

**Upper Clark Fork River Basin Steering Committee**  
**Meeting Summary**  
**November 8, 2010**

**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>
Carol Fox	Natural Resources Damage Program (NRDP)
Bob Bushnell	Lewis and Clark Conservation District
Stan Bradshaw	Trout Unlimited
Jim Dinsmore	Granite Conservation District
Jim Quigley	Little Blackfoot River
Jules Waber	Powell County
Maureen Connor	Granite County Commissioner
Bob Benson	Clark Fork Coalition
Jon Sesso	Butte-Silver Bow

**Agency**

Mike McLane	Department of Fish, Wildlife and Parks (FWP)
Tom Mostad	Natural Resources Damage Program (NRDP)
Ann Schwend	Department of Natural Resources and Conservation (DNRC)

**Public**

Chris Brick	Clark Fork Coalition
-------------	----------------------

**Staff**

Gerald Mueller	Facilitator
----------------	-------------

**Agenda**

- Review October 7, 2010 Meeting Summary
- Updates
  - Basin Closure Letter
  - Hohenlohe vs DNRC Supreme Court Decision
  - Other Organizations
- Long Range Restoration Priorities and NRDP Restoration Fund Allocation Guidance Plan
- Plan Revision Meeting and Next Steps
- Public Comment
- Next Meeting

Today's agenda originally included a presentation by Watershed Restoration Coalition Executive Director Renee Myers about her organization's restoration planning for the upper Clark Fork River basin. However, she was unable to attend this meeting, and will reschedule for a future meeting.

**October 7, 2010 Meeting Summary**

The Steering Committee made no change to the October 7, 2010 meeting summary.

## **Updates**

Basin Closure Letter - Gerald Mueller passed out copies of the letter to the Environmental Quality Council and Interim Water Policy Committee reporting on the Steering Committee's review of the upper Clark Fork River basin water right closure. A copy of the letter is included below in Appendix 1.

Montana Supreme Court Decision - Stan Bradshaw summarized a recent decision by the Montana Supreme Court in the Hohenlohe vs DNRC case. The full opinion is available at the following web address.

<http://mtlawlibrary.wordpress.com/2010/09/22/opinion-hohenlohe-v-dnrc/>

This case involved an appeal by DNRC of a district court ruling overturning its decision to deny a water right change permit application on lower Prickly Pear Creek. A water right holder, Hohenlohe, had applied to DNRC to change an irrigation right from flood to sprinkler and to leave the salvaged water instream. Hohenlohe previously diverted about 32 cubic feet per second (cfs) from Prickly Pear Creek about a mile upstream of the creek's confluence with the Missouri River to irrigate about 190 acres. After converting to a center pivot, Hohenlohe would continue to irrigate the same ground but would divert only 3.5 cfs, leaving the remaining 29 cfs instream.

DNRC denied the application for three reasons, finding that:

- Only the amount of water historically consumed by evapotranspiration could be left instream below the headgate. Since the applicant did not retire the land from irrigation, the evapotranspiration would continue and would not be available to be left instream.
- Much of the 32 cfs previously diverted constituted waste that could not be salvaged.
- The applicant did not analyze the impact of the proposed change on return flow to the Missouri River.

Hohenlohe appealed the DNRC decision to district court, which overturned it and ruled that the department must summarily approve the application. DNRC appealed the district court decision to the Montana Supreme Court. Trout Unlimited filed an amicus brief on the side of Hohenlohe. The Supreme Court reversed the district court on a limited basis, ruling that while DNRC's holding regarding the return flow study was arbitrary and capricious, the department retains the discretion to determine on a case-by-case basis whether an instream flow application may be approved for the full amount historically diverted, the amount historically consumed, or a smaller amount. DNRC, however, must be transparent about what is required of the change applicant and must stand by the requirement. Although not at issue in the appeal, the Supreme Court agreed that historic consumption below the headgate is not necessarily limited to the amount of evapotranspiration.

*Question - What is the basis for the amount that may be left instream?*

Answer - If the applicant is asking to leave a greater amount than the evapotranspiration from retired irrigated acres, a return flow study must be conducted to demonstrate that the instream amount would not result in an adverse affect on downstream irrigators. DNRC denied the application, in part, because Hohenlohe did not show that Missouri water users would not be adversely affected. The Supreme Court found, however, that the impact of the proposed change on

return flow to the Missouri would not constitute an adverse affect on Missouri River water users.

*Question - Is the amount that can be left instream in a change application limited to the amount of evapotranspiration that would not occur as a result of retiring land from irrigation?*

Answer - No, the upper limit may be the amount diverted, depending on the specific circumstances. Under the ruling in this case, the department must determine the amount of water that can be left instream on a case-by-case basis.

