

**Upper Clark Fork River Basin Steering Committee**  
**Meeting Summary**  
**March 10, 2011**

**Introductions**

Gerald Mueller, members of the Upper Clark Fork River Basin Steering Committee (Steering Committee), and others in attendance introduced themselves. Those in attendance included:

<b>Members</b>	<b>Group/Organization Represented</b>
Bob Benson	Clark Fork Coalition
Darryl Barton	City of Deer Lodge
Jim Quigley	Little Blackfoot River
Jim Dinsmore	Granite Conservation District
Jason Lindstrom	Montana Department of Fish, Wildlife and Parks (DFWP) for Pat Saffel

**Agency**

Ann Schwend                      Department of Natural Resources and Conservation (DNRC)

**Staff**

Gerald Mueller                      Facilitator

**Agenda**

- Review February 7, 2011 Meeting Summary
- Updates
  - Steering Committee Funding
  - Other Organizations
- Fish and Wildlife Protection Plan for Montana’s Blackfoot River
- 2011 Water Legislation
- Preliminary Draft of Chapters 1, 2, and 4 of the Plan Revision
- Public Comment
- Next Meeting

**February 7, 2011 Meeting Summary**

The Steering Committee made no change to this meeting summary.

**Updates**

Steering Committee Funding - Gerald Mueller reported on the Task Force funding, including its FY 10-11 budget, FY2010 expenditures, FY2011 expenditures, and FY 12-13 annual budget using the following table. He stated that he has shared this information with Senator Lewis, who is a Task Force member and Vice Chairman of Senate Finance and Claims. Mr. Mueller met with Senator Lewis after the February 7, 2011 joint meeting of the Steering Committee and the Clark Fork River Basin Task Force. Senator Lewis indicated a willingness to consider Steering Committee funding when HB2 is considered in Finance and Claims.

Category	FY 10-11 Budget	FY2010 Expenditures	FY2011 Expenditures	FY 12-13 Annual Budget
Facilitation Services	\$10,000.00	\$10,000.00	\$2,500.00	\$10,000.00
Meeting Expenses	\$900.00	\$525.00	\$81.80	\$900.00
Member Mileage and Meals	\$3,000.00	\$322.19	\$36.00	\$500.00
Publications and Education	\$2,100.00	\$322.54	\$0.00	\$600.00
Other	\$996.00	\$0.00	\$0.00	\$0.00
Totals	\$16,996.00	\$11,169.73	\$2,617.80	\$12,000.00

*Comment by Ann Schwend - Given the absence of any budget for the coming biennium and the pending basin water management plan revision, the Steering Committee might consider applying for a DNRC Watershed Planning Assistance Program (WPAG) grant. These grants are available to watershed groups to support watershed coordination expenses. Approximately \$40,000 is available for grants for the next grant cycle. Applications must be received by the end of April 2011.*

Response - The Steering Committee did have funding support from this program during 2000 - 2004. Maximum grants from this program are for \$10,000 annually. I am applying for a WPAG grant to support the Granite Headwaters Watershed Group, another group that I facilitate. If it were to make an application, the Steering Committee would have to do so through a conservation district.

*Question - What about combining the Steering Committee and the Clark Fork River Basin Task Force (Task Force), perhaps by making the Steering Committee a Task Force committee?*

Answer - The DNRC has suggested such a combination; however, the Steering Committee discussed this option and rejected it in the past.

*Comment - The Task Force has had an emphasis on Flathead related water issues. Combining the two would risk loss of the Steering Committee's local identity. I continue to prefer that they be kept separate.*

Response - The Task Force is seeking a Renewable Resources Grant and Loan Program grant to support its activities during the FY2012-13. The DNRC recommended approving only \$32,000 of the Task Force's \$72,000 request, suggesting that the Water Resources Division provide the group's facilitation. The Division has stated that it does not have the staff or budget to take on this role. Task Force funding is therefore unsettled. We can revisit the possibility of combining the Steering Committee and the Task Force after the legislature makes budget decisions affecting the two groups.

*Comment - Since Granite Conservation District is sponsoring the Granite Headwaters Watershed Group application, you might contact John Hollenback to see if Deer Lodge Valley Conservation District would sponsor the Steering Committee WPAG grant.*

***Steering Committee Action - Those members of the Steering Committee present at this meeting agreed to pursue a WPAP grant if Deer Lodge Conservation District agrees to be the sponsor. Mr. Mueller will look into the grant possibility and draft the application.***

Other Organizations - There were no additional reports from other organizations.

## **Fish and Wildlife Protection Plan for Montana's Blackfoot River**

Stan Bradshaw had agreed to address this agenda item. Because Mr. Bradshaw is not in attendance today, this item will be postponed until the next meeting.

## **2011 Water Legislation**

Gerald Mueller discussed the following bills under consideration in the present legislative session.

- HB11, Treasure State Fund transfer - Did not pass the Long-Range Planning Subcommittee. The vote on a "do pass" motion failed with 3 yes and 5 no, so the bill will move to the full Appropriations Committee with a "do not pass" recommendation.
- HB24, Water marketing bill - Passed House; concurred in by Senate Natural Resources.
- HB28, Septic mixing zones - Passed House; Senate Natural Resources hearing on March 9.
- HB433, Exempt well bill - Missed transmittal deadline, and is therefore likely dead.
- HB602, Exempt well study bill - Referred to Appropriations Committee.
- SB36, Court fees and costs - Passed Senate; concurred in by House Judiciary.
- SB103, Water permit exemption for heating and cooling - Passed Senate; House Natural Resources hearing on March 4.
- SB343, Aquatic invasive species bill - Senate Finance and Claims hearing on March 4.

