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Water Rights in Montana

October 2008



This document has been updated to reflect Montana statute and rules as of October 2008.

Montana Department of Natural
Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601
Phone (406) 444-6610
<http://dnrc.mt.gov>

Legislative Environmental
Quality Council
P.O. Box 201704
Helena, MT 59620-1704
Phone (406) 444-3742
<http://leg.mt.gov/eqc>

Montana University System Water Center
101 Huffman Building
Montana State University-Bozeman
Bozeman, MT 59717-2690
Phone (406) 994-6690
<http://watercenter.montana.edu>

Acknowledgment

Water Rights in Montana is a compilation of two previous citizen guides discussing Montana water rights—the Montana Department of Natural Resources and Conservation’s *Water Rights in Montana* and the Environmental Quality Council’s and Montana University System Water Center’s *Wading into Montana Water Rights*. We would like to thank the authors of the latter guide, Michelle Bryan and Professor Gerald L. Westesen, for their significant contribution to this publication.

Disclaimer

Water Rights in Montana should not be used as a legal reference. When in doubt, always refer to the MONTANA CODE ANNOTATED or the Department of Natural Resources and Conservation ADMINISTRATIVE RULES OF MONTANA.¹ When making any legal judgments on the adequacy or completeness of procedure, always consult your own legal counsel.

¹ Terms that are capitalized and underlined are further defined or explained in the glossary at the end of the publication.

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Background of Water Rights in Montana

Few elements reach so deeply into the human existence as water. Our economic endeavors, recreational excursions, and very well-being depend on the quality and abundance of this resource. But who can use water? How much can they use? At what time? What uses are legal? Such questions lead into the realm of water rights—a blend of laws, regulations, and traditions that govern the distribution of Montana’s water among its many users.

Montana waters, in all their varied forms and locations, belong to the state. This ownership, however, exists on behalf of all state citizens. The Montana CONSTITUTION explains that:

[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the **property of the state for the use of its people** . . . (Article IX, section 3(3)) (emphasis added).

Because Montana waters belong to the state, water rights holders **do not own** the water itself. Instead, they possess a **right to use** the water, within state guidelines. Accordingly, Montana law notes:

[a] “water right” means the **right to use** water . . . (section 85-2-422, MCA) (emphasis added).

Water rights in Montana are guided by the prior appropriation doctrine, that is, first in time is first in right. 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 established the first right; the second person could establish a right to the water that was left, and so on. During dry years, the person with the first right has the first chance to use the available water to fulfill that right. The holder of the second right has the next chance. Water users are limited to the amount of water that can be beneficially used. In Montana, the term “beneficial use” means, generally, a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.

Other beneficial uses include instream flow to benefit fish, AQUIFER RECHARGE, MITIGATION, OR AN AQUIFER STORAGE AND RECOVERY PROJECT.

The water rights process—with all its discrepancies and conflicts—was a major topic at the 1972 Montana Constitutional Convention. Policymakers recognized the overwhelming need for improved recordkeeping and regulation. First, the Convention incorporated all past water rights into the new Montana Constitution:

[a]ll existing [water] rights . . . are hereby recognized and confirmed (Article IX, section 3(1)).

EXISTING RIGHTS included any right originating on or before July 1, 1973. Whether a use right, DECREED WATER RIGHT, or filed right, each was now equally VALID. By recognizing all rights, the state upheld the prior appropriation doctrine and over a hundred years of PRECEDENT.

To strengthen state supervision, the Convention next charged the Montana Legislature with providing:

. . . the administration, control, and regulation of water rights and
. . . a system of centralized records . . . (Article IX, section 3(4)).

The Legislature responded by enacting Title 85, chapter 2, MCA.

Montana Water Use Act

The provisions of Title 85, chapter 2, MCA, commonly referred to as the Montana Water Use Act, were the most comprehensive change in Montana's water rights laws in the state's history. The Act (effective July 1, 1973) changed the water rights administration significantly in a number of ways.

1. All water rights existing prior to July 1, 1973, are to be finalized through a statewide ADJUDICATION process in state courts.

2. A PERMIT system was established for obtaining water rights for new or additional water developments.
3. An authorization system was established for changing water rights.
4. A centralized records system was established. Prior to 1973, water rights were recorded, but not consistently, in county courthouses throughout the state.
5. A system was provided to reserve water for future CONSUMPTIVE USES and to maintain minimum INSTREAM FLOWS for water quality and fish and wildlife.

Water Rights Administration

Six state entities play a role in administering Montana water rights and the statewide water adjudication: the Montana Department of Natural Resources and Conservation (DNRC), the Montana Water Court, the District Courts, the Reserved Water Rights Compact Commission, the Attorney General, and the Legislative Environmental Quality Council (EQC).

The DNRC administers the portions of the Montana Water Use Act that relate to water uses after June 30, 1973. The DNRC trains water commissioners and recommends water measuring techniques on streams or stream reaches that have an enforceable decree.

The DNRC maintains a central records system for all permits, changes, certificates, and water reservations granted after June 30, 1973, and for all existing water right claims filed as part of the statewide adjudication.

By examining all claims filed before 1973, the agency provides technical information and assistance to the Water Court, which is responsible for adjudicating claims for water rights that existed before July 1, 1973. The Water Court decides any legal issues certified to the District Court by the DNRC that may arise in connection with processing permit or change applications or in disputes filed in the

District Courts. A District Court can issue injunctive relief while it certifies water rights issues to the Water Court for a decision.

The Attorney General has the authority to intervene, on behalf of the state, in the adjudication of water right claims that are being decreed by the Water Court (section 85-2-248, MCA).

The EQC contributes policy oversight to the administration of state water rights. Among its roles, the EQC:

- advises and updates the Legislature on water rights developments
- oversees policies of the DNRC and other institutions that deal with state water; and;
- communicates with the public on matters of water policy (section 85-2-105, MCA).

Adjudication of Existing Water Rights

Historical Evolution

Montana first ventured into organizing existing water rights by conducting an adjudication in the Powder River Basin. Initiated in 1973, the burden of collecting and investigating CLAIMS fell to the DNRC. Investigations often involved onsite visits, aerial photo interpretations, and interviews. In 1979, after 6 years of intensive field work, completion of the first BASIN appeared distant. Decidedly, to adjudicate its remaining 84 basins in a timely manner, Montana needed a more efficient system.

Consequently, the 1979 Legislature passed Senate Bill No. 76 (SB 76), amending the adjudication procedures originally established by the Montana Water Use Act. Rather than adjudicating existing water rights one basin at a time, the Legislature opted for a comprehensive general adjudication of the entire state. Existing water rights are those that originated legally before July 1, 1973, and are often referred to as pre-1973 water rights.

SB 76 established two revolutionary entities for western water law. The Montana Water Court is a specialized court that has sole jurisdiction over the adjudication of pre-1973 water right claims. The other entity that was established is the Montana Reserved Water Rights Compact Commission. The Compact Commission is responsible for negotiating on behalf of the state with the federal and tribal entities to quantify the federal and tribal reserved water rights.

When SB 76 was passed in 1979, a majority of people thought the process would be complete in less than 15 years. Due to various reasons, the adjudication is still not completed. During the 2003-2004 interim between legislative sessions, the Legislative Environmental Quality Council (EQC) conducted an in-depth study on Montana's water adjudication process and progress. The EQC determined there were two issues that needed to be addressed. The first issue was timeliness and the second was ensuring the decrees that are the result of the adjudication process are as accurate as possible. The EQC determined that the estimated timeframe to complete the adjudication was too long. Montana had already spent 25 years on the adjudication and it was estimated that it would take another 30-40 years to complete.

The result of the EQC study was House Bill No. 22 (HB 22), which was requested and supported by the EQC. The sole purpose of this bill was to develop a funding source for the adjudication and to establish statutory deadlines for completion. All claims must be examined by June 30, 2015.

As passed in 2005, HB 22 imposed a fee on every water right in the state. Water right claims as well as provisional permits and certificates granted in the new appropriations process were to be required to pay the fee until the statute terminated in 2014. However, the 2007 Legislature repealed the fee provisions of HB 22 and transferred \$25 million in general fund revenue to the water adjudication account to replace fee revenue and keep the process on the 2015 timeline.

House Bill No. 782 also passed in 2005. The measure clarifies that issue remarks added to water right claims must be finally resolved before the issuance of a final decree.

Who Administers the Adjudication Process?

MONTANA WATER COURT

The Montana Water Court is divided into four water divisions according to the geographical drainages of the state:

- the Lower Missouri River;
- the Upper Missouri River;
- the Yellowstone River; and
- the Clark Fork River (sections 3-7-101 and 3-7-102, MCA).

WATER JUDGES

Division Judges. Within each division, a Water Judge presides, appointing WATER MASTERS to assist in the adjudication process. A Water Judge must be a District Court Judge (current or retired) from a DISTRICT within the water division (sections 3-7-201 and 3-7-301, MCA). Water Judges cannot preside over water claims occurring beyond the boundaries of their divisions (section 3-7-501, MCA).

Chief Water Judge. The Chief Justice of the Montana Supreme Court appoints a Chief Water Judge to supervise all division Water Judges and guide the statewide adjudication. Ultimately, the Montana Supreme Court monitors all Water Judges, water masters, and Water Court personnel (sections 3-7-204 and 3-7-221, MCA).

It is at the Chief Water Judge's discretion to assign cases to the division judges. The division judges have historically been used to a limited extent with cases being assigned in instances where the Chief Water Judge might have a conflict or other similar situation. Currently, the Chief Water Judge handles a majority of the cases.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

The DNRC and its regional offices assist the Water Court throughout the adjudication process by:

- providing information and technical support to the Water Judges;
- providing information and technical support to persons filing claims; and
- upon the request of a Water Judge, conducting field investigations of claims (section 85-2-243(1), MCA).

RESERVED WATER RIGHTS COMPACT COMMISSION (RWRCC)

Unique circumstances arise when federal entities or Indian tribes assert reserved water claims in a basin. Separate from general adjudication, Montana may form a COMPACT with the entity or tribe. In such cases, the RWRCC negotiates on behalf of the Governor (section 85-2-701, MCA).

How Is the Order of Adjudication Determined?

Each BIENNIUM, the Montana Legislature may give priority to specific basins within each water division. The Water Judges and the DNRC conduct adjudication according to this prioritization. With 100 or more signatures, claimants may also petition the Water Judge to designate a priority basin (section 85-2-218(2), MCA). To receive priority in adjudication, a basin must involve:

- recurring water shortages resulting in urgent water rights controversies;
- federal or Indian water rights negotiations nearing completion;
- a location that would help ensure efficient use of department and Water Court resources; or
- adjudication proceedings nearing issuance of a decree (section 85-2-218(1), MCA).

