



Montana Legislative Services Division

PO BOX 201706

Legal Services Office

TO: Water Policy Interim Committee
FROM: Cori Hach, Staff Attorney
RE: Constitutionality of Making Water Court Permanent and Discussion of Potential Constitutional Amendment
DATE: December 16, 2019

During its September 2019 meeting, the Water Policy Interim Committee (WPIC) directed legal staff to research two issues regarding the constitutionality of the Water Court that arose as part of the WPIC's study under House Joint Resolution 14. First, the committee requested more information regarding whether a potential proposal by the Montana Legislature to make the Water Court a permanent institution would be constitutionally permissible. Second, the WPIC expressed interest in developing a constitutional amendment that would eliminate the possible constitutional conflict regarding the Water Court's structure.

I. QUESTIONS PRESENTED

- A. Would a legislative action to make the Water Court permanent violate the Montana Constitution?
- B. How could the Montana Constitution be amended to reduce or eliminate ambiguity about the constitutionality of the Water Court?

II. BRIEF ANSWERS

- A. The answer to the question of whether making the Water Court permanent would create a constitutional conflict depends on the extent to which the current legitimacy of the Water Court is dependent upon it being a "temporary" institution.
 - i. If the Water Court is a district court that is subject to the requirement that all judges be elected by the qualified electors, the "temporary" nature of the Water Court may provide justification for its continued legitimacy.
 - ii. If the Water Court is an "other" court "provided by law," making the Water Court permanent would probably not impact the constitutional permissibility of the Water Court as an institution.

- B. A brief discussion of considerations for a constitutional amendment is located in Section IV of this memorandum.

III. EFFECT OF MAKING WATER COURT PERMANENT ON CONSTITUTIONALITY OF INSTITUTION

A. Preliminary Discussion

The question of why some commentators consider the temporary nature of the Water Court to be constitutionally significant merits a brief preliminary discussion. The first thing it is important to understand is that the constitutionality of the Water Court has, to date, never been challenged in court, and the structure of the Water Court will be presumed constitutional unless a court someday rules otherwise.¹ As such, a certain amount of speculation is necessary to predict how a court would analyze these issues if they were ever presented.

The second thing that it is important to understand is that there is nothing in the Montana Constitution that specifically prohibits the Water Court from being made a permanent court. There is, however, Article VII, section 8(1), of the Montana Constitution, which requires that district court judges be elected by the qualified electors of the judicial district. Whether the Water Court judges are district court judges is an unsettled question of law in that it has not been squarely addressed by a court. There are compelling arguments on both sides, as expounded in much greater detail in Appendix A². Assuming for the sake of argument that Water Court judges *are* district court judges, a potential constitutional issue arises because the geographical jurisdiction of the Water Court is significantly larger than the geographical jurisdiction of a district court³, with each Water Court encompassing multiple counties. Because only the residents of the county where the Water Court is physically located are eligible to vote for the district court judge in that county, it follows that there are individuals in each water district who are subject to the decisions of the Water Court but have never had the opportunity to cast a vote for the judge.

This is the reason why the debate regarding the constitutionality of the Water Court has largely focused on whether Water Court judges are district court judges. If the Water Court is a specialized “other” court with concurrent jurisdiction to the district court as permitted under Article VII, section 4(3), of the Montana Constitution⁴, then the election requirement does not apply and the appointment of Water Court judges does not conflict with Article VII, section 8(1).

¹ 1-3-232, MCA (“An interpretation which gives effect is preferred to one which makes void.”); *Mead v. M.S.B., Inc.*, 264 Mont. 465, 474, 872 P.2d 782, 788 (1994) (“We presume that the Legislature [acted with] constitutional considerations in mind, and will not construe the statute in a manner that would render it unconstitutional.”)

² Appendix A is the memorandum regarding the Constitutionality of Water Court Jurisdiction that was presented to this committee on May 9, 2016. That memorandum touched briefly on the temporary nature of the Water Court, but took a wider lens in that it addressed the question of whether the Water Court’s jurisdiction can be expanded more generally.

³ The jurisdiction of each district court is coextensive with the county in which it sits. Mont. Const. Art. VII, Sec. 6(1).

⁴ “Other courts may have jurisdiction of criminal cases not amounting to felony and such jurisdiction concurrent with that of the district court as may be provided by law.”

On the other hand, if a future court determines that Water Court judges are full district court judges, then the election requirement may apply. It is in this latter situation that the question of the temporary-versus-permanent Water Court becomes potentially relevant.

