

Considerations for the future of water rights

A Water Policy Interim
Committee report to the
65th Legislature

Legislative Environmental Policy Office

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 WPIC, like the members of other interim committees, serve one 20-month term. Members who are reelected to the Legislature may serve again on an interim committee, if appointed, and are subject to overall term limits. This information is included to comply with 2-15-155, MCA.

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This report summarizes the work of the Water Policy Interim Committee specific to a study of the future of the Water Court. Members received additional information and public testimony on the subject, and this report highlights key information and the processes followed by the WPIC. To review additional information, including written minutes, written public comments, exhibits, and audio minutes, visit the WPIC website: www.leg.mt.gov/water.

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Introduction

The 2015 Water Policy Interim Committee investigated and studied many of the legal processes involving water rights. The working title of this inquiry was the study of the future of the Water Court; however, the committee's work took the members into the inner workings of the Department of Natural Resources and Conservation and of the district courts. The WPIC prepared this report to summarize its work on this subject. This report includes a history of water rights administration in Montana, current processes used by the most-involved entities, and a discussion of some future issues these entities will face. This report provides findings for the 2017 legislative session.

Findings

The committee reviewed relevant laws, policies, and legal decisions; hosted numerous panel discussions with expert testimony; and journeyed on a field trip in the Gallatin Valley, observing the distribution of water in the Gallatin Valley. The committee's 10 findings follow:

Future of the Water Court: Findings
Since at least 1921, Montana has recognized the prior appropriation doctrine as the guiding legal principle for the distribution of water.
Myriad local, state, federal, and tribal officials have certain legal authorities over water rights in Montana.
The Water Use Act of 1973 created a process to determine existing water rights and to permit new water rights. The act also provides a permit exemption for small ground water wells.
The Water Use Act of 1973 establishes a system of centralized records, which functionally exists as the Department of Natural Resources and Conservation's Water Right Information System.
The Water Court, with assistance from the DNRC, determines pre-1973 water rights through an adjudication process.
District courts distribute water and enforce water rights.
The DNRC approves permits for new beneficial uses of water and changes to existing beneficial uses of water.
After adjudication ceases and the Water Court issues final decrees by 2028, the Water Court's remaining duty will be to aid district courts in a water distribution controversy, when requested.
Adjudication, permitting, and enforcement processes occur (sometimes simultaneously) in different venues for a single water right.
Some water right ownership transfers are not reflected in the centralized water rights database in a timely manner, which has complicated the adjudication and enforcement of certain water rights.

Three Venues for One Water Right

A century-old water right on the Musselshell River illustrates a complexity the Water Policy Interim Committee seeks to solve: How to simplify Montana's current legal process related to water rights?

Some have said that water users are bewildered when they are subjected to three different proceedings in three different venues: (1) proving their right in the Water Court, (2) changing their right in the Department of Natural Resources and Conservation, and (3) enforcing their right in district court. Defending a water right that may have been previously done with something as simple as a shovel and (hopefully) a handshake now includes legal paperwork, objections from neighbors, scientific analyses, court rulings, and — most likely — the cost of attorneys and other experts.

In 1906, James Hart filed a water claim in Lewistown and declared “to all the world” that he was going to use 640 miner's inches for irrigation, stock, and domestic use.¹ In 1952, a railroad company challenged Hart and others. Judge Watts upheld the Hart water right.

In 1981, the new owners of that water right filed a claim form at the DNRC's Billings office, at the beginning of the momentous statewide adjudication. The Water Court first decreed this claim in 1985 — mirroring most of the original elements, including the original flow rate.

The Hart right's subsequent owners sought to change their right after the destructive 2011 Musselshell River floods blew out their headgate. The ranching family also wanted to convert from flood irrigation to sprinklers. As a result of its legally required adverse effect and historic use analyses, the DNRC reduced the historic flow rate.

The Musselshell is a heavily used and overappropriated waterway under the watchful eye of the Musselshell River Distribution Project and the Honorable Judge Randal I. Spaulding. The right is “called” or shut off near the end of the summer in deference to superior, older water rights.

After 110 years, the Hart water right is well established and legally concrete. But how should Montana's complex legal system treat future senior water right holders or new appropriators? The Water Policy Interim Committee sought to answer this broad question during its 2015-16 interim.

Future of the Water Court

The WPIC first discussed possible changes to the legal processes related to water rights in 2014. The 2015-16 Water Policy Interim Committee restarted this discussion, which was formalized with a “study of the future of the Water Court.”

¹ Legislative Environmental Policy Office staff presentation to the WPIC, Sept. 2, 2015.

This study includes three major entities — the Water Court, the DNRC, and the district courts — and three distinct processes. The entities’ most significant roles² are as follows:

Agency	Role
Water Court	Adjudicates all pre-1973 water claims
DNRC	Examines and processes pre-1973 claims Permits new uses of water Processes changes to existing water rights
District courts	Enforces water rights through court proceedings

The committee investigated beyond the Water Court (and the title of this study) but necessarily excluded some entities, such as irrigation districts, county attorneys, and tribes.³ The committee and staff researched relevant laws, policies, and legal decisions,⁴ hosted numerous panel discussions, and participated in a May field trip in the Gallatin Valley.

A study of the legal processes related to water rights is a history lesson that revolves around a bedrock western principle: the prior appropriation doctrine. As legal scholar A. Dan Tarlock observed:

Prior appropriation 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 states decided to build irrigation economies around the doctrine.... As the West began to [be] settled and developed as a ranching, mining, and irrigation economy, it became necessary to develop a complete property law of water rights.⁵

Early Western Water Rights

Events in California had the earliest influence on what would become Montana’s legal framework for water rights. The birth of the prior appropriation system of distributing water has its roots in the California gold rush.

Among the customs generally adopted in the (mining) camps was that the first person to stake out a claim had the first right to it. The first person to divert a stream to use his rocker or pan had the first right to that amount of water. This

² These entities have additional duties related to water rights. See appendix A.

³ See appendix A.

⁴ See appendices B, C, D, and E.