How Does the Adjudication Process Work?

In 1979, the Montana Supreme Court issued a “Water Rights Order” requiring all persons claiming existing water rights to file with the DNRC by January 1, 1982. Failure to file by the deadline would result in presumption of ABANDONMENT of the right (section 85-2-212, MCA).

Later, the court extended the filing deadline to April 30, 1982. The DNRC received more than 200,000 claims by this closing date.

Public Notice. To ensure that all claimants knew of adjudication requirements, the court dispersed its “Water Rights Order” through:

- printings in state newspapers;
- mailings with property taxes; and
- notices in county courthouses and DNRC field offices (section 85-2-213, MCA).

EXEMPTIONS. Existing water rights claims for livestock and domestic uses from instream flows or GROUND WATER sources were exempt from the requirement to file a claim; however, they could be voluntarily filed.

If an exempt right was filed in the adjudication process, the water right claim will be made part of the decree for that basin. If the exempt water right was not filed as a claim in the adjudication process, the water right will not be made part of the decree for the basin.

Criteria. Each statement of claim had to include:

- the name and address of the claimant;
- the name of the WATERCOURSE from which a right was claimed;
- the quantities and times of claimed water use;
- a description of the point of DIVERSION and place of claimed water use;
- the purpose of use and the number of acres irrigated, if applicable;
- an approximate starting date of beneficial use; and
- supporting evidence, such as maps, plats, aerial photos, or decrees (section 85-2-224, MCA).

Late Claims. Although the “Water Rights Order” considered unfiled claims abandoned, the 1993 Legislature passed a law authorizing late claims to be filed through July 1, 1996. Around 4,500 late claims were made before the 1996 closing date. Late claims are subordinate to:

- federal and Indian compacts with Montana;
- timely filed claims; and

- some newly permitted rights (section 85-2-221(3), MCA).

Decrees

A decree is the final product of a basin adjudication. To reach completion, a decree progresses through several stages: examination → temporary preliminary/preliminary decree → public notice → hearings → and final decree. Each stage is described in more detail below.

Examination

Before the Water Court evaluates a basin, DNRC staff must examine each claim to determine if it is complete, accurate, and reasonable. If an examination uncovers excessive claims or other discrepancies, the DNRC contacts the claimant to resolve any errors. If the DNRC is not able to come to an agreement with a claimant on a discrepancy that the DNRC has found with the claim, an issue remark is placed on the claim. All issue remarks must be finally resolved before a final decree can be issued. After examining all claims in a basin, the DNRC issues a “Summary Report” to the Water Judge who uses the information to prepare the basin decree.

Temporary Preliminary Decree

When a basin adjudication involves RESERVED WATER RIGHTS negotiations, the process can become complex. Thus, a Water Judge may issue a temporary preliminary decree defining all claimed rights except reserved ones. Once a compact concludes, the Water Judge incorporates it into a preliminary decree (section 85-2-231(1) and (4), MCA).

Preliminary Decree

In basins with either concluded compacts or no reserved water rights, the Water Court issues a preliminary decree based on:

- statements of claim;
- the DNRC “Summary Report”; and

- if applicable, reserved water rights compacts (section 85-2-231(2), MCA).

Public Notice of the Decree

A notice of issuance of every temporary preliminary or preliminary decree is given to all parties who may be affected by the decree, along with the deadline for objecting to the rights or compacts, or both, in the decree. This notification consists of direct mailings and publication in area newspapers (section 85-2-232(1) and (3), MCA). Water users are encouraged to review the decree and file objections if they believe that their own claims or claims belonging to others in the basin are in error or contain incorrect information. Following the expiration of a decree's objection period, each party whose claim received an objection will be given notice of the filing of that objection. This notice triggers a 60-day counterobjection period.

Objections

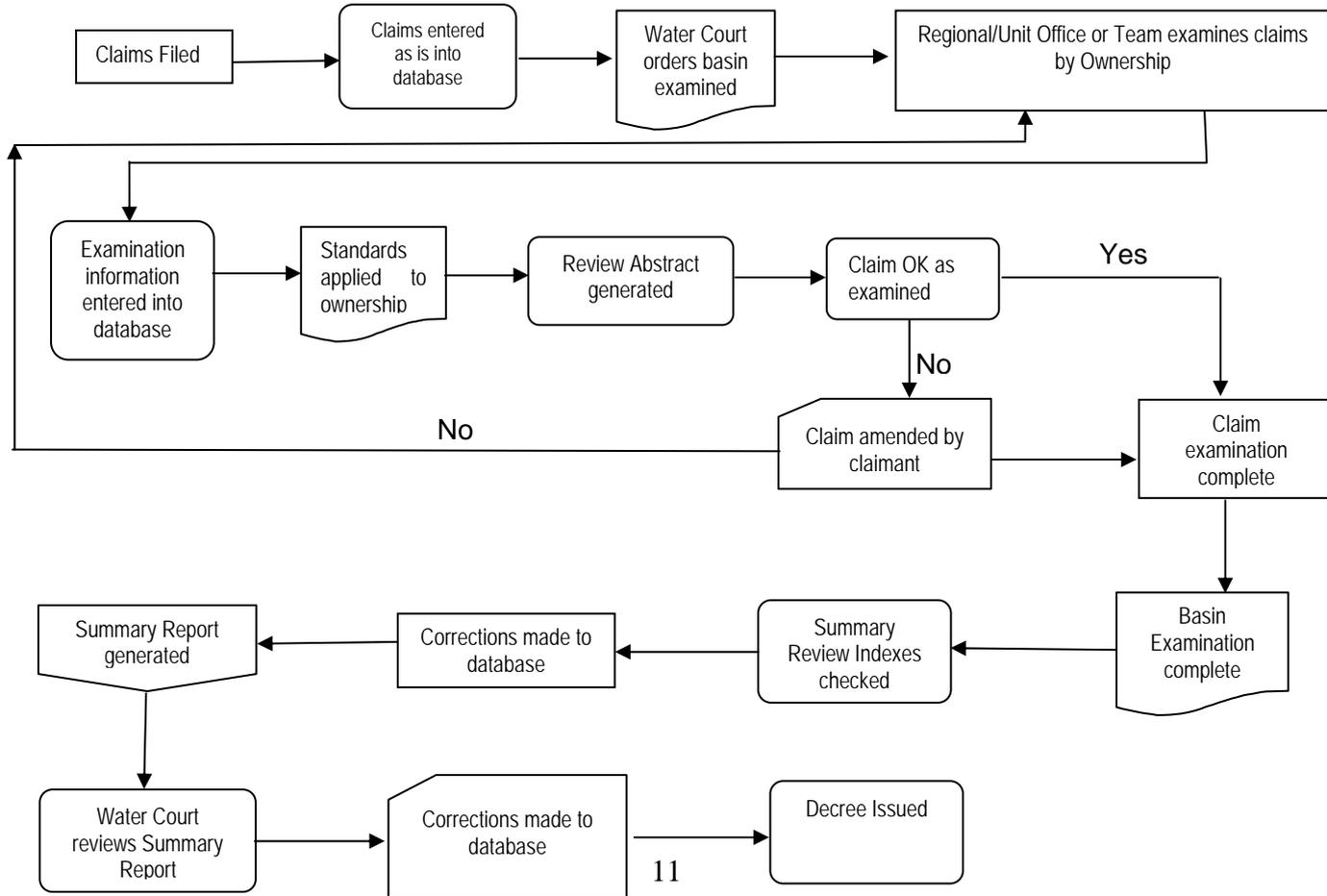
It is very important that persons who are entitled to file an objection as provided above do so if they believe there is a problem with a claim. By failing to file an objection in an earlier decree phase, the person may be excluded from filing an objection at a later date (section 85-2-233(1)(d), MCA).

All ISSUE REMARKS, as defined by law, must be finally resolved before a final decree may be issued whether or not there is an objection to the claim.

Hearing

Persons disagreeing with a decree have 180 days to file an objection. Accordingly, the Water Court will hold a hearing to reevaluate all disputed areas. Any of the following parties may object:

CLAIM EXAMINATION FLOW CHART



- the DNRC;
- any person named in the decree;
- any INTERESTED PERSON; or
- any other person who claims rights to the use of water from sources in other basins that are hydrologically connected to the sources within the decreed basin and who would be entitled to receive notice if the claim or claims were from sources within the decreed basin (section 85-2-233(1) and (2), MCA).

Resolving Issue Remarks

In the event an objection is not filed and a claim contains an issue remark, the Water Court is required to take certain steps to finally resolve the issue remark.

First, the Water Court will review each factual and legal issue remark to determine if information in the claim file or information obtained by the Court provides a sufficient basis to resolve the issue remark or to determine if the issue remark can be corrected as a clerical error.

If an issue remark cannot be resolved by the Court as provided above, the Water Court will notify the claimant in writing that each issue remark must be resolved.

The first step in resolving the issue remark is a meeting between the DNRC and the claimant in an informal effort to resolve the issue remark. If the issue remark is resolved in this meeting to the satisfaction of the DNRC, the claimant will need to file the appropriate paperwork with the Water Court to support the resolution of the issue remark. The DNRC will assist the claimant as necessary and will also file a separate memorandum with its recommendation regarding the disposition of the issue remark involved in the proposed resolution. Only the Water Court can make the final decision regarding whether or not the issue remark is resolved.

If the issue remark is not resolved as the result of this informal process, the DNRC is required to file a notice with the Water Court informing the Court that the issue remark was not resolved and that the Water Court will need to take additional steps to resolve the issue remark.

For all issue remarks that are not resolved by the informal process with the DNRC, the Water Court will schedule proceedings to resolve the issue remark. The proceedings must include the DNRC and any parties appearing in opposition to the claim, including the Attorney General if the Attorney General has chosen to intervene.

If the issue remark involves *nonperfection or abandonment*, the Water Court shall join the State of Montana through the Attorney General as a necessary party to resolve the issue remark. If the issue remark does not involve nonperfection or abandonment, the Attorney General may intervene as a matter of right.

Once the parties have been notified of the proceedings, the Water Court will hold an evidentiary hearing unless the claimant files a written proposal along with supporting documentation with the Water Court to proceed without an evidentiary hearing and the Water Court accepts that proposal. If a claimant does not appear at the scheduled evidentiary hearing or fails to comply with an order issued by the Water Court in its review of issue remarks, the Water Court, upon motion or its own initiative, may in its ruling:

- amend the element of the claim to conform with the information in the claim file;
- amend the elements in the claim to conform with information obtained by the Court;
- remove the issue remark; or
- terminate the claim.

