

# **Final Decree Transition Sub-working Group Meeting Ongoing Working Document Updated 11.26.2023**

This ongoing working document captures the needs, goals, and values to frame the conversation around recommending a clear, consistent, and user-friendly process for Montanans 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.

## **Suggested Premise**

Starting with the premise that the Adjudication Court will expire in 2028. Recommendation to main SWG for November meeting. (Consensus amongst SWG members who participated during the sub-working group meeting on 10.30.23 – Abby, Raylee, Jocelyn, Vicki, Alan, Clayton, and Julie)

## **Problem Statement(s) Formulation**

1. The process is the problem- after adjudication work court work is done, what is in existing law has multiple courts dealing with water.
  - a. Is there consensus that there is one venue? TBD, build out the ideal Divisional Court Model
  - b.
2. Final Decrees spanning multiple jurisdictions
  - Some basins overlap multiple districts
  - Going to multiple courts is a problem
    - district court;
    - adjudication court;
    - DNRC hearing process;
  - There is not consistency amongst district courts and how cases are handled; inconsistent answers from different courts regarding the same issue
3. Statute is not clear regarding divisional court judges & adjudication court jurisdiction

- Are divisional judges (also district court judges) ready to handle this work where there is no adjudication court? What will this look like?
- How divisional judges are selected? Right now there's a panel of judges that anecdotally do the job when they want to do it. Is there a better way to put someone in that position who is equipped *and* likes to do the job?
- Need to Look at the Future: Growing population; change in demands; change in the use of the court regarding water issues
- What is left with final decrees once adjudication court has issued final decrees in every basin:
  - a. What is the court with competent jurisdiction once the adjudication court is terminated?
  - b. Interpretation of the final decree?
  - c. What if there is an error in the water right?
  - d. Enforcement?
  - e. Abandonment of a water right – currently in district court
  - f. Ditch and water right questions that go together – where do those go when there are multiple districts involved?
  - g. Water rights issued post 1973 – provisional permits
  - h. Keeper of final decree? Now it is the adjudication court. Who does it when adjudication court goes away?
- Tension between local control and uniformity and consistency
- What do we do during this transition period? Easier to work our way back once we determine a solution for post final decree to then determine how to handle the transition period. SWG- said to set this aside and work on where to end up and then back up from there.
- Duties as assigned done by the adjudication court and DNRC that is not provided for in statute or will go away.
- Can the district court handle the work load? Will the workload change in the future?

**Goal**

**Values**

NEEDS	CONTEXT	CLARIFICATION NEEDED
<b>Clear process for post final decree and current transition period</b>	– 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	–

NEEDS	CONTEXT	CLARIFICATION NEEDED
<b>Simplicity of Process</b>	<ul style="list-style-type: none"> <li>- Currently need an attorney to file a complaint</li> </ul>	<ul style="list-style-type: none"> <li>-</li> </ul>
<b>Efficiency</b>	<ul style="list-style-type: none"> <li>- Currently one water issue often has multiple venues to resolve</li> <li>- Costly and difficult to navigate if in multiple venues</li> <li>- Want one place to hear water issues and clarity on where to file</li> <li>- Avoid incompatible decisions amongst multiple venues</li> <li>- Avoid multiple courts</li> <li>- 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"> <li>- <b>Option:</b> File in your home district court. Clerk of Court sends up to the Divisional Court.</li> <li>- <b>Option:</b> File in your Divisional Court. Divisional Court sends out to district court as desired by the parties.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- How are water cases getting categorized in the district courts?</li> <li>- What can be changed? If there's no uniformity between counties/clerks of court and the system, what are we able and <i>not</i> able to do?</li> </ul>
<b>Timeliness</b>	<ul style="list-style-type: none"> <li>- District courts don't have the time or resources to have timely resolution.</li> <li>- Can lose growing seasons while waiting for a decision (distribution, enforcement, abandonment, waste).</li> <li>-</li> </ul>	<ul style="list-style-type: none"> <li>- What is the ideal amount of time?</li> <li>- Is this area specific? Multiple areas (Teton, Gallatin) experiencing large population growth, conversion from Ag to other uses.</li> <li>- Will we see more problems in the future?               <ul style="list-style-type: none"> <li>- Clarify problems with what?</li> <li>- Timeliness?</li> <li>- In all areas?</li> <li>- Or just in areas of high growth?</li> </ul> </li> </ul>

