

## **Prioritization of basins and sub-basins in Montana's Water Adjudication**

**Krista Lee Evans, Research Analyst**

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In an effort to accomplish a statewide adjudication of existing water rights in a timely manner, the legislature has provided mechanisms for the legislature, DNRC, district court, and the Water Court to prioritize the adjudication work load. The certification process was referred to at the January EQC meeting with regard to getting highly contentious situations adjudicated. In reviewing these sections of law, critical questions that you might consider include:

- (1) Are these various processes being implemented?
- (2) If not -- why not? If yes, how is it working?
- (3) Will prioritization be more important to the process if funding is not the primary limiting factor in the program?
- (4) If prioritization is important, are these options the best way to move through the basins and subbasins in a timely manner?
- (5) Does it matter if your basin or subbasin has a priority?
- (6) Is it worth petitioning the district court to certify the matter to the chief water judge, when it may take years for the water court to take action?

The full text of the statutory provisions are provided below.

**85-2-218. Process and criteria for designating priority basins or subbasins.** (1) The water judges and the department, in performing their functions in the adjudication process, shall give priority to basins or subbasins designated each biennium by the legislature. Basins or subbasins must be designated according to the following criteria:

(a) recurring water shortages within the basin or subbasin have resulted in urgent water rights controversies that require adjudication to determine relative rights;

(b) federal or Indian reserved rights are nearing determination, either by compact or adjudication, thus making adjudication of other rights in the basin or subbasin important for timely issuance of preliminary or final decrees;

(c) the basin or subbasin's location would help ensure efficient use of department and water court resources; and

(d) the adjudication process in the basin or subbasin is nearing the issuance of a decree.

(2) The water judge may designate a basin for priority adjudication upon petition of 100 or more persons who have filed claims within the basin, or he may designate a subbasin for priority adjudication upon petition of a majority of persons who have filed claims within the subbasin. The basin or subbasin shall receive priority, however, only if it meets one or more of the criteria in subsection (1).

(3) If adjudication work in one or more of the priority basins or subbasins has been completed or has been suspended for good cause, the water judge may select other basins or subbasins for priority adjudication, based on the criteria in subsection (1). (emphasis added)

**85-2-309. Hearings on objections -- jurisdiction.** (1) If the department determines that an objection to an application for a permit or change approval under 85-2-402 states a valid objection, it shall hold a contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 60 days from the date set by the department for the filing of objections, after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). The department may consolidate hearings if more than one objection is filed to an application. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322. (emphasis added)

**85-2-321. Milk River basin -- suspension of action on permits -- proposal -- priority in adjudication process.** (1) (a) In order to balance the need for the continued development of Montana's water and for protection of existing rights in the Milk River basin, the department may suspend action on a class of applications or may close a source in the basin and refuse to accept a class of applications, or both, for a permit under this part to appropriate from that source in the basin.

(b) Suspension or closure, or both, may only be proposed by the department.

(c) The proposal must state the source in the basin and class of applications for which suspension or closure, or both, is being proposed and any of the following allegations:

(i) that the frequency of occurrence of unappropriated waters is such that:

(A) any new appropriation from the source for the class of applications will adversely affect the rights of a prior appropriation from the source; or

(B) any new appropriation from the source for the class of applications will interfere unreasonably with another planned use or development for which a permit has been given or for which water has been reserved pursuant to this part in the source; or

(ii) that significant disputes or enforcement problems regarding priority of rights or amounts or duration of water in use by appropriators are in progress or will arise.

(2) After April 8, 1985, the chief water judge shall make issuance of a temporary preliminary decree in the Milk River basin the highest priority in the adjudication of existing water rights pursuant to Title 85, chapter 2, part 2. (emphasis added)

**85-2-406. District court supervision of water distribution.** (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision must be governed by the principle that first in time is first in right.

(2) (a) A district court may order the distribution of water pursuant to a district court decree entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the matter has been adjudicated under the procedure set forth in subsection (2)(b).

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

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

(4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree or preliminary decree as modified after objections and hearings is enforceable and administrable according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water judge shall upon referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities.

(5) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter may appeal a determination made pursuant to subsection (2). (emphasis added).

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