

Final Decree Transition sub working group (judiciary roles and responsibilities)

Working document for the 11.14.2023 SWG meeting

Adjudication

Review DRNC decisions

Distribution, enforcement, abandonment

Section	Title	Type of work	Adjudication Court	Divisional Court	District Court
2-4-702	(Temporary) Initiating judicial review of contested cases	Review DRNC decisions	X (expires 10/1/25)		x
3-7-101	Water divisions	Adjudication	x	x	
3-7-211	Appointment of water commissioners	Distribution, enforcement, abandonment			x
3-7-212	Enforcement of decrees	Distribution, enforcement, abandonment			x
3-7-223	(Temporary) Duties of chief water judge – operation of water court	Review DRNC decisions	X (PJR expires 10/1/25)		
3-7-501	Jurisdiction (Water Court)	Adjudication	x	x	
85-2-114	Judicial enforcement	Distribution, enforcement, abandonment			x
85-2-234	Final decree	Adjudication	x	x	
85-2-235	Appeals	Adjudication	x	x	
85-2-236	Certificate of Water Rights	Adjudication	x	x	
85-2-309	Hearings on objections - jurisdiction	Review DRNC decisions	x	x	
85-2-405	Procedure for declaring appropriation rights abandoned	Distribution, enforcement, abandonment			x
85-2-406	District court supervision of water distribution	Distribution, enforcement, abandonment			x
85-2-424 (9)	Filing – ownership	Review DRNC decisions	x	x	x

Section	Statute Title	Type of work	Adjudication Court	Divisional Court	District Court
2-4-702	(Temporary) Initiating judicial review of contested cases	Review DRNC decisions	X (expires 10/1/25)		x
3-7-223	(Temporary) Duties of chief water judge – operation of water court	Review DRNC decisions	X (PJR expires 10/1/25)		
85-2-309	Hearings on objections - jurisdiction	Review DRNC decisions	x	x	
85-2-424 (9)	Filing – ownership	Review DRNC decisions	x	x	x
3-7-101	Water divisions (general)	Adjudication	x	x	
85-2-234	Final decree	Adjudication	x	x	
85-2-235	Appeals	Adjudication	x	x	
85-2-236	Certificate of Water Rights	Adjudication	x	x	
3-7-501	Jurisdiction (Water Court)	Adjudication	x	x	
3-7-211	Appointment of water commissioners	Distribution, enforcement, abandonment			x
3-7-212	Enforcement of decrees	Distribution, enforcement, abandonment			x
85-2-114	Judicial enforcement	Distribution, enforcement, abandonment			x
85-2-405	Procedure for declaring appropriation rights abandoned	Distribution, enforcement, abandonment			x
85-2-406	District court supervision of water distribution	Distribution, enforcement, abandonment			x

Statute Text

Adjudication and Final Decrees

3-7-101. Water divisions.

To adjudicate existing water rights and to conduct hearings in cases certified under **85-2-309**, water divisions are established as defined in **3-7-102**. A water division shall be presided over by a water judge

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.

85-2-234. 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.

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.

Review agency decisions

2-4-702. (Temporary) 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 district court or the water court for judicial review of the decision. If a petition for judicial review is filed in the water court, the water court rather than the district court has jurisdiction and the provisions of this part apply to the water court in the same manner as they apply to the district court. The time for filing a petition is the same as provided in subsection (2)(a).

(ii) If more than one party 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, the district court where the appropriation right is located has jurisdiction. If more than one aggrieved party files a petition but no aggrieved party files a petition in the district court where the appropriation right is located, the first judicial district, Lewis and Clark County, has jurisdiction.

(iii) If a petition for judicial review is filed in the district court, the petition for review must be filed in the district court in the county where the appropriation right is located.

(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.

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**.

3-7-223. (Temporary) Duties of chief 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 ensure that the information is expeditiously and properly compiled and transferred to the water judge in each water division;

(b) ensuring that the water judge in each water division moves without unreasonable delay to enter the required preliminary decree; and

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

(2) conduct hearings in cases certified to the district court under **85-2-309**;

(3) conduct proceedings for petitions for judicial review filed with the water court under **2-4-702**;

(4) assign court personnel to divisions and duties as needed;

(5) assign the associate water judge to divisions and cases as needed; and

(6) request and secure the transfer of water judges between divisions as needed. (*Terminates September 30, 2025--sec. 6, Ch. 126, L. 2017.*)

3-7-223. (*Effective October 1, 2025*) **Duties of chief 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;

(b) assuring that the water judge in each water division moves without unreasonable delay to enter the required preliminary decree;

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

(2) conduct hearings in cases certified to the district court under **85-2-309**;

(3) assign court personnel to divisions and duties as needed;

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

(5) request and secure the transfer of water judges between divisions as needed.

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.

Distribution, enforcement, abandonment

85-2-114. Judicial enforcement.

(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.

3-7-211. Appointment of water commissioners.

Except as provided in **85-20-1902**, the district court having jurisdiction over the hydrologically interrelated portion of a water division, as described in **85-2-231**(3), in which the controversy arises may appoint and supervise a water commissioner as provided for in Title 85, chapter 5.

3-7-212. Enforcement of decrees.

The district court having jurisdiction may enforce the provisions of a final decree. In the absence of any final decree having been issued, the district 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.

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).