

Water Commissioner Frequently Asked Questions (FAQs)

How do I address streams losing or gaining flow throughout the season?

Commissioners and water users often refer to the natural loss of flow in a stream or ditch as “shrink”. While streams and ditches often lose flow during conveyance to seepage through the channel bottom, the opposite is also true. Gains in flow due to surface and sub-surface return flow, typically associated with irrigation and ditches can impact water availability throughout the season. Water commissioners need to be aware of these gains and losses to appropriately deliver water to users in priority. In rare cases, these gains and losses have been quantified by government agencies in hydrologic reports. In most cases however, the commissioner determines in the field how to handle gains and losses throughout the season based on water availability as water is distributed in priority. It is important for water commissioners and water users to understand that natural gains and losses are not static. Fluctuations in percentage loss or gained fluctuate during the season in response to water availability, storm events, and irrigation cycles.

How do I deal with a water user who is wasting water?

A common complaint from water users is that another water user is wasting water due to over-irrigating as evidence of water presence in drain ditches, on neighbors’ fields and adjacent to public roadways. Unless otherwise noted in the judge’s order, the water commissioners’ jurisdiction is at the headgate and therefore waste of water down ditch is not within their legal purview and is up to water users to resolve. That said, water commissioners can be a helpful resource to district courts in these disputes if they are well informed of local operations and keep accurate distribution records. For example, the presence of water in drain ditches or along roadways may be a waste of water from over irrigation or may be normal flood irrigation resulting in tailwater runoff from fields or groundwater return flow.

How do I distinguish between natural flow water and stored water?

Natural flow is that portion of water released from a reservoir that is equal to the amount flowing into the reservoir. It is determined by measuring all inflows into the reservoir with a flowmeter, streamflow gage, or some form of measuring device such as a flume or weir. Stored water is equal to the total outflow from the reservoir minus the total inflow to the reservoir and therefore requires the ability to measure outflows as well as inflows. Water stored in a reservoir and turned into a natural channel is not considered part of the natural flow of the stream and therefore must be administered separately by the water commissioner. The point of diversion for stored water is typically at the outlet of the reservoir and therefore

should be measured at this point. Another point of diversion (POD) located downstream in the natural channel must consider any carriage losses accrued during the transport of the stored waters. In other words, the quantity of natural flow cannot be diminished as a result of the added stored water (MCA 85-2-411). This in turn will result in most cases with water being turned out at the second POD at a value diminished from the flow rate associated with the water right. In some cases, stored and natural flow water users may have an informal agreement to share in the carriage losses occurring during transport. This agreement cannot in anyway differentiate from the parameters of the water rights involved including priority date, period of use, flow rate, point of diversion, and place of use.

What if the water user does not pay their bill?

If water users do not pay their bill, the water commissioner can shut off their water until bills are paid. It is good practice for the water commissioner to give the water user warning in writing of such consequences and to inform them and the district court of an established date when water will be shut off if bills are not paid.

What if water users are re-adjusting headgates without the consent of the water commissioner?

Unless otherwise noted in the district court order, water commissioners have full jurisdiction over headgates during their tenure. Water users, while allowed to access their own headgates, cannot tamper with the adjustments or interfere with the discharge of the commissioners' duties. Such action is considered contempt of court (MCA 85-5-406).

A commissioner may lock a headgate in place to deter interference with settings. A notice explaining the commissioners jurisdiction issued by the district court can be posted on the headgate as well.

Is there such a thing as futile call?

Yes, if a junior appropriator is called upon for water and the outcome will result in no beneficial use of water by the senior appropriator then the junior could be entitled to invoke the Futile Call Doctrine. It is the responsibility of the junior in this case to show no useable water would reach the seniors point of diversion. Determination of proper invocation of the Futile Call Doctrine would be under the jurisdiction of the District court in an evidentiary hearing. For additional information refer to *Kelly v Teton Prairie LLC*, 2016 MT 179, 384 Mont. 174, 376 P.3d 143.

