

FLEXIBLE PERIODS OF USE

STUDY OF CLIMATE AND WATER RIGHTS

The 2019-20 Water Policy Interim Committee identified a study of climate and water rights as part of its work plan. The committee did not initially identify a scope for this study; however, for their Jan. 2020 meeting, the committee will focus on flexible periods of use for water rights, use of canals and ditches for water management, and increasing water storage. This memo focuses on flexible periods of use for water rights, identifying current state of Montana policy, and summarizing the approaches of other Western states.

FLEXIBLE P.O.U.?

At its September 2019 meeting, the committee posed this question: Does Montana law allow for a flexible period of use for a water right? The question arose out of a discussion about an observed climate trend that has resulted in spring runoff occurring before the start of a water right holder's period of use. The 2017 Montana Climate Assessment states "historical observations show a shift toward earlier snowmelt and an earlier peak in spring runoff in the Mountain West (including Montana). Projections suggest these patterns are very likely to continue into the future as temperatures increase."¹ The effect of this "will reduce late-summer water availability in snowmelt-dominated watersheds."² This effect may particularly affect irrigation rights.

MONTANA POLICY: NEW PERMIT OR STORAGE

To start, while "period of use" is an element of a water right—it appears on a water right abstract—Montana statute does not refer specifically to "period of use." Instead various phrases are used, such as "times of use,"³ "inclusive dates during which the water is used each year,"⁴ "length of time,"⁵ and "starting and ending date of the proposed use of water."⁶

¹ Whitlock C, Cross W, Maxwell B, Silverman N, Wade AA, *2017 Montana Climate Assessment*, Bozeman and Missoula Montana State University and University of Montana, Montana Institute on Ecosystems, 72.

² Ibid.

³ 85-2-224, MCA.

⁴ 85-2-234, MCA.

⁵ 85-2-316, MCA.

⁶ 85-2-410, MCA.

“Period of use” does appear in administrative rule. The Department of Natural Resources and Conservation sets a date range for irrigation based on climatic designation by the Natural Resources and Conservation Service for new appropriations. The department requires information from an applicant for any deviation from these dates.⁷

Department policy does not allow a user to change a period of use outside the originally defined water right. A water user would need to apply for a new water right with the earlier period of diversion or use or file a change application to add storage to the existing water right. This stored water could potentially be used before the next year’s period of diversion.⁸

WESTERN STATES REQUIRE CHANGE APPLICATION

Agencies in at least 5 Western states must approve a change in a “period of use.” Idaho, Colorado, Utah, Wyoming, and Washington use slightly different terminology,⁹ but broadly a change in Montana referred to as a change in “period of use” triggers those states’ change of use process. In Montana, a “change in appropriation right” is defined as a change in the place of diversion, place of use, purpose of use, or place of storage.

⁷ Admin. R. Mont. 36.12.112.

⁸ Email from James Ferch, DNRC, to WPIC staff.

⁹ Colorado refers to a change in “time of use,” Washington includes season of use within “purpose of use,” and for Wyoming a “change use” limits a new use to the same period of time. Water Policy Interim Committee memo, “Comparison of Change of Water Right Processes in 6 States,” July 2018.