NEEDS	CONTEXT	CLARIFICATION NEEDED
<b>Water Expertise</b>	<ul style="list-style-type: none"> <li>– 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?</li> <li>– Need clerks of court with water experience / understanding of unique procedures of water cases.</li> <li>– <b>Options:</b> <ul style="list-style-type: none"> <li>– 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</li> <li>– Commissioner – required training / better support</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>– What are we looking for? <ul style="list-style-type: none"> <li>– expert in water vs local expert or both?</li> <li>– understanding of water law</li> <li>– flexibility to understand local water systems</li> </ul> </li> <li>– Is this specific to enforcement actions to get a commissioner/dissatisfied water user actions? Those can be unique (maybe).</li> <li>–</li> </ul>
<b>Define local control</b>	<ul style="list-style-type: none"> <li>– Water doesn't respect state or judicial boundaries.</li> <li>– We have downstream <i>and</i> upstream water use to keep in mind. One reason MT has statewide ADJ is because of the need to quantify MT's water rights and our amount of water since in order to sustain/defend water within the borders of MT against downstream states making call.</li> <li>– Compacts will be incorporated into final decrees – court jurisdictions – 18 compacts with US including but not limited to Tribal compacts</li> <li>– Need to quantify MT water rights and amount of water</li> <li>– We like our local district court judge; there are other district court judges that don't want to take on water cases – is it people or is it local?</li> <li>– How do we get things more uniform?</li> <li>– If you can substitute for some level of cause that allows for local aspect when appropriate – or</li> </ul>	<ul style="list-style-type: none"> <li>– <b>How local is local? What <i>is</i> local control?</b></li> <li>– Does the Divisional Judge structure satisfy a definition of 'local control'?</li> <li>– What happens when people in different jurisdictions or communities are doing things their own way/differently than others?</li> <li>–</li> </ul>

NEEDS	CONTEXT	CLARIFICATION NEEDED
	<p>division judge request that that judge comes in – when adjudication is over this substitution could be an option – not currently an option</p> <ul style="list-style-type: none"> <li>– Election vs appointment</li> <li>– If you stay with current statute that precludes anyone from substituting water judge. If there's a substitution, it has to be for some level of cause that allows the judge to request the substitution to come in. It depends on what tools are made available to water users within the current District Court structure. When adjudication is over, that substitution could be an option to water users to move from Divisional to something more local.</li> </ul>	
<p><b>Keep What is Working</b></p>	<ul style="list-style-type: none"> <li>– Framework to keep a specialized court (Division Court) and funding with it</li> <li>– Staying at home, decisions in the home area</li> <li>– Division Court is too expanded</li> <li>– District Court works</li> <li>– Division courts in law</li> <li>– The state is McCarran compliant currently</li> </ul>	<ul style="list-style-type: none"> <li>– What is home area? Water division? Regional? Basin? Smaller?</li> <li>– What is too expanded?</li> <li>– Who does the district court work for? How? Where does it work?</li> <li>– How to transition from two identified judges acting as division judges to the division judges doing water work</li> <li>– Can we strengthen McCarran compliance? – in describing where these cases will be filed – competent court of jurisdiction; not too concerned with how it stands today but could do it better – remains a live issue MT vs Federal Court</li> </ul>

## **Local Control – Homework for all SWG Members to respond by 11.24.23**

- Define what you think of by local control;
- What entity/court provides that local control; for whom;
- If there is the option for that entity to hear the issue, does that satisfy the need

### **Arnold**

Local control for me falls within the tribal water code and the Fort Peck Montana compact, and the tribes sovereignty when dealing with water right issues.

### **Clayton**

What is local to me – having access to a judicial remedy to your various water problems in the state of Montana, in a state court. Preferably in your watershed so that your decision cannot be overturned by another judge in the same water source (i.e. competing district court judges in one water basin). But, as long as you have access to a Montana Court that seems local to me.

