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The town 's application proposed to pump 575 gallons per minute, for 560 acre-feet per year to accommodate a proposed 363-lot subdivision within city limits.[115] The application, which proposed to pump near the lower Gallatin River, caught the attention of senior surface water users.[116] In an attempt to avoid a showdown, senior users met with the developer of the subdivision and city officials prior to the deadline for filing objections on the town 's water use application.[117] They requested that the town of Manhattan commit to a plan to mitigate the new consumptive use of the proposed development, in order to avoid any depletion in surface water flows.[118] This would address the concerns of senior users while allowing the proposed groundwater pumping to proceed through permitting.

Just upstream on the Gallatin, a private, municipal water provider, Utility Solutions, Inc., had recently pioneered such a mitigation plan in cooperation with the same set of senior water users.[119] There, Utility Solutions changed part of a senior irrigation right into a mitigation right offsetting the new consumptive use of the planned residential and commercial development.[120] In this way, the retirement of an existing, senior irrigation use balanced the new groundwater pumping.

Unfortunately, Manhattan was unfamiliar with what Utility Solutions had done and did not readily see the need to provide mitigation water.[121] Senior water users filed objections to the town 's groundwater pumping application.[122] The town of Manhattan ultimately contracted with water attorney, Matt Williams, who had helped Utility Solutions navigate the change-in-use of the senior irrigation right that cemented the settlement agreement with the senior water users.[123] It took almost two years, but by May of 2008, Manhattan and the senior water users had constructed a settlement agreement that again relied on a change-in-use of senior irrigation water to mitigate the proposed groundwater depletions to the Gallatin River.[124]

But the long-awaited settlement with the objectors was merely the start of the town 's procedural entanglement with the DNRC. Even though the objections were settled, DNRC decided that it had to hold a contested case hearing on the town 's groundwater pumping

Town of Manhattan, 13 (Mont. Dep't of Natural Res. & Conservation Dec. 8, 2009) (final order).

115. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 113.

116. *Id.* at 26-27.

117. *See id.* at 4.

118. *See id.* at 7.

119. MONT. DEP'T OF NATURAL RES. & CONSERVATION, ENVIRONMENTAL ASSESSMENT FOR UTILITY SOLUTIONS, LLC 1 (2010).

120. *Id.* at 2, 6.

121. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 113, at 16.

122. *Id.* at 4.

123. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 114, at 1.

124. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 1113, at 8.

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application. So on September 4, 2008, the town called in its experts and presented testimony regarding its proposed groundwater pumping application, and their plan for mitigating any adverse effects.[125]

After the hearing, the DNRC asked the applicant to submit additional explanation of the applicant's two years of analysis and reports since the initial application had been filed.[126] Then on December 9, 2008, DNRC issued a thirty-two-page Proposal for Decision denying the town's application, because the town had not shown compliance with all the statutory criteria for a new application.[127] DNRC again took submissions from the applicant that explained to the DNRC the perceived information gaps or inconsistencies in the now voluminous record, and held oral argument. On April 6, 2009, DNRC issued a Final Order denying Manhattan's application, despite the town's submissions.[128] The town promptly appealed to the district court.[129] In discussions facilitated by the senior water user objectors, the town and DNRC were able to agree to a remand for the submission of additional evidence to address the deficiencies identified in the agency's Final Order.[130]

DNRC held a second evidentiary hearing on the application on July 17, 2009, for the purpose of accepting additional evidence and testimony in support of the application. After additional briefing, DNRC issued an *Order for Clarification of Wastewater Returns to the Gallatin River* on October 22, 2009. The applicant then filed this additional clarification.[131] Ultimately, DNRC conditionally granted the town's application on essentially the same grounds as the settlement with the senior water users—a settlement that had been finalized 18 months earlier.[132]

At this point, the town of Manhattan was three and one-half years into the application process with DNRC, and over $100,000 in expert analyses and attorney fees—or nearly $1000 for every man, woman, and child in the town of Manhattan.[133] And it still wasn't over for the town.

125. *Id.* at 1.

126. *Id.*

127. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 114, at 27-34.

128. *See* Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 114, at 3. The Final Order's denial was based in part on the town's failure to prove that its groundwater use would not adversely affect groundwater users on the opposite side of the Gallatin River. During the application review process, the DNRC's hydrogeologist acknowledged that the Gallatin River was a hydraulic barrier to further groundwater effects, and had told Manhattan as part of the "correct and complete" finding that wells on the opposite side of the Gallatin did not need to be evaluated. Interview with Matthew Williams, Water Law Attorney, Williams & Jent, in Bozeman, Mont. (Sept. 21, 2010).

129. Application for Beneficial Water Use Permit by Town of Manhattan, *supra* note 114, at 3.

130. *Id.* at 3-4.

131. *Id.* at 5.

132. *Id.* at 34-36.

133. Interview with Matthew Williams, *supra* note 128.. Mr. Williams ultimately stopped billing the town of Manhattan for the time he invested over the last twelve months because of the high transaction costs and the lack of final resolution for the

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The senior irrigation water that Manhattan was relying on to provide the mitigation water belonged to a nearby ditch company. At this point, the ditch company was reluctant to go through a change-of-use application process with DNRC, because they did not want to get bound up in the same kind procedural maze and scrutiny that the town of Manhattan went through.[134] So, four years after its initial application, it's back to the drawing board for the town of Manhattan.

### C. *BOSTWICK V. DNRC*—DOWN THE RABBIT HOLE ONE MORE TIME.

In late 2005, more than two years after the passage of HB 720 and nearly a year after DNRC's adoption of rules implementing HB 720, another applicant in the Gallatin watershed embarked on an application process that revealed how little had changed since 2003. A developer, Bostwick Properties, filed an application for a new groundwater permit on a proposed residential and commercial development along the upper Gallatin River, near the ski resort town of Big Sky, Montana. The Lazy J South development proposed 99 homes and 40 businesses (with an estimated 27 acres of irrigation).

Little did the applicant know that it was embarking on a more than three-year odyssey that included DNRC's termination of the application, a re-filing of the application, an eventual DNRC finding that the second application was correct and complete, the filing of public notice, the filing of objections,[135] the settlement of objections, the expiration of a the statutory 180-day deadline on DNRC to render a decision,[136] the applicant's filing of a lawsuit for writ of mandamus to compel DNRC to act, DNRC's subsequent denial of the application before a scheduled show-cause hearing, an order, on May 12, 2008, from the district court mandating DNRC to approve the applicant's application,[137] and, in 2009, a Supreme Court decision.[138]

The district court focused its ruling on the term "correct and complete." After describing the statutory treatment of the term "correct and complete," the district court granted Bostwick's motion for a writ of mandamus, and expressly ordered DNRC "to immediately issue the Water Use Permit determined by the agency to be correct and complete

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town.

134. *Id.*

135. *See* Objections of Trout Unlimited & Mont. Dep't of Fish, Wildlife, and Parks to Application No. 41H 30025398 (on file with author).

136. *See* Act of May 5, 2003, ch. 574, §1, 2003 Mont. Laws 2409, 2409-410. This failure to meet statutory deadlines was not unique to the Bostwick case. *See* Application to Change Water Right by Vermillion Ranch, *supra* note 94, at 5, in which the agency took sixteen months to issue a decision after the close of the record. More recently the DNRC took ten months after the close of the record in Application No. 76F 30028985 to Change Water Right Claim No. 76F 98201-00 by Talan, Inc. (Mont. Dep't of Natural Res. & Conservation Feb. 26, 2010) (final order).

137. Bostwick Properties, Inc. v. Mont. Dep't of Natural Res. & Conservation, No. DV-07-917AX (Mont. May 12, 2008) (findings of fact, conclusions of law and writ of mandate and order).

138. *See* Bostwick Properties, Inc. v. Mont. Dep't of Natural Res. & Conservation, 2009 MT 181, 351 Mont. 26, 208 P.3d 868 (Mont. 2009) for a recitation of the procedural background of this case.

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in the form and in the amount as requested by Bostwick."[139] It is evident from the court's recitation of findings and conclusions that it took offense at what it saw as the DNRC's dilatory and arbitrary behavior.[140] The decision, however, failed to account for the settlement between the applicant and the objectors.

DNRC appealed the decision to the Supreme Court.[141] The Supreme Court held that DNRC had violated a clear legal duty with regard to the Lazy J South application, but that this legal duty was only to act within the statutory deadlines.[142] The appropriate remedy, the Court held, was to order the agency to make a determination on the permit application, not to require the agency to issue the permit.[143] The Court rejected Bostwick Properties' reasoning that once DNRC had accepted the application as correct and complete and the objections were resolved, that the agency was obligated to issue the permit.[144]

A concurring opinion joined by five of the Justices, agreed that once the application was correct and complete DNRC had only a clear legal duty to process the application—not to grant it—but its displeasure with DNRC's behavior was manifest. It found that "DNRC's actions are nothing less than arbitrary, if not outrageous."[145] The one dissenting opinion was equally disapproving, and echoed the district court's conviction that the "correct and complete" should have compelled approval in this case.[146] This case provides at least some judicial guidance, however ambivalent, as to the meaning of "correct and complete" in DNRC's application process. But, even as the Supreme Court was deliberating on Bostwick, the legislature, largely in response to the Bostwick district court decision, was working to address the recurring conflict attending DNRC's review process.

