

Menu of Exempt Right Resolution Options for the Water Policy Interim Committee¹

When the Water Use Act was enacted in 1979, livestock and domestic uses sourced from groundwater or instream flow were exempt from the filing and forfeiture requirements of the Montana General Stream Adjudication (the Adjudication). *See* §§ 85-2-221, -222, and -226, MCA. At the time, it was expected that these so-called “Exempt Rights” would eventually be incorporated formally into the Adjudication,² though the process for how that would be accomplished was never identified. Pursuant to Senator Brendan’s letter of May 3, 2011, Water Court Judge Loble convened the Water Adjudication Advisory Committee to examine this issue. This Paper reflects discussions among Advisory Committee members and a belief that these options outlined below should be brought forward for consideration by the Legislature. Please note that the order in which these options are presented in this paper does *not* reflect a ranking by the Advisory Committee, or a specific endorsement of any of these options. They are simply brought forward for consideration by the Water Policy Interim Committee.

Some additional background considerations that inform this paper are the following:

- Holders of Exempt Rights were told by the Legislature, through § 85-2-222, MCA, that they need not file in the Adjudication alongside other water rights claimants, and these Exempt Rights holders should therefore not be penalized for having previously failed to file;
- There appears to be some public interest in ensuring the existence of a forum for holders of these Exempt Rights to formally validate these water rights and ensure that water associated with these rights may be distributed by water commissioners;
- Examination of claims filed for these Exempt Rights is typically minimal, but is important to validate the existence of these rights and assure the accuracy of the Adjudication as a whole;
- Consideration should be given to the timing of the current decree issuance schedule and resources availability.

Option One – A Fully Mandatory Filing Process

- All exempt stock and domestic claims filed by a date certain.³
 - Filing fee (all other claimants had to pay a \$40 fee)
- Failure to file results in forfeiture of right.

¹Although staff from both agencies participated in the drafting of this paper, this paper is not a specific endorsement of any of the options set forth herein by the Montana Attorney General’s Office or the Montana Department of Natural Resources and Conservation.

² *See* April 14, 1978, Report to the Montana Legislature Interim Committee on Water Rights, at 3-4.

³ DNRC estimates that there are likely to be approximately 40,000 Stock and Domestic claims that were exempt from filing pursuant to §85-2-222, MCA. Of these, DNRC estimates that roughly 18,000 of these are for instream Stock rights.

- Claims are to be examined
 - Examined by DNRC pursuant to MT Supreme Court Claims Examination Rules (information furnished to Water Court in summary reports by basin)?⁴
 - Examined only if above a certain flow-rate/volume threshold (e.g., no examination necessary for Domestic claims below 35 gpm/1 AFY or Stock claims below 15 AFY)?
 - Equity issue if these later-filed rights are subject to a lesser level of examination than previously filed rights?
- Claims noticed out by Water Court as part of issuance of preliminary decree (or amended preliminary decree if PD already issued)
- Opportunity for filing, hearing and resolution of objections as for all other claims in the Adjudication.
- Decree of claims as for all other claims in the Adjudication.

Option Two – A Hybrid Process (Mandatory Stock/Voluntary Domestic)

- Same as the Full Mandatory process for Stock claims.
- Domestic claims may file by the date certain set for instream Stock claims (and be decreed through the same process) but are not forfeited for failure to file by that date
- Disputes involving domestic claims not filed by the date certain set for Stock claims to be resolved by local district courts on a case-by-case basis under the §85-2-406 certification process as actual controversies arise.
- Domestic claims not filed by the mandatory instream Stock deadline could be filed under a new certification process amended into §85-2-406 when no distribution controversy exists:
 - File claim form with district court.
 - District court certifies claim for adjudication to Water Court.
 - DNRC examines claim to validate existence of right.
 - Once validated, claimant receives a maximum of a 35 gpm flow rate and a total annual volume of 1.5 acre-feet for domestic use.
 - No objection process.
 - Equity issue about lack of objection process for these claims as opposed to all other claims filed in the adjudication?
 - Water Court amends decree (depending on stage) to include these newly processed Domestic rights.

Voluntary and Certification options are treated separately.

⁴ DNRC estimates that examination of all these claims would take approximately two years at current staffing levels and cost roughly \$2.62 million (at least some of which could be defrayed by receipts from a filing fee).