

Water Rights in Montana: An Overview

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All water in Montana is owned by the State for the benefit of its people. Individual water users have the right to use the waters of the State if they hold or are covered under a valid water right. A basic understanding of water rights is essential for people who want to play a part in the effective management of water resources.

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Background

Development of conveyance systems for water use helped define civilizations like the Roman, Egyptian, and Inca Empires. Closer to home, archeological evidence indicates that early Puebloan people in the Four Corners region of the United States (US) relied on irrigation for farming and developed significant water conveyance systems as early as 200 BC. Similarly, the construction of water conveyance systems played an important role in the development of the western US. As early as the nineteenth century, demand for water often outpaced supply, creating the need for a method for allocating water. The primary legal framework adopted throughout the western US was the prior appropriation doctrine, often summarized as “first in time, first in right.” Under this system, the earliest water users have the highest priority (senior) water rights. This means that in times of shortage, senior water right holders are entitled to all of their water before more junior water right holders are entitled to any of their water. Under the prior appropriation doctrine, a person does not have the right to use water simply because it flows through their property. They must have a water right, and this is an important difference from the doctrine of riparian water rights commonly used in the eastern US.

What is a Water Right?

All water in Montana is owned by the State for the benefit of its people. Individual water users have the right to use the waters of the State if they hold or are covered under a valid water right. The term “water right” in this document refers

The **prior appropriation doctrine**, or doctrine of prior appropriation, is the legal basis for water rights and use in Montana and across most of the western US. It establishes that those who first put water to beneficial use have the highest priority to continue to use water in times of shortage. “First in Time, First in Right”

to rights established both before and after 1973, which was an important year for water rights in Montana (described in the following sections). There are also important federal and Indian reserved water rights recognized in Montana, which are not explicitly covered in this document. Water rights have a set of “elements” that define the water right. The elements of a water right are:

1. **Source** – surface water sources include streams, rivers, some springs, and lakes. Wells and some springs have groundwater as the source.
2. **Point of Diversion** – this is where water is first diverted from the source. For surface water, this can be the dam or headgate. For stock water or instream flow, this may be a reach of a stream. For groundwater pumped from a well or a developed spring, it is the location of the wellhead or the place where the spring is developed.
3. **Purpose (Beneficial Use)** – this is the designated beneficial use of the water right. These beneficial uses include, but are not limited to: irrigation, stock water, municipal, industrial, domestic, recreational uses, in-stream flow, hydropower, fish and wildlife, aquifer storage and recovery, and mitigation.
4. **Place of Use** – place where the water is put to beneficial use, identified by legal land description (township, range, and section).
5. **Flow and Volume (Quantity)** – Flow rate is the maximum rate at which water can be diverted from a source. Volume is the maximum amount of water that can be diverted in a calendar year. The maximum flow rate is typically defined in cubic feet per second (cfs) and volume is described in acre-feet. Some water rights, such as for stock water use, may not specify a flow rate or volume, but are generally limited to the amount historically used. Most pre-1973 water rights do not specify a volume, but all of these water rights are limited to the amount historically used, defined by the beneficial use.

6. **Period of Use** – period of the year during which the water is allowed to be used.
7. **Period of Diversion** – the period of the year that water is diverted from the source, which may differ from the period of use, if water is stored.
8. **Priority Date** – the date the water was first put to beneficial use.

Water right holders are required to operate within the confines of these elements as specified in their water right. One generally cannot change source, quantity, period of use, period of diversion, or priority date. If the owner of a water right wishes to change the point of diversion, place of use, purpose (beneficial use), or place of storage (including adding storage), they must apply for and be granted a change authorization (“change in use”) through the Montana Department of Natural Resources and Conservation (DNRC). This change process is intended to protect other water users from harm.

A water right is a property right to use (but not own) water in Montana, as affirmed by the Montana Constitution, the Montana Supreme Court, and by State law. Because it is a property right, a water right can be sold, leased, and/or severed from the property where it has historically been put to beneficial use. If a change in ownership, severance, or a lease of a water right would result in the change in any of the basic elements of the water right, the water right holder must apply for and receive a change authorization from the DNRC.

As with all property rights, there are responsibilities that go with them. Water right holders have the legal responsibility to ensure ownership and contact information are correct and up-to-date with the DNRC. Points of diversion and means of conveyance need to be maintained and must be operating in order to protect the right. Because most water sources

are over-appropriated in Montana, water rights must be put to actual beneficial use to be protected from challenges of abandonment. Another cornerstone of the prior appropriation doctrine is “use it or lose it.”