In addition to SB343, the legislature will apparently be considering two other bills that address AIS, one of which, LC2199, has not been introduced. The three AIS bills are:

- SB343, aquatic invasive species (AIS) bill, introduced by Senator Jackson. This bill cleans up existing statutory language related to inspection and use of quarantine.
- SB363, introduced by Senator Brenden. This bill requires a 10% surcharge on all DFWP land transactions (including easements). The surcharge funds would be deposited in a DFWP account to fund invasive species control, both terrestrial and aquatic.
- LC 2199, in drafting. This bill apparently would transfer AIS programmatic authority for to DFWP, but specify some role for DNRC in AIS management. Surplus funds from the noxious weed trust fund may be given directly to conservation districts for aquatic weed control.

## **Preliminary Draft of Chapters 1, 2, and 4 of the Plan Revision**

Gerald Mueller passed out and reviewed preliminary drafts of chapters 1, 2, and 4 of the revised management plan. See Appendix 1 below. He asked for comments from Steering Committee members on these drafts. Highlights of the discussion and comments follow.

- Section C of chapter 2 should be labeled "Other Organizations" rather than Other Watershed Groups.

- The other organizations covered in this section should include the Granite Headwaters Watershed Group, Trout Unlimited, and the Clark Fork River Technical Assistance Committee.
- The Steering Committee should at a future meeting discuss who manages the Georgetown-Silver Lake system and the purposes for which it is managed. Butte-Silver Bow is apparently preparing a master plan for this system.
- The Milltown Dam issue that will be addressed in chapter 5 should address management alternatives for this right and their impacts on agricultural water use.
- Use of a water right fee to fund water administration and management activities by the state should be considered in the revised plan.

### **Public Comment**

There was no additional public comment.

### **Next Meeting**

The next meeting was scheduled for Thursday, May 5, 2011 at St. Mary's Center in Deer Lodge. The agenda may include the master plan for the Georgetown-Silver Lake system as well as revisions to the preliminary drafts of chapters 1, 2, and 4 of the revised plan.

# PRELIMINARY DRAFT

## Appendix 1

### Upper Clark Fork River Basin Water Management Plan 2012 Revision

#### Chapter I - Goals of the Plan Revision

In 1994, the Upper Clark Fork River Basin Steering Committee (Steering Committee) adopted the *Upper Clark Fork River Basin Water Management Plan (Plan)*<sup>1</sup> and presented it to the Montana legislature and governor. It did so pursuant to a state statute, 85-2-338 MCA. In 1995, the Montana Department of Natural Resources and Conservation (DNRC) adopted the *Plan* as a separate chapter of the Montana State Water Plan.<sup>2</sup> The goals of the 1994 *Plan* were twofold: to provide for continued planning and management of the waters of the upper Clark Fork River basin rooted at the local level; and to balance all of the basin's beneficial water uses. The upper Clark Fork River basin means the area drained by the Clark Fork River and its tributaries above the confluence of the Blackfoot River with the Clark Fork River mainstem. See Figure 1.

The 2012 *Plan* revision focuses on an unmet basin need, a basin stream flow plan to compliment the basin remediation and restoration plans. As will be discussed in chapter 3, planning efforts have been and continue to be underway aimed at remediation of the of injuries to the natural resources of the upper Clark Fork River basin and to the services the resources provide caused by over 100 years of mining and smelting, restoration of those resources and services, at development of Total Maximum Daily Load (TMDL) and framework water quality restoration for impaired tributaries of the upper Clark Fork River, and at specific projects to increase and protect the instream flow of the river mainstem and its tributaries. These planning efforts have not developed an overall plan for basin stream flow specifying target flows, water sources to meet the targets, or a basin drought plan. This *Plan* revision provides a basin wide flow plan in chapter 6. In chapter 3, it updates information about basin hydrology, demographic and land use changes, water uses, and the water measurement and supply forecasting system. In chapter 4, it summarizes Montana's water regulatory framework. Chapter 7 addresses a number of specific water management issues. Chapter 8 sets forth recommendations to implement this revision. Before turning to these topics, the revised *Plan* sets the stage in chapter 2 by discussing the history of the Steering Committee, the status of recommendations of the 1994 *Plan*, and identifies other basin watershed and water planning groups.

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<sup>1</sup>The 1994 *Plan* is available at: [http://dnrc.mt.gov/wrd/water\\_mgmt/montana\\_state\\_waterplan/pdfs/upper\\_clarkforkriverbasin\\_wa termgmt\\_plan.pdf](http://dnrc.mt.gov/wrd/water_mgmt/montana_state_waterplan/pdfs/upper_clarkforkriverbasin_wa termgmt_plan.pdf).

<sup>2</sup>See: [http://www.dnrc.mt.gov/wrd/water\\_mgmt/montana\\_state\\_waterplan/default.asp](http://www.dnrc.mt.gov/wrd/water_mgmt/montana_state_waterplan/default.asp).

