

Yellowstone Basin Advisory Council
Membership &
Report of 2013 Public Scoping Activities

Appendix G:
Written Public Comments



Written Comments Submitted by Public

Gilbertz, Susan

From: Brad Sauer <deecinmc@gmail.com>
Sent: Monday, March 25, 2013 9:37 PM
To: Gilbertz, Susan
Subject: COMMENT_Content_Billings_Table Discussion Items

Thanks Susan, You have a hard task, I appreciate what you are doing. Nick just wanted to convey that cumulative damages to the aquifers from surface coal mining operations be discussed and addressed. I'll be at the Forsyth Meeting and hold my thoughts until after that.

Brad

Gilbertz, Susan

From: Craig Wagner <craig.wagner60@gmail.com>
Sent: Tuesday, March 26, 2013 3:32 PM
To: Gilbertz, Susan
Subject: water issues comments
Attachments: Round Table Discussions_FINAL.docx

Susanne, I made some comments in the first item.

(see attached)

Round Table Discussions
Yellowstone Basin Planning Meeting

35 minute small-group discussion

Facilitator: Asks questions below and ensures participation from each participant

Research Assistant: Take notes on easel

Audio Recorder: Record discussion

Introductions

Please introduce yourselves:

tell us who you are, Craig Wagner, Glendive Montana

where you are from, and

why you are participating today. Interested in water rights, etc.

Discussion Items

1. What are some issues that the BAC will need to address as immediate or pressing concerns? Is the current water rights inventoried and if all water rights were used; what would the impacts be? Has a minimum flow been established to sustain fisheries and other related aquatic life? Is agriculture runoff being treated equivalent to other types of runoff ie. are all of the drainages back to the river in irrigated areas tested for fertilizer and pesticide related compounds. Long term plans should be developed to improve water quality for these drainages.



May 2, 2013

Mack Cole, Chairman
Yellowstone Basin Advisory Council
c/o Dr. Susan J. Gilbertz
Montana State University Billings
1500 University Drive
Billings, MT 59101

RE: Yellowstone River Basin Water Planning Scoping Comments

Dear Chairman Cole:

Previous Yellowstone River basin water planning efforts in the 1970s culminated in the Yellowstone Water Reservations, setting aside water for future municipal and irrigation development and protecting water quality, as well as for fish, wildlife and recreation. Since the 1970s, some of the issues foreseen and addressed by water planning efforts have come to fruition while others have not, and new unforeseen issues have developed. The recently initiated water planning process presents us with an opportunity to build on these previous efforts to address present and future water issues in the Yellowstone River Basin. To that end, please accept Montana Fish, Wildlife & Parks' (FWP's) official scoping comments for the Yellowstone River Basin Water Plan.

Protecting and providing for existing water uses

Across the state, the people of Montana find it essential that the existing uses of Montana's water be provided for and protected. This protection is especially necessary for those living in the Yellowstone River Basin who uses water for a variety of purposes including: irrigation of crops, municipal, domestic, industrial needs, recreation, fish and wildlife, stock water, or protection of water quality. While not every water use is equally important to every person, on the whole it is in the interest of all to protect and provide for current water uses and to better match water supplies to demands where shortages currently occur. This match should be the primary focus of the current planning process.

Water supplies at times fail to meet existing fish and wildlife uses. Dewatering of tributaries important for the spawning of Yellowstone cutthroat trout already limits the range and viability of this species. Existing instream water reservations with very junior priority dates often fall short of protecting and providing for the Yellowstone cutthroat trout. On other streams, instream water reservations do not exist to protect the fishery. Within the lower reaches of the Yellowstone River, it is unclear if the existing instream water reservations are adequate to protect the federally endangered pallid sturgeon. These water reservations are significantly less

than those requested by FWP and do not consider the water levels and flow regimes that pallid sturgeon require. Planning efforts should consider not only existing water reservations for fish and wildlife uses, but also the actual water needs where not met.

Unused water allocations

Within the Yellowstone River Basin, much of the available water is already allocated through the Yellowstone River Compact, the Crow-Montana and Northern Cheyenne-Montana Tribal Water Right Compacts, and water reservations that are yet to be developed. The planning effort should focus on fully understanding these demands and their potential impacts on existing water uses, their likelihood for development in near and longer term, and the mechanisms to mitigate these impacts.

Future water demands

Water for energy development and transportation in many ways drove the planning activities of the 1970s, and energy development impacts on water resources are again warranting attention. Dewatering activities associated with coalbed methane or coal-mine development affect important aquifers as well as streams and rivers where the water is discharged. Hydraulic fracturing places new demands on water supplies, sometimes in areas with limited water supplies. Both energy-related dewatering impacts and new demands should be subjects of the planning process. Whether considering coal-mine or coalbed methane development or hydraulic fracturing, water quantity and quality are inextricably intertwined and should be considered conjunctively in this planning process to the extent possible.

Continuing groundwater development (whether using large wells or the much more common small wells exempt from permitting requirements) impacts streamflow in tributaries and the Yellowstone River main stem. However, the impacts to surface water often are not well understood, and the means by which to mitigate impacts to surface water are not readily available in some circumstances. An example is winter impacts to surface water that cannot be addressed through retirement of irrigation but require some type of surface or aquifer storage to be available to supplement surface water in the winter months. Further, the mitigation of these impacts is not required for exempt wells. Conversion from flood to sprinkler irrigation and the urbanization of previously irrigated lands has reduced return-flow contribution to groundwater and to surface water, thereby affecting users of both. These impacts related to groundwater/surface water interactions warrant further study (and potentially policy changes) to address the impacts.

With climbing energy costs, new hydropower development is again gaining traction within the basin. While being a renewable energy source, hydropower often comes with substantial impacts to aquatic life. The planning process should consider policies that promote hydropower development with impacts that are fully mitigated or avoided.

Changes in available water supply

The past 30 years have demonstrated the variability of water supply within the Yellowstone River basin. While the reasons for this variability may lack consensus, the occurrence of significant variability in water supply should be evaluated and addressed in this planning process. A reduction in water supply will likely result in more stress to aquatic life in the latter months of summer when irrigation demands are the greatest. The planning process should offer

specific drought mitigation practices that reduce stress to aquatic life and provide irrigators with common sense planning tools that lessen economic losses.

Meeting existing and future water demands

While water yield in the basin varies widely, a sustained increase in yield to meet existing and future demands is highly unlikely. Conservative planning would dictate that yields should be considered to be declining. Water storage undoubtedly plays an important role in meeting existing and future demands. The likelihood that significant new conventional surface-water storage can be economically developed within the basin seems limited. However, more novel groundwater storage concepts should be investigated. Such projects not only could provide increased local supply, but could also be used to provide storage that is moved via streams and rivers to supply downstream needs.

Consider all waters within the basin

The importance to the region of the Yellowstone River itself at times overshadows the many important watersheds that contribute to the main stem. Water supply in relation to demand varies dramatically amongst the streams and rivers that make up the Yellowstone River basin. While it is impractical within this current process to study every stream within the basin, outcomes of the process should be, to the greatest degree possible, applied basin-wide.

Thank you for the opportunity to provide input into this important water planning process. My staff will continue to work with your committee and DNRC to provide relevant data and analyses, as well as provide additional input regarding the issues raised herein.

Sincerely,

A handwritten signature in blue ink that reads "Bruce Rich" followed by "for BR".

Bruce Rich
Division Administrator

C: Jim Robinson, DNRC

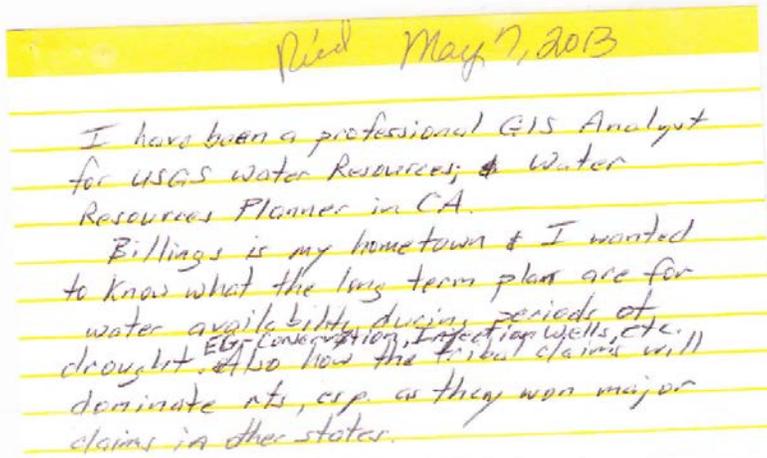
Note Card # 1 with Public Comment from Billings meeting, May 7, 2013

I have been a professional GIS Analyst for USGS water resources; water Resources Planner in CA.

