



# **HJ 14: PROSPECTS FOR A FUTURE WATER COURT**

August 2020

Water Policy Interim Committee

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**FINAL REPORT TO THE 67<sup>TH</sup> MONTANA LEGISLATURE**

# 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 Water Policy Interim Committee, like most other interim committees, serve one 20-month term. Members who are reelected to the Legislature, subject to overall term limits and if appointed, may serve again on an interim committee. This information is included in order to comply with 2-15-155, MCA.

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## **This report is a summary of the work of the Water Policy Interim**

**Committee,** specific to the Water Policy Interim Committee's 2019-20 study as outlined in the Water Policy Interim Committee's 2019-20 work plan and House Joint Resolution 14 (2019). Members received additional information and public testimony on the subject, and this report is an effort to highlight key information and the processes followed by the Water Policy Interim Committee in reaching its conclusions. To review additional information, including audio minutes and exhibits, visit the Water Policy Interim Committee website: [www.leg.mt.gov/water](http://www.leg.mt.gov/water).

**A full report** including links to the documents referenced in this print report is available at the Water Policy Interim Committee website: [www.leg.mt.gov/water](http://www.leg.mt.gov/water)

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## WORLD'S FIRST WATER COURT

The Water Court of the Plains of Valencia has convened for more than 1,300 years. Elected by their fellow irrigators, members of the court enforce decrees that were first created orally during Arabic rule of the Iberian Peninsula. The court judges water theft, watering out of turn, and "throwing water in neighboring fields that damage the harvest," among other possible violations, for 65 square miles of irrigated land. Formally known as the Tribunal de les Aigües de la Vega de València, the court announces decisions at noon Thursdays in front of the gothic Valencia Cathedral's Door of the Apostles.



TRIBUNALDELASAGUAS.ORG

The need to regulate and administer the use of water in arid lands is apparent in both Spain and Montana. The Montana Water Court has been in existence for about 41 years but draws from some of the same traditions. From an office building near Montana State University, two appointed judges and 12 expert water masters decree "historical" water rights for much of the state's 3,100 square miles of irrigated lands. Whereas the Valencian tribunal--apparently the oldest judicial system in Europe--will likely continue issuing decisions from the cathedral doors, the Montana Water Court faces a less certain future.

### What is this report about?

The Legislature has recently devoted time to examining the future of the Montana Water Court. Over two of the past three interim periods, the Water Policy Interim Committee (WPIC) has specifically focused on the Water Court--more than that of other water-related entities. Certain Water Court duties are expected to be completed within the next decade, perhaps adding to a sense of urgency. But while other Water Court functions will not expire, a greatly reduced Water Court--both in staff numbers and function--is expected to take place in just over a decade without statutory change.

This report explores the history of the Water Court, the workings of the Water Court, and options for the future of the Water Court. This report is based on hours of testimony and pages of documents produced during and for the WPIC during the 2019-20 interim, as well as additional source material.

### HJ 14: A study of the future of the Water Court

In 2019, seven of the eight current members of the WPIC asked for an interim study to "review the future role of the Montana Water Court and, if possible, make recommendations for the Water Court." The Legislature passed House Joint Resolution 14, which the Legislative Council assigned to the WPIC. In June 2019, the committee adopted the study, beginning work in September.



## PRIOR APPROPRIATION IN MONTANA

To discuss the Montana Water Court, one must begin with a discussion of the state's system of water law. The "prior appropriation doctrine" was born in the California gold camps and adopted by other Western and Rocky Mountain states, most notably Colorado. The doctrine "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 state decided to build irrigation economies around the doctrine."<sup>1</sup>



HUNTLEY IRRIGATION PROJECT, 1908. (MONTANA MEMORY PROJECT)

Under the doctrine, the first person to divert water had the first right to that amount of water. As noted Montana water law expert Al Stone told the Legislature, "This is the doctrine of 'first in time, first in right,' and is the embryo of our system of prior appropriation."<sup>2</sup>

While prior appropriation was the accepted doctrine from Montana's territorial days,<sup>3</sup> today's system of administration was launched with passage of the 1972 Constitution. Two sections of the Constitution directed today's processes:

All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.<sup>4</sup>

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.<sup>5</sup>

Practically, this meant the state recognized all existing beneficial uses of water, and the state would create an organized legal system.

At first, the Legislature passed the Water Use Act, which launched an adjudication process led by the Department of Natural Resources. (The department was predecessor the Department of Natural Resources and Conservation.) The department would identify the rights and district courts would issue decrees for all water claimed before 1973.

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<sup>1</sup> A. Dan Tarlock, *Law of Water Rights and Resources*, section 5:1 and 5:4, Thomson Reuters, (2105).

<sup>2</sup> Seminar on water rights by Al Stone, professor, University of Montana Law School, to the Montana Legislature's Subcommittee on Water Rights, July 1977.

<sup>3</sup> The Montana Supreme Court recognized the doctrine in 1921. *Mettler v Ames Realty Co.*, 61 Mont. 152, 169, 201 P. 702 (1921).

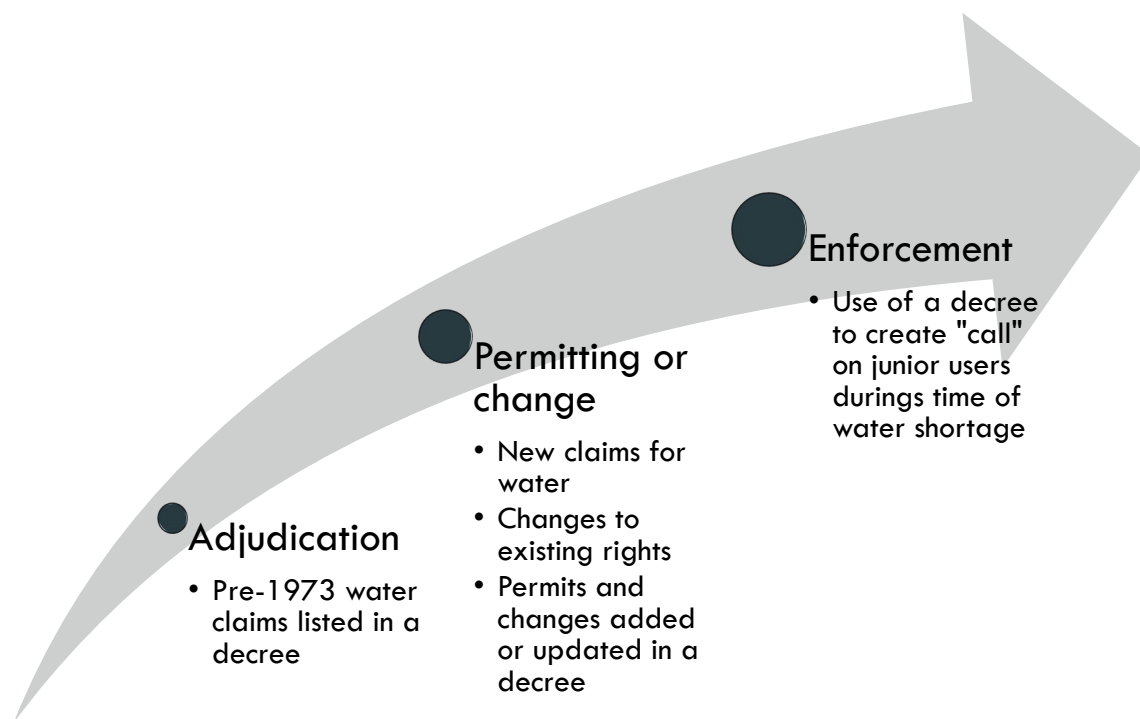
<sup>4</sup> Article IX, section 3(1), 1972 Mont. Const.

<sup>5</sup> Article IX, section 3(4), 1972 Mont. Const.



But the painstaking work and detail it took to produce these decrees--combined with the threat of seven federal lawsuits filed by Indian tribes and the federal government asserting their own claims to water--led to the passage of Senate Bill 76 in 1979. This legislation essentially created the legal processes of today: adjudication, permitting new rights and changing rights, and enforcement of water rights (see figure 1). A federal district court subsequently stayed the federal and tribal lawsuits.<sup>6</sup> Importantly, SB 76 also created the Montana Water Court.

**FIGURE 1. THE ADMINISTRATION OF WATER RIGHTS IN MONTANA**



Under SB 76, the Water Court conducts the litigation phase of adjudication, after DNRC experts examined each claim. The water court would issue "final decrees" for water claimed or put to use before 1973.

## What does the Water Court do?

The Water Court's ultimate work product is a final decree, which compiles all pre-1973 water rights in each of the state's 85 hydrologic basins. The final decree lists important information about each water right, such as

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<sup>6</sup> Further settlements have dismissed some of these lawsuits. The 1952 federal McCarren Amendment waves sovereign immunity for the federal government, including Indian and federal water right claims. The court concluded "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 state courts." Environmental Quality Council, *Montana's Water -- Where Is It? Who Can Use It? Who Decides?* (2004), 22.

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the priority date, the source, the place of use, and the flow rate or volume of water (for rights that cannot be measured by flow rate).

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 conducts the important first step: verification or examination of the elements of each individual claim. The rest of the adjudication process--and much of the public involvement--occurs at the Water Court.<sup>7</sup>

By design the process is adversarial: a claimant asserts a claim to water, which is upheld as valid unless another user objects and proves otherwise. The DNRC may attach an issue remark, which flags uncertain information within 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."<sup>8</sup> In practice, the chief or associate water judge appoints special water masters to conduct the litigation phase for claims within a basin.

In addition to priority date, source, place of use, and flow rate or volume, a final decree must also include the name of the water right owner, the purpose of the right, the place and means of diversion, and the period of use. The Water Court must provide public notice of the final decree. After any objections to the final decree are resolved, the DNRC issues a water right certificate to each person who has been decreed an existing right.<sup>9</sup> This is the "piece of paper" that some water users have been waiting decades for. The Water Court has issued six final decrees.<sup>10</sup>

The Water Court continues to review negotiated compacts with the state's Indian tribes and federal agencies. The court approved the first compact for the Northern Cheyenne Tribe in 1995.<sup>11</sup> The Reserved Water Rights Compact Commission negotiated these compacts, which must be approved not only by the Legislature, but--depending on the circumstances--by the tribes, federal agency, Congress, and ultimately by the Water Court. The Legislature has approved seven tribal compacts and 12 federal agency compacts. Two compacts are still pending at the Water Court.<sup>12</sup>

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<sup>7</sup> Environmental Quality Council, *Water Rights in Montana* (2014).

<sup>8</sup> Water Policy Interim Committee, *Considerations for the future of water rights* (2016).

<sup>9</sup> Legislative Services Division Legal Services Office memo to the WPIC, Overview of Final Decrees Issued by the Water Court," Jan. 4, 2016.

<sup>10</sup> As of June 1, 2020, the Water Court had issued final decrees for the Little Powder River, Powder River, Belle Fourche River about the Cheyenne River, Little Missouri River below Little Beaver, and O'Fallon Creek. However, these decrees will need to incorporate certain additional claims.

<sup>11</sup> 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.

<sup>12</sup> Congress and/or the tribes must approve of the compacts for the Fort Belknap Indian Reservation and the Confederated Salish and Kootenai Tribes. Montana Water Court memo to the WPIC, Montana Water Court Report to the Water Policy Interim Committee (2020).

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MONTANA WATER COURT

## Previous examinations of the court

Some groups have scrutinized the Water Court and its functions during its nearly 4 decades' existence, offering analysis and suggestions for its operations.

## 1988 Ross Report

Nine years after the passage of SB 76 and the launch of the Montana Water Court, the Legislature's Water Policy Committee hired a Colorado firm to "evaluate the judicial mechanism set up by Senate Bill 76 to determine whether a number of concerns which had been raised about that institutional arrangement

required correction by the legislature to assure the legal efficacy of the adjudication process."<sup>13</sup> The review by the Denver-based law firm of Saunders, Snyder, Ross & Dickson, P.C., came at a particularly tense time, after the Department of Fish, Wildlife, and Parks challenged the adjudication process.

According to the Water Policy Committee report to the 51st Legislature, lawsuits by FWP and other entities "slowed adjudication efforts and, perhaps more importantly, resulted in discord among the parties directed by statute to implement the process."

The 1988 Ross Report examined a broad swath of the adjudication process, including the DNRC-Water Court relationship, Water Court practices and procedures, McCarren Amendment considerations, and the accuracy of adjudication decrees.<sup>14</sup> The report proposed six pieces of legislation for improvement, but concluded "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."<sup>15</sup>

Importantly, the report found that the DNRC's multiple roles within adjudication were appropriate with Water Court oversight. And that changing claims examination standards were OK, because affected parties had a chance to object to that right at the Water Court. The objections process ensures Water Court decrees are accurate, and McCarren Amendment concerns have paled over time as the Reserved Water Rights Compact Commission concluded compacts and the Water Court approved those compacts.<sup>16</sup>

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<sup>13</sup> Jack F. Ross, *Evaluation of Montana's Water Rights Adjudication Process* (1988), 1.

<sup>14</sup> The report authors addressed the issue of "excessively overstated or 'bogus' claims," concluding that budget, time, and "inherent" uncertainties made such analyses impossible. Jack F. Ross, *Evaluation of Montana's Water Rights Adjudication Process* (1988), 54-59.

<sup>15</sup> Jack F. Ross, *Evaluation of Montana's Water Rights Adjudication Process* (1988), 4.

<sup>16</sup> Testimony of John E. Thorson to the WPIC, Sept. 10, 2019.

## 2009 legislative audit

After 25 years of slow but steady progress, the Legislature injected money and set performance measures for adjudication with passage of House Bill 22 in 2005. A 2009 legislative audit suggested other 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.<sup>17</sup> Final decrees would presumably be issued after that.

## 2014 law school report

In 2014, the Montana Supreme Court commissioned a study to assess how Montana's water rights legal system works today, how it compares to other states, and how Montana might adapt its legal system to meet our state's water future. The study was conducted by the University of Montana law school's Land Use and Natural Resources Clinic.

The study made a number of recommendations, including the following:

- Create concurrent Water Court-district court jurisdiction over water disputes and distribution to avoid duplicative proceedings
- Update and integrate water records to create a comprehensive "living record" of pre- and post-1973 water rights
- Address post-1973 changes to water rights already in adjudication, including the appropriateness of the historical "look back" period for proof of beneficial use
- Allow water users to appeal agency water rights decisions to the Water Court
- Modernize water commissioner laws.<sup>18</sup>

## 2016 committee report

The 2015-16 WPIC started a study of the future of the Water Court but expanded their scope early in the interim. The committee recognized that the state's water rights administration system sometimes results in a water user facing proceedings in three venues--the Water Court, district court, and DNRC--depending on the circumstances.<sup>19</sup> The committee also broached the question of whether the Water Court could expand its jurisdiction.

The WPIC's efforts led directly to a bill draft allowing the Water Court to hear an appeal to a DNRC permit or change of water right application. Senate Bill 28 passed the 2017 Legislature.

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<sup>17</sup> Legislative Audit Division, *09P-09: Water Rights Adjudication* (2010).

<sup>18</sup> Land Use and Natural Resources Clinic of the University of Montana School of Law, *Water Rights in Montana* (2014), 4.

<sup>19</sup> A water claimant may have the Water Court adjudicating their right, a district court enforcing their right, and the DNRC considering a change to their right.

## Recent legislation

Over recent legislative sessions, five pieces of legislation have altered the pace and scope of the Water Court's work.

Beginning in 2005, four bills have affected the pace of work at the DNRC, which in turn has affected the efficiency and effectiveness of the Water Court.

House Bill 22 (2005) developed a funding source to reinvigorate the adjudication process.<sup>20</sup> It also set deadlines for the DNRC to examine claims, allowing the Water Court to conduct court proceedings on a larger number of claims.

In 2012, the Water Court ordered the reexamination of 90,000 early water right claims across 44 basins, correcting certain claim elements to avoid future water distribution issues. Senate Bill 57 (2015) created benchmark deadlines for the DNRC to complete reexamination, providing consistency to the Water Court judges and water masters.

Meanwhile, the Legislature passed Senate Bill 355 (2013) and House Bill 110 (2017), which allowed users of small domestic or stock water claims to file for their pre-1973 exempt rights.<sup>21</sup> These "late-filed" claims added 25,000 claims to the DNRC and (eventually) Water Court adjudication workloads.

As previously mentioned, SB 28 (2017) allows a party aggrieved by an agency decision on a water rights permit or change to appeal to the Water Court, which is in addition to a district court. The Water Court has decided three cases with this SB 28 authority.<sup>22</sup> A fourth petition is pending in the Water Court.

In these cases, the Water Court reversed the DNRC order and directed the department to approve the water user's application. Although each appeal was decided by a different water judge, the reasons cited for the reversal were similar in each case. Among the most common reasons for reversal were:

- Imposing demands on the applicant to demonstrate lack of adverse effect in excess of the minimum standard of proof required by statute



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<sup>20</sup> The bill imposed a fee on every water user in the state. The Legislature repealed the fee in 2007 and appropriated general fund money toward the adjudication process.

<sup>21</sup> Some claimants did not file their exempt water rights in the general filing of the early 1980s, but such an unfiled claim would be subordinated to all timely filed rights, groundwater certificates, and permits. Legislative Services Division Legal Services Office memo to the WPIC, "Adjudication Benchmarks White Paper," May 6, 2020. See Appendix A.

<sup>22</sup> One of the cases, Debuff v. DNRC, WC-MAPA-2019-01, is on appeal to the Montana Supreme Court.

- Rejecting evidence supplied by the applicant but failing to provide a meaningful explanation for the rejection
- Inconsistency with internal guidance or prior agency decisions.<sup>23</sup>

## POLICY INQUIRIES

In addition to background information described above, the WPIC drove its inquiries into specific areas, including outstanding questions concerning the constitutionality of the Water Court, the structure of other states' water courts, how district courts handle water issues, and the workflow of claims awaiting adjudication.

### Constitutionality of Water Court

The Water Court was created by an act of the Legislature, but some have questioned whether the Water Court is a permanent court and may be assigned permanent duties beyond adjudication. Others have asked if it is appropriate that appointed Water Court judges have the same powers as an elected district court judge. These questions have formed a basis for some questioning the constitutionality of the Water Court.

State law provides that the Chief Justice of the Montana Supreme Court appoints the chief and associate water judges.<sup>24</sup> This four-year appointment is subject to approval (and reapproval) by the Montana Senate.<sup>25</sup> State law states that within the chief water judge's jurisdiction, the chief water judge and the associate water judge "have the same powers as a district court judge."<sup>26</sup> Certainly, a water judge is not assigned and does not handle criminal or child endangerment or divorce proceedings, for example.

Senate Bill 76 created the Water Court to conduct adjudication proceedings. The Water Court does this by conducting court cases for individual water rights. Since passage of the bill, the Legislature assigned at least three more duties to the Water Court:

- determine whether existing water rights have been abandoned from nonuse<sup>27</sup>
- address claims certified from the district courts when a "water distribution controversy arises" regarding existing water rights<sup>28</sup>
- consider appeals of DNRC decisions on permit or change of water right applications.<sup>29</sup>

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<sup>23</sup> Legislative Services Division Legal Services Office memo to the WPIC, "Summary of Water Court Petitions Pursuant to SB 28," Dec. 16, 2019. See Appendix B.

<sup>24</sup> Section 3-7-221, MCA.

<sup>25</sup> The Senate must approve continuation of a "water division." SB 76 created a chief judge and four district court judges within each water division; in practice, the chief water judge -- with help from the associate water judge -- appoints special water masters for the litigation phase.

<sup>26</sup> Section 3-7-224, MCA.

<sup>27</sup> Section 3-7-501(4), MCA.

<sup>28</sup> Section 85-2-406, MCA.

<sup>29</sup> Section 2-4-702, MCA.



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The Legal Services Office has analyzed these questions over constitutionality in two different interims, most recently concluding<sup>30</sup>:

"...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 jurisdiction, the fact that laws are presumed to be constitutional if there is a reasonable interpretation, and the fact that the Montana Constitution clearly contemplates giving the Legislature power to create alternative and specialized courts with broad judicial power are all factors that a court might find persuasive."

## Other states' water courts

While each of the Western states have their own brand of water rights administration--adjudication, permitting and changes, and enforcement--only three states (Colorado, Idaho, and Montana) have water courts.

Adjudication in the West tends to follow two models: the Colorado model or the Wyoming model. Colorado water rights are judicially determined through the Colorado Water Court<sup>31</sup>; Wyoming's are administratively managed through the State Engineer's Office.



Colorado, Idaho, and Montana have judicially determined water rights—at least in part. All rights in Colorado are judicially determined. The Montana Water Court is adjudicating all pre-1973 water rights. And the Snake River Adjudication Court in Idaho adjudicated water rights throughout the entire Snake River system, including groundwater, which is home to about two-thirds of the state's irrigated agriculture.<sup>32</sup>

In contrast to all other Western states, the Colorado Water Court also decrees new uses of water. For the others, including Montana, the “acquisition, exercise, transfer, and termination of water rights are regulated by administrative permit systems.”<sup>33</sup>

## District courts' workload

Forty-nine judges within 22 judicial districts represent the enforcement part of water rights administration depicted at the top of Figure 1 on page 3. The judges resolve disputes between water users, including injunctions to prohibit a party from interfering with the use of a water right. District court judges also

<sup>30</sup> Legislative Services Division Legal Services Office memo to the WPIC, "Constitutionality of Making Water Court Permanent and Discussion of Potential Constitutional Amendment," Dec. 16, 2019. See Appendix C.

<sup>31</sup> Colorado water judges may also have a regular district court caseload. A judicial nominating committee appoints Colorado district court judges (Colo. Const. Art. VI, Sec. 24). Judges who wish to remain in office after the expiration of each judicial term must win a retention vote by electors of their judicial district. (Colo. Const. Art. VI, Sec. 25).

<sup>32</sup> Idaho completed an adjudication of 150,000 Snake River water claims in 2014. Legislative Environmental Policy Office memo to the WPIC, "Other States' Water Courts," Dec. 16, 2019. See Appendix D.

<sup>33</sup> A. Dan Tarlock, *Law of Water Rights and Resources*, section 7:5, Thomson Reuters (2015).



consider petitions from water users to appoint a water commissioner to distribute water. Water commissioners are self-employed and paid by the water users.<sup>34</sup>

When existing water rights have not been determined on a stretch of water, a 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 depending upon the Water Court determination.

District court judges serve 6-year terms and hear a wide variety of cases, both civil and criminal. A district court judge is subject to nonpartisan elections; the governor fills an open court seat by appointment from a list supplied by a judicial nominating committee.

Water law is a very small part of their caseload. In some districts, district court judges have developed a specialty in water rights enforcement. However, a 2016 survey of 30 district court judges found that most would prefer to steer many water issues to the Water Court.<sup>35</sup> Most judges surveyed said they had little experience in water cases; a small majority of those surveyed said they did not want to retain responsibilities over water rights nor supervision of water commissioners.

District court workloads continue to grow,<sup>36</sup> but shifting water cases away from district court would not appreciably affect a district judge's workload. Doing so may decrease the time a water user may have to wait for a resolution to their issue.<sup>37</sup>

## Performance benchmarks

Legislative benchmarks have been used in state law to ensure a steady flow of adjudication work in Montana. House Bill 22 (2005) and SB 57 (2015) created deadlines for the DNRC to examine and reexamine most pre-1973 water rights claims. At roughly the same time, the Legislature allowed the filing of 25,000 "late claims" for small domestic and stock water uses through SB 355 (2013) and HB 110 (2017).

The reexamination required under HB 22 and SB 57 and the exempt-from-filing claims work created under SB 355 and HB 110 run in conflict, requiring duplicative DNRC efforts and multiple Water Court decrees in many basins.<sup>38</sup> Water users would likely face expensive, confusing, and similar-sounding processes within a matter of a few years.

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<sup>34</sup> Section 85-5-101, MCA.

<sup>35</sup> Supreme Court Administrator's Office survey of district court judges (2016). See Appendix E.

<sup>36</sup> Supreme Court Administrator's Office, *2020 District Court Workload Review, Judicial Resources Needs* (2020). See Appendix F.

<sup>37</sup> Testimony of Beth McLaughlin, Supreme Court Administrator's Office to WPIC, May 18, 2020.

<sup>38</sup> Legal Services Office Legislative Services Division memo to the WPIC, "Adjudication Benchmarks White Paper," May 6, 2020. See Appendix A.

Consolidating these processes through legislative action would help resolve these concerns, slicing years off adjudication work, accelerating the Water Court's ability to begin issuing final decrees, and sparing water users from years of frustration.<sup>39</sup>

## SUMMARY OF PUBLIC INPUT

Throughout the process, the WPIC heard numerous public comments from water users, water law practitioners, and the public (see Table 1 for a list in chronological order). The committee also solicited written public comments. Specifically, a call went out in December asking for "stakeholder and public input" before the committee's January meeting. The committee received six written individual comments (see Table 2 and Appendix G). In addition, the Water Law Section of the Montana State Bar surveyed its members for their thoughts on the status and future of water law in the state (see Table 3).

**Table 1. Summary of public oral comments to WPIC, 2019-20 interim**

Commenter	Summary of oral comment
John Tubbs, director of Department of Natural Resources and Conservation (DNRC)	Suggests Legislature should conduct comprehensive study to examine and propose a water rights system that contemplates a post-final decree future. (Sept. 10, 2019)
Krista Evans, Association of Gallatin Agricultural Irrigators (AGAI)	Expresses members' concerns about unelected judges, discusses past studies, and suggests committee look at the end of adjudication process. (Sept. 10, 2019)
Ryan McLane, Water Law Section of Montana Water Bar	Says water attorneys are interested in this study and voted to survey their members. (Sept. 10, 2019)
Ross Miller, attorney	Advocates for a permanent Water Court because of its valuable expertise and experience. (Jan. 7, 2020)
Holly Franz, attorney representing NorthWestern Energy	Asks what is problem committee is trying to solve with study? Committee should consider other issues, such as avoiding forum-shopping for judges, regional water judges, and cost. (Jan. 7, 2020)

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<sup>39</sup> Refer to draft legislation.

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Commenter	Summary of oral comment
Hon. Russ McElyea, chief water judge	Says district court judges don't want to handle water cases, have other burdens in their caseload, and don't generally have the expertise. The Water Court can handle more than adjudication, which would be more efficient. And water cases in Montana often go beyond jurisdictional boundaries. (Jan. 7, 2020)
Mike Murphy, Montana Water Resources Association	States that the Water Court should focus on getting adjudication done, but also keep an eye on what the system should be in the future. (Jan. 7, 2020)
Hon. Steve Brown, associate water judge	Reminds committee that water administration happens now when there's a water shortage, not when adjudication is complete. (Jan. 7, 2020)
John Bloomquist, attorney	Describes tension between two courts and one agency, which lead to jurisdictional issues and inefficiencies. For example, it is inefficient having two courts deciding the same issue. (March 9, 2020)
Hertha Lund, attorney	Says Water Court should finish adjudication first, then Legislature can figure out what it wants it to be. Elected judges may treat local water disputes more carefully. (March 9, 2020)
Ms. Evans, AGAI and Senior Water Rights Coalition	States that members are concerned with an appointed water judge having control of a water right, which is an important property right. The future of the Water Court has become piecemeal, but what is needed is a new Water Use Act. (March 9, 2020)
Ms. Franz	Says committee may be limiting itself to only a superficial look at the whole system of legal processes related to water rights, and should instead examine all details and moving parts. Discusses Water Court, DNRC proposals. (March 9, 2020)
Brian Ohs, Montana Stockgrowers Association	Says members are exhausted with adjudication and want it finished. (March 9, 2020)
Mr. Murphy	Wants to see options for future after adjudication. Suggests working committee to look at the future. (March 9, 2020)
Mr. Tubbs	States that adjudication may not be finished this decade due to thousands of outstanding claims. Committee has another biennium to figure out future of Water Court. Unauthorized changes of use will be future issue. Suggests hiring consultant for full study of Montana's water right processes. (March 9, 2020)

# HJ 14 REPORT

Commenter	Summary of oral comment
Beth McLaughlin, Montana Supreme Court administrator	Says taking water cases away from district courts would not affect district court workload, but may expedite the case for the litigant. (March 10, 2020)
Judge McElyea	Says adjudication is beautiful, but at some point the Water Court will run out of work and die. McCarren Amendment requires the state to have an adequate administration of water rights. Suggests DNRC hire, train, and supervise water commissioners, and a court with most expertise will settle disputes. (March 10, 2020)
Ms. Evans	Asks how Water Court would handle ditch easement issues if the problem is related to trespass. Asks who controls the venue in Water Court proposal. (May 18, 2020)
Steve Kelly, lower Teton River water commissioner	Says local water commissioners and local district courts understand how Teton River functions as a whole. Changing to state-managed commissioners would be a detriment. (May 18, 2020)
Peter Marchi, Musselshell River water commissioner	Says he doesn't understand why idea of state-employed water commissioners as state employees keeps coming back. The water commissioner system needs improvement, though. District court oversight works. (May 18, 2020)
Peter Bertolino, Rock Creek water commissioner	Strongly opposes DNRC taking over water commissioner system. (May 18, 2020)
Rachel Cone, Montana Farm Bureau Federation	Supports current system, as does the federation. (May 18, 2020)
Peter Fritsch, Teton River water commissioner	Says DNRC staff have always been helpful. Adjudication funding could be used for DNRC water management projects, like stream gauging and water commissioner assistance. (May 18, 2020)
Ms. Evans, AGAI	Reiterates concern with appointed judge making ditch easement decisions rather than elected judge. Ditch easements don't always include a related water right, or vice-versa. Need more thorough analysis of Water Court, district courts, and DNRC. (May 18, 2020)
Ms. Evans	Proposes holistic analysis of entire water rights process. (July 13, 2020)

# HJ 14 REPORT

Table 2. Summary of Written Public Comments to the WPIC (Dec. 2019)

Commenter	Summary of written comment
Baldwin (HydroSolutions, Inc.)	Water Court should continue to litigate historical water right claims and issue decrees. The court should become a permanent entity entrusted with all future water right disputes.
Bloomquist	Water Court should be a permanent fixture administering law related to water rights and water distribution. (Add'l comments on DNRC role, water rights database, water compacts.)
Certalic	Water Court has the knowledge to enforce all water rights.
DNRC	Water Court should be provided with resources to complete adjudication. WPIC should define scope and priorities for a comprehensive water policy study.
Miller	Retain Water Court beyond adjudication of pre-1973 water rights.
Pomnichowski	Water Court should finish adjudication duties before adding more.

**Table 3. Selected Water Bar survey responses**

A survey of 42 Montana water law attorneys provided a broad array of opinions about the future of water law. The 43-question survey covered aspects beyond the adjudication process and the Water Court, such as new appropriations, water distribution, enforcement actions, water measurements, abandonment, and ownership updates. The survey also asked practitioners to assess working with district courts, the DNRC, and with water commissioners.

Some questions were directly related to the Water Court and its functions. For example, respondents were asked about their frustrations with Water Court proceedings, the adjudication laws that need clarifying, and impediments to the completion of adjudication (see Table 3 and Appendix H).

Survey question	Top responses
Frustrations with Water Court proceedings?	Cost (31%), working with DNRC (31%)
Should adjudication be funded to completion?	Yes (97%)
What adjudication laws most need clarifying?	Effect of post-1973 changes (55%), scope of Water Court jurisdiction (40%)
Impediments to adjudication completion?	HB 110 exempt claims (50%); no definition of "final decree" (40%)
Process to modify final decrees?	Yes (74%)
Who should interpret/enforce Water Court orders and decrees?	Water Court (64%); district court or new agency/court (12%)
Should Water Court, water judges be permanent?	Yes (83%)

## PROPOSALS TO THE COMMITTEE

In January, the WPIC asked the Water Court and the DNRC for proposals, envisioning a future not only for the Water Court but for the future administration of water rights in the post-adjudication era. In March, the committee received four suggestions from the Judicial Branch (which is led by the Montana Supreme Court) and a water distribution pilot project from the DNRC.

### Judicial Branch proposal

The Judicial Branch offered suggestions to "bring expertise to solving water problems, decrease the cost and increase the speed of decision making, and create more consistent law regarding water rights and their use."<sup>40</sup> The suggestions would allow the Water Court:

- Permanent and exclusive review of DNRC permit and change decisions
- Exclusive jurisdiction to decide boundaries of irrigation districts
- Concurrent jurisdiction to decide cases regarding ditch easements
- Concurrent jurisdiction to administer Water Court decrees

In the "concurrent jurisdiction" instances, the Water Court would share jurisdiction with district courts, where jurisdiction currently lies. The Water Court may hear review of DNRC permit and change decisions due to SB 28, as previously discussed.

### DNRC pilot project

The department drafted a water distribution pilot project "for appointment of water commissioners under DNRC regulatory authority to measure and distribute water."<sup>41</sup> The department's pilot project would envision little—if any—continued role for the Water Court.

The pilot project would cover a specific source basin with the input of stakeholders. The department or water users could petition for department administration of all surface and ground waters within that basin. Significantly, the pilot project envisions changes for water commissioners, increased record-keeping, and penalties for noncompliance.

The DNRC would train, appoint, oversee, and, if necessary, remove water commissioners. Water commissioners, now appointed by district court judges and paid by water users, would become DNRC employees.

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<sup>40</sup> Judicial Branch memo to the WPIC, "Judicial Branch Proposal for Changes to Water Court Jurisdiction," Feb. 4, 2020. See Appendix I.

<sup>41</sup> DNRC memo to the WPIC, "Water Distribution Pilot Project Scoping Whitepaper," Feb. 14, 2020. See Appendix J.



The department would tabulate all water rights and collect and maintain standardized diversion records. A water commissioner could deny distribution of water to owners without measuring devices. A water commissioner must obtain daily records of water deliveries. These records would become public.

The department would also have the authority and duty to entertain all administration and distribution disputes, including mediation of disputes. The department could establish civil or criminal penalties for noncompliance with DNRC orders or levy fines.

## FINDINGS, RECOMMENDATIONS, LEGISLATION

1. Despite members' concerns over adequate funding and the coronavirus pandemic, the WPIC recommends the Montana Legislature fund a comprehensive, third-party study to examine and propose a water rights system that contemplates a post-final decree future. This recommendation was not made unanimously.

2. Although the Chief Justice of the Montana Supreme Court appoints the chief and associate water judges, these 4-year terms are subject to approval by the Montana Senate, ensuring regular public appraisals of the judges' performances.

3. 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. Additionally, there is nothing in the Montana Constitution that specifically prohibits the Water Court from being made a permanent court.

4. The permanence of the Water Court is not only statutory, but also a function of jurisdiction, scope, and funding.

At the time of this final report, the committee has not approved the preintroduction of any related legislation.

## LIST OF APPENDICES

<b>Appendix A</b>	Legislative Services Division Legal Services Office memo to the WPIC, "Adjudication Benchmarks White Paper," May 6, 2020.
<b>B</b>	Legislative Services Division Legal Services Office memo to the WPIC, "Summary of Water Court Petitions Pursuant to SB 28," Dec. 16, 2019
<b>C</b>	Legislative Services Division Legal Services Office memo to the WPIC, "Constitutionality of Making Water Court Permanent and Discussion of Potential Constitutional Amendment," Dec. 16, 2019.
<b>D</b>	Legislative Environmental Policy Office memo to the WPIC, "Other States' Water Courts," Dec. 16, 2019.
<b>E</b>	Supreme Court Administrator's Office survey of district court judges (2016).
<b>F</b>	Supreme Court Administrator's Office, <i>2020 District Court Workload Review, Judicial Resources Needs</i> (2020).
<b>G</b>	Public comments to the WPIC, Jan. 7, 2020.
<b>H</b>	Letter and survey of Water Law Section of the Montana State Bar to the WPIC, Jan. 2, 2020.
<b>I</b>	Judicial Branch memo to the WPIC, "Judicial Branch Proposal for Changes to Water Court Jurisdiction," Feb. 4, 2020.
<b>J</b>	DNRC memo to the WPIC, "Water Distribution Pilot Project Scoping Whitepaper," Feb. 14, 2020.
<b>K</b>	Written public comments on HJ14 draft report received Sept. 10, 2020



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## Montana Legislative Services Division

### Legal Services Office

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

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#### I. Introduction and Purpose of Paper

The Department of Natural Resources and Conservation (DNRC) and the Water Court have reported to Water Policy Interim Committee (WPIC) that the forecasted completion of examination and reexamination of claims will be delayed given the introduction of about 25,000 exempt-from-filing claims that were filed pursuant to 2017 House Bill 110<sup>1</sup>. Moreover, DNRC has reported that if it were to focus all resources solely on reexamination, it would be theoretically feasible to meet the final 2023 deadline for the reexamination benchmarks codified in Section 85-2-271, MCA. However, focusing solely on this deadline would compromise overall efficiency and further prolong the adjudication.

