

**How Will Completion of the Adjudication  
Affect Water Management in Montana?**  
**Prepared by the Upper Clark Fork River Basin Steering Committee**  
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**Introduction**

The 2005 Legislature has set the state on a course to complete the state-wide water rights adjudication by 2020. It has done so by passing two bills, HB 22 and HB 782. HB 22 establishes a water right fee designed to raise up to \$31 million over ten years. Fee receipts are to be used to fund the Montana Department of Natural Resources and Conservation (DNRC) and the Montana Water Court so that DNRC can complete its examination of all claims filed in the adjudication by 2015 and the Water Court can issue water rights decrees for all basins by 2020. HB 782 will help ensure the accuracy of the adjudication by requiring the Water Court to address all issue remarks made by the DNRC as a result of its claims examination before issuing final decrees.

The need for the state-wide water rights adjudication and the history of its implementation was addressed in a previous paper issued by the Upper Clark Fork River Basin Steering Committee (Steering Committee)<sup>1</sup> on March 2, 2004, “White Paper on the Montana Water Rights Adjudication.”<sup>2</sup> The paper noted that the adjudication has been underway for 25 years, but because of inadequate funding for both the DNRC and the Water Court, no one could predict when it might be finished. The paper concluded that, “Without a complete and accurate state-wide water rights adjudication, the status of Montana’s water rights is uncertain. This uncertainty threatens the livelihoods of farmers and ranchers, the viability of water dependent industries, the value and marketability of real property, and the health of fisheries and aquatic ecosystems.” The Steering Committee, therefore, applauds the actions of 2005 Legislature aimed at removing this uncertainty.

Although completion of the adjudication remains several years away, the Steering Committee believes that this event will result in fundamental changes to water rights enforcement, water administration and water management. This paper is written to stimulate discussion by Montana water users, water managers, and policy makers of these changes and their implications so that appropriate responses to them can be identified, discussed and put in place before the final water rights decrees are issued.

The paper that follows first briefly identifies and discusses the fundamental changes. It then provides context for understanding their implications by reviewing existing water administration and management and the experience of our neighboring states that have completed or are nearing

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<sup>1</sup> The Steering Committee is a watershed group formed in 1991 pursuant to a 1991 Montana statute. Its members include six people appointed by the upper Clark Fork basin’s (the area of the Clark Fork River basin above Milltown Dam) six counties, six appointed by the basin’s six conservation districts, and ten appointed by the DNRC Director to ensure representation of a balance of basin water interests. The Steering Committee’s 1991 statutory mandate included drafting a water management plan for the basin which it completed in December 1994. In 1995, the mandate was changed to include implementing and revising the initial plan. See 85-2-338 MCA and *The Upper Clark Fork River Basin Water Management Plan*.

<sup>2</sup> A copy of the paper is available from Gerald Mueller, 440 Evans, Missoula, MT 59801.

completion of an adjudication process. The paper concludes by describing options by which the state and water users might prepare for the changes.

## **Primary Changes**

Based on discussions with Montana Water Court Chief Judge and staff of DNRC, the Steering Committee has identified three fundamental changes that will result from completion of the adjudication: almost all water rights will be decreed,<sup>3</sup> all decrees in a basin and the water rights they contain will be tied together, and diversions of water will be measured.

### Water Rights Will Be Decreed

The purpose of the adjudication is to determine who has what water right. At its completion, with the exception of some instream stock watering and domestic rights, information about who has the right to use how much water, over what period, where, and for what purpose will be documented.

### Decree Integration

A critical result of the adjudication will be integrating all existing decrees and all water rights in each of Montana's major river basins, thereby creating new relationships among water rights and water users. For example, all water rights in the Clark Fork River basin, an area of about 22,000 square miles, will be tied together for the first time, perhaps in a single decree.<sup>4</sup> In fact, after the adjudication, Montana will have final decrees for each of the five major basins, one for the Kootenai, Clark Fork, Missouri, Yellowstone, and St. Mary River Basins. Each of those final decrees will have been noticed throughout the basin and integrated to be binding. Except for determining the water rights themselves, this change is likely to have the greatest significance for water rights administration, water management and water rights enforcement.

