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DETERMINATION OF EXISTING WATER RIGHTS

A REPORT TO THE  
FORTY-SIXTH LEGISLATURE

Subcommittee on Water Rights

November 1978

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## SUMMARY OF RECOMMENDATIONS

The Subcommittee on Water Rights recommends that the 1979 Montana Legislature enact a bill to adjudicate existing water rights through a special system of water courts coupled with a mandatory filing system.

The Subcommittee also recommends that the preference system of water rights not be considered further.

## HOUSE JOINT RESOLUTION NO. 81

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THE COMMITTEE ON PRIORITIES TO ASSIGN TO THE APPROPRIATE COMMITTEE A STUDY OF THE METHODS AND PROGRESS IN THE DETERMINATION OF EXISTING WATER RIGHTS IN MONTANA.

WHEREAS, establishing a centralized record of all water rights is essential for the documentation, protection, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan; and

WHEREAS, according to the report submitted by the Department of Natural Resources and Conservation, "The Future of the Yellowstone River.....?", the actual amount of water available in the Yellowstone Basin for industrial or agricultural development or the provisions of instream flows cannot be positively quantified. The determination of existing water rights in the Yellowstone as well as other areas of the state is a necessary prerequisite to the quantification of available water for new uses and the effects of the new uses on water rights; and

WHEREAS, at the present budget allocation of \$180,000 per year, the determination of existing water rights has been projected to take over 100 years to complete the entire state.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) That the Committee on Priorities assign to the appropriate interim committee a study of methods for and progress in the determination of existing water rights in Montana.

(2) That the Committee consult with the Department of Natural Resources and Conservation and other appropriate agencies and persons during the course of the study.

(3) That the Committee study the methods for determination of existing water rights of other Western States.

(4) That the Committee report its findings and recommendations to the 46th Legislature.

Approved April 2, 1977.

## INTRODUCTION AND SUMMARY OF SUBCOMMITTEE DELIBERATIONS

Following the 1977 Legislature, the Committee on Priorities charged the Subcommittee on Water Rights to study the methods for and progress in the determination of existing water rights in Montana. In connection with its study, the Subcommittee was to consider the methods for determination of existing water rights of other Western states and the feasibility of establishing a preference system of water rights in Montana.

The Subcommittee approached its task with a study plan divided into several phases. The first phase was devoted to learning about the problems with water rights in Montana. Two academic experts were invited to present seminars on water law. Professor Al Stone of the University of Montana School of Law and Professor Frank Trelease of the McGeorge School of Law each presented a seminar for the Subcommittee. The Subcommittee also heard a judge's view of Montana water law in a presentation by Judge W. W. Lessley. Proceedings of these seminars are available for review in the Legislative Council offices.

The Subcommittee's learning phase also included an on-site tour of the lower Powder River adjudication area and a thorough briefing on the adjudication process under present law. Personnel from the Department of Natural Resources and Conservation conducted the tour and briefing.

Further learning phase meetings included attendance at a Water Law Short Course conducted by the U. S. Fish and Wildlife Service that concentrated on instream flows and their relationship to water rights law.

Following the learning phase, the Subcommittee conducted a series of public hearings around the state. Hearings were held in Livingston, Miles City, Malta, Kalispell, Hamilton, and Dillon to hear a wide variety of views from those affected by water rights problems. In addition, Subcommittee members held a number of informal hearings and meetings in their local areas to discuss these problems.

The Subcommittee also held a meeting with representatives of several Montana Indian tribes to hear their views and concerns relating to water rights adjudication. State agencies were also invited to make recommendations for legislative action.

The Subcommittee then developed preliminary recommendations, distributed them widely, received comments, and formulated a final proposal.

This report contains a brief report on the background of water rights problems in Montana and a copy of the bill recommended by the Subcommittee. Extensive additional information on water rights is available in the Legislative Council office for those who wish to delve more deeply into this subject.

## OVERVIEW OF THE RECOMMENDED BILL

As a result of its study of the problems with water rights in Montana, the Subcommittee identified the following as the most significant objectives to be achieved with any proposal to solve those problems:

Most important: Quantify water use rights to protect users in our jurisdiction from claims exerted by other jurisdictions and out-of-state interests.

Second: Provide a basis for better internal administration by (1) resolving disputes among rivals; and (2) provide base knowledge from which to determine availability of waters for future appropriation.

To accomplish these goals, the Subcommittee proposes adoption of legislation that will do the following:

1. Establish a system of water courts:

(a) The level of jurisdiction will be the same as the district courts.

(b) The courts will have authority to handle all water cases arising in their districts.

(c) There will be four districts -- the Yellowstone River, Upper and Lower Missouri River divided at the Marias, and the Clark Fork River drainage including the Kootenai.

(d) There will be one judge per district.

(e) One of the judges will be designated chief judge.

(f) Originally, the judges will be nominated by a special seven-member nominating commission selected as follows:

(1) 2 House members appointed by the Speaker (bipartisan)

(2) 2 Senate members appointed by the president (bipartisan)

(3) 1 member appointed by the Governor

(4) 1 member appointed by the Supreme Court

(5) 1 member appointed by the Montana Bar Association



The Governor will appoint the judges from among the nominees. Vacancies will be filled in the same manner as district judge vacancies are filled.

(g) The original term of appointment is six years. Subsequent terms are four years. The system is designed to be temporary. When the adjudication is finished, the system will be dismantled.

2. Establish a mandatory filing system:

(a) All persons, including the federal government and Indians who claim rights arising prior to 1973, will be required to file a claim for such rights within four years. Exceptions to this will be existing rights for instream stock water uses and claims for rights already declared in the Powder River procedure now taking place.

(b) A person failing to file will be presumed to have abandoned any right. This presumption may be rebutted in court, but rightholders would be wise to file early.

(c) A fee of \$40 per water right with a limit of \$480 per water court district for any person is set. The court will waive this fee when adequate evidence of a previously adjudicated right is submitted with the claim.

## KEY ISSUES IN WATER RIGHTS

The 1972 Constitution responded to nearly 75 years of political and academic arguments about the best way to establish stable water rights. The Constitution confirmed all existing rights to the beneficial use of water. It also required the establishment of a centralized filing system for water rights in addition to the maintenance of local filings. To satisfy these constitutional mandates and to establish a stable water right, the 1973 Legislature adopted the Montana Water Use Act. That act required: (1) adjudication of all existing rights; (2) establishment of a permit system as the exclusive means for securing all new water rights; and (3) establishment of a central water rights file. Problems with adjudication have precluded full implementation of the second and third requirements. It is with those problems we must now concern ourselves.

The Department of Natural Resources and Conservation told the 1977 Legislature that at the current rate of progress in adjudication, it would take an estimated 100 years and \$50 million to adjudicate all existing water rights. The Legislature considered several alternative solutions to these problems but found no acceptable solution. The balance of this part of the report explores the background of the water rights problem in Montana and outlines some major facts and conclusions considered by the Subcommittee in the course of its study.

### What are existing water rights and why are problems associated with them?

There is no definitive answer to this question. In essence, a water right is the right to the use of water for beneficial purposes acquired through appropriation as provided by law. The right to water use that may be appropriated by one person is restricted in that no prior user's right be harmed -- this protection being granted under the maxim that "first in time is first in right." Appropriation is governed by statute and case law. A perfected right is generally based on an actual physical diversion of a specific amount of water at a specific time and place from a specific source and its timely application to a recognized beneficial use. Thus, the right of use is tied to a date of original appropriation, an amount of water appropriated, and a particular use. So if there is a current use, it is correct to say there is a right, but it is of little value until the priority and amount of the right are determined with relation to all other "rights" on the source. A right, without such legally binding prioritization and quantification, is an empty shell, protecting no one.

Prior to 1973 statutory and case law in Montana allowed persons to obtain water rights in three ways: (1) by statutory filing under provisions of section 89-801, et seq.; (2) by simply using water diverted for a beneficial use; or (3) by having been issued a right in a court decree resulting from an adjudication process.

