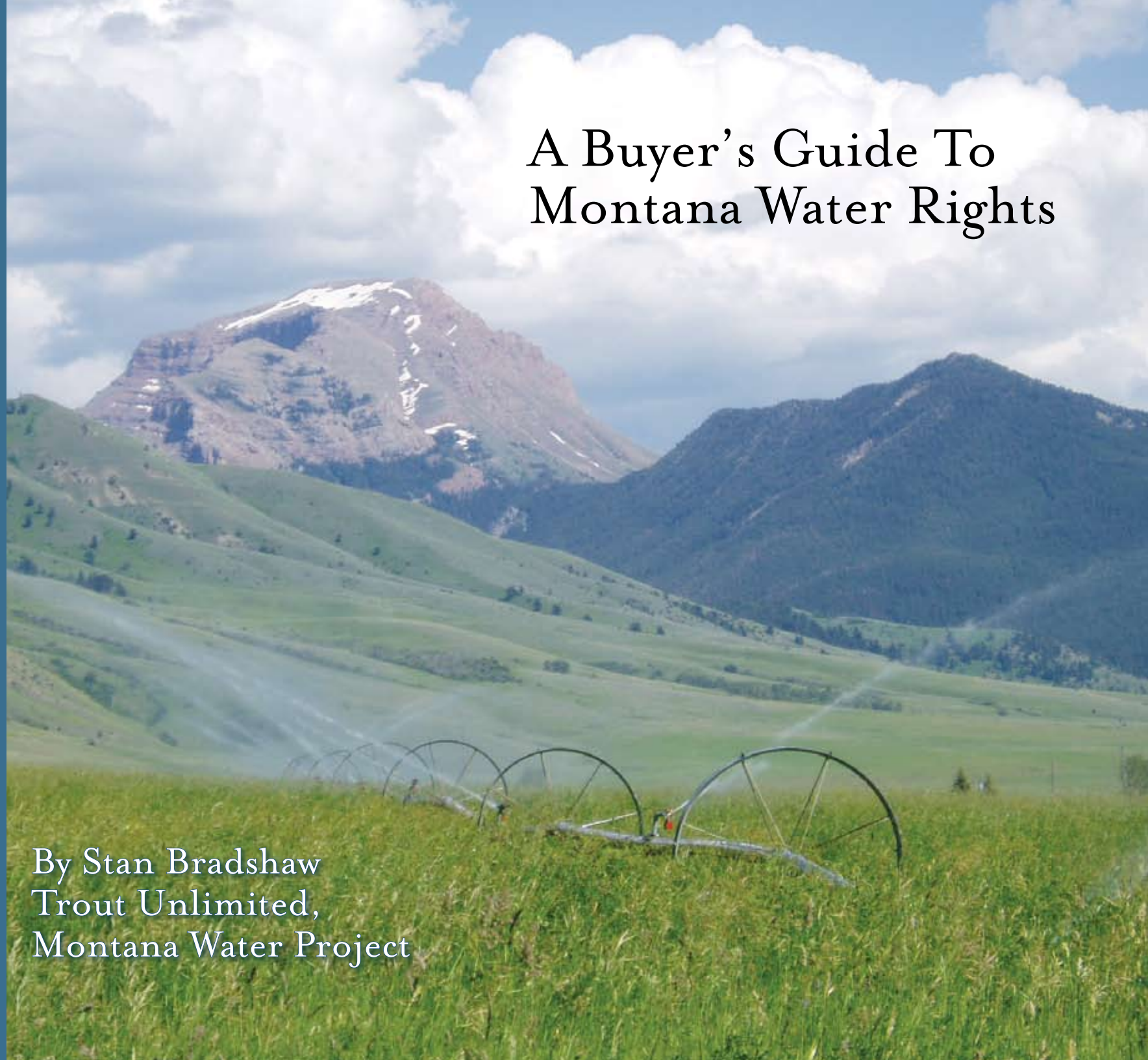
A Buyer's Guide To Montana Water Rights



By Stan Bradshaw
Trout Unlimited,
Montana Water Project

TROUT UNLIMITED

A Cautionary Tale

This tale is based on real events. I've just changed the names, details of the water right, the specific facts of the dispute, and the location to avoid undue embarrassment to anyone.

In 2002, Michael Hartman looked at a ranch for sale on a major tributary in the upper Missouri river basin. It was 1100 acres with frontage on a trout stream, and it had an active sprinkler-irrigated hay operation on 160 acres. When Hartmann was negotiating the deal, the realtor produced a water rights document entitled "Statement of Existing Water Right Claim" ("Statement of Claim" for our purposes). It included a water right number, identified a flow rate of 10 cubic feet per second (cfs), and 320 irrigated acres, complete with a legal description of the acres irrigated.

It seemed like a great deal—nice property right on a famous trout stream, and a whole lot of water rights to work with. What's not to like? So he bought it. After moving on to the land, Hartman looked at the acres claimed for irrigation in the Statement of Claim, located the 160 acres that weren't currently being irrigated, and embarked on plans to start irrigating them. When he walked the land, he didn't notice any sign of ditches or headgates on the quarter section he wanted to irrigate, but he figured, "Hey, it's listed on the water right, so I have the water for it." He approached the Natural Resources Conservation Service (NRCS) about cost sharing a new center pivot on the land and putting a pump into the ditch serving the other 160 acres, and they seemed interested.

Well, his little valley was a small town and word got out about what he had planned. Some downstream irrigators, who were having particular difficulty getting their water that year, contacted a lawyer. The lawyer wrote to Hartman, telling him that the property he wanted to irrigate had no history of irrigation, and that if he didn't cease-and-desist (a favorite lawyer phrase), his clients would take Hartman to court.

Hartman was stunned. "But, my water right says I can irrigate this land," he thought. So he called his lawyer, who specialized in real estate law, but had taken a course in water law at the University of Montana 20 years before. The lawyer, after perusing Hartman's Statement of Claim, assured his client it was okay to irrigate that property.

To shorten this up a bit, Hartman started to install his pivots and the downstream irrigators sued to stop him from using the pivot because he did not have a water right for the acreage he wanted to irrigate. Several thousands of dollars later, the court ordered Hartman to cease and desist because Hartman could produce no evidence that the land had been irrigated and, notwithstanding the language in the Statement of Claim, he did not have a water right to irrigate those acres.

The moral of this tale? First, don't necessarily believe everything you read on that Statement of Claim—due diligence in searching water rights in Montana requires more than simply looking at your paper "water right" as Hartman did. And, by the way, don't hire just any old lawyer to advise you on water law—hire one that specializes in water law.

Introduction

Welcome to Montana water law. To the casual observer, water law appears arcane, internally contradictory, illogical, and generally inaccessible to anyone not fully immersed in it. At one time or another it can indeed be all those things. Happily, however, you don't have to be a water-law expert to avoid Hartman's fate.

The purpose of this guide is simple—to help you, the prospective buyer of Montana land, determine if any real water rights go with the land you want to buy. One thing this guide won't do is make you an expert. But it should help you ask some of the right questions when you're looking at a piece of land with water rights.

