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Water Policy Interim Committee
Jason Mohr

FINAL REPORT TO THE 66TH MONTANA LEGISLATURE

**A RIGHT TO STREAM
CONDITIONS AS THEY EXISTED:
A STUDY OF THE PROCESS FOR
CHANGING A WATER RIGHT**

WATER POLICY INTERIM COMMITTEE

Before the close of each legislative session, the House and Senate leadership appoint lawmakers to interim committees. The members of the Water Policy Interim Committee, like most other interim committees, serve one 20-month term. Members who are reelected to the Legislature, subject to overall term limits and if appointed, may serve again on an interim committee. This information is included in order to comply with 2-15-155, MCA.

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This report is a summary of the work of the Water Policy Interim

Committee, specific to the Water Policy Interim Committee’s 2017-2018 study of the process for changing a water right as outlined in the Water Policy Interim Committee’s 2017-18 work plan. Members received additional information and public testimony on the subject, and this report is an effort to highlight key information and the processes followed by the Water Policy Interim Committee in reaching its conclusions. To review additional information, including audio minutes, and exhibits, visit the Water Policy Interim Committee website: www.leg.mt.gov/water.

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CONDITIONS AS THEY EXISTED

INTRODUCTION

A water right in Montana is valuable property, one that is enshrined in the Montana Constitution. As elsewhere in the arid West, a person doesn't own water in its "natural state," but has a right to put it to beneficial use.

Like other property rights, a water right may be transferred to a new owner. A water right may also be changed—to where the water is diverted, where the water is used, where the water is stored, and what the water is used for.

Changing a water right in Montana is an administrative process that includes a healthy dose of legal and technical analysis. This report details these legal and technical processes, while presenting to policy options for future consideration.

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FINDINGS AND CONCLUSIONS

Findings

- The Montana Constitution states that all surface, underground, flood, and atmospheric waters in the state are the property of the state for the use of its people.
- Since at least 1921, Montana has recognized the prior appropriation doctrine as the guiding legal principle for the use of water: Water rights are granted according to when a person applies a particular quantity of water to a beneficial use.
- Before the Water Use Act of 1973, a water user could change a water right provided an existing water right holder did not prove in court that the change would cause adverse effects.
- The Water Use Act of 1973 created a process to confirm existing water rights and to permit new water rights.
- The Water Use Act of 1973 allows a user to change an existing beneficial use of water, subject to authorization by the Department of Natural Resources and Conservation.
- State law defines a change in water right as a change in the place of diversion, the place of use, the purpose of use, or the place of storage. A change in irrigation method is not defined as a change in water right.
- An applicant for a change of water right must prove through a preponderance of evidence that the change will not cause adverse effects to other water rights. This includes analysis of historic diversions, historic consumption, and historic return flows.
- A major part of the change of water right process is a quantification of the water right's historic consumptive use.
- The Montana Supreme Court has ruled that water users are entitled to stream conditions that existed at the time of their appropriation.

Conclusions

- Generally, applicants want the change application process to be as easy as possible, while objectors to a change application want it to be as difficult as possible. But for all water users, a fair process is necessary.
- Some view the change of water right process as onerous and may change a use without authorization.
- Unauthorized changes to a water right may complicate subsequent efforts to distribute water and enforce priority dates during water shortages.

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A HISTORY OF THE CHANGE

Prior appropriation as water law

Many of Montana's oldest water rights were established in the late 1800s.¹

The “prior appropriation doctrine” provides the legal framework for the exercise of water rights in Montana. The doctrine was born in the California gold camps, with a simple tenant: The first person to divert and use water had the first right to that amount of water. This concept is commonly distilled as “first in time, first in right.”

Montana's water right system is considered a variant of the Colorado theory of prior appropriation.² The system was underdeveloped until the adoption of the 1972 Montana Constitution and the Montana Legislature's passage of the 1973 Water Use Act. The Constitution recognizes “[a]ll surface, underground, flood, and atmospheric waters” in Montana “are the property of the state for the use of its people.”³ The subsequent Water Use Act defined a water right as that “right to use water.”⁴

Water users are limited to the amount of water that can be put to a beneficial use. In Montana, the term “beneficial use” means a use of water for agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. Other beneficial uses include instream flow to benefit fish, aquifer recharge, mitigation, and aquifer storage and recovery projects.⁵



Changing a property right

As a property right, these water rights may be transferred to a new owner. These rights may also be changed in how they function. Sometimes these changes reflect a changing Montana, where agricultural, irrigation, or mining uses give way to domestic or municipal uses in and around the state's growing cities.

