May 4, 2018

Water Policy Interim Committee
Jason Mohr

DRAFT FINDINGS AND CONCLUSIONS: STUDY OF THE PROCESS OF CHANGING A WATER RIGHT

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

- 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.