



## Montana Legislative Services Division

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### Legal Services Office

August 30, 2004

Krista Lee Evans  
Legislative Environmental Policy Office  
State Capitol  
Helena, Montana 59620

Dear Ms. Evans:

I am writing in response to your request for an analysis of the requirement contained in the draft version of LCEQC1 concerning the implementation of a fee for the purpose of funding the water adjudication program. You have specifically asked whether the provision requiring an examination process in water basins in which a verification process was used prior to the issuance of a final decree will pass constitutional muster. You have also asked whether applying the examination process only to irrigation rights in those adjudicated basins will pass constitutional muster.

Some background is necessary for this analysis. Article IX, section 3, of the Montana Constitution recognized and confirmed all rights to the use of any waters for any useful or beneficial purpose that existed at the time of the adoption of the Montana Constitution. That section also declares state ownership of all water subject to use and appropriation by its people as provided by law. The Legislature is required to provide for the administration, control, and regulation of water rights and is required to establish a system of centralized records, in addition to the system of local records that existed at the time of the adoption of the Constitution. The implementation of this provision has been a joint effort on the part of all three branches of government. Pursuant to Montana Supreme Court Order No. 14833 issued on July 13, 1979, every person asserting a claim to an existing right for the use of water prior to July 1, 1973, was ordered to file a statement of claim for the right with the Department of Natural Resources and Conservation (DNRC) no later than January 1, 1982. Failure to file a claim resulted in a conclusive presumption that the water right or claimed water right had been abandoned. Supreme Court Order 14833, issued December 7, 1981, extended the filing deadline to April 30, 1982, with the Court stating that no more extensions would be granted.

Section 85-2-237, MCA, provides for the reopening and review of decrees. The Legislature revised that section in 1993. The preamble attached to Chapter 629, Laws of 1993, provides the rationale for that legislative action, including the desire to provide water rights claimants with one more opportunity to file a water rights claim in the general adjudication. This legislation recognized that In the Matter of the Adjudication of the Water Rights Within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), the Montana Supreme Court had determined that the failure to file a statement of claim to an existing right to the use of water on or before April 30, 1982, had resulted in the forfeiture of that right. The Court stated that the Legislature has the power to mandate that rights be terminated if their holders do not take the affirmative action required by the Legislature. The Court also stated that it is undisputed that "quantification of the total water rights in the State of Montana is an expressed and necessary objective under the constitutional mandate for centralized records and is within the police power of the state". Legislation in 1979 placed the procedure for adjudication of water rights claims in the Water Courts and reserved the power of rulemaking with respect to pending judicial proceedings to the Supreme Court. The various roles of the entities involved in the water adjudication process were analyzed in 1987. Lacking express legislative authority, neither the Board of Natural Resources and Conservation nor the DNRC had any rulemaking authority with respect to procedures in the adjudication of water rights before the Water Courts. The Montana Administrative Procedure Act did not grant that authority. Functions of the DNRC

respecting water claims are limited to rendering assistance to the Water Judges as set out in section 85-2-243, MCA. The statutory authority of the DNRC to independently investigate adjudication matters was repealed. The statutory rulemaking authority was delegated by the Legislature to the Supreme Court. The Supreme Court ordered the Water Court and the DNRC to draft proposed rules for adoption by the Supreme Court. In re Department of Natural Resources and Conservation, 226 Mont. 221, 740 P.2d 1096 (1987). The Supreme Court approved an order July 7, 1987, adopting water rights claims examination rules.

Section 85-2-234, MCA, concerns final decrees. Section 85-2-234(8), MCA, authorizes the Water Judge to correct clerical mistakes in a final decree at any time on the initiative of the Water Judge or on the petition of any person who possesses a water right. The Water Judge is required to order the notice of a correction proceeding as the Water Judge determines to be appropriate to advise all persons who may be affected by the correction. An order of the Water Judge making or denying a clerical correction is subject to appellate review.

In order to ensure that all adjudicated water rights are established pursuant to the same procedure, are subjected to the same level of scrutiny, and contain the same degree of accuracy, it appears that subjecting water rights to an examination process in water basins in which a verification process was initially used is permissible. However, the authority for that action must be specifically statutorily authorized.

Your second question is whether applying the examination process only to irrigation rights in the adjudicated basins will pass constitutional muster. In McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986), the Montana Supreme Court was called upon to determine the validity of the statutory requirements that final decrees and preliminary decrees of the Water Courts had to state the amount of water, rate, and volume included in the water right. The Court determined that even though almost every irrigation water right prior to the 1973 water use law was expressed in flow rate, the requirement of section 85-2-234, MCA, that the final decree state the amount of water, rate, and volume, included in the right was not unconstitutional under Article IX, section 3(1), of the Montana Constitution. That provision was amended in 1987. In McDonald, the Supreme Court also determined that the quantification of total water rights in the state of Montana is within the police power of the state. No matter how a water right is expressed in a decree of the Water Court, either in flow rate or in acre feet, the expression of amount is not the final determining factor. Beneficial use is the basis, measure, and limit of all rights to the use of water. Where volumes, for the purpose of water rights, cannot be made more definite, as they are contained in judgments, the Supreme Court will use the concept of beneficial use in determining rights subject to the priorities established by law.

