EVALUATION OF MONTANA'S WATER RIGHTS ADJUDICATION PROCESS

Prepared for the Water Policy Committee
of the Legislature of the State of Montana

by

Saunders, Snyder, Ross & Dickson, P.C.
Denver, Colorado

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SAUNDERS, SNYDER, ROSS & DICKSON, P.C.
LAW OFFICES
707 SEVENTEENTH STREET
SUITE 3500
DENVER, COLORADO 80202
TELEPHONE: (303) 292-6600
TELECOPIER: (303) 292-5902

JACK F. ROSS
WAYNE J. FOWLER
W. B. TOURTILLOTT, JR.
WILLIAM J. KIRVEN III
HENRY C. CLEVELAND III
JAMES W. SANDERSON
EUGENE F. MEGYESY, JR.
CHRISTOPHER R. PAULSON
DEBORAH L. FREEMAN
DAVID C. HALLFORD
ROBERT E. SCHWEEN

PETER H. EVANS
DAVID E. BELLACK
BARBARA L. CRAWFORD

GLENN G. SAUNDERS
WILLARD S. SNYDER
JOHN M. DICKSON
OF COUNSEL

September 30, 1988

Senator Jack E. Galt
Chairman, Water Policy Committee
Montana State Legislature
Capitol Station, Room 432
Helena, Montana 59620

Dear Senator Galt:

In accordance with our contract with the Water Policy Committee of the Montana Legislature, I transmit herewith the Final Report of our analysis of the Montana water adjudication system.

It has been a pleasure to have served the Committee, the Legislature and, ultimately, the people of Montana in that phase of our endeavor.

We look forward to the opportunity to work further with the Committee and the Legislature in providing counsel to them in the development of legal mechanisms for the attainment of their water policy objectives.

Very truly yours,

SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.

Jack F. Ross

JFR/emc

Enclosure

Table of Contents

	Page
INTRODUCTION	1
EXECUTIVE SUMMARY	4
OVERVIEW	
A. THE ADJUDICATION PROCESS	8
B. DUE PROCESS AND EQUAL PROTECTION	10
ANALYSIS	
A. DNRC ROLES, PRACTICES, AND RELATIONSHIP WITH THE WATER COURT	
1. Separation of Powers	13
2. DNRC's Multiple Roles	17
3. Adequacy of Claims Examination	19
4. Efficiency of Examination Process	22
5. Sufficiency of Claimants' Access to DNRC Information	22
6. Claimants' Perception of Fairness of DNRC Process	23
B. WATER COURT PRACTICES AND PROCEDURES	
1. Extent of Variance in Procedures and Guidelines Applied to Claims	24
2. Adequacy of Notice of Adjudication Proceedings	26
3. Late Claims and Objections	30
4. Sufficiency of Water Court Adjudication Schedule to Insure Due Process	32
5. Optimum Adjudication Schedule	32
6. Sufficiency of Claimants' Access to Court Information	33
7. Efficiency of Water Court	34
8. Constitutionality of Water Court Structure	35
9. Sufficiency of Water Court's Claims Index and Docket System	41
10. Water Court's Criteria for Requiring Further Proof	41
C. McCARRAN AMENDMENT CONSIDERATIONS	
1. McCarran Amendment Adjudication Issues	43
2. Sufficiency of Montana Act Under McCarran Standards	49
3. Adequacy of Integration of Federal Rights	54
4. Conflicts Between Montana Law and Federal Law	54
5. Montana Adjudication Remedial Measures	54
D. ACCURACY OF ADJUDICATION DECREES	
1. Accuracy of Final Decrees	54
2. Desirability of a Mandatory Adversarial System	61
3. Usefulness of Decrees to Water Users	62
4. Reliability of Decrees in Equitable Apportionment or Interstate Compacting	63

Table of Contents (continued)

Page

5. Statutory Process to Correct Adjudication Errors 66
6. Effect of Final Powder River Decree on Unadjudicated and Noncompacted Federal Rights . . 67

E. ADDITIONAL QUESTIONS CONCERNING THE ADJUDICATION PROCESS
1. Legality of the Conclusive Presumption of Abandonment 69
2. Effect of the Prima Facie Evidence Statute and Need for Any Modification 74
3. Need for Additional Delineation of DNRC Responsibilities 76
4. Legal Effect of Decrees Issued by the Water Courts 76
5. Effects of the 1986 Stipulation and Related Court Decisions and Rulemaking 77
6. Integration of Subbasins by Notice of Mainstem Claims 79

FOOTNOTES 80

APPENDIX I - Engineering Evaluation of Wright Water Engineers
APPENDIX II - Results of Water Rights Claimants Survey
APPENDIX III - Results of Water Rights Attorneys Survey
APPENDIX IV - Proposed Legislation
APPENDIX V - Comments on Draft Evaluation dated 7/29/88
APPENDIX VI - Responses to Comments on Draft Evaluation

INTRODUCTION

In 1979, the Montana legislature enacted Senate Bill 76 into law. It provided a judicial mechanism for adjudicating water rights created through the application of water to beneficial use prior to July 1, 1973 as well as water rights claimed within Montana by the United States and the Indian tribes.

Senate Bill 76 was enacted in response to a perceived concern over the projected length of time and anticipated cost required to complete the adjudication process which had commenced in 1973 using an administrative agency mechanism. In the latter part of 1987, the Water Policy Committee of the Montana legislature called on us to evaluate the judicial mechanism set up by Senate Bill 76 to determine whether a number of concerns which had been raised about that institutional arrangement required correction by the legislature to assure the legal efficacy of the adjudication process.

While much of the controversy about the adjudication process seems to result from differing perceptions as to how well various participants in that process are performing their appointed roles, we were not asked by the Water Policy Committee to provide performance evaluations, but rather to address institutional issues. Our objective has been to evaluate those issues from the perspective of our extensive experience in the adjudication of water rights under a somewhat similar institutional arrangement.

In conducting our study, we have attempted to secure as much in depth information about the how the current system operates from as many of those who are involved in the process as available time and practical constraints inherent in the study process allowed.

Those constraints required us to limit the number of people we could personally interview to approximately 60 individuals. Those people were individual water users, including representatives of industrial water users, as well as representatives of agriculture and environmental organizations, individual legislators and other state officials, representatives of state and federal agencies involved in the process, tribal representatives, individual engineers and lawyers who have participated in the process, and the court personnel involved in the process, including water judges, masters and clerks.

In an attempt to gain as much professional input as possible, we were also able to conduct telephone or personal interviews of 11 from a list of 17 attorneys who have participated in the process. The information produced from those telephone interviews was further augmented by written questionnaires which were returned by 23 of the 34 attorneys to whom they were submitted. That survey is summarized in Appendix III.

In an attempt to gain a feel from the "customers of the system" as to how they perceive it to work, we also sent out over 1,000 questionnaires to water right claimants whose rights have been processed through the system, and 394 responded. The insights gained from those responses aided us in our evaluations. That survey is summarized in Appendix II.

We used the attorney and water user questionnaire procedures, not for the purpose of developing a statistically significant result (a purpose neither required nor possible under the study constraints), but rather as another tool to help us gain better insight into how well the system is perceived to be working by those segments of the Montana population.

Another and probably more important reason for using both the interview and questionnaire procedures was to help us more

clearly understand the real nature and significance of the institutional issues we were asked to look at. They have helped us prevent our study from becoming merely an academic inquiry into the niceties of esoteric legal questions of little practical value to a policy making, legislative body seeking to find out whether there are real, genuine institutional problems requiring legislative solutions.

Finally, we were greatly aided in developing a practical perspective of the process by our subcontractor, Wright Water Engineers, the engineering firm which developed "A Water Protection Strategy for Montana-Missouri River Basin" for the state of Montana in 1982. This firm was of inestimable value in providing us an independent objective evaluation of the accuracy of Water Court decrees and the Water Court/DNRC claims evaluation process.

In the presentation of our report we provide an Executive Summary of our findings, conclusions and recommendations. We then address, in the body of the report, each specific institutional issue as it was set forth in the detailed study design established by the Water Policy Committee on December 11, 1987.

EXECUTIVE SUMMARY

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. We conclude that with some minor legislative fine tuning, the process now going forward under that law can be expected to achieve the results sought by the legislature when it adopted Senate Bill 76 in 1979. 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.

A summary of our specific findings, conclusions, and recommendations, keyed to the study design outline, follows.

Proposed legislation recommended in this Final Report appears at Appendix IV.

A.1 The investigative functions performed by DNRC in aid of the adjudication process do not violate the separation of powers doctrine. The Water Court's direction to DNRC does not constitute an improper exercise of executive power by the judiciary.

A.2 We found no compelling legal requirement that the legislature act to reassign some of the multiple functions of the DNRC to some other executive branch agency.

A.3 The claims examination procedures used by DNRC both before and after the promulgation of the new rules by the Supreme Court have been adequate to provide reasonable evidentiary material for the Water Courts' use.

A.4 The DNRC claims examination process is efficient.

A.5 Claimants have adequate access to DNRC information.

A.6 Claimants generally perceive the DNRC process to be fair and designed to benefit all users.

B.1 We found no legal problem inherent in the use by the Water Courts of evolving or differing procedures and guidelines in the adjudication process.

B.2 In order to assure that decrees entered in individual subbasins be binding, not only within those subbasins, but throughout the entire river system of which they are a part, we recommend legislation to require notice of the issuance of those decrees to be provided throughout that river system.

B.3 We find no authority for the practice of decreeing late filed claims; the practice should terminate. We also conclude that users are not precluded by law from objecting to claims at the preliminary decree stage even where those claims were first evidenced in a temporary preliminary decree.

B.4 We recommend that the time for filing objections to subbasin decrees by affected water users in other subbasins of the stream system run for at least one year after the notice of the filing of such subbasin decree.

B.5 The supplemental notice and objection procedure we recommend will lengthen the time the adjudication process will take.

B.6 Claimants' access to Water Court decrees and other information is adequate.

B.7 The Water Courts are highly efficient in the adjudication of claims, providing adequate procedures for resolving disputed claims.

B.8 Credible arguments have been advanced that the Water Court structure violates the Montana constitution because the water judges do not stand for election as water judges. Equally credible arguments can be made that the structure is constitutional. In the absence of a definitive pronouncement on the issue by the Montana Supreme Court, we find no justification for the legislature to react by causing a wholesale dismantling or revision of the Water Court system.

B.9 The Water Courts' claim index and docket control systems are exemplary.

B.10 The Water Courts' method of requiring further proof of claims challenged by DNRC verification conclusions is adequate.

C. The current phase of the Montana statutory adjudication process is adequate to adjudicate federal and tribal claims under the McCarran Amendment and the various perceived shortcomings in the process involving the adjudication of state based claims do not threaten the utility of the process for McCarran Amendment purposes.

D.1 Neither the appropriation doctrine nor the present statutory procedure prescribe a universal, precisely measureable standard of accuracy for the entry of decrees evidencing water rights.

D.2 The present system provides ample opportunity for claims to be contested without the creation of a mandatory adversarial system.

D.3 The final decrees will be useful in the eventual administration of water rights in Montana.

D.4 Final decrees will be useful but not conclusive in equitable apportionment litigation or interstate compact negotiations.

D.5 We recommend the adoption of legislation to provide a method for correcting clerical errors in decrees.

D.6 The final Powder River Decree is not final and binding as against unadjudicated federal and tribal claims.

E.1 The conclusive abandonment of late filed claims is both legal and constitutional.

E.2 The "prima facie" evidence statute does not require amendment except to clarify its effect in light of our recommendation for legislation concerning administration of temporary preliminary decrees and preliminary decrees.

E.4 Under present statutes, only final decrees are administrable.

E.5 The 1986 Stipulation and Rulemaking have resulted in improved examination rules and procedures. The 1987 legislative changes have more clearly tied the adjudication's schedule to the level of funding of DNRC's verification activities.

E.6 Our recommended notice procedure will provide for effective integration of mainstem and subbasin decrees. See conclusion B.2 above.

OVERVIEW

A. THE ADJUDICATION PROCESS.

The perceived problems and our conclusions and recommendations must be viewed in the context of both the nature of the adjudication process and its results for the individual Montana water users and the state itself.

The adjudication process is relatively straight forward. Pursuant to public notice, all claimants of water rights created by beneficial use before July 1, 1973 were required to file written claims of those water rights with the Department of Natural Resources and Conservation ("DNRC") on or before April 30, 1982. Those written claims were submitted on forms prepared by DNRC which required a comprehensive description of the water right elements such as type and place of use, point of diversion, amount of diversion or storage, and priority date.

