

From: [McElyea, Russell](#)
To: [Mohr, Jason](#)
Subject: FW: Water Adjudication Advisory Comments
Date: Wednesday, October 28, 2015 11:23:26 AM

Jason

[Supplemental comments below.](#)

Russ

From: John E. Bloomquist [mailto:jbloomquist@helenalaw.com]
Sent: Wednesday, October 28, 2015 9:49 AM
To: McElyea, Russell; "Holly Franz"
Subject: Water Adjudication Advisory Comments

Judge McElyea and Holly- I have reviewed comments by the Adj. Advisory Group and those I submitted. Mine were a bit truncated due to time constraints. I have had a bit more time to think more about the UM Study, my comments and those of others on the group. Please consider these my supplemental comments for consideration by the Committee or WPIC.

Concurrent Jurisdiction. My initial comments were incomplete. Some of that may stem from my not understanding what exactly the study views as "concurrent" jurisdiction. I will try and be more basic. I think the issue of jurisdiction over water matters is an issue which needs to be addressed. Presently we have two courts and one administrative agency with jurisdiction over water matters, each in different areas. I agree with the study that this is a source of confusion and perhaps at times a waste of resources. I think a discussion of clarifying or modifying the jurisdiction issue in the long term is a conversation worth having.

In the near term the water court needs to be focused on the adjudication. I also think allowing certification cases to be completed in the water court is a consideration worth exploring. In the long term water distribution will need to be done by the court system. Distribution of basin-wide decrees involving multiple district courts each within their own districts will be a challenge in my view. I can see merit in utilizing the division water judges or providing the water court with a role in administration of basin-wide decrees once we get to that stage. I reiterate my initial comments on the need for a very clear process on exactly when the water court decrees become enforceable and will in fact be enforced.

To unwind the present jurisdictional complexities the following is a proposal I will put out for discussion:

1. Water Court Jurisdiction: Adjudication of all "existing water rights" as presently performed. Modify certification statutes to allow water court through its water judges to complete certification cases and provide relief to the parties.
2. Distribution: Allow District Courts to continue to enforce district court decrees until the water court decrees become enforceable. Allow district courts to enforce water court decree, or portions of the decree, as necessary or requested by water users within the jurisdictional area of the district court. If enforcement involves multiple district court jurisdictions empower the water courts, either through the division judges or the water

court judges, to oversee and coordinate distribution of a basin-wide decree.

3. "Updating" Decrees: This is a whole topic unto its own but in my view probably one of the most important as I tried to indicate in my prior comments. I would suggest a discussion be done on just how this is to occur or if it needs to occur. The present idea that post-1973 changes would all go through the DNRC change process in many instances has not occurred. If updating is desired, or necessary, I think the present administrative process is ill suited to complete the task. I'm not sure what the answer is to this issue but would like to at least have the discussion on whether the water court could update its decrees to reflect post-1973 changes.

Records Coordination. I touched on this in my prior comments but should probably expand some. Accurate and timely water rights records are a basic function of our system. That said I think what we live with needs to improve dramatically. Updates to abstracts and decrees seems to take significant time. Getting an updated source tabulation which identifies rights as modified is a hit and miss proposition. Updates on ownership has become complicated or even compromised by the use of geocodes in identifying water right ownerships. "Splits" have become more complicated than is necessary. I am quite sure there is a "technical" reason for the state of the water right data bases, but in many instances those data sources are difficult to navigate or worse provide outdated or incorrect information. This needs to be addressed in the short and long term.

Appeals of Permit/Change Decisions to the Water Court. I think whether this would be advisable depends in part on how we are going to "update" decrees and if necessary how that would be done. If the Water Court is utilized to update decrees then this topic may be moot. If the Water Court is utilized to perform other long-term functions then using it as a reviewing court for DNRC permit decisions would seem to have merit. Simply having a water court around for the purpose of reviewing DNRC decisions is probably not warranted in and of itself without other functions for the court to perform.

Please include these comments with my initial comments on the topics noted. I still feel there is much more to discuss within each of the areas described within the UM study and as noted by the various issues discussed above. If any of these topics get discussed further either by the Committee or by WPIC I would be happy to participate. Thx. John Bloomquist

John E. Bloomquist
BLOOMQUIST LAW FIRM, P.C.
P.O. Box 799
Helena, MT 59624-0799
(406) 502-1244 fax: (406) 422-4353

This message may contain confidential privileged material, including attorney-client communications and attorney work product. This electronic transmission does not constitute a waiver of privilege. Please contact sender immediately if you have received this message in error. Thank you.

