

## Palakovich, Sandra

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**From:** Cindy Younkin <younkinlaw@gmail.com>  
**Sent:** Monday, February 08, 2016 3:51 PM  
**To:** Mohr, Jason; Thigpen, Helen; Spencer, Nadine; McElyea, Russell  
**Cc:** Palakovich, Sandra; Shearer, Swithin  
**Subject:** WPIC - Water administration statutes

Dear Folks,

On January 15, I received an email from Judge McElyea's clerk/assistant regarding suggestions for Water Administration Statutes. I understand the WPIC is taking a look at various aspects of water administration which may be considered in the next legislative session.

I offer my perspective based on my nearly 27 years of practicing law in Bozeman, a significant portion of which has related to water rights, either in the adjudication process with the Water Court, in various DNRC processes (adjudication, change/permit applications, ownership updates/records etc.), distribution/water commissioner issues or through evaluations for real estate owners or purchasers.

There are 2 specific areas which I believe the governing statutory provisions should be addressed.

1. Distribution/Water Commissioners by the District Courts
2. Changes to existing water rights.

### **Distribution**

There are three governing bodies (Water Court, District Court and DNRC) which a water user may have to contend with in distribution matters. In my experience, these three layers have proven to be inefficient and sometimes ineffective.

It is apparently not always clear how a District Court should be ordering a water commissioner to distribute water. The status of a water right after the Water Court has adjudicated the underlying claims is what a District Court should be ordering a water commissioner to distribute. To order distribution based on an old decree is usually not accurate nor does it reflect what's on the ground. An old decree should not be used for distribution/enforcement if a water source under the purview of a water commissioner has been through the Water Court adjudication process.

While the tabulation prepared by the Water Court is helpful, it may not always be complete with specific details which affect water distribution. Thus, the abstracts, (if updated after resolution of objections or approval of amendments by the Water Court) should be enforceable in and of themselves. The abstract at that point is a reflection of a Water Court order and should be honored by a District Court. The tabulation should be used only as a summary, not the final word if there are discrepancies between the abstracts and the tabulation.

If there is a particularly problematic source where distribution is always or usually a problem or if dissatisfied water users have petitioned the Court for review of a commissioner's acts, it may be more efficient for the water commissioner to be under the direction of the Water Court with the expertise, rather than a District Court, with a loaded docket and little time. Referral/certification to the Water Court could be at the option of the water users or the District Court either one.

Timely resolution of distribution is critical to water users. If a water user can't get the water to which he/she is entitled it may make the difference in a successful crop or a failed crop. There can be significant overlap between the Water Court, District Court and DNRC, particularly in hotly contested creeks/rivers, which is cumbersome and confusing. This equates to significant time and expense for the parties appearing before these tribunals. In most cases water users have neither the time nor the money to spare on water distribution conflicts. Use of a water commissioner or a dissatisfied water users action will be avoided by most if at all possible. But, it must be more user friendly for all parties – the users, the District Courts and the water commissioners – or the statutes are meaningless.

**Change applications:**

Water use has evolved over the last 40 years; various *de facto* changes have occurred on the ground. Some are significant. Perhaps a ditch or head gate has washed out, and rather than try to work with a problem ditch or head gate, the water user has placed a pump in the source nearer to the POU. Or, another example, is when a user puts in a sprinkler system, usually a pivot, and the pivot now swings above the ditch which was not historically irrigated, but there are corners of the flood irrigated area which are no longer irrigated. Many water users in these two scenarios will just use the pivot or the new POD and never go through a formal change application process. Frankly it is extremely cumbersome and very user unfriendly – and it never used to be that way (OK, 20 years ago). The time and expense of doing so far outweighs any benefit for the user with the changed use who is likely to just do what they are going to do until someone tells them they can't. In all likelihood none of the neighbors have complained, so from the changed user's perspective, it must not be a problem, so there is no benefit to the other users either.

Over the last 25 years in my experience, the change application process has become more stringent, bogged down in minutia which in most cases makes little or no difference in practice, in the creek or on the ground, and now it seems much time is spent re-determining historical use which the Water Court may have already adjudicated. All of this has done little, if anything, which I'd classify as an 'improvement' for anyone, particularly not the changing party nor even for other water users on the source.

There are probably hundreds of examples where the water right on the ground is not consistent with the paperwork. If a water user can use their water without engaging the Courts or the DNRC, most water users will take the path of least resistance. If they make changes and no one complains, then the statutes are meaningless. If the change process were streamlined and user friendly, and Water Court determinations honored as to historical use, there would be significantly more compliance.

I apologize I did not have the time to go through the statutes to give you specifics statutes which should be addressed, which would have been more useful for the committee, certainly. However, I hope you find my more anecdotal comments useful from a general perspective. I'd be most appreciative if you could please share this email with the WPIC committee members.

Thank you and the committee members for your work on this important subject.



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