

**White Paper on the Montana Water Rights Adj
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Purpose

After almost 25 years and the expenditure by the State of Montana of over \$37.5 million dollars, no end is in sight for the adjudication of pre-July 1, 1973 water rights. No estimate is available of the amount of money spent by private individuals seeking to confirm their water rights through this process. No estimate is available of the costs imposed by the uncertainty resulting from the incomplete adjudication on land transactions and water related economic activity. As the years pass, knowledge of historic uses of water - the key determinant in the adjudication decisions - is being lost. In addition, today, the burden of achieving an accurate adjudication falls heavily, and probably too heavily, on individual water users. Before another generation passes, Montana water users need accurate, enforceable water right decrees to facilitate the management and use of water. These water rights decrees also need to be "living" decrees in the sense that they can be accessible and easily updated to reflect changing conditions of water use. While these issues may be well-known in the community of agencies, water rights lawyers and consultants, they are not under active consideration by water user groups and individual water rights holders.

This paper is written by a local watershed group, the Upper Clark Fork River Basin Steering Committee (Steering Committee)¹, to stimulate such considerations. The Steering Committee believes that a timely and accurate completion of the adjudication is critical to the collective welfare of the State and individual water users. We also believe that this collective welfare is threatened unless water user groups and individual water rights holders act to discuss, identify, and demand implementation of solutions for these key adjudication issues. At the conclusion of this paper we offer some ideas to address these issues, but the primary purpose of this paper is to stimulate attention to the ongoing water rights adjudication and to urge creation of an active coalition of the water interests that will be needed to make the changes in the adjudication process. To succeed, this coalition must include, first and foremost, water users together with the Montana Water Court and the Montana Department of Natural Resources and Conservation.

¹ The Steering Committee was formed in 1991 pursuant to a 1991 Montana statute. Its members include six people appointed by the upper Clark Fork basin's (the area of the Clark Fork River basin above Milltown Dam) six counties, six appointed by the basin's six conservation districts, and ten appointed by the DNRC Director. The Steering Committee's 1991 statutory mandate included drafting a water management plan for the basin which it completed in December 1994. In 1995, the mandate was changed to include implementing and revising the initial plan. See 85-2-338 MCA and *The Upper Clark Fork River Basin Water Management Plan*.

Background

Article IX Section 3 (4) of the 1972 Montana Constitution directs the Montana legislature to “provide for the administration, control and regulation of water rights” and (to) “establish a system of centralized records.” The Constitution’s framers included these provisions because by 1972 the status of Montanans’ right to use water was often not known. Since before statehood, people had been acquiring water rights in one of two ways, either by diverting water and putting it to use or later by posting a notice of intent to use water and filing the notice with the county clerk. No written record existed for rights acquired the first way, the so-called use rights. Montana courts struck down part of the second process, so for over 100 years water rights were developed without any centralized record keeping. As a result, the state struggled with developing a mechanism to administer both existing and new water rights. In response to the Constitution’s directive, the Montana legislature in 1973 passed the Montana Water Use Act, which established a centralized record system for water rights and required that all water rights existing prior to July 1, 1973 must be finalized, documented and quantified through a statewide water rights adjudication in state courts.

In November, 1978, the legislature’s Subcommittee On Water Rights completed and submitted “Determination of Existing Water Rights: A Report to the 46th Legislature” recommending the establishment of a general, statewide adjudication of existing water rights in Montana. The report listed two objectives of the adjudication:

- “Quantify water use rights to protect users in our jurisdiction from claims exerted by other jurisdictions and out-of-state interests”, and
- “Provide a basis for better internal administration by (1) resolving disputes among rivals; and (2) provide a base knowledge from which to determine availability of waters for future appropriation.” (Report to the 46th Legislature, p. 5)

In the course of its recommendations, the Subcommittee underscored the need for an accurate adjudication as follows: “We need to establish an accurate basis upon which to make decisions for the allocation of new water rights. *Existing rights must be firmly established in definite quantities so judgments may be made as to the amount of water that may be available in a stream for further appropriation by permit. . . . Proper water planning depends on the establishment of accurate records of water use. . . .*” (Emphasis added). (Report to the 46th Legislature, pp. 9-10.)

In 1979, the Montana legislature largely adopted the Subcommittee recommendations and mandated a state-wide adjudication of all pre-July 1, 1973 water rights and created the Montana Water Court to implement it. The adjudication process

began with an initial filing deadline of April 30, 1982. This deadline was extended by the 1993 legislature to July 1, 1996. Since these filing deadlines, the Water Court assisted by the Montana Department of Natural Resources (DNRC) has labored to examine and sort out 219,413 water rights claims in Montana's 85 basins. After almost 25 years, the Water Court has issued six "final" decrees.² No one knows when the adjudication might be completed.

