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Montana Water Rights and Regulation

Understanding Montana Surface Water and Groundwater Rights
Presentation and Written Materials by Betsy Story
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I. Public Waters, Private Rights and Prior Appropriation

A. Water Rights are Use-Based Rights

The Montana Constitution provides that Montana water "shall be held to be a public use" and "are the property of the state for the use of its people" subject, however, "to appropriation for beneficial uses as provided by law." *See,* Article IX, Section 3 of the Montana Constitution below:

ARTICLE IX
ENVIRONMENT AND NATURAL RESOURCES

Section 3. **WATER RIGHTS.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) 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.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

While the above provision is from the 1972 Montana Constitution, the concept was not new. *See,* Article III, Sec. 15 of the 1889 Montana Constitution: ("The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use"). Wells Hutchins aptly described the "ownership" of a water right as follows:

> "Running water in a natural stream is *publici juris*; that is, it belongs to the public. It is an elementary principle that the appropriator does not own the *corpus* of the water while it is

> running in the stream. The right that the appropriator acquires is a right to the usufruct of the water, that is, a right of possession and use only."

Wells A. Hutchins, *The Montana Law of Water Rights*, (1958) pp. 4-5, citations omitted.

While water rights are not necessarily absolute property rights, they are transferable interests appurtenant to the lands on which the water was appropriated for and continuously beneficially used upon. Thus, once a water right is perfected, it can be sold and transferred to successor owners of the water right's *place of use*. Note that the location where the point of diversion and source for a water right arises may be owned by others. There is a fundamental difference between water rights, which are usufructuary, and interests in ditches, which are interests in land. Additionally, as will be discussed later, water rights can be changed or severed from their original purpose and appropriated location (i.e. the original point of diversion, place of use, and other aspects of the original right) as provided by law and subject to adjudication by the Montana Water Court.

B. First in Time, First in Right

Montana, like other western states, is a prior appropriation state. This means that whoever is "first in time" is "first in right." This is the foundation for the supremacy of the most "prior" or "senior" right perfected on a particular water source against subsequent, or "junior" rights. This does not come without limits, however, as the senior user is limited by the parameters of the senior right and cannot infringe upon the rights of others.

In a nutshell, senior water right holders may call for water when there is less flow at the senior's point of diversion than the flow rate that the senior is entitled to according to their water right. Senior users bear the burden of asserting their rights against junior users, as juniors are not required to verify that downstream seniors are getting enough water. *In re S Bar B Ranch Co*., Case No. 40J-4 (Mont. Water Ct. June 6, 2016). Seniors who do not need their full water right on a particular day are obligated to return or leave instream any excess water for use by other juniors. *See,* Mont. Code Ann. § 85-2-412; *See also, Galiger v. McNulty,* 80 Mont. 339, 260 P. 401 (1927). To maximize the amount of flow reaching the place of use, water users should engage in reasonable ditch efficiency measures, such as lining ditches, making sure culverts are the proper size and depth, and if necessary, filing water use complaints against water users diverting water without a water right, or out of priority.

Additionally, all rights, regardless of their priority date, may be lost or reduced for non-use, as will be discussed later.

i. Perfecting Water Rights

As the "first in time, first in right" concept was put to use by Montana's earliest settlers, there were two ways in which early settlers established their water rights. The first and most basic way was by simply putting the water to use (a.k.a. a "Use Right"). Such "Use Rights" require intent and beneficial use. In other words, speculative diversions absent actual use do not constitute a perfected water right. Along the same lines, the intent of the appropriator is the limit of the perfected right.

After 1885, appropriators could file Notices of Appropriation ("NOAs", a.k.a. "Filed Rights") according to the statutory requirements of the 1885 statute. A right may have started as a use right, and the appropriator later filed a Notice of Appropriation to record their pre-existing use. See the example Notice of Appropriation below:

Frederick Pottler
TO
Declaration

Notice of Water Right 5664

TERRITORY OF MONTANA, } ss
COUNTY OF Gallatin

To all Whom these Presents may Concern

BE IT KNOWN, That I the undersigned Frederick Pottler of Fridley P.O. in said County and Territory, do hereby publish and declare, as a legal notice to all the world,

I That I have a legal right to the use, possession and control of and claim Forty (40) inches of the waters of a small stream known as "Sheep Creek" in said County and Territory, for irrigating and other purposes

II That the special purpose for which said water is intended to be used, and the place of intended use is for the irrigation of my Homestead land, described as follows, to wit: NE¼ of section 12 in Township 6 South of range seven (7) East.

