I. INTRODUCTION

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A. WHAT IS WATER RIGHTS ADJUDICATION

When a judge hears a case and renders a decision, the matter is said to have been adjudicated. In the arena of water rights, adjudication refers specifically to the settling of claims filed for water rights.

Before passage of the Montana Water Use Act in 1973, a person could gain a right to use water simply by putting that water to beneficial use. These rights are known as existing water rights. But no one knew how many existing water rights there were or exactly how much water had been appropriated. The Water Use Act, effective July 1, 1973, established a central repository for water right records and required prospective water users to apply for a permit before putting water to use. The act also recognized that the amounts, ownership, and priority dates for all existing water rights needed to be better defined.

The first undertaking in organizing Montana's existing water rights began in the Powder River Basin. In 1973, the task of collecting and investigating claims fell to the Department of Natural Resources and Conservation (department). After six years of intensive field work, aerial photo interpretations and interviews, completion of the first basin was not in sight.

Consequently in 1979, the legislature modified the Water Use Act by passing Senate Bill 76, which set up Montana's current system for adjudicating existing water rights.

Senate Bill 76 divided Montana into four water divisions (See Figure I-1, Water Divisions Map) and called for four judges, commonly known as the Water Court, to adjudicate all existing water rights in a statewide proceeding. At the same time, the Reserved Water Rights Compact Commission (RWRCC) was created to negotiate compacts with federal agencies and Indian tribes wishing to quantify their federal reserved water rights in Montana. The activities of the commission are an integral part of the statewide adjudication process.

On June 6, 1979, the Montana Supreme Court issued an Order requiring every person claiming ownership of an existing water right to file a claim (see Exhibit I-1) with the Department of Natural Resources and Conservation no later than January 1, 1982. On December 7, 1981, the Supreme Court extended the deadline to 5:00 p.m. on April 30, 1982. Stockwater and domestic claims for groundwater or instream flow were exempted from this process, though such claims could be filed voluntarily.

By statute, claims not filed by the April 30, 1982 deadline were presumed to have been abandoned. In 1992, the Montana Supreme Court made a determination that the failure to file a statement of claim on or before April 30, 1982, was a forfeiture of the water right. In 1993, the 53rd Montana Legislature passed Senate Bill 310 which under certain terms and conditions, provided for the remission of the forfeiture of existing rights caused by the failure to file claims on or before April 30, 1982. Accordingly, a “late claim” could be filed by physically filing the claim with the department on or before July 1, 1996, or sending the claim by United States mail, postmarked on or before July 1, 1996.
Over 200,000 claims were received by the April 30, 1982 deadline. To date, 4,986 late claims have been filed. Since all of these claims cannot be adjudicated at once, the claims are being handled systematically for each of Montana's 85 river basins. Each claim is examined by the department staff for completeness and accuracy; apparent discrepancies are reported to the claimants and the Water Court. The reports are also made available to the public. When all claims in a basin are examined, a decree is issued.

Historically, the first issuance of a decree by the Water Court was termed either a temporary preliminary decree or a preliminary decree. Temporary preliminary decrees were issued in basins containing federal reserved water rights where a compact was not been concluded. Such decrees contain all rights other than reserved rights being negotiated. In these basins, a preliminary decree will be issued as a second step in the process and will include all rights in the temporary preliminary decree along with all reserved rights in the basin. Adjudication in basins without federal reserved rights began with a preliminary decree. As of 2010, all decrees issued by the Water Court will be termed a preliminary decree.

In 2011 the legislature provided for the addition of an Associate Water Judge appointed by the Chief Justice of the Montana Supreme Court to work on cases as assigned by the Chief Water Judge.
In 1997, the legislature passed Senate Bill 108 which revised the water adjudication laws. One revision in the bill allows the Water Court to adjudicate water right claims or review federal reserved water right compacts when necessary, and without the need to wait until other types of claims in the same basin are examined. In addition, SB 108 requires objections to be filed at the initial decree stage, and also allows claimants an opportunity to file counter-objections.

A notice of issuance of every decree is given to all parties that may be affected by it, along with notice of the time period for objecting to the rights or compacts in the decree. The water judge, with the help of a water master, hears and decides all objections. After all objections have been resolved, the water judge issues a final decree. On the basis of the final decree, the department will issue a Certificate of Water Right to each person decreed an existing water right. Water rights dated after July 1, 1973, are not subject to the adjudication process.
B. PROGRAM DESCRIPTION

The Adjudication Program, i.e., the department and the Montana Water Court, is responsible for the protection and confirmation of all rights having any useful and beneficial purpose that existed prior to July 1, 1973 (the effective date of the Montana Water Use Act).

1. Program Responsibilities. Generally the department's role in the program is to collect, compile, record, and examine claims for pre-1973 water rights filed pursuant to Senate Bill 76 and thereby assist the Water Court in preparing temporary preliminary, preliminary and final decrees. More specifically, the department's responsibilities are:

   i. Provide information and assistance to aid claimants in filing claims in accordance with §85-2-112(5), MCA. Even though the general filing deadline has passed, amendments to filed claims are still received.

   ii. Develop and maintain a Claim Examination Manual.

   iii. Maintain the centralized record system of all existing water right claims as required by Article IX Section 3 of the Montana Constitution.

   iv. Provide assistance and information to the water judges as required by §85-2-243, MCA. see also Rule 1, W.R.C.E.R. Meeting this objective involves the following:

      • Continue to examine water right claims in specified basins, meet the benchmarks set forth in House Bill 22, and provide a summary report to the Court upon completion.

      • Respond to requests made by the Water Court in conjunction with the litigation of objections to Water Court decrees, the resolution of issue remarks, and enforcement of decrees.

      • Assist the Water Court with the issuance and mailing of decrees, counter-objection and objection notices. Conduct return mail research.

      • Provide technical expertise to the Reserved Water Right Compact Commission regarding water right quantification for negotiations on reserved water rights.

