The Water Policy Interim Committee

Boiling It Down

A study of water policy in Montana

A Report to the 62nd Legislature

September 2010

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Legislative Services Division

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Water Policy Interim Committee

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This report is a summary of the work of the Water Policy Interim Committee. Volumes of information were presented to and reviewed by committee members. Some of that information is referenced here or included in the appendixes. All of the information, including written minutes and, in some cases, audio minutes, is available on the WPIC web site: http://leg.mt.gov/water

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[1] For the 2011 Legislature, this bill draft can be found under LC351.

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Public comment submitted on the report and proposed legislation is available at:

http://leg.mt.gov/content/Committees/Interim/2009_2010/Water_Policy/Meeting_Documents/September2010/public-comment.pdf

[2] For the 2011 Legislature, this bill draft can be found under LC350.

[3] For the 2011 Legislature, this bill draft can be found under LC349.

[4] For the 2011 Legislature, this bill draft can be found under LC347.

[5] For the 2011 Legislature, this bill draft can be found under LC348.

Introduction

Many people may not pay much mind to how we get the water we need. Snow, rain, rivers, and lakes provide us with water to live and play. Whether for drinking, fishing, growing crops, or generating electricity, our use of water is guided by a complex network of laws. To understand water law as it has evolved in Montana and the rest of the western United States, one must traipse through the subjects of history, human nature, and science.

Interim committees of the Montana Legislature have been doing just that for decades. It could be said that the study of water issues by lawmakers is a bit like the spring melt: one cannot know exactly when it will occur, but it happens every year.

This interim saw the resurgence of a committee specifically designated to study water policy. Over the course of the interim, the Water Policy Interim Committee (WPIC) examined issues ranging from adjudication to water marketing.[6] What follows is a summary of the Committee's research as well as findings, recommendations, and proposed legislation.

But first, a bit of background.

In the early 1980s, the Environmental Quality Council (EQC)I, an interim committee, established a Select Committee on Water Marketing. Upon the recommendation of that committee, the Legislature in 1985 established a Water Policy Committee to protect for present and future use Montana's fair share of the water in interstate rivers and streams — particularly the Missouri.

For the next decade, the WPIC studied the state water plan, interstate water issues, drought management, adjudication, instream management, and water quality.

In 1995, the WPIC was dissolved, the membership of the EQC was increased, and the EQC took over the duties previously assigned to the WPIC in 85-2-105, MCA. For the next 12 years, the EQC studied water quality, adjudication, coal bed methane production, private ponds, and other water issues.

Starting in 2005, there were several significant developments in water policy. Following a recommendation of the EQC, the Legislature approved a measure to rejuvenate water rights adjudication.

A year later, the state Supreme Court ruled that the use of ground water wells in the Smith River Basin was affecting senior water rights holders on the river and that the system of permitting used by the state failed to recognize the connection of ground water and surface water. To address

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[6] Lawmakers did not assign the WPIC a specific study. In order to focus its work, the Committee examined legislation that appeared during the session and prioritized those issues into a work plan priority survey, the decision matrix, and the work plan, which are included in Appendix A, B, and C, respectively.

that situation, the 2007 Legislature passed House Bill No. 831 regulating ground water appropriations in closed basins.

These developments figured in the decision by the 2007 Legislature to create a temporary water policy committee. Lawmakers also asked the Montana Bureau of Mines and Geology to assess and report to the committee the range of potential impacts of ground water development on surface flows.

The Legislature assigned the 2007-08 WPIC a bevy of tasks with a general mandate to study water issues in order to develop a clear policy direction and necessary legislation to guide Montana's water policy that ensures fair and reasonable use of Montana's water resource as demands on water increase while supplies remain the same or decrease.[7]

The WPIC endorsed several bills that were approved in the 2009 session, including measures dealing with water permitting, enforcement, and water quality.

The 2009 Legislature also made the WPIC a permanent interim committee, marking another chapter in the history of water policy study in Montana.[8]

As part of its mission, the WPIC must coordinate with the EQC to avoid duplication of efforts. While the water policy duties outlined in 85-2-105, MCA remained with the EQC, some of them are now optional.[9]

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[7] Please see "Water - Montana's Treasure" for a complete report on the activities of the 2007-08 WPIC. http://leg.mt.gov/content/Publications/Environmental/2008montanastreasure.pdf

[8] Both the WPIC and the EQC supported Senate Bill No. 22 to make the WPIC a permanent committee. The EQC also sponsored Senate Bill No. 4 to create a permanent water policy subcommittee of the EQC.

[9] For more details, see historical water study overviews of EQC and Water Policy. http://leg.mt.gov/css/Committees/interim/2007_2008/environmental_quality_council/subcommittees/eqc_wpic/eqcwpic.asp

Findings and Recommendations

Through research and presentations on the topics the WPIC chose to study, committee members formulated findings and recommendations.

Agency and program monitoring

Water Resources Division Administrator Vacancy

Finding: The position of Water Resources Division Administrator for the Department of Natural Resources and Conservation (DNRC) is historically the point person between the Department and interim committees on water issues. The position should be held by a person intimately familiar with Montana as well as the management of state waters.

Action: The WPIC sent a letter July 15, 2009, urging the DNRC to fill the position as soon as possible.

Water right ownership update

Finding: In 2007, it was estimated that the ownership information on file with DNRC was obsolete for about 72,000 water rights. Even though water right ownership updates have been required when property was sold or transferred since 1983, there was significant noncompliance. The Montana Constitution requires the Legislature provide a system of centralized records. Accurate ownership information is integral to fulfilling this requirement. Accurate ownership records are key to completing water right adjudication.

Finding: The 2007 Legislature passed House Bill No. 39 authorizing almost $250,000 to create a process where geocodes -- unique property identifiers -- link parcels of land with water rights. The DNRC and the Department of Revenue were to work together on the process. Ultimately, the system should update most water right changes automatically.

Finding: The implementation of the water right ownership update process is taking longer than the Legislature intended. Complications included the conversion of the Department of Revenue's database to a new system, the higher priority of conducting the statewide property reappraisal, and data compatibility issues between the two databases.

Recommendation: The Departments of Revenue and Natural Resources and Conservation should make successful implementation of the water right ownership update system a priority and ensure that the WPIC is kept fully informed of progress, or lack thereof.

Ground Water Investigation Program

Finding: The continued and expanded study of ground water resources is vital to shaping statewide policy as well as providing the data necessary for local decisions regarding water.

Finding: The 2008-09 Water Policy Interim Committee supported creating a Ground Water Investigation Program within the Montana Bureau of Mines and Geology. The WPIC, the Legislature, and the Governor supported funding the program at $4.2 million.

Finding: The WPIC and the Legislature intended that the program would be ongoing, meaning that the program should be included in the base budget of the Bureau of Mines and Geology.

Finding: Thirty-nine subbasins were nominated and prioritized by the Ground Water Assessment Steering Committee based on land use changes and anticipated growth in housing, agriculture, industry, and commercial activities. Seven study sites were selected for the current biennium and those projects are under way. Each investigation takes 1 to 3 years to complete. Each investigation will include a description of the hydrogeologic system, a computer model simulating hydrogeologic features and processes, and online data. The models, reports, and supporting data will be available for use by scientists and engineers representing agencies, senior water right holders, new applicants, and other stakeholders.

Action: In a letter to the governor on May 12, 2010, the WPIC reiterated the intent of the committee and the Legislature that the investigation program is an ongoing endeavor and should be considered as such for funding purposes.

Recommendation: The Ground Water Investigation Program should continue to be funded at a level that will continue to provide information about the state's ground water resources that will be used by policymakers and others.

Completion of adjudication

Finding: The passage of House Bill No. 22 in 2005 injected a sense of urgency into the water right adjudication process and provided the funding necessary to move toward issuance of initial decrees. The law also established completion deadlines and required updates to the Legislature on the progress of adjudication.

Finding: The DNRC is well ahead of the examination benchmarks set in HB22 and, with adequate funding, should be able to complete examination work before 2015. Again, with adequate funding, it is realistic and feasible for the water court to issue a preliminary or temporary preliminary decree by June 30, 2020, for all basins in Montana.

Finding: After issuance of initial decrees, there are no benchmarks in state law for the Water Court. It is possible the court may complete the objections phase by 2020, after which the court will hold hearings and process cases through litigation. The litigation phase could last until 2028.

Recommendation: In consultation with the WPIC, the Water Court should establish defined performance expectations for the remainder of the water right adjudication process. Regular progress reports to the Legislature should continue after 2020.

Recommendation: The continued funding of the water right adjudication is of statewide importance. In 2007, House Bill No. 473 authorized a general fund transfer of $25 million to the water adjudication account provided for in 85-2-280, MCA to be used for the sole purpose of completing the statewide water adjudication by 2020. All available money in that fund should continue to be used for that sole purpose.

Overview of water management

Future administration of water rights

Finding: As the post adjudication era begins, significant water right administration issues will emerge, including maintenance of negotiated compacts, post decree assistance from DNRC, management of the water right database, and enforcement by both the DNRC and the Water Court.

Recommendation: To protect the investment the people of Montana made in the adjudication of water rights, the WPIC should continue to be involved in planning for the transition to the post adjudication era.

Recommendation: Agencies involved with water rights should begin producing workload estimates for post decree assistance and reviewing current staff and resources to identify where expertise should be allocated.

Change of water right authorization and pre-1973 rights

Finding: The examination of water right claims is expected to be complete in 2015 and preliminary or temporary preliminary decrees are expected to be issued in all basins by 2020. The Water Court adjudication covers claims of water used prior to 1973.

Finding: Population growth and demand for water mean that many historic water rights may be changed for different uses in the coming years. The DNRC is charged with ensuring that changing a water right does not adversely affect existing water users, both senior and junior to the right proposed for change. The agency examines how much water was historically diverted, but also the amount consumed by the historic use. That means that the amount of water allowed for the new use may be less than the amount historically diverted if the new use does not require the same amount of diverted water to achieve the amount of water historically consumed.

Recommendation: In future interims, the WPIC should study the scope and limitations of adjudication and how the adjudication result relates to the enforceable accuracy of water right claims. The study should examine the role and power of the DNRC to evaluate changes in water rights. The study should analyze how adjudication and change authorizations work together and suggest improvements to those systems.

Water planning

Finding: Montana law recognizes the need for a comprehensive, coordinated multiple-use state water plan. Statute also recognizes that the general welfare of the people of Montana, in view of the state's population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.

Finding: Significant portions of the state water plan have not been reviewed or updated for nearly two decades. The 2009 Legislature passed Senate Bill No. 303 to update portions of the state water plan and appropriated nearly $155,000. Objectives of the update were to analyze the effects of drought, new and current uses, and storage options. However, most of that funding was cut in response to the budget shortfall.

Recommendation: In future interims, the WPIC should evaluate the current water plan, determine what parts are still relevant and what sections need updating, and, if possible, suggest ways that the water plan can be updated to meet the future water needs of Montana.

Enforcement

Finding: A water right is a form of real property. However, a water right holder does not own the water; rather, the water right holder owns the right to use the water. While the water right holder is entitled to use a particular quantity of water and may call the water right of a more junior appropriator, the water is a shared resource. Real property rights are usually enforced through private party actions without government involvement.

Finding: Neither the DNRC nor the Water Court is charged with broad authority to enforce water rights. The stated mission of the Water Rights Bureau within the DNRC is "to assure the orderly appropriation and beneficial use of Montana's scarce waters". The Water Court provides jurisdictional authority over the adjudication of Montana's pre-1973 water rights.

Finding: While the DNRC does have statutory authority to investigate illegal water use -- and does exercise that authority -- there are concerns that senior water rights are not being protected.

Finding: When compared to other prior appropriation states, the burden to enforce water rights in Montana relies more heavily on water right holders than on the government.

Finding: There are several options available to water users to resolve conflicts,

including mediation, filing for court action, and, in some areas, petitioning for a water commissioner.

Ground water permitting

New permits and change authorizations

Finding: The 2009 Legislature, at the suggestion of the WPIC, approved significant changes to the new appropriation and change authorization process. House Bill No. 40 required that DNRC provide notice of receipt of applications; allowed the DNRC, the applicant, and affected parties to meet informally on a permit application; required a preliminary determination and set timelines.

Finding: There are some who contend that the permitting and change process is still slow and cumbersome, especially in closed basins.

Recommendation: Applicants and the DNRC should work together to identify specific issues that may unnecessarily impede the permit and change process and report those findings, along with suggestions to improve the process, to the next WPIC.

Mixing zones

Finding: Water quality and quantity are concerns in closed basins as well as statewide. The use of individual water wells exempt from permitting and individual septic systems is appropriate in many parts of Montana, and the use of public water and sewer systems is not always feasible, practical, or affordable.

Finding: In some areas, particularly those in closed basins that are experiencing population growth, there are concerns about the effect of individual septic systems on water quality. There is a need to address public health issues in areas where there is an increasing density of single wells and septic systems.

Finding: DEQ rules require that a subdivision lot using an individual water well and septic system must be at least 1 acre in size. This requirement dates to the 1970s. The minimum lot size with either community water or sewer is half an acre. There is no minimum lot size if both community water and sewer systems are used.

Finding: Individual septic systems use a drain field and a mixing zone. Solid wastes settle in the septic tank and the liquid effluent is discharged into a drain field. Beyond the drain field is the mixing zone, defined in law as an area where water quality standards may be exceeded.

Finding Option: Wells must be drilled at least 50 feet away from septic tanks and 100 feet from drain fields. (36.21.638, ARM). Ground water mixing zones must not intercept the zone of influence of an *existing* water well, a 100-foot radius around a well. (17.30.508, ARM).

Finding: Mixing zones are allowed to cross property lines. At a minimum, this creates a situation where a lot owner may be prohibited from drilling a well because of a neighbor's mixing zone. It also means a new well may be drilled 100 feet from a drain field, but within a mixing zone, where, by law, water quality standards are exceeded.

Recommendation Option: State law should be revised to require that drain field mixing zones be located wholly within the subdivision where the drain field is located unless an easement is obtained to place the drain field mixing zone outside the boundaries of the proposed subdivision. **(LC0350)**.

Exempt wells

Finding: More than 109,000 exempt wells in Montana are on file with the DNRC. It is estimated that nearly a quarter of those exempt wells are located within the five major river basins closed to most new ground water appropriations unless surface water depletion is analyzed and mitigated, if necessary.

Finding: The use of individual water wells exempt from permitting is appropriate in many parts of Montana, but there are concerns, especially in closed basins, about the cumulative effect of exempt wells on existing water rights.

Finding: Controlled ground water areas are local areas where all ground water withdrawals are subject to review. Establishing a controlled ground water area requires an applicant to provide a significant amount of hydrogeologic evidence.

Recommendation: The Ground Water Investigation Program is an unbiased source that can provide policy makers and others, including those who may petition for a controlled ground water area, with valuable hydrogeologic information about the effects of exempt wells and other ground water withdrawals. Funding for the Ground Water Investigation Program should continue at the level needed to provide this information.

Water marketing

Finding: The ability to change the use and place of use of water is key to the future of water management.

Finding: State law requires that new ground water uses in closed basins that result in a net depletion of surface water that causes adverse effect be offset through aquifer recharge or mitigation. In most cases, this will require that historic uses of water undergo change authorizations.

Finding: Current law, 85-2-310, MCA, does not allow the marketing of water without first identifying each user, each place of use, and each contract. While this provision is a curb against

speculation, it prohibits the marketing of water for mitigation or aquifer recharge in an area where the new user is not yet identified.

Finding: Water right holders are concerned about the status of a portion of a water right that is not changed.

Recommendation Option: Current law should be revised to allow water marketing without contracts in place, but only for the purpose of aquifer recharge or mitigation. For an appropriation right that retains the original beneficial use, the flow rate and volume of water allowed at the point of diversion must be equal to the flow rate and volume allowed under the initial beneficial uses minus the amount that was sold or marketed for mitigation or aquifer recharge. **(LC0351)**

Other issues

Amendments to Clean Water Act

Finding: In 1972, the Federal Water Pollution Control Act gave the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers the authority to regulate "navigable" waters of the U.S., such as lakes, rivers, and oceans. By passing this common-sense law, Congress ensured that these bodies of water were protected environmentally and that they were able to help promote interstate commerce. The original Act provides the federal government broad, but not unlimited, authority to regulate "navigable waters", with state governments responsible for regulating all other waters.

Finding: Proposed federal legislation would strip states of the right to regulate waters under the guise of "clarifying" jurisdictional questions raised by language within the Federal Water Pollution Control Act. Given the ambiguity of the legislation's jurisdictional reach, the implementation of this proposal may lead to increased litigation and uncertainty among public and private stakeholders, including homeowners, farmers, water districts, and state and federal agencies. It would undoubtedly lead to more bureaucracy and undue burdens on the water right holders throughout the country.

Action: The WPIC sent a letter to the Montana Congressional Delegation on March 11, 2010, requesting that Congress ensure that state authority over intrastate water resources is not preempted.

Levee accreditation

Finding: Members of the Board of Commissioners for the Great Falls Flood Control and Drainage District are concerned about the Map Modernization Program and the process for accrediting levees. If the program moves forward on its current path and levees in Montana are not accredited, there will be a devastating effect on the families that live in flood districts throughout Montana. A lack of accreditation will bring lower property values, raise flood

insurance costs, and make new construction or improvements to existing structures virtually impossible. Because of its rural nature, Montana has neither the population nor the resources to implement this expensive unfunded federal mandate. There are many questions about the Map Modernization Program that still need to be answered before implementation takes place.

Action: The WPIC sent a letter on March 11, 2010, to the Montana Congressional Delegation requesting that the Army Corps of Engineers and the Federal Emergency Management Agency delay implementation of the Flood Map Modernization Program until a number of issues are resolved. The letter said there may be a lack of coordination between the two agencies.

Local government powers

Finding: Current law, 76-3-504, MCA, requires that local subdivision regulations prescribe standards for water supply and sewage and solid waste disposal. Those standards may not be more stringent than state regulations or guidelines unless the criteria of 76-3-511, MCA, are met. Those conditions include that the local standard is technologically feasible and is supported by peer-reviewed scientific studies.

Finding: Some county officials believe that 76-3-504, MCA, does not state clearly enough that a local government may require a public water system, a public sewer system, or both, as long as the standards comply with 76-3-511, MCA.

Recommendation: Current law should be revised to clarify that, subject to 76-3-511, MCA, a local government may require a public water system, a public sewer system, or both. **(LC0349)**

Attorney fees

Finding: Current law requires the District Court to award the prevailing party reasonable costs and attorney fees if a final decision by the DNRC on a permit is appealed to the District Court. This leaves the District Court without discretion to determine whether an award of costs or attorney fees is appropriate under the circumstances.

Finding: Current law also limits the recovery of reasonable costs and attorney fees to a final decision on an application for a permit. It does not apply to the other common scenario, which is an appeal of a decision on a proposed change in appropriation right.

Recommendation: Revise 85-2-125, MCA, to clarify that the District Court has discretion to award reasonable costs and attorney fees incurred as a result of the appeal of a final decision on an application for a permit or a change in appropriation right. **(LC0347)**.

Use of river beds

Finding: The Land Board clearly has a fiduciary duty to administer Montana's riverbeds in the public interest. The Legislature may pass general laws providing for the use of state-owned river beds by various users of water.

Finding Option: A person who historically used the bed of a navigable river in conjunction with a legal use of water or for other uses or a person who desires to use the bed of a navigable river in conjunction with a legal use of water or for other uses must be able to do so provided that statutory provisions are met.

Recommendation: The Legislature should create a process for allowing historic uses on the beds of navigable rivers as well as providing a process for new uses on the beds of navigable rivers. The process should ensure that the use of beds of navigable rivers is consistent with the Land Board's fiduciary duty to administer that property in the public interest. **(LC0348)**

Water and the Way of the West

The concept that no one person can own water -- but rather owns a right to use the water -- dates to the Romans, who held that such things as air and water were common to all and could not be owned.[10]

Montana and other states claim ownership of water in their laws and constitutions.

In Wyoming, the constitution states: "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."

In Utah, Title 73, chapter 1, section 1, states: "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."

The framers of Montana's Constitution wrote that "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."

The right to use water is considered a property right, akin to a surface right or a mineral right. A water right can be sold, regulated, subjected to eminent domain, or taxed. However, water is different from other real property since the water can be reused. Unlike other rights, a water right may be forfeited if it is not used. Another difference from other property rights is the fact that a water right is limited by its beneficial use and the change of that use is often subject to government review. [11]

Beneficial use

The idea that water must be used in a productive way, and not for speculation, can be traced to Mormon irrigation practices in Utah. The requirement of beneficial use was imposed by courts and found its way into the Wyoming permit system, which dates to the late 1800s and was widely copied in the West.[12]

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[10] Law of Water Rights and Resources. A. Dan Turlock

[11] Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

[12] Law of Water Rights and Resources. A. Dan Turlock.

One way to think of beneficial use is a use that "communities, institutions, and laws have deemed valuable and worthy of protection."[13]

Another way to consider the term is in three parts: there is a continuous use of water, the use is limited to productive purposes, and water cannot be wasted.[14]

A beneficial use of water is one deemed valuable and worthy of protection.

Beneficial use is also considered the basis, measure, and limit of the water right. In general, a water right is limited to:

* the capacity of the water delivery system;
* the amount actually put to a beneficial use, even though the capacity of the system might be larger;
* the amount of water reasonably necessary for the particular use; and
* the period of actual need. For example, one cannot normally have an irrigation water right for wintertime use.[15]

Some state laws define a beneficial use in general terms.

In South Dakota, the term means "any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies."[16]

Colorado legislators said beneficial use is "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife, and also includes the diversion of water by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for recreational in-channel diversion purposes. For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on

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[13] Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

[14] Law of Water Rights and Resources. A. Dan Turlock

[15] Basic Montana Water Law. http://www.courts.mt.gov/water/default.mcpx

[16] South Dakota Codified Laws 46-1-6(3)

natural streams and lakes as are required to preserve the natural environment to a reasonable degree."[17]

Montana also has defined the term specifically through the years. In 85-2-102, MCA, "beneficial use" means:

* a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;
* a use of water appropriated by the DNRC for the state water leasing program and of water leased under a valid lease issued by the Department;
* a use of water by the Department of Fish, Wildlife, and Parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource;
* a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource;
* a use of water for aquifer recharge or mitigation; or
* a use of water for an aquifer storage and recovery project.

However states choose to define beneficial use, some may consider it still a "vague judicial concept", the determination of which will be decided in court as uses and priorities evolve.[18]

The Prior Appropriation Doctrine

Water law in Montana and the rest of the West is primarily rooted in the Prior Appropriation Doctrine. It is commonly described as "first in time, first in right." However, it may be more easily understood with the more modern term of "first come, first served."

One way to think of the Prior Appropriation Doctrine is "first come, first served."

At the root of the doctrine is the understanding that a person's right to use a specific quantity of water depends on when the use of water began. The first person to use water from a source, such as a river, is considered to have the first right of use on that river. The second person could establish a right on all or a portion of the water that was left, and so on. If, as can often happen, there is not enough water to satisfy all the water right holders on a particular source, the most senior water right holder -- the first user -- gets the first chance to use the amount of water allowed by the water right.

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[17] Colorado Revised Statutes 37-92-103

[18] Law of Water Rights and Resources. A. Dan Turlock

This concept is different from the way water is allocated in the eastern part of the United States. The Riparian Doctrine generally gives the right to use water to the landowner whose property lies adjacent to the waterway. This system works well in areas where rainfall is an ample source of water.

But as miners and farmers made their way into the vast, arid West, it became clear that there would not always be sufficient water where they needed it. Also, the settlement was occurring far away from the seat of federal power, making it hard for the U.S. government to control the public domain, which included land and water.

Miners and other water users adopted the first in time, first in right concept to mining claims and water use. Between 1855 and 1882, the western states developed justifications for the prior appropriation doctrine.

In 1864, the first Montana Territorial Legislature adopted a modified version of riparian rights for water use that allowed water to be used away from the riparian area. But as mining activity in Montana increased, policymakers warmed to the notion of "first in time" as it applied to water use. The Territorial Supreme Court affirmed the principle in 1870, though the riparian doctrine was not scrapped altogether until 1921.[19]

By 1900, western states developed justifications for the Prior Appropriation Doctrine.

The 18 states west of Iowa follow some portion of the prior appropriation doctrine. Though states use the doctrine differently, there are elements common to all the water right systems. In general, a valid appropriation must consist of:

* an intent to apply the water to an existing or contemplated beneficial use;
* an actual diversion of water in an amount sufficient for the use; and
* an application of the water to the beneficial use within a reasonable time. [20]

Prior to the advent of permit systems in the states, intent might have been shown by on-the-ground acts such as site surveys, land clearing, preparation of diversion point, or posting of notice.[21] Now, the filing of an application to appropriate water is considered intent.

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[19] Brian Shovers, "Diversions, Ditches, and District Courts: Montana's Struggle to Allocate Water," Montana, The Magazine of Western History, Vol. 55, No. 1 (Spring 2005), p. 2-15.

[20] Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

[21] Western States Water Laws, BLM. http://www.blm.gov/nstc/WaterLaws/abstract1.html

Diversions are an important historical component of a water right. The actual diversion of water provides a means of measuring the water being used and limits the right to the capacity of the diversion. Of course, historical uses such as sawmills or other machines that use moving water to do work did not divert water, but were considered a beneficial use. Many states, including Montana, have determined that leaving water in a stream under certain conditions -- meaning there is no diversion -- is also a beneficial use.[22]

Water Right Organization

Over the last hundred years or so, all western states except Colorado adopted administrative permit systems for water rights. Elwood Mead, an Indiana native educated in agriculture, engineering, and the law, is credited with what has become the modern water right permit system. As a professor in Colorado, Mead witnessed widespread water speculation, waste, and chaos. He advocated for an organized system.[23]

While Colorado rejected Mead's ideas, Wyoming hired him as the territorial engineer in 1888 and made him the state engineer a year later. Mead created water divisions organized by drainage. Appropriators had to apply for a permit and the office collected stream flows, water usage, ditch dimensions, and construction costs.[24]

Permit systems were devised to protect existing water uses and limit unrealistic claims.

The premise of the permit system in Wyoming was that new permits would be granted only in the case that existing priorities were protected and there would be security for all water right holders because the permits were public records. The permit system also limited unrealistic claims on water. In 1900, the Wyoming Supreme Court wrote: "In the state of Wyoming, at least, there will no longer be the ludicrous spectacle of learned judges solemnly decreeing the right from two to ten times the amount of water flowing in the stream .[25]

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[22] Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

[23] Selected Writings of Elwood Mead on Water Administration in Wyoming and the West. seo.state.wy.us/PDF/FinalMeadBooklet.pdf

[24] Brian Shovers, "Diversions, Ditches, and District Courts: Montana's Struggle to Allocate Water," Montana, The Magazine of Western History, Vol. 55, No. 1 (Spring 2005), p. 2-15.

[25] Law of Water Rights and Resources. A. Dan Turlock

Most other western states followed Wyoming's example.[26]

In Montana, the 1972 Constitution required: "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." A permit system administered by the DNRC was created within the Water Use Act of 1973[27]

Permit systems differ among the states, but in general an application is reviewed by an administrative agency that determines if there is unappropriated water available, if existing water right holders would be affected, and if there are any other reasons to deny or condition the permit.[28]

Permits may be granted if unappropriated water is available and existing water uses are not adversely affected.

The criteria for a permit in Montana are contained in 85-2-311, MCA. An applicant must prove that:

* the proposed use of water is a beneficial use;
* water is physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate;
* the amount of water requested can reasonably be considered legally available during the period in which the applicant seeks to appropriate. Legally available includes an analysis of the physical availability and the existing legal demands on the source.
* the water rights of a prior appropriator will not be adversely affected;
* the proposed means of diversion, construction, and operation of the appropriation works are adequate; and
* the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

It is not uncommon for a water right holder to request a change in the water right. A rancher may want a different point of diversion or an applicant may want to change the beneficial use from irrigation to domestic use.

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[26] Colorado water right applications are made to water courts. http://www.water.state.co.us/wateradmin/waterright.asp

[27] Until 1973, water was mainly appropriated in Montana by diverting it and putting it to use. Sometimes, notice was provided. The Constitution recognized and confirmed all these rights. The Water Use Act requires that these pre-1973 rights be finalized by a statewide adjudication in court. The adjudication process is ongoing and will be discussed throughout the interim by the WPIC.

[28] Law of Water Rights and Resources. A. Dan Turlock

A request to change a water right is handled similarly to a request for a new appropriation. The applicant must show the administrative agency how the water has been historically used prior to the change application because changes are limited to the amount of water the applicant has historically put to beneficial use.[29]

A request to change a water right is handled similarly to an application for a new appropriation of water.

As with new permits, an applicant for a change in appropriation right in Montana must show, if applicable, that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The requirement for a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use may also apply.

Again, as with new permits, the DNRC also must determine if the change requested would adversely affect existing water right holders.[30]

At the request of the 2008-2009 WPIC, the Legislature revised how the DNRC processes permit and change applications. The intent of House Bill No. 40 was to allow the DNRC to provide more feedback to an applicant earlier in the process. A flow chart showing how an application is processed is included in Appendix D.

