

Senate Bill 128  
January 25, 2007  
Presented by Jeff Hagener  
Senate Fish and Game Committee

Mr. Chairman and committee members, I am Jeff Hagener, Director of Montana Department of Fish, Wildlife & Parks (FWP).

Productive fisheries are vital to Montana's way of life and economy. Passage of SB 128 would enhance FWP's ability to maintain and restore viable fisheries. The bill renews and makes permanent FWP's ability to lease water for instream flow. It would allow FWP to repeatedly renew water leases, and to permanently dedicate water rights that it owns to instream flow.

Instream water leasing was first authorized in 1989. FWP has pursued leasing opportunities with willing lessors on seriously dewatered streams with high fishery restoration potential. FWP's leasing statute was originally set to expire in 1999. In its Final Report to the 56<sup>th</sup> Legislature, EQC concluded that FWP had been very careful in obtaining leases. The leasing study was reauthorized for 10 additional years.

FWP's approach continues to be cautious. To date, FWP has developed 16 instream flow leases. The leases have enhanced spawning, rearing and recruitment of fish in tributaries of the Blackfoot, Bitterroot, Jefferson, Clark Fork and Yellowstone rivers. Leasing is a valuable tool, but it is not the correct tool for every job.

**SB 128 would remove the limitations on lease renewals.** Currently, FWP is limited to a single 10-year lease and one 10-year renewal. FWP has already lost one effective lease due to this limitation. Given that all leases involve willing lessors, there is no need to restrict renewal of leases.

**SB 128 would make the leasing program permanent.** The leasing program will expire in 2009. The 2005 Legislature removed the sunset clause from the water leasing and conversion statute for other parties, and we hope the 2007 Legislature will do the same for FWP.

**SB 128 would allow permanent dedication of water to instream flow:** In the Upper Clark Fork, FWP is in the process of purchasing, as part of the Dutchman wetlands acquisition, sufficient water rights in Warm Springs, Dutchman and Lost creeks to protect instream flows in these tributaries. FWP anticipates obtaining additional water rights in other tributaries to the Upper Clark Fork River as part of a Natural Resource Damage settlement. This water will be critical to the restoration of the Upper Clark Fork River Basin. With the current limitations, this restoration will only last 20 years.

**SB 128 includes safeguards that protect senior water right holders.** Foremost is the requirement that any change to instream flow, whether temporary or permanent, must comply with sections 85-2-307- 309, 401 and 402. The statutes requires public notice and approval by DNRC, but most importantly, they require that the applicant show there will be no adverse affect

to any other water user. Other water users may object to the change, but when a lease is renewed, or up to 10 years after it approves a permanent conversion, DNRC may modify or revoke the change authorization if another appropriator submits new evidence that his or her water right is adversely affected. This 10-year period will allow other water users on a stream to determine whether they are adversely impacted based on their real world experience. The "test drive" feature will provide a virtual guarantee that other water users will not be adversely affected.

Changes of consumptive rights to instream flows will be limited to special, but critical, circumstances like the Upper Clark Fork Basin and spawning tributaries.

FWP urges your support in the passage of SB 128, which will allow us to continue protection and enhancement of our valuable fishery resources.

## SB 128 SUPPORTING MATERIAL

Healthy, productive fisheries are vital to Montana's economy and to its citizens' way of life. Passage of SB 128 would enhance the Department of Fish, Wildlife and Parks' ability to maintain and restore viable fisheries in the State of Montana. By amending Section 85-2-436, the bill renews and makes permanent FWP's ability to lease water for instream flow, it would allow the Department to repeatedly renew water leases, and it would authorize the Department to permanently convert and dedicate water rights that it owns in fee to instream flow to enhance fisheries.

