



**TROUT UNLIMITED'S MISSION IS TO CONSERVE,  
PROTECT AND RESTORE NORTH AMERICA'S  
COLDWATER FISHERIES AND THEIR WATERSHEDS**

## Maintaining Instream Flow through Water Leasing and Forebearance Agreements

Yellowstone Basin Advisory Committee  
November 14, 2013 Billings, Montana



Patrick Byorth, Director  
Trout Unlimited's  
Montana Water Project



# Water Leasing and Forbearance Agreements

- Historical background
- Water Leasing
  - Instream Flow
  - Short-term Leases
- Forbearance Agreements
- Case Studies



**Fishing Regulations**  
**1864 Territorial Legislature limits**  
**fishing to “a rod or pole”**

**1876 Use of explosives to catch fish**  
**is prohibited**



# 1889 Statehood!

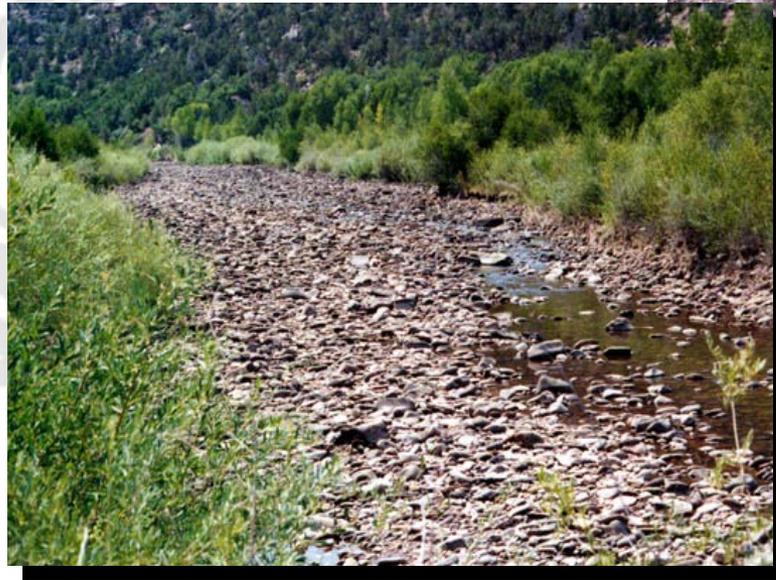
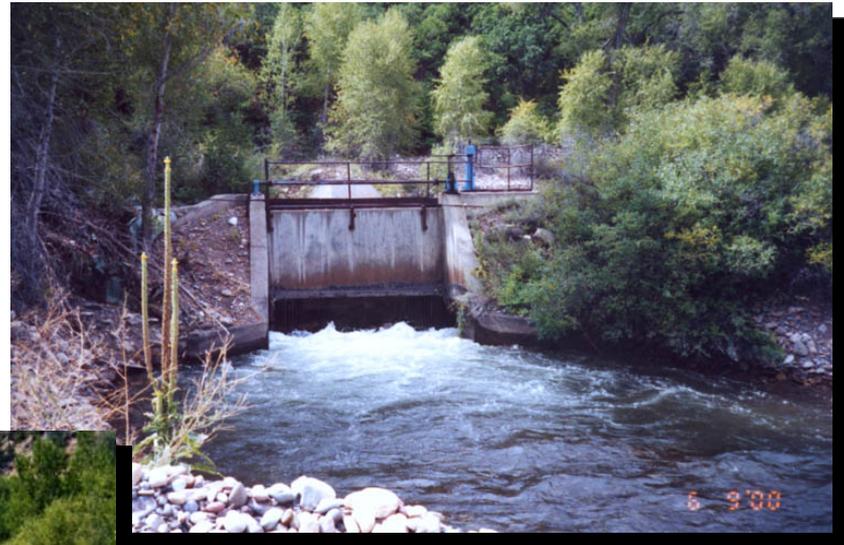
*The enabling act admitting Montana and other states to the union on “equal footing” – states take ownership of water.*



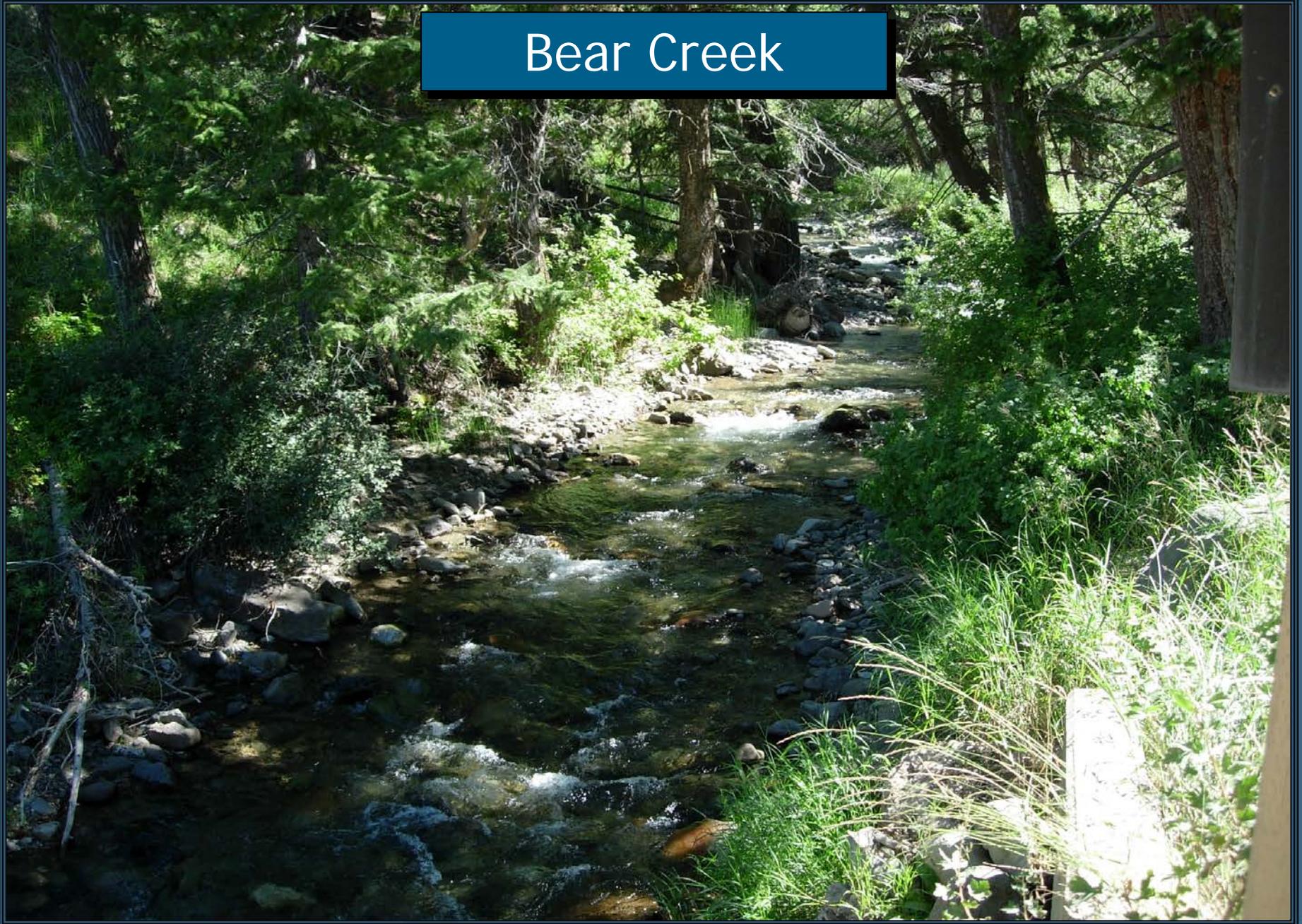
**Rainbow, brown and brook trout were introduced into Yellowstone National Park, headwaters to the Yellowstone and Madison rivers.**