B. Analysis

In 1988, the authors of the “Evaluation of Montana’s Water Rights Adjudication Process” (informally known as the “Ross Report”)⁵ contemplated what would happen if it is someday determined that the election requirement applies to Water Court judges because Water Court judges act as district court judges. When considering this very scenario, the Ross Report suggested that such a constitutional problem could be avoided or remedied based on Article VII, section 6(3), of the Montana Constitution. This provision allows the chief justice to “assign district judges and other judges for *temporary service* from one district to another, and from one county to another” (emphasis added). The Ross Report points to this provision as evidence that the Montana Constitution contemplates and condones a judge being appointed to a different judicial district than the one he or she was elected to serve.⁶ It follows, posits the Ross Report, that as long as service as a Water Court judge can be construed as “temporary service,” then it could be argued that each of the water judges have been temporarily appointed to the judicial districts that they exercise authority over but were not elected by.⁷

Whether the tenure of a Water Court judge can reasonably be considered “temporary” is another unsettled question of law.

In support of the Ross Report’s contention that Article VII, section 6(3), is applicable to this situation and the appointment of water judges should be considered “temporary service” is the fact that the Water Court, as originally conceived, was intended to be a temporary institution created for a temporary task – the adjudication of claims to pre-1973 water rights in Montana.⁸

On the other hand, there are also arguments that a court would not consider Article VII, section 6(3), to apply to the Water Court. First, adjudication has been ongoing for four decades, with no realistic end in sight. Second, the Legislature has expanded the duties of the Water Court twice, so that its duties are no longer limited to the discrete and finite task of adjudication.⁹ Third, the fact that water judges are appointed to fixed terms of four years¹⁰ could be considered a factor in finding that the assignment of each water judge is not “temporary.”

⁵ Jack F. Ross, Evaluation of Montana’s Water Rights Adjudication Process, 39 (1988), available at: <https://leg.mt.gov/content/publications/environmental/1988adjudication.pdf>

⁶ *Id.*

⁷ *Id.* at 40.

⁸ See the Subcommittee on Water Rights, Determination of Existing Water Rights – A Report To The Forty-Sixth Legislature (November 1978), available at <https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Committee-Topics/1978%20Existing%20Water%20Right%20Report.pdf>. “The system is designed to be temporary. When the adjudication is finished, the system will be dismantled.”

⁹ Ch. 596, L.1985, added the ability to conduct cases certified under 85-2-309, and Ch. 126, L. 2017, allows the Water Court to conduct proceedings for petitions for judicial review filed with the Water Court under 2-4-702.

¹⁰ 3-7-202, MCA

Montana courts have not had opportunity to comment in detail about the meaning of the term “temporary service” as used in Article VII, section 6(3), but the existing case law and the discussion of the provision during the 1972 Constitutional Convention provide some clues. In *State ex rel. Wilcox v. Dist. Court*, 208 Mont. 351, 358, 678 P.2d 209, 213 (1984), the Supreme Court stated that Article VII, section 6(3), “addresses the problem of congestion in a particular judicial district or in a particular county.” The Wilcox court went on to quote extensively from the Transcript of Constitutional Convention, Vol. IV, at 1081:

"DELEGATE BERG: I should only comment upon that change [amendment of the language [in Article VII, section 6(3), of the Montana Constitution] that it was felt that the Chief Justice ought not to be able to assign district judges, in effect, willy-nilly around the state; that it could be open to possible abuse; that the real need arises when there is heavy congestion in one District Court; and, therefore, upon the request of that district judge, the Supreme Court Chief Justice may assign any other judge in there to assist him in the cleanup of his work. That is the reason for this ad hoc amendment." [Bracketed phrase added by *Wilcox* court]¹¹.

This statement of intent by the framers suggests that Article VII, section 6(3), was enacted to allow the judicial system flexibility to address a buildup of cases in a particular judicial district.

To conclude, it is not possible to predict how the Montana Supreme Court would address the question of the constitutionality of the Water Court if the issue was placed squarely before it. It is unlikely that making the Water Court permanent, in and of itself, would create a constitutional issue. Such an action would, however, essentially foreclose the state from arguing that Article VII, section 6(3), excuses or “saves” an otherwise unconstitutional arrangement.

IV. DISCUSSION OF POTENTIAL AMENDMENTS

As discussed in Appendix A, there are many cogent arguments to suggest that a court analyzing the Water Court would find that the current structure is constitutional. The fact that the Supreme Court has addressed numerous appeals from the Water Court without taking the opportunity to discuss its jurisdiction¹², the fact that laws are presumed to be constitutional if there is a reasonable interpretation¹³, and the fact that the Montana Constitution clearly contemplates giving the Legislature power to create alternative and specialized courts with broad judicial power¹⁴ are all factors that a court might find persuasive.

