

Final Decree Transition SubWorking Group

Meeting Summary 1.23.24

FDT Questions

1. Who is the Division judge and how do they get in that seat discussion and options?

- a. *Modified Status Quo* - Pull from existing district court judges within the division to serve as Division Judge, wholly or partly (3-7-201)
 - i. Self-selection – volunteer; continue their other workload
 - ii. *Term*: 4 years (3-7-202)
 - iii. *Vacancy and Removal*: TBD (addressed somewhat in 3-7-203)
 - iv. *Workload*: water takes priority and existing workload that is displaced distributed to other judges; more water judges can be appointed as needed (Colorado, C.R.S.A, 37-92-203(2))
 - v. Note: least power to constituents; least accountability to water users.
 - vi. Note: Not a lot of support from sub-working group, can do better
- b. Appointment, confirmation (Senate) from sitting district court judges wholly or partly within the division that volunteer to be nominated
 - i. *Appointment (three options that you will see throughout the appointment discussions)*:
 1. Governor: aligns with current statute of district court judges, separation between who is appointing and who hears the appeal, constituents can lobby the governor. Con: continuity & politics
 2. Chief Justice: understands the strengths and weaknesses of the district court judges; they supervise all lawyers and judges; supreme court is responsible for reallocating workload & cascade effect within the court system. Chief justice is an eight-year term- buffers against politics.
 3. Hybrid: the chief justice can recommend four nominees, public comment and the Governor appoints from that list.
 - ii. *Workload*: water takes priority and workload distributed to other judges; more water judges can be appointed as needed (Colorado, C.R.S.A, 37-92-203(2))
 - iii. *Retired judges*: opportunity for judge pro tempore (3-5-113) for a single case.
 - iv. *Term*: 4 years, at the end of the term, needs reappointment & confirmed.
 - v. Question: do the district judges want this work or role?
 - vi. Note: mechanism for constituents to use their elected officials in the senate and the governor; *district court judge is a judge of general jurisdiction, stays within the framework in statute. One stop shopping and one place for files.* Reservation: have to go to the senate to oppose; fear of retaliation; cuts both ways. How is centralized filing and data management addressed?
 - vii. Note: more support from subworking group than a; some with equal support and concerns for (a).

- c. Appointment, senate confirmation, after initial term- retention election from anyone who meets the qualification of a judge (Art. VII, Sec 9, Mont Const) within the Division
 - i. *Appointment*: Governor or Chief justice of Supreme Court or hybrid
 - 1. *Options see above*
 - ii. *Term*: six years to align with district court judges; retention election during the next statewide general election. Special elections have huge costs.
 - iii. *Jurisdiction*: need to enumerate the scope of work and duties.
 - iv. *Qualification*: qualification of a judge, retired judge (Art. VII, Sec 9, Mont Const)
 - v. *Workload*: this is all that they do, can they serve in more than one division if not enough work or support district court work (is this possible if they are not elected/ like a judge pro tempore)
 - 1. Serving in more than one division is important question to explore further
 - vi. *Election*: retention - within the division or statewide.
 - vii. *Venue*: Can deal with where cases are heard (i.e. in place of controversy).
 - viii. Note: if this is not a sitting district court judge will need office space and staff. 3-7-204(2) provides for the Supreme Court to pay for salaries and expenses of water judges as well as their staffs. Salaries and expenses include personnel, office expenses and space, and other necessary expenses.
 - ix. Note: preference for appointment; there is preference for election for accountability & does b address this; prefer c because of workload concerns and clarity needed; c is creating a new court if not using sitting district court judges & prefer b (because they cannot help anyone else); seems like it is similar to SB72 & didn't play well; new court; this is not a new court. Opens up the options of who can be selected from, including qualified water law attorneys who may not want to run for District Court.