# 19<sup>th</sup> and 20<sup>th</sup> Centuries: Water Working Hard in the West

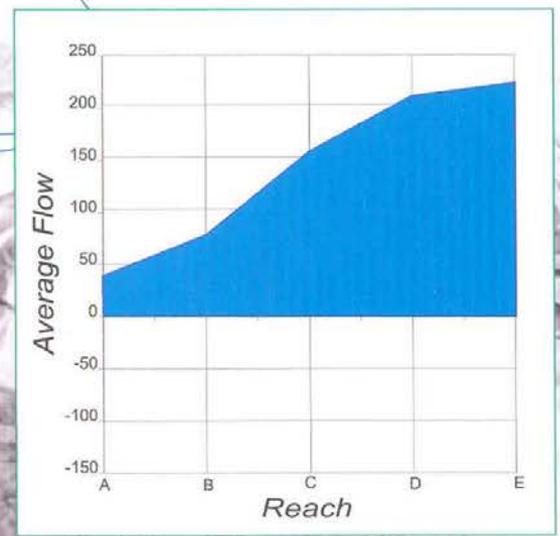
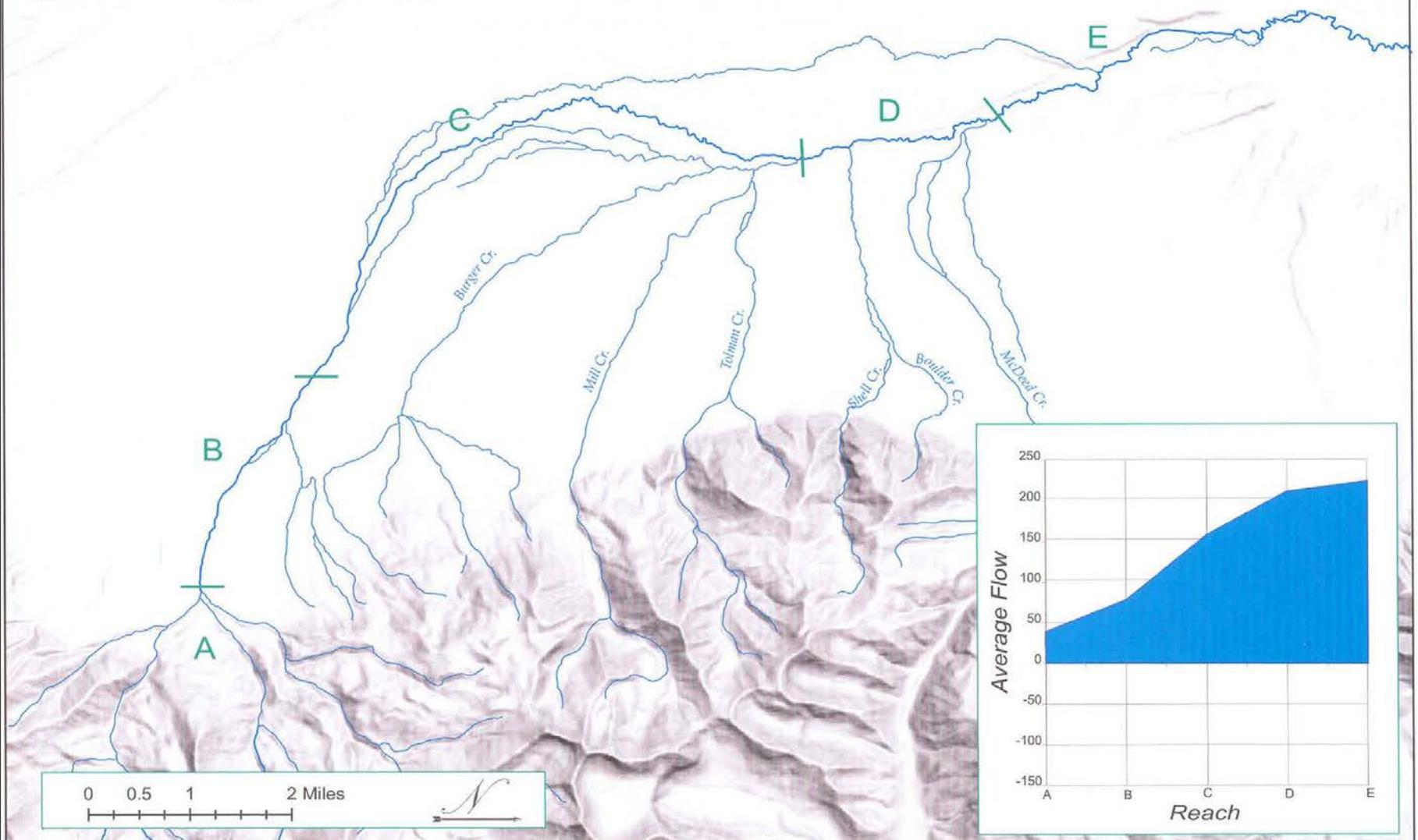
- First in Time, First in Right
- Use it or Lose it
- 80% Ag Water Use



