

WATER RIGHTS in MONTANA

A stylized graphic of a water drop, rendered in a dark gray color. The drop is teardrop-shaped with a thick outline and a lighter gray interior, giving it a three-dimensional appearance. It is positioned centrally, overlapping the word 'in' in the title.

february
2018

Water Policy Interim Committee
P.O. Box 201704
Helena, MT 59620-1704
Phone (406) 444-3742
leg.mt.gov/water

Acknowledgment

Water Rights in Montana is a compilation of two previous citizen guides discussing Montana water rights—the Montana Department of Natural Resources and Conservation's *Water Rights in Montana* and the Environmental Quality Council's and Montana University System Water Center's *Wading into Montana Water Rights*. We would like to thank the authors of the latter guide, Michelle Bryan and Professor Gerald L. Westesen, for providing a foundation for this publication.

Disclaimer

Water Rights in Montana should not be used as a legal reference. When in doubt, always refer to the MONTANA CODE ANNOTATED or the Department of Natural Resources and Conservation ADMINISTRATIVE RULES OF MONTANA.¹ When making any legal judgments on the adequacy or completeness of procedure, always consult your own legal counsel.

¹ Terms that are capitalized and underlined are further defined or explained in the glossary at the end of the publication.

Table of Contents

Acknowledgmenti

Disclaimer..... iii

Background of Water Rights in Montana..... 4

Montana Water Use Act..... 5

Legal Processes for Water Rights..... 6

Adjudication of Water Rights..... 7

 A Short History of Adjudication 7

 Who Administers the Adjudication Process?..... 8

 How Does the Adjudication Process Work? 9

 Decrees10

 Federal Reserved and Indian Reserved Water Rights14

New Appropriations of Water15

 Surface Water15

 Ground Water16

 Stream Depletion Zones17

 Replacement Wells18

 Redundant Wells18

 Replacement Point of Diversion19

 Appropriations Over 3,000 Acre-Feet.....19

 Leasing Water Rights for Road Construction20

How the Permit System Works21

 Step 1 - Application Form.....21

 Step 2 - Application Review22

 Step 3 - Project Completion25

 Step 4 - Certificate of Water Right.....26

Temporary Permits28

Interim Permits28

Changes in Water Use.....28

 Temporary Change in Appropriation Water Right.....30

 Marketing for Aquifer Recharge or Mitigation31

 Temporary Lease of a Water Right31

 Salvaged Water32

Ownership of a Water Right.....32

Water Distribution33

Enforcement of Water Rights.....34

 District Court34

Other Types of Water Rights36

 Water Reservations36

 Instream Use and Leasing37

Limitations on Water Use.....38

 Controlled Ground Water Areas38

 Effects of a Controlled Ground Water Designation.....39

 Yellowstone Controlled Ground Water Area.....40

Closure of Highly Appropriated Basins.....	41
Legislative Closures.....	41
Administrative Rule Closures	42
Milk River Closures	43
Compact Closures	43
Appropriations in Closed Basins	46
Sources of Information.....	48
DNRC Offices	48
Water Resources Regional Offices	48
Montana University System Water Center	49
Montana Water Court.....	49
Water Policy Interim Committee.....	50
Water Conversion Table	50
Water Right Forms and Fees	50
Glossary of Terms	54
Appendix A. Government Authority and Water Rights.....	59
Appendix B. Status of Water Compacts in Montana.....	62

Figures and Tables

Flowchart of Legal Processes for Water Rights	6
Flowchart of Decree Process.....	10
Flowchart for Permit and Change Applications	27
Active, Permanent Controlled Ground Water Areas	40
Basins Closed by Administrative Rule	43
Effects on Areas Closed by Federal, Tribal Compacts.....	43
Flowchart of Closed Basin Ground Water Permits	47
Water Right Forms and Fees	50

Background of Water Rights in Montana

Water powers our economy, ensures human health, and provides recreational activities. Few elements reach so deeply into the human existence as water. 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:

[a]ll 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.

The birth of the prior appropriation system of distributing water has its roots in the California gold rush. It was customary in the mining camps that the first person to stake a claim and subsequently divert a stream to operate the claim, had the first right to that water. The prior appropriation system is often summarized as “first in time, first in right.”

In Montana, many early users sought legal protections for their rights by filing a claim at a county courthouse. Others simply put the water to use. In some cases, district courts issued decrees on who was entitled to what amount of water in times of scarcity.

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 instream flow to benefit fish, AQUIFER RECHARGE, MITIGATION, and 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)).

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.

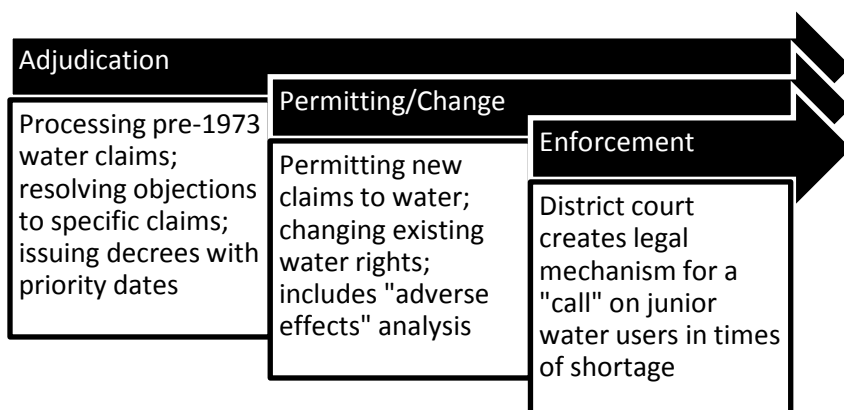
Montana Water Use Act

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.

Legal Processes for Water Rights

The Water Use Act and other legislation helped create the three major processes related to water rights:



Other government entities have certain authorities related to water rights, which are listed in Appendix A.

This handbook focuses on the three major entities involved:

Agency	Role
Water Court	Adjudicates all pre-1973 water claims
Department of Natural Resources and Conservation	Examines and processes pre-1973 claims Permits new uses of water Processes changes to existing water rights
District courts	Enforce water rights through court proceedings

Adjudication of Water Rights

A Short History of Adjudication

The Montana Supreme Court recognized the prior appropriation doctrine in 1921. The 1939 Montana Legislature saw the need for an organized legal system. But the first real effort to organize and administer water rights wouldn't come until the state's constitution was rewritten more than 30 years later.

The 1973 constitution meant that the state recognized all existing beneficial uses of water and that the state would create an organized legal system. Efforts to adjudicate existing water rights would follow first in the Powder River basin.

Initiated in 1973, the burden of collecting and investigating CLAIMS fell to the DNRC. Investigations often involved onsite visits, aerial photo interpretations, and interviews. In 1979, after six years of intensive field work, completion of adjudication for the first BASIN appeared distant. Decidedly, to adjudicate its remaining 84 basins in a timely manner, Montana needed a more efficient system.

Consequently, the 1979 Legislature passed Senate Bill 76 (SB 76), amending the adjudication procedures originally established by the Montana Water Use Act. Rather than adjudicating existing water rights one basin at a time, the Legislature opted for a comprehensive general adjudication of the entire state. Existing water rights are those that originated legally before July 1, 1973, and are often referred to as pre-1973 water rights.

Senate Bill 76 established two revolutionary entities for western water law. The Montana Water Court is a specialized court that has sole jurisdiction over the adjudication of pre-1973 water right claims. The other entity is the Montana Reserved Water Rights Compact Commission. The compact commission is responsible for negotiating on behalf of the state with the federal and tribal entities to quantify the federal and tribal reserved water rights.

When SB 76 was passed, many people thought the process would be finished in less than 15 years. For a variety of reasons, the adjudication is still not complete.

Who Administers the Adjudication Process?

MONTANA WATER COURT

The Water Court was designed with a chief judge and four district court judges, although rarely does a district court judge get assigned a Water Court case.

The Montana Supreme Court monitors all water judges, WATER MASTERS, and Water Court personnel (sections 3-7-204 and 3-7-221, MCA). The chief justice of the Montana Supreme Court appoints a chief water judge to supervise all division water judges and guide the statewide adjudication. The 2011 Legislature allowed the chief justice to appoint an associate water judge (section 3-7-221, MCA). The Legislature confirms the appointments of the chief water judge and associate water judge at four-year intervals.

District Court judges (current or retired) serve as a water judge from a district within a water division (sections 3-7-201 and 3-7-301, MCA).

Water judges cannot preside over water claims occurring beyond the boundaries of their divisions (section 3-7-501, MCA).

It is at the chief water judge's discretion to assign cases to water masters, to division water judges, and to the associate water judge. The division water judges have historically been used to a limited extent.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

The DNRC and its regional offices assist the Water Court throughout the adjudication process by:

- providing information and technical support to the water judges;
- providing information and technical support to persons filing claims; and
- upon the request of a water judge, conducting field investigations of claims (section 85-2-243(1), MCA).

RESERVED WATER RIGHTS COMPACT COMMISSION (RWRCC)

Unique circumstances arise when federal entities or Indian tribes assert reserved water claims in a basin. Separate from general adjudication, Montana may form a COMPACT with the entity or tribe. In such cases, the RWRCC negotiates on behalf of the governor (section 85-2-701, MCA).

How Does the Adjudication Process Work?

In 1979, the Montana Supreme Court issued a Water Rights Order requiring all persons claiming existing water rights to file their claims with the DNRC by January 1, 1982. Failure to file by the deadline would result in presumption of ABANDONMENT of the right (section 85-2-212, MCA).

Later, the court extended the filing deadline to April 30, 1982. The DNRC received more than 200,000 claims. The 1993 Legislature allowed the filing of late claims. Around 4,500 late claims were filed

before the 1996 closing date. Late claims are subordinate to other filed claims.

Criteria. Each statement of claim had to include:

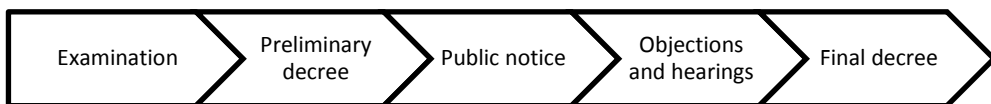
- the name and address of the claimant;
- the name of the WATERCOURSE or water source from which a right was claimed;
- the quantities and times of claimed water use;
- a legal description of the point of DIVERSION and place of claimed water use;
- the purpose of use and the number of acres irrigated, if applicable;
- an approximate starting date of beneficial use;
- a sworn statement that the claim is true and correct; and
- supporting evidence, such as maps, plats, aerial photos, or decrees (section 85-2-224, MCA).

