WATER RIGHTS IN MONTANA

How Our Legal System Works Today,

How Montana Compares to Other States,

and

Ideas for Montana's Future

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REPORT OVERVIEW & BACKGROUND

Montana's Water Use Act is now in its fourth decade. The state is charting a course to complete adjudication of existing water rights and is undertaking statewide water planning for a future that includes a more complex set of water uses, alongside climate-driven water changes. Our understanding of groundwater and surface water hydrology is increasingly more sophisticated. And our need to both protect existing water uses and adapt to meet new water demands grows ever greater.

Looking toward the future, our courts and agencies seek to ensure that the legal processes for water rights remain relevant and are professional, fair, effective, and efficient. The Montana Supreme Court thus commissioned this report to assess how Montana's water rights legal system works today (**Part I**), how it compares to other states (**Part II**), and how Montana might adapt its legal system to meet our state's water future (**Part III**).

In preparing this report, the Land Use & Natural Resources Clinic consulted with representatives from the Montana Supreme Court, the Water Court, and the Department of Natural Resources & Conservation (DNRC). These representatives helped identify key focus areas for the report, recommended comparison states in the West, and provided important feedback on report drafts. We thank these representatives for their generous commitment of time and expertise.

The Clinic began its research with regulations, statutes, and case law. But to get a sense of how things work on the ground, we also interviewed water rights users, water judges, state agency personnel, water commissioners, and water lawyers and consultants. The Clinic independently selected its interviewees to ensure that they represented a diversity of perspectives and experiences. Over 50 people were interviewed, and each person was assured confidentiality. These interviews yielded additional focus areas for the report. We are grateful to the many people in Montana and across the West who devoted countless hours helping us with this report.

We note that this report is written for a lay audience and contains a general summary of legal processes. The summary is a composite of both written laws and interviews. By necessity, we could not cover every nuance of water law that might arise. Thus, we wish to note that certain aspects of the law are not fully addressed, and many legal terms of art are replaced with simplified terminology. Nonetheless, we hope this report will serve as a useful starting place for discussing possible ways that Montana's legal system might evolve to serve the water users and people of this great state.

EXECUTIVE SUMMARY

After briefly explaining Montana's current water rights system, **Part I** of this report highlights some key focus areas for further consideration and study, including:

- Generally, Water Court decrees describe water rights as they existed on or before July 1, 1973, even if those rights are used differently today. With the exception of abandonment, changes happening after July 1, 1973 are typically not part of the Water Court's focus in adjudication. Decrees thus may not accurately describe the water use that is occurring at the time they are issued, and they can become increasingly less relevant as time goes on.

- Some changes to existing water rights require DNRC review (i.e., changes in point of diversion, place of use, purpose of use, or place of storage), whereas other changes can occur without DNRC review (e.g., changes to methods of irrigation or internal ditch systems). Agency-authorized changes result in a record that is part of the state's centralized database. But changes occurring outside of agency review may not become part of the state records if they are not addressed in the Water Court's decrees.

- Water users changing certain aspects of their pre-July 1, 1973 rights will be required to appear before both the DNRC and the Water Court. Although the Water Court makes many findings about the underlying characteristics of water rights during adjudication, DNRC makes additional findings about "historic" volume and consumptive use during its change of use process. DNRC change proceedings have a different focus and burden of proof than Water Court adjudication proceedings, which can leave water users wondering why their water right is treated differently in each forum. And because the DNRC "looks back" to 1973 when making its findings, water users can face challenges in locating historical evidence of use. Additionally, a water user may rely on a DNRC change approval only to later learn that her water right has been modified in the Water Court adjudication. While water users are alerted to the risk of such future modifications, they may nonetheless need to move forward in the short term with changes to their water rights operations.

- Water users may be required to appear both before a district court and the Water Court if they have a dispute about water or its distribution that also requires a determination of the underlying characteristics of water rights. Although district courts address disputes about water and its distribution, and the Water Court rules on the characteristics of water rights, those questions are often intertwined. Thus both courts may be involved before a water user's matter is fully resolved.

- District court judges can lack the expertise, time, and resources to resolve complex water disputes. District court judges also vary in the way that they appoint, compensate, train, and oversee water commissioners. Further, some district court judges are uncomfortable with the judicial branch directly overseeing water commissioners, who essentially serve a "law enforcement" function.

- Water Court decrees are issued by basin, and basins often span multiple judicial districts. District courts have historically appointed water commissioners for more localized water distribution within their district, and there are questions about how to fairly and effectively achieve water distribution throughout an entire basin under Montana's current water commissioner laws.

- Different types of water records are issued by the DNRC, Water Court, and district courts. The law is not always clear on when and how these records should be updated or integrated. Water users thus have to review multiple records to fully understand a water right and water source. Additionally, as noted, some types of water rights changes are currently not captured by state records.

- In watersheds where the courts, DNRC, water commissioners, and water users hold regular meetings, the accuracy of water use information can improve and the likelihood of litigation may be reduced.

Part II provides a brief overview of how other western states approach some of the issues that Montana is facing. While no state provides a model of perfection, there are some out-of-state ideas that, after careful study and discussion, may merit consideration for use in Montana's system. In particular:

- Most states allow the adjudicating court to declare water rights as they are currently used, rather than how those rights were used at some point in the past.

- States generally allow water judges to resolve both adjudication matters and other water dispute and distribution matters in one proceeding. Some also use water judges as appellate judges for agency decisions about water.

- Most states identify a diverted volume for adjudicated water rights, so that agencies reviewing water rights changes conduct less fact-finding regarding historical water use.

- Many states have a shorter "look back" period (5-15 years) for calculating historic consumptive use in a change of use proceeding.

- Some states give courts ongoing jurisdiction over water decrees, so that future changes to decreed rights are reviewed by the water judge presiding over the adjudication. Other states have a hybrid model where agencies review changes, but appeals of change decisions go to the water judge.

- Most state agencies employ water commissioners and have a standardized process for hiring and training those employees. In several of those states, the commissioners are organized by major water divisions and sub-basins so that basin-wide decrees can be effectively administered. While commissioner oversight is centralized, the commissioners themselves are people that live and work in their local communities.

- Some states have invested in modern technology and gathered hydrologic data to ensure effective, real-time monitoring of water distribution on basin-wide scales.

Part III describes some possible short term and longer term modifications to Montana's water rights system that merit further study and discussion. We are careful to note that this report discusses these modifications in broad strokes that will have to be carefully refined in processes involving all stakeholders.

In the short term, creating concurrent Water Court–district court jurisdiction over water disputes and distribution is recommended as a legislative action that would allow litigants to avoid duplicative proceedings involving the same water rights.

An additional short term recommendation for the DNRC, Water Court, and district courts (with Montana Supreme Court oversight) is to develop internal procedures for updating and integrating the water records generated by each entity so that users have a "one-stop-shop" for accessing up-to-date, comprehensive "living records."

A final short term recommendation is to coordinate educational, collaborative meetings in each watershed aimed at improving the accuracy of local water information and fostering informal conflict resolution.

In the longer term, a primary recommendation is that the state develop a process for addressing post-July 1, 1973 changes to water rights in adjudication. The process should address how changes are raised, how other water users may object, and how the Water Court's review meshes with DNRC change review to ensure fairness among users. The process should also consider the related question of whether a "look back" period that goes back to 1973 is appropriate when considering changes to water rights.

Additionally, to reduce the burden on district courts and provide better expertise in water rights disputes, a longer term legislative recommendation is creating the option of allowing water users to appeal agency water rights decisions to the Water Court as a district court of specialized expertise.

A final longer term recommendation is to modernize the water commissioner laws, including how commissioners are appointed, trained, paid, and supervised, along with how users petition for commissioners under basin-wide decrees that span multiple judicial districts. The state should consider which entity is best suited for carrying out this law enforcement function. And to position itself for the effective implementation of basin-wide water rights decrees, the state should also consider how multiple water commissioners will coordinate across basins, and how hydrologic data and modern technology will become available for commissioners to effectively monitor large-scale water distribution.

PART I: HOW THINGS WORK IN MONTANA TODAY

A. A Brief History

From its earliest territorial days, Montana has recognized that people can use state waters for a variety of beneficial uses such as mining, irrigation, municipal, stock watering, industry, and commerce. Like many western states, we adopted the prior appropriation doctrine of "first in time, first in right" to govern use of those waters. Under this doctrine, a senior user with an earlier priority date is entitled to use the full amount of her water before a junior user with a later priority date can use water. This doctrine also allows users to change their water use so long as other users are not injured.

