

Upper Clark Fork River Basin Steering Committee
Meeting Summary
September 9, 2009

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:

Members	Group/Organization Represented
Bob Benson	Clark Fork Coalition
Jim Dinsmore	Granite Conservation District
Dave Lewis	Senate District 42
Jules Waber	Powell County

Agency Personnel

Mike McLane Montana Department of Fish, Wildlife and Parks (DFWP)

Staff

Gerald Mueller Facilitator

Agenda

- Review summary of the June 17, 2009 Meeting
- Updates
 - Joint Newsletter
 - Interim Water Policy Committee (WPIC)
- Milltown Dam Water Right Meeting Plan
- Public Comment
- Next Meeting

June 17, 2009 Meeting Summary

The Steering Committee made no changes to the meeting summary.

Updates

Joint Upper Clark Fork River Basin Newsletter

Gerald Mueller reported that five groups are proceeding to produce a joint newsletter to inform upper Clark Fork River basin water interests about the activities of the groups. Details about the newsletter are contained in Mr. Mueller's September 1, 2009 memo included below in Appendix 1, which was passed out to the meeting participants. Mr. Mueller also passed out his draft of an article for the initial October issue about the Milltown Dam water rights. See Appendix 2 below.

Comment by Mike McLane - I suggest two changes to the Milltown Dam water right article. First, in the second paragraph, the word "maximum" should be added so that the sentence would read, "MPC's Milltown water right claim for power generation had a maximum flow of 2,000 cubic feet per second (cfs), a period of use of January 1 through December 31, and a priority date of December 11, 1904." Second, I am not comfortable with the sentence, "With the

removal of the dam, the purpose of the existing hydropower right is no longer valid.”

Response - I will ask that “maximum” be inserted. Will you please email me a suggested change for your second concern?

Interim Water Policy Committee

Gerald Mueller passed out the agenda for the September 21, 2009 Interim Water Policy Committee (WPIC) meeting and copies of the WPIC draft work plan. Both documents are available on the WPIC web page at:

http://www.leg.mt.gov/css/Committees/interim/2009_2010/Water_Policy/Meeting_Documents/meetings.asp#meeting2.

Mr. Mueller plans to attend the September 21 meeting and will report on it at the next Steering Committee meeting.

Milltown Dam Water Right Meeting Plan

Status of the Milltown Dam Water Rights

Mr. Mueller summarized the status of the Milltown Dam water rights. Pursuant to its settlement agreement with ARCO, the state plans to accept ownership from NorthWestern Corporation of its land and water rights at Milltown Dam. The state has not yet signed the deed of ownership of the land that will complete the transfer. Staff of the Natural Resources Damage Program has stated that they expect the water rights to be transferred to DFWP. After the ownership transfer occurs, the state, presumably DFWP, will have to file for a water right change permit to reflect a new beneficial use of the water. Mr. Mueller recommends that prior to filing the change application, that the Steering Committee and DFWP hold informational meetings in the upper Clark Fork.

Milltown Water Right Public Meeting Topics

Mr. Mueller asked the Steering Committee to identify topics that should be discussed at the public meetings. Those members present at this meeting agreed on the following topics.

- Status of the existing water rights, including:
 - A hydrograph consisting of the maximum historic use of water to generate electricity each day of the year. Although the Montana Power Company hydropower water right claim was for 2,000 cubic feet per second (cfs) with a period of use January 1 through December 31, on some days the Clark Fork River may not have flowed at 2,000 cfs. Since a water right is limited to the historic beneficial use, the hydropower water right would be based on historic flows up to 2,000 cfs.
 - A summary of the Water Court deliberations concerning this water right. The hydropower right was addressed by Judge Leslie in preliminary decrees for the Upper and Middle Clark Fork River basins.
- An explanation of the water right change process, including the reasonable use criteria in §85-2-402(4) MCA that the change application would have to address.
- The new purpose for which the state would file a change of use permit application. Assuming that DFWP would file the change application for an instream fishery beneficial use, DFWP would have to include in the application the amount of water for the fishery use.
- A management plan for the instream, fishery water right. Again, assuming that DFWP receives the water right and files for a change of use permit for a fishery beneficial use, DFWP would have to include a plan to manage the changed right. Historically, neither of the utilities

that owned the hydropower water rights sought to enforce the rights by making a water right call or objecting to new water right permit applications.

Next Steps Regarding the Public Meetings

Those members present at this meeting agreed on the following next steps:

- Gerald Mueller will ask DNRC to prepare the hydrograph of the maximum daily historic use of water to generate electricity at the Milltown Dam.
- Mike McLane will summarize the past actions by the Water Court addressing the Milltown Dam hydropower water right.
- Gerald Mueller will meet with Dave Risely, Administrator of the DFWP Fish and Wildlife Division to bring the Milltown Dam water right to his attention and discuss the public meetings on them.
- Scheduling the public meetings will await formal transfer of the water rights to the state and the governor's decision about the agency that will hold and manage them.