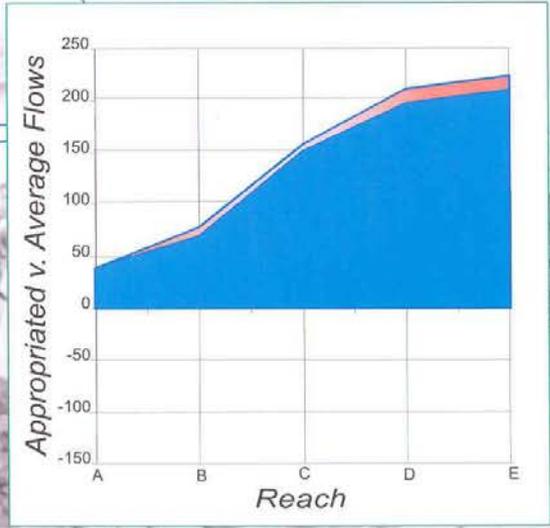
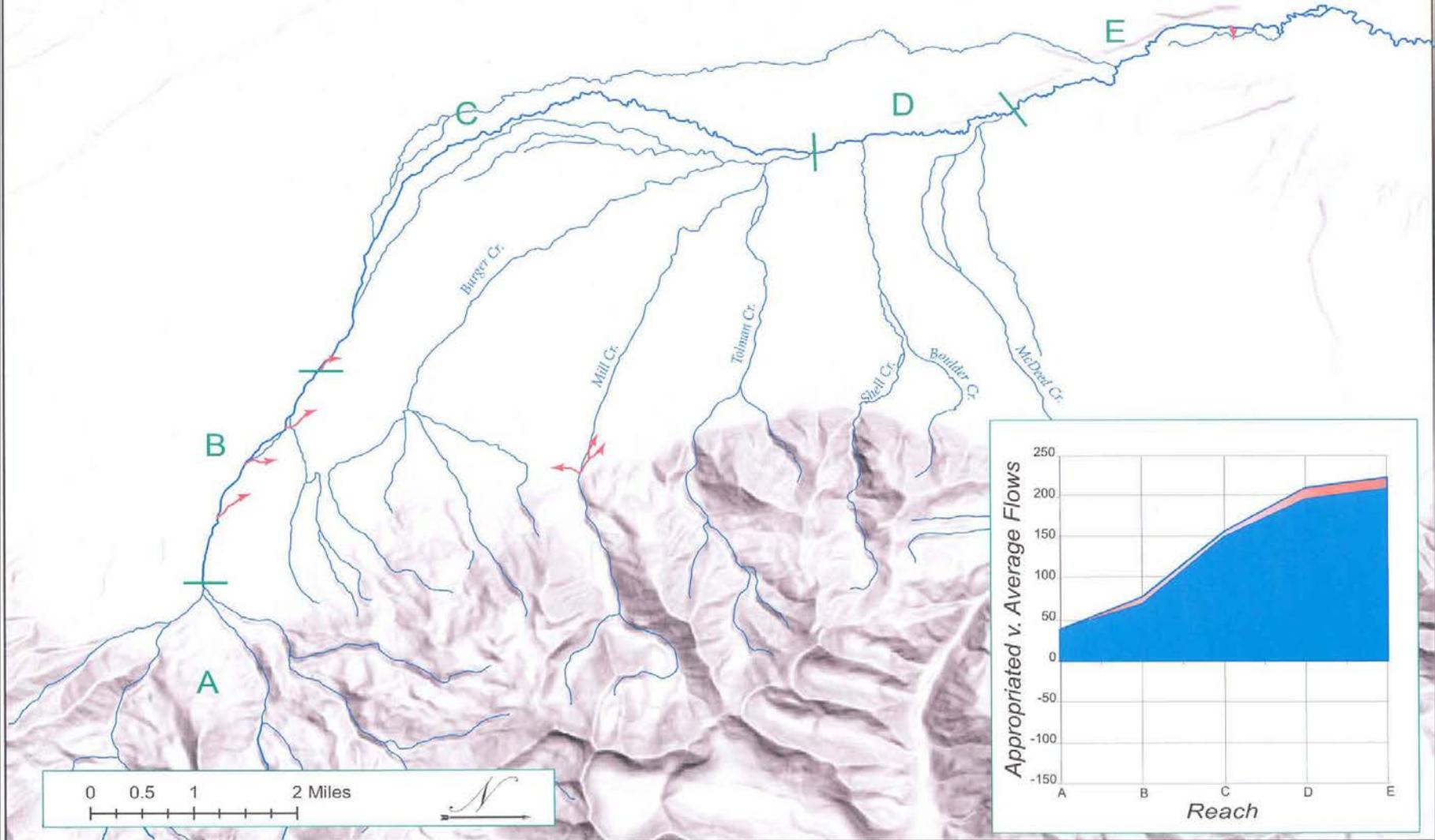
# Bear Creek