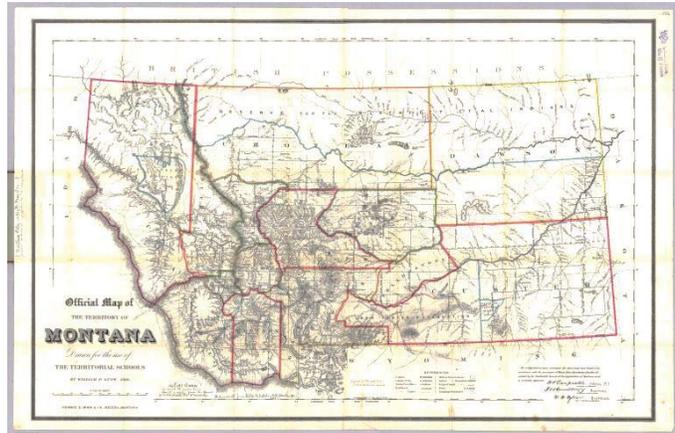
⁵ A. Dan Tarlock, *Law of Water Rights and Resources*, sections 5:1 and 5:4, Thomson Reuters (2015).

is the doctrine of “First in time, first in right” and is the embryo of our system of prior appropriation.⁶

The doctrine “was later extended to farmers and other users, even on private lands.”⁷

In Montana, many early users sought legal protections for their rights by filing a claim at a county courthouse. Others simply put the water to use. In some cases, district courts issued decrees on who was entitled to what amount of water in times of scarcity.

Although the state’s 1889 constitution barely mentioned water use — confining its words to a recognition of irrigation — the Montana Supreme Court finally recognized the prior appropriation doctrine in 1921.⁸ The 1939 Montana Legislature saw the need for an organized legal system when it declared that the “water of this state and especially interstate streams arising out of the state be investigated and adjudicated as soon as possible in order to protect the rights of water users in this state.”⁹



1886 Map of Montana.

But the first real effort wouldn’t come until the state’s constitution was rewritten more than 30 years later. Two important sections of the 1972 Montana Constitution helped create today’s processes:

All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.¹⁰

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.¹¹

Practically, this meant that the state recognized all existing beneficial uses of water and that the state would create an organized legal system. Efforts to adjudicate existing water rights would soon follow.

Water Use Act

After ratification of the new constitution, the Legislature passed the Water Use Act in 1973, which ordered a state agency to “begin proceedings under this act to determine

⁶ Seminar on water rights by Al Stone, professor, University of Montana School of Law, to the Montana Legislature’s Subcommittee on Water Rights, July 1977.

⁷ David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 74.

⁸ *Mettler v. Ames Realty Co.*, 61 Mont. 152, 169, 201 P. 702 (1921).

⁹ Section 89-847 R.C.M. 1947.

¹⁰ Article IX, section 3(1), 1972 Mont. Const.

¹¹ Article IX, section 3(4), 1972 Mont. Const.

existing rights.” This launched the adjudication process, led by what was then the Department of Natural Resources, the predecessor to the DNRC. Under this system, a district court would issue decrees establishing each and every water right that existed before 1973.

But the task soon became overwhelming. A Montana Supreme Court decision illustrated what happened:

One of the difficulties with the 1973 adjudication provisions was that representatives for the Department of Natural Resources were required to go into the field, walk the old ditches and laterals, and physically discover all of the unrecorded, unasserted, and unknown water rights. So the Legislature became restless over the evident prospect of a century or more which would be needed to adjudicate the water rights for the entire state.”¹²

The pace of the adjudication wasn’t the only challenge to the process.

Indian tribes and the federal government sought to assert their claims in federal court, which they viewed as friendlier to their interests. “States feared that federal and tribal water rights would be determined in federal court,” according to one history of water rights adjudication in the West.¹³ “Conversely, federal and tribal attorneys feared the state court determination. The time had come for the U.S. Supreme Court to decide where these issues would be decided.”¹⁴ In Montana, the Northern Cheyenne Tribe filed the first action, asking a federal court to adjudicate rights on the Tongue River and Rosebud Creek. In all, seven federal lawsuits were filed by 1979.¹⁵



Galt



Scully

In the face of this, the Montana Legislature convened a special Subcommittee on Water Rights. This subcommittee got a crash course in water law, toured the state, and issued recommendations. The subcommittee consisted of Rep. John P. Scully, chairman; Sen. Jack E. Galt, vice-chairman; Rep. William M. Day; Rep. Jack Ramirez; Rep. Audrey Roth; Sen. Russell J. Bergren; Sen. Paul F. Boylan; and Sen. Jean A. Turnage. The subcommittee heard from many experts, including University of Montana law school professor Al Stone and

Judge W. W. Lessley, a district judge from Bozeman who would later be appointed as the state’s first water judge.

Legislative leaders wanted an expedited process. “It is not going to do much good if it takes us 20 years to do what the statute says we should do with existing rights,” Lessley told subcommittee members,¹⁶ referring to those who had filed some sort of paperwork at county courthouses. Even those who had been using water without filing

¹² *In re the matter of the activities of the Department of Natural Resources and Conservation*, 226 Mont. 221, 236, 740 P.2d 1096 (1987).

¹³ John E. Thorson, Ramsey L. Kropf, Andrea K. Gerlak, and Dar Crammond, “Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II,” 9 *U. Denv. Water L. Rev.* 2 (2006).

¹⁴ *Ibid.*

¹⁵ Letter from Chief Water Judge C. Bruce Loble to Montana Legislative Audit Division, June 10, 2010.

