

Considerations for the future of water rights

A Water Policy Interim
Committee report to the
65th Legislature

Legislative Environmental Policy Office

Water Policy Interim Committee members

Before the close of each legislative session, the House and Senate leadership appoint lawmakers to interim committees. The members of the WPIC, like the members of other interim committees, serve one 20-month term. Members who are reelected to the Legislature may serve again on an interim committee, if appointed, and are subject to overall term limits. This information is included to comply with 2-15-155, MCA.

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This report summarizes the work of the Water Policy Interim Committee specific to a study of the future of the Water Court. Members received additional information and public testimony on the subject, and this report highlights key information and the processes followed by the WPIC. To review additional information, including written minutes, exhibits, and audio minutes, visit the WPIC website: www.leg.mt.gov/water.

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Contents

Introduction	3
Findings and Legislation	4
Three Venues for One Water Right	5
Future of the Water Court.....	5
Early Western Water Rights	6
Water Use Act.....	7
The Water Court’s Goal: Final Decrees	10
The Once and Future Water Court	10
The DNRC: Increased Future Role.....	12
The District Courts	13
Other Reviews of Legal Processes	14
Identified Issues.....	15
Water Commissioners	15
Election of Water Court Judges	15
Water Right Ownership Transfers.....	15

Appendices

Appendix A: Legal Authorities Related to Water Rights in Montana (Legislative Environmental Policy Office)

Appendix B: Overview of Final Decrees Issued by the Water Court (Legislative Services Division Legal Services Office)

Appendix C: Summary of DNRC Water Right Permitting and Change Process (Legislative Services Division Legal Services Office)

Appendix D: Summary of Water Right Enforcement by District Courts (Legislative Services Division Legal Services Office)

Appendix E: Constitutionality of Water Court Jurisdiction (Legislative Services Division Legal Services Office)

Appendix F: A Short Timeline of the Montana Water Court (Legislative Environmental Policy Office)

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Introduction

The 2015 Water Policy Interim Committee investigated and studied many of the legal processes involving water rights. The working title of this inquiry was the study of the future of the Water Court; however, the committee's work took the members into the inner workings of the Department of Natural Resources and Conservation and of the district courts. The WPIC prepared this report to summarize its work on this subject. This report includes a history of water rights administration in Montana, current processes used by the most-involved entities, and a discussion of some future issues these entities will face. This report provides findings and legislation for the 2017 legislative session.

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Findings and Legislation

The committee reviewed relevant laws, policies, and legal decisions; hosted numerous panel discussions with expert testimony; and journeyed on a field trip in the Gallatin Valley, observing the distribution of water in the Gallatin Valley. The committee’s 10 findings and proposed six pieces of legislation follow:

Future of the Water Court: Findings and Proposed Legislation
<p>Since at least 1921, Montana has recognized the prior appropriation doctrine as the guiding legal principle for the distribution of water.</p>
<p>Myriad local, state, federal, and tribal officials have certain legal authorities over water rights in Montana.</p>
<p>The Water Use Act of 1973 created a process to determine existing water rights and to permit new water rights. The act also provides a permit exemption for small ground water wells.</p>
<p>The Water Use Act of 1973 establishes a system of centralized records, which functionally exists as the Department of Natural Resources and Conservation’s Water Right Information System. <i>Proposed legislation: Clarify process for disclosure of water right transfer.</i></p>
<p>The Water Court, with assistance from the DNRC, determines pre-1973 water rights through an adjudication process.</p>
<p>District courts distribute water and enforce water rights. <i>Proposed legislation: Clarify the 15 percent threshold for water commissioner appointments.</i> <i>Proposed legislation: Require training for water commissioners.</i></p>
<p>The DNRC approves permits for new beneficial uses of water and changes to existing beneficial uses of water. <i>Proposed legislation: Revise process for a water right change.</i> <i>Proposed legislation: Limit analysis of adverse effects for water right permit or change.</i> <i>Proposed legislation: Authorize Water Court review of DNRC permit, change decisions.</i></p>
<p>After adjudication ceases and the Water Court issues final decrees by 2028, the Water Court’s remaining duty will be to aid district courts in a water distribution controversy, when requested.</p>
<p>Adjudication, permitting, and enforcement processes occur (sometimes simultaneously) in different venues for a single water right.</p>
<p>Some water right ownership transfers are not reflected in the centralized water rights database in a timely manner, which has complicated the adjudication and enforcement of certain water rights.</p>

Three Venues for One Water Right

A century-old water right on the Musselshell River illustrates a complexity the Water Policy Interim Committee seeks to solve: How to simplify Montana's current legal process related to water rights?