Following the conclusion of the evidentiary hearing and the expiration of any posthearing briefing schedule, the Water Court will issue its written decision. The Water Court's decision on each issue remark that it reviews pursuant to law must be documented in a master's report or Water Judge's order. The Water Court must modify the abstract of each claim in accordance with its written decision and remove any applicable issue remarks (section 85-2-248, MCA).

Final Decree

After resolving all objections and finally resolving all issue remarks, the Water Judge issues a final decree. Because the Water Judge adjusts existing rights according to the overall needs of a basin, the elements

of a decreed water right may differ from the original claim. For each water rights holder, the decree states:

- FLOW RATE;
- PRIORITY DATE;
- beneficial use;
- time and place of use;
- source of water; and
- place and means of diversion (section 85-2-234(6), MCA).

In turn, the DNRC issues a "Certificate of Water Right" to each decreed rights holder, filing a copy in its centralized records system (section 85-2-236, MCA).

What Is the Current Status of the Adjudication Process?

Updates on the adjudication can be found here:

http://dnrc.mt.gov/wrd/water_rts/adjudication/default.asp

Federal Reserved and Indian Reserved Water Rights

Montana's Reserved Water Rights Compact Commission (RWRCC) was established by the Montana Legislature in 1979 as part of the statewide general stream adjudication process (section 85-2-701, MCA). The RWRCC is composed of nine members. Four members are appointed by the Governor, two members are appointed by the President of the Senate, two members are appointed by the Speaker of the House of Representatives, and one member is appointed by the Attorney General.

The RWRCC is authorized to negotiate settlements with federal agencies and Indian tribes claiming federal reserved water rights within the State of Montana. A federal reserved water right is a right to use water implied from an act of Congress, a treaty, or an executive order establishing a tribal or federal reservation. The amount of water the reservation is entitled to depends on the purpose for which the land was reserved. In Montana, reserved water rights have been claimed for seven Indian reservations, for allotments for the Turtle Mountain Chippewa Tribe, for national parks, forests and wildlife refuges, and for federally designated wild and scenic rivers.

The claims of the tribes and the federal agencies are suspended from adjudication in the Montana Water Court while they are being negotiated by the RWRCC. This suspension is effective until July 1, 2009, as long as negotiations are continuing or ratification of a completed compact is being sought. Upon termination of the suspension in 2009, the tribes and the federal agencies are subject to the filing requirements and other adjudication requirements provided by Montana law. If a tribe or federal agency chooses not to negotiate their federal or Indian reserved water rights, the tribe or federal agency may not benefit from the suspension statute (section 85-2-217, MCA).

Settlements negotiated by the RWRCC on behalf of the State of Montana are ratified by the Montana Legislature and the Tribal Councils and approved by the appropriate federal authorities. In some instances, approval by the U.S. Departments of Justice and the Interior are sufficient. In other cases, where federal authorization or federal appropriations are needed to implement provisions of the settlement, congressional approval is required.

Status of Water Compacts in Montana

Compact	Dates of Legislative Passage	Information
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation 85-20-201, MCA	May 1985	The compact contains a provision for water marketing by the Tribes, making federal legislation necessary. Federal legislation has not been passed. The compact has been approved by the Montana Water Court.
Northern Cheyenne Tribe 85-20-301, MCA Public Law 102-374	May 1991 September 1992	Included in the compact was a requirement that the federal government and the State of Montana contribute funds to repair and enlarge the unsafe Tongue River Dam, which has been completed. The compact has been approved by the Montana Water Court.

Compact	Dates of Legislative Passage	Information
U.S. Department of the Interior National Park Service <i>Yellowstone National Park</i> <i>Glacier National Park</i> <i>Big Hole National Battlefield</i> 85-20-401, MCA	January 1994	The compact includes an article providing a controlled ground water area to protect the hydrothermal system in Yellowstone National Park. The compact has been approved by the Montana Water Court.
U.S. Department of the Interior National Park Service <i>Little Bighorn Battlefield National Monument</i> <i>Bighorn Canyon National Recreation Area</i> 85-20-401, MCA	May 1995	Codified with the first compact with the National Park Service (above), this compact has been approved by the Montana Water Court.
U.S. Department of the Interior Bureau of Land Management (BLM) <i>Upper Missouri National Wild & Scenic River</i> <i>Bear Trap Canyon Public Recreation Site</i> 85-20-501, MCA	March 1997	The compact settles the instream flow rights for two river segments; one on the Upper Missouri and one on the Madison River. It has received final approval from the BLM and the U.S. Department of Justice. It will be submitted to the Montana Water Court.
U.S. Department of the Interior Fish and Wildlife Service (FWS) <i>Benton Lake National Wildlife Refuge, Black Coulee National Wildlife Refuge</i> 85-20-701, MCA	March 1997	The compact settles the reserved water rights for two of the six national wildlife refuges claiming such rights in Montana. It has been approved by the FWS and the U.S. Department of Justice. The compact has been approved by the Montana Water Court.

Compact	Dates of Legislative Passage	Information
<p>Chippewa Cree Tribe of the Rocky Boy's Indian Reservation</p> <p>85-20-601, MCA</p> <p>Public Law 106-163</p>	<p>April 1997</p> <p>December 1999</p>	<p>The compact allocates 10,000 acre-feet per year to the Tribe from water arising on the reservation. The compact was approved by Congress and signed by the president in 1999. It has been approved by the Montana Water Court.</p>
<p>U.S. Department of the Interior Fish and Wildlife Service (FWS)</p> <p><i>Red Rock Lakes National Wildlife Refuge</i></p> <p>85-20-801, MCA</p>	<p>April 1999</p>	<p>Another of the six wildlife refuges claiming reserved water rights in Montana, the Red Rock Lakes settlement has been approved by the appropriate federal agencies and by the Montana Water Court.</p>
<p>Crow Tribe</p> <p>85-20-901, MCA</p>	<p>June 1999 Special Session</p>	<p>The compact allocates 500,000 acre-feet per year (AFY) of the natural flow of the Bighorn River to the Crow Tribe. The U.S. Bureau of Reclamation will allocate 300,000 AFY of storage in Bighorn Lake to the Tribe. The state paid \$15 million into an account in exchange for the Tribe's dismissal of a coal severance tax lawsuit and for the State's portion of cost-share for the water settlement. A management plan for Bighorn River and Lake was finalized in 2000. Legislation is being considered by Congress. The compact also must pass a Tribal referendum.</p>

Compact	Dates of Legislative Passage	Information
<p>Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation</p> <p>85-20-1001, MCA</p>	<p>April 2001</p>	<p>The compact allocates 645 cubic feet per second (CFS) from the Milk River to the Tribes, limited by the U.S. share of the natural flow of the Milk River and the Tribal capacity to develop the water. It also quantifies the Tribal water rights in People Creek, Beaver Creek, and Missouri River Basin 40EJ. When uses upstream of the reservation interfere with the Tribal water right, the Tribes will obtain water from the federal Milk River Project. The compact must be passed by Congress. Congressional legislation is being drafted as of this printing in 2007.</p>
<p>United States Department of Agriculture, Agriculture Research Service <i>Fort Keogh Livestock and Range Research Laboratory</i></p> <p>85-20-1101, MCA</p>	<p>March 2007</p>	<p>The compact settles the administrative, irrigation, stock, and emergency fire suppression water rights for Fort Keogh near Miles City. It includes reserved rights to Fort Keogh's current irrigation use from the Yellowstone River and some future irrigation use, and it includes a small amount of current use from a tributary of the Tongue River.</p>
<p>United States Department of Agriculture, Agricultural Research Service <i>Sheep Experiment Station</i></p> <p>85-20-1201, MCA</p>	<p>March 2007</p>	<p>The compact settles the stockwater, domestic, irrigation, storage, dust abatement, reclamation, research, emergency fire suppression, and other water rights for the small portion of the Sheep Experiment Station located in Montana.</p>

Compact	Dates of Legislative Passage	Information
<p>United States Department of the Interior Fish and Wildlife Service <i>Bowdoin National Wildlife Refuge</i></p> <p>85-20-1301, MCA</p>	<p>April 2007</p>	<p>The compact settles the reserved rights for uses including administrative, wildlife habitat maintenance and enhancement, stockwatering, and other uses. The FWS water rights are contingent on a memorandum of understanding (MOU) which must be attached to the compact as Appendix 3. The MOU will have provisions relating to the solution of the severe salinity problems on the Refuge. Commission staff is working with FWS on this MOU.</p>
<p>United States Department of Agriculture <i>Forest Service</i></p> <p>85-20-1401, MCA</p>	<p>April 2007</p>	<p>The water compact between the State of Montana and the U.S. Forest Service, which took more than 15 years to negotiate, has been signed by the Governor and the appropriate federal officials. In general, the compact recognizes reserved water rights for the Forest Service for administrative and emergency firefighting and for instream flows for the South Fork Flathead Wild and Scenic River. The compact uses state law to create state-based water rights for instream flow on National Forest System lands.</p>

Proposed Blackfeet Compact	Proposed 2009	This legislation creates a mitigation account within the state special revenue fund; the funds to mitigate economic and hydrologic impacts on water right holders among other things. It creates an infrastructure account to be used only for water-related infrastructure projects on the Blackfeet Indian reservation. Both accounts are administered by DNRC and funds may not be used unless a Blackfeet-Montana compact is ratified by the legislature, Tribe, and United States.
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New Appropriations of Water

The Montana Water Use Act of 1973 established a permit system for new uses of water. Any person planning a new or expanded development for a beneficial use of water from SURFACE WATER or ground water after June 30, 1973, must obtain a permit to APPROPRIATE water or file a Notice of Completion of Ground Water Development to get a Certificate of Water Right. The permit system is administered by the DNRC. Beneficial uses of water include domestic, stock, irrigation, lawn and garden, mining, municipal, industrial, commercial, agricultural spraying, fisheries, wildlife, and recreation.

There are basins and subbasins in Montana that have been “closed” to new appropriations because they have been deemed to be highly appropriated. There are some exceptions to these closures. Please see the section on basin closures for more information.