Billings is my hometown & I wanted to know what the long term plans are for water availability during periods of drought. EG- conservation, injection wells, etc.

Also how the tribal claims will dominate rts, esp. as they won major claims in other states.

Signed on back: Jane Henson (336) 468-0952)



Rec'd May 7, 2013

I have been a professional GIS Analyst for USGS water Resources; & Water Resources Planner in CA.

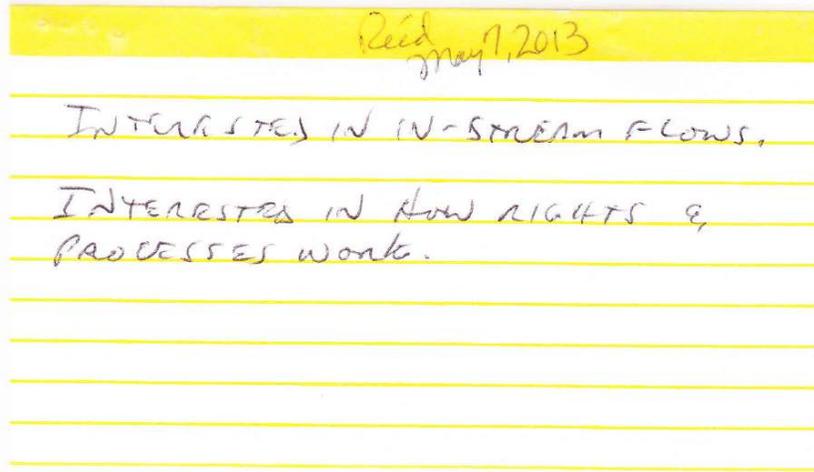
Billings is my hometown & I wanted to know what the long term plan are for water availability during periods of drought. EG- conservation, injection wells, etc.

Also how the tribal claims will dominate rts, esp. as they won major claims in other states.

Note Card #2 with Public Comment from Billings meeting, May 7, 2013

Interested in in-stream flows.

Interested in how rights & processes work.



Reed
May 7, 2013

INTERESTED IN IN-STREAM FLOWS.

INTERESTED IN HOW RIGHTS &
PROCESSES WORK.

Recd May 7, 2013

The recent Montana Supreme Court hearing in Bozeman Montana contained the following claim by attorneys representing James Cox Kennedy in reference to the water in the Ruby River running thru his ranch.

His attorney claimed that the landowner not only owns the land under the river but the river its self as well as the air above the river.

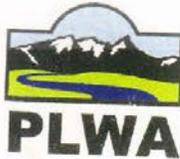
He was immediately challenged by one of the justices who asked if he believed that the definition of water ownership in the Montana Constitution was unconstitutional. He answered, "Yes."

Following is what the Montana Constitution says about the water in our state." All surface, underground flood and atmospheric water are property of the state for the use of the people."

Anyone acquiring land in Montana should be aware of this proclamation. Basically, water in its natural channel belongs to the public. Only after it is diverted for beneficial use as part of a valid water right does it carry some characteristics of private ownership.

Public water runs thru private land throughout our state. In 1984 the Montana Supreme Court saw fit to allow the public to enjoy the use of their water along with their fish by allowing anglers and others to move up and down the stream below high water mark. The court applied this to all streams in the state large enough to support water based recreation. The Legislature of 1985 passed legislation consistent with the court's findings.

Perhaps those who are unhappy with this situation should move to another state.



Public Land/Water Access
Association, Inc.
P.O. Box 80987
Billings, MT 59108
www.plwa.org
John Gibson, President
406-656-0384
gibsonjohn43@gmail.com

An all volunteer organization dedicated to the restoration, maintenance, and perpetuation of public access to the boundaries of all public lands and waters in Montana.

John Gibson

ppp public comment submitted
May 7th, Billings

Gilbertz, Susan

From: Rostad, Dan - NRCS-CD, Big Timber, MT <Dan.Rostad@mt.nacdn.net>
Sent: Monday, May 13, 2013 6:08 PM
To: Gilbertz, Susan; Robinson, Jim
Cc: Tom Osborne; Virginia M. O'Hair
Subject: NOTES from BIG TIMBER extra meeting

Susan & Jim:

I had mentioned to you both that local Farm Bureau, Woolgrowers and Stockgrowers folks had asked me if I could attend a special meeting they were holding to ask questions about the YBAC and MWSI. That meeting took place this past Thursday, May 9th at the Big Timber Public Library.

I thought it was only going to include folks from Sweet Grass & Park Counties, but Tom Osborne called me that afternoon to say he had been told folks from Stillwater County would be attending as well.

So, that evening, there were folks from Park, Sweet Grass & Stillwater Counties in attendance representing their local Woolgrowers group, Farm Bureau and Stockgrowers group(s). Jerry O'Hair, Tom Osborne and I all participated.

Our local Crazy Mountain Stockgrowers organized the meeting and you will see in Tom's notes below, that it was very well attended.

I passed out material outlining the goals of the MWSI, included the statute and pointed out to the group the mandate of the law and how the YBAC was supposed to function.

Former state Senator Lorents Grosfield attended along with current state Representative Alan Redfield (Park/Sweet Grass County) and one SG County Commissioner (the other two Commissioners attended the Big Timber scoping meeting). Lorents Grosfield served in the Legislature and is well versed in water resources issues.

After nearly two hours of discussion, Jerry, Tom & I encouraged the attendees to write letters with their concerns addressing them to Mack Cole in care of Susan. We told them to have letters submitted by the May 31st deadline. I wouldn't be surprised if you get a lot of input, from both individuals and groups. It was good to see a good turnout and interest in the process.

By the way, a reporter from the local newspaper, the Big Timber Pioneer, was in attendance and will most likely write a news story in this week's edition.

I visited with her privately and told her that this was not a meeting of the YBAC but that we (Tom, Jerry & I) were the invited guests of the group. She said she found out about the meeting by viewing the Commissioners schedule. Someone in that group must have invited the Commissioners so it appeared on their schedule. She will include information about how people can comment to the YBAC in her article.

Tom's notes below are very thorough and I can't think of anything else to mention.

Jerry, Tom and I were wondering if the Mill Creek listed on the "First-Cut Ranking Card" is referring to the Mill Creek in Paradise Valley?

If you have other questions for us about this meeting, send us a note and we will try to answer them.

Thanks, Dan

Thanks again to Tom & Jerry for making the trip over for this gathering in Big Timber!!!

From: Tom Osborne [mailto:TomO@hydrosi.com]
Sent: Friday, May 10, 2013 11:10 AM
To: Rostad, Dan - NRCS-CD, Big Timber, MT; Virginia M. O'Hair
Subject: RE:

Hi Dan- you bet. It was a very interesting meeting with a highly motivated group who have large stakes in water rights. Will you be reporting on the meeting to Susan Gilbertz? I know she wanted to hear. I took some notes- here are the highlights:

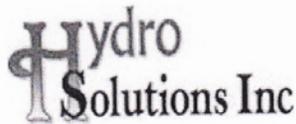
- I counted 25 attendees in addition to us 3.
- Water leasing in Mill Cr was discussed. Evidently, DNRC and a private organization were attempting to lease water rights from irrigators for an unrealistically small amount. Program was not viewed as successful.
- Many of the "Concerns" on the list are items that are "givens" and cannot be changed by us or the legislature.
- It was noted that the Yellowstone River is fully or over appropriated, even though it is not officially a "closed basin".
- Off-stream storage will be difficult but should be looked at.
- The BAC should adhere to the role outlined in the statute (SB303), and not get too far afield with its issues.
- The upper Yellowstone River (generally above the Bighorn River) is different than the lower basin in that it is not much affected by water use/policy in Wyoming. There was a question of whether the YR basin should be split in terms of water planning.
- Water rights in Montana are constitutionally protected.
- There has never been a "call" by the lower basin on water rights in the upper YR basin, but could there be?
- Can a stockgrower now file a claim on what has been termed "Exempt" water rights for livestock use?

