

# Final Decree Transition sub-working group

## Legislative Draft for Water Division Court

1.4.2024

### Approach:

- Using divisions- update power and duties to all water functions
- Post final decree in all basins, no adjudication water judges
- Division judges, which has chief and associate adjudication judges AND water division judges
  
- (TBD) Clean up all water judges in statute and be explicit of the meaning
- (TBD) Adding more divisions; split upper Missouri in ½ (everything north of the canyon; wolf creek)
  - o Does this further address what is local?
- (TBD) Transition & funding
  - o Separate duties of two types of judges helps with the transition challenge
  - o Adjudication court staff, transferred to water division
  - o Need for administrator
  - o Funding model Funding (HB2, vs counties, vs supreme court)
  - o How do you codify roles?
- (TBD) How does a judge get to the water division court?
  - o Appointment (gov or supreme court)
  - o Election
  - o Today: district judges select among themselves-
  - o Consider CO and UT examples – sitting district court judges serve as water judges for a division (CO) or the State (UT).
- (TBD) File, Judge, Venue
  - o Where do I file? **Divisional Court (1 filing place).**
    - Why: multijurisdictional issue; filing in the divisional court- saves one headache for district court clerks.
    - Why: a single place for water files is important to retrieve files in multiple places
    - Why: McCarran, where filing matters. not be an option to be filed in the local judicial district.
    - Question: one clerk or four?
      - Consider CO example.
  - o What judge hears the case? **Default division court**
    - In the filing, the person filing can choose to have if district judge as the judge (Division court hat), the clerk must sends it there.
    - Revise the substitution statute- defendant gets to say, want something else.
    - Why: the filer is in the driver seat

- Why: regional solution opportunity
- **Venue:** where is the case decided?
  - Default: Where the water rights are located.
  - The filer can identify a proper venue
- Other options:
  - Default district court (with division court hat) then to division
    - People are used to district court being the start.
    - If they don't have time, they can move it to the division
    - What about when it spans multiple district court jurisdictions?
- Timeliness
  - Put something under the statute in terms of timelines for administration (e.g., like a TRO), like an emergency need.
  - What are the bucket of issues that need high response- enforcement?

**Terms – need to settle on consistent terms throughout**

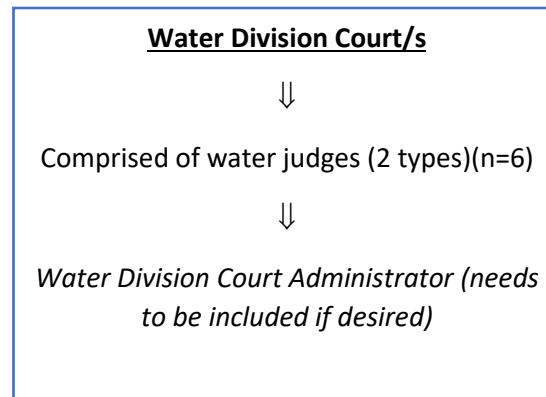
**Water adjudication judge**

**Adjudication water judge**

**Water division judge**

**Division water judge**

Visual:



**25-2-123. Real property.** (1) The proper place of trial for the following actions is the county in which the subject of the action or some part thereof is situated:

- (a) for the recovery of real property or of an estate or an interest therein or for the determination, in any form, of such right or interest;
- (b) for injuries to real property;
- (c) for the partition of real property;
- (d) for the foreclosure of all liens and mortgages on real property.

(2) Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action.

(3) The proper place of trial for all actions for the recovery of the possession of, quieting the title to, or the enforcement of liens upon real property is the county in which the real property, or any part thereof, affected by such action or actions is situated.

(4) The proper place for trial for all actions for INSERT **TYPE WATER ACTION** is the county in which the [point of diversion of the] water right or some part thereof is situated.

**2-4-702. (Effective October 1, 2025) Initiating judicial review of contested cases.** (1) (a) Except as provided in **75-2-213** and **75-20-223**, a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter. This section does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute.

(b) A party who proceeds before an agency under the terms of a particular statute may not be precluded from questioning the validity of that statute on judicial review, but the party may not raise any other question not raised before the agency unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.

(2) (a) Except as provided in **75-2-211**, **75-2-213**, and subsection (2)(c) of this section, proceedings for review must be instituted by filing a petition in district court within 30 days after service of the final written decision of the agency or, if a rehearing is requested, within 30 days after the written decision is rendered. Except as otherwise provided by statute or subsection (2)(d), the petition must be filed in the district court for the county where the petitioner resides or has the petitioner's principal place of business or where the agency maintains its principal office. Copies of the petition must be promptly served upon the agency and all parties of record.

