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The Adjudication of Montana's Waters – A Blueprint for Improving the Judicial Structure

by

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ARTICLES

THE ADJUDICATION OF MONTANA'S WATERS—A BLUEPRINT FOR IMPROVING THE JUDICIAL STRUCTURE

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I. INTRODUCTION

Water is the lifeblood of Montana. Few issues are more important to Montana than those concerning water and agriculture.[1] Re-

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1. T. Schwinden, *One State's Strategy for Putting Water to Beneficial Use*, in WATER SCARCITY IMPACTS ON WESTERN AGRICULTURE 437 (E. Engelbert ed. 1984).

cently, the governor of Montana said that "[i]f it's safe to say that agriculture is the wheel on which Montana's economy turns, then water is the hub of that wheel."[2] On a yearly average, irrigation currently accounts for ninety-five percent of the water withdrawn in Montana.[3] Industrial, livestock, domestic, and other uses total less than five percent.[4] In Montana, approximately 2.6 million acres are irrigated and another 10.6 million acres are classified as irrigable.[5]

As in many western states, increased use and competition for water in Montana have made shortages and conflicts a reality. Almost all the potentially good agricultural land close to water supplies has been developed. Most of the readily available and relatively inexpensive sources have been accessed. In certain locations water quality has become a problem, with increased salinity of supplies or deterioration through pollution.[6] Economic competition is increasing. Industry has a need for water in manufacturing and for power.[7] Cities demand water for residential and municipal purposes. Recreationists value water-related amenities. Finally, Montana is witnessing a rise in a conservation ethic under which the natural environment is valued as much for itself as for its exploitable potential.[8]

Projections indicate that Montana will experience modest growth in irrigated agriculture,[9] nevertheless all is not well with

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2. *Id.*

3. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA WATER USE IN 1980 18 (March 1986) [hereinafter cited as 1986 WATER USE STUDY]. Irrigation began as early as 1842 and has increased steadily. Although gravity ditch and lateral systems have been the most extensively used, sprinkler systems are becoming more and more popular, using easily portable aluminum pipes with pumps or gravity feed drawing from streams, reservoirs, or wells.

4. *Id.*

5. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, WATER USE IN MONTANA 4 (April 1975) [hereinafter cited as 1975 WATER USE STUDY].

6. In the Tongue River Basin, located in the heart of the Powder River coal area in southeastern Montana, return flows contribute to a degree of salinity that makes the expansion of irrigation nearly impractical. In northeastern Montana along the Poplar River, irrigators fear pollution from a Canadian, coal-fired generation project in the Poplar River drainage.

7. The Montana Department of Natural Resources and Conservation has pending before it large, competing applications for water use in the Yellowstone River Basin to meet energy-related demands.

8. The conservation ethic is held by those who perceive that a resource has value beyond its productivity for human purposes. It is argued that biological diversity and aesthetic values must be safeguarded for future generations and that every river need not be dammed, every acre put to seed, and every drop of water used. *See, e.g.*, P. CULHANE, PUBLIC LAND POLITICS 3 - 6 (1981).

9. OAK RIDGE NATIONAL LABORATORY, STATE WATER USE AND SOCIOECONOMIC DATA RELATED TO THE SECOND NATIONAL WATER ASSESSMENT B-5 (prepared for the U. S. Water Re-

water and agriculture in Montana or anywhere in the West.[10] Having recognized the water problem, Montana commenced the implementation of a water resource management program in the early 1970s. An essential part of the program is the determination of how much water is being legally claimed and used in Montana. This article focuses on Montana's adjudication program currently implemented by the Montana Water Court and the need for legislative change to insure an adequate adjudication.

This article is intended to direct the attention of legislators, judges, lawyers, ranchers, farmers, water resource managers, and all concerned with the adjudication of water rights in Montana to a serious consideration of a major problem in Montana's attempt to adjudicate its waters. The issue involves the questionable constitutionality of the system of water judges and the need to restructure the judicial mechanism to achieve a reasonably accurate adjudication.

Section II provides a backdrop of the current water resource picture in Montana and presents a historical review leading up to Montana's implementation of its adjudication process. Section III examines the problems surrounding the specialized water court system and the need for legislative reform. Finally, Section IV provides suggested revisions and comments for legislative consideration.

II. MONTANA WATER RESOURCES

A. *The Physical Facts*

Although Montana, like its neighboring western states, is experiencing the conflicts that are catapulting it into a new era of water resource management,[11] the state may be classified as a

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sources Council (Oak Ridge, Tenn. 1980)).

10. For an engaging discussion of the unsettled situation concerning western water law and policy, *see* Wilkinson, *Western Water Law in Transition*, 56 COLO. L. REV. 317 (1985) .

11. Since the California goldrush of the 1850s, the prior appropriation doctrine has been the basis for water resource allocation in the West. *See* 3 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 141-243, 261-649 (1971). It is a doctrine devised according to the values of the mid-nineteenth century in an era of relative plenty. The appropriation doctrine is being challenged as a response to the demands of the twenty-first century. Water users demand clean water for municipal development and industrial use. As increased salinity and point source pollutant discharges decrease crop yields, agriculture is insisting on better water quality. Maintenance of essential streamflows for aquatic and wildlife habitat, water-based recreation and aesthetic preferences is being demanded. Water diversion from the area of origin into water short areas that are experiencing growth gives rise to regional equity questions. Additionally, varied environmental concerns challenge water developments that alter wildlife habitats, dry up streams, alter landscapes, or limit land use options. Finally, it is a time in history during which society places an increasing value upon

water-rich state with water physically available to meet current needs, and ample supplies to meet future requirements.[12] However, there is a potential for downstream conflicts with other states over the consumptive water use in Montana and these conflicts exist both east and west of the Continental Divide. West of the Continental Divide in the Columbia River Basin, the upstream and downstream conflict potential is lessened by the existence of a large hydroelectric water right at the Montana-Idaho state line; the Noxon Rapids Dam has the effect of guaranteeing that practically all of the water leaving the state of Montana from the Columbia River Basin will be available to meet downstream demands. This contrasts with the situation east of the Continental Divide in the Missouri and the Yellowstone River Basins where a considerable quantity of water is available for future consumptive uses in Montana.[13] However, potential conflicts[14] threaten future development,

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unaltered natural river systems. The social goals and policies of the mid-nineteenth century will not adequately serve the twenty-first century. Therefore, it is not surprising to find water resource commentators becoming more and more involved in the debate over western water law in transition. *See generally* Wilkinson, *supra* note 10; Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483 (1982); Pring & Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MTN. MIN. L. INST. 25-I (1979); Kramer & Turner, *Prevention of Waste or Unreasonable Use of Water: The California Experience*, 1 AGRIC. L.J. 519 (1980); Howe, Alexander & Moses, *The Performance of Appropriative Water Rights Systems in the Western United States During Drought*, 22 NAT. RESOURCES J. 379 (1982).

12. *See generally* 1986 WATER USE STUDY, *supra* note 3. Montana contains 147,000 square miles of land. 121,000 square miles are in the Missouri River Basin, 25,400 square miles are in the Columbia River Basin, and 600 square miles are tributary to the Hudson Bay. Principal land uses in Montana are agricultural, including range land, crop land, and forests. Other land uses include parks and recreation, municipal, industrial, mining, military, and transportation uses. Stream flow records indicate that the average outflow of water from Montana is approximately 43,899,580 acre feet per year. 1975 WATER USE STUDY, *supra* note 5, at 24. Irrigation accounts for 3,251,000 acre feet, or 44.6 percent, of the total Montana water consumption. Reservoir evaporation consumes 3,925,000 acre feet, or another 53.8 percent. Consumption from industrial, municipal, livestock, rural, domestic, and other uses accounts for 120,000 acre feet, or 1.6 percent. *Id.* at 19.

13. There is significant hydroelectric power production on the Missouri River. There are approximately 50 megawatts of installed hydroelectric power capacity at the Bureau of Reclamation Canyon Ferry Dam. Five power facilities of the Montana Power Company have a combined capacity of 218 megawatts. Further downstream on the Missouri River is Fort Peck Dam, a federal dam, with a capacity of 165 megawatts. 37,624,000 acre feet per year of water are used in the Missouri River for hydroelectric power generation. 1986 WATER USE STUDY, *supra* note 3, at 20. The water rights claimed for these power generation facilities cloud the issue of availability of water in the basin. In November, 1987, the Montana Department of Natural Resources and Conservation, the United States of America (Bureau of Reclamation), and the Montana Power Company entered into an agreement which in part calls for an expeditious determination of the scope of existing water rights of the Montana Power Company and Bureau in the Upper Missouri River drainage.

14. Potential future conflicts in the mainstream of the Missouri result from competition between water for maintenance of instream flows to accommodate navigation and hy-

and a possibility of future water shortages in the Missouri River Basin exists. These factors create a potential for out-of-state interference with the development of future consumptive uses of water in Montana.

Because of the potential conflicts in the Missouri River Basin, Montana has prepared a strategy for the eventual allocation of water resources in this basin between the upper and lower basin states and also among states in the upper basin.[15] As part of the strategy, Montana is solidifying its water right claims to existing and future uses and is attempting to resolve the uncertainties with Indian and federal reserved water rights and with the allocation of water under the Yellowstone River Compact.[16]

One of the important actions that the state will pursue to prepare for the eventual allocation is the documentation of existing water rights and uses. The Montana Legislature selected a state-wide adjudication process to quantify Montana's claims for existing water uses and to protect the water rights in the event of an interstate water allocation. The goal of this process is a state-wide general adjudication to achieve accurate decrees that will allow Montana to defend its water resource position in the event of an allocation among the basin states.[17] Further, adjudicating water rights is necessary to administer competing water uses among water users within the state and to plan for future water development.

B. *The Adjudication Process in Montana*

Efforts to adjudicate[18] water rights in Montana began in the

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droelectric production versus depletions of water for consumptive purposes.

15. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, A WATER PROTECTION STRATEGY FOR MONTANA-MISSOURI RIVER BASIN (1982) [hereinafter cited as PROTECTION STRATEGY].

16. Act of October 30, 1951, ch. 629, 65 Stat. 663 (1951). The Yellowstone River Compact is a congressionally approved agreement between Montana, North Dakota, and Wyoming on the allocation and use of the unappropriated waters of the Yellowstone River Basin. Under the agreement, the unappropriated waters of the four major tributaries are allocated on a percentage basis between Montana and Wyoming. The allocation between Montana and North Dakota on the main stream of the Yellowstone River is determined on a proportionate basis of acreage irrigated. For a general discussion of the Yellowstone River Compact, *see* Comment, *The Yellowstone River Compact: An Overview*, 3 PUB. LAND L. REV. 179 (1982) (authored by R. Back).

17. Interstate allocation between the upper and lower basin states in the Missouri River Basin is not imminent. In excess of 16.5 million acre feet of water flow out of Montana to meet the needs of downstream states. 1975 WATER USE STUDY, *supra* note 5 at 24.

18. As used herein, the term adjudication refers to the method of ascertaining the existence and extent of water rights. In Montana, existing water rights refers to rights "to the use of water which would be protected under the law as it existed prior to July 1, 1973."

last century.[19] However, prior to 1973, an adjudication system had never been established to adjudicate all water rights in a source of supply in a single proceeding that provided finality to the determination.

Montana's pre-1973 adjudication scheme did not require that all appropriators in the source of supply be made parties to the adjudication proceedings. Consequently, any appropriator not a party to the adjudication proceeding was not bound by any decree of the court.[20] The importance of this flaw is best understood from the perspective of Montana's pre-1973 water rights acquisition procedures. Prior to July 1, 1973, an appropriator in Montana could acquire a water right in diverse ways. One prominent method for appropriating water evolved out of the passage of an 1885 statute establishing a system involving the posting of a notice at the intended point of diversion and the subsequent filing of a notice of appropriation with the county clerk and recorder.[21] This statutory right, commonly referred to as a filed right,[22] has a priority date as of the date of the posting of the notice. The water must have been dedicated to a beneficial use. Although the filed right was a matter of record, the filing did not always reflect the actual amount of water put to beneficial use and many times reflected exaggerated claims.[23]

A second mechanism involved the mere diversion and putting

MONT. CODE ANN. § 85-2-102(8) (1987). July 1, 1973 is the effective date of legislation which established a procedure for the acquisition of water rights. This statutory procedure is the exclusive method for acquiring a water right in Montana. MONT. CODE ANN. § 85-2-301(3) (1987).

19. In 1885, the Montana territorial legislature enacted a statute authorizing an appropriator to make all persons who had diverted water from the same source of supply as the appropriator parties to an adjudication proceeding in which the court had jurisdiction to enter a single judgment settling the relative priorities and rights of all the parties to such action. In 1921, the legislature adopted an exclusive and mandatory procedure requiring new appropriators on adjudicated streams to obtain district court approval before diverting water. This procedure proved ineffective and doubt exists as to whether there was a fully adjudicated stream in Montana. *See* Stone, *Are There any Adjudicated Streams in Montana?*, 19 MONT. L. REV. 19 (1957) [hereinafter cited as Stone I], for a discussion of the unreliability of adjudications in Montana. Additionally, the legislature enacted a statute giving the state engineer the discretion to initiate general adjudications, but no state engineer ever exercised the discretion. REVISED CODES OF MONTANA § 89-848 (1947) [hereinafter R.C.M. 1947].

20. State *ex rel.* McKnight v. District Court, 111 Mont. 520, 527, 111 P.2d 292, 295 (1941).

21. R.C.M. §§ 89-810, -812 (1947).

22. Filed rights are the second largest number of rights claimed under the adjudication system in progress in Montana. Interview with Larry Holman, Bureau Chief, Water Rights Bureau, Montana Department of Natural Resources and Conservation (November 10, 1986) [hereinafter cited as Holman Interview].

23. *Id.*

to beneficial use of a quantity of water.[24] This so-called "use right" required no recording or filing by the appropriator. The essential elements of a use right are the completion of the appropriation facilities with reasonable diligence, diversion of the water, and the application of the water to a beneficial use.[25] The priority date of a pre-1885 right is the date physical work on the diversion facility was commenced;[26] a post-1885 right has a priority date of the first beneficial use of the water.[27] The lack of a record of the use right introduced uncertainty and confusion in the allocation scheme.[28]

It was not until 1961 that the Montana Legislature passed a water code concerning the appropriation of groundwater. The code provided for a filing system with the priority date based upon the filing of a notice of completion.[29] Because the statute specifically provided that "[u]ntil a notice of completion is filed with respect to any use of groundwater instituted after January 1, 1962, no right to that use of water shall be recognized," failure to file a notice of completion meant that an appropriator could not claim a "use right" to groundwater after 1961.[30]

Another pertinent mechanism for appropriators to acquire a water right prior to 1973 involved sources of water previously decreed. In 1921, a statute was enacted requiring an appropriator desiring to obtain a new right on a decreed stream to petition the district court for approval of the appropriation.[31] Failure to follow the statutory provisions on a decreed stream resulted in no water right.[32] However, because of the issue of whether any stream in

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24. Based on the statement of claims filed under Montana's on-going adjudication, it is estimated that between 60 to 70 percent of the water rights claimed in Montana are "use rights." Holman Interview, *supra* note 22.