A decline in the economic importance of agriculture and urbanization of the West has created a demand to be shifted to uses that return higher economic benefits. Agriculture requires vastly larger quantities of water than municipal and industrial uses, so acquisition of irrigation water rights can

¹ This is excepting certain tribal reserved rights, which obviously pre-date the settlement era.

² A. Dan Tarlock, *Law of Water Rights and Resources*, section 5:8, Thomson Reuters (2015).

³ Article IX, section 3(3), 1972 Mont. Const.

⁴ Section 85-2-422, MCA.

⁵ Section 85-2-102, MCA.

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yield plentiful water for such uses. And the typically early priority of irrigation right makes them especially desirable.⁶

Water rights claimed before the passage of the 1973 Water Use Act are clarified and finalized by the Montana Water Court.⁷ The Department of Natural Resources and Conservation (DNRC) must permit water rights claimed after 1973. A person may change a water right from either era. Because the DNRC must approve a change in water right—whether it is adjudicated by the act or permitted by the DNRC—the “change process” sometimes represents a major technical and administrative hurdle.

The permit and change provisions of the [Water Use] Act reflect a fundamental shift from pre-July 1, 1973, water appropriation in that they require prior approval from the DNRC before water is appropriated or a change in use occurs. The Act provides the DNRC with the authority to condition, revoke, or modify permits and change authorization as necessary to ensure compliance with the Act through administrative proceedings.⁸

Western states protect other users from a proposed change. This protection is rooted in a Colorado court case.

Changes in use may affect stream conditions upon which other appropriators depend for their beneficial uses. Of course a junior appropriator may do nothing to impair a senior appropriator’s prior rights to water, but juniors are also protected from changes made by a senior. The doctrine of prior appropriation recognizes a right of junior appropriators “in the continuation of stream conditions as they existed at the time of their respective appropriations.”⁹

Criteria for changes

By law, a change in a place of diversion, place of use, purpose of use, or place of storage must go through the DNRC’s permitting process. This process begins with a water right holding submitting an Application for Change of Appropriation Water Right, form 606, to the DNRC. The application must contain information about the proposed change and evidence to meet certain criteria. There are rules that define what must be included in an application in order for the DNRC to deem an application correct and complete. If the DNRC deems the application correct and complete, the department will begin evaluating the application and draft a preliminary decision to grant or deny the change. In order for the DNRC to grant a change application, the applicant must prove by a preponderance of the evidence that the criteria are met. An application includes a public notice and public hearing process. The process for a change application is similar to that of a new appropriation, which is illustrated in Figure 1.

⁶ David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 155-156.

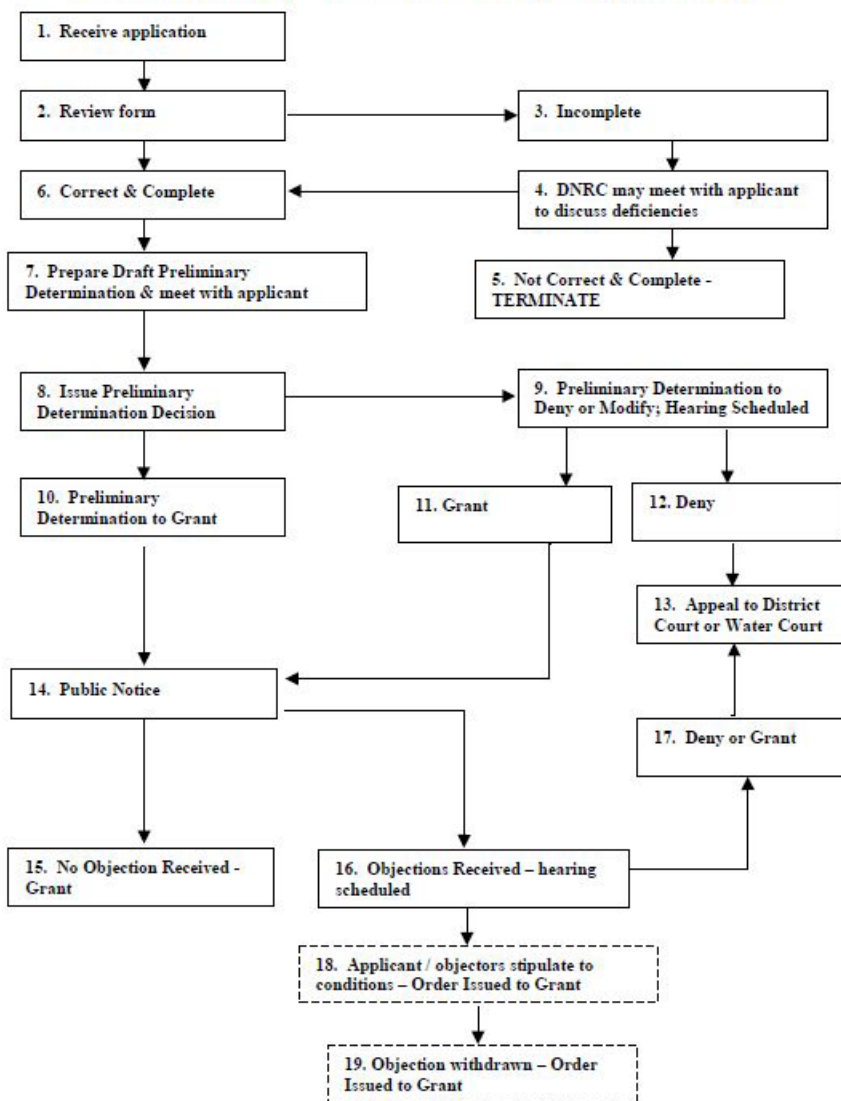
⁷ This is referred to as the state’s “adjudication” process.