The claim filings initiated a process through which the Water Court, acting through its water judges and water masters, began the evaluation of claims within the hydrologic subbasins of the state. The state was divided into hydrological basins so that essentially all the claims for water from a defined regional source would be examined together and made the subject of one comprehensive decree. Because of the statutorily mandated abatement under section 85-2-217, MCA of judicial adjudication proceedings in subbasins where the federal government or Indian tribes claim noncompacted reserved water rights, the adjudication was required to proceed with recognition of the many areas of the state in which adjudication proceedings are legally stayed.

In the evaluation of claims, the Water Court has recognized properly filed and completed claims as establishing prima facie

evidence of their contents. The information provided in a claim is supplemented in the Water Court's evaluation by submission of information by the DNRC, which has examined essentially all claims against available information at some level of inquiry.

The product of the Water Court's evaluation is the issuance of a preliminary decree containing the findings of fact and conclusions of law applicable to the claims in the water sub-basin being adjudicated and findings as to the elements of the claimed rights, including the claimants' identities, the amounts, locations, and priorities of use, and the points of diversion for the structures involved. Notice of the issuance of the preliminary decree is provided so that the claimants of water rights in the affected subbasin and other interested parties may review the decree and file objections to any claims decreed in the preliminary decree. The notice and objection period is 90 days unless the Court extends it to 180 days. Contested claims are resolved either through settlement or through litigation involving discovery of information by the contesting parties and a trial before the Water Court involving the presentation of proof and argument.

After all objections to a preliminary decree are resolved by the Water Court, the Court issues a final decree which is appealable to the Montana Supreme Court for alleged errors of fact or law.

The final decree of a water right claim is useful to the Montana water user because it evidences his property interest and defines its important elements: the amount, priority, type, and location of his use. Such confirmation of a real property interest in water can be useful in financing transactions and in assisting the user to receive his entitlement to water if competition for water intensifies and water rights are administered.

The final decrees for water rights also are useful to the State of Montana. The existence of such decrees will facilitate the orderly administration of water rights. Also, by providing benefits to the individual water users, the adjudications will provide greater stability to Montana's agriculture community. Finally, the decrees will provide evidence as to Montana's water use in disputes concerning interstate allocation of the surface waters which originate in Montana.

B. DUE PROCESS AND EQUAL PROTECTION.

It is in light of this process and the resulting benefits that we examine the important considerations of fairness and due process as they apply in the Montana adjudication.

When interested persons articulate many of their concerns about the adjudication process, they speak with catch words that include concepts of "due process" and "equal protection." It is imperative that the Committee understand what those concepts mean in the context of the Montana adjudication.

The principles of due process and equal protection of the laws are both contained in the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment prohibits federal deprivation of life, liberty, or property without due process of law, and the Fourteenth Amendment prohibits any state deprivation of the same.

Procedural due process concerns the fairness of a process or procedure used by the government to affect a person's life, liberty, or property. The minimal procedural safeguards required under the federal constitution require that an affected person be given notice of an intended action, that the person be given a meaningful opportunity to be heard about the matter, and that any decision about that matter be made by a fair and

impartial decision maker. Considerations of procedural due process only arise when a protected interest such as life, liberty, or property is involved. Clearly, water rights are recognized as real property in Montana, and their owners are entitled to due process in governmental actions affecting those property interests.

The requirements for notice and the nature of the opportunity to be heard vary according to the type of interest involved. The impartiality of the decision maker is a constant requirement.

Substantive due process and equal protection of the laws address whether the substance of a law, rather than the procedure employed to implement the law, is constitutional. Substantive due process requires that a law or procedure be reasonable in relation to the government's power to enact it. Equal protection of the laws protects against improper legal classifications which have the effect of treating similar people in dissimilar manners.

The major "due process" issue raised in the Montana adjudication involves procedural due process and the adequacy of the Water Court process to provide both notice and an opportunity to be heard. As discussed in the body of the report below, the issue is whether the statutory provisions as implemented through the Water Court's practices provide claimants and other interested persons adequate notice of the nature of claims and an adequate opportunity to file objections and to be heard about their claims and those to which they object.

The "equal protection" issue involved in the Montana adjudication involves the question of whether the application of varying and evolving water rights examination criteria and procedures unconstitutionally has treated similarly situated individuals in impermissibly dissimilar manners.

What the Committee needs to keep in mind when evaluating these issues is that neither the "due process" nor the "equal protection" principles exists as an abstraction in a vacuum. Both apply to real world conditions. They are invoked, when necessary, not by some third party who expresses concern that an abstract principle has been violated, but rather by the owner or claimant of a water right who can show 1) that there was, in fact, a failure of due process or equal protection, and 2) that such failure resulted in the loss or impairment of his water right. Anyone who could make such a showing would be entitled to judicial relief from that loss or impairment.

We emphasize that such relief comes about in our governmental system through a judicial, not a legislative, process. Legislative action becomes appropriate only when a flaw in a legislatively-created institution requires that a claimant be deprived of his due process or equal protection rights.

Our analysis of the Montana adjudication system revealed no institutionally-mandated procedure requiring the violation of due process or equal protection principles. As a result, if any due process or equal protection problems actually occur, it will not be because the system is flawed, but rather because some participant in the process causes the problem. Should that actually occur, the Courts are open to correct any such abuse, and we have seen no evidence to suggest that any Montana Court would shirk its duty in that regard.

ANALYSIS

A. DNRC ROLES, PRACTICES, AND RELATIONSHIP WITH THE WATER COURT.

Analyses of questions concerning the roles and practices of DNRC and its relationship with the Water Court in the adjudication process were central to our task.

1. Separation of Powers.

The separation of powers doctrine, which is unique to the constitutional jurisprudence of the United States, was adopted by the people of Montana in their constitution. In order to assure that Montana's system of governmental checks and balances works, the doctrine of separation of powers requires that no one of the three branches of government may exercise the power granted exclusively to the other two branches of government.

The specific questions raised are (1) whether the DNRC, a department of the executive branch, unlawfully exercises a judicial power when it develops factual information under section 85-2-243, MCA to be used by the Water Court in the adjudication of pre-1973 water rights and (2) whether the Water Court improperly exercises executive power in controlling the activities of the DNRC under the same statute.

With respect to the first question posed above, we conclude that while such investigative activities may have traditionally been viewed as being exclusively within the scope of the judicial adjudicatory function, Montana case law indicates that the development of such information by DNRC and its use by the Court is appropriate and not constitutionally suspect.

Article III, section 1 of the Montana state constitution provides for the division of the power of the state government among three distinct branches, the legislative, the executive, and the judicial. It further prohibits any persons charged with the exercise of a power belonging to one branch from exercising any power properly belonging to another branch. Article VII, section 1 vests the judicial power of the state in the state Supreme Court, the district courts, justice courts, and other courts as may be provided by law. Under Article VI, section 4, the Governor is vested with the executive power to see that the state laws are faithfully executed.

Two general principles emerge from the judicial decisions interpreting the Montana constitutional separation of powers provision. First, the separation of functions of the three branches need not be absolute and exclusive, and some overlap of functions is permissible.[1] Second, if the performance of a legislatively delegated function can only result in the exercise of the judicial power through subsequent, independent action of the Court, the performance of the function is valid and does not violate the doctrine of separation of powers.[2]

Under these decisions, the Water Court's employment of DNRC to perform factual investigations appears constitutional. DNRC's investigations provide a source of factual information to the Water Court for completion of the adjudicatory process. The conclusions of DNRC's investigative inquiries are not binding on the Water Court or on the affected parties and therefore cannot be independently operative. The Water Court retains the ultimate power to make the factual findings from an evaluation of all the evidence before it, not just the evidence resulting from the DNRC investigation. The Water Court retains the discretion to make whatever findings from the evidence before it which may be required to pronounce final judgment as to whether or not a water right exists.

Addressing the question of whether the Water Court improperly exercises executive power in its control of DNRC's activities under section 85-2-243, MCA, we conclude that this control is within the bounds of the separation of powers doctrine.

The "judicial power is the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[3] The executive power is to "see that the laws are faithfully executed."[4]

Statutory law gives DNRC several roles in the water right adjudication process: as a claimant, as an objector, and as a claims verifier. Additionally, DNRC acts as the permitting authority for post-July 1, 1973 water rights.

In its role as a claim verifier under section 85-2-243, MCA, DNRC was given no independent, executive discretion to exercise. The statute provides that DNRC is to perform this function subject to the direction of the water judge. That being the case, faithful execution of the law by DNRC requires that it act at the direction of the water judge when performing the functions set forth in section 85-2-243, MCA. Since the Legislature gave the agency no independent executive discretion to exercise when performing that role, the Water Court's direction of the agency's efforts in such matters cannot be in violation of the separation of powers doctrine.

Thus, to the extent that the water judge directs the activities of DNRC in its performance of the functions enumerated under section 85-2-243, MCA, neither the water judge nor DNRC is improperly exercising or impinging upon the proper exercise of power belonging to the other.

Concern has been expressed that the Water Courts are attempting to or have attempted to totally control DNRC's "executive" activities in verifying claims. As discussed above, the direct response to those concerns is that the DNRC has no "executive" authority as a claims verifier and acts in that capacity only as an arm of the judicial branch. The Montana Supreme Court has adopted that analysis of the statutes in holding that DNRC has no independent executive authority under the claims verification statutes, and that DNRC acts at the direction of the Water Court.[5]

The Montana Supreme Court also observed that no factual record had been presented to it showing that the Water Courts were improperly attempting to exert control over activities of DNRC in areas where the Legislature had given the agency executive discretion, such as the functions of representing state interests as claimant and objector. In our investigation we found no such attempt at Water Court control of executive functions. It is clear from our reading of the law that if the Water Courts attempted to exercise such an impermissible control, DNRC could expect, upon making a proper factual record, to receive relief from such action by the Montana Supreme Court.

The Water Court has maintained a tight control over DNRC's activities in the verification process, but has not intruded into the DNRC's discretion and activities concerning its roles as claimant and objector in the adjudication. It appears that the Water Court's extensive, yet appropriate, control of DNRC in the verification process has generated an unfounded concern which is not substantiated when the facts are viewed in the context of separation of powers analysis.

2. DNRC's Multiple Roles.

Under a number of different legislative directives, DNRC performs a number of different functions affecting determinations of rights to the use of water. DNRC may act in its own right as an executive agency as a claimant of water rights or as an objector to water right claims of others. It acts for the Water Court in a judicial role as an examiner of facts concerning water right claims of others. Finally, it acts as the permitting authority for all post-July 1, 1973 water rights. As we understand DNRC's internal structure, each of those separate roles is implemented through a separate bureau consisting of individuals who do not consciously coordinate their activities or share information.

The specific question which we were asked to address is whether an impermissible institutional conflict of interest results from the various divisions of the DNRC exercising their discretion in the performance of the different roles assigned to the DNRC by the legislature.

Prohibitions against governmental institutional conflicts are addressed in article III, section 1 of the Montana constitution, which provides for the division of the power of the state government into the three branches, legislative, judicial, and executive. Separation of powers issues typically arise when the exercise of a power by an agency or department of one branch of government impedes the exercise of a governmental power belonging to another branch of government.[6] The separation of powers issue also may arise when an agency of one branch attempts to exercise the power properly belonging to another branch.[7] These separation of powers issues deal primarily with conflicts between government branches, not within a government agency.

In In Re Activities of the Department of Natural Resources and Conservation[8] it was argued that the various roles of DNRC as a water rights claimant, potential objector for state interests, and advisor to the Water Court give rise to potential due process objections because of institutional bias. The Montana Supreme Court was not required to dispose of that issue, but did note that the adjudicatory scheme in the state of Arizona had been upheld by that state's supreme court because the executive adjudicatory function was separated from the ownership function of the state.

Of particular importance to the Arizona Supreme Court was the fact that, although the Department of Water Resources (DWR) had multiple roles in connection with the adjudicatory process, DWR did not act as a participant, i.e., was not a claimant or objector. In contrast, the DNRC, in addition to its role as claims verifier, is a participant in the adjudicatory process. The separation of its various roles by bureau within the DNRC is therefore crucial.

In apparent recognition of the need to keep separate DNRC's various roles, the legislature provided the Water Court with authority to strictly control DNRC's investigative activities in order to ensure that the information so generated is used to assist the Water Court in its adjudication of claims and does not bleed over to benefit DNRC in its role as claimant or objector. Because of DNRC's multiple missions, it is important that the verification process conducted by DNRC as a judicial activity be thoroughly controlled by the Water Court. The Water Court has exercised pervasive control, obviously aggravating DNRC's perceptions of its executive prerogatives but, in our view, fully in accordance with the statutory scheme which separates the judicial function of claims verification from the executive functions of representing Montana's state interests as claimant and objector. Tight Water Court control

of DNRC verification, then, is essential in insulating DNRC from claims of institutional bias and conflict.