Some have said that water users are bewildered when they are subjected to three different proceedings in three different venues: (1) proving their right in the Water Court, (2) changing their right in the Department of Natural Resources and Conservation, and (3) enforcing their right in district court. Defending a water right that may have been previously done with something as simple as a shovel and (hopefully) a handshake now includes legal paperwork, objections from neighbors, scientific analyses, court rulings, and — most likely — the cost of attorneys and other experts.

In 1906, James Hart filed a water claim in Lewistown and declared “to all the world” that he was going to use 640 miner's inches for irrigation, stock, and domestic use.¹ In 1952, a railroad company challenged Hart and others. Judge Watts upheld the Hart water right.

In 1981, the new owners of that water right filed a claim form at the DNRC's Billings office, at the beginning of the momentous statewide adjudication. The Water Court first decreed this claim in 1985 — mirroring most of the original elements, including the original flow rate.

The Hart right's subsequent owners sought to change their right after the destructive 2011 Musselshell River floods blew out their headgate. The ranching family also wanted to convert from flood irrigation to sprinklers. As a result of its legally required adverse effect and historic use analyses, the DNRC reduced the historic flow rate.

The Musselshell is a heavily used and overappropriated waterway under the watchful eye of the Musselshell River Distribution Project and the Honorable Judge Randal I. Spaulding. The right is “called” or shut off near the end of the summer in deference to superior, older water rights.

After 110 years, the Hart water right is well established and legally concrete. But how should Montana's complex legal system treat future senior water right holders or new appropriators? The Water Policy Interim Committee sought to answer this broad question during its 2015-16 interim.

Future of the Water Court

The WPIC first discussed possible changes to the legal processes related to water rights in 2014. The 2015-16 Water Policy Interim Committee restarted this discussion, which was formalized with a “study of the future of the Water Court.”

¹ Legislative Environmental Policy Office staff presentation to the WPIC, Sept. 2, 2015.

This study includes three major entities — the Water Court, the DNRC, and the district courts — and three distinct processes. The entities’ most significant roles² are as follows:

Agency	Role
Water Court	Adjudicates all pre-1973 water claims
DNRC	Examines and processes pre-1973 claims Permits new uses of water Processes changes to existing water rights
District courts	Enforces water rights through court proceedings

The committee investigated beyond the Water Court (and the title of this study) but necessarily excluded some entities, such as irrigation districts, county attorneys, and tribes.³ The committee and staff researched relevant laws, policies, and legal decisions,⁴ hosted numerous panel discussions, and participated in a May field trip in the Gallatin Valley.

A study of the legal processes related to water rights is a history lesson that revolves around a bedrock western principle: the prior appropriation doctrine. As legal scholar A. Dan Tarlock observed:

Prior appropriation began as the custom of the miners in California and Colorado and after the 1890s developed into a sophisticated property rights system when the western states decided to build irrigation economies around the doctrine.... As the West began to [be] settled and developed as a ranching, mining, and irrigation economy, it became necessary to develop a complete property law of water rights.⁵

Early Western Water Rights

Events in California had the earliest influence on what would become Montana’s legal framework for water rights. The birth of the prior appropriation system of distributing water has its roots in the California gold rush.

Among the customs generally adopted in the (mining) camps was that the first person to stake out a claim had the first right to it. The first person to divert a stream to use his rocker or pan had the first right to that amount of water. This

² These entities have additional duties related to water rights. See appendix A.

³ See appendix A.

⁴ See appendices B, C, D, and E.

