

February 9, 2001

Erik Merrill, Coordinator  
Independent Science Review Panel and Advisory Board  
Northwest Power Planning Council  
851 SW 6th Avenue, Suite 1100  
Portland, OR 97204

RE: Bonneville Power Administration,  
FY 2001 High Priority Project Proposal Review  
**Project Number: 23021**  
**Project Title:**  
**Restoring Bull Trout Habitat In The Blackfoot River's North Fork.**  
**Sponsor: Trout Unlimited**

Dear Mr. Merrill,

**ISRP or CFWA Comment or Issue #1**

The project sponsor, Montana Trout Unlimited, has asked that we in clarify the legal status of protecting water for instream flow in the Blackfoot River System. As relayed to us the question is as follows:

*“Upon the reviewers' independent inquiry, it appears the water would remain instream for the benefit of fish; however, the response should describe the legal assurances that the water will remain instream for the benefit of fish.”*

**Response to “#1”**

The short answer is – Yes. Montana Water law will can extend water right protection to instream flows created through the lease and conversion of an existing water right. Leases can be establish for a period of 10 years and renewed for an additional 10 year period. In the instance of leasing conserved or salvaged water the term of the lease may be set at 30 years.

Montana Department of Natural Resources and Conservation, Water Resources Division is the legal entity in Montana having the jurisdiction to approve and evaluate new water rights, water reservation and changes to existing apporpriative water rights. As an agency we review and approve all new water rights and all water leases that convert water rights to instream flow.

Our review of the N. F. Blackfoot project proposal indicates that water leasing is a critical component of the applicant's plan. The applicant proposed a positive action to acquire a protectable interest as allowed under Montana law. Many water conservation and stream enhancement projects are being put in place, often using public monies, where the instream flow "benefit" is not protected.

There are ways in addition to instream flow leases through which this conserved water may augment "existing instream flow water rights. We will also introduce that concept here.

Montana water law is based upon the theory of prior appropriation. Priorities in Montana are based solely upon water right concepts of "first in time is first in right". This ranking of water rights is relative to the date a water right is developed. There are no priorities among uses (irrigation is a statutorily higher use than domestic and neither are of higher value the instream flow). A water right retains its priority when the use is changed. Therefore, an 1880 irrigation right converted via a lease to instream flow continues to be an 1890 water right. Its enforcement against other is, of course mitigated by the legal concept of appropriative law that a water user has a right to "unchanged conditions on the source of supply".

Montana's water law was affirmed in the 1972 Montana Constitutional Convention. Further confirmation of law and enhancements brought into code through the Water Use Act of 1973. That act specifically identifies fish and wildlife as potential beneficial uses of water.

Montana has also struggled with the protection of instream flows for fishery and water quality, especially in those stream that are have been heavily appropriated since the turn of the century. Resolution of the instream flow issue is far from over and the implementation of existing options is far from complete. However, through the Water Use Act and its amendments there now exist several methodologies to protect water for instream fishery flows. These include a) affirmation and protection of existing water rights, b) basin closure c) water reservations and d) water leasing.

This letter will address several opportunities and aspects of instream flow protection in Montana including three statutory provisions allowing the lease of an existing water right to provide instream flow.

**Existing Instream Water Rights (Murphy Rights)** Prior to 1973 Montana's water right statutes generally did not provide for instream flows. However, specific legislation in the 1969 allowed the Montana Fish and Game, now MT Department of Fish, Wildlife and Parks, to "appropriate and document" the water needed for instream water rights. This authority was limited to a small number of publicly designated high value fisheries – Blue Ribbon Streams. These appropriative rights have become known as Murphy rights, in honor of the sponsoring legislator.

The Blackfoot River has such instream flow water rights. These rights provide instream flows in the reach beginning at the confluence of the mainstem and the North Fork of the Blackfoot River and extend downstream to the river's mouth just

above Milltown Dam. The Blackfoot River's instream flow Murphy water right is very junior in priority. As a result, in water short years available supply does not fully satisfy the right.

Water conserved and returned to the Blackfoot River becomes part of the rivers appropriative supply. This is, at least in part, the water that supplies down stream uses. In the Blackfoot River junior water right holders would receive the greatest benefit from added water. (The vast majority of senior water rights have adequate flows in almost all years.) Further, in this upper reach the junior user is the Blackfoot instream Murphy water right. Therefore, conserving water in the North Fork adds supply to the mainstem Murphy water right.

**Basin Closure:** Montana code allows the department or the legislature to restrict the development of new surface water rights in highly appropriated streams or basins. This concept has become known as basin closure. Designating a basin as closure restricts the development of new uses. To date most surface water closures have created basin specific limitations and exemptions. By in large they have however limited most new consumptive uses of surface water.

The Blackfoot River became part of the Clark Fork River Basin Closure through legislative action passed in 1995. This Closure, codified in 85-2-335 - 337 MCA [1999], prohibits virtually all new uses of surface water and placed restrictions on hydrologically connected groundwater supplies.

The Clark Fork Basin closure designation prevents a new or expanded water use from stepping in and laying a new claim to conserved water. This limitation on new development protects the stream from additional appropriation and provides additional protection to conserved water.

