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## CHAPTER 5 WATER COMMISSIONERS AND WATER MEDIATORS

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### Part 1 Appointment and Duties

**85-5-101. Appointment of water commissioners.** (1) Whenever the rights of persons to use the waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply have been determined by a decree of a court of competent jurisdiction, including temporary preliminary, preliminary, and final decrees issued by a water judge, it is the duty of the judge of the district court having jurisdiction of the subject matter, upon the application of 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, in the exercise of the judge's discretion, to appoint one or more commissioners. The commissioners have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates, permits, and changes in appropriation right issued under chapter 2 of this title. When petitioners make proper showing that they are not able to obtain the application of the owners of at least 15% of the water rights affected or at least 15% of the flow rate of the water rights affected and they are unable to obtain the water to which they are entitled, the judge of the district court having jurisdiction may appoint a water commissioner.

(2) When the existing rights of all appropriators from a source or in an area have been determined in a temporary preliminary decree, preliminary decree, or final decree issued under chapter 2 of this title, the judge of the district court may, upon application by both the department of natural resources and conservation and one or more holders of valid water rights in the source, appoint a water commissioner. The water commissioner shall distribute to the appropriators, from the source or in the area, the water to which they are entitled.

(3) The department of natural resources and conservation or any person or corporation operating under contract with the department or any other owner of stored waters may petition the court to have stored waters distributed by the water commissioners appointed by the district court. The court may order the commissioner or commissioners appointed by the court to distribute stored water when and as released to water users entitled to the use of the water.

(4) At the time of the appointment of a water commissioner or commissioners, the district court shall fix their compensation, require a commissioner or commissioners to purchase a workers' compensation insurance policy and elect coverage on themselves, and require the owners and users of the distributed waters, including permittees, certificate holders, and holders of a change in appropriation right, to pay their proportionate share of fees and compensation, including the cost of workers' compensation insurance purchased by a water commissioner or commissioners. The judge may include the department in the apportionment of costs if it applied for the appointment of a water commissioner under subsection (2).

(5) Upon the application of the board or boards of one or more irrigation districts entitled to the use of water stored in a reservoir that is turned into the natural channel of any stream and withdrawn or diverted at a point downstream for beneficial use, the district court of the judicial district where the most irrigable acres of the irrigation district or districts are situated may appoint a water commissioner to equitably admeasure and distribute stored water to the irrigation district or districts from the channel of the stream into which it has been turned. A commissioner appointed under this subsection has the powers of any commissioner appointed under this chapter, limited only by the purposes of this subsection. A commissioner's compensation is set by the appointing judge and paid by each district and other users of stored water affected by the admeasurement and distribution of the stored water. In all other matters, the provisions of this chapter apply so long as they are consistent with this subsection.

(6) A water commissioner appointed by a district court is not an employee of the judicial branch, a local government, or a water user.

(7) A water commissioner who fails to obtain workers' compensation insurance coverage required by subsection (4) is precluded from receiving benefits under Title 39, chapter 71, as a result of the performance of duties as a water commissioner.

**History:** En. Sec. 1, Ch. 43, L. 1911; re-en. Sec. 7136, R.C.M. 1921; amd. Sec. 1, Ch. 125, L. 1925; re-en. Sec. 7136, R.C.M. 1935; amd. Sec. 1, Ch. 187, L. 1939; amd. Sec. 1, Ch. 231, L. 1963; amd. Sec. 39, Ch. 452, L. 1973; amd. Sec. 1, Ch. 51, L. 1975; R.C.M. 1947, 89-1001(1) thru (3), (5), (6); amd. Sec. 1, Ch. 444, L. 1979; amd. Sec. 1, Ch. 246, L. 1983; amd. Sec. 1, Ch. 468, L. 1989; amd. Sec. 7, Ch. 604, L. 1989; amd. Sec. 1, Ch. 179, L. 2003; amd. Sec. 37, Ch. 416, L. 2005; amd. Sec. 1, Ch. 92, L. 2007; amd. Sec. 1, Ch. 212, L. 2017.

### **Cross-References**

Water Judges, Title 3, ch. 7, part 2.

Appointment of Water Commissioner after final decree, 85-5-407.

Apportionment of costs, 85-5-408.

Board power to provide sufficient water, 85-7-1907.

### **Case Notes**

*Earlier Decree Superseded by Modified Temporary Preliminary Decree — Properly Enforced by Commissioner:* The plaintiff filed a dissatisfied water user complaint against a Water Commissioner for enforcing a modified temporary preliminary decree issued by the Water Court. The plaintiff argued that the commissioner should enforce the decree that preceded the temporary preliminary decree and that the decree was unenforceable. The District Court denied the plaintiff's complaint, holding that the temporary preliminary decree superseded the earlier decree and that the commissioner was correct in enforcing the temporary preliminary decree. On appeal, the Supreme Court agreed that the temporary preliminary decree superseded the plaintiff's claim of existing right and affirmed. *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, 383 Mont. 523, 373 P.3d 836.

*Water Court Exceeded Authority by Allowing Water Rights Owner Option to Divert Water Right Through Ditch — Remanded for Modification:* A group of water users with appropriation rights on the Teton River challenged the Water Commissioners for their practice of diverting water upstream and through a ditch to satisfy the water rights of another user with senior appropriation rights. The District Court issued a certification notice to the Water Court to determine all existing rights to divert water through the ditch. The Water Court concluded that the ditch user had a private right to divert water along the ditch and had the option to divert water or to take it from the river directly. On appeal, the Supreme Court reversed, holding that the Water Court did not have the authority to allow the ditch user the right to choose how it received the water and that the option belonged to the Water Commissioners of the District Court. *In re Eldorado Co-op Canal Co.*, 2014 MT 272, 376 Mont. 420, 337 P.3d 74. See also *In re Teton Co-op Reservoir Co.*, 2018 MT 66, 391 Mont. 66, 414 P.3d 1249.

*Distribution of Waters:* In an action by landowners against the State Water Conservation Board (precursor of the Department of Natural Resources and Conservation), for declaration of the respective rights of the parties to waters in a creek, plaintiffs alleged that the defendant's refusal to unlock the headgate to a ditch rendered it impossible for the Water Commissioner to measure and distribute the waters in question. Defendant's denial of this material allegation precluded a judgment on the pleadings. *Johnson v. St. Water Conserv. Bd.*, 140 M 603, 374 P2d 325 (1962).

*Persons Concluded by Decree:*

Any act of the judge or of any Water Commissioner appointed by him done in violation of the plain

mandate of the statute, which gives to the Commissioner authority to admeasure and distribute to the parties bound by the decree or decrees the waters to which they are entitled under the decrees, cannot be relied upon by a person to establish his claimed right to the prior use of waters by adverse possession. *Lamping v. Diehl*, 126 M 193, 246 P2d 230 (1952).

On certiorari, where landowner, who was not a party to an original water right suit or a successor in interest of a party thereto but who claimed a right under an appropriation the legality of which had not been a subject of litigation, tapped the stream and when advised by Water Commissioner that water in stream was insufficient for needs of those with decreed rights, continued in its use, a finding that he was guilty of contempt was not warranted in the absence of a showing that he interfered with the Commissioner in performance of his duties. *State ex rel. Reeder v. District Court*, 100 M 376, 47 P2d 653 (1935).

A person not mentioned in the decree, who joined in a petition for the appointment of the Water Commissioner and afterward refused to respect the decree, made himself a party thereto and was liable to be punished in contempt proceedings. *State ex rel. Pool v. District Court*, 34 M 258, 86 P 798 (1906).