Rationing of Scarce Water and Enforcement

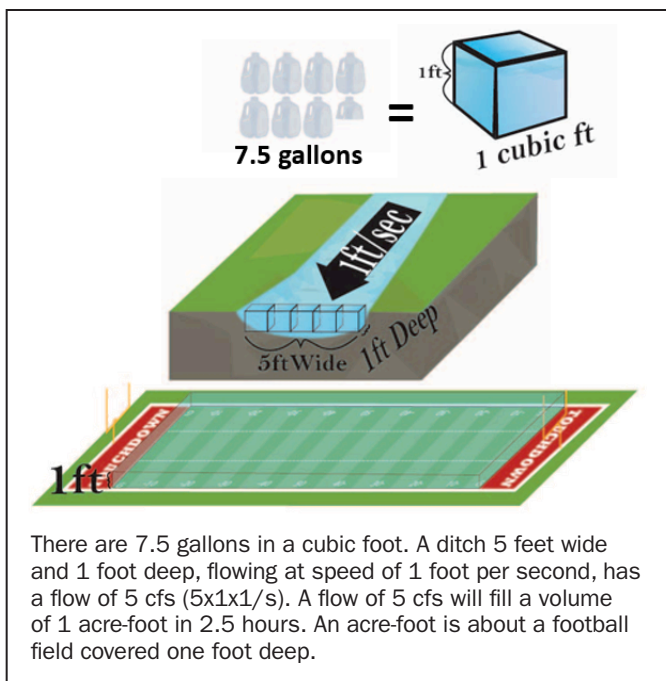
In Montana, no one beneficial use (e.g. agriculture, municipal, domestic, wildlife/fisheries) takes priority over the others. It is the relative seniority of water rights laid out by the prior appropriation doctrine (“first in time, first in right”) that is used to ration scarce water. The earlier the priority date specified on the water right, the more “senior” it is. A water right with an 1889 priority date is senior to a water right with an 1892 or 1915 priority date. When flows get low, the more senior water right owner (1889 in this example) is entitled to use their water first and can “make a call” on upstream water users with later (junior) priority dates. Making a “call” means that a senior water user requests that a junior user stop using water so the senior user can get their water. The process leaves it to individual water users to protect and enforce their water rights.

In times of water shortage or in areas where distribution is contentious, water users can petition the District Court to appoint a Water Commissioner to enforce distribution of water according to rights as recognized by the District Court or Water Court. If a water user is using water illegally, one can either contact the DNRC, or can file an action in District Court.

Legal Framework for Water Rights in Montana

The 1972 Montana Constitution provides the foundation for Montana water law. Specifically, Article IX, Section 3 sets forth that:

1. All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
2. The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
3. All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
4. The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.



Expanding on these provisions of the Montana Constitution, the Montana Legislature adopted the Montana Water Use Act in 1973. The act provides a statutory framework for the adjudication of water rights that existed prior to 1973, changes of use for existing water rights, the creation of a centralized water right recording system, and a system to create and regulate water use permits issued after 1973.

Water Rights Established Before July 1, 1973 (Adjudication)

The Montana Water Use Act created a statutory framework for adjudication of water rights that existed prior to 1973. The process of “adjudication,” in the context of water rights, started when the Montana Supreme Court issued an order in 1979 requiring all persons with water rights having priority dates earlier than July 1, 1973, file “claims” describing the use of their water. If a water user did not file a claim for their pre-1973 water on or before April 30, 1982, their water right was considered abandoned; however, there are some exemptions, including for stock watering directly from a stream or river. Filed claims were then examined by DNRC for completeness and accuracy and all information was entered into a database, summaries of which can be retrieved as “abstracts.” Any discrepancies noted by the DNRC were reported to the claimants and appear on the water right abstracts as “issue remarks.” Water users were (and still are where adjudication is ongoing) then given an opportunity to object to claims, including their own, if they felt the information contained within a claim was not correct. The Water Court hears these objections and decides on these issues. When all of the objections and issue remarks for a particular basin are resolved, the Water Court issues decrees setting forth the particular elements of every recorded water right in that basin. The adjudication process is ongoing throughout the state with different basins at different stages in the process. To find out where in the process your water rights may be, see the DNRC map linked on the Extension page or contact the Water Court or your regional DNRC office.