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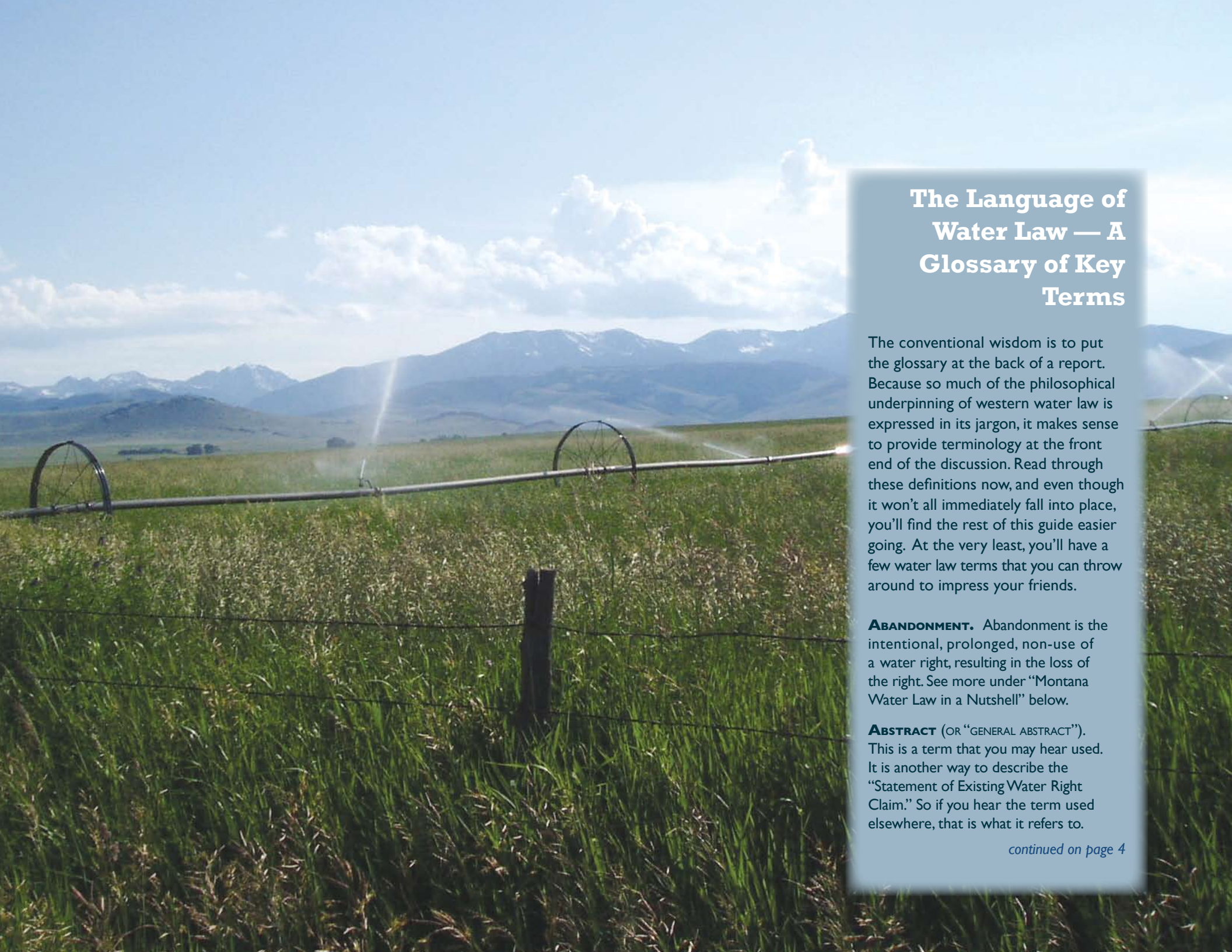

The Language of Water Law — A Glossary of Key Terms

The conventional wisdom is to put the glossary at the back of a report. Because so much of the philosophical underpinning of western water law is expressed in its jargon, it makes sense to provide terminology at the front end of the discussion. Read through these definitions now, and even though it won't all immediately fall into place, you'll find the rest of this guide easier going. At the very least, you'll have a few water law terms that you can throw around to impress your friends.

Abandonment. Abandonment is the intentional, prolonged, non-use of a water right, resulting in the loss of the right. See more under "Montana Water Law in a Nutshell" below.

Abstract (or "general abstract"). This is a term that you may hear used. It is another way to describe the "Statement of Existing Water Right Claim." So if you hear the term used elsewhere, that is what it refers to.

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Montana Water Law in a Nutshell

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 first when water is scarce. This "first in time, first in right" priority system ensures that water users whose forebears first put water to use—so-called "senior users"—can rightfully demand that their needs from a stream be fulfilled before the interests of junior users. Some senior water rights in Montana go back to the late 1860s. In years when water is too scarce to satisfy all water rights, senior users get water and junior users often don't. So the first take-home lesson is that not all water rights are created equal. In a dry year, a 1910 water right for 10 cfs may not provide as much water to the user as an 1875 water right for 2 cfs.

Not all water rights are created equal. In a dry year, a 1910 water right for 10 cfs may not provide as much water to the user as an 1875 water right for 2 cfs.

Beneficial Use—A Moving Target

Another key provision of this doctrine of prior appropriation is that water must be put to a *beneficial use*. When this system evolved in the arid west in the 19th century, "beneficial use" was largely defined by the act of diverting waters from the stream. Water left instream was widely considered to be waste. A well-managed stream was a dry one. 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 such things as the benefit of fisheries, wildlife, and water quality.

One cautionary note about diversions and beneficial use—some water right holders believe that simply diverting water, even if they don't apply it to a beneficial use, protects their water right from a claim of abandonment. It doesn't. The key to protecting your claim to 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.

A Water Right is a Property Right.

While it may seem contradictory at first blush, the State of Montana owns all the water in the state—the owners of water rights possess only the *right to use* some of that water. Here's the crucial language in Article IX of the Montana Constitution:

"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.

The key to protecting your claim to a water right is to apply it to a beneficial use.

Use it Or Lose it. So the state owns it, but we get to use it. Your right to use the water—your water right or appropriation 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 concept of "use it or lose it" doesn't mean it has to be used every year—a really junior right may only find available water every few years, and then only for a small part of the year—it's still a valid water right; just not a very reliable one. Disuse, coupled with some outward sign of intent to no longer use the water, can lead to abandonment of a water right.

Photo © www.kestrelaerial.com

Keep this concept of abandonment in mind as you consider the water rights claimed for the property you're examining. If you see an abstract that shows a claim for irrigated acres where there is no sign of any irrigation system or, if what is there looks like it hasn't been used since the advent of the internal combustion engine, it should send up a warning flag.

Acre-foot. This is a term used to describe a volume of water. An acre-foot equals 325,851 gallons, or enough to cover one acre in one foot of water (43,560 sq. ft., or about the size of a football field). An acre-foot is also enough water to meet the demands of a family of four for a year.

Adjudication. In the context of Montana water law this refers to the statewide judicial proceeding to determine the type and extent of all water rights claimed before July 1, 1973. See the sidebar below on the adjudication.

Adverse effect. In water rights, something that impedes the ability of a water user to make use of water. Change in use must avoid an adverse effect to other water users.

Appropriate. The acts necessary to create a water right.

Appropriation right. A long-winded way of saying water right. A water right is a right to put water to a beneficial use.

Appropriator. One who applies water to a beneficial use. An appropriator owns a water right.

Beneficial use. 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; a use of water to maintain and enhance streamflows to benefit fisheries pursuant to conversion or a lease of a consumptive use right. *Note: simply diverting water down a ditch and letting it run back to the stream is not a "beneficial use."*

Change in appropriation right. A change in the place of diversion, the place of use, the purpose of use, or the place of storage of a water right. These changes need the approval of the Department of Natural Resources and Conservation (DNRC) to assure that the change will cause no adverse effect to other water users.

Consumptive use. A beneficial use of water that reduces the source of supply, such as irrigation or municipal use.

Cubic feet per second (cfs). 448.8 gallons per minute. Cfs is a measurement of flow. A flow of 1.0 cfs over 24 hours will yield a volume of 1.98 acre feet.

1.0 cfs = 448.8 gpm = 40 miner's inches

1.0 cfs x 24 hrs = 1.98 acre feet

DNRC. The Montana Department of Natural Resources and Conservation, the state agency responsible for permitting new water rights and changes in appropriation rights.

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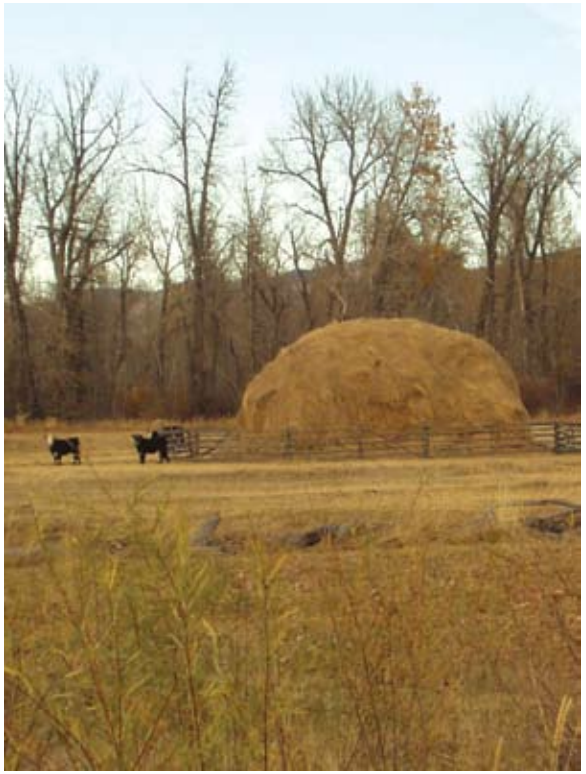
In a similar vein, a declaration of intent to use a water right, by itself, does not establish a water right. A water right has to be perfected by actually putting it to a beneficial use. In the 19th and early 20th century, it was possible to file a notice of a water right in the county clerk's office. Miners, often with an excess of wishful thinking, were particularly fond of doing this. In many cases, that is all that ever happened—no ditches were dug or water diverted. To put it kindly, the validity of those water rights is highly suspect.