Until 1973, Montana allowed water rights to develop in two ways. The most common method was to simply divert water and apply it to a beneficial use — a "use right." Under a less common method, a user could follow a statutory process that included recording a notice of appropriation at the county courthouse — a "filed right." The classic characteristics of a water right included its priority date, point of diversion, flow rate (in miner's inches), and place of use. If disputes arose, water users could go to a state trial court (a "district court") and seek a court order called a "decree" that resolved the characteristics of the water rights at issue — "decreed rights." Additionally, courts heard disputes over whether changes in water use injured other users. Courts could also appoint a "water commissioner" — an on-the-ground official who distributes water to users according to a decree.

Over time, it became difficult to track the numerous water rights on a particular watercourse, especially since most rights had no paper record. Because watercourses often span multiple counties, the limited paper records that did exist were scattered among multiple county courthouses. Many watercourses also became over-appropriated, with claimed water rights exceeding actual water supply. Throughout the West, states also began experiencing competing pressures from other states, the federal government, and tribes claiming interests in the same waters. For these various reasons, Montana faced a need to modernize its water rights system.

Our 1972 Montana Constitution included a special provision on state waters that recognized all existing water rights and called for a centralized record keeping system for all water rights. In 1973, the Montana Legislature then passed the Water Use Act, a law aimed in part at clarifying water rights ownership throughout the state. The law looks both into the past and into the future, with July 1, 1973, serving as an important point in time.

Looking into the past, the law requires a special process called "adjudication" that requires our courts to decree "existing" water rights throughout the entire state. An "existing" water right means the "right to the use of water that would be protected under the law as it existed prior to July 1, 1973." The adjudication is an ambitious undertaking that continues today, with an estimated completion target of 2028. Looking into the future, the law requires an agency-issued permit for new water uses commencing on or after July

1, 1973. Additionally, as of July 1, 1973, the agency approves certain changes to water rights. The law also requires the agency to maintain comprehensive water rights records for the entire state.

As the state's water rights system has evolved, so have its water use needs. For example, the law now recognizes that water use for recreation and fishery protection is a valid beneficial use, and conservation organizations search for ways to convert historic, consumptive water uses to instream rights. Some irrigators are interested in more efficient methods of water use and seek to convert water savings to new uses. Hydraulic fracturing and other water-dependent extractive processes are introducing new demands on our water resources. And in over-appropriated watercourses, including "closed basins" where new rights are more restricted, there is an interest in creative ways to modify existing water uses to make more water available for new uses. At the same time, our improved understanding of hydrology means that we can better analyze how changes of water rights may affect existing users. Overall, these trends signal a need for a water rights system that provides both predictability and adaptability so that current uses are not only protected, but also nimble enough to change in response to society's needs.

B. Entities that Implement the Water Use Act

Three main entities implement what is commonly known as the Water Use Act: the Water Court, the district courts, and the Department of Natural Resources & Conservation (DNRC). Adjudication to define the characteristics of existing water rights falls within the exclusive jurisdiction of the Water Court. District courts continue to play a role in resolving individual water use disputes and implementing decrees through the appointment of water commissioners that distribute water. The DNRC provides technical expertise to the Water Court by examining existing water rights claims made to the Water Court. Additionally, the DNRC has jurisdiction over applications for new water rights as well as applications for post-July 1, 1973 changes to existing water rights. The agency is also responsible for maintaining a centralized record of all water rights. The Montana Supreme Court plays a role as well, supervising the Water Court and district courts and enacting rules that govern both the Water Court and DNRC's review of existing water rights claims.

Montana Water Court

Created in 1979, the Water Court is a special district court with exclusive jurisdiction to determine the characteristics of existing water rights. The court also determines whether existing rights have been abandoned due to nonuse. In addition to the Water Use Act, the Water Court's adjudication proceedings are governed by Montana Supreme Court rules.

The Water Court's mission is to expedite and facilitate the statewide adjudication of over 218,000 existing water rights claims. The Legislature originally expected statewide adjudication to take about 15 years, but, as in other states, this process has proven more complicated and time-consuming than anticipated. The current target for completion of

final decrees in all basins is 2028. The Legislature recently authorized the expansion of Water Court staff to help meet this target.

A Chief Water Judge and Associate Water Judge lead the Water Court, both appointed by the Chief Justice of the Montana Supreme Court. There are also four sitting district court judges (one from each major water basin) who can be tapped to serve as additional water judges, although this practice rarely occurs. The Chief Water Judge appoints "water masters" who are assigned to particular basins around the state. Water masters assist the court in making recommended findings and conclusions about water rights claims. They also facilitate the potential settlement of disputes. The vast majority of water rights disputes before the court are resolved without a trial.

The Water Court's main job is decreeing water rights on a basin-wide basis. Under the Water Use Act, the court also takes certified questions from district courts deciding localized water disputes that raise questions about characteristics of an existing water right. These questions are given priority by law so that the district court can receive an answer and proceed to resolve the dispute. Additionally, when district courts appoint water commissioners to distribute waters, the Water Court provides its decrees and other background information to the district courts. Appeals of Water Court decisions go to the Montana Supreme Court.

District Courts

Montana has nearly 50 elected district court judges serving in 22 judicial districts around the state. These courts have general jurisdiction, which means the judges can hear all criminal and civil matters. Although these district courts no longer conduct adjudications, other localized water disputes between individual users can proceed in district court. Occasionally, the Water Court may dispatch a water master to assist the district court on such water cases. As noted, the district court may also certify aspects of its cases to the Water Court when the characterization of an existing water right is needed.

District court judges can also appoint "water commissioners" to do on-the-ground distribution of water according to the terms of a decree (called "enforcement" proceedings). Water commissioner appointments typically occur when owners of at least 15% of the water rights on a water source make a request. In basins that do not have a decree, water commissioners are not an option.

Finally, when the DNRC grants or denies an application for a new water right or a change of water right, that decision may be appealed to a district court for review. The DNRC can also initiate a case in district court to stop illegal or wasteful uses of water.

Department of Natural Resources & Conservation

The DNRC is part of the executive arm of state government, with a director appointed by the Governor. The agency maintains a searchable, centralized water rights database that contains basic information about state water rights, whether they are newly permitted or existing water rights that predate the Water Use Act.

In the area of adjudication, the department provides technical expertise to the Water Court, such as compiling information from its database, conducting field examinations, interviewing claimants, examining aerial photographs and Water Resources Surveys, and creating topographical and hydrological maps. The department's claims examinations are governed by Montana Supreme Court rules. Under those rules, if the agency identifies a concern with a claimed water right, it places an "issue remark" on the claim that must ultimately get resolved during the adjudication. For example, a DNRC examiner might use an issue remark to note a discrepancy between irrigated acres claimed and irrigated acres depicted on a historical aerial photo. When the agency is done examining the claims for a particular basin, it transmits a report to the Water Court.

As the Water Court decrees the rights in particular basins, the agency is tasked with maintaining the records of those decreed rights, along with the records of newly permitted rights and certain changes to water rights. In an enforcement action involving water distribution, the DNRC also assists the Water Court and district court by compiling information such as water distribution lists and detailed maps of the diversions involved.

In the area of permitting, the DNRC reviews and decides upon applications for new appropriation permits and certain changes to water rights. The Water Use Act describes the specific criteria an applicant must meet to get a new appropriation or change of use approved, and the DNRC has adopted rules that implement those statutes. To reduce conflicts of interest, the agency has one set of employees who review and make preliminary determinations about an application, and another set of employees who act as "administrative judges" hearing objections and resolving contested issues related to the application. DNRC rulemaking and permit decisions can both be appealed to district court.

The DNRC also investigates and may act upon complaints involving illegal uses of water, and sometimes plays an informal mediator role in resolving disputes among individual water users. Because of limited resources, the DNRC does not pursue enforcement of all water use violations. In those instances, a water user could file his own case in district court.