### Diversion Measurements

Because the adjudication will result in enforceable water rights decrees, a pre-condition for the appointment of water commissioners, provisions of state law requiring diversions to be measured will be more likely to be implemented.<sup>5</sup>

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<sup>3</sup> The only exceptions will be some instream stock watering and domestic rights. Claims for these uses were not required to be filed in the adjudication, and as a result, only some were filed. Final decrees resulting from the adjudication will, therefore, include only some instream stock watering and domestic rights. It is not clear how, when or in what court those unclaimed instream stock and domestic water rights will be adjudicated during or after the present adjudication.

<sup>4</sup> Private communication with Judge Loble on December 16, 2003.

<sup>5</sup> 85-5-302 MCA provides that "All persons using water from any stream or ditch whereon a water commissioner is appointed are required to have suitable headgates at the point where a ditch taps a stream

## **Existing Water Rights Administration and Enforcement and Water Management**

The basis for allocating water in Montana is rooted in the Montana Constitution. Article 9, section 3, paragraphs (3) and (4) of the Constitution provide:

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Thus while ownership of water remains with the state, Montanans can acquire a water right pursuant to state law authorizing them to appropriate water for a beneficial use. The legal framework for water rights is the prior appropriation doctrine which is based on two general rules summarized by the phrases "first in time, first in right" and "use it or lose it".

"First in time, first in right" determines who may use water. Each water right has a priority date which is the date on which the water was first put to beneficial use. The earlier the priority date, the better the water right. A senior water right holder with an earlier priority date is entitled to use the full amount of his or her water right before any junior water right holder can use any water. In times of shortage, the senior user whose right is "first in time" can place a "call" on water to junior users and take all of the available water until his or her right is filled without sharing it with other users.

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and shall also, at some suitable place on the ditch and as near the head as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in the ditch."

"Use it or lose it" refers to the requirement that water must be used beneficially or can eventually be alleged to have been lost (abandoned).<sup>6</sup> Regardless of priority date, a right holder must use only that amount of water necessary to fulfill a legally recognized beneficial use.<sup>7</sup> For example, an irrigation right is capped by the amount of water needed by the crop grown on a specific piece of ground. If the crop does not need water, such as when hay is being cut, the water right holder cannot continue to divert the water and must leave it in the stream for use by junior water rights holders. Both case law and statute provide water cannot be wasted.<sup>8</sup> If a user stops putting water to a beneficial use, the water right can be lost or abandoned. Also, if the historical beneficial use underlying a water right was 10 cubic feet per second on a specific field, the right holder cannot expand his or her use to more than that amount without obtaining a new right. A Montana statute establishes 10 years of non-use as a rebuttable presumption of abandonment of a water right.<sup>9</sup>

The Water Resources Division of the DNRC administers water rights. It maintains a data base accessible to the public about the status of existing water rights. Since the passage of the Montana Water Use Act in 1973, it also issues permits for new water rights as well as for changes to all water rights. Also since 1973, DNRC has statutory authority to stop violations of the Water Use Act by pursuing court enforcement of water rights, but that authority does not extend to parceling out water among water users. Because of staffing and funding limitations, it almost never uses its authority to go to court.<sup>10</sup> DNRC is now seeking ways to partner with local county attorney offices for more enforcement of violations of the Water Use Act. DNRC supported the passage of HB 609 in 2005 to help empower water users on a stream to police illegal uses.

DNRC's lack of enforcement resources means that the burden of enforcing water rights falls almost entirely on individual water right holders. Individuals can make call on junior users and

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<sup>6</sup> Pre-1973 beneficial uses are defined by case law. For post-1973 permits and water right changes, 85-2-102 MCA defines "beneficial use" to mean, unless otherwise provided:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under §85-2-141 and of water leased under a valid lease issued by the department under §85-2-141;

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under §85-2-436; or

(d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized under 85-2-439.