Exemptions. Existing water rights claims for livestock and domestic uses from instream flows or GROUND WATER sources were exempt from the requirement to file a claim; however, these could be voluntarily filed.

The 2013 Legislature passed a law that allowed one to file for these “exempt rights.” These rights must be filed with the DNRC by June 30, 2019. The filing process includes filing fees, public notification, and objections from other potentially affected water rights holders.

Decrees

A decree is the final product of a basin adjudication. To reach completion, a decree progresses through several stages:



Each stage is described in more detail in the following pages.

Examination

Before the Water Court evaluates a basin, DNRC staff must examine each claim to determine if it is complete, accurate, and reasonable. If an examination uncovers excessive claims or other discrepancies, the DNRC contacts the claimant to resolve any errors. If the DNRC is not able to come to an agreement with a claimant on a discrepancy, an ISSUE REMARK is placed on the claim. All issue remarks must be finally resolved before a final decree can be issued. After examining all claims in a basin, the DNRC issues a summary report to the water judge who uses the information to prepare the basin decree.

Preliminary Decree

In basins with either concluded compacts or no reserved water rights, the Water Court issues a preliminary decree based on:

- statements of claim;
- the DNRC summary report; and
- if applicable, reserved water rights compacts (section 85-2-231(2), MCA).

Temporary Preliminary Decree

When a basin adjudication involves RESERVED WATER RIGHTS negotiations, a water judge may issue a temporary preliminary decree defining all claimed rights except reserved ones. Once a compact concludes, the water judge incorporates it into a preliminary decree (section 85-2-231(1) and (4), MCA).

Public Notice of the Decree

A notice of issuance of every temporary preliminary or preliminary decree is given to all parties who may be affected by the decree, along with the deadline for objecting to the rights or compacts, or both, in the decree. This notification consists of direct mailings and publication in area newspapers (section 85-2-232(1) and (3), MCA). Water users are encouraged to review the decree and file objections if they believe that their own claims or claims belonging to others in the basin are in error

or contain incorrect information. Following the expiration of a decree's objection period, each party whose claim received an objection will be given notice of the filing of that objection. This notice triggers a 60-day counterobjection period.

Objections

It is very important that persons who are entitled to file an objection do so if they believe there is a problem with a claim. By failing to file an objection in an earlier decree phase, the person may be excluded from filing an objection at a later date (section 85-2-233(1)(d), MCA).

All issue remarks, as defined by law, must be finally resolved before a final decree may be issued whether or not there is an objection to the claim (section 85-2-248, MCA).

Hearings

Persons disagreeing with a decree have a period of 180 days to file an objection, which may be extended up to 360 days. Accordingly, the Water Court will hold a hearing to reevaluate all disputed areas. Any of the following parties may object:

- the DNRC;
- any person named in the decree;
- any INTERESTED PERSON; or
- any other person who claims rights to the use of water from sources in other basins that are hydrologically connected to the sources within the decreed basin and who would be entitled to receive notice if the claim or claims were from sources within the decreed basin (section 85-2-233(1), MCA).

Resolving Issue Remarks

If an objection is not filed and a claim contains an issue remark, the Water Court is required to take certain steps to finally resolve the issue remark.

First, the Water Court will review each factual and legal issue remark to determine if information in the claim file or information obtained by

the court provides a sufficient basis to resolve the issue remark or to determine if the issue remark can be corrected as a clerical error.

If an issue remark cannot be resolved by the court, the Water Court will notify the claimant in writing that each issue remark must be resolved through an informal process with the DNRC.

For any issue remark that is not resolved by this informal process with the DNRC, the Water Court will schedule proceedings to resolve the issue remark. The proceedings must include the DNRC and any parties appearing in opposition to the claim, including the attorney general if the attorney general has chosen to intervene.

If the issue remark involves nonperfection or abandonment, the Water Court shall join the state of Montana through the attorney general as a necessary party to resolve the issue remark. If the issue remark does not involve nonperfection or abandonment, the attorney general may intervene as a matter of right.

Following any hearings or proceedings, the Water Court will issue its written decision. The Water Court's decision on each issue remark that it reviews pursuant to law must be documented in a water master's report or water judge's order. The Water Court must modify the abstract of each claim in accordance with its written decision and remove any applicable issue remarks (section 85-2-248, MCA).

Final Decree

After resolving all objections and finally resolving all issue remarks, the water judge shall issue a final decree. Because the water judge adjusts EXISTING RIGHTS during the adjudication, the elements of a final decreed water right may differ from the original claim. For each water right, the decree includes:

- FLOW RATE;
- PRIORITY DATE;
- beneficial use;
- time and place of use;
- source of water; and
- place and means of diversion (section 85-2-234(6), MCA).

In turn, the DNRC issues a Certificate of Water Right to each DECREEED WATER RIGHTS holder and files a copy in its centralized records system (section 85-2-236, MCA).

The Water Court has issued six final decrees. An accurate accounting of water throughout the state's 85 hydrologic basins must necessarily include all permitted water rights (new appropriations of water), changes to water rights, federal water rights, Indian reserved water rights, and exempt groundwater rights. These rights are described in the following pages.

Updates on the adjudication can be found at dnrc.mt.gov/wrd/water_rts/adjudication

Federal Reserved and Indian Reserved Water Rights

Montana's Reserved Water Rights Compact Commission (RWRCC) was established by the Montana Legislature in 1979 as part of the statewide general stream adjudication process (section 85-2-701, MCA).

The RWRCC was authorized to negotiate settlements with federal agencies and Indian tribes claiming federal reserved water rights within the state of Montana. A federal reserved water right is a right to use water authorized by an act of Congress, a treaty, or an executive order establishing a tribal or federal reservation. The amount of water the reservation is entitled to depends on the purpose for which the land was reserved. In Montana, reserved water rights have been claimed for seven Indian reservations, for allotments for the Turtle Mountain Chippewa Tribe, for national parks, forests, and wildlife refuges, and for federally designated wild and scenic rivers.

Settlements negotiated by the RWRCC on behalf of the state of Montana are ratified by the Montana Legislature and the tribal councils and approved by the appropriate federal authorities. In some instances, approval by the U.S. departments of Justice and the Interior are sufficient. In other cases, where federal authorization or federal

appropriations are needed to implement provisions of the settlement, Congress must approve. A list of all compacts is at Appendix B.

New Appropriations of Water

Any person planning a new or expanded development for a beneficial use of water from SURFACE WATER or ground water must obtain a permit to APPROPRIATE water or file a Notice of Completion of Ground Water Development to get a Certificate of Water Right. The permit system is administered by the DNRC.

There are basins and subbasins in Montana that have been closed to new appropriations of surface water because they have been deemed to be highly appropriated. There are some exceptions to these closures.

Surface Water

A person must apply for and receive a permit to appropriate water *before* beginning to construct diversion works or diverting water from a surface water source. Those seeking a permit must plan ahead—the application process takes time to complete. The applicant for a permit must provide the following evidence:

- the physical availability of water at the point of diversion during the requested period of diversion;
- the legal demands on the source;
- a comparison of the physical water available and the existing legal demands;
- the effects of the proposed use on existing water rights;
- an analysis of the effects of existing water rights on the water supply within the source;
- the design and operation of the proposed system;
- a description of the proposed beneficial use;
- an explanation of how the requested flow rate and volume was determined and that the amounts are the amounts necessary for the use; and
- that the applicant has possessory interest in the place of use.

The exception to this law is for small livestock pits or reservoirs located on NONPERENNIAL FLOWING STREAMS. If the pit or reservoir will hold less than 15 ACRE-FEET of water with an annual appropriation of less than 30 acre-feet and will be located on a parcel of land 40 acres or larger, construction may begin immediately. Within 60 days of completion, an Application for a PROVISIONAL Permit for Completed Stockwater Pit or Reservoir, form 605, must be submitted to the DNRC. A provisional permit, subject to prior water rights, will then be issued. If the reservoir adversely affects prior water rights, the DNRC can revoke the permit or require an applicant to modify the reservoir.

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.

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.

In 2016, the Montana Supreme Court reinstated a DNRC rule that prohibits an appropriation of water from a same source aquifer by two or more groundwater developments, "which, in the department's judgement, could have been accomplished by a single appropriation."

As a result, new subdivisions or developments cannot assume each newly created lot will be able to use its own ground water exemption.

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.

Stream Depletion Zones

The 2013 Legislature passed Senate Bill 346, 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. 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 stream depletion zone may be established in a closed basin by:

- The DNRC;
- A municipality, county, conservation district, or local water quality district;
- The owners of at least 15% of the flow rate of the surface water rights in the area estimated to be affected.

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.

In 2016, the DNRC approved the first stream depletion zone for Rye Creek, a tributary to the Bitterroot River.

Replacement Wells

If an existing well fails and a new well is constructed, a person can retain the priority date of the existing well. A Replacement Well Notice, form 634, must be filed if the new well meets the following requirements:

- The old and new wells must be located outside the boundaries of a controlled ground water area, or they can be located within the boundaries of a controlled ground water area if the provisions of the order do not restrict the development of replacement wells.
- The existing well may no longer be used and must be abandoned.
- The flow rate and VOLUME of water must be equal to or less than the amounts used from the old well. For municipal wells, the flow rate may not exceed 450 gallons a minute. For other wells, the flow rate and volume may not exceed 35 gallons a minute or 10 acre-feet a year.
- The old and new well withdraw water from the same ground water source.

If these conditions are met, the DNRC can issue an authorization to change a water right (section 85-2-402(15), MCA).

Redundant Wells

When a public water supply system constructs a backup well, a Redundant Well Construction Notice, form 635, must be filed if the backup well meets the following requirements (section 85-2-402(16), MCA):

- The backup well must withdraw water from the same ground water source as the original well(s).
- The backup well must be required by a state or federal agency.

The flow rate and volume of all wells, including backup wells, may not exceed the flow rate or volume authorized by the water rights for the public water supply system.

Replacement Point of Diversion

An appropriator may change an appropriation right for a replacement point of diversion without the prior approval of the department if:

- The existing point of diversion is inoperable due to natural causes or deteriorated infrastructure;
- There are no other changes to the water right;
- The capacity of the diversion is not increased;
- There are no points of diversion or intervening water rights between the existing point of diversion and the replacement point of diversion or the appropriator obtains written waivers from all intervening water rights holders;
- The replacement point of diversion is on the same surface water source and is located as close as reasonably practicable to the existing point of diversion;
- The replacement point of diversion replaces an existing point of diversion and the existing point of diversion will no longer be used;
- The appropriator can show that the existing point of diversion has been used in the 10 years prior to the notice for change of appropriation right for a replacement point of diversion; and
- The appropriator can show the change will not increase access to available water, change the method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed.