- d. Appointment, senate confirmation from anyone who meets the qualification of a judge (Art. VII, Sec 9, Mont Const) ** same as option c without retention election **
 - i. *Appointment*: Governor or Chief justice of Supreme Court or hybrid
 - 1. *Options see above*
 - ii. *Term*: four or six years to align with district court judges; eligible for reappointment
 - iii. *Jurisdiction*: need to enumerate the scope of work and duties.
 - iv. *Qualification*: qualification of a judge, retired judge (Art. VII, Sec 9, Mont Const)
 - v. *Workload*: this is all that they do, can they serve in more than one division if not enough work or support district court work (is this possible if they are not elected/ like a judge pro tempore)
 - 1. Serving in more than one division is important question to explore further

- vi. *Space & staff:* 3-7-204(2) provides for the Supreme Court to pay for salaries and expenses of water judges as well as their staffs. Salaries and expenses include personnel, office expenses and space, and other necessary expenses.
 - vii. *Venue:* Can deal with where cases are heard (i.e. in place of controversy).
 - viii. Many of the same questions under b & c.
 - ix. Questions: do they still have the jurisdiction?
 - x. Note: explore further with the main working group, but the thinking behind this option is to mimic the current process for adjudication judges.
- e. Full and open election without appointment and confirmation, anyone who is qualified to be a judge (Art. VII, Sec 9, Mont Const), and likely lives within the Division
- i. *Qualification:* anyone who is qualified to be a judge under Art. VII, Sec 9, Mont Const, discussion about whether or not they live within the district
 - ii. *Appointment and confirmation:* when there is a vacancy follow provisions similar to other judges (Title 3, chapter 1, part 9)
 - iii. *Elections:* discussion should be had about whether or not it is a statewide election or just within the division (assume during statewide general election).
 - iv. *Term:* four or six years to align with district court judges; eligible for reelection
 - v. *Number of judges:* Likely follow one per division (4), but that is a discussion point, including whether a judge could serve in more than one division depending on workload
 - vi. *Workload:* this is all that they do, can they serve in more than one division if not enough work or support district court work (is this possible if they are not elected/ like a judge pro tempore)
 - 1. Serving in more than one division is important question to explore further
 - vii. *Space & staff:* 3-7-204(2) provides for the Supreme Court to pay for salaries and expenses of water judges as well as their staffs. Salaries and expenses include personnel, office expenses and space, and other necessary expenses.
 - viii. *Venue:* Can deal with where cases are heard (i.e. in place of controversy).
 - ix. Same questions under c
 - x. Note: concerns about appointment generally and who gets to appoint; alternatively should be a straight up election by everyone. Campaigns can be costly for judges- will it inject outside influence and lessen the pool? Population centers driving the vote- cuts both ways.

All options:

- xi. Training: dedicated funding for training on water law, adjudication, and administration of water rights (emerging issues, continuing education)

- xii. Term of office: some consistency/building knowledge base/predictability
- xiii. Removal option: is it the same as other judges in statute and Art VII, Sec 11, Mont Const?
- xiv. Ensuring that there is a supervising judge/chief judge for administrative tasks (3-7-204), supervising staff (e.g., admin staff), budget management, thinking through the general supervision by the Supreme Court for these functions (3-7-204)
- xv. Ability for judge pro tempore, substitution, etc
- xvi. Stagger the appointment- some judge always has experience with water
- xvii. Qualifications: qualifications of a judge (3-7-221), water experience or training taken above or continued education requirements; who decides? There may be pushback if there are additional qualification limitations with appointment

2. Creating a new court?

- a. Is the question of jurisdiction?
- b. New duties?
- c. More government issue?
- d. Is the Water Division a new court?
- e. **Homework:** subworking group try to articulate why the water division is seen as a new court; is it a new court?

Homework:

- All SWG members review the options
 - o Additional questions & context
 - o Rank choice/straw poll on top three & articulate why
- All members try to articulate why the water division is seen as a new court; is it a new court?

Notes from 1.10.24 SWG Meeting (did not get to this in the 1.23.24 subworking group meeting)

- 3. Are there types of actions that need to be in one court or the other (page 2)
 - a. Commissioner- who supervises and what to do when I have a problem with the commissioner? (NOT other commissioner issues)
 - b. Interpretation of decrees
 - c. Review DNRC decisions
 - d. Litigation (non-petition enforcement)
 - e. Interpretation of decrees
- 4. How to address multi-jurisdictional conflicts?
- 5. What does administrative support look like?
- 6. Will a hybrid approach work (district to division/division to district); the use of water divisions/judges a non-starter; is district court only a non-starter?

