



**Montana Fish,
Wildlife & Parks**

**BIENNIAL PROGRESS REPORT
- FWP WATER LEASING STUDY -
2012 & 2013**

Submitted to:

**Montana Environmental Quality Council
Montana Department of Natural Resources and Conservation
And
Montana Fish & Wildlife Commission**

Submitted by:

**Montana Fish, Wildlife & Parks
Fisheries Division**

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**WATER POLICY INTERIM
COMMITTEE. 2013-14**

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Ex. No. 5

Executive Summary: No new leases or conversion of water rights to instream flow were perfected by Montana Fish, Wildlife & Parks (FWP) during the biennium. No existing leases were renewed during the 2012 and 2013 reporting period.

In 2011, FWP noted that an *Application to Change of Appropriation Water Right(s)* had been submitted to the Montana Department of Natural Resources and Conservation (DNRC) that proposed the use of two La Marche drainage water rights for instream purposes. Conditions of operation proposed by DNRC's were unacceptable to the owner of the water rights. Therefore the Change Application and the underlying lease for instream flow purposes were both terminated.

Other instream flow projects are presently in various stages of investigation. FWP accepted ownership, through donation, of a series of water rights on Nevada Spring Creek and will seek authorization from DNRC to convert these water rights to instream flow. (Nevada Spring Creek is located in the Blackfoot River Basin.). FWP is also conducting a due diligence review of water rights Mill and Willow creeks to determine their potential to be used for instream flow purposes. (Both streams are tributaries to the Clark Fork River in the Columbia River basin.)

This report also provides a summary of current and past leases as well as a brief overview of leasing program and statutory authorities.

Authority to Lease: The conversion of existing water rights to instream flow by FWP is governed by §85-2-436 MCA 2011, *Instream flow to protect, maintain, or enhance streamflows to benefit fishery resources – change in appropriation rights by department of fish, wildlife and parks until June 30, 2019.*

Through this section, FWP has the statutory authority to change a water right to instream-flow use to protect, maintain or enhance stream flows to benefit the fishery resource by:

- o leasing and temporarily changing someone else's water right,
- o temporarily changing an FWP water right held in fee simple, and
- o permanently changing a water right held in fee simple on a limited number of streams reaches (12).

Reporting Requirements: Under subsection 4 of the FWP water leasing statute, the agency has a responsibility to submit a biennial progress report to the FWP Commission, the legislative Environmental Quality Council (EQC) and the DNRC. This biennial report must include a summary of all appropriation rights changed to an instream-flow purpose *in the last two years*. The report must include specific information for each *new* lease including:

- o the length of the stream reach and how it is determined;
- o streamflow or volume needed to enhance or preserve fisheries;
- o the amount of water available for instream flows as a result of the change in appropriation rights;
- o contractual parameters, conditions, and other steps taken to ensure that each change in appropriation right does not harm other appropriators, particularly if the stream is one that experiences natural dewatering; and
- o methods and technical means used to monitor use of water under each lease.

Leasing Activity 2012 – 2013:

LaMarche Creek. The “*Biennial Progress Report- FWP Water Leasing Study -2010 & 2011*” noted that FWP submitted to DNRC an Application to Change of Appropriation Water Right to convert two water rights in the LaMarche Creek basin (a tributary to the Big Hole River) to instream flow purpose. DNRC issued its Preliminary Determination regarding this application (No. 41D 30051693) in February 2013. The Preliminary Determination included a favorable decision with respect to the LaMarche Creek irrigation water right proposing to grant a change of the right to instream flow. However, DNRC proposed to deny the portion of the change with respect to Porcupine Spring Creek and went further to preclude the use portions of the Porcupine Spring water right not leased to FWP. In consultation with and at the request of the owner, FWP withdrew the change application and terminated the associated water right lease because of the findings and restrictions in the Preliminary Determination.

