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Memorandum

To: Environmental Quality Council

From: Krista Lee Evans
Research Analyst

RE: Water adjudication program funding

Date: February 23, 2004

Historical funding for Montana's Water Adjudication Program

Since Montana's statewide water adjudication effort was begun, funding has varied both in amount and source. I've attached a copy of the funding levels and their sources since 1974. In brief, the three sources for funding have been the Water Rights Account and Adjudication Account, the General Fund, and the State Special Revenue Fund (Resource Indemnity Trust, Renewable Resource Development, Renewable Resources Grants/Loans, Local Impact, Reclamation and Development).

The numbers that I have provided for this summary exclude the funding for the Compact Commission, which is for adjudication of reserved rights. The EQC had asked to be informed of numbers that the DNRC and Water Court for the Water Adjudication Advisory Committee came up with as an estimated cost to complete the adjudication in 15 years. Therefore, numbers excluding the Compact Commission are more appropriate for comparison purposes. A certain portion of the Water Court's time is spent on approving negotiated compacts. However, in comparison to the number of state-based rights that the Water Court has to handle, the negotiated compacts are fairly small.

The funding provided to DNRC and the Water Court has varied from \$313,118 as a low point in 1980 to just over \$1.6 million in 1985 as the high point. The average funding for the DNRC and the Water Court from 1980-2003 is just over \$1.2 million per year. Montana has spent a total of \$37,471,120.

Comparison with adjudication in Idaho

As a comparison, the state of Idaho, which began its adjudication of the Snake River Basin in 1980, has spent a total of \$67,818,700, not quite double what Montana has spent. Idaho has funded its adjudication through the adjudication fund (SRBA account) and the general fund. I've attached a chart that details Idaho's funding sources and amounts. You will notice that there was a major shift in funding sources in 1997. Prior to 1997, the program was primarily funded by filing fees. After 1997, the program has been primarily funded by general fund appropriations. The shift was the result of a U.S. Supreme Court case, United States v. Idaho, ex rel. Director, Idaho Department of Water Resources, 508 U.S. 1 (1993). This case is very pertinent when discussing funding of an adjudication program and whether the United States can be assessed a fee. This decision provided: "While we therefore accept the proposition that the critical language of the second sentence of the McCarran Amendment submits the United States generally to state adjective law, as well as to state substantive law of water rights, we do not believe it subjects the United States to the payment of the sort of fees that Idaho sought to exact here. The cases mentioned above dealing with waivers of sovereign immunity as to monetary exactions from the United States in litigation show that we have been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for them. We hold that the language of the second sentence making 'the State laws' applicable to the United States in comprehensive water right adjudications is not sufficiently specific to meet this requirement." The result of this decision was that Idaho could no longer collect filing fees from the United States, and therefore the funds were not available in the SRBA account to pay for the adjudication and the general fund picked up the slack. A copy of this decision is provided for your review.

The major differences between Idaho and Montana are the following:

1. Timeline
 - a. Idaho expects to be finished with the claims examination portion by 2005 and through the courts by 2010 at the latest -- total time to complete adjudication -- 25 years.
 - b. Montana started in 1974, and at current funding expects to be finished with claims examination by 2033, finished with court process by ? -- total time to complete adjudication -- at least 60 years.
2. Cost (the dollar amounts have not been adjusted to take into account inflation and other factors)
 - a. Total cost for Idaho -- estimate = \$80 million
 - b. Total cost for Montana (estimated by doubling what has been spent over the last 30 years) = \$75 million
3. Conclusion
 - a. Montana will take an additional 35 years for a \$5 million savings--assuming a correlation exists between funding and timeliness of the adjudication.

