MONTANA WATER PLAN
Management Section

FINAL

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Subsection: Instream Flow Protection

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INTRODUCTION

Water uses may be differentiated on the basis of whether they involve withdrawing water from a source of supply. Offstream uses divert water from a natural watercourse. This withdrawn water is then either used and returned to the watercourse or completely consumed. By contrast, instream uses maintain a specified level of flow in the natural watercourse.

The allocation of water in Montana has traditionally focused on the important task of satisfying offstream uses for domestic and commercial purposes, irrigated agriculture, industry, and mining. While these offstream uses remain critical to the growth and development of the state, there has been an increasing demand to leave water in the stream, unavailable for offstream diversion below a specified level, for fish, wildlife, recreation, and water quality. Montana law (Section 85-1-101(5), MCA) provides that "The water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life." In addition, Section 75-5-101(1), MCA states that "It is the public policy of this state to conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses."

Based on these and other statutory policies, natural resource management agencies are taking steps to protect instream flows through a variety of programs and practices. The purpose of this plan component is to identify the issues involved with maintaining and enhancing instream flows, and to present recommendations for resolving them.

BACKGROUND

In 1969, the state took its first steps to statutorily allocate water for instream use. The Legislature established so-called "Murphy Rights" on the unappropriated waters of twelve "blue ribbon" trout streams to maintain stream flows necessary for the preservation of fish and wildlife habitat (Section 89-801(2), RCM, 1947). In 1973, state efforts were expanded with the enactment of the Montana Water Use Act, which not only provided an opportunity to reserve water for future diversionary and consumptive uses, but also for maintaining instream flows (Section 85-2-316, MCA). To date, instream reservations have been established only in the Yellowstone River Basin. Several other streams have received instream flow protection pursuant to Section 85-2-223, MCA, which allows the Montana Department of Fish, Wildlife and Parks to represent the public in adjudication proceedings for purposes of documenting public recreational uses of water established prior to 1973. Instream flows are also maintained on several streams by releasing water from reservoirs during critical times of the year. Finally, the Department of Natural Resources and Conservation (DNRC) may condition water use permits for large appropriations on the basis of reasonable use criteria which include the protection of instream flows (Section 85-2-311(2)(c), MCA).

In addition to state efforts to protect instream resources, federal agencies and tribal governments have also taken steps to ensure the maintenance of instream flows. The Wild and Scenic Rivers Act (16 U.S.C. 127) has been used to protect instream resources on the North, South, and Middle Forks of the Flathead River, and on one reach of the Missouri River. Federal land management agencies are studying the possibility of adding rivers to the wild and scenic river system, thereby protecting additional instream resources. Through its special use permitting process, the U.S. Forest Service also protects instream flows by regulating access to developers seeking to divert water within the national forests (43 U.S.C. 1761-1771 (1982)). The federal reserved water rights doctrine may give federal resource management agencies and tribal governments another mechanism to manage instream resources. Finally, tribal governments, such as the Confederated Salish and Kootenai Tribes of the Flathead Reservation, are claiming aboriginal fishing rights to protect instream flows under their respective treaties with the United States.

Although the state of Montana has made significant progress in protecting instream flows, some of the existing programs and practices need refinement if they are to be effective. In certain cases, new legal and institutional mechanisms also may be needed to enhance instream resources.

STATE WATER PLAN POLICY STATEMENT

Instream flows are an important use of water, and mechanisms should be developed and refined to protect and enhance instream resources. However, instream flow protection activities must not adversely affect existing water rights and should be weighed and balanced against alternative future uses of water.

ISSUES AND RECOMMENDATIONS

Issues

Four issues need to be addressed with respect to instream flow protection. They are:

1. Inadequate consideration of instream flow values in the water use permitting process.
2. Insecurity of instream water reservations.
3. Need for enhancement of instream resources in dewatered basins.
4. Need for research on instream resource management decisions.

Recommendations

1. Permitting Process

The existing criteria for issuing a water use permit, as outlined in Section 85-2-311, MCA, may not adequately provide for the consideration of instream flow values. It is not clear whether the water permitting process allows for the consideration of instream flow values other than when instream flow water rights have been established. To date, many streams in Montana with important instream values do not have the necessary protection of an instream flow right. Water permits for new consumptive use continue to be granted before instream flow rights are established. Consequently, in certain areas of Montana, instream resources are subjected to further depletions.

The recommended solution to this issue is to promote more timely acquisition of instream flow reservations by assigning a priority date at the time a qualified applicant submits a notice of intent to reserve water (instead of several years later when final reservation decisions are made). Under this approach a "base" priority date would also be established for all reservants at the time the first notice is submitted for any given stream reach or river basin. Once such a notice is submitted, all qualified applicants with an interest in the stream (including those needing water for offstream purposes) would have the opportunity to prepare and submit applications within a specified time period and receive the same base priority date. In making its final decision on the applications, the Board of Natural Resources and Conservation (BNRC) would also weigh and balance the reservation requests against water use permits granted since the base priority date. The BNRC could subordinate reservations to water use permits if the purpose of the reservations is not substantially impaired.