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

Water Rights Are Transferable. A lot of water rights traditionalists repeat a common refrain, "Water runs with the land." The statement is only partly true. If you own a piece of real estate, and it has water rights on it, when you sell that real estate, if you don't mention the water rights in the conveyance, the water rights automatically transfer to the buyer of the real estate.



Some old timers want to believe that this means the water right can never be severed from the land. That isn't true, and hasn't been true since at least 1895. Water rights can be transferred to new places of use totally unrelated to the original real estate. 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. Prior to 1973, if you wanted to change the place of use, purpose, or point of diversion, you just did it. While you had an obligation not to do anything that would adversely affect the water rights of others, you didn't have to seek any prior agency approval to do the change. If you harmed somebody, they had the option to sue you after the deed was done. In 1973 however, with the passage of the Montana Water Use Act, that all changed. Now, if you want to change the point of diversion, place of use, or purpose of use of

your water right, you have to first secure DNRC's approval, and the burden is on you to prove that you won't adversely affect the water rights of anyone else. And step one in providing that proof? Documenting historic use. Ultimately, it's a bit more complicated than that—there is some hydrology involved—but a key part of granting a change is assuring that there won't be any expansion of use over what historically occurred. So, back to our cautionary tale at the beginning, any proposed change which will expand the amount of water diverted or consumed might have an uphill battle getting DNRC's approval if there are any downstream water rights.

Historic use of a water right—not what an abstract, or even what a court decree says—is key to establishing the extent of a water right.

Historic use of a water right—not what an abstract, or even what a court decree says—is key to establishing the extent of a water right. So, when you embark on due diligence research of a water right, one fundamental goal is get a handle on what the actual historic use was.

Flow rate. A measurement of the rate at which water flows are diverted, impounded, or withdrawn from the source of supply for beneficial use, and commonly measured in cubic feet per second (cfs) or gallons per minute (gpm). Put in every day terms, when you turn on the faucet in your kitchen sink, the water comes out at a certain rate of flow (gpm).

Instream flow or use. Water left in a stream or river for nonconsumptive uses such as a fishery use.

Junior Appropriator. A secondary user on a water course. One who does not have the most senior rights.

Miner's inch. An archaic description of flow rate that you'll occasionally hear. In Montana, one cfs equals 40 minor's inches. Or one miner's inch equals 11.22 gallons per minute. One caveat for the strict constructionists among you—a miner's inch in Montana isn't necessarily the same a miner's inch in another state. Why? Go figure.

Nonconsumptive use. A beneficial use of water that does not reduce quantity, quality, or timing of water in the source of supply, such as an instream use.

NRCS. The Natural Resources Conservation Service. This is the federal agency that implements the federal farm

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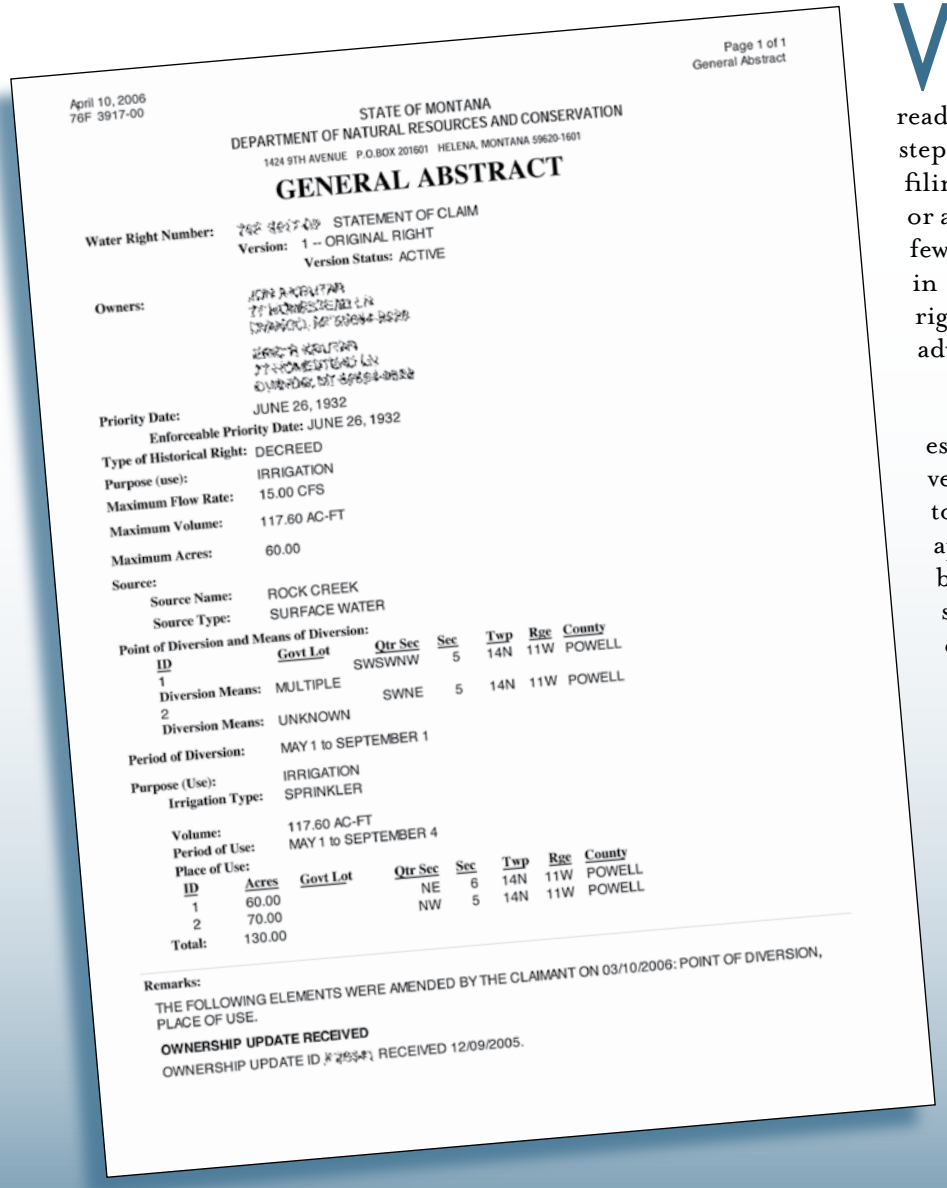
Performing Due Diligence on the Existence of a Water Right



April 10, 2006
76F 3917-00

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General Abstract

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1424 9TH AVENUE P.O.BOX 201601 HELENA, MONTANA 59620-1601

GENERAL ABSTRACT

Water Right Number: 76F 3917-00 STATEMENT OF CLAIM
Version: 1 -- ORIGINAL RIGHT
Version Status: ACTIVE

Owners:

Priority Date: JUNE 26, 1932
Enforceable Priority Date: JUNE 26, 1932
Type of Historical Right: DECREED
Purpose (use): IRRIGATION
Maximum Flow Rate: 15.00 CFS
Maximum Volume: 117.60 AC-FT
Maximum Acres: 60.00

Source:
Source Name: ROCK CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1		SWSWNW	5	14N	11W	POWELL
2		SWNE	5	14N	11W	POWELL

Diversion Means: MULTIPLE
Diversion Means: UNKNOWN
Period of Diversion: MAY 1 to SEPTEMBER 1
Purpose (Use): IRRIGATION
Irrigation Type: SPRINKLER
Volume: 117.60 AC-FT
Period of Use: MAY 1 to SEPTEMBER 4
Place of Use:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	60.00		NE	6	14N	11W	POWELL
2	70.00		NW	5	14N	11W	POWELL
Total:	130.00						

Remarks:
THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 03/10/2006: POINT OF DIVERSION, PLACE OF USE.

OWNERSHIP UPDATE RECEIVED
OWNERSHIP UPDATE ID # 2654, RECEIVED 12/09/2005.

What follows in this section is a step-by-step guide to researching the validity of water rights claims attached to a piece of land. This does not cover every single aspect of a due-diligence inquiry, but rather those things that are readily accessible to an interested prospective buyer. There are a number of useful steps omitted here—examination of tax records, close examination of 19th century filing documents, comparison of claimed flow rates with measured ditch capacity, or a review of electrical records where irrigation is powered by electricity, to name a few—that are better done by a trained professional. But if you follow the suggestions in this section, it should substantially improve your understanding of the water rights that attach to a property and help you decide whether you need professional advice on the water rights aspect of your purchase.

The bottom line is to establish actual use. Because the people who first established most water rights of any early priority are long since dead, and because very few irrigators actually measured the amount of water they diverted and applied to their fields, establishing historic use can be a challenge. The most accessible approach to establish the existence of an irrigation claim (and one which has been accepted by DNRC) is to look at acres historically irrigated. There is no single magic source for establishing historic use—it is usually an accumulation of sources.