Surface Water

A person must apply for and receive a permit to appropriate water before beginning to construct diversion works or diverting water from a surface water source. Those seeking a permit must plan ahead—the application process takes time to complete. The applicant for a permit must provide the following evidence: the physical availability of water

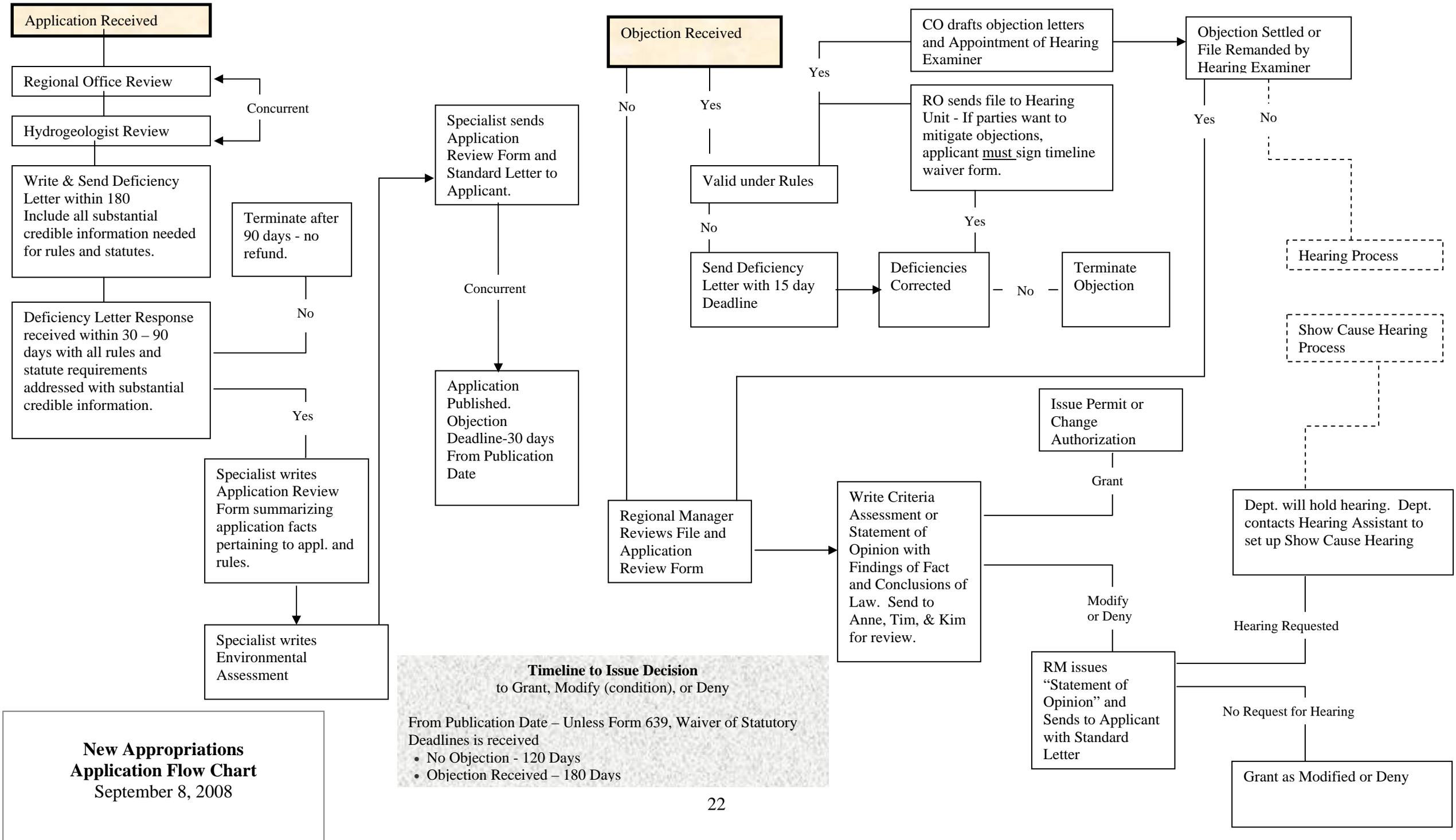
at the point of diversion during the requested period of diversion; the legal demands on the source; a comparison of the physical water available and the existing legal demands; the effects of the proposed use on existing water rights; an analysis of the effects of existing water rights on the water supply within the source; the design and operation of the proposed system; a description of the proposed beneficial use; an explanation of how the requested flow rate and volume was determined and that the amounts are the minimum amounts necessary for the use; and that the applicant has possessory interest in the place of use.

The exception to this law is for small livestock pits or reservoirs located on NONPERENNIAL FLOWING STREAMS. If the pit or reservoir will hold less than 15 ACRE-FEET of water with an annual appropriation of less than 30 acre-feet and will be located on a parcel of land 40 acres or larger, construction may begin immediately. Within 60 days of completion, an Application for PROVISIONAL Permit for Completed Stockwater Pit or Reservoir, form 605, must be submitted to the DNRC. A provisional permit, subject to prior water rights, will then be issued. If the reservoir adversely affects prior water rights, the DNRC can revoke the permit or require an applicant to modify the reservoir.

Ground Water

Anyone who anticipates using more than 35 gallons a minute or 10 acre-feet a year of ground water is required to obtain a permit to appropriate water before any development begins or water is used. In a controlled GROUND WATER AREA, a permit may be required to appropriate any amount of water, depending on the terms of the ground water area. This handbook contains a list of the controlled ground water areas.

A person does not need to apply for a permit to develop a well or a ground water spring with an anticipated use of 35 gallons a minute or less, not to exceed 10 acre-feet a year. The first step is to drill the well or develop the spring. A Well Log Report, form 603, is completed by the driller and sent to the Bureau of Mines and Geology within 60 days. A copy is also given to the well owner. Within 60 days after the development is put to use, the owner must submit a Notice of



New Appropriations Application Flow Chart
September 8, 2008

Timeline to Issue Decision to Grant, Modify (condition), or Deny

From Publication Date – Unless Form 639, Waiver of Statutory Deadlines is received

- No Objection - 120 Days
- Objection Received – 180 Days

Completion of Ground Water Development, form 602, along with a filing fee, to the DNRC. The priority date of the water right is the date that the DNRC receives the completed form 602. The DNRC will review the form to ensure that it is correct and complete. A person must have possessory interest in the property where the water right is put to beneficial use or written notification 30 days prior to the intent to appropriate ground water. Also, a person must have exclusive property rights in the ground water development works or written consent from the person with the property rights. A Certificate of Water Right will then be issued to the owner for the specified use.

Replacement Wells

If an existing well fails and a new well is constructed, a person can retain the priority date of the existing well. A form 634 can be filed if the new well meets the following requirements:

- ☐ The old and new wells must be located outside the boundaries of a controlled ground water area, or they can be located within the boundaries of a controlled ground water area if the provisions of the order do not restrict the development of replacement wells.
- ☐ The existing well may no longer be used and must be abandoned.
- ☐ The flow rate and VOLUME of water must be equal to or less than the amounts used from the old well and may not exceed 35 gallons a minute or 10 acre-feet a year.
- ☐ The old and new well must be from the same ground water source.

If these conditions are met, the DNRC can issue an authorization to change a water right.

Redundant Wells

When a public water supply system constructs a backup well, a form 635 can be filed if the backup well meets the following requirements:

- ☐ The backup well must withdraw water from the same ground water source as the original well(s).
- ☐ The backup well must be required by a state or federal agency.

The flow rate and volume of all wells, including backup wells, may not exceed the flow rate or volume authorized by the water rights for the public water supply system.

Special Ground Water Circumstances

COMBINED APPROPRIATION

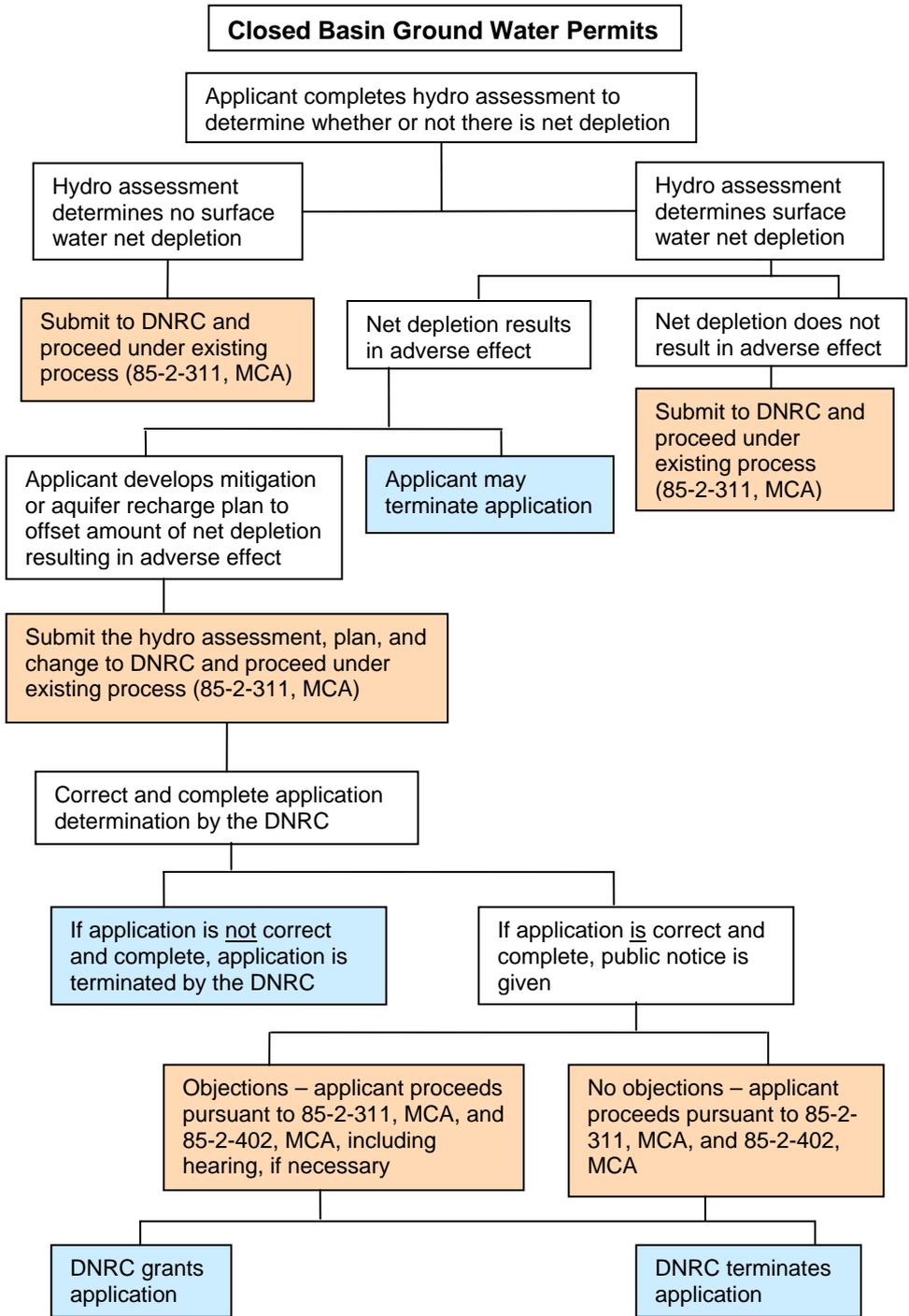
When a person or persons combines an appropriation of two or more wells or developed springs from the same source and uses more than 35 gallons a minute or 10 acre-feet a year, a permit to appropriate water is required. A combined appropriation is defined as “an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system” (ARM 36.12.101(13)).

