

Water Rights Donated in Exchange for Federal Tax Deduction

Tom Hicks

Trout Unlimited (TU); Kinross Gold U.S.A., Inc.; and the Rocky Mountain Elk Foundation (RMEF), have completed two conservation transactions on the Jardine Mine near Gardiner, Montana: (1) a donated conservation easement on the majority of the fee interest from Kinross' TVX Mineral Hill, Inc. (TVX) to RMEF; and (2) an outright donation of multiple senior water rights from TVX to TU.

Both transactions highlighted creative collaboration for common conservation goals, while also pioneering an emerging federal tax mechanism to protect and enhance western states' instream flows: the voluntary, non-regulatory, use of a donative transfer of water rights in exchange for a federal tax deduction.



(from left to right: Chris Wood, president and CEO of Trout Unlimited; David Allen, president and CEO, Rocky Mountain Elk Foundation; U.S. Congressman Greg Gianforte (MT); Dan Wenk, superintendent, Yellowstone National Park; J. Paul Rollinson, president and CEO, Kinross Gold Corporation; David Bernhardt, deputy secretary, Department of the Interior; U.S. Sen. Jon Tester (MT); Gov. Steve Bullock (MT); U.S. Sen. Steve Daines (MT).

Mine History

The Jardine Mine is located just outside our nation's oldest national park, along the northern boundary of Yellowstone National Park. The mine's rich history traces back to 1866 when Joe Brown discovered gold in the gravels at the confluence of Bear Creek and the Yellowstone River, waters teeming with Yellowstone cutthroat trout. Miners put the waters of both Pine and Bear Creeks to work for a variety of beneficial purposes including placer and hydraulic mining, hard rock mining and milling, hydropower and hydroelectric power, domestic water, fire suppression, and irrigation. Over time, the miners established, perfected, and defended their water rights to both streams.



The last active modern gold and silver mining and milling operation at Mineral Hill Mine was conducted by TVX until the mine closed in 1996, followed by reclamation activities in 2000. TVX became a subsidiary of Kinross Gold U.S.A., Inc. in 2003 and from there TVX carried forward all remaining reclamation activities, which received a BLM Hardrock Mineral Environmental Award in 2011. Now, after more than 100 years of mining activities in their various forms, much of the Mineral Hill district has reverted back to pre-mining condition as a result of these reclamation efforts.

Two Separate Conservation Transactions: Land and Water

The conservation transaction teams included: Patrick Byorth and Laura Ziemer, Trout Unlimited; Mike Mueller and Grant Parker, Rocky Mountain Elk Foundation; Dennis McHarness and Martin Litt, Kinross Gold U.S.A., Inc.; Gage Zobell, Crowley Fleck PLLP; and Tom Hicks and Aaron Baker, TU outside tax and water law counsel.

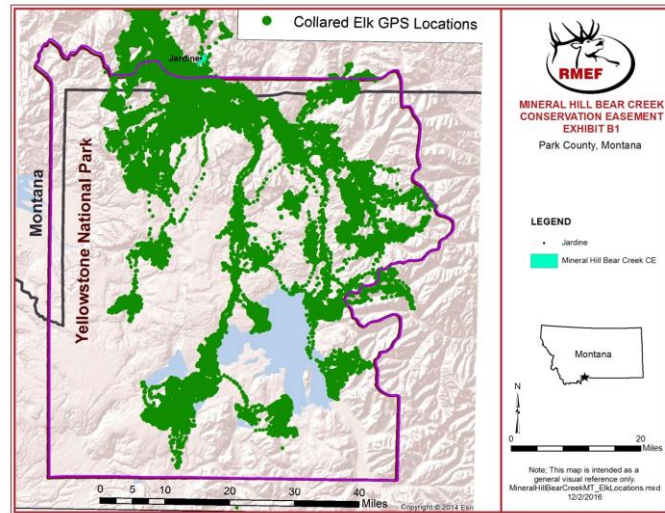
The conservation easement restricts development and subdivision on the property which historically was comprised of 30 patented mining claims.

Founded in 1984 by four hunters from Montana, the Rocky Mountain Elk Foundation's mission is to ensure the future of elk, other wildlife, their habitat, and our hunting heritage. In support of its mission, the RMEF is committed to: (1) conserving, restoring, and enhancing natural habitats; (2) promoting the sound management of wild elk, which may be hunted or otherwise enjoyed; (3) restoring elk to their native ranges; and (4) educating members and the public about habitat conservation and our hunting heritage. RMEF focuses on hunting access, and wildlife management and conservation issues.