25. *See, e.g.*, Shammel v. Vogl, 144 Mont. 354, 396 P.2d 103 (1964); Midkiff v. Kincheloe, 127 Mont. 324, 263 P.2d 976 (1953); Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922); Maynard v. Watkins, 55 Mont. 54, 173 P. 551 (1918).

26. Wright v. Cruse, 37 Mont. 177, 182, 95 P. 370, 372 (1908); Murray v. Tingley, 20 Mont. 260, 268, 50 P. 723, 725 (1897).

27. Clausen v. Armington, 123 Mont. 1, 14, 212 P.2d 440, 448 (1949); Musselshell Valley Farming & Livestock Co. v. Cooley, 86 Mont. 276, 290-91, 283 P. 213, 217 (1929).

28. Most appropriation doctrine states established permitting and recording systems to collect and centralize records of existing water rights early in the century or near the turn of the century. Use rights could be obtained in Montana until June 30, 1973. (MONT. CODE ANN. § 85-2-301 (1987) made the permit process the exclusive method for acquisition of a water right, except as noted in MONT. CODE. ANN. § 85-2-306 (1987)).

29. Under the groundwater code, if the appropriator filed a notice of appropriation and a notice of completion, the priority date would relate back to the date of first notice, i.e., the notice of appropriation. If only a notice of completion was filed, the priority date would not relate back. R.C.M. §§ 89-2912, -2913 (1947).

30. R.C.M. § 89-2913 (1947).

31. R.C.M. §§ 89-829 through -838 (1947).

32. Hanson v. South Side Canal Users' Ass'n, 167 Mont. 210, 537 P.2d 325 (1975);

Montana is an adjudicated stream, it is possible that use rights may have been established after 1921 on a previously decreed stream.[33] By following the elaborate statutory procedure, an appropriator's priority date was the date of filing of the petition unless a later date was warranted by the facts of the case.[34]

Until July 1, 1973, it was also possible to acquire water rights by adverse use and prescription, condemnation, and transfer.[35] These all involved already existing rights and, consequently, are not considered to be the origin of the right for purposes of an adjudication. Also, prior to July 1, 1973, other less utilized mechanisms existed in Montana for the acquisition of water rights.[36]

The adoption of a new state constitution in 1972 compelled Montana's move to an adjudication scheme that afforded finality and conclusivity to a water right. The constitution, which replaced one adopted in 1889 upon Montana's admission to the Union, declared that the beneficial use of all water in Montana, rights-of-way for the enjoyment of the use, and sites for the storage of water are public uses;[37] that all waters within the state are the property of the state;[38] that all existing rights are recognized and confirmed;[39] and that the legislature must establish a statutory procedure for the administration, control, and regulation of water rights, and must establish a system of centralized records.[40] The latter two clauses formed the constitutional directive for the legislature to enact adjudication legislation. This broad directive to establish a system of centralized records was fortified by the narrow requirement that all existing rights to the use of water be recognized and confirmed.

An analysis of the adjudication legislation commences with a

Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); Anaconda Nat'l Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1926).

33. *See* Stone I, *supra* note 19.

34. R.C.M. § 89-829 through -838 (1947).

35. MONT. CODE ANN. § 85-2-301(3) (1987) prohibits the acquisition of water rights by adverse use and prescription, condition or transfer.

36. Other lesser known mechanisms for acquiring water rights include: (1) a hybrid of the 1885 filed rights law for state owned projects (R.C.M. § 89-121 (1947)); (2) filed rights by the state that claim instream flows for the preservation of fish and wildlife habitat (R.C.M. § 89-801(2) (1947), now repealed; see compiler's notes in the 1977 Cumulative Supplement to Volume 6, Part 1 of the 1947 Revised Codes of Montana for a reprint of the statute); (3) the filing for appropriations of water from the tributaries to the Yellowstone River that were apportioned by the Yellowstone River Compact (R.C.M. §§ 89-904 through -916 (1947)); and (4) a permitting procedure in controlled groundwater areas (R.C.M. § 89-2918 (1947)).

37. MONT. CONST. art. IX, § 3, cl. 2.

38. MONT. CONST. art. IX, § 3, cl. 3.

39. MONT. CONST. art. IX, § 3, cl. 1.

40. MONT. CONST. art. IX, § 3, cl. 4.

review of the property interest in question: an existing water right.[41] What property interest is constitutionally protected by the article IX, section 3 provision that "[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed"?[42]

Although the recognizing and confirming language may be comforting to pre-1973 water users, it must be understood that existing rights prior to 1973 were not so well-defined as to be recognizable.[43] In fact, the legislature had never enacted comprehensive legislation to assist the courts with the adjudication of water rights in Montana.[44] The decrees entered by the courts were neither permanent nor conclusive, and the water rights were neither defined nor secure.[45] As such, there is little assurance afforded by the constitutional language recognizing and confirming existing rights to the use of water. Existing rights cannot be readily recognized and confirmed for many reasons: (1) pre-1973 water right records are nearly useless; (2) adjudications that adjust a prior right cause uncertainties; (3) inquiry into original needs casts doubts upon existing rights; (4) purchasers do not know the quantity of water they are buying; (5) adjudications are inconclusive; (6) separate adjudications cannot be conjunctively administered; and (7) greater efficiency in water use may have the effect of reducing the right.[46]

The lack of good records and the existence of exaggerated filings in existing records is indicative of the fact that water rights in Montana prior to 1973 were neither quantified nor prioritized. These two elements are the essential elements in the bundle of sticks recognized as a water right.[47] Therefore, no one really knows what "existing right" is recognized and confirmed. Logically, "the existing right" can only be whatever right is determined to have existed, both as to quantity and priority, as of July 1, 1973.

Given the intent of the 1972 Montana Constitutional Convention, the specific proviso is in accord with general constitutional provisions concerning property rights in general. Article IX, section 3(1) was offered by Delegate Carl Davis.[48] In debating the arti-

41. An existing water right is statutorily defined in Montana as "a right to the use of water which would be protected under law as it existed prior to July 1, 1973." MONT. CODE ANN. § 85-2-102(8) (1987).

42. MONT. CONST. art. IX, § 3, cl. 3.

43. *See supra* text accompanying notes 20-34.

44. *Id.*

45. *See generally* Stone I, *supra* note 19; Stone, *Montana Water Rights—A New Opportunity*, 34 MONT. L. REV. 57 (1973) [hereinafter cited as Stone II].

46. For a complete understanding of the listed reasons, *see* Stone II, *supra* note 45.

47. *See* MONT. CODE ANN. § 85-2-234(5) (1987) (listing elements of a water right).

48. Carl Davis is a practicing attorney with many years of water law experience in

cle, Delegate Davis stated:

> I first should disclose that I have an interest in the subject. I'm an attorney for a water company, where we build a dam and irrigate many thousand acres of land. I also have clients who float on the water, fish in the water, and drink the water occasionally. So, I have a great interest in it. The whole purpose, just for the purpose of the journal, is to establish, in this first sentence, that all existing water rights are recognized and confirmed—so no one will get any idea that we're trying to take away any vested or existing rights. And I make that statement merely for the journal. And if there is any dissent or difference of opinion in it—I think it should be expressed, if there's other thinking.[49]

No dissent or difference of opinion was offered by any delegate.[50] Clearly, the potential loss of the right or of its value as a property right prompted Delegate Davis to act. Thus, the intent behind the provision appears to be two-fold: (1) to assure that a water right would be recognized as having the same status and afforded the same protection as any generally recognized property right; and (2) to assure water users that the new constitution was not diminishing the stature or validity of any existing claim to use water despite the lack of any existing centralized record or verification of the use of the water. Nothing in the transcript of the constitutional convention indicates that the delegates intended to bestow on existing water rights some super status above other property rights that would forever make those rights indefeasible. This rationale is supported by the very same article of the constitution, which provides that the water is the property of the state for the use of its people and subject to appropriation for beneficial use.[51] To argue otherwise would lead to an irreconcilable conflict between state ownership on the one hand and an indefeasible individual property right on the other. Such a conflict finds no support in either the express constitutional language or in the transcripts of the constitutional convention.

Montana's constitution does not create water rights. The right is one that has been created and its dimensions defined by existing

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Beaverhead County, Montana. Based on 1980 water use data Beaverhead County experienced the greatest withdrawal of irrigation water, where 1,279,000 acre feet were used to irrigate 277,000 acres. 1986 WATER USE STUDY, *supra* note 3, at 5. The extensive reliance of Beaverhead County's economy on irrigated agriculture is reflected in Delegate Davis' interest in Article IX, § 3, cl. 1.

49. V Montana Constitutional Convention 1971-72, 1302 (1981).

50. Delegate Bates, the only other delegate to make a statement, agreed, stating, "I feel it protects the appropriated and adjudicated water rights . . . ." *Id.*

51. MONT. CONST. art IX, § 3, cl. 3.

rules that stem from state law.[52] What the constitution does provide is protection of the right. When the constitution is read in *para materia* with the dimensions defined by existing state law, a water right, under Montana law, although a usufructuary right, is a vested property interest separate and distinct from surface ownership, and entitled beyond question to constitutional protection from irrational state action.

The Montana Constitution was adopted by the Constitutional Convention on March 22, 1972, and ratified by referendum of the people on June 6, 1972. In the session following its adoption the Montana Legislature responded to its constitutional mandates by enacting a statutory adjudication process.[53]

The mechanism the legislature selected in 1973 for a general and comprehensive adjudication procedure required the Montana Department of Natural Resources and Conservation (DNRC) to identify an area or source of water for adjudication and to issue an order requiring each person claiming a water right from the source of supply to file a declaration of the right within one year.[54] In 1975, the legislature required that the order commencing the adjudication be issued by the district court rather than the DNRC.[55] The legislature passed this amendment because of the growing concern that Montana's general adjudication should be purely judicial rather than administrative.[56] The criteria for selection of a source to be adjudicated was "where the need for a determination of existing rights is most urgent. . . ."[57]

Under the revised procedure, the order was issued by the district court and the state resource agency was charged with the duty of gathering and studying data, and filing the data gathered with the district court.[58] To be included within the information were all the declarations of existing rights made by the water users in the source of supply.[59] Based upon the data supplied to the district

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52. In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the United States Supreme Court stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

53. 1973 Mont. Laws 452.

54. R.C.M. § 89-872(1) (Supp. 1977).

55. R.C.M. § 89-872(1) (Supp. 1977).

56. *See infra* text accompanying notes 96-116.

57. R.C.M. § 89-870(2) (Supp. 1977).

58. R.C.M. §§ 89-870 through -874 (Supp. 1977).

59. R.C.M. § 89-872 (Supp. 1977). A declaration of existing right is a claim to the right to use water that is made under oath by the person asserting the right. The Montana De-

court, a preliminary decree was issued and served by the DNRC upon all persons who filed declarations of existing rights.[60] Thereafter, a hearing could be held on the preliminary decree in district court and any person who would be affected by the issuance of a decree had the right to appear.[61]

Ultimately, on the basis of the preliminary decree or on the basis of any hearing held on the preliminary decree, a final decree adjudicating the source of supply would be entered.[62] The final decree could be appealed to the Montana Supreme Court if the appellant had requested a hearing and appeared and entered objections to the preliminary decree, or if the appellant's rights as determined in the preliminary decree were altered as a result of a hearing on the preliminary decree.[63] If no appeal was made or once the appeal of the final decree was determined by the Montana Supreme Court, all existing rights to water in the area or source of supply were forfeited except as stated in the final decree.[64]

After enactment of the 1973 adjudication statutes, the DNRC selected the Powder River Basin in southeastern Montana for the initial adjudication.[65] After receiving declarations, the state agency

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partment of Fish and Game was authorized to file declarations for the purpose of establishing any prior and existing public recreational uses. R.C.M. § 89-872(1)(a) (Supp. 1977).

60. R.C.M. § 89-875 (Supp. 1977).

61. R.C.M. § 89-876 (Supp. 1977). The DNRC was required by statute to be a party to all hearings on a preliminary decree. R.C.M. § 89-876(5) (Supp. 1977).

62. R.C.M. § 89-877 (Supp. 1977).

63. R.C.M. § 89-878 (Supp. 1977).

64. R.C.M. § 89-877(5) (Supp. 1977). The forfeiture of an existing right under any adjudication scheme presents a constitutional issue worthy of note. It is the author's contention that there is no constitutional infirmity in a statute that effectively requires the forfeiture of an existing right. Pursuant to MONT. CODE ANN. § 85-2-226 (1987), the state has declared that a water right is of less than absolute duration. Retention is conditioned on the performance of at least one action—the filing of a claim. In Texaco, Inc. v. Short, 454 U.S. 516, 526 (1982), the United States Supreme Court stated:

> We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.

As noted in *Texaco*, the United States Supreme Court has from an early time recognized that states have the power to permit unused or abandoned interests in property to revert to another after the passage of time. *See* Hawkins v. Barney's Lessee, 5 Pet. 457 (1831); Wilson v. Iseminger, 185 U.S. 55 (1902) (wherein the Court emphasized that the statutory "extinguishment" properly could be viewed as the withdrawal of a remedy rather than the destruction of a right). Also, when the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same. El Paso v. Simmons, 379 U.S. 497, 506-07 (1965). The state of Montana's legislation is to the same effect.

65. This adjudication, triggered by an order of the DNRC, was commenced in 1974. The Powder River Basin was chosen because of the basin's impending industrial use of water, its water supply problems, and its lack of documentation of water usage.

prepared to implement a verification program in which representatives of the state would go into the field, walk the old ditches and laterals, and physically discover all of the unrecorded, unasserted, and unknown water rights. The annual appropriation for the adjudication program was approximately $180,000, and the DNRC learned quickly that the cost and time of field investigations for every declaration would be prohibitive.[66] The agency developed a policy and practice of using field investigations only in those cases where the filed declarations documented substantial changes in irrigation practices in the more recent years. By using recent aerial photographs and applying general water use standards, the state agency was able to make accurate estimates in verifying the declarations. Since most of the necessary information could be gathered by reviewing the declarations, the documents on file in the various county clerk and recorder offices, and aerial photographs, as well as by conducting claimant interviews, only about ten percent of the irrigation declarations required actual field investigations.[67]

In addition to the adjudication work commenced in the Powder River Basin, work was begun in the Tongue River Basin, Rosebud and Armells Creek basins, and the Big Horn Basin.[68] The adjudication staff of the DNRC began gathering ownership data, updating that data, and examining aerial photos, county filings and other data in these basins.[69] However, the work in these basins was halted and the district court orders requiring the filing of declarations of existing water rights were not issued because of litigation in federal court concerning jurisdiction over Indian reserved rights and non-Indian federal reserved rights.[70] As will be seen,[71] the argument over jurisdiction was an integral reason why Montana determined in 1979 to modify and accelerate the adjudication process in an effort to avoid years of litigation to quantify and prioritize

66. Letter from Laurence Siroky to G. Steven Brown (October 31, 1986) (discussing verification in the Powder River Basin from 1975 to 1982)(available from the DNRC).

