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HB 782

House Bill 782
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Presented by Bob Lane
House Natural Resource Committee

Mr. Chairman and committee members, I am Bob Lane, Chief Legal Counsel for the Montana Department of Fish, Wildlife & Parks (FWP).

Montana deserves and must have a timely and accurate adjudication. There is no excuse for not striving for both. A hallmark of this session is HB 22 and this bill - one to provide the funding and HB 782 to establish a workable, effective, efficient and fair process to ensure that the final products of the adjudication are accurate enough to have meaning. Final decrees must be accurate enough to be used by water commissioners and accurate enough to be used by the Department of Natural Resources and Conservation (DNRC) when evaluating applications for new permits.

Right now the adjudication is not doing the job. Relying on neighbors objecting to their neighbors has not worked. Looking back, it is obvious why it has not worked. Neighbors are reluctant, at least the vast majority, to object to their neighbor. They have told us so, and the numbers prove that much less then one-half of the issue remarks are objected to by other claimants. Many of these objections are by those objecting to their own claims or objections by the federal agencies. The other reason is that it is impossible, for example, for neighbors to police and object to the almost 10,000 other claimants in the Musselshell River Basin. A majority of the major legal and factual issues are being left unchallenged. For example, in basin 41I, the Upper Missouri River mainstem, over 5,000 issue remarks have been left unresolved even though the temporary preliminary decree has been adjudicated. The Water Court has recognized that this is happening.

The primary lesson from the history of the adjudication is that it is time to put the past behind us and to plan the future, a successful future, for the adjudication.

HB 782 does just that. It combines an administrative process, the office of the Attorney General as an institutional objector and a determination to resolve all issue remarks. Issue remarks are, of course, the potential errors found by DNRC's examination of each claim. These are errors such as potentially exaggerated or overstated claims, water claimed that was never put to use, rights once used but long since abandoned, etc. It is very important to understand that small or de minimus potential errors are not included in issue remarks. Only substantial, potential errors are included.

The process of HB 782 will ensure that all issue remarks are resolved. It is anticipated that up to 90% of issue remarks will be resolved with a required, but relatively informal, claimant and DNRC meeting or meetings. This is the easiest and least costly process for the claimant for those claims that can be resolved. The remaining unresolved issue remarks will be decided by the Water Court under the Court's on motion authority or through a hearing where the Attorney General has intervened on legal issues and the more complicated factual issues. Thus, the Water

Court will not be placed in a potentially adversarial role in the more significant and complicated cases.

The bottom line is that issue remarks - the substantial, identified potential problems with claims must be resolved. Issue remarks are added by DNRC pursuant to the Supreme Court's rules only after a determination that the potential error will affect the accuracy of the decree and the ability to enforce the decree. If the clear majority of issue remarks are not resolved, which is the present course of the adjudication, then what does this say about the adjudication? It says the adjudication failed; it says the decrees can't be used by a water commissioner; and, it says the adjudication can't be defended as an adequate general adjudication if a tribe or federal agency wants out of the state's jurisdiction over its own water resources.