

EXHIBIT 4  
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SB 356

Senate Bill 356  
March 21, 2011  
Presented by Bob Lane  
House Natural Resources Committee

Ms. Chairperson and committee members, I am Bob Lane, Chief Legal Counsel of Montana Department of Fish, Wildlife & Parks (FWP). I am here in opposition of Senate Bill 356

SB356 would amend the statute that defines who has standing to object to water right claims at the Montana Water Court and who is entitled to a hearing. Section 85-2-233 is a strange creature. It broadly allows objection. For example, anyone who requests a copy of a decree may object. But it then says that in order to be entitled to a hearing on that objection an objector must demonstrate both an ownership interest in water or its use and, that the use has been affected by the decree. As currently written, Section 85-2-233(1)(b), MCA defines "good cause shown" as a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree. This bill would delete "in water or its use" and substitute "an existing water right, permit, certificate, or state water reservation under 85-2-316."

This bill attempts to preempt a pending decision of the Montana Supreme Court by amending the definition of "good cause shown." In the case, Trout Unlimited (TU) requested notice of the Big Hole Basin temporary preliminary decree and objected to certain water rights in the decree on behalf of its members. The Water Court found that TU was not entitled to a hearing because it and its members do not own water rights and thus, do not have an ownership interest in water or its use. The decision is on appeal, and there is a chance that the Montana Supreme Court will find that the term "ownership interest in water or its use" includes TU's members.

If this bill passes, the Supreme Court's decision may or may not actually be preempted. As amicus, FWP argued that TU's members have a constitutionally recognized right to recreate upon Montana's waters which would be diminished if TU is not entitled to a hearing on its water right objections. The right was recognized by the Montana Supreme Court in both the *Curran and Hildreth* decisions where it held that under Art. IX, Sec. 3(3) of the 1972 Montana Constitution and the public trust doctrine, the public has a constitutional right to use any surface waters of the State that are capable of such use. The diminishment of that right would occur where a party with a constitutional right that it wishes to protect is denied access to the courts to represent that interest. A constitutional right is of little value if affected parties are not allowed to defend the right. In this case the court is adjudicating the extent of private parties' right to take water from the stream, thus affecting stream flow and the ability to recreate.

Because legislative enactments are presumed to comply with Montana's Constitution, FWP first argued that the statute should be construed in a manner that would include TU by recognizing that an "ownership interest in water or its use" includes a public ownership of the right to use the waters of streams and rivers for recreation. However, as an alternative, FWP further argued that if the current definition of "good cause shown" is found to not include TU's members that the

Court should find the statute unconstitutional because it abrogates a constitutional right. This second argument will not be resolved if SB356 becomes law.

FWP believes that the real issue is the fear that if recreationists were entitled to a hearing on their objections, the adjudication would be bogged down with objections by the recreating public and the organizations that represent them. It is highly unlikely that would occur. First, the adjudication has been ongoing for almost thirty years, and it has not occurred to this point. There is simply no evidence to suggest that there are fishermen and paddlers waiting to file objections. Second, the current definition of good cause shown already is self limiting. Under the current definition, in order to be entitled to a hearing, an objector must demonstrate both an ownership interest in water or its use and, that the use has been affected by the decree. In other words, the same individual who shows injury because of his history of floating and fishing the Big Hole may not be able to that he would be affected by the decree of the Tongue River.

Finally, perhaps the most important factor to consider is that objectors play an important role in the adjudication. When Montana opted for a judicial adjudication of pre-1973 water rights, it was generally thought that adverse parties would help ensure its accuracy. Sometimes other water users object, and sometimes they don't. People are often reluctant to object to their neighbors water rights. More objections, and more participation by adverse parties results in a more accurate adjudication. In the long run, this is in the best interest of all Montanans. Therefore, FWP opposes SB356.