      • Assist the Water Court in complying with district court requests for Water Court decree enforcement, by providing technical assistance and information.

   v. Pursuant to §85-2-236, MCA, issue a certificate of water right to each person decreed an existing right in those basins where a final decree has been entered. (Note: No certificates have been issued to date for the six
vi. Improve the department's public relations through positive contact with claimants during claims examination.

2. **Program Goals.**

   - To provide the statewide adjudication with thorough and timely review of existing water rights claims for completeness, accuracy, and reasonableness.

   - To check that the elements of a water right, individually and in combination, are reasonable and accurate using the policies and procedures specified in the Montana Supreme Court Water Right Claim Examination Rules (W.R.C.E.R.) and the examination manual.

   - To identify for further review through the decree process those aspects of a water right that do not appear reasonable or accurate.

3. **Policy and Procedures.** The policy and procedures to implement the program goals are based on rules adopted by the Montana Supreme Court on July 15, 1987, amended in 1991 and again in 2006. These rules provide the general guidelines on how to examine claims.

   To implement the general guidelines to examine claims as specified in the Supreme Court Rules, the department has written this more detailed manual entitled the "Water Right Claim Examination Manual".

   This manual provides step-by-step procedures for department adjudication staff to follow in implementing the Supreme Court Rules on a day-to-day basis. This manual explains how to routinely apply these guidelines to specific claims and issues in a manner consistent with the state's centralized water right database. This manual also describes how the department claims examination is to be coordinated between the regional/unit offices, the specialist teams, the program manager, the records section, the Water Court, and the claimants.

   This Claim Examination Manual covers daily technical guidance to the adjudication staff for examining each element as prescribed by the Supreme Court Rules. By addressing the details of day-to-day claim examination, this manual serves the objective of consistent treatment of claims by different staff members and between different regional/unit offices and teams.
4. **Claims Examination Overview.** In general, the review of water right claims by the department consists of the following activities (also see Figure I-2 Claim Examination Flow Chart):

- **Review** the claim file to see if the claimed information is clear and understandable. If discrepancies exist in the claimed information, the claimant is usually contacted. The claim should clearly and accurately reflect the claimant's intent.

- **Examine** the claim against the available factual records and resources, i.e., maps, aerial photographs, courthouse records, etc. In many cases, factual records and resources may be limited, in which case the claimed information is reviewed for reasonableness. Additional information may be requested from the claimant.

- If the examination raises issues and questions, or makes changes to a claim regarding the claimed information, the claimant **must be** contacted. The result of this contact may or may not resolve the issues. In certain cases a field inspection may be conducted. Unresolved issues are documented on the examination worksheet and reported in the department's review abstract for the claim.

- The **examination worksheet** and supplement forms are scanned and used to update the computer database. From the database, a copy of the department's summary report is printed for the Water Court's review.

- When examining claims, department personnel must abide by the following principles:
  - The claimant may claim or adjust their claim as they wish. The final authority for determining the validity of changes is the Water Court.
  - Department claim examination personnel are not to draw legal conclusions or give legal advice.
  - The department may explain the claim examination procedures and the adjudication process, discuss options, and offer reasonable assistance with forms and paperwork with and for the claimants.

- The department has a responsibility by statute to keep accurate records (including documenting claimant contact) and to report facts and issues discovered during claim examination.
FIGURE I-2
CLAIM EXAMINATION FLOW CHART

Claims Filed → Claims entered as is into database → Water Court orders basin examined → Regional/Unit Office or Team examines claims by Ownership

- Examination information entered into database
- Standards applied to ownership
- Review Abstract generated
- Claim OK as examined
- Yes
- No
- Claim amended by claimant
- Claim examination complete

- Summary Report generated
- Corrections made to database
- Summary Review Indexes checked
- Basin Examination complete
- No
- Summary Report
- Corrections made to database
- Decree Issued

Water Court reviews Summary Report
5. **Current FTE and Claim Examination Status.** The program currently has 43 FTE’s, of which, 16 FTE’s will be located in the regional/unit offices and 27 FTE’s in Helena on the statewide adjudication teams.

6. **Examination Priorities.** The Montana Legislature prioritizes the basins within each water division and the department examines claims accordingly. Claimants may petition the Water Judge to designate a priority basin if the basin involves: recurring water shortages resulting in urgent water rights controversies;

- federal or Indian water rights negotiations nearing completion; or
- adjudication proceedings nearing issuance of a decree.

Presently, the department is focused on meeting benchmarks assigned by the 2005 legislature. There are approximately 57,000 unexamined claims that must be examined before June 30, 2015. The benchmarks set by the legislature are as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Total Number Claims Examined</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 31, 2006</td>
<td>8,000</td>
</tr>
<tr>
<td>December 31, 2008</td>
<td>19,000</td>
</tr>
<tr>
<td>December 31, 2010</td>
<td>31,000</td>
</tr>
<tr>
<td>December 31, 2012</td>
<td>44,000</td>
</tr>
<tr>
<td>June 30, 2015</td>
<td>57,000</td>
</tr>
</tbody>
</table>

7. **Decree Issuance.** Rule 5, W.R.C.E.R.; Rule 3, W.R.Adj.R. Following examination of claims by the department, a Summary Report, which consists of an Abstract of Water Right Claim for each claim, is generated by the DNRC. The Water Court reviews the Summary Report prior to decree issuance and may ask the DNRC questions concerning examination of the claims pursuant to the Water Right Claim Examination Rules. Changes may be made to claims by the DNRC based upon its answers to the Courts’ questions.

If the Court determines that changes pursuant to the claim examination rules or statute should be made to claims beyond those made by the DNRC, it will issue an order directing the DNRC to make such changes. The order from the Court is placed in the claim file by the DNRC. Rule 3, W.R.Adj. R.

Any changes made to a claim by the DNRC are stated in writing and sent to the Water Court. The department will enter changes in the centralized water right database and place the Court’s written documentation in the claim file.