(b) The petition must include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved, and the ground or grounds specified in **2-4-704(2)** upon which the petitioner contends to be entitled to relief. The petition must demand the relief to which the petitioner believes the petitioner is entitled, and the demand for relief may be in the alternative.

(c) If a petition for review is filed pursuant to **33-16-1012(2)(c)**, the workers' compensation court, rather than the district court, has jurisdiction and the provisions of this part apply to the workers' compensation court in the same manner as the provisions of this part apply to the district court.

(d) If a petition for review is filed challenging a licensing or permitting decision made pursuant to Title 75 or Title 82, the petition for review must be filed in the county where the facility is located or proposed to be located or where the action is proposed to occur.

(3) Unless otherwise provided by statute, the filing of the petition may not stay enforcement of the agency's decision. The agency may grant or the reviewing court may order a stay upon terms that it considers proper, following notice to the affected parties and an opportunity for hearing. A stay may be issued without notice only if the provisions of **27-19-315** through **27-19-317** are met.

(4) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be required by the court to pay the additional costs. The court may require or permit subsequent corrections or additions to the record.

**3-1-101. The several courts of this state.** The following are courts of justice of this state:

- (1) the court of impeachment, which is the senate;
- (2) the supreme court;
- (3) the district courts;
- (4) the water division courts;
- (5) the municipal courts;
- (6) the justices' courts;
- (7) the city courts and such other courts of limited jurisdiction as the legislature may establish in any incorporated city or town.

**3-1-102. Courts of record.** The court of impeachment, the supreme court, the district courts, the water division courts, the workers' compensation court, the municipal courts, the justices' courts of record, and the city courts of record are courts of record.

**3-1-804. Substitution of district judges and water [division] judges.**

This section applies to judges presiding in district courts and water division courts. It does not apply to any judge sitting as a water adjudication judge or to a workers' compensation court judge.

(1) Each adverse party is entitled to one substitution of a district judge or water [division] judge.

(a) In a civil action other than those noted in subsection (1)(c) and (1)(d), a motion for substitution by the party filing the action must be filed within 30 calendar days after the first summons is served or an adverse party has appeared. A motion for substitution by the party served must be filed within 30 calendar days after service has been completed in compliance with M. R. Civ. P. 4.

(b) In a criminal action, a motion for substitution by the prosecution or the defendant must be filed within 10 calendar days after the defendant's arraignment.

(c) In an action involving the supervision of water distribution under 85-2-406 or supervision of a water commissioner under Title 85, chapter 5, part 1, a motion for substitution by the party filing the action or an adverse party must be filed within 10 calendar days after a petition is filed pursuant to 85-2-406(b) or an application is filed pursuant to 85-5-101.

(d) A motion for substitution may not be filed in the following cases: a child abuse or neglect proceeding under Title 41, chapter 3; a youth court action proceeding under Title 41, chapter 5; or a mental health commitment proceeding under Title 53, chapter 21, part 1.

(2) (a) When an initial pleading is filed, the clerk of court shall stamp the name of the district judge or water [division] judge to whom the case is assigned on the face of the original and all copies of that document.

(b) A motion for substitution of district judge or water [division] judge must be made by filing a written motion with the clerk as follows:

The undersigned hereby moves for substitution of District Judge \_\_\_\_\_ in this case; or

The undersigned hereby moves for substitution of Water [Division] Judge \_\_\_\_\_ in this case.

The moving party shall serve copies of the motion for substitution upon all other parties to the proceeding. The clerk shall immediately notify the district judge or water division judge of the motion and, if there has already been a substitution, the first district judge or water division to whom the case was assigned.

(3) In civil cases, the motion for substitution is not effective for any purpose unless the filing fee for a motion for substitution required by **25-1-201** is paid to the clerk of the district court or water division courts administrator.

In criminal cases, the motion for substitution is effective upon filing, except as otherwise provided herein for a motion filed by a defendant who is not represented by a public defender, as defined by **47-1-103**.

In criminal cases filed by the county attorney, the county attorney shall pay the substitution motion fee required by **25-1-201** within 30 days of receipt of a claim from the clerk of district court. In criminal cases filed by the attorney general, the attorney general shall pay the substitution motion fee required by **25-1-201** within 30 days of receipt of a claim from the clerk of district court.