⁸ Montana Department of Natural Resources and Conservation, *Montana State Water Plan* (2015), 20.

⁹ David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 161; and *Farmers Highline Canal & Reservoir Co. V. City of Golden* 129 Colo. 575, 272 P.2d 629 (1954).

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FIGURE 1: FLOWCHART FOR PERMIT AND CHANGE APPLICATIONS



State law provides four major criteria for the DNRC to consider in a change application:

1. The proposed use will not adversely affect the use of other water rights or other authorized users,
2. The proposed means of diversion, construction, and operation of the appropriation works are adequate,
3. The proposed use of the water is a beneficial use, and
4. The applicant owns or has permission from the person who owns the property where the water is to be used.

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Harm to a water right

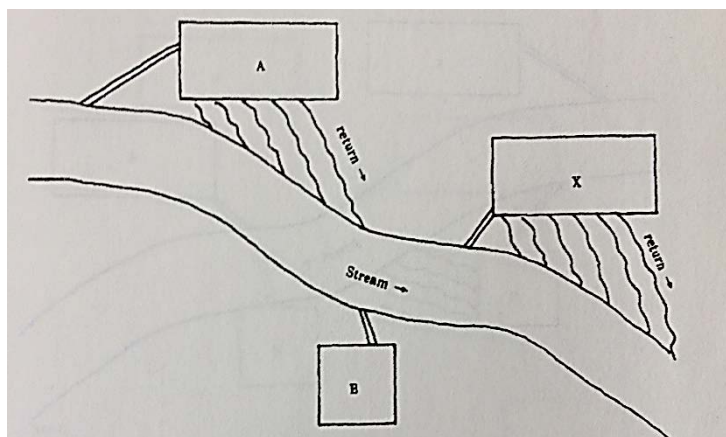
Of the four main criteria, the promise not to adversely affect other users may provide the most significant challenges to an applicant. But how could a water right be harmed?

Harm may occur either from depriving an appropriator of the quantity or quality of water that was available before the change or by increasing the appropriator's obligations to seniors. It is the possibility of harm, and not a certainty that it will occur, that must be proved... Juniors are harmed to the extent that the quantity of water available to them is reduced.¹⁰

Two simple examples may demonstrate how an applicant for a water right change might harm other users.¹¹

In Figure 2, senior water rights holder A moves the point of diversion and place of use downstream to X, which is below junior B. B is deprived of A's return flow.

FIGURE 2



In figure 3, senior A moves the point of diversion downstream to point X. B may have been supplied by A's return flow, leaving some water for C. After the change, B (who is senior to C) may be left with no water. B may now call C in order to get enough water.

Other instances of harm include expanding the acreage on a place of use or negatively affecting water quality.

Adverse effect

Specifically, what is adverse effect in Montana?

During a change application, an applicant must document effects to:

- other water rights using the existing or proposed point of diversion,
- other ditch users,
- downslope (or downstream) water users,
- return flows that other water users may depend upon, and
- changing a historic diversion pattern, including rate and timing of depletions.

¹⁰ David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 164.

¹¹ David H. Getches, *Water Law in a Nutshell*, West Pub. Co. (1997), 165-168.

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Groundwater change applicants must explain how the changed right might affect the rate and timing of water rights from hydraulically connected surface waters. It is up to the department to ultimately rule if a water right is adversely affected by a change.

How is adverse effect measured?

Applying for a new water right requires one to prove that water is physically available (through hydrologic measurements) and legally available (by examining existing rights on the stream). A change of water right presumes the water is physically and legally available. But an applicant must also prove historic use of the water, which is not always a straightforward equation.