As ordered by the Water Court, the department prints all abstracts of existing water rights to be included in the decree. The department prepares and mails the decree. Included in the mailing process is a Notice of Availability (an individual notice) for each owner of a claim, certificate, permit, water reservation grantees, and other interested persons requesting notice.
Historically, the first issuance of a decree by the Water Court was termed either a temporary preliminary decree or a preliminary decree. Temporary preliminary decrees were issued in basins containing federal reserved water rights where a compact was not been concluded (see §85-2-231, MCA). Such decrees contain all rights other than reserved rights being negotiated. In these basins, a preliminary decree will be issued as a second step in the process and will include all rights in the temporary preliminary decree along with all reserved rights in the basin. Adjudication in basins without federal reserved rights begins with a preliminary decree. As of 2010, all decrees issued by the Water Court will be termed a preliminary decree.

Adjudication by the Water Court beyond a temporary preliminary decree has been temporarily suspended in basins with reserved water rights while negotiations for a compact are being pursued. Several basins within Montana have no federal or Indian reserved water rights subject to compact negotiations and, therefore, may proceed to preliminary and final decree. Compacts negotiated and ratified to date are:

<table>
<thead>
<tr>
<th>COMPACT</th>
<th>DATE RATIFIED</th>
</tr>
</thead>
<tbody>
<tr>
<td>o Fort Peck-Montana Compact</td>
<td>1985 Legislature</td>
</tr>
<tr>
<td>o Northern Cheyenne-Montana Compact</td>
<td>1992 Legislature</td>
</tr>
<tr>
<td>o U.S. National Park Service-Montana Compact</td>
<td>1994 Legislature</td>
</tr>
<tr>
<td>o U.S. Bureau of Land Management-Montana Compact</td>
<td>1997 Legislature</td>
</tr>
<tr>
<td>o Chippewa Cree Tribe-Montana Compact</td>
<td>1997 Legislature</td>
</tr>
<tr>
<td>o U.S. Fish and Wildlife Service-Montana Compact</td>
<td>1997 Legislature</td>
</tr>
<tr>
<td>(Black Coulee and Benton Lake National Wildlife Refuges)</td>
<td></td>
</tr>
<tr>
<td>o U.S. Fish and Wildlife Service-Montana Compact</td>
<td>1999 Legislature</td>
</tr>
<tr>
<td>(Red Rock Lakes National Wildlife Refuge)</td>
<td></td>
</tr>
<tr>
<td>o Crow Tribe-Montana Compact</td>
<td>1999 Legislature</td>
</tr>
<tr>
<td>o Fort Belknap Indian Reservation-Montana Compact</td>
<td>2001 Legislature</td>
</tr>
<tr>
<td>o Forest Service Compact</td>
<td>2007 Legislature</td>
</tr>
<tr>
<td>o U.S. Fish and Wildlife Service-Montana Compact</td>
<td>2009 Legislature</td>
</tr>
<tr>
<td>(National Bison Range)</td>
<td></td>
</tr>
</tbody>
</table>

After a temporary preliminary or preliminary decree has been issued, statute provides for a minimum 180-day review period. The water judge may extend the time limit of the review period up to two additional 90-day periods for good cause shown. An objection to the findings and conclusions stated in the decree may be filed with the Water Court by a person named in the decree, or any other person for good cause shown.

Once the objection period ends, the Water Court notifies each person who received an objection. That individual has 60 days to file a counter-objection to the claim or claims of the objector. The counter-objection is limited to those claims included in the decree and the counter-objection period cannot be extended.

The objection and counter-objection entitles the parties to a hearing before the water judge to resolve the objections.
Most objections and issue remarks are resolved prior to a hearing by settlement. After an objection/issue remark is resolved through hearings, status conferences, or stipulations, the Water Court sends updated information to the department for inclusion into the centralized water right database. Upon order from the water judge, the department prepares the next level decree (preliminary or final) for issuance. See Figure I-3 below.

**FIGURE I-3**
DECREE ISSUANCE FLOW CHART

8. **Decree Status.** The following summarizes the number of claims and basins involved in each stage of the decree process as of April, 2008. See Figure I-4, Basin Location and Adjudication Status below or http://dnrc.mt.gov/wrd/water_rts/adjudication/default.asp for most current status.

Temporary Preliminary Decrees
- 39 basins and 2 subbasins
- 96,266 claims

Preliminary Decrees
- 11 basins and 1 subbasin
- 23,262 claims

Final Decrees
- 6 basins
- 16,354 claims (Of these, 10,302 water rights were in the two Powder River basins which were examined by the department prior to the formation of the Water Court.)

Total Decrees
- 56 basins and 3 subbasins
- 128,657 claims
C. COMMENTS FROM W. W. LESSLEY, CHIEF WATER JUDGE

- We are adjudicating the waters of Montana. Water that belongs to all the people of Montana and the beneficial use of water that belongs to the claimants of that water.

- We are adjudicating the waters of Montana for the enjoyment and use of the people of Montana now and in the future.

- We must remember always that we are bound by the law, that we are not owners of this water, and that we are not to make "we know best" decisions.

- We will follow an aggressive, common-sense program seeking a balanced perspective.

- There is a job to do and we intend to do it. We will do this job as quickly as possible.

- The job we do will be as factually correct as possible. We will be following the rules that we have from the courts reasonably and sensibly.

- Our adjudication must be correct enough to withstand factual and legal analysis and attack--and this from within or without Montana.

- But with all that, we refuse to slow down on our job for absolute perfection. (That type of perfection is saved for Heaven and the Heavenly Hosts!)

- We know our job is adjudication, that is, identification, and not allocation and definitely not elimination.

- A copy of these methods, procedures, and testing shall be furnished to those working on our adjudication program in the field offices, engineers, water masters and each judge.

- We insist they be followed. They are the result of months of study, revising, testing in actual drainages. Such unified methods and procedures followed by us all will result in a finished job, a job which we will all take pride in--more important, a job that will stand.