C. How Specific Water Rights Issues are Resolved

Adjudicating Characteristics of an Existing Water Right

Adjudication before the Water Court is essentially a large lawsuit involving all users on a water source. To preserve her water rights, each user had to timely file a "statement of claim" describing the water right. That claim is considered "*prima facie*" evidence of the right, which means that it is accepted as proof unless other, contradictory evidence proves otherwise. When the DNRC places an "issue remark" on a statement of claim, it does so based on evidence it finds that may contradict the claim. Other water users and affected parties can also object to a claim and provide contrary evidence. Ultimately, all issue remarks and objections must be resolved through settlement or a Water Court determination. Before a final decree issues, the Water Court issues temporary preliminary and/or preliminary decrees. Some interviewees indicated that water users "overclaimed" water rights on a source and that neighbors were not comfortable objecting to one another's inflated claims. Other interviewees in other basins believed claims were accurately stated.

The Water Use Act requires that the Water Court decree the characteristics of "existing" water rights. As noted, these are rights "to the use of water that would be protected under the law as it existed prior to July 1, 1973." Therefore, the primary law that the Water Court applies is pre-1973 water law. Similarly, the primary evidence that the Water Court reviews is evidence of use predating 1973 — evidence which is becoming increasingly difficult to obtain as witnesses with historical knowledge pass away. With the exception of abandonment, Water Court decrees focus primarily on uses as they existed before 1973. As a result, they may not reflect the way a water right is used today. One interviewee aptly observed that the decree is like a "snapshot in time while the movie keeps on playing." For example, the court might decree a water right for a ranch that existed in 1973, even though the ranch today is subdivided into multiple lots and water is no longer used for the same purposes. As discussed below, these post-July 1, 1973 changes sometimes involve actions that should have undergone DNRC review and approval; but in other instances, these changes are of a type that required no agency authorization.

In most instances, the water right characteristics that a decree describes are priority date, flow rate, point of diversion, period of use, and place of use. (Modern flow rate is typically noted in cubic feet per second (cfs) for surface water and gallons per minute (gpm) for groundwater. Over time, the Water Court has begun to more specifically describe the ditch systems tied to particular water rights so that water commissioners can more easily distribute decreed water. Because the Legislature removed the Water Use Act's original requirement of finding a diverted volume on irrigation water right claims, the Water Court does not always specify that information. "Volume" is a way of describing the maximum amount a user can divert during her period of use. (Typically noted as acre-feet). As noted below, this information "gap" can create difficulty when a rights holder seeks to change the water right with the DNRC because the agency requires findings related to volume and consumptive use.

Seeking a New Water Right

To obtain a new appropriation of water, an applicant must apply to the DNRC and demonstrate that all applicable statutory criteria are met, including that water is available for the new use and that existing users will not be injured. Permits for new appropriations are made subject to the final outcome of the Water Court adjudication. In closed basins that have more restrictions on new appropriations, the process is more rigorous because applicants may be required to find mitigation (replacement) water if their proposed use will deplete surface waters and adversely affect existing water rights holders.

Changing a Water Right

Certain changes to both existing water rights and post-July 1, 1973 water rights require DNRC approval based on the statutory criteria in the Water Use Act. Changes that require approval include moving the point of diversion, place of use, or place of storage, as well as changing the purpose of the use. A conversion from flood to sprinkler irrigation, a change in crops, or modifications to internal ditch systems — where no change in point of diversion or place of use results — does not require agency approval, even if the change increases "historic" consumptive use. Agency-authorized changes are recorded in the centralized water rights database, whereas changes made outside of the agency process may not be reflected in state water rights records.

An important part of change review is ensuring other water users (both senior and junior) are not injured by the change. The agency focuses on the historic volume *diverted* under the water right, along with an estimate of the historic volume *consumed*. "Consumed water" is the volume of water that does not return to the water source after use. The water that does return to the system is "return flow," and other water users may depend on that return flow for their water rights. For example, the irrigation water used by a crop is considered consumptive because it does not return to the source, whereas the water not consumed by the crop that finds its way back to a creek would be "return flow."

Also relevant to the DNRC calculation is the water right's historic "pattern of use." For example, an irrigator may have historically diverted water into his ditch for a limited number of days each month. In other words, the irrigator did not divert water continuously over the entire use period. Sometimes irrigators alternated diversion days with other irrigators that shared the same ditch. If a water user later increases the number of days he diverts water, the overall volume of water taken could also increase.

Thus, when a water right changes, the agency may place limits on the diverted volume and consumptive use to its historical amount as a way of protecting existing users. The end result is that a water user may not be able to change the full amount of a water right if the proposed change would enlarge the right's volume or consumptive use.

This focus on volume and consumptive use during change review is different than the focus in the Water Court adjudication. Recall that, under the Water Use Act, the Water Court does not decree volume as a matter of course in its proceedings. When volume is

decreed, that volume generally does not specify what portion was historically consumed. Nor does the Water Court typically decree a water right's historic pattern of use (such as when an irrigator diverts water for a limited number of days per month), but rather describes the general period of use allowed (such as April 1 to October 30 for an irrigation right). As one DNRC interviewee explained, the agency therefore "fills in gaps" left by the decree to determine whether an applicant has met the statutory no-injury requirement.

Determining volume and consumptive use appears to be one of the most vexing tasks for water users, water lawyers, and consultants. Based on its understanding of Montana water law, the DNRC "looks back" to 1973 when determining "historic use." Thus, water users must gather evidence of past farming operations, places of irrigation, periods of use, and the like. Aerial photos and county water resources surveys may also be available. Alternatively, because historical evidence can be difficult to find, the agency has mathematical models and rules it can use to calculate historic volume and consumption based on crops, climatic data, and county agricultural statistics. Some water users appreciate having models when historical evidence is lacking; other water users are not confident in the validity of the models and express concern that it is difficult to introduce alternative methods of calculating volume and consumption. A number of interviewees indicated that in the past users have declined to pursue changes, or made changes without notifying the agency, to avoid the challenges of the change process.

In the past few years, the DNRC has reformed its application process to simplify submission requirements, provide more technical support, and make its decisions more transparent. The DNRC notes that it has had fewer appeals since these reforms, and more applicants are applying without the expense of hiring a consultant. Because the reforms are still new, many of the interviewees with whom we spoke had not yet gone through the new process. Interviews with some water users recently seeking to change rights for instream flow suggest that there may be ongoing concerns with the change process for that sector of water users. In interviewing water lawyers and consultants in general, some noted that they would still want to hire their own technical expert to determine whether it was worthwhile to apply for a permit or change authorization, and to be prepared with their own data if they did not agree with the agency's findings.

Another important distinction between DNRC change review and Water Court adjudication is the burden of proof on the water user. In adjudication, the water user's claimed historic use is *prima facie* proof of a valid right. As noted above, the claim itself, with no other evidence, will initially be accepted as true on its face. Objectors carry the burden of overcoming the *prima facie* proof of a water right claim by a "preponderance of the evidence." Preponderance of the evidence means that the party with the burden must introduce evidence to tip the scale toward a particular fact (to show that fact is more probable than not). For objectors, that means showing that certain aspects of a claim are, more probable than not, incorrect. Objections, along with DNRC issue remarks, can result in a claimant having to provide additional proof to support a claim. Absent objections or issue remarks, however, a water user may establish her existing right based her claim alone.

In a DNRC change proceeding, by contrast, the applicant water user has the initial burden of proving the statutory change criteria by a preponderance of the evidence. Those criteria cover issues (such as the potential for injury to other water users) that are not addressed in the Water Court. If the applicant does not introduce enough evidence at the outset, her application will be denied for failure to meet the statutory criteria. From a practical standpoint, water users may thus have to provide additional evidence in the DNRC change proceeding beyond that required in the Water Court. Agency personnel express concern that water users lack a basic understanding of these differences between adjudication and agency processes.

Because of these differences, some water users perceive that they have received their full water right claim in the adjudication, only to "lose" some of that right for failure to provide sufficient evidence of historic volume and consumption in the change process. On the other hand, agency personnel express concern that, based on their experiences, many existing rights are over-claimed or not rigorously scrutinized during adjudication. They cite the change process as an important "check and balance" on adjudication that provides an opportunity to better investigate the historic use of a claimed right so that other users are protected from injury. During this investigation, the agency indicates it may also unearth past changes of water rights that did not undergo agency review and that may have enlarged the volume or consumptive use of a water right.