It begins with documentation to prove how the right was used. Users in Montana may not have measured their historic water use. Nor has state law required this until recently (and only in certain cases). Proving a historic use may depend on historic documents: irrigation records, maps, Water Resources Surveys completed nearly 50 years ago, or aerial photos taken in 1979, 1997, or 2005.

Using this historic information, additional factors are weighed, such as:

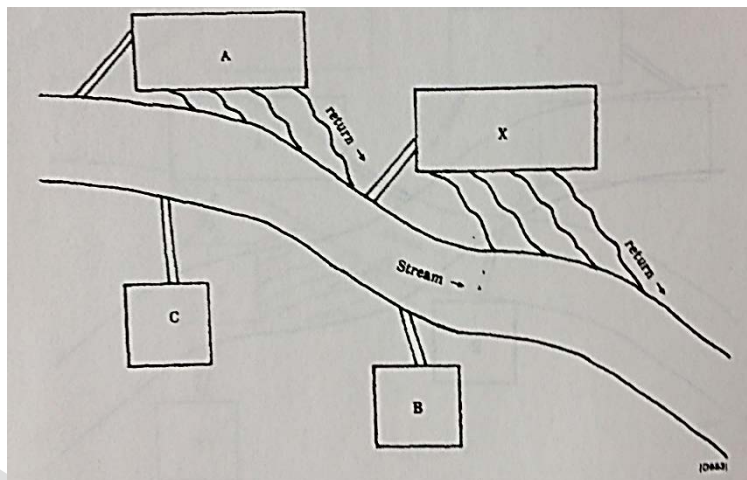
- what amount of water is diverted and consumed,
- historic diversion schedule and operation,
- calculated ditch capacity,
- soils information,
- conveyance loss when water travels from a head gate to an irrigated place,
- estimated available water supply, and
- estimated consumptive irrigation use using evapotranspiration rates.

All of these factors are used to calculate historic use. Once all this math is done, if the calculated historic use doesn't match the diverted amount on the paper water right, the department may reduce an applicant's volume of water.

Protection of the system

Some may complain that Montana's change process subjects a water right through unnecessary rigors. A common allegation, because of the review just described, was made that the department gives pre-1973 water rights a "haircut" during today's change process.

FIGURE 3



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The department believes it is necessary to protect other rights. The department must somehow conform old ways—“For over a hundred years in Montana if someone wanted to change their water right, all they had to do was change it”¹²—with the much higher standards under the 1973 Water Use Act. Department staff said a “tension” always underlines a water right decreed under the pre-1973 legal standards when it is subjected to the modern 1973 Water Use Act. For example, under pre-1973 law, other water users had to prove a neighbor’s change was adversely affecting their right; under the Water Use Act, that burden of proof was switched.

The Water Use Act was structured to protect existing water users. When the new change process and the new burden on change applicants were challenged, they were upheld by the Montana Supreme Court. The prior appropriation doctrine can be seen as a conservative doctrine protecting prior property investments, protecting the status quo and providing certainty; anyone who now wants a new water right or wants to change a water right has to prove beforehand that they will not upset the priorities that exist on a stream.¹³

The department refers to several court cases to bolster their approach, including that:

- the burden of proof is on the change applicant,¹⁴
- an appropriator has a right only to the amount of water historically put to beneficial use,¹⁵
- junior users are entitled to have water flow in the same manner as when they located,¹⁶ and
- calculation of historic consumptive use is the critical math used to protect other users.¹⁷

Changes in other states

As part of the committee work plan, staff examined the change process in other Western states. Appendix A includes tables highlighting the similarities and differences between Colorado, Idaho, Montana, Utah, Washington, and Wyoming.

What is similar among the states is that each protects users from harmful changes by another user. Each of the six states does an investigation or analysis of that proposed change. While each state ensures a changed water right does not “harm,” “injure,” or cause “adverse effect,” some states have additional criteria, such as a change may not “prove detrimental to the public welfare” (Utah) or a change may not significantly affect the local agricultural base (Idaho). Colorado law allows a water judge to reconsider a change in water right “on the question of injury to the vested rights of others”¹⁸ at a later date.

¹² Tim D. Hall, *Historical Background of the Law of Changing a Water Right in Montana* (2015).

¹³ Tim D. Hall, *Historical Background of the Law of Changing a Water Right in Montana* (2015).

¹⁴ *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41s and 101967-41s by Keith and Alice Royston*, 249 Mont. 425, 432, 816 P.2d 1019, 1026 (1982).

¹⁵ *Hobenlohe v. State*, 2010 MT 203, 357 Mont. 348, 240 P.3d 628.

