

WATER DISTRIBUTION PILOT PROJECT SCOPING WHITEPAPER

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The purpose of this whitepaper is to outline potential legislation addressing a Water Distribution Pilot Project for appointment of water commissioners under DNRC regulatory authority to measure and distribute water.

PROJECT PROPOSOL

The Pilot Project generally proposes to establish DNRC authority over water administration and distribution within a chosen basin.

It is recommended that the Pilot Project be legislatively enacted. This legislation may require “cleanup” in other sections, notably, MCA § 85-5-101, et seq (the existing enforcement statutes), and perhaps MCA § 85-2-114 (the Water Use Act enforcement statute).

Scope of Pilot Project

A specific source basin has not yet been identified but will be chosen with the input of stakeholders. It should be made clear that all waters (surface and ground) within the specified basin will fall within the scope of the Pilot Project legislation.

Process to Initiate DNRC Administration of Water Rights

The Pilot Project would allow for two methods to initiate administration of water rights: (1) DNRC could initiate administration on its own initiative, or (2) water users could petition DNRC for administration of water rights.

It is recommended that the Pilot Project legislation establish that DNRC enter an Order concerning any decision to initiate an administration action, regardless of whether the issue is raised by petition or DNRC initiative. It is further recommended that such Order would be reviewable by the DNRC hearings unit, and that any final agency action by the hearing officer would be subject to judicial review pursuant to MAPA.

DNRC Initiated

DNRC would be able to initiate administration pursuant to statutory authority created under the Pilot Project legislation. It is recommended that the Pilot Project create clear statutory authority and clear statutory criteria for DNRC to initiate administration and appointment of a water commissioner on its own initiative.

Petition Process

It is recommended that the Pilot Project follow the existing statutory criteria and structure for appointing a water commissioner (currently located in MCA §§ 85-5-101, and 407), but simplify and clarify some of the language. However, the pilot project legislation should direct such petitions to the DNRC instead of the district court. The current criteria for petition are as follows:

A water commissioner must be appointed if:

- The owners of at least 15% of the water rights affected by the decree or at least 15% of the flow rate of the water rights affected by the decree petition the district court. 85-5-101(1), MCA.

A water commissioner may be appointed if:

- The owners of less than 15% of the water rights or 15% of the flow rate of the water rights petition the district court and show that they cannot obtain the water to which they are entitled. 85-5-101(1), MCA.
- The DNRC and at least one water right holder petition the district court, but only for any area decreed under the state-wide adjudication (Temporary preliminary, Preliminary, or Final decree). 85-5-101(2), MCA.
- The DNRC or any other party petitions to have stored waters distributed (85-5-101(3) & (5), MCA).
- The owners of at least 10% of a ditch system under joint ownership petition the district court, but only if the rights flowing through the ditch have been adjudicated. 85-5-407, MCA.

Term

It is recommended that the term of a water commissioner appointment / DNRC administrative action is the irrigation season of each year, or as designated by DNRC. This would be consistent with existing law at Section 85-5-104, MCA.

DNRC Authority

It is recommended that the Pilot Project legislation clearly identify the basin(s) in which DNRC is to have authority over all administration and distribution issues. Such statement of authority should include the ability to appoint, remove, and oversee water commissioners.

However DNRC's authority should be specifically limited to the admeasurement and distribution of water pursuant to decree, certificates, permits or changes, the terms of the administration statutes, and any DNRC administrative orders on the distribution of water.

Additional DNRC authorities / duties should include:

- The authority/duty to enter upon a ditch, and inspect and adjust headgates.
- Duty to tabulate all water rights and collect and maintain diversion records (see DNRC Record Keeping section below).
- The authority to deny water deliveries to a ditch or ditch system which is inadequately maintained or does not have an adequate measuring device
- The authority to entertain water distribution and administration disputes and enter administrative orders concerning proper distribution of water
- The authority to entertain disputes concerning a water commissioner's administration, and enter administrative orders concerning proper distribution of water
- The authority for DNRC to bring a court case enjoining and potentially levying fines against a non-compliant water user (see section regarding DNRC Enforcement)
- The authority for DNRC to promulgate rules to implement the statute.

