



A REPORT  
TO THE  
MONTANA  
LEGISLATURE

PERFORMANCE AUDIT

# *Water Rights Adjudication*

*Department of Natural Resources  
and Conservation*

*Reserved Water Rights  
Compact Commission*

*Montana Water Court*

JUNE 2010

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June 2010

The Legislative Audit Committee  
of the Montana State Legislature:

This is our performance audit of the water rights adjudication process. Water rights adjudication involves the Department of Natural Resources and Conservation, the Reserved Water Rights Compact Commission, and the Montana Water Court.

This report provides the Legislature information about progress in completing the water right adjudication process, which began in the early 1980s. This report includes findings and recommendations addressing the issue of re-examination of claims in verified basins, agency compliance with statutory deadlines and benchmarks for the adjudication process, the need for transitioning resources to the Water Court as the adjudication moves into the post-decree phase, and the actions necessary to ensure a smooth transition to organizational structures appropriate for administration of decreed rights.

We wish to express our appreciation to personnel in all audited agencies for their cooperation and assistance during the audit.

Respectfully submitted,

*/s/ Tori Hunthausen*

Tori Hunthausen, CPA  
Legislative Auditor



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## APPOINTED AND ADMINISTRATIVE OFFICIALS

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John Peterson, Chief, Adjudication Bureau

### **Reserved Water Rights Compact Commission**

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Chris Tweeten, Commission Chairman

Representative Dave McAlpin, Commission Member

Representative Jeffrey Welborn, Commission Member

Senator John Bruggeman, Commission Member

Senator Carol Williams, Commission Member

Dorothy Bradley, Commission Member

Gene Etchart, Commission Member

Mark DeBruycker, Commission Member

Richard Kirn, Commission Member

### **Montana Water Court**

Mike McGrath, Chief Justice, Montana Supreme Court

Judge Bruce Loble, Chief Water Judge

Sandra Palakovich, Water Court Administrator

Lois Menzies, Supreme Court Administrator



# REPORT SUMMARY

## Water Rights Adjudication

**The initial phases of water rights adjudication should be completed by statutory deadlines, but the process may not finish until 2028 or later; changes in how state agencies manage the adjudication should help save money and avoid further delays as the process moves forward.**

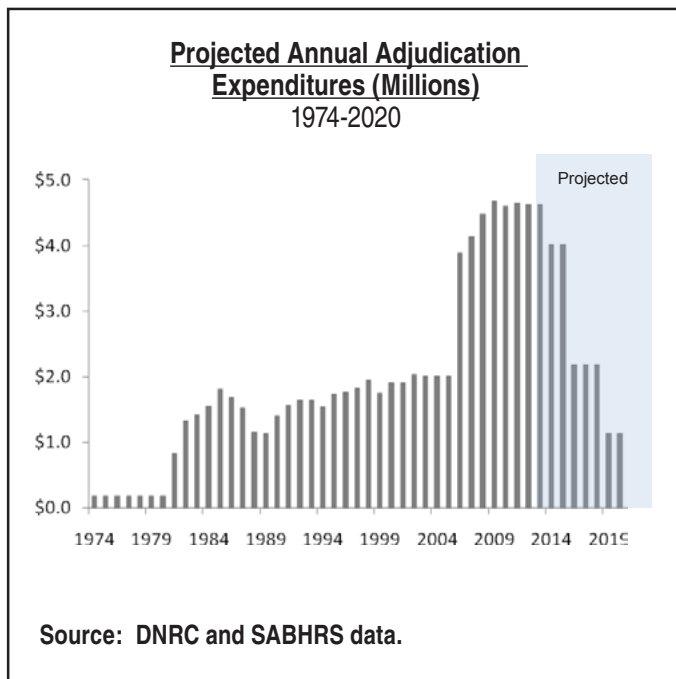
## Audit Findings

Montana’s statewide adjudication of existing water rights officially began in 1973 and has been underway for over 30 years. For the period between 1974 and 2020, the state could expend up to \$65 million for adjudication activities in the Department of Natural Resources and Conservation (DNRC), the Reserved Rights Compact Commission (RWRCC), and the Montana Water Court. These activities consist of examination

of around 220,000 individual water rights claims by DNRC, negotiation of compact agreements with 20 different federal agencies and Indian tribes by the RWRCC, and the processing of water users’ objections through litigation at the Water Court. In 2005, the legislature passed House Bill (HB) 22, which provided additional resources to expedite examination and initial decree issuance and set deadlines for the process.

As the adjudication moves forward, several issues could impact progress. This includes the potential for re-examination of claims that were reviewed under the DNRC verification process. Statistical analysis of a sample of water rights claims showed

the differences between verified and examined claims are not significant enough to justify the time and expense of re-examination. Rather than launching a full-scale re-examination, issues with verified claims can be addressed through other means that are less expensive and less time consuming. Further delays resulting from compact negotiations could also impact progress towards completing the adjudication. As the initial phases of the process near completion, it will be important to ensure agencies coordinate their activities effectively. Delaying decree issuance to accommodate compact negotiations is no longer an option.



The changes made under HB22 have been successful in moving the adjudication process forward. Audit work showed DNRC should meet the statutory deadlines established for completion of claim examination and is likely to finish this phase of the adjudication before the 2015 statutory deadline. Our analysis also shows the Water Court should be able to complete the initial decree issuance phase prior to its 2020 statutory deadline. However, the litigation phase of the adjudication is likely to continue until 2028 or later. Although many objections litigated through the Water Court can be settled quickly, a minority of cases take many years to reach a conclusion. There are currently no defined expectations regarding management of the litigation phase of the adjudication and opportunities may exist to better control the duration and cost of Water Court litigation. As remaining claims move into the litigation phase, the role of DNRC will diminish as the focus of the adjudication shifts to the Water Court. Because of the progress made on DNRC claims examination, the transition to the litigation phase and the eventual post-decree administration of water rights is happening sooner than anticipated. The current organizational structure for water rights adjudication does not provide a good basis for the transition to administration of decreed rights. To date, limited planning has been undertaken to prepare for these changes. To protect the investments made in the state's water resources, state agencies and the legislature need to begin preparing now for the transition to the post-adjudication era.

### **Audit Recommendations**

We make five audit recommendations to the various agencies involved in the adjudication effort addressing the following issues:

- ◆ The role of the Water Court in requesting further re-examination work in verified basins
- ◆ Developing system-based review procedures by DNRC to address the status of verified claims
- ◆ Avoiding of further delays resulting from compact negotiations through formal communications and reporting mechanisms between the RWRCC and the Water Court
- ◆ Developing defined expectations for Water Court performance during the litigation phase
- ◆ Beginning the process of planning for the transition to the post-adjudication era for all agency resources involved in the adjudication

# Chapter I – Introduction & Background

## **Introduction**

The Montana Constitution states “All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed” (Article IX, Section 3 (1)). The statewide adjudication of water rights in Montana is an attempt to systematically categorize and confirm most significant uses of water within the boundaries of the state. The procedural aspects of the statewide adjudication were established under the Montana Water Use Act in 1973, but more than 35 years later, the process remains incomplete. In 2009, the Legislative Audit Committee requested a performance audit of the water rights adjudication process. This report presents audit findings and recommendations relative to the roles of three different agencies involved in the adjudication effort; the Department of Natural Resources and Conservation (DNRC), the Montana Water Court (the court), and the Reserved Water Rights Compact Commission (RWRCC).

## **The Adjudication Process Could Cost \$65 Million**

Although a statewide adjudication presents major administrative challenges, it is doubtful the legislature originally anticipated the process taking in excess of 30 years to complete. For the three agencies involved in the process, adjudication expenditures between 1974 and 2020 are likely to be at least \$65 million. This represents a significant investment of public funding. Total expenditures include the \$25 million provided to agencies in 2005 to ensure completion of the process. Given these circumstances, we focused our audit work to address questions relating to the longevity of the process, prevention of further delays, and likely completion dates.

## **Outline of the Adjudication Process**

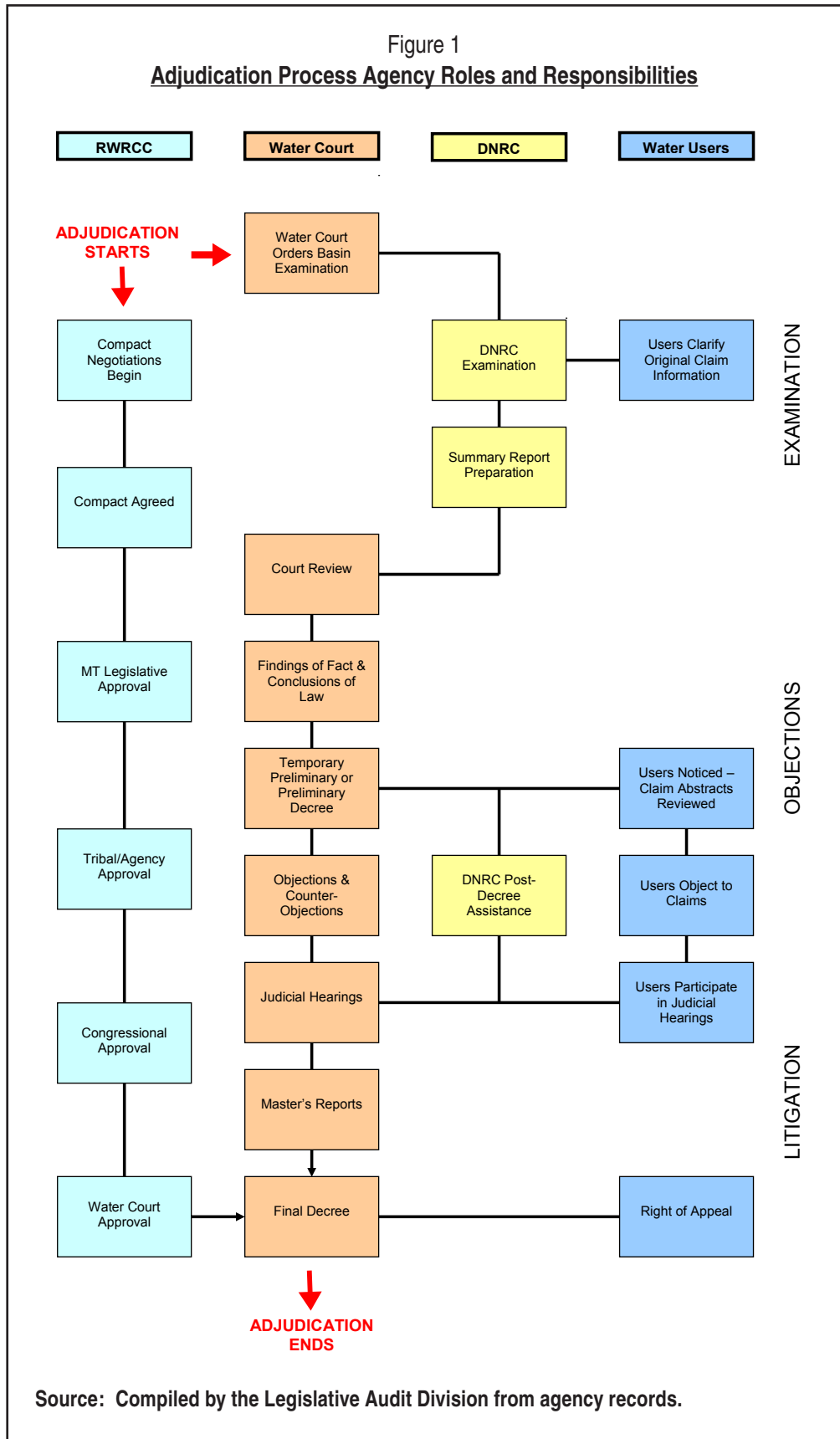
For most water users, the adjudication began in 1979 with amendments to the Water Use Act requiring submission of a claim form to DNRC. Claims were divided into four main purpose categories; irrigation claims, stock water claims, domestic claims and claims for other uses (this includes multiple use types, including mining, power generation, fish and wildlife, commercial, industrial, and several other uses). Following several extensions and late claim filings, DNRC received a total of approximately 220,000 statements of claim. The adjudication proceeded based on hydrological basins. There are 88 individual basins, and sub-basins, and each basin can have anywhere between several hundred to in excess of 10,000 water rights claims.

The goal of the adjudication process is to confirm all the claimed uses of water existing before July 1, 1973. Adjudication does not address any of the subsequent water use claims made by users after this date (these are handled under the separate permitting

process). At various stages throughout the process, the Water Court issues decrees, which serve as a record of the judicial proceedings establishing the quantity and priority date for each individual water right in a basin. The court can issue four different types of decree; interlocutory, temporary preliminary, preliminary and final. At each decree stage, the Water Court adjudicates individual rights to further refine and revise their elements, with the goal of determining what right to use water existed prior to July 1, 1973. The goal of the adjudication is not to reduce or restrict water use by individuals, but to establish a basis for the ongoing administration of water rights by determining what users had to begin with.

The legislature assigns roles and responsibilities of different agencies in the adjudication process, but many of the details have been developed over the years through Supreme Court rules. The process has undergone multiple changes over the years, but the broad outline has remained consistent. The following figure outlines the adjudication process, including the roles/responsibilities of the three agencies and the role of water users (claimants) in the process:

Figure 1  
**Adjudication Process Agency Roles and Responsibilities**



Source: Compiled by the Legislative Audit Division from agency records.

One important distinction in the process is the separation between adjudication of reserved water rights (those held by Indian tribes and federal agencies) and those rights subject to the state law-based adjudication. The RWRCC exists to negotiate compacts for reserved rights and this process takes place separately from the adjudication of the state law-based rights, which are handled through the Water Court with the assistance of DNRC. Although compact negotiations take place independently of the rest of the adjudication process, the compact rights are incorporated into final decrees as issued by the Water Court.