¹⁶ *Ibid.*

¹⁷ *Town of Manhattan v. DNRC*, 2012 MT 81, 364 Mont. 450, 276 P.3d 920.

¹⁸ Section 37-92-304, C.R.S.

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There are certainly differences between the states, too. The most notable may be when a state began permitting water rights. Western states had unregulated systems of claiming (and using) water in their early, territorial days until the law caught up to the custom and practices. However, eventually each state began permitting new water rights, which not only gave the state control over the process but also allowed a quantification of available water.

This matters because permitting a water right (or decreeing one, as in Colorado's system) allows an exact amount of water to be appropriated, perhaps later avoiding an onerous review of historical records and estimate of historical use if the right is changed. Typically, the earlier a system began permitting, the fewer rights experience this historic "tension" described above.

For example, in Wyoming the state engineer issued permits beginning in 1890. Water availability issues in the state's major river basins were on their way to being determined early in that state's history. And, according to staff in Wyoming, the main expense for an applicant is a surveyor's map that shows affected appropriators, who must object in order to gain a hearing.

Conversely, Montana began permitting in 1973, after decades of allowing users to claim water with minimal administrative process. District courts resolved disputes. That decades-long gap is at least partially responsible for the onerous historical use review, as applicants and the department must determine how much water was being put to historical use and consumed.

It is important to remember that the adjudication was never set up as a water availability study—the Water Court does not need to determine how much water is actually in a stream to adjudicate the water rights on that stream. The DNRC, however, in a change proceeding has to scientifically analyze whether the change of a water right would injure other water users on a stream...¹⁹

Other transfers of a water right

Montana law provides for other ways to transfer or change a water right. Taken together, these transfer policies may shape the future of the state. An organization of Western governors have identified the ability to transfer rights as a vital way to cope with a limited resource.

Western governors believe states should identify and promote innovative ways to allow water transfers from agricultural to other uses (including urban, energy, and environmental) while avoiding or mitigating damages to agricultural economies and communities.²⁰

¹⁹ Tim D. Hall, *Historical Background of the Law of Changing a Water Right in Montana* (2015).

²⁰ Western States Water Council, *Water Transfers in the West: Projects, Trends, and Leading Practices in Voluntary Water Trading* (2012).

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Montana law provides for nine primary ways to transfer or change a water right. Due to the nature of the transfer, many of these options require an adverse analysis like that described in this report. The types of transfers are reflected in Table 1.

TABLE 1: TRANSFERS OR CHANGES ALLOWED UNDER LAW

Type of transfer	Statute	Description
Change in appropriation right	85-2-402, MCA	The process described by this report. The department analyzes an applicant’s proposal to ensure the change does not adversely affect other rights, the proposed means of diversion, construction, and operation are adequate, the proposed use a beneficial one, water quality is not adversely affected.
Transfer of appropriation right	85-2-402	Usually executed by a sale of the land or of the right. May undergo process review in 85-2-402.
Temporary changes in appropriation right	85-2-407	Allows a change in water right to benefit an appropriator and another users. The DNRC must approve a temporary change. These changes are typically for 10-year periods. At the end of the temporary change, the water right reverts to its original elements. This change also relies on the criteria in 85-2-402.
Temporary change authorization for instream flow	85-2-408	Water rights may be temporarily changed to benefit a fishery resource. This change must follow criteria in 85-2-402 and 85-2-407.
Short-term lease of appropriation right	85-2-410	An appropriator may lease all or part of a water right for up to 90 days for road construction or dust abatement with limitations. If certain conditions are met, DNRC approval is not necessary.
Diversion of natural flow of waters	85-2-413	An irrigator may purchase or lease water from a reservoir or source not adjacent to their land and use this water to meet the rights of other, prior appropriators. This would allow an irrigator to receive water from a stream that otherwise would not have enough water to deliver water to the irrigator’s lands.
Owners of water to sell surplus; enforcement of right to surplus	85-2-415 - 417	Allows a rights holder with a surplus of water to use, sell, or dispose it.