2. Security Of Instream Reservations

The current reservation process may not provide adequate security to instream reservations. If the BNRC finds that the total amount of an instream flow reservation is not needed to fulfill its purpose, and a qualified applicant can show that its need outweighs the need of the instream reservation holder, the excess water may be reallocated to the competing applicant (Section 85-2-316(11), MCA). Such actions may not occur more than once every five years. Moreover, all reservations are to be reviewed at least once every ten years, and if the objectives of the reservation are not being met, the Board may extend, revoke, or modify the reservation (Section 85-2-311(10), MCA).

The recommended solution to this issue is to evaluate the relative security of instream flow reservations after the BNRC completes its review of the Yellowstone River reservations in 1989. This strategy is recommended because it is difficult to evaluate the security of instream reservations, and thus determine what action is needed, without first going through the process of making a ten-year review. The evaluation would identify and assess all the problems associated with the security of instream reservations.

3. Enhancing Instream Flows

Instream resources are often threatened in streams that are subject to regular or periodic low flow conditions. The issue here is not how to maintain existing flow levels, but how to increase or enhance the flow levels in certain streams.

The first recommendation to address this issue is to allow the Department of Fish, Wildlife and Parks to lease water rights from offstream or consumptive uses for purposes of protecting instream flows in important stream reaches. This opportunity is entirely voluntary and would not jeopardize existing offstream water rights. It would result in the temporary transfer of an offstream water right to enhance instream flows during critical low flow periods. Under the lease agreement, the offstream water user would still hold the water right and be compensated for leaving water in the stream during certain years. This recommendation would also allow for the temporary emergency leasing of offstream or stored water rights to protect instream resources during critical low flow periods. Leases under this approach could not occur if they would result in adverse effects to existing water users.

A second recommendation is to support public entities in purchasing or leasing water stored in reservoirs above dewatered streams and in revising the operating procedures on such reservoirs. In addition, the feasibility of new storage projects to enhance instream resources should be assessed. Finally, cooperative solutions at the local level, such as irrigation scheduling, are supported.

4. Research

To improve the management of instream resources, research is needed to evaluate:

a. The effect of return flows on the maintenance and enhancement of instream resources.

b. Instream flow quantification methods to determine if existing methods result in an inappropriate amount of water for instream resources.

c. The physical availability of water to meet the demands for instream resource protection.

PLAN IMPLEMENTATION

Legislative Action

The legislature would have to revise Section 85-2-316(9), MCA to allow the BNRC to establish a base priority date for all reservants at the time the first notice of intent to apply for a water reservation is submitted for a particular stream reach; to define the time limit within which competing applications must be submitted; and to allow the Board to subordinate reservations to water use permits granted since the base priority date.

The legislature would also have to enact a statute to allow the voluntary leasing of water from offstream uses to instream uses. Some of the statutory modifications that may be needed include changing the definition of "appropriate" in Section 85-2-102(1), MCA and clarifying the change statute in Section 85-2-402(2)(b), MCA. It may also require a modification or clarification in the abandonment statute in Section 85-2-404, MCA.

Administrative Action

To determine the relative security of instream flow reservations, the DNRC will, in cooperation with the Instream Flow Technical Advisory Committee, evaluate both the five-year and ten-year review processes after the BNRC completes the Yellowstone River reservation review. The DNRC will prepare a brief report for the State Water Plan Advisory Council (SWPAC) outlining the options and recommendations for addressing this problem.

To facilitate research on the three areas outlined above, the DNRC will work in cooperation with the Water Resources Research Center (WRRC) at Montana State University. The focus of this cooperative effort will be: (1) to identify leading researchers in the topic areas; (2) to survey the current state of research in each of the areas; (3) to consult with resource management agencies and water users to identify research needs; and (4) to outline research strategies, including financial requirements and sources of funding. Research proposals in these three areas will receive a high priority by the Research Center for funding. Periodical "progress reports" will be made to the SWPAC.

To assess the feasibility of new storage projects to enhance instream flows in dewatered basins, this issue should be incorporated into a state water plan section devoted exclusively to water storage projects.

Financial Requirements and Funding Strategies

Funding may be necessary to conduct research on the three areas outlined above. Periodic progress reports to the SWPAC will outline the financial requirements and funding strategies for research.

Time Schedule

Activity	Responsibility	Deadline
A. Development and Implementation Tasks		
1. Draft legislation	DNRC	January 1989
2. Enact legislation	Legislature	April 1989
3. Evaluate security of instream reservations	DNRC	June 1989
B. Ongoing Tasks		
1. Reservoir management and cooperative solutions	DFWP, DNRC, others	
2. Research	DNRC, WRRC	