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Water Policy Interim Committee

61st Montana Legislature

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TO: Water Policy Interim Committee
FROM: Helen Thigpen, Staff Attorney
DATE: February 22, 2010
RE: The nature of a water right and implications for enforcement

I. Summary

The Water Policy Interim Committee (WPIC) is scheduled to discuss the issue of water right enforcement at the March 2010 meeting. Water right enforcement is not a new area of concern, but the issue has garnered significant attention in the last several years as drought and increased use have strained existing water supplies. Many have suggested that water rights should be more strictly enforced. Some have also suggested that the use of water by someone who *does not* possess a water right or, conversely, the overuse of water by someone who *does* possess a water right is a theft that should be enforced in the same manner as, for example, the theft of a car. A water right, however, is a unique form of real property that is characterized by the holder's right to use water rather than by ownership. The purpose of this memorandum is to provide WPIC members with information on the legal characteristics of water rights and to highlight how these characteristics may be significant to the issue of water right enforcement.

II. Water rights as a unique form of real property

One of the most important yet controversial topics in modern property discourse is whether a particular thing constitutes property. The reason for the controversy is obvious; the classification of something as property has enormous implications for whether an individual will have certain recognized property rights. If something is classified as property, then it may be freely conveyed between parties, devised by will, inherited, or encumbered. The classification of a particular thing as property also determines the availability of certain constitutional protections that are unique to property ownership. For example, the Due Process Clause of the U.S. Constitution prohibits the deprivation of property without due process of law. Likewise, the Takings Clause prohibits the taking of private property without just compensation. Across jurisdictions, it is well-settled that neither a due process claim nor a takings claim will be recognized unless a cognizable property interest is at stake. See e.g. *Board of Regents v. Roth*, 408 U.S. 564, 69 (1972). In addition, unless a property interest is at stake, a common law claim for trespass, conversion, or nuisance cannot be recognized. Finally, since property rights are generally enforced through equitable remedies, such as injunctions, the classification of something as property may determine the availability of a particular remedy.

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The very notion of what constitutes property is abstract and cannot be neatly categorized. In its most basic form, property is the "exclusive right of possessing, enjoying, and disposing of a thing". Blacks Law Dictionary, 1216 (Bryan A. Garner ed., 4th ed., West 1990). In Montana, anything that can be owned is called property, which may be classified as either: (1) real or immovable property; or (2) personal or movable property. Sections 70-1-101 and 105, MCA. Real property consists of: (1) land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; and (4) that which is immovable by law. By contrast, anything that is not real property is considered personal property.

Property may be owned privately by individuals or publicly by the government. Section 70-1-102, MCA. Ownership of property gives an individual the right to possess and use property to the exclusion of others. Private property – or property over which a person may enjoy absolute and exclusive possession – is a complex and oftentimes controversial topic. Private property may include any type of property that can be legally held by an individual, including land, fixtures, bank accounts, stocks, homes, and cars. In Montana, an individual may have an interest in numerous forms of property. Under section 70-1-104, MCA, an ownership interest may exist in inanimate things capable of manual delivery, domestic animals, obligations, products of labor or skill such as the goodwill of a business or trademarks, and other rights created or granted by law.

Beyond these broad statutory rules, property rights can be generally described as a set of laws that define how individuals may control and transfer property. The rights associated with property ownership are commonly illustrated as a bundle of rights or a bundle of sticks. Instead of describing a particular thing that a person can own, the bundle of rights theory describes a group of rights, which generally includes the right to exclude others from the property, to use and enjoy the property, to dispose of the property by sale or by will, or to mortgage or lease the property. The removal of one right, such as the removal of exclusive possession by granting an easement, does not eliminate the owner's other rights in the property. Many courts, including the Montana Supreme Court, have indicated that the most valued right encompassed within the bundle of rights is "the right to sole and exclusive possession – the right to exclude strangers, or for that matter friends, but especially the government". *Kafka v. Mont. Dept. of Fish, Wildlife and Parks*, 2008 MT 460, ¶ 51, 348 Mont. 80, 201 P.3d 8 (citing *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991).