[29] Ibid

[30] 85-2-402, MCA

Water Rights as Property: Who Enforces the Right?

Water right enforcement is not a new area of concern, but as drought and increased use strain existing water supplies, enforcement of water rights garners significant attention.

Some suggest that water rights should be more strictly enforced. Some also suggest that the use of water by someone who *does not* possess a water right or, conversely, the overuse of water by someone who *does* possess a water right is a theft that should be enforced in the same manner as, for example, the theft of a car.

A water right, however, is a unique form of real property that is characterized by the holder's right to use water rather than by ownership.

One of the most important yet controversial topics in modern property discourse is whether a particular thing constitutes property. The reason for the controversy is obvious: the classification of something as property has enormous implications for whether an individual will have certain recognized property rights. If something is classified as property, then it may be freely conveyed between parties, devised by will, inherited, or encumbered. The classification of a particular thing as property also determines the availability of certain constitutional protections that are unique to property ownership. For example, the Due Process Clause of the U.S. Constitution prohibits the deprivation of property without due process of law. Likewise, the Takings Clause prohibits the taking of private property without just compensation. Across jurisdictions, it is well settled that neither a due process claim nor a takings claim will be recognized unless a cognizable property interest is at stake.[31]

In addition, unless a property interest is at stake, a common-law claim for trespass, conversion, or nuisance cannot be recognized. Finally, since property rights are generally enforced through equitable remedies, such as injunctions, the classification of something as property may determine the availability of a particular remedy.

The very notion of what constitutes property is abstract and cannot be neatly categorized. In its most basic form, property is the "exclusive right of possessing, enjoying, and disposing of a thing."[32]

In Montana, anything that can be owned is called property, which may be classified as either: (1) real or immovable property; or (2) personal or movable property.[33]

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[31] See e.g. *Board of Regents v. Roth*, 408 U.S. 564, 69 (1972).

[32] Black's Law Dictionary, 1216 (Bryan A. Garner ed., 4th ed., West 1990).

[33] Sections 70-1-101 and 70-1-105, MCA.

Real property consists of: (1) land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; and (4) that which is immovable by law. By contrast, anything that is not real property is considered personal property.

Property may be owned privately by individuals or publicly by the government.[34]

Ownership of property gives an individual the right to possess and use property to the exclusion of others. Private property – or property over which a person may enjoy absolute and exclusive possession – is a complex and oftentimes controversial topic. Private property may include any type of property that can be legally held by an individual, including land, fixtures, bank accounts, stocks, homes, and cars. In Montana, an individual may have an interest in numerous forms of property. Under 70-1-104, MCA, an ownership interest may exist in inanimate things capable of manual delivery, domestic animals, obligations, products of labor or skill such as the goodwill of a business or trademarks, and other rights created or granted by law.

Beyond these broad statutory rules, property rights can be generally described as a set of laws that define how individuals may control and transfer property. The rights associated with property ownership are commonly illustrated as a bundle of rights or a bundle of sticks. Instead of describing a particular thing that a person can own, the bundle of rights theory describes a group of rights, which generally includes the right to exclude others from the property, to use and enjoy the property, to dispose of the property by sale or by will, or to mortgage or lease the property. The removal of one right, such as the removal of exclusive possession by granting an easement, does not eliminate the owner's other rights in the property. Many courts, including the Montana Supreme Court, have indicated that the most valued right encompassed within the bundle of rights is "the right to sole and exclusive possession – the right to exclude strangers, or for that matter friends, but especially the Government." [35]

The bundle of rights or bundle of sticks theory is used to describe water rights, which is indicative of the treatment of water rights as a form of property. In general, a water right may be defined as an exclusive right to access and use a specific quantity of water as provided by law. The right is exclusive because the holder of a water right may exclude others from interfering with the specific quantity of water that has been allocated to the holder or the source of supply from which the water is claimed. In Montana, a water right is defined as "the right to use water as documented by a claim to an existing right, a permit, a certificate of water right, a state water reservation, or a compact."[36]

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[34] Section 70-1-102, MCA.

[35] *Kafka v. Mont. Dept. of Fish, Wildlife and Parks*, 2008 MT 460, ¶ 51, 348 Mont. 80, 201 P.3d 8 (citing *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991).

[36] Section 85-2-422, MCA.

Because Montana is a prior appropriation state, which is characterized by the concept of "first in time, first in right," a water right cannot be obtained unless the water is actually diverted and applied to a beneficial use. Most western states have adopted some form of the prior appropriation doctrine, but despite whether a state has adopted the prior appropriation doctrine, the riparian doctrine, or some combination of the two, the character and nature of the water right itself are generally the same across jurisdictions.

It is well settled that water rights are legally protected property rights. As the Montana Supreme Court explained in 1936, when a right has been fully perfected by diverting the water and applying it to a beneficial purpose, the right becomes a property right that can "only be divested in some legal manner."[37]

As a result, water rights are protected by both the U.S. and Montana Constitutions and cannot be taken by the government without due process of law. In addition, water rights have value and may be transferred like other forms of property. Thus, water rights are very conceptually similar to the rights that stem from the ownership of real property. In fact, the general rule in western states that have adopted the prior appropriation doctrine is that water rights *are* considered real property. Like other forms of real property, water rights may be sold, conveyed, leased, encumbered, or assigned. In addition, although a water right normally passes with the land, it may be reserved if the transfer instrument specifically states that the water right has been reserved.[38]

The recognition that a water right is a form of real property came early in Montana's history. For example, in *Sain v. Montana Power*, 20 F. Supp. 843 (D. Mont. 1937), the District Court found that water rights were a form of real property and further, that suits to adjudicate the extent and priority of water rights were similar to quiet title actions. This principle was also recognized in a 1924 decision, in which the Montana Supreme Court stated that "[a]n action to ascertain, determine and decree the extent and priority of the right to use of water partakes of the nature of an action to quiet title to real estate."[39]

The comparison of an action to adjudicate the extent and priority of a water right to an action to quiet title to real property (in addition to the explicit recognition that a water right is real property) is significant in the context of water law not only because of the rights that stem from the ownership of real property, but because quiet title actions are actions between private parties to establish title to real property. The government generally does not get involved with these types of transactions.

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[37] *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 294, 62 P.2d 206, 210 (1936).

[38] See section 85-2-403, MCA.

[39] *See Verwolf v. Low Line Irrigation Co.*, 70 Mont. 570, 227 P. 68 (1924).

The substantive nature of a water right as a form of real property is also illustrated by the Montana Supreme Court's recognition that water rights may be acquired through adverse possession or prescription. Adverse possession is a method of acquisition of title to property by possession for a statutory period under certain conditions. A claim for adverse possession requires proof of open, notorious, exclusive, adverse, and continuous possession or use of the property for the statutory period of 5 years.[40]

Title by prescription requires the establishment of the same elements for an adverse possession claim, but provides only a right to use another's property for a limited purpose. Persons claiming title by adverse possession or an easement through prescription bear the "heavy burden" of proving each of these elements because according to the Montana Supreme Court, "One who has legal title should not be forced to give up what is rightfully his without the opportunity to know that his title is in jeopardy and that he can fight for it."[41]

However, pursuant to 85-2-301, MCA, adverse possession cannot be used as a method for obtaining a water right after July 1, 1973. That statute also provides that a person may not acquire a right to appropriate water "by any other method, including by adverse use, adverse possession, prescription, or estoppel."

The nature of a water right as real property is also illustrated by how water rights are treated for purposes of taxation. In *Verwolf*, the Montana Supreme Court stated that while a right to use water "partakes of the nature of real estate" it was "not land in any sense, and when considered alone and for the purpose of taxation is personal property." Otherwise, according to the Supreme Court, a right to use water "is not subject to taxation independently of the land to which it is appurtenant".[42]

Because water rights may be severed from land, the possibility arises that one's land value (and thereby the taxable value of the land) will decrease with the separation of the water right from the land. This question of whether a severed water right should be subject to taxation to make up the difference in decreased property tax revenue is beyond the scope of this report, but the WPIC may choose to refer the issue to the Revenue and Transportation Interim Committee.

Even though water rights may be considered a form of real property, there are significant differences between water rights and traditional forms of real property, such as land, that are often overlooked. The differences, however, are integral to how water rights are acquired, perfected, and transferred. The most significant yet commonly overlooked distinction between a water right and a traditional property right is that a water right holder does not *own* the water. Instead, by acquiring a water right, the holder acquires the right to *use* the water at a particular

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[40] See *Shors v. Branch*, 221 Mont. 390, 720 P.2d 239 (1986).

[41] *Grimsley v. Spencer*, 206 Mont. 184, 205, 670 P.2d 85, 92-93 (1983).

[42] *Verwolf*, at 578.

place in a particular quantity. As a result, a water right is commonly described in property law texts as a usufructuary right.

A usufruct is defined as "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing".[43]

The right to use instead of ownership is significant because the water right holder does not have an "ownership interest in the actual corpus (body) of the water until the water is reduced to possession".[44] However, once the water is reduced to possession, the water essentially takes on the character of real property and the holder has a property right in the specific quantity of water that has been authorized under the right itself.

The concept of a water right as a right of use instead of ownership is easily illustrated by Montana law. Under Article IX, section 3(3), of the Montana Constitution, "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."

In other words, the people of Montana own the water and individuals may use the water if the water is not wasted and is allocated toward a beneficial purpose. The Montana Supreme Court articulated this principle in 1923 when it held that an appropriator is not the owner of property but acquires the right to use it.[45]

Thus, in Montana the possession of a water right cannot be characterized as *absolute* ownership. Instead, by acquiring a water right, an individual acquires a right to use the water at a particular place for a particular purpose.

Water rights are distinct from traditional property rights for a variety of additional reasons. The differences stem largely from various limitations – legal and natural – that are unique to water rights in general. First, the water right holder does not have exclusive possession of the water itself. As noted above, the ability of a property owner to exclude others from using or intruding upon a particular piece of property is one of the most essential characteristics of a property right. While the water right holder is entitled to use a particular quantity of water and may "call" the water right of a more junior appropriator in times of scarcity, the water itself may be characterized as a shared resource.

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[43] Powell on Real Property § 65.03.

[44] Ibid.

[45] *Galahan v. Lewis*, 105 Mont. 294, 72 P.2d 1018 (1937).

For example, there may be federal, state, and tribal government interests in the same watercourse. The federal government may have an interest in hydroelectric power and ensuring the free flow of commerce. The state may have an interest in the water from a public health and safety standpoint and must ensure the viability of the public trust doctrine in navigable waterways. In addition, an Indian tribe may have a reserved water right in the watercourse, and of course, ecological systems rely on a sufficient and clean source of water. On top of these competing possessory interests, the water resource itself is a dynamic resource that changes with each season according to climatological influences.

Water rights are also unique because they are limited in prior appropriation jurisdictions such as Montana by the beneficial use requirement. Under Montana law, water cannot be appropriated unless it is applied to a beneficial use. Beneficial use is defined as "a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses".[46]

While the definition of beneficial use is broad (there are additional uses that will meet the beneficial use standard set forth in 85-2-102(4), MCA), all water rights are limited by this requirement, which has been characterized numerous times as the basis, measure, and limit of the right. In addition, water rights are limited to the amount of water that is actually put to a beneficial use and to the amount that is reasonably necessary for that use. Also, an appropriator cannot change his or her water right without receiving prior approval from the DNRC. To receive approval, the applicant must demonstrate that the change will not have an adverse effect on another's existing water rights. Finally, a water right may be forfeited if it is not used for the statutory period of 10 years.[47]

On a related note, the uniqueness of water rights is also demonstrated by 85-2-212, MCA, which codified the Montana Supreme Court's 1979 Order No. 14833 requiring every person, entity, municipality, county, state, and federal agency and tribe to file a statement of claim to an existing right to the use of water arising prior to July 1, 1973. Failure to file a claim resulted in a conclusive presumption that the water right or claimed water right was abandoned. Claims for stock and individual uses based upon instream flow or ground water sources were exempted from the requirement, although the claims could be voluntarily filed.

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[46] Section 85-2-102(4), MCA.

[47] Section 85-2-404(1), MCA, states that "[i]f an appropriator ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately expire."

A hybrid scheme for enforcement

The scheme for water right enforcement in Montana is a unique hybrid of both private and government enforcement mechanisms. The DNRC is charged with administering and regulating water rights in Montana. Under 85-2-114, MCA, the DNRC has authority to petition the District Court supervising the distribution of water to uphold a water right. Specifically, the DNRC may petition the District Court to "regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use". The DNRC may also petition the District Court to "order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference".[48]

Finally, the DNRC may request a temporary, preliminary, or permanent injunction to prevent a violation of surface and ground water laws.[49]

The DNRC may direct its attorneys, the Attorney General, or a County Attorney to bring suit to enjoin any of the above referenced actions, although either the Attorney General or a County Attorney may initiate such an action.[50]

In any event, prior appropriators must be given priority in judicial enforcement proceedings and a violator may be subject to civil penalties for noncompliance in an amount not to exceed $1,000 each violation..[51] Criminal penalties are not available in Montana.

While the DNRC has some authority to enforce water rights and can petition the District Court in the instances outlined above, for a variety reasons that are discussed more thoroughly below, water rights are most commonly enforced through private litigation. Usually this requires a party to obtain an injunction to prevent an interference with a water right. An injunction is an enforceable court order that requires a party to take a particular action. There are three types of injunctions: (1) temporary restraining orders; (2) preliminary injunctions; and (3) permanent injunctions. The first two are commonly brought together and are usually valid for a very limited duration. A temporary restraining order may be granted without notice and allows a court to enjoin an adverse party until a hearing can be held on an application for an injunction or order for a show cause hearing. Under 85-2-114, MCA, "a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified compliant that a provision of this chapter [Title 85, chapter 2] is being violated."[52]

Like a temporary restraining order, a preliminary injunction is also issued before trial. A preliminary injunction, however, lasts longer than a temporary restraining order and is usually

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[48] Section 85-2-114(1)(b).
[49] 85-2-114(1)(c), MCA.
[50] 85-2-114(3) and (4), MCA.
[51] 85-2-122, MCA.
[52] See *Eliason v. Evans*, 178 Mont. 212, 583 P.2d 398 (1978).

issued to preserve the status quo before trial. As an equitable action, a request for a preliminary injunction (or any injunction for that matter) will not give rise to a trial by jury. A preliminary injunction may be granted in the following situations: (1) when it appears that the applicant is entitled to the relief demanded and the relief will restrain the action complained of; (2) when it appears that the commission or continuance of some action during the litigation would produce a great or irreparable injury to the party seeking the injunction; (3) when it appears during the litigation that the adverse party is doing, is threatening to do, or is about to do some act that violates the rights of the party seeking the injunction; or (4) when it appears that the adverse party, during the pendency of the action, is threatening to or is about to remove or dispose of the adverse party's property with intent to defraud the party seeking the injunction.[53]

Finally, a court may order a permanent injunction after a trial is complete and the dispute has been decided. Although similar to a temporary injunction, a permanent injunction may be limited or infinite in duration. Permanent injunctions have been upheld by the Montana Supreme Court on a variety of occasions in the context of water use.[54]

There are additional methods by which a party can enforce a water right. In times of scarcity, a senior appropriator may "call" the water rights of a more junior appropriator when water availability is low. The quintessential component of the first-in-time, first-in-right doctrine is that whoever obtains a water right first has priority over those who obtained subsequent water rights in the same source. As such, priority dates can determine whether a user will have any access to water in times of scarcity. Senior users are entitled to use the total amount of their water rights first. Junior water right holders cannot use water pursuant to their rights unless the use does not adversely affect a senior user.

In addition, in cases where a temporary preliminary, preliminary, or final decree exists, a party may petition a District Court to appoint a water commissioner to settle a water distribution dispute, provided that the owners of at least 15% of the water rights affected by the decree filed the petition.[55]

If 15% of the owners of the water rights affected by the decree cannot be obtained for the petition, a water commissioner may still be appointed if the petitioners can show that they are not receiving the water to which they are entitled. In these cases, the water commissioner will distribute the water according to the decree. Similarly, in the case where the water rights of *all* appropriators from a source or in a defined area have been determined, the DNRC and one or more water right holders may also petition a District Court to have a water commissioner appointed.[56]

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[53] Section 27-19-201(1) through (4), MCA; see also *Espy v. Quinlan*, 2000 MT 193, 300 Mont. 441, 4 P.3d 1212.

[54] See e.g. *Wills Cattle Co. v. Shaw*, 2007 MT 191, 338 Mont. 351, 167 P.3d 397.

[55] See section 85-5-101, MCA.

[56] Sections 85-5-101(1) and (2), MCA.

A water dispute may be easily settled in these cases because the water rights at issue have already been determined. When a temporary preliminary, preliminary, or final decree does not exist or when all appropriators from a source or area have not been determined, any party may petition the District Court to certify the matter to the Chief Water Judge for a determination of the water rights at issue. Pending a determination by the Water Court, the District Court may issue an injunction or other relief necessary.[57]

Any party may also petition the District Court to appoint a water mediator to assist with the resolution of a dispute. Under Montana law, a water mediator does not have formal power to order any water user to take a particular action. Rather, the mediator provides guidance to the parties for the nonjudicial resolution of the dispute.[58]

In 2009, the Legislature revised many of Montana's laws with respect to water right enforcement. Pursuant to House Bill No. 39, a special water master may now be appointed by a District Court to assist with enforcement. Prior to the passage of HB39, water masters were authorized only to assist with various duties before the Water Court. The bill provided specific authorization for a water master to assist with actions brought pursuant to 85-2-114, MCA. As an officer of the court, a water master has all the general powers given to a master under Rule 53(c) of the Montana Rules of Civil Procedure. In the Water Court, water masters are responsible for assisting the Court with adjudication matters and are assigned to a particular basin to consolidate claims, conduct conferences, order field investigations, accept or reject settlement agreements, and issue a Master's Report. Water masters, however, do not monitor individual water users to determine whether a person is unlawfully using water in violation of another's water rights.

House Bill No. 39 also removed various enforcement hurdles for the DNRC. Section 85-2-114(1), MCA, formerly required the DNRC to make reasonable attempts to obtain voluntary compliance from a party before it could file a petition with the District Court for any alleged violation of Title 85, chapter 2, MCA, commonly referred to as the Montana Water Use Act.

The DNRC may, but is not required to, obtain voluntary compliance from a party before filing a petition with the District Court. The 2009 amendments to 85-2-114, MCA, also require the DNRC, the County Attorney, and the Attorney General to "give priority to protecting the water rights of a prior appropriator under an existing water right, a certificate, a permit, or state water reservation" when enforcing any of the provisions of 85-2-114, MCA. Finally, the legislation established a water right enforcement program and account that required fines collected under 85-2-122(3)(b), MCA, to be deposited into the account.

Considerations

As previously noted, water right enforcement in Montana is a unique hybrid of both private and government enforcement mechanisms. While other states have also developed shared enforcement schemes for water rights, the degree of involvement by state agencies varies from

[57] Section 85-2-406(2)(b), MCA.
[58] Section 85-5-110, MCA.

state to state. In comparison to other prior appropriation states, enforcement of water rights in Montana relies more heavily on individual water right holders and less on government assistance.

Some suggest that water right holders in Montana would benefit from a more robust state role. But some issues should be considered when contemplating changes to the current enforcement scheme.

There are a variety of possible explanations for the emphasis on private rather than government enforcement. The primary reason may stem from the legal characterization of water rights as a form of real property. On one hand, the classification of water rights as real property has resulted in the recognition that water rights have value and can be transferred, inherited, devised, encumbered, and disposed of in much the same way as real property. On the other hand, it may be why much of the enforcement burden has been placed upon private individuals. Real property rights are usually enforced through private party actions without government involvement.

For example, the government does not assist parties with the enforcement of private property rights through quiet title and adverse possession actions (common claims involving disputes over real property). In these cases, the individuals themselves are responsible for establishing their rights in the property at issue. With respect to quiet title actions, an individual files a claim in a District Court with jurisdiction over the property to remove any adverse claims against the title. There is no mechanism whereby the government steps into the shoes of this individual to ensure that adverse claims have been removed and title has been established. Similarly, in the context of adverse possession, an individual is responsible for filing a claim in court and establishing that title has been established through adverse possession. Again, the government does not assist the individual claimant with establishing rights in the property.

Particular aspects of Montana's history may also be a factor in the emphasis on private enforcement. For example, it was not until the passage of the Montana Water Use Act in 1973 that Montana adopted a comprehensive system of water right administration. The creation of the Water Court in 1979 added to the state's capacity to carry out the significant administrative tasks imposed by the Montana Water Use Act, but full adjudication of water rights in Montana is still years away. As a result, comprehensive enforcement of water rights by the state is a difficult prospect.

There are additional complications, including the fact that an enforceable decree (one where a commissioner can be appointed to distribute water) is difficult to obtain in many cases. An enforceable decree may be obtained only after federal reserved water rights have been incorporated into a preliminary decree by the Water Court or pursuant to 85-2-404(4), MCA. Because of the relatively late development of institutions and processes for clarifying and protecting water rights, especially the ongoing adjudication processes, Montana's water rights system remains primarily focused on clarifying existing rights rather than on enforcement. This focus on adjudication of existing rights has also likely contributed to the heavy reliance on private party enforcement of water rights.

There are also administrative limitations on the enforcement of water rights in Montana. Neither the DNRC nor the Water Court is charged with broad authority to enforce water rights. The stated mission of the Water Rights Bureau within the DNRC is "to assure the orderly appropriation and beneficial use of Montana's scarce waters". While the DNRC has significant authority to administer the Montana Water Use Act, it does not have the specific statutory authority or resources to implement a broad enforcement scheme.

For its part, the Water Court was established to provide jurisdictional authority over the adjudication of Montana's pre-1973 water rights, not to provide enforcement.

Wyoming's centralized system provides a clear contrast to Montana's. Wyoming began permitting and administering water rights on a statewide basis in 1890, the same year Wyoming became a state. Wyoming's State Engineer and Board of Control provide for the ongoing adjudication and administration of water rights. Water rights are derived solely through the Wyoming State Engineer's permitting process, and neither historic use nor adverse possession can be used to establish a water right. In addition, adjudicated water rights in Wyoming exist in perpetuity and can be lost only through abandonment. Anyone wishing to change an existing water right must petition the Board of Control regarding the desired change and include all pertinent existing information about the water right. The Board of Control may request a public hearing on the petitioned change at the owner's expense. In contrast to Montana, Wyoming provides the State Engineer with broad statutory authority to distribute water in accordance with existing permits pursuant to state law and administrative rules.

To this end, Wyoming has four water divisions, each with its own superintendent (the equivalent of a court-appointed water commissioner in Montana) who actively administers water within the division. Superintendents may also intervene in the distribution of water at the request of an existing user.

Utah also embarked on a comprehensive effort to define and administer water rights earlier than Montana. The Utah Legislature enacted a complete water code in 1903. Rights to use water are established only through an appropriation process administered by the Division of Water Rights or by filing a "diligence claim" to rights for water diversion and use established prior to 1903 for surface water or prior to 1935 for ground water.

Like Wyoming, Utah has a State Engineer that administers the appropriation and distribution of the state's waters. In Utah, the State Engineer leads the Division of Water Resources. Until 2005, Utah's system was similar to Montana's in that it relied largely on private action for enforcement. In 2005, however, largely in response to growing demand on the state's limited water resources after several years of drought, the Utah Legislature passed a series of new laws that strengthened the state's role in enforcement. The State Engineer was given the authority to <u>commence</u> enforcement actions against unlawful water uses. Enforcement actions may be initiated by the Division of Water Rights after a violation has been observed by a state official or after a complaint is filed by a water user, government agency, or interested party. All alleged violations are first investigated by the State Engineer's office. If a violation is confirmed, the state issues a

notice of violation, a cease and desist order, or both. In response, the user may request a hearing, respond with information refuting the alleged violation, or do nothing. These actions by the alleged violator influence the state's final order, which may include administrative penalties of $5,000 for each knowing violation or $1,000 for each unknowing violation. Further, violators may be required to replace up to 200 % of any misused water.

It should be noted that in addition to institutional and administrative limitations in Montana, there would be significant costs associated with increasing the state's ability to more actively investigate and enforce water rights. Currently the DNRC does not have the funding or the staff to increase its enforcement capabilities. With water users spread throughout all corners of the state, the DNRC would need to hire numerous additional employees to assist with actively monitoring water use and establishing interferences with water rights. It is unclear how these costs would be supported, especially during the current fiscal downturn.

Exempt Wells: No Permit Necessary

In 1973, the Montana Legislature passed a piece of sweeping legislation that would radically alter the way the way water rights were allocated. The Water Use Act established a formal system of permitting for water use.

It also included an exemption to the new permit system. Section 16 of the act provided that:

"Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than 100 gallons a minute."

Exempt wells do not undergo an adverse effect test or public notice.

Montana is like most western states in providing that small wells are not subject to the same requirements as other appropriations of water. The exemption means that a limited use of ground water is not subject to the criteria needed for a permit, including providing evidence that the water rights of a prior appropriator will not be adversely effected. The exemption also means that other water users may not object to a proposed exempt well.

The legislative history from 1973 in Montana provides little insight into the reasons for the exemption or the flow rate selected. Reasons for such a provision may include the belief that access to water is a fundamental human right, that evaluating small wells could clog up the permitting process, and that in rural areas a small well may be the only source of potable water.[59]

Over the last three decades, there have been two significant changes to Montana's exempt well statute and one change to the rule implementing the law.

In 1987, several amendments were made to permitting laws. House Bill No. 642 provided that appropriations of less than 100 gallons per minute (gpm) were still exempt, "except that a combined appropriation *from the same sourc*e from two or more wells or developed springs exceeding this limitation requires a permit."

The original language of House Bill No. 642 did not contain the words "from the same source". It appears that language was added at the request of Ted Doney, an attorney representing the Water Development Association.[60]

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[59] Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

[60] Minutes of Senate Natural Resources hearing on HB642. March 23, 1987.

According to the minutes of a hearing on the bill, "Mr. Doney disliked the word 'combined' because he didn't know what the word meant in the bill. He thought it meant that two wells that were irrigating the same tract but not physically connected. Mr. Doney would rather the bill read, 'wells from the same source.'"[61]

The rule adopted in 1987 to implement the statute defines a combined appropriation as "an appropriation of water from the same source aquifer by two or more ground water developments, the purpose of which, in the department's judgement, could have been accomplished by a single appropriation. Ground water developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.' They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated for the entire project or development from these ground water developments in the same source aquifer is the 'combined appropriation.'"[62]

In 1993, the DNRC amended the definition to its current form, which states that a combined appropriation is "an appropriation of water from the same source aquifer by two or more ground water developments, that are physically manifold into the same system."[63]

The department said the change was made "to more concisely define what is considered a combined appropriation. The past definition was too ambiguous and therefore difficult to administer ... fairly and consistently throughout the state. It required the department to make assumptions when determining whether developments were considered combined appropriations. The amended rule clearly defines what is a combined appropriation without any supposition."[64]

The second significant legislative change, passed in 1991, reduced the flow rate and 10-acre foot a year limit. The changes were part of a bill requested by the DNRC, the main purpose of which was to clarify the definition of ground water. Apparently, there was concern at the time that the 100 gpm exemption was being abused to irrigate large parcels as well as to provide water to subdivisions and trailer parks.[65]

The exemption changed in 1991 from 100 gpm to 35 gpm, not to exceed 10 acre-feet a year.

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[61] Ibid.

[62] Montana Administrative Register Notice No. 36-12-6, June 25, 1987.

[63] 36.12.101 ARM.

[64] Montana Administrative Register, June 24, 1993. Two petitions to the DNRC argue that this interpretation of the law does not reflect legislative intent. One was denied in 2006 while the other is under consideration.

[65] WPIC presentation. "Wells Exempt from the Permitting Process". Curt Martin, Water Resources Div., DNRC. Sept. 13, 2007.

According to the minutes of the House hearing, the sponsor of the bill said the Senate committee talked about lowering the limit and 35 gallons per minute was the most common figure cited. But he added that the DNRC considered 100 gpm to be reasonable and lowering the limit would increase the number of permit applications.

In response to a question about protecting a surface water right if an upstream user drills an irrigation well, a representative of the DNRC said that if the well were less than 100 gpm, "any adverse impact would have to be addressed in the courts."[66]

The statute now says, in part:

"Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit."[67]

To appropriate water under the statue, a person must drill the well, submit a notice of completion form to the DNRC, and pay $125. The form asks for the flow rate, the type of use, and the location of use. If the requirements are met, the user is issued a certificate of water right with a priority date recorded as the day the notice of completion was filed. [68]

Since 1991, the exempt well law has changed little, but the use of the exemption has become more controversial.

The Issues

The use of small wells for domestic purposes is a much-discussed policy issue across the West. The Western States Water Council, an organization consisting of representatives appointed by the governors of 18 western states, declared in a 2008 report that "while the impact of an individual exempt well on water resources may be negligible, the aggregate impact of many exempt wells can be significant." Council members said exempt wells have the potential to affect ground water and surface flows and raise water quality concerns. [69]

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[66] Gary Fritz, DNRC Water Resources Administrator, House Natural Resources Committee, March 14, 1991.

