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Memorandum

To: Environmental Quality Council

From: Krista Lee Evans
Research Analyst

RE: Water Commissioners in areas with enforced decrees

Date: July 3, 2006

At the May EQC meeting the committee requested more information regarding water commissioners and how they are compensated when they are working in an area that is enforcing a decree. On July 18th, you will be hearing from a panel of individuals who have experience with enforcing water court decrees and paying the water commissioners for their services. The purpose of this paper is to provide background information for you regarding water commissioners and the statutes that govern how water commissioners operate, rights of water users, and provisions for addressing disagreements. This is a brief summary and does not address every single statute but provides a basic overview. If you have questions, comments or need additional information, don't hesitate to contact me at 444-1640 or kevans@mt.gov.

The statutes governing water commissioners and water mediators are generally contained in Title 85, chapter 1 of the Montana Code Annotated. Section 85-5-105, MCA, provides that "the purpose of parts 1 through 3 of this chapter is to provide a uniform, equitable, and economic distribution of adjudication, stored, and supplemental waters". These are the statute that govern the water commissioners.

What kind of authority does a water commissioner have?

The water commissioner operates under the authority of the district court that appointed the commissioner. Section 85-5-108, MCA, specifically states that "each commissioner appointed by the court shall have authority to enter upon any ditch, canal, aqueduct, or other source for conveying the water affected by the decree and to visit, inspect and adjust all headgates or other means of distributing the waters and shall have the same powers as a sheriff or constable to arrest any and all persons interfering with the distribution made by him, to be dealt with according to law".

What has to be done for a commissioner to be appointed and a stream to be enforced?

First, the area that is to be enforced must be part of a decree. Once a temporary preliminary, a preliminary, or a final decree has been issued, the area can be enforced.

There are a few different ways to get a decree enforced through the appointment and use of a water commissioner:

(1) At least 15% of the water rights affected by the decree must apply to the district court requesting the appointment of a commissioner and enforcement of the decree.

(2) If the petitioners can make proper showing that they are (a) not able to obtain application from 15% of the water rights and (b) that they are unable to obtain the water to which they are entitled, the district court judge having jurisdiction over the area may appoint a water commissioner.

(3) The Department of Natural Resources and Conservation (DNRC) and one or more holders of valid water rights in the source can apply to the district court for appointment of a water commissioner.

How does the commissioner know who gets water?

The commissioner distributes the water to water users based on the information contained in the decree that is being enforced. The first in time - first in right of the prior appropriation doctrine is important because water is delivered to water users based on the priority date of the water rights as they are identified and outlined in the decree. The water user with the earliest priority date gets their water first. If there is water left over after the earliest priority date is filled, the commissioner works down the list of priority dates until no water is available for distribution.

How is a water commissioner paid?

At the time appointment, 85-5-101(4), MCA, requires the district court to fix compensation including requiring the water commissioner to obtain their own workers compensation insurance. This same section of law provides that the owners and users of the **distributed** waters pay their proportionate share of fees and compensation. The judge may include DNRC in this apportionment.

The fact that the statute says "distributed" water indicates that the commissioner can not get paid until water has been distributed. Hence, the cause for concern from basins that are currently operating under an enforced decree. How can a water commissioner be paid until the water has been distributed for the season? This has been addressed differently in different basins - some basins bill on a monthly basis, at least one decreed water users group has taken out a loan to pay the commissioner salary and costs, and others require the commissioner to work throughout the season and receive payment

after the year end bills have been sent by the clerk of district court, based on the total amount of water distributed. Each of these options has their pros and cons but are examples of the ways citizens are trying to make the system work. With the increased speed of the adjudication and the time lines associated with completion of decrees it is very likely that Montana will see a substantial increase in the number of enforced decrees - especially if there is a water short year or two.

Can there be more than one commissioner?

Yes, there can be more than one commissioner if the district court judge chooses to appoint more than one. If the district court judge does appoint more than one commissioner to enforce the decree then one is identified as the chief water commissioner.

Who does the water commissioner work for?

The question of who a water commissioner works for has come up numerous times in the last 10-15 years. Primarily because of questions about workers compensation and who should be required to obtain the insurance and pay the associated costs. Section 85-5-101(6), MCA, provides that the water commissioner is essentially an independent contractor and is not an employee of the judicial branch, a local government, or a water user.

What is a commissioner's term of office?

The water commissioner's term is during the irrigation season of each year, as designated by the district court judge in the order making the commissioner's appointment. At the judge's discretion or upon written request of at least three people entitled to use the water that is subject to the enforcement the term for closing the commissioner's service may be extended.

How do water users pay for the commissioner?

Each water commissioner is required to keep a daily record of the amount of water distributed to each water user and must file a summary of the record with the clerk of the court monthly or seasonally depending on the judge's wishes. The report must show the amount of water delivered each day to each water user either for the month or the season. The record must also show the cost of delivering the water. The cost includes the commissioner's salary per day and other expenses approved by the district court. The cost per day is then split proportionately amongst the water users that received water. Once the report is filed, the clerk of the district court is required to notify, by letter, each person mentioned in the report of the amount the water user is made liable by the report.

What if a water user doesn't agree with the water commissioner's report?

When the clerk of court notifies the water users of the liability that has accrued to them based on the amount of water they have received for the month or the season, the clerk is also responsible for informing the water user that objections to the report and the amount assessed against the water user must be made within 20 days of the mailing of the notice. If objections are not filed, the judge will make an order finally fixing and determining the amount due from each of the water users identified in the report provided for in 85-5-107. MCA.

Pursuant to 85-5-205, MCA, if there is an objection filed within the 20-day window the court or judge will set a time for a hearing on the objections or motion to retax. The court or judge will set the hearing date at a time when it can conveniently hear the objections. Anyone who objected is entitled to receive at least 5 days notice of the hearing date.

At the hearing the court or judge shall hear and determine the motion or objections and shall issue an order fixing and determining the amount due from each of the water users.

What if a water user doesn't pay the amount due?

Once the order has been issued by the judge or the court, the order has the same force and effect as a judgement against the person to whom the water was admeasured and for whose benefit it was used. When the amount due is assessed against the land it serves as a lien against the land. A water commissioner can, at the commissioner's discretion, withhold further admeasurement or distribution of water to any person until all fees, compensation, and expenses of the water commissioner or water commissioners that have been fixed by the court and apportioned and charged to the person have been paid.

What if a water user is dissatisfied?

A person owning or using any of the waters of the stream or ditch or extension of the ditch who is dissatisfied with the method of distribution of the waters by the commissioner and who claims to be entitled to more water that is being received or to a water right prior to that allowed by the water commissioner may file a written complaint setting forth the facts. At the time fixed for the hearing by the judge, the judge must hear and examine the complainant and other parties to support or resist the claim and examine the water commissioner and witnesses as to the charges contained in the complaint. Upon determination of the hearing, the judge shall make findings and an order that the judge considers just and proper.

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