As an alternative, the Water Court and DNRC jointly submitted the Proposed Benchmark Timetable, attached here as Appendix A, at the March 2020 WPIC meeting. Under this proposal, the examination of exempt claims filed pursuant to HB 110 would occur alongside the remaining reexamination work and review of other unadjudicated claims.

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.

While the proposed statutory amendments are simple, a certain amount of background understanding is useful to understand the purpose behind each proposed amendment and foster committee discussion. This paper is targeted toward providing the context necessary to understand (1) the current requirements imposed on DNRC and the Water Court by the benchmarks and (2) what statutory changes would be required to facilitate their proposed revised timetable. This background includes an understanding of the:

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<sup>1</sup> Ch. 338, L. 2017

- Purpose and importance of adjudication
- Stages of adjudication and the role of DNRC and the Water Court in each stage
- Past and present types of DNRC review: verification, examination, and reexamination
- Types of water claims subject to adjudication: timely filed claims, late claims, and exempt claims
- Current status of the benchmarks and relevant history of the Water Court.

## II. Purpose and Importance of Adjudication

The statewide water adjudication is a continuous series of Water Court proceedings intended to resolve any disputes about the amount, ownership, priority, and other attributes of all properly claimed uses of water that were in place prior to July 1, 1973, in the state of Montana. The adjudication is divided into separate proceedings according to the source of supply, with the Water Court issuing an individual decree for each of Montana's 85 hydrologic basins.

Prior to the enactment of the Water Use Act and commencement of the statewide adjudication, smaller-scale efforts to decree water rights claims among users were thwarted by the fact that people who were not notified of and made party to such proceedings could not be bound by the terms of the resulting decree. In other words, such piecemeal determinations lacked widespread enforceability and were vulnerable to repeated reopening and relitigation.

Because finality and enforceability are of paramount importance in the statewide adjudication, a critical element of the process has been providing **notice** of the adjudication and an opportunity to participate through the objection process to every person who claims a water right within each basin. This ensures that when each final decree is eventually issued nobody can come forward and argue that they were excluded from the process and therefore should not be bound by the decree. For this reason, mailing notice to each person who claims a water right in Montana and publishing notice in newspapers has been a major focus and necessary component of the adjudication.

In addition to facilitating the orderly administration of water rights within Montana, there are two reasons that are often cited for the importance of completing the statewide adjudication. **First**, many Montanans express a concern that neighboring states and Canada may attempt to claim more than their "fair share" of transboundary water resources if Montana cannot prove the extent of its historical use.<sup>2</sup>

**Second**, the federal McCarran Amendment, which waives sovereign immunity to adjudicate federal and tribal claims in state court, applies only if there exists a comprehensive state system establishing a single continuous proceeding for adjudication of water rights.<sup>3</sup> During the 1980s, a handful of lawsuits that the United States had filed in federal court prior to the commencement of

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<sup>2</sup> See DNRC website: "Downstream states are demanding water in increasing amounts. Montana cannot defend its water use from other states' demands or calls on water until it has completed the adjudication of all of the water rights in Montana, and knows how much of our water is currently being claimed and used. Issuing water rights decrees for every basin in Montana will help the state establish its historic usage. In the event of downstream calls for water from other states or Canada, Montana water users are better protected with these decrees in place." <http://dnrc.mt.gov/divisions/water/adjudication/what-is-adjudication-hb22-information>

<sup>3</sup> Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819, 96 S. Ct. 1236, 1247 (1976); State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 Mont. 76, 84, 712 P.2d 754, 759 (1985).

Montana's statewide adjudication were stayed pending the conclusion of the state court proceedings,<sup>4</sup> with the idea that the federal courts would remain available as an alternate forum if the state adjudication is not completed or does not satisfy the procedural requirements of the McCarran Amendment.<sup>5</sup> Since that time, the Reserved Water Rights Compact Commission (RWRCC), which was established in 1979, has concluded seven tribal agreements and 12 settlements with federal agencies, all of which have been passed by the state legislature. Approval of these settlements by the Water Court and integration of these claims into final decrees is a major part of the completion of adjudication.

### III. Stages of Adjudication

In 1973, after ratification of the new constitution, the Legislature passed the Water Use Act<sup>6</sup>. This legislation established a central repository for water right records and required prospective water users to apply for a permit before putting water to use. It also recognized that the many "existing rights" that had been appropriated from the territorial days through June 30, 1973, would need to be adjudicated. To accomplish this, the 1979 Legislature passed Senate Bill 76<sup>7</sup>, which divided Montana into four water divisions, created the Water Court, and established the adjudication process roughly as it stands today. The ultimate goal of the adjudication is for a final decree to be issued for each of Montana's river basins. To reach this point, the process progresses through several stages:

#### A. Filing

After the passage of Senate Bill 76, the Montana Supreme Court issued an order directing every person claiming a pre-1973 water right to file their claim with the DNRC by April 30, 1982. About 219,000 claims were filed by the deadline, and about 4,500 additional "late" claims were filed under an extension to 1996 that was created by a subsequent legislature<sup>8</sup>. It is important to note that stockwater and domestic claims for groundwater or instream use were exempted from this process, though such claims could be filed voluntarily. The present-day consequences of this exemption are discussed in greater detail in **Section V**, below.

#### B. Verification or Examination

The DNRC is responsible for reviewing the filings, gathering information, and reporting data, facts, and issues pertaining to the elements of each claim to the Water Court. Originally known as "verification", this process is now referred to as "examination". A brief discussion about the difference between the two will provide context for the discussion of statutory amendments to facilitate the proposed revised benchmarks timeline.

##### 1. *Examination*

On July 15, 1987, the Montana Supreme Court adopted Water Right Claim Examination Rules (Examination Rules). Amended in 1991 and again in 2006, the Examination Rules are nearly 100 pages long and contain detailed requirements for DNRC staff to follow when gathering, examining, and

<sup>4</sup> N. Cheyenne Tribe of N. Cheyenne Indian Reservation v. Adsit, 721 F.2d 1187, 1189 (9th Cir. 1983).

<sup>5</sup> Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 570 n.21, 103 S. Ct. 3201, 3215 (1983).

<sup>6</sup> Title 85, chapter 2, MCA.

<sup>7</sup> Ch. 697, L. 1979.

<sup>8</sup> Ch. 629, L. 1993.

reporting data, facts, and issues pertaining to claimed water rights. The DNRC's duties under the Examination Rules include:

- reviewing each claim to determine whether it is clear, complete, understandable, and consistent;
- examining the claim against the available factual records and resources including maps, aerial photographs, public notices, courthouse records, etc.;
- identifying issues and questions and in certain cases conducting a field inspection to attempt to resolve questions; and
- inputting the information gathered into the centralized records system and reporting to the Water Court.

## 2. *Verification*

From 1982 until the 1987 adoption of the Examination Rules, DNRC's process for reviewing claim filings was called verification. DNRC utilized the verification process for approximately 98,000 claims contained in about 45 basins. Although similar to examination, verification lacked the same rigor on certain elements. For example, during verification very little time was spent on locating actual points of diversion and confirming correct legal descriptions; standardization of source names and ditch names was a low priority; most major elements of storage reservoirs were not documented and many assumptions were made; and the period of diversion was not standardized among claims of the same type or often even identified.<sup>9</sup> Eventually this lack of standardization led to litigation alleging that the verification process would not produce sufficiently accurate decrees. As part of the settlement of the litigation, the decision was made to "reexamine" certain verified claims, discussed in greater detail in **Section IV**, below.

### C. Temporary Preliminary Decree or Preliminary Decree

Once DNRC has completed its examination or reexamination (or, prior to 1987, verification) of the claims in a given water basin, DNRC provides a Summary Report to the Water Court. The Water Court uses the information in the Summary Report to produce a preliminary decree for that basin. This decree is intended to include all the claims in the basin or, if the basin contains Indian or federal water rights reservation claims that have not yet been settled through a water compact or negotiation, all the claims in the basin except those unsettled Indian or federal claims.

### D. Notice and Objection

After the preliminary decree is issued, the Water Court is required to provide notice of its availability to every person who claimed a water right in the basin. The Water Court also publishes notice in the newspapers in the basin. As discussed above, this notice is an extremely important part of the process, since without proper notice there is a risk that the final decree will be jurisdictionally defective and unenforceable.

The day after a decree is issued, the time period for filing objections begins. The objection period lasts 180 days unless a request to extend that time is granted. Claimants are instructed to review

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<sup>9</sup> Reexamination Guidebook Updated March 2019, p 22.

the decree to identify any errors in the decree's description of their water rights and notify the Water Court. This is also the time to review any water claims that might injuriously affect their water rights and object if appropriate. After the close of the objection and counterobjection periods, the objection list is published. At this time, parties who are not a claimant or objector can file a Notice of Intent to Appear in the proceedings.

E. Litigation

A Water Master is assigned to each basin and is responsible for adjudication of objections in the basin by consolidating claims into cases. Claims that receive issue remarks but not objections are also consolidated into cases. For each consolidated case, the Water Masters order and conduct conferences and if necessary order field investigations, accept or reject settlement agreements, and conduct hearings. After the objections are settled or after a hearing if necessary, the Master will either recommend (1) that changes be made to the water right claim, or (2) that the water right claim should remain unchanged. This recommendation is issued in the form of a Master's Report, which is adopted by the Water Judge and incorporated into the Water Court's final decree, if there are no objections, or as modified following rulings on objections.

**IV. History of the Benchmarks: House Bill 22 and Senate Bill 57**

A. House Bill 22

After proceeding at variable funding levels for decades, by the early 2000s there were still 57,000 claims remaining that had not yet been examined by DNRC. In response, the Legislature passed House Bill 22 in 2005<sup>10</sup>. HB 22 developed a funding source for the adjudication by imposing a fee on every water user in the state<sup>11</sup> and also established statutory deadlines for completion of the examination process. These deadlines, codified in Section 85-2-271, MCA, imposed incremental benchmarks for examining the 57,000 claims that had never before been reviewed by the DNRC, with a final deadline of June 30, 2015. The DNRC successfully met the final benchmark from HB 22 by completing examination in 2015.

B. The Current Landscape: Senate Bill 57:

By the time the initial examination was nearing completion, lingering questions remained regarding whether it would be necessary to reexamine claims that had been subject to the DNRC's verification process prior to the adoption of the Examination Rules. In 2012, a committee of Water Court and DNRC staff was formed to address the issue. Generally, the committee agreed that a complete reexamination should not be undertaken. However, the committee recommended that certain elements or issues that had not previously been subject to consistent or meticulous scrutiny<sup>12</sup> should be reviewed by DNRC to eliminate potential problems for water users. The committee concluded that the reexamination should include all claims in decrees issued prior to March 28, 1997, that are not a final decree, not just claims that were subject to the verification process.

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<sup>10</sup> Ch. 288, L. 2005.

<sup>11</sup> In 2007, this fee was repealed and the funding replaced with a general fund appropriation. See Ch. 319, L. 2007.

<sup>12</sup> Specifically, these were: (1) decree exceeded; (2) filed and use rights predating district court decrees; (3) over-filed notices of appropriation; (4) claims with multiple uses; and (5) standardization and identification of point of diversion, source, and ditch name.



Upon the committee's recommendation, the Water Court issued a statewide order (2012 Order) requiring the DNRC to reexamine all claims in Temporary Preliminary Decrees and Preliminary Decrees issued prior to March 28, 1997, for the elements that had not previously been subject to consistent scrutiny -- about 90,000 previously decreed claims. The objectives were to correct water right elements that may cause water distribution problems and make claims consistent across the state.

The 2012 Order was put into law by Senate Bill 57 in 2015<sup>13</sup>. SB 57 provided for funding for the reexamination and amended Section 85-2-271, MCA, to its current form by replacing the examination benchmarks with new benchmarks for reexamination by the DNRC with a final completion date of June 30, 2023. The chart below shows the benchmarks language before and after SB 57, with emphasis added. Note that in their current form the benchmarks direct DNRC to complete *reexamination*, not examination. Further, the statute is limited to *verified* claims.

85-2-271 Benchmarks under HB 22		85-2-271 Benchmarks under SB 57											
(b) The cumulative benchmarks are as follows:		(b) The benchmarks are as follows:											
<table><tr><th>Date</th><th>Total Number of Claims <b>Examined</b></th></tr><tr><td>December 31, 2006</td><td>8,000</td></tr><tr><td>December 31, 2008</td><td>19,000</td></tr><tr><td>December 31, 2010</td><td>31,000</td></tr><tr><td>December 31, 2012</td><td>44,000</td></tr><tr><td>December 31, 2015</td><td>57,000</td></tr></table>	Date	Total Number of Claims <b>Examined</b>	December 31, 2006	8,000	December 31, 2008	19,000	December 31, 2010	31,000	December 31, 2012	44,000	December 31, 2015	57,000	<ul style="list-style-type: none"><li>(i) the department shall <b>reexamine</b> 10,000 <b>verified</b> claims by June 30, 2017;</li><li>(ii) the department shall <b>reexamine</b> 30,000 <b>verified</b> claims by June 30, 2019;</li><li>(iii) the department shall <b>reexamine</b> 60,000 <b>verified</b> claims by June 30, 2021; and</li><li>(iv) the department shall <b>reexamine</b> 90,000 <b>verified</b> claims by June 30, 2023.</li></ul>
Date	Total Number of Claims <b>Examined</b>												
December 31, 2006	8,000												
December 31, 2008	19,000												
December 31, 2010	31,000												
December 31, 2012	44,000												
December 31, 2015	57,000												

## V. HB 110 -- The Goalpost Is Moved Again

At the time that SB 57 was passed, 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. This changed with the 2017 passage of House Bill 110, which established a June 30, 2019, deadline for filing exempt claims. By the time the deadline arrived, over 25,000 claims had been filed, and all of them will need to be examined by DNRC prior to issuance of final decrees.

If DNRC were to focus solely on meeting the reexamination benchmarks, it would likely be able to complete that process by 2023 with its current staffing levels. However, given the flood of HB 110 claims, DNRC and the Water Court are now questioning whether directing resources solely toward reexamination is the prudent course. A bit of background is helpful to understand why.

### A. What Is an Exempt Claim?

<sup>13</sup> Ch. 269, L. 2015.

As noted in **Section III.A** above, in recognition of the fact that many domestic and stockwater claims had very low consumptive volume compared to other uses like irrigation and municipal use and were therefore unlikely to result in enforcement disputes, the DNRC exempted such claims from the original statewide filing requirement. According to some commentators, the Department actively discouraged people from filing exempt claims, evidently daunted by the number of claims it needed to examine and concerned about a flood of small applications.<sup>14</sup>

**B. SB 355 and HB 110**

As the adjudication proceeded over the decades, concern arose that claimants who had declined to file their exempt water rights might eventually be disadvantaged by that choice. Although failure to file an exempt claim did not result in forfeiture of the right, it did result in a potentially negative consequence: an unfiled claim would be subordinated to all timely filed rights, groundwater certificates, and permits. In 2013, Senate Bill 355 was enacted to create a process for claimants to file exempt rights in the general adjudication<sup>15</sup>. This was followed up by HB 110 in 2017, which imposed a final deadline in order to create a "date certain" by which all exempt claims would need to be filed to avoid losing their priority date. The advantage of this approach was eliminating the uncertainty and potential disruption from allowing exempt claims to trickle in gradually and unpredictably. The disadvantage was a flood of filings requiring examination -- over 25,000 claims.

None of the claims received under HB 110 have been previously reviewed by DNRC, so they will need to be examined pursuant to the Examination Rules. DNRC anticipates that the amount of time required to process each exempt claim may be less than for other types of claims, because domestic and stockwater claims tend to be less complex and for smaller volumes than many of the types of claims that were filed under SB 76. However, the sheer magnitude of claims will require extensive time and resources.

**VI. Current State of Benchmarks and Adjudication**

Currently, the benchmarks in Section 85-2-271, MCA, direct DNRC to complete the reexamination process statewide by 2023<sup>16</sup>. DNRC does not have the staff or funding to meet this deadline while simultaneously tackling the HB 110 exempt claims. Moreover, there is very little flexibility since the language in Section 85-2-271, MCA, is limited to "reexamination" of "verified" claims, which would appear to preclude initial *examination* of *exempt* claims. Because DNRC is legally bound to the statutory benchmarks, without legislative action it will need to focus its resources almost exclusively on reexamination. After it has met the 2023 reexamination deadline, it will then shift its focus to examining the HB 110 claims.

**A. Outcome Without Legislative Action**

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<sup>14</sup> For example, see the testimony of Jay Bodner during the House Natural Resources Committee hearing for HB 110, January 23, 2017.

<sup>15</sup> Ch. 323, L. 2013.

<sup>16</sup> About 60% of the Water Court's current budget (about \$2.7 million biennially) comes from a water adjudication account filled from the general fund. This portion of the budget is tied to the benchmarks and is set to sunset in 2028.

If DNRC remains obligated to focus solely on the reexamination benchmarks until 2023, it will result in the issuance of more decrees than would otherwise be necessary and an even more drawn out and expensive adjudication process. DNRC and the Water Court agree that it would be more efficient for DNRC to work on reexamination of verified claims and examination of exempt claims concurrently.

Under current procedures, the Water Court issues preliminary and interlocutory decrees on a rolling basis. Bifurcating DNRC's reexamination work from the examination of exempt claims would interfere with this system and 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 basin that includes reexamined claims but 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 Summary Report for both reexamined and 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 years later.

The first option would delay the entire adjudication, since the Water Court would be paused in issuing preliminary decrees for some years. The second option would require the issuance of two more decrees in many basins, in turn multiplying the public notice periods<sup>17</sup>, 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.

#### B. Proposed Statutory Revisions

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.

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<sup>17</sup> The fiscal note for HB 110 estimated the cost for the issuance of ten supplemental preliminary decrees at nearly \$20,000.

<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</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	Appendix A (HJ14)		2025	10,669	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	7,033		2025	10,669	Missoula
41H		596	done	Interlocutory	596					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	5,409		2026	5,260	Billings
43O		172	4	Interlocutory	176					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	1,684		2028	0	Glasgow
42I		38	1	Interlocutory	39					Billings
42J		140	3	Interlocutory	143					Billings
	Reexam	HB 110	SB 355	Total						
	47,935	24,820	1,591	74,346	74,346	74,346				



## Montana Legislative Services Division

### Legal Services Office

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**TO:** Water Policy Interim Committee  
**FROM:** Cori Hach, Staff Attorney  
**RE:** Summary of Water Court Petitions Pursuant to SB 28  
**DATE:** December 16, 2019

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In 2017, the Montana Legislature passed Senate Bill 28<sup>1</sup>, which gave the Water Court the authority to review Final Orders from the Department of Natural Resources & Conservation (DNRC) upon the petition of one of the parties. To date, the Water Court has decided three cases under this new authority, two in 2018 and one in 2019.

In all three cases, the DNRC decision was appealed by an applicant whose petition had been denied or modified by the DNRC. Also in all three cases, the Water Court reversed the Final Order of the DNRC and directed the DNRC to approve the water user's application. Although each appeal was decided by a different water judge, the reasons cited for the reversal were similar in each case. Among the most common reasons for reversal were:

- Imposing demands on the applicant to demonstrate lack of adverse effect in excess of the minimum standard of proof required by statute;
- Rejecting evidence supplied by the applicant but failing to provide a meaningful explanation for the rejection; and
- Inconsistency with internal guidance or prior agency decisions.

The orders are summarized below.

#### **Clark Fork Coalition v. DNRC (Case No. WC-MAPA-2018-01)**

This case was heard by Chief Water Judge Russ McElyea in the Water Court for the Clark Fork Division, and the Order Remanding Case and Closing Proceedings was filed on April 10, 2019.

The Clark Fork Coalition (CFC) purchased a 433.3 acre-foot (AF) storage right that was originally used for irrigation with the intention of changing the use to instream flow protection and enhancement on Racetrack Creek. CFC's predecessors-in-interest had used the water by impounding it in Racetrack Lake then releasing it as needed. Once released, water from Racetrack Lake flowed down Racetrack Creek 16.5 miles to the Cement Ditch, where it was diverted to irrigate the ranch property. When CFC purchased the water right without purchasing

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<sup>1</sup> Ch. 126, L. 2017

the appurtenant ranch, the water right was considered to be severed from its historical place of use.<sup>2</sup>

### **Procedural History:**

CFC applied to the DNRC for a change of water right to change its irrigation storage right to the new use of instream flow protection and enhancement on Racetrack Creek. The DNRC issued an order titled Preliminary Determination to Grant Change in Modified Form, in which it ruled that CFC could not use its storage right to protect streamflows below the Cement Ditch. The distance between Cement Ditch and Racetrack Creek's confluence with the Clark Fork River is several miles. CFC requested review of this decision and was granted a hearing before a DNRC Hearing Examiner. The Hearing Examiner found that the amount of water historically consumed by irrigation was 66.53 AF, with the remaining 323.47 AF returning to Racetrack Creek downstream of the Cement Ditch and potentially available for diversion by other water users. Thus, the Hearing Examiner issued a ruling that CFC could protect 66.53 AF below the Cement Ditch. CFC filed a Petition for Review of Final Agency Action with the Water Court.<sup>3</sup>

### **Water Court Decision:**

The Water Court reversed the DNRC's order and directed the DNRC to approve the protection of 390 AF<sup>4</sup> from all the way to Racetrack Creek's confluence with the Clark Fork River.<sup>5</sup> The Water Court discussed the following factors in explaining the reversal:

- The Water Court found that the DNRC abused its discretion by requiring more evidence than necessary to meet the statutory criteria for the change. In this case, the Water Court found that *Hohenlohe v. State*, 2010 MT 203, 357 Mont. 438, 240 P.3d 628, applied and that the DNRC had acted inconsistently with the requirements of *Hohenlohe* in two respects:
  - First, the DNRC required a full analysis of return flows even though CFC had already shown by a preponderance of the evidence that its application would not adversely affect other water users.<sup>6</sup>
  - Second, the DNRC required CFC to rule out potential injury to hypothetical water users when the CFC had had already shown by a preponderance of the evidence that its application would not adversely affect other water users.<sup>7</sup>
- The Water Court found that the DNRC's decision to modify CFC's application was inconsistent with its own internal policies and therefore arbitrary. The Water Court cited

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<sup>2</sup> The explanation of the purchase is summarized in the Order Remanding Case and Closing Proceedings in Clark Fork Coalition v. DNRC, WC-MAPA-2018-01, dated Apr. 10, 2019 (CFC Order) at pages 1-2.

<sup>3</sup> The procedural history is summarized in the CFC Order, 2-3.

<sup>4</sup> CFC showed "that the amount of water historically diverted into the Cement Ditch was 390 AF."

<sup>5</sup> CFC Order, 16.

<sup>6</sup> CFC Order, 8-10. It appears that compelling evidence was presented showing that there were no return flows from the irrigation water applied on the ranch back to Racetrack Creek.

<sup>7</sup> CFC Order, 10-11.



a DNRC policy memo suggesting that rather than unilaterally modifying the CFC's application, the proper procedure would have been to first issue a Preliminary Determination to Grant CFC's application and then allow other water users the opportunity to object.<sup>8</sup>

- The Water Court found that the DNRC's reasoning in this case departed from its prior decisions regarding return flows and was therefore arbitrary.<sup>9</sup>
- The Water Court found that *Hohenlohe* required the DNRC to balance the benefits to the fishery resource and aquatic habitat that were likely to result from the CFC's proposal against the realistic likelihood of adverse effects to other users, and that the DNRC's failure to undertake this balancing test constituted legal error.<sup>10</sup>

### **Broken O Land & Livestock, LLC v. DNRC (Case No. WC-MAPA-2018-02)**

This case was heard by Judge Loren Tucker in the Water Court for the Upper Missouri Division, and the Order Reversing DNRC Administrative Decision was filed on September 9, 2019.

Broken O Land & Livestock, LLC (Broken O) owns four water rights previously adjudicated by the Water Court for irrigation purposes. All four water rights are diverted from the Sun River through a ditch known as the Company Ditch. Because Broken O demonstrated that livestock historically drank from the Company Ditch when water was diverted for irrigation, all four water rights include the following remark added by the Water Court in 2016: "The incidental use of this right for stock is limited to times when water is diverted for irrigation and does not provide an independent basis for a call on other water rights."<sup>11</sup>

### **Procedural History:**

Broken O applied to the DNRC for a change in use in order to divert water into several stock tanks dispersed on the ranch instead of allowing the livestock to drink directly from the Company Ditch. After initially advising Broken O that its application was correct and complete and that its requested change would be granted with a measurement condition added, the DNRC changed course and denied the application. Broken O thereafter submitted a Petition for Judicial Review to the Water Court.<sup>12</sup>

### **Water Court Decision:**

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<sup>8</sup> CFC Order, 11-14.

<sup>9</sup> CFC Order, 11-14.

<sup>10</sup> CFC Order, 15-16.

<sup>11</sup> The explanation of the water rights is summarized in the Order Reversing DNRC Administrative Decision in *Broken O Land & Livestock, LLC v. DNRC*, WC-MAPA-2018-02, dated Sept. 9, 2019 (Broken O Order) at pages 1-2.

<sup>12</sup> Broken O Order, 2-4.

The Water Court reversed the DNRC's decision, finding that the DNRC acted arbitrarily and that its denial of Broken O's change permit constituted clear error in abuse of the agency's discretion.<sup>13</sup> The Water Court discussed the following factors in explaining the reversal:

- The DNRC has adopted rules to implement the water rights change statute and publishes forms to implement those rules. Broken O submitted a “correct and complete” Form 606, which is the form developed by the DNRC for stock tank changes. The DNRC determined that the application was nevertheless deficient because Broken O had failed to provide information regarding the historical irrigation use. The Water Court found that it was arbitrary and capricious for the DNRC to request information that the Water Court deemed irrelevant and deny the addition of stock tanks based on the failure to provide information not required on the DNRC's own form<sup>14</sup>.
- The DNRC took the position that since the four water rights were for irrigation, Broken O should be required to follow the irrigation change procedure and provide a historical use analysis of the irrigation rights. The Water Court found that because the number of cows allowed to drink was not proposed to change, it was improper to require additional information. The Water Court took the DNRC's insistence on irrigation information as evidence that was misinterpreting and misapplying the stock water remark authorizing incidental stock watering with the four water rights<sup>15</sup>.
- The Water Court believed that the DNRC was applying its internal rules and procedures inconsistently, constituting error of law<sup>16</sup>.

The Water Court also addressed Broken O's request for attorney fees as the prevailing party. The DNRC argued that it was not a party to the case, but instead acted in a judicial capacity in ruling on the change application and should thus be afforded absolute immunity for acts performed in the judicial capacity. The Water Court also noted that Section 85-2-125, MCA, authorizes district courts to award attorney fees but does not address the Water Court. The Water Court concluded that although there was "equitable impetus" to award attorney fees since the DNRC sent agency counsel to defend its position in the Water Court proceedings as though it were a party, there was insufficient case law guidance and statutory authority to allow the award of attorney fees<sup>17</sup>. The Water Court noted that the Legislature was free to clarify whether it intended to bestow the power to award attorney fees on the Water Court.

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<sup>13</sup> Broken O Order, 12-13.

<sup>14</sup> Broken O Order, 8-9.

<sup>15</sup> Broken O Order, 9-10.

<sup>16</sup> Broken O Order, 10-11.

<sup>17</sup> Broken O Order, 11-12.

### **DeBuff v. DNRC (WC-MAPA-2019-01)**

This case was heard by Associate Judge Brown in the Water Court for the Lower Missouri Division, and the Order on Petition for Judicial Review was filed on November 21, 2019.

#### **Procedural History:**

The applicants applied to the DNRC for a permit to use groundwater pumped from four wells and a pit for irrigation purposes.<sup>18</sup> After requesting correction of deficiencies and receiving additional information from the applicants, the DNRC determined that the application was correct and complete and sent the applicants a technical report which determined that groundwater, but not necessarily surface water, was physically and legally available to support the proposed use. The DNRC expressed concern that the proposed withdrawals would decrease flows on a down-gradient creek, impacting water users on that creek. The applicants and their consultants then met with the DNRC to provide a conceptual model and propose terms to protect senior water users from adverse effect.

During protracted back-and-forth spanning over two years, the applicants and their consultant provided additional information, proposed strategies to mitigate potential impact to other water users, and eventually amended the application to reduce the amount of water permitted by an amount equivalent to what the applicants proposed to mitigate. The DNRC responded with several revised technical and depletion reports, occasionally shifting the focus of the anticipated adverse effect. Finally, the DNRC issued a Preliminary Determination to Deny Permit, and the applicants requested a show cause hearing. After a hearing, the DNRC Hearing Examiner issued a Final Order denying the application, which the applicants appealed to the Water Court.

#### **Water Court Decision:**

The Water Court reversed the DNRC's decision and remanded with instructions that the DNRC grant the application.<sup>19</sup> The Water Court found that the DNRC had failed to perform a meaningful evaluation of the applicants' evidence and failed to investigate whether or not downstream water users could meaningfully exercise their water rights under the changed conditions. Relying heavily on *Hohenlohe*, the Water Court determined that this failure was arbitrary and constituted an abuse of discretion under these circumstances. Of note in the Water Court's decision were the following factors:

- The Water Court acknowledged that it was obligated to “pay some deference to the agency” where the agency has relied on its technical expertise and that it was not permitted to “reweigh the evidence or find new facts.”<sup>20</sup> However, the Water Court found that the agency's actions were clearly erroneous on a number of factors:

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<sup>18</sup> The lengthy procedural history is summarized in the Order on Petition for Judicial Review in *DeBuff v. DNRC*, WC-MAPA-2019-01, dated Nov. 21, 2019 (DeBuff Order) at pages 2-10.

<sup>19</sup> DeBuff Order, 23.

<sup>20</sup> DeBuff Order at 14.

- The Water Court found that the DNRC incorrectly determined that the source aquifer was connected to the aquifer of concern because the agency relied on a map that was not properly submitted as part of the administrative record to support its conclusion and rejected evidence submitted by the applicants without providing an explanation.<sup>21</sup>
- The Water Court found that the DNRC improperly relied on facts from a prior permit decision because the agency did not follow official notice procedures to add the prior permit application to the administrative record or notify the applicants that the prior application would factor heavily in its decision<sup>22</sup>.
- At some point after initially determining that the application was correct and complete, the DNRC determined that it could no longer follow the surface-water-estimation methodology provided by the applicants. The Water Court found that this change of course was accompanied by insufficient explanation, and that “[a]bsent a rule or more clear explanation . . . DNRC’s change of position was arbitrary and capricious.”<sup>23</sup>
- Similarly, the Water Court found that the DNRC failed to provide meaningful explanation for its rejection of an evapotranspiration model supplied by the applicants, and that this failure was likewise arbitrary and capricious.<sup>24</sup>
- The applicants provided a report theorizing that the downstream surface water users only withdrew surface water when precipitation events caused the otherwise dry streambed to run full. The applicants argued that this meant that their groundwater depletions would not affect this practice even if the aquifer was connected. The Water Court found that DNRC failed to meaningfully evaluate this theory and that failure was arbitrary in abuse of discretion.<sup>25</sup>

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<sup>21</sup> DeBuff Order, 12-13.

<sup>22</sup> DeBuff Order, 14-15.

<sup>23</sup> DeBuff Order, 17.

<sup>24</sup> DeBuff Order, 19.

<sup>25</sup> DeBuff Order, 22.



## Montana Legislative Services Division

### Legal Services Office

PO BOX 201706

**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

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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.<sup>1</sup> 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 A<sup>2</sup>. 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 court<sup>3</sup>, 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 Constitution<sup>4</sup>, then the election requirement does not apply and the appointment of Water Court judges does not conflict with Article VII, section 8(1).

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<sup>1</sup> 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.”)

<sup>2</sup> 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.

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

<sup>4</sup> “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”)<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> Third, the fact that water judges are appointed to fixed terms of four years<sup>10</sup> could be considered a factor in finding that the assignment of each water judge is not “temporary.”

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 40.

<sup>8</sup> 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.”

<sup>9</sup> 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.

<sup>10</sup> 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]<sup>11</sup>.

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 jurisdiction<sup>12</sup>, the fact that laws are presumed to be constitutional if there is a reasonable interpretation<sup>13</sup>, and the fact that the Montana Constitution clearly contemplates giving the Legislature power to create alternative and specialized courts with broad judicial power<sup>14</sup> are all factors that a court might find persuasive.

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

<sup>12</sup> 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).

<sup>13</sup> See note 1, *supra*.

<sup>14</sup> 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.



## Montana Legislative Services Division

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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)

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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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup>

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.<sup>5</sup> 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."<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> For matters within the judge's jurisdiction,

<sup>1</sup> 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.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; 3-7-102, MCA.

<sup>4</sup> 3-7-201(3), MCA.

<sup>5</sup> 3-7-201(1), MCA.

<sup>6</sup> 3-7-203, MCA.

<sup>7</sup> Ch. 80, L. Mont. 1981.

<sup>8</sup> 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.<sup>9</sup>

In addition to adjudicating water rights, the Water Court may also determine whether existing water rights have been abandoned from nonuse.<sup>10</sup> The Water Court also addresses claims certified from the district courts when issues arise regarding existing water rights.<sup>11</sup> Because certification proceedings arise when there is a distribution controversy, the proceedings are given priority over all other adjudication matters.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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:

<sup>9</sup> 3-7-224(3), MCA.

<sup>10</sup> 3-7-501(4), MCA.

<sup>11</sup> 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”).

<sup>12</sup> 85-2-406(2)(b), MCA.

<sup>13</sup> 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.

<sup>14</sup> 85-2-114, MCA.

<sup>15</sup> 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).<sup>16</sup>

Without jurisdiction to act, the article argued that all decisions issued up until that point were likely void for lack of jurisdiction.<sup>17</sup> 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."<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

<sup>16</sup> *Id.* at 239.

<sup>17</sup> *Id.* at 243-244.

<sup>18</sup> *Id.* at 241.

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

<sup>20</sup> *Id.* at 39.

<sup>21</sup> MacIntyre, 49 Mont. L. Rev. at 242.

<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup>

<sup>23</sup> 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>.

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

<sup>25</sup> *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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

In 1981, the Supreme Court upheld the WCC’s jurisdiction in *State ex rel. Uninsured Employers’ Fund v. Hunt*.<sup>30</sup> 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.”<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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

<sup>26</sup> IV Montana Constitutional Convention, Verbatim Transcript, 1020 (1972).

<sup>27</sup> See Ch. 537 Laws. Mont. 1975.

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

<sup>29</sup> 2-15-1707, MCA.

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

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

<sup>32</sup> 38 A.G. Op. 27 (1979).

<sup>33</sup> 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.<sup>34</sup> 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.”<sup>35</sup> 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

<sup>34</sup> C-22 (1992).

<sup>35</sup> 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.<sup>36</sup>

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

<sup>36</sup> *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.<sup>37</sup>

**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:

<sup>37</sup> 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.”<sup>38</sup>

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

<sup>38</sup> 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.<sup>39</sup>

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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<sup>39</sup> 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.”

# OTHER STATES' WATER COURTS

## FUTURE OF THE MONTANA WATER COURT

In 1979, the Montana Legislature created the Montana Water Court. The court has a limited—if complex and wide-impacting—function: It is charged with the litigation phase for the adjudication of historical water rights. Montana's legal framework for water rights is the prior appropriation doctrine, which is sometimes described as “first in time, first in right.” The Montana Water Court, the Department of Natural Resources and Conservation, and state district courts each play certain roles within this doctrine.

House Joint Resolution 14 asks the 2019-20 Water Policy Interim Committee to study the future of the Montana Water Court. In Sept. 2019, the WPIC asked for a general survey of other Western water courts. While each of the Western states have their own brand of water rights administration, only three states (Colorado, Idaho, and Montana) have water courts. This memo serves to generally detail how these water courts operate, but will also outline relevant water rights processes in other Western states.

## WESTERN STATUTORY SYSTEMS

Many of the West's oldest water rights were established in the mid- to late-1800s.<sup>1</sup> The prior appropriation doctrine was developed “during the nation's rapid western expansion, particularly after the discovery of gold in California in 1848.”<sup>2</sup> The doctrine “was an expedient means to encourage development of the arid West, where much of the land is distant from streams and water is limited.”<sup>3</sup> Especially in mostly arid states, “statutory systems have evolved to provide for initiation of appropriations, establishment and enforcement of priorities, and water distribution.”<sup>4</sup>

Constitutions in Western states “assume that water in its natural state belongs to no person or entity, but rather is a common resource to be administered for the benefit of society.”<sup>5</sup> But beyond Constitutional language, what are these “statutory systems?”

<sup>1</sup> This is excepting tribal reserved rights, which predate the settlement era.

<sup>2</sup> David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 78.

<sup>3</sup> David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 81.

<sup>4</sup> Ibid.

<sup>5</sup> David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 85.