The groups in attendance plan to write letters to the DNRC with their comments on the issues of concern.

Hope this helps. Below is the schedule for the SVWC Water Policy Seminar, May 23rd.

Tom Osborne, P.H.

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Boulder River Watershed Association

May 21, 2013

Hon. Mack Cole, Chairman
Yellowstone Basin Advisory Council

Dear Mack,

For more than a decade the Boulder River Watershed Association has been working to maintain and improve the health of their land and water resources. The Association stresses the importance of maintaining agriculture as the primary land use in the area.

Ranchers settled the area, and the vision of the Boulder River Watershed Association is to perpetuate this lifestyle and maintain the values that make this area what it is. To that end, the Association's Water Committee goal is to enhance water quantity and quality for all beneficial uses.

Our efforts promote and encourage the most effective and judicious use of irrigation water for agricultural purposes. We work to preserve agricultural water use as the priority, while maintaining adequate fisheries habitat and encourage irrigation practices that minimize (optimize) water use and maximize production potential.

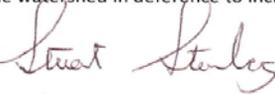
Our Association has taken the lead in several collaborative efforts to attain these goals including providing a comprehensive stream assessment of the Boulder River and its tributaries, providing oversight for the TMDL process including providing a technical advisory committee for this process, and providing an irrigation efficiency study benefitting water users in the watershed.

It is our opinion that the upper Yellowstone River drainage and tributaries like the Boulder River, are unique to the overall Yellowstone River Basin and has special characteristics and water planning requirements considering our downstream neighboring communities/counties.

It is our desire that the Council provide a policy document for Legislative consideration that honors existing State water law and strengthens the doctrine of prior appropriation. As upstream water contributors, we are concerned about future downstream demand and how that will affect availability. Consideration of existing water rights demands should take precedence over increased demands for new water users.

In reviewing the Legislative mandate the YBAC is using as their guide for water use planning considerations, we would urge the Council to protect the water resources of the Yellowstone River Basin by protecting agricultural water users and irrigators in your water supply planning document. We also ask you to consider the importance of the water sourced to the basin by the upper area of the Yellowstone watershed in deference to increasing downstream demands.

Sincerely,



Boulder River Watershed Association Executive Board – Stuart Stenberg, Chairman

Stuart Stenberg, Bill Brownlee, Leo Cremer, Keith Engle, Mark George

Post Office Box 515 - McLeod, Montana 59052

Mack Cole, Chairman
Yellowstone Basin Advisory Council (BAC)
7 Cole Ln
Forsyth, MT 59327

May 22, 2013

Dear Chairman Cole and Members of the BAC,

The recent amendments to the Montana state water plan statute outline a relatively short and specific agenda for the DNRC and river basin water user councils appointed under this statute to follow. The statutory charge is to develop an inventory of uses associated with existing water rights, an estimate of the amount of water needed for future demands, an analysis of the effects of drought and new depletions, an evaluation of storage opportunities and other sources of water for future needs, and legislation necessary to address these basin water resource concerns. During the initial development of this program by the DNRC and the scoping and public participation process, dozens of questions and issues were raised, some of which fell within this statutory agenda, and some of which did not. This is rather typical of any wide-open scoping process. It then becomes the first job of the Council to recommend paring down the list to include only those items specifically enunciated in the statute and that are consistent with the Constitution and the laws of the state. The second logical job is to group remaining similar items into manageable categories. It is simply NOT the charge of the Council or the DNRC to address every item on the wish list of every person or group in the state whether or not they are related to the statutory mandate or current constitutional and statutory law. It would be a waste of time and taxpayer dollars to spend time and resources on items that fall outside this arena, or outside the realm of potential legislation that is reasonably passable.

Both the federal and the state constitutions contain provisions that do not allow the taking of private property without due process and just compensation. The writers of (and voters adopting) the "new" 1972 Montana Constitution went further with respect to water rights, and stated that all water rights "are hereby recognized and confirmed." Montana (as well as virtually all other western states) has long adopted the doctrine of prior appropriation, which is the water rights system that this Montana constitutional provision guarantees and preserves. Proposals contrary to this long-established system of law are simply not appropriate to be considered in the state water planning process. We urge the Council to be ever mindful of the Constitutional protections for existing water rights, and not to make any recommendations that would tend to compromise these rights. Certainly any such recommendations would find vociferous opposition in a legislative or court setting.

We believe that it was a mistake for the DNRC not to have split this river basin into an upper and a lower segment as they did for the Missouri River Basin. In the Montana segments of these two rivers, the Yellowstone is actually bigger than the Missouri, is also nearly as long, and has many quite different issues in the lower basin than in the upper, just as the Missouri does. Practically speaking, the Yellowstone is already divided into two sections because of the Yellowstone River Compact with Wyoming, which controls the use of most of the inflow from tributaries starting at the Clarks Fork and all the way downstream to North Dakota. This Compact specifically does not affect the waters of the Yellowstone or its tributaries upstream of the Clarks Fork, which area accounts for about half of the Yellowstone's flow into North Dakota. This and many other factors make the lower Yellowstone quite different from the upper Yellowstone, just as the upper and lower Missouri are quite different. We Upper Yellowstone River Basin water users are very apprehensive that Lower Basin interests may want to try to limit present or future Upper Basin water rights to satisfy their present (or future) needs (especially since only three or four out of twenty Council members are from the Upper Basin). That would adversely affect

Upper Basin water rights that are protected by the Montana constitution, and we would be very opposed to any such proposals or action. We think it would be better and fairer for the Council to ask DNRC to appoint a separate Basin Advisory Council to deal with Upper Basin issues. Failure to do so would likely end up setting Lower Basin interests in opposition to Upper Basin interests, and that should not be the result of a state-sponsored planning process.

While there may be individuals or groups that would like to dramatically or radically change Montana water law, the simple fact is that it is not going to happen, and the BAC's time spent in that kind of endeavor would be wasted, wasted at the expense of issues that may benefit from examination. We submit that the whole concept of changing or "re-thinking" beneficial uses falls into this category—such a change would adversely affect constitutionally protected water rights, would receive vociferous *statewide* opposition in a legislative setting, would be very polarizing, and would immediately be challenged if ever passed. We strongly urge that you delete this concept (in the 2nd item on the list of 28) from any further consideration, and recommend the same to the DNRC.

As to the other 27 separate categories of "Public Participation Topics and Concerns" and the many questions listed under each one, we believe that a number of these could be combined, and another number could be eliminated as being outside the statutory mandate and/or contrary to the constitutional protections of water rights. In fact, we think it would at any rate be unwieldy and unmanageable for the BAC as currently presented.

For example, "Availability" essentially encompasses "Current Allocations," "Tribal (Reserved) Rights," "Federal Reserved Rights," "Future Allocations/Additional Rights," the two categories of "Hydrologic Models," "Montana as Priority," "Use it or Lose it Doctrine," some of "Reservations (Protected Water Rights in Montana)," "Enforcement/Protecting Senior Rights" (which itself essentially encompasses "Gauges/Monitoring"), and "Drought Readiness." All of those categories seem to us to be simply part of "Availability."

"Storage Capacities" encompasses "Stock Water Ponds and Tanks/Fishing Ponds." While "Storage" could also be considered part of "Availability," analyzing storage opportunities itself is specifically required in the statute, so we agree that it's better to emphasize it by keeping it separate. This is not to say new storage development should not be examined. Indeed, the agricultural community recognizes both in stream and off stream storage as a viable and beneficial means of addressing the perceived future increase of water use in the Yellowstone Basin.