THE LAW FIRM

MOORE, O'CONNELL & REFLING

A PROFESSIONAL CORPORATION

MARK D. REFLING
ALLAN H. BARIS
MICHAEL J. L. CUSICK
JENNIFER L. FARVE
JENIFER S. REECE
RYAN K. MATTICK
ELIZABETH W. LUND
ABIGAIL R. BROWN
B. GRANT DICKSON

PERRY J. MOORE (Retired)
BARRY G. O'CONNELL (1947-2006)

SUITE 10, LIFE OF MONTANA BUILDING
601 HAGGERTY LANE

Reply to
POST OFFICE BOX 1288
BOZEMAN, MONTANA 59771-1288

TELEPHONE: (406) 587-5511
FAX: (406) 587-9079
E-MAIL: morlaw@qwestoffice.net

October 13, 2015

Water Adjudication Advisory Committee
c/o Committee Member Holly Franz
holly@franzdriscoll.com

RE: Comments to University of Montana Report for the Montana Supreme Court Entitled "Water Rights in Montana," Spring 2014
Our file no: 66060\001

Dear Judge McElyea and Members of the Water Adjudication Advisory Committee:

Judge McElyea has asked that we submit our comments on the 2014 University of Montana Water Right Study to committee member Holly Franz this month. My comments are set forth below.

The introduction to the University of Montana study "Water Rights in Montana" notes that Montana's Water Use Act is now in its fourth decade. That observation made me think about the intent of Montana's constitutional framers and the 1973 Legislature when they enacted Article IX, Section 3 of the 1972 Constitution regarding water rights and the 1973 Water Use Act. An important part of the 1972 Constitutional provision that differs from the 1889 Constitution is the mandate that the Legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records in addition to the present system of local records. Under the 1973 Water Use Act, all water permitting and adjudication was originally under the authority of a single agency, the DNRC. Thus, it seems to me that a fundamental goal of both the Constitution and the Act was to create a more modern and centralized system for water rights records and determinations.

Notwithstanding, when the adjudication portion of that system became bogged down in the Powder River adjudication and it became apparent that the administrative adjudication process would be too long and costly, the Legislature changed the original model and created the Water Court system with the passage of Senate Bill 76 in 1979. This bifurcation of the roles of permitting and adjudication, along with the previous jurisdictional split with the District Courts that supervise water administration, creates a major point of confusion for water users. I spend a significant amount of time in my practice explaining to clients the various roles of these agencies and courts, the reason for this division of authority, and the differences in the

burden, type, and quantity of proof needed in each of these tribunals. The University of Montana study suggests these various jurisdictional roles present a source of confusion and increased expense for water users; I would agree. The division of roles is not what was originally envisioned by our constitutional framers in 1972 or by the Legislature in 1973 when it passed the original Water Use Act. Trying to reunite this jurisdictional split under fewer entities or perhaps even a single entity in the future seems like a reasonable legislative goal.

The Legislature could decide to vest all jurisdiction regarding water rights issues as an administrative function of the DNRC, with judicial review by the District Courts, as it was between 1973 and 1979. Under that scenario, the Water Court would essentially “fold up its tent” and dissolve once the adjudication is completed. Alternatively, the Legislature could vest more jurisdiction over water rights determinations with the Water Courts.

My preference would be for a long-range plan placing more water rights determinations with the Water Courts. The Water Court has gained considerable expertise during the adjudication process, making literally thousands of water rights determinations every year. It would be a shame to not preserve this knowledge and expertise into the future. The DNRC has also gained considerable expertise in assisting the Water Court in the adjudication process, and should still have an active role in water right matters, akin to the role of state engineer in other western states. The DNRC should also have an expanded role in water administration, enforcement, and training and supervising local water commissioners, with the hearing of disputes on those matters taking place in the Water Courts.

I generally agree with most of the recommendations on page 4 of the executive summary of the University of Montana study. Notwithstanding, I do have concerns about complete centralization of all water right permitting, adjudication and administration, whether it's with the DNRC or the Water Court. Montanans are passionate about their right to vote. In my experience, water users are particularly passionate about choosing the District Judge who supervises the administration of their water rights. While I agree with the study's conclusion that some District Judges lack the expertise, time, and resources to deal with complex water disputes, there are many District Judges who excel at resolving water issues and supervising water commissioners, and who would not want to lose that role in their districts. Such judges likely receive many votes from water users at election time. Any future changes in the law should respect that right to vote for a local or regional supervisor of water administration, so as not to make water users who currently enjoy that system feel disenfranchised.

A solution to this issue may lie within the statutory framework that already exists for the Water Courts. While the University of Montana study discusses the Water Court primarily as the Court in Bozeman (with the Chief Water Judge, the Associate Judge and the Water Masters), the statutory framework of Senate Bill 76 originally envisioned four Water Divisions with active Division Water Judges. Perhaps there is a way to modify the existing statutory framework to utilize Division Water Judges as the regional supervisors of water administration within their Divisions, who appoint and supervise local water commissioners and resolve regional disputes.