Nevada Spring Creek. FWP was offered (through donation) several water rights from a Nevada Springs and Nevada Spring Creek. These water rights, for both irrigation and stock water, are located on a spring creek tributary to Nevada Creek in the Blackfoot Basin.

Public comment was collected in November and December 2012 as part of the “Nevada Spring Creek Water Right Acquisition Environmental Assessment”. The Fish and Wildlife Commission authorized acceptance of the irrigation water rights in December 2012. In July 2013, the Fish and Wildlife Commission authorized acceptance of the associated stockwater rights. In August 2013, the quit claim deed was record and the Water Right Ownership was filed with DNRC.

The subject water rights are part of the Montana Water Courts ongoing Blackfoot River Basin Preliminary Decree (Basin 76F). FWP is now in the early stages of reviewing these water rights and addressing adjudication issues raised in the decree. FWP is also collecting operational and historical use data. Once adjudication issues are resolved, FWP will prepare and submit a Change Application to convert the irrigation water right to an instream-flow purpose.

Mill Creek and Willow Creek. In 2008, the State of Montana Department of Justice accepted, as part of a settlement agreement, a number of water rights held by ARCO Environmental Remediation LLC. These water rights diverted water from Mill and Willow creeks, both tributaries to the Clark Fork River. These two streams have confluence with the river near Anaconda, MT.

Montana Department of Justice’s Natural Resources Damage Program (NRDP) intends to transferring management of these water rights to FWP, which will then be converted to an instream flow purpose. FWP began a due diligence evaluation of those rights in February 2013 by reviewing ownership of the subject water rights and any overlapping filings made by other parties. This review continues.

General Approach to Leasing: Historically, FWP’s water-leasing activities largely focused on tributaries to larger rivers that provide important spawning habitat. Typically, these tributaries flow from the mountains onto the valley floor where they are tapped for irrigation. Irrigation

diversions often cause seasonal or periodic dewatering between the diversion and the main-stem river. The dewatered reaches typically extended a few miles or less.

Most current leases target the restoration of flow in these dewatered reaches so that redds are not dewatered, fry can emerge and migrate to the main-stem river, and connectivity between the main stem and tributary can be maintained. Water conservation leases focus on improving irrigation efficiency and keeping the amount of irrigation unchanged, while reducing the diversions so that stream flow can be restored.

Current Leases: FWP has eleven active leases and one conversion of a FWP irrigation right to instream flow. All have approved "Change of Use Authorizations" issued by DNRC. These current instream flow transactions are located on the following ten streams:

1. Big Cr., tributary to the Yellowstone River (two leases)
2. Cedar Cr., tributary to the Yellowstone River (two leases)
3. Mol Heron Cr., tributary to the Yellowstone River
4. Locke Cr., tributary to the Yellowstone River
5. Hells Canyon Cr., tributary to the Jefferson River in the Upper Missouri Basin
6. Cottonwood Cr., tributary to the Blackfoot River in the Clark Fork Basin (FWP right)
7. Chamberlain Cr., tributary to the Blackfoot River in the Clark Fork Basin
8. Pearson Cr., tributary to the Blackfoot River in the Clark Fork Basin
9. Rock Cr., tributary the upper Clark Fork River
10. Lazyman Cr., tributary to the Ruby River in the Upper Missouri Basin

Figure 1 is a table displaying all of the leases (active, terminated, or transferred) that FWP has been associated with over the life of the water-leasing study. Three of the listed leases were not renewed by FWP. A fourth lease, on Tin Cup Creek, could not be renewed a second time by FWP under the statutory provision in place at that time. However, the Montana Water Trust (now part of the Clark Fork Coalition) was able to acquire and maintain this water lease. Two leases were not perfected through a *Change of Use Authorization* and were terminated.

Other Instream Flow Protection Methods: Montana's water law currently provides several mechanisms to protect flows or water levels. Most of these provisions were added with the passage of the Water Use Act in 1973, and therefore are relatively late in Montana's water allocation history. The other tools to create water-right or other protections for instream flow include:

- State-based *Water Reservations*.
- Water rights obtained as a result of statutory directive and legislative authorization. (These are pre-1973 water rights and include *Murphy Rights* and *public recreational claims*.)
- Purchase or contract from new or existing water storage.
- Designation of a stream or river basin as closed to additional water-right appropriation (Closed Basin).