We think it would be much more manageable and understandable for the BAC and the public if the other identified issues were presented in just a few categories, such as:

- Markets
- Municipal
- Instream/recreation/water quality
- Other

Federal and tribal reserved water rights in the Yellowstone Basin are largely settled and were all negotiated in a manner to protect senior existing Montana water rights. This may not be quite as true of the Yellowstone Compact with Wyoming and North Dakota, but this again points to the need to separate into two separate basins. And of course, drought can have significant negative effects on existing water right holders, be they agricultural, municipal, recreation, or whatever, but our system of water law addresses this in a variety of ways, including the whole water commissioner enforcement mechanism which has worked relatively well throughout our water use history. On the other hand, finding market or

voluntary, incentivised means to augment water availability for other existing uses in the Basin could go a long ways towards alleviating shortages in specific situations, as well as toward cooperative problem solving amongst users.

Finally, like a lot of fear mongering, we believe that the fear mongering that warns of drying up the river is misplaced. Very significant water rights and reservations for fish and wildlife, as well as for public health, with priority dates of 1962 and 1978, as well as mechanisms for leasing water rights for instream flow (either on a temporary or long term basis), together with existing enforcement mechanisms, are available to assure flows in all years, if responsibly pursued and enforced. While extreme drought years have resulted and will result in very minimum flows, the fact remains that the Yellowstone River is a healthy river that recovers quickly. While low flows are hard on all water users/uses/species, the simple fact is that they are not disastrous and unrecoverable for fish or wildlife or the ecology of the river basin.

We note that some of the questions imply concepts that either are not accurate or are misleading. For example, a question under "Future Allocations" is "Can we avoid over-allocating?" This implies or hints that the river might (in a worst case) essentially dry up, but it fails to understand how prior appropriation works and that instream water rights are part of the statutory allocations, and are protected by the enforcement mechanisms currently in place, and may be augmented by market or voluntary approaches. The same is true of the question (under "Hydrologic Models"), "Do we know what will happen if permittees pull their full shares?" Perhaps the mechanisms need some touching up, but the river is not going to dry up.

Likewise under "fracking," the question is asked, "If that water is essentially "lost," are we addressing the detrimental effects of those uses?" Why would we call water that is "lost" during fracking a "detrimental effect," but only call it "consumption" when talking about irrigation? Either way, it is "lost" in the interests of an economic endeavor of benefit to the Montana economy. And why is irrigation considered a "(mostly) non-consumptive use," but fracking a "consumptive use." Doesn't it depend on whether the irrigation is flood or sprinkler? (Sprinklers are basically designed to be entirely consumptive, with no runoff.)

In addition, we would suggest developing working definitions of some terms that get loosely used, but have different implications in different situations. For example, "efficiency" and "conservation." Some would say that the less water diverted, the more efficient you are. Others would say that if you're looking at the entire water flow year, it may be more efficient to divert more water such that there is more aquifer recharge (from runoff) and thus better fall flows in the drainage. Both could be true, though likely in different circumstances. Another term needing clarification is "waste." Is irrigation runoff waste? Like efficiency, it depends on the situation and how the term is used, for example, waste with respect to what—other users, the stream, recharge or what? Is it only waste if it goes out of the basin or subbasin?

We note too that several of the questions implicitly or explicitly suggest substantial new and bigger bureaucracy. Are users in the basin really ready for this? Is the state budget ready for it? Are these mostly coming from the DNRC? Some examples are:

- "Are we ready to address monitoring? Do we have access to their [irrigation companies] information?"
- "Do we need a comprehensive system that links all monitors in the basin to one database?"
- "Do we need to monitor water depots and municipal sales?"
- "Should Montana stop allocating and start a new transfer system?"
- "Is water already in a "loose" market system that needs to be watched over more carefully?"
- "Do we need to establish and support TMDL processes in this basin?"

On the other hand, we believe that there are several questions throughout the document that could lead to providing good tools for specific water situations. Examples are [with suggested clarification in brackets]:

- “Can we create a structure to promote Best Practices that serve multiple users?”
- “Do other [prior appropriation doctrine] states have better models?”
- “Can we prepare for drought by identifying “water volunteers” who agree, in advance, to reduce or cease use [and what incentives might be useful in this endeavor]?”
- “Can we create a better system for addressing who is senior and who is junior—the “communications” between these users is [often] strained and we need better ways to keep users informed?”
- “Can we create tools and resources so that people better understand the limits of their water rights?”
- “Can we get people to volunteer to limit or reduce use during drought [and what incentives might be useful in this endeavor]?”
- “How can we get irrigation districts [ditch companies and other ditch owners] to deal with leaks and seepage from ditches?”
- “Do we know that all seepage is detrimental? What about the shallow aquifers that are charged via the seepage? [How much does this seepage help late-season flows in nearby surface waters? How much do irrigation return flows help late-season flows in nearby surface waters?]”
- “What can be done to reduce evaporation that is also cost effective [and not water consumptive as, for example, planting shade trees along ditches might be]?”
- “Can we devise management plans that work to serve all needs [and what incentives might be useful in this endeavor]?”
- “Do we know the circumstances when flood irrigation is preferable to sprinkler irrigation (or vice versa)?”
- “There is [usually] plenty of water in the spring—how can we capture it?”
- “How do we increase storage without losing a great deal to evaporation?”

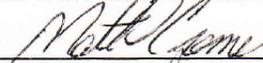
In summary, we urge the BAC to ask DNRC to split the Yellowstone Basin into two Basins, and treat them according to their unique characteristics. We urge the BAC to remain mindful and respectful of our system of prior appropriation, and urge the DNRC to do the same. We urge the BAC to be realistic in the amount of work it chooses to pursue in the limited time available. We urge the BAC to reject approaches that create significant new bureaucracy and red tape (which several of the questions in the list of 28 topics seem to suggest). We strongly urge the BAC to focus on the realm of investigating incentivised and cooperative approaches to Yellowstone Basin water problems, and to stay away from approaches contrary to our long history of constitutionally and statutorily protected water use, or that will be so controversial that they will be divisive and have little or no chance of passage, and to urge the DNRC to do the same.

Thank you for the opportunity to comment.

Sincerely,

Members and water users of the Crazy Mountain Stockgrowers Association

President, Matt Cremer



Vice President, Chuck Schuman



May 24, 2013

Mack Cole, Chairman
Yellowstone Basin Advisory Council
C/o Dr. Susan Gilbertz
MSU Billings
100 University Drive
Billings, Mt 59101

Re: Yellowstone River Basin Water Planning Scoping Comments

Dear Chairman Cole:

The process of developing a Water Plan for the Yellowstone Basin will be a challenge since it needs to be one that tries to balance the uses of the water for now and into the future. I am writing to express my views on the subject.

First and foremost is to protect the State's water for its residents which means keeping instate use at the forefront of any policy. People of both Montana and Wyoming have the same interest in their concern for water.

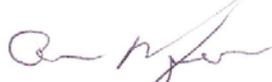
In the interest of protecting existing water rights and the Prior Appropriation Doctrine, the current water users have been working with the water court for years to get through the adjudication process and that should be finished.

Since there are dewatered tributaries and fisheries the push to provide water for these is a noble endeavor. The basin should work for local solutions to the dewatering of streams and take into account local history and knowledge. No tributary should be singled out in the plan beyond just the acknowledgement that it is an issue. The economic impacts of the mitigation of dewatering must be taken into account when a plan is made to reserve more water in the stream. There needs to be a way developed to offset the cost to the water right holder that can be agreed upon by both parties involved with the stream.

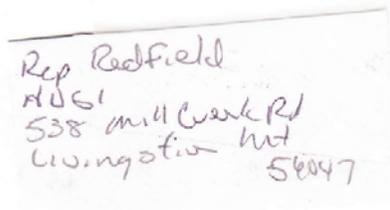
Hydropower and Industrial use: The use and development of small Hydropower generators will be a benefit to the basin as they can be used in many streams and not affect the flow or the fishery. Their low head design and minimal diversion structures do not impede flows and fish. Water discharged into streams from industrial uses must meet clean water and temperature standards.

Off stream storage: A plan for storage should be considered so that drought or low water supplies can be mitigated. This could be important for Municipalities to address their water needs.