Water Commissioner Duties and Authorities

The Pilot Project legislation should establish the water commissioner as an agent and employee of the DNRC. It is recommended that the Pilot Project legislation would vest administration authorities and duties upon DNRC. However, the following enumerated powers of the water commissioner should be included in the Pilot Project legislation

- Upon a DNRC order establishing an administration action in the basin, the Pilot Project legislation should establish the water commissioner's authority and duty to admeasure and distribute water to the water users pursuant to decree, certificates, permits or changes, the terms of the administration statutes, and any DNRC administrative orders on the distribution of water. This would parallel the existing statute at Section 85-5-101(1), MCA.
- The Pilot Project legislation should establish the administrative procedure for dissatisfied water users to assert a failure of a commissioner to comply with his or her duties. WRD should also consider what the remedies for such a situation will be.
- In the event of any dispute over distribution of water, water commissioners should comply with the DNRC's administrative orders. This would parallel existing statute at Section 85-5-301(3), MCA.
- Water Commissioner's ability to deny distribution of water to owners without measuring devices. This would parallel existing statute at Section 85-5-302, MCA.
- Water Commissioner's ability to deny distribution of water to owners with inadequate diversion works.
- Water Commissioner's Authority to enter upon a ditch, and inspect and adjust headgates. This would parallel, in part, existing statute at Section See 85-5-108, MCA.

DNRC Record Keeping

- The Pilot Project legislation should require DNRC to tabulate all water rights (existing decreed rights, certificates, permits or changes)
- The Pilot Project legislation should generally require DNRC to maintain records concerning all amounts of water administered during a DNRC administration on a source.
- The Pilot Project legislation should specifically require Water Commissioners to obtain daily records of the amount of water delivered to each user.
- Although not needed in statute, the DNRC should implement rules or policies concerning measurements and records. The Pilot Project legislation should include a statement of intent with language clarifying the type rules contemplated for adoption by DNRC. It is recommended that the policies or rules include:
 - Standardized forms and record keeping to ensure and prove proper distribution of water.
 - Standardized accounting and reporting protocols
 - Provisions which allow the DNRC to impose measurement / reporting requirements upon water users
 - DNRC training and oversight
 - System which allows flexibility within a basin or region
 - Requiring daily record keeping
 - Records retention through the water right database
 - Public access to records

DNRC Review of Administration Disputes / Mediation

DNRC Orders Regarding Administration Disputes

As discussed above, DNRC should have the authority and duty to entertain all administration and distribution disputes. This would include all issues relating to administration and distribution of waters among the various water users and the Water Commissioner. The statute would not allow consideration of questions regarding the scope of a water right, which means that in some cases disputes would have to be resolved by the court system which has jurisdiction. The statute should require DNRC to enter an order on all such disputes, and by which the Water Commissioner may distribute waters. The statute should allow judicial review of that final agency decision.

DNRC Mediation of Administration Disputes

DNRC also desires a mediation process included in the Pilot Project legislation, allowing DNRC to attempt to resolve administration disputes without the need for a contested hearing. This directive can be broadly accomplished with language in the Pilot Project legislation allowing DNRC to attempt to obtain mediated settlement or voluntary compliance. See e.g. MCA § 85-2-116.

It should be recognized that DNRC's mediation efforts may implicate DNRC's ability to impartially enter an order in the dispute, or may result in a perception of impropriety. In one recent case the Montana Supreme Court held: "When investigatory and adjudicatory functions are combined, the risk of unfairness from the combination of those functions may, under certain circumstances, be too high." *In re Best*, 2010 MT 59, ¶133, 355 Mont. 365, 371, 229 P.3d 1201, 1206 (Mont. 2010). It further held that "due process requires a fair and impartial tribunal." *Id.*, 2010 MT 59 at ¶122, 355 Mont. at 370, 229 P.3d at 1204. Accordingly, DNRC mediation efforts should be accomplished under a separate mediator and mediation process from the hearings officer of a contested hearing so as to guarantee the due process rights of water users. This facet should also be considered regarding a separation of DNRC's commissioners from hearing's officers within the DNRC organization structure.

