

Water 201: Deeper Dive into the Role of the Judiciary in Montana Water Management

Presentation to
Water Policy Interim Committee
March 27, 2026

Judge Brown, Judge Peters (Water Court)
Ben Sudduth, Diana Abbott (Water Bar)
Todd Netto (DNRC)

Outline

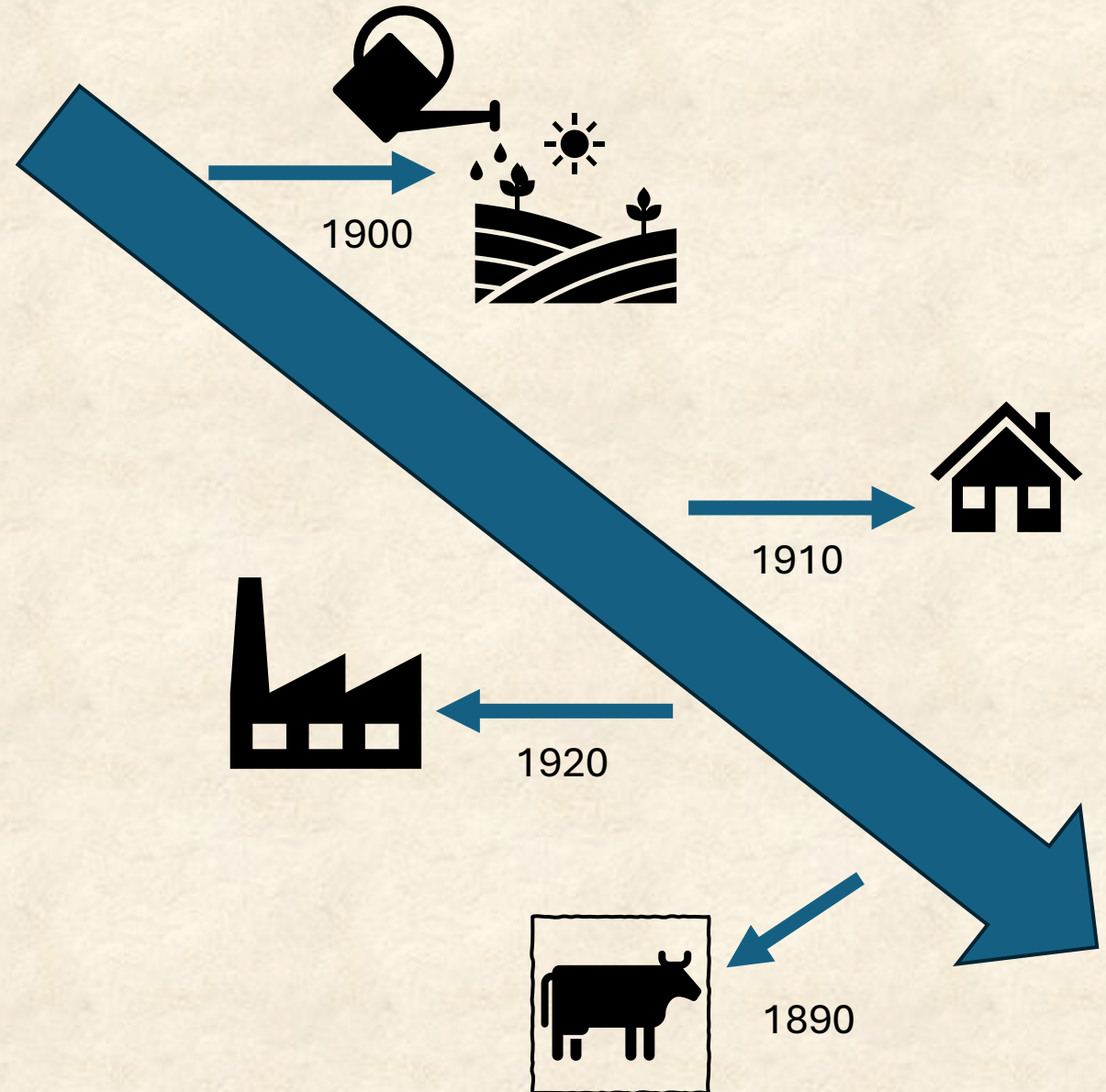
1. The evolution of water management in Montana
2. Overview of the role of the judiciary
3. Hypotheticals that highlight practitioner applicability of judiciary roles and challenges
4. Judicial challenges and opportunities

