



PO BOX 201704  
Helena, MT 59620-1704  
(406) 444-3742  
FAX (406) 444-3971

**Montana Legislative Services Division**  
**Legislative Environmental Policy Office**

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To: Water Policy Interim Committee  
From: Joe Kolman, research analyst  
Re: Fish, Wildlife, and Parks Instream Leasing Report

2/23/10

As required by 85-2-436, MCA, the Department of Fish, Wildlife, and Parks submitted its biennial report on instream water leasing to the Environmental Quality Council. Since this is of interest to the Water Policy Interim Committee, the report is also being provided below.

Please contact me if you have questions.

Joe Kolman, Research Analyst  
Legislative Environmental Policy Office  
406.444.9280 Phone 406.444.3971 FAX  
Rm 171A, State Capitol Building  
P.O. Box 201706  
Helena, MT 59620-1706

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**Montana Fish,  
Wildlife & Parks**

**BIENNIAL PROGRESS REPORT  
- FWP WATER LEASING STUDY -  
2008 & 2009**

**Submitted to:**

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

**Submitted by:**

**Montana Fish, Wildlife and Parks  
Fisheries Bureau**

**December 2009**

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## Leasing Activity Report

**Executive Summary:** Montana Department of Fish, Wildlife and Parks (FWP) perfected no new instream flow leases during the 2008 and 2009 calendar years. FWP renewed one existing lease on Big Creek, a tributary to the Yellowstone River, in 2009. The change application associated with a lease on Lazyman Creek in the Ruby River drainage, submitted in early 2008, is still pending before the Montana Department of Natural Resources and Conservation (DNRC). Other instream flow projects are presently in various stages of investigation. Also provide here is a summary of current and past leases as well as a brief overview of leasing program and statutory authorities.

**Background:** During the low water and drought years of the mid to late 1980s, many Montana streams experienced severe low flow conditions. It became clear that diversions by senior existing water rights coupled with drought conditions dramatically reduced stream flows or completely dewatered key streams and rivers. These conditions impacted all users of the streams and rivers including the state's fishery resource and aquatic ecosystems.

After these extreme low water years Montanans, through their legislature, created special statutory provisions allowing the transfer of diversionary water rights to instream flow. Under these provisions, on a voluntary and willing party basis, the water rights system could allow the temporary conversion of existing diversionary water rights to instream flow purposes. Development and passage of this legislation required considerable debate and compromise. Numerous provisions ensure adequate consideration and protection of existing water right holders.

To create this opportunity, the Legislature relied upon the existing Change of Appropriation Water Right (*Change of Use*) provisions found in Title 85 Part 4 and administered by the DNRC. Instream flow leasing was implemented through this part.

In 1989, limited authority was granted to FWP to temporarily lease or convert a water right to an instream flow.<sup>1</sup> In 1995 the Legislature extended the authority to a water right owner to convert their right to instream flow or lease that water right to private third party for instream flow. That legislative provision was known as the private instream flow leasing study.<sup>2</sup> In 2005, the Legislature made this study a permanent statutory provision.

Leasing existing water rights to provide instream flow is a tool that provides specific benefits and opportunities. Water leasing for instream flow typically is most suited for re-watering and re-connecting stream reaches subject to seasonal low flow or drought year conditions, where there are existing water rights appropriated either from or just above the stream reach of interest. Water leasing is not as well suited to establishing long-term, year-long, instream flow conditions.

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<sup>1</sup> §85-2-436 MCA

<sup>2</sup> §85-2-408 MCA

**Authority to Lease:** The conversion of existing water rights to instream flow by FWP is governed by §85-2-436 MCA 2009, *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 a FWP water right held in fee simple, and
- o permanently changing a water right held in fee simple on a limited number of streams (twelve).

**Reporting Requirements:** Under subsection 4 of the FWP water leasing statute, the agency has a responsibility to submit a biennial progress report to the Montana Fish, Wildlife and Parks Commission (Commission), the legislative Environmental Quality Council (EQC) and the Montana Department of Natural Resources and Conservation (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 2008 – 2009:** FWP signed no new leases during the last biennium. Preliminary investigations of several potential leases and water conservation projects are on-going. This includes the evaluation of the underlying water rights and investigation of the potential fish habitat benefits.

During the last two years, FWP renewed an existing water lease for an additional ten-year period on Big Creek, a tributary to the Yellowstone River.

In November 2009, the Commission endorsed efforts to enter into a water right lease on Hell Roaring Creek, a tributary to Red Rock Lakes in the Centennial Valley. This stream provides critical habitat for Arctic grayling. A detailed investigation of the water rights, water use operations and fishery benefits and initial negotiations for a lease are presently underway.

FWP is seeking DNRC approval of a *Change of Use* for a new water right lease on Lazyman Creek, a tributary to the Ruby River in southwestern Montana. This project is focused on restoring natural spawning of Arctic grayling in the upper Ruby River basin. The application should proceed to public notice in early 2010.