Another area of potential confusion arises when the DNRC authorizes changes to an existing water right before it is finally adjudicated. In this situation, the DNRC may be making decisions about historic use before the Water Court has ruled on the validity and underlying characteristics of the water right. Although agency change authorizations state that they are subject to final adjudication by the Water Court, water users in the short term still rely on those change decisions to modify their operations. In one example, a water user received DNRC approval of a change, invested money to upgrade an irrigation system, and subsequently lost that water right when the Water Court held it abandoned. Short of abandonment, the Water Court could also conclude that a water user has a smaller water right than originally claimed, or that the right is actually junior to additional users on the source. These rulings could similarly disrupt the assumptions on which a change authorization was based. While such examples appear to be rare, the implications are nonetheless worth highlighting.

Stopping Unlawful Use, Interference, or Waste of Water

The DNRC investigates complaints of illegal water use, interference with another's water use, or waste of water. Illegal water use might entail using water without a water right/permit, or using water in ways not authorized by the water right/permit. Waste occurs when someone diverts water without applying it to a beneficial use. In these situations, the DNRC may take informal steps that include meeting with the alleged violator to find solutions for bringing the water use into compliance with state law. When informal processes prove unsuccessful, the agency may also petition the district court to order the violator to cease the unlawful conduct. The county attorney or attorney general also have authority to file such a suit, although this is infrequently done. As noted above, when DNRC

does not pursue a potential Water Use Act violation, individuals may elect to file their own case in district court.

Disputing the Actions of Another Water User

If individual water users are in a localized dispute, they may take their controversy to district court. Perhaps one water user believes another water user should not divert water down a particular ditch, or should not take water at a particular time. Or, perhaps there was a sale of land and contract interpretation questions exist about whether the seller intended to transfer water rights to the buyer. While a limited number of district court judges have experience and interest in water rights, other district court judges may not, and the handling of water disputes can be taxing on an already heavy district court caseload. On occasion, the Water Court dispatches its water masters to assist district court judges in water rights disputes in their courts.

An area of concern occurs when individual water user disputes overlap with larger questions of adjudication. Recall that if a lawsuit requires a determination of a water right's characteristics, the district court must send that particular question to the Water Court for determination. When no decree exists to guide the district court, the Water Court will step in to assist, and the DNRC may be called upon to gather technical information about the water in dispute. The Water Court then resolves the water right's characteristics and returns the matter to district court so it can proceed with its case. When these certified questions arise, they must be given highest priority under the Water Use Act.

On the flip side, the Water Court may encounter ditch easement or other water dispute questions entwined with the issues it is resolving during adjudication. It may lack the authority to resolve these related questions, leaving parties to take their remaining dispute before the district court. At the end of the day, water users can thus find themselves appearing before two separate courts to achieve full resolution of their water rights issues — a phenomenon that one interviewee described as "being caught in a jurisdictional seam."

Distributing Water Under a Decree

Sometimes multiple water users have concerns about the fair distribution of water on a source and request the services of a water commissioner. Montana's water commissioner statutes date back to the early 1900s and thus predate the Water Use Act. Under those statutes, a district court judge typically appoints a water commissioner upon the request of water users representing at least 15% of the water rights on a source. Enforceable decrees can include historic decrees and temporary preliminary, preliminary, and final decrees issued by a water judge (which supersede historic decrees). In basins that do not have a decree, water commissioners are currently not an option.

Judges note that water commissioners need to be individuals with good people skills and technical skills. Commissioners become intimately familiar with the diversions, head

gates, and ditch systems of a particular water source, as well as the unique hydrology and personalities of the water users on that source.

The appointment process for commissioners varies from judge to judge. A common approach is for the water users themselves to request a particular commissioner. Another approach is for the judge to select the commissioner after advertising the position and conducting interviews. The compensation, qualifications, and training of commissioners vary around the state, and this variability was a concern for several interviewees.

Historically, district court decrees focused on localized parts of a water source, and water commissioners have most commonly been appointed to localized stream segments. Today, however, the Water Court is issuing decrees that cover entire basins. These basins often span the jurisdiction of multiple district courts. Interviewees thus questioned how large-scale Water Court decrees will effectively be administered by one district court and one water commissioner. In one basin, for example, lower river users have been unable to get the 15% approval necessary for appointment of a commissioner because the upper river users have declined to sign the petition. In another basin that spans multiple court districts, water users residing in one judicial district felt disenfranchised when they were sued by water users residing in another judicial district. The out-of-district water users expressed concern that the judge and water commissioner would have loyalties toward those water users located within their own judicial district. Agency personnel also noted that there is an overall lack of adequate measuring devices and hydrologic data in the state, which further hampers a commissioner's ability to administer decrees.

Several district court judges highlighted the value of water commissioners, while noting the need to clarify their roles. Some judges expressed discomfort with the necessary, yet potentially *ex parte*, communications that occur between them and the water commissioners when implementing a decree. Water users dissatisfied with a commissioner's distribution can file a petition with the district court. Thus, the water commissioner, if sued, becomes a litigant before the very court that is overseeing her work. Additionally, some judges wondered whether the water commissioner is providing a law enforcement function better located in the executive branch. At the same time, some judges noted how important it is for a judge to remain involved in the distribution matter after she has developed expertise involving the water source. These judges emphasized the great value of having a water commissioner located within their community that works as a team with the judge.

The Water Court and DNRC assist the district court and water commissioner by creating a tabulation of water rights that includes the Water Court decree information, DNRC permit and change information, and detailed maps depicting the locations of head gates, ditches, and places of use. This tabulation and maps are bound into a "Red Book" that guides the water commissioner in her work. The water master and district court judge may hold informational sessions where water users can hear about the distribution process and provide input on the draft Red Book before it becomes final. One district court judge conducts annual "water walks" where water users, commissioners, DNRC officials, and Water Court representatives meet on site to discuss water supply and delivery conditions.

These collaborative approaches increase the district court judge's familiarity and expertise, build trust, and strengthen collaboration among stakeholders so that litigation is minimized. While a select number of district court judges have developed these collaborative models, the prevailing view among interviewees was that most judges lack the expertise, interest, and time to handle such complex water rights disputes.

Locating Water Records

With respect to water rights records, there are also some concerns about where water users, water lawyers, consultants, and the public look to find a complete and up-to-date listing of all water rights on a source. Water Court decrees do not list agency permits or change authorizations. Thus, even when final decrees issue, the law currently does not provide a mechanism for updating those decrees to reflect new and changed uses.

DNRC's centralized database contains abstracts of post-July 1, 1973 water permits, along with abstracts of existing water rights claims undergoing Water Court adjudication. These abstracts are updated to reflect DNRC-authorized changes and Water Court rulings on the characteristics of existing water rights. Even in this more comprehensive database, however, it is not always clear when interim Water Court determinations should trigger DNRC modifications to abstracts. For example, when the Water Court issues a temporary preliminary or preliminary decree before its final decree, the agency lacks clear guidance on whether to modify change authorizations with each interim ruling, or wait until the final ruling issues and all issues are resolved on appeal. The agency also notes a lack of guidance on how ownership changes and splits in ownership of water rights should be reflected in the records. Further, as noted, there is currently no mechanism for recording changes to existing rights that do not undergo agency review.

Additionally, water disputes in the district court generate a separate set of orders related to water rights. In distribution proceedings in particular, the Red Book generated to govern commissioner implementation of a Water Court decree contains details beyond those stated in the Water Court's decree or the DNRC water right abstract. There are thus multiple locations of information that must be reviewed to fully understand the scope of legal records relating to a water right and its water source.

D. Focus Areas for the Future

Based on interviews with various stakeholders in Montana's water rights system, some common focus areas emerge for the future. In Part III, below, the report recommends some possible ways of proceeding in these focus areas. In particular, stakeholders highlight:

- *The time gap.* Water Court decrees may not reflect current water right uses because the court generally describes water rights as they existed before July 1, 1973. In other words, there may be post-July 1, 1973 changes to an existing water right that go unaddressed in a decree. Some post-July 1, 1973 changes undergo agency review,

whereas others do not. Changes not requiring agency review thus may not be reflected in state water records. Even when agency change authorizations occur, however, those authorizations do not affect the Water Court's general obligation to describe rights in their pre-July 1, 1973 formulation. For each year that adjudication continues, the time gap between present day uses and decreed uses widens further.