III That I have taken said water out of, and diverted it from said stream by means of a ditch which said ditch is 12 inches by 8 inches in size and carries or conducts said 40 inches of water from said stream said ditch taps and diverts the water from said stream at a point upon its North bank about 75 yards north of my present residence in NE¼ of S 12 T6 S R 7E

thence running, or to run, to and upon said described land (and through said land, if I so desire, to any requisite point of final discharge)

IV That I appropriated and took said water on the or about 1st day of July 1869 A D 1869,

by means of said ditch

V That the name of the appropriator of said water is Frederic Pottler

VI That I also hereby claim said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed, from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands of any dams, flumes, reservoirs, constructed, or to be constructed, by me in appropriating, and in using said water

VII That I also claim the right to keep in repair and to enlarge said means of water appropriation at any time, and the right to dispose of the said right, water, ditch or said appurtenances in part or whole, at any time

Claiming the Same, All and singular, under any and all laws, National and Territorial, and rulings and decisions thereunder, in the matter of water rights, and specifically under Sections 731 to 735, inclusive, and 738 and 741, General Laws, Laws of Montana, Revised Statutes of 1879 or as amended, and under an Act of the Legislative Assembly of the Territory of Montana entitled "An Act relative to Water Rights," approved March 12th, A D 1885

TOGETHER WITH ALL AND SINGULAR, The hereditaments and appurtenances thereunto belonging or appertaining or to accrue to the same

Witness my hand at Bozeman Montana Territory, this 12th day of [illegible] 1886

Frederick Pottler

TERRITORY OF MONTANA, County of Gallatin)

ii. Historical Decrees

Disputes naturally arose. The current adjudication by the Montana Water Court was not established until 1973. Until that time, state District Courts "adjudicated" the existing and purported rights along particular sources as complaints were filed, which resulted in a "decree" of the water rights along that particular source. Thus, water rights whose historical basis is listed as "decreed" on a water right abstract today were involved in a historical decree issued by a state District Court, likely sometime in the late 19th or early 20th century.

In essence, a dissatisfied water user (or a group of dissatisfied water users) filed a complaint against the offending water user(s). In a perfect historical decree, the District Court noticed all users along the source of the stream at issue and brought them all into the water rights suit to adjudicate the entire stream. The District Court would hear evidence about all the existing uses on that stream and resolve the disputes, culminating in a list of all valid water rights to that stream and their respective priority dates, flow rates, and other relevant elements – a.k.a. the "decree."

However, not all water sources were involved in historical decrees, nor were all water users along a source involved in a particular decree on that source. Most historical decrees were limited to irrigation rights or other rights (such as mining or industrial uses) that involved large quantities of water. Additionally, certain decrees were more detailed than others, and many new water uses sprang up along a source that was previously decreed. As such, historical decrees were not the best evidence of the scope of valid water rights on all sources, which was one of

many reasons necessitating the state-wide, comprehensive adjudication by the Montana Water Court established by the Montana Water Use Act in 1973.

C. Montana Water Use Act of 1973

The Water Use Act of 1973 overhauled the historical system of appropriating water in Montana. After July 1, 1973, new water rights could no longer be established by merely filing a Notice of Appropriation or putting water to beneficial use. Instead, water users required a permit from the DNRC. *See*, Mont. Code Ann. § 85-2-302(1): ("[A] person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works unless the person applies for and receives a permit or authorization for a change in appropriation right from the [DNRC]."). The permitting process is discussed *infra*. The backbone statutory scheme is contained in Chapter 2, Title 85.

i. Pre-1973 ("Existing") Rights

Following the Water Use Act of 1973, the Montana Legislature established the Montana Water Court to oversee the statewide adjudication of all existing rights.

> "Created in 1979, the Water Court is a special district court with exclusive jurisdiction to determine the characteristics of existing water rights. The [Water Court] also determines whether existing rights have been abandoned due to nonuse. In addition to the Water Use Act, the Water Court's adjudication proceedings are governed by Montana Supreme Court rules. The Water Court's mission is to expedite and facilitate the statewide adjudication of over 218,000 existing water rights claims."