APPROPRIATIONS OVER 3,000 ACRE-FEET

A person proposing to appropriate more than 3,000 acre-feet of ground water a year must receive legislative approval for the specific appropriation. This law does not apply to appropriations for municipal use, public water supplies, or the irrigation of cropland owned and operated by the applicant.

APPROPRIATIONS IN CLOSED BASINS

A person proposing to appropriate ground water in a closed basin must complete a HYDROGEOLOGIC ASSESSMENT and must meet other criteria. If the hydrogeologic assessment predicts that the appropriation would have no net depletion of surface water, the application moves through the permitting process. If the assessment predicts net depletion of surface water, it must be determined if net depletion would have an adverse effect on prior appropriators. If not, the application moves through the permitting process. If there would be adverse effect, the applicant must submit a plan for mitigation or aquifer recharge.



Leasing Water Rights for Road Construction

Water needed for road construction and dust control can be leased from an individual who holds a valid Montana water right. This statute, section 85-2-410, MCA, was specifically designed to assist Montana's road construction contractors with water use COMPLIANCE. The restrictions include the following:

- ☐ The lease can run for up to 90 days and applies to diversions of water that do not exceed 60,000 gallons a day or the amount of the existing right, whichever is less.
- ☐ A combination of short-term leases may not exceed 120,000 gallons a day for one project.
- ☐ The lease does not require prior approval by the DNRC. However, 30 days prior to the use of water, the lessee must publish a notice of the proposed use in the local newspaper or mail individual notices to the potentially affected water users in the area of the proposed point of diversion.
- ☐ At least 2 days prior to water use, the lessee must submit a copy of the public notice and a copy of the lease agreement to the DNRC.

An existing water user whose right is not being satisfied may make a complaint to the DNRC and could cause the short-term lease to end. However, if it is shown that there is no ADVERSE effect on the existing water user's right, the lessee can continue to divert water.

How the Permit System Works

The permit process involves two steps: 1) The DNRC determines if the application contains the information required by rule to deem the application correct and complete. 2) The DNRC weighs all of the evidence known to the DNRC and documents whether the majority of the evidence supports permit issuance. This assessment occurs regardless of whether objections have been filed or a hearing held. The DNRC will decide whether to deny the permit, grant the permit as requested, or grant the permit with conditions needed to ensure the

permit criteria are met. A prospective water user (applicant) must follow the procedure described below to apply for a water use permit.

Step 1 - Application Form

A potential new water user must first complete an Application for Beneficial Water Use Permit, form 600. The application form requires information describing the intended use, place of use, point of diversion, source of supply, amount of water to be used, diversion facilities, and other particulars of the proposed appropriation. The application also must contain evidence pertaining to the permit criteria that must be met. There are specific rules that define what must be included in an application in order for the DNRC to deem an application correct and complete. If the DNRC deems the application correct and complete, it means the application can move to the next phase of the permit process, which is public notice. An application fee must be submitted with the application. Forms and instructions are available from any water resources regional office and are available on the DNRC website at <http://www.dnrc.mt.gov/wrd/default.asp>. A list of forms is included in this handbook.

Additional criteria must be addressed if the application is for appropriations of 4,000 or more acre-feet and 5.5 or more CUBIC FEET PER SECOND (cfs). If the appropriation is for an out-of-state use, the applicant must also address criteria set out in section 85-2-311(4), MCA.

If the application is for an appropriation of ground water in a closed basin, additional criteria apply. This procedure is explained in this handbook.

Criteria for Issuance of a Permit
Section 85-2-311(1), MCA

The applicant for a water use permit to appropriate less than 4,000 acre-feet a year and 5.5 cfs has the initial burden to prove by a PREPONDERANCE OF THE EVIDENCE that the criteria for issuance of a permit are met. These include the following:

1. Water is physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.
2. Water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested.
3. The water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state WATER RESERVATION will not be adversely affected.
4. The proposed means of diversion, construction, and operation of the appropriation works are adequate.
5. The proposed use of water is a beneficial use.
6. 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.

An applicant is required to prove one of the following criteria if a valid objection is filed:

1. The DISCHARGE PERMIT holder has the ability to satisfy EFFLUENT limitations of a permit issued in accordance with Title 75, chapter 5, part 4, MCA.
2. The proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to section 75-5-301(l), MCA.
3. The water quality of a prior appropriator will not be adversely affected.

Step 2 - Application Review

The date that the DNRC receives the original permit application will be the priority date assigned to the appropriation. This date is important because of the “first in time is first in right” principle in Montana water law. The DNRC will review the application to ensure that the information required by rule is provided. Applications are usually

reviewed in the order that they are received. The review to determine if the application is correct and complete will be completed within 180 days of receipt of the application.

At the same time, an environmental review is made to determine whether the proposed project will have significant environmental impacts and whether an environmental impact statement is needed. A correct and complete application moves to the next step in the process. The average processing time after an application is deemed correct and complete is 210 days.

If an application is not correct and complete, the DNRC will notify the applicant of any defects in the application. The applicant has 90 days to make the application correct and complete. If an application is not correct or complete within 30 days of DNRC notification, the priority date will change to the date that the application is made correct and complete. An application that is not made correct or complete within 90 days will be terminated.

If there is potential for adverse effect, the applicant must publish notice of the application once in a newspaper of general circulation in the area of the source. The DNRC will mail notification of the application to existing water users listed in the DNRC records and determined by the DNRC as water rights that may be affected by the proposed application. Local water users have an opportunity to file an Objection to Application, form 611, with the required fee on or before the deadline specified in the published notice. All objections must explain how the objector will be adversely affected or why the objector does not believe the applicant can meet the criteria. An objector must have property, water rights, or interests that would be adversely affected by the proposed appropriation. If no objections are received and the applicant proves the permit criteria can be met, the permit is granted.

If valid objections are received and cannot be resolved, the DNRC conducts a hearing. After evaluation of the evidence and testimony given at the hearing, the hearings examiner issues a proposal for decision to grant, modify, or deny the permit. Within 20 days, parties adversely affected by the proposal can file written exceptions to the proposal for decision. The exceptions may request presentation of

briefs or oral argument before the DNRC on the proposed decision. If no exceptions are filed or after oral arguments are heard, the DNRC issues a final order. A final order may be APPEALED to District Court. Issues that could affect applications for permits are:

1. Any proposed appropriation that may significantly affect the quality of the human environment will require an environmental impact statement (EIS). The purpose of the EIS is to document environmental and human impacts, evaluate alternatives, and provide for public review and comment. Information developed during the EIS process will aid the DNRC in processing the permit. The DNRC may assess a fee to the applicant to fund preparation of the EIS. See section 85-2-124, MCA.
2. Any permit to appropriate water that the DNRC issues is provisional. It is junior to all prior existing water rights and subject to the final Water Court determination or adjudication of those rights. It also is junior to prior DNRC permitted water rights and prior water reservations, except as otherwise provided by law.

Step 3 - Project Completion on a Perfected Permit

Upon receiving the permit, the applicant's next step is to construct the project, divert the water, and put the water to the intended use as granted in the permit. When this is finished, the permittee must provide the DNRC with a certified statement describing how the appropriation has been completed. This includes submitting a Project Completion Notice for Permitted Water Development, form 617, to the DNRC before the deadline specified in the permit or any authorized extension of time. If the permittee fails to file a project completion notice by the deadline, the permit will be terminated by operation of law.

When unforeseen circumstances prevent completion of the project before the deadline, the permittee may submit an Application for Extension of Time, form 607. If the permittee shows good cause that a continuous effort has been made to complete the project, the DNRC will grant an extension of time for a reasonable period.

Step 4 - Certificate of Water Right

After the project is completed, the DNRC will review the project completion notice and determine whether the project was completed in substantial accordance with the permit. The DNRC will issue a Certificate of Water Right when:

1. The project has been completed.
2. The water has been used according to the terms of the permit.
3. The basin in which the permit lies has been adjudicated and the final decree is issued.

The priority date of a certificate is the same as on the original permit.

Temporary Permits

A person may request a temporary permit to appropriate water if the use of water is for a limited period of time. Temporary uses include water needed for oil or gas exploration or in highway construction. An application for a temporary permit is processed in the same manner as a provisional permit. The applicant must prove the same criteria listed under section 85-2-311, MCA. A temporary permit has an expiration date based on the period requested by the applicant and will expire on that date. No Certificate of Water Right is issued for a temporary permit.

Interim Permits

An interim permit to appropriate water allows an applicant to begin constructing and using water pending final approval or denial of the provisional permit. An interim permit may be issued unless substantial information indicates that the criteria for issuing a provisional permit under section 85-2-311, MCA, cannot be met. An interim permit is issued pending final approval or denial by the department of the application for a regular permit.

Changes in Water Use

To protect all water rights, prior approval from the DNRC is required before changing any water right or water reservation in any of the following ways:

1. point of diversion;
2. place of use;
3. purpose of use; or
4. place of storage.

A person must submit an Application to Change a Water Right, form 606, to the DNRC. An applicant may change up to the historic amount of water diverted and the historic consumptive use. Therefore, an applicant must first provide information proving the water right to be changed was used and the extent of the historic use. The application must contain information about the proposed change and evidence pertaining to the criteria that must be met. There are specific rules that define what must be included in an application in order for the DNRC to deem an application correct and complete. If the DNRC deems the application correct and complete, it means the application can move to the next phase of the process, which is public notice. In order for the DNRC to grant a change application, the applicant must provide by a preponderance of evidence that the criteria for issuance of an authorization to change a water right listed below are met. An application to change a water right follows the same general process for notice and hearing as a permit to appropriate water. Upon completion of the change, the appropriator must file a Project Completion Notice for Change of a Water Right, form 618, notifying the DNRC that the authorized change is completed.

Criteria for Issuance of an Authorization
to Change a Water Right
Section 85-2-402(2), MCA

The applicant for a change in an appropriation water right has the burden to prove by a preponderance of the evidence that the criteria for issuance of an authorization are met. These criteria include:

1. The proposed use will not adversely affect the use of other water rights or other planned developments for which a permit or certificate has been issued or water has been reserved.
2. The proposed means of diversion, construction, and operation of the appropriation works are adequate.
3. The proposed use of the water is a beneficial use.
4. The applicant owns or has permission from the person who owns the property where the water is to be used.

