

**Water Adjudication Advisory Committee
Webex Meeting (Hosted by Ross Keogh)
February 4, 2021**

Committee members Abigail Brown, John Bloomquist, Mike Cusick, John Scully, Brian Bramblett, Ross Miller, Ross Keogh, Judge Holly Brown, Jeff Laszlo, and Jim Hagenbarth attended. 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 Masters Julia Nordlund and Kirsia Shelkey; and Judicial Assistant Swithin Shearer, who took minutes.

Also attending were: Deb Stephenson, private water rights consultant; Judith Coleman with the United States; Molly Kelly and Barbara Chillcott with the Montana DNRC; and Jeremiah Langston with the Montana Attorney General's office.

Minutes

9:03 Begin meeting. Ross Keogh opens.

9:03 John Bloomquist begins presentation: final decree is a fixed document, it's a final judgment on existing rights as of 7/1/1973. Shortcomings to use that as an administration document for water distribution.

How are ongoing changes put into a final decree? This should be a judicial process. Judicial review of administrative process is less ideal. Water Court is in the best position to review ongoing updates.

Jeff Laszlo: What do you think we have versus what was intended? Changes from 1973 forward need to be incorporated into some type of decree. What is the process?

9:14 Judge McElyea: 40H final decree has been drafted, and I have taken the comments in these meetings into consideration when drafting that document.

9:15 John Bloomquist: We have a description of rights as of 7/1/1973. That's not necessarily what was intended. Intention was to decree the existing rights, and a final decree would incorporate changes made in the interim, as well as post-1973 rights, tribal, and federal rights. Supreme Court decision requires definition of the water right as of 7/1/1973.

Brian Bramblett: Does district court oversee info that goes into redbook? It seems like the existing system already provides the ability to administer decrees from the Water Court.

John Bloomquist: Yes, but the court that administers the rights is different from the court that created the decree. Will district courts be ready to handle that for state-wide water distribution? Could the Water Court do that instead? Junior and senior rights all need to be administered.

Judge Holly Brown: District courts have been doing that administration. Different jurisdictions have different knowledge of water distribution, but the system already exists. District court is supportive of the bill Judge McElyea was suggesting that would give water users the choice of venue (Water Court versus district court) for distribution controversies.

John Bloomquist: Choice between venues is interesting. Unsure whether that's the appropriate choice down the road.

Ross Keogh: Threshold question about whether statutory framework is in place to administer final decree. Brian Bramblett seems to think we have that in place, but John Bloomquist and I think there are improvements to be made. The second question is whether we like the system that is in place.

Brian Bramblett: There is an opportunity for improvement, but we need to take on those potential changes cautiously.

Abigail Brown: What could the role be of the division water judges? How likely are we to have success in making legislative changes before administration of final decrees is imminent?

John Bloomquist: I think that's a good idea for a possible long-term solution.

Judge McElyea: Possible future issues of multiple counties/jurisdictions involved in one distribution controversy. Does the McCarran Amendment allow for state court jurisdiction over USA in a distribution controversy?

John Bloomquist: Enforcement down the road will be more challenging because more people will be involved who may have questions about the potential jurisdictional issues raised by Judge McElyea. This committee is well-equipped to put together legislation to provide to WPIC, so we can use WPIC as a vehicle for actual implementation.

Ross Keogh: Does anyone desire the Water Court to end as currently written in statute?

Ross Miller: Better if WC continued to exist.

Judge Stephen Brown: What will replace the Water Court if it does go away? Currently, district courts send cases to the Water Court. What happens when the district court can't rely on the Water Court anymore?

Judge McElyea: Some potential for the division water judges to be utilized down the road, but the current framework doesn't allow for that expanded responsibility. But the same issue exists that the division water judge isn't elected by all the people within that division.

Abigail Brown: Agree with a specialized court. My clients would like water distributed by a court that knows about the adjudication.

Judge Stephen Brown: Compacts have a provision stating that disputes will be resolved by a court of competent jurisdiction. That question hasn't been answered yet about what that court could be.

Mike Cusick: Agree with Ross Miller and Abigail Brown: Water Court should continue and have a role in distribution/administration. Yes, this is a big question, but we need to address it now before we get too far down the road with issuance of final decrees. Water users need to assist us on their opinions about whether the Water Court should exist, so it's not just attorneys testifying in front of WPIC.

John Scully: Not opposed to continuation of Water Court. Many district court judges don't have the knowledge or desire to deal with water issues. How does a final decree incorporate post-1973 claims? Funding for record-keeping is also important to be addressed.

Ross Keogh: I believe there is consensus here that there is a role for the Water Court after issuance of the final decrees. How do we accomplish that?

Brian Bramblett: Who are the actual members of the committee currently?

Judge McElyea: Discussion of ad hoc, appointed, and other members.

Abigail Brown: What next-let's get something in writing.

John Bloomquist: I'm willing to start getting something in writing. We need the Attorney General's office to assist with McCarran Amendment jurisdictional questions at some point. Identification of statutes to be tweaked and concepts, dissemination by early March.

Judge Holly Brown: Status of legislation?

Judge Stephen Brown: Possible study being funded by legislature, but no recommendations from WPIC.

John Bloomquist: Signing off for today.

Ross Keogh: Another discussion helpful for you to write something up?

John Bloomquist: Yes.

Ross Keogh: Determining date for next meeting: February 22 at 9:00 AM. Also, how/when do we communicate with WPIC?

Judge McElyea: Chances this session are very small.

Judge Holly Brown: What kind of support is required?

Judge McElyea: Conceptual support, but a lack of urgency is the problem.

Ross Miller: I noticed a lot of interest in keeping the Water Court as a permanent institution, but the questions were all about monetary consequences.

10:36 Ross Miller begin discussion of next topic, set stage for further discussion at next meeting: change application struggles. For example, changing an irrigation right to municipal use for an irrigation claim that has already been adjudicated by the Water Court. In the change proceeding, you have to re-prove place of use, acres irrigated, consumptive volume. Helpful to use the Water Court decree to prove the underlying use of water in a change proceeding to avoid duplication of proving the elements of a water right for purposes of a change. Changes are essential in closed basins where you can't apply for a new use of water. Can the final decree help with that problem? Would a date of determination in the final decree help?

Judge McElyea: Let's think about that for the next meeting.

Deb Stephenson: Agree with Ross Miller. That's a problem for other types of water users as well, and confusing for water users. What happens to the rest of your water right after a change proceeding has determined consumptive use?

Ross Miller: In closed basins, it tends to continue downstream to power generation rights or others downstream.

10:48 Ross Keogh: Conclusion

10:48 John Scully: Could someone explain SB 13?

Judge McElyea: Statute as written only allowed supplemental decrees with exempt rights only, but there are other types of claims that need to be included, like late claims, etc.

10:50 Meeting closed