The University of Montana report notes that in Colorado, the position of Water Judge is a coveted and sought-after position. It is unclear from the report what motivates Colorado judges to seek this extra

responsibility. Perhaps some incentive could be created for Montana District Judges to seek appointment as Division Water Judges, such as extra compensation or reduced caseload on other matters. Alternatively, perhaps the statutes could be modified to provide for full-time Division Water Judges. Division Water Judges are currently selected by other District Court Judges within the Division. Maybe Division Water Judges could be subject to general election Division-wide. This should satisfy water users' concerns about choosing the judge who oversees the distribution of their water. Depending upon the complexity of issues in the basins they administer, these Division Water Judges could employ one or more Water Masters as referees for specific basins within the Division.

Issues arising on the Milk River near Malta are likely to be quite different from issues that arise on Willow Creek near Harrison, the Jocko River at Arlee, Flint Creek near Drummond, or the Tongue River near Miles City. Using Division Water Judges (selected or elected from that particular region) will better address regional water issues in both water administration and in hearing appeals of agency water decisions.

The idea here is to have a gradual transition from a central Water Court in Bozeman that adjudicates claims, to regional Water Division Courts that administer water decrees and hear judicial review cases. As pre-1997 temporary preliminary decrees are reissued as preliminary decrees the Water Court could focus on moving a particular Water Division toward fully enforceable status, with the goal of setting up a permanent Division Court with an elected Division Judge and appointed Water Masters and local water commissioners, as an initial step towards future administration. Eventually, permanent Division Judges and Courts could be set up in Missoula (or Butte), Havre and Billings, and eventually the Upper Missouri Division could be set up in Bozeman or Helena. If necessary, additional water divisions or subdivisions could be created.

Implementing a future water administration policy utilizing the existing Water Divisions should be a long-range goal that would not interfere with the current adjudication process. The adjudication process is now moving forward with greater efficiency at an accelerated pace, and the main goal should be to complete the adjudication in as timely a manner as possible. The Legislature should be careful not to tinker with the Water Courts if it will slow the adjudication process. Still, there is a light at the end of the tunnel and the end of the adjudication is coming into view. We do not need to wait, nor should we wait, to completely emerge from the tunnel before we consider the future. A discussion of how we transition from statewide adjudication to statewide administration of water rights is definitely appropriate now. It is shortsighted to think that water resource, water development and water right issues will not become increasingly frequent, complex and important to Montanans after the adjudication is completed. Just as the 1972 constitutional delegates had the foresight to bring Montana out of the 19th century in water rights matters, our Legislature has a new opportunity to set a course for the future as the adjudication nears completion.

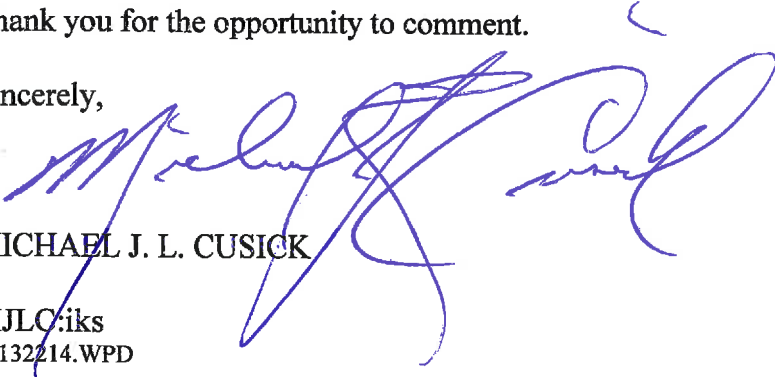
Finally, I agree strongly with Holly Franz's comments at the last conference call regarding improving the training for water commissioners to reflect a more skilled, technical and professional occupation. I agree with the approach used by other western states noted in the University of Montana study to keep those individuals as selected by or from their local communities. At the same time, there should be more consistency in the qualifications, training, expertise and compensation for these water commissioners.

Water Adjudication Advisory Committee
October 13, 2015
Page 4

I think the DNRC should play an expanded role, much like the state engineer in other western states, in training these individuals and perhaps employing them either directly or as independent contractors.

Thank you for the opportunity to comment.

Sincerely,



MICHAEL J. L. CUSICK

MJLC:iks
00132214.WPD

As requested by Chief Judge McElyea, the DNRC provides the following comments on the potential future of the Montana Water Court (per Water Policy Interim Committee study) and the Study *Resolving Water Rights Issues in Montana* (UM 2014)(Study).

