

Dec. 19, 2017

Water Policy Interim Committee  
 Jason Mohr, research analyst



## COMPARISON OF CHANGE OF WATER RIGHT PROCESS IN 6 STATES

	<i>Montana</i>	<i>Idaho</i>	<i>Colorado</i>	<i>Utah</i>	<i>Wyoming</i>	<i>Washington</i>
<b>Who approves, processes, or administers changes of water rights?</b>	Montana Department of Natural Resources and Conservation	Idaho Water Resources Division	Colorado Water Court	State engineer (Utah Division of Water Rights)	Wyoming Board of Control	Washington Department of Ecology (conservancy boards may do initial processing)
<b>Approval necessary for what types of changes?</b>	<ul style="list-style-type: none"> <li>•Place of diversion</li> <li>•Place of use</li> <li>•Purpose of use</li> <li>•Place of storage</li> </ul>	<ul style="list-style-type: none"> <li>•Point of diversion</li> <li>•Place of use</li> <li>•Period of use</li> <li>•Nature of use</li> </ul>	<ul style="list-style-type: none"> <li>•Type, place, or time of use</li> <li>•Point of diversion</li> <li>•From a fixed point to an alternate or supplemental points of diversion</li> <li>•Means of diversion</li> <li>•Place of storage</li> <li>•From direct application to storage and subsequent application</li> <li>•From storage and subsequent application to direct application</li> <li>•From a fixed place of storage to alternate places of storage</li> <li>•From alternate places of storage to a fixed place of storage</li> <li>•Or any combination of such changes</li> </ul>	<ul style="list-style-type: none"> <li>•Point of diversion</li> <li>•Place of use</li> <li>•Period of use</li> <li>•Nature of use</li> <li>•Storage of water</li> </ul>	<ul style="list-style-type: none"> <li>•Change use</li> <li>•Place of use</li> <li>•Point of diversion</li> </ul>	<ul style="list-style-type: none"> <li>•Place of use</li> <li>•Point of diversion or withdrawal</li> <li>•Additional point(s) of diversion or withdrawal</li> <li>•Purpose of use (including season of use)</li> </ul>

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<b>How are other water rights protected?</b>	<p><b>Criteria.</b> Applicant must prove a “lack of adverse effect” on other rights.</p> <p><b>Analysis.</b> The department reviews historical use and possible adverse effects. A quantification of historical consumptive use must be done, which may require proof of use for more than 30 years. Agency uses evapotranspiration and soil type information to estimate historical consumptive use. Effects of the change on return flows are examined.</p> <p><b>Objections.</b> An appropriator may object to a change.</p>	<p><b>Criteria.</b> IDWR must ensure a “transfer” does <i>not</i> injure other rights; enlarge the original right; conflict with local public interest; prevent water conservation; adversely affect local economy.</p> <p><b>Analysis.</b> To prevent injury, an analysis of timing and location of return flows may be necessary, among other considerations, such as water quality. To prevent enlargement, an application may be examined for historic consumptive use usually for the past 5 years. Crop or diversion records may be used estimated with evapotranspiration and other data. Also, diversion rate, volume,</p>	<p><b>Criteria.</b> A change is measured by the right’s historical beneficial consumptive use in time, location, and quantity. The change must include conditions preventing enlargement of water rights and injury to other rights.</p> <p><b>Analysis.</b> To prevent enlargement of the right and injury to other users, the State Engineer’s Office (also known as the Colorado Division of Water Resources) reviews historical beneficial consumptive use and historic return flow patterns. The state engineer provides a consulting report and</p>	<p><b>Criteria.</b> A change may not cause another right “to experience quantity impairment,” which is defined as reducing the amount, the timing of water availability, or enlarging the changed water right.</p> <p><b>Analysis.</b> The state engineer calculates diversion and depletion “figures” for each change. The diversion figure is based on duty values according to geographic location; the depletion figure is based on potential evapotranspiration. The new use is limited by historic potential diversion and depletion. State engineer must also ensure a change</p>	<p><b>Criteria:</b> A change of use or change of place of use may not “exceed the amount of water historically diverted,” “increase the historic amount consumptively used,” “decrease the amount of return flow,” nor injure other appropriators.</p> <p><b>Analysis.</b> An applicant must supply a consumptive use report or a return flows study. The Board of Control “will look with disfavor” upon a petition for change without documented historic use, which may be diversion or pumping records. The board may request studies of conveyance loss and return flow lag</p>	<p><b>Criteria.</b> Changes may be made “without detriment or injury to existing rights.” Changes may be allowed for irrigation of additional acres or for other uses if “annual consumptive quantity” does not increase.</p> <p><b>Analysis.</b> Among other requirements, the Department of Ecology examines the history of water use (pump records, meter readings, electrical records, maps, photographs, etc.) and must consider “impairments,” which may adversely impact physical availability of water entitled to protection. The</p>