*Contempt in County Other Than Where Decree Made:* Where the violation of the decree of the District Court of Cascade County was committed in Lewis and Clark County, the courts of Lewis and Clark County may punish for the violation. Contempts, being criminal in their nature, must be tried in the county where they were committed. *State ex rel. Swanson v. District Court*, 107 M 203, 82 P2d 779 (1938).

*River and Tributaries Flowing in Several Counties:* Where a river and its tributaries flowed in three counties, the District Court of any one of the counties had jurisdiction to adjudicate the water rights on the whole watershed. The court which first acquired jurisdiction retained it for the purpose of disposing of the whole controversy, and no court of coordinate power could interfere with its action. Such court "having jurisdiction" appoints the Water Commissioner to enforce its decree. This rule does not apply to rights not adjudicated in that decree. *State ex. rel. Swanson v. District Court*, 107 M 203, 82 P2d 779 (1938).

*Nature of Proceedings:*

Procedure under Montana statutes authorizing an owner or user of waters of an adjudicated stream who is dissatisfied with the method of distribution to file a written claim in the appropriate court and providing for a hearing and the making of appropriate findings and orders is not a formal trial but is more in the nature of proceedings ancillary to an original decree adjudicating rights on the stream. *Sain v. Mont. Power Co.*, 84 F2d 126 (9th Cir. 1936).

In a proceeding brought under this act, relating to the appointment and duties of Water Commissioners, by one owning or using an adjudicated water right who is dissatisfied with the method of distribution of the waters in a stream by a Commissioner, a formal trial, upon pleadings filed by the interested parties, is not contemplated. The only pleading required is the complaint, and the sole question for determination is whether the Commissioner has distributed the waters in accordance with the decree. Other users may present themselves at the hearing and resist the demands of a complainant orally if they object to the granting of relief. *Gans & Klein Inv. Co. v. Sanford*, 91 M 512, 8 P2d 808 (1932).

*Contempt Proceeding Not Procedure to Adjudicate Water Rights:* A Water Commissioner does not possess complete and exclusive jurisdiction to control the stream, regardless of whether all rights are adjudicated under court decree fixing measurement of water. Nor may the District Court in a contempt proceeding, summary in nature, decide that contemnor claiming right in stream, otherwise adjudicated, has no right. This may be done only by appropriate action after due notice and hearing. *State ex rel. Reeder v. District Court*, 100 M 376, 47 P2d 653 (1935), distinguished in *Clausen v. Armington*, 123 M 1, 212 P2d 440 (1949).

*Damages for Impairment of Water Rights:* The provisions relating to the appointment of a Water Commissioner and prescribing his duties and powers do not provide an exclusive remedy for one whose water rights have been impaired and therefore do not preclude him from maintaining an action for damages. *Tucker v. Missoula Light & Ry.*, 77 M 91, 250 P 11 (1926), distinguished in *Sain v. Mont. Power Co.*, 20 F. Supp. 843 (D.C. Mont. 1937).

**85-5-102. Appointment of chief commissioner.** When the judge of the district court appoints two or more commissioners to admeasure and distribute the waters mentioned in 85-5-101, the judge may appoint one of them as chief commissioner and empower the chief commissioner to exercise direction and control over the other commissioners in the discharge of their duties. The judge may depose the person appointed as chief commissioner from that position and appoint another as chief commissioner whenever it appears to the judge that better service may be given to the water users by making the change.

**History:** En. Sec. 2, Ch. 43, L. 1911; re-en. Sec. 7137, R.C.M. 1921; re-en. Sec. 7137, R.C.M. 1935; R.C.M. 1947, 89-1002; amd. Sec. 2770, Ch. 56, L. 2009.

#### **Cross-References**

Appointment of Water Commissioners, 3-7-211, 85-5-101.

**85-5-103. Oath and bond.** Each water commissioner appointed by the court shall subscribe and file with the clerk of the district court an oath of office before commencing the discharge of duties as commissioner and shall file with the clerk a bond executed by the commissioner, with two or more sureties, in a sum that the judge of the court may designate, to ensure the faithful discharge of the commissioner's duties.

**History:** En. Sec. 3, Ch. 43, L. 1911; amd. Sec. 1, Ch. 12, Ex. L. 1919; re-en. Sec. 7138, R.C.M. 1921; re-en. Sec. 7138, R.C.M. 1935; R.C.M. 1947, 89-1003; amd. Sec. 2771, Ch. 56, L. 2009.

#### **Cross-References**

Oaths, Title 1, ch. 6.

General duties of Clerk of District Court, 3-5-501.

Suretyship, Title 28, ch. 11, part 4.

#### **Case Notes**

*Discretion to Fix Bond:* The District Court has discretion to set the sum of a bond under this section at \$1. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

**85-5-104. Term of office.** A water commissioner holds office for the time during the irrigation season of each year that may be designated by the judge in the order making the appointment. The judge may fix the date of the commencement of the term and may, in the judge's discretion or when requested in writing by at least three persons entitled to the use of the waters, change the term for closing of the commissioner's service.

**History:** En. Sec. 4, Ch. 43, L. 1911; amd. Sec. 1, Ch. 116, L. 1921; re-en. Sec. 7139, R.C.M. 1921; re-en. Sec. 7139, R.C.M. 1935; amd. Sec. 1, Ch. 68, L. 1955; R.C.M. 1947, 89-1004; amd. Sec. 2772, Ch. 56, L. 2009.

#### **Cross-References**

Appointment of Water Commissioners, 3-7-211, 85-5-101.

**85-5-105. Power and duty to distribute water.** Upon the issuance of an order, the water commissioner or commissioners have authority and it is the commissioner's or commissioners' duty to admeasure and distribute to the users of water, as their interests may appear and be required, the stored and supplemental water stored and as released by the department of natural resources and conservation under provisions of Title 85, chapter 1, to be diverted into and through a stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply in the same manner and under the same rules as decreed water rights are admeasured and distributed. The water commissioner or commissioners and the owners and users of the stored and supplemental water are bound by and are subject to the provisions of this chapter. However, the admeasurements and distribution of the stored and supplemental water may not interfere with decreed water rights. The purpose of Title 85, chapter 5, parts 1 through 3, is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters.

**History:** En. Sec. 1, Ch. 43, L. 1911; re-en. Sec. 7136, R.C.M. 1921; amd. Sec. 1, Ch. 125, L. 1925; re-en. Sec. 7136, R.C.M. 1935; amd. Sec. 1, Ch. 187, L. 1939; amd. Sec. 1, Ch. 231, L. 1963; amd. Sec. 39, Ch. 452, L. 1973; amd. Sec. 1, Ch. 51, L. 1975; R.C.M. 1947, 89-1001(4); amd. Sec. 2773, Ch. 56, L. 2009.

## Cross-References

Priority, 85-2-401.

District Court supervision of water distribution, 85-2-406.

## Case Notes

*No Authority of Water Commissioner to Rule on Water Quality Issues:* A water commissioner is not vested with authority to rule on water quality issues. In re Water Complaint of Kelly, 2010 MT 14, 355 Mont. 86, 224 P.3d 640, clarifying Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, and Morrison v. Higbee, 204 Mont. 515, 668 P.2d 1025.

*Recharge of River — Right to Use of Water by Subsequent Appropriator Even Though No Water Available to Upstream Prior Appropriator:* A Water Commissioner closed the headgate of the Baker Ditch Company, a downstream appropriator with decreed water rights, because there was no water available to an upstream superior appropriator, even though there was water available to the Company due to recharge of the river by return flows, seepage, and other sources. The Commissioner evidently believed that he had to enforce the decree to the extent that if a prior appropriator was without water upstream, a subsequent appropriator downstream could not divert water under its rights even though the river was being recharged. However, if a subsequent appropriator is using water in accordance with the decree and that use cannot in any way be a detriment to a prior appropriator, then the subsequent appropriator has the right to the use of the water. Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260, 49 St. Rep. 17 (1992), replacing the prior opinion at 48 St. Rep. 972 (1991).

