

Water Adjudication Advisory Committee Agenda

June 1, 2010 telephone conference at 4:00 P.M.

1-866-479-6576 Participant Code 51610471#

When Senate Bill 76 was enacted in 1979, the statute required water users to file a statement of claim on all water rights which were in use prior to July 1973. Failure to file the statement of claim created a conclusive presumption of abandonment. Section 85-2-226, MCA. The Supreme Court later held the failure to file was a forfeiture.

Claims for livestock and individual, as opposed to municipal domestic uses, based upon instream flow or ground water sources were exempt from the filing requirements, but they could be voluntarily filed. 85-2-222, MCA. Since these claims were exempt from the SB 76 filing requirements, they are often referred to as “exempt” claims.

The exempt from filing claims should not be confused with the other “exempt” well issue which was the subject of House Bill 602 passed in the 2011 Legislature. The Water Policy Interim Committee will study the other exempt well issues discussed in HB 602 over the next several months.

With regard to the exempt from filing claims, they have been a topic of periodic discussion for many years. What, if anything, should be done about exempt claims which were not voluntarily filed? About 20 some years ago, the DNRC tried to address the issue. The DNRC created a *Notice of Water Right (Exempt from the Adjudication Filing Requirements)* Form No. 627. For a fee, water users who did not voluntarily file their exempt claims could file the Form 627 with the DNRC. Upon receipt, the DNRC assigned a number to each 627 Form and added its information into the DNRC’s water right centralized record system. Several years ago, the DNRC ended this filing practice, but there still remain a number of these exempt filings in the centralized record system.

Historical Note: When the Water Court first began providing tabulations to district courts for enforcement proceedings, these exempt from filing Form 627 claims were sometimes inadvertently included in the enforceable tabulations because the enforcement tabulations are produced from the DNRC water right centralized record system.

Occasionally, an exempt claim becomes involved in a water distribution controversy before a district court and is certified to the Water Court. The Water Court has concluded that it has jurisdiction to resolve disputes involving exempt from filing claims. Since the exempt claim was not voluntarily filed, the Court has held that the exempt claim is not prima facie proof of its contents. Therefore, in any certification case, the water user claiming an exempt from filing claim has the burden of proof to establish all elements of the claim.

Once the Water Court resolves the exempt claim issues, the results are not folded into the general adjudication of water rights. The Water Court believes its decision is only binding on the parties in the certification proceeding. Its decision is not binding on all water users involved in the statewide adjudication because they had no notice of the claim. Unless the exempt claim has a water right number assigned to a previously filed 627 Form, the Water Court does not assign a number to the exempt claim or create a claim abstract for it.

During the 2011 Legislature, there was a bill draft to authorize the filing of exempt claims in the statewide adjudication. It was never introduced. Instead, the bill sponsor requested the Water Adjudication Advisory Committee be convened to consider the issue and provide recommendations to the Environmental Quality Council.

During the upcoming June 1 telephone conference, I suggest we brainstorm the potential options. If there is a consensus on one option, then the Committee might work on some language for a potential bill draft. If there is no consensus, then perhaps the Committee could provide a list of options for the EQC to consider. Under either scenario, I would guess that the EQC would appreciate a list of the benefits and disadvantages for any proposed options.

To get the June 1 conversation started, I have listed four possible options and some questions to be considered. Presumably, there are more options and more questions than set forth below.

One thing to remember is that for all basins which have a Water Court decree issued after 1997, there was only one authorized objection period. Once all objections and issue remarks are resolved in post-1997 decrees, the next step is a final decree. At this moment, there are 20 such basin decrees, but the number will increase before the 2013 Legislature convenes. If the Legislature were to create a mechanism authorizing the statewide filing of exempt claims, these 20+ decrees would presumably need to be reopened for the filing of exempt claims and for the filing of potential objections. Presumably, there would be some costs involved. Who should pay those costs, the general taxpayers or the water users?

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FOUR POSSIBLE OPTIONS

- 1) Take no action.
- 2) Authorize DNRC to accept filings in a manner similar to the DNRC Form 627. What would be the legal and practical outcome of such filings?
- 3) Authorize water users to voluntarily file exempt claims on a rolling deadline in any basin prior to issuance of a Water Court decree. A deadline would need to be set sufficiently prior to the issuance of the decree to give DNRC time to examine the exempt claims. The rolling deadline could be mandatory or simply provide one more voluntary opportunity to file the claims.
- 4) Set a specific statewide deadline to file all exempt claims. Again the deadline could be mandatory or simply another voluntary opportunity to file.
- 5) Other options.

Questions to consider for each option:

- A) What would be the evidentiary value of the newly filed claims? Should they be prima facie proof of their contents or should the claimant have the burden to prove up the exempt claim?
- B) What type of notice would be required to be provided to other water users? Would the general taxpayer pay for the notice or would the owner of the newly filed exempt claim be responsible for the costs?
- C) What other questions arise?