

Reconciling provisional permits and final decree to get to certificates of water right



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(Comprehensive Water Review)

Adjudication And New Appropriation



July 1st, 1973

Adjudication

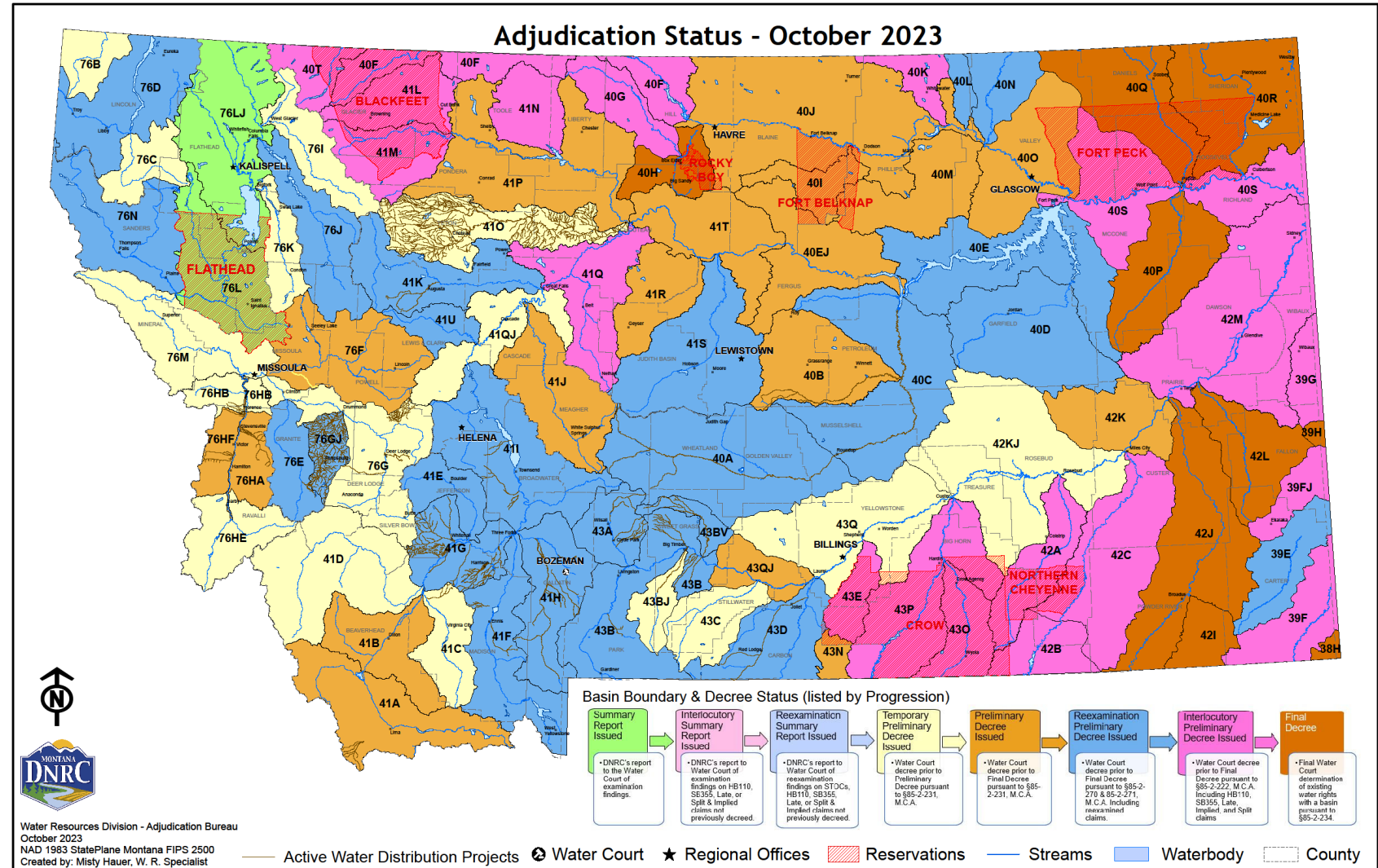
- The Montana Water Court adjudicates existing rights by basin and issues final decrees, recognizing and confirming water rights developed prior to July 1, 1973
- DNRC provides technical assistance to the Water Court
- Process has been far more expensive and time consuming than contemplated but all summary reports scheduled to be delivered to Water Court by June 30, 2025

New Appropriations

- New water rights (July 1, 1973, or newer) and changes to all existing water rights are administered by the DNRC through a permitting process and require authorization by the DNRC