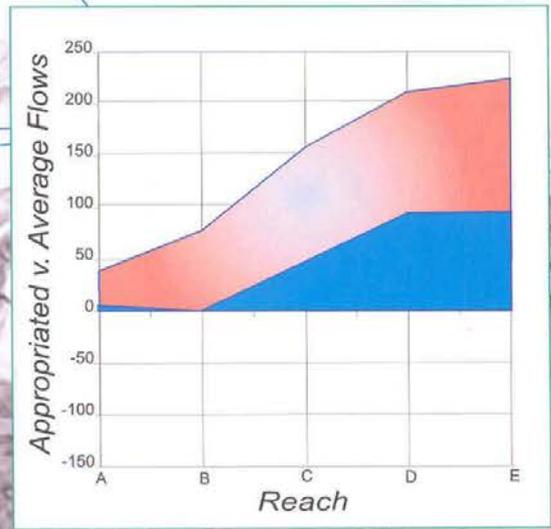
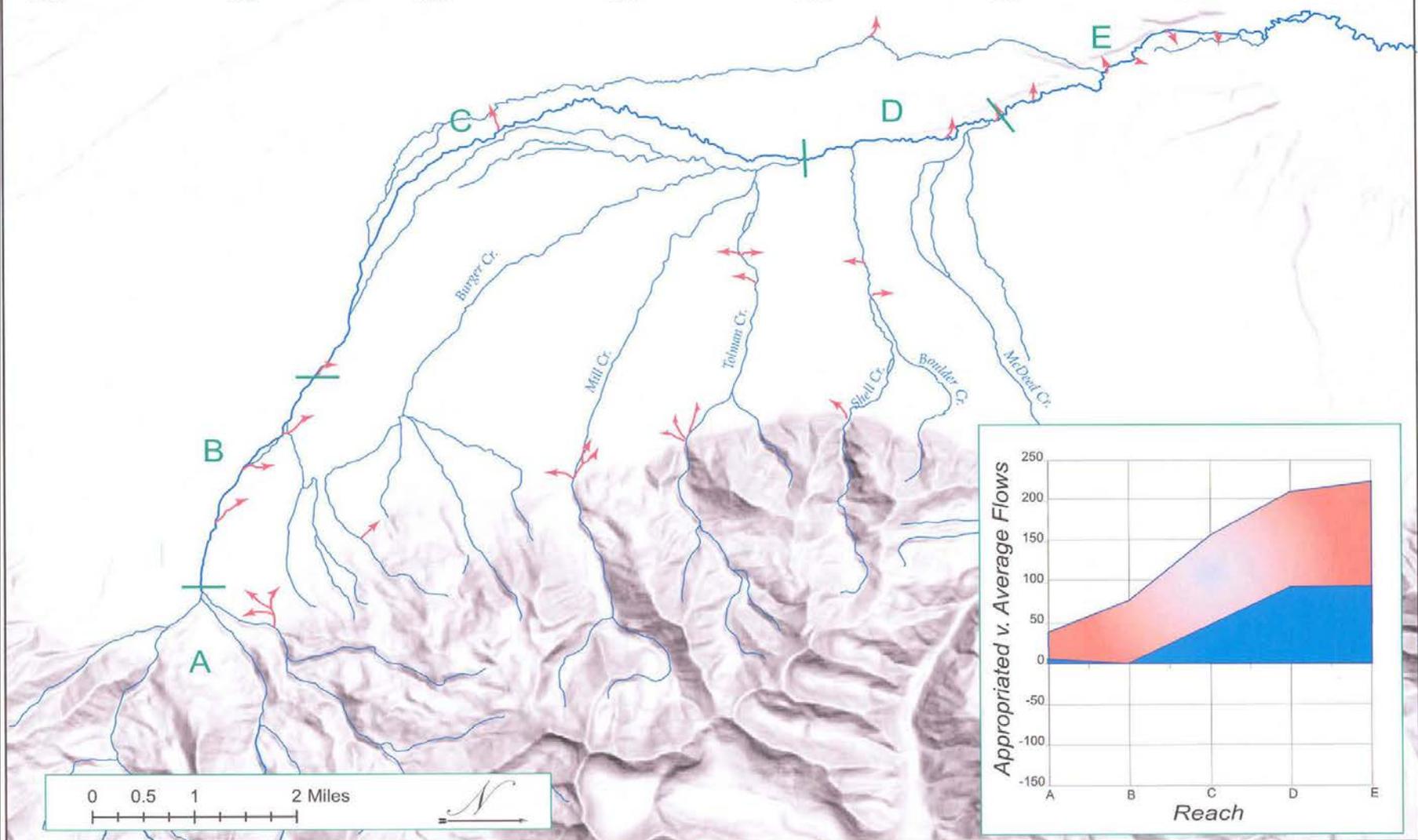
# Bear Creek & Tributaries: Lewis & Clark Era (c. 1800)