Because of the uncertainties inherent in these practices, it was nearly impossible for any person to know without dispute what water rights he might have. Professor Stone reported in a 1973 Montana Law Review article that whenever Montana water users have a problem they are forced to bring it into a court for resolution. The court then "renders a decree stating what the rights of the parties are -- what their rights are, that is, only as between parties to any particular lawsuit, not what their rights are with respect to any and all challengers who may come along and start trouble at a later date." By adopting the Montana Water Use Act in 1973, the Legislature attempted to establish a system for adjudicating existing rights that would establish the validity of these rights with respect to all possible challengers. Without such a procedure there can never be any assurance of what rights were "recognized and confirmed." As Stone describes them, decrees under the former system are "neither permanent nor conclusive, and rights [granted in them] are neither clear nor secure."

Stone went on to detail why existing rights cannot be readily defined. He listed the following reasons:

1. The water right records are nearly useless because:
  - (a) The person filing a notice of intent to appropriate water may never have done so;
  - (b) The case of Murray v. Tingley stated that a person might obtain a valid water right by using water but without filing, so the record would not show many rights.
2. Adjudications prior to the 1973 act often simply reduced an owner's property interest with little or no explanation, which caused great uncertainty.
3. Court inquiry into original water use needs and the resulting possible court-ordered reduction in the quantity of a water right gives unadjudicated right holders little certainty as to what right they might really have.
4. Adjudications under former law were inconclusive because there was no way of joining all users in the legal action. As a result, decrees could be attacked by anyone affected by the use of water but who was not a party to the adjudication.

The Montana Water Use Act attempted to remedy this situation by establishing a statewide system of water rights adjudication. That system requires the Department of Natural Resources and Conservation to gather data needed to provide sufficient evidence of existing rights and for court proceedings to conclusively identify existing rights by decree.

One Subcommittee member posed a question in the face of all this uncertainty. Will a person have the same water right after an adjudication process as he had before? Professor Stone replied, "What you had before the 1973 Water Use Act is what you will be decreed after the 1973 Water Use Act, but it very well may not be what you think you had."

#### Why adjudicate existing rights now?

Having studied the problems with the identification of existing rights, the Subcommittee discussed whether it would be worthwhile to pursue adjudication and, if so, how soon. The following advantages of timely adjudication were identified:

1. As our water right system developed, many overlapping claims were made on water. This has resulted in an extremely confusing situation for a person who holds a water right. We need to know who now has what water right. Adjudication will help firmly establish each person's existing rights.

2. We need to establish an accurate basis upon which to make decisions for the allocation of new water rights. Existing rights must be firmly established in definite quantities so judgments may be made as to the amount of water that may be available in a stream for further appropriation by permit. The security of firmly established water rights is a must if we want to be able to put a maximum amount of water to beneficial use and allow for the orderly development of the state. Secure rights cannot be guaranteed without first adjudicating existing rights.

3. When conflicts arise between Montana residents and the federal government as to water rights reserved in connection with Indian and other federally reserved lands, it will be extremely helpful to show exactly what water has been put to beneficial use. A well established adjudication system can assist water users in showing the court precisely what applied beneficial uses have been established.

4. A comprehensive adjudication system allows the state to take advantage of the state courts and to move expeditiously to determine the rights of all persons, including the federal government, in the state. Montana now has the authority and the opportunity as granted by Congress in the McCarran Amendment, 43 U.S.C. §666, to bring the

federal government and Indian interests into state courts and determine its water right along with all others. Without an established procedure for general adjudication the opportunity to exercise this right is weakened and could be lost. The alternative would be adjudication in federal courts.

5. Adjudication will fix the precise needs and rights of water users along free flowing streams, thus reducing the chance of expensive emergency litigation in low water years.

6. Proper water planning in the future depends on the establishment of accurate records of water use. Adjudication will establish the necessary basic data needed to identify the kind and quantity of beneficial uses to which water has been put in Montana. Increasing pressures for new uses spawned by new technologies make planning capabilities very important. Such planning is critical to the future protection of our agricultural base.

7. The state constitution requires recognition and confirmation of all existing rights to use water for beneficial purposes. The constitution also requires the legislature to provide for the administration, control, and regulation of water rights, including establishment of central water rights records. Adjudication is a necessary starting point in this process. The Montana Water Use Act recognizes these requirements and has provided one possible avenue for implementing them. But the adjudication process, which is a key element in implementation, is proceeding too slowly.

8. Full implementation of centralized records and administration will assure individuals what their rights are. This, in turn, will facilitate buying, selling, and transferring water rights. Adjudication is a necessary first step toward this goal.

9. State-assisted adjudication will help settle local issues and settle local conflicts with as certain a finality as possible. The process should lower ultimate costs to individuals.

10. Gathering accurate data to establish rights becomes more difficult as both physical evidence and human witnesses grow older. The Supreme Court once described the problem with witnesses thus: "The trial judges have been confronted with aged witnesses who testified to what took place in early days. These venerable men, having more or less knowledge of what they testified about, frequently looked through mental magnifying glasses in attempting to recall forgotten things from bygone days." The longer we wait, the dimmer will be the view of these bygone days.

How has the adjudication problem been handled in other states?

Adjudication of water rights has been a costly and time-consuming process in every state that has attempted it in earnest. Water rights statutes date back to 1879 in Colorado, 1890 in Wyoming, 1903 in Idaho, 1905 in North Dakota, and 1907 in South Dakota. Most adjudications implemented under these statutes are still in process or are still being revised and corrected. Despite continuous and agonizing litigation and relitigation of rights and the lack of any kind of record of rights from which intelligent planning or distribution of water could be derived, Montana didn't even begin general adjudication until 1973. Despite the slowness of adjudication, virtually all states basically have the same procedure which varies mainly in which agency performs various functions. To date there has been no magic system devised. The dedication of adequate funding and effort remains the primary factor in successful and timely adjudication.

Professor Stone pointed out that three methods predominate for settling water rights in the Western states: (1) the administrative system used in Wyoming, (2) administrative investigation and court determination used in Oregon, and (3) a system derived from the Bien Code. Stone summarized these systems in the Winter 1973 issue of the Montana Law Review as follows:

The Wyoming system authorizes the Board of Control to select streams for adjudication, to publish notice of the investigation and hearing, and (after a hearing by the Division Superintendent) to make the determination of rights which is conclusive and binding upon all. An aggrieved person may appeal to the courts.

The Oregon system starts out similarly to the Wyoming system, in that the State Engineer publishes and mails notice, conducts an investigation and hearing, and makes a determination of all rights. But then this administrative order of determination is filed in a circuit court, where interested parties may file exceptions, and from which emanates a final court decree of adjudication which is conclusive and binding upon all -- subject to appeal to the Supreme Court of Oregon.

The Bien Code system derives its name from Morris Bien of the U. S. Reclamation Service, who drafted this system of stream adjudication in 1903. It provides for an administrator such as the State Engineer to prepare a hydrographic survey and transmit it to the state Attorney General who then brings an action in court based upon the Engineer's findings and determinations.

Some of the states which use the Bien Code provide for publication of notice and a conclusive decree.

The charts on the following pages were prepared by Dave Cogley, staff attorney of the Legislative Council. The charts summarize the systems in use in selected Western states.