Judging the current institutional arrangement by principles in the applicable case law leads us to the conclusion that as long as the current practice of insulating one function from another continues, no legally prohibited institutional conflict of interest need arise. These multiple roles create no clear legal conflict when they are implemented through separate functioning units of attorneys, engineers, and staff.

It is clear, however, that the continuation of the present multiple mission directive to the DNRC could lead to mischief if the present departmental protocol for avoiding such problems were to change or fail. But even with that protocol in place so as to avoid a conflict in fact, the risk of the appearance of conflict will continue. That problem need not be so bothersome, however, because the appearance of conflict standards applicable to the practice of law do not apply to prohibit simultaneous implementation of multiple programs now required of DNRC.

Because of these considerations, we conclude that there is no compelling legal requirement that the legislature act to reassign one or more of the functions now performed by DNRC to some other existing or new agency in the executive branch. Rather, the determination of whether, as a matter of policy, such changes would be appropriate rests in the sound discretion of the legislature as it balances a need to avoid the risk of having a conflict in fact occur against the cost of making such a reassignment.

3. Adequacy of Claims Examination.

Questions have been raised as to whether the claims examination processes used by the DNRC since 1979 have been adequate

to provide the Water Courts with reliable verification evidence which those courts can use in completing the adjudication process. Such questions have been raised, in this context and others, because of a perception by some that a large portion of the more than 200,000 claims which had been filed may have erroneously claimed exaggerated quantities of water.

The instructions for the completion of water right claims which were provided to water users by DNRC and the Water Courts were comprehensive and, to anyone who is experienced in such matters, clear and understandable. Nevertheless, with so many thousands of claims being filed by claimants not experienced in such matters, it would not be surprising that many may have been confused about what to file for and how to complete the claim forms. Given the nature of human beings, undoubtedly some claimants could be expected to exaggerate their claims intentionally, while other exaggerations may have occured through inadvertence or misunderstanding. However, we have not been persuaded from the evaluation of the available evidence including Wright Water Engineers' investigation, that there has been a deliberate, wholesale and pervasive exaggeration of claims. Even if there were, the claims verification procedures authorized by the statute and now implemented under Supreme Court rules can provide a tool for the Water Courts to use in correcting any excesses found to exist while processing amd evaluating the validity of claims now before them.

Attached to this report as Appendix I is Wright Water Engineers' technical memorandum describing its investigations on this process and its conclusions on the issue of the accuracy of decrees and the claims examination processes.

We found that the claims examination process and procedures of DNRC, as they have evolved, are adequate to determine the existence and the nature of pre-July 1, 1973 appropriative water

rights. The data and standards on which a DNRC examination is based are probative of the existence and nature of such rights. They are the kinds of information which would be acceptable in a judicial proceeding as relevant evidence, and they are the kinds of data and standards that water right engineering experts normally utilize to determine the nature and existence of such rights.

The initial data sources used to verify irrigation rights are aerial photography, topographic maps, and the Montana Water Resources Surveys for the various counties. These data sources are utilized to determine points of diversion and the location and extent of irrigated land areas. DNRC assigns no particular weight or ranking to these various data sources and considers all data sources in verifying a claim. Thus, the use of post-1973 aerial photography to document pre-July 1, 1973 irrigation practices, while reasonable in itself, is balanced by the availability of the other data such as the county water use surveys which used many data sources, including field inspections and earlier aerial photography.

The increased contact with claimants to resolve verification questions and the increased use of field investigations under the new Supreme Court claims examination rules has improved the verification process. The question is whether the verification of claims under the original process (as evolved and amended until the promulgation of the new rules) was adequate to verify the existence and nature of water right claims. We believe that it was, when coupled with the judicial process established by the Water Court and the availability of objection to claims in the Water Court.

Any adjudication of water rights requires affected water users to appear and defend their interests. Montana's adjudication has followed that pattern, and significant modifications

of claims have resulted when objections are made. Given this process and our suggested remedial measures, we see no legal deficiency because all or most claims are not field investigated at state expense.

4. Efficiency of Examination Process.

We found the DNRC examination process to be efficient. The process is rational and progresses through reliance on the most probative available evidence before expanding the inquiry to additional sources, claimant contact, and field investigations.

The efficiency of the DNRC examination process results from three apparent factors. First, DNRC does not have a budget adequate to investigate every claim by thorough field examination within the time schedule for completion of the overall adjudication currently projected by the Water Courts. Consequently, DNRC has necessarily developed and implemented efficient practices. Second, DNRC's substantial experience in the Powder River Basin adjudication allowed it to develop an institutional perspective and approach to the most efficient utilization of available resources in carrying out its verification mission. Third, the new claims examination rules have essentially institutionalized an efficient and logical process for the examination of claims.

5. Sufficiency of Claimants' Access to DNRC Information.

We were asked to evaluate whether a water right claimant has sufficient access to the DNRC records to permit him to develop an informed determination of whether and how to deal with the information relating to his claim and whether to participate in the process of adjudicating the claims of others.

We found that water right claimants and the public in general have adequate access to DNRC records concerning water right claims. Microfiche copies of all claims are available in the nine field offices for public inspection. Hard copies of the basin decrees are available in the field office for each basin. Those copies are also available for the public in the district courts. Further, the Water Court has a microfiche and a hard copy file of all claims. Copies of DNRC records can be ordered by phone or correspondence at relatively modest cost.

Because of the number of claims involved and the inherent difficulties in organizing, maintaining, and updating information on claims for the entire state, access to information about claims may be difficult or confusing for some persons not comfortable with or confident in dealing with governmental systems. Thus, in individual cases persons may experience difficulty in accessing information. Nevertheless, based upon our understanding of the systems and capabilities of other jurisdictions, Montana's computer-based and professionally-staffed system is quite superior.

6. Claimants' Perception of Fairness of DNRC Process.

We were asked to try to find out how various claimants perceive their treatment throughout the claims verification process.

The results of our interviews and surveys lead us to conclude that claimants predominantly perceive that they are being treated fairly by the claims examination process, including DNRC's activities. As might be expected, the spectrum of views held by claimants and their attorneys ranges from those who believe that the agency has been quite helpful to them in clarifying and correcting their claims to those who believe any DNRC inquiry is intrusive and unnecessary. Overall, however,

the claimants perceive that the process is fair and motivated by an intent to implement an accurate adjudication for the benefit of all water users.

Some state, federal, and private water interests have expressed concerns that while the majority of private claimants may feel they are being treated fairly, they are substantially unaware that other claimants of rights from common sources of supply may have filed inflated claims which might cause harm in the future after the adjudication process is completed. While these may be valid concerns, the limitation of water rights in future changes of use or in future modifications of facilities, as recommended in subsection D.1. below, can remedy much of the potential harm from erroneous claims. Moreover, the renotice and additional objection periods for preliminary decrees, recommended in subsection B.2, will provide additional opportunities for investigation of claims by public and private interests.

B. WATER COURT PRACTICES AND PROCEDURES.

In addition to our inquiry into the practices and procedures of DNRC, we were asked to inquire into the practices and procedures of the Water Courts.

1. Extent of Variance in Procedures and Guidelines Applied to Claims.

We were asked for our opinion as to whether the application of differing procedures and guidelines during the adjudication process may have created problems requiring legislative correction.

The procedures and guidelines utilized in the examination of water right claims have evolved continually and substantially

since the inception of the adjudication process. From August 1982 through February 1986, DNRC reports that 35 updates were made to the claims verification manual, including a total of 336 changes affecting the outcome of examination of claims.

While strict uniformity of adjudicatory guidelines and procedures may be desirable as a policy matter, such uniformity is not legally required in the adjudication process. This is because those procedures and guidelines serve only to provide a framework for the development of evidence and issues to be determined by the Water Courts in the adjudication process. The guidelines do not preclude submission of evidence to rebut the guideline. Thus, so long as all claimants are provided an opportunity to be heard in the presentation of their own evidence about their own claims and to rebut any evidence about their own claims developed by DNRC or others, there is no legal problem inherent in the use of the evolving or differing procedures and guidelines in the adjudication process. Due process is afforded parties. Similarly, so long as one who chooses to participate as an adversary in the adjudication of another's claim can be heard in the presentation of his evidence and arguments, he cannot complain of any lack of uniformity in the procedures and guidelines occurring in the process prior to his opportunity to be heard.

Procedures and guidelines utilized in the water rights examination have varied among and even within the various subbasins which are the subject of issued decrees. If the legislature intended as matter of policy to have a single, universally applicable set of procedures and guidelines for the adjudication of all pre-July 1, 1973 water rights claims, that objective has not been achieved through the present process. As a matter of legal sufficiency, rather than policy, however, we conclude that the varying guidelines and procedures which have been applied in the development of relevant factual data need not create any infirmities in the resulting decrees.

DNRC has concluded that the application of the new Supreme Court examination rules in basins where examination under the old procedures was initiated but not completed will result in practical difficulties in the preparation of decrees for these basins. Consequently, DNRC has recommended that some partially examined basins be completely re-examined utilizing the new rules. We understand that the Chief Water Judge has entered an order directing DNRC to examine and re-examine four of these basins under the new rules. We assume that the Court will address any other problems or that appeals to the Supreme Court will do so. We find no issue here which requires legislative attention.

2. Adequacy of Notice of Adjudication Proceedings.

We were asked to determine whether the notice procedure followed under the present statute is adequate to satisfy the requirements of both state and federal law.

The principal mischief sought to be remedied by the adoption of the present adjudication procedure was to avoid the previously unsatisfactory partial adjudication of some rights on a stream system which was not binding on anyone not a party to that proceeding. The objective of the new procedure was to provide a vehicle for adjudicating all the pre-July 1, 1973 water rights in a stream system by means of a decree binding on the world. To achieve this result, it became necessary to provide a method for the court to acquire jurisdiction over all persons who may be affected by the adjudication. That method consists of the court providing notice, actual or constructive, of the pendency of the proceedings to all who might be affected thereby and providing them a reasonable opportunity to appear and be heard on the matters affecting their interests. Affected persons who have not been provided adequate actual or constructive notice of such matters would not be bound by an adjudica-

tion decree and the purpose of the statutory proceeding would be frustrated.

The applicable statute, section 85-2-232, MCA, provides for the issuance of notice of a preliminary decree. The receipt of such notice allows water users to investigate and object to claims of other users which may affect their rights. The statute as applied by the Water Court requires the Water Court to serve a notice that the preliminary decree is available on each person who has filed a claim of existing right within the same subbasin. The notice must also be served upon persons who have been issued or who have applied for permits as well as on those whose rights are based upon a federal reservation. Finally, the statute requires that the notice shall be served on "other interested persons who request service of the notice." Presumably, the latter provision permits any person to request and receive notice of the issuance of any preliminary decree.

The notice procedures required by the statute and followed by the Water Courts with respect to the adjudication of rights within each subbasin appear to be adequate to achieve the objective of the law within that subbasin, except that the 90-day objection period may be too short in some cases because of the number of claims decreed. As discussed below, a lengthening of the objection period is recommended. However, because a stream system is composed of a number of subbasins deriving their source of supply from the same stream or tributaries thereto, the question arises as to whether the statutory notice procedure is adequate to permit a claimant in one subbasin to receive timely notice of claims decreed in another subbasin which could affect his water right, so that he may have a reasonable opportunity to appear and to object to the rights decreed in the other subbasin.

The statute as applied provides no procedure for notice of the issuance of preliminary decrees to claimants outside a subbasin unless those claimants have, as "other interested persons," "requested service of the notice."

It is arguable that, because of the widely disseminated notice of the pendency of the adjudication proceedings throughout the state, a water right claimant in one subbasin could be held to have received constructive notice that rights in another subbasin possibly affecting his rights were also going to be adjudicated. Under such a theory, the affected claimant could request service of notice under the statute or be held to a duty to inquire about the status of the adjudication proceedings in other subbasins so that he could make a timely appearance in those proceedings to protect his rights.

Such a rationale would be analogous to the one that prevailed in Colorado prior to 1969. There, even though there was no procedure for the provision of actual notice among water districts (subbasins), the courts followed the constructive notice rule to make the decree in one water district binding on the owners of water rights decreed in another. But there, a claimant in one water district could challenge a right decreed in another water district by an independent proceeding outside the adjudication process if the action were brought within four years of the entry of the decree. After the expiration of the four-year period, no further remedy was available.

In our view, the situation in Montana is sufficiently different from that which obtained in pre-1969 Colorado to require legislative attention. Montana law does not require notice of a preliminary decree to be given to all potentially affected persons, and it contains no provision for post-decree challenges except for direct appeal of litigated issues. While the rights of downstream or upstream water users outside the subbasin may

be affected by the adjudication of priorities within the subbasin, they are not provided with notice of the adjudication. Without such notice those other users outside the subbasin cannot be made constructive parties to the action and be bound by the decree within the subbasin.

