

Optional Filing Option Report for the Water Adjudication Advisory Committee

When the statewide adjudication under the Water Use Act commenced in 1979, livestock and domestic uses sourced from groundwater or instream flow were exempt from the filing and forfeiture requirements of the Montana General Stream Adjudication. *See* §§ 85-2-221, -222, and -226, MCA. The Water Adjudication Advisory Committee is now examining this issue at the request of Senator Brenden.

This Report sets forth an optional filing option for discussions among the Water Adjudication Advisory Committee members. This report relies on some of the same background considerations that informed the mandatory filing option, specifically that holders of exempt rights were told by the Legislature, through § 85-2-222, MCA, that they did not need to file claims in the Adjudication alongside other water rights claimants, and these exempt rights holders should therefore not be penalized for having previously failed to file. As such a voluntarily filed statement of claim for an exempt right would be prima facie evidence of its contents similar to the claims previously filed in the adjudication.

In the mandatory option report, one of the considerations for the mandatory approach was stated as follows: A forum needs to be provided so that holders of these Exempt Rights have an avenue to formally validate and record these water rights and have a way to ensure that water associated with these rights may be distributed by water commissioners. The voluntary filing option is based upon a slightly different premise. The voluntary option recognizes that some users in some areas perceive a need to formally validate their water rights that were exempt from filing in the adjudication so their rights may be distributed by water commissioners. Many other users, however, do not share in the perceived need to formalize their exempt rights. Perhaps the most common example of this may be exempt rights for stock drinking directly from headwater streams and unnamed tributaries.

The voluntary filing option recognizes that legitimate situations occur where users may have no need to formally adjudicate their exempt rights and that requiring such an adjudication may be a hardship in some circumstances. For example, under the adjudication rules, a separate water right claim must be filed for each source. If a water user has stock drinking from multiple unnamed tributaries of a stream, each tributary will require the filing of a separate claim with the payment of the requisite fee. In many of these areas, it is highly unlikely that a water commissioner would ever be called upon to administer these rights. If a water commissioner was appointed and a call was placed on an instream stock right, it is unclear how such a call would be enforced by the water commission.

Under the voluntary filing option, the same procedure would apply to claims voluntarily filed as is envisioned under the mandatory option. The following background considerations that serve as a background to the mandatory option would also apply to claim filed under the voluntary option. A deadline would be set for the filing of claims, the claims would be examined by the DNRC, and notice would be provided to other users with an opportunity to object. As with the mandatory option, consideration should be given to the timing of the current decree issuance schedule and resources availability.

The primary difference between the mandatory and voluntary filing approach is the failure to file a claim in the adjudication for an exempt right by a specified deadline will not result in the claims being forfeited like all other claims that were not filed by the required filing deadlines. *See* § 85-2-226, MCA. Rather, under this approach, the failure to file a claim for adjudication by the required filing deadline would result in the forfeiture of the ability to place a call on other water rights.

The advantage to this approach is it will allow those water users desiring administration of their exempt rights into the adjudication, subject to the same notice and objection requirements, with the filed exempt rights appearing in final decrees alongside all other water rights. It would also limit the time and expense involved in the adjudication by not requiring the filing of all claims. Any claim that is not filed assumes the risk that other users may impact the non-filed exempt right.

The primary drawback to this approach is the lack of a clear process for other water right holders, whose uses might be affected by the non-filed exempt rights, to take enforcement actions against the exempt rights. If the members of the Water Adjudication Advisory Committee or the Water Policy Interim Committee determine the voluntary filing option is worthy of further consideration, this drawback should be examined further to determine if it is a significant concern and if it is, the possible approaches to address the concern.