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## Upper Clark Fork River Basin Water Management Plan 2012 Revision

### Chapter II - History

#### A. Steering Committee

The Steering Committee was created in 1991 by enactment of 85-2-338 MCA. Its members were initially all appointed by the DNRC director. In 1997, the statute was changed at the Steering Committee's request to allow the basin's counties and conservation districts and the DNRC director to appoint Steering Committee members. Each of the basin's six counties and each of the six conservation districts was authorized to appoint one member. The DNRC director appointments must ensure that ensure that the Steering Committee includes a balance of affected basin interests. Current members are listed in Table 1.

Since its formation, the Steering Committee has successfully sought changes to Montana statutes and administrative rules related to water management. Statutory changes addressed the closure of the basin to most new surface water rights, conjunctive surface and ground water management, and water leasing. At the Steering Committee's request, DNRC issued a declaratory ruling that no one has a right to the use of water discharged as effluent from a sewage treatment plant, thereby making land application of nutrient laden sewage treatment plant effluent possible. Also at the Steering Committee's request, the Natural Resources Conservation Service modified its EQIP application material to ensure coordination with DNRC water rights administration. The Steering Committee has authored a number of policy papers, the titles of which are: "Conservancy District, An Option for the Management of Georgetown Lake Dam", "White Paper on the Montana Water Rights Adjudication", "How Will Completion of the Adjudication Affect Water Management in Montana?", and "Milltown Dam Water Right Paper". The Steering Committee has conducted, commissioned or otherwise helped to initiate studies or surveys of several subjects, including the basin's ground water resources, return flows in the Flint Creek Valley, a Flint Creek watershed history, measurements of losses in the ditches that affect flows in the mainstem of the Clark Fork River in the upper Deer Lodge Valley, the experience of water right holders with the state-wide water right adjudication process and their expectations after this process is completed, the *Upper Clark Fork River Flow Study*, the adequacy of the existing water rights held by basin cities and towns to provide for existing and future municipal and domestic water uses, and current water management by basin water commissioners. Through well over a hundred publicly noticed and open meetings and other subbasin meetings, basin-wide news letters, and other activities, the Steering Committee has provided education on numerous water quantity, quality, and fishery related topics including water law, water rights, the on-going state water rights adjudication, the public trust doctrine, basin water rights closure, wetland water rights, the basin's ground water resources, the status of the basin's water supply infrastructure, basin annual water supply, basin water use, basin hydropower production, water quality standards, the state TMDL law and planning process, water rights leasing for instream flow, grazing best management practices, utility irrigation efficiency programs, fish habitat needs and restoration projects, fish screens, irrigation return flows, the basin Superfund project, and the Natural Resource Damage Program (NRDP). More specific information about Steering Committee accomplishments including copies of its policy papers, studies, and meeting summaries and presentations are available on the Steering Committee web page at: [http://www.dnrc.mt.gov/wrd/water\\_mgmt/clarkfork\\_steeringcomm/default.asp](http://www.dnrc.mt.gov/wrd/water_mgmt/clarkfork_steeringcomm/default.asp).

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## Upper Clark Fork River Basin Steering Committee Members

Name	Area or Organization Represented	Appointment Entity	Date Appointed
Darryl Barton	City of Deer Lodge	DNRC Director	2010
Bob Benson	Clark Fork-Pend Oreille Coalition	DNRC Director	1997
Stan Bradshaw	Trout Unlimited	DNRC Director	1991
Bob Bushnell	Lincoln Area Rancher	Lewis and Clark Conservation District	2010
Maureen Connor	Granite County Commissioner	Granite County Commission	2010
Don Despain	Deer Lodge Valley	Deer Lodge Valley Conservation District	2010
Jim Dinsmore	Hall Rancher	Granite Conservation District	1991
Holly Franz	PPL Montana	DNRC Director	1991
Carol Fox	Natural Resource Damage Program	DNRC Director	2003
Rebecca Guay	Anaconda-Deer Lodge County	Anaconda-Deer Lodge County Commission	2010
Michele Landquist	Missoula County Commissioner	Missoula County Commission	2010
Sen. Dave Lewis	Lewis and Clark County	Lewis and Clark County Commission	2006
Jim C. Quigley	Little Blackfoot Rancher	DNRC Director	1991
Pat Saffel	DFWP	DNRC Director	2003
Marci Sheehan	ARCO	DNRC Director	2007
Rep. John Sesso	Butte/Silver Bow Planner	Butte/Silver Bow Commission	1997
Jules Waber	Powell County Superintendent of Schools	Powell County Commission	1997

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### B. 1994 *Plan* Recommendation Status

The 1994 *Plan* made recommendations addressing ten topics: basin closure, an ongoing water planning and management mechanism, protection of existing water rights, the water adjudication system, implementing adjudication decrees, water storage, water quality, the fishery, an in-stream flow pilot study, and water reservations.<sup>1</sup> The status of implementation of the recommendations is summarized in the following table and will now be discussed.