### D. *Hohenlohe v. Montana DNRC*—The Shifting Sands of Agency

139. *Id.*, at 871.

140. *Id.* at 869. The court notes with emphasis the amount of time that passed after the filing of the second application, and compares the department's approval on a similar application in the same area, implying that the department's denial was arbitrary. In its conclusions of law, the court explicitly characterizes the DNRC actions as arbitrary at conclusions 64 and 65.

141. In addition, Trout Unlimited and the Association of Gallatin Agricultural Irrigators filed a brief as amicus curiae. *See* Brief of Amicus Curiae Montana Trout Unlimited and Association of Gallatin Agricultural Irrigators (on file with the author).

142. Bostwick, 208 P.3d at 874.

143. *Id.* at 873-74.

144. *Id.*

145. *Id.* at 875 (Rice, J., concurring) ("Apparently realizing that it was required to follow the law, and that a court would hold it accountable, DNRC magically kicked out a decision on Bostwick's application in just six days—*denying* it, of course, and advising Bostwick for the first time of DNRC's concerns about the application.").

146. *Id.* at 875-76 (Warner, J., dissenting) ("This parity of terms forces the conclusion that DNRC's initial designation of an application as correct and complete is substantive and indicates that the applicant has established a prima facie showing within 180 days from the date of publication, its initial designation of correct and complete must stand, and a district court may require by writ of mandate that DNRC issue the permit.").

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INTERPRETATION.

Montana is unique in the West in that it allows private entities such as Trout Unlimited to lease water rights for instream flow, and it allows a water right holder to simply convert a consumptive use right,[147] such as an irrigation right, to instream use for a term of years.[148] Between the creation of the pilot program in 1995 and the lifting of the sunset provision in 2005, DNRC approved 20 leases or conversions.[149] Since then, DNRC has approved a handful more.[150]

Since the passage of the pilot program in 1995, DNRC 's treatment of applications for changes to instream flow in some ways mirror the challenges described elsewhere in this article. Between 2001 and 2005, both the amount of documentation necessary to establish historic use,[151] and the time from filing to agency decision has increased.[152] And as illustrated by the case of *Hohenlohe v. Montana Department of Natural Resources and Conservation*, DNRC altered its interpretation of how much flow an instream change could protect below the historic point of diversion.[153] The leasing statutes require an applicant for an instream flow change to describe the stream reach in which flow will be maintained.[154] A key provision in the instream flow change statutes defines what water can be protected:

The maximum quantity of water that may be changed to maintain and enhance streamflows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance streamflows to

147. MONT. CODE ANN. § 85-2-408(2)(a) (2009).

148. *Id.* at § 85-2-408(2)(b) (2009); *see also* § 85-2-407(2), (9) (2009) (setting the maximum term for most temporary changes (including instream changes) at ten years, with a provisions of up to 30 years for changes that involve "a water conservation or storage project . . . .").

149. PRIVATE WATER LEASING, A MONTANA APPROACH, *supra* note 26, at 13.

150. Telephone Interview with Mike McLane, *supra* note 51. There are three entities in Montana that actively lease water rights for instream use: The DFWP, Trout Unlimited, and the Clark Fork Coalition (formerly Montana Water Trust). Telephone Interview with Barbara Hall, counsel for the Clark Fork Coal., former Executive Dir. for the Mont. Water Trust. Since 2005, the DNRC has not approved any leases to DFWP (two leases to Trout Unlimited; and nine leases to the Clark Fork Coalition).

151. *Compare* Authorization to Change Appropriation Water Right No. 76M-W015976-00 (the first private instream change approved in the state, a 1997 change on Rock Creek in the Nine Mile drainage, comprised six pages and seven exhibits), *with* Firehole Ranch Change Application for Water Right Claim No. 41F 125476 (a recently filed application of similar complexity to the Rock Creek lease, on Watkins Creek in the Madison River watershed, comprised an application of 14 pages and 16 exhibits).

152. *Compare* Authorization to Change Appropriation Water Right No. 76M-W015976-00 (1997 change on Rock Creek in the Nine Mile drainage, took less that six months from the filing of the application to its approval), *with* Application 76F-3004783 (TU filed a pending application on January, 2010; as of August 25, DNRC has 120 days to make a preliminary determination on the application).

153. Hohenlohe v. DNRC, Cause No. BDV-2008-750, at 1-3 (Mont. Dist. Ct. 2009).

154. MONT. CODE ANN. §§ 85-2-408(1)(a), 85-2-436(1) (2009).

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benefit the fishery resource below the existing point of diversion.[155]

The key language in section 408 is "the amount historically consumed." The question raised by "historically consumed" is what does it mean in the context of a reach that has been historically dried up, or at least severely de-watered by historic irrigation practices? The classic definition of "consumptive use" focuses on loss to plant use—evapotranspiration.[156] In 2005,prior to the application that gave rise to the *Hohenlohe* case, DNRC had approved an application in which Trout Unlimited sought to change to instream flow, a right that had historically been diverted from the stream and lost to the proposed reach of instream flow protection.[157] In the 2005 approval, DNRC authorized the protection instream of nearly the entire diverted amount, including the historic return flow that had re-entered the stream below the protected reach.[158] Trout Unlimited's rationale for requesting the protection of the return flow in an upstream reach was twofold: First, this return flow had not been historically available to other users within the reach protected and thus harmed no one; second, since instream flow is non-consumptive in nature, the historic return flow portion of the right would still be available to other downstream users relying on it. In the *Hohenlohe* case, the ground shifted.

Christian and Nora Hohenlohe own a ranch that has water rights to Little Prickly Pear Creek, a tributary to the Missouri River. The Hohenlohe's predecessor in interest had historically flood irrigated land adjacent to the stream, diverting as much as 32 cubic feet per second (cfs), which could be the entire flow at mid-summer. The Hohenlohes, in cooperation with the DFWP, converted their irrigation from flood to sprinkler, and continued to irrigate the same ground that they had historically irrigated.[159] The installation of the sprinkler enabled them to reduce their diversion from Prickly Pear Creek to a maximum of 3.5 cfs.

Once the Hohenlohes installed the sprinkler, they retained a water rights consultant and filed an application with DNRC to protect the water they were no longer diverting for fisheries in the reach below the historic point of diversion.[160] After protracted correspondence between

155. *Id.* at § 85-2-408(7); *see also* § 85-2-436(3)(a) (enabling DFWP instream leases).

156. *See, e.g.*, MONT. ADMIN. R. 36.12.101(15) (2009) ("'Consumptive use' means the annual volume of water used for a beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that does not return to ground or surface water.").

157. Change Authorization 76F-30011112 (Dep't. Natural Res. & Conservation, Apr. 18, 2005) (final auth.).

158. *See e.g., Id.* (showing Trout Unlimited's ability to demonstrate that most or all of the water historically diverted was lost to the reach proposed for protection, and the DNRC authorized a protected flow and volume reflecting that loss).

159. MONT. CODE ANN. 85-2-102(6) (2009), (defining "change in appropriation". The Hohenlohes were not required to seek DNRC approval for the switch to a sprinkler as long as they did not change the irrigated footprint. Because, a "change in appropriation" does not include a change in method of irrigation. It only includes a change in purpose, place of use, or point of diversion).

160. Hohenlohe v. DNRC, No. BDV-2008-750, at *1-3 (Mont. Dist. Ct. 2009) (on file

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the consultant and DNRC, and field visits to the site, DNRC determined that the application was correct and complete, and issued a public notice.[161] DNRC received one objection that was later withdrawn.[162] Subsequently the regional office denied the application based on its finding that the application failed to prove the change criteria under section 402.[163] The Hohenlohes requested a hearing, and DNRC appointed as hearings officer the regional manager who had initially issued the denial. The manager denied the Hohenlohe's request to disqualify himself.[164] In July, 2008, after further hearing, DNRC confirmed the regional office denial. DNRC's order listed a number of grounds for denial:

The applicant failed to prove that the change in return flows would not adversely affect any other water rights on the stream;[165]

The historic claimed volume was excessive; [166]

The applicant had failed to prove that there was any water salvaged because there was no reduction in irrigated acres.[167]

The Hohenlohes filed a petition for judicial review in district court in August, 2008, challenging both the substance of the opinion and the process by which the hearings officer reviewed his own decision.[168] Trout Unlimited and the Montana Water Trust sought and were granted permission to participate as amici curiae on the sole question of whether DNRC's new interpretation of section 85-2-408(7) of Montana Code, relating to the amount of water that could be protected below the historic point of diversion, was correct.[169]

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with author).

161. *Id.* at 5.

162. *Id.*

163. *Id.*

164. *Id.*

165. Application No 41QJ30013407 to Change Water Right Claims nos. 41QJ 7073 and 41QJ 7074, at *16 (Dep't Natural Res. & Conservation Jul. 8, 2008) (final order). In addition, the department asserted that the applicant failed to show that there would be no adverse effect on downstream users from the change in return flow regime. Specifically, the DNRC noted that there was one downstream user on Little Prickly Pear Creek that the applicants did not address (the objector with whom the applicants settled) and that the applicants did not address the potential adverse effects on water users on the Missouri River, which appeared to be the recipient of the return flow.

166. *Id.* at *15. At the heart of this finding was DNRC's conviction that the claimed historically diverted volume was excessive, and therefore constituted waste that exceeded the amount historically necessary for beneficial use. The department actually calculated what it determined to be a reasonable diverted volume, but declined to offer any conditions for approval that would reflect the lower volume.