The evolution of Montana water law

- Historical prior appropriation doctrine
- Pre-1973 district court decrees
- Constitutional convention and 1972 Constitution
- 1973 Water Use Act

Prior appropriation basics

- The basic doctrine in many early cases
- Confirmed by Montana Supreme Court in *Mettler v. Ames Realty Co.* (1921)
- Codified in MCA 85-2-401(1): “As between appropriators, the first in time is the first in right”



Beneficial use

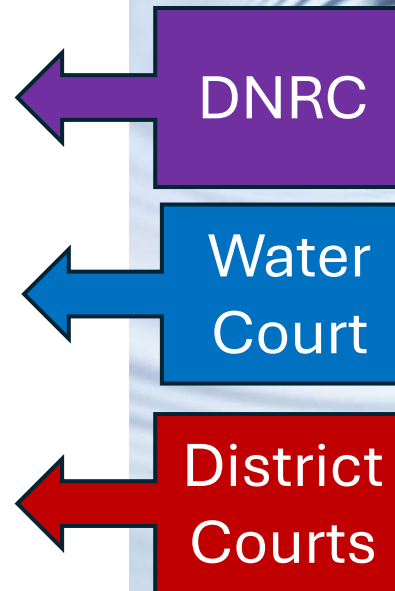
- “beneficial use shall be the basis, the measure and the limit of all rights to the use of water” *McDonald v. State* (1986)
- The “basis” – non beneficial water uses not protected by prior appropriation doctrine
- The “measure” – amount of water that may be diverted or used
- The “limit” – no diversion or use beyond what may be beneficially use.

1972 Constitution: Art. IX, Section 3

- 1) Recognizes and confirms “existing rights”
- 2) Recognizes beneficial uses as a public use
- 3) Recognizes state property interest in water for the benefit of the people, and subject to appropriation for beneficial use
- 4) Sets legislative obligations for administration, control, regulation, and centralized record system

1973 Water Use Act

- Followed from 1972 Constitution
- Also years of decentralized water litigation in district courts
- Basic functions of Water Use Act
 - Permit system for new water uses
 - Determine the elements of all “existing” water rights – those in place as of July 1, 1973
 - System for resolving disputes between water users
 - System for enforcement



The Montana Department of
Natural Resources
& Conservation

Water Court's role

- Established by legislature 1979
- Exclusive Jurisdiction over the determination of the elements of "existing water rights."
- Standardized and replaced the district court decree process
- Ongoing assistance to district courts



DNRC's Role in Adjudication is Changing

Examination is Complete

- The DNRC provides information and assistance to the Water Court as may be required to adjudicate claims of existing rights (85-2-243, MCA and Supreme Court Rules).
- The DNRC issues Certificate of Water Rights to each person decreed an existing right after a **final decree** (85-2-236, MCA).
- Final decrees will be issued for about 10 more years.



Adjudication - Department Assistance to the Water Court

Decree and Post-Decree Assistance

- DNRC provides ongoing support to both the Montana **Water Court** and the **public** through the eight DNRC Water Resources Regional Offices
- **Decree Assistance** – DNRC supports decree mailings (85-2-243, MCA).
- **Post-Decree Assistance** - Resolution of issue remarks other than by objection (85-2-248, MCA).