[67] 85-2-306, MCA.

[68] DNRC Form 602. http://www.dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/602.pdf

[69] Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

The report notes that compared to irrigation, municipal, and industrial uses, domestic wells have the least effect on supplies. However, an increase in new subdivision residents who rely on such wells, combined with drought, may add stress to water supplies.[70]

"Incorporating domestic wells into existing water regulatory schemes may prove necessary before land and water management can be comprehensively integrated," the report said.

More than 109,000 exempt wells in Montana are on file with the DNRC.[71] It is estimated that nearly a quarter of those exempt wells are located within the five major river basins closed to further appropriation.[72]

According to a report from the United States Geological Survey, Montana has the fourth highest percentage of residents in the country who depend on what is called "self-supplied domestic water" meaning a water supply not provided by a public system.[73]

One-third of Montanans drink from a non-public water source. Most of that comes from ground water wells.

The drinking water of nearly one of every three Montanans comes from a self-supplied source. Most of that comes from ground water wells. See **Appendix E** and **Appendix F** to see how Montana compares to other states. **Appendix G** shows exempt wells by subdivision lot size. **Appendix H** is an example from Gallatin County of a permitted irrigation well that is adjacent to a subdivision of exempt wells.

The 2007-2008 WPIC discussed domestic wells throughout the interim. The Committee agreed on several findings, including:[74]

* The use of individual water wells exempt from permitting and individual septic systems is appropriate in many parts of Montana, and the use of public water and sewer systems is not always feasible, practical, or affordable.

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[70] Ibid.

[71] This includes 109,147 certificates of water rights issued between 1973 and Nov. 30, 2009. However, it is widely acknowledged that not all owners of wells drilled under the exemption filed the required notice of completion.

[72] Through Nov. 30, 2009, there were 25,663 exempt wells in the Bitterroot, Jefferson-Madison, Upper Missouri, Teton, and Upper Clark Fork River Basins.

[73] USGS Estimated Use of Water in the United States, 2005. The report did not count domestic wells in the states. The self-supplied numbers were calculated using an estimate of the population not served by public supply and a coefficient for daily per capita use. http://pubs.usgs.gov/circ/1344/pdf/c1344.pdf

[74] Water - Montana's Treasure, WPIC, 2008. http://leg.mt.gov/css/Committees/interim/2007_2008/water_policy/default.asp

* Statewide, the DNRC estimates that exempt wells, including stock and domestic wells, represent less than 5% of total consumption.

* In some areas, particularly those in closed basins that are experiencing population growth, there are concerns about the effect of exempt wells on water quantity and the effect of individual septic systems on water quality.

* Not all exempt wells are filed with the DNRC. For those that are filed, the DNRC does not meter whether the wells are exceeding the allowed rate or volume.

* DNRC records show that there are thousands of purposes listed for wells. Some of the most common include domestic (75%), stock watering (32%), lawn and garden (24%), irrigation (6.5%), commercial (2.6%), multiple domestic (1.9%), and fish, waterfowl, wildlife, and recreation-related purposes (1.7%).[75]

* Domestic and multiple domestic purposes automatically include one-quarter acre of lawn irrigation per household. Therefore, when the purpose "lawn and garden or irrigation" appears on the certificate, it is for more than one-quarter acre of irrigated area.

* For DEQ subdivision review, the average in-house diversion is about .22 acre-feet per year and much of that is nonconsumptive. Based on an 18-week irrigation season, a quarter-acre lawn takes .55 acre-feet annually.

* According to the DNRC, the limiting factor to irrigation from an exempt well would probably be the annual volume, not the rate. It may be possible to irrigate 4 acres with an exempt well, enough to feed three horses.

* The water right permitting process for a public system may take longer and be more expensive for a subdivision than using exempt wells.

* There is a need to address public health issues in areas where there is an increasing density of single wells and septic systems.

* In some areas of Montana, public water systems and public sewer systems are preferable to individual water wells and septic systems. But installing public water and sewer systems at the time of development may represent a significant cost to the developer, which is passed on to the homeowner.

* While individual water wells may cost less per lot initially, over time a public water system may result in less cost to the homeowner.

* Incentives are needed to encourage public water and sewer systems.

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[75] Certificates can be issued listing more than one purpose.

* Subject to certain provisions, a county has the power to adopt subdivision regulations that require public water systems, sewer systems, or both.

The committee also discussed how ground water appropriations, including exempt wells, figure into the prior appropriation system.

Unlike some states, the domestic use of water does not have a higher priority in Montana than other uses.

In a legal memorandum to the WPIC, the Committee's attorney wrote that unlike some other states, Montana does not prioritize water rights by the type of use. However, it is much easier to close a headgate on a ditch during a call by a senior appropriator than it is to shut off wells. An additional complicating factor is the legal ability to continue to develop ground water through the use of exempt wells, even in closed basins in which it is recognized that water is overappropriated. During a call for water by a senior appropriator, all junior water right uses are supposed to be curtailed according to their priority, but the public health crisis that may result from curtailing domestic or municipal water use may create a de facto priority for those uses even if they are junior to other uses.[76]

Another issue associated with exempt wells is the additional water used when a piece of land is sold for development but the water rights are severed from the property. Instead of changing the water use associated with the land to domestic, the new development appropriates its water supply with exempt wells and the existing right is used elsewhere.

Montana Legislation

Several attempts failed over the last few years to amend the exempt well statute or otherwise limit the use of exempt wells.

On a split vote, the 2007-2008 WPIC endorsed Senate Bill No. 17. The measure would have required public water and sewer systems in subdivisions of at least 30 lots with an average lot size of 3 acres or less. A developer could propose an alternative water or sewer system, but the alternative would need county approval.

Other proposed legislation in recent years includes:

* 2009 -- Senate Bill No. 437 -- Prohibit the issuance of a fish pond license for a body of water supplied by an exempt appropriation of ground water.

* 2007 -- House Bill No. 104 -- Would have kept the 35 gpm and 10 acre-feet a year exemption for stock water on parcels of land 40 acres or larger. For domestic or commercial use, the flow rate remained the same but the volume could not exceed 1 acre-foot a year. Lawn and

[76] Enforcement of Senior Rights in Relation to Ground Water Rights, Greg Petesch. 2007 http://leg.mt.gov/content/Committees/Interim/2007_2008/water_policy/staffmemos/watenforcement.pdf

garden uses associated with a domestic or a commercial use could not exceed one-quarter acre of land.

* 2007 -- House Bill No. 138 -- Remove exemption for domestic use in closed basins.

* 2005 -- House Bill No. 403 -- Require a water use permit for subdivisions. Retain current exemption for 35 gpm wells of less than 10-acre feet but require a permit for a combined appropriation, defined as any ground water development consisting of two or more wells or developed springs, regardless of whether their diversion works are physically connected, that are developed in connection with a major or minor subdivision.

A bill that passed in the 2009 session may provide more insight into exempt wells and their effects. House Bill No. 52 established the Ground Water Investigation Program at the Montana Bureau of Mines and Geology. Among other things, ground water studies will examine stream depletion from ground water development by subdivisions or changes in irrigation projects.[77]

Rule Challenges

Two challenges have been made to the administrative rule that defines a combined appropriation. In 2006, Gallatin County argued that the current definition of "combined appropriation" does not reflect the Legislature's intent and the rule as written encouraged a proliferation of exempt wells that has a cumulative effect on senior water right holders and water resources.[78]

Gallatin County requested that the definition of "combined appropriation" be changed so that a permit is required if a second or subsequent well is drilled from the same source on a tract of land after the effective date of the rule if the additional well would exceed the 35 gpm or 10 acre-feet limits. A permit also would be required for any well on a tract of land smaller than 20 acres created after the date of the rule.

The DNRC denied the petition, saying it was too complex and could require the hiring of up to 50 new employees to process new permits. The Department also said the rule change would halt development in closed basins where the DNRC could not process applications for new ground water permits.[79]

However, in response to comments, the DNRC wrote that "with increasing use of the exemption, and a greater understanding of the impact of exempt water rights on other ground water and surface water resources, the Department acknowledges that ground water use under the exemption statute and the definition of 'combined appropriation' must continue to be scrutinized

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[77] Ground Water Investigation Program. http://www.mbmg.mtech.edu/gwip/gwip.asp

[78] Gallatin County Petition for Rulemaking for Exempt Wells, Oct. 23, 2006.

[79] The denial followed the Trout Unlimited decision in 2006. The passage of HB831 in 2007 allowed for the processing and granting of new permits in closed basins, with certain requirements.

to be consistent with the purposes of the prior appropriation doctrine, its many codifications in the Water Use Act, and the intent of the Legislature."[80]

In December 2009, five water right holders filed a petition with the DNRC asking the agency to declare the current combined appropriation rule invalid. The petition asserts the rule does not meet the legislative intent. The petition also asks for a new rule that would define a combined appropriation as "an appropriation of water from the same source aquifer by two or more wells or developed springs that are part of the same project, development, or subdivision. Two or more wells or developed springs that are part of the same project, development, or subdivision are presumed to appropriate water from the same source aquifer."[81]

Other States

Most western states allow some kind of exemption for small wells. In Montana, upon filing of a correct and complete notice of completion, the a certificate of water right is issued with a priority date the same as the filing of the notice. **Appendix I** shows how western states compare for regulation of domestic wells.

Three states are addressing domestic wells in differing manners.

Utah regulates domestic wells in the same way as other uses of ground water. All wells must be approved by the state engineer. In areas open to appropriation, a person applies to appropriate new water. But in areas closed to new appropriations, a person must acquire at least part of an existing water right and go through the change process to cover the new use of water. Both the application for water right and the change application require public notice.[82]

In Washington and New Mexico, the proliferation of exempt wells in basins otherwise closed to new appropriations of water has the subject of administrative and judicial action.

Washington has had an administrative moratorium in effect for years in the headwaters area of the Yakima River Basin. No new ground water permits have been issued since 1993.

However, the moratorium did not apply to exempt wells, including those used to irrigate a half acre or those that supply up to 5,000 gallons per day for domestic use. Since 1998, nearly 3,000 exempt wells have been drilled in Kittitas County, prompting concerns that ground water pumping threatens senior water users and stream flows in the Yakima Basin.[83]

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[80] Order of Denial, Gallatin County Petition for Rulemaking, Dec. 22, 2006.

[81] Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13), December 2009.

[82] http://www.waterrights.utah.gov/wrinfo/faq.asp#q2

[83] Department of Ecology News Release - August 3, 2009. http://www.ecy.wa.gov/news/2009news/2009-192.html

In 2008, the Department of Ecology started adopting temporary emergency rules that limited the amount of the exempt appropriation but did not prohibit the exempt use of water. In July 2009, the latest emergency rule prohibited all new ground water appropriations except those that are "water budget neutral projects." The state established a trust water right program to help proposed new users of water find existing rights to offset the consumptive use of the new project.[84]

Washington established a water trust to help offset the consumptive use of new uses, including domestic wells.

The Washington Attorney General said that while the department lacked authority to limit the amount of the exemption, the agency's latest rule is within its statutory authority.[85]

In New Mexico, the exempt well provision directs the state engineer to issue a permit for irrigation of less than an acre or for domestic use. As with other states, the issuance of a permit is not contingent upon any other factors, such as adversely affecting existing water right holders.

Several attempts have been made to change the law, but in 2006, the state engineer implemented an administrative rule limiting the exemption to 1 acre-foot annually per household. Further limitations may be imposed in domestic well management areas, defined as places bounded by an overlying stream-connected aquifer that requires special water resource protection. The state engineer relied upon the statutory authority that allows the adoption of regulations to enforce any provision of law administered by the office.[86]

The state engineer said the limits were necessary. "The regulations were developed in response to current conditions – rapid growth along our major interstate rivers, continuing drought, the need to conserve water wherever and whenever possible, and the need to protect senior water rights."[87]

However, a District Court decision last year cast doubt upon the entire exempt well provision in New Mexico. A farmer with senior water rights who lives in a basin closed to new appropriations since 1972 objected to the domestic wells.

The judge declared the exempt well statute unconstitutional because it created an impermissible exemption to the priority administration system created by the state's constitution. He added that the exempt well

A New Mexico judge said the exempt well statute is at odds with the priority administration system.

[84] Attorney General Opinion, AGO 2009 No. 6. http://www.ecy.wa.gov/programs/wr/cro/images/pdfs/2009_no6_ago_ZempleManningOpinion.pdf

[85] Ibid.

[86] Domestic Well Regulations, New Mexico. http://www.ose.state.nm.us/PDF/RulesRegsGuidelines/DomesticWells/72-12-1-Rules-2006-08-15.pdf

[87] Regulations on Domestic Wells - Response to Common Issues and Concerns. http://www.ose.state.nm.us/PDF/RulesRegsGuidelines/DomesticWells/DomWells-Issues-2006-0919.pdf

statute lacked due process safeguards in that senior water right holders were not notified of new wells, there was no opportunity for a hearing, and there was no determination if the new well would impair existing water rights. [88]

"It is not logical, let alone consistent with constitutional protections, to require (the state engineer) to issue domestic well permits without any consideration of the availability of unappropiratied water or the priority of appropriated water," wrote District Judge J.C. Robinson. Robinson wrote that the farmer did not need to suffer actual damage to challenge the law.

"When the water is gone, it will be too late," the judge wrote.[89]

The New Mexico state engineer is appealing the decision.[90]

[88] Bounds v. State of New Mexico. No. CV-2006-166.

[89] Ibid. Robinson also wrote that the state engineer's assertion that the state can regulate domestic wells is "questionable."

[90] As of June, 2009, the case is pending in the New Mexico Court of appeals. Case No. 28860.

Water and Coal Bed Methane

Coal bed methane (CBM) occurs naturally within coal seams. Evidence of CBM production exists from as early as 1926, but most production has taken place in the last two decades following tax incentives approved by Congress to boost domestic exploration into alternative energy sources.[91]

The Powder River Basin in Montana and Wyoming is one of the country's major sources of coal bed methane. The vast majority of the producing wells are located in Wyoming. However, it is possible that thousands of wells could be drilled in Montana in the coming years.[92]

While there are several issues related to CBM production, the management of water produced in conjunction with the extraction of the gas is likely the topic of most controversy. To extract CBM from a coal seam, ground water is removed to lower the pressure and release the gas. Water production is higher in the initial stages of production, decreasing as more methane is released.[93]

Methane-producing coalbeds in the Powder River Basin of Montana contain water that is dominated by ions of sodium and bicarbonate. Sodium adsorption ratios (SAR) are generally between 40 and 60, and total dissolved solids concentrations between 1,000 and 2,000 mg/L. Sulfate concentrations in production water are very low. This production water is typically of acceptable quality for domestic and livestock use; however, its high SAR makes it undesirable for direct application to soils.[94]

Putting CBM-produced water to a beneficial use, such as stock watering or irrigation, presents a valuable option to landowners in arid areas where CBM is located. The beneficial use of water is one of several management options that a CBM operator may use in combination to dispose of the water.

The use of CBM water for beneficial purposes is a key part of the Final Supplement to the Statewide Oil and Gas Environmental Impact Statement, issued in 2008. The preferred alternative selected by the Bureau of Land Management (BLM) will require operators to submit water management plan that provide a rationale for using, or not using, injection, treatment, surface discharge, infiltration, storage, evaporation, or beneficial uses.

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[91] Coal Bed Natural Gas Handbook, 2004. U.S. Department of Energy.

[92] The Final Supplement to the Statewide Oil and Gas Environmental Impact Statement, Alternative H, predicts more than 16,00 CBM wells.
http://www.deq.state.mt.us/COALBEDMETHANE/FinalEIS/FinalSuppCBM.pdf

[93] This differs from conventional natural gas wells, where water production increases as the volume of gas decreases. Coal Bed Natural Gas Handbook, 2004. U.S. Department of Energy.

[94] 2008 Annual coal bed methane regional ground-water monitoring report: Northern portion of the Powder River Basin. Montana Bureau of Mines and Geology.
http://www.mbmg.mtech.edu/pdf-open-files/mbmg578-2008AnnuallReportFinal.pdf

The agency prefers that beneficial uses, such as livestock watering, dust control, and managed irrigation, be utilized. The BLM estimates that 20% of produced water would be used beneficially.[95]

However, the amounts of water extracted as well as the quality of the water raise concerns about effects on stock and domestic supplies due to drawdown as well as impacts to surface water quality and soils from water management practices.[96]

In 2008, there were 907 Montana wells producing coal bed methane, water, or both. The average water production per well ranged from 2.9 gallons per minute (gpm) to 9.2 gpm, for a total of 5,156 acre-feet of water. That is 4.6 million gallons a day.[97]

For the same year, the 2,647 wells in northern Wyoming produced 16,361acre-feet of water, or 14.6 million gallons a day.[98]

Montana Regulations

The Montana Board of Oil and Gas Conservation (MBOGC) oversees most facets of CBM development in the same way it does other oil and gas operations. A statute passed in 1961, before CBM development began in the state, speaks to the management of water produced in association with oil or gas extraction within a controlled ground water area.

The production, use, or disposal of that water is under the "prior jurisdiction" of the Board of Oil and Gas Conservation, but the DNRC can petition for hearings on the operations.[99]

That statute was acknowledged in 1999 when the DNRC created the Powder River Basin Controlled Ground Water Area, which deals specifically with the management of water produced from CBM extraction.[100]

The order states that water levels in targeted aquifers could be reduced near project areas for long periods of time in an area where water is scarce. It also called for extended monitoring of ground water data.[101]

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[95] Final Supplement to the Statewide Oil and Gas Environmental Impact Statement, Alternative H, October 2008. http://www.deq.state.mt.us/COALBEDMETHANE/FinalEIS/FinalSuppCBM.pdf

[96] 2008 Annual coal bed methane regional ground-water monitoring report: Northern portion of the Powder River Basin. Montana Bureau of Mines and Geology. http://www.mbmg.mtech.edu/pdf-open-files/mbmg578-2008AnnuallReportFinal.pdf

[97] Ibid.

[98] Ibid.

[99] 85-2-510, MCA.

[100] A variety of factors may lead to the formation of a controlled ground water area to protect water quantity or quality. 85-2-506, MCA.

[101] Final Order In the Matter of the Designation of the Powder River Basin Controlled Ground Water Area, 1999.

However, the order said that the extraction of water, though necessary to obtain the CBM, is not a "desired product of the operation" and therefore is not a beneficial use, subject to permitting from the DNRC. But, reflecting the law, the order said that the DNRC could petition the MBOGC for hearings on matters of CBM development that could affect existing water rights.[102]

Though a beneficial water use permit is not required in Montana to extract CBM, a permit is required if that water is put to beneficial use, in part defined as a purpose that uses "water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses".[103]

In 2001, the Legislature passed a measure detailing the management of ground water produced during coal bed methane extraction. It requires that certain management options be regulated by the DNRC and the DEQ. Ground water produced in association with a coal bed methane well must be managed in any of the following ways:[104]

* used as irrigation or stock water or for other beneficial uses in compliance with Title 85, chapter 2, part 3, MCA;
* discharged to the surface or surface waters subject to the permit requirements of Title 75, chapter 5, MCA;[105]
* reinjected to an acceptable subsurface strata or aquifer pursuant to applicable law;[106] or

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http://www.dnrc.mt.gov/wrd/water_rts/cgwa/powder_riverbasin/powder_final_order.asp

[102] Ibid.

[103] 85-2-102, MCA.

[104] 82-11-175, MCA.

[105] In 2003 and 2006, the Montana Board of Environmental Review revised water quality standards affecting discharge permits for coal bed methane in the Powder River Basin. The Environmental Protection Agency approved the standards, which were challenged. In 2008, the Montana Supreme Court upheld the rules, writing that they have a scientific basis and are consistent with, and not more stringent than, EPA policy. However, in October 2009, a U.S. District Judge in Wyoming vacated EPA approval of the standards, saying the federal agency did not consider industry's legitimate concerns about the lack of scientific basis for the 2003 standards and failed to make plain its course of inquiry, analysis, and reasoning for approving the 2006 standards. The EPA must reissue a decision to approve or disapprove the rules. The agency also must explain that decision. In May 2010, the Montana Supreme Court ruled the DEQ violated the Clean Water Act by issuing two discharge permits to Fidelity Exploration without evaluating the treatment of CBM ground water prior to discharge into the Tongue River. The court gave DEQ 180 days to reevaluate the permit applications under pretreatment standards.

[106] Reinjection into Class II oil and gas wells is regulated by the MBOGC. The Record of Decision for the Final Supplement of the EIS considered, but did not fully analyze, reinjection as a management option for CBM water. It cited a study that found favorable conditions for reinjection exist in about 9% of the area. The agency said that while injection may be technically and economically feasible in some aquifers as a way of conserving water, it cannot be regarded as appropriate in all settings.

* managed through other methods allowed by law.

Another section of law says that the management of CBM ground water through discharge, reinjection, or any other method allowed by law is not a waste of water. Other uses of water that do not constitute waste include the disposal of ground water from a mine to preserve it in good condition or the disposal of ground water used for milling, smelting, or other processes involving metallic ores.[107]

These sections of law were disputed in a 2008 court case in Big Horn County. At issue were whether the Montana Constitution and the Water Use Act required that CBM water be put to a beneficial use and whether 85-2-505 and 82-11-175, MCA; provided the statutory means for the beneficial disposition of water.

In short, Judge Blair Jones ruled that "the production, use, or disposal of large quantities of CBM ground water must serve a statutorily defined beneficial use." He also wrote that the two sections of law related to managing CBM water are constitutional.[108]

In reaching those conclusions, Judge Jones raises issues that may be of interest to the WPIC.

The DNRC argued that the extraction and disposal of CBM water is not a beneficial use requiring a water right. The agency cited examples of disposal that do not require a water right, including the dewatering of a gravel pit, the removal of contaminated mine water, and the land application of sewage effluent.

"The DNRC has reasoned that it is the regulator of water rights, not the regulator of water disposal and that not all diversions of water involve a water use or require the security of a water right," Jones wrote. But he said the amount of water involved in CBM production and the fact that the area in question is a controlled ground water area are distinctions that require regulatory review to ensure mandates of the Montana Constitution and the Water Use Act (WUA) are being met.[109]

The judge cites 85-2-510, MCA, which gives the Montana Board of Oil and Gas Conservation (MBOGC) prior jurisdiction in controlled ground water areas over the production of ground water related to oil and gas wells, but acknowledges that the DNRC has a role. Jones said the two

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[107] 85-2-505, MCA. In May 2010, a District Court Judge upheld the statute as constitutional but ruled that the use of evaporation pits in coal bed methane operations is a waste of water. Judge Jeffrey Sherlock wrote that no party in the case cited a beneficial use that might be gained from causing water to evaporate and be lost from any and all beneficial use.

[108] DV-05-70, Order on Summary Judgment Motions. Diamond Cross Properties, LLC, et al. v. State of Montana, DEQ, MBOGC, DNRC, et al.

[109] Ibid.

agencies should work together to "evaluate the management of CBM ground water for beneficial purposes under the recognized criteria of the WUA."[110]

"The WUA provides criteria to be considered when senior users may be adversely impacted by a proposed water appropriation," Jones wrote. "To the extent the WUA is applied equally to all potential appropriators of water, equal protection concerns are minimized. Moreover, the significant State interest in the management of enormous quantities of the State's ground water is advanced by appropriate State agency review."[111]

Another court decision in 2008 provided the basis for proposed legislation in 2009.

Fidelity Exploration and Production Co., which produces CBM in the Powder River Basin, applied to the DNRC for two beneficial use permits to market CBM water in Montana and Wyoming. Proposed uses included dust suppression, irrigation, fire control, and stock and wildlife watering.

In accordance with 85-2-311, MCA, the company was required to show that water was physically and legally available, the appropriation works were adequate, there would be no adverse effect to prior appropriators, and the proposed use was beneficial. The assertions of physical availability and beneficial use were not questioned. But controversy ensued around the comparison required between the physical water supply and existing legal demands. The application said the point of diversion and the source supply were not the ground but rather the company's pipeline, which stored the water after it was pumped from the ground. Since the pipeline acted as a reservoir that no other water user could access, there could be no adverse effect.[112]

The DNRC hearings examiner concluded that the source of the water to be appropriated was not the ground, but the pipeline. Citing the Powder River Basin Controlled Ground Water Area Order and 85-2-510, MCA, the examiner wrote that the "Legislature intended (but did not expressly state) that water produced by CBM development is to be considered something other than ground water ..."[113]

"Considering water developed through CBM development as not being a “ground water” appropriation but as an appropriation from their pipeline is more consistent with the statutory scheme of ... 82-11-175 and is eminently more practical," the examiner wrote, adding that if the

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[110] Ibid.

[111] Ibid.

[112] Proposal for Decision, Application Nos. 42B-30011045 and 42B-30014358 by Fidelity Exploration.
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/significant_hearingdecisions/fidelity_exploration_pfd.pdf

[113] Order on Scope of Issues for Application Nos. 42B-30011045 and 42B-30014358 by Fidelity Exploration.
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/significant_hearingdecisions/fidelity_order-hearingexaminer.pdf

company wanted to dispose of the water through other means provided by 82-11-175, MCA, a beneficial use permit would not be required.

Additionally, the examiner wrote, use of the water is limited because it exists in the pipeline only when CBM is being produced.

"If Fidelity was granted a water right for ground water, then presumably when the methane runs out, Fidelity could still exercise their ground water right indefinitely," the examiner wrote. "Such a result, the Legislature most certainly did not contemplate happening."[114]

The DNRC approved the Montana permit, but denied the Wyoming permit.[115]

Both decisions were the subject of judicial review. District Judge Thomas Honzel ruled that since the source of supply is actually ground water, neither application should be approved. When the examiner ruled that the water produced was not ground water, Honzel said other water right holders were prevented from presenting any evidence on whether the proposed water use would adversely impact their water rights.[116]

Honzel said the water gets to the pipeline by being pumped from the ground through wells. He also wrote that the statutes cited by the DNRC examiner refer to ground water, meaning the application was for ground water, not pipeline water.[117]

"If the legislature intended something different, it could have said so, but did not," Honzel wrote.

In 2009, the Legislature passed a bill that addressed Honzel's ruling, but it was vetoed by the Governor. House Bill No. 575 would have created a temporary permit that the DNRC could issue for the beneficial use of water produced in conjunction with CBM production.[118]

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[114] Ibid. The examiner did not note that 85-2-303, MCA, provides that an unproductive oil or gas well can be converted to a water well, subject to Title 85, chapter 2, MCA.

[115] In addition to the criteria for using water in state, an out-of-state proposal must prove that the use is not contrary to water conservation in Montana and is not otherwise detrimental to the public welfare of the citizens of Montana. The DNRC concluded that the Wyoming application did not meet the necessary burden of proof.

[116] Memorandum and Order on Petition for Judicial Review, CDV-2007-425, 12/15/2008.
http://www.northernplains.org/news/past-news-room-articles/2008-news-items/2008-court-cases/Honzel%20decision%20on%20water%20rights%2012-16-08.pdf

[117] Ibid. The reasoning set forth in CDV-2007-425 was incorporated and the beneficial use permit granted to Fidelity was declared void in an order issued by District Judge Kathy Seeley on July 2, 2010.

[118] http://data.opi.mt.gov/bills/2009/billhtml/HB0575.htm

The only uses allowed under the permit were stock water, managed irrigation with no return flow to surface water, dust suppression, industrial uses, and domestic use. The permits were limited to 2,000 acre-feet annually and expired when CBM production ceased.[119]

Just like any application for an appropriation of ground water, a proposal for the temporary permit would need to meet the permitting criteria, including proving that the water is physically and legally available, the appropriation works are adequate, there would be no adverse effect to prior appropriators, and the proposed use is beneficial.

However, unlike other permit applications, the proposed law stipulated that the source of appropriation for a CBM temporary permit is surface water in a pipeline, pond, pit, or other structure approved by the MBOGC. Additionally, the bill stated that the DNRC must consider the point of diversion to be the place where the water is diverted from the pipeline, pond, pit, or other structure.

The bill passed the House 56-44 and the Senate 30-20. However, in vetoing the bill, the Governor said the measure reversed longstanding water law by not protecting senior water right holders.[120]

The Governor wrote, "Ultimately, the bill fails to reconcile the substantive conflict between the extraction of water in the CBM process and senior water rights."

Mitigation

What role, if any, senior water right holders play in the permitting of CBM water for beneficial uses is debatable. But prior appropriators are addressed in Montana law and are included in the permitting by the MBOGC and the BLM.

When submitting a plan of development with a density of more than one well per 640 acres, a CBM developer must notify ground water right holders whose spring or well is within the development area or within 1 mile of the exterior boundary of the development area.[121]

State law provides a measure of protection for water right holders. Coal bed methane developers must notify and offer a "reasonable mitigation agreement" to appropriators of ground water for which the point of diversion is within 1 mile of the CBM well or within a half mile of a well adversely affected by a CBM well.[122]

The mitigation agreement must provide for prompt supplementation or replacement of water from any natural spring or water well adversely affected by the coal bed methane well.

