



**Montana Fish
Wildlife & Parks**

ENVIRONMENTAL QUALITY
COUNCIL. 2003-2004

September 13, 2004

Ex. No. 11

P.O. Box 200701, Helena, MT 59620-0701

September 10, 2004

C. Bruce Loble
Chief Water Judge
Montana Water Court
P.O. Box 1389
Bozeman, MT 59771-1389

Re: 8/26/04 On Motion Rules

Dear Judge Loble:

Thank you for the opportunity to review your Draft On Motion Rules dated August 26, 2004. The following comments are submitted on behalf of the Montana Department of Fish, Wildlife and Parks ("DFWP").

First, DFWP was surprised and disappointed that you submitted draft on motion rules for comment without convening another meeting of the Adjudication Advisory Council ("AAC"). Your 8/26/04 draft contains new on motion concepts not previously submitted to or considered by the AAC. As you are aware, the AAC has been considering and debating the Attorney General's on motion proposal for over a year. The Advisory Council members were nearing a consensus on the content of a final on motion proposal that would be submitted to you for possible inclusion in the adjudication rules you have agreed to submit to the Montana Supreme Court on or before January 1, 2005. On May 20, 2004, you indicated that you would like to avoid holding AAC meetings for the next two or three months because you intended to work on 17 opinions during that period. Your decision to submit new and previously undisclosed on motion proposals without consulting the AAC appears to indicate that you have already rejected the AAC's on motion recommendations.

Second, the mandatory on motion language in your 8/26/04 draft (section 7a) appears to simply restate the Water Court's present but limited on motion policies. Your draft mandatory on motion proposal does not contain additional on motion criteria that will address the decree accuracy and enforcement issues discussed at length by the AAC over the past year.

Third, relying on a "Steering Committee" comprised of the attorneys representing claimants and objectors in a basin to identify those issue remarks that will be called in by the Water Court for resolution is a potential unconstitutional delegation of the Water Court's authority under S.B. 76. It is also unworkable, as illustrated by the following:

Your Steering Committee proposal contains no procedural rules. For example, does a majority vote of the Steering Committee determine which issue remarks are pursued or does it

take a "super majority" vote before the Water Court will call in an issue remark? Can absent members of the Steering Committee vote by proxy? Does an attorney who represents multiple claimants or objectors get multiple votes or will votes be weighted by the number of claims or objections filed by an attorney's clients?

Your Steering Committee proposal ignores a host of fundamental ethical and practical issues. Who pays the attorneys on the Steering Committee for the time spent reviewing claim examination files to determine which issue remarks should be called in on motion of the Water Court? How can the Water Court exclude pro se claimants from serving as Steering Committee members when the Water Court has openly encouraged pro se participation throughout the S.B. 76 adjudication? If pro se claimants can be Steering Committee members, how will membership on the Committee be limited in order to ensure that the Committee does not have hundreds of members? Under Montana's code of ethics and conflict of interest rules for attorneys, how can lawyers who represent claimants in the adjudication possibly vote on whether to pursue resolution of issue remarks without subjecting themselves to possible disciplinary action before the Commission on Practice? What happens if most of the attorneys on the Steering Committee have a potential conflict and abstain from voting, leaving only a small minority of Committee members to vote on whether an issue remark is called in by the Water Court?

Your Steering Committee proposal makes it unlikely that the on motion process will ensure the accuracy and enforceability of final decrees. Can the United States or DFWP be assured that a Steering Committee dominated by private attorneys representing private consumptive water users will vote to pursue abandonment or non-perfection issues involving consumptive use claims? Your draft proposal makes it clear that a Steering Committee vote not to pursue an issue remark eliminates the Water Court's obligation to call an issue remark in for resolution. In other words, a claim with clear evidence of abandonment or non-perfection in the claim examination file would not be called in by the Water Court even if the Steering Committee vote not to pursue resolution of the remark was based on pure political trading of votes and not on the substance of the claim examination file. The Montana Legislature has delegated to the Water Court and the Department of Natural Resources and Conservation ("DNRC") the legal responsibility for issuing accurate, enforceable and timely final decrees. Your Steering Committee proposal makes it likely that substantive issue remarks affecting either the accuracy or enforceability of final decrees will not be addressed by the S.B. 76 adjudication because of a vote by the Steering Committee.

A related issue adversely affecting the accuracy and enforceability of final decrees is that your on motion proposal appears to contemplate that Steering Committees in each basin can adopt different "basin or source plans" that may leave substantive issue remarks unresolved in one or more basins. For example, can the Steering Committee in a Bitterroot subbasin vote not to pursue abandonment issues in that subbasin while the Basin 41I Committee includes abandonment issues in its basin plan? Such an inconsistent approach to resolving substantive issue remarks will not result in uniform accurate and enforceable final decrees.

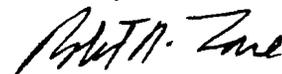
Fourth, DFWP is concerned that the increased S.B. 76 funding proposals you and DNRC have submitted to the Environmental Quality Council ("EQC") and the AAC may be based on your limited draft on motion proposal of 8/26/04 and not the more comprehensive on motion

proposal recommended by the Attorney General and five of the seven AAC members. Furthermore, DFWP believes that the EQC supports a more comprehensive on motion policy similar to the Attorney General's proposal and that the EQC assumed that the proposed increase in S.B. 76 funding would cover a comprehensive on motion process. If the DNRC and Water Court requests for increased S.B. 76 funding are based on your limited 8/26/04 on motion proposal, then EQC, the AAC and the public need to be so advised immediately. Both EQC and the AAC have expended considerable time and effort attempting to address on motion funding issues. There appears to be a consensus that the S.B. 76 adjudication should be adequately funded to complete the examination and reexamination of claims in ten (10) years and the adjudication in fifteen (15) years. Future S.B. 76 funding discussions and decisions must also be based on a common understanding of the scope of the on motion proceedings that are deemed necessary to ensure that accurate, enforceable, and timely final decrees are issued by the Water Court.

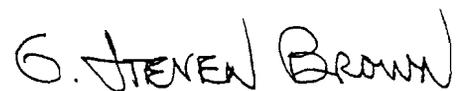
Finally, DFWP remains willing to assist you in the preparation of on motion rules for submittal to the Supreme Court. In late 2000 and early 2001, you directed Steve Brown to convene a subcommittee comprised of Cindy Younkin, Holly Franz, John Bloomquist and DNRC to consider all on motion comments received and recommend a "consensus" set of on motion rules. Steve submitted a "consensus" proposal on January 12, 2001, pointing out that the subcommittee was only in disagreement on one issue relating to the Water Court's on motion review of settlement stipulations. The ten page submittal on January 12, 2001 addressed most of the fundamental on motion issues still being discussed today. DFWP urges you to reconsider your 8/26/04 draft on motion proposal, reconsider previous comments submitted on the on motion issue, and meet with the AAC before submitting any on motion rules to the Supreme Court.

Thank you again for the opportunity to comment on this important matter.

Sincerely,



Robert N. Lane
Chief Legal Counsel



G. Steven Brown
Retained Counsel

C: Jeff Hagener, Director
Adjudication Advisory Council Members
Adjudication Advisory Council Interested Persons List
Environmental Quality Council