**Table 2 - Specific Tasks Described in the Management Plan**

<u>Proposed Action (location in plan)</u>	<u>Status*</u>
1) Basin Closure (p. 50)	complete
2) On-going Water Planning Mechanism (p. 51)	complete (pending)
3) Protection of Existing Water Rights (p.52)	complete
4) Water Adjudication System (p.52) USFS compact as a priority	complete
5) Implementing Adjudication Decrees (p.53)	partial
6) Water Storage (54) (a) Structural (b) Non-structural	not complete partial not complete
7) Water Quality (p.55) (a) Toxic Metals (b) Nutrient Pollution (c) Non-point pollution strategy	<hr/> partial partial
8) Fishery (p.57) a) UCFSC provide communications link b) DFWP to pursue opportunities for instream flows	complete (pending) partial
9) Instream flow Pilot study (p.59)	complete
10) Water reservations (p.61)	complete
* "Complete" means a discreet task has been performed, or that the Steering Committee has continued to perform an ongoing task, but the task continues into the future (pending). "Not complete" means a task has not been started "Partial" means part of a discreet task or some part of a series of tasks has been completed, but work remains to be done	

Basin Closure - The *Plan* recommended that the basin be closed to most new surface water right permits and new ground water permits. The 1995 legislature closed the upper Clark Fork River

<sup>1</sup>See Chapter I of the *Plan*, pp. 4 - 7.

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basin to most new surface water rights, but opted not to close basin ground water. The legislature did require, at the Steering Committee's request, that an applicant for a ground water permit submit a report prepared by a professional engineer or hydrologist verifying that the source of the ground water is not part of or substantially or directly connected to surface water. This requirement anticipated the hydrogeologic study requirements adopted in 2007 in HB831.

On-going Water Planning Mechanism - The 1995 legislature adopted the *Plan's* recommendation that it provide for an on-going basin water planning and management mechanism including a basin-wide committee and watershed committees to address specific purposes<sup>2</sup> in its entirety, and added some additional tasks for the Steering Committee:

- Review the Upper Clark Fork River basin closure and exceptions as provided in [85-2-336](#) no less than every 5 years after April 14, 1995, and make recommendations to the legislature regarding necessary changes;
- Prepare and submit a report concerning the relationship between surface water and ground water and the cumulative impacts of ground water withdrawals in each subbasin; and
- Identify the potential beneficiaries of and a funding mechanism for new and expanded water storage sites.

The first of the additional tasks is an ongoing obligation, and the Steering Committee has complied with it every five years, most recently in 2010. The Steering Committee used an EPA grant to conduct studies of the basin's groundwater resources, including management of groundwater resources in other western states and summarizing records of existing groundwater development. One consequence of the Steering Committee's ground water study was the development by the Natural Resource Information System (NRIS) of the template for the water right search engine. The third additional task will be discussed below.

In 2001, in response to the Steering Committee's request that the state not walk away from a negotiated agreement between the state and Avista concerning Avista's hydropower water rights and Clark Fork basin water rights holders junior to Avista, Governor Racicot directed DNRC to draft legislation authorizing creation of a Clark Fork Basin Task Force charged with preparing a water management plan for the entire Clark Fork River basin. The legislature enacted this legislation.

Protection of Existing Water Rights - The Steering Committee has been vigilant in ensuring that actions taken by the legislature or any executive branch agency in response to the *Plan* have been predicated on preserving existing water rights, permits and certificates in effect as of July 1, 1995.

Water Adjudication System - The *Plan* recommended that the Reserved Rights Compact Commission make negotiation of a compact with the United States Forest Service a high priority. The Forest Service Reserved Rights Compact was completed and ratified by the 2007 legislature. In 2004, the Steering Committee also prepared a policy paper on the Montana water right adjudication. This paper helped stimulate action by the legislature to increase funding to the DNRC and the Montana Water Court to speed completion of the state-wide water rights

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<sup>2</sup>A complete list of Steering Committee duties is found at 85-2-338(5) MCA.

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adjudication.

Implementing Adjudication Decrees - The *Plan* recommended that the Steering Committee begin considering adjudication issues that will emerge as the adjudication comes to completion such as cost, funding, staffing, practicality, accuracy, and fairness as those issues relate to a future water right enforcement system. In 2006, the Steering Committee issued a policy paper entitled, “How Will Completion of the Adjudication Affect Water Management in Montana?” The paper’s purpose was to stimulate discussion by Montana water users, water managers, and policy makers of changes that will result from completion of the water rights adjudication as well as the implications of these changes so that appropriate responses to them can be identified, discussed and put in place before the final water rights decrees are issued.

Structural and Non-Structural Water Storage - In preparing the *Plan*, a committee of the Steering Committee ranked the potential for increasing storage at new and existing basin sites. Two of those recommended were evaluated by the Soil Conservation Service. The Steering Committee discussed what appeared to be one of the most promising of the existing sites, upper Douglas Creek, with local land owners, who chose not pursue restoration of a dam on the site. The Steering Committee’s work helped stimulate focus on the Silver Lake water system which was later acquired by Butte-Silver Bow pursuant to a 1996 litigation settlement. As part of the settlement, ARCO received the right to use a substantial part of the Silver Lake storage capacity for “environmental remediation.” Three Steering Committee members, Trout Unlimited, ARCO, and Butte-Silver Bow, managed the delivery of flows from Silver Lake down Warm Springs Creek and into the upper Clark Fork for a number of years. While that effort did maintain flows in Warm Springs Creek, a subsequent acquisition by ARCO and the Montana Department of Fish, Wildlife and Parks (DFWP) of irrigation rights off Warm Springs Creek has significantly reduced the need for Silver Lake releases in late summer. An opportunity for other environmental uses of Silver Lake water therefore remains. Regarding non-structural storage, the Steering Committee promoted the Flint Creek return flow study and similar studies in other watersheds throughout the basin.