Other concerns with the mediation process include: that DNRC should not pursue its own policies through mediation; that the hearings officer should never approve settlements but instead only recognize the withdrawal of a claim, and; that the hearing officer should not allow mediation to cause a delay on a prompt order on the dispute.

Therefore, it is recommended that Pilot Project legislation ensure that the mediated outcome not result in injury to any water users, not result in delay, and is handled by someone other than the hearings officer. It should also be noted that such legislation should not be written to bind DNRC to enforce mediated settlements between water users inconsistent to the governing decrees or permits.

DNRC Enforcement

It is recommended that the Pilot Project legislation include a process for enjoining / levying penalties against non-compliant water users. DNRC should determine whether it wants to establish either/both (A) a civil or criminal penalties for non-compliance with DNRC orders and the ability to issue a citation for violations of orders, or (B) a cause of action to enjoin and potentially levy fines for non-compliance with DNRC orders. Either process will involve court action. In no event should the DNRC or its Water Commissioners have arrest powers or otherwise act as law enforcement personnel.

Water Commissioner Employment Status, Compensation, Experience, and Training

Water Commissioner Employment Status

- It is recommended that under the Pilot Project Water Commissioners be employees of the DNRC.
 - Existing statutory language (85-5-101(6), MCA) states that Water Commissioners are not employees of the court. However, many Water Commissioners have never been treated as independent contractors, and instead bear many hallmarks of an employee.
 - This distinction is important because the law determines whether a worker is an employee or independent contractor in fact, not merely in title.
 - This legal recognition is important to the employer because an employer is liable for its employees, and may bear additional responsibilities with regard to its employees (e.g. liability, benefits, workers compensation, unemployment insurance, etc.)
 - In determining whether a worker is an employee or an independent contractor Montana Courts have considered some of the following considerations: “(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.” *Eldredge v. Asarco Inc.*, 2011 MT 80, ¶151, 360 Mont. 112, 124, 252 P.3d 182, 191 (Mont. 2011).
 - In the context of this Pilot Project proposal, the first factor is likely the most telling: exercise of control over the Water Commissioners. Whereas the Courts have exercised varying levels of control over Water Commissioners, the Pilot Project envisions more oversight and direction to provide greater consistency across varying administration actions. This is likely evidence of an employer-employee relationship. Other factors also appear to indicate an anticipated an employer-employee relationship.
 - The benefits of such a relationship is the ability to hire, fire, and direct the actions of an employee. The limitations include the need to pay for benefits, provision of workplace tools and equipment, and increased liability from potential actions of the employee.

- Such Water Commissioner employees would need to be one of two types of employees permitted by statute: either a Temporary employee or a Seasonal Employee. Although other distinctions apply, Seasonal employees are permanent employees who acquire benefits, while Temporary employees (even if employed on recurring a seasonal basis) are not permanent and may not receive all benefits. See e.g. MCA § 2-18-101; see also State Human Resources Division guidance document at <https://hr.mt.gov/Portals/78/newdocs/guidesandforms/employee-definition-guide.pdf>
 - The desired term (in years, not season length), pay, benefits, requisite skills, and training required for the Water Commissioner will likely inform whether the employee will be a Seasonal or Temporary employee. A more skilled or permanent employee favors Seasonal status.
 - A table excerpted from a State Human Resources Division guidance document regarding the different employee types has been attached to this document. It provides a useful comparison of the varying requirements to hire, fire, and retain the types of employees. See Attachment A. The handout also provides citations to the statutory or regulatory authority controlling the various aspects of these employment classes.
 - When DNRC determines what employee type it wishes to select it should consult with HR (and legal if necessary) to determine the costs or employment requirements associated with that employee type.