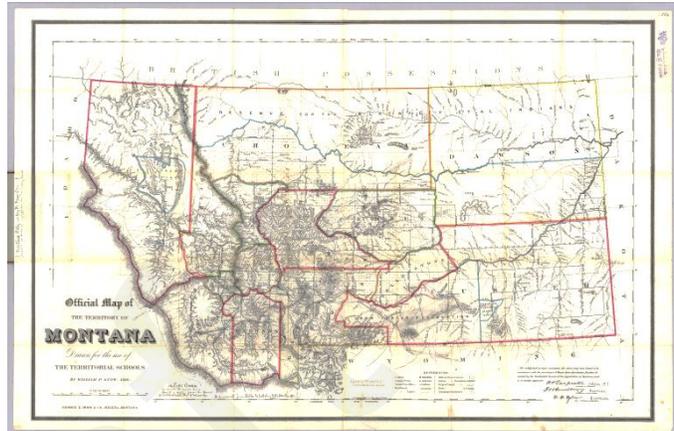
⁵ A. Dan Tarlock, *Law of Water Rights and Resources*, sections 5:1 and 5:4, Thomson Reuters (2015).

is the doctrine of “First in time, first in right” and is the embryo of our system of prior appropriation.⁶

The doctrine “was later extended to farmers and other users, even on private lands.”⁷

In Montana, many early users sought legal protections for their rights by filing a claim at a county courthouse. Others simply put the water to use. In some cases, district courts issued decrees on who was entitled to what amount of water in times of scarcity.

Although the state’s 1889 constitution barely mentioned water use — confining its words to a recognition of irrigation — the Montana Supreme Court finally recognized the prior appropriation doctrine in 1921.⁸ The 1939 Montana Legislature saw the need for an organized legal system when it declared that the “water of this state and especially interstate streams arising out of the state be investigated and adjudicated as soon as possible in order to protect the rights of water users in this state.”⁹



1886 Map of Montana.

But the first real effort wouldn’t come until the state’s constitution was rewritten more than 30 years later. Two important sections of the 1972 Montana Constitution helped create today’s processes:

All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.¹⁰

And

The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.¹¹

Practically, this meant that the state recognized all existing beneficial uses of water and that the state would create an organized legal system. Efforts to adjudicate existing water rights would soon follow.

Water Use Act

After ratification of the new constitution, the Legislature passed the Water Use Act in 1973, which ordered a state agency to “begin proceedings under this act to determine

⁶ Seminar on water rights by Al Stone, professor, University of Montana School of Law, to the Montana Legislature’s Subcommittee on Water Rights, July 1977.

⁷ David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 74.

⁸ *Mettler v. Ames Realty Co.*, 61 Mont. 152, 169, 201 P. 702 (1921).

⁹ Section 89-847 R.C.M. 1947.

¹⁰ Article IX, section 3(1), 1972 Mont. Const.

¹¹ Article IX, section 3(4), 1972 Mont. Const.

existing rights.” This launched the adjudication process, led by what was then the Department of Natural Resources, the predecessor to the DNRC. Under this system, a district court would issue decrees establishing each and every water right that existed before 1973.

But the task soon became overwhelming. A Montana Supreme Court decision illustrated what happened:

One of the difficulties with the 1973 adjudication provisions was that representatives for the Department of Natural Resources were required to go into the field, walk the old ditches and laterals, and physically discover all of the unrecorded, unasserted, and unknown water rights. So the Legislature became restless over the evident prospect of a century or more which would be needed to adjudicate the water rights for the entire state.”¹²

The pace of the adjudication wasn’t the only challenge to the process.

Indian tribes and the federal government sought to assert their claims in federal court, which they viewed as friendlier to their interests. “States feared that federal and tribal water rights would be determined in federal court,” according to one history of water rights adjudication in the West.¹³ “Conversely, federal and tribal attorneys feared the state court determination. The time had come for the U.S. Supreme Court to decide where these issues would be decided.”¹⁴ In Montana, the Northern Cheyenne Tribe filed the first action, asking a federal court to adjudicate rights on the Tongue River and Rosebud Creek. In all, seven federal lawsuits were filed by 1979.¹⁵



Galt



Scully

In the face of this, the Montana Legislature convened a special Subcommittee on Water Rights. This subcommittee got a crash course in water law, toured the state, and issued recommendations. The subcommittee consisted of Rep. John P. Scully, chairman; Sen. Jack E. Galt, vice-chairman; Rep. William M. Day; Rep. Jack Ramirez; Rep. Audrey Roth; Sen. Russell J. Bergren; Sen. Paul F. Boylan; and Sen. Jean A. Turnage. The subcommittee heard from many experts, including University of Montana law school professor Al Stone and

Judge W. W. Lessley, a district judge from Bozeman who would later be appointed as the state’s first water judge.