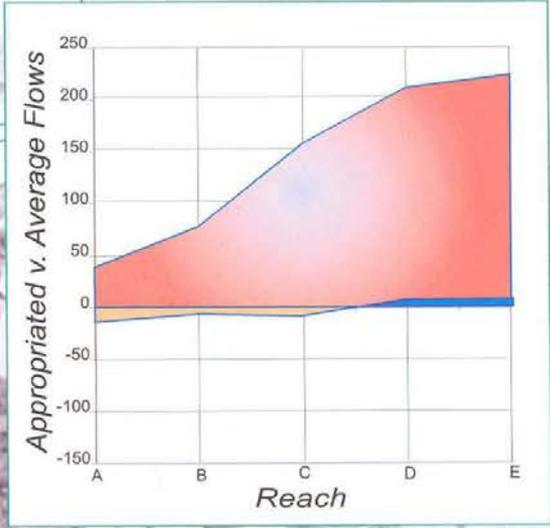
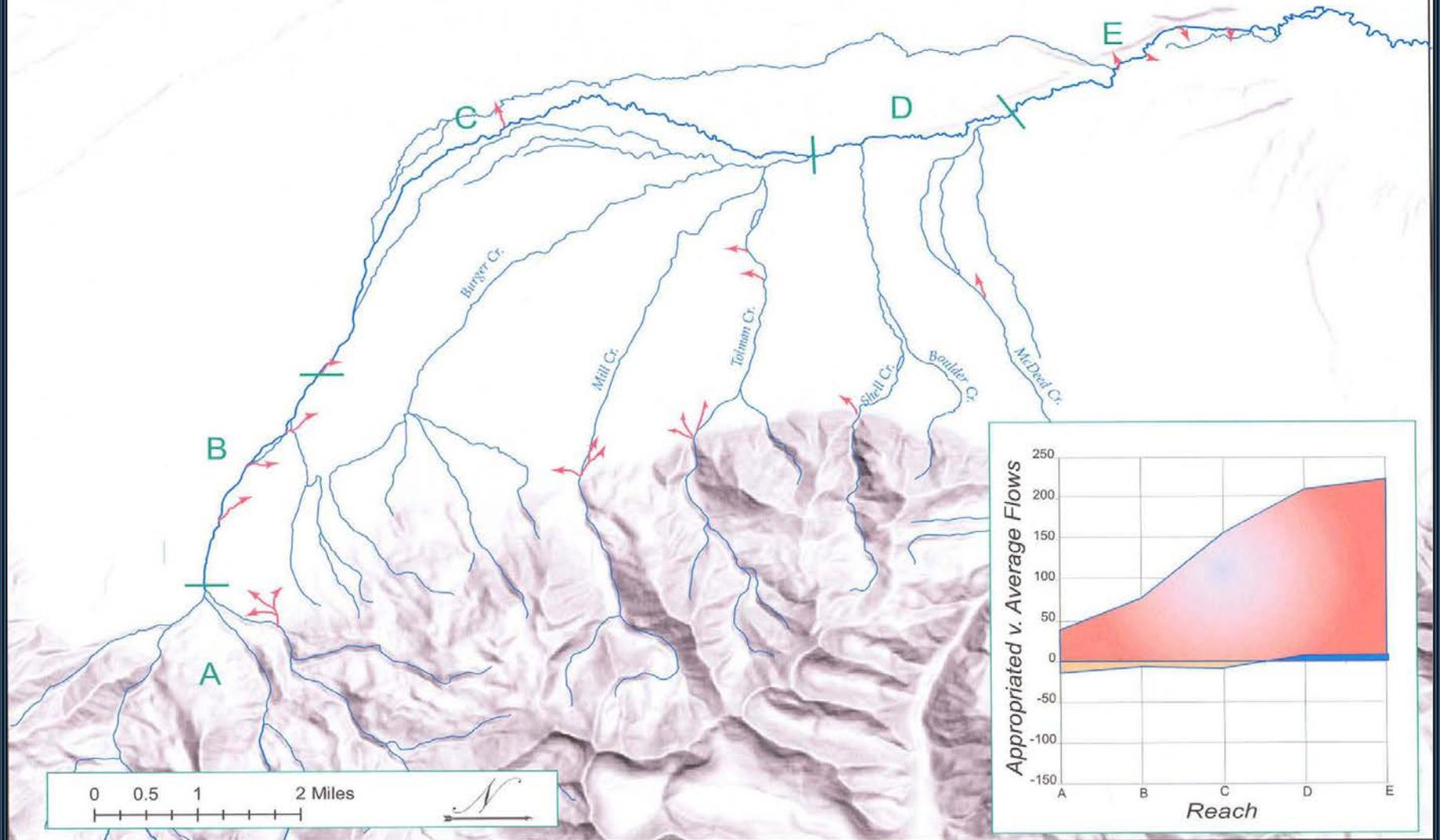
# Bear Creek & Tributaries: 1867-1879 Withdrawals



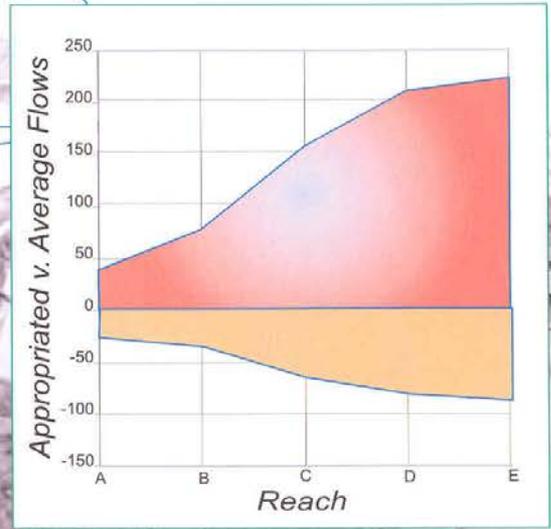
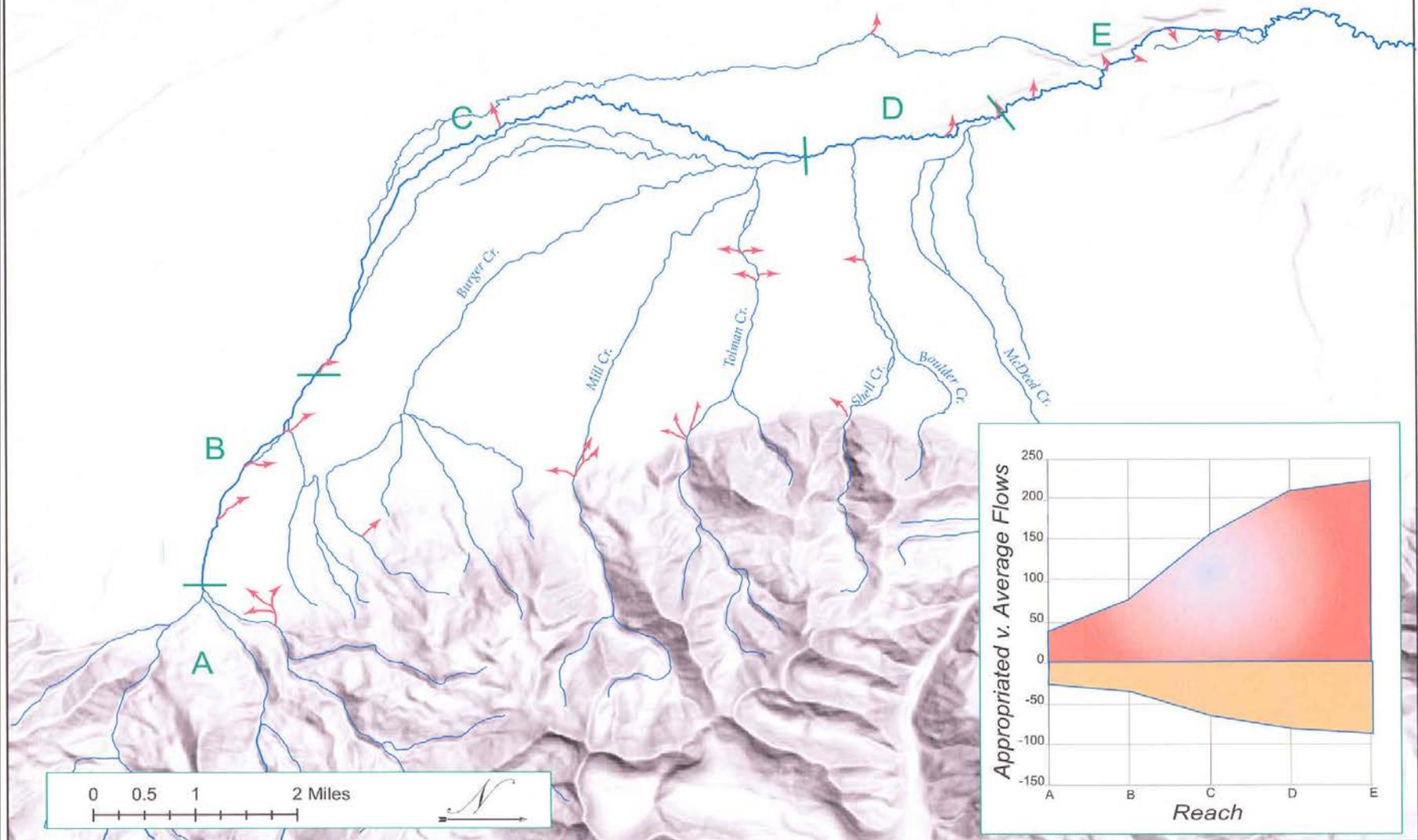
# Bear Creek & Tributaries: 1880-1881 Withdrawals