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Type of transfer	Statute	Description
Salvaged water	85-2-419	Water rights holders who salvage water may retain the right to the salvaged water for beneficial use. Criteria under 85-2-402 may apply. Salvaged water may be leased or sold.
Change in appropriation right for aquifer recharge or mitigation	85-2-420	An appropriator may change a right for aquifer recharge or mitigation. This change may not exceed 20 years. This change is subject to criteria under 85-2-402.
Temporary lease of appropriation right	85-2-427	The department does not review this lease under 85-2-402 criteria. But limitations apply, such as the water may not be leased for more than 2 years during any 10-year period, no more than 180 acre-feet a year may be leased, a point of diversion may not be changed, and storage may not be added to the point of diversion or place of use.
Instream flow...to benefit fishery resource	85-2-436	FWP may change an appropriation right to instream flow to “protect, maintain, or enhance streamflows to benefit the fishery resource.” The change must meet 85-2-402 criteria. The department may not change a right to instream flow or enter into new or renewed leases for instream flows after June 30, 2019.
State water marketing, other public water markets	85-2-141, Title 85, chapter 1, part 8	Water users may contract for water from state, federal, and local projects. ²¹ Title 85, chapter 1, part 8 also allows DNRC to create a water leasing program.

Although the transformation may be a gradual one, how today’s water rights holders transfer rights to tomorrow’s users “may change the complexion of the state.”²²

Together, future public policy and private transactions will likely alter the state’s social, economic, and natural makeup.²³

²¹ From Water Policy Interim Committee, *Water Transfers in Montana* (2013): “The DNRC leases water from its own storage projects. Together with various water user associations, the agency delivers over 293,000 acre-feet of water annually (more than 95 billion gallons) from 20 dams and 10 canals. Federal projects – such as the Milk River/St. Mary’s system, the Bitter Root Project, the Huntley Project, and the Sun River Project – have distributed water to users for decades. These federal projects serve over 365,000 acres (570 square miles) of irrigated land. Additionally, more than 200 water supply organizations provide water to thousands of users. These local projects range from the large associations such as the Billings Bench Water Association to Ed’s Creek Water Company near Huson, which serves 100 acres.”

²² Water Policy Interim Committee, *Water Transfers in Montana* (2013)

²³ Ibid.

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RECENT ISSUES WITH THE PROCESS

Threat of unauthorized changes

Aside from protecting other water users from harm, a process to change water rights is necessary to head off unauthorized changes. While no concrete evidence was presented to the committee, it was acknowledged that water users changing a right without authorization (and analysis) may pose a future threat to Montana's prior appropriation system.²⁴



WPIC members discuss Gallatin Valley water issues during 2018 field trip. (LEPO)

Unapproved changes may be analogous to a situation that faced the 2015-16 WPIC. The committee was told that incomplete or inaccurate property transfer records had been impeding legal proceedings related to water rights. It appeared that information about water rights on a realty transfer certificate was not making it from county clerk and recorders, title companies, or the Department of Revenue to the DNRC, which needed updated ownership information for its centralized database.²⁵ Due to the unclear water right ownership, the Water Court delayed decrees or rulings,²⁶ and water commissioners shut off water rights.²⁷

The Legislature passed House Bill 49 in 2017, which may resolve the issue. But the cautionary tale remains—if other elements of a water right are changed without authorization or notice, Montana's system of administering and enforcing water rights may become impotent. For example, if a water right holder changes the location of acres irrigated, a future district court seeking to enforce rights may be forced to reanalyze all affected water rights, embroiling all affected users in a legal proceeding. Ultimately, some water users may be forced to go without water during a drought.

²⁴ Testimony of Patrick Byorth to WPIC, May 21, 2018.

²⁵ Water Policy Interim Committee, *Considerations for the Future of Water Rights* (2016), 15-16.

²⁶ Testimony of Honorable Judge Russ McElyea to the WPIC, Jan. 12, 2016.

²⁷ Testimony of Leslie Kinne to the WPIC, March 8, 2016.

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Improvement potential

The committee did not contemplate a solution to this perceived problem. However, the committee heard from those who believe the process could be improved. Suggestions to the committee are included in Table 2; further discussion of some suggestions is on page 15.²⁸

TABLE 2: SUGGESTIONS FOR THE CHANGE PROCESS TO THE WPIC

Submitter	Summary
Franz	Changes are granted largely on the opinions of experts regarding what may happen, but the actual impacts may be different than the expert's opinion. Similar to Colorado law, a provision to review the change authorization sometime after implementation to determine if additional conditions are necessary to protect other users. (See following discussion.)
Franz	Allow the DNRC to issue a second deficiency letter to allow an additional opportunity to fix deficiencies with their proposed change application.
Franz	Allow applicant to waive deadlines in order for DNRC to act on an application.
Franz	Promote consistency and continuity in how DNRC staff handles change applications. (See following discussion.)
Byorth, St. Lawrence	DNRC's calculation of "legal availability" exaggerates maximum use of existing water rights, which then insinuates itself into adverse effect analysis for a change application. The assumption then becomes that any change in a highly appropriated basin is an adverse effect. State law should disassociate legal availability from adverse effect.
Byorth, Gorder, St. Lawrence	Define the term "adverse effect." (See following discussion)
Byorth	A state law allowing an existing water user to waive adverse effects on their right due to a new permit or change application is complicated by a requirement to determine "legal availability." This requirement should be removed.
White	Not enough quality data on irrigation acreage for change applicants or the department.