*Comment - FWP has applied for change permits for water leases in lower basins based on the amount of water consumed from the source, including the amount the plants consumed and the amount diverted. DNRC, however, does not have a consistent methodology for determining the amount of water consumed. As a result, the FWP applications, including the water right changes on Warm Springs Creek, have been in limbo for three and a half years. This methodology is needed. DNRC's approach to salvage during the mid-1980s would be a good one.*

*Question - What are the expectations for DNRC transparency in change of use applications?*

Answer - We need to understand what is meant by return flows relied upon by others. DNRC should convene a group of applicants, objectors, and technicians to examine this issue and seek clarity about what an applicant would have to prove. The change process does not now appear to be working. Justice Wheat, in a concurring opinion in Hohenlohe, noted that DNRC is becoming an adversary to applicants.

*Comment - I recently attended a conference in Helena in which the Hohenlohe case was highlighted as an example of how bad the change process is and how the Supreme Court said that DNRC must change.*

*Question - Is return flow limited to flows from a beneficial use but not from waste?*

Answer by Mike McLane - Return flow is defined as water applied to a crop that percolates below the roots and flows back into the stream. Ditch leakage is seepage, not return flow. A water user may depend on return flow, but not seepage or waste. DNRC rules addressing return flow, seepage, and waste are not consistent with court cases.

*Question - How would Hohenlohe be allowed to keep such a large amount of water for the number of acres irrigated?*

Answer by Mike McLane - The adjudication by the Montana Water Court may not allow 30 cfs for 190 acres. In the absence of records of use or diversion design, the Court applies a 17 gallons per minute per acre standard. However, if no water user objects, the Court may approve claims for higher amounts.

*Question - Who would protect the 30 cfs to the headgate?*

Answer - The landowner.

*Question - How do you do changes without a completed adjudication?*

Answer - The changes are subject to modification by the Court in the adjudication.

*Comment - People sometimes argue that the DNRC is adjudicating rights through the change process. The Supreme Court said in the Hohenlohe decision that this is not the case.*

*Comment - An important issue is whether a change of use must be based on the amount of water consumed from source or the total amount consumed altogether. This is true not only for instream uses, but also for changes from one use to another such as agriculture to municipal uses.*

Other Organizations - Ann Schwend reported that DNRC has hired Tim Davis as the new Water Resources Division Administrator. Tom Schultz who was the Acting Administrator will continue as the Trust Lands Division Administrator.

### **Long Range Restoration Priorities and NRDP Restoration Fund Allocation Guidance Plan**

Maureen Connor passed out a copy of the “Resolution by The Upper Clark Fork River Basin 2010 Advisory Council for Adoption of a Long Range Restoration Priorities and Fund Allocation Guidance Plan” and summarized the events leading to it. In 2010, Governor Schweitzer reappointed the Advisory Council, reducing its size and changing the public members. The new Advisory Council faced continuing or halting the current grant cycle. It opted to continue but appointed a subcommittee to review the Restoration Fund governing document. After subcommittee development of tentative recommendations to bring to the committee of the whole, the subcommittee determined their most appropriate recommendation at this time was for the entire group to develop a long range financial guidance document, with the intent of returning to detailed project review specific recommendations when the overall financial planning was complete. The resulting guidance plan addressed the “big picture” for use of the Restoration Fund for the entire basin. The plan does not address remediation which must be funded by BP-ARCO. The guidance plan deliberately did not specify the how individual projects would approach the NRDP.

*Question - Does the Guidance Plan recommend continuation of the Advisory Council?*

Answer - It does not address the subject of an advisory council specifically, a silence that means yes a citizens advisory council remains with the program. In terms of the annual grant process, The Guidance Plan was deliberately silent. That did not mean that an annual process was not envisioned, but that the details of that process were not to be determined in the financial budgeting recommendation put forth. I do not foresee a process that would not allow landowners and local governments to approach the NRDP with specific project proposals.

*Question - What is the difference between remediation and restoration?*

Answer - Remediation is ordered by EPA or DEQ to address harm to public health and the environment caused by the mining and smelting activities. Restoration is refers to repair of damage to natural resources or the services they provide. There is some overlap between the two, and both may be carried out at the same time because of cost efficiencies.

Gerald Mueller reported that he read the Steering Committee’s letter to the Trustee Restoration Council (TRC) at its October 14, 2010 meeting. The letter had been previously circulated to and accepted by Steering Committee members. The letter urged the TRC to seek public comments on the Advisory Council Resolution but took no position on the substance of the guidance plan.