Within 60 days after completion of a replacement point of diversion, the appropriator shall file a notice of replacement point of diversion with the department on a form provided by the department (section 85-2-402(18), MCA).

Appropriations Over 3,000 Acre-Feet

A person proposing to appropriate more than 3,000 acre-feet of ground water a year must receive legislative approval for the specific appropriation. This law does not apply to appropriations for municipal

use, public water supplies, or the irrigation of cropland owned and operated by the applicant.

Leasing Water Rights for Road Construction

Water needed for road construction and dust control can be leased from an individual who holds a valid Montana water right. Section 85-2-410, MCA, was specifically designed to assist Montana's road construction contractors with water use COMPLIANCE. The restrictions include the following:

- The lease can run for up to 90 days and applies to diversions of water that do not exceed 60,000 gallons a day or the amount of the existing right, whichever is less;
- A combination of short-term leases may not exceed 120,000 gallons a day for one project;
- The lease does not require prior approval by the DNRC. However, 30 days prior to the use of water, the lessee must publish a notice of the proposed use in the local newspaper or mail individual notices to the potentially affected water users in the area of the proposed point of diversion; and
- At least 2 days prior to water use, the lessee must submit a copy of the public notice and a copy of the lease agreement to the DNRC.

An existing water user whose right is not being satisfied may make a complaint to the DNRC and could cause the short-term lease to end. However, if it is shown that there is no adverse effect on the existing water user's right, the lessee can continue to divert water.

How the Permit System Works

The permit process involves several steps. A prospective water user (applicant) must follow the procedure described below to apply for a water use permit.

Step 1 - Application Form

A potential new water user must first complete the Application for Beneficial Water Use Permit, form 600. The application form requires information describing the intended use, place of use, point of diversion, source of supply, amount of water to be used, diversion facilities, and other particulars of the proposed appropriation. The application also must contain evidence pertaining to the permit criteria that must be met. There are specific rules that define what must be included in an application in order for the DNRC to deem an application correct and complete (see Chapter 36.12, ARM). If the DNRC deems the application correct and complete, the department will begin evaluating the application. An application fee must be submitted with the application. Forms and instructions are available from any water resources regional office and are available on the DNRC website at www.dnrc.mt.gov/divisions/water/water-rights. A list of forms is included in this publication.

Additional criteria must be addressed if the application is for appropriations of 4,000 or more acre-feet and 5.5 or more CUBIC FEET PER SECOND (cfs). If the appropriation is for an out-of-state use, the applicant must also address criteria set out in section 85-2-311(4), MCA.

If the application is for an appropriation of ground water in a closed basin, additional criteria apply. This procedure is explained later in this publication.

Criteria for Issuance of a Permit Section 85-2-311(1), MCA

The applicant for a water use permit to appropriate less than 4,000 acre-feet a year and 5.5 cfs has the initial burden to prove by a PREPONDERANCE OF THE EVIDENCE that the criteria for issuance of a permit are met. These include the following:

1. Water is physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.
2. Water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested.
3. The water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state WATER RESERVATION will not be adversely affected. Adverse effect is based on a consideration of the applicant's plan to exercise the water right so that prior water rights will be satisfied.
4. The proposed means of diversion, construction, and operation of the appropriation works are adequate.
5. The proposed use of water is a beneficial use.
6. The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

An applicant is required to prove one of the following criteria if a valid objection is filed:

1. The DISCHARGE PERMIT holder has the ability to satisfy EFFLUENT limitations of a permit issued in accordance with Title 75, chapter 5, part 4, MCA.
2. The proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to section 75-5-301(1), MCA.
3. The water quality of a prior appropriator will not be adversely affected.

Step 2 - Application Review

The date that the DNRC receives the original permit application will be the initial priority date assigned to the appropriation. This date is important because of the “first in time is first in right” principle in Montana water law. The DNRC will review the application to ensure all the information required by rule is provided. Applications are usually reviewed in the order that they are received.

At the same time, an environmental review is made to determine whether the proposed project will have significant environmental impacts and whether an environmental impact statement is needed. If information is incomplete, the department will send a deficiency letter within 180 days of receipt of the application.

After issuance of the deficiency letter, the applicant has 90 days to make the application correct and complete. If an application is not correct or complete within 30 days of DNRC notification, the priority date will change to the date that the application is made correct and complete. An application that is not made correct or complete within 90 days will be terminated.

Within 120 days of determining that an application is correct and complete, the DNRC issues a preliminary determination to grant or deny an application. An applicant may meet with the DNRC prior to the issuance of the preliminary determination in order to review and discuss any concerns with the application and the information that will be the basis of the department's determination. The applicant may provide the department additional information. Other water users may also request to meet with the DNRC or attend the meeting with the applicant.

If the preliminary determination is to grant the application, the application proceeds to public notice for objections. The DNRC may add conditions to the permit.

If the preliminary determination is to deny the application, the applicant may request a hearing to show why the permit or change application should be approved. A hearing with the applicant will be conducted to take further information or evidence from the applicant. The applicant may request a hearing examiner who did not participate in the preliminary determination. If the preliminary determination is to approve the application with modifications, the applicant may request a hearing.

A final order will be issued after the hearing if the decision is to deny the application. The applicant may appeal the decision to District Court.

If, after the hearing on the decision to deny, the department determines that the application may be granted, the preliminary determination will be modified and the application will proceed to public notice.

If there is potential for adverse effect, the DNRC will publish notice of the application once in a newspaper of general circulation in the area of the source. The DNRC will mail notification of the application to existing water users listed in the DNRC records and determined by the DNRC having as water rights that may be affected by the proposed application. Local water users have an opportunity to file an Objection to Application, form 611, with the required fee on or before the deadline specified in the published notice. Objections must explain how the objector will be adversely affected or why the objector does not believe the applicant can meet the criteria. An objector must have property, water rights, or interests that would be adversely affected by the proposed appropriation. If no objections are received and the applicant proves by a preponderance of the evidence that the permit criteria can be met, the permit is granted.

If valid objections are received, the DNRC conducts a hearing. After evaluation of the evidence and testimony given at the hearing, the hearings examiner issues a proposal for decision to grant, modify, or deny the permit. Within 20 days, parties adversely affected by the proposal can file written exceptions to the proposal for decision. The parties may request presentation of briefs or oral argument before the DNRC on the proposed decision. If no exceptions are filed or after oral arguments are heard, the DNRC issues a final order. A final order may be APPEALED to District Court or the Water Court.

Issues that could affect applications for permits are:

1. The Montana Environmental Policy Act requires an environmental review of all water rights applications. Any proposed appropriation that may significantly affect the quality of the human environment will require an environmental impact statement (EIS). The purpose of the EIS is to document environmental and human impacts, evaluate alternatives, and provide for public review and comment. Information developed

during the EIS process will aid the DNRC in processing the permit. The DNRC may assess a fee to the applicant to fund preparation of the EIS. See section 85-2-124, MCA.

2. Any permit to appropriate water that the DNRC issues is provisional. It is junior to all prior existing water rights and subject to the final Water Court determination or adjudication of those rights. It also is junior to prior DNRC-permitted water rights and prior water reservations except as otherwise provided by law.

Step 3 - Project Completion

Upon receiving the permit, the permittee's next step is to construct the project, divert the water, and put the water to the intended use as granted in the permit. When this is finished, the permittee must provide the DNRC with a certified statement describing how the appropriation has been completed. This includes submitting a Notice of Completion of Permitted Water Development, form 617, to the DNRC before the deadline specified in the permit or any authorized extension of time. If the permittee fails to file a project completion notice by the deadline, the permit will be terminated.

A permittee may petition to the DNRC to modify or remove a condition of approval or reduce the amount permitted or authorized. Denial of the petition does not affect the permit or change authorization.

When unforeseen circumstances prevent completion of the project before the deadline, the permittee may submit an Application for Extension of Time, form 607. If the permittee shows good cause that a continuous effort has been made to complete the project, the DNRC may grant an extension of time for a reasonable period.

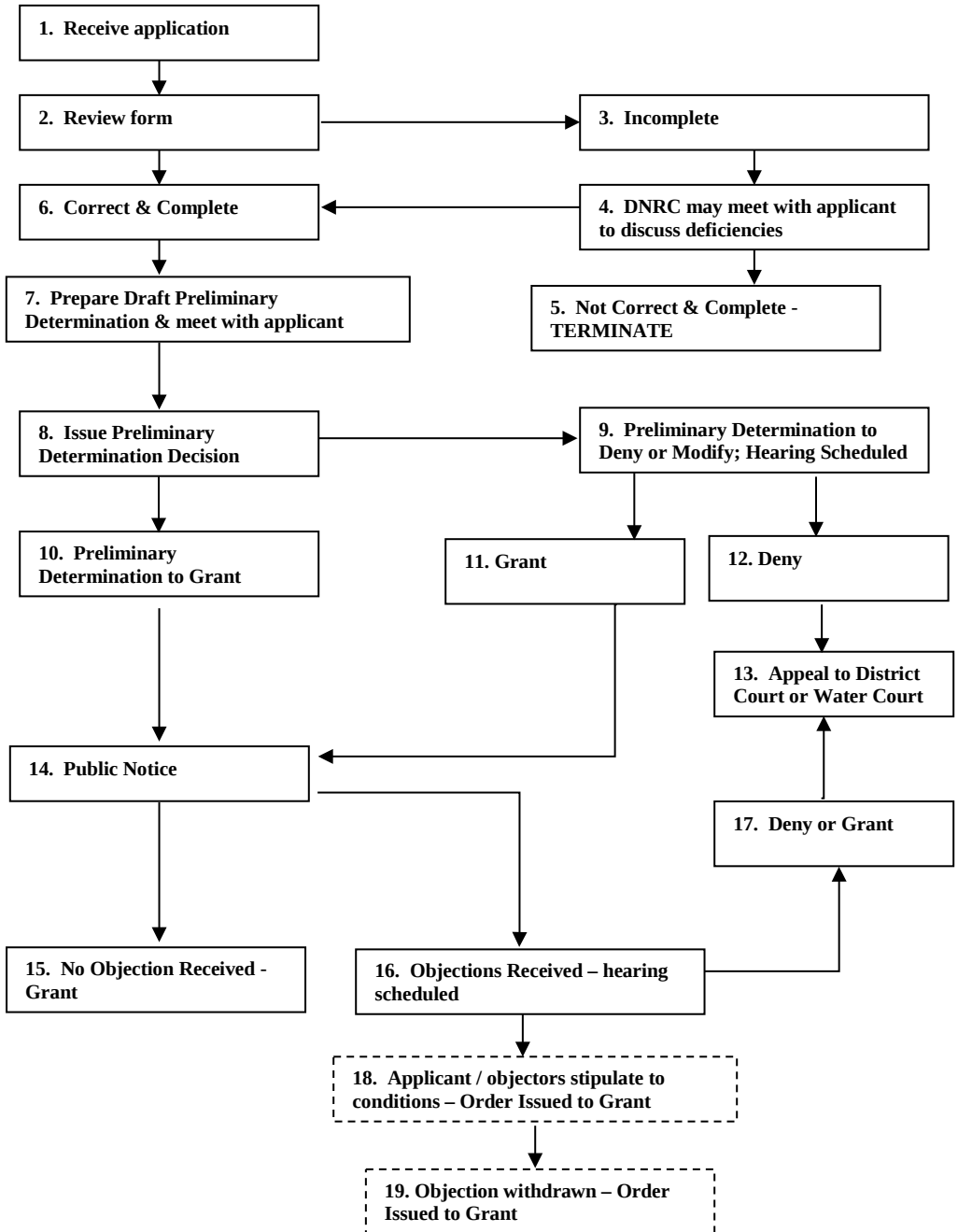
Step 4 - Certificate of Water Right

After the project is completed, the DNRC will review the project completion notice and determine whether the project was completed in substantial accordance with the permit. The DNRC will issue a Certificate of Water Right when:

1. The project has been completed.
2. The water has been used according to the terms of the permit.
3. The basin in which the permit lies has been adjudicated and the final decree is issued.

The priority date of a certificate is the same as on the original permit.

Flowchart for Permit and Change Applications



Temporary Permits

A person may request a temporary permit to appropriate water if the use of water is for a limited period of time (36.12.101(78), ARM). Temporary uses include water needed for oil or gas exploration or in highway construction. An application for a temporary permit is processed in the same manner as a provisional permit. The applicant must prove the same criteria listed under section 85-2-311, MCA. A temporary permit has an expiration date based on the period requested by the applicant and will expire on that date. A Certificate of Water Right is not issued for a temporary permit.

Interim Permits

An interim permit to appropriate water allows an applicant to begin constructing and using water pending final approval or denial of the provisional permit (36.12.104, ARM). An interim permit may be issued unless substantial information indicates that the criteria for issuing a provisional permit under section 85-2-311, MCA, cannot be met. An interim permit is issued pending final approval or denial by the department of the application for a regular permit.

Changes in Water Use

To protect all water rights, prior approval from the DNRC is required before changing any water right or water reservation in any of the following ways (section 85-2-402, MCA):

1. point of diversion;
2. place of use;
3. purpose of use; or
4. place of storage.

The holder of a water right must submit the current Application for Change of Appropriation Water Right, form 606, to the DNRC. An applicant may change up to the historic amount of water diverted and the historic consumptive use. Therefore, an applicant must first provide information proving the water right to be changed was used and the extent of the historic use. The application must contain information

about the proposed change and evidence pertaining to the criteria that must be met. There are specific rules that define what must be included in an application in order for the DNRC to deem an application correct and complete. If the DNRC deems the application correct and complete, the department will begin evaluating the application and draft a preliminary decision to grant or deny the change. In order for the DNRC to grant a change application, the applicant must provide by a preponderance of the evidence that the criteria for issuance of an authorization to change a water right are met (see related box). An application to change a water right follows the same general process for notice and hearing as a permit to appropriate water. Upon completion of the change, the appropriator must file a Notice of Completion of Change of Appropriation Water Right, form 618, notifying DNRC that the authorized change is completed.

The 2017 Legislature clarified that a change in irrigation method is not a change in the appropriation right and would not trigger the DNRC change process.

An applicant submitting a change in purpose or place of use of an appropriation to divert 4,000 or more acre-feet of water a year and 5.5 or more cubic feet a second will be required to prove the criteria set out in section 85-2-402(4), MCA. If a proposed change in purpose or place of use for a diversion results in 4,000 or more acre-feet and 5.5 or more cubic feet a second of water being consumed, the applicant must prove the criteria in section 85-2-402(5), MCA. If the change involves the transport of water out of state, the applicant must prove the criteria listed in section 85-2-402(6), MCA, and obtain legislative approval.

Criteria for Issuance of an Authorization
to Change a Water Right
Section 85-2-402(2), MCA

The applicant for a change in an appropriation water right has the burden to prove by a preponderance of the evidence that the criteria for issuance of an authorization are met. These criteria include:

1. The proposed use will not adversely affect the use of other water rights or other planned developments for which a permit or certificate has been issued or water has been reserved.
2. The proposed means of diversion, construction, and operation of the appropriation works are adequate.
3. The proposed use of the water is a beneficial use.
4. The applicant owns or has permission from the person who owns the property where the water is to be used.

If a valid objection pertaining to WATER QUALITY is received, the applicant must also prove one of the following.

1. The water quality of an appropriator will not be adversely affected.
2. The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, MCA.

An applicant for salvaged water must also prove that the proposed water-saving method will salvage at least the amount of water asserted by the applicant.

Temporary Change in Appropriation Water Right

An appropriator may temporarily change a water right with DNRC approval (section 85-2-407, MCA). The temporary change may be approved for up to 10 years with an opportunity to renew for 10 more years, although there is no limit on the number of renewals. An appropriator must file an Application for Change of Appropriation Water Right, form 606, and a Temporary Change Addendum, form 606TCA, identifying the proposed change and how long it will be needed. The applicant must also provide evidence to meet the same criteria as an authorization to change listed above. If granted, the temporarily changed appropriation has the same priority date as the existing water right.

In 1995, the Legislature provided for the protection of fishery resources by allowing the owner of an existing consumptive use water right to change the purpose temporarily to instream flow. The owner must file an application, as described in the preceding paragraph. The owner may voluntarily change the purpose to instream flow or lease the water right and change the purpose to protect the fishery resource.

Marketing for Aquifer Recharge or Mitigation

The 2011 Legislature allowed existing water rights holders to change all or part of an appropriation for use as aquifer recharge or mitigation (section 85-2-420, MCA). Part of the appropriation may be marketed (e.g., leased) or sold. The appropriator may continue the authorized beneficial use until the change in use is completed.

The appropriator's flow rate and volume at the point of diversion would then equal the initial beneficial use minus the amount sold or marketed. Changes to an appropriator's right must be completed within 20 years. The appropriator must notify the department within 30 days each time a portion of change is completed.

The water purchaser or lessee would still be required to submit an Application for Beneficial Water Use Permit.

Temporary Lease of a Water Right

The 2013 Legislature passed House Bill 37, which allows an appropriator to temporarily lease a water right with certain criteria (36.12.2101, ARM). Applicants must file form 650, Temporary Lease of Appropriation Right. Temporary lease conditions include:

- the appropriation right must have been used within five years prior to the lease application date;
- the appropriation right may be leased only during the right's period of diversion;
- the appropriation right may not be leased for more than two years during any consecutive 10-year period;
- the leased volume may not exceed 180 acre-feet per year;

- only the consumptive portion of a water right as determined by the DNRC may be leased;
- the point of diversion may not be changed;
- storage may not be added at the point of diversion or at the place of use for the leased appropriation right; and
- the place of use for the leased appropriation right must be retired while the water is leased.

The DNRC must accept objections to the proposed lease from any person adversely affected. A temporary lease is not subject to other sections of law related to a temporary change in an appropriation right. Out-of-state uses for a leased appropriation right are subject to 85-2-402, MCA, which includes public hearings and legislative approval.

Salvaged Water

A water user who implements a water-saving method may retain the right to the SALVAGED WATER for a beneficial use (section 85-2-419, MCA). The salvaged water is that portion of the water made available through the implementation of water-saving methods. Lining a ditch to reduce seepage or replacing a ditch with a pipeline is considered a water-saving method if water consumption is reduced. If the salvaged water is to be used for any purpose or in any place not associated with the original appropriation, DNRC approval is required. The appropriator must file an Application for Change of Appropriation Water Right, form 606; Salvage Water Addendum, form 606 SWA; and must meet the criteria for issuance of an authorization to change a water right. The proposed water-saving method also must salvage at least the amount of water asserted by the applicant.

Ownership of a Water Right

A water right is appurtenant to the land on which it is used. When that land is sold, the seller shall disclose on the realty transfer certificate (RTC) at or before the closing if any water rights associated with the property will be transferred with the land (section 85-2-424, MCA). A fee must be paid at closing or upon completion of the transfer. The water right information is subsequently updated either through a DNRC form or in coordination with the Department of Revenue. If land is sold

and the fee is not paid, the DNRC will send a notice to the buyer requesting payment of the fee. If the buyer does not pay the fee within 60 days, the DNRC may assess a penalty.

If an RTC indicates a water right is being divided or exempted (reserved) from the property, the buyer, seller, and escrow agent must complete the Certification of Water Right Ownership Update form (included with the RTC) before the deed can be recorded.

When an RTC discloses the division of a water right among parcels, the person dividing the water right shall complete and file a DNRC Ownership Update Divided Interest form, form 641, and submit the form within 60 business days of the deed recording.

If a person sells land but retains the water right, the person must fill out and file a DNRC Ownership Update Exempt (Reserved) form, form 642, describing the exempting of the water right and the appropriate fee. If a person severs a water right from land that is not being sold, the person must fill out and file form 642.

In any case, for a water right that will be changed from how it was historically used, the owner must file an Application for Change of Appropriation Water Right, which was described previously.

Water Distribution

Whether exercising a century-old, existing water right or a newly permitted water right, an appropriator must observe standard rules of use. From period of use, to place of use, to type of use, these rules guide the distribution of Montana waters.

In Montana, water right distribution follows the traditional “first in time, first in right” philosophy (section 85-2-401, MCA). Accordingly, a SENIOR APPROPRIATOR may completely fulfill the senior appropriator’s water right before a JUNIOR APPROPRIATOR receives any.

Each Montana District Court supervises water use within its jurisdiction (section 85-5-101, MCA). In its oversight capacity, a court may appoint

one or more water commissioners to measure, record, and distribute water rights on a watercourse. Such appointments result upon:

- petition of water rights holders (owning at least 15% of the water rights on a watercourse);
- application by both the DNRC and one or more water rights holders on a watercourse; or
- application of the board(s) of one or more IRRIGATION DISTRICTS (section 85-5-101, MCA).