¹¹ *State ex rel. Wilcox v. Dist. Court*, 208 Mont. 351, 359, 678 P.2d 209, 213 (1984)

¹² See e.g. *Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.*, 2014 MT 167, 375 Mont. 327, 328 P.3d 644 (2014); *City of Helena v. Cmty. of Rimini*, 2017 MT 145, 388 Mont. 1, 397 P.3d 1 (2017); *Klamert v. Iverson*, 2019 MT 110, 395 Mont. 420, 443 P.3d 379 (2019).

¹³ See note 1, *supra*.

¹⁴ As summarized in Appendix A, p 11, “While Article VII, section 8, of the Constitution requires the election of Supreme Court justices and district court judges, it does not require the election of all judges and Article VII, section 9, of the Constitution authorizes the legislature to establish the qualifications and methods for selection of other judges.” In other words, the legislature can both establish other courts and determine the qualifications and methods of selection for the judges of these courts.

With this said, it is impossible to know how a court would view the full picture, and there are also good arguments against the constitutionality. If the WPIC wishes to eliminate uncertainty, the idea of a constitutional amendment has been brought forward.

As discussed in Section III, the temporary-versus-permanent issue is not central to the constitutionality of the Water Court. For this reason, it would be most effective to concentrate any amendment on eliminating a potential conflict stemming from the appointment of water judges.

Possible constitutional or statutory amendments ideas include but are not limited to:

- adding a provision to Article VII, section 8, of the Montana Constitution to describe the process for appointing Water Court judges;
- expressly exempting water court judges from the election requirement in Article VII, section 8;
- Amending areas in Title 3 and Title 85 that refer to Water Courts as district courts.

Any proposal would be accompanied by its own set of advantages and disadvantages, so more extensive discussion is merited if the WPIC wishes to pursue the idea of a constitutional amendment.



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TO: Water Policy Interim Committee
FROM: Helen Thigpen, Staff Attorney
RE: Constitutionality of Water Court Jurisdiction
DATE: May 9, 2016 (Final Version)

During its March 2016 meeting, the Water Policy Interim Committee (WPIC) directed legal staff to assess the constitutionality of the structure of the Water Court, with specific direction to assess whether Montana's constitutional requirement for the election of judges prohibits the legislature from expanding the jurisdiction of the Water Court. Because this inquiry arose during the WPIC's study of the future of the Water Court, this memorandum focuses primarily on whether there are constitutional barriers to having the Water Court carry out certain functions that are primarily under the purview of the district courts. To date, the WPIC has not set forth specific proposals for restructuring the Water Court. As such, this memorandum serves as framework for future evaluations of legislative proposals and not an evaluation of any existing legislative proposal.

I. Question Presented

Does the requirement in Article VII, section 8, of the Montana Constitution for the election of Supreme Court justices and district court judges prohibit the legislature from expanding the jurisdiction of the Water Court?

II. Brief Answer

Most likely no. Article VII, section 1, of the Montana Constitution vests the legislature with the authority to establish other courts as may be necessary. The water court structure was established in 1979 to adjudicate existing water rights in Montana and would most likely be considered a specialized court within the meaning of Article VII, section 1, of Constitution. While Article VII, section 8, of the Constitution requires the election of Supreme Court justices and district court judges, it does not require the election of all judges and Article VII, section 9, of the Constitution authorizes the legislature to establish the qualifications and methods for selection of other judges. Because the legislature can both establish other courts and determine the qualifications and methods of selection for the judges of these courts, the requirement in Article VII, section 8, of the Constitution for the election of Supreme Court justices and district court judges does not prohibit the legislature from expanding the jurisdiction of the Water Court. Significantly, the judicial structure for the adjudication and administration of water rights in Montana has never been challenged in court, and any legislation to expand the Water Court's

jurisdiction would be presumed constitutional. Nevertheless, all proposals would need to be evaluated on a case-by-case basis.

III. Analysis

The current water right adjudication process was established in 1979 through passage of S.B. 76, which provided for various water divisions to adjudicate existing water rights.¹ The bill established four water divisions throughout the state as determined by natural divides between drainages, and required that water division to be presided over by a water judge who also sat as a district court judge.² Water division boundaries were established for the Clark Fork River Basin, the Yellowstone River Basin, the Upper Missouri River Basin, and the Lower Missouri River Basin.³ Through S.B. 76, the legislature authorized a water division judge to preside over all matters related to the determination of existing water rights within the judge's division, which consisted of several judicial districts. There are currently 22 judicial districts in Montana, and a division water judge presides as a district court judge "in and for each judicial district wholly or partly within the water division."⁴

