

Water Adjudication Advisory Committee
Zoom Meeting
July 7, 2021

Committee members Abigail Brown, John Bloomquist, Mike Cusick, Jim Hagenbarth, John Scully, Ross Miller, Ross Keogh, Brian Bramblett, Judge Holly Brown, Jeremiah Langston, Judith Coleman, and Jim DuBois attended. Jeff Laszlo, Lorents Grosfield, and Christy Clark did not attend.

The following people from the Water Court attended: Chief Water Judge Russ McElyea; Associate Water Judge Stephen Brown; Water Court Administrator Sara Calkins; Water Court Intern Brooke Reynolds; Water Court Extern Emily McKay; and Judicial Assistant Swithin Shearer, who took minutes.

Deb Stephenson, private water rights consultant, also attended.

Minutes

10:01 Begin meeting.

10:01 Judge McElyea opens the meeting by summarizing questions from the prior meeting about concurrent jurisdiction based on the draft statute changes. The subcommittee members can lead the conversation this morning. This will likely be the last meeting

10:03 John Bloomquist: Begins discussion of draft legislation, particularly regarding concurrent jurisdiction with district courts and the Water Court. Section 2 of legislation, appointment of a water division judge-changes were made to allow a district court judge to be appointed as a water division judge.

Section 8 changes since last meeting include express authority to allow a local district court judge to act as a division judge.

Section 4 (duties) changes were made in subsection i.

Exclusive district court jurisdiction in areas where the only valid decree is a pre-1973 district court decree.

10:12 Feedback solicited

Ross Keogh: Questions and comments on Section 4 and the interplay between duties of the different judges/courts. Where do appeals go?

John Bloomquist: The division water judge would be sitting as the Water Court to resolve those disputes once a final decree is issued. The appeal would go straight to the Supreme Court.

Judge Stephen Brown: Section 4(1)(a) is limited to existing rights. How would that work if a proceeding involves abandonment of a permit-would that go to a district court?

John Bloomquist: This likely requires a change to the draft to allow the water judge to have jurisdiction to review all abandonment questions regardless of whether it's a permit or an existing right. It would be easiest to have one venue to resolve all those disputes.

Brian Bramblett: Would the current Chief and Associate Water Judges be the division water judges?

John Bloomquist: The judges would be appointed in three ways: district court judges; appointment by the Supreme Court to sit as a water division judge; or if the Chief/Associate Judge were handling those duties.

Brian Bramblett: What is the default?

John Bloomquist: A water division judge for that particular water division.

Ross Keogh: That concept seems to decentralize the Water Court too much. Maybe we could limit the scope of the district court judges hearing these controversies? This seems to decentralize the process too much and prevent a cohesive court to provide answers.

Brian Bramblett: I see the water users wanting a more local judge to make the decisions.

John Bloomquist: This would provide an expedited process to get answers to water users, depending on the caseload of the water division judges. If the division judges were too busy, it would be helpful to have the Chief or Associate Judge be able to handle the case.

Abigail Brown: Chief or Associate Judges would still need to be appointed as a division water judge. The division water judges would be appointed in the same manner the Associate and Chief Judges are currently appointed.

John Scully: I perceive this to mean that the Chief and Associate Judges still exist, in addition to the division water judges, and a district court judge could be appointed to fill a division water judge duty.

John Bloomquist: That's accurate.

Judge Russ McElyea: State Engineers case. Desirability to have district court judges continue to hear water controversies where it works, but we need to prevent lawsuits from ending up in federal court with McCarran Amendment challenges.

John Bloomquist: This allows the same court that issued a decree to enforce the terms of that decree, rather than having a district court administer a Water Court decree.

Judge Stephen Brown: Would a district court judge appointed to hear a water controversy be appointed to be the division water judge for the whole division? Or could the appointment be limited for a specific purpose?

John Bloomquist: That's my intent is to allow district court judge appointment for a specific purpose/controversy. I see it being flexible, but if that needs to be clarified in the draft, we can do that.

John Scully: This makes sense because it allows for easy access to records.

Abigail Brown: In the new Section 4(i), we might need more discussion or clarification.

Mike Cusick: There's certain situations involving a federal water right that could potentially lead to federal court challenges.

McCarran waiver also applies to federal state-based rights.

Abigail Brown: Could we add a clause stating "as long as a federal or Indian reserved right is not implicated...?"

John Bloomquist: Maybe we need to be clearer in stating that a water division judge will hear the controversy if it deals with enforcement of a water court decree.

Russ McElyea: The argument could be made that a decision was issued from a judge that didn't have proper jurisdiction.

Three of the four current division water judges declined to serve another term.

The Water Court is about to issue two final decrees this month, so this discussion is very timely.

John Bloomquist: I would suggest we make changes to Section 4, subsection i.

Abigail Brown: I agree with that change.

Russ McElyea: I will leave it to you to make those changes if necessary. Are there any other topics?

John Scully: I want to make sure that we maintain clarity that the Water Court keeps the authority.

John Bloomquist: This needs to be distributed to a larger audience. I would suggest we do a short report to the Water Court, Supreme Court, legislature, and administration.

Ross Keogh: I think we should consider going directly to the governor's office first. I think our relationship with the administration will be really important. I would recommend that we clarify that an appointed district court judge is subject to the review of the Water Court. I also think we need to clarify where appeals would go.

Judge Russ McElyea: Does the AG have an opinion on the State's ability to protect the adjudication process?

Jeremiah Langston: We need to be careful in case the result doesn't perfectly align with someone's perceptions of the requirements of the McCarran Amendment.

John Bloomquist: There are policy ramifications that involve the governor's office and the AG. Maybe the next step should be to present it to the governor. Doing nothing is the worst possible result.

Abigail Brown: I'm willing to take this to the governor's office because I was approached last week from his office asking about the status of this project.

John Scully: I'd like to see a paragraph describing the purpose of the amendments before providing this to the governor or the public.

John Bloomquist: Maybe we could pass around that paragraph first.

Abigail Brown: I will do that and circulate to the group.

Ross Keogh: Should the Water Court be part of this, or does this come from the committee only? Who should be involved in meetings with the governor or the Attorney General?

Judge Russ McElyea: I think it should come from you guys. I won't attend unless the Water Court is invited.

Judge Stephen Brown: I agree. You can state that the Water Court has provided input and supports this.

John Scully: Do we have an obligation to provide a report to the Supreme Court?

Judge Russ McElyea: Yes, I'll speak with the Chief Justice.

Judge Holly Brown: I have some concerns, but I'd be interested to see the purpose statement.

Ross Keogh: I'd like to have a call with John Bloomquist and Abigail Brown to discuss the purpose paragraph.

Judge Russ McElyea: The Water Court will continue to facilitate these meetings, but otherwise, feel free to do what's necessary to get the legislation out there.

Jeremiah Langston: Send the paragraph to me and I'll work to set up a meeting. We can provide limited, generic suggestions.

John Scully: We might also need to reach out to the agricultural groups with this too.

Judge Russ McElyea: Summary of action items: the sub-committee will draft a mission statement and distribute to the committee and initiate a conversation with the AG and the governor's office. I will approach the Chief Justice. There will also be tweaks to Section 4. If another meeting is needed, we will convene another one.

Mike Cusick: When should we work on rewriting -406?

John Bloomquist: Let's see how this amendment is received first.

11:26 Meeting closed