67. *Id.* There is an erroneous but widespread belief in Montana that the DNRC field investigated 100 percent of the declarations and that the law required agency representatives to conduct the investigations. *See, e.g.*, A. STONE, MONTANA WATER LAW FOR THE 1980'S 5 (1981).

68. These basins, like the Powder River Basin, are located in southeastern Montana in the Yellowstone River Basin. Because of the potential of mushrooming energy development in the Yellowstone River Basin in the early 1970s, the sub-basins of the Yellowstone River Basin were identified as an area in need of an adjudication.

69. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, REPORT TO MONTANA LEGISLATURE INTERIM SUBCOMMITTEE ON WATER RIGHTS 3 (April, 1978) [hereinafter cited as DNRC INTERIM REPORT].

70. *Id.*

71. *See infra* text accompanying notes 87-98.

the water rights of the entire state.[72]

Although the initial impetus for change in the adjudication is generally perceived as the restlessness of the Montana Legislature over the speed and cost of the 1973 adjudication process,[73] the initial impetus for change in the adjudication actually came from the DNRC. The state agency was concerned that the process as defined by the 1973 legislation was not an effective general water adjudication law that could be used as an alternative to determining federal non-Indian reserved rights and Indian reserved rights in federal court. The DNRC approached the legislature in 1977, reported on the status of the adjudication in the sub-basins of the Yellowstone River Basin and urged a legislative solution. To avoid acting in haste, the legislature adopted a resolution establishing an interim committee of the legislature.[74] House Joint Resolution 81 provided for a study of the progress for and methods used to determine existing water rights in Montana. The findings of the study were to be reported to the next session of the legislature.[75]

During the legislative interim, the subcommittee met with a diverse group of water lawyers, judges, federal representatives, representatives of the several Montana Indian tribes,[76] farmers, ranchers, and state government representatives. In addition, public hearings were held throughout the state. Out of this year-long study, a recommendation for an expedited adjudication was developed.[77] The legislative report concluded that an expedited adjudication would be more advantageous to the state. These advantages included:

> (1) the elimination of confusion and uncertainty in each appropriator's existing rights;
>
> (2) the establishment of an accurate basis upon which to

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72. The experiences of the western states document that an adjudication of water rights is a time-consuming process. A review of Montana's neighboring states shows water rights statutes that date back to 1879 in Colorado, 1890 in Wyoming, 1903 in Idaho, 1905 in North Dakota, and 1907 in South Dakota. Most of the adjudications implemented under these statutes are still in progress.

73. *See, e.g.*, STONE, *supra* note 67, at 5.

74. Mont. H. J. Res. 81, 45th Leg., 1977 Mont. Laws.

75. *Id.*

76. Montana contains seven Indian reservations: the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Crow Tribe of Indians of the Crow Reservation, the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, the Blackfeet Indian Nation of the Blackfeet Reservation, the Chippewa-Cree Tribes of the Rocky Boy's Reservation, and the Gros Ventre, Sioux and Assiniboine Tribes of the Fort Belknap and Fort Peck Reservations.

77. SUBCOMMITTEE ON WATER RIGHTS, DETERMINATION OF EXISTING WATER RIGHTS—A REPORT TO THE FORTY-SIXTH LEGISLATURE (November 1978) [hereinafter LEGISLATIVE REPORT].

make decisions for the allocation of new water rights;

(3) the establishment of the amount of water put to beneficial use to assist the courts when conflicts arise between Montana residents and the federal government as to reserved water rights;

(4) the guaranteeing of a state forum for the adjudication of all rights;

(5) the reduction of the chance of expensive piecemeal litigation in low water years;

(6) the establishment of accurate records of water use for proper water planning;

(7) the establishment of a central water right record as mandated by the state constitution in a timely manner;

(8) the facilitation of the buying, selling, and transferring of water rights;

(9) the settlement of local water right issues with finality by utilizing a state assisted adjudication; and,

(10) the establishment of a more accurate adjudication by utilizing witnesses and physical evidence that might not be available if the adjudication was delayed.[78]

The described advantages were based on the estimates supplied by the DNRC that at the rate the adjudication was proceeding in the Powder River drainage under the 1973 law, the adjudication for the entire state would take over 100 years and require an expenditure of more than $50 million.[79] The state natural resource agency based this estimate on the adjudication of a projected 500,000 water rights.[80]

The legislative subcommittee identified two major objectives to be achieved with a legislative solution to the adjudication problems. The most important goal was to quantify water use rights to protect Montana water users from claims exerted by other jurisdictions and out-of-state interests.[81] Clearly, this objective was two-fold: to protect in-state use of water by quantification and to complete the quantification in a unified state proceeding. The second objective was to provide a basis for better internal administration by resolving disputes from which to determine availability of water for future appropriation.[82] To accomplish these goals, the legislative subcommittee proposed legislation that would establish a system of water judges at the level of jurisdiction of a

78. *Id.* at 9-10.

79. DNRC INTERIM REPORT, *supra* note 69, at 1.

80. Under the mandatory claims registration program implemented in 1979, the number of water right claims filed exceeds 200,000, almost 300,000 less than that estimated by the state in 1979. Holman Interview, *supra* note 22.

81. LEGISLATIVE REPORT, *supra* note 77, at 5.

82. *Id.*

state district court judge[83] and that would establish a mandatory filing system for claiming existing rights.[84]

The DNRC argued for legislation that included a mandatory claims registration program,[85] with a provision for forfeiture of any water right not claimed. The state agency, however, recommended against the creation of special water judgeships, urging the legislative adoption of a system in which the state could initiate a general stream adjudication where needed as provided in the 1973 adjudication statutes.[86] Both the legislative subcommittee[87] and the state agency[88] recognized and sought to assure that the adjudication scheme implemented would be a McCarran Amendment adjudication.[89]

As a McCarran Amendment adjudication, the quantification and prioritization of all water rights, including state-created rights and federal reserved rights, could be processed in state court. The first move to strengthen Montana's statutes as McCarran Amendment statutes occurred three years prior to the 1978 interim legis-

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83. *Id.*

84. *Id.* at 6.

85. DNRC INTERIM REPORT, *supra* note 69, at 11.

86. *Id.* at 12.

87. LEGISLATIVE REPORT, *supra* note 77, at 9.

88. DNRC INTERIM REPORT, *supra* note 69, at 1.

89. Prior to the enactment of the McCarran Amendment in 1952, water rights claimed by or through the United States were not affected by a state adjudication because the United States was immune from suit. With the passage of the McCarran Amendment, Congress consented to join the United States as a defendant in any suit for adjudication of water rights under state law. Congress provided that all water users, including those claiming through the federal government, would be bound by state adjudication. The Supreme Court has defined the scope of the amendment by applying it to Indian reserved water rights. The full text of the McCarran Amendment is found at 43 U.S.C. § 666 (1982):

> (a) Consent hereby is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> (c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

lative study. In 1975, the legislature amended Montana law to provide that a district court order would initiate the claims declaration phase of the adjudication.[90] The second more comprehensive move was the enactment of Senate Bill 76 in 1979.[91] In attempting to secure a McCarran Amendment type adjudication, the state was interested in adjudicating all water rights in state court. From the state's perspective, the situation of undefined federal and Indian reserved water left great uncertainties.[92] These included uncertainties in the limits, if any, on federal and Indian use of reserved waters and the security of present and future uses by non-Indian water users. Certainty in the development of water is based on knowledge of the priority of rights in the water source, priority being an essential element of the doctrine of prior appropriation. The doctrine of "first in time, first in right"[93] provides a necessary incentive for water appropriators to invest in expensive diversion works. Because the senior water right is strictly enforceable against later appropriators, the certainty regarding relative

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90. 1975 Mont. Laws 485.

91. 1979 Mont. Laws 697.

92. For an understanding of Indian perspectives on the adjudication of Indian water rights *see* Comment, *The Adjudication of Indian Water Rights in State Courts*, 19 U.S.F.L. REV. 27 (1984); Note, *Resolving Indian Reserved Water Rights in the Wake of San Carlos Apache Tribe*, 15 ENVTL. L. 181 (1984).

93. As the West was settled, the notion of water law carried by the settlers was that of the common law doctrine of riparian rights. But as the farmers and miners pushed across the arid West they soon recognized the need to discard their riparian notions for one better suited to non-riparian development. The greatest impetus for a substitute to riparian law is found in the customs developed by the California gold rush miners. During this time the United States did not have a clear-cut policy of establishing ownership of minerals and mining claims in this remote area of the United States. Consequently, the 1849 California miners' rules originated. The common sense law the miners applied to the minerals on the public domain was that of first in time is first in right. And since water was a vital tool of the miner, it naturally followed that if the first miner to claim the right to work an area was accorded an absolute right of priority, so too was the first user of water considered to have the prior right to appropriate the water. In 1855, the Supreme Court of California embraced this prior appropriation doctrine by looking to the current societal values, finding that the practice of respecting senior uses of water had been "firmly fixed" by "a universal sense of necessity and propriety" in the mining camps. Irwin v. Phillips, 5 Cal. 140, 146 (1855). Thereafter, in 1866 and 1870, Congress enacted a uniform set of miners' rules. In Montana, judicial recognition came in the case of Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921). The United States Supreme Court recognized the doctrine in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), which held that local laws generally govern the allocation of water in the West. The doctrine of prior appropriation represented a practical approach to orderly water use and to overcoming the problems of the federal government's control of the major sources of water on the public domain—federally owned lands. The doctrine was also the solution to the problem of the great distances that separated most productive uses from the streams. It made no sense to require miners and irrigators to own land along streams before they could use water from the watercourse; it was only equitable that the first person putting water to use should have a priority in that use of the water.

rights is guaranteed. Agriculture based families have built their homes and operations on water rights they believed to be certain. These and other water users who had been encouraged to appropriate water in accordance with state law began to discover that the federal government and the Indian tribes possessed previously unexercised water rights with a higher priority than the state-created water rights. Consequently, water that can be beneficially used is either not used at all or is not put to its highest and best use because potential water users are hesitant to invest capital in expensive diversion works until the uncertain federal and Indian water rights are resolved.

The uncertainty associated with the undefined limits of a federal right is manifested when issues exist as to the uses that water may be put to on an Indian reservation or the existence of reserved rights applicable to water used outside the exterior boundaries of a reservation. For example, water users in the Yellowstone River Basin express concern at the potential for using Indian reserved water rights for energy related developments, on and off the reservation.[94] These concerns are legitimatized by the pleadings of Indian tribes in federal adjudication proceedings requesting the federal court to quiet title to the use of all water in reservation waters with a priority from time immemorial in amounts sufficient to meet the tribe's needs for all purposes, including domestic, municipal, stock water, agricultural, industrial, environmental, and aesthetic uses, as well as other uses.[95]

Furthermore, the state's interest in maintaining a state forum stems from a perception that the division of jurisdiction between state and federal courts is offensive and the state regards the federal courts as indifferent or hostile to settled state appropriation systems. This belief is fostered by the fact that the federal reserved water rights doctrine is a doctrine created solely by the federal judiciary.[96] The federal government favors federal courts as potentially more fair to federal interests because some state water systems are seen as dominated by local interests that may be hos-

94. M. Colberg, Federal and Indian Water Cases—Status and Impact Upon Other Users (Oct. 1980) (unpublished presentation at the State Bar of Montana Water Right Institute).

95. Prayer of the first amended complaint, Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982) *infra* note 116 (available from the DNRC).

96. The development of the reserved water rights doctrine may be traced as follows: Winters v. United States, 207 U.S. 564 (1908) (doctrine recognized for an Indian tribe); Arizona v. California, 373 U.S. 546 (1963) (doctrine made applicable to all federal lands); Cappaert v. United States, 426 U.S. 128 (1976) (limited doctrine to amount of water necessary to fulfill the purpose of the reservation); United States v. New Mexico, 438 U.S. 696 (1978) (doctrine limited to the primary purpose of the federal reservation).

tile to federal claims. To a large degree the historical jurisdictional conflict between the states and the Indian tribes lends credence to the argument that state courts may be hostile to federal claims.[97]

To achieve the perceived advantages of an adjudication in a state forum compatible with the provisions of the McCarran Amendment, the Montana Legislature enacted Senate Bill 76 to "expedite and facilitate"[98] the adjudication. The goal, in part, was to win the race to the courthouse.

For the adjudication of Montana's water rights, the race to the courthouse began in 1975 when the state amended its adjudication statute to provide that the state district courts would issue the order to file declarations of existing rights.[99] Aware of the pending legislation, the Northern Cheyenne Tribe in January 1975 brought suit in the United States District Court for the District of Montana.[100] This suit sought to adjudicate water rights in the Tongue River and Rosebud Creek in Montana. Also, in March 1975, the United States brought suit in its own right and as fiduciary on behalf of the reservation tribes of the Northern Cheyenne Reservation.[101] In July 1975, the state filed petitions in state court for the determination of all existing rights in the affected basins in accordance with the recently amended state law. Those petitions involved the reserved water rights of tribes of both the Northern Cheyenne Indian Reservation and the Crow Indian Reservation. Subsequently, the United States in April 1975 filed suit in federal district court on behalf of the Crow Tribe.[102] The three federal cases were consolidated but stayed in February 1976 pending the United States Supreme Court decision in *Colorado River Conservation District v. United States*,[103] a case involving federal reserved rights that were challenged in both federal court and Colorado state court.[104]

The three cases remained dormant in the Montana federal district courts from 1976 until 1979. Prior to the federal courts taking

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97. *See, e.g.*, Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 How. L. J. 3 (1984).

98. 1979 Mont. Laws 697, sec. 1.

99. *See supra* text accompanying note 90.

100. Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Tongue River Water Users Ass'n, No. CV-75-6-BLG (D. Mont., filed Jan. 30, 1975).

101. United States v. Tongue River Water Users Ass'n, No. CV-75-20-BLG (D. Mont., filed March 7, 1975).

102. United States v. Big Horn Low Line Canal, No. CV-75-34-BLG (D. Mont., filed April 17, 1975).

103. 424 U.S. 800 (1976).

104. The United States Supreme Court held that state courts had jurisdiction over federal reserved rights, including Indian reserved rights. *Id.* at 811-12.

any dispositive action in November 1979,[105] Senate Bill 76 was introduced in the state legislature to amend the Water Use Act to revamp the state adjudication process into a state-wide general adjudication process. Representatives of the federal government and various Indian tribes attended the legislative hearings regarding the adjudication legislation. Those representatives supported amending the proposed legislation to exclude reserved water rights from the adjudication process.[106] One amendment proposed by the Montana Inter-Tribal Policy Board specifically provided that the state adjudication laws "not apply to any water rights owned by any Indian or Indian Tribe."[107] The tribes maintained that to include Indian rights in a state general adjudication would be "illegal" and "totally contrary to all federal laws."[108]

At the April 4, 1979, meeting of the Select Committee on Water, the legislative committee voted to include tribal and federal water rights in Senate Bill 76.[109] On April 5, 1979, the chairman of the Select Committee on Water informed the committee that an official of the United States Department of Interior had stated that if the committee included federal and Indian reserved water rights in Montana's adjudication program, the federal government would immediately initiate an adjudication of federal reserved water rights in federal court.[110] On notification that the committee would not exclude federal and Indian reserved water rights, the United States on April 5, 1979, filed four actions in Montana federal district courts seeking the declaration of water rights on behalf of the United States and the tribes of the various Indian reservations in Montana.[111] These and the three previous federal lawsuits[112] in-

105. In November 1979, the Montana federal district court judges issued a joint opinion dismissing all federal actions. Northern Cheyenne Tribe v. Tongue River Water Users Ass'n, 484 F. Supp. 31 (1979). The Indian tribes and the federal government appealed to the Ninth Circuit. The Ninth Circuit Court reversed in favor of federal jurisdiction. Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982). In turn, the United States Supreme Court reversed the Ninth Circuit Court. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

106. *Adjudication of Existing Water Rights in Montana: Hearings on S.B. 76 Before the Select Committee on Water*, 46th Leg. (March 12, 29 and April 4, 5, 1979) (statements of tribal representatives from Confederated Salish and Kootenai Tribes, Blackfeet Nation, Chippewa-Cree Tribe and Crow Tribe) [hereinafter cited as *Select Comm. Hearing*].