Water Rights in Montana, University of Montana Law School Study (2014) p. 6. First, however, all existing rights had to be identified.

ii. Statement of Claim Filing Period – Claim It or Waive It

One of the purposes of the Montana Water Use Act was "to implement Article IX, section 3(4), of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights." Mont. Code Ann. § 85-2-101(2). Thus, "[t]he legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan." *Id*. Requiring all water users to file "Statements of Claim" for their Pre-73 water rights was the first step in this process.

All "person[s] claiming an existing right" were ordered to "file with the [DNRC] no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the [DNRC]." Mont. Code Ann. § 85-2-221(1). This deadline was extended from the previous deadline of April 30, 1982, and was subsequently extended to 1996 for certain claims, i.e. "late claims." The Statement of Claim is typically the first document appearing in the claim file for a water right on the DNRC Water Right Query. The claim file should also include all of the evidence called for by Mont. Code Ann. § 85-2-224: "maps, plats, aerial photographs, decrees, pertinent portions of those documents, or other evidence in support of the claim."

The legislature further provided that "failure to file a claim of an existing right as required by 85-2-221(1) establishes a conclusive presumption of abandonment of that right." Mont. Code Ann. § 85-2-226. Faced with the risk of forfeiture, many users overclaimed water rights or filed duplicitous statements of claim. On the other hand, many users incorrectly filled out the requisite forms or claimed multiple existing rights on only one form. As such, DNRC review of the Statements of Claim to correct obvious clerical errors and mistakes with the water users prior to the Water Court's Adjudication was required.

iii. DNRC Examination

"[T]he burden of collecting and investigating claims fell to the DNRC" which "often involved onsite visits, aerial photo interpretations, and interviews." *Water Rights in Montana,* Report to the Water Policy Interim Committee (2018) at p. 7. The results of those investigations should be contained within the claim file for each water right on the DNRC Water Right Query System.

The degree of scrutiny by the DNRC in certain basins evolved as time went on. Generally, however, DNRC attempted to confirm historical use of the water right and identified certain issues with the water right. If the DNRC could not confirm some aspect of the water right claim, DNRC added an issue remark to the claim.

Following completion of DNRC's review, "Review Abstracts" of the modified claims and issue remarks added by the DNRC are sent to the water right owners. In recent years, the water right owner has a limited period of time to attempt to resolve certain issues with the DNRC prior to issuance of the Decree. Once the Decree is issued, a deadline will be set for objections to be filed against all claims in that basin, and all remaining issues will have to be resolved before the Water Court.

iv. Water Court Adjudication

a. "Prima Facie" Status of the Claim

In Montana, properly filed Statements of Claim are "prima facie proof" of their content which can only be overcome by a preponderance of the evidence that one or more elements are

incorrect. Mont. Code Ann. § 85-2-227, Mont. W. R. Adj. R. 19. A preponderance of the evidence is a "modest standard" that requires evidence which demonstrates the fact sought to be proved is "more probable than not." *Hohenlohe v. State,* 2010 MT 203, ¶ 33. In the adjudication of water rights, objectors to a claim, including self-objectors to their own water rights, have the burden to prove by a preponderance of the evidence that the elements of the original Statement of Claim "do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973." *Nelson v. Brooks*, 2014 MT 120, ¶ 37.

b. DNRC Issue Remarks

Similarly, Mont. Code Ann. § 85-2-247(2) provides that if "an issue remark is attached to a claim" by DNRC during DNRC's review prior to issuance of the Decree, "the information in the issue remark and the issue remark must be weighed against the claimed water right." When the claim file and information available to the Water Court provide a sufficient basis to do so, the Water Court has the authority to resolve issue remarks on its own. Mont. Code Ann. § 85-2-248(3). If the Water Court does not have enough information to do so, it will require the owner of the water right (a.k.a. the "claimant") to confer with DNRC to attempt resolution of the issue remarks. Thereafter, the claimant and/or DNRC will file documentation and recommendations with the Water Court explaining how to resolve the issue remarks. Mont. Code Ann. § 85-2-248(5).

c. Water Court Cases

Water right owners have three opportunities to participate in the Water Court's adjudication:

- Filing objections to other water rights or their own water rights ("Self Objections");
- Filing counter-objections against the water rights of water right owners who filed objections against them. For example, if Water User A filed an objection to Water User B's water right, Water User B may file a counter-objection to any of Water User A's water rights); and
- Filing Notices of Intent to Appear ("NOIAs") against water rights which received either DNRC Issue Remarks, objections, or counter-objections. The NOIA is typically used in situations where a water right owner wishes to monitor and/or participate in the resolution of objections and issue remarks against other water rights.

