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SENATE BILL NO. 72

INTRODUCED BY S. FITZPATRICK

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE POWERS, DUTIES, TERMS, DESIGNATIONS, APPOINTMENTS, OPERATIONS, AND JURISDICTION OF THE WATER COURT; PROVIDING FOR THE GOVERNOR'S APPOINTMENT OF WATER JUDGES; PROVIDING FOR WATER COURT JURISDICTION OVER WATER DISTRIBUTION; REVISING THE APPOINTMENT OF WATER COMMISSIONERS; DESIGNATING WATER JUDGES TO WATER DIVISIONS; PROVIDING THAT WATER JUDGES ENFORCE FINAL DECREES; PROVIDING FOR A WATER COURT ADMINISTRATOR; REVISING THE POWERS AND DUTIES OF WATER MASTERS; REVISING THE PROCESS TO PETITION FOR DEPARTMENT ACTION ON UNPERFECTED WATER RIGHTS; REVISING JUDICIAL REVIEW OF CERTAIN CONTESTED CASES; PROVIDING DEFINITIONS; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTIONS 2-4-702, 3-1-101, 3-1-901, 3-1-905, 3-7-101, 3-7-102, 3-7-103, 3-7-201, 3-7-202, 3-7-203, 3-7-204, 3-7-211, 3-7-212, 3-7-221, 3-7-223, 3-7-224, 3-7-301, 3-7-311, 3-7-401, 3-7-501, 3-7-502, 19-5-301, 85-2-112, 85-2-114, 85-2-122, 85-2-123, 85-2-125, 85-2-236, 85-2-309, 85-2-313, 85-2-314, 85-2-315, 85-2-405, 85-2-406, 85-5-101, 85-5-102, 85-5-103, 85-5-104, 85-5-106, 85-5-107, 85-5-108, 85-5-109, 85-5-110, 85-5-111, 85-5-201, 85-5-202, 85-5-203, 85-5-204, 85-5-205, 85-5-206, 85-5-301, AND 85-5-407, MCA; REPEALING SECTIONS 3-7-222 AND 3-7-225, MCA; AND PROVIDING EFFECTIVE DATES."

WHEREAS, Article VII, section 1, of the Montana Constitution provides that the "judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law"; and

WHEREAS, the Montana Legislature possesses the authority to constitute a water court and similarly set forth mechanisms for the appointment and election of judges for the court; and

WHEREAS, neither the Water Court nor its judgeships are mandated or created by the Montana Constitution but rather are judgeships maintained by the Montana Legislature.

1 **"3-1-905. Appointments.** (1) The governor, ~~or the chief justice of the supreme court for the office~~
2 ~~described in 3-7-221,~~ shall make an appointment within 30 days of the close of the public comment period from
3 the list of applicants.

4 (2) For the purposes of Article VII, section 8, of the Montana constitution, the governor must be
5 construed to receive the names of the nominees at the close of the public comment period provided for in 3-1-
6 904.

7 (3) If the governor fails to appoint within 30 days of the close of the public comment period
8 provided for in subsection (1), the chief justice shall make the appointment from the same list of applicants
9 within 30 days of the governor's failure to appoint."

10
11 NEW SECTION. Section 5. Definitions. As used in this chapter, the following definitions apply:

12 (1) "Water court" means a court comprised of four water division courts that preside over water
13 disputes and controversies that arise within the boundaries of the water division as described in 3-7-102.

14 (2) "Water judge" means a judge presiding over any matter under 3-7-101 in a water division.

15
16 **Section 6.** Section 3-7-101, MCA, is amended to read:

17 **"3-7-101. Water divisions Powers and duties of water court.** ~~To adjudicate existing water rights~~
18 ~~and to conduct hearings in cases certified under 85-2-309, water divisions are established as defined in 3-7-~~
19 ~~102.~~A water division shall be presided over by a water judge one or more water judges. ~~A water judge~~
20 ~~Water~~ judges of the water court shall:

21 (1) prior to and including the issuance of a final decree in a basin pursuant to 85-2-234 and 85-2-
22 235, administer the adjudication of existing water rights in the basin by:

23 (a) coordinating with the department of natural resources and conservation to:

24 (i) compile information submitted on water claim forms under Title 85, chapter 2, part 2; and

25 (ii) expeditiously and properly transfer that information to the water judge in each division; and

26 (b) ensuring any contested or conflicting claims are expeditiously tried and adjudicated.

27 (2) conduct proceedings for petitions for judicial review filed with the water court under 2-4-

28 702(2)(e);

Amendment - 1st Reading-white - Requested by: Walt Sales - (S) Natural Resources

- 2023

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Drafter: Jason Mohr, 406-444-1640