To assure that the entry of adjudication decrees will be binding on all users in a river system in cases where decrees have already been issued, the law should be amended to require that objection periods be reopened for those decrees which currently are at the preliminary decree stage and for the current final decrees pursuant to notice provided throughout the entire affected stream system by newspaper or other media at least sufficient to constitute constructive notice for purposes of due process. Objections to any claim could be filed only by persons who did not previously object to that claim. Moreover, the statute should require that such a notice procedure be implemented for the issuance of all future preliminary decrees. This will require remedial legislation to provide for an additional or clarified notice provision dealing with the availability of preliminary decrees and extending the objection period for such decrees.

Final decrees are in repose and are binding as among all claimants within the subbasins which have been so decreed. If such decrees also were reopened by renotice and an additional objection period, a judicial challenge to the need for any remedial notice could precipitate appellate review and a decision of the due process adequacy of the current notice procedure.

Except for the problem with notice as between related water basins, we find that the manner of notice is generally sufficient to satisfy both state and federal law requirements. While many of the issued preliminary decrees are extensive and involve

thousands of claims, the organization of those claims within those decrees is commendable. The decrees may be accessed by reference to particular source, owner name, location of point of diversion, or priority date. Thus, interested water users are not required to review the entirety of a massive decree to discover the nature of other claims which may require their investigation. If a user is interested only in a particular source, the inquiry can be narrowed by use of the appropriate index. Likewise, if a user is concerned only with priorities senior to a particular date, the index again provides a vehicle for limiting the scope of the investigation.

3. Late Claims and Objections.

As we report in subsection E.1., the statutory abandonment of water rights for failure to timely file claims is legal. The Water Courts have included in decrees water rights which were claimed after the filing deadline. The decrees apparently identify these as rights as having been filed late. We conclude that the decrees for these late-filed claims, if entered as final decrees, will be void as to those claims. For that reason, we believe that the practice of decreeing late-filed claims should terminate. Moreover, a Water Court's refusal to decree such a claim could provide the foundation for an early appeal to the Montana Supreme Court for a definitive disposition of the issue.

Montana's statutory law does not contemplate filing of late objections to a preliminary decree. The principle issue raised in regard to "late objections" concerns whether the Water Court's apparent practice of requiring that the claimants of water rights based upon state appropriation doctrine whose rights are included in a "temporary" preliminary decree must object to the claims of other appropriators after the issuance of a temporary preliminary decree and, if they do not object,

whether such claimants can be bound or precluded from objecting to claims included in the temporary preliminary decree when a preliminary decree is issued incorporating federal and Indian claims.

We are convinced that Montana law presently contemplates the entry of "temporary" preliminary decrees by the Water Court.[9] We have concluded, however, that there is no authority for using temporary preliminary decrees to achieve binding resolution of issues affecting state law-based water right claims prior to the entry of a preliminary decree. Such use of temporary preliminary decrees apparently is contemplated under Rule 1.II(7) of the July 15, 1987 claims examination rules, but it is not statutorily authorized.

Under the current statutory scheme, if a state law-based claim is adjudicated in a temporary preliminary decree, persons concerned with that claim legally can wait until the preliminary decree is issued concerning the claim before filing an objection. Such an objection should not be interpreted as a "late" objection on the basis that no objection was made to the temporary preliminary decree.

The legislature could, if it wished to do so as a matter of policy, consider changing the statutory process to expressly provide that temporary preliminary decrees can be issued and, pursuant to notice and objection process, result in binding determinations of state law claims. Consideration of both due process and equal protection would require that such legislation provide a mechanism which would authorize the filing of "late objections" to previously issued temporary preliminary decrees.

4. Sufficiency of Water Court Adjudication Schedule to Insure Due Process.

As set forth in subsection B.2., we believe that it is necessary and desirable to provide an additional notice and objection period for preliminary and final decrees. Because the objection period must be long enough to provide a meaningful opportunity to review and evaluate the decrees and file appropriate objections, the Water Court's existing time line for completion of all adjudications appears unrealistic. Because of these factors and others described under subsection D.4 of this report, we do not now see any special need to continue to expidite the process, but rather believe the state can comfortably afford to have it carried out at a more deliberate pace.

Because of the magnitude of the number of claims adjudicated in many subbasins, and because under a revised notice procedure water users may be obligated to examine and evaluate several decrees within the same relative time span, we recommend that the period for filing objections run for at least one year after the notice of availability of that decree.

5. Optimum Adjudication Schedule.

A modified notice and objection procedure lengthening the time for filing objections after the issuance of preliminary decrees and reopening existing preliminary and final decrees by additional notice and objection period will necessarily lengthen the schedule for completion of the state-wide adjudication. The process will be lengthened by several years.

In addition to the foregoing consideration, we expect that the implementation of the new claims examination rules will lengthen the time for completion of the entire adjudication. DNRC contacts with claimants to resolve questions about claims

and DNRC field investigations of claims will both increase under the new rules. Unless DNRC's manpower is increased, implementation of the new rules will lengthen the examination and adjudication process.

6. Sufficiency of Claimants' Access to Court Information.

Water right claimants generally have sufficient access to Water Court information. In particular, as described in subsection B.9., water right decrees are readily accessible.

There appear to have been problems in the past with the Water Court's refusal to disclose verification procedures and standards. The Water Court viewed questions about procedures and standards as an interference with its mandate to expeditiously adjudicate claims. Those problems now appear to have been resolved.

Concern has been expressed that the Water Court does not maintain an index of decisions or issues. Because of this, some litigants feel that they have been foreclosed from participation in decisions on issues which the Water Court may later apply to their claims. However, all litigants have an opportunity through the objection process and the appellate process to seek the correction of what they perceive to be errors of law or fact which may be applied to their claims. The fact that they may not have had an opportunity to litigate such issues with respect to claims of others does not deprive them of the right to litigate such matters fully with respect to their own claims. To date, major legal issues such as Water Court constitutionality, validity of late claims, and adequacy of notice have not been appealed to the Montana Supreme Court to provide case law guidance for future litigation.

7. Efficiency of Water Court.

The Water Court is highly efficient in the adjudication of claims. The Court has a well organized and dedicated staff which includes water judges, water masters and supporting clerical personnel. The staff meets frequently with the chief water judge and the other water judges to discuss the progress of the various adjudications and problem areas which require the Court's direction.

The objectives of the Water Court are simple: to expeditiously process claims and to enter decrees which accurately prioritize and quantify water rights in river basins or subbasins.

To identify those claims which, because of irregularities or because of objections filed, require formal or informal hearings, the Court has devised an economical system of inquiry by telephone conference. Formal hearings are conducted, usually at the request of attorneys representing the claimant or objectors, or both. Formal hearings are generally conducted in open court. Rules of Civil Procedure apply but are not often invoked by the Court or the parties. Informal hearings are generally conducted by telephone conference. Most cases are processed by informal hearing procedures.

The adjudication process contemplated by the 1979 Act as well as the Water Court procedures envision claimants and objectors having the opportunity to adjudicate issues pro se. Lawyers are not excluded from the process, but the sheer volume of claims means that most claimants proceed through the water adjudication process without the assistance of legal counsel.

Claimant contact has been expanded under the examination rules promulgated by the Supreme Court. The Water Court staff

investigates claims whenever any element of a water right is unclear, questionable, or contains discrepancies. To assist the staff in identifying claims that require additional investigation, the Court, with the assistance of the DNRC, has established certain guidelines such as flow rates and volumes for water usage which, when exceeded by a claimant, automatically select that claim for further investigation. Although the guidelines may be somewhat arbitrary, they provide a guide for determining reasonableness of claims, and the claimant is provided ample opportunity to prove that he is entitled to adjudication of the claim as filed.

There have been over 203,000 claims filed, of which approximately 130,000 are in the process of being included in "temporary" preliminary decrees or preliminary decrees. Approximately fifty percent of all cases are settled by Water Court status conferences, which are conducted principally by telephone. Tapes of these conferences are maintained, and the quality of the tapes listened to appears to be good. If the cases are not settled at status conference, then a hearing is scheduled and those proceedings are also taped.

The chief water judge assisted in the preparation of forms utilized by claimants and objectors in the adjudication process. The forms and instructions for completion of the forms are expressed in "lay" terminology as much as possible.

In conclusion, we cannot suggest any meaningful improvements in the Water Court's administration to increase its efficiency.

8. Constitutionality of Water Court Structure.

A very recent law review analysis written by DNRC's chief legal counsel Donald MacIntyre[10] concludes that the Water Court structure is unconstitutional and that the past and on-

going activities of the Court are void for want of jurisdiction because water judges are not elected by Montana citizens. The arguments advanced in that article are credible. Other arguments supporting the constitutionality of the Water Court system are equally credible.

Unfortunately, the Montana Supreme Court does not have the power to provide an advisory opinion in response to an inquiry from the Committee or others as to whether the current Water Court structure is constitutional. Absent contested litigation, such as an appeal of a final decree bringing the issue of constitutionality to the Supreme Court's attention, the prosecution of a writ of prohibition challenging the Water Court's authority, or a declaratory judgment action brought to test the validity of an issued decree, the adjudication will be clouded by the potential for constitutional invalidation.

This problem arises from the fact that Montana's constitution and statutes provide for direct elections of district court judges while Montana law provides for the appointment of water judges. The question is whether the appointment of water judges violates the Montana constitution or conflicts with other statutory provisions requiring the election of district court judges.

The selection of district court judges is addressed in its entirety in article VII, section 8, which contemplates two means by which a person may become a district court judge. First, when a vacancy arises, the district court judge is appointed for his first term by nomination of the governor and confirmation of the senate. Thereafter, the district judge holds his office subject to re-election. Second, a candidate may file for election to the office of district court judge and run against an incumbent judge for that office.

Section 8 comprises all that the Montana constitution has to say with regard to the selection of district court judges, and it does not mandate election of district court judges in all circumstances. The process of selecting district court judges can be divided into two distinct processes: (1) the selection of judges, accomplished by nomination and confirmation or direct election, and (2) the retention of judges, accomplished by election. The process of designating a water judge conflicts with both of these processes, albeit in different ways.

Under section 3-7-201, MCA a water judge for each water division is to be selected by a committee composed of district court judges from all districts within the water division. The committee must select as a water judge either a district judge or a retired district judge, section 3-7-201, MCA, for a term of four years. Section 3-7-202, MCA. The water judge holds his office subject to redesignation by the selection committee. The use of the selection committee presumably permits the water divisions's judiciary to select from their ranks a water judge experienced in water issues.

Montana's statutes state that the water judge presides as a district court judge in and for each judicial district within the water division.[11] This statutory provision is the crux of the problem because of the divergence between Montana's selection processes for district court judges and water judges. If the water judge truly acts as a district court judge, the selection of a water judge by a judicial committee appears to conflict with the constitution. While the committee is limited in its selection of a water judge to district court judges or retired district court judges, the selection of a district court judge as water judge would not avoid the conflict since such a district court judge has been selected as a district court judge only for one of the numerous judicial districts in

the water division. Where a statute is in conflict with the constitution, the statute is void to the extent of such conflict.[12] The selection of a retired district court judge is a separate and more difficult question.

The statutory provisions for the selection of water judges also conflict with the statutory provisions for the selection of district court judges because section 3-5-201, MCA requires that all district judges be elected.

If the water court is found to be unconstitutional, then all of its past acts are void for lack of jurisdiction. This would invalidate all the past adjudicatory actions of the Court, including the evaluation of claims and the issuance of decrees. Thus, if the Water Court is invalidated and the adjudication must be reinitiated, a new court would have to evaluate from inception all of the claims which have previously been decreed. The reliance in such reevaluation on prior decrees or judicial findings would be highly questionable.[13]

In support of the Court's constitutionality, it can be argued that the Water Court does not act as a district court, that when the substance of its legislatively-created jurisdiction and powers are examined it is clearly a special court created by law, pursuant to article VII, section 1 of the Montana constitution, free from the requirement of election which attaches to district court judges.

The Water Court has jurisdiction over the adjudication of claims to pre-July 1, 1973 water rights, but its jurisdiction does not extend generally to civil and criminal matters like a district court. Regular district courts do not have jurisdiction to adjudicate water rights. Thus, for the statute to say that the water judge sits "as a district court judge" does not actually vest the water judge with the authority of a

district court judge in every judicial district in his water division. Rather, it confers jurisdiction only to address the adjudication of claims for water use. Thus, it can be cogently argued that the Water Court is a court "provided by law," as contemplated by Montana constitution, article VII, section 1, separate and apart from the district courts.