107. *Adjudication of Existing Water Rights in Montana: Hearings on S.B. 76 Before the Senate Agriculture, Livestock & Irrigation Committee*, 46th Leg. (Jan. 26, 1979); (statement of Philip Roy on behalf of Montana Inter-Tribal Policy Board) [hereinafter cited as *Senate Hearing*].

108. *Id.*

109. *See Select Comm. Hearing*, (April 4, 1979), *supra* note 106.

110. *See Select Comm. Hearing*, (April 5, 1979), *supra* note 106.

111. United States v. Aasheim, No. CV-79-BLG (D. Mont., filed April 5, 1979); United States v. Aageson, No. CV-79-21-GF (D. Mont., filed April 5, 1979); United States v. AMS

volving a total of 9,000 defendants put at issue the quantification of federal and Indian reserved rights in Montana. Despite the filing of the federal lawsuits, the Montana Legislature enacted Senate Bill 76 and, in June 1979, the Montana Supreme Court issued an order implementing the adjudication of all water right claims in a systematic state general adjudication in state court.

With adjudications pending in both state and federal courts, the question was raised as to who had won the race to the courthouse, or whether it mattered. The issue developed out of the belief that the forum for adjudication of federal and Indian reserved rights depended in part upon who won the race to the courthouse. If an adjudication proceeding was initiated and diligently prosecuted in the first instance in state court, it was believed that the state court would be able to continue its jurisdiction. On the other hand, if the suit was initiated and diligently prosecuted in federal court, then it was believed that the federal court would not be required to give way to state court on the basis of abstention. This logic was based upon the facts underlying the United States Supreme Court decisions in *United States v. District Court for Eagle County*,[113] *United States v. District Court for Water Division No. 5*,[114] and *Colorado River Conservation District v. United States*.[115] Consequently, a major impetus to expedite and facilitate the adjudication was for Montana to be in a position to reach the courthouse with a comprehensive adjudication before similar federal lawsuits were filed. This is one reason why the federal government and the various Indian tribes filed their lawsuits prior to the time that Montana's general adjudication scheme was signed into law by the governor.

It was not until the United States Supreme Court decided *Arizona v. San Carlos Apache Tribe*[116] that it became explicitly clear

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Ranch, No. CV-79-22-GF (D. Mont., filed April 5, 1979); United States v. Abell, No. CV-79-33-M (D. Mont., filed April 5, 1979) (all actions stayed).

112. Northern Cheyenne Tribe v. Tongue River Water Users Ass'n, No. CV-75-6-BLG (D. Mont., filed Jan. 30, 1975); United States v. Tongue River Water Users Ass'n, No. CV-75-20-BLG (D. Mont., filed March 7, 1975); United States v. Big Horn Low Line Canal, No. CV-75-34-BLG (D. Mont., filed April 17, 1975).

113. 401 U.S. 520 (1971).

114. 401 U.S. 527 (1971).

115. 424 U.S. 800 (1976).

116. 463 U.S. 545 (1983). The *San Carlos Apache Tribe* decision arose out of three separate consolidated appeals that were decided within three days of each other by the same panel of the Ninth Circuit Court of Appeals: San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982); Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982); and Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982). *Adsit* included the consolidation of all seven of the Montana federal adjudication cases.

that the test was not one of a race to the courthouse. In *San Carlos Apache Tribe*, the United States Supreme Court held that deference will be given to the more comprehensive state process and the Court will not sanction the potential for duplicative and wasteful litigation resulting in inconsistent dispositions of property should the federal and state proceedings both continue.

The Montana Legislature did not have the benefit of the *San Carlos Apache Tribe* decision in 1979. Nevertheless, the decision of whether to follow the recommendation of the DNRC to adjudicate on a basin-by-basin basis[117] or to follow the recommendation of the Water Rights Subcommittee to adopt a comprehensive state-wide adjudication had to be made.[118] The legislature opted for the latter system.

Under the general state-wide stream adjudication system, the process was initiated by an order of the Montana Supreme Court mandating the filing of claims of existing water rights.[119] The failure to file a claim of water right establishes a statutorily conclusive presumption of abandonment.[120] The legislature provided that all claims had to be filed by June 30, 1983, unless the Montana Supreme Court ordered a shorter claims filing period upon petition of the attorney general in those basins where state jurisdiction was being challenged by the federal government.[121] Because of the seven pending federal adjudication actions,[122] the attorney general determined that a jurisdictional challenge affected every major drainage in Montana. Consequently, the state supreme court ordered the mandatory claims process to be completed by April 30, 1982.[123]

Once filed, a claim constitutes *prima facie* proof of its content[124] in the adjudication proceeding. The process allows the

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117. *See* DNRC INTERIM REPORT, *supra* note 69, at 12.

118. *See* LEGISLATIVE REPORT, *supra* note 77, at 1.

119. MONT. CODE ANN. §§ 85-2-211 through -214 (1987). The only water rights exempted from the claims filing requirement (and the adjudication process) are instream livestock and domestic uses, groundwater livestock and domestic uses, and rights declared under the Powder River Basin adjudication. MONT. CODE ANN. § 85-2-222 (1987).

120. MONT. CODE ANN. § 85-2-226 (1987). The legislature provided that all claims be filed prior to June 30, 1983, but allowed for a shorter claims filing period upon petition of the attorney general. *See also supra* note 64.

121. MONT. CODE ANN. § 85-2-212 (1987).

122. *See supra* text accompanying notes 100-02, and 111.

123. *In re* Petition of Attorney General for an Order Requiring the Filing of Statements of Claims to the Use of Water in Montana, No. 14833 (Mont. Dec. 7, 1981) (order extending the final date for filing statement of claims to existing rights to the use of water). This order apparently will not be reported in either the Montana or Pacific Reports. *See* In re Water Rights Order, 36 St. Rep. 1228 (1979).

124. MONT. CODE ANN. § 85-2-227 (1987). The statute provides that the claim "consti-

DNRC, subject to the direction of a water judge, to provide information and assistance to the water judge and to conduct field investigations of claims.[125] Thereafter, the water judge is responsible for filing a preliminary decree;[126] objections may be filed,[127] and hearings held on the objections.[128] After the hearings, a final decree is to be issued subject to appeal to the Montana Supreme Court.[129] Although the process is a state-wide adjudication, the legislature provided no specific time frame in which to complete the process. The legislative mandate was simply phrased to "expedite and to facilitate" the existing adjudication.[130] Further, the legislature provided that a preliminary decree could be issued for portions of a basin.[131] This legislative direction leaves to speculation the precise timing of the completion of the adjudication. At a minimum, it can be concluded that the legislature intended a reasonable time period of less than one hundred years in duration.[132]

Although the *San Carlos Apache Tribe* decision cleared up the "race to the courthouse" issue and culminated a nine-year legal battle by Montana authorities to secure a state court forum for the adjudication of all water rights in Montana, it did not decide all issues concerning the adequacy of the Montana proceedings to adjudicate all water rights.[133] In response to the specific questions left to state determination by the federal courts, the Montana Attorney General commenced an action in the Montana Supreme Court in August 1984.[134] The court in *State ex rel. Greely* ad-

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tutes prima facie proof of its content until the issuance of a final decree." Since the final decree ends the process, it is doubtful that the legislature intended other than to give a claim *prima facie* status until controverted or overcome by other competent evidence.

125. MONT. CODE ANN. § 85-2-243 (1987).

126. MONT. CODE ANN. § 85-2-231 (1987).

127. MONT. CODE ANN. § 85-2-233 (1987).

128. MONT. CODE ANN. § 85-2-233 (1987).

129. MONT. CODE ANN. §§ 85-2-234, -235 (1987).

130. 1979 Mont. Laws 697, § 1.

131. MONT. CODE ANN. § 85-2-231(2)(1987).

132. *See supra* text accompanying note 79.

133. For example, specific questions reserved for consideration on remand and left open for state determination by the Ninth Circuit Court of Appeals included: (1) the question of jurisdiction under state law, and (2) the question of adequacy of the state process to adjudicate the reserved water rights of the federal government and the Indians. Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187, 1188-89 (9th Cir. 1983).

134. The action was originally commenced as an action against the water courts. State *ex rel.* Greely v. Water Court, ___ Mont. ___, 691 P.2d 833 (1984). The Montana Supreme Court realigned the parties making the attorney general and the water court co-petitioners and naming the United States and tribes as respondents, but granting the tribes an opportunity to request dismissal. *Id.* at 840. All of the tribes withdrew as parties and decided to participate as amici curiae. The Confederated Salish and Kootenai Tribe, the Crow Tribe and the Northern Cheyenne Tribe were reinstated as respondents. The United States appeared individually and as trustee for all the tribes with land in Montana. State *ex rel.*

dressed three issues: (1) whether the Montana Water Court was prohibited from exercising jurisdiction over Indian reserved water rights based on article I of the 1972 Montana Constitution; (2) whether the Montana adjudication statutes were adequate to adjudicate Indian reserved water rights; and, (3) whether the statutes were adequate to adjudicate non-Indian reserved water rights. The Montana Supreme Court held that the disclaimer language in article I of the 1972 Constitution did not bar state jurisdiction to adjudicate Indian reserved water rights in state court proceedings,[135] and that the state adjudication statutes are adequate on their face to adjudicate Indian reserved water rights[136] and non-Indian reserved water rights.[137] The court limited its decision, stating that "[a]ctual violations of procedural due process and other issues regarding the Act as applied are reviewable on appeal after a factual record is established."[138]

Even before the Montana Supreme Court left open the door to all fact-based challenges to the adjudication process,[139] various parties were proceeding with legal challenges to the adjudication process on an as-applied basis.[140] To date, however, no one has raised in court the most basic of issues: the constitutional jurisdiction of the water judges. The next part of this article examines the jurisdictional issue of the constitutionality of the Montana water judges and associated problems with restructuring the judicial system.

Greely v. The Confederated Salish and Kootenai Tribes, ___ Mont. ___, 712 P.2d 754 (1985).

135. State *ex rel.* Greely v. The Confederated Salish and Kootenai Tribes, ___ Mont. ___, ___, 712 P.2d 754, 762 (1985).

136. *Id.* at 766.

137. *Id.* at 768.

138. *Id.* at 765.

139. *Id.* at 768. For a more detailed discussion of State *ex rel.* Greely v. Water Court and State *ex rel.* Greely v. The Confederated Salish and Kootenai Tribes, *see* MacIntyre; *Quantification of Indian Reserved Water Rights in Montana; State ex rel. Greely In the Footsteps of San Carlos Apache Tribe*, 8 PUB. LAND L. REV. 33 (1987).

140. Four causes of action were filed with the Montana Supreme Court prior to the issuance of the court's opinion in State *ex rel.* Greely v. The Confederated Salish and Kootenai Tribes. These were Montana Department of Fish, Wildlife and Parks v. Water Court, No. 85-345 (filed July 17, 1985) (petition for writ of supervisory control or, in the alternative, for administrative supervision of the water court); Skelton Ranch, Inc. v. Water Court, No. 85-351 (filed July 18, 1985) (petition for writ of supervisory control or, in the alternative, for administrative supervision of the water court) (remanded by supreme court to water court; plaintiffs subsequently participated as *amici* in *Montana Dept. of Fish, Wildlife and Parks*, No. 85-345); McDonald v. State, No. 85-468 (filed Sept. 20, 1985) (application to file original proceeding and complaint for declaratory judgment); United States v. Water Court, No. 85-493 (filed Oct. 7, 1985) (petition for writ of supervisory control).

III. WATER COURT ISSUES AFFECTING THE ADEQUACY OF MONTANA'S ADJUDICATION

A. *The Constitutional Issue*

One of the major elements of Montana's 1979 legislative attempt to establish a McCarran Amendment adjudication was the establishment of a system of water courts. The Subcommittee on Water Rights recommended that the water court be established at the level of jurisdiction of the state district courts, with authority to handle all water cases, and be divided into four distinct districts with one judge per district to be appointed by the governor for a fixed term. The water courts were to be dismantled when the statewide adjudication was finished.[141] The legislature responded by providing for a system of water judges within the existing structure of state district courts. This was accomplished by establishing four water divisions whose boundaries are formed by the natural divides between the major drainages and the state borders.[142] Each water division is presided over by a water judge[143] who presides as a district judge in and for each judicial district wholly or partly within the water division.[144] A water judge is selected by a majority vote of a committee composed of the chief district judge from each multiple judge judicial district and the district judge from each single judge judicial district, wholly or partly within the division.[145] To be eligible for election, an individual must be a district judge or a retired district judge.[146] The term of office for a water judge is a four-year fixed term.[147] The jurisdiction of each judicial district

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141. LEGISLATIVE REPORT, *supra* note 77, at 5-6.

142. MONT. CODE ANN. § 3-7-102 (1987). The four divisions are:

(1) The Yellowstone River Basin Water Division consists of those areas drained by the Yellowstone and Little Missouri Rivers and any remaining areas in Carter County.

(2) The Lower Missouri River Basin Water Division consists of those areas drained by the Missouri River from below the mouth of the Marias River and any remaining areas in Glacier and Sheridan Counties.

(3) The Upper Missouri River Basin Water Division consists of those areas drained by the Missouri River to below the mouth of the Marias River.

(4) The Clark Fork River Basin Water Division consists of the areas drained by the Clark Fork River, the Kootenai River, and any remaining areas in Lincoln County.

143. MONT. CODE ANN. § 3-7-101 (1987).

144. MONT. CODE ANN. § 3-7-201(3) (1987).

145. MONT. CODE ANN. § 3-7-201(1) (1987).

146. MONT. CODE ANN. § 3-7-201(2) (1987). Senate Bill 76 provided for water judges to be selected from district court judges. Retired district court judges were made eligible by amendment in 1981. 1981 Montana Laws 80.

147. MONT. CODE ANN. § 3-7-202 (1987). The initial term of office lasted approximately six years, that is, from the date of appointment to June 30, 1985.

concerning the adjudication is exercised exclusively by the district court through the water division by a water judge.[148] This specialized system of water judges created within the existing district court system is generally referred to as the water court.