### **Jocelyn**

Local control is the court elected by local voters, which knows the history, the relationships, and has a stake in the area. The only court that can provide this is the District Court. They should be hearing the water related cases and handle the appointment and management of water commissioners.

### **Abby**

To me local control means control by the State of Montana (as opposed to the federal court, a court of another state, or in theory the international courts in a dispute between Montana and Canada at our northern border). This “control” could be made more “local” by having a divisional court as contemplated in 3-7-101 preside over each hydrologic basin, as those basins are set forth in 3-7-102.

The divisional court would provide this control in the context of water right disputes, as already set forth in statute under 3-7-101.

This question is premised on the local district court being able to hear the issue. I do not think the local district court needs to hear water issues issues. I think a divisional court hearing the issue is “local” enough. For those that want to “keep” their local judge overseeing the dispute, the parties could petition to have the local district court judge sit on a case as the divisional court judge

under judge pro tempore statutes (existing statute 3-5-115 could be modified (or replicated in Title 3, Chapter 7 to fit the water divisional court model).

## Raylee

This is multi-layered and until a path forward is mapped out it is hard to define local control. I don't think it is actually local control but a local option. So far we have heard it just relates to commissioner selection, it's where paperwork is filed, it's where a court case is heard, it's local knowledge. I would like to see a "local option" available for those who are happy with how water issues are handled at a district court level where it is working. A local option does not mean the only option.

Based on the conversations we had at the last meetings, the local court for water issues needs to be the divisional courts. Too many scenarios where water issues cross district court lines.

- If there is the option for that entity to hear the issue, does that satisfy the need
  - Yes

## Jan

-States that assign more responsibility over the governance and management of resources to local governing bodies are often called "local-control states." These states have generally deferred to local boards and committees on governance issues, including many issues related to compliance with state statutes and regulations.

-grounded in a philosophy of government premised on the belief that the individuals and institutions closest to, and most knowledgeable of, the system are most invested in its operational success.

-professional independence particularly the degree to which governing bodies can make autonomous decisions about their processes and outcomes.

-the governing and management of regulations by elected or appointed representatives serving on governing bodies that are located as near as possible to the people and areas served.

-legal powers of local governments to create and manage regulations

-local entities to set goals, plan actions, and leverage resources to meet goals.

## Vicki

- Local Control Is a person that lives and is elected by the people in their respective areas that has knowledge and experience of that specific area.
- The District Court is that local control for those people in the district.

- Statue is already in the law for the District Court to hear the issues. The District Court can request assistance or expertise in specific matters. If the Division is the assistance or next step there needs to be more consideration of when and how details discussed.

## Kurt

1. My definition of local control is a court system in a regional area that is accessible to water right owners in that region. My opinion is that there should be eight (8) divisional water courts set up in the same locations as the DNRC Water Resources regional offices and generally creating districts more aligned with the DNRC WRD regional offices than water courts drainage basin divisions. The court system would have one person in a judiciary (divisional water court judge) position that can make legal decisions about individual water rights or certified controversies and have the necessary staff to support that person. The divisional water court judge would be a person with a legal education (attorney) and technical training or technically educated person (engineering) with legal training. It would be planned that the person would have intimate knowledge of the region or an overall knowledge of Montana with adequate regional knowledge. Being adjacent to a DNRC Water Resources regional office could provide that necessary local area knowledge of the DNRC staff that can be share with the divisional water courts judge and staff and will provide the divisional water court with access to DNRC records and DNRC staff.

2. I believe the entity that provides the best local control would be the existing fifty-six (56) district courts. The district courts represent smaller areas within the DNRC WRD regional office area and the county of the district courts would be associated to the divisional water court. Local district courts could provide the venue to file motions on individual water rights or certified controversies. A district court judge would be empowered to rule that a water right issue should be decided by the divisional water court. All other water related issues such as stream access, ditch easements, or stream side management would stay within the district court. Appeals to a divisional water court would be to the Montana Supreme Court.

3. When issues with water rights are closely tied to adjoining issues with property rights associated to stream access, ditch easements or streamside management, a district court judge could decide to hear the entire issue, including the water rights issues. The appeal of the case would be to the Montana Supreme Court. In that case, the need for easy access to local courts is best met.