*Expiration of Commissioner's Term — Action Not Rendered Invalid:* The purpose of this section is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters. In order to assure this type of distribution, instructions given by a District Court must be binding upon the office of the Water Commissioner, not merely upon the individual holding the office at a particular time. Thus the filing of an action to clarify decreed rights subsequent to the expiration of a Commissioner's term does not render the action invalid. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

**85-5-106. Maintenance and repair of ditches or systems.** Upon written request of the owners of at least 51% of the water rights in any adjudicated ditch or single water system, the judge of the district court may empower the commissioner to maintain and keep in reasonable repair such water ditch or water system at the expense of the owners thereof, and for such purposes the commissioner shall have authority to enter and work upon any ditch, canal, aqueduct, or other source of conveying the waters affected by the decree and the right-of-way thereof and to visit, inspect, and adjust all headgates or other means of distribution of such waters.

**History:** En. Sec. 6, Ch. 43, L. 1911; re-en. Sec. 7141, R.C.M. 1921; re-en. Sec. 7141, R.C.M. 1935; R.C.M. 1947, 89-1006.

## Cross-References

Board plan for acquisition and construction, 85-7-1901.

Entry upon land by Board or agent, 85-7-1903.

**85-5-107. Record of distribution of water.** (1) Each water commissioner shall keep a daily record, unless a different recording schedule is ordered by the district judge, of the amount of water distributed to each water user and shall file a summary of the record with the clerk of the court monthly or seasonally, at the discretion of the district judge during the judge's term of service. The report must show in detail the total amount of water distributed to each water user during the month or the season and the cost of distributing the water, based upon the water commissioner's or commissioners' daily salary, other costs of the water commissioner or commissioners approved by the district judge, and the proportionate amount of water distributed. When two or more water commissioners serve under the same decree or decrees by order of the judge, they may file a joint summary of their records with the clerk of the court, or the chief commissioner, if one has been appointed by the judge, may file a summary on behalf of all of them.

(2) If the district court judge determines that it is necessary to establish a billing cycle prior to a distribution season, as provided in 85-5-204, the report or reports must serve as the basis for the amounts billed.

History: En. Sec. 9, Ch. 43, L. 1911; re-en. Sec. 7144, R.C.M. 1921; re-en. Sec. 7144, R.C.M. 1935; R.C.M. 1947, 89-1009; amd. Sec. 1, Ch. 305, L. 1983; amd. Sec. 1, Ch. 513, L. 2007.

#### Cross-References

General duties of Clerk of District Court, 3-5-501.  
Measurement of water, 85-2-103.  
District Court supervision of water distribution, 85-2-406.

**85-5-108. Authority and arrest power.** For the purposes of carrying out the provisions of Title 85, chapter 5, parts 1 through 3, each commissioner appointed by the court has the authority to enter upon any ditch, canal, aqueduct, or other source for conveying the waters affected by the decree and to visit, inspect, and adjust all headgates or other means of distributing the waters and has the same powers as a sheriff or constable to arrest any person interfering with the distribution made by the commissioner, to be dealt with according to law.

History: En. Sec. 8, Ch. 43, L. 1911; re-en. Sec. 7143, R.C.M. 1921; re-en. Sec. 7143, R.C.M. 1935; R.C.M. 1947, 89-1008; amd. Sec. 2774, Ch. 56, L. 2009.

#### Cross-References

Arrest, Title 46, ch. 6.  
Entry upon land by Board or agent, 85-7-1903.

#### Case Notes

*Power of Commissioner Appointed in Another County:* The fact that a Water Commissioner is by this section vested with the same power of arrest as is a Sheriff or Constable, whose powers are confined to their counties, does not militate against the holding that the District Court of one county may appoint a Commissioner in another county to which his duties are wholly confined. One violating a water right decree will not be heard to say that his arrest should have been accomplished by some other officer. State ex rel. Swanson v. District Court, 107 M 203, 82 P2d 779 (1938).

*Offender Liable to Injured Party for Damages:* It is true that under the authority vested in him by this section the Commissioner may arrest an offender for interference with such distribution and take him before the court for punishment, but such action does not in any manner compensate the party injured by the unlawful act of the culprit and therefore does not preclude him from maintaining an action for damages. Tucker v. Missoula Light & Ry., 77 M 91, 250 P 11 (1926), distinguished in Sain v. Mont. Power Co., 20 F. Supp. 843 (D.C. Mont. 1937).

*Nonjudicial Officer:* This section does not constitute Water Commissioners judicial officers in the sense that violations of their orders are contempts committed in the immediate view and presence of the court. State ex rel. Flynn v. District Court, 33 M 115, 82 P 450 (1905).

**85-5-109. Failure to perform duty as contempt of court.** If a commissioner fails to perform any of the duties imposed upon the commissioner by the order of the judge of the district court, the commissioner is guilty of contempt of court.

History: En. Sec. 7, Ch. 43, L. 1911; re-en. Sec. 7142, R.C.M. 1921; re-en. Sec. 7142, R.C.M. 1935; R.C.M. 1947, 89-1007; amd. Sec. 2775, Ch. 56, L. 2009.

#### Cross-References

Contempts, Title 3, ch. 1, part 5.

**85-5-110. Appointment of water mediators — duties.** (1) Except as provided in 85-20-1902, the judge of the district court may appoint a water mediator to mediate a water controversy in a decreed or nondecreed basin under the following circumstances:

- (a) upon request of the governor;
  - (b) upon petition by at least 15% of the owners of water rights in a decreed or nondecreed basin; or
  - (c) in the discretion of the district court having jurisdiction.
- (2) A water mediator appointed under this section may:
- (a) discuss proposed solutions to a water controversy with affected water right holders;
  - (b) review options related to scheduling and coordinating water use with affected water right holders;

(c) discuss water use and water needs with persons and entities affected by the existing water use;  
(d) meet with principal parties to mediate differences over the use of water; and  
(e) hold public meetings and conferences to discuss and negotiate potential solutions to controversies over use of water.

(3) If the governor requests or a state agency petitions for a water mediator, the governor or agency shall pay all or a majority of the costs of the water mediator as determined equitable by the district court having jurisdiction.

(4) The governor may use funds appropriated under 75-1-1101 to pay the costs of a water mediator.

(5) This section does not allow a water mediator to require any valid water right holder to compromise or reduce any of the holder's existing water rights.

(6) If an appropriator voluntarily ceases to use all or part of an appropriation right or voluntarily ceases to use an appropriation right according to its terms and conditions as a result of the efforts of a mediator appointed under this section, the appropriator may not be considered to have abandoned all or any portion of the appropriation right.

**History:** En. Sec. 1, Ch. 625, L. 1989; amd. Sec. 1, Ch. 108, L. 1991; amd. Sec. 2776, Ch. 56, L. 2009; amd. Sec. 11, Ch. 294, L. 2015.

### **Cross-References**

Environmental contingency account objectives, 75-1-1101.

**85-5-111. Water commissioner and mediator education.** (1) The department of natural resources and conservation, in cooperation with the Montana supreme court, the Montana water courts, the district courts of Montana, the Montana university system, and other appropriate state and federal agencies, shall develop an educational program for water commissioners and mediators that includes:

(a) an annual seminar on commissioner and mediator duties, mediation techniques, and water measuring techniques;

(b) preparation and, as necessary, revision of a water commissioner and mediator manual; and

(c) an outreach program that identifies persons who might serve as water commissioners or mediators.