While much of this can be easily be done by the prospective purchaser, if the water right claims are a key part of a parcel's value, you should seriously consider hiring a consultant or attorney who specializes in water rights to conduct the search.

1) Get Copies of the Statement of Claim.

Virtually every consumptive use water right claim is in the Montana DNRC database and available for viewing on line at: **http://nris.mt.gov/dnrc/waterrights/default.aspx**. (See the Resource Guide on page 23). The statement of claim that you find there will be an abbreviated version of the complete statement, but you can request via email a complete copy of the full statement of claim. Remember the numbers you see here—flow rate, volume, and acres

irrigated—don't necessarily accurately represent the extent of the water right. This is just what a prior owner has asserted as a claim—it may or may not be accurate.

In many instances—especially when the adjudication has progressed beyond an initial filing—you may find text at the bottom of the abstract that can provide some hints as to the validity of the historic use claims. These are called "issue remarks." DNRC, after examination of the claim, has placed them on the abstract. For example, a common issue remark is "THIS CLAIM PRESENTS ISSUES OF LAW AND FACT THAT MAY BE ADDRESSED AT THE OBJECTION STAGE. IT APPEARS THAT ___ACRES [instead of the acres claimed on the abstract] ARE ACTUALLY IRRIGATED, AND PROBLEMS COULD EXIST WITH THE FLOW RATE AND PLACE OF USE." If you see a comment like this, you'll want to see what claims examination was done to prompt such a comment, and that information should be available in the regional DNRC office.

2) Review the original 1982 water right claim file and the material submitted in support of it.

The statement of claim that you obtained at step 1 shows what the water user claimed for the water right in 1982 as part of the statewide adjudication.

As of 2006, that adjudication has yet to be completed in any basin. The information on the abstract likely also includes any adjustments to the original claim made as a result of any proceedings in the adjudication. You can see the detail behind the abstract by going to the records on file at the DNRC headquarters in Helena (phone 406-444-6694), at the State Water Court Offices in Bozeman (406-586-4364), or at the regional DNRC Water office that covers the water right in question. The file might include the claim document, supporting evidence, maps, or air photos. It might also include DNRC claims-review documents and field reports. At times, the claims review notes can be a bit cryptic—if you have trouble understanding

bill, and has local and regional offices around the state. It is a source of information and assistance on agricultural irrigation practices, soil types, weed control, grazing practices, and other ranch management issues. It also has a variety of programs providing partial funding for irrigation improvements and some habitat restoration.

Perfected. A water right claim is perfected when it is actually put to use. Under the traditional system one could file a notice of a claim in the county clerk and recorder's office without first having put the water to use. And under the modern permitting system (since July 1, 1973), an applicant for a water use permit must get DNRC approval before putting the water to use. In either instance, if the water is not subsequently put to use, then the water right has not been perfected, and it may not be valid. Remember, a water right is defined by its actual beneficial use. Good intentions don't count for much.

Place of Use. The place at which a water right is put to use.

Point of Diversion. The place on a water source at which water is diverted.

Senior appropriator. As between two or more users on a source, the water user with the earliest priority date.

Return flow. Part of a diverted

flow that is applied to irrigated land and is not consumed and returns underground to its original source or another source of water, and to which other water users are entitled to a continuation, as part of their water right.

Volume. On the Statement of Claim, the volume of the water right is indicated in acre-feet (*see definition above*). This indicates the total amount of water that can be diverted from the stream at the specified flow rate. In many cases, you may see this comment on the "maximum volume" line on the Statement of Claim: "The total volume of this water right shall not exceed the amount put to historical and beneficial use."

Waste Water. That part of a diverted flow which is not consumptively used and which returns as surface water to any surface water source, and which other water users can appropriate, but have no legal right to its continuance. For example, if an irrigator puts so much water on his field that some of it flows off his land as surface flow, that surface flow is waste water.

Water Court. Located in Bozeman, the Water Court's primary function is to carry out the state-wide adjudication. Disputes between water right holders are still handled in local district court, and the local district courts still oversee any water commissioners in their area.

them, ask for help from DNRC personnel. Often the detail you find is not of much help, but it's still worth a look. When you visit any of these offices, the office can give you an update on the status of the adjudication and how it might affect the claims you are examining.

One useful item that may surface as part of this inquiry is an old court decree. Historically, if people had a water rights dispute, parties would sue in district court to resolve it. Many—but far from all—streams have some historic water rights decree that apportions water use among the water users on that stream. While it is not conclusive evidence of historic use, it is another helpful piece of evidence that the water right was indeed put to use at some time in its claimed history.

3) Review the current deed to the property to assure that no water rights have been reserved (severed) from the land.

Remember, In Montana, unless expressly stated otherwise, water rights attached to land will pass with the conveyance of the land, *unless the water right holder expressly exempts the water right from the conveyance.* So notwithstanding anything else you have heard, it's good to peruse the deeds to the land to make sure none of the water rights have been reserved from conveyance to the current owner.

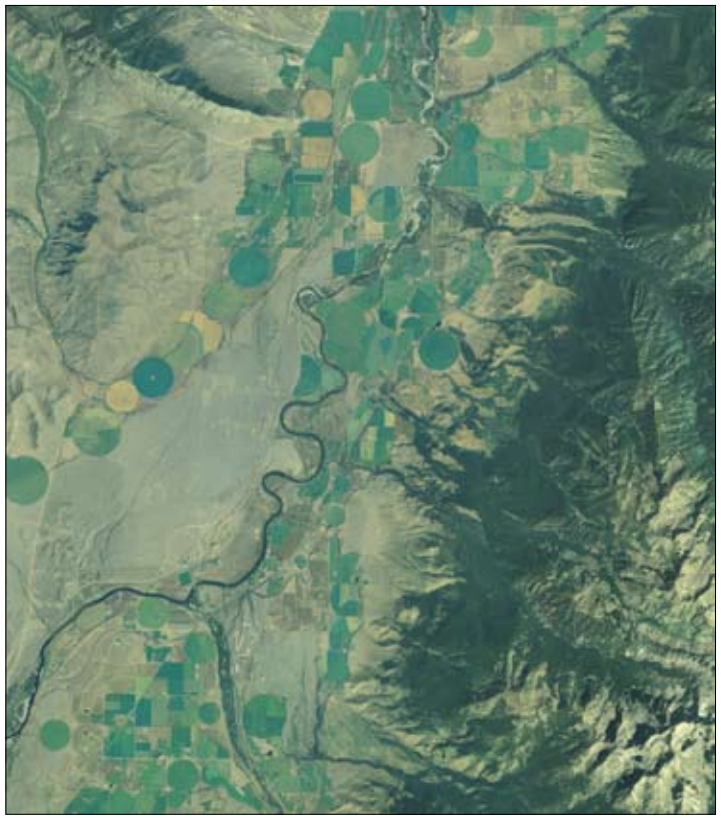
4) If the water rights are represented by shares in a ditch company or irrigation district, check with the ditch company or irrigation district to confirm status of the shares.

If the current owner indicates that the water for the land you are looking at is provided by an irrigation district or ditch company, ask to see the owner's records concerning those shares. And get the name and address of the ditch company, along with any key personnel or phone numbers, so you can conduct your own examination of the shares that attach to your

land. Among other things, you'll want to make sure that any annual assessments have been paid.

5) Review the Montana Water Resources Survey Maps for the township and range in which the water right claims a place of use.

In the 1940, 50s, and 60s, the State Engineer's Office (predecessor to DNRC) surveyed water use in most counties in the state. The results of these surveys were published and expressed as water rights maps that show ditches and irrigated acres. The maps were derived from aerial photos taken in a year close to when the publication occurred (the' 30s, '40s, '50s and '60s), so they represent a snapshot of water use. If the land claimed to be irrigated on your water right abstract does not show up as irrigated on the Water Resources Survey, take that as an early warning. Had Michael Hartman in our cautionary tale taken this step, he might have saved himself a lot of grief. If you draw a blank on the Water Resources Survey map, don't automatically assume that the land in question wasn't irrigated—but you may have to look to other aerial photos to see if any of the claimed lands show up as irrigated in other years. You can look at Water Resources Survey maps online by going to: **www.dnrc.state.mt.us/wrd/home.htm.**



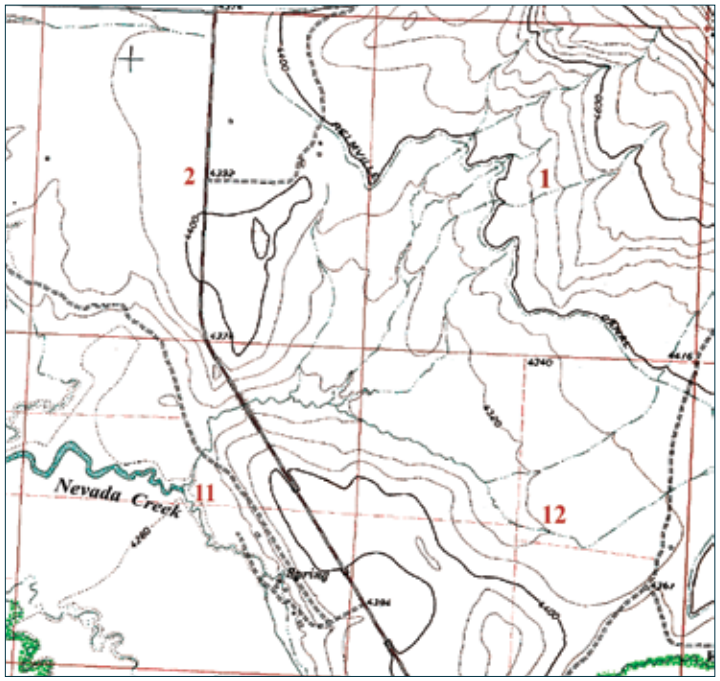
Irrigation activity is often readily identifiable on aerial photos. NRIS photo.