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- 1 (3) review decisions made by a compact board or other administrative entity as provided in Title
2 85, chapter 20;
- 3 (4) review motions brought pursuant to Rule 59 or 60, M.R.Civ.P., concerning the adjudication of
4 an existing water right and orders pursuant to 85-2-234(8);
- 5 (5) hear and resolve disputes arising under the interpretation of a final decree issued under 85-2-
6 234;
- 7 (6) hear and resolve issues related to judicial enforcement actions for waste, unlawful use,
8 interference, or other violations pursuant to 85-2-114 and 85-2-122;
- 9 (7) hear and resolve issues related to enforcement actions brought pursuant to common law
10 remedies, including but not limited to the waste of water, unlawful use of water, abandonment, or interference
11 with the use of water, including the right to injunctive relief under Title 27, chapter 19;
- 12 (8) conduct abandonment proceedings under 85-2-404 and 85-2-405;
- 13 (9) hear and determine matters related to ~~objections to permits or changes in appropriation rights~~
14 factual and legal issues involving the adjudication or determination of water rights certified to the water court
15 under 85-2-309;
- 16 (10) hear and determine matters related to a dispute over ownership of a water right certified to the
17 water court under 85-2-424(9);
- 18 (11) hear and determine rights and issues related to water distribution controversies under 85-2-
19 406;
- 20 (12) appoint and supervise water commissioners or water mediators under Title 85, chapter 5;
- 21 (13) hear and resolve ditch easement matters ancillary to a water right dispute or controversy, as a
22 water right is defined in 85-2-102;
- 23 (14) promulgate rules for use across all water divisions for practice and procedure pursuant to Title
24 3, chapter 7;
- 25 (15) prescribe forms for use pursuant to Title 3, chapter 7; and
- 26 (16) determine and interpret existing water rights, including without limitation the adjudication of total
27 or partial abandonment of existing water rights occurring at any time."
- 28

1 (d) The committee members shall serve at the pleasure of the water court and shall serve without
2 compensation.

3 (e) The committee shall file a report with the Montana supreme court by ~~October 1, 1996, and as~~
4 often as determined by the Montana supreme court."
5

6 NEW SECTION. Section 9. Venue for water rights determinations. All matters under 3-7-101(2)
7 through (16) must be brought before or immediately transferred to the water judge in the appropriate water
8 division. Any proceedings for matters arising under 3-7-101(2) through (16) must be conducted within the water
9 division or county in which the controversy arises unless otherwise determined by mutual agreement of the
10 parties.
11

12 **Section 10.** Section 3-7-201, MCA, is amended to read:

13 **"3-7-201. Designation of water judge.** (1) A water judge must be designated for each water division
14 ~~by a majority vote of a committee composed of the district court judge from each single judge judicial district~~
15 ~~and the chief district judge from each multijudge judicial district, wholly or partly within the division. Except as~~
16 ~~provided in subsection (2), a water judge must be a district court judge or retired district court judge of a judicial~~
17 ~~district wholly or partly within the water division subject to the terms of office in 3-7-221.~~

18 (2) A district court judge, ~~or retired district court judge,~~ retired water judge, or water judge
19 appointed to another water division may sit as a substitute water judge in more than one division if requested by
20 the chief justice of the supreme court or the water judge of the division in which the judge is requested to sit. A
21 substitute water judge has the same powers as a water judge appointed pursuant to 3-7-221.

22 (3) A water judge, when presiding over a water division, ~~presides~~ has as the duties and powers of a
23 district court judge in and for each judicial district wholly or partly within the water division, including the ability
24 to appoint a judge pro tempore and standing masters pursuant to Title 3, chapter 5, part 1."
25

26 **Section 11.** Section 3-7-202, MCA, is amended to read:

27 **"3-7-202. Term of office.** ~~The On a retention election pursuant to 13-14-212 Pursuant to 3-5-203, the~~
28 ~~term of office for water judges is from the date of initial appointment as provided in 3-7-201 to June 30, 1985.~~

Amendment - 1st Reading-white - Requested by: Walt Sales - (S) Natural Resources

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1 After June 30, 1985, the term of office of a water judge is 4 years, subject to continuation of the water divisions
2 by the legislature a water judge is 6 years."

3

4 **Section 12.** Section 3-7-203, MCA, is amended to read:

5 **"3-7-203. Vacancies.** (1) If a vacancy in the office of water judge occurs, it must be filled in the
6 manner provided in 3-7-204 for the initial designation of a water judge ~~3-1-904~~ Title 3, chapter 1, part 9.

7 (2) ~~(a) The senate shall confirm each appointment made pursuant to 3-1-901 and 3-1-905. An~~
8 ~~appointment of a water judge is subject to senate confirmation at the next regular legislative session, except for~~
9 ~~an appointment made while the legislature is not in regular session, for which the appointment expires prior to~~
10 ~~the next regular legislative session.~~

11 ~~(b) An appointment made while the senate is not in session is effective until the end of the next~~
12 ~~legislative session.~~

13 (3) ~~Except in basins that contain existing water rights pursuant to Title 85, chapter 20, part 10, prior~~
14 ~~to the issuance of final decrees in all basins pursuant to 85-2-234 and 85-2-235, and after the appointment and~~
15 ~~confirmation of a water judge, that water judge is subject to a statewide retention election pursuant to 13-14-~~
16 ~~212 to be held on the next general election day in an even-numbered year. Prior to the issuance of final decrees~~
17 ~~in all basins pursuant to 85-2-234 and 85-2-235, except in basins that contain existing water rights pursuant to~~
18 ~~Title 85, chapter 20, part 10, and after appointment by the governor and confirmation by the senate of a water~~
19 ~~judge, at the end of the water judge's term the judge must be an unopposed incumbent candidate in a~~
20 ~~statewide retention election. The ballot must follow the form provided in 13-14-212. The election must be held~~
21 ~~on the next general election day in an even-numbered year.~~

22 (4) ~~Except in basins that contain existing water rights pursuant to Title 85, chapter 20, part 10, prior~~
23 ~~to the issuance of final decrees in all basins pursuant to 85-2-234 and 85-2-235, and after the appointment and~~
24 ~~confirmation of a water judge, that water judge is subject to a retention election pursuant to 13-14-212 to be~~
25 ~~held on the next general election day in an even-numbered year within the assigned water division. After the~~
26 ~~issuance of final decrees in basins pursuant to 85-2-234 and 85-2-235, except in basins that contain existing~~
27 ~~water rights pursuant to Title 85, chapter 20, part 10, and after appointment by the governor and confirmation~~
28 ~~by the senate of a water judge, at the end of the water judge's term the judge must be an unopposed incumbent~~

1 candidate in a retention election to be held on the next general election day in an even-numbered year within
2 the assigned water division. The ballot must follow the form provided in 13-14-212.