¹⁶ Testimony of Judge W. W. Lessley to Subcommittee on Water Rights, Oct. 22, 1977.

at a courthouse “should take about one year actually [to process] — it may take more than that time, but if it’s handled that way it should go fairly fast,” Lessley said.¹⁷

Stone advised the subcommittee that the 1952 congressional legislation waiving sovereign immunity for the federal government would apply to the Indian and federal claims. “The McCarren Amendment ... gives jurisdiction to the state when they are conducting a general adjudication of a stream to join all federal interest in order to get a complete adjudication. So you can have this proceeding in state court.”¹⁸

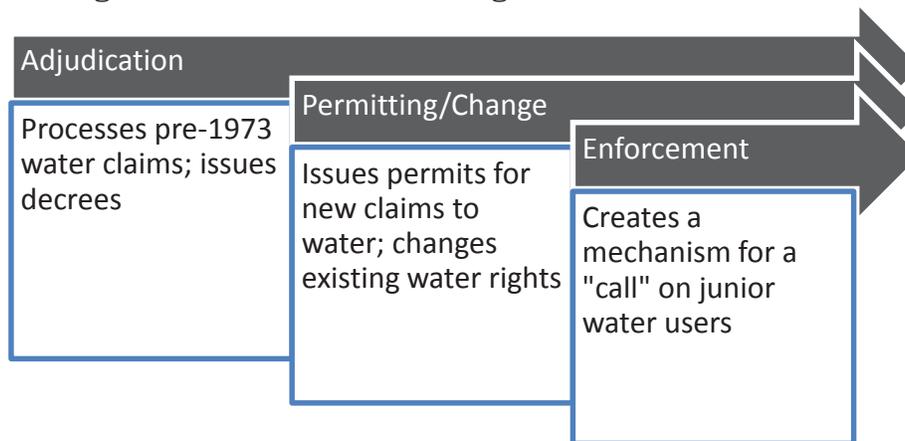
The subcommittee eventually recommended that the 1979 Legislature “enact a bill to adjudicate existing water rights through a special system of water courts coupled with a mandatory filing system.”¹⁹

The Montana Legislature subsequently passed Senate Bill 76, which is roughly the adjudication process of today (see figure 1). The legislation created the Water Court to conduct the litigation phase of the adjudication, after DNRC experts examine each claim. The court was designed with a chief judge and four district court judges, although rarely does a district court judge get assigned a Water Court case.²⁰

After passage of SB 76, 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. These claims are considered prima facie proof of the right — that is, the claim for water stands as stated, unless someone else provides evidence to the contrary.²¹

After the adjudication launched, a federal district court stayed all seven federal lawsuits, concluding “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 states.”²²

Figure 1. The Legal Processes for Water Rights



¹⁷ Ibid.

¹⁸ Testimony of Al Stone to Subcommittee on Water Rights, July 1977.

¹⁹ Subcommittee on Water Rights, “Determination of Existing Water Rights: A Report to the Forty-Sixth Legislature” (1978), 1.

²⁰ In practice, a chief water judge —with help from the associate water judge — appoints special water masters for the litigation phase.

²¹ Residents of basins are notified as decrees are being developed. A later Legislature allowed the filing of approximately 4,500 “late” claims in 1996, although these claims are subordinate to all those filed on time.

²² Environmental Quality Council, *Montana’s Water – Where Is It? Who Can Use It? Who Decides?* (2004), 22.

The Water Court's Goal: Final Decrees

A final decree is the final product of basin adjudication. 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 is in charge of the important first step: verification or examination. The rest of the proceedings, and much of the public involvement, occurs at the Water Court.²³

By design the process is adversarial: a claimant asserts a claim to water, which is upheld as valid unless another user objects. The DNRC may attach an issue remark, which flags uncertain information in 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.”

A final decree must at least include the name of the water right owner, the flow rate or volume of water (for rights that cannot be measured by flow rate), the priority date of the right, the purpose of the right, the place of use, the source of the water for the right, the place and means of diversion, and the period of use. The court must provide public notice of the final decree. After this, the DNRC issues a water right certificate to each person who has been decreed an existing right.²⁴ This is the “piece of paper” that defines a person’s water right. It is also the piece of paper some have been waiting decades for — a wait that will continue at least into the 2020s.

The Water Court has issued six final decrees.²⁵ There are 85 hydrologic basins in Montana.

The Water Court’s role to review and rule on objections to negotiated compacts with the state’s Indian tribes and federal agencies is ongoing. The court approved the first compact for the Northern Cheyenne Tribe in 1995.²⁶ These settlements are negotiated by the Reserved Water Rights Compact Commission. With legislative approval of the Confederated Salish and Kootenai Tribes settlement in 2015, the commission has concluded seven tribal agreements and 12 settlements with federal agencies. Some of these are still pending at the Water Court.²⁷

The Once and Future Water Court

The work of the Water Court has been marked by certain milestones.

In 1987, the Montana Supreme Court resolved disagreements between the agency, the court, other agencies, and water rights attorneys over the process and standards. The

²³ Environmental Quality Council, *Water Rights in Montana* (2014).

²⁴ Legislative Services Division Legal Services Office memo to the WPIC, “Overview of Final Decrees Issued by the Water Court,” Jan. 4, 2016. See appendix B.

²⁵ As of Dec. 1, 2015, the Water Court had issued final decrees for the Little Powder River, Powder River, Belle Fourche River above the Cheyenne River, Little Missouri River below Little Beaver, and O’Fallon Creek.

²⁶ 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.

²⁷ Environmental Quality Council, *Water Rights in Montana* (2014), and Water Court adjudication reports to the WPIC.

Supreme Court created claims examination rules that are much the same that exist today.²⁸

After 25 years of slow, steady progress, money and performance measures were injected into the process in 2005 through House Bill 22. The sole purpose of this bill was to develop a funding source for the adjudication and to establish statutory deadlines for completion. All claims were required to be examined by June 30, 2015, a deadline the DNRC recently met.

A 2009 legislative audit suggested further 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 2028.²⁹ Final decrees would presumably be issued after that.

The 2013 Legislature recognized the need to shift resources from the DNRC and the examination phase to the Water Court for the litigation phase.

Water Judge C. Bruce Loble ordered the agency to reexamine 90,000 of those early claims, standardizing some of the claim elements and looking for outliers. The 2015 Legislature approved reexamination benchmarks as well as increased funding for the agency and the Water Court.



Montana Water Court at the Life of Montana Building, Bozeman.

The Montana Supreme Court appointed Russ McElyea as the court's third chief water judge in 2012. McElyea had previously served as associate water judge, a position created by the 2011 Legislature. Doug Ritter has held the associate water judge position since 2013.