If a valid objection pertaining to WATER QUALITY is received, the applicant must also prove one of the following.

1. The water quality of an appropriator will not be adversely affected.
2. The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, MCA.

An applicant for salvaged water must also prove that the proposed water-saving method will SALVAGE at least the amount of water asserted by the applicant.

An applicant submitting a change in purpose or place of use of an appropriation to divert 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second will be required to prove the criteria set out in section 85-2-402(4), MCA. If a proposed change in purpose or place of use for a diversion results in 4,000 or more acre-feet and 5.5 or more cubic feet per second of water being consumed, the applicant must prove the criteria in section 85-2-402(5), MCA. If the change involves the transport of water out of state, the applicant must prove the criteria listed in section 85-2-402(6), MCA, and obtain legislative approval.

Temporary Change in Appropriation Water Right

An appropriator may temporarily change a water right with DNRC approval. The temporary change may be approved for up to 10 years with an opportunity to renew for 10 more years, although there is no limit on the number of renewals. An appropriator must file an Application To Change a Water Right, form 606, and a Temporary Change Supplement, form 606T, identifying the proposed change and how long that it will be needed. The applicant must also provide evidence to meet the same criteria as an authorization to change listed above. If granted, the temporarily changed appropriation has the same priority date as the existing water right.

In 1995, the Legislature provided for the protection of fishery resources by allowing the owner of an existing consumptive use water right to change the purpose temporarily to instream flow. The owner must file an application, as described in the preceding paragraph. The owner may voluntarily change the purpose to instream flow or lease the water right and change the purpose to protect the fishery resource.

Salvaged Water

A water user who saves water through conservation may retain the right to the salvaged water for a beneficial use. The salvaged water is that portion of the water made available through the implementation of water-saving methods. For example, lining a ditch or canal to reduce seepage or replacing a ditch with a pipeline to eliminate delivery losses are considered water-saving methods if water consumption is reduced. If the salvaged water is to be used for any purpose or in any place not associated with the original appropriation, DNRC approval is required. The appropriator must file an Application to Change a Water Right, form 606, and must meet the criteria for issuance of an authorization to change a water right. The proposed water-saving method also must salvage at least the amount of water asserted by the applicant.

Ownership of a Water Right

A water right is appurtenant to the land on which it is used. On sales of land after July 1, 1997, the transferor shall disclose on the realty transfer certificate (RTC) at or before the closing if any water rights associated with the property will be transferred with the land. A fee must be paid at closing or upon completion of the transfer. The water right information is updated through coordination between the Department of Revenue and the DNRC. If land is sold and the fee is not paid, the DNRC will send a notice to the transferee requesting payment of the fee. If the transferee does not pay the fee within 60 days, the DNRC may assess a penalty.

If an RTC indicates a water right is being divided or exempted (reserved) from the property, the buyer, seller, and escrow agent must complete the Certification of Water Right Ownership Update form (included with the RTC) before the deed can be recorded.

When an RTC discloses the division of a water right among parcels, the person dividing the water right shall complete and file with the DNRC a Water Right Ownership Update – Divided Interest form, form 641 and submit the form within 5 days of the deed recording.

If a person sells land but retains the water right, the person must fill out and file a DNRC Water Right Ownership Update – Exempt (reserved) form, form 642, describing the exempting of the water right and the appropriate fee.

If a person severs a water right from land that is not being sold, the person must fill out and file a DNRC Water Right Ownership Update – Severed Water Right form, form 643.

In any case, for a water right that will be changed from how it was historically used, the owner must file an Application to Change a Water Right.

Water Right Distribution

Whether exercising a century-old, existing water right or a newly permitted water right, an appropriator must observe standard rules of

use. From period of use, to place of use, to type of use, these rules guide the distribution of Montana waters.

In Montana, water right distribution follows the traditional “first in time, first in right” philosophy. Accordingly, a SENIOR APPROPRIATOR may completely fulfill the senior appropriator’s water right before a JUNIOR APPROPRIATOR receives any (section 85-2-401, MCA).

Each Montana District Court supervises water use within its JURISDICTION (section 85-5-101, MCA). In its oversight capacity, a court may appoint one or more water commissioners to measure, record, and distribute water rights on a watercourse. Such appointments result upon:

- petition of water rights holders (owning at least 15% of the water rights on a watercourse);
- application by both the DNRC and one or more water rights holders on a watercourse; or
- application of the board(s) of one or more IRRIGATION DISTRICTS (section 85-5-101, MCA).

When a court appoints two or more water commissioners on a watercourse, one may be designated chief commissioner. A chief commissioner supervises the other commissioner(s) in distributing water rights (section 85-5-102, MCA).

Upon petition of water rights holders (owning at least 51% of the water rights on a watercourse), the court may direct a commissioner to maintain and repair ditches, canals, and other structures necessary to distribute water rights. Owners are responsible for all maintenance expenses (section 85-5-106, MCA).

Dispute Resolution

If a water user feels that a water right is being adversely affected by the actions of another water user, the DNRC urges the parties to first talk to each other to see if the matter can be settled. If the matter cannot be settled, there are various options under Montana law for resolution. These options include petitioning the District Court to appoint a water commissioner; filing a temporary restraining order or

preliminary INJUNCTION in District Court; making a “call” regarding the water, documenting the “call”, or filing a written complaint to the DNRC; and other specific District Court actions. Also, with the passage of House Bill No. 609 during the 2005 session, a water right holder who is successful in going to court to stop someone without a water right from using water will be awarded their attorney fees by the District Court. Which option is best depends on the particular circumstance, how fast the matter needs to be settled, and the cost of the action. For specific details of each option, refer to the Water Right Dispute Options handout available at the water resources regional offices or on the DNRC website at:

http://dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/609-ins.pdf

Water Reservations

Water reservations may be granted for future beneficial uses or to maintain minimum streamflows or quality of water, but only to the State of Montana or any political subdivisions or agencies of the state or by the United States or any of its agencies. The DNRC administers the water reservation application process.

In 1978, the Board of Natural Resources and Conservation (Board) granted water reservations in the Yellowstone River Basin to eight municipalities, fourteen CONSERVATION DISTRICTS, and six state and federal agencies. These water reservations have a priority date of December 15, 1978. Individuals within a conservation district who are interested in using water under the local district’s water reservation should contact the conservation district office.

In 1992, the Board issued an order granting water reservations in the upper Missouri River Basin above Fort Peck Dam to seventeen municipalities, fifteen conservation districts, and four state and federal agencies. These water reservations have a priority date of July 1, 1985.

In 1994, the Board granted water reservations in the lower Missouri River Basin below Fort Peck Dam with a priority date of July 1, 1985, to nine municipalities, eight conservation districts, and one state

agency. The Board also granted reservations in the Little Missouri River Basin with a priority date of July 1, 1989, to two municipalities, three conservation districts, and one state agency.

In both the Yellowstone and Missouri River Basins, water reservations were granted for municipal, irrigation, stock water, and instream flows for fish and wildlife and water quality protection.

Instream Use and Leasing

Most water rights involve taking water out of streams for irrigation, domestic, or other consumptive uses. These diversions can reduce streamflows during times of drought, which in turn can stress local fisheries. In the 1980s and 1990s, the Montana Legislature realized this concern and created laws that allow water that is diverted for consumptive uses to be transferred temporarily to an instream use.

There are three ways to convert an existing consumptive use water right to instream use. A person may lease all or a portion of a water right to the Montana Department of Fish, Wildlife, and Parks (FWP), lease the water right to another party interested in holding the right for the fishery, or convert the water right to an instream use without a lease. Any conversion to an instream use requires a temporary change authorization from the DNRC and must benefit fisheries.

The FWP as well as some conservation groups seek interested senior water rights holders who no longer wish to use all of their appropriated water (possibly through increased water conservation) and have a desire to contribute water to maintain fish populations during critical times of drought. Water rights holders may get help from interested lessees to develop salvage water projects, assess water savings, and file the necessary authorizations to change the water rights involved in a leasing agreement. As a result, the water rights holder continues to own the water right, receives financial compensation, and makes a valuable contribution to maintaining Montana's natural heritage. For more information, contact the Department of Fish, Wildlife, and Parks at (406) 444-2535.

Controlled Ground Water Areas

A controlled ground water area may be proposed by the DNRC on its own motion, by petition of a state or local public health agency, or by a petition signed by at least 20 or one-fourth, whichever is less, of ground water users when the petitioners feel that a controlled ground water area is necessary. A petition must allege facts showing one or more of the following:

1. Ground water withdrawals are in excess of RECHARGE to the aquifer.
2. Excessive ground water withdrawals are very likely to occur in the near future because withdrawals have consistently increased in the area.
3. There are significant disputes within the area concerning priority of rights, amounts of water being used, or priority of type of use.
4. Ground water levels or pressures are declining or have declined excessively.
5. Excessive ground water withdrawals would cause contaminant migration.
6. Ground water withdrawals adversely affecting ground water quality are occurring or are likely to occur.
7. Water quality within the ground water area is not suited for a specific beneficial use as defined by section 85-2-102(4)(a), MCA.

A controlled ground water area may be designated if any of these criteria are established. It may also be designated to ensure public health, safety, or welfare if there is WASTEFUL USE of water or undue interference with existing wells or if any new well will impair or interfere with existing water rights.

Upon receipt of a petition, the DNRC will give notice to concerned parties and hold public hearings to gather comments and information. After notice and public hearing, the DNRC will issue an order. If the order declares a permanent or temporary controlled ground water area, the order will contain the specific control provisions.

WATER QUANTITY CLOSURES	Status	Effective Date	County
Hayes Creek	Permanent	5/25/1995	Missoula
Larson Creek	Permanent	11/14/1988	Ravalli
Old Butte Landfill/Clark Tailings Site	Permanent	12/17/1999	Silver Bow
Powder River Basin	Permanent	12/15/1999	Custer
South Pine	Permanent	11/1/1967	Wibaux
Green Meadow	Temporary	4/11/2010	Lewis & Clark
Horse Creek	Temporary	2/10/2010	Ravalli
North Hills	Temporary	4/25/2010	Ravalli
WATER QUALITY CLOSURES	Status	Effective Date	County
Bitterroot Valley Sanitary Landfill	Permanent	2/9/2004	Ravalli
BNSF Paradise	Permanent	8/19/2002	Sanders
BNSF Somers Site	Permanent	5/9/2003	Flathead
Bozeman Solvent Site	Permanent	7/20/1998	Gallatin
Idaho Pole	Permanent	11/30/2001	Gallatin
Rocker	Permanent	5/30/1997	Silver Bow
US National Park Service-MT Compact Yellowstone	Permanent	1/31/1994	Park
Warm Springs Ponds	Permanent	5/25/1995	Deer Lodge

The Petition for Controlled Ground Water Area, form 630, is available from the DNRC website. A petition must be filed with the appropriate

fee, and the petitioner must also pay the reasonable costs of processing the petition.