## The Three Phases of Adjudication

Aside from the separation between rights subject to compacts and state-law based rights, the figure illustrates how the Water Court, DNRC and water users interact through three main phases of adjudication:

- ◆ **Examination** – following an order from the court, DNRC opens a basin for examination. Each basin is examined separately and individual claims are processed in order based on the owner’s name. Examination involves checking each claim element for accuracy, completeness and inconsistencies. During this process, DNRC can contact claimants to request further information or clarify any information about the claim. When all the claims in a basin have been reviewed, DNRC prepares a summary report for the Water Court, which contains an abstract of every claim. Summary report preparation involves checking all the claims for accuracy, consistency, and other errors or anomalies.
- ◆ **Objections** – the Water Court reviews the summary report and issues a temporary decree. The decree consists of the court’s findings of fact and conclusions of law and also includes all claim abstracts. Every claimant in the basin is noticed and receives a copy of their claim abstract for review. The decree is also made available to users, so they can review each others’ claims. The Water Court encourages users to review their own claims and those of other users for accuracy and completeness. Users can object to the claims of other users or their own claims, if they think there is some kind of problem. During this phase, DNRC staff are available to assist the court and water users with questions or clarifications regarding claims (this is referred to as post-decree assistance).
- ◆ **Litigation** – objections are reviewed by the Water Court and related objections are consolidated into cases. The court schedules hearings and administers other aspects of the cases in much the same way as other courts deal with civil litigation. Parties to a case can submit evidence, testify as witnesses and make arguments regarding the disputed elements of a claim. The court encourages litigants to settle cases through a stipulated agreement. Cases are concluded with a water master’s report, and order adopting the master’s report which can amend claim elements or result in claims being withdrawn or dismissed. When all the cases within a basin have concluded, the claims are ready to be incorporated into a final decree. This involves combining the state law-based claims with those reserved rights negotiated as part of compacts. DNRC continues to provide post-decree assistance to the Water Court through the litigation phase.

All three state agencies involved in the adjudication have had to work together to ensure the process moves forward. DNRC cannot begin the examination process without an order from the Water Court and must work within the court's rules. The Water Court cannot begin the process of issuing decrees until DNRC has completed the initial examination of claims and compiled information in an accessible format. The Water Court continues to rely on DNRC for assistance through the post-decree phase. Both these agencies must also coordinate to some extent with the RWRCC. Although the work of the RWRCC proceeds independently of the state law-based adjudication, compact negotiations impact how DNRC and the Water Court approach the process.

## **Chronology of Major Adjudication Events**

Adjudication began in the 1970s with work in the Powder River basin in southeastern Montana. Following review of this initial work, changes were made to begin a comprehensive adjudication of the entire state. These changes were made in 1979 and users had until 1982 to submit their claims. After several years of work, significant changes were introduced in 1987 when the Supreme Court asserted control over the scope and extent of the DNRC review of claims. Throughout the 1990s, the process of reviewing claims and issuing decrees continued basin-by-basin at a relatively slow rate. In 2005, reacting to uncertainty produced by the adjudication's extended duration, the legislature passed House Bill (HB) 22, which provided additional resources with the expectations that the initial phases of the adjudication would be completed within defined timeframes. HB22 has resulted in an accelerated schedule for claim review and decree issuance and the adjudication process is currently proceeding at a much faster rate.

## **Audit Scope, Objectives and Methodologies**

Audit scope was developed to include the management, administrative and procedural elements of the adjudication process. All of the significant administrative and procedural elements of water rights adjudication at DNRC were included within scope. Water Court management, administrative and procedural activities outlined in statute (and therefore subject to legislative authority), were included within scope. The role of the RWRCC in coordinating its activities with other state agencies was also included within audit scope. However, the majority of RWRCC activity involves negotiations with federal agencies and tribal governments and these activities were excluded from audit scope. Audit scope addressed management and administrative functions, as opposed to the individual claimed water rights that collectively constitute the adjudication process. This specifically excludes from audit scope judicial consideration of individual cases brought before the Court or the judicial authority and discretion of Water Judges. Audit scope includes the entire time period for the adjudication process

to date, generally from the passage of the Water Use Act in 1973 to the beginning of 2010. Certain analyses included in this report use statistical and other quantitative methods to project future trends in the adjudication after 2010. Although we made appropriate adjustments to reflect known data, future changes in the adjudication process are currently unknown. This applies to the workload assumptions for DNRC and the Water Court's process for transitioning between different decree types. Future developments in the adjudication process could affect the projected timeframes and other values referenced in our analyses.

## **Audit Objectives**

Based on risk assessment work and audit scope decisions, we developed the following four main objectives:

1. Are differences between verified and examined claims significant enough to impact completion of the adjudication process?
2. Do the different governmental units involved in water rights adjudication coordinate their activities in a manner that promotes timely completion of the process?
3. Is progress toward completion of water rights adjudication being proactively managed to meet statutory deadlines and other performance standards?
4. Does the current organizational structure for water rights adjudication provide a good basis for the transition to management of decreed water rights?

## **Audit Methodologies**

Audit methodologies were developed to address our objectives and included the following:

- ◆ Review of statutes, administrative rules, and agency policies and procedures
- ◆ Review of records of legislative proceedings relating to adjudication
- ◆ Interviews with management personnel in all three agencies
- ◆ Collection and analysis of chronological data for major events in the process
- ◆ Statistical analysis of a sample of verified and examined claims
- ◆ Statistical analysis of event/duration data for the court litigation phase of the process
- ◆ Analysis of trends in issue remarks, objections, and court case duration
- ◆ Analysis of DNRC workload and productivity data and trends
- ◆ Review of financial information for agencies
- ◆ Analysis of agency organizational structures, staff positions and responsibilities
- ◆ Review of water rights adjudication and administration programs in other states



## **Report Organization**

The remainder of this report is organized in five chapters, each addressing distinct time period in chronological order:

- ◆ **Chapter II – Re-examination of Verified Claims.** Addresses the time period between 1982 and 1987 when claims were reviewed by DNRC under the verification process. Findings in this chapter address our first audit objective.
- ◆ **Chapter III – Agency Coordination.** Addresses the time period between 1987 and 2005, prior to introduction of the HB22 changes. Findings in this chapter address our second audit objective.
- ◆ **Chapter IV – Statutory Deadlines and Performance Standards.** Addresses the time period between 2005 and 2015 and assesses the efforts of DNRC and the Water Court to meet the mandates set-out in HB22. Findings in this chapter address our third audit objective.
- ◆ **Chapter V – Future Administration of Water Rights.** Addresses the time period after 2015 and the transition to the post-adjudication administration of water rights. Findings in this chapter address our fourth audit objective.



## Chapter II – Re-Examination of Verified Claims

### **Introduction**

The first five years of the adjudication effort between 1982 and 1987 was a time when the executive and judicial branches of government worked on balancing their respective roles in the process. The Department of Natural Resources and Conservation (DNRC) had adopted a process for reviewing claim elements called ‘verification’. However, there was no clear line between the executive functions being fulfilled by DNRC and the judicial functions of the Water Court and the two agencies frequently disagreed over roles and responsibilities.

### **Difference Between Verification and Examination Processes**

In 1987, the Montana Supreme Court intervened in the adjudication process by ordering changes in the method used by DNRC to review claims. Under new Supreme Court rules, the review proceeded under a different process referred to as ‘examination’. Around 45 basins containing approximately 98,000 claims were subject to verification. The new examination process changed the way DNRC reviewed claims and the information supplied to the Water Court. However, rather than applying the new examination rules to the previously-verified claims, the verified basins moved forward through the objections and litigation phases without further DNRC review. Because of differences between the verification and examination processes and the decision not to examine verified claims, the accuracy and consistency of the adjudication process has been called into question.

Our first audit objective was to determine whether differences between verified and examined claims were significant enough to justify continued re-examination in verified basins. Following statistical analysis of the available data, we determined the differences between the claimed versus the decreed water rights in verified and examined basins are not significant enough to justify re-examination work. A full-scale re-examination would cost in excess of \$8 million and take many years to complete. There are some remaining inconsistencies between verified and examined claims, but these can be addressed relatively quickly and at much less cost when compared with a full-scale re-examination.

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### **CONCLUSION**

*The differences between verified and examined claims are not significant enough to justify the resources necessary to conduct a full-scale re-examination in verified basins.*

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The basis for this conclusion, related discussion, analysis of data and recommendations are discussed in the following sections.

### **Statutory Basis and Historical Experience of Re-examination**

Following passage of House Bill (HB) 22 in 2005, the Water Court was granted specific authority to order re-examination of some or all of the 98,000 verified claims. The changes made under HB22 provided guidance to the court on process for re-examining verified claims and also applied a deadline to any such re-examination efforts (the relevant sections of statute are temporary and provisions relating to re-examination expire after July 1, 2020). HB22 established a process for re-examining claims in specific basins, but the bill does not require that re-examination take place and any re-examination work can only be conducted at the discretion of the Water Court.

### **Re-Examination Could Be Expensive and Time Consuming**

Re-examination has occurred periodically throughout the adjudication process. Review of DNRC work reports going back to 1990 shows that re-examination has been a small, but significant proportion of the adjudication workload. The majority of this re-examination work has been conducted on a different basis as that envisioned in HB22; it appears to have involved specific individual projects addressing certain issues in certain basins, or problems with specific claim types or elements. The Water Court has also recently ordered DNRC to re-examine all the claims in one basin.

Based on statutory authority and past experience in the adjudication process, it is reasonable to assume that some level of re-examination work could be completed in the period prior to 2020. Given the potential for re-examination to occur, we reviewed the available data to determine the cost impacts. Calculating a cost for re-examination involves consideration of the scope and likely duration of the work. Section 85-2-282, MCA, also provides for certain parameters to be applied to re-examination, such as looking at only certain claim purposes or elements. Our cost analysis accounts for some of these variables, but generally takes a conservative approach to determine a minimum cost for different levels of re-examination. Summarized data for our cost analysis is shown in the following table:

Table 1  
**Potential Costs Associated With Re-Examination  
of Verified Claims**

<b>Cost/Duration Analysis - All Verified Claims</b>	
Estimated Re-Examination Cost	\$8.0 Million
Completion Date	January 2022
<b>Cost/Duration Analysis - Verified Irrigation Claims</b>	
Estimated Re-Examination Cost	\$1.8 Million
Completion Date	July 2014

**Source: Compiled by the Legislative Audit Division from Department of Natural Resources and Conservation records.**

Costs are calculated for the verified claims that are not subject to a final decree (a total of approximately 82,000 claims). Dollar value cost estimates were calculated on an hours per claim basis, which appears to be the most reliable method for estimating costs, but is still fairly conservative in nature. The estimated completion date is calculated based on a re-examination timeframe that assumes a DNRC productivity level reflecting past experience. These cost estimates are based only on time necessary to re-examine claims and do not take into account the full financial impact associated with keeping the DNRC Adjudication Bureau fully-staffed past the HB22 deadlines. If the full costs associated with re-examining all verified claims through to January 2022 are calculated based on the resource needs provided under HB22, the ultimate cost of the re-examination effort could exceed \$15.2 million.

### **Statistical Analysis of Verified and Examined Claims**

Given that re-examination is a real possibility and that the costs associated with such an effort would be significant, we conducted audit work to determine whether there are real differences between verified and examined claims. To conduct this analysis, we used statistical testing to determine whether there is a significant difference between values for two random independent samples drawn from the respective populations (verified vs. examined claims). Testing assessed what the water user originally claimed as their right and compared this with what the adjudication process eventually determined their right to be. We analyzed a sample of 730 water rights claims, equally divided between verified and examined populations. It is important to note that this analysis addresses the actual outcomes of the adjudication process as a whole, rather than looking only at how the procedural aspect of the verification and examination processes changed. By looking at what the user originally claimed versus how their right was actually decreed, we can address whether the change in DNRC procedures from verification to examination had any significant impact on water users.

## Differences Between Verified and Examined Claims Are Minimal

Test results were analyzed to determine whether the observed differences between the verified and examined populations were significant. The following table presents the results of our analysis to show where we identified significant differences for each claim element reviewed. The first row of the table shows results for all the claims in the sample. The subsequent rows break-out results by claim purpose and water division variables:

Figure 2  
**Results of Statistical Testing for Verified and Examined Claims**

<u>CLAIM ELEMENT</u>		HISTORIC RIGHT TYPE	MEANS OF DIVERSION	PERIOD OF USE	PLACE OF USE	PRIORITY DATE	POINT OF DIVERSION	SOURCE NAME	PURPOSE	IRRIGATION METHOD	STOCK UNITS	DOMESTIC HOUSEHOLDS	ACREAGE	FLOW RATE	VOLUME
<b>ALL CLAIMS</b>		✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
<b>PURPOSE</b>	DOMESTIC	✓	✓	✓	✓	✓	✓	✗	-	-	-	✓	✓	✓	✓
	IRRIGATION	✓	✓	✓	✓	✓	✓	✗	-	-	-	✓	✓	✓	✓
	OTHER	✗	✗	✗	✓	✗	✓	✓	✓	-	-	-	✓	✓	✗
	STOCK	✓	✓	✗	✓	✓	✓	✓	✓	-	-	-	✓	✓	✓
<b>DIVISION</b>	CLARK FORK	✗	✗	✗	✓	✗	✓	✓	✓	✗	✓	-	✓	✓	✓
	LOWER MISSOURI	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-	✓	✓	✓
	UPPER MISSOURI	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-	✓	✓	✓
	YELLOWSTONE	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-	✓	✓	✓
✓	Not Statistically Significant														
✗	Statistically Significant														
-	Test Not Applicable / Sample Size														

Source: Compiled by the Legislative Audit Division from Department of Natural Resources and Conservation records.

Fourteen claim elements were tested. Under “All Claims” in the first row of the table, we see which claim elements were identified as having significant differences between the verified and examined populations. Two claim elements are identified; the historic right type (whether the claim is a decreed right, a filed appropriation right or a use

right), and the period of use (the period during which water can be used). All the other claim elements reviewed did not show significant differences between the verified and examined claims.

The next sections of the table show results specific purpose types and water division areas. Two variables that may be problematic; claims for other uses and claims in basins in the Clark Fork division. For both these variables, we see an increase in the number of claim elements where a significant difference exists between the verified and examined populations. For some claim elements, testing was not applied for all the variables, either because the elements were mutually exclusive (you cannot test the irrigation method element on a stock water claim), or because sample size was reduced beyond acceptable levels.