Montana's system of water rights involves three distinct phases—adjudication,<sup>6</sup> permitting (and changes to existing rights), and enforcement. These three phases are generally mirrored in the other Western states.

Water rights adjudication is “an action to determine all respective water rights on a stream system.”<sup>7</sup> Like Montana, not all Western states have adjudicated all rights on all streams. For example, of 85 hydrologic basins, the Montana Water Court has issued final decrees—determining the important elements of priority, flow rate, source, and place of use—in 6 basins.<sup>8</sup>

Adjudication tends to follow two models: the Colorado model or the Wyoming model.<sup>9</sup> In short, Colorado water rights are judicially determined; Wyoming's are administratively so. As Thorson observed, “Colorado remains the only western state with a permanent water court. By contrast, Wyoming, in advancing a California innovation, furthered the development of an administrative structure with a state engineer as its central character.”<sup>10</sup>

Some Western states have determined most rights on most streams.<sup>11</sup> For example, Wyoming and Colorado comprehensively determined their water rights more than a century ago. Subsequent rights are then based on those existing rights. Meanwhile, Montana began a statewide adjudication in the 1980s; Idaho completed an adjudication of 150,000 Snake River water claims in 2014. The process of adjudicating “old” claims was working in parallel with the permitting of “new” ones.

Colorado, Idaho, and Montana have judicially determined water rights—at least in part. All of the rights in Colorado are judicially determined. The Montana Water Court is adjudicating all pre-1973 water rights; the Snake River Adjudication Court adjudicated water rights throughout the entire Snake River system, including groundwater, which is home to about two-thirds of the state's irrigated agriculture.

In contrast to all other Western states, the Colorado Water Court also decrees new uses of water. For the others, including Montana, the “acquisition, exercise, transfer, and termination of water rights are regulated by administrative permit systems.”<sup>12</sup>

Enforcement, or water distribution, varies by state, but is generally performed by a state official of some ilk. In Montana, it is a district court-appointed water commissioner.

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<sup>6</sup> Adjudication is defined by Black's Law Dictionary as “the entry of a decree by a court in respect to the parties in a case.” For Montana, the Water Court is the court, and the parties are the water rights claimant and any objectors to that claim.

<sup>7</sup> A. Dan Tarlock, *Law of Water Rights and Resources*, section 7:2, Thomson Reuters (2015).

<sup>8</sup> Litigation of pre-1973 water rights claims is mostly complete in most basins. And the DNRC has issued nearly 150,000 water rights permits and groundwater certificates.

<sup>9</sup> There are variations, of course, most notably Oregon's adoption of the Wyoming system, and how California's adjudication laid the groundwork for Wyoming's.

<sup>10</sup> John E. Thorson, A Permanent Water Court Proposal for a Post-general Stream Adjudication World, *52 Idaho L. Rev.* 17 (2016).

<sup>11</sup> Although not necessarily for groundwater claims. California only recently adopted a groundwater permitting system.

<sup>12</sup> A. Dan Tarlock, *Law of Water Rights and Resources*, section 7:5, Thomson Reuters (2015).

## WATER COURTS OF COLORADO

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The Colorado water courts are permanent courts that adjudicate existing rights and determine new water rights and changes to water rights. Because Colorado adjudicated most of its water rights more than 100 years ago, “its modern adjudications are ‘supplemental’ to those historical decrees.”<sup>13</sup> Historical water rights may be changed to different purposes or places of use by applying to a water court.

The court, which is composed of 7 water divisions within the state’s 7 major basins, was created in 1969, assuming functions previously performed by the district courts. The state engineer’s office provides technical assistance to the courts. Judges serving in one of the water divisions may also have a regular district court caseload.<sup>14</sup> A water referee investigates water cases filed with a court, oversees settlement discussions, and issues proposed rulings. The water courts have a unique settlement rule that requires parties to resolve factual disputes.<sup>15</sup> Administrative decisions of the state engineer may be appealed to a water court. Appeals of water court decisions go to the Colorado Supreme Court.

Water courts don’t distribute water; water commissioners do so as employees of the state engineer’s office.

## IDAHO’S WATER COURT

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The Snake River Basin Adjudication court was created in 1987 to adjudicate water rights in the Snake River Basin drainage, which covers about 87 percent of the state. This adjudication included federal and tribal claims.

In a process similar to Montana’s, the Idaho Department of Water Resources “reviewed claims and submitted reports to the specialized water court presided over by a district judge assigned essentially full-time to the case. Special masters and the judge resolved objections.”<sup>16</sup> Prior to 1963 for groundwater and 1971 for surface water, water rights could be claimed by putting water to a beneficial use or by posting notice under law. The Snake River court is located in Twin Falls, Idaho.

The court completed its work with the Snake River final decree in 2014. The court will “continue to hear water-related appeals from state administrative agencies and now also turns its attention to smaller adjudications in northern Idaho.”<sup>17</sup> Although the court continues to adjudicate and hear appeals, it appears to be a temporary one.

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<sup>13</sup> Land Use and Natural Resources Clinic, University of Montana School of Law, *Water Rights in Montana* (2014), 19.

<sup>14</sup> In contrast to Montana, a judicial nominating committee appoints Colorado district court judges (Colo. Const. Art. VI, Sec. 24). Judges who wish to remain in office after the expiration of each judicial term must win a retention vote by electors of their judicial district. (Colo. Const. Art. VI, Sec. 25).

<sup>15</sup> Land Use and Natural Resources Clinic, University of Montana School of Law, *Water Rights in Montana* (2014), 19.

<sup>16</sup> John E. Thorson, A Permanent Water Court Proposal for a Post-general Stream Adjudication World, *52 Idaho L. Rev.* 17 (2016).

<sup>17</sup> *Ibid.*

The Idaho Department of Water Resources processes applications for new water rights and for changes to existing rights. The Snake River court hears appeals to application decisions, distribution disputes, and other water-related decisions of the Idaho Department of Water Resources.

Distribution of water is through the Idaho Department of Water Resources and elected water masters.

## THE MONTANA WATER COURT

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The Water Court, with administrative and technical analysis by DNRC experts, conducts the statewide adjudication.

Senate Bill 76 (1979) created the Water Court to conduct the litigation phase of adjudication, after DNRC experts examine each claim. 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. It is these claims, plus an additional 30,000 late claims authorized by later legislatures, that the court is working through.

Although officially crafted to have a chief judge with four district court judges, the Water Court practically operates through the chief water judge with the help of an associate chief water judge and various water masters. Because the bulk of the Water Court's work is focused on those pre-1973 water claims, the court will have limited function after it issues final decrees, which must include federal and tribal reserved water rights.

The Montana Water Court has two other important roles: district courts use the Water Court and its judges and masters to certify claims involved in a distribution controversy, and the Water Court is a potential venue for an appeal of a DNRC decision on a water right permit or change application.

The DNRC issues permits and approves changes of water rights (some of which are appealable to the Water Court). District courts distribute water rights through the appointment of a water commissioner, who monitors streamflows and may close headgates to protect highest priority water rights.

## OTHER SYSTEMS

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As described above, a minority of Western states have a water court, whether permanent or temporary. However, it is worth understanding the systems in other states, including permitting and enforcement. It is also important to



note that district and superior courts are involved in appeals of administrative decisions. The following graphic<sup>18</sup> sums up the water rights systems in 7 Western states<sup>19</sup>:

State	Adjudication	Permitting, changes	Distribution
<b>Montana</b>	Water Court, after technical analysis by Department of Natural Resources and Conservation (DNRC).	Since 1973, the DNRC has issued new permits and processes changes of water rights.	Water commissioners appointed by district court.
<b>California</b>	State Water Resources Control Board (SWRCB) investigates stream and claims and makes preliminary determination of surface water claims subject to judicial confirmation. Superior courts have historically conducted groundwater adjudications.	Since 1914, SWRCB permits new uses and changes for surface water. A 2014 law requires local agencies to sustainably manage groundwater under SWRCB oversight.	Trial court-appointed water master oversees exercise of decreed rights and may operate water diversion structures. Water master may be a public entity with a governing body in a major urban area.
<b>Colorado</b>	One of the state's 7 water courts with assistance from a water referee, who investigates a water case, oversees settlement discussions, and proposes rulings.	Water courts decree new water rights. On changes of rights, the courts receive technical support from the State Engineer. The engineer produces a "consultation report" with recommended findings and conditions.	Water Commissioners employed by the State Engineer distribute water according to water court decrees. Division engineers and water court referees may aid water commissioners in interpreting decrees.

<sup>18</sup> Water Policy Interim Committee memo, "Comparison of Change of Water Right Process in 6 States," July 16, 2018; Land Use and Natural Resources Clinic, University of Montana School of Law, *Water Rights in Montana* (2014); A. Dan Tarlock, *Law of Water Rights and Resources*, section 7:5, Thomson Reuters (2015); and John E. Thorson, A Permanent Water Court Proposal for a Post-general Stream Adjudication World, *52 Idaho L. Rev.* 17 (2016).

<sup>19</sup> Nevada, New Mexico, and Oregon do not employ water courts. Nevada and New Mexico have judicial adjudications with agency involvement. Oregon has an administrative adjudication, which must be filed as a judicial action. Permitting, changes, and enforcement are primarily executive agency functions.

Dec. 16, 2019

## Other States' Water Courts

State	Adjudication	Permitting, changes	Distribution
<b>Idaho</b>	Snake River Basin Adjudication court with technical assistance from the Idaho Department of Water Resources (IDWR). Court has completed largest basin (Snake River) and is conducting adjudications in Northern Idaho and Bear River basins.	IDWR processes post-1971 applications for new water uses and all changes of use. Appeals of agency decisions go to Snake River Basin Adjudication court.	IDWR water masters are elected from state water districts to distribute water.
<b>Utah</b>	State Engineer's Office initiates adjudication of pre-1903 surface claims and pre-1935 groundwater claims in district court. Users file claims, which may be objected to. Engineer's office recommends a "proposed determination" to the court. District court retains jurisdiction over decrees. Adjudication is ongoing.	Since 1903, the State Engineer's Office. District courts review engineer's office decisions on changes to water rights.	State Engineer's Office appoints water commissioners to 4-year terms with local users' input.

State	Adjudication	Permitting, changes	Distribution
<b>Washington</b>	Superior Court conducts adjudications, which are initiated by the Department of Ecology. These adjudications may include all appropriators – pre-1917 and -1932 claims and subsequent permits. Adjudication is complete in 83 basins; a superior court approved the important Yakima River basin adjudication most recently. Much of the state remains unadjudicated.	Department of Ecology issues permits for surface water use after 1917 (or 1932 in some instances) and for groundwater use after 1945. Changes are processed by the adjudication court, if a right is under adjudication, or Department of Ecology. Decisions may be appealed to trial court or a Pollution Control Hearings Board. Change proposals may go through the Water Transfer Working Group.	Adjudicating courts usually assign Department of Ecology with distribution and enforcement, although the courts may be more involved in some instances. The Department of Ecology hires, trains, and supervises “water masters” to distribute water.
<b>Wyoming</b>	State Engineer adjudicated 5,000 pre-1890 territorial water rights. Adjudication is thus complete.	Since 1890 statehood, the state engineer has issued water rights permits. The Board of Control (which includes the state engineer) considers changes to water rights.	State engineer hires water commissioners. Distribution decisions may be appealed to a district supervisor, state engineer, and the courts.

## CONCLUSION

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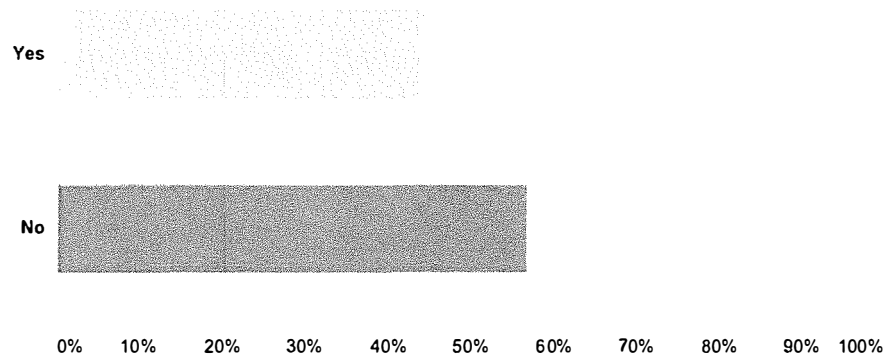
Three Western states employ water courts. One—Colorado's—has been virtually employed since the determination of water rights began. Colorado's water courts conduct virtually all water right processes—adjudication, permitting, and changes—although distribution and enforcement is up to the State Engineer's Office.

Montana's and Idaho's water courts were created more recently and are primarily used for adjudication of historical water rights, although Idaho's water court does hear appeals of permit and change decisions; the Montana Water Court may be chosen by an applicant to hear an appeal of a permit or change decision.

Throughout the West, each state's adjudication, permitting, and enforcement mechanisms reflect the particular history of the development of water use in that state. Further inquiry may be necessary to adapt specific processes from other states' systems into Montana's.

## Q1 Did you have any experience with water law prior to becoming a judge?

Answers: 30 | Page: 1

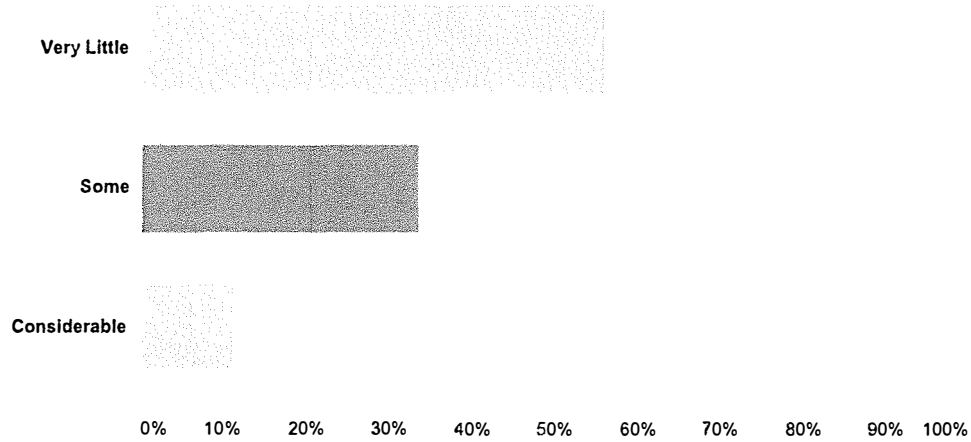


Answer Choices	Responses	
Yes	43.33%	13
No	56.67%	17
<b>Total</b>		<b>30</b>

#	Comments:	Date
1	as an attorney in private practice and an irrigator	2/22/2016 8:56 AM
2	Attorney for the Daly Ditches Irr. District & Supply Ditch as well as various water users	2/17/2016 10:12 AM
3	Basically as an attorney representing persons that filed claims	2/17/2016 9:01 AM
4	litigated injunction in district court	2/12/2016 11:21 AM
5	Was district judge in 4th jud. dist. before water courts were established and am familiar with ordeal, including calls at 5 am.	2/12/2016 10:42 AM
6	Limited	2/12/2016 10:13 AM

## Q2 If so, how extensive was that experience?

Answered: 18 out of 18

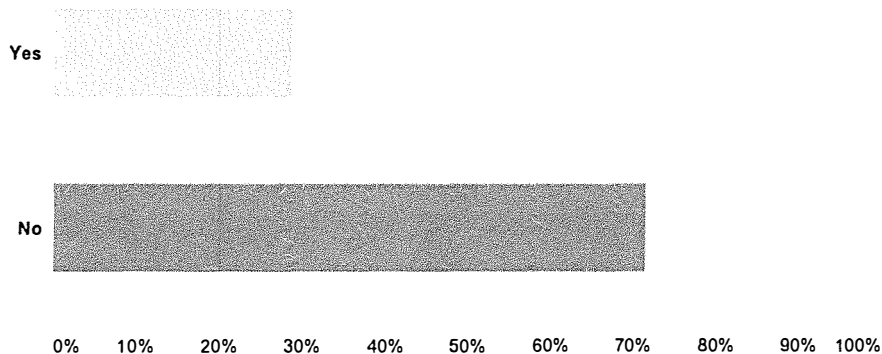


Answer Choices	Responses	
Very Little	55.56%	10
Some	33.33%	6
Considerable	11.11%	2
<b>Total</b>		<b>18</b>

#	Comments:	Date
1	seminar after election	2/12/2016 12:43 PM
2	Involved. Constant. First homicide between whites in Ravalli County was over water rights.	2/12/2016 10:42 AM
3	none	2/12/2016 10:10 AM

### 03 Are you currently enforcing any District Court water decrees?

Answers: 11 / Questions: 2



#### Answer Choices

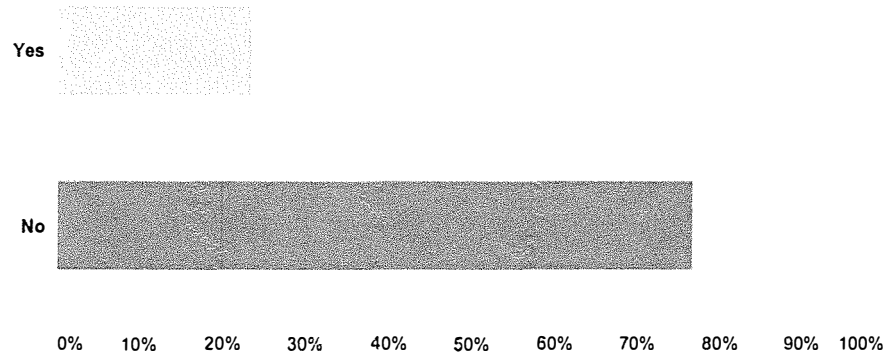
#### Responses

Yes	28.57%	8
No	71.43%	20
<b>Total</b>		<b>28</b>

#	Comments:	Date
1	I assume you mean a District Court decree establishing a water right. I have appointed and do supervise some water commissioners.	2/17/2016 1:57 PM
2	I haven't had this issue arise in five years.	2/17/2016 11:24 AM
3	Burnt Fork, COWELL v. JULIAN, Cause # 556	2/17/2016 10:12 AM

### Q4 Are you currently enforcing any Water Court decrees?

Answered: 30 (100%)

**Answer Choices**

Yes

No

**Total****Responses****23.33%****76.67%**

7

23

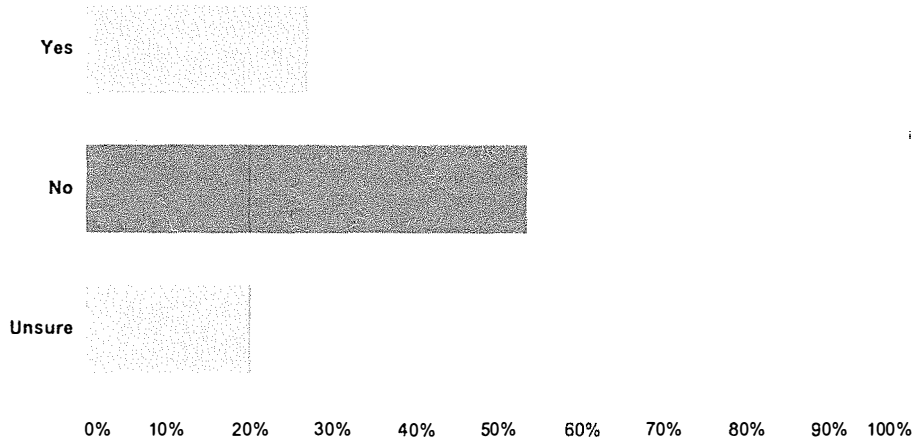
**30**

#	Comments	Date
1	At least not aware of any; Clerk has not brought any to my attention.	2/17/2016 1:57 PM



### Q5 Do you want to retain responsibility for administration of water rights in the future?

answered: 30 / Skipped: 0



#### Answer Choices

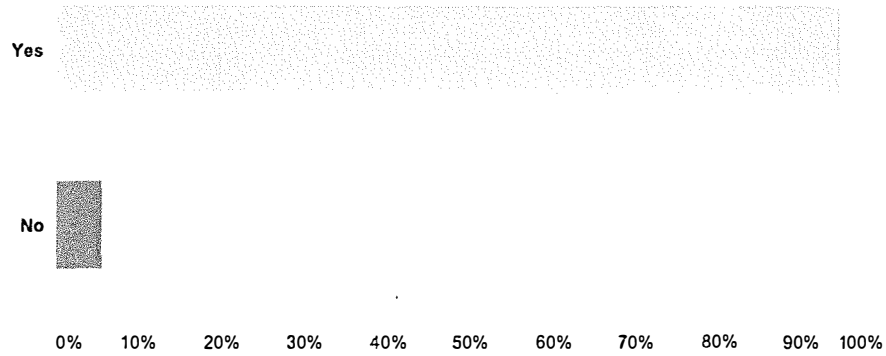
#### Responses

Yes	26.67%	8
No	53.33%	16
Unsure	20.00%	6
<b>Total</b>		<b>30</b>

#	Comments	Date
1	Not sure of the work demand	2/17/2016 1:57 PM
2	Since disputed issue seem to simmer over the winter months and then arise quickly as the irrigation seasons begins, any other admin. system would need the capability to respond (and resolve) in a prompt, timely manner	2/17/2016 10:12 AM
3	Better left to experts.	2/17/2016 8:41 AM
4	Think water courts are better equiped to deal with enforcement	2/12/2016 12:43 PM
5	Keep water court.	2/12/2016 10:42 AM

**Q6 If you favor retaining jurisdiction over water administration, would you like the ability to refer those cases to the Water Court?**

by Water 14, 2/12/2016 10:42 AM



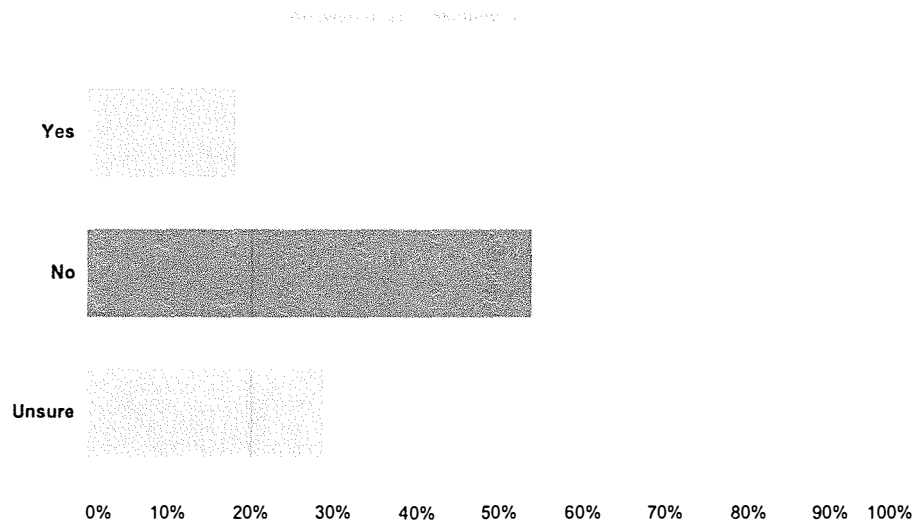
**Answer Choices**

**Responses**

Yes	94.44%	17
No	5.56%	1
<b>Total</b>		<b>18</b>

#	Comments	Date
1	Absolutely.	2/12/2016 10:42 AM
2	Not sure	2/12/2016 10:13 AM

### Q7 Do you want to retain responsibility for appointment and supervision of water commissioners in the future?

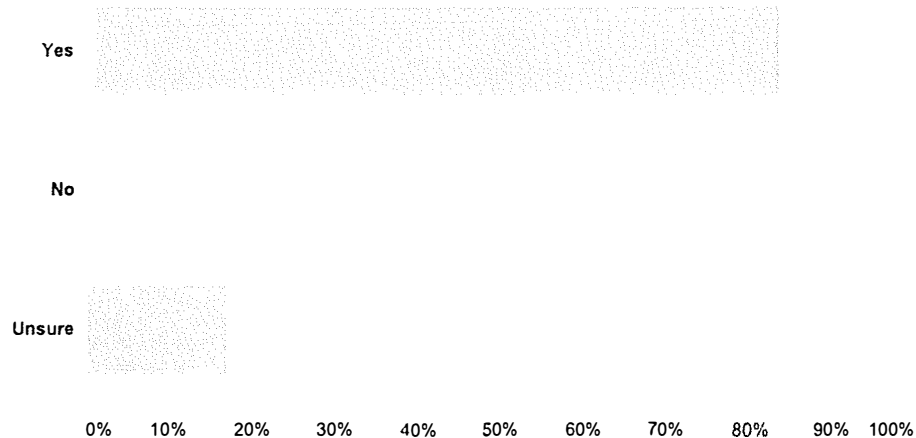


Answer Choices	Responses	
Yes	17.86%	5
No	53.57%	15
Unsure	28.57%	8
<b>Total</b>		<b>28</b>

#	Comments	Date
1	This is big problem on contentious streams	2/22/2016 8:56 AM
2	I like the work, but the inherent conflict between apointing and adjudicating between commrs and users is a problem	2/19/2016 3:07 PM
3	no real water in my district	2/18/2016 8:51 AM
4	Depends on workload; currently the supervision has not been much work	2/17/2016 1:57 PM
5	Am leaning toward DNRC training, hiring, and admin. of water commissioners	2/17/2016 10:12 AM
6	My water users are very insistent on keeping the appointment of the wter commissioneers local and prefer that be done by the District Court. If they were assured the Water Court would continue to appoint a local water commissioner, they may be satisfied with changing the appointment to the Water Court.	2/12/2016 5:41 PM
7	If I am charged with enforcement	2/12/2016 12:43 PM

**Q8 At present, Montana law contemplates that the Water Court cease to exist after the general adjudication is complete. Thereafter, all water cases will be heard by District Courts. Would you support a permanent Water Court to hear such cases?**

Answers: 10 / Apples: 0

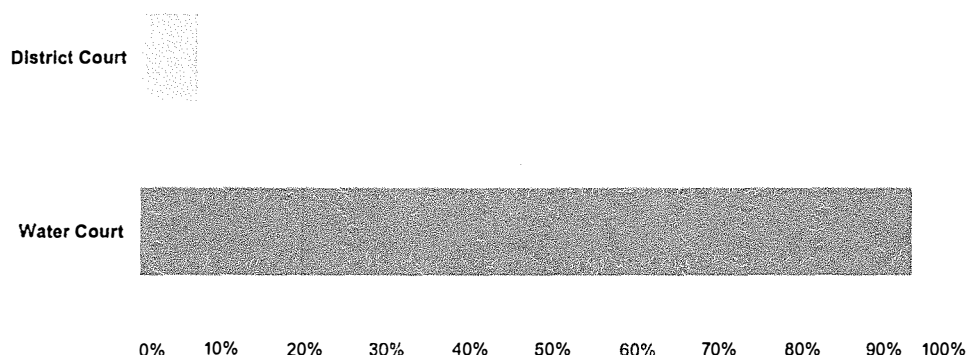


Answer Choices	Responses	
Yes	83.33%	25
No	0.00%	0
Unsure	16.67%	5
<b>Total</b>		<b>30</b>

#	Comments	Date
1	under the present construct, it appears the water court will not ever be able to finish	2/19/2016 3:07 PM
2	Perhaps shared jurisdiction in some form over distribution issues only (adjudication issues remain solely with water Court)	2/17/2016 10:12 AM
3	Absolutely!	2/12/2016 12:43 PM

**Q8 The legislature may decide to put the Department of Natural Resources and Conservation in charge of future water rights enforcement. If this happens, it is likely agency decisions will be appealed to a court. Should those appeals be heard by District Courts or the Water Court?**

Answers: 28 Skipped: 0



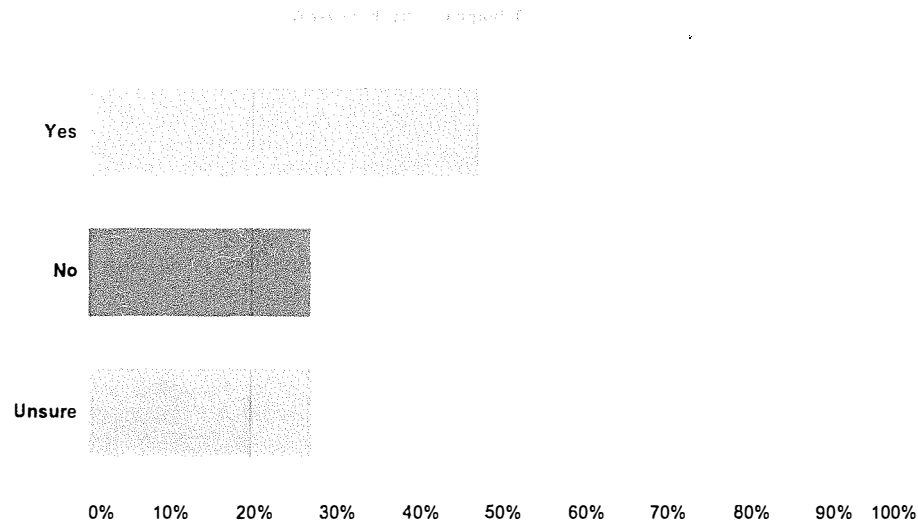
#### Answer Choices

#### Responses

District Court	6.90%	2
Water Court	93.10%	27
<b>Total</b>		<b>29</b>

#	Comments	Date
1	under present arrangements, water court appears to be the proper forum	2/19/2016 3:07 PM
2	The water court judges are far more versed in this area of law and unique and often complex issues that arise in such cases and are thus better suited, in my opinion, to efficiently and competently resolve such cases.	2/17/2016 5:42 PM
3	The Legislature will have to establish additional judges in the First Judicial District Court if these cases will be appealed to district court.	2/17/2016 11:42 AM
4	Unsure. District Courts may be able to handle water distribution issues, or share JRD with the Water Court. Adjudication appeals should go to the Water Court only.	2/17/2016 10:12 AM
5	Assuming it is an independent judicial body.	2/12/2016 10:42 AM

Q10 At present, there are four division water judges who are also sitting District Court judges. The role of these division water judges could be expanded so that they hear all water right disputes in their division. While this would require further study, do you think the idea of four division water judges with the responsibility to hear all water right disputes in that division has merit?



Answer Choices	Responses	
Yes	46.67%	14
No	26.67%	8
Unsure	26.67%	8
<b>Total</b>		<b>30</b>

#	Comments	Date
1	I would want to hear the experience of the division water judges and their take on this issue before stating a position.	2/19/2016 3:17 PM
2	See previous response.	2/17/2016 5:42 PM
3	Seems like these "district Court" judges would become de facto water court judges... Would they be elected from the entire region they represent? Would the Governor or Chief Justice appoint them to a region?	2/17/2016 10:12 AM
4	The water court is the best forum for this. Having the division water judges do it would make them unavailable for their regular district court duties requiring the creation of more district judgeships to pick up the workload. Leave it with the water court.	2/15/2016 11:59 AM

# 2020 DISTRICT COURT WORKLOAD REVIEW

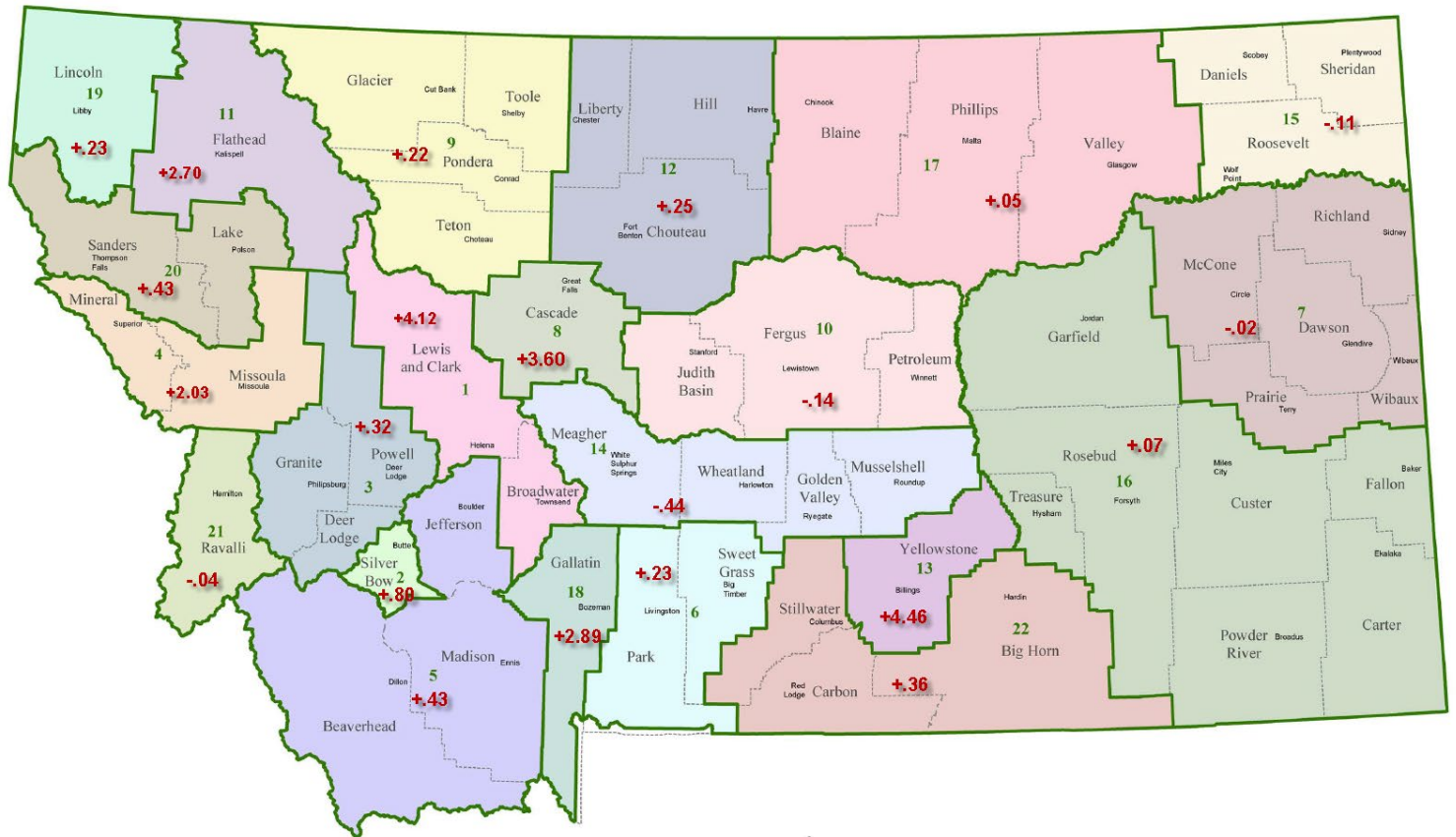
## JUDICIAL RESOURCE NEEDS

The District Court Council tracks and reviews judicial resource needs using case filing statistics and a weighted workload formula approved by the Council. The following table summarizes the results of each review year, 2010 – 2019. The number represents the estimated number of judicial resources (FTE) needed to meet workload demands. The data is sorted on CY2019 data (largest to smallest). The sparkline is a line graph of the data for each district – a red market marks the highest number recorded for the district. CY2019 values are also depicted on the map on page 2.

Judicial Resource Need											
Judicial District	CY2010	CY2011	CY2012	CY2013	CY2014	CY2015	CY2016	CY2017	CY2018	CY2019	Sparkline
13	3.10	1.77	2.91	3.75	5.01	6.18	6.70	7.14	7.75	4.46	
1	2.74	1.45	1.82	1.84	2.27	2.66	2.25	1.38	2.79	4.12	
8	1.06	0.94	1.27	1.67	2.16	2.14	2.08	2.39	2.35	3.60	
18	0.78	0.42	0.43	0.69	1.50	1.43	1.45	1.58	2.36	2.89	
11	2.77	1.53	2.16	2.29	2.01	2.44	2.39	2.42	2.44	2.70	
4	1.37	1.47	1.89	2.02	2.59	2.70	2.39	2.26	3.01	2.03	
2	0.33	0.23	0.27	0.23	0.33	0.41	0.28	0.49	0.80	0.80	
20	0.43	0.34	0.27	0.34	-0.04	0.55	0.55	0.26	0.44	0.43	
5	0.61	0.57	0.40	0.48	0.33	0.40	0.40	0.59	0.52	0.43	
22	0.53	0.43	0.42	0.50	0.46	0.54	0.25	0.15	0.43	0.36	
3	0.24	0.24	0.26	0.31	0.17	0.33	0.49	0.34	0.52	0.32	
12	0.35	0.34	0.46	0.45	0.33	0.39	0.31	0.21	0.25	0.25	
19	0.37	0.38	0.35	0.32	0.21	0.27	0.32	0.24	0.23	0.23	
6	0.32	0.27	0.33	0.24	0.02	0.02	0.14	0.05	0.22	0.23	
9	0.54	0.46	0.55	0.68	0.58	0.61	0.25	0.35	0.48	0.22	
16	0.12	0.01	0.10	0.06	-0.10	0.00	0.00	-0.13	-0.06	0.07	
17	0.06	0.13	0.19	0.18	-0.04	0.02	-0.05	-0.09	-0.06	0.05	
7	0.07	0.12	0.22	0.34	0.32	0.47	0.22	0.08	0.11	-0.02	
21	0.36	0.29	0.24	0.40	0.06	0.06	-0.05	-0.15	0.11	-0.04	
15	-0.12	-0.17	-0.11	-0.07	0.00	-0.04	-0.14	-0.16	-0.16	-0.11	
10	0.18	0.05	0.00	0.10	-0.09	0.00	-0.09	-0.11	0.06	-0.14	
14	-0.21	-0.20	-0.21	-0.22	-0.42	-0.38	-0.42	-0.56	-0.46	-0.44	
All	16.00	11.07	14.22	16.60	17.63	21.20	19.72	18.73	24.13	22.44	

# 2020 DISTRICT COURT WORKLOAD REVIEW - JUDICIAL RESOURCE NEEDS

## 2020 Judicial Resource Needs Map





**From:** [David Baldwin](#)  
**To:** [Mohr, Jason](#)  
**Subject:** [EXTERNAL] HJ14 - Comments to WPIC for Consideration  
**Date:** Wednesday, December 11, 2019 9:01:02 AM  
**Attachments:** [image001.png](#)

---

HydroSolutions Inc (HydroSolutions) thanks the Water Policy Interim Committee (WPIC) for allowing our comment on House Joint Resolution 14 (HJ14) regarding that resolution's request that WPIC "review the future role of the Montana Water Court and, if possible, make recommendations for the Water Court".

