



**Montana Legislative Services Division**  
**Legal Services Office**

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TO: Water Policy Interim Committee Members  
FROM: Helen Thigpen, Staff Attorney  
DATE: December 18, 2015  
RE: Summary of Water Right Enforcement by District Courts.

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Montana's district courts play an important role in water right enforcement. Within Montana's 22 judicial districts, there are 56 district court judges who are elected to serve 6-year terms. As courts of general jurisdiction, district courts hear a wide variety of cases involving everything from homicide cases to probate and divorce cases. Occasionally these courts are asked to resolve disputes between water users, and in many of these cases, a water user will ask the court for an injunction to prohibit a party from interfering with the use of a water right. An injunction may be temporary or permanent and is an enforceable court order that requires a party to take a specified action.

If there is a decree from a district court that was issued before July 1, 1973, or a temporary preliminary, preliminary, or a final decree issued by the water court after July 1, 1973, the owners of at least 15% of the water rights affected by the decree may petition a district court to appoint a water commissioner to distribute water according to the decree. Similarly, if the water rights of all appropriators from a source or in a defined area have been determined, the DNRC and one or more water right holders may petition a district court to appoint a water commissioner to distribute water and resolve the distribution dispute.<sup>1</sup>

A water commissioner has the authority to measure and distribute water to the appropriate owners.<sup>2</sup> As a "first in time, first in right" jurisdiction, water commissioners distribute water to the most senior water right owners first. When a water commissioner is appointed and directed by a district court, a dispute may be easily settled because the water rights at issue have largely been determined.

When all of the existing water rights on a water course have not been determined, any party may petition a district court to certify the question of existing water rights to the Water Court. Pending a determination by the Water Court, a district court may issue an injunction or order other necessary relief. Certification proceedings are given priority over other adjudication matters at the Water Court.<sup>3</sup>

The Department of Natural Resources and Conservation may also ask a district court to take various actions to prevent the wasting or unlawful use of water. The DNRC may direct

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<sup>1</sup> § 85-5-101(1) and (2), MCA.

<sup>2</sup> § 85-5-101, MCA.

<sup>3</sup> § 85-2-406(2) MCA.

its attorneys, the attorney general, or a county attorney to bring suit to enjoin the unlawful use of water. The Attorney General or a county attorney may also bring an action independently of the DNRC.<sup>4</sup> In these proceedings, senior water right holders must be given priority, and a person found to be violating the Water Use Act may be subject to civil penalties.<sup>5</sup>

In other cases, a district court may appoint a water mediator to help resolve water controversies in both decreed and nondecreed basins. A water mediator may discuss proposed solutions, review options for coordinating water use, discuss water needs with affected persons and entities, meet with parties to mediate differences over water use, and hold public meetings and conferences to discuss and negotiate potential solutions.<sup>6</sup> A water mediator does not have the power to order a particular action, but the mediator may provide guidance to the parties for an out-of-court resolution of the dispute.

In 2009, the Legislature authorized a district court to appoint a water master to assist with judicial enforcement proceedings.<sup>7</sup> A water master is appointed by the chief water judge and is an attorney who issues preliminary determinations in the Water Court.

Finally, a district court may also be asked to address a decision from the DNRC on a water right permit application. If an application for a water right permit is denied, for example, a party may appeal the decision to a district court for review. The Montana Supreme Court may also be asked to weigh in on the dispute if the matter is not resolved before the district court.

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<sup>4</sup> § 85-2-114, MCA.

<sup>5</sup> § 85-2-122, MCA.

<sup>6</sup> § 85-5-110, MCA.

<sup>7</sup> H.B. 39, Chapter 103, Laws of 2009 and § 3-7-311, MCA.