## UTAH

## TEXAS

## OREGON

	UTAH	TEXAS	OREGON
Date of original adjudication statute	1901	1917	1909
Who initiates	(§73-4-1) State Engineer	(§5.304) Texas Water Rights Commission or Texas Water Development Board	(§§539.020, 539.030) Water Resources Director
Limitations on claims or allotment		(§5.303) Maximum used any year between 1963-1967	
Who investigates	(§§73-4-3, 73-4-11) State Engineer	(§5.305) Texas Water Rights Commission	(§§539.020, 539.120) Water Resources Director
Who pays cost of engineer study	State	State	State
Who makes preliminary findings	(§73-4-11) State Engineer	(§§5.309, 5.337) Commission	(§§539.020, 539.130) Water Resources Director
Who makes final decision	(§§73-4-12, 73-4-15) District Court	(§5.322) District Court	(§539.150) Circuit Court
Jurisdictional area of tribunal making final decision (non-appellate)	(§§73-4-12, 73-4-15) Source or river system	(§5.322) Source	(§539.020) Source
Conclusive	(§73-4-9) Yes	(§5.303(i)) Yes	(§539.200) Yes
Update procedure	(§§73-3-2, 73-3-3) Permit system	(§5.121) Permit system	(§§537.130, 540.520) Permit system



## NORTH DAKOTA

## SOUTH DAKOTA

## WYOMING

	NORTH DAKOTA	SOUTH DAKOTA	WYOMING
Date of original adjudication statute	1905	1907	1890
Who initiates	(\$61-03-16) State engineer via attorney general	(\$46-10-1) Water Resources Commission via attorney general	(\$41-165) Board of Control
Limitations on claims or allotment			(\$41-181) 1 cfs/70 acres
Who investigates	(\$61-03-15) State Engineer	(\$46-10-4) Water Resources Commission	(\$41-180) State Engineer
Who pays cost of engineer study	(\$61-03-17) Private user	(\$46-10-4) State or consenting private party	State
Who makes preliminary findings	(\$61-03-16) Court	(\$46-10-2) District Court	(\$41-180) Board of Control
Who makes final decision	(\$61-03-16) Court	(\$46-10-2) District Court	(\$41-181) Board of Control
Jurisdictional area of tribunal making final decision (non-appellate)	(\$61-03-16) Source	(\$46-10-2) Source	Division (major drainage basin)
Conclusive	No (?) - no publication	No - no publication	(\$41-190) Yes
Update procedure	(\$61-04-02) Permit system	(\$46-5-10) Permit system	(\$41-201) Permit system (\$41-161) Tabulations

## MONTANA

## COLORADO

## IDAHO

	MONTANA	COLORADO	IDAHO
Date of original adjudication statute	1973	1879	1903
Who initiates	(\$89-873) Department of Natural Resources	(\$37-92-302) Water user - The present Colorado statute does not speak in terms of comprehensive adjudication since that has been accomplished in Colorado.	(42-1406) Director of Water Resources
Limitations on claims or allotment			
Who investigates	(\$89-871, 89-874) Department of Natural Resources	(\$37-92-203) Water Court referee	(\$42-1401, 42-1408) Department of Water Resource
Who pays cost of engineer study	State	(\$37-92-203) Supreme Court (?)	(\$42-1401) Department
Who makes preliminary findings	(\$89-875) District Court	(\$37-92-301(2), 37-92-303) Special water court or referee	(\$42-1410) Director of Water Resources
Who makes final decision	(\$89-877) District Court	(\$37-92-304) Special water court	(\$42-1410) District Court
Jurisdictional area of tribunal making final decision (non-appellate)	(\$89-873, 89-877) Source	(\$37-92-203) Division (major drainage basin)	(\$42-1407) Source
Conclusive	(\$89-877(5)) Yes	Yes	(\$42-1411) Yes
Update procedure	(\$89-880) Permit system	(\$37-92-302, 37-92-401) 4-year tabulations - adjudication of each new right	(\$42-202, 42-222) Permit system

How did the Montana Water Use Act propose to solve our water rights problems?

The Montana Water Use Act established an entirely new system for acquisition and administration of water rights. Since 1973 a water right may be acquired only by permit. The Department of Natural Resources and Conservation is required to issue a permit if:

- (1) there are unappropriated waters in the source of supply:
  - (a) at times when the water can be put to the use proposed by the applicant;
  - (b) in the amount the applicant seeks to appropriate; and
  - (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (2) the rights of a prior appropriator will not be adversely affected;
- (3) the proposed means of diversion or construction are adequate;
- (4) the proposed use of water is a beneficial use;
- (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;
- (6) an applicant for an appropriation of 10,000 acre-feet a year or more, or 15 cubic feet per second or more, proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

Clearly, all prior rights must be known before items (1), (2), and (6) can be known conditions. Therefore, in addition to the reasons stated previously, some method of determining existing rights is needed in order to provide a rational base for administration of all water rights.

The Montana Water Use Act requires the Department of Natural Resources and Conservation to begin proceedings for the determination of existing rights. Proceedings are to begin first in areas where the problem is most urgent. The Department of Natural Resources and Conservation has given the Powder River drainage first priority because of looming

problems in that area. Proceedings have also been started on the Tongue and Big Horn Rivers in response to federal lawsuits initiated to determine rights reserved for Indian reservations.

As a first step in the adjudication of a source, the department is required to gather data for the determination of the rights. Among data to be gathered are the following:

(1) court decrees adjudicating water rights in a proceeding commenced prior to July 1, 1973;

(2) declarations of existing rights filed by each person claiming an existing right;

(3) records of rights acquired under the groundwater code;

(4) notices of appropriations filed under former statutes;

(5) records of declarations filed under prior statutes;

(6) records of statements filed in connection with the Yellowstone River Compact legislation;

(7) the findings of water resource surveys conducted by the department and its predecessor agencies;

(8) the findings of inspections, surveys, reconnaissance, and investigations made by the department of the area or source involved.

The department is then required to submit to the district court all data gathered, the names of all persons who filed a declaration, and the names of all persons who appear to have existing rights. The court subsequently issues a preliminary decree; legal action may be entertained in disputed cases to adjust the decree. Following this process, a final decree must be issued. The decree must state findings of fact and conclusions of law upon which existing rights and priorities are based. For each person found to have an existing right, the decree must show:

(1) the name and post office address of the owner of the right;

(2) the amount of water, rate, and volume, included in the right;

(3) the date of priority of the right;

(4) the purpose for which the water included in the right is used;

(5) the place of use and a description of the land to which the right is appurtenant;

(6) the source of the water included in the right;

(7) the place and means of diversion;

(8) the approximate time during which the water is used each year;

(9) any other information necessary to fully define the nature and extent of the right.

The statute then states that the final decree in each existing right determination is final and conclusive as to all existing rights in the source or area under consideration. After the final decree there shall be no existing rights to water in the area or source under consideration except as stated in the decree.

In adopting the Montana Water Use Act the legislature intended to create order and clarity in place of the previous confusion.

Now what is the problem?

The purposes of the Montana Water Use Act are being recognized as laudatory by more and more people. At the same time, it is unfortunately true that not one existing right has been identified under the act.

The department has found that 70% of declared rights in the Powder River adjudication work are totally undocumented. That fact has resulted in the need to develop, train, and retain qualified staff in the field to gather adequate data to fulfill requirements of the law. The department's goal as presented to the Subcommittee is to have all field work on the Powder River completed and ready for department attorneys by June 30, 1981.

At the rate the work in the Powder River drainage is proceeding, the department estimates it will take 100 years and \$50 million to adjudicate all rights in the state. In addition, the Subcommittee believes that requiring district courts to adjudicate massive numbers of rights will heavily overburden district judges, many of whom are already overworked.

There clearly is a problem. For all the reasons that a timely adjudication is needed, a long delay in the process is unacceptable.

What can be done to solve the problem?

The following alternatives have been mentioned as possible solutions to one or more aspects of the problems outlined above.

1. Do not adjudicate. This would certainly lessen the appropriations needed, but would accept the situation that existed before 1973 as reasonable. No firm basis for issuance of permits would exist.

2. Streamline the existing system by reducing detail. This could be done by accepting small filings as prima facie evidence of a right without field work. Similarly, ground-water declarations could be taken at face value. Such simplification would make the process both faster and cheaper. The margin of error would be increased; risk of future litigation might be incurred.