Final Decrees: Montana Water Court

- 1983: 42I, 42J
- 1984: 38H, 39H
- 1985: 40P, 40L
- 2021: 40H
- 2022: 40Q, 40R



DNRC

- DNRC duties include:
 - Maintain publicly accessible centralized record system of all water rights
 - Administer New Appropriations (post-June 30, 1973, uses)
 - Administer Change Authorizations
 - Provide technical assistance to Water Court prior to Final Decree
 - Issue Certificates and manage water rights after Final Decree

Challenges:

- The Water Use Act provided that post-1973 changes could be authorized by DNRC prior to final adjudication of existing water rights. The time the adjudication has taken exceeded expectations. Due to the number of changes authorized prior to final decree, **there will be change authorizations that are inconsistent with the adjudicated water right.**
- DNRC has standard language on all changes on claims reflecting that the change is subject to adjudication proceedings under Title 85, Chapter 2, Part 2, MCA.

Goals:

- DNRC maintains accurate record of the water right
- Consistency with Final Decree
- Finality for permit and change holders after issuance of Final Decree
- Statute requires Certificates of Water Right to be issued for claims after Final Decree (85-2-236) and Provisional Permits (85-2-315)
- After Final Decree, have all water rights documented in the same manner (Certificate of Water Right)

Provisional Permit & Final Decree

- Statewide: ~12,000 permits have been issued since 7/1/1973.
- 9 basins in Final Decree
 - 500 permits issued for these basins
- These are provisional until the petition process is completed (85-2-313) and a Certificate of Water Right is issued (85-2-315)

Provisional Permits: Petition Process

- 85-2-313: Provisional Permit
 - A permit issued prior to a final determination of existing water rights is provisional and is subject to that final determination. Upon petition, the amount of the appropriation granted in a provisional permit must be reduced, modified, or revoked by the department following a show cause hearing in which it is determined that reduction, modification, or revocation is necessary to protect and **guarantee existing water rights determined in the final decree.**

Reconciling Change Authorizations with Final Decree

- Statewide: ~4900 changes issued
 - These changes are on all types of rights, including claims
- 9 basins in Final Decree
 - 67 claims in basins with Final Decree have changes on them (<1%)
 - 11 of these changes do not match Flow Rate and/or Volume of the Final Decree (16%)
 - This is a small part of the problem; but important. Without changes reconciled with Final Decree, confusion exists as to what is correct.
 - There is not currently a process to reconcile changes with Final Decree

Change Authorizations: Project Completion

- 85-2-402
 - (10) If a change in appropriation right is not completed as approved by the department or legislature or if the **terms, conditions, restrictions, and limitations of the change** in appropriation right approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change in appropriation right approval.

Version: 4 -- CHANGE AUTHORIZATION

Version Status: ACTIVE

THIS AUTHORIZATION IS LIMITED TO THE AMOUNT OF THE HISTORIC USE RECOGNIZED BY THE DEPARTMENT IN THIS PROCEEDING AS SUBJECT TO CHANGE, AND WILL THEREAFTER NOT EXCEED THAT AMOUNT. IF THE HISTORIC USE IS REDUCED UNDER ADJUDICATION PROCEEDINGS PURSUANT TO TITLE 85, CHAPTER 2, PART 2, MCA, THIS AUTHORIZATION WILL BE LIMITED TO A LESSER AMOUNT.

Example: 40R 165985-00

	Original Right received 4/30/1982 for irrigation	POD Change submitted 8/30/1974	Final Decree 12/22/2022
Flow Rate	40CFS	40CFS	7.58 CFS
Place of Use (Acres)	200 Acres	200 acres	67 Acres
Volume	200 AF/year claimed volume	196 AF/year volume issued	45 AF
Period of Use	1/1-10/31 period of diversion/use	1/1-10/31 period of diversion/use	4/1-10/31 period of diversion/use

