

Unofficial Draft Copy

As of: January 4, 2008 (9:38AM)

LC5003

**** Bill No. ****

Introduced By *****

By Request of the *****

A Bill for an Act entitled: "An Act revising the laws governing the enforcement of water rights and water uses; providing for the employment of water commissioners by the department of natural resources and conservation; creating a water rights enforcement division within the department of natural resources and conservation headed by a state engineer; providing that water commissioners are employees of the department of natural resources and conservation; removing the authority of district courts to appoint water commissioners except with regard to water compacts; providing that water right enforcement proceedings are contested cases; amending sections 85-1-204, 85-2-406, 85-5-101, 85-5-105, 85-5-107, 85-5-201, 85-5-202, 85-5-301, 85-5-302, 85-5-401, 85-5-403, 85-5-404, 85-7-201, 85-7-207, and 85-7-301, MCA; repealing sections 3-7-211, 85-5-102, 85-5-103, 85-5-104, 85-5-111, 85-5-203, 85-5-204, 85-5-206, 85-5-402, 85-5-405, 85-5-407, and 85-5-408, MCA; and providing an effective date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Water rights enforcement division**
-- state engineer. (1) There is a water rights enforcement

division within the department. The division director is the state engineer.

(2) The water rights enforcement division is responsible of the administrative enforcement of water rights and for administratively preventing the unauthorized use of water. The division shall conduct hearing on applications for new appropriations and for changes in existing water rights.

(3) The division shall employ water commissioners as provided in 85-5-101.

Section 2. Section 85-1-204, MCA, is amended to read:

"85-1-204. Department powers over state water. (1) The department may sell, lease, and otherwise dispose of water impounded under this chapter. The water may be sold for the purpose of irrigation, development of power, watering of stock, or other purposes. The department may also lease water under the state water leasing program established under the provisions of 85-2-141. To the extent that it may be necessary to carry out this chapter and subject to compliance with the other provisions of this chapter, the department has full control of all the water of the state not under the exclusive control of the United States and not appropriated for private use. The department shall take the necessary actions to appropriate and conserve the water for the use of the people. The authority of the department conferred by this chapter extends and applies to rights to the natural flow of the water of this state that it may acquire by condemnation

pursuant to Title 70, chapter 30, or by purchase, exchange, appropriation, or agreement.

(2) For the purpose of regulating the diversion of water, the department may enter upon the means and place of use of all appropriators for making surveys of respective rights and seasonal needs.

(3) The department may take into consideration the decrees of the courts of this state having jurisdiction that purport to adjudicate the water of a stream or its tributaries. A fair, reasonable, and equitable reconciliation must be made between the claimants asserting rights under different decrees and between decreed rights and asserted rights of appropriation not adjudicated by a court.

(4) The department may hold hearings relating to the rights of respective claimants after first giving the notice that it considers appropriate. The department shall make findings of the date and quantity of appropriation and use of all claimants that the department recognizes and observes in diverting the water that the department is appropriated. The department may measure and distribute the water to the holder of the recognized appropriation right under agreed-upon terms.

(5) The department, when engaged in controlling and dividing the natural flow of a stream under the authority granted by this chapter, is exercising a police power of the state, and water commissioners ~~appointed by any court~~ may not deprive the department of any of the water appropriated or administered under

agreement with respective water right holders. The holder of a prior right who contends that the department is not recognizing and respecting the appropriation may resort to a court for the purpose of determining whether or not the rights of the claimant have been invaded, and the department shall observe the terms of the final decree.

(6) When the department impounds or acquires the right of appropriation of the water of a stream, it may divert or authorize the diversion at a point on the stream or a portion of the stream when it is done without injury to a prior appropriator."

{*Internal References to 85-1-204:*

70-30-102x}

Section 3. Section 85-2-406, MCA, is amended to read:

"85-2-406. ~~District court supervision~~ Supervision of water distribution. (1) The ~~district courts~~ department 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~~ The department 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 water rights enforcement division unless the matter is appealed to the district court. The order of the water rights enforcement division or 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~~ decision 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)."