The adjudication process currently involves a number of steps, beginning with the filing of water right claims and continuing with the examination of those claims by the DNRC, the issuance by the Water Court of a temporary or preliminary decree, the filing of objections on the decree by individuals, the convening by the Water Court of formal hearings on the objections, and, finally, the issuance by the Water Court of a final decree.

The last step in which preliminary decrees are converted to final decrees requires the incorporation into the decree of federal reserved water rights. Federal reserved water rights were created by the United States Supreme Court when it ruled on the Winters case,³ which involved a Fort Belknap Indian Reservation water claim. In the Winters decision, the Supreme Court held that when Congress or the President sets aside land out of the public domain for a specific federal purpose, such as an Indian reservation, National Park, or National Forest, a quantity of water is impliedly reserved which is necessary to fulfill that primary federal purpose. A federal reserved water right has a priority date as of the date the land was withdrawn and the reservation was created; it cannot be lost through nonuse.

In 1952, the United States Congress passed the McCarran Amendment⁴ which subjected federal reserved water right determinations to state court. In 1979, the legislature created the Montana Reserved Water Rights Compact Commission (Compact Commission) and assigned it the job of negotiating agreements with federal agencies and Indian tribes holding reserved water rights. The agreement must quantify the reserved water right. The resulting agreement must be signed by the negotiating parties and the appropriate federal officials, be approved by the Montana legislature (and the U.S. Congress, in some cases) and go to the Water Court for incorporation into a final decree for the specific water basins involved.

² While six decrees are issued which DNRC describes as "final," they will have to be re-opened, so, arguably, even those "final" decrees are not truly final. *See* Mont. Code Ann. § 85-2-237 (reopening and review of decrees).

³ *Winters v. United States*, 206 U.S. § 564 (1908)

⁴ 43 U.S.C. § 666

Adjudication Pace and Resources

When it passed legislation in 1979 to set the adjudication into motion, the legislature estimated that 100 full time equivalents (FTE's) of state personnel would be required to conduct the work to complete the adjudication within ten years. However, today, after almost 25 years, the Water Court has only six water masters and three administrative support positions in addition to the chief water judge. The DNRC has only 9.8 FTEs assigned to assisting the Water Court deliberations. The legislature's failure to provide and maintain adequate staffing and funding levels is one of the primary causes of the adjudication's slow pace. In addition, past disputes between the Water Court and the DNRC over the accuracy of the adjudication process led the Department not to seek reinstatement of cuts to the adjudication budget and to reduce staff assigned to the adjudication effort.

The Water Court has issued temporary preliminary decrees in 35 basins and 2 subbasins and preliminary decrees in 11 basins and 1 subbasin. Water users in 4 of the basins with preliminary decrees are attempting to enforce the decrees.⁵ The DNRC is presently examining water rights claims in 19 basins. DNRC has not yet begun examining claims in 15 basins, including the Flathead and Blackfoot basins. No one knows how many more decades will pass before the adjudication is completed under current funding and staffing conditions, although DNRC estimates it will take 25-28 years just to complete claims examination at the present pace.

Historic water use is the basic building block of the adjudication. As time passes, people knowledgeable about historic water use are moving away, losing interest, becoming incapacitated, or dying. The loss of this information will decrease the ability of water users both to defend their water rights claims and to file and resolve objections to water rights claims. Each year that passes, therefore, damages the efficacy of the adjudication process.

Decree Accuracy

The issue of whether the adjudication is producing decrees that accurately reflect existing water rights as of 1973 has been a recurring one. In 1988, a study commissioned by the legislature determined that it could not conclude the accuracy of the adjudication under the limitations of its funding.⁶ The report suggested that mechanisms are in place

⁵ According to a Tim Hall, a DNRC attorney, more decrees could be enforced if water users invoked the statutory provisions allowing them to enforce them. *See* Mont. Code Ann. § 85-2-406.

⁶ Evaluation of Montana's Water Rights Adjudication Process, September 30, 1988 p. 55.

which could be invoked to assure the accuracy of water rights decreed. The primary mechanisms include:

- 1) DNRC claim verification;
- 2) The call-in of the claimant on the court's own motion;
- 3) The direction for a field investigation by DNRC at the discretion of the water judge; and
- 4) Neighbor objecting to neighbor.⁷

Under current practices, the burden of assuring accurate decrees is falling largely on the fourth category, objections by water users. As stated above, the adjudication begins with the filing of claims by water users and continues with an examination of the claims by the DNRC pursuant to rules adopted by the Montana Supreme Court. If the examiner finds a problem with the claim, such as an incorrect identification of the place of water diversion or use, an incorrect priority date, or a claim in excess of the amount of water historically put to beneficial use, an issue remark noting the problem is added to the claim. The Water Court next assembles the claims into a decree, and issues a notice to all basin water rights holders beginning a 180-day period in which basin water rights holders can file objections to the decree. Objections are resolved through hearings before the Water Court's masters or the Court itself. Claims not receiving objections from basin water rights holders are now generally being passed through to the next stage of the adjudication process without further scrutiny, including claims with DNRC issue remarks.

