Maintaining Instream Flow through Water Leasing and Forebearance Agreements

Yellowstone Basin Advisory Committee
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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.
19th and 20th 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
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\textit{the use of its people} and are\textit{subject to appropriation} for beneficial uses as provided by law.”
Advances in Water Law

- 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

<table>
<thead>
<tr>
<th>Stream</th>
<th>Amount</th>
<th>Effective</th>
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<tbody>
<tr>
<td>Mill Creek</td>
<td>&gt;41.4 cfs (3d flush)</td>
<td>August ‘92</td>
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<tr>
<td>Mill Creek</td>
<td>6.13 cfs</td>
<td>May ‘93</td>
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<tr>
<td>Mill Creek</td>
<td>2.64 cfs</td>
<td>Aug. ’95</td>
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<tr>
<td>Cedar Creek</td>
<td>1.3 cfs min</td>
<td>May ‘94</td>
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<tr>
<td>Mol Heron</td>
<td>5 cfs</td>
<td>May ‘98</td>
</tr>
<tr>
<td>Big Creek</td>
<td>11-26 cfs</td>
<td>April ‘99</td>
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<tr>
<td>Locke Creek</td>
<td>9.5 cfs</td>
<td>Dec. ‘01</td>
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## Big Creek Monitoring

<table>
<thead>
<tr>
<th>Year</th>
<th>Spawners</th>
<th>Redds</th>
<th>Fry</th>
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<tbody>
<tr>
<td>1988</td>
<td>5 (season-long)</td>
<td>27 (all-season)</td>
<td>0</td>
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<tr>
<td>1989</td>
<td></td>
<td>39 (all-season)</td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>57 (season-long)</td>
<td></td>
<td>3,429</td>
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<tr>
<td>2004</td>
<td>35 (one day)</td>
<td>142 (one day, near peak)</td>
<td></td>
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<tr>
<td>2005</td>
<td></td>
<td>89</td>
<td>18,369</td>
</tr>
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</table>
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