

**A Report to the  
Water Policy Committee  
Board of Natural Resources and Conservation  
and  
Fish, Wildlife and Parks Commission  
on Status of the Water Leasing Study**

**by the**

**Fisheries Division  
Department of Fish, Wildlife and Parks**

**November 29, 1991**

## Section I INTRODUCTION

The water leasing program was established in 1989 by the 51st Legislature with the passage of House Bill 707. In November 1990, a report on the status of the water leasing study and pilot program was prepared and submitted to the Water Policy Committee (WPC) by the Board of Natural Resources and Conservation (BNRC) and the Fish and Game Commission (FGC) pursuant to Section 895-2-436 MCA. That report, described the first 18 months of the program and contained several recommendations for consideration by the 52nd legislature. Copies may be obtained from BNRC or FGC.

In January 1991, the Department of Fish, Wildlife and Parks (DFWP) prepared a listing of the 38 stream reaches that had been investigated for leasing during the first 18 months of the program's existence. This report also contained a description of the status of each of the investigations (Copies of this report may be obtained from DFWP).

The 52nd Legislature passed SB 425 during the 1991 session which contains four significant changes to the water leasing program.

- A. The term of leases was increased from four to 10 years. In addition, a lease could be renewed once for up to 10 years except for leases of water made available from the development of a water conservation or storage project which could be made for a term of not more than 20 years. A similar recommendation was included in the November 1990 status report.
- B. The reporting requirements were changed such that DFWP shall prepare and submit to BNRC, WPC and FGC an annual report by December 1 of each year. This report must include pertinent information for each designated stream reach and each pilot lease entered into. If DFWP has not leased any water by December 1 of each year, compelling justification for that fact must be presented in the report. A similar recommendation was made in the November 1990 status report.
- C. A section was added specifically stating that the leasing program does not create the right for a person to bring suit to compel the renewal of a lease that has expired.
- D. The number of stream reaches that the BNRC can designate was increased from five to no more than 10. In addition, the BNRC can remove designation of a reach if DFWP determines that a lease cannot be reasonably obtained on that designated reach.

The remainder of this report, describes the efforts under taken by DFWP during 1991 to obtain water leases (Section II) and the justification for the Department not obtaining a lease during the past 12 months (Section III). An appended memorandum summarizes the results of a meeting held on November 20 at the Governor's request. The meeting attendees discussed why no water leases have been obtained and suggested strategies for bringing greater success to this program.

## Section II. DFWP EFFORTS IN 1991 TO OBTAIN A WATER LEASE

### A. On-Going

The November 1990 status report described the progress at that time on the three stream reaches designated by the BNRC. This section provides an up-date on these three.

#### 1. Swamp Creek

Swamp Creek is a 20-mile-long tributary that enters the Big Hole River  $3\frac{1}{2}$  miles north of Wisdom. The reach studied for leasing extends  $2\frac{1}{2}$  miles upstream from the mouth of the creek.

DFWP completed a water availability analysis of Swamp Creek and the water right offered for leasing. The Department and the water right holder negotiated a flow measuring plan and other aspects of a lease as described in the law. Negotiations ended in mid-November 1991 because the price asked by the right holder was substantially greater than the value of the water as determined by an economist retained by the Department. The price of the water was computed on the basis of the value it added to the hay crop. The lease holder felt the price should include other considerations as well. These other considerations included the value of the fishery and the potential for loss of the water right through a lawsuit. This latter issue was resolved through the change in the law described in Section I.C. above.

DFWP informed the water right holder that it could not afford to pay the amount he asked. However, if circumstances change, DFWP will re-enter negotiations.

#### 2. Big Creek

Big Creek is a tributary to the upper Yellowstone River entering at river mile 533, approximately seven miles southwest of Emigrant. The stream reach being studied for leasing extends upstream for about one mile above the mouth of the creek. A series of six irrigation diversions are within the reach and serve nine water users who irrigate about 1,200 acres of alfalfa, wild hay and occasionally small grains.

The water users and the Soil Conservation Service (SCS) are investigating the potential of replacing the inefficient ditch system with a gravity sprinkler irrigation project. Based upon engineering work conducted by the SCS, the increased efficiency of the pipeline project over the ditch system will result in 11-14 cfs of salvaged water that could be available for leasing. This salvaged water would remain instream, providing flows for hatching and out-migration of Yellowstone cutthroat fry. Typically this stream reach is dry in August and September, greatly reducing cutthroat hatching success.