W.W. Lessley, Chief Water Judge
Montana Water Court
(1979-1990)
D. HISTORY OF THE ADJUDICATION PROGRAM

1. Legislative History. Article IX, Section 3(1) of the Montana Constitution (adopted in 1972) states "All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." In response to this mandate, a water rights adjudication program was created by the 1973 Legislature under the Water Use Act (Senate Bill 444) to judicially and finally determine Montana’s pre-1973 water rights.

The Department of Natural Resources and Conservation (department) had the responsibility of beginning proceedings to determine existing rights under the Water Use Act. Guided by the statutes at that time, the department organized the adjudication program and selected two Powder River basins to begin gathering data essential to the proper understanding and determination of existing rights. Approximately 10,000 existing water rights were examined by the department during a five year period in preparation for the two preliminary decrees.

The 1979 Legislature significantly amended the adjudication process with the passage of Senate Bill 76 (SB76). In this legislation, the owners of the water rights were given the primary responsibility for claiming their water use and providing documentation to support their claim. In addition, a system of water judges (commonly referred to as the Water Court) with the responsibility to adjudicate water rights was established. The Water Court consists of four judges (one for each of the major water divisions in the state, i.e., Clark Fork, Yellowstone, Upper and Lower Missouri) plus a staff of water masters and clerical personnel. The chief water judge, who serves the Upper Missouri division, and all Water Court staff are located in Bozeman.

SB76 redefined the department’s role from the former adjudication process (commonly referred to as the Powder River adjudication). The department was now statutorily mandated to provide information and assistance to the water judges. In the former role, the department, as directed by the local district court, was to independently prepare draft preliminary decrees for the district court. Title 85, Chapter 2, Part 2 of the Montana Code Annotated contains the statutes to be followed in Montana’s present adjudication process.

SB76 also created the Reserved Water Rights Compact Commission. This Commission was given the authority to negotiate and quantify federal reserved water rights with those entities, primarily federal agencies and Native Americans residing on reservations, having these unique rights. Results of the compacts upon ratification by Congress and the Legislature are to be included in the Water Court decree, issued under the statewide adjudication effort.

There are several notable court actions, all interrelated to some degree, which have had significant impacts on the adjudication. Beginning on January 30, 1975 the United States and Indian tribes filed seven cases over a four year period in United States District Court. Apparently these were filed in response to the department beginning adjudication activities on the Tongue and Big Horn Rivers (under the Montana Water Use Act) and later in initiating statewide adjudication efforts (under Senate Bill 76). On November 26, 1979, the Federal District Court dismissed all seven cases in favor of ongoing statewide water right adjudication.
proceedings. The United States and the Indian tribes appealed the cases to the U.S. Circuit Court of Appeals.

The Ninth Circuit Court of Appeals consolidated the appeals for review and in Northern Cheyenne Tribe vs. Adsit ("Adsit") reversed the District Court. Then the State of Montana appealed the Circuit Court decision to the U.S. Supreme Court. On October 4, 1982 the United States Supreme Court granted Montana's petition and consolidated it with San Carlos Apache Tribe vs. Arizona. The Supreme Court, in July 1983, upheld the District Court's dismissal and stated that they were correct in deferring to the state proceedings.

2. **Claim Filing And Recordation.** Based on petitions from the Montana Attorney General, the Montana Supreme Court ordered that statements of claim for all existing water rights must be filed with the department by 5:00 p.m. on April 30, 1982. By statute, failure to file a claim as required resulted in a conclusive presumption that the water right had been abandoned.

Statement of claim forms first became available November 15, 1979. These forms were made available at ten department offices statewide, at every County Clerk and Recorder and Clerk of Court office and in many County Extension, Soil Conservation Service (SCS) or Agricultural Stabilization and Conservation Service (ASCS) offices around the state. In addition to the forms, the department made water use guide sheets, instructional brochures, and general informational brochures available.

To get the program off the ground the department, with assistance from the four water judges, conducted 19 public meetings in January and February of 1980. A total of 7,046 people attended these meetings and received specific information on the adjudication process. In addition to these public meetings and as required by statute several legal steps were taken to provide the people of Montana, especially property owners, with proper notice of the adjudication proceedings. The Water Rights Order issued by the Montana Supreme Court was printed in the 8 daily newspapers in the state and in at least 1 paper published in each county. The Order was published in a total of 59 papers within 30 days of its issuance and again during April of 1980, 1981, and 1982. To serve individual notice, the Water Rights Order and explanation were enclosed with every County Treasurer's statement of property tax in October 1979, 1980, and 1981. A copy of the Order was conspicuously posted in county courthouses within 30 days after issuance and again in 1980, 1981, and 1982.

The most successful public information and assistance efforts were the workshops conducted by the department on a regular statewide basis throughout the filing period. From January to March of 1982, 238 assistance workshops were conducted in 50 different cities. Workshops were given to many special groups including the Montana Realtors Association, County Agricultural Extension Agents, Municipalities, County Clerk and Recorders, County Clerks of Court, and agricultural organizations such as Montana Stockgrowers Association. The department conducted two seminars for the State Bar of Montana in April 1980 and participated in a third in October 1981.

Extensive use was made of all media. Public service announcements for radio and television were produced and received wide coverage. A 30-minute film entitled "Crisis at our
Headgate" received wide coverage in 1981 and early 1982. Weekly public service announcements providing workshop schedules were provided to all interested radio stations and newspapers in the state. Press releases were also sent out on a regular basis. Many, like the Stone/Dunbar/Eagle series, were major feature articles. These announcements were given good media coverage. Adjudication personnel participated in news programs and contacted media sources in their area to initiate coverage and special interest articles on the adjudication program. Direct mailings through the use of bulk mailing permits were used to announce meetings and deadlines in the fall of 1981 and early spring of 1982. Paid advertising was used moderately throughout the program. However, a fairly intensive advertising effort was made in December 1981 and March 1982.

On April 30, 1982 at 5:00 p.m. the deadline for filing Statements of Claim for existing pre-July 1, 1973 water rights passed. The department received 201,165 claims. See Figure I-5 below for a statewide breakdown by type of use.