167. *Id.* at *17. This goes to the issue of "amount protected" below the historic point of diversion in 85-2-408(7). The Department was arguing, in effect, that if irrigated acreage was not reduced, then there was no loss of evapotranspiration, and therefore nothing to be protected below the historic point of diversion. This marked a radical departure from the DNRC's earlier interpretation of 85-2-408(7). Manhattan, *supra* note 113, at 3.

168. *See* Petition For Judicial Review, Hohenlohe v. DNRC, No. BDV 2008-750, *3 (Mont. Dist. Ct. 2009) (on file with the author).

169. *See* Brief of Amici Trout Unlimited and the Montana Water Trust at 1-2, Hohenlohe v. DNRC, No. BDV 2008-750 (Mont. Dist. Ct. 2009) (on file with the

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In June 2009 the district court ruled in favor of the Hohenlohe's application, remanding the application back to DNRC with instructions to "summarily" grant the application.[170] In the opinion accompanying the order, the court dismissed DNRC's findings on return flows, brushed aside the DNRC findings on the historic volume diverted, and overturned the DNRC's construction of section 408 that reversed its previous position that water lost to the protected reach but not lost to evapotranspiration could be salvaged and applied to the beneficial use of fisheries.[171] DNRC appealed the district court decision, challenging the district court's findings as to the historic volume diverted and return flow, but expressly declining to challenge the court's ruling on the construction of section 408.[172] On September 21, 2010, the Supreme Court issued its opinion.[173]

First, notwithstanding the decision of DNRC to accept the district court opinion as to section 85-2-408(7), the court firmly, and extensively upheld the lower court ruling that an instream lease could protect up to the entire amount diverted below the headgate in certain circumstances.[174] In so doing, it noted, with disapproval that the DNRC decision in the Hohenlohe application represented a deviation from past practice.[175]

On other issues of procedure and proof, the court was equally explicit. First, it specifically described the "preponderance of the evidence" standard in section 802 of the Montana Code as "the relatively modest standard that the statutory criteria are 'more probable than not' to have been met."[176] It also held that section 408(7) did not impose an additional requirement of proof upon applicants.[177] Further, the Supreme Court took DNRC to task for abusing its discretion in its

author) (noting a key part of the TU/MWT argument was that the DNRC's interpretation marked a radical departure from its earlier interpretation as embodied in the approval of changes granted to both TU and MWT).

170. *See* Hohenlohe v. DNRC No. BDV 2008-750 at *11 (Mont. Dist. Ct. 2009) (on file with the author).

171. *Id.* at *7-11.

172. *See* Opening Brief for Appellant at 9, Hohenlohe v. DNRC No. BDV 2008-750 (Mont. Dist. Ct. 2009) (on file with author).

173. Hohenlohe v. State of Montana, Department of Natural Resources and Conservation, 240 P.3d 628 (Mont. 2010).

174. *Id.* at 641 ("We recognize, however, that the Department's own past interpretation of the phrase 'amount historically consumed,' as contemplated by § 85-2-408(7), MCA, reflects the reality that under some circumstances the diverted amount and consumed amount will be the same. These circumstances likely will arise in situations where no water historically had returned to the protected reach, and no downstream users likely would be affected adversely.").

175. *Id.* at 635 ("The Department deviated from its own prior interpretation of § 85-2-408(7), MCA, in denying Hohenlohes' application. *See e.g., Authorization Nos. 76F-30023056, Mannix Lease* (2007), and *76F-30011112, Hoxworth Lease* (2005). Moreover, the Department has conflated the subsection (7) consumptive use language with the showing of no adverse effect required by §§ 85-2-402(2) and -408(3), MCA.").

176. *Id.* at 634.

177. *Id.* at 634 ("The Department may not refuse to grant a change of use solely on the ground that the applicant failed to "prove" the limitation articulated by the applicant.").

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review of instream flow change applications.[178] While it reversed the district court's order on the narrow issue that it directed the department to "summarily" grant the application, it made it clear that the department's review should comport with the letter of its pronouncements.[179] Finally, it closed with a pointed slap at the department's length of review, citing the *Bostwick* case and pointedly directing DNRC to "comply with all applicable statutory procedures."[180]

One concurring opinion, by Justice Wheat, offered some specific constructive criticism to DNRC. In short, he suggested that it would serve all concerned—applicants, objectors, and DNRC alike—if the department were more open and forthcoming in its dealings with it sister agency the Department of Fish, Wildlife, and Parks, and with the applicant. Specifically, it chided DNRC for (1) not coordinating with the Department of Fish, Wildlife, and Parks,[181] (2) not disclosing to the applicant the information that its experts gathered and that could have supplemented the record,.[182] and (3) finally for being so tone-deaf as to appoint as hearing examiner the original decision-maker, legal though

178. *Id.* at 639 ("We agree as a general matter that the Department possesses the discretion to require return flow analysis to the extent necessary to determine lack of adverse effect. We are troubled, however, by the Department's failure to use its discretion in a consistent manner so as to provide instream flow change applicants with sufficient guidance as to the factual circumstances that will correlate with a given level of analysis. . . The analysis will vary from one application and accompanying set of facts to the next. This inherent variability does not mean that the Department may act with impunity according to its own whims and without regard for the facts of a case or the underlying purpose and intent of the statute that it is empowered to uphold.").

179. *Id.* at 641("We deem it appropriate under the circumstances to reverse the District Court's order that directed the Department to grant summarily Hohenlohes' change of use application for the full diverted amount. The District Court's order sweeps too broadly and casts aside entirely the Department's discretion granted by § 85-2-408(7), MCA, to limit under appropriate circumstances the amount of water that a change of use applicant may dedicate to instream flow. The Department should evaluate in the first instance Hohenlohes' change of use application consistent with the principles set forth here.").

180. *Id.* ("In evaluating Hohenlohes' application, the Department further must comply with all applicable statutory procedures. For example, the Department issued its final order denying Hohenlohes' application 742 days after the objection deadline had passed. Section 85-2-310(1), MCA (2007). This same type of dilatory response prompted the Eighteenth Judicial District Court, Gallatin County, to grant the applicants a writ of mandate in *Bostwick*. . . The Department cites *Bostwick*, however, for the proposition that this Court may not overturn its discretionary act in refusing to grant Hohenlohes' change of use application. The Department reads a level of administrative immunity into *Bostwick* that does not exist in statute or case law. We in no way intended to condone the Department's procedural deficiencies.").

181. *Id.* at 642.

182. *Id.* at 643 (Justice Wheat was pointed in his suggestion: "[i]nstead, the Department denied Hohenlohes' application for failure to meet their burden to prove lack of adverse effect, the extent of historic use, and historic consumption—all while the Department itself had data that it could have contributed to the record. The Department's actions with respect to this issue disregard the public policy mandate that the State 'shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources.' Section 85-1-101(3), MCA. The Department's adversarial approach does not further the goal that all water resources of the State be put to optimum beneficial use.").

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it may have been.[183]

### E. MONTANA'S CHANGE OF WATER RIGHT PROCESS UNDER HOUSE BILL 40.

After the District Court ruled against DNRC in the *Bostwick* case, but before the Supreme Court decision in that case, the 2009 Montana Legislature passed House Bill 40. The impetus for House Bill 40 was partly in response to the "correct and complete" issues litigated in the *Bostwick* case,[184] partly because of dissatisfaction with DNRC's review of proposed new groundwater developments under the recently passed HB 831,[185] and, partly to provide some clarity to a process that, as evidenced by *Bostwick* and *Hohenlohe*, had grown increasingly unpredictable.[186] House Bill 40 purported to address all of these infirmities in the review process. Specifically, HB 40:

Modified the definition of "correct and complete" by describing it as the documentation necessary for the "department to begin evaluating the information."[187]

Required DNRC to issue a preliminary decision to grant or deny the application and allows for informal communication between DNRC, applicants, and potential objectors within a 120-day period after a correct and complete determination.[188]

If DNRC preliminarily denies the application, the applicant may request a show cause hearing with a *different* examiner than the regional manager who issued the denial.[189]

If the DNRC preliminarily grants the application, the public is given notice and a contested case hearing is held if anyone should object to the application.[190]

Once a matter has been heard and briefed on contested case, DNRC must issue a decision within ninety days after the administrative record has closed.[191]

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183. *Id.* ("Third, I recognize that under then-existing law, the Department was not required to appoint a new hearing examiner. That being said, the Department's obstinate approach to this issue lacks common sense and courtesy. It gives the impression that the Department did anything it could to avoid giving Hohenlohes a fair shake. Once again, the Department's actions paint it as an adversary that is not interested in effecting full utilization, conservation, and protection of Montana's water resources. The Department's obstinance in this case was both unfortunate and unnecessary.").

184. *Hearing on House Bill 40 Before the H. Natural Res. Comm.* 2009 Leg., 61st Sess. 4 (Mont. 2009) (Testimony of John Tubbs, Division Adm.,' Water Res. Div., Mont. DNRC).

185. *Id.* (Testimony of Dustin Stewart, Exec. Dir., Mont. Bldg. Indus. Ass'n).

