

**RESPONSE TO FEBRUARY 2006 WHITE PAPER
REGARDING WATER MANAGEMENT FOLLOWING ADJUDICATION**

3-31-06

From: Dave Pruitt, former Chief Water Commissioner for Gallatin County's 18th Judicial District; George Alberda, West Gallatin Water Commissioner; Peter Marchi, Musselshell Water Commissioner; Walt Sales, Chair of AGAI; Dorothy Bradley, District Court liaison to the Gallatin Water Commissioners.

During a telephone conference call on March 20, 2006, Gerald Mueller and Mike McLane invited our group to submit our concerns regarding their White Paper for the record and for further discussion. We appreciate this. They are as follows:

- 1) Our water enforcement systems for the Musselshell, West Gallatin, Willow Creek, and Middle Cottonwood are working well.
- 2) We believe that any centralization of the water commissioner function, particularly turning commissioners into state employees, would neither improve water regulation nor be acceptable to water rights owners.
- 3) We have not thought of any hypothetical situation which would be better resolved by a different enforcement scheme than the one we have.
- 4) The relationship of commissioners with district judges has not only worked adequately and efficiently, but, coupled with a system of water mediation, has kept litigation to a minimum.

Decree Integration

The authors anticipate "decree integration" as the most significant change that will come with the completion of adjudication. They presume that decree enforcement will be integrated into the five major basins of Montana. While we agree that changes will come with completion, the expected date is 15-20 years in the future. And the outcome may not be integrating enforcement into five large basins.

Consider a hypothetical in which a call is made by a senior water rights owner down the Yellowstone River east of Billings for junior water in the Shields Valley. The junior user would likely invoke the Doctrine of Futility, and argue that his forbearance of use would never benefit the senior user. If the burden of proof of futility is on the junior user, he might be forced to sacrifice his operation for an entire season, baking his fields in the sun, to prove the point. Rigid enforcement of seniority from the top to bottom of such an immense drainage would not seem practical.

The Water Court is expected to adjudicate 85 decrees for the 85 Montana hydrologic basins, and this number may increase for convenience into more sub-basins. In the meantime, enforcement might well continue in many separate sources or drainages,

without encompassing an entire basin decree. Accordingly, the system of judicial appointments would continue to be appropriate.

The example raised by Mike and Gerald -- a call for senior water by downstream hydropower interests -- is a dreaded possibility and could shake the whole system to the core. While the present system of judicially appointed commissioners is not prepared to deal with this eventuality, neither is the entire state, nor would a centralized system of regulation appear to offer easy answers.

The Judicial Connection

Temporary preliminary decrees of the Montana Water Court are now being enforced for several of Gallatin County's major drainages. Little has changed after 100 years of enforcing prior decrees, except legally secure and readily available numbers, records, quantities, use types, dates of use, names and addresses. Local flexibility and judicial involvement are key ingredients to success. On the occasion of commissioner turnover, the district court judge selects a new commissioner following applications, interviews, and consultation with the users who will be paying the bill. Considering the task of watching 35 West Gallatin ditches between the mouth of Gallatin Canyon and the Interstate, the commissioner must intimately know the lay of the land. To their immense credit, the irrigators have voluntarily gone beyond the letter of the law with their water use, becoming the central watchdog that assures a sufficient flow in even their greatest time of need. Rarely do users need more than a phone call from their commissioner to shut their headgates when the water drops. Bills are calculated by the commissioners, mailed by the Clerk of District Court in October, and mostly paid by the users to the commissioners by December. The commissioners sometimes include requests to improve headgates or upgrade measuring devices, and the requests are generally met. There is no shortage of applicants for the job. Bi-annual meetings with the district court judge, water judge, and users assure open communications and respected expectations. Even with the completion of adjudication, we do not see what improvements would be gained by scrapping this system.

Disputes

Water rights disputes do arise, and will always arise. The question is how to resolve them inexpensively and quickly, considering that haste is often of the essence. Our experience is that local control is a viable approach if not the best approach. Water mediation is enabled by §85-5-110, MCA. The 18th Judicial District has encouraged it by assuring that mediation training is provided to water commissioners, who, with their wealth of knowledge from the trenches, frequently serve as excellent mediators. Resolving a water dispute quickly may be more of an art than a science, involving a little give here and there that will avoid protracted litigation. In any case, whether enforcement is local or centralized, a bank of well trained mediators as an important component for present and future enforcement and dispute resolution.

Issues in need of Answers

We believe the present system of court-appointed commissioners has problems in need of resolution. For example, Workers Compensation was superimposed on top of water commissioners to solve one of the unintended consequences of state assumption of district courts. While some kind of accident insurance is advised, Workers Compensation is not well suited for commissioners. A commissioner may be petitioned for work that will involve a handful of users and only a few hours of work scattered over a few months. Adding a \$600 workers comp bill to an otherwise small fee will discourage users from utilizing a system that protects their seniority and resolves their conflicts. However, replacing local commissioners with a system of state employees would be like doctoring a few small cuts with a hip replacement – the new hip is not needed, and the cuts may continue to be unaddressed.