EXHIBIT 11
DATE 3/6/15
HB 427

BASIC MONTANA WATER LAW

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May 31, 1990

Modified and Updated by
C. Bruce Loble, Chief Water Judge
1999, 2003, and 2010

I. THE PRIOR APPROPRIATION SYSTEM

A. GENERALLY

Montana is a Prior Appropriation state, as are most of the Western states. Under the Prior Appropriation Doctrine, one must have a water right to appropriate water from a stream or other source. Municipal water supply users and other water users who buy their water from a water supply system do not need to have a water right, although the municipality or water supply system owner must have a water right in order to divert water for the system users.

B. ORIGINS

The Prior Appropriation Doctrine originated in the Western states to accommodate the irrigation and mining needs of a developing west. Eastern states use the Riparian Doctrine.

C. BENEFICIAL USE AND PRIORITY

Beneficial use and priority of the right are the two key attributes of a water right acquired under the Prior Appropriation Doctrine. For the water right to be valid, it must be used for a beneficial purpose. Each right carries a priority date based on first use. The right having an earlier priority date can be used first - "first in time is first in right."

D. LEGALLY PROTECTED PROPERTY RIGHTS

Water rights in Montana are property rights. They are afforded the protection of the United States and Montana Constitutions just like any other property right. Water rights have value and water users cannot be deprived of their property without due process of law.

A water right is a right to use the water. It is not an ownership right in the water itself. In legalese, this is called a "usufructuary" right.

E. EFFECT OF 1973 WATER USE ACT

Until July 1, 1973, Montana's law regulating water right acquisition, or use, was not constrained by strict statutory limitations. As a practical matter, merely diverting water from a source and applying it to a beneficial use obtained a water right. With a few exceptions, the filing of a document with a governmental entity to give notice of the appropriation was optional.

On July 1, 1973, the Montana Water Use Act became effective. The Act did not alter basic water right concepts, but the procedure for acquiring and changing water rights became an administrative process overseen by the Montana Department of Natural Resources and Conservation.

F. WATERS SUBJECT TO APPROPRIATION

A water right can be appropriated from almost any source of water. This includes surface water flowing in streams, groundwater, seepage, drainage and wastewater, and floodwater.

G. USES FOR WHICH WATER CAN BE APPROPRIATED

1. Beneficial Use is the Basis, Measure and Limit of the Right.

Under the Prior Appropriation Doctrine, water can be appropriated for nearly any beneficial use. It has been said many times that "beneficial use is the basis, measure and limit of the right." This means that if one cannot use the water beneficially, even if one has an existing water right, one cannot exercise the right. For example, if a rainstorm provides adequate moisture for crops, there is no need to irrigate or use the water right because there would be no beneficial use in doing so.

The following general rules have been developed in Montana to describe the limits of a water right:

a. The right is limited to the capacity of the water delivery system;

b. The right is limited to the amount actually put to a beneficial use, even though the capacity of the system might be larger;

c. The right is limited to the amount of water reasonably necessary for the particular use (this is called the "duty" of water); and

d. The right is limited to the period of actual need. For example, one cannot normally have an irrigation water right for wintertime use.

All these rules help define the extent of one's water right.

2. Duty

A water right is limited to the amount of water reasonably needed for a particular use. In Montana, the early courts developed a rule of thumb for irrigation of 1 miner's inch of water per acre. The courts deviated from this duty standard when the evidence demonstrated a greater or lesser need. The Water Court's rule of thumb is 17 gallons per minute (1½ miner's inches) per acre.

H. DIVERSION REQUIREMENT

Most water rights have some kind of diversion or development associated with them. However, non-diversionary rights for instream beneficial uses (such as stock watering, recreation, fish and wildlife uses) are recognized as valid, existing rights.

I. PREFERRED USES

Water rights under the Prior Appropriation Doctrine are exercised according to their order of priority, first in time being first in right. Generally, there is no such thing as a preferred use; meaning one kind of use is preferred over another. Although many people believe that domestic use of water has an unqualified right of first use, regardless of priority date, neither the legislature nor any Montana court has adopted such a principle.

II. TYPES OF WATER RIGHTS IN MONTANA

A. GENERALLY

There are many types of water rights in Montana, which were acquired in accordance with particular rules that applied at the time. Each right is just as valid and legal as the next, and just as enforceable, in accordance with its priority date, as the next.

B. USE WATER RIGHTS

Use rights are water rights that were acquired by merely appropriating and beneficially using the water. No recording, approval from a government agency, or other written record of the right was required. Approximately 67% of the water rights filed in Montana's statewide adjudication are use rights. Since July 1, 1973, it became impossible under the Water Use Act to get a new water right in this manner, but existing use rights were not affected. The priority date of use rights is generally the date the water was first put to beneficial use.

