

Water Adjudication Advisory Committee
Zoom Meeting
January 7, 2021

Committee members Abigail Brown, John Bloomquist, Mike Cusick, Christy Clark, John Scully, Jim DuBois, Brian Bramblett, Judge Holly Brown, Ross Miller, Ross Keogh, and Jim Hagenbarth attended. Lorents Grosfield and Jeff Laszlo did not attend. Chief Water Judge McElyea presided. Judicial Assistant Swithin Shearer took minutes. Also in attendance from the Water Court were: Sara Calkins, Water Court Administrator; Associate Water Judge Stephen Brown; and Water Masters Julia Nordlund and Kirsia Shelkey.

Also attending were: Judith Coleman and Jen Najjar with the United States; Molly Kelly and Barbara Chillcott with the Montana DNRC; and Jeremiah Langston (joined later) with the Montana Attorney General's office.

Minutes

9:01 Begin meeting, Judge McElyea thanked members for participation

9:03 Introduction of each person in attendance (Ross Miller, John Scully, Ross Keogh, Jim Hagenbarth, Jim DuBois, Mike Cusick, Christy Clark, Judge Holly Brown, Abigail Brown, Brian Bramblett, and John Bloomquist).

9:25 Judge McElyea discussed scope of meetings and ground rules: not a forum for complaints or furtherance of personal agendas. Candor is appreciated and helpful.

9:29 Judge McElyea provided brief summary of adjudication process and significance of final decrees.

9:31 Judge McElyea requests that the meeting focus on the main topic of final decrees.

9:32 Discussion Questions 1 and 2: Purpose of final decrees and how will they be used?

Bloomquist: Content of final decrees; What goes into a final decree? Final decrees that cover multiple basins?

Judge Holly Brown: Should be final, should be clear and shouldn't be ambiguous, should be understandable by the water users.

Christy Clark: Reduce conflict

Judge Holly Brown: Would education help reduce conflict?

Christy Clark: Tributaries didn't expect to be included in adjudication, education helpful

John Scully: Identify water being used to protect the water user and the State as a whole, so final decree needs to be clear and usable the uses of the State of Montana, then agencies within the State, then the federal users. Too difficult to incorporate all state and reserved rights into one cohesive decree.

Jim Hagenbarth: A final decree is an updated document used to enforce water rights. Defense of our water against downstream users outside the state of Montana. Each source has its

own characteristics. The water commissioners must be educated on how to read a decree in order to enforce the water rights. Living final decree needed that continually gets updated.

Abigail Brown: Keep in mind who will be the audience/reader of the final decree. Many sources don't have water commissioners. The decree needs to be written for the water users themselves without needing an attorney to interpret it. How do we ensure that final decrees include updated information when a water right is severed or a water right changes ownership. Water marketing-how to protect our water when investors come here? If "Red Book" tabulation books are used, there needs to be a narrative to explain how to interpret that information.

Judge Stephen Brown: Land transactions

Ross Keogh: Final decree should be used as the point in time that the Water Court finished its process with its review of the water rights.

Brian Bramblett: Final judgment that ends statewide litigation of the water rights. There's a difference between a final decree and administration of the water rights.

Jim DuBois: Purpose of final decree is something to look at from a specific point in time, use the final decree as a starting point for research. Another purpose is administration of water rights. Final decree from this Court can't include permits or changes for post-1973 rights. Record abstracts of water rights in the title/recording offices. Incorporate federal/tribal compacts into final decrees.

Judge McElyea: Knowing that the Water Court doesn't have the authority to enforce the final decrees that it will issue, we need to plan for issuance of the final decrees to try to reduce the confusion and conflict.

Ross Miller: Content is the compilation of the abstracts. Will/can a final decree be used as proof of historical use for things like change proceedings in DNRC.

Mike Cusick: Purpose of a decree is to define the water user's property interest, and then use that for enforcement/administration. Tabulations are helpful, but additional narrative (as mentioned by Abby Brown) would be helpful. Abstract content is good, but some things on the ground can't be summarized on an abstract (e.g. where does an 1895 water right fit on the Gallatin River?) 85-2-237, MCA. Need a tool for evaluating property interest.

Judge McElyea: Abstracts try to comply with the specific requirements in 85-2-234. Comply with spirit of the McCarran Amendment. Should final decrees reference post-1973 changes? Content question will be addressed again in future meetings.

10:33 Judge McElyea moves on to discussion about the Water Court final decree checklist

Brian Bramblett: Do you plan to make a draft of a final decree for review?

Judge McElyea: No, not now.

John Scully: This won't really be a final decree, so that's a misnomer and can be confusing. It will be changed again, so it won't truly be final. The final decree should be a list of all water rights at a certain point in time. How you deal with ongoing challenges?

Ross Keogh: The current abstract should say it is subject to another decree, or that it went through litigation about certain elements.

Judge McElyea: We can't solve the problem of how the decree will be used for administration.

10:43 Judge McElyea returns focus back to Water Court checklist

Judge Stephen Brown: DNRC was involved in the checklist creation.

Judge McElyea: The checklist has been a collaboration.

John Bloomquist: Where and how the record will be maintained and how it will be available. Access to things like decisions or stipulations that led to the definition of an element a certain way should also be available.

Judge McElyea: Brian Bramblett discuss in next meeting how the DNRC executes its obligation to maintain a centralized record?

Brian Bramblett: Should a final decree abstract be sent to water user and be required to be recorded?

Judge McElyea: What happens to the case and claim files in the future? Those files include potentially valuable documents like stipulations that give the backstory for how a water right was changed.

10:50 Judge McElyea provides a summary of today's meeting and questions to think about for next meeting

Who is the audience for the final decree?

Education part of or outside the final decree process?

Living document of a final decree

Next meeting January 21, 2021 at 9:00 AM

No further discussion on checklist

For next meeting, talk more about audience, education, and content, no discussion yet about Snake River decree provisions to use or not. Any other topics?

Jim Hagenbarth: Decree needs to be practical because people can't afford attorneys all the time to interpret the decree.

Judge Stephen Brown: Maybe have Judge Holly Brown discuss other types of decrees.

Judge Holly Brown: The Water Court is already taking things into consideration about writing decisions that will be used in the future, but I'm willing to discuss at our next meeting as well.

Judge McElyea: Are we missing anything required by the McCarran Amendment? Federal legislation allowing for statewide adjudication. A copy of that will be sent to all members. Possibly distribute *Greely* decision to all members as well.

Judge Holly Brown: Keep in mind statutory constraints, and even though the Court may want to include more, there are sometimes limitations.

Judge McElyea: Do we say what we included and what's missing from the decree, or do we ignore/not mention at all the things not included in the decree?

Ross Keogh: Notation about appeals to the Supreme Court for the final decree.

John Scully: Ongoing appeals listed in checklist.

Judge McElyea: There may be legislation required for some of the objectives, and that's ok to talk about. Cell phone, direct office line, and email address provided to attendees and offered attendees the opportunity to discuss ideas and questions with him or other Committee members.

Judge Stephen Brown also provided his cell, email, and direct office line.

11:09 Judge McElyea thanked everyone for their participation and closed the meeting.