

ENFORCEMENT STATUTES

Title 85 Chapter 2

District Court Supervision of Water Distribution

85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision must be governed by the principle that first in time is first in right.

(2) (a) A district court may order the distribution of water pursuant to a district court decree entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the matter has been adjudicated under the procedure set forth in subsection (2)(b).

(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 certify to the chief water judge the determination of the existing rights that are involved in the controversy according to part 2 of this chapter. The district court from which relief is sought shall retain exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights certified to the water judge. Certified controversies must be given priority over all other adjudication matters. After determination of the matters certified, the water judge shall return the decision to the district court with a tabulation or list of the existing rights and their relative priorities.

(3) A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the district court. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal enlargement or change of right. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy must be appended to the final decree, and a copy must be filed with the department. The department must be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

(4) 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. 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 existing rights and their relative priorities.

(5) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree or a person exercising a suspension under [85-2-217](#) and part 7 of this chapter may appeal a determination made pursuant to subsection (2).

Title 85 Chapter 5

Water Commissioners and Water Mediators

Part 1. Appointment and Duties

Part 2. Charges and Expenses

Part 3. Rights and Duties of Water Users

Part 4. Water Ditches Under Joint or Corporate Control

PART 1

85-5-101. Appointment of water commissioners. (1) Whenever the rights of persons to use the waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply have been determined by a decree of a court of competent jurisdiction, including temporary preliminary, preliminary, and final decrees issued by a water judge, it is the duty of the judge of the district court having jurisdiction of the subject matter, upon the application of the owners of at least 15% of the water rights affected by the decree, in the exercise of the judge's discretion, to appoint one or more commissioners. The commissioners have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates, permits, and changes in appropriation right issued under chapter 2 of this title. When petitioners make proper showing that they are not able to obtain the application of the owners of at least 15% of the water rights affected and they are unable to obtain the water to which they are entitled, the judge of the district court having jurisdiction may appoint a water commissioner.

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

(3) The department of natural resources and conservation or any person or corporation operating under contract with the department or any other owner of stored waters may petition the court to have stored waters distributed by the water commissioners appointed by the district court. The court may order the commissioner or commissioners appointed by the court to distribute stored water when and as released to water users entitled to the use of the water.

(4) At the time of the appointment of a water commissioner or commissioners, the district court shall fix their compensation, require a commissioner or commissioners to purchase a workers' compensation insurance policy and elect coverage on themselves, and require the owners and users of

the distributed waters, including permittees, certificate holders, and holders of a change in appropriation right, to pay their proportionate share of fees and compensation, including the cost of workers' compensation insurance purchased by a water commissioner or commissioners. The judge may include the department in the apportionment of costs if it applied for the appointment of a water commissioner under subsection (2).

(5) Upon the application of the board or boards of one or more irrigation districts entitled to the use of water stored in a reservoir that is turned into the natural channel of any stream and withdrawn or diverted at a point downstream for beneficial use, the district court of the judicial district where the most irrigable acres of the irrigation district or districts are situated may appoint a water commissioner to equitably admeasure and distribute stored water to the irrigation district or districts from the channel of the stream into which it has been turned. A commissioner appointed under this subsection has the powers of any commissioner appointed under this chapter, limited only by the purposes of this subsection. A commissioner's compensation is set by the appointing judge and paid by each district and other users of stored water affected by the admeasurement and distribution of the stored water. In all other matters, the provisions of this chapter apply so long as they are consistent with this subsection.

(6) A water commissioner appointed by a district court is not an employee of the judicial branch, a local government, or a water user.

(7) A water commissioner who fails to obtain workers' compensation insurance coverage required by subsection (4) is precluded from receiving benefits under Title 39, chapter 71, as a result of the performance of duties as a water commissioner.

85-5-102. Appointment of chief commissioner. When the judge of the district court appoints two or more commissioners to admeasure and distribute the waters mentioned in [85-5-101](#), the 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 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.

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

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 judge in the order making the appointment. The 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.

85-5-105. Power and duty to distribute water. Upon the issuance of an order, the water commissioner or commissioners have authority and it is the commissioner's or commissioners' duty to admeasure and distribute to the users of water, as their interests may appear and be required, the stored and supplemental water stored and as released by the department of natural resources and conservation under provisions of Title 85, chapter 1, to be diverted into and through a stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply in the same manner and under the same rules as decreed water rights are admeasured and distributed. The water commissioner or commissioners and the owners and users of the stored and supplemental water are bound by and are subject to the provisions of this chapter. However, the admeasurements and distribution of the stored and supplemental water may not interfere with decreed water rights. The purpose of Title 85, chapter 5, parts 1 through 3, is to provide a uniform, equitable, and economical distribution of adjudicated, stored, and supplemental waters.