## **Discussion of Re-Examination Costs and Benefits**

The extended duration and frequent changes of direction affecting the adjudication process have resulted in concerns over the consistency and overall reliability of the effort. One potential solution that has been made available via statute is re-examination of some or all of the claims in verified basins. Our review of the available data suggests this course of action would not necessarily achieve the desired results. Several factors support this assertion:

- ◆ There are differences between the verification and examination processes, but these are unlikely to have a big effect on a water user's claim. If a verified claim is re-examined, the probability that elements of the right will change in a way that affects use of the water is relatively small. Although the verified claims are not perfect, the number of claim elements with statistically significant differences is minimal when compared with examined claims.
- ◆ The absence of evidence of big differences between the verified and examined populations indicates a low level of risk that claims in verified basins have not been properly adjudicated. Conversely, expending significant resources to re-examine these claims would involve a large risk that this effort would not achieve anything meaningful for water users. In addition to significant costs being incurred by the state, re-examination would likely cause considerable inconvenience for water users. In most verified basins, users went through the initial stages of the adjudication more than 20 years ago. Re-opening these basins and repeating the whole process again could, at the very least, cause confusion. For users in verified basins who have previously been involved in litigation as part of the adjudication, further re-examination could raise legal as well as practical issues.
- ◆ Observed differences in the historic right type element is unlikely to be of any significance to water users as it has no practical impact on their water right. By contrast, the most important claim element in a state operating under the prior appropriations doctrine is priority date, where we see no cause for concern. Identifying one or two problematic claim elements may not be significant to how a water right is actually administered and how the

right is exercised by the water user. Water users know when a problem with a claim element may affect their right and they act on it.

- ◆ Further uncertainty is introduced when other variables are considered and it may be difficult to make a clear distinction between verified and examined claims. Some differences exist depending on when a claim was verified or when it was examined. This could mean that the difference between a claim that was examined early and one that was examined late could be as important as the difference between verified and examined claims. The adjudication process has been affected by many different factors over the years, including application of the court decisions, changes in technology and increases and decreases in available resources. Re-examining verified claims could open the door to further review and refinement of other classes of claims, leading to a perpetual cycle of review, objections and litigation.

### **Further Re-Examinations Should Be Avoided**

Overall, our review shows there is absence of compelling evidence that a full-scale re-examination of verified claims would produce results that would justify the required resources. There is too much risk that re-examination would provide insufficient benefits, while costing millions of dollars, causing considerable inconvenience for water users, and extending the adjudication process well past the deadlines established in House Bill 22. Because statute currently allows for re-examination to take place at the discretion of the Water Court, there exists the potential for costly and unnecessary additional work, which would result in further delays in completion of the adjudication. To avoid the time and expense of unnecessary re-examination work, the Water Court could use its existing authority under section 85-2-282, (4) (a), MCA, to evaluate whether any increase in accuracy resulting from re-examination provides a significant benefit in terms of outcomes for water users. Given the costs involved in expanding re-examination work, there should be an objective, data-driven basis for proceeding with these activities. In the limited circumstances in which re-examination may be necessary, the court should be able to provide a clear rationale that is based on identification of actual anomalies or problems with the original verification work. This analysis should be clearly stated in the re-examination order and provided to DNRC to guide the re-examination effort.

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#### ***RECOMMENDATION #1***

*We recommend the Water Court avoid further re-examination unless data supports a significant increase in accuracy that provides benefits to water users.*

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## **Additional Steps Could Improve Consistency of Final Decrees**

Balanced against the factors suggesting a full-scale re-examination would not be beneficial, there are some issues with verified claims that are either problematic or unclear. Some elements of some claims could be subject to a higher degree of error. Although these problems do not appear to be significant enough to undermine the water right itself, further review and clarification could help improve the accuracy of final decrees.

Staff at both the Water Court and DNRC have emphasized that a fundamental goal of the adjudication process is to provide for equal treatment of all water users and consistency in the quality and accuracy of final decrees. Inconsistencies in how certain claim elements are presented in final decrees could cause confusion among water users and lead to further questions about the reliability of the adjudication process. Discussions with DNRC staff have indicated the department is considering a proposal that would attempt to address some of the issues identified with verified claims, without conducting any re-examination. The DNRC proposal would involve automated identification of errors and inconsistencies prior to summary report preparation to make verified claims more consistent with examined claims. The Water Court has indicated this approach could be viable.

Verification was completed prior to the development of many of the system-based controls used by DNRC to provide consistency and identify errors/inaccuracies during summary report production. Because verified claims were not subject to these same system-based standards, inconsistencies between different claims were not addressed prior to decree issuance. DNRC and the Water Court could remedy this situation by developing procedures to ensure problematic elements of certain verified claims are reviewed for consistency and accuracy. Any such procedures would need to be reviewed by the court to ensure they could not adversely affect subsequent issuance of preliminary or final decrees. Any further review of claim elements should not be applied to elements of claims that have previously been subject to Water Court litigation.

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### ***RECOMMENDATION #2***

*We recommend the Water Court and the Department of Natural Resources and Conservation address the status of verified claims by developing procedures for the application of system-based standards, and summary report preparation to certain verified claims.*

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## Chapter III – Agency Coordination

### **Introduction**

The intervention of the Supreme Court in the adjudication process in 1987 resulted in a clearer understanding between the agencies involved in the effort. Adoption of the Supreme Court examination rules provided guidance to the Department of Natural Resources and Conservation (DNRC) and the Water Court on their roles in adjudication. Meanwhile, the Reserved Water Rights Compact Commission (RWRCC) had begun work on negotiating with holders of reserved water rights. The 18-year period between 1987 and 2005 was characterized by slow progress on the statewide adjudication. Although compact negotiations and the statewide adjudication proceeded independently, they are really part of a unified process and, developments in either can affect the other. The effectiveness of the coordination between the three agencies has a large impact on progress towards the goal of completing the adjudication.

### **Agency Coordination Has Improved, but Further Delays Could Affect Progress**

Our second audit objective was to determine whether the different agencies involved in adjudication have coordinated their activities in a manner that promotes timely completion of the process. To address this objective we reviewed progress in completing adjudication workload in the period after 1987 and assessed the impacts of the last major legislative changes in the process under House Bill (HB) 22. Overall, we found that the adjudication process is now on track, thanks largely to the mandates introduced under HB22. However, the timing of events in the process has historically been affected by compact negotiations. If the current level of coordination between agencies is maintained, the adjudication should finish as planned. Changes in how agencies coordinate their activities can help avoid any further delays.

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#### **CONCLUSION**

*State agencies involved in water rights adjudication have improved coordination of their activities in response to recent legislative mandates. Timely completion of the process can be assured through implementation of the decree issuance schedule developed by DNRC and the Water Court.*

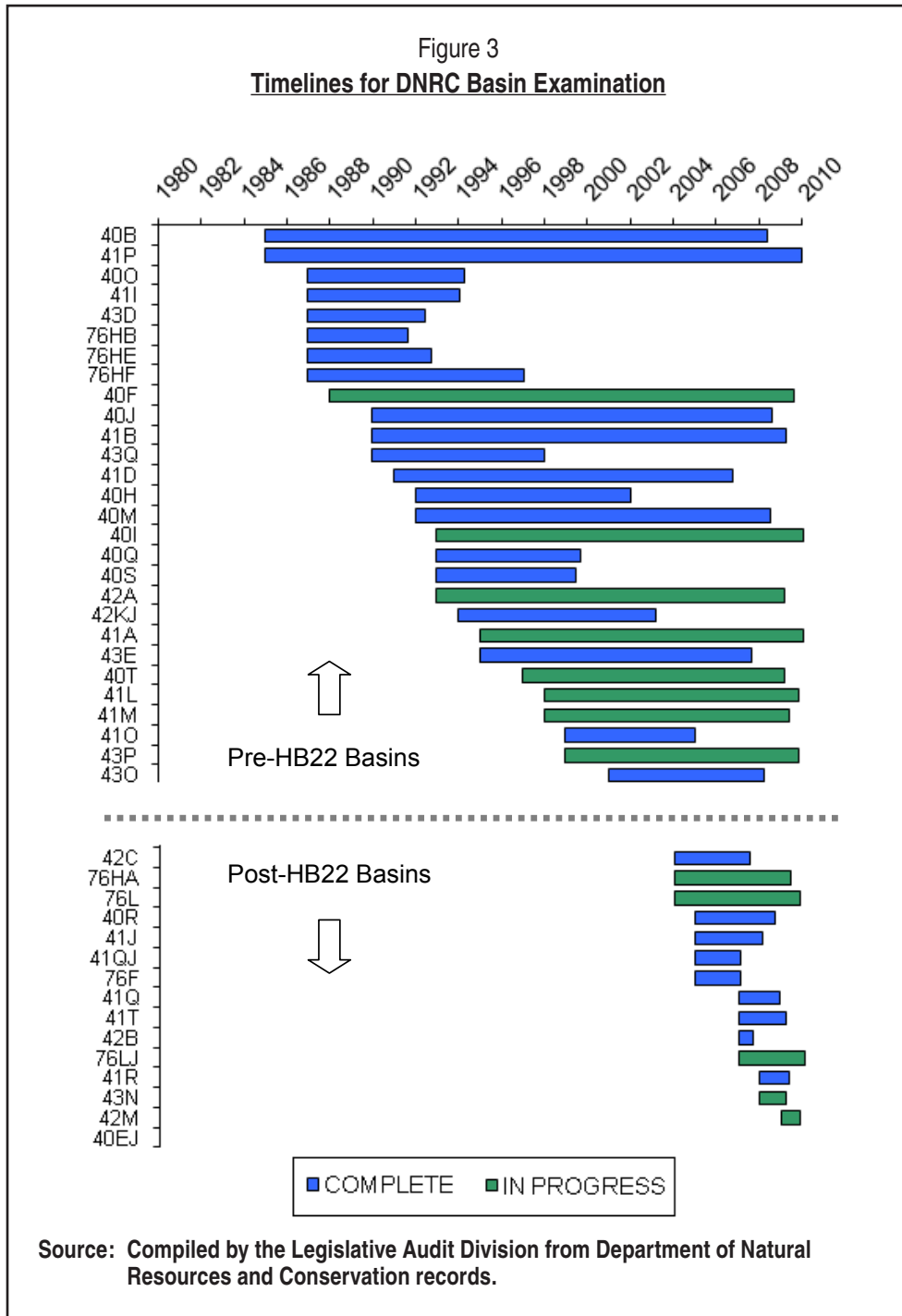
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The basis for this conclusion, related discussion, review and analysis of data, and recommendations are discussed in the following sections.

## **DNRC Impacts to Timeliness**

In 1987, 43 out of 88 basins had not been examined by DNRC. Several years into the examination effort, staff resources at DNRC were cut almost in half and the adjudication process began to slow down. As DNRC staffing was reduced, examination took longer to complete in individual basins. Examination work was performed by staff in DNRC regional offices and this meant limited numbers of staff were available to examine basins with thousands of claims. The adjudication effort at DNRC also suffered from competing with other agency priorities relating to water resources. As DNRC examination work slowed down, the Water Court had to wait longer for summary reports and decree issuance was also delayed.

To determine how well DNRC has managed its role in the adjudication process, we reviewed timelines and other data for all examined basins. Data was gathered from historic DNRC work reports and other documents. For each of the 43 examined basins, analysis of the approximate durations for examination of those basins that are complete shows a wide variation in the amount of time DNRC has taken to finish the process. The minimum amount of time to examine a basin was under one year (around eight months), but the maximum ranged as high as 23 years. Over the whole period, it has taken DNRC an average of 95 months or around eight years to fully examine a basin. Since the changes made under HB22, the time taken to examine basins has been significantly reduced. The following figure illustrates examination timelines for all examined basins.



Some basins that were initially opened early in the adjudication process were subsequently delayed as examination work stopped and started again over the course of the years. There are also some basins that took much longer to examine, regardless of when they were initially opened. In theory, the number of claims will have some impact on how quickly DNRC can complete the examination. However, duration data shows very little correlation between the number of claims and the length of time

the examination took. Some basins with around 4,000 claims have taken two years to examine and other basins with a similar number of claims have taken 15 years. There are multiple variables that could have affected examination timelines, but on the basis of the available data, we can say that the time taken to examine a basin is dependent on factors other than the volume of work. Again, this emphasizes the fact that DNRC has not always had the resources available to pursue or prioritize adjudication activities effectively.

## Timeliness of Water Court Processing Objections

Once DNRC completes the examination and issues a summary report, the Water Court takes over and begins managing initial decree issuance and objections. To determine how well the Water Court has managed its role, we reviewed data for all examined basins subject to decree issuance since 1987. Data was gathered from Water Court basin files and other documents detailing the timing of the court's processes. For each basin, a starting point was identified for court receipt of the DNRC summary report and dates for subsequent process steps were identified and recorded.