New Appropriations

Hearings and Petitions for Judicial Review

- Hearings on applications
 - Reside with the DNRC Office of Administrative Hearings (OAH)
 - Contested cases associated with **objections** to permit, change, change exceptions, and temporary leases (85-2-308, 85-2-428, 85-2-429, MCA).
 - Show/cause for DNRC denial of a permit or change application (85-2-310 (1), MCA).
- Petitions for Judicial Review (PJR) addressed in 2-4-702, MCA
 - A party who is aggrieved by a final decision on an application for a **permit or change** may petition district court or water court for judicial review of the decision (2-4-702 (2)(e)(i), MCA).

New Appropriations – Certificates

- Permits and/or Provisional Permits 85-2-302, MCA
 - The DNRC issues Certificate of Water Rights to permits that are verified in basins that already have a final decree (85-2-315(1), MCA).
 - The DNRC issues Certificate of Water Rights after a final decree and an opportunity for water users to petition for the reduction, modification, or revocation of provisional permit(s) (85-2-113, MCA).
- Change Authorization 85-2-402, MCA
 - The DNRC issues Certificate of Water Rights to change in appropriation right that are verified or modified after a final decree.
- Exceptions to permit requirements 85-2-306, MCA
 - Are not dependent on final decrees.

DNRC's - Assistance to the Water Court and District Court

- Distribution is a District Court led process (Title 85, Chapter 5).
- Distribution is a formal application of the **Prior Appropriation Doctrine** (first-in-use, first-in-right).
- Distribution is often conflated with “enforcement.”
- When discussing the physical allocation of legally appropriated water that is distributed by a commissioner in conjunction with a District Court Order: “Distribution” is the word that is consistent with statute.
- Violations to the Montana Water Use Act are found often through a constituent complaint driven process. “**enforcement**” is the word that is consistent with statute.

DNRC's Role in Distribution

Formal Application of the Prior Appropriation Doctrine (First-in-Use, First-in-Right).

- Facilitate annual water commissioner and mediator education seminars.
- Prepare and maintain a water commissioner and mediator manual.
- Generate water right tabulations and maps.
- Provide ongoing support and education to water commissioners, water users, and the judicial branch.

Distribution -Water Commissioner Trainings and Manual

85-5-111, MCA Water Commissioner and Mediator Education

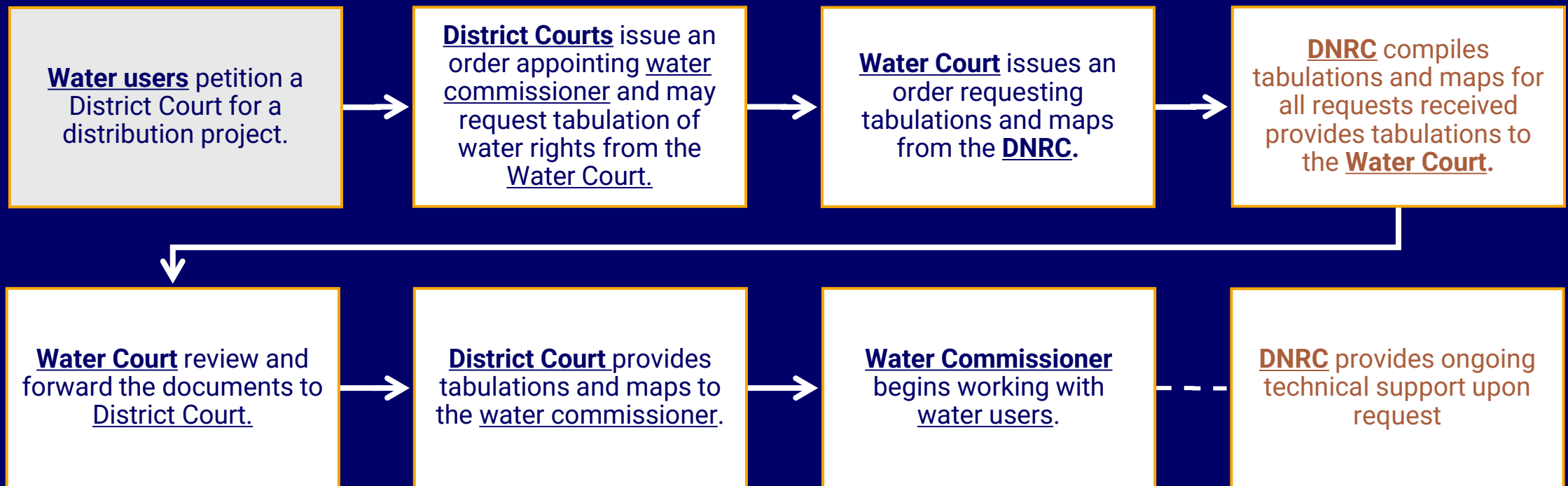
The Department of Natural Resources and Conservation, in cooperation with the Montana Supreme Court, the Montana water courts, the district courts of Montana, the Montana university system, and other appropriate state and federal agencies, shall develop an educational program for water commissioners and mediators that includes:

- (a) an annual seminar on commissioner and mediator duties, mediation techniques, and water measuring techniques;
- (b) preparation and, as necessary, revision of a water commissioner and mediator manual; and
- (c) an outreach program that identifies persons who might serve as water commissioners or mediators.

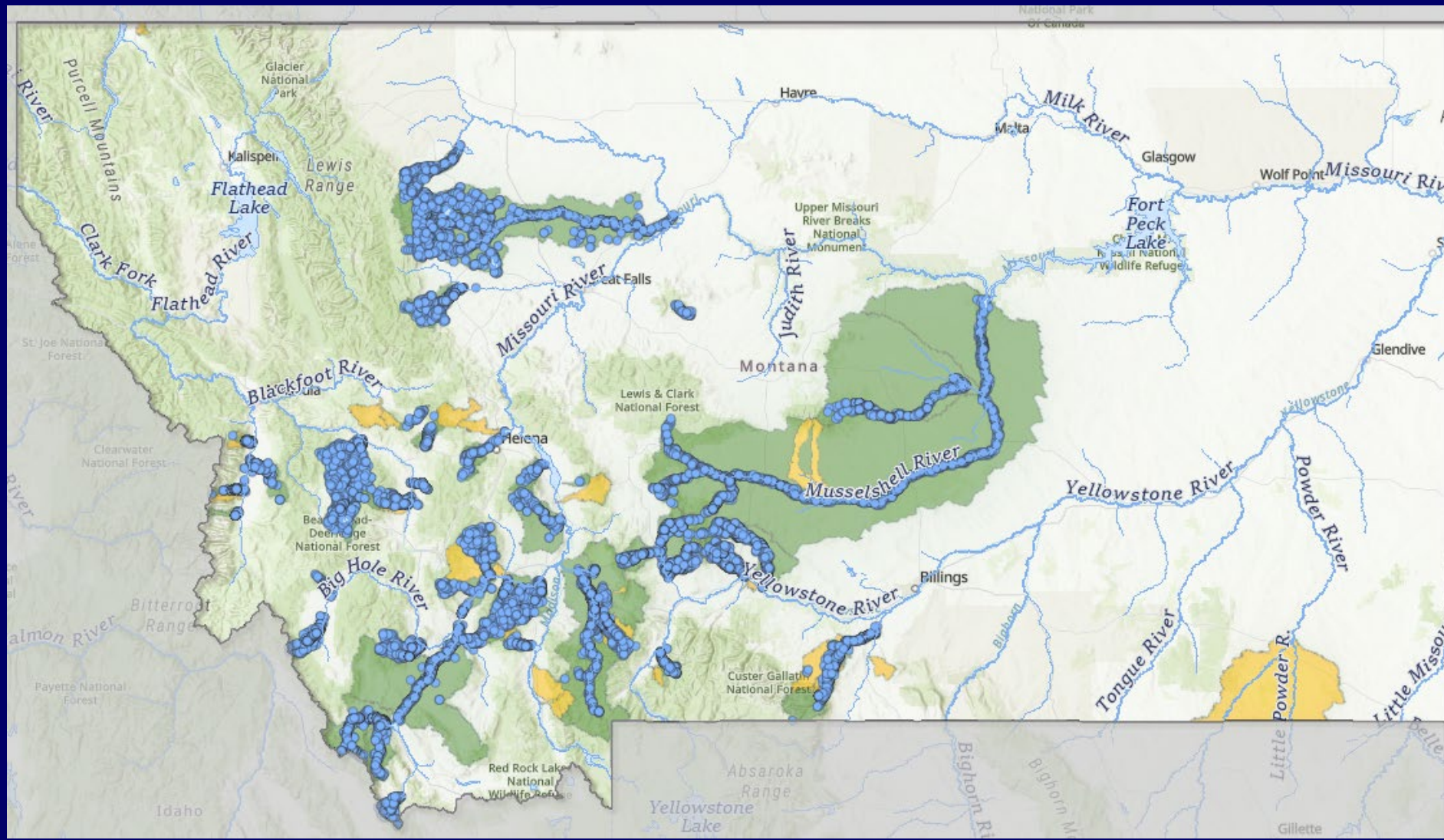


The DNRC's Role in Distribution Tabulations

TABULATION AND MAP GENERATION



Distribution – WaterMapper

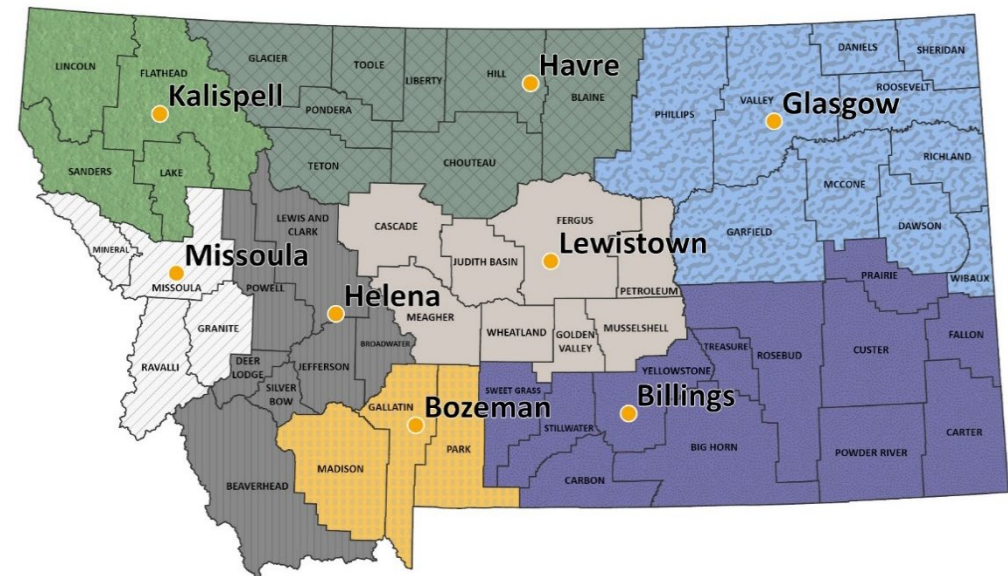


Water Right Enforcement

Constituent Complaint Driven Process

- The DNRC accepts written complaints.
- When violations to the Water Use Act are found through the constituent complaint driven process:
 1. Investigate
 2. Educate
 3. Seek Compliance
 4. Enforcement

WATER RESOURCES REGIONAL OFFICES



Violations of the Water Use Act

Complaint Examples:

1. **Judicial Path:** When someone diverts, impounds, or otherwise appropriates water to use without a water right to do so, the DNRC may pursue action(s) in District Court.
2. **Administrative Path:** When water is not being applied to the beneficial use contemplated in the permit or change in appropriation right, or the permit or change in appropriation right is otherwise not being followed, the DNRC may pursue modification or revocation.

District Court's Role

Supervising water distribution. § 85-2-406(1), MCA.
Enforcing water right decrees. § 3-7-212, MCA.

