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January 29, 2016

Chief Water Judge Russ McElyea
Montana Water Court
PO Box 1389
Bozeman, MT 59718

Via email only: watercourt@mt.gov

RE: WPIC—Suggestions for Water Administration Statutes

Dear Judge McElyea:

We are in receipt of the January 15th email from Swithin Shearer soliciting input on identification of areas of concern with existing water administration statutes and suggestions for improvements to those statutes. Thank you for the opportunity to provide input on this important subject. As you know, during the January Water Policy Interim Committee (“WPIC”) meeting, a number of topics were discussed regarding the difficulties in enforcement for water users under the current statutes, mostly due to a lack of clarity in those statutes. Following are suggestions for revisions to those statutes to address some of those difficulties.

The first major issue that needs to be addressed regarding enforcement is the lack of clarity on when a Water Court decree is enforceable. Second, the Water Court and the Legislature should look at providing due process to water users of when the decree will be enforced. Finally, what portion of a Water Court decree is enforceable needs to be examined. To address these issues requires fully harmonizing Mont. Code Ann. § 3-7-212 with Mont. Code Ann. § 85-2-406. Our suggestion would be to repeal Mont. Code Ann. § 3-7-212 and modify Mont. Code Ann. § 85-2-406 as follows (amended language underlined; deleted language struck through):

(2)(a) A district court may order the distribution of water pursuant to a district court decree entered prior to July 1, 1973, until an enforceable Water Court decree is entered under the provisions of ~~part 2 of this chapter~~ subsection (4) or the matter has been adjudicated under the procedure set forth in subsection (2)(b).

(4) Upon notice by written order entered by the Chief Water Judge to the district courts situated within the area the subject of a temporary preliminary decree or preliminary decree, and subject to the provisions of subsection (5), the terms of a temporary preliminary decree or preliminary decree ~~or a portion of a temporary preliminary decree or preliminary decree as modified after objections and hearing~~ is enforceable and administrable ~~according to its terms.~~ The order shall only be issued after the Chief Water Judge has determined that all objections and hearings as provided under part 2 of this chapter for the temporary preliminary

~~decree or preliminary decree have concluded. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water judge shall upon referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities.~~

~~(5) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter may appeal a determination made pursuant to subsection (2).~~

(5) Prior to enforcement and administration of the terms of a temporary preliminary decree or preliminary decree by a district court under subsection (4), notice must be published once a week for three consecutive weeks in at least two newspapers of general circulation in the basin that is subject to the Water Court decree that the terms of the temporary preliminary decree or preliminary decree will be enforceable and administrable by the district court. The notice shall further set a date and time where the holders of existing water rights under the decree may appear and be heard on the issue of enforcement and administration of the terms of the decree by the district court.

(6) The terms of final decrees issued under part 2 of this chapter are administrable and enforceable under the procedures set forth in subsections (4) and (5).

In addition to the above-suggested modifications to Mont. Code Ann. § 85-2-406, amendments to Title 85, Chapter 5 regarding the appointment and administration of Water Court decrees by water commissioners would also be required. By modifying the statutes to provide for basin-wide administration and enforcement, it will also avoid piecemeal administration.

Another issue that needs to be addressed on the topic of enforcement is consistency in how the decrees—either existing district court decrees or enforceable decrees issued by the Water Court—are administered. As you pointed out to WPIC during its September 2015 meeting, there are structural issues with the statutes providing instructions to the district court that need to be addressed. A standardized and codified set of instructions to both the district courts and water commissioners would be helpful to address the current inconsistencies in administration from source to source.

Finally, the issue of exempt-from-filing claims needs to be examined. Senate Bill (“SB”) 37 from the 2015 Legislature attempted to address many problematic areas in the current statute, but perhaps the most pressing was the deadline for filing such claims. Currently under Mont. Code Ann. § 85-2-222(2), a claimant may file a claim “at least 90 days prior to issuance of a final decree pursuant to 85-2-234 or upon the reopening of a final decree pursuant to 85-2-237, whichever occurs later.” This is an unclear timeline. A better solution would be to set a date certain (SB 37 proposed February 28, 2018) for filings. Getting a full tabulation of exempt claims is key to having a decree that reflects the full picture of rights on a source, and, thus, a decree that is enforceable for all parties.

As basin adjudication continues, enforcement will be an ongoing issue for all parties. If we take the chance now to address areas where the statute needs to be revised, hopefully we can avoid litigation and other longer-term problems in the future. Thank you again for the opportunity to provide input on a topic of importance to both water users and practitioners. We look forward to working with the Court and the Legislature to address enforcement issues.

Sincerely,

/s/ John E. Bloomquist

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/s/ Patti L. Rowland

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/s/ Rachel K. Meredith

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