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[119] Senate Bill No. 505 contained similar provisions. It passed the Senate but died in the House.http://data.opi.mt.gov/bills/2009/billhtml/SB0505.htm

[120] http://data.opi.mt.gov/bills/2009/AmdHtmH/hb0575govveto.HTM

[121] MBOGC Order 151-2008, http://bogc.dnrc.mt.gov/PDF/May2008Orders.pdf

[122] 82-11-175, MCA.

For development of federal minerals, the BLM will require operators to certify that mitigation agreements have been offered in accordance with state law. The agreements also must explain how the operator will respond to wells that are unusable due to methane migration and how health and safety impacts will be monitored and mitigated.[123]

The Legislature also created the Coal Bed Methane Protection Program to compensate landowners or water right holders who demonstrate that a CBM operator who caused damage is unlikely to pay.[124]

In its findings and declarations, the Legislature said clean-burning energy is a priority and Montana possesses a plentiful reserve of clean-burning CBM. But the Legislature noted that the extraction of CBM may adversely impact water quality and availability.

Under the law, a landowner or water right holder may apply for compensation if there is:

* a loss of agricultural production or a loss in the value of land;
* a reduction in the quantity or quality of water available from a surface water or ground water source that affects the beneficial use of water; or
* the contamination of surface water or ground water that prevents its beneficial use.

A landowner may be compensated for loss of agricultural production and income, lost land value, and lost value of improvements caused by CBM development if the land is directly affected by CBM development.

A water right holder may be compensated for damages caused by the contamination, diminution, or interruption of surface water or ground water.

Compensation is limited to $50,000 or 75% of the damages, whichever is less.

Compensation comes from an account funded by oil and natural gas production taxes. Money in the account is dispersed to conservation districts, which will handle claims. Money for emergencies became available in 2005, but no claims have been filed. Other claims may be filed after June 30, 2011.

By July 2011, it is estimated, the account will contain almost $10 million.

In the supplement to the oil and gas environmental impact statement, the BLM states that CBM production could result in reduced yields for wells and springs that obtain water from the

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[123] Record of Decision for the Final Statewide Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans, December 2008. http://www.deq.state.mt.us/COALBEDMETHANE/FinalEIS/RODforRMPs.pdf

[124] 76-15-901, MCA through 76-15-905, MCA.

developed coal seams. However, the agency said, impacts would be mitigated by agreements with operators and the provisions of the CBM Protection Program.[125]

The mitigation criteria were amended by House Bill No. 575, which was vetoed. Under the measure, the money would have become available immediately upon passage and approval and the maximum compensation would have been $150,000.

Prior Proposals

Past Legislatures considered the beneficial use of CBM water.

In 2007, Senate Bill No. 223 proposed to create an exemption for the beneficial use of CBM water. The water had to be used on land owned or leased by the appropriator and the amount of water could not exceed 750 acre-feet a year. It died in the Senate.[126]

Also during that session, the Legislature passed Senate Bill No. 407. It required the DEQ to issue a general permit for discharges of CBM water into existing impoundments of water for livestock and wildlife. The discharge for a single impoundment could not exceed 25 acre-feet of water or 75% of the capacity of the impoundment, whichever is less. The Governor vetoed the measure, saying that the discharges to unlined ponds could violate water quality standards and threatened downstream agriculture.[127]

Senate Bill No. 437 in 2003 would have exempted the beneficial use of water produced by CBM extraction from the DNRC permitting requirements. It also would have doubled the distances within which CBM operators must offer mitigation agreements. It died in the Senate.[128]

Other States

Western states vary in the approach taken to produced water and whether it is subject to permitting under the prior appropriation doctrine.

Like Montana, Utah does not require a water right to extract minerals in Utah. A water right is required to put the produced water to a beneficial use.[129]

Wyoming has required permitting of water uses for more than a century on the basis of the prior appropriation doctrine. The state does not require a water permit for conventional oil and gas

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[125] Chapter 4, The Final Supplement to the Statewide Oil and Gas Environmental Impact Statement. http://www.deq.state.mt.us/COALBEDMETHANE/FinalEIS/FinalSuppCBM.pdf

[126] http://data.opi.mt.gov/bills/2007/billhtml/SB0223.htm

[127] http://data.opi.mt.gov/bills/2007/billhtml/SB0407.htm http://data.opi.mt.gov/bills/2007/AmdHtmS/SB0407GovVeto.HTM

[128] http://data.opi.mt.gov/bills/2003/billhtml/SB0437.htm

[129] Personal correspondence, Dec. 16, 2009, John Mann, Utah Assistant State Engineer.

operations but does for CBM. "The intentional production, or appropriation, of ground water for the CBM production led to the designation of CBM as a beneficial use of water and subsequently, to a requirement for a permit to appropriate the ground water," according to the state engineer.[130]

Wyoming law also states that well permits are generally granted as a "matter of course, if the proposed use is beneficial, and if the state engineer finds that the proposed means of diversion and construction are adequate." If the application is not in the public's water interest, then it may be denied and subject to review by the state board of control.[131]

In New Mexico, the Oil Conservation Division regulates the disposition of water produced or used in connection with the drilling for, or producing of, oil or gas. No permit is required from the state engineer for the disposition of the water.[132] For oil and gas wells drilled in aquifers of nonpotable water more than 2,500 feet deep, the law requires that information be submitted to the state engineer, but it is not considered as an application for a water right. The law provides that anyone who claims impairment of existing water rights from such a well may file a claim in District Court.[133]

Though it has not been applied to oil and gas operations, New Mexico does require a water right to extract minerals under the Mine Dewatering Act. [134]

The Colorado Supreme Court recently declared that the extraction of CBM, which involves pumping of ground water, is a beneficial use of the water and that the extractor of CBM must obtain a well permit and, where necessary, provide an augmentation plan.[135]

In light of the court decision, Colorado is considering administrative rules to address the permitting of ground water withdrawals for water produced by oil and gas production. Referring to the court case, the state engineer said oil and gas wells must be in compliance with well permitting regulations and the operation of the wells cannot injure vested water rights. The rules seek to define areas where water withdrawals are "non-tributary," meaning the withdrawal of ground

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[130] Guidance, CBM/Groundwater permits, State Engineer.
http://seo.state.wy.us/PDF/GW_CBM%20Guidance.pdf

[131] 41-3-931, Wyoming Code.

[132] 70-2-12 and 70-2-12.1 NMSA.

[133] 72-12-25 to 72-12-28 NMSA

[134] The state engineer evaluates applications under regulations governing ground water appropriations. If existing water rights are not impaired, the permit is issued. The applicant may appeal or file a plan of replacement. New Mexico Mine Dewatering Act. Section 72-12A-7.
http://law.justia.com/newmexico/codes/nmrc/jd_72-12a-7-19a95.html

[135] No. 07SA293, Vance v. Wolfe
http://water.state.co.us/wateradmin/NontribGW/VanceVsWolfe.pdf

water will not within 100 years deplete the flow of a natural stream at an annual rate of greater than one-tenth of one percent of the annual rate of withdrawal.[136]

[136] Rulemaking for produced, non-tributary ground water, http://water.state.co.us/wateradmin/NontribGw.asp

Changing Water Use

Nearly four decades ago, a group of Montana's finest minds gathered in Helena to talk about water law and its relation to the economic development of the state's water. Some advocated for a central system to keep track of water rights as they were issued and, inevitably, as they were changed to meet new demands for water.

One of the participants was Charles Bowman, a professor of agricultural engineering at Montana State University.

"We must remember that we have to have something to meet these changing times," Bowman said, "because we have had changing uses of water from the time people came into the state until now."[137]

Some things never change.[138] With reincarnation of the Water Policy Interim Committee, fine minds again convened to discuss the evolving uses of water and the laws that govern those changes.

It is appropriate that the WPIC discussed water rights changes, sometimes called transfers, during the same meeting in which it delved into water marketing. In many cases, a sale or lease of water also requires a change authorization from the Department of Natural Resources and Conservation.

Like other western states that operate under the Prior Appropriation Doctrine, Montana will likely deal with an increasing number of requests to transfer water rights from an historic use, such as irrigation, to other uses, including residential and commercial development.

"As states turn to alternative means of firming and stretching water supplies to meet future needs, transfers will become an increasingly important way to move water to higher valued or more efficient uses," according to a report written by the Western States Water Council, an organization consisting of representatives appointed by the governors of 18 western states. "However, traditional western water law imposes barriers on transfers. In addition, states' efforts to mitigate the negative effects of transfers on third parties and the environment may impose additional barriers."[139]

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[137] Symposium on Water Law and Its Relationship to the Economic Development of Montana's Water Resources, 1971. http://www.archive.org/details/symposiumonwater00symprich

[138] Of course, that isn't completely true. Two years after the 1971 symposium, the Legislature passed the Water Use Act, which included a provision for regulating changes in appropriation rights. The law has been evolving ever since.

[139] Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

Changing a water right is handled in much the same way as an application for a new appropriation of water. An applicant for a change in appropriation right in Montana must show, if applicable, that:

* the proposed use is a beneficial use of the water;
* the proposed means of diversion, construction, and operation of the appropriation works are adequate;
* the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and
* the proposed change will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments under a permit, certificate, or state water reservation.

Changes - the basics

There are common questions about changing appropriation rights. The answers form a basis for understanding the process as well as how change authorizations relate to water marketing.

Who can change a water right?

The owners of pre-1973 rights, post 1973 permits, and state water reservations.

When is a change authorization needed?

If there is any change in the point of diversion, the place of use, the purpose of the use, or the place of storage. Some examples: if the point of diversion is moved; if the irrigator wants to increase or realign the acreage beyond the original permit or right; or if the use changes from irrigation to industrial.

Why is authorization from DNRC needed for a change?

Changes may affect water conditions upon which other appropriators rely for their beneficial uses. A proposal to change a water right must be weighed against the water rights of existing users who are generally entitled to the conditions of the stream as they existed at the time of their appropriations. Harm may occur from depriving an appropriator of the quantity or quality of water available before the change. For example, moving a point of diversion or changing a place of use may deprive other users of the return flow that existed when they received their water right.[140]

Return flow is an important component of water use. Montana defines return flow as the portion of diverted flow that is applied to irrigated land but is not consumed. Rather, the water returns underground to its original source or another source of water. Other water users are entitled to that water as part of their water right. Return flow is not wastewater. Return flow results from use and not from water carried on the surface in ditches and returned to the stream.[141]

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[140] Water Law in a Nutshell, 2009. David Getches, p. 177.

[141] 36.12.101, ARM.

The DNRC is charged with ensuring that changes in water rights do not adversely affect existing water right holders. This includes the protection of rights that may be junior to the right held by the applicant for the change.

What kinds of changes do not need authorization?

Changing crops and switching from flood irrigation to sprinklers are not usually considered changes as long as the purpose of the use and the place of use remain the same. Though such changes may increase consumption or decrease the amount of return flow, this exemption is built on historic assumptions of irrigators that they should be able to plant their crop of choice and irrigate as needed, within the confines of the original water right or permit.[142]

How much water can be changed to the new use?

The amount of water diverted after the change cannot exceed the amount previously diverted or beneficially used. However, attention is paid not only to how much water was historically diverted, but to how much was consumed. That means that the amount of water allowed to be changed may be less than the amount historically diverted if the new use does not require the same amount of diverted water to achieve the amount of water historically consumed. It also means the applicant must submit evidence beyond what may have been claimed, including photographs, water use records, or testimony from those with first-hand knowledge of the historic use.[143]

In irrigation, the volume historically consumed includes the water used by the plant, the amount that evaporated, and any other amount that does not return to ground or surface water.[144] In November 2009, the DNRC adopted rules that provide an optional formula to calculate historic consumptive use. The formula can be used if the applicant either does not know the historic use or does not want to spend the time and money necessary to prove the historic use.[145]

Are changes permanent?

They can be. But the law also provides for temporary changes. Temporary changes in appropriation rights can be approved by the department for 10 years, subject to 10-year

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[142] Water Law in a Nutshell, 2009. David Getches, p. 183. However, a change to sprinklers may include a proposal to irrigate additional acreage, thus changing the place of use and requiring a change application.

[143] In Montana, this is articulated in 36.12.1902, ARM. "(2) Final Water Court approved stipulations, master's reports, or examination information related to the water right being changed must be submitted with the application; however, this information or an abstract of a water right from the department or the Montana Water Court by itself is not sufficient to prove the existence or extent of the historical use. (3) The amount of water being changed for each water right cannot exceed or increase the flow rate historically diverted under the historic use, nor exceed or increase the historic volume consumptively used under the existing use. http://www.dnrc.mt.gov/About_Us/notices/december/3621612173.pdf

[144] 36.12.1902 (12), ARM. http://dnrc.mt.gov/About_Us/notices/december/3621612173.pdf

[145] Montana Administrative Register 22-11/25/09

renewals. In cases where new water conservation or a storage project is involved, the change may be approved for up to 30 years, again subject to 10-year renewals. The temporary change retains the original priority date. No authorization is needed for a temporary change to revert to the permanent purpose, place of use, point of diversion, or place of storage after the temporary change expires.[146]

Is water quality considered?

The applicant must address water quality issues only if a valid objection to the change proposal contains substantial credible information that the change would adversely affect the water quality of an appropriator or the ability of a discharge permit holder to satisfy effluent limitations.[147]

How much water can be changed?

There is no limit. But applications to change the place of use or the purpose of use for appropriations of 4,000 or more acre-feet of water annually and 5.5 cubic feet per second of water require additional consideration, including evidence that the use is reasonable.[148]

Can a change be approved for out-of-state use?

Yes. But an application to change for use outside the state cannot be approved unless the DNRC determines the out-of-state use of water is not contrary to water conservation in Montana and is not otherwise detrimental to the public welfare of Montana citizens. If the proposal is to consume a large amount of water, the DNRC approval must be affirmed by the Legislature. [149]

What is salvaged water?

Montana encourages the conservation and full use of water. If a water right holder conserves water -- such as lining a ditch to reduce seepage -- the holder may retain the right to use the salvaged water for beneficial use. The water right holder must apply for a change authorization if the salvaged water is used for any purpose or in any place other than that associated with the original appropriation right. The applicant must prove that the water savings will be at least equal to what to what is claimed by the applicant.[150]

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[146]85-2-407, MCA

[147] 85-2-402, MCA

[148] 85-2-402 (4) and (5).

[149] 85-2-402 (5) and (6). Similar criteria applies to applications for new appropriations of water.

[150] Last fall, a District Court judge ruled that the term "associated with" in 85-2-419, MCA, means that salvaged water may be used -- without obtaining a change authorization -- on parcels immediately adjoining land listed as the original place of use for the water right. The DNRC interprets the law to mean that if the salvaged water is used anywhere but in the original place of use, a change authorization is needed. The case is set for trial in October 2010. DV-08-30, DNRC v. Catlin Ranch LP.

What is instream flow?

Consumptive water rights, such as irrigation, can be changed to keep water in a stream. Keeping water in a stream to benefit a fishery resource is a defined beneficial use and is protected from being considered as abandoned. A proposal to temporarily change a right to instream flow must meet additional criteria beyond those required of other change requests. The applicant must detail the reach of stream where the flow is to be maintained or enhanced and provide a streamflow measuring plan. The applicant must show there is no adverse effect and the proposed amount of water to be changed is needed to benefit the fishery resource.[151]

Only the amount of water historically consumed -- or less, after DNRC review -- may be changed to instream flow.[152]

Is a change needed when a water right is bought or sold?

It depends. If a parcel of land is sold with the attached water right and there is not a change in the point of diversion, the place of use, the purpose of the use, or the place of storage, then a change is not needed. But, for example, if a water right is severed from a piece of land and sold for use on another parcel, the new use is subject to a change authorization.

Is a change needed for water marketing?

Yes. Historically, speculation has been discouraged when it comes to water. Laws steer people toward the immediate use of water and away from hoarding.[153] Montana law states the applicant must show a bona fide intent to appropriate water for a beneficial use. If the applicant plans to market the water to other users, the applicant must provide information on:[154]

* each person who will use the water and the amount of water each person will use;
* the proposed place of use of all water by each person;
* the relationship between the applicant and each person using the water; and
* each firm contractual agreement for the specified amount of water for each person using the water.

Water Marketing

In broad terms, the phrase water marketing includes the buying, selling, or leasing of water rights. Montana law provides for each of these actions.

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[151] 85-2-408, MCA

[152] The instream flow statute is the subject of a pending Supreme Court case. In 2009, a District Court judge ruled that an analysis of return flow is not essential for instream flow changes as long as the increased instream flows do not cause adverse effects. The DNRC contends that because of inadequate historical use information, it was unable to analyze return flow, and therefore unable to determine if there would be an adverse effect. Case No. DA-09-0429, Hohenlohe v. DNRC.

[153] Law of Water Rights and Resources. A. Dan Turlock, p. 5-120.

[154] 85-2-310, MCA. Another section of law, 85-1-101, MCA, states: "Any attempt to gain control of or speculate on large quantities of ground water of the state of Montana is not in the interest of the people and is to be restricted."

Water rights are attached to the land where the water is used. If the land is sold, the water right passes with the conveyance of the parcel unless the owner severs the right.[155] In either case, if the place of use, point of diversion, place of storage, or purpose of use of the water right changes after it is sold, the new owner must apply for a change authorization.

In Montana and other states, competing demands for water are driving water marketing discussions. With the passage of House Bill No. 831 in 2007, many ground water withdrawals in closed basins may be permitted only with a mitigation plan that offsets adverse effects on surface water. One mitigation option is to purchase and change an existing appropriation right to offset any adverse effects of the new ground water appropriation.

Instream Leasing

Instream leasing has been one of the more common examples of water marketing in Montana over the last two decades.

In 1989, in response to drought conditions that left some streams dry and killed fish, the Legislature passed a bill to allow the Department of Fish, Wildlife and Parks (DFWP) to lease consumptive water rights for instream flows for terms up to 10 years.

This statute, 85-2-436, MCA, underwent significant changes in the 2007 session.[156] Until July 1, 2019, FWP may change consumptive use appropriation rights that it holds in fee simple to instream flow purposes on up to 12 stream reaches without any time constraints. The DFWP may enter into leases for instream flow purposes on an unlimited number of stream reaches for terms up to 10 years, with 10 year renewals. However, after June 30, 2019, the DFWP may not enter into new lease agreements or renew leases that expire after that date. Any change in purpose or place of use must be approved by the DNRC and is subject to other criteria to protect the rights of other appropriators from adverse impacts.[157]

As discussed previously, the owner of a consumptive water right also may either convert the use of that right or lease the right for instream flow to benefit fishery resources.[158]

Much of the leasing in Montana under these statutes has been done by three entities: DFWP, Trout Unlimited, and the Montana Water Trust.

Since it was granted the authority to lease water, FWP has signed 17 agreements for instream flow. One lease on Tin Cup Creek could not be renewed and is now held by the Montana Water Trust. Four have been terminated. Most of the leases are with private parties, but one was with a

[155] 85-2-403, MCA.

[156] Senate Bill 128. http://data.opi.mt.gov/bills/2007/billhtml/SB0128.htm

[157] The 2019 date, as well as other portions of the law, may be amended by future Legislatures.

[158] 85-2-408, MCA.

water and sewer district and one is with the Forest Service. The quantity of water leased and the cost vary. There were no new leases in the last 2 years.[159]

Montana Trout Unlimited holds leases in the Blackfoot drainage and on Madison River tributaries. The organization also assists water right holders who want to change to instream flow.[160]

The Montana Water Trust works with landowners and irrigation districts on instream flow leases and irrigation efficiency projects. The organization has completed 37 water transactions totaling about $590,000. It currently holds 12 water leases that contribute up to 6,300 acre-feet of water per year to 10 streams. In 2009, the Water Trust paid about $136,000 for water.[161]

State Water Marketing

Montana owns several of its own water projects around the state, such as Deadman's Basin Dam in Wheatland County and the Tongue River Dam in Big Horn County. The state, through DNRC's State Water Projects Bureau, owns water rights in these projects and leases them primarily for irrigation.

The Bureau administers almost 2,000 water marketing contracts for nearly 300,000 acre-feet of water annually through local water user associations. Revenue from the water purchase contracts, leases of lands associated with the projects, and net revenue from hydropower generation supplements funds for state water project rehabilitation costs.[162]

In a few cases, the water is used outside of agriculture. The Middle Creek project near Bozeman provides drinking water for 2,000 households in Bozeman. In Ravalli County, the DFWP leases 15,000 acre-feet of water for fisheries downstream of the Painted Rocks dam. Deadman's Basin provides municipal water for Ryegate, Roundup, and Melstone.[163]

In 1985, at the suggestion of an interim committee, the Legislature established a water leasing program administered by the DNRC. The statute allows the DNRC to acquire water through appropriation in its own name, by agreement or purchase with another water right holder, or by contract for water in certain reservoirs. The water may be leased for beneficial uses.[164]

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[159] 2009 FWP Annual Progress Report - Water Leasing Study. http://leg.mt.gov/content/Committees/Interim/2009_2010/Water_Policy/Meeting_Documents/March/fwp-leasing-report-and-letter.pdf

[160] Mark Aagenes, Trout Unlimited, correspondence 2/2/2010.

[161] Barbara Hall, Montana Water Trust. Correspondence 2/18/2010. In March 2010, the Water Trust joined the Clark Fork Coalition. That organization will continue the Water Trust's water transaction work in the Clark Fork Basin.

[162] State Water Projects Bureau 2009 report. http://www.dnrc.mt.gov/wrd/water_mgmt/planning_reports/pdfs/govs_rpt_waterstorage_09/govrpt_waterstorage2009.pdf

[163] Ibid.

[164] 85-2-141, MCA

The statute was amended in 2007. Previously, the program was limited to leasing 50,000 acre-feet. Now, the DNRC may lease up to 1 million acre-feet of water under contract with the federal government from Fort Peck, Tiber, Canyon Ferry, Hungry Horse, Koocanusa, or Yellowtail or from other reservoirs. Of that 1 million acre-feet, up to 50,000 acre-feet may be leased for beneficial uses outside Montana.

No water has been leased under this statute, but the 2005 Legislature passed a resolution urging the DNRC to enter into negotiations with the federal Bureau of Reclamation to determine the availability and cost of water stored behind Hungry Horse Dam in hopes that the state might contract for water and then lease it for water development in the Clark Fork River Basin.[165]

In 2007, the Legislature appropriated $260,000 to pay for a Hungry Horse leasing study. The DNRC, the Bureau of Reclamation, and others continue to work on the proposal.

The strategic plan for the Water Resources Division of the Department of Natural Resources and Conservation includes the tasks of determining where water is physically and legally available for development and creating a report of what rights might be available for sale or change.[166]

Water Banking

Under the umbrella of water marketing is water banking. Water banking is a multi-faceted term. In general, a water bank is an institutional process that facilitates the transfer of water to new uses. In one sense, the water bank operates like a broker, bringing together buyers and sellers. However, the institutional nature of a water bank comes with set procedures and some sort of public sanction for its actions.[167]

Statewide water banking in Montana is not addressed in statute.[168] The leasing laws the state has in place might constitute what is called a lease bank, where a single lessee solicits and temporarily obtains water from one or more lessors for a specific use, often for environmental purposes.

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[165] http://data.opi.mt.gov/bills/2005/billhtml/HJ0003.htm

[166] DNRC Water Resources Division Strategic Plan 2005-2010. http://dnrc.mt.gov/wrd/pdfs/wrd_strategicplan05.pdf

[167] Lawrence J. MacDonnell, "Water Banks: Untangling the Gordian Knot of Western Water."

[168] The Fort Belknap-Montana Compact, codified in Title 85, chapter 20, part 10, MCA, establishes a water bank for implementation in years of significant short-term water shortage. However, the compact must still be ratified by Congress, so no water banking activity has taken place. The provisions provide for grants to purchase water, pricing alternatives and requirements, how banked water is allocated, and a clause providing that the water bank established in the compact is not intended to preclude a more comprehensive water marketing system within the Milk River Basin.

In contrast, a water bank involves the exchange of water entitlements through the interaction of multiple sellers and multiple buyers.[169]

The goal of a water bank is to facilitate the transfer of water from one use to another use by bringing buyers and sellers together. Doing so may meet one or more of the following objectives:[170]

* Create a reliable water supply during dry years.
* Ensure a future water supply for people, farms, and fish.
* Promote water conservation by encouraging right holders to conserve and deposit rights into the bank.
* Act as a market mechanism.
* Resolve issues of inequity between ground water and surface-water users.
* Ensure compliance with intrastate agreements on instream flow.

Water banks may be structured in many ways, but they can be broken down into these general categories:[171]

* Institutional bank. This might be called a paper bank. It functions as a way to exchange water rights and other entitlements. Institutional banks are developed for areas where physical water storage is limited or for large geographic areas. These banks also may be used for natural flow rights or a combination of natural flow and storage rights.
* Surface storage bank. In this case, the exchange of water is backed by water stored in reservoirs or other storage facilities.
* Ground water bank. Ground water banking exchange credits or entitlements for water withdrawls from an aquifer. Under conjunctive use programs, excess surface water is injected or infiltrated into the ground water aquifer to be extracted during times of limited surface water supply. Ground water banking programs also are being developed to provide mitigation in areas with excessive surface water withdrawals.

The entity that administers the bank will play a role in how much it costs to establish and administer the bank. The administration of the bank also may play a part in the level of trust and participation by water users.[172]

Examples of administrative structures include:[173]

* Public - Most existing water banks are operated by a federal, state, or local governmental agency or an administrative board specifically developed to provide administrative oversight.

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[169] Clifford, Peggy; Landry, Clay; Larsen-Hayden, Andrea. "Analysis of Water Banking in Western States," Washington Department of Ecology and WestWater Research. July 2004. http://www.ecy.wa.gov/biblio/0411011.html

[170] Ibid.

[171] Ibid.

[172] Ibid.

[173] Ibid.

* Private nonprofit - This could bean existing nonprofit organization or a new organization composed of representatives from stakeholder groups.

* Private for-profit corporation - There have been limited attempts at this model.

* Public-private partnership - In this model, a private corporation and a public entity jointly invest capital and operate the water bank.

The administrative costs also will be affected by what services a water bank chooses to offer. At the least, a water bank might aggregate water supplies from willing sellers and facilitate the sale to buyers. Other services may include:[174]

* Registry of water rights or entitlements.
* Regulating or setting market prices.
* Setting and implementing long-term strategic policies and daily operations.
* Establishing whether the bank operates on a year-by-year or continual basis.
* Determining which rights can be banked.
* Quantifying the bankable water.
* Specifying who can purchase or rent from the bank.
* Setting transfer or contract terms.
* Dealing with any regulatory agencies.
* Resolving disputes.

Other States

Several western states have water banks that vary widely in their purposes and administration. Following are a few examples.[175]

* The Arizona Water Banking Authority stores unused water for future needs as opposed to bringing together buyers and sellers.

* California has used a drought water bank to contract with sellers to use ground water instead of surface water. Locally, water districts store excess surface water underground to renew aquifers and provide conjunctive management for ground water and surface water.

* The Idaho water bank primarily facilitates voluntary transfers. It brings together buyers and sellers and suggests a price, though it does not set a price. Ten percent of the lease price goes to the water bank for administration. Water in the bank is protected from forfeiture and is not subject to transfer requirements. The state also allows for local water districts to operate rental pools.

* The Deschutes Water Alliance in Oregon administers a ground water mitigation bank where new users of ground water purchase credits from the bank to mitigate the new use. Water rights are donated or leased to the bank and used as instream flow.

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[174] Ibid.

[175] Most of these brief descriptions come from Chapter 2, Section 7 of Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. More detailed descriptions can be found here: http://www.westgov.org/wswc/publicat.html

* The Texas Water Bank is a clearinghouse for voluntary buyers and sellers.

* The Washington State Trust Water Rights program, administered by the state, provides a way to legally hold water rights for future uses without the water right relinquishing. Water is held in trust to benefit ground water and instream flows and other beneficial uses. While water is held in trust it retains its original priority date.[176] In a specific portion of the state where new wells exempt from permitting must be water neutral, the state set up a water exchange to help facilitate the mitigation of new ground water use.[177]

[176] Washington Department of Ecology. http://www.ecy.wa.gov/programs/wr/market/trust.html
[177] Washington Department of Ecology. http://www.ecy.wa.gov/programs/wr/cwp/wtrxchng.html

The Many Meanings of Navigable Water

In recent years, there has been much discussion about the ownership of river and lake beds as well as the use of state waters. Central to these discussions is the term "navigability". There are various legal tests of navigability under federal and Montana law relating to the title to the river and lake bed and use of state waters.

Unlike other personal or real property rights, the right to use water and the right to own and control the underlying river and lake beds are not necessarily exclusive. Water is a resource which multiple private parties may have a right to use. In addition, the public also has embedded rights to use that same water resource. Throw in competing state, federal, and tribal law water control issues and you are in for a wild whitewater ride through the legal morass known as "navigability". The various legal tests and applications of navigability are designed to sort out "who" or "what" has legal control and use of waterways and water bodies and the underlying beds.

