

## Performance Evaluation Fact Sheet

# WATER COURT - JUDICIARY

### ISSUE STATEMENT

The Joint Appropriations Subcommittee on Judicial Branch, Law Enforcement, and Justice voted to request monitoring of this item. Statute requires that the Water Court report to the Environmental Quality Council at each meeting during the interim and to the applicable appropriations subcommittee during legislative sessions. Because the Legislative Finance Committee (LFC) did not wish to duplicate efforts of other legislative committees this issue will be addressed by providing copies of reports made to other legislative committees to the LFC, but will also update the LFC on the status and projections of the water adjudication fund and staff transition from the Department of Natural Resources (DNRC) to the Water Court.

### HISTORY AND PURPOSE OF PROGRAM OR ITEM

#### Water Right Decree

Water right decrees have not been issued in every basin in Montana. Without such decrees, Montana cannot know how much of the state's water is currently being claimed and used. Issuing water right decrees for every basin in Montana would help the state establish its historic usage, protect state water users, and assist in settling disputes among users. Enforcing water rights is only possible with a water right decree in place. The 2005 Legislature, in HB 22, took steps to expedite the process of establishing water rights decrees for all basins in Montana by June 30, 2020. HB 22 established a water adjudication fee to provide revenues to fund the adjudication activities, but the 2007 Legislature repealed the fee and funded the activities with a general fund transfer.

#### Funding for Claims Examination and Adjudication

The 2007 Legislature, in HB 473, transferred \$25.0 million from the general fund to the water adjudication account, effective July 15, 2007, for the sole purpose of funding the water rights examinations and adjudications through FY 2020. When the water adjudication account was established, the legislature specified limits on allocations of the funds to the Department of Natural Resources and the Water Court. The following figure shows the allocations from the account after 2011 Legislature action and assumes future allocations would be at the statutory limit. The figure also shows the projected ending fund balance of the account through FY 2020. It shows that the fund would be depleted during FY 2018 if appropriations are made up to the statutory limit.

Department of Natural Resources & Conservation Water Adjudication Fund Statutory Limit and Disbursements After the 2011 Legislature					
Fiscal Year	Limit	Disbursements	Difference	Cummulative	Ending Fund Balance
2020	\$1,125,509	\$1,125,509	\$0	(\$2,090,753)	(\$2,976,207)
2019	1,092,727	1,092,727	0	(2,090,753)	(1,850,698)
2018	1,060,900	1,060,900	0	(2,090,753)	(757,971)
2017	1,030,000	1,030,000	0	(2,090,753)	302,929
2016	1,000,000	1,000,000	0	(2,090,753)	1,332,929
2015	3,392,410	3,392,410	0	(2,090,753)	2,332,929
2014	3,293,602	3,293,602	0	(2,090,753)	5,725,339
2013	3,197,672	3,162,964	34,708	(2,090,753)	9,018,941
2012	3,104,536	2,902,990	201,546	(2,125,461)	12,181,905
2011	3,014,113	2,797,944	216,169	(2,327,007)	15,084,895
2010	2,926,323	5,090,920	(2,164,597)	(2,543,176)	17,817,852
2009	2,841,090	3,193,938	(352,848)	(378,579)	22,838,695
2008	2,758,340	2,784,071	(25,731)	(25,731)	25,312,650

Disbursements for FY 2012 and FY 2013 are appropriated amounts.  
Disbursements for FY 2014 through FY 2020 are limits.

## **Water Rights Adjudication Staffing Transition Plan**

In funding the water adjudication process with the water adjudication account, the legislature anticipated staffing from DNRC would be reduced as claims examination work is completed and staffing of the Water Court would be increased to address the increased workload of issuing decrees. DNRC commissioned a private consulting firm to develop a staffing transition plan, the report of which was issued on July 1, 2011. The report focused mainly on the resource needs of DNRC but included information about FTE needs provided by the Water Court.

In summary, the report stated that DNRC would need 47.50 FTE for adjudication activities through FY 2015, after which it could draw down staffing to 28.00 FTE through attrition by the end of FY 2020. The report also specified that the department would need to maintain 12.00 to 24.00 FTE to accomplish post decree activities. For the Water Court the report stated that the court indicated in July 2011 that 4.50 FTE additional staffing would be needed by 2015.