After the filing deadlines for all three opportunities listed above in a particular basin have passed, the Water Court begins consolidating water rights into water court cases. While many water court cases are resolved without resort to litigation (and often without lawyers at all) water court cases can rise to "hearing track" posture which proceed similar to civil cases in district courts, where the parties have the opportunity to engage in discovery, depositions, and motions, culminating in a hearing or trial before a Water Master or Water Judge.

A water court case will conclude with a "Master's Report" from the presiding Water Master which will list findings of fact and conclusions of law regarding the resolution of issue remarks, objections, and NOIAs for each water right in the case. The Master's Report will also include "Post Decree" Abstracts of the water rights as adjudicated in that case. The parties have ten days to object to any findings or conclusions in the Master's Report (including clerical errors), after which the Water Judge will adopt, modify, or reject/vacate the Master's Report.

v. Final Decrees

Upon conclusion of all water court cases in the basin, a "Final Decree" will be issued that will include all of the "Post Decree" Abstracts of each water right adjudicated. Note that all water rights that were not adjudicated – in other words, all water rights that were not brought before the Water Court because they did not receive substantive issue remarks or objections – will appear in the Final Decree as they appeared in the Preliminary Decree.

vi. Interlocutory Decrees

In 2017, the Legislature provided a means for water right owners to claim "exempt" water rights for Pre-73 uses of water that were not *required* to be claimed during the Statement of Claim filing period in the early 1980s. These uses included Pre-73 groundwater wells or developed springs for stock or individual domestic purposes, including lawn and garden purposes, and direct-from-source stock watering along surface water sources. Also referred to as "HB 110" claims, these water rights have been reviewed by the DNRC similar to the process outlined above for Statements of Claim and issued in "Interlocutory Decrees" in basins in which the Preliminary Decree adjudication has already begun. In other basins where the Preliminary Decree adjudication has yet to begin, HB 110 claims will be included in the Preliminary Decrees for those basins. The adjudication of Interlocutory Decrees follows the same procedure as Preliminary Decrees but is typically less intensive as there are fewer exempt claims, and therefore fewer issue remarks and objections for the Water Court to resolve.

vii. Concepts that Affect the Adjudication of Water Rights: Abandonment and Illegal Expansion

An existing water right is "a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." W. R. Claim Exam. R. 2(a)(23). While the adjudication of existing rights is a snapshot in time of the elements of the right as it existed in 1973, there are often circumstances arising after 1973 that affect the adjudication of the Pre-73 elements. For example, assessing whether the existing right has been fully or partially abandoned after 1973 is within the purview of the Water Court. Abandonment is a fact-intensive inquiry into the length of alleged non-use coupled with "intent" (or lack thereof) to abandon the right. See, *Heavirland v. State*, 2013 MT 313, ¶ 18; *79 Ranch v. Pitsch,* 204 Mont. 426, 433, 666 P.2d 215, 218 (1983); *In Re Clark Fork River Drainage Area*, 274 Mont. 340, 344, 908 P.2d 1353, 1355 (1995); *In re*

Musselshell River Drainage Area, 255 Mont. 43, 51, 840 P.2d 577, 582 (1992). On the other hand, expansions of existing rights need to be distinguished from the existing right's historical elements. Generally, the Water Court will generate "implied claims" with a junior priority date for the expansion if it is reasonably supported by the evidence. *See, e.g., Final Order,* Water Court Case 41B-0254-P-2015, (Dec. 14, 2023) pp. 6-7, citing *Smith v. Duff,* 39 Mont. 382, 389 (1909): (expansion of an 1873 decreed right after 1953 "came too late to warrant attaching an 1873 priority date to the expanded acreage[]" but warranted the generation of a 1953 implied claim, however, "[t]he remaining acreage [that] was not irrigated until after July 1, 1973" came "far too late … to reasonably assert [claimants] were diligent in the development of an existing right[]" and no implied claim was generated for those acres.)