The disparate treatment of irrigation claims would have to pass muster under the equal protection clauses contained in section 1 of the 14th Amendment to the United States Constitution and in Article II, section 4, of the Montana Constitution. The Equal Protection Clauses essentially require that similarly situated individuals and entities be treated in the same manner. In a suit for declaratory and injunctive relief, Intake Water Company challenged the Yellowstone River Compact, claiming that it was a violation of equal protection under the 14th Amendment to the United States Constitution for the Compact to restrict interbasin transfer of Yellowstone River water while other water appropriations from other river basins in Montana do not require consent of all the signatory states to the compact. The federal court upheld the Compact, ruling: (1) it is well settled that the 14th Amendment does not prohibit legislation that operates on a limited geographical area within a state; (2) differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment; and (3) Intake could not meet its required

heavy burden to show that the Compact is not rationally related to a legitimate government purpose. Intake Water Company v. Yellowstone River Compact Commission, 769 F2d 568 (Mont. 1985).

Courts examine the right to equal protection under three levels of scrutiny: (1) strict scrutiny for classifications that infringe fundamental rights or involve suspect classifications, such as race or national origin; (2) middle-tier analysis in specific limited situations requiring a somewhat heightened scrutiny; and (3) rational basis analysis for all other classifications. McKamey v. State, 268 Mont. 137, 885 P.2d 515 (1994).

Strict scrutiny has been applied to statutes that affect the fundamental rights found in Article II of the Montana Constitution. If a fundamental right is involved, the state must demonstrate a compelling interest for its action. In Montana Environmental Information Center v. Department of Environmental Quality, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (1999), the Montana Supreme Court held that the right to a clean and healthful environment contained in Article II, section 3, of the Montana Constitution is fundamental. Any statute or rule implicating that right will be strictly scrutinized and will survive scrutiny only if the state establishes a compelling state interest and its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to meet the state's objectives. Because rights provided for in Article IX, section 1, of the Montana Constitution, are not found in the declaration of rights, a statute implicating those rights would normally be subject to a middle-tier scrutiny test. However, those rights guaranteed by Article II, section 3, and those rights provided for in Article IX, section 1, were intended by the Constitution's framers to be interrelated and interdependent, so state action under either section is subject to strict scrutiny.

The Montana Supreme Court has applied middle-tier scrutiny to constitutionally based rights. That level of scrutiny essentially requires the state's classification to be reasonable and the state's interest in the classification to be more important than the interest of the impacted party in the right infringed upon. That analysis was applied to welfare benefits in Butte Community Union v. Lewis, 219 Mont. 426, 712 P.2d 1309 (1986), and to student participation in extra-curricular activities in Kaptein v. Conrad School District, 281 Mont. 152, 931 P.2d 1311(1997).

Although water rights are constitutionally recognized, it is not certain that middle-tier analysis would apply to disparate treatment of irrigation rights. In Montana Stockgrowers Association v. State, 238 Mont. 113, 777 P.2d 285 (1989), the Supreme Court reversed a lower court decision that held that taxing livestock while exempting business inventories was unconstitutional in that the law denied certain individuals equal protection under the federal and state constitutions. The Supreme Court ruled that a middle-tier scrutiny was not required because Article XII, section 1, of the Montana Constitution directing the Legislature to enact laws to protect and enhance agriculture was a broad directive whose specifics were intended to be implemented through legislative decisions, not by constitutional mandate. The proper test was a rational basis test to determine if there was a basis for treating inventory and livestock differently. Under the rational basis test, it was clear that the Legislature had acted rationally in applying different classifications, and historically the two properties had been treated differently. Because Article IX, section 3, of the Montana Constitution directs the Legislature to provide for the administration, control, and regulation of water rights, the rational basis standard of review should be applied to its determinations.

In Stratemeyer v. Lincoln County, 259 Mont. 147, 855 P.2d 506 (1993), the Montana Supreme Court considered an equal protection challenge to Montana workers' compensation law that did not provide coverage for mental stress-related injuries as opposed to injuries having a physical component. The

Workers' Compensation Court had declared the portion of the statute precluding stress-related coverage to be a violation of the constitutional guarantee of equal protection. However, the Workers' Compensation Court did not first presume the statute to be constitutional and did not look to any possible legitimate purpose for the law, which is the proper analysis under an equal protection challenge. Applying the rational basis test, the Supreme Court found that the exclusion of mental claims was rationally related to the possible goal of reducing costs and providing a viable program for the state, employers, and employees in the workers' compensation field, which is a legitimate government objective warranting various classifications of work-related injuries and not an equal protection violation.

In summary, a provision requiring an examination process in water basins in which a verification process was used prior to the issuance of a final decree should be specifically statutorily articulated. The rationale for that requirement and the application of that requirement only to irrigation rights should be articulated. I hope that I have adequately addressed your questions. If I can provide additional information, please feel free to contact me.

Sincerely,

Gregory J. Petesch  
Director of Legal Services

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