In criminal cases where the motion is filed by or on behalf of an indigent defendant, as defined by **47-1-103**, represented by a public defender, as defined by **47-1-103**, the office of public defender, as defined by **47-1-103**, shall pay the substitution motion fee within 30 days of receipt of a claim from the clerk of district court. In criminal cases where the motion is filed by or on behalf of a defendant who is not represented by a public defender, as defined by **47-1-103**, the motion for substitution is not effective for any purpose unless the substitution motion fee required by **25-1-201** is paid to the clerk of the district court except as waived pursuant to **25-10-404**.

The substitution motion filing fee required by **25-1-201** is not a district court expense within the meaning of **3-5-901**.

(4) Any motion for substitution that is not timely filed is void. The district judge or water [division] judge for whom substitution is sought has jurisdiction to determine timeliness, and if the motion for substitution is untimely, shall enter an order denying the motion.

(5) After a timely motion has been filed, the substituted district judge or water [division] judge does not have the power to act on the merits of the case or to decide legal issues in the case, except as provided in subsection (10).

(6) The first district judge or water [division] judge who has been substituted or disqualified for cause has the duty of calling in all subsequent district judges or water division judges. In a multijudge district or water division, all other district judges or water [division] judges in that district must be called before a district judge or water division from another district is called.

(7) When a new district judge or water [division] judge has accepted jurisdiction, the clerk of court shall provide a copy of the assumption of jurisdiction to the first district judge or the water divisions court administrator shall provide a copy of the assumption of jurisdiction to the first water [division] judge to whom the case was assigned and to each attorney or party of record. A certificate of service must be attached to the assumption of jurisdiction form in the court file.

(8) If the presiding judge in any action recuses himself or herself or if a new district judge or water [division] judge assumes jurisdiction in any action, the right to move for substitution of a district judge or water [division] judge is reinstated, except as to parties who have previously obtained a substitution. The time periods run anew from the date of service of notice or other document identifying the new district judge or water [division] judge.

(9) No party who is joined or intervenes has any right of substitution after the time has run as to the original parties to proceed.

(10) A district judge or water [division] judge who has previously been substituted from the case may agree to set the calendar, draw a jury, and conduct all routine matters including arraignments, preliminary pretrial conferences in civil cases, and other matters that do not address the merits of the case, if authorized by the presiding district judge or water [division] judge.

(11) When a new trial is ordered by the district court or water division court, each adverse party shall be entitled to one motion for substitution of district judge or water [division] judge. The motion must be filed, with the required filing fee, within 20 calendar days after the district court or water division court has ordered a new trial.

(12) When a judgment or order is reversed or modified on appeal and the cause is remanded to the district court or water division court for a new trial, or when a summary judgment or judgment of dismissal is reversed and the cause remanded, each adverse party is entitled to one motion for substitution of district judge or water [division] judge. The motion must be filed, with the required filing fee, within 20 calendar days after the remittitur from the supreme court has been filed with the district court or water division court. There is no other right of substitution in cases remanded by the supreme court.

In criminal cases, there is no right of substitution when the cause is remanded for sentencing.

### 3-7-101. Water divisions.

(1) The district courts shall be divided into four water divisions. Each water division shall be presided over by one or more water [division] judges.

(2) One or more water adjudication judges may be appointed to each water division to adjudicate existing water rights pursuant to Title 85, Chapter 2, Part 2 and to conduct hearings certified under 85-2-309.

3-7-102. **Water divisions boundaries.** There are four water divisions whose boundaries are formed by the natural divides between drainages and the borders of the state of Montana and which are described as follows:

(1) The Yellowstone River basin water division consists of those areas drained by the Yellowstone and Little Missouri Rivers and any remaining areas in Carter County.

- (2) The lower Missouri River basin water division consists of those areas drained by the Missouri River from below the mouth of the Marias River and any remaining areas in Glacier and Sheridan Counties.
- (3) The upper Missouri River basin water division consists of those areas drained by the Missouri River to below the mouth of the Marias River.
- (4) The Clark Fork River basin water division consists of the areas drained by the Clark Fork River, the Kootenai River, and any remaining areas in Lincoln County.

**3-7-103. Promulgation of rules and prescription of forms -- advisory committee.** (1) As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the water adjudication judge and the department of natural resources and conservation.

(2) (a) The water adjudication judge shall appoint a water adjudication advisory committee to provide recommendations to the water division courts, the Montana supreme court, the department of natural resources and conservation, and the legislature on methods to improve and expedite the water adjudication process.

(b) The committee consists of three nongovernmental attorneys who practice before the water court, one district court judge, and three water users who have filed statements of claim with the department of natural resources and conservation under this chapter.