If projections made by the Legislative Audit Division hold true, the Water Court will be a much smaller operation as 2028 approaches. After that, very little would remain for the court to do, as envisioned in statute. The Water Court does aid district courts in a water distribution controversy when asked by a district court judge.³⁰

But the remaining — and critical — roles concerning water rights in Montana are with the DNRC and the district courts. The agency continues to process new water right permits and make changes to existing ones, including older, pre-1973 rights. The district courts and the water commissioners who work under court order are in the last stage of the water rights legal process: enforcement. A role for the Water Court in either of these two other processes may be of interest to a future legislature.

Issues raised during the 2015-16 interim study regarding the Water Court included allowing the Water Court to consider appeals of DNRC permitting and change decisions, giving parties in a water dispute the option of either district court or Water

²⁸ Environmental Quality Council, *Montana's Water – Where Is It? Who Can Use It? Who Decides?* (2004), 24.

²⁹ Legislative Audit Division, *09P-09: Water Rights Adjudication* (2010).

³⁰ Section 85-2-406, MCA.

Court to resolve their issue, and questions about the constitutionality of allowing Water Court judges or masters to make rulings related to water rights.

The DNRC: Increased Future Role

The DNRC is — and has been — involved in the major legal processes related to water rights for decades. In the future, new water users will need to permit a new right, change an existing one, or use another method of transfer, such as a long- or short-term lease. And if water needs increase — and especially if water supplies decrease — the department’s future role should not be understated.

Prior to 1973, a person could simply divert and use water for a beneficial purpose to assert a water right. As written previously, users sometimes filed these rights at their county courthouse. In many instances, users merely continued to divert the water with limited or no documentation of their use.

The 1973 Water Use Act reaffirmed that water must be put to a beneficial use in order for it to be lawfully appropriated. A beneficial use includes everything from domestic, stock, irrigation, and municipal use to industrial, commercial, agricultural spraying, fisheries, wildlife, and recreation.³¹

In addition to its role helping the Water Court in adjudication, the DNRC has two important tasks: permitting post-1973 uses of water and approving changes to existing water rights or claims.

For the permitting process, the agency grants a permit if the applicant sufficiently proves that water is both physically and legally available, that senior appropriators will not be harmed, that the proposed means of diversion, construction, and operation of the appropriation works are adequate, that the proposed use is a “beneficial use,” and that the applicant has a possessory interest or the written consent of the person with a possessory interest in the property where the water will be put to use.³²

The DNRC permitting process allows objections and a resolution of objections through an internal appeals process.³³

After the DNRC issues the permit, the project must be constructed and the water must be diverted and applied to its beneficial use. The DNRC issues a certificate of water right if it “determines that the appropriation has been completed in substantial accordance with the permit.”³⁴

While the Water Court focuses on water rights claimed before 1973, the DNRC focuses on water rights claimed after 1973. The department has issued nearly 17,000 permits for these post-1973 water rights. (The department has also issued nearly 123,000 water right certificates for exempt ground water wells.)

³¹ Legislative Services Division Legal Services Office memo to the WPIC, “Summary of DNRC Water Right Permitting and Change Process,” Jan. 4, 2016. See appendix C.

³² *Ibid.*

³³ Permitting decisions may be appealed to a district court.

³⁴ Legislative Services Division Legal Services Office memo to the WPIC, “Summary of DNRC Water Right Permitting and Change Process,” Jan. 4, 2016.

The DNRC must also approve changes to a water right for a change in the point of diversion, place of use, purpose of use, or place of storage.³⁵ The applicant must prove that existing water right holders will not be adversely affected, that the proposed means of diversion, construction, and operation are adequate, that the proposed use is a beneficial one, and that the applicant has a possessory interest in the place of use.

A particular element of a change application continues to earn scrutiny, including from the WPIC. A change applicant is required to provide information regarding the historic use of the water right to be changed. Historic information is generally how the DNRC determines that senior water right holders will not be harmed by a change to an existing water right — the “adverse effects” analysis. The description of historic use information that must be submitted depends on the type of water right the applicant is proposing to change.³⁶

Other issues raised during this study include the timelines for DNRC action on new water right permits or changes, the “time gap” that results when the DNRC calculates historic use for a new water right or a change application, and the venue for appeals to DNRC permit and change decisions.



West Gallatin River at Farmers Canal diversion

The District Courts

Montana’s district courts have the longest involvement and association with water rights. That involvement is likely to remain.

Fifty-six district court judges within 22 judicial districts resolve disputes between water users, including ruling on injunctions to prohibit a party from interfering with the use of a water right. These judges serve 6-year terms and hear a wide variety of cases, both civil and criminal. Water law is a small part of their caseload.³⁷ A Water Court survey of district court judges indicated that a minority of district court judges wishes to solely handle cases involving water rights.

Water users may petition the district court to appoint a water commissioner to distribute water. If there is a historic decree (issued by a district court before 1973) or a decree issued by the Water Court, the owners of at least 15 percent of the water rights affected by the decree may petition the district court to appoint a water commissioner. Under certain circumstances, the DNRC and one or more water right holders may petition a district court to distribute water and to resolve the distribution dispute.³⁸

³⁵ However, a change approval is not necessary for a change in irrigation method. This was a much-discussed topic during the interim.

³⁶ Section 36.12.1902, Administrative Rules of Montana, and Legislative Services Division Legal Services Office memo to the WPIC, “Summary of DNRC Water Right Permitting and Change Process,” Jan. 4, 2016.

³⁷ Testimony of Honorable Judge Loren Tucker to the WPIC, Jan. 12, 2016.

³⁸ Sections 85-5-101(1) and (2), MCA.

A district court may appoint a water commissioner to measure and distribute water to the appropriate owners. These “ditch riders” are self-employed and paid by the water users.³⁹

When existing water rights have not been determined, any 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 pending a Water Court determination. The Water Court must give priority to these certification proceedings over its adjudication work.⁴⁰

A district court may be involved in other proceedings related to water rights. The DNRC may also ask a court to take action to prevent the waste or unlawful use of water.⁴¹ A district court may appoint a water mediator to resolve water controversies. And the 2009 Legislature authorized a district court to appoint a water master to assist with judicial enforcement proceedings. As described previously, an applicant may appeal a DNRC permit or change decision to a district court.