Water Uses Established On or After July 1, 1973 (New Appropriations)

New appropriations are water rights issued on or after July 1, 1973, and include “water use permits” and “groundwater certificates.” New appropriations do not undergo review in the adjudication process. Anyone seeking a new appropriation must submit a form and fee to the DNRC. The form must describe all water right elements listed above. For permitting, an applicant must demonstrate that the new use will not adversely affect other users and must address a number of other statutory criteria (including physical and legal availability or historic use, beneficial use, adequacy of diversion, and possessory interest in the place of use). The DNRC will initially review the application to determine

whether it is correct and complete before analyzing the criteria to determine whether the application can be granted. The public is allowed an opportunity to object to the application if they can show that the change in use or new appropriation may adversely affect their property, water rights, or interest. Water is in very limited supply or not legally available in some areas of Montana, making getting a new water right difficult. Small groundwater uses (35 gpm or less for up to 10 acre-feet per year) are an exception to the permitting process, so no public notice and no criteria analysis are required. A person wanting to obtain a water right for a small groundwater use is required to complete and file a form with the DNRC after putting the water to use. If one is developing multiple exemptions (wells, pits, developed springs) up to 10 acre-feet within a small area, some restrictions are in place.

For Further Information

This document is intended to provide a general overview of water rights in Montana and is not intended to offer legal advice. For specific questions on water rights, contact the following entities and/or see the additional information resources.

- For questions on changes to existing water rights, permits, or general information on water rights, contact your regional DNRC office <http://dnrc.mt.gov/divisions/water/water-rights/water-resources-regional-offices> or visit <http://dnrc.mt.gov/divisions/water/water-rights> where a “Water Rights in Montana” booklet and many other resources are available.
- For concerns about water rights claims and the adjudication process, contact the Water Court <http://courts.mt.gov/water>
- For issues or concerns about water distribution controversies, contact your district court <http://courts.mt.gov/locator>
- For technical legal issues, contact an attorney who is practiced in water rights law

Additional resources

- The Constitution of the State of Montana http://leg.mt.gov/bills/mca_toc/CONSTITUTION.htm
- Montana Code Annotated (MCA) Title 85 - Montana Water Use Act http://leg.mt.gov/bills/mca/title_0850/chapters_index.html
- Administrative Rules of Montana (ARM) <http://www.mtrules.org/gateway/ChapterHome.asp?Chapter=36.12>
- MSU Extension – weblinks to various water-rights-related resources <http://waterquality.montana.edu/resources/waterrights>

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This publication has been approved by representatives of the following groups/agencies, who recommend its reading by those with basic questions about water rights in Montana:

- MT Department of Natural Resources and Conservation (DNRC)
- Association of Gallatin Agricultural Irrigators (AGAI)
- One Montana
- Trout Unlimited (TU)
- two attorneys from the Water Law Section of the State Bar of Montana
- Extension colleagues with Montana State University, and members of the public

Common Montana Water Right Terms

Abstract: a document outlining the elements of a water right (e.g. Statement of Claim, permit, or groundwater certificate).

Acre-foot: enough water to cover one acre of area, one foot deep.

Adjudication: assessment of pre-July 1, 1973, water rights claims by the DNRC and Water Court.

Adverse effect: impairment to an existing water right.

Change in use: a modification to any of the elements of a water right that requires approval by the DNRC (point of diversion, place of use, purpose, or place of storage).

cfs: cubic feet per second; one cfs is equal to 448 gallons per minute (gpm); a garden hose running full-blast might run 10 gpm.

Closed basin: a drainage area where all available water is claimed with existing water rights and new water rights are limited.

Controlled Groundwater Area: an area where special restrictions on groundwater use are in place.

Conveyance system: canals, ditches, pipes, natural channels, etc. that move water from the source to the place of use.

Decreed rights: a water right issued by a court upon adjudication for an area (typically a basin or a stream).

Exempt well: a popular term for groundwater use that uses less than 35 gpm and less than 10 acre-feet per year and that is exempt from the permitting process if certain conditions are met. (see also groundwater certificate, a type of water right)

Groundwater certificate: a water right established on or after July 1, 1973, for a well, a groundwater pit, or a developed spring that is exempt from the permitting process if certain conditions are met. (see also “exempt well”)

Historic use: the amount of water that was actually applied to a beneficial use in the past.

Instream flows: water protected in a stream for beneficial uses such as preservation of fish or wildlife habitat.

Junior water right: water right with a use that started later in time and has a lower priority relative to senior rights.

Making a “call”: when a senior water right holder asks a junior user to stop using water so the senior right holder can get their water first.

Miner’s inch (mi): a statutory measure of flow rate. The definition varies by state, but in Montana, 40 mi are equal to 1 cfs.

Mitigation: a mechanism for using existing water rights to offset adverse effects resulting from a new water use.

Senior water right: water right with a use that started earlier and has higher priority relative to junior rights.

Statement of Claim: an existing water right originated before July 1, 1973, and generally established by putting water to beneficial use.

Stock use: beneficial use of water for livestock.

Water use permit: a water right established on or after July 1, 1973.



This MontGuide should not be used as a legal reference; for legal matters refer directly to the Montana Code Annotated, the Administrative Rules of Montana, and/or your own legal counsel.

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