

Final Decree Transition SubWorking Group Meeting

Ongoing Working Document

10.30.2023

This document captures the needs, goals, and values to frame the conversation around recommending a clear, consistent, and user-friendly process for Montana post final decree (and the transition period).

These needs, goals, and values are not specific to a particular outcome or policy but will be used to assess the holistic suite of policy options that this group will be exploring and recommending. This document also captures the potential solutions developed by working group members to date.

Problem Statement

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Goal

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Values

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Values - Same as Water Planning and Growth and Exempt Wells?

- Equity - equal access to process
- Fairness (recognizing prior appropriations)
- Consistency
- Transparency
- Timely
- Coordination of multiple regulatory agency authorities

NEEDS	CONTEXT	CLARIFICATION NEEDED
Clear process for post final decree and current transition period	<ul style="list-style-type: none"> - We are getting to final decrees, and the current system is unclear; unclear on how and when work goes to Divisional Courts and what court to go to when a final decree spans 2 or more existing judicial districts 	<ul style="list-style-type: none"> -
Simplicity of Process	<ul style="list-style-type: none"> - Currently need an attorney to file a complaint 	<ul style="list-style-type: none"> -
Efficiency	<ul style="list-style-type: none"> - Currently one water issue often has multiple venues to resolve - Costly and difficult to navigate if in multiple venues - Want one place to hear water issues and clarity on where to file - Avoid incompatible decisions amongst multiple venues - Avoid multiple courts - Develop clear process for one court to obtain jurisdiction over the entire issue, depending on the complexity of the issue. <ul style="list-style-type: none"> - Option: File in your home district court. Clerk of Court sends up to the Divisional Court. - Option: File in your Divisional Court. Divisional Court sends out to district court as desired by the parties. 	<ul style="list-style-type: none"> -
Timeliness	<ul style="list-style-type: none"> - District courts don't have the time or resources to have timely resolution. - Can lose growing seasons while waiting for a decision (distribution, enforcement, abandonment, waste). - 	<ul style="list-style-type: none"> - What is the ideal amount of time? - Is this area specific? Multiple areas (Teton, Gallatin) experiencing large population growth, conversion from Ag to other uses. - Will we see more problems in the future? <ul style="list-style-type: none"> - Clarify problems with what?

NEEDS	CONTEXT	CLARIFICATION NEEDED
		<ul style="list-style-type: none"> - Timeliness? - In all areas? - Or just in areas of high growth?
Water Expertise	<ul style="list-style-type: none"> - The water adjudication court will eventually complete its work and therefore likely go away (has expiration), maintain subject matter expertise. How do we get that expertise? - Need clerks of court with water experience / understanding of unique procedures of water cases. - Options: <ul style="list-style-type: none"> - Divisional Court – must go to the water CLE, required training? Required to have some water background. Learn it on the ground. Appointment process ensures that they have the knowledge - Commissioner – required training / better support 	<ul style="list-style-type: none"> - What are we looking for? <ul style="list-style-type: none"> - expert in water vs local expert or both? - understanding of water law - flexibility to understand local water systems - Is this specific to enforcement actions to get a commissioner/dissatisfied water user actions? Those can be unique (maybe). -
Define local control	-	<ul style="list-style-type: none"> - This phrase is being used often – lets further define for clarification of need
Keep What is Working	<ul style="list-style-type: none"> - Framework to keep a specialized court (Division Court) and funding with it - Staying at home, decisions in the home area - Division Court is too expanded - District Court works - Division courts in law - The state is McCarran compliant currently 	<ul style="list-style-type: none"> - What is home area? Water division? Regional? Basin? Smaller? - What is too expanded? - Who does the district court work for? How? Where does it work? - How to transition from two identified judges acting as division judges to the division judges doing water work - Can we strengthen McCarran compliance?

