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October 13, 2015

Water Adjudication Advisory Committee
c/o Committee Member Holly Franz
holly@franzdriscoll.com

RE: Comments to University of Montana Report for the Montana Supreme Court Entitled "Water Rights in Montana," Spring 2014
Our file no: 66060\001

Dear Judge McElyea and Members of the Water Adjudication Advisory Committee:

Judge McElyea has asked that we submit our comments on the 2014 University of Montana Water Right Study to committee member Holly Franz this month. My comments are set forth below.

The introduction to the University of Montana study "Water Rights in Montana" notes that Montana's Water Use Act is now in its fourth decade. That observation made me think about the intent of Montana's constitutional framers and the 1973 Legislature when they enacted Article IX, Section 3 of the 1972 Constitution regarding water rights and the 1973 Water Use Act. An important part of the 1972 Constitutional provision that differs from the 1889 Constitution is the mandate that the Legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records in addition to the present system of local records. Under the 1973 Water Use Act, all water permitting and adjudication was originally under the authority of a single agency, the DNRC. Thus, it seems to me that a fundamental goal of both the Constitution and the Act was to create a more modern and centralized system for water rights records and determinations.

Notwithstanding, when the adjudication portion of that system became bogged down in the Powder River adjudication and it became apparent that the administrative adjudication process would be too long and costly, the Legislature changed the original model and created the Water Court system with the passage of Senate Bill 76 in 1979. This bifurcation of the roles of permitting and adjudication, along with the previous jurisdictional split with the District Courts that supervise water administration, creates a major point of confusion for water users. I spend a significant amount of time in my practice explaining to clients the various roles of these agencies and courts, the reason for this division of authority, and the differences in the

burden, type, and quantity of proof needed in each of these tribunals. The University of Montana study suggests these various jurisdictional roles present a source of confusion and increased expense for water users; I would agree. The division of roles is not what was originally envisioned by our constitutional framers in 1972 or by the Legislature in 1973 when it passed the original Water Use Act. Trying to reunite this jurisdictional split under fewer entities or perhaps even a single entity in the future seems like a reasonable legislative goal.

The Legislature could decide to vest all jurisdiction regarding water rights issues as an administrative function of the DNRC, with judicial review by the District Courts, as it was between 1973 and 1979. Under that scenario, the Water Court would essentially “fold up its tent” and dissolve once the adjudication is completed. Alternatively, the Legislature could vest more jurisdiction over water rights determinations with the Water Courts.

My preference would be for a long-range plan placing more water rights determinations with the Water Courts. The Water Court has gained considerable expertise during the adjudication process, making literally thousands of water rights determinations every year. It would be a shame to not preserve this knowledge and expertise into the future. The DNRC has also gained considerable expertise in assisting the Water Court in the adjudication process, and should still have an active role in water right matters, akin to the role of state engineer in other western states. The DNRC should also have an expanded role in water administration, enforcement, and training and supervising local water commissioners, with the hearing of disputes on those matters taking place in the Water Courts.

I generally agree with most of the recommendations on page 4 of the executive summary of the University of Montana study. Notwithstanding, I do have concerns about complete centralization of all water right permitting, adjudication and administration, whether it's with the DNRC or the Water Court. Montanans are passionate about their right to vote. In my experience, water users are particularly passionate about choosing the District Judge who supervises the administration of their water rights. While I agree with the study's conclusion that some District Judges lack the expertise, time, and resources to deal with complex water disputes, there are many District Judges who excel at resolving water issues and supervising water commissioners, and who would not want to lose that role in their districts. Such judges likely receive many votes from water users at election time. Any future changes in the law should respect that right to vote for a local or regional supervisor of water administration, so as not to make water users who currently enjoy that system feel disenfranchised.

A solution to this issue may lie within the statutory framework that already exists for the Water Courts. While the University of Montana study discusses the Water Court primarily as the Court in Bozeman (with the Chief Water Judge, the Associate Judge and the Water Masters), the statutory framework of Senate Bill 76 originally envisioned four Water Divisions with active Division Water Judges. Perhaps there is a way to modify the existing statutory framework to utilize Division Water Judges as the regional supervisors of water administration within their Divisions, who appoint and supervise local water commissioners and resolve regional disputes.