S.B. 76 also established the method for appointing water division judges. Instead of a separate election, the legislature provided for the appointment of water judges by a majority vote of a committee composed of the district court judges in the division.⁵ In sum, a sitting district court judge was selected by a committee of other district court judges, serving in districts that fell wholly or partly within the water division, to serve as the division's water court judge. This process is still used today to select and appoint water division judges and is also used to fill vacancies that may arise. A vacancy occurs "when a water judge dies, resigns, retires, is not elected to a subsequent term, forfeits the judicial position, is removed, or is otherwise unable to complete the term as a water judge."⁶ In 1981, the legislature authorized a retired district judge of a judicial district wholly or partly within the water division to serve as a water division judge.⁷

A few years after creating the adjudication process and establishing the water divisions, the legislature provided for a chief water judge to be selected by the chief justice of the Montana Supreme Court. The chief justice can select either a current or retired district court judge for the position. The legislature authorized the chief water judge to exercise jurisdiction over "all matters relating to the determination of existing water rights within the boundaries of the state of Montana" and to administer the adjudication process and coordinate claim information with DNRC.⁸ For matters within the judge's jurisdiction,

¹ Ch. 697, L. Mont. 1979; Existing water rights are water rights existing prior to July 1, 1973, and include federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law. 85-2-102, MCA.

² *Id.*

³ *Id.*; 3-7-102, MCA.

⁴ 3-7-201(3), MCA.

⁵ 3-7-201(1), MCA.

⁶ 3-7-203, MCA.

⁷ Ch. 80, L. Mont. 1981.

⁸ Ch. 442 L. Mont. 1981 Laws Mont. 442; 3-7-223, MCA.

the chief water judge (and now the associate water judge) has the same powers of a district court judge.⁹

In addition to adjudicating water rights, the Water Court may also determine whether existing water rights have been abandoned from nonuse.¹⁰ The Water Court also addresses claims certified from the district courts when issues arise regarding existing water rights.¹¹ Because certification proceedings arise when there is a distribution controversy, the proceedings are given priority over all other adjudication matters.¹² Although the statutes clearly vest the four individual water division judges with the authority to adjudicate existing water rights, the Water Court judges in Bozeman, along with its water masters and court staff, handle the bulk of the adjudication work today.

As opposed to the Water Court, the district courts have original jurisdiction in all felony criminal cases and all civil cases. These courts are sometimes called upon to address water issues and resolve disputes among water users. If there are decreed water rights, the district courts may appoint water commissioners in certain cases to distribute the water according to the decree. A water commissioner has the authority to measure and distribute water to the appropriate water right owners.¹³ If there is a question over the characteristics of existing water rights, a district court may certify the question to the Water Court for a determination as noted above. In other cases, district courts address enforcement issues to prevent the waste or unlawful use of water or to address decisions on water right applications from the DNRC.¹⁴ District court decisions are subject to review by the Montana Supreme Court.

The constitutionality of the existing structure of the water court was raised in the mid-1980s. In 1988, then chief legal counsel for the Department of Natural Resources and Conservation (DNRC) published an article in the Montana Law Review arguing that the water adjudication structure was unconstitutional.¹⁵ Specifically, the article argued that the four individual water division judges did not have the authority to exercise jurisdiction beyond the boundaries of the judicial district in which they were elected to serve. As described in the article:

⁹ 3-7-224(3), MCA.

¹⁰ 3-7-501(4), MCA.

¹¹ 85-2-406, MCA (providing that “When a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition the district court to certify the matter to the chief water judge”).

¹² 85-2-406(2)(b), MCA.

¹³ 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 the water. 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 the distribute water. 85-5-101, MCA.

¹⁴ 85-2-114, MCA.

¹⁵ Donald D. MacIntyre, *The Adjudication of Montana’s Waters – A Blueprint for Improving the Judicial Structure*, 49 Mont. L. Rev. 211 (1988).

The constitutional problem is raised when the water judge exercises jurisdiction beyond the judicial district he serves. No elector within the water division, except within the judge's own judicial district, has ever cast a vote approving the water judge as the people's choice to exercise judicial powers over them. Rather the water judge has been designed by a vote of a committee of his fellow district court judges. (Internal quotations omitted).¹⁶

Without jurisdiction to act, the article argued that all decisions issued up until that point were likely void for lack of jurisdiction.¹⁷ The article also took issue with legislature's 1981 amendments to allow retired district court judges to serve as water division judges, stating that "designating a retired district court judge as a water judge is a radical departure from article VII, section 8, because the retired district court judge is elected by no one he serves as a water judge."¹⁸

During the same time period, the WPIC received a report from a Denver law firm it hired to assess the adjudication process. That report, known informally as the Ross Report, stated that credible arguments existed on both sides of the constitutional debate, but noted the following:

In support of the Court's constitutionality, it can be argued that the Water Court does not act as a district court, that when the substance of its legislatively-created jurisdiction and powers are examined it is clearly a special court created by law, pursuant to article VII, section 1 of the Montana constitution, free from the requirement of election which attaches to district court judges.¹⁹

The Ross Report also noted that Article VII, section 6(3), of the Constitution potentially reconciled the issue since the Constitution allows the chief justice of the Montana Supreme Court to assign district judges and other judges for temporary service from one district to another and from one county to another.²⁰ When developed, the water adjudication process was intended by the legislature to be temporary, although the projected completion has been pushed back several times and is now estimated for 2028. As noted in the Ross Report, the Constitution allows appointment of district court judges and other judges but only so long as that service is considered "temporary." DNRC legal counsel argued that service as a water court judge could not be construed as "temporary service" since the legislature established 4-year fixed terms for water division judges and contemplated an on-going adjudication process.²¹ However, ultimately the Ross Report concluded that while "cogent arguments" existed on both sides of the debate, the presumption favoring the constitutionality of legislative acts and the lack of any authority from the Supreme Court on the issue favored the existing adjudication structure.²²

¹⁶ *Id.* at 239.

¹⁷ *Id.* at 243-244.

¹⁸ *Id.* at 241.

¹⁹ Jack F. Ross, *Evaluation of Montana's Water Rights Adjudication Process*, 38 (1988), available at: <http://leg.mt.gov/content/publications/environmental/1988adjudication.pdf>.

²⁰ *Id.* at 39.

²¹ MacIntyre, 49 Mont. L. Rev. at 242.

²² Ross, *Evaluation of Montana's Water Rights Adjudication Process* at 40.

The issue raised in the 1980s centered on the jurisdictional reach of the four district court judges who are appointed as water division judges and whether these judges can lawfully act outside of the judicial districts in which they were elected to serve. The same issue was raised against the jurisdiction of the chief water court judge who is appointed and therefore not elected by the voters in any judicial district. As noted above, this issue was never litigated or challenged in court. Although this issue theoretically still exists, the present issue raised during the WPIC's study of the future of the Water Court asks a different if not further question, which is whether the chief and associate judges of the Water Court may take on additional duties that have traditionally fallen under the purview of the district courts. Some have suggested, for example, that the Water Court could be utilized to administer decrees or to address appeals on permit applications from the DNRC.²³

The legal arguments against expanding the jurisdiction of the Water Court appear to rest not only on the lack of direct election of the Water Court judges, but also on the notion that there are judicial functions that are so inherently within the realm of the district courts, that they cannot be lawfully exercised by the Water Court judges without violating the Constitution. An analysis of the relevant constitutional provisions related to these issues is provided below.

A. The legislature may establish other courts as it deems necessary pursuant to Article VII, section 1, of the Montana Constitution.

Pursuant to Article VII, section 1, of the Montana Constitution, "The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law." This provision establishes the framework for judicial power in the state, but the courts have rarely been asked to interpret its meaning, especially the meaning of the phrase "and such other courts as may be provided law." However, in a challenge to the legislature's creation of justice courts of record, the Supreme Court has affirmed the legislature's authority to create inferior courts or courts of limited jurisdiction.²⁴ In reaching its decision, the Supreme Court noted the following:

The Convention Notes to Article VII, Section 1, following the recitation of this provision in the Montana Code Annotated, state that it "[r]evises [the] 1889 constitution by allowing the legislature to establish 'inferior' courts, such as a small claims court, as well as intermediate courts of appeal." Thus, the compilers of the Montana Code Annotated recognized that the phrase "such other courts as may be provided by law" grants the Legislature the authority to create inferior courts.²⁵

²³ See the Water Adjudication Advisory Committee report to the WPIC on Water Distribution Issues, accessible at: <http://courts.mt.gov/Portals/113/water/WAAcommittee/wpic03012016/WaterDistributionIssuesFinalDocumentForWPIC.pdf>.

²⁴ *Hernandez v. Yellowstone County Comm'rs*, 2008 MT 251, 345 Mont. 1, 189 P.3d 638 (2008).

²⁵ *Hernandez*, ¶ 16.