As part of the transition of adjudication staff, the 2011 Legislature reduced DNRC by 3.50 FTE beginning with FY 2012 and increased Water Court by 1.00 FTE beginning in FY 2012 and additional 2.50 FTE (3.50 FTE total) in FY 2013. Of the additional FY 2013 staff, 1.00 FTE is associated with an associate water judge added by HB 587.

After actions to shift FTE from DNRC to the Water Court, the Water Resources Division of DNRC has funding for 36.50 FTE dedicated to water adjudication work of HB 22 and the Water Court has funding for 21.50 FTE.

## **MEASURES FOR DETERMINING EFFECTIVENESS**

Key milestones in the water adjudication process are, assuming adequate funding is provided:

- DNRC to complete claims examination and reexamination of claims of verified basins by June 30, 2015
- Water Court to issue preliminary or temporary decrees by June 30, 2020

## **CURRENT STATUS**

In keeping with directions from the Legislative Finance Committee not to duplicate reporting on items that other legislative committees are monitoring, the report that was presented to the September 2011 meeting of the Environmental Quality Council is attached in Appendix A and accessible at the following Internet link:

<http://leg.mt.gov/content/Committees/Interim/2011-2012/EQC/Studies-Duties/adjudication-reports-sept-2011.pdf>

The report shows the status of claims examinations reported by DNRC to the Water Court through July 30, 2011, and the status of decrees in the Water Court as of August 19, 2011. The report indicates that the claims examinations being done by DNRC were at 48,530 as of July 30, 2011, which is ahead of the fourth statutory benchmark of 44,000 set for December 31, 2012. The Water Court is on track to complete its work of completing temporary preliminary decrees or preliminary decrees across the state by June 30, 2020 or earlier.

## **POTENTIAL OPTIONS OR DECISION POINTS**

Staff will continue monitoring the status of the water adjudication account and provide analysis and options to aid the legislature in moving forward into the 2015 to 2021 biennia for both the transition of FTE and allocation of available funds from the account.

## **APPENDIX A**

# **DNRC AND WATER COURT REPORTS TO THE ENVIRONMENTAL QUALITY COUNCIL SEPTEMBER 2011**

**DNRC REPORT TO EQC**  
**HB22 ADJUDICATION PROGRESS**  
**September, 2011**

**Claims Examination Progress**

- First benchmark 8,000 claims by 12-31-2006
- Second benchmark 19,000 claims by 12-31-2008
- Third benchmark 31,000 claims by 12-31-2010
- **Fourth Benchmark 44,000 claims by 12-31-2012**
- Claims examined July 2005 thru **July, 30 2011**      **48,530**
- 
- Claims examined by Purpose
 

o Irrigation	10444	22%
o Stock	27116	56%
o Domestic	6427	13%
o Other	<u>4543</u>	9%
	<b>48,530</b>	

**Claims remaining to be examined**                      **8,470**

**Summary Reports to Water Court**

**Date Issued**

Union Creek (part of 76F)	May 19, 2005
Teton River (41O)	August 15, 2005
Big Hole River (41D)	October 31, 2006
Tongue River, below hanging Woman Creek (42C)	August 7, 2007
Blackfoot River (76F)	August 14, 2007
Missouri River, from Holter Dam to Sun River (41QJ)	August 15, 2007
Tongue River, above Hanging Woman (42B)	December 5, 2007
Pryor Creek (43E)	August 18, 2008
Smith River (41J)	September 1, 2008
Beaver Creek (40M)	September 1, 2008
Flatwillow Creek (40B)	September 11, 2008
Milk River (40J)	December 5, 2008
Little Big Horn River (43O)	February 6, 2009
Big Muddy Creek (40R)	April 6, 2009
Missouri River, Sun River to Marias River (41Q)	June 16, 2009
Beaverhead River (41B) *	August 14, 2009
Arrow Creek (41R)	October 23, 2009
Missouri River, from Marias River to Bullwacker Creek (41T) *	November 17, 2009
Milk River above Fresno (40F)*	April 15, 2011

(\* basins not yet decreed)