(2) Unless a district court judge having jurisdiction determines otherwise, a water commissioner appointed pursuant to 85-5-101 shall complete at least one educational program as provided in subsection (1) prior to administering water.

**History:** En. Sec. 2, Ch. 625, L. 1989; amd. Sec. 1, Ch. 118, L. 2017.

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## **Part 2**

### **Charges and Expenses**

**85-5-201. Distribution of water and related expenses.** (1) Each water commissioner appointed by the judge of the district court for the purpose of distributing water has the authority to determine the appropriate quantity and distribute to the parties interested, under a decree, permit, certificate, or change in appropriation right, the water to which those who are parties to the decree or holders of a permit, certificate, or change in appropriation right, or privy to a permit, certificate, or change in appropriation right, are entitled, according to their priority as established by the decree, permit, certificate, or change in appropriation right.

(2) The water commissioner may incur necessary expenses in the making of headgates or dams for the distribution of the waters if the parties fail or refuse to do so. Expenses associated with making headgates or dams for the distribution of water must be assessed against and paid by the party or parties for whom the ditch or ditches were repaired or the dams or headgates were made. In the discretion of the court, the costs or expenses may be assessed against the land upon which or for the benefit of which the expense had been incurred.

(3) (a) At the district court's discretion, a water commissioner may bill water users prior to the beginning of a distribution season for the purpose of offsetting costs associated with distributing water and water commissioner duties by submitting the information necessary for the billing to the clerk of the district court. A billing issued prior to the beginning of a distribution season:

(i) must be assessed on a per-user basis;

(ii) must be based on the report provided for in 85-5-107 for the prior year; and

(iii) may not exceed 80% of the amount that was provided to the district court pursuant to 85-5-107 for the prior distribution season on a per-user basis.

(b) Upon receipt of the information from the water commissioner, the clerk of district court shall proceed as provided in 85-5-204.

**History:** En. Sec. 5, Ch. 43, L. 1911; re-en. Sec. 7140, R.C.M. 1921; amd. Sec. 2, Ch. 125, L. 1925; re-en. Sec. 7140, R.C.M. 1935; R.C.M. 1947, 89-1005; amd. Sec. 2, Ch. 246, L. 1983; amd. Sec. 2, Ch. 92, L. 2007; amd. Sec. 2, Ch. 513, L. 2007.

#### **Cross-References**

Appointment of Water Commissioners, 3-7-211, 85-5-101.

Priority, 85-2-401.

Irrigation districts — indebtedness, bonds, and bankruptcy, Title 85, ch. 7, part 20.

Irrigation districts — taxes and assessments, Title 85, ch. 7, part 21.

#### **Case Notes**

*Court Allowed to Assess Lands in Another County:* The District Court of one county has power to make an assessment for costs and expenses against lands situated in another county benefited by appointment of a Water Commissioner, thereby creating liens upon such lands. This procedure is no more objectionable than the statutory provision that a judgment rendered in one county is a lien upon real estate of the debtor in another county under 25-9-302. *State ex rel. Swanson v. District Court*, 107 M 203, 82 P2d 779 (1938).

**85-5-202. Repair expenses.** The judge may allow as a charge any expenses necessarily incurred by the water commissioner in the discharge of duties in the employment of extra labor for the repair of dams, headgates, ditches, or flumes when immediate action is necessary to preserve the rights of the parties entitled to the waters of a stream or when the judge has, in the order appointing the commissioner, required the commissioner to repair ditches and keep in repair necessary headgates, ditches, or flumes. The water commissioner shall report all expenses, and the cost must be taxed against the party or parties for whose benefit the expenses were incurred. In the discretion of the court, the costs or expenses may be assessed against the land upon which or for the benefit of which the expense had been incurred.

**History:** En. Sec. 10, Ch. 43, L. 1911; re-en. Sec. 7145, R.C.M. 1921; amd. Sec. 3, Ch. 125, L. 1925; re-en. Sec. 7145, R.C.M. 1935; R.C.M. 1947, 89-1010; amd. Sec. 2777, Ch. 56, L. 2009.

#### **Cross-References**

Board powers over district property, 85-7-1908.

**85-5-203. Telephone expenses.** The judge may also allow as a charge reasonable expenses incurred by a water commissioner in telephoning to the judge for instructions in cases of emergency. When there are two or more commissioners acting under the judge's order, reasonable expenses incurred in communicating with each by telephone or with the judge of the district court, in order to carry on the distribution of the waters harmoniously and in accordance with the decree, shall be deemed a necessary expense. These expenses shall be reported by the water commissioner or commissioners at the close of the season and shall be taxed against all the water users affected by the decree or decrees ratably in proportion to the whole amount of water distributed to them during the season.

**History:** En. Sec. 11, Ch. 43, L. 1911; re-en. Sec. 7146, R.C.M. 1921; re-en. Sec. 7146, R.C.M. 1935; R.C.M. 1947, 89-1011.

#### **Cross-References**

Water Judges, Title 3, ch. 7, part 2.

**85-5-204. Apportionment of fees and expenses.** (1) Upon the filing of the report by the water commissioner or water commissioners, the clerk of court shall notify by letter each person mentioned in the report:

(a) of the amount the water user is made liable for by the report;

(b) that objections to the report and the amount taxed against the water user may be made by any person interested in the report or the amount assessed against the water user within 20 days after the date of the mailing of the notice; and

(c) that, unless objections are filed, an order will be made by the judge of the district court finally fixing and determining the amount due from each of the water users.

(2) The affidavit of the clerk that the clerk has mailed a notice to each person mentioned in the report at the person's last-known post-office address, in the usual manner, must be considered prima facie evidence that the person received the notice provided for in this section.

(3) At the discretion of the district judge, the water commissioner may issue a bill prior to the beginning of a distribution season for the purpose of offsetting costs associated with distributing water and water commissioner duties by submitting the information necessary for the billing to the clerk of the district court. The bill for each water user may not exceed 80% of the amount that was provided to the district court pursuant to 85-5-107 for the prior distribution season.

(4) If the cost of distributing water during a distribution season is less than the amount that was collected through a bill issued prior to a distribution season, the water commissioner shall refund the money to the water user based on the amount of water that the water user received during the distribution season. The water commissioner shall submit a refund report, along with proof that any refunds were issued, to the clerk of district court for filing.

**History:** En. Sec. 12, Ch. 43, L. 1911; re-en. Sec. 7147, R.C.M. 1921; amd. Sec. 1, Ch. 11, L. 1923; amd. Sec. 1, Ch. 45, L. 1927; re-en. Sec. 7147, R.C.M. 1935; R.C.M. 1947, 89-1012; amd. Sec. 3, Ch. 513, L. 2007.

#### **Cross-References**

General duties of Clerk of District Court, 3-5-501.

**85-5-205. Objections to expenses — hearing.** At the expiration of the 20 days' notice, as provided for in the preceding section, if objections to said report have been filed or a motion to retax the same has been made, the court or judge shall fix a time for the hearing of such objections or motion to retax, which time of hearing shall be as soon as the judge or a court can conveniently hear the same. Any person objecting to said report shall be entitled to at least 5 days' notice of the date and time of such hearing. At such hearing the court or judge shall hear and determine the motion or objections and shall make an order fixing and determining the amount found due from each of said water users to such commissioner or commissioners. In case no objections are filed within the 20 days, as hereinbefore provided for, such order shall be made as a matter of course, and in either case said order shall be final determination of the matter.