See, e.g., *Matter of Water Comm'r to Measure & Distribute Water on Beaver Creek Within Basin 411*, 2026 MT 16, ¶¶ 30-31, 583 P.3d 938, 946. (“Where a decree or claim abstract identifies a specific point of diversion, delivery of that right through an alternative diversion may not be justified solely by administrative efficiency or the absence of proven injury, absent adjudicated authorization or modification. . . . Here, the District Court failed to apply these *decree-first principles*.” (emphasis added)).



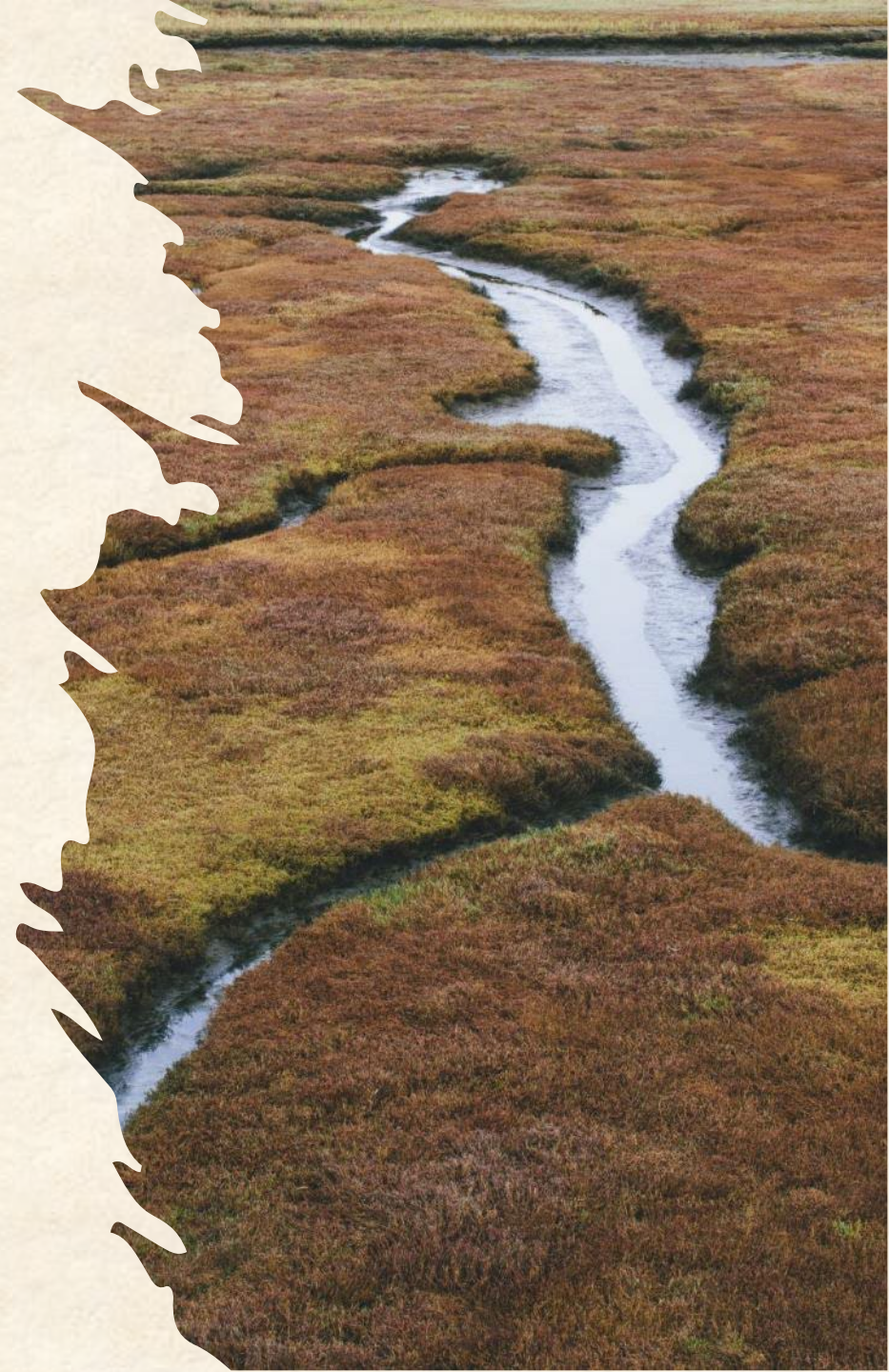
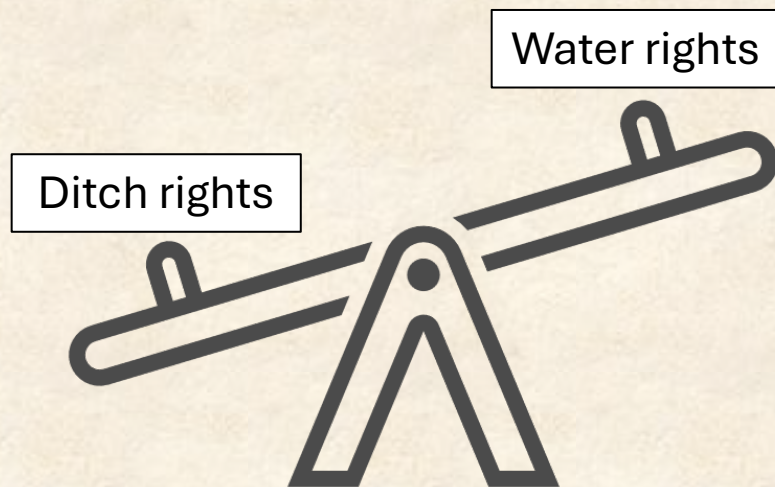
POD X

