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IN THE WATER COURT OF THE STATE OF MONTANA

SWO-0001-WC-2024

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**STATEWIDE ORDER REGARDING WATER RIGHTS TABULATIONS**

**BACKGROUND**

Montana law authorizes water users to petition a state district court for appointment of a water commissioner to administer and distribute water on a source that has been the subject of a prior court decree. Section 85-5-101(1), MCA. Historically district courts issued water rights decrees. With the passage of the Water Use Act, district court decrees have been progressively superseded by decrees issued by the Water Court.

The Water Court’s adjudication rules require it to “provide tabulations of existing water rights within the proposed enforcement area to the district courts.” W.R.Adj.R. 31(d). The Water Court relies on the Department of Natural Resources and Conservation (“DNRC”) for assistance in preparing the tabulations. The purpose of this Order is to provide clarification and guidance to DNRC as to the content of tabulations.

The Water Court follows a statutory sequence to issue decrees. The process begins with temporary preliminary decrees and preliminary decrees. The Water Court also issues interlocutory decrees to address existing water rights not previously included in decrees such as exempt from filing rights recognized by the legislature, as codified in § 85-2-222, MCA. Ultimately the Water Court issues a final decree for each hydrologic basin in Montana. A final decree sets out the elements of each water right contained in a final decree. Section 85-2-234, MCA.

The Water Use Act recognizes that water rights administration must occur while the adjudication process is ongoing. To ensure orderly administration of water rights, the Legislature included provisions in the Act providing that a “temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree or preliminary decree as modified after objections and hearings is enforceable and administrable according to its terms.” Section 85-2-406(4), MCA; *see also* § 3-7-212, MCA (providing for district court enforcement of temporary decrees in the “absence of any final decree”). The Montana Supreme Court has confirmed that when a district court appoints a water commissioner to “admeasure and distribute” decreed water rights under the water commissioner statute, the commissioner must administer those water rights contained in a Water Court decree, whether temporary or final, even if a prior district court decree exists on a source. *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, 383 Mont. 523, 373 P.3d 836.<sup>1</sup>

Not all claimed existing (i.e. pre-July 1, 1973) water rights have been included in Water Court decrees or prior district court decrees. Primarily, the non-decreed existing water right claims include exempt from filing rights, and water right claims in two Flathead River basins (Basins 76L and 76LJ). These categories of claims cannot yet be included in tabulations because they fall outside of the statutory tabulation scheme unless and until they either are included in a decree, or are addressed in a Water Court order following a certification request issued by a district court to the Water Court under § 85-2-406(2)(b), MCA.

The water commissioner statute only allows administration of decreed water rights “as fixed by the decree.” Section 85-5-101(1), MCA. The decree thus establishes the permissible scope of what may be included in a tabulation supplied by the Water Court to a district court. As noted, the Water Court decrees a number of elements for each water right, such as flow rate, priority date, water source, point of diversion, and “any other information necessary to fully define the nature and extent of the right.” Section 85-2-

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<sup>1</sup> Water commissioners also are authorized to administer “certificates, permits, and changes in appropriation right issued under chapter 2 of this title.” Section 85-5-101(1), MCA.

234, MCA. The Water Court commonly refers to the “other information” category as a “commissioner remark.”

When the Water Court receives a tabulation request from a district court, the Water Court works with DNRC to prepare a tabulation that contains enough elements to provide for administration, recognizing that ultimately all elements are enforceable. Customarily, unless the district court request provides otherwise, the tabulated elements include flow rate, priority date, water source, point of diversion, and commissioner remarks. The Water Court relies on DNRC to generate a tabulation based upon the most recent version of the decreed water rights included in the database for the particular source at issue. The Water Court then transmits the tabulation to the district court for water commissioner administration. To facilitate administration, DNRC also prepares maps depicting the points of diversion for the tabulated claims.

Based on this scheme, and to ensure consistency in tabulation generation, the Court now provides this Order to DNRC.

#### ORDER

Based upon the foregoing and effective immediately, IT IS ORDERED:

1. When DNRC receives a tabulation request from the Water Court, it shall provide the following information in a tabulation for the source identified in the request: (a) each water right claim that has been included in a Water Court decree, including any final decree, or a temporary preliminary decree or preliminary decree as modified after objections and hearings; and (b) any water right claim included in an order of the Water Court following a certification request from a district court. The tabulation shall be based on the most recent version of the water right claim contained in the State’s centralized water rights record system (*i.e.*, the database).

2. For clarification, the tabulation shall not include any exempt from filing or other claims of existing rights that have not previously been included in a Water Court decree or a Water Court order. The DNRC shall assume that all prior district court decrees have been superseded by a Water Court decree, unless the Water Court instructs otherwise.

3. If requested by a district court, the DNRC may include in the tabulation certificates, permits, and changes in water rights as authorized by W.R.C.E.R. 3(d).

4. The tabulation shall include the following elements unless otherwise requested by the Water Court based on a request from a district court: flow rate, priority date, water source, point of diversion, and commissioner remarks.

5. This Order supersedes all prior orders of the Water Court regarding its subject matter. The Order applies to all tabulation requests in 2024 and in the future.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

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