

## **I. THE PRIOR APPROPRIATION SYSTEM**

### **A. GENERALLY**

Montana is a Prior Appropriation state, as are most of the Western states. Under the Prior Appropriation Doctrine, one must have a water right to appropriate water from a stream or other source. Municipal water supply users and other water users who buy their water from a water supply system do not need to have a water right, although the municipality or water supply system owner must have a water right in order to divert water for the system users.

### **B. ORIGINS**

The Prior Appropriation Doctrine originated in the Western states to accommodate the irrigation and mining needs of a developing west. Eastern states use the Riparian Doctrine.

### **C. BENEFICIAL USE AND PRIORITY**

Beneficial use and priority of the right are the two key attributes of a water right acquired under the Prior Appropriation Doctrine. For the water right to be valid, it must be used for a beneficial purpose. Each right carries a priority date based on first use. The right having an earlier priority date can be used first - "first in time is first in right."

### **D. LEGALLY PROTECTED PROPERTY RIGHTS**

Water rights in Montana are property rights. They are afforded the protection of the United States and Montana Constitutions just like any other property right. Water rights have value and water users cannot be deprived of their property without due process of law.

A water right is a right to use the water. It is not an ownership right in the water itself. In legalese, this is called a "usufructuary" right.

### **E. EFFECT OF 1973 WATER USE ACT**

Until July 1, 1973, Montana's law regulating water right acquisition, or use, was not constrained by strict statutory limitations. As a practical matter, merely diverting water from a source and applying it to a beneficial use obtained a water right. With a few exceptions, the filing of a document with a governmental entity to give notice of the appropriation was optional.

On July 1, 1973, the Montana Water Use Act became effective. The Act did not alter basic water right concepts, but the procedure for acquiring and changing water rights became an administrative process overseen by the Montana Department of Natural Resources and Conservation

### **F. WATERS SUBJECT TO APPROPRIATION**

A water right can be appropriated from almost any source of water. This includes surface water flowing in streams, groundwater, seepage, drainage and wastewater, and floodwater.

## **G. USES FOR WHICH WATER CAN BE APPROPRIATED**

### **1. Beneficial Use is the Basis, Measure, and Limit of the Right.**

Under the Prior Appropriation Doctrine, water can be appropriated for nearly any beneficial use. It has been said many times that "beneficial use is the basis, measure and limit of the right." This means that if one cannot use the water beneficially, even if one has an existing water right, one cannot exercise the right. For example, if a rainstorm provides adequate moisture for crops, there is no need to irrigate or use the water right because there would be no beneficial use in doing so.

Most water rights have some kind of diversion or development associated with them. However, non-diversionary rights for instream beneficial uses (such as stock watering, recreation, fish and wildlife uses) are recognized as valid, existing rights.

### **2. PREFERRED USES**

Water rights under the Prior Appropriation Doctrine are exercised according to their order of priority, first in time being first in right. Generally, there is no such thing as a preferred use; meaning one kind of use is preferred over another. Although many people believe that domestic use of water has an unqualified right of first use, regardless of priority date, neither the legislature nor any Montana court has adopted such a principle.

## **II. TYPES OF WATER RIGHTS IN MONTANA**

### **A. GENERALLY**

There are many types of water rights in Montana, which were acquired in accordance with particular rules that applied at the time. Each right is just as valid and legal as the next, and just as enforceable, in accordance with its priority date, as the next.

### **B. USE WATER RIGHTS**

Use rights are water rights that were acquired by merely appropriating and beneficially using the water. No recording, approval from a government agency, or other written record of the right was required. Approximately 67% of the water rights filed in Montana's statewide adjudication are use rights. As of July 1, 1973, it became impossible under the Water Use Act to get a new water right in this manner, but existing use rights were not affected. The priority date of use rights is generally the date the water was first put to beneficial use.