186. *Id.* at 4. *See also* testimony of David Schmidt, Water Rights Solutions, Inc. In his testimony, Mr. Schmidt criticizes the DNRC for what he describes as shifting criteria and includes correspondence with the DNRC that he asserts exemplifies "the shifting sands of DNRC policy."

187. *See* MONT. CODE ANN. § 85-2-102(8) (2009).

188. *See id.* at § 85-2-307(2).

189. *See id.* at § 85-2-310(1)(b).

190. *See id.* at § 85-2-307(2)(b).

191. *See id.* at § 85-2-310(5). Prior to the 2009 amendments the deadline was 180

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### F. REVIEW OF CHANGES OF APPROPRIATION IN A POST-HOUSE-BILL-40 WORLD.

House Bill 40 addresses a number of the common complaints of the past. The most contentious of those include: (1) length of time between filing and DNRC decision; (2) a moving target of policy and legal interpretation; and (3) perceptions of fairness in agency deliberations.[192]

DNRC has taken some action in response to the mandates in House Bill 40. Perhaps the most notable of these actions has been the development of a "preliminary decision" template for reviewers to use in announcing a preliminary decision on a proposed application.[193] The Department appears to have derived the template from the form previously used to announce a decision in which there has been a hearing on the application.[194] The format of the template is somewhat of a checklist approach, and if followed should provide a relatively clear path to the DNRC's reasoning behind the preliminary decision.[195] DNRC anticipates that the Preliminary Determination Change Template will assist its staff in providing sound and consistent review of the change process under the HB 40 structure.

In addition to the internal guidance implied in the development of the Preliminary Determination Change Template, DNRC initiated a series of workshops held at various locations around the state in 2009 to explain to the public how to complete DNRC's change and new permit applications.[196] Unfortunately, some have characterized the substance of these workshops as superficial and not particularly helpful in describing the level of documentation that DNRC needs for its review.[197]

After House Bill 40, the Change Review process, at least on paper, progresses as follows:

The applicant files an application; DNRC must notify the applicant of any deficiencies in the application within 180 days;[198]

The applicant has ninety days to address the deficiencies that the

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days.

192. *See* DNRC WATER RESOURCES DIVISION STRATEGIC PLAN 2005-2010, *supra* note 111.

193. Draft Template for Preliminary Determination to Grant Change (July 16, 2009) (on file with the Dep't of Natural Res. and Conservation).

194. *See* Application No. 41QJ-30013407 to Change Water Right Claim Nos. 41QJ-17073-00 and 41Q17074-00 by Christian C. and Nora R. Hohenlohe (Dep't of Natural Res. and Conservation, Jul. 28, 2008) (on file with DNRC) (final order) (exemplifying the style prior to House Bill 40); *compare* Draft Template for Preliminary Determination, *supra* note 190 (template of forms under the new rules).

195. *See* Draft Template for Preliminary Determination, *supra* note 193.

196. Interview with Patrick Byorth, Staff Attorney, Trout Unlimited Mont. Water Project, in Bozeman, Mont. (Sept. 17, 2010).

197. *Id.*; Interview with Barbara Hall, *supra* note 150.

198. MONT. CODE ANN. § 85-2-302(5) (2009); Application No. 76F-30028985 to Change Water Right Claim No. 76F 98201-00 by Talan, Inc., Final Order (Dep't of Natural Res. and Conservation, Feb. 26, 2010) (on file with DNRC) (illustrating that the application Trout Unlimited filed under the terms of HB 40 has progressed well, as DNRC sent a deficiency letter well within the 180 day time limit).

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department identified;[199]

Upon receipt of the applicant's corrections, the department has an indeterminate amount of time to determine if the application is correct and complete;[200]

Once the department has determined that an application is correct and complete, DNRC has 120 days to make a preliminary determination as to whether the application meets the criteria, during which time the DNRC may meet with the applicant; if the preliminary determination is for approval, the application goes to public notice;[201]

Persons have from fifteen days up to sixty days to file objections;[202]

If an application goes to hearing, the DNRC has ninety days to issue a decision once the administrative record is closed.[203]

DNRC staff does not appear to be of one mind about the ability to meet new deadlines.[204] Some staff members are confident of meeting the deadlines;[205] however, others suggest that the levels of staffing may significantly affect the agency's ability to meet the statutory deadlines.[206]

Given that it became law a little over a year ago, it may still be too early to tell if House Bill 40 has had its desired effect; early indications seem to be mixed. On one hand, a tabulation of applications filed under House Bill 40 shows that between July 2009, and July 13, 2010, of the thirty-two change applications filed, DNRC had approved only one.[207] DNRC terminated seven applications without going to notice, and gave two others preliminary determinations for approval, which did

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199. MONT. CODE ANN. § 85-2-302(6) (2009).

200. *See* MONT. CODE ANN. §§ 85-2-302, -307 (2009).

201. *See id.* at. § 85-2-307 (2009); *see* Interview with Kerri Strasheim, Bozeman Reg'l Manager, Dep't of Natural Res. and Conservation, in Bozeman, Mont. (July 23, 2010) (describing process of how, once a regional manager issues a preliminary decision to grant or deny the proposed changes, the New Appropriations Program staff ["central office" composed of two to three resource specialists] reviews the application for quality control and consistency insurance); *see* Interview with Andy Brummond, *supra* note 81 (explaining how the central office review, a relatively recent practice, has become a source of contention for applicants, because the central office may override the recommendations of the regional staff after months of discussion between this staff and the applicant, a process which underscores the applicants' perception of DNRC's arbitrariness).

202. MONT. CODE ANN. § 85-2-307 (2009).

203. *Id.* at. § 85-2-310(5) (2009); *see also* In The Matter of Application No. 76F-30028985, *supra* note 198 (discussing the DNRC took nearly seven months to issue a final decision in Trout Unlimited's only contested case proceeding completed since enactment of HB 40).

204. Interview with Kathy Arndt, Water Res. Specialist, Dep't of Natural Res. and Conservation, Helena Reg'l Office, in Helena, Mont. (Sept. 13, 2010); *see* Interview with Kerri Strashheim, *supra* note 201.

205. *Id.*

206. Interview with Kathy Arndt, *supra* note 204.

207. *See* Telephone Interview with Mike McLane, *supra* note 51, (describing that the one application that did receive approval, application no. 30047599-76M, completed the process in just over six months); *see* E-Mail from Barbara Hall, Legal Director, Clark Fork Coal., to Stan Bradshaw, Counsel, Mont. Water Project (Sept. 16, 2010) (on file with author) (providing data on change applications).

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go to public notice.[208] Thus, it is difficult to conclude much from this sample about the timeliness of review.

A review of the change processes in two other states, Washington and Colorado, indicates that these states have grappled with many of the same challenges that Montana has; namely, timeliness, transparency of the change criteria, and the accessibility of the process.[209] While the central goal of each state's process is the same as Montana's—to protect other water users from injury that could arise from a proposed change—each state approaches the task differently.[210] The examination of the change process in these states may provide some insight into other opportunities for Montana to improve its change process.

## V. WASHINGTON'S CHANGE OF WATER RIGHT APPLICATION & REVIEW PROCESS.

### A. SUMMARY OF WASHINGTON STATUTORY STRUCTURE.

Washington has already allocated much of its water for use, so the state allows individuals to change elements of existing water right permits, certificates, or claims in order to adjust to new water needs.[211] To approve a water right change, Washington's Department of Ecology (DOE) "must find that three criteria have been satisfied; (1) that the applicant holds valid water rights; (2) that the proposed change will be for a beneficial use; and, (3) that the change will not result in any adverse impact on existing rights."[212] One statute authorizes Washington's change of water right process[213] and a wealth of opinions issued by the Pollution Control Hearings Board further guides the process[214]. Washington's change statute, unlike Montana's, explicitly

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208. *See* Telephone Interview with Mike McLane, *supra* note 51; *see also* E-Mail from Barbara Hall to Stan Bradshaw, *supra* note 207.

209. James S. Witwer and P. Andrew Jones, *Statutory and Rule Changes to Water Court Practice*, 38 COLO. LAW. 53 (2009); *see also* Telephone Interview with Robert Barwin, Envtl. Eng'r, Wash. Dep't of Ecology Water Res. Program (July 15, 2010); *see also* Telephone Interview with Aaron Penvose, Project Manager, Wash. Water Project, Trout Unlimited (July 23, 2010).

210. *See* WASH. REV. CODE § 90-03-380 (2010) (example of difference in Washington's approach); *see* Mark Honhart, *Carrots for Conservation: Oregon's Water Conservation Statute Offers Incentives to Invest in Efficiency,* 66 U. COLO. L. REV. 827, 838 (1995) (illustrating the different approaches taken in states such as Colorado towards water law issues).

211. SMITH, P., STATE OF WASH., DEP'T OF ECOLOGY, *Changing or Transferring an Existing Water Right, in* WATER RESOURCES PROGRAM, PUB NO. 98-1802-WR (2008); *See generally* STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM POLICY, POL-1200 (1999) ("'Change' means a modification or combination of modifications, in whole or in part, of the point of diversion or withdrawal, purpose of use, or a transfer of water right, or other limitation or circumstance of water use.").

212. Knight v. State, Pollution Control Hearings Bd., Nos. 94-61, 94-77, 94-80 (1995), *aff'd*, 137 Wash.2d 118 (Wash. 1999).

213. WASH. REV. CODE § 90.03.380 (2008) (authorizing the Department of Ecology to approve applications for a change or transfer of existing water rights).

