

HOUSE BILL NO. 942

INTRODUCED BY M. MALONE

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO WATER COMMISSIONERS; LIMITING THE COMPENSATION OF WATER COMMISSIONERS; PROVIDING FOR 1-YEAR TERMS FOR WATER COMMISSIONERS; PROVIDING FOR THE ACCOUNTING OF OTHER COSTS FROM WATER COMMISSIONERS; REQUIRING AN EDUCATION FEE; AMENDING SECTIONS 85-5-101, 85-5-102, 85-5-104, 85-5-107, 85-5-111, 85-5-201, 85-5-204, AND 85-5-301, MCA; AND REPEALING SECTION 85-5-203, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-5-101, MCA, is amended to read:

"85-5-101. Appointment of water commissioners. (1) (a) Whenever the rights of persons to use the waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply have been determined by a decree of a court of competent jurisdiction, including temporary preliminary, preliminary, and final decrees issued by a water judge, it is the duty of the judge of the district court having jurisdiction of the subject matter, upon the application of the owners of at least 15% of the water rights affected by the decree or at least 15% of the flow rate of the water rights affected by the decree and after notice of the application and an opportunity to comment by all water right holders subject to the enforcement application, in the exercise of the judge's discretion, to appoint one or more commissioners.

(b) The commissioners have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates, permits, and changes in appropriation right issued under chapter 2 of this title. When petitioners make proper showing that they are not able to obtain the application of the owners of at least 15% of the water rights affected or at least 15% of the flow rate of the water rights affected and they are unable to obtain the water to which they are entitled, the judge of the district court having jurisdiction may appoint a water commissioner.

1 (2) When the existing rights of all appropriators from a source or in an area have been determined
2 in a temporary preliminary decree, preliminary decree, or final decree issued under chapter 2 of this title, the
3 judge of the district court may, upon application by both the department of natural resources and conservation
4 and one or more holders of valid water rights in the source, appoint a water commissioner. The water
5 commissioner shall distribute to the appropriators, from the source or in the area, the water to which they are
6 entitled.

7 (3) The department of natural resources and conservation or any person or corporation operating
8 under contract with the department or any other owner of stored waters may petition the court to have stored
9 waters distributed by the water commissioners appointed by the district court. The court may order the
10 commissioner or commissioners appointed by the court to distribute stored water when and as released to
11 water users entitled to the use of the water.

12 (4)— (a) At the time of the appointment of a water commissioner or commissioners, the district court
13 shall fix their compensation subject to subsection (4)(b), require a commissioner or commissioners to purchase
14 a workers' compensation insurance policy and elect coverage on themselves, and require the owners and users
15 of the distributed waters, including permittees, certificate holders, and holders of a change in appropriation
16 right, to pay their proportionate share of fees and compensation, including the cost of workers' compensation
17 insurance purchased by a water commissioner or commissioners. The judge may include the department in the
18 apportionment of costs if it applied for the appointment of a water commissioner under subsection (2).

19 (b) Compensation for a water commissioner may not exceed 15% of the annual salary, not
20 including benefits, of the judge appointing and overseeing the water commissioner. If there is more than one
21 water commissioner, the total compensation may not exceed the annual salary, not including benefits, of the
22 judge appointing and overseeing the water commissioners, except that each water commissioner may not
23 receive compensation in excess of 15% of the annual salary of the judge, not including benefits.

24 (5) Upon the application of the board or boards of one or more irrigation districts entitled to the use
25 of water stored in a reservoir that is turned into the natural channel of any stream and withdrawn or diverted at
26 a point downstream for beneficial use, the district court of the judicial district where the most irrigable acres of
27 the irrigation district or districts are situated may appoint a water commissioner to equitably admeasure and
28 distribute stored water to the irrigation district or districts from the channel of the stream into which it has been

1 turned. A commissioner appointed under this subsection has the powers of any commissioner appointed under
2 this chapter, limited only by the purposes of this subsection. A commissioner's compensation is set by the
3 appointing judge and paid by each district and other users of stored water affected by the admeasurement and
4 distribution of the stored water. In all other matters, the provisions of this chapter apply so long as they are
5 consistent with this subsection.

6 (6) A water commissioner appointed by a district court is not an employee of the judicial branch, a
7 local government, or a water user.

8 (7) A water commissioner who fails to obtain workers' compensation insurance coverage required
9 by subsection (4) is precluded from receiving benefits under Title 39, chapter 71, as a result of the performance
10 of duties as a water commissioner.

11 (8) A water commissioner must reside in the water division, as described in 3-7-102, in which the
12 water commissioner admeasures and distributes waters.

13 (9) The term for a water commissioner may not exceed 1 year from the date of appointment unless
14 the water commissioner is reappointed pursuant to the petition process required by this section."