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	<p>and acres irrigated may be examined to prevent enlargement. Special scrutiny is applied to changing points of diversion in the Eastern Snake Plain Aquifer. Analysis of local public interest includes consideration of recreation, fish and wildlife, and the state water plan. Analysis of the effects on the local economy may include local employment and economic activity. And a change may not be approved if it would significantly affect the local agricultural base.</p> <p><b>Objections.</b> Any person “aggrieved” by IDWR decision may protest.</p>	<p>recommendations to a water court “referee.”</p> <p><b>Objections.</b> A person or party may file statements of opposition with the water court. A referee’s ruling on the application may be appealed to the water court.</p>	<p>must not “prove detrimental to the public welfare” or interfere with other beneficial uses.</p> <p><b>Objections.</b> Any person may file a protest with the state engineer for subsequent formal or information hearings.</p>	<p>times and patterns, geology, and soils. The board may also consider any economic loss to a community. Changes to a point of conveyance do not require a consumptive use analysis.</p> <p><b>Objections.</b> Other stream users must consent to the change; if consent cannot be obtained, a hearing is held. Applicant may need to pay for public hearing and a transcript of the hearing. Any decision of the board may be appealed.</p>	<p>department issues a Report of Examination, which includes their analyses and a recommendation.</p> <p><b>Objections.</b> The Pollution Control Hearings Board considers appeals and protests of decisions.</p>

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<b>How to appeal a decision on a change application?</b>	<ol style="list-style-type: none"> <li>1. Administrative hearings</li> <li>2. District court or Montana Water Court</li> <li>3. Montana Supreme Court</li> </ol>	<ol style="list-style-type: none"> <li>1. Administrative hearing</li> <li>2. Agency director review</li> <li>2. Judicial review</li> </ol>	Colorado Supreme Court	<ol style="list-style-type: none"> <li>1. Agency review</li> <li>2. Judicial review</li> </ol>	<ol style="list-style-type: none"> <li>1. Board hearing</li> <li>2. District court</li> </ol>	<ol style="list-style-type: none"> <li>1. Pollution Control Hearings Board</li> <li>2. Superior Court</li> <li>3. Court of Appeals</li> </ol>
<b>What is the structure of adjudication and permitting?</b>	<p>1973 law established permitting process. Adjudication of pre-1973 rights by Montana Water Court is estimated to be completed in 2028.</p>	<p>Prior to 1963 for groundwater and 1971 for surface water, water rights could be claimed by putting water to a beneficial use or by posting notice under law. Subsequent surface and groundwater rights are established through an “application/permit/license” process. Adjudication may include historical and licensed rights. Adjudication remains incomplete, although the Snake River Basin was adjudicated by 2014, containing most state claims.</p>	<p>1879 law assigned district courts the duty of setting water right priority dates and amount. Each water right – and adjustments to it – is confirmed through an individual decree. (Therefore, all rights are effectively adjudicated.) 1969 law created water courts in seven divisions, with jurisdiction over decrees for surface water and most groundwater rights.</p>	<p>1903 law requires a permit. Pre-1903 surface water and pre-1935 groundwater rights are subject to general water rights adjudication through the district courts. Adjudication of these historical rights continues.</p>	<p>Since 1890 statehood, the state engineer has issued water rights permits. Therefore, adjudication is effectively complete.</p>	<p>State law requires permits for surface water use after 1917 (or 1932 in some instances) and groundwater after 1945. Superior Court conducts adjudication, which may include all appropriators – pre-1917 and -1932 claims and subsequent permits. Adjudication is complete in some basins; the 40-year-old Yakima River basin adjudication is nearing resolution. Much of the state remains unadjudicated.</p>

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## Disclaimer

The summary was produced according to the 2017-18 Water Policy Interim Committee's work plan for **study of the process for changing a water right**. This summary of change processes is neither exhaustive nor complete. These change processes may include proof of ownership, location, and other similar information. Additional factors that may affect how a change is processed include, but are not limited to, factors such as burden of proof for evidence and available water measurement data. This summary does not contemplate other conditions or issues related to a water right, such as augmentation or mitigation plans, exchanges, abandonment or relinquishment, many groundwater circumstances, or storage. Enforcement schemes differ by state. These change processes generally do not apply to federal reserved or tribal water rights.

## Sources

Colorado Foundation for Water Education, *Citizen's Guide to Colorado Water Law* (2009).

Colorado Revised Statutes.

Idaho Department of Water Resources, *Administrator's Memorandum Re: Transfer Processing Policies & Procedures* (2009).

Idaho Department of Water Resources, *Idaho Water Rights a Primer* (2015).

Idaho Department of Water Resources, *Instructions for Filing an Application for Transfer of a Water Right* (2011).

Idaho Statutes (2017).

Jacobs, James J., Tyrrell, Patrick T., and Brosz, Donald J., *Wyoming Water Law a Summary*, University of Wyoming Agricultural Experiment Station (2003).

Land Use and Natural Resources Clinic, University of Montana School of Law, *Water Rights in Montana* (2014).

Montana Code Annotated (2017).

Revised Code of Washington.



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Tarlock, A. Dan, *Law of Water Rights and Resources*, Thomson Reuters (2015).

Utah Code.

Washington Department of Ecology, *Changing or Transferring an Existing Water Right* (2008).

Water Resources Program, Washington Department of Ecology, *Frequently Asked Questions Water Right Claims* (2006).

Water Resources Program, Washington Department of Ecology, *Frequently Asked Questions Water Rights in Washington* (2013).

Wolfe, Dick, Colorado Division of Water Resources, *Synopsis of Colorado Water Law* (2009).

Wyoming Board of Control, *Board of Control Regulations & Instructions*.

Wyoming Statutes (2017).