Background of Water Rights in Montana: From the Montana Water Rights Handbook

Few elements reach so deeply into the human existence as water. Our economic endeavors, recreational excursions, and very wellbeing 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: all surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people . . . (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 leftover water, 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 in stream 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 rights to the use of any waters . . . are hereby recognized and confirmed (Article IX, section 3(1)). EXISTING RIGHTS included any right originating 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 100 years of precedent. To strengthen state supervision, the Convention next charged the Montana Legislature with providing for: . . . 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.

**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 publication contains a list of the controlled ground water areas. A person is not required 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 (section 85-2-306, MCA). 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 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. The 2011 Legislature extended the exemption to allow development of an appropriation made by a local governmental fire agency for emergency fire protection and for nonconsumptive geothermal heating or cooling exchange applications.

**Stream Depletion Zones**

The 2013 Legislature passed SB346, which allows the DNRC to create STREAM DEPLETION ZONES. These zones are defined as an area where hydrogeologic modeling determines a ground water well will deplete a stream by a certain amount during a certain time period. "Stream depletion zone" means an area where hydrogeologic modeling concludes the stream would be depleted by 30% within 30 days after the water is withdrawn from a well (meaning 30 days of continuous pumping). The stream depletion zone could allow for two possible regulatory actions:

* A new exempt ground water well within an established stream depletion zone would be limited to a volume of 2 acre-feet a year (and a flow of 20 gallons per minute (gpm)), rather than the 10 acre-feet a year (and flow of 35 gpm) for exempt ground water wells outside the zone.
* A stream depletion zone provides a conclusive, scientific basis for determining where ground water rights that are exempt from permitting are affecting senior surface water rights. In effect, the zone could allow for calls on junior, exempt ground water rights.

A hydrogeologic assessment must be completed for a proposed stream depletion zone by the Ground Water Investigation Program at the Montana Bureau of Mines and Geology, a hydrogeologist, or a qualified licensed professional engineer.