Water Quality - The *Plan* recommendations addressed water pollution under three categories: toxic metals and stream dewatering; nutrients and noxious aquatic plants; and nonpoint source pollution.

Regarding the first of these, the *Plan* stated, “Proposed new storage or other management activities that could change the flow regime in the Clark Fork River must incorporate careful consideration of impacts on water quality and, particularly, toxic metal concentrations.” Until the Natural Resources Damage litigation was settled, state agencies discouraged work on mainstem river flows. Settlement occurred in 2008.

The second category largely addressed the municipal contribution to nutrient pollution to the upper Clark Fork River and recommended that the Steering Committee “encourage and assist” Deer Lodge, the National Park Service, and the Montana Department of Health and Environmental Science, now the Montana Department of Environmental Quality (DEQ), among others, in implementing land-application sewage treatment to reduce the discharge of nutrients in the stream. The Steering Committee, through the efforts of its members actively assisted the City of Deer Lodge in securing a declaratory ruling that helped pave the way for its land

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application effort.

The primary recommendation in the *Plan* regarding the third category was that the Steering Committee encourage the watersheds within the basin to implement voluntary local nonpoint pollution control strategies. At the time of the *Plan's* adoption, no a legal mechanism was in place to quantify and begin to address nonpoint pollution. Since then, DEQ, implementing federal criteria, has embarked upon the identification of Total Maximum Daily Loads (TMDL) of pollutants emanating from nonpoint sources. The Steering Committee assisted DEQ's efforts to implement its TMDL responsibilities in the basin by co-sponsoring meetings on the 303(d) list and pilot tests of voluntary water quality planning on Racetrack and Fred Burr Creeks. A major vehicle for gathering the data for identifying TMDLs has been watershed specific inventory efforts, often implemented in cooperation with local watershed groups. For example, in the Blackfoot basin, the Blackfoot Challenge lead the way in establishing TMDLs for the entire Blackfoot, and now, in cooperation with many landowners and other entities, is embarking on a series of restoration efforts to reduce the entrainment of pollutants into its surface waters. Other basins that have embarked on similar efforts include the Upper Clark Fork, for which a TMDL was recently completed, and Flint Creek.

Fishery - The fishery section of the *Plan* provided a brief overview of a number of factors that impair the fisheries in the upper Clark Fork, including pollutants, dewatering, and other habitat impairment. It recommended that the Steering Committee and local watershed committees provide a communications link through which DFWP and willing landowners can discuss opportunities for leasing water to implement the instream flow pilot study, and for other stream habitat improvement projects. In addition, it recommended that DFWP continue to seek willing landowners to help solve dewatering problems and to use River Restoration Funds and fish kill mitigation money to fund habitat improvement projects on private land.

Since the plan was drafted, the Steering Committee has, on occasion, provided a communication link between DFWP and willing landowners concerning potential water leases. The reality, however, is that the communication usually arises at a much more local level than at the Steering Committee level, so this has not been an important function of the watershed group.

DFWP has been involved in both streamflow and habitat restoration efforts at various levels of intensity throughout the basin - most notably in the Blackfoot watershed, where DFWP has been a leading factor in a nationally recognized habitat restoration effort. More recently, DFWP has conducted tributary fisheries and habitat assessments throughout the upper Clark Fork to assess opportunities for restoration. On the streamflow front, legislation which has allowed private entities to engage in water leasing has taken some of the pressure off of DFWP to complete leases.

The *Plan* included in Appendix D the DFWP list of basin streams that are chronically and periodically dewatered. However, the DFWP list did not include information about the frequency or the severity of the dewatering or its significance to the fishery. In 1999, the Upper Clark Fork River Basin Steering Committee (Steering Committee) developed this information for streams in the Clark Fork basin above Milltown Dam by contracting with a retired DFWP Region 1 fishery manager, Dennis Workman. Workman classified stream reaches according to the degree and frequency of dewatering and the potential effects of this dewatering on the fishery. Based on his analysis, Workman recommended three mainstem reaches for immediate work to relieve the effects of the dewatering. In 2006, the Steering Committee published the *Upper Clark Fork River*

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*Flow Story* which built upon Workman's study. This publication provided a vision of a fishery the quality of Rock Creek or the Blackfoot Rivers and continued agricultural water use. It examined current flow conditions including the location, amount and frequency of dewatering and its importance for the fishery. It continued with the identification of alternatives for addressing the dewatering and enhancing instream flows and ended with an assessment of how these alternatives might be achieved.

Finally, at the time the *Plan* was drafted, three funding sources did not exist: (1) the Future Fisheries Fund, which supplemented the original river restoration fund (and dramatically increased the amount of funding available), (2) the NRD fund; and (3) The Columbia Basin Water Transaction Program (specifically targeting instream flow transactions). These three funding sources have become significant sources of funding for fisheries habitat restoration efforts in the Upper Clark Fork Basin.