Water reservations are the most common water rights for instream flow found in Montana. The Yellowstone and Missouri river basins contain all of FWP's water reservations. The water reservations developed through state-initiated, water-planning processes. Through separate processes in the Yellowstone River and Upper and Lower Missouri basins, public entities received water rights for future diversionary development and for instream-flow protection. Diversionary reservations were granted to cities, towns, Conservation Districts, and the U. S. Bureau of Reclamation. FWP, the Department of Environmental Quality and the U.S. Bureau of Land Management received reservations for stream-flow and water-level protection. Statutory authorization for such rights is found in §85-2-316 MCA.

Water rights created by statutory directive or authorization are derived from two separate acts. The 1969 legislature directed FWP to establish water rights in a specified set of rivers and streams known as "blue ribbon" streams.¹ In 1979 under Senate Bill 76 (a statute modifying Montana's general stream adjudication process), the legislature also directed FWP to file "Statements of Existing Water Right Claims" for public recreational uses (§85-2-222 MCA). The Montana Supreme Court, in a series of cases commonly referred to as the *Bean Lake* decisions, further explored these legislative requirements. Their most recent holding recognized that there could be other pre-1973, judicially recognizable, non-diversionary, instream water rights. Through the general stream adjudication proceedings, those claims are to be reviewed and decided by the Montana Water Court.

Water for instream flows is and can be purchased from existing storage facilities. FWP possess two long-standing contracts for stored water. Both are in the Bitterroot River basin and come from Painted Rocks Reservoir, a DNRC water project, and Lake Como, a storage reservoir operated by the Bitter Root Irrigation District.

The designation of a basin as "closed" to certain new appropriations of water does not create any new water rights or specifically protect an instream-flow level. However, the designation places a cap on additional depletions of water from the system, thus protecting existing water rights and maintaining the status quo water for demand and therefore indirectly maintain existing streamflow conditions. The legislative Upper Clark Fork Basin Closure was specifically crafted to protect status quo conditions and, thereby, to protect fisheries and existing water-right holders.²

Conclusion: FWP will continue to administer its existing leases and pursue new leases where opportunities arise. In the next two years, projects involving permanent changes to instream flow will continue to move forward. FWP will also explore other opportunities, such as the purchase of stored water to restore and supplement instream flow.

¹ §89-801 RCM (1969)