### **C. FILED RIGHTS**

These are water rights that were filed with the local county Clerk and Recorder's Office under an optional system that was first statutorily recognized in 1885 and which continued until the July 1, 1973 effective date of the Water Use Act of 1973. The process involved posting a notice at the point of diversion, filing a notice of appropriation with the local county Clerk and Recorder, proceeding with the construction of the diversion facility, and putting the water to use with "due diligence." If one followed all the steps exactly (they are too detailed to describe

here), one got a water right with a priority date relating back to the date the notice was posted at the point of diversion. If the steps were not exactly followed, the priority date would be the date of first use of the water.

#### **D. DECREED RIGHTS**

These water rights were initially use or filed rights that have been adjudicated (decreed) by a district court. These rights are more certain in their existence, because a district court previously reviewed the evidence and decided, at least at the time of the decree, that a water right existed. Today, all pre-1973 water rights are adjudicated in the Water Court.

#### **E. FEDERAL AND INDIAN RESERVED RIGHTS**

When the United States withdraws land from the public domain and reserves it for a federal purpose, it reserves appurtenant water then unappropriated to the extent needed to accomplish the primary purpose of the reservation. The United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.

#### **F. PERMITS**

From and after July 1, 1973, a right to use surface water, and groundwater exceeding 35 gallons per minute, requires an application to be filed with the Department of Natural Resources and Conservation (DNRC) for a permit. The priority date is the date the DNRC receives the application.

#### **G. CERTIFICATES**

Except in controlled groundwater areas, no application for a permit is needed for appropriations of groundwater for amounts of 35 gallons per minute or less, not to exceed 10 acre-feet per year. Water users simply drill a well and then file a Notice of Completion with the DNRC. The date the notice is filed becomes the assigned priority date.

#### **H. INSTREAM USE AND LEASING**

The Department of Fish, Wildlife & Parks is authorized to lease water rights and has several leases in place.

### **III. ADJUDICATION OF WATER RIGHTS**

Montana has embarked upon a massive, statewide adjudication of all the water rights in the state having priority dates before July 1, 1973. The purpose of the adjudication is to bring some certainty to the number and extent of water rights in Montana. Even water rights that were previously decreed by district courts are included in the statewide adjudication. Claims for all existing rights were required to be filed with the DNRC by April 30, 1982. Over 201,000 claims were filed by the deadline. Failure to

file a claim resulted in forfeiture of the water right.

Almost 5,000 claims missed the filing deadline and were considered to be forfeited. In 1993, the Montana Legislature provided for the conditional remission of forfeited water rights, but required payment of a \$150.00 processing fee and required assessment of reasonable administrative costs and expenses incurred by the Water Court due to the filing of a late claim. The filing deadline for late claims was July 1, 1996. Thereafter, no further claims were accepted.

All late claims are subordinate to Indian and federal reserved water rights. If late claims were not postmarked or executed by April 30, 1982 and received by the DNRC by May 7, 1982, then they are also subordinate to rights represented in all valid, timely filed claims, and potentially subordinate to permits or state reservations of water.

Indian and federal reserved water rights are included in this adjudication. The Montana Reserved Water Rights Compact Commission negotiated with federal and tribal authorities in an effort to reach an agreement on the scope of the federal and Indian reserved water rights in Montana. Several agreements have been reached.

The only water rights not included in the initial adjudication effort are "exempt" claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources. These claims were exempt from the mandatory filing deadline initially, but they could be voluntarily filed, and many were. On June 1, 2019, it was mandatory that these claims were filed as well. The stock claims were filed as HB 110 claims and are now included in the adjudication.