**History:** En. Sec. 13, Ch. 43, L. 1911; re-en. Sec. 7148, R.C.M. 1921; amd. Sec. 2, Ch. 11, L. 1923; re-en. Sec. 7148, R.C.M. 1935; R.C.M. 1947, 89-1013.

**85-5-206. Effect of order fixing fees.** After the order of the court fixing the fees and compensation and expenses of the water commissioner is final, the order has the force and effect of a judgment against the person to whom the water was or will be distributed and for whose benefit it was used or will be used. When the expenses of a commissioner or commissioners has been assessed against the land for which the service of the commissioner or commissioners has been rendered, the assessment is a lien against the land. The lien has the same effect as a judgment. The lien may be executed in the same manner as a judgment upon order of the court. The water commissioner, at the water commissioner's discretion, may withhold further determinations of quantity or distribution of water to any person entitled to the water until the person has paid all fees, compensation, and expenses of the water commissioner or commissioners fixed by the court and apportioned and charged to the person, including bills sent prior to the beginning of a distribution season. The commissioner may withhold the determination of quantity and distribution of water from any land against which there exists any lien that is the result of lack of payment pursuant to this section until the lien has been fully discharged.

**History:** En. Sec. 14, Ch. 43, L. 1911; re-en. Sec. 7149, R.C.M. 1921; amd. Sec. 4, Ch. 125, L. 1925; amd. Sec. 1, Ch. 39, L.

1929; re-en. Sec. 7149, R.C.M. 1935; R.C.M. 1947, 89-1014; amd. Sec. 4, Ch. 513, L. 2007.

### Compiler's Comments

*2007 Amendment:* Chapter 513 deleted former third sentence that read: "Execution may issue upon the order, as upon a judgment, by direction of the court or judge upon the application of any person interested therein", inserted third and fourth sentences providing that lien has same effect as judgment and may be executed in same manner as a judgment, and in fifth sentence at end inserted reference to bills sent prior to beginning of distribution season; and made minor changes in style. Amendment effective May 16, 2007.

### Cross-References

Appointment of Water Commissioners, 3-7-211, 85-5-101.

Execution of judgment, Title 25, ch. 13.

District Court supervision of water distribution, 85-2-406.

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## Part 3

### Rights and Duties of Water Users

**85-5-301. Complaint by dissatisfied user.** (1) A person owning or using any of the waters of the stream or ditch or extension of the ditch who is dissatisfied with the method of distribution of the waters of the stream or ditch by the water commissioner or water commissioners and who claims to be entitled to more water than the person is receiving or to a right prior to that allowed the person by the water commissioner or water commissioners may file a written complaint, duly verified, setting forth the facts of the claim.

(2) Upon receipt of the complaint, the judge shall fix a time for the hearing of the petition and shall direct that notice be given to the parties interested in the hearing as the judge considers necessary. At the time fixed for the hearing, the judge shall hear and examine the complainant and other parties who appear to support or resist the claim and examine the water commissioner or water commissioners and witnesses regarding the charges contained in the complaint.

(3) Upon the determination of the hearing, the judge shall make findings and issue an order that the judge considers just and proper. If it appears to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, permit, certificate, or change in appropriation right, the judge shall give the proper instructions for distribution of the water.

(4) The judge may remove any water commissioner and appoint a new water commissioner if the judge determines that the interests of the parties in the waters mentioned in the decree, permit, certificate, or change in appropriation right will be best served by appointing a new water commissioner. If it appears to the judge that the water commissioner has willfully failed to perform the water commissioner's duties, the water commissioner may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make an order regarding the payment of costs of the hearing that the judge determines is just and proper.

**History:** En. Sec. 15, Ch. 43, L. 1911; re-en. Sec. 7150, R.C.M. 1921; amd. Sec. 5, Ch. 125, L. 1925; re-en. Sec. 7150, R.C.M. 1935; amd. Sec. 13, Ch. 460, L. 1977; R.C.M. 1947, 89-1015; amd. Sec. 3, Ch. 92, L. 2007.

### Cross-References

Contempts, Title 3, ch. 1, part 5.

Appeals from final decree, 85-2-235.

### Case Notes

*Water Commissioner, Billing Records Contrary to Witness Testimony — Evidence Undermining Written Records With Witness Testimony Sufficient to Establish Continual Use — Failure to Assert Rights Through Water Commissioner — Nonuse:* In an action involving water rights adjudication, the Water Court adopted the Water Master's report, finding that the objectors failed to prove that the claimant had

abandoned the water right due to 10 successive years of misuse. While the objectors provided evidence that the Water Commissioner and billing records established a period of nonuse for 17 years, the Water Court determined that witness testimony contradicted this evidence and that, while the records were instructive, evidence undermining the credibility of the records was persuasive. On appeal, the Supreme Court affirmed, holding that the objectors failed to establish a continuous period of nonuse, the Water Master's report was based on substantial credible evidence, the Water Commissioner and billing records were not dispositive, the failure to assert water rights through the Water Commissioner was not the equivalent of nonuse, and the Water Court was correct to not address the issues of partial abandonment and whether additional remedies were available to the objectors. *In re Klamert*, 2019 MT 110, 395 Mont 420, 443 P.3d 379.

*Place-of-Use Requirement — Water Supply Company's Claim of Service Area and Not Historic Place of Use Proper:* The plaintiffs sued a water supply company after it locked the plaintiffs' headgate. The parties disputed the extent to which the company satisfied the place-of-use requirement. The company argued that the water rights it acquired prior to the Water Use Act (Title 85, ch. 2) extended to its claimed service area. The Water Master, however, concluded that the company's rights were limited to the boundaries of its historical use. The Water Court rejected the Water Master's conclusions. On appeal, the Supreme Court affirmed the Water Court, holding that the concept of a service area is the proper method of satisfying the place-of-use requirement for a water service company. *Curry v. Pondera County Canal & Reservoir Co.*, 2016 MT 77, 383 Mont. 93, 370 P.3d 440.

*Rights of Water Supply Company — Measurement Based on Shares Authorized by Carey Land Board, Not Actual Acreage Irrigated:* The plaintiffs sued a water supply company after it locked the plaintiffs' headgate. The plaintiffs argued that the company's water rights that were authorized by the Montana Carey Land Board (MCLB) extended only to the amount of actual acreage irrigated by the shareholders of the company, whereas the company claimed that its rights extended to the maximum number of shares authorized by the MCLB. The Water Master concluded that the company's rights extended to the actual acreage irrigated by the shareholders. The Water Court rejected the Water Master's conclusion, holding that the company's rights extended to the maximum number of shares authorized by the MCLB. On appeal, the Supreme Court affirmed the Water Court's ruling, holding that the Water Master's conclusion ran contrary to the policy and intent of the Carey Land Act. *Curry v. Pondera County Canal & Reservoir Co.*, 2016 MT 77, 383 Mont. 93, 370 P.3d 440.

*No Authority of Water Commissioner to Rule on Water Quality Issues:* A water commissioner is not vested with authority to rule on water quality issues. *In re Water Complaint of Kelly*, 2010 MT 14, 355 Mont. 86, 224 P.3d 640, clarifying *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067, and *Morrison v. Higbee*, 204 Mont. 515, 668 P.2d 1025.

*Objections to State Conduct in Issuing Water Rights Permit or Providing Information Regarding Permit Outside Scope of Dissatisfied Water User Complaint Process:* Any objections to the conduct of the Department of Natural Resources and Conservation in issuing water rights permits or in providing information regarding the permit are outside the scope of the informal dissatisfied water user complaint process. *In re Water Complaint of Kelly*, 2010 MT 14, 355 Mont. 86, 224 P.3d 640.

