

Draft background for Future of the Water Court study

Early Western water rights

Supreme Court of California first articulated prior appropriation system of distributing water in 1855 during the California gold rush. The doctrine was extended from miners to farmers and other users.

Some early Montana water users filed a claim at a county courthouse. Others simply put water to use.

1889 Montana Constitution recognized right to use water in lukewarm fashion. 1921 Montana Supreme Court decision recognized prior appropriation doctrine. 1939 Montana Legislature declared need for organized legal system of water rights.

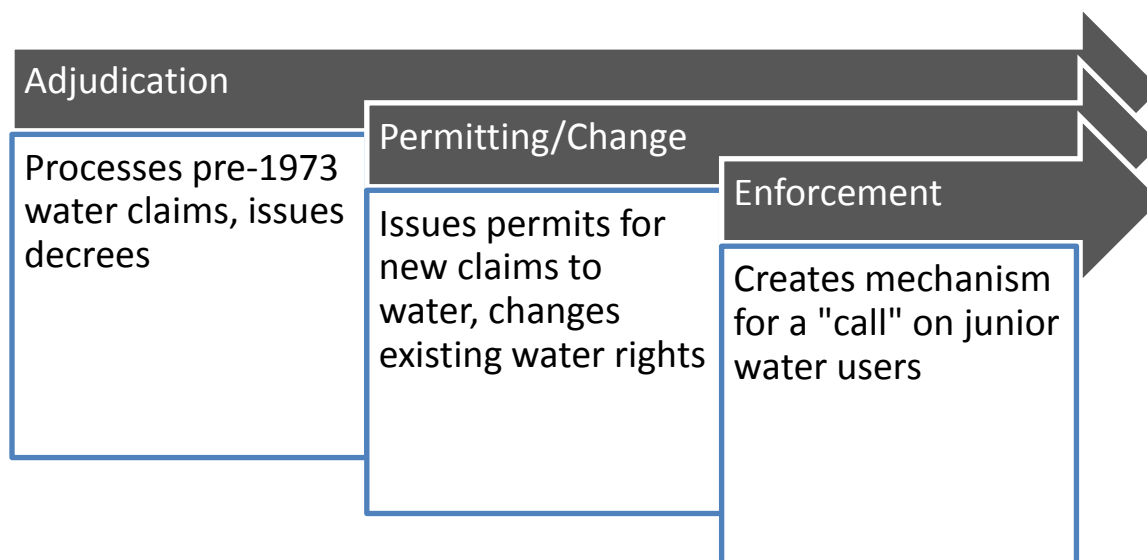
Water Use Act

1972 Montana Constitution recognized existing uses of water and directed the legislature to provide for “administration, control, and regulation of water rights” and to establish “a system of centralized records.”

Department of Natural Resources attempted to determine existing rights in the Powder River basin, but overwhelmed by scope and complexity of the exercise. The agency was also charged with issuing new water rights, and district courts would continue their role as enforcer of water rights.

Meanwhile, Indian tribes and federal government sought to assert water claims in federal court, beginning with Northern Cheyenne Tribe on the Tongue River and Rosebud Creek.

1977 Montana Legislature created Subcommittee on Water Rights, which met several times in 1978. The subcommittee envisioned a quicker process and recommended “a bill to adjudicate existing water rights through a special system of water courts coupled with a mandatory filing system.” 1979 Legislature passed Senate Bill 76, which created basically today’s adjudication process:



Senate Bill 76 created Water Court to conduct litigation phase of adjudication, after DNRC experts collect and examine each claim. Water Court also reviews and rules on objections to water rights compact negotiated with Indian tribes and federal agencies. (A federal district court stayed all lawsuits by Indian tribes and federal government, pending the completion of adjudication.)

By 1982, 219,000 water claims were filed with DNRC. (4,500 late claims were allowed in 1996.) These claims are considered prima facie proof of the right, i.e. the claim for water stands as stated, unless someone else provides contrary evidence to be resolved by the Water Court.

Reviews of current process

1988 review (Ross Report) mostly affirmed and validated adjudication process, suggesting only legislative “fine tuning.”

2014 report by UM Law School commissioned by the Montana Supreme Court suggested creating concurrent Water Court-district court jurisdiction over water disputes and distribution; coordinate water rights records; building education and collaboration; addressing the adjudication “time gap”; allowing appeals of agency decisions to the Water Court; and modernize water commissioner and distribution system.

Adjudication Advisory Committee suggested 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 users disputes, dealing with adjudication “time gaps,” appeals of agency decisions; and the modernization of water commissioner and distribution systems.

The Water Court

A decree is the final product of adjudication, after claimants file claims; the DNRC verifies or examines the claim; and the Water Court issues a temporary preliminary or preliminary decree (with public notice), resolves individual cases (created by objections and perhaps), holds public hearings on decrees, and issues a final decree.

A 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.

The Water Court has issued 6 final decrees (as of Dec. 1, 2015). There are 85 hydrologic basins in Montana.

In 2010, the Legislative Audit Division estimated the adjudication process would be completed in 2028. The legislature has since been assigned more resources to the Water Court. The 2011 Legislature established an associate water judge position. 2013 Legislature recognized need to shift resources from DNRC and the examination phase to the Water Court and the litigation phase.

