

## 1 HOUSE BILL NO. 524

2 INTRODUCED BY K. KERNS

3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO WATER  
5 COMMISSIONERS; ALLOWING A MAJORITY OF WATER RIGHT OWNERS TO OVERSEE THE  
6 MEASUREMENT AND DISTRIBUTION OF WATER; GRANTING WATER RIGHT OWNERS THE AUTHORITY  
7 TO APPOINT AND SUPERVISE WATER COMMISSIONERS; PROVIDING THAT DECISIONS OF THE WATER  
8 RIGHT OWNERS MAY BE APPEALED TO DISTRICT COURT; AND AMENDING SECTIONS 3-7-211, 85-2-406,  
9 85-5-101, 85-5-102, 85-5-103, 85-5-104, 85-5-106, 85-5-107, 85-5-201, 85-5-202, 85-5-203, 85-5-204, 85-5-205,  
10 AND 85-5-301, MCA."

11  
12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13  
14 **Section 1.** Section 3-7-211, MCA, is amended to read:  
15 **"3-7-211. Appointment of water commissioners.** The Except as provided in [section 3], the district  
16 court having jurisdiction over the hydrologically interrelated portion of a water division, as described in  
17 85-2-231(3), in which the controversy arises may appoint and supervise a water commissioner as provided for  
18 in Title 85, chapter 5."

19  
20 **Section 2.** Section 85-2-406, MCA, is amended to read:  
21 **"85-2-406. District court supervision of water distribution.** (1) The district courts shall supervise the  
22 distribution of water among all appropriators. This Except for the powers granted to water right owners pursuant  
23 to Title 85, chapter 5, part 1, this supervisory authority includes the supervision of all water commissioners  
24 appointed prior or subsequent to July 1, 1973. The supervision must be governed by the principle that first in time  
25 is first in right.

26 (2) (a) A district court or water right owners pursuant to Title 85, chapter 5, part 1, may order the  
27 distribution of water pursuant to a district court decree entered prior to July 1, 1973, until an enforceable decree  
28 is entered under part 2 of this chapter or the matter has been adjudicated under the procedure set forth in  
29 subsection (2)(b).

30 (b) When a water distribution controversy arises upon a source of water in which not all existing rights

1 have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition  
2 the district court to certify the matter to the chief water judge. If a certification request is made, the district court  
3 shall certify to the chief water judge the determination of the existing rights that are involved in the controversy  
4 according to part 2 of this chapter. The district court from which relief is sought shall retain exclusive jurisdiction  
5 to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water  
6 rights certified to the water judge. Certified controversies must be given priority over all other adjudication matters.  
7 After determination of the matters certified, the water judge shall return the decision to the district court with a  
8 tabulation or list of the existing rights and their relative priorities.

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

18 (4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree  
19 or preliminary decree as modified after objections and hearings is enforceable and administrable according to  
20 its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water  
21 judge shall upon referral from the district court establish, in a form determined to be appropriate by the water  
22 judge, one or more tabulations or lists of all existing rights and their relative priorities.

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

26  
27 **NEW SECTION. Section 3. Powers and duties of water right owners.** (1) Pursuant to 85-2-406,  
28 district courts supervise the distribution of water among all appropriators. Pursuant to 85-5-101(2), a majority of  
29 water right owners may appoint one or more water commissioners and, with limited oversight from the district  
30 court, may supervise those commissioners pursuant to Title 85, chapter 5, parts 1 through 3.

1 (2) Decisions related to supervision and compensation of a water commissioner appointed by water right  
2 owners must be made at a public meeting and decided by majority vote.

3 (3) A water commissioner or a water right owner may appeal any decision of the majority of the water  
4 right owners to the district court.

5

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

7 **"85-5-101. Appointment of water commissioners.** (1) Whenever the rights of persons to use the  
8 waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply  
9 have been determined by a decree of a court of competent jurisdiction, including temporary preliminary,  
10 preliminary, and final decrees issued by a water judge, one or more water commissioners may be appointed.

11 ~~(2) it is the duty of the judge of the district court having jurisdiction of the subject matter, upon~~ Upon the  
12 application of the owners of at least 15% of the water rights affected by the decree, ~~in the exercise of the judge's~~  
13 ~~discretion, to appoint one or more commissioners.~~ to the district court having jurisdiction:

14 (a) the water right owners may appoint one or more water commissioners by a majority vote of the owners  
15 present at a public meeting; or

16 (b) if the owners do not elect to hire one or more water commissioners, the district judge may appoint one  
17 or more water commissioners.