*Jurisdiction of District Court to "Update" Old Water Rights Decree — Statute Governing Complaints by Dissatisfied Users Inapplicable:* Pursuant to a previous writ of supervisory control, a remand to the District Court, and findings entered by the Senior Water Master, the Supreme Court found that the Order Authorizing Updated Decree, entered by the judges of the Fourth Judicial District in January of 1989, was beyond the jurisdiction of the District Court. The order was intended to deal with the problem of a 1902 water rights decree by a District Court, in which the judge adjudicated 27 water rights on Carlton Creek, that had become so brittle with age and damaged by time that the decree could not be readily handled. In the process of updating and reissuing the 1902 order, the Supreme Court found that the Fourth Judicial District Judges had actually made a de facto adjudication of water rights in an overly appropriated drainage and that that adjudication had been undertaken without notice and hearing to the holders of certain of those water rights. Citing *Mildenberger v. Galbraith*, 249 M 161, 815 P2d 130 (1991), and *Baker Ditch Co. v. District Court*, 251 M 251, 824 P2d 260 (1992), the Supreme Court held that under 85-2-234(6), it is within the sole jurisdiction of the Water Court to determine such things as priority dates, flow rates, place of use, and means of diversion with respect to a water right. The Supreme Court also held that the matters adjudicated by the decree were not within the scope of matters cognizable under

this section because that section concerns the correct administration of a water rights decree while the Updated Decree attempts to change the terms of the decree itself. For these reasons, the Supreme Court vacated the 1989 Updated Decree. *State ex rel. Jones v. District Court*, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

*Continuance of Water Use Case Properly Denied:* On October 7, 4 days before a scheduled hearing on charges of contempt of the order of a Water Commissioner, counsel for relator sent a letter notifying the court that his schedule would prevent him from appearing and requesting that the hearing be continued until November 4 or 18, approximately 1 month later. However, the court properly denied the request in light of the fact that the continuance would have left relator in sole possession and use of all waters of the creek for over a month at a time when very little remained of the irrigation season. *Marks v. District Court*, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

*Knowledge of Water Commissioner's Directives and Procedures Sufficient to Uphold Contempt Charge:* A water user's participation in many water controversies over a period of several years, his continuing refusal to abide by a Water Commissioner's directives, and his prior knowledge of procedures involving water Commissioners and Water Courts provided sufficient substantial evidence for a lower court to find that the water user was in contempt of court for failing to obey an order of a Water Commissioner. *Marks v. District Court*, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

*Proceedings to Be Informal:* The procedure in a dissatisfied water user's action filed under this section is informal. Since standard trial procedures are not followed in this informal, summary proceeding, the time limits governing posttrial procedures should not be strictly applied. *Morrison v. Higbee*, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

*Scope of Court's Authority in Dissatisfied Water User's Action:* The purpose of a dissatisfied water user's action is to enforce the original decree and oversee the Water Commissioner's distribution of water through properly maintained ditches, headgates, and other water measuring devices. In an action of this type, it was appropriate for a District Court to order the removal of trees and brush on an irrigation ditchbank when the purpose of the removal was to enhance the method of distribution of water. *Morrison v. Higbee*, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

*Court's Findings Exceeding Scope of Section:* Findings based upon facts and occurrences subsequent to the decree under consideration and those outside of the pleadings, record, and judgment role of that decree exceeded the scope of this section. *Luppold v. Lewis*, 172 M 280, 563 P2d 538 (1977).

*Evidence Sufficient to Establish Interference With Water Commissioner:* Evidence that a water user locked and rendered inoperative headgate controls at the diversion point from a creek was sufficient to establish that the water user interfered with and hindered the duties of the Water Commissioner. *Luppold v. Lewis*, 172 M 280, 563 P2d 538 (1977).

*Expiration of Commissioner's Term — Action Not Rendered Invalid:* The purpose of this section is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters, and in order to assure this type of distribution, instructions given by a District Court must be binding upon the office of the Water Commissioner, not merely upon the individual holding the office at a particular time. Thus the filing of an action to clarify decreed rights subsequent to the expiration of a Commissioner's term does not render the action invalid. *Luppold v. Lewis*, 172 M 280, 563 P2d 538 (1977).

*Notice to All Water Users on a Creek:* The District Court is not required to give notice in an action for clarification of a 1890 water rights decree to all water users on a creek under the prior decree. Specifically, notice is not required to be given to users who have not questioned a Water Commissioner's authority and whose rights are not adversely affected. *Luppold v. Lewis*, 172 M 280, 563 P2d 538 (1977).

*Prior Decree Uncertain:* The purpose of an action pursuant to this section is not to adjudicate water rights previously determined by decree but only to enforce the rights determined by the prior decree. Thus, in determining whether a Water Commissioner properly distributed water, a District Court must look to two factors: (1) what was adjudged in the former proceeding and decree; and (2) was the Water Commissioner distributing the water in accordance with what was adjudged. As to the first factor, the absence of identifying the respective lands of the water owners is sufficient by itself to support the District Court's finding that the prior decree was uncertain in meaning and susceptible of different interpretations. *Luppold v. Lewis*, 172 M 280, 563 P2d 538 (1977).

*Standing:* Plaintiff has standing to pursue an action under this section on the basis that he is

dissatisfied with the method of distribution of a Water Commissioner and that plaintiff's entitlement to more water is in jeopardy. Plaintiff may also have standing if he is dissatisfied with the method of distribution of the Water Commissioner and his entitlement to a right prior to that allowed him by a Water Commissioner is being challenged. *Luppold v. Lewis*, 172 M 280, 563 P2d 538 (1977).

*Counterclaim Denied:* A counterclaim against a petition of an irrigation district for additional appropriation of water was properly denied where evidence was uncontradicted that water was going to waste and that impoundment would be beneficial. *Sunset Irrigation District v. Ailport*, 166 M 11, 531 P2d 1349 (1974).

A petition filed under this section is limited to consideration of the rights under the decree that the Water Commissioner is administering. A plaintiff lacks standing as a dissatisfied user to challenge the Water Commissioner's actions under a decree if the plaintiff's water rights are not derived from that decree. *Fellows v. Office of Water Comm'r*, 2012 MT 169, 365 Mont. 540, 285 P.3d 448. See also *Fellows v. Saylor*, 2016 MT 45, 382 Mont. 298, 367 P.3d 732.

*Purpose of Summary Proceeding:* The District Court had no authority in a proceeding under this section to approve a method of distribution which changed the point of diversion of water to a tract and changed the transportation ditch thereto, because the only function of the court in such a proceeding is to determine whether the water involved is being allocated in compliance with existing decrees and not to decree new water rights. *Allen v. Wampler*, 143 M 486, 392 P2d 82 (1964).

*Purpose Not to Adjudicate Water Rights:* The purpose of the summary proceeding authorized by this section is not to adjudicate water rights determined by prior decrees or, under the guise of instructions to the Commissioner after hearing, to summarily subordinate the right of one to that of another where, as between the two, their rights have never been adjudicated. A Water Commissioner is as disinterested in such proceeding as a stakeholder or interpleader and may not champion the rights of an owner whose rights have never been adjudicated and who had no notice and did not appear at the hearing. *State ex rel. McKnight v. District Court*, 111 M 520, 111 P2d 292 (1941).