Allocation of funds between DNRC and the Water Court

Historically, a majority of the funding has been directed towards DNRC. This would make sense when compared with the adjudication process. The claims examination process has to be completed before the basin can come before the Water Court for its examination. Once the claims examination process is completed, it may be wise to shift funding from the DNRC to the Water Court to be able to complete decrees and enter the enforcement stage, hopefully arriving at final decrees within a reasonable timeframe. However, when moving the emphasis of funding from the DNRC to the Water Court, it would be imperative to recognize the level and amount of assistance that DNRC provides to the Water Court through the Court process and the enforcement process. Without DNRC expertise, it may slow down the Court's ability to complete decrees. Section 85-2-243(2), MCA, provides that "Department assistance to a water judge must be without cost to the judicial districts wholly or partly within the affected water division. Expenses incurred by the department under subsection (1) must be paid from the money appropriated to it for the adjudication program by the legislature to carry out its function under subsection (1) and when that appropriation is expended then the department is no longer required to provide further assistance." (emphasis added)

The other issue to consider with staffing levels is whether or not DNRC shifts FTEs from the adjudication effort to other areas of need within DNRC. If there is concern that this might happen, it would be within the Legislature's authority to provide that FTEs that are allocated to DNRC for the purpose of the adjudication program may not be reallocated to other areas of DNRC.

Types of funding structures in other states

Idaho

I have provided a pretty detailed summary of how Idaho funds its program above. One reason I have gone into such detail on Idaho is because based on my interaction with various entities involved in adjudication in other states, it seems that Idaho is very well respected for its ability to move through the adjudication process and to have a completion date in sight. Other states, including Montana, seem to be known for the amount of time it is taking them to get the adjudication of state rights completed. Montana's Compact Commission has served as a model and example in other states for inexpensive settlement of reserved rights. Therefore, it might serve Montana well to pat ourselves on the back for being foresighted and having enough ingenuity to develop the Compact Commission to address the federal and tribal reserved rights within Montana and learn from Idaho's experiences and practices with regard to state-based rights.

As shown in the Idaho chart that I have provided, they are funded through the SRBA account and the general fund. Their statutory language is contained in section 42-1414, Idaho Code. "Fees for filing notice of claims with the director." This section

contains a fee schedule for filing claims. The fees are due by a time certain and are different based on the beneficial use to which the water is applied. However, as time passes, the amount of funds available in a "filing fee" account are dwindling. Much like other states, Idaho will probably have to turn more and more to the state general fund to cover the costs of the adjudication.

Arizona

Arizona pays for its adjudication through filing fees and through the general fund. It is important when discussing Arizona that it is clear that they are not doing a statewide adjudication. They are conducting their adjudication using a basin-by-basin approach. They are working on two basins right now. One basin is funded entirely by filing fees. For the other basin, because it is extremely small and there aren't very many claimants to provide funding through the payment of fees, a general fund appropriation of \$20,000 is being used in addition to the filing fees. Arizona's staff consists of two people, one special master and one additional staff person. Arizona's fee structure is established in sections 45-254 and 45-255, Arizona Revised Statutes. The fee for filing a statement of claim by an individual is \$20. The fee for filing a claim for a corporation, a municipal corporation, the state or any political subdivision, an association, or a partnership is 2 cents for every acre-foot of water claimed or \$20, whichever is greater. A claim is not considered by the court unless all fees have been fully paid.

Oregon

Oregon relies exclusively on general fund appropriations to fund its adjudication of the Klamath River Basin. Revenue in the Water Resources Department budget only covers about one-half to two-thirds of the revenue required, however, forcing the adjudication process to seek additional WRD funds from savings in other programs. Current fiscal year revenue amounts to approximately \$700,000, leaving a shortfall of between \$550,000 to \$650,000.

Montana

Montana's adjudication program was initially funded with filing fees and general fund. However, the money from the filing fees was expended and the program now relies primarily on the general fund and on the state special revenue fund referred to above. There were four divisions outlined in Montana. The divisions were the Yellowstone, the Clark Fork, the Upper Missouri, and the Lower Missouri. The filing fee was \$40 per claim and it could not exceed more than \$480 in a division. So if a claimant had more than 12 claims within the Yellowstone Division, the claimant only had to pay \$480. The fee was a flat rate and had no correlation with the amount of water claimed.

