

Association of Gallatin Agricultural Irrigators

www.agaimt.com

A Guide to Water Rights in Gallatin County

Montana Water Law Basics
Domestic Wells
Creek or Irrigation Ditch?
Ponds

Every water right has:

- A specific source – generally, a stream or spring (for surface water) or groundwater (for a well).
- A specific point of diversion – a point where the water is diverted from its source – a head gate or wellhead.
- A specific place where water is used – defined in acres, township, range, and section.
- A beneficial use – including, but not exclusively, irrigation, stock water, municipal, industrial, domestic, recreational uses, in-stream flow, power, fish and wildlife, aquifer storage and recovery, and mitigation.
- A specific flow rate and volume – in cubic feet per second (flow) and acre feet (volume).
- A period of use. Domestic and stock water uses are typically year round. Irrigation is seasonal, usually April to October.
- A priority date – the date the water was first put to beneficial use.

This information is kept in a database administered by the Montana Department of Natural Resources and Conservation (DNRC) – Water Rights Bureau (<http://dnrc.mt.gov/wrd/default.asp>).

Montana Water Law Basics

First in Time, First in Right

Like most of the western United States, Montana operates under what is known as the doctrine of “prior appropriation.” Simply stated, this doctrine says that those who first put water to beneficial use get to continue using it when water is scarce. This “first in time, first in right” priority system ensures that water users whose predecessors first put water to use—so-called “senior users”—can rightfully demand that their needs from a source be fulfilled before the interests of junior users. Some senior water rights in Montana go back to the mid 1860s. In years when water is too scarce to satisfy all water rights, senior users get water and junior users often don’t.

Beneficial Use

Another key provision of this doctrine of prior appropriation is that water must be put to a beneficial use. When the “prior appropriation doctrine” evolved in the arid west in the 19th century, “beneficial use” was largely defined by the act of diverting waters from the source. The idea of water left instream serving a beneficial use didn’t begin to surface in Montana law until the late 1960s. Now, in specific circumstances, it is possible to acquire a legal water right for instream use for fisheries, wildlife, and water quality.

The key to protecting a water right is to apply it to a beneficial use. In the case of irrigation, for instance, that means actually irrigating something other than the bottom of a ditch. Likewise, pouring enough water on fifty acres to irrigate 400 acres doesn’t establish a beneficial use in the excess water. Your beneficial use is limited by the reasonable need of the particular use.



Photo: USDA NRCS

A Guide to Water Rights in Gallatin County

Association of Gallatin Agricultural Irrigators www.agaimt.com

A Water Right is a Usufructuary Right

While it may seem contradictory at first, the State of Montana owns all the water in the state - the owners of water rights possess only the right to use the water. Article IX of the Montana Constitution states:

“All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.”

Just because water arises on your land, you don't have an automatic right to use it. You must have a water right.

Use it Or Lose it.

Your right to use a water right has been recognized as a form of property right. But it's not like a piece of real estate or a new car: you have to use it. If you don't use it, usually over a long period of time, you can lose it. This doesn't mean it has to be used every year. For instance, a really junior right may only have water available every few years, and then only for a limited period of time. Non-use, coupled with some outward sign of intent to no longer use the water, can lead to an abandonment of a water right.



A water right is under threat of abandonment if it meets three criteria:

- (1) the claimant does not use the water for an extended period of time (10 or more years),
- (2) water is available AND
- (3) there is no intent to use the water. This does not apply to federal or tribal water rights and

Water Rights Are Transferable.

If you own a piece of real estate, and it has water rights on it, when you sell that real estate (unless you reserve the water rights in the conveyance) the water rights automatically transfer to the buyer of the real estate, see http://dnrc.mt.gov/wrd/water_rts/HB39/default.asp. Water rights can be transferred to new places of use totally unrelated to the original place of use. But there's a catch. **Any change in the purpose, place of use, or place of diversion of a water right must first be approved by the Montana Department of Natural Resources and Conservation.**

Domestic Wells

Individual wells supply domestic water for almost all rural households in the Gallatin watershed. As of December 2012, there were 13,700 wells on record in the watershed, of which approximately 60 percent had filed water rights (DNRC & Gallatin Watershed Sourcebook).

If you do not have an abstract of your water right that came with your deeded property, you can go to the DNRC website <http://nriss.mt.gov/dnrc/waterrights/> to obtain the abstract.



**To apply for a new domestic or agricultural well contact the
DNRC Water Rights Bureau (406) 444- 6601.**

A Guide to Water Rights in Gallatin County

Association of Gallatin Agricultural Irrigators www.agaimt.com

In Montana, landowners with “live” water on or adjacent to their property have certain rights and obligations attached to the use of water on their property. Understanding these rights and obligations maintains good neighbor relations.

Is it a Stream or an Irrigation Ditch?

If the watercourse is a natural stream, the landowner should consult the Gallatin Conservation District about stream alteration rules.