C. FILED RIGHTS

These are water rights that were filed with the local county Clerk and Recorder's Office under an optional system that was first statutorily recognized in 1885 and which continued until the July 1, 1973 effective date of the Water Use Act of 1973. The process involved posting a notice at the point of diversion, filing a notice of appropriation with the local county Clerk and Recorder, proceeding with the construction of the diversion facility, and putting the water to use with "due diligence." If one followed all the steps exactly (they are too detailed to describe here), one got a water right with a priority date relating back to the date the notice was posted at the point of diversion. If the steps were not exactly followed, the priority date would be the date of first use of the water.

D. DECREED RIGHTS

These are water rights, initially use or filed rights that have been adjudicated (decreed) by a district court. These rights are more certain in their existence, because a district court previously reviewed the evidence and decided, at least at the time of the decree, that a water right existed. Today, water rights are adjudicated in the Water Court.

E. COURT APPROVED RIGHTS ON ADJUDICATED STREAMS

These are rights approved by a district court after 1921 on an adjudicated stream. The 1921 legislature required water users on adjudicated streams to petition the district court for new appropriations. The petition process was not always followed.

F. GROUNDWATER RIGHTS FROM 1962 TO JULY 1, 1973

In 1961, the Montana Legislature set up an exclusive method for acquiring a right to appropriate groundwater. It was much like the 1885 filing method described earlier, except it was mandatory. If it wasn't done right, acquisition of a water right was questionable. On July 1, 1973, the groundwater code was repealed and the Water Use Act now governs groundwater appropriations.

G. FEDERAL AND INDIAN RESERVED RIGHTS

When the United States withdraws land from the public domain and reserves it for a federal purpose, the United States, either explicitly or by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the primary purpose of the reservation. The United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.

H. MURPHY RIGHTS

In 1969, the Montana Legislature enacted legislation granting the Montana Fish and Game Commission authority to appropriate unappropriated waters on twelve streams to maintain instream flows for the preservation of fish and wildlife habitat. Rep. James E. Murphy was the sponsor. The Legislature established specific reaches of the following sources: Big Spring Creek in Fergus County; Blackfoot River in Missoula and Powell counties; Flathead River and Middle Fork Flathead River in Flathead County; South Fork Flathead River in Flathead and Powell counties; Gallatin River and West Gallatin River in Gallatin County; Madison River in Madison and Gallatin counties; Missouri River in Broadwater, Lewis and Clark and Cascade counties; Rock Creek in Granite and Missoula counties; Smith River in Cascade and Meagher counties; and the Yellowstone River in Stillwater, Sweetgrass and Park Counties. The priority dates are 1970 or 1971.

I. PERMITS

From and after July 1, 1973, a right to use surface water, and groundwater exceeding 35 gallons per minute, requires an application to be filed with the Department of Natural Resources and Conservation (DNRC) for a permit. The priority date is the date the DNRC receives the application.

J. CERTIFICATES

Except in controlled groundwater areas, no application for a permit is needed for appropriations of groundwater for amounts of 35 gallons per minute or less, not to exceed 10 acre-feet per year. Water users simply drill a well and then file a Notice of Completion with the DNRC. The date the notice is filed becomes the assigned priority date.

K. STATE WATER RESERVATIONS

The Water Use Act of 1973 authorized state and federal agencies to apply to the DNRC to acquire a state water reservation for existing or future beneficial uses. Several reservations have been granted.

L. INSTREAM USE AND LEASING

The Department of Fish, Wildlife & Parks is authorized to lease water rights and has several leases in place.

III. PRIORITY

A. GENERALLY

The priority of a water right in a Prior Appropriation state is probably the most important part of the right. Water rights are exercised in accordance with their order of priority, starting with the earliest (senior) rights and progressing to the later (junior) rights, until the water is all appropriated. The earlier the priority date, the better the water right. Priority dates are extremely important as water gets low in the summer.

B. RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS

When water is in short supply, senior water right holders are entitled to use their water right first. They can "call" the water right of a junior appropriator. A junior water right user can only use water if it does not "adversely affect" the water right usage of senior water users. If senior water right users can reasonably obtain their water, even though the junior's use affects the senior's use in insignificant ways, the senior cannot demand that the junior appropriator stop using the water. However, if a junior appropriator is upstream from a senior, and the water is insufficient for use by both, the junior must let the water go by for the senior's use.

In theory, both senior and junior appropriators are entitled to a continuation and maintenance of the stream conditions that were in existence when the appropriations were initiated. If senior water users decide to make a change in an appropriation (such as moving the point of diversion or building a reservoir), they cannot do so if it will change the stream conditions and "adversely affects" junior appropriators. So juniors have rights as against seniors too.

Determining when an appropriator is "adversely affected" can be extremely complicated. Such a determination can involve detailed stream flow measurements, measurements of return flow, calculations of evaporation and other losses, etc. Many water right disputes have involved conflicts over "adverse affects."