3 (5) A vacancy is created when a water judge dies, resigns, retires, is not ~~elected to a subsequent~~
4 ~~term retained in a retention election~~, forfeits the judicial position, is removed, or is otherwise unable to complete
5 the term as a water judge."
6

7 **Section 13.** Section 3-7-204, MCA, is amended to read:

8 **"3-7-204. Supervision and administration by supreme court.** (1) The Montana supreme court shall
9 supervise the activities of the water judges, ~~water masters,~~ and associated water court personnel in
10 implementing this chapter and Title 85, chapter 2, part 2.

11 (2) The supreme court shall pay the salaries and expenses of the water judges and ~~the salaries~~
12 ~~and expenses of the water judges' staffs and the salaries and expenses of the water masters and the water~~
13 ~~masters' staffs, from appropriations made for that purpose~~ associated water court personnel. "Salaries and
14 expenses" as used in this section include but are not limited to the salaries and expenses of personnel, the cost
15 of office equipment and office space, and other necessary expenses that may be incurred in the administration
16 of this chapter and Title 85, chapter 2, part 2.

17 (3) A water judge must receive the same salary and expense allowance as provided for a district
18 court judge pursuant to 3-5-211.

19 (4) The office of the water court, as described in 3-7-223, must be at a location designated by the
20 chief justice of the Montana supreme court. "
21

22 **Section 14.** Section 3-7-211, MCA, is amended to read:

23 **"3-7-211. Appointment of water commissioners.** (1) Except as provided in 85-20-1902, the district
24 ~~court having jurisdiction over the hydrologically interrelated portion of a water division, as described in 85-2-~~
25 ~~231(3),~~ water judge having jurisdiction over a water division in which the controversy arises may appoint and
26 supervise a water commissioner as provided for in Title 85, chapter 5.

27 (2) A water judge having jurisdiction over a water division in which the judicial district is situated
28 may transfer a petition for a water commissioner under Title 85, chapter 5, to the appropriate district court

1 judge, who shall sit as a water division judge in the matter, if the petition:

2 (a) seeks the appointment of a water commissioner ~~that would act wholly within a single judicial~~
3 ~~district;~~ and

4 (b) requests that the district court judge appoint and supervise the water commissioner. "

5

6 **Section 15.** Section 3-7-212, MCA, is amended to read:

7 **"3-7-212. Enforcement of decrees.** The ~~district water court judge having jurisdiction may over a~~
8 ~~water division shall~~ water court has jurisdiction to enforce the provisions of a final decree ~~within that water~~
9 ~~division.~~ In the absence of any final decree having been issued, the ~~district water court judge having jurisdiction~~
10 ~~over the water division may~~ water court has jurisdiction to enforce the provisions of a temporary preliminary
11 decree, preliminary decree, or supplemental preliminary decree entered under 85-2-231, as modified by a water
12 judge after objections and hearings."

13

14 **Section 16.** Section 3-7-221, MCA, is amended to read:

15 **"3-7-221. Appointment of chief water judge and associate water judge water judges -- terms of**
16 **office.** (1) The chief justice of the Montana supreme court shall appoint a chief water judge as provided in Title
17 3, chapter 1, part 9. The chief justice of the Montana supreme court may appoint an associate water judge.
18 Prior to the issuance of final decrees in all basins pursuant to 85-2-234 and ~~85-5-235~~ 85-2-235, except in
19 basins that contain existing water rights pursuant to Title 85, chapter 20, part 10, ~~water judges a water judge~~
20 -serving as of October 1, 2023, shall serve the remainder of ~~the judge's~~ term of office. On the expiration of the
21 term of office ~~or in the case of a vacancy in the office,~~ the governor shall fill the vacancy subject to 3-7-203, and
22 the governor:

23 (a) may appoint additional water judges;

24 (b) shall assign each water judge to one or more water divisions in order to exercise their powers
25 and duties under 3-7-101(2) through (16); and

26 (c) shall designate one water judge to serve as chief water judge.

27 (2) ~~After the issuance of~~After the chief water judge certifies to the governor's office and the
28 Montana supreme court that all final decrees in all basins pursuant to 85-2-234 and 85-2-235, except in basins

1 that contain existing water rights pursuant to Title 85, chapter 20, part 10, ~~and after the chief water judge~~
2 ~~certifies to the governor's office and the Montana supreme court that all final decrees~~ have been issued, the
3 governor:

4 (a) shall assign sitting water judges to a water division or divisions for the remainder of their term;

5 (b) may appoint additional water judges to each of the remaining water divisions to serve as that
6 division's judge. The governor may appoint additional water judges to any division as needed afterward.

7 (c) shall designate one water judge to serve as chief water judge.

8 (2)(3) To be eligible for the office of chief water judge or associate water judge, a person shall must
9 have the qualifications for district court or supreme court judges found in Article VII, section 9, of the Montana
10 constitution.