3. Require more proof of a right to be filed with the original declaration. Such a provision would require a certificate by an engineer or land surveyor attesting to the veracity of the capacity and location of water diversion systems, etc. This would be more accurate than merely accepting the declaration of the rightholder and would save the state some engineering costs. The rightholder would have to pay the cost of the engineer or surveyor which he does not now pay.

4. Require a declaration of all rights to be filed within five years and eventually adjudicate. This would provide an early estimate of the total number of existing rights to aid in planning. This could help speed up the process. Some assistance to declarers would help make declarations more accurate. The department has found rightholders need assistance to enable them to file meaningful declarations.

5. Establish an administrative adjudication system. This would reduce the pressure on the district court. This idea was rejected earlier by the Legislature because of the greater confidence the citizenry is felt to have in the judiciary as opposed to the bureaucracy.

6. Adjudicate under the present system faster by spending more money. This could be accomplished by increasing the appropriation to the department for the work or by finding additional revenues for the program through fees or special taxes. Increasing the appropriation may be required in any event, but serious political and practical limits must be recognized.

7. Require water users to pay a fee for their water right. Such a fee could be collected when the declaration is filed, when the right is granted in the final decree or at some other time. It could be based on an estimated cost per acre, per water right, per quantity of water right, or on some other basis. A fee could be designed to cover the entire cost of determining the right, be designed to split the cost between the state and the water user on a benefit/cost basis, or be designed to merely reimburse a reasonable amount to the state. Ideally, costs would be apportioned in proportion to value received.

8. Establish a system of water judges. This would relieve the burden on the district judges and would encourage more consistent decisions across the state.

The Subcommittee's proposal, included in this report, combines several of these options into a system the Subcommittee believes will work for Montana.

#### What is a preference system?

When there is an ample amount of water for all who wish to use it, no conflicts need arise among users. Shortage creates conflicts. Conflicts may be resolved by operation of law. Our present system provides that when two appropriators come into conflict over using a too small amount of water, the appropriator whose right was first in time has the first right to use the water. Under a preference system, a statute says that certain classes of use are higher than others. If a conflict arises, the higher use prevails over the lower use. Preference systems enacted in other states have not been implemented, according to Professor Stone.

If Montana were to adopt a preference system, pre-1973 water rights could be affected only by condemnation. The adjudication process would thus have to be completed so the property right being taken would be clearly identifiable.

Based on the fact that no clear need has been established for a preference system and the fact that the priority system could supersede the existing system only with difficulty, the Subcommittee decided not to consider the preference system further.

APPENDIX

RECOMMENDED BILL  
TO ADJUDICATE WATER RIGHTS



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BILL NO. \_\_\_\_\_

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INTRODUCED BY \_\_\_\_\_

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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NEW SECTION. Section 1. Water courts established. (1)

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To adjudicate existing water rights, a system of water courts is established. A water court shall be presided over by a water judge.

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(2) There shall be one water judge for each water court district. A water judge may sit in any district.

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(3) The governor shall designate one water judge to serve as chief water judge. The chief water judge may distribute caseloads among the several water judges on an equitable basis. The chief water judge shall be assigned to a district and shall hear cases in that district on an equitable basis with the other judges. The chief water judge in consultation with the other water judges shall determine the sites of the offices of the water courts.

1        NEW SECTION. Section 2. Water court districts  
2 defined. (1) There are four water court districts whose  
3 boundaries are formed by the natural divides between  
4 drainages and the borders of the state of Montana and which  
5 are described as follows:

6        (a) The Yellowstone River Basin water court district  
7 consists of those areas drained by the Yellowstone and  
8 Little Missouri Rivers and any remaining areas in Carter  
9 County.

10        (b) The Lower Missouri River Basin water court  
11 district consists of those areas drained by the Missouri  
12 River from below the mouth of the Marias River and any  
13 remaining areas in Glacier and Sheridan Counties.

14        (c) The Upper Missouri River Basin water court  
15 district consists of those areas drained by the Missouri  
16 River to below the mouth of the Marias River.

17        (d) The Clark Fork River Basin water court district  
18 consists of the areas drained by the Clark Fork River, the  
19 Kootenai River and any remaining areas in Lincoln County.

20        (2) Whenever a question arises concerning which water  
21 court has jurisdiction over adjudication of an existing  
22 right, the question shall be settled through consultation  
23 with the water judges involved, subject to review by the  
24 chief water judge.

25        NEW SECTION. Section 3. Salary, expenses, and

1 retirement of water judges. (1) A water judge is entitled to  
2 the salary and expenses authorized by law for district  
3 judges.

4 (2) A water judge shall participate in the Montana  
5 judges' retirement system established in Title 19, chapter  
6 5, on the same basis as a district court judge.

7 NEW SECTION. Section 4. Jurisdiction of the water  
8 court. (1) A water court has exclusive jurisdiction in  
9 matters arising in relation to the determination and  
10 interpretation of existing water rights under [this act].  
11 It is the intent of the legislature that all such matters be  
12 brought in or immediately transferred to a water court  
13 unless witnesses have been sworn and testimony has been  
14 taken by the district court.

15 (2) The jurisdiction of the water court includes  
16 jurisdiction to appoint and supervise water commissioners in  
17 the same manner as authorized for district judges.

18 (3) The district court shall assume jurisdiction over  
19 enforcement of the provisions of a final decree issued as  
20 provided in [section 24 of this act].

21 NEW SECTION. Section 5. Procedure. (1) The water  
22 court shall make rules, including rules of evidence,  
23 necessary to accomplish the purposes of [this act].

24 (2) Except as may be specifically provided in this  
25 section, procedures established in Title 25 applicable to

1 civil procedure in the district court apply to the water  
2 court.

3 (3) The use of discovery in cases before the water  
4 court may be exercised only to the extent specifically  
5 authorized by order of the water court.

6 NEW SECTION. Section 6. Disqualification of water  
7 judge. (1) A water judge may disqualify himself in any  
8 proceeding in which his impartiality might reasonably be  
9 questioned.

10 (2) A water judge may also disqualify himself in the  
11 following circumstances:

12 (a) if he has a personal bias or prejudice concerning  
13 a party or personal knowledge of disputed evidentiary facts  
14 concerning the proceeding;

15 (b) if in private practice he served as a lawyer in  
16 the matter in controversy or a lawyer with whom he  
17 previously practiced law served during such association as a  
18 lawyer concerning the matter or the judge or the lawyer has  
19 been a material witness concerning it;

20 (c) if he has served in governmental employment and in  
21 such capacity participated as counsel, adviser, or material  
22 witness concerning the proceeding or expressed an opinion  
23 concerning the merits of the particular case in controversy;

24 (d) if he knows that he, individually or as a  
25 fiduciary, or his spouse or minor child residing in his

1 household has a financial interest in the subject matter in  
2 controversy or in a party to the proceeding or any other  
3 interest that could be substantially affected by the outcome  
4 of the proceeding; or

5 (e) if he or his spouse or a person within the third  
6 degree of relationship to either of them (as calculated  
7 according to 72-11-101 through 72-11-105) or the spouse of  
8 such a person:

9 (i) is a party to the proceeding or an officer,  
10 director, or trustee of a party;

11 (ii) is known by the judge to have an interest that  
12 could be substantially affected by the outcome of the  
13 proceeding;

14 (iii) is to the judge's knowledge likely to be a  
15 material witness in the proceeding.

16 (3) A water judge should inform himself about his  
17 personal and fiduciary financial interests and make a  
18 reasonable effort to inform himself about the personal  
19 financial interests of his spouse and minor children  
20 residing in his household.

21 (4) For the purposes of this section the following  
22 definitions apply:

23 (a) "Proceeding" includes prehearing, hearing,  
24 appellate review, or other stages of adjudication.

25 (b) "Fiduciary" includes such relationships as

1 executor, administrator, trustee, or guardian.