Legislative leaders wanted an expedited process. “It is not going to do much good if it takes us 20 years to do what the statute says we should do with existing rights,” Lessley told subcommittee members,¹⁶ referring to those who had filed some sort of paperwork at county courthouses. Even those who had been using water without filing

¹² *In re the matter of the activities of the Department of Natural Resources and Conservation*, 226 Mont. 221, 236, 740 P.2d 1096 (1987).

¹³ John E. Thorson, Ramsey L. Kropf, Andrea K. Gerlak, and Dar Crammond, “Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II,” 9 *U. Denv. Water L. Rev.* 2 (2006).

¹⁴ *Ibid.*

¹⁵ Letter from Chief Water Judge C. Bruce Loble to Montana Legislative Audit Division, June 10, 2010.

¹⁶ Testimony of Judge W. W. Lessley to Subcommittee on Water Rights, Oct. 22, 1977.

at a courthouse “should take about one year actually [to process] — it may take more than that time, but if it’s handled that way it should go fairly fast,” Lessley said.¹⁷

Stone advised the subcommittee that the 1952 congressional legislation waiving sovereign immunity for the federal government would apply to the Indian and federal claims. “The McCarren Amendment ... gives jurisdiction to the state when they are conducting a general adjudication of a stream to join all federal interest in order to get a complete adjudication. So you can have this proceeding in state court.”¹⁸

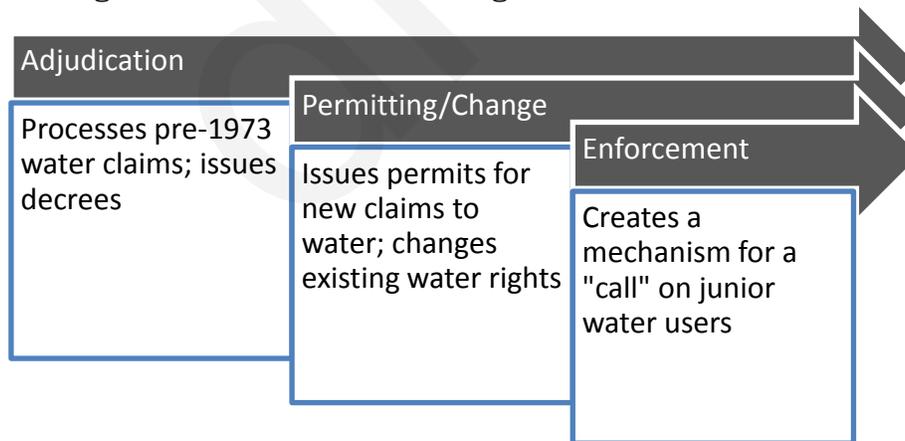
The subcommittee eventually recommended that the 1979 Legislature “enact a bill to adjudicate existing water rights through a special system of water courts coupled with a mandatory filing system.”¹⁹

The Montana Legislature subsequently passed Senate Bill 76, which is roughly the adjudication process of today (see figure 1). The legislation created the Water Court to conduct the litigation phase of the adjudication, after DNRC experts examine each claim. The court was designed with a chief judge and four district court judges, although rarely does a district court judge get assigned a Water Court case.²⁰

After passage of SB 76, the Montana Supreme Court ordered everyone with a pre-1973 water claim to file with the DNRC. About 219,000 claims were filed by the April 30, 1982, deadline. These claims are considered prima facie proof of the right — that is, the claim for water stands as stated, unless someone else provides evidence to the contrary.²¹

After the adjudication launched, a federal district court stayed all seven federal lawsuits, concluding “that the question of jurisdiction under state law is one to be resolved by the state courts and that the question of adequacy of the state proceedings is to be decided by the states.”²²

Figure 1. The Legal Processes for Water Rights



¹⁷ Ibid.

¹⁸ Testimony of Al Stone to Subcommittee on Water Rights, July 1977.

¹⁹ Subcommittee on Water Rights, “Determination of Existing Water Rights: A Report to the Forty-Sixth Legislature” (1978), 1.

²⁰ In practice, a chief water judge —with help from the associate water judge — appoints special water masters for the litigation phase.