11 (3) ~~The term of office of the chief water judge and the associate water judge is 4 years, subject to~~
12 ~~continuation of the water divisions by the legislature."~~

13
14
15 **Section 17.** Section 3-7-223, MCA, is amended to read:

16 **"3-7-223. (Temporary) Duties of chief water judge -- operation of water court.** (1) The chief water
17 judge shall:

18 (1) ~~administer the adjudication of existing water rights by:~~

19 (a) ~~coordinating with the department of natural resources and conservation in compiling information~~
20 ~~submitted on water claim forms under Title 85, chapter 2, part 2, to ensure that the information is expeditiously~~
21 ~~and properly compiled and transferred to the water judge in each water division;~~

22 (b) ~~ensuring that the water judge in each water division moves without unreasonable delay to enter~~
23 ~~the required preliminary decree; and~~

24 (c) ~~ensuring that any contested or conflicting claims are tried and adjudicated as expeditiously as~~
25 ~~possible;~~

26 (2) ~~conduct hearings in cases certified to the district court under 85-2-309 ;~~

27 (3) ~~conduct proceedings for petitions for judicial review filed with the water court under 2-4-702 ;~~

28 (4) ~~assign court personnel to divisions and duties as needed;~~

1 **Section 18.** Section 3-7-224, MCA, is amended to read:

2 "**3-7-224. (Temporary) Jurisdiction of chief water judge and associate water judge water**
3 **judges.** (1) ~~The chief water judge and the associate water judge may, at the discretion of the chief justice of the~~
4 ~~Montana supreme court, also serve as water judge for one of the water divisions.~~

5 ~~(2) The chief water judge and the associate water judge have jurisdiction over cases certified to the~~
6 ~~district court under 85-2-309, all matters relating to the determination of existing water rights within the~~
7 ~~boundaries of the state of Montana, and all petitions for judicial review filed with the water court under 2-4-702.~~

8 ~~(3) With regard to the consideration of a matter within the chief a water judge's jurisdiction, the chief~~
9 ~~water judge and the associate water judge have a water judge has~~ the same powers as a district court judge.
10 The chief water judge and the associate A water judge may issue orders, on the motion of an interested party
11 or on the judge's own motion, that may reasonably be required to allow the judge to fulfill the judge's
12 responsibilities, including but not limited to requiring the joinder of persons not parties to the administrative
13 hearing being conducted by the department pursuant to 85-2-309 or 85-2-402 as considered necessary to
14 resolve any factual or legal issue certified pursuant to 85-2-309(2).

15 ~~(2) The water court shall has jurisdiction to administer and enforce all final decrees pursuant to 3-~~
16 ~~7-212 and Title 85, chapter 20. (Terminates September 30, 2025—sec. 6, Ch. 126, L. 2017.)~~

17 ~~**3-7-224. (Effective October 1, 2025) Jurisdiction of chief water judge and associate water**~~
18 ~~**judge.** (1) The chief water judge and the associate water judge may, at the discretion of the chief justice of the~~
19 ~~Montana supreme court, also serve as water judge for one of the water divisions.~~

20 ~~(2) The chief water judge and the associate water judge have jurisdiction over cases certified to the~~
21 ~~district court under 85-2-309 and all matters relating to the determination of existing water rights within the~~
22 ~~boundaries of the state of Montana.~~

23 ~~(3) With regard to the consideration of a matter within the chief water judge's jurisdiction, the chief~~
24 ~~water judge and the associate water judge have the same powers as a district court judge. The chief water~~
25 ~~judge and the associate water judge may issue orders, on the motion of an interested party or on the judge's~~
26 ~~own motion, that may reasonably be required to allow the judge to fulfill the judge's responsibilities, including~~
27 ~~but not limited to requiring the joinder of persons not parties to the administrative hearing being conducted by~~
28 ~~the department pursuant to 85-2-309 or 85-2-402 as considered necessary to resolve any factual or legal issue~~

1 certified pursuant to 85-2-309 (2)."

2

3 **Section 19.** Section 3-7-301, MCA, is amended to read:

4 **"3-7-301. Appointment of water masters -- removal.** (1) ~~The chief water judge or the~~ A water judge
5 in each water division may appoint one or more water masters when performing the duties of 3-7-101(1).

6 ~~(2) A water master may be appointed after July 1, 1980, and must be appointed on or before July 1,~~
7 ~~1982.~~

8 ~~(3)~~(2) In appointing a water master, ~~the~~ a water judge shall consider a potential master's experience
9 with water law, water use, and water rights.

10 ~~(4)~~(3) A water master shall serve at the pleasure of the chief water judge who appointed the water
11 master and may be removed by the chief water judge.

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

14

15 **Section 20.** Section 3-7-311, MCA, is amended to read:

16 **"3-7-311. Duties of water masters.** (1) The water master has the general powers given to a master
17 by Rule 53(c), M.R.Civ.P.

18 ~~(2) Within a reasonable time after June 30, 1983, the water master shall issue a report to the water~~
19 ~~judge meeting the requirements for the preliminary decree as specified in 85-2-231.~~

20 ~~(3)~~(2) After a water judge issues a preliminary decree, ~~the~~ The water master shall assist the water
21 judge in the performance of the water division's further duties under 3-7-101(1) as ordered by the water judge.

22 ~~(4) A water master may be appointed by a district court to serve as a special master to a district court~~
23 ~~for actions brought pursuant to 85-2-114 (1) or (3) or 85-5-301 if the appointment is approved by the chief water~~
24 ~~judge."~~

25

26 **Section 21.** Section 3-7-401, MCA, is amended to read:

27 **"3-7-401. Definitions.** For the purposes of this part, the following definitions apply:

28 (1) "Fiduciary" includes such relationships as executor, administrator, trustee, or guardian.