Before July 1, 1973, any party adversely affected by another's change in their water right usage was required to file a lawsuit in district court. Now, the Water Use Act of 1973 requires water users planning a change to file an application with the DNRC and to satisfy legislative criteria before making any changes.

IV. TRANSFER OF WATER RIGHTS

Water rights are generally "appurtenant" to the land upon which they are beneficially used. This usually means that water rights automatically transfer with the land when the land is conveyed to someone else. However, water rights can be reserved from such conveyances and they can be freely

bought and sold and made appurtenant to other land. If a water right is reserved, DNRC approval is required before the right can be moved and used on another place of use.

The DNRC is required is to maintain an accurate water right ownership record system. The Water Court uses the DNRC computer database to mail notices to water users. Whenever property is transferred, any appurtenant water right is transferred to the new owner, unless the right is specifically reserved and withheld from the sale. In the past, the DNRC ownership update process required the filing of a DNRC Ownership Update form. Today, the update process is integrated with the Department of Revenue's use of geocodes and tax records and the water right ownership update process is more automatic.

V. CHANGES IN WATER RIGHTS

Changes in a water right include a change in the point of diversion, the place of use, the purpose of use, or the place of storage. A change in a water right can be made so long as there is no "adverse affect" to other appropriators. Before any change can be initiated, approval from the DNRC must be obtained.

There are many ways in which a change in a water right can "adversely affect" other water rights. Each case must be looked at individually. However, some examples can be listed:

1. Changing a water right to use more water from the stream than the original appropriation used increases the "burden" on the stream. Such an increase might not be allowed if it takes more water away from junior appropriators. Changing from a flood irrigation system to a sprinkler system could also increase the burden if the change reduces the amount of return flow to the stream and thereby deprives other appropriators of water for their water rights. Increasing the amount of water consumed from a stream really amounts to a new appropriation of water and a new water right should be obtained for that increased use.

2. Moving a point of diversion upstream and ahead of other points of diversion may adversely affect water rights associated with those points of diversion. In many cases, there will be less water available for the downstream appropriators as a result of such a change.

VI. DITCH RIGHTS

Ditch rights are separate from water rights. One can have a water right, without having a ditch right, and vice versa, although this doesn't often occur. If water users want to use water on their land, and need to bring the water through a ditch across another's land, they can do so only if they have a ditch easement across the other person's land. Ditch easements are created by agreement, by condemnation proceedings and resulting compensation, or by prescriptive use. Most ditches in Montana have no recorded document evidencing the creation of an easement and probably are unrecorded prescriptive easements. *See e.g., Boz-Lew Builders v. Smith* (1977), 174 Mont. 448.

Owners of ditch easements generally also have a secondary easement to repair and maintain a ditch on another's land. However, the access must be reasonable and necessary for maintenance of the ditch and cannot exceed the historical access. *See* § 72-17-112, MCA. In many cases, several water right holders have common ditch rights in a single ditch. Each is then supposed to maintain their respective share of the ditch or cost share for all maintenance.

Liability over irrigation ditches is limited. *See* § 85-7-2212, MCA.

VII. ADJUDICATION OF WATER RIGHTS

Montana has embarked upon a massive, statewide adjudication of nearly all the water rights in the state having priority dates before July 1, 1973. The purpose of the adjudication is to bring some certainty to the number and extent of water rights in Montana. Even water rights that were previously decreed by district courts are included in the statewide adjudication. Claims for all existing rights were required to be filed with the DNRC by April 30, 1982. Over 201,000 claims were filed by the deadline. Failure to file a claim resulted in forfeiture of the water right.

Indian and federal reserved water rights are included in this adjudication. The Montana Reserved Water Rights Compact Commission is negotiating with federal and tribal authorities in an effort to reach an agreement on the scope of the federal and Indian reserved water rights in Montana. Several agreements have been reached.

The only water rights not included in the adjudication effort are "exempt" claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources. These claims were exempt from the mandatory filing deadline, but they could be voluntarily filed, and many were.

Almost 5,000 claims missed the filing deadline and were considered to be forfeited. In 1993, the Montana Legislature provided for the conditional remission of forfeited water rights, but required payment of a $150.00 processing fee and required assessment of reasonable administrative costs and expenses incurred by the Water Court due to the filing of a late claim. The filing deadline for late claims was July 1, 1996. Thereafter, no further claims were accepted.

All late claims are subordinate to Indian and federal reserved water rights. If late claims were not postmarked or executed by April 30, 1982 and received by the DNRC by May 7, 1982, then they are also subordinate to rights represented in all valid, timely filed claims, and potentially subordinate to permits or state reservations of water.

The claim filing system established for the adjudication effort has created a reasonably accessible computer record of the claims for water rights on any stream in Montana. Contact the DNRC to access the database.