²¹ Residents of basins are notified as decrees are being developed. A later Legislature allowed the filing of approximately 4,500 “late” claims in 1996, although these claims are subordinate to all those filed on time.

²² Environmental Quality Council, *Montana’s Water – Where Is It? Who Can Use It? Who Decides?* (2004), 22.

The Water Court’s Goal: Final Decrees

A final decree is the final product of basin adjudication. To reach this point, the adjudication progresses through several stages: verification or examination, temporary preliminary decree or preliminary decree, public notice, resolution of objections, public hearings, and a final decree. The DNRC is in charge of the important first step: verification or examination. The rest of the proceedings, and much of the public involvement, occurs at the Water Court.²³

By design the process is adversarial: a claimant asserts a claim to water, which is upheld as valid unless another user objects. The DNRC may attach an issue remark, which flags uncertain information in a claim and must be resolved before a final decree is issued. The Water Court also has its own authority to call in claims on its own motion — “en motion.”

A final decree must at least include the name of the water right owner, the flow rate or volume of water (for rights that cannot be measured by flow rate), the priority date of the right, the purpose of the right, the place of use, the source of the water for the right, the place and means of diversion, and the period of use. The court must provide public notice of the final decree. After this, the DNRC issues a water right certificate to each person who has been decreed an existing right.²⁴ This is the “piece of paper” that defines a person’s water right. It is also the piece of paper some have been waiting decades for — a wait that will continue at least into the 2020s.

The Water Court has issued six final decrees.²⁵ There are 85 hydrologic basins in Montana.

The Water Court’s role to review and rule on objections to negotiated compacts with the state’s Indian tribes and federal agencies is ongoing. The court approved the first compact for the Northern Cheyenne Tribe in 1995.²⁶ These settlements are negotiated by the Reserved Water Rights Compact Commission. With legislative approval of the Confederated Salish and Kootenai Tribes settlement in 2015, the commission has concluded seven tribal agreements and 12 settlements with federal agencies. Some of these are still pending at the Water Court.²⁷

The Once and Future Water Court

The work of the Water Court has been marked by certain milestones.

In 1987, the Montana Supreme Court resolved disagreements between the agency, the court, other agencies, and water rights attorneys over the process and standards. The

²³ Environmental Quality Council, *Water Rights in Montana* (2014).

²⁴ Legislative Services Division Legal Services Office memo to the WPIC, “Overview of Final Decrees Issued by the Water Court,” Jan. 4, 2016. See appendix B.

²⁵ As of Dec. 1, 2015, the Water Court had issued final decrees for the Little Powder River, Powder River, Belle Fourche River above the Cheyenne River, Little Missouri River below Little Beaver, and O’Fallon Creek.

²⁶ The Legislature approved the first compact for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in 1985. The Water Court approved the compact in 2001, although it is still pending in Congress.

²⁷ Environmental Quality Council, *Water Rights in Montana* (2014), and Water Court adjudication reports to the WPIC.

Supreme Court created claims examination rules that are much the same that exist today.²⁸

After 25 years of slow, steady progress, money and performance measures were injected into the process in 2005 through House Bill 22. The sole purpose of this bill was to develop a funding source for the adjudication and to establish statutory deadlines for completion. All claims were required to be examined by June 30, 2015, a deadline the DNRC recently met.

A 2009 legislative audit suggested further refinements, such as not reexamining certain decrees completed in the early 1980s and preparing for a post-adjudication future. The audit estimated that the litigation phase — the period of time in which all objections and issue remarks related to every claim are resolved — would last until 2028.²⁹ Final decrees would presumably be issued after that.

The 2013 Legislature recognized the need to shift resources from the DNRC and the examination phase to the Water Court for the litigation phase.

Water Judge C. Bruce Loble ordered the agency to reexamine 90,000 of those early claims, standardizing some of the claim elements and looking for outliers. The 2015 Legislature approved reexamination benchmarks as well as increased funding for the agency and the Water Court.



Montana Water Court at the Life of Montana Building, Bozeman.

The Montana Supreme Court appointed Russ McElyea as the court's third chief water judge in 2012. McElyea had previously served as associate water judge, a position created by the 2011 Legislature. Doug Ritter has held the associate water judge position since 2013.

