

Water Rights and Historical Beneficial Use

Montana's economy and quality of life rely on water for everything from agriculture, livestock, industry, fisheries, and recreation, to municipal and domestic uses. Water use in Montana is influenced by a variety of factors including irrigated acreage, physically available water supplies, number of stock, and the state population. Every drop of water counts when ensuring that all water needs are met for the citizens of Montana.

What is a Water Right?

All water belongs to the state of Montana for the beneficial use of its people. In order to legally put water to a beneficial use in Montana, a person must have a water right. And a water right is both based on and limited by the actual use of the water. In 1973, the Montana state constitution established the process of defining water rights that were in use prior to 1973. The Water Use Act of 1973 defined the process to change those water rights as well as acquire new water rights in the future.

A water right does not create ownership of water itself; rather, it creates a property interest in the right to beneficially use a quantity of water for a specific purpose. When water is first put to use defines its priority date and where its seniority is in comparison to when other water rights are put to use. This is known as the prior appropriation doctrine – first in time, is first in right. There is no hierarchy among beneficial uses other than priority date. There are more than 250,000 [sic.] pre-1973 water rights. Many of these were established by simply putting water to

A water right consists of a priority date, a purpose of use, point of diversion, a source, place of use, period of use, and a quantity reflected in a flow rate, volume or both.



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use. A process was created to generally define these water rights including establishing their priority dates – known as the water rights adjudication.

After 1973, a water right has to be permitted by the DNRC before water can be put to use with a few exceptions for minor water uses that are defined in law. All water rights, pre-and post-1973, are defined and limited by the actual use of water. This includes both the amount of water that is diverted and the amount consumed for the water use.

Historical Beneficial Use

Water rights are defined and perfected based on how, when, and where the water is used. For example, when water is used during the irrigation season matters. The quantity of water associated with a water right is determined by the pattern of use and flow rate, not simply by the flow rate diverted.

The flow rate is determined by the capacity of the diversion system (e.g. pump or ditch) and is expressed in gallons per minute (GPM), cubic feet per second (CFS), or Miners Inches (MI). If the actual flow rate diverted is less than what is decreed, the water right is determined by the actual diversion rate.

The diverted volume is the quantity of water diverted over a period of time, and is expressed in acre-feet (AF). It is calculated by determining the length of



time water is diverted at a given flow rate. A very important part of the diverted volume is consumptive use, which is the annual volume of water consumed for a beneficial purpose, such as water used by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that does not return to ground or surface water.

The level of agricultural crop production is directly related to the amount of water consumed by the crop, including precipitation and water supplied through irrigation. The consumed volume part of a water right is important because it determines how much water returns to a stream. The total volume of water produced by a stream is finite, if one producer's consumed volume increases, then another producer can be negatively impacted by the increased consumption because less water returns to the stream and reaches their head gate.

A water user can change the place of use, purpose of use, point of diversion, and place of storage for a water right. However, a water user may not enlarge the underlying water right. The water rights adjudication establishes the outside limits of water use, but in many cases does not specifically define the actual water use. When a water right holder wants to change how they use water from how it is described by their water right, DNRC reviews the actual water use to ensure that water use is not expanded and other water right holders are not harmed by the change. This is done through an extensive analysis using the best available information to determine the historic period of diversion, acres irrigated, diverted volume, and consumptive use (collectively referred to as historic use) of the claimed right.

Increases in the amount of consumption or changes in

Diverted water is what is removed from a stream or groundwater and applied to the beneficial use. **Consumed water** does not return to the surface or groundwater after the water use. Diverted water that is not consumed returns to a water source.

the pattern of use from the historic use of the water right can affect other water right holders who depend on that historic pattern of use in exercising their own water right. The person wishing to change their water right has the burden of showing that the proposed change will not adversely affect other water rights on the source.

Over the past 40 years, the DNRC has developed an extensive set of data to assist water users in identifying relevant evidence to establish the parameters of historic use. Since actual historical beneficial use is the basis, measure, and limit of a water right, a water user only has the legal right to the amount of water they have historically put to a beneficial use.



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Want more in-depth information? Check out -

- Water Rights in Montana FAQ's—dnrc.mt.gov/divisions/water/water-rights/docs/faq.pdf
- Water Rights in Montana—dnrc.mt.gov/divisions/water/water-rights/docs/2014-water_rights_in_mt_handbook.pdf
- Montana State Water Plan—dnrc.mt.gov/divisions/water/management/state-water-plan

Websites:

- DNRC Water Rights Bureau: dnrc.mt.gov/divisions/water/water-rights
- Montana Water Court: courts.mt.gov/water