TVX donated a 549-acre conservation easement on the Mine's fee interest to RMEF to permanently protect and preserve the conservation value of the property. The easement will protect a vital part of the migration corridor for the thousands of elk as they migrate in and out of Yellowstone National Park. This land also provides important wildlife habitat for moose, deer, black bear, mountain lion, and many other species of fish and wildlife that are a part of the Yellowstone region. The property also protects the scenic viewshed that can be seen from the

Mammoth and Grand Loop Roads within Yellowstone National Park and ensures the public will be able to use and enjoy the newly negotiated Pine Creek trailhead and existing Forest Service trails that cross the property.



Beyond outstanding scenic and wildlife values, two important tributaries of the Yellowstone River—Pine and Bear Creeks—flow through the property.

TU is the nation’s oldest and largest coldwater fisheries conservation organization. TU’s mission is to conserve, protect, and restore North America’s coldwater fisheries and their watersheds. To accomplish this vision, TU: (1) protects the highest quality trout and salmon habitat; (2) reconnects high-quality habitats with restored areas downstream through the augmentation of instream flows and barrier removals; (3) restores degraded habitats so that they again support healthy trout and salmon populations; and (4) sustains progress by educating and motivating a future generation of environmental stewards. TU’s Western Water and Habitat Program staff have successfully partnered with ranchers, farmers, and other landowners on pragmatic, on-the-ground restoration projects that show that working landscapes and fish can coexist in some of the West’s best places including Montana, Colorado, Idaho, Wyoming, Utah, New Mexico, California, Washington, and Oregon.



Yellowstone cutthroat trout in the Yellowstone River
(Photo Credit: Steven Brutger, Trout Unlimited)

TVX's water right donation to TU will permanently protect instream flows in Bear Creek and Pine Creek, further enhancing the Yellowstone River's cutthroat and wild trout habitat. This water right gift—the first of what is hoped to be hundreds across the western states in the years ahead—will directly help ensure the quality of life for native trout and the local communities that both depend on a healthy river and clean, cold water.

Focus: Water Right Donation Mechanics

TU's Western Water and Habitat Program provides specialized public-interest expertise and legal support for regional conservation partners, which require tax-specific and/or water right donation advice, during locally driven, real property transactions. TVX's outright donation of multiple water rights in their entirety as a charitable donation of a property right worth several hundred thousand dollars to protect instream flows and fish habitat and the claimed federal tax deduction is a conservation precedent.

The first step to qualify a water right donation for a federal tax deduction is to determine if the water right is real property under state law. To answer this question, the IRS must look to state law. In virtually every western state, there are legislative, state supreme court, and other legal authorities that reinforce that both appropriative and riparian water rights are real property.

Seventeen western states have adopted appropriative water rights systems. Colorado and other pure appropriative right states (Colorado Doctrine states including New Mexico, Nevada, Utah, Idaho, Montana, and Wyoming) have rejected riparian right systems altogether, choosing instead to recognize only rights gained by prior appropriation. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882). California recognizes a dual system of riparian rights and appropriative rights (*Lux v. Haggin*, 69 Cal. 255 (1886)), while Oregon and Washington legislatively transitioned riparian rights into state-administered appropriative right systems with priority over newer appropriations in the early 20th century.

A second step in the water right donation (and subsequent state administrative water right change-in-use process) requires due diligence and documenting historic beneficial use of the water right measured in flow rate (cubic feet per second or cfs) and annual volumes diverted, consumed, and returned to the source (gallons or acre-feet or AF; 1 AF = 325,851 gallons).

Jardine Mine due diligence supported historic reasonable and beneficial use of the rights, showing historic mining activity and the related water demands totaling nearly 3.0 billion gallons or 8,828 AF of protected volume. In June 2017, TVX permanently donated to TU the Mine's water rights, which equaled an annual 2.5 cfs in Pine Creek and 14.0 cfs in Bear Creek from the upstream-most point of diversions to their confluence with the Yellowstone River. Legally, the protected or enhanced instream flow is below the historic hydropower reach of Bear Creek to the confluence with the Yellowstone River, but this "pulse" of added water generates water quality, temperature, riparian habitat, and economic benefits for forty miles downstream.

