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Study of the Future of the Water Court

Legislative Env. Policy Office

[A SHORT HISTORY OF THE WATER COURT]

Adjudication of pre-1973 water rights has flowed through the Montana Water Court since 1979. The court's functions will mostly cease by 2028, according to some estimates, although other entities will continue to issue new permits, change existing permits, and enforce water rights.

A short timeline of the Montana Water Court

1921	Montana Supreme Court recognizes "prior appropriation"
1939	Legislature seeks adjudication "as soon as possible"
1972	Constitution recognizes existing water uses
1973	Water Use Act begins adjudication on Powder River basin
1977-78	Subcommittee on Water Rights meets
1979	SB76 creates Water Court; Lessley appointed as first chief judge
1982	219,000 claims filed with DNRC, Water Court
1985	Water Court approves first Indian compact
1987	Supreme Court issues claims examination rules
1988	Ross Report suggests "fine-tuning" process
1990	Lessley dies; Loble appointed chief water judge
2005	HB22 adds fundings, performance benchmarks
2009	Legislative audit predicts 2028 end of litigation phase, suggests future transition
2011	Legislature creates position of associate water judge
2012	Loble retires, McElyea appointed
2015	Legislature approves reexamination of 90,000 claims

A short history of the Montana Water Court

The demands of pioneer farmers and miners 150 years ago forged the legal framework for water rights in Montana and the West. First articulated by the Supreme Court of California in 1855, the concept of prior appropriation – "first in time, first in right" – became a bedrock legal foundation.

In Montana, the Water Court is untangling 219,000 water rights claims to determine who is "first in time." Like seven other Western states, the judicial branch has taken the lead in this process, but an executive agency plays a major role.[1]

Adjudication is one of three legal processes involving water rights. The Water Court adjudicates – "determine(s) all respective water rights on a stream system"[2] – all water claims made prior to 1973. The Water Court does not issue new water rights permits, change existing ones, or enforce these. And under current law, the Water Court will cease to exist when adjudication is complete.

Early water rights

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

> Among the customs generally adopted in the (mining) camps was that the first person to stake out a claim had the first right to it. The first person to divert a stream to use his rocker or pan had the first right to that amount of water. This is the doctrine of "First in time, first in right" and is the embryo of our system of prior appropriation.[3]

The doctrine "was later extended to farmers and other users, even on private lands."[4]

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

Although the state's 1889 constitution barely mentioned water use – confining its words to a recognition of irrigation – the Montana Supreme Court finally recognized the prior appropriation doctrine in 1921.[5] The 1939 Montana Legislature saw the need for an organized legal system when it declared that the "water of this state and especially

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[1] Also Arizona, Colorado, Idaho, New Mexico, Nevada, South Dakota, and Washington. A. Dan Tarlock, *Law of Water Rights and Resources*, § 7:5, Thomson Reuters/West Pub. Co. (2012)
[2] A. Dan Tarlock, *Law of Water Rights and Resources*, § 7:2, Thomson Reuters/West Pub. Co. (2012)
[3] Seminar on water rights by Al Stone, professor, University of Montana School of Law to the Montana Legislature's Subcommittee on Water Rights, July, 1977.
[4] David H. Getches, W*ater Law in a Nutshell*, West Pub. Co. (1997), 74.
[5] Mettler v. Ames Realty Co., 61 Mont. 152, 169, 201 P. 702 (1921).

interstate streams arising out of the state be investigated and adjudicated as soon as possible in order to protect the rights of water users in this state."[6]

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

> All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.[7]

And

> The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.[8]

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

Early adjudication

After ratification of the new constitution, the Legislature passed the Water Use Act in 1973, which ordered a state agency to "begin proceedings under this act to determine existing rights." This launched the adjudication process, led by what was then the Department of Natural Resources, the predecessor to the Department of Natural Resources and Conservation (DNRC). Under this system, a district court would issue decrees establishing each and every water right that existed before 1973.

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

> One of the difficulties with the 1973 adjudication provisions was that representatives for the Department of Natural Resources were required to go into the field, walk the old ditches and laterals, and physically discover all of the unrecorded, unasserted, and unknown water rights. So the Legislature became restless over the evident prospect of a century or more which would be needed to adjudicate the water rights for the entire state."[9]

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

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[6] Section 89-847 R.C.M. 1947
[7] Article IX, section 3(1), 1972 Mont. Const.
[8] Article IX, section 3(4), 1972 Mont. Const.
[9] *In re the matter of the activities of the Department of Natural Resources and Conservation*, 226 Mont. 221, 236, 740 P.2d 1096 (1987)

Indian tribes and the federal government sought to assert their claims in federal court, which they viewed as friendlier to their interests. "States feared that federal and tribal water rights would be determined in federal court," according to one history of water rights adjudication in the West.[10] "Conversely, federal and tribal attorneys feared the state court determination. The time had come for the U.S. Supreme Court to decide where these issues would be decided." In Montana, the Northern Cheyenne Tribe filed the first action, asking a federal court to adjudicate rights on the Tongue River and Rosebud Creek.