Where to go for types of actions (where does it start, when is it transferred, who decides):

1. **Commissioner-** who supervises and what to do when I have a problem with the commissioner? (NOT other commissioner issues- e.g., record keeping, bills, training)
 - a. **Start:**
 - i. Appointed and supervises at district court;
 - ii. *need to figure out what is the appropriate district court.
 - b. **Petition/transfer:**
 - i. Either party or district judge can petition for request for commissioner/supervision/appointment the division court
 - ii. Who can petition- someone impacted by the enforcement
 - iii. It *shall* be transferred if petitioned. (question)
 - iv. Need trigger- Can not be transferred after the issue has been taken up; if a commissioner has been appointed; public notice required;
 - c. **Dissatisfied** water user complaint:
 - i. Someone other than the commissioner's supervising judge hears it.
2. **Litigation-** where do I go for illegal water use, abandonment, waste. (non-petition enforcement)
 1. **Start:**
 - a. start with the district court
 - b. need to talk about when it starts in the division
 - i. if it spans multiple courts
 1. Option 1: then the petition must be filed in both courts.
 2. Option 2: Goes to division court
 2. **Petition/transfer:**
 - a. Either party or district judge can petition for request for commissioner/supervision/appointment the division court
 - b. Who can petition- someone impacted by the enforcement
 - c. It *shall* be transferred if petitioned (required?)
 - d. Need trigger- Can not be transferred after the issue has been taken up; if a commissioner has been appointed; public notice required
3. **Review DNRC decisions-** what court do we go to when we petition for judicial review of DNRC decisions.
4. **Interpretation of decrees-** where do I file a motion for clerical error in a final decree?
 - a. **Start:**
 - i. **division court** (subject matter, consistency of opinions, separation of powers- commissioners vs interpretation): Ryan, Brian, Krista, Clayton, Nicole, Raylee, Vickie, Abby, Jan, Julie, (need to determine how division judges are determined)
 - ii. **district court (simple, local):** Alan, Jocelyn, Spencer

iii. **neutral:** Kelly, Mark

b. Transfer/petition

- i. What if it has distribution/commissioner established; different judge for interpretation
- ii. Talk about if it shall be transferred

* Beth come in after a draft proposal is developed and have reviewed for McCarran compliance (Governor, WAAC)

Action items (sub-group):

- Abby send out answers about Utah
- Feedback to subworking on how people get into a division judge seat
- Subworking group:
 - o Build out those option on getting into that seat

Be clear every time on the goals & objectives:

- Increase or decrease cost to the water users
- Increase or decrease fiscal not costs
- Is it realistic given the confines of the judicial system
- Does the decision maker have the resources
- Does it increase or decrease McCarran compliance
- Increase or decrease subject matter expertise
- Is in increasing or decreasing complexity
- Is it politically feasible

- review decisions made by a compact board or other administrative entity as provided in Title 85, chapter 20;

- conduct proceedings for petitions for judicial review filed with the Water Division Court under 2-4-12 702(2)(e);
- review motions brought pursuant to Rule 59 or 60, M.R.Civ.P., concerning the adjudication of an existing water right and orders pursuant to 85-2-234(8);
- hear and resolve disputes arising under the interpretation of a final decree issued under 85-2-234;
- hear and resolve issues related to judicial enforcement actions for waste, unlawful use, interference, or other violations pursuant to 85-2-114 and 85-2-122;
- hear and resolve issues related to enforcement actions brought pursuant to common law remedies, including but not limited to the waste of water, unlawful use of water, abandonment, or interference with the use of water, including the right to injunctive relief under Title 27, chapter 19
- conduct abandonment proceedings under 85-2-404 and 85-2-405;
- hear and determine matters related to objections to permits or changes in appropriation rights under 85-2-309;
- hear and determine matters related to a dispute over ownership of a water right certified to the Water Division Court under 85-2-424(9);
- hear and determine rights and issues related to water distribution controversies under 85-2-406;
- coordinate with the Department of Natural Resources and Conservation the compilation of necessary technical information for water distribution under XXX (redbooks)
- hear and resolve ditch easement matters ancillary to a water right dispute or controversy, as a water right is defined in 85-2-102;
- promulgate rules for use across all water divisions for practice and procedure pursuant to Title 3, chapter 7;
- prescribe forms for use pursuant to Title 3, chapter 7; and determine and interpret existing water rights, including without limitation the adjudication of total or partial abandonment of existing water rights occurring at any time;