The plan must fit within the confines of Senate bill 303 and address the concerns in section 3. If the plan exceeds or fails to address areas within section 3 it will be hard to get it through any legislative committee.



Representative Alan Redfield



Rep Redfield
HUGI
538 mid Creek Rd
Livingston Mt
58047

Mack Cole, Chairman
Yellowstone Basin Advisory Council (BAC)
7 Cole Ln
Forsyth, MT 59327

May 28, 2013

Dear Chairman Cole and Members of the BAC,

The Park County Stockgrowers appreciate the opportunity to submit the following comments regarding this all too important issue of water in general and the Yellowstone Basin, in particular. We have worked extensively and in concert with The Crazy Mountain Stockgrowers in an effort to give all aspects of this issue considerable thought and discussion among and between our respective memberships.

As you know, the recent amendments to the Montana state water plan statute outline a relatively short and specific agenda for the DNRC and river basin water user councils appointed under this statute to follow. The statutory charge is to develop an inventory of uses associated with existing water rights, an estimate of the amount of water needed for future demands, an analysis of the effects of drought and new depletions, an evaluation of storage opportunities and other sources of water for future needs and legislation necessary to address these basin water resource concerns. During the initial development of this program by the DNRC and the scoping and public participation process, dozens of questions and issues were raised, some of which fell within this statutory agenda, and some of which did not. This is rather typical of any wide-open scoping process. It then becomes the first job of the Council to recommend paring down the list to include only those items specifically enunciated in the statute and that are consistent with the Constitution and the laws of the state. The second logical job is to group remaining similar items into manageable categories. It is simply NOT the charge of the Council or the DNRC to address every item on the wish list of every person or group in the state whether or not they are related to the statutory mandate or current constitutional and statutory law. It would be a waste of time and taxpayer dollars to spend time and resources on items that fall outside this arena, or outside the realm of potential legislation that is reasonably passable.

Both the federal and the state constitutions contain provisions that do not allow the taking of private property without due process and just compensation. The writers of (and voters adopting) the "new" 1972 Montana Constitution went further with respect to water rights, and stated that all water rights "are hereby recognized and confirmed." Montana (as well as virtually all other western states) has long adopted the doctrine of prior appropriation, which is the water rights system that this Montana constitutional provision guarantees and preserves. Proposals contrary to this long-established system of law are simply not appropriate to be considered in the state water planning process. We urge the Council to be ever mindful of the Constitutional protections for existing water rights, and not to make any recommendations that would tend to compromise these rights. Certainly any such recommendations would find vociferous opposition in a legislative or court setting.

We believe that it was a mistake for the DNRC not to have split this river basin into an upper and a lower segment as they did for the Missouri River Basin. In the Montana segments of these two rivers, the Yellowstone is actually bigger than the Missouri, is also nearly as long, and has many quite different issues in the lower basin than in the upper, just as the Missouri does. Practically speaking, the Yellowstone is already divided into two sections because of the Yellowstone River Compact with Wyoming, which controls the use of most of the inflow from tributaries starting at the Clarks Fork and all the way downstream to North Dakota. This Compact specifically does not affect the waters of the Yellowstone or its tributaries upstream of the Clarks Fork, which area accounts for about half of the Yellowstone's flow into North Dakota. This and many other factors make the lower Yellowstone quite

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different from the upper Yellowstone, just as the upper and lower Missouri are quite different. We Upper Yellowstone River Basin water users are very apprehensive that Lower Basin interests may want to try to limit present or future Upper Basin water rights to satisfy their present (or future) needs (especially since only three or four out of twenty Council members are from the Upper Basin). That would adversely affect Upper Basin water rights that are protected by the Montana constitution, and we would be very opposed to any such proposals or action. We think it would be better and fairer for the Council to ask DNRC to appoint a separate Basin Advisory Council to deal with Upper Basin issues. Failure to do so would likely end up setting Lower Basin interests in opposition to Upper Basin interests, and that should not be the result of a state-sponsored planning process.

While there may be individuals or groups that would like to dramatically or radically change Montana water law, the simple fact is that it is not going to happen, and the BAC's time spent in that kind of endeavor would be wasted, wasted at the expense of issues that may benefit from examination. We submit that the whole concept of changing or "re-thinking" beneficial uses falls into this category—such a change would adversely affect constitutionally protected water rights, would receive vociferous *statewide* opposition in a legislative setting, would be very polarizing, and would immediately be challenged if ever passed. We strongly urge that you delete this concept (in the 2nd item on the list of 28) from any further consideration, and recommend the same to the DNRC.

As to the other 27 separate categories of "Public Participation Topics and Concerns" and the many questions listed under each one, we believe that a number of these could be combined, and another number could be eliminated as being outside the statutory mandate and/or contrary to the constitutional protections of water rights. In fact, we think it would at any rate be unwieldy and unmanageable for the BAC as currently presented.

For example, "Availability" essentially encompasses "Current Allocations," "Tribal (Reserved) Rights," "Federal Reserved Rights," "Future Allocations/Additional Rights," the two categories of "Hydrologic Models," "Montana as Priority," "Use it or Lose it Doctrine," some of "Reservations (Protected Water Rights in Montana)," "Enforcement/Protecting Senior Rights" (which itself essentially encompasses "Guages/Monitoring"), and "Drought Readiness." All of those categories seem to us to be simply part of "Availability."

"Storage Capacities" encompasses "Stock Water Ponds and Tanks/Fishing Ponds." While "Storage" could also be considered part of "Availability," analyzing storage opportunities itself is specifically required in the statute, so we agree that it's better to emphasize it by keeping it separate. This is not to say new storage development should not be examined. Indeed, the agricultural community recognizes both in stream and off stream storage as a viable and beneficial means of addressing the perceived future increase of water use in the Yellowstone Basin.

We think it would be much more manageable and understandable for the BAC and the public if the other identified issues were presented in just a few categories, such as:

- Markets
- Municipal
- Instream/recreation/water quality
- Other

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Federal and tribal reserved water rights in the Yellowstone Basin are largely settled and were all negotiated in a manner to protect senior existing Montana water rights. This may not be quite as true of the Yellowstone Compact with Wyoming and North Dakota, but this again points to the need to separate into two separate basins. And of course, drought can have significant negative effects on existing water right holders, be they agricultural, municipal, recreation, or whatever, but our system of water law addresses this in a variety of ways, including the whole water commissioner enforcement mechanism which has worked relatively well throughout our water use history. On the other hand, finding market or voluntary, incentivised means to augment water availability for other existing uses in the Basin could go a long ways towards alleviating shortages in specific situations, as well as toward cooperative problem solving amongst users.

Finally, like a lot of fear mongering, we believe that the fear mongering that warns of drying up the river is misplaced. Very significant water rights and reservations for fish and wildlife, as well as for public health, with priority dates of 1962 and 1978, as well as mechanisms for leasing water rights for instream flow (either on a temporary or long term basis), together with existing enforcement mechanisms, are available to assure flows in all years, if responsibly pursued and enforced. While extreme drought years have resulted and will result in very minimum flows, the fact remains that the Yellowstone River is a healthy river that recovers quickly. While low flows are hard on all water users/uses/species, the simple fact is that they are not disastrous and unrecoverable for fish or wildlife or the ecology of the river basin.

We note that some of the questions imply concepts that either are not accurate or are misleading. For example, a question under "Future Allocations" is "Can we avoid over-allocating?" This implies or hints that the river might (in a worst case) essentially dry up, but it fails to understand how prior appropriation works and that instream water rights are part of the statutory allocations, and are protected by the enforcement mechanisms currently in place, and may be augmented by market or voluntary approaches. The same is true of the question (under "Hydrologic Models"), "Do we know what will happen if permittees pull their full shares?" Perhaps the mechanisms need some touching up, but the river is not going to dry up.

Likewise under "fracking," the question is asked, "If that water is essentially "lost," are we addressing the detrimental effects of those uses?" Why would we call water that is "lost" during fracking a "detrimental effect," but only call it "consumption" when talking about irrigation? Either way, it is "lost" in the interests of an economic endeavor of benefit to the Montana economy. And why is irrigation considered a "(mostly) non-consumptive use," but fracking a "consumptive use." Doesn't it depend on whether the irrigation is flood or sprinkler? (Sprinklers are basically designed to be entirely consumptive, with no runoff.)