The bundle of rights or bundle of sticks theory has also been used to describe water rights, which is indicative of the treatment of water rights as a form of property. In general, a water right may be defined as an exclusive right to access and use a specific quantity of water as provided by law. The right is exclusive because the holder of a water right may exclude others from interfering with the specific quantity of water that has been allocated to the holder or the source of supply from which the water is claimed. In Montana, a water right is defined as "the right to use water as documented by a claim to an existing right, a permit, a certificate of water right, a state water reservation, or a compact". Section 85-2-422, MCA. Because Montana is a prior appropriation state, which is characterized by the concept of "first-in-time, first-in-right," a water right cannot

be obtained unless the water is actually diverted and applied to a beneficial use. Most western states have adopted some form of the prior appropriation doctrine, but despite whether a state has adopted the prior appropriation doctrine, the riparian doctrine, or some combination of the two, the character and nature of the water right itself is generally the same across jurisdictions. These characteristics are the subject of the following discussion.

It is well-settled that water rights are legally protected property rights. As the Montana Supreme Court explained in 1936, when a right has been fully perfected by diverting the water and applying it to a beneficial purpose, the right becomes a property right that can "only be divested in some legal manner". *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 294, 62 P.2d 206, 210 (1936). As a result, water rights are protected by both the U.S. and Montana Constitutions and cannot be taken by the government without due process of law. In addition, water rights have value and may be transferred like other forms of property. Thus, conceptually water rights are very similar to the rights that stem from the ownership of real property. In fact, the general rule in western states that have adopted the prior appropriation doctrine is that water rights *are* considered real property. Like other forms of real property, water rights may be sold, conveyed, leased, encumbered, or assigned. In addition, although a water right normally passes with the land, it may be reserved if the transfer instrument specifically states that the water right has been reserved. See section 85-2-403, MCA.

The recognition that a water right is a form of real property came early in Montana's history. For example, in *Sain v. Montana Power*, 20 F. Supp. 843 (D. Mont. 1937), the Court found that water rights were a form of real property and further, that suits to adjudicate the extent and priority of water rights were similar to quiet title actions. This principle was also recognized in a 1924 decision from the Montana Supreme Court, in which the Court stated that "[a]n action to ascertain, determine and decree the extent and priority of the right to use of water partakes of the nature of an action to quiet title to real estate." *See Verwolf v. Low Line Irrigation Co.*, 70 Mont. 570, 227 P. 68 (1924). The comparison of an action to adjudicate the extent and priority of a water right to an action to quiet title to real property (in addition to the explicit recognition that a water right is real property) is significant in the context of water law not only because of the rights that stem from the ownership of real property, but because quiet title actions are actions between private parties to establish title to real property. The government generally does not get involved with these types of transactions. This concept is explored more thoroughly in section IV below.

The substantive nature of a water right as a form of real property is also illustrated by the Montana Supreme Court's recognition that water rights may be acquired through adverse possession or prescription. Adverse possession is a method of acquisition of title to property by possession for a statutory period under certain conditions. A claim for adverse possession requires proof of open, notorious, exclusive, adverse, and continuous possession or use of the property for the statutory period of 5 years. See *Shors v. Branch*, 221 Mont. 390, 720 P.2d 239 (1986). Title by prescription requires the establishment of the same elements for an adverse possession claim, but provides only a right to use another's property for a limited purpose.

Persons claiming title by adverse possession or an easement through prescription bear the "heavy burden" of proving each of these elements because according to the Montana Supreme Court, "One who has legal title should not be forced to give up what is rightfully his without the opportunity to know that his title is in jeopardy and that he can fight for it." *Grimsley v. Spencer*, 206 Mont. 184, 205, 670 P.2d 85, 92-93 (1983). However, pursuant to section 85-2-301, MCA, adverse possession cannot be used as a method for obtaining a water right after July 1, 1973. Section 85-2-301, MCA, also provides that a person may not acquire a right to appropriate water "by any other method, including by adverse use, adverse possession, prescription, or estoppel".

The nature of a water right as real property is also illustrated by how water rights are treated for purposes of taxation. In *Verwolf*, the Montana Supreme Court stated that while a right to use water "partakes of the nature of real estate" it was "not land in any sense, and when considered alone and for the purpose of taxation is personal property." Otherwise, according to the Court, a right to use water "is not subject to taxation independently of the land to which it is appurtenant". *Verwolf*, at 578. Because water rights may be severed from land, the possibility arises that one's land value (and thereby the taxable value of the land) will decrease with the separation of the water right from the land. This question of whether a severed water right should be subject to taxation to make up the difference in decreased property tax revenue is beyond the scope of this memorandum, but it may be something WPIC might want to refer to the Revenue and Transportation Interim Committee for further consideration.