<b>Decrees Issued by Water Court</b>	<b>Date Issued</b>	<b>Number of Claims</b>
Teton River (41O)	12/29/2005	2,500
Union Creek (part of 76F)	3/10/2006	42
Big Hole River (41D)	4/6/2007	3,892
Missouri River (41QJ)	2/6/2008	2,584
Tongue River (42C)	2/28/2008	4,710
Tongue River (42B)	2/28/2008	1,345
Forest Service Compact	5/19/2008	262
BLM-Montana Compact	3/6/2009	2
Beaver Creek (40M)	3/20/2009	2,942
Big Muddy Creek (40R)	1/28/2010	2,029
Pryor Creek (43E)	2/25/2010	629
Little Big Horn River (43O)	3/17/2010	1,176
Missouri River from Sun River to Marias River (41Q)	5/27/2010	4,127
Milk River between Fresno Res & Whitewater (40J)	6/24/2010	12,897
Smith River (41J)	12/16/2010	2,684
Blackfoot River (76F)	2/10/2011	3,717
Flatwillow Creek (40B)	5/5/2011	3,677
<b>Arrow Creek (41R)</b>	<b>6/23/2011</b>	<b>2,173</b>

Above decrees scanned and available at:

[http://www.dnrc.mt.gov/wrd/water\\_rts/adjudication/default.asp](http://www.dnrc.mt.gov/wrd/water_rts/adjudication/default.asp)

	<b>BASINS BY COMPLETION DATE - DNRC WORK PLAN 2012</b>			
BASIN COUNT	BASIN NAME	WORK STATUS	Estimated Completion Date	
1	Flathead R below Flathead Lake (76L)	Examination complete	12	2009
2	Big Horn R below Greybull R (43P)	Summary Report pending	6	2012
3	Rosebud Creek (42A)	Summary Report pending	12	2011
4	Shoshone River (43N)	Summary Report pending	10	2011
5	Milk River above Fresno (40F)	Summary Completed	4	2011
6	Flathead River (76LJ)	Examination in progress	7	2013
7	Cut Bank River (41L)	Summary Report pending	6	2012
8	St. Mary River (40T)	Summary Report pending	11	2011
9	Yellowstone R below Powder R (42M)	Examination in progress	8	2012
10	Red Rock River (41A)	Examination in progress	3	2012
11	Peoples Creek (40I)	Summary Report pending	9	2011
12	Two Medicine River (41M)	Summary Report pending	8	2013
13	Marias River (41P)	Examination in progress	10	2013
14	Missouri R between Bullwacker & Musselshell (40EJ)	Examination in progress	12	2012
15	Bitterroot R, E side (76HA)	Examination in progress	6	2015
16	Frenchman Creek Re-Examination (40L)	Summary Report pending	7	2014

### **District Court Enforcement Actions**

2005 season completed water court assistance for 23 streams

2006 season completed water court assistance for 23 streams

2007 season completed water court assistance for 26 streams

2008 season completed water court assistance for 32 streams

2009 season completed water court assistance for 36 streams

2010 season completed water court assistance for 38 streams

**2011 season completed water court assistance for 38 streams**

Automated indexes are now in use

### **Post Decree Assistance (July 2011)**

<u>Case type</u>	<u>case count</u>	<u>work hours</u>
Certified case		<b>0</b>
85-2-248	<b>7</b>	<b>290</b>
Case	<b>7</b>	<b>442.5</b>
<u>General assist</u>		<b>319</b>
Total hours		<b>1,051.5</b>

*Post Decree assistance primarily involves working with claimants and the Water Court to help resolve issue remarks on water rights. This assistance is generated through the on motion process (85-2-248) and objections by water users resulting in a case. Assistance includes meeting with claimants, conducting field investigations, mapping, and providing recommendations and technical reports pertaining to individual cases. In addition, assistance is requested by the Water Court to help with certified cases before and after the initial decree phase. Unique requests to help the Water Court resolve specific cases such as large basin mapping projects, and other technical requests fall within the general assistance category.*

### **Expenses**

YTD FY 2012:	Operating Costs	\$ <b>10,849.10</b>
	Personnel Services	\$ <b>71,884.59</b>
	Total	\$ <b>82,733.69</b>
	Budget	\$ <b>2,141,331</b>

### **Billing System**

108,000 bills mailed Dec 27, 2005  
Estimated revenue generated \$6.2 million  
Revenue received \$5.217 million

