under the current version of § 85-2-222, MCA, that there have been two opportunities to file exempt from filing claims, and that they see little point in creating another claim filing period for these types of water rights.

As there is a lack of consensus among the members of the Advisory Committee, it appears that the Water Adjudication Advisory Committee must report that it cannot, at this time, recommend a proposal.

I intend to convene the Advisory Committee at least one more time to see if a solution might be available. I have asked Judge McElyea to attend the meeting. Perhaps, his fresh eyes might see a solution. If the Advisory Committee finds a solution before the next legislative session, it will advise Mr. Kolman. If a legislator wishes to sponsor the proposed solution, the Water Court and some of the Advisory Committee members would likely be available to provide assistance.

Respectfully,



C. Bruce Loble
Chief Water Judge

cc: Members of the Water Adjudication Advisory Committee