2 (c) "Financial interest" means ownership of a legal or  
3 equitable interest, however small, or a relationship as  
4 director, adviser, or other active participant in the  
5 affairs of a party, except that:

6 (i) ownership in a mutual or common investment fund  
7 that holds securities is not a financial interest in such  
8 securities unless the judge participates in the management  
9 of the fund;

10 (ii) an office in an educational, religious,  
11 charitable, fraternal, or civic organization is not a  
12 financial interest in securities held by the organization;

13 (iii) the proprietary interest of a policyholder in a  
14 mutual insurance company or a depositor in a mutual savings  
15 association or a similar proprietary interest is a financial  
16 interest in the organization only if the outcome of the  
17 proceeding could substantially affect the value of the  
18 interest; and

19 (iv) ownership of government securities is a financial  
20 interest in the issuer only if the outcome of the proceeding  
21 could substantially affect the value of the securities.

22 (5) A water judge may accept from the parties to the  
23 proceeding a waiver of any ground for disqualification if it  
24 is preceded by a full disclosure on the record of the basis  
25 for disqualification.

1 (6) The procedure for disqualification of a water  
2 judge specified in this section is exclusive.

3 NEW SECTION. Section 7. Appeals from water court. The  
4 supreme court has exclusive jurisdiction over appeals from a  
5 water court. Appeal procedures shall be governed by the  
6 Montana Rules of Appellate Civil Procedure.

7 NEW SECTION. Section 8. Qualifications of a water  
8 judge. To be eligible to serve as a water judge, a person  
9 must have the qualifications of a district court judge  
10 required by Article VII, section 9, subsections (1) through  
11 (3), of the constitution of Montana. A water judge shall  
12 reside within the state.

13 NEW SECTION. Section 9. Creation, composition,  
14 function, and termination of water judge nominating  
15 commission. (1) A water judge nominating commission is  
16 created. Its function is to provide the governor with  
17 nominees for appointment as water judges. The commission  
18 shall be composed of seven members appointed as follows:

19 (a) two members of the house of representatives  
20 appointed by the speaker, not more than one of whom is from  
21 the same political party;

22 (b) two members of the senate appointed by the  
23 president, not more than one of whom is from the same  
24 political party;

25 (c) one member appointed by the governor;

1 (d) one member appointed by the supreme court;

2 (e) one member appointed by the board of directors of  
3 the state bar of Montana.

4 (2) Appointments shall be made [within 30 days of the  
5 effective date of this section].

6 (3) In the event of a vacancy, the position shall be  
7 filled as in the manner of the original appointment.

8 (4) The water judge nominating commission shall meet  
9 as often as required to select the nominees. The  
10 commission shall nominate three persons for the position of  
11 chief water judge and five persons for positions as water  
12 judges.

13 (5) The water judge nominating commission shall  
14 organize itself and conduct its business under the  
15 procedures provided for the nominating commission.

16 (6) Upon the acceptance of appointment by nominees as  
17 water judges in each water court district, the water judge  
18 nominating commission ceases to exist. Hereafter  
19 nomination and appointment of water judges shall be as  
20 provided for district court judge.

21 (7) Not later than July 1, 1979, the governor shall  
22 appoint a chief water judge and three other water judges  
23 from among lists of nominees presented by the water judge  
24 nominating commission.

25 NEW SECTION. Section 10. Appointment of water judges



1 to fill vacancy. (1) If a vacancy occurs, the governor shall  
2 appoint a person to complete the unexpired term in the same  
3 manner as provided for the appointment of a district judge.

4 (2) Appointments to subsequent terms shall be made in  
5 the same manner as filling a vacancy.

6 NEW SECTION. Section 11. Water judges -- term of  
7 office. The term of office for water judges is from July 1,  
8 1979, to June 30, 1985. After June 30, 1985, the term of  
9 office of a water judge is 4 years, subject to continuation  
10 of the water court system by the legislature.

11 NEW SECTION. Section 12. Claim of existing water  
12 right -- filing statement of claim required -- exemptions.  
13 (1) A person claiming an existing right, unless exempted  
14 below, shall file with the water court for the water court  
15 district wherein the diversion occurs no later than June 30,  
16 1983, a statement of claim for each water right asserted on  
17 a form provided by the department of natural resources and  
18 conservation. If there is a claimed right with no division,  
19 the filing shall be made in the district where the use  
20 occurs.

21 (2) Claims for existing rights for livestock and  
22 domestic uses based upon instream flow or groundwater  
23 sources and claims for rights included in a declaration  
24 filed pursuant to the order of a district court issued under  
25 sections 8 and 9 of Chapter 452, Laws of 1973, as amended,

1 are exempt from the filing requirements of subsection (1) of  
2 this section. Such claims may, however, be voluntarily  
3 filed.

4 NEW SECTION. Section 13. Department of fish and game  
5 to represent public recreational uses. The department of  
6 fish and game shall exclusively represent the public for  
7 purposes of establishing any prior and existing public  
8 recreational use in existing right determinations under  
9 [sections 12 through 26], provided that the foregoing shall  
10 not be construed in any manner as a legislative  
11 determination of whether or not a recreational use sought to  
12 be established prior to July 1, 1973, is or was a beneficial  
13 use.

14 NEW SECTION. Section 14. Statement of claim --  
15 contents. (1) The statement of claim for each right shall  
16 include substantially the following:

17 (a) the name and mailing address of the claimant;

18 (b) the name of the watercourse or water source from  
19 which the right to divert or make use of water is claimed,  
20 if available;

21 (c) the quantities of water and times of use claimed;

22 (d) the legal description, with reasonable certainty,  
23 of the point or points of diversion and places of use of  
24 waters;

25 (e) the purpose of use, including, if for irrigation,

1 the number of acres irrigated;

2 (f) the approximate dates of first putting water to  
3 beneficial use for the various amounts and times claimed in  
4 subsection (c); and

5 (g) the sworn statement that the claim set forth is  
6 true and correct to the best of claimant's knowledge and  
7 belief.

8 (2) The claimant may submit maps, plats, aerial  
9 photographs, decrees, or other evidence in support of his  
10 claim.

11 NEW SECTION. Section 15. Abandonment by failure to  
12 file claim. The failure to file a claim of an existing right  
13 as required by [section 12] establishes a rebuttable  
14 presumption of abandonment of that right.

15 NEW SECTION. Section 16. Claim to constitute prima  
16 facie evidence. A claim of an existing right filed in  
17 accordance with [section 12] constitutes prima facie proof  
18 of its content until the issuance of a final decree.

19 NEW SECTION. Section 17. Notice of requirement to  
20 file claim. The department shall provide notice of the  
21 requirement to file a statement of a claim of an existing  
22 water right in substantially the following form:

23 WATER RIGHTS NOTICE

24 FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT  
25 IN A REBUTTABLE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED

1 WATER RIGHT HAS BEEN ABANDONED. (This introductory sentence  
2 shall be printed in not less than 12-point boldface type.)

3 This is notice of commencement of procedures for the general  
4 adjudication of existing rights to the use of water and of  
5 the requirement to file a claim for certain rights. Every  
6 person, including but not limited to an individual,  
7 partnership, association, public or private corporation,  
8 city or other municipality, county, state agency or the  
9 state of Montana, and federal agency or the United States of  
10 America, asserting a claim to an existing right to the use  
11 of water which would be protected under the law as it  
12 existed prior to July 1, 1973, is notified that a statement  
13 of claim to that right is required to be filed with the  
14 water court for the water court district wherein water is  
15 diverted or used for the right claimed no later than June  
16 30, 1983. Claims for stock and domestic uses based upon  
17 instream flow or groundwater sources are exempt from this  
18 requirement; however, claims for such uses may be  
19 voluntarily filed. Claims filed with the department in a  
20 declaration filed pursuant to the order of a district court  
21 issued pursuant to sections 8 and 9 of Chapter 452, Laws of  
22 1973, as amended, are also exempt.