<sup>7</sup> The quantity of water attached to a water right is limited in time and in volume by the capacity of the appropriation facilities, actual use, actual need, or original intent, whichever is less. Doney, *Montana Law Handbook*, page 27 (1981).

<sup>8</sup> See 85-2-102(18) and 85-2-505 MCA.

<sup>9</sup> 85-2-404 MCA. However, for pre-1973 water rights this statute applies only after the issuance of a final decree by the Montana Water Court.

<sup>10</sup> DNRC has only two attorney positions to seek court enforcement of water rights state-wide while carrying out the Department's other water related legal responsibilities. DNRC regional offices routinely obtain voluntary compliance with water rights by providing information about legal requirements and discussing issues/complaints with water users.

file lawsuits in district court to enforce their rights. In a basin with an enforceable water right decree, individuals can petition district court to appoint a water commissioner to act as the court's agent and allocate the available supply of water according to the decree water right priority dates. Because of the expense and time associated with individual law suits, use of a water commissioner is generally the preferred means of enforcement. The cost of a water commissioner is now borne only by those water right holders who receive water pursuant to commissioner action. Thus in drier years, the cost will be paid only by the most senior users, in proportion to the amount of water received. Given this funding mechanism and the nature of their work, commissioners today work part time, without benefits such as health insurance, sick leave, retirement funding, etc. These working conditions tend to limit the people available to serve as water commissioners.

Water management today has a local focus. Water users deal primarily with their immediate neighbors or with fellow members of water user organizations such as irrigation districts. In areas without enforceable water rights decrees and/or that are not facing regular water supply short-falls, water management also tends to be based on informal agreements among neighbors. Even when disagreements and/or supply short-falls result in enforcement actions through water rights calls or use of water commissioners, allocation decisions are generally limited to a local area such as a creek or a specific reach of the mainstem of a river.<sup>11</sup>

### **Implications of the Primary Changes**

The three primary changes resulting from completion of the adjudication will have significant implications for water rights administration and enforcement and for water management. Some of the implications are easy to foresee and are clearly positive. Others, although likely to be profound, are more difficult to predict in detail. Completing the adjudication will at least reduce, if not eliminate, the uncertainty about who has an existing legal right to use water. This is a necessary first step to protecting the water uses based on existing rights. To achieve meaningful protection, however, documentation must be accompanied by a practical means for enforcing water rights.

#### Water Rights Enforcement

After the adjudication is completed and all water rights in a basin are tied together into one decree, enforcing water rights is likely to be more difficult. As previously mentioned, whether through actions by individual water rights holders or by water commissioners, traditional water rights enforcement has almost always involved nearby water uses and users. For example, water use in the Flint Creek valley has traditionally been subject to multiple decrees, including decrees addressing the upper and lower portions of the valley and lower Willow Creek.<sup>12</sup> In the post-adjudication era, not only will the three major existing Flint Creek decrees be tied together, all Flint Creek Valley water rights will be integrated with the other rights throughout the entire

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<sup>11</sup> 85-2-406 provides for enforcement of temporary preliminary water rights decrees on the whole or only a part of a stream.

<sup>12</sup> Flint Creek is a tributary of the Clark Fork River. The confluence of Flint Creek with the Clark Fork occurs near Drummond, Montana. Water use on numerous individual creeks have been decreed. The three major decrees affecting the Flint Creek are: No. 655 of US Federal District Court, the Mary Schuh Decree, dated March 31, 1906; No. 719 of the Third Judicial District of the State of Montana, the Featherman Decree, dated September 18, 1909; and No. 3046 of the Third Judicial District of the State of Montana, the Willow Creek Dam Decree, dated May 3, 1960.

Clark Fork River basin, the 22,000 square mile area incorporating the entire Clark Fork River and all of its tributaries, including the Flathead, Bitterroot, and Blackfoot Rivers.