The court's objections process is governed by timeframes established by rule. Claimants are given a certain amount of time to review the decree and lodge objections, counter-objections are similarly restricted to a defined time period. Overall, this means the objections process is far more linear in nature and easier to define in terms of duration. The following table illustrates the duration for the three main portions of the objections phase; court review of the DNRC summary report, objections, and counter-objections (values are time elapsed in months):

The data shows a good degree of consistency in the court's objections process. This is to be expected, given that claimants are allowed fairly

Table 2  
**Water Court Objections Process Durations**  
(Months)

Basin	Court Review	Objections
43A	0.3	16.2
41G	0.6	19.0
40K	0.3	13.9
40C	0.6	21.4
41C	0.5	55.2
76HB	1.5	20.2
43D	1.5	21.7
76HE	8.5	14.9
41I	1.7	18.4
40O	1.8	34.4
76HF	0.9	21.3
43Q	0.2	15.8
40Q	0.0	17.4
40S	0.0	17.4
40H	0.7	21.8
42KJ	0.0	25.2
41O	4.5	9.7
41D	5.2	21.9
42C	6.7	17.9
41QJ	5.8	14.7
42B	2.8	17.9
<b>Average</b>	<b>2.1</b>	<b>20.9</b>

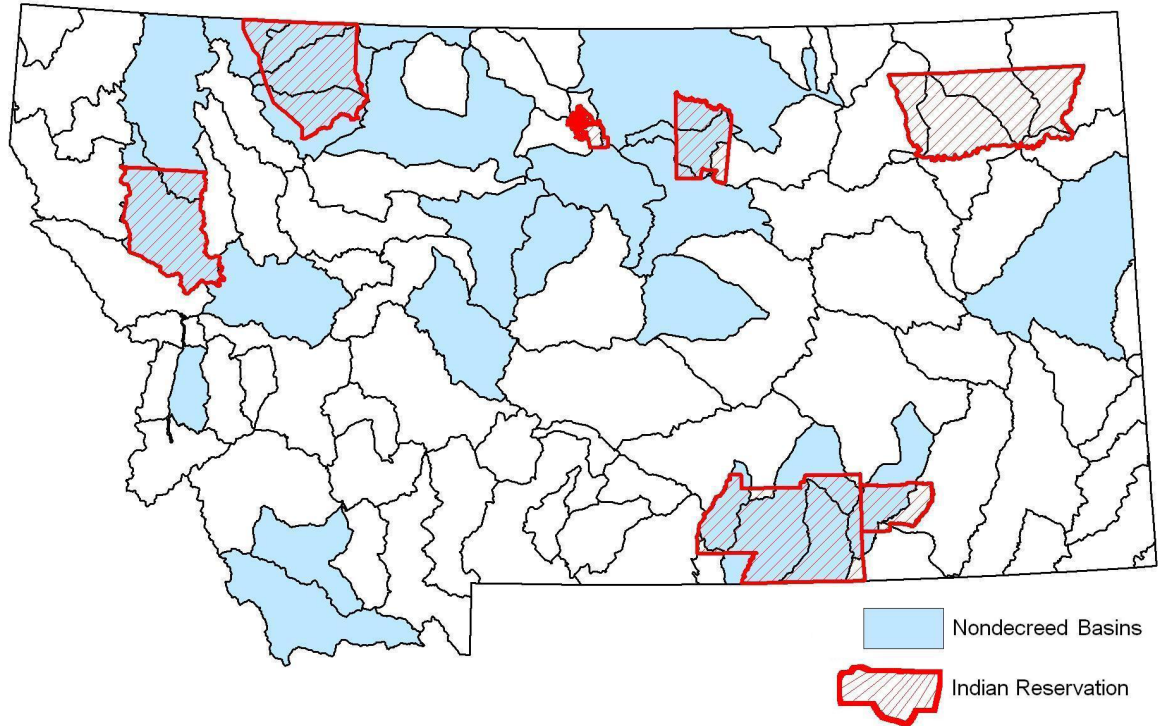
Source: Compiled by the Legislative Audit Division from Water Court records.

restricted time periods in which to file objections. Statute allows the court the ability to extend deadlines and this has apparently happened in most basins, but the objections process for the majority of basins follow a predictable trend. Another feature noticeable in the data is the time elapsed between the court's receipt of the summary report and the initial noticing of claimants (labeled "Court Review" in the table). This timeframe is more significant as any longer delays could indicate that the court was not ready and/or capable of processing the summary report and preparing for decree issuance. On average, it has taken the court two months to review the summary report and prepare for decree issuance. There have been a few examples of basins where decree issuance has been delayed by six to eight months, but the overall picture does not suggest significant problems in this area. Both the Water Court and DNRC appear to have been coordinating their activities well in terms of the transmittal of summary reports between the two entities.

### **How RWRCC Negotiations Impact Timeliness**

Compact negotiations are complex, involve many different parties, and can be subject to many different circumstances that cause delays. RWRCC compact negotiations have always existed on a separate but parallel track from the statewide adjudication. However, this does not mean the work of the RWRCC has not affected DNRC and the Water Court. Throughout the process, the Water Court and DNRC have frequently deferred to compact negotiations when making decisions regarding when to open basins for adjudication. The RWRCC has been sensitive to the impact adjudication may have on compact negotiations and this sensitivity has been particularly acute in and around the state's Indian reservations. The RWRCC has influenced the statewide adjudication through informal requests for delays or re-scheduling of examination and/or decree issuance in specific basins, but the effects of these informal requests have been real from the perspective of progress towards completing the process. The impacts of compact negotiations on the timing of events for the statewide adjudication can be seen in the following figure, which shows basins that currently have no decree issued and the location of the state's Indian Reservations.

Figure 4  
**NonDecreed Basins and Indian Reservations**  
 February 2010



Source: Compiled by the Legislative Audit Division from Department of Natural Resources and Conservation records.

The figure shows how nondecreed basins tend to be located within or near to some of the state's Indian reservations. Although this is not exclusively the case, it is more likely that basins with high levels of compact activity have been delayed until the later stages of the adjudication.

### **Identification of Causes for Significant Delays in Adjudication**

Since inception, the water rights adjudication process has been plagued by delays, abrupt changes in direction, and fluctuations in available resources. The scale and complexity of a statewide adjudication has been a unique organizational and administrative challenge, and the level of resources available to agencies has not been consistent and was often insufficient. Although some basins prioritized for action by the legislature have moved through the process, some higher priority basins are still not subject to initial decrees. The three agencies involved in the adjudication rely on one another to



complete their responsibilities in a timely manner; each agency essentially constrains the ability of others to act and there is, therefore, a need for them to coordinate their activities effectively.

## **Impacts of House Bill 22 on Adjudication Process**

Passage of House Bill (HB) 22 in 2005 has been the most significant intervention in the adjudication process since the Supreme Court examination rules were adopted in 1987. HB22 was designed to expedite the completion of claims examination and the initial decree phase of the adjudication process. This was to be achieved through increased funding for both DNRC and the Water Court to provide additional staff and other resources. DNRC was provided with a total of 39 new FTE positions, and the court received an additional 7 FTE positions. By increasing the resources available to the two agencies, the legislature intended to ensure the examination and initial decree phase of adjudication would be finished by 2015 and 2020 respectively. These deadlines were explicitly stated in the legislation.

Prior to passage of HB22, DNRC, the Water Court and the RWRCC moved through different phases of the process in an orderly manner, but long delays were frequent. HB22 injected a sense of urgency into the process and provided the resources necessary to fulfill the goal of issuing initial decrees. DNRC and the Water Court have responded by developing a decree issuance schedule that should, if implemented fully, allow for completion of the initial stages of adjudication in accordance with the established deadlines. Implementation of HB22 assumes that DNRC will complete examination of remaining basins by 2015. Between 2005 and 2015, DNRC has staggered completion dates for individual basins to ensure summary reports are delivered to the court periodically through the course of the ten-year period. The ability of the court to proceed with decree issuance depends on timely receipt of DNRC summary reports. Provided DNRC issues summary reports in a timely manner, there should be a smooth transition between the examination and objections phases of the process.

## **Compact Negotiations and the Role of the RWRCC**

By establishing defined deadlines and benchmarks for the examination and objections phases, HB22 highlighted the need to tackle issues that remain with the process. The parallel process of negotiating compacts through the RWRCC continues to introduce uncertainties that can impact the statewide adjudication. RWRCC compact negotiations are inherently complex and because of the issues involved, these negotiations have often taken precedence over the statewide adjudication in specific basins.

Statute establishes defined expectations for completing the statewide adjudication and this has necessitated changes in how the agencies work together. Successful completion of the initial phases of the statewide adjudication depends on a seamless transition between DNRC examination and court decree issuance. Any further delays in either examination or decree issuance as a result of compact negotiations could affect this transition and make it difficult for DNRC and the court to coordinate staff resources in an efficient manner.

### **Further Delays Resulting From Compact Negotiations Should Be Avoided**

The RWRCC has often requested that statewide adjudication avoid basins near reservations in active negotiations. This has always been done on an informal basis; no written requests were located during review of records. Requests for delays in decree issuance appear to have been motivated by a desire to avoid causing concerns among water users that could result in objections being filed with the Water Court. However, this logic does not recognize the importance of objections to the adjudication process; the accuracy and completeness of decrees are enhanced by objections. An underlying premise of the statewide adjudication is public scrutiny of decrees to identify problems and the more objections that are made, the better the ultimate outcome.

Ideally, the statewide adjudication should be allowed to proceed in all basins regardless of the presence of federal reserved rights covered under compact negotiations. However, if the RWRCC believes further delays are necessary, these requests should be made to the Water Court formally and include a rationale for not moving forward with decree issuance. In considering any such request, the court should balance the risk of causing problems in compact negotiations with the deadlines established for the statewide adjudication. If further delays are anticipated, the RWRCC and the Water Court should report the likely impacts on adjudication timelines to the relevant legislative committees and to other interested parties. Providing public information on likely delays in the adjudication could enhance awareness among water users regarding the process and add to the transparency of agency efforts. Following these steps will provide for a greater level of accountability in the process and allow the agencies involved to better manage progress towards the ultimate goal of completing the statewide adjudication.

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**RECOMMENDATION #3**

*We recommend the Reserved Water Rights Compact Commission and the Water Court coordinate their activities to ensure any further delays in decree issuance are considered on the basis of their effect on the statewide adjudication by:*

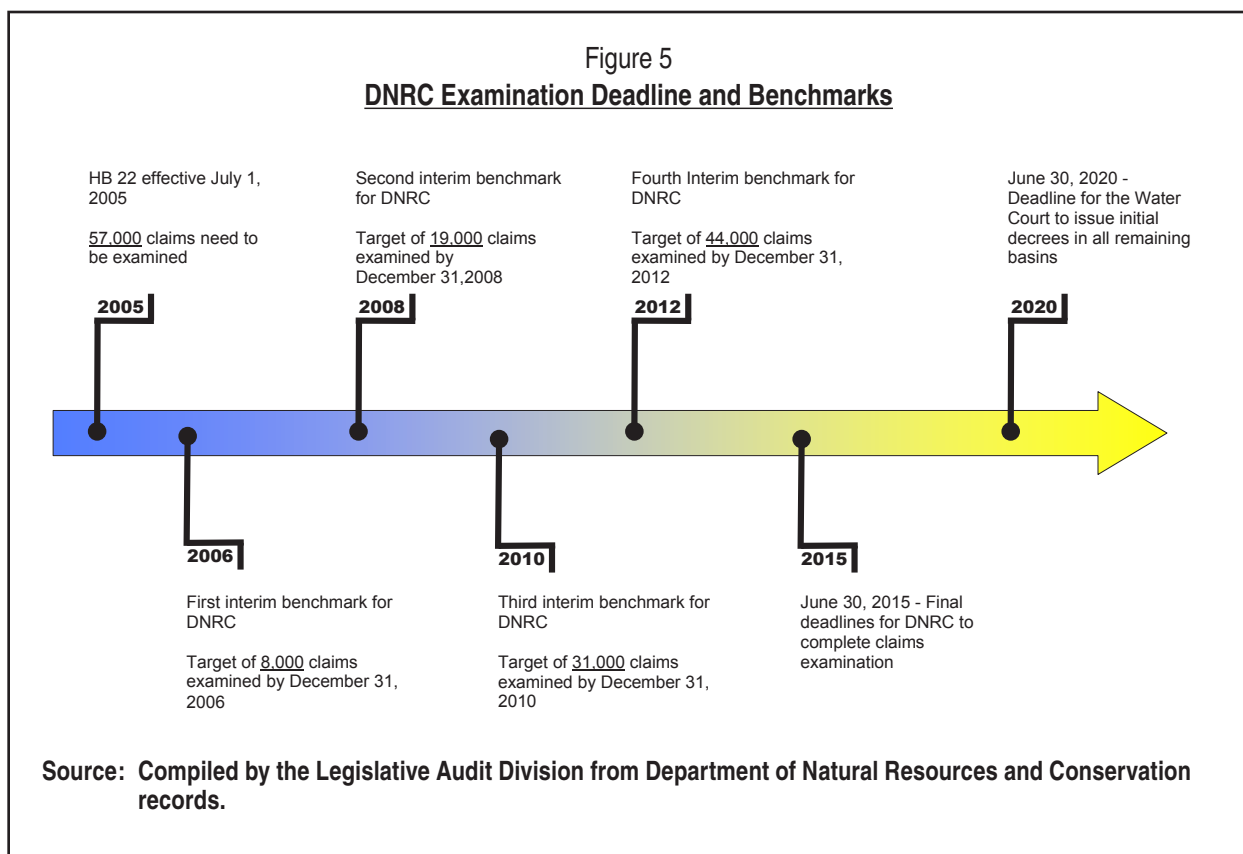
- A. *Considering only formal written requests for further delays; AND*
  - B. *Reporting anticipated impacts on adjudication deadlines to the Environmental Quality Council, the Water Policy Interim Committee, and other interested parties.*
-



## Chapter IV – Statutory Deadlines and Performance Standards

### Introduction

Under House Bill (HB) 22, Department of Natural Resources and Conservation (DNRC) was set the goal of completing examination of 57,000 claims in 32 basins not subject to any sort of decree. Section 85-2-270(2), MCA, establishes a deadline of June 30, 2015 for completing claims examination and §85-2-271(4), MCA, sets interim benchmarks for progress. The following figure shows a timeline for the deadlines and benchmarks applied to the DNRC examination:



### **Examination Should Be Completed Prior to 2015, but Claims Litigation Could Last Until 2028**

Our third audit objective was to determine whether progress towards completion of the adjudication is being proactively managed to meet statutory deadlines and other performance standards. Our review of DNRC workload data shows examination of remaining water rights claims should be finished in advance of the 2015 deadline. DNRC has made good progress in completing the examination in line with legislative

expectations. Some of the progress is attributable to high levels of productivity among DNRC examination staff, but some is also the result of activity in certain areas not being necessary. Our analysis also shows the expected duration of the litigation phase could result in the Water Court reaching case closure for all remaining examined basins by the end of 2028. This estimated completion point is approximately eight years after the 2020 deadline for initial decree issuance. There could be opportunities for the Water Court to minimize the duration of the litigation phase through proactive management of its case workload in the coming years.

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**CONCLUSION**

*The Department of Natural Resources and Conservation should meet statutory deadlines and performance standards and complete claims examination prior to 2015. The Water Court should complete the initial decree phase before 2020, but the litigation phase is likely to continue until 2028. The estimated duration of the litigation phase could change as further developments occur in the adjudication process.*

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The basis for this conclusion, related discussion, review and analysis of data, and recommendations are discussed in the following sections.

