

Dear Judge McElyea and Members of the Committee:

Below are my initial suggested revisions to the water administration statutes currently set forth in Title 85, Chapter 2 of the Mont. Code Ann.

In my view, the current water administration statutes are unclear and lead some parties to believe they can selectively choose a portion of a Water Court temporary preliminary or preliminary decree to have enforced under § 85-2-406(4), MCA. In some instances, parties have sought to obtain an enforcement decree that includes certain junior water rights they may call, but does not include other junior water rights that would be subject to a call if enforcement were comprehensive. In some cases, these additional junior rights might belong to the party seeking enforcement or to their “allies” on the source. Selective enforcement of portions of Water Court decrees, without including all hydrologically interrelated water, is problematic. First, like a selective call, it often violates the principle of “first in time is first in right.” Second, it simply repeats the piecemeal water enforcement of the past, where some but not all rights were administered by a commissioner. Third, selective partial enforcement of decrees not based on hydrologic boundaries may violate the McCarran amendment. Under McCarran, the United States has waived its sovereign immunity in lawsuits: “(1) for the adjudication of rights to the use of water of a river system or other source; or (2) for the administration of such rights where the United States is a necessary party to such suit.” 43 U.S.C. § 666. My suggested revisions would clarify that an enforcement project, or a petition or motion requesting to enforce a Water Court decree, or a portion thereof, pursuant to § 85-2-406(4), MCA, must include all hydrologically interrelated water in the particular source, subbasin, or stream reach that a party is attempting to have administered.

Certification tabulations pursuant to § 85-2-406(2)(b), MCA, present a different circumstance. A party involved in a water distribution controversy may seek a determination of the water rights involved in the controversy from the Water Court via certification, and then the case is returned to the District Court for enforcement of the priorities determined in the certification action. The water rights determined in the certification action should be “the existing rights that are involved in the controversy.” I am currently involved in an appeal from the Water Court involving the construction of that language and feel that I must disclose that before making any suggestions to modify § 85-2-406(2)(b), MCA, concerning certification. *See, Fellows v. Water Commissioner, et al.*, Sup. Ct. Case No. DA-15-0392. As stated in my arguments on appeal, I believe that under basic rules of statutory construction, the language of the statute is only susceptible to one interpretation. Nonetheless, I have suggested some further clarifications below.

For a number of reasons, certification tabulations under subsection (2)(b) present a different situation than enforcement tabulations under subsection (4). Certification tabulations are the result of a dispute where a party is seeking an immediate remedy against a particular party or parties. Certification tabulations are very similar to the *in personam* piecemeal water decrees that existed prior to the initiation of Montana’s comprehensive general adjudication of water rights. In a certification case involving the United States Bureau of Reclamation’s water rights in the Beaverhead River Basin for the Clark Canyon Reservoir, the United States made a special appearance to contest the Water Court’s jurisdiction on those grounds. *See, WC-2009-06*. The United States took the position that a certification case was a piecemeal adjudication that did not satisfy the requirements of the McCarran amendment, and therefore contested the Water Court’s jurisdiction over the United States in the certification case. Regardless of the merits of that argument, it is clear from the plain language of the statute that a certification tabulation is intended to serve a different purpose than an enforcement tabulation under subsection (4). A certification tabulation is intended to resolve an immediate dispute between only a few parties; the subsection (4) enforcement tabulation is intended to be the comprehensive end result of the adjudication process that results in administration of water rights that would satisfy the McCarran amendment waiver of sovereign immunity in cases where the United States is a necessary party.

It is my view that the statutes need to be clarified so it is clear that § 85-2-406(4), MCA, enforcement tabulations must include all hydrologically interrelated water, and that certification tabulations must include all the rights involved in a particular dispute. Toward that end, I suggest the following revisions to the statutes, shown in underlining.

First, to the extent further clarification is necessary under subsection (2)(b) of § 85-2-406, MCA, I would add the following language to the statute:

**SECTION 85-2-406. District Court supervision of water distribution.**

(2)(b) When a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition the district court to certify the matter to the chief water judge. If a certification request is made, the district court shall identify the existing water rights of parties involved in the controversy by reviewing the allegations of the pleadings in the case, and certify to the chief water judge the determination of the identified existing rights involved in the controversy according to part 2 of this chapter. The identification of the rights involved in the controversy is a question of law appealable pursuant to § 85-2-235(3), MCA.

**Section 85-2-231. Temporary preliminary and preliminary decree**

(3) a temporary preliminary decree or preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, enforcement area, or single source of supply of water, or any claim or group of claims at a time different from the issuance of other temporary preliminary or preliminary decrees.

**Section 85-2-406. District Court supervision of water distribution**

(4) a temporary preliminary decree or preliminary decree or a hydrologically interrelated portion of a temporary preliminary decree or preliminary decree as modified after objections and hearings, is enforceable and administrable according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water judge shall upon referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all hydrologically interrelated existing rights, certificates, permits, water reservations and changes in appropriation rights, and their relative priorities. Upon receiving a petition or other request to enforce a temporary preliminary decree or preliminary decree, or a portion thereof, the water judge shall order the Department to identify all hydrologically interrelated existing water rights, certificates, permits, water reservations, and changes in appropriation rights within the geographic area in which enforcement is sought. The Department shall identify all hydrologically related existing rights, certificates, permits, water reservations and changes in appropriation rights, from both surface and ground water sources, that are within the enforcement area and create a proposed tabulation for the Water Court. The Water Court may adopt, reject, modify, or return the proposed tabulation to the Department for further consideration. Upon adoption of the tabulation, the Water Court shall return the tabulation to the District Court for enforcement.

These are my initial suggestions at this time. I have not made any suggestions concerning the water commissioner statutes, because those statutes may be in need of a comprehensive overhaul, depending on whether the legislature wants to change the nature and role of the office of water commissioner. Nor have I addressed the proposal for concurrent Water Court/District Court jurisdiction.

Again, my concerns are based on my experience that, in some instances, parties have sought to enforce incomplete, partial or piecemeal tabulations under (4) of the statute. The goal of comprehensive adjudication should be comprehensive enforcement. Comprehensive enforcement requires that all hydrologically interrelated waters, both groundwater and surface water, be included in the enforcement tabulation. The statute should be clarified to achieve that goal.

Thank you for the opportunity to comment.

Sincerely,

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