In Montana, the multiple meanings of navigability have taken center stage recently with regard to the following issues:

1. Whether the state of Montana can charge dam owners rent for the use of certain river beds.[178]
2. Whether the state of Montana can charge rent from other users of certain river beds.[179]
3. The determination of the state of Montana's ownership of underlying beds of water bodies and the delineation of private property for taxation purposes.[180]
4. The scope and nature of the federal government's regulatory power under current and pending federal legislation as it relates to dredging and filling wetlands in Montana.[181]
5. The extent to which the public has the right to access water bodies in Montana for recreational purposes.[182]

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[178] PPL Montana, LLC v. State of Montana, Cause No. DCV-2004-846, First Judicial District (2008), currently on appeal to the Montana Supreme Court.

[179] See PPL Montana LLC and Senate Bill No. 507 (2009), Chapter 475, Laws of Montana (2009), related to the treatment of property in navigable river beds.

[180] Senate Bill No. 465 (2009), Chapter 472, Laws of Montana, (2009) related to the treatment of property consisting of the bed of navigable rivers and streams and property taxes.

[181] S. 787 Clean Water Restoration Act (2009), a bill introduced to amend the Federal Clean Water Act to clarify the jurisdiction of the United States over waters of the United States.

[182] See House Bill No. 190; Bitterroot Protection Ass. and FWP v. Bitteroot Conservation Dist., Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984);

Tests of Navigability

Over time, three tests of navigability have evolved: two of the tests are federal and one test is state-based.[183] Multiple tests that use the same term can be very confusing. It is important to note that navigability used in one legal context can have a separate and distinct meaning from navigability used in another legal context. Set out below is an explanation and analysis of each navigability test.

Federal Test of Navigability for Title

The Equal Footing Doctrine provides that states admitted to the Union after the original 13 colonies were established, received title to the beds beneath the navigable water upon statehood.[184] Pursuant to the Equal Footing Doctrine, the United States Supreme Court in Montana v. United States[185] held that if a river is navigable, the state owns the bed of the river subject to the paramount powers of the federal government, but if the river is not navigable, the abutting riparian landowners may own the adjacent river bed.[186] Navigability determines ownership or title to the underlying beds.

The federal test of navigability for title was judicially developed and is used by courts to establish whether a water body is navigable. In order for a court to determine whether a water body is navigable for title purposes, the court must figuratively go back in time and factually recreate the conditions and uses of the water body that existed at the time the state entered the Union.[187] Navigability is determined by natural conditions at the time of statehood, and evidence of the use of the water before statehood is relevant.[188] The fact that a water body was navigable for a significant portion of time is sufficient to establish navigability.[189] So long as the water body was capable or susceptible of being navigable (i.e., useable for floating logs), it is not necessary to show that the water body was actually used for commerce.[190] It is important to emphasize here that the federal navigability test for title resides with a court with the jurisdiction and authority to make the fact-specific navigability determination.

If navigability for title has been established, title to the underlying beds rests with the state and the state is free, subject to other paramount federal powers and potential public trust doctrine

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[183] Tarlock, Dan, Law of Water Rights and Resources (1988), annual updates.

[184] United States v. Oregon, 295 U.S. 1, 14 (1935), State Land Bd. v. Corvallis Sand & Gravel, 429 U.S. 363 (1977); Pollard's Lessee v. Hagan, 44 U.S. 212 (1845).

[185] Montana v. United States, 450 U.S. 544 (1981)

[186] Id. at 551.

[187] Tarlock at section 8:12, page 8-16.

[188] Id. See also United States v. Utah, 283 U.S. 64 (1931),

[189] Id.

[190] The Daniel Ball, 77 U.S. 557 (1870); United States v. Utah, 283 U.S. 64 (1931), Edwards v. Severin, 241 Mont. 168, 785 P.2d 1022 (1990), Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

constraints,[191] to allocate the title to or use of those beds underlying navigable waters. Montana has judicially and legislatively adopted the federal test of navigability for title to resolve allocation and use disputes.[192]

During the 2009 Legislative Session, the Montana Legislature passed two bills (Senate Bill No. 507 (SB 507) and Senate Bill No. 465 (SB 465)) that deal with state allocation issues regarding navigability for title. Though the contents of SB 507 are worthy of discussion, the measure contained a contingent voidness clause that rendered the statute void when the Supreme Court ruled that river beds are not school trust lands.

In enacting SB 507, the Legislature clarified the treatment of property consisting of the beds of navigable rivers for state land management purposes and clarified the authority of the Department of Natural Resources and Conservation (DNRC) and the State Land Board .[193] SB 507 defines a "navigable river" as a river that:

> (a) was determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river; or
>
> (b) has been adjudicated as navigable by a court of competent jurisdiction.[194]

In clarifying the authority of the Land Board and DNRC regarding ownership of the beds of navigable rivers, SB 507 requires that:

> [t]he board or the department may only require a lease, license, or easement for the use of the bed of a river that has been adjudicated as navigable for title purposes by a court of competent jurisdiction or was meandered by official government survey at the time of statehood.[195]

There is an internal inconsistency within SB 507. The definition of "navigable river" in section 2 of the bill does not include the requirement that the official government survey be conducted at the time of statehood that is required in section 8 of SB 507. The question becomes, in order to determine navigability of a river, whether the governmental surveys conducted at or before the time of statehood are the only surveys that can be used to determine navigability or whether

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[191] Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984); Montana Coalition for Stream Access v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984); Galt v. State, 225 Mont. 142, 731 P.2d 912 (1987).

[192] See Curran, at 43 through 48 adopting the federal title definition. See Edwards, at 170 adopting the federal title definition. The Montana Legislature has also adopted the federal title test in Sections 2 and 8, Chapter 475, Laws of Montana (2009).

[193] Chapter 475, Laws of Montana (2009).

[194] Section 2(3), Chapter 475, Laws of Montana (2009).

[195] Section 8, Chapter 475, Laws of Montana (2009).

governmental surveys conducted after the time of statehood could be used to indicate navigability. Federal law is the controlling authority in determining navigability for title purposes. Ultimately a court of competent jurisdiction would be the final arbiter regarding this SB 507 inconsistency.[196]

In enacting SB 465, the 2009 Montana Legislature clarified how the Department of Revenue (DOR) and the DNRC should procedurally handle claims in changes of ownership or disputes of title to river beds and streambeds related to DOR property taxation and DNRC regulatory jurisdiction. SB 465 sets forth specific legislative findings that acknowledge Montana's adoption of the federal definition of navigability for title:

> (1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;
> (2) in Montana v. United States, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;
> (3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984), based upon The Montello, 87 U.S. 430 (1874), Sierra Pacific Power Co. v. Federal Energy Regulatory Commission, 681 F.2d 1134 (9th Cir. 1982), and State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982).[197]

SB 465 also established procedural due process mechanisms including notice and the opportunity to be heard for a claim of change in ownership of a river bed or streambed.[198]

The issue of navigability for title was recently before the Montana Supreme Court in PPL Montana LLC v. State of Montana.[199] The District Court in PPL Montana concluded that the Missouri River, the Madison River, and the Clark Fork River are navigable rivers and that, pursuant to the Equal Footing Doctrine, the state of Montana owns the beds of the rivers and those lands underlying navigable rivers are school trust lands. One of the issues appealed to the Montana Supreme Court is whether the District Court's navigability determination made pursuant to summary judgment was procedurally correct.

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[196] See Curran at 43.
[197] Section 1, Chapter 472, Laws of Montana (2009).
[198] Section 1(6) and (8), Chapter 472, Laws of Montana (2009).
[199] See footnote #1.

Federal Test of Navigability in Fact (or Federal Regulatory Navigability)

The federal government's power to regulate the use of water has been historically based on the test of "navigability in fact". As Professor Tarlock notes in his treatise on Law of Water Rights and Water Resources:

> "Navigability in fact"is a forward-looking test that determines the power of the federal government to regulate the use and enjoyment of rivers. The navigability in fact test was developed before the current expansive reading of the commerce clause and has been superceded [sic] by the recognition that the full commerce power over water resources encompasses the regulation of all water bodies for any legitimate federal interest. Still, navigability in fact remains important. It is the basis of FERC and some U.S. Army Corps of Engineers jurisdiction and it defines and limits the exercise of federal and state navigation servitudes.[200]

The U.S. Supreme Court first articulated the navigability in fact test for purposes of federal regulation in The Daniel Ball case:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[201]

The Court in The Daniel Ball defined navigable waters of the United States as follows:

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[202]

This test articulated in The Daniel Ball should be familiar, because it is also the test for navigability of title for submerged lands discussed above. However, the type of commerce required to meet the navigability for title test is intrastate commerce.[203] As noted above, the navigability for title test is limited to the finding of navigability to the date that the state was admitted to the Union.[204] The test for navigability of a body of water today is not limited to evidence of actual commerce, but to evidence of the susceptibility of useful commerce in its

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[200] See Tarlock at Section 8:3, page 8-3.
[201] The Daniel Ball, 77 U.S. 557, at 563 (1870)
[202] Id. at 563.
[203] Utah v. United States, 403 U.S. 9, at 10 (1971)
[204] See footnote #7.

natural and ordinary condition or whether the water body could be made suitable for use in the future by reasonable improvements.[205]

The state of Montana has codified, to some extent, the federal navigability in fact test within the state's water use and water resources laws. It is statutorily declared that "[n]avigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation."[206] Navigable waters are determined under the according to the following standards:

> (1) All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all lakes which are navigable in fact are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable or public waters.
>
> (2) All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all rivers and streams which are navigable in fact are hereby declared navigable.[207]

In addition to the Montana Constitution, the codification of the navigability in fact test is the legal foundation and authority for the state to conduct statewide water planning activities, construct water impoundments, finance water projects, generate hydroelectric energy, establish the renewable resource grant and loan program, and establish a water storage policy, among other state water-related activities.

The Daniel Ball historical test for federal regulatory jurisdiction has become limited in its application over time, mostly because the Federal Courts and Congress expanded the use of the commerce clause as justification of federal regulation and in so doing, did not require that water bodies be navigable for purposes of federal regulatory jurisdiction. However, in recent years the U.S. Supreme Court has begun to limit the scope of the commerce power by setting a high standard for Congressional intent to extend federal regulatory jurisdiction.[208]

The scope and nature of the federal government's regulatory power under the commerce clause and the traditional navigability in fact test as it relates to the federal Clean Water Act and dredging and filling wetlands is currently a hotly debated topic in Montana and across the nation.

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[205] Rochester Gas & Elec. Corp. v. FPC, 344 F.2d 594 (2d Cir.), cert. denied, 382 U.S. 832 (1965); City of Centralia v. FERC, 851 F.2d 278 (9th Cir. 1988)

[206] 85-1-111, MCA

[207] 85-1-112, MCA

[208] United States v. Lopez, 514 U.S. 549 (1995), Solid Waste Agency of Northern Cook county v. United States Army Corps fo Engineers, 531 U.S. 159 (2001), Rapanos v. United States, 547 U.S. 715 (2006).

This issue came up during the July WPIC meeting, and the Committee requested periodic updates on any pending federal legislation.

Two recent U.S. Supreme Court cases have limited the scope of the federal government's wetland regulatory jurisdiction.[209] The Clean Water Act requires that any person seeking to discharge certain material into navigable waters under federal jurisdiction obtain a permit from the U.S. Army Corps of Engineers.[210] Navigable waters are defined under the Clean Water Act as "waters of the United States".[211] The U.S. Army Corps of Engineers, has interpreted "waters of the United States" to include not only traditional navigable waters, but other defined waters including tributaries and wetlands adjacent to such waters and tributaries.[212] Adjacent wetlands include wetlands bordering, contiguous to, or neighboring waters of the United States.[213] In one case, the U.S. Supreme Court has ruled that nonnavigable, isolated, intrastate waters do not fall under the Clean Water Act.[214] In another case, a majority of the Court agreed to void a lower court ruling that affirmed the Army Corps of Engineers' interpretation of navigable waters to include not only traditional navigable waters but wetlands adjacent to navigable waters.[215] A plurality of the Court held that the Army Corps of Engineers' regulatory jurisdiction under the Clean Water Act applies only to "relatively permanent, standing or flowing bodies of water."[216]

In response to these U.S. Supreme Court decisions, S. 787, The Clean Water Restoration Act, was introduced in Congress on April 2, 2009, to clarify and expand the scope of federal regulatory wetland jurisdiction. On June 17, 2009, S. 787 was passed out of the Senate Committee on Environment and Public Works. It is awaiting action on the Senate Floor.

S. 787 amends the Clean Water Act by replacing the term "navigable waters" throughout the existing Act with the term "waters of the United States" which are defined as follows:

> all waters subject to the ebb and flow of the tide, the territorial seas, all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters or activities affecting these waters, are subject to the legislative powers of Congress under the Constitution.[217]

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[209] Solid Waste Agency of Northern Cook county v. United States Army Corps of Engineers, 531 U.S. 159 (2001), Rapanos v. United States, 547 U.S. 715 (2006).

[210] 33 U.S.C. Section 1311(a) and 1342(a).

[211] 33 U.S.C. Section 1362(7).

[212] 33 CFR Section 328.3(a).

[213] Id.

[214] Solid Waste Agency of Northern Cook county v. United States Army Corps of Engineers, 531 U.S. 159 (2001)

[215] Rapanos v. United States, 547 U.S. 715 (2006).

[216] Id.

[217] S. 787, Section 4.

S. 787 sets forth several Congressional findings and a savings clause regarding the scope and applicability of the definition of "waters of the United States". According to S. 787 nothing in the Act:

> modifies or otherwise affects the amendments made by the Clean Water Act of 1977 (Public Law 95-217; 91 Stat. 1566) to the Federal Water Pollution Control Act that exempted certain activities, such as farming, silviculture, and ranching activities, as well as agricultural stormwater discharges and return flows from oil, gas, and mining operations and irrigated agriculture, from particular permitting requirements.[218]

Waters of the United States do not include prior converted cropland used for agriculture or man-made waste treatment systems neither created in waters of the United States nor resulting from the impoundment of waters of the United States.[219] S. 787 states that:

> Congress supports the policy in effect under section 101(g) of the Federal Water Pollution Control Act (33 U.S.C. 1251(g)), which states that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.[220]

One of the issues raised in the WPIC July meeting was whether S. 787 would result in more private property being potentially regulated via the dredge and fill pollution control mechanisms under the Clean Water Act. The answer is probably "yes", because the S. 787 definition of waters of the United States is more expansive than the current definition under existing law as interpreted by the U.S. Supreme Court.

State of Montana Test of Navigability for Use of State Waters

With the passage of House Bill No. 190 regarding public access at certain bridges crossing streams and rivers during the 2009 Session, the issue of recreational access and use of Montana's water bodies has once again garnered statewide attention. The test for navigability for use of state waters is a state determination.

The Montana Supreme Court has held that navigability for use of a water body is a matter governed by state law and is a separate concept from the federal question of determining

[218] S. 787, Section 3 (13).
[219] S. 787, Section 3(14)
[220] S. 787, Section 3(15)

navigability for title purposes.[221] The Montana Supreme Court has determined that under the 1972 Montana Constitution and the public trust doctrine:[222]

> The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.[223]

The public's recreational use right extends to the high-water mark of the waters.[224] The public does not have the right to enter upon or cross over private property to reach waters for which there is a recreational use right.[225] However, the public may portage around barriers in water in the least intrusive way possible in order to avoid damage to the private property holder's rights.[226]

In response to the Montana Supreme Court decision regarding recreational use, the 1985 Legislature enacted Title 23, chapter 2, part 3, MCA, providing for the scope of public recreational use of streams. This law was challenged on constitutional grounds by landowners requesting that the Court declare the recreational use statute an unconstitutional taking of private property without just compensation.[227] The Supreme Court held that the real property interests of the private landowners are as important as the public's interest in water and if these constitutionally protected competing interests are in conflict, they must be reconciled to the extent possible.[228] The Court reconciled these rights by striking the provisions that the public has a right to hunt big game, build duck blinds and boat moorages, and camp overnight. The Court held as unconstitutional the requirement that a landowner pay the costs of constructing the portage route around artificial barriers.

The state of Montana also recognizes that navigable waters are public waters subject to fishing rights:

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[221] Montana Coalition for Stream Access v. Curran, 210 Mont. 38, at 51, 682 P.2d 163 (1984)

[222] The public trust doctrine is an issue that deserves some attention regarding its potential impact on title and access issues. For more information, see Greg Petesch Legal Memorandum addressed to Rep. Bob Raney regarding an analysis of the Mono Lake case from California and whether the decision in that case could be applied in Montana. (March 6, 1998).

[223] Id. at 52.

[224] Id. at 55.

[225] Id.

[226] Id. See also Montana Coalition for Stream Access v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984)

[227] Galt v. State, 225 Mont. 142, 731 P.2d 912 (1987)

[228] Id. at 916.

> Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof of the state of Montana and all rivers, sloughs, and streams flowing through any public lands of the state shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or the land between the high water flow lines or within the meander lines of navigable streams shall be subject to the right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose.[229]

The application of navigability

This is a very complicated area of law. As the U.S. Supreme Court has stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case."[230] In other words, look to who or what is invoking some type of legal control over a water body and analyze the reasons behind invoking that legal control and you will discover which concept of navigability is applicable under the circumstances.

In its opinion in PPL Montana, LLC v. State of Montana, the Montana Supreme Court outlined the following factors in determining whether a water body was navigable at time of statehood:

1. The concept of navigability for title purposes is very liberally construed by the United States Supreme Court.

2. A river does not have to experience "actual use" at or before the time of statehood, so long as it was "susceptible" of providing a channel for commerce.

3. The term "commerce" in the navigability for title context is very broadly construed such that newly discovered forms of commerce can be retroactively applied to considerations of navigability. Standard, present-day usage of a river may be useful information regarding the status of the river as navigable at the time of statehood.
Present-day recreational use is sufficient for purposes of commerce.

4. Carrying places, portages, or other obstructions that require artificial means of navigation do not defeat a finding of navigability.

5. So long as the river was susceptible for use during portions of the year, it is considered navigable at the time of statehood.

6. A particular stretch of a river that is nonnavigable based on particular physical characteristics (i.e., Great Falls Reach of the Missouri) does not defeat a finding of navigability with respect to the whole river, nor does it require that some stretches of the river be declared

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[229] 87-2-305, MCA

[230] Kaiser Aetna v. United States, 444 U.S. 164, 171 (1979).

navigable and others declared nonnavigable. Short interruptions of navigability in a river that is otherwise navigable are insufficient as a matter of law to declare any portions of a river nonnavigable.

The Montana Supreme Court's ruling broadly defines navigability for title purposes. The Court's ruling provides the legal framework for the Legislature as it moves forward on policy development with respect to state land management and the ownership and use of underlying beds of water bodies. It bears repeating: the judiciary, not the Legislature, ultimately determines what is or is not navigable for title purposes.

Appendix A

Policy Issue. Please add your own issues and rank accordingly. (* Denotes statutorily assigned to EQC).	Bean	Pomnichowski	Murphy	Hamlett **	McChesney	**Average**
CBM water use (HB575)	2	2	5	1	7	3.4
Water Right Enforcement (HB39)	1	5	1	9	9	5.0
DNRC Rules (permitting; other issues)*	5	7	8	4	2	5.2
Closed Basin Permitting (SB93; SB94)	9	4	2	5	8	5.6
General Permitting (HB40)	4	7	8	8	1	5.6
Ground Water Investigation Oversight (HB52)	11	1	2	3	11	5.6
Water-related subdivision issues (SB17)	7	3	7	9	3	5.8
Municipal Water Use (HB379; SB149)	3	7	6	9	6	6.2
State Water Plan Oversight (SB303)*	12	6	8	2	4	6.4
DEQ Rules (septic mixing zones; other issues)*	6	7	8	9	5	7.0
Adjudication Oversight*	8	7	3	9	12	7.8
Water Marketing	10	7	8	6	10	8.2
Implementation of Phosphorus Ban (SB200)	14	7	8	7	14	10.0
Nutrient Work Group Oversight (SB95)*	13	7	8	9	13	10.0

** Exempt wells also ranked 2

NOTE: Sens. Barrett and Wanzenried repsonses attached. Not included in average.

To: Joe Coleman, call me if you need more specifics on my choices.

Appendix A

From: Debby Barrett SD36

Water Policy Issue Priority Worksheet

This worksheet is intended to help WPIC members prioritize issues for study during the 2009-10 interim. The issues listed include some addressed by the 2008-09 WPIC as well as issues that came up during the 2009 session. Please add other issues and rank them accordingly. The WPIC report, the handbooks on water quality and water rights, and the list of 2009 legislation may provide ideas for study topics. Based on the priorities, staff will devise a work plan that will allow WPIC members to decide the amount of time and resources devoted to each issue.

Policy Issue. Please add your own issues and rank accordingly. (* Denotes statutorily assigned to EQC)	Ranking in Order of Priority
Closed Basin Permitting (SB93; SB94)	
General Permitting (HB40)	
Adjudication Oversight*	
Water Right Enforcement (HB39)	
Water Marketing	2
DNRC Rules (permitting; other issues)*	
DEQ Rules (septic mixing zones; other issues)*	
Water-related subdivision issues (SB17)	
Ground Water Investigation Oversight (HB52)	
State Water Plan Oversight (SB303)*	
CBM water use (HB575)	
Implementation of Phosphorus Ban (SB200)	
Nutrient Work Group Oversight (SB95)*	
Municipal Water Use (HB379; SB149)	
Navigable stream issues (testing: title vs recreation)	1
Protecting Senior Water Rights (water leasing & marketing)	2
Using MT. WATER CENTER for studies & research	3
WPC to send letter to DNRC stressing importance of replacing John Tubbs with a person knowledgeable of MT. water laws and policy	4

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06/08/2009 14:04 4066813278 DEBBY BARRETT PAGE 01/01

Appendix A

Kolman, Joe

From: Dave Wanzenried [daveew@gmail.com]
Sent: Saturday, June 13, 2009 9:31 AM
To: Kolman, Joe; McNutt, Walter; Everts, Todd; Chas Vincent
Subject: Priority worksheet

Good morning, Mr. Kolman.

Here are my priorities from the worksheet you provided in our packets. All of my priorities (and, yes, there are m,ore rankings than there were choices on your list) assume the maximum amount of coordination with EQC, so as to develop a coordinated, complementary work plan.

Following my rankings, I have provided a narrative concerning a broader look at water issues.

Administrative :
1. General permitting - implementation oversight (HB 40), particularly "substantial credible evidence" criteria
2. Phosphorous Ban - implementation oversight
3. Monitor SB 507 implementation, specifically issue DNRC list of meandering streams
4. Consumptive use rule - implementation oversight
5. Ownership record update - data base interface
6. Closed basin permitting

Water use:
1. Exempt wells
2. Water marketing - examine initiatives in other states to develop tools in addition to the in-stream flow option
3. Coalbed methane water use
4. Ground water study oversight (HB 52)
5. Water plan oversight (SB 303)

I also recommend that the Committee devote time to developing a longer-term perspective than one interim. For example, planning and rulemaking may not always fit neatly into a two-year period. Expenditures for planning must continue beyond one biennium and should be regarded as investments. It should also try to develop guiding principles about studies and rulemaking to ensure senior water rights are safeguarded. Further, to the greatest extent possible, other legislators and the public need a distilled version of our proceedings and major findings as we go along.

There are long-term trends and initiatives that Montana should be cognizant of, most particularly the consequences of reduced stream flows, increased in-state demands for water and designs by other states (Missouri River Basin and Columbia River Basin) and the federal government (Bonneville Power Administration) for our water. We may want to consider having several hearings and invite those with a broad or specific perspective to testify.

Finally, the Committee's work and work products (including drafts) should be available on-line as much as possible. The water rights and adjudication processes seem to be a paper chase - - - I recommend that the Committee work diligently to avoid adding to it.
I apologize for taking liberties with your request for feedback.

FTE Available to WPIC
.80 FTE = 2650 hrs = 331 days

1 Interim FTE = 2768 hrs = 346 days
.75 FTE = 2076 hrs = 259.5 days
.50 FTE = 1384 hrs = 173 days
.25 FTE = 692 hrs = 86.5 days
.10 FTE = 276 hrs = 34.5 days
.05 FTE = 136 hrs = 17 days

2009-10 Draft Water Policy Interim Committee Work Plan Decision Matrix		
Topic	**Summary**	**Resources Allocated**
The following has been assigned to the WPIC by the Legislative Council for evaluation and study.		
None		0 FTE
Possible study topics and study actions. The WPIC may revise the topic list and the resources allocated		
Overview of water management	✓ List of available water policy information ✓ Presentations on basics of hydrology and hydrogeology ✓ Comparison of water management in western states ✓ Presentations on new permitting, including closed basins ✓ Presentations on appropriation change procedures ✓ Staff summaries of issues ✓ Draft legislation, if desired ✓ Report to the 62nd Legislature	.15 FTE
Enforcement	✓ Overview of prior appropriation doctrine ✓ The role of adjudication in enforcement ✓ Enforcement by water commissioners, DNRC, AG ✓ Staff summaries of issues ✓ Draft legislation, if desired ✓ Report to the 62nd Legislature	.1 FTE
Ground water permitting	✓ Overview of permitting ✓ Presentations on ground water permitting in closed basins ✓ Permitting of coal bed methane wells, DNRC, DEQ, MBOGC ✓ Presentations on exempt wells, comparisons with other states, water quality issues ✓ Staff summaries of issues ✓ Draft legislation, if desired ✓ Report to the 62nd Legislature	.25 FTE
Water marketing	✓ Overview of current Montana law ✓ Review water marketing and banking in other states ✓ Examine surface and aquifer storage opportunities in Montana ✓ Examine change in appropriation right process regarding water marketing ✓ Staff summaries of issues ✓ Draft legislation, if desired ✓ Report to the 62nd Legislature	.25 FTE
Agency and program monitoring	✓ Implementation of state water plan update (EQC) ✓ Monitor claims examination, adjudication, water right ownership update (EQC) ✓ Implementation of Ground Water Investigation Program ✓ Monitor drought status ✓ Updates on water legal issues ✓ Implementation of phosphorus ban (EQC) ✓ Updates on nutrient working group (EQC) ✓ Review of FWP instream leasing report (EQC) ✓ Update on Reserved Water Rights Compact Commission (EQC) ✓ Draft legislation, if desired	.025
The following are the WPIC's statutory duties.		
EQC Coordination	✓ Coordinate issues with committee leaders from EQC-WPIC ✓ Provide written summaries to EQC-WPIC ✓ Oral presentations to EQC-WPIC	.025
Total Resources	Estimated resources available based on other duties and leave: .80 FTE	.80 FTE

2009 - 2010
Water Policy Interim Committee
Work Plan

June 2010

draft

DRAFT

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draft

Introduction

This is the work plan for the Water Policy Committee (WPIC) for the 2009-2010 interim. In this document you will find:

- Staff for the WPIC.
- An explanation of how the WPIC plans its work.
- A description of study topics identified by the WPIC and work plan tasks.
- An interim time line.

Staff

- Joe Kolman, Research Analyst
  (406) 444-9280 or jkolman@mt.gov
- Todd Everts, Legislative Environmental Analyst, Attorney
  (406) 444-3747 or teverts@mt.gov
- Cindy Peterson, Secretary
  (406) 444-3064 cpeterson2@mt.gov

How the WPIC Plans its Work

The WPIC was created in 2009 through Senate Bill 22 to study water policy.

During the legislative interim, the WPIC may focus on the study topics it has been assigned as well as any water policy issue. It also may address issues and improve law as it deems to be in the best interest of the state. The Legislative Council did not assign the committee any studies in the form of joint study resolutions ranked by legislators following the close of the 2009 Legislature.

The WPIC establishes its work plan at the beginning of the interim. **The primary constraint limiting the study agenda for the interim is the number of issues that can be effectively addressed within the available time and resources of the committee members and its staff.**

This *Draft 2009-2010 Work Plan* is a **DRAFT**. It is a **decision-making tool** to help committee members work together efficiently to set priorities and decide how and where to spend the WPIC's limited time and resources. The work plan sets out a strategy for fulfilling the WPIC's responsibilities throughout the 2009-2010 interim.

Once you collectively make a decision on the work plan, it will become your blueprint for the 2009-2010 interim. Staff will develop detailed draft work plans and timetables for each major study. A draft time line illustrating the overall schedule that these work plans will fit into once the meeting schedule and work plan are finalized is presented at the end of this document.

Water Policy Committee Work Plan Topics

Source/authority: Senate Bill No. 22 (2009)

Background: Senate Bill No. 22 was supported both by the Environmental Quality Council and the 2007-08 WPIC, which was a temporary interim committee. SB22 made the WPIC a permanent interim committee.

The legislation specifically directed the WPIC to study water policy. At the July 2009 meeting, WPIC members discussed several topics to study over the interim. This work plan and the attached decision matrix attempt to reflect that discussion and allocate staff resources to each topic.

Resource Allocation

There is approximately .80 FTE of staff time available to conduct the study outlined in this work plan. A breakdown of the allocation is included in the attached Work Plan Decision Matrix.

