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Water Policy Interim Committee

64th Montana Legislature

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Dec. 7, 2015

To: Water Policy Committee members

From: Jason Mohr, research analyst, Legislative Environmental Policy Office

Re: Adjudication Advisory Committee comments on UM Law School report

This memo serves as a summary of comments requested by the Water Policy Interim Committee of the Water Court's Adjudication Advisory Committee.

In September, the WPIC requested the advisory committee to offer comments based on the content and ideas contained in a 2014 report by the Land Use & Natural Resources Clinic of the University of Montana School of Law titled *Water Rights in Montana: How Our Legal System Works Today, How Montana Compares to Other States, and Ideas for Montana's Future*. The Montana Supreme Court commissioned the report, a copy of which is attached to this memo. It provides short-term and long-term ideas related to jurisdiction in water user disputes, records coordination, education, adjudication "time gaps," appeals of agency decisions, and modernization of the water commissioner and distribution system (see pages 4, 28, and 29 of the report).

The advisory committee provided seven sets of comments, which are attached to this memo. Except perhaps that most believe adjudication of pre-1973 water rights should continue until completion in 2028, the advisory committee members do not necessarily have a consensus opinion about the future of legal processes related to water rights. However, the report offered many ideas for the WPIC to consider. These are reflected in the accompanying table:

Ideas identified by UM study	Summary of comment
<p>Jurisdiction in water user disputes</p>	<p>The Water Court should adjudicate all “existing water rights” as presently performed. District courts should continue to enforce decrees until the Water Court’s decrees are enforceable. Division water courts could be empowered for basinwide distribution.</p> <p>Reunite the jurisdictional split between adjudication and permitting process into a single entity to reduce confusion, with elected regional/division water judges determining water rights, but do not slow the current adjudication process.</p> <p>Complete the adjudication; improve administration and enforcement of water rights through new technologies and expanded metering and measuring.</p> <p>Keep the Water Court focused on adjudication. Standing masters could serve district court judges within one or more judicial districts.</p> <p>The Water Court should be the court of last resort. Anything that might distract or retard adjudication in the Water Court should be avoided. Water measurements and metering are critical to administration and enforcement. Water Court rulings should be transparent. Legal standards differ between the adjudication and change processes, which may complicate Water Court involvement. The Legislature should consider funding the attorney general’s role in resolving agency issue remarks and enforcement.</p> <p>The primary task of the Water Court needs to be to continue and complete the adjudication process. But the court should not go away after adjudication. The Water Court should handle all water right controversies. Any new process should be inexpensive, using modern computer technology.</p>
<p>Records coordination</p>	<p>Updates to data must occur more quickly.</p> <p>Address concerns with ownership update.</p> <p>Establish a one-stop shop for water right information</p>
<p>Education and collaboration</p>	<p>(none)</p>

<p>Adjudication “time gaps” (post-1973 changes to adjudicated water rights)</p>	<p>The current administrative process to marry pre-1973 decrees with post-1973 permits and changes is ill suited to complete the task.</p> <p>Update final decrees with new ownership, water right changes, and permits to produce “living decrees.” Changing the “look back” period would change the burden of proof and create constitutional implications.</p> <p>The change process is already designed to produce “living decrees.”</p> <p>The Water Court should accept DNRC findings on historical consumptive use. Changing the “look back” period is a nonstarter due to accuracy issues in adjudication. The Water Court should charge the DNRC with defining a water right correctly.</p> <p>A process for ensuring “living decrees” would be valuable.</p> <p>“Time gaps” reflect a balance carefully struck by the Legislature to protect claimants and other water users. A shorter “look back” period may raise constitutional questions and ignores ongoing adjudication and unenforced abandonment statutes.</p>
<p>Appeal of agency decisions</p>	<p>The Water Court should not be kept around only to review agency decisions.</p> <p>Maintain current roles of the executive and judicial branches.</p> <p>Appeals of DNRC decisions are record reviews under the Montana Administrative Procedures Act, which differs from the Water Court’s de novo abilities.</p>
<p>Modernization of water commissioner and distribution system</p>	<p>Improve training for water commissioners and increase qualifications, training, expertise, and compensation.</p> <p>Update related statutes.</p> <p>A single user showing damage should be able to force appointment of a water commissioner.</p>