Moreover, the apparent inconsistencies between Montana's constitutional and statutory provisions for the appointment and election of district court judges and the statutes concerning selection of water judges possibly are reconciled by article VII, section 6(3) of the constitution, which states that "[t]he chief justice may, upon request of the district judge, assign district judges and other judges for temporary service from one district to another, and from one county to another." In addition, section 19-5-103(1), MCA provides that retired district court judges may be called into temporary service in the Water Court by the Supreme Court. Through article VII, section 6(3) of the constitution and section 19-5-103(1), MCA, district court judges and retired district judges are authorized to be appointed as water judges, if that position can be construed as a "temporary service" as a district court judge.

In State ex rel. Wilcox v. District Court,[14] the Supreme Court of Montana addressed the constitutionality of using retired district judges to alleviate the congestion in district court, stating that it

> construe(d) Article VII, Section 6(3), of the Montana Constitution to include retired judges in the term "other judges" and to empower the Chief Justice, upon request of the district judge, to assign retired judges for temporary service to any judicial district or county in Montana. This provision is a constitutional grant of power exclusive of any statutory grant by the legislature.

The Wilcox court gave as examples of judges who were not elected a worker's compensation judge appointed by the Governor, judges pro tempore, and the water court judges. The Court stated that "[t]he fact that retired judge's terms as district judges have expired does not, in itself, disqualify them from exercising judicial functions."[15] Thus, the Supreme Court of Montana has held that the statute providing that judges of the district court must be elected does not overcome the constitutional power given the chief justice to assign retired district court judges to sit in temporary service for a duly elected district court judge. Therefore, the appointment of retired district court judges to the Water Court is not unconstitutional if the position involves "temporary service"[16] as a district court judge.

Mr. MacIntyre argues that service on the Water Court's bench should not be considered "temporary" service because the term of office of a water judge is specified by statute as four years, subject to reselection, and because the statutes seemingly contemplate an ongoing and permanent involvement of the Water Court in the DNRC permitting process and in the administration of final decrees. We have found no meaningful case law guidance on the issue of what constitutes "temporary" judicial service.

Courts are traditionally inclined to find laws constitutional if there are rational and credible grounds for doing so.[17] As the foregoing discussion indicates, there are several cogent arguments supporting the constitutionality of the Water Court. Thus, we cannot conclude, as does Mr. MacIntyre, that the Montana Supreme Court would find the Water Court structure unconstitutional. Accordingly, unless and until that Court so finds, we cannot recommend that the legislature consider a massive overhaul or dismantling of the Water Court system.

9. Sufficiency of Water Court's Claims Index and Docket System.

The Water Court's claim index system is organized to enable the Court, attorneys, claimants, and objectors to locate and find ample information regarding water right claims in the river basins being adjudicated. The indices are designed to facilitate locating water rights by source name, owner name, point of diversion, and priority date. The system is adequate to locate water rights and identify claimants.

Docket control is a function of the judicial system being dedicated to orderly adjudication of water right claims. The system which has been created by the Water Court is exemplary. The water judges, water masters, and clerical support personnel have frequent meetings to review specific cases and the status of all cases which have been assigned to the masters for adjudication. Considering that thousands of claims are pending, docket control and follow-through on the claims could be a model for other courts.

10. Water Court's Criteria for Requiring Further Proof.

The adjudication system designed by the legislature and implemented by the Water Court favors expeditious adjudication of claims. Claimants are presumed to file truthful claims. The criteria established by the Water Court provide standards (flow rate and volume limitations) to evaluate this presumption. The element of a water right most misunderstood by claimants is the volume or annual quantity of water used in the exercise of a water right. The DNRC plays a vital role in verifying the accuracy of claims where additional proof is required. Field investigations and discussions with the claimants usually identify the problem for resolution by the Court.

Under the new examination rules, technicians of DNRC at the field offices identify numerous elements of the water right, as identified in the Wright Water Engineers report (Appendix I).

The earlier verification process did not identify as many issues as the current examination rules; nevertheless, the verification process was directed at the most significant consumer of water in Montana, namely irrigation.[18] The criteria established by the Court with the assistance of DNRC described standards for acreage, flows, volumes and climate conditions. For example, the Madison Basin (41-F) described three climatic areas. Within each area the Court, with assistance of DNRC, assigned volumetric standards for flood, sprinkler, and water spreading irrigation. The Court correctly characterized "Standards" by defining a standard on July 26, 1984 as follows:

> Standards have been used by the Water Court to aid in calculating flow rate, volume and other elements of a water right. These standards are guidelines only and can be modified to reflect an individual's own circumstances upon objection."

The specific standards or guidelines for the Madison Basin are as follows:

Climate Area	Flow Systems (diversion ditch) Volume (AF/A)	Sprinklers & Pumped Diversion Systems Volumes (AF/A)	Water Spreading Systems, Sub-Irrigation and Natural Overflow Volumes (AF/A)
III	9.4	3.8	1.9
IV	8.5	3.4	1.7
V	7.2	2.9	1.4

The Court also included periods of use of water for the climatic areas as follows:

Climate Area	Period of Use (month-day)
III	4-15 to 10-15
IV	4-20 to 10-10
V	4-25 to 10-05

Other guidelines are described in more detail in Wright Water Engineer's report (Appendix I). DNRC and the Court concentrated, through the verification process, on verifying irrigation claims. Communication with claimants was not as extensive as it is under the new examination rules. The principal means of resolving deviations from the guidelines was for DNRC to identify on the computer-generated claim abstracts "gray area" remarks which could be resolved by the Court, claimant, or objectors. Under the verification process, the responsibility for resolving gray area remarks was left principally to claimants and objectors.

Under the new examination rules, "gray area" remarks are not used. Instead, DNRC technicians identify matters deviating from the standards by listing on the claims abstract "issue remark." It is the policy of the Court to "call in" on its own motion all "issue remarks" for resolution. This process involves the Court (Master), a DNRC technician, claimant, and any objectors.

C. McCARRAN AMENDMENT CONSIDERATIONS.

1. McCarran Amendment Adjudication Issues.

A rather curious mystique about how the "McCarran Amendment" impacts the Montana water adjudication process seems to have come into being as that process has moved forward. We find it curious because the amendment itself was designed to provide a straightforward, simple solution to an unfortunate but simple problem.

The problem was that, because of the sovereign immunity of the United States, rights to the use of water claimed by the federal establishment under state law or federal law could not be adjudicated in state water right proceedings unless repre-

sentatives of the United States waived the federal immunity to state court action and voluntarily subjected those rights to the jurisdiction of the state courts. As might be expected, no representative of the United States or of tribes claiming Winters doctrine rights was ever willing to voluntarily subject such claims to a state adjudication process.

As a result, prior to the McCarran Amendment, no state in which the federal establishment or the tribes claimed rights to the use of water could ever have a complete adjudication of water rights because there was no way the state process could identify and quantify those claims. For the public lands states of the west, where the federal and tribal establishments are the largest landowners, the situation became intolerable. No one could know whether his water right, once adjudicated in a state proceeding, had any usefulness at all so long as the specter of unquantified federal and tribal claims hung over his head.

To remedy this intolerable condition, congressional representatives of the western states persuaded the Congress to pass the "McCarran Amendment" in 1952. By its adoption, the Congress told the representatives of the United States that they could no longer hide behind the doctrine of sovereign immunity to prevent federal and tribal claims to water from being included in state adjudication proceedings if the United States was properly invited into those proceedings and if those proceedings were "* * * for the adjudication of rights to the use of water of a river system or source, * * *."

As might be expected, challenges to the use of the McCarran Amendment to get the United States into state proceedings have been raised in a number of cases. Those challenges have resulted in a body of law which interprets the intent of the McCarran Amendment and how the federal-state relationships are adjusted by its operation.

One challenge was based on a race to the courthouse theory. In Colorado River Water Conservation District v. United States,[19] the federal government had brought suit in the United States District Court for the District of Colorado against some 1,000 local water users seeking a declaration of the government's water rights, both those based on state law and those based on federal reservations. Following commencement of the federal suit, a defendant in that suit initiated a state water adjudication proceeding and, following the procedure provided for under the McCarran Amendment, served the United States therein. Thereafter, the federal district court dismissed the federal case on the grounds that the doctrine of abstention required deference to the subsequently initiated state court proceedings. The issue finally decided by the United States Supreme Court was whether the operation of the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the district court's dismissal of the case was appropriate. That Court held that the McCarran Amendment's consent to jurisdiction in the state courts did not deprive the federal courts of jurisdiction, but made the state court's jurisdiction concurrent with the federal court's in matters involving federal rights to the use of water. Even so, the Court approved the dismissal of the federal court proceedings on the basis of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[20] The Court stated:

> Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the Court first acquiring control of property, for the concern

> in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. [Citations omitted.] The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.[21]

The Court recognized that Colorado's water adjudication statute established a "single continuous proceeding for water rights adjudication."[22] So, a race to the federal courthouse cannot defeat the intent of the McCarran Amendment.

Other challenges to the use of the McCarran Amendment have called upon the courts to determine whether particular state adjudication procedures are adequate to resolve the federal claims. Two of those grew out of two different adjudication procedures which had been used in the state of Colorado. We believe a brief review of those two cases will be instructive in analyzing how well the Montana procedure meets the McCarran standard.

In one of those cases, United States v. District Court for Eagle County,[23] the courts were called upon to determine whether Colorado's 1943 Adjudication Act proceedings qualified under the McCarran "river system" adjudication standard. Colorado's 1943 Act authorized adjudication proceedings by the various district courts for separate and distinct water districts (similar to Montana subbasins) encompassing only a portion of a stream system which was actually located within each water district. Proceedings held under that statute were challenged as not meeting the McCarran Amendment standard because

they did not encompass an entire stream system but only, as in Montana, a part thereof. In holding that the proceedings met the standard, the United States Supreme Court said:

> Eagle River is a tributary of the Colorado River; and Water District 37 is a Colorado entity encompassing all Colorado lands irrigated by water of the Eagle and its tributaries. . . . * * * . . . We deem almost frivolous the suggestion that the Eagle and its tributaries are not a 'river system' within the meaning of the Act.. . . The 'river system' must be read as embracing one within the particular State's jurisdiction. . . .[24]

In 1969, Colorado replaced the 1943 Act procedures with a new adjudication system which abolished the water district concept. It placed jurisdiction for the adjudication of rights from a whole watershed in a single water court and changed the claim procedure so that an individual claimant could initiate proceedings to adjudicate his particular claim as against all other users, including the United States, within the watershed whenever he chose to do so. This procedure was challenged under McCarran as being piecemeal with claims being filed on a month-by-month basis and thus not the kind of unified proceeding required by the McCarran Amendment. In disposing of that challenge and holding that the 1969 Act procedures met the McCarran test, the United States Supreme Court in the case of United States v. District Court for Water Division No. 5 said:

> The major issue--the scope of the consent-to-be-sued provision in 43 U.S.C. § 666--has been covered in the Eagle County opinion and need not be repeated here.
>
> It is emphasized, however, that the procedures under the new Act are much more burdensome on the Government than they were under the older Act. It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because

> all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. . . .
>
> * * *
>
> It is argued from those premises that the proceeding does not constitute a general adjudication which 43 U.S.C § 666 contemplated. As we said in the Eagle County case, the words "general adjudication" were used in Dugan v. Rank, 372 U.S. 609, 618, 83 S.Ct. 999, 1005, 10 L.Ed.2d 15, to indicate that 43 U.S.C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality; . . .[25]

Those decisions and the Colorado River decision were followed by Arizona v. San Carlos Apache Tribe of Arizona.[26] The San Carlos case involved a dispute over Indian water rights in both Arizona and Montana. In San Carlos, the United States Supreme Court reconfirmed the propriety, under the McCarran Amendment, of concurrent jurisdiction in both the state and federal courts, but then stated:

> In the cases before us, assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account the McCarran Amendment policies we have just discussed, the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the district courts were correct in deferring to the state proceedings . . .[27]

The court then directed the federal district court to retain its concurrent jurisdiction but to stay further proceedings thereunder while the Montana proceedings went forward and so

that challenges to the adequacy of those proceedings could later be considered if necessary.[28]

2. Sufficiency of Montana Act Under McCarran Standards.

In response to the United States Supreme Court's invitation in San Carlos, proceedings framing such a challenge in Montana resulted in the opinion of the Montana Supreme Court in State ex rel. Greely v. Confederated Salish and Kootenai Tribes.[29] The state Supreme Court confirmed the Montana Water Use Act as adequate, on its face, to adjudicate both Indian and federal reserved water rights. In ruling on that question, the Montana Supreme Court concluded that under the Act the water courts could apply federal law to questions of beneficial use, diversion requirements, quantification, and priority dates, thus enabling a proper differentiation between Indian and federal reserved water rights and water rights based on state law. The court, obviously recognizing its general supervisory role in matters conducted by the judiciary, reserved judgment on the question of whether the conduct of the proceedings under this statute also met the Court's understanding of what adequate proceedings under the McCarran Amendment might be.