D. Post-73 Water Rights

i. DNRC Permits

The Montana Water Use Act of 1973 acknowledged that new uses of water would need to be permitted and recognized prior to the completion of the statewide adjudication. Mont. Code Ann. § 85-2-101(5) provides:

> "It is the intent of the legislature that the statutory determinations for issuing new water use permits and authorizing changes do not require the adjudication of all water rights in the source of supply. ... Consequently, the legislature has provided an administrative forum for the factual investigation into whether water is available for new uses and changes both before and after the completion of an adjudication in the source of supply. To allow for orderly permitting in the absence of a complete adjudication in the source of supply, permits issued under this chapter are provisional. A provisional permit is subject to reduction, modification, or revocation by the department as provided in 85-2-313 upon completion of the general adjudication."

Mont. Code Ann. § 85-2-313 further provides in relevant part:

> "Upon petition, the amount of the appropriation granted in a provisional permit must be reduced, modified, or revoked by the department following a show cause hearing in which it is determined that reduction, modification, or revocation is necessary to protect and guarantee existing water rights determined in the final decree. ... A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department."

ii. Permitting Criteria for Post-73 Water Rights

Mont. Code Ann. § 85-2-311 provides for the criteria for issuance of a beneficial use permit, a.k.a. the "311 Criteria." Applicants for a beneficial use permit must prove by a preponderance of the evidence the following:

- Physical availability of water
- Legal availability of water
- Lack of adverse effect to existing water rights
- Adequate means of diversion
- Beneficial use
- Possessory interest in the point of diversion and place of use

If a valid objection is filed, the applicant must prove additional criteria. If the permit is for 4,000 or more acre-feet of water per year or 5.5 CFS, the applicant must prove additional criteria subject to the higher standard of proof of "clear and convincing evidence."

iii. Post-73 Changes to Pre-73 Rights

A "Change Authorization" from the DNRC is required for changes to the points of diversion, places of use, purpose of use, or place of storage, of existing ("Pre-73") water rights. Mont. Code Ann. § 85-2-402. An applicant for a Change Authorization must prove by a preponderance of the evidence:

- Lack of adverse effect to existing water rights
- Adequate means of diversion (unless applying to change to instream flow, mitigation, or marketing for mitigation)
- Beneficial use
- Possessory interest in the point of diversion and place of use (unless applying to change to instream flow, mitigation, or marketing for mitigation)

Similar to beneficial use permits, if valid objections are filed or if the change involves 4,000+ acre-feet/year or 5.5 CFS, additional criteria and different standards of proof will apply. Please see Mont. Code Ann. § 85-2-402 for all of the factors that affect the requisite criteria for obtaining a Change Authorization depending on the contemplated change to the existing right.

E. Distribution and Enforcement Disputes

"Montana's water rights system distinguishes water adjudication from water distribution." *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 16. Determining which forum(s) your particular dispute should be in is the first step towards resolution.

i. Ditch Disputes

Ditch easements (a.k.a. "ditch rights") and water rights are separable and distinct property rights. *Connolly v. Harrel*, 102 Mont. 295, 300-01 (1936). Ditches are easements that attach to land, while water rights are usufructuary rights to the use of the water more akin to a "permit" granted by the state. See, Mont. Code Ann. § 70-17-101. Thus, the adjudication of water rights by the Montana Water Court is not an adjudication of the water right owners' rights to ditches, because awards of rights to use water do not restrict the use to any particular diversion channel. *Missoula Light & Water Co. v. Hughes*, 106 Mont. 355, 364-65, 77 P.2d 1041 (1938).

Rather, the Water Court confirms or identifies the ditches historically used with the water right by listing them under the Point of Diversion and Ditch Elements of the water right abstract for the purpose of providing guidance to future users and water commissioners of how the water under the water right has been historically distributed. However, this identification on a water right abstract does not necessarily equate to the existence of a ditch right. Disputes about the existence of a ditch right associated with a particular water right are not only beyond the jurisdiction of the Water Court but requires an analysis of property law. Specifically, because ditch easements are real property rights, they have to be acquired through conveyance (i.e. a deed or agreement between landowners) or prescription (open, notorious, hostile, adverse use of the ditch for the requisite statutory period of five years). See, *Mildenberger v. Galbraith*, 249 Mont. 161 (1991).