While the Water Court has confirmed its authority to call claims in for review on its own motion, it has largely declined to do so in the last several years.⁸ This means that if individual water right holders, including state and federal agencies, do not object, water rights claims will likely be passed through to the final decree, including those with problems identified by DNRC examination. In practice, no government agency is examining every claim for objection. While they probably have the best knowledge about historical water use in their immediate vicinity, individual water users may fail to file objections to inaccurate water rights claims for several reasons, including lack of knowledge of the inaccuracy, reluctance to dispute their neighbors, and lack of financial resources necessary to file an objection and/or to pursue the objection through the legal process. In larger basins with thousands and in some instances tens of thousands of water

⁷ Ibid. at p. 56

⁸ In 2000, the water court specifically signaled its intent not to call claims in on its own motion, noting, "Frankly, when we went to the On Motion decision, we pulled back on all those on motions. We have taken the position that, by and large, that's not our problem." Meeting on Water Court Rules, November 21, 2000, p. 24 (<http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-5939>).

rights claims, individual water users cannot be expected to scrutinize every claim and to pursue more than a few objections. When the adjudication began, individual water users were urged by the Water Court and the DNRC to err on the side of claims that were too large. Given this fact, sole reliance on neighbor objecting to neighbors may put the accuracy of the adjudication at risk.

Inaccurate decrees would undermine the intent of the adjudication in a number of ways. First, if a final decree recognizes water claims in excess of what was historically used, then the claimant could expand acreage or increase a flow rate to the amount decreed without any further review as to how that action would affect neighboring water rights. Such recognition of excessive claims would likely lead to further conflict in the future. Also, uncorrected clerical errors, misidentified points of diversions and places of use, and unresolved overlapping and redundant water rights claims may undermine water administration by water commissioners.

Second, inaccurate decrees may not only deny water to which individual water rights holders are legally entitled, they may also threaten the validity of the entire adjudication. The McCarran Amendment which subjects federal reserved water rights to state water rights adjudication processes does so subject to the condition that the adjudication be sufficiently accurate. Errant claims incorporated by the Water Court into decrees because no one objected to them may provide the legal basis for a federal court acting at the behest of a federal reserved right holder or a down-stream state to challenge Montana's adjudication.

A subgroup of a committee created by the Water Court to advise it on the adjudication has proposed that the Court implement the second mechanism identified in the 1988 study - the call-in of the claimant on the court's own motion - as an important means of addressing the accuracy concern. The subgroup has proposed that the Court give notice that it will on its own motion call in claims with DNRC issue remarks to which no objections have been filed. The proposal would leave to the Court's discretion at what point in the adjudication process it would do so. The proponents of this "on motion" proposal argue that such notice by the Water Court would motivate claimants to resolve most issue remarks with the DNRC prior to any Court action on them, thereby improving claim and ultimately decree accuracy without substantially increasing either the length or the cost of the adjudication process.

Water Rights Enforcement

The ability to enforce water rights is fundamentally important to Montana water users. Several options exist for enforcing water rights. Individual water right holders

may: file an action in state district court to enforce an old decree[85-2-406(2) (a) MCA]; file an action for relief where no new decree yet exists [85-2-406(2)(b)]; or, in basins for which a new enforceable water court water rights decree exists, may petition district court to appoint a water commissioner to administer the new water court decree [85-2-406(4)].⁹ The water commissioner approach offers cost and timeliness advantages over individual litigation to obtain access to water. A critical challenge for water uses regarding the water commissioner approach is obtaining an enforceable decree. Water rights holders in basins with decrees issued by state courts prior to July 1, 1973 (old decrees) have routinely and successfully petitioned district courts for the appointment of a water commissioner. To date four basins¹⁰ have petitioned the Water Court through a district court for an enforceable Water Court decree pursuant to 85-2-406(4). Even with additional funding and staffing resources, considerable additional time will be required to carry out the last step necessary to achieve final decrees, incorporating federal reserved water rights. The Water Court has appeared to favor prioritizing this petitioning route for achieving enforceable decrees sooner rather than later.

