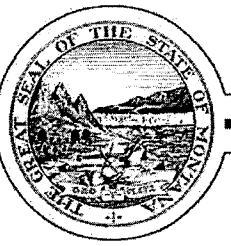
SENATE NATURAL RESOURCES
EXHIBIT NO. 2
DATE March 6, 2009
BILL NO. HB 139

MONTANA WATER COURT



STATE OF MONTANA

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September 10, 2008

Re: LC 5021 - Water Court Comments

Dear Mr. Kolman:

Although I support the general concept of draft legislation LC 5021, there is one provision which may limit its usefulness. If appropriate, would you please pass my concerns on to the members of the Water Policy Committee.

Draft legislation LC 5021 proposes to amend Section 3-7-311, MCA, to authorize Water Court Water Masters to help District Court judges in certain water right cases. The draft proposes to add the following language to the statute:

> (4) A water master may be appointed by a district court to serve as a special master to a district court for actions brought pursuant to 85-2-114 (1) and (3) and 85-5-301 provided that:
> (a) the water master appointed has not been involved with adjudication proceedings in the area where the action is brought;
> and (**WATER COURT ALTERNATIVE: is not currently involved with adjudication proceedings on the stream where the action is brought**)
> (b) the appointment is approved by the chief water judge."

I suggest the proposed language in (4)(a), (including the provision styled as "Water Court Alternative") be eliminated. If (4)(a) is enacted, it will limit the appointment of a Water Master to one who has the least knowledge, experience, or understanding of the stream involved in the District Court controversy and has a real potential to eliminate our Senior Water Masters, our most experienced staff, from helping resolve the controversy in a rapid and expeditious manner.

For example, Senior Water Master Kathryn Lambert has twenty-four years of water adjudication experience and has been involved with proceedings in at least 39 basins, including most of the basins where Water Court decrees and District Court decrees are currently being enforced. Senior Master Doug Ritter has sixteen years of adjudication experience and has worked in at least twelve basins including several basins

which have streams under the supervision of District Court appointed water commissioners. Senior Water Master Colleen Coyle oversees the Water Court/District Court decree enforcement projects and helps in the annual water commissioner training. She has worked on decree enforcement for seven years and routinely works with District Court staff, Department of Natural Resources and Conservation (DNRC) staff, and water users to correct problems that arise in the decree enforcement areas. Using Colleen in these matters brings statewide consistency in water distribution and decree enforcement matters. The proposed draft legislation (4)(a) would eliminate Colleen's involvement and likely eliminate the other Senior Masters in many cases.

The remainder of our basin Water Masters have three or less years of individual Water Court adjudication experience and for many of them their evidentiary trial experience is limited. In their regular adjudication work, they are mentored by the Senior Water Masters who provide oversight and assistance on more complicated matters. If our Senior Water Masters are initially precluded from being appointed by the draft legislation, then they would not be able to offer any subsequent assistance.

Prior involvement in the adjudication of water rights on a stream should not be viewed as a reason to disqualify a Water Master from helping a District Judge, rather it should be viewed as a distinct advantage. A Water Master working on adjudication matters in a basin has knowledge of the water users, water rights, the drainage in general and its landmarks. This knowledge is generally helpful in providing assistance in a case requiring rapid resolution, such as a dissatisfied water users petition.

In *Luppold v. Lewis* (1977), 172 Mont. 280, 287-287, the Supreme Court stated that the purpose of the dissatisfied water users statute (then codified at § 89-1001 et seq., R.C.M. 1947) is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters and not to adjudicate water rights previously determined by the decree. Therefore, the primary questions for the District Court to determine was (1) what was adjudged in the former proceeding and decree and (2) was the water commissioner distributing the water in accordance with what was there adjudged? *Luppold*, 172 Mont. at 288. The statutes governing this process are for the purpose of expeditious administration and not for the purpose of adjudication. *Baker Ditch Co. v. District Court* (1992), 251 Mont. 251, 255, 824 P.2d 260.

A dissatisfied water user petition is basically a request for the District Court to exercise its continuing jurisdiction over the decree. The judge's familiarity with the case and stream is assumed and beneficial in such circumstances, and by extension, a master with familiarity of the case and stream will provide more effective assistance, particularly in water distribution controversies which require immediate action.

The Supreme Court does not believe a judge's prior involvement in overseeing a water rights decree is grounds for disqualification. *Peters v. Montana Fifth Judicial District Court*, Montana Supreme Court Case No. 02-641 (October 22, 2002). In a dissatisfied water user action, District Judge Loren Tucker denied a party's motion for substitution of judge, under section 3-1-804, MCA, stating that:

> Petitioners themselves suggest that their issues require rapid resolution...[t]his judge is at least moderately well informed of the water users, the points of diversion, the places of use, the drainage in general, and a number of its landmarks. This judge has had the benefit of a day long examination of the drainage with water users to advance that understanding. Requiring this case to be heard by a different judge at this point would require substantial duplication of effort for the parties and the new judge and would concomitantly waste time and increase expense.

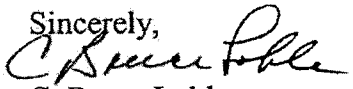
Fifth Judicial District Cause No. DV-1-19908-1292, Decision and Order Denying Motion to Substitute Judge, Oct 3, 2002. The Montana Supreme Court upheld Judge Tucker's decision on these and other grounds. *Peters*, supra.

Several of the District Court Judges may not have the background in water issues that Judge Tucker has. Therefore, the option of providing District Court Judges with Water Court assistance should be drafted to allow the most appropriate Water Master to be appointed rather than to limit the appointment to a Water Master with the least familiarity or experience on the source.

I believe most water users would view a Water Master's knowledge of a stream and its water right usage to be a benefit rather than a conflict of interest. In the circumstances where parties perceive a conflict of interest with a particular master, they could simply indicate those concerns to the District Court. If the perceived conflict is real and not just interposed to delay the proceedings, a different master could be appointed, assuming one is available. This approach would be better suited than requiring a master with the least knowledge of the source to be appointed in all circumstances.

Thank you for taking the time to consider these potential ramifications. Please feel free to contact me with any questions or concerns.

Sincerely,



C. Bruce Loble
Chief Water Judge