

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

July 12, 2016

Judicial Nomination Commission
% Office of Court Administrator
Attn: Lois Menzies
PO Box 203005
Helena, MT 59620-3005

Hal Harper
1608 Gold Rush Avenue
Helena, MT 59601

Richard A. Simonton
207 W Bell Street
PO Box 1249
Glendive, MT 59330-1249

Elizabeth A. Halverson
1631 Zimmerman Trail, Suite 2
Billings, MT 59102

Nancy Zadick
1901 Whispering Ridge Drive
Great Falls, MT 59405

Janice Bishop
532 South Avenue East
Missoula, MT 59801

Lane Larson
1417 Cedar Canyon Road
Billings, MT 59101

Karl J. Englund
401 North Washington Street
PO Box 8358
Missoula, MT 59807

Re: Re-Appointment of Doug Ritter for Associate Water Judge

Members of the Commission:

I support Doug Ritter for Associate Water Judge. I have known Judge Ritter for over twenty five years and have worked directly with him for four years. He has always brought high standards of integrity and commitment to his work at the Water Court. As a consequence, he is well respected by Court staff, litigants, and attorneys.

Judge Ritter has also been an important part of changes at the Court. He and I approach our responsibilities as a partnership, and his advice and wise counsel have been invaluable on many occasions. He has an extraordinary command of water law and a solid understanding of the practicalities of water distribution and use. Despite this knowledge and experience, he approaches new problems with humility, curiosity and passion. This combination makes him a fine judge, and ensures that litigants receive fair and impartial treatment.

I consider it a privilege to work with Judge Ritter. Our relationship is open, collegial, and friendly. His contributions to the Water Court have been significant, and the Court will continue to benefit from his steady hand in the future. I give him an unqualified recommendation for re-appointment as Associate Water Judge.

Sincerely,

A handwritten signature in black ink, appearing to read "Russ McElyea", written in a cursive style.

Russ McElyea
Chief Water Judge

cc: mtsupremecourt@mt.gov
Chief Justice Mike McGrath via email: mmcgrath@mt.gov

ELDORADO COOPERATIVE CANAL COMPANY
P.O. BOX 1327
CHOTEAU, MT 59422

August 8, 2016

Judicial Nomination Commission
% Office of Court Administrator
Attn: Lois Menzies
PO Box 203005
Helena, MT 59620-3005

Re: Re-Appointment of Doug Ritter for Associate Water Judge

Members of the Commission:

The Eldorado Cooperative Canal Company does not support Doug Ritter for Associate Water Judge.

Eldorado owns four early water rights on the Teton River and has gone through adjudication with Mr. Ritter as the Water Master.

Several of Judge Ritter's rulings on the elements of our water rights were wrong and had to be appealed and corrected by the Chief Water Judge and affirmed by the Supreme Court. Judge Ritter has cost the water users on the upper Teton River several million dollars in Attorney's fees. We had to appeal most all of his decisions just to try to maintain what has been the historic practice for several decades. In the end we did not gain anything and are worse off that when we started.

Judge Ritter also allowed some Lower Teton users to amend their priority dates to a much earlier date through an implied claim very late in the adjudication process. What he allowed is not right.

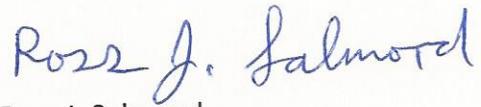
Judge Ritter also seems to pick and choose as to what records he will use in determining the elements of different water rights. He would not put any reliability in old Water Commissioner Water use records kept by the District Court Clerk in Teton County. Yet, he would allow old tax records from Chouteau County to be used to change priority dates to real early dates for stock water rights.

It also seems that Judge Ritter does not want to rule on the real hard decisions. Many times he would have to be forced to make these decisions or the Chief Water Judge would have to make them.

We are not satisfied with Judge Ritter's work on the Teton River Basin and there are many other Water Right owners on the Teton River that feel the same way.

We would not recommend Doug Ritter to be appointed to the Associate Water Judge position and feel that we could do better with someone else.

Sincerely,

A handwritten signature in blue ink that reads "Ross J. Salmond". The signature is written in a cursive style with a large initial "R".

Ross J. Salmond
President of the Eldorado Cooperative Canal Company

August 11,2016

Ron Korman; Maxine Korman

Box 162

Hinsdale, Montana 59241

Ph. (406) 648-5536

kormanmax@hotmail.com

To: Judicial Nomination Commission

c/o Lois Menzies

Office of Court Administrator

P.O. Box 203005

Helena, MT 59620-3005

mtsupremecourt@mt.gov

RE: OPPOSITION TO SELECTION OF ASSOCIATE WATER JUDGE DOUGLAS RITTER

To the Judicial Nomination Commission and Montana Supreme Court Chief Justice McGrath:

We, (Ron Korman and Maxine Korman) write in opposition to selection of Associate Water Judge Douglas Ritter for another term as Associate Water Judge in the Montana Water Court, based on our serious concerns arising from our cases before Associate Water Judge Ritter.

As you know, 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.

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. 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, 51Wy.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. We disagree with Judge McElyea in his endorsement of Associate Water Judge Douglas Ritter.

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.

“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.

Associate Water Judge Ritter has not, in Cases 40M-A 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. 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 *prior to* appointment 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 them without due process and just compensation.

Respectfully,

Ron Korman and Maxine Korman

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> 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-July1973 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/WAAcornnrittee/>

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 McEYea 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-

