

## *The Network Note* June 2021

### *Focus on Montana*

#### ***Race, Federal Indian Policy, and Access to Water Parts III – The Lower Klamath River August 11 at 10 am PDT***

Stay tuned for the next *Dividing the Waters* webinar on racial justice and water. Speakers will offer diverse perspectives on the conflict over river flow to protect salmon (central to tribal interests) and four aging power dams. For more than a decade, the tribes, the State and the Federal Government have worked to remove the dams, leading to a successful recent settlement. **Stay tuned for registration information!**

**MT: Adjudicating Entire State, Since 1973**  
In 1973, the MT Legislature passed the Water Use Act, to establish a statewide water rights system and set state policy to “encourage the wise use of the state’s water resources . . . for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems.” Adjudication began as an administrative process to address pre-1973 water rights, but did not include federal reserved rights.

**Federal Lawsuits.** In the following years, the Federal Government sued, in federal court, for an adjudication of tribal water rights. The federal court stayed the litigation pending SCOTUS’ decision in *Colorado River Conservation Dist. v. US* (1976). When SCOTUS held that the McCarran Amendment (43 U.S.C. 666) gave state courts jurisdiction for water right adjudications and federal suits could be dismissed in favor of state action, MT filed to dismiss the federal suits.

**1979 Amendment.** After the federal court did not rule on the MT motion, the Legislature amended the Act in 1979, to create the water court and expand the adjudication to include “Indian water rights.” It required the AG to petition the MT Supreme Court to require all claimants, including federal reserved right claimants to file claims for water rights existing as of 1973. The State would negotiate compacts with the tribes, whose claims would be suspended.

**State ex rel Greely v. US.** In 1984, the MT Supreme Court affirmed the water court’s authority to adjudicate federal and tribal water rights. The MT court reviewed the federal courts’ then-recent decisions on reserved water rights and state courts. It accepted supervisory control of the MT Water Court and held that it could adjudicate federal reserved rights. Today, the MT Water Court includes 2 judges and 11 water masters, covering 85 water basins and more than 219,000 claims.

**MT: Tribes and Tribal Compacts**  
MT has several Indian tribes with large reservations and other federal reserved lands, so reserved rights are a significant factor in MT water rights. As the *Greely* decision recognized, state law promoted negotiation of water right compacts and it has negotiated 7 tribal and 11 federal compacts. All but 2 tribal compacts have received federal legislative approval and orders to incorporate into water decrees by the water court.

**In Focus: Judge Stephen Brown (MT Water Court)**  
Unlike many *Dividing the Waters* members, Associate Water Judge Stephen Brown has a long history in water, practicing water and natural resources law for 30 years before joining the water court in 2019. He has taught at U of MT since 1996. In law school in the 80’s, he received a certificate and an award for outstanding written scholarship in environmental/natural resources law from Lewis & Clark. He also is a co-author of the recently-published treatise *Montana Water Law*.

Brown’s interest in water stems from a lifetime of exploring rivers and canyons throughout the West. He grew up in Tacoma, WA and spent the last 28 years in Montana. Since joining the Water Court, he has participated in *DTW* webinars and the 2019 *DTW* conference at Stanford. He looks forward to participating when live programs return. “As water disputes in the West become increasingly critical, the educational and resource role *DTW* plays will only become more valuable.”

**MT: Executive Branch Water Agencies**  
MT’s Executive Branch plays an important role in managing the state’s water. Water agencies include:

- **Dept. of Natural Resources & Conservation:** Issues post-1973 water rights and processes change applications, subject to appeal to the Water Court. Has responsibilities for water planning, technical studies, management of drought, groundwater wells, floodplains, and dam safety.
- **Department of Environmental Quality:** Regulates wetlands, water quality and watersheds, via federal Clean Water Act and Safe Drinking Water Act.
- **District Courts:** Handle enforcement disputes. Oversee water commissioners who administer water rights.
- **Fish, Wildlife & Parks:** Protects fishery and recreation resources, including Blue Ribbon Trout Streams, and other instream flow water rights.

*Thanks to MT Water Court Judge Stephen Brown for his assistance with this edition.*

***Ideas for Network Note? Court Decision on Water? Contact [ALFIII@sbcglobal.net](mailto:ALFIII@sbcglobal.net)***