![FIGURE I-5](image)

Approximately 56% of the claims were filed between January 1 and April 30, 1982. Approximately 45% of the claims were filed in the month of April and 60,000 claims or 30% were filed in the last week of the filing period. About 2,000 claims were received after April 30 that were postmarked April 30. To collect these filings, the department had a total of 57 people working in the adjudication program by April 30, 1982.

The department then processed and entered all Statements of Claim received into a centralized record system. To do this, the department went through a claim check process called "clarification". This process was approved by the Water Court and implemented in April 1981. Staff reviewed the claim and any attachments to ensure it was complete, clear, and
interpretable. If problems were discovered, the claimant was contacted. The DNRC’s goal was to have all claims reviewed, filmed, computerized, and filed in archives by July 11, 1983. Filming was completed in May 1983. Computerizing and filing in archives were completed in June 1983.

Approximately 5,000 water right claims have been filed with the department since the 5:00 p.m. April 30, 1982 Supreme Court deadline. In addition, 10,302 existing water uses were declared in the two Powder River basins prior to the current claims filing process. As a result, a total of over 216,000 filings for existing water uses are on record with the department for the 85 drainage basins in Montana. The number of claims in a basin ranges from 99 to 12,864.

In 1993, the Montana Legislature passed Senate Bill No. 310. This act provided for, under certain terms and conditions, the remission of the forfeiture of existing rights to the use of water caused by the failure of persons to file statements of claim on or before April 30, 1982. Accordingly, a claim of existing right not filed with the department on or before April 30, 1982, could be filed with the department on or before July 1, 1996. These are referred to as “late claims.”

On six different occasions, beginning in October, 1993 and ending in April, 1996, legal notices of the opportunity to file a late claim were published in 55 newspapers throughout the state. Copies of the notice were posted in each of the regional offices as well as the Clerk of Court’s office in every county. In addition, on June 14, 1996, the department issued a news release resulting in numerous inquiries.

The department prepared and submitted rules establishing procedures for collecting processing fees for late claims (see §85-2-225, MCA). The rules provided for the payment of $150 (in addition to any filing fee) for claims filed after April 30, 1982, but prior to July 1, 1993. The rules were filed with the Secretary of State’s Office on June 30, 1995 and published in the Montana Administrative Register Issue No. 13 dated July 13, 1995.

On October 10, 1995 and April 16, 1996, the department mailed processing fee ($150) notices.

3. Claim Review, Senate Bill 76, as encoded in §85-2-243, MCA, requires the department to provide assistance and information as may be required by the water judge. Under this statute, the department provides pertinent information and facts to the Water Court at the direction of the water judge. The department reviews all claims prior to issuance of a decree as the fulfillment of this requirement.

The department began reviewing claims in the fall of 1982 using a Water Court approved operations manual, referred to as the Verification Manual. The department "verified" over 80,000 claims. Verification included gathering, examining, and reporting data, facts, and issues pertaining to the claims of existing water rights. Typically, each of nine regional offices verified all claims within an assigned, local basin before proceeding to another basin. The verification methodology and scheduling of basins for department review varied, but was approved by the water judges.

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May 2013
Most of the claims "verified" by the department have been decreed by the Water Court in 28 temporary preliminary decrees, 7 preliminary decrees, and 4 final decrees.

4. **Stipulation.** During the summer and fall of 1985, the Montana Department of Fish, Wildlife and Parks, the United States, and other parties filed original proceedings with the Montana Supreme Court urging the court to take supervisory control of the water rights adjudication process. It was argued that the verification procedures developed by the Water Court and used by the department to examine claims were seriously flawed. The parties claimed that inequitable treatment and inadequate examination of claims would result in inaccurate decrees, and possibly nullify Montana’s adjudication process.

Negotiations were held by the various parties which led to an out-of-court stipulation. The department, although not a party, participated in these discussions. The Stipulation was submitted to the Montana Supreme Court on February 19, 1986. Following oral arguments before the Supreme Court to explain its contents and answer questions, the petitioners agreed to dismiss their complaints with the understanding that the Stipulation would be followed.

In regard to the department, the Stipulation states that the examination of water right claims will be limited to "factual analysis and the identification of issues" and that the "Water Court will refrain from participating in the verification of claims by DNRC, except the Water Court upon proper application and for good cause shown, may enjoin DNRC from acting beyond its jurisdiction in the verification process". It was also stated that the examination procedures and policies will be available to the public.

In addition, the Stipulation required that basins where temporary preliminary or preliminary decrees have been issued, the department prepare a report for each decreed basin comparing the verification procedures with the examination procedures adopted pursuant to the Stipulation. The Water Court agreed, pending the implementation of the procedural revisions described in the Stipulation which included the adoption of new verification procedures, that it would not issue any further decrees.

5. **Rules Adoption.** Following the stipulation, the department began implementing its provisions, principally the review and modification of the claims review policy and procedures. The objective was to develop a process of gathering data and identifying issues pertinent to water right claims as an independent agency, thereby assisting the Water Court in accurately adjudicating the underlying rights.

Toward this end, the question arose whether the claim examination procedures should be adopted by the department under the Montana Administrative Procedures Act (MAPA) or adopted by the Water Court. The department proceeded with the intent of rule adoption under MAPA. Two orders were issued by the Water Court during July and August, 1986 stating "that the DNRC shall not take any further action to proceed with an informal process of public review and comment...without the...express authorization of the Montana Water Courts." It further ordered "that any future failure to comply with this court’s...Order shall be deemed contempt of court."
An appeal of the Water Court's orders to the Montana Supreme Court was filed by the department on August 20, 1986. Oral arguments were held January 12, 1987. A decision was issued on March 31, 1987 affirming the Water Court orders prohibiting the department from rule adoption; however, the Supreme Court declared it would promulgate rules covering the verification of water right claims. The Supreme Court's decision went on to say that nothing in the decision "shall be taken to demean or underestimate the crucial role to be played by DNRC in the adjudication of water right claims." It termed the technical expertise, assistance, and information of the department as "indispensable for the success of the adjudication process."