23 For further information, contact the department of  
24 natural resources and conservation, Helena, Montana, for a  
25 copy of the law and an explanation of it.

1        NEW SECTION. Section 18. How notice to be given. To  
2 assure that all persons who may claim an existing water  
3 right are notified of the requirement to file a claim of  
4 that right, the department of natural resources and  
5 conservation shall give notice as follows:

6        (1) It shall cause a notice printed in not less than  
7 10-point type to be placed in a prominent and conspicuous  
8 place in all daily newspapers of the state and in at least  
9 one newspaper published in each county of the state during  
10 the month of July, 1979, and in April of 1980, 1981, 1982,  
11 and 1983.

12        (2) It shall cause a notice in writing to be placed in  
13 a prominent and conspicuous location in each county  
14 courthouse in the state.

15        (3) It shall provide a sufficient number of copies of  
16 the notice to the county treasurers before October 15, 1979,  
17 1980, 1981, and 1982, and the county treasurers shall  
18 enclose a copy of the notice with each statement of property  
19 taxes mailed in 1979, 1980, 1981, and 1982. In the  
20 implementation of this subsection, the department shall  
21 provide reimbursement to each county treasurer for the  
22 reasonable additional costs incurred by the treasurer  
23 arising from the inclusion of the notice required by this  
24 section.

25        (4) It shall provide copies of the notice in writing

1 to the press services with offices located in Helena during  
2 July, 1979, and April of 1980, 1981, 1982, and 1983.

3 (5) The water court may also in its discretion give  
4 notice in any other manner that will carry out the purposes  
5 of this section.

6 NEW SECTION. Section 19. Filing fee -- special  
7 account created. (1) Each claim filed under [section 12]  
8 shall be accompanied by a fee in the amount of \$40, subject  
9 to the following exceptions:

10 (a) the total fees for all claims filed by one person  
11 in any one water court district may not exceed \$480; and

12 (b) no fee is required accompanying a claim of an  
13 existing right that is included in a decree of a court in  
14 the state of Montana and which is accompanied by a certified  
15 copy of that decree or verified as otherwise ordered by the  
16 court.

17 (2) There is established a water right adjudication  
18 account in the earmarked revenue fund of the state treasury.  
19 All fees collected under [sections 19 and 22] shall be  
20 deposited in the account to pay the expenses incurred for  
21 administering [this act].

22 NEW SECTION. section 20. Adjudication of existing  
23 rights. (1) The state of Montana upon relation of the  
24 attorney general shall petition each water court to require  
25 all persons claiming a right within the water court district

1 to file a claim of the right as provided in [section 12].

2 (2) The requirement by the water court to file a claim  
3 for an existing right is the first step in proceedings for  
4 the general adjudication of all existing rights to the use  
5 of water which would be protected under the law as it  
6 existed prior to July 1, 1973.

7 (3) The water court shall monitor the claim filing  
8 procedure and make any orders necessary to assure timely and  
9 accurate compliance with the claim filing procedure.

10 NEW SECTION. Section 21. Department assistance to  
11 water court. The department, subject to the direction of the  
12 water court, shall, without cost to the water court:

13 (1) provide such information and assistance as may be  
14 required by the water court to adjudicate claims of existing  
15 rights;

16 (2) establish information and assistance programs to  
17 aid claimants in the filing of claims for existing rights  
18 required by [section 12];

19 (3) conduct field investigations of randomly selected  
20 claims or claims that the water court determines warrant  
21 investigation; and

22 (4) provide the water courts with all information in  
23 its possession bearing upon existing rights.

24 NEW SECTION. Section 22. Preliminary decree. (1)  
25 Within a reasonable time after June 30, 1983, the water

1 court shall issue a preliminary decree. The preliminary  
2 decree shall be based on the data submitted by the  
3 department and on any additional data obtained by the court.

4 (2) The preliminary decree shall contain the  
5 information and make the determinations, findings, and  
6 conclusions required for the final decree under [section  
7 24].

8 (3) The water court shall send a copy of the  
9 preliminary decree to the department, and the court shall  
10 serve by mail a notice of availability of the preliminary  
11 decree to each person named in the preliminary decree. The  
12 clerk or person designated by the court to mail the notice  
13 shall make a general certificate of mailing certifying that  
14 a copy of the notice has been placed in the United States  
15 mail, postage prepaid, addressed to each party in the  
16 preliminary decree. Such certificate shall be conclusive  
17 evidence of due and legal notice of entry of decree.

18 (4) Any person may obtain a copy of the preliminary  
19 decree upon payment of a fee of \$20 to the water court.

20 NEW SECTION. Section 23. Hearing on preliminary  
21 decree. (1) Upon objection to the preliminary decree by the  
22 department, a person named in the preliminary decree, or any  
23 other person, for good cause shown, the department or such  
24 person is entitled to a hearing thereon before the water  
25 court.



1       (2) If a hearing is requested, such request must be  
2 filed with the water court within 90 days after notice of  
3 entry of the preliminary decree. The water court shall, for  
4 good cause shown, extend this time limit an additional 30  
5 days if application for the extension is made within 90 days  
6 after notice of entry of the preliminary decree.

7       (3) The request for a hearing shall contain a precise  
8 statement of the findings and conclusions in the preliminary  
9 decree with which the department or person requesting the  
10 hearing disagrees. The request shall specify the paragraphs  
11 and pages containing the findings and conclusions to which  
12 objection is made. The request shall state the specific  
13 grounds and evidence on which the objections are based.

14       (4) Upon expiration of the time for filing objections  
15 and upon receipt of a request for a hearing, the court shall  
16 notify each party named in the preliminary decree that a  
17 hearing has been requested. The court shall fix a day when  
18 all parties who wish to participate in future proceedings  
19 must appear or file a statement. The court shall then set a  
20 date for a hearing. The court may conduct individual or  
21 consolidated hearings. A hearing shall be conducted as for  
22 other civil actions.

23       NEW SECTION. Section 24. Final decree. (1) The water  
24 court shall, on the basis of the preliminary decree and on  
25 the basis of any hearing that may have been held, enter a

1 final decree affirming or modifying the preliminary decree.  
2 If no request for a hearing is filed within the time  
3 allowed, the preliminary decree automatically becomes final,  
4 and the court shall enter it as the final decree.

5 (2) The final decree shall establish the existing  
6 rights and priorities within the water court district of  
7 persons required by [section 12] to file a claim for an  
8 existing right and of persons who filed declarations  
9 pursuant to an order of a district court issued under  
10 sections 8 and 9, of Chapter 452, Laws of 1973.

11 (3) The final decree shall state the findings of fact,  
12 along with any conclusions of law, upon which the existing  
13 rights and priorities of each person named in the decree are  
14 based.

15 (4) For each person who is found to have an existing  
16 right, the final decree shall state:

17 (a) the name and post-office address of the owner of  
18 the right;

19 (b) the amount of water, rate, and volume, included in  
20 the right;

21 (c) the date of priority of the right;

22 (d) the purpose for which the water included in the  
23 right is used;

24 (e) the place of use and a description of the land, if  
25 any, to which the right is appurtenant;

1 (f) the source of the water included in the right;

2 (g) the place and means of diversion;

3 (h) the inclusive dates during which the water is used  
4 each year;

5 (i) any other information necessary to fully define  
6 the nature and extent of the right.

7 NEW SECTION. Section 25. Appeals from final decree.

8 (1) A person whose existing rights and priorities are  
9 determined in the final decree may appeal the determination  
10 only if:

11 (a) he requested a hearing and appeared and entered  
12 objections to the preliminary decree; or

13 (b) his rights as determined in the preliminary decree  
14 were altered as the result of a hearing requested by another  
15 person.

16 (2) An appeal from the final decree shall be taken as  
17 provided by the Montana Rules of Appellate Civil Procedure.

