



January 29, 2016

Hon. Russ McElyea  
Chief Water Judge  
Montana Water Court  
601 Haggerty Lane  
PO Box 1389  
Bozeman, MT 59771

RE: Suggestions for Water Administration Statutes

Dear Judge McElyea:

Thank you for the opportunity to submit comments regarding improvements to the water statutes governing the administration and distribution of water. We submit these comments based upon our first-hand experience representing water rights owners in various basins. These comments are strictly based on those observations, and are not intended to advance the position of any particular client.

1. *Water right elements set forth in orders adopting master's report should be enforceable as of the date the Water Court issues the order.*

Under the Water Use Act, a water right claim is prima facie proof of its contents. Often times a statement of claim will be based upon an historic decree. As part of the adjudication process, the claim often is modified so that by the time the claim is adopted and approved in a final order for the particular case it no longer matches the elements claimed or the historic decree.

By the nature of the adjudication process individual claims in basins are addressed in a series of cases. The cases are not all resolved at the same time. In some more complicated basins, it may be several years between the time that the first case is finally resolved and when the last case is resolved. This raises the question of the legal effect of Water Court final orders pending completion of the remaining cases in a basin. The problem is especially acute when a Water Court case modifies a water right that previously was addressed in an historic decree. Because water rights are enforced by a district court, it becomes confusing for a court to know how to administer rights when some are subject to final Water Court orders and others are not. To help reduce this confusion, the Water Use Act might be

clarified to specifically state that Water Court orders are binding and enforceable as of the date they are entered by the Water Court.

2. *The process for appointing water commissioners should be clarified.*

In March 2013, a state district court judge concluded that an application for appointment of a water commissioner is premature if the petition is filed prior to the resolution of all water rights in a basin. “Order Denying Application for Appointment of Water Commissioner, *In the Matter of Application for Appointment of a Water Commissioner to Admeasure and Distribute Water in Certain Portions of Basin 401 [sic] in Chouteau County and Teton County, Montana*, Cause No. SB-12-08 (Mar. 7, 2013). This ruling creates the untenable situation that in basins that are not fully adjudicated, parties who have their water rights resolved have difficulty enforcing them because they are unable to rely on the Water Court, DNRC or the a district court appointed water commissioner for assistance. Instead, they are forced to spend their own resources on self-help with no reasonable prospect for recovery of time and expenses. Clarifying Montana Code Annotated 85-5-101 to allow appointment before complete adjudication would alleviate this hardship.

3. *Water Commissioners should be overseen by the Department of Natural Resources and Conservation, not district courts.*

For many decades water rights have been enforced by water commissioners. Water commissioners are overseen by district courts. While historically this made sense, and in some basins it still does, overall this may not be the best system. The process of enforcing water rights can be extremely complicated and technical. Water commissioners also are required to maintain records, but the records are filed in district courts and often are difficult to access without physically visiting county courthouses. Given these issues, the process might be improved by providing a larger role for DNRC to play in overseeing water commissioners rather than imposing this oversight obligation on district courts.

4. *The Water Court should have jurisdiction to resolve water rights enforcement disputes.*

Currently the Water Court’s primary function is to complete the adjudication. The Water Court possesses an enormous amount of expertise and conducts many hearings each year. However, once enforcement begins, enforcement occurs in district courts. Because the Water Court already exists, has process and procedures in place, and has sophisticated knowledge of water complexities, it would seem to be a far more logical forum to conduct enforcement proceedings. The current process of using special masters could continue, with ultimate oversight by the water judges.

5. *Orders adopting master’s reports should be more readily available to the public.*

Electronic access to Water Court records has improved dramatically in recent years. However, it still is rather tedious for practitioners to access Water Court final orders online. Once orders are final, it would be very useful if there was a simply way to access them. This would assist in private

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enforcement actions, and also when parties are conducting water rights due diligence in connection with property transactions.

6. *Alternative dispute resolution should be required prior to appeals to the Montana Supreme Court.*

Finally, recent years has seen an increase in the number of cases appealed to the Montana Supreme Court. Currently, there is no mandatory mediation for water court cases.

Thank you for the opportunity to submit these comments.

Very truly yours,

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