We thus have four pronouncements by the United States Supreme Court and one by the Montana Supreme Court which can be used to measure whether the present Montana statutory scheme meets the McCarran standard. In the three of the Supreme Court cases, the Court dealt with two different types of procedures in Colorado, one of which is very similar to the one now in use in Montana. Specifically, with respect to the Montana statutory scheme, we have the determinations in both San Carlos and Greely. Applying those standards in a consistent way requires us to conclude that the current phase of the Montana statutory process is adequate to adjudicate the federal and tribal claims under the McCarran amendment.

It is important to emphasize that none of the five cases we have described attempted to address or define "adequacy" in the context of substantive water law. Instead, because the McCarran Amendment is a procedural statute, those cases dealt only with procedural matters. This is most appropriate because if the proceedings meet the procedural adequacy standards, they will automatically provide remedies for correcting substantive errors if they occur and result in any impairment of the federal and tribal rights. We conclude that the Montana system makes such remedies available and unless and until the Montana judicial system fails to make those remedies meaningful by correcting any perceived substantive errors affecting federal and tribal rights, there can be no reason for the federal court to exercise its concurrent jurisdiction. We have no reason to believe that if substantive errors affecting federal and tribal claims should be committed by the water courts, such errors would not be corrected by order of the Montana Supreme Court in a properly prosecuted appeal to it.

We are not unmindful of criticisms of the process which are based on McCarran Amendment arguments.

One argument claims that the proceedings failed to result in a sufficiently accurate quantification of rights, including federal rights. As discussed in subsections A.3. and D.1. of this report, however, we have found that Montana's adjudication system, as implemented under both the old verification procedures and the new examination rules, has produced and continues to produce reasonably accurate determinations of water rights and that adequate remedies are available to address the inaccuracies which inevitably result in any adjudicatory process. We do not find that federal or Indian rights are disadvantaged by the adjudication in the state forum. Neither more, nor less stringent examination is accorded to appropriators of water rights under state law than that accorded federal and Indian

water rights. As such, the Montana adjudication system as implemented allows a comprehensive and adequate quantification of claims.

Second, it is claimed that the water courts' failure to further utilize the expertise of DNRC and to direct additional claims verification and reverification, together with application of the prima facie standard, unjustly places the burden on every party of examining all other claims to rebut the claims' prima facie validity. This is said to deny procedural due process to claimants who do not have the resources to adequately protect their rights and who receive disparate treatment at the hands of the court due to the lack of uniformity in claims examination procedures. As discussed in Overview section B and Analysis subsections A.3., B.1., and B.10. hereof, we find no constitutional due process or equal protection infirmity under the circumstances. We note, moreover, that this challenge goes to the basis of the procedure--that claim, objection and adjudication is so burdensome as to defeat due process. It is this very procedure, however, that the Montana Supreme Court has already found to be adequate on its face when measured against the requirements of the McCarran Amendment.

Third, it has been asserted that the adjudication process, as applied, contravenes the federal policy behind the McCarran Amendment of avoiding piecemeal litigation, because Montana's expedited adjudication fails to avoid tension and controversy between the federal and state forums and results in hurried and pressured decision making and confusion over the disposition of property rights, no different than would occur under piecemeal federal proceedings. It is also asserted that issuance of temporary preliminary decrees in streams with federal and Indian claims, subject to a later incorporation of the adjudicated or negotiated resolution of those claims, is not a general adjudication; rather, the court is proceeding to settle all non-

federal and non-Indian claims prior to and separate from a later incorporation of Indian and federal water rights. We do not find either of these arguments persuasive. As previously discussed, we do not find the water court's implementation of the statutes to provide an unreasonable means of determining water rights, particularly in light of the remedies available to address improper court conduct or inaccurate results. Nor do we find that entry of temporary preliminary decrees causes the adjudication to be "piecemeal." We note that Colorado River Water Conservation District v. United States[30] found Colorado's adjudication system to be a "comprehensive" as opposed to piecemeal one, even though it reached various claims on a month-by-month basis, because it was "inclusive[] in the totality."[31] Any doubt as to the inclusiveness in the totality of Montana's adjudication process would be removed upon the full notice and opportunity to litigate all claims which should be afforded at the preliminary decree stage. This notice and opportunity to litigate any and all claims prior to entry of a final decree in essence makes everyone a party to the general proceedings, whether or not they have chosen to participate, and assures a comprehensive adjudication.

Like the quest for the Holy Grail, the search for an exhaustive list of substantive and procedural criteria that a state water rights adjudication must meet in order to become a "McCarran Act Adjudication" is doomed to failure. The continuation of critical introspection and public arguments about whether the Montana process meets such an elusive list of standards is a significant disservice to the people of Montana. This is so because the question of whether the Montana process meets whatever those standards may be has been definitively and affirmatively answered by the only two authorities that count: the United State Supreme Court and the Montana Supreme Court.

The United States Supreme Court, in directing that the U.S. District Court in Montana defer to the state court proceedings, recognized that the state system was better equipped to adjudicate the multitude of claims, including those of the United States (whether based on state law or federal law) than the federal court system. In the process, the Court recognized that the Montana system met the threshold requirements of the McCarran Act, i.e., the avoidance of piecemeal adjudication rights in a river system, the avoidance of inconsistent disposition of property, that the state system be comprehensive and ultimately adjudicate an entire river system within the state.

That Court premised its directive on an assumption, ". . . that the state adjudications are adequate to quantify the rights at issue in the federal suits . . . ."[32] The Montana Supreme Court in State ex rel. Greely v. Confederated Salish and Kootenai Tribes concluded that the Montana process would adequately quantify the federal and tribal claims. That court did reserve judgment on whether the actual conduct of the proceedings would achieve that result, while clearly indicating that it is available to correct, on a genuine factual showing of need, any real, rather than perceived shortcomings in the conduct of the process which might prevent the adjudication from "adequately quantifying the rights at issue in the federal suit."

But the final proof of the pudding is seen in the fact that the United States is not seeking relief from the Montana Supreme Court or complaining to the federal district court that the Montana process is not working for federal claims. Instead it has filed, as we understand it, as many as 32,000 claims and 6,400 objections. The U.S. is participating in the state process both as claimant and objector; it is not boycotting the process.

3. Adequacy of Integration of Federal Rights.

This topic is addressed above.

4. Conflicts Between Montana Law and Federal Law.

This topic is addressed above.

5. Montana Adjudication Remedial Measures.

This topic is addressed above.

D. ACCURACY OF ADJUDICATION DECREES.

1. Accuracy of Final Decrees.

A lead question in the study design asks whether the adjudication process can be expected to result in "sufficiently accurate" final decrees.

The accuracy question was asked in light of assertions that the adjudication process has been abused by the massive filing of excessively overstated or "bogus" claims. On the basis of those assertions, it is argued that unless the legislature once again changes how the adjudication process must go forward, the process will inevitably result in the wholesale issuance of final decrees which are not "sufficiently accurate." As a consequence, dire results such as the loss of McCarran Act jurisdiction or the loss of litigation advantage in interstate equitable apportionment actions are predicted to occur.[33]

Some criticism of decretal accuracy is based upon the prevalent reliance on the old "notices of appropriation" filed in the late 1800s in the clerk and recorders' offices. These notices are thought to reflect exaggerations of flow rates and

mere plans for diversion rather than rights actually perfected by beneficial use.

Notwithstanding their limitations, the old notices often are the only currently available evidence of the original initiation of water rights which have not been the subject of earlier stream adjudications. They cannot be ignored, and the need to rely upon them is one of the prices in exact accuracy which results from adjudicating appropriative rights approximately 100 years after appropriative water use began in Montana.

Our study cannot confirm the validity of the claimed abuse of the Montana system.

At the outset of our study, we had hoped that our subcontractor, Wright Water Engineers, would be able to make an independent engineering evaluation of the correctness of the "bogus" claim assertions. Such an evaluation, we had hoped, would permit us to provide the Committee with a realistic determination of whether such a perceived problem actually existed, and if so, its nature and magnitude. It soon became apparent, however, that the budgetary and time constraints imposed on the study would preclude the subcontractor from developing sufficient field verified data to make any kind of statistically significant or meaningful analysis of the existence, nature or magnitude of such claims on a statewide basis. We were therefore forced to conclude that use of our subcontractor for what could only be token field verification could, at best, be counter productive in attempting to help the Committee understand whether the asserted magnitude of the "bogus" claim issue could be verified.

Moreover, we doubt that any one can reliably conclude that the system has been abused as charged without performing a statistically significant statewide field check analysis. Our

consultant advises that such a study should examine no less than 450 to 500 randomly selected claims at an estimated cost, to do the job properly, of $4,000 to $5,000 per claim. We have not been persuaded from what we have seen that there is any legal necessity to spend public money to make such an inquiry.[34]

Because of our extensive experience in the Colorado adjudication system, we knew that even attempting to achieve one hundred percent (100%) accuracy in the description of water rights created in the recent past, much less any created as long as 100 years ago, would be unattainable. We also knew from that experience and elsewhere that mechanisms for dealing with irrigated acreage and flow rate descriptions exist in every adjudication process. We therefore turned our attention to an analysis of the Montana process to examine and evaluate, to the extent possible, the efficacy of the mechanisms it provides.

The mechanisms available in the process, which remains a judicial one, include the use by the Court of the DNRC claim verification reports, optional field verification at the direction of the Court, and additional evidence presented by the claimant, if requested by the Court, or by adversaries if objections to a claim have been filed.

We understand the Water Courts now call claimants in for presentation of further evidence to resolve differences between the claims and the verification reports when those differences are flagged by "issue remarks" made by DNRC on the claims abstract.

At the preliminary and the temporary preliminary decree stage, the protest mechanism becomes available. Any other appropriator who believes a claim has been erroneously decreed may protest its issuance and set up an adversary proceeding in

which the accuracy issue may be litigated. If he fails to receive the corrective relief he seeks from the Water Court, he may perfect an appeal therefrom to the Montana Supreme Court based on whatever factual record he has been able to make before the Water Court.

All told, there are a total of six mechanisms available throughout the process which can be invoked to assure the accuracy of the descriptions of irrigated acreage and rates of flow of decreed rights. One, the DNRC claim verification, is mandatory. Two mechanisms, the call in of the claimant and the direction for a field investigation by DNRC, are available at the discretion of the water judge. Three such mechanisms, the objection, the protest and the appeal to the Supreme Court, are available at the discretion of other appropriators, including DNRC. Such a large number of corrective mechanisms would appear ample when compared with the Colorado systems, both pre-1969 and post-1969, which have never had a mandatory detailed claim verification procedure of the type in use in Montana but relied entirely on voluntary adversarial mechanisms as by objection or protest to force litigation over accuracy issues.

Critics of the process, however, charge that those mechanisms are not adequate to achieve "sufficient accuracy" because:

1. The Water Judges do not use the call in and DNRC field investigations often enough;

2. Neighbors are not policing neighbors through the objection process; and

3. The judicial system is too burdensome for affected appropriators to use.

Since we have been unable to confirm that the system has been subjected to widespread abuse, we have no basis for forming a judgment as to the validity of such charges. But we know from our experience in adjudicating water rights in a very similar system that the protest mechanism provides an effective tool for an appropriator to protect himself if he chooses to use it.

We have no doubt that use of properly conducted field investigations can provide an evidentiary foundation for the issuance of accurate decrees. However, the question which needs to be asked is what degree of accuracy is practicably attainable and at what cost to the State of Montana.

Our consultant, Wright Water Engineers, provides an engineering overview of how difficult it is to achieve really high levels of accuracy in water flow measurement in the report which appears as Appendix I to this report. Wright Water Engineers also points out why, because of wide variations in factors affecting irrigation practices such as altitude, soil conditions, cropping patterns and efficiency of conveyance systems, the use of an institutionalized rate of flow rule of thumb to judge accuracy is not realistic.

Even more significant in evaluating the practical realities of the problem is their recognition and confirmation of what we as lawyers working in the water right adjudication field have long known. We know that two competent, honest engineers who have studied the same irrigation system with the same care can and often do honestly differ in their conclusions by as much as thirty percent (30%). In our experience in contested water right matters, if two such engineers are as close as fifteen percent (15%) apart we consider that they have essentially checked each other with respect to accuracy.

In recognition of the uncertainties inherent in this imperfect field, we cannot advise the Committee that there is a legal standard which fixes the degree of accuracy required for water right decrees. We have not been able to find any reported case which purports to prescribe such a "sufficiently accurate" standard. Instead, the courts universally fall back on the general guiding principle that the water right be measured by the extent of actual beneficial use.