1 of the certificate shall be sent to the person to whom the right is decreed. The department shall keep a copy of
2 the certificate in its office in Helena."

3

4 **Section 31.** Section 85-2-309, MCA, is amended to read:

5 **"85-2-309. Hearings on objections -- jurisdiction.** (1) If the department determines that an objection
6 to an application for a permit under 85-2-311 or change in appropriation right under 85-2-402 states a valid
7 objection, it shall hold a contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 90
8 days from the date set by the department for the filing of objections after serving notice of the hearing by first-
9 class mail upon the applicant and the objector, unless the department certifies an issue to the district water
10 court for determination by a water judge under subsection (2). The department may consolidate hearings if
11 more than one objection is filed to an application. The department may extend the 90-day deadline for good
12 cause shown or upon request of the applicant and all objectors. The department shall file in its records proof of
13 the service by affidavit of the department.

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

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

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

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

25

26 **Section 32.** Section 85-2-313, MCA, is amended to read:

27 **"85-2-313. Provisional permit permits and ~~change authorizations~~ changes in appropriation**
28 **rights -- petitions after final decree.** (1) A permit or change in appropriation right issued prior to a final

1 determination of existing water rights pursuant to 85-2-234 is provisional and is subject to that final
 2 determination ~~final decree~~. ~~Upon~~ On a petition pursuant to ~~85-2-314(2) subsection (2)~~, the amount of the
 3 appropriation granted in a provisional permit or change in appropriation right must be reduced, modified, or
 4 revoked by the department following a show cause hearing in which it is determined that reduction,
 5 modification, or revocation is necessary to protect and guarantee existing water rights determined in the final
 6 decree. Because a provisional permit is issued on a reasonable determination of legal availability under 85-2-
 7 311(1)(b), in a show cause hearing under this section, legal availability must be determined on a consideration
 8 of the final decree in the affected basin or subbasin. A person may not obtain any vested right to an
 9 appropriation obtained under a provisional permit or change in appropriation right by virtue of construction of
 10 diversion works, purchase of equipment to apply water, planting of crops, or other action by the person where
 11 the permit or change in appropriation right would have been denied or modified if the final decree had been
 12 available to the department.

13 (2) (a) A person has standing to file a petition under this section if a water right of the petitioner is
 14 adversely affected by the permit or change in appropriation right authorized prior to the final decree.

15 (b) A correct and complete petition must be submitted on a form designated by the department
 16 within 120 days after the issuance of the final decree for the basin or subbasin, in which the permit or change in
 17 appropriation right is located.

18 (c) The department shall provide written notice of its determination concerning the petition to the
 19 petitioner and the permittee or holder of the change in appropriation right subject to the petition. Within 30 days
 20 of the notice, the petitioner or the permittee or holder of the change in appropriation right may request a hearing
 21 to show cause by a preponderance of evidence as to why the proposed action should not be taken. If a request
 22 for a show cause hearing is not requested, the determination becomes final."

23
 24 **Section 33.** Section 85-2-314, MCA, is amended to read:

25 **"85-2-314. Revocation or modification of permit or change in appropriation right.** (1) (a) If the
 26 work on an appropriation or change in appropriation right is not commenced, prosecuted, or completed within
 27 the time stated in the permit or an extension of the time stated in the permit, if the water is not being applied to
 28 the beneficial use contemplated in the permit or change in appropriation right, if the permit or change in

1 appropriation right would have been denied or modified had the final decree been available to the department,
2 or if the permit or change in appropriation right is otherwise not being followed, the department may, after
3 notice, require the permittee or the holder of the change in appropriation right to show cause why the permit or
4 change in appropriation right should not be modified or revoked.

5 (b) If the permittee or holder of the change in appropriation right fails to show sufficient cause, the
6 department may modify or revoke the permit or change in appropriation right.

7 (2) (a) ~~A permittee, or holder of a change in appropriation right, or holder of a water right may~~
8 ~~petition the department to enforce subsection (1) or 85-2-313 to: modify or remove a condition of approval or~~
9 ~~reduce the amount of the permit or change authorization~~

10 (i) ~~revoke;~~

11 (ii) ~~modify;~~

12 (iii) ~~modify a condition of approval; or~~

13 (iv) ~~reduce the amount of the permit or change authorization.~~

14 (b) ~~A petition brought to enforce 85-2-313 must be filed within 120 days after the issuance of the~~
15 ~~final decree for the basin in which the permit or change in appropriation right is located. A permittee or holder of~~
16 ~~a change in appropriation right may petition the department to modify or remove a condition of approval or to~~
17 ~~reduce the amount of the person's own permit or change authorization.~~

18 (b)(c)(b) The A correct and complete petition must be submitted on a form designated by the
19 department, is subject to the criteria of 85-2-311 and 85-2-402, and must be processed in the same manner as
20 an application made pursuant to 85-2-302, 85-2-307 through 85-2-309, and 85-2-310(1) through (5) except that:

21 (i) the department may waive the public notice of a preliminary determination to grant the petition
22 if the department finds, on the basis of information reasonably available to it, that the petition as proposed in the
23 application will not adversely affect the rights of other appropriators;

24 (ii) if the department issues a preliminary determination to grant the petition and waives public
25 notice, the determination becomes final;

26 (iii) the department may condition a preliminary determination to grant the petition in order to meet
27 the criteria under 85-2-311 and 85-2-402; and

28 (iv) a preliminary determination to deny a petition is final. Denial of a petition does not affect the

1 permit or change authorization.

