

Upper Clark Fork River Basin Steering Committee
Meeting Summary
June 17, 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
Jon Sesso	Butte Silver Bow
Jim Dinsmore	Granite Conservation District
Carol Fox	Natural Resources Damage Program