Other Reviews of Legal Processes

The WPIC’s review of legal processes related to water rights is certainly not the first examination of the involved processes.

In 1988, the Legislature hired a Denver law firm to review the state’s adjudication process. The subsequent “Ross Report” mostly affirmed and validated the state’s process, suggesting only legislative “fine-tuning.”⁴² The report stated:

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.... How rapidly that process can be concluded under the changes we recommend will become a function of the level of funding provided to both the judicial and executive branch institutions involved in the process.⁴³

As previously written, the Legislative Audit Committee also examined the adjudication process, producing recommendations that have mostly been embraced.

A 2014 report by the University of Montana Law School (commissioned by the Montana Supreme Court) suggested establishing concurrent Water Court/district court jurisdiction over water disputes and distribution; coordinating water rights records; building education and collaboration; addressing the adjudication “time gap”; allowing appeals of agency decisions to the Water Court; and modernizing the water commissioner and distribution systems.

Most recently the Adjudication Advisory Committee (which advises the Water Court) suggested that the adjudication of pre-1973 water rights should proceed to its estimated completion date of 2028 without unnecessary delays. The committee also offered options for jurisdiction in water user disputes, dealing with adjudication “time

³⁹ Section 85-5-101, MCA.

⁴⁰ Legislative Services Division Legal Services Office memo to the WPIC, “Summary of Water Right Enforcement by District Courts,” Dec. 18, 2015. See appendix D.

⁴¹ Unlawful use of water may also involve the attorney general or a county attorney.

⁴² Jack F. Ross, *Evaluation of Montana’s Water Rights Adjudication Process* (1988), 4.

⁴³ *Ibid.*

gaps,” appeals of agency decisions, and the modernization of the water commissioner and distribution systems.

Identified Issues: Election of Judges, Ditch Riders, and Recordkeeping

Other issues rose to prominence, including updating “antiquated” water commissioner laws, considering the constitutionality of unelected judges, and improving recordkeeping related to water right ownership transfers.

Water Commissioners

The committee scrutinized state law related to water commissioners, which has been only modestly altered since its original passage in 1911.⁴⁴ The committee specifically discussed:

- required training for water commissioners and judges;
- bonding requirements for water commissioners;
- whether water commissioners should have arrest powers; and
- whether water distribution data should be made public.



WPIC field trip in Gallatin Valley, May 2016

The DNRC has proposed a pilot project as it distributes Tongue River water under a U.S. Supreme Court order. This pilot project will require legislation.

Election of Water Court Judges

The WPIC also discussed whether unelected Water Court judges could be allowed to expand their jurisdiction. Specifically, the committee asked whether the Montana Constitution prohibits the Legislature from expanding the Water Court’s jurisdiction.

WPIC legal staff determined that because the Montana Constitution allows the Legislature to establish courts and determine qualification and selection methods for judges, and because no one has successfully challenged the judicial structure for the adjudication and administration of water rights in court, it appears there is no constitutional barrier to an expansion of Water Court jurisdiction.⁴⁵

Water Right Ownership Transfers

Incomplete or inaccurate property transfers may be impeding legal proceedings related to water rights.

⁴⁴ Title 85, ch. 5, MCA.

⁴⁵ See appendix E.

House Bill 39 (2007) revised the water right ownership update process, requiring county clerks and recorders, the Department of Revenue, and the DNRC to coordinate to ensure the water rights are correctly recorded on a realty transfer certificate.⁴⁶

County clerks and recorders first collect a realty transfer certificate, usually from a title company.⁴⁷ This certificate includes a place to indicate whether or not water rights were transferred. At the closing or transfer of real estate, the parties must pay a fee to the DNRC to transfer the water right. This fee starts at \$50. (Ultimately, it is up to the new owner or buyer of a property to ensure the fee is paid and the certificate is submitted.)⁴⁸ County officials report these property transfers to the Department of Revenue, which then updates the department's ORION property ownership database. Periodically, the DNRC updates its Water Right Information System database from ORION.⁴⁹ The DNRC is responsible for reconciling missing fees and missing transfers.⁵⁰

The Water Court has delayed decrees or rulings in certified controversies, because water right ownership was unclear due to uncompleted water right transfer.⁵¹ Water commissioners have shut off water rights due to uncompleted water right transfers.⁵² Revenue officials said a geocode is used to identify a parcel and is likely insufficient to indicate location details necessary for a water right, such as place of diversion or point of diversion.⁵³

Some details about the handling of the realty transfer certificate were unclear during testimony at WPIC meetings. The DNRC convened a working group of the affected parties.⁵⁴

Action on Proposed Legislation

On Aug. 29-30, the committee approved the following bill drafts related to this study:

- **Clarify water commissioner appointments (LCwp01).** This bill allows holders of 15 percent of the flow rate of the water rights along a contested stretch to petition a district court for enforcement. The statute currently allows holders of 15 percent of the number of water rights along a contested stretch to petition.
- **Require education program for water commissioners (LCwp02).** This legislation requires a water commissioner to attend DNRC training on the subject before distributing water. A district court judge is allowed to adjust this requirement as necessary.
- **Clarify definition of a water right change (LCwp03).** This bill clarifies that a change in "method of irrigation" will not trigger the DNRC's formal change analysis.

⁴⁶ Section 85-2-424, MCA.

⁴⁷ Section 15-7-305, MCA.

⁴⁸ Sections 85-2-424 and 85-2-426, MCA.

⁴⁹ Krista Lee Evans, memo to the WPIC, "HB39 Ownership Update Status Sheet," March 8, 2016.

⁵⁰ Section 85-2-424, MCA.

⁵¹ Testimony of Honorable Judge Russ McElyea to the WPIC, Jan. 12, 2016.

