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COMMENTS TO THE ENVIRONMENTAL QUALITY COUNCIL CONCERNING VESTED WATER RIGHTS IN THE ADJUDICATION OF THE WATERS OF THE STATE OF MONTANA

I appreciate the opportunity you have given me to present some concerns and questions about the protection of our vested water rights that are on our grazing allotment. I would like to call your attention to the case of Hage v. U.S.,United States Court of Federal Claims. The jurisdiction of this court is to hear takings of private property claims of citizens against agencies of the United States government. The Hage case raised issues of takings of various property rights on the Hage's ranch and the Court agreed that several takings actions had occurred. One part of the Court's decision stated that Hage owned VESTED water rights on the federal land and that these vested water rights had been acquired and maintained by his predecessors-in-interest. .These vested water rights were created by the Act of 1866 which reads in section 9:" And be it further enacted, That whenever by priority of possession , rights to the use of water for mining, agriculture ,manufacturing ,or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs ,laws, and the decisions of courts ,the possessors and owners of such vested rights shall be maintained and protected in the same: and the right-of-way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed." I have some citations that come from property law regarding vested, vested right and vested and accrued right .I'm not going to read them all ,but there are some critical issues that I feel need to be raised about their importance. 1) It is only a vested right which cannot be taken away except by due process of law. 2)Vested has a well-understood meaning .It is used to define an estate ,either present or future ,the title to which has become established in some person or persons and is no longer subject to some contingency. A Vested and Accrued Right :One complying with local laws for appropriation of water and constructing works for diversion thereof on vacant public lands of U.S. acquires "vested and accrued right" ,which is superior to rights of subsequent entrymen and carries with it right of way or easement for impounding water .This vested right is absolute ,complete and unconditional in itself ,fixed ,unalterable and irrevocable. This property interest is so substantial in character that its destruction or deprivation cannot be justified by the objectives in view. The vested water right ,being subject to no contingency is good against all challengers, including the United States government.

The Taylor Grazing Act recognizes prior rights and vested water rights :section 315:"Nothing in this subchapter shall be construed in any way to diminish ,restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands ,nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction." Section 315b."vested water rights:" Preference shall be given in the issuance of grazing permits to those who are landowners engaged in the livestock business, owners of water or water rights .Provided further ,That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining ,agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. "TGA also says that fences, wells ,reservoirs and other

improvements necessary to the care and management of the permitted livestock may be constructed...No permit shall be issued which shall entitle the permittee to the use of the improvements owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements.

The Federal Land Policy and Management Act also contained a Savings Provision. Title 43,section 1769 a) Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter...There was also savings provision language recognizing pre-existing rights in Section 1752g that states if the government takes an allotment to devote it to another purpose ,then the allotment owner shall be compensated for the value of the improvements. The Hage Decision, as well as preceding laws beginning with the Act of 1866 indicate that improvements on the rancher's grazing allotment belong to the rancher. I have enclosed a BLM Rangeland Summary and Record of Decision page from August 1982.This Prairie Pothole EIS addresses construction of water improvements for wildlife and waterfowl and how the funding will be raised .Page 10 "The proposed range improvements explained previously will be completed within a 7 year period if sufficient funds are appropriated ",ALTHOUGH THE ONLY CURRENT SOURCE OF PUBLIC FUNDS FOR RANGE IMPROVEMENTS IS ONE-HALF THE GRAZING FEES RETURNED FOR THIS PURPOSE. "This is in reference to the Range Improvement Cooperative Trust Fund ,whereby 1/2 of the rancher's grazing fee is deposited into this trust fund and that money is to be used only for improvements.

Title 16,section 1133 Wilderness Act 3c) ;"Except as specifically provided for in this chapter, and subject to existing private rights"

I have gone over all of this information to show our concern and confusion with present Montana Water Law and the adjudication proceedings .Our understanding of the Act of 1866 is that when our predecessors first put that water to beneficial use for stock on the federal land, that water right vested. However, in 1972, according to "Water Rights in Montana" page 2 :" ALL EXISTING WATER RIGHTS ARE HEREBY RECOGNIZED AND CONFIRMED.EXISTING RIGHTS,WHETHER A USE RIGHT,DECREED WATER RIGHT OR FILED RIGHT,EACH WAS NOW EQUALLY VALID." Did that mean that all of the federal agency claims for stockwater are now equally valid? Does this now consider "U.S. v. New Mexico, 1978",which Montana's Attorney General signed on, siding with New Mexico? The U.S. Supreme Court upheld the New Mexico Supreme Court finding that "any water rights arising from cattle grazing by permittee on the forest should be adjudicated to the permitte under the law of prior appropriation and not to the United States." The United States argued that it was entitled to a reserved right for stockwatering purposes. The State Supreme Court again disagreed ,holding that stockwatering was not a purpose for which the national forests were created .Regarding the Taylor Grazing Act, one of the purposes was to provide for the orderly use of the range and protect the sheep and cattle grazers rights against interference.