Depending on the basin, it could have multiple rounds of adjudication. Many basins had a Temporary Preliminary Decree several years ago and will have to go through a re-examination now. Other basins had a Preliminary Decree for the first round of adjudication and will reach Final Decree once the HB 110 claims are examined. The easiest way to see what level of examination has been completed on a particular basin is to check this DNRC website's map. <http://dnrc.mt.gov/divisions/water/adjudication>

#### **IV. DISTRICT COURT'S ROLE IN ENFORCING MONTANA WATER RIGHTS**

- A. Before 1973, no central recording system existed - Water rights could be obtained by beneficial use or notice of appropriation. These water rights may also have been previously adjudicated in a District Court Decree.
- B. District Courts enforced their own water right decrees through the statutory process of appointing a water commissioner.
- C. The Montana Water Court was created to preside over the statewide adjudication of existing (Pre-1973) water rights.

D. Water rights after 1973

- DNRC issues post-1973 water right permits and change authorizations for pre-1973 rights. District court water commissioners have jurisdiction over these changes and permits, which are incorporated into Red Book tabulations for enforcement.

E. Compacts

- The Montana Reserved Water Right Compact commission negotiates Federal and Indian Reserved Water Rights. Compacted rights are incorporated into Montana Water Court decrees, and any reserved rights that are not compacted will be filed as state-based rights and addressed in the general stream adjudication.

F. Summary

- District Courts currently enforce both pre-1973 District Court decrees and Montana Water Court decrees, which include historical filed rights and use rights, as well as post-1973 permits and change permits issued by DNRC.

## **V. RED BOOK TABULATIONS**

- A. After receiving an order from the district court, the water court may be able to provide a basic list of adjudicated rights in a few days. A more detailed and accurate list with maps, referred to as a Red Book Tabulation, may take several months to complete because the DNRC has to compile a list of all claims, permits, certificates, ditch names, and points of diversion, and map them.
- B. Enforceable decrees include district court decrees, as well as temporary preliminary decrees and preliminary decrees from the Water Court. Water Court decrees are enforceable when all objections to the rights on the subject stream have been resolved. Currently, every basin in the state except for two (in the Flathead) have issued at least one decree.
- C. When a Water Court decree is ready for enforcement, it is more complete than any of the old District Court decrees. District Court decrees were often entered for parts of a stream, or did not include every water user, and usually have not been updated since entered. Water Court decrees include all pre-1973 rights on the stream and tributaries, plus federal and Indian reserved water rights. With the help of the DNRC, the Red Book will include all post-1973 permits as well. MCA §85-2-406(2) does not contemplate enforcing pre-1973 District Court decrees once the water court decree becomes enforceable.
- D. If a basin is partially adjudicated through either the preliminary or temporary preliminary decree, the tabulations will continue to be based on a modified Temporary Preliminary Decree unless objections and hearings to claims in the Preliminary Decree have been resolved. If some of the claims have had objections and issue remarks resolved, but others have not, it will be a hybrid tabulation. It is possible a Red Book from a basin which has recently had a Decree issued will have many changes from the previous year

due to objections or issue remark resolution. The Water Court website has an up to date list of which basins are being adjudicated next and when Decrees will be issued.

<https://courts.mt.gov/Courts/Water/Notices-and-Information/decree-issuance-update>

- E. After the claim has been adjudicated, a water master or judge may place an information remark which helps define a claim. These remarks will often provide further information to explain how a water system works or if there is a private agreement that the commissioner needs to be aware of. This section is located at the end of the Red Book.

## **VI. GENERAL ORDER OF PROCEEDINGS**

1. The Water User petitions the District Court to Enforce a Water Court Decree and Appoint a Water Commissioner.
2. The District Court Requests an Enforcement Tabulation from the Water Court.
3. The District Court Grants the Petition to Enforce the Water Court Decree and appoints a water commissioner.
4. Once a Water Commissioner is appointed, the Water Commissioner must file with the clerk of the District Court an Oath of Office and a Bond, executed by the Commissioner with two or more sureties.
5. Upon receipt of the Water Commissioner's Report, the clerk of the District Court notifies the water users of the amount of fees and expenses the water user will be assessed.
6. If a water user is not satisfied with the distribution of water, the Commissioner's Report, or the apportionment of fees and expenses, he/she may file a Complaint with the District Court.