Yellowstone Controlled Ground Water Area

The Yellowstone Controlled Ground Water Area was established under the compact negotiated between the U.S. National Park Service (NPS) and Montana under section 85-20-401, MCA, and became effective January 31, 1994. It is located north and west of Yellowstone National Park and was established to regulate ground water development adjacent to the park in an effort to preserve the park's natural hydrothermal features. Ground water developments are restricted within this area. The restrictions apply to ground water appropriations with a priority date on or after January 1, 1993. Anyone wanting to appropriate ground water in this area after January 31, 1994, must apply for a permit from the DNRC. Depending on the rate and volume of ground water needed and the temperature of the ground water at the wellhead, different restrictions apply. All applicants must provide a statement of whether the proposed water use requires water with a temperature of 60 degrees Fahrenheit or more. All permits issued require meters to be installed for measuring the total volume of water used. Annual water usage must be reported to the Montana Bureau of Mines and Geology in Butte. The DNRC provides the meters necessary to gather data.

The compact requires the DNRC to send the NPS a copy of each permit application, including a map and well log. The NPS has 30 days to file an objection to the application and 60 days to file an objection to the well log report if it determines that the proposed appropriation is hydrologically connected to surface water or ground water specifically described in the compact. The compact also provides certain requirements depending on the temperature of the water. Please refer to section 85-20-401, MCA, Article IV, Section G, Part 2, for more specific information.

Additional information and a map of the Yellowstone Controlled Ground Water Area can be obtained by contacting the Water Resources Regional Office at (406) 586-3136 or the Helena Central Office at (406) 444-6610.

Closure of Highly Appropriated Basins

Montana has closed some of its river basins to certain types of new water appropriations because of water availability problems, overappropriation, and a concern for protecting existing water rights. Sections 85-2-319 and 85-20-401, MCA, legislatively authorize the closure of basins to certain new appropriations through the adoption of administrative rules and negotiation of reserved water rights compacts.

Legislative Closures

1. The Upper Missouri River Basin, the Jefferson and Madison River Basins, the Teton River Basin, and the Upper Clark Fork River Basin are closed to certain new appropriations of water.
2. There are also temporary closures in the Bitterroot Basin and the Clark Fork Basin.
3. The Legislature authorized the DNRC to study and close sources of water in the Milk River Basin. Currently, portions of the mainstem Milk River, all of Miners Coulee, Halfbreed Coulee, Bear Creek, and their tributaries are closed to certain appropriations.

Administrative Rule Closures

The law also provides for the closure of highly appropriated basins through the adoption of administrative rules. In order to adopt rules, the DNRC must receive a petition signed by at least 25% or 10 (whichever is less) of the users of water from the source of supply within the specific basin or receive a petition from the Montana Department of Environmental Quality. The petition must show that during certain times of the year, one of the following occurs:

1. There is no unappropriated water in the source of supply.
2. The rights of prior appropriators would be adversely affected by further appropriation.
3. Further new uses would interfere with other planned uses for which a permit has been issued or water has been reserved.
4. The water quality of an appropriator would be adversely affected by the issuance of permits.
5. Further use would not be substantially in accordance with the classification of water set for the source of supply pursuant to section 75-5-301(1), MCA.

6. Issuance of permits would adversely affect holders of a discharge permit issued in accordance with Title 75, chapter 5, part 4, MCA, in their ability to satisfy effluent limitations.

If the DNRC determines that rules should be adopted to close a basin, notice will be provided and a public hearing held on the rules.

Depending on the evidence and testimony submitted, the rules could close a basin:

1. to all new appropriations of water or to only consumptive uses;
2. during all times of the year or only during certain times of the year;
3. to all types of uses or to only specific types of uses.

Petition for Closure of a Highly Appropriated Basin, form 631, is available from the DNRC. A petition must be filed with the appropriate fee, and the petitioner also must pay reasonable processing costs.

Administrative Basin Closures	County
Grant Creek, Houle Creek, and Sixmile Creek	Missoula
Sharrott Creek and Willow Creek	Ravalli
Walker Creek and Truman Creek	Flathead
Rock Creek	Carbon
Towhead Gulch	Lewis and Clark
Musselshell River	Meagher, Wheatland, Golden Valley, Musselshell, Petroleum, Garfield, and Rosebud

Compact Closures

Under section 85-2-701, MCA, the RWRCC has several compacts with Indian tribes and federal agencies. The following compacts have closed certain sources of water to new appropriations.

1. The Northern Cheyenne-Montana Compact required the DNRC to order a moratorium on the issuance of permits in the basin of Rosebud Creek, a tributary to the Yellowstone River in Big Horn

and Rosebud Counties. The moratorium, effective May 20, 1991, is for surface water and alluvial ground water.

2. The Chippewa Cree Tribe of the Rocky Boy's Indian Reservation-Montana Compact has two moratoriums on new state appropriations and tribal water rights, effective April 15, 1997. The moratoriums are a 10-year moratorium on new state permits from sources in the Big Sandy Creek Basin (excluding Sage Creek and Lonesome Lake Coulee) and in the Beaver Creek drainage and a 5-year moratorium on the development of tribal consumptive uses from surface water in the Beaver Creek drainage. (During this time, a monitoring network of recording stations will gather data to determine whether Beaver Creek gains or loses flow between the confluence of the east and west forks of the creek and the downstream boundary of the reservation.)
3. The United States Fish and Wildlife Service-Montana Compact applies to Benton Lake National Wildlife Refuge and Black Coulee National Wildlife Refuge. As of July 17, 1997, the following basins have been closed to further appropriations or reservations of water for consumptive use:
 - Black Coulee WATERSHED; and
 - Lake Creek watershed, including the unnamed tributaries of Benton Lake.
4. The United States Fish and Wildlife Service, Red Rock Lakes-Montana Compact includes a closure of appropriations for consumptive use in the drainage basins upstream of the most downstream point on the Red Rock Lakes National Wildlife Refuge and the Red Rock Lakes Wilderness Area. Certain exceptions apply.
5. The United States Bureau of Land Management-Montana Compact applies to the Upper Missouri National Wild and Scenic River (UMNW&SR) and the Bear Trap Canyon Public Recreation Site. The compact, ratified March 28, 1997, closes the following basins:
 - mainstem of the Missouri River to new storage;
 - IMPOUNDMENTS upstream from the UMNW&SR;
 - Missouri River Basin upstream of the UMNW&SR to new appropriations in any month in which the water volume designated for the "available water supply" has been exhausted.

6. The United States National Park Service-Montana Compact applies to Glacier National Park, Big Hole National Battlefield, and the portion of Yellowstone National Park that is in Montana. As a result of the compact, the following areas will be closed to new appropriations when the total appropriations reach a specified level:
 - Big Hole National Battlefield;
 - North Fork of the Big Hole River and its tributaries, including Ruby and Trail Creeks (these streams are currently partially closed under the Jefferson/Madison Basin Closure);
 - Big Horn Canyon National Recreation Area:
 - Dry Head, Deadman, Davis and Layout Creeks
 - Glacier National Park;
 - Middle Fork of the Flathead River;
 - North Fork of the Flathead River;
 - Yellowstone National Park;
 - Bacon Rind, Buffalo, Cottonwood, Coyote, Crevice, Dry Canyon, Hellroaring, Little Cottonwood, Slough, Snowslide, Soda Butte, and Tepee Creeks;
 - Gallatin, Madison, and Yellowstone Rivers.

7. The Crow Tribe-Montana Compact closes basins within the Crow Reservation, the Bighorn River Basin, and Pryor Creek Basin to new appropriations under state law. The basin closures, effective June 22, 1999, are on all surface water and ground water requiring a permit under state statute.

8. The Fort Belknap-Montana Compact closure extends, in the Milk River Basin, from the Eastern Crossing of the Milk River (into the United States from Canada) to the confluence between the Milk River and the Missouri River composed of Basins 40F, 40G, 40H, 40I, 40J, 40K, 40L, 40M, 40N, and 40O both above the Western Crossing (of the Milk River from the United States into Canada) and below the Eastern Crossing. Certain exceptions apply.

Persons wishing further information on any of these compact closures should contact the DNRC to determine the specifics of the restrictions on these sources. The NPS compact also established the Yellowstone Controlled Ground Water Area, which set up restrictions on appropriating ground water.

Sources of Information

All water right forms required by the DNRC are available at any of the eight water resources regional offices listed below, the Helena Central Office, or on the DNRC website at <http://dnrc.mt.gov/wrd/default.asp>.

DNRC Offices

Montana Department of Natural Resources and Conservation
Water Resources Division
Water Rights Bureau
1424 Ninth Ave.
P.O. Box 201601
Helena, MT 59620-1601
Phone: (406) 444-6610; Fax: (406) 444-5918
dnrc.mt.gov/wrd/default.asp

Water Resources Regional Offices

BILLINGS:

Airport Industrial Park
1371 Rimtop Dr.
Billings, MT 59105-1978
Phone: (406) 247-4415
Fax: (406) 247-4416

Serving: Big Horn, Carbon,
Carter, Custer, Fallon, Powder
River, Prairie, Rosebud,
Stillwater, Sweet Grass,
Treasure, and Yellowstone
Counties

BOZEMAN:

2273 Boot Hill Court, Suite 110
Bozeman, MT 59715
Phone: (406) 586-3136
Fax: (406) 587-9726

Serving: Gallatin, Madison, and
Park Counties

GLASGOW:

222 6th St. South
P.O. Box 1269
Glasgow, MT 59230-1269
Phone: (406) 228-2561
Fax: (406) 228-8706

Serving: Daniels, Dawson,
Garfield, McCone, Phillips,
Richland, Roosevelt, Sheridan,
Valley, and Wibaux Counties

HAVRE:

210 6th Ave.
P.O. Box 1828
Havre, MT 59501-1828
Phone: (406) 265-5516
Fax: (406) 265-2225

Serving: Blaine, Chouteau,
Glacier, Hill, Liberty, Pondera,
Teton, and Toole Counties

HELENA:
1424 9th Ave.
P.O. Box 201601
Helena, MT 59620-1601
Phone: (406) 444-6999
Fax: (406) 444-9317

Serving: Beaverhead,
Broadwater, Deer Lodge,
Jefferson, Lewis and Clark,
Powell, and Silver Bow
Counties

KALISPELL:
109 Cooperative Way, Suite
110
Kalispell, MT 59901-2387
Phone: (406) 752-2288
Fax: (406) 752-2843

Serving: Flathead, Lake,
Lincoln, and Sanders Counties

LEWISTOWN:
613 Northeast Main St., Suite E
Lewistown, MT 59457-2020
Phone: (406) 538-7459
Fax: (406) 538-7089

Serving: Cascade, Fergus,
Golden Valley, Judith Basin,
Meagher, Musselshell,
Petroleum, and Wheatland
Counties

MISSOULA:
1610 S. 3rd St. West, Suite 103
P.O. Box 5004
Missoula, MT 59806-5004
Phone: (406) 721-4284
Fax: (406) 542-1496

Serving: Granite, Mineral,
Missoula, and Ravalli Counties

Montana Water Court

The Montana Water Court in Bozeman can provide information about issued decrees, objections, or hearings on pre-July 1, 1973, water rights in the statewide adjudication.