6) Look at other aerial photos.

Part of due diligence is establishing that there has been some continuity of use of a water right—not that it has just been used for one year (e.g. the year of the water Resources survey) and never again. One way to do this is to look at other aerial photos. Two sources of aerial photos are (1) the DNRC regional offices (they will have aerial photos for their particular region); and (2) the water rights website for the water rights claim in question (see item 1 above). By clicking on the "use count" box in the water rights list, you can generate a water rights map that can then be converted to an aerial photo (typically with a 1995 and a 2005 photo date) that can provide some guidance as to recent use. There are a number of other sources of aerial photography, but if you need to go to that much effort and level of detail, you may want to consider hiring a consultant.

7) Look at topographical maps.

One useful exercise is to look at a topographical map of the ground claimed to be irrigated. Most irrigation claims, even if they are now perfected through some kind of pump and sprinkler system, started as flood irrigation. Flood irrigation relies on gravity. For a flood system to work, the water has to flow downhill. And that's where the topographical map comes in handy. If a parcel that has been claimed to be flood irrigated sits higher than the source claimed to irrigate it, that claim of irrigated land is, to put it kindly, suspect. And, indeed, such claims have been filed. In addition, many topographical maps will show some evidence of irrigation canals.



8) Ask the seller for a map that highlights the property for sale and then compare that map to the irrigated acres described in the Statement of Claim.

Over the years, if the property has been split, part of the land irrigated may not be on the parcel you are considering, and that may not necessarily have been reflected in the conveyances. It is possible that there may be more than one person claiming the right.

9) Check the legal descriptions of the points of diversion against the legal description on the land that you are considering buying.

If the points of diversion and ditches are not on the prospective property, you will want to check for any easements on the property where the points of diversion and ditches reside.

10) Do a site visit.

If you're serious about purchasing land, you will no doubt be visiting the site. In a perfect world, you will have read this guide, done your office homework on the water rights, and come prepared to closely scrutinize any evidence of water use at that first visit. If not, plan a second visit and

If the place of use is in section **1** *(4300--4400 feet elevation) and the point of diversion is in section* **11** *(under 4300 feet elevation), Section* **1** *couldn't be flood-irrigated from section* **11**.

If you see an abstract that shows a claim for irrigated acres where there is no sign of any irrigation system, it should send up a warning flag.

come with a camera, a topographical map, copies of the water rights abstracts, the Water Resources Survey map, and a note pad.

When you're on the ground, make sure you see any current irrigation operations, and try to correlate them to the legal descriptions of irrigated ground found on the claim abstract. Ask to see any old diversion sites, ditches or other irrigation works, even if they are not currently in operation. Take pictures. Ask questions about the historic use—what was irrigated, what crops were grown. Determine if there are any old timers around who can talk about what the irrigation practices were. Ask about any historic records—journals, irrigation records, etc.—that might shed light on the historic water use.

Look for signs of historic irrigation, such as old ditches or headgates.

11) Inquire into reliability of the right and how often it is satisfied.

One of the great limitations of junior rights is that, in heavily-used drainages, they might not always—and sometimes not often—get the full amount of the claim satisfied (remember the discussion above about "senior vs. junior.") The other limiting factor may be the source itself. So it's important to focus some inquiry on the seniority of the right and on the reliability of flow in the stream that provides the water. Good sources for this information include not only the landowner, but other water users on the source. If there was a court decree on the stream, there may be a court appointed water commissioner who knows who gets what, and who is typically an unbiased source of information. So make sure to ask if there is a water commissioner on the stream.

12) Check the seniority of the right.

As to seniority, there are a number of things that can be done. First, when reviewing the abstract at the online site described in item 1, also look at a list of the other water rights on the stream in question. This provides you an opportunity to see what the relative priority is of the water rights in question. If there are a lot of water rights senior to the rights in question, they may not provide much access to the water claimed. This may trigger some additional questions of the previous owners as to how often the water right gets satisfied, and how far into the season they get water. Don't hesitate to ask questions of either DNRC or water court personnel about the claims you are looking at. One key question—ask if a district court has appointed a water commissioner to the stream in question. If so, get the name of the commissioner, contact the commissioner and find out if, or when, water rights of the priority date in question cease getting water during the irrigation season because of their relatively junior status. For example, on the

West Gallatin, water rights with a priority date of 1890 or later are considered so junior as to only be able to get water during spring runoff. If you can't find the commissioner, the clerk of court should have his report of his work that he must file to get paid. This can often have useful information about the actual use of the water right.

13) Check the reliability of the source.

Diversions aside, many streams in Montana have extremely low flows, or even dry up, naturally. Yet water rights on those streams might be expressed in flow rates and acres irrigated to suggest otherwise. So it is important to ask questions about whether the stream is perennial or intermittent. In fact, a late-season site visit (generally meaning August or early September) might be the best way to assess that.

14) For any Water Use Permits (post-June 30, 1973 water rights) make sure the Permit has been perfected.

While water use permits, because of their junior priority dates, may not be the most powerful water rights, sometimes they may be all you get—and in some locations, they may be plenty reliable. So if you see statements of claim with a priority dates of July 1, 1973 or later, make sure they have actually been put to use ("perfected"). Also, check with DNRC to make sure the required notice of completion has been filed for the permit, or if any extensions on the filing of that notice have been granted. When on your site visit, compare the permit with what you see on the ground. If there is no evidence of beneficial use, the right may not be valid.

15) If, after doing the first fourteen things on this list, you're still not sure about the water right, consult an expert.

Once you have compiled this kind of evidence, it should give you a realistic picture of what the extent of the water right is. It is rare that a claimed water right is completely false. But it is not unusual for there to be some variance between what is claimed and what can actually be documented as historically used. This is the difference between a "paper water right" and a real water right. In the case of Mr. Hartman and my cautionary tale, Hartman had paper claiming 320 acres, but a real water right only to 160 acres. A reasonable due diligence effort such as described here can go a long way toward providing a reasonable expectation about the water right available for use, and avoiding the kind of shock that Mr. Hartmann encountered.

IV. DUE DILIGENCE CHECKLIST

❑ **Get Copies of the claim abstract for water rights on land of interest**

- ❑ **Check for Issue Remarks**
- ❑ **If Issue Remarks, check at regional office for any claim review notes**

❑ **Review the original 1982 water right claim file and the material submitted in support of it**

- ❑ **Check for maps, aerial photos, etc. used to support claim**
- ❑ **Check for any claims examination materials**
- ❑ **Ask office personnel for assistance in interpreting files**
- ❑ **Look for evidence of a district court decree**

❑ **Review deeds of property to current owner to make sure that no water rights have been reserved (severed) from the land**

❑ **If the water rights are represented by shares in a ditch company or irrigation district, check with the ditch company or irrigation district to confirm status of the shares**

❑ **Review the Montana Water Resources Survey Maps for the township and range in which the water right claims a place of use**

- ❑ **See if land claimed to be irrigated in the Statement of Claim is shown on the Survey Map as irrigated.**

❑ **Look at aerial photos for evidence of historic use**

- ❑ **Look for evidence of irrigation (different shading)**

❑ **Look at topographical maps**

- ❑ **Compare elevations between the point of diversion and the claimed places of use**
- ❑ **Look for evidence of irrigation ditches**

❑ **Compare the legal description of the land offered for sale to the irrigated acres described in the Statement of Claim—do they fully overlap?**

❑ **Check the legal descriptions of the points of diversion against the legal description on the land that you are considering buying.**