Even though water rights may be considered a form of real property, there are significant differences between water rights and traditional forms of real property, such as land, that are often overlooked. The differences, however, are integral to how water rights are acquired, perfected, and transferred. The most significant yet commonly overlooked distinction between a water right and a traditional property right is that a water right holder does not *own* the water. Instead, by acquiring a water right, the holder acquires the right to *use* the water at a particular place in a particular quantity. As a result, a water right is commonly described in property law texts as a usufructuary right. A usufruct is defined as "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing". Powell on Real Property § 65.03. The right to use instead of ownership is significant because the water right holder does not have an "ownership interest in the actual corpus (body) of the water until the water is reduced to possession". Powell on Real Property § 65.03. However, once the water is reduced to possession, the water essentially takes on the character of real property and the holder has a property right in the specific quantity of water that has been authorized under the right itself.

The concept of a water right as a right of use instead of ownership is easily illustrated by Montana law. Under Article IX, section 3(3) of the Montana Constitution, "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." In other words, the people of Montana own the water and individuals may use the water

if the water is not wasted and is allocated towards a beneficial purpose. The Montana Supreme Court articulated this principle in 1923 when it held that an appropriator is not the owner of property but acquires the right to use it. *Galahan v. Lewis*, 105 Mont. 294, 72 P.2d 1018 (1937). Thus, in Montana the possession of a water right cannot be characterized as *absolute* ownership. Instead, by acquiring a water right, an individual acquires a right to use the water at a particular place for a particular purpose.

Water rights are distinct from traditional property rights for a variety of additional reasons. The differences stem largely from various limitations – legal and natural – that are unique to water rights in general. First, the water right holder does not have exclusive possession of the water itself. As noted above, the ability of a property owner to exclude others from using or intruding upon a particular piece of property is one of the most essential characteristics of a property right. While the water right holder is entitled to use a particular quantity of water and may "call" the water right of a more junior appropriator in times of scarcity, the water itself may be characterized as a shared resource. For example, there may be federal, state, and tribal government interests in the same watercourse. The federal government may have an interest in hydroelectric power and ensuring the free flow of commerce. The state may have an interest in the water from a public health and safety standpoint and must ensure the viability of the public trust doctrine in navigable waterways. In addition, an Indian tribe may have a reserved water right in the watercourse, and of course, ecological systems rely on a sufficient and clean source of water. On top of these competing possessory interests, the water resource itself is a dynamic resource that changes with each season according to climatological influences.

Water rights are also unique because they are limited in prior appropriation jurisdictions such as Montana by the beneficial use requirement. Under Montana law, water cannot be appropriated unless it is applied to a beneficial use. Beneficial use is defined as "a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses". Section 85-2-102(4), MCA. While the definition of beneficial use is broad (there are additional uses that will meet the beneficial use standard set forth in section 85-2-102(4), MCA), all water rights are limited by this requirement, which has been characterized numerous times as the basis, measure, and limit of the right. In addition, water rights are limited to the amount of water that is actually put to a beneficial use and to the amount that is reasonably necessary for that use. Also, an appropriator cannot change his or her water right without receiving prior approval from the Department of Natural Resources and Conservation (DNRC). To receive approval, the applicant must demonstrate that the change will not have an adverse effect on another's existing water rights. Section 85-2-402, MCA. Finally, a water right may be forfeited if it is not used for the statutory period of 10 years in Montana. See section 85-2-404, MCA.[1] On a related note, the uniqueness of water rights is also demonstrated by section 85-2-

[1] Section 85-2-404(1), MCA, states that "[i]f an appropriator ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately expire."

212, MCA, which codified the Montana Supreme Court's 1979 order (Order No. 14833) requiring every person, entity, municipality, county, state, and federal agency and tribe to file a statement of claim to an existing right to the use of water arising prior to July 1, 1973. Failure to file a claim resulted in a conclusive presumption that the water right or claimed water right was abandoned. Claims for stock and individual uses based upon instream flow or ground water sources were exempted from the requirement, although the claims could be voluntarily filed.