Instream Flow Pilot Study - The *Plan* recommended that the legislature pass an instream flow pilot study bill with specific elements setting forth how water can be left instream by existing water right holders or through leases to public or private interests along with a reporting requirement at the end of the ten-year study period. The 1995 legislature gave life to this recommendation, passing not one, but two, instream leasing bills - one for the Clark Fork and one for the entire state. In late 2004, the Steering Committee submitted a ten-year report to the legislature.<sup>3</sup> In the 2005 session, the legislature combined the two statutes into one, and passed a permanent leasing statute.

Water Reservations - The *Plan* recommended continued suspension of the reservation applications filed in 1986 and 1987 for the duration of the basin closure, with the possibility of renewing the reservations if the closure is terminated or if the exemptions to the closure were significantly modified. The 1995 legislature enacted this recommendation.

### C. Other Watershed Groups

In addition to the Steering Committee, several organizations, including the Blackfoot Challenge, the Watershed Restoration Coalition, the Clark Fork Coalition, and the NRDP are active in conducting or funding water management and projects in the basin. This section will list and briefly summary information about them.

Blackfoot Challenge - The Blackfoot Challenge (Challenge) was formed in 1993 and became a nonprofit organization the following year. According to its web page, the Challenge "...is a landowner-based group that coordinates management of the Blackfoot River, its tributaries, and adjacent lands."<sup>4</sup> Its mission, from the same web page, is "...to coordinate efforts that conserve and enhance the natural resources and rural way of life in the Blackfoot River Valley for present and future generations." Challenge members include private landowners, federal and state land managers, local government officials, and corporate landowners, who share a common vision of

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<sup>3</sup>The report is available at:  
[http://dnrc.mt.gov/wrd/water\\_mgmt/clarkfork\\_steeringcomm/default.asp](http://dnrc.mt.gov/wrd/water_mgmt/clarkfork_steeringcomm/default.asp)

<sup>4</sup>See <http://blackfootchallenge.org/Articles/?p=185>.

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how the organization operates in the Blackfoot watershed and can achieve success by building trust, partnerships, and working together. In addition to an executive committee, the Challenge has committees that address conservation, education, forestry, water resources, weeds, and wildlife. In 2000, the Challenge formed the Blackfoot Drought and Water Conservation Committee which developed the Blackfoot Drought Response Plan. The Drought Committee provides Blackfoot water users with the information necessary to prepare for and respond to drought and oversees implementation of the Drought Response Plan during low flow periods. The Drought Committee is comprised of representatives from state and federal agencies, conservation districts, and local conservation organizations and local landowners, irrigators, outfitters, and anglers. Implementation of the drought plan by local irrigators, homeowners, businesses, and fishing outfitters has increased instream flow by an estimated 50 cfs during low flow periods and reduced stress to fish during low flow periods. Fifteen soil moisture monitors have been installed since 2002.<sup>5</sup> The Challenge has completed or underway projects on 37 tributaries involving instream, riparian area and wetland restoration, removal of fish passage barriers, installation of fish screens on irrigation ditches, and movement of feedlots from streams.<sup>6</sup>

Watershed Restoration Coalition - The Watershed Restoration Coalition (WRC) of the Upper Clark Fork is a landowner-led nonprofit organization that restores and monitors water quality, fisheries, and wildlife, as well as protecting the heritage and open space of the Upper Clark Fork River basin. The WRC was founded in 1998 with support from four conservation districts: Deer Lodge Valley, Granite, Mile-High, and Missoula. The WRC has partnered with landowners, stakeholders, and agency representatives to implement Best Management Practices, watershed restoration projects, and environmental stewardship to conserve natural resources vital to the local economy. The WRC and the Montana Department of Environmental Quality developed the Total Maximum Daily Load (TMDL) for the upper Clark Fork Basin, the area from river's confluence with Hoover Creek to its confluence with Silver Bow Creek. The TMDL report, *Upper Clark Fork River Tributaries Sediment, Metals, and Temperature TMDLs and Framework for Water Quality Restoration* was published in March 2010.<sup>7</sup> WRC is developing a restoration plan for all tributaries in this area except for the Little Blackfoot River and Silver Bow Creek. The restoration plan will use three issues, water quality, water quantity, and the fishery, to rank the Clark Fork River tributaries in this area for restoration activities.

Clark Fork Coalition - The Clark Fork Coalition (Coalition) is a private, non-profit organization founded in 1985 that is dedicated to protecting and restoring the Clark Fork River basin, a 22,000-square-mile area draining western Montana and northern Idaho.<sup>8</sup> Among the Coalition's programs is the Vital Rivers Initiative which is targeted at creating partnerships and projects to fix degraded, disconnected, and dewatered creeks and streams. In 2010, the Coalition acquired another non-profit entity, the Montana Water Trust, which since 2002 had worked with basin

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<sup>5</sup>See <http://blackfootchallenge.org/Articles/?cat=13>.

<sup>6</sup>See <http://blackfootchallenge.org/Articles/?p=69>.

<sup>7</sup>The TMDL is available at <http://deq.mt.gov/wqinfo/TMDL/UpperClarkFork/ucfFinal.pdf>.