- *The change conundrum.* In most instances, the Water Court is not decreeing a volume or consumptive use for existing water rights. During the change process, the DNRC "fills in this informational gap" by finding a historic diverted volume and consumptive use so it can then analyze whether other users may be injured by the change. Applicants thus may have to produce additional evidence before the agency. Because the DNRC "look back" period extends to 1973, some applicants struggle to find sufficient evidence of historic use and instead rely on agency rules and mathematical models.

  Adjudication and change review involve different criteria, types of evidence, and burdens of proof, and applicants sometimes feel they "lose" decreed water during the change process because the DNRC may limit the amount of water they can change. Changes are also processed without knowing the ultimate outcome of adjudication. Although change authorizations expressly note that they are subject to final adjudication, water users may rely on change approvals and later have their water rights claims altered by the adjudication process.

- *Multiple court forums.* Water users can occasionally become caught in the "jurisdictional seam" between a district court and the Water Court. Certifications from a district court to the Water Court slow down the district court case. On the flip side, the Water Court is presently unable to resolve distribution and other individualized water dispute questions that naturally arise in its adjudication proceedings. Water users may thus be required to appear in two separate forums to resolve their water rights matter.

  As a related matter, district court judges with heavy caseloads may lack the resources, expertise, or interest to wade into complex water cases, whether those cases involve individual water disputes, broader distribution and decree enforcement, or appeals of agency water decisions.

- *Clarifying and supporting the commissioner role.* The water commissioner statutes are among the oldest statutes affecting water rights and may not reflect modern day realities. Some district court judges express discomfort with the necessary, yet potentially *ex parte*, communications that occur between them and the water commissioners when implementing a decree. Some stakeholders express concerns about the inconsistency in hiring and training of water commissioners, and the fact that courts must play a role in law enforcement. There is also concern about how Water Court basin-wide decrees will be enforced when they span multiple judicial districts, and whether Montana has adequate measuring devices, hydrologic data, and technology to implement those effectively implement decrees.

- *Creating living records.* In general, water users must consult multiple records to fully understand a water right and its water source, and some types of changes to existing rights are simply not reflected in the records. It is also unclear when DNRC should update its records as the Water Court makes interim rulings on water rights claims pending final decree. Further, there is presently no provision for updating decrees to reflect changes and new permitted uses on a water source so that decrees represent a complete, "living record" of all water rights. At the end of the day, we lack a "one-stop-shop" for ascertaining water rights information.

- *Developing robust collaborative processes.* Stakeholders note the value of public outreach and working groups designed to educate water users, improve on-the-ground knowledge of a water source, and resolve conflicts that may arise among water users. While there are currently informal collaborative processes being used in select watersheds, there is no coordinated effort to apply these models throughout the state.

PART II: A COMPARISON TO OTHER STATES

This section summarizes in general terms the water rights systems of several other western states, and then focuses more particularly on how those states approach the types of issues identified in Part I. Notably, not every state is successful in its approach. Indeed, some interviewees expressed their admiration of certain features in Montana water law. Nonetheless, this report highlights some out-of-state innovations that merit consideration as Montana plans its water future. We also note that, because each state has its own unique legal systems around water, any adaptations made in Montana should be done after careful study and involvement of all stakeholders.

California

Overview. California has a complex water rights system because it recognizes both riparian and appropriative surface water rights and because it does not comprehensively regulate groundwater withdrawals through a centralized permit system. It has not conducted statewide adjudication of water rights, but both its trial courts and its State Water Resources Control Board (SWRCB) have authority to adjudicate surface water rights. Trial courts also have jurisdiction to separately adjudicate groundwater rights. Since 1914, the SWRCB has regulated surface water rights through a permit program that covers new permits, changes of use, and enforcement of permit violations. Trial courts implement decrees by appointing a "water master" (somewhat like Montana's "water commissioner") that oversees the exercise of decreed rights and sometimes physically operates the water diversion structures of decreed rights holders.

Concurrent court-agency jurisdiction over adjudication. In California, surface water rights adjudication can commence either before a trial court or before the SWRCB. Water users initiate trial court adjudication by filing a lawsuit. In this scenario, the trial court may ask the SWRCB to analyze water rights claims and provide technical expertise to the court. The SWRCB can also commence its own adjudication of a surface water source, resulting in

an order that is filed with a trial court for ultimate approval in a decree. Because the trial courts have general jurisdiction, they can adjudicate both the characteristics of water rights as well as related matters such as distribution and ditch easement disputes. Unlike Montana Water Court decrees, California decrees are not comprehensive: they may address appropriative rights but not riparian rights, or may address only surface water or groundwater, but not both. Modern decrees do address diverted volume, and describe water uses as they exist at the time of decree. But decrees are not uniform in all respects; rather, they are tailored to the circumstances of the affected community.

Durability of decrees. Decrees in California are not regularly updated. Water masters, however, maintain and update records for those water rights covered by the decrees they administer. The SWRCB also maintains updated records based on mandatory water use reporting by all surface water rights holders.

Changes of water rights. California began requiring surface water use permits in 1914. Changes to post-1914 water rights go before the SWRCB. When it analyzes consumptive use during its change process, the agency typically looks at current and recent uses of the water right proposed for change. Depending on the type of change requested, historic uses may also be reviewed to the extent they are relevant.

Changes to adjudicated, pre-1914 surface water rights are more complex and depend on the language of the decree. Some minor changes may merely require the approval of the water master and need not go before the trial court. Most changes, however, require approval of the trial court that originally issued the decree. In this situation, the court is deemed to have ongoing jurisdiction over the decree and it reopens and amends the decree to reflect the change. California also expressly applies the principle of *res judicata* (the idea that once a matter has been judged on the merits, it may not generally be re-litigated) to preclude the SWRCB from modifying the characteristics of a judicially decreed water right.

Water distribution. In water systems that have been adjudicated, there is a water master that distributes water under the decree, conducts studies about the hydrology of the water source, collects fees, and even initiates projects to facilitate the availability and deliverability of water rights recognized by the decree. The water master issues reports to the trial court pursuant to the decree. In rural areas, the water master may be an individual or small group. But in major urban areas, the water master is actually a public entity with a governing board. Water rights holders have a say in the membership of the board, which adopts rules and regulations, holds public meetings, and is considered an arm of the court. Board actions are appealed to the trial court. Interviewees held mixed views of this approach, depending on how well the particular board is functioning.

Colorado

Overview. Colorado has "unitary administration" of water rights. Water courts adjudicate the characteristics of existing water rights (including diverted volume) and also have ultimate authority over recognizing new water rights and changes of rights. The State Engineer assists the water courts by providing technical expertise on water rights cases, and issues approvals of some technical matters. In high-profile or controversial matters, the State Engineer also occasionally opposes an application to protect state interests. That office also oversees the state water commissioners that distribute water in accordance with water court decrees. Actions taken by the State Engineer, including agency decisions and rule promulgation, are appealed to the water courts.

Water court adjudication. Water courts have jurisdiction over all water matters: both general basin-wide adjudications and smaller, individual disputes among water users. Water courts also have the option of separating out related issues such as ownership disputes over water or related ditch easement questions and sending those matters to district court. This broader water court jurisdiction avoids the dual-court problem that Montana water users face when they must go to the Water Court for adjudication and the district court for individual disputes and distribution matters.

Colorado has 7 major water divisions, each with its own specialized water court. The divisions generally follow the state's 7 major basin boundaries so that a court has jurisdiction over an entire water source — both for purposes of adjudication and distribution. This, too, differs from Montana, where a basin-wide decree might encompass multiple judicial districts and users struggle over which district should oversee distribution questions. In Colorado, the judges serving on the water courts are designated district court judges that handle both their regular docket as well as water matters. These designations are competitive and highly sought after by the Colorado judiciary. An important distinction between Colorado and Montana is that Colorado adjudicated most of its water rights a century ago, so its modern adjudications are "supplemental" to those historical decrees.

Each water division also has a "water referee" (akin to Montana's "water master") who investigates water cases filed with the court, oversees settlement discussions, and issues proposed rulings. Referees may be either lawyers or engineers. If the referee's proposed ruling receives a protest, the matter goes on a trial track before the water judge, with a 1-year timeline for decision. The water courts have a unique settlement rule requiring the parties' experts to meet without their attorneys to attempt to resolve factual disputes — a step lauded by both the courts and the lawyers. Water court decisions are appealed directly to the Colorado Supreme Court.