A third and necessary step to achieve the federal tax deduction is an independent water right valuation, required for any real property valued in excess of \$5,000. This requires an appraisal by a qualified appraiser and completing the related IRS Form 8283.

The fourth step is a function of state water law. Even for a donation from TVX to TU, under Montana law, only the state agency Montana Department of Fish, Wildlife and Parks can hold water rights in perpetuity for instream conservation purposes. TU accepted the charitable gift of

the mining rights and subsequently re-deeded them to Montana Department of Fish, Wildlife and Parks who then undertook the change of the water rights' beneficial uses from mining to instream flows, thereby permanently protecting the senior water rights and avoiding future issues of forfeiture.

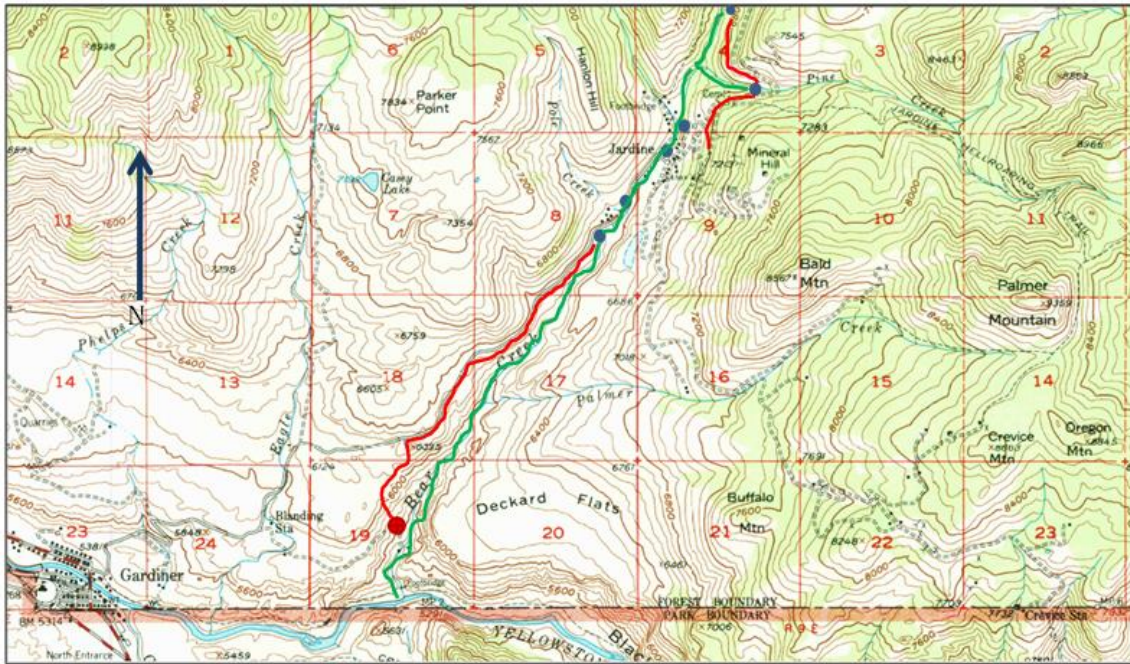


Figure 1. Map of the project area at Jardine, MT at Mineral Hill, T9S R9E, Park County, MT. Blue circles are historic points of diversions, red lines are ditch locations. The Bear Creek Ditch (Biglow Chapman Ditch) is red line west of Bear Creek, and power plant location red circle. Proposed protected reach is green line. Source: USGS Gardiner Quadrangle (1955).

What's Next

This conservation easement, along with public lands and other private lands protected by the conservation easement, should help ensure the future of the northern Yellowstone ecosystem and its incredible fish and wildlife resources.

Knowledge of the Jardine Mine water rights donation is expected to spur new charitable donations of water rights and related federal tax deductions. The Jardine Mine donation is already being regionally scaled across western states where mining, energy, or other companies

can donate water rights as a state-defined real property interest to protect, enhance, and conserve streams. Healthy streams contribute to local community values such as fishing, recreation, tourism, and economic sustainability. This water right donation tool is intended to generate unique and exponential conservation impacts in the years ahead that will broadly benefit western rivers and communities.

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