**Water Reservations:** The 1973 Water Use Act also developed the concept of "state water reservations". Such reservations were to supply future demands for water and to protect instream or in lake values. Only public entities could apply for and hold such a water right. In the Missouri River and Yellowstone River systems a comprehensive planning action developed reservations for both consumptive and nonconsumptive uses. A similar comprehensive action has not occurred in the Clark Fork of the Columbia or Kootenai River basins. It is important to note that water reservations are not an option in the Blackfoot River. The Clark Fork Basin Closure action discussed above also included a prohibition on the use of the water reservation process for surface waters in the Blackfoot and Upper Clark Fork drainages.

**Water Leasing:** The concept of water sales and leasing has a long history in Montana reaching back into the 1880s. However, it was not until instream flow protection was addressed in the State Water Plan and legislation was developed in 1989 that the concept of leasing consumptive uses to protect or augment instream flow became legal. Even now those instream flow-leasing provisions are attached to studies and are currently temporary nature.

Montana Law has three sections of code that specifically provide for the leasing of private water rights to provide instream flows. These are found in

- 85-2-436 – 438, MCA [1999], “Water Leasing Study” (Fish, Wildlife and Parks water leasing authority)
- 85-2-439 – 449, MCA [1999] “Upper Clark Fork basin Instream Flow Pilot Program” (a leasing program open to all interests but limited to the watershed above Milltown Dam – Blackfoot and Upper Clark Fork Watersheds)
- 85-2-408 – 409, MCA [1999] “Temporary Change Authorization of instream flow – Additional Requirements” (A leasing program open to all interests, except Department of Fish, Wildlife and Parks, and statewide in its geographic area of application.)

All of the above statutory provisions require that a water right lease for instream flow purposes provide a demonstrated fishery benefit. All of them are temporary in nature. All lease proposals are subject to the agencies administrative review of “change in appropriative water rights” process as directed in 85-2-402 MCA.

The instream flow leasing concept has not yet been made a permanent process. A legislative analysis of the “Water Leasing Study” in 1999 resulted in that program being extended until December 2008. (The report discussing that review and its recommendations is available through the Montana Legislature’s Environmental Quality Council.) The “Upper Clark Fork” and “Temporary Change Authorization for Instream Flow” study programs will both be up for legislative review in June 2005.

Firm predictions of the results of those future reviews would be speculative. Past action on the “Water Leasing Study” appear to indicate that the leasing concept would be extended in some format. Also it appears that leases would be renewed and perhaps for extended periods. Instream flow leases developed under the Water Leasing Study are now set as 10 year leases with 10-year extensions. However, in those instances where the lease relies upon “conserved and salvaged water” that the lease can extend to the life of the conservation project or 30 years.

The Montana legislature is currently considering House Bill 455. This bill would provide the same “30 year or of life of the project” provisions to 85-2-408.

There is clearly support for the permanent transfer of consumptive water rights to instream flow through sale of water rights. However, it is yet unclear if the legislature will accept that concept in 2005 legislative session or before.

This grant proposal funds actions that appear to encompass the concept of conservation and salvage. The water use efficiency methodologies considered provide for water conservation / water salvage lease for instream flows. Therefore lease developed under these circumstances have the potential to be considered for the extended leasing period.

**Administrative Review:** DNRC has not yet received any applications to formally consider a “water lease” related to the proposed project. Therefore we are unable to

give a statement of final approval for any of these proposals. Montana code requires that any change in the point of diversion, place of use, place of storage or purpose of use must be reviewed and notice through administrative process described in 85-2-402 MCA.

This review and consideration should occur prior to the construction of the water conservation action. There are limited instances where the construction could occur first but the actual review and subsequent “change in the purpose of use” might occur later. (For example: a water conservation project that did not change the place of use, point of diversion, or initially the place of use could be built and not require administrative review. Then project completion the documented and measured salvage could be considered for a new use, such as instream flow, through the state’s administrative review.)

An applicant in DNRC’s administrative process may be the grants sponsor. The applicant may be determined by the leasing program selected. The applicant in some cases would have to be the Dept. of Fish, Wild life and Parks. However, in other programs the applicant could be Trout Unlimited, a participating third party or the original water right holder. Who holds and administers the day to day operation of the lease is a matter of contracts just as is the “remuneration” paid to the water right holder of a lease.

**Summary** DNRC is please to provided this clarification. If the sponsor or the review committee seeks additional information please feel free to contact us. Any of our Water Resources Offices should be equipped to provide information and assistance. I can be contacted at the above address or through phone (406 444 – 1806) or email ([mmclane@state.mt.us](mailto:mmclane@state.mt.us)).

DNRC is encouraged to see the effort made enhance instream flows and then to protect those flows developed through water conservation. We are also encourage to see the water users and other affected interests looking at the share benefits that can be derived through stream restoration and water conservation in the North Fork of the Blackfoot River.

Our staff has dedicated a major part of the last three years collecting hydrologic data and analyzing the basin conditions. This effort was given in support the of local watershed efforts guided by the Blackfoot Challenge. Additional support has been provided through the Assistance to State’s Program offered by the U.S Bureau of Reclamation.

Sincerely

Michael McLane, Watershed Planner – Clark Fork Basin