WATER DISTRIBUTION ISSUES

This document is a synthesis of comments received from members of the Water Adjudication Advisory Committee and other sources. For the sake of brevity, comments have been condensed. The full text of all comments has been posted on the Water Court website.

Comments are divided below into issues and solutions. Several issues were raised by more than one party. Solutions were inserted below the issue which seemed to fit best.

The focus of the Water Adjudication Advisory Committee on this project was water administration. Some comments went beyond the scope of water administration to include concerns about post-1973 changes and living decrees. Those comments and issues are also included below.

ISSUES AND SOLUTIONS IDENTIFIED IN COMMENTS

1. Issue: It is not clear when a Water Court decree is enforceable.

Solutions:

a. Amend statutes so that Water Court decrees are only enforceable after all objections and hearings pertaining to that decree have concluded.

b. Amend statutes so that all hydrologically connected water rights are enforced simultaneously. Define whether hydrologically related rights include groundwater.

c. Make orders issued by the Water Court enforceable upon issuance.

d. Revise certification process so that certification of water rights disputes to the Water Court includes all hydrologically related water rights in a single proceeding.

e. Older District Court decrees should not be used to administer water if a source has been through the Water Court adjudication process. Clarify when it is appropriate to use old District Court decrees for water administration.

2. Issue: Provide adequate due process as part of water rights enforcement.

Solutions:

a. Publish notice of the enforceability of water right decrees before enforcement begins. This change would require amendment and/or clarification of § 85-2-406(5), MCA.

b. Require issuance of an order by the Water Court confirming that all objections and hearings regarding water rights in a TPD or PD have concluded. This change would require amendment of § 85-2-406(4), MCA.

3. Issue: The exempt claim statute needs to be amended to include the same filing deadline for all basins.

Solution:

a. Amend exempt claim statute in conformance with SB 37 proposed during the last legislative session.

4. Issue: The lack of clarity in enforcement statutes leads to selective enforcement of water rights.

Solutions:

a. Require that all hydrologically related water rights be enforced simultaneously. Define whether hydrologically related rights include groundwater.

b. Allow enforcement only after all rights in a TPD or PD have been adjudicated.

5. Issue: Some District Courts will not appoint a Water Commissioner unless all water rights have been adjudicated by the Water Court.

Solutions:

a. Amend § 85-2-101, MCA to allow appointment of a Water Commissioner before the adjudication of all water rights has been completed.

b. Allow judges to enforce Temporary Preliminary Decrees and Preliminary Decrees without modification

6. Issue: Water Commissioner training and recordkeeping is haphazard.

Solutions:

a. Allow for greater control over Water Commissioners by the DNRC.

b. Require that all Water Commissioners receive training before they are appointed.

c. Amend statute to require consistent reporting by water commissioners statewide.

d. Expand frequency/availability of water commissioner training.

e. Require that water commissioners complete training before they can be appointed.

7. Issue: District Courts don't have adequate knowledge to administer water rights.

Solution:

a. Use the Water Court to administer water rights.

8. Issue: Orders of the Water Court are not readily accessible.

Solutions:

a. Improve access to orders issued by the Water Court.

i. Develop PACER-type system.

ii. Send all Court orders to Lexis/Westlaw.

9. Issue: The number of appeals of Water Court decisions has increased substantially.

Solutions:

a. Require mandatory mediation before the filing of an appeal.

b. Mandatory mediation adds additional time and expense and should be avoided.

10. Issue: The place of use for municipal rights does not match municipal service areas. Municipal service areas are constantly changing and compliance with the change process is expensive, time-consuming, and impractical.

Solution:

a. Allow the places of use for municipal water rights to change as municipal service areas change. This solution would require amendments to change statutes similar to those enacted in the states of Washington, Oregon, and Idaho.

11. Issue: GWIC data needs to be integrated with the DNRC water rights query system.

Solution:

a. Update the DNRC database to include GWIC information.

12. Issue: If an administrative process for water distribution is implemented, appeal should go to either the Water Court or a District Court, but not both. Pick one court to hear all appeals.

13. Issue: Some water users are unwilling to file a change application to have post-1973 changes to their water rights recognized.

Solutions:

a. Allow the Water Court to incorporate post-‘73 changes into its decisions so that we have a living decree, or postpone the change application process until a dispute regarding the change arises in the future.

b. Enforce existing change statutes.

14. Issue: Tabulations prepared by the Water Court are helpful, but may not always contain complete information necessary for water distribution.

Solutions:

a. Tabulations should only be used as a summary and not as the final word if there are discrepancies between water right abstracts and tabulations.

b. The Water Court should adopt a rule requiring draft abstracts (including the specific language of any agreed-upon info remarks concerning distribution or administration) as part of settlement agreements.

15. Issue: Overlap between the Water Court, District Court, and DNRC can be cumbersome and confusing.

Solutions:

a. Simplify the decision-making process.

b. Allow the Water Court to hear cases in areas with chronic problems, and when dissatisfied water users have petitioned the Court for review of a Water Commissioner's actions.

16. Issue: The water rights change process is cumbersome and not user-friendly. As a result, many water users do not comply with the change process.

Solutions:

a. Streamline the process and honor Water Court determinations regarding historical use.

b. Enforce existing change statutes.

17. Issue: Small changes to water distribution statutes will not produce much benefit.

Solutions:

a. A discussion of changes to water distribution should begin with a comparison of the benefits and disadvantages of analogous systems.

b. Amend statutes to make them more comprehensive and to clarify intent. For example, it is currently unclear what "15% of the water rights" means under § 85-5-101, MCA.

18. Issue: An accurate change process is vital. Any change that increases consumptive use, including conversion from flood to sprinkler irrigation, should require a change application.

19. Issue: District Court's jurisdictional boundaries do not match the boundaries in river basins. How do we administer water rights in a river that crosses multiple District Court jurisdictions?

20. Issue: Changing water commissioner distribution and enforcement statutes statewide could result in unintended consequences.

Solution:

a. Establish a pilot project in a single basin to test what works and what does not work before revising statutes statewide.

21. Issue: The Bureau of Indian Affairs and the Field Solicitor's Office would like the Committee to consider recognition and possible integration of the water administration plans set out in each Indian Compact. The respective Tribe would administer Tribal fee and all trust property, and the DNRC would administer all other fee property, including the reservation. Several Compacts authorize Compact Boards to settle disputes with the two groups. Several Compacts also state that appeals from the Boards should be heard by a court of competent jurisdiction. The term "court of competent jurisdiction" is undefined, leaving open the question of where such appeals should be filed. As a result, appeals could conceivably be filed in the Water Court, state district courts, federal courts, or Tribal courts.