All those commenting at the TRC meeting supported issuing the Resolution for public comments. Spokespersons for the Greenway Service District and the Clark Fork Coalition expressed concerns about some of the substantive provisions of the guidance plan, but did not oppose issuing it for public comments. The TRC agreed to release the resolution, setting a public comment period

ending on November 30, 2010. This comment period coincides with the comment period for the FWP/NRDP tributary aquatic and terrestrial resource prioritization documents. Mr. Mueller invited Jon Sesso and Chris Brick and any other member to explain concerns about the substance of the guidance plan. He then asked the Steering Committee to consider if it wishes to comment on the guidance plan substance.

Butte Concerns - Jon Sesso stated that Butte is concerned that the guidance plan does not place enough emphasis on the restoration of damaged areas. Funding would be spread across the basin and not be directed to the areas where damage occurred. The guidance plan assumes that the injured areas have their own resources to turn to, even though the state did not recover compensation for all of the claims it made in the natural resource damage litigation. Another concern is the relationship between the guidance plan and the tributary aquatic and terrestrial wildlife prioritization documents. The latter prioritized replacement in areas in the basin outside of damaged areas.

Clark Fork Coalition - Chris Brick reviewed the content of the guidance plan, including the categorical allocations for injuries to groundwater and groundwater services, aquatic resources and services, and terrestrial resources and services; the groundwater restoration funding process; and funding for recreational and educational projects. She indicated support for these provisions. She indicated that she did not share Jon's concerns about allocation of the funds – that in fact most of the projects funded to date (70%) have been in Silver Bow and Deer Lodge counties, and that under the proposed plan, there's no reason to think this would change. The plan recognizes that the most severely injured are upstream of Garrison. With respect to the terrestrial prioritization plan, she referred to Figure 3 in this document, which shows the injured areas that the lawsuit identified as places where wildlife is injured (they include the riparian areas of Silver Bow Creek and Reach A of the Clark Fork River, Anaconda Uplands, and the Opportunity Ponds). She noted that these areas already have specific funds set aside for restoration. She also noted that the plan prioritizes land for wildlife restoration from a scientific/biological standpoint, identifying the best areas to restore wildlife. They did not count urban areas as places where wildlife can be restored. She noted that not much land around Butte is designated as optimal wildlife habitat, but thought it was worth asking the biologists why the hills south of Silver Bow Creek weren't ranked higher.

*Question - How did the Clark Fork Coalition feel about the Spotted Dog project?*

Answer by Chris Brick - We were worried about it because we lacked a sense of how it fit into the restoration plan. We did not know what restoration opportunities would be forgone by funding it. Spotted Dog seemed like a done deal.

*Comment - Approval of Spotted Dog was a sad day. We will not be able to feed as many people by replacing agricultural production with elk and bison. The taxable valuation of land in agricultural production increased for landowners surrounding the Spotted Dog lands.*

*Question - Do Butte interests have a problem with the guidance plan allocations of 36%, 39%, and 25% respectively for injuries to groundwater and groundwater services, aquatic resources and services, and terrestrial resources and services?*

Answer by Jon Sesso - The percentage values of the nine restoration claims in the state's natural resource damage lawsuit were: 57% for groundwater, 26% for aquatic resources, and 17% for

terrestrial resources. The state sued for a total of \$760 million, \$350 million in restoration claims and \$410 million in compensable claims. In settling the litigation, the state received only \$188 million of the \$760 million it claimed, \$.33 on the dollar. We prefer to use the restoration claim percentages for two reasons. First, the restoration claims were split nine ways. The \$410 million in compensable claims were not split, so we don't know how they would have been allocated. Second, in accident litigation, you normally try to make everybody whole before pursuing other damages. Making whole is analogous to restoration claims and other damages are analogous to compensable claims. However, the guidance plan takes the reserve fund out of the aquatic and terrestrial funds and not out of groundwater funds. This fact combined with ensuring that the remainder of the Silver Bow funds would be used in the basin above the Warm Spring ponds would probably make the 36%, 39%, and 25% allocation acceptable.