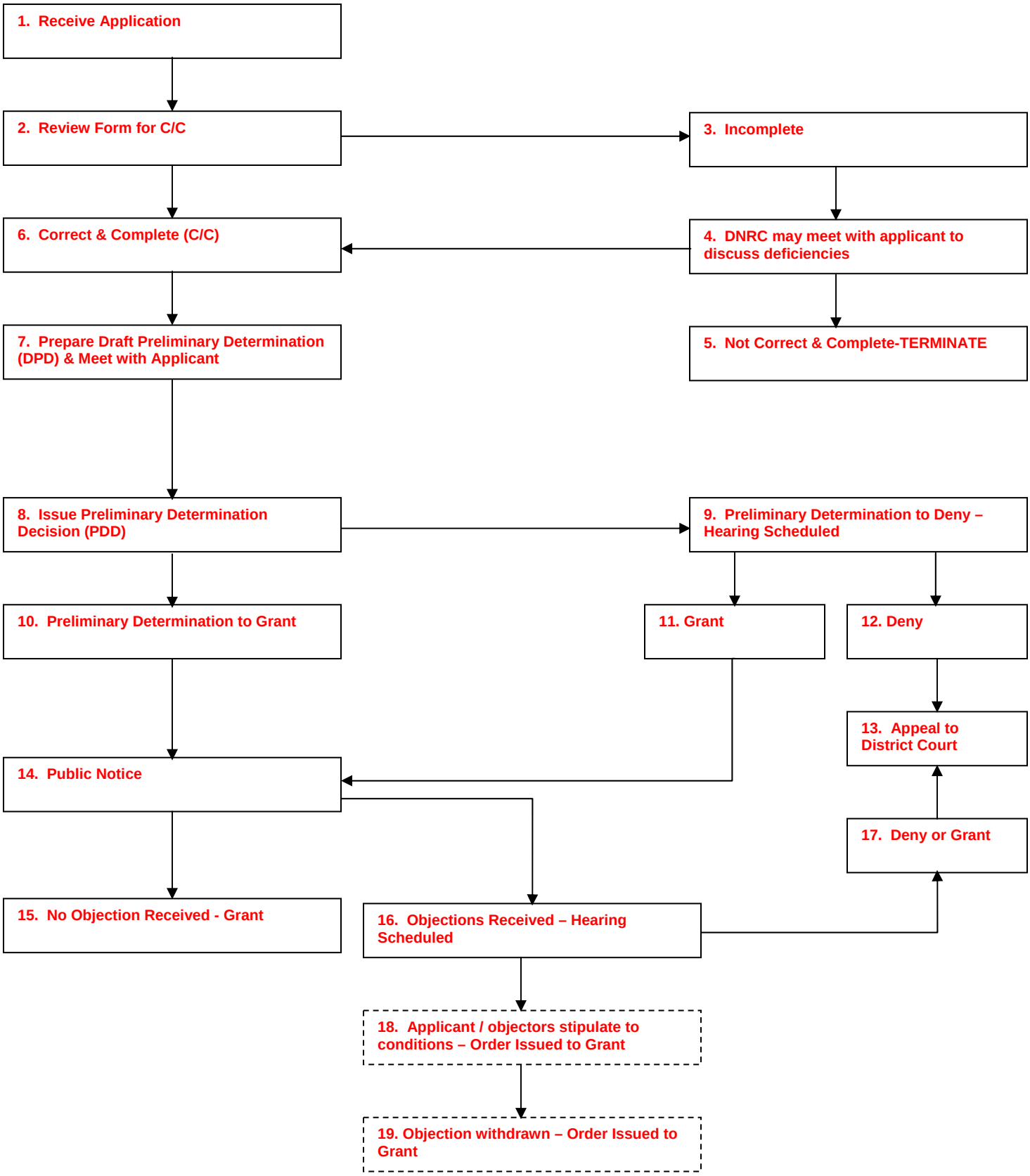
Date	Tasks
July 9, 2009	➤ Elect officers ➤ Agency/program overviews ➤ Public input on study issues ➤ Discuss possible study issues ➤ Adopt rules ➤ Review budget, meeting dates ➤ Overview water policy study history - staff ➤ Public comment

Sept. 21, 2009	➤ Overview of beneficial use history in Montana and the West - staff ➤ Legal opinion regarding term "navigable waters" - staff ➤ Overview of prior appropriation doctrine - UM Law School ➤ Science of water - presentations, DNRC, MBMG, Water Center, MT Watercourse ➤ Presentations on beneficial use permitting - DNRC, other interested parties ➤ Update on drought status - DNRC ➤ Update on GWIP, MBMG ➤ Overview of adjudication performance audit, Legislative Audit Division ➤ Update on adjudication, water right ownership transfers, DNRC, WC, DOR ➤ Identify areas where more information is needed - WPIC ➤ Revisions to work plan, if necessary - WPIC ➤ Adopt work plan - WPIC ➤ Public comment
Jan. 13, 2010	➤ Differences in ground and surface water permitting, presentations ➤ Ground water permitting in closed basins ➤ Update on implementation of new controlled ground water area statutes ➤ Comparison of exempt well statutes and issues - staff ➤ Presentations on exempt wells, DNRC, DEQ, and other interested parties ➤ Permitting CBM wells, DNRC, DEQ, MBOGC ➤ Update on adjudication, water right ownership transfers, DNRC, WC, DOR ➤ Presentation on implementation of state water plan update, DNRC ➤ Identify areas where more information is needed - WPIC ➤ Revisions to work plan, if necessary - WPIC ➤ Discussion of draft report, legislation, if necessary - WPIC ➤ Public comment
March 10-11, 2010	➤ Overview of Montana water supply, storage report, aquifer storage opportunities - DNRC, MBMG ➤ The change of appropriation process, historic consumption - DNRC, interested parties ➤ Municipal water rights, staff and interested parties (added Jan10) ➤ Overview of water marketing - staff ➤ Water marketing opportunities in Montana - Interested parties ➤ St. Mary and Milk Rivers Water Management Initiative (added Jan10) ➤ Review FWP instream leasing report ➤ Update on GWIP - MBMG ➤ Enforcement of water rights - DNRC, AG, WC, water commissioners ➤ Identify areas where more information is needed - WPIC ➤ Revisions to work plan, if necessary - WPIC ➤ Discussion of draft report, legislation, if necessary - WPIC ➤ Public comment

May 11-12, 2010	➤ Update on adjudication, water right ownership transfers, DNRC, WC, ➤ Update on drought status ➤ Update on Reserved Water Rights Compact Commission ➤ Identify areas where more information is needed - WPIC ➤ Revisions to work plan, if necessary - WPIC ➤ Discussion and approval of draft report, legislation for public comment period - WPIC ➤ Public comment
July 26-27 2010	➤ Implementation of phosphorus ban - DEQ ➤ Update on nutrient working group - DEQ ➤ Results of adjudication performance audit, Legislative Audit Division ➤ Identify areas where more information is needed - WPIC ➤ Revisions to work plan, if necessary - WPIC ➤ Discuss and revise draft report, legislation - WPIC ➤ Public comment
August 2010	➤ Public comment on draft report, proposed legislation
Sept. 8-9, 2010	➤ Review public comment on draft report, legislation ➤ Revise draft report, legislation ➤ Approve proposed legislation - WPIC ➤ Selection of bill sponsors - WPIC ➤ Approve WPIC report - WPIC ➤ Overview of proposed agency legislation - DNRC, DEQ, FWP ➤ Public comment

Appendix D

July 1, 2009



Percent of population with self supplied domestic water – USGS 2005

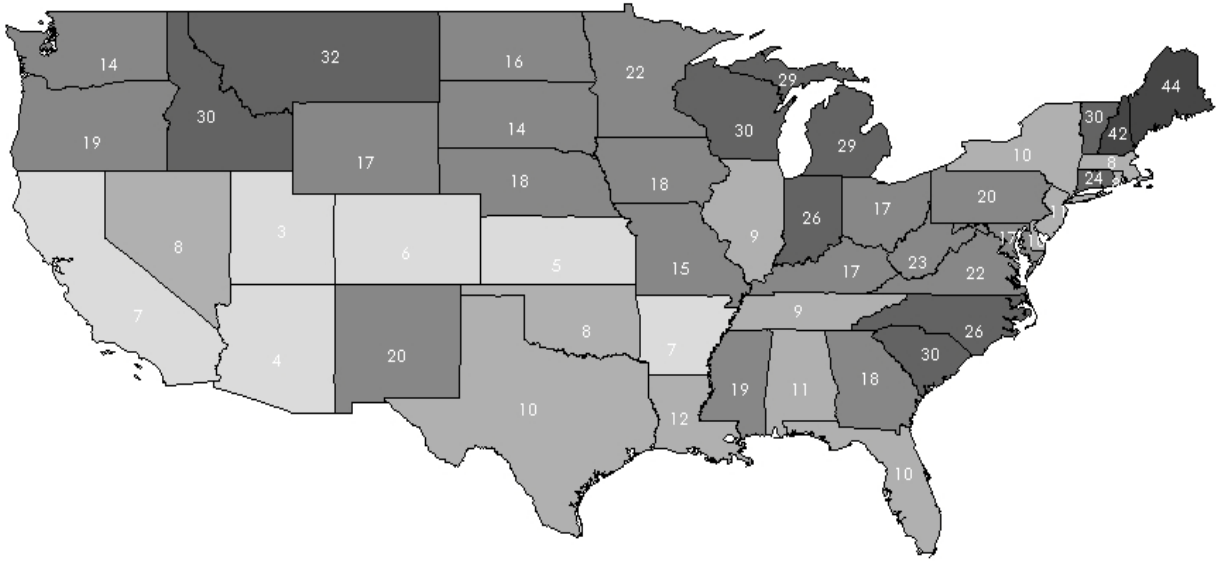
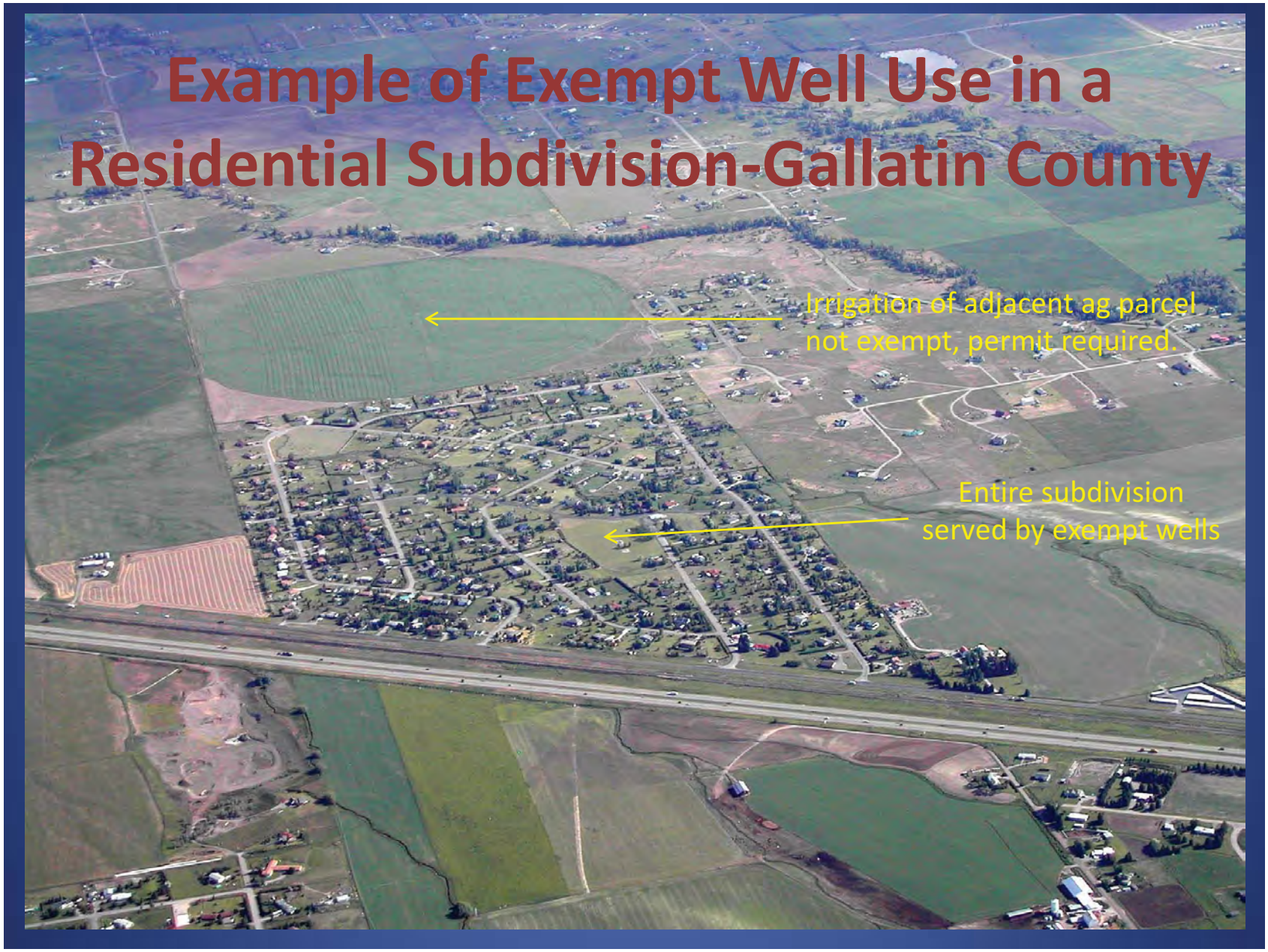


Table 6. Domestic water withdrawals and deliveries, 2005.

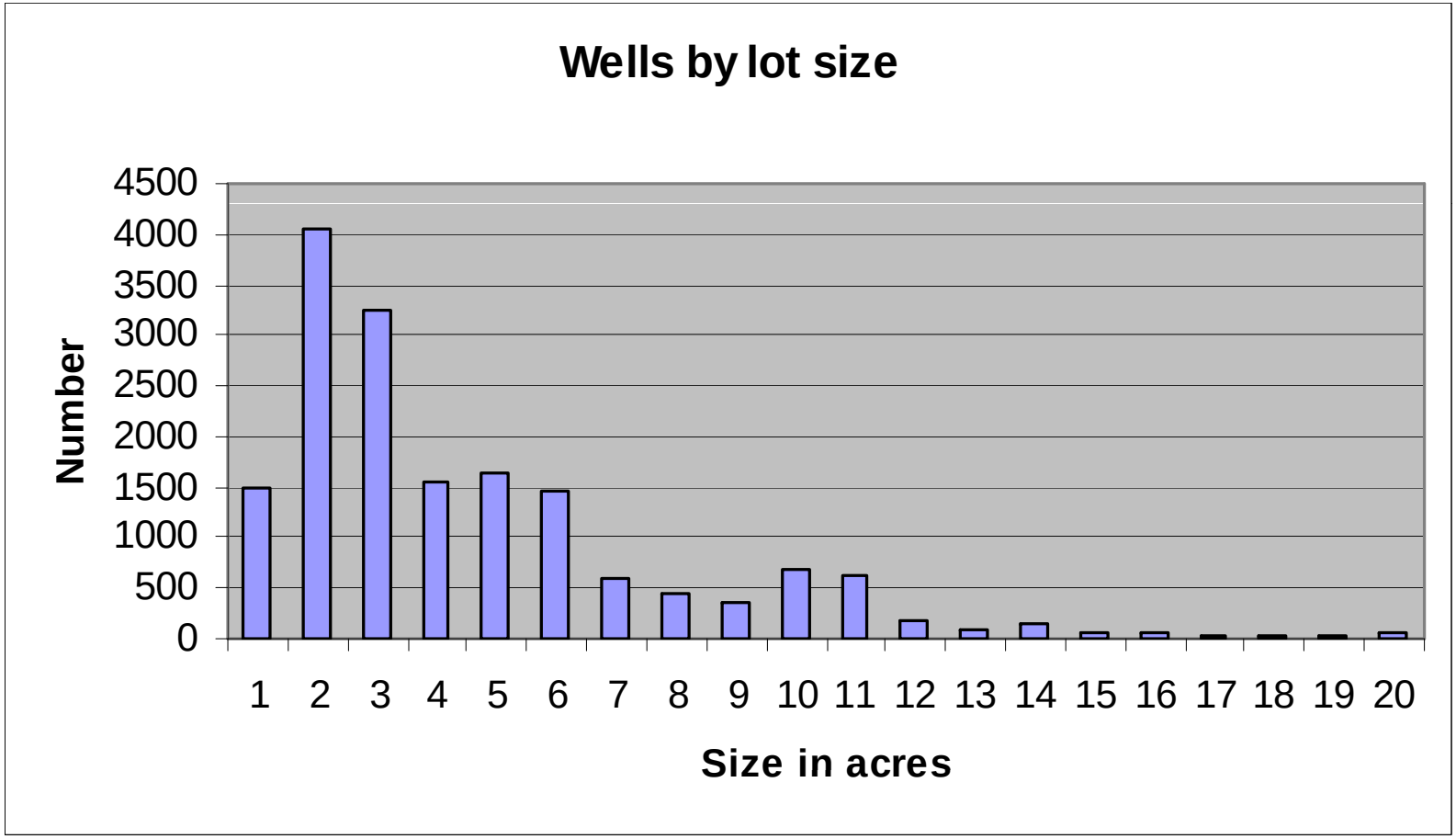
[Values may not sum to totals because of independent rounding; Mgal/d, million gallons per day; gal/d, gallons per day; n/a, not applicable]

State	Self supplied						Public supply			Total use		
	Self-supplied population (in thousands)	Percent of total population	Withdrawals (in Mgal/d) By source: Ground-water	Withdrawals (in Mgal/d) By source: Surface water	Withdrawals (in Mgal/d) Total	Self-supplied per capita use (in gal/d)	Population served (in thousands)	Water deliveries (in Mgal/d)	Public-supply per capita use (in gal/d)	Total population (in thousands)	Water use (withdrawals and deliveries, in Mgal/d)	Total domestic per capita use (in gal/d)
Alabama	521	11	39.1	0	39.1	75	4,040	326	81	4,560	365	80
Alaska	235	35	13.4	.68	14.1	60	429	46.8	109	664	60.9	92
Arizona	218	4	27.2	0	27.2	125	5,720	802	140	5,940	830	140
Arkansas	200	7	17.8	0	17.8	89	2,580	254	99	2,780	272	98
California	2,710	7	429	57.2	486	179	33,400	3,980	119	36,100	4,470	124
Colorado	299	6	34.4	0	34.4	115	4,370	530	121	4,670	564	121
Connecticut	841	24	63.1	0	63.1	75	2,670	200	75	3,510	263	75
Delaware	80.4	10	6.43	0	6.43	80	763	44.6	58	844	51.1	61
District of Columbia	0	0	0	0	0	n/a	582	82.7	142	582	82.7	142
Florida	1,790	10	190	0	190	106	16,100	1,530	95	17,900	1,720	96
Georgia	1,600	18	120	0	120	75	7,470	727	97	9,070	847	93
Hawaii	74.0	6	12.2	0	12.2	165	1,200	198	165	1,280	210	165
Idaho	424	30	86.6	0	86.6	204	1,010	181	180	1,430	267	187
Illinois	1,130	9	101	0	101	90	11,600	1,050	90	12,800	1,150	90
Indiana	1,630	26	124	0	124	76	4,650	353	76	6,270	477	76
Iowa	531	18	34.6	0	34.6	65	2,440	158	65	2,970	193	65
Kansas	149	5	14.9	0	14.9	100	2,600	209	80	2,740	223	81
Kentucky	696	17	22.2	12.6	34.8	50	3,480	243	70	4,170	278	67
Louisiana	551	12	44.0	0	44.0	80	3,970	485	122	4,520	529	117
Maine	575	44	34.1	0	34.1	59	746	37.8	51	1,320	71.9	54
Maryland	929	17	74.3	0	74.3	80	4,670	536	115	5,600	610	109
Massachusetts	527	8	40.5	0	40.5	77	5,870	487	83	6,400	528	82
Michigan	2,910	29	251	0	251	86	7,210	559	77	10,100	810	80
Minnesota	1,110	22	77.8	0	77.8	70	4,020	273	68	5,130	351	68
Mississippi	555	19	56.4	0	56.4	102	2,370	284	120	2,920	340	116
Missouri	850	15	59.5	0	59.5	70	4,950	452	91	5,800	512	88
Montana	301	32	22.4	1.06	23.5	78	635	81.0	128	936	104	112
Nebraska	313	18	52.1	0	52.1	167	1,450	185	128	1,760	237	135
Nevada	182	8	37.4	0	37.4	206	2,230	421	189	2,410	459	190
New Hampshire	555	42	41.6	.09	41.6	75	755	56.6	75	1,310	98.2	75
New Jersey	961	11	79.5	0	79.5	83	7,760	525	68	8,720	605	69
New Mexico	377	20	32.0	0	32.0	85	1,550	175	113	1,930	207	107
New York	1,870	10	140	0	140	75	17,400	1,720	99	19,300	1,860	97
North Carolina	2,300	26	161	0	161	70	6,390	444	69	8,680	604	70
North Dakota	105	16	8.90	0	8.90	85	532	48.8	92	637	57.7	91
Ohio	1,990	17	146	3.00	149	75	9,470	643	68	11,500	792	69
Oklahoma	295	8	25.1	0	25.1	85	3,250	276	85	3,540	301	85
Oregon	707	19	69.5	8.22	77.7	110	2,930	363	124	3,640	441	121
Pennsylvania	2,540	20	152	0	152	60	9,890	552	56	12,400	704	57
Rhode Island	85.9	8	6.10	0	6.10	71	990	79.3	80	1,080	85.4	79
South Carolina	1,270	30	127	0	127	100	2,980	298	100	4,260	426	100
South Dakota	110	14	7.67	0	7.67	70	666	65.6	99	776	73.3	94
Tennessee	509	9	36.7	0	36.7	72	5,450	443	81	5,960	479	80
Texas	2,230	10	257	0	257	115	20,600	2,870	139	22,900	3,130	137
Utah	68.5	3	11.8	2.11	13.9	203	2,480	460	186	2,550	474	186
Vermont	185	30	13.7	.17	13.9	75	438	25.8	59	623	39.8	64
Virginia	1,680	22	126	0	126	75	5,890	442	75	7,570	568	75
Washington	904	14	86.0	.02	86.0	95	5,380	562	104	6,290	648	103
West Virginia	420	23	32.8	.66	33.5	80	1,400	149	107	1,820	183	101
Wisconsin	1,670	30	87.3	0	87.3	52	3,870	229	59	5,540	316	57
Wyoming	84.4	17	6.32	0	6.32	75	425	71.0	167	509	77.4	152
Puerto Rico	30.7	1	2.11	0	2.11	69	3,880	347	89	3,910	349	89
U.S. Virgin Islands	35.7	33	0	1.95	1.95	55	73.0	5.33	73	109	7.28	67
TOTAL	42,900	14	3,740	87.7	3,830	89	258,000	25,600	99	301,000	29,400	98



Presentation by Alan English, Gallatin Local Water Quality District, to WPIC in January 2010.

Numbers continued



Domestic Well Provisions in the West

State	Capacity Limit AFY	Irrigation Limit (acres)	Water Right Permit Exemptions
Alaska	0.56		Permit required for water use exceeding 500 gallons-per-day, no annual reporting
Arizona[1]	56	2	Notice of intent to drill and completion report
California			Varies by local control
Colorado[2]	5	1	Well construction permit required, other exceptions exclude subdivisions <35 acres/owner
Idaho	14	0.5	No permit required
Kansas		2	No permit required
Montana	10		File notice of completion
Nebraska	80		Registration required
Nevada	2		Permits required in designated basins
New Mexico[3]	1	1	No permit, but must have approved well application
North Dakota	12.5	1	File notice of completion
Oklahoma		3	No permit required
Oregon	16.8	0.5	No permit required
South Dakota	29.1	1	No permit required
Texas	28		No permit for >10 acre tracts, excludes subdivisions
Utah			Permit required
Washington	5.6	0.5	No permit required
Wyoming[4]	40.4	1	Permit required

[1] 10 AFY in AMAs post 1983

[2] AFY may be expanded to 80 AFY

[3] AFY limit in effect post 2006

[4] Domestic wells may serve up to three dwellings.

SOURCE: Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

How Water Works

Appendix J

An important part of developing water policy is having a basic understanding of how water moves through the world. With the help of several organizations, the WPIC spent part of one meeting taking part in demonstrations.

The Department of Natural Resources and Conservation's Rolling River is a five by ten foot utility trailer with a six-inch deep trailer bed that is filled with sand (actually recycled plastic granules).

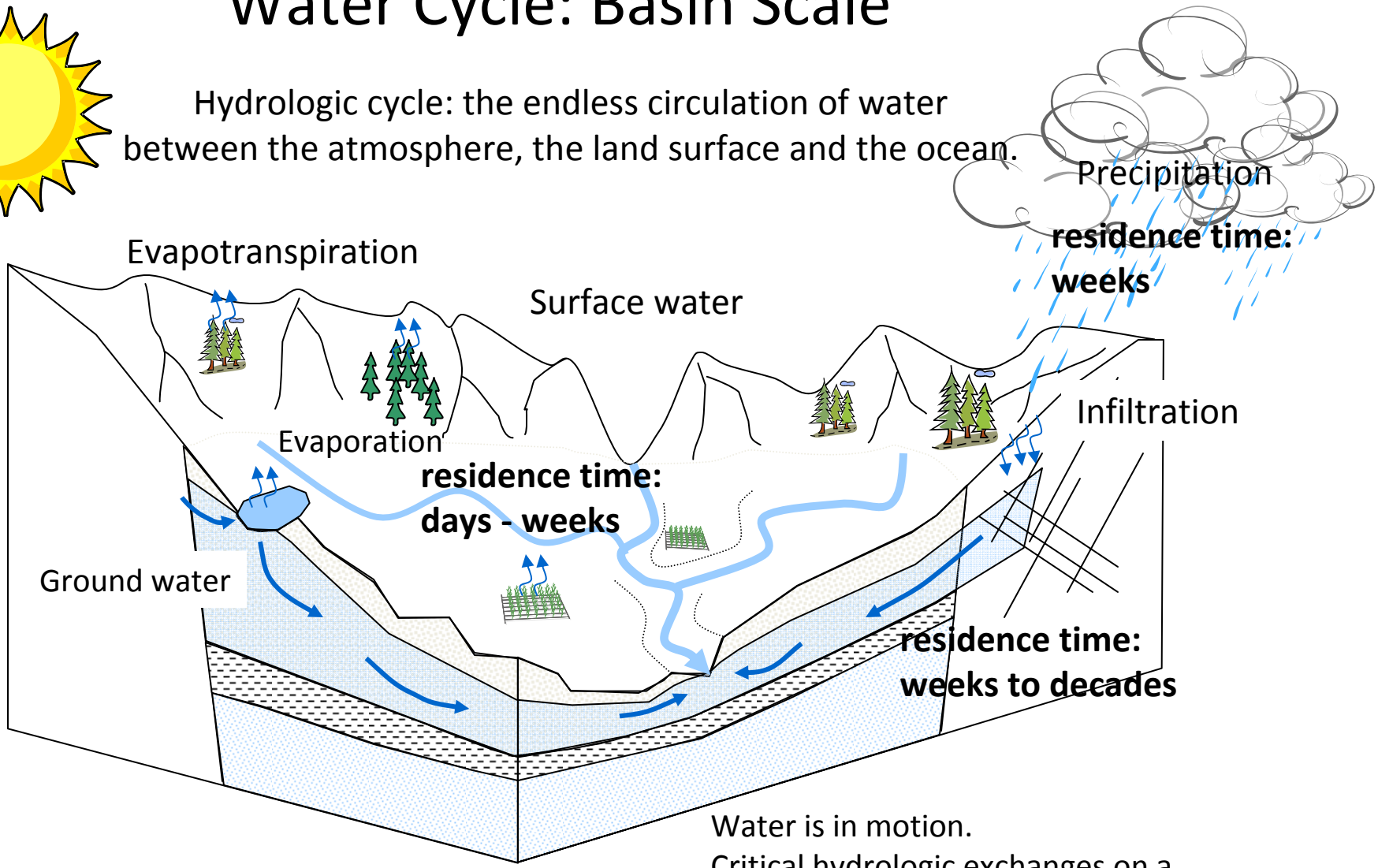
A meandering river or two is scooped out running from one end to the other. When water is turned on at the top of the watershed, it flows through the river and can be used to demonstrate a variety of water lessons including riparian areas. With the vegetation in place along the riverbank, the banks remain stable. Remove some of the foliage, and erosion occurs as water cuts into the banks. Turn the water on full force as in a flood situation and the riverbank begins to break down and collapses even faster. This demonstrates the principles of healthy versus unhealthy riparian areas.

The Montana Bureau of Mines and Geology showed how ground water interacts with surface water, including recharging of aquifers and the effects of wells.

The Montana Watercourse demonstration showed how nonpoint pollution can reach streams and how it can be mitigated.