With the assistance of the Water Court and the department, the Supreme Court issued a temporary version of the claim examination rules - nearly 100 pages - on July 7, 1987. The Supreme Court, without prior public comment, issued the rules with an effective date of July 15, 1987. The Supreme Court stated that public comment on the operation and effectiveness of the rules could be filed with the Supreme Court until March 15, 1988. The intention was to allow a reasonable interval for operating under the rules to determine if they promote a steady progress to final adjudication. Comments were submitted to the Supreme Court by the department, Water Court, United States government, Department of Fish, Wildlife and Parks, Montana Power Company, Washington Water and Power, and the Confederated Salish and Kootenai Tribes. To date, the Supreme Court has not acted on the comments submitted.

6. Re-examination. The stipulation required the department to file a report with the Water Court in those basins where a temporary preliminary or preliminary decree had been issued comparing the previous review procedures with those adopted by the Supreme Court. Based on the report, the Water Court, either on its own motion, at the request of the department or at the request of an individual, could order the department to re-examine all or a portion of the claims in a decreed basin. This requirement of the stipulation affected 34 decreed basins.

In July, 1987 the Water Court was advised that the department, in accordance with the stipulation, planned to complete the reports for decreed basins comparing the previous verification procedures to the Supreme Court examination procedures. The department further advised the Water Court that it believes any subsequent claim re-examination in decreed basins should be conducted prior to claim examination in non-decreed basins. Based on several orders issued in August, 1987, the Water Court ordered the department to cease preparation of comparison reports except for five basins (41G, 40C, 41C, 43A, and 40K) where review of the claims was eventually completed under the verification procedures. The reports were submitted in September, 1987. Re-examination in the five basins was denied.

On January 4, 1988, the United States filed a motion with the Water Court to:

1) produce reports comparing the previous verification procedures with the present Water Rights Claims Examination Rules in those basins where temporary preliminary or preliminary decrees have been issued; and
2) conduct re-verification in those basins for which comparison reports have already been issued.

Grounds for the motion included assertions that (1) many of the claims filed to date are inaccurate and excessive (including claims within basins that have received temporary preliminary and preliminary decrees); (2) the re-verification of basins that have been inadequately verified under the old claim examination rules is required by both state law and the McCarran amendment (43 USCS 666(a)(1952); and (3) the February 1986 stipulation requires preparation of comparison reports for the previously decreed basins.

Similar motions were filed by Washington Water Power and Montana Power Company, and a motion to intervene was filed by the Department of Fish, Wildlife and Parks. The Water Court held a hearing on these motions March 7, 1988 and issued an order and memorandum concerning the motions on May 10, 1988.

The Water Court's order denied re-examination in the five basins having comparison reports (basins 41G, 41C, 40C, 40K, and 43A), and took under advisement the motion for comparison reports for those basins where temporary preliminary or preliminary decrees have been issued "to allow the court time to specifically examine each of the many basins with thousands of claims," and to then make specific orders.

The court emphasized that the purpose of the adjudication is "to adjudicate all of Montana's pre-1973 water as soon as possible, as simply as possible and to do it accurately and under all the law applicable," and stated that "we are and will continue to give complete study to each basin as it proceeds through adjudication to its final decree."

7. Consultant's Report. Due to the numerous questions raised about the adjudication program, the 1987 legislature reduced the funding for the program by approximately half. The reasoning for the budget cut was to slow down the adjudication process and allow more time for ironing out difficulties. The program work force was reduced from 37.72 to 20 full-time employees. Seven people were laid off, others were repositioned, and vacant positions were eliminated.

The legislature also allocated $75,000.00 for an independent study of Montana's general stream adjudication to be administered by the legislative Water Policy Committee. A request for proposal for the study was advertised nationally. From a pool of 15 proposals, the law firm of Saunders, Snyder, Ross, and Dickson from Denver was chosen. The consultant's report, submitted on September 30, 1988 to the Water Policy Committee, recommended that Montana's adjudication process only needed some minor legislative fine tuning. The report says Montana's process is not "so grievously flawed as to require massive legislative overhauls".

As a result of the study, four bills were introduced and passed by the 1989 legislature to help reduce potential conflicts and clarify the previous statutes. In addition, funding for the program was increased allowing for the hiring of seven additional FTE’s, moving staff from 20 to 27 FTEs.
8. **Supreme Court Orders.** On July 13, 1989 the Montana Supreme Court issued an order amending the Water Right Claim Examination Rules based on proposed changes submitted to them by the Water Court and the department on May 8, 1989. In working with the rules since their adoption on July 15, 1987, areas were recognized where the rules were unclear, activities were minimally productive and limits on the department’s activities were not adequately defined. The amendments were to increase the efficiency and speed of examining claims, and enhance the precision and clarity with which the rules describe the examination process. The effective date for implementing the amendments was September 1, 1989. On December 18, 1990, the Montana Supreme Court issued a second order amending the Water Right Claim Examination Rules with an effective date of January 15, 1991.

The most significant revisions occurred in the proposed rules submitted to the Supreme Court on December 30, 2004. Along with changing the title of the rules to the Water Right Adjudication Rules, the proposed rules specify the practice and procedures by which the court reviews statements of water right claims on its own initiative (also called the court’s “on motion” policy), how the Water Court reviews settlement documents, and the court’s use of the department in post-decree evaluation of claims or settlement documents.

*The Water Right Adjudication Rules were adopted by the Montana Supreme Court on December 6, 2006, as a result of an interim study by the Environmental Quality Council (EQC) mandated by House Joint Resolution 4 in the 2003 legislature (resulting bills were HB22 and HB782).*

*Figure I-6, Adjudication Program Chronology, lists the more important events which have occurred in the adjudication program from 1979 to the present.*
May 11, 1979  Senate Bill 76 became effective.

May 11, 1979  Claim filing period. Original filing through deadline was January 1, 1982. This April 30, 1982 deadline was extended by the Montana Supreme Court to April 30, 1982.