18 NEW SECTION. Section 26. Certificate of water right.

19 When a final decree is entered, the court shall send a copy  
20 to the department. The department shall on the basis of the  
21 final decree issue a certificate of water right to each  
22 person decreed an existing right. The original of the  
23 certificate shall be sent to the county clerk and recorder  
24 of the county where the point of diversion or place of use  
25 is located for recordation. The department shall keep a

1 copy of the certificate in its office in Helena. After  
 2 recordation, the clerk and recorder shall send the  
 3 certificate to the person to whom the right is decreed.

4 Section 27. Section 3-1-101, MCA, is amended to read:

5 "3-1-101. The several courts of this state. The  
 6 following are courts of justice of this state:

7 (1) the court of impeachment, which is the senate;

8 (2) the supreme court;

9 (3) the district courts;

10 ~~(4) the water courts;~~

11 ~~(4)(5)~~ the justices' courts;

12 ~~(5)(6)~~ the city courts and such other inferior courts  
 13 as the legislature may establish in any incorporated city or  
 14 town."

15 Section 28. Section 3-1-102, MCA, is amended to read:

16 "3-1-102. Courts of record. The court of impeachment,  
 17 the supreme court, the district courts, ~~the water courts,~~  
 18 and the municipal courts are courts of record."

19 Section 29. Section 3-1-1001, MCA, is amended to read:

20 "3-1-1001. Creation, composition, and function of  
 21 commission. A judicial nomination commission for the state  
 22 of Montana is created. Its function is to provide the  
 23 governor with a list of candidates for nomination to fill  
 24 any vacancy on the supreme court, or any district court, ~~or~~  
 25 ~~a water court~~ of the state of Montana. The commission shall

1 be composed of seven members as follows:

2 (1) four lay members who are neither judges nor  
3 attorneys, active or retired, who reside in different  
4 geographical areas of the state, and each of whom is  
5 representative of a different industry, business, or  
6 profession, whether actively so engaged or retired, who  
7 shall be appointed by the governor;

8 (2) two attorneys actively engaged in the practice of  
9 law, one from each congressional district, who shall be  
10 appointed by the supreme court;

11 (3) one district judge elected by the district judges  
12 under an elective procedure initiated and conducted by the  
13 supreme court and certified to such election by the chief  
14 justice of the supreme court. The election shall be  
15 considered an appointment for the purposes of this part."

16 Section 30. Section 3-1-1010, MCA, is amended to read:  
17 "3-1-1010. List submitted to governor. The commission  
18 shall meet forthwith after a vacancy occurs on the supreme  
19 court, or a district court, or a water court and submit to  
20 the governor within 30 days from the date of the vacancy a  
21 list of not less than three or more than five persons."

22 Section 31. Section 19-5-301, MCA, is amended to read:  
23 "19-5-301. Membership. (1) A judge or justice who was  
24 a member of the PERS prior to March 2, 1967, may elect to  
25 remain under that system by notifying the public employees'

1 retirement board in writing of the election on or before  
2 October 1, 1967.

3 (2) Every other judge of a district court, water  
4 court, or justice of the supreme court must be a member of  
5 the Montana judges' retirement system."

6 Section 32. Section 19-5-404, MCA, is amended to read:  
7 "19-5-404. Contributions by the state. The state of  
8 Montana shall contribute monthly to the fund a sum equal to  
9 6% of the salary of each member. In addition, the clerk of  
10 each district court shall transmit 60% of the fees collected  
11 under 25-1-201 to the state, which shall first deposit in  
12 the fund an amount equal to 20% of the salaries paid to  
13 district judges, water judges, and supreme court justices  
14 who are covered by the judges' retirement system and then  
15 deposit the balance in the state general fund. The clerk of  
16 the supreme court shall pay one-fourth of the fees collected  
17 under 3-2-403 to the public employees' retirement division  
18 of the department of administration to be credited to the  
19 fund."

20 Section 33. Section 85-2-102, MCA, is amended to read:  
21 "85-2-102. Definitions. Unless the context requires  
22 otherwise, in this chapter the following definitions apply:  
23 (1) "Appropriate" means to divert, impound, or  
24 withdraw (including by stock for stock water) a quantity of  
25 water or, in the case of a public agency, to reserve water

1 in accordance with 85-2-316.

2 (2) "Beneficial use" means a use of water for the  
3 benefit of the appropriator, other persons, or the public,  
4 including but not limited to agricultural (including stock  
5 water), domestic, fish and wildlife, industrial, irrigation,  
6 mining, municipal, power, and recreational uses. A use of  
7 water for slurry to export coal from Montana is not a  
8 beneficial use. Slurry is a mixture of water and insoluble  
9 matter.

10 (3) "Board" means the board of natural resources and  
11 conservation provided for in 2-15-3302.

12 (4) "Certificate" means the a certificate of water  
13 right issued by the department under ~~85-2-2107~~ ~~subsections~~  
14 ~~(1) and (2) of 85-2-3067 and 85-2-315.~~

15 (5) "Declaration" means the declaration of an existing  
16 right filed with the department under 85-2-203 section 8,  
17 Chapter 452, Laws of 1973.

18 (6) "Department" means the department of natural  
19 resources and conservation provided for in Title 2, chapter  
20 15, part 33.

21 (7) "Existing right" means a right to the use of water  
22 which would be protected under the law as it existed prior  
23 to July 1, 1973.

24 (8) "Groundwater" means any water beneath the land  
25 surface or beneath the bed of a stream, lake, reservoir, or

1 other body of surface water, and which is not a part of that  
2 surface water.

3 (9) "Permit" means the permit to appropriate issued by  
4 the department under 85-2-301 through 85-2-303 and 85-2-306  
5 through 85-2-314.

6 (10) "Person" means an individual, association,  
7 partnership, corporation, state agency, political  
8 subdivision, the United States or any agency thereof, or any  
9 other entity.

10 (11) "Political subdivision" means any county,  
11 incorporated city or town, public corporation, or district  
12 created pursuant to state law or other public body of the  
13 state empowered to appropriate water but not a private  
14 corporation, association, or group.

15 (12) "Waste" means the unreasonable loss of water  
16 through the design or negligent operation of an  
17 appropriation or water distribution facility or the  
18 application of water to anything but a beneficial use.

19 (13) "Water" means all water of the state, surface and  
20 subsurface, regardless of its character or manner of  
21 occurrence, including geothermal water and diffuse surface  
22 water.

23 (14) "Well" means any artificial opening or excavation  
24 in the ground, however made, by which groundwater is sought  
25 or can be obtained or through which it flows under natural



1 pressures or is artificially withdrawn."

2 Section 34. Section 85-2-112, MCA, is amended to read:

3 "85-2-112. Department duties. The department shall:

4 (1) enforce and administer this chapter and rules  
5 adopted by the board under 85-2-113;

6 (2) prescribe procedures, forms, and requirements for  
7 applications, permits, certificates, declarations, and  
8 proceedings under this chapter and prescribe the information  
9 to be contained in any application, declaration, or other  
10 document to be filed with the department under this chapter;

11 (3) establish and keep in its Helena office a  
12 centralized record system of all existing rights and a  
13 public record of permits, certificates, declarations, claims  
14 of existing rights, applications, and other documents filed  
15 in its office under this chapter;

16 (4) cooperate with, assist, advise, and coordinate  
17 plans and activities with the federal, state, and local  
18 agencies in matters relating to this chapter;

19 (5) upon request by any person, cooperate with,  
20 assist, and advise that person in matters pertaining to  
21 measuring water or filing declarations with the department  
22 or claims of existing rights with a water court under this  
23 chapter."

