

**A Summary of Montana Water Use Law**  
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**Introduction**

Similar to other western states, Montana water law is based on the prior appropriation doctrine. The prior appropriation doctrine which means first in time, first in right evolved as western lands were developed through mining and agriculture. The eastern United States is based on a riparian doctrine which provides that property owners along the banks of a surface water source have the right to use the water that runs through or is pooled on their property. Those that aren't located along a surface water body are not entitled to water. The riparian doctrine didn't work well in the arid western United States and the prior appropriation doctrine emerged as the predominant method of appropriating water. Settlers needed access to water for livestock, farming, and mining operations which were often not located on a surface water body and they moved the water to where they needed it. Sometimes the movement of water was extensive and it is probably safe to say that none were more extensive than the federal irrigation projects.

In Montana a water user had only to put the water to beneficial use to have a water right. There was no requirement that the use of the water be filed however, a water user could file the water use in the county if they chose. Some water users filed and some water users did not. Those that put water to beneficial use first have the most "senior" water rights and are therefore entitled to their share of the water first. Water is shared among users on a water source based on priority date or "first in time, first in right". The more recent or "junior" a water right the less likely the water user will receive the water in times of low or limited water supplies. A junior water right holder receives their water only if all of the senior water rights have been fulfilled.

**Montana Constitution**

In 1972, the Constitutional Convention recognized the importance of Montana's water to the future of the state and its people. The Constitution made it very clear that all waters of the state are the property of the state for the use of its people. Article IX, section 3 of the Montana Constitution provides:

**"Section 3. Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the

boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

Because not all water use was required to be filed with the state or with the county there was no way to quantify the water rights that are guaranteed through subsection (1) of Article IX, section 3. The state knew that these rights were recognized and confirmed they just didn't know who had the right to use the water, where the water was put to beneficial use, how much water was used, when the water was used, and other important elements of a water right. The Legislature recognized this problem and initiated a statewide water adjudication to quantify all existing water rights in the state of Montana that were in effect prior to the passage of the new Constitution. A more detailed description of the statewide adjudication and ancillary issues can be found in the Legislative Environmental Policy Office Publication "Montana's Water: Where is it? Who can use it? Who decides?" (2004) (<http://leg.mt.gov/css/publications/lepo/default.asp>).

Subsection (4) of Article IX, section 3 required the legislature to provide for the administration, control, and regulation of water rights and to establish a system of centralized records, in addition to the present system of local records.

### **Montana Water Management Framework**

Water in Montana is managed by the Department of Natural Resources and Conservation (DNRC). The water rights process in the Department is managed by the water rights bureau and is split into two program areas -- the new appropriations program and the water adjudication program. The new appropriations program addresses applications for state based water rights or "new" uses of water (after the 1972 Constitution) and "changes in appropriation rights" which involve changing an element of an existing water right. The adjudication program is responsible for examining claims that were filed as a part of the state wide water adjudication process, providing assistance to the Montana Water Court, maintaining the centralized water right records, and updating water right ownership records.

The DNRC also has other water management responsibilities that are outlined below. These different activities and programs work together to manage Montana's water resources. The other water bureaus that are within the Water Resources Division are the water management, water operations, and water projects bureaus.

The Water Management Bureau develops and analyzes policies on statewide water resource issues, represents and protects Montana's water interests in regional and international river basins, and assists local watershed groups and water users solve water management problems by providing technical support to other DNRC bureaus, the Reserved Water Rights Compact Commission, and other governmental entities.

The Water Operations Bureau administers the following programs:

- Dam Safety -- Ensures that the approximately 90 dams statewide that have the potential to cause loss of life downstream if they fail, are properly constructed, maintained, and operated.
- Floodplain Management -- Assists the 110 locally administered floodplain management programs throughout Montana in reducing the loss of life and structural property through wise floodplain development, and in reducing the loss of functional floodplains by reducing the amount of erosion of stream banks due to unwise floodplain development throughout Montana.
- Water Measurement Program -- Provides technical information and/or water measurement requirements regarding diversion from streams where chronic dewatering has caused water use disputes or severe dewatering impacts.
- Board of Water Well Contractors -- BWWC is responsible for licensing water well drillers and contractors and enforcing water well construction standards.

The Water Projects Bureau administers the operation and maintenance of state-owned water projects. These include 22 dams, with approximately 250 miles of irrigation canals and one 10 MW hydropower facility. The bureau is also responsible for dam safety of 10 dams owned by the Department of Fish, Wildlife, and Parks. Most of the DNRC projects are operated by local water users associations that use the water for irrigation. Many of the projects provide secondary recreational benefits including camping, fishing and boating.

In addition to the DNRC there are two other entities that are intimately involved with water rights and water management in the state of Montana.

#### Montana Water Court

The Montana Water Court was created in 1979 and is responsible for hearing all cases regarding water use in Montana. The Chief Water Judge serves a four year term and is appointed by the Chief Justice of the Supreme Court. In addition to hearing cases related to water use the Water Court is responsible for issuing decrees in the statewide water adjudication. The Water Court has adopted both procedural rules as well as claims examination rules that must be followed by DNRC when the department is examining claims filed under pursuant to a Montana Supreme Court order regarding the statewide water adjudication.

There are four water divisions in Montana that were created by section 3-7-101, MCA to adjudicate existing water rights and to conduct hearings in cases certified under section 85-2-309, MCA. The water divisions boundaries are established as defined in section 3-7-102, MCA. Each water division is presided over by a water judge. These water judges are district court judges that are also designated as water judges. Because of extremely large work load faced by district court judges most certified hearings and other water related controversies are heard by the Water Court rather than by the water division water judges. However, based on the accelerated pace of the statewide adjudication process there is a possibility that this practice may not be able to continue because of the Water Court workload related to decree issuance and addressing all issue remarks prior to issuance of a final decree.