III. Enforcing water rights in Montana

The scheme for water right enforcement in Montana is a unique hybrid of both private and government enforcement mechanisms. The DNRC is charged with administering and regulating water rights in Montana. Under section 85-2-114, MCA, the DNRC has authority to petition the District Court supervising the distribution of water to uphold a water right. Specifically, the DNRC may petition the District Court to "regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use". The DNRC may also petition the District Court to "order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference". Section 85-2-114(1)(b). Finally, the DNRC may request a temporary, preliminary, or permanent injunction "to prevent a violation of this chapter [Title 85, chapter 2]". Section 85-2-114(1)(c), MCA. The DNRC may direct its attorneys, the Attorney General, or a County Attorney to bring suit to enjoin any of the above referenced actions, although either the Attorney General or a County Attorney may bring such an action on their own accord. Section 85-2-114(3) and (4), MCA. In any event, prior appropriators must be given priority in judicial enforcement proceedings and a violator may be subject to civil penalties in an amount not to exceed $1,000 for noncompliance. Section 85-2-122, MCA. Criminal penalties are not available in Montana.

While the DNRC has some authority to enforce water rights and can petition the District Court in the instances outlined above, for a variety reasons that are discussed more thoroughly below, water rights are most commonly enforced through private litigation. Usually this requires a party to obtain an injunction to prevent an interference with a water right. An injunction is an enforceable court order that requires a party to take a particular action. There are three types of injunctions: (1) temporary restraining orders; (2) preliminary injunctions; and (3) permanent injunctions. The first two are commonly brought together and are usually valid for a very limited duration. A temporary restraining order may be granted without notice and allows a court to enjoin an adverse party until a hearing can be held on an application for an injunction or order for a show cause hearing. Under section 85-2-114, MCA, "a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified compliant that a provision of this chapter [Title 85, chapter 2] is being violated". See *Eliason v. Evans*, 178 Mont. 212, 583 P.2d 398 (1978).

Like a temporary restraining order, a preliminary injunction is also issued before trial. A preliminary injunction, however, lasts longer than a temporary restraining order and is usually issued to preserve the status quo before trial. As an equitable action, a request for a preliminary injunction (or any injunction for that matter) will not give rise to a trial by jury. A preliminary injunction may be granted in the following situations: (1) when it appears that the applicant is entitled to the relief demanded and the relief will restrain the action complained of; (2) when it appears that the commission or continuance of some action during the litigation would produce a great or irreparable injury to the party seeking the injunction; (3) when it appears during the litigation that the adverse party is doing, is threatening to do, or is about to do some act that violates the rights of the party seeking the injunction; or (4) when it appears that the adverse party, during the pendency of the action, is threatening or is about to remove or dispose of the adverse party's property with intent to defraud the party seeking the injunction. Section 27-19-201(1) through (4), MCA; see also *Espy v. Quinlan*, 2000 MT 193, 300 Mont. 441, 4 P.3d 1212. Finally, a court may order a permanent injunction after a trial is complete and the dispute has been decided. Although similar to a temporary injunction, a permanent injunction may be limited or infinite in duration. Permanent injunctions have been upheld by the Montana Supreme Court on a variety of occasions in the context of water use. See e.g. *Wills Cattle Co. v. Shaw*, 2007 MT 191, 338 Mont. 351, 167 P.3d 397.

There are additional methods by which a party can enforce a water right. In times of scarcity, a senior appropriator may "call" the water rights of a more junior appropriator when water availability is low. The quintessential component of the first-in-time, first-in-right doctrine is that whoever obtains a water right first has priority over those who obtained subsequent water rights in the same source. As such, priority dates can determine whether a user will have any access to water in times of scarcity. Senior users are entitled to use the total amount of their water rights first. Junior water right holders cannot use water pursuant to their rights unless the use does not adversely affect a senior user.

In addition, in cases where a temporary preliminary, preliminary, or final decree exists, a party may petition a District Court to appoint a water commissioner to settle a water distribution dispute, provided that the owners of at least 15% of the water rights affected by the decree filed the petition. See section 85-5-101, MCA. If 15% of the owners of the water rights affected by the decree cannot be obtained for the petition, a water commissioner may still be appointed if the petitioners can show that they are not receiving the water to which they are entitled. In these cases, the water commissioner will distribute the water according to the decree. Similarly, in the case where the water rights of *all* appropriators from a source or in a defined area have been determined, the DNRC and one or more water right holders may also petition a District Court to have a water commissioner appointed. Sections 85-5-101(1) and (2), MCA. A water dispute may be easily settled in these cases because the water rights at issue have already been determined. When a temporary preliminary, preliminary, or final decree does not exist, or when all appropriators from a source or area have not been determined, any party may petition the District Court to certify the matter to the Chief Water Judge for a determination of the water rights at issue. Pending a determination by the Water Court, the District Court may issue an

injunction or other relief necessary. Section 85-2-406(2)(b), MCA. Any party may also petition the District Court to appoint a water mediator to assist with the resolution of a dispute. Under Montana law, a water mediator does not have formal power to order any water user to take a particular action. Rather, the mediator provides guidance to the parties for the nonjudicial resolution of the dispute. Section 85-5-110, MCA.