214. State of Wash., *Pollution Control Hearings Board*, ENVTL. HEARINGS OFF., http://www.eho.wa.gov/Boards_PCHB.aspx (last updated 2008) (explaining that the Pollution Control Hearings Board is the administrative body which hears appeals

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states that a change may be permitted if there is "no increase in annual consumptive use."[215] In addition, change applicants in Washington are not faced with the challenge of estimating consumptive use that occurred forty or more years in the past.[216] While DOE[217] has not developed additional administrative rules to govern change applications, the agency's Water Resources Program Policies, provide highly accessible guidance for agency reviewers.[218]

The following summarizes Washington's change of water right application and review process:[219]

An applicant files an application to change a water right by one of three methods: (a) apply directly to Ecology, (b) apply to a local Water Conservancy Board, or (c) enter into a Cost Reimbursement Contract with Ecology.[220]

Ecology reviews the application for completeness and informs the applicant of any informational deficiencies.[221]

Once it has finished the completeness review and the applicant has remedied any deficiencies, Ecology sends a Legal Notice of Application to the applicant.[222] The applicant then publishes information of the proposed change for two weeks, notifying the public of its thirty-day objection period.[223]

At the end of the objection period, Ecology initiates a tentative review of the water right's extent and validity,[224] and that of any potentially impaired rights.[225] Ecology notifies the applicant if

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from orders and decisions of the Department of Ecology and other agencies as provided by law, and consists of three governor-appointed members).

215. WASH. REV. CODE § 90.03.380 (1) ("[A]nnual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.").

216. *Id.*

217. WASH. REV. CODE § 43.21A.020 (2010) (creating Washington Department of Ecology is the administrative agency and authorizing Ecology to govern the state water rights and management programs).

218. Telephone Interview with Robert Barwin, *supra* note 209.

219. WASH. REV. CODE § 90.03.380. *See generally* Smith, *supra* note 211 (explaining that the process varies slightly depending on the type of water instrument proposed for change—a perfected water certificate, a water right permit, or a water right claim).

220. Smith, *supra* note 211211; *see generally* STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM, ECY 040-1-97, APPLICATION FOR CHANGE/TRANSFER OF WATER RIGHT (2008) (demonstrating the application process).

221. *Compare* Smith, *supra* note 211, *with* MONT. CODE ANN. § 85-2-102(6) (requiring that all information submitted be "correct and complete").

222. Smith, *supra* note 211.

223. *Id.*

224. STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM POLICY, POL-1120 (2004) (defining a tentative determination as the Water Conservancy Board's or Ecology's finding of the amount of water perfected and beneficially used under a water right that has not been abandoned or relinquished).

225. WASH. REV. CODE § 90.03.380 (noting that a transferred water right or change in point of diversion may be granted only to the extent that water right was historically put to beneficial use); Okanogan Wilderness League, Inc. v. Twisp, 133 Wash. 2d 769, 777, 781 (Wash. 1997) (explaining that in deciding whether to approve

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additional information is needed to proceed.[226]

Ecology staff and unit supervisors summarize the investigations in a Report of Examination (ROE) which contains a recommendation to deny or grant the change.[227] The ROE is then put before an Ecology section manager who, if approves, issues either a final ROE, or an Order approving the ROE which may contain specific, *reasonable* conditions for the change approval.[228]

The applicant or any member of the public may appeal Ecology's decision to the Pollution Control Hearings Board (PCHB) within thirty days, with the burden of proof falling on the appellant to prove Ecology is in error.[229] PCHB may affirm, deny or modify Ecology's decision.[230]

If Ecology approves a change to a water right *permit*, it will issue a Superseding Permit with a set development schedule for the change completion.[231] If applying to change to a *claim* or *certificate*, the applicant may request an extension in order to develop a three-phase project completion plan.[232] After the applicant completes the construction and submits the proper forms,[233] Ecology collects fees and conducts a Proof of Examination before issuing the final certificate.[234]

### B. THE APPLICANT'S BURDEN IN WASHINGTON STATE.

In Montana, the burden remains with the applicant throughout the change review process to prove that the proposed change meets the criteria.[235] While the two processes require similar findings, much of what would be the applicant's burden in Montana is ultimately the agency's responsibility in Washington.[236]

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a change under RCW 90.03.380, Ecology must tentatively determine "the existence and extent of the beneficial use of a water right").

226. Smith, *supra* note 211; *see generally* Telephone Interview with Robert Barwin, *supra* note 209 (explaining that for most applicants, the "extent and validity review" is the most onerous part of the process); *see also* Telephone Interview with Aaron Penvose, *supra* note 209.

227. Smith, *supra* note 211.

228. *Id.*; Merritt v. State, Pollution Control Hearings Bd., Nos. 98-140, 98-202, 98-272, 98-273 (1999) (holding that Ecology has the authority to impose reasonable conditions when granting an order, and the imposition of a condition does not transform the certificate into a permit to develop new water); *see also* Telephone Interview with Aaron Penvose *supra* note 209 ("[Ecology] conditions most rights now. [Frequently, changes are] conditioned on an instream flow rule, which most basins have now.").

229. Smith, *supra* note 211; Knight v. State, Pollution Control Hearings Bd., Nos. 94-61, 94-77, 94-80 (1995), *aff'd*, 137 Wash.2d 118 (Wash. 1999).

230. Smith, *supra* note 211.

231. STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM POLICY, POL-1280 (2009).

232. *Id.*

233. STATE OF WASH., DEP'T OF ECOLOGY, WATER RES. PROGRAM POLICY, Form ECY 040-74 (2008).

234. Smith, *supra* note 211.

235. *In re* Application of Change of Water Rights No. 101960-41S and 101967-41S by Keith and Alice Royston, 816 P.2d 1054, 1057 (Mont. 1991).

236. "The right to the use of water which has been applied to a beneficial use [Ecology must make a tentative determination of extent and validity of the right] in

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In Washington, an applicant must complete an Application for Change or Transfer of a Water Right for each right or claim subject to change. The form requires the applicant to describe the right and the proposed changes, including: the point of diversion, purpose of use, timing and rate of use, and an aerial map depicting the place of use.[237] With the applicant's information in hand, Ecology bears the ultimate burden of calculating the extent of historic use.[238] Similarly, Ecology bears the burden to show that the change will not impair existing water rights.[239]

### C. WASHINGTON STATE'S CHANGE OF WATER RIGHT APPLICATION STATISTICS.

Ecology processes change of water right applications at an average of eight to nine months at minimum and an indeterminate amount of time at maximum.[240] Aside from the timelines to respond to Water Conservancy Board recommendations, Ecology decision-making is not subject to any deadlines. The lack of temporal pressure on the agency is likely a central contributor to Washington's sizeable backlog of change applications, which currently sits at around one thousand.[241]

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the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights [Ecology must then make an impairment determination]." WASH. REV. CODE Ann. 90.03.380(1) (West 2010); *see also* R.D. Merril Co. v. State Pollution Control Hearings Bd., 969 P.2d 458, 463 (Wash. 1999) (When the Department of Ecology is asked, under Wash. Rev. Code 90.03.380, to approve a requested change in the point of diversion or use made of a previously perfected water right, or to approve a transfer of the right to another, the department must tentatively determine the extent to which the right continues to be applied to a beneficial use; i.e., the Department must preliminarily quantify the right and determine if the right has been abandoned or relinquished in whole or in part.).

237. Application for Change or Transfer of Water Right, Form ECY 040-1-97, Department of Ecology, State of Washington (an applicant should present any information depicting the owner's historic use of the water right—such as electric bills for a pumping station, receipt for purchase of water system equipment, dated aerial photographs, and affidavit(s) of person familiar with the water right—then may work with the permit writer to reconcile any remaining concerns or discrepancies). *See also,* Penvose, *supra* note 209.

238. To compute the consumptive use of the water right, Ecology prefers meter record data, but will also accept calculations taken by pump, motor, sprinkler layout and nozzle delivery. *See* ELWIN A. ROSS & LELAND A. HARDY, NATURAL RESOURCES CONSERVATION SERVICE, NATIONAL ENGINEERING HANDBOOK, PART 652, IRRIGATION GUIDE 7-9, 7-10 (1997), *available at* http://www.wa.nrcs.usda.gov/technical/ENG/ irrigation_guide/index.html (Sept. 2, 2007)*; see also* Penvose, *supra* note 209.

239. *See* WASH. REV. CODE ANN. 90.03.380(2) (West 2010). At this stage, Ecology must make tentative determinations of the extent and validity of any other water rights that could be impaired by the proposed change. Ecology requires applicants to obtain signatures from adjacent property owners within the described place of use. While this requirement may speed the process by putting potential objectors on early notice, the extent and validity review remains one of the more complex, time-consuming stages of the change review. Penvose, *supra* note209.