More filings followed:

> In 1975, three federal lawsuits were filed. In 1979, four more federal lawsuits were filed. The lawsuits sought to adjudicate the water rights of several Indian tribes, the United States, and other water users in general stream adjudications filed in the federal district court system. The filing of these lawsuits increased the level of urgency.[11]

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

Legislative leaders wanted an expedited process. "It is not going to do much good if it takes us 20 years to do what the statute says we should do with existing rights," Lessley told subcommittee members,[12] referring to those who had filed some sort of paperwork at county courthouses. Even those who had been using water without filing at a courthouse "should take about one year actually [to process] – it may take more than that time, but if it's handled that way it should go fairly fast," Lessley said.[13]

Stone advised the subcommittee that 1952 congressional legislation waiving sovereign immunity for the federal government would apply to the Indian and federal claims. "The McCarren Amendment … gives jurisdiction to the state when they are conducting a general adjudication of a stream to join all federal interest in order to get a complete adjudication. So you can have this proceeding in state court."[14]

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[10] John E. Thorson, Ramsey L. Kropf, Andrea K. Gerlak, and Dar Crammond, "Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II," 9 *U. Denv. Water L. Rev.* 2 (2006).
[11] Letter from Chief Water Judge C. Bruce Loble to Montana Legislative Audit Division, June 10, 2010.
[12] Testimony of Judge W.W. Lessley to Subcommittee on Water Rights, Oct. 22, 1977.
[13] Ibid.
[14] Testimony of Al Stone to Subcommittee on Water Rights, July, 1977.

The subcommittee eventually recommended the 1979 Legislature "enact a bill to adjudicate existing water rights through a special system of water courts coupled with a mandatory filing system."[15]

Creation of the Water Court

The Montana Legislature subsequently passed Senate Bill 76, which is roughly the adjudication process of today. The legislation created the Water Court to conduct the litigation phase of the adjudication, after DNRC experts examine each claim. The court was designed with a chief judge and four district court judges, although rarely does a district court judge get assigned a Water Court case. In practice, a chief water judge – with help from the associate water judge – appoints special water masters for the litigation phase.

A decree is the final product of basin adjudication. To reach this point, the process progresses through several stages: verification or examination, temporary preliminary decree or preliminary decree, public notice, resolution of individual cases, public hearings, and a final decree. The DNRC is in charge of the important first step. The rest of the proceedings, and much of the public involvement, occurs at the Water Court.

The Water Court was assigned another role, namely to review and rule on objections to negotiated compacts with the state's Indian tribes and federal agencies. The court approved the first compact for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in 1985. These settlements are negotiated by the Reserved Water Rights Compact Commission. With legislative approval of the Confederated Salish and Kootenai Tribes settlement in 2015, the commission has concluded seven tribal agreements and 12 settlements with federal agencies. Some of these are still pending at the Water Court.

After passage of SB76, the Montana Supreme Court ordered everyone with a pre-1973 water claim to file with the DNRC. About 219,000 claims were filed by April 30, 1982, deadline. These claims are considered prima facie proof of the right, i.e. the claim for water stands as stated, unless someone else provides evidence to the contrary. (Residents of basins are notified when decrees are being developed.) A later legislature allowed the filing of approximately 4,500 "late" claims in 1996, although these claims are subordinate to all those filed on time.

After the adjudication launched, a federal district court stayed all seven federal lawsuits, concluding "that the question of jurisdiction under state law is one to be resolved by the state courts and that the question of adequacy of the state proceedings is to be decided by the states."[16]

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[15] Subcommittee on Water Rights, *Determination of Existing Water Rights: A Report to the Forty-Sixth Legislature* (1978), 1.
[16] Environmental Quality Council, *Montana's Water – Where is it? Who can use it? Who decides?* (2004), 22.

Unsettled 1980s

The prediction of a quick adjudication by Judge Lessley, who was now chief water judge and established his court in Bozeman, would not come to pass.

From 1982-85, the DNRC began rapidly verifying water rights claims, and the Water Court began issuing decrees. This period was also marked by disagreements between the agency, the court, other agencies, and water rights attorneys over the process and standards. "The DNRC had adopted a process for reviewing claim elements called 'verification,'" according to a later audit of the process. "However, there was not clear line between the executive functions being fulfilled by DNRC and the judicial functions of the Water Court and the two agencies frequently disagreed over roles and responsibilities."[17]

The dispute culminated with a 1987 Montana Supreme Court action declaring that the Supreme Court – not the agency, not the Water Court – would "promulgate rules to cover water right claim examination."[18]

The claims examination rules created in 1987 are much the same that exist today. By design the process is adversarial: a claimant asserts a claim to water, which is upheld as valid unless another user objects. The DNRC may attach an issue remark, which flags uncertain information in a claim and must be resolved before a final decree is issued. And the Water Court has its own authority to call in claims on its own motion – en motion.

In light of the controversy, the legislature hired a Denver law firm to review the state's adjudication process. In 1988 the firm issued what became known as the Ross Report, which mostly affirmed and validated the state process, suggesting only legislative "fine-tuning."[19]

> We did not find the framework of the Montana water adjudication law or the process prescribed by it to be so grievously flawed as to require a massive legislative overhaul… How rapidly that process can be concluded under the changes we recommend will become a function of the level of funding provided to both the judicial and executive branch institutions involved in the process.[20]

Judge Lessley died in 1990. C. Bruce Loble was appointed shortly thereafter. Budgets for the Water Court and DNRC adjudication staff shrunk, and the pace of adjudication slowed again.