### **Background: FWP's Instream Flow Water Leasing Program**

In the 1960s, conservationists began to advocate for legal mechanisms to keep water instream. The 1969 Legislature passed "Murphy's Law" which allowed FWP to file instream flow claims on 12 blue ribbon trout streams. The concept of water reservations was established in the Montana Water Use Act of 1973. Reservations provided an avenue for public entities to seek water for future use or to protect instream flows or water levels. FWP holds instream flow reservations in the Yellowstone Basin, Missouri River Basin above and below Ft. Peck, and the Little Missouri Basin. Reservations are a valuable water conservation tool. However, due to their late priority date they often do not provide much protection for stream flows during drought because they are junior to most diversionary water rights.

In the late 1980s, much of Montana suffered severe drought conditions. Low natural flows coupled with high irrigation demand exacted severe tolls on stream flows and, in turn, sensitive fisheries. Montana newspapers ran front-page photos of fish kills on dewatered streams. These conditions spurred attempts to create voluntary, market-based mechanisms to protect stream flows. One controversial idea considered by the 1989 Legislature was to allow FWP to temporarily lease consumptive water rights for instream flows. After considerable debate, the idea became law. Since then, FWP has pursued leasing opportunities with willing lessors on seriously dewatered streams with high fishery restoration potential. These water leases are now making important contributions to select fisheries.

FWP's leasing statute was originally set to expire in 1999. The Environmental Quality Council reviewed the program during the 1997-98 Interim. In its Final Report to the 56<sup>th</sup> Legislature EQC stated:

The DFWP has been very careful in obtaining the leases it currently holds. Although many potential leases have been investigated, only a small number have been pursued to completion. Interest in leasing is more prevalent now than it was during the first few years of the study. Water leasing will not solve all of Montana's stream dewatering problems, because of; (1) the complexity of obtaining leases, (2) the small quantities of water that are usually involved, and (3) the potential effects on existing water users. However, because leasing is one tool that can help balance the competing uses of a finite water resource, leases should continue to be cautiously selected and pursued where they will benefit the fisheries resource without adverse effects on existing water users.

The EQC proposed legislation to authorize FWP to lease water for 10 additional years, increase the cap on the number of FWP leases, increase the maximum period for certain leases, and allow for the leasing of salvaged water. The bill received overwhelming support in both houses, and was signed by the Governor on March 19, 1999.

To date, FWP has developed 16 instream flow leases. Instream flow leases have enhanced spawning, rearing and recruitment of fish in several important tributary streams. These streams attract thousands of anglers every year and contribute to local economies. Fisheries of the Blackfoot, Bitterroot, Jefferson, Clark Fork and Yellowstone have all benefited from the leasing program. Leasing is a valuable tool in selected locations, but it is not the correct tool for every job. Therefore, the Department not only seeks permanence in the leasing program, but the ability to permanently dedicate water to instream flow.

### **Changes Proposed through SB 128 and Rational.**

**Remove Limitations on Lease Renewals:** The water leasing study statute limits FWP to a single lease and one renewal. Except for projects that include considerable conservation infrastructure, the lease term is limited to 10 years with one 10-year renewal. FWP has already lost one effective lease due to this limitation. Fisheries in Montana would benefit if FWP had the ability to renew leases for more than two terms.

**Authorization of a Permanent Leasing Program:** The leasing program was conceived as a study. Ten years into the program, the EQC published a final report on the leasing study. The EQC considered making the program permanent but recommended that the study be continued for another ten years citing the need to take a cautious approach with the legislature and avoid losing the entire program to a sunset clause. FWP's current authority to lease water will expire in 2009. The current legislature has the opportunity to not only renew it, but to put it on a par with the "private leasing statute." Until two years ago, there were three statutes that governed the temporary conversion of water to instream flow; FWP's, private parties (whether converting on their own or leasing to someone other than FWP) and a leasing provision specific to the Upper Clark Fork. The 2005 Legislature determined that the non-FWP statutory provisions could safely be combined into a single statewide program and become permanent. There is no reason FWP should not have the same opportunity.