601 Haggerty Lane
P.O. Box 1389
Bozeman, MT 59771-1389
Phone: (406) 586-4364 or (toll-free number) (800) 624-3270
Fax: (406) 522-4131
montanacourts.org/water
E-mail: watercourt@mt.gov

Legislative Environmental Quality Council

State Capitol, Room 171
P.O. Box 201704
Helena, MT 59620-1704

Phone: (406) 444-3742; Fax: (406) 444-3971
<http://leg.mt.gov/eqc>

Montana University System Water Center

101 Huffman Building
Montana State University-Bozeman
Bozeman, MT 59717
Phone: (406) 994-6690; Fax: (406) 994-1774
watercenter.montana.edu
E-mail:water@montana.edu

Other Information Sources

Several DNRC publications relate to water and are available online or at DNRC headquarters, DNRC regional offices, or local libraries through interlibrary loans with the Montana State Library.

New Appropriations Rules; Montana Basin Closures and Controlled Groundwater Areas: http://dnrc.mt.gov/wrd/water_rts/default.asp

A Guide to Stream Permitting in Montana:
<http://dnrc.mt.gov/permits/streampermitting/default.asp>

Applications for the Renewable Resource Loan and Grant Program:
http://dnrc.mt.gov/cardd/ResDevBureau/renewable_grant_program.asp

Various publications regarding water wells:
http://dnrc.mt.gov/wrd/water_op/bwwc/default.asp

Dam safety publications:
<http://dnrc.mt.gov/wrd/water%5Fop/dam%5Fsafety/>

Water Conversion Table

FLOW RATE is the rate at which water is diverted or withdrawn from the source. It is measured in gallons per minute (gpm) or cubic feet per second (cfs). One cfs is a rate of water flow that will supply 1 cubic foot of water in 1 second and is equivalent to flow rates of:

448.80 gpm
1.98 acre-feet a day
40.00 MINER'S INCHES in Montana (11.22 gpm)

Form No.	Title	Fee
Form 606B	Supplement to Application for Change of Appropriation Water Right	None
Form 606INS	Instructions for Application to Change a Water Right	None
Form 606ASW	Supplement to Application to Change a Water Right: For Salvage Water	None
Form 606T	Temporary Change Supplement to Application for Change of Appropriation Water Right	None
Form 607	Application for Extension of Time	\$200
Form 608	DNRC Water Right Ownership Update (\$10 for each additional water right updated, up to a maximum of \$300)	\$50
Form 609	Water Use Complaint	None
Form 609INS	Water Right Dispute Options	None
Form 611	Objection to Application	\$25
Form 613	Fee Schedule for Water Use in Montana	None
Form 615	Water Conversion Table	None
Form 617INS	Instructions for Notice of Completion of Permitted Water Development	
Form 617	Project Completion Notice for Permitted Water Development	None
Form 618	Project Completion Notice for Change of a Water Right	None
Form 618INS	Instructions for Notice of Completion of Change of a Water Right	
Form 625	Correction of Water Right Record	None
Form 626	Notice of Renewal of Temporary Water Right Change	\$200
Form 630	Petition to the DNRC for Controlled Groundwater Area (fee plus DNRC costs of giving notice, holding hearing, etc.)	\$1500

Form No.	Title	Fee
Form 631	Petition for Closure of a Highly Appropriated Basin. Petition to the DNRC to adopt rules to reject permit applications or modify or condition permits issued in a highly appropriated water basin or subbasin (fee plus DNRC costs of giving notice, holding hearing, etc.)	\$1500
Form 633	Aquifer Test Data Form	None
Form 634	Replacement Well Notice	\$100
Form 635	Redundant Well Construction Notice	\$50
Form 637	Reinstate a permit or change authorization	\$200
Form 639	Waiver of statutory timelines - request additional time regarding a water right application	None
Form 641	DNRC Ownership Update Divided Interest	\$50
Form 642	DNRC Ownership Update Exempt (Reserved) Water Right	\$25
Form 643	DNRC Ownership Update Severed Water Right	\$50

Glossary of Terms

abandonment — intentional, prolonged nonuse of a water right, resulting in its loss.

acre-foot — the volume of water that will cover 1 acre to a depth of 1 foot.

adjudication — a judicial procedure decreeing the quantity and priority date of all existing water rights in a basin.

Administrative Rules of Montana (ARM) — a collection of state agency rules used in the implementation of federal and state codes.

adverse — unfavorable.

appeal — to transfer a case from a lower to a higher court for a new hearing.

appropriate — to capture, impound, or divert water from its natural course and apply toward a beneficial use.

aquifer recharge — 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.

aquifer storage and recovery project — 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.

basin — the area drained by a river and its tributaries; a watershed.

biennium — a 2-year period.

claim — an assertion that a water right exists, usually occurring during the adjudication process.

compact — a legal agreement between Montana and a federal agency and/or an Indian tribe determining the distribution of federally and/or tribally claimed water rights.

compliance — obeying and achieving the conditions of a rule, permit, order, or law.

conservation district — a political subdivision of state government, possessing both public and private attributes, that primarily distributes irrigation water in a given region and that may also administer electric power generation, water supply, drainage, or flood control.

constitution — the highest form of state law, agreed upon by the people of the state, establishing the fundamental character and concept of state government.

consumptive use — a beneficial use of water that reduces supply, such as irrigation or municipal use.

cubic foot per second (cfs) — a rate of water flow that will supply 1 cubic foot of water in 1 second.

decreed water right — a water right issued by the court upon adjudication of a stream.

discharge permit — an authorization from the Montana Department of Environmental Quality that allows the discharge of WASTE within specific parameters.

district — one of the territorial areas into which a state is divided for judicial purposes; each district has a District Court presided over by a District Court Judge.

diversion — an open, physical alteration of a stream's flow away from its natural course.

effluent — an outflow of waste.

exemption — freedom from a rule or obligation that applies to others.

existing right — a Montana water right originating on or before July 1, 1973; subject to adjudication.

flow rate — that rate at which water is diverted from a source.

ground water — any water beneath the land surface, bed of a stream, lake, or reservoir.

ground water area — an area enclosing a single, distinct body of ground water.

hydrogeologic assessment — a report for a project for or through which water will be put to beneficial use, the point of diversion, and the place of use that describes the geology, hydrogeologic environment, water quality, and predicted net depletion, if any, including the timing of any net depletion.

impoundment — gathering and enclosure, as in a reservoir.

injunction — a court order prohibiting a specific act or commanding the undoing of some wrong or injury.

instream flow — water left in a stream for nonconsumptive uses such as preservation of fish or wildlife habitat.

interested person — a person with a real property interest, water right, or other economic interest that may be directly affected.

irrigation district — a subdivision of government, managed by a board of directors, that supplies water to irrigators within a specified region.

issue remark — a statement added to an abstract of water right in a water court decree by the department or the water court to identify potential factual or legal issues associated with the claim. The term also includes "gray area remarks" that were the result of the verification process.

junior appropriator — a secondary user on a watercourse, holding a water right inferior to previous (senior) users.

jurisdiction — the geographic area in which a court has authority.

miner's inch — by Montana law, 1 cfs is approximately equal to 40 miner's inches.

Montana Code Annotated (MCA) — a collection of Montana laws and regulations classified by subject.

mitigation — 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.

nonperennial flowing stream – a stream that does not flow continuously year-round.

permit — an authorization to use water, issued by the state, specifying conditions such as type, quantity, time, and location of use.

precedent — a course of action that serves as an example for a later one.

preponderance of the evidence — convincing evidence that shows that the facts are more probable than not.

priority date — the official date of an appropriation, generally the date of established intent; used in determining seniority among water users.

provisional — temporary.

recharge — the resupply of water to rivers or aquifers.

reserved water right — a special water right accompanying federal lands or Indian reservations, holding a priority date originating with the creation of the land.

salvage — water made available through water-saving methods.

senior appropriator — an original user on a watercourse, holding a water right superior to all subsequent (junior) users.

surface water — water above the land surface, including lakes, rivers, streams, wetlands, wastewater, flood water, and ponds.

valid — recognized by law; legal and enforceable.

volume — amount of water diverted over a specific period of time.

waste or wasteful use — 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. The term "waste" as it relates to ground water does not include:

- the withdrawal of reasonable quantities of ground water in connection with the construction, development, testing, or repair of a well or other means of withdrawal of ground water;
- the inadvertent loss of ground water because of breakage of a pump, valve, pipe, or fitting, if reasonable diligence is shown by the person in effecting the necessary repair;
- the disposal of ground water without further beneficial use that must be withdrawn for the sole purpose of improving or preserving the use of land by draining the same or that must be removed from a mine to permit mining operations or to preserve the mine in good condition;
- the disposal of ground water used in connection with producing, reducing, smelting, and milling metallic ores and industrial minerals or that is displaced from an aquifer by the storage of other mineral resources; and
- the management, discharge, or reinjection of ground water produced in association with a coal bed methane well.

watercourse — any naturally occurring stream or river, not including ditches, culverts, or other constructed waterways.

water master — an attorney versed in water law who serves at the discretion of the Water Court.

water quality — chemical, physical, and biological characteristics of water that determine its suitability for a particular use.

water reservation — a water right held by a government entity for future use or instream flow.

watershed — a geographic area that includes all land and water in a drainage system.

Persons with disabilities who need an alternative accessible format of this document should contact:

Department of Natural Resources and Conservation
1424 9th Ave.
P.O. Box 201601
Helena, MT 59620-1601
Phone: (406) 444-6601
Fax: (406) 444-5918
TDD: (406) 444-6873