The administration of the water court has been placed in a chief water judge who is appointed by the chief justice of the Montana Supreme Court from a list of nominees submitted by the judicial nomination committee.[149] The term fixed for the chief water judge corresponds to that of a water judge.[150] The life of the water court itself is subject to termination by the legislature.[151] Although the subcommittee recommendation was to dismantle the water court upon completion of the state-wide adjudication, the law itself contains no such clause. Instead the legislature chose to tie the terms of the water judges to a period of "[four] years, subject to continuation of the water divisions by the legislature."[152] However, in 1985 the legislature enacted legislation vesting jurisdiction in the water court to determine questions of law and fact certified to it by the DNRC involving water allocation decisions by the state agency.[153] This legislation effectively made the water court a permanent part of the judiciary.

Although the constitutionality of the water court has not been raised in any court in the eight years of its existence, the legislature was obviously concerned initially with the potential of a constitutional challenge to a specialized water court system.[154] In the

148. MONT. CODE ANN. § 3-7-501 (1985).

149. MONT. CODE ANN. §§ 3-1-1010, 3-7-221(1) (1987). Prior to 1987 the appointment was made from among the district court judges serving or retired as of the time of the appointment. Although the statute does not require the appointment of a chief water judge from one of the four water judges elected from a water division, the Montana Supreme Court has always appointed a water judge as the chief water judge. MONT. CODE ANN. § 3-7-224 (1985) provides that the chief water judge may serve as a water judge for one of the water divisions.

150. MONT. CODE ANN. § 3-7-221(2) (1987).

151. MONT. CODE ANN. §§ 3-7-202, -221 (1987).

152. MONT. CODE ANN. §§ 3-7-202, -221 (1987).

153. 1985 Montana Laws 596, provides in pertinent part that "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." MONT. CODE ANN. § 85-2-309 (1985).

154. Interview with Robert N. Lane, staff counsel for the Senate Agriculture, Livestock and Irrigation Committee, 46th Leg. (October 14, 1986). The main concern of the many legislators and water law attorneys involved in the passage of legislation establishing a specialized water court was that the legislature not establish a statutory court system outside of the existing district court system provided for in article VII, section 1 of the 1972 Montana Constitution. *Id.* However, because the legislative record does not include the many discussions which occurred on this subject, it may be expected that if a constitutional challenge is raised under the theory expressed in this article, the defense would include the

committee hearings, arguments were made that the water judges would have too much power[155] and that a constitutional amendment was needed to establish a separate system of water judges.[156] One of the co-sponsors of the legislation flatly stated that he believed there was a constitutional problem concerning the jurisdiction of the water judges and that a constitutional amendment would solve the problem.[157] But regardless of the concern over a constitutional problem, the legislative committee drafting the final proposed bill clearly intended that the water judges be a part of the existing district court system.[158]

The constitutional issue created by the passage of Senate Bill 76 is whether the state constitution requires an elected judiciary. As enacted in 1979, Senate Bill 76 required that a water judge be a district court judge.[159] This requirement is in accord with the constitutional proviso that "[t]he judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law."[160] No attempt was made by the legislature to create "such other court." Both the legislative history and the statutes clearly establish that a water judge exercises his powers as a district judge in and for the judicial district affected by the exercise of jurisdiction.[161] Consequently, the constitutional issue must be addressed in terms of the existence of the water court as an integral part of Montana's system of judicial district courts.

Montana adopted a constitution in 1972 that totally superseded its 1889 constitution. The 1889 constitution provided that the state be divided into judicial districts and that a judge be elected by the electors of each judicial district.[162] The Montana Supreme Court construed this constitutional provision to establish the power of the electors of each district to choose their district court judge.[163] The 1972 Constitutional Convention rewrote the

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argument that a statutory court has been established. Because the author believes that the water judges were intended to be judges of the district court, this article leaves the discussion of that defense to some future commentator or court.

155. *Select Comm. Hearing* (January 19, 1979), *supra* note 121 (statement of Carl Davis representing the Clark Canyon West Company).

156. *Senate Hearing* (January 26, 1979), *supra* note 107 (statement of Ron Waterman representing Burlington Northern, Inc.).

157. *Senate Hearing* (January 29, 1979), *supra* note 107 (statement of Senator Steve Brown representing Senate District 15).

158. *Select Comm. Hearing* (April 4, 1979), *supra* note 106 (statement of Representative John Scully, Chairman of the subcommittee of the House Select Committee on Water).

159. 1981 Mont. Laws 80. *See supra* note 146.

160. MONT. CONST. art. VII, § 1.

161. *See supra* text accompanying notes 142-48.

162. MONT. CONST. of 1889, art. VIII, § 12.

163. State *ex rel.* Scharnikow v. Hogan, 24 Mont. 383, 62 P. 583 (1900).

constitutional provision establishing the Montana judiciary, but the requirement of an elected judiciary remained. The provision mandating an elective process was transferred from the section concerning judicial districts to a separate section governing the selection, election and filling of vacancies. This selection process of the 1972 Montana Constitution is set out in article VII:

> Section 8. Selection. (1) The governor shall nominate a replacement from nominees selected in the manner provided by law for any vacancy in the office of the supreme court justice or district court judge. If the governor fails to nominate within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the nomination. Each nomination shall be confirmed by the senate, but a nomination made while the senate is not in session shall be effective as an appointment until the end of the next session. If the nomination is not confirmed, the office shall be vacant and another selection and nomination shall be made.
>
> (2) If, at the first election after senate confirmation, and at the election before each succeeding term of office, any candidate other than the incumbent justice or district judge files for election to that office, the name of the incumbent shall be placed on the ballot. If there is no election contest for the office, the name of the incumbent shall nevertheless be placed on the general election ballot to allow voters of the state or district to approve or reject him. If an incumbent is rejected, another selection and nomination shall be made.
>
> (3) If an incumbent does not run, there shall be an election for the office.[164]

Although the Montana case law interpreting article VII, section 8, has involved the appointment of judges to fill vacancies and the need to include unopposed incumbents on an election ballot, the Montana Supreme Court has held that the election requirement imposed by the 1889 constitution remained as a requirement in the revised 1972 constitution.

In construing the intent of the 1972 Constitutional Convention concerning article VII, section 8(2), the Montana Supreme Court ruled in *Keller v. Smith*[165] as follows:

> The best indication of the intent of the framers is found in the explanatory notes as prepared by the Constitutional Convention. These provide in pertinent part, following Article VII, Section 8, 1972 Montana Constitution:

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164. MONT. CONST. art. VII, § 8.
165. 170 Mont. 399, 553 P.2d 1002 (1976).

> "Convention Notes
>
> "Revises 1889 constitution * * * Contested election of judges is not changed, however if a judge in office does not have an opponent in an election his name will be put on the ballot anyway and the people asked to approve or reject him * * * "
>
> This expresses the intent of the delegates to the Constitutional Convention and the meaning they attached to the new constitution they framed and adopted.[166]

Again in 1976, the Montana Supreme Court addressed the same constitutional convention notes in *Yunker v. Murray*.[167] In this case the incumbent judges of the thirteenth judicial district argued that they could escape the constitutional requirement that unopposed judges are subject to voter approval on a retain or reject ballot because they had filed for election in separate departments of a multi-judge district and, thus, were no longer incumbents subject to voter retention or rejection. Stating that the contested election of judges had not been changed by the implementation of the 1972 constitution, the Montana Supreme Court construed the constitutional proviso requiring "unopposed incumbent judges" to encompass all district court judges, and required the judges to be subject to public scrutiny at the ballot box. In so doing, the court established a rule of construction for all statutes regulating the citizen's right to vote. Because the rights of citizens to vote are of great public interest, the statutes regulating these rights are to be interpreted "with a view to securing for citizens their right to vote and to insure the election of those officers who are the people's choice."[168]

The active district court judges that have been designated as water judges by the other district court judges in the respective water divisions serve as constitutionally qualified district judges only for the judicial district in which they serve. Consequently, no constitutional problem is raised when the water judge exercises jurisdiction in the judicial district he is elected to serve. The constitutional problem is raised when the water judge exercises jurisdiction beyond the judicial district he serves. No elector within the water division, except within the judge's own judicial district, has ever cast a vote approving the water judge as the "people's choice" to exercise judicial powers over them. Rather the water judge has been designated by a "vote of a committee" of his fellow district

166. *Id.* at 406, 553 P.2d at 1007.

167. 170 Mont. 427, 554 P.2d 285 (1976).

168. *Id.* at 434, 554 P.2d at 289 (quoting *Keller*, 170 Mont. at 408, 553 P.2d at 1008, quoting 3 SUTHERLAND, STATUTORY CONSTRUCTION, § 71.15 (4th ed. 1984)).

court judges.[169]

It is unlikely that the designation of a water judge through an election by judicial peers is a constitutional substitute for an election by the qualified electors.[170] The Montana Supreme Court held in both the *Keller* and *Yunker* cases that the 1972 Montana Constitution did not change the election requirement for district court judges.

The Montana Supreme Court has always treated the citizens' right to vote for their judges as constitutionally significant. As early as 1900, the supreme court soundly rejected the argument that a consolidated system of party conventions satisfied the election requirement.[171] More recently, the election required by article VII, section 8, was addressed in a case where the court held that electors have standing to bring a cause of action on their right to vote for district court judges.[172] In a declaratory judgment action brought by a group of registered voters who intended to exercise their voting rights in the primary and general elections, the Montana high court held that the right to vote is a personal and constitutional right.[173] In rendering its decision, the court recognized that, as a general rule, private citizens may not restrain official acts when the citizens fail to allege and prove damages distinct from the harm sustained by the general public, but that an elector who is denied his personal and constitutional right to vote "is sufficiently affected to invoke the judicial power to challenge the validity of the act which denies him the right."[174] The affirmative ruling in the case (that the electors had standing to bring the action) supports the argument that the electors' right to vote can not be replaced by an election process in which district court judges select the water judges. The election required in article VII of the 1972 Montana Constitution is an election by electors and not by district court judges.

The constitutional cloud hanging over the water court was compounded by the legislature in 1981 when it amended the law to provide that a water judge must be a "district judge or retired district judge of a judicial district wholly or partly within the water division."[175] The addition of retired district judges means that it is

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169. *See supra* text accompanying note 145.

170. The term "qualified electors" refers to the eligible voters within the judicial districts that comprise a water division over which a water judge presides.

171. *State ex rel. Scharnikow*, 24 Mont. 383, 62 P. 583 (1900).

172. Jones v. Judge, 176 Mont. 251, 577 P.2d 846 (1978).

173. *Id.* at 254, 577 P.2d at 848.

174. *Id.*

175. 1981 Mont. Laws 80, now codified at MONT. CODE ANN. § 3-7-201(1) (1987).

possible that a water judge could be a person who has not been elected by any qualified elector.[176] Thus, designating a retired district court judge as a water judge is a radical departure from article VII, section 8, because the retired district court judge is elected by no one he serves as a water judge. Recognizing that there are 18 judicial districts in Montana and that there are only four water divisions, it is clear that only a minority of the electors have had any voice in the selection of any water judge, and no voice in those divisions in which a retired district judge presides as a water judge.

Article VII, section 6(3), provides an exception to the general requirement of an elected judiciary. Pursuant to this provision, the supreme court chief justice may, upon the request of a district court judge, assign district court judges and other judges for temporary service from one district to another, and from one county to another.[177] Therefore, a water judge may serve only the district in which elected unless the water judge is constitutionally appointed to serve temporarily in another judicial district.

Article VII, section 6(3) has been construed by the Montana Supreme Court to be a limited power, a power that may be used only at the request of a district court judge, and only for temporary service. In *State ex rel. Lane v. District Court*,[178] the court stated that the clear constitutional intent was to limit the power to emergency situations. The provision merely allows district court judges to request immediate temporary assistance for a specified period during which a backlog could be reduced to manageable proportions.[179]

The general adjudication of water rights in any source of supply involves complex litigation because of the numbers of parties and attorneys, the costs, and the time required to provide due process and equal protection of the laws. A comprehensive adjudication that attempts to insure finality as to all water users within the source of supply, as does Montana's process, clearly creates an added workload for the state's district courts. Since Montana's adjudication is state-wide, the impact of the added workload affects all of the judicial districts. The adjudication creates an emergency situation in that it increases the workload of the district court judges beyond manageable proportions. In response to this problem, the legislature created a specialized water court to handle the

176. Of the four water judges, two are retired district court judges. One of the retired district court judges is also the chief water judge.

177. MONT. CONST. art. VII, § 6(3).

178. 167 Mont. 53, 535 P.2d 174 (1975).

179. *Id.* at 57-59, 535 P.2d at 177.

overload. But the legislative solution fails to stand up under constitutional analysis. Article VII, section 6(3) of the 1972 constitution allows for temporary service, but not for the duration required in the state-wide adjudication process.

The emergency temporary service sanctioned in *State ex rel. Lane* is much different from the statutory creation of the water court. In the case of the water court, a water judge has a fixed term.[180] The water judges have jurisdiction over cases involving more than 204,000 claims of existing water rights involving at least eighty-five distinct hydrologic subbasins.[181] Additionally, a water judge has statutory duties beyond his general adjudication duties.[182] Consequently, the office and duties of a water judge are not susceptible of characterization as temporary. Although the general adjudication is not intended to be a permanent process, the legislature has not fixed its life by any precise definition. This is no different than any public office in Montana. The terms of public officials who may fill the public offices are set by either the constitution or by statute—the public offices themselves have no fixed term.

Comparing the term of office of a water judge to other public offices, one finds that the four-year term of a water judge is as long as the terms of office for the governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor,[183] as well as for state senators.[184] It is longer than the term of office for members of the state house of representatives.[185] Within the judicial branch the terms of office are eight years for supreme court justices, six years for district court judges, and four years for justices of the peace.[186] To characterize the term of office of a water judge as "temporary" would require the characterization of most every government office as temporary.

In its narrow constitutional sense, the term "temporary service" is used to modify the service an appointed judge may render in a district he is not elected to serve. The law creating the position of water judge, however, provides not only a defined term of

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180. MONT. CODE ANN. § 3-7-202 (1987).

181. Holman Interview, *supra* note 22.

182. *See supra* text accompanying note 153. Additionally, a water distribution controversy between appropriators from a source which has not been adjudicated can be filed in district court and transferred to a water judge for temporary relief pending the general adjudication. MONT. CODE ANN. §§ 85-2-216, 406 (1985).

183. MONT. CONST. art VI, § 1.

184. MONT. CONST. art V, § 3.

185. MONT. CONST. art. V, § 3.

186. MONT. CONST. art. VII, § 7(2).

lengthy duration but also a mechanism to fill a vacancy in the position, thereby elevating the position to some status other than temporary.[187] To argue that a water judge is only temporarily assigned for service means that the legislature could effectively avoid the constitutional requirement by carving out specialized courts relating to all matters of civil and criminal jurisdiction and provide for a non-elected judiciary. To indulge in an assumption that the framers of the constitution intended to impose the requirement of a "temporary service" assignment, and at the same time nullify it is unwarranted. It logically follows that a water judge position is not a temporary assignment.