**Discussion of Activities:** 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 mainstem river. The dewatered reach 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 (i.e. crop consumption) unchanged, while reducing the diversions so that stream flow can be restored.

As noted in previous annual reports FWP, Double Arrow Enterprises, and Double Arrow Ranch Landowners Association have, since 2004, been exploring an instream water lease related to a water conservation project in Trail Creek, a tributary to the Clearwater River. Due to several factors, efforts to finalize this water lease have ceased. Once the Montana Water Court adjudicates the underlying water right, the project may be revisited.

In the 2007 biennial report, FWP noted that it was in the early stages of developing a new water right lease on Lazyman Creek. The parties signed the lease agreement (contract) in October 2007. The conservation and restoration improvements were developed and installed in 2008. (The restoration improvements were funded through a partnership of funding entities. The objectives of those improvements met multiple land and water management objectives.)

FWP submitted an Application for Change of Appropriation Water Right for the Lazyman Creek lease to DNRC in early 2008. Action on this application was delayed by a change in DNRC's interpretation of the law (§85-2-436 MCA) governing changes to instream flow by FWP. At the time of this report, it appears that DNRC and FWP have resolved concerns relative to the amount of water protected and the methods of measuring and monitoring flows. It also appears likely that the application can proceed to public notice after the first of the year.

Over the last year and half, FWP, DNRC and other instream flow leasing entities (Trout Unlimited's Montana Water Project and the Montana Water Trust) have been discussing the amount of water protectable below the historic point of diversion. To a large degree, this discussion focused on; a) defining protectable reaches, b) determining and defining water consumption and salvage, and c) defining the historic pattern of use and beneficial use vs. wasteful practices.

It is important to note that DNRC, in its role as administrator of the Water Use Act, has been taking a close look all *Change of Use* standards, especially as they relate to the amount of water beneficially used, the amount of water consumed (and therefore unavailable to other users), as well as return flows. Through rule development, DNRC has been defining consumptive use and methodologies to quantify it.

**Current Leases:** FWP has ten 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 nine 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 R. in the Upper Missouri R.
6. Cottonwood Cr., tributary to Blackfoot R. in Clark Fork Basin (FWP right)
7. Chamberlain Cr., tributary to Blackfoot R. in Clark Fork Basin
8. Pearson Cr, tributary to the Blackfoot R. in Clark Fork Basin.
9. Rock Cr. tributary the upper Clark Fork River.

Figure 1 is a table displaying all of the leases (active, terminated, transferred) that FWP has been associated with over the life of the water-leasing project. 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 was able to acquire and maintain this water lease.

**Other Instream Flow Protection Methods:** Montana’s water law currently provides several mechanisms, other than changing existing water rights to instream, 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 or authorization. (These are pre-1973 water rights and include *Murphy Right* 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 a state initiated water planning processes. Through separate processes in the Yellowstone River, Upper Missouri 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 and 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 in streams known as “blue ribbon” streams.<sup>3</sup> 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 *Bean Lake*, 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 streamflow conditions. The legislative Upper Clark Fork Basin Closure was specifically crafted to protect status quo conditions and thereby to protect fishery conditions and existing water right holders.<sup>4</sup>

**Conclusion:** FWP will continue to administer its existing leases and pursue new leases where opportunities occur. 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.

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<sup>3</sup> §89-801 RCM (1969)

<sup>4</sup> §85-2-335 & 336 MCA



**Figure 2. FWP Instream Flow Leasing History, as of December 2009**

SOURCE	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 Aug. Diversion shut off after 10-day notice from FWP
Mill Creek	Upper Yellowstone	Terminate	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 MT Water Trust	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 <sup>2</sup> 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 <sup>st</sup> 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 Apr. 1, 2017	October 10, 1911	½ the flow up to 25 cfs	April 1 - October 31
Pearson Creek	Blackfoot	Active	Individual	10 years Apr. 1, 2017	October 10, 1911	Up to 8 cfs	April 1 - October 31

**Figure 2. FWP Instream Flow Leasing History, as of December 2009**

SOURCE	RIVER BASIN	STATUS	LESSOR	LEASE TERM/EXP.	PRIORITY OF RIGHT	QUANTITY LEASED	PERIOD OF USE
Cottonwood Creek	Blackfoot	Active	FWP <sup>3</sup>	20 years Oct. 2016	May 1, 1884	14 cfs April, 37 cfs May 1-June 30, 32 cfs July, 9 cfs August, 6 cfs Sept., 9 cfs Oct. 8 cfs November (Salvaged water)	April 1 - November 4
Mol Heron Creek	Yellowstone	Active	Private ranch	20 years Dec. 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 <sup>4</sup>	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 <sup>st</sup> 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	Private ranch	30 years: June 9, 2033	May 29, 1894 (4 <sup>th</sup> 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
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 to October 31.