10 years of adjustments

Change again affected the Montana Water Court over the last decade.

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[17] Legislative Audit Division, *09P-09: Water Rights Adjudication* (2010), 1.
[18] Environmental Quality Council, *Montana's Water – Where is it? Who can use it? Who decides?* (2004), 24.
[19] Jack F. Ross, *Evaluation of Montana's Water Rights Adjudication Process (1988)*, 4.
[20] Jack F. Ross, *Evaluation of Montana's Water Rights Adjudication Process (1988)*, 4.

The first notable change came with an injection of money and performance benchmarks in 2005. Much of this effort was led by Rep. Walt McNutt and the Environmental Quality Council, which studied the adjudication process in 2003-04.

The EQC determined two issues needed to be addressed. The first issue was timeliness and the second was ensuring the decrees are as accurate as possible. The EQC determined that the estimated timeframe to complete the adjudication was too long. Montana had already spent 25 years on the adjudication and it was estimated that it would take another 30-40 years to complete.

The result of the EQC study was House Bill 22. The sole purpose of this bill was to develop a funding source for the adjudication and to establish statutory deadlines for completion. All claims were required to be examined by June 30, 2015, a deadline the DNRC recently met.

As passed in 2005, HB 22 imposed a fee on every water right in the state. Persons with water right claims, as well as those with provisional permits and new appropriations, were required to pay the fee. However, the 2007 Legislature repealed the fee and transferred general funds to replace fee revenue and keep the process on its 2015 timeline.[21]

A 2009 legislative audit suggested further refinements, such as not reexamining certain decrees completed in the early 1980s and preparing for a post-adjudication future. The audit estimated that the litigation phase – the period of time in which all objections and issue remarks related to every claim is resolved – would last until 2028. Final decrees would presumably be issued after that.

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

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

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

One Montana Supreme Court ruling has impacted the Water Court's work within the last decade – although the extent of its effects remains to be seen.

In 2011, the Montana Supreme Court overruled a Loble decision when it ruled there "is not statutory or regulatory restriction on who is entitled to file an objection to a claim of a

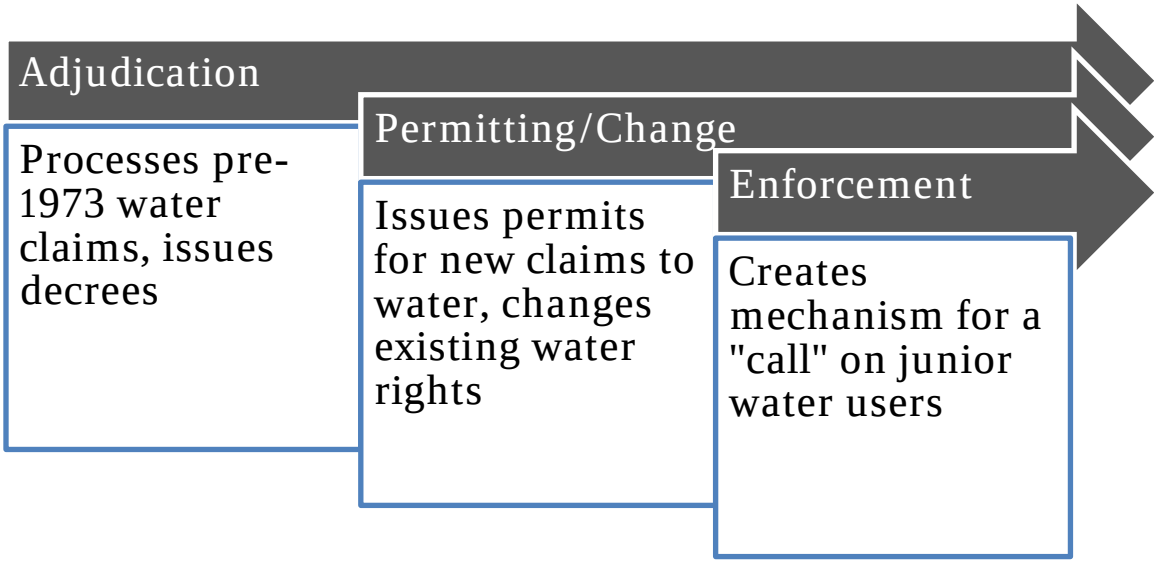
[21] Environmental Quality Council, *Water Rights in Montana* (2014), 5.

water right."[22] Afterwards, Judge Loble said "the opinion may not have the far-reaching ramifications some have predicted.[23] These ramifications may include slowing down the issuance of decrees.

A smaller Water Court

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

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



[22] Montana Trout Unlimited v. Beaverhead Water Company, 2011 MT 151, 361 Mont. 77, 255 P.3d 179.
[23] Helen Thigpen memo to Water Policy Interim Committee, Feb. 6, 2012.