A further review of the convention transcripts for Article VII, section 1, indicates that the delegates intended to provide the legislature with flexibility in establishing “other courts.” For example, in a discussion of justice of the peace courts, a delegate stated that:

under that system, in the minority, so far as jurisdiction is concerned, you may improve and create you may not only improve the justices of the peace, you may create other courts if you want to; you may have a small claims court, you may have a municipal court, you may have a police court, you may have any kind of a court the Legislature finds necessary in the future.²⁶

An example of a court established under this authority is the Montana Workers’ Compensation Court. The WCC was created by the legislature in 1975 to resolve disputes arising under the Workers’ Compensation Act and the Occupational Disease Act.²⁷ The WCC has exclusive jurisdiction over disputes regarding the independent contractor exemptions, penalties for the theft of benefits under the Workers’ Compensation Act, and certain return to work preferences.²⁸ The WCC may also act as the appellate court for certain matters arising from the Department of Labor and Industry. The WCC conducts trials as necessary in Helena and throughout the state, and its proceedings and hearings are governed by statutory law, common law, rules of evidence, and the Montana Administrative Procedure Act. The WCC judge is appointed for six years and is appointed by the Governor from a list of nominees originating from the Judicial Nomination Commission.²⁹

In 1981, the Supreme Court upheld the WCC’s jurisdiction in *State ex rel. Uninsured Employers’ Fund v. Hunt*.³⁰ In this case, the Supreme Court recognized that while the WCC was not given the full powers of a district court, “it nevertheless has been given broad powers concerning benefits due and payable to claimants under the Act.”³¹ In addition, in an opinion from 1979, the Attorney General concluded that while the legislature did not expressly provide that the WCC was part of the judicial branch, there were a number of factors indicating that it was the legislature’s intent to do so.³² As evidence, the Attorney General noted that many of the same powers and procedures assigned to the WCC were similar to other state courts. The legislative history and committee minutes from the bill that created the WCC were especially relevant to the inquiry.

While some have argued that the Water Court structure is not a specialized court within the meaning of Article VII, section 1, of the Constitution, it is difficult to imagine what other structure the legislature intended to create.³³ In establishing the water adjudication structure, the legislature created four water divisions out of the already existing judicial districts and subsequently provided for both a chief and associate water

²⁶ IV Montana Constitutional Convention, Verbatim Transcript, 1020 (1972).

²⁷ See Ch. 537 Laws. Mont. 1975.

²⁸ Title 39, chapter 71, Part 29; see also <http://wcc.dli.mt.gov/whoware.asp#Jurisdiction>.

²⁹ 2-15-1707, MCA.

³⁰ *State ex rel. Uninsured Employers’ Fund v. Hunt*, 191 Mont. 514, 625 P.2d 539 (1981).

³¹ *Uninsured Employers’ Fund*, 191 Mont. at 519, 625 P.2d at 542.

³² 38 A.G. Op. 27 (1979).

³³ MacIntyre, 49 Mont. L. Rev. at 237.

court judge. While there has admittedly been some confusion with having district court judges serve as water division judges for the Water Court, the legislative history for S.B. 76 indicates that the legislature considered the unique nature and characteristics of the water adjudication process and carved out a new judicial system for addressing those issues. In sum, the Water Court was specifically established to adjudicate existing water rights in Montana and would most likely be considered a “specialized court” within the meaning of the Article VII, section 1, of the Montana Constitution.

B. Article VII, section 8(1) of the Constitution applies to Supreme Court justices and district court judges, and the legislature may establish the qualifications and methods of selection for judges of other courts pursuant to Article VII, section 9(1).

Article VII, section 8(1), of the Constitution, which has been relied on by those arguing that division water judges and Water Court judges cannot exercise jurisdiction in certain cases because they are not elected, provides that “Supreme court justices and district court judges shall be elected by the qualified electors as provided by law”. Both the 1972 and 1889 constitutions required direct election of Supreme Court and district court judges, but subsection (1) was revised through a constitutional referendum (C-22) to make the language even more clear.³⁴ This constitutional referendum was designed to clarify that judicial appointments must run for election as soon as possible after being appointed by the governor. Interestingly, when this section was revised in 1992, the debate over the constitutional issue regarding whether the water division judges could exercise jurisdiction outside of the districts in which they were elected to serve had already occurred. The revisions also made no mention of the WCC, which had been in place since the mid-1970s, and whether the WCC judge needed to be elected. The legislative history for C-22 notes that the legislation was specifically intended to “protect the voter’s right to vote for Supreme Court and District Court judges.”³⁵ There is no reference in the legislative history for C-22 about whether other judges were subject to election.

Certainly the issue of an elected judiciary has been an issue of debate in Montana over the years and was a significant issue during 1972 constitutional convention. Ultimately, however, the convention delegates settled on a system that incorporated elements of both an elected and appointed judiciary. For example, the 1972 Constitution required judicial elections but also allowed judges to be appointed in cases of vacancies. In addition, and perhaps most importantly to the question presented in this memorandum, Article VII, section 9, of the Montana Constitution allows the legislature to determine the “Qualifications and methods of selection of judges of other courts . . .”