## **Starting Point for Exploring Solutions – suggested 10.30.23 during sub-working group meeting**

### **Identify/Clarify Roles and Responsibilities of the Adjudication Court**

- Wants to make sure we don't lose anything as we explore potential routes
- What's in statute
- What's not in statute
- Perception

From discussion:

- Institutional knowledge
- Statutory tasks
- Page 1 of flow chart captures role of adjudication court work
- Keep court records (different than query system)
- Field all of the phone calls
- Provides body of education to court process
- Adjudication judges serves as 'informal' education on enforcement when a new area is brought online – before it goes to DNRC
- Supplies water masters to supply as water mediators
- water master at adjudication court has been appointed to sit as a standing master at a district court to preside over a water enforcement action
- Advising callers as to where they need to go (and completing the handoff) - 10 judicial assistants needed to field all the phone calls
- Assisting the District Court:
  - in collaboration with DNRC, completing the Red Book -- annual compilation of all the water rights on an administered stream, incorporating new permits and changes; ownership updates, abandonments, splits and severs, private agreements that the commissioner needs to be aware of
  - Acting as a water master when the commissioners have disputes that require district court involvement
- MAPA cases
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Clarify/Identify Role/Responsibilities of Divisional Court

- What's in statute?
- What is actually happening?
- What is perception?
  
- Start with what this looks like as it is now in MCA?

- Is there a different between what they do that's in statute vs. what they're doing now?
- Statute is confusing whether it's a Divisional Judge or District Court judge that appoints commissioners.
  
- Chart out what is clear
- Identify/clarification – areas that are addressed but left for interpretation resulting in inconsistencies
- Identify gaps (not addressed in current statute) – roles and responsibilities that are currently handled by the Adjudication Court and will go away
- Identify needs not addressed in current statute
- How does a litigant get to a Divisional Court judge?

**Table Below - Notes from 9.25.23 sub-working group meeting**

POTENTIAL SOLUTIONS	CONTEXT/DETAIL	NEED	CHALLENGES
<b>SB72</b>	<ul style="list-style-type: none"> <li>- Use the current Divisional Court adjudication judges transition into these judges</li> <li>- one office/administrator</li> <li>- option to take to district court</li> </ul>		<ul style="list-style-type: none"> <li>-</li> <li>-</li> </ul>
<b>Division Start, District Option</b>	<ul style="list-style-type: none"> <li>- 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.</li> </ul>		<ul style="list-style-type: none"> <li>- Where are the gaps in statute that exist that would need to be addressed?</li> <li>- Can we make water issues get to these courts today (see flow chart)?</li> <li>- Can we treat a <del>Water</del> Divisional Court like a multi-judge district?</li> <li>- In what way?</li> </ul>

POTENTIAL SOLUTIONS	CONTEXT/DETAIL	NEED	CHALLENGES
			<ul style="list-style-type: none"> <li>– In terms of case assignments?</li> <li>– In terms of rotating which sitting district court judge in a district is the ‘water judge’?</li> <li>– Should the divisions be smaller? Based workload - smaller. And if so, how would the staffing work for these?</li> <li>– Use of special masters as needed for workload</li> <li>– Where do you file within the division?</li> <li>– 3-7-221 &amp; 3-7-223 &amp; 3-7-224- not temporary</li> <li>– Substitutions 3-1-804?</li> </ul>
<b>District Start, Division Option</b>	<ul style="list-style-type: none"> <li>– Start at the District Court, take it to the Divisional Court if it is not working.</li> </ul>	–	<ul style="list-style-type: none"> <li>– Will there still be a timeliness issue? Urban vs Rural.</li> <li>– This seems antithetical to the identified needs of simplicity of process, timeliness and water expertise.</li> </ul>
<b>Simple Bill</b> (proposed on 9.25 sub-working group)	<ul style="list-style-type: none"> <li>– Clean-up bill to remove “water court” out of statue. Change to water judges title 3, part</li> </ul>	–	–

### **Discussion Items 9.25.23 Sub-working Group Meeting**

- 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.

**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.