April 30, 1982  Filing deadline. 200,000+ claims submitted.

April 30, 1982 through Nov. 11, 1985  Claims verified, decrees issued.

Preliminary - 7 basins, 9,930 claims
   Final - 4 basins, 5,096 claims
   Powder River Final - 2 basins, 10,302 claims
   40 basins 79,894 claims

June 18, 1985  Montana Supreme Court rules the State of Montana, as owner of the land where water is used, is the owner of the water right and not the lessee. (Pettibone decision)

July 17, 1985  DFWP filed writ of supervisory control against the Water Courts with the Montana Supreme Court.
   - substantive errors
   - procedural law errors
   - accuracy and validity of decrees questioned

Fall, 1985  Numerous other parties joined or filed suit siding either with or against the Water Court.

Dec. 2, 1985  Oral arguments were scheduled, but the parties requested and were granted a delay to negotiate out of court.

Dec. 18, 1985  Montana Supreme Court rules the Water Court has the authority to adjudicate water right claims on all Indian reservations. The court further concluded the Water Use Act is adequate to adjudicate both Indian and federal reserved rights.

Feb. 19, 1986  Stipulation signed. Helped separate role of DNRC vs Water Court. Verification by DNRC shall be limited to a factual analysis of water right claims for accuracy and completeness and the identification of issues.

April 8, 1986  Montana Supreme Court rules the ultimate measure of volume for water right claims in Montana is the amount needed for beneficial use and not the limits set in court decrees.
Spring, 1986  DNRC drafted a set of rules for claim examination. DNRC intended to adopt rules under MAPA.

Summer, 1986  Water Court order issued directing DNRC to re-examine certain groups of claims in the following basins:

- Basin 43B - MN and PG claims
- Basin 76G - MN, FW and PG claims
- Basin 41K - MN, FW, WI, CM and PG claims
- Basin 41E - MN, FW, WI, CM and PG claims
- Basin 41H - MN, FW, CM and PG claims

July 23, 1986  Water Court order issued prohibiting DNRC from adopting rules under MAPA.

August 7, 1986  DNRC issued rules informally for public comment.

August 8, 1986  Water Court order issued that DNRC take no further action on rules without express authorization of the Water Court.

August 20, 1986  DNRC appeals orders.

Sept. 26, 1986  Based on a September 25, 1986 Motion by the DNRC, the Water Court orders the re-examination of Basins 76G, 41K, 41E and 41H stopped. The stay was requested on the grounds re-examination procedures had not yet been adopted as agreed to in the Stipulation.

Jan. 12, 1987  Oral arguments before the Montana Supreme Court.

- separation of powers
- due process concerns
- conflict of interest if Water Court involved in daily DNRC examination activities

Feb. 3, 1987  Joint Appropriations Subcommittee on Natural Resources cuts $500,000 per year from adjudication program budget.

March 31, 1987  Decision issued. Affirmed the Water Court's orders. Declared that Supreme Court would promulgate rules to cover claim examination. Directed Water Court and DNRC to submit draft.

April 30, 1987  Draft rules submitted to Supreme Court.

July 1, 1987  Effective date of reduced adjudication program budget. Staff reduced from 37.72 FTE to 20 FTE for FY88 and FY89 (13 FTE in regional offices).

Comments to July 15, 1987 version of claim examination rules were received by the Supreme Court from the Confederated Salish and Kootenai Tribes; Dept. of Fish, Wildlife & Parks; Dept. of Natural Resources & Conservation; Montana Power Co.; United States of America; Washington Water & Power; and the Montana Water Court.

No action has yet been taken on comments.

August 19, 1987 Water Court orders the DNRC to report any substantial differences between the claim examination procedures and the verification manual for Basins 43A, 41G, 40K, 40C and 41C.

Fall, 1987 Water Right Claim Examination Manual drafted to provide step-by-step procedures for DNRC staff to follow in implementing the Supreme Court rules on a day-to-day basis.

Sept. 4, 1987 Report for the five basins (43A, 41G, 40K, 40C and 41C) mentioned in the August 19, 1987 order, are submitted to the Water Court.

Oct. 14, 1987 Legislature's Water Policy Committee hires Denver law firm as consultants to study the adjudication and submit a report.

Oct. 19, 1987 Water Court issues order denying re-examination of Basin 40C.


Dec. 11, 1987 Water Court issues order denying re-examination of Basin 41G.

Dec. 17, 1987 Water Court issues order denying re-examination of Basin 40K.

January 4, 1988 US Government files a Motion before the Water Court to have re-examination comparison reports prepared on all basins in Temporary Preliminary and Preliminary Decree, and that re-examination be conducted in those basins on which comparison reports had been written, i.e., 40C, 40K, 41C, 41G, and 43A.

May 10, 1988 Water Court issues Order and Memorandum denying the US Government Motion for re-examination and takes Motion for comparison reports under advisement.


May 10, 1989 Water Court and DNRC jointly submit proposed revisions to the rules to the state Supreme Court aimed at increasing pace of examination.
Spring, 1989  
1989 Legislature increases adjudication program budget by $150,000 per year for FY90 and FY91. Staff increased from 20 FTE to 27 FTE (20 FTE in regional offices).

July 13, 1989  
Supreme Court issues first Order amending the claim examination rules, with an effective date of September 1, 1989.

July 17, 1989  
Water Court rules that any claims for existing pre-1973 water rights not filed on or before the April 30, 1982 deadline are forfeited.

Sept. 1, 1989  
Dept. of Fish, Wildlife and Parks only party to submit comments and objections to the September 1, 1989 version of the claim examination rules. DFWP’s comments were overruled by the Supreme Court on November 2, 1989.

March 29, 1990  
Judge W. W. Lessley dies after serving close to eleven years as the first Chief Water Judge of the Montana Water Court.

May, 14, 1990  
C. Bruce Loble is appointed Chief Water Judge by the Montana Supreme Court.

Dec. 18, 1990  
Supreme Court issues second Order amending the claim examination rules, with an effective date of January 15, 1991.