Tying water rights together will change relationships among water rights.<sup>13</sup> Historically, Montana water was often developed first in the lower portions of a watershed. A senior right in a local area such as the upper Flint Creek Valley may, therefore, be junior to a right located downstream on lower Flint Creek or even downstream on the mainstem of the Clark Fork River. Prior to completion of the adjudication, these areas were most likely subject to different, independent decrees that were managed separately. After the adjudication, formerly senior upper Flint Creek water rights may be subject to interruptions to meet the needs of earlier rights in the lower Flint Creek or even downstream on the Clark Fork River. Deciding the targets of a water rights call and who must be notified as a potentially affected water rights holder may also involve more than the traditional local area, and a call will likely become more expensive and more difficult. A water user may be subject to a call by a water rights holder located far downstream. For example, a Flint Creek water user could receive a call to cease using water from a senior water right holder located near the Montana-Idaho border.

Similarly, petitioning and paying for a water commissioner is likely to be more complicated. Presently, fifteen percent of the holders of water rights under a decree may petition district court for the appointment of a commissioner. After the water rights and old decrees are combined, how the fifteen percent requirement would be defined is not clear. Also, instead of one commissioner implementing a single decree for a specific stream, a hierarchy of commissioners will likely be required to enforce the combined decree. The actions of the commissioners will have to be coordinated in some manner. For example, sub-basins such as Flint Creek, the Little Blackfoot, or the Blackfoot may have flow targets set to protect downstream senior users and water users in other areas. How the cost of the multiple commissioners will be allocated is not clear.

Recent enforcement activity in the Musselshell sub-basin may provide a glimpse of the post-adjudication future. Four years ago, Musselshell water users successfully petitioned the Water Court to issue an enforceable decree encompassing the entire mainstem of the Musselshell River, which is about 200 miles in length. For these four years, the basin has been divided into six zones and a water commissioner has been assigned to work in one or more of the zones. One commissioner has served as the chief commissioner, coordinating the activities of the others. Depending on the year, either five or six commissioners have successfully worked together and allocated both contract and decreed water. Costs of the commissioners were compiled and divided among the water rights holders receiving water through commissioner actions. In a briefing of the Steering Committee, the chief commissioner and a representative of Musselshell water users identified the following challenges/problems with administering the commissioners:

- Commissioners do not wish to wait until the irrigation season ends to receive payment for their services. As mentioned above, current law provides that only those water rights holders who actually receive water pay the commissioner costs, and the total bill is divided according to the proportion of the water received to the total amount delivered.
- Whether the commissioners are independent contractors or are employees of some

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<sup>13</sup> 85-2-234(4) states that a final basin decree "... must establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all water rights and their relative priorities."

government entity is in dispute. Independent contractors are exempt from the Workers Compensation Program, whereas government employees are subject and their agencies must pay into the Workers Compensation fund.

- Finding enough people willing to serve as commissioners has been a challenge.
- Because upper and lower basin water rights holders are tied together in one decree, lower basin users often feel compelled to try to protect their interests by objecting to management activities of upper basin water users, and visa versa.

While this experience gives some idea of how the commissioner system might work when more than just the water rights in a local area are involved, it does not fully represent the complexity of the post-adjudication situation. Commissioners are presently employed only on the mainstem of the Musselshell River. Water rights on the tributaries are not addressed, although discussions are underway to do so. When final decrees are someday issued for Montana's five major river basins, mainstem water use will be tied legally to what happens on the tributaries. It seems unlikely that enforcement actions on the mainstem will be divorced from tributary water rights, especially if tributary rights are junior to mainstem rights. The hierarchy of commissioners, will, therefore, likely have more layers and interactions than the five or six commissioners looking after one or more zones on the Musselshell mainstem.