²⁸ The WPIC convened a panel at their May 21, 2018, meeting, which included Holly Franz, water rights attorney; Patrick Byorth, attorney for Trout Unlimited; Mack White, ag producer in Wheatland County; and Millie Heffner, Water Rights Bureau chief (DNRC). The committee also heard public comments from Julie Merritt, WGM Group; Krista Lee Evans, Senior Water Rights Coalition and Association of Gallatin Agricultural Irrigators; Andrew Gorder, Clark Fork Coalition; Abigail St. Lawrence, Montana Building Industry Association; Bill Schenk, Department of Fish, Wildlife, and Parks; and Dane Gamble, Bridge Creek Golf Course. The committee also received suggested changes via letter from John Bloomquist, water rights attorney; and Lucas J. Osborne, water resources engineer, HydroSolutions Inc.

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Submitter	Summary
White	Register pivot sprinkler systems because each one alters how a stream works.
Merritt	DNRC data practices should be changed, such as calculations for timing of mitigation water, data modeling, information used in historic use analysis, methodology use in net depletion and return flow analysis, and use of significant digits when reporting figures.
Evans	Do not define adverse effect, as it may be a site-specific analysis.
Evans	Resolve differences between calculable adverse effects and measureable adverse effects.
Gorder	Alleviate need for water right holder to reprove elements of a claim that has already been through multiple legal processes, such as a Water Court proceeding, district court enforcement action, or DNRC change process.
Bloomquist	Empower Water Court to update its decrees in an ongoing manner as changes to rights are made. The present DNRC change process is not equipped to update the Water Court Decrees in a manner that could be viewed as timely, cost-effective, or sufficient.
Osborne	Because there are few people alive today associated with the use of water before 1973, such as pump specifics and ditch widths, shorten the “look back” period from which the agency uses to determine historic evidence of water use.
Osborne	If an applicant can show the ground was historically irrigated and used the Water Resource Survey plus aerial imagery, it should be accepted by the DNRC that the diversion and conveyance system was adequate.
Osborne	Changes to water rights that have been severed from the permitted place of use should not be reviewed to the extent of a nonsevered right. These severed water rights will never again be diverted and applied to the historic place of use, rendering an adverse effects analysis irrelevant.
Osborne	Shorten the length of time to process a change application, including the time needed to produce the technical report. This may be solved by allowing applicants to conduct physical and legal analysis.
Osborne	The DNRC has an inherent conflict of interest when it provides the analysis for the applicant, while also fairly representing the interests of the state and other potential objectors to the application.

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Colorado: Revisiting a change

As mentioned on page 8, Colorado law allows a Water Court judge to reconsider a change in water right to ensure no injury occurs to other, existing rights.²⁹ This “is intended to address injurious effects that result from placing the change of water right or augmentation plan into operation.”³⁰ A Water Court judge determines when to exercise the “retained jurisdiction,” usually in response to an applicant’s or objector’s petition to invoke retained jurisdiction.³¹

Colorado courts have repeatedly emphasized that retained jurisdiction provision does not allow an applicant to forego or delay the “no-injury” (or adverse effect) analysis required in the court’s initial review of the proposed change.³² Judges usually limit the retained jurisdiction period for a change, and sometimes limit retained jurisdiction to specific aspects. As a result, modifications under retained jurisdiction tend to be fairly rare in Colorado.

Colorado’s water right processes differs from Montana’s. Colorado courts decree water rights—including changes and other transfers—and have done so for nearly 140 years. In Montana, an executive agency (the DNRC) issues post-1973 permits and processes changes, and the Montana Water Court adjudicates pre-1973 water rights claims. (Appendix A further details the two states’ processes.)

Montana law may already provide for reconsideration of a change authorization. The DNRC may revoke or modify a permit or a change in appropriation right if the water “is not being applied to the beneficial use contemplated” or the authorization “is otherwise not being followed.”³³ In addition, a permittee or water right holder may petition the department to “modify or remove a condition of approval or reduce the amount of the permit or change authorization.”³⁴

The committee took no action related to this suggestion.

Consistency in agency decision-making

Testimony to WPIC included a request for consistent staffing decisions from DNRC staff on water rights changes. A 2010 law review article³⁵ on the change process from the conservation organization Trout Unlimited suggested greater professional training for DNRC staff and a technical educational program for not only DNRC staff, but also for water rights attorneys and consultants.