## **HB22 Impacts and Workload Planning Assumptions**

To assess how workload planning and prioritization issues were addressed under HB 22, we analyzed planning documents compiled by DNRC and reviewed historic workload data. We used this data to review the assumptions and trend data used in HB22, the establishment of interim benchmarks for DNRC examination, and the anticipated timelines for individual basins. Further review of the data also shows the level of resources made available in HB22 were fairly conservative in nature. Even when using a conservative estimating method, HB22 assumed lower levels of productivity than historic experience would support. Specific to staffing levels, DNRC was provided with resources beyond the level necessary to examine the 57,000 claims subject to HB22. This appears to be the case because the legislation anticipated additional activities occurring, including post-decree assistance, claims re-examination, enforcement projects, and training of new staff.

## **Progress Towards HB22 Deadlines and Benchmarks**

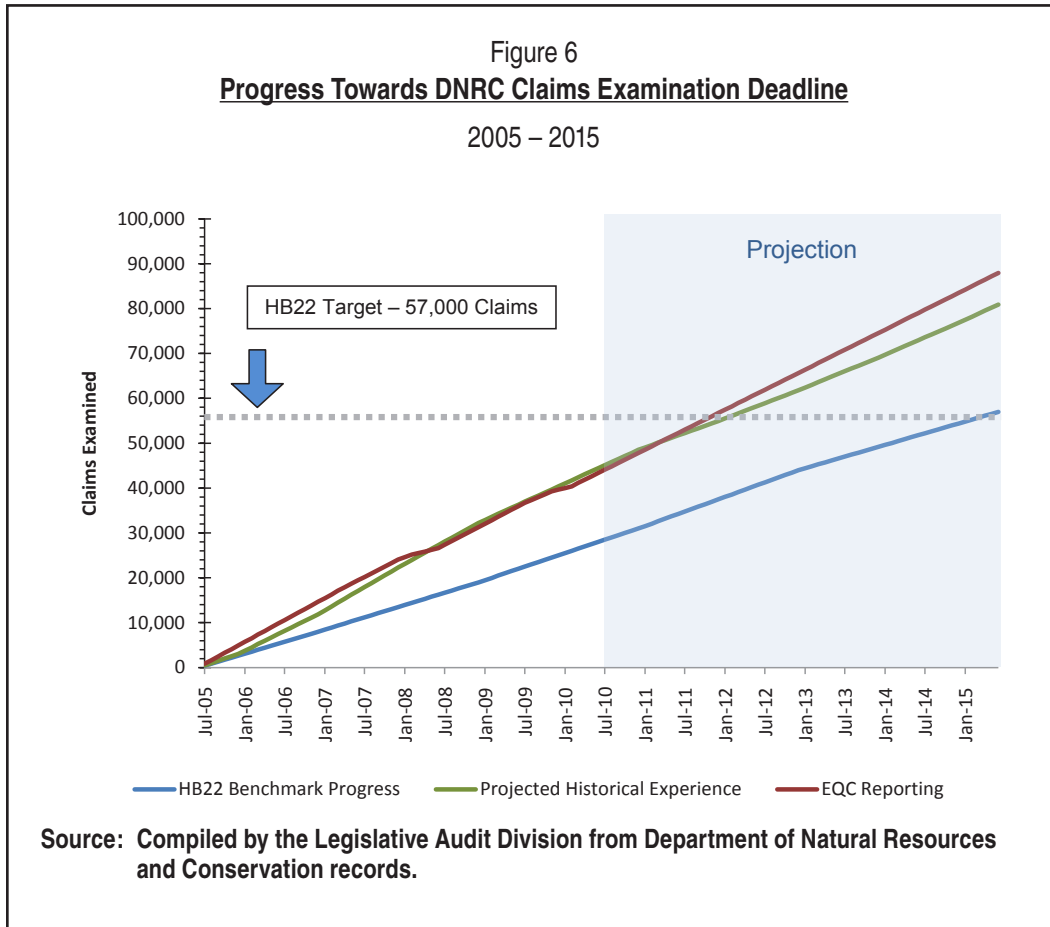
In the five years between 2005 and 2010, DNRC has made considerable progress toward the deadline and benchmarks established in statute. Approximately 40,000 claims or 70 percent of the total identified in HB22 have been examined. In terms of the interim benchmarks, DNRC is well ahead of the targets established in statute.

## **DNRC Progress Toward Statutory Deadlines**

We conducted data analysis to determine whether DNRC was prioritizing work on less complex and less time-consuming claims to artificially boost performance relative to benchmarks. Four main claim types are used for water rights claims; irrigation, stock water, domestic and other uses. Different purpose types have different characteristics and require different levels of review. Irrigation claims in particular are generally more complex, so these claims have generally taken longer to examine. While there are some differences between the attributes of examined and unexamined basins, there does not appear to be cause for concern that DNRC is examining the easy claims first. Progress toward the HB22 deadlines and benchmarks has not been achieved by working on less complex basins with fewer irrigation claims. On the basis of this analysis, we can also assume that future examination work should not be affected by any difficulties relating to purpose type and should, all other things being equal, proceed at the same pace as before.

## **Projection of Likely Duration of DNRC Examination Work**

Overall, our estimates show examination in all remaining basins should be completed before the 2015 deadline. The estimated duration for examination in the remaining basins varies from a few months to around five years. Further review of the benchmarks included estimating progress toward the 2015 deadline based on historic experience. This analysis showed that using the historic averages for workload/productivity would result in the benchmarks being exceeded at each interim point. We also reviewed reported progress to date based on the claims examination data DNRC submits to the Environmental Quality Council (EQC). The EQC data gives the most accurate indication of actual progress to date for examination work. The following figure charts anticipated progress under the HB22 assumptions, versus estimated progress based on historic workload assumptions and actual progress as reported to EQC:



The blue line in the figure shows the number of claims examined as anticipated under HB22, with the target of around 57,000 claims being met in July of 2015. The green line shows the estimated number of claims examined based on historic averages in DNRC workload over the five years preceding 2005. Under this scenario, the target of 57,000 claims is met in early 2012. The red line shows the actual number of claims examined as reported to EQC up to February 2010, with projected values beyond 2010. As shown, the progress reported to EQC closely mirrors the projections based on historic averages, which suggests the DNRC examination effort has come close to and has probably exceeded the productivity levels seen in previous years. If present trends continue, data reported to the EQC suggests DNRC can expect to have completely examined all 57,000 HB22 claims by the beginning of 2012, around 2.5 years ahead of schedule. However, depending on additional workload associated with post-decree assistance and other factors, the current level of productivity at DNRC may decline in the next few years. If DNRC productivity levels decline by 50 percent, we would anticipate claims examination will not be complete until mid to late-2013, which would still be 1.5 years ahead of the schedule established in HB22.



## **Compact Negotiations Could Adversely Affect DNRC Progress**

Although DNRC should be able to address any remaining examination issues and still meet the 2015 deadline, development with compact negotiations could have more significant impacts. The RWRCC is currently negotiating a compact with the Confederated Salish and Kootenai tribe for reserved rights in Flathead Valley. Failure to finalize this compact prior to the disbandment of the RWRCC in 2013 could result in over 10,000 additional claims being examined by DNRC, which would mean years of extra work. Under this scenario, DNRC would not be able to meet the 2015 statutory deadline.

Looking ahead, there is some uncertainty regarding the level of workload associated with completing the DNRC claims examination. Several factors could affect whether the current productivity trends will continue in the future, including post-decree assistance to the court, increased enforcement activity, claims re-examination tasks, or ownership updates. However, it still seems likely that DNRC will finish claims examination work ahead of the statutory deadline and benchmarks. In the absence of any further significant developments in the adjudication process, it is unlikely that DNRC staff will have any further examination work to complete beyond the end of 2012.

## **Water Court Progress Toward Statutory Deadline**

Unlike DNRC, the Water Court was not provided with detailed expectations regarding its role in the completion of the adjudication process. The only parameters applied to the court's activities under current statute are completion of the "initial decree phase" by June 30, 2020. Section 85-2-270(2), MCA, defines the initial decree phase to mean issuance of either a preliminary or a temporary preliminary decree. Assuming the court receives all the summary reports from DNRC according to schedule, meeting its 2020 deadline depends on whether the court can subsequently complete its review in the five years preceding 2020. To determine whether this is likely to occur, we reviewed the time elapsed between receipt of the DNRC summary report and the court's issuance of findings of fact and conclusions of law. The following table summarizes values for the court's review time, based on different time periods:

Table 3  
**Average Duration of Water Court Review of DNRC  
 Summary Reports**

Decree Status/Time Period	Average Time (Months)
Decreed Basins 1988 - 2005	1.5
Decreed Basins 2005 - 2009	5.9
NonDecreed Basins	13.5

**Source: Compiled by the Legislative Audit Division from Water Court records.**

Prior to 2005, the average turnaround time for court review of summary reports was 1.5 months. The court's decree issuance workload was relatively light and, as a result, review timeframes were short. After 2005, the average review time increases to nearly six months for decreed basins. This is likely attributable to increased workload for the court as the number of summary reports received in each year increases. For nondecreed basins, the average time elapsed as of March 2010 is 13.5 months. This includes some basins where the DNRC summary report was issued in 2007 or 2008, but decree issuance has not yet occurred.

### **Initial Decree Issuance Could Be Completed by 2016**

Even if all remaining nondecreed basins take up to a year or more to go through Water Court review, it still appears reasonable to assume that decree issuance will generally follow the schedule established for DNRC summary reports. The latest report provided to the Environmental Quality Council shows the last DNRC summary report is scheduled for delivery to the court in the middle part of 2015. Assuming this to be the case, the Water Court should be able to issue a temporary preliminary or preliminary decree for most basins within 12 – 18 months. Taking a relatively conservative approach to decree issuance timeframes, the Water Court could complete the initial decree issuance phase of adjudication by the end of 2016. However, the Water Court currently anticipates delaying decree issuance in some basins to allow sufficient staff and other resources to be available during the objections phase.

### **Trends and Management of the Water Court Objections Process**

To determine whether the objections process is meeting the timeframes established in statute, we reviewed Water Court documents recording chronological data for all examined basins. This review shows the objections process takes an average of 21 months to complete. Overall, we did not identify any concerns with the court's

ability to meet the statutory timeframes. In addition, there appears to have been some improvement in the timeliness of the process since 2005. Basins that have been through the objections process more recently seem to be less subject to delays.

## **Projection of Likely Completion Date for Objections**

Estimates of potential objections in remaining basins indicate the objections rate is likely to increase as the adjudication process nears completion. This appears to be related to higher levels of compact activity in basins within or adjoining Indian Reservations, but this should not greatly affect its ability to manage the process in a timely manner. The Water Court was given five years to complete the initial decree phase and it appears the court can both meet this goal and potentially complete the objections process prior to 2020.

Based on our estimates and assuming DNRC summary report production proceeds as scheduled, the Water Court should be able to issue initial decrees and complete the process of filing objections prior to 2020. This assumes the court will have sufficient resources to manage the objections process in multiple basins simultaneously. Once objections have been received, the court will still have to hold hearings and process cases through the litigation phase.

## **How Will the Litigation Phase Impact Statutory Timeframes**

Following filing of objections, water masters work to review which claims have been objected to and who the objectors are. Objections for related claims are grouped together to consolidate one or more objections into cases. Case duration can be affected by the complexity of the circumstances, past history of disputes between litigants, previous legal rulings in the basin, involvement of Indian Tribes or federal agencies as holders of reserved rights, and changes in legal representation or land ownership.

## **Role of Federal Agencies in Litigation**

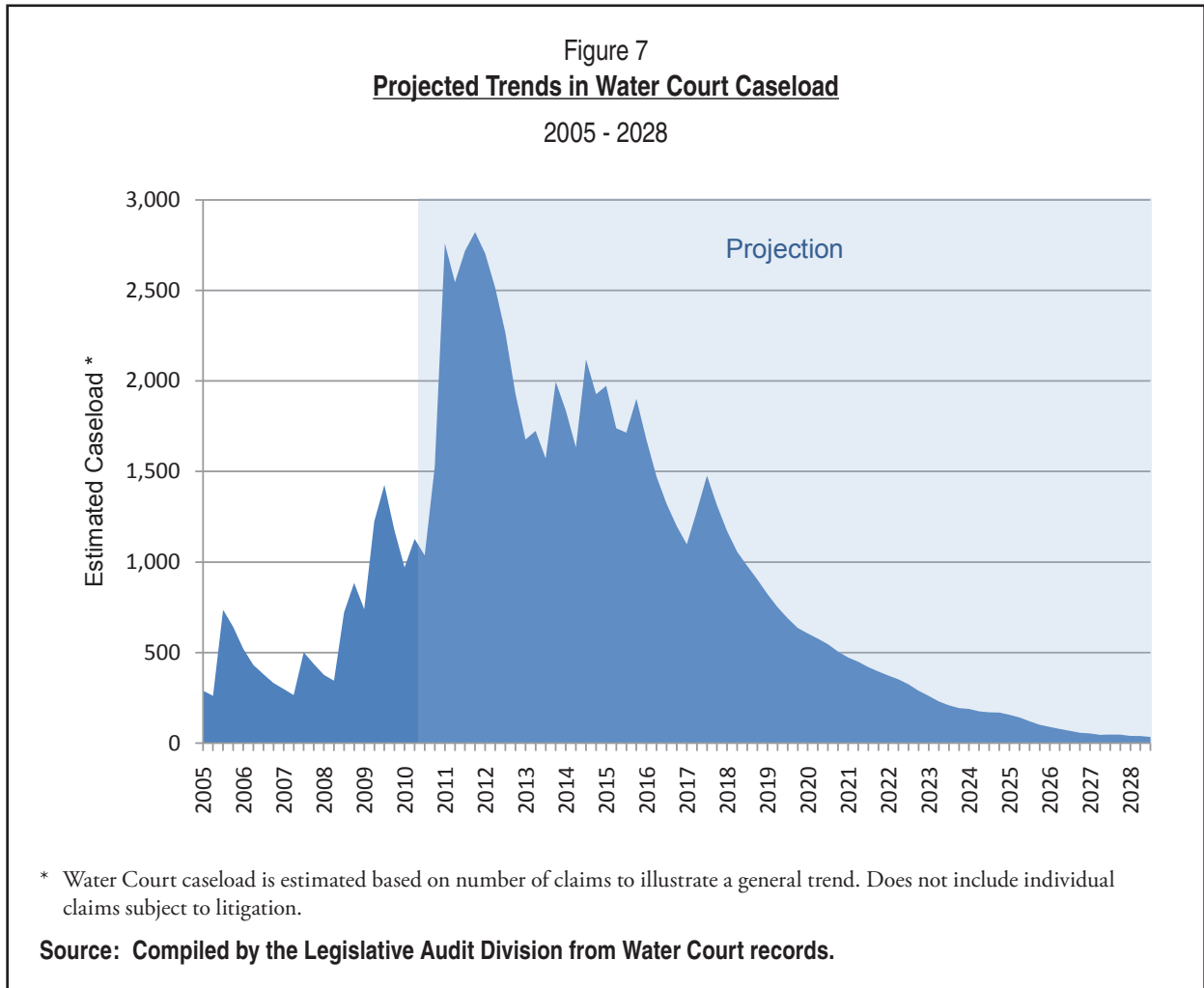
One factor outside of the Water Court's control that impacts the timeliness of litigation is the participation of federal agencies as objectors. Federal agencies have been active litigants before the court and our analysis shows that federal land ownership and tribal lands are significant variables for litigation duration. Projected litigation timeframes increase as the proportion of federally-owned land and tribal land within a basin increases. If federal agencies do not have sufficient resources or do not prioritize Water Court litigation, delays can occur and litigation duration can be extended beyond what is usually the case.