When a court appoints two or more water commissioners on a watercourse, one may be designated chief commissioner. A chief commissioner supervises the other commissioner(s) in distributing water rights (section 85-5-102, MCA).

Upon petition of water rights holders (owning at least 51% of the water rights on a watercourse), the court may direct a commissioner to maintain and repair ditches, canals, and other structures necessary to distribute water rights. Owners are responsible for all maintenance expenses (section 85-5-106, MCA).

Enforcement of Water Rights

If a water user feels that a water right is being adversely affected by the actions of another water user, the issue may be resolved either informally or in court. The affected parties may discuss whether the matter can be settled. Otherwise, there are various options under Montana law for resolution.

District Court

Montana's district courts have the longest involvement and association with water rights. Fifty-six judges within 22 judicial districts resolve disputes between water users, including ruling on INJUNCTIONS to prohibit a party from interfering with the use of a water right.

Water users may petition a district court to appoint a water commissioner to distribute water. If there is a historical decree (issued by a district court before 1973) or a decree issued by the Water Court, the owners of at least 15 percent of the water rights affected by the decree may petition the district court to appoint a water commissioner.

Under certain circumstances, the DNRC and one or more water right holders may petition a district court to distribute water and to resolve the distribution dispute (section 85-5-101, MCA).

A district court may appoint a water commissioner to measure and distribute water to the appropriate owners. These “ditch riders” are self-employed and paid by the water users. As Montana is a “first in time, first in right” jurisdiction, water commissioners distribute water first to the most senior water right owners. When a district court appoints and directs a water commissioner, a dispute may be easily settled because the water rights at issue have largely been determined.

When existing water rights have not been determined, any party may petition a district court to certify that question to the Water Court. The district court may issue an injunction or may order other relief pending a Water Court determination. The Water Court must give priority to these certification proceedings over its adjudication work. When assisting a district court, the Water Court relies on the DNRC to tabulate water rights for a distribution project. A list of active and historical distribution projects is available at dnrc.mt.gov/divisions/water/adjudication/water-distribution.

A district court may be involved in other proceedings related to water rights:

- The DNRC may ask a court to take action to prevent the waste or unlawful use of water. (Unlawful use of water may also involve the attorney general or a county attorney.)
- A district court may appoint a water mediator to resolve water controversies.
- A district court may appoint a water master to assist with judicial enforcement proceedings.

Other Types of Water Rights

Water Reservations

State law allows the state of Montana, state agencies, other political subdivisions, or the United States and any of its agencies to apply for a water reservation for future beneficial uses or to maintain stream flows. The DNRC administers the water reservation application process.

In 1978, the Board of Natural Resources and Conservation granted water reservations in the Yellowstone River Basin to eight municipalities, 14 CONSERVATION DISTRICTS, and six state and federal agencies. These water reservations have a priority date of December 15, 1978.

In 1992, the board issued an order granting water reservations in the upper Missouri River basin above Fort Peck Dam to 17 municipalities, 15 conservation districts, and four state and federal agencies. These water reservations have a priority date of July 1, 1985.

In 1994, the board granted water reservations in the lower Missouri River basin below Fort Peck Dam with a priority date of July 1, 1985, to nine municipalities, eight conservation districts, and one state agency. The board also granted reservations in the Little Missouri River basin with a priority date of July 1, 1989, to two municipalities, three conservation districts, and one state agency.

In both basins, water reservations were granted for municipal, irrigation, instream flow, and water storage uses. Individuals within a conservation district who are interested in using water under the local district's water reservation should contact the conservation district office.

The U.S. Forest Service reserved water rights compact approved by the Legislature in 2007 allows the federal agency to file for reservations as an instream right within a national forest boundary.

State law requires the DNRC to review each water reservation every 10 years to ensure the objectives of the reservation are being met. The 2016 report may be found at:
leg.mt.gov/css/Committees/interim/2017-2018/Water-Policy/Committee-Topics/committee-topics.asp

Instream Use and Leasing

Most water rights involve taking water out of streams for irrigation, domestic, or other consumptive uses. These diversions can reduce streamflows during times of drought, which in turn can stress local fisheries. In the 1980s and 1990s, the Montana Legislature realized this concern and created laws that allow water that is diverted for consumptive uses to be transferred temporarily to an instream use.

There are three ways to temporarily convert an existing consumptive use water right to instream use. A person may:

- lease all or a portion of a water right to the Montana Department of Fish, Wildlife, and Parks (FWP);
- lease the water right to another party interested in holding the right for the fishery; or
- convert the water right to an instream use without a lease.

Any conversion to an instream use requires a temporary change authorization from the DNRC and must benefit fisheries. The FWP may not enter into new leases for instream flow after June 30, 2019.

The FWP and some conservation groups seek interested senior water rights holders who no longer wish to use all of their appropriated water (possibly through increased water conservation) and who have a desire to contribute water to maintain fish populations during critical times of drought. Water rights holders may get help from interested lessees to develop salvage water projects, assess water savings, and file the necessary authorizations to change the water rights involved in a leasing agreement. As a result, the water rights holder continues to own the water right, receives financial compensation, and assists in maintaining a fishery.

Limitations on Water Use

Controlled Ground Water Areas

Certain government agencies and water rights holders may designate a controlled ground water area to protect water quality or quantity (section 85-2-506, MCA). An area for designation may be proposed by:

- the DNRC on its own motion;
- petition of a state or local public health agency, municipality, county, conservation district, or local water quality district; or
- petition of at least one-third of the water rights holders in the proposed controlled ground water area.

A correct and complete petition must contain analysis prepared by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer concluding that one or more criteria described below are met. In general, the law prohibits the WASTEFUL USE of ground water.

The department may designate a permanent controlled ground water area by administrative rule. The following criteria must be met and these conditions cannot be appropriately mitigated:

- current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled ground water area will cause ground water levels to decline to the extent that water rights holders cannot reasonably exercise their water rights;
- current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have reduced or will reduce ground water levels or surface water availability necessary for water rights holders to reasonably exercise their water rights;
- current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have induced or altered or will induce or alter contaminant migration exceeding relevant water quality standards;
- current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have impaired or will impair ground water quality necessary for water

rights holders to reasonably exercise their water rights based on relevant water quality standards;

- ground water within the proposed controlled ground water area is not suited for beneficial use; or
- public health, safety, or welfare is or will become at risk.

Upon receipt of a correct and complete petition, the DNRC may deny the petition, study it further, or draft rules to implement the proposed controlled ground water area. The public will be notified of the proposed rules and may provide comment.

Effects of a Controlled Ground Water Designation

A temporary controlled ground water area designation is for the purpose of further study. It may include the control provisions of measurement, water quality testing, and reporting requirements, but it may not last longer than six years.

A permanent controlled ground water area designation may include control provisions of:

- banning further appropriation of ground water;
- restricting the development of future ground water appropriations by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other criteria;
- requiring measurement of future ground water or surface water appropriations;
- requiring notice on land records within a permanent controlled ground water area to inform prospective holders of a property interest of the permanent controlled ground water area;
- requiring spacing restrictions on certain wells;
- mitigating ground water withdrawals;
- testing water quality; and
- requiring data reporting.

The Controlled Ground Water Area Petition, form 630, is available from the DNRC website. A petition must be filed with the appropriate fee, and the petitioner must also pay the reasonable costs of processing the petition.

Active, Permanent Controlled Ground Water Areas

WATER QUANTITY CLOSURES	County
Hayes Creek	Missoula
Larson Creek	Ravalli
Old Butte Landfill/ Clark Tailings Site	Silver Bow
Powder River Basin	Custer
South Pine	Wibaux
Butte Alluvial	Silver Bow
Horse Creek	Stillwater
WATER QUALITY CLOSURES	County
Bitterroot Valley Sanitary Landfill	Ravalli
BNSF Paradise	Sanders
BNSF Somers Site	Flathead
Bozeman Solvent Site	Gallatin
Idaho Pole	Gallatin
Rocker	Silver Bow
Nat'l Park Service-MT Compact Yellowstone	Park
Warm Springs Ponds	Deer Lodge
East Valley	Lewis and Clark

Yellowstone Controlled Ground Water Area

The Yellowstone Controlled Ground Water Area was established under the compact negotiated between the U.S. National Park Service (NPS) and Montana under section 85-20-401, MCA, and became effective January 31, 1994. It is located north and west of Yellowstone National Park and was established to regulate ground water development adjacent to the park in an effort to preserve the park's natural

hydrothermal features. Ground water developments are restricted within this area. The restrictions apply to ground water appropriations with a priority date on or after January 1, 1993. Anyone wanting to appropriate ground water in this area after January 31, 1994, must apply for a permit from the DNRC. Depending on the rate and volume of ground water needed and the temperature of the ground water at the wellhead, different restrictions apply. All applicants must provide a statement of whether the proposed water use requires water with a temperature of 60 degrees Fahrenheit or more. All permits issued require meters to be installed for measuring the total volume of water used. Annual water usage must be reported to the Montana Bureau of Mines and Geology in Butte. The DNRC provides the meters necessary to gather data.

The compact requires the DNRC to send the NPS a copy of each permit application, including a map and well log. The NPS has 30 days to file an objection to the application and 60 days to file an objection to the well log report if it determines that the proposed appropriation is hydrologically connected to surface water or ground water specifically described in the compact. The compact also provides certain requirements depending on the temperature of the water (section 85-20-401, MCA, Article IV, Section G, Part 2).

Additional information and a map of the Yellowstone Controlled Ground Water Area can be obtained by contacting the DNRC Water Resources Regional Office in Bozeman at 406-586-3136 or the DNRC Helena Central Office at 406-444-6601.

Closure of Highly Appropriated Basins

Montana has closed some of its river basins to certain types of new water appropriations because of water availability problems, overappropriation, and a concern for protecting existing water rights.

Legislative Closures

Section 85-2-319, MCA, legislatively authorizes the closure of basins to certain new appropriations through the adoption of administrative

rules and negotiation of reserved water rights compacts, including the following:

1. The Upper Missouri River basin, the Jefferson and Madison river basins, the Teton River basin, and the Upper Clark Fork River basin are closed to certain new appropriations of water.
2. There is a temporary closure in the Bitterroot Basin.
3. The Legislature authorized the DNRC to study and close sources of water in the Milk River basin.