HydroSolutions is a leading water rights consulting firm in Montana, with active work in the areas of adjudication, new permit applications, change applications and expert services in water court proceedings.

Based on our decades of experience, HydroSolutions strongly believes the Water Court should continue its essential role litigating historical water rights claims and issuing decrees in the on-going statewide adjudication. Further, we believe the Water Court should become a permanent judicial entity entrusted with hearing all future water rights disputes. Because the Water Court, through its Judges and Water Masters, possesses a wealth of experience with Montana water rights legal issues, we believe this tremendous knowledge base should be kept permanently in place as the primary judicial body designated to hear and rule on water rights matters. We believe that the Water Court is uniquely capable of understanding the technical subject matter and "body of precedent" in the complex cases we deal with. Additionally, we believe the HJ14 should expand the role of the Water Court to administer water use complaints and all other water rights disputes, including all post-July 1, 1973 issues. This restructuring would have the added benefit of reducing District Court caseloads.

Respectfully submitted,

HydroSolutions Inc

And the following employees who regularly do water rights and water court work.

Tom Osborne  
Luke Osborne  
David Donohue  
Mike Meredith  
Dave Baldwin  
Chris Carparelli



Tel: 406.443.6169 x 104  
Mob: 406.431-7760

303 Clarke Street  
Helena, MT 59601

[dbaldwin@hydrosi.com](mailto:dbaldwin@hydrosi.com)

[www.hydrosi.com](http://www.hydrosi.com) [[hydrosi.com](http://hydrosi.com)]

**From:** [John E. Bloomquist](#)  
**To:** [Mohr, Jason](#)  
**Subject:** [EXTERNAL] HJ 14 Study (WPIC)  
**Date:** Tuesday, December 10, 2019 3:11:28 PM

---

Jason- Please accept the following as my comments to HJ 14 for consideration by the WPIC. The following comments are suggested topics for WPIC to consider in the context of HJ 14. I would be happy to follow up on any of the suggested topics with more detail should you or any member wish additional input. I have practiced water law in Montana for over 30 years. My background includes work as a former Water Master at the Water Court and as a private practitioner representing parties in all aspects of the adjudication, DNRC water permitting and change applications, and district court matters involving ditch easement issues, administration of water and enforcement actions. I have also represented water users before the state legislature and Congress on matters involving Compacts with Indian Tribes and irrigation district contract issues with the US Bureau of Reclamation. I have served on the Water Rights Adjudication Advisory Group since its formation and have drafted and participated in numerous water related bills and legislation as a member of that group, and as a private practitioner and lobbyist. From my perspective Montana water law and in particular various aspects of the Water Use Act are at a critical cross road. While the 1973 Water Use Act and the 1979 legislation establishing the system of water courts were landmark legislative enactments for their time, the evolution of water law and policy in Montana since those enactments require the present Montana legislature to lay the framework for the future. This framework requires some comprehensive adjustments to Montana statutes. The following describes topics the legislature should address, and in particular topics the WPIC should provide leadership on:

1. Firmly Secure the Future of the Montana Water Court: The Water Court should be made a permanent fixture administering the law related to water rights and water distribution in Montana. Changes should be made to the Water Use Act which establish the role of the Water Court in implementing the following programs: A. completion of the present adjudication process. B. updating of the Water Court decrees for newly established water rights and changes to existing water rights. C. administration of Water Court decrees and updated decrees including jurisdiction over water commissioners and water distribution disputes. D. jurisdiction over irrigation district statutes involving creation and administration of irrigation district practices and policies. And, E. jurisdiction over water conveyance issues (i.e. ditch easement issues and related conveyance questions).
2. Clarification of the Role of the Montana DNRC: The role of DNRC should be reviewed. The DNRC provides a valuable technical role in water policy. However, the present statutory scheme should be revised to posture DNRC as an advisory/technical review agency as opposed to a decision making agency on water right related questions or disputes.
3. Water Right Data Base: Accurate and timely access to water right information in Montana is critical. The legislature needs to supply DNRC and the Water Court with adequate resources to design and maintain data bases which provide needed access to accurate and timely information on water rights.
4. Administration of Water Compacts: The future of water right Compacts with the several Indian Tribes and the United States will be in administering the provisions of the agreements. The legislature should review and supply to the Water Court and DNRC the necessary mechanisms to fulfill the terms of the agreements to assure the understandings of all affected

parties are realized in the future.

Montana has made great strides under the Water Use Act to date in documenting Montana's existing water rights, reaching agreements with Indian Tribes and the United States on tribal and federal reserved water rights, and on creating the framework for water administration and distribution. However, as time has evolved there are gaps in the statutory framework which in the future will result in confusion and inefficiency in the administration of water rights and distribution of this scarce and valuable resource. The role of WPIC in directly addressing issues which face Montana water policy now and in the near future is critical. Leadership by WPIC in these and other issues will be of great service to the State.

Thank you for the opportunity to comment on HJ 14. Should you or the committee feel the need for any assistance by me in clarifying or expanding on any of the issues raised herein I would be happy to assist. John E. Bloomquist, Helena, MT.

**John E. Bloomquist**

BLOOMQUIST LAW FIRM, P.C.  
3355 Colton Drive, Suite A  
Helena, MT 59602  
(406) 502-1244

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**From:** [Certalic, Regina](#)  
**To:** [Mohr, Jason](#)  
**Subject:** Input on HJ14  
**Date:** Wednesday, December 04, 2019 10:13:45 AM

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Jason,

My name is Regina Certalic and I just have a little input on what I feel should be the future of the Water Court. I am a deputy clerk, so this doesn't pertain to selfish reasons and needing a job. I just truly feel that we can decree and fix older rights, but there will always be active changes. Water rights are alive and don't just end. Once decreed we have the knowledge to enforce. We will be the ones accessing old systems and we are water law professionals. Leave things to the pro's that's my opinion!

Thank you for allowing my input!

**Regina Certalic**  
**Deputy Water Court Clerk**  
**Montana Water Court**



---

**From:** Calkins, Sara <[Sara.Calkins@mt.gov](mailto:Sara.Calkins@mt.gov)>  
**Sent:** Wednesday, December 4, 2019 8:39 AM  
**To:** Bertke, Carol <[cbertke@mt.gov](mailto:cbertke@mt.gov)>; Block, Nathaniel <[Nathaniel.Block@mt.gov](mailto:Nathaniel.Block@mt.gov)>; Brown, Stephen <[Stephen.Brown@mt.gov](mailto:Stephen.Brown@mt.gov)>; Burton, Anna <[anburton@mt.gov](mailto:anburton@mt.gov)>; Calkins, Sara <[Sara.Calkins@mt.gov](mailto:Sara.Calkins@mt.gov)>; Certalic, Regina <[RCertalic@mt.gov](mailto:RCertalic@mt.gov)>; Cole, Dan <[danc@mt.gov](mailto:danc@mt.gov)>; Cristiani, Julie <[JCristiani@mt.gov](mailto:JCristiani@mt.gov)>; Heiser, Vicki <[VHeiser@mt.gov](mailto:VHeiser@mt.gov)>; Lambert, Kathryn <[kalambert@mt.gov](mailto:kalambert@mt.gov)>; Lauer, Colton <[Colton.Lauer@mt.gov](mailto:Colton.Lauer@mt.gov)>; Lockman, Melissa <[Melissa.Lockman@mt.gov](mailto:Melissa.Lockman@mt.gov)>; McElyea, Russ <[RMcElyea@mt.gov](mailto:RMcElyea@mt.gov)>; Natale, Emily <[Emily.Natale2@mt.gov](mailto:Emily.Natale2@mt.gov)>; Nordlund, Julia <[julia.nordlund@mt.gov](mailto:julia.nordlund@mt.gov)>; Ostrem, Eyvind <[Eyvind.Ostrem@mt.gov](mailto:Eyvind.Ostrem@mt.gov)>; Peterson, Lucy <[LPeterson3@mt.gov](mailto:LPeterson3@mt.gov)>; Shearer, Swithin <[SShearer@mt.gov](mailto:SShearer@mt.gov)>; Shelkey, Kirsia <[Kirsia.Shelkey@mt.gov](mailto:Kirsia.Shelkey@mt.gov)>; Stern, Anika <[astern@mt.gov](mailto:astern@mt.gov)>; Stradley, Anna <[astradley@mt.gov](mailto:astradley@mt.gov)>; Weisz, Madeleine <[MWeisz@mt.gov](mailto:MWeisz@mt.gov)>; White, Eugene <[Eugene.White@mt.gov](mailto:Eugene.White@mt.gov)>  
**Subject:** FW: Water committee seeks input on water court, cloud seeding

FYI – Request from the WPIC. Subscribers to WPIC emails will receive this email from Jason.

---

**From:** Jason Mohr <[jmohr2@mt.gov](mailto:jmohr2@mt.gov)>  
**Sent:** Tuesday, December 3, 2019 4:59 PM  
**To:** Calkins, Sara <[Sara.Calkins@mt.gov](mailto:Sara.Calkins@mt.gov)>  
**Subject:** Water committee seeks input on water court, cloud seeding

The Water Policy Interim Committee seeks stakeholder and public input regarding two studies—one of the future of the Water Court (House Joint Resolution 14) and another of weather modification laws (HJ40). The 2019 Legislature passed both study resolutions, which WPIC agreed to conduct.

HJ14 states that “it may be wise to retain [Water Court judges’ and masters’] expertise for future decades of water rights administration in Montana.” The Legislature created the court in 1979 as a venue to litigate 219,000 historical water rights claims. The court must also issue final decrees in the state’s 85 hydrologic basins for these water rights. HJ14 asks WPIC to “review the future role of the Montana Water Court and, if possible, make recommendations for the Water Court.”

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The committee has heard mostly background material related to the two studies in its first two meetings of the 2019-20 interim.

The WPIC is asking the public and stakeholders about relevant issues and possible issues for each study. Written comments may be submitted by mail or email to committee staff. If sending an email, please indicate in the subject line which study resolutions is being referenced. Comments must be received by Dec. 11 for consideration by the committee at its Jan. 6-7 meeting.

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For more information on the committee's activities and meetings, please visit the committee’s website or contact Jason Mohr, committee staff.

Committee Website: [leg.mt.gov/water](http://leg.mt.gov/water)

Committee Staff: [jasonmohr@mt.gov](mailto:jasonmohr@mt.gov) or 406-444-1640

Committee mailing address:

Water Policy Interim Committee  
Capitol Building, room 171D  
P.O. Box 201704

Helena, MT 59620-1704

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DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



STEVE BULLOCK, GOVERNOR

1539 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074  
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PO BOX 201601  
HELENA, MONTANA 59620-1601

December 20, 2019

Chairman Zach Brown  
Water Policy Interim Committee

Re: Comments on HJ 14: Study of the future of the Water Court

Dear Chairman Brown and Members of the Water Policy Interim Committee:

The Montana Department of Natural Resources & Conservation (the "Department") appreciates the opportunity to provide comments to the Water Policy Interim Committee ("WPIC") on the scope of HJ 14 (2019). While HJ 14 is technically a study of the future of the Water Court, outcomes of such an effort could affect all of water policy, the institutions responsible for its implementation, and stakeholders with interests in water rights and water management.

The 1972 Montana Constitution requires the legislature to "provide for the administration, control, and regulation of water rights and [to] establish a system of centralized records . . ." Mont. Const. Art. IX., sec. 3(4). There are essentially two stages to creating a constitutionally defensible water right administration and regulation system. The first stage is the required filing, adjudication, and recording of all existing water rights. The second stage is to put in place a system of administration, including mandatory measurement, reporting, and recording of water use to manage water rights post-adjudication.

At this juncture, the first stage of creating a system that comports with the constitutional requirements must be completed, and WPIC's focus on the future of the Water Court should be on what resources are needed to complete the adjudication as quickly as possible. Many of the issues being raised with WPIC stem from the fact that the Water Court is in the 40th year of the adjudication, and there is no clear end in sight. At this late stage in the adjudication process, the expertise possessed by the Water Court should be utilized to maintain laser focus on the completion of the adjudication.

Further, any comprehensive water policy study needs to be conducted with purpose and funding. A study of the future of the Water Court cannot occur without considering many other facets of current water policy. Prior to embarking on such an endeavor, WPIC should engage stakeholders, the executive, and the judiciary in formal



scoping to define the priorities and scope of a study. If Montana is at a crossroads of water policy, it should proceed with a comparable level of study, expertise, and stakeholder engagement as the legislature has done in the past when evaluating the adjudication, which resulted in the Ross Report (Sept. 30, 1988), or other major water policy matters, such as the comprehensive water marketing study conducted in the early 1980s. *See*, Montana Select Committee on Water Marketing, Report to the 49<sup>th</sup> Montana Legislature (Dec. 1984).

The 2015 Montana State Water Plan <sup>1</sup> reveals that stakeholders consider completion of the adjudication, water measurement, and data-driven administration and enforcement, major water policy priorities for Montana. *See*, pp. 70-74. In that vein, the Department believes the following water policy topics are worthy and ripe for the legislature's consideration:

- Requiring mandatory water measurement, recording, and reporting;
- Standardizing administrative record keeping on administered streams;
- Developing a pilot project to test water administration options in a specific basin;
- Establishing water commissioners as employees of the Department;
- Creating a framework for the administrative resolution of distribution disputes, including mediation options, right to hearing, and judicial review; and
- Bolstering administrative enforcement of unauthorized water use.

If it is true that water is Montana's most valuable resource, it is imperative that time, resources, and funding be allocated to study the future of Montana water policy. While it is critical for the adjudication to conclude with the utmost speed, now is the time for the State to chart a path toward comprehensive water right administration post-adjudication. The Department is committed to working with stakeholders, WPIC, and the Water Court on this effort.

Thank you for considering our comments.

Sincerely,



John E. Tubbs, Director

---

<sup>1</sup> The State Water Plan and related documents are available at this link:  
<http://dnrc.mt.gov/divisions/water/management/state-water-plan>.

ROSS D. MILLER

ATTORNEY AT LAW

Miller Law, PLLC  
401 Washington St.  
Missoula, MT 59802

Phone: 406.544.0651  
e-mail: ross@millerlawmontana.com

December 10, 2019

**RE: House Joint Resolution 14 (HJ14) Comments**

Dear Water Policy Interim Committee,

I am writing in support of retaining the Water Court and its judges and masters for future decades beyond the completion of Montana's adjudication of pre-1973 "existing water rights". Water rights in Montana are uniquely complicated. Litigating and fairly resolving water right matters is heavily dependent upon not only the law, but also the hydrologic sciences, engineering, and historical research techniques that most District Court judges are not experienced with, and quite frankly are ill equipped to handle. However, the Montana Water Court has this expertise. The Water Court, with DNRC as its technical expert, has been a tremendous asset to Montana in adjudicating its pre-1973 "existing water rights", and has proven itself a highly competent specialized court uniquely qualified to administer Montana Water law matters.

Upon completion of Montana's adjudication, the need for this specialized court will not go away. Conversely, Montana's water right issues will only get more complicated and the need for a specialized court will only grow. As more and more stream basins become statutorily closed or effectively closed due to over-appropriation, Montana will become increasingly dependent on changing existing water rights for new uses, as opposed to creating new water rights. The Water Court is, and will be the most well-suited court for such specialized matters. To promote judicial economy while providing the most fair court for our citizens, jurisdiction of the Water Court could potentially be expanded in the future to include some or all of the following:

- Changes to pre-1973 "existing rights" (currently under DNRC jurisdiction),
- Changes to post-1973 permits (currently under DNRC jurisdiction),
- Continued jurisdiction for amendments to pre- 1973 "existing water rights",
- Hearings on new water right permits (currently under DNRC jurisdiction),
- Water distribution disputes (currently under MT District Court jurisdiction).

As a lawyer practicing exclusively in the area of Montana water law, I can attest to the advantages of having a specialized court for jurisdiction over these matters. In a similar manner as the Federal Bankruptcy Court is uniquely trained and qualified to hear complex bankruptcy matters, the Montana Water Court has unique expertise and technical background to preside over Montana's complicated water right matters.

I strongly encourage WPIC to support retaining the Water Court beyond the completion of Montana's adjudication of pre-1973 "existing water rights". Thank you for the opportunity to comment.

Sincerely,



Ross D. Miller, P.E., Esq.

**From:** [JP Pomnichowski](#)  
**To:** [Mohr, Jason](#)  
**Subject:** [EXTERNAL] RE: Water committee seeks input on water court, cloud seeding  
**Date:** Friday, December 13, 2019 3:55:06 PM

---

Dear members of the Water Policy Interim Committee,

In response to WPIC's invitation for public comment regarding House Joint Resolution 14 to study the future of the Water Court, I offer this opinion.

The Montana Water Court, being the entity tasked with determining hundreds of thousands of property rights in Montana (water rights) must focus its efforts on completing adjudication before the legislature considers expanding its role.

The work of the Water Court has been ongoing for *forty years* since its creation in 1979, in a process that was expected to be complete by 2020. Within three years of the court's creation, there were 200,000 pre-1973 water rights claims filed, but adjudication stalled in the 1980s. Some of you may remember a bill passed in the 2005 Montana Legislature (the "Water Bill") by Walt McNutt to assess Montana water rights holders from \$20-\$400 each to spur adjudication. After that bill passed, and with that influx of money for the Water Court, the DNRC expected the adjudication process to be complete in ten years, by 2016.

Adjudication is not yet done, and won't be for some time. A 2010 legislative audit estimated the court would complete adjudication in 2028. However, since that report, the court ordered re-examination of 90,000 claims and the legislature allowed the filing of late stock and domestic claims (HB110 claims previously exempt from filing). The DNRC received more than 24,000 of these claims, which the court must also process. The Water Court must issue final decrees in all basins, and the court cannot issue final decrees in basins that have compacts for reserved rights pending (Ft. Belknap and CSKT). HB220 (2019) amended 85-2-270 to say, "it is realistic and feasible for the water court to issue" first decrees by June 30, 2024.

All of this now extends the timeline for adjudication another eight years or more, coming closer to fifty years for a process slated originally to take no more than twenty years.

The first job of the Water Court is adjudication. That must be done before additional responsibilities are considered.

There's a certain irony in a discussion of expanding the role of the Water Court before adjudication is complete, since adjudication must be completed before water rights users can defend their water rights, and before the state can defend its water use from downstream states' demands.

A recommendation from WPIC that the Water Court must focus its work on completing adjudication would help to reinforce Montanans' investment of time and money to the only entity that can determine their water rights.

Thank you.

JP Pomnichowski  
Montana State Senator, District 33, Bozeman

[pomnicho@montanadsl.net](mailto:pomnicho@montanadsl.net)    [jp.pomnichowski@mtleg.gov](mailto:jp.pomnichowski@mtleg.gov)

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**From:** Jason Mohr [mailto:jmohr2@mt.gov]  
**Sent:** Tuesday, December 3, 2019 4:59 PM  
**To:** pomnicho@montanadsl.net  
**Subject:** Water committee seeks input on water court, cloud seeding

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For more information on the committee's activities and meetings, please visit the

committee's website or contact Jason Mohr, committee staff.

Committee Website: [leg.mt.gov/water](http://leg.mt.gov/water)

Committee Staff: [jasonmohr@mt.gov](mailto:jasonmohr@mt.gov) or 406-444-1640

Committee mailing address:

Water Policy Interim Committee

Capitol Building, room 171D

P.O. Box 201704

Helena, MT 59620-1704

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Water Law Section of the Montana State Bar  
c/o Ryan McLane, Chair  
P.O. Box 1155  
Helena, MT 59624-1155

January 2, 2020

Water Policy Interim Committee, Montana Legislature  
c/o Jason Mohr, Committee Staff  
P.O. Box 201704  
Helena, MT 59620-1704

Re: Water Law Section's Survey results concerning Water Law in Montana

Dear Chairman Brown, and Members of WPIC:

Thank you for the invitation to present at the January 2020 meeting of WPIC, concerning WPIC's HJ14 study bill. I plan on attending on behalf of the Water Law Section.

As discussed at WPIC's August 2019 meeting, the Water Law Section had prepared an internal survey of its members concerning the status and future of water law in Montana. We have very recently completed that survey, and we have attached a copy of the results. We intend to briefly discuss this survey at the January 2020 meeting. We hope that the collective opinions and experiences of our members will prove useful to WPIC in identifying challenges and opportunities for the future of water law in Montana.

Please let us know how the Water Law Section, and its members, can continue to be of assistance to WPIC and the State of Montana. Thank you.

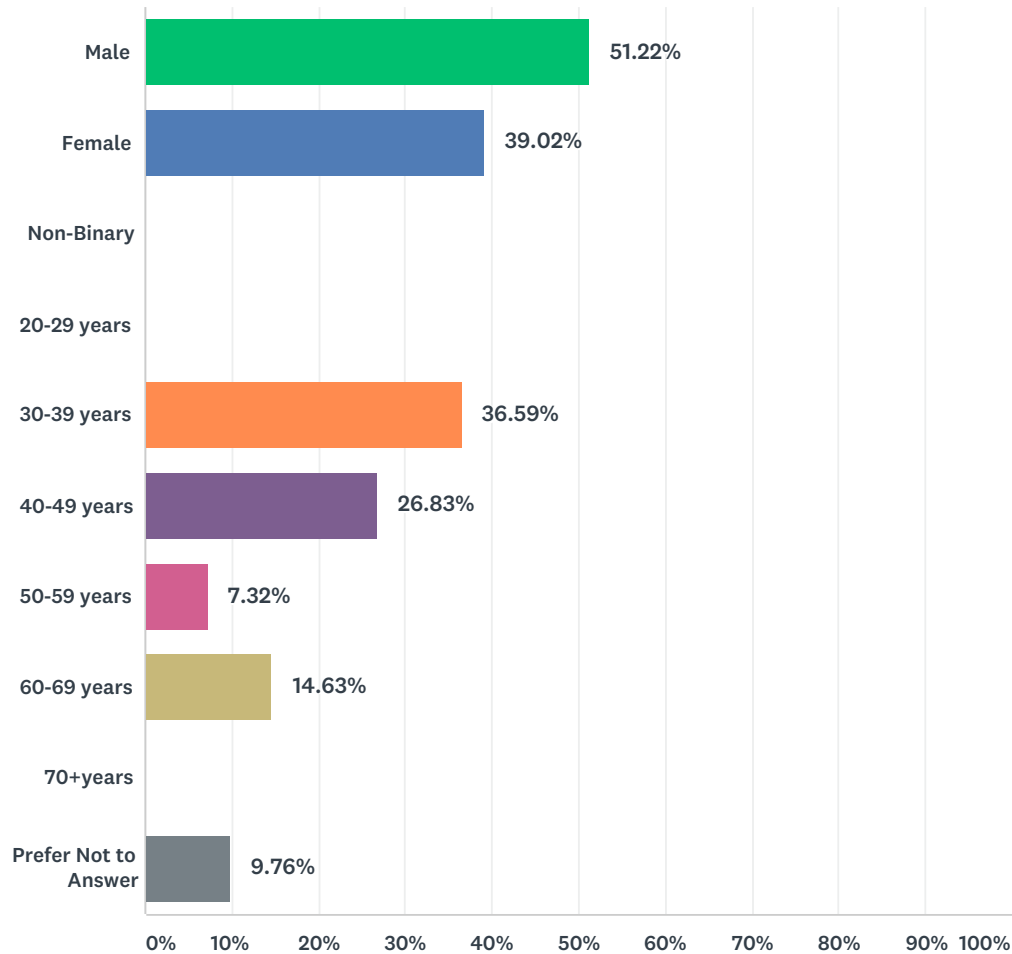
Water Law Section of the State Bar of Montana



By: Ryan McLane, chair

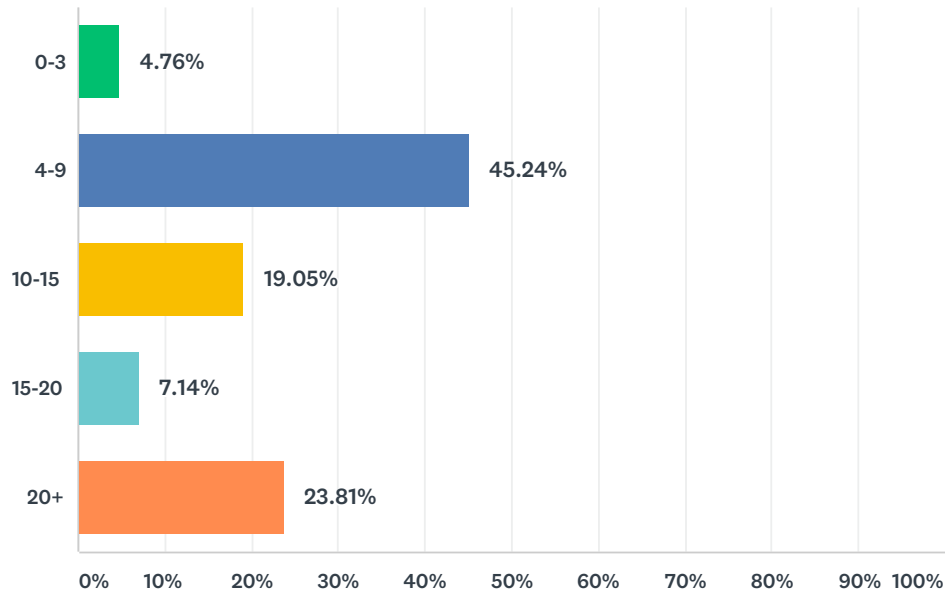
## Q1 Please provide your Gender and Age (optional, but for demographic purposes)

Answered: 41 Skipped: 1



## Q2 How many years have you been practicing law?

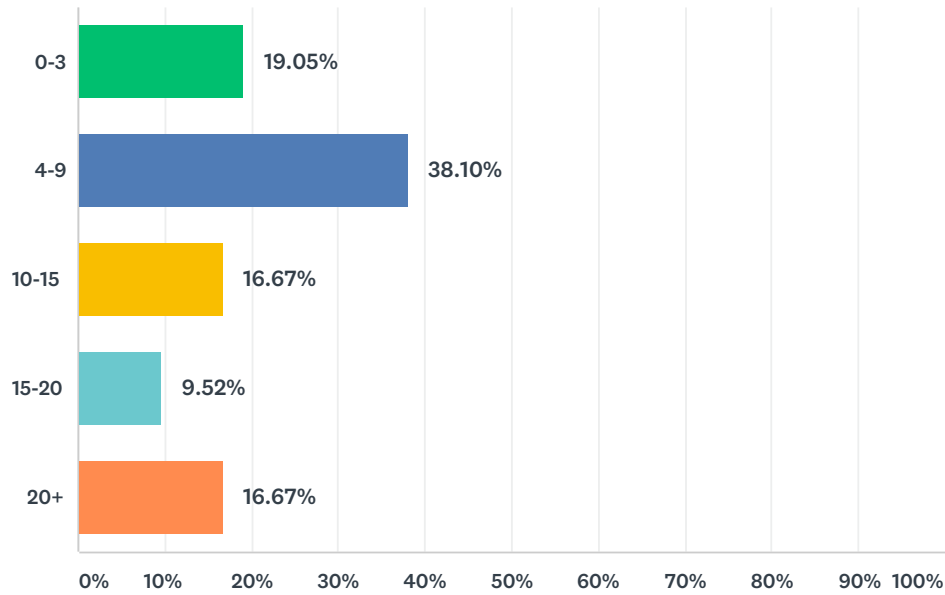
Answered: 42 Skipped: 0





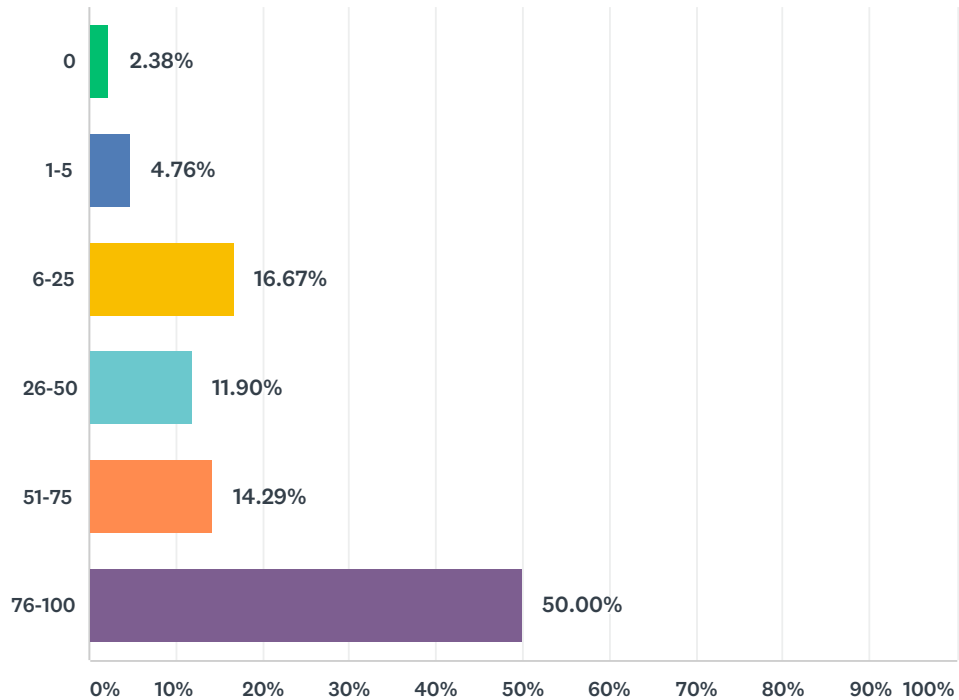
### Q3 How many years have you been practicing water law?

Answered: 42 Skipped: 0



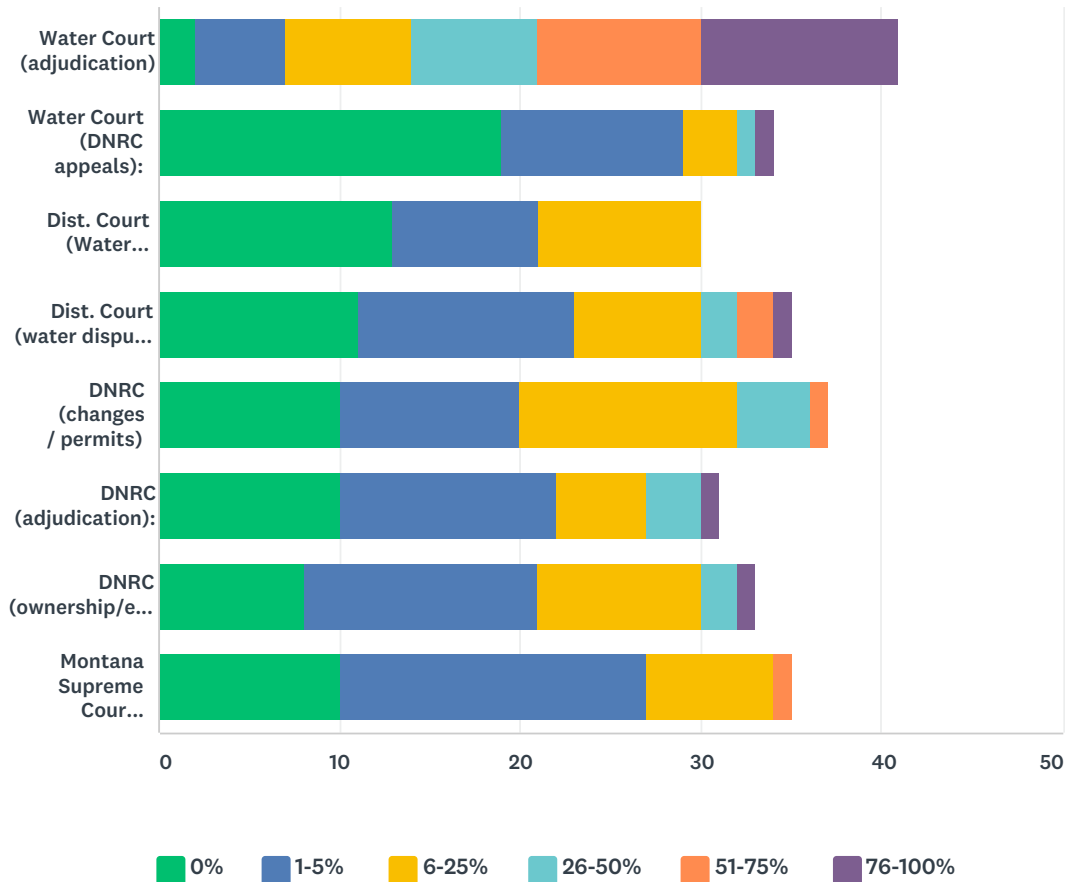
## Q4 About what percentage of your practice over the last 5 years involves water issues?