# Bear Creek & Tributaries: 1882-1909 Withdrawals



# Bear Creek & Tributaries: 1910-1971 Withdrawals





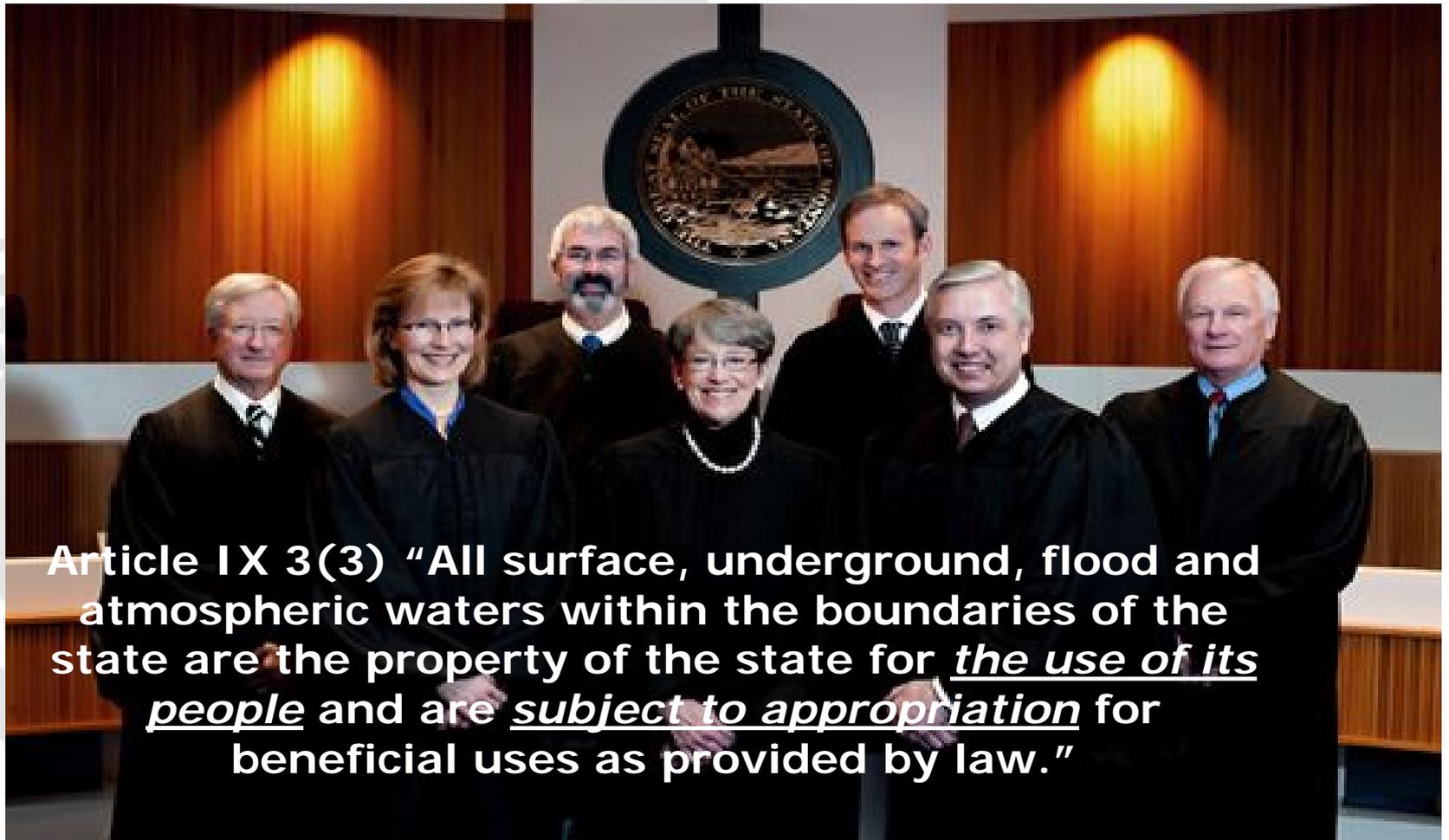
Bear Creek  
Below Irrigation Diversion

# Water Rights are Property Rights

- Constitutionally protected – cannot be confiscated without due process and just compensation.
- Can be leased, sold, transferred
- Run with the land, but can be severed
- BUT,
  - Usufructory right, not fee absolute
  - Can be forfeited through non-use
  - Purpose, place of use, point of diversion can be changed, but right cannot be enlarged or adversely effect other water users on the source.