*Real Parties in Interest:* As in the case of an injunction action against a Water Commissioner, so in a proceeding under this section, the real parties interested are the parties whose water rights are affected. The constitutional right of due process cannot be abridged by the court's instructing the Water Commissioner in a manner subordinating the right of one to that of another to conform to a decree to which the former was not a party, merely because time and expense would be consumed in litigation between users whose rights between themselves have not been adjudicated. *State ex rel. McKnight v. District Court*, 111 M 520, 111 P2d 292 (1941).

*Appropriations in Anticipation of Future Needs:* When the intention is made manifest, the court must take into consideration prospective or future needs in entering a water right decree, and a mere description of lands does not justify the extended use of water in the absence of recitals in the pleadings and decree and proof in the record that the appropriation is made in anticipation of future needs. In reviewing the acts of the Water Commissioner in distributing water, in a proceeding under this section, reasonable diligence must be shown to have been exercised since entry of the decree in developing such needs. *Quigley v. McIntosh*, 110 M 495, 103 P2d 1067 (1940).

*Diversion Into Fishpond Without Outlet Constituting Unauthorized New Appropriation:* Where, after the appointment of a Water Commissioner, there never was more than enough water in an adjudicated stream to supply the needs of the parties under their adjudicated rights, a diversion of water therefrom by one of them into a fishpond which had no outlet constituted an attempted new appropriation under sections 89-829 through 89-838, R.C.M. 1947 (now repealed), which in the absence of a decree establishing it was unauthorized and therefore properly prohibited by an order of a court in a proceeding under this section. *Quigley v. McIntosh*, 110 M 495, 103 P2d 1067 (1940).

*Reference to Entire Record to Construe Obscure or Uncertain Decree:* In construing a water right decree which is lacking in certain elements or obscure and uncertain in meaning, the Supreme Court, on appeal from orders of the District Court in a proceeding under this section relating to the actions of a Water Commissioner in distributing water to claimants whose rights were adjudicated in prior decrees, may refer to the pleadings, judgment roll, or the entire record of the case. *Quigley v. McIntosh*, 110 M 495, 103 P2d 1067 (1940).

*Rule as to Extended Use of Water Irrespective of the Rights of Others:* Owners of decreed rights are not entitled to increase the use of the water decreed on additional lands even if they do not exceed their

decreed quota per unit of time, when to do so would result in injury to subsequent appropriators. The decreed right is limited to water taken and beneficially applied on lands either in actual or contemplated irrigation at the time it was decreed. *Quigley v. McIntosh*, 110 M 495, 103 P2d 1067 (1940).

*Jurisdiction Federal Court May Entertain:* That a prior decree of a state court settling water priorities in a particular stream permanently enjoined parties thereto from interfering with rights of each other did not preclude federal court from entertaining jurisdiction of a suit to have the power company's rights adjudged inferior to plaintiffs', in view of holdings of state court authorizing independent actions, notwithstanding prior injunction; nor does the fact that state court had appointed a Water Commissioner and through him was still exercising jurisdiction over the res preclude exercise of jurisdiction, especially where state laws did not contemplate that his adjustment of water rights should be exclusive. *Sain v. Mont. Power Co.*, 84 F2d 126 (9th Cir. 1936).

*Questions to Be Determined:* In a proceeding under this section, the primary questions for consideration by the trial court are: (1) what was adjudged in the former proceeding and decree; and (2) was the Water Commissioner distributing the water in accordance with what was there adjudged. *Brennan v. Jones*, 101 M 550, 55 P2d 697 (1936).

*Jurisdiction of District Court:* In a proceeding brought under this section by a dissatisfied water user against a Water Commissioner appointed to admeasure the waters of a tributary of a river, defendant's contention that his refusal to distribute water to plaintiff was justified by the fact that the tributary flowed entirely in his county and that therefore the District Court of a neighboring county was without jurisdiction to render the decree upon which plaintiff relied as the basis of his water right was without merit. *Whitcomb v. Murphy*, 94 M 562, 23 P2d 980 (1933), distinguished in *State ex rel. Swanson v. District Court*, 107 M 203, 82 P2d 779 (1938).

*Claimant to Be Able to Use Water Before He May Object to the Use by Others:* Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water or for damages for its diversion. *Miles v. Butte Elec. & Power Co.*, 32 M 56, 79 P 549 (1905).

### **Attorney General's Opinions**

*Water Commissioner Employee of District Court Judge:* When a District Court Judge appoints a Water Commissioner under Title 85, ch. 5, the District Court Judge, rather than the water users, is considered the employer for the purpose of payment of workers' compensation. 40 A.G. Op. 56 (1984).

**85-5-302. Maintenance of headgates and measuring devices.** All persons using water from any stream or ditch for which a water commissioner is appointed are required to have suitable headgates at the point where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in the ditch. If a person fails to place or maintain a proper measuring appliance, it is the duty of the water commissioner not to apportion or distribute any water through the ditch. The commissioner shall notify all parties interested by certified mail or in person 1 week before making the annual repair or cleaning of a stream or ditch or performing necessary labor or expenses to divert water to a ditch. The sending of a certified letter to the last-known post-office address of any interested party is prima facie evidence of the fact that the party was duly notified. Any work in the way of repairing a ditch made necessary by an emergency may be done without notice when injury would result from a delay.

**History:** En. Sec. 7, Ch. 64, L. 1905; re-en. Sec. 4890, Rev. C. 1907; re-en. Sec. 7151, R.C.M. 1921; amd. Sec. 6, Ch. 125, L. 1925; re-en. Sec. 7151, R.C.M. 1935; R.C.M. 1947, 89-1016; amd. Sec. 4, Ch. 432, L. 1989; amd. Sec. 2778, Ch. 56, L. 2009.

### **Cross-References**

Measurement of water, 85-2-103.

District Court supervision of water distribution, 85-2-406.

Conduction of water, 85-2-414.

Regulation, supervision, apportionment, and control of water distribution, 85-7-1922.

### **Case Notes**

*Scope of Court's Authority in Dissatisfied Water User's Action:* The purpose of a dissatisfied water

user's action is to enforce the original decree and oversee the Water Commissioner's distribution of water through properly maintained ditches, headgates, and other water measuring devices. In an action of this type, it was appropriate for a District Court to order the removal of trees and brush on an irrigation ditchbank when the purpose of the removal was to enhance the method of distribution of water. *Morrison v. Higbee*, 204 M 501, 668 P2d 1029, 40 St. Rep. 1031 (1983).

*Police Regulation*: This section requiring the installation of headgates and measuring boxes in ditches by persons using water from a stream under a decree where a Water Commissioner has been appointed is in the nature of a police regulation, under which the Commissioner may refuse to distribute water to one who fails to do so. It does not license a stranger to appropriate water to his own use from a stream merely because an owner of a right has not complied with such requirement. *Tucker v. Missoula Light & Ry.*, 77 M 91, 250 P 11 (1926).

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## Part 4

### Water Ditches Under Joint or Corporate Control

#### Part Case Notes

*Irrigation Contract — Interpretation of Limitations on Water Usage*: In an action against an irrigation company, plaintiff irrigator claimed the company had violated its contract by failing to provide him with sufficient water to irrigate his land, the District Court did not err in holding that it was the plaintiff who violated the contract since there was substantial evidence showing that the blockage of the irrigation ditch by the plaintiff resulted in the plaintiff's taking of more than the 400 miner's inches of water a year allowed by the contract. The District Court did err, however, in prohibiting the plaintiff from diverting water by pumping and from irrigating land not historically irrigated. There was no language in the contract restricting the method of irrigation or the number or location of acres to be irrigated. As long as the plaintiff used no more water than his contractual entitlement, the District Court could not limit the means or place of irrigation. *Griffel v. Cove Ditch Co.*, 207 M 348, 675 P2d 90, 41 St. Rep. 1 (1984).