24 Section 35. Section 85-2-113, MCA, is amended to read:

25 "85-2-113. Board powers and duties. (1) The board may

1 prescribe fees or service charges for any public service  
2 rendered by the department under this chapter, including  
3 fees for the filing of applications or for the issuance of  
4 permits and certificates. There shall be no fees for the  
5 filing of declarations or for any action taken by the  
6 department at the request of a water court or for the  
7 issuance of certificates of existing rights.

8 (2) The board may adopt rules necessary to implement  
9 and carry out the purposes and provisions of this chapter.  
10 These rules may include but are not limited to rules to:

11 (a) govern the issuance and terms of interim permits  
12 authorizing an applicant for a regular permit under this  
13 chapter to begin appropriating water immediately, pending  
14 final approval or denial by the department of the  
15 application for a regular permit;

16 (b) require the owner or operator of appropriation  
17 facilities to install and maintain suitable controlling and  
18 measuring devices;

19 (c) require the owner or operator of appropriation  
20 facilities to report to the department the readings of  
21 measuring devices at reasonable intervals and to file  
22 reports on appropriations; and

23 (d) regulate the construction, use, and sealing of  
24 wells to prevent the waste, contamination, or pollution of  
25 groundwater.

1       (3) The board shall adopt rules providing for and  
2 governing temporary emergency appropriations, without prior  
3 application for a permit, necessary to protect lives or  
4 property."

5       Section 36. Section 85-2-114, MCA, is amended to read:

6       "85-2-114. Prevention of waste. (1) If the department  
7 ascertains, by a means reasonably considered sufficient by  
8 it, that a person is wasting water, using water unlawfully,  
9 or preventing water from moving to another person having a  
10 prior right to use the same, it may petition the district  
11 court supervising the distribution of water among  
12 appropriators from the source to:

13       (a) regulate the controlling works of an appropriation  
14 as may be necessary to prevent the wasting or unlawful use  
15 of water or to secure water to a person having a prior right  
16 to its use; or

17       (b) order the person wasting, unlawfully using, or  
18 interfering with another's rightful use of the water to  
19 cease and desist from doing so and to take such steps as may  
20 be necessary to remedy the waste, unlawful use, or  
21 interference.

22       (2) The department may attach to the controlling works  
23 a written notice, properly dated and signed, setting forth  
24 the fact that the controlling works have been properly  
25 regulated by it, which notice shall be legal notice to all

1 persons interested in the appropriation or distribution of  
2 the water.

3 (3) The department may also direct its own attorney or  
4 request the attorney general or county attorney to bring  
5 suit to enjoin such waste, unlawful use, or interference."

6 Section 37. Section 85-2-401, MCA, is amended to read:

7 "85-2-401. Priority. (1) As between appropriators, the  
8 first in time is the first in right. Priority of  
9 appropriation does not include the right to prevent changes  
10 by later appropriators in the condition of water occurrence,  
11 such as the increase or decrease of streamflow or the  
12 lowering of a water table, artesian pressure, or water  
13 level, if the prior appropriator can reasonably exercise his  
14 water right under the changed conditions.

15 (2) Priority of appropriation made under this chapter  
16 dates from the filing of an application for a permit with  
17 the department, except as otherwise provided in 85-2-301  
18 through 85-2-303, 85-2-306, 85-2-310(3), and 85-2-313.

19 (3) Priority of appropriation perfected before July 1,  
20 1973, shall be determined as provided in ~~85-2-201 through~~  
21 ~~85-2-210 part 2 of this chapter.~~"

22 Section 38. Section 85-2-405, MCA, is amended to read:

23 "85-2-405. Procedure for declaring appropriation  
24 rights abandoned. (1) When the department has reason to  
25 believe that an appropriator may have abandoned his

1 appropriation right under 85-2-404 or when another  
2 appropriator in the opinion of the department files a valid  
3 claim that he has been or will be injured by the resumption  
4 of use of an appropriation right alleged to have been  
5 abandoned, the department shall petition the district court  
6 ~~which determined the existing rights in the source for the~~  
7 ~~county wherein the diversion of place of use~~ of the  
8 appropriation in question is located to hold a hearing to  
9 determine whether the appropriation right has been  
10 abandoned. Proceedings under this section shall be conducted  
11 in accordance with the Montana Rules of Civil Procedure, and  
12 appeal shall be taken in accordance with the Montana Rules  
13 of Appellate Civil Procedure.

14 (2) At the hearing, the burden of proof shall be on  
15 the department which must establish by a preponderance of  
16 the evidence that the appropriation has been abandoned under  
17 85-2-404.

18 (3) The determination of the court shall be appended  
19 to the final decree. The department shall keep a copy of the  
20 determination in its office in Helena."

21 Section 39. Section 85-2-406, MCA, is amended to read:  
22 "85-2-406. ~~District-court--supervision~~ Supervisor of  
23 water distribution. (1) The district courts shall supervise  
24 the distribution of water among all appropriators. This  
25 supervisory authority includes the supervision of all water

1 commissioners appointed prior or subsequent to July 1, 1973.  
2 The supervision shall be governed by the principle that  
3 first in time is first in right. A district court shall  
4 relinquish supervision of water distribution when a water  
5 court assumes responsibility for such supervision.

6 (2) When a water distribution controversy arises upon  
7 a source of water in which existing rights have not been  
8 determined according to 85-2-201 through 85-2-210 part 2 of  
9 this chapter, any party to the controversy may petition the  
10 district water court for relief. ~~The department shall be~~  
11 ~~served with process in any proceeding under this subsection~~  
12 ~~and shall within a reasonable time thereafter notify the~~  
13 ~~court whether it intends in its discretion within a~~  
14 ~~reasonable time to begin proceedings to determine existing~~  
15 ~~rights in the source in accordance with part 2 of this~~  
16 ~~chapter. The department may if it declines to commence~~  
17 ~~proceedings to determine existing rights in the source~~  
18 ~~intervene as a party in the proceeding. The district court~~  
19 from which relief is sought may grant such injunctive or  
20 other relief which is necessary and appropriate to preserve  
21 property rights or the status quo pending the department's  
22 ~~decision whether to determine existing rights in the source~~  
23 ~~or the department's decision to intervene as a party as the~~  
24 ~~case may be. If the department does not proceed to obtain a~~  
25 ~~determination of existing rights, the district court shall~~

1 ~~settle-only-the-controversy-between-the-parties~~ issuance of  
2 the final decree.

3 (3) A controversy between appropriators from a source  
4 which has been the subject of a general determination of  
5 existing rights under ~~85-2-201-through-85-2-210~~ part 2 of  
6 this chapter shall be settled by the district court which  
7 ~~issued-the-final-decree for a county in which a diversion or~~  
8 place of use germane to the controversy is located. The  
9 order of the district court settling the controversy may not  
10 alter the existing rights and priorities established in the  
11 final decree. In cases involving permits issued by the  
12 department, the court may not amend the respective rights  
13 established in the permits or alter any terms of the permits  
14 unless the permits are inconsistent or interfere with rights  
15 and priorities established in the final decree. The order  
16 settling the controversy shall be appended to the final  
17 decree, and a copy shall be filed with the department. The  
18 department shall be served with process in any proceeding  
19 under this subsection, and the department may, in its  
20 discretion, intervene in the proceeding."

21 Section 40. Codification. (1) Sections 1 through 9 and  
22 section 11 of this act are intended to be codified as an  
23 integral part of Title 3, and the provisions contained in  
24 Title 3 apply to this act.

25 (2) Sections 12 through 26 are intended to be codified

1 as an integral part of Title 85, chapter 2, and the  
2 provisions contained in Title 85, chapter 2, apply to this  
3 act;

4 (3) If the provisions of this act are not codified as  
5 stated above, the code commissioner shall add to the MCA, if  
6 necessary, statutory language to convey the intent of this  
7 section.

8 Section 41. Repealer. Sections 85-2-201 through  
9 85-2-210, MCA, are repealed.

10 Section 42. Effective date. Sections 8, 9, and 10 of  
11 this act are effective upon passage and approval.

-End-