

RIVER FLOW RESTORATION: DO WE HAVE THE NECESSARY TOOLS AND RESOURCES?^{AFS}

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Any discussion of tools and resources has to be within the context of existing law that recognizes water rights as property. Current instream flow tools in Montana do two things: provide for some protection against future consumptive uses; and provide some drought relief on specific streams in which leases or conversions of existing, senior rights to instream rights have been negotiated with willing water users. Leasing and conversions of existing rights are slow to implement, but have shown promising tributary benefits. Current tools don't provide for base flows that trump all other water rights. It is unlikely that we'll soon see such a provision. If such a measure were to be enacted, it might not survive judicial scrutiny. The Public Trust Doctrine may offer an additional tool in the future. California, having applied to Public Trust Doctrine to water rights, has realized some benefits to instream values. It has not been, however, a panacea. Voluntary watershed efforts on the Blackfoot, Big Hole, and the Jefferson have shown some promising results, but have some limitations. Additional tools that have yet to be tapped to their fullest potential are management of existing storage to improve instream flows, expansive public interest criteria that incorporates instream values to assess new consumptive use permit applications, and the use of the Clean Water Act TMDL process. In addition, the Washington Supreme Court has held that stream flows are a component of water quality that can be protected under the Clean Water Act.