{*Internal References to 85-2-406:*

85-2-344 x 85-20-1001x}

Section 4. Section 85-5-101, MCA, is amended to read:

"85-5-101. ~~Appointment of water~~ 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~~ Subject to 85-20-201, 85-20-401, 85-20-701, 85-20-801, 85-20-1001, 85-20-1201, 85-20-1301, and 85-20-1401, the water rights enforcement division shall employ water commissioners to enforce water rights and to prevent the unauthorized use of water. The commissioners have authority to admeasure and distribute to the parties owning water rights in the source affected by ~~the~~ a 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~~

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~~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)(4) 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 may 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."~~

{*Internal References to 85-5-101:*

85-20-1001x}

Section 5. Section 85-5-105, MCA, is amended to read:

"85-5-105. Power and duty to distribute water. ~~Upon the~~
~~issuance of such order, the~~ A water commissioner or commissioners
shall ~~have authority and it is hereby made his or their duty to~~
admeasure and distribute to the users ~~thereof~~ of water, as their
interests may appear and be required, the ~~stored and supplemental~~
waters stored and ~~as~~ released by the department of natural
resources and conservation under provisions of chapter 1 of this
title, to be diverted into and through ~~said streams~~ 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. ~~Such~~ A water commissioner ~~or commissioners~~ and the
owners and users of ~~such~~ the stored and supplemental waters shall
~~be~~ are bound by and ~~be~~ are subject to the provisions of this
chapter, ~~and all acts amendatory thereof and supplemental~~
~~thereto,~~ provided, that the admeasurements and distribution of
~~such~~ the stored and supplemental waters ~~shall in no way~~ may not
interfere with decreed water rights. The purpose of parts 1
through 3 of this chapter is to provide a uniform, equitable, and
economical distribution of adjudicated, stored, and supplemental
waters."

{ Internal References to 85-5-105: None. }

Section 6. Section 85-5-107, MCA, is amended to read:

"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 monthly summary of the record with the appropriate clerk of the court monthly or seasonally, at the discretion of the district judge during the judge's term of service and the state engineer.~~ 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~~ are enforcing 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 and the state engineer.

~~(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."~~

{ Internal References to 85-5-107: None. }

Section 7. Section 85-5-201, MCA, is amended to read:

"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~~ state engineer, 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."~~

{ Internal References to 85-5-201: None. }

Section 8. Section 85-5-202, MCA, is amended to read:

"85-5-202. Repair expenses. The judge may also allow as a charge any expenses necessarily incurred by the water commissioner in the discharge of ~~his~~ the water commissioner's 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 such the 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 such~~ these expenses as provided in 85-5-201, and the cost ~~thereof shall~~ must be taxed against the party or parties for whose benefit the ~~same~~ costs were incurred. In the discretion of the ~~court~~ state engineer, ~~such~~ the costs or expenses may be assessed against the land upon which or for the benefit of which ~~such~~ the expense ~~had been~~ were incurred."

{*Internal References to 85-5-202: None.*}

Section 9. Section 85-5-301, MCA, is amended to read:

"85-5-301. Complaint by dissatisfied user. (1) A person owning or using any of the waters of ~~the~~ a 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 with the water rights enforcement division.

(2) Upon receipt of the complaint, the ~~judge~~ division shall fix a time for the hearing of the petition and shall ~~direct that~~ give notice ~~be given~~ to the parties interested in the hearing as the ~~judge~~ division considers necessary. At the time fixed for the hearing, ~~the judge~~ a hearings officer 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.
The hearing on the petition must be conducted as a contested case as provided in Title 2, chapter 4, part 6.

(3) Upon the ~~determination~~ conclusion of the hearing, the judge hearing officer shall make findings and issue an order ~~that the judge considers just and proper~~. If it appears to the judge hearing officer 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 hearing officer shall give the proper instructions for distribution of the water. The decision of the hearing officer may be appealed to the district court as provided in Title 2, chapter 4, part 7.

~~(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 hearing officer shall make an order regarding the payment of costs of the hearing that the judge hearing officer determines is just and proper."~~

{*Internal References to 85-5-301:*

85-20-1001x}

Section 10. Section 85-5-302, MCA, is amended to read:

"85-5-302. Maintenance of headgates and measuring devices.

All persons using water from any stream or ditch ~~whereon 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. ~~In case~~ If any person ~~or persons shall fail~~ 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 any stream or ditch or performing necessary labor or expenses to divert water to any 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 ~~he~~ the person was duly notified. Any work in the way of repairing a ditch made necessary by any emergency may be done without ~~such~~ notice when injury would result from delay."