Water Commissioner Funding

- It is recommended that the Pilot Project legislation abandon the existing compensation framework of assessing water users, and instead obtain legislative funding for all costs associated with the pilot project (e.g. commissioner time and expenses, any administrative costs, etc.).
 - Under the existing enforcement statutes, all water owners under an enforcement action are to pay a pro rata share of commissioner compensation. 85-5-101(4), MCA. The district court enters orders setting water commissioner compensation (85-5-101(4), MCA), and amount of water distributed to each water users (85-5-204, MCA), which together are a judgment against each water user to pay the commissioner (85-5-2206, MCA).
 - Under the existing framework, the court is able to address all due process concerns because its subject matter jurisdiction extends to such issues.
 - However, DNRC does not inherently have the authority to assess water users for deliveries of water. Instead, the Pilot Project legislation would need to create an assessment process and it would need to provide all the expected due processes. This therefore becomes a complicated piece of legislation, which may not be needed if the pilot project is limited to a particular river basin or source.
 - The funding for Temporary or Seasonal employees is far cheaper than the potential costs to fight/resolve challenges to an assessment.
 - If the Pilot Project is expanded state-wide, then an assessment process could be created in statute and would likely be more cost-efficient.
- It is recommended that the Pilot Project legislation abandon the existing framework of Water Commissioners affirmatively replacing or maintaining diversion works and then billing ditch owners for the expense. See Section 85-5-106 & 202, MCA.
 - Instead it is recommended that the Water Commissioner be able to curtail water use where a diversion works or measuring device is inadequate.

Water Commissioner Experience

- It is difficult to state what kind of experience would be desired by a Water Commissioner when it is unknown what employment status will be selected. A Seasonal Employee will demand higher pay and more consistent employment, and correspondingly DNRC can expect a more skilled applicant. However, Temporary employment could attempt to hire undergraduate students seeking degrees in related fields (hydrology, agriculture, etc.).
- In short a desired Water Commissioner has a good understanding of water rights, irrigation practices, water measurement skills, and successful completion of required training.

Water Commissioner Training

- It is recommended that the DNRC develop and implement a comprehensive training program for Water Commissioners expanding the current training program. If the DNRC adopts the recommendation to hire Water Commissioners as employees, then the ability to train and oversee Water Commissioners is not statutorily required and would fall within the normal employer-employee relationship. If that DNRC decides not to hire Water Commissioners as employees, then including that language in the Pilot Project legislation would be necessary, likely as a necessary certification.

DNRC Organization Structure

The program would be located under the existing Water Adjudication Bureau, the DNRC should evaluate:

- Potential Disparate programmatic goals, specifically:
 - State Water Projects Bureau is a recognized water user subject to Montana water law likely subject to the proposed Pilot Project, and which has a vested interest in receiving water
 - Water Rights Bureau regularly makes determinations of fact regarding historic usage of a water right, and might be criticized for making those decisions contrary to distribution decisions made by a Water Commissioner.
- Program being located centrally or regionally
 - If the program is regionally located, it allows for more direct connection between the program and the water users, it reduces certain program expenditures (e.g. travel) and it favors the hire of an employee which is more tied to the local community. However, regional offices vary in job performance and in local policies or customs. It is more difficult to standardize, staff, or consistently manage programs which are located away from central management offices or diffusely located across the state.
 - If the program is centrally located, it allows for more standardized consistent application of job duties and program policies. The program can more easily and consistently be managed. Certain program costs may be reduced (i.e. administrative / staffing costs). However, the Program may not have good information or understanding of local water problems or water users, as a result there may be a disconnect between the Program and the local water users.

Water User Duties, Rights & Remedies

The Pilot Project legislation should include language requiring all water users to maintain suitable headgates and measuring devices. This will parallel the existing statutory requirements of Section 85-5-302, MCA.

Water Users should have the ability to obtain a DNRC hearing on all Water Commissioner actions or orders, and thereafter the right to appeal the final agency action for judicial review. (See DNRC Review of Administrative Disputes / Mediation section, above) Regardless of what model DNRC chooses for enforcement actions comply with the substantive requirements for due process and administrative procedure.