85-5-106. Maintenance and repair of ditches or systems. Upon written request of the owners of at least 51% of the water rights in any adjudicated ditch or single water system, the judge of the district court may empower the commissioner to maintain and keep in reasonable repair such water ditch or water system at the expense of the owners thereof, and for such purposes the commissioner shall have authority to enter and work upon 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 waters.

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 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 monthly or seasonally, at the discretion of the district 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 the water commissioner's or commissioners' daily salary, other costs of the water commissioner or commissioners approved by the district 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 judge, they may file a joint summary of their records with the clerk of the court, or the chief commissioner, if one has been appointed by the judge, may file a summary on behalf of all of them.

(2) If the district 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.

85-5-108. Authority and arrest power. For the purposes of carrying out the provisions of Title 85, chapter 5, parts 1 through 3, each commissioner appointed by the court has the authority to enter upon any ditch, canal, aqueduct, or other source for conveying the waters affected by the decree and to visit, inspect, and adjust all headgates or other means of distributing the waters and has the same powers as a sheriff or constable to arrest any person interfering with the distribution made by the commissioner, to be dealt with according to law.

85-5-109. Failure to perform duty as contempt of court. If a commissioner fails to perform any of the duties imposed upon the commissioner by the order of the judge of the district court, the commissioner is guilty of contempt of court.

85-5-110. Appointment of water mediators -- duties. (1) The judge of the district court may appoint a water mediator to mediate a water controversy in a decreed or nondecreed basin under the following circumstances:

- (a) upon request of the governor;
 - (b) upon petition by at least 15% of the owners of water rights in a decreed or nondecreed basin; or
 - (c) in the discretion of the district court having jurisdiction.
- (2) A water mediator appointed under this section may:
- (a) discuss proposed solutions to a water controversy with affected water right holders;
 - (b) review options related to scheduling and coordinating water use with affected water right holders;
 - (c) discuss water use and water needs with persons and entities affected by the existing water use;
 - (d) meet with principal parties to mediate differences over the use of water; and
 - (e) hold public meetings and conferences to discuss and negotiate potential solutions to controversies over use of water.
- (3) If the governor requests or a state agency petitions for a water mediator, the governor or agency shall pay all or a majority of the costs of the water mediator as determined equitable by the district court having jurisdiction.
- (4) The governor may use funds appropriated under [75-1-1101](#) to pay the costs of a water mediator.
- (5) This section does not allow a water mediator to require any valid water right holder to compromise or reduce any of the holder's existing water rights.
- (6) If an appropriator voluntarily ceases to use all or part of an appropriation right or voluntarily ceases to use an appropriation right according to its terms and conditions as a result of the efforts of a mediator appointed under this section, the appropriator may not be considered to have abandoned all or any portion of the appropriation right.

85-5-111. Water commissioner and mediator education. The department of natural resources and conservation, in cooperation with the Montana supreme court, the Montana water courts, the district courts of Montana, the Montana university system, and other appropriate state and federal agencies, shall develop an educational program for water commissioners and mediators that includes:

- (1) an annual seminar on commissioner and mediator duties, mediation techniques, and water measuring techniques;
- (2) preparation and, as necessary, revision of a water commissioner and mediator manual; and
- (3) an outreach program that identifies persons who might serve as water commissioners or mediators.

PART 2

85-5-201. Distribution of water and related expenses. (1) Each water commissioner appointed by the judge of the district court for the purpose of distributing water has the authority to determine the appropriate quantity and distribute to the parties interested, under a decree, permit, certificate, or change in appropriation right, the water to which those who are parties to the decree or holders of a permit, certificate, or change in appropriation right, or privy to a permit, certificate, or change in appropriation right, are entitled, according to their priority as established by the decree, permit, certificate, or change in appropriation right.

(2) The water commissioner may incur necessary expenses in the making of headgates or dams for the distribution of the waters if the parties fail or refuse to do so. Expenses associated with making headgates or dams for the distribution of water must be assessed against and paid by the party or parties for whom the ditch or ditches were repaired or the dams or headgates were made. In the discretion of the court, the costs or expenses may be assessed against the land upon which or for the benefit of which the expense had been incurred.