**Permanent Dedication of Water to Instream Flow:** The leasing program is one valuable tool for the enhancement of fishery resources. However, being limited to leasing water causes the Department to miss opportunities. The immediate example is the Upper Clark Fork River where dewatering of the river and tributaries has marginalized the fishery and will prevent the fulfillment of many of the potential benefits of the removal of Milltown Dam. FWP is in the process of purchasing as part of the Dutchman wetlands acquisition, sufficient water rights in Warm Springs, Dutchman and Lost creeks to protect instream flows in these tributaries and anticipates obtaining additional water rights in Mill Creek, Willow Creek and other tributaries and in the Upper Clark Fork River as part of a Natural Resource Damage settlement. This water will be one of the most critical and essential elements of the restoration of the Upper Clark Fork River Basin. However, under the present leasing statute that FWP is constrained by, FWP can

only change a consumptive water right to instream purposes for 10 years, with one 10-year renewal. Therefore, the restoration of the Upper Clark Fork River will only last 20 years unless the statute is amended.

Changes of consumptive rights to instream flows will be limited to special, but critical, circumstances like the opportunity in the Upper Clark Fork Basin and spawning tributaries. FWP's leasing program has been limited to otherwise dewatered spawning tributaries because the opportunities are there and because the cost and complexity on larger streams and rivers is prohibitive. FWP is now starting to face the loss of successful efforts to establish base flows in dewatered spawning tributaries as the 20-year limit is reached. Where there is an opportunity to make those flows permanent, the fishing and recreating public and the dependant local and state economies should benefit. The public would be better served if the Department could permanently dedicate these waters to instream flow not only to restore the fishery, but to meet water quality restoration goals.

Other western states, including Colorado and Oregon allow water to be permanently dedicated to instream flow. Montana does not. Moreover in Montana, a consumptive water right holder may change the use of that right to any beneficial use other than instream flow so long as certain statutory criteria are met – the most important of which is that the change does not adversely affect any other water user. The legislature is currently considering the reserved water rights compact between the State of Montana and the United States Department of Agriculture Forest Service. If the compact is approved, the Forest Service will be authorized to permanently convert acquired consumptive water rights to instream flow on National Forest lands. We recommend applying the same concept to water rights owned by FWP.

**Increased Costs for Water Leasing:** Many of Montana's rivers and streams are over-allocated and large basins are closed to new surface water appropriations. Meanwhile, the state's population is growing and demand for water is increasing. Naturally, the value of water rights is increasing with it.

Water is a limited resource and senior rights are even more limited. The cost to lease water is increasing. At some point these increased costs will limit the agencies ability to participate in a leasing program. It follows that Montana should evaluate the need for a mechanism to permanently dedicate formerly consumptive water rights to instream flow.

**Safeguards for Existing Water Holders:** While some concerns linger over long-term consequences and impacts to other users, there are safeguards that protect senior water right holders. Foremost is the requirement that any change to instream flow, whether temporary or permanent, must comply with sections 85-2-307- 309, 401 and 402. The statutes requires public notice and approval by DNRC, but at their core, they require that the applicant show there will be no adverse affect to any other water user. Not only may other water users object, but upon renewal, in the case of a lease, and up to 10 years after it approves a permanent conversion, DNRC may modify or revoke the change authorization if another appropriator submits new evidence that his or her water right is adversely affected. This 10-year period will allow other water users on a stream to determine whether they are adversely impacted based on their real world experience. The "test drive" feature will be unique in Montana water law and will provide

a virtual guarantee that other water users will not be adversely affected. Like the current law, FWP will have to obtain approval of its commission to lease water for instream flow.

In an environment in which water's value is increasing, supplies are likely decreasing due to climate change, and a consumptive use water right may be purchased and permanently converted to any use other than instream flow, it is essential that the state allow itself, through its fish and wildlife management agency, the opportunity to participate in the market for water and secure existing water rights for the benefit of fisheries.