(c) The water adjudication judge or the judge's designee shall serve as an ex officio member of the committee. The Montana supreme court may appoint the attorney general or the attorney general's designee, a representative from the department of natural resources and conservation, and a representative of the United States government as ex officio members of the committee.

(d) The committee members shall serve at the pleasure of the water adjudication judge and shall serve without compensation.

(e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as often as determined by the Montana supreme court.

#### NEW Section (Part 2): Jurisdiction of Water Division Judges

- (1) With regard to the consideration of a matter within the water division judge's jurisdiction, a water division judge has the same powers as a district court judge. A water division judge may issue orders, on the motion of an interested party or on the judge's own motion, that may reasonably be required to allow the judge to fulfill the judge's responsibilities, including but not limited to requiring the joinder of persons not parties to the administrative hearing being conducted by the department pursuant to **85-2-309** or **85-2-402** as considered necessary to resolve any factual or legal issue certified pursuant to **85-2-309**(2).
- (2) The water division judge has the jurisdiction administer and enforce all final decrees pursuant to 4 3-7-212 and Title 85, chapter 20.

#### **3-7-201. Designation of water judges.**

- (1) The water division courts consist of a chief water [division] judge and at least three associate water [division] judges. A water division judge must be designated for each water division by a majority vote of a committee composed of the district court judge from each single-judge judicial district and the chief district judge from each multijudge judicial district, wholly or partly within the division. Except as provided in subsection (3), a water [division] judge must be a district court judge or retired district court judge of a judicial district wholly or partly within the water division.

(2) The chief justice of the Montana supreme court shall appoint a chief water adjudication judge as provided in Title 3, Chapter 1, Part 9 to implement Title 85, Chapter 2, Part 2. The chief justice of the Montana supreme court may appoint an associate water adjudication judge. To be eligible for the office of water adjudication judge, a person shall have the qualifications set forth in Articles VII, section 9, of the Montana Constitution.

(3) A district court judge or retired district court judge may sit as a water [division] judge in more than one division if requested by the chief justice of the supreme court or the water [division] judge in which the judge is requested to sit.

(3) A water [division] judge, when presiding over a water division, presides as district court judge in and for each judicial district wholly or partly within the water division.

(4) {Hold for multijudge water divisions – see 3-5-403 (multijudge districts) for suggested language}.

**3-7-202. Term of office.** The term of office for a water [division] judge and a water adjudication judge is 6 years and begins on the date of initial appointment as provided in **3-7-201**, subject to continuation of the water divisions by the legislature. .

**3-7-203. Vacancies.** If a vacancy in the office of water [division] judge occurs, it must be filled in the manner provided in **3-7-201** for the initial designation of a water [division] judge. A vacancy is created when a water [division] judge dies, resigns, retires, is not elected to a subsequent term, forfeits the judicial position, is removed, or is otherwise unable to complete the term as a water [division] judge.

**3-7-204. Supervision and administration by supreme court.** (1) The Montana supreme court shall supervise the activities of the water adjudication judges, water masters, and associated personnel in implementing this chapter and Title 85, chapter 2, part 2.

(2) The supreme court shall pay the expenses of the water adjudication judges and the salaries and expenses of the water adjudication judges' staffs and the salaries and expenses of the water masters and the water masters' staffs, from appropriations made for that purpose. "Salaries and expenses" as used in this section include but are not limited to the salaries and expenses of personnel, the cost of office equipment and office space, and other necessary expenses that may be incurred in the administration of this chapter and Title 85, chapter 2, part 2.

### 3-7-212. Enforcement of decrees.

The water division court having jurisdiction may enforce the provisions of a final decree. In the absence of any final decree having been issued, the water division court having jurisdiction may enforce the provisions of a temporary preliminary decree, preliminary decree, or supplemental preliminary decree entered under **85-2-231**, as modified by a water adjudication judge after objections and hearings.

**3-7-222. Salary -- office space for water adjudication judges.** (1) A water adjudication judge must receive the same salary and expense allowance as provided for district judges in **3-5-211**.

(2) The office of the water adjudication judges must be at a location designated by the chief justice of the Montana supreme court. The Montana supreme court shall provide in its budget for the salary, expenses, and office and staff requirements of the water adjudication judges. Money may be appropriated by the legislature from the general fund for these purposes.



3-7-223.