If projections made by the Legislative Audit Division hold true, the Water Court will be a much smaller operation as 2028 approaches. After that, very little would remain for the court to do, as envisioned in statute. The Water Court does aid district courts in a water distribution controversy when asked by a district court judge.³⁰

But the remaining — and critical — roles concerning water rights in Montana are with the DNRC and the district courts. The agency continues to process new water right permits and make changes to existing ones, including older, pre-1973 rights. The district courts and the water commissioners who work under court order are in the last stage of the water rights legal process: enforcement. A role for the Water Court in either of these two other processes may be of interest to a future legislature.

Issues raised during the 2015-16 interim study regarding the Water Court included allowing the Water Court to consider appeals of DNRC permitting and change

²⁸ Environmental Quality Council, *Montana's Water – Where Is It? Who Can Use It? Who Decides?* (2004), 24.

²⁹ Legislative Audit Division, *09P-09: Water Rights Adjudication* (2010).

³⁰ Section 85-2-406, MCA.

decisions, giving parties in a water dispute the option of either district court or Water Court to resolve their issue, and questions about the constitutionality of allowing Water Court judges or masters to make rulings related to water rights.

The DNRC: Increased Future Role

The DNRC is — and has been — involved in the major legal processes related to water rights for decades. In the future, new water users will need to permit a new right, change an existing one, or use another method of transfer, such as a long- or short-term lease. And if water needs increase — and especially if water supplies decrease — the department’s future role should not be understated.

Prior to 1973, a person could simply divert and use water for a beneficial purpose to assert a water right. As written previously, users sometimes filed these rights at their county courthouse. In many instances, users merely continued to divert the water with limited or no documentation of their use.

The 1973 Water Use Act reaffirmed that water must be put to a beneficial use in order for it to be lawfully appropriated. A beneficial use includes everything from domestic, stock, irrigation, and municipal use to industrial, commercial, agricultural spraying, fisheries, wildlife, and recreation.³¹

In addition to its role helping the Water Court in adjudication, the DNRC has two important tasks: permitting post-1973 uses of water and approving changes to existing water rights or claims.

For the permitting process, the agency grants a permit if the applicant sufficiently proves that water is both physically and legally available, that senior appropriators will not be harmed, that the proposed means of diversion, construction, and operation of the appropriation works are adequate, that the proposed use is a “beneficial use,” and that the applicant has a possessory interest or the written consent of the person with a possessory interest in the property where the water will be put to use.³²

The DNRC permitting process allows objections and a resolution of objections through an internal appeals process.³³

After the DNRC issues the permit, the project must be constructed and the water must be diverted and applied to its beneficial use. The DNRC issues a certificate of water right if it “determines that the appropriation has been completed in substantial accordance with the permit.”³⁴

While the Water Court focuses on water rights claimed before 1973, the DNRC focuses on water rights claimed after 1973. The department has issued nearly 17,000 permits for these post-1973 water rights. (The department has also issued nearly 123,000 water right certificates for exempt ground water wells.)

³¹ Legislative Services Division Legal Services Office memo to the WPIC, “Summary of DNRC Water Right Permitting and Change Process,” Jan. 4, 2016. See appendix C.

³² Ibid.

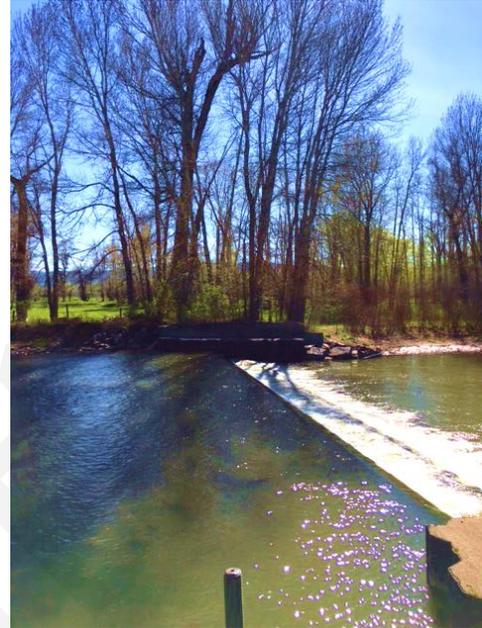
³³ Permitting decisions may be appealed to a district court.

³⁴ Legislative Services Division Legal Services Office memo to the WPIC, “Summary of DNRC Water Right Permitting and Change Process,” Jan. 4, 2016.