*Comment - An objective of the Tributary Prioritization Plan was to identify streams that would supply fish to the mainstems of the Clark Fork River and Silver Bow Creek. A dominant factor in identifying the priority tributaries was restoring streams in the injured areas. The tributaries to Reach A of the Upper Clark Fork River and to Silver Bow Creek were the ranked as the highest priority for restoration funding.*

*Comment - The NRDP does not agree with Jon's analysis of the claims, or his characterization of the priority plans. The compensable claims were 54% of the entire claims and 75% of the claims settled in the 1999 settlement that created the UCFRB Restoration Fund. The compensable claims can be split between the three resource categories. The urban areas such as Butte do not come out as a priority in the terrestrial prioritization plan because that plan focuses on where efforts could best improve wildlife resources in the Basin, nor were the urban areas covered in the state's terrestrial claims, which were focused on wildlife resources. The tributary prioritization plans are focused on where work on the tributaries could best help augment the Clark Fork and Silver Bow Creek fisheries; it focuses on the injured resources and would be a much different plan without that focus.*

***Steering Committee Action - After a discussion, with two exceptions noted below, those members of the Steering Committee present at this meeting agreed to make comments on the proposed guidance plan and that the comments should make the following points. Mr. Mueller was directed draft a comment letter and circulate the draft letter to Steering Committee members for their review and comments before it is finalized and mailed. The points were:***

- ***A guidance plan is necessary to move away from a reactive process.***
- ***Restoration funds should be spent on restoring damaged resources according to the location and severity of the damage.***
- ***Project implementation criteria should include maintaining the local economy, including agricultural production.***
- ***Project decisions should continue to include strong public input.***
- ***The Advisory Committee should be continued with broader representation of basin interests than are currently represented. For example, agriculture interests should be represented.***
- ***The project selection process should be directed by the guidance plan priorities.***
- ***The Steering Committee has not attempted to parse the definition of the priorities.***
- ***The community of basin interests should be considered and incorporated into the guidance plan and project selection.***

*Two Steering Committee members abstained from consideration of comments on the guidance plan. Maureen Connor abstained because she is a member of the Advisory Council. Carol Fox abstained because the NRDP staff will be offering separate comments on the guidance plan.*

### **Plan Revision Meeting and Next Steps**

Gerald Mueller reported on the October 21 meeting with invited watershed, local government and other groups potentially interested in the revision of the *Upper Clark Fork River Basin Water Management Plan*. Those attending the meeting included: Mike McLane and Jason Lindstrom with FWP; Molly Staats, a University of Montana Department of Geo-Sciences student, Granite County Commissioner Maureen Connor, and Bob Benson representing the Clark Fork Coalition. The meeting attendees generally supported the proposed plan revision focused on an upper basin flow plan. Commissioner Connor cautioned that a plan focused on instream flow may cause problems for some agriculture water users.

Mr. Mueller then showed the following plan revision process and work plan.

#### Plan Revision Process

- Approve revision outline.
- 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

<b>Activity (What)</b>	<b>Entity (Who)</b>	<b>Deadline (When)</b>
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

Mr. Mueller noted that an entity or entities that would conduct step 3, updating the basin information, needs to be identified. For the 1994 plan, DNRC staff assembled the information and drafted this section. Ann Schwend agreed to discuss the department's interest and ability to conduct this step of the revision. The Steering Committee will be asked to review and approve the process and work plan at its next meeting.

### **Public Comment**

There was no additional public comment.

### **Next Meeting**

The next meeting was scheduled for Thursday, December 2, 2010 at St. Mary's Center in Deer Lodge.

Appendix 1

**Upper Clark Fork River Basin Steering Committee**

**C/O Gerald Mueller**

**440 Evans**

**Missoula, MT 59801**

**(406)543-0026**

October 28, 2010

Representative Chas Vincent  
Chairman  
Environmental Quality Council  
P.O. Box 201704  
Helena, MT 59620-1704

**RE: Upper Clark Fork River Basin Steering Committee Basin Closure Report**

Dear Chairman Vincent:

I write to you on behalf and at the direction of the Upper Clark Fork River Basin Steering Committee (Steering Committee). The purpose of this letter is to report on the Steering Committee's review of the closure of the Upper Clark Fork River basin enacted in §85-2-336 MCA. Pursuant to §85-2-338(5)(a), the Steering Committee must review the closure and its exceptions at least every five years and make recommendations to the legislature regarding necessary changes.

We consulted with the Montana Department of Natural Resources and Conservation and its Missoula and Helena Water Resources Regional Office Managers. The closure was discussed at meetings in June, September, and October 2010. The Steering Committee decided not to recommend any changes to the closure or exceptions in §85-2-336.

If the Environmental Quality Council has questions or would like a presentation regarding this subject, please contact me at the address or telephone listed above or by email at [gmueller@montana.com](mailto:gmueller@montana.com).

Thank you.

Sincerely,



Gerald Mueller  
Steering Committee Facilitator

cc: Representative Walter McNutt, Chairman, Water Policy Interim Committee