#### Reserved Water Rights Compact Commission and Federal Reserved Rights

The Reserved Water Rights Compact Commission was created in 1979 by Senate Bill 76 (Chapter 697, Laws of 1979), which also created the Water Court. At the time, the federal government was involved in litigation on behalf of the seven reservations for their federal reserved water rights. The Commission was created in response to uncertainty about how, and in what court, the adjudication would proceed. The Commission is a division of DNRC and is administratively attached to the Department for budget purposes. The Commission's only mandate is to negotiate an equitable apportionment and division of the waters of the state between the tribes that are claiming those waters (as well as nontribal federal users) and nontribal state water users. The Commission is not separate from the adjudication process but is integral to it, and the outcome of the entire statewide adjudication process is critical to the work of the Commission. Montana is the only state with a Compact Commission. Some other western states are involved in negotiation with the tribes and the federal government through their attorneys general or natural resources departments. Montana's process has been successful because negotiations are conducted in the context of litigation--if a tribe or federal entity chooses not to negotiate, then their reserved water rights will be litigated by the Attorney General, on behalf of the state, in Montana's Water Court. The procedures the Commission follows are clearly spelled out in statute. The first step is to negotiate an initial settlement between the three involved parties--the state, the claimant of the reserved water right, and, if the claimant is an Indian tribe, the federal government as trustee for the tribe. Once the initial settlement is reached, and it can take many years, the compact is then ratified by the Legislature and becomes a part of the Montana statutes. Water compacts involving tribal settlements then go to Congress because of necessary authorizations and appropriations for projects or improvements. The final step in the process occurs when the compact is filed with the Water Court and is published as a decree in that water basin. At that time, the 6-month objection period begins.

The Water Court has statutory authority to approve or disapprove a compact but not to amend one, and approval is based on a consent decree standard. A consent decree standard is one where all

parties consent to the decree and the decree conforms to applicable law. To date, the Legislature has approved five tribal and several federal water compacts. The Northern Cheyenne and the Rocky Boy Compacts have gone through the entire process, and the Fort Peck Compact is in front of Congress because of concerns of downstream states over water marketing provisions, although other provisions are operational and have been approved by the Interior and Justice Departments. The Crow and Fort Belknap Compacts have been approved by the Legislature but are still waiting for federal approval and necessary legislation. The necessary federal legislation appears to be moving forward but the outcome is unknown at this time. The Blackfeet Compact, which is still under negotiation, will be of critical importance because of the St. Mary Project located at the headwaters of the Milk River. The water moving through the St. Mary Project is so crucial to the entire Milk River Basin that there is language included in the Fort Belknap Compact that if the St. Mary Project is not maintained to current standards, then the entire Fort Belknap Compact is void. The Confederated Salish/Kootenai Compact is also still under negotiation and is of a high priority because of the permitting freeze in place on the Flathead Reservation. The Tribes brought water rights cases before the Montana Supreme Court and won, and the Supreme Court placed a moratorium on new state water rights permits until the water rights are quantified.

A federal reserved water right is created when the federal government reserves land for an Indian tribe, thereby impliedly reserving enough water to fulfill the purposes of the reservation. The federal reserved water rights doctrine was decided in 1908, but it wasn't until the 1960s that questions arose as to what that means in terms of quantity. A federal reserved water right does not lapse from lack of utilization.

### **Montana Water Law Basics**

In Montana you must have a water right prior to appropriating water and putting the water to beneficial use exempt for a few limited "exemptions" that are contained in 85-2-306, MCA. These exemptions are as follows:

- A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:
  - the maximum capacity of the impoundment or pit is less than 15 acre-feet;
  - the appropriation is less than 30 acre-feet a year;
  - the appropriation is from a source other than a perennial flowing stream; and
  - the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.
- 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. (notice of completion must be filed with DNRC)

- An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder is now required to file a notice of completion.

Water rights are required for both surface water appropriations and ground water appropriations. Montana law does not provide for conjunctive management or enforcement of surface water and ground water rights. However, after the decision in *Montana Trout Unlimited v. DNRC*, 2006 MT 72 that was issued in 2006 and enactment of HB 831 in the 2007 session the connectivity between surface water and ground water in "closed basins" must be considered and plays a role in determining whether or not an application for a new ground water permit can be approved.

Montana also has areas that are called "closed basins" which are closed to certain new surface water appropriations for a certain amount of time. Five of the closed basins were closed by the Legislature in statute. There are also multiple subbasins and basins that have been closed administratively pursuant to 85-2-319, MCA, which can be found in the Administrative Rules of Montana under 36.12.1010 ARM - 36.12.1021 ARM. New ground water appropriations can be made in closed basins if the applicant for the water right complies with more stringent application requirements that include a hydrogeologic assessment, and, if necessary, a mitigation or aquifer recharge plan, and ensures that a "senior" or prior surface water appropriator will not be adversely affected by the new water use. Applying for a new ground water permit in a closed basin is more complex than enumerated here due to new statutes, case law, and pending litigation on multiple issues. For the purposes of this paper it is important to recognize that it is more difficult to obtain an appropriation in a closed basin than in a non-closed basin.

## **Conclusion**

This paper serves as a starting point with regard to Montana water law - specifically related to water rights and water appropriations. The issue is much more complex and multifaceted depending on which area is being addressed. As the water policy interim committee moves forward in its discussions and deliberations more detailed analysis will be prepared for the committee to facilitate their ability to make well informed decisions related to water policy in Montana.