Administrative Rule Closures

The law also provides for the closure of highly appropriated basins through the adoption of administrative rules. In order to adopt rules, the DNRC must receive a petition signed by at least 25% or 10 (whichever is less) of the users of water from the source of supply within the specific basin or receive a petition from the Montana Department of Environmental Quality. The petition must show that during certain times of the year, one of the following occurs:

1. There is no unappropriated water in the source of supply.
2. The rights of prior appropriators would be adversely affected by further appropriation.
3. Further new uses would interfere with other planned uses for which a permit has been issued or water has been reserved.
4. The water quality of an appropriator would be adversely affected by the issuance of permits.
5. Further use would not be substantially in accordance with the classification of water set for the source of supply pursuant to section 75-5-301(1), MCA.
6. Issuance of permits would adversely affect holders of a discharge permit issued in accordance with Title 75, chapter 5, part 4, MCA, in their ability to satisfy effluent limitations.

If the DNRC determines that rules should be adopted to close a basin, notice will be provided and a public hearing will be held on the rules. Depending on the evidence and testimony submitted, the rules could close a basin:

1. to all new appropriations of water or to only consumptive uses;
2. during all times of the year or only during certain times of the year;

3. to all types of uses or to only specific types of uses.

Petition for Closure of a Highly Appropriated Basin (form 631) is available from the DNRC. A petition must be filed with the appropriate fee, and the petitioner also must pay reasonable processing costs.

Basins Closed by Administrative Rule

Basin	County
Grant, Houle, and Sixmile creeks	Missoula
Sharrott and Willow creeks	Ravalli
Walker and Truman creeks	Flathead
Rock Creek	Carbon
Towhead Gulch	Lewis and Clark
Musselshell River	Meagher, Wheatland, Golden Valley, Musselshell, Petroleum, Garfield, and Rosebud

Milk River Closures

The DNRC may suspend new appropriations or close a source in the Milk River basin (85-2-231, MCA). The department has closed the mainstem and the southern tributaries of the Milk River.

Compact Closures

The state of Montana has several compacts with Indian tribes and federal agencies. The following compacts have closed certain sources of water to new appropriations.

Effects on Areas Closed by Federal, Tribal Water Compacts

Compact	Closure
Northern Cheyenne Tribe	Prohibits new appropriations in the Rosebud Creek basin, a tributary to the Yellowstone River.

Compact	Closure
Chippewa Cree Tribe of the Rocky Boy's Indian Reservation	Except for exempt wells, stockwater, or deep aquifer ground water, the DNRC may not permit new appropriations from sources in the Big Sandy Creek basin (excluding Sage Creek and Lonesome Lake Coulee) and in the Beaver Creek drainage.
U.S. Department of the Interior Fish and Wildlife Service <i>Benton Lake National Wildlife Refuge and Black Coulee National Wildlife Refuge</i>	Two basins have been closed to further appropriations or reservations of water for consumptive use: Black Coulee <u>WATERSHED</u> , and Lake Creek watershed (including the unnamed tributaries of Benton Lake).
U.S. Department of the Interior Fish and Wildlife Service <i>Red Rock Lakes</i>	Closes appropriations for consumptive use in the basins upstream of the most downstream point on the Red Rock Lakes National Wildlife Refuge and the Red Rock Lakes Wilderness Area. Certain exceptions apply.
U.S. Department of the Interior Fish and Wildlife Service <i>Charles M. Russell National Wildlife Refuge</i>	Certain <u>IMPOUNDMENTS</u> are prohibited within the refuge.
U.S. Department of the Interior Bureau of Land Management <i>Upper Missouri National Wild & Scenic River</i> <i>Bear Trap Canyon Public Recreation Site</i>	Closes the Missouri River mainstem to new storage, prohibits impoundments upstream from the scenic river area, and closes the Missouri River basin upstream from the scenic river area to new appropriations in any month in which the water volume designated for the "available water supply" has been exhausted.

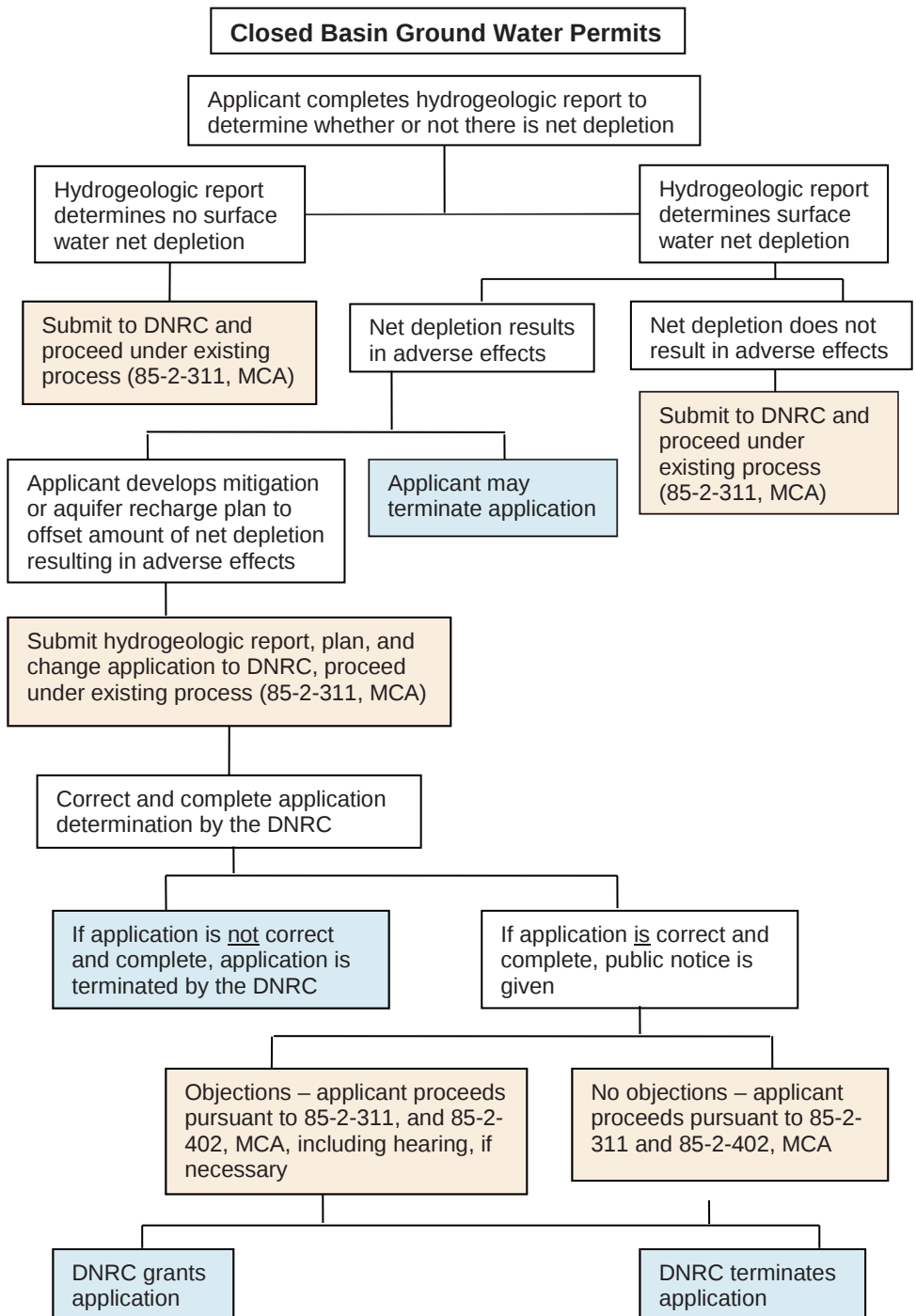
Compact	Closure
U.S. Department of the Interior Bureau of Land Management <i>Upper Missouri Breaks National Monument</i>	Certain impoundments prohibited on portions of the mainstems of the Judith River and Arrow Creek within the monument.
U.S. Department of the Interior National Park Service <i>Yellowstone National Park (within Montana)</i> <i>Glacier National Park</i> <i>Big Hole National Battlefield</i> <i>Little Bighorn Battlefield National Monument</i> <i>Bighorn Canyon National Recreation Area</i>	In addition to specific restrictions and conditions in each location, these locations will be closed to new appropriations when the total appropriations reach a specified level: • Around Big Hole National Battlefield, including the North Fork of the Big Hole River and the tributaries upstream of the battlefield; • To the westside tributaries adjoining Bighorn Canyon National Recreation Area, including Dry Head, Deadman, Davis and Layout creeks; • Drainages around Glacier National Park, including the Middle and North forks of the Flathead River; • Numerous basins adjoining Yellowstone National Park, including Bacon Rind, Buffalo, Cottonwood, Coyote, Crevice, Dry Canyon, Hellroaring, Little Cottonwood, Slough, Snowslide, Soda Butte, and Tepee creeks; and the Gallatin, Madison, and Yellowstone rivers. Certain water rights may be curtailed on the Little Bighorn River above the Little Bighorn Battlefield National Monument.

Compact	Closure
Crow Tribe	Closes basins to new appropriations within the Crow Reservation, the Bighorn River basin, and the Pryor Creek basin. Certain exceptions apply to fee land.
Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation	Prohibits new appropriations in the Milk River basin in basins above the western crossing of the Milk River (into Canada from the United States) and below the eastern crossing of the Milk River (into the United States from Canada) to the confluence of the Milk and Missouri rivers.
Blackfeet Tribe	Prohibits new appropriations from the mainstems of the reservation boundary streams (Birch and Cut Bank creeks and the Two Medicine River). Temporary exceptions may apply.

Persons wishing further information on any of these compact closures should contact the DNRC to determine the specifics of the restrictions on these sources.

Appropriations in Closed Basins

A person proposing to appropriate ground water in a closed basin must complete a HYDROGEOLOGIC REPORT and must meet other criteria (section 85-2-360, MCA). If the hydrogeologic report predicts that the appropriation would have no net depletion of surface water, the application moves through the permitting process. If the assessment predicts net depletion of surface water, it must be determined if net depletion would have an adverse effect on prior appropriators. If no adverse effect determined, the application moves through the permitting process. If there would be an adverse effect, the applicant must submit an aquifer recharge or mitigation plan.



Sources of Information

All water right forms required by the DNRC are available at any of the eight water resources regional offices listed below, at the Helena Central Office, or on the DNRC website at dnrc.mt.gov/divisions/water/water-rights.