In 2009, the Legislature revised many of Montana's laws with respect to water right enforcement. Pursuant to House Bill No. 39, Chapter 103, Laws of 2009, a special water master may now be appointed by a District Court to assist with enforcement. Prior to the passage of House Bill No. 39, water masters were only authorized to assist with various duties before the Water Court. House Bill No. 39 provides specific authorization for a water master to assist with actions brought pursuant to section 85-2-114, MCA. As an officer of the Court, a water master has all the general powers given to a master under Rule 53(c) of the Montana Rules of Civil Procedure. In the Water Court, water masters are responsible for assisting the Court with adjudication matters and are assigned to a particular basin to consolidate claims, conduct conferences, order field investigations, accept or rejecting settlement agreements, and issue a Master's Report. Water masters, however, do not monitor individual water users to determine whether a person is unlawfully using water in violation of another's water rights.

House Bill No. 39 also removed various enforcement hurdles for the DNRC. Section 85-2-114(1), MCA, formerly required the DNRC to make reasonable attempts to obtain voluntary compliance from a party before it could file a petition with the District Court for any alleged violation of Title 85, chapter 2, MCA, commonly referred to as the Montana Water Use Act. Following the passage of House Bill No. 39, the DNRC may, but is not required to, obtain voluntary compliance from a party before filing a petition with the District Court. The 2009 amendments to section 85-2-114, MCA, also require the DNRC, the County Attorney, and the Attorney General to "give priority to protecting the water rights of a prior appropriator under an existing water right, a certificate, a permit, or state water reservation" when enforcing any of the provisions of section 85-2-114, MCA. Finally, House Bill No. 39 established a water right enforcement program and account that required fines collected under section 85-2-122(3)(b), MCA, to be deposited into the account.

IV. Considerations

As noted in the discussion above, water right enforcement in Montana is a unique hybrid of both private and government enforcement mechanisms. While other states have also developed shared enforcement schemes for water rights, the degree of involvement by state agencies varies from state to state. In comparison to other prior appropriation states, enforcement of water rights in Montana relies more heavily on individual water right holders and less on government assistance. Some have suggested that water right holders in Montana would benefit from a more robust state role. This section provides some considerations for WPIC members as the committee contemplates changes to the current enforcement scheme.

There are a variety of possible explanations for the emphasis on private rather than government enforcement. The primary reason may stem from the legal characterization of water rights as a form of real property. On one hand, the classification of water rights as real property has resulted in the recognition that water rights have value and can be transferred, inherited, devised, encumbered, and disposed of in much the same way as real property. On the other hand, it may be why much of the enforcement burden has been placed upon private individuals. Real property rights are usually enforced through private party actions without government involvement. For example, the government does not assist parties with the enforcement of private property rights through quiet title and adverse possession actions (common claims involving disputes over real property). In these cases, the individuals themselves are responsible for establishing their rights in the property at issue. With respect to quiet title actions, an individual files a claim in a District Court with jurisdiction over the property to remove any adverse claims against the title. There is no mechanism whereby the government steps into the shoes of this individual to ensure that adverse claims have been removed and title has been established. Similarly, in the context of adverse possession, an individual is responsible for filing a claim in court and establishing that title has been established through adverse possession. Again, the government does not assist the individual claimant with establishing rights in the property.

Particular aspects of Montana's history may also be a factor in the emphasis on private enforcement. For example, it was not until the passage of the Montana Water Use Act in 1973 that Montana adopted a comprehensive system of water right administration. The creation of the Water Court in 1979 added to the state's capacity to carry out the significant administrative tasks imposed by the Montana Water Use Act, but full adjudication of water rights in Montana is still years away. As a result, comprehensive enforcement of water rights by the state is a difficult prospect. There are additional complications, including the fact that an enforceable decree (one where a commissioner can be appointed to distribute water) is difficult to obtain in many cases. An enforceable decree may be obtained only after federal reserved water rights have been incorporated into a preliminary decree by the Water Court or pursuant to section 85-2-404(4), MCA. Because of the relatively late development of institutions and process for clarifying and protecting water rights, especially the ongoing adjudication processes, Montana's water rights system remains primarily focused on clarifying existing rights rather than on enforcement. This focus on adjudication of existing rights has also likely contributed to the heavy reliance on private party enforcement of water rights.