## **Case Duration in Litigated Basins**

Analysis of case duration involved review of Water Court records to determine when individual cases started and ended for selected examined basins. In-depth review was conducted for eight examined basins where we could determine that approximately 95 percent of the cases were closed (this would indicate the litigation phase for the basin was substantially complete). Analysis of case duration data shows that some basins reach a closure point relatively quickly in the process, but others can take many years. For examined basins that have reached the point of substantial closure, the average total duration of the litigation phase has been approximately eight years. There is significant variability between basins in terms of total duration; litigation is substantially complete in some basins within two to three years, while others can take over ten years to finish the process. When the court begins hearing cases in a basin, most of the workload is concentrated in the first three to five years. After this point, a small minority of cases can often extend the duration of the litigation for multiple years. These cases are likely to be the most complex and contentious, or involve resolution of difficult issues with reserved water rights holders.

## **Water Court Management of Litigation Phase**

Our analysis of litigation duration in completed and remaining basins suggests the ultimate ending date for the adjudication process is likely to be some time after 2028. Completion of litigation in all remaining basins will be followed by issuance of final decrees, a process which could add one or more years to the final timeframe. However, the court's workload is unlikely to remain at high levels throughout the period after 2020. We used case consolidation data and starting dates for the litigation process to estimate the court's past and future caseload. The trend in estimated caseload (expressed as the estimated number of open cases) is shown in the following figure:



The chart displays a generalized trend in anticipated caseload, which closely mirrors the case duration trends discussed in sections above. The expected increase in decree issuance between 2010 and 2015 results in a significant spike in court caseload, but if the assumption that most cases close within five years holds true, the court should begin to see a gradual decline in the number of open cases through 2020. It should be noted that these projections are based on past experience and could be impacted by future developments in the adjudication process. Past trends in Water Court caseload may not be replicated for the basins currently entering litigation and our analysis does not take into account the effects of individual claims subject to court litigation (as opposed to consolidated cases). The litigation process could be substantially complete by 2028, but it could take longer. Equally, changes in the process or in how the Water Court manages litigation could result in earlier completion.

## **Transition from Temporary Decrees Could Affect Water Court Progress**

Our analysis of the litigation phase addresses anticipated progress for basins with preliminary decrees or waiting to be decreed, but does not address potential future developments in basins with temporary decrees. Basins with temporary decrees will have to be re-opened for new objections prior to transitioning to preliminary decree status. Because claims in these basins have already been subject to objections and litigation, it is unclear whether many more objections will be filed, but this could impact progress at the Water Court. Likewise, future re-opening of basins with final decrees could also delay the work of the court. Projected timeframes for the litigation phase cannot be adjusted to reflect these potential developments, but there is some risk that further delays could result.

## **Water Court Should Develop Performance Measures for the Litigation Phase**

Given our analysis of litigation duration in specific basins, a small number of cases could extend the overall timeframe for the adjudication process and result in continuing delays in reaching final decree status for water users all round the state. This will add to the inconvenience already being experienced by water users, some of whom have waited in excess of 30 years for their original claims to be properly resolved. In addition, funding will continue to be needed to maintain the functions of the Water Court as litigation of the remaining open cases continues. Water Court expenditures are budgeted at approximately \$1.5 million annually and this amount is likely to increase as the focus of the adjudication process moves toward the litigation phase.

Statutes relating to the adjudication process do not currently include any defined performance expectations for the litigation phase. Statutes do contain such performance expectations for both the examination and objections phase, either by establishing deadlines and interim benchmarks for achieving certain results, or by specifically requiring certain process timeframes. Although statute does not impose specific performance expectations on what is essentially a judicial process, this limitation does not necessarily apply to the judicial branch itself. Recent initiatives by the Montana Supreme Court suggest that establishing performance expectations for judicial proceedings is an appropriate management tool in helping the branch meet its goals and objectives.

The Water Court currently lacks specific performance expectations relative to productivity or timeliness for the court's overall caseload or the individual water

masters who are responsible for case management. Establishing defined expectations of performance could help the Water Court better manage the litigation phase and potentially lead to the adjudication process finishing earlier than is currently projected. The judicial branch is best placed to determine what kinds of performance measures could be applied to the litigation phase for water rights adjudication, but consideration could be given to various measures of productivity and timeliness relating to the closure of cases.

The Water Court should establish defined performance expectations for the remainder of the litigation phase of the water rights adjudication process. The court should identify performance measures for both productivity and timeliness of the case litigation phase, and, where appropriate, include time reference points to guide staff. Water Court management should ensure these performance measures are updated regularly and reported to the Environmental Quality Council, the Water Policy Interim Committee and other interested parties.

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**RECOMMENDATION #4**

*We recommend the Water Court develop and adopt defined expectations of performance for the litigation phase of the adjudication process.*

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## Chapter V – Future Administration of Water Rights

### **Introduction**

Although the goal of final decrees for all basins is unlikely to be achieved for some years, parts of the adjudication process are already nearing completion. In 2013, the Reserved Water Rights Compact Commission (RWRCC) will be disbanded in accordance with a statutory sunset mandate. Around the same time, the Department of Natural Resources and Conservation (DNRC) could be completing work on examination of remaining claims in the statewide adjudication. The focus of the adjudication will shift increasingly to the Water Court and the task of litigating cases. Even though the court's work is likely to take some time to complete, the administration of water rights through enforcement and distribution of water is occurring in multiple basins around the state. Post-adjudication activities have, in some respects, already begun.

Our fourth audit objective was to determine whether the current organizational structures for water rights adjudication will meet the future demands and priorities for administration of decreed rights. Moving to the post-adjudication era presents two problems relating to the current organizational structures within agencies. Leaving present work units and process in place risks duplication of effort and expenditure of funds. But indiscriminate elimination of agency functions also poses risks, if expertise and institutional knowledge built-up during the adjudication are lost. The adjudication represents a significant investment of public funds in the state's water resources. Without proper planning for the transition to post-adjudication administration of these rights, much of the value inherent in this investment could be at risk.

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### **CONCLUSION**

*To protect the investments made in the state's water resources, state agencies and the legislature should begin preparing now for the transition to the post-adjudication era.*

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### **Current Organization and Funding for Water Rights Administration**

The adjudication process has been conducted by three agencies in two branches of government. The approach taken in Montana is necessarily unique among western states working under the prior appropriations doctrine, as for other states have attempted a comprehensive statewide adjudication of existing rights. Both the RWRCC and the Water Court are unique entities with no comparative organizations in other states.

## Agency Organizational Structures

Agency organizational structures have been adapted over the years to meet the needs of the adjudication process. The following provides a brief description of the current structures in place:

### **DNRC:**

Two bureaus and four regional offices within the department's Water Resources Division work on adjudication. Examination tasks are shared between a central staff unit in the Adjudication Bureau and the regional offices. The Adjudication Bureau also has management and support functions for the adjudication. The Water Rights Bureau also provides technical support to the adjudication effort, including records management, database support and geographic information systems support.

### **RWRCC:**

The RWRCC is administratively attached to DNRC, but is functionally separate from the other DNRC organizational units. The RWRCC negotiates on behalf of the Governor and also works closely with staff in the Department of Justice, and the DNRC Water Resources Division.

### **Water Court:**

The Water Court is part of the Supreme Court within the judicial branch. The Chief Water Judge reports directly to the Supreme Court. The court's main functions relate to the legal aspects of the judicial process (performed by Water Masters under the direction of the judge) and administrative and management support functions (performed by court clerks and administrators). Within the judicial branch, district courts are also involved in the adjudication; four district court judges are appointed as division water judges and the district courts are also responsible for administration of decreed rights through enforcement projects.

## Analysis of Staff Positions

Between the three agencies, 77 FTE staff positions are currently appropriated for adjudication functions (not all these positions are currently filled due to vacancy savings). DNRC accounts for 53 of these positions, the Water Court has 18, and the RWRCC six. The following figure provides more detail on the different types/functions of staff positions within agency organizational units:

Figure 8  
**Agency Staff Positions Appropriated for Adjudication**

	RWRCC	DNRC	Water Court
<b>MANAGEMENT</b>	1   Program Manager	1   Bureau Chief	1   Chief Water Judge
<b>ADMINISTRATIVE</b>		4   Compliance, Quality Control	6   Administrator, Court Clerks
<b>LEGAL / PROFESSIONAL</b>	3   Attorney, Research, Engineer		11   Water Masters
<b>IT / GIS</b>	1   GIS	4   GIS, Data Entry	
<b>TECHNICAL</b>	1   Hydrologist	44   Water Resource Specialists	

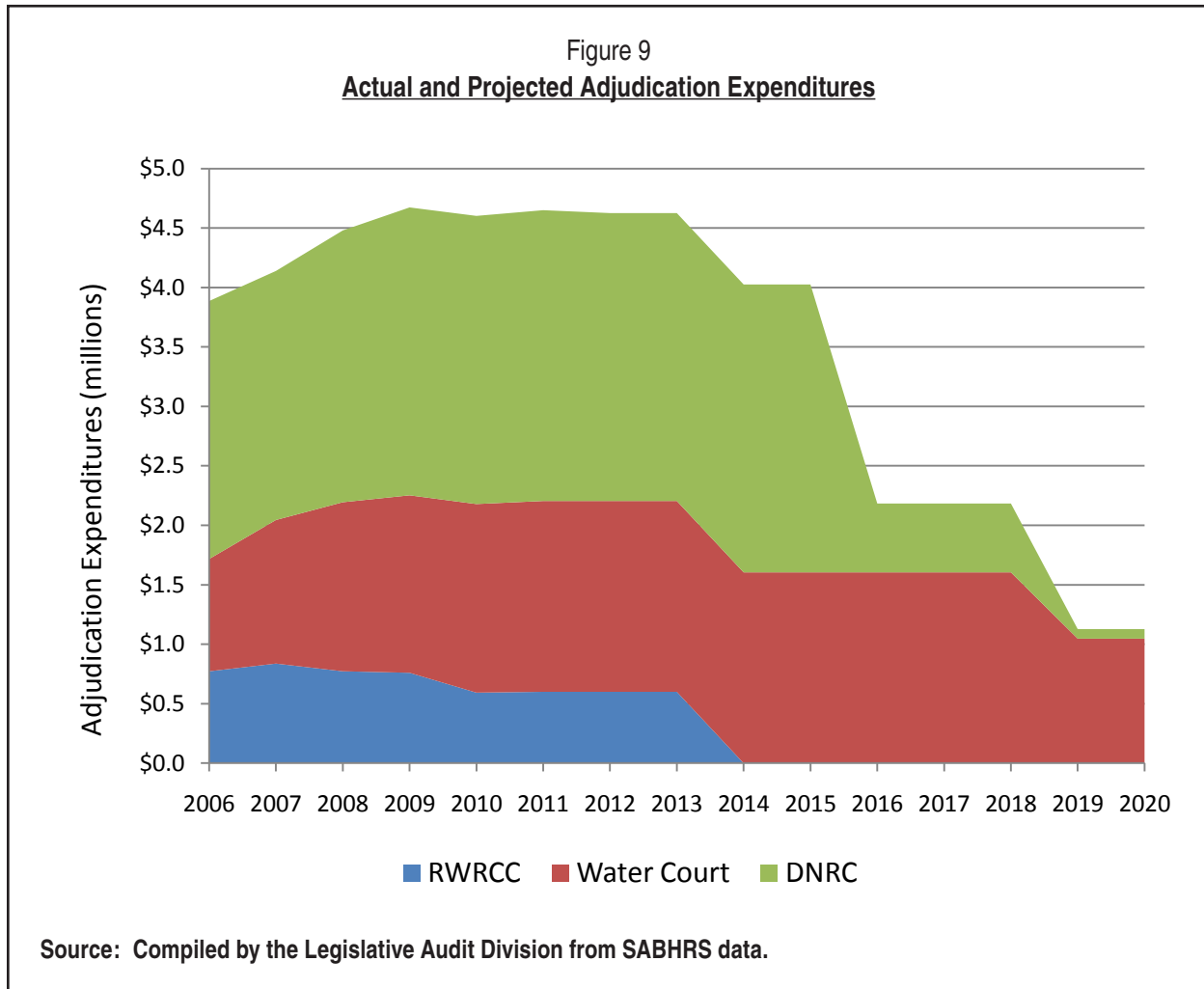
Source: Compiled by the Legislative Audit Division from RWRCC, DNRC, and Water Court records.