In June 1991, SCS and DFWP signed a Memorandum of Understanding by which DFWP shall pay SCS \$5,000 to provide the following services:

1. Analyze water availability in Big Creek for the pipeline project and the Yellowstone cutthroat trout fishery;
2. Assist DFWP in the determination of that portion of project costs which may be attributed to fishery benefits of the project;
3. Determine the consumed amount of each water right currently diverted for irrigation purposes; and
4. Assist in determining natural water losses in Big Creek.

SCS has been calculating the preliminary project costs. DFWP has prepared an estimate of the economic benefits of the proposed project to the fishery resource. This report will be incorporated by SCS into a complete economic documentation of the project. The economic documentation will then be presented to the irrigators to determine if they wish to proceed with the project.

### 3. Mill Creek

Mill Creek, is a 22-mile long tributary to the upper Yellowstone River located in Park County about 20 miles south of Livingston. The length of stream in which leasing would likely occur is about 6.4 miles long and extends upstream from the mouth of Mill Creek to the diversion point of the new Mill Creek Water and Sewer District pipeline.

During August, a critical month for irrigation and hatching of Yellowstone cutthroat trout eggs, diversions on Mill Creek remove, on the average, over 90% of the mean August flow, leaving little or no water at the mouth.

A large construction project to convert flood irrigation to a gravity-feed pipeline irrigation system was completed this fall. The project will result in salvaged water becoming available for leasing. This added streamflow was projected, in the original project economic justification documents, to substantially benefit the fishery resource by maintaining satisfactory cutthroat spawning, hatching and out-migration flows in the lower six miles of Mill Creek.

DFWP has met one-on-one with eight major water users on Mill Creek to discuss water leasing. All appear to be interested in leasing once the project is on-line and they are comfortable with how the system operates. The system will go on-line during the summer of 1992, however, it is not expected that all project participants will be operational until fall 1996. According to a schedule prepared by DFWP, negotiation of leasing contracts with key participants should occur in 1992.

In August 1991, DFWP was contacted by the Mill Creek Water Users Board of Directors. Cost of construction of the project exceeded the budget by approximately \$200,000. The Board wished to discuss the possibility of DFWP providing the funds necessary to meet this shortfall.

DFWP and the Board of Directors have met several times since August in an attempt to negotiate a mutually beneficial agreement. At this time, there appears to be an opportunity for several days of high flows to be provided by the project to flush Yellowstone cutthroat fry to the river and to provide certain other services in exchange for an annual payment. There are additional considerations still to be worked out. DFWP is continuing to discuss the situation with the Mill Creek Water Users.

## B. New Investigations

### 1. Sweathouse Creek

Sweathouse Creek is a tributary to the Bitterroot River. DFWP personnel arranged to meet with two water right holders to discuss leasing in March of 1991. One of the right holders, whose right is one of the oldest on the stream, stated he wasn't interested in leasing but was willing to discuss water use in the drainage. He suggested that if DFWP constructed a gravity flow irrigation system for he and his neighbor (who also holds an early right) a lease of salvaged water might be worked out. Such a project would require 1½ miles of pipeline to irrigate 150+ acres. This right holder was extremely doubtful that any user on Sweathouse Creek would lease water.

The second individual failed to make the scheduled meeting. In subsequent phone conversations, he suggested that, rather than leasing water, DFWP pump water out of the Bitterroot River and pipe it upstream in the Sweathouse drainage where it would be released to provide instream flow. This proposal does not fit well into the water leasing program.

### 2. Big Creek

Big Creek is another tributary to the Bitterroot River located between Victor and Stevensville. Big Creek provides spawning and rearing for Bitterroot River rainbow trout.

DFWP personnel met with an individual that is the main water user on the lowermost irrigation ditch on Big Creek. In July of most years, this user bulldozes a gravel dike across Big Creek to divert all flow into his ditch. By mid-July only seepage water remains in the lower  $\frac{1}{2}$  mile of creek.

This individual was not interested in water leasing. He would like to divert a portion of DFWP's Painted Rocks Reservoir water into Big Creek and allow it to flow to the mouth. This concept is similar to that proposed at Sweathouse Creek but does not fit into the water leasing program.

### 3. Bear Creek

Bear Creek is a third Bitterroot River tributary that was investigated. Bear Creek enters the Bitterroot River near Victor. It is another important Bitterroot River rainbow spawning stream.

DFWP personnel spoke with two water right holders on Bear Creek. The first individual indicated that water storage projects and conversion to gravity flow irrigation systems, done at DFWP's expense, is the answer to instream flow problems. He felt there was no chance of leasing water on Bear Creek. He stated that even if he wanted to lease, community pressures would prevent him from participating.