<sup>8</sup>See <http://www.clarkfork.org/about-us/mission-and-history.html>.

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farmers, irrigation districts and other water users to keep more flow in the state's rivers and streams by helping improve ditch efficiency, buying or leasing unused water rights, and modernizing irrigation systems.

NRDP - The Natural Resource Damage Program (NRDP) was created in 1990 to prepare Montana's lawsuit against the Atlantic Richfield Company (ARCO) for injuries to the natural resources in the upper Clark Fork River basin caused by the release of hazardous substances from historic mining and mineral processing operations in the basin. The state has settled its lawsuit through a series of settlement agreements with ARCO completed in 1999, 2005 and 2008. NRDP administers a grant program using settlement funds for projects that will improve basin water, fish and wildlife resources, public drinking water supplies, and natural resource-based recreational opportunities. NRDP and DFWP have conducted and published assessments of the fishery and wildlife habitat and populations in the basin that can be used to prioritize restoration of these resources, including the *Prioritization of Tributaries in the Upper Clark Fork River Basin for Fishery Enhancement*.<sup>9</sup>

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<sup>9</sup>See

<http://www.doj.mt.gov/lands/naturalresource/resources/projects/2010tributaryprioritization.pdf>.

# PRELIMINARY DRAFT

## Upper Clark Fork River Basin Water Management Plan 2012 Revision

### Chapter IV - Montana Water Law

Montana water law was discussed in Chapter III A of the 1994 *Plan*. The specific topics addressed were: water law basics, water reservations, basin closure, changes to existing water rights, in-stream flows, adjudication, and enforcement of water rights. Rather than repeat this material, this chapter will consider changes to water law and related actions since the 1994 *Plan* was adopted.

#### A. Basin Closure

The 1995 legislature, in response to recommendations in the 1994 *Plan*, permanently closed the upper Clark Fork River basin to the issuance of most new surface water rights. The water right closure included specific exceptions, and, as a result, new water right permits are now only available in the basin for the following:

- An appropriation of ground water if the applicant complies with the provisions of 85-2-360;
- An appropriation of surface water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; except that a permit issued to conduct aquatic resource actions may not be used for dilution;
- An appropriation of water for stock use;
- An appropriation to store water;
- A reservation of water under Article VI of the USFS Compact; or
- An appropriation of water for power generation at existing hydroelectric dams, except that a permit may not be issued for power generation if it would result in additional consumption of water.<sup>1</sup>

Although the basin remains open to new ground water permits, the potential affects of a new ground water permit on existing surface water uses must be assessed before DNRC may issue them. In response to the 2006 decision by the Montana Supreme Court in Trout Unlimited vs. DNRC, the 2007 legislature passed HB831 which clarified the requirements for ground water permitting in closed basins. HB831 required that an applicant for a new well in a closed basin must provide a hydrogeologic assessment conducted by a hydrologist, qualified scientist or a qualified licensed professional engineer demonstrating whether the new appropriation would result in a net depletion of surface water. If a net depletion would result, the applicant must also assess whether it would result in an adverse affect on an existing water right. If an adverse affect is predicted, the applicant must file a plan for mitigating the impact.<sup>2</sup>

#### B. Water Reservations

Water reservations are the mechanism under state law by which irrigation districts, municipalities, state agencies, and other public entities can reserve water for future instream and

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<sup>1</sup>See 85-2-336 MCA.

<sup>2</sup>See 85-2-360 MCA.

## PRELIMINARY DRAFT

consumptive uses. Along with basin closure, the 1994 *Plan* recommended that no additional water reservations be approved and that the suspension of the water reservation applications filed by the Granite Conservation District and DFWP be continued with their May 1, 1991 priority date. The 1995 legislature mandated that the DNRC “...may not process or approve applications for state water reservations in the Upper Clark Fork River basin...” It also preserved the May 1, 1991 priority date for the Granite Conservation District and DFWP water reservation applications.

The 2007 legislature ratified a water rights compact between the State of Montana and the United States of America, Department of Agriculture, Forest Service (USFS Compact). In Article VI, the compact provided:

The Forest Service may apply for a state water reservation to maintain a minimum flow, volume, level, or quality of water on National Forest System Lands under 85-2-316, MCA, in all basins within the State including basins or subbasins closed to new appropriations on or after the Effective Date of This Compact, subject to the terms of this Compact, for any purpose authorized by federal law applicable to National Forest System Lands. Any purpose authorized by federal law applicable to National Forest System Lands shall be considered a beneficial use under state law for the purposes of this Compact but shall set no precedent as to whether such purposes are beneficial uses under state law outside the terms of this Compact. A state water reservation issued under 85-2-316, MCA, is a Water Right Recognized Under State Law.<sup>3</sup>

### C. Instream Flows

At the time of the 1994 *Plan*, instream flows could be protected legally through one of three mechanisms, Murphy Rights, water reservations, and temporary water leases by DFWP. DFWP could lease water on up to 20 streams for periods up to 10 years, with one possible renewal. As discussed in Chapter 2 above, the 1994 *Plan* recommended a ten year pilot study of allowing a public or private entity to lease water for instream flow to lease an existing water right for instream flows from a willing lessor, or allowing an existing water right holder to convert an existing water right to an instream use during the period of the study. The 1995 legislature enacted this recommendation and authorized a similar temporary leasing program state-wide. After the Steering Committee’s report on the pilot study, the 2005 legislature made the water leasing program permanent for entities other than DFWP, and allowed them to lease water for a ten year period with no limit on how many times the leases can be renewed.<sup>4</sup> The 1995 statute also authorized DFWP to lease existing water rights on an unlimited number of streams or to change its existing water rights on 12 stream reaches from May 8, 2007, through June 30, 2019.<sup>5</sup>

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<sup>3</sup>See 85-20-1401 MCA, Article VI.

