

WATER RIGHT ENFORCEMENT IN MONTANA 2013

I. Jurisdiction:

The district courts have jurisdiction to enforce state district court decrees, federal district court decrees, and water court decrees. Enforceable water court decrees include temporary preliminary decrees, preliminary decrees, and final decrees. §85-2-406. The water court does not have jurisdiction to enforce its decrees. Rights that have not been decreed are not enforced by commissioners. The district courts have appointed commissioners to administer water court decrees on 43 streams and stream segments. Not every enforcement project is active every year. About 6,100 surface water rights are included in enforcement projects.

II. Water users have these choices when they believe their water rights are adversely affected:

- Talk to the other water user.
- Apply to district court for a temporary restraining order, or a preliminary injunction. §27-19-101, 201, 314.
- Petition for a water commissioner. §§85-5-101, 85-2-406(2)(a)
- If no district court decree was entered before July 1, 1973 and there is no fully adjudicated water court decree, §85-2-406(2)(b) allows district court to certify the matter to the chief water judge for a determination of existing rights.
- Petition district court for a water mediator. §85-5-110.
- Contact regional DNRC office. DNRC can investigate waste of water, unlawful use, anyone who prevents water from moving to serve a senior right, and other violations of water use act. Must first make a call (ask the upstream junior) for your water and file a written complaint with the DNRC. §85-2-114

III. Water Commissioners:

1. Appointment of a Commissioner. §85-5-101: A water commissioner may be appointed by the district court:
 - On application of at least 15% of the water rights affected by the decree. §85-5-101(1)
 - In the exercise of the judge's discretion. §85-5-101(1)
 - If there is a water court decree, on application of DNRC and at least one holder of a valid water right.
 - On application of the DNRC or a person who has contract water from any other owner of stored water.
 - On application of an irrigation district which uses a stream as means of conveyance.
2. Commissioner's powers.
 - Measure and distribute water. § 85-5-501. Measurement is at the diversion,

not the field boundary. For stored water, shepherd it to its secondary diversion. Conveyance losses belong to the appropriator or stored water user. §85-2-411

- Require headgates and measuring devices. No facilities, no water. §85-5-302. Commissioner will check for proper installation. Measuring devices have to be correctly sized, level, square, sealed against bypass, and installed with the right amount of fall above and below.
 - Install headgates at the user's expense. §85-5-201.
 - Repair dams, headgates, ditches, and flumes, if court has so ordered. §85-5-202. The cost is taxed against the benefited party or benefited land.
 - Enter land, inspect and adjust the diversion. §85-5-108
 - Administer joint ditches when appointed to do so. § 85-5-401.
 - Enter and work on ditches. Visit, inspect, and adjust headgates. §85-5-106
 - Administer temporary changes allowed by statute. Road construction, instream flow, short-term leases. §§85-2-408, 85-2-410
 - When a water commissioner finds an error in the tabulation, the water court may ask DNRC to do field work to provide accurate diversion locations, ditch names, places of use.
 - Water right users who might be affected by any change to their water rights or water rights which could affect them are given notice and an opportunity to be heard. All parties get notice of DNRC field visits requested by the water court and a chance to comment on the DNRC report. Rule 12, W.R.Adj.R.
 - Refusal to allow regulation and interference with regulation can be punished as a contempt of court, or through the criminal law as interference with a public officer in the performance of his duties. *Marks v. First Judicial Dist. Court*, 239 Mont. 428 (1989).
 - A commissioner's dereliction can be punished as a contempt of court. §85-3-301
 - If the commissioner incurs repair expenses when "immediate action is necessary to preserve the rights of the parties" or when the appointment order requires the commissioner to repair ditches, headgates, or flumes, the costs are taxed against those who benefit. §85-5-202.
 - Commissioners have the powers of a sheriff or constable to arrest anyone who interferes with their distribution of water. §85-5-108.
3. Dissatisfied water user complaints. §85-5-301, Rule 31 W.R.Adj.R.
- Any water user who is dissatisfied with the method of distribution of water may file a complaint.
 - The judge holds a hearing and may direct how distribution is to be made, or

remove commissioner. The district courts can appoint water masters, with the CWJ's consent, to hear dissatisfied water user complaints.

4. Commissioner Compensation

- Commissioners are not employees of the courts, local government, or water users. Commissioners are required to buy workers' compensation insurance. §85-5-101 (6) and (7)
- Court sets compensation of the commissioners. §85-5-101(4). They may be paid a daily or monthly salary, or by the amount of water they regulate, whatever the district judge decides. Compensation varies from 1 cent per miner's inch regulated to \$2000/month or more.
- The water users pay the commissioners in proportion to the water distributed. Headgate and dam construction are charged to the party for whom the work was done. § 85-5-201. Water users can contest the billing. §85-5-205.
- Commissioners must keep a regular record, usually daily, of distribution and file it with the court. §85-5-107. Includes cost of distribution to each water user based on proportion of water distributed. Clerk of court sends bills. When the court fixes the fees, the charges are a lien against the land. §85-5-206
- The water court may assist the district courts in developing water user billing systems, water commissioner training, and any other requirement to facilitate the distribution of water under the water court decree and tabulations. Rule 32, W.R.Adj.R.

IV. An idealized enforcement project:

1. The water court has a decree for Badwater Creek.
2. Someone petitions the district court to have a commissioner appointed
3. The district court notifies the water court. The water court:
 - (1) determines the scope of the enforcement project and project staffing in consultation with the district court. May include water users and water commissioners; and
 - (2) assesses the status of all proceedings within the proposed enforcement area to confirm that all objections have been resolved and that the decree is ready for enforcement. Rule 31(a), W.R.Adj.R.
4. The water court contacts the DNRC for help and prepares a tabulation. The DNRC makes a list of water right holders by owner name and priority date and a map which locates all of the diversions. The water court creates a red tab book with a priority date list, owner list, maps, commissioner's report forms, the order of appointment, the commissioner's bond, and evidence of worker's compensation insurance. The water court keeps a copy, sends one to the local district court, and sends one to the water commissioner. The red book is a public document, which

the public may use at the clerk of court's office. The red books are updated annually.

5. The water court may hold meetings in the local community. With a tab book in the local clerk of court's office, water users can see where their water rights stand. Rule 31(c), W.R.Adj.R.
6. Sometimes there are those who prefer enforcement of a pre-1973 district court decree. They see some advantage in the status quo: larger flow rate, less competition, no one insisting on headgates and measuring devices, and so on.
7. The district court appoints a commissioner. For first-time projects, the commissioner may have to require headgates and measuring devices.
8. There are times when the DNRC has limited grant money available to help with the cost of measuring devices. Check with the DNRC to see whether any is available.

V. Useful Web Addresses:

- http://dnrc.mt.gov/wrd/water_rts/adjudication/default.asp
- http://courts.mt.gov/content/water/rules/water_right_adjudication_rules.pdf