

## Protecting Instream Flows in Montana\*

### The Problem

The allocation of water is one of the most fervently debated issues in the arid American West. The principal areas of debate include offstream use, instream flow, and the doctrine of prior appropriation.



“Offstream” refers to removing water from streams and rivers for domestic and commercial consumption, irrigated agriculture, industry, and mining. “Instream” refers to maintaining enough water in rivers and streams to protect fish and wildlife, recreation, aesthetic and scenic values, and water quality.

In Montana, as elsewhere in the West, the doctrine of prior appropriation, or “first in time, first in right,” is central to debate over water use. It is the basic tenet of water law and policy, adopted to facilitate the settlement and development of the West.

In a growing Montana, the demands for instream and offstream uses have intensified. As Matthew J. McKinney, director of the Montana Consensus Council, reports:

“Although offstream uses of water remain critical to the culture and economy of Montana, there has been an increasing demand and effort since the late 1960s to leave water in many streams and rivers, unavailable for diversion and offstream use, to satisfy fish, wildlife, water quality, and other purposes.”

In 1988, the Montana Department of Natural Resources and Conservation (DNRC) prepared a discussion paper outlining options and possible strategies to protect instream flows. It created a working group representing diverse interests to review the paper. Sensing a threat to their livelihood, many agricultural members of the group were upset about proposed measures that contemplated voluntarily selling or leasing water rights for instream uses.

DNRC incorporated some ideas from the working group and presented all the options to the public at increasingly tense public meetings throughout the state during one of Montana’s hottest, driest summers. “Fish died, and farmers and ranchers had a difficult time getting water for their crops,” McKinney writes. Meanwhile, farmers and ranchers were “furious over the idea of voluntarily selling

### Assessing When to Proceed

Before using a consensus-based process, an assessment first should be made to determine if the situation lends itself to consensus building. Here are key steps in an assessment:

- Identify the stakeholders
- Gather information about the concerns and interests, both common and opposing, that you and other stakeholders have.
- Analyze the alternatives available to stakeholders in the absence of trying to reach a negotiated agreement.
- Identify the constraints or obstacles to using a consensus approach.
- Assess stakeholders' ability to be represented and willingness to come to the table

or leasing their water rights to protect instream flows," he says. In 1989, Montana's legislature passed restrictive legislation allowing the Department of Fish, Wildlife and Parks to lease water on a trial basis. "Nobody was happy and the debate continued," McKinney writes. Two legislative initiatives failed to become law.

### The Process

In 1994, the Montana Consensus Council (MCC) successfully mediated a long-standing dispute between recreationists and ranchers over access to state school trust lands. The main participants happened to be the principal adversaries in the debate over instream uses of water. After participants reached agreement on state lands, MCC suggested that they might want to shift their focus to instream flows. Each side eventually agreed that, as the council puts it, "a consensus process might provide an opportunity to address the issue constructively and reach a mutual gain solution."

The participants decided that if they were to make progress, the negotiation should include only representatives from key advocacy groups. The parties included the Montana Water Resources Association, the stock growers association, the association of conservation districts, the Montana Farm Bureau, the Montana Wildlife Federation, and the Montana Council of Trout Unlimited.

McKinney comments: "Contrary to conventional theory on negotiating public policy disputes, key decision makers with a potential interest in the issue (representatives of the governor, legislature and state agencies) were not invited to the table." This was done to keep the process from getting too political. The stakeholders believed that if they, with their divergent views, could reach agreement, the government would accept their solution.

The participants developed ground rules for the negotiation and spent several meetings learning about each other's needs and interests. They explained how their particular organizations made policy decisions and the internal process they would have to go through to confirm any agreement. "The result of this educational process was to reframe the issue from one of winners and losers to a perspective that the right solution would benefit everyone," McKinney reports.

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The participants realized that a solution to the instream flow impasse likely would require new legislation. By late October 1994, they agreed on a measure allowing water rights to be bought and sold to protect instream flows. But the proposed bill met firm opposition from some participating organizations. So, at subsequent meetings, the working group focused instead on the issue of leasing existing water rights for instream flows. As the council reports, “they gradually drafted a new proposed bill that satisfied the criteria of each caucus, creating a mechanism that would allow existing water rights to be leased for instream use.”

In drafting the measure, the participants asked for advice from key legislators and representatives from the office of the governor, the Montana Department of Fish, Wildlife and Parks, and DNRC. Eventually the parties and government officials were comfortable with the agreement. “The draft bill would provide a much needed tool to improve instream flow protection, protect existing water rights, and minimize any potential adverse effects to local communities,” the MCC says.

## **The Results**

At the 1995 legislative session, no one opposed the bill as it moved out of committee. The measure passed the House by a 93-6 vote, then won Senate approval and the signature of Governor Marc Racicot. At his request, the MCC convened the same working group to monitor implementation of the law.

## **Lesson Learned**

Consulting with legislators and other officials as an agreement is being developed increases the chances that the agreement will be approved and implemented by governing bodies.

\*This case study is based on a brief report available from the Montana Consensus Council at [www.state.mt.us/MCC](http://www.state.mt.us/MCC) and “Building Agreement on Water Policy,” a chapter written by Matthew J. McKinney, director of the Montana Consensus Council, for the forthcoming book *Finding the Common Good: Case Studies in Consensus Building and the Resolution of Natural Resource Controversies*, edited by Peter S. Adler and G. Kemmery Lowry.