2 ~~(3) The department shall provide written notice of its determination concerning the petition. Within~~
3 ~~30 days of the notice, the petitioner, permittee, or holder of the change in appropriation right may request a~~
4 ~~hearing to show cause by a preponderance of the evidence why the proposed action should not be taken. If a~~
5 ~~request for a show cause hearing is not made, the determination becomes final."~~

6

7 **Section 34.** Section 85-2-315, MCA, is amended to read:

8 **"85-2-315. Certificate of water right.** ~~Upon~~On actual application of water to the proposed beneficial
9 use within the time allowed, ~~the permittee a person holding an issued permit or a change in appropriation right~~
10 shall notify the department that the appropriation has been completed. The notification must contain a certified
11 statement by a person with experience in the design, construction, or operation of appropriation works
12 describing how the appropriation was completed. ~~The~~After the resolution of any petition filed under ~~85-2-314~~
13 85-2-313, the department shall review the certified statement and may then inspect the appropriation, and if it
14 determines that the appropriation has been completed in substantial accordance with the permit or change
15 authorization in addition to any final determination made pursuant to ~~85-2-313 or 85-2-314,~~ it shall issue the
16 ~~permittee person~~ a certificate of water right. The original of the certificate shall must be sent to the ~~permittee~~
17 ~~person holding an issued permit or a change in appropriation right,~~ and a duplicate copy shall must be ~~kept in~~
18 ~~the office of the department in Helena and~~ maintained in a centralized database."

19

20 **Section 35.** Section 85-2-405, MCA, is amended to read:

21 **"85-2-405. Procedure for declaring appropriation rights abandoned.** (1) When the department
22 has reason to believe that an appropriator may have abandoned an appropriation right under 85-2-404 or when
23 another appropriator in the opinion of the department files a valid claim that the appropriator has been or will be
24 injured by the resumption of use of an appropriation right alleged to have been abandoned, the department
25 shall petition the ~~district~~water court that determined the existing rights in the source of the appropriation in
26 question to hold a hearing to determine whether the appropriation right has been abandoned. Proceedings
27 under this section must be conducted in accordance with the Montana Rules of Civil Procedure, and appeal
28 must be taken in accordance with the Montana Rules of Appellate Procedure.

1 (2) At the hearing, the burden of proof is on the department, which shall establish by a
2 preponderance of the evidence that the appropriation has been abandoned under 85-2-404.

3 (3) The determination of ~~the court must be appended to the final decree. The department shall~~
4 keep a copy of the determination in its office in Helena that the water right is abandoned must include an order
5 to the department to update the centralized records system."
6

7 **Section 36.** Section 85-2-406, MCA, is amended to read:

8 **"85-2-406. District Water court supervision of water distribution.** (1) The water court shall retain
9 jurisdiction over the administration and enforcement of any final judgment or decree issued by the water court,
10 including those pursuant to Title 85, chapter 20, consistent with the provisions of those compacts. The district
11 ~~courts~~ water court shall supervise the distribution of water among all appropriators. This supervisory authority
12 includes the supervision of all water commissioners ~~appointed prior or subsequent to July 1, 1973.~~ The
13 supervision must be governed by the principle that first in time is first in right.

14 (2) (a) ~~A district~~ The water court may order the distribution of water pursuant to ~~a district court~~
15 ~~decree entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the~~
16 ~~matter has been adjudicated under the procedure set forth in subsection (2)(b).~~ the terms of the governing
17 decree and by the terms of an applicable certificate of water right, permit, state water reservation, compact, or
18 change in appropriation right. A decree entered prior to July 1, 1973, is enforceable:

19 (i) ~~for the valid claims filed pursuant to 85-2-221 that are based on an existing right contained in~~
20 ~~the decree;~~

21 (ii) ~~until an enforceable decree is entered under part 2 of this chapter; or~~

22 (iii) ~~until the existing rights have been adjudicated under the procedure set forth in subsections~~
23 ~~(2)(b), (3), or (4) for a valid claim filed pursuant to 85-2-221 that is based on an existing right contained in the~~
24 ~~decree until an enforceable decree is entered under part 2 of this chapter or until the existing rights have been~~
25 ~~adjudicated under the procedure set forth in subsections (2)(b), (3), or (4).~~

26 (b) (i) When a water distribution controversy arises ~~upon~~ on a source of water in which not all
27 existing rights have been conclusively determined according to part 2 of this chapter, any party to the
28 controversy may petition ~~the district court to certify the matter to the chief water judge. If a certification request~~

1 is made, ~~the district court shall certify to the chief water judge the~~ water court for a determination of the existing
2 rights that are involved in the controversy according to part 2 of this chapter.

3 (ii) ~~The district court from which relief is sought~~ presiding water judge shall retain exclusive
4 jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the
5 existing water rights certified to the water judge. ~~Certified controversies~~

6 (iii) Controversies arising under this subsection (2)(b) must be given priority over all other
7 adjudication matters.

8 (iv) ~~After determination of the matters certified, the water judge shall return the decision to the~~
9 ~~district court~~ issue a decision with a tabulation or list of the existing rights and their relative priorities that are
10 subject to the water distribution controversy.