Judge Loble ordered reexamination of 90,000 early claims, standardizing claim elements and looking for outliers. 2015 Legislature approved reexamination benchmarks and increased funding to DNRC and Water Court.

When requested by a district court, the Water Court may aid the court by determining water rights in a certified water right controversy.

The Water Court provides materials and expertise to district courts for the enforcement of water rights.

Issues raised during the 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 Court to resolve their issue; answering questions about allowing unelected Water Court judges or masters make rulings related to water rights.

The Department of Natural Resources and Conservation

Prior to 1973, a person could simply divert and use water for a beneficial purpose to acquire a valid water right.

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.

The DNRC administers the permitting process. In general, the agency grants a permit if the applicant sufficiently proves that water is both physically and legally available, senior appropriators will not be harmed, the proposed means of diversion, construction, and operation of the appropriation works are adequate, the proposed use is a “beneficial use,” and 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.

The DNRC permitting process includes allowing objections and consideration of those objections through an internal appeals process.

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.”

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. 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, and the proposed use is a beneficial one, and the applicant has a possessory interest in the place of use. DNRC rules require a proposed project will not exceed historic use.

Additional issues raised during this study include the timelines for DNRC action when processing a new water right permit or a change of a water right; the “time gap” that results when the DNRC considers historic use for processing a new water right or a change to an existing one; the venue for appeals to DNRC permit and change decisions.

The district courts

56 district court judges within 22 judicial districts occasionally resolve disputes between water users, including considering injunctions to prohibit a party from interfering with the use of a water right.

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 (after 1973), 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. If all

water rights of all appropriators from a source or in a defined area have been determined, the DNRC and one or more water right holder may petition a district court to distribute water and to resolve the distribution dispute.

A district court-appointed water commissioner has the authority to measure and distribute water to the appropriate owners. Water commissioners are self-employed and paid by the water users.

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 order other relief pending a Water Court determination.

The district court may take other actions to allow for the distribution of water. The DNRC may also ask a district court to take various actions to prevent the wasting or unlawful use of water. A district court may appoint a water mediator to resolve water controversies in decreed and nondecreed basins. And the 2009 Legislature authorized a district court to appoint a water master to assist with judicial enforcement proceedings.

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

Additional issues raised during this study include uncertainty over what point a decree is enforceable; and how district courts calculate the “15 percent of water users”; if water commissioners and water judges require additional training or should be required to take annual training; if water commissioners should be bonded, have arrest powers, and should make water distribution data public.

A Water Court survey of district court judges indicated that a minority of district court judges wish to solely handle cases involving water rights.

Water right ownership transfers

HB39 (2007) revised the water right ownership update process, requiring the Department of Revenue and the DNRC to coordinate water right ownership records based on property transfers.

The parties at closing or transfer of real estate must pay a fee to the DNRC to transfer the water right. At the same time, the water right transfer must be indicated on the realty transfer certificate; county clerks and recorders process first process this certificate, oftentimes from title companies. The DOR’s ORION property ownership database system is periodically updated with information from clerks and recorders. The ORION database feeds the DNRC’s Water Right Information System. The DNRC must rectify missing fees and missing transfers.

The Water Court has delayed decrees or rulings in certified controversies, because water right ownership was unclear due to uncompleted water right transfer. Water commissioners have shut off water rights due to uncompleted water right transfers.

Three venues for one water right

In testimony to the WPIC, some water rights attorneys have said it is oftentimes difficult to explain to clients that their water right might be subject to proceedings in three different venues.

A staff presentation to WPIC told the story of water rights in Montana through a 1906 claim on the Musselshell River in 1906. This right has traveled through all venues – district court, Water Court, and the DNRC – and sometimes more than once.

James Hart filed his claim in Lewistown and declared “to all the world” that was going to use 640 miner’s inches for irrigation, stock, and domestic use. In 1952, some nearby landowners challenged the water rights of Hart and others. Judge Watts upheld the Hart family right.

In 1981, the new owners of that water right, Leo Jarrett, filed out a claim form for the DNRC’s Billing office, as part of the statewide adjudication. The Water Court first decreed this claim in 1985 – mirroring most of the original elements, including the original flow rate.

Now owned by Vescovi Polled Herefords, the Hart right was changed after the 2011 floods blew out a headgate and the owners wanted to convert from flood irrigation to sprinklers. The DNRC reduced the allowed flow rate as part of its adverse effect and historic use analysis.

The Hart water right lies on a heavily used waterway. It is not uncommon for the right to be “called” or shut off near the end of the summer in deference to superior, older water rights. The Hart right is protected by a 2015 order from District Court Judge Hon. Randal I. Spaulding, as part of the Musselshell River Distribution Project.

Others' legal authorities related to water rights

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	<p>Develop plans for conservation, development, use, and disposal (sale) of excess water</p> <p>Obtain water rights (water reservations) for district use</p>
Department of Environmental Quality	<p>Ensure proof of water rights from DNRC for certain subdivision approvals</p> <p>Provide discharge permit for aquifer recharge or mitigation plan to DNRC, if necessary</p>

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