Montana Fish, Wildlife & Parks

NEVADA SPRING CREEK WATER RIGHT ACQUISITION
ENVIRONMENTAL ASSESSMENT DECISION NOTICE

Montana Fish, Wildlife & Parks
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Proposed Action

Montana Fish, Wildlife & Parks (FWP) is proposing to acquire through donation, the water rights from Nevada Spring Creek, a tributary of Nevada Creek in the Upper Blackfoot River Drainage. These water rights are currently owned by Nevada Spring Creek Partners (Partners), who have been in negotiations with Trout Unlimited (TU) to purchase the water rights. TU has offered, after purchase, to donate these water rights to FWP for the purpose of converting them to instream flow through the *Change of Use* process administered by the Department of Natural Resources and Conservation (DNRC). The intent of the project is to improve and maintain habitat for salmonids, primarily westslope cutthroat and bull trout, in the Upper Blackfoot Fishery. The subject water rights are utilized on property owned by the Partners, approximately 2 miles north of the town of Helmville in Powell County, MT. The proposed protected reach would extend from the spring head of Nevada Spring Creek to the confluence of Nevada Spring Creek and Nevada Creek.

Montana Environmental Policy Act

FWP is required by the Montana Environmental Policy Act (MEPA) to assess significant potential impacts of a proposed action on the human and physical environment. In compliance with MEPA, an Environmental Assessment (EA) was prepared for the proposed project by FWP and released for public comment on November 2, 2012.

Public comments on the proposed project were taken for 30 days (through December 3, 2012). Legal notice of the proposal and availability of the Draft EA was published twice each in the *Blackfoot Valley Dispatch* (Lincoln, Nov 8 & 15), *Independent Record* (Helena, Nov 2 & 9), *Missoulian* (Nov 2 & 9), and *Silver State Post* (Deer Lodge, Nov 7 & 14) newspapers.

FWP mailed 36 copies of the EA (and sent approximately 35 email notifications of the EA's availability) to adjacent landowners and interested individuals, groups and agencies. The EA was available for public review on FWP's web site (http://fwp.mt.gov/, "Recent Public Notices" and "Submit Public Comments") from November 2 through December 3, 2012. An FWP statewide news release was issued November 9 and posted on FWP's website (http://fwp.mt.gov/, "News Releases") the same day.

Summary of Public Comment

A total of eight comments were received. Of these, seven were general but supportive of the concept of acquiring and converting water rights to improve streamflow, fishery and recreation in the basin. One commenter voiced the following concern.

Comment: "NO - I do not think the fish and game should be in partnership with any major corporation willing to "buy out" the rights of MONTANA citizens to water rights or land ownership/access."

Response: FWP understands the concerns that some may have with respect to acquiring water rights from private landowners. In this instance, a private water right is being permanently returned to instream flow for the public's benefit. That water right, which is a right to use the public resource, will now be held by the public providing public benefits. Acquisition of the water right does nothing to improve or impair a citizen's access to land or water. The current landowners made a management decision to cease irrigation, and restore both stream flow and channel conditions in order to benefit the Nevada Spring Creek, Nevada Creek, and upper Blackfoot River fisheries. The transfer of the irrigation water right fits with the landowner's management plan and provides public benefits. Under existing statute, the landowner could do a 10-year conversion from irrigation to instream flow with an unlimited number of renewals. However, they have chosen to transfer this right to FWP who by statute can do a permanent conversion.

As demand on Montana's limited water resources have increased, Montana's legal water policy (developed and approved by the Montana legislature, and reviewed the Montana's Supreme Court) has increasingly relied upon market approaches for the reallocation of water. Third party and public impacts are evaluated under statutory criteria defined in the Montana Water Use Act (Title 85 Montana Code Annotated). Montana's water right *Change of Use* process relies upon the voluntary transactions between willing sellers and buyers to carry out these transactions. FWP was statutorily granted the ability by the legislature to participate in these transactions as a specific tool to improve impaired stream flow conditions in targeted places. The statutory process, as defined in 85-2-401, 402 and 436 MCA (2011), reviews these transactions to ensure

the new use, including instream flow uses, is a beneficial use and that third parties are not adversely affected.

FWP did receive a comment from another interested party on the proposal outside of the comment window, but because the comments were substantial in nature, FWP found it necessary to address the concerns expressed.

Comment: We are concerned we have the only water rights on a spring that is the source of an unnamed tributary of Nevada Spring Creek, and were not notified of this intended donation of Nevada Spring Creek water rights.

We have a right of first refusal to graze the lands adjacent to Nevada Spring Creek, and are concerned that the stock water rights may be abandoned with this transaction, as we would like to graze this property in the future as we have in the past. We ask that you please keep the grazing of livestock in mind should you be consider removing the stock water right from this property. An article in the November/December issue of *Working Ranch* referred to a study done by the Nature Conservancy, which found a higher composition of native species in wetlands that were grazed versus those that were not grazed. In fact, there was a 25% decline in native species composition in wetlands that were not grazed

Response: During the evaluation of this proposal and in compiling data for the EA, FWP conducted a water right ownership query on DNRC's Water Right Query System. The query did find the pair of water rights that were mentioned in your comment. We referenced this pair of water rights on page 1 of the EA, recognizing that the point of diversion for this pair of rights has moved to the Blackfoot River. If the conversion of these irrigation water rights to instream flow is granted through DNRC's *Change of Use* process, the proposed project will increase water availability during low water periods, and will likely have a positive effect on water users who divert water from the Blackfoot River.

The land management decisions that take place on the lands adjacent to Nevada Spring Creek will continue to reside with the landowners, the Nevada Spring Creek Partners. The proposed action seeks to acquire both the irrigation water rights and direct-from-source stock water rights. The stock-water rights that FWP receives as a result of this proposed action will remain active. FWP has some concerns as to how selling the stock-water rights will affect long term management and the additive benefits to instream flow. FWP intends on doing further investigation with the Partners related to the fate of the stock-water rights. It is important to note that poor livestock management practices were the cause of Nevada Spring Creek's impairment in the past. FWP does understand the benefits of properly managed grazing on grass and wetland habitats.

Decision

Based on the Environmental Assessment, public comment, and evaluation of the benefits and risks associated with this project, it is my decision to recommend that the FWP Commission approve the transfer of water rights on Nevada Spring Creek, for the purpose of converting them to instream flow through the *Change of Use* process administered by the DNRC. I find there to be no significant impacts on the human and physical environments associated with this project. Therefore, I conclude that the Environmental Assessment is the appropriate level of analysis, and that an Environmental Impact Statement is not required.

/s/ _____ 12/19/12
Bruce Rich Date
Fisheries Bureau Chief