

Water Transfers in Montana

Water rights transfers – the buying or selling or leasing of a right – have long been in place in Montana law. Water rights are generally recognized as a transferable property right.¹ Transfers may become more important in future years as a limited resource faces likely increasing demands. While state law has long recognized these tools, state lawmakers have regularly adjusted policy related to transfers, as recently as last session.

Recently, governors of Western states have identified the ability to transfer rights as vital “as new demands stress limited supplies.”² To this end, the Salt Lake City-based Western States Water Council developed a report on the subject: *Water Transfers in the West: Projects, Trends and Leading Practices in Voluntary Water Trading*. (Montana is one of 18 members states of the Western States Water Council.) According to the report:

“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.”³

How today’s water rights holders transfer rights to tomorrow’s users may change the complexion of the state. And how legislators might change state policies would also have an impact. Together, future public policy and private transactions will likely alter the state’s social, economic and natural makeup.

¹ A. Dan Tarlock, *Law of Water Rights and Resources*, §5:72, Thomson Reuters/West (2012)

² Western States Water Council, *Water Transfers in the West: Projects, Trends, and Leading Practices in Voluntary Water Trading* (2012)

³ i.b.i.d.

Montana transfers

Montana transfers are generally found in Title 85, Chapter 2, MCA. Generally, the types of “transfers” allowed in Montana include these broad categories:

Change of right •85-2-402, MCA •85-2-436	Transfer or sale •85-2-403	Temporary change •85-2-407, -408
Lease •85-2-410	Temporary lease •85-2-427 •85-2-408	Surplus water •85-2-415, -417
Salvaged water •85-2-419	Aquifer recharge, mitigation •85-2-420	Public water markets •85-2-141

This background paper briefly describes each specific type of “transfer” in order to demonstrate what tools are allowed by law for the orderly transfer of rights between people, uses, and places.

Changes in appropriation rights (85-2-402, MCA)

A change in a right undergoes a comprehensive review in Montana. A change to a right may occur when an appropriator alters how the water is used, or perhaps when the right is sold or leased (see subsequent sections). This section of law allows a person to change a water right, a permit or a reservation, provided the Department of Natural Resources and Conservation determines various criteria are fulfilled.

The law allows for changes in the type of beneficial use, place of use, point of diversion, or other attributes associated with the water right. For example:

- a point of diversion is moved
- an irrigator wants to increase or realign acreage beyond the original permit or right
- a use changes from irrigation to industrial.⁴

The DNRC analyzes the proposed change in water right to determine if:

- The change adversely affects the use of the existing water rights of others
- The proposed means of diversion, construction, and operation of the appropriation works are adequate
- The proposed use of water is for a beneficial use

⁴ Montana Water Policy Interim Committee, *The times, they are a-changin’: An overview of changes in appropriation rights and water marketing*, 4 (2010)

- Water quality will not be adversely affected

The “adverse impacts” study is perhaps the agency’s most important review step under this section of law.

But the law has other conditions, too. A change in purpose of use or place of use for large quantities of water – volumes of more than 4,000 acre-feet per year (approximately 1.3 billion gallons) and flows of 5.5 cubic feet per second – must meet further criteria, such as a consideration of existing demands on the state water supply, benefits to the applicant and state, effects on quantity and quality of water, and significant adverse environmental impacts.

Additionally, if this large quantity of water is bound out of state, the legislature must ultimately approve the transfer and determine if the appropriator can prove the out-of-state water use is not contrary to water conservation in Montana, and is not otherwise detrimental to the public welfare. So far no such large transfers have been proposed or approved.

Replacement wells are generally allowed without DNRC approval, except for some in a controlled groundwater area. This section of law limits the size of the replacement well. A replacement point of diversion may also be constructed without DNRC approval, if the existing point of diversion is inoperable due to natural causes or deterioration, there are no changes to the right, the diversion capacity is not increased, and other conditions.

Transfer of appropriation right (85-2-403, MCA)

A transfer of a water right is usually executed by a sale of the land or of the right. A transfer of a water right keeps that water right’s priority date. Any changes must meet various criteria included in 85-2-402, MCA. A transfer of appropriation right may include a change in the way the water is used, such as from agricultural to municipal, which the DNRC would review.