The DNRC must also approve changes to a water right for a change in the point of diversion, place of use, purpose of use, or place of storage.³⁵ The applicant must prove that existing water right holders will not be adversely affected, that the proposed means of diversion, construction, and operation are adequate, that the proposed use is a beneficial one, and that the applicant has a possessory interest in the place of use.

A particular element of a change application continues to earn scrutiny, including from the WPIC. A change applicant is required to provide information regarding the historic use of the water right to be changed. Historic information is generally how the DNRC determines that senior water right holders will not be harmed by a change to an existing water right — the “adverse effects” analysis. The description of historic use information that must be submitted depends on the type of water right the applicant is proposing to change.³⁶

Other issues raised during this study include the timelines for DNRC action on new water right permits or changes, the “time gap” that results when the DNRC calculates historic use for a new water right or a change application, and the venue for appeals to DNRC permit and change decisions.



West Gallatin River at Farmers Canal diversion

The District Courts

Montana’s district courts have the longest involvement and association with water rights. That involvement is likely to remain.

Fifty-six district court judges within 22 judicial districts resolve disputes between water users, including ruling on injunctions to prohibit a party from interfering with the use of a water right. These judges serve 6-year terms and hear a wide variety of cases, both civil and criminal. Water law is a small part of their caseload.³⁷ A Water Court survey of district court judges indicated that a minority of district court judges wishes to solely handle cases involving water rights.

Water users may petition the district court to appoint a water commissioner to distribute water. If there is a historic decree (issued by a district court before 1973) or a decree issued by the Water Court, the owners of at least 15 percent of the water rights affected by the decree may petition the district court to appoint a water commissioner. Under certain circumstances, the DNRC and one or more water right

³⁵ However, a change approval is not necessary for a change in irrigation method. This was a much-discussed topic during the interim.

³⁶ Section 36.12.1902, Administrative Rules of Montana, and Legislative Services Division Legal Services Office memo to the WPIC, “Summary of DNRC Water Right Permitting and Change Process,” Jan. 4, 2016.

³⁷ Testimony of Honorable Judge Loren Tucker to the WPIC, Jan. 12, 2016.

holders may petition a district court to distribute water and to resolve the distribution dispute.³⁸

A district court may appoint a water commissioner to measure and distribute water to the appropriate owners. These “ditch riders” are self-employed and paid by the water users.³⁹

When existing water rights have not been determined, any party may petition a district court to certify that question to the Water Court. The district court may issue an injunction or may order other relief pending a Water Court determination. The Water Court must give priority to these certification proceedings over its adjudication work.⁴⁰

A district court may be involved in other proceedings related to water rights. The DNRC may also ask a court to take action to prevent the waste or unlawful use of water.⁴¹ A district court may appoint a water mediator to resolve water controversies. And the 2009 Legislature authorized a district court to appoint a water master to assist with judicial enforcement proceedings. As described previously, an applicant may appeal a DNRC permit or change decision to a district court.

Other Reviews of Legal Processes

The WPIC’s review of legal processes related to water rights is certainly not the first examination of the involved processes.

In 1988, the Legislature hired a Denver law firm to review the state’s adjudication process. The subsequent “Ross Report” mostly affirmed and validated the state’s process, suggesting only legislative “fine-tuning.”⁴² The report stated:

We did not find the framework of the Montana water adjudication law or the process prescribed by it to be so grievously flawed as to require a massive legislative overhaul.... How rapidly that process can be concluded under the changes we recommend will become a function of the level of funding provided to both the judicial and executive branch institutions involved in the process.⁴³

As previously written, the Legislative Audit Committee also examined the adjudication process, producing recommendations that have mostly been embraced.

A 2014 report by the University of Montana Law School (commissioned by the Montana Supreme Court) suggested establishing concurrent Water Court/district court jurisdiction over water disputes and distribution; coordinating water rights records; building education and collaboration; addressing the adjudication “time gap”; allowing appeals of agency decisions to the Water Court; and modernizing the water commissioner and distribution systems.

Most recently the Adjudication Advisory Committee (which advises the Water Court) suggested that the adjudication of pre-1973 water rights should proceed to its

³⁸ Sections 85-5-101(1) and (2), MCA.

