

# MONTANA WATER LAW

## KEY TERMS & CONCEPTS

### WATER RIGHT KEY TERMS

**Abandonment:** Intentional, prolonged nonuse of a water right, resulting in its loss

**Appropriate:** To capture, impound, or divert water from its natural course and apply toward a beneficial use.

**Basin:** The area drained by a river and its tributaries; a watershed. Montana has been divided into 90 water rights basins. See [http://dnrc.mt.gov/wrd/water\\_rts/adjudication/](http://dnrc.mt.gov/wrd/water_rts/adjudication/)

**Call:** The holder of a water right with a senior priority date and an immediate need for a use of water may require a holder of a water right with a junior priority date to refrain from appropriating water otherwise physically available until the senior water right is satisfied. This curtailment is termed “making a call”.

**Consumptive Use:** A beneficial use of water that reduces supply, such as irrigation or household use.

**Diversion:** An open, physical alteration of a stream’s flow away from its natural course.

**Flow Rate:** That rate at which water is diverted from a source, generally expressed in cubic feet per second or “cfs”.

**Ground Water:** Any water beneath the land surface, bed of a stream, lake, or reservoir.

**Instream Flow:** Water left in a stream for nonconsumptive uses such as preservation of fish or wildlife habitat.

**Junior Appropriator:** A secondary user on a watercourse who holds a water right inferior to previous (senior) users.

**Priority Date:** The official date of an appropriation, generally the date of established intent; used in determining seniority among water users.

**Prior Appropriations:** The principle governing water law in Montana, namely that first in time is first in right, and that a senior appropriator is entitled to use the last drop of water to which that user is entitled before a junior appropriator may use the first drop of theirs.

**Senior Appropriator:** An original user on a watercourse who holds 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.

**Watercourse:** Any naturally occurring stream or river, not including ditches, culverts, or other constructed waterways.

**Watershed:** A geographic area that includes all land and water in a drainage system.

### MEASUREMENT TERMS & ACRONYMS

**Acre Foot (AF):** A measurement based on the volume of water that will cover 1 acre to a depth of 1 foot.

**Acre Feet per Year (AFY):** Maximum volume allowed for use during the course of a year

**Cubic Feet per Second (cfs):** A measurement based on a rate of water flow that will supply 1 cubic foot of water in 1 second.

**Gallons per Minute (gpm):** A measurement based on a rate of water flow that will supply 1 gallon of water in 1 minute.

**Miner's Inches (MI):** By Montana law, 1 cfs is approximately equal to 40 miner's inches.

**Volume:** Amount of water diverted over a specific period of time.

### **DNRC QUICK CONVERSION CHART**

$MI \times 11.22 = GPM$	$CFS \times 40 = MI$
$MI \div 40 = CFS$	$CFS \times 448.8 = GPM$
$MI \times .0495 = AF/ DAY$	$CFS \times 1.98 = AF/ DAY$
$GPM \div 11.22 = MI$	$AF/DAY \div 1.98 = CFS$
$GPM \div 448.8 = CFS$	$AF/DAY \times 226.67 = GPM$
$GPM \div 226.67 = AF/DAY$	$AF/DAY \div .0495 = MI$

For DNRC's full conversion & usage chart:

[https://dnrc.mt.gov/wrd/water\\_rts/wr\\_general\\_info/wrforms/615.pdf](https://dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/615.pdf)

### **COMPACTS & RESERVED WATER RIGHTS**

**Aboriginal Water Right:** Aboriginal (or original) title to Indian lands and waters established long prior to the creation of an Indian reservation by Indian occupation of the land and use of water for hunting, fishing and spiritual purposes. These rights typically become recognized when a reservation is established by treaty or statute on aboriginal lands. The recognized priority date is usually "time immemorial," *see definition below. See also U.S. v. Adair*, 723 F.2d 1394, 1412-15 (9<sup>th</sup> Cir. 1983).

**Compact:** A legal agreement between Montana and a federal agency or an Indian tribe determining the quantification of federally or tribally claimed water rights.

**Reserved Water Right:** A special water right accompanying federal lands or Indian reservations, holding a priority date originating with the creation of the land.

**Time Immemorial:** Time extending beyond the reach of memory, record, or tradition, indefinitely ancient, "ancient beyond memory or record;" a time before legal history and beyond legal memory.

**Walton Right:** A non-Indian purchaser of an Indian allotment also acquires the Indian allottees' share of the reservation's irrigation water rights; the priority date of the right remains the date of the creation of the reservation; and, unlike the Indian allottee, the non-Indian purchaser loses the reserved water right if it is not put to use. The non-Indian purchaser is limited to the quantity of water that he/ she puts to use with reasonable diligence after the transfer of title to the land. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9<sup>th</sup> Cir. 1981) and William C. Canby, Jr., *American Indian Law in a Nutshell* 485-487 (West 2009).