DNRC Offices

Montana Department of Natural Resources and Conservation
Water Resources Division
Water Rights Bureau
1424 Ninth Ave.
P.O. Box 201601
Helena, MT 59620-1601
Phone: 406-444-6601; Fax: 406-444-0533
dnrc.mt.gov/divisions/water/water-rights

Water Resources Regional Offices

BILLINGS

Airport Industrial Park
1371 Rintop Drive
Billings, MT 59105-1978
Phone: (406) 247-4415
Fax: 406-247-4416
Serving: Big Horn, Carbon, Carter, Custer, Fallon, Powder River, Prairie, Rosebud, Stillwater, Sweet Grass, Treasure, and Yellowstone counties

BOZEMAN

2273 Boot Hill Court, Suite 110
Bozeman, MT 59715-7249
Phone: 406-586-3136
Fax: 406-587-9726
Serving: Gallatin, Madison, and Park counties

GLASGOW

222 Sixth St. South
P.O. Box 1269
Glasgow, MT 59230-1269
Phone: 406-228-2561
Fax: 406-228-8706
Serving: Daniels, Dawson, Garfield, McCone, Phillips, Richland, Roosevelt, Sheridan, Valley, and Wibaux counties

HAVRE

210 Sixth Ave.
P.O. Box 1828
Havre, MT 59501-1828
Phone: 406-265-5516
Fax: 406-265-2225
Serving: Blaine, Chouteau, Glacier, Hill, Liberty, Pondera, Teton, and Toole counties

HELENA
1424 Ninth Ave.
P.O. Box 201601
Helena, MT 59620-1601
Phone: 406-444-6999
Fax: 406-444-9317
Serving: Beaverhead, Broadwater,
Deer Lodge, Jefferson, Lewis and
Clark, Powell, and Silver Bow
counties

KALISPELL
655 Timberwolf Parkway
Suite 4
Kalispell, MT 59901-1215
Phone: (406) 752-2288
Fax: (406) 752-2843
Serving: Flathead, Lake, Lincoln,
and Sanders counties

LEWISTOWN
613 Northeast Main St., Suite E
Lewistown, MT 59457-2020
Phone: 406-538-7459
Fax: 406-538-7089
Serving: Cascade, Fergus, Golden
Valley, Judith Basin, Meagher,
Musselshell, Petroleum, and
Wheatland counties

MISSOULA
2705 Spurgin Road, Building C
P.O. Box 5004
Missoula, MT 59806-5004
Phone: 406-721-4284
Fax: 406-542-5899
Serving: Granite, Mineral,
Missoula, and Ravalli counties

Montana University System Water Center

23 Faculty Court
Montana State University-Bozeman
Bozeman, MT 59717-2690
Phone: 406-994-6690
montanawatercenter.org
E-mail: water@montana.edu

Montana Water Court

The Montana Water Court in Bozeman can provide information about issued decrees, objections, water right hearings in the statewide adjudication, and enforcement of water right decrees.

1123 Research Drive
P.O. Box 1389
Bozeman, MT 59718
Phone: 406-586-4364
montanacourts.org/courts/water
E-mail: watercourt@mt.gov

Water Policy Interim Committee

State Capitol, Room 171
P.O. Box 201704
Helena, MT 59620-1704
Phone: 406-444-3742; Fax: 406-444-3971
leg.mt.gov/water

Water Conversion Table

FLOW RATE is the rate at which water is diverted or withdrawn from the source. It is measured in gallons per minute (gpm) or cubic feet per second (cfs). One cfs is a rate of water flow that will supply 1 cubic foot of water in 1 second and is equivalent to flow rates of:

448.80 gpm
1.98 acre-feet a day
40 MINER'S INCHES in Montana (1 miner's inch = 11.22 gpm)

VOLUME is the amount of water diverted over a specific period of time each year. One acre-foot is the volume of water that will cover 1 acre to a depth of 1 foot and is equal to:

43,560 cubic feet or 325,851 gallons

Water Right Forms and Fees

These water right forms are available from the water resources regional offices or on the DNRC website at:
dnrc.mt.gov/divisions/water/water-rights/water-right-forms

Form No.	Title	Fee
Form 600	Application for Beneficial Water Use Permit	\$800-\$1000
	Other permits (including groundwater appropriations of less than 35 gpm in a controlled groundwater area)	\$200

Form No.	Title	Fee
Form 602	Notice of Completion of Ground Water Development	\$125
Form 603	Well Log Report	None
Form 605	Application for Provisional Permit for Completed Stockwater Pit or Reservoir	\$125
Form 606	Application for Change of Appropriation Water Right Other changes, including a replacement well that exceeds 35 gpm or 10 acre-feet or a municipal well that exceeds 450 gpm; or a reservoir in the same source; or to move or add stock tanks to an existing system.	\$700-900 \$200
Form 607	Application for Extension of Time	\$200
Form 608	DNRC Water Right Ownership Update (\$10 for each additional water right updated, up to a maximum of \$300)	\$50
Form 609	Water Use Complaint	None
Form 609INS	Water Right Dispute Options	None
Form 611	Objection to Application	\$25
Form 613	Fee Schedule for the Appropriation of Water in Montana	None
Form 615	Water Conversion Table	None
Form 617	Notice of Completion of Permitted Water Development	None
Form 617INST	Instructions for Notice of Completion of Permitted Water Development	None

Form No.	Title	Fee
Form 618	Notice of Completion of Change of Appropriation Water Right	None
Form 618INST	Instructions for Notice of Completion of Change of Appropriation Water Right	None
Form 625	Correction of Water Right Record	None
Form 626	Notice of Renewal	\$200
Form 630	Controlled Groundwater Area Petition (also must pay DNRC costs of giving notice, holding hearing, etc.)	\$1500
Form 631	Petition for Closure of a Highly Appropriated Basin. Petition to the DNRC to adopt rules to reject permit application or modify or condition permits issued in a highly appropriated water basin or subbasin (also must pay DNRC costs of giving notice, holding hearings, etc.)	\$1500
Form 633	Aquifer Test Data Form	None
Form 634	Replacement Well Notice	\$100
Form 635	Redundant Well Construction Notice	\$50
Form 637	Reinstatement Request	\$200
Form 639	Waiver of Statutory Timelines	None
Form 641	DNRC Ownership Update Divided Interest	\$50
Form 642	DNRC Ownership Update Exempt (Reserved) Water Right/Severed Water Right	\$50

Form No.	Title	Fee
Form 644	Notice of Replacement Point of Diversion	\$400
Form 645	Permit Registration for Groundwater Use within the National Park Service Compact Area	\$200
Form 646	Geothermal Heating/Cooling Notice of Completion	\$250
Form 647	Notice of Completion of Emergency Fire Protection Development	\$125
Form 649	Surface Water Discharge Measurement Form	None
Form 650	Temporary Lease of Appropriation Right	\$200
Form 651	Petition to Modify a Permit or Change Application	\$400
Form 652	Petition to Create Stream Depletion Zone	\$750

Glossary of Terms

abandonment — intentional, prolonged nonuse of a water right, resulting in its loss.

acre-feet — a measurement based on the volume of water that will cover 1 acre to a depth of 1 foot.

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.

appropriate — to capture, impound, or divert water from its natural course and apply toward a beneficial use.

aquifer recharge — either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

aquifer storage and recovery project — a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

basin — the area drained by a river and its tributaries; a watershed.

claim — an assertion that a water right exists, usually occurring during the adjudication process.

compact — a legal agreement between Montana and a federal agency or an Indian tribe determining the quantification of federally or tribally claimed water rights.

compliance — obeying and achieving the conditions of a rule, permit, order, or law.

conservation district — a political subdivision of state government, possessing both public and private attributes, that primarily distributes irrigation water in a given region and that may also administer electric power generation, water supply, drainage, or flood control.

consumptive use — a beneficial use of water that reduces supply, such as irrigation or household use.

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.

decreed water right — a water right issued by the court upon adjudication of a stream.

discharge permit — an authorization from the Montana Department of Environmental Quality that allows the discharge of WASTE within specific parameters.

diversion — an open, physical alteration of a stream's flow away from its natural course.

effluent — an outflow of waste.

existing right — a Montana water right originating on or before July 1, 1973, that is subject to adjudication.

flow rate — the rate at which water is diverted from a source.

ground water — any water beneath the land surface, bed of a stream, lake, or reservoir.

ground water area — an area enclosing a single, distinct body of ground water.

hydrogeologic assessment/hydrogeologic report — a report for a project for or through which water will be put to beneficial use, the point of diversion, and the place of use that describes the geology, hydrogeologic environment, water quality, and predicted net depletion, if any, including the timing of any net depletion.

impoundment — gathering and enclosure, as in a reservoir.

injunction — a court order prohibiting a specific act or commanding the undoing of some wrong or injury.

instream flow — water left in a stream for nonconsumptive uses such as preservation of fish or wildlife habitat.

interested person — a person with a real property interest, water right, or other economic interest that may be directly affected.

irrigation district — a subdivision of government, managed by a board of directors, that supplies water to irrigators within a specified region.

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.

junior appropriator — a secondary user on a watercourse who holds a water right inferior to previous (senior) users.

miner's inches — by Montana law, 1 cfs is approximately equal to 40 miner's inches.

Montana Code Annotated (MCA) — the laws of Montana classified by subject.

mitigation — the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

nonperennial flowing stream — a stream that does not flow continuously year-round.

permit — an authorization to use water, issued by the state, specifying conditions such as type, quantity, time, and location of use.

preponderance of the evidence — convincing evidence that shows that the facts are more probable than not.

priority date — the official date of an appropriation, generally the date of established intent; used in determining seniority among water users.

provisional — temporary.

recharge — the resupply of water to rivers or aquifers.

reserved water right — a special water right accompanying federal lands or Indian reservations, holding a priority date originating with the creation of the land.

salvaged water — water made available through water-saving methods.

senior appropriator — an original user on a watercourse who holds a water right superior to all subsequent (junior) users.

stream depletion zone — an area where hydrogeologic modeling concludes ground water withdrawals deplete surface water by a rate of at least 30% of the ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35 gpm.

surface water — water above the land surface, including lakes, rivers, streams, wetlands, wastewater, flood water, and ponds.

volume — amount of water diverted over a specific period of time.

waste — as it relates to ground water, waste does not include:

- the withdrawal of reasonable quantities of ground water in connection with the construction, development, testing, or repair of a well or other means of withdrawal of ground water;
- the inadvertent loss of ground water because of breakage of a pump, valve, pipe, or fitting if reasonable diligence is shown by the person in effecting the necessary repair;
- the disposal of ground water without further beneficial use that must be withdrawn for the sole purpose of improving or preserving the use of land by draining the same or that must be removed from a mine to permit mining operations or to preserve the mine in good condition;

- the disposal of ground water used in connection with producing, reducing, smelting, and milling metallic ores and industrial minerals or that is displaced from an aquifer by the storage of other mineral resources; and
- the management, discharge, or reinjection of ground water produced in association with a coal bed methane well.

wasteful use — the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

watercourse — any naturally occurring stream or river, not including ditches, culverts, or other constructed waterways.

water master — an attorney versed in water law who serves at the discretion of the Water Court.

water quality — chemical, physical, and biological characteristics of water that determine its suitability for a particular use.

water reservation — a water right held by a government entity for future use or instream flow.

watershed — a geographic area that includes all land and water in a drainage system.