(3) (a) At the district court's discretion, a water commissioner may bill water users prior to the beginning of a distribution season for the purpose of offsetting costs associated with distributing water and water commissioner duties by submitting the information necessary for the billing to the clerk of the district court. A billing issued prior to the beginning of a distribution season:

- (i) must be assessed on a per-user basis;
- (ii) must be based on the report provided for in [85-5-107](#) for the prior year; and
- (iii) may not exceed 80% of the amount that was provided to the district court pursuant to [85-5-107](#) for the prior distribution season on a per-user basis.

(b) Upon receipt of the information from the water commissioner, the clerk of district court shall proceed as provided in [85-5-204](#).

85-5-202. Repair expenses. The judge may allow as a charge any expenses necessarily incurred by the water commissioner in the discharge of duties in the employment of extra labor for the repair of dams, headgates, ditches, or flumes when immediate action is necessary to preserve the rights of the parties entitled to the waters of a stream or when the judge has, in the order appointing the commissioner, required the commissioner to repair ditches and keep in repair necessary headgates, ditches, or flumes. The water commissioner shall report all expenses, and the cost must be taxed against the party or parties for whose benefit the expenses were incurred. In the discretion of the court, the costs or expenses may be assessed against the land upon which or for the benefit of which the expense had been incurred.

85-5-203. Telephone expenses. The judge may also allow as a charge reasonable expenses incurred by a water commissioner in telephoning to the judge for instructions in cases of emergency. When there are two or more commissioners acting under the judge's order, reasonable expenses incurred in communicating with each by telephone or with the judge of the district court, in order to carry on the distribution of the waters harmoniously and in accordance with the decree, shall be deemed a necessary expense. These expenses shall be reported by the water commissioner or commissioners at

the close of the season and shall be taxed against all the water users affected by the decree or decrees ratably in proportion to the whole amount of water distributed to them during the season.

85-5-204. Apportionment of fees and expenses. (1) Upon the filing of the report by the water commissioner or water commissioners, the clerk of court shall notify by letter each person mentioned in the report:

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

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

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

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

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

85-5-206. Effect of order fixing fees. After the order of the court fixing the fees and compensation and expenses of the water commissioner is final, the order has the force and effect of a judgment against the person to whom the water was or will be distributed and for whose benefit it was used or will be used. When the expenses of a commissioner or commissioners has been assessed against the land for which the service of the commissioner or commissioners has been rendered, the assessment is a lien against the land. The lien has the same effect as a judgment. The lien may be executed in the

same manner as a judgment upon order of the court. The water commissioner, at the water commissioner's discretion, may withhold further determinations of quantity or distribution of water to any person entitled to the water until the person has paid all fees, compensation, and expenses of the water commissioner or commissioners fixed by the court and apportioned and charged to the person, including bills sent prior to the beginning of a distribution season. The commissioner may withhold the determination of quantity and distribution of water from any land against which there exists any lien that is the result of lack of payment pursuant to this section until the lien has been fully discharged.

PART 3

85-5-301. Complaint by dissatisfied user. (1) A person owning or using any of the waters of the stream or ditch or extension of the ditch who is dissatisfied with the method of distribution of the waters of the stream or ditch by the water commissioner or water commissioners and who claims to be entitled to more water than the person is receiving or to a right prior to that allowed the person by the water commissioner or water commissioners may file a written complaint, duly verified, setting forth the facts of the claim.

(2) Upon receipt of the complaint, the judge shall fix a time for the hearing of the petition and shall direct that notice be given to the parties interested in the hearing as the judge considers necessary. At the time fixed for the hearing, the judge shall hear and examine the complainant and other parties who appear to support or resist the claim and examine the water commissioner or water commissioners and witnesses regarding the charges contained in the complaint.

(3) Upon the determination of the hearing, the judge shall make findings and issue an order that the judge considers just and proper. If it appears to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, permit, certificate, or change in appropriation right, the judge shall give the proper instructions for distribution of the water.

(4) The judge may remove any water commissioner and appoint a new water commissioner if the judge determines that the interests of the parties in the waters mentioned in the decree, permit, certificate, or change in appropriation right will be best served by appointing a new water commissioner. If it appears to the judge that the water commissioner has willfully failed to perform the water commissioner's duties, the water commissioner may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make an order regarding the payment of costs of the hearing that the judge determines is just and proper.