Answered: 42 Skipped: 0



## Q5 In the last 5 years, approximately what percentage of your water law practice has been in front of:

Answered: 42 Skipped: 0



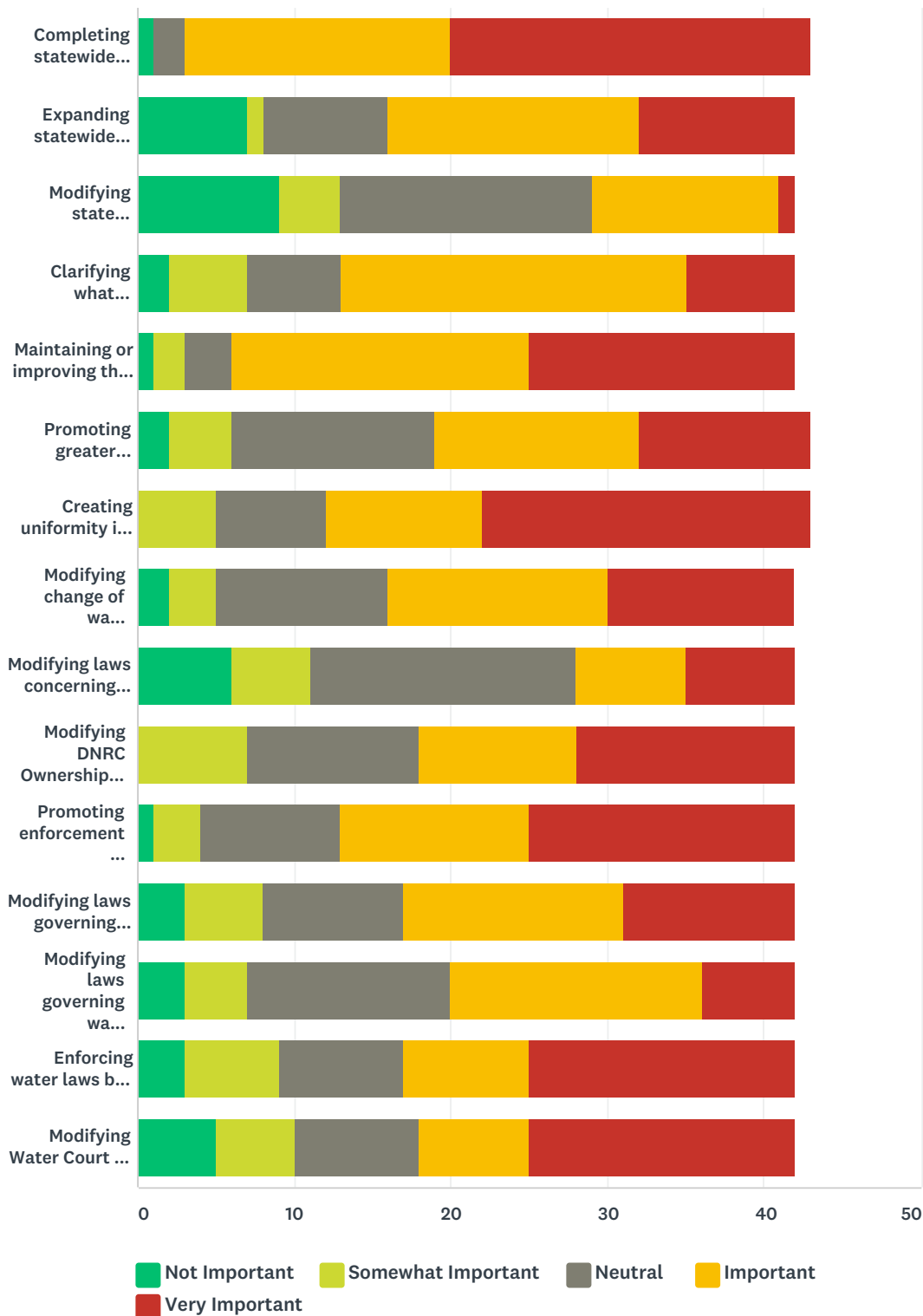
	0%	1-5%	6-25%	26-50%	51-75%	76-100%	TOTAL RESPONDENTS
Water Court (adjudication)	4.88% 2	12.20% 5	17.07% 7	17.07% 7	21.95% 9	26.83% 11	41
Water Court (DNRC appeals):	57.58% 19	30.30% 10	9.09% 3	3.03% 1	0.00% 0	3.03% 1	33
Dist. Court (Water Commissioner):	43.33% 13	26.67% 8	30.00% 9	0.00% 0	0.00% 0	0.00% 0	30
Dist. Court (water disputes / DNRC appeals):	31.43% 11	34.29% 12	20.00% 7	5.71% 2	5.71% 2	2.86% 1	35
DNRC (changes / permits)	27.03% 10	27.03% 10	32.43% 12	10.81% 4	2.70% 1	0.00% 0	37
DNRC (adjudication):	32.26% 10	38.71% 12	16.13% 5	9.68% 3	0.00% 0	3.23% 1	31
DNRC (ownership/exempt wells/other):	24.24% 8	39.39% 13	27.27% 9	6.06% 2	0.00% 0	3.03% 1	33
Montana Supreme Court (water related issue(s)):	28.57% 10	48.57% 17	20.00% 7	0.00% 0	2.86% 1	0.00% 0	35

## Water Law Section Survey of Membership (2019)

#	OTHER TRIBUNAL NOT LISTED ABOVE (PLEASE SPECIFY):	DATE
1	water compacts, not really in front of a tribunal	12/19/2019 5:22 PM
2	Water rights related transactional work.	12/2/2019 9:21 PM
3	MDEQ re: public water system permitting issues	11/19/2019 7:21 PM
4	legislative policy	11/18/2019 9:50 PM
5	Federal District Court	11/18/2019 9:07 PM

## Q6 Please identify the importance of each of the following actions in the context of improving Montana's water laws.

Answered: 42 Skipped: 0



	NOT IMPORTANT	SOMEWHAT IMPORTANT	NEUTRAL	IMPORTANT	VERY IMPORTANT	TOTAL RESPONDENTS
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## Water Law Section Survey of Membership (2019)

Completing statewide adjudication (as contemplated under current state law)	2.38% 1	0.00% 0	4.76% 2	40.48% 17	54.76% 23	42
Expanding statewide adjudication to address additional issues (Such as adjudicating post-1973 changes of water use that have not been taken through the DNRC Change Process)	16.67% 7	2.38% 1	19.05% 8	38.10% 16	23.81% 10	42
Modifying state adjudication laws	21.43% 9	9.52% 4	38.10% 16	28.57% 12	2.38% 1	42
Clarifying what constitutes a Final Decree / issuance of Final Decrees	4.76% 2	11.90% 5	14.29% 6	52.38% 22	16.67% 7	42
Maintaining or improving the integrity of Montana's centralized water rights record-keeping system	2.38% 1	4.76% 2	7.14% 3	45.24% 19	40.48% 17	42
Promoting greater compliance with change of water right and/or new appropriation laws (as currently contemplated under state law)	4.76% 2	9.52% 4	30.95% 13	30.95% 13	26.19% 11	42
Creating uniformity in DNRC processes across regional offices (in all facets, including examination, issue remarks, new appropriations)	0.00% 0	11.90% 5	16.67% 7	23.81% 10	50.00% 21	42
Modifying change of water right and/or new appropriation laws	4.76% 2	7.14% 3	26.19% 11	33.33% 14	28.57% 12	42
Modifying laws concerning exempt rights	14.29% 6	11.90% 5	40.48% 17	16.67% 7	16.67% 7	42
Modifying DNRC Ownership Update process / geocoding system	0.00% 0	16.67% 7	26.19% 11	23.81% 10	33.33% 14	42
Promoting enforcement / administration of water rights in the state	2.38% 1	7.14% 3	21.43% 9	28.57% 12	40.48% 17	42
Modifying laws governing enforcement / administration of water rights	7.14% 3	11.90% 5	21.43% 9	33.33% 14	26.19% 11	42
Modifying laws governing water user disputes	7.14% 3	9.52% 4	30.95% 13	38.10% 16	14.29% 6	42
Enforcing water laws by State of Montana	7.14% 3	14.29% 6	19.05% 8	19.05% 8	40.48% 17	42
Modifying Water Court / District Court / DNRC jurisdictions concerning water rights issues	11.90% 5	11.90% 5	19.05% 8	16.67% 7	40.48% 17	42

**Q7 Please identify issues of great importance to improving Montana's water laws that were not listed in the previous question 6. Please explain your response as thoroughly as possible. If you have no comment, type "none."**

Answered: 42 Skipped: 0

#	RESPONSES	DATE
1	The DNRC should not make changes to any water rights without first contacting the listed attorney or water right owner.	12/20/2019 4:35 AM
2	Cleaning up DNRC ownership changes made without due process or authority	12/20/2019 3:21 AM
3	Integrating water quality and water quantity regulation to some extent	12/19/2019 7:03 PM
4	Water measurement. Without reliable water measurement enforcement will be very difficult and adjudication will continue to be a guessing game. New water resource maps would be good.	12/19/2019 5:22 PM
5	moving to a 5 or 10 year forfeiture list	12/18/2019 11:57 PM
6	none	12/18/2019 11:44 PM
7	none	12/18/2019 10:58 PM
8	To me, providing relief to district courts by promoting enforcement through the Water Court should be a top priority. Thus, giving Water Court jurisdiction to offer injunctive relief and supervision of ditch disputes should be a priority. In my experience the district courts do not want these responsibilities and do not have time in their already crowded dockets to handle such time intensive matters and hearings.	12/18/2019 10:19 PM
9	none	12/18/2019 8:08 PM
10	none	12/16/2019 5:39 PM
11	none	12/13/2019 9:17 PM
12	Professionalizing water commissioners and having a more robust measurement, monitoring, and enforcement program at DNRC is critical to water right administration state-wide.	12/13/2019 4:09 PM
13	Montana needs to undertake administration / enforcement of its existing water rights. We do not need to continue creating adjudication opportunities, or other related "paper" exercises. These rights need to start being exercised by priority amongst all other water rights in the state. The overwhelming likelihood is that in most areas, can be addressed within the framework of our existing water laws. Attempting to 'guess' what problems exist, when we have never tried to actually enforce or administer our water rights does not make sense. Moreover, there is all too much focus on the current problems with our water rights system, with little recognition that it was drafted to operate effectively after completion of the state-wide adjudication. Although few expected the state-wide adjudication to be entering its 5th decade, that is not a reason to change our state laws under the assumption that the adjudication will never end. We must have some patience with the adjudication process, and trust that Montana's water laws are drafted such that will work better once adjudication is complete.	12/11/2019 11:24 PM
14	none	12/11/2019 9:41 PM
15	Requiring water measurement and reporting. Measurement data is critical to the future of determining water availability for new uses, authorizing changes in use, enforcement, administration and abandonment determinations.	12/5/2019 5:04 PM
16	none	12/5/2019 4:42 PM
17	None	12/4/2019 11:05 PM
18	none	12/3/2019 11:37 PM
19	None	12/3/2019 5:22 PM

## Water Law Section Survey of Membership (2019)

20	None	12/3/2019 4:53 PM
21	Updating the system to reflect water rights transfers instantly similar to property right transfers.	12/3/2019 4:56 AM
22	none	12/2/2019 9:57 PM
23	Creating clear and transparent property rights	12/2/2019 9:21 PM
24	Clarifying rights between holders of exempt water rights and other existing rights in adjudicated basins;	12/2/2019 7:34 PM
25	I don't think the inconsistencies between DNRC regional offices can be underscored enough. These inconsistencies are apparent in every aspect of DNRC operations, from claims examination through new permitting processes. There is no reason for the inconsistencies, given the number of handbooks and rules DNRC has, but yet, inconsistencies persist.	12/2/2019 6:52 PM
26	none	12/2/2019 6:45 PM
27	none	12/2/2019 6:41 PM
28	none	12/2/2019 6:04 PM
29	Using private mediators and mediation should be encouraged as the avenue of first attempt prior to litigation in water court.	11/25/2019 6:40 PM
30	As indicated above, the completion of as accurate as possible adjudication is first priority. While recognizing the imperfections and inaccuracies of the adjudication, the second priority is to make effective enforcement of water rights available to Montana water users without incurring excessive costs.	11/25/2019 3:00 AM
31	Revision of abandonment laws: Despite the adjudication, the state's database is riddled with thousands of bogus water rights that have either never been used, are not physically capable of being used, or are long since abandoned. The burden should be placed on water rights holders to verify ongoing use of water rights or risk abandonment.	11/20/2019 5:30 PM
32	none	11/19/2019 10:37 PM
33	NONE	11/19/2019 8:39 PM
34	I believe the legislature needs to review notice requirements for DNRC actions on water rights, particularly PLACE OF USE changes, conversions from private to municipal, etc. While the DNRC tries to enforce its own requirement for certified mail notice to other water rights owners who may be impacted, the MCA mandate for a single timely newspaper notice seems to be the only legally enforceable notice requirement (e.g., claims that a change of use applicant failed to directly notify a potentially impacted neighboring owner are weak because that only represents a violation of a DNRC rule/policy and not an MCA provision). The change process, particularly in the context of conversion of a water right from private to municipal with corresponding change of place of use, should be subject to far more stringent public notice requirements than those which are currently in place. Average people do not monitor the public notice section of the newspaper every day, and the DNRC's reliance on an applicant to identify and directly notice potentially affected parties falls short of the due process that should be in place in the context of significant water right changes. ALSO, what's up with the DNRC extension process lacking a public notice component? If a water right owner secures a change along with a corresponding timeframe in which to complete that change (which is typically a couple decades), and fails to make use of the water, why does the DNRC just treat the mere submission of a rudimentary extension request form as an AUTOMATIC EXTENSION? I wouldn't propose the same process for an extension as the original change followed, but I think the DNRC's policy of unquestioningly rubber stamping poorly explained extension requests without any public notice whatsoever, is absurd and should be reviewed.	11/19/2019 7:21 PM
35	none	11/19/2019 4:13 PM
36	none	11/18/2019 10:15 PM
37	Comprehensive review of cohesiveness of water policy across tribunals. Current statutory/regulatory schemes have come into being piecemeal as some of the big players in policy have decided to turn their attention to it. Unfortunately, many of these players are controlled by interests outside of the everyday water users and practitioners of Montana.	11/18/2019 9:50 PM
38	.	11/18/2019 9:29 PM
39	none.	11/18/2019 9:07 PM
40	none.	11/18/2019 7:41 PM

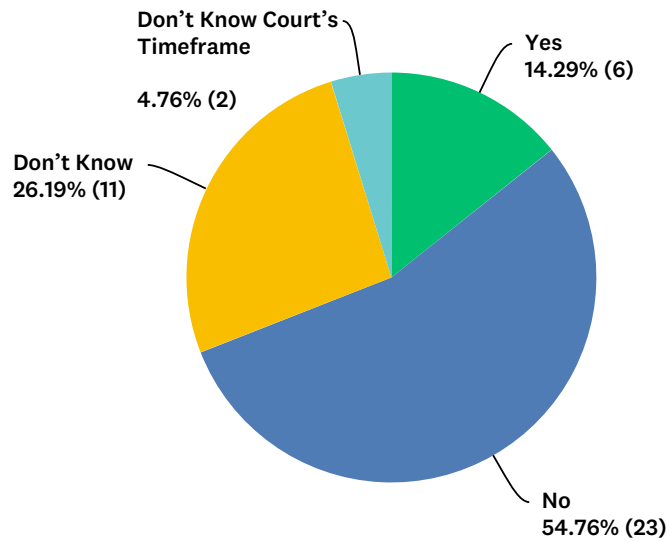


## Water Law Section Survey of Membership (2019)

41	None.	11/18/2019 7:09 PM
42	None.	11/18/2019 6:48 PM

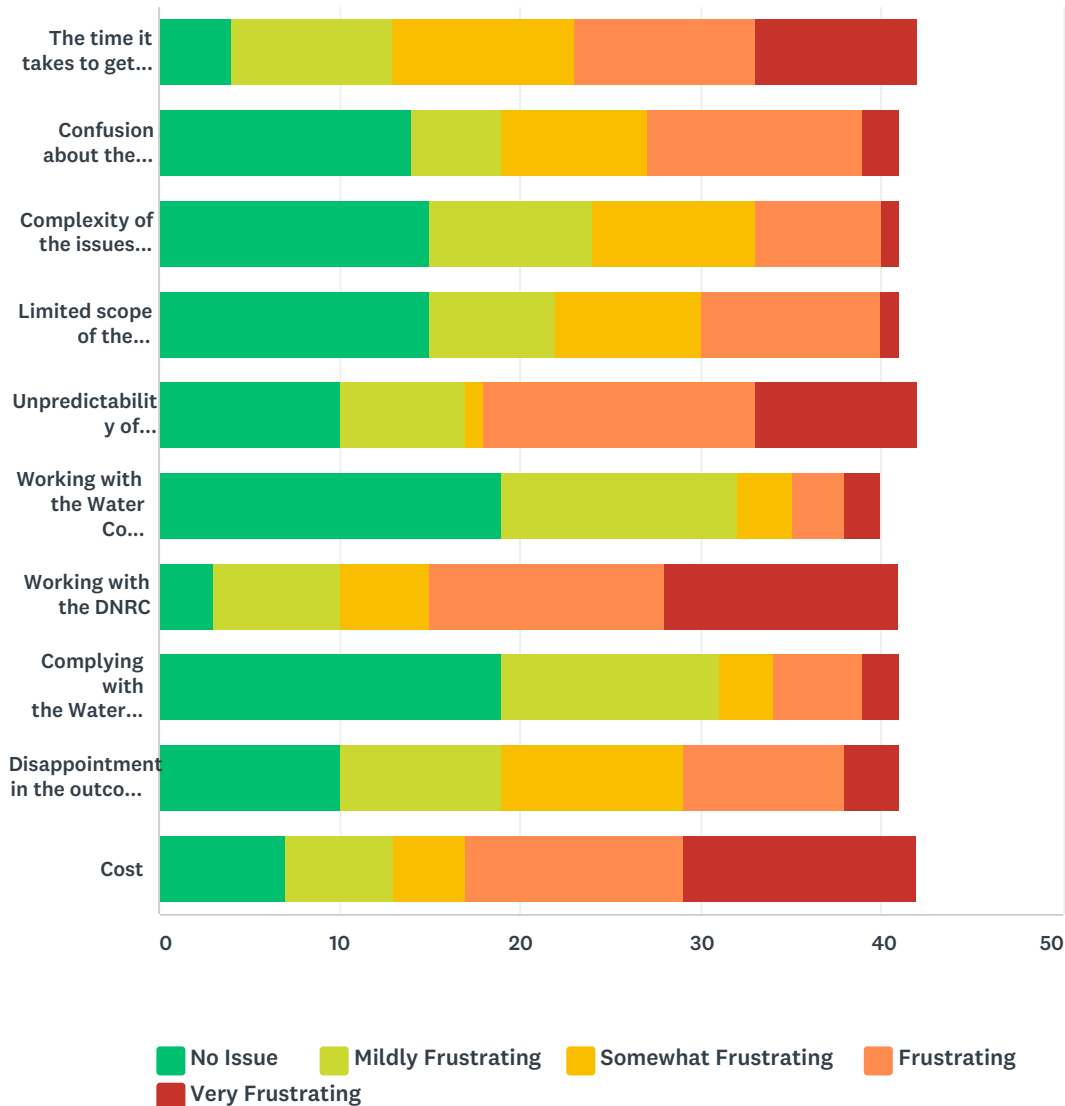
## Q8 Can water attorneys and individual water users adequately resolve all adjudication issues within the Water Court's contemplated timeframe?

Answered: 42 Skipped: 0



## Q9 How frustrating are the following proceedings before the Water Court for your clients?

Answered: 42 Skipped: 0



	NO ISSUE	MILDLY FRUSTRATING	SOMEWHAT FRUSTRATING	FRUSTRATING	VERY FRUSTRATING	TOTAL RESPONDENTS
The time it takes to get through the adjudication	9.52% 4	21.43% 9	23.81% 10	23.81% 10	21.43% 9	42
Confusion about the issues that the Water Court will address during the adjudication	34.15% 14	12.20% 5	19.51% 8	29.27% 12	4.88% 2	41
Complexity of the issues addressed	36.59% 15	21.95% 9	21.95% 9	17.07% 7	2.44% 1	41
Limited scope of the adjudication	36.59% 15	17.07% 7	19.51% 8	24.39% 10	2.44% 1	41
Unpredictability of proceedings	23.81% 10	16.67% 7	2.38% 1	35.71% 15	21.43% 9	42

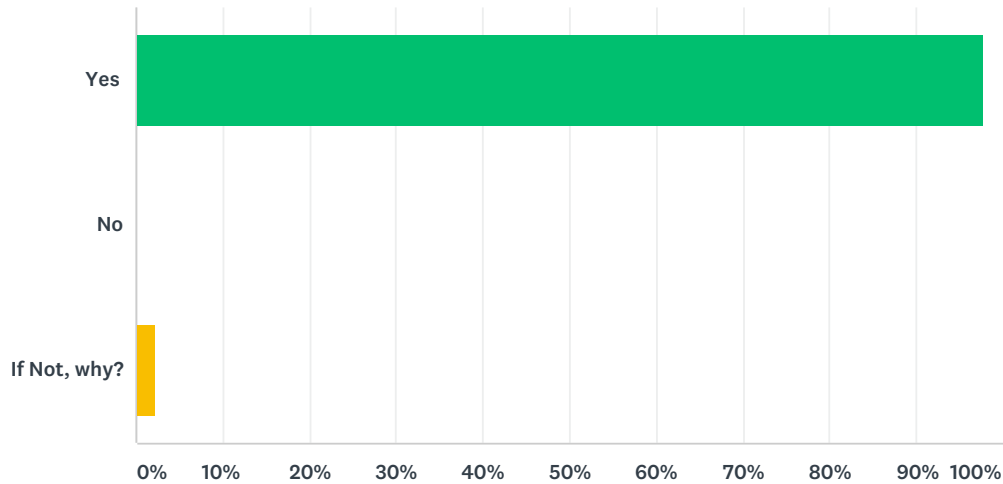
## Water Law Section Survey of Membership (2019)

Working with the Water Court	47.50% 19	32.50% 13	7.50% 3	7.50% 3	5.00% 2	40
Working with the DNRC	7.32% 3	17.07% 7	12.20% 5	31.71% 13	31.71% 13	41
Complying with the Water Court's / DNRC's deadlines	46.34% 19	29.27% 12	7.32% 3	12.20% 5	4.88% 2	41
Disappointment in the outcomes / disagreement with substantive law	24.39% 10	21.95% 9	24.39% 10	21.95% 9	7.32% 3	41
Cost	17.07% 7	14.63% 6	9.76% 4	29.27% 12	31.71% 13	41

#	OTHER (PLEASE SPECIFY)	DATE
1	Frustration with working with DNRC depends on which office; Cost is nebulous, cost of what?; highest frustration is the disparity in Water Master decisions on the same or similar issues, such as huge expansions of acreage with or without notice to adjoining land owners. No expansion in excess of 50 - 100 acres should ever be allowed without notice. There are always negative impacts of marshalling waters.	12/20/2019 3:21 AM
2		12/13/2019 9:17 PM
3	No comment	12/5/2019 5:04 PM
4	The ability to access information and electronically file are the most frustrating aspects.	12/2/2019 9:21 PM
5	none	11/20/2019 5:30 PM
6	I don't practice before the water court so the responses above, with the exception of working with the DNRC which I've experienced firsthand...unfortunately.	11/19/2019 7:21 PM
7	The resolution of issue remarks-both that the AG is using the DNRC as its expert (where the Claimant was required by the Court to informally meet with the DNRC) and that many Masters drag out the resolution process.	11/18/2019 9:29 PM

## Q10 Should the adjudication be funded to its completion?

Answered: 42 Skipped: 0

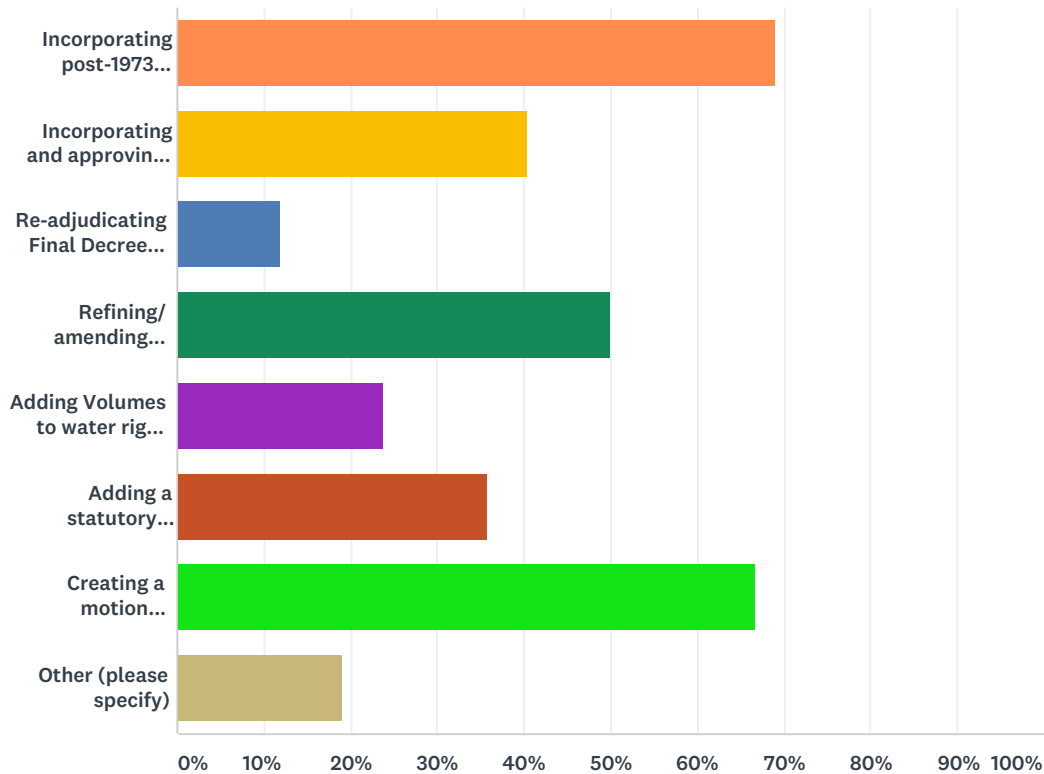


ANSWER CHOICES		RESPONSES	
Yes		97.62%	41
No		0.00%	0
If Not, why?		2.38%	1
TOTAL			42

#	IF NOT, WHY?	DATE
1	The tax payer should not be burdened by an adjudication system set up on the premise that the claimant gets to dictate the basis for his or her water right. Overstated claims are the reason the statewide adjudication has taken so long.	12/19/2019 5:22 PM

# Q11 Should the current statewide adjudication laws be modified to address any of the following additional issues or elements of a water right? [Select all that apply]:

Answered: 42 Skipped: 0



ANSWER CHOICES		RESPONSES	
Incorporating post-1973 approved changes into post-decree abstracts;		69.05%	29
Incorporating and approving any post-1973 change (including changes not authorized by DNRC)		40.48%	17
Re-adjudicating Final Decree basins		11.90%	5
Refining/ amending geocodes attached to a water right		50.00%	21
Adding Volumes to water rights as a matter of course (rather than at the discretion of the Water Court)		23.81%	10
Adding a statutory deadline by which motions to amend can be filed in each basin		35.71%	15
Creating a motion proceeding in the Water Court for ownership updates that include splits, reservations, or severances of water (in lieu of filing a Form 641 or 642 with DNRC).		66.67%	28
Other (please specify)		19.05%	8
Total Respondents: 42			

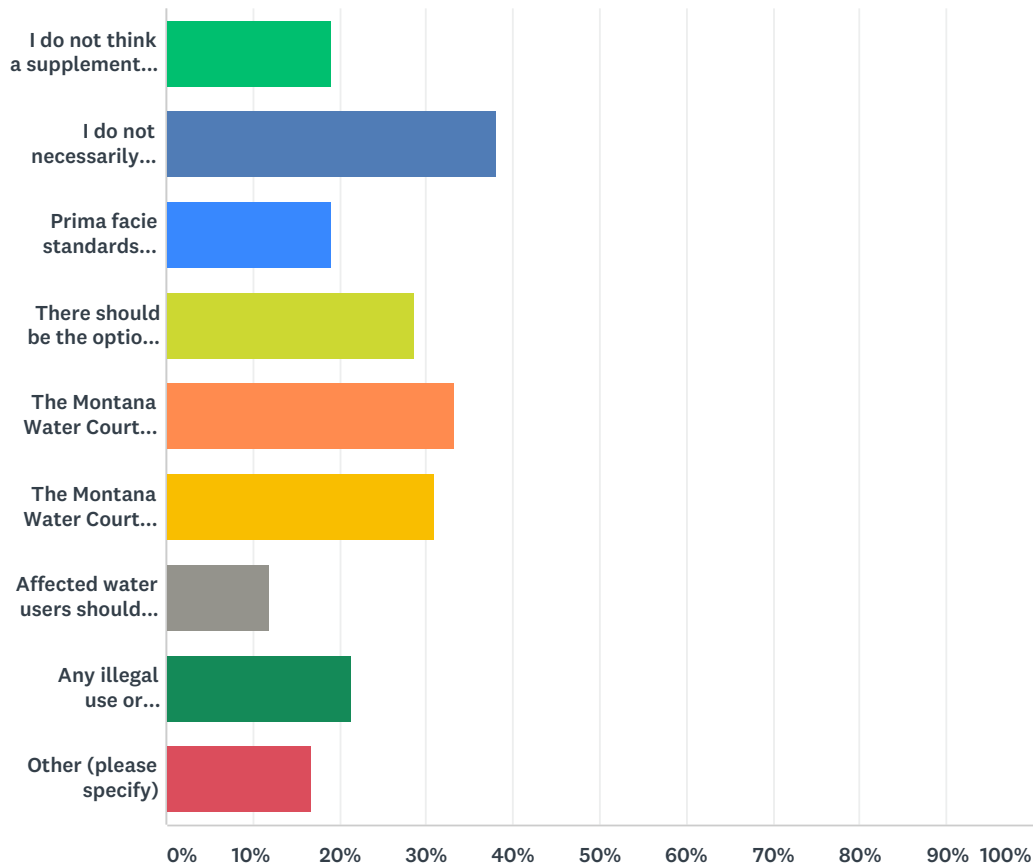
#	OTHER (PLEASE SPECIFY)	DATE
1	I would need more information to answer.	12/20/2019 4:35 AM

## Water Law Section Survey of Membership (2019)

2	It seems post-73 issues should be dealt with on a rolling basis. The statewide adjudication was meant to provide a snapshot in time from which to be able to have a definite basis for comparison. Post-73 issues should be dealt with, in my opinion, through perhaps regional water courts set up for the different watershed basins as related to an appropriate HUC level (perhaps the 4 digit HUC). Water judges would then adjudicate ongoing water disputes in the same way as the district courts did prior to the advent of the state-wide adjudication.	12/19/2019 5:22 PM
3	no comment/opinion	12/11/2019 9:41 PM
4	While volumes in decrees would have been helpful, its too late to decree volumes at this point in time. Focus should remain on completion of the adjudication. Water measurement reporting and time will sort out any shortcomings in decrees.	12/5/2019 5:04 PM
5	I don't know, i can't find a job	12/5/2019 4:42 PM
6	the current adjudication should finish its work with out an expanded or changed scope. A different process, probably motions work before the water court, should address the other issues. Or, a technical review followed by a period to file a motion or accept the change.	12/2/2019 9:21 PM
7	none	11/20/2019 5:30 PM
8	improve the ownership update process focusing on accuracy and timeliness - the old paper filing system seemed to work better and did not have the problem of people erroneously added as co-owners which the current geocode based system has	11/19/2019 10:37 PM

**Q12 If a supplemental adjudication proceeding was put into place to incorporate water right uses from 1973 to present, how should illegal or unauthorized changes of use of a water right be handled? [Check all that apply]:**

Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
I do not think a supplemental adjudication proceeding like this should be implemented	19.05%	8
I do not necessarily oppose the idea, but the issue is more complicated than can be adequately addressed in this survey question.	38.10%	16
Prima facie standards should not apply to claimants in such a proceeding.	19.05%	8
There should be the option to initiate a special proceeding, but the affirmative burden to prove no injury should be on the claimant.	28.57%	12
The Montana Water Court should be able to entertain such cases as part of the general adjudication.	33.33%	14
The Montana Water Court should be able to enforce the existing statutory change laws, and grant or deny the claims or impose terms and conditions.	30.95%	13
Affected water users should affirmatively avail themselves of the current dissatisfied water user complaint process to protect themselves from injury.	11.90%	5
Any illegal use or unauthorized post-1973 change which has already been the subject of a judicial or administrative proceeding should be treated as res judicata.	21.43%	9

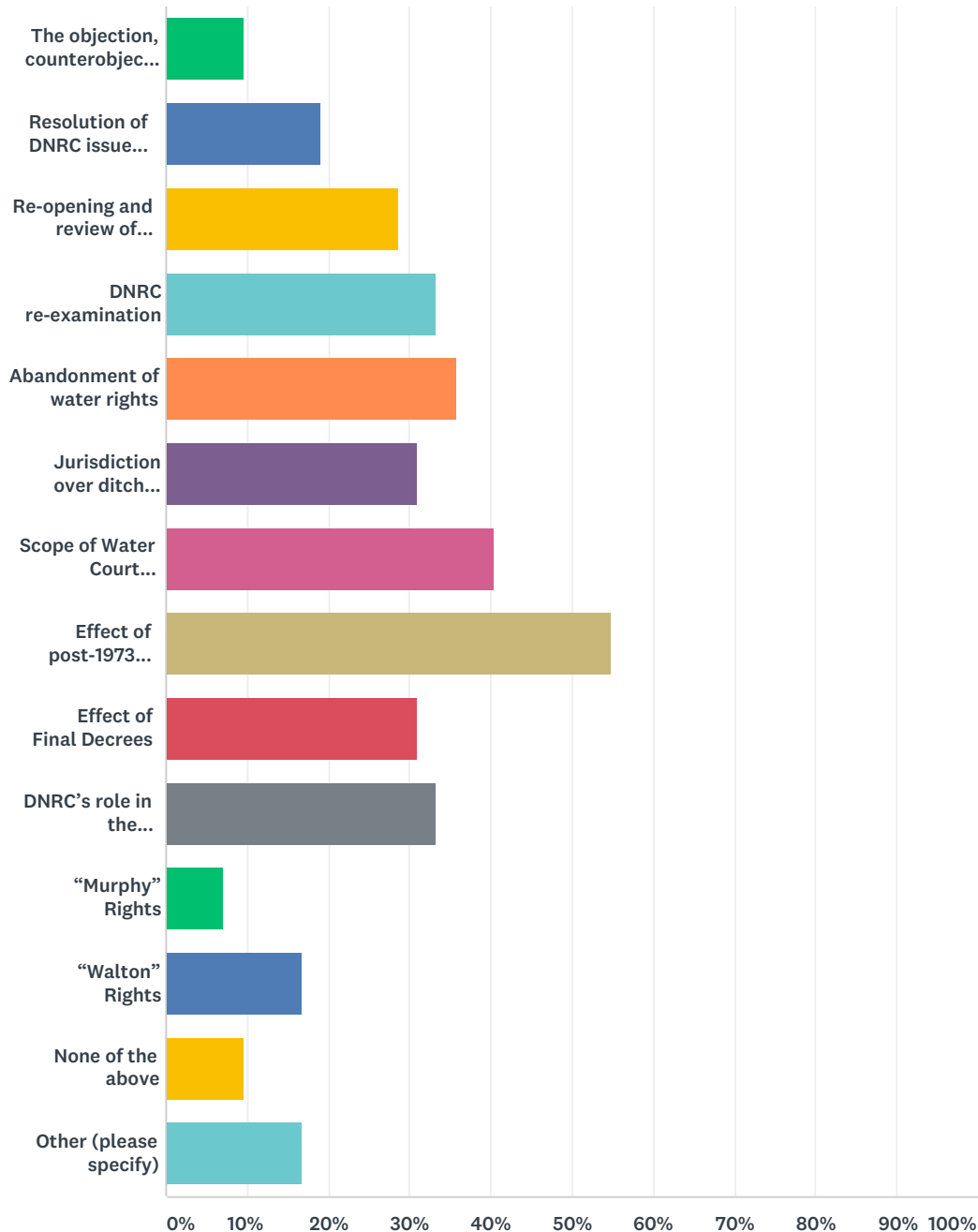


## Water Law Section Survey of Membership (2019)

Other (please specify)		16.67%	7
Total Respondents: 42			
#	OTHER (PLEASE SPECIFY)	DATE	
1	illegally changed water rights should be unenforceable until they go through the change process	12/18/2019 11:57 PM	
2	This is a terrible idea. Montana law, since 1973, has required water users who desire to change their water rights to bear the burden of proving that their proposed change will not injure other water users. These changes are required to satisfy common-sense statutory criteria established by the Montana legislature. In short: if you want to change your water right, you need to bear the costs of proving that it won't injure your neighbor. It's unclear why the Water Court would do a better job of this task than the DNRC. Assumedly, the Water Court would continue to require compliance with Montana's existing change laws, requiring a proof of no injury. (Departure from Montana's existing change laws is worse still, because there would then be no firm legal basis to protect other people's valuable senior water rights.) But assuming the law was changed whereby the Water Court simply heard such cases under the same law, it is still unlikely that the Water Court will do a better job. DNRC relies on experienced and specialized staff to review such applications. The Water Court, albeit knowledgeable about water rights, law, and general hydrologic principals, are not hydrologists or able to conduct complicated groundwater hydrologic analyses. Moreover, under this scenario, the cost of protecting a senior water right would skyrocket. Existing water right holders would no longer be able to rely upon a protective government agency to thoroughly vet proposed changes, and instead would be required to hire a water lawyer and water rights consultant to litigate the issue in front of the Water Court. For a variety of reasons, this change will increase expense to existing water users and likely result in more injury to senior water rights holders.	12/11/2019 11:24 PM	
3	no comment/opinion	12/11/2019 9:41 PM	
4	i dont know; i cant find a job	12/5/2019 4:42 PM	
5	The basin by basin quiet title action works for pre '73 issues. We dont need it for post "permitted" changes. Proposed changes by the DNRC and notice with recourse to the Water Court is sufficient.	12/2/2019 9:21 PM	
6	There might be multiple justifications for supplemental adjudication, including: (1) to deal with tribal/federal water rights; (2) to deal with exempt "110" water right filings; and (3) to deal with post-1973 uses or changes. To do a separate, supplemental adjudication for each such issue would be burdensome. Many issues regarding finality, res judicata, and scope of any supplemental adjudication remain uncertain. I agree that the Water Bar, and WPIC, should be considering these issues in detail before advancing any proposed legislation.	12/2/2019 7:34 PM	
7	Complicated - think we should change the statutory directive/role for DNRC as guardian of the water on behalf of the public to a model more like the pre-1973 change statute (for all elements, not just a few) - precise notice of every requested changes should be required before any change authorized	11/19/2019 10:37 PM	

### Q13 Which areas of Montana's laws (or lack of laws) governing statewide adjudication need clarification or revision [Select all that apply]:

Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
The objection, counterobjection, and notice of intent to appear process	9.52%	4
Resolution of DNRC issue remarks	19.05%	8
Re-opening and review of existing decrees by the Montana Water Court	28.57%	12
DNRC re-examination	33.33%	14

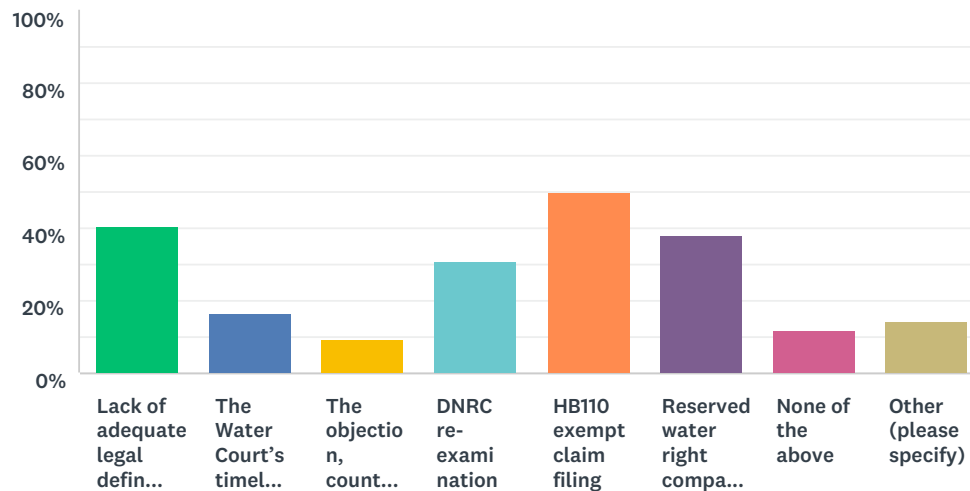
## Water Law Section Survey of Membership (2019)

Abandonment of water rights	35.71%	15
Jurisdiction over ditch rights and access	30.95%	13
Scope of Water Court jurisdiction	40.48%	17
Effect of post-1973 changes to existing water rights	54.76%	23
Effect of Final Decrees	30.95%	13
DNRC's role in the adjudication	33.33%	14
"Murphy" Rights	7.14%	3
"Walton" Rights	16.67%	7
None of the above	9.52%	4
Other (please specify)	16.67%	7
Total Respondents: 42		

#	OTHER (PLEASE SPECIFY)	DATE
1	Volumes and measurement requirements need to be attached to each adjudicated water right.	12/19/2019 5:22 PM
2	Boy, I am torn on some of these issues, but i think they are better resolved by Court proceedings than additional statutory clarification or revision.	12/18/2019 8:08 PM
3	no comment/opinion	12/11/2019 9:41 PM
4	Each revision of the adjudication statutes results in further delay of the adjudication, which is now been underway for FORTY years. Any revision of the adjudication statutes should focus on finishing the adjudication, not further complicating it or adding responsibility to the water court.	12/5/2019 5:04 PM
5	i don't know; i cant find a job	12/5/2019 4:42 PM
6	The role of the water court to review water permitting issues and changes.	12/2/2019 9:21 PM
7	need an end date for motions to amend prior to issuance of a Final Decreed	11/19/2019 10:37 PM

# Q14 Are any of the following laws governing adjudication impediments to the completion of the statewide adjudication and issuance of final decrees? [Check all that apply]:

Answered: 42   Skipped: 0

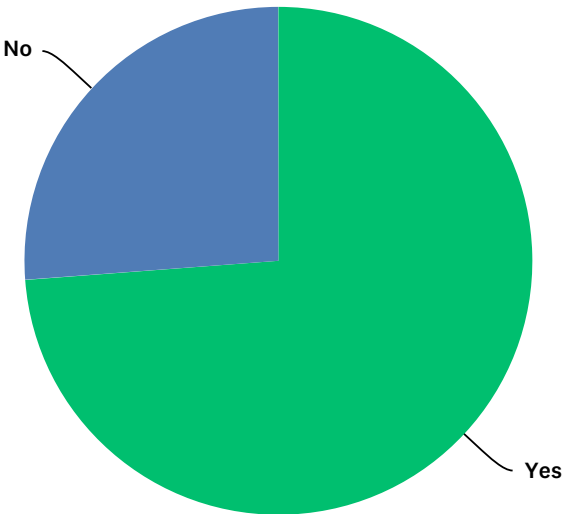


ANSWER CHOICES	RESPONSES	
Lack of adequate legal definition of what should constitute a "Final Decree." See Definition at Section 85-2-234, MCA	40.48%	17
The Water Court's timeline for basin adjudication	16.67%	7
The objection, counterobjection, and notice of intent to appear process	9.52%	4
DNRC re-examination	30.95%	13
HB110 exempt claim filing	50.00%	21
Reserved water right compacts	38.10%	16
None of the above	11.90%	5
Other (please specify)	14.29%	6
Total Respondents: 42		

#	OTHER (PLEASE SPECIFY)	DATE
1	The Water Court needs to myopically pursue a pre-'73 baseline understanding of what the water use in Montana looked like so that we can have a basis for comparison.	12/19/2019 5:22 PM
2	Exempt claim entry and examination.	12/18/2019 8:08 PM
3	no comment/opinion	12/11/2019 9:41 PM
4	The adjudication has been underway for FORTY years. The biggest impediment to its completion is deflecting attention from the adjudication to the "future role of the water court"	12/5/2019 5:04 PM
5	i dont know, i cant find a job	12/5/2019 4:42 PM
6	municipal water rights	11/18/2019 9:29 PM

Q15 Once Final Decrees are issued by the Water Court, should there be a legal framework allowing water users to correct or modify the Final Decree?

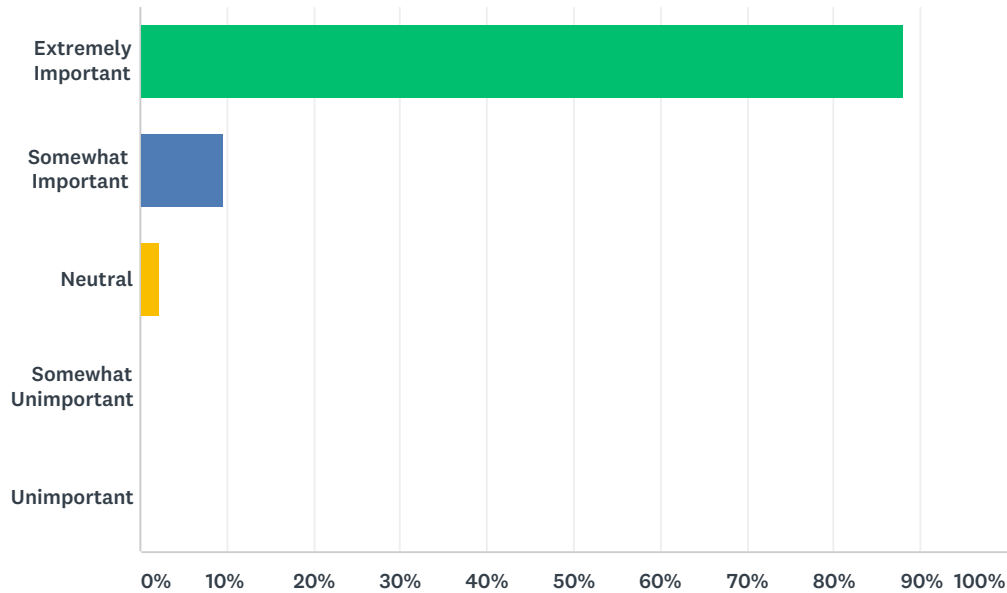
Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	73.81%	31
No	26.19%	11
TOTAL		42

## Q16 How important is it to have long-term, public availability of all court decisions / stipulations entered in a Water Court proceeding?

Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
Extremely Important	88.10%	37
Somewhat Important	9.52%	4
Neutral	2.38%	1
Somewhat Unimportant	0.00%	0
Unimportant	0.00%	0
TOTAL		42

**Q17 Please identify any other issues of great importance to improving Montana's statewide adjudication of water rights that have not been previously addressed in this section on adjudication questions. Please explain your response as thoroughly as possible.**

Answered: 42 Skipped: 0

#	RESPONSES	DATE
1	None	12/20/2019 4:35 AM
2	There needs to be clarity on NOIAs roll in the adjudication. The NOIA should be used as a mechanism to hide in the weeds and then try to back door objections where no issues were identified. In other words, the NOIA should not get a second bite at the apple and get to expand the scope of the issue remarks if they did not object to begin with.	12/20/2019 3:21 AM
3	Clarification of standard of review for Water Master's orders, is it de novo, abuse of discretion, etc. Seems to fluctuate.	12/19/2019 7:03 PM
4	The water judge needs to stop advocating for changes and do the job he was appointed to do - adjudicate all pre-73 wate rights in the state.	12/19/2019 5:22 PM
5	Taking a hard look at our enforcement mechanisms and improving them	12/18/2019 11:57 PM
6	none	12/18/2019 11:44 PM
7	none	12/18/2019 10:58 PM
8	none	12/18/2019 10:19 PM
9	The Court must have the financial ability to hire attorneys with experience for the Water Master positions rather than new attorneys who use it as a training ground.	12/18/2019 8:08 PM
10	none	12/16/2019 5:39 PM
11	The adjudication needs to be completed as soon as possible.	12/13/2019 9:17 PM
12	none	12/13/2019 4:09 PM
13	Montana water attorneys are having trouble keeping up with the Montana Water Court's ambitious adjudication timelines. Moreover, we are regularly unable to accept all potential clients who approach us. It appears there are significantly under-served, or ill-served, water users in the state who are unable to timely obtain qualified legal representation. Their legal issues are not being resolved, and will re-surface in the future.	12/11/2019 11:24 PM
14	no comment/opinion	12/11/2019 9:41 PM
15	The most important issue regarding improvement of the adjudication is its completion. The adjudication was not intended to be all things. However, its completion is critical to the other aspects of the MWUA that backfill what the adjudication does not do. FInal decree triggers important aspects of administration, abandonment, and provisional permits. The chroninc delay in completion of the adjudication jeopardizes the core principles behind the MWUA.	12/5/2019 5:04 PM
16	na	12/5/2019 4:42 PM
17	None	12/4/2019 11:05 PM
18	none	12/3/2019 11:37 PM
19	None	12/3/2019 5:22 PM
20	None	12/3/2019 4:53 PM
21	None	12/3/2019 4:56 AM
22	none	12/2/2019 9:57 PM

## Water Law Section Survey of Membership (2019)

23	Centralized record keeping and data administration. DNRC provides technical review, but not substantive determinations.	12/2/2019 9:21 PM
24	Legal issues related to future changes to water availability (reduced flows, perhaps, or changes to when within the year water is available) due to climate change.	12/2/2019 7:34 PM
25	In DNRC's rush to get something into their system, the agency has improperly entered hundreds of HB 110 claims. Rather than correcting errors, they've taken the position that errors will not be corrected until claim examination, which may not be for several years. Meanwhile, errors persist and are creating issues for real estate transactions. DNRC should reconsider this policy.	12/2/2019 6:52 PM
26	none	12/2/2019 6:45 PM
27	none	12/2/2019 6:41 PM
28	uniformity	12/2/2019 6:04 PM
29	Mediation by a private mediator should be pushed to settle cases before lengthy litigation . Other jurisdictions have found good success in reducing court caseload which, since Court is inadequately funded, is of high importance.	11/25/2019 6:40 PM
30	In question 15, it ask about a legal framework to correct or modify a final decree. My affirmative answer does not indicate a need for a new procedure but recognizes that the relief available under the MRCivP needs to apply. The adjudication, regardless of inaccuracy, needs to be a final decree.	11/25/2019 3:00 AM
31	Once Final Decrees have been issued, the State will (for the most part) only have an enforceable list of water uses as they existed 50 years ago, not today. While water users should NOT have the ability to further amend the historical elements of their claims after the issuance of a Final Decree, water users should have the ability to defend against post-1973 changes that were not approved. The Water Court may be the appropriate venue for such challenges.	11/20/2019 5:30 PM
32	The integrity and functionality of the DNRC database - the abstracts need to be protected from inadvertant corruption	11/19/2019 10:37 PM
33	NONE	11/19/2019 8:39 PM
34	none	11/19/2019 7:21 PM
35	none	11/19/2019 4:13 PM
36	none	11/18/2019 10:15 PM
37	Better coordination between DNRC and the Water Court, primarily DNRC understanding and acting upon its role to facilitate and not impede water court proceedings. For example, placing issue remarks on claims because the claimed place of use is off by de minimis amounts between original claims and what the DRNC can map using sophisticated technology is not helpful and puts an inappropriate and needless burden on both the Court and water users. We need to keep focus on the actual purpose of adjudication and not let perfection be the enemy of the good.	11/18/2019 9:50 PM
38	I believe the Court needs to stop acting as the prosecutor in cases and the AG need to properly fund is water division so they properly and thoroughly prosecute water adjudication cases. I think it is unfair that Claimant are ordered by the Court to meet with DNRC personnel which they often do without counsel and then this same personnel is being used by the AG as an expert witness against them. I think the MT Supreme Court's lack of understanding of water law which has resulted in opinions being issued that are nonsensical if you have an indepth understnading of water law.	11/18/2019 9:29 PM
39	n	11/18/2019 9:07 PM
40	none.	11/18/2019 7:41 PM
41	None.	11/18/2019 7:09 PM
42	None.	11/18/2019 6:48 PM



**Q18 Please identify any other issues of great importance to improving Montana's Water Court that have not been previously addressed in this section. Please explain your response as thoroughly as possible.**

Answered: 42 Skipped: 0

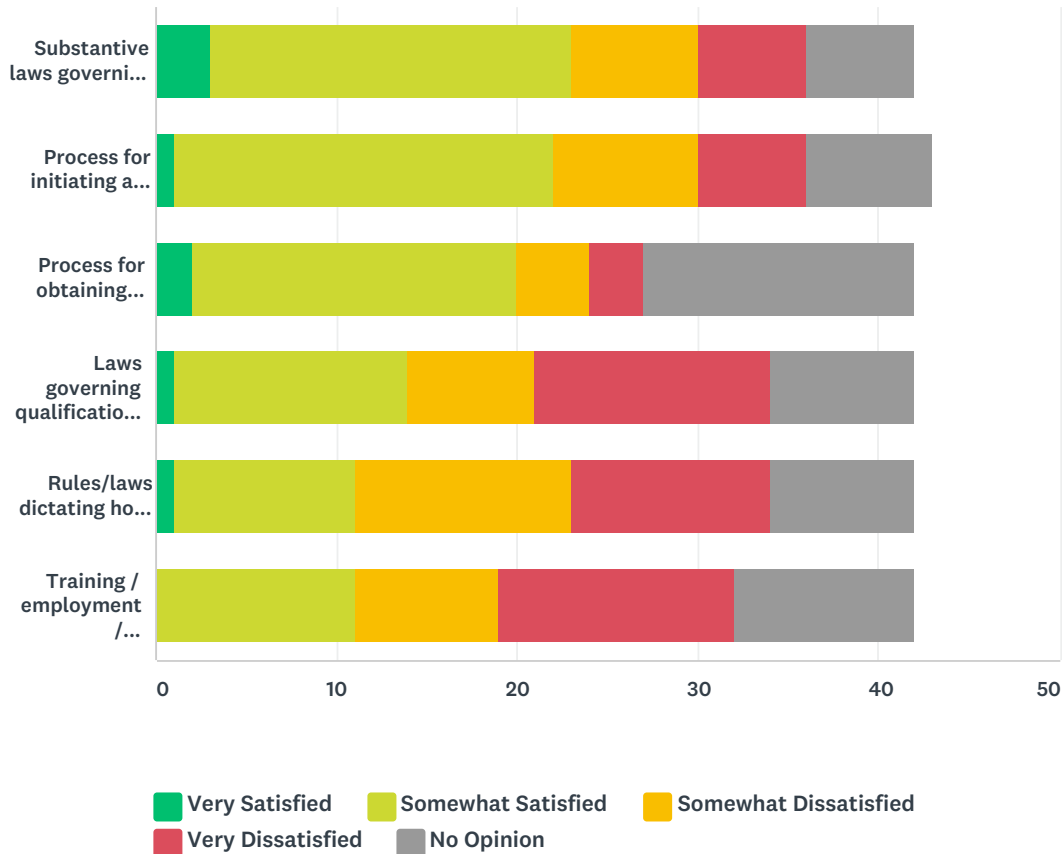
#	RESPONSES	DATE
1	None	12/20/2019 4:35 AM
2	N/A	12/20/2019 3:21 AM
3	None	12/19/2019 7:03 PM
4	I commend the Water Court's efforts to provide more avenues for mediation. The cost associated with adjudication is too high for many producers to be expected to bear.	12/19/2019 5:22 PM
5	None	12/18/2019 11:57 PM
6	Water Court should have jurisdiction over post-decree administration.	12/18/2019 11:44 PM
7	Providing the Water Court with jurisdiction to handle dissatisfied water users complaints against water commissioners would be very helpful. The district court judges don't like these cases and generally treat their other cases (criminal, dependent neglect, family law) with greater priority.	12/18/2019 10:58 PM
8	none	12/18/2019 10:19 PM
9	none	12/18/2019 8:08 PM
10	none	12/16/2019 5:39 PM
11	NA	12/13/2019 9:17 PM
12	All documents filed with the Water Court on a particular claim need to be scanned and made part of the water right record maintained by the DNRC.	12/13/2019 4:09 PM
13	The Water Court is very good at what it does, but it needs to focus on completing its efforts and then folding up shop. Local control of water issues is important to water users, notwithstanding the district court's reluctance to deal with problems it would rather pass onto somebody else.	12/11/2019 11:24 PM
14	no comment/opinion	12/11/2019 9:41 PM
15	None	12/5/2019 5:04 PM
16	na	12/5/2019 4:42 PM
17	Lack of consistent case law from even the same judge.	12/4/2019 11:05 PM
18	none	12/3/2019 11:37 PM
19	None	12/3/2019 5:22 PM
20	None	12/3/2019 4:53 PM
21	None	12/3/2019 4:56 AM
22	none	12/2/2019 9:57 PM
23	A statutory role for the Court past the adjudication.	12/2/2019 9:21 PM
24	Perhaps not of "great" importance, but it would be nice if electronic filings could include color exhibits without such color exhibits needing to be submitted in hard copy.	12/2/2019 7:34 PM
25	The Water Court's timeframes are unrealistic and sacrifice quality for quantity. Practitioners are working as quickly as they can and everyone (Water Court included) should deliberately recommit themselves to achieving quality adjudication.	12/2/2019 6:52 PM
26	none	12/2/2019 6:45 PM
27	none	12/2/2019 6:41 PM

## Water Law Section Survey of Membership (2019)

28	none	12/2/2019 6:04 PM
29	none	11/25/2019 6:40 PM
30	Turnover and training of new personnel.	11/25/2019 3:00 AM
31	none	11/20/2019 5:30 PM
32	same as 17 - the decisions represented on the abstracts need to be secure	11/19/2019 10:37 PM
33	There needs to be a better way for water users to access final decree water rights to be able to see, for instance, all water rights on one source. This would simplify the process of obtaining red book tabulations for enforcement.	11/19/2019 8:39 PM
34	I think any attorney who does not practice water law exclusively, but runs into water-related issues during the course of other representation (transactional/real estate/land development) would benefit from a panel-type CLE where a water court judge, an official from the DNRC, and a District court judge who has handled water right disputes, could explain their own understanding of what falls within their jurisdiction, where there is overlap, and how a practitioner would determine venue for cases where overlapping jurisdiction presents.	11/19/2019 7:21 PM
35	none	11/19/2019 4:13 PM
36	none	11/18/2019 10:15 PM
37	Proper funding to obtain and retain quality water masters. The turnover in water masters has made cohesiveness in decisions and proceedings troublesome. Perhaps moving the Water Court out of the most expensive area of the state in terms of cost of living should be considered.	11/18/2019 9:50 PM
38	I believe member of the water court need to follow the precedent established by the Water judges both on substantive and procedural issues.	11/18/2019 9:29 PM
39	n	11/18/2019 9:07 PM
40	The unpredictability of proceedings is very frustrating. I think this could be solved by more oversight and mentorship of Water Masters. This is most frustrating in terms of issue remark resolution. The same issue remark can result in automatic removal by a Water Master or years of proceedings.	11/18/2019 7:41 PM
41	The Legislature should explore a better way to utilize the divisional water judges in coordination with the Water Court, particularly as related to jurisdiction over enforcement actions (which currently rests with district courts).	11/18/2019 7:09 PM
42	None.	11/18/2019 6:48 PM

## Q19 How satisfied are you with the following aspects of water distribution, water user disputes, and enforcement actions in the district courts?

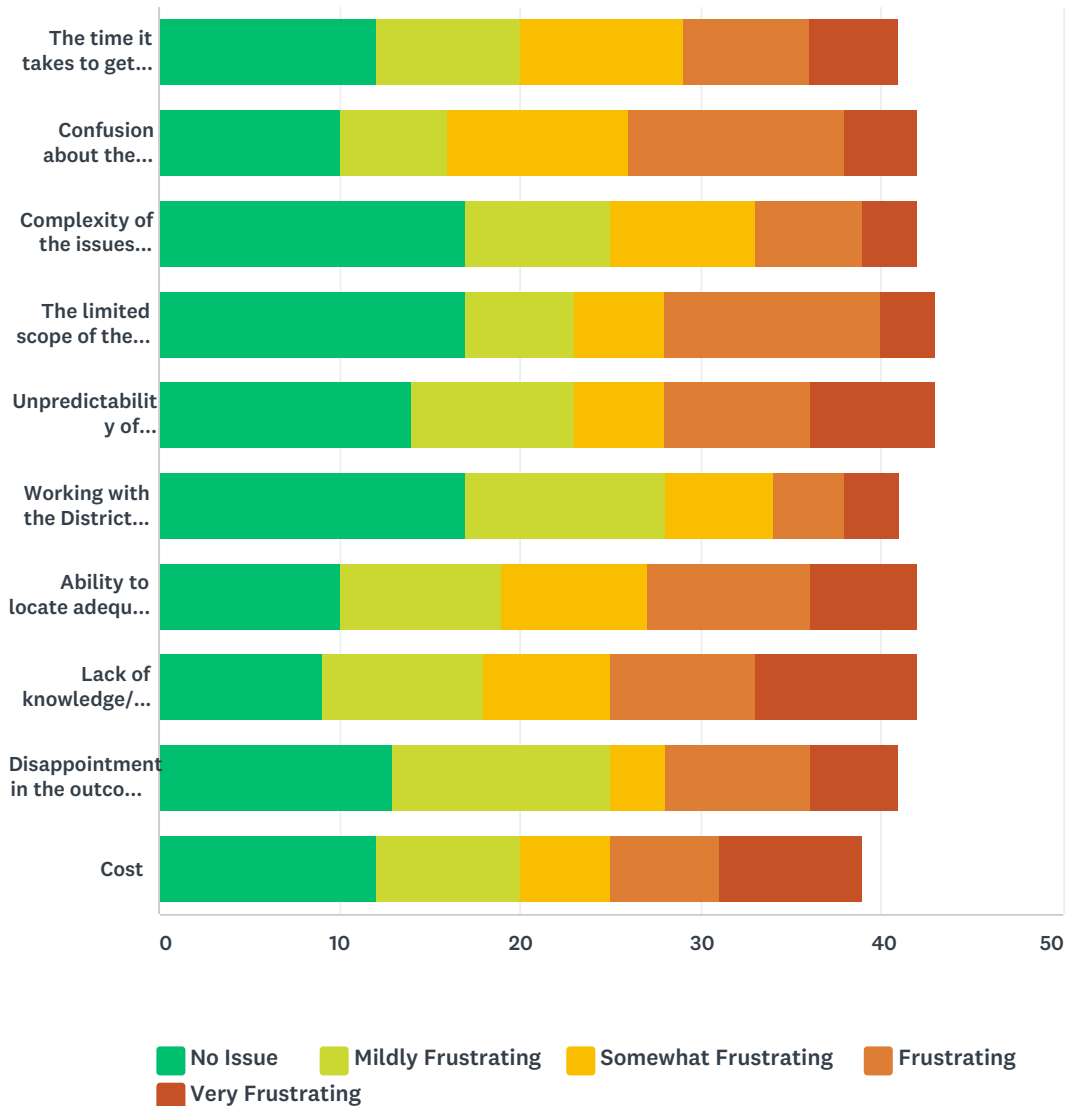
Answered: 42 Skipped: 0



	VERY SATISFIED	SOMEWHAT SATISFIED	SOMEWHAT DISSATISFIED	VERY DISSATISFIED	NO OPINION	TOTAL RESPONDENTS
Substantive laws governing use of water in Montana	7.14% 3	47.62% 20	16.67% 7	14.29% 6	14.29% 6	42
Process for initiating an action in the district court	2.38% 1	50.00% 21	19.05% 8	14.29% 6	16.67% 7	42
Process for obtaining tabulation / certification of water rights (Water Court)	4.76% 2	42.86% 18	9.52% 4	7.14% 3	35.71% 15	42
Laws governing qualifications/appointment of Water Commissioner	2.38% 1	30.95% 13	16.67% 7	30.95% 13	19.05% 8	42
Rules/laws dictating how Water Commissioners' enforce/distribute water	2.38% 1	23.81% 10	28.57% 12	26.19% 11	19.05% 8	42
Training / employment / support dedicated to District Court / Water Commissioners by the State of Montana	0.00% 0	26.19% 11	19.05% 8	30.95% 13	23.81% 10	42

## Q20 How frustrating are the following aspects of water distribution/ water use dispute cases in front of the District Court for your clients?

Answered: 42 Skipped: 0



	NO ISSUE	MILDLY FRUSTRATING	SOMEWHAT FRUSTRATING	FRUSTRATING	VERY FRUSTRATING	TOTAL RESPONDENTS
The time it takes to get through the process	29.27% 12	19.51% 8	21.95% 9	17.07% 7	12.20% 5	41
Confusion about the issues the District Court will address	23.81% 10	14.29% 6	23.81% 10	28.57% 12	9.52% 4	42
Complexity of the issues addressed	40.48% 17	19.05% 8	19.05% 8	14.29% 6	7.14% 3	42
The limited scope of the proceedings	40.48% 17	14.29% 6	11.90% 5	28.57% 12	7.14% 3	42
Unpredictability of proceedings/ outcomes	33.33% 14	21.43% 9	11.90% 5	19.05% 8	16.67% 7	42

## Water Law Section Survey of Membership (2019)

Working with the District Court	41.46% 17	26.83% 11	14.63% 6	9.76% 4	7.32% 3	41
Ability to locate adequate Water Commissioners and/or working with the Water Commissioner	23.81% 10	21.43% 9	19.05% 8	21.43% 9	14.29% 6	42
Lack of knowledge/ experience/ training of Water Commissioners	21.43% 9	21.43% 9	16.67% 7	19.05% 8	21.43% 9	42
Disappointment in the outcomes / disagreement with substantive law	31.71% 13	29.27% 12	7.32% 3	19.51% 8	12.20% 5	41
Cost	30.77% 12	20.51% 8	12.82% 5	15.38% 6	20.51% 8	39

#	OTHER (PLEASE SPECIFY)	DATE
1	Inability to rely on DNRC to enforce water rights/permits	12/19/2019 5:22 PM
2	This question does not apply to my clients.	12/13/2019 4:09 PM
3	no comment/opinion	12/11/2019 9:41 PM
4	Not Applicable	12/5/2019 5:04 PM
5	I don't handle such cases.	12/2/2019 7:34 PM
6	I am frustrated by the Supreme Court's lack of understanding of water law.	11/18/2019 9:29 PM
7	Cost is frustrating in relation to having to often go through both district court and water court proceedings.	11/18/2019 7:41 PM

**Q21 Please identify any other issues of great importance to improving Montana's laws / process governing water distribution, water commissioners, water user disputes, or enforcement actions that have not been previously addressed in this section. Please explain your response as thoroughly as possible.**

Answered: 42 Skipped: 0

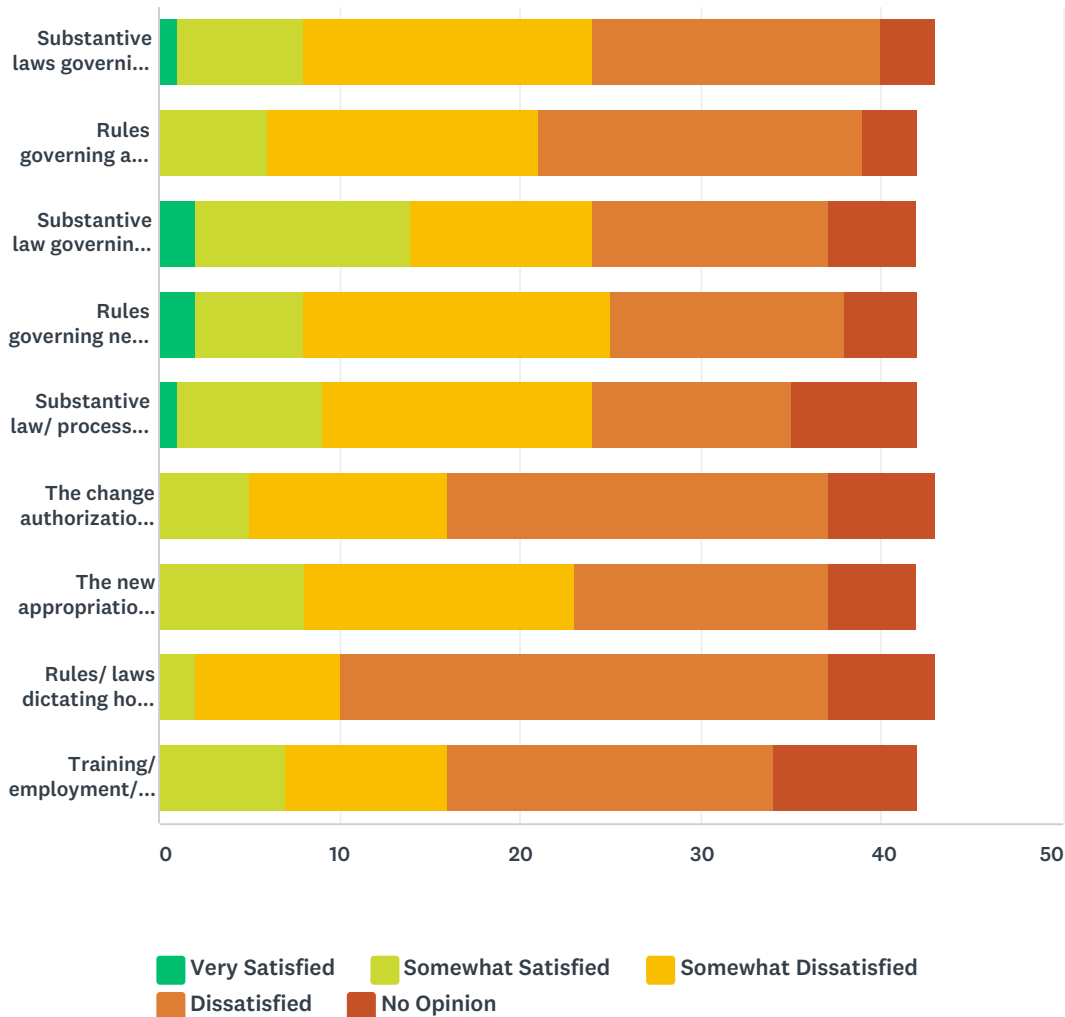
#	RESPONSES	DATE
1	None	12/20/2019 4:35 AM
2	N/A	12/20/2019 3:21 AM
3	lack of enforceable decrees, clarity in decrees leave much discretion in the hands of water commissioners subject to public pressures	12/19/2019 7:03 PM
4	Water Commissioners should be paid better. Water mediators should be used more. Every water user should have to have a valid form of measurement and a water right/permit with a flow rate and volume.	12/19/2019 5:22 PM
5	None	12/18/2019 11:57 PM
6	none	12/18/2019 11:44 PM
7	See answer to 18	12/18/2019 10:58 PM
8	Providing district court's with relief from complex distribution controversies they don't have time to handle.	12/18/2019 10:19 PM
9	With enforceable decrees, distribution issues will be more at the forefront. There will need to be much more education for everyone involved.	12/18/2019 8:08 PM
10	none	12/16/2019 5:39 PM
11	Water Commissioners should be DNRC employees	12/13/2019 9:17 PM
12	Water commissioners should be professionalized and housed at DNRC. Measurement on all water rights should be required.	12/13/2019 4:09 PM
13	Montana's water distribution, enforcement, and administration laws are antiquated and unresponsive to water user needs. The DNRC is no better, with no desire or budget to resolve any obvious illegal water uses. Water Users are regularly left with a Hobson's choice of initiating a district court action which provides little benefit at great cost, or hoping that the problem improves while slowly losing money as a result of their water rights enforcement issues. This is only compounded when the water thief is a rich landowner.	12/11/2019 11:24 PM
14	no comment/opinion	12/11/2019 9:41 PM
15	None	12/5/2019 5:04 PM
16	none	12/5/2019 4:42 PM
17	None	12/4/2019 11:05 PM
18	none	12/3/2019 11:37 PM
19	None	12/3/2019 5:22 PM
20	None	12/3/2019 4:53 PM
21	None	12/3/2019 4:56 AM
22	none	12/2/2019 9:57 PM
23	Judicial enforcement makes little sense. An agency should enforce water rights.	12/2/2019 9:21 PM
24	None	12/2/2019 7:34 PM

## Water Law Section Survey of Membership (2019)

25	None	12/2/2019 6:52 PM
26	none	12/2/2019 6:45 PM
27	There is a general lack of consensus as to if a Water Commissioner is an officer of the court. Therefore, when a dissatisfied water user's complaint or other equitable action is brought in District Court there is confusion as to if the Water Commissioner needs to pay for his own defense. This creates a scenario where District Judges are less likely to rule against their appointed water commissioners as they would be forcing them to pay for their own defense. In turn, dissatisfied water users who seek equitable relief run the risk of being forced to pay the cost of any action brought. If the Water Commissioner were an officer of the Court, the District Judge may need to be recused from an equitable action brought against the water commissioner, but the water commissioner would also not need to pay for his own defense.	12/2/2019 6:41 PM
28	none	12/2/2019 6:04 PM
29	none	11/25/2019 6:40 PM
30	Conflict of interest criteria should apply to water commissioners.	11/25/2019 3:00 AM
31	none	11/20/2019 5:30 PM
32	none	11/19/2019 10:37 PM
33	SEE ABOVE.	11/19/2019 8:39 PM
34	none	11/19/2019 7:21 PM
35	none	11/19/2019 4:13 PM
36	none	11/18/2019 10:15 PM
37	If DNRC and some industrial water users want to continue to posit policy arguments that center on unlawful water use, rather than creating more laws, the laws that are currently on the books need to be maximized first. More laws are not necessarily the solution.	11/18/2019 9:50 PM
38	.	11/18/2019 9:29 PM
39	n	11/18/2019 9:07 PM
40	none.	11/18/2019 7:41 PM
41	The current statutes (85-5-101 et seq) are from 1921. They are inadequate and difficult to apply in 2019 for everyone involved - judges, water users, water attorneys, commissioners.	11/18/2019 7:09 PM
42	None.	11/18/2019 6:48 PM

## Q22 How satisfied are you with the following aspects of the DNRC change of water right/ new appropriations process?

Answered: 42 Skipped: 0



	VERY SATISFIED	SOMEWHAT SATISFIED	SOMEWHAT DISSATISFIED	DISSATISFIED	NO OPINION	TOTAL RESPONDENTS
Substantive laws governing change of a water right	2.38% 1	16.67% 7	38.10% 16	38.10% 16	7.14% 3	42
Rules governing a change of water right	0.00% 0	14.29% 6	35.71% 15	42.86% 18	7.14% 3	42
Substantive law governing new appropriation of a water right	4.76% 2	28.57% 12	23.81% 10	30.95% 13	11.90% 5	42
Rules governing new appropriation of a water right	4.76% 2	14.29% 6	40.48% 17	30.95% 13	9.52% 4	42
Substantive law/ process concerning exempt groundwater certificates	2.38% 1	19.05% 8	35.71% 15	26.19% 11	16.67% 7	42
The change authorization permitting process	0.00% 0	11.90% 5	26.19% 11	50.00% 21	14.29% 6	42

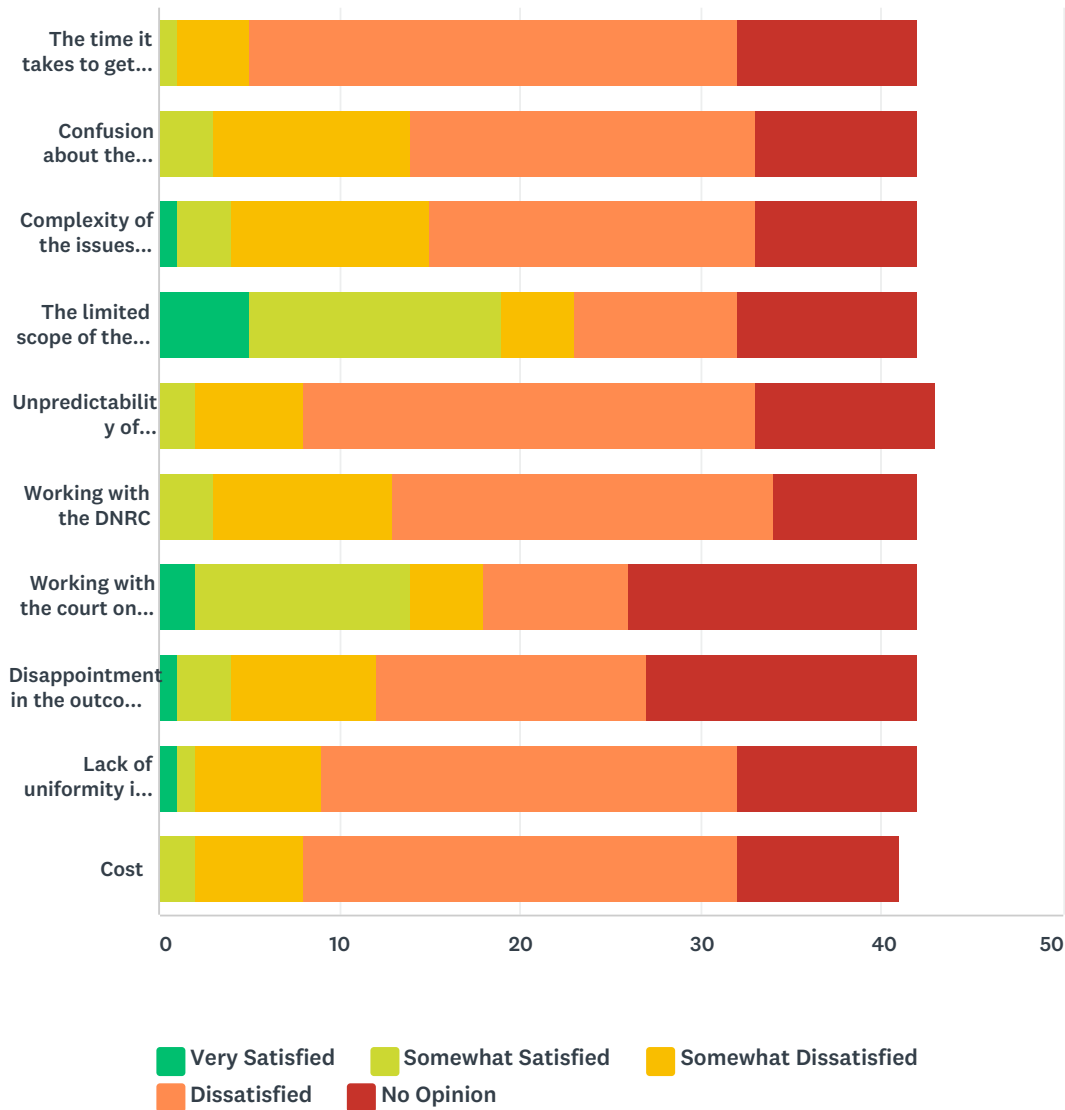


## Water Law Section Survey of Membership (2019)

The new appropriation permitting process	0.00% 0	19.05% 8	35.71% 15	33.33% 14	11.90% 5	42
Rules/ laws dictating how DNRC enforces unauthorized water uses	0.00% 0	4.76% 2	19.05% 8	64.29% 27	14.29% 6	42
Training/ employment/ support dedicated to DNRC by the State of Montana	0.00% 0	16.67% 7	21.43% 9	42.86% 18	19.05% 8	42

## Q23 How frustrating do your clients find the following aspects of the change of water right/ new appropriations of water rights processes in front of the DNRC?