The second water user also expressed no interest in leasing water.

### 4. Elk Creek

In August, DFWP contacted an individual regarding leasing of water in Elk Creek. Elk Creek is located on the Rocky Mountain Front near Augusta. It has been identified as a chronically de-watered stream by DFWP.

The individual contacted controls certain water in Nilan Reservoir that could be used to augment flow in Elk Creek. The water is currently conveyed in a canal. The problem to overcome is getting the water from the canal into the creek. The party is willing to discuss leasing options. DFWP personnel have not been able to schedule a meeting with the parties since the initial contact in August.

### 5. Blackfoot River Spawning Tributary I

This stream flows into the lower Clearwater River and is a prime rainbow trout spawning tributary for the Blackfoot River. This stream is severely dewatered by a single water user, greatly reducing the recruitment of young fish from this creek to the Blackfoot.

DFWP personnel have been working closely with the water user on another project. The topic of water leasing will be broached when a good working relationship has been established with this individual.

#### 6. Blackfoot River Spawning Tributary II

This is another Blackfoot River tributary that provides important spawning and rearing habitat. DFWP is working with the only user on the creek to improve fish habitat. The owner is currently diverting water to prevent abandonment of the water right. Consequently, about 2,000 ft of the best habitat on the creek is dry. This creek is a significant rainbow and brown trout spawning tributary for the Blackfoot River and its North Fork. The owner is receptive to leasing as a means of protecting his water rights. DFWP will discuss leasing with him in the near future once the fish habitat work is completed.

#### 7. Nevada Creek

DFWP personnel are talking to the Nevada Creek Reservoir Water Users in the hopes of leasing some of their stored water for instream use. A few have expressed an interest and are willing to talk further. DFWP hopes to make a presentation to the users association sometime this fall/winter.

#### 8. Blaine Spring Creek

Blaine Spring Creek rises west of the Madison River approximately 10 miles south of Ennis. The creek supplies water for the Ennis federal fish hatchery, then flows roughly seven miles to its confluence with the Madison River.

DFWP has been investigating the possibility of leasing five cfs of water from the Shining Mountain Homeowners Association (SMHA). The right held by SMHA is the senior right on the creek and has historically been diverted into the Economy Ditch located about 100 yards downstream of the hatchery. The derived benefits of leasing this water would be recruitment of rainbow and brown trout to the Madison River. Local anglers indicate that Madison River brown and rainbow migrate up as far as the hatchery to spawn. These larger river fish are caught in Blaine Spring Creek only during their respective spawning seasons.

Blaine Spring Creek is severely dewatered approximately one mile downstream of the Economy Ditch by diversion of virtually all flow via the Daems-Robbie ditch. The creek is commonly dry in summer for a distance of 0.8 miles for a period of 2-2½ months. In 1966, 0.9 miles of Blaine Spring Creek were documented as dry and an

additional 1.4 miles was critically dewatered. Leasing the SMHA right and moving this water past the Daems-Robbie ditch would provide continuous, year-long flow from headwaters to mouth of this potentially valuable spawning stream.

On June 26, DFWP personnel held an informational meeting with Blaine Spring Creek water users. The purpose of the meeting was to inform users of our interest in leasing water from SMHA, explain the leasing process and hear the water users comments on the proposal.

During the course of the meeting, general support for the lease was expressed by several right holders. However, one individual expressed strong opposition. SMHA had attempted to sell their right previously to an out-of-basin irrigator. The proposed change-of-use was objected to by the same individual. He claimed his water right would be adversely affected by the proposed change. The hearings examiner held for the objector and denied the change-of-use.

Subsequent to the informational meeting, DFWP received a letter from attorneys for the individual who objected to the initial sale of the water right and is opposed to the leasing proposal. The letter raised several issues associated with the SMHA water right and suggested that if DFWP proceeds with the lease the department will be taken to court.

DFWP is presently weighing the costs, (fiscal, manpower and from a public relations perspective), against the benefits of pursuing this leasing opportunity further.

#### 9. Yellowstone River Tributary

A small tributary to the upper Yellowstone River, despite severe dewatering in the lower portion of the stream, supports a Yellowstone cutthroat trout spawning run. This run would benefit from increased flows.

In the fall of 1991, DFWP began discussions with a federal agency which acquired irrigation water rights in this drainage in 1990. The agency irrigated during 1991. The agency is not interested in continuing with irrigation and is receptive to the idea of leasing.

If DFWP leased these upstream rights, it would be necessary to reach an agreement with downstream senior water users to allow the leased water past their diversions. If a bypass flow could be negotiated, there would be additional flow to the mouth which would benefit cutthroat reproduction.



DFWP plans to hold an informational meeting with water users in the drainage to discuss this proposed lease. DFWP has already been informed by one right holder that he will take legal action if the lease is entered into. This individual has requested that the informational meeting be held in December to avoid conflict with his business interests.

#### 10. Missouri River Tributary

This tributary to the upper Missouri River is potentially a very important spawning tributary to a large reservoir. An irrigation ditch intercepts the creek, creating a barrier to fish movement during the irrigation season. The stream is also severely dewatered during the period when rainbow trout are hatching and rearing.

In the course of working with agricultural water users in the drainage on the restoration of a nearby stream, DFWP personnel have established good rapport in the community. This past summer the ditch company agreed to release water into the stream during the critical hatching and rearing period. A water user offered to voluntarily leave this released water instream to help with this project. DFWP will soon discuss leasing this water with the ditch company and individual.

#### Section III. WHY NO LEASES HAVE BEEN OBTAINED

DFWP has investigated leasing on over 50 streams and stream reaches since the passage of HB 707. To date, no leases have been consummated. A review of Section II of this document reveals some of the reasons:

1. In several cases, the stream was not chronically dewatered, did not contain sufficient fishery value or the situation would not be a good application of the leasing law.
2. Some right holders that expressed initial interest in the program proved not to be interested in water leasing. In several cases, they were looking to DFWP to subsidize storage or irrigation projects that might result in salvaged water.
3. In many instances, the water rights involved were either too junior, too small or the status of the right was too clouded to pursue.
4. Individuals have expressed concern about social repercussions of leasing.

5. DFWP is proceeding cautiously on two of the most promising leasing opportunities, Blaine Spring Creek and the Yellowstone River tributary, due to threatened litigation.
6. At Swamp Creek, the disparity in asking price and what DFWP could reasonably pay was enormous.
7. Some projects, such as Mill Creek and Big Creek, are complex, long-term projects.

At the Governor's request, the Directors of the Departments of Fish, Wildlife and Parks and Natural Resources and Conservation convened a meeting on November 20, 1991 to discuss water leasing. The purpose of the meeting was twofold: (1) identify why no leases have been obtained and (2) develop recommendations to expedite putting water leases in place. A summary of that meeting was prepared by the facilitator and is appended to this report.

drg  
Attachment

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



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MEMORANDUM

TO: Participants, Water Leasing Meeting  
FROM: Matthew McKinney  
SUBJECT: Results of Meeting and Commitments  
DATE: November 26, 1991

Enclosed is a summary of the water leasing meeting held on November 20, 1991 in the Department of Fish, Wildlife and Parks' Commission Room. A list of the participants is also attached.

The purpose of the meeting was to address two questions. First, why isn't the water leasing program working? That is, why do we not have a lease? Second, how can the water leasing program be improved? That is, what steps can be taken to acquire a water lease?

Based on the discussions throughout the meeting, the following commitments were made by various individuals to move the water leasing program forward.

1. The Department of Fish, Wildlife and Parks will distribute a list of chronically dewatered streams to participants of the meeting.
2. The Department of Fish, Wildlife and Parks will meet with Fred Hirschy to further discuss to possibilities of a water lease on Swamp Creek. The Department will consider using a skilled negotiator.
3. The Department of Fish, Wildlife and Parks will continue to pursue a lease on Mill Creek.
4. Jim Peterson and Lorents Grosfield will talk to the water rights holder associated with the potential lease on U.S. Forest Service land.
5. The Department of Fish, Wildlife and Parks will work with J.B. Anderson to identify streams and water right holders in southwestern Montana.

6. K. Cool and Errol Galt will help "break the ice" in local communities or with specific water rights holders.
7. Glenn Marx will arrange for Governor Stan Stephens to speak at the Annual Meeting of the Montana Stockgrowers Association about the importance of the water leasing program.
8. Karen Barclay and Jim Peterson will work with the Montana Stockgrower's Association's Water Committee on what role the organization should play in the water leasing program (e.g., initiator, mediator, other).
9. Jim Peterson will coordinate the monthly publication of an article on water leasing in several agricultural newsletters and newspapers.
10. The Departments of Fish, Wildlife and Parks and Natural Resources and Conservation will jointly determine what role the Department of Natural Resources and Conservation should play in the water leasing program.

The participants agreed to meet on January 29, 1992 at 9:30a.m. in the Main Conference Room of the Lee Metcalf Building (DNRC) to review these commitments and further assess the water leasing program.

Summary of Meeting  
Water Leasing Program

November 20, 1991

WHY DO WE NOT HAVE A LEASE?

1. *Resistance by Affected Interests*

- \* agricultural resistance
- \* lack of incentives does not outweigh perceived risks
- \* many people do not have sympathy for fisherman and hunters
- \* legality -- what will happen 10 years down the road?
- \* lack of trust of bureaucracy -- DNRC, DFWP, other
- \* lack of understanding and perceived loss of rights
- \* low level of trust of legislation -- is it going to work?  
is it the right thing to do?
- \* leasing concept does not have a high priority within the  
DFWP; perceived lack of commitment
- \* no more water, but water use permits continue to be  
granted; the leasing concept is foreign -- if we continue  
to grant permits, why do we need leasing?
- \* the bill is used as a shield by agriculture to hide behind
- \* rhetoric has created a difficult social and political  
climate in which to proceed
- \* lack of public information about streams in need
- \* perception by third parties that the water leasing bill  
will not protect their interests

2. *Problems With the Process*

- \* wrong agency out in front
- \* should Fisheries Division be in the lead?
- \* leasing is complex; perception is that it is simple
- \* water leasing bill does not work; Senate amendments don't

work

- \* unrealistically complex process
- \* the water leasing bill and program lack private sector involvement
- \* is leasing a realistic solution to low flow streams?
- \* unrealistic expectations of what leasing can do
- \* poor research on the need for leasing and likely impacts of leasing
- \* why can't anyone lease water? this may help create a market
- \* whose responsibility is it to move forward? (DFWP)
- \* it is difficult to make initial contacts (DFWP)
- \* perception that leasing is too complex to work
- \* are we searching too hard for the perfect lease?
- \* do we have to lease a right or can we lease water?  
innovative ideas about what and how to trade
- \* water rights are inherently complex, long-term issues --  
are our expectations reasonable?
- \* there is not enough money or staff to make the program work

### 3. *Difficult to Calculate Economic Value of Water*

- \* the agency value (\$) or water is significantly different from the water rights holder's value
- \* what is the market value of water?
- \* the price may be too high -- is the cost of leasing higher than the amount of funds the legislature is willing to allocate to this program? the water rights holder is taking a risk and needs to be compensated for that risk (particularly the first one)

# WHO IS RESPONSIBLE FOR THE WATER LEASING PROGRAM?

- \* the Department of Fish, Wildlife and Parks is responsible for initiating the process
- \* the agricultural community is responsible for educating its constituents about the water leasing program

# HOW CAN WE OVERCOME AGRICULTURAL RESISTANCE TO THE PROGRAM?

- \* identify people willing to lease water on streams needing more water
- \* the agricultural community needs to take the lead in overcoming resistance
  - \* education
  - \* joint panels at various meetings
  - \* newsletters -- to solicit inquiries
  - \* magazine articles
  - \* Stockgrowers meeting -- Governor's address; water committee; full group
- \* there appears to be miscommunication or misunderstanding between the leadership in agricultural organizations and the farmers and ranchers in the field
- \* why should agriculture lease water?
  - \* to help themselves
  - \* to help fish, fishermen, and other recreationists
  - \* to help defuse accusations by the conservation community
- \* conduct local, informal meetings with all interests -- include the Conservation Districts, Trout Unlimited, and perhaps the Department of Fish, Wildlife and Parks
- \* pursue short-term (one-year) leases
- \* need to get around the idea of holding leasing "hostage" to developments like the Baker Ditch decision and the water reservation process

- \* need to develop innovative ideas to "break the ice"
- \* terms of the lease
- \* the Department of Fish, Wildlife and Parks should assume some of the costs/risks associated with water rights holders
- \* use different people/interests to make initial contact
- \* who should get involved when the process breaks down?

#### WHO SHOULD BE INVOLVED IN THE WATER LEASING PROCESS?

- \* the messenger is critical -- if the agricultural community does not trust the Department of Fish, Wildlife and Parks, who should initiate contact with local communities and water rights holders?
- \* someone other than the Fisheries Division should negotiate
- \* depends on the location and local situation
- \* use the Land Reliance, Trout Unlimited, the Stockgrower's Association and other groups to help initiate contact with water right holder and local communities, and to assist in negotiations
- \* employ a mediator to help bring parties together, if necessary
- \* can Trout Unlimited and other groups help raise money for leases?