18 (3) The commissioners have authority to ~~admeasure~~ determine the appropriate quantity and distribute  
19 to the parties owning water rights in the source affected by the decree the waters to which they are entitled,  
20 according to their rights as fixed by the decree and by any certificates, permits, and changes in appropriation right  
21 issued under chapter 2 of this title. When petitioners make proper showing that they are not able to obtain the  
22 application of the owners of at least 15% of the water rights affected and they are unable to obtain the water to  
23 which they are entitled, the judge of the district court having jurisdiction may appoint a water commissioner.

24 ~~(2)(4)~~ (4) When the existing rights of all appropriators from a source or in an area have been determined  
25 in a temporary preliminary decree, preliminary decree, or final decree issued under chapter 2 of this title, the  
26 judge of the district court or the water right owners may, upon application by both the department of natural  
27 resources and conservation and one or more holders of valid water rights in the source, appoint a water  
28 commissioner. The water commissioner shall distribute to the appropriators, from the source or in the area, the  
29 water to which they are entitled.

30 ~~(3)(5)~~ (5) The department of natural resources and conservation or any person or corporation operating

1 under contract with the department or any other owner of stored waters may petition the court to have stored  
 2 waters distributed by the water commissioners appointed by the district court or the water right owners. The court  
 3 may order the commissioner or commissioners appointed by the court or the water right owners to distribute  
 4 stored water when and as released to water users entitled to the use of the water.

5 ~~(4)~~(6) At the time of the appointment of a water commissioner or commissioners, the district court or the  
 6 water right owners shall fix their compensation, require a commissioner or commissioners to purchase a workers'  
 7 compensation insurance policy and elect coverage on themselves, and require the owners and users of the  
 8 distributed waters, including permittees, certificate holders, and holders of a change in appropriation right, to pay  
 9 their proportionate share of fees and compensation, including the cost of workers' compensation insurance  
 10 purchased by a water commissioner or commissioners. The judge or the water right owners may include the  
 11 department in the apportionment of costs if it applied for the appointment of a water commissioner under  
 12 subsection ~~(2)~~ (4).

13 ~~(5)~~(7) Upon the application of the board or boards of one or more irrigation districts entitled to the use  
 14 of water stored in a reservoir that is turned into the natural channel of any stream and withdrawn or diverted at  
 15 a point downstream for beneficial use, the district court of the judicial district where the most irrigable acres of  
 16 the irrigation district or districts are situated may appoint a water commissioner to equitably ~~admeasure~~ determine  
 17 the appropriate quantity and distribute stored water to the irrigation district or districts from the channel of the  
 18 stream into which it has been turned. A commissioner appointed under this subsection has the powers of any  
 19 commissioner appointed under this chapter, limited only by the purposes of this subsection. A commissioner's  
 20 compensation is set by the appointing judge and paid by each district and other users of stored water affected  
 21 by the ~~admeasurement~~ determination of the appropriate quantity and distribution of the stored water. In all other  
 22 matters, the provisions of this chapter apply so long as they are consistent with this subsection.

23 ~~(6)~~(8) A water commissioner appointed by a district court or the water right owners is not an employee  
 24 of the judicial branch, a local government, or a water user.

25 ~~(7)~~(9) A water commissioner who fails to obtain workers' compensation insurance coverage required by  
 26 subsection ~~(4)~~ (6) is precluded from receiving benefits under Title 39, chapter 71, as a result of the performance  
 27 of duties as a water commissioner."  
 28

29 **Section 5.** Section 85-5-102, MCA, is amended to read:

30 **"85-5-102. Appointment of chief commissioner.** When the judge of the district court ~~appoints~~ or the

1 ~~water right owners appoint~~ two or more commissioners to ~~admeasure~~ determine the appropriate quantity and  
 2 distribute ~~the waters mentioned in~~ pursuant to 85-5-101, the judge or the water right owners may appoint one of  
 3 them as chief commissioner and empower the chief commissioner to exercise direction and control over the other  
 4 commissioners in the discharge of their duties. The judge or the water right owners may depose the person  
 5 appointed as chief commissioner from that position and appoint another as chief commissioner whenever it  
 6 appears to the judge or the water right owners that better service may be given to the water users by making the  
 7 change."  
 8

9 **Section 6.** Section 85-5-103, MCA, is amended to read:

10 **"85-5-103. Oath and bond.** Each water commissioner appointed by the court or by the water right  
 11 owners shall subscribe and file with the clerk of the district court an oath of office before commencing the  
 12 discharge of duties as commissioner and shall file with the clerk a bond executed by the commissioner, with two  
 13 or more sureties, in a sum that the judge of the court may designate, to ensure the faithful discharge of the  
 14 commissioner's duties."  
 15

