

Testimony On HB 308
Before the House Committee on Fish, Wildlife and Parks
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Chairman Golie, members of the Committee, my name is Gerald Mueller. I live at 440 Evans in Missoula. I testify today in favor of HB 308 on behalf and at the direction of the Upper Clark Fork River Basin Steering Committee.

The Steering Committee is a watershed planning body created in 1991 pursuant to a state law passed in that year. The Steering Committee was directed to write a water management plan for upper Clark Fork River basin, which includes all of the basin above Milltown Dam. State law provides that members of the Steering Committee be appointed one each by the basin's six counties, one each by the basin's six Conservation Districts, and ten by the Director of the DNRC. The DNRC appointments must ensure that committee membership includes a balance of affected basin interests and must be made on the basis of knowledge of water use, water management, fish, wildlife, recreation, water quality, and water conservation. Current members include representatives of upper basin farmers and ranchers, local governments, basin conservation and recreation organizations, hydropower utilities, industries, and state agencies. A list of the current members is attached to this testimony.

In 1994, the Steering Committee forwarded the *Upper Clark Fork River Basin Water Management Plan* to Montana's governor and legislature. The *Plan* was adopted as a part of the State Water Plan. Among the *Plan's* recommendations that the legislature subsequently enacted into law was the proposal that:

The legislature should authorize a ten year in-stream flow pilot study in the upper Clark Fork River Basin. The study will test allowing a public or private entity to lease an existing water right for instream flows from a willing lessor, or allowing an existing right holder to convert an existing right to an in-stream use, and then protect the lease or conversion against appropriation by junior users for the period of the study. To obtain and protect a lease for in-stream flows or to convert an existing right to an in-stream use in a specific stream reach, an entity would be required to proceed through the water rights change process and demonstrate that no other water right holder would be adversely affected by the lease or conversion.

Pursuant to the upper Clark Fork River basin water leasing statute passed in 1995, the Steering Committee recently completed and provided this legislature, the governor, and the DNRC a report entitled, "Ten Years of Private Instream Flow Rights in the Upper Clark Fork Basin." A copy of the report recommendations and the section entitled "Lessons Learned in Ten Years of Leasing" is attached below.

Two of the report's lessons learned are particularly relevant to this bill:

- The concerns expressed when the instream leasing programs were authorized have not been borne out in practice because the statutes were designed to address them and the water rights change process protects against adverse effects from other users.
- No adverse effects on other water users in the drainages where leases have been approved have occurred, largely because the safeguards in the statute are a substantial

discouragement to projects which might have adverse effects on other users. DNRC scrutiny of changes places a substantial incentive on an applicant for an instream flow change to avoid pursuing a change that would adversely affect other water users. Because the burden is on the applicant to document historic use and anticipate the effects of downstream users, the applicant has to engage in a substantial amount of pre-application research. This research usually identifies the potential problems before the application is ever filed.

The December 2004 Steering Committee report includes eight recommendations, the first of which is that the private leasing law should be renewed and made permanent. The study found that while private leases and changes to instream uses will likely never be as widespread as some imagined, they are nonetheless valuable tools in the array of water management options available to water users and should be made a permanent part of Montana's water law. Since no problems have surfaced after 10 years, no reason is evident for not renewing the law and removing its sunset date.

HB 308 is consistent with this recommendation as well as the other seven report recommendations with one exception. HB 308 removes the requirement that a lessor must completely re-apply to DNRC for a new approval upon renewing a lease. Instead, it requires in Section 85-2-407(3) that the water right holder seeking to renew a lease notify the DNRC without specifying when the notification must occur. Once the DNRC receives notification it in turn must notify potentially affected water rights holders that they have 30 days for submission of new evidence of adverse effects to other water rights. The Steering Committee report agrees with not requiring re-application to renew a lease. However, it recommends that a lessor publish a notice of intent to renew a lease one year before the lease expires. This one year notice period is needed to assure potentially affected water users sufficient time to determine whether to object to the lease renewal because of adverse effect. The Steering Committee is concerned that 30 days is not enough notice.

In closing, the Steering Committee supports the basic objective of HB 308, renewing and making permanent Montana's private instream flow water leasing law. We also recommend that the water rights holders be notified one year in advance of a pending lease renewal.

Thank you.