Durability of decrees. As one Colorado water judge observed, "one-shot adjudications of water rights don't work." For this reason, Colorado water courts retain ongoing jurisdiction over decrees and update them on a regular basis to reflect newly recognized water rights and changes to water rights. (There are approximately 1,200 such requests annually). Each month the water court publishes a "resume" of requests for new or

changed water rights so that all water users have notice of potential modifications to the decree, along with the opportunity to protest. The State Engineer maintains a water rights tabulation that commissioners and users can consult for up-to-date decree information. When water rights are decreed, they reflect the current realities of the water right. A primary driver of this "living decree" approach is the need for adaptability to respond to demands in the Colorado water market.

Changes of water rights. As noted, changes of water rights are ultimately approved by the water court with technical support from the State Engineer. That office has division engineers that oversee each of the 7 major basins, and serve as the point of contact to the water court referee for that division. Changes of water rights are allowed subject to conditions that protect against injury to other users. An applicant must prove an absence of harm to other users and must hire his own expert. The State Engineer also conducts an independent technical analysis that reviews historic consumptive use, as well as location and timing of return flows. After conferring with the referee, the division engineer provides a "consultation report" to the water court that recommends findings and conditions.

There is no definite "look back" period for determining historic consumptive use, but 20-30 years of record is cited as typical. Nonetheless, statements of opposition could raise fact questions that go back farther in time. The 10-year abandonment statute also plays a role. One water lawyer said it is typical for the water court to impose "knock downs" on the water right, meaning a reduction in historic decreed volume to account for changes between the proposed and historic consumptive use. Colorado also has a "fast track" change process for relocating points of diversion, which includes a presumption of non-injury when there are no intervening users between the original and proposed diversion location. This "fast track" approach does not require a historic consumptive use analysis. One water lawyer indicated that it is rare for a change to qualify for this fast-track status. Because the water courts review agency determinations and incorporate changed rights into their living decrees, they avoid the Montana dilemma of having different proceedings and standards between the agency and the Water Court.

Water distribution. Under separation of powers principles, Colorado locates its enforcement function in the executive branch. Colorado has 115 surface water commissioners and 20 groundwater commissioners who distribute water according to water court decrees. Commissioners serve in 78 water districts nested within the 7 major state basins. When a water source spans multiple districts, there is a lead commissioner and assistant commissioners that coordinate and rely heavily on remote-sensing, real-time monitoring data. Commissioners are employees of the State Engineer, and they are hired after receiving input from local water users. Commissioners reside in the local community and work from their homes. When commissioners have questions about how to apply or interpret a water court decree, they report their question to the division engineer, who in turn consults with the water court referee. In this way, *ex parte* communications are avoided between the court and a commissioner who may ultimately be sued by dissatisfied water users. Water commissioners also play an important role in a division engineer's review of new or changed water rights because of their "boots on the ground" perspective on the affected water source.

Idaho

Overview. Idaho's statewide, water rights adjudication occurs in a single, designated court called the Snake River Basin Adjudication District Court (SRBA-DC), which is a separate division of the district courts. This court has exclusive jurisdiction over water rights matters. The SRBA-DC is also the exclusive forum to petition for judicial review of any water-related agency decisions. The Idaho Water Resources Division (IDWR) is an agency that provides technical assistance to the SRBA-DC. In addition, IDWR has broad authority and responsibility for distributing water through its "water masters" (like Montana's "water commissioners"). Since 1971, IDWR has been responsible for processing applications for new water uses and changes of use. The SRBA-DC reviews these administrative decisions in an appellate capacity.

Specialized district court adjudication. The SRBA-DC exercises unique and exclusive jurisdiction given to it by the legislature. It is supervised by the Idaho Supreme Court, and its focus has largely been on the Snake River Basin, which comprises 87% of the land area of Idaho. IDWR serves as an independent expert and technical assistant to the SRBA-DC by filing Director's Reports, which are *prima facie* evidence of the nature and extent of claimants' water rights. The court uses "special masters" (like Montana's "water masters") to make preliminary rulings on issues. Jurisdiction remains with the SRBA-DC until final orders of water rights are decreed. With some exceptions for groundwater rights and previously changed water uses, Idaho is similar to Montana in that it does not as a routine practice decree volume as part of its adjudication.

Durability of decrees. In the Snake River Basin, the SRBA-DC adjudication process results in a "time gap" similar to Montana's because it decrees rights as of 1987. However, the IDWR has on occasion recommended findings based on post-1987 changes when other users are notified and no objections are raised. Idaho decrees are not regularly updated to reflect new uses or changes in use. IDWR is charged with maintaining water rights records. If there is an administrative proceeding that changes elements of a water right, the administrative decision supersedes the judicial decree for that particular water user.

Changes of water rights. IDWR processes applications for changes of use (called "transfers"). If the nature of use is not changing, IDWR does not evaluate consumptive use within the transfer process. Thus, if someone is simply changing the place of use or point of diversion for their irrigation water right, IDWR will allow the water right to be transferred in full. Essentially, IDWR only evaluates historic consumptive use in transfers proposing to change the nature of use of the water right. For example, if an irrigation water right is being changed to industrial use, the agency would evaluate the historic consumptive use associated with the irrigation. Although there is no specific "look back" period for determining consumptive use, Idaho does recognize a five-year forfeiture for unused water rights. Thus, IDWR generally will look at the previous five years of crops as a measure of the consumptive use. Applicants are also free to provide additional data. An innovator among western states for its use of water rights software, IDWR depends heavily on a

Geographic Information System (GIS) framework and quantitative models when considering the impacts of new or changed water uses.

To ensure consistency and court expertise regarding the administration of water rights, the Idaho Supreme Court placed appeals of agency change decisions, as well as other water-related decisions, within the exclusive jurisdiction of the SRBA-DC. IDWR decisions are reviewed for abuse of discretion or clear error using a closed administrative record. IDWR appears as the respondent and is represented by the Idaho Attorney General's Office.

Water distribution. IDWR oversees the distribution of water through "water masters" elected from state water districts. Distribution disputes are raised in an IDWR administrative forum, after which parties may appeal the agency decision to the SRBA-DC.

Oregon

Overview. Since the passage of the Oregon Water Code in 1909, all new permits and changes of use ("transfers") are administered through the Oregon Water Resources Department. All pre-statutory rights are adjudicated in basin-specific actions after the Department examines the claims and presents proposed final orders to the local district court. Although around two-thirds of the state is adjudicated, the Klamath Basin is the only basin adjudicated in the last 40 years.

Agency-driven adjudication. In an adjudication, the Department examines all claims in a basin and issues proposed final orders. Protests to the proposed final orders are first heard by an administrative law judge. The Department then reviews the administrative law judge's findings and issues a proposed Findings of Fact and an Order of Determination (FFOD), which is presented to a local district court. The local district court can affirm the FFOD as a decree. The district court will hear any contested issues and review the Department's order under a *de novo* standard (deciding the matter anew, without deferring to the Department's findings). Until entry of the final decree, the FFOD is treated as an enforceable preliminary decree. The description of finally decreed rights generally includes a maximum rate (in cfs or gpm) and a duty/diverted volume (in acre-feet) and mirrors the description of rights obtained through the statutory permitting process. Water rights are described according to those uses occurring at the time of decree.

Durability of decrees. Like Montana, Oregon decrees are not updated on an ongoing basis; instead, decreed rights receive a "certificate" like statutory permitted rights and are maintained within the Department's centralized water rights records.

Changes of water rights. The Department deals with all future changes to decreed water rights, subject to appeal to a district court. Although there is no statutory "look back" period for consumptive use, the forfeiture statute guides the agency (requiring 5 years of continuous non-use in the last 15 years). Stated another way, the agency asks whether the water has been beneficially used to its full extent once in the last five years. In one attorney's experience, the vast majority of the cases involve no look back at all, but rather

focus on whether there is injury if the current use is changed to the proposed use. Typical evidence includes recent power bills or crop yields. Pre-statutory rights that have not been decreed do not qualify for transfer.

Water distribution. The Department has twenty water masters (hydrologists), divided among 5 regions in the state, who not only implement distribution, but also conduct inspections and enforce violations of state water law. They also play an important supporting role when the Department processes applications, by providing information on crop use, injury review, and water availability.