**3-7-223. Duties and jurisdiction of adjudication water judges.** (1) The chief water adjudication judge shall

administer the adjudication of existing water rights by:

(a) coordinating with the department of natural resources and conservation in compiling information submitted on water claim forms under Title 85, chapter 2, part 2, to assure that the information is expeditiously and properly compiled and transferred to the water judge in each water division;

(b) assuring that any contested or conflicting claims are tried and adjudicated as expeditiously as possible; and

(c) assigning personnel and duties as needed.

(d)

(2) An adjudication water judge has jurisdiction over all matters relating to the adjudication of existing water rights within the boundaries of the state of Montana.

(3) With regard to the consideration of a matter within an adjudication water judge's jurisdiction, the adjudication water judge has the same powers as a district court judge. An adjudication water judge may issue orders, on the motion of an interested party or on the judge's own motion, that may reasonably be required to allow the judge to fulfill the judge's responsibilities, including but not limited to requiring the joinder of persons not parties to the administrative hearing being conducted by the department pursuant to **85-2-309** or **85-2-402** as considered necessary to resolve any factual or legal issue certified pursuant to **85-2-309(2)**.

**3-7-301. Appointment of water masters -- removal.** (1) The chief adjudication water judge may appoint one or more water masters to expedite the adjudication of water rights pursuant to Title 85, Chapter 2, Part 2.

(2) In appointing a water master, the chief adjudication water judge shall consider a potential master's experience with water law, water use, and water rights.

(3) A water master shall serve at the pleasure of the chief adjudication water judge and may be removed by the chief adjudication water judge.

(5) A water master may serve in any water division and may be moved among the water divisions at the discretion of the chief water adjudication judge.

**3-7-311. Duties of water masters.** (1) The water master has the general powers given to a master by Rule 53(c), M.R.Civ.P.

(2) Within a reasonable time after June 30, 1983, the water master shall issue a report to the chief water adjudication judge meeting the requirements for the preliminary decree as specified in **85-2-231**.

(3) After a water adjudication judge issues a preliminary decree, the water master shall assist the water adjudication judge in the performance of the water division's further duties as ordered by the water adjudication judge.

**3-7-401. Definitions.** For the purposes of this part, the following definitions apply:

(1) "Fiduciary" includes such relationships as executor, administrator, trustee, or guardian.

(2) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(a) ownership in a mutual or common investment fund that holds securities is not a financial interest in such securities unless the judge or water master participates in the management of the fund;

(b) an office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest in securities held by the organization;

(c) the proprietary interest of a policyholder in a mutual insurance company or a depositor in a mutual savings association or a similar proprietary interest is a financial interest in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(d) ownership of government securities is a financial interest in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(3) "Proceeding" includes prehearing, hearing, appellate review, or other stages of adjudication conducted by the water master or water adjudication judge.

**3-7-402. Disqualification of water judge or master.** (1) A water judge may withdraw or may disqualify the water master in any proceeding or pertinent portion of a proceeding in which the judge's or the water master's impartiality might reasonably be questioned.

(2) A water judge may also withdraw or may disqualify the water master in the following circumstances:

(a) if the judge or the water master has a personal bias or prejudice concerning a party or personal knowledge or disputed evidentiary facts concerning the proceeding;

(b) if in private practice the judge or the water master served as a lawyer in the matter in controversy or a lawyer with whom the judge or the water master previously practiced law served during the association as a lawyer concerning the matter or the judge or the lawyer has been a material witness concerning it;

(c) if the judge or the water master has served in governmental employment and in that capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(d) if the judge or the water master knows that the judge or the water master, individually or as a fiduciary, or the judge's or the water master's spouse or minor child residing in the judge's or the water master's household has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding; or

(e) if the judge or the water master or the judge's or the water master's spouse or a person within the third degree of relationship to any of them (as calculated according to **72-11-101** through **72-11-104**) or the spouse of such a person:

- (i) is a party to the proceeding or an officer, director, or trustee of a party;
- (ii) is known by the judge or water master to have an interest that could be substantially affected by the outcome of the proceeding;
- (iii) is to the judge's or water master's knowledge likely to be a material witness in the proceeding.

(3) A water judge should be informed about the judge's and the water master's personal and fiduciary financial interests and make a reasonable effort to be informed about the personal financial interests of the judge's and the water master's spouse and minor children residing in the judge's or the water master's respective household.

**3-7-403. Waiver of disqualification.** A water judge may accept from the parties to the proceeding a waiver of any ground for disqualification if it is preceded by a full disclosure on the record of the basis for disqualification.

**3-7-404. Procedure exclusive.** The procedure for disqualification of a water judge or water master specified in this section is exclusive unless otherwise specifically altered by the Montana supreme court.