❑ **Do a site visit**

- ❑ **Bring a camera, a topographical map, Water Resources Survey map**
- ❑ **Bring Notepad**
- ❑ **Check current irrigation operations, compare to claims abstract**
- ❑ **Look for signs of historic irrigation—ditches, headgates, etc.**
- ❑ **Ask what was and is irrigated**
- ❑ **Ask about people in area acquainted with irrigation practices on land**
- ❑ **Ask about any irrigation records**

❑ **Inquire into reliability of the right and how often it is satisfied**

- ❑ **Ask current owner**
- ❑ **Ask others on the stream**
- ❑ **If there has been a water commissioner, find out who it is and ask the water commissioner**

❑ **Check the seniority of the right**

- ❑ **Go to DNRC online website and look at priorities on your water source**
- ❑ **Ask the current owner how often the water right gets satisfied—all of every year? Part of every year? Only occasionally?**
- ❑ **If there is a water commissioner for the source, talk to the water commissioner about how reliable the water right is**

❑ **Check the reliability of the water source**

- ❑ **Ask whether the stream runs throughout the season or even throughout the year**
- ❑ **Schedule a late-summer visit to see first hand**

❑ **For any water use permits (post-June 30, 1973 water rights) make sure the permit has been perfected.**

Township, Range, and Quarter Quarter Quarter Section: A Quick And Dirty Guide to Reading Legal Descriptions

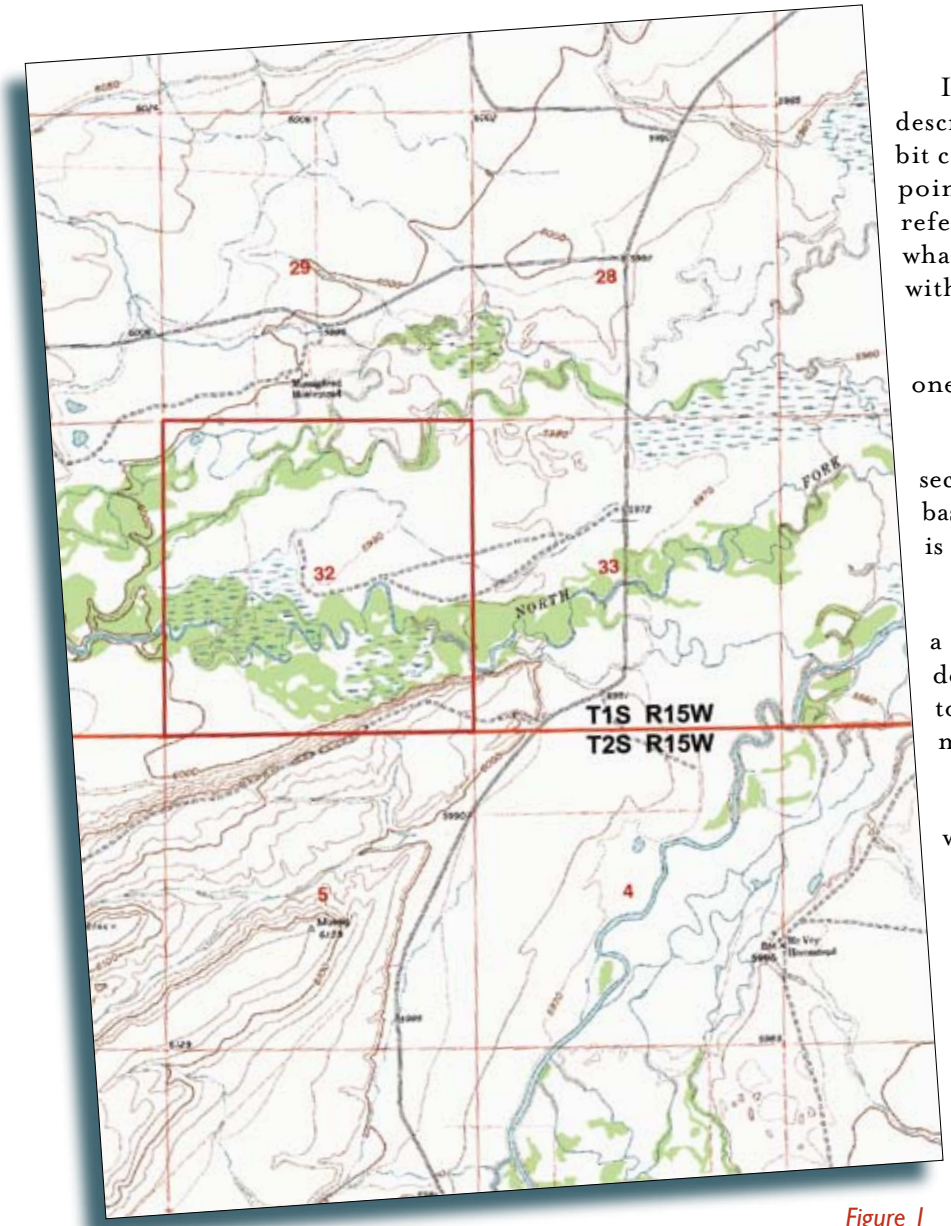


Figure 1

If you haven't spent a lot of time reading legal descriptions—and most of us, happily, haven't—it can be a bit confusing the first time you try it. Water rights—both point of diversion and place of use—are described by reference to township, range, and section numbers. So what's a section, and what on earth has that got to do with a township and a range?

A SECTION is a tract of land that measures one mile by one mile—it contains 640 acres.

A TOWNSHIP is a tract of land made up of thirty-six sections—six across and six down—in reference to a given baseline. So a description of T3N identifies a township that is the third township north of a baseline.

A RANGE sets the east/west location of a township from a reference point known as a "principal meridian." So a description of R2W indicates the east west location of a township as being two ranges to the west of a principal meridian.

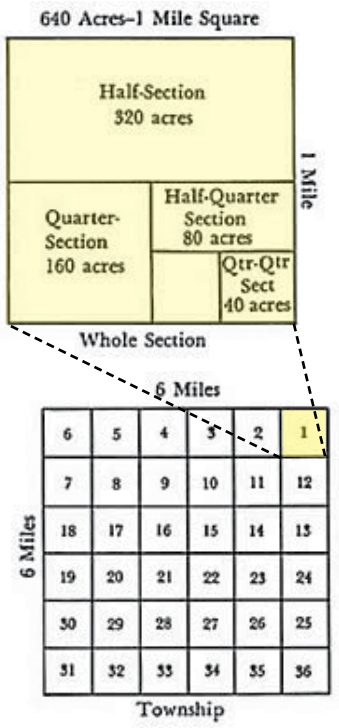


Figure 2

A typical legal description, down to the section level, would look like this:

T1S R15W, section 32, Beaverhead County.

So you would look on the map (typically USGS topographic maps, Bureau of Land Management, United States Forest Service, or Water Resource Survey maps) for Township 1 South, Range 15 West, Section 32 in Beaverhead County.

But you'll find water rights described down to the quarter quarter quarter section.

The **quarter section** descriptions are based on dividing a section into 4 equal quarters of 160 acres each—moving clockwise, a northwest (NW) quarter,

a northeast (NE) quarter, a southeast(SE) quarter, and a southwest (SW) quarter. If you see this description: **NE ¼ section 32**, It is describing this:

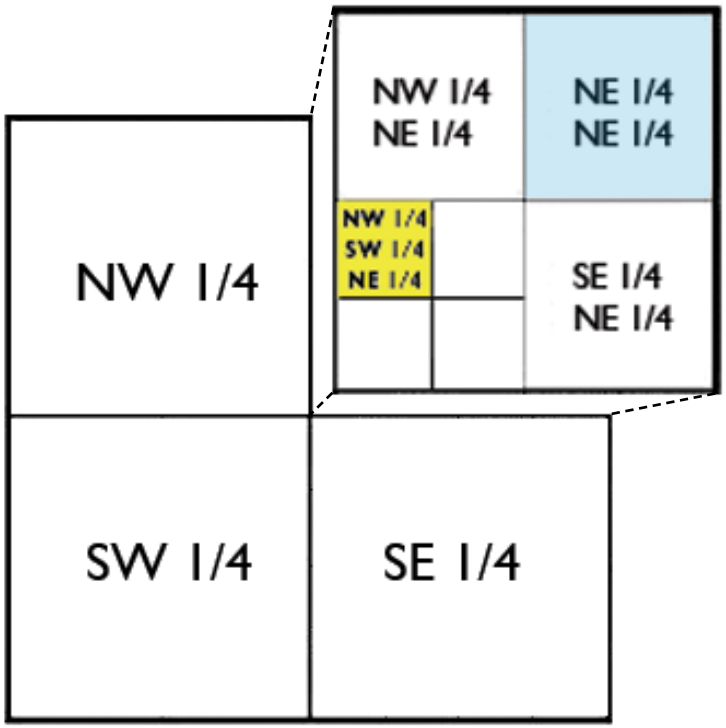


Figure 3

A **quarter quarter section** simply divides the quarter section into quarters of 40 acres each. If you want to describe the northeast quarter of the northeast quarter of section 32 it will look like this: **NE ¼ NE ¼ section 32**. And that will describe the blue shaded portion of Figure 3.