As pointed out in Hage (pages 14 and 15),and by definition of adjudication in Black's Law dictionary ,the adjudication does not determine the ownership of the water right ,but determines the quantity of water rights owned so the state can administer the

water rights and prevent over-appropriating a stream .This is a common on-going proceeding in western states ,Nevada law recognizes rights established prior to 1905 as VESTED WATER RIGHTS and are outside the framework of statutory water law and are not affected by water law enacted after 1905.The state of New Mexico in 72-1-3(I have provided a copy) DECLARATION OF WATER RIGHTS VESTED PRIOR TO 1907;form:contents;finding ,recording ;presumption .I have read the "Water Rights in Montana" February 2006 and "Montana Water Law" 2003 and I cannot find Vested Right and I cannot find a method to claim or give public notice of our vested water rights .The New Mexico Water engineer site has a form similar to the Montana 627 but it specifically has the wording "AFFIDAVIT OF DECLARATION OF VESTED WATER RIGHT."I also noticed that an application for coalbed methane has an affidavit and I have enclosed a copy of that page however, I can't seem to file an affidavit to declare vested water rights tied to the Act of 1866.I think it should be obvious that ranchers have historically had ownership of water rights. The fact that they have been bought and sold is proof. In our case, the warranty deed has the following language :"ALL RANGE RIGHTS,ALL WATER RIGHTS AND ALL APPURTENANCES." Are we able to defend our vested water rights against a federal agency given the current situation? I don't think these facts are lost on the federal agencies.

We are finding that we are having some problems claiming and defending our vested water rights under the present law and system. The Montana Supreme Court has an Order in the Montana Water Law Book stating for example that stockwater direct from stream is voluntary to file. The Order states plainly that filing IS NOT MANDATORY. I have learned that if the rancher does not file and a federal agency has, that the rancher will forfeit his ownership of that right and it will be owned by the federal government. This does not appear to be explained clearly and yet will have a serious negative impact on the rancher and ranching business. .I would like to go through some correspondence and a preliminary decree we did get to illustrate. The water law ,in both books says that a water right is appurtenant to the land on which it is used .A water right may also be severed from the land and sold or retained .Here is a copy of a letter from Montana Legislative Services Division ,Legislative Environmental Policy Office regarding water rights on federal land. And the response from Dr. Angus McIntosh at New Mexico State University ..Here is an Oct. 30, 2002 letter to my neighbor ,Feb.6,2003 and March 12,2003 . We have a letter from DNRC from Feb 6,2003 and March 12,2003 , which DNRC also provided a copy of directly to the Glasgow BLM .That's interesting as no one has ever sent us written notice as the BLM files stockwater and wildlife claims over our Act of 1866 water rights ..The Dnrc Guidelines for filing water rights applications does not seem to us to address the Act of 1866 vested water right , nor the provision addressing use into the future ,impoundments. Asking to use the form 605 on those means forfeiting the priority date and very likely coming out with a junior water right to a federal agency who has filed invalid stockwater claims and many questionable wildlife claims .Right now ,I don't have an easy way to find out the federal law that the wildlife claim is based on for wildlife rights going back as far as the 1920's and '30's .(85-2-224: statement of claim which has been actually put to use shall include laws of U.S. on which claim is based) Do we have to object to each of multiple (as many as 4 filings-2 for stock and 2 for wildlife) , ALL ON THE SAME ONE LEGAL DESCRIPTION. The language in the exempt right guidelines denies our ability to claim VESTED WATER RIGHTS to

many locations our stock do now have use of, historically have had use of and logic and common sense would say our predecessors stock put water to beneficial use at those locations as well.We are denied claiming that vested water right .I find it interesting ,but do not understand the following :"PLEASE NOTE THAT IF ANY OF THE APPLICATIONS WE RECEIVE ARE FOUND TO DUPLICATE AN EXISTING WATER RIGHT FILING,DNRC WILL TERMINATE THE APPLICATION." I HAVE INCLUDED AN "Acknowledgement of exempt water right" showing the remark put on by the DNRC "the ownership of this right may be questionable .The points of diversion and place of use appear to be on federal land." Obviously ,we feel , based on information that has been presented that that remark is at least inappropriate and we strongly feel that it rises to the level of a threat to the protections afforded the VESTED WATER RIGHT ,ACT OF 1866. The Montana DNRC website has a site regarding the Bean Lake Decision .This does not give a date so I can't tell how valid the statistics that are quoted on the 2nd page are , however ,note mention of blm filings for wildlife, ,natural potholes and small pits .That is inaccurate as we have found multiple filings for wildlife on the same legal description and on every water development put in on our grazing allotment through private funding as well as Range Improvement Cooperative Trust Fund.

The Montana Water Law 85-2-116 has provisions regarding legal assistance, particularly if a Montana citizen is involved in a controversy to which an agency of the federal government or another state is a party, the department may in its discretion intervene as a party or provide necessary legal assistance to the citizen of Montana .In light of U.S.v. New Mexico and previous rulings coming from the Montana Water Court ,these questions have been answered and yet all those federal agency claims are still putting in jeopardy our ownership of those water rights and I think it is a legitimate question to ask why . I would also like to ask if 85-2-125 regarding recovery of attorney fees by prevailing party is only valid concerning issues of permits or will it also be worded to apply to those vested water rights situations as well? Is there a provision for penalties for willfully filing invalid claims, which only drag out the adjudication process and is there a provision that they pay the other parties filing fees, which are substantial, as well as legal fees?

I appreciate the opportunity to raise these issues .Unfortunately, there are others who are afraid to raise the issues or even try to claim these rights . They have ,in many cases been told by federal agencies that they have no water rights ,the federal government owns them all ,they had better not file and so apparently these private rights will be forfeited due to fear .I have to say that I had a similar experience when asking for an allotment map .I was told I was wasting my time and that I was crazy. The BLM owned the land and the water ,we were just there because they let us and they could kick us off any time they wanted and here's a copy of our rules and regulations that says so .I firmly believe that there is a serious fatal flaw when citizens are afraid to claim and defend the property that at one time the federal government granted to our predecessors...I would hope the state of Montana would help its citizens and find remedies to move the adjudication forward more quickly so that we can hold and prove quiet title to our property.

This concludes my remarks. I would request Valley County Commissioner Pippin be allowed to present his statement. Thank you very much for your time and attention..

Maxine Karman
Hinsdale, MT.