16 **Section 7.** Section 85-5-104, MCA, is amended to read:

17 **"85-5-104. Term of office.** A water commissioner holds office for the time during the irrigation season  
 18 of each year that may be designated by the judge or the water right owners in the order making the appointment.  
 19 The judge or the water right owners may fix the date of the commencement of the term and may, in ~~in the judge's~~  
 20 their discretion or when requested in writing by at least three persons entitled to the use of the waters, change  
 21 the term for closing of the commissioner's service."  
 22

23 **Section 8.** Section 85-5-106, MCA, is amended to read:

24 **"85-5-106. Maintenance and repair of ditches or systems.** Upon written request of the owners of at  
 25 least 51% of the water rights in any adjudicated ditch or single water system, the judge of the district court or the  
 26 water right owners may empower the commissioner to maintain and keep in reasonable repair ~~such water the~~  
 27 ditch or water system at the expense of the owners, ~~thereof, and for such purposes the commissioner shall have~~  
 28 ~~authority to~~ To perform maintenance or repair, the commissioner may enter and work upon any ditch, canal,  
 29 aqueduct, or other source of conveying the waters affected by the decree and the right-of-way thereof and to may  
 30 visit, inspect, and adjust all headgates or other means of distribution of such the waters."

1

2           **Section 9.** Section 85-5-107, MCA, is amended to read:

3           **"85-5-107. Record of distribution of water.** (1) Each water commissioner shall keep a daily record,  
 4 unless a different recording schedule is ordered by the district judge or the water right owners, of the amount of  
 5 water distributed to each water user and shall file a summary of the record with the clerk of the court monthly or  
 6 seasonally, at the discretion of the district judge ~~during the judge's term of service~~ or the water right owners. The  
 7 report must show in detail the total amount of water distributed to each water user during the month or the season  
 8 and the cost of distributing the water, based upon the water commissioner's or commissioners' daily salary, other  
 9 costs of the water commissioner or commissioners approved by the district judge or water right owners, and the  
 10 proportionate amount of water distributed. When two or more water commissioners serve under the same decree  
 11 or decrees ~~by order of the judge~~, they may file a joint summary of their records with the clerk of the court; or the  
 12 chief commissioner, ~~if one has been appointed by the judge~~, may file a summary on behalf of all of them.

13           (2) If the district court judge or the water right owners ~~determines~~ determine that it is necessary to  
 14 establish a billing cycle prior to a distribution season, as provided in 85-5-204, the report or reports must serve  
 15 as the basis for the amounts billed."

16

17           **Section 10.** Section 85-5-201, MCA, is amended to read:

18           **"85-5-201. Distribution of water and related expenses.** (1) Each water commissioner appointed by  
 19 the judge of the district court or by the water right owners for the purpose of distributing water has the authority  
 20 to determine the appropriate quantity and distribute to the parties interested, under a decree, permit, certificate,  
 21 or change in appropriation right, the water to which those who are parties to the decree or holders of a permit,  
 22 certificate, or change in appropriation right, or privy to a permit, certificate, or change in appropriation right, are  
 23 entitled, according to their priority as established by the decree, permit, certificate, or change in appropriation  
 24 right.

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

1           (3) (a) At the ~~district court's~~ discretion of the district court or the water right owners, a water  
 2 commissioner may bill water users prior to the beginning of a distribution season for the purpose of offsetting  
 3 costs associated with distributing water and water commissioner duties by submitting the information necessary  
 4 for the billing to the clerk of the district court. A billing issued prior to the beginning of a distribution season:  
 5           (i) must be assessed on a per-user basis;  
 6           (ii) must be based on the report provided for in 85-5-107 for the prior year; and  
 7           (iii) may not exceed 80% of the amount that was provided to the district court pursuant to 85-5-107 for  
 8 the prior distribution season on a per-user basis.  
 9           (b) Upon receipt of the information from the water commissioner, the clerk of district court shall proceed  
 10 as provided in 85-5-204."

11  
 12           **Section 11.** Section 85-5-202, MCA, is amended to read:  
 13           **"85-5-202. Repair expenses.** The judge or the water right owners may allow as a charge any expenses  
 14 necessarily incurred by the water commissioner in the discharge of duties in the employment of extra labor for  
 15 the repair of dams, headgates, ditches, or flumes when immediate action is necessary to preserve the rights of  
 16 the parties entitled to the waters of a stream or when the judge has, in the order appointing the commissioner,  
 17 required the commissioner to repair ditches and keep in repair necessary headgates, ditches, or flumes. The  
 18 water commissioner shall report all expenses, and the cost must be taxed against the party or parties for whose  
 19 benefit the expenses were incurred. In the discretion of the court, the costs or expenses may be assessed against  
 20 the land upon which or for the benefit of which the expense had been incurred."