240. Barwin, *supra* note 209.

241. Penvose, *supra* note 209; Barwin, *supra* note 209218.

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Experts further attribute the backlog to Ecology's burden to produce the required evidentiary showings. "Insufficient information does not equate to the denial of an application, therefore, coupled with an insufficient budget to gather all the necessary information or, alternatively, political support for Ecology to place that burden on applicants, we have a large backlog."[242]

### D. INTERNAL AGENCY GUIDANCE ON PROCESS IMPLEMENTATION.

Most of the intra-agency training occurs on the job (e.g., periodic internal instructional lectures on particular topics held by the senior staff).[243] The Department of Ecology also compiled an extensive collection of guidance documents "to guide and ensure consistency among water resources program staff in the administration of laws and regulations."[244] Ecology produced the Water Resources Program Policies and Procedures using agency staff management teams and by incorporating public comment (however, the policies are not formal rules passed through the full APA rulemaking process).[245] These policies and procedures inform how the Department of Ecology applies case law along with the explicit statutes. They are the "meat" of the agency's accountability.[246]

Ecology posted the Water Resources Program Policies and Procedures on its website in a user-friendly format to assist applicants in managing their water rights and to publicize agency rationale.[247] Although Ecology is not statutorily required to post draft reports of examinations relating to new water right and change applications, the agency elected to open them to a 30-day public review.

> Public notice of applications is a key procedural element of the permit application process intended to protect the rights of existing water right holders, and ensure that interests of other citizens are considered during evaluation of applications. . . .
>
> One of the Water Resources Program's (WRP) goals is to improve both the quality and consistency of decisions made in response to applications for new permits and changes to existing water rights. In recent years, the WRP has made efforts to improve its training program for staff assigned to review applications and recommend approval or denial of applications for permits and changes or

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242. Telephone Interview with Robert Barwin *supra* note 209 (discussing Black Star Ranch v Ecology, 63 Wash. App. 1045 (1992) (unpublished) (Ecology must have sufficient information to make affirmative findings to approve or deny an application), and Andrews v. Ecology, PCHB No. 97-20 (1997) (Where incomplete information exists to determine whether the existing rights of others would be impaired, a change cannot be granted.)).

243. Barwin, *supra* note 209.

244. Washington Department of Ecology, *Water Resource Program Policies and Procedures* http://www.ecy.wa.gov/programs/wr/rules/pol_pro.html.

245. Barwin, *supra* note 215.

246. *Id.*

247. *Id.*

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> transfers. Part of the effort includes improving the tools the staff and decision makers rely on. Another part is development of clear guidance and policy to facilitate more consistent decisions.
>
> Improved quality and consistency can be achieved by intensifying the program's efforts to ensure that reports of examination are factually correct.[248]

Ecology's additional notice and comment period thus promotes more accurate record-building, earlier dispute-resolution, and more transparent agency action.

## VI. COLORADO CHANGE OF WATER RIGHT APPLICATION & REVIEW PROCESS

In light of Colorado's longstanding water scarcity challenges, the state's process for changing a water right may provide Montana with a useful context in which to consider the realities of twenty-first century water management.[249] "With less water available for appropriation to begin with, Colorado legislators may be more concerned with protecting existing water rights than in creating new water rights."[250] While most of the Northwest and Rocky Mountain states face increasing water demands on fully or over-allocated basins, Colorado must not only cope with an exploding population, also allot water for its four neighboring states and perpetrate multiple, expensive trans-mountain diversions.

Colorado's change process reflects the magnitude of its water scarcity pressures in two important ways. First, the process is well developed. Colorado has recognized the right to change water rights since 1899 and has applied a highly structured judicial approach to its application process since 1969.[251] Since the principle of "maximum utilization" or "optimum use" still prevails in water management decision-making, courts are more willing to grant changes subject to

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248. Internet Posting of Reports of Examination by Ken Slattery, *Water Resources Program Policy: POL-1005*, WASHINGTON STATE DEPARTMENT OF ECOLOGY (Jan. 1, 2007), http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol1005.pdf

249. *See* Mark Honhart, *Carrots for Conservation: Oregon's Water Conservation Statute offers Incentive to Invest in Efficiency.* 66 U. COLO. L. REV. 827, 841 (1995) ("Montana's three largest watersheds carry more than three times the water Colorado's largest rivers carry. Oregon's [similar to Washington's] rivers carry more than ten times Colorado's river volumes.").

250. *Id.*

251. *See* An Act in Relation to Irrigation, ch. 185, 1899 Colo. Sess. Laws 235 (The statute originally allowed changing only a water right's point of diversion.); Adjudication Act of 1943, ch. 190, 1943 Colo. Sess. Laws 613 (codified as amended at COLO. REV. STAT. § 148-9-22 (1963)); COLO. REV. STAT. §§ 148-149 (1963) (decreed the changes of the points of diversion consistent with the usage over the previous years); Water Rights Determination and Administration Act of 1969, COLO. REV. STAT. § 37-92-101 (2010) (defined "change of water right," established water right adjudication process, integrated ground and surface water management, etc.); *see* COLO R. CIV. P. 90(e)-(f) (amendments setting timelines by which water judges and referees must issue decisions for applications to change water rights).

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modifications or conditions rather than deny an entire application.[252]

Second, the process is generally predictable. While the applicant's evidentiary burdens are high and often expensive, water judges and referees apply statutory and Water Court Rules strictly and consistently. Numerous factors may contribute to this uniformity, but perhaps the most important factor has been the development of a clear line of precedent arising from the judicially-driven change process.[253]

### A. COLORADO'S WATER COURT SYSTEM.

Unique in the West, Colorado manages its water rights using a judicially-supervised system, rather than agency permitting.[254] Water courts, staffed by water judges, referees, and clerks, adjudicate all water matters within the state's seven districts—each district covering a major river basin.[255] The court hears each application to change a water right in a separate litigation process, subject to the Water Rights Determination and Administration Act of 1969, Colorado's Rules of Civil Procedure (C.R.C.P.), the Water Court Rules (Uniform Local Rules for All State Water Court Divisions), and a substantial body of case law.[256] Pursuant to C.R.C.P. 15, courts consider a change application to be a complaint, and a statement of opposition to be a responsive pleading.[257] Stripped to its essentials, an application for a change or new use goes through the following process:

Applicant files an application with the appropriate district water court.[258]

After the water clerk files and numbers the application, the district water judge "promptly reviews" the application to determine whether it contains sufficient information to be published for public notice.[259] If the application is incomplete for publication, the water judge sets a date by which the applicant may submit the required information to avoid application dismissal.

The water clerk publishes the complete application in the court's monthly resume, which serves as public notice of the proposed change.[260] Individuals opposing the change are allotted two months in which they may file statements of objection with the water court.[261]

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252. Fellhauer v. People, 447 P.2d 986, 993 (Colo. 1968) ("[i]t is implicit in [Colorado's] constitutional provisions that, along with vested rights, there shall be maximum utilization of the water of this state.").

253. *See* Ziemer, *supra* note 11.

254. Fort Lyon Canal Co. v. Catlin Canal Co., 642 P.2d 501, 506 (Colo.1982) ("[C]hanges of water rights cannot be effected in any manner other than through judicial approval, following statutorily authorized procedures.").

255. *See* COLO. REV. STAT. § 37-92-305 (2010).

256. Water Rights Determination and Administration Act of 1969, COLO. REV. STAT. § 37-92-101 (2010); COLO. R. CIV. P. 86-91 (general provisions); WATER CT. R. 1-10.

257. *See* COLO. R. CIV. P. 15.

258. COLO. R. CIV. P. 90 (dispositions of water court applications).

259. *Id.*; *see also* COLO. REV. STAT. § 37-92-302(2)(a) (approved standard forms).

260. COLO. R. CIV. P. 90, *supra* note 256.

261. WATER CT. R. 6(e).

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The water judge refers each case to a water referee, except those that the judge determines to retain for adjudication.[262] A water referee examines the application, statements of opposition, and Division Engineer's Report, consults with the division engineer, and proposes a decree for the case.[263]

The water court hears protests from the referee's decision and issues a decree.[264]

An applicant may appeal a water court decree directly to the Colorado Supreme court.[265]

Notwithstanding the apparent virtues of the Colorado system, some of the same challenges that Montana has faced arose in Colorado. In 2007, in response to those challenges, the Chief Justice of the Colorado Supreme Court established a Water Court Committee to "(1) to review the water court process and identify possible ways through statutory and/or rule changes to achieve efficiencies in water court cases while still protecting the quality of outcomes; and (2) to ensure the highest level of competence."[266] Generally, the water court has described deadlines and timelines by rule.[267]

The Water Court Committee included the broad spectrum of stakeholders in its membership, including water users, court personnel, government and private engineering professionals, and attorneys.[268] One compelling feature of this committee effort is that the Supreme Court circulated two surveys—one for members of the public who interact with the Water Court and one for Water Court professionals such as engineers, attorneys, and court personnel—to identify some consensus as to what problems the Committee should address.[269]

The committee recommended a number of amendments to the Water Court Rules which the Court subsequently adopted.[270] Finally, the committee specifically recommended "the creation of an ongoing educational program designed specifically for experts, attorneys, referees, judges, and state water administration officials involved in

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262. *See* WATER CT. R. 6(a) (Referral to Referee, Case Management, Rulings, and Decrees); *Gardner v. State*, 200 Colo. 221 (1980) (explaining that aside from those water rights requiring adjudication, water judges must refer all applications and statements of opposition to a water referee. The water referee's authority is derivative from, not greater than the water judge's authority. A case will also be heard by a water judge if the water referee's decision is protested and the parties agree to proceed to court.).

263. WATER CT. R. 6(b) ("[t]he referee's ruling and proposed decree shall set forth appropriate findings and conditions as required by COLO. REV. STAT. § 37-92-303 & 305. . . .").

