

# **Water Right Permitting**

**A brief summary and select examples**

Prepared for  
**THE WATER POLICY INTERIM COMMITTEE**

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**September 2011**

**Published By**

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For someone unfamiliar with western water law, the idea that a bureaucratic permit system must be negotiated prior to using the water may seem needless. If you can see the water in the creek or someone assures you that cool, clean water is bountiful below the surface, what more does one need to know?

Quite a bit. The actual presence of water at the time one wants to use it and in the quantity one needs are just a couple of the criteria that must be proven before most would-be water users can appropriate the precious but reusable resource.

The use of water is a property right. Montana and other western states allocate that right based on the time line known as the Prior Appropriation Doctrine. A water right dating to 1889 is entitled to be exercised before any right occurring after that date.

More than a century ago, western lawmakers started seeing the need for a regulated system of water rights. The use and re-use of water by many parties, the complexity of a water right, was a recipe for confusion and disagreement without a centralized system. (That is not to say that a centralized system eliminates all confusion and disagreement).

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 1973.

Revisions in 1997 to the declaration and purpose section of the Water Use Act reiterate the role of permitting and how it relates to the adjudication of rights that existed prior to the Water Use Act. Subsection (5) 85-2-101, MCA reads in part:

It is the intent of the legislature that the statutory determinations for issuing new water use permits and authorizing changes do not require the adjudication of all water rights in the source of supply. The legislature recognizes the unique character and nature of water resources of the state. Because water is a resource that is subject to use and reuse, such as through return flows, and because at most times all water rights on a source will not be exercised to their full extent simultaneously, it is recognized that an adjudication is not a water availability study. Consequently, the legislature has provided an administrative forum for the factual investigation into whether water is available for new uses and changes both before and after the completion of an adjudication in the source of supply.

The permitting requirements of law apply to both surface water and ground water. To understand more about exempt ground water wells, it may be helpful to examine the process from which these appropriations are exempt. According to 85-2-306, MCA, a permit is required for any ground water appropriation that exceeds 35 gpm.

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. Legal availability 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.

In order for the WPIC to see how these criteria are examined in a permit, the September meeting will include presentations from two water right permit applicants. Attached are documents from these proceedings.

The first is the final order for a water right for the town of Stevensville. The approval is for a ground water well to serve the 117-lot Twin Creeks Subdivision, which sits on 40 acres. The appropriation is for municipal use with 33.6 acre-feet per year for in-home domestic uses and 62.7 acre-feet per year for lawn and garden uses. The total consumptive use is about 50 acre-feet per year.

Because the appropriation is in a closed basin, the applicant also was required to obtain an approved aquifer recharge plan. To offset the new consumptive use, water that was historically used for irrigation will be diverted to a pond and gravel pit to recharge the aquifer.

The second document is a preliminarily-approved application in Lewis and Clark County for a three well system serving the Elk Creek Colony. The water will be used in 28 homes for up to 150 people, stock use, and industrial which will include a concrete batch plant and shop use. Again, this application is in a closed basin. The mitigation proposal is to retire two water rights on 65 acres for a mitigation amount of about 50 acre-feet per year.

Both the Stevensville and the Lewis and Clark County appropriations will be required to meter the wells and monitor ground water levels.

A third presenter at the September meeting will be a representative of a development that is choosing to utilize exempt wells.