

A Drop in the Bucket

A brief overview of the evolution of water law in the West

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THE WATER POLICY INTERIM COMMITTEE

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Introduction

Most people probably know - though they may not pay it much mind - that water doesn't come out of the faucet by magic. We know snow, rain, rivers, and lakes provide us with water we need to live and play.

What may be less well known is that a complex network of laws guide the use of water - be it for drinking, fishing, growing crops, or generating electricity.

To understand water use 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. This primer is intended to provide a basic overview of the laws guiding water use - a drop in the bucket, so to speak.

The Ownership of Water

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.¹

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."

¹ Law of Water Rights and Resources. A. Dan Turlock

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.²

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.³

One way to think of beneficial use is a use that "communities, institutions, and laws have deemed valuable and worthy of protection."⁴

Another way to consider the term is in three parts: that there is a continuous use of water,

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

² Water Laws and Policies for a Sustainable Future: A Western States' Perspective, Western States Water Council, 2008. <http://www.westgov.org/wswc/publicat.html>

³ Law of Water Rights and Resources. A. Dan Turlock.

⁴ 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 use is limited to productive purposes, and water cannot be wasted.⁵

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.⁶

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."⁷

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 natural streams and lakes as are required to preserve the natural environment to a reasonable degree."⁸

⁵ Law of Water Rights and Resources. A. Dan Turlock

⁶ Basic Montana Water Law. <http://www.courts.mt.gov/water/default.mcp>x

⁷ South Dakota Codified Laws 46-1-6(3)

⁸ Colorado Revised Statutes 37-92-103

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 Department of Natural Resources and Conservation 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.⁹

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."

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.

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

⁹ Law of Water Rights and Resources. A. Dan Turlock

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.

This concept is different from the way water is allocated in the eastern part of the nation. 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, policy makers warmed to the

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

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 1921.¹⁰

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 of 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

¹⁰ Brian Shovers, "Diversion, 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.

* an application of the water to the beneficial use within a reasonable time.¹¹

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.¹² Now, the filing of an application to appropriate water is considered intent.

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.¹³

Water Right Organization

Over the last hundred years or so, all western states except Colorado adopted administrative permits 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.¹⁴

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

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 Western States Water Laws, BLM. <http://www.blm.gov/nstc/WaterLaws/abstract1.html>

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

drainage. Appropriators had to apply for a permit and the office collected stream flows, water usage, ditch dimensions and construction costs.¹⁵

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."¹⁶

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

Most other western states followed Wyoming's example.¹⁷

In Montana, the 1972 Constitution required that, "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 Department of Natural Resources and Conservation (DNRC) was created within the Water Use Act of 1973¹⁸

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

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

¹⁵ Brian Shovers, "Diversion, 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.

¹⁶ *Law of Water Rights and Resources*. A. Dan Turlock

¹⁷ Colorado water right applications are made to water courts.
<http://www.water.state.co.us/wateradmin/waterright.asp>

¹⁸ 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.

water right holders would be affected, and if there are any other reasons to deny or condition the permit.¹⁹

The criteria for a permit in Montana is 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.

A request to change a water right is handled similar 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.²⁰

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

¹⁹ Law of Water Rights and Resources. A. Dan Turlock

²⁰ Ibid

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.²¹

Conclusion

The preceding overview is truly a drop in the bucket when it comes to understanding the vast subject of water law.

But the elements touched on here - ownership, prior appropriation, beneficial use, and permitting - are the foundation of water law as it exists and will likely figure prominently when contemplating policy changes.

²¹ 85-2-402, MCA