The number and type of staff positions differ between agencies depending on their roles in the adjudication. RWRCC staffing reflects the varied nature of compact negotiations, with positions dedicated for legal and research purposes, and more technical tasks such as engineering and hydrology. Most of the DNRC staff are Water Resource Specialists working on the actual examination of claims, with some support/administrative positions, and Information Technology/Geographic Information System staff. Most of the Water Court's positions are legal staff (Water Masters) dedicated to the court's judicial functions, with administrators and clerks providing support. Both DNRC and the Water Court also rely on centralized support services. DNRC has no legal staff specifically appropriated to adjudication, but the department's attorneys provide support to the process. Similarly, the Water Court has no IT staff positions, but the Supreme Court provides support functions in this area.

## Funding Trends and Predictions

The adjudication process has been funded through a variety of sources. The water rights adjudication account was established in 2005 and provides statutory appropriations to DNRC and the Water Court under §85-2-280, MCA. This account is the primary funding source for the adjudication. General Fund appropriations support the operations of the RWRCC. Several other state special revenue sources are also used to fund adjudication, including Resource Indemnity Trust funding and other sources. In fiscal year 2009, combined expenditures for the three agencies involved in adjudication totaled approximately \$4.5 million. Up until 2015, funding for the adjudication should remain at or above \$4 million annually, before declining as activities at RWRCC and

DNRC decrease. The following figure illustrates the trend in adjudication expenditures from fiscal year 2006, with projected values through fiscal year 2020:



The RWRCC sunsets in 2013 and expenditures associated with its activities are projected to be absorbed in other DNRC budgets this point. Appropriations to DNRC from the adjudication account is reduced after fiscal year 2015 and as a result the department's overall share of adjudication expenses declines significantly after this point. After 2015, statutory direction on the appropriation of adjudication account funds could allow for increased expenditures at the Water Court. Projected expenditures are adjusted for the reductions in the adjudication account resulting from a \$2 million transfer out of the fund authorized by the 2009 Legislature, which will reduce funding available for adjudication in the period after fiscal year 2018.

## **Preparations for Future Administration of Water Rights**

Although the end of the adjudication process is some years away, agencies are already entering a transition period. Both RWRCC and DNRC are approaching points at which their adjudication workload will begin to decline, but post-adjudication tasks are also becoming more prevalent for these agencies. The Water Court will also soon begin to experience changes in workload as large numbers of post-2005 basins are decreed and the process of filing objections and litigating cases begins. On the other side of the process, the court will also have to deal with post-adjudication tasks as basins exit the litigation phase and administration of the decreed rights becomes a priority.

### **Resources Could Be Available if DNRC Examination Finishes Early**

The direction provided to DNRC under both HB22 and subsequent legislation appropriating funds to the water rights adjudication account makes clear that funding is to be used only for adjudication activities. After 2005, DNRC hired around 40 additional staff to complete the examination process. The majority of these staff positions are claims examiners, but other support and administrative positions were also created. DNRC hired additional staff to meet the goal of completing examination by 2015. Many of the staff positions at DNRC are therefore essentially temporary in nature, as most of the claims examination staff will not be required once basins exit the objections phase. If DNRC completes examination work ahead of schedule, there is a potential that the Adjudication Bureau's staff resources will not be fully utilized in the period between 2013 and 2015. This is particularly true if either post-decree assistance or claims re-examination tasks are not undertaken on a large scale.

If claims examination work is complete between 2012 and 2013, DNRC will have some degree of flexibility in terms of managing its existing resources. A significant proportion of the Adjudication Bureau's funding is currently dedicated to supporting approximately 35,000 hours annually for claims examination work at a unit cost of around \$21 per hour. As the full extent of post-decree assistance activities becomes clearer over the next few years, some of these resources could be made available for other tasks. Without some further action to reassign these resources, there is a potential for under-utilization to occur and for unnecessary expenditures from the adjudication account.

### **Future Workload Estimates**

Based on past and current experience, there appear to be several areas where agencies will need to focus as the transition to the post-adjudication era begins, these are briefly summarized as follows:

- ◆ **Compact Maintenance** – the RWRCC will sunset in 2013, but the compact agreements negotiated by the state will likely need some level of ongoing maintenance. Some compacts could be affected by tribal or congressional actions after 2013 and all the agreements will still need to be incorporated into final decrees at the Water Court. Maintaining some of the commission’s knowledge and expertise would likely be beneficial. This could include retaining a limited number of RWRCC staff positions within the DNRC Water Resources Division.
- ◆ **DNRC Post-Decree Assistance** – our analysis of post-decree assistance to the Water Court by DNRC shows workload peaking between 2011 and 2013 at over 10,000 hours annually. This estimate is based on past experience, but could increase depending on workload associated with resolution of issue remarks (see Chapter IV of this report for more discussion). It seems likely that some of the post-decree assistance workload can be addressed by DNRC regional office staff, but some Adjudication Bureau positions will also be necessary after 2015.
- ◆ **Database Management** – the DNRC water rights database is the central repository for all water rights records and has been an integral part of the adjudication process. DNRC will likely need to retain IT/GIS positions within the Water Rights Bureau that were funded through the adjudication account.
- ◆ **DNRC Enforcement Activities** – in 2009, decreed rights were already being administered through 39 enforcement projects around the state. DNRC is currently dedicating staff resources to these enforcement projects. If, as expected, enforcement projects continue to increase, some level of resources will be necessary to support these activities at DNRC. However, DNRC enforcement activities are currently organized under the Adjudication Bureau, which will likely cease to exist at some point after 2015. It is not clear how many or what kinds of staff positions may transition to enforcement roles or where these will be located organizationally within the agency.
- ◆ **Water Court Enforcement Activities** – the Water Court is also involved in enforcement projects. Although water rights are administered through enforcement at the district court level, much of the state’s water law expertise now resides at the Water Court. This was emphasized by legislative changes in 2009, which authorized appointment of Water Court Water Masters to assist district courts in enforcement projects under §3-7-311(4), MCA. The institutional knowledge and procedural traditions of the Water Court have become embedded in the administration of water rights and this is likely to continue into the post-adjudication era.

### **Planning Work Should Begin for the Transition to the Post-Adjudication Era**

Up to this point, agency transition planning efforts have been limited. In some cases this is because there is too much uncertainty about the type or scale of post-adjudication workload, but the long-term nature of the adjudication process has also had an effect. Although statute references the period between 2015 and 2020, our review shows

the transition has already begun and will accelerate as soon as 2012–2013 as DNRC examination workload declines and the RWRCC finalizes negotiations on compacts. This period includes one of the fiscal years subject to legislative appropriations and other actions in the upcoming 2011 legislative session.

The adjudication process represents an investment of \$65 million in public funding. Successive legislatures have appropriated this funding to “provide for the administration, control, and regulation of water rights” under Article IX, section 3(4) of the Montana Constitution. The process does not, however, end with the completion of the adjudication. The investments made in adjudication and the value of the underlying water rights could be diminished unless the state is in a position to effectively administer the rights. This will mean adapting the current organizational structures within agencies that have been designed to adjudicate, rather than administer rights.

## **Review of Different Administrative Models**

Planning for the transition to the post-adjudication administration of water rights will involve addressing some of the unique aspects of Montana’s process, such as future administration of RWRCC compacts. Planning for other aspects of administration could involve referencing models in other states. Western states operating under the prior appropriations doctrine offer several different administrative models, which could provide guidance. In particular, Colorado and Wyoming have well-developed administrative structures in place for administration of water rights, which address the roles of state agencies and district courts in the process. Montana itself also has existing structures within DNRC for administration of new appropriations of water.

The purpose in referencing other administrative models is not to suggest that one is better or worse than the others. Decisions regarding the respective roles and authority of different state agencies and others in water rights administration will be a matter for the legislature. However, regardless of what approaches are chosen, a structured and methodical planning process should help decision-making.

## **Planning Could Help Agencies Avoid Past Mistakes**

Possibly the biggest concern in the upcoming transition period is an uncoordinated division of responsibility and authority between different agencies involved in the process. Historically, this has been the case and the early years of adjudication provide examples of how ineffective coordination and blurred lines of authority resulted in wasted time and effort. As different organizational units within agencies approach sunset dates or deal with decreasing workload, there is also a danger that resources will not be used efficiently or effectively.

Beginning a formal planning process now should help address these concerns. Although some work remains to be done to quantify post-decree workload and other issues, DNRC, the Water Court, and the RWRCC should begin planning for an earlier-than-expected transition of adjudication resources away from the examination process and towards the Water Court. This will likely involve working with the court to determine how the resources assigned to the adjudication process can be most efficiently used to meet the goals and objectives outlined in statute. This effort should also involve the appropriate legislative interim committees providing oversight of the agencies and, particularly, a role for the Water Policy Committee would appear to be important. Several factors would appear to be important in planning this transition:

- ◆ Reviewing past trends in post-decree assistance and making a determination regarding likely future impacts in the period leading up to 2015 (this would also include estimates of workload associated with resolution of issue remarks under §85-2-248, MCA).
- ◆ Determining resource needs associated with addressing the re-examination of verified claims (discussed in Chapter II of this report)
- ◆ Determining whether moving appropriated FTE to the court in the next biennium could result in an accelerated schedule for summary report preparation and subsequent decree issuance.
- ◆ Reporting to committees of the legislature regarding transition planning and proposals for reorganization of agency work units and resources to meet the demands and priorities of administration of water rights

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#### **RECOMMENDATION #5**

*We recommend the agencies begin a formal planning process for the transition to post-adjudication administration of rights by:*

- A. *Producing estimates of workload associated with post-decree assistance; AND*
  - B. *Reviewing current staffing and resource allocations to identify where expertise and knowledge should be maintained; AND*
  - C. *Coordinating post-adjudication water rights activities with legislative committees.*
-



AGENCY RESPONSES

DEPARTMENT OF  
NATURAL RESOURCES  
AND CONSERVATION

RESERVED WATER RIGHTS  
COMPACT COMMISSION

MONTANA WATER  
COURT



DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

A-1



BRIAN SCHWEITZER, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074  
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PO BOX 201601  
HELENA, MONTANA 59620-1601

June 11, 2010

RECEIVED

Jun 11 2010

Angie Grove, Deputy Legislative Auditor  
Performance Audits  
Room 160, State Capitol  
P.O. Box 201705  
Helena, Montana 59620-1705

LEGISLATIVE AUDIT DIV.

Dear Mrs. Grove:

Thank you for the opportunity to review and comment on the 2010 performance audit of the Water Rights Adjudication. The adjudication process is an important undertaking for the state, and the audit report provides direction for the program both in the present and future. The report correctly addresses the significant issues we face with the process: **reexamination of verified claims, scenarios for finalizing reserved water rights, and transition planning.**

We have thoroughly reviewed the June 3<sup>rd</sup> 2010 performance audit of Water Rights Adjudication. The Department agrees with the five audit recommendations and will take the necessary actions regarding the recommendations directed at the Adjudication Bureau. We appreciate your in depth analysis of this complex process and look forward to working with the legislature, water court, and reserved water rights holders as we move adjudication to completion.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Sexton".

Mary Sexton, Director  
Montana Department of Natural Resources

## Performance Audits Recommendations

### Recommendation #1

We recommend the Water Court avoid further re-examination unless data supports a significant increase in accuracy that provides benefits to water users.

**The Department concurs:** The Department has an obligation to follow the Court's Orders pursuant to 85-2-243 MCA regarding assistance. Statute 85-2-282 establishes the ability of water users to petition the Court for examination in verified basins. We recognize other avenues to address re-examination issues, such as Recommendation #2. The department will continue to comply with Water Court orders.

### Recommendation #2

We recommend the Water Court and the Department of Natural Resources and Conservation address the status of verified claims by developing procedures for the application of system-based standards, and summary report preparation to certain verified claims.

**The Department concurs:** The Department sent a proposed draft for implementation of the recommendation to the Montana Water Court on March 22, 2010. This draft includes detailed information on system-based standards and proposed summary preparation. The Department will continue to work with the Montana Water Court to develop procedures for the recommendation.

### Recommendation #3

We recommend the Reserved Water Rights Compact Commission and the Water Court coordinate their activities to ensure any further delays in decree issuance are considered on the basis of their effect on statewide adjudication by:

- A. Considering only formal written requests for further delays; AND
- B. Reporting anticipated impacts on adjudication deadlines to the Environmental Quality Council, the Water Policy Interim Committee, and other interested parties.

**The Department concurs with A and B:** The Adjudication Bureau is sensitive to the Compact Commission needs and will continue to incorporate their requests. This recommendation will allow the Adjudication Bureau of the Department of Natural Resources to develop a refined and improved work plan.

**Recommendation #4**

We recommend the Water Court develop and adopt defined expectations of performance for the litigation phase of the adjudication process.

**The Department concurs:** Although this recommendation is directed towards the Montana Water Court, defined expectations of performance will assist the Department in workload planning and retention of required positions before and beyond 2015.

**Recommendation #5**

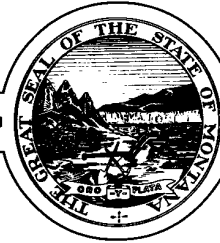
We recommend the agencies begin a formal planning process for the transition to post-adjudication administration of rights by:

- A. Producing estimates of workload associated with post-decree assistance; AND
- B. Reviewing current staffing and resource allocations to identify where expertise and knowledge should be maintained; AND
- C. Coordinating post-adjudication water rights activities with legislative committees.

**The Department concurs with A, B, and C:** The department is planning to utilize a consultant to draft a transition plan which will analyze current and future staffing needs, and conduct a thorough workload analysis. This plan will be constructed in tandem with the Montana Water Court. The workload analysis will consist of current and projected workload to identify and document staff resources required to meet statutory obligations and to effectively serve the ongoing needs of the Water Court. Staffing analysis will include: identification of post-decree staffing needs; documentation of ongoing roles; and identify staffing levels and time required to get to a final decree in *all* basins. This transition plan is expected to be complete by early fall of 2010. The plan will be presented to legislative committees for approval.