² §85-2-335 & 336 MCA

FWP Instream Flow Leasing History, as of November 2013

SOURCE ³	RIVER BASIN	STATUS	LESSOR	LEASE TERM/EXP.	PRIORITY OF RIGHT	QUANTITY LEASED	PERIOD OF USE
Mill Creek	Upper Yellowstone	Terminated	Mill Creek Water and Sewer District	Terminated	95 rights with various priorities	41.4 cfs	48-60 hours in August Diversion shut off after 10-day notice from FWP
Mill Creek	Upper Yellowstone	Terminated	Individual	Terminated	June 30, 1880; June 1, 1903	2.0 cfs (1880) and 4.13 cfs (1903) (salvaged water)	May 1 -October 4
Blanchard Creek	Blackfoot	Terminated	Individual	Contract rescinded 3/5/2004	May 11, 1913 (first right on stream)	3.0 cfs	April 15 -October 15
Tin Cup Creek	Bitterroot	Now held by Clark Fork Coalition	Six individuals	Met statutory limit on renewal. 5-year renewal March 28, 2005	August 1, 1883 (first right on stream)	2.28 cfs April 1-April 14 4.32 cfs April 15-April 30 4.72 cfs May 1-October 19	April 1- November 4
Cedar Creek	Upper Yellowstone	Active	US Forest Service	10 years Lease renewed Sep. 20, 2015	April 1, 1890; April 1, 1893; April 1898; April 1, 1904; April 7, 1972 (high-water rights only)	6.77 cfs May 1-July 15 6.39 cfs July 16-July 31 9.64 cfs August 1-August 31 6.39 cfs Sept 1 - October 15	May 1-October 15
Hells Canyon Creek	Jefferson	Active	Three individuals	20 years Apr. 1, 2016	December 31, 1884 (1 st right on stream), August 23, 1889; August 29, 1912	1.12 cfs (salvaged water)	April 1- November 4
Mill Creek	Yellowstone	Active	Individual	Terminated	June 1, 1891	2.64 cfs (salvaged water)	May 1-October 19
Chamberlain Creek	Blackfoot	Active	Individual	10 years April 1, 2017	October 10, 1911	½ the flow up to 25 cfs	April 1 - October 31
Pearson Creek	Blackfoot	Active	Individual	10 years April 1, 2017	October 10, 1911	Up to 8 cfs	April 1 - October 31
Cottonwood Creek	Blackfoot	Active	FWP	20 years October 2016	May 1, 1884	14 cfs April, 37 cfs May 1-June 30, 32 cfs July, 9 cfs August, 6 cfs September, 9 cfs October 8 cfs November (Salvaged water)	April 1- November 4

³ Text highlighted with bold text identifies active leases.

FWP Instream Flow Leasing History, as of November 2013

SOURCE ³	RIVER BASIN	STATUS	LESSOR	LEASE TERM/EXP.	PRIORITY OF RIGHT	QUANTITY LEASED	PERIOD OF USE
Mol Heron Creek	Yellowstone	Active	Private ranch	20 years December 31, 2018	July 15, 1884; May 7, 1885; June 15, 1893; January 1, 1900; March 2, 1903; June 5, 1905; August 5, 1920; April 15, 1967	5.0 cfs to 27.0 cfs	April 15 - October 19
Big Creek	Yellowstone	Active	Two private ranches	20 years April 15, 2020	March 12, 1883; June 30, 1901; May 31, 1909; May 15, 1910; May 15, 1910	1.0 – 16.0 cfs (rights dedicated to a land trust in perpetuity)	April 15 - October 15
Big Creek	Yellowstone	Active	Private ranch	10 years May 1, 2019	June 30, 1873 (1 st right on stream)	10.0 cfs	May 1 - November 1
Rock Creek	Upper Clark Fork of Columbia	Active	Private ranch	20 years	March 23, 1881; May 15, 1881; June 1, 1892; May 1, 1898; September 29, 1904; May 10, 1907	5.0 - 27.22 cfs	April 15 - October 31
Locke Creek	Yellowstone	Active	Private ranch	30 years; December 14, 2031	March 6, 1915	7.5 cfs	April 20 – October 24
Cedar Creek	Yellowstone	Active	FWP purchased right from private ranch	30 years: June 9, 2033	May 29, 1894 (4 th right on stream; other high-priority rights already leased by FWP); June 11, 1971 (high-water right); April 7, 1972 (high-water right)	3.25 cfs 3.76 cfs (high water)	April 1 – November 4
Lazyman Creek	Ruby River	Active	Private ranch	10 years: November, 2021	April 30, 1888 (only diversionary right on source)	Up to 1.0 cfs	May 15 – October 15
Trail Creek	Clearwater River	Not perfected Terminated	Resort (and) Homeowners Association	30 years: June 3, 2034	April 10, 1905 January 10, 1911	1.06 cfs 2.37 cfs plus an additional 0.5 cfs during periods of low flow	Both have periods of use: April 1 - October 31.
Hell Roaring Creek	Red Rock River	Not perfected Terminated	Private ranch	5 years from date of change authorization	May 26, 1900 October 25, 1901 September 24, 1915	8.0 cfs 4.0 cfs 6.0 cfs	May 1 – October 15 May 1 – October 15 May 1 – October 25