**3-7-501. Jurisdiction.** (1) The water division courts have the exclusive jurisdiction to preside over matters assigned to the water division courts.

(2) A water [division] judge may not preside over matters beyond the boundaries specified in **3-7-102** for the judge's division except as provided in **3-7-201** or **3-1-804**.

**3-7-502. Jurisdictional disputes.** Whenever a question arises concerning which water [division] judge shall preside over a matter that could be heard in more than one division, the question shall be settled by the water [division] judges involved.

**85-2-114. Judicial enforcement.** (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may petition the water division court supervising the distribution of water among appropriators from the source to:

- (a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;
- (b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or
- (c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

(2) Upon the issuance of an order or injunction, the department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin the waste, unlawful use, interference, or violation.

(4) The county attorney or the attorney general may bring suit to enjoin the waste, unlawful use, interference, or violation or bring an action under **85-2-122(1)** without being requested to do so by the department.

(5) A county attorney who takes action pursuant to subsection (3) or (4) may request assistance from the attorney general.

(6) When enforcing the provisions of this section, the department, the county attorney, and the attorney general shall give priority to protecting the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation.

(7) After considering the provisions of subsection (6), the department may attempt to obtain voluntary compliance through warning, conference, or any other appropriate means before petitioning the district court under subsection (1). An attempt to obtain voluntary compliance under this subsection must extend over a period of at least 7 days and may not exceed 30 working days.

(8) Pursuant to **85-20-1902**, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation.

(9) The provisions of this section do not limit a water right owner from seeking relief, including injunctive relief, in district court under Title 27, chapter 19, or this chapter.

#### 85-2-234. Final decree.

(1) A water adjudication judge shall, on the basis of the preliminary decree and any supplemental preliminary decree, on the basis of any hearing that may have been held, and on final resolution of all issue remarks, as defined in **85-2-250**, enter a final decree affirming or modifying the preliminary decree.

(2) The terms of a compact negotiated and ratified under **85-2-702** must be included in the final decree without alteration unless an objection is sustained pursuant to **85-2-233**. However, the water division court may not alter or amend any of the terms of a compact except with the prior written consent of the parties in accordance with applicable law.

(3) The final decree must establish the existing rights and priorities within the water adjudication judge's jurisdiction of persons who have filed a claim in accordance with **85-2-221** and **85-2-222**, of persons required to file a declaration of existing rights in the Powder River basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, and of any federal agency or Indian tribe possessing water rights arising under federal law, required by **85-2-702** to file claims.

(4) The final decree must establish, in a form determined to be appropriate by the water adjudication judge, one or more tabulations or lists of all water rights and their relative priorities.

(5) The final decree must state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person, federal agency, and Indian tribe named in the decree are based.

- (6) For each person who is found to have an existing right arising under the laws of the state of Montana, the final decree must state:
- (a) the name and post-office address of the owner of the right;
  - (b) the amount of water included in the right, as follows:
    - (i) by flow rate for direct flow rights, such as irrigation rights;
    - (ii) by volume for rights, such as stockpond and reservoir storage rights, and for rights that are not susceptible to measurement by flow rate; or
    - (iii) by flow rate and volume for rights that a water judge determines require both volume and flow rate to adequately administer the right;
  - (c) the date of priority of the right;
  - (d) the purpose for which the water included in the right is used;
  - (e) the place of use and a description of the land, if any, to which the right is appurtenant;
  - (f) the source of the water included in the right;
  - (g) the place and means of diversion;
  - (h) the inclusive dates during which the water is used each year;
  - (i) any other information necessary to fully define the nature and extent of the right.
- (7) For each person, tribe, or federal agency possessing water rights arising under the laws of the United States, the final decree must state:
- (a) the name and mailing address of the holder of the right;
  - (b) the source or sources of water included in the right;
  - (c) the quantity of water included in the right;
  - (d) the date of priority of the right;
  - (e) the purpose for which the water included in the right is currently used, if at all;
  - (f) the place of use and a description of the land, if any, to which the right is appurtenant;
  - (g) the place and means of diversion, if any; and
  - (h) any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under **85-2-702**.
- (8) Clerical mistakes in a final decree may be corrected at any time on the initiative of the water [division] judge or on the petition of any person who possesses a water right. The water [division] judge shall order the notice of a correction proceeding that the judge determines to be appropriate to advise all persons who may be affected by the correction. An order of the water [division] judge making or denying a clerical correction is subject to appellate review.