Nevertheless, the concern remains that the process may result in the issuance of decrees for more water than has actually been applied to beneficial use, along with the questions of how to avoid such a result or what to do about it if it does occur.

One suggested solution is for legislation to require more field verification, but perhaps less than what occurred in the Powder River effort. The legislature could, as a matter of policy, decide to embrace such a program with its attendant costs. In our judgment, such a course of action is not legally required to protect the viability of the Montana adjudication process.

Another mechanism to remedy the problem of decreed claims which exceed historical use could be to provide a forfeiture provision for the nonuse of decreed water. Typically, such provisions in other jurisdictions provide that a water right is forfeited to the extent that water available in priority is not diverted over a given period of time, such as five or ten years. This type of provision over time can remedy the mischief of adjudication of "inaccurate" claims.

One major limitation defeats the utility of a forfeiture provision in Montana. Forfeiture must rely upon records and evidence of nonuse. Montana agricultural diversions typically

are not measured at the headgate. This presents something of a problem in evaluating recorded historical use and a substantial problem when forfeiture is the effect of nonuse. Unless the legislature finds the problem so serious as to require the imposition of a measurement requirement on all diverters, a forfeiture mechanism would appear to be practically unrealistic.

As an alternative to such a program, we suggest to the Committee for its consideration a remedial mechanism which can be used if and when necessary to avoid the mischief which could result from someone attempting to expand the use of water in the exercise of a right decreed in excess of what actually historically has been beneficially used.

The remedial mechanism would consist of legislation prohibiting the owner of a pre-1973 water right from:

1. Enlarging the capacity of his diversion facilities;

2. Enlarging the capacity of his ditch or canal system;

3. Extending the length of his ditch or canal system; or

4. Increasing the acreage irrigated under his system

without first securing a permit from DNRC.

Such permits could be denied if any of the proposed work could result in the appropriator being able to expand the use of water DNRC found from a then current field investigation to have historically been made in the exercise of the water right.

Such a mechanism could prevent the expansion of water use under such a senior right and require the appropriator to secure a new permit for a junior right for his expansion. With

such a mechanism in place, a prospective purchaser would be on notice that he could acquire only the right to the historic level of depletion resulting from the use under that senior right, regardless of the rate of flow or volume set out in the decree evidencing it.

Other, junior rights on the stream could be protected from injury from excessive diversions in at least two ways. If a junior right is downstream from such a diversion, it receives the benefit of the enlarged return flows resulting from upstream diversions. If a junior is upstream and the senior right seeks to curtail the junior right so the senior right can make excess diversions, the junior can, by invoking the law prohibiting waste, lawfully decline to pass more water than is required to meet the actual historical beneficial use needs of the senior.

We suggest this remedial mechanism option to the Committee as a practical way to prevent decrees which may not be "sufficiently accurate" from being used to the injury of other water rights. One of its advantages is that it avoids wholesale costly field verification at the expense of the State of Montana during the present process while recognizing that expanded uses may never be pervasively attempted. It also recognizes that unless and until actual expansion and use under such senior rights are attempted, no real injury to junior rights can occur. Finally, it casts the burden of proving the right to receive such a permit on the appropriator who seeks to benefit from the terms of a decree which is not "sufficiently accurate," rather than on the State of Montana.

2. Desirability of a Mandatory Adversarial System.

It would not be desirable to establish a mandatory system for adversarial challenge of water right claims. It would be difficult if not impossible to statutorily delineate criteria

under which claims should be challenged by a mandatory adversary; thus, it would be necessary for a mandatory adversary to contest almost every claim. This would substantially erode the benefit of the prima facia evidence statute in completing the adjudication.

The new Supreme Court rules are perceived as providing an adequate process and criteria for determining the accuracy of claims. The DNRC examines and has examined every claim against some criteria, so in a sense there is a mandatory check on the accuracy of all filed claims. Moreover, DNRC in its capacity as an objector can contest claims. The real question is whether Montana wants to allocate the resources to permit DNRC to object to claims without fiscal constraint and with the effect of extending the adjudicatory process by probably tens of years.

3. Usefulness of Decrees to Water Users.

The final decrees will be useful to water users in the eventual administration of water rights in Montana. They will provide binding confirmation of the priority date of the water right, its point of diversion, and place of use.

As in other appropriation doctrine jurisdictions, the decree for a water right will not memorialize forever the diversion entitlement of the decreed rights. Historical use should remain a relevant consideration when decreed rights are changed to different uses and when rights are bought and sold by knowledgable parties either for continuation of the historical use or change to new uses. Abandonment will remain a possibility notwithstanding that a water right has been decreed to be in existence as of July 1, 1973. These inherent limitations on the usefulness of decreed priorities arise from the very nature of the appropriative right and the fact that continued efficient and beneficial use remains the basis for the continuation and value of the water right.

4. Reliability of Decrees in Equitable Apportionment or Interstate Compacting.

The final decrees will be useful but not conclusive in equitable apportionment of water among states or in interstate compacting of those waters. In equitable apportionment litigation or interstate compacting it will be necessary to look behind the decrees to actual use, efficiency of the diversions, and the harm versus the benefit to users involved.

One of the earliest cases to discuss the conclusiveness of a properly decreed state water right in an equitable apportionment case was Hinderlider v. La Plata River and Cherry Creek Ditch Company.[35] The case was brought by a ditch company, alleging that the State of Colorado, through its state engineer and pursuant to compact, administered Colorado water in such a manner as to deprive the company of its decreed water rights. The U.S. Supreme Court noted that a state cannot claim entitlement to divert the whole of an interstate stream, regardless of any injury or prejudice to the lower state:

> It may be assumed that the right adjudicated by the decree of January 12, 1898 to the Ditch Company is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof.
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> * * *
>
> The decree obviously is not res judicata so far as concerns the State of New Mexico and its citizens who claim the right to divert water from the stream in New Mexico. As they were not parties to the Colorado proceedings, they remain free to challenge the claim of Ditch Company that it is entitled to take in Colorado all the water of the stream and leave nothing for them.
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> * * *

> Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.[36]

This approach also was taken by the U.S. Supreme Court in State of Nebraska v. State of Wyoming[37]:

> The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State.

Most recently, the U.S. Supreme Court affirmed this stance in Colorado v. New Mexico,[38] a case in which Colorado brought an action seeking to divert water for future use from the Vermejo River flowing from Colorado into New Mexico. No water had previously been diverted in Colorado while New Mexico users had diverted for many years. New Mexico argued that the special master was required to focus exclusively on the rule of priority. The U.S. Supreme Court countered that argument as follows:

> When, as in this case, both States recognize the doctrine of prior appropriation, priority becomes the "guiding principle" in an allocation between competing States. But state law is not controlling. Rather, the just apportionment of interstate waters is a question of federal law that depends "upon a consideration of the pertinent laws of the contending States and all other relevant facts."
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> * * *
>
> Our prior cases clearly establish that equitable apportionment will protect only those rights to water that are "reasonably required and applied." . . . Thus, wasteful or inefficient uses will not be protected. Similarly, concededly senior water rights will be deemed

> forfeited or substantially diminished where the rights have not been exercised or asserted with reasonable diligence.[39]

In addition to these qualifiers on senior rights, the Court also stated that it is proper to weigh the harms and benefits to competing states. Noting that previous cases have established that a priority should not be strictly applied where it would "work more hardship" on the junior user "than it would bestow benefits" on the senior user, it found the same principle applicable in balancing the benefits of diversion for proposed uses against the harms to existing uses. The Court concluded:

> We conclude, therefore, that in the determination of an equitable apportionment of the water of the Vermejo River the rule of priority is not the sole criterion. While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both States and the balance of harm and benefit that might result from the diversion sought by Colorado.[40]

From the above, it is clear that adjudicated water rights are not absolute protection for those rights in an equitable apportionment case. Federal law prevails, and the law of the highest court indicates that while established priority will be useful, there are other areas of consideration including actual beneficial use, efficiency of diversion, and the harm versus benefit to the affected users. Because of the prima facie evidence value to claims pending issuance of final decrees, and because of the limitations of decrees in compacting and equitable apportionment discussed above, lengthening the adjudication process as recommended herein should not jeopardize Montana's interests.

5. Statutory Process to Correct Adjudication Errors.

Currently, there is no express statutory process to correct clerical errors in final adjudication decrees. Traditionally, a clerical error is defined as a mistake in the judgment as rendered which is apparent from the record or other evidence and which prevents the judgment as written from expressing the judgment as rendered by the court. In contrast, a substantive error involves a reasoned judicial decision which is correctible only through appeal based on error of fact or law.

It would be impossible to adjudicate so many thousands of claims without incorporating errors in points of diversion or places of use. Montana needs an express provision for the correction of clerical errors in its final decrees. It would be desirable to amend Montana's water statutes to provide expressly that clerical errors in final judgments may be corrected at any time on the motion of affected persons or at the instance of the Water Court and pursuant to such notice as that Court deems necessary. The requirement for notice must be evaluated on a case-by-case basis in light of the nature of the requested correction and the proximity of the point of diversion and place of use to other diversions. When a change in a decree point of diversion could affect the decreed rights of other diversions, or when a change in the place of use could alter the pattern of the returnflow of water for other rights, other users should be given notice of the requested correction and the opportunity to contest whether the error is in fact clerical or whether it implicates a substantive change of water right in which historical use and injury must be assessed.

The correction of substantive errors is possible under limited circumstances under Montana law. Rule 60(b), MRCP provides a mechanism whereby a final decree may be subsequently modified or vacated. The Montana courts recognize that "there

must be some point at which litigation ends and the respective rights between parties are forever established."[41] Rule 60(b), however, is an exception to this rule. Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) satisfaction, release or discharge of judgment; or (6) "any other reason justifying relief from the operation of the judgment." The rule goes on to emphasize that Rule 60(b) "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . ."

The Montana courts have interpreted the "residual clause" as recognizing the inherent power of a court of equity to set aside judgments. Relief under Rule 60(b)(6) is subject to the requirement that the petition for relief be filed within a reasonable time. What is a reasonable time depends on the particular facts of the case and is addressed to the sound discretion of the court.[42]

Thus, the language of Rule 60(b)(6) vests power in the courts "adequate to enable them to vacate judgments wherever such action is appropriate to accomplish justice."[43] While this language may appear to permit the reopening of judgments of decrees in many circumstances, it requires a demonstration of extraordinary circumstances, other than the five enumerated in the Rule, which may justify relief.[44]

6. Effect of Final Powder River Decree on Unadjudicated and Noncompacted Federal Rights.

The Powder River adjudication was commenced in October 1973 pursuant to the Water Use Act of 1973. Declarations of rights were required to be filed on or before February 1, 1975. The

United States was not served by the state of Montana and thereby made a party to Montana's water rights adjudications until June 1979, after the cutoff date for filing declarations in the Powder River basin. In 1979, the Montana legislature stayed adjudication of Indian claims, and in 1981 the stay of all federal reserved rights claims was enacted.

Following extensive data collection and claim verification by DNRC water rights specialists, a preliminary decree was issued in May 1981 pursuant to the provisions of S.B. 76. This was followed by entry of a final decree two years later in May 1983. The final decree for basins 42I and 42J covers over 10,000 claims. Not covered therein, however, are certain Indian and federal reserved water rights claims in the Powder River below Clear Creek in basin 42J. The issue presented concerns the effect of the final Powder River decree on these unadjudicated and noncompacted federal rights.

We conclude that a decree which does not address Indian and federal reserved water rights claims fails to satisfy the requirements of the statute and is, at best, interlocutory in nature and nonbinding as a final adjudication.

It was the intent of the Montana legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. This includes the adjudication of Indian and federal reserved water rights claims as well as claims based on state law. The legislature thus provided that both preliminary and final decrees must be based on, among other things, "the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights."[45]

Hence, decrees which do not reflect consideration of Indian and federal claims, as compacted or as filed upon during the special filing period therefor, fail to satisfy the statutory requirements for entry of preliminary or final decrees, fail to constitute a "complete" or final adjudication, and are, at best, interlocutory in nature. It is our recommendation that, at such time when the Indian and federal reserved water rights may be incorporated therein, the decrees be noticed out as preliminary decrees and the procedural steps applicable thereto be followed.

E. ADDITIONAL QUESTIONS CONCERNING THE ADJUDICATION PROCESS.

1. Legality of the Conclusive Presumption of Abandonment.

We have concluded that Montana's conclusive presumption of abandonment of pre-July 1, 1973 rights is legal and constitutional. This issue is of concern because numerous water right claims were filed after the filing deadline and the Water Court has included such rights in issued decrees. Evaluation of this issue is complicated because the 1972 Montana constitution provides that existing rights to beneficial use of water are recognized and confirmed. As stated previously in our report in addressing the status of late claims, we have concluded that decrees for late-claimed water rights are void as to those rights.