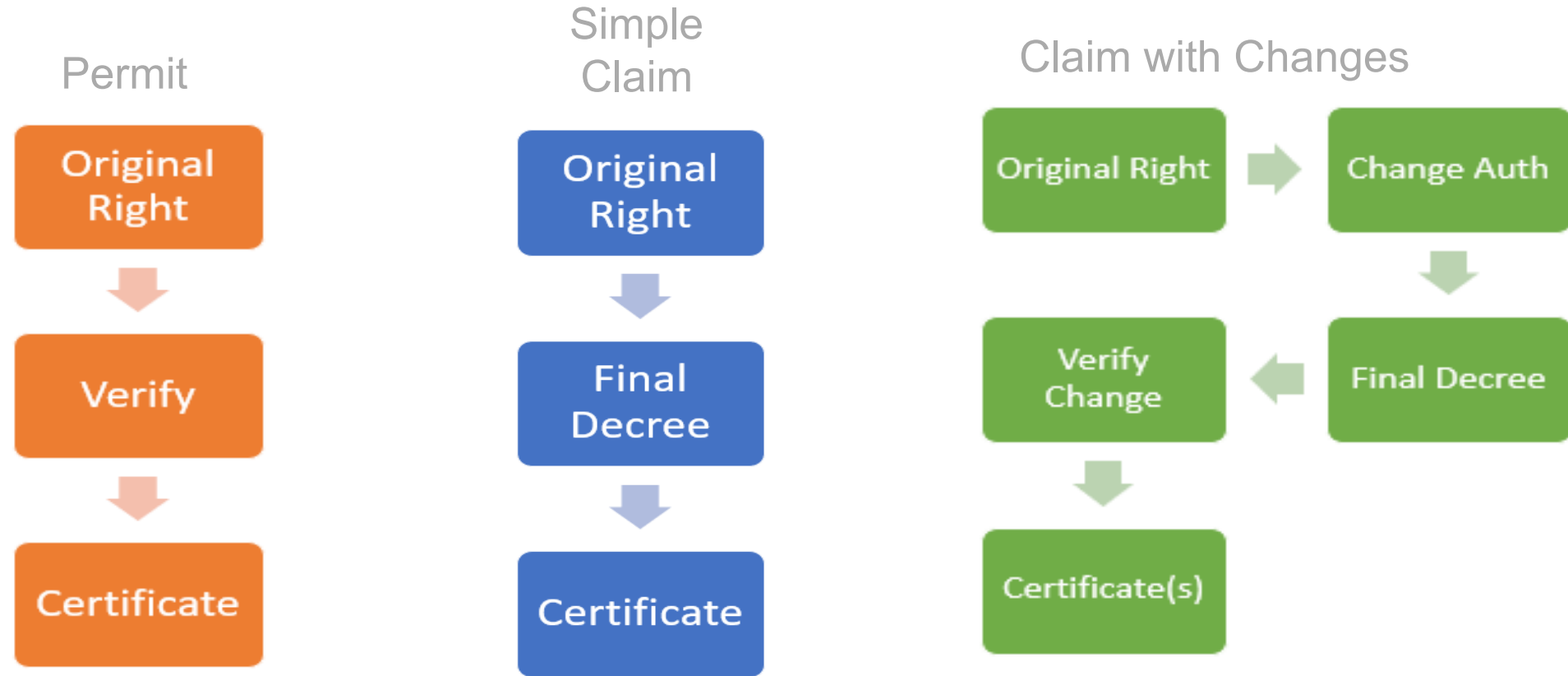
Example: 40Q 113803-00

	Original Right received 12/21/1981 for municipal	Multiple changes submitted & authorized 1985, 2001, 2020	Final Decree 12/22/2022
Flow Rate	134 GPM	134 GPM	20 GPM
Volume	120 AF/year claimed volume	120 AF/year	32 AF/year

Certificate of Water Right

- Statements of Claim (85-2-236):
 - “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.”
- Provisional Permits (85-2-315):
 - The permittee shall notify the department that the appropriation has been completed. if the department determines that the appropriation has been completed in substantial accordance with the permit, it **shall issue the permittee a certificate of water right**.
- Changes:
 - Nothing in statute that specifically states changes are documented in a Certificate of Water Right. Stands to reason they should be if everything else is.

How could it work?



Authority to Reconcile the Differences?

- 85-2-113, 311, and 402, provide that DNRC is authorized to adopt rules necessary for implementation of the WUA and permit and change criteria assessment.
- 85-2-313 provides that all permits issued prior to final decree are provisional and subject to reduction, modification or revocation if upon petition the DNRC determines it would not have issued the permit had the final decree been available.
- 85-2-314 authorizes DNRC to propose reducing, modifying, or revoking a provisional permit or change authorization.
- 85-2-315 provides that DNRC is authorized and required to issue a certificate of water right for a provisional permit completed in substantial compliance with the terms of the permit. The petition procedure is not provided for by statute. DNRC is authorized to adopt rules necessary for implementation of the act.
- 85-2-236 requires DNRC to issue a certificate of water right for each decreed water right.
- 85-2-402(9) and (10) require the owner to notify DNRC of completion of a change and authorize DNRC to propose modification or revocation of the change if conditions are not met.

Next steps

- Define process, timing and scope
 - Reconcile provisional permits with Final Decree (petition process)
 - Reconcile changes with Final Decree
- Evaluation of rule vs statute change
 - Existing authority under rule
 - Ability to modify statute
- Small working group

QUESTIONS?

