

Who Owns the Water in Montana?



Water Fact Sheet #1

Italicized terms are defined in Fact Sheet #10

All waters in Montana, above and below the surface of the earth, are held by the state on behalf of its citizens. The notion that water is a “public” resource was first stated in the 1889 Montana Constitution and was reaffirmed in the 1972 Constitution. Article IX Section 3, asserts that “All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to *appropriation for beneficial uses* as provided by law.”

The State of Montana therefore “owns” Montana’s waters, and it administers a system of *water rights* under the *doctrine of prior appropriation* that gives a person the right to appropriate water for a variety of beneficial uses.



Source: prudkov/iStock/Thinkstock

The Montana Legislature passed the Montana Water Use Act, effective July 1, 1973. The Act established an adjudication system to adjudicate pre-July 1, 1973 water rights, a permit system to control and regulate post-July 1, 1973 water appropriations, changes in use of existing water rights, and created a centralized system of recording water rights. The Act confirmed the fundamental principles of Montana’s prior appropriation doctrine, including the following:

1. Montana’s water belongs to the state for the beneficial use of its people. Therefore, water right

holders do not own the water; they possess the right to use the water.

2. Doctrine of Prior Appropriation (first in time, first in right).
3. “Use it or lose it.” A water right holder must use the water or risk losing the right to use it.
4. The water diverted must be for a beneficial use and all beneficial uses are equal under the law.
5. A water right is a property right and can be separated from the land.
6. One must have a water right to beneficially use water, and after July 1, 1973, new water rights can be obtained only from the Montana Department of Natural Resources and Conservation (DNRC), generally through the permitting process.
7. Any change in the purpose, place of use, place of storage, or point of diversion of a water right can not adversely affect other water rights and must first be approved by the DNRC.

A water right is a unique property right known as a “usufructuary” right. The owner of a water right has the right to the use of the water; they do not own the water itself.

Generally, a water right is attached to the land on which the water is used. If ownership of the land changes, the water right transfers to the new owner unless the water right is expressly severed from the land in the deed.

In some cases, a landowner may want to subdivide their land and split the water right between the different parcels. A landowner may also want to separate the water right from the land by selling the water

right and keeping the land, or keeping the land and selling the water right.

In the event of a change of ownership, the seller is required to file a Water Right Ownership Update with the DNRC. If the water right is severed from the land or split among multiple owners, the seller may need to undergo a change process and show that the proposed changes to the water right will not have an adverse effect upon other users. It is always a good idea to contact DNRC for more information regarding the specifics of your situation if you are unsure.

Water rights can also be relinquished due to non-use, or *abandonment*. Abandonment only applies to water users who intentionally cease to appropriate all or part of a water right over an extended period of time. Non-use as a result of inadequate supply is not evidence of abandonment.

Montana recognizes a variety of water rights. Water rights established prior to July 1, 1973 are known as *existing water rights*. These water rights are also known as use rights, or filed rights. The *priority date* of existing water rights is generally the date water was first put to beneficial use, or the date notice of the intent to appropriate was filed.

Certain pre-July 1st, 1973 livestock and domestic uses from in-stream or groundwater sources were exempt from the statewide water right adjudication process. These are known as exempt rights. A *decreed* water right is a water right issued by the court upon adjudication of a stream (see Fact Sheet #7: *What is Water Rights Adjudication?*).

In 1969, the Montana Legislature authorized the Montana Fish and Game Commission to appropriate waters on 12 streams to maintain *instream flows* and protect fish and wildlife habitat. These rights are known as *Murphy Rights*, after the legislator who sponsored the measure. The priority dates for Murphy Rights are 1970 and 1971 (see Fact Sheet #8: *How Are Instream Flows Protected*).

Federal and Indian reserved water rights were created by an act of Congress, treaty, or an executive order establishing a tribal reservation or federal reservation, such as national parks, forests, and monuments. These rights are also known as Winters Doctrine rights, named for the U.S. Supreme Court case that established the existence of these rights in 1908 (see Fact Sheet #9: *What Are Federal or Tribal Reserved Water Rights*).

For new users looking to acquire a water right after June 30, 1973, the *Montana Water Use Act* established a permitting system administered by the DNRC. Any new surface water or groundwater appropriators must obtain a *beneficial water use permit* before constructing the diversion works or diverting water. The Montana Water Use Act provides for limited exceptions to the permitting requirements for small groundwater wells and small stock ponds on non-perennial streams.



Source: Jerrhoman/Stock/Thinkstock

Some river basins in Montana are closed to certain types of new surface water appropriations because of limited water availability and a concern for protecting existing water rights (see Fact Sheet #6: *How Is Water Managed in the Event of Water Shortages*). In some

areas of the state, groundwater resources may also be closed to new or expanded appropriations through the establishment of Controlled Groundwater Areas. These areas may be designated by the DNRC to protect existing uses and/or public health.

Water users looking to acquire a water right in a closed basin or controlled ground water area should contact the DNRC to learn more about the permitting process in these areas.