⁵² Testimony of Lezlie Kinne to the WPIC, March 8, 2016.

⁵³ Testimony of Rocky Haralson, Department of Revenue, to the WPIC, May 2, 2016.

⁵⁴ Testimony of Tim Davis, DNRC, to the WPIC, May 2, 2016.

- **Clarify process for updating water right transfer (LCwp11).** This legislation allows the DNRC to update its water rights database through use of its own ownership update form, without having to wait for a Department of Revenue update.

On Oct. 12, the committee approved two additional bill drafts:

- **Limit adverse effects analysis (LCwp4b).** This bill lets a water rights holder to file a “consent to approval,” allowing an applicant for a new water right or change in a water right to ignore the adverse effect on an existing water right – and possibly clearing the way for the requested new right or change.
- **Allow Water Court review of certain DNRC decisions (LCwp06).** This bill allows an appeal of a DNRC decision on a water right permit or change at the Water Court. Appeals are now taken to district court.

The 2017 Legislature will consider the six bill drafts.⁵⁵

⁵⁵ A complete list of 2016-17 WPIC-approved bills drafts may be found at <http://leg.mt.gov/css/Committees/interim/2015-2016/Water-Policy/Meetings/meetings-and-materials.asp>. Updated information on these bills as these progress during the 2017 Legislature may be found at <http://leg.mt.gov/css/bills/Default.asp>

Table 1. Legal authorities related to water rights in Montana

Agency or entity	Water right-related function(s)
Any state agency, state political subdivision, or federal agency	Acquire a state water reservation for beneficial uses or to maintain flow, level or quality
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation; Blackfeet Tribe; Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Crow Tribe, Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation; Northern Cheyenne Tribe	Administer tribally based water rights on designated reservations
Attorney General	<p>Water Court may join to certain cases of abandonment or non-perfection</p> <p>May litigate:</p> <ul style="list-style-type: none"> • issues of state-wide importance • unresolved issues on historic water rights claims • water waste or water right abandonment • certain compact-related proceedings • fines for violations of Title 85, chapter 2, MCA <p>May offer general legal services to carry out Title 85, chapter 2, MCA</p>
Board of Land Commissioners	Appropriate water for use upon state lands
County attorneys	Intervene, if necessary, in cases of water waste or water right abandonment
Conservation districts	Develop plans for conservation, development, use, and disposal (sale) of excess water Obtain water rights (water reservations) for district use
Department of Environmental Quality	Ensure proof of water rights from DNRC for certain subdivision approvals Provide discharge permit for aquifer recharge or mitigation plan to DNRC, if necessary

Agency or entity	Water right-related function(s)
Department of Natural Resources and Conservation	<ul style="list-style-type: none"> • Process historic water rights claims for pre-1973 adjudication • Process and consider permits for new water rights and changes to existing water rights • Aid district courts, Water Court in water distribution controversies • Maintain a centralized database of water rights • Implement compacts with federal reserved water rights holders (tribes and federal agencies) • Process water reservation requests from other government entities • Process stream depletion zone petitions • Administer basins closed to additional appropriations • Designate, process petitions for, and administer controlled groundwater areas • Investigate water waste • Administer state water projects • Develop state water plan
Department of Revenue	Notify DNRC of property transfers including an associated water right
District Court	<p>Enforce water rights through court proceedings</p> <p>Appoint water commissioners to distribute water</p> <p>Appoint water mediators to settle disputes</p> <p>Consider cases of water waste, water right abandonment</p> <p>Consider appeals of permitting, change, or adjudication decisions</p>
Irrigation districts/Water users' associations	Improve, develop, and maintain common water delivery systems
Legislature	<p>Pass and amend water right-related laws</p> <p>Consider certain out-of-state appropriations of water and large groundwater appropriations</p> <p>Designate closed basins</p>
Montana Bureau of Mines and Geology	<p>Maintain groundwater well log reports</p> <p>Manage the Ground Water Assessment Program</p>
Montana Supreme Court	Consider appeals of district court, Water Court decisions
Regional Water Authority	Secure source of water for individual public agencies for sale

Agency or entity	Water right-related function(s)
Reserved Water Rights Compact Commission	Inactive; negotiated settlements with 19 Indian tribes, federal agencies
Unitary Management Board of the Flathead Indian Reservation	Administer water rights on the Flathead Indian Reservation*
Water Court	Conduct legal proceedings related to historic, pre-1973 water rights claims Produce enforceable decrees of water rights Aid district courts in water distribution controversies Consider petitions for certain historic domestic and stock water right claims

NOTE: Most – but not all – of the authorities described in this table are found in Title 85 of Montana Code Annotated

* After compact ratification by Congress and the Confederated Salish and Kootenai Tribes



Montana Legislative Services Division
Legal Services Office

TO: Water Policy Interim Committee Members
FROM: Helen Thigpen, Staff Attorney
DATE: January 4, 2016
RE: Overview of Final Decrees Issued by the Water Court.

Issuance of a final decree is the last step in the Water Court's adjudication of the existing water rights in a particular basin, subbasin, or drainage. As defined by the Water Use Act, existing water rights are rights "that would be protected under the law as it existed prior to July 1, 1973."¹ A final decree is entered after the Department of Natural Resources and Conservation (DNRC) examines the water right claims, the Water Court issues a temporary preliminary or preliminary decree describing the water right claims, public notice of the decree is provided, hearings on any objections are held, and potential issues with the claims identified by the DNRC are resolved.

Although the Water Use Act passed in 1973, it was not until 1979 that claims to existing water rights were required to be filed with the state. The original filing deadline was January 1, 1982, but the deadline was extended to April 30, 1982.² Claims that were not filed were considered abandoned, although another filing deadline was established by the Legislature in the early 1990s that allowed late claims to be filed until 1996. These claims were subordinate to federal and Indian water compacts, timely filed claims, and certain newly permitted water rights.³

The final decree must include, at minimum, the name of the water right owner, the flow rate or volume of water (for rights that cannot be measured by flow rate), the priority date of the right, the purpose of the right, the place of use, the source of the water for the right, the place and means of diversion, and period of use.⁴ Notice of the decree is provided to all parties who are named in the decree and whose rights are stated, determined, or affected by the decree.⁵ Notice of the final decree is also published once in a newspaper in the area where the basin, subbasin, or subdrainage is located.⁶ The Water Court also sends a copy of the final decree to the DNRC for filing. The DNRC then issues a certificate of water right to

¹ 85-2-102(12), MCA.