Preliminary Comment

Many of the issues discussed in the Study about the adjudication, the permit and change process, enforcement and administration of water, and the post-final decree world were thoroughly discussed during the State Water Planning process. This process involved 80 diverse members of four Basin Advisory Councils (BACs), many technical advisory committee members, dozens of public meetings, and hundreds of public comments. The recommendations arising from those discussions can be found under the *Water Use Administration* section in the State Water Plan. <http://dnrc.mt.gov/divisions/water/management/state-water-plan>. This public-based planning product is bedrock to the Department's comments below.

Future of the Water Court

- *Complete the Adjudication:* It is critical that the State of Montana and the Water Court stay focused on completing the adjudication. The current timeline for completion is 2028. The BACs consistently cited the completion of the adjudication as a top priority. Deciding the future or changing the focus of the Water Court before final decrees is premature and distracts the Court from the sole purpose for which it was created. However, it is important to begin planning for how the final decrees will be implemented after the conclusion of the adjudication.
- *Improve Administration and Enforcement:* Of immediate concern for both current water use and in anticipation of final decrees is improving consistency, predictability and availability of administration (distribution) and enforcement of water rights. This could involve exploration of the use of new technologies as well as expanding the use of metering and measurement reporting to improve water right administration before and after final decrees. Additional water use data would improve both the change process and water availability for new permitting.
- *Living Decrees:* A statutory process should be developed to provide for updating final decrees with new ownership and incorporating changes and permits.
- *Maintain the current roles of the Executive and Judicial Branches:* Current due process protections in the permit and change processes need to be maintained or strengthened in the future. The current permit and change processes involve the Executive and Judicial branches as well as public notice. DNRC provides a scientific and legal review of permit and change applications and public notice of decisions. Applicants or other water right holders have the ability to participate and appeal a final DNRC decision to a local district court. This process continues to work and should be maintained in order to maximize the

due process protections involving both branches of government. It should be noted that a final DNRC decision on the merits of a change authorization has not been appealed since 2008.

General Study Concerns

- The Study would need additional context and detail for its purpose. Water rights are by their very nature both legal and science-based. The lack of legal and scientific context makes it impossible for a “lay” reader or anyone else to evaluate critically what changes should or should not be made to our current system. The Study is too general for one to make an informed decision.
- The discussion of authority from other states lacks sufficient context to form a basis for a critical evaluation for Montana. Each state has a complex scheme of checks and balances. Any one legal provision of a neighboring state is acceptable and effective only because it works in conjunction with other provisions. Individual provisions cannot be viewed in isolation. For example, the generous *prima facie* status of water right claims in Montana works only because the check on the accuracy of water rights comes in the change process; the change process purposefully puts the burden of proof of relevant criteria on the person seeking that change and involves a scientific review of potential adverse effects of the proposed change on the source and potentially affected water right holders.
- The Study seems to focus too heavily on the “look back” period. The use of the term “look back” period is really a misnomer. The Constitution and the Montana Water Use Act protect existing rights as they existed in 1973, with some, limited perfection exceptions. In 1973, the Legislature, based on the Constitution struck a balance between those existing rights and post-1973 new rights and changes in existing rights. The Legislature consciously chose to change the burden of proof moving forward and included a prospective scientific review. Changing the “look back” period has burden-shifting and constitutional implications; changing the look-back period would also arguably reward those who chose not to follow the law by seeking timely change approval from the DNRC. Since 1973, water holders old and new have relied on the Water Use Act process to protect their interests. Other states such as Colorado can have a much longer “look-back” period.
- The issues raised in the Study would need to be part of a broader open, public review and comment process to ensure transparency and that all perspectives are heard. A comparison can be made to the extensive public participation in *The Evaluation of Montana’s Water Rights Adjudication Process* (“Ross Report,” 1988), prepared for the Water Policy Interim Committee.

From: [McElyea, Russell](#)
To: [Mohr, Jason](#)
Subject: FW: Water Adj. Advisory Committee
Date: Friday, October 16, 2015 9:58:12 AM
Attachments: [DNRC Comments WCT_study.pdf](#)
[Comments MT AG to Water Adjudication Advisory Committee.pdf](#)
[A Review of the paper of U of M.docx](#)
[Water Adjudication Advisory Committee Ltr.pdf](#)

Jason

Attached are comments from advisory committee members regarding the UM study.

Russ

From: Holly Franz [mailto:holly@franzdriscoll.com]
Sent: Friday, October 16, 2015 7:31 AM
To: john.chaffin@sol.doi.gov; Weiner, Jay; Yates, Anne; james.dubois@usdoj.gov; 'bradley.s.bridgewater@usdoj.gov'; McElyea, Russell
Cc: Shearer, Swithin; tomatty@mtintouch.net; bill@galtranch.com; morlaw@qwestoffice.net; goffenar@midrivers.com; jbloomquist@helenalaw.com
Subject: FW: Water Adj. Advisory Committee

I have attached the written comments that I received regarding the UM study. John Bloomquist's comments set forth below. My comments are:

The review of how the other states address water issues was fairly superficial and not particularly helpful in making decisions regarding Montana's adjudication, distribution, and permitting system.