### Management Flexibility

Two of the three changes resulting from the adjudication will work against the existing level of management flexibility. The post-adjudication integrated water decrees addressing the five major river basins will likely expand the focus of water management beyond independent, local areas. This fact combined with the increased likelihood of required water diversion measurements may preempt informal management agreements among neighbors, replacing them with actions directed by a hierarchy of water commissioners.

## **Experience of Other States**

### Wyoming

As is the case in Montana, the Wyoming Constitution provides that the state owns the state's waters and is in charge of its allocation, and that water allocation is governed by prior appropriation doctrine.<sup>14</sup> However, unlike Montana, after the date of statehood (July 10, 1890), the only method for Wyoming water users to obtain a water right was to obtain a permit from the state engineer. Prior to statehood, a Wyoming water user could obtain a right by using water and filing a claim with territorial officials.<sup>15</sup> Thus unlike Montana, Wyoming has not had the uncertainty about water rights or the need for a state-wide adjudication process. In effect, Wyoming is an example of one approach to a post-adjudication future.

Along with a state engineer, the Wyoming Constitution also provides for the division of the state into four water divisions and the appointment of a supervisor for each division.<sup>16</sup> It also creates "...a Board of Control composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various

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<sup>14</sup> Wyoming Constitution, Titles 97-8-001 through 97-8-003.

<sup>15</sup> "Wyoming Water Law - a summary", Jacobs, Tyrrell, and Brosz, University of Wyoming, B-849R, May 2003, p. 2.

<sup>16</sup> Wyoming Constitution, Title 97-8-004.

officers connected therewith.”<sup>17</sup> The Board of Control acts, as does Montana Water Resources Division, to finalize water rights and to approve changes to existing rights.<sup>18</sup> If water users elect state regulation, state personnel who serve the division superintendents regulate the distribution of water, the role of court-appointed water commissioners in Montana.<sup>19</sup> Thus in Wyoming, state government has closely controlled the issuance of water rights, as has Montana since 1973. Unlike Montana, when requested to do so by water users, Wyoming state government actively administers water pursuant to water rights and the prior appropriation doctrine. Prior to the 2005-2006 biennium, funding for the state engineer’s office was provided primarily from earmarked coal severance and oil and gas royalties accounts. Beginning with the 2005-2006 biennium funding was shifted to the state general fund.

### Idaho

The Idaho Constitution and statutes provide that all of the waters of the state when flowing in their natural channels and state ground waters are public waters subject to diversion for beneficial uses. Water law is based on the prior appropriation doctrine. As is the case in Montana, prior to the date on which the state established a permit requirement (May 20, 1971 for surface water and March 25, 1963 for ground water), a water right could have been obtained by diverting water and putting it to a beneficial use. Prior to their respective permit requirement dates, both surface and ground water rights could also have been established by complying with the statutory method in effect at the time the water right was established.<sup>20</sup> Idaho, like Montana, decided to confirm its pre-permit water rights through a court adjudication process. However, Idaho has not instituted a state-wide adjudication; instead, a decision by the Idaho Attorney General at the request of the Director of the Idaho Department of Water Resources (IDWR) triggers the adjudication in a specific basin. A general adjudication, somewhat similar to Montana’s state-wide adjudication, is underway in the Snake River Basin. The IDWR Director also can approve applications to change the point of diversion, place of use, period of use, or nature of a water right.

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<sup>17</sup> Wyoming Constitution, Title 97-8-002.

<sup>18</sup> The steps to finalizing a water right are as follows. An application for a permit is filed with the state engineer. Upon approval of the application, the state engineer issues a permit for developing the proposed water project. After the water has been put to beneficial use (or a reservoir constructed) and the construction completion and beneficial use notices have been submitted, a final proof of appropriation or construction must be submitted to the appropriate water division superintendent. This proof is then advertised in a local newspaper, and an inspection of the project is made. If the paperwork is in order and no protests are filed, a proof is submitted to the Board of Control. If the Board approves the application, a certificate of appropriation and/or construction is issued and recorded in the county clerk’s office in the county where the project is located as well as in the state engineer’s office. It is then listed in the tabulation of adjudicated rights for the respective division as evidence of an adjudicated water right. Once adjudicated, the water right is permanently attached to the specific land or place of use described on the certificate of appropriation and cannot be removed or changed except by action of the Board of Control. “Wyoming Water Law - a summary”, Jacobs, Tyrrell, and Brosz, University of Wyoming, B-849R, May 2003, page 3. Thus water right decrees in Wyoming are up-to-date or “living” documents.

