

Judy McElyea and committee members:

I had hoped to get this to you Friday and apologize for the delay. While I do not have any particular amendments to statutes to offer, I thought I would comment on a couple of topics of discussion at the January WPIC meeting.

First I note that Tim Davis has stated that DNRC is working on a draft of legislation to provide for a pilot project on an administrative process for resolving water right disputes. Along that same line, at the WPIC meeting there was discussion concerning possible concurrent water court and district court jurisdiction to resolve water distribution controversies. If an administrative process is implemented, it might make sense to have appeals go directly to either the water court or the local district court, but I would think that because there would not likely be a lot of appeals, it would make sense to pick one court or the other to handle appeals rather than giving litigants a choice of appellate courts.

On the other hand if an administrative process is not implemented, or if it is effective only once a final decree is issued in a water basin, then concurrent jurisdiction might make sense at least until an administrative process is available. As I recall, the comments at the WPIC meeting included two options for deciding which cases would go to the water court rather than district court. One option was to allow removal to water court only when all of the parties agree to removal. The other option was to allow any party to a matter to have the right to move a matter to water court, thereby forcing all other parties to go along.

A variation on this second option that perhaps could be considered when one party wants to move a matter to water court and another party does not is to allow the water court the authority to make a final determination of whether a matter would be allowed to be removed. There would probably have to be some sort of a standards for the water court to apply to determine whether a matter could be removed. Among them would be cost and convenience to the litigants, whether substantial delay in resolving a matter would likely occur in not allowing removal, whether separate proceedings in the water court and district court might otherwise be necessary - such as to determine damages, whether there is special expertise that one court or the other might have that would be useful in resolving the dispute - such as cases where the district judge already has significant experience with litigants' irrigation systems, and possibly also a general standard that the interests of justice require that a matter be removed. There is the significant possibility that parties and their attorneys would attempt to use the removal process to gain advantage over the other side. So a provision allowing the water court and district court to confer in making a decision on removal would probably also be appropriate. I think there would also have to be a stage after which a party could no longer remove a matter to water court, but I am not sure what that stage should be. A rule similar to the rule on disqualification of district judges comes to mind, but where you have a fair number of pro se litigants who are not familiar with the rules, that might not work well since the litigants would often miss such a deadline for cases to be removed. I also think that district court judges should have the option of applying to send a case to water court if they deemed that appropriate. Allowing district court judges that option might remedy the problem of litigants who fail to realize they have that choice. It also seems to me that any decision that is made as to which court will handle a matter should not be reviewable unless it rises to the level of a conflict of interest that would disqualify any court in similar circumstances.

The other area I keep thinking about is the matter of change applications before DNRC to deal with changes to a water right between July 1, 1973, and the date of a decision by the water court on a water right claim. My observation as a practitioner has been, among my clients at least, that when claimants

learn that the water court decision on their claim will not include changes since 1973, like for instance the movement of a point of diversion, and that they should file a change application with DNRC, my clients are unwilling to go that extra step. They have usually already spent a fair amount of time and money on getting through the adjudication process, and no one is pushing them to do the change applications. So they would rather just let the matter lay in hopes that it never comes up, at least not in their life times.

The water court could be given authority to incorporate any post 1973 changes into decisions on claims so that we do truly have a "living decree." A blanket notice could be given to all water right holders in a basin just before a final decree is issued identifying cases in which there have been post 1973 changes, and allowing objections to those post 1973 changes. The intervening nearly 43 years between 1973 and the present have certainly left open the possibility of numerous changes that are actually occurring on the land. I believe many of them are small, such as the movement of a point of diversion, or a non-expansive change to a field's boundaries. And I believe water users will continue to delay getting those changes approved, even when it is in their best interests, because of the cost of time and money to them.

I have to admit that I have mixed thoughts on the matter however. For one there are a lot of claims that have already gone through the adjudication process. To allow those water users whose claims are not yet through the process to have their failures to apply for change applications overlooked while not giving those who have already gone through the same process the same opportunity seems unfair. And to even mention the possibility of allowing claims already adjudicated to be re-opened would likely be met with a great deal of protest from those who want the whole process over. Allowing any additional issues to be added to the on going claims adjudication process, and especially allowing claims already adjudicated to be re-opened, has the potential to extend the adjudication process, which no one really wants. If a dispute does arise at some point, the change applications could be filed then, probably with little difference in the consequences for those who failed to file the applications earlier since in any event their rights to the changes would be junior to any adjudicated rights. On the other hand, not recognizing the changes that have occurred on the land makes Montana's adjudication process somewhat incomplete because it does not identify those changes. And as I have said, many of the changes are relatively minor and would not be difficult or time consuming to incorporate into the adjudication of claims. I will be interested in the thoughts of other practitioners on this issue.

Thank you for consideration of my comments.

Tom

Thomas J. Sheehy
Sheehy Law Office, PLLC
P. O. Box 511
Big Sandy, MT 59520
Phone 406-378-2103
Fax 406-378-2378