

Final Decree Transition sub-working group

Legislative Draft for Water Division Court

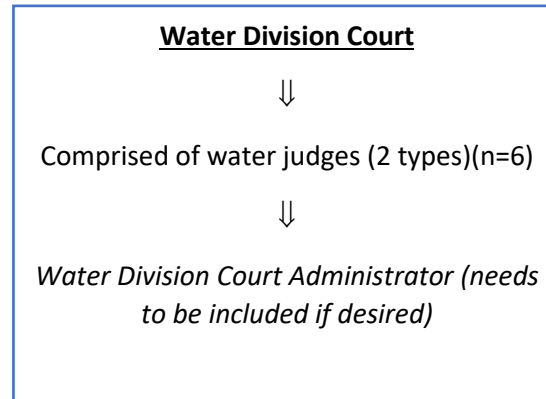
11.22.2023

Approach:

- Using divisions- update power and duties to all water functions
- Post final decree in all basins, no adjudication water judges
- Division judges, which has chief and associate adjudication judges AND water administration judges

- (TBD) Clean up all water judges in statute and be explicit of the meaning
- (TBD) Selection / nomination
- (TBD) Adding more divisions (1-2), based on workload – split upper Missouri in ½
- (TBD) Transition
 - o Adjudication court staff, transferred to water division
 - o Funding (HB2, vs counties, vs supreme court)
- (TBD) How does filing occur with water division court?
 - o Administrator; supervision
- (TBD) Funding model
- (TBD) request to transfer the action to district court

Visual:



Water Judge type 1: Water Administration Judges

- Currently 4 divisions (N=4)
- Duties: administer decrees, review DNRC Water Division decisions, and to preside over distribution, enforcement and abandonment disputes

Water Judge type 2: Adjudication Water Judges

- Chief and associate water judge (N=2)
- Statewide
- Duties: Complete statewide adjudication of claims
- Water masters

NEW SECTION. Venue for water rights determinations.

All matters under **new section duties** must be brought before to the water administration judge in the appropriate water division. Any proceedings for matters arising under **new section duties** must be conducted within the water division or county in which the controversy arises unless otherwise determined by mutual agreement of the parties.

2-4-702. Initiating judicial review of contested cases.

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

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

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

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

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

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

(e) (i) A party who is aggrieved by a final decision on an application for a permit or change in appropriation right filed under Title 85, chapter 2, part 3, may petition the water division court for judicial review of the decision. The water division court has jurisdiction over the petitions and the provisions of this part apply.

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

(4) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be required by the court to pay the additional costs. The court may require or permit subsequent corrections or additions to the record. (*Terminates September 30, 2025--sec. 6, Ch. 126, L. 2017.*)

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

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

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

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

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

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

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

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

3-7-101. Water division court.

There is a Water Division Court to adjudicate existing water rights and administer decrees, review DNRC Water Division decisions, and to preside over distribution, enforcement and abandonment disputes. A water division court shall have "water judges" comprised of a chief and associate statewide adjudication water

judges and water administration judges that preside over the divisions.

NEW Section (Part 2): Duties of Water administration judges

- (1) conduct proceedings for petitions for judicial review filed with the Water Division Court under 2-4-12 702(2)(e);
- (2) review decisions made by a compact board or other administrative entity as provided in Title 85, chapter 20;
- (3) review motions brought pursuant to Rule 59 or 60, M.R.Civ.P., concerning the adjudication of an existing water right and orders pursuant to 85-2-234(8);
- (4) hear and resolve disputes arising under the interpretation of a final decree issued under 85-2-234;
- (5) hear and resolve issues related to judicial enforcement actions for waste, unlawful use, interference, or other violations pursuant to 85-2-114 and 85-2-122;
- (6) hear and resolve issues related to enforcement actions brought pursuant to common law remedies, including but not limited to the waste of water, unlawful use of water, abandonment, or interference with the use of water, including the right to injunctive relief under Title 27, chapter 19
- (7) conduct abandonment proceedings under 85-2-404 and 85-2-405;
- (8) hear and determine matters related to objections to permits or changes in appropriation rights under 85-2-309;
- (9) hear and determine matters related to a dispute over ownership of a water right certified to the Water Division Court under 85-2-424(9);
- (10) hear and determine rights and issues related to water distribution controversies under 85-2-406;
- (11) hear and resolve ditch easement matters ancillary to a water right dispute or controversy, as a water right is defined in 85-2-102;
- (12) promulgate rules for use across all water divisions for practice and procedure pursuant to Title 3, chapter 7;
- (13) prescribe forms for use pursuant to Title 3, chapter 7; and determine and interpret existing water rights, including without limitation the adjudication of total or partial abandonment of existing water rights occurring at any time;
- (14) coordinate with the Department of Natural Resources and Conservation the compilation of necessary technical information for water distribution under XXX (redbooks)

NEW Section (Part 2): Jurisdiction of Water administration judges

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

3-7-201. Designation of water administration judge.

(1) A water administration judge must be designated for each water division by a majority vote of a committee composed of the district court judge from each single-judge judicial district and the chief district judge from each multijudge judicial district, wholly or partly within the division. Except as provided in subsection (2), a water judge must be a district court judge or retired district court judge of a judicial district wholly or partly within the water division.

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

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

3-7-202. Term of office. The term of office for water administration judges is from the date of initial appointment as provided in **3-7-201** to June 30, 1985. After June 30, 1985, the term of office of a water administration judge is 4 years, subject to continuation of the water divisions by the legislature.