The ongoing adjudication is causing uncertainty for water rights enforcement in basins with old decrees. Because the preliminary decrees may not incorporate all of the historic use information in the old decrees, preliminary decrees issued by the Water Court may be in conflict with historic and existing uses. Because the new Water Court decrees are not final, and with the noted exceptions are not being enforced, water commissioners and district judges have questions about how the new decrees should be integrated into basin water management.¹¹

Creating a “Living” Water Rights Decree

DNRC’s centralized water resource system includes water rights and changes issued after 1973 under the Water Use Act as well as statements of claims of existing water right claims filed in the adjudication. Eventually, it will also include the outcome of the Water Court’s adjudication of those claims. The system of records exists in three

⁹ The petition must include at least 15% of the water rights affected by a decree, or if less than 15% sign, then the district judge may at his or her discretion appoint a water commissioner (85-5-105(1)). The district court may also appoint a water commissioner to administer stored water.

¹⁰ The four basins are the West Gallatin River, Basin 41H, Sweet Grass Creek, basin 43BV, Silver Creek in Basin 41I, and the Musselshell River in Basins 40A and 40C.

¹¹For example, *Montana Water, Electric Power and Mining Company v.s Mary Schuh* dealing with the adjudication of water rights on upper Flint Creek has numerous operating conditions for Georgetown Lake that were not incorporated into the preliminary decree for Flint Creek (basin 76 GJ).

forms: archives of original documents, microfiche records, and electronic data files. Particularly in the electronic files, DNRC records contain updated information not included in hard-copy basin water rights decrees issued by the Water Court such as changes in ownership, modifications to existing water rights authorized by the change statute, and other legally allowed modifications. These differences between the DNRC data base and “signed decrees” will grow over time.

These differences are already causing confusion in water rights administration and will continue to do so unless some way is found to create a “living” water rights decree that reflects the reality of water rights from year to year, not just the year in which a final decree was issued. Although a living decree is technologically and physically possible, current law does not provide for such a decree. Legislative amendments may be needed to allow updating of a final decree using the latest computer database information, to provide notice that an updated final decree is available for inspection to correct errors, and to provide a process to challenge inaccurate updates. Water users and water commissioners would then have the benefit of a living decree which would be more useful for administration of water rights.

Steering Committee Recommendations

- **More Funding and Staff** - The most critical problem with the adjudication is the pace at which it is producing accurate and enforceable decrees. The legislature must be convinced to provide both the Water Court and the DNRC with additional funding and staff. Montana cannot afford to wait another 25 to 50 years before finalizing pre-1973 water rights. The Water Court and the DNRC are currently working together to determine the additional funding and staff necessary to complete the adjudication within 15 years. Water users should work with the legislature to secure these additional resources and with the DNRC to ensure that it will apply these resources to speed completion of its claims review responsibility.
- **Enforceable Decrees** - The Water Court should be supported in prioritizing use of the petition process to allow temporary preliminary or preliminary decrees to be enforced. Basins with water use conflicts need the option of obtaining a commissioner to enforce water rights.
- **On Motion Claims Review** - The Water Court should rule or the Montana Supreme Court or the legislature should clarify that all claims with unresolved DNRC issue remarks will be called before the Water Court. Doing so should elevate the importance of the DNRC claims evaluation and encourage claimants to work with DNRC to eliminate issue remarks. The more errors that can be resolved through the DNRC

work, the fewer that will be left to individual water rights holders to correct through the objection process. The on motion review is needed because it is unrealistic to rely solely on the knowledge, time, and financial resources of individual water users to file and pursue objections to ensure the adjudication's accuracy. However, the timing of when in the process the Water Court calls in claims on its on motion should be left to its discretion so as not to halt work needed to produce enforceable decrees

- “Living” Decrees - Water users should work with the Water Court, DNRC and the legislature to authorize “living” decrees by allowing DNRC to update decrees using the latest computer database information such as ownership updates, by providing notice that updates are available for inspection to correct errors, and, finally, by providing a process to challenge inaccurate updates.

Conclusion

In granting a water right, the state authorizes the right holder to put water to a beneficial use. These rights are critical to the allocation of water. Water, of course, is fundamental to the financial well-being and quality of life of individual Montanans and our state as a whole. Without a complete and accurate state-wide water rights adjudication, the status of Montanan's water rights is uncertain. This uncertainty threatens the livelihoods of farmers and ranchers, the viability of water dependent industries, the value and marketability of real property, and the health of fisheries and aquatic ecosystems. The Steering Committee urges water user organizations, watershed groups, and individual water users to study these issues, help in devising solutions to them, and then support the legislature, judiciary, and executive branch in implementing them.