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TO: Water Policy Interim Committee
FROM: Cori Hach, Staff Attorney
RE: Executive Summary of Adjudication Benchmarks White Paper
DATE: May 6, 2020

This document is intended to serve as a quick reference to accompany the longer Adjudication Benchmarks White Paper. It explains why the reexamination benchmarks set forth in Section 85-2-271, MCA, are going to result in adjudication delays and the issuance of additional decrees and summarizes the statutory revisions proposed by the Department of Natural Resources and Conservation (DNRC) and the Water Court to address these issues.

Those seeking additional context are encouraged to read the accompanying primer. It provides background information such as relevant legislative and administrative history, explanations of important terminology, and discussion of the role and responsibilities of DNRC and the Water Court relating to the adjudication and benchmarks.

I. Explanation of Delays to Adjudication if no Legislative Action Taken

Section 85-2-271, MCA, is one of the statutes governing the statewide adjudication. It contains a provision known as the "reexamination benchmarks" that sets forth a gradual timeline for DNRC to complete reexamination of verified claims. The reexamination benchmarks provision is reproduced as follows:

- (2) (a) The benchmarks that are provided in subsection (2)(b) must be met. If the benchmarks are not met, money for water adjudication may not be included in the department's base budget.
 - (b) The benchmarks are as follows:
 - (i) the department shall reexamine 10,000 verified claims by June 30, 2017;
 - (ii) the department shall reexamine 30,000 verified claims by June 30, 2019;
 - (iii) the department shall reexamine 60,000 verified claims by June 30, 2021; and
 - (iv) the department shall reexamine 90,000 verified claims by June 30, 2023.

When the reexamination benchmarks were enacted in 2015, completion of reexamination was thought of as a symbolic "finish line" after which DNRC's role in the adjudication would be mostly wrapped up and subsequently limited to its support function during the litigation phase. However, over 25,000 claims were subsequently filed pursuant to 2017 House Bill 110.

According to DNRC and the Water Court, it is unavoidable that completing examination of the newly filed HB 110 claims will push the overall adjudication timeline back. *How far back* depends on

whether the Legislature modifies the reexamination benchmarks or not. The reason for this is that DNRC does not have the staff or funding to fulfill its current statutory obligation to meet the reexamination benchmarks while simultaneously tackling the HB 110 exempt claims¹. So under current law, DNRC will need to focus on the reexamination benchmarks exclusively until it has met the final 2023 reexamination deadline. Then it will be able to shift its focus to examining the HB 110 claims in 2023.

This restriction is already causing disruption in the adjudication process. The Water Court's preferred practice is to issue preliminary and interlocutory decrees on a rolling basis in order to stagger the litigation workload efficiently. Bifurcating DNRC's reexamination work from the examination of exempt claims interferes with this system and will significantly delay the Water Court from issuing final decrees. This is because if DNRC provides the Water Court with a Summary Report for a given water basin that includes only reexamined claims and not exempt claims, the Water Court will need to decide whether to:

(1) delay issuing a preliminary decree for years until it receives the DNRC's follow-up Summary Report including the exempt claims for that basin; or

(2) issue a preliminary decree with the reexamined claims and then follow up with a supplemental or interlocutory decree with the exempt claims from that basin sometime after 2023.

The first option would delay the entire adjudication, since the Water Court would be paused in issuing preliminary decrees for years. The second option would require the issuance of two more decrees in many basins, in turn multiplying the public notice periods², the objection periods, and the opportunities for costly litigation and ultimately delaying the issuance of final decrees. Duplicate decrees would also risk frustrating and confusing members of the public in basins that have already gone through the noticing process multiple times at significant expense.

II. Proposed Amendments to Adjudication Benchmarks

DNRC and the Water Court have jointly submitted the Proposed Benchmark Timetable attached as Appendix A. Under this timetable, DNRC would examine exempt claims concurrently with reexamining verified claims. By consolidating its work in each basin, DNRC would be able to provide the Water Court with a single Summary Report for each basin that included both reexamined claims and exempt claims. The Water Court could then use that information to issue a preliminary or interlocutory decree for each basin that includes the HB 110 exempt claims.

In order to be consistent with the Proposed Benchmark Timetable, the benchmarks would need to be revised in accordance with the timeline set forth in Appendix A. The language would need to be amended to allow for both examination and reexamination of both verified and never-before-reviewed claims. In addition, the notice provisions in Section 85-2-231 should be amended to clarify that exempt claims may be noticed in the same decree as reexamined and other unadjudicated claims.

¹ . The language in Section 85-2-271, MCA, restricts DNRC's ability to count examination of exempt claims toward its benchmark numbers, since the statute is limited to "reexamination" of "verified" claims, which would appear to preclude *initial examination of exempt* claims.

² The fiscal note for HB 110 estimated the cost for the issuance of ten supplemental preliminary decrees at nearly \$20,000.

According to the Water Court and DNRC, there would be four main advantages to this consolidated approach:

- **First**, it would allow DNRC to complete all its work in a given basin at once instead of finishing reexamination and then doubling back to each basin to examine the exempt claims.
- **Second**, beginning examination of HB 110 claims immediately would save the Water Court from issuing multiple decrees in many basins, which would conserve funding and cut years off the adjudication process by resulting in fewer objection periods, reduced litigation costs, and savings on publication and postage fees due to combined noticing.
- **Third**, consolidation would avoid creating public frustration that could occur with expensive, confusing, and similar-sounding processes taking place years apart.
- **Fourth**, it would accelerate the Water Court's ability to begin issuing final decrees.