Benefits of Pilot Project

- It would affirm the State of Montana's commitment to the on-the-ground implementation of the prior appropriation doctrine
- Increase the Montana Legislature's ability to oversee and manage the administration of water rights in the State of Montana.
- Opportunity to test a modernized water administration system on the ground and contemplate its state-wide applicability

- Water users would still be able to initiate an administration action under the same petition process, but would allow the State of Montana (through the DNRC) to affirmatively institute administration in a basis if other administration concerns arise.
- Creates an administrative system that may be implemented state-wide
- Modernizes the administration statutes in key ways, including:
 - Ability of Water Commissioner to enter upon a ditch and inspect and adjust headgates
 - Expressly recognizes a Water Commissioners ability to curtail water use because of inadequate diversion works or the lack of measuring devices, instead of requiring the Water Commissioner to fix the problem and bill the water user.
 - Establishes a clear statutory process and clear statutory criteria for enforcement of administrative orders instead of relying on a contempt of court order
 - Allows for the promulgation of rules to flexibly and quickly deal with administration issues
- Avoidance of pitfalls in the court system such as *ex parte* communications with the court, less reliance upon attorneys, less need for formal court orders, and an increased ability to prospectively resolve issues.
- Water Commissioners become state employees who are trained, guided, and operate under the clear authority of the State of Montana.
- Water Commissioners can better rely on clear job duties, expect more support from the DNRC and its staff, will have better resources at their disposal, and can spend more of their time actually working with water users on the ground.
- Water Commissioners will no longer have to worry about issues such as payment from water users or being bonded as an independent contractor.
- Strengthens the long-standing DNRC practice of tabulating all water rights and providing technical support to water commissioners
- Opportunity to expand and improve the training and knowledge base of Water Commissioners
- Ability to standardize water measurement, and water accounting and reporting protocols
- Standardized forms and record keeping functions supported by the DNRC
- Improved record keeping functions will allow for better water management decisions by water users
- DNRC support will result in well-developed administration policies and implementation grounded upon experience and knowledge
- New mediation process allowing for dispute resolution of administration issues, while still allowing quick administrative orders and judicial review if mediation fails

Attachment A

Quick Reference Chart of State of Montana Employee Types, excerpted from A Managers Guide to the Employee Definition in Montana State Government, State Human Resources Division, Department of Administration p.11-12 (Rev. Nov. 2009), available at <https://hr.mt.gov/Portals/78/newdocs/guidesandforms/employeedefinitionguide.pdf>

	References	Permanent Employee	Seasonal Employee	Temporary Employee	Short-Term Worker	Student Intern
Definition	Definitions 2-18-101, MCA					
Permanent Status	Recruitment and Selection Policy ARM 2.21.3701 et seq. Probation Policy	Yes	Yes	No	No	No
Competitive Process	Recruitment and Selection Policy ARM 2.21.3701 et seq.	Yes	Yes	Typically, unless agency decides on a case-by-case basis.	No	No
Sick and Annual Leave	Sick Leave Policy Annual Leave Policy	Yes	Yes	Yes	No	No
Holiday Pay	Holiday Policy	Yes	Yes	Yes	No	No
Performance Management	Performance Management and Evaluation Policy ARM 2.21.6401 et seq.	Yes	Yes	Not Required	Not Required	Not Required
Group Benefits	State Employee Group Benefits 2-18-701 through 711, MCA	Yes	Yes	Yes	No	No
Retirement System	Public Retirement Systems 19-3-411 & 19-3-412, MCA	If scheduled > 960 hours/fiscal yr membership is mandatory; If scheduled < 961 hours/fiscal yr membership is optional until the 961 hour limit is met. Once the employee meets 961 hours/fiscal year, membership is mandatory. Note: If an employee is already a member of the retirement system then membership is mandatory regardless of hours worked in the current fiscal year.				
Longevity Allowance	Longevity Allowance 2-18-304, MCA	Yes	Yes	May	No	No
Collective Bargaining	Collective Bargaining Agreements 39-31-306, MCA	Yes	May	May	May	May
Grievance	ARM 2.21.8010 et seq. Also see agency's CBA	Yes	Yes	May Not eligible under Policy, but may be eligible under CBA	May Not eligible under Policy, but may be eligible under CBA	May Not eligible under Policy, and not usually eligible under CBA