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16 **Section 2.** Section 85-5-102, MCA, is amended to read:

17 **"85-5-102. Appointment of chief commissioner.** (1) When the judge of the district court appoints
18 two or more commissioners to admeasure and distribute the waters mentioned in 85-5-101, the judge may
19 appoint one of them as chief commissioner and empower the chief commissioner to exercise direction and
20 control over the other commissioners in the discharge of their duties. The judge may depose the person
21 appointed as chief commissioner from that position and appoint another as chief commissioner whenever it
22 appears to the judge that better service may be given to the water users by making the change.

23 (2) A chief commissioner must reside in the water division, as described in 3-7-102, in which the
24 water commissioner admeasures and distributes waters.

25 (3) Subject to 85-5-101(4)(b), compensation for a chief commissioner may not exceed 15% of the
26 annual salary, not including benefits, of a judge appointing and overseeing the chief commissioner.

27 (4) The term for a chief commissioner may not exceed 1 year from the date of appointment unless
28 the chief commissioner is reappointed pursuant to this section and the petition process required by 85-5-101."

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2 **Section 3.** Section 85-5-104, MCA, is amended to read:

3 **"85-5-104. Term of office.** A-(1) Subject to subsection (2), a water commissioner holds office for the
4 time during the irrigation season of each year that may be designated by the judge in the order making the
5 appointment. The judge may fix the date of the commencement of the term and may, in in the judge's discretion
6 or when requested in writing by at least three persons entitled to the use of the waters, change the term for
7 closing of the commissioner's service.

8 (2) The term for a water commissioner may not exceed 1 year from the date of appointment unless
9 the water commissioner is reappointed pursuant to the petition process required by 85-5-101."

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11 **Section 4.** Section 85-5-107, MCA, is amended to read:

12 **"85-5-107. Record of distribution of water.** (1) (a) Each water commissioner shall keep a daily
13 record, unless a different recording schedule is ordered by the district judge, of the amount of water distributed
14 to each water user and shall file a summary of the record with the clerk of the court monthly or seasonally, at
15 the discretion of the district judge during the judge's term of service. The report must show in detail the total
16 amount of water distributed to each water user during the month or the season and the cost of distributing the
17 water, based upon the water commissioner's or commissioners' daily salary, other costs of the water
18 commissioner or commissioners approved by the district judge and subject to subsection (1)(b), and the
19 proportionate amount of water distributed. When two or more water commissioners serve under the same
20 decree or decrees by order of the judge, they may file a joint summary of their records with the clerk of the
21 court, or the chief commissioner, if one has been appointed by the judge, may file a summary on behalf of all of
22 them.

23 (b) A water commissioner shall provide the district judge with an itemized accounting of other
24 costs. These other costs must be reasonable and necessary for the distribution of water.

25 (2) If the district court judge determines that it is necessary to establish a billing cycle prior to a
26 distribution season, as provided in 85-5-204, the report or reports must serve as the basis for the amounts
27 billed."

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1 **Section 5.** Section 85-5-111, MCA, is amended to read:

2 **"85-5-111. Water commissioner and mediator education.** (1) The department of natural resources
3 and conservation, in cooperation with the Montana supreme court, the Montana water courts, the district courts
4 of Montana, the Montana university system, and other appropriate state and federal agencies, shall develop an
5 educational program for water commissioners and mediators that includes:

- 6 (a) an annual seminar on commissioner and mediator duties, mediation techniques, and water
7 measuring techniques;
- 8 (b) preparation and, as necessary, revision of a water commissioner and mediator manual; and
- 9 (c) an outreach program that identifies persons who might serve as water commissioners or
10 mediators.

11 (2) Unless a district court judge having jurisdiction determines otherwise, a water commissioner
12 appointed pursuant to 85-5-101 shall complete at least one educational program as provided in subsection (1)
13 prior to administering water.

14 (3) A water commissioner shall pay an education fee of \$50 for each educational program."

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16 **Section 6.** Section 85-5-201, MCA, is amended to read:

17 **"85-5-201. Distribution of water and related expenses.** (1) Each water commissioner appointed by
18 the judge of the district court for the purpose of distributing water has the authority to determine the appropriate
19 quantity and distribute to the parties interested, under a decree, permit, certificate, or change in appropriation
20 right, the water to which those who are parties to the decree or holders of a permit, certificate, or change in
21 appropriation right, or privy to a permit, certificate, or change in appropriation right, are entitled, according to
22 their priority as established by the decree, permit, certificate, or change in appropriation right.

23 (2) The water commissioner may incur necessary expenses in the making of headgates or dams
24 for the distribution of the waters if the parties fail or refuse to do so. Expenses associated with making
25 headgates or dams for the distribution of water must be assessed against and paid by the party or parties for
26 whom the ditch or ditches were repaired or the dams or headgates were made. In the discretion of the court,
27 the costs or expenses may be assessed against the land upon which or for the benefit of which the expense
28 had been incurred.