There are also administrative limitations on the enforcement of water rights in Montana. As illustrated above, neither the DNRC nor the Water Court are charged with broad authority to enforce water rights. The stated mission of the Water Rights Bureau within the DNRC is "to assure the orderly appropriation and beneficial use of Montana's scarce waters". While the DNRC has significant authority to administer the Montana Water Use Act, it does not have the specific statutory authority or resources to implement a broad enforcement scheme. For its part, the Water Court was established to provide jurisdictional authority over the adjudication of Montana's pre-1973 water rights, not to provide enforcement.

Wyoming's centralized system provides a clear contrast to Montana's. Wyoming began permitting and administering water rights on a statewide basis in 1890, the same year Wyoming became a state. Wyoming's State Engineer and Board of Control provide for the ongoing adjudication and administration of water rights. Water rights are derived solely through the Wyoming State Engineer's permitting process, and neither historic use nor adverse possession can be used to establish a water right. In addition, adjudicated water rights in Wyoming exist in perpetuity and can only be lost through abandonment. Anyone wishing to change an existing water right must petition the Board of Control regarding the desired change and include all pertinent existing information about the water right. The Board of Control may request a public hearing on the petitioned change at the owner's expense. In contrast to Montana, Wyoming provides the State Engineer with broad statutory authority to distribute water in accordance with existing permits pursuant to state law and administrative rules. To this end, Wyoming has four water divisions, each with its own superintendent (the equivalent of a court-appointed water commissioner in Montana) who actively administers water within the division. Superintendents may also intervene in the distribution of water at the request of an existing user.

Utah also embarked on a comprehensive effort to define and administer water rights earlier than Montana. The Utah Legislature enacted a complete water code in 1903. Rights to use water are established only through an appropriation process administered by the Division of Water Rights or by filing a "diligence claim" to rights for water diversion and use established prior to 1903 for surface water or prior to 1935 for ground water. Like Wyoming, Utah has a State Engineer that administers the appropriation and distribution of the state's waters. In Utah, the State Engineer leads the Division of Water Resources. Until 2005, Utah's system was similar to Montana's in that it relied largely on private action for enforcement. In 2005, however, largely in response to growing demand on the state's limited water resources after several years of drought, the Utah Legislature passed a series of new laws that strengthened the state's role in enforcement. Following 2005, the State Engineer was given the authority to commence enforcement actions against unlawful water uses. Enforcement actions may be initiated by the Division of Water Rights after a violation has been observed by a state official or after a complaint is filed by a water user, government agency, or interested party. All alleged violations are first investigated by the State Engineer's office. If a violation is confirmed, the state issues a notice of violation, a cease and desist order, or both. In response, the user may request a hearing, respond with information refuting the alleged violation, or do nothing. These actions by the alleged violator influence the state's final order, with may include administrative penalties of $5,000 for each knowing violation or $1,000 for each unknowing violation. Further, violators may be required to replace up to 200 % of any misused water.

It should also be noted that in addition to institutional and administrative limitations, there would be significant costs associated with increasing the state's ability to more actively investigate and enforce water rights. Currently the DNRC does not have the funding or the staff to increase its enforcement capabilities. With water users spread throughout all corners of the state, the DNRC would need to hire numerous additional employees to assist with actively monitoring water use

and establishing interferences with water rights. It is unclear how these costs would be supported, especially during the current fiscal downturn.

V. Conclusion

Water rights are a unique form of real property that are characterized by use rather than ownership. An individual water right holder does not own the water. Rather, under Article IX, section 3(3) of the Montana Constitution, "All surface, underground, flood, and atmospheric water 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." While the DNRC is charged with administering and issuing water rights, there are several institutional and administrative limitations to stricter enforcement of water rights. The primary limitation may be that private property rights are usually enforced by the parties to the dispute through private litigation. The government usually does not intervene in disputes over private property. The states of Wyoming and Utah have more centralized water right administration systems, as well as state engineers to enforce water rights on a comprehensive statewide basis. The cost of establishing a similar program in Montana would be significant and should be considered during these discussions.

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