RESERVED WATER RIGHTS  
COMPACT COMMISSION



BRIAN SCHWEITZER, GOVERNOR

CHRIS D. TWEETEN, CHAIRMAN

STATE OF MONTANA

Daniel Belcourt  
Gene Etchart  
Senator Jesse Laslovich  
Senator Bill Tash

Dorothy Bradley  
Representative Art Noonan  
Representative Jack Ross  
Mark DeBruycker

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JUN 11 2010

LEGISLATIVE AUDIT DIV.

**To:** Tori Hunthausen, Legislative Auditor

**From:** Chris D. Tweeten, Chairman MT RWRC *Chris D. Tweeten*

**Date:** June 11, 2010

**Re:** Performance Audit of Water Rights Adjudication

We appreciate the opportunity to comment on the report prepared by your staff. It represents many hours of thoughtful effort to identify issues associated with the completion of the statewide water adjudication as well as highlighting post-adjudication concerns.

As a key component of this process, the Compact Commission has been very successful in completing water settlements with most of the tribes and federal entities claiming reserved water rights within the State of Montana. Beginning in 1985, the Montana Legislature has approved compacts with the Assiniboine and Sioux Tribes of the Ft. Peck Reservation, the Northern Cheyenne Tribe, the National Park Service for five units in Montana, including Yellowstone and Glacier National Parks, the Bureau of Land Management for two units in Montana, including the Missouri Wild & Scenic River, the Chippewa Cree Tribe of the Rocky Boy's Reservation, the US Fish Wildlife Service for five out of the six units claiming reserved water rights in Montana, the Crow Tribe, the Assiniboine and Gros Ventre Tribes of the Ft. Belknap Reservation, the US Forest Service, US Department of Agriculture for two research stations and the Blackfeet Tribe.

These settlements are in various stages of Legislative, Congressional, Tribal and Water Court approval. Many are finalized but much work remains to be done. Ultimately, they must all be incorporated into final decrees by the Water Court.

Settlements must still be finalized with the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the CM Russell Wildlife Refuge, and two tributaries in the Upper Missouri National Monument. Turtle Mountain public domain allotments may also claim reserved water rights and a decision on how best to settle or adjudicate these rights must be made in the next few years.

The Commission is currently scheduled to sunset in 2013.

The two recommendations in the Audit Report that affect the commission are:

- **Recommendation #3 p.26**

“We recommend the Reserved Water Rights Compact Commission and the Water Court coordinate their activities to ensure any further delays in decree issuance are considered on the basis of their effect on the statewide adjudication by:

- A. Considering only formal written requests for further delays; AND
- B. Reporting anticipated impacts on adjudication deadlines to the Environmental Quality Council, the Water Policy Interim Committee, and other interested parties.”

- **Recommendation #5 p.44**

“We recommend the agencies begin a formal planning process for the transition to post-adjudication administration of rights by:

- A. Producing estimates of workload associated with post-decree assistance; AND
- B. Reviewing current staffing and resource allocations to identify where expertise and knowledge should be maintained; AND
- C. Coordinating post-adjudication water rights activities with legislative committees.”

As far as Recommendation #3, the Commission generally concur although we believe corrective action is unnecessary for the reasons stated below. However, we disagree with the characterizations which led to the Part A recommendation.

Over the years, while sometimes intense negotiations were progressing, the Commission informally requested the Water Court to prioritize other water basins not impacting reservations. This was NOT (as stated on p. 25) because we do “not recognize the importance of objections to the adjudication process” but because the potential for federal objections to state-based water rights in the middle of a delicate negotiation might derail any progress and undermine public support for a settlement. Since, for many years, there were other water basins for the court to work on, we did not view this as a delay in the adjudication. It simply meant the reservation basins would be dealt with in later priority.

The issue is now moot because the Water Court is moving forward with decrees in basins involving the Crow and Ft. Belknap (which are not yet at the Water Court approval stage.) It remains to be seen how many objections and counter objections will occur and how long it will take for these to be resolved.

At this time, the Commission understands the court must move forward in order to meet deadlines and does not intend to ask the court to continue to prioritize non-reservation basins. In fact, to the contrary, the parties to the CSKT negotiation have



formally asked the court to proceed with claims examination in the reservation basins and work there is progressing well. We are certainly willing to formalize any other requests to the court in the future.

As to the second part of recommendation, we concur but do not believe corrective action is necessary. The Commission staff director routinely reports to the Water Policy Interim Committee and would willingly do so with the Audit Committee and EQC.

As to Recommendation #5, the Commission concurs. "Beginning a formal planning process for the transition to post-administration of rights" is a vitally important task and we appreciate the audit committee staff for focusing on its importance.

Since the Compact Commission is due to sunset in 2013, we have already begun the planning process for post-compact implementation. A transition plan is being proposed to move the existing commission staff to DNRC Water Resources. Critical tasks will include: seeking congressional approval for the remaining settlements, providing technical reports to the Water Court, administration of compacts including reporting and dispute resolution components, seeking appropriations for any infrastructure or mitigation requirements, engineering and hydrologic oversight, interpretation of the compacts and archiving 30 years of documents and creating a digital library. All of this will be critical to making sure that final decrees in a post-adjudication world will be able to administered as intended.

We agree with the overall conclusion that negotiating water settlements with Tribes and federal agencies is a complex process, legally, factually, politically and financially, which does not lend itself to deadlines and which may at times have impacted the adjudication process. As pointed out in the audit report on p. 31, if compacts are not successfully concluded with all tribes and federal agencies by July 1, 2013, then those entities will have to file claims with the Water Court by 2015 (if the Legislature does not extend the Commission.) This will necessarily complicate the work of the Water Court and DNRC, increasing workloads and adding time to the process. It should also be pointed out that in the past the CSKT has raised the possibility of challenges to the adjudication process if they end up litigating rather than settling their rights.

At this time, the parties to this very complex negotiation are moving forward with monthly negotiating sessions and anticipate bringing a compact to the 2013 Legislature, but since this scenario was raised in the report, we wanted to comment.

Ultimately, the Compact Commission believes the initial decision by the Montana Legislature in 1975 to negotiate rather than litigate reserved water rights was a wise one and the time and money spent negotiating over the years has been well justified. Montana's success has been emulated around the West. Settlements authorized by Congress have resulted in millions of dollars of appropriations for water infrastructure on and around Montana's Indian reservations. Existing state-based water users have been protected, not disrupted, and Indian and non-Indian neighbors who share watersheds are working together to achieve common goals.

Again, we appreciate the Audit Committees attention to these important matters and commend its' staff's efforts. We look forward to continue working with you and the Legislature to achieve a successful statewide adjudication.





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June 10, 2010

Tori Hunthausen  
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Legislative Audit Division  
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P O Box 201705  
Helena MT 59620-1705

**RECEIVED**

**Jun 10 2010**

**LEGISLATIVE AUDIT DIV.**

**Re: Water Rights Adjudication - 2010 Performance Audit - Water Court Response**

Dear Ms. Hunthausen:

This letter represents the Water Court's response to the final report on the performance audit of the Water Rights Adjudication.

The urgency and struggle to document, adjudicate, and to administer Montana's water rights has ebbed and flowed for over one hundred years. The Legislature has grappled with the uncertainty of the state's water right system on many occasions. A few examples illustrate the more recent efforts.

In 1939, the Legislature declared that the "**waters of this state** and especially interstate streams arising out of the state **be investigated and adjudicated as soon as possible** in order to protect the rights of water users in this state . . . ." Section 89-847 R.C.M. 1947 (emphasis added).

In 1973, the Legislature enacted the Water Use Act and stated that "the department [DNRC] . . . **shall, as soon as practicable, begin proceedings under this act to determine existing rights.**" Sec. 6, Ch. 452, L. 1973 - originally codified as 89-870 R.C.M. 1947 (emphasis added).

In 1975, three federal lawsuits were filed. In 1979, four more federal lawsuits were filed. These lawsuits sought to adjudicate the water rights of several Indian Tribes, the United States, and other water users in general stream adjudications filed in the federal district court system. The filing of these lawsuits increased the level of urgency.

In 1979, the Legislature enacted Senate Bill 76 and amended the Water Use Act "**to expedite and facilitate the adjudication of existing water rights.**" Sec. 1, Ch. 697, L. 1979 (emphasis added). As the years went by, the resources directed to the DNRC claims examination program gradually ebbed away.

*" . . . to expedite and facilitate the adjudication of existing water rights."*  
CH.697 L. 1979

In 2005, the Legislature enacted House Bill 22, codified in §§ 85-2-270 through 282, MCA. The purpose of the legislation as set forth in § 85-2-270(1) is to:

- (a) complete claims examination and the initial decree phase;
- (b) reexamine claims . . . , and
- (c) ensure that the product of the adjudication is enforceable decrees.

Section 85-2-270(2) states:

With adequate funding, it is realistic . . . to complete claims examination and reexamination . . . by June 30, 2015. It is also realistic and feasible for the water court to issue a preliminary or temporary preliminary decree by June 30, 2020, for all basins in Montana.

As the Audit Report notes, the DNRC and Water Court are on track to meet the 2005 legislative goals. All claims will be examined by 2015 or before, initial decrees (i.e. a preliminary or temporary preliminary decree) will be issued in all basins by 2020 or before. After the objections to all initial decrees have been resolved, the Water Court decrees will be enforceable. Assuming adequate funding is provided, the stated purpose and stated goals of HB 22 will be reached.

The Audit Report logically focused on the 2005 legislative goals and directives. However, relatively recently, an EQC member advised that he thought one or more legislators believed the purpose of HB 22 was not just to issue initial decrees by 2020, but to issue final decrees in all basins by June 30, 2020. If this is a common perception of legislative members, then meeting the purpose and goals of HB 22 will not meet the expectations of these legislators.

Before final decrees can be issued in all basins, the temporary preliminary decrees issued before March 28, 1997 must be reissued and an objection opportunity provided to basin water users. Furthermore, “late” claims authorized to be filed by the 1993 Legislature, must be incorporated into the adjudication; and all final decrees must be reopened and reviewed as required by the 1989 Legislature. *See* Sections 85-2-221(3) and 85-2-237, MCA. If there was a perception among the 2005 legislators that final decrees would be issued by 2020, then the Legislature may want to revisit this issue and reevaluate the process to reach the purpose and goals of the Water Rights Adjudication effort.

## **RESPONSE TO AUDIT RECOMMENDATIONS**

### **RECOMMENDATION # 1:**

*We recommend the Water Court avoid further re-examination unless data supports a significant increase in accuracy that provides benefits to water users.*

**Response:** The Water Court concurs.

There will not be a need to even consider a “full-scale” reexamination of claims unless or until the temporary preliminary decrees issued before March 28, 1997 are reissued as preliminary decrees. Since the current legislative direction outlined in HB 22 is to issue initial decrees by 2020, it seems unlikely that all the temporary preliminary decrees will be reissued before 2020.

However, assuming adequate funding exists, the Court contemplates reissuing the two temporary preliminary decrees (Basins 40K and 40L) in the Milk River drainage as preliminary decrees within the next few years. Although HB 22 only requires initial decrees to be issued by 2020, our internal goal is to issue final decrees in the Milk River basins before 2020. The re-issuance of Basins 40K and 40L as preliminary decrees is a prerequisite to reaching that goal. As we work towards this final decree goal, we will coordinate with DNRC to develop limited or modified claim examination procedures and avoid the “full-scale” examination concerns outlined in the Audit Report.

RECOMMENDATION # 2:

*We recommend the Water Court and the Department of Natural Resources and Conservation address the status of verified claims by developing procedures for the application of system-based standards, and summary report preparation to certain verified claims.*

**Response:** The Water Court concurs.

The likelihood of any “full-scale” reexamination of claims within the near future is not anticipated, but some limited examination may be required. The Court and DNRC will use the claims in Basins 40K and 40L to develop and test procedures to meet Recommendation # 2. The goal to develop and test procedures is July 1, 2011.

RECOMMENDATION # 3:

*We recommend the Reserved Water Rights Compact commission and the Water Court coordinate their activities to ensure any further delays in decree issuance are considered on the basis of their effect on the statewide adjudication by:*

- A. Considering only formal written requests for further delays; AND*
- B. Reporting anticipated impacts on adjudication deadlines to the Environmental Quality Council, the Water Policy Interim Committee, and other interested parties.*

**Response:** The Water Court concurs.

RECOMMENDATION # 4:

*We recommend the Water Court develop and adopt defined expectations of performance for the litigation phase of the adjudication process.*

**Response:** The Water Court concurs.

The Water Court will first develop a framework for the performance measures and define a method for collecting needed data by July 1, 2011. Implementation and data collection will begin as soon as the framework has been defined and processes are put in place to collect needed data.

....  
....  
....

RECOMMENDATION # 5:

*We recommend the agencies begin a formal planning process for the transition to post-adjudication administration of rights by:*

- A. Producing estimates of workload associated with post-decree assistance; AND*
- B. Reviewing current staffing and resource allocations to identify where expertise and knowledge should be maintained; AND*
- C. Coordinating post-adjudication water rights activities with legislative committees.*

**Response:** The Water Court concurs.

The DNRC and the Water Court are always engaged in transitional planning. It is a necessary part of the adjudication process. As the Audit Report recognizes, HB 22 has injected greater urgency into the process and required the DNRC and Water Court to coordinate more closely to meet the HB 22 goals. Probably the best example of “formal” planning occurred in April and May 2010. In April, the Water Court requested the transfer of 4.5 FTEs from DNRC and in May, the DNRC agreed to transfer 2.5 FTEs. DNRC then submitted an “EPP Proposals 2013 Biennium” document to accomplish that task. The DNRC has advised the Court that it is developing a detailed transition plan and would like the Water Court’s assistance in its development. A preliminary plan will likely be developed prior to the 2011 Legislature. By July 1, 2011, the DNRC and Water Court will likely develop an updated plan to reflect any modifications or directives to the Water Rights Adjudication expressed by the 2011 Legislature.

Sincerely,



C. Bruce Loble  
Chief Water Judge

cc: Lois Menzies, Supreme Court Administrator  
Mary Sexton, Director - Department of Natural Resources and Conservation  
John Peterson, Chief - DNRC Water Rights Adjudication Bureau  
Susan Cottingham, Manager - Reserved Water Rights Compact Commission