**85-5-401. Determination of water rights between partners, tenants in common, and corporate stockholders.** If a water ditch used for irrigating purposes is owned by a partnership, tenants in common, or corporation and there is any dispute between the respective owners, tenants in common, or stockholders respecting the use and division of the waters flowing in the ditch, any partner, tenant in common, or stockholder may commence an action in any court of competent jurisdiction to determine the rights of the respective parties to the use of the waters and may join in the petition a request for the appointment of a water commissioner to apportion and distribute the waters of the ditch according to the rights of the respective owners, tenants in common, or stockholders during the pendency of the action.

**History:** En. Sec. 1, Ch. 181, L. 1919; re-en. Sec. 7152, R.C.M. 1921; re-en. Sec. 7152, R.C.M. 1935; R.C.M. 1947, 89-1017; amd. Sec. 2779, Ch. 56, L. 2009.

#### Cross-References

- Appointment of Water Commissioners, 3-7-211, 85-5-101.
- Water Courts — jurisdiction, Title 3, ch. 7, part 5.
- District Court supervision of water distribution, 85-2-406.
- Duty of purchaser to dig ditches, 85-2-416.
- Board agreements for joint operation or cooperation, 85-7-1905.

**85-5-402. Appointment of commissioner prior to final decree.** After the filing of the complaint in an action under 85-5-401, the court may, upon 5 days' notice to the other parties to the action, appoint a commissioner to divide and distribute the waters of the ditch to the respective parties, according to their respective rights, during the pendency of the action. The court may, upon good cause shown, appoint a commissioner without notice, and when a commissioner is appointed without notice, any party to the action may, on 5 days' notice to the plaintiff, move the court or judge to vacate the appointment or to modify the order as to the distribution of the waters of the ditch. The court or judge, on hearing, may affirm, vacate, or modify the order previously made. Each water commissioner appointed shall subscribe to an oath of office before commencing the discharge of duties.

History: Ap. p. Sec. 2, Ch. 181, L. 1919; re-en. Sec. 7153, R.C.M. 1921; re-en. Sec. 7153, R.C.M. 1935; Sec. 89-1018, R.C.M. 1947; Ap. p. Sec. 3, Ch. 181, L. 1919; re-en. Sec. 7154, R.C.M. 1921; re-en. Sec. 7154, R.C.M. 1935; Sec. 89-1019, R.C.M. 1947; R.C.M. 1947, 89-1018, 89-1019(part); amd. Sec. 2780, Ch. 56, L. 2009.

#### **Cross-References**

Appointment of Water Commissioners, 3-7-211, 85-5-101.  
Final decree, 85-2-234.

**85-5-403. Division of water.** It shall be the duty of the water commissioner to divide the waters of said ditch between the owners, tenants in common, or stockholders in proportion to their respective rights, as set forth in the complaint or in such other manner or proportion as the court or judge may direct.

History: En. Sec. 3, Ch. 181, L. 1919; re-en. Sec. 7154, R.C.M. 1921; re-en. Sec. 7154, R.C.M. 1935; R.C.M. 1947, 89-1019(part).

#### **Cross-References**

District Court supervision of water distribution, 85-2-406.

**85-5-404. Authority of commissioner.** Such commissioner shall have authority to enter upon said ditch; open, close, and set headgates; and do whatever else is necessary to apportion and distribute the waters of said ditch to the respective parties according to their respective rights.

History: En. Sec. 4, Ch. 181, L. 1919; re-en. Sec. 7155, R.C.M. 1921; re-en. Sec. 7155, R.C.M. 1935; R.C.M. 1947, 89-1020.

#### **Cross-References**

Entry upon land by Board or agent, 85-7-1903.

**85-5-405. Compensation and expenses.** The court shall fix the compensation of the commissioner and the term of employment and shall make an order apportioning the amount of compensation among the several owners, tenants in common, or stockholders of the ditch, according to their respective rights and interest in the ditch. The amounts apportioned must be taxed as costs in the action against the respective parties.

History: En. Sec. 5, Ch. 181, L. 1919; re-en. Sec. 7156, R.C.M. 1921; re-en. Sec. 7156, R.C.M. 1935; R.C.M. 1947, 89-1021; amd. Sec. 2781, Ch. 56, L. 2009.

#### **Cross-References**

Appointment of Water Commissioners, 3-7-211, 85-5-101.

**85-5-406. Interference with actions of commissioner.** A person opening or closing a headgate after being set by the commissioner or who in any manner interferes with the commissioner in the discharge of the commissioner's duties is guilty of contempt of court and may be proceeded against for contempt of court as provided in contempt cases.

History: En. Sec. 6, Ch. 181, L. 1919; re-en. Sec. 7157, R.C.M. 1921; re-en. Sec. 7157, R.C.M. 1935; R.C.M. 1947, 89-1022; amd. Sec. 2782, Ch. 56, L. 2009.

#### **Cross-References**

Contempts, Title 3, ch. 1, part 5.

**85-5-407. Appointment of water commissioner after final decree.** When the rights of the respective parties in an action to the use of the waters flowing in a ditch are adjudicated, the judge of the district court having jurisdiction of the subject matter, upon the application of the owners of at least 10% of the waters of the ditch, may, in the exercise of the judge's discretion, appoint a water commissioner to divide, apportion, and distribute the waters of the ditch to the respective parties according to their respective rights as set forth in the decree. When a commissioner is appointed under the provisions of this chapter to apportion and distribute the waters of the stream from which the water flowing in a ditch is taken, the commissioner shall, when directed by the judge or court, apportion and distribute the waters of the ditch according to the decree by which the rights of the respective owners were adjudicated.

**History:** En. Sec. 7, Ch. 181, L. 1919; re-en. Sec. 7158, R.C.M. 1921; re-en. Sec. 7158, R.C.M. 1935; R.C.M. 1947, 89-1023; amd. Sec. 301, Ch. 42, L. 1997.

#### **Cross-References**

Appointment of Water Commissioners, 3-7-211.

Appeals from final decree, 85-2-235.

**85-5-408. Apportionment of costs.** (1) When a commissioner is appointed upon the application of an owner or owners of a ditch, the court may fix the compensation of the commissioner and the term of the commissioner's employment. The court shall make an order apportioning the amount of compensation among the several owner or owners, tenants in common, or stockholders of the ditch according to their respective rights and interest. The order has the effect of a judgment against the person to whom the water was admeasured and for whose benefit it was used. When, in the discretion of the court, an order of apportionment of expense is made against the land for which the water was used, it has the effect of a lien against the land to which the apportionment was made. Execution may issue upon the order as upon a judgment by direction of the court, upon the application of any person interested in the order.

(2) When a commissioner is appointed under the provisions of this chapter to distribute the waters of the stream from which the waters flowing in a ditch are taken and to apportion and distribute the waters of the ditch according to the rights of the respective owners of the waters, the judge, in the judge's discretion, may, in addition to the apportionment taxed against the respective owners of the waters of the stream, apportion and tax the amount, if any, that the owners of the ditch shall pay in addition to the amount taxed under the provisions of this chapter.

**History:** En. Sec. 8, Ch. 181, L. 1919; re-en. Sec. 7159, R.C.M. 1921; amd. Sec. 7, Ch. 125, L. 1925; re-en. Sec. 7159, R.C.M. 1935; R.C.M. 1947, 89-1024; amd. Sec. 302, Ch. 42, L. 1997.

#### **Cross-References**

Execution of judgment, Title 25, ch. 13.

Apportionment of fees and expenses, 85-5-204.

Irrigation districts — taxes and assessments, Title 85, ch. 7, part 21.