In addition, we would suggest developing working definitions of some terms that get loosely used, but have different implications in different situations. For example, "efficiency" and "conservation." Some would say that the less water diverted, the more efficient you are. Others would say that if you're looking at the entire water flow year, it may be more efficient to divert more water such that there is more aquifer recharge (from runoff) and thus better fall flows in the drainage. Both could be true, though likely in different circumstances. Another term needing clarification is "waste." Is irrigation runoff waste? Like efficiency, it depends on the situation and how the term is used, for example, waste with respect to what—other users, the stream, recharge or what? Is it only waste if it goes out of the basin or subbasin?

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We note too that several of the questions implicitly or explicitly suggest substantial new and bigger bureaucracy. Are users in the basin really ready for this? Is the state budget ready for it? Are these mostly coming from the DNRC? Some examples are:

- “Are we ready to address monitoring? Do we have access to their [irrigation companies] information?”
- “Do we need a comprehensive system that links all monitors in the basin to one database?”
- “Do we need to monitor water depots and municipal sales?”
- “Should Montana stop allocating and start a new transfer system?”
- “Is water already in a “loose” market system that needs to be watched over more carefully?”
- “Do we need to establish and support TMDL processes in this basin?”

On the other hand, we believe that there are several questions throughout the document that could lead to providing good tools for specific water situations. Examples are [with suggested clarification in brackets]:

- “Can we create a structure to promote Best Practices that serve multiple users?”
- “Do other [prior appropriation doctrine] states have better models?”
- “Can we prepare for drought by identifying “water volunteers” who agree, in advance, to reduce or cease use [and what incentives might be useful in this endeavor]?”
- “Can we create a better system for addressing who is senior and who is junior—the “communications” between these users is [often] strained and we need better ways to keep users informed?”
- “Can we create tools and resources so that people better understand the limits of their water rights?”
- “Can we get people to volunteer to limit or reduce use during drought [and what incentives might be useful in this endeavor]?”
- “How can we get irrigation districts [ditch companies and other ditch owners] to deal with leaks and seepage from ditches?”
- “Do we know that all seepage is detrimental? What about the shallow aquifers that are charged via the seepage? [How much does this seepage help late-season flows in nearby surface waters? How much do irrigation return flows help late-season flows in nearby surface waters?]”
- “What can be done to reduce evaporation that is also cost effective [and not water consumptive as, for example, planting shade trees along ditches might be]?”
- “Can we devise management plans that work to serve all needs [and what incentives might be useful in this endeavor]?”
- “Do we know the circumstances when flood irrigation is preferable to sprinkler irrigation (or vice versa)?”
- “There is [usually] plenty of water in the spring—how can we capture it?”
- “How do we increase storage without losing a great deal to evaporation?”

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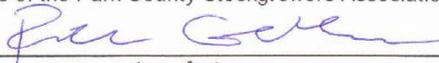
In summary, we urge the BAC to ask DNRC to split the Yellowstone Basin into two Basins, and treat them according to their unique characteristics. We urge the BAC to remain mindful and respectful of our system of prior appropriation, and urge the DNRC to do the same. We urge the BAC to be realistic in the amount of work it chooses to pursue in the limited time available. We urge the BAC to reject approaches that create significant new bureaucracy and red tape (which several of the questions in the list of 28 topics seem to suggest). We strongly urge the BAC to focus on the realm of investigating incentivised and cooperative approaches to Yellowstone Basin water problems, and to stay away from approaches contrary to our long history of constitutionally and statutorily protected water use, or that will be so controversial that they will be divisive and have little or no chance of passage, and to urge the DNRC to do the same.

Again, thank you for the opportunity to comment.

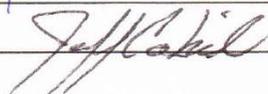
Respectfully Submitted,

Members and water users of the Park County Stockgrowers Association

President, Rick Gibson



Vice President, Jeff Cahill



Sweet Grass County Farm Bureau Federation

Big Timber, MT 59011

May 28, 2013

Mack Cole, Chairman
Yellowstone Basin Advisory Council
c/o Dr. Susan J. Gilbert
Montana State University Billings
1500 University Drive
Billings, MT 59101

Re: Yellowstone River Basin Water Planning Scoping Comments

Dear Chairman Cole:

On behalf of Sweet Grass County Farm Bureau Federations 200+ production agricultural members, I am submitting our official scoping comments for the Yellowstone River Basin Water Plan. Our intention is to aide this committee to craft a progressive program for beneficial water use, conservation, development and utilization of both consumptive and non consumptive water uses.

Upper and Lower Yellowstone River Advisory Areas

We urge this committee to consider dividing the Yellowstone River into Upper and Lower Advisory Areas. Growing seasons vary greatly up and down the Yellowstone Valley and its tributaries, as well as varying fisheries and recreational opportunities.

Inventory of consumptive and nonconsumptive uses

As this committee compiles an inventory of consumptive and non consumptive uses associated with existing water rights please include exempt water rights that may be filed (SB 355).

Estimating future demands of surface and ground water

Please keep in mind that agriculture continues to evolve crop production with research. Crops, requiring varying water consumption are routinely rotated for best management practices and market indicators.

Consider how agricultural practices positively benefit wetlands, wildlife, groundwater recharge and recreational opportunities

As this committee pursues its due diligence and either adopts studies and/or perform research, such as historical military or survey journals, archeological reports or present day measuring stations, recognition should be acknowledged of the positive benefits to the Yellowstone Basins wildlife, fisheries and recreational opportunities.

Proposals for the the best means, such as an evaluation of opportunities for storage of water by both private and public entities, to satisfy existing water rights and new water demands.

All private, municipal, industrial, state and federal off stream storage should be included in a survey as well as previously identified off stream storage areas were in the last report. New areas of potential off stream storage areas should be identified on all land, regardless of ownership. Federal Regulations, Plans and aide should also be considered. (SB 601 Water Resource Development Act (WRDA).)

Water Rights

Water rights are personal property rights. Water is directly tied to the appraised taxable value of land. A water right is not free use of water. Considerable investment and maintenance are required for water facilities to operate.

Preservation of the First in Time, First in Right principal should be maintained.

Resources for research

Montana Department of Agriculture USDA-NASS (Fact Finders for Agriculture)

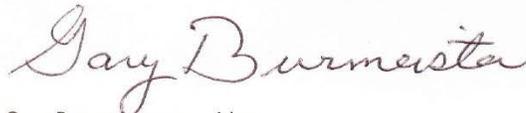
County Clerk of Court Records for Documented Water Uses

Montana Farm Bureau Federation (MFBF Agricultural Committees)

USDA NRCS and FSA County Offices

Historical documents, prior to state hood.

Sincerely,



Gary Burmeister, president

Sweet Grass County Farm Bureau Federation

Cc: Montana Farm Bureau Federation

Crazy Mountain Stockgrowers

Dan Rostad, Big Timber Conservation District

Sweet Grass Co. Farm Bureau
Ronda Johnston Sec/Tres
PO Box 276
Melville, MT 59055

Postmark: 5/28/13

Gilbertz, Susan

From: Brad Sauer <deecinmc@gmail.com>
Sent: Thursday, May 30, 2013 8:57 AM
To: Gilbertz, Susan
Subject: Re: Y_BAC_ScopingWrapUp_Notes_WRITTEN COMMENTS

Morning Susan, I hope you are enjoying this rain as much as I am. I am able to catch up on many things while I watch the land recover.

I apologize for not being able to make it to the last meeting.

I am also late in sending my comments in on items of concern. I hope you are still accepting them.

Here are my two bits:

Is the available water in the state overallocated?

How do the allocations break out? ie. 50% to Ag?

How much water is held in water reservations?

I would like to see of stream storage developed for times of excess runoff

What is the total effect of Russian Olive and Salt cedar uptake of water?

What are the guiding policies for the long term use of ground and surface water in the state? Are these policies regularly reviewed and evaluated or does each time an issue of water use develops does the wheel need to be reinvented?

How does climate change figure in to our water policy and planning?