My comments on the specific recommendations of the UM study are:

Short Term:

1. Concurrent jurisdiction. My primary approach regarding the Water Court's jurisdiction at this time is to keep it focused on completion of the adjudication. Great progress has been made in the timely issuance of decrees and resolution of objections. I am extremely hesitant to add any new duties onto the Water Court that dilutes its focus on adjudication. In addition, when water distribution disputes occur, they often include issues beyond simple adjudication and administration such as ditch disputes and damage claims. Damage claims are occasionally tried to a jury. Once the water distribution portion of the case is completed, the parties often want a water commissioner appointed. These other issues seem a better fit for the district courts. This recommendation seems to also have a longer term component. In the long-term, I do not believe a single Water Court in one location can serve the needs of the State. I understand that the immediacy of many water disputes conflict with a district judge's duty to prioritize criminal matters and that other cases, such as neglect and dependency, also require immediate attention. As a water practitioner, I would also like more water expertise throughout the State. One approach may be to consider standing masters that serve the district judges within one or more judicial districts. If the Water Court, itself, is envisioned as serving this role, there would need to be regional

offices/judges throughout the state similar to the DNRC. I do not anticipate the legislature would be eager to fund this.

2. Records Coordination. I have concerns about how the new DOR ownership update system is working. I have discovered several instances where a client's water right has been transferred into someone else's name, who has no ownership in the right, based on a transfer of a small part of the described place of use. This usually happens when the place of use description is fairly general. In these cases, there is no notice to the person who is taken off of the ownership record since they are not the one that transferred the property. As to living decrees, it has always been my understanding that the change process is designed to accomplish this. The DNRC electronic system is a great improvement to the old paper file days but it can always benefit from review and improvement. I have been concerned about changes to the DNRC website that make it more difficult to use. For example, you can no longer search for points of diversion or places of use according to township, range, and section. You can only search by geocode which defeats the purpose and is extremely unwieldy.
3. Education and Collaboration. No comment

Long Term:

1. Time Gap. This is a result of the adjudication taking longer than planned and emphasizes the need to complete the adjudication as soon as possible. Since 1973, all changes were to be approved by DNRC. The burden of proof was placed on the applicant. We are too far down this road to change the system now. We need to complete the adjudication as it is currently structured. As stated above, incorporating changes into the decrees administered by water commissioners is how our system creates a living decree. I am not sure if the study's reference to the burden of providing 1973 historical use is referring to the adjudication or the change process. In the adjudication, folks typically are not looking for 1973 evidence but are more likely to want 1873 evidence. The prima facie statute is designed to help with this evidentiary issue, but it also leads to a less than accurate adjudication particularly in the absence of an objection.
2. Agency review is a standard district court duty, and I am not aware of any problems in this arena.
3. Modernizing Water Commissioner/Distribution. The statutes can benefit from an update.

Holly Franz

From: John E. Bloomquist [<mailto:jbloomquist@helenalaw.com>]

Sent: Friday, October 09, 2015 10:17 AM

To: Holly Franz <holly@franzdriscoll.com>

Subject: Water Adj. Advisory Committee

Holly- here are my comments to the U of M study recommendations.

Short Term:

1. Concurrent jurisdiction. I'm not sure concurrent jurisdiction advances any consistency or would make water distribution/administration any more consistent than having the district courts maintain authority. I think the larger issue is providing the district court with the necessary resources, knowledge and understanding to administer the water court decrees. I think the main issue which needs clarification is just when does a water court decree become enforceable and to what extent. The statutes are not clear to me on when the decree itself is enforceable and when does the district court and water users know the water court decree is being administered.
2. Records Coordination. We still need accurate and up to date records being available. The system we have still has a huge time delay on providing up to date tabulations and information.
3. Education and Collaboration. No comment.

Long Term:

1. Time Gap. This issue should be addressed. Having 1973 decrees in 2015 and beyond does us little good. I also think it is the biggest problem with the adjudication in terms of sufficiency and accuracy. We need a process to amend decrees to be updated to reflect actual water use under the rights which are being adjudicated.
2. Administrative appeals to Water Court. I think how No. 1 is addressed may make this topic moot.
3. Modernizing Water Commissioner/Distribution. The water commissioner statutes do need to be updated. Related to this is to update/clarify when and how the water court decrees become enforceable/administrable.

Those are my comments. Thanks for compiling. JEB

John E. Bloomquist

BLOOMQUIST LAW FIRM, P.C.
P.O. Box 799
Helena, MT 59624-0799
(406) 502-1244 fax: (406) 422-4353

This message may contain confidential privileged material, including attorney-client communications and attorney work product. This electronic transmission does not constitute a waiver of privilege. Please contact sender immediately if you have received this message in error. Thank you.