Temporary changes in appropriation right (85-2-407, MCA)

This section allows a change in a water right to benefit an appropriator and another user. The DNRC must approve a temporary change.

Temporary changes are typically for 10-year periods of consecutive or intermittent use, which the department may renew. The department may modify or revoke its authorization if other rights are adversely affected. Other appropriators may object to the temporary change. At the end of the temporary use, the water right reverts to its original purpose, place of use, point of diversion, or place of storage.

Temporary change authorization for instream flow (85-2-408, MCA)

Water rights may be temporarily changed to benefit a fishery resource. This temporary change must follow criteria set forth in the sections related to change of water rights (85-2-402, MCA) and temporary changes in a water right (85-2-407), which have been described previously. In addition to proving that the temporary change for instream flow won’t adversely affect others’ water rights, the applicant must demonstrate the amount of water is needed to maintain or enhance that an instream flow.

Short-term lease of appropriation right (85-2-410, MCA)

An appropriator may lease all or part of a water right for up to 90 days for road construction or dust abatement. If certain conditions are met, a short-term lease does not need prior DNRC approval, but the lessee must submit information about the lease to the department before the short-term use begins. Short-term leases also:

- may not exceed 60,000 gallons a day
- require public notice prior to use of the water
- allow complaints if one's water right cannot be satisfied

Diversion of natural flow of waters (85-2-413, MCA)

An irrigator may purchase or lease water from a reservoir or source not adjacent to their lands and use this water to meet the rights of other, prior appropriators. This action would allow an irrigator to receive water from a stream that otherwise would not have enough water in the stream deliver water to the irrigator's lands.

Owners of water to sell surplus (85-2-415, MCA), Enforcement of right to surplus (85-2-417, MCA)

Any person with a surplus of water – and with a right to use, sell, or dispose of the water and with adequate infrastructure – may do so.

Salvaged water (85-2-419, MCA)

As state law encourages the conservation of water, water rights holders who salvage water may retain the right to the salvaged water for beneficial use. If the salvaged water is to be used for a different purpose or at a different place, the DNRC must approve the change in appropriation under 85-2-402, MCA. This salvaged water may also be sold or leased.

Change in appropriation right for aquifer recharge or mitigation (85-2-420, MCA)

An appropriator may change their right for aquifer recharge or mitigation after department review. This water – all or a portion of it – may be marketed for those uses, too. This change in right may not exceed 20 years.

Temporary lease of appropriation right (85-2-427, MCA)

The 2013 Legislature passed House Bill 37, which resulted in this statute. Under the law, a temporary lease does not undergo other department review processes, such as those contained in 85-2-402, MCA. But this temporary lease has other conditions, including

- A to-be-leased right must have been used five years previous to the application
- May not be leased for more than two years for one time during any 10-year period
- No more than 180 acre-feet per year may be leased
- A point of diversion may not be changed
- Storage may not be added to the point of diversion or place of use
- Out-of-state leases must undergo the change review process in 85-2-402, MCA
- Any person adversely affected by the temporary lease may object to the department for further review. This objection may cancel a lease

Instream flow...to benefit fishery resource (85-2-436, MCA)

FWP may change an appropriation right to instream flow to “protect, maintain, or enhance streamflows to benefit the fishery resource.” The department must resolve objections to these changes. An instream flow lease is limited to 10 years, unless it is a storage project. The department may not change rights or enter into new leases for instream flows that expire after June 30, 2019.

State Water Marketing (85-2-141, MCA) and other public water markets

Water users may contract for water from an array of state, federal, and local projects.

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.⁵

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.⁶

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.⁷

Title 85 of the Montana code also allows the DNRC to create a water leasing program. The program may acquire rights to water through its own appropriations, by agreement with another holder of water rights, or by contract for water held in federal reservoirs. The water must be leased for a beneficial use; some of this water could be used outside Montana. An environmental impact statement is required on projects that consume a large amount of water.

⁵ PBS&J, *Irrigation in Montana: A Preliminary Inventory of Infrastructure Condition* (2000)

⁶ i.b.i.d

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