Steering Committee Membership List

When it authorized the creation of the Steering Committee in 1991, the Legislature directed that members of the Steering Committee be appointed by the DNRC Director. In 1997, at the request of the Steering Committee, the Legislature provided that a majority of its members be appointed by units of basin local governments. Six members are to be appointed by the basin's six county commissions and six by the basin's six conservation districts. Ten members would continue to be appointed by the DNRC Director to assure balanced representation of the basin's water interests. Current members are listed in the following table:

Name	Area or Organization Represented	Appointed Entity
Bob Benson	Clark Fork-Pend Oreille Coalition	DNRC Director
Stan Bradshaw	Trout Unlimited	DNRC Director
Robin Bullock	ARCO	DNRC Director
Bob Bushnell	Lincoln Area Rancher	Lewis and Clark Conservation District
Jim Dinsmore	Hall Rancher	Granite Conservation District
Holly Franz	PPL Montana	DNRC Director
Carol Fox	Natural Resource Damage Program	DNRC Director
Steve Fry	Avista Corporation	DNRC Director
Eugene Manley	Granite County & Montana Water Resources Association	Granite County Commission
Brent Mannix	Big Blackfoot Rancher	North Powell Conservation District
Jim C. Quigley	Little Blackfoot Rancher	DNRC Director
Pat Saffel	DFWP	DNRC Director
John Sesso	Butte/Silver Bow Planner	Butte/Silver Bow Commission
Dan Ueland	Silverbow Rancher	Mile High Conservation District
Jules Waber	Powell County Superintendent of Schools	Powell County Commission

Lessons Learned in Ten years of Leasing
Excerpted from
Ten Years of Private Instream Flow Rights in the Upper Clark Fork Basin

The first ten years of leasing have revealed considerable information about how leasing water rights for instream flows has been used as a tool, how DNRC addresses the changes, when and where leasing works best. A number of conclusions can be drawn from the pilot private leasing and instream change program:

- Leases of water rights take a substantial period of time to complete because of the many steps necessary to find available water rights, to negotiate those water rights, and to document use of the water right.
- The concerns expressed when the instream leasing programs were authorized have not been borne out in practice because the statutes were designed to address them and the water rights change process protects against adverse effects from other users.
- No adverse effects on other water users in the drainages where leases have been approved have occurred, largely because the safeguards in the statute are a substantial discouragement to projects which might have adverse effects on other users. DNRC scrutiny of changes places a substantial incentive on an applicant for an instream flow change to avoid pursuing a change that would adversely affect other water users. Because the burden is on the applicant to document historic use and anticipate the effects of downstream users, the applicant has to engage in a substantial amount of pre-application research. This research usually identifies the potential problems before the application is ever filed.
- The obligation to document historic use has underscored the need for an accurate adjudication. The parties engaged in acquiring instream leases, Trout Unlimited and the Montana Water Trust, find that claims abstracts filed in 1982 as part of the general adjudication regularly overstate the amount of acres irrigated, and therefore the flow rate and volume of water actually used. Because DNRC places the burden on the applicant to document historic use, change approvals often result in a reduction in the size of water rights claimed.
- Private leases and changes to instream use have proven to be a flexible tool that can provide substantial fisheries benefit in specific instances where flows are limiting fisheries. In most cases, tributary streams offer the greatest potential for fisheries benefits, in part because of the importance of tributaries to mainstem river productivity, and in part because the amount of water necessary to have a measurable benefit is relatively small. They are particularly valuable as one tool in a larger cooperative watershed effort.

Ten Years of Private Instream Flow Rights in the Upper Clark Fork Basin Recommendations

- Renew the private leasing law and make it permanent - While private leases and changes to instream uses will likely never be as widespread as some imagined, they are nonetheless valuable tools in the array of water management options available to water users and should be made a permanent part of Montana's water law. Since no problems have surfaced after 10 years, no reason is evident for not renewing the law and removing its sunset date.
- Combine the two "pilot" bills into one and make all the requirements for instream changes consistent statewide - The experience in the Clark Fork and statewide does not indicate a need for different programs in different areas of the state.
- Remove the requirement that an applicant has to completely re-apply to DNRC for a new approval upon renewing a lease, but require a leaseholder of any leases initiated after June 30, 2005, to publish notice of the possible renewal of a lease at least one year in advance of the termination date of the lease.
- Maintain the post-approval monitoring requirements.
- Continue to require the description of the specific reach to be protected - This helps assure that changes cannot be used for speculative purposes.
- Continue to allow for the opportunity of a post-approval objection during the term of the lease.
- Continue to keep the burden of proof on applicants that there will be no adverse effects on other users if the program is made permanent or reauthorized.
- Remove the limitation of only one renewal on a lease. This provision mainly anticipated the possible sunset of the law. If the sunset date is removed from the program, then there should not be a limit on the number of renewals of a lease. In addition, parties such as Atlantic Richfield and the Department of Transportation have found leases useful to meet mitigation obligations - but if leases are limited to one or two terms, it may not be sufficient for them to meet those obligations.