However, recent case law in Montana may explain the reason for the lack of a challenge to the jurisdiction of the water court. In *State ex rel. Wilcox v. District Court*,[188] a case upholding the assignment of retired district judges to temporary service, the Montana Supreme Court referred to the water court and the workers' compensation court[189] as examples of courts with non-elected judges. The reference was in *obitur dicta* and the court did not directly analyze the constitutional soundness of the water court. However, the holding in *Wilcox* is important because it solidifies the Montana Supreme Court's interpretation that the chief justice's power to appoint retired district judges is an emergency power to be exercised for the elimination of an extraordinary backlog in a particular district. In *Wilcox* the court focused on the language in article VII, section 6(3), "other judges," and held that the term included retired district court judges who were assigned for temporary service.[190] Although the court did not directly address the issue of the meaning of the term "temporary service," the period of service at issue was a period "not exceeding ten days per month for a three-month period because of the volume and backlog of all matters . . . ."[191] In contrast, the office of a water judge

187. MONT. CODE ANN. §§ 3-7-202, -203 (1987).

188. ___ Mont. ___, 678 P.2d 209 (1984).

189. In Montana the workers' compensation court is a quasi-judicial decision making tribunal for an executive branch agency. MONT. CODE ANN. §§ 2-15-1014, 39-71-2907 (1987). It is an administrative law court, having limited jurisdiction to decide disputes relating to workers' compensation benefits in proceedings that are not governed by the rules of civil procedure. Hock v. Lienco Cedar Prod., ___ Mont. ___, 634 P.2d 1174 (1981). The common law and statutory provisions on evidence do not apply. Tocco v. City of Great Falls, ___ Mont. ___, 714 P.2d 160 (1986).

The water court in contrast to the workers' compensation court is a branch of the district court and subject to control by the Montana Supreme Court, and all of the Montana rules of evidence and civil procedure apply.

190. *Wilcox*, ___ Mont. at ___, 678 P.2d at 214.

191. *Id.* at ___, 678 P.2d at 211.

has no hourly, daily, monthly, or yearly time constraint, and the office of the water judge exists until such time as the legislature declares it to end.[192]

The supreme court's apparent approval of the water court selection process in the *Wilcox* case is not a part of the holding of the court: "In our view, the constitutional provision in question addresses the problem of congestion in a particular county. It requires initiation by request of the district judge and approval of that request by assignment of the Chief Justice."[193] Since *Wilcox*, the court has reaffirmed the power of the chief justice to appoint judges for temporary service in two cases in which the period of service at issue were limited to the duration of several specific cases.[194]

Water judges are a part of the existing district court system. However, the jurisdiction of a water judge to act is severely limited by the constitutional requirement for an elected judiciary.[195] Recognizing that the constitution provides an exemption to this general requirement, the legislative mechanism creating the specialized water court does not stand up to the constitutional requirement of assignment to temporary service by the chief justice.[196]

B. *The Need for Change*

1. *Selection of Judges*

The authority and jurisdiction of a water judge is derived from the office of the district court judgeship, whose power is conferred by the electors of the district or, in limited cases, from temporary assignment by the chief justice. If a water judge has not been vested with jurisdiction, as suggested herein, then a serious flaw exists in Montana's general adjudication. In effect, if a water judge is not elected, nor temporarily assigned, then there has been no jurisdiction conferred. The actions taken by a water judge under the guise of exercising judicial authority through a district court are void. The actions are void because judgments by courts having no jurisdiction are not judgments and bind no one[197]—they are "of

192. MONT. CODE ANN. §§ 3-7-202, -221 (1987).

193. *Wilcox*, ___ Mont. at ___, 678 P.2d at 213.

194. State *ex rel.* Welch v. District Court, ___ Mont. ___, 680 P.2d 327 (1984); State v. Holmes, ___ Mont. ___, 687 P.2d 662 (1984).

195. *See supra* text accompanying notes 159-76.

196. *See supra* text accompanying notes 177-94.

197. *See* State *ex rel.* Johnson v. District Court, 147 Mont. 263, 410 P.2d 933 (1966) (district court without authority to order payment to counsel of a fee for his services in

no greater validity than so much waste paper."[198]

As of November 1, 1986, final decrees have been issued in six of the eighty-five basins.[199] These basins represent 15,398 claims out of approximately 214,000 claims, or less than 8 percent of all claims filed.[200] Preliminary decrees and temporary decrees have been issued in forty basins and represent approximately 80,000 claims.[201] All of the final decrees have been issued by a water judge whose jurisdiction is clouded by the above-described constitutional problem.[202] Only two temporary preliminary decrees have been issued by a water judge whose jurisdiction is not subject to constitutional challenge.[203]

Although much work has gone into the adjudication process since 1979, it is important to recognize that even if the decrees may be void, the data, information and legal research composing those decrees is available for a judge of competent jurisdiction to utilize in issuing new decrees. The basins affected by the void decrees could be given priority by the legislature for adjudication.[204] The courts could then marshall the available information for inclusion in new preliminary decrees. Because 15,398 claims have gone to final decree, it can reasonably be expected that the processing of these claims to final decree should not be burdensome or time consuming. The work completed on the temporary preliminary decrees and preliminary decrees that have been issued can be integrated into valid decrees by reissuance. Costs will be accrued because of

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justice court); Marcellus v. Wright, 61 Mont. 274, 202 P. 381 (1921) (the power of the office of the judiciary stems from the constitution, where a duly elected judge's term lapses so does his power, so that any action taken beyond the time of the term is void); State *ex rel.* Mannix v. District Court, 51 Mont. 310, 152 P. 753 (1915) (the power of a temporarily appointed judge cannot endure longer than his substitution for the local judge continues); State *ex rel.* Patterson v. Lentz, 50 Mont. 322, 146 P. 932 (1915) (appointed judge required to yield to the candidate elected to a newly created judgeship); State *ex rel.* Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 77 P. 312 (1904) (judicial actions taken outside the courts jurisdiction are *coram non judice*).

198. *Mannix*, 51 Mont. at 322, 152 P. at 757.

199. Chief Water Judge W. W. Lessley, Report of the Montana Water Courts delivered to the Montana Conservation Districts Association's annual meeting (November 7, 1986) (unpublished report).

200. *Id.*

201. Holman Interview, *supra* note 22.

202. *Id.*

203. The two temporary preliminary decrees were issued in the judicial district the water judge was elected to serve as a district court judge.

204. In 1985 the Montana Legislature singled out the Milk River Basin for priority treatment in the adjudication. MONT. CODE ANN. § 85-2-321(2) (1987). In 1987 the Montana Legislature enacted legislation directing the water court and Department of Natural Resources and Conservation to give priority to basins or subbasins designated each biennium by the legislature. MONT. CODE ANN. § 85-2-218 (1987).

the due process requirement that the decrees be re-noticed and the objection process re-opened. However, because the issuance of a new temporary preliminary decree or preliminary decree can integrate the results of the objection process achieved to date it is anticipated that many of the previous objections should not resurface. In other words, the solution to overcome the problems of a constitutionally infirm water court does not require that Montana give up the fruits of over nine years of adjudication. It does require that the past efforts be integrated into a constitutionally sound decree process.[205]

The purpose of any reform in the adjudication process is to overcome the perceived constitutional problem. To meet that purpose only two options are available: change the constitution or conform the suspect statute to the existing constitution. It was recognized in 1979 that a constitutional amendment might be required to create a system of specialized water judges.[206] However, the constitutional amendment solution is not recommended because it involves a necessarily cumbersome process.[207] The legislative solution is initially more attractive because it involves a more immediate solution and because existing case law interpreting the constitution lends more certainty to the soundness of the solution.

The recommended legislative solution to the constitutional problem is to eliminate the specialized water judge structure and use the existing district court structure to adjudicate the waters of Montana. The main concerns that led to the establishment of the specialized system of water judges was to relieve the added burden on the district judges and to encourage consistent adjudication decisions.[208] Consequently, these concerns must also be addressed in any recommended legislative reform.

The initial focus centers on the need to shift the added burden of adjudicating water rights from the work load of district court judges without violating the Montana Constitution. The key constitutional provision in the blueprint presented herein is the one

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205. It is recognized that the process will require the expenditure of time and money. However, correcting the problem now will require the investment of less time and money than to cure the problem at some later time.

206. *See supra* text accompanying notes 154-57.

207. A constitutional amendment can be achieved through one of two processes. An amendment may be initiated by an affirmative vote of two-thirds of all members of the legislature and then submitted to the qualified electors at the next general election. MONT. CONST. art. XIV, § 8 (amendment by legislative referendum). Alternatively, the amendment may also be initiated by the petition of at least 10 percent of the qualified electors of the state and then submitted to the qualified electors at the next regular state-wide election. MONT. CONST. art. XIV, § 9 (amendment by initiative).

208. LEGISLATIVE REPORT, *supra* note 77, at 20.

that vests the chief justice with the power to assign other judges for temporary service when requested by a district court judge.[209] If a large enough pool exists of "other judges" to handle the adjudication, then the shifting of the adjudication work load can be accomplished. The history of the adjudication since 1979 documents that the pool of water judges consists of four judges at any given time. More than two retired district court judges have never served at the same time.[210] This indicates that the pool of "other judges" does not need to be a large one. The second important historical fact is that one judge has taken on the vast majority of the responsibilities associated with the adjudication including the coordination of activities between the other water judges.[211] This indicates that the pool may be limited and need not require a proportionate sharing of work load among the pool of available judges.

Consequently, the pool of judges that exists in the law—district court judges and retired district court judges need not be expanded. However, because potential exists that attorneys who are not judges may have water law qualifications equal to or in excess of judges within the pool, consideration should be given to broadening the pool. Such a broadening may include district court judges, retired district court judges and judges pro tempore.[212]

In the *Wilcox* case the Montana Supreme Court explicitly held that retired district court judges qualified as "other judges" under the constitution.[213] In dicta, the court in *Wilcox* recognized that judges pro tempore exercise judicial functions.[214] There is, however, no Montana case law directly on point. But the logic of the *Wilcox* case leads to the conclusion that the state supreme court would be compelled to hold that a judge pro tempore fits within the definition of "other judges."

In *Wilcox* the court relied on the transcript of the constitutional convention and statutes existing at the time of the convention to find retired judges within the legislative scheme of

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209. MONT. CONST. art. VII, § 6(3).

210. Holman Interview, *supra* note 22.

211. Originally all four water judges were district court judges. Throughout most of the adjudication the chief water judge, a retired district court judge, has been the impetus behind the judicial implementation of the adjudication process.

212. A judge pro tempore is an attorney agreed upon in writing by the parties litigant or their attorneys of record, and approved by the district judge with jurisdiction. MONT. CODE ANN. § 3-5-113 (1987). The legislature has shown an implicit willingness to use judges pro tempore. In 1987 the office of chief water judge was expanded to include any person having the qualifications for district court or supreme court judges. MONT. CODE ANN. § 3-7-221 (1987).

213. *Wilcox*, ___ Mont. at ___, 678 P.2d at 214.

214. *Id.* at ___, 678 P.2d at 210.

judges.[215] The retired judge statutes referred to had been in existence since 1967.[216] The statute allowing the designation of a judge pro tempore has been a part of the legislative scheme of judges since 1895.[217] At the time of the constitutional convention in 1972, existing Montana statutes clearly allowed for the utilization of both retired district court judges and judges pro tempore for temporary service in the district court system. There is nothing in the transcript of the constitutional convention to suggest that judges pro tempore were to be excluded from the term "other judges." Since judges pro tempore and retired judges were recognized as qualified judges to serve temporarily prior to 1972, there is little reason to believe that the Montana Supreme Court would interpret article VII, section 6(3) to exclude judges pro tempore from the term "other judges" in the wake of the court's *Wilcox* decision.

Once the issue of the pool of judges making up "other judges" under article VII, section 6(3) is put aside, the issue of temporary service must be addressed. Temporary service need not, and should not, be defined by the term of office for the temporary judge.[218] However, temporary service has been recognized to encompass jurisdiction over an entire case or a few cases to final judgment.[219] Consequently, it would only be necessary to amend existing law so as to eliminate the term of the water judge. A water judge could be designated on a case-by-case basis.

Under the proposed legislation the legislature would initially determine which basin or source of supply should be adjudicated. Because the legislature controls the budget it can help prioritize the basins to be adjudicated by providing direction to the courts as to the need to proceed in any particular source of supply for the following biennium[220] and provide the funds to carry out the assignment. Upon prioritization by the legislature, the district court judges in the basins affected by the prioritization would meet to determine the need to request the chief justice to assign a qualified judge or judges for temporary service. Because the boundaries of judicial districts do not correspond to the boundaries of the hydro-

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215. Specifically, the Montana Supreme Court stated "[A]t the time of the Constitutional Convention existing Montana statutes referred to retired judges as judges." *Id.* at ____, 678 P.2d at 214.

216. 1967 Mont. Laws 289.

217. Montana Code of Civil Procedure § 164 (1895) (current version at MONT. CODE ANN. § 3-5-113 (1987)).

218. *See supra* text accompanying notes 180-94.

219. *See, e.g., In re* Estate of Pegg, ____ Mont. ____, 680 P.2d 316 (1984); and cases cited *supra* notes 178, 188, 194.

220. The Montana Legislature meets each odd-numbered year in regular session of not more than 90 legislative days. MONT. CONST. art. V, § 6.

logic basins in the state, it is likely that more than one district judge will have jurisdiction over a portion of a basin involved in any given adjudication proceeding. Thus, it will be necessary for a request to be made of the chief justice in most every case.

Once a request is made, the chief justice would have the power to designate a water judge from the pool of district court judges, retired district court judges, and individuals qualified to serve as judges pro tempore. The water judge so designated would then assume jurisdiction of the adjudication proceeding and would retain jurisdiction through the issuance of a final decree in the source of supply. The assignment of water judges, as described, would allow the district court judges within their respective districts the flexibility of determining whether their work load required the calling in of another judge as contemplated by the constitutional convention delegates and as embodied in article VII, section 6(3).

2. *Administration*

Although this system provides the necessary relief for overburdened district courts, it is also necessary to provide a mechanism to encourage consistent adjudication decisions. This can be achieved by establishing an administration function within the office of the supreme court. The administrator would coordinate the activities of the water judges between judicial districts and water divisions, coordinate the compilation and dissemination of information between the water judges and the DNRC, and serve as staff personnel to the water judges as a liaison between the executive and legislative branches of government. The administrator would also be charged with the preparation and administration of a biennial budget for the activities of the water judges. The establishment of a water adjudication administrator would create a clearinghouse to provide the water judges with the necessary information to efficiently draft consistent decrees without unnecessarily infringing upon any individual water judge's discretion. It would also provide a centralized adjudication information center for attorneys practicing water law in the state.

3. *Procedure*

Consistent decision-making has not been achieved under the current administration of the adjudication by the water court. The reason is that the water court treats the adjudication of each source of supply as a series of bifurcated actions between each claimant and those parties objecting to that claimant's water right. The water court does not, and never has, conducted a trial in

which all parties to the adjudication are brought together in a single integrated hearing. Instead, the water court relies on a system of independent hearings conducted by water masters.