**Article IX 3(3) "All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."**



# Advances in Water Law

- 1969 Murphy Rights – Instream Flow Water Rights on 12 Rivers
- 1972 Montana Constitution – Article 9 Section III
  - Recognizes historic rights
  - Reaffirms all water belongs to state, held in trust
  - Mandates statewide adjudication
  - Mandates modern system of administering water rights
- 1973 Montana Water Use Act
  - New appropriation require permit
  - Change authorizations required
  - Instream Flow Reservations
  - Closed Basins
- 2002 Bean Lake III – No diversion necessary, *In situ* rights recognized





# Water Leasing – Many forms

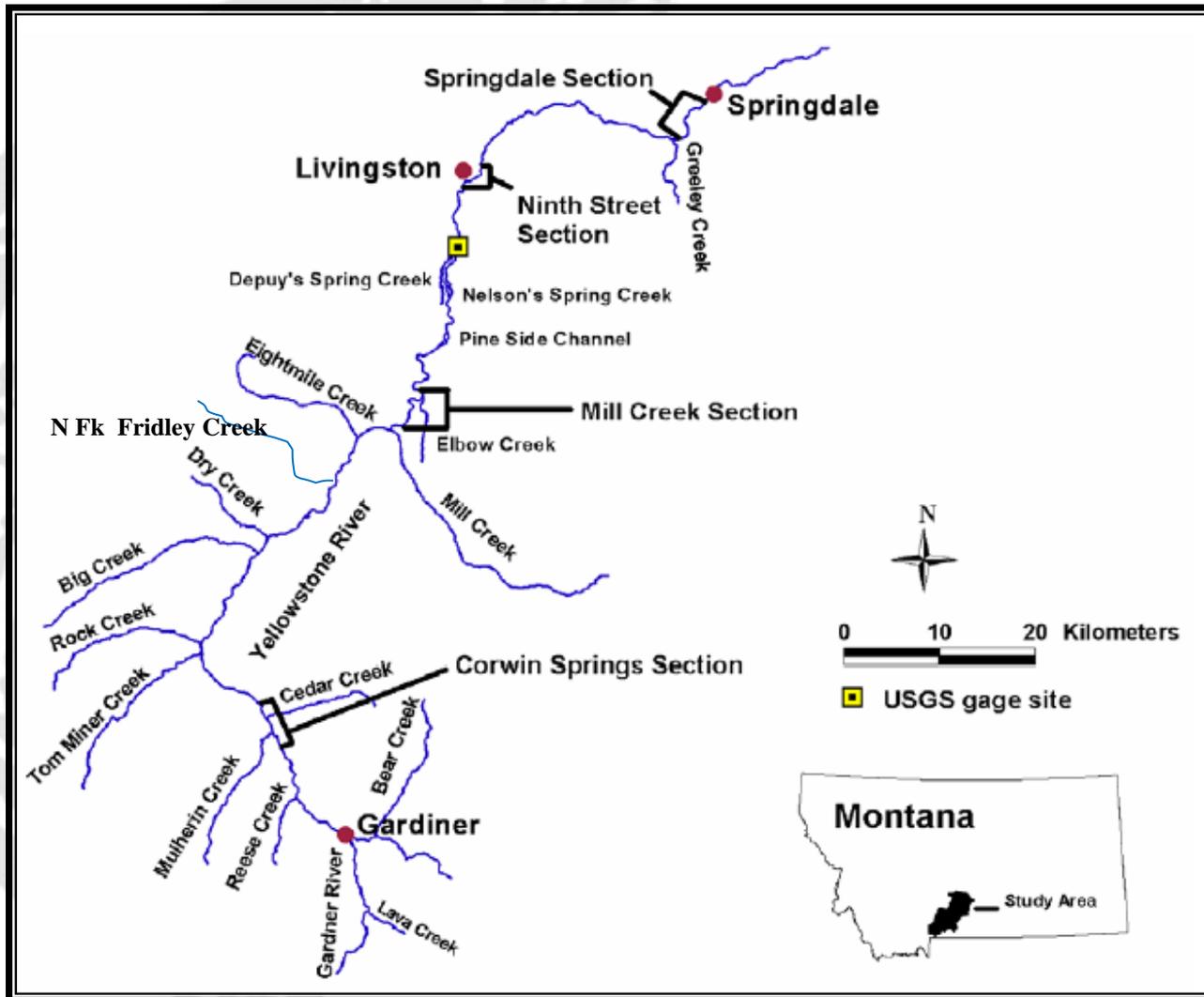
- MCA 85-2-141 – DNRC can lease up to 1 mil. ac-ft from current or existing storage reservoirs, and lease for beneficial uses.
- MCA 85-2-303 – New permits or changes
- MCA 85-2-436 FWP authorized to lease water rights for instream flow.
- MCA 85-2-402, 407 - Temporary change provisions
- MCA 85-2-408 - Temporary instream flow change in use
- MCA 85-2-410 - Short-term lease of water right – road construction
- MCA 85-2-427 - Temporary lease of appropriation right



# Water Leasing for Fisheries

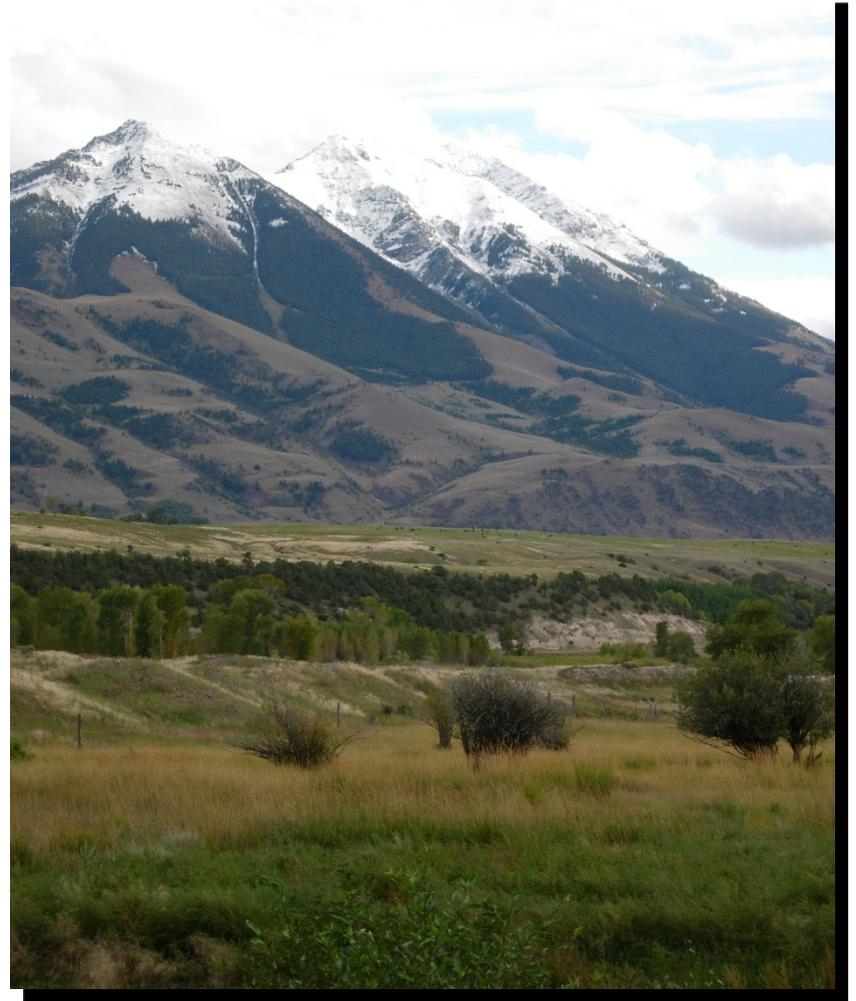
- In 1991, MT legislature authorized FWP to lease water rights in 10 streams for up to 10 years.
- Subsequent amendments allowed:
  - private entities to lease water rights for instream flow,
  - FWP to hold rights in perpetuity,
- Some fisheries conservation projects *do not involve a third party lease*, where water right holder changes use to instream flow