Public Comment

There was no public comment.

Next Meeting

The next meeting was scheduled for Wednesday, October 14, 2009 in Deer Lodge. The agenda will include continued planning for the Milltown Dam water right public meetings, and a report by Joel Chavez, the Montana Department of Environmental Quality Upper Clark Fork Project Officer, on the Clark Fork River remediation and restoration activities.

Appendix 1
Upper Clark Fork River Basin Steering Committee
C/O Gerald Mueller
440 Evans
Missoula, MT 59801
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Memorandum

Date: September 1, 2009
To: Steering Committee Members
From: Gerald Mueller
RE: Joint Newsletter Update

Five groups are proceeding to develop a joint newsletter for the upper Clark Fork River Basin. The groups are: the Blackfoot Challenge (Challenge) , the Clark Fork Coalition (Coalition), the Montana Water Trust (MWT), the Watershed Restoration Coalition (WRC), and the Upper Clark Fork River Basin Steering Committee (Steering Committee).

The first issue is planned for October 1 and will include articles introducing the newsletter and on the Milltown Dam water right transfer, the Watershed Restoration Council, and the Clark Fork Coalition ranch. We will probably print 1,000 copies. The newsletter will be printed three times a year.

Each of the groups, except for the Challenge, is compiling a mailing list to which the newsletter will be mailed. The Challenge has a policy of not sharing its mailing list. The newsletter will also be posted on the groups' web pages. Hard copies will also be placed at various locations in the upper basin such as cafes, conservation district offices, libraries, etc.

Printing, folding and affixing the mailing labels costs through the Directory in Missoula will be \$681 for 1,000 copies. Merging mailing lists will cost \$34 per 1,000. Mailing costs are \$.15 per copy. We expect the first issue to cost under \$1,000. Funding for the first issue would be provided via the Steering Committee budget.

The Clark Fork Coalition will edit the newsletter articles and the WRC will provide the layout. Representatives of each of the five organizations will act as the editorial board.

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Appendix 2

Milltown Dam Water Rights

It's old news that the Milltown dam has been removed. But more change is coming, change that will be crucially important to water users in the upper Clark Fork River basin. As result of the settlement of Superfund litigation, the State of Montana is about to accept ownership of the water rights formerly used by the Montana Power Company (MPC) and the NorthWestern Corporation (NWC) to generate hydropower at Milltown.

MPC's Milltown water right claim for power generation had a flow of 2,000 cubic feet per second (cfs), a period of use of January 1 through December 31, and a priority date of December 11, 1904.

The Clark Fork at Milltown normally flows above 2,000 cfs only during the spring and early summer. In an average year, river flows exceed the level of the hydropower water right claim 130 days per year, generally late March through July. This means that the Milltown hydropower water right was not filled on average 235 days per year, including much of the irrigation season.

Under Montana law, when a water right is not filled, its owner can make call on upstream water users with a junior priority date directing them to cease diverting water. MPC and NWC could have made call on water rights newer than December 11, 1904 to enforce the Milltown hydropower right.

The Montana Department of Natural Resources and Conservation (DNRC) water right data base lists 12,650 rights water rights above the Milltown Dam site with priority dates junior to December 11, 1904, including 3,938 surface water rights.

Historically, Milltown Dam hydropower generation did not affect upper basin water use because neither MPC nor NWC chose to enforce their Milltown hydropower water right. When it takes over this right, the state will face a decision about whether and how to enforce its right.

Water Right Change Permits

With the removal of the dam, the purpose of the existing hydropower right is no longer valid. To preclude loss of the right through abandonment, the state will have to obtain a water right change permit from DNRC reflecting a new beneficial use. To do so, the state will have to demonstrate how much water would be used for the new purpose. This means that the state will not necessarily retain the 2,000 cfs flow claimed for the hydropower right.

The Superfund litigation settlement specifies that the state may not change the hydropower right to a consumptive right; it must remain an instream right. Governor Schweitzer has not yet designated the state agency that will own and manage the right. Because the right must be based on an instream purpose, the Montana Department of Fish, Wildlife and Parks (DFWP) is the likely candidate to own and manage the changed right to benefit the Clark Fork River fishery. As a part of the water right change process, DFWP will have to demonstrate how much water would

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be used for fish.

How Can Water Users Become Involved in the Milltown Water Right Decisions?

The water right change process has not yet begun. This process will allow upper basin water users to object to a change application and participate formally as parties in it. Upper basin water users have time to learn more about this issue and to decide how to become involved. This fall, the Upper Clark Fork River Basin Steering Committee and DFWP are planning to hold informal public meetings at several basin locations to provide information and begin a public discussion about the Milltown water right.

The Steering Committee has prepared a paper to identify and explore the implications of the change in the Milltown water right for upper basin water users. This paper is available online at: http://dnrc.mt.gov/wrd/water_mgmt/clarkfork_steeringcomm/pdfs/milltown_dam_paper.pdf