

**Water Adjudication Advisory Committee  
Webex Meeting (Hosted by Ross Keogh)  
February 22, 2021**

Committee members Abigail Brown, John Bloomquist, Mike Cusick, Brian Bramblett, Ross Miller, Ross Keogh, Judge Holly Brown, Jeff Laszlo, and Jim Hagenbarth attended. John Scully, Lorents Grosfield, Jim DuBois, and Christy Clark did not attend. Ross Keogh hosted the meeting. The following people from the Water Court attended: Chief Water Judge Russ McElyea; Sara Calkins, Water Court Administrator; Associate Water Judge Stephen Brown; Water Master Julia Nordlund; and Judicial Assistant Swithin Shearer, who took minutes.

Also attending were: Deb Stephenson, private water rights consultant; and Barbara Chillcott with the Montana DNRC.

**Minutes**

9:02 Begin meeting. Ross Keogh opens. No specific agenda.

9:03 Judge McElyea: see if John Bloomquist has anything prepared in writing for discussion, then Ross Miller can proceed.

9:03 John Bloomquist: intend to get something written by early March, looking at division water judge, administration of final decrees. Interbasin final decrees administered by division water judges. Keep local district courts in administration.

Judge McElyea: accurate summary.

9:07 Ross Miller: change application problems in administrative rules to prove historical and consumptive volume. Especially difficult for municipal users who are entitled to water for future growth. This ends up re-adjudicating elements of the water right. Is it possible for the final decree to be the starting point for proving extent of historical use for potential future change proceedings?

Brian Bramblett: Has abandonment been addressed in every case?

Judge McElyea: No, not in every case.

John Bloomquist: DNRC's authority to modify elements of finally decreed water right

Brian Bramblett: *Hohenlohe* was about water right in a Preliminary Decree, not a final decree.

Ross Miller: Water Court jurisdiction over an element not decreed (like unquantified volume), could that be petitioned to be determined by the Water Court versus DNRC?

Brian Bramblett: Not contemplated by current statutes. 85-2-402

Mike Cusick: Statute allowing certification from DNRC to District Court.

John Bloomquist: Correct, but question about whether/how it gets used. Mandatory versus discretionary certification?

Ross Miller: Can the final decree help with this or do we just need to create case law to deal with this?

Judge McElyea: Water Court will be cautious about requirements after decree issuance because that goes beyond what the Water Court is required to do by defining the property interest. Fix likely lies elsewhere.

Ross Miller: Record preservation becomes that much more important if that's the case, so we at least have access to prior litigation records.

Judge McElyea: Court will likely not participate in continued discussions about the topic of change proceedings. You may continue the discussion on your own, but that's beyond the intent of this committee at this time.

Jeff Laszlo: What's next after a final decree is issued? What does it provide the landowner or lessee? Does it provide any assurances to the water user about anything?

Judge McElyea: Changing, selling, etc. should be easier after final decree, but the truth is nobody really knows.

Jeff Laszlo: Certification district court versus DNRC. Can you clarify?

Judge McElyea: Explanation of certifications from district courts to Water Court, or from DNRC to Water Court. DNRC has ability to certify but hasn't done that in a long time.

Brian Bramblett: DNRC not using that under -309, there has to be an objection to the change and has to be a contested case, but there haven't been as many objections, so that results in the reduction in cases certified to the Water Court.

Jeff Laszlo: Who would be the litigants post-final decree? Hope that adjudication settles matters more to allow more certainty in the future about water use.

Judge McElyea: Some people hope that final decrees are a permanent final decision, and some people think there will be additional issues to be revisited at some point in the future.

Judge Holly Brown: No requests for certifications lately. Litigants post-final decree will depend on the facts.

Judge McElyea: Many of the fixes in the future may be legislative.

Brian Bramblett: Final decree will be the beginning of enforcement for a lot of users and end of litigation.

John Bloomquist: Closed basins tied to final decrees. Unsure about whether the closed status goes away when final decree is issued. This committee can help the legislature with the adjudication process.

Jim Hagenbarth: Value of water is increasing, and some of the water may be sold in the future. What happens to the portion of the water right that can't be sold and wasn't consumed (like ditch losses)? That will be an issue.

Ross Miller: The change process problem I raised likely won't be fixed in the final decree. Good discussion, but likely a policy issue. This does impact the final decree by requiring record preservation.

Judge McElyea: Draft of a final decree in process, and it contains language requiring preservation of documents. Working through how that happens.

9:52 Judge McElyea wrap up.

Mike Cusick: Conversation in future about Water Court role in administration may also tie into Water Court maybe having a part in change proceedings as well.

Judge McElyea: March 9 for next meeting? March 10 at 9:00 AM?

Ross Keogh: Yes, March 10 at 9, invite from me for Webex meeting.

Judge McElyea: Agenda for next meeting: Mr. Bloomquist will address his write-up on potential legislation.

9:58 Meeting closed