A Review of the paper of "Water Rights in Montana" by U OF M law School.

My background is the Musselshell River basin which is an over appropriated and dewatered river. When a user increases their historical consumptive use someone else on our system loses water which is legally theirs. I am glad to see the "goal " on page one is "fair, effective and efficient" The 1987 report on the difference between the Examination method and the verification method on the Musselshell river shows that more than half of the water right have a major flaw in one or more elements. This coupled with the fact that a prior water court didn't allow the DNRC to bring forth issue remarks on the Musselshell means that as far as the Musselshell is concerned the very premise of "fair, Effective and efficient is comprised .

On page 2 the report says "Decrees thus may not accurately describe the water use that is occurring at the time they are issued and become increasing less relevant as time goes on." This is when a very aggressive change process by the DNRC is needed and water rights need to be held to historical consumptive use to avoid harming other water rights through any changes including internal changes. The DNRC findings should be accepted by the water court as findings of fact. This way changes can occur with no harm and the water court and the DNRC will be working together. We need to look back to at least 1973 before the great expansion of pivots to protect junior rights and as such accept the DNRC as the finder of fact on historical consumptive use. This way changes can happen with no harm. One more failing of the system is to not have removed abandon rights which been used to support new water uses.

On page 3, the reports states that "most states allow adjudicating as currently used" and some states use "diverted volume" Or a "look back of" only "5 to 15 years". What a way with the use of pivots, sprinklers unchecked expansion of a of all water right elements and the limiting of return flows and increasing of historical consumptive use to dry up a river like the Musselshell. These ideas are nonstarters for Montana because of the lack of accuracy in our adjudication.

On page 4, it seems like the report tends to want to pull more from the DNRC and put it in district court or in water court. Water right holders just want their rights protected and to avoid as much court as possible. U of M is a school of lawyer and they may support more lawyer ways. Water court should rely on the DNRC as a finder of fact and only be a court of last resort.

We on the Musselshell have done the water commissioner thing quite well and should be an example, if not with the District Court, with the water court or the DNRC to be held to a standard. Our problem is all the inaccuracy of the water right book yet to be solved by the adjudication . WE have done our part.

Page 6. I quote. "Some irrigators are interested in more efficient methods of water use to convert water savings to new uses." That is great if they do not harm other users by increasing their historical consumptive use.

PAGE 11 issue remarks are brought up. We have very few on the Musselshell. The adjudication expects water users to tell on their neighbors and with 50% of our water rights not correctly listed, users are afraid of retaliation. This requirement also depends on a very uneducated public who does not understand water rights in most cases. Once again I turn to the 1987 study on the Musselshell.

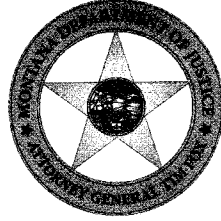
Page 12. Under "Potential confusion", the water court can charge the DNRC to define the water right correctly and the change and except it with a right to protest. Use the DNRC as the finder of fact and accept their findings.

Page 14. One user should be able to cause water commissioners by showing damage. Our goal should be to have our adjudication done accurately and timely and controlled by commissioners to protect all water users and defend Montana from downstream states.

ATTORNEY GENERAL

STATE OF MONTANA

Tim Fox
Attorney General



Department of Justice
Joseph P. Mazurek Justice Bldg.
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

Comments of the Montana Attorney General's Office to the Water Adjudication Advisory Committee Concerning the Future of the Adjudication and the University of Montana's "Water Rights in Montana" Report

October 8, 2015

I. General Comments Regarding the Future of the Adjudication

- The Enforcement of Water Rights Post-Adjudication is the Most Significant Question for the Future of Water Rights in Montana
 - A key threshold question is whether, in a post-Adjudication universe, Montana wants to have a judicial enforcement system, an administrative one or some sort of hybrid, and what the respective roles of district courts, the DNRC, the Water Court, the Attorney General's Office and individual water users ought to be in that enforcement system. Under the law as it currently stands, the Water Court would go away once the Adjudication is complete, with day-to-day distribution of water primarily in the hands of water commissioners appointed and supervised by local district courts and with specific enforcement responsibilities split among the DNRC, the Attorney General and County Attorneys, each of whom is entitled to invoke the power of the district courts, as are individual water users. (*See* Mont. Code Ann. §§ 85-1-114, 85-2-405 and 85-2-406 regarding enforcement and Title 85, Chapter 5 for water commissioners.)
 - When it comes time to consider the future of water rights in Montana it seems appropriate to begin with a consideration of whether this is still the structure that best suits the State and to work backward from there. Many of the Report's short- and medium-term suggestions seem to put the cart before the horse.