How much water is wasted due to leaking irrigation, reservoirs, old city infrastructure, etc?

How much water is actually available?

Are water use decisions consistent?

Thanks for your excellent work.

Brad Sauer



Patrick Byorth, *Staff Attorney*
Montana Water Project

Dr. Susan J. Gilbertz
Yellowstone BAC Coordinator
Montana State University — Billings
1500 University Drive
Billings, MT 59101

May 30, 2013

RE: Yellowstone River Planning Basin – Scoping

Dear Dr. Gilbertz,

Trout Unlimited, Inc. (TU) has a long history of working in the Yellowstone River Basin and throughout Montana to protect, restore, reconnect and sustain Montana's treasured cold-water fisheries. Unfortunately, TU has been unable to participate in the Basin Advisory Council (BAC) or attend the scoping meetings earlier in May. However, we feel it is imperative that we voice a concern that maintaining and enhancing instream flows in the mainstem and tributaries be a priority focus of the BAC as it develops a Yellowstone basin plan.

TU's Montana Water Project has been diligently working on instream flow issues in Montana since the late 1990's. Working alongside Montana Fish, Wildlife, and Parks (FWP), TU has focused its efforts on reforming water law and policy as well as implementing on the ground instream flow leases and transactions. While our work has been a struggle at times, Montana law and administrative agencies clearly recognize instream flows as a beneficial use of Montana's water and a critical habitat feature for our diverse fish and wildlife. In fact, earlier versions of Montana's Water Plan recognized instream flow as an important use of water in this 1989 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 uses of water."

Interestingly, this statement was made at the dawning of water leasing as a legal tool for protecting and enhancing instream flows. Since that time, water leasing for instream flows evolved from a pilot study authorizing FWP to lease instream flows on a few streams to the current framework that allows private entities to lease water for instream flows to benefit fisheries. FWP, TU and the Clark Fork Coalition have each employed water leases to restore coldwater fisheries across the state. In the Yellowstone Basin, water leases have restored flows in tributary streams formerly dewatered for decades and successfully restored spawning runs and populations of Yellowstone cutthroat trout. An early lease in Big Creek that rewaters a mile of channel, dewatered for over 60 years, resulted in an increase in spawning cutthroat trout from a handful to hundreds, and increasing production of young fry from a few to nearly 20,000 annually. Most recently, TU secured a second water lease on the North Fork of Fridley Creek that has successfully been reconnected to the Yellowstone after decades of terminating in an irrigation canal. These leases like many statewide were the product of a collaborative process between willing irrigators and conservationists. TU continues to work with the Upper Yellowstone Watershed Basin and Mill

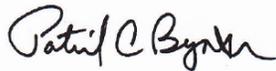
Trout Unlimited: America's Leading Coldwater Fisheries Conservation Organization
321 East Main Street, Suite 411, Bozeman, MT 59715
(406) 522-7291 ext. 100 • Fax: (406) 522-7695 • email: pbyorth@tu.org • www.tu.org

Creek water users to find solutions to severe dewatering issues that respect water rights and restore damaged fisheries. We firmly believe that we can creatively balance water supply with agricultural needs and fisheries, but complex projects require time, agency support, and resources.

While many water leases have been implemented in the Yellowstone basin, the potential for further rewatering projects is boundless. Indeed, the policy vision of 1989 has been realized: instream flow mechanisms are available, functional and avoid adversely effecting water rights. Factors limiting success of instream flow restoration include financing available for water leasing, procedural hurdles, and public misconceptions about water leasing.

TU respectfully urges the Yellowstone BAC to include consideration of the importance of instream flows as it develops recommendations for the basin water plan. As you are aware, preserving instream flow is not only good for fish and wildlife habitat, but healthy flows are also an economic force producing investment returns for municipalities dealing with water supply and treatment issues, as well as the economic benefits from fishing, boating, recreation and quality of life. Furthermore, we hope you will develop a new vision for instream flow that includes water leasing as a key tool for restoring instream flow and for carving a secure future for the Yellowstone, its tributaries, and the fish and wildlife treasures they support. Thanks for your consideration.

Sincerely,



Patrick A. Byorth

C: Jim Robinson, DNRC, Laura Ziemer, TU, Bruce Farling Montana TU.



May 31, 2013

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Re: Yellowstone Basin Advisory Council scoping on the Montana Water Supply Initiative

Thank you for the opportunity to comment on the Yellowstone Basin Advisory Council's scoping process for the Montana Water Supply Initiative. Northern Plains Resource Council is a grassroots conservation and family agriculture organization that organizes Montana citizens to protect water quality, family farms and ranches, and our unique quality of life. Many of Northern Plains' members reside in eastern Montana where the annual precipitation is between 10 to 14 inches each year. Water is vital to their survival, and we completely support a state water budget.

However, we want to highlight a few major concerns that we believe need to be considered during this process.

Water quality

First, we are concerned about threats to water quality from oil and gas development. Although the state has regulations that provide for minimal chemical disclosure, most of the chemicals used in oil and gas drilling are kept secret. This makes it extremely hard to do any solid baseline water testing. Baseline testing is essential to prove that clean water existed before oil and gas development. The state of Wyoming, through their 2013 energy policy entitled "Leading the Charge," is recommending "baseline pre-development water quality testing." According to the plan, "this initiative seeks to establish minimum baseline water quality testing requirements and standards for oil and gas operators prior to development." The state of Montana, potentially through the Montana Water Supply Initiative, should develop a similar approach to gauge the quality of our water resources.

Even if baseline testing is implemented, the water supply can still become contaminated by irresponsible practices of oil and gas companies. Although the current public debate focuses on contamination from hydraulic fracturing, other deficiencies such as faulty well casing, cement failure, and surface spills are all major threats to water quality and are the most common ways that water becomes contaminated in drilling operations. Earthjustice has documented with an interactive map many of the known contamination cases across the US.¹ However, since the water contamination that the Fort Peck Indian Tribe is facing from old oil wells is not on the map, it is certain that other incidents are also not accounted for.

There are ways to prevent some of this pollution and neighboring states such as North Dakota have already implemented regulations to do so. According to a recently released report by the Western Organization of Resource Councils (*Gone for Good: Fracking and Water Loss in the West*, 2013), “after 47 reserve pits overflowed during the spring thaw of 2011, the state Department of Mineral Resources initiated new rules that essentially eliminated reserve pits at the sites of fracked wells.”² This water management practice is called a closed-loop system and is a very effective practice for preventing some water pollution. Interestingly, despite this step forward, the filter socks that have been straining frack water have been exceeding federal radioactivity limits. This is an entirely new threat to our water system and, since the Montana Bakken stems from the same formation, it is a likely threat in Montana as well.

Overall, although it may not be up to the YBAC to prevent contamination from oil and gas, it should be accounted for as a possibility in the proposed water budget and a quantity of fresh water should be reserved in case of an emergency. If any of our groundwater or surface water is contaminated by drilling chemicals, fracking chemicals, or radioactive waste water there is no turning back. We need to be extremely careful during this process and make sure that the state is prepared to protect our supplies of clean water.

Water quantity

On the other side of the water issue are quantity concerns. Oil and gas development uses large amounts of fresh water. However, there is no single state agency that documents the amount of water used and lost to the system by oil and gas development.

In the 2013 Wyoming energy policy report, the state is requiring a “unified groundwater database” that “will share groundwater data that has been collected by water quality, land quality, and solid and hazardous waste divisions within the agency. This system will lead to eliminating redundant data collection, reducing data collection needs, reducing costs, and will enable more informed decision making.” Montana also needs to consider this approach. We need to know exactly what our resources are in order for a budget system to work.

As part of this approach, Montana needs to document the water lost to oil and gas drilling operations. As mentioned above, the WORC report *Gone for Good* states that EPA believes between 70 and 140 billion gallons of water are used each year for fracking. This water is

¹ “Fracking Across the United States”, Earthjustice, May 2011

<http://earthjustice.org/features/campaigns/fracking-across-the-united-states>

² “Gone for Good: Fracking and Water Loss in the West,” Western Organization of Resource Councils, 2013.

http://worc.org/userfiles/file/Oil%20Gas%20Coalbed%20Methane/Hydraulic%20Fracturing/Gone_for_Good.pdf

completely lost to the system since it is contaminated with drilling and fracking chemicals and much of it is disposed of into deep-injection wells. This is in contrast to agricultural water use. Agriculture is the largest water user in Montana, but the water used is sent right back into the overall water cycle. This is not the case with water used for oil and gas development.