The appointment of water masters is specifically provided for by statute,[221] and each master is to be appointed based upon the potential master's experience with water law, water use, and water rights.[222] It has been alleged that water masters appointed to date by the water court have never practiced water law, never investigated or abstracted water rights claims prior to appointment, and have had no practical experience in the use of water for irrigation purposes.[223] Although it may be established that most water masters have had training in water law, none of the ten past or present water masters has had any previous judicial training and most masters had not practiced law prior to appointment.

In carrying out their responsibilities, the masters are guided by the Montana Rules of Civil Procedure and the water right claims examination rules adopted by the Montana Supreme Court.[224]

In other jurisdictions involved with a McCarran Amendment adjudication of water rights, the process includes an *inter sese* litigation of all claims in the basin of concern.[225] That is, the claims of water right are adjudicated through a comprehensive trial process.

Montana's determination not to follow the more traditional *inter sese* trial process raises a concern that due process is being denied by the failure to bring all parties together at the same time in a trial-type proceeding.[226] The due process issue could be

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221. MONT. CODE ANN. § 3-7-301 (1987).

222. MONT. CODE ANN. § 3-7-30 (1987).

223. Petition for Writ of Supervisory Control at 8-9, Skelton Ranch, Inc. v. Water Court, No. 85-351 (filed July 18, 1985) (order dismissing without prejudice). *See supra* note 140 and accompanying text.

The writ of supervisory control, under that name, is not in general use in any jurisdiction except Montana. The writ is grounded on MONT. R. APP. PRO. 17 and MONT. CONST. art. VII, § 2(1). For an understanding of the nature of the writ of supervisory control see Morris, *The Writ of Supervisory Control*, 8 MONT. L. REV. 14 (1947); Grossman v. Dep't of Natural Res. & Conv., ___ Mont. ___, 682 P.2d 1319 (1984).

224. The Montana Supreme Court adopted water court rules of practice and procedure on July 7, 1987. *In re* Activities of Dep't of Natural Res. & Consv., No. 86-397 (Mont. 1987) (order adopting water right claim examination rules) (available from the DNRC). However, the rules are not comprehensive and do not provide uniform procedures for all water masters, all of whom appear to operate under their own set of procedures.

225. *See, e.g.*, N.M. STAT. ANN. § 72-4-17 through -18 (1978); ARIZ. REV. STAT. ANN. §§ 45-256, -257 (Supp. 1984-85).

226. The Confederated Salish and Kootenai Tribes raised the due process argument in a 1985 case testing the adequacy of Montana's statutory adjudication scheme to adjudicate federal and Indian reserved water rights in state court. However, the case did not answer the issues because as the tribe stated in its brief the issues are fact dependent and they

avoided if the water court would institute the traditional trial type proceeding. The only justification advanced for not proceeding in more traditional trial setting is the need to expedite the adjudication, a need that is more perceived than real.[227]

No suggestion is made that an adjudication is anything less than a complex case. An adjudication will require a time commitment to process through the trial phase of the adjudication of any basin. Consequently, the adoption of the blueprint suggested herein should be recognized as a conscious slowing down of the process from the fast track approach currently being followed by the water court. Admittedly, the water court's approach provides a more expeditious approach because it requires a hearing only on those claims to which objections are filed and does not require the development and implementation of guidelines to deal with the large number of parties in the litigation and the diversity that would be necessitated by an *inter sese* litigation process.

However, the approach currently being implemented does not appear to be the one contemplated at the time of passage of Senate Bill 76. Montana's most respected commentator on Montana water law noted that the hearings to be held on the preliminary decrees could be expected to be complex, involve many parties and require a great amount of time to complete.[228] There is sound reason to believe that the hearing process as proposed herein would be more complex and time consuming than the one being implemented by the water court. As early as 1904, the Montana Supreme Court recognized that in a proceeding commenced to determine the relative priorities and rights of the parties to the use of the waters of a source of supply, every party to the suit is an antagonist of every other party to the suit.[229] It is this adversary role of each party to the other that requires that the courts assure that no party is excluded prematurely from the process, thereby denying due process. The likelihood or potential for a due process violation to occur is increased by a process that limits the trial process to individual objectors and claimants. Utilization of an *inter sese* litigation process excludes no one and the due process rights of each water right claimant are protected.

As implemented, the adjudication process relies heavily on the

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must be reserved for subsequent trial. Brief of the Confederated Salish and Kootenai Tribe of the Flathead Reservation at 87-92, State *ex rel.* Greely v. United States, ___ Mont. ___, 712 P.2d 754 (1985).

227. *See supra* text accompanying notes 98-132.

228. STONE, *supra* note 67, at 8.

229. McNinch v. Crawford, 30 Mont. 297, 76 P. 698 (1904).

agricultural community for objections to ensure the accuracy of the decrees. The water court adheres to the belief that because water is of fundamental importance to the agricultural community, the agriculture water users in a basin will serve in a watchdog role in reviewing erroneous and exaggerated claims.[230] Although it is certainly true that water is of fundamental importance, a great burden is placed on each individual objector to proceed on both legal and factual issues in the bifurcated trial process. Additionally, few farmers or ranchers, faced with the current economic crisis can afford to hire the technical and legal help necessary to effectively object to exaggerated or erroneous claims. As a result, many of the legal issues have never been addressed.[231] If the adjudication continues under the current practice, it is unlikely that the problem can be corrected because the bifurcated process has not worked as an effective tool to handle the problem of issue identification and resolution.

A water right lawsuit, let alone a general adjudication of water rights, has long been recognized as different from most, if not all, other kinds of litigation.[232] An adjudication encompasses a myriad of procedural, technical and legal issues. In order to achieve a comprehensive decree, it is necessary to provide a prompt, orderly, and consistent resolution to these overriding issues. Once these major issues are resolved, they can be consistently applied by the water judges and masters throughout the basin as well as be used as precedent throughout the state. This appears to have been the intent of the legislature in creating Montana's adjudication scheme to conform to the requirements of the McCarran Amendment.[233]

For whatever reason, the water court has determined to proceed with a process alien to the express direction of legislative intent. The statute unambiguously provides that "[b]ecause the water and water rights within each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act."[234] To comport with legislative intent, the

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230. Letter from Chief Water Judge W. W. Lessley to the Montana Environmental Quality Council staff (December 23, 1986) (responding to the council's suggestion that water court decrees be sampled for accuracy).

231. The potential legal issues include, but are not limited to, the constitutionality of the conclusive presumption of abandonment caused by the failure to timely file a claim, the effect of prior decrees on the adjudication, the integration of final decrees, the constitutionality of a water judge to preside in a district he is not elected to preside in, the necessary scope of DNRC verification activities, and the criteria for abandonment.

232. Osnes Livestock Co. v. Warren, 103 Mont. 284, 305, 62 P.2d 206, 215 (1936).

233. *See supra* text accompanying notes 74-89.

234. MONT. CODE ANN. § 85-2-701 (1987).

water court should initially adopt a mechanism to identify and resolve the major issues facing the adjudication.

The mechanism to identify the major issues and to provide a method for their resolution does not require legislation. It is, however, a mechanism suited to *inter sese* litigation. Borrowing from the Federal Courts' Manual for Complex Litigation, the water court should establish a steering committee on issue resolution.[235]

The water judges, and everyone associated with the adjudication, should recognize that the adjudication is a part of the overall scheme to preserve Montana's options for current and future water development.[236] The goal of the adjudication phase of the state strategy is to achieve realistic decrees that are accurate and defensible.[237] The bottom line is that Montana must achieve this goal if it is to meet the challenge of western water law in transition. This can be accomplished by solidifying Montana's claims to water rights through a comprehensive adjudication. The solidification occurs only if the decrees issued represent an accurate reflection of existing uses. If the adjudication is used to exaggerate the use of water in Montana in an attempt to establish a higher base for either compact negotiations or the equitable apportionment of water among the states, then a grave error is being made. If the decrees are easily assailed, their value is nil. Montana gains no advantage in negotiation or apportionment unless the decreed water uses are accurate and reasonable. The range of accuracy is a subjective standard defined as a high confidence level that a federal court would accept the decrees as valid if they document within a 10 percent variation the use of water in Montana.[238] In other words, accuracy is the keystone of the adjudication.

The current practice of the water court of relying on neighbor against neighbor to object to the accuracy of preliminary decrees, conducting hearings and avoiding *inter sese* litigation, failing to treat the adjudication as complex litigation and limiting the claims examination process is a risky and judicially untested method to quantify and prioritize water rights. Reliance on a more traditional and tested adjudication approach would increase confidence in the viability of the process. The blueprint suggested in section IV attempts to provide a restructuring of the water court system aimed

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235. The committee would be established by allowing any party having an interest in establishing a committee to submit a proposal for its formation by a specified date. If no acceptable proposal is submitted, the water court would designate counsel and outline their duties.

236. *See, e.g.*, PROTECTION STRATEGY, *supra* note 15, at VII-19.

237. *Id.*

238. *Id.* at VI-9.

at assuring that accurate decrees are issued by a constitutionally structured court.

IV. A Blueprint for Change: The Water Court Statutes

A key element in the implementation of Montana's water resource management program has been the support of the agricultural community. As noted in section II, Montana has an agriculture based economy that is dependent on its water resource.[239] Without the active support of the agricultural sector, Montana would not now be moving forward with the implementation of the state's strategy to protect its water resources. That strategy includes a state-wide general adjudication aimed at achieving accurate decrees. Those decrees will form the basis for Montana's defense in equitable apportionment proceedings as well as the administration of competing water uses. They will also be used to plan for future agricultural development in Montana.[240] If the accuracy of the decrees is suspect, then the overlying goals cannot be achieved. Consequently, it is crucial that a constitutional court exercising its powers in a manner that is fair to all existing and future water users be in charge of the adjudication.

Section III of this article describes the problems inherent with the present system of water judges and points out the need for change. The reforms that are required touch upon the water court structure as well as the substantive law. The need for change is recognized; the plans to fill the need are required. The following draft of proposed changes to the water court statutes includes a review of all of the existing statutes.[241] The proposals are designed to afford a pattern for the needed change. The comments note where no changes are proposed.

A. *Water Divisions*

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.

Comment: The reference to section 85-2-309 of the Montana Code Annotated has been deleted. That section involves the alloca-

239. *See supra* text accompanying note 2.

240. *See supra* text accompanying notes 15-17.

241. For purposes of section III the existing statutes are used. Deletion of existing language is designated by interlineation. The addition of amendatory language is designated by underscoring.

tion of water rights and not the general adjudication process and, thus, is not pertinent to this discussion.

> 3-7-102. Water divisions boundaries. There are four water divisions whose boundaries are formed by the natural divides between drainages and the borders of the state of Montana and which are described as follows:
>
> (1) The Yellowstone River Basin water division consists of those areas drained by the Yellowstone and Little Missouri Rivers and any remaining areas in Carter County.
>
> (2) The lower Missouri River Basin water division consists of those areas drained by the Missouri River from below the mouth of the Marias River and any remaining areas in Glacier and Sheridan Counties.
>
> (3) The upper Missouri River Basin water division consists of those areas drained by the Missouri River to below the mouth of the Marias River.
>
> (4) The Clark Fork River Basin water division consists of the areas drained by the Clark Fork River, the Kootenai River, and any remaining areas in Lincoln County.

Comment: This is the present statute and no change is suggested.

> 3-7-103. Promulgation of rules and prescription of forms. (1) As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the water judge and the department of natural resources and conservation.
>
> (2) The special rules of practice and procedure shall be adopted pursuant to Title 3, chapter 2, part 7.

Comment: Subsection (2) is added to the present statute to clarify that in promulgating rules the supreme court must appoint an advisory committee to assist the court in considering and preparing rules.[242] It also requires that copies of proposed rules be distributed to the bench and bar of the state for their consideration and suggestions prior to adoption of the rules.[243] The Montana Supreme Court does not follow this practice in its exercise of rulemaking power concerning water court rules of practice and procedure, although it follows the practice in virtually all other cases.[244] The proposed statutory change will ensure consistency

242. MONT. CODE ANN. § 3-2-702 (1987).

243. MONT. CODE ANN. § 3-2-703 (1987).

244. Letter from Justice John C. Sheehy to Chief Water Judge W. W. Lessley and Donald D. MacIntyre (October 28, 1986) (discussing the proposed promulgation of the spe-

and will allow the opportunity for more informed input.

B. *Water Judges*

3-7-201. Designation of water judge. (1) After the water divisions administrator has selected any hydrologically interrelated portion of a water division for the issuance of a preliminary decree, a ~~A~~ water judge shall be designated ~~within 30 days after May 11, 1979, for each water division by a majority vote of a committee composed of~~ by the district ~~judge~~ judges from each ~~single judge~~ judicial district ~~and the chief district judge from each multiple judge judicial district,~~ wholly or partly within the division requesting the chief justice to assign a district judge, a retired district judge, or other judge as the water judge for temporary service for the purpose of adjudicating the water rights of the selected portion of the water division. ~~Except as provided in subsection (2) and 3-7-213, a water judge must be a district judge or retired district judge of a judicial district wholly or partly within the water division.~~

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

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

Comment: This section has been substantially rewritten to conform to the constitutional requirements analyzed in section II.[245] It introduces the concept of a water divisions administrator whose responsibilities include triggering the appointment of water judges for temporary service. Since the proposed statutory language repeats that of article VII of the Montana Constitution, the anticipated challenge is disarmed. Consequently, the proposed language is central to the blueprint for change.

3-7-202. ~~Term of office~~ Length of service. ~~The term of office for~~ A water ~~judges is~~ judge shall serve from the date of initial ~~appointment~~ assignment as provided in 3-7-201 to ~~June 30, 1985. After June 30, 1985, the term of office of a water judge is 4 years, subject to continuation of the water divisions by the legislature~~ the exhaustion of appeals from a final decree entered by a water judge.

Comment: The phrase "term of office" is a misnomer as pro-

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cial rules of practice and procedure in the water courts).

245. *See supra* text accompanying notes 154-208.

posed in this section. Because a water judge is assigned to temporary service, the term in office is of no fixed duration but lasts only as long as the case itself.[246] The proposed language is intended to give jurisdiction to a water judge to allow for the incorporation of any matters following a potential remand on appeal.

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

Comment: The existing statutory language "is not elected to a subsequent term," is removed because a temporary assignment of a water judge does not require that the water judge be an elected judge.

> 3-7-204. Supervision and administration by supreme court. (1) The Montana Supreme Court shall supervise the activities of the water divisions administrator, water judges, water masters, and associated personnel in implementing this chapter and Title 85, chapter 2, part 2.
>
> (2) The supreme court shall pay the expenses of the water divisions administrator, water judges and the salaries and expenses of the water divisions administrators' and water judges' staffs and the salaries and expenses of the water masters and the water masters' staffs, from the water right adjudication account established by 85-2-241. "Salaries and expenses" as used in this section include but are not limited to the salaries and expenses of personnel, the cost of office equipment and office space, and such other necessary expenses as may be incurred in the administration of this chapter and Title 85, chapter 2, part 2.

Comment: This is the present statute and the only change is to include the water divisions administrator to the statute. [Montana Code Annotated §§ 3-7-205 to -210 (1987) have been reserved in the Montana statutes and no addition is proposed].

> 3-7-211. Appointment of water commissioners. ~~The~~ A water judge ~~of each water division~~ may appoint and supervise a water commissioner as provided for in Title 85, chapter 5.