TELEPHONE: (406) 444-2026 FAX: (406) 444-3549 E-MAIL: contactdoj@mt.gov WEB: mtdoj.gov

MONTANA DEPARTMENT OF JUSTICE

Legal Services Division ★ Division of Criminal Investigation ★ Highway Patrol Division ★ Forensic Science Division
Gambling Control Division ★ Motor Vehicle Division ★ Information Technology Services Division ★ Central Services Division

- The Report's focus seems particularly curious in light of the fact that, in the wake of HB 22, both the Water Court and the DNRC are meeting their benchmarks, and while the Adjudication still has years to run, it appears to be on track for its eventual completion. As completing the Adjudication is the Water Court's core task, anything that might detract from that or retard its progress (such as expanding the Court's jurisdiction to take on other responsibilities) should be avoided.
- A Process for Ensuring "Living" Decrees Would Be Valuable
 - The Report makes some good points about the importance of ensuring that the DNRC's water rights database has the most current and comprehensive information possible. After final decrees are entered by the Water Court, there still needs to be a mechanism for ensuring that the decreed rights can be updated as a result of changes, ownership updates and other relevant information. This also would help facilitate water rights administration and the development of Montana's market for the lease or sale of water rights.
- Better Water Measurement and Metering Are Critical to Any Effort at Enforcement and Administration
 - It is essential to the administration of water rights to be able to know how much water is available in a source and how much is being used.
 - The WPIC and the Legislature should give important and sustained consideration to ways to enhance the availability and public accessibility of measurement data and could consider updated requirements for the metering of individual uses.
- Greater Transparency Regarding Water Court Rulings Is Essential to the Practice of Water Law in Montana
 - The Water Court is building the body of law that will govern water rights in Montana will into the future. While the Water Court is taking steps to improve its ability to make more of its decisions available to the public, WPIC and the Legislature could help facilitate and expedite this process. This is particularly important since the Water Court is using legal principles articulated in individual case determinations in other cases irrespective of notice or the participation of a party in a given case.
 - As a short-term solution, LEXIS has the ability to make Water Court decisions more widely available with no cost if the Water Court chooses to avail itself of this service.

II. Comments More Specific to the Report

- The Report seems superficial in its analysis of both other state laws and also the actual history and practice of the Adjudication in Montana (at least as compared to something like the Ross Report). Each state has its own system of checks and balances, and its own unique history regarding the development of its water laws and administration, and the Report seems to have a tendency to take individual pieces of other state systems out of context.
- The Report's heavy focus on the "time gap" and the way it presents the "problem" seems to ignore the importance of protecting other water users during the change process, since all water users, even junior ones, are entitled to rely on stream conditions as they find them. The Report also seems to skip over the fact that the change process and the adjudication apply very different standards to the determinations in question (whether to approve or deny a change application and whether and how to decree a water rights claim - *see, e.g.*, Mont. Code Ann. §§85-2-101(5), 85-2-227(1), and 85-2-311). This distinction reflects a balance carefully struck by the Legislature to protect both claimants (by giving their claims a *prima facie* presumption of validity, to address the difficulty posed by having to come up with evidence of water use that in some cases could be over a century old) and other water users (by requiring change applicants to prove lack of adverse effect on other water users). The Report's concern about when volumes come into play in determining actual use of water in a change process also seems misplaced as the change process' focus on actual use is an important check against the expansion of water rights, which is not allowed under the law absent a new permit application.
- The Report doesn't recognize the differences between the standards in play in the Adjudication and in the change process when it suggests giving the Water Court jurisdiction over the change process. Moreover, increasing the Water Court's caseload risks increasing the time it will take to complete the Adjudication (which is the single best way to address the "time gap").
- The Report's concern about a "look back" period regarding changes in water rights seems to sidestep the fact that, under Montana law, post-1973 changes to the substantive elements of a water right are only legal if they are approved by DNRC. (*See* Mont. Code Ann. § 85-2-402.) The Report's suggestion of employing a shorter look-back period when evaluating change applications raises important legal (and perhaps constitutional) questions that the Report does not address. In addition, states that employ shorter look-back periods also have completed adjudication baselines (something Montana won't have until the Adjudication is complete) and also have enforced abandonment statutes in a manner that minimizes the amount of time they need to look back. There are also other western states that have lengthy look-back periods, often depending on how long it has been since the underlying rights were

decreed, perfected or changed. Ultimately, the consideration of what is most appropriate for Montana is best made by reference to the specific context of water rights in Montana.