² Montana Supreme Court Order No. 14833 July 13, 1979 and Dec. 7, 1981.

³ 85-2-221, MCA.

⁴ 85-2-234, MCA.

⁵ Rule 24(b), Water Right Adjudication Rules.

⁶ *Id.*

each person who has been decreed an existing right.⁷ A person whose existing rights are determined in a final decree may appeal to the Montana Supreme Court and a district court may enforce the provisions of the decree.⁸

Six final decrees have been issued through Dec. 1, 2015. (Little Powder River, Powder River, Redwater River, Belle Fourche River above Cheyenne River, Little Missouri below Little Beaver, and O'Fallon Creek). There are 85 basins in the state. In 2010, the Legislative Audit Division estimated that the adjudication process would be completed by 2028.⁹ In 2011, the Legislature established an associate water judge position to assist with the adjudication process. The Water Court also employs water masters who make preliminary determinations on water right claims. More information on decrees and the status of the adjudication process in Montana is available from the DNRC at dnrc.mt.gov/divisions/water/adjudication or the Water Court at courts.mt.gov/water.

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⁷ 85-2-236, MCA.

⁸ Rule 25, Water Right Adjudication Rules, 85-2-235, 85-2-406, 85-5-101, and 3-7-212, MCA.

⁹ Legislative Audit Division, *09P-09: Water Rights Adjudication* (2010).



Montana Legislative Services Division
Legal Services Office

TO: Water Policy Interim Committee Members
FROM: Helen Thigpen, Staff Attorney
DATE: December 18, 2015
RE: Summary of DNRC Water Right Permitting and Change Process.

The Legislature enacted the Water Use Act in 1973 to carry out the Constitution's mandate to provide for the "administration, control, and regulation of water rights" in the state of Montana.¹ The Water Use Act establishes a permitting process for new and expanded uses of water and requires a person to obtain a permit from the Department of Natural Resources and Conservation (DNRC) to appropriate water within the state.² Prior to 1973, a person could simply divert and use water for a beneficial purpose to acquire a valid water right. Other rights were filed with local county clerk and recorders, but there was no centralized method for recording water rights.

In addition to reaffirming the basic water law principle of "first in time, first in right," the Water Use Act reaffirmed that water must be put to a beneficial use in order for it to be lawfully appropriated. A beneficial use includes everything from domestic, stock, irrigation, and municipal use to industrial, commercial, agricultural spraying, fisheries, wildlife, and recreation.³

The water right permitting process is administered by the DNRC. There are several steps in the process, but it always begins with the submission of the DNRC's Application for Beneficial Water Use Permit and the filing fee. Among other things, the application requires information about the intended use of the appropriation, the proposed means of diversion, the number of acres proposed to be irrigated, the period of diversion and period of use, and the proposed flow rate and volume of the appropriation.⁴

If the application is considered "correct and complete," the DNRC will evaluate the application to determine if the criteria for the issuance of a permit have been established. The DNRC will issue a preliminary determination to grant or deny the application within 120 days.⁵ In general, a permit is granted if the applicant sufficiently proves that water is both physically and legally available (*i.e.*, that no one else has already laid claim to the water), that senior appropriators will not be harmed, that the proposed means of diversion, construction, and operation of the appropriation works are adequate, that the proposed

¹ Art. IX, Sec. 3, Mont. Const. and Title 85, Chapter 2, MCA.

² § 85-2-301, MCA.

³ § 85-2-102(4), MCA.

⁴ Admin. R. Mont. 36.12.1701.

⁵ § 85-2-307, MCA.

use constitutes a "beneficial use" as described above, and that the applicant has a possessory interest or the written consent of the person with a possessory interest in the property where the water will be put to use.⁶ An applicant may be required to establish additional criteria if an objection to the application is received.

If the DNRC makes a preliminary determination to grant the application, public notice of the decision is published in a newspaper of general circulation in the area of the source.⁷ Notice is provided so that a person who may be adversely affected by the proposed appropriation may object to the issuance of the water right. If the DNRC preliminarily denies the application or if the application is approved with modifications, the applicant may request a hearing before the DNRC. A final order is issued following resolution of any objections from other water right holders or modifications by the DNRC. The order is subject to appeal to a district court. There may be additional steps or requirements depending on the circumstances.

Afer the DNRC issues the permit, the project must be constructed and the water must actually be diverted and applied to the beneficial use.⁸ A certified statement must then be provided to the DNRC regarding the completion of the project. Following an assessment of the project, the DNRC issues a certificate of water right if it "determines that the appropriation has been completed in substantial accordance with the permit."⁹ The priority of the water right is established by the date the DNRC received the original application or when application was made correct or complete.

Similar to the process for new appropriations, DNRC approval is generally required before a water right can be changed in Montana. Specifically, approval is required for a change in the point of diversion, place of use, purpose of use, or place of storage.¹⁰ For the DNRC to approve the change, the applicant must prove by a preponderance of the evidence that existing water right holders will not be adversely affected, that the proposed means of diversion, construction, and operation are adequate, that the proposed use is a beneficial use, and that the applicant has a possessory interest in the place of use.¹¹ As described by the Montana Supreme Court, "an underlying water right is not affected by action on an

⁶ § 85-2-311, MCA.

⁷ § 85-2-307(2), MCA.

⁸ § 85-2-312, MCA.

⁹ § 85-2-315, MCA.

¹⁰ § 85-2-402, MCA.