Answered: 42 Skipped: 0



	VERY SATISFIED	SOMEWHAT SATISFIED	SOMEWHAT DISSATISFIED	DISSATISFIED	NO OPINION	TOTAL RESPONDENTS
The time it takes to get through the process	0.00% 0	2.38% 1	9.52% 4	64.29% 27	23.81% 10	42
Confusion about the issues the DNRC will review during the process	0.00% 0	7.14% 3	26.19% 11	45.24% 19	21.43% 9	42
Complexity of the issues addressed	2.38% 1	7.14% 3	26.19% 11	42.86% 18	21.43% 9	42
The limited scope of the DNRC's jurisdiction	11.90% 5	33.33% 14	9.52% 4	21.43% 9	23.81% 10	42

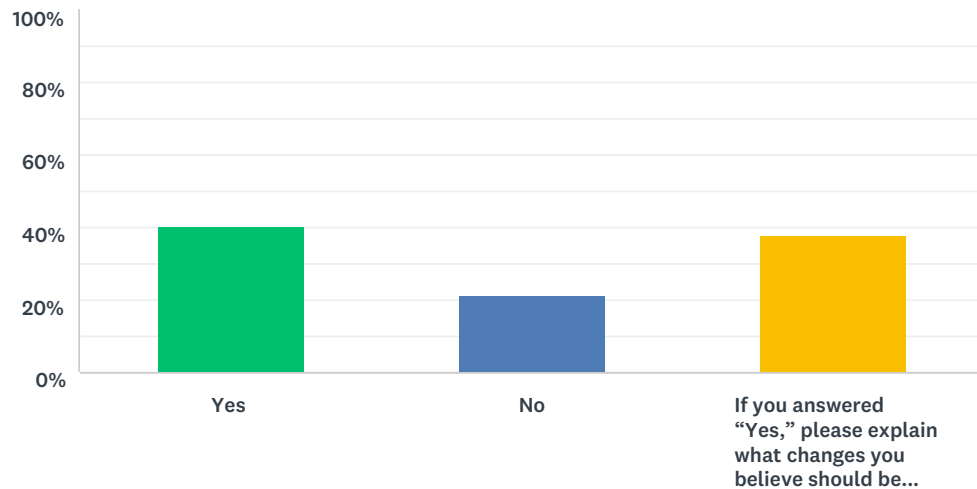
## Water Law Section Survey of Membership (2019)

Unpredictability of proceedings/ outcomes	0.00% 0	4.76% 2	14.29% 6	59.52% 25	23.81% 10	42
Working with the DNRC	0.00% 0	7.14% 3	23.81% 10	50.00% 21	19.05% 8	42
Working with the court on judicial review of agency determination	4.76% 2	28.57% 12	9.52% 4	19.05% 8	38.10% 16	42
Disappointment in the outcomes / disagreement with substantive law	2.38% 1	7.14% 3	19.05% 8	35.71% 15	35.71% 15	42
Lack of uniformity in how new appropriations are treated	2.38% 1	2.38% 1	16.67% 7	54.76% 23	23.81% 10	42
Cost	0.00% 0	4.88% 2	14.63% 6	58.54% 24	21.95% 9	41

#	OTHER (PLEASE SPECIFY)	DATE
1	Dissatisfaction with DNRC depends on the office and arbitrary denials	12/20/2019 3:21 AM
2	This question does not apply to my clients.	12/13/2019 4:09 PM
3	DNRC needs to stop making the rules harder to comply with. This is not a comment on the rules or law themselves, and more a comment on DNRC's approach to enforcement. They are regularly more restrictive than the rules or statute require.	12/11/2019 11:24 PM
4	none	12/3/2019 11:37 PM
5	Note your question asks "how frustrating" but the answers are about levels of satisfaction. I assume "dissatisfied" equals "frustrated."	12/2/2019 7:34 PM
6	The DNRC is the most frustrating state agency that I've ever worked with. They are adversarial, unpredictable, secretive, unreasonable, and lack respect for communication or public service.	11/20/2019 5:30 PM

## Q24 Should the laws/ process governing changes of water rights be revised?

Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	40.48%	17
No	21.43%	9
If you answered "Yes," please explain what changes you believe should be revised.	38.10%	16
<b>TOTAL</b>		<b>42</b>

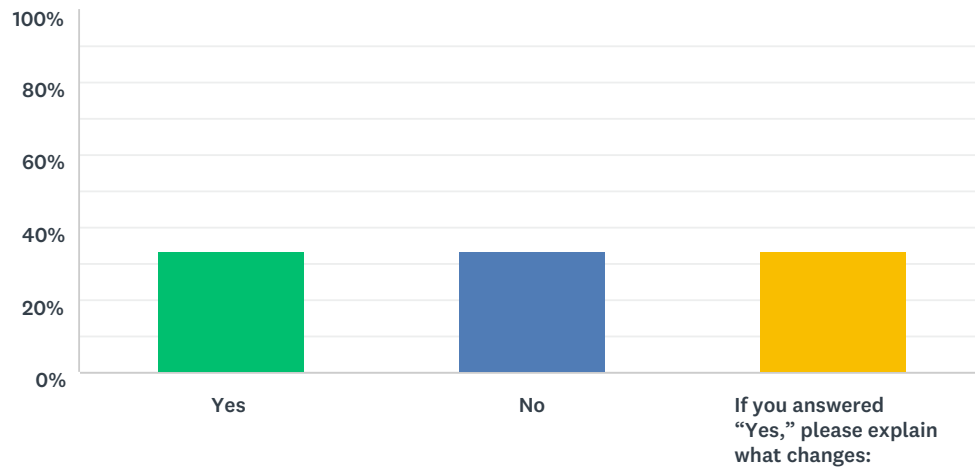
#	IF YOU ANSWERED "YES," PLEASE EXPLAIN WHAT CHANGES YOU BELIEVE SHOULD BE REVISED.	DATE
1	The process for a simple change is too difficult. It discourages water right owners from making changes required by law, forcing them to choose between costs they cannot afford or being out of compliance.	12/20/2019 4:35 AM
2	limits to agency discretion to arbitrarily ratchet up burdens of proof on applicants	12/19/2019 7:03 PM
3	Water right changes are complicated and its made worse by having to basically rely on a fudging of data to ensure no adverse impact. I don't know what the answer is here. I think a baseline adjudication of pre-73 water rights would definitely help; I think everyone measuring their water would help; and I think a new water resources survey would be great.	12/19/2019 5:22 PM
4	More clarity about what constitutes a change and more consequences for failure to go through the change process	12/18/2019 11:57 PM
5	Addition of stock water tanks should be an easy process to get through.	12/18/2019 8:08 PM
6	none	12/16/2019 5:39 PM
7	no comment/opinion	12/11/2019 9:41 PM
8	Administrative rules and/ or the statutory laws need to be revised to clearly define the standards, terms, and procedures the DNRC may use in order to confirm or deny a permit. Statutory timelines should be put in place for all aspects of DNRC review and there should be clear enforcement mechanisms for applicants to hold DNRC accountable. Administrative "black holes" need to be closed so that applicants have expectations for DNRC timelines, procedures, and when actions are considered appealable either directly to the agency or to the District or Water Court.	12/3/2019 4:53 PM
9	too complex for this survey.	11/25/2019 6:40 PM

## Water Law Section Survey of Membership (2019)

10	This is too complicated to answer in this survey, but in general, the current water right change laws unequally favor the status quo and disincentivize water users from making common sense improvements to their systems. Among other issues, the DNRC is re-adjudicating water rights, implementing a higher burden of proof than what the law requires, and creating its own extra-judicial body of "case law" that it can bend to reach whatever pre-determined outcome it desires in a particular situation. Without additional oversight and changes to statute, this situation will only get worse.	11/20/2019 5:30 PM
11	As noted several questions above, very complicated - think accurate notice before processing more important than DNRC's scientific review	11/19/2019 10:37 PM
12	Process needs to be more streamlined and uniform from one regional office to another.	11/19/2019 8:39 PM
13	Notice requirements should be more rigorous/public participation should be facilitated and encouraged, particularly for changes with community-wide impacts like conversion to municipal	11/19/2019 7:21 PM
14	The regulations concerning allow too much discretion to the DNRC on how to proceed and reach conclusions that then create a presumption prior to the time an interested party is informed of the process.	11/19/2019 4:13 PM
15	As the statutory changes that have been adopted in the last 10 years are being applied, it is clear that there are procedural issues requiring clarification and substantive criteria that are not necessarily applicable to Montana. This is in part the danger of adopting policy from other states with both different water law and different water availability situations than Montana. The specific statutory items that should be revised are more detailed than a simple survey can cover, but suffice it to say that the workability needs to be examined with input from actual practice.	11/18/2019 9:50 PM
16	Jurisdictional laws should be changed to provide options for more efficient and timely decisions and outcomes.	11/18/2019 7:41 PM

## Q25 Should the laws/ process governing new appropriations of water rights be revised?

Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	33.33%	14
No	33.33%	14
If you answered "Yes," please explain what changes:	33.33%	14
<b>TOTAL</b>		<b>42</b>

#	IF YOU ANSWERED "YES," PLEASE EXPLAIN WHAT CHANGES:	DATE
1	Agency must abide by burdens of proof, analyze adverse effect on case by case, judged by facts provided by applicants, not by agency experts overriding burden of proof with scientific levels of certainty	12/19/2019 7:03 PM
2	I am not sure if the laws/processes do need revision. I need an "I don't know" option here	12/19/2019 5:22 PM
3	DNRC's legal should not be involved in the outcome of a hearing on a change or a new approp.	12/18/2019 8:08 PM
4	none	12/16/2019 5:39 PM
5	no comment/opinion	12/11/2019 9:41 PM
6	Administrative rules and/ or the statutory laws need to be revised to clearly define the standards, terms, and procedures the DNRC may use in order to confirm or deny a permit. Statutory timelines should be put in place for all aspects of DNRC review and there should be clear enforcement mechanisms for applicants to hold DNRC accountable. Administrative "black holes" need to be closed so that applicants have expectations for DNRC timelines, procedures, and when actions are considered appealable either directly to the agency or to the District or Water Court.	12/3/2019 4:53 PM
7	Montana needs to confront the absurdity that is exempt claims. Why invest money in water rights when a new subdivision, or old subdivision, can undermine the entire appropriation scheme?	12/2/2019 9:21 PM
8	Legal availability needs to be better defined.	12/2/2019 6:04 PM
9	too many transation costs, too easy on developers, too hard for individuals.	11/25/2019 6:40 PM
10	I don't deal with new permits as much as changes, but it seems to me that some of the issues noted above exist for new permits as well as changes.	11/20/2019 5:30 PM
11	not familiar with this process but if like the change application process, should also have it's focus shifted from science to detailed notice	11/19/2019 10:37 PM

## Water Law Section Survey of Membership (2019)

12	The DNRC regulations are too vague and allow DNRC to reach conclusions that then create presumptions that an interested party must overcome without any opportunity to address issues on a level playing field.	11/19/2019 4:13 PM
13	see comments on 24 above.	11/18/2019 9:50 PM
14	Laws should be changed for more efficient processes and quicker decisions.	11/18/2019 7:41 PM

**Q26 Please identify any other issues of great importance to improving Montana's laws / process governing changes to and new appropriations of water rights that have not been previously addressed in this section.**  
**Please explain your response as thoroughly as possible.**

Answered: 42   Skipped: 0

#	RESPONSES	DATE
1	The process for a very simple change or permit (such as adding a stock tank to an existing water right) is much too difficult and expensive. The process discourages law-abiding citizens from obeying the law by being too costly to allow compliance.	12/20/2019 4:35 AM
2	N/A	12/20/2019 3:21 AM
3	DNRC has fashioned its culture of changes and new appropriations to become a legal opponent of any application. I believe the Water Use Act charges DNRC with the role of referee who should review the evidence provided to them by applicant to determine sufficiency against the burden of proof. The agency has become an independent, wildcat technical agency that doesn't abide by the law and arbitrarily shifts rules and regulations to suit its whims.	12/19/2019 7:03 PM
4	I think mandatory water mediation would perhaps benefit these processes at least on the objection side of things.	12/19/2019 5:22 PM
5	None	12/18/2019 11:57 PM
6	none	12/18/2019 11:44 PM
7	none	12/18/2019 10:58 PM
8	New appropriation and change laws need to be enforced uniformly across regional offices. The use of internal rules and memoranda that are not memorialized in the ARM and thus do not have the force of law needs to be forbidden.	12/18/2019 10:19 PM
9	none	12/18/2019 8:08 PM
10	none	12/16/2019 5:39 PM
11	none	12/13/2019 9:17 PM
12	A thorough study should be conducted and stakeholders engaged to determine the best approach to water right administration post-adjudication. The legislature should avoid expanding the jurisdiction of the Water Court over DNRC new appropriations decisions and require all Water Court resources to go to completely the adjudication as quickly as possible.	12/13/2019 4:09 PM
13	none	12/11/2019 11:24 PM
14	no comment/opinion	12/11/2019 9:41 PM
15	Clarifying DNRC's authority to require measurement	12/5/2019 5:04 PM
16	none	12/5/2019 4:42 PM
17	None	12/4/2019 11:05 PM
18	none	12/3/2019 11:37 PM
19	None	12/3/2019 5:22 PM
20	None	12/3/2019 4:53 PM
21	None	12/3/2019 4:56 AM
22	none	12/2/2019 9:57 PM
23	none	12/2/2019 9:21 PM

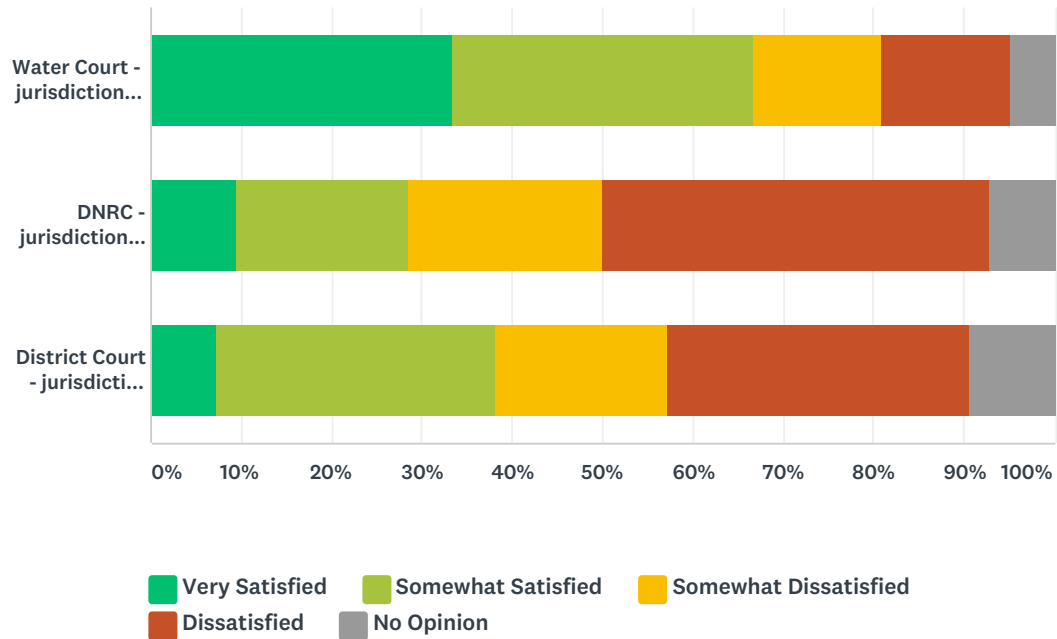


## Water Law Section Survey of Membership (2019)

24	In some cases, DNRC review has been unduly slow, or raised issues that were not warranted under the circumstances. DNRC frequently requires applicants to supplement the information they provided, and rely more heavily on consultants. Some additional facts DNRC requests/requires appear to go beyond the scope of the statutory process.	12/2/2019 7:34 PM
25	None.	12/2/2019 6:52 PM
26	none	12/2/2019 6:45 PM
27	none	12/2/2019 6:41 PM
28	none	12/2/2019 6:04 PM
29	DNRC rules need to be simplified and made uniform as applied throughout the state.	11/25/2019 6:40 PM
30	Water practicioners and users need to recognize water is a limited resource.	11/25/2019 3:00 AM
31	none	11/20/2019 5:30 PM
32	none	11/19/2019 10:37 PM
33	NONE	11/19/2019 8:39 PM
34	none	11/19/2019 7:21 PM
35	The Montana legislature must find a way to prevent colloquial complaints to become law.	11/19/2019 4:13 PM
36	none	11/18/2019 10:15 PM
37	In general, DNRC's focus on the de minimis impacts of changes to water conditions rather than practical on-the-ground application hinders both efficient use of water and adherence to the law. In addition, variances in how the existing law is applied among regional offices, as well as the existence of agency "guidance" that has neither been adopted in statute nor put into regulation through the MAPA process need to be examined by policymakers.	11/18/2019 9:50 PM
38	.	11/18/2019 9:29 PM
39	n	11/18/2019 9:07 PM
40	none.	11/18/2019 7:41 PM
41	None.	11/18/2019 7:09 PM
42	None.	11/18/2019 6:48 PM

## Q27 How satisfied are you with the current jurisdictional structure?

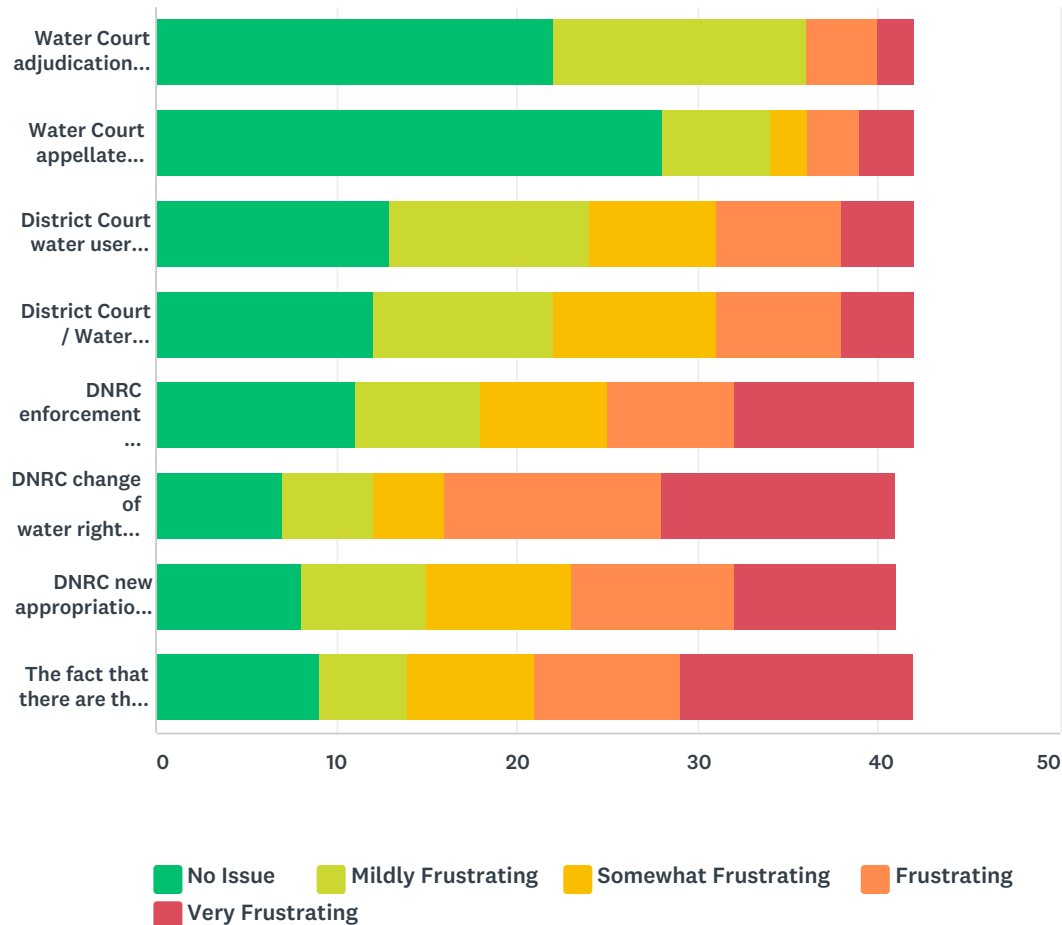
Answered: 42 Skipped: 0



	VERY SATISFIED	SOMEWHAT SATISFIED	SOMEWHAT DISSATISFIED	DISSATISFIED	NO OPINION	TOTAL	WEIGHTED AVERAGE
Water Court - jurisdiction over adjudication and DNRC appeals	33.33% 14	33.33% 14	14.29% 6	14.29% 6	4.76% 2	42	2.76
DNRC - jurisdiction over changes and new appropriations	9.52% 4	19.05% 8	21.43% 9	42.86% 18	7.14% 3	42	1.81
District Court - jurisdiction over distribution, water user disputes, and DNRC appeals	7.14% 3	30.95% 13	19.05% 8	33.33% 14	9.52% 4	42	1.93

## Q28 In which of these contexts are your clients most frustrated concerning the jurisdiction of water rights?

Answered: 42 Skipped: 0



	NO ISSUE	MILDLY FRUSTRATING	SOMEWHAT FRUSTRATING	FRUSTRATING	VERY FRUSTRATING	TOTAL RESPONDENTS
Water Court adjudication of existing water rights	52.38% 22	33.33% 14	0.00% 0	9.52% 4	4.76% 2	42
Water Court appellate jurisdiction of DNRC permit & change decisions	66.67% 28	14.29% 6	4.76% 2	7.14% 3	7.14% 3	42
District Court water user disputes	30.95% 13	26.19% 11	16.67% 7	16.67% 7	9.52% 4	42
District Court / Water Commissioner enforcement actions	28.57% 12	23.81% 10	21.43% 9	16.67% 7	9.52% 4	42
DNRC enforcement of unauthorized use	26.83% 11	17.07% 7	17.07% 7	17.07% 7	24.39% 10	41
DNRC change of water right process	17.07% 7	12.20% 5	9.76% 4	29.27% 12	31.71% 13	41
DNRC new appropriation permitting process	19.51% 8	17.07% 7	19.51% 8	21.95% 9	21.95% 9	41

## Water Law Section Survey of Membership (2019)

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The fact that there are three separate governing bodies for water rights issues in Montana.	21.43% 9	11.90% 5	16.67% 7	19.05% 8	30.95% 13	42
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**Q29 Please identify any other issues of great importance to improving Montana's laws regarding jurisdiction over water rights that have not been previously addressed in this section. Please explain your response as thoroughly as possible.**

Answered: 42 Skipped: 0

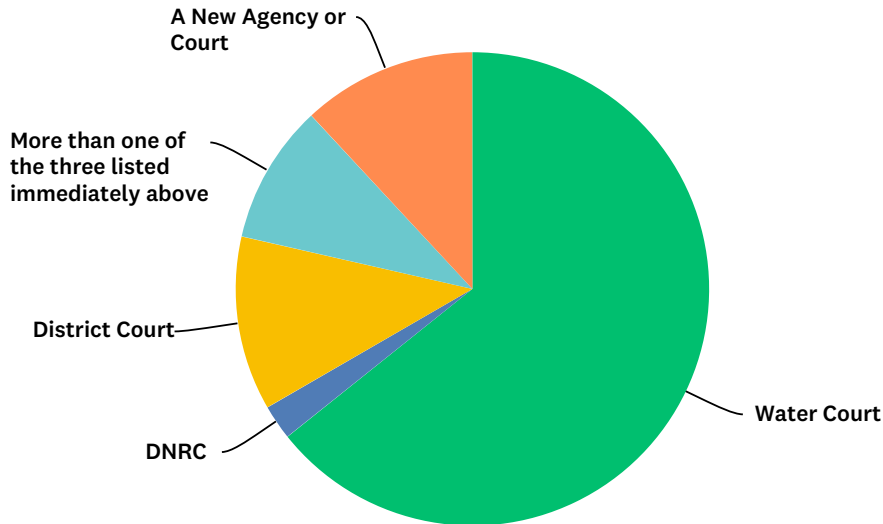
#	RESPONSES	DATE
1	None	12/20/2019 4:35 AM
2	DNRC should only be the record keeper; changes in water rights through the adjudication need to be conveyed to DNRC, including maps, and put into the query system; DNRC needs to ensure the query system is accurate and timely updated, without the use of Dept of Revenue information	12/20/2019 3:21 AM
3	None	12/19/2019 7:03 PM
4	Water is money in Montana and so it is political. As such, I do not think concentrating power in one jurisdiction or tribunal is wise. I think water is also inherently local and so having localized jurisdictional process is important.	12/19/2019 5:22 PM
5	None	12/18/2019 11:57 PM
6	none	12/18/2019 11:44 PM
7	none	12/18/2019 10:58 PM
8	I believe we need to move away from the three-venue system that we currently have, eliminating both the DNRC role in permitting decisions and the District Court's role in enforcement actions. The DNRC should still provide its valuable analysis of the scientific elements necessary to meet statutory criteria for permitting, but the decision making authority should be vested in the court, eliminating the MAPA contested case process and vesting authority with the Water Court.	12/18/2019 10:19 PM
9	none	12/18/2019 8:08 PM
10	none	12/16/2019 5:39 PM
11	NA	12/13/2019 9:17 PM
12	none	12/13/2019 4:09 PM
13	Montana needs to administer water rights. This means require measuring devices on every diversion, and requiring daily measurement and reporting to the DNRC (or similar state-wide entity). It appears to me that changes and new appropriations are being severely restricted under the theory that there is no water in the system, or that water rights are being adversely impacted. These analyses then rely on hypothetical / claimed / assumed water use patterns. If we actually had data of actual water use, there would be no need to have expensive and complicated debates about hypothetical injury, and instead the DNRC could focus on actual evidence suggesting potential injury. Montana's water rights need to start being administered and enforced.	12/11/2019 11:24 PM
14	no comment/opinion	12/11/2019 9:41 PM
15	There is one executive agency with jurisdiction over water rights and two judicial branch "courts" with jurisdiction over water rights. Upon completion of the adjudication, the water court goes away. The primary jurisdictional complaint - that there are three entities with jurisdiction over water rights - is the product of the chronic delay in completion of the adjudication. Had the adjudication concluded in a timely manner, there would only be one executive agency and one judicial branch court with original jurisdiction over water rights. The solution to an jurisdictional concerns, as with many other issues related to water rights, is completion of the adjudication.	12/5/2019 5:04 PM
16	none	12/5/2019 4:42 PM
17	None	12/4/2019 11:05 PM
18	none	12/3/2019 11:37 PM

## Water Law Section Survey of Membership (2019)

19	None	12/3/2019 5:22 PM
20	None	12/3/2019 4:53 PM
21	None	12/3/2019 4:56 AM
22	none	12/2/2019 9:57 PM
23	none	12/2/2019 9:21 PM
24	None	12/2/2019 7:34 PM
25	It would be my preference that the Water Court assume jurisdiction over DNRC appeals as well as all matters of water right enforcement. Having three different jurisdictional frameworks is expensive and creates unnecessary frustration for water users.	12/2/2019 6:52 PM
26	none	12/2/2019 6:45 PM
27	none	12/2/2019 6:41 PM
28	none	12/2/2019 6:04 PM
29	none.	11/25/2019 6:40 PM
30	The problem with water rights jurisdiction is the time that it has taken to complete the adjudication. If the Water Court ever finishes the job, the district courts can take over to enforce water rights since they are closer to the water users.	11/25/2019 3:00 AM
31	none	11/20/2019 5:30 PM
32	none	11/19/2019 10:37 PM
33	NONE	11/19/2019 8:39 PM
34	none	11/19/2019 7:21 PM
35	none	11/19/2019 4:13 PM
36	none	11/18/2019 10:15 PM
37	Utilizing the Water Court's expertise in addressing a variety of water-related controversies needs to be maximized. The policy argument that the Water Court needs to remain solely focused on adjudication does not hold up. As the Chief Water Judge has said to the legislature, the Court can walk and chew gum at the same time, so to speak.	11/18/2019 9:50 PM
38	I believe the greatest issue is that there is no court I would currently support having jurisdiction. District Court judge as a general statement do not understand water law. Water Master are generally new lawyers who do not have the experience to smooth manage case procedure and understand the substantive law. If I were a legislature, I would place jurisdiction of the adjudication, distribution and change in the water court and only have judges and law clerks.	11/18/2019 9:29 PM
39	z	11/18/2019 9:07 PM
40	none.	11/18/2019 7:41 PM
41	None.	11/18/2019 7:09 PM
42	None.	11/18/2019 6:48 PM

# Q30 After the conclusion of the statewide adjudication, who should have authority to interpret Water Court Orders and Decrees, and/ or enforce disputes concerning Water Court Orders and Decrees?

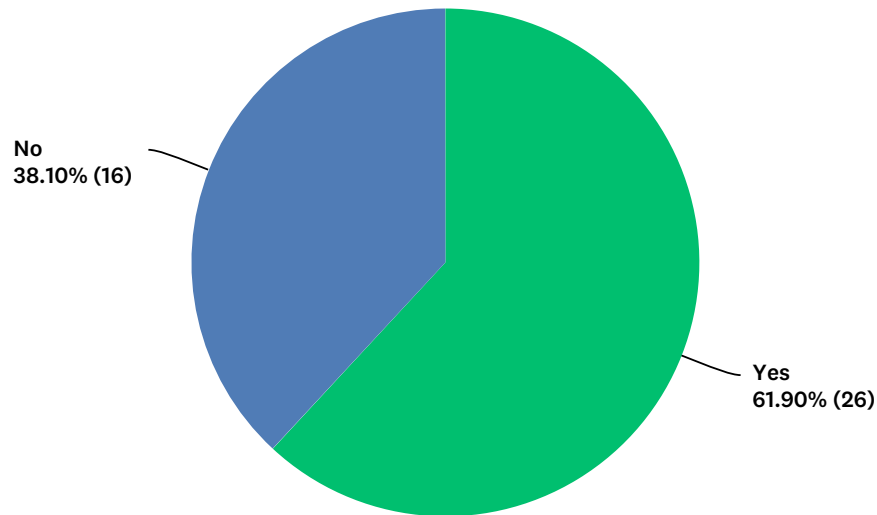
Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
Water Court	64.29%	27
DNRC	2.38%	1
District Court	11.90%	5
More than one of the three listed immediately above	9.52%	4
A New Agency or Court	11.90%	5
TOTAL		42

**Q31 Would you support a single governing body having control over all water right issues in Montana, including scope of a water right, changes/new appropriations, adjudication/interpretation, and distribution/administration/enforcement?**

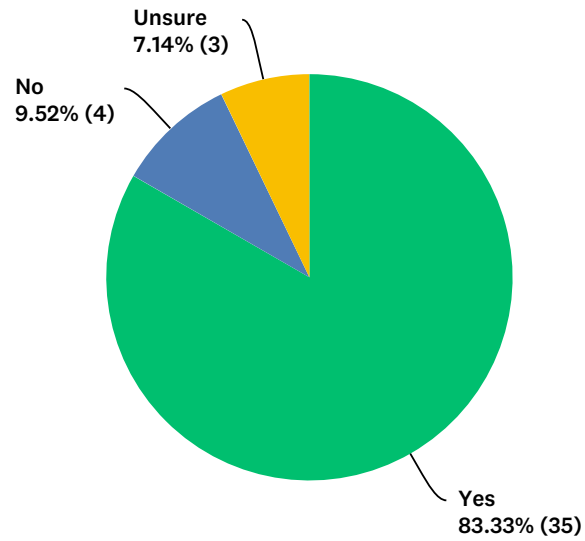
Answered: 42 Skipped: 0





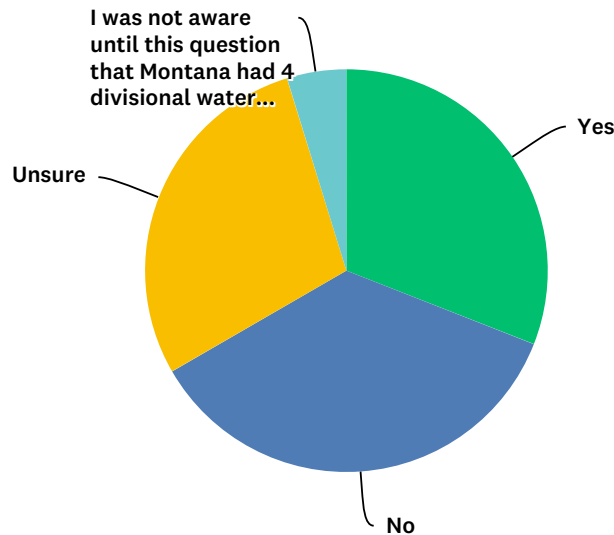
### Q32 Should the Water Court and/ or dedicated Water Judges be a permanent institution in Montana?