{*Internal References to 85-5-302: None.*}

Section 11. Section 85-5-401, MCA, is amended to read:

"85-5-401. Determination of water rights between partners, tenants in common, and corporate stockholders. Whenever 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 ~~said~~ 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 ~~said~~ the waters and ~~may join in his petition a prayer for the appointment of a water commissioner to apportion and distribute the waters of said ditch according to the rights of the respective owners, tenants in common, or stockholders during the pendency of the action.~~"

{ *Internal References to 85-5-401: None.* }

Section 12. Section 85-5-403, MCA, is amended to read:

"85-5-403. Division of water. It ~~shall be~~ is the duty of the water commissioner to divide the waters of ~~said~~ a ditch between the owners, tenants in common, or stockholders in proportion to their respective rights, as set forth in the complaint or in ~~such~~ any other manner or proportion ~~as~~ that the ~~court or~~ judge may direct pursuant to 85-5-401."

{ *Internal References to 85-5-403: None.* }

Section 13. Section 85-5-404, MCA, is amended to read:

"85-5-404. Authority of commissioner. ~~Such~~ A water commissioner ~~shall have authority to~~ may enter upon ~~said~~ the ditch_± open, close, and set headgates_± and do whatever else is

necessary to apportion and distribute the waters of ~~said~~ the ditch to the respective parties according to their respective rights as determined pursuant to 85-5-401."

{*Internal References to 85-5-404: None.*}

Section 14. Section 85-7-201, MCA, is amended to read:

"85-7-201. Creation of districts by owners of water of adjudicated streams. It is the purpose and intention of this part, in the furtherance of public welfare, to provide an effective public agency for the improvement, development, and maintenance of certain existing irrigation systems in cases where administration ~~thereof~~ of the systems, through the agency of a water commissioner ~~and the existing statutes~~, is not effective."

{*Internal References to 85-7-201: None.*}

Section 15. Section 85-7-207, MCA, is amended to read:

"85-7-207. Part not to conflict with other regulations. This part is not intended to conflict in any way with ~~present~~ statutes governing the appointment and duties of water commissioners on adjudicated water right streams or the operation of statutes as to the jurisdiction of courts over ~~such~~ ~~commissioners and~~ water rights and distribution of water under court decree but is for the sole purpose of making it possible for users of water out of decreed water right streams to improve the stream channel and conserve water in the best possible manner through the agency of an irrigation district, as provided for in

this part."

{ *Internal References to 85-7-207: None.* }

Section 16. Section 85-7-301, MCA, is amended to read:

"85-7-301. Creation of district by owners of rights in common water supply. (1) It is a purpose and intention of this part, in the furtherance of the public welfare, to provide an effective public agency for the improvement, development, operation, maintenance, and administration of certain existing irrigation systems in cases where administration thereof of the systems through the agency of a water commissioner is not effective.

(2) It is a purpose and intention of this part to extend to irrigation districts organized ~~hereunder~~ this part the powers, duties, and status of the public corporations organized under the irrigation district laws of the state of Montana, ~~as the same may now or hereafter exist; provided, that.~~ However, neither such the districts nor the board of commissioners thereof ~~shall~~ of the districts have any power or authority to issue bonds or incur indebtedness, other than warrant indebtedness, under the limitations proposed by law. This part does not contemplate the acquisition by the district of the existing water, water rights, or system or works owned by the respective water right owners within the district."

{ *Internal References to 85-7-301: None.* }

NEW SECTION. **Section 17. {standard} Repealer.** Sections 3-7-211, 85-5-102, 85-5-103, 85-5-104, 85-5-111, 85-5-203, 85-5-204, 85-5-206, 85-5-402, 85-5-405, 85-5-407, and 85-5-408, MCA, are repealed.

{*Internal References to 3-7-211: None.*
Internal References to 85-5-102: None.
Internal References to 85-5-103: None.
Internal References to 85-5-104: None.
Internal References to 85-5-111: None.
Internal References to 85-5-203: None.
Internal References to 85-5-204: None.
Internal References to 85-5-206: None.
Internal References to 85-5-402: None.
Internal References to 85-5-405: None.
Internal References to 85-5-407: None.

Internal References to 85-5-408: None.}

NEW SECTION. **Section 18. {standard} Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, part 1, and the provisions of Title 85, chapter 2, part 1, apply to [section 1].

NEW SECTION. **Section 19. {standard} Effective date.** [This act] is effective July 1, 2007.

- END -

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