Utah

Overview. Utah began requiring water rights permits in 1903. Prior to 1903, rights were established by filing a "diligence claim" with the State Engineers Office (SEO), which today processes applications for new appropriations and changes of existing rights. If a new use is authorized, the SEO monitors the use for several years to confirm it is perfected, and then issues a Certificate of Beneficial Use. The SEO also has exclusive jurisdiction over enforcement and drives the adjudication process for pre-1903 rights.

Agency-driven adjudication. In nearly every state stream with pre-statutory diligence claims, there are ongoing general stream adjudications (some of which are being prosecuted in smaller stream segments). Some of these adjudications have languished for decades, but increased staffing has begun speeding up the process. Diligence claims are decreed as they existed pre-1903, and include a diverted volume in acre-feet. Because the SEO has been approving water rights changes since 1903, and thus determining the validity of all changed diligence claims, Utah does not face the same "time gap" issue as Montana.

The SEO initiates adjudication proceedings in district court, after which water users file their claims and SEO field staff check the accuracy of the claims. Similar to Oregon, the SEO then issues a Proposed Determination of Water Rights Book, which contains recommendations to the district court. Users have 90 days to object to the proposed determination, although objections are few and settlements are common. The burden of proof is on the claimant to overcome the SEO's determination, and objections that cannot be resolved are decided by the court. Until the final decree is issued, the SEO distributes water in accordance with its Proposed Determination.

Durability of decrees. The district court retains ongoing jurisdiction over decrees. If individual water user disputes arise, it can supplement the decree with additional rulings. The court reserves the right to make changes in the quantification of the decree based on the availability of better scientific information and analytical techniques that become available. If such modifications become advisable in the future, the court also retains jurisdiction, upon motion of the SEO, to modify the irrigation duty, the domestic use allowance, and the stock water allowance.

Changes of water rights. The SEO reviews changes of all water rights. It does a full hydrological analysis of the change to determine if there will be injury, and it assumes maximum volume of use based on flood irrigation. SEO decisions are reviewed in district court, subject to *de novo* review. Roughly 90% of water rights applications are handled without an attorney and "fewer than 1% of the applicants" appeal SEO decisions.

Although Utah has a forfeiture statute that applies to water rights that are not used for 7 years, the Utah Supreme Court has held, under separation of powers, that the SEO does not have authority to declare unadjudicated rights to be forfeited during the change application process. Instead, forfeiture is a question that must arise in the general adjudication proceeding or in a private forfeiture action. For that reason, the agency does not "look back" at historical uses for pre-statutory rights.

Water distribution. The SEO has distribution authority and appoints water commissioners for 4-year terms, based on input by local water users. Similar to several of the surveyed states, commissioners are paid, trained, and directed by the SEO.

Washington

Overview. In Washington, superior courts (a type of trial court) conduct adjudications that are commenced by the state Department of Ecology (Ecology). Adjudications can range from small disputes to large, general adjudications. They can be limited to surface water or groundwater, or include both. Since 1918, 82 basins in Washington have been adjudicated. The main active adjudication today commenced in the 1970s and involves surface waters in the Yakima River Basin. And since 1967, a relinquishment statute has provided that failure to use all or part of a water right without good cause for 5 successive years can trigger loss of the water right. There is also a common law cause of action for abandonment.

Court-driven adjudication. Superior courts may appoint special masters to take evidence and issue preliminary findings and conclusions. The parties bear the burden of proof and have deadlines for submitting evidence to support their claimed water use. Ecology investigates claims, gathers its own evidence, and reports findings to the court. Washington decrees include a maximum diverted volume in addition to flow rate, and decrees reflect current water uses.

Changes of water rights. During an ongoing adjudication, parties request temporary changes directly through the court overseeing the adjudication. For permanent changes, Ecology processes requests and records its agency decision with the court. The change then becomes part of the final decree. Post-decree, Ecology processes changes of use outside of the court. A "superseding certificate" is issued and Ecology updates its records.

Appealing Ecology's decision on a change request is somewhat complicated. If the agency decision touches on the extent and validity of a claimed water right, that decision is appealed to the trial court overseeing the adjudication subject to *de novo* review. If the

decision touches on matters other than the extent and validity of a claimed water right, that aspect of the appeal is certified to a Pollution Control Hearings Board (PCHB). Decisions by that board can be appealed back to the trial court, which applies deferential review.

In the Yakima, the state encourages, but does not require, that change proposals be brought to the Water Transfer Working Group: a voluntary team of agencies and water users that meet to provide technical review of proposed water right transfers in the Yakima Basin. This optional process guides applicants to those types of water right changes and transfers that can quickly and easily gain approval from the state.

Because decrees resolve volume, Ecology does not adjust volume in a change proceeding involving an adjudicated water right unless there are questions of relinquishment/nonuse. And the Washington courts have held that in the processing of a change application, the doctrine of *res judicata* bars Ecology from raising allegations of relinquishment that it failed to raise during its investigation of a water rights claim during the adjudication. Thus, the agency cannot "look back" beyond the date of the court's order characterizing the right. In non-decreed water rights situations, Ecology reviews the history of the water right to perform a tentative determination of the validity and extent of the water right.

Whenever an applicant seeks to add irrigated acres or new purposes to a water right, Ecology is also required to limit transfers to the "annual consumptive quantity" which means "the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right." Thus, the look-back period under this formula is generally 5 years.

Durability of decrees. Similar to the Montana approach, Ecology maintains a record of decreed rights and does not update those decrees to reflect changes made after they become final. The Yakima Basin decree may be updated, however, in light of the possibility of ongoing court jurisdiction.

Water distribution. The adjudicating courts have authority to fashion enforcement and implementation of a decree. Typically, the courts will charge Ecology with the task of enforcement and implementation, and appeals of Ecology actions will go to the PCHB. In the Yakima Basin, the court's proposed final decree envisions that Ecology will supervise enforcement, with the court taking direct appeals of agency actions for three years. Thereafter, appeals will go to the PCHB and then to the court under its ongoing jurisdiction. Ecology is in charge of hiring, training, and supervising "water masters" (like Montana's "water commissioners") that do on-the-ground distribution of water. Unlike Montana, Washington water masters are used both in decreed and non-decreed basins.

Wyoming

Overview. In contrast to the judicially-driven approach of Colorado, Wyoming takes a strong agency-driven approach to water rights. Since 1890, the Wyoming State Engineer's Office (SEO) has issued permits for all water rights. The State Engineer and superintendents heading each of four water divisions make up the State Board of Control (BOC), which "adjudicates" water rights and considers water rights changes.

Agency-exclusive adjudication. At statehood, Wyoming had about 5,000 territorial rights. The State Engineer took sworn proofs of historic use and conducted field inspections on each of these rights during the period from 1890 to 1920. Today, if a water user seeks to change a pre-1890 right, then the agency "adjudicates" that individual right by conducting fact-finding to confirm it was perfected. Once a water right is "adjudicated," it is given a duty (stated as a flow rate) and "permanently attached to the specific land or place of use described on the certificate." It cannot be removed or changed except by action of the BOC. A water user may also request an adjudication of her right to confirm its validity in advance of marketing the water right. Appeals of BOC actions go to district court, which must advance the water case to the head of its docket.

The exception to individualized agency adjudication is the Big Horn River Basin adjudication, which is a general adjudication that has been ongoing in state district court because it involves federal and tribal rights. With respect to the pre-1890 rights involved in that case, the SEO has followed the Oregon and Utah models by providing technical expertise and making proposed findings for approval by the district court.

Durability of decrees. Because Wyoming adjudicated pre-1890 rights one at a time, there are no comprehensive decrees for a water source outside the Big Horn River Basin. The SEO does maintain and update its statewide permit records.

Changes of water rights. To change an existing right, an applicant petitions the BOC, which determines diverted volume and consumptive use to ensure no injury to other users. Although the "look back" period is 5 years, based on the state's abandonment statute, the BOC is known to be "pretty friendly" to applicants trying to resuscitate their water rights. Additionally, there is a heavy burden on water users who argue that another user has abandoned their rights, which makes it difficult to eliminate unperfected claims. Interviewees noted that the BOC may tell an applicant to go back and use the water and return in five years. Finally, instead of the BOC asking for objections to a change application, the applicant obtains consent forms signed by other users on the stream. In the absence of full consent, the BOC holds a contested case hearing.