11 (3) A controversy between appropriators ~~from a source concerning a water right~~ that has been the
12 subject of a final decree under part 2 of this chapter must be settled by the ~~district court~~ water judge presiding
13 over the water division. The order of the ~~district court~~ water judge settling the controversy may not alter the
14 existing rights and priorities established in the final decree water rights except to the extent the court alters
15 rights based upon ~~on~~ abandonment, waste, or illegal enlargement or change of right. ~~In cases involving permits~~
16 ~~issued by the department, the court may not amend the respective rights established in the permits or alter any~~
17 ~~terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the~~
18 ~~final decree.~~ The order settling the controversy must be appended to the final decree, and a copy must be filed
19 with the department include an order to the department to update its centralized records system for an altered
20 water right. The department must be served with process in any proceeding under this subsection, and the
21 department may, in its discretion, intervene in the proceeding.

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

28 (5) A person whose existing rights and priorities are determined in a temporary preliminary decree

1 or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter may
2 appeal a determination made pursuant to subsection (2)."

3

4 **Section 37.** Section 85-5-101, MCA, is amended to read:

5 **"85-5-101. Appointment of water commissioners.** (1) (a) Whenever the rights of persons to use the
6 waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply
7 have been determined by a decree of a court of competent jurisdiction, including temporary preliminary,
8 preliminary, and final decrees issued by a water judge, it is the duty of the ~~judge of the district court having~~
9 ~~jurisdiction of the subject matter~~ water judge having jurisdiction, ~~upon~~ on the application of the owners of at
10 least 15% of the water rights affected by the decree or at least 15% of the flow rate of the water rights affected
11 by the decree and after notice of the application and an opportunity to comment by all water right holders
12 subject to enforcement under the application, in the exercise of the judge's discretion, to appoint one or more
13 commissioners.

14 (b) The commissioners have authority to admeasure and distribute to the parties owning water
15 rights in the source affected by the decree the waters to which they are entitled, according to their rights as
16 fixed by the decree and by any certificates, permits, and changes in appropriation right issued under chapter 2
17 of this title. When petitioners make proper showing that they are not able to obtain the application of the owners
18 of at least 15% of the water rights affected or at least 15% of the flow rate of the water rights affected and they
19 are unable to obtain the water to which they are entitled, the ~~judge of the district court~~ water judge of the water
20 division having jurisdiction may appoint a water commissioner.

21 (2) When the existing rights of all appropriators from a source or in an area have been determined
22 in a temporary preliminary decree, preliminary decree, or final decree issued under chapter 2 of this title, the
23 ~~judge of the district court~~ water judge of the water division may, ~~upon~~ on application by both the department of
24 natural resources and conservation and one or more holders of valid water rights in the source, appoint a water
25 commissioner. The water commissioner shall distribute to the appropriators, from the source or in the area, the
26 water to which they are entitled.

27 (3) The department of natural resources and conservation or any person or corporation operating
28 under contract with the department or any other owner of stored waters may petition the ~~court~~ water judge

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Section 38. Section 85-5-102, MCA, is amended to read:

"85-5-102. Appointment of chief commissioner. When the judge of the district court ~~a water judge~~ appoints two or more commissioners to admeasure and distribute the waters mentioned in 85-5-101, the water judge may appoint one of them as chief commissioner and empower the chief commissioner to exercise direction and control over the other commissioners in the discharge of their duties. The water judge may depose the person appointed as chief commissioner from that position and appoint another as chief commissioner whenever it appears to the judge that better service may be given to the water users by making the change."

Section 39. Section 85-5-103, MCA, is amended to read:

"85-5-103. Oath and bond. ~~Each water commissioner appointed by the water court shall subscribe and file with the clerk of the district court water court administrator an oath of office before commencing the discharge of duties as commissioner and shall file with the clerk water court administrator a bond executed by the commissioner, with two or more sureties, in a sum that the judge of the court water judge may designate, to ensure the faithful discharge of the commissioner's duties. Before commencing the discharge of duties as commissioner, each water commissioner appointed by the water judge shall file with the clerk of the district court or water court administrator, as directed by the water judge:~~

- ~~(1) an oath of office subscribed by the commissioner; and~~
- ~~(2) a bond executed by the commissioner, with two or more sureties, in a sum that the water judge may designate, to ensure the faithful discharge of the commissioner's duties."~~

Section 40. Section 85-5-104, MCA, is amended to read:

"85-5-104. Term of office. A water commissioner holds office for the time during the irrigation season of each year that may be designated by the water judge in the order making the appointment. The water judge may fix the date of the commencement of the term and may, in in the judge's discretion or when requested in writing by at least three persons entitled to the use of the waters, change the term for closing of the commissioner's service."

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Section 41. Section 85-5-106, MCA, is amended to read:

"85-5-106. Maintenance and repair of ditches or systems. ~~Upon~~On written request of the owners of at least 51% of the water rights in any adjudicated ditch or single water system, the water judge ~~of the district court~~ may empower the commissioner to maintain and keep in reasonable repair ~~such~~the water ditch or water system at the expense of the owners thereof, and for ~~such~~these purposes the commissioner shall have authority to enter and work ~~upon~~on any ditch, canal, aqueduct, or other source of conveying the waters affected by the decree and the right-of-way thereof and to visit, inspect, and adjust all headgates or other means of distribution of ~~such~~the waters."