Appendix A. Government Authority and Water Rights

Agency or entity	Water right-related function(s)
Any state agency, state political subdivision, or federal agency	• Acquire a state water reservation for beneficial uses or to maintain flow, level or quality
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation; Blackfeet Tribe; Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Crow Tribe, Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation; Northern Cheyenne Tribe	• Administer tribally based water rights on designated reservations
Attorney General	• Water Court may join to certain cases of abandonment or nonperfection • May litigate: • issues of statewide importance • unresolved issues on historic water rights claims • water waste or water right abandonment • certain compact-related proceedings • fines for violations of Title 85, chapter 2, MCA • May offer general legal services to carry out Title 85, chapter 2, MCA
Board of Land Commissioners	• Appropriate water for use upon state lands
County attorneys	• Intervene, if necessary, in cases of water waste or water right abandonment
Conservation districts	• Develop plans for conservation, development, use, and disposal (sale) of excess water • Obtain water rights (water reservations) for district use

Agency or entity	Water right-related function(s)
Department of Environmental Quality	•Ensure proof of water rights from DNRC for certain subdivision approvals •Provide discharge permit for aquifer <u>RECHARGE</u> or mitigation plan to DNRC, if necessary
Department of Natural Resources and Conservation	•Process historic water rights claims for pre-1973 adjudication •Process and consider permits for new water rights and changes to existing water rights •Aid district courts, Water Court in water distribution controversies •Maintain a centralized database of water rights •Implement compacts with federal reserved water rights holders (tribes and federal agencies) •Process water reservation requests from other government entities •Process stream depletion zone petitions •Administer basins closed to additional appropriations •Designate, process petitions for, and administer controlled groundwater areas •Investigate water waste •Administer state water projects •Develop state water plan
Department of Revenue	•Notify DNRC of property transfers including an associated water right
District Court	•Enforce water rights through court proceedings •Appoint water commissioners to distribute water •Appoint water mediators to settle disputes •Consider cases of water waste, water right abandonment

Agency or entity	Water right-related function(s)
	•Consider appeals of permitting, change, or adjudication decisions
Irrigation districts/water users' associations	•Improve, develop, and maintain common water delivery systems
Legislature	•Pass and amend water right-related laws •Consider certain out-of-state appropriations of water and large ground water appropriations •Designate closed basins
Montana Bureau of Mines and Geology	•Maintain ground water well log reports •Manage the Ground Water Assessment Program
Montana Supreme Court	•Consider appeals of district court, Water Court decisions
Regional Water Authority	•Secure source of water for individual public agencies for sale
Reserved Water Rights Compact Commission	•Inactive; negotiated settlements with 19 Indian tribes, federal agencies
Unitary Management Board of the Flathead Indian Reservation	•Administer water rights on the Flathead Indian Reservation*
Water Court	•Conduct legal proceedings related to historic, pre-1973 water rights claims •Produce enforceable decrees of water rights •Aid district courts in water distribution controversies •Consider petitions for certain historic domestic and stock water right claims

Appendix B. Status of Water Compacts in Montana

Compact	Dates of Legislative Passage	Information
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation 85-20-201, MCA	May 1985	The compact contains a provision for water marketing by the Tribes, making federal legislation necessary. Federal legislation has not been passed. The Water Court approved this compact.
Northern Cheyenne Tribe 85-20-301, MCA Public Law 102-374	May 1991 September 1992	The compact required the federal government and the State of Montana to contribute funds to repair and enlarge the unsafe Tongue River Dam; this has been completed. Congress and the Water Court approved this compact.
U.S. Department of the Interior National Park Service <i>Yellowstone National Park</i> <i>Glacier National Park</i> <i>Big Hole National Battlefield</i> 85-20-401, MCA	January 1994	The compact includes an article providing a controlled ground water area to protect the hydrothermal system in Yellowstone National Park. The Water Court has approved this compact; it and does not require Congressional approval.

Compact	Dates of Legislative Passage	Information
U.S. Department of the Interior National Park Service <i>Little Bighorn Battlefield National Monument</i> <i>Bighorn Canyon National Recreation Area</i> 85-20-401, MCA	May 1995	Codified with the first compact with the National Park Service (above), the Water Court has approved this compact. It does not require congressional approval.
U.S. Department of the Interior Bureau of Land Management <i>Upper Missouri National Wild & Scenic River</i> <i>Bear Trap Canyon Public Recreation Site</i> 85-20-501, MCA	March 1997	The compact settles the instream flow rights for two river segments; one on the Upper Missouri and one on the Madison River. The Water Court has approved this compact. This compact does not require congressional approval.
U.S. Department of the Interior Fish and Wildlife Service <i>Benton Lake National Wildlife Refuge, Black Coulee National Wildlife Refuge</i> 85-20-701, MCA	March 1997	The compact settles the reserved water rights for two of the six national wildlife refuges claiming such rights in Montana. It has been approved by the FWS and the U.S. Department of Justice. The Water Court approved this compact.
Chippewa Cree Tribe of the Rocky Boy's Indian Reservation 85-20-601, MCA Public Law 106-163	April 1997 December 1999	The compact allocates 10,000 acre-feet per year to the tribe from Tiber Reservoir. Congress and the Water Court have approved this compact.

Compact	Dates of Legislative Passage	Information
U.S. Department of the Interior Fish and Wildlife Service <i>Red Rock Lakes National Wildlife Refuge</i> 85-20-801, MCA	April 1999	Another of the six wildlife refuges claiming reserved water rights in Montana, the Red Rock Lakes settlement has been approved by the appropriate federal agencies and by the Water Court. This compact does not require congressional approval.

Compact	Dates of Legislative Passage	Information
Crow Tribe 85-20-901, MCA Public Law 111-291	June 1999 Special Session December 2010	A compact between the Crow Tribe, the United States, and the state passed the Legislature in 1999 and was ratified by Congress in 2010. The Crow Tribe approved the compact by referendum in 2011. The compact allocates 500,000 acre-feet per year of the natural flow of the Bighorn River to the tribe. The U.S. Bureau of Reclamation will allocate 300,000 acre-feet per year of storage in Bighorn Lake to the tribe. The state paid \$15 million in exchange for the tribe's dismissal of a coal severance tax lawsuit and for the state's portion of cost-share for the water settlement. A management plan for Bighorn River and Bighorn Lake was finalized in 2000. This compact must be approved by the Water Court.

Compact	Dates of Legislative Passage	Information
Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation 85-20-1001, MCA	April 2001	The compact allocates 645 cubic feet per second from the Milk River to the tribes, limited by the U.S. share of the natural flow of the Milk River and the tribal capacity to develop the water. When uses upstream of the reservation interfere with the tribal water right, the tribes will obtain water from the federal Milk River Project. This compact awaits ratification by Congress and the tribes.
U.S. Department of Agriculture Agriculture Research Service <i>Fort Keogh Livestock and Range Research Laboratory</i> 85-20-1101, MCA	March 2007	The compact settles the administrative, irrigation, stock, and emergency fire suppression water rights for Fort Keogh near Miles City. It includes reserved rights to Fort Keogh's current irrigation use from the Yellowstone River and some future irrigation use, and it includes a small amount of current use from a tributary of the Tongue River. The Water Court approved this compact.

Compact	Dates of Legislative Passage	Information
U.S. Department of Agriculture Agricultural Research Service <i>Sheep Experiment Station</i> 85-20-1201, MCA	March 2007	The compact settles the stockwater, domestic, irrigation, storage, dust abatement, reclamation, research, emergency fire suppression, and other water rights for the small portion of the Sheep Experiment Station located southeast of Dillon. The Water Court approved this compact.
U.S. Department of the Interior Fish and Wildlife Service <i>Bowdoin National Wildlife Refuge</i> 85-20-1301, MCA	April 2007	The compact settles the reserved rights for uses including administrative, wildlife habitat maintenance and enhancement, stockwatering, and other uses. The Water Court approved this compact.
U.S. Department of Agriculture <i>Forest Service</i> 85-20-1401, MCA	April 2007	In general, the compact recognizes reserved water rights for the Forest Service for administrative and emergency firefighting and for instream flows for the South Fork Flathead Wild and Scenic River. The compact uses state law to create state-based water rights for instream flow on National Forest System lands. The Water Court approved this compact.

Compact	Dates of Legislative Passage	Information
Blackfeet Tribe 85-20-1501, MCA Public Law 114-322	April 2009 December 2016	This compact will provide water and economic development for the Blackfeet while protecting the rights of water users locally and downstream on the Milk River. Congress approved this compact in 2016; the tribe approved the compact in 2017. The compact is pending in the Water Court.
U.S. Department of the Interior U.S. Fish and Wildlife Service <i>National Bison Range</i> 85-20-1601, MCA	April 2009	This compact quantifies federal reserved water rights for the FWS National Bison Range from springs, seeps, naturally occurring flood flows, and ground water sources arising within the National Bison Range. The Water Court approved this compact.
U.S. Department of the Interior Bureau of Land Management <i>Upper Missouri River Breaks National Monument</i> 85-20-1801, MCA	April 2013	This compact includes instream rights for the Judith River and Arrow Creek; new appropriations for those two waterways must observe minimum flow requirements. The Department of Interior and the Water Court approved this compact.

Compact	Dates of Legislative Passage	Information
U.S. Department of the Interior Fish and Wildlife Service <i>Charles M. Russell National Wildlife Refuge</i> 85-20-1701, MCA	April 2013	This compact quantifies water rights for stock, wildlife, and wildlife habitat. The Department of Interior and the Water Court have approved this compact.
Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation 85-20-1901, MCA	April 2015	This compact creates a unitary management board to govern use of state- and tribal-based rights on the reservation. The compact plans to improve the Flathead Indian Irrigation Project; project water rights are part of the tribal water right. The compact includes millions of gallons of water from Hungry Horse Reservoir for future on- and off-reservation development. The compact grants the tribe 22 off-reservation water rights, mostly co-owned with the state of Montana. Congress, the tribe, and the Water Court must approve this compact.

Notes:

Persons with disabilities who need an alternative accessible format of this document should contact:

Department of Natural Resources and Conservation
1539 11th Ave.
P.O. Box 201601
Helena, MT 59620-1601
Phone: 406-444-2074
Fax: 406-444-2684
TDD: 406-444-2074

