EXHIBIT 5
DATE 3/26/09
SB 407

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March 11, 2009

Montana House Agriculture Committee
Chairman Representative Mike Jopek
Montana House of Representatives
PO Box 200400
Helena, MT 59620

RE: Senate Bill 407
Our file no: 93083\001

Dear Mr. Chairman and Members of the Committee:

I practice law in Bozeman where I specialize in water rights and water right adjudication issues. About 90% of my practice involves water rights. Prior to joining the Moore Law Firm in 1999, I was employed as a Water Master at the Montana Water Court from 1991 through 1998.

On February 17, 2009, I testified on behalf of Open A Ranch in opposition to Senate Bill 407, which proposes to amend Mont. Code Ann. § 85-7-1957, striking language requiring district courts to review federal reclamation water contracts. Senate Bill 407 is a bad idea because it takes away the State's and other water user's ability to challenge federal reclamation water contracts and make sure they comply with Montana law. Without this check against the federal government, contracts could create new water rights, usurping and undermining Montana's adjudication process.

A case in point is the proposed contract between the United States Bureau of Reclamation ("USBR") and the East Bench Irrigation District ("EBID") in the Beaverhead Valley near Dillon. Some of the proponents of SB 407 are involved in litigation over the proposed contract between USBR and EBID for water from Clark Canyon Reservoir near Dillon. The litigation involves the interpretation of the very language in Mont. Code Ann. § 85-7-1957 that this bill would strike. This language requires a Montana district court to examine the validity of the

contract terms and affirm or disapprove those terms. Our firm represents Open A Ranch in this litigation.

The reason involvement by the district court is important is because the proposed contract between USBR and EBID will increase the number of irrigated acres in EBID from 21,800 to 28,055, resulting in 6,255 more acres irrigated. When this increase is combined with acreage increases by the Clark Canyon Water Supply Company (CCWSC), another party to the contract, the total acres irrigated under the Clark Canyon Project will be increased by approximately 12,000 acres. Without the district court's involvement the additional acres allowed under the contract are essentially new water right appropriations, created without consideration of Montana law. Such a large increase in acres would require additional water use by the irrigation district, adversely affecting all water users who are not included in the irrigation district. The water to irrigate these additional acres has to come from some source, at the detriment of other users. Open A is one of the few ranches in the Beaverhead Valley that does not receive any water from the reclamation project.

The Montana Department of Natural Resources and Conservation (DNRC) quantifies water rights based on acre-feet of consumption. Each additional acre irrigated represents approximately 1½ acre feet more water consumed by the federal project, or potentially 18,000 acre feet more water under federal control.

Open A has objected to the contract in the confirmation proceeding and alleged that its terms are illegal because it allows expansion of irrigated acres beyond the original congressional authorization for the project without a water right. Water rights are controlled by and must be appropriated in accordance with Montana law.

The proposed amendment to Mont. Code Ann. § 85-7-1957 would take away Open A's ability to participate in confirmation proceedings and object to what it believes is an illegal contract under Montana law. The only remaining challenge would be whether the USBR and the irrigation district complied procedurally, however, the substance of the contract could not be challenged.

The proposed removal of district court confirmation is not merely disastrous to Open A Ranch, but all water users outside of the irrigation district boundaries. Without district court involvement there are no restrictions to the USBR expanding their service area on reclamation water projects all across Montana. The proposed amendment not only affects irrigators near the East Bench Irrigation District in Dillon, but other water users near reclamation projects like the Sun

River reclamation project near Fairfield, the Lower Yellowstone reclamation project near Sidney, the Milk River reclamation project near Malta, and the Huntley reclamation project near Huntley Project. Non-project irrigators and water users near these reclamation projects will also be affected by the proposed repeal of district court oversight over a contract's validity when those contracts must be renewed in upcoming years.

Furthermore, I oppose SB 407 in its current form because it is short-sighted and abdicates Montana's authority to determine water rights within its borders to the federal government.

Since territorial times, the federal government has deferred to local rules and customs governing the appropriation of water. This deference to western prior appropriation law has carried on past statehood until today. One example is the McCarran Amendment, where the federal government waived its sovereign immunity in state water adjudications, like the adjudication currently being conducted by our state water court. See 43 U.S.C. § 666. The federal government defers to Montana's legal system to determine federal water rights, such as forest service, national parks, and BLM water rights, and water rights for Indian reservations.

Under the 1902 Reclamation Act, Congress directed USBR to appropriate water rights in accordance with state law. See 43 U.S.C. § 383. Without Montana district court confirmation it is impossible to verify if the contract complies with state water law.

The concept of federalism, where the federal government recognizes the power of the individual states to control certain resources and issues within their borders, and defers to state law, is still alive in the water rights arena. **This bill proposes to erode the state of Montana's power of oversight over federal water projects within its borders**, and requires the state to yield to federal power in the area of reclamation water contracts - even if those contracts are inconsistent with Montana law.

The proponents have not offered any reason why unnecessarily yielding to federal power is a good idea, other than it will make contract confirmation easier for irrigation districts, such as EBID. **Efficiency should not override traditional notions of due process and state's rights.**

This short-sighted approach does not consider that requiring Montana district court oversight of a contract's terms not only protects noncontracting parties (like Open A) but also protects the minority

interests in an irrigation district from unfair and unconscionable terms favored by the majority, such as disproportionate water assessment rates.

The current law also protects the district water users from the unequal bargaining power they have with the Bureau of Reclamation. This is a real issue for irrigators. If anyone thinks this bargaining power is equal and the playing field is level, just talk to irrigators in the Klamath River Basin of Oregon and California who have lost their contract irrigation water to an endangered species of fish.

In summary, Montana District Court oversight protects both the contracting parties and non-contracting parties, and Montana's interest in the water within its borders. Art. IX, § 3 (3) Mont. Const. provides, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." New beneficial uses require a permit from DNRC. A farmer in Montana could not begin irrigating 5,000 additional acres without seeking a water right permit. Such use of water would subject the farmer to administrative enforcement action, would be illegal, and would not be an enforceable appropriation. **The proposed amendment tacitly allows the USBR to do what a Montana citizen could not.** Furthermore, adversely affected water users outside of the irrigation district would be unable to challenge increased water use in a federal water contract, while those inside an irrigation district who have not been following the law, would have no incentive to challenge increased water use in a federal water contract. **SB 407 would throw out those protections, in the name of expedience.**

I would urge two alternatives for this committee to consider:

1) First, keep the language concerning judicial review of the contracts terms in the statute and provide for certification of water right issues to the Montana Water Court.

   The Irrigation District Laws were enacted in 1909, with the contract confirmation provisions added in 1931. At the time there was no concept of Water Court as it was not created until 1979. The Water Court has exclusive jurisdiction to determine water rights. Mont. Code Ann. § 85-2-406 only provides for certification of "water distribution controversies" if the basin is not adjudicated.

A possible amendment should make it clear that a contract confirmation dispute is a water distribution controversy, and therefore, certification to the Water Court would be allowed.

Any amendment to the statute should keep district court oversight of contract terms and allow for certification of water right issues to Water Court.

2) Second, consider tabling this bill in favor of a major overhaul and revision of Chapter 7 of Title 85 concerning irrigation districts. The current law was adopted in 1909 from California law. Several other western states have revised their statutes. Again, I urge you to keep judicial oversight to protect water users, but look at the entire code and bring it up to date so that it is more consistent with the Montana Water Use Act.

Please feel free to contact me if there are any questions and I would be happy to answer them.

Sincerely,

MICHAEL J. L. CUSICK

MJLC/smk
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