²⁹ Section 37-92-304, C.R.S.

³⁰ *Famers Reservoir and Irrig. Co. v. Consolidated Mut. Water Co.*, 33 P.3d 799 (Colo. 2001).

³¹ *Ibid.*

³² *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, 195 P.3d 674, 685 (Colo. 2008).

³³ Section 85-2-314, MCA.

³⁴ *Ibid.*

³⁵ Laura Ziemer, Stan Bradshaw, Meg Casey, “Changing Changes; A Road Map for Montana’s Water Management,” 14 *U. Denv. Water L. R.* 1 (2010).

CONDITIONS AS THEY EXISTED

Managers in Water Resources Division regional offices in 8 locations³⁶ across Montana’s varied hydrologic basins analyze and decide on water rights change applications. Helena-based hydrologists and water rights specialists review these decisions to ensure consistency. Although staffing levels are limited by budget constraints, department staff meets at least annually for limited training and to discuss process issues.³⁷ As an additional protection, all change decisions may be appealed to a department hearings officer or to district court.

The committee took no action related to this suggestion.

Defining adverse effects

To determine if an existing water right may be harmed, the DNRC must measure potential adverse effects on others. Testimony to WPIC included a suggestion that state law define the term “adverse effects” to alleviate confusion over what this determination entails. One suggestion was to define adverse effect as “an unreasonable interference with the legal appropriation of another appropriator through the change in use of an existing water right or a new appropriation.”³⁸

The committee took no action related to this suggestion.

³⁶ Regional offices are located in Billings, Bozeman, Glasgow, Havre, Helena, Kalispell, Lewistown, and Missoula.

³⁷ Discussion with DNRC staff, July 20, 2018.

³⁸ Memo from Patrick Byorth to WPIC, May 10, 2018.

CONDITIONS AS THEY EXISTED

Past legislative efforts

The change process has been altered in the past.

House Bill 720 (2003) established time frames for the department analysis. House Bill 831 (2007) introduced mitigation plans for any net surface depletion in closed basins, a process which may involve a change application.

House Bill 40 was presented to the 2009 Montana Legislature as an improvement to a “convoluted, complex, unworkable, awkward” process that had been a “disaster” for the DNRC, according to that department’s director.³⁹

HB 40, which the legislature unanimously passed, included the following changes:

- Allowed for informal meeting with an applicant before an application was submitted,
- Changed the timing of the department’s preliminary determination to prior to public notice,
- Lessened the information-gathering burden on the applicant,
- Reduced costs for the applicant, and
- Reduced processing times.

Department staff told WPIC it has reduced the average number of objections to permits or changes from 30 a year to 8 a year. The average processing time has been reduced to about 8 months,⁴⁰ and application decisions have not been appealed to district court. However, the committee also heard testimony that complex change applications may take years—including one instance of a change having taken 3 years and counting.⁴¹

With this information in mind, the committee proposed three bills related to the change of a water right process.

³⁹ Testimony of Mary Sexton to House Natural Resources Committee, Jan. 21, 2009.

⁴⁰ Discussion with DNRC staff, July 13, 2018.

⁴¹ Testimony of Mack White to WPIC, May 22, 2018.

CONDITIONS AS THEY EXISTED

COMMITTEE ACTIONS, RECOMMENDATIONS

The committee will consider three bill drafts related to the processes for changing a water right:⁴²

- **Extend deadline to correct an application for a permit or change of water right.** This would allow an applicant 120 days to meet department’s “correct and complete” standard for applications.
- **Clarify that legal availability analysis does not determine adverse effects analysis as a criterion for a change of water rights application.** This suggestion to the WPIC maintains that the DNRC’s calculation of legal demand, which assumes the full exercise of every right on a stream, should not automatically influence the calculation of adverse effects, which is a quantitative analysis of actual conditions, i.e. diversion volumes, return flow volumes, irrigation efficiency, estimated transeaporation, and conveyance loss. New appropriations of water require legally available water and an absence of adverse effects. A water right undergoing a change is presumed to have legally available water, and so only needs an adverse effects analysis. However, in an over-appropriated basin, water may not be legally available for appropriation—and this fact may bleed into the adverse effects analysis. This bill attempts to separate the two determinations.
- **Clarify criteria for a water rights permit relying on waiver of adverse effect.** This bill amends the permitting process. A waiver of adverse effect may allow a water right permit applicant to obtain a permit if a senior water right holder agrees to ignore any adverse effect. This bill may alleviate confusion, as the legal availability determination is already required in law.

The committee considered the three bills at their July 16-17 meeting.

⁴² See appendices B,C, and D for complete bill drafts.