264. *Id.*

265. *See* COLO. REV. STAT. § 37-92-304 (2010).

266. Witwer, *supra* note 209, at 53.

267. *See* WATER CT. R. 6, 11.

268. Witwer, *supra* note 209, at 53.

269. *Id.* (indicating three primary areas of improvement per surveys: (1) timeliness of water court judge's decisions, (2) cost of the process, and (3) need to improve professionalism in water court practice).

270. *Id.* at 54-57.

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water court proceedings."[271]

B. THE COLORADO APPLICANT'S BURDEN.

Individuals who wish to change a Colorado water right face a considerable evidentiary burden. Water courts require detailed accounts of the applicant's original decree, actual use, and proposed change of the water right. Like Montana and Washington, Colorado's change of water right form requires the applicant to provide a comprehensive description of the existing right's character; including the legal location or GPS coordinates, date decreed, purpose and amount of decreed use, point of diversion.[272] As in Montana, the applicant is also responsible to provide data informing the more complex showings of non-injury and historic consumptive use. An applicant in Colorado must provide a complete statement of change, including topographic maps depicting the existing and proposed places of use, monthly records of actual diversions on which the applicant intends to rely (to the extent the records exist), and in some cases, an analysis of historical return flow patterns.[273]

An applicant for a water right change bears the initial burden to show the change will not injure others' existing water rights.[274] Once the applicant makes a *prima facie* showing of the absence of injury, the burden shifts to the objector to rebut the applicant's case by presenting evidence to the contrary. Upon the objector's submission of evidence, the burden shifts back to the applicant to show a lack of injury by preponderance of the evidence.

Water referees and judges must afford the applicant an opportunity to propose conditions to prevent injury to opposing right holders.[275] If the applicant's proposals do not fully mitigate potential injury, the objectors may propose their own protective terms and conditions for

271. *Id.* at 56. The implementation of this program began in the fall of 2009. Sponsored by the Colorado Bar Association, the program includes a water law module, a hydrology and engineering module, and a geographic module that addresses site-specific issues in selected basins. Telephone Interview, Pricilla Fullmer, Program Attorney, Colo. Bar Ass'n (Sept. 16, 2010).

272. Colo. Application for Change of Water Right Form JDF 299W, Question 2.

273. COLO. WATER CT. RULE 3(f). *See also* Pueblo W. Metro. Dist. v. Se. Colo. Water Conservancy Dist., 717 P.2d 955, 958-60 (Colo. 1986), *and* Central Colo. Water Conservancy Dist. v. City of Greeley, 147 P.3d 9, 14-15 (Colo. 2006) (citing Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999) ("the right to change a . . . type, place or time of use, is limited . . . by the appropriation's historic use."), *and* Williams v. Midway Ranches Prop. Owners Ass'n, Inc., 938 P.2d 515, 521-22 (Colo. 1997) ("[f]or change purposes, the lawful historic use of an absolute decree is measured over a representative period of time for the appropriation made.").

274. *See* COLO. REV. STAT. § 37-92-305(3) (2010) (a change of water right must be approved if it "will not injuriously affect the owner of or person entitled to use water under a vested water right or decreed conditional water right"); Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co., 33 P.3d 799, 810-11 (Colo.2001); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo. 1988); COLO. WATER CT. RULE 6(d).

275. *See* COLO. REV. STAT. § 37-92-305(4)(a)(I)-(IV) (2010).

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the court's consideration.[276] A decree of change must allow for a reconsideration of the change after implementation to ensure no resulting injury to existing water rights.[277]

## C. COLORADO INTERNAL GUIDANCE.

Colorado law requires that its water referees "possess such training and experience as to qualify them to render expert opinions and decisions on the complex matters of water rights and administration."[278] While this description is silent as to what might constitute "training and experience" sufficient to the task, it is nonetheless a legislative acknowledgement that the proper consideration of change applications requires professional training and expertise in the subject matter, at least equal to the professionals who regularly interact with the process through applications or objections.

## D. TIMELINES IN COLORADO'S CHANGE OF WATER RIGHT PROCESS.

Colorado's change statute provides some deadlines for referees to rule,[279] but the obligation of the water court is otherwise slight, with terms that evince a general desire for promptness but little specificity of obligation.[280] Since 1969, referees had sixty days after the filing of objections to rule on an application. Referees observed this largely in the breech.[281] Colorado has recently taken action to improve the timeliness of water court actions on change and new use applications. The new Water Court Rules more clearly define the sixty-day requirement for referees and applicants in the expectation that it will reduce the length of their deliberations.[282]

For cases before water referees, the 2009 amendments reaffirm the sixty-day statutory deadline for unopposed applications and require a

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276. *See id.* at § 37-92-305(3)(a).

277. *See id.* at. § 37-92-304(6) (the water judge designates the period after making comprehensive findings and may extend the reconsideration time upon determining the applicant's non-injury showing is insufficient).

278. *Id.* at § 37-92-203(6).

279. *Id.* at § 37-92-303(1)-(2) (sets a 60-day time limit for referees to rule).

280. *See, e.g., id.* at. § 37-92-304(7) (2010) ("Judgments and decrees shall be entered promptly with respect to matters that have been heard and matters in which no protest has been filed or order of referral entered.").

281. Witwer, *supra* note 209, at 55. *See also* OFFICE OF THE COLORADO STATE COURT ADMINISTRATOR, WATER DATA PRESENTED TO THE SUPREME COURT WATER COMMITTEE, Feb. 11, 2008 (Between 2001 and 2007, Colorado processed an average of 162 applications each year. Table 1: Statewide Water Filings by Case Type. Within these years, applications to change water rights were the third most frequent type of water case filed (45.56 percent of all water cases in Division 3 and 12.05 percent of all water cases statewide). Table 4: Percent of Filings by Case Type and Division. Prior to the 2009 Water Court Rule amendments, the estimated time taken to process a change application before a water referee was a minimum of two years as compared to an average of one year process time for all applications. Table 5: Colorado Water Courts, time to Disposition FY 2007. In the 2007 fiscal year, the time taken for a change proceeding to reach disposition was 2.21 years. Table 5: Colorado Water Courts, time to Disposition FY 2007.); *see also* Personal Communication to Amy Beatie, Colorado Water Trust (July 2010).

282. Witwer, *supra* note 209, at 55.

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decision "as quickly as possible" or within one year in opposed cases.[283] As of February 2009, Colorado's water referees and judges are required to process change applications within specific time constraints now mandated by the Water Court Rules. The amendments also set deadlines for the water referee to obtain the Division Engineer's reports, schedule conferences when adverse parties file statements of opposition, and file comments, decrees and status reports related to the Case Management Plan. Cases the water court hears take significantly longer than cases a water referee hears.[284] The trial length itself and the time to post-trial disposition can vary greatly, depending on the nature of dispute and proposed change.

## VII. RECOMMENDATIONS FOR MONTANA'S CHANGE PROCESS.

The comparison between Montana, Washington, and Colorado's change processes reveals that all three states wrestle with some of the same challenges, including how to: be timely in processing applications while maintaining a careful, in-depth review; make the change process evolve along with the evolution of the state's water law; and maintain a consistent, professional level of review across agency or water court staff. While there are no "silver bullet" solutions to any of these challenges, each state has made exemplary progress in some area, from which the other two states could learn.

Montana's DNRC, for example, appears to have the smallest backlog of applications, and the most transparent time-frames to complete specific stages of review. Washington's DOE appears to have the most systematic, thorough approach to training new staff, and developing the expertise of current staff. Colorado's water court system appears to have developed the most consistent level of review across staff and jurisdictions. There are lessons to be learned from each of these state-specific accomplishments. Below, the authors present their best effort to synthesize these state-specific accomplishments, and apply them to the Montana change process.

### A. RECOMMENDATION ONE: A WATER RESOURCES ADVISORY COMMITTEE.

DNRC's Strategic Plan already identified the authors' primary recommendation: create and maintain a Water Resources Advisory Committee as described in the 2005-2010 DNRC Strategic Plan.[285] Given the quick pace of evolution in Montana's water law at the turn

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283. COLO. WATER CT. R. 6(e); COLO. REV. STAT. § 37-92-303(1) (2010).

284. COLO. WATER CT. R. 11(b)(1) (at issue date set 45 days after the earlier of either entry of an order of referral or filing of a protest to the ruling of the referee, unless the court directs otherwise.); COLO. WATER CT. R. 11(b)(4) (Applicant must set the trial date 60 days after the case is at issue.), *available at* http://www.courts.state.co.us/userfiles/File/Full_set_of_CRCP_and_Water_Rules.doc.

285. *See* DNRC Water Resource Division Strategic Plan 2005-2010, *supra* note 111, at 5.

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of the twenty-first century, it makes sense to engage Montana's water resource professionals in an advisory role to the agency. The Advisory Committee can help provide constructive feedback to the agency about what is—and is not—working from an applicant's and objector's perspective as DNRC grapples with implementation of its new statutory directives.[286] In addition, the Advisory Committee can help bridge the gap in institutional memory and continuity that stems from inevitable staff turn-over within DNRC.