<sup>19</sup> Ibid, p. 11. The state will regulate water distribution if requested to do so by one senior water rights holder who believes that she or he is not receiving her or his full appropriation due to water use by a junior user (email from Sue Lowry to Gerald Mueller on May 20, 2005).

<sup>20</sup> “Idaho Water Rights A Primer , A Water Users Information Guide,” Idaho Department of Water Resources, 1301 N. Orchard, Boise, ID 83720.



Pursuant to Idaho law, the IDWR Director has a duty to distribute water in water districts through water masters supervised by the Director, or in parts of the state not included in a water district directly by IDWR employees.<sup>21</sup> Water districts are created and can be modified or abolished by the IDWR Director.<sup>22</sup> Thus, as is the case in Wyoming, but not in Montana, state employees distribute water. Water districts allow a local focus and provide for involvement of local water users in water management. Idaho currently has over 100 water districts, more than 70 of which are active. Districts vary in both geographical size and number of water users. The state's largest district covers most of the Upper Snake River basin and includes numerous streams and tributaries with thousands of individual water users. Smaller districts may include only one tributary stream with no more than a half dozen users.<sup>23</sup> Each district must by statute hold an annual meeting at which the district water users present by majority vote<sup>24</sup> elect the water commissioner and set his or her compensation.<sup>25</sup>

### Colorado

Colorado's Constitution declares the water of "...every natural stream...to be the property of the public..." and "(p)riority of appropriation shall give the better right..."<sup>26</sup> Water allocation is, therefore, governed by the prior appropriation doctrine. Water rights are decreed by a water

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<sup>21</sup> Idaho Code 42-602.

<sup>22</sup> Idaho Code 42-604. CREATION OF WATER DISTRICTS. The director of the department of water resources shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.

The director may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry of an order if such action is required in order to properly administer uses of the water resource.

<sup>23</sup> IDWR Web Site, <http://www.idwr.state.id.us/>, "What is a Water District?"

<sup>24</sup> Idaho Code 42-605 4) Voting shall be by majority vote of the water users present at the meeting unless one (1) or more water users requests voting using the procedure which follows in this subsection. In such case the meeting chairman shall appoint a credentials committee to determine the number of votes each water user present is authorized to cast. If requested, each person present, owning or having the use for the ensuing season of any water right in the stream or water supply comprising such water district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources, shall be entitled to a number of votes equal to the average annual dollar amount and any fraction thereof assessed for that person's qualifying water right for the previous five (5) years, or such lesser number of years as the right has been assessed. If a right has not previously been assessed, a person present, owning or having the use of the right for the ensuing season shall be entitled to a number of votes equal to the dollar amount and any fraction thereof which the right would have been assessed had it existed and been reasonably used when water was available under the priority of the right during the previous season.

<sup>25</sup> Idaho Code 42-605 (3) .

<sup>26</sup> Colorado Constitution, Article XVI Section 5 and 6.

court, which is a District Court that hears “...matters related solely to water.”<sup>27</sup> Water rights are administered by the state engineer’s office, also known as the Colorado Division of Water Resources. Colorado is divided into seven water divisions, each of which is headed by an engineer in the state engineer’s office and each of which is served by two water judges. Division engineers supervise water commissioners who allocate surface and ground water pursuant to water court decrees. Since 1957, ground water permitting and regulation has been the responsibility of the Colorado Ground Water Commission. Funding for the state engineer’s office is provided from the state general fund. In 2003, Colorado implemented a water administration fee to support the state engineer’s office, but this fee was repealed the next year.