¹¹ § 85-2-402(2), MCA.

application for a change, and the DNRC may not adjudicate water rights in deciding an application for a change."¹²

Many of the elements required in the application for a new appropriation are also required in the application for a change to an existing water right. Also similar to new appropriations, the DNRC has adopted administrative rules that guide the contents of the change application. For example, a change applicant is required to provide information regarding the historic use of the water right that is proposed to be changed. Historic information is generally how the DNRC determines that senior water right holders will not be harmed by a change to an existing water right. According to DNRC rule, "lack of adverse effect for change applications is generally based on the applicant's plan showing the diversion and use of water and operation of the proposed project will not exceed historic use, and can be implemented and properly regulated."¹³ The description of historic use information that must be submitted depends on the type of water right the applicant is proposing to change.¹⁴

More complete information regarding the application process for new water rights or changes to existing water rights is available in the *Water Rights in Montana* publication from the Legislative Environmental Policy Office or from the Water Rights Bureau at the DNRC.

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¹² *Town of Manhattan v. DNRC*, 2012 MT 81, ¶ 8, 364 Mont. 450, 76 P.3d 920.

¹³ Admin R. Mont. 36.12.1903.

¹⁴ Admin. R. Mont. 36.12.1902.



Montana Legislative Services Division
Legal Services Office

TO: Water Policy Interim Committee Members
FROM: Helen Thigpen, Staff Attorney
DATE: December 18, 2015
RE: Summary of Water Right Enforcement by District Courts.

Montana's district courts play an important role in water right enforcement. Within Montana's 22 judicial districts, there are 56 district court judges who are elected to serve 6-year terms. As courts of general jurisdiction, district courts hear a wide variety of cases involving everything from homicide cases to probate and divorce cases. Occasionally these courts are asked to resolve disputes between water users, and in many of these cases, a water user will ask the court for an injunction to prohibit a party from interfering with the use of a water right. An injunction may be temporary or permanent and is an enforceable court order that requires a party to take a specified action.

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 water according to the decree. Similarly, 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 distribute water and resolve the distribution dispute.¹

A water commissioner has the authority to measure and distribute water to the appropriate owners.² As a "first in time, first in right" jurisdiction, water commissioners distribute water to the most senior water right owners first. When a water commissioner is appointed and directed by a district court, a dispute may be easily settled because the water rights at issue have largely been determined.

When all of the existing water rights on a water course have not been determined, any party may petition a district court to certify the question of existing water rights to the Water Court. Pending a determination by the Water Court, a district court may issue an injunction or order other necessary relief. Certification proceedings are given priority over other adjudication matters at the Water Court.³

The Department of Natural Resources and Conservation may also ask a district court to take various actions to prevent the wasting or unlawful use of water. The DNRC may direct

¹ § 85-5-101(1) and (2), MCA.

² § 85-5-101, MCA.

³ § 85-2-406(2) MCA.

its attorneys, the attorney general, or a county attorney to bring suit to enjoin the unlawful use of water. The Attorney General or a county attorney may also bring an action independently of the DNRC.⁴ In these proceedings, senior water right holders must be given priority, and a person found to be violating the Water Use Act may be subject to civil penalties.⁵

In other cases, a district court may appoint a water mediator to help resolve water controversies in both decreed and nondecreed basins. A water mediator may discuss proposed solutions, review options for coordinating water use, discuss water needs with affected persons and entities, meet with parties to mediate differences over water use, and hold public meetings and conferences to discuss and negotiate potential solutions.⁶ A water mediator does not have the power to order a particular action, but the mediator may provide guidance to the parties for an out-of-court resolution of the dispute.

In 2009, the Legislature authorized a district court to appoint a water master to assist with judicial enforcement proceedings.⁷ A water master is appointed by the chief water judge and is an attorney who issues preliminary determinations in the Water Court.

Finally, a district court may also be asked to address a decision from the DNRC on a water right permit application. If an application for a water right permit is denied, for example, a party may appeal the decision to a district court for review. The Montana Supreme Court may also be asked to weigh in on the dispute if the matter is not resolved before the district court.

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⁴ § 85-2-114, MCA.

⁵ § 85-2-122, MCA.

⁶ § 85-5-110, MCA.

⁷ H.B. 39, Chapter 103, Laws of 2009 and § 3-7-311, MCA.



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Montana Legislative Services Division

Legal Services Office

TO: Water Policy Interim Committee
FROM: Helen Thigpen, Staff Attorney
RE: Constitutionality of Water Court Jurisdiction
DATE: May 9, 2016 (Final Version)

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.¹ 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.² 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.³ 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."⁴

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.⁵ 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."⁶ 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.⁷

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.⁸ For matters within the judge's jurisdiction,

¹ 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.

² *Id.*

³ *Id.*; 3-7-102, MCA.

⁴ 3-7-201(3), MCA.

⁵ 3-7-201(1), MCA.

⁶ 3-7-203, MCA.

⁷ Ch. 80, L. Mont. 1981.

⁸ 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.⁹

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

⁹ 3-7-224(3), MCA.

¹⁰ 3-7-501(4), MCA.

¹¹ 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”).

¹² 85-2-406(2)(b), MCA.

¹³ 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.

¹⁴ 85-2-114, MCA.

¹⁵ 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).¹⁶

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

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.¹⁹

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.²⁰ 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.²¹ 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.²²

¹⁶ *Id.* at 239.

¹⁷ *Id.* at 243-244.

¹⁸ *Id.* at 241.

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

²⁰ *Id.* at 39.

²¹ MacIntyre, 49 Mont. L. Rev. at 242.

²² 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.²³

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.²⁴ 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.²⁵

²³ 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>.

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

²⁵ *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.²⁶

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.²⁷ 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.²⁸ 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.²⁹

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

²⁶ IV Montana Constitutional Convention, Verbatim Transcript, 1020 (1972).

²⁷ See Ch. 537 Laws. Mont. 1975.

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

²⁹ 2-15-1707, MCA.

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

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

³² 38 A.G. Op. 27 (1979).

³³ 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.³⁴ 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.”³⁵ 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

³⁴ C-22 (1992).

³⁵ 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.³⁶

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

³⁶ *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.³⁷

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:

³⁷ 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.”³⁸

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

³⁸ 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.³⁹

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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³⁹ 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."

A short timeline of the Montana Water Court