Comment: Since there may be more than one water judge in each water division, the existing statute must be changed to reflect the power of each water judge to appoint a water commissioner.

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246. The problems associated with the fixing of a term of office are discussed *supra* at text accompanying notes 180-92.

This change also presumes that some form of the preliminary decree is enforceable. If only the final decree is enforceable, the appointment of water commissioners can be left to the district courts once the jurisdiction of the water judge has lapsed.[247]

3-7-212. Enforcement of ~~final~~ decree. (1) ~~The~~ A water judge ~~of each water division~~ may enforce the provisions of a ~~final~~ decree issued ~~in that water division~~ as provided in 85-2-234.
(2) A final decree shall be enforced as provided for in Title 85, chapter 5.

Comment: This change recognizes that the Montana Legislature has an interest in making decrees enforceable prior to the issuance of a final decree.[248] If only the final decree is legislatively designed to be enforceable, subsection (1) is not necessary.

3-7-213. Designation of alternate judge. The water judge may designate ~~a district judge, retired district judge or another water judge~~ any judge of the district court having jurisdiction to preside in his absence on his behalf as water judge for the immediate enforcement of an existing decree or the immediate granting of extraordinary relief as may be provided for by law upon an allegation of irreparable harm.

Comment: This section has been changed to provide that only a district court judge of competent jurisdiction may act in exigent circumstances where the water judge is unavailable. The present statute allowing the designation of any district judge or retired district judge is contrary to the right of the chief justice to assign a judge for temporary service upon proper request. Since a judge of competent jurisdiction, i.e., within the area under his jurisdiction, would not require assignment, the proposed language is not constitutionally suspect. However, to avoid potential jurisdictional problems, the initial appointment of a water judge by the chief jus-

247. It is doubtful under Montana's existing statutory scheme that any decree less than a final decree is enforceable. However, statutory schemes and theories beyond the scope of this article suggest the courts may enforce preliminary decrees. Therefore, an amendment to the appointment of water commissioners statute is suggested. MONT CODE ANN. § 85-5-101 (1) (1987). The amendment would simply provide that a water judge, as a district court judge, has jurisdiction to appoint a water commissioner.

248. Because 74 of the 85 basins in Montana are affected by the negotiation of federal reserved rights under MONT. CODE ANN. § 85-2-701 to -704 (1987), the water courts have taken the approach of adjudicating all non-federal reserved rights in temporary preliminary decrees prior to those rights being negotiated. The argument is advanced that the non-federal reserved rights can be enforced under the temporary preliminary decree, at least until such time as the federal reserved rights are compacted and can be incorporated into a preliminary decree with all other rights. *See* MONT. CODE ANN. §§ 85-2-231(3), 85-2-702 (1987). Legislative change may be required to enforce the temporary preliminary decree. The proposed change in the text anticipates the enforceability of the temporary preliminary decree.

tice should incorporate the intent of the above statute as part of the assignment.

[Montana Code Annotated §§ 3-7-214 to -220 (1987) have been reserved in the Montana statutes and no addition is proposed].

3-7-221. Appointment of ~~chief~~ a water ~~judge~~ divisions administrator—term of office. (1) The chief justice of the Montana Supreme Court shall appoint a ~~chief~~ water ~~judge as provided in Title 3, chapter 1, part 10~~ divisions administrator experienced in water law and water use.

~~(2) To be eligible for the office of chief water judge, a person shall have the qualifications of district court or supreme court judges found in Article VII, section 9, of the Montana constitution.~~ ~~(3)~~ (2) The term of office of the ~~chief~~ water ~~judge~~ divisions administrator is from the date of initial appointment until June 30, ~~1985~~ 1989. After June 30, ~~1985~~ 1989, the term of office is 4 years, subject to continuation of the water divisions by the legislature.

Comment: The work load of the water judges should be primarily a judicial work load. Because the legislature has identified a need to expedite the adjudication, the water judges should be allowed to concentrate on the business of adjudicating. There is, nevertheless, a void that must be filled. There is a need to coordinate and orchestrate the entire adjudication, but a judge need not provide this service. Rather, an administrator who is accountable to the Montana Supreme Court and who is knowledgeable in water law and water use can best serve this interest. Because the administrator has no judicial powers, a term of office can be legislatively fixed without transgressing the constitutional boundaries noted in this article. In sum, this section eliminates the office of a chief water judge and replaces it with a non-judicial administrative office.

3-7-222. Salary—office space. (1) The ~~chief~~ water ~~judge~~ divisions administrator is entitled to receive ~~the same~~ a salary and expense allowance as ~~provided for district judges in 3-5-211~~ set by the chief justice.

(2) The office of the ~~chief~~ water ~~judge~~ divisions administrator shall be at the seat of government ~~location that the chief justice of the Montana Supreme Court shall designate~~. The Montana Supreme Court shall provide in its budget for the salary, expenses, and office and staff requirements of the ~~chief~~ water ~~judge~~ divisions administrator, which money may be appropriated by the legislature from the water right adjudication account.

Comment: The main purpose of the proposed legislation is to establish the residence of the administrator at the seat of government, because the Department of Natural Resources and Conser-

vation is located in the state capitol along with its central data systems and computers that are used in the adjudication. It is anticipated that requiring the administrator to work in the same locale as the central water rights records and process equipment is situated will enhance the administrator's productivity and efficiency.

3-7-223. Duties of the ~~chief~~ water ~~judge~~ divisions administrator. The ~~chief~~ water judge administrator shall: ~~(1)~~ administer the adjudication of existing water rights by:
(1) preparing and presenting budget requests to the legislature for the operation and activities of the water judges;
(2) preparing and presenting jointly with the department of natural resources and conservation a listing of adjudication activities to be commenced, prosecuted, or completed within the next biennium to the legislature;
(3) coordinating with the district judges in each water division affected by legislative action the commencement, prosecution or completion of adjudication activities to allow for the assignment of a water judge pursuant to 3-7-201;
(4) ~~(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 as needed;
(5) ~~(b) assuring that~~ assisting the water judge in each water division to allow the water judge to move ~~moves~~ without unreasonably delay ~~to~~ in *entering* ~~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;~~
(6) ~~(3)~~ employ office and staff personnel and assign ~~court~~ personnel to divisions and duties as needed; ~~and~~
~~(4) request and secure the transfer of water judges between divisions as needed.~~
(7) assist the water judges in the appointment of water masters; and
(8) perform such other duties as the chief justice may assign.

Comment: The proposed amendments establish the duties of the administrator in coordinating the activities of the judiciary in interacting with the executive and legislative branches of government. Because the administrator is not a judge, all judicial functions have been eliminated from the duties assigned to the administrator.

One critical change in existing law is that the legislature,

which meets every two years, will be required to establish a biennial budget and tie the budget to the projected adjudication activities of the water judges and the Department of Natural Resources and Conservation.[249] The water divisions administrator would be responsible for the budgetary and workload projections of the judiciary. In conjunction with the state natural resource agency, the administrator would be responsible for requesting legislation each session identifying the adjudication workload for the biennium and appropriating the necessary funds.

3-7-224. ~~Jurisdiction~~ Duties of ~~chief~~ a water judge. ~~(1) The chief water judge may, at the discretion of the chief justice of the Montana supreme court, also serve as water judge for one of the water divisions.~~

~~(2)~~ (1) ~~The chief~~ A water judge has jurisdiction over cases ~~certified to the district court under 85-2-309 and all matters relating to the determination of existing water rights within the boundaries of the state of Montana~~ assigned under 3-7-201.

~~(3)~~ (2) With regard to the consideration of a matter within his jurisdiction, ~~the chief~~ a water judge has the same powers as a district judge. He may issue such orders, on the motion of an interested party or on his own motion, as may reasonably be required to allow him to fulfill his responsibilities ~~including, but not limited to, requiring the joinder of persons not parties to the administrative hearing being conducted by the department pursuant to 85-2-309 or 85-2-402 as deemed necessary to resolve any factual or legal issue certified pursuant to 85-2-309(2).~~

(3) A water judge shall adjudicate as expeditiously as possible any contested or conflicting claims and shall conduct a unified proceeding in the assigned case.

Comment: The duties assigned to a water judge are those of a district court judge. However, because of the problems encountered in the existing adjudication involving the water court's failure to provide for *inter sese* litigation of all the claims in a basin of concern, the statute expressly provides for a unified proceeding wherein all parties are brought before the court prior to a final decree being entered by the water judges.[250] Finally, because the administrative duties of the chief water judge have been transferred to the water divisions administrator all references to the

249. Recent budgetary problems in Montana have required the state legislature to take a hard look at all state programs. The 1987 legislature recognized the need to tie both the agency budget and the judicial budget directly to the adjudication program and to the respective adjudication tasks assigned by the legislature. MONT. CODE ANN. § 85-2-243 (1987).

250. For a full discussion of the problem *see supra* text accompanying notes 234-38.

chief water judge have been stricken.

C. *Water Masters*

3-7-301. Appointment of water masters—removal. (1) ~~The chief water judge or the water judge in each water division may appoint one~~ One or more water masters may be appointed in each water division.

(2) A water master may be appointed after ~~July 1, 1980, and must be appointed on or before July 1, 1982~~ a water judge has been assigned pursuant to 3-7-201.

(3) The appointment of more than one water master in a water division shall be determined by the water judges assigned to serve in the water division in consultation with the water judge administrator.

~~(3)~~ (4) In appointing a water master, the water judge shall consider a potential master's experience with water law~~;~~ and water use~~, and water rights~~.

~~(4)~~ (5) A water master shall serve at the pleasure of the ~~chief~~ water judge and may be removed by the ~~chief~~ water judge.

~~(5)~~ (6) A water master may serve in any water division and may be moved among the water divisions at the discretion of the affected ~~chief~~ water ~~judge~~ judges.

Comment: These amendments to the existing statute are intended to allow water judges to utilize the shared services of a water master. Flexibility is maintained to move a master among the water divisions.

3-7-302. Salary, expenses and retirement of water masters. (1) The water ~~judges~~ divisions administrator shall set a uniform salary for water masters. Water masters shall receive expenses as provided in 2-18-501 through 2-18-503.

(2) A water master shall participate in the Montana Public Employees' Retirement System established in Title 19, chapter 3.

(3) The salary and expenses of a water master shall be paid from the water right adjudication account established in 85-2-241.

Comment: This is the present statute and the only suggested change is the setting of a uniform salary by the water divisions administrator.

[Montana Code Annotated §§ 3-7-303 to -310 have been reserved in the Montana statutes and no addition is proposed].

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

(2) Within a reasonable time ~~after June 30, 1983~~ established by the water judge, the water master shall issue a report to the water judge meeting the requirements for the preliminary decree

as specified in 85-2-231.

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

Comment: This section is the present statute except the water judge is given the authority to establish the time frame under which the water master must issue his initial report. The proposed change does not substantively amend the existing practice.

[Mont. Code Ann. §§ 3-7-401 to -404 (1985) concerns disqualification of a water judge or water master. Because these statutes do not substantively affect this article they are not set forth herein.]

D. *Jurisdiction*

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) No water judge may 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 his division except as provided in 3-7-201 and 3-7-213.

(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 his division as specified in 3-7-102 that are considered filed in or transferred to a judicial district wholly or partly within the division.

Comment: The proposed changes reflect changes made to section 3-7-101 of the Montana Code Annotated. The fundamental importance of retaining this section is that it reflects that the establishment of the water judges is not an attempt by the legislature to establish a court system outside the existing district court system. This is made explicitly clear by the legislature when this section is read in conjunction with section 3-7-201(3) of the Montana Code Annotated.[251]

3-7-502. Jurisdictional disputes. Whenever a question arises concerning which water judge shall preside over adjudication of a matter concerning ~~a case certified to the court under 85-2-309 or~~

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251. For a discussion of this issue *see supra* note 154.

the determination and interpretation of existing water rights, the question shall be settled by the water judges involved.

Comment: This section is the present statute except it reflects the changes made to section 3-7-101 of the Montana Code Annotated.

V. CONCLUSION

In an agricultural state such as Montana, water is essential to the economic life of the community. Water means grain bins full of wheat, barley, and corn, grass for cattle, sheep, and wildlife, power for electrical generation, and quality fishing and recreation. As economic competition increases to move water usage to its most economically efficient state, the need increases to wisely manage the resource to ensure the current and future needs of Montana.

Montana has reacted positively to the problems being encountered by the transition of western water law. One essential part of Montana's water resource management program has been the implementation of a state-wide general adjudication. But for the program to be successful, the adjudication must be one that is adequate both in fact and in law. Montana water users should not be lulled to sleep believing that the state courts can or will engineer around any legal problems that may be raised by Montana's implementation of its adjudication.

Since *Sporhase v. Nebraska ex rel. Douglas*,[252] wherein the United States Supreme Court held that water is an article of commerce subject to congressional regulation,[253] Montana cannot ignore its water-using neighbors in structuring this state's water management plans. Similarly, Montana is not at liberty to issue paper rights intended to exaggerate the utilization of water in Montana. The adjudication must result in reasonably accurate decrees, "within a range of accuracy of plus or minus 10 percent,"[254] if the decrees are to be legally defensible. If not, the decrees cannot be used to defend Montana's water rights from the claims of downstream states, cannot be used to equitably administer federal water rights in state court,[255] and cannot be used to administer water

252. 458 U.S. 941 (1982).

253. *Id.* at 945-54.

254. The purpose of Montana's verification process was stated by the eminent water law scholar, Frank J. Trelease, as "a good faith attempt . . . to guard against duplicate claims, claims to abandoned rights, or exaggerated claims . . . . The current program should identify the level of existing water rights within a range of accuracy of plus or minus 10 percent . . . ." PROTECTION STRATEGY, *supra* note 15, at VI-9.

255. *See supra* text accompanying notes 87-98.

rights in times of water shortage or to settle any water disputes on a stream.

This article examined the water resources of Montana in the context of potential constitutional and practical problems encountered by utilizing a specialized system of water judges to adjudicate water rights. The constitutionality of a system of water judges was initially raised in legislative hearings prior to the enactment of the 1979 general adjudication statutes. However, the debate has been both legislatively and judicially ignored since that time. If the problem exists, it cannot be solved by ignoring it. Yet, many of those most concerned with the adjudication, including legislators, judges, lawyers, ranchers, farmers, and water resource managers, refuse to accept responsibility for the adjudication and pass the responsibility to the water judges without questioning the fundamental jurisdiction of the water judges to act, or when acting, to act in a manner that best ensures an adequate and accurate adjudication. The article concludes by presenting a blueprint for restructuring the system of water judges.

If water is the hub of the agricultural wheel that turns Montana's economy, as suggested by the governor of Montana,[256] then the adequacy of Montana's adjudication is vital to agriculture and Montana's economy. Even in the best of economic times, a general adjudication is an expensive proposition for the farmer and rancher. Consequently, the state statutes implementing the adjudication must be constitutionally sound and provide sufficient safeguards to insure the adequacy of the adjudication. Serious questions exist as to whether Montana's statutes achieve that goal, and consequently, legislative reform is urged.

256. *See supra* text accompanying note 2.