Section 42. Section 85-5-107, MCA, is amended to read:

"85-5-107. Record of distribution of water. (1) Each water commissioner shall keep a daily record, unless a different recording schedule is ordered by the ~~district~~water judge, of the amount of water distributed to each water user and shall file a summary of the record with the ~~clerk of the court~~ water court administrator clerk of the district court or water court administrator, as directed by the water judge, monthly or seasonally, at the discretion of the ~~district~~water judge during the judge's term of service. The report must show in detail the total amount of water distributed to each water user during the month or the season and the cost of distributing the water, based ~~upon~~on the water commissioner's or commissioners' daily salary, other costs of the water commissioner or commissioners approved by the ~~district~~water judge, and the proportionate amount of water distributed. When two or more water commissioners serve under the same decree or decrees by order of the water judge, they may file a joint summary of their records with ~~the clerk of the court~~ water court administrator the clerk of the district court or water court administrator, as directed by the water judge, or the chief commissioner, if one has been appointed by the water judge, may file a summary on behalf of all of them.

(2) If the ~~district~~water court judge determines that it is necessary to establish a billing cycle prior to a distribution season, as provided in 85-5-204, the report or reports must serve as the basis for the amounts billed."

Section 43. Section 85-5-108, MCA, is amended to read:

1 dams, headgates, ditches, or flumes when immediate action is necessary to preserve the rights of the parties
 2 entitled to the waters of a stream or when the water judge has, in the order appointing the commissioner,
 3 required the commissioner to repair ditches and keep in repair necessary headgates, ditches, or flumes. The
 4 water commissioner shall report all expenses, and the cost must be taxed against the party or parties for whose
 5 benefit the expenses were incurred. In the discretion of the court, the costs or expenses may be assessed
 6 against the land ~~upon~~on which or for the benefit of which the expense had been incurred."

7

8 **Section 49.** Section 85-5-203, MCA, is amended to read:

9 **"85-5-203. Telephone expenses.** The water judge may also allow as a charge reasonable expenses
 10 incurred by a water commissioner in telephoning to the water judge for instructions in cases of emergency.
 11 When there are two or more commissioners acting under the water judge's order, reasonable expenses
 12 incurred in communicating with each by telephone or with the water judge ~~of the district court~~, in order to carry
 13 on the distribution of the waters harmoniously and in accordance with the decree, shall be deemed a necessary
 14 expense. These expenses ~~shall~~must be reported by the water commissioner or commissioners at the close of
 15 the season and ~~shall~~must be taxed against all the water users affected by the decree or decrees ratably in
 16 proportion to the whole amount of water distributed to them during the season."

17

18 **Section 50.** Section 85-5-204, MCA, is amended to read:

19 **"85-5-204. Apportionment of fees and expenses.** (1) ~~Upon~~On the filing of the report by the water
 20 commissioner or water commissioners, the ~~clerk of court~~ water court administrator ~~clerk of the district court or~~
 21 water court administrator, as directed by the water judge, shall notify by letter each person mentioned in the
 22 report:

- 23 (a) of the amount the water user is made liable for by the report;
- 24 (b) that objections to the report and the amount taxed against the water user may be made by any
 25 person interested in the report or the amount assessed against the water user within 20 days after the date of
 26 the mailing of the notice; and
- 27 (c) that, unless objections are filed, an order will be made by the water judge ~~of the district court~~
 28 finally fixing and determining the amount due from each of the water users.

1 (2) The affidavit of the ~~clerk~~water court administrator that the ~~clerk~~administrator has mailed a
2 notice to each person mentioned in the report at the person's last-known post-office address, in the usual
3 manner, must be considered prima facie evidence that the person received the notice provided for in this
4 section.

5 (3) At the discretion of the ~~district~~water judge, the water commissioner may issue a bill prior to the
6 beginning of a distribution season for the purpose of offsetting costs associated with distributing water and
7 water commissioner duties by submitting the information necessary for the billing to the ~~clerk of the district court~~
8 water court administrator. The bill for each water user may not exceed 80% of the amount that was provided to
9 the ~~district~~water court pursuant to 85-5-107 for the prior distribution season.

10 (4) If the cost of distributing water during a distribution season is less than the amount that was
11 collected through a bill issued prior to a distribution season, the water commissioner shall refund the money to
12 the water user based on the amount of water that the water user received during the distribution season. The
13 water commissioner shall submit a refund report, along with proof that any refunds were issued, to the ~~clerk of~~
14 district court water court administrator for filing."
15

16 **Section 51.** Section 85-5-205, MCA, is amended to read:

17 **"85-5-205. Objections to expenses -- hearing.** At the expiration of the 20 days' notice, as provided
18 for in the preceding section, if objections to ~~said the~~ report have been filed or a motion to retax the same has
19 been made, the ~~court or~~water judge shall fix a time for the hearing of ~~such the~~ objections or motion to retax,
20 ~~which and the~~ time of hearing shall must be as soon as the water judge ~~or a court~~ can conveniently hear the
21 same. Any person objecting to ~~said the~~ report shall be entitled to at least 5 days' notice of the date and time of
22 ~~such the~~ hearing. At ~~such the~~ hearing the ~~court or~~water judge shall hear and determine the motion or
23 objections and shall make an order fixing and determining the amount found due from each of ~~said the~~ water
24 users to ~~such the~~ commissioner or commissioners. In case no objections are filed within the 20 days, ~~as~~
25 ~~hereinbefore provided for pursuant to this section,~~ ~~such the~~ order shall must be made as a matter of course,
26 and in either case ~~said the~~ order shall must be the final determination of the matter."
27

28 **Section 52.** Section 85-5-206, MCA, is amended to read:

