

ENHANCING INSTREAM FLOWS THROUGH WATER LEASING

Prepared for the
National Instream Flow Program Assessment
Denver, Colorado
February 20-24, 1995



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February 15, 1995

Summary

A pilot water leasing program was established by the 1989 Montana legislature to test the feasibility of leasing existing consumptive use water rights to restore instream flows in dewatered streams. It was probably the most controversial natural resource issue that came before that legislative session. This issue arose as a result of the 1988 drought in Montana and a recommendation from the State Water Plan section on Instream Flow Protection. The legislation was, at one point, rejected by the legislature but then revived and passed in the closing days of the session. The original legislation was amended in both the 1991 and 1993 sessions. No amendments to the act were introduced in the 1995 session at the time this paper was written.

The original and amended legislation created a 10-year pilot program that allows Montana Fish, Wildlife and Parks (FWP) to lease water rights from willing individuals and groups of individuals, such as irrigation districts. FWP, with the consent of the Fish, Wildlife and Parks Commission, must provide to the Montana Board of Natural Resources and Conservation (Board) the stream reaches where FWP would like to lease water for instream flows. The Board must approve each stream reach before leasing can proceed. Once approval is received, the Board has no other jurisdiction in the leasing program.

FWP is currently the only entity allowed to lease water for instream flows in Montana. However, there is pending legislation in the 1995 legislature to allow private individuals and organizations to lease water for instream flows.

The current leasing law expires on July 1, 1999. However, all leases entered into before that date remain valid until the expiration of the leases.

A lease may not be approved until any objections to the lease are resolved through a water right change process administered by the Montana Department of Natural Resources and Conservation (DNRC). If the change process shows the lease would adversely affect an

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existing water right holder, either senior or junior to the right being leased, the change will not be approved.

Three water leases have been approved by DNRC and implemented by FWP since the beginning of the program. All three leases are for improving flows in spawning tributaries of larger rivers to improve the recruitment of trout to these systems. Several other leases are in various stages of the approval process. These leases would also enhance flows in tributary streams to improve trout spawning and recruitment.

Details of the Water Leasing Process²

A number of requirements must be met before a lease can be approved. The following is a more detailed summary of the process to meet these requirements.

Authorization for water leases for instream flows is contained in Montana Codes Annotated 85-2-436 and 85-2-437.

The leasing program begins when FWP, with the consent of the FWP Commission, submits to the Board a list of potential stream reaches where leasing is desired. The Board may declare a stream reach eligible for leasing only if it finds that water is "necessary" to maintain or enhance streamflows for fisheries. The Board may designate no more than 20 stream reaches where leasing may occur (the original legislation allowed for only five reaches to be approved). FWP prepares a detailed report and makes a presentation to the Board to support the stream's need for leasing.

Once the Board approves streams for leasing, FWP meets with potentially affected water users on the stream to explain the program and to see if there are any major concerns that need to be addressed. The next step is to negotiate a leasing agreement with the potential lessor(s). This usually takes considerable time to iron out provisions so both parties are protected during the term of the lease. Some of the provisions could include: Amount of water to be leased, price, payment schedule, access to headgates and measuring devices, use of water commissioners to protect the leased water, etc.

Once the lease agreement is completed, FWP submits an Application

²Portions of this section were excerpted from : "A Report to the Water Policy Committee on the Status of the Water Leasing Program and Pilot Study" submitted by the Montana Board of Natural Resources and Conservation and the Montana Fish and Game Commission, November, 1990.

for Change of Appropriation Water Right to the DNRC. The application describes the water right that was historically diverted for a consumptive use, such as irrigation, and the new use to which it is being put. The application must also include the name of the lessor(s) and the amount and period of use of the water to be leased, specific information on the length and location of the stream reach in which the streamflow must be maintained or enhanced, and a detailed streamflow measuring plan describing the points where, and the manner in which, the streamflow will be measured. The FWP must pay all the costs of installing measuring devices and personnel to measure streamflows.

The maximum quantity of water that may be leased is the amount historically diverted by the lessor. However, only the amount historically consumed, or a smaller amount if specified by the DNRC in the lease authorization, may be protected to enhance streamflows below the lessor's point of diversion. This is to protect senior or junior consumptive users who may have relied on return flows from the lessor's previous diversion of water.

A proposed water lease must be processed the same as any other water transfer. Upon receipt of an application, DNRC must publish a notice of the application in newspapers of general circulation in the area of the transfer. Parties who believe they may be adversely affected by the lease may file an objection. A lease may not be approved until objections are resolved. If there are no objections, or the objections are resolved, DNRC can authorize the lease. The priority date of the leased water is the same as the priority date of the original water right. FWP attempts to obtain a very senior water right of adequate quantity at a location that will provide the necessary benefits to the fishery.

A lease may not be issued for more than 10 years, but may be renewed once for up to an additional 10 years. However, if the lease is the result of a water conservation project (such as replacing flood irrigation with sprinkler irrigation) that conserves (salvages) water, or a storage project, the first lease may be issued for not more than 20 years.

FWP must notify the DNRC of its interest to renew a lease. Upon receiving a notice of lease renewal, DNRC must notify other appropriators potentially affected by the lease and allow 30 days for submission of new evidence of adverse effects. A lease authorization is not required for a renewal unless an appropriator submits evidence of adverse effects to his rights that has not been previously considered. If new evidence is submitted, a new lease authorization must be obtained according to the requirements outlined above.

During the term of the original lease, the DNRC may modify or revoke the lease authorization if an appropriator proves by a preponderance of evidence that his water right is adversely

affected.

Neither a change of an appropriation right nor any other authorization is required for the reversion of the leased water right to the lessor's previous use.

However, a person issued a water use permit with a priority date after the date of filing an application for a lease authorization may not object to the exercise of a lease, the modification of a lease, the renewal of a lease, or the reversion of the leased water right to the previous use.

Although FWP is the only entity allowed to lease water for instream flow purposes, it may accept contributions from public or private entities to help pay for water leases. The Nature Conservancy in Montana has helped raise funds for this purpose.