

## **Mandatory Option Report for the Water Adjudication Advisory Committee**<sup>1</sup>

When the statewide adjudication under the Water Use Act commenced 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,<sup>2</sup> 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 reconvened the Water Adjudication Advisory Committee to examine this issue. This Report reflects discussions among Water Adjudication Advisory Committee members and a belief that this option should be brought forward as one of multiple alternatives for consideration by the Legislature.

Some additional background considerations that inform this report 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;
- A forum needs to be provided so that holders of these Exempt Rights have an avenue to formally validate and record these water rights and have a way to 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 such examination is important to confirm the existence and scope of these rights, in addition to ensuring consistency across the Adjudication as a whole;
- Consideration should be given to the timing of the current decree issuance schedule and resources availability.

By “mandatory option,” this report means a process by which Exempt Rights are required to file claims in the adjudication by a specified deadline or have those claims be deemed abandoned like all other claims that were not filed by the required filing deadlines. *See* § 85-2-226, MCA. The chief advantage to this approach is that it will incorporate all existing claims into the adjudication, subject to the same notice and objection requirements, with Exempt Rights appearing in final decrees alongside all other water rights. This process would benefit both the holders of Exempt Rights, whose rights would be recorded and confirmed through the adjudication. Other water right holders whose uses might be affected by those Exempt Rights

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<sup>1</sup>Although staff from both agencies participated in the drafting of this report, this report is not an endorsement of this proposal by the Montana Attorney General’s Office or the Montana Department of Natural Resources and conservation.

<sup>2</sup> *See* April 14, 1978, Report to the Montana Legislature Interim Committee on Water Rights, at 3-4, attached hereto as Appendix A.

would benefit though the existence of a forum for the fair and accurate adjudication of Exempt Rights. The primary drawbacks to this approach are in time and expense.<sup>3</sup> The Montana Department of Natural Resources and Conservation (DNRC) has estimated that there could be as many as 150,000 Exempt Rights that might be filed in the adjudication. Claims examination,<sup>4</sup> or some analogous process, is likely to be necessary to incorporate these Exempt Rights into preliminary decrees so that they may be noticed out to the public. The DNRC estimates that it could cost more than \$15 million<sup>5</sup> and take up to eight years at current DNRC Adjudication Program staffing levels to conduct a full examination of these claims.

The specific nature of the mandatory filing process could affect both the time and expense pieces of this equation. One option for this approach would be to provide that, to be incorporated in the Adjudication, these Exempt Rights must go through the same process as all other water rights claims that have been filed. That is, as occurred pursuant to § 85-2-212, MCA, the Supreme Court could be directed to issue an order requiring the filing of these claims by a specified deadline, and include the statement that any claim not filed by that deadline is conclusively presumed abandoned. This order could then be noticed to the public pursuant to the process set forth at § 85-2-213, MCA. The filing requirements for each claimant could be identified as those set forth in § 85-2-224, MCA, possibly with the additional requirement for stock claims that the number and type of livestock served by the claimed right be identified as well. Claims would then be examined by the DNRC, and incorporated into preliminary decrees.<sup>6</sup> The *prima facie* status that attaches to filed claims pursuant to § 85-2-227, MCA, would presumably attach to these Exempt Rights as well. This is probably the most robust (and costly) approach to bringing Exempt Rights into the Adjudication. It also ensures true parity between Exempt Rights and all other water rights claims filed in the Adjudication.

There are other approaches to structuring the mandatory filing process for Exempt Right that could be considered as well. For example, a less rigorous (or no) examination process could be required, or examination requirements could be bifurcated, with, for example, less review and analysis if a particular claim is beneath a certain flow rate or volume, and more thorough examination for claims above this threshold.<sup>7</sup> If the examination requirements are lower,

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<sup>3</sup> It is worth noting, however, that unless it is contemplated that these rights will never be formally incorporated into the Adjudication, these time and money costs will need to be borne at some point.

<sup>4</sup> As part of its assistance to the water court, provided pursuant to § 85-2-243, MCA, the DNRC examines filed claims under the Claims Examination Rules promulgated by the Montana Supreme Court.

<sup>5</sup> It is worth noting that the proceeds from any filing fee imposed for the filing of these Exempt Claims in the Adjudication (as was required of all others who were compelled to file their claims by the original 1982 filing deadline, *see* § 85-2-225, MCA) could be used to defray some portion of these costs. (The size of the fee might also have some bearing on the number of people who choose to file.)

<sup>6</sup> In basins for which preliminary decrees have already been issued, those preliminary decrees (and the objection period associated with each) could be reopened for the limited purpose of incorporating (and resolving objections to) these Exempt Rights.

<sup>7</sup> This approach would conceptually mirror the permit exceptions set forth in § 85-2-306, MCA, under which certain uses are considered sufficiently small as to not have to go through the formal DNRC permitting process that otherwise pertains to all post-1973 uses of water in Montana.

however, it may be appropriate to consider declining to confer *prima facie* status on these Exempt Rights, leaving the burden of proof on the claimant to prove up the historic use of any such water right claim. Similarly, a less strenuous objection process could be considered, at least for claims beneath a certain volume or flow rate threshold. This would have the advantage of allowing the confirmation (through the Adjudication) of small domestic and stock uses in a way that minimizes the costs, in terms of time and money, to both the claimants and the Water Court. Other modifications could be made as well in order to strike the most appropriate balance between facilitating the straightforward incorporation of these Exempt Rights into the Adjudication and protecting the legal rights of other water rights holders whose uses might be affected by these currently unrecorded Exempt Rights. One example would be to create a partial mandatory process, which could require the filing of all stock water claims by a date certain, while leaving the filing of domestic uses to the discretion of the individual water user. The amount of taxpayer dollars to be committed to this process (predominantly through the amount of Water Court and DNRC staff time that would be required to bring about the final Adjudication of these Exempt Rights) is an important consideration as well. These are complicated policy judgments that are appropriately left to the Legislature, and this report takes no position on how these balances could or should best be struck.