### **Appeals**

5,089 Appeals received  
5089 appeals resolved to date (1121 denied, 3113 resolved with fee correction, 855 cancelled)

### **HB39 Automate Ownership updates (effective July 1, 2008)**

- Contract is finalized and Tyler Inc is developing the program for DOR to pass thru new property owner names to DNRC for updating water right records.
- Geocodes were loaded into DNRC database in June 2008.
- State-wide ownership update export to DNRC was received 12-4-2009.
- The department has completed the initial data scrubbing and geocode validation due June 2010.
- Department staff continue to validate water right geocodes for property transfers that occurred from November 2010 thru July 2011.**
- In 2010, 3,821 ownerships were updated involving 9,460 water rights**
- In 2011, 4,476 ownerships were updated involving 11,174 water rights.**

### **Adjudication Transition Plan**

- The adjudication transition plan was completed summer of 2011 as identified in the legislative audit report. This plan identifies potential resources needed beyond 2015.**

**WATER COURT**  
**ADJUDICATION PROGRESS REPORT TO THE EQC (AND WATER POLICY INTERIM**  
**COMMITTEE) PURSUANT TO § 85-2-281, MCA**  
**Submitted by C. Bruce Loble, Chief Water Judge**  
**As of August 19, 2011**

The Water Court is continuing to work through its inventory of water right claims that have unresolved objections, issue remarks, motions to amend, and claims certified to the Water Court by the DNRC or District Courts. The Water Court is primarily working on water right claims in the following basins:

Basin	Sources	Claims in Decree	Remaining Claims to Resolve
40B	Flatwillow Creek (Public Meeting Sept 6, 2011 - Winnett)	3,677	Decree issued 5/5/2011 Objection Deadline is 11/1/2011
40H	Big Sandy Creek	797	31
40J	Milk River Between Fresno Reservoir & Whitewater Creek	12,897	Decree issued 6/24/2010 Counterobjection Deadline is 10/11/2011
40M	Beaver Creek, Tributary of Milk River	2,942	1,103
40O	Milk River Below Whitewater Creek	3,306	296
40R	Big Muddy Creek	2,029	710
41D	Big Hole River	3,892	1,386
41I	Missouri River upstream of Holter Dam	5,168	211
41J	Smith River	2,719	Decree issued 12/16/2010 Extended Objection Deadline is 9/12/2011
41K	Sun River	2,856	103
41O	Teton River	2,541	379
41Q	Missouri River from Sun River to Marias River	4,127	Decree issued 5/27/2010 Notice of Intent to Appear Anticipated Deadline 11/1/2011
41QJ	Missouri River from Holter Dam to Sun River	2,584	305
41R	Arrow Creek	2,179	Decree issued 6/23/2011 Objection Deadline 12/20/2011
42B	Tongue River above & including Hanging Woman Creek	1,345	260



42C	Tongue River below Hanging Woman Creek	4,710	988
42KJ	Yellowstone River between Bighorn and Tongue Rivers	4,767	255
43A	Shields River	3,395	109
43B	Yellowstone River above & including Bridger Creek	4,860	315
43E	Pryor Creek (Public meeting in Hardin & Billings on August 30, 2011)	629	Decree issued 2/2/2010 Notice of Intent to Appear Deadline is 9/26/2011
43O	Little Bighorn River (Public meeting in Hardin & Billings on August 30, 2011)	1,176	Decree issued 3/3/2010 Notice of Intent to Appear Deadline is 10/03/2011
43Q	Yellowstone River between Clarks Fork Yellowstone and Bighorn Rivers	2,473	104
76F	Blackfoot River	3,717	Decree issued 2/10/2011 Extended Objection Deadline 11/7/2011
76HF	Bitterroot River - Westside Subbasin	3,774	138
United States Forest Service - Montana Compact — Several Objections Still Pending - Discovery and Pre-hearing Deadlines, and December 5-6, 2011 Missoula hearing dates have been set.			
United States Bureau of Land Management - Montana Compact — Compact Approved June 29, 2011			

Although the Water Court has completed most of its review of the current Summary Reports (basically draft decrees), it will not be issuing any new decrees for a few months. Following the issuance of the last several decrees, the United States filed an increasing number of general objections contending some of the claims examination has been deficient. The Water Court is in the process of requesting some additional checks and standards to be run on prospective decrees and anticipates ordering a more detailed examination of claim ownership issues on Indian Reservations.