POD Y

District Court's Role

Ditch interference. § 70-17-112, MCA.

See, e.g., *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991) (“This Court has previously held that ditch rights and water rights are separate and distinct property rights. Therefore, our determination of whether or not a ditch right exists is entirely bifurcated from the water right issue.” (citation omitted)).



Practitioner Applicability

Dissatisfied water user actions. § 85-5-301, MCA.

- ✓ **Limited scope:** water user vs. water commissioner distributing water.
- ✓ **Limited district court role:** Is the water commissioner distributing water to water right holders under the latest, enforceable decree? *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 12, 383 Mont. 523, 527, 373 P.3d 836, 839.
- ✗ **NOT** to re-adjudicate water rights.
- ✗ **NOT** to resolve ditch or water right disputes between water users.
- 📏 **Hypothetical:** (1) 1902 District Court Decree; (2) 1996 Temporary Preliminary Decree; (3) 2026 Preliminary Decree.

John (1891):

1902 Decree: 80 MI

TPD: 2 CFS

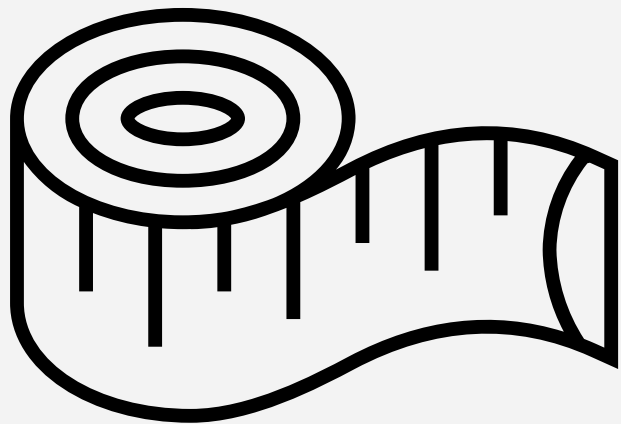
PD: 1 CFS

Jane (1890):