Few cases have interpreted Article VII, sections 8 or 9, of the Constitution and the ones that do are not relevant to this memorandum. However, in addressing whether the chief justice of the Supreme Court may assign retired judges for service in district courts, in

³⁴ C-22 (1992).

³⁵ House Jud. Committee, Hearing on H.B. 353 to Submit Constitutional Amend. to the People to Clarify Judicial Selection, Feb. 1, 1991.

St v. Wilcox, 208 Mont. 351, 678 P.2d 209 (1984); the Supreme Court explicitly recognized that not all judges in Montana must be elected, stating the following:

While it is true in a general sense that Montana has an elected judiciary, all persons serving as judges and exercising judicial functions are not elected by the people by popular vote. For example, retired judges are empowered to serve as water judges and are selected by a committee of district judges. Section 3-7-201(1), MCA. The Chief Water Judge is appointed by the Chief Justice of the Montana Supreme Court and may be a retired judge. Section 3-7-221, MCA. Judge Lessley and Judge Thomas, both retired district judges, are presently serving in such capacities and exercising judicial functions. The Workers' Compensation Judge clearly exercises judicial functions but is appointed by the Governor, not elected by the people. Section 2-15-1014, MCA.³⁶

As noted in *Wilcox*, judicial functions in Montana are also routinely carried out by other judicial officers who are not elected. For example, standing and special masters may be appointed by district court judges to address certain matters, and such masters are employed and routinely used by the Water Court during the adjudication process. These masters may regulate proceedings, require the protection of evidence, rule on the admissibility of evidence, administer oaths, and take all measures necessary to carry out their duties.

If called upon to address the language of Article VII, sections 8 and 9, in a challenge to the jurisdiction of the Water Court, a court would be guided by principles of constitutional interpretation that require the Constitution to be interpreted as a whole. In addition, a court would be guided by the principle that it should not insert language into the Constitution that the express language omits. Article VII, section 8, clearly requires the election of Supreme Court justices and district court judges but contains no language requiring other judges to be elected. In addition, the plain language of the Constitution authorizes the legislature to not only establish specialized courts, but to also determine the qualifications and methods for the qualifications and selection of these judges. A conclusion that Water Court judges must be elected in order to properly exercise jurisdiction lawfully authorized by the legislature would require a court to essentially ignore these provisions or insert language where it presently does not exist.

C. Article VII, section 6(3), of the Constitution, allowing the chief justice to temporarily assign district court judges and "other judges" from one district to another or from one county another, is likely not relevant to the question of expanding the jurisdiction of the Water Court.

As raised in the Ross Report, Article II, section 6(3), of the Montana Constitution allows the chief justice to assign district court judges and other judges for temporary service from one district to another and from one county to another. The author of the Ross Report suggested that the constitutional issue over the election of division water judges could possibly be remedied by this provision since it allows the chief justice to

³⁶ *State ex rel. Wilcox*, 208 Mont. 356, 678 P.2d 221.

appoint other judges for temporary service. However, while this provision authorizes a district court judge to be called in for temporary service, it does not appear to relate to the question of the future of the Water Court and whether certain duties that are currently under the purview of the water division judges may be allocated to the Water Court.

Presumably, the author of the Ross Report was suggesting that any question about the legality of the water division judges acting outside of the district to which they were elected could be resolved by having the chief justice assign that judge for temporary service to the other districts. However, while the water right adjudication process was certainly intended to be “temporary”, it is unclear how this language would apply to the current question of Water Court jurisdiction. The language in subsection (3) appears to allow other judges to be assigned from one district to another and from one county to another and doesn’t appear to apply to the current question presented by the WPIC. In addition, this issue has not been raised in any proceeding challenging the constitutionality of the existing structure, and it is not clear whether the court would consider it going forward. In addition, the chief justice is already authorized to assign the chief water judge or the associate water judge to serve as a water division judge.³⁷

D. Article VII, section 4(3), of the Constitution authorizes but does not appear to require the legislature to provide other courts and district courts with concurrent jurisdiction.

Article VII, section 4, of the Constitution provides as follows:

Section 4. District court jurisdiction. (1) The district court has original jurisdiction in all criminal cases amounting to felony and all civil matters and cases at law and in equity. It may issue all writs appropriate to its jurisdiction. It shall have the power of naturalization and such additional jurisdiction as may be delegated by the laws of the United States or the state of Montana. Its process shall extend to all parts of the state.

(2) The district court shall hear appeals from inferior courts as trials anew unless otherwise provided by law. The legislature may provide for direct review by the district court of decisions of administrative agencies.

(3) Other courts may have jurisdiction of criminal cases not amounting to felony and such jurisdiction concurrent with that of the district court as may be provided by law.

