



Montana Legislative Services Division
Legal Services Office

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TO: Water Policy Interim Committee Members
FROM: Helen Thigpen, Staff Attorney
DATE: December 18, 2015
RE: Summary of DNRC Water Right Permitting and Change Process.

The Legislature enacted the Water Use Act in 1973 to carry out the Constitution's mandate to provide for the "administration, control, and regulation of water rights" in the state of Montana.¹ The Water Use Act establishes a permitting process for new and expanded uses of water and requires a person to obtain a permit from the Department of Natural Resources and Conservation (DNRC) to appropriate water within the state.² Prior to 1973, a person could simply divert and use water for a beneficial purpose to acquire a valid water right. Other rights were filed with local county clerk and recorders, but there was no centralized method for recording water rights.

In addition to reaffirming the basic water law principle of "first in time, first in right," the Water Use Act reaffirmed that water must be put to a beneficial use in order for it to be lawfully appropriated. A beneficial use includes everything from domestic, stock, irrigation, and municipal use to industrial, commercial, agricultural spraying, fisheries, wildlife, and recreation.³

The water right permitting process is administered by the DNRC. There are several steps in the process, but it always begins with the submission of the DNRC's Application for Beneficial Water Use Permit and the filing fee. Among other things, the application requires information about the intended use of the appropriation, the proposed means of diversion, the number of acres proposed to be irrigated, the period of diversion and period of use, and the proposed flow rate and volume of the appropriation.⁴

If the application is considered "correct and complete," the DNRC will evaluate the application to determine if the criteria for the issuance of a permit have been established. The DNRC will issue a preliminary determination to grant or deny the application within 120 days.⁵ In general, a permit is granted if the applicant sufficiently proves that water is both physically and legally available (*i.e.*, that no one else has already laid claim to the water), that senior appropriators will not be harmed, that the proposed means of diversion, construction, and operation of the appropriation works are adequate, that the proposed

¹ Art. IX, Sec. 3, Mont. Const. and Title 85, Chapter 2, MCA.

² § 85-2-301, MCA.

³ § 85-2-102(4), MCA.

⁴ Admin. R. Mont. 36.12.1701.

⁵ § 85-2-307, MCA.

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January 12, 2016

Exhibit 13

use constitutes a "beneficial use" as described above, and that the applicant has a possessory interest or the written consent of the person with a possessory interest in the property where the water will be put to use.⁶ An applicant may be required to establish additional criteria if an objection to the application is received.

If the DNRC makes a preliminary determination to grant the application, public notice of the decision is published in a newspaper of general circulation in the area of the source.⁷ Notice is provided so that a person who may be adversely affected by the proposed appropriation may object to the issuance of the water right. If the DNRC preliminarily denies the application or if the application is approved with modifications, the applicant may request a hearing before the DNRC. A final order is issued following resolution of any objections from other water right holders or modifications by the DNRC. The order is subject to appeal to a district court. There may be additional steps or requirements depending on the circumstances.

Afer the DNRC issues the permit, the project must be constructed and the water must actually be diverted and applied to the beneficial use.⁸ A certified statement must then be provided to the DNRC regarding the completion of the project. Following an assessment of the project, the DNRC issues a certificate of water right if it "determines that the appropriation has been completed in substantial accordance with the permit."⁹ The priority of the water right is established by the date the DNRC received the original application or when application was made correct or complete.

Similar to the process for new appropriations, DNRC approval is generally required before a water right can be changed in Montana. Specifically, approval is required for a change in the point of diversion, place of use, purpose of use, or place of storage.¹⁰ For the DNRC to approve the change, the applicant must prove by a preponderance of the evidence that existing water right holders will not be adversely affected, that the proposed means of diversion, construction, and operation are adequate, that the proposed use is a beneficial use, and that the applicant has a possessory interest in the place of use.¹¹ As described by the Montana Supreme Court, "an underlying water right is not affected by action on an

⁶ § 85-2-311, MCA.

⁷ § 85-2-307(2), MCA.

⁸ § 85-2-312, MCA.

⁹ § 85-2-315, MCA.

¹⁰ § 85-2-402, MCA.