Answered: 42 Skipped: 0



**Q33 Rather than a permanent, centralized water court, should Montana consider reworking its existing statutes regarding 4 divisional water judges (Title 3, Ch. 7, Pt. 1, MCA) to handle water rights related issues at the close of the statewide adjudication?**

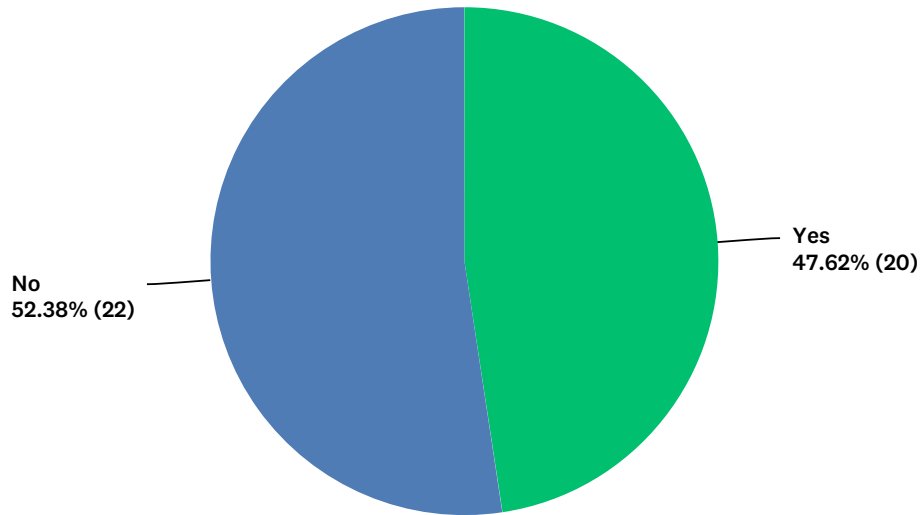
Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	30.95%	13
No	35.71%	15
Unsure	28.57%	12
I was not aware until this question that Montana had 4 divisional water judges	4.76%	2
TOTAL		42

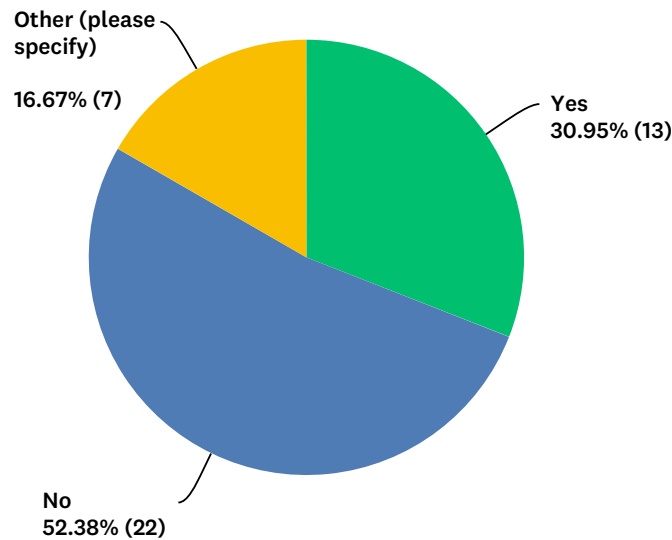
### Q34 Should all water users be required to measure and report their diversions?

Answered: 42 Skipped: 0



## Q35 Should Montana pursue an active administrative enforcement model but relocate enforcement powers to a Bureau of the DNRC or a newly created Office of the State Engineer?

Answered: 42 Skipped: 0

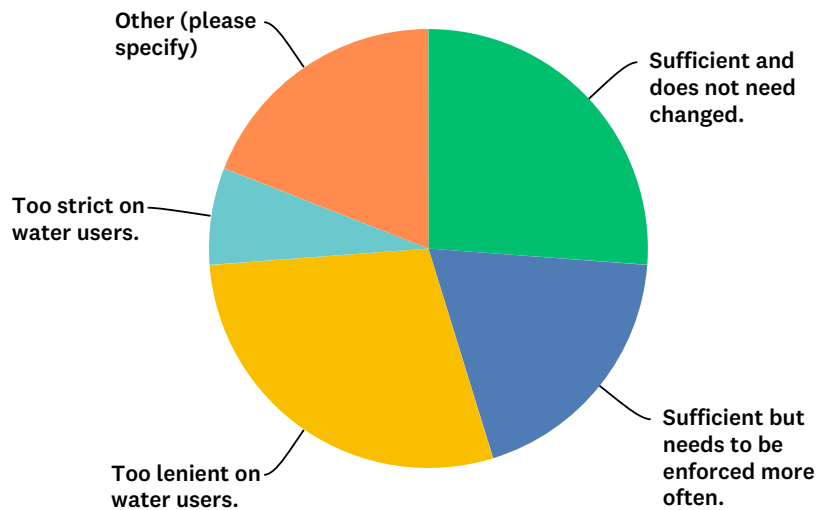


ANSWER CHOICES	RESPONSES	
Yes	30.95%	13
No	52.38%	22
Other (please specify)	16.67%	7
TOTAL		42

#	OTHER (PLEASE SPECIFY)	DATE
1	I'm in favor of one-stop shopping for water issues - whether that's a court or an administrative agency I feel less strongly about	12/18/2019 11:57 PM
2	need more specifics on this issue.	12/18/2019 11:44 PM
3	no comment/opinion	12/11/2019 9:41 PM
4	I think the only way this would work is if a new agency, e.g. Office of the State Engineer, is created to do the administrative enforcement. The agency would also need to be adequately funded and have adequate technical staff. If the legislature cannot see its way to do this, then I do not think an administrative enforcement model will work. Instead, additional resources, support, and training should be provided to the DNRC and Water Court to bolster judicial enforcement. Further, all jurisdiction over water issues, including ditch easements, and water disputes should be placed with the Water Court.	12/3/2019 4:53 PM
5	This option is worth considering, but I'm uncomfortable giving a definitive yes or no without a consideration of the variables--cost, personnel, operation with existing statute and other involved governmental bodies, etc.	11/18/2019 9:50 PM
6	Don't know	11/18/2019 9:29 PM
7	Not DNRC. Perhaps Office of State Engineer (or similar).	11/18/2019 7:09 PM

## Q36 Montana's current law of abandonment is:

Answered: 42 Skipped: 0



ANSWER CHOICES	RESPONSES	
Sufficient and does not need changed.	26.19%	11
Sufficient but needs to be enforced more often.	19.05%	8
Too lenient on water users.	28.57%	12
Too strict on water users.	7.14%	3
Other (please specify)	19.05%	8
<b>TOTAL</b>		<b>42</b>

#	OTHER (PLEASE SPECIFY)	DATE
1	Currently is based on completely disparate legal decisions out of the court; recent ruling would indicate there is no abandonment where previously it was relatively clear that a water right could be abandoned, money or no money	12/20/2019 3:21 AM
2	In a state of suspended animation, hard to say if there is a law of abandonment in Montana. Post adjudication 10-year period will help	12/19/2019 7:03 PM
3	no comment/opinion	12/11/2019 9:41 PM
4	The current statute regarding abandonment has largely been ineffective because the adjudication is not complete. Measurement records will be key to to meaningful abandonment enforcement.	12/5/2019 5:04 PM
5	Needs clearer statutory definition and clear parameters for enforcement.	12/3/2019 4:53 PM
6	Like reading tea leaves. The statutory/common law is ambiguous, and difficult to correctly predict how claims examiners and courts will apply the current laws to a specific factual scenario.	12/2/2019 7:34 PM
7	ReDespite the adjudication, the state's database is riddled with thousands of bogus water rights that have either never been used, are not physically capable of being used, or are long since abandoned. The burden should be placed on water rights holders to verify ongoing use of water rights or risk abandonment.	11/20/2019 5:30 PM
8	Could use some statutory clarification.	11/18/2019 9:50 PM

**Q37 Please identify any other issues of great importance to improving Montana's current system for the administration and enforcement of water rights that have not been previously addressed in this section. Please explain your response as thoroughly as possible. If you have no comment, type "none."**

Answered: 42 Skipped: 0

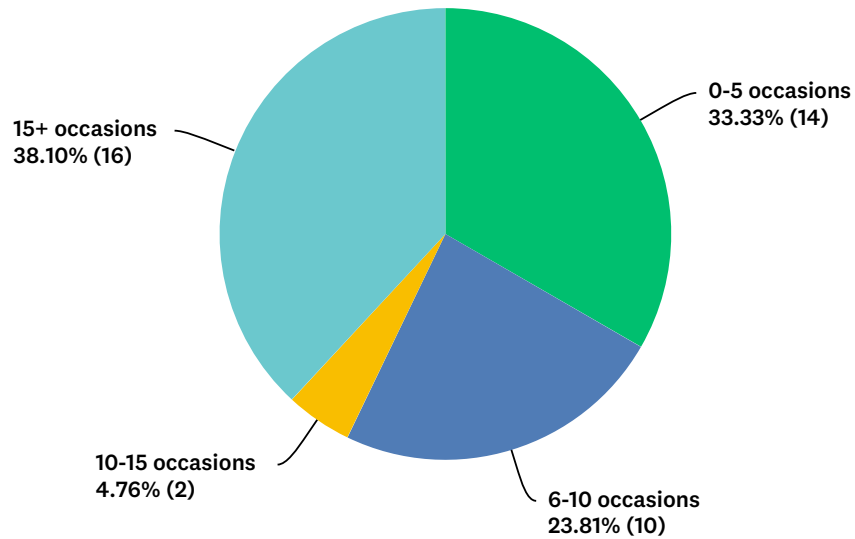
#	RESPONSES	DATE
1	None	12/20/2019 4:35 AM
2	"none"	12/20/2019 3:21 AM
3	None	12/19/2019 7:03 PM
4	The basis and extent of a water right is its beneficial use. Any erosion to this premise needs to be corrected.	12/19/2019 5:22 PM
5	None	12/18/2019 11:57 PM
6	none	12/18/2019 11:44 PM
7	Measurement devices should be required for diversions and available upon request by DNRC if valid enforcement action is initiated	12/18/2019 10:58 PM
8	none	12/18/2019 10:19 PM
9	none	12/18/2019 8:08 PM
10	none	12/16/2019 5:39 PM
11	none	12/13/2019 9:17 PM
12	none	12/13/2019 4:09 PM
13	none	12/11/2019 11:24 PM
14	no comment/opinion	12/11/2019 9:41 PM
15	Mandatory measurment reporting is key to administration and enforcement.	12/5/2019 5:04 PM
16	none	12/5/2019 4:42 PM
17	None	12/4/2019 11:05 PM
18	none	12/3/2019 11:37 PM
19	None	12/3/2019 5:22 PM
20	None	12/3/2019 4:53 PM
21	None.	12/3/2019 4:56 AM
22	none	12/2/2019 9:57 PM
23	none	12/2/2019 9:21 PM
24	None	12/2/2019 7:34 PM
25	None	12/2/2019 6:52 PM
26	none	12/2/2019 6:45 PM
27	none	12/2/2019 6:41 PM
28	none	12/2/2019 6:04 PM
29	DNRC needs funding to do enforcement	11/25/2019 6:40 PM

## Water Law Section Survey of Membership (2019)

30	If the Water Court become permanent, it should be set up using the four divisional water judges.	11/25/2019 3:00 AM
31	none	11/20/2019 5:30 PM
32	none	11/19/2019 10:37 PM
33	NONE	11/19/2019 8:39 PM
34	none	11/19/2019 7:21 PM
35	I believe that there needs to be single Water Court judicial office, but that relies on a strong DNRC presence to respond quickly to issues. I am concerned that reliance solely on a court system will not be too slow.	11/19/2019 4:13 PM
36	none	11/18/2019 10:15 PM
37	Examination of DNRC policy on return flow analysis, carriage water for in stream flow, and general evaluation of in stream flow applications.	11/18/2019 9:50 PM
38	none	11/18/2019 9:29 PM
39	z	11/18/2019 9:07 PM
40	none.	11/18/2019 7:41 PM
41	None.	11/18/2019 7:09 PM
42	None.	11/18/2019 6:48 PM

### Q38 On approximately how many occasions have your clients experienced problems with the water right ownership update process?

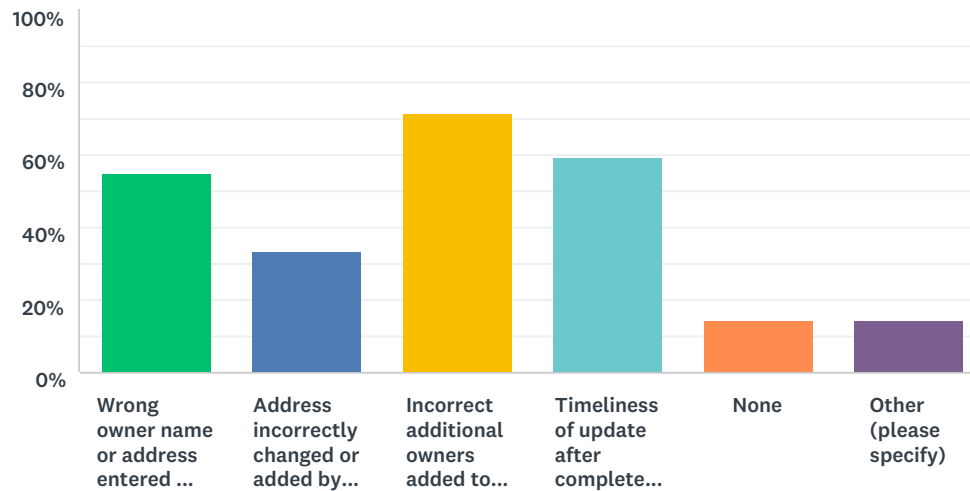
Answered: 42 Skipped: 0





### Q39 Which of the following ownership update problems have your clients experienced [Check all that apply]:

Answered: 42 Skipped: 0

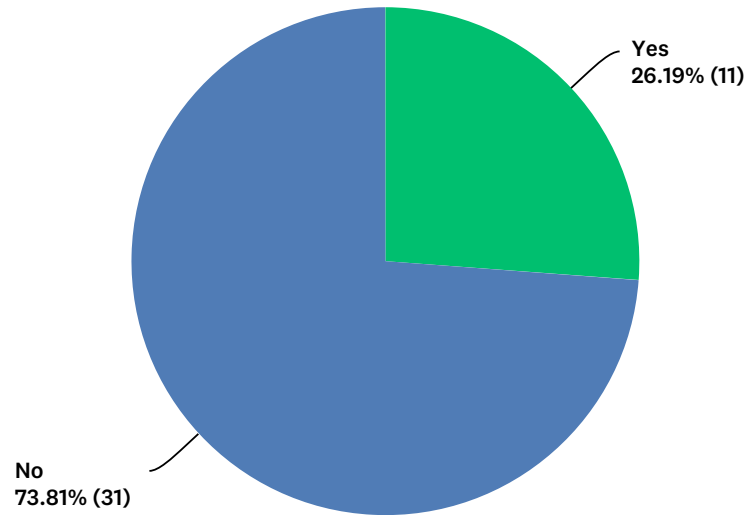


ANSWER CHOICES	RESPONSES	
Wrong owner name or address entered by DNRC	54.76%	23
Address incorrectly changed or added by DNRC based on updated Department of Revenue Records	33.33%	14
Incorrect additional owners added to the claim by DNRC	71.43%	30
Timeliness of update after completed ownership update forms are filed with DNRC regional office	59.52%	25
None	14.29%	6
Other (please specify)	14.29%	6
Total Respondents: 42		

#	OTHER (PLEASE SPECIFY)	DATE
1	Previously unirrigated ground added to water right based on geocode manipulation by DNRC	12/20/2019 3:21 AM
2	This question does not apply to my clients.	12/13/2019 4:09 PM
3	NA	12/5/2019 5:04 PM
4	DNRC's process for change of a water user's name [eg. a corporation changing its name] is more onerous than the processes used by DOR, assessors, etc.	12/2/2019 7:34 PM
5	Incorrect division of split ownership.	11/18/2019 9:50 PM
6	Adding owners leads to DNRC re-examining parts of claims.	11/18/2019 7:41 PM

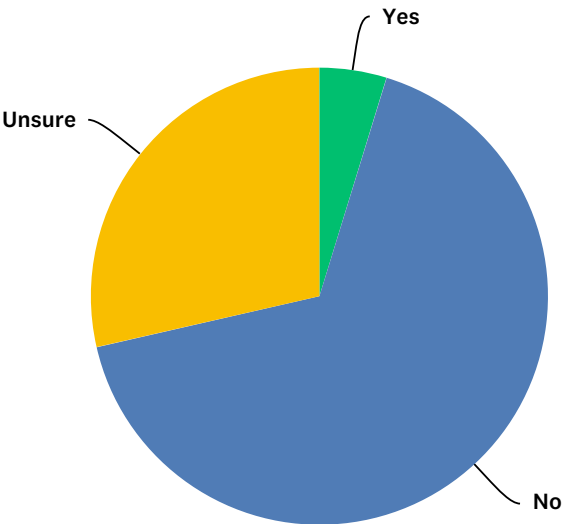
## Q40 Should the ownership update process through DNRC remain the same?

Answered: 42 Skipped: 0



Q41 Should DNRC have authority to update the record ownership of a water right based only on Department of Revenue records of cadastral ownership, geocodes, and legal descriptions?

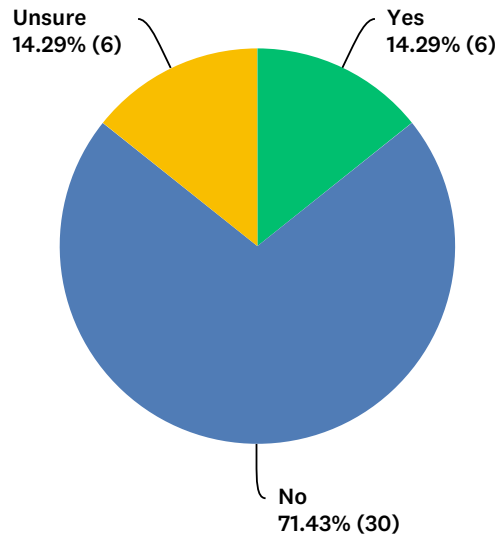
Answered: 42 Skipped: 0



ANSWER CHOICES		RESPONSES	
Yes		4.76%	2
No		66.67%	28
Unsure		28.57%	12
TOTAL			42

Q42 Should the state revise the laws of conveyance of water rights, so that water rights do not pass with the sale of land unless explicitly stated in the instrument of conveyance?

Answered: 42 Skipped: 0



**Q43 Please identify any other issues of great importance to improving Montana's current ownership update of water rights system, that have not been previously addressed in this section. Please explain your response as thoroughly as possible. If you have no comment, type "none."**

Answered: 42 Skipped: 0

#	RESPONSES	DATE
1	The DNRC should contact the listed attorney or water right owner before making any unrequested changes to a water right.	12/20/2019 4:35 AM
2	"none"	12/20/2019 3:21 AM
3	DNRC has to have the capacity to keep up	12/19/2019 7:03 PM
4	Cadastral needs to be better funded and updated to be able to reliably use it for property and water right associated inquiries. This should be public information that is easy to obtain.	12/19/2019 5:22 PM
5	none	12/18/2019 11:57 PM
6	none	12/18/2019 11:44 PM
7	none	12/18/2019 10:58 PM
8	none	12/18/2019 10:19 PM
9	If there is a question of ownership, it should be addressed by the Water Court, not DNRC. Owners should never just be added by DNRC.	12/18/2019 8:08 PM
10	none	12/16/2019 5:39 PM
11	none	12/13/2019 9:17 PM
12	Education and training for realtors and title companies is necessary to ensure water right transfers are accurately reported.	12/13/2019 4:09 PM
13	This process works for the vast majority of water users in the state, and we should not throw the baby out with the bathwater. Admittedly some small percentage of problems do occur, however it is vastly better than the ownership update process that existed prior to the current governing law. Moreover, attorneys will over-report problems with this system, because currently the only solution is a legal approach. (i.e. any problems on this front are brought to attorneys). The DNRC and Water Court have magnified the problems of the system by having a turf war over the issue. The Water Court indicates that its aliquat (ie qtr qtr qtr) legal descriptions are the last word on the place of use -- even when they are not and very detailed stipulation maps and place of use maps prove otherwise. Similarly, the DNRC is more than happy to ignore all other information in water rights claim file other than the aliquat place of use, and subsequently assign obviously incorrect geocodes to the water right. Then there is no simple administrative relief to fix the problem. The DNRC / Water Court should not be permitted to modify or add any information to a water right abstract without first providing notice to the water right owner, and opportunity by the water user to challenge the modifications. Water Rights are valuable personal property rights, and regardless of jurisdiction the DNRC/Water Court must comply with due process. Both the DNRC and Water Court ignore this treat water rights abstracts as subject to their whims.	12/11/2019 11:24 PM
14	no comment/opinion	12/11/2019 9:41 PM
15	none	12/5/2019 5:04 PM
16	none	12/5/2019 4:42 PM
17	None	12/4/2019 11:05 PM
18	none	12/3/2019 11:37 PM
19	None	12/3/2019 5:22 PM
20	None	12/3/2019 4:53 PM

## Water Law Section Survey of Membership (2019)

21	None.	12/3/2019 4:56 AM
22	none	12/2/2019 9:57 PM
23	none	12/2/2019 9:21 PM
24	None	12/2/2019 7:34 PM
25	None.	12/2/2019 6:52 PM
26	none	12/2/2019 6:45 PM
27	none	12/2/2019 6:41 PM
28	none	12/2/2019 6:04 PM
29	none	11/25/2019 6:40 PM
30	DNRC is the agency maintaining the central record of water rights. While DOR cadastral records are helpful to identifying transfers of ownership, the process needs improvement.	11/25/2019 3:00 AM
31	none	11/20/2019 5:30 PM
32	none	11/19/2019 10:37 PM
33	NONE	11/19/2019 8:39 PM
34	none	11/19/2019 7:21 PM
35	none	11/19/2019 4:13 PM
36	none	11/18/2019 10:15 PM
37	Training for real estate professionals to facilitate an awareness of water rights. Many of the issues I see in my practice arise from a lack of understanding by real estate and title professionals as to the transfer and split of water rights, particularly when land being sold is being converted from agricultural to residential use.	11/18/2019 9:50 PM
38	none	11/18/2019 9:29 PM
39	z	11/18/2019 9:07 PM
40	none.	11/18/2019 7:41 PM
41	None.	11/18/2019 7:09 PM
42	None.	11/18/2019 6:48 PM

## **JUDICIAL BRANCH PROPOSAL FOR CHANGES TO WATER COURT JURISDICTION**

The Water Policy Interim Committee is considering changes to the role of the Water Court. The following suggestions will bring expertise to solving water problems, decrease the cost and increase the speed of decision making, and create more consistent law regarding water rights and their use.

### **SUGGESTION 1**

Water Court review of DNRC permit and change decisions should be permanent and exclusive.

#### *Benefits of Suggestion 1*

The DNRC's decisions on permit and change applications are subject to judicial review by either the Water Court or the District Courts. While this system gives water users choice of forum, it does not ensure consistent application of law nor does it ensure the reviewing court has the expertise to review permit and change decisions.

### **SUGGESTION 2**

The Water Court should have exclusive jurisdiction to decide the boundaries of Irrigation Districts.

#### *Benefits of Suggestion 2*

District Courts currently have jurisdiction to decide the boundaries of Irrigation Districts. This process involves identification of lands susceptible to irrigation. The Water Court uses a similar process to describe Irrigation District water rights. Under the current system, an Irrigation District must first have its boundaries defined in district court before going to the Water Court to have its water rights defined.

This arrangement is costly for water users because it requires two court cases to decide similar issues. It also causes delays in the adjudication of water rights because Irrigation District boundaries must be defined *before* water rights can be addressed. Allowing the Water Court to decide both issues in a single proceeding would save judicial resources, cost water users less money, produce more consistent results, and speed up the adjudication.

**SUGGESTION 3**

The Water Court should have concurrent jurisdiction to decide cases regarding ditch easements.

*Benefits of Suggestion 3*

Although water disputes often involve both water rights and the ditches that carry them, these disputes cannot presently be resolved by the same court. Under the current system, district courts must adjudicate ditch easements, while the water rights carried in those ditches can only be decided by the Water Court. Litigants are forced to present their cases in two different courts where they face the potential for conflicting outcomes. This inefficient division of jurisdiction increases costs, delays decision making, and unnecessarily burdens the judicial system by requiring duplicate proceedings on similar issues.

Allowing the Water Court to decide water right and ditch easement issues in the same proceeding would save judicial resources, cost water users less money, give water users answers more quickly, and produce more consistent results.

**SUGGESTION 4**

The Water Court should have concurrent jurisdiction to administer its own decrees.

*Benefits of Suggestion 4*

Montana's statutes give district courts exclusive jurisdiction to administer water rights. This system is a leftover from the days when district courts also adjudicated water rights. Under the current system, the Water Court adjudicates water rights but cannot enforce them. Water users must have their rights adjudicated in one court and administered in another.

Concurrent jurisdiction would give water users the option of having their rights decreed and administered by the same court. This change would allow water users to



select a court with specialized expertise to help them resolve complicated water distribution issues. Providing for concurrent jurisdiction would also address other problems with the current system, including inconsistency, forum shopping between districts, and delays in decision making.

### **ANSWERS TO WPIC QUESTIONS**

WPIC asked the following questions regarding Suggestion 4. Answers are provided below.

- What would your agency propose as a plan framework if your agency were to take over water rights enforcement/administration responsibilities from the District Courts?

*Answer: Water Court jurisdiction should be expanded to permit the court to hear dissatisfied water user petitions and illegal water use complaints.*

- What would you need to staff a centralized and professionalized WR enforcement effort?

*Answer: The Water Court would not need additional staff.*

- What would your budget look like (positions & salaries, work comp, office space, etc)?

*Answer: The Water Court would not need additional funding.*

- What would you propose in terms of where to locate staff (Bozeman, Helena, regional offices, etc.)?

*Answer: Water Court staff would remain in Bozeman, and travel to the location of the water dispute to conduct hearings. The court has used this system for years and it works well.*

- What would be a realistic timeline for Implementation?

*Answer: Implementation will occur immediately following statutory changes.*

- What would be some areas in MCA that would need to be reformed/amended to make this work?

*Answer: 85-2-406 should be amended to allow the Water Court to administer water rights. Changes would also be required to Title 85, chapter 2, part 1; and chapter 5, parts 2 and 3; and Title 3, chapter 7, parts 2, 3, and 5.*

## **WATER DISTRIBUTION PILOT PROJECT SCOPING WHITEPAPER**

February 2020

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 commissioners administration, and enter administrative concerning proper distribution of water
- The authority to for DNRC 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, ¶33, 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 ¶22, 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\\_definitionguide.pdf](https://hr.mt.gov/Portals/78/newdocs/guidesandforms/employee_definitionguide.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	<a href="#">Definitions</a> 2-18-101, MCA					
Permanent Status	<a href="#">Recruitment and Selection Policy</a> ARM 2.21.3701 et seq. <a href="#">Probation Policy</a>	Yes	Yes	No	No	No
Competitive Process	<a href="#">Recruitment and Selection Policy</a> ARM 2.21.3701 et seq.	Yes	Yes	Typically, unless agency decides on a case-by-case basis.	No	No
Sick and Annual Leave	<a href="#">Sick Leave Policy</a> <a href="#">Annual Leave Policy</a>	Yes	Yes	Yes	No	No
Holiday Pay	<a href="#">Holiday Policy</a>	Yes	Yes	Yes	No	No
Performance Management	<a href="#">Performance Management and Evaluation Policy</a> ARM 2.21.6401 et seq.	Yes	Yes	Not Required	Not Required	Not Required
Group Benefits	<a href="#">State Employee Group Benefits</a> 2-18-701 through 711, MCA	Yes	Yes	Yes	No	No
Retirement System	<a href="#">Public Retirement Systems</a> 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	<a href="#">Longevity Allowance</a> 2-18-304, MCA	Yes	Yes	May	No	No
Collective Bargaining	<a href="#">Collective Bargaining Agreements</a> 39-31-306, MCA	Yes	May	May	May	May
Grievance	<a href="#">Grievance Policy</a> 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



**MONTANA  
FARM BUREAU  
FEDERATION**

502 S. 19<sup>th</sup> Ave, Suite 104  
Bozeman, MT 59718

September 3, 2020

Water Policy Interim Committee  
P.O. Box 201704  
Helena, MT 59620-1704

RE: HJ 14 Study of the Future of the Water Court Public Comment

To whom it may concern,

The Montana Farm Bureau is a grassroots organization dedicated to preserving and improving the agriculture and natural resource industries through member involvement in education, political activities, programs and services. We represent our membership on all facets of agriculture.

The Montana Farm Bureau Federation would like to take this opportunity to comment on the Water Policy Interim Committee's report on water right ownerships updates, the study of the future of the Water Court.

The discussion on the future of the Water Court has been ongoing and deserves the time it has been given to ensure that a post adjudication Water Court is one that is agreed upon. The report done by WPIC explains much of this history and outlines potential options for the future. While adjudication completion is the priority for the Water Court and it must stay as the top priority, the post adjudication role that the Water Court plays in the state is vital to understand. Part of this is to gather where responsibilities lay within the DNRC, Water Court and District Courts.

The Montana Farm Bureau does support the continuation of the Water Court after adjudication is completed and we also understand that to best identify how to proceed a third party study may be the best the option. We support the continuation of this comprehensive study with a third party.

Thank you for your time,

Rachel Cone

Montana Farm Bureau Federation  
State Government Affairs

Appendix K (HJ14)  
**ROSS D. MILLER**  
ATTORNEY AT LAW

Miller Law, PLLC  
401 Washington St.  
Missoula, MT 59802

Phone: 406.544.0651  
e-mail: ross@millerlawmontana.com

August 11, 2020

**RE: House Joint Resolution 14 (HJ14) Comments**

Dear Water Policy Interim Committee,

Please consider my comments below as supplemental to my written comments submitted on December 10, 2019.

I fully support and agree with the “Judicial Branch Proposal For Changes to Water Court Jurisdiction” in its entirety.

1. Permanent and exclusive Water Court review of DNRC Permit and Change decisions will help ensure consistent application of the law by a court with the appropriate expertise. This consistency is lacking in the current system where water users can choose their forum.
2. Exclusive Water Court jurisdiction over Irrigation District boundaries would promote judicial economy and save water users money and time.
3. Concurrent jurisdiction by the Water Court over ditch easements would promote judicial economy and save water users money and time.
4. Water Court jurisdiction to administer and enforce water rights and the Water Court’s own decrees would promote judicial economy, provide consistency, and save water users money and time. Water users would benefit by having their cases heard in a court with specialized expertise to help them resolve complicated water distribution cases.

As a lawyer practicing exclusively in the area of Montana water law, I can attest to the advantages of having a specialized court for jurisdiction over these matters. In a similar manner as the Federal Bankruptcy Court is uniquely trained and qualified to hear complex bankruptcy matters, the Montana Water Court has unique expertise and technical background to hear Montana’s complicated water right matters.

I strongly encourage WPIC to support retaining the Water Court beyond the completion of Montana’s adjudication of pre-1973 “existing water rights”, and to change the court’s jurisdiction as recommended by the Judicial Branch. Thank you for the opportunity to comment.

Sincerely,



Ross D. Miller, P.E., Esq.

**From:** [M Seeburg](#)  
**To:** [Mohr, Jason](#)  
**Subject:** Re: [EXTERNAL] Re: Water committee seeks comment on 3 reports, 2 bills  
**Date:** Friday, August 07, 2020 2:32:17 PM

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Thanks, Jason. All my concerns are addressed in some manner. I do not think senate review(confirmation) is truly a review by the public and prefer the water court's masters to be voted on by citizens.  
Enjoy summer.  
Mick

On Aug 7, 2020, at 9:02 AM, Mohr, Jason <[JasonMohr@mt.gov](mailto:JasonMohr@mt.gov)> wrote:

Mick,

You can find the HJ14 report [here](#).

Thanks,

Jason

---

**From:** M Seeburg [mailto:[mseeburg@aol.com](mailto:mseeburg@aol.com)]  
**Sent:** Thursday, August 06, 2020 8:06 PM  
**To:** Mohr, Jason <[JasonMohr@mt.gov](mailto:JasonMohr@mt.gov)>  
**Subject:** [EXTERNAL] Re: Water committee seeks comment on 3 reports, 2 bills

Jason,  
Please forward the text of HJ 14 to me.  
Thank you  
Mick Seeburg

On Aug 6, 2020, at 5:01 PM, Jason Mohr <[jmohr2@mt.gov](mailto:jmohr2@mt.gov)> wrote:

The Water Policy Interim Committee (WPIC) is seeking public comment on three draft reports and two pieces of legislation.

The reports are:

- HJ 14 study of the future of the Water Court
- HJ 40 study of weather modification
- a whitepaper on "climate and water rights"

The legislation is related to:

- weather modification (PD0006)
- adjudication benchmarks (PD0010)

The committee will also release a bill draft related to water right ownership updates in the coming weeks.

Each report contains background and the committee's inquiries into each topic. The committee may preintroduce the proposed legislation for the 2021 session. The reports and legislation are available for review on the WPIC's website, <http://www.leg.mt.gov/water>. Comments may be sent to the WPIC at P.O. Box 201704, Helena, MT 59620-1704, or emailed to [jasonmohr@mt.gov](mailto:jasonmohr@mt.gov) with the subject line, "Public comments for WPIC reports/bills."

All comments received by 5 p.m. on Sept. 10 will be compiled for the WPIC prior to its Sept. 14-15 meeting. Comments received after the deadline will be provided to the WPIC at or after the meeting. Comments are welcome in person at the meeting as well. An agenda and other meeting materials for the September meeting will be made available on the WPIC's web site approximately two weeks in prior to the meeting.

The WPIC is led by Rep. Zach Brown, D-Bozeman, chairman, and Sen. Jeffrey Welborn, R-Dillon, vice-chairman. Other members of the committee are: Sen. Jill Cohenour (D-E. Helena), Sen. Bruce "Butch" Gillespie (R-Ethridge), Sen. Jon Sesso (D-Butte), Rep. Bob Brown (R-

Thompson Falls), Rep. Carl Glimm (R-Kila), Rep. Bradley Maxon Hamlett (D-Cascade), Rep. Shane Morigeau (D-Missoula), and Rep. Walt Sales (R-Manhattan).

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Senior Water Rights Coalition

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Helena, MT 59604

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To: Water Policy Interim Committee

From: Krista Lee Evans, Senior Water Rights Coalition

RE: Future of the Water Court Study

Date: September 2, 2020

The Senior Water Rights Coalition is a coalition of senior water right holders including irrigators, stock water users, and hydropower facilities. The Senior Water Rights Coalition works to protect the property rights of senior water right holders in Montana.

SrWRC appreciates the opportunity to provide public comment on the draft WPIC study addressing the Future of the Montana Water Court.

The “Future of the Water Court” is not a new issue to WPIC or to the Legislature. The hurdle that continues to emerge in these discussions is the interrelationship and appropriate separation of responsibilities between the Water Court, DNRC, and the District Court in the Water Use Act. A piecemeal approach of analyzing or changing the role or jurisdiction of one piece of the Water Use Act without substantive consideration to the other parties may not be conducive to a post adjudication process that is efficient and effective.

The priority for the Water Court must remain completion of the statewide adjudication in a timely and accurate manner. We also recognize that the discussions and ultimately decisions regarding the post-adjudication role of the Water Court, District Court, and DNRC need to be determined far enough in advance to facilitate implementation prior to completion of the adjudication.

SrWRC urges WPIC to move forward with a comprehensive analysis of future roles within the Water Use Act. It is critical that the legislature hear from impacted parties on this issue. A comprehensive analysis should be conducted by an independent third party in a manner that would encourage impacted parties to express their opinions and concerns.

We are committed to continuing to work on this important issue and the process that will guide the determination of the future role the Water Court, District Courts, and DNRC will perform under the Water Use Act.

**From:** [webmaster@localhost.legmt.gov](mailto:webmaster@localhost.legmt.gov)  
**To:** [Mohr, Jason](#)  
**Subject:** Public Comment Submission for WPIC  
**Date:** Monday, August 31, 2020 2:01:15 PM

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## Comments for WPIC

**Date:** 31st August 2020 14:01

**Full Name:**  
Leonard Ormseth

**Email Address:**  
[leonard.ormseth@umontana.edu](mailto:leonard.ormseth@umontana.edu)

**Subject Line:**  
HJ14

**Your Comment:**

The water court should finish adjudication as mandated then terminate its existence. At that time, management should shift to local water commissioners and district courts, as water issues are hyper-local, and these parties have the most apposite knowledge. In essence, a form of state-federalism takes over where the rights not reserved to the state are given to the localities because state-managed commissioners may have little to no knowledge on local water issues as they are far removed from the small communities where these issues are at play.

Sent via [www.leg.mt.gov/committees/interim/2019wpic/meeting-info/](http://www.leg.mt.gov/committees/interim/2019wpic/meeting-info/)