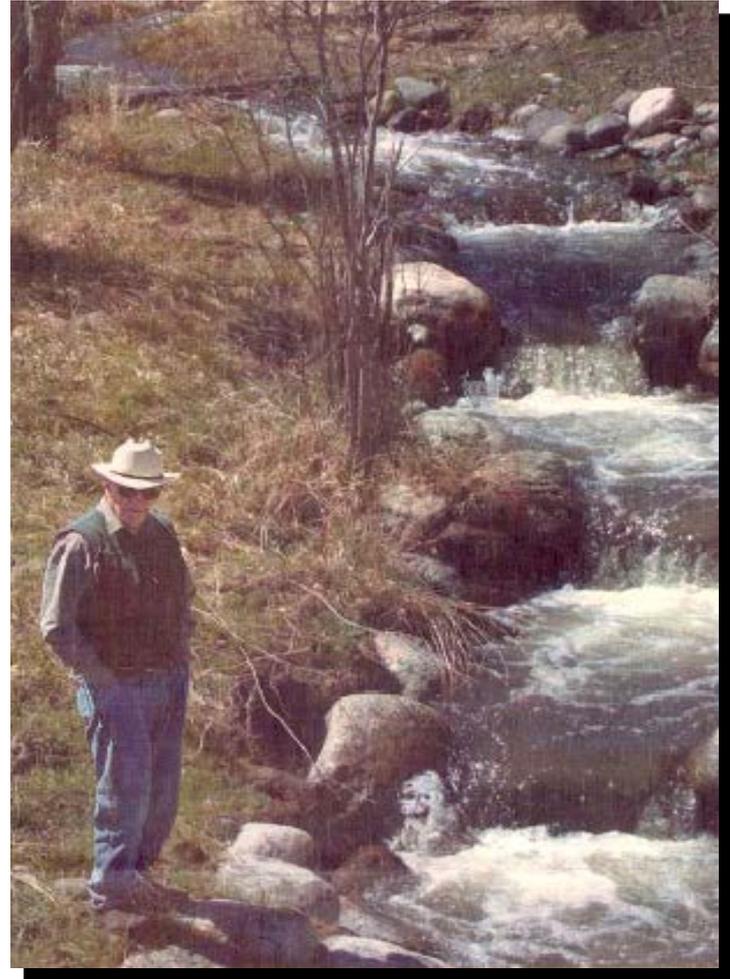
# Murphy's Ox Yoke Ranch North Fork Fridley Creek Restoration

- Partial water right conversion
- Normal irrigation until after runoff, late season irrigation from groundwater
- Dedicated Murphy's Ox Yoke Ranch water rights to creek flows



# North Fork Fridley Creek Reconnected to Yellowstone River

- North Fork stepped down to pass underneath Park Branch Canal
- Restoration of stream channel and riparian vegetation below Park Branch Canal



# Yellowstone Cutthroat Trout in Fridley Creek

- Young-of-the-year Yellowstone cutthroat trout found in North Fork of Fridley Creek
- Created new spawning and rearing habitat for Yellowstone cutthroat



# Improved Irrigation for Murphy's Ox Yoke Ranch

- Two new micro-pivots
- New groundwater pump
- Increased productivity over flood irrigation, less labor inputs



# Big Creek







# Yellowstone Tributary Water Leases

Stream	Amount	Effective
Mill Creek	>41.4 cfs (3d flush)	August '92
Mill Creek	6.13 cfs	May '93
Mill Creek	2.64 cfs	Aug. '95
Cedar Creek	1.3 cfs min	May '94
Mol Heron	5 cfs	May '98
Big Creek	11-26 cfs	April '99
Locke Creek	9.5 cfs	Dec. '01



# Big Creek Monitoring

Year	Spawners	Redds	Fry
1988	5 (season-long)	27 (all-season)	0
1989		39 (all-season)	
1999	57 (season-long)		3,429
2004	35 (one day)	142 (one day, near peak)	
2005		89	18,369



## Forbearance Agreements

- Enforceable contract between private parties, where water user agrees to not exercise its rights
- Not condoned by MT Water Use Act
- Not enforceable against junior water users
- No statutory protection against abandonment, but evidence against intent to abandon.
- Generally applicable for short term, in key stream reaches on small tributaries with few other appropriators



# Mill Creek

- Chronically dewatered stream in lower 2 miles
- Complex water rights administration in water district pipeline excluded most water users from participation
- Limited ability to maintain flow



## Short Term Leases

- Expedited temporary change process
- Water right must have been in use within last 5 years
- For no more than 2 years in 10 year period
- Maximum 180 acre-feet
- No change in consumptive use, point of diversion
- Place of use retired during period of lease
- Provided for oil and gas exploration, but may have application for instream flow protection - “test drive” for instream flow leases, all beneficial uses eligible