The applicable statute, section 85-2-226, MCA, provides that failure to file a claim of an existing right before the statutory deadline establishes a conclusive presumption of abandonment of that water right. This statute actually works a forfeiture of a non-claimed water right regardless of the existence of non-use of water or intent not to use water. Failure to file a claim would work a forfeiture of a real property interest. The provision is constitutional, however,

because the Montana legislature provided for adequate notice of the filing deadline, because the duty to file a claim imposed by this statute was reasonable and designed to accomplish a legitimate goal, and the duty to file a claim to adjudicate a water right is a reasonable condition to be imposed on the retention and use of water rights.

There are two alternative ways to construe the purpose of section 85-2-226. First, the statute could be interpreted as creating an irrebuttable presumption of nonuse and the formation of an intent to abandon upon failure to file a claim before the statutory deadline. In the alternative, the statute could be interpreted as a forfeiture of property for failure to timely file a claim. The United States Supreme Court has developed different sets of standards for determining the validity of irrebuttable presumptions and forfeitures.

An irrebuttable presumption arises where a statute allows one fact to be conclusive evidence of another fact. Irrebuttable presumptions are generally disfavored by the law. In Vlandis v. Kline,[46] the U.S. Supreme Court struck down a statute as violative of the due process clause where the statutory presumption was not necessarily true and reasonable alternative means of making the determination were available.

Under section 85-2-226, MCA the fact that a person failed to file his claim prior to the statutory deadline establishes conclusively that he has abandoned his water right. If the statute is interpreted as creating an irrebuttable presumption, it could fail the Vlandis test because it is not necessarily true that those who failed to file a claim have abandoned their water rights by nonuse and intent to abandon, and because hearings could provide a reasonable alternative means to determine whether claimants have abandoned their water rights.

Section 85-2-225, MCA may properly be construed as a forfeiture provision instead of an irrebuttable presumption. The case of United States v. Locke[47] presented the United States Supreme Court with a situation similar to that presented by section 85-2-226, MCA. That case involved a challenge to section 314(c) of the Federal Land Policy and Management Act of 1976 (FLPMA) which provides that failure to timely file an affidavit of assessment work performed on a mining claim "shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner." Locke's failure to meet this statutory deadline resulted in forfeiture of unpatented mining claims recognized as property interests entitled to due process protection.

In addressing Locke's due process challenge, the Supreme Court discussed both irrebuttable presumptions and forfeitures. Locke argued that section 314(c) created an irrebuttable presumption of abandonment. Abandonment requires the intent, while forfeiture requires only noncompliance with the law. Thus, argued Locke, Congress intended that failure to file was but one piece of evidence concerning the claimant's intent to abandon.

The Court held that section 314(c) operated as a forfeiture provision. The Court reasoned that if the conclusive presumption arising out of one's failure to file merely shifts the burden of going forward with evidence to the claimant to show that he intended to keep the claim, nothing conclusive is thereby achieved.

The Court addressed the issue of whether this forfeiture provision was constitutional, applying a three part test. First, was the duty imposed by the statute reasonable and designed to achieve a legitimate state goal? This question was answered affirmatively. The Court said that Congress may impose

reasonable restrictions to further legitimate legislative goals by conditioning retention of vested property rights on the performance of affirmative duties. This is particularly true, said the Court, where the interest is a unique form of property, such as an unpatented mining claim. The U.S. government owns the underlying fee title to the public domain and therefore maintains broad powers over conditions of land use and acquisition. The Court also found that the goal of the Act, to rid federal lands of stale mining claims and to provide current information on claims, was a legitimate goal and that section 314(c) was a reasonable means of achieving that goal.

Second, does the forfeiture result in a "taking" of private property without just compensation? The Court held that reasonable regulatory restrictions on private property rights do not "take" private property when an individual must merely comply with a reasonable regulation. "[T]his Court has never required [Congress] to compensate the owner for the consequences of his own neglect."[48]

Finally, does the statute provide constitutionally adequate process to alter substantive rights? Here, the said the Court, Congress provided constitutionally adequate process simply by enacting the statute, publishing it, and affording those within the statute's reach a reasonable opportunity to familiarize themselves with the general requirements imposed and comply with those requirements.

Having satisfied each of the three tests identified above, the Court determined that the forfeiture provision of section 314(c) is constitutional.

The language of section 85-2-226, MCA is almost identical to the language of section 314(c) of FLPMA. It provides that failure to file a claim by the statutory deadline establishes a

conclusive presumption of abandonment of a water right. The U.S. Supreme Court's reasoning as to the distinction between an irrebuttable presumption and forfeiture is equally applicable to section 85-2-226, MCA. The Montana statute is therefore properly construed as a forfeiture provision and is subject to the Locke three part test.

The filing requirement is a reasonable condition on retention of a water right. The state's power to impose reasonable restrictions is particularly broad in the case of unique forms of property. Pursuant to article IX, section 3 of the Montana constitution, all water in the state is the property of the state for the use of its people. The state therefore maintains broad powers over the conditions of its use. Further, the state has a legitimate interest in eliminating stale water rights, and a filing requirement is a reasonable means of achieving that goal.

Second, as a reasonable regulatory restriction on property, section 85-2-226 does not "take" private property without just compensation. The statute merely requires the claimant to comply with a reasonable regulation, and the government is not required to compensate an individual for his own neglect.

Finally, the Montana legislature provided a constitutionally adequate process in section 85-2-213, MCA. Notice of the filing deadline was not only published in every newspaper in the state, it was also mailed with each statement of property taxes in 1979, 1980, 1981 and 1982. This is significantly more process than the Court found to be adequate in Locke.

The forfeiture provision of section 85-2-226, MCA is constitutional.

Given our conclusion that Montana's forfeiture provision is valid and that decrees for late-filed water rights claims are void as to those late filed claims, the legislature could consider remedial legislation providing that late-filed claims may be adjudicated but shall have priorities junior and inferior to the priorities for all rights adjudicated for claims which were timely filed. Such claims probably would have to be made junior and inferior to rights permitted by DNRC prior to the effective date of any curative legislation. This legislation would ameliorate somewhat the harsh, albeit legal, effect of the conclusive presumption of abandonment.

We understand that the Water Courts soon will address this issue about the status of late claims. The Water Courts' decision, and any appellate review by the Montana Supreme Court, will affect the need for and nature of any curative legislation. Therefore, and because providing or not providing a curative process for late claims would involve a policy decision by the legislature, we have not offered any proposed legislation at this time.

2. Effect of the Prima Facie Evidence Statute and Need for Any Modification.

The prima facie evidence statute, section 85-2-227, MCA, provides that a claim of an existing right filed in the adjudication proceeding constitutes prima facie proof of the contents of the claim until a final decree is issued disposing of the claim. This statute provides certainty of claimed water rights until the adjudication process is finalized. This certainty assists water users, and it also assists DNRC in its evaluation of the availability of unappropriated water for permit rights.

The Water Court has applied the prima facie evidence statute by treating those water right claims as evidence adequate to

meet the burden of proof required to grant the claim unless other evidence rebuts the facts stated in the claim. Thus, if the contents of a complete water claim are not questioned through the DNRC verification process, which includes use of standard flow rate and other criteria, or rebutted through an objection by some other party, the water right is decreed as claimed.

The prima facie evidence statute could be interpreted as inapplicable in the adjudication process. Under section 85-2-231, MCA, a preliminary decree must be based upon the statements of claim, DNRC data, and additional data and information identified in that statute. Moreover, that decree is required to include all of the determinations, findings, and conclusions required for the entry of a final decree. In other words, the water judge is required to consider the claim and all data relevant to the claim which might rebut or supplement the claim. If, because of its consideration of the available evidence, the Water Court modifies the claim in the preliminary decree, does the claim retain independent prima facie validity?

The prima facie evidence statute serves two purposes which can be reconciled within the context of a conclusion that the prima facie evidence statute applies in the adjudication process. First, the statute serves the aforementioned purpose of providing certainty as to the nature of water rights during the pendency of the adjudication process. Since only a final decree is subject to administration under the current statutory process, there is useful purpose in having claims accorded prima facie effect until the entry of the final decree disposing of those claims, even if a preliminary decree is issued which modifies the claims.

The second purpose of the statute is to provide a proof process which can expedite the adjudication of thousands of

claims without the required presentation of testimonial and documentary evidence by each claimant.

We find no need to modify the statute as it applies to and in the adjudication. We do recommend modification to clarify that the statute applies in the adjudication and not in the administration of water rights decreed in a temporary preliminary, preliminary, or final decree. This modification is recommended for consistency with our proposal to make temporary preliminary decrees and preliminary decrees administerable.

3. Need for Additional Delineation of DNRC Responsibilities

We have not identified any need for greater statutory delineation of DNRC's responsibilities. Moreover, the new Supreme Court claims examination rules provide ample direction for DNRC's activities in support of the Water Court's adjudication.

4. Legal Effect of Decrees Issued by the Water Courts.

Under current law only final Water Court decrees are subject to administration. Such final decrees are subject to administration only by court-appointed water commissioners.

If the legislature desires to provide for administration of temporary preliminary decrees or preliminary decrees, the statutes would have to be amended to expressly make those decrees administrable either by court-appointed water commissioners or by another entity. In Appendix IV we offer recommended legislation to provide that such decrees can be administered through the current scheme involving water commissioners appointed by the district courts. To preserve that scheme while avoiding the risk of jurisdictional conflicts arising

between the Water Courts and the District Courts, it appeared necessary to provide in that recommended legislation for the removal of decretal enforcement powers from the Water Courts.

Montana has not yet provided a modern comprehensive and permanent water rights administration scheme through a bureaucracy of state water administration officials as some other appropriation doctrine jurisdictions have done. While there is currently no pressing state-wide need for such comprehensive and on-going water right administration, that need may very well materialize in the future. If, and when it does, we believe that legislature can deal with the matter in a timely fashion and in a manner which can best solve whatever real problems are found then to exist.

5. Effects of the 1986 Stipulation and Related Court Decisions and Rulemaking.

The obvious result of the 1986 stipulation and related court decisions and rulemaking has been the Supreme Court's promulgation of the new claims examination rules. These rules are perceived by almost all interested persons as providing an adequate process for the verification of claims by DNRC and the Water Court. The major perceived deficiency is in the perception that the rule should more specific as to the Water Court's procedures and, specifically, the manner in which the Court addresses and disposes of DNRC findings.

Given the nature of an adjudication of water rights on a case-by-case basis, we believe that it would be difficult, and possibly imprudent, to specify by rule exactly what the effect of DNRC findings should be and how they should be addressed by the Water Court as affecting the prima facie correctness of claims as filed. Certainly, a rule that DNRC findings contrary to a claim automatically rebut the prima facie evidence value

of a filed claim would be inappropriate. Prima facie evidence stands unless contradicted and overcome by other evidence.[49] The Water Court must decide in each case whether DNRC findings contradict and overcome the filed claim.

The Montana Supreme Court has not expressly approved the 1986 stipulation, and we are unable to conclude that it has implicitly done so. Thus, the stipulation must be viewed as a contract or an attempt at contract. It is questionable whether the Water Court has the capacity to contract with litigants concerning how it will proceed generically in an adjudication. Such an agreement would not be within the context of a pre-trial order or other court order entered under the rules of civil procedure which binds the court unless modified to prevent injustice.

The 1987 legislation (H.B. 754) also has affected or could affect the adjudication.

The first change of note effected by H.B. 754 was the modification of the process for selection of the chief water judge. The legislature at that time considered broadly the question of the water judge selection process. It did not modify the process to address the concern of Mr. MacIntyre and others that the nonelective process for water judge selection is unconstitutional. From this one could infer a legislative view of the Water Courts as courts "otherwise created by law" which are not "district" courts for which the appointive/elective process applies.

The second statutory change of significance, in our analysis, which was wrought by H.B. 754 was the legislature's directive that when DNRC's verification budget has been expended it is not required to continue verification activities at Water Court direction until an additional verification budget is

appropriated. Since verficiation is inherent in the Water Court's statutory process for issuing preliminary decrees, this statutory clarification means that the adjudication process will proceed on a schedule which is directly related to the legislature's funding of DNRC's verification role.

6. Integration of Subbasins by Notice of Mainstem Claims.

Our discussion in Section B.2. above, concerning the adequacy of notice of judicial proceedings, has addressed the question of the integration of subbasins by notice in those subbasins of claims made on mainstem rivers. We have recommended in that foregoing analysis that supplemental notice procedures be legislatively imposed to insure the binding effect of all subbasin decrees throughout the unified river system.