¹¹ § 85-2-402(2), MCA.

application for a change, and the DNRC may not adjudicate water rights in deciding an application for a change."¹²

Many of the elements required in the application for a new appropriation are also required in the application for a change to an existing water right. Also similar to new appropriations, the DNRC has adopted administrative rules that guide the contents of the change application. For example, a change applicant is required to provide information regarding the historic use of the water right that is proposed to be changed. Historic information is generally how the DNRC determines that senior water right holders will not be harmed by a change to an existing water right. According to DNRC rule, "lack of adverse effect for change applications is generally based on the applicant's plan showing the diversion and use of water and operation of the proposed project will not exceed historic use, and can be implemented and properly regulated."¹³ The description of historic use information that must be submitted depends on the type of water right the applicant is proposing to change.¹⁴

More complete information regarding the application process for new water rights or changes to existing water rights is available in the *Water Rights in Montana* publication from the Legislative Environmental Policy Office or from the Water Rights Bureau at the DNRC.

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¹² *Town of Manhattan v. DNRC*, 2012 MT 81, ¶ 8, 364 Mont. 450, 76 P.3d 920.

¹³ Admin R. Mont. 36.12.1903.

¹⁴ Admin. R. Mont. 36.12.1902.



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TO: Water Policy Interim Committee Members
FROM: Helen Thigpen, Staff Attorney
DATE: December 18, 2015
RE: Summary of Water Right Enforcement by District Courts.

Montana's district courts play an important role in water right enforcement. Within Montana's 22 judicial districts, there are 56 district court judges who are elected to serve 6-year terms. As courts of general jurisdiction, district courts hear a wide variety of cases involving everything from homicide cases to probate and divorce cases. Occasionally these courts are asked to resolve disputes between water users, and in many of these cases, a water user will ask the court for an injunction to prohibit a party from interfering with the use of a water right. An injunction may be temporary or permanent and is an enforceable court order that requires a party to take a specified action.

If there is a decree from a district court that was issued before July 1, 1973, or a temporary preliminary, preliminary, or a final decree issued by the water court after July 1, 1973, the owners of at least 15% of the water rights affected by the decree may petition a district court to appoint a water commissioner to distribute water according to the decree. Similarly, if the water rights of all appropriators from a source or in a defined area have been determined, the DNRC and one or more water right holders may petition a district court to appoint a water commissioner to distribute water and resolve the distribution dispute.¹

A water commissioner has the authority to measure and distribute water to the appropriate owners.² As a "first in time, first in right" jurisdiction, water commissioners distribute water to the most senior water right owners first. When a water commissioner is appointed and directed by a district court, a dispute may be easily settled because the water rights at issue have largely been determined.

When all of the existing water rights on a water course have not been determined, any party may petition a district court to certify the question of existing water rights to the Water Court. Pending a determination by the Water Court, a district court may issue an injunction or order other necessary relief. Certification proceedings are given priority over other adjudication matters at the Water Court.³

The Department of Natural Resources and Conservation may also ask a district court to take various actions to prevent the wasting or unlawful use of water. The DNRC may direct

¹ § 85-5-101(1) and (2), MCA.

² § 85-5-101, MCA.

³ § 85-2-406(2) MCA.

its attorneys, the attorney general, or a county attorney to bring suit to enjoin the unlawful use of water. The Attorney General or a county attorney may also bring an action independently of the DNRC.⁴ In these proceedings, senior water right holders must be given priority, and a person found to be violating the Water Use Act may be subject to civil penalties.⁵

In other cases, a district court may appoint a water mediator to help resolve water controversies in both decreed and nondecreed basins. A water mediator may discuss proposed solutions, review options for coordinating water use, discuss water needs with affected persons and entities, meet with parties to mediate differences over water use, and hold public meetings and conferences to discuss and negotiate potential solutions.⁶ A water mediator does not have the power to order a particular action, but the mediator may provide guidance to the parties for an out-of-court resolution of the dispute.

In 2009, the Legislature authorized a district court to appoint a water master to assist with judicial enforcement proceedings.⁷ A water master is appointed by the chief water judge and is an attorney who issues preliminary determinations in the Water Court.

Finally, a district court may also be asked to address a decision from the DNRC on a water right permit application. If an application for a water right permit is denied, for example, a party may appeal the decision to a district court for review. The Montana Supreme Court may also be asked to weigh in on the dispute if the matter is not resolved before the district court.

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⁴ § 85-2-114, MCA.

⁵ § 85-2-122, MCA.

⁶ § 85-5-110, MCA.

⁷ H.B. 39, Chapter 103, Laws of 2009 and § 3-7-311, MCA.