

ATTORNEY GENERAL

STATE OF MONTANA

Tim Fox
Attorney General



Department of Justice
Joseph P. Mazurek Justice Bldg.
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

Comments of the Montana Attorney General's Office to the Water Adjudication Advisory Committee Concerning the Future of the Adjudication and the University of Montana's "Water Rights in Montana" Report

October 8, 2015

I. General Comments Regarding the Future of the Adjudication

- The Enforcement of Water Rights Post-Adjudication is the Most Significant Question for the Future of Water Rights in Montana
 - A key threshold question is whether, in a post-Adjudication universe, Montana wants to have a judicial enforcement system, an administrative one or some sort of hybrid, and what the respective roles of district courts, the DNRC, the Water Court, the Attorney General's Office and individual water users ought to be in that enforcement system. Under the law as it currently stands, the Water Court would go away once the Adjudication is complete, with day-to-day distribution of water primarily in the hands of water commissioners appointed and supervised by local district courts and with specific enforcement responsibilities split among the DNRC, the Attorney General and County Attorneys, each of whom is entitled to invoke the power of the district courts, as are individual water users. (*See* Mont. Code Ann. §§ 85-1-114, 85-2-405 and 85-2-406 regarding enforcement and Title 85, Chapter 5 for water commissioners.)
 - When it comes time to consider the future of water rights in Montana it seems appropriate to begin with a consideration of whether this is still the structure that best suits the State and to work backward from there. Many of the Report's short- and medium-term suggestions seem to put the cart before the horse.

TELEPHONE: (406) 444-2026 FAX: (406) 444-3549 E-MAIL: contactdoj@mt.gov WEB: mtdoj.gov

MONTANA DEPARTMENT OF JUSTICE

Legal Services Division ★ Division of Criminal Investigation ★ Highway Patrol Division ★ Forensic Science Division
Gambling Control Division ★ Motor Vehicle Division ★ Information Technology Services Division ★ Central Services Division

- The Report’s focus seems particularly curious in light of the fact that, in the wake of HB 22, both the Water Court and the DNRC are meeting their benchmarks, and while the Adjudication still has years to run, it appears to be on track for its eventual completion. As completing the Adjudication is the Water Court’s core task, anything that might detract from that or retard its progress (such as expanding the Court’s jurisdiction to take on other responsibilities) should be avoided.
- A Process for Ensuring “Living” Decrees Would Be Valuable
 - The Report makes some good points about the importance of ensuring that the DNRC’s water rights database has the most current and comprehensive information possible. After final decrees are entered by the Water Court, there still needs to be a mechanism for ensuring that the decreed rights can be updated as a result of changes, ownership updates and other relevant information. This also would help facilitate water rights administration and the development of Montana’s market for the lease or sale of water rights.
- Better Water Measurement and Metering Are Critical to Any Effort at Enforcement and Administration
 - It is essential to the administration of water rights to be able to know how much water is available in a source and how much is being used.
 - The WPIC and the Legislature should give important and sustained consideration to ways to enhance the availability and public accessibility of measurement data and could consider updated requirements for the metering of individual uses.
- Greater Transparency Regarding Water Court Rulings Is Essential to the Practice of Water Law in Montana
 - The Water Court is building the body of law that will govern water rights in Montana will into the future. While the Water Court is taking steps to improve its ability to make more of its decisions available to the public, WPIC and the Legislature could help facilitate and expedite this process. This is particularly important since the Water Court is using legal principles articulated in individual case determinations in other cases irrespective of notice or the participation of a party in a given case.
 - As a short-term solution, LEXIS has the ability to make Water Court decisions more widely available with no cost if the Water Court chooses to avail itself of this service.

II. Comments More Specific to the Report

- The Report seems superficial in its analysis of both other state laws and also the actual history and practice of the Adjudication in Montana (at least as compared to something like the Ross Report). Each state has its own system of checks and balances, and its own unique history regarding the development of its water laws and administration, and the Report seems to have a tendency to take individual pieces of other state systems out of context.
- The Report's heavy focus on the "time gap" and the way it presents the "problem" seems to ignore the importance of protecting other water users during the change process, since all water users, even junior ones, are entitled to rely on stream conditions as they find them. The Report also seems to skip over the fact that the change process and the adjudication apply very different standards to the determinations in question (whether to approve or deny a change application and whether and how to decree a water rights claim - *see, e.g.*, Mont. Code Ann. §§85-2-101(5), 85-2-227(1), and 85-2-311). This distinction reflects a balance carefully struck by the Legislature to protect both claimants (by giving their claims a *prima facie* presumption of validity, to address the difficulty posed by having to come up with evidence of water use that in some cases could be over a century old) and other water users (by requiring change applicants to prove lack of adverse effect on other water users). The Report's concern about when volumes come into play in determining actual use of water in a change process also seems misplaced as the change process' focus on actual use is an important check against the expansion of water rights, which is not allowed under the law absent a new permit application.
- The Report doesn't recognize the differences between the standards in play in the Adjudication and in the change process when it suggests giving the Water Court jurisdiction over the change process. Moreover, increasing the Water Court's caseload risks increasing the time it will take to complete the Adjudication (which is the single best way to address the "time gap").
- The Report's concern about a "look back" period regarding changes in water rights seems to sidestep the fact that, under Montana law, post-1973 changes to the substantive elements of a water right are only legal if they are approved by DNRC. (*See* Mont. Code Ann. § 85-2-402.) The Report's suggestion of employing a shorter look-back period when evaluating change applications raises important legal (and perhaps constitutional) questions that the Report does not address. In addition, states that employ shorter look-back periods also have completed adjudication baselines (something Montana won't have until the Adjudication is complete) and also have enforced abandonment statutes in a manner that minimizes the amount of time they need to look back. There are also other western states that have lengthy look-back periods, often depending on how long it has been since the underlying rights were

decreed, perfected or changed. Ultimately, the consideration of what is most appropriate for Montana is best made by reference to the specific context of water rights in Montana.

- The Report's suggestion of giving the Water Court jurisdiction over appeals from DNRC water rights decisions is problematic for several reasons. As noted above, the standards applicable to the adjudication of claims before the Water Court and to the consideration of new permit and change applications before the DNRC are different, and it is not clear that the specialized expertise the Water Court possesses in adjudicating claims is directly relevant to the review of DNRC permitting/change decisions. Moreover, these appeals from DNRC water rights decisions are record reviews under the Montana Administrative Procedures Act rather than *de novo* reconsideration, which lessens the importance of the reviewing court having particular specialized knowledge related to water rights. In, the most important task before the Water Court is the completion of the Adjudication. Anything that risks detracting from that mission (such as expanding the Water Court's jurisdiction in ways that increase its workload) should be resisted.
- The fact that the Report was written for a lay audience and accordingly does not emphasize the legal underpinnings of water rights either in Montana or in the other western states it surveys limits the utility of this Report for the WPIC and the Legislature, which must of course be cognizant of the law as it stands when it seeks to consider how that law might usefully be changed.
- It is disappointing that the Report bypasses the role the Attorney General's Office plays in the Adjudication, most specifically in the resolution of issue remarks giving rise to questions of non-perfection or abandonment (*see* Mont. Code Ann. §85-2-248) but also with its enforcement powers under Mont. Code Ann. §85-2-114(3)-(6), a role for which the Legislature has not to date budgeted funding but one which may be worth considering as part of the broader question of how water rights in Montana are to be enforced in the future.