May 6, 1992  
Montana Supreme Court affirms the July 17, 1989 decision by the Water Court that claims filed after the April 30, 1982 deadline are forfeited.

July 1, 1993  
Senate Bill 310 becomes effective. The bill provides for the conditional remission of the forfeiture of existing right caused by the failure to comply with the April 30, 1982 deadline. Water right claimants are given one more opportunity to file a water right claim in the general adjudication. The deadline for filing claims is July 1, 1996.

July 1, 1993  
1993 Legislature reduced adjudication staff from 27 to 23 FTE. (Regional office staff reduced from 20 to 17 FTE and the Helena central office staff decreased from 7 to 6 FTE.)

November, 1993  
Special Legislative session reduced adjudication budget and eliminated four regional office FTE (13 FTE in regional offices). Total program staff reduced from 23 to 19 FTE.

Feb. 8, 1995  
Water Court rules they have the right to call claims [ON MOTION OF THE WATER COURT].

April 13, 1995  
The 1995 Legislature forms an advisory committee. The chief water judge shall appoint the committee to provide recommendations on methods to improve and expedite the water adjudication process.

July 13, 1995  
Rules for collecting processing fees for late claims are adopted. Claims filed after April 30, 1982 and prior to July 1, 1993, must pay a $150 processing
fee. The Department was to send a billing invoice to the current late claim owner. The Department was to complete this mailing by June 30, 1996. Late claims filed by a state agency had until July 30, 1997 to pay the processing fee to the department.

Oct. 6, 1995  First late claim processing fee invoices mailed by the department. Payment received on 829 out of 2,050 claims (130 claims withdrawn or determined timely).

April 16, 1995  Second late claim processing fee invoices mailed. Department received payment on 261 out of 1091 claims (51 claims withdrawn determined timely).

July 1, 1996  Deadline for filing late claims. Approximately 1,950 late claims received. Total late claims filed: 4,986.

Sept. 20, 1995  Judge Loble appoints members of the Montana Water Adjudication Advisory Committee.

Oct. 1, 1996  Montana Water Adjudication Advisory Committee presents Report to the 55th Montana Legislature, the Governor, the Montana Water Court and the department.

The Committee recommended amendments to several statutes, as well as the DNRC making greater use of direct claimant contact in its examination; also recommended further study of 1) how exempt claims should be treated in the adjudication, 2) how to tabulate in a binding decree all existing water rights, permits, and change authorizations to serve as guidance to water commissioners, 3) whether there should be an institutional objector in the adjudication process, and 4) the impact subdivisions may be having on the adjudication process.


August 29, 1997  Water Court Orders department to re-examine 1122 irrigation claims in the Judith River Basin.

June 29, 2000  Department submits original final draft of the Water Right Adjudication Rules to the Water Court.

Sept. 22, 2000  Judge Loble requests comments on the Water Court’s ‘on motion’ process, the Court’s review of settlement documents, and the Court’s use of the department in post-decree assistance.

Sept. 24, 2002  Montana Supreme Court overrules 1998 Bean Lake decision, stating the prior appropriation doctrine does not require a physical diversion of water where no diversion is necessary to put water to beneficial use. Fish, wildlife and recreation uses are beneficial and that valid instream and inlake appropriations existed prior to 1973 when facts and circumstances indicated that notice of the appropriators intent had been given. Water Court instructed to identify, review and hold hearing on all pre-1973 recreation, fish and wildlife claims.
Nov. 14, 2002 Judge Loble reconvenes the Montana Water Adjudication Advisory Committee.

April, 2003 The 2003 Legislature directs the Environmental Quality Council (EQC) in HJR 4, to evaluate various elements of Montana’s water policies. Through this evaluation the EQC determined the adjudication process was taking too long. The EQC held numerous meetings and heard testimony from many concerned water users and user groups. The EQC requested budget and staffing requirements from the department and the Water Court for adjudication completion to the first decree in 10 and 15 years respectively. EQC drafted a proposal to generate fees from all water users in the state. Critical items for the department were the completion of a fully functional database and agreement to claim examination benchmarks; items for the Water Court concerned accuracy and the ‘on motion’ process.

2004 The Adjudication Advisory Committee meets throughout the year to address the accuracy, on motion, and acceleration of the adjudication process.

September, 2004 The department contracts with Northrup-Grummon to develop a summary report and decree and complete other items critical to the database.


January, 2005 House Bill 22 is introduced in the 2005 legislature. The bill implements a water adjudication fee; sets benchmarks for the department; and provides a mechanism for claimants in verified basins to have claims examined.

January, 2005 House Bill 782 is introduced in the 2005 legislature. The bill allows the Attorney General’s office to intervene in Water Court cases, and required the court to resolve all issues before final decree.

July, 2005 The adjudication program hires 2 GIS staff, 31 water right specialists, 3 central office support staff, 1 quality control specialist and creates 3 teams of 8 specialists each located in Helena just to examine claims.

December, 2005 The first HB 22 billing cycle of 108,000 adjudication fee bills were sent to water right owners for a total of $6.2 million. $5.01 million is initially collected.

September, 2006 DNRC meets the first HB 22 Benchmark by examining over 10,000 claims.

April 2007 House Bill 473 is passed by the 2007 Legislature. This bill confirms all elements of HB22 passed in 2005 except for the water rights adjudication fee, which was discontinued after one billing cycle in December 2005.

Dec. 31, 2008 DNRC meets the second HB 22 Benchmark by examining over 19,000 claims.
Dec. 31, 2010        DNRC meets the third HB 22 Benchmark by examining over 31,000 claims.

2011
In 2011 the legislature provided for the addition of an Associate Water Judge appointed by the Chief Justice of the Montana Supreme Court to work on cases as assigned by the Chief Water Judge.

2013
SB 355 of the 2013 Session provides a petition process before the Water Court for owners of existing rights exempt from filing who did not voluntarily file their exempt claims to request a judicial determination from the Water Court of their existing exempt rights claims.