In 2010, decrees were issued in the Pryor Creek (43E) and the Little Bighorn River (43O) basins. Many of the claims in these basins are within the boundaries of the Crow Reservation. The Crow Tribe and/or the United States Bureau of Indian Affairs have filed objections to almost every claim on the Little Bighorn River and to a sizable number on Pryor Creek. A significant number of the tribal objections involve Section 2 of the 1920 Crow Allotment Act. Many water users, including tribal and non-tribal water users, have filed motions to dismiss and motions for sanctions against the Tribe and its attorney. The Water Court has consolidated these motions into two cases for early resolution.

Pursuant to the request of Senator Brenden, the Water Adjudication Advisory Committee is examining options concerning claims which were “exempt” from the filing requirements of the 1979 legislation (SB 76) which created the statewide water rights adjudication effort. Senator Brenden has requested the Advisory Committee to report its review to the EQC. The Advisory Committee has met twice and is scheduled to meet again on September 19, 2011.

The 2011 Legislature increased the Water Court staff by 3.5 FTEs to be phased in over the 2013 fiscal biennium. It is anticipated that a half time administrative FTE (deputy clerk) will begin in September 2011; a new Water Master in January 2012; and a new law clerk and Associate Water Judge in July 2012. Applications for the Associate Water Judge will likely be advertised in January 2012.

On June 23, 2011, the Montana Supreme Court reversed the Water Court's earlier decision which held that Montana Trout Unlimited did not have standing or "good cause" to challenge water right claims in the Big Hole River basin decree. *Montana Trout Unlimited v. Beaverhead Water Company, et al.*, 2011 MT 151. The Supreme Court, Chief Justice McGrath authoring the majority opinion, concluded that "there is no statutory or regulatory restriction on who is entitled to file an objection to a claim . . . ." and MTU "has a sufficient ownership interest in water or its use to demonstrate 'good cause' to require the Water Court to hold a hearing or hearings on its objections under § 85-2-223, MCA." *MTU* ¶ 23 and ¶ 34.

Justice Nelson agreed MTU had standing, but he disagreed with the Majority's broad construction of § 85-2-233(1)(b), MCA. He thought it would have been better to "hold that a demonstrated interest in the use of the water, coupled with a personal and concrete injury resulting from the decree, is necessary to establish 'good cause' under the statute." *MTU* at ¶¶ 65 and 66. He said the majority opinion "effectively reads the 'good cause' requirement out of the statutory scheme" and that the "Court has transformed the adjudication of water rights into a broad public participation process - a result not contemplated by the statutory scheme." *MTU* at ¶¶ 59 -60.

Justice Rice dissented and would have affirmed the Water Court decision. He agreed with Justice Nelson's interpretation that the majority opinion "broadly opened the Water Court to a public participation process which was not intended under the statutes." *MTU* at ¶ 73. In addressing the dissenting views, Chief Justice McGrath asserted that the Court's "interpretation of § 85-2-233, MCA, does not render the word 'ownership' meaningless or expand the right to be heard on an objection to a preliminary decree to every person in the State of Montana. Rather, it is consistent with the statute as a whole and with the intent of the Legislature in developing a comprehensive water rights adjudication process." *MTU* at ¶ 35.

Although it is too soon to know what effect the *MTU* decision will have on Montana's statewide water rights adjudication, the decision has the potential of broadening the participation and number of possible objectors. However, the practical effect of the decision will probably be less than one might expect. The speed and intensity of the adjudication effort, jump started by the 2005 Legislature, is rapidly accelerating. As the number of active decrees increases over the next few years, the pace of litigation will intensify even more. The Water Court anticipates the number of claims requiring active attention will triple within the next few years. Therefore, becoming significantly involved in this process will require a relentless and constant attention to Water Court deadlines and other details. Any person or organization seeking to participate in the adjudication of water rights on many claims or on a broad scale will likely need to maintain a well trained and busy professional staff for many years in order to do so.



# Basin Location and Adjudication Status

## 8/10/11