The University of Montana report notes that in Colorado, the position of Water Judge is a coveted and sought-after position. It is unclear from the report what motivates Colorado judges to seek this extra

responsibility. Perhaps some incentive could be created for Montana District Judges to seek appointment as Division Water Judges, such as extra compensation or reduced caseload on other matters. Alternatively, perhaps the statutes could be modified to provide for full-time Division Water Judges. Division Water Judges are currently selected by other District Court Judges within the Division. Maybe Division Water Judges could be subject to general election Division-wide. This should satisfy water users' concerns about choosing the judge who oversees the distribution of their water. Depending upon the complexity of issues in the basins they administer, these Division Water Judges could employ one or more Water Masters as referees for specific basins within the Division.

Issues arising on the Milk River near Malta are likely to be quite different from issues that arise on Willow Creek near Harrison, the Jocko River at Arlee, Flint Creek near Drummond, or the Tongue River near Miles City. Using Division Water Judges (selected or elected from that particular region) will better address regional water issues in both water administration and in hearing appeals of agency water decisions.

The idea here is to have a gradual transition from a central Water Court in Bozeman that adjudicates claims, to regional Water Division Courts that administer water decrees and hear judicial review cases. As pre-1997 temporary preliminary decrees are reissued as preliminary decrees the Water Court could focus on moving a particular Water Division toward fully enforceable status, with the goal of setting up a permanent Division Court with an elected Division Judge and appointed Water Masters and local water commissioners, as an initial step towards future administration. Eventually, permanent Division Judges and Courts could be set up in Missoula (or Butte), Havre and Billings, and eventually the Upper Missouri Division could be set up in Bozeman or Helena. If necessary, additional water divisions or subdivisions could be created.

Implementing a future water administration policy utilizing the existing Water Divisions should be a long-range goal that would not interfere with the current adjudication process. The adjudication process is now moving forward with greater efficiency at an accelerated pace, and the main goal should be to complete the adjudication in as timely a manner as possible. The Legislature should be careful not to tinker with the Water Courts if it will slow the adjudication process. Still, there is a light at the end of the tunnel and the end of the adjudication is coming into view. We do not need to wait, nor should we wait, to completely emerge from the tunnel before we consider the future. A discussion of how we transition from statewide adjudication to statewide administration of water rights is definitely appropriate now. It is shortsighted to think that water resource, water development and water right issues will not become increasingly frequent, complex and important to Montanans after the adjudication is completed. Just as the 1972 constitutional delegates had the foresight to bring Montana out of the 19th century in water rights matters, our Legislature has a new opportunity to set a course for the future as the adjudication nears completion.

Finally, I agree strongly with Holly Franz's comments at the last conference call regarding improving the training for water commissioners to reflect a more skilled, technical and professional occupation. I agree with the approach used by other western states noted in the University of Montana study to keep those individuals as selected by or from their local communities. At the same time, there should be more consistency in the qualifications, training, expertise and compensation for these water commissioners.

Water Adjudication Advisory Committee

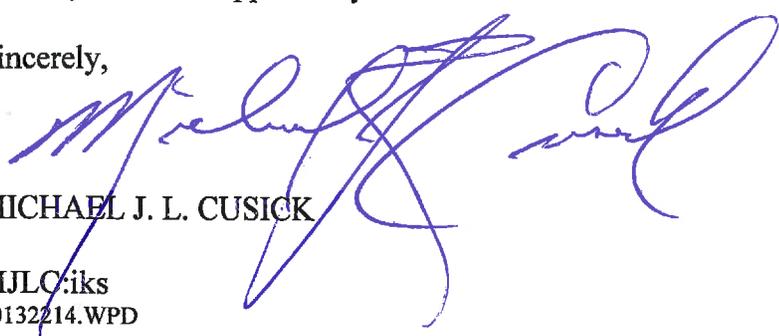
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I think the DNRC should play an expanded role, much like the state engineer in other western states, in training these individuals and perhaps employing them either directly or as independent contractors.

Thank you for the opportunity to comment.

Sincerely,



MICHAEL J. L. CUSICK

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