As stated in subsection (1), district courts have original jurisdiction in all civil matters and cases at law and in equity. In addition, subsection (3) provides that other courts *may* have jurisdiction in non-felony criminal cases and “such jurisdiction concurrent with that of the district court as may be provided by law.” The phrase “concurrent jurisdiction” is somewhat unclear, but generally refers to when two distinct courts have simultaneous jurisdiction over the same case. In addressing the meaning of the phrase “concurrent jurisdiction,” a constitutional convention delegate stated the following:

³⁷ 3-7-224(1), MCA.

In that regard, I want to first call your attention to the last sentence in subparagraph 3, which provides for concurrent jurisdiction with other courts. This language is inserted in this section for the sole purpose of giving great flexibility to the entire inferior court system. Pursuant to this language, the Legislature will be able not only to enlarge, if they desire, the jurisdiction of the Justice of the Peace Courts. It may also, if it desires, create Small Claims Courts. It may also, if it finds it necessary in the future, provide for domestic relations courts. It may provide, if necessary, for separate probate courts. It gives great flexibility to the entire inferior court system.”³⁸

In addition, while the courts have not been called upon to review the full meaning of the phrase “other courts”, the Convention Notes reveal that this section “allows [the] legislature to create other courts having the same power as district courts.”

Clearly, based on the convention transcripts, the framers of the 1972 Constitution intended to vest the legislature with flexibility to design Montana’s court system. The language recognizes that the legislature *may* establish other courts with jurisdiction in non-felony criminal cases and “such jurisdiction concurrent with that of the district court as may be provided by law.” Depending on whether the “may” preceding the phrase “have jurisdiction of criminal cases” also applies to the phrase “such jurisdiction concurrent with that of the district court as may be provided by law,” then the legislature would be authorized but not required to establish other courts with concurrent jurisdiction to the district courts. However, because the framers clearly intended to provide the legislature with great flexibility in designing the entire inferior court system, subsection (3) likely does not require all other courts to have concurrent jurisdiction with the district courts. The WCC, for example, has original jurisdiction in certain proceedings and district courts do not appear to have concurrent jurisdiction to address these cases. In addition, any issues associated with the phrase “concurrent jurisdiction” may be able to be addressed in the drafting process if the WPIC or the legislature requests legislation to expand the duties of the Water Court.

IV. Conclusion

While the specific issue of whether the existing water adjudication structure in Montana is constitutional has not been addressed or resolved by the courts, it is important to note that a court is unlikely to issue a ruling that strikes down the entire structure that has been in place since 1979. Since the creation of the adjudication process, the Montana Supreme Court has addressed numerous appeals from the Water Court without taking the opportunity to address any issue associated with the water adjudication structure. The Montana Supreme Court has also adopted and amended rules for the operation of the Water Court, including Water Right Claim Examination Rules and Water Right Adjudication Rules. Even if the issue were squarely raised before a court, it is unlikely any court would upend the numerous decisions the water courts have issued in the previous 37 years. Such a decision would result in significant uncertainty to water users and property owners

³⁸ IV Montana Constitutional Convention, Verbatim Transcript, 1076 (1972).

across the state, which any court would surely consider. Equitable doctrines requiring claims to be timely filed may also bar any challenge to the existing adjudication structure.³⁹

In addition, the Montana Constitution's requirement for the election of judges likely does not prohibit the legislature from expanding the jurisdiction of the Water Court to include duties that have traditionally fallen under the purview of the district courts. Article VII, section 1, of the Constitution vests the legislature with the authority to establish other courts as may be necessary. The judicial system for the adjudication of existing water rights would most likely be considered a specialized court within the meaning of the Constitution. While Article VII, section 8, of the Constitution requires the election of Supreme Court justices and district court judges, it does not require the election of all judges and Article VII, section 9, of the Constitution authorizes the legislature to establish the qualifications and methods for selection of other judges. Because the legislature can both establish other courts and determine the qualifications and methods of selection for the judges of these courts, the requirement in Article VII, section 8, of the Constitution for the election of Supreme Court justices and district court judges does not prohibit the legislature from expanding the jurisdiction of the Water Court. In addition, Article VII, section 4(3), of the Constitution authorizes but does not appear to require the legislature to provide all other courts with concurrent jurisdiction to the district courts. Finally, but significantly, the judicial structure for the adjudication and administration of water rights in Montana has never been challenged in court and any legislative act to expand the Water Court's jurisdiction would be presumed constitutional. Nevertheless, all proposals would need to be evaluated on a case-by-case basis as the WPIC considers the future of the Water Court.

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³⁹ See e.g. the doctrine of laches codified at 1-3-218, MCA, which provides that "the law helps the vigilant before those who sleep on their rights."