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

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

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

3-7-212. Enforcement of decrees.

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

3-7-221. Appointment of chief adjudication water judge and associate adjudication water judge -- terms of office. (1) The chief justice of the Montana supreme court shall appoint a chief adjudication water judge as provided in Title 3, chapter 1, part 9. The chief justice of the Montana supreme court may appoint an associate adjudication water judge.

(2) To be eligible for the office of chief adjudication water judge or associate adjudication water judge, a person shall have the qualifications for district court or supreme court judges found in Article VII, section 9, of the Montana constitution.

(3) The term of office of the chief adjudication water judge and the associate adjudication water judge is 4 years, subject to continuation of the water divisions by the legislature.

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

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

3-7-223.

3-7-223. Duties of chief adjudication water judge. The chief water judge shall:

(1) administer the adjudication of existing water rights by:

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

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

(3) assign personnel and duties as needed;

(4) assign the associate adjudication water judge cases as needed; and

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3-7-224) Jurisdiction of chief water judge and associate water judge. (1) The chief adjudication water judge and the associate adjudication water judge may, at the discretion of the chief justice of the Montana supreme court.

(2) The chief adjudication water judge and the associate adjudication water judge have jurisdiction over all matters relating to the determination of existing water rights within the boundaries of the state of Montana.

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

3-7-225. (*Effective October 1, 2025*) **Duties of associate adjudication water judge.** The duties of the associate adjudication water judge are the same as those assigned to the chief adjudication water judge pursuant to **3-7-223(1)** and (2).

3-7-301. Appointment of water masters -- removal. (1) The chief adjudication water judge may appoint one or more water masters.

- (3) In appointing a water master, the chief adjudication water judge shall consider a potential master's experience with water law, water use, and water rights.
- (4) A water master shall serve at the pleasure of the chief adjudication water judge and may be removed by the chief adjudication water judge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) is a party to the proceeding or an officer, director, or trustee of a party;

(ii) is known by the judge or water master to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's or water master's knowledge likely to be a material witness in the proceeding.

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

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

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

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

85-2-114. Judicial enforcement.

85-2-234. Final decree.

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

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

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

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

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

(6) For each person who is found to have an existing right arising under the laws of the state of Montana, the final decree must state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water included in the right, as follows:

(i) by flow rate for direct flow rights, such as irrigation rights;

(ii) by volume for rights, such as stockpond and reservoir storage rights, and for rights that are not susceptible to measurement by flow rate; or

(iii) by flow rate and volume for rights that a water judge determines require both volume and flow rate to adequately administer the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land, if any, to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the inclusive dates during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right.

(7) For each person, tribe, or federal agency possessing water rights arising under the laws of the United States, the final decree must state:

(a) the name and mailing address of the holder of the right;

(b) the source or sources of water included in the right;

(c) the quantity of water included in the right;

(d) the date of priority of the right;

(e) the purpose for which the water included in the right is currently used, if at all;

(f) the place of use and a description of the land, if any, to which the right is appurtenant;

(g) the place and means of diversion, if any; and

(h) any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under **85-2-702**.

(8) Clerical mistakes in a final decree may be corrected at any time on the initiative of the water judge or on the petition of any person who possesses a water right. The water judge shall order the notice of a correction proceeding that the judge determines to be appropriate to advise all persons who may be affected by the correction. An order of the water judge making or denying a clerical correction is subject to appellate review.

85-2-235. Appeals.

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

3-7-501. Jurisdiction.

- (1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under **85-2-309** or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly.
- (2) A water judge may not preside over matters concerning the determination and interpretation of cases certified to the court under **85-2-309** or of existing water rights beyond the boundaries specified in **3-7-102** for the judge's division except as provided in **3-7-201**.
- (3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under **85-2-309** or concerning the determination and interpretation of existing water rights within the judge's division as specified in **3-7-102** that are considered filed in or transferred to a judicial district wholly or partly within the division.
- (4) The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

History: En. Secs. 1, 6, Ch. 697, L. 1979; amd. Sec. 4, Ch. 80, L. 1981; amd. Sec. 4, Ch. 596, L. 1985; amd. Sec. 4, Ch. 604, L. 1989; amd. Sec. 1, Ch. 174, L. 1997.

85-2-236. Certificate of water right.

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

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

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

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

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

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

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

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

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

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

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

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

(1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision must be governed by the principle that first in time is first in right.

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

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

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

(4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree or preliminary decree as modified after objections and hearings is enforceable and administrable according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water judge shall upon referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities.

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

85-2-424. Filing.

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

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

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

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

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

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

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

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

- (i) the party is required to submit a complete water right ownership update form and the required fee within 60 days after the notice; and
- (ii) ownership of the water right will not be changed in the department's records until the complete water right ownership update form is provided.
- (c) The appropriate fee must be paid at closing or upon completion of the transfer of real property as provided in **85-2-426**.
- (d) The transferee of a water right, after receiving notice as provided in subsection (2)(e), is responsible for compliance with this section.

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

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

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

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

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

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

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

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

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

"WATER RIGHT OWNERSHIP UPDATE DISCLOSURE:

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

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

- (a) receiving a withdrawal of a water right, or an interest in a water right, by an owner of the right or interest;
- (b) receiving an order from the water court or other court of competent jurisdiction that modifies or terminates ownership of a water right; or
- (c) learning of a clerical error resulting from an error on a water right ownership update form.

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

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

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

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

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

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

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

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

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

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

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

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

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