³⁹ Section 85-5-101, MCA.

⁴⁰ Legislative Services Division Legal Services Office memo to the WPIC, “Summary of Water Right Enforcement by District Courts,” Dec. 18, 2015. See appendix D.

⁴¹ Unlawful use of water may also involve the attorney general or a county attorney.

⁴² Jack F. Ross, *Evaluation of Montana’s Water Rights Adjudication Process* (1988), 4.

⁴³ *Ibid.*

estimated completion date of 2028 without unnecessary delays. The committee also offered options for jurisdiction in water user disputes, dealing with adjudication “time gaps,” appeals of agency decisions, and the modernization of the water commissioner and distribution systems.

Identified Issues: Election of Judges, Ditch Riders, and Recordkeeping

Other issues rose to prominence, including updating “antiquated” water commissioner laws, considering the constitutionality of unelected judges, and improving recordkeeping related to water right ownership transfers.

Water Commissioners

The committee scrutinized state law related to water commissioners, which has been only modestly altered since its original passage in 1911.⁴⁴ The committee specifically discussed:

- required training for water commissioners and judges;
- bonding requirements for water commissioners;
- whether water commissioners should have arrest powers; and
- whether water distribution data should be made public.



WPIC field trip in Gallatin Valley, May 2016

The DNRC has proposed a pilot project as it distributes Tongue River water under a U.S. Supreme Court order. This pilot project will require legislation.

Election of Water Court Judges

The WPIC also discussed whether unelected Water Court judges could be allowed to expand their jurisdiction. Specifically, the committee asked whether the Montana Constitution prohibits the Legislature from expanding the Water Court’s jurisdiction.

WPIC legal staff determined that because the Montana Constitution allows the Legislature to establish courts and determine qualification and selection methods for judges, and because no one has successfully challenged the judicial structure for the adjudication and administration of water rights in court, it appears there is no constitutional barrier to an expansion of Water Court jurisdiction.⁴⁵

Water Right Ownership Transfers

Incomplete or inaccurate property transfers may be impeding legal proceedings related to water rights.

⁴⁴ Title 85, ch. 5, MCA.

⁴⁵ See appendix E.

House Bill 39 (2007) revised the water right ownership update process, requiring county clerks and recorders, the Department of Revenue, and the DNRC to coordinate to ensure the water rights are correctly recorded on a realty transfer certificate.⁴⁶

County clerks and recorders first collect a realty transfer certificate, usually from a title company.⁴⁷ This certificate includes a place to indicate whether or not water rights were transferred. At the closing or transfer of real estate, the parties must pay a fee to the DNRC to transfer the water right. This fee starts at \$50. (Ultimately, it is up to the new owner or buyer of a property to ensure the fee is paid and the certificate is submitted.)⁴⁸ County officials report these property transfers to the Department of Revenue, which then updates the department's ORION property ownership database. Periodically, the DNRC updates its Water Right Information System database from ORION.⁴⁹ The DNRC is responsible for reconciling missing fees and missing transfers.⁵⁰

The Water Court has delayed decrees or rulings in certified controversies, because water right ownership was unclear due to uncompleted water right transfer.⁵¹ Water commissioners have shut off water rights due to uncompleted water right transfers.⁵² Revenue officials said a geocode is used to identify a parcel and is likely insufficient to indicate location details necessary for a water right, such as place of diversion or point of diversion.⁵³

Some details about the handling of the realty transfer certificate were unclear during testimony at WPIC meetings. The DNRC convened a working group of the affected parties.⁵⁴

⁴⁶ Section 85-2-424, MCA.

⁴⁷ Section 15-7-305, MCA.

⁴⁸ Sections 85-2-424 and 85-2-426, MCA.

⁴⁹ Krista Lee Evans, memo to the WPIC, "HB39 Ownership Update Status Sheet," March 8, 2016.

⁵⁰ Section 85-2-424, MCA.

⁵¹ Testimony of Honorable Judge Russ McElyea to the WPIC, Jan. 12, 2016.

⁵² Testimony of Lezlie Kinne to the WPIC, March 8, 2016.

⁵³ Testimony of Rocky Haralson, Department of Revenue, to the WPIC, May 2, 2016.

⁵⁴ Testimony of Tim Davis, DNRC, to the WPIC, May 2, 2016.