21  
 22           **Section 12.** Section 85-5-203, MCA, is amended to read:  
 23           **"85-5-203. Telephone expenses.** The judge or the water right owners may also allow as a charge  
 24 reasonable expenses incurred by a water commissioner in telephoning to the judge or the water right owners for  
 25 instructions in cases of emergency. When there are two or more commissioners acting under ~~the judge's order~~  
 26 a judge or the water right owners, reasonable expenses incurred in communicating with each by telephone, ~~or~~  
 27 with the judge of the district court, or with the water right owners in order to carry on the distribution of the waters  
 28 harmoniously and in accordance with the decree, ~~shall be deemed~~ are considered to be a necessary expense.  
 29 These expenses ~~shall~~ must be reported by the water commissioner or commissioners at the close of the season  
 30 and ~~shall~~ must be taxed against all the water users affected by the decree or decrees ratably in proportion to the

1 whole amount of water distributed to them during the season."

2

3 **Section 13.** Section 85-5-204, MCA, is amended to read:

4 **"85-5-204. Apportionment of fees and expenses.** (1) Upon the filing of the report by the water  
5 commissioner or water commissioners, the clerk of court shall notify by letter each person mentioned in the  
6 report:

7 (a) of the amount the water user is made liable for by the report;

8 (b) that objections to the report and the amount taxed against the water user may be made by any  
9 person interested in the report or the amount assessed against the water user within 20 days after the date of  
10 the mailing of the notice; and

11 (c) that, unless objections are filed, an order will be made by the judge of the district court or the water  
12 right owners finally fixing and determining the amount due from each of the water users.

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

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

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

26

27 **Section 14.** Section 85-5-205, MCA, is amended to read:

28 **"85-5-205. Objections to expenses -- hearing.** (1) At the expiration of the 20 days' notice, ~~as provided~~  
29 ~~for in the preceding section, pursuant to 85-5-204,~~ if objections to ~~said~~ the report have been filed or a motion to  
30 ~~retax the same~~ has been made, the ~~court~~ or judge shall fix a time for the hearing of ~~such~~ the objections or motion



1 to retax, which time of hearing shall be as soon as the judge or a court can conveniently hear the same.

2 (2) Any person objecting to ~~said the~~ report ~~shall be~~ is entitled to at least 5 days' notice of the date and  
3 time of ~~such the~~ hearing.

4 (3) At ~~such the~~ hearing the ~~court or~~ judge shall hear and determine the motion or objections and shall  
5 make an order fixing and determining the amount found due from each of ~~said water users~~ user to ~~such the~~  
6 commissioner or commissioners.

7 (4) ~~In case~~ If no objections are filed within the 20 days, ~~as hereinbefore provided for, such the~~ order shall  
8 ~~be made as a matter of course, and in either case said order shall be final determination of the matter~~ is final."

9

10 **Section 15.** Section 85-5-301, MCA, is amended to read:

11 **"85-5-301. Complaint by dissatisfied user.** (1) A person owning or using any of the waters of the  
12 stream or ditch or extension of the ditch who is dissatisfied with the method of distribution of the waters of the  
13 stream or ditch by the water commissioner or water commissioners and who claims to be entitled to more water  
14 than the person is receiving or to a right prior to that allowed the person by the water commissioner or water  
15 commissioners may file a written complaint, duly verified, setting forth the facts of the claim.

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

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

26 (4) The judge or the water right owners may remove any water commissioner and appoint a new water  
27 commissioner if ~~the judge determines that~~ the interests of the parties in the waters mentioned in the decree,  
28 permit, certificate, or change in appropriation right will be best served by appointing a new water commissioner.

29 (5) ~~If it appears to the judge that~~ the water commissioner has willfully failed to perform the water  
30 commissioner's duties, the water commissioner may be ~~proceeded against~~ cited by the judge for contempt of

1 court, ~~as provided in contempt cases.~~ The judge shall make an order regarding the payment of costs of the  
2 hearing ~~that the judge determines is just and proper."~~

3  
4 **NEW SECTION. Section 16. Codification instruction.** [Section 3] is intended to be codified as an  
5 integral part of Title 85, chapter 5, part 1, and the provisions of Title 85, chapter 5, part 1, apply to [section 3].

6 - END -