The description of a **quarter quarter quarter section**, which is 10 acres, simply looks at one fourth of a quarter quarter section. So the description of the northwest quarter of the southwest quarter of the northeast quarter of section 32 would look like this: **NW ¼ SW ¼ NE ¼ section 32.** And that will describe the yellow shaded portion of Figure 3.

That's all pretty straightforward. Now try it out. When you come upon the description of **NW ¼ SW ¼ NW ¼ section 32**, read it from the back to the front (think: big to small) and mark it on Figure 4:

- ❑ Find section 32;
- ❑ Then find the NW ¼ of section 32;
- ❑ Then find the SW ¼ of the NW ¼;
- ❑ Then find the NW ¼ of the SW ¼ of the NW ¼,

And you're there!
Pretty easy, huh? (See page 20 for answer.)

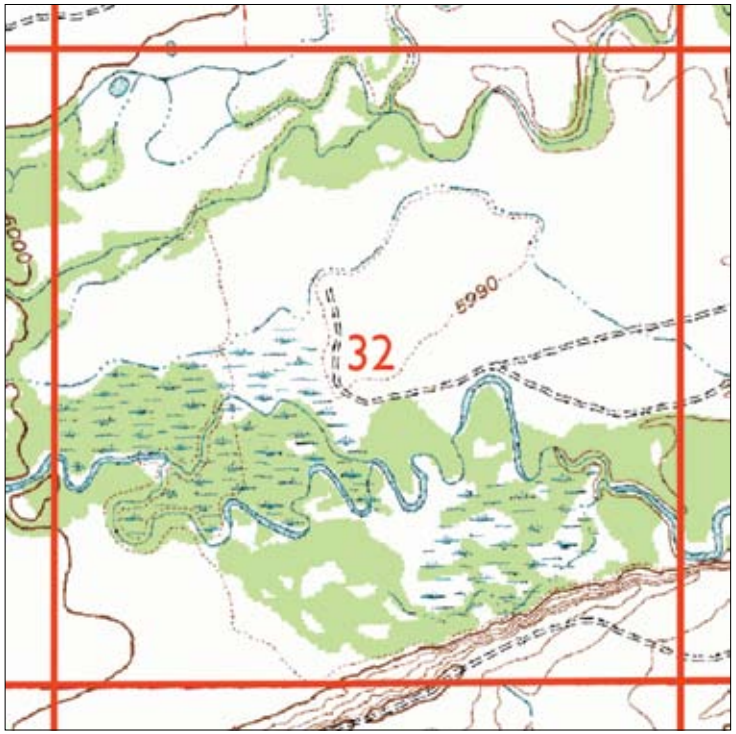


Figure 4

Streamflow Restoration Options for Landowners

Above: Rock Creek before flow and habitat restoration.
Below: Rock Creek one year after restoration.

What happens when you have purchased a ranch, and want to restore its streams? Until recently, it wasn't possible for an irrigator to simply let water flow in a stream instead of diverting it. If he did, he risked abandoning his right (see "**Use it Or Lose it"** on page 4).

Montana, however, now has a statutory "water leasing" program to provide water for fish in streams. As the Mannix Brothers Ranch did in partnership with TU to keep water in Wasson Creek (see facing page), it is possible to voluntarily convert an irrigation use to an instream use in Montana to benefit fisheries. A water user in Montana has three options: (1) convert all or part of a consumptive-use water right to an instream use by seeking a change in purpose and place of use without use of a lease; (2) lease a water right to the Montana Department of Fish, Wildlife and Parks; or (3) lease a water right to a private entity such as Trout Unlimited.

So what does it mean to convert a consumptive use to an instream use under this law? Well, first, it keeps the priority date intact. For example, if you had an 1865 priority date on irrigation right and you converted it to an instream use, the instream use would retain the 1865 priority date. Second, the ownership of the water right remains the same. The Mannix Brothers Ranch still owns its entire water right, it is just temporarily leasing the right to TU to provide flows in Wasson Creek.

There are limitations on your ability to convert a water right to an instream use. The biggest one is that, in most cases, a conversion can only be done for a period of ten years. You can renew use for successive ten-year periods ad infinitum, but you cannot make a "permanent" conversion to instream uses. In some instances, if there is the construction of some kind of conservation measure, such as the replacement of a ditch with a pipeline, it is possible to extend the life of an instream lease or conversion to 30 years.

Restoring streamflows through a water lease can be a critical piece of a more comprehensive restoration effort. This was the case on Wasson Creek, where the water lease was a key component of restoring native westslope cutthroat trout, but its success depends on the channel and riparian restoration work that had been done on Wasson Creek to create good habitat conditions.

If you decide you want to explore an instream option, a good first step is to talk to either Trout Unlimited or the Montana Department of Fish, Wildlife and Parks about water leasing.

A Profile of a Water Lease:
A Little Bit of Water Can Go a Long Way

Wasson Creek is tiny. As you drive over it on Highway 141 near Helmville, Montana, you likely wouldn't recognize it as a creek, except for the serpentine swath of willows and cottonwoods that mark its course. The vegetation encroaches enough that you most definitely wouldn't see any water if you were whizzing along at highway speed.

Despite its humble appearance, Wasson Creek has become a key piece in the effort to restore fisheries in the middle reach of the Blackfoot River. Years of human activity have seriously compromised the fisheries of lower Nevada Creek, which in turn has reduced fisheries in the Blackfoot for several miles below its confluence with Nevada Creek. There are several challenges ranging from low flows to high temperatures to nutrient pollution from irrigation runoff. Complete restoration will involve work on several fronts over many years.

But the efforts of landowners on two tributaries to Nevada Creek—Spring Creek and its tributary, Wasson Creek—mark a promising start on the larger restoration effort. Spring Creek was restored from a livestock-damaged, shallow, warm stream in the first five years of this century—it now sends a clean, cold pulse of water into the lower reaches of Nevada Creek year-round. But, left to its own devices, it wasn't growing many fish as the restoration progressed.

That's where Wasson Creek comes in. Like Spring Creek, Wasson Creek has taken its share of knocks. The creek has suffered from straightening, irrigation depletions, and grazing. But the reach above the irrigation diversion is home to a robust population of pure-strain westslope cutthroat trout. Those native fish represent a promising seed source for Spring Creek, Nevada Creek and eventually the Blackfoot. The problem is that, until recently, irrigation diversions have de-watered lower Wasson creek by mid-summer so much that those cutthroats had not been able to migrate down to repopulate the newly restored Spring Creek.

But over the past few years, the Mannix Brothers Ranch, the primary owner on Wasson Creek, has partnered with TU, the downstream landowners, and a variety of state and federal agencies, on a comprehensive restoration effort. An integral part of that work has been to restore stream flows in the lower two miles. According to David Mannix, the ranch operations rely heavily on the contributions of Wasson Creek to provide pasture grass for its cattle. Working with TU, however, the ranch has come up with a solution that allows them to continue much of their irrigation while keeping flows in the lower reach in late summer. The Mannix Brothers Ranch experimented for a couple of summers with one-year agreements with TU to not irrigate after flows in the lower reach

Mannix headgate.

dropped to 0.5 cfs (about 224 gallons per minute). TU paid the ranch for its reduction in pasture grass. Under this arrangement, the ranch could maintain its early-season irrigation while providing water for fish in the important late-summer period. For Randy Mannix, it's a question of balance. "As ranchers who believe in stewardship, the challenge for us is to protect these stream resources while still maintaining an economically viable agricultural operation," he said. "This lease gives us a chance to find part of that balance and, to also demonstrate that agricultural interests and fisheries interests could work together to each other's benefit."

The results of this experiment were immediate. In the fall after the first season of the agreement, a population check in the Spring Creek documented the presence of westslope cutthroat in the stream for the first time in decades. In the wake of this success, the ranch and TU have entered into a ten-year lease to maintain a minimum flow in Wasson Creek, helping to restore the native trout fishery.

Randy Mannix. Photo by WestRidge Creative, www.westridgecreative.com

Answer from page 17.

Flood vs. Sprinkler: Which Consumes More Water?

There is a widely held belief that spans almost every segment of the Montana community—irrigators, anglers, biologists, federal farm subsidy programs—that the key to making our water go further is to reduce the amount of flood irrigation that occurs by replacing it with sprinkler irrigation, especially sprinkler irrigation by center pivots. The basic premise is that because sprinkler irrigation is more efficient, we'll save more water. As with so many things involving water, however, the devil in this myth lies in the details.