### 85-2-235. Appeals.

- (1) A person whose existing rights and priorities are determined in a final decree may appeal the determination only if:
  - (a) the person requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree;
  - (b) the person's rights or priorities as determined in the temporary preliminary decree or the preliminary decree were affected as the result of an objection filed by another person;
  - (c) the person requested a hearing and appeared before the water division court to finally resolve an issue remark, as defined in **85-2-250**; or
  - (d) the person is a claimant appealing an adverse decision when the water division court issued the decision as the result of an evidentiary hearing or as the result of calling the claim in on the court's own motion.
- (2) The attorney general may appeal a determination made in a final decree if the attorney general participated as an intervenor as provided in **85-2-248**.
- (3) An interlocutory ruling by a water division judge or water adjudication judge upon a question of law may be appealed by any party who is affected by the decision and who participated in the matter in which the ruling was issued.

### 85-2-236. Certificate of water right.

When a final decree is entered, the chief water adjudication judge shall send a copy to the department. Except as provided in **85-2-306**, the department shall on the basis of the final decree issue a certificate of water right to each person decreed an existing right. The original of the certificate shall be sent to the person to whom the right is decreed. The department shall keep a copy of the certificate in its office in Helena.

### 85-2-309. Hearings on objections -- jurisdiction.

(1) If the department determines that an objection to an application for a permit under **85-2-311** or change in appropriation right under **85-2-402** states a valid objection, it shall hold a contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 90 days from the date set by the department for the filing of objections after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). The department may consolidate hearings if more than one objection is filed to an application. The department may extend the 90-day deadline for good cause shown or upon request of the applicant and all objectors. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the water division court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water division judge over all other matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the water division court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to **85-2-316** or **85-2-322**.

#### 85-2-405. Procedure for declaring appropriation rights abandoned.

(1) When the department has reason to believe that an appropriator may have abandoned an appropriation right under **85-2-404** or when another appropriator in the opinion of the department files a valid claim that the appropriator has been or will be injured by the resumption of use of an appropriation right alleged to have been abandoned, the department shall petition the water division court that determined the existing rights in the source of the appropriation in question to hold a hearing to determine whether the appropriation right has been abandoned. Proceedings under this section must be conducted in accordance with the Montana Rules of Civil Procedure, and appeal must be taken in accordance with the Montana Rules of Appellate Procedure.

(2) At the hearing, the burden of proof is on the department, which shall establish by a preponderance of the evidence that the appropriation has been abandoned under **85-2-404**.

(3) The determination of the court must be appended to the final decree. The department shall keep a copy of the determination in its office in Helena.

#### 85-2-406. District court supervision of water distribution.

(1) The water division courts shall supervise the distribution of water among all appropriators within the boundaries of their divisions as defined in 3-7-102. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision must be governed by the principle that first in time is first in right.

(2) (a) A **water division court** or district court may order the distribution of water pursuant to a district court decree entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the matter has been adjudicated under the procedure set forth in subsection (2)(b).

(b) When a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition the water division court to certify the matter to the chief water adjudication judge. If a certification request is made, the water division court shall certify to the chief water adjudication judge the determination of the existing rights that are involved in the controversy according to part 2 of this chapter. The water division court from which relief is sought shall retain exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights certified to the chief water adjudication judge. Certified controversies must be given priority over all other adjudication matters. After determination of the matters certified, the chief water adjudication judge shall return the decision to the water division court with a tabulation or list of the existing rights and their relative priorities.

(3) A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the water division court. The order of the water division court settling the controversy may not alter the existing rights and priorities established in the final decree except to the extent the water division court alters rights based upon abandonment, waste, or illegal enlargement or change of right. In cases involving permits issued by the department, the water division court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy must be appended to the final decree, and a copy must be filed with the department. The department must be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

(4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree or preliminary decree as modified after objections and hearings is enforceable and administrable according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water division judge shall establish one or more tabulations or lists of all existing rights and their relative priorities.

(5) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree or a person exercising a suspension under **85-2-217** and part 7 of this chapter may appeal a determination made pursuant to subsection (2) to the Montana supreme court.

#### 85-2-424. Filing.

(1) Except in the case of a transfer of real property served by a public service water supply, when a person presents for recording a deed or other instrument evidencing a transfer of real property, the realty transfer certificate must contain a water rights disclosure in which the transferor shall acknowledge, at or before closing or transfer of real property, whether or not any water rights are associated with the property to be transferred and whether or not any water rights will transfer with the real property.