1 (3) (a) At the district court's discretion, a water commissioner may bill water users prior to the
 2 beginning of a distribution season for the purpose of offsetting costs associated with distributing water and
 3 water commissioner duties by submitting the information necessary for the billing to the clerk of the district
 4 court. A billing issued prior to the beginning of a distribution season:

- 5 (i) must be assessed on a per-user basis;
- 6 (ii) must be based on the report provided for in 85-5-107 for the prior year; ~~and~~
- 7 (iii) may not exceed 80% of the amount that was provided to the district court pursuant to 85-5-107
- 8 for the prior distribution season on a per-user basis; and
- 9 (iv) may include other costs that are reasonable and necessary for the distribution of water.

10 (b) Upon receipt of the information from the water commissioner, the clerk of district court shall
 11 proceed as provided in 85-5-204."

13 **Section 7.** Section 85-5-204, MCA, is amended to read:

14 **"85-5-204. Apportionment of fees and expenses.** (1) Upon the filing of the report by the water
 15 commissioner or water commissioners, the clerk of court shall notify by letter each person mentioned in the
 16 report:

- 17 (a) of the amount the water user is made liable for by the report;
- 18 (b) of an itemized accounting of other costs that are reasonable and necessary for the distribution
- 19 of water pursuant to 85-5-107(1)(b);
- 20 (c) that objections to the report and the amount taxed against the water user may be made by any
- 21 person interested in the report or the amount assessed against the water user within 20 days after the date of
- 22 the mailing of the notice; and
- 23 ~~(e)(d)~~ that, unless objections are filed, an order will be made by the judge of the district court finally
- 24 fixing and determining the amount due from each of the water users.

25 (2) The affidavit of the clerk that the clerk has mailed a notice to each person mentioned in the
 26 report at the person's last-known post-office address, in the usual manner, must be considered prima facie
 27 evidence that the person received the notice provided for in this section.

28 (3) At the discretion of the district judge, the water commissioner may issue a bill prior to the

1 beginning of a distribution season for the purpose of offsetting costs associated with distributing water and
2 water commissioner duties by submitting the information necessary for the billing to the clerk of the district
3 court. The bill for each water user may not exceed 80% of the amount that was provided to the district court
4 pursuant to 85-5-107 for the prior distribution season.

5 (4) If the cost of distributing water during a distribution season is less than the amount that was
6 collected through a bill issued prior to a distribution season, the water commissioner shall refund the money to
7 the water user based on the amount of water that the water user received during the distribution season. The
8 water commissioner shall submit a refund report, along with proof that any refunds were issued, to the clerk of
9 district court for filing."

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11 **Section 8.** Section 85-5-301, MCA, is amended to read:

12 **"85-5-301. Complaint by dissatisfied user.** (1) A person owning or using any of the waters of the
13 stream or ditch or extension of the ditch who is dissatisfied with the allocation of other costs and the method of
14 distribution of the waters of the stream or ditch by the water commissioner or water commissioners and who
15 claims to be entitled to more water than the person is receiving or to a right prior to that allowed the person by
16 the water commissioner or water commissioners may file a written complaint, duly verified, setting forth the
17 facts of the claim.

18 (2) Upon receipt of the complaint, the judge shall fix a time for the hearing of the petition and shall
19 direct that notice be given to the parties interested in the hearing as the judge considers necessary. At the time
20 fixed for the hearing, the judge shall hear and examine the complainant and other parties who appear to
21 support or resist the claim and examine the water commissioner or water commissioners and witnesses
22 regarding the charges contained in the complaint.

23 (3) Upon the determination of the hearing, the judge shall make findings and issue an order that
24 the judge considers just and proper. If it appears to the judge that the water commissioner or water
25 commissioners have incurred other costs that are not reasonable and necessary or have not properly
26 distributed the water according to the provisions of the decree, permit, certificate, or change in appropriation
27 right, the judge shall give the proper instructions for distribution of the water and adjust the amount of other
28 costs.

1 (4) The judge may remove any water commissioner and appoint a new water commissioner if the
2 judge determines that the interests of the parties in the waters mentioned in the decree, permit, certificate, or
3 change in appropriation right will be best served by appointing a new water commissioner. If it appears to the
4 judge that the water commissioner has willfully failed to perform the water commissioner's duties or inflated
5 other costs beyond those that are reasonable and necessary, the water commissioner may be proceeded
6 against for contempt of court, as provided in contempt cases. The judge shall make an order regarding the
7 payment of costs of the hearing that the judge determines is just and proper."

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9 NEW SECTION. Section 9. Repealer. The following section of the Montana Code Annotated is

10 repealed:

11 85-5-203. Telephone expenses.

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