

To: Governor Greg Gianforte
Montana Attorney General Austin Knutson
The Chief Justice of the Montana Supreme Court, Mike McGrath
The Chief Water Judge of the Water Court, Wm. Russ McElyea

From: The Water Adjudication Advisory Committee

Date: July 28, 2021

RE: Opportunity to Comment on Draft Legislation Concerning Water Division Judges

The Water Adjudication Advisory Committee (“WAAC”) was established by the legislature in 1995 to provide recommendations to the Water Court, the Montana Supreme Court, the DNRC and the legislature on methods to improve and expedite the water adjudication process. Since its creation, the Committee has made several recommendations to the legislature on modifications to the water adjudication process in Montana which have subsequently been enacted into law. In January 2021, the most recent WAAC members were appointed by the Chief Water Judge, and convened in February 2021, to address subjects related to the issuance of final decrees by the Water Court.

The Montana Water Court is beginning to issue final decrees pursuant to Mont. Code Ann. § 85-2-234, signaling a historic shift in many parts of the state from adjudication of state-based water rights and localized administration of historical district court decrees to the comprehensive administration of final decrees. Final decrees will include state-based existing water rights and water right permits, as well as federal water rights and Indian reserved water rights.

This shift from adjudication to unified administration represents a major accomplishment and milestone in Montana’s protection and management of its water resources. With this historical milestone in mind, the Water Adjudication Advisory Committee recommends amendments to the Montana Code Annotated Title 3, Chapter 7, Part 2 (Water Judges) be considered to clarify how the functions of the Water Court will be implemented through the office of the water division judges by modifications to the existing statutes addressing the functions and duties of division judges.

The proposed amendments clarify that water division judges of the Montana Water Court would have inherent continuing jurisdiction to administer Water Court final decrees, confirming Montana’s statewide adjudication of all water rights remains comprehensive and sufficient for purposes of Montana’s primacy over water adjudication and administration under the McCarran Amendment.¹ Since Mont. Code Ann. § 3-7-201 *et seq.* has not been substantively updated since its enactment by the 1979 Legislature, the Committee’s recommendations also modernize the

¹ 43 U.S.C.A. Section 666(a) (statute allowing state courts concurrent jurisdiction to adjudicate *and administer* federal water rights under certain conditions); see also e.g., *State Eng’r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 809 (9th Cir. 2003) (analyzing McCarran Amendment administration of federal water rights by a state court).

appointment process and duties of division water judges in a future-focused manner that incorporates post-1979 statutory amendments to Title 85.

In making these recommendations, the committee was mindful of the role of DNRC in making permitting and change decisions, and mindful of the role local district courts may provide. The proposed modifications maintain DNRC's existing authorities in permitting and change decisions. The proposed modifications also provide an avenue and opportunity for the judges of the local district courts to function as water division judges in the administration of final decrees of the Water Court.

The recommended amendments to Title 3, Chapter 7, Part 2 will necessitate corresponding amendments to several statutes in Title 85, particularly Mont. Code Ann. § 85-2-406 (supervision of administration of water rights) and Title 85, Chapter 5 (water commissioners). It is the Committee's intention that these corresponding amendments flow from the framework shaped by the final recommended amendments to Title 3, Chapter 7, Part 2.

Prior to advancing these recommendations to the legislature, the Committee is seeking input and comments from a broad range of stakeholders in Montana, including your office. We look forward to your feedback on this important matter. Comments on the recommendations of the WAAC would be appreciated by August 30, 2021. Please forward any comments to Sara Calkins, Montana Water Court Administrator, at sara.calkins@mt.gov.