CASE STUDY: DEDICATING HISTORIC JARDINE MINE RIGHTS TO INSTREAM FLOW
Donated Entire Interest, a National Precedent

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Noted author and world traveler Rudyard Kipling visited Yankee Jim at his toll station along the Yellowstone River on July 2, 1890…

"At the fortieth trout I gave up counting, and I had reached the fortieth in less than two hours. Ye Gods…that was fishing, though it peeled the skin from my nose in strips…"

Source: Whithorn 1989
Typical change process requirements

- **Historic use documentation:**
  - Claim files, adjudication
  - Water Resource Survey Maps
  - Aerial Photographs
  - Crop records
  - Affidavits from pre-1973 irrigators
  - **Mine engineering reports**

- **Historic diverted amount:**
  - ditch capacity
  - availability on the source, gaging records or modeling.

- **Historic consumptive use:**
  - amount of water consumed by crops, or industrial process. ARM §36.12.1901(16).
  - Consumptive use is generally the basis for economic valuation, although non-consumed flow may be protected, depending on the situation.
  - Return flow = diverted volume - consumed volume.

  The water returned to the source and was available to other water users (**Spokane Ranch & Water Co. v. Beatty**, 37 Mont. 342, 351, 96 P. 727, 731 (1908) where junior water users are entitled to maintenance of conditions as when they arrived on the source.)
Historic Use Analysis

Figure 118. Structure #36, wooden water tank.

Figure 106. Revenue Mill (structure #34) showing steam boiler at south west corner of the mill.

Section 436(6)(a) authorizes FWP to change water rights it hold in fee simple to instream flow, limited to 12 stream reaches.

FWP subsequently accepted donation from Trout Unlimited as a permanent acquisition, applied for change authorization.

Kinross Gold, USA, donation to TU was entitled to a tax deduction.

- Permanent donation of a water right to the state or a qualified non-profit organization may qualify for a tax deduction under Section 170(f) of the Internal Revenue Code (IRC).
Valuation vs. Change

Due Diligence Report and Valuation (June 2017)
- Assumed consumptive portion was transferrable extent of water right
- Valuation was based on **2,424 af**
- Appraiser used a series of comparable water transactions, mostly instream leases
- Dollar value per acre-ft over 30 year period discounted at 5.5% cap rate

Final Change Authorization (Nov. 2022)
- DNRC dug deeply into seasons of use, reaches of stream effected by the change, and permitted change of both consumptive and non-consumptive water rights

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Conclusions – Donated Entire Interest

• Valuation is effective within 6 mos of donation
• Due diligence analysis informed valuation, conservatively estimated 2,424 af of water right was transferable
• Five years later DNRC approved a change authorization up to 57% greater than protectable volume under valuation.
• Vagaries of quantifying water as a property right warrants a more structured approach.
(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; David Bernhardt, Deputy Secretary Department of the Interior; U.S. Sen. Jon Tester (MT); Gov. Steve Bullock (MT); U.S. Sen. Steve Daines (MT).)