POTENTIAL SOLUTIONS	CONTEXT/DETAIL	NEED	CHALLENGES
SB72	<ul style="list-style-type: none"> – Use the current Divisional Court adjudication judges transition into these judges – one office/administrator – option to take to district court 		<ul style="list-style-type: none"> – –
Division Start, District Option	<ul style="list-style-type: none"> – Use the current Divisional Court model (4 water judges that are elected from their peers), bolster, have option to take to District Court, adjudication courts expires. – 		<ul style="list-style-type: none"> – Where are the gaps in statute that exist that would need to be addressed? – Can we make water issues get to these courts today (see flow chart)? – Can we treat a Water Divisional Court like a multi-judge district? <ul style="list-style-type: none"> – In what way? – In terms of case assignments? – In terms of rotating which sitting district court judge in a district is the ‘water judge’? – Should the divisions be smaller? Based workload - smaller. And if so, how would the staffing work for these? – Use of special masters as needed for workload

POTENTIAL SOLUTIONS	CONTEXT/DETAIL	NEED	CHALLENGES
			<ul style="list-style-type: none"> – Where do you file within the division? – 3-7-221 & 3-7-223 & 3-7-224- not temporary – Substitutions 3-1-804?
District Start, Division Option	<ul style="list-style-type: none"> – Start at the District Court, take it to the Divisional Court if it is not working. 	–	<ul style="list-style-type: none"> – Will there still be a timeliness issue? Urban vs Rural. – This seems antithetical to the identified needs of simplicity of process, timeliness and water expertise.
Simple Bill (proposed on 9.25 subworking group)	<ul style="list-style-type: none"> – Clean-up bill to remove “water court” out of statute. Change to water judges title 3, part 	–	–
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NOT a focus for the sub-working group (based on SWG feedback at September meeting)

1. **Option district court only:** Only use district courts for all water issues, adjudication courts expires, and non-adjudication authorities removed, and divisional courts are removed from statute.
2. **Option adjudication court only:** The adjudication court takes on this role, does not expire.
 - Discussion: is making the adj Court Constitutional?
 - Discussion: funding, currently adj funding rules out.

Additional Discussion Items

- Is there conflict between title 85 and title 3 for commissioners?
- Is there something about water rights that requires a specialized court post adjudication?
 1. Yes:
 - Water rights are a private property right/right to use, needs to be treated differently, there is a value.
 - Requires more interface with a decision-maker (judicial)
 - It is what we have now. 50 years down this path.
 - Our current laws require judicial orders to enforce water rights / obtain water, meaning water users are dependent on quick decisions from the courts.
 - Decrees need to be enforced by a judicial entity that understands the underlying property right
 2. No:
 - Other agencies don't use specialized court; concerns that district courts may not want to take on other issues (new precedence?) - there are other specialized courts – ie: workers compensation court?
 - Other agencies have boards (e.g., DEQ has board of env review/DNRC has the hearings unit/ DOL has a hearings unit), that are appealable to district courts.
- How to approach effective dates/termination dates on transition recommendations, new statute.
- Timing issue, final decrees are rolling. Do we just deal with what we have until adjudication is over, or fix now? Built in a transition? People with decrees now that are in limbo now.
- If there was a specialized court, what would it be called?
 - Divisional Courts
 - Water Division Courts
 - Keep what it is in statute
 - Need to also need to think about the title of any future legislation
 - Water Administration after Adjudication

Action Items from 9.25.2023

- How many water cases do they see? Timeline to hear the water cases? Who are the divisional judges? District Court and Adjudication Court (adjudication vs other water) Joselyn ask Beth & Sara
- Abby update the flow chart. Other citations for visual, and to ensure consistency across the authorities:
 - “Water division”, “water judge” and “water master” is defined in 85-2-2-102(29), (30), and (31).
 - “Water Court” is only defined in the DNRC Claims Examination Rules 2(a)(73) and not in statute.

The current judges are acting as division judges - that's why decrees have the division listed at the top. I don't think folks understand this.

(73) “Water Court” means the water division of the state courts, presided over by water judges responsible for adjudicating existing water rights in Montana, as provided for in Title 3, Chapter 7, MCA.