Water Cycle: Basin Scale

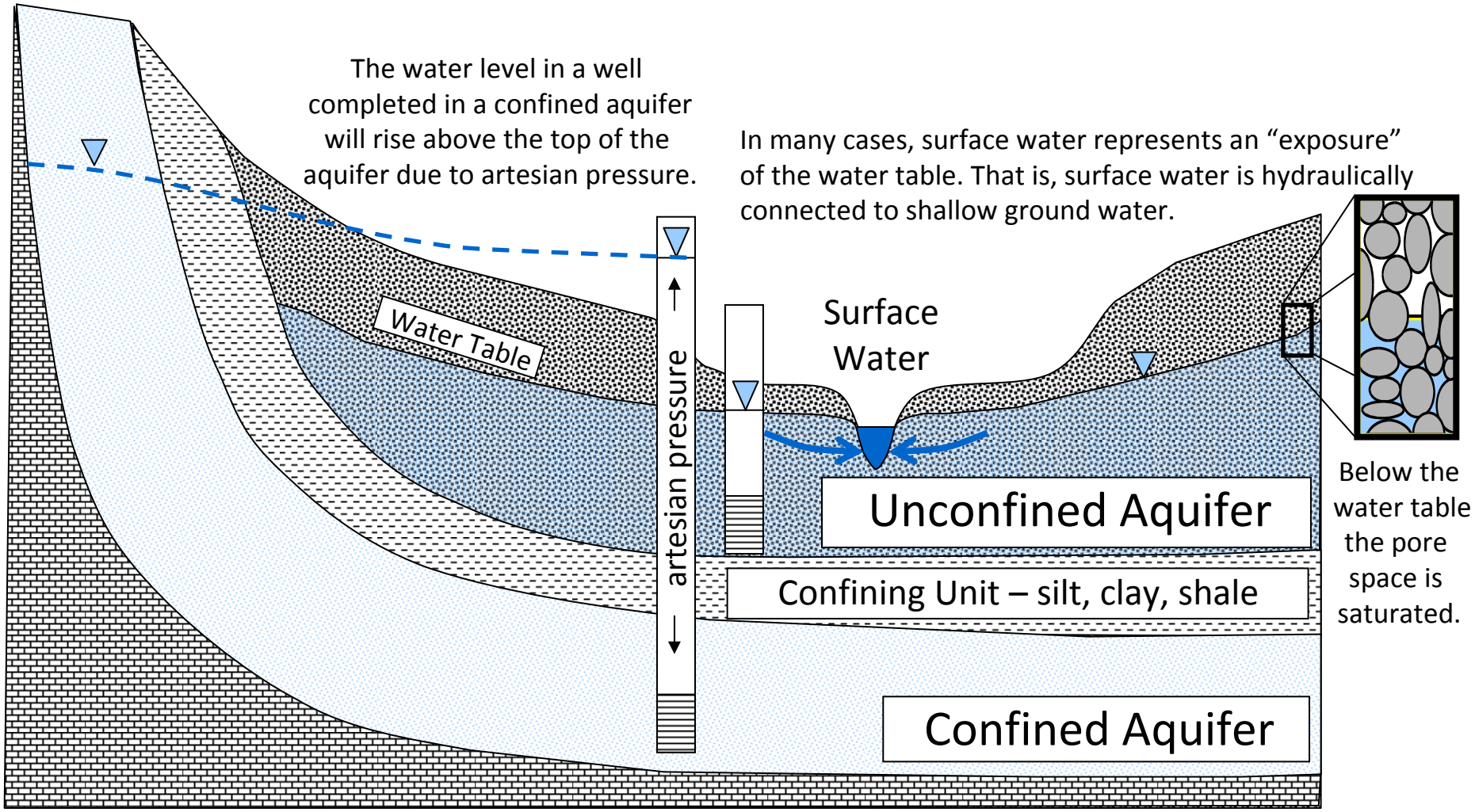
Hydrologic cycle: the endless circulation of water between the atmosphere, the land surface and the ocean.



Water is in motion.
Critical hydrologic exchanges on a typical Montana basin scale include: precipitation, infiltration, surface runoff, evaporation and transpiration

Ground Water, Aquifers and Confining Units

Ground water occurs in unconfined (water table) or confined aquifers. The water table marks the upper surface in an unconfined aquifer. Confined aquifers are bounded by low permeability units.



Montana Water Studies and Policy Documents

Legislative Services

Publication	Link
Water - Montana's Treasure (2008)	http://www.leg.mt.gov/content/Publications/Environmental/2008montanastreasure.pdf
Water Rights in Montana (2008)	http://www.leg.mt.gov/content/Publications/environmental/2008waterrights.pdf
A Guide to Montana Water Quality Regulation (2008)	http://www.leg.mt.gov/content/publications/environmental/2008waterqualityguide.pdf
Water Policy in Montana (2006)	http://www.leg.mt.gov/content/publications/environmental/2006waterpolicy.pdf
Montana's Water--Where is it? Who can use it? Who decides? (2004)	http://www.leg.mt.gov/content/publications/environmental/2004waterreport.pdf
Coal Bed Methane and Water Policy in Montana (2002)	http://www.leg.mt.gov/content/publications/environmental/2002waterpolicyreport.pdf
Water Policy 2000	http://www.leg.mt.gov/content/publications/environmental/2000waterpolicy.pdf
Montana's Revised Water Quality Monitoring, Assessment, and Improvement Program (HB 546 and TMDLs in Practice): an EQC Report to the Montana Legislature (1999)	http://www.leg.mt.gov/content/publications/environmental/1998TMDL.pdf
Montana's Water Policy, 1997-1998. An EQC Communique to the Montana Legislature	http://www.leg.mt.gov/content/publications/environmental/1998waterpolicy.pdf
Montana Department of Fish, Wildlife and Parks' Water Leasing Study. Environmental Quality Council Final Report to the 56th Legislature (1998)	http://www.leg.mt.gov/content/publications/environmental/1998leasing.pdf
Report on Water Policy to the 55th Legislature (1996)	http://www.leg.mt.gov/content/publications/environmental/1996waterpolicy.pdf
Report on Water Policy to the 54th Legislature (1995)	
SJR 29 Water Quality Nondegradation Study (1995)	http://www.leg.mt.gov/content/publications/Environmental/1995nondeg.pdf
Water Policy Committee: Report to the 53rd Montana Legislature (1992)	http://www.leg.mt.gov/content/publications/environmental/1992waterpolicy.pdf
SJR 22: Interim Study on Ground Water Quality Protection and Management (1990)	http://www.leg.mt.gov/content/publications/environmental/1990groundwater.pdf

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Water Policy Committee: Report to the 52nd Montana Legislature (1990)	http://www.leg.mt.gov/content/publications/environmental/1990waterpolicy.pdf
A Study of Water Resources Research Centers and Graduate Programs in Water Resources in the United States (1989)	
Water Policy Committee: Report to the 51st Montana Legislature (1988)	http://www.leg.mt.gov/content/publications/environmental/1988waterpolicy.pdf
Evaluation of Montana's Water Rights Adjudication Process (1988)	http://www.leg.mt.gov/content/publications/environmental/1988adjudication.pdf
Montana Water Policy: Innovations, Realities and Propsects (1987)	
A Montana Water Quality Program Assessment for Oil and Gas Practices, Forest Practices and Subdivisions (1987)	
Report of the Water Policy Committee to the 50th Legislature of the State of Montana (1986)	
Report of the Select Committee on Water Marketing (1985)	http://www.leg.mt.gov/content/publications/environmental/1985watermarketing.pdf
Annual Report, Ninth Edition: Montana's Water (1985)	http://www.leg.mt.gov/content/Publications/Environmental/1985annualreport.pdf
Small Scale Hydro in Montana (1984)	
Montana Ground Water Status Report (1983)	http://www.leg.mt.gov/content/publications/environmental/1983groundwater.pdf
Montana Ground Water Conference: Planning a Ground Water Strategy, 1982	
A Report on Analyses of Periphyton Collections from the North Fork and the Middle Fork of the Flathead River (1976)	
An Algal Survey of Surface Waters in Eastern Montana Suspected to be Influenced by Saline Seep, with Special Emphasis on Salinity Indicators and Potentially Toxic Species (1976)	
Microflora of the Yellowstone River, Part III: The Non-Diatom Algae (1976)	http://www.leg.mt.gov/content/Publications/Environmental/1976microflora3.pdf
Microflora of the Yellowstone River, Part II: Pertubations Through Billings (1976)	http://www.leg.mt.gov/content/Publications/Environmental/1976microflora2.pdf

Microflora of the Yellowstone River, Part I: Microflora in the Plankton at the Confluence of the Bighorn River (1974)	http://www.leg.mt.gov/content/Publications/Environmental/1974microflora1.pdf
Water and Eastern Montana Coal Development (1973)	
Eastern Montana Water Resources: Annotated Bibliography (1973)	

Department of Natural Resources and Conservation

Publication	**Link**
Governor's Report on the Potential for Drought 2009	http://www.dnrc.mt.gov/wrd/water_mgmt/planning_reports/pdfs/gov_drt_rpt_2009.pdf
Governor's Report on Water Storage 2009	http://www.dnrc.mt.gov/wrd/water_mgmt/planning_reports/pdfs/govs_rpt_waterstorage_09/govrpt_waterstorage2009.pdf
Irrigation In Montana: A Program Overview and Economic Analysis, 2008	http://dnrc.mt.gov/cardd/publications/SummaryReportEconAnalysis.pdf
Inventory of Irrigation Infrastructure in Montana, 2009	http://dnrc.mt.gov/cardd/ResDevBureau/irrigation_development/docs/InventoryIrrigationInfrastructureMontana.pdf
Managing Montana's Water: Challenges Facing the Prior Appropriation Doctrine in the 21st Century	http://www.dnrc.mt.gov/wrd/water_mgmt/clarkforkbasin_taskforce/pdfs/appropriation_paper.pdf
DNRC Water Resource Division Strategic Plan	http://www.dnrc.mt.gov/wrd/pdfs/wrd_strategicplan05.pdf
St. Mary and Milk Rivers Water Management Initiative	http://www.dnrc.mt.gov/wrd/water_mgmt/planning_activities/montana-alberta/default.asp
Coal Bed Methane Annual Report (2008)	http://www.dnrc.mt.gov/wrd/water_mgmt/planning_reports/cbm/2008annual_report.pdf
Montana's State Water Plan 1987 - 1999	http://dnrc.mt.gov/wrd/water_mgmt/montana_state_waterplan/default.asp
Big Hole Watershed Study	http://www.dnrc.mt.gov/wrd/water_mgmt/current_projects/bighole/bighole_2004.pdf
North Hills Controlled Ground Water Area	http://www.dnrc.mt.gov/wrd/water_rts/cgwa/northhills/default.asp
Hydrogeology of the Upper Beaverhead Basin Near Dillon, 1998	http://www.dnrc.mt.gov/wrd/water_mgmt/groundwaterstudies/pdfs/mbmg_open-file_report_384.pdf
A Reconnaissance Ground Water Investigation in the Upper Flathead River Valley, 2000	http://www.dnrc.mt.gov/wrd/water_mgmt/groundwaterstudies/pdfs/mbmg_open-file_report_414.pdf
Ground Water Levels at the South End of the Red Lodge Bench Near Red Lodge, 2000	http://www.dnrc.mt.gov/wrd/water_mgmt/groundwaterstudies/pdfs/groundwaterlevels_redlodge.pdf

Use of Regression and Time-Series Methods to Estimate a Sediment Budget for Nevada Creek Reservoir, June 2006	http://www.dnrc.mt.gov/wrd/water_mgmt/surfacewaterstudies/pdfs/nevadacreeksedimentbudgetcdalbyawrarevised.pdf
Flint Creek Return Flow Study, 1997	http://www.dnrc.mt.gov/wrd/water_mgmt/surfacewaterstudies/pdfs/mbmg_open-file_report_364.pdf
North Fork Blackfoot River Hydrology Study Abstract, 2001	http://www.dnrc.mt.gov/wrd/water_mgmt/surfacewaterstudies/northforkblackfoot_hydrostudy.asp
Lower Poorman Creek Hydrologic Assessment, 2002	http://www.dnrc.mt.gov/wrd/water_mgmt/surfacewaterstudies/pdfs/poorman_creek_report.pdf
Morrison Ditch Seepage Analysis Monitoring Report, 2003	http://www.dnrc.mt.gov/wrd/water_mgmt/surfacewaterstudies/pdfs/morrison_ditch_report.pdf
Upper Shields River Watershed Water Supply and Irrigation Efficiencies Investigations 1999-2005	http://www.dnrc.mt.gov/wrd/water_mgmt/surfacewaterstudies/pdfs/shields_river_report_2005.pdf
Boulder River Watershed Irrigation Efficiencies and Water Supply Study 2003-2006	http://www.dnrc.mt.gov/wrd/water_mgmt/surfacewaterstudies/pdfs/boulder_river_report.pdf
A Water Protection Strategy for Missouri River Basin 1982	http://www.dnrc.mt.gov/wrd/water_mgmt/water_reservations/waterprotectstrategy_missrivbasin.pdf
Smith River Basin Environmental Assessment, 2003	http://www.dnrc.mt.gov/wrd/water_mgmt/water_reservations/smith_river_basin/default.asp
Smith River Basin Environmental Assessment Addendum, 2003	http://www.dnrc.mt.gov/wrd/water_mgmt/water_reservations/smith_river_basin/pdfs/addendum_smithriverbasin.pdf

Montana Bureau of Mines and Geology

Publication	**Link**
Ground Water Case Studies, 2008 (HB831)	http://www.mbmg.mtech.edu/gwip/hb831book_appendix.pdf
Ground Water Investigation Program (HB52)	http://www.mbmg.mtech.edu/gwip/gwip.asp
Ground Water Assessment Program	http://www.mbmg.mtech.edu/grw/grwassessmemt.asp

Department of Environmental Quality

Publication	**Link**
Clean Water Act Information Center	http://cwaic.mt.gov/

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Source Water Program Summary	http://www.deq.state.mt.us/wqinfo/swp/MT%20SWP%20Booklet_Jul%2007_WEB.pdf
An Assessment of the Ecological Conditions of the Streams and Rivers of Montana using the Environmental Monitoring and Assessment Program (EMAP) Method – 2008	http://www.deq.state.mt.us/wqinfo/publications/EMAP_REPORT_FINAL-wCover.pdf
Diatom Biocriteria for Montana Streams – Middle Rockies Ecoregion – 2006	http://www.deq.state.mt.us/wqinfo/publications/DiatomBiocriteriaMontanaStreams-MiddleRockiesEcoregion.pdf
Diatom Biocriteria for Montana Streams – 2005	http://www.deq.state.mt.us/wqinfo/publications/DiatomBiocriteriaMontanaStreams2005.pdf
Evaluation of Fecal Coliform Concentrations Along Selected Upper Smith River – 2003	http://www.deq.state.mt.us/wqinfo/Standards/SmithRiverFecalReportv30.pdf
Interpretation of Periphyton Samples for Montana Streams – Middle Rockies Ecoregion – 2006	Interpretation of Periphyton Samples for Montana Streams – Middle Rockies Ecoregion – 2006
Identification and Assessment of Montana Reference Streams: A Follow-up and Expansion of the 1992 Benchmark Biology Study – 2005	http://www.deq.state.mt.us/wqinfo/Standards/Refsites_writeup_FINALPrintReady.pdf
Statistical Evaluation of Periphyton Samples from Montana Reference Streams – 2007	Statistical Evaluation of Periphyton Samples from Montana Reference Streams – 2007
Wadeable Streams of Montana's Hi-line Region: An Analysis of Their Nature and Condition, with an Emphasis on Factors Affecting Aquatic Plant Communities and Recommendations to Prevent Nuisance Algae Conditions – 2004	http://www.deq.state.mt.us/wqinfo/Standards/Master_Doc_DII.pdf
Water Quality and Biological Characteristics of Montana Streams in a Statewide Monitoring Network, 1999-2005 Comprehensive Report – 2007	http://www.deq.state.mt.us/wqinfo/monitoring/SiteSummaries/Comprehensive%20Report_condensed.pdf
Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PPCPs) and Microbial Indicators of Fecal Contamination in Ground Water in the Helena Valley, MT, USA--Presentation	http://www.deq.state.mt.us/wqinfo/pws/docs/Kathleen%20Miller%20NGWA%20Presentation.pdf
Helena Valley Ground Water: Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PPCPs) and Microbial Indicators of Fecal Contamination--Manuscrip	http://www.deq.state.mt.us/wqinfo/pws/docs/Helena%20valley%20pharms_new.pdf

Department of Fish, Wildlife, & Parks	
Publication	**Link**
FWP Water leasing report 2007	http://www.leg.mt.gov/content/Committees/Interim/2007_2008/water_policy/staffmemos/2007leasing.pdf
Montana Water Court	
Publication	**Link**
Adjudication Guide Book	http://www.courts.mt.gov/water/guidebook.pdf
Montana Water Center	
Publication	**Link**
Research Projects Database	http://watercenter.montana.edu/research/default.asp

**** Bill No. ****

Introduced By **********

By Request of the *********

A Bill for an Act entitled: "An Act generally revising water laws related to aquifer recharge and mitigation; providing up to 20 years to complete a change of use for aquifer recharge or mitigation or marketing for aquifer recharge or mitigation; and amending sections 85-2-102, 85-2-310, and 85-2-402, MCA."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Change in appropriation right for aquifer recharge or mitigation -- marketing.** (1) Subject to 85-2-402 and this section, an appropriator may apply for a change in appropriation right for the purpose of aquifer recharge or mitigation or for the purpose of marketing water for aquifer recharge or mitigation.

(2) During the completion period authorized by the department for a change pursuant to this section, the appropriator may continue to use the appropriation right for any authorized beneficial use provided that proportionate amounts of the appropriation right are retired as the mitigation or aquifer recharge beneficial use is perfected.

(3)(a) If the full amount of the appropriation right is not sold or marketed as mitigation or aquifer recharge prior to the completion date, the water right retains the beneficial uses

authorized prior to the change approved pursuant to this section.

(b) For an appropriation right that retains the original beneficial uses pursuant to this section, the flow rate and volume of water allowed at the point of diversion must be equal to the flow rate and volume allowed under the initial beneficial uses minus the amount that was sold or marketed for mitigation or aquifer recharge.

(4) As part of a change in appropriation right approved pursuant to this section, the department shall:

(a) determine a period for the change in appropriation right to be completed that does not exceed 20 years and;

(b) require the appropriator to notify the department within 30 days each time a portion of the change is completed.

Section 2. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;

(d) in the case of the United States department of

agriculture, forest service:

(i) instream flows and in situ use of water created in 85-20-1401, Article V; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(f) a use of water for aquifer recharge or mitigation ~~as provided in 85-2-360 and 85-2-362~~; or

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator,

other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation ~~as provided in 85-2-360 and 85-2-362~~; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(5) "Certificate" means a certificate of water right issued by the department.

(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial

credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information for the department to begin evaluating the information.

(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(10) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(13) "Ground water" means any water that is beneath the ground surface.

(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other

means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(22) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory

upon which the department should proceed with the action requested by the person providing the information.

(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(25) "Water division" means a drainage basin as defined in 3-7-102.

(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

(27) "Water master" means a master as provided for in Title 3, chapter 7.

(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

{*Internal References to 85-2-102:*
75-5-410x *82-4-355x* *85-2-141x* *85-2-340x*}

Section 3. Section 85-2-310, MCA, is amended to read:

"85-2-310. Action on application for permit or change in appropriation right. (1) (a) If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied.

(b) (i) Upon request from the applicant, the department shall appoint a hearing examiner who did not participate in the preliminary determination.

(ii) The applicant may make only one request pursuant to this subsection (1)(b) for a different hearing examiner.

(2) A proposal to grant an application with or without conditions following a hearing on a proposal to deny the application must proceed as if the department proposed to grant the application in its preliminary determination pursuant to 85-2-307.

(3) If valid objections are not received on an application or if valid objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right as proposed in the preliminary determination pursuant to 85-2-307.

(4) If valid objections to an application are received and withdrawn with conditions stipulated with the applicant and the

department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

(5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

(6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

(7) Except as provided in subsection (6), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The

department shall serve a statement of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

(8) The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

(9) For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

(a) an application is not corrected and completed as required by 85-2-302;

(b) the appropriate filing fee is not paid;

(c) the application does not document:

(i) a beneficial use of water;

(ii) the proposed place of use of all water applied for;

(iii) for an appropriation of 4,000 acre-feet a year or more

and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application of the water to a beneficial use.

(iv) for appropriations not covered in subsection (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use; and

(v) <u>except as provided in (vi),</u> if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

(D) each firm contractual agreement for the specified amount of water for each person using the water;

<u>(vi) if water applied for is to be marketed by the applicant to other users for the purpose of aquifer recharge or mitigation, the applicant is exempt from the provisions of (9)(c)(v). The applicant must provide information detailing the proposed place of use;</u> or

(d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124."

{*Internal References to 85-2-310:*

85-2-102x 85-2-307x 85-2-322x 85-2-363x* 85-2-401x 85-20-1401x*}

Section 4. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights -- definition. (1) (a) The right to make a change in appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(b) If an application involves a change in a point of diversion, conveyance, or place of use located on national forest system lands, the application is not correct and complete until the applicant has submitted proof to the department of any written special use authorization required by federal law for the proposed change in occupancy, use, or traverse of national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(c) As used in this part, "national forest system lands" has the same meaning as that provided in 85-20-1401, Article I.

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

~~(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320, the proposed means of diversion, construction, and operation of the appropriation works are adequate.~~

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for:

(i) a change in appropriation right for instream flow pursuant to 85-2-436 or 85-2-320;

(ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

(iii) a change in appropriation right pursuant to [section 1] for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

~~(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.~~

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to:

(i) a change in appropriation right for instream flow

pursuant to 85-2-436 or 85-2-320;

(ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

(iii) a change in appropriation right pursuant to [section 1] for mitigation or marketing for mitigation.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(f) The water quality of an appropriator will not be adversely affected.

(g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

(4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:

(a) the criteria in subsection (2) are met; and

(b) the proposed change in appropriation right is a reasonable use. A finding of reasonable use must be based on a

consideration of:

(i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(5) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and

(b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(b) In determining whether the appropriator has proved by clear and convincing evidence that the requirements of

subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it determines that the proposed change in appropriation right might adversely affect the rights of other

persons.

(8) The department or the legislature, if applicable, may approve a change in appropriation right subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change in appropriation right. The department may extend time limits specified in the change in appropriation right approval under the applicable criteria and procedures of 85-2-312(3).

(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed.

(10) If a change in appropriation right is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change in appropriation right approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change in appropriation right approval.

(11) The original of a change in appropriation right approval issued by the department must be sent to the applicant,

and a duplicate must be kept in the office of the department in Helena.

(12) A person holding an issued permit or change in appropriation right approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change in appropriation right pursuant to this section.

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

(14) The department may adopt rules to implement the provisions of this section.

(15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval of the department if:

(i) the appropriation right is for:

(A) ground water outside the boundaries of a controlled ground water area; or

(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the rule establishing the controlled ground water area do not restrict a change in appropriation right;

(ii) the change in appropriation right is to replace an

existing well and the existing well will no longer be used;

(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced and do not exceed:

(A) 450 gallons a minute for a municipal well; or

(B) 35 gallons a minute and 10 acre-feet a year for all other wells;

(iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from the well being replaced; and

(v) a timely, correct and complete notice of replacement well is submitted to the department as provided in subsection (15)(b).

(b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the appropriator shall file a notice of replacement well with the department on a form provided by the department.

(ii) (A) The department shall review the notice of replacement well and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct and complete.

(B) If the replacement well is located on national forest system lands, the notice is not correct and complete under this subsection (15) until the appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the replacement well.

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement well has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

(A) cease appropriation of water from the replacement well pending approval by the department; and

(B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).

(c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.

(d) For each well that is replaced under this subsection (15), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-43-202.

(e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (15)(a).

(16) (a) An appropriator may change an appropriation right without the prior approval of the department for the purpose of constructing a redundant water supply well in a public water

supply system, as defined in 75-6-102, if the redundant water supply well:

(i) withdraws water from the same ground water source as the original well; and

(ii) is required by a state or federal agency.

(b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.

(c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion. If the redundant water supply well is located on national forest system lands, the notice is not correct and complete under this subsection until the appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the redundant water supply well.

(d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets the requirements of this subsection (16).

(17) The department shall accept and process an application for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320 and this section and to benefit the fishery resource pursuant to 85-2-436 and this section.

(18) (a) An appropriator may change an appropriation right for a replacement point of diversion without the prior approval of the department if:

(i) the existing point of diversion is inoperable due to natural causes or deteriorated infrastructure;

(ii) there are no other changes to the water right;

(iii) the capacity of the diversion is not increased;

(iv) there are no points of diversion or intervening water rights between the existing point of diversion and the replacement point of diversion or the appropriator obtains written waivers from all intervening water right holders;

(v) the replacement point of diversion is on the same surface water source and is located as close as reasonably practicable to the existing point of diversion;

(vi) the replacement point of diversion replaces an existing point of diversion and the existing point of diversion will no longer be used;

(vii) the appropriator can show that the existing point of diversion has been used in the 10 years prior to the notice for change of appropriation right for a replacement point of diversion;

(viii) the appropriator can show the change will not increase access to water availability, change the method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and

(ix) a timely, correct and complete notice of replacement point of diversion is submitted to the department as provided in

subsection (18)(b).

(b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file a notice of replacement point of diversion with the department on a form provided by the department.

(ii) The department shall review the notice of replacement point of diversion and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met and the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under subsection (18)(a) have been met. If the department issues an authorization of a change in an appropriation right for a replacement point of diversion, the department shall prepare a notice of the authorization and provide notice of the authorization in the same manner as required in 85-2-307 for applications.

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement point of diversion has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement point of diversion within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iv) If a notice of replacement point of diversion is not filed and completed within the time allowed or if the department

determines the criteria under subsection (18)(a) have not been met, the appropriator shall:

(A) cease appropriation of water from the replacement point of diversion pending approval by the department; and

(B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).

(c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under 85-2-404.

(d) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (18)(a).

(e) (i) An appropriator may file a correct and complete objection with the department alleging that the change in appropriation right for a replacement point of diversion will adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under Title 85, chapter 2, part 3.

(ii) If the department determines after a contested case hearing between the appropriator and the objector that the rights of other appropriators have been or will be adversely affected, it may revoke the change or make the change subject to terms, conditions, restrictions, or limitations necessary to protect the rights of other appropriators.

(iii) The burden of proof to prove lack of adverse effect at the hearing is on the appropriator changing the point of

diversion."

{*Internal References to 85-2-402:*

3-7-224s	*75-5-410x*	*85-2-308x*	*85-2-309x*
85-2-310x	*85-2-316x*	*85-2-320x*	*85-2-320x*
85-2-336x	*85-2-363x*	*85-2-363x*	*85-2-363x*
85-2-368x	*85-2-403x*	*85-2-407x*	*85-2-408x*
85-2-408x	*85-2-419x*	*85-2-436x*	*85-2-436x*
85-2-436x	*85-2-602x*	*85-2-708x*	*85-20-1001x*
85-20-1401x	*85-20-1501x*	*85-20-1501x*	*85-20-1501x*}

NEW SECTION. **Section 5. {standard} Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to [section 1].

- END -

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**** Bill No. ****

Introduced By **********

By Request of the *********

A Bill for an Act entitled: "An Act requiring drainfield mixing zones be located wholly within the subdivision where the drainfield is located; amending section 76-4-104, MCA; providing an immediate effective date and an applicability date."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 76-4-104, MCA, is amended to read:

"76-4-104. Rules for administration and enforcement. (1) The department shall, subject to the provisions of 76-4-135, adopt reasonable rules, including adoption of sanitary standards, necessary for administration and enforcement of this part.

(2) The rules and standards must provide the basis for approving subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal. The rules and standards must be related to:

(a) size of lots;

(b) contour of land;

(c) porosity of soil;

(d) ground water level;

(e) distance from lakes, streams, and wells;

(f) type and construction of private water and sewage

facilities; and

(g) other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.

(3) (a) Except as provided in subsection (3)(b), the rules must provide for the review of subdivisions by a local department or board of health, as described in Title 50, chapter 2, part 1, if the local department or board of health employs a registered sanitarian or a registered professional engineer and if the department certifies under subsection (4) that the local department or board is competent to conduct the review.

(b) (i) Except as provided in 75-6-121 and subsection (3)(b)(ii) of this section, a local department or board of health may not review public water supply systems, public sewage systems, or extensions of or connections to these systems.

(ii) A local department or board of health may be certified to review subdivisions proposed to connect to existing municipal water and wastewater systems previously approved by the department if no extension of the systems is required.

(4) The department shall also adopt standards and procedures for certification and maintaining certification to ensure that a local department or board of health is competent to review the subdivisions as described in subsection (3).

(5) The department shall review those subdivisions described in subsection (3) if:

(a) a proposed subdivision lies within more than one jurisdictional area and the respective governing bodies are in

disagreement concerning approval of or conditions to be imposed on the proposed subdivision; or

(b) the local department or board of health elects not to be certified.