(2) (a) The department shall update its records to reflect the new ownership of a water right within 30 days after receipt of either:

(i) information received from the department of revenue, if:

(A) the transferor of the property is the same as the owner of record for the water right;

(B) the transferor conveys the entirety of the property associated with the place of use; and

(C) the department has not received a form pursuant to subsection (3), (4), or (5); or

(ii) a complete water right ownership update form provided by the department and submitted to the department.

(b) If the department receives information from the department of revenue that a transfer has occurred and the transferor of the property is not the same as the owner of record for the water rights, the department shall within 30 days after receipt of the information from the department of revenue notify each party indicated as a transferee that:

(i) the party is required to submit a complete water right ownership update form and the required fee within 60 days after the notice; and

(ii) ownership of the water right will not be changed in the department's records until the complete water right ownership update form is provided.

(c) The appropriate fee must be paid at closing or upon completion of the transfer of real property as provided in **85-2-426**.

(d) The transferee of a water right, after receiving notice as provided in subsection (2)(e), is responsible for compliance with this section.

(e) If the department receives notice from the department of revenue that a property transfer has occurred and the proper fee was not received by the department, the department shall send a notice to the transferee requesting payment of the fee. If the transferee does not pay the fee within 60 days, the department may assess a penalty against the transferee pursuant to **85-2-431**.

(3) (a) Except as provided in subsection (3)(b), if the realty transfer certificate discloses the division of the place of use of a water right among separate parcels, each transferee receiving a portion of the water right shall file with the department a complete water right ownership update form confirming the transfer, a map, and the required fee.



(b) If a complete water right ownership update form is not filed by all parties pursuant to subsection (3)(a), the parties must be reflected as co-owners on the water right.

(4) If a person exempts a water right pursuant to 85-2-403, the person shall file with the department a complete form provided by the department describing the exempting of the water right and the appropriate fee.

(5) If a person severs a water right from appurtenant property without conveying the property, the person shall file with the department a complete form provided by the department describing the severance and the appropriate fee.

(6) If the realty transfer certificate submitted with a deed or other instrument indicates that a water right is being transferred, severed, divided, or exempted, the clerk and recorder may not record the deed or instrument unless there is submitted with the deed or instrument a certification under penalty of false swearing, on a form provided by the department and signed by the transferor and transferee, that states either:

(a) that the documents and fee necessary to comply with this section are held in escrow, in which case the certification must also be signed by the escrow agent; or

(b) if there is no escrow, that the transferor and transferee certify that they have filed or mailed the required documents and fee with or to the department.

(7) Any written agreement to transfer land that has appurtenant water rights on record with the department must contain the following disclosure or words of a similar nature:

"WATER RIGHT OWNERSHIP UPDATE DISCLOSURE:

By Montana law, failure of the parties at closing or transfer of real property to pay the required fee to the Montana Department of Natural Resources and Conservation for updating water right ownership may result in the transferee of the property being subject to a penalty. Additionally, in the case of water rights being exempted, severed, or divided, the failure of the parties to comply with section **85-2-424**, MCA, could result in a penalty against the transferee and rejection of the deed for recording."

(8) Except as provided in subsection (2), the department shall update its records to reflect new ownership without collection of a transfer fee within 30 days after:

(a) receiving a withdrawal of a water right, or an interest in a water right, by an owner of the right or interest;

(b) receiving an order from the water division court or other court of competent jurisdiction that modifies or terminates ownership of a water right; or

(c) learning of a clerical error resulting from an error on a water right ownership update form.

(9) In the event of a dispute over the ownership of a water right, the department shall, within 30 days after being notified of the dispute, certify the matter to the water division court or other court of competent jurisdiction for resolution.

(10) The department may not delay updating ownership based on nonpayment of transfer fees by a transferee. The department's sole remedy in the event of nonpayment of transfer fees is to assess a penalty and seek collection from the transferee pursuant to **85-2-431**.

(11) For the purposes of this section, "complete" means that the information requested in the form has been supplied, together with a copy of the executed deed or deeds or any other instruments confirming the transferee's ownership or the ownership by the person exempting the water right, for each water right listed on the form. The department shall notify the transferee or the person exempting the water right of any deficiencies causing the form to be considered not complete within 60 days of submission.

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

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

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

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

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

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

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

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

Outstanding Areas to Consider If Amendments are Required:

- Title 85, Ch 7 (irrigation districts) – district court
- Title 85, Ch 8 (drainage districts) – district court
- Title 85, Ch 20 (compacts) – depends based on compact, but general court of competent jurisdiction