<u>Basin</u>	<u>Reexam</u>	<u>HB110</u>	<u>SB 355</u>	<u>Reexam or Interlocutory</u>	<u>No. of Claims</u>	<u>Total No. of Claims Examined/ Reexamined</u>	<u>Deadline/ Year to send SR to WC</u>	<u>Remaining Claims to Examine/ Reexamine</u>	<u>Regional Office</u>
39E	2,414	186	Done	Reexam	2,600				Billings
40N	1,421	311	Done	Reexam	1,732				
40H	Done	24	2	Interlocutory	26				
40D	2,917	266	Done	Reexam	3,183				
40E	2,972	348	Done	Reexam	3,320				
41K	2,697	268	48	Reexam	3,013				
41I	4,698	1,019	73	Reexam	5,790				
40Q		76	10	Interlocutory	86				
41Q		209	23	Interlocutory	232	19,982	2020	54,364	
41S	5,160	1,099	Done	Reexam	6,259				
43BV	717	488	9	Reexam	1,214				
41U	854	61	Done	Reexam	915				
42A		126	Done	Interlocutory	126				
42M		460	57	Interlocutory	517				
40R		92	19	Interlocutory	111				
42B		38	Done	Interlocutory	38				
43E		27	14	Interlocutory	41				
41L		30	Done	Interlocutory	30	9,251	2021	45,113	
76D	1,413	175	14	Reexam	1,602				
42K	1,441	139	Done	Reexam	1,580				
41E	1,151	321	7	Reexam	1,479				Helena
76M	2,403	331	7	Reexam	2,741				Missoula
40S		226	10	Interlocutory	236				Glasgow
76C	243	38	1	Reexam	282				Kalispell
76N	1,201	119	9	Reexam	1,329				Kalispell
40EJ		293	33	Interlocutory	326				Havre
40F		27	Done	Interlocutory	27				Havre
40L		149	done	Interlocutory	149				Glasgow
39F		174	done	Interlocutory	174	9,925	2022	35,188	Billings
40O		405	14	Interlocutory	419				Glasgow
43BJ	803	56	Done	Reexam	859				Bill/Boze
76HE	1,323	Done	Done	Reexam	1,323				Missoula
40I		12	3	Interlocutory	15				Havre
76G	4,479	698	49	Reexam	5,226				Helena
76GJ		112	done	Interlocutory	112				Missoula
41O		258	22	Interlocutory	280				Havre
76L		454	Done	Interlocutory	454				Kalispell
76LJ		515	Done	Interlocutory	515				Kalispell
41P		128	30	Interlocutory	158				Havre
76J		3	done	Interlocutory	3	9,364	2023	25,824	Kalispell
76E		62	done	Interlocutory	62				Missoula
41F	3,026	359	22	Reexam	3,407				Bozeman
76HB	994	Done	Done	Reexam	994				Missoula
42C		205	83	Interlocutory	288				Billings
76B	96	12	2	Reexam	110				Kalispell
40B		317	50	Interlocutory	367				Lewistown
41B		625	53	Interlocutory	678				Helena
41N		9	done	Interlocutory	9				Havre
76E		62	done	Interlocutory	62				Missoula
43C	1,709	392	44	Reexam	2,145	8,122	2024	17,702	Billings
39G		54	done	Interlocutory	54				Billings
40G		65	done	Interlocutory	65				Havre
41A		789	53	Interlocutory	842				Helena
76I	162	7	5	Reexam	174				Kali/Havre

Appendix A

43QJ	1,120	355	11	Reexam	1,486				Billings
40J		580	41	Interlocutory	621				Havre
40M		495	13	Interlocutory	508				Glasgow
41D		571	31	Interlocutory	602				Helena
41J		938	286	Interlocutory	1,224				Lewistown
76H		787	74	Interlocutory	861				Missoula
41H		596	done	Interlocutory	596	7,033	2025	10,669	Bozeman
76F		442	6	Interlocutory	448				Missoula
40T		29	Done	Interlocutory	29				Havre
41M		90	16	Interlocutory	106				Havre
41C	1,959	605	20	Reexam	2,584				Bozeman
41G		648	59	Interlocutory	707				Bozeman
76K	562	60	4	Reexam	626				Kalispell
41QJ		537	7	Interlocutory	544				Lewistown
41R		156	17	Interlocutory	173				Havre
43N		13	3	Interlocutory	16				Billings
43O		172	4	Interlocutory	176	5,409	2026	5,260	Billings
40A		833	done	Interlocutory	833				Lewistown
40C		305	done	Interlocutory	305				Lewistown
39FJ		74	done	Interlocutory	74				Billings
43P		194	Done	Interlocutory	194				Billings
43Q		755	27	Interlocutory	782				Billings
40K		64	done	Interlocutory	64				Glasgow
43B		731	done	Interlocutory	731				Bozeman
41T		252	30	Interlocutory	282				Havre
43A		311	done	Interlocutory	311	3,576	2027	1,684	Bozeman
43D		580	140	Interlocutory	720				Billings
42KJ		434	18	Interlocutory	452				Billings
42L		191	3	Interlocutory	194				Billings
38H		19	0	Interlocutory	19				Billings
39H		4	0	Interlocutory	4				Billings
40P		102	11	Interlocutory	113				Glasgow
42I		38	1	Interlocutory	39				Billings
42J		140	3	Interlocutory	143	1,684	2028	0	Billings
Reexam	47,935	HB 110	SB 355	Total	74,346	74,346			
		24,820	1,591						