In reality, however, most ditch disputes also involve questions about the validity or scope of the water rights in the ditch. In those situations, the questions related to the elements of the water rights must be certified to the Water Court, while the questions related to the ditch rights remain with the District Court. *See,* Mont. Code Ann. § 85-2-406(2)(b): ("[w]hen a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to [Title 85, Chapter 2], any party to the controversy may petition the district court to certify the matter to the chief water judge.").

ii. New or Ongoing Water Rights Disputes

As explained above, the Water Court has exclusive jurisdiction over "all matters relating to the determination of existing water rights[.]" Mont. Code Ann. § 3-7-224(2). While State District Courts "lack[] authority to adjudicate water rights" they "may supervise the distribution of rights to the use of water which have previously been decreed." *Fellows v. Office of Water Com'r ex rel. Perry v. Beattie Decree, (Fellows II)* 2012 MT 169, ¶ 15. Accordingly, State District Courts may appoint Water Commissioners pursuant to the petition process described in Mont. Code Ann. §§ 85-2-406(4) and 85-5-101(1) in order to enforce the operative decree on the source in question. If users on the source are dissatisfied with the Water Commissioner's enforcement, they can file a Dissatisfied Water Use Complaint with the District Court. *See, Baker Ditch Co. v. District Court*, 251 Mont. 251, 256, 824 P.2d 260, 263 (1992).

When a new and unpermitted use of water arises on a source (i.e. an illegal use) Water Use Complaints with the DNRC are appropriate. Because such new uses are post-1973, Water Use Complaints are a tool to get the DNRC's attention that a violation of the Water Use Act may be occurring so that DNRC may enforce the Water Use Act against the alleged illegal use.

II. Groundwater

While the Montana Supreme Court in 1912 acknowledged that certain groundwater ("subterranean water") is tributary to surface waters and could be subject to call by senior surface water users, there were no rules or statutory requirements for perfecting groundwater rights until 1961. *See, Ryan v. Quinlan*, 45 Mont. 521, 533-34, 124 P. 512, 516 (1912). Determining the priority date of groundwater rights established depends on the type of documentation filed in relation to when the well was first put to use.

Groundwater rights arising prior to January 1, 1962, were simply deemed junior to all surface water rights. Section 89-2912, RCM. Groundwater rights appropriated prior to January 1, 1962, required a Declaration of Vested Groundwater Rights. Water Court Case 42B-3 (2012 WL 10638515), citing Section 89-2913(h), RCM. Groundwater rights arising between January 1, 1962, and July 1, 1973, required a Notice of Appropriation and a Notice of Completion (GW2). "If only a Notice of Completion was filed, the priority date is the date the Notice of Completion was filed." Water Court Case 42B-3, citing Section 89-2913(e), RCM. The priority dates of groundwater rights arising after July 1, 1973, is the date the Notice of Completion of Groundwater Development and Form 602 is or was filed with the DNRC.

Beneficial use permits for groundwater may be required in controlled ground water areas and stream depletion zones depending on the amount of ground water seeking to be appropriated. Outside of controlled groundwater areas, beneficial use permits for groundwater are not required in the following situations:

> (i) when the appropriation is made by a local governmental fire agency organized under Title 7, chapter 33, and the appropriation is used only for emergency fire protection, emergency fire training, and emergency fire-related operations, which may include enclosed storage;
>
> (ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive geothermal heating or cooling exchange applications, all of the water extracted is returned without delay to the same source aquifer, and the distance between the extraction well and both the nearest existing well and the hydraulically connected surface waters is more than twice the distance between the extraction well and the injection well;

> (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or
>
> (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding this limitation requires a permit.

Mont. Code Ann. § 85-2-306(3)(a).

New groundwater appropriations within subdivisions are subject to different rules, depending on when the subdivision was created, the size of the subdivided lots, and the characteristics of the groundwater development(s). See subsection (iii) above pertaining to "combined appropriations." The guidance surrounding combined appropriations has evolved significantly in recent years and is likely to be further refined and revised. For contemplated subdivisions requiring new groundwater wells, consultation with the DNRC and local counsel versed in water law issues is recommended.