



ENVIRONMENTAL QUALITY COUNCIL

ENVIRONMENTAL QUALITY
COUNCIL. 2003-2004

January 14 and 15, 2004 Ex. No. 2

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Memorandum

To: Environmental Quality Council

From: Krista Lee Evans, Research Analyst

A handwritten signature in cursive script, appearing to read "Krista", written over the printed name.

RE: Water Adjudication Advisory Committee

Date: December 3, 2003

At the October EQC meeting Judge Loble, Chief Water Judge, mentioned that he had reinstated the Water Adjudication Advisory Committee (Advisory Committee). The committee was initially established pursuant to 3-7-103, MCA. This section of law states:

3-7-103. Promulgation of rules and prescription of forms -- advisory committee. (1) As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the water judge and the department of natural resources and conservation.

(2) (a) The chief water judge shall appoint a water adjudication advisory committee to provide recommendations to the water court, the Montana supreme court, the department of natural resources and conservation, and the legislature on methods to improve and expedite the water adjudication process.

(b) The committee consists of three nongovernmental attorneys who practice before the water court, one district court judge, and three water users who have filed statements of claim with the department of natural resources and conservation under this chapter.

(c) The chief water judge or the judge's designee shall serve as an ex officio member of the committee. The Montana supreme court may appoint the attorney general or the attorney general's designee, a representative from the department of natural resources and conservation, and a representative of the United States government as ex officio members of the committee.

(d) The committee members shall serve at the pleasure of the

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water court and shall serve without compensation.

(e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as often as determined by the Montana supreme court. (emphasis added)

The purpose of this paper is to update you on the work that the Advisory Committee and the accuracy subcommittee of the Advisory Committee have been doing. Since the Advisory Committee and the EQC are both working on potentially the same or at least very similar issues, I feel it is important to keep the 2 groups informed as to the progress of the other. Hopefully this will minimize any duplication of work between the two groups so that everyone gets more bang for their buck!

The full Advisory Committee held a meeting on October 23, which I attended. There is time allocated in the January meeting agenda for the EQC to receive an update from Candace West, Assistant Attorney General regarding work of the "accuracy subcommittee" of the Advisory Committee. This subcommittee has been meeting on a weekly basis, excluding holidays, since the October 23 meeting. I have also been attending the subcommittee meetings when possible.

I have provided a copy of a summary of the meeting that was prepared by Judge Loble. If you have questions please don't hesitate to contact me at 444-1640 or kevans@state.mt.us

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**WATER ADJUDICATION ADVISORY COMMITTEE
SUMMARY OF OCTOBER 23, 2003 MEETING**

Prepared by Bruce Loble, Chief Water Judge

The Advisory Committee met on October 23, 2003 at the Department of Natural Resources and Conservation in Helena. Mike Cusick chaired the meeting. The following committee members were also present: Eugene Manley, Robert Goffena, John Bloomquist, Mark Josephson (by telephone), and *ex officio* members Candace West, Don MacIntyre and Jim DuBois (by telephone). The following non-committee members were present: Jim Gilman, Stan Bradshaw, G. Steven Brown, Bob Lane, Bill Schenk, Tim Hall, Curt Martin, Kim Overcast, Bette Goffena, and Bruce Loble.

~~Krista Lee Evans, a Resource Policy Analyst for the Environmental Quality Council was~~ also present. She briefly discussed and distributed copies of the 2003-2004 EQC Work Plan. The EQC Work Plan contemplates research into the water adjudication process.

The issue of accuracy of the Water Court decrees was the primary topic of the meeting. The Attorney General believes that claims examination by DNRC water resources staff pursuant to the Supreme Court Claims Examination Rules and a more prompt effort by the Water Court to call claims in on its own motion to address unresolved issue remarks will lead to a more accurate adjudication of water rights.

Candace West of the Attorney General's office presented a brief history of the Water Court's practice of calling claims in on its own motion to address unresolved issue remarks. Ms. West distributed an Index of Documents Addressing Accuracy Issues in Montana's Statewide Water Rights Adjudication, which included copies of 1986-1987 correspondence between the DNRC and Judge W. W. Lessley; several pages of the 1988 Ross Adjudication Evaluation Report; the Water Court's 1995 "On Motion" decision; and a discussion of the topic by the current chief water judge extracted from a transcript of a November 2000 public meeting on Water Court Rules.

During the general discussion that followed, several people agreed with Ms. West that the Water Court should call in claims with unresolved issue remarks on a more rapid schedule and assert that this process will lead to more accurate decrees. Some people suggested that delay in addressing unresolved issue remarks by the Water Court could result in the issue remarks never being reviewed and that the State of Montana, through the Water Court, has an obligation to make sure claims in water right decrees accurately reflect a water right's historical beneficial use.

Others said that the Water Court's current "On Motion" policy, as set forth in its 1995 "On Motion" decision, concentrates the Water Court limited resources on resolving objections that solve real controversies and that calling in unresolved issue remarks at some later date simply reflects the Court's 1995 shift in priority to expedite the enforcement of Water Court decrees by the district courts. This group contends that expediting the enforcement of Water Court decrees will, as noted in the Water Court's 1995 "On Motion" decision, create conditions by which "the accuracy and reliability of the adjudication can be tested under actual conditions"

before the water rights are made final.” They contend that unresolved and uncontested issue remarks will still be addressed, just at a later date.

After lengthy discussions about the benefits and disadvantages in the two approaches, Candace West agreed to chair a subcommittee to draft a specific proposal for further discussion. Tim Hall, Stan Bradshaw, Bob Lane and Jim Gilman agreed to join the subcommittee. The subcommittee will meet from 10:00 to 12:00 at the DNRC or the Attorney General’s office every Thursday to work on this project. When the subcommittee has drafted its proposal, the full committee will meet to discuss it. The subcommittee will provide a chair for the next meeting of the full committee and will suggest a proposed date for that meeting.

The subcommittee also indicated it might study the DNRC’s “exempt” claim proposal and report on that issue at the next meeting.

The public is welcome to attend the meeting of the subcommittee. Contact Candace West at (406) 444-2026 or at her e-mail address listed below for more information on the subcommittee meetings.

Committee Members

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cc: Committee Mailing List (10/29/2003)