Colorado's experience with such a multi-stakeholder, professional Advisory Committee appears to have been positive.[287] The circulation of surveys to professionals and applicants that had regularly engaged with the Colorado Water Court system helped identify the highest-priority issues,[288] and the Advisory Committee's recommendations were ultimately adopted by rule amendment.[289] Learning from Colorado's experience, a Montana Advisory Committee should likewise include the regulated public and professionals interacting with the Agency on a regular basis. The circulation of surveys may also provide a very constructive way to channel the collective experience of water resource professionals who engage with the agency in Montana, and make that resource available to DNRC.

The authors see several issues that such an Advisory Committee could tackle. One such issue could be to work with the DNRC to provide an inventory of accepted methodologies for establishing pre-1973 historic use and return flows. Such an inventory of methodologies should likewise address the amount of information that meets the change application standard of correct and complete, and then describe what meets the burden of proof required to obtain a grant of a change application, in the context of each particular methodology.[290] While, of course, such an inventory of methodologies could not provide a "cookie cutter" or "one size fits all" approach to the highly fact-specific realm of water rights transfers, it would provide a very useful touchstone of consensus expertise on particular, troublesome issues.

### B. RECOMMENDATION TWO: GREATER PROFESSIONAL TRAINING FOR DNRC STAFF.

The authors offer a second recommendation, related to the first. Just as an inventory of accepted methodologies for particular criteria in the change process would be helpful to potential applicants, training for DNRC staff in methodologies that applicants can rely on to meet the change application criteria would be very helpful. It would help improve the professional expertise of the DNRC staff so that they would

286. *See* discussion *supra* Parts II A., IV E (describing passages of HB 831 and HB 40).
287. *See* Witwer, *supra* note 209, at 53.
288. *Id.* at 53-54.
289. *Id.* at 53.
290. *See, e.g.,* WATER RIGHT CHANGES: INFORMATION AND INSTRUCTIONS, *supra* note 71 (analyzing the "substantial credible information" standard as defined as "probable, believable facts" for correct and complete application information).

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know how to apply the methods in different factual contexts. In addition, training in the basic legal concepts behind the change application process would help DNRC staff in their review of what constitutes an adequate showing of proof for different change application criteria.

Here, Montana can learn from Washington's Department of Ecology (DOE). DOE compiled an extensive collection of guidance documents to guide and ensure consistency among water resources program staff.[291] DOE produced the Water Resources Program Policies and Procedures using agency staff management teams and by incorporating public comment, and has made this guidance document easily available to the public. Particularly noteworthy to Montana's implementation of HB 40 that requires DNRC to make a preliminary decision on applications, DOE has invested extra effort in creating transparent, consistent, and publicly-accessible, preliminary decisions on applications.[292] Washington's investment in training staff and sharing information with the regulated public promotes more accurate record-building, earlier dispute-resolution, and more transparent agency action.

### C. RECOMMENDATION THREE: PUBLIC RULEMAKING IN ACCORDANCE WITH THE MONTANA APA.

Consistent with this article's theme of consistency and transparency in agency decision-making, the authors recommend that DNRC conduct rule-making in accordance with Montana's APA standards—ensuring transparent and public procedures—for adopting any new methodologies that the DNRC can use to document compliance with the statutory criteria. The rationale for this recommendation is that any procedure that purports to increase or decrease the burden on the applicant to meet the statutory criteria should go through rule-making.

Here, Montana can look to its own experience last year with the adoption through public rule-making of county management factors to guide estimates of partial-service irrigation.[293] The agency's process provided extensive outreach to the regulated community through a series of public sessions, incorporated public comment, and the DNRC made the final product accessible through postings on the agency's website.[294] While not everyone has happily embraced the final product, this example of DNRC adopting a methodology for calculating partial-service irrigation through public rule-making led to a transparent,

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291. *See* Barwin, *supra* note 209 (describing the Washington Dept. of Ecology's *Water Resource Program Policies and Procedures*).

292. *See* Interview with Robert Barwin, *supra* note 209; *see* POL 1005, *supra* note 248.

293. *See* 22 Mont. Admin. Reg. Notice 36-22-134 (Nov. 25, 2009), *available at* http://www.mtrules.org/gateway/showNoticefile.asp?TID=2238 (showing proposed amendments to ARM 36.12.1901 and ARM 36.12.1902).

294. *See generally* DNRC & WATER MGMT. BUREAU, DNRC CONSUMPTIVE USE METHODOLOGY (Mar. 17, 2010), http://www.dnrc.mt.gov/wrd/water_rts/appro_info/cu_methodology.pdf (last visited Sept. 21, 2010).

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public, decision-making process that was easily accessible to applicants. It is a model that the DNRC could follow with regard to other statutory criteria that would improve the DNRC's consistency and professional standards in its review and decision-making on applications. Of course, as with any new methodology, the DNRC will have to remain attentive to refinements that are required in the methodology's application in order to have a workable process.[295]

### D. Recommendation Four: Develop a Technical Educational Program Directed at Attorneys, Consultants, and DNRC's Professional Staff.

The development of an educational program to increase the professional and technical expertise of both DNRC's staff and those who interact with the agency regularly—such as hydrologists, consultants, and attorneys—would accomplish two worthy goals. First, it would allow water resources professionals to learn together, and, by learning together, the water resource professionals keep current with the evolution and refinement of applicable methodologies and analytical tools. Again Colorado's example is instructive. Working with the State Bar Association, the state developed a series of course that specifically address the skills needed to operate in the state Water Court.[296]

Second, it would provide a forum for a critical review of new methodologies or refinements of analytical tools. This would allow a "test drive" of methodologies that the DNRC may be considering adopting as a standard among water resource professionals.

### E. Recommendation Five: Develop a DNRC Web-Library of Specific Accepted Methodologies, References, and Documentation.

Transparent agency decision-making and well-informed, well-documented applications begin with a common understanding of requirements and available resources. An electronic library of specific methodologies, references, and acceptable documentation made available on DNRC's website would be an important first step toward developing this common understanding. There are features already in the DNRC's website that partially accomplish this. Under the "Water Rights" tab at the website, clicking on the reference "new appropriations" takes one to a list of references that can be quite helpful in navigating parts of the application process.[297] It is incomplete, however. Particularly during a time of evolving standards

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295. Interview with Matthew Williams, *supra* note 128. One refinement that would improve the methodology is changing the requirement that the historic, consumptive-use flow-rate for flood irrigation be evenly divided across a sixteen-week irrigation season. This results in a large, downward adjustment in a senior, historic irrigation right's flow rate that is in priority in the water-scarce months of July and August, just when, historically, the crop consumption was greatest.

296. *See* Telephone Interview with Priscilla Fulmer, *supra* note 271.

297. DNRC Water Resources Division, *available at* http://www.dnrc.mt.gov/wrd/.

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and application requirements, such an electronic "collective consciousness" would be a way to maintain communication between the agency and applicants.

### F. RECOMMENDATION SIX: INITIATE RULE-MAKING TO CLOSE THE DEADLINE LOOPHOLE BETWEEN "DEFICIENCY LETTER RESPONSE" AND "CORRECT AND COMPLETE."

After the 2009 legislature, Montana now has a specific, statutorily-defined review process that purports to limit the time of review,[298] both prior to public notice and after the completion of a contested case hearing.[299] The process of allowing an applicant to correct an application that is deficient can take up to 270 days[300] and from the time the agency has received a correct and complete application, it has 120 days to make a preliminary decision on the application.[301]

One problem is that there is a gap in the timelines. While the new provisions increase agency accountability, there is still substantial uncertainty arising out of the lack of deadline for the agency' s finding of correct and complete, after receiving a timely response from an applicant to the agency' s deficiency letter. Another uncertainty is whether the agency can deny a correct and complete determination on grounds that the agency not identify in the initial deficiency letter; or, whether the agency can send a second, follow-up deficiency letter if the applicant ' s first response was not satisfactory.

Resolving these issues in implementing the new statutory directives could be another useful role for a Montana Advisory Committee. While Colorado has experienced the same challenges as Montana and Washington with the issuance of timely decisions on applications, it has actively engaged all of the participants in its processes to craft a solution. The Colorado Supreme Court has taken measures to enhance the accountability of both applicants and referee by recent rule amendments, stemming from the Colorado Advisory Committee recommendations.

## VIII. CONCLUSION

The ability to transfer water from one use to another is essential to twenty-first century water management. With increasing water demands in a climate of increasing water scarcity, transfers are the linchpin of the future—transfers of water between uses will be what prevents the proverbial wheel from sliding off the axle. This puts a newfound pressure on our water agencies to have a workable change-in-use process for transferring water rights; one that protects the value of senior water rights while at the same time allowing applicants to get through the process in a timely, predictable way.

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298. MONT. CODE ANN. §§ 85-2-302(5) & 85-2-307(2) (2009).
299. *Id.* at. § 85-2-310.
300. *Id.* at. § 85-2-302(5)&(6).
301. *Id.* at. § 85-2-307(2)(a).

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The experiences of Washington and Colorado provide relevant insights for Montana's water agency, and the six chief recommendations in this article are intended to help provide a roadmap for success based on a synthesis of this tri-state experience. The over-arching theme of the recommendations is to achieve consistent, transparent agency decision-making, based on shared knowledge and clear communication of required elements of proof. The path to that point is making use of the knowledge, experience, and expertise of both DNRC's professional staff and the community of professionals that regularly engage with the agency, while providing avenues for continually improving the collective experience and expertise. Ultimately, the six recommendations acknowledge that we're all in this together, and that we'd better all pull in the same direction to make the process work.