**Winters Doctrine:** Amalgamation of federal case law defining a reserved Indian water right as a right to water sufficient to carry out the purposes of the reservation with a priority date as of the date of establishment the reservation. *See Winters v. U.S.*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. U.S.*, 426 U.S. 128 (1976); *U.S. v. Adair*, 723 F.2d 1394, 1408-1411 (9<sup>th</sup> Cir. 1983). Under the Montana Water Use Act, tribal reserved water rights must be resolved through Montana's statewide adjudication process. The Montana Supreme Court has ruled that the Act is adequate to adjudicate federal and Indian reserved water rights. *State ex rel. Greely v. Confed. Salish & Kootenai Tribes*, 219 Mont. 76, 95 (1985). However, though the Water Court can adjudicate tribal reserved rights, its decisions will be subject to scrutiny by both the Montana and U.S. Supreme Courts. *Id.*

### **ADJUDICATION TERMS**

**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.

**Appeal:** To transfer a case from a lower to a higher court for a new hearing.

**Claim:** An assertion that a water right exists, usually occurring during the adjudication process.

**Decreed Water Right:** A water right issued by the court upon adjudication of a stream.

**Existing Right:** A Montana water right originating on or before July 1, 1973, that is subject to adjudication.

**Injunction:** A court order prohibiting a specific act or commanding the undoing of some wrong or injury.

**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.

**Interested Person:** A person with a real property interest, water right, or other economic interest that may be directly affected.

**Montana Water Use Act (MWUA):** The laws of Montana that govern water rights adjudication and administration. Found at Title 85 of the Montana Code Annotated.

**Murphy Right:** In 1969, the Montana Legislature enacted legislation granting the Montana Fish and Game Commission authority to appropriate unappropriated waters on 12 streams to maintain instream flows for the preservation of fish and wildlife habitat. These are known as Murphy rights after Representative James E. Murphy, who sponsored the measure. The Legislature established specific reaches of the following sources: Big Spring Creek in Fergus County; Blackfoot River in Missoula and Powell Counties; Flathead River and Middle Fork Flathead River in Flathead County; South Fork Flathead River in Flathead and Powell Counties; Gallatin River and West Gallatin River in Gallatin County; Madison River in Madison and Gallatin Counties; Missouri River in Broadwater, Lewis and Clark, and Cascade Counties; Rock Creek in Granite and Missoula Counties; Smith River in Cascade and Meagher Counties; and Yellowstone River in Stillwater, Sweet Grass, and Park Counties. The priority dates are 1970 or 1971.

**Preponderance of the Evidence:** Convincing evidence that shows that the facts are more probable than not. Standard used in the Montana Water Court to determine water right validity.

**Valid:** Recognized by law; legal and enforceable. Under Montana water law *validity* is used to determine water rights possession and assignment. Only those with valid water rights have an enforceable right to water. Validity for pre-1973 rights is determined through the adjudication process in the Montana Water Court. Post-1973 water rights are obtained through the permitting process with DNRC.

**Vested:** A term used in some other Western states to describe water rights that are secured in the possession of or assigned to a person. Montana water law does not use this term or concept for determining water rights possession or assignment. *See Valid*, above.

**Water Court:** Only Montana court with exclusive jurisdiction over the adjudication of water rights claims.

**Water Master:** An attorney versed in water law who serves at the discretion of the Water Court.

## **OBTAINING NEW WATER RIGHTS & PERMITTING**

**Permit:** An authorization to use water, issued by the state, specifying conditions such as type, quantity, time, and location of use, and required for any new appropriation of water under State law after June 30, 1973.

**Provisional Permit:** Temporary permit for use of water.

## **ADDITIONAL HELPFUL RESOURCES**

Water Rights in Montana, April 2014:

<http://leg.mt.gov/content/publications/environmental/2014-water-rights-handbook.pdf> (Most of the definitions in this handout are taken from this publication)

William C. Canby, Jr., *American Indian Law in a Nutshell* (West 2009)

DNRC Available Resources:

- Water Adjudication Bureau: [http://dnrc.mt.gov/wrd/water\\_rts/adjudication/](http://dnrc.mt.gov/wrd/water_rts/adjudication/)
- Reserved Water Rights Compact Commission: <http://www.dnrc.mt.gov/rwrcc/>
- Montana Closed Basins Map:  
[http://dnrc.mt.gov/wrd/water\\_rts/appro\\_info/basinclose-cgw\\_map.pdf](http://dnrc.mt.gov/wrd/water_rts/appro_info/basinclose-cgw_map.pdf)

**NOTE:** The proposed Compact contains a comprehensive list of definitions. Those definitions, and any other legal definitions under State law are controlling for purposes of legal interpretation. The definitions contained in this document are merely intended to help the reader familiarize themselves with basic principles of Montana water law.