## **Options for the Post-Adjudication Era**

As stated above, the adjudication will integrate existing water rights decrees and previously non-decreed rights into one decree for each of Montana’s major river basins. This integration will expand the focus of water rights enforcement beyond the traditional local areas creating new relationships among water rights. Changes will be necessary to the existing mechanisms for enforcing water rights, action by individual water users or by water commissioners. The following are options identified by the Steering Committee for addressing these changes.

### **Enhanced State Role**

State Enforcement - The burden for enforcing water rights could be shifted from individual water rights holders to the state, the situation in the other three western states examined above. This shift could occur either by providing DNRC adequate staffing and funding so that it could either use its existing authority to pursue court action to stop illegal water use or by empowering the agency to enforce water rights directly by issuing administrative penalties for illegal use. The past session of the Montana Legislature lessened the existing enforcement burden on individual water right holders by authorizing them to recover court and attorney fees in successful court actions to halt use of water not supported by a water right. However, given the narrow scope of this remedy, the time and monetary expense litigation requires, and the new water rights relationships that will result from completing the adjudication, continuing to rely on individual water rights holders will likely not be a viable means of enforcing water rights.

State Water Commissioners - Montana could also change the water commissioner mechanism so that commissioners would be DNRC employees rather than district court employees compensated by water users receiving water pursuant to commissioner actions. This change would allow upgrading the expertise, training, pay, and benefits of commissioners. Given the increased complexity of its role, an upgrade of the position of commissioner seems inevitable.

### **Modified Court Role**

New Water Judges - Today, specially designated district court judges bear the responsibility for overseeing water administration in Montana. These judges, however, are not relieved of their responsibility to hear other criminal and civil cases. If it decides to retain court water administration responsibilities, Montana could follow the Colorado example and designate additional district court judges with the sole duty of hearing water right cases. Doing so would improve both the water law expertise of the judges hearing water cases and the timeliness of their

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<sup>27</sup> “How Do I Obtain a Water Right”, *Guide to Colorado Well Permits, Water Rights, and Water Administration*, State Of Colorado Department of Natural Resources Division of Water Resources, June 2002, page 15.

water administration decisions.

Court Appointed Water Commissioner Administration and Support - If water commissioners continue to be independent contractors acting as court agents rather than DNRC employees, some means should be found to increase their administrative and technical support commensurate with the increased complexity of the post-adjudication water rights decrees. This support might be supplied directly by DNRC or by a combination of court appointed water masters and DNRC.

## **Conclusion**

Change is coming to Montana water rights administration and enforcement and water management. The present course of the adjudication will lead to clarity about existing water rights, but it will also tie together and create new relationships among water rights that have been managed in independent, local areas. This change will likely mean that Montana's historical reliance on courts, court appointed water commissioners, and actions by individual water right holders to administer and enforce water rights will no longer be adequate. To remedy this situation, Montana could follow the example of other western states such as Wyoming, Idaho, and Colorado and empower a state agency, likely DNRC, to distribute water. It could also shift the enforcement burden from individual water rights holders to the DNRC and/or to district court judges hearing only water cases. Whether or not water distribution authority remains with court appointed water commissioners or shifts to commissioners employed by DNRC, the job of the water commissioner will become more complex and require additional time, information, skills, and administrative support.

All of these options will likely require more state staffing and funding for either DNRC or the courts or both. This funding might be provided through the general fund, as occurs now in Wyoming, Idaho, and Colorado, or through fees on water users or some other mechanism such as the Coal Tax. By the Montana Constitution, water is owned by the state, and the legislature must provide for the administration, control, and regulation of water rights. The legislature and the executive branch therefore have a responsibility to work with water right holders, water user organizations, and others interested in water to use the time available prior to completion of the adjudication to prepare for the pending change. Completing the adjudication so that water rights are certain is necessary, but for water rights to have value, a practical means for administering and enforcing them is also required.