<sup>4</sup>See 85-2-408 MCA.

<sup>5</sup>See 85-2-436 MCA.

# PRELIMINARY DRAFT

## D. Adjudication

The upper Clark Fork River basin is divided into four subbasins for purposes of the on-going water rights adjudication: 76E, Rock Creek; 76F, Blackfoot River; 76GJ, Flint Creek; and 76G, upper Clark Fork River basin above the Blackfoot. As of February 25, 2011, the Montana Water Court had issued temporary water right decrees for three of the subbasins, 76E, 76GJ, and 76G, and a Temporary Preliminary Decree for the Blackfoot subbasin.<sup>6</sup>

Temporary or preliminary decrees can be enforced in all or portions of basins once objections have been resolved and Water Court hearings have been held on them. In the upper Clark Fork the following portions of the four subbasins have enforceable decrees.<sup>7</sup>

Enforcement #	Source	County	Basin
E027	Dempsey Creek	Powell	76G
E028	Racetrack Creek	Powell	76G
E029	Cottonwood Creek	Powell	76G
E030 Lower	Willow Creek/Tribs	Granite	76GJ

[http://dnrc.mt.gov/wrd/water\\_rts/adjudication/overview\\_admin\\_watercourt\\_decrees.pdf](http://dnrc.mt.gov/wrd/water_rts/adjudication/overview_admin_watercourt_decrees.pdf)

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<sup>6</sup>See [http://www.dnrc.mt.gov/wrd/water\\_rts/adjudication/images/adjudication\\_map.pdf](http://www.dnrc.mt.gov/wrd/water_rts/adjudication/images/adjudication_map.pdf).

<sup>7</sup>[http://dnrc.mt.gov/wrd/water\\_rts/adjudication/overview\\_admin\\_watercourt\\_decrees.pdf](http://dnrc.mt.gov/wrd/water_rts/adjudication/overview_admin_watercourt_decrees.pdf).

**PRELIMINARY DRAFT**

**Appendix 1**

# PRELIMINARY DRAFT

## Appendix 2

### Plan Revision Outline

#### **I. Goal of the Revision**

- A. Goals of the 1994 Plan
  - 1. To provide for continued planning and management of the waters of the upper Clark Fork River Basin rooted at the local level; and
  - 2. To balance all of the basin's beneficial water uses.
- B. The goal of the revision is to develop a basin flow plan to correspond to the remediation and restoration plan(s).

#### **II. History**

- A. Steering Committee
  - 1. Formation
  - 2. Accomplishments
- B. 1994 Plan
  - 1. Implementation of the recommendations
- C. Other basin watershed groups

#### **III. Basin Information**

- A. Hydrology
- B. Water uses
- C. Water measurement and supply forecasting system
  - 1. Stream gauges
  - 2. Snowtel sites
  - 3. Water supply forecasts
- D. Remediation and restoration plan summary

#### **IV. Water Regulatory Framework**

- A. Water law
- B. Adjudication status
- C. Basin closure

#### **V. Water Management Issues**

- A. Water right enforcement
- B. Dewatered reaches
- C. Milltown Dam water right change
- D. Aboriginal Confederated Salish and Kootenai Tribal Rights

#### **VI. Flow Plan Components**

- A. Target flows
- B. Water sources
- C. Drought plan

#### **VII. Recommendations**

### Plan Revision Process

- Approve revision outline.

## REVIEW DRAFT

- Draft revised plan chapters 1, 2, and 4, goal of the revision, history, and water regulatory framework.
- Update basin information:
  - Hydrology;
  - Demographic and land use changes;
  - Water uses;
  - Water measurement and supply forecasting system; and
  - Remediation and restoration plan summary.
- Draft issue papers for chapter 5:
  - Water right enforcement;
  - Dewatered reaches;
  - Milltown Dam water right change; and
  - Aboriginal Confederated Salish and Kootenai Tribal Rights.
- Develop recommendations.
- Assemble draft plan.
- Hold public meetings and solicit written comments on the draft plan.
- Revise the draft plan in light of public comments.

### Work Plan

Activity (What)	Entity (Who)	Deadline (When)
1. Approve revision outline	Steering Committee	December 2010
2. Draft revised plan chapters 1, 2, and 4	Gerald Mueller	February 2011
3. Update basin information	?	April 2011
4. Draft issue papers for chapter 5	Gerald Mueller and Steering Committee	May - October 2011
5. Develop recommendations	Steering Committee	November 2011 - January 2012
6. Assemble draft plan	Gerald Mueller	February 2012
7. Hold public meetings and solicit written comments on the draft plan	Steering Committee	March 2012
8. Revise the draft plan	Steering Committee	June 2012