To alleviate some of this water loss from oil and gas operations, the State should require recycling of drilling and frack water. Oil and gas companies have the technology to do this and, in Pennsylvania where there are only a few injection wells in the state and no hazardous waste water treatment facilities, water treatment companies are in high demand. Unfortunately, in Montana, deep injecting the water is cheaper at this point despite the fact that the water is lost to the system.

Water marketing

On top of other concerns, our state is currently promoting water marketing without truly gauging how much water is available. The 2013 Legislature enacted HB 37 that would allow for temporary water leasing. We believe this bill incentivizes leasing any excess water that water rights holders may have. This bill was specifically developed in response to illegal use and demand from the oil and gas industry. During the summer of 2012, the Department of Natural Resources and Conservation (DNRC) discovered a number of illegal water depots in operation³. Instead of enforcing the current law, however, the DNRC pushed HB 37 forward. As water comes into higher demand, water marketing will become a bigger concern. The YBAC needs to strongly consider this issue in its water budget.

The possibility that agricultural water rights will be permanently changed into rights for oil and gas use should also be carefully documented and considered. As mentioned above, agricultural water uses return water to the water cycle but oil and gas uses contaminate the water and pump it into deep injection wells. If a large number of agricultural rights are transferred to oil and gas uses, the amount of available water in the system will decrease.

Coal bed methane

On the coal bed methane front, we still have strong concerns about the quality of discharge water coming from Wyoming. Wyoming needs to meet Montana's water quality standards for electrical conductivity (EC) and sodium absorption ratio (SAR) in order to protect downstream agricultural uses. In addition, water quantity issues and groundwater withdrawal should be of concern to the YBAC. The Bureau of Land Management's recently released draft Miles City Resource Management plan states that 1,100 new wells will be drilled in addition to the 1,100 already in existence⁴. Each of those wells involves removing 16,000 gallons of water per day from the coal bed aquifer. Studies in the area have shown that the groundwater table is not being recharged as quickly, if at all, as anticipated by the state. Methane drilling will be a problem well into the future, both for the quality and quantity of water in south eastern Montana.

³ Water Policy Interim Committee Meeting Audio, July 12, 2012 <http://leg.mt.gov/css/Committees/Interim/2011-2012/Water-Policy/Meeting-Documents/meetings.asp#meeting6>

⁴ "Minerals Appendix" p.MIN-89, Miles City Draft Resource Management Plan, 2013 http://www.blm.gov/pgdata/etc/medialib/blm/mt/field_offices/miles_city/rmp/draft_rmp.Par.91236.File.dat/Appendices.pdf

Coal

Finally, we have concerns about the impact of proposed coal development on the aquifers of Montana. In particular, the proposed Otter Creek coal mine near Ashland is located in an alluvial valley floor. If mining is undertaken, strip mining will eliminate this important resource in an agricultural valley and impact the area ranches and farms that depend on consistent access to water resources. This is just one more threat to the dry prairie regions of eastern Montana. When added to the other threats, it may be the tipping point for the region.

In the end, the state will have a long path to ensure that our water resources are properly documented and are protected from contamination and over-withdrawal. When discussing the current status of the water in these watersheds, historical uses, such as agriculture and recreation must be considered. How will current and future impacts from new development such as oil and gas or other industry impact these uses? The Yellowstone Basin Advisory Council and the Montana Water Supply Initiative have their work cut out for them in order to balance the competing water interests in Montana, but we hope that you will take our comments and concerns into account.

Thank you again for the opportunity to comment and please contact us at 406-248-1154 if you have questions.

Sincerely,



Walter Archer, Chair
Northern Plains Resource Council

Mack Cole, Chairman
Yellowstone Basin Advisory Council
7 Cole Lane
Forsyth, MT 59327

Dear Chairman Cole,

We have concerns about the new state water planning process for the Yellowstone River Basin. Please consider our comments in your process.

For state water planning purposes, the DNRC (**not** the revised state water plan statute) split the Missouri River Basin into two sections, the upper and lower, for some logical reasons that also apply in the Yellowstone. In Montana, the Yellowstone River is not much shorter than the Missouri River, and actually discharges more water to North Dakota than does the Missouri.

The Yellowstone is essentially split into two sections by virtue of the Yellowstone River Compact with Wyoming and North Dakota. The reason for this is that the Wyoming contribution to the Yellowstone that is affected by the Compact begins at the confluence of the Clarks Fork near and upstream of Billings, and includes all the other interstate tributaries downstream of that point. But the Compact does not significantly affect the waters of the Yellowstone upstream of the Clarks Fork—it certainly hasn't historically. In addition, somewhere near the Clarks Fork, the Yellowstone begins to become more of a warm water fishery, with species that do not occur upstream. Finally, the Yellowstone River receives in the neighborhood of half of its waters above the Clarks Fork, which also makes this a logical dividing point.

In addition, several of the BAC identified issues are split in their importance between the basins. For example, municipal issues are not very significant in the Upper Basin, but are in the Lower. Instream fishery issues are probably a bigger concern in the Upper Basin than in the Lower. Invasive species are not near the concern in the Upper that they are in the Lower unless you want to include aspens and cottonwoods (or noxious weeds such as leafy spurge and spotted knapweed, especially their proliferation on the mostly state-owned islands and banks with a resulting seed source that finds its way downstream). Likewise, water for industry is not as big an issue in the Upper Basin. Finally, drought issues are quite different in the two basins.

We in the Upper Yellowstone River Basin are very concerned that at some point in the future, Lower Basin interests may look to the Upper Basin's water rights to satisfy their needs (instead of to the headwaters rivers in Wyoming that are part of the Compact). We believe that could compromise constitutionally protected water rights in the Upper Basin, and the long history of use that they represent, use that has heretofore never been challenged by downstream interests. This concern is magnified by the fact that only about one fifth or less of the Yellowstone Basin Advisory Council membership comes from the Upper Yellowstone area. For these reasons, we strongly urge the Council to split consideration of issues between the Upper and Lower Basins, with the dividing line at the Clarks Fork confluence. Like the Missouri, they should be treated as two separate basins, and we believe that

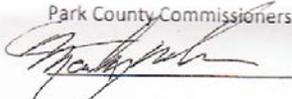
doing so would better respect the integrity of Upper Basin water rights and coincidentally, would also make the Council's work much more manageable.

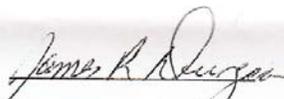
If the Council is unwilling to split the Yellowstone into Upper and Lower Basins, we strongly urge you at least to **not** make recommendations that would pit the Upper Basin against the Lower Basin (or visa versa). That would not serve either basin, or Montana, well.

Thank you for your consideration.

Sincerely,

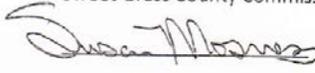
Park County Commissioners:


Marty Malone, Chairman

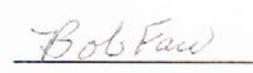

Jim Durgan


Clint Tinsley

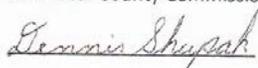
Sweet Grass County Commissioners:

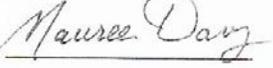

Susan Mosness, Chairman


William Wallace


Bob Faw

Stillwater County Commissioners:


Dennis Shupak, Chairman


Maureen Davey


Gerald "Jerry" Dell

Mack Cole, Chairman
Yellowstone Basin Advisory Council
7 Cole LN
Forsyth, MT 59327

Dear Chairman Cole,

We would like to see the Yellowstone Basin Divided into the Upper and Lower with dividing being at the Clarksfork Confluence. There are a lot of issues that need to be addressed separately.

We would encourage more off stream storage from high water run off as well as the continued system of protected water rights. These both have a long history of working, so no need to change them only to make things more complicated.

Thank you for your consideration.

Beartooth Stock Association