85-5-302. Maintenance of headgates and measuring devices. All persons using water from any stream or ditch for which a water commissioner is appointed are required to have suitable headgates at the point where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in the ditch. If a person fails to place or maintain a proper measuring appliance, it is the duty of the water commissioner not to apportion or distribute any water

through the ditch. The commissioner shall notify all parties interested by certified mail or in person 1 week before making the annual repair or cleaning of a stream or ditch or performing necessary labor or expenses to divert water to a ditch. The sending of a certified letter to the last-known post-office address of any interested party is prima facie evidence of the fact that the party was duly notified. Any work in the way of repairing a ditch made necessary by an emergency may be done without notice when injury would result from a delay.

PART 4

85-5-401. Determination of water rights between partners, tenants in common, and corporate stockholders. If a water ditch used for irrigating purposes is owned by a partnership, tenants in common, or corporation and there is any dispute between the respective owners, tenants in common, or stockholders respecting the use and division of the waters flowing in the ditch, any partner, tenant in common, or stockholder may commence an action in any court of competent jurisdiction to determine the rights of the respective parties to the use of the waters and may join in the petition a request for the appointment of a water commissioner to apportion and distribute the waters of the ditch according to the rights of the respective owners, tenants in common, or stockholders during the pendency of the action.

85-5-402. Appointment of commissioner prior to final decree. After the filing of the complaint in an action under [85-5-401](#), the court may, upon 5 days' notice to the other parties to the action, appoint a commissioner to divide and distribute the waters of the ditch to the respective parties, according to their respective rights, during the pendency of the action. The court may, upon good cause shown, appoint a commissioner without notice, and when a commissioner is appointed without notice, any party to the action may, on 5 days' notice to the plaintiff, move the court or judge to vacate the appointment or to modify the order as to the distribution of the waters of the ditch. The court or judge, on hearing, may affirm, vacate, or modify the order previously made. Each water commissioner appointed shall subscribe to an oath of office before commencing the discharge of duties.

85-5-403. Division of water. It shall be the duty of the water commissioner to divide the waters of said ditch between the owners, tenants in common, or stockholders in proportion to their respective rights, as set forth in the complaint or in such other manner or proportion as the court or judge may direct.

85-5-404. Authority of commissioner. Such commissioner shall have authority to enter upon said ditch; open, close, and set headgates; and do whatever else is necessary to apportion and distribute the waters of said ditch to the respective parties according to their respective rights.

85-5-405. Compensation and expenses. The court shall fix the compensation of the commissioner and the term of employment and shall make an order apportioning the amount of compensation among the several owners, tenants in common, or stockholders of the ditch, according to their respective rights and interest in the ditch. The amounts apportioned must be taxed as costs in the action against the respective parties.

85-5-406. Interference with actions of commissioner. A person opening or closing a headgate after being set by the commissioner or who in any manner interferes with the commissioner in the discharge of the commissioner's duties is guilty of contempt of court and may be proceeded against for contempt of court as provided in contempt cases.

85-5-407. Appointment of water commissioner after final decree. When the rights of the respective parties in an action to the use of the waters flowing in a ditch are adjudicated, the judge of the district court having jurisdiction of the subject matter, upon the application of the owners of at least 10% of the waters of the ditch, may, in the exercise of the judge's discretion, appoint a water commissioner to divide, apportion, and distribute the waters of the ditch to the respective parties according to their respective rights as set forth in the decree. When a commissioner is appointed under the provisions of this chapter to apportion and distribute the waters of the stream from which the water flowing in a ditch is taken, the commissioner shall, when directed by the judge or court, apportion and distribute the waters of the ditch according to the decree by which the rights of the respective owners were adjudicated.

85-5-408. Apportionment of costs. (1) When a commissioner is appointed upon the application of an owner or owners of a ditch, the court may fix the compensation of the commissioner and the term of the commissioner's employment. The court shall make an order apportioning the amount of compensation among the several owner or owners, tenants in common, or stockholders of the ditch according to their respective rights and interest. The order has the effect of a judgment against the person to whom the water was admeasured and for whose benefit it was used. When, in the discretion of the court, an order of apportionment of expense is made against the land for which the water was used, it has the effect of a lien against the land to which the apportionment was made. Execution may issue upon the order as upon a judgment by direction of the court, upon the application of any person interested in the order.

(2) When a commissioner is appointed under the provisions of this chapter to distribute the waters of the stream from which the waters flowing in a ditch are taken and to apportion and distribute the waters of the ditch according to the rights of the respective owners of the waters, the judge, in the judge's discretion, may, in addition to the apportionment taxed against the respective owners of the waters of the stream, apportion and tax the amount, if any, that the owners of the ditch shall pay in addition to the amount taxed under the provisions of this chapter.