1902 Decree: 80 MI

TPD: 2 CFS

PD: 2 CFS



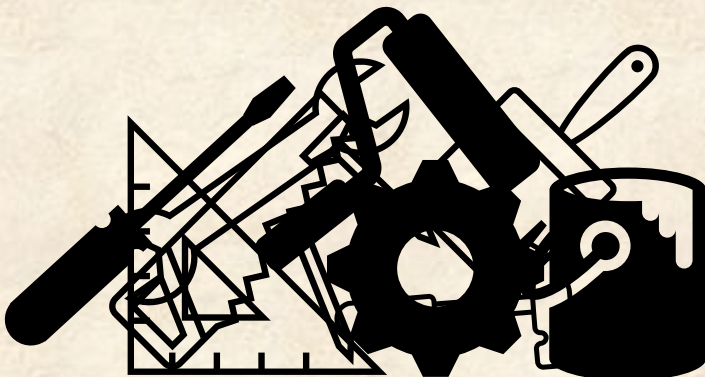
“It then becomes obvious that the decree must be the yardstick by which the commissioner shall proceed[.]” *Quigley v. McIntosh*, 110 Mont. 495, 500, 103 P.2d 1067, 1069 (1940).

Practitioner Applicability

Certification process. § 85-2-406(2)(b), MCA.

- ✓ **Limited scope:** water user vs. water user that have a “water distribution controversy.”
- ✓ **Why?** Exclusive jurisdiction . . .
Water Court = adjudicates existing water rights.
District Courts = supervises water distribution/enforces water right decrees.

Hypothetical: (1) 1902 District Court Decree; (2) 1996 Temporary Preliminary Decree; (3) 2026 Preliminary Decree; (4) 2027 Final Decree.



John (1891):

1902 Decree: 80 MI

TPD: 2 CFS

PD: 1 CFS

FD: 1 CFS

Jane (1890):

1902 Decree: 80 MI

TPD: 2 CFS

PD: 2 CFS

FD: 2 CFS

Jurisdictional Divide

Opportunities

Changing roles as final decrees are issued

Final decree statutes have been seldom used

Courts and DNRC are standardizing forms and processes

Pre- and post-1973 water rights jurisdiction is clear

Certification and dissatisfied water user actions are two processes commonly used by practitioners and are limited in scope, but are subject to misuse

Challenges

Changing roles as final decrees are issued

Final decree statutes have been seldom used

Instances where roles, interplay, and processes of courts are not clear and could be clarified

High cost to parties for navigating different venues

Confusion for parties to know which court/agency is proper

District court challenges for esoteric content/area of law

Busy dockets

Certification Statute—Jurisdiction

- Section 85-2-406(2)(b), MCA:

When a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition the district court to certify the matter to the *chief water judge*. If a certification request is made, the district court shall certify to the chief water judge the determination of the existing rights that are involved in the controversy according to part 2 of this chapter. The district court from which relief is sought shall retain exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights certified to the water judge. Certified controversies must be given priority over all other adjudication matters. After determination of the matters certified, the water judge shall return the decision to the district court with a tabulation or list of the existing rights and their relative priorities.

(emphasis added).

Certification Statute—Jurisdiction (cont.)

- Section 85-2-406(3), MCA:

A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the district court. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal enlargement or change of right. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. *The order settling the controversy must be appended to the final decree, and a copy must be filed with the department.* The department must be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

(emphasis added).

Prima Facie Evidence

- Section 85-2-227(1), MCA:

For purposes of adjudicating rights pursuant to this part, a claim of an existing right filed in accordance with 85-2-221 or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree. For purposes of administering water rights, the provisions of a temporary preliminary decree or a preliminary decree, as modified after objections and hearings, supersede a claim of existing right until a final decree is issued.

(emphasis added).

Provisional Permits → Certificates of Water Right

- Section 85-2-313(1), MCA:

A permit authorized prior to the issuance of a final decree pursuant to 85-2-234 in the basin where the permit is located is provisional and is subject to that final decree.

- Reconciliation process. *See generally*, Section 85-2-313, MCA.

Final Decrees

- Section 85-2-234(8), MCA:

Clerical mistakes in a final decree may be corrected at any time on initiative of the water judge or on the petition of any person who possesses a water right.

Take Homes

- More final decrees are being issued.
- Meaning, certain statutes will shift.
- There are also places for clarity, especially as we enter new territory of final decrees.