

WATER ADJUDICATION ADVISORY COMMITTEE
DECEMBER 19, 2011 MINUTES
 Prepared by Bruce Loble

On December 19, 2011, the Water Adjudication Advisory Committee held a telephone conference to discuss draft proposals concerning the exempt from filing claims which were not voluntarily filed during the general adjudication filing period (“exempt claims”). At least fourteen people attended the telephone conference.

The following Committee members were present: Ex officio members Jay Weiner, Anne Yates, and James DuBois; attorney members Holly Franz, John Bloomquist, and Mike Cusick; and water user member Robert Goffena.

During a previous Committee meeting held on November 17, 2011, Jay Weiner and Anne Yates agreed to revise the previously proposed mandatory proposal. The DNRC agreed to provide estimates of the number of exempt claims which might be filed, the potential cost of examining the claims, and some prospective claim filing cost figures. Holly Franz agreed to draft a voluntary claim filing process. Mike Cusick agreed to revise the certification proposal and to include some notice provisions.

The proposals were completed, emailed to the Court, and posted on the Water Court website. Notice of their posting was circulated electronically among the Committee membership and some members of the public. Additionally, email notice of the website posting and the December 19 meeting was provided to sixty-nine people whose email addresses are kept on a “Water Right Adjudication Info Group” list maintained by the Water Court.

During the December 19 telephone conference, the Committee members and some members of the public discussed the proposals. Some slight modifications to the proposals were made.

The DNRC estimates that there are as many as 150,000 non-filed exempt claims. The actual number which might be filed under the adoption of any of the proposals would probably be less than 150,000 due to filing fees and other factors. Assuming a \$40 per claim filing fee, the DNRC estimates that the costs of examination and the completion date of a sliding number of claims is represented in the following tabulation (which was provided to the Court after the December 19 meeting):

	25,000 Claims @ 2YRs	27,000 Claims @ 2YRs	50,000 Claims @ 3YRs	55,000 Claims @ 3YRs	100,000 Claims @ 5YRs	150,000 Claims @ 8 YRs
Est. Program Cost	3,702,104	3,702,104	5,598,520	5,598,520	9,484,451	15,685,705
\$40 Fee Collected	1,000,000	1,080,000	2,000,000	2,600,000	4,000,000	6,000,000
Total Est. Cost	2,702,104	2,622,104	3,598,520	2,998,520	5,484,451	9,685,705

The Advisory Committee felt that there was sufficient consensus to present a menu of options to the Water Policy Interim Committee, even if not every option was likely to have a solid recommendation from the Advisory Committee. The Advisory Committee believed its task was to present a list of policy options for WPIC consideration. A synopsis of the current status quo and the other proposals follow:

1) **Take No Action Option - Current Status Quo:** Of the 219,000 claims currently involved in the statewide adjudication of water rights, the DNRC water rights database identifies 73,892 exempt from filing claims as being voluntarily filed. These voluntarily filed claims are examined by the DNRC, included in the adjudication process, and enjoy the same prima facie status as all timely filed claims. After all objections are resolved on a source, the terms of a Water Court decree may be enforced and water distributed by a district court appointed water commissioner.

Non-filed exempt claims are not included in the statewide adjudication effort. If the claims in a Water Court decree are administered or regulated by a court appointed water commissioner, the non-filed exempt claims are not included in the distribution list. If a non-filed claim becomes involved in a water distribution controversy and there is a need to determine one or more of the elements (such as priority date or flow rate) or determine whether the claim was ever perfected or been abandoned, the non-filed claim may be certified to the Water Court by a district court in accordance with § 85-2-406(2), MCA. Since the claim was not voluntarily filed during the adjudication filing period, the burden of proof is on the water user to prove up the elements of the non-filed exempt claim. After the Water Court determines the elements of the claim or whether it was perfected or abandoned, the decision on the claim is returned to the district court to regulate the distribution of water under the Water Court decision. The Water Court decision is only binding on the water users involved in the district court proceeding and the exempt claim is not included in the statewide adjudication of water rights. This certification process has been used about three times to quantify non-filed exempt from filing claims. If no action is taken, the current status quo is the *Take No Action Option*.

2) **Voluntary Petition Filing Option:** Exempt from filing claim owners could be authorized to file a petition with the Water Court to quantify the elements of a non-filed exempt claim. Notice would be provided to all water users in the basin at the expense of the petitioning water user. The burden of proof would be on the petitioner. After the Water Court quantifies the claim, it would be included in the basin decree and be subject to regulation by a water commissioner (if appointed). Petitions would be allowed until final decrees are issued. All exempt claims for which a petition is not filed would remain unregulated as they are under the current status quo.

3) **Voluntary Claim Filing Option:** Under this option, a statewide filing deadline for non-filed exempt claims would be set. The newly filed claims would be examined by the DNRC, included as part of any newly issued Water Court decree, and treated the same as any other timely filed claim. Some previously issued decrees would have to be reopened and notice of the newly filed exempt claims provided to water users. Filings would be allowed until issuance of final decrees. Failure to file a claim would not result in a forfeiture of the non-filed exempt claim, but it would not be included in any water commissioner distribution or enforcement effort. Non-filed exempt claims would remain unregulated as they are under the current status quo.

4) Mandatory Filing Option: All non-filed exempt claims (both instream and groundwater) would be required to be filed by a date certain or be forfeited. After filing, the claims would be fully examined by the DNRC. (An alternative or further refined proposal could require no DNRC examination if the newly filed claim asserts a flow rate or volume below a specified minimum threshold.) Newly filed claims would be included in all newly issued Water Court decrees. Past issued decrees would need to be reopened and notice provided to water users. After being included in the Water Court decrees, all exempt claims would then be adjudicated using the same procedures as other claims in the decree.

5) Mandatory Stock/Voluntary Domestic Filing Option: This option would be similar to the Mandatory Filing Option, except only stock claims (both instream and groundwater) would be required to be filed or deemed forfeited. Domestic non-filed exempt claims could be voluntarily filed as set forth in the 3) Voluntary Claim Filing Option.

6) Mandatory Refiling and Re-Adjudication of All Vested Claims Option: Maxine Korman, a member of the public who has been attending the Committee meetings appears to support this option, although this introductory topical sentence probably does not precisely summarize her contentions. Mrs. Korman has provided the Committee with extensive materials and comments. Her most recent submission is a January 5, 2012 email containing 16 statements and at least 3 points. Based on her previously submitted material and the January 5 email, it appears she contends that if Montana's water right adjudication is to be supportable, it needs to be started over and that all water right claimants with pre-July 1973 vested water rights would need to file a Declaration of Vested Water Right of all their water right claims. Based on the last statement in her January 5 email, ("Either water rights that pre-date are a vested water right or they have, by law, been retroactively altered and are not vested water right anymore. That would be an illegal law."), it appears she contends that filed vested water right claims may not be modified to reflect evidence of actual historical beneficial use. To avoid misinterpretation, however, the reader is advised to review Maxine Korman's documents and comments posted on the Water Court website under the Water Adjudication Advisory Committee link.

At the end of the Advisory Committee meeting, the chief water judge agreed to draft a short executive summary of the proposals and make a requested presentation to the Water Policy Interim Committee in Helena on January 11, 2012. Advisory Committee members Anne Yates and Holly Franz stated that they would attend the WPIC meeting and would be available for questions from the WPIC membership. Some of the other Advisory Committee members indicated a willingness to attend the WPIC meeting if their schedules permitted.