The *Natural Streambed and Land Preservation Act of 1975*, commonly known as the 310 Law, was enacted by the Legislature in 1975 for the purpose of protecting and preserving the State’s waterways. The Gallatin Conservation District, formed in 1949, administers the 310 law in Gallatin County.

A 310 permit is required by any person proposing a project that would physically alter or modify the bed or banks of a perennial stream, river, or spring. A project may be a culvert, footbridge, headgate, diversion, bank stabilization, etc. A perennial stream is defined as: a stream, which in the absence of diversion, impoundment, appropriation, or extreme drought, flows continuously at all seasons of the year and during dry as well as wet years. Man-made irrigation ditches do not require a 310 permit, except at river diversion locations.

**To find out if it is a stream or ditch, contact the
Gallatin Conservation District.
(406) 282-4350
<http://www.gallatined.org/>**



If the water course is an irrigation ditch, the landowner needs to contact the ditch company that owns the irrigation ditch to determine whether he has rights in the ditch or not.

A ditch company is a group of water right holders (landowners) that built and maintain the infrastructure of headgates and ditches needed to divert water from a source (a river) and deliver it to its members. The water rights used in the ditch may be held individually or held by the ditch company and issued as shares. There are 37 ditch companies, most over 80 years old, diverting water from the West Gallatin River for irrigation.

If an Irrigation Ditch Crosses Your Property, Here are a Few Things You Should Know:

- In addition to the easement for the ditch, easements also exist on every ditch for maintenance and cleaning. Expect large equipment to cross your property in the easement to remove debris, restore ditch banks, and periodically clean out the bed of the ditch.
- Any alterations to the ditch need prior approval from the ditch company - realignment, road crossings, culverts, bridges, etc.
- Anything that impedes water flow - landscape plantings, bridges, lawn clippings and debris, temporary dams - is not allowed within the ditch easements. Trees and shrubs capture water, injuring water right owners, and will likely be removed during routine cleaning.
- Weeds are the legal responsibility of the landowner. Be aware that many herbicides are not safe to use in or near water. If improperly applied, herbicides can easily be transported through an irrigation ditch harming non-target plants in other areas.
- You can't use the water unless you have a valid water right. If you own a water right in the ditch, or shares in the ditch, you are expected to pay maintenance assessments and use water only in the quantity (and for the purposes) allowed by the water right.

A Guide to Water Rights in Gallatin County

Association of Gallatin Agricultural Irrigators www.agaimt.com

Ponds

There is an increase in private landowners constructing ponds for recreation and aesthetic in the Gallatin Valley. If you are considering building a pond, contact the Montana Watercourse for a copy of the publication, "A Guidebook for Montana Ponds: What You Need to Know about Ponds and Alternatives". There are many logistical and financial considerations involved, including obtaining a water right for your pond.



Contact your local DNRC Water Resources office to learn what type of water right is needed. Federal, state, and local permits may be required, and be aware that application processes vary and can take some time. Finally, know that there are many options besides ponds, such as stream restoration or wetland enhancement, that may meet your goals and be more appropriate for your property.

For more information:

Association of Gallatin Agricultural Irrigators
www.AGAIMT.com

Gallatin Local Water Quality District
(406) 582-3148
www.gallatin.mt.gov/GLWQD

U.S. Geological Survey, Helena,
(406) 441-1319
<http://mt.water.usgs.gov/>

DNRC Bozeman Regional Office
(406) 586-3136
<http://dnrc.mt.gov>

Montana Fish, Wildlife & Parks
(406) 444-2449
www.fwp.mt.gov

Gallatin Association of Realtors
(406) 585-0033
www.gallatinrealtors.com

Montana Water Court
(406) 586-4364 (Bozeman office)
<http://courts.mt.gov/water>

Gallatin Conservation District
(406) 282-4350
<http://www.gallatincd.org/>

Natural Resources Information System (NRIS) at the State Library, Water Rights
<http://nris.mt.gov/wis/data/waterrights.htm>

Gallatin County Planning Department
(406) 582-3130
www.gallatin.mt.gov/planning

Trout Unlimited
(406) 522-7291 (Bozeman Office)
www.tu.org

Greater Gallatin Watershed Council
(406) 551-0804
www.greatergallatin.org

Informational Booklets:

A Buyer's Guide to Montana Water Rights
www.tu.org

Gallatin Watershed Sourcebook
www.gallatin.mt.gov/GLWQD

A Guidebook for Montana Ponds: What you Need to Know About Ponds and Alternatives
<http://www.mtwatercourse.org>

Water Rights in Montana
<http://dnrc.mt.gov>

A Guide to Water Rights in Gallatin County is
a cooperative project by:

Association of Gallatin Agricultural Irrigators
www.agaimt.com

Gallatin Conservation District
<http://www.gallatincd.org/>

AGAI would like
to thank
Trout Unlimited
for permission to use
text from
*A Buyer's Guide to
Montana Water Rights in
this publication.*