Water distribution. Water Commissioners are hydrographers and full-time employees of the SEO. Streams are generally not "regulated" unless a user makes a "call." If a "call for regulation" comes in, then the hydrographer uses the BOC tabulation books and listings of un-adjudicated permits in good standing to regulate by priority. This decision can be appealed to a division superintendent, then the SEO, and ultimately the courts.

Trends in Other State Systems

Without passing judgment on the merits of different state approaches, we note some of the more significant trends observable in other states:

- Every surveyed state except Wyoming has a judicial role in adjudication (and even Wyoming does for the Big Horn Basin). In states like Oregon and Utah (and sometimes California), the state agency plays a larger role in making findings and resolving objections, and a district court signs off on the agency's work. In states like Colorado, Washington, and Idaho, the judiciary plays a larger role in making findings and resolving objections, with the agency playing the role of technical expert.

- Most state court decrees reflect water uses as they exist at the time of the decree, rather than some distant point in the past. In Idaho, which dates its decrees back to 1987, decrees have sometimes been adapted to reflect current uses when no parties object.

- Most state courts conducting adjudication also have authority to handle related water disputes and distribution matters, thus avoiding the "jurisdictional seam" that exists in Montana. Capitalizing on the expertise of water judges, Idaho has further designated its water court as the sole appellate court for all agency water decisions. Washington does this on a more limited basis by making the water judge the appellate judge for agency decisions affecting water rights currently under adjudication.

- Some states like Colorado, Utah, and California allow courts to retain ongoing jurisdiction over decrees so that changes are reviewed by the court and decrees are updated to reflect changes. Other states place the agency in charge of approving changes to decreed rights. Washington occupies a middle territory in that its agency processes changes to decreed rights while the adjudication is pending, but appeals of the agency decision go to the trial court overseeing the adjudication.

- In some states, court decrees have been expressly held to be *res judicata* and agencies are precluded from considering certain evidence that would be considered a "reopening" of issues within the purview of adjudication.

- In many states, the trend toward converting agricultural water use to municipal water use (in response to population growth) has required the change/transfer process to become streamlined to facilitate water marketing.

- In most states, the agency is charged with keeping updated records and the decree is not updated to reflect new or changed uses. Colorado, Utah, and California are exceptions.

- In every surveyed state, except Wyoming and Idaho (some of the time), decrees include diverted volume as part of the adjudication process. Thus, most agencies are not determining diverted volume during the change process.

- All state agencies are examining consumptive use during the change process, although the methodology varies, and Idaho does so only when the water right's purpose changes. Several states have a specific "look back" period for determining consumptive use. The period is often tied to the statutory period for forfeiture or abandonment, so the range is often 5-15 years, which is much less than Montana's look back to 1973.

- Most states have a standardized process for hiring and training water commissioners, and they are usually employees of the state agency. In several states, commissioners are organized by major water divisions that correlate with water court jurisdiction so that basin-wide decrees can be effectively administered.

- Some states have invested in modern technology and gathered hydrologic data to ensure effective, real-time monitoring of water distribution on basin-wide scales.

- A few states leverage their water commissioner function by having them gather evidence related to change and permit applications, conduct well and dam inspections, and enforce waste and illegal use violations.

PART III: IDEAS FOR MONTANA'S FUTURE

This part describes possible short term and longer term innovations that Montana can make to its water rights system. In many respects, Montana is to be lauded for the progress it has already made in clarifying statewide water rights. In other respects, Montana can benefit by learning from the technical and legal innovations of other state systems. And, importantly, Montana may discern that novel approaches, yet untested elsewhere, provide the best path forward. Because this report discusses possible approaches in broad strokes, we note that all of the suggested ideas should be carefully refined and studied in processes involving all stakeholders.

Short Term

- *Concurrent Water Court jurisdiction over water user disputes and distribution.* In the short term, legislation can provide the Water Court concurrent jurisdiction over water distribution matters and individual water user disputes. When such issues arise during adjudication, the Water Court can then avoid referring those matters to the district court, which allows the parties to achieve full resolution of their issues in one forum. With concurrent jurisdiction, the parties or district court can also elect to certify a district court case in full to the Water Court, rather than splitting the proceeding into two cases, as current law requires. This approach also eliminates the dilemma of multiple district courts being involved in a water commissioner appointment because the Water Court can provide relief on a basin-wide basis. While the Water Court foresees a modest increase in workload under this scenario, it notes that it is already dedicating significant resources to assisting district courts on water rights questions. By

combining all water issues into one proceeding, as other states do, the burden on the district courts and court system as a whole is reduced, as are litigant expenses due to appearances in multiple forums.

- *A records coordination policy.* An additional short term strategy for the DNRC, Water Court, and district courts is to develop internal procedures for updating and integrating the water records generated by each entity. The parties can resolve how interim Water Court rulings affect abstracts in the DNRC database, how ownership changes and splits are recorded, and how to create a "one-stop-shop" for water users that want to view abstracts, Water Court decisions, district court orders, and Red Book tabulations. The optimal system would be one where the public and water users can consult a single source for comprehensive, current water rights information — a "living decree."

- *Education and collaboration.* Building upon the "water walk" and "Red Book" community meeting examples discussed above, the DNRC, Legislature, and Montana court system could undertake a more planned enterprise of education and outreach that brings technical and legal expertise to bear on a watershed-by-watershed basis. Based on past experiences, these watershed collaborations yield meaningful, on-the-ground information and create more possibilities for out-of-court dispute resolution.

Longer Term

- *Addressing the "time gap" in adjudication.* In the longer term, a primary recommendation is that the state develop a process for enabling the Water Court to issue decrees that better reflect actual uses occurring at the time of decree. The process should consider how post-July 1, 1973 changes (both those that require agency review and those that do not) are raised and reviewed, how other water users may object, and how fairness will be ensured among water users. Such a process should also help capture the non-agency reviewed changes occurring in Montana's water rights system.

  At the same time, the state should consider the related question of how water users seeking changes of use can avoid the burden of gathering historical evidence as far back as 1973. While each state has its own unique rules related to "look backs," it may prove worthwhile for Montana to review those states with shorter look back periods and determine whether similar concepts can be incorporated into Montana's legal system.

- *Appeals of agency decisions to the Water Court.* As noted in Part I, appeals of DNRC water decisions currently go to local district courts. In the longer term, the state could consider providing water users the option of appealing DNRC water decisions to the Water Court as an alternative venue to local district courts. The Water Court could review appeals under the same administrative procedures as any other district court. This approach would be comparable to that taken in Idaho, where its water court handles administrative appeals, or in Washington, where a water judge reviews change appeals. The Water Court does not expect a significant increase in workload if this

change is implemented. The benefits of this process could be reduced workload to district courts and increased expertise for water users appealing agency matters.

- *A modernized water commissioner and distribution system.* A final longer term recommendation is to modernize the state laws that apply to water commissioners. These laws should clarify the way water commissioners are appointed, trained, paid, and supervised so that there is a more uniform statewide approach. In light of concerns expressed by district court judges, the state should also consider whether another entity is most appropriate for carrying out this law enforcement function. On this point we note that other states with agency oversight of commissioners still use commissioners that reside and work within local communities.

  Additionally, as the state transitions to basin-wide water rights decrees that span multiple judicial districts, it should examine the process by which judges appoint commissioners to ensure that there is coordination and fairness among the various hydrological regions of a water source. By the same token, the state should consider how it will provide water commissioners with the technology and data they need to fairly and accurately distribute water across large hydrological areas.

CONCLUSION

This report has described the general contours of Montana's current water rights legal system, focusing on the areas where water users, agency officials, the courts, and other stakeholders confront the largest questions and challenges. The systems of other western states provide important places to compare and contrast what we do in Montana, and may serve to inspire us as we craft our own state-driven solutions. The report has identified some possible starting places for solutions in the short and longer term, but the success of those solutions depends on careful refinement and collaboration among stakeholders. The Clinic observed significant collaboration among those stakeholders as it prepared this report, and we are optimistic that constructive solutions will be forthcoming.

In conclusion, we express our gratitude to Chief Justice Mike McGrath of the Montana Supreme Court for the opportunity to work on this important document. And we express our sincere thanks to the Water Court and the DNRC for the time and expertise each provided in support of our work. Should the state so desire, the Clinic would be pleased to assist in the future steps taken to shape Montana's water rights system.

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