First, sprinkler irrigation can have some very real benefits both for the irrigator and for water quality. For irrigators, increased productivity is often a significant benefit. Many irrigators report a much higher yield of crop with sprinklers than they got with flood irrigation. Second, center pivots in particular can save an irrigator a substantial amount of time. Flood irrigation is labor-intensive, hard work. With a properly operating center pivot, you hit the "On" button, and the center pivot pretty much does the rest.

In many places flood irrigation can leach salts, chemical fertilizers, and other pollutants from the soil into groundwater and eventually back into the streams that they came from. Sprinkler irrigation can reduce that leaching, substantially benefiting water quality.

But sprinklers as a "water saving" device? Well, the benefits aren't nearly so straight forward. Consider increased productivity. If an irrigator can grow four tons of hay with sprinkler irrigation where he used to grow only two tons—well, four tons consume (through evaporation and transpiration) up to twice as much water over the course of an irrigation season. What the crop drinks and evaporates doesn't go back into the stream.

Often people will say, but "I don't have to divert so much water with a sprinkler system, so how can I be using more water?" First, flood irrigation systems often don't provide what is known as "full service" irrigation—irrigation throughout the entire irrigation season, resulting in maximum crop production. In many cases, as streamflows drop throughout the irrigation season, irrigators are unable to divert enough water to effectively flood irrigate, so they quit diverting. A sprinkler system fed by a pump and pipeline, however, may be able to divert water and irrigate throughout the entire season, because it can effectively utilize low stream flows. So while a sprinkler may divert less in the early season, they may actually divert more in the late season, when flood irrigation would have ended. And, if late-season low flows are a problem for fish, sprinklers may aggravate the problem.

Second, irrigated land coverage within a field boundary by a sprinkler system is effectively 100%. In contrast, many flood-irrigated fields are not capable of achieving full coverage due to uneven terrain. The difference results in higher crop production for sprinkler irrigation, which translates into higher water consumption.

Third, flood irrigation provides "return flows," or those streamflows that were diverted from the stream but not consumptively used by the crop. These "return flows" are sub-surface flows that follow the hydrologic gradient and emerge again as stream or river flows downstream. The timing and amount of return flows are particular to each stream reach and irrigation practice, so it is difficult to generalize other than to say that flood irrigation provides more return flows than sprinkler irrigation. These return flows can be critical in sustaining fisheries later in the season.

At times, sprinklers may allow irrigation without as much early season diversion as flood irrigation. For some native species, that may be a critical period. In those cases, sprinklers may actually prove beneficial to fish.

The bottom line on sprinklers is that they do not offer a silver bullet for water conservation and stream flows. Their relative benefit—or detriment—is site specific, and people engaged in streamflow enhancement need to view them carefully and critically before adopting a conversion to sprinkler as part of a conservation plan.

The Statewide Adjudication: What Is It, and What Does It Have To Do With My Water Rights?

Sooner or later, anyone who acquires water rights in Montana will hear about the "adjudication." In an effort to secure Montana water rights from claims by downstream states, and in an effort to get some kind of accurate accounting of water use in Montana, the 1979 legislature passed a bill that required Montana to initiate a statewide adjudication of all water rights with priority dates prior to July 1, 1973, and established a statewide Water Court to preside over the adjudication.

Under the auspices of that 1979 law, everyone who claimed a pre-July 1, 1973 water right had to file a statement of claim with the Montana Water Court by April 30, 1982 or lose their water rights. By April 30, 1982, claimants had filed over 200,000 claims. When you look at a water rights claim abstract on the internet at the state website, you are looking at a dressed-up version of the original claim as filed in 1982. In some cases there may have been modifications to those claims that will be reflected in the abstracts, in others, they appear pretty much as they were filed. The bottom line? Those official looking abstracts don't necessarily reflect your actual water right.

So if everybody filed claims way back in 1982, the adjudication must be complete and all those claim abstracts represent that final adjudication, right? Well, no. Since the filing of those claims, the adjudication has moved with might kindly be termed "deliberate speed." Which is to say, at a glacial pace. The 2005 Montana Legislature, recognizing that there is yet to be a final decree from the Water Court in any river basin, passed a new law to add funding to the adjudication by imposing a fee on all water rights. With luck, the entire adjudication could be completed by 2020. With luck.

The good news is that even while we await the completion of this seemingly endless process, irrigators can still irrigate, fish can still swim, and we can still change water rights from one use to another, working together to find ways to make Montana's glorious rivers and streams serve many needs.

Photo © www.kestrelaerial.com

Resource Guide for Researching Water Rights

The following resources can assist a prospective land purchaser in performing due diligence on water rights.

Montana Department of Natural Resources Water Resources Division, Water Rights Bureau, 406-444-6610

Regional Offices: Regional offices have some aerial photos of the lands covered by their offices and also have current information on the status of the statewide adjudication in its region.

BILLINGS: AIRPORT INDUSTRIAL PARK, 1371 RIMTOP DR., 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: 273 Boot Hill Court, Suite 110, BOZEMAN, MT 59715
PHONE: 406-586-3136 FAX: 406-587-9726
SERVING: Gallatin, Madison, and Park Counties

GLASGOW: 222 6TH STREET SOUTH, PO 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 6TH AVENUE, PO 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 9th Ave., PO 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: 109 COOPERATIVE WAY, SUITE 110, KALISPELL, MT 59901-2387
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: 1610 S 3RD ST WEST, SUITE 103, PO BOX 5004, MISSOULA, MT 59806-5004
PHONE: 406-721-4284 FAX: 406-542-1496
SERVING: Granite, Mineral, Missoula, and Ravalli Counties

Online Access to Water Rights Claims Abstracts: nris.mt.gov/dnrc/waterrights/default.aspx.

Water Resource Survey maps: These maps are available at: dnrc.mt.gov/wrd/water_rts/survey_books/default.asp.

U.S.G.S. Real Time Streamflow Measurements for the State of Montana: This website provides up-to-date streamflow measurements on many streams and rivers throughout Montana: waterdata.usgs.gov/mt/nwis/current?type=flow.

U.S.G.S. Montana Daily Streamflow Records: This site provides historic flow records on streams throughout Montana that U.S.G.S. has measured at some time in its history. It can occasionally provide a helpful look at flow patterns on a stream: nwis.waterdata.usgs.gov/mt/nwis/dvstat.

Trout Unlimited, Montana Water Project: Works on instream leases and water rights issues related to instream flows. 321 East Main St., Bozeman, MT 59715. phone: 406-522-7291.

Financial Support

The publication of A Buyer's Guide to Montana Water Rights would not have been possible without generous donations from the following sponsors. Thank you!

- Outlandish Conservation Land Brokerage & Consulting
- Hall and Hall
- Fay Ranches, Inc.

Trout Unlimited

Trout Unlimited works to conserve, protect, and restore North America's trout and salmon fisheries and their watersheds. The success of Trout Unlimited relies on the financial support from communities, businesses and people like you. We gratefully accept donations. You may also make a gift through estate planning or donations of stock and real estate. Please contact Sarah Davies at sdavies@tu.org for more information. You may also go to our website www.tu.org to become a member of Trout Unlimited.

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Stan Bradshaw works as a staff attorney for Trout Unlimited's Montana Water Project. His responsibilities include working with irrigators to change water rights from consumptive uses to instream uses. All of the photos in this handbook were taken by Stan unless otherwise credited.

Acknowledgments

Many people have contributed their thoughts, suggestions, edits, and common sense to make this guide much better that it was in its first draft. Amy Kelley has given us an inspired design and layout, not to mention a seemingly endless reservoir of patience in working with us. My colleague Julie Eaton not only gave me invaluable critical comments from a lay perspective, but she also worked closely with Amy on the presentation of the information and in finding key photos and illustrations. Jamie Morin, Mike McLane, Ryan McLane, Matt Williams, Scott Irvin, and Andy Brummond have all provided the benefit of their considerable practical water rights experience in their review and suggestions. Greg Neudecker, Paul Roos, Dave Johnson, and Dave and Randy Mannix all applied not only their discerning eyes, but a considerable dose of common sense to their review of the manual. Glenda Bradshaw and Kate Wright both had an important hand in proof-reading and copy-editing the text. Thanks to Bob Kiesling for telling me he thought this project was a good idea when I had just about talked myself out of it. Two organizations, the Montana Association of Land Trusts and the Blackfoot Challenge, made important early commitments to help distribute this guide, both through their websites and through their member organizations. Thanks, finally, to my boss, Laura Ziemer, for her constant encouragement and wise counsel.

Whatever flaws remain after the good efforts of everyone mentioned above are mine alone.

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