(6) The rules must further provide for:

(a) providing the reviewing authority with a copy of the plat or certificate of survey subject to review under this part and other documentation showing the layout or plan of development, including:

(i) total development area; and

(ii) total number of proposed dwelling units and structures requiring facilities for water supply or sewage disposal;

(b) adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed;

(c) evidence concerning the potability of the proposed water supply for the subdivision;

(d) adequate evidence that a sewage disposal facility is sufficient in terms of capacity and dependability;

(e) standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways;

(f) standards and technical procedures applicable to sanitary sewer plans and designs, including soil testing and site design standards for on-lot sewage disposal systems when applicable;

(g) standards and technical procedures applicable to water systems;

(h) standards and technical procedures applicable to solid waste disposal;

(i) adequate evidence that a drainfield mixing zone is located wholly within the boundaries of the proposed subdivision where the drainfield is located or that an easement has been obtained to place the drainfield mixing zone outside the boundaries of the proposed subdivision where the drainfield is located. Except for 76-3-207(1)(b), this subsection does not apply to the divisions provided for in 76-3-207.

~~(i)~~(j) criteria for granting waivers and deviations from the standards and technical procedures adopted under subsections (6)(e) through ~~(6)(h)~~ (6)(i);

~~(j)~~(k) evidence to establish that, if a public water supply system or a public sewage system is proposed, provision has been made for the system and, if others methods of water supply or sewage disposal are proposed, evidence that the systems will comply with state and local laws and regulations that are in effect at the time of submission of the preliminary or final plan or plat; and

~~(k)~~(l) evidence to demonstrate that appropriate easements, covenants, agreements, and management entities have been established to ensure the protection of human health and state waters and to ensure the long-term operation and maintenance of water supply, storm water drainage, and sewage disposal facilities.

(7) If the reviewing authority is a local department or board of health, it shall notify the department of its recommendation for approval or disapproval of the subdivision not later than 50 days from its receipt of the subdivision application. The department shall make a final decision on the subdivision within 10 days after receiving the recommendation of the local reviewing authority, but not later than 60 days after the submission of a complete application, as provided in 76-4-125.

(8) Review and certification or denial of certification that a division of land is not subject to sanitary restrictions under this part may occur only under those rules in effect when a complete application is submitted to the reviewing authority, except that in cases in which current rules would preclude the use for which the lot was originally intended, the applicable requirements in effect at the time the lot was recorded must be applied. In the absence of specific requirements, minimum standards necessary to protect public health and water quality apply.

(9) The reviewing authority may not deny or condition a certificate of subdivision approval under this part unless it provides a written statement to the applicant detailing the circumstances of the denial or condition imposition. The statement must include:

(a) the reason for the denial or condition imposition;

(b) the evidence that justifies the denial or condition imposition; and

(c) information regarding the appeal process for the denial or condition imposition.

(10) The department may adopt rules that provide technical details and clarification regarding the water and sanitation information required to be submitted under 76-3-622."

{*Internal References to 76-4-104:*
76-3-504x *76-3-622x* *76-3-622x* *76-3-622x*
76-4-102x *76-4-105x* *76-4-108x*}

NEW SECTION. **Section 2. {standard} Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 3. {standard} Applicability.** [This act] applies to subdivision applications received on or after [the effective date of this act].

- END -

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**** Bill No. ****

Introduced By **********

By Request of the *********

A Bill for an Act entitled: "An Act clarifying the authority of local governments to require public water supply systems and public sewer and wastewater systems for subdivisions; and amending sections 76-3-504, 76-3-601, and 76-3-604, MCA."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 76-3-504, MCA, is amended to read:

"76-3-504. Subdivision regulations -- contents. (1) The subdivision regulations adopted under this chapter must, at a minimum:

(a) list the materials that must be included in a subdivision application in order for the application to be determined to contain the required elements for the purposes of the review required in 76-3-604(1);

(b) except as provided in 76-3-509, 76-3-609, or 76-3-616, require the subdivider to submit to the governing body an environmental assessment as prescribed in 76-3-603;

(c) establish procedures consistent with this chapter for the submission and review of subdivision applications and amended applications;

(d) prescribe the form and contents of preliminary plats and the documents to accompany final plats;

(e) provide for the identification of areas that, because of natural or human-caused hazards, are unsuitable for subdivision development. The regulations must prohibit subdivisions in these areas unless the hazards can be eliminated or overcome by approved construction techniques or other mitigation measures authorized under 76-3-608(4) and (5). Approved construction techniques or other mitigation measures may not include building regulations as defined in 50-60-101 other than those identified by the department of labor and industry as provided in 50-60-901.

(f) prohibit subdivisions for building purposes in areas located within the floodway of a flood of 100-year frequency, as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body;

(g) prescribe standards for:

(i) the design and arrangement of lots, streets, and roads;

(ii) grading and drainage;

(iii) subject to the provisions of 76-3-511, water supply and sewage and solid waste disposal that meet the:

(A) regulations adopted by the department of environmental quality under 76-4-104 for subdivisions that will create one or more parcels containing less than 20 acres; and

(B) standards provided in 76-3-604 and 76-3-622 for subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres; and

(iv) the location and installation of public utilities;

(h) provide procedures for the administration of the park

and open-space requirements of this chapter;

(i) provide for the review of subdivision applications by affected public utilities and those agencies of local, state, and federal government identified during the preapplication consultation conducted pursuant to subsection (1)(q) or those having a substantial interest in a proposed subdivision. A public utility or agency review may not delay the governing body's action on the application beyond the time limits specified in this chapter, and the failure of any agency to complete a review of an application may not be a basis for rejection of the application by the governing body.

(j) when a subdivision creates parcels with lot sizes averaging less than 5 acres, require the subdivider to:

(i) reserve all or a portion of the appropriation water rights owned by the owner of the land to be subdivided and transfer the water rights to a single entity for use by landowners within the subdivision who have a legal right to the water and reserve and sever any remaining surface water rights from the land;

(ii) if the land to be subdivided is subject to a contract or interest in a public or private entity formed to provide the use of a water right on the subdivision lots, establish a landowner's water use agreement administered through a single entity that specifies administration and the rights and responsibilities of landowners within the subdivision who have a legal right and access to the water; or

(iii) reserve and sever all surface water rights from the

land;

(k) (i) except as provided in subsection (1)(k)(ii), require the subdivider to establish ditch easements in the subdivision that:

(A) are in locations of appropriate topographic characteristics and sufficient width to allow the physical placement and unobstructed maintenance of open ditches or belowground pipelines for the delivery of water for irrigation to persons and lands legally entitled to the water under an appropriated water right or permit of an irrigation district or other private or public entity formed to provide for the use of the water right on the subdivision lots;

(B) are a sufficient distance from the centerline of the ditch to allow for construction, repair, maintenance, and inspection of the ditch; and

(C) prohibit the placement of structures or the planting of vegetation other than grass within the ditch easement without the written permission of the ditch owner.

(ii) Establishment of easements pursuant to this subsection (1)(k) is not required if:

(A) the average lot size is 1 acre or less and the subdivider provides for disclosure, in a manner acceptable to the governing body, that adequately notifies potential buyers of lots that are classified as irrigated land and may continue to be assessed for irrigation water delivery even though the water may not be deliverable; or

(B) the water rights are removed or the process has been

initiated to remove the water rights from the subdivided land through an appropriate legal or administrative process and if the removal or intended removal is denoted on the preliminary plat. If removal of water rights is not complete upon filing of the final plat, the subdivider shall provide written notification to prospective buyers of the intent to remove the water right and shall document that intent, when applicable, in agreements and legal documents for related sales transactions.

(l) require the subdivider, unless otherwise provided for under separate written agreement or filed easement, to file and record ditch easements for unobstructed use and maintenance of existing water delivery ditches, pipelines, and facilities in the subdivision that are necessary to convey water through the subdivision to lands adjacent to or beyond the subdivision boundaries in quantities and in a manner that are consistent with historic and legal rights;

(m) require the subdivider to describe, dimension, and show public utility easements in the subdivision on the final plat in their true and correct location. The public utility easements must be of sufficient width to allow the physical placement and unobstructed maintenance of public utility facilities for the provision of public utility services within the subdivision.

(n) establish whether the governing body, its authorized agent or agency, or both will hold public hearings;

(o) establish procedures describing how the governing body or its agent or agency will address information presented at the hearing or hearings held pursuant to 76-3-605 and 76-3-615;

(p) establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in 76-3-201 or 76-3-207 is an attempt to evade the requirements of this chapter. The regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body.

(q) establish a preapplication process that:

(i) requires a subdivider to meet with the authorized agent or agency, other than the governing body, that is designated by the governing body to review subdivision applications prior to the subdivider submitting the application;

(ii) requires, for informational purposes only, identification of the state laws, local regulations, and growth policy provisions, if a growth policy has been adopted, that may apply to the subdivision review process;

(iii) requires a list to be made available to the subdivider of the public utilities, those agencies of local, state, and federal government, and any other entities that may be contacted for comment on the subdivision application and the timeframes that the public utilities, agencies, and other entities are given to respond. If, during the review of the application, the agent or agency designated by the governing body contacts a public utility, agency, or other entity that was not included on the list originally made available to the subdivider, the agent or agency shall notify the subdivider of the contact and the timeframe for response.

(iv) requires that a preapplication meeting take place no

more than 30 days from the date that the authorized agent or agency receives a written request for a preapplication meeting from the subdivider; and

(v) establishes a time limit after a preapplication meeting by which an application must be submitted as provided in 76-3-604;

(r) requires that the written decision required by 76-3-620 must be provided to the applicant within 30 working days following a decision by the governing body to approve, conditionally approve, or deny a subdivision.

(2) In order to accomplish the purposes described in 76-3-501, the subdivision regulations adopted under 76-3-509 and this section may include provisions that are consistent with this section that promote cluster development.

(3) A governing body implementing the provisions of subsection (1)(g)(iii) may, subject to the requirements of 76-3-511, require public water systems, public sewer systems, or both.

~~(3)~~(4) The governing body may establish deadlines for submittal of subdivision applications."

{*Internal References to 76-3-504:*

50-60-901x	*50-60-901x*	*76-3-511x*	*76-3-511x*
76-3-601a	*76-3-604a*	*76-3-604 x*	*76-3-605x*
76-3-609x	*76-3-615x*	*76-3-620x*}	

Section 2. Section 76-3-601, MCA, is amended to read:

"76-3-601. Submission of application and preliminary plat for review -- water and sanitation information required. (1) Subject to the submittal deadlines established as provided in

~~76-3-504(3)~~ 76-3-504(4), the subdivider shall present to the governing body or to the agent or agency designated by the governing body the subdivision application, including the preliminary plat of the proposed subdivision, for local review. The preliminary plat must show all pertinent features of the proposed subdivision and all proposed improvements and must be accompanied by the preliminary water and sanitation information required under 76-3-622.

(2) (a) When the proposed subdivision lies within the boundaries of an incorporated city or town, the application and preliminary plat must be submitted to and approved by the city or town governing body.

(b) When the proposed subdivision is situated entirely in an unincorporated area, the application and preliminary plat must be submitted to and approved by the governing body of the county. However, if the proposed subdivision lies within 1 mile of a third-class city or town, within 2 miles of a second-class city, or within 3 miles of a first-class city, the county governing body shall submit the application and preliminary plat to the city or town governing body or its designated agent for review and comment. If the proposed subdivision is situated within a rural school district, as described in 20-9-615, the county governing body shall provide a summary of the information contained in the application and preliminary plat to school district trustees.

(c) If the proposed subdivision lies partly within an incorporated city or town, the application and preliminary plat

must be submitted to and approved by both the city or town and the county governing bodies.

(d) When a proposed subdivision is also proposed to be annexed to a municipality, the governing body of the municipality shall coordinate the subdivision review and annexation procedures to minimize duplication of hearings, reports, and other requirements whenever possible.

(3) The provisions of 76-3-604, 76-3-605, 76-3-608 through 76-3-610, and this section do not limit the authority of certain municipalities to regulate subdivisions beyond their corporate limits pursuant to 7-3-4444."

{*Internal References to 76-3-601:*
*76-3-609x**}

Section 3. Section 76-3-604, MCA, is amended to read:

"76-3-604. Review of subdivision application -- review for required elements and sufficiency of information. (1) (a) Within 5 working days of receipt of a subdivision application submitted in accordance with any deadlines established pursuant to ~~76-3-504(3)~~ 76-3-504(4) and receipt of the review fee submitted as provided in 76-3-602, the reviewing agent or agency shall determine whether the application contains all of the listed materials as required by 76-3-504(1)(a) and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that

elements are missing from the application, the reviewing agent or agency shall identify those elements in the notification.

(2) (a) Within 15 working days after the reviewing agent or agency notifies the subdivider or the subdivider's agent that the application contains all of the required elements as provided in subsection (1), the reviewing agent or agency shall determine whether the application and required elements contain detailed, supporting information that is sufficient to allow for the review of the proposed subdivision under the provisions of this chapter and the local regulations adopted pursuant to this chapter and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that information in the application is not sufficient to allow for review of the proposed subdivision, the reviewing agent or agency shall identify the insufficient information in its notification.

(c) A determination that an application contains sufficient information for review as provided in this subsection (2) does not ensure that the proposed subdivision will be approved or conditionally approved by the governing body and does not limit the ability of the reviewing agent or agency or the governing body to request additional information during the review process.

(3) The time limits provided in subsections (1) and (2) apply to each submittal of the application until:

(a) a determination is made that the application contains the required elements and sufficient information; and

(b) the subdivider or the subdivider's agent is notified.

(4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an application contains sufficient information as provided in subsection (2), the governing body shall approve, conditionally approve, or deny the proposed subdivision within 60 working days or 80 working days if the proposed subdivision contains 50 or more lots, based on its determination of whether the application conforms to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:

(a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the review period, not to exceed 1 year; or

(b) a subsequent public hearing is scheduled and held as provided in 76-3-615.

(5) (a) If the governing body fails to comply with the time limits under subsection (4), the governing body shall pay to the subdivider a financial penalty of $50 per lot per month or a pro rata portion of a month, not to exceed the total amount of the subdivision review fee collected by the governing body for the subdivision application, until the governing body denies, approves, or conditionally approves the subdivision.

(b) The provisions of subsection (5)(a) do not apply if the review period is extended or suspended pursuant to subsection (4).

(6) If the governing body denies or conditionally approves the proposed subdivision, it shall send the subdivider a letter,

with the appropriate signature, that complies with the provisions of 76-3-620.

(7) (a) The governing body shall collect public comment submitted at a hearing or hearings regarding the information presented pursuant to 76-3-622 and shall make any comments submitted or a summary of the comments submitted available to the subdivider within 30 days after conditional approval or approval of the subdivision application and preliminary plat.

(b) The subdivider shall, as part of the subdivider's application for sanitation approval, forward the comments or the summary provided by the governing body to the:

(i) reviewing authority provided for in Title 76, chapter 4, for subdivisions that will create one or more parcels containing less than 20 acres; and

(ii) local health department or board of health for proposed subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres.

(8) (a) For a proposed subdivision that will create one or more parcels containing less than 20 acres, the governing body may require approval by the department of environmental quality as a condition of approval of the final plat.

(b) For a proposed subdivision that will create one or more parcels containing 20 acres or more, the governing body may condition approval of the final plat upon the subdivider demonstrating, pursuant to 76-3-622, that there is an adequate water source and at least one area for a septic system and a replacement drainfield for each lot.

(9) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this chapter may occur only under those regulations in effect at the time a subdivision application is determined to contain sufficient information for review as provided in subsection (2).

(b) If regulations change during the review periods provided in subsections (1) and (2), the determination of whether the application contains the required elements and sufficient information must be based on the new regulations."

{*Internal References to 76-3-604:*
76-3-504x *76-3-504x* *76-3-504 x* *76-3-601x*
76-3-608x *76-3-609x* *76-3-609* x* *76-3-615x*
76-3-620x *76-4-125x*}

- END -

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**** Bill No. ****

Introduced By **********

By Request of the *********

A Bill for an Act entitled: "An Act providing the district court discretion to award reasonable costs and attorney fees incurred as a result of an appeal of a final decision on a permit application or change in appropriation right; amending section 85-2-125, MCA; providing an immediate effective date and an applicability date."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 85-2-125, MCA, is amended to read:

"85-2-125. Recovery of costs and attorney fees by prevailing party. (1) If a final decision of the department on an application for a permit <u>or change in appropriation right</u> is appealed to district court, the district court ~~shall~~ <u>may</u> award the prevailing party reasonable costs and attorney fees.

(2) The party obtaining injunctive relief in an action to enforce a water right must be awarded reasonable costs and attorney fees. For the purposes of this section, "enforce a water right" means an action by a party with a water right to enjoin the use of water by a person that does not have a water right."

{*Internal References to 85-2-125: None.*}

<u>NEW SECTION.</u> **Section 2. {standard} Effective date.** [This

act] is effective on passage and approval.

NEW SECTION. **Section 3. {standard} Applicability.** [This act] applies to applications for a permit or a change in appropriation right pending for which a district court judgement has not been entered prior to the [effective date of this act] and applications for a permit or a change in appropriation right filed on or after the [effective date of this Act].

- END -

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**** Bill No. ****

Introduced By **********

By Request of the *********

A Bill for an Act entitled: "An Act generally revising and clarifying laws related to the treatment of property consisting of the bed of navigable rivers; defining a navigable river; requiring authorization from the board of land commissioners for uses on the beds of navigable rivers; requiring the board of land commissioners to adopt rules for providing easements, leases, or licenses for uses on the beds of navigable rivers; clarifying the authority of the board of land commissioners to grant easements; amending sections 77-1-121, 77-1-134, and 77-2-101, MCA."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Legislative findings -- purpose.** (1) The legislature finds that:

(a) Article IX, section 3, of the Montana constitution provides that the use of all water that is or may 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 with the beneficial use, and the sites for reservoirs necessary for collecting and storing water are a public use;

(b) a person who has historically used the bed of a navigable river in conjunction with a legal use of water or for

other uses or a person who desires to use the bed of a navigable river in conjunction with a legal use of water or for other uses must be able to do so provided that statutory provisions are met;

(c) owners of property adjacent to navigable rivers in Montana have historically been assessed property taxes on the beds of navigable rivers on the premise that the riverbeds are the property of the adjacent property owners;

(d) the historic payment of property taxes on the bed of a navigable river constitutes adequate compensation for any past use of the riverbed and relieves the owner of adjacent property of the duty to compensate the state for past use of the riverbed;

(e) any person who uses the bed of a navigable river after [the effective date of this act] shall apply to the state for a lease, license, or easement and pay full market value for the use of the riverbed; and

(f) the department has not consistently required payment for riverbed uses over time.

(2) The purpose of [sections 1 through 9] is to clarify the historic and future use of the beds of navigable rivers and how the state should be compensated for that use.

NEW SECTION. **Section 2. Definitions.** For the purposes of [sections 1 through 9], the following definitions apply:

(1) "Footprint" means a structure or other constructed interruption or modification to the bed of a navigable river below the low-water mark as provided in 70-16-201.

(2) "Full market value" means an amount calculated based

upon the area of a footprint and the fair market value as determined by rule or statute. The annual payment for a license issued under [sections 1 through 9] is $150.

(3) "Navigable river" means a river adjudicated as navigable for title purposes by a court of competent jurisdiction.

NEW SECTION. **Section 3. Use of beds of navigable rivers -- authorization requirement restricted.** The board or the department may only require a lease, license, or easement for a footprint on the bed of a navigable river.

NEW SECTION. **Section 4. Historic use of navigable riverbeds -- authorization required -- exemptions.** (1) A person using the bed of a navigable river below the low-water mark without written authorization from the department prior to [the effective date of this act] who wants to continue use of the bed of a navigable river after [the effective date of this act] shall file for authorization of the use on a form prescribed by the department for a lease, license, or easement by July 15, 2017.

(2) A person using the bed of a river below the low-water mark without written authorization from the department who wants to continue use of the bed after the date the river is deemed a navigable river shall file for authorization of the use on a form prescribed by the department for a lease, license, or easement within five years of the date the river after notice is issued by the department as provided in [section 6].

(3) The application must include:

(a) an application fee of $50;

(b) a notarized affidavit:

(i) demonstrating that the applicant or the applicant's predecessor in interest used the bed of a navigable river and that the use continues;

(ii) describing the acreage covered by the footprint prior to [the effective date of this act]; and

(iii) demonstrating that the use applied for under this section is the use shown in the evidence provided in subsection (3)(c); and

(c) (i) aerial photographs demonstrating the use to which the application for authorization applies; or

(ii) other evidence of the use to which the application for authorization applies.

(4) The department shall issue the authorization for a lease, license, or easement if:

(a) the applicant provides evidence to satisfy the requirements of subsection (3);

(b) the applicant pays the application fee and the full market value of the footprint acreage;

(c) the department has, if necessary, made a site inspection of the use to which the application for authorization applies;

(d) the authorization is only for the acreage of the footprint historically used by the applicant or the applicant's predecessor in interest; and

(e) the authorization is approved by the board. The authorization must be approved if the requirements of this section are met.

(5) Proceeds from the application fee must be deposited in the account in [section 5] and must be used by the department to administer the provisions of this section.

(6) The full market value collected pursuant to subsection (4)(b) must be deposited in the appropriate trust fund established for receipt of income from the land over which an authorized use is granted.

(7) Issuance of an authorization pursuant to this section is exempt from the requirements of Title 22, chapter 3, part 4, and Title 75, chapter 1, parts 1 and 2.

(8) The department shall waive the survey requirements of 77-2-102 if the department determines that there is sufficient information available to define the boundaries of the proposed use for the purposes of recording the easement or issuing a license or lease.

(9) The requirements of this section do not apply to footprints:

(a) related to hunting, fishing, or trapping;

(b) that existed prior to November 8, 1889;

(c) for which the applicant can show an easement obtained from a state agency prior to [the effective date of this act] or prior to the date the river was deemed a navigable river; or

(d) associated with a power site regulated pursuant to Title 77, chapter 4, part 2.

(10) A person using the bed of a navigable river who is subject to [this section] may continue to use the bed of the navigable river for that purpose while applying for an easement, license, or lease or until the applicable time frame for obtaining an lease, license, or easement expires. The state may not impede access to a footprint or use of a footprint during the applicable time frame or after a lease, license, or easement is obtained.

NEW SECTION. **Section 5. Historic riverbed use account.** (1) There is an account in the state special revenue fund into which the fees collected pursuant to [section 4] must be deposited.

(2) The funds in the account may be used only for administering the provisions of [section 4].

NEW SECTION. **Section 6. Notice required.** (1) The department shall provide notice of the requirements of [this act] to owners of property adjacent to rivers that are navigable rivers on [the effective date of this act] and provide notice pursuant to subsection (3).

(2) For a river deemed a navigable river after [the effective date of this act] the department shall provide notice of the requirements of [this act] to owners of property adjacent to the navigable river. The five-year period pursuant to [section 4] begins when the department issues this notice and publishes the notice required in subsection (3).

(3) The department shall publish notice of navigable rivers

and the requirements of [this act] twice in a newspaper of general circulation in the area of the navigable river.

NEW SECTION. **Section 7. Navigable riverbed uses -- lease, license, or easement required -- challenges.** (1) (a) After [the effective date of this act], the department shall require a person who proposes to use the bed of a navigable river up to the low-water mark to obtain a lease, license, or easement pursuant to the provisions of this title.

(b) The requirements of subsection (1)(a) do not apply to footprints related to hunting, fishing, or trapping.

(2) An applicant for authorization to use the bed of a navigable river pursuant to [section 4] or for a lease, license, or easement under this section may challenge the requirement of the authorization based on the navigability of the river, the location of footprint related to the low-water mark, or other factors. There is no presumption of navigability because an entity has applied for or received a lease, license, or easement.

NEW SECTION. **Section 8. Easement transferable -- relocation of structure -- increased footprint.** (1) An easement granted pursuant to [section 4 or 7] runs with the benefited land and may be transferred or assigned.

(2) (a) Pursuant to rules adopted under [section 9], the holder of a lease, license, or easement under [section 4 or 7] may relocate a footprint and associated facilities due to the natural relocation of a navigable river or other factors.

(b) (i) The holder of a lease, license, or easement shall provide written notice to the department when a footprint or associated facilities are proposed to be relocated.

(ii) The holder of a lease, license, or easement for water diversion structures associated with a water right may increase the size of the footprint if the increase is necessary to accomplish the purpose for which the lease, license, or easement was granted if the holder pays full market value for the portion of the footprint that is greater than the original footprint and the applicant has the appropriate state or federal permits.

(3) Section 77-1-805 applies to the use of navigable rivers for which leases, licenses, or easements for the use of the bed have been granted.

NEW SECTION. **Section 9. Board to adopt rules.** To fulfill the requirement of [sections 1 through 9], the board shall adopt rules to:

(1) determine the full market value for the use of a bed of a navigable river and establish a minimum payment for leases and easements;

(2) allow an applicant to choose to apply for a lease, license, or easement depending on the type of proposed use and the duration of the use; and

(3) allow the holder of a lease, license, or easement for water diversion structures associated with a water right to relocate a footprint based on certain circumstances, including but not limited to natural relocation of a navigable river.

Section 10. Section 77-1-121, MCA, is amended to read:

"77-1-121. Environmental review compliance -- exemptions. (1) Except as provided in 77-1-122, [section 4], and subsection (2) of this section, the department and board are required to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within this title only if the department is actively proposing a sale or exchange or to issue a right-of-way, easement, placement of improvement, lease, license, or permit or is acting in response to an application for an authorization for a proposal.

(2) The department and board are exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when issuing any lease or license that expressly states that the lease or license is subject to further permitting under any of the provisions of Title 75 or 82.

(3) Except for rulemaking and as provided in subsection (1), the department and board are otherwise exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within this title, including but not limited to the issuance of lease renewals. The department and board do not have an obligation to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within this title if the department or board chooses not to take any action, even though either may have the authority to take an action.

(4) The department and board are exempt from the provisions

of Title 75, chapter 1, parts 1 and 2, when taking actions, including preparing plans or proposals, in relation to and in compliance with the following local government actions:

(a) development or adoption of a growth policy or a neighborhood plan pursuant to Title 76, chapter 1;

(b) development or adoption of zoning regulations;

(c) review of a proposed subdivision pursuant to Title 76, chapter 3;

(d) actions related to annexation;

(e) development or adoption of plans or reports on extension of services; and

(f) other actions that are related to local planning."

{*Internal References to 77-1-121: None.*}

Section 11. Section 77-1-134, MCA, is amended to read:

"77-1-134. Irrigation structures, utility structures, and bridges of formerly taxable land -- water rights. (1) If an irrigation structure, a utility structure, or a bridge was placed on land that consists of the bed of a navigable river or stream, the irrigation structure, utility structure, or bridge remains the property of the original owner or the original owner's successors in interest or assignees. ~~Access~~ Subject to [section 4] (10), access to the irrigation structures, utility structures, and bridges described in this section for the purposes of operation, maintenance, repair, enhancement, or improvement may not be impeded by the state.

(2) ~~The~~ Subject to [section 4] (10), the change of

designation of the bed of a navigable river or stream from a taxable to a nontaxable status may not interfere with or impede the exercise of a water right, including a livestock watering right for which a claim was not required to be filed pursuant to 85-2-212 and 85-2-222."

{*Internal References to 77-1-134:*
77-1-809x *77-3-442x* *77-3-442x* *77-3-442x*
77-6-115x *77-6-302x* *77-6-302x* *77-6-302x*
77-6-501x }

Section 12. Section 77-2-101, MCA, is amended to read:

"77-2-101. Easements for specific uses. (1) Upon proper application as provided in 77-2-102, the board may grant easements on state lands for the following purposes:

(a) schoolhouse sites and grounds;

(b) public parks;

(c) community buildings;

(d) cemeteries;

(e) conservation purposes:

(i) to the department of fish, wildlife, and parks for parcels that are surrounded by or adjacent to land owned by the department of fish, wildlife, and parks as of January 1, 2001;

(ii) to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001; and

(iii) to a nonprofit corporation for the Owen Sowerwine natural area located within section 16, township 28 north, range 21 west, in Flathead County; and

(f) for other public uses.

(2) The board may grant easements on state lands for the following purposes:

(a) right-of-way across or upon any portion of state lands for any public highway or street, any ditch, reservoir, railroad, private road, or telegraph or telephone line, or any other public use as defined in 70-30-102;

(b) any private building or private sewage system that encroaches on state lands; or

~~(c) the use of the bed of a navigable river pursuant to 77-1-1103 or 77-1-1105. (Subsection (2)(c) void on occurrence of contingency--sec. 12, Ch. 475, L. 2009.)~~

(c) the use of a bed of a navigable river pursuant to [section 4 or 7]."

{*Internal References to 77-2-101:*
77-2-105x *77-2-318**}

NEW SECTION. **Section 13. Codification instruction.** [Sections 1 through 9] are intended to be codified as an integral part of Title 77, chapter 1, and the provisions of Title 77, chapter 1, apply to [sections 1 through 9].

NEW SECTION. **Section 14. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid

applications.

- END -

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