Montana also allowed for the filing of late claims. The filing fee associated with a late claim was a bit more. The fee was still \$40 for filing but there was an additional \$150 fee for processing.

A review of the attached chart will provide a better understanding of the funding levels and sources.

Funding Alternatives for Montana

Claim Fee

Montana has approximately 220,000 claims filed that are being addressed in the adjudication. An option would be to assess a fee on a per-claim basis. Because of the U.S. v. Idaho case that I discussed earlier, any claims by the United States would probably have to be excluded from assessment. Also, a certain number of claimants aren't going to be able to be found, etc. Therefore, let's assume that there are 175,000 claims that can be assessed a fee. The amount of the fee would be a policy decision. I have outlined some rough numbers below.

Fee per claim	Amount raised per year (assuming 175,000 claims and does not include cost of administration, collection, etc.)	Amount raised per biennium (assuming 175,000 claims and does not include cost of administration, collection, etc., and also assuming that the fee is recurring)
\$10	\$1,750,000	\$3,500,000
\$20	\$3,500,000	\$7,000,000
\$30	\$5,250,000	\$10,500,000
\$40	\$7,000,000	\$14,000,000

As you can see from the chart, a fairly nominal "per-claim fee" could produce significant amounts of money for the program. However, there are always other issues to consider, such as:

1. What happens if the fee isn't paid?

There are a couple of different alternatives to addressing this issue.

- a. Collect the unpaid "fee" as a delinquent tax. This is done in other areas of Montana law and could be set up in a similar structure. The Department of Revenue has the ability to do this, and since the structure exists, the cost to implement it should be less than giving this responsibility to a different state agency. The Department of Revenue would have to be consulted to be able to determine exact costs of implementing a collection mechanism.
- b. Forfeiture of the water right. This is a very severe result for not paying the fee and may lead to litigation. However, it is an alternative and it would probably be the best

avenue for ensuring payment. The question is whether or not the state wants to take away a water user's private property for failing to pay a \$10 fee. Under current law, if a claimant never paid a filing fee the Water Court will terminate the claim when it addresses that particular basin in the adjudication process. The difference between a filing fee and a post-filing fee are significant. In the filing process a water user could choose not to file a claim or pay the fee and forfeit any associated water right. In the instance of a post-filing fee, the water user has already paid the filing fee with the assumption that they would not have to pay fees in the future.

2. Who has to pay the fee?

This question starts to get into the complications of imposing a fee after the filing has already taken place.

a. What if a water user's basin is already adjudicated? If the water user's basin has already been adjudicated it would be very easy to make the case that this fee is in essence a tax on the right to use water. That isn't a good or bad thing, it is an element that needs to be considered when making a policy decision. Do water users located in a basin that has already been adjudicated benefit from a program with adequate funding? The answer might be yes because the Water Court would have enough staff to address all of the issue remarks that are coming to the surface as a result of decrees being enforced.

b. If only water users in nonadjudicated streams have to pay the fee, is that fair? The water users themselves really had no control over how and when their basin was adjudicated, unless they took it upon themselves to petition the District Court to have their stream certified to the Water Court. One might make the argument that it was the state's fault for taking so long to get the adjudication done and that citizens who just happened to be further down the list shouldn't be held responsible for paying when other users are not being held responsible. Is it their fault that their stream was further down "the list" when it came to the state getting the work done?

c. Do entities of state government have to pay the fee? Both DNRC (state lands) and FWP have water rights claims. Will they be responsible for paying a portion of the adjudication costs through the fee system? If the fee system is set up to collect fees from water rights holders in order to pay for the program, wouldn't it make sense to have the state agencies pay as well since they are receiving the same benefit that a water user is from having the adjudication completed?

3. What is the cost of managing a fee program? I mentioned above the cost of collecting when fees aren't paid. However, there are other costs associated with implementing a fee program as well. For instance:

a. DNRC's database will have to be current and functioning well to be able to separate

out the United States claims and to be able to pull names and addresses for mailing notices.