- The Report's suggestion of giving the Water Court jurisdiction over appeals from DNRC water rights decisions is problematic for several reasons. As noted above, the standards applicable to the adjudication of claims before the Water Court and to the consideration of new permit and change applications before the DNRC are different, and it is not clear that the specialized expertise the Water Court possesses in adjudicating claims is directly relevant to the review of DNRC permitting/change decisions. Moreover, these appeals from DNRC water rights decisions are record reviews under the Montana Administrative Procedures Act rather than *de novo* reconsideration, which lessens the importance of the reviewing court having particular specialized knowledge related to water rights. In, the most important task before the Water Court is the completion of the Adjudication. Anything that risks detracting from that mission (such as expanding the Water Court's jurisdiction in ways that increase its workload) should be resisted.
- The fact that the Report was written for a lay audience and accordingly does not emphasize the legal underpinnings of water rights either in Montana or in the other western states it surveys limits the utility of this Report for the WPIC and the Legislature, which must of course be cognizant of the law as it stands when it seeks to consider how that law might usefully be changed.
- It is disappointing that the Report bypasses the role the Attorney General's Office plays in the Adjudication, most specifically in the resolution of issue remarks giving rise to questions of non-perfection or abandonment (*see* Mont. Code Ann. §85-2-248) but also with its enforcement powers under Mont. Code Ann. §85-2-114(3)-(6), a role for which the Legislature has not to date budgeted funding but one which may be worth considering as part of the broader question of how water rights in Montana are to be enforced in the future.

From: [McElyea, Russell](#)
To: [Mohr, Jason](#)
Subject: FW: advisory committee comment
Date: Thursday, November 05, 2015 8:18:21 AM

Jason

Here is another comment from an advisory committee member.

It would be helpful if I could have some time to discuss these comments at the next WPIC meeting.

Regards, Russ

From: Thomas Sheehy [mailto:tomatty@mtintouch.net]
Sent: Wednesday, November 04, 2015 2:00 PM
To: McElyea, Russell
Cc: Weiner, Jay; holly@franzdriscoll.com; jbloomquist@helenalaw.com; morlaw@qwestoffice.net; bill@galtranch.com; goffnar@midrivers.com; Yates, Anne; Dubois, James (ENRD); Ritter, Douglas
Subject: Re: advisory committee conf call

Judge McElyea,

Please accept my tardiness in commenting on the UM Report. I found it and the comments that have been made thought provoking and interesting. Clearly the report raises some large issues that will require considerable public and legislative comment and discussion before changes are made. Nonetheless the comments I have at this time are as follows:

I agree that the primary task of the Water Court needs to be to continue and complete the adjudication process as is as soon as reasonably possible.

The number one complaint I hear from water users is the cost they must incur to protect their water rights and resolve disputes over them. What ever changes are made to our system, we need to continually keep in mind that we need to make this process as inexpensive as possible for those involved. This is especially so for those with rights for small amounts of water. Too often the process is too costly to afford the justice that is deserved.

Modern computer technology, including the internet, email, and video conferencing has vastly changed the ability of rural Montanans to obtain and utilize information, and to conquer the vast distances in our state. While there are those who lag behind, today rural Montanans are becoming quite technologically sophisticated, especially when compared with their abilities of only a few years ago. This trend will surely continue. With it the need to have wide spread offices of our government agencies is quickly declining. Changes to our water dispute resolution structure need to made while keeping this trend in mind.

The Water Court should not go away when adjudication is complete. The Water Court has considerable expertise in matters involving water rights that should not be lost. In my view the water court should handle all water right controversies, not just the adjudication of the rights themselves. It is time consuming, expensive and very disheartening to water users to have to go from court to court. And unfortunately too many district courts are so over burdened with criminal and other matters that demand priority that they can't hear and

resolve water disputes in a timely manner.

Although I know it would be a substantial departure from the present system, in my view having water rights disputes heard through an administrative process with a de novo appeal to the water court makes sense. Administrative procedures are less formal, and therefore typically less costly and more timely, than court procedures. And having an opportunity for a de novo appeal encourages litigants to not throw in the kitchen sink the first time around when pressing their case. In my opinion the result would be that those with disputes would tend more to represent themselves and would still not be very likely to appeal once a decision was reached by the administrative agency.

Of course anything that can be done to make records more complete and available is desirable. A “one stop shop” for water right information would be of benefit to everyone involved.

I have limited experience with water commissioners, but making the selection and training of commissioners, with local input, a function of DNRC in an effort to keep the judiciary independent of the executive branch seems reasonable.

Over all I applaud those who worked on the report for their efforts. These are issues that will take time to digest and resolve.

Tom

Thomas J. Sheehy
Sheehy Law Office, PLLC
P. O. Box 511
Big Sandy, MT 59520
Phone 406-378-2103
Fax 406-378-2378

On Oct 21, 2015, at 10:08 AM, McElyea, Russell <RMcElyea@mt.gov> wrote:

The conf call will be Nov. 5 at 10:00. I will call those who can't make that date separately.

Meeting invite to follow.