- b. The cost of developing, printing, and mailing notices and keeping a record.
 - c. I'm sure there are other issues to consider as well.
4. Is this a one-time fee or a recurring fee? If recurring, for how long?
5. Who will be in charge of collecting the fee? Does the fee go to the DNRC, the Department of Revenue, or the Water Court? Who is responsible for actually taking in the money and keeping the records associated with that? Can it be done at a local level?
6. Who will address noncompliance? This question relates to question #1. If a water user is required to forfeit his/her right if the fee isn't paid, it would be advisable to include the cost of litigation in the budget of the entity that has to follow up on claimant payments. If the fee is collected as a delinquent tax, then it would probably be advisable to have the Department of Revenue serve in this capacity. They already do this for other fees and would have the policies and framework established.
7. Based on my understanding of committee discussions, it appears that the purpose of trying to get more funding for the adjudication program is to try to speed up the process. If there is a potential for litigation based on a new funding source, like a fee, will this simply prolong the adjudication effort even further?
8. Consumptive use

An issue that the EQC has not addressed specifically but has heard from public testimony is the issue of "consumptive use". In a wide angle lens, the easiest way to look at consumptive use is the accepted belief that some beneficial uses of water are consumptive, some aren't. As your lens begins to narrow you get to the more complicated discussion on how consumptive does a use have to be before it makes a difference. Within one type of beneficial use--let's use irrigation for an example--there are various levels of consumption of the water. This consumption is based on, to name a few:

- a. type of irrigation -- center pivot vs. wheel line vs. hand line vs. flood
- b. type of soil -- sandy vs. clay
- c. type of crop being grown -- alfalfa vs. wheat
- d. time of year irrigation is occurring -- spring vs. late summer

These issues are just a few that would have to be considered when addressing consumptive use. This raises the question of whether or not a distinction should be made between consumptive and nonconsumptive uses and whether or not the Legislature

believes it feasible to address it in statewide policies.

Beneficial Use Fee

An additional alternative for funding the adjudication program is to base a fee structure on the beneficial use to which the water is applied. This is how Idaho's filing fee structure is set up. There is a flat fee for domestic and/or stock water rights and a flat fee for all other rights. In addition to the flat fee there is a variable water use fee on all rights except domestic and/or stock water rights. A potential outline of fees, based on Idaho's statute, is provided below:

Beneficial Use	Fee
Domestic and/or stock water rights	\$25
Claims for all other rights	\$50 flat fee plus an additional variable water use fee based on acreage, power generating capacity, c.f.s., or equivalent volume of water
Additional variable water use fee	
Irrigation use	\$1.00 per acre (one fee irrespective of number of claims)
Power	\$3.50 per kilowatt of capacity (manufacturer's nameplate rating)
Aquaculture	\$10.00 per c.f.s.
Municipal, industrial, commercial, mining, heating, cooling	\$100.00 per c.f.s
Public instream flow, public lake level maintenance, wildlife	\$100.00 per c.f.s

Hydro Tax

SB 176 was introduced in the 2003 session. A hydro tax of this sort is also an option for funding the adjudication program. A copy of the bill and the fiscal note are attached for your review. I think it is important to remember that hydro facilities have water rights and generally speaking they are senior rights. Review the bill draft and the attached fiscal note and we can discuss any questions at the March meeting.

Summary

The Montana Constitution provides the following:

Article IX. Environment and Natural Resources

Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records. (emphasis added)

The important elements to look at with regard to the funding discussion are that (1) water within the boundaries of the state is property of the state and (2) all waters are subject to appropriation for beneficial uses as provided by law.

There are numerous examples of when the state assesses a fee for the use of a state-owned resource. One example is state lands. The property is owned by the state. Others are able to use those lands for specific purposes upon payment of a fee. The state also assesses administrative fees associated with the management of these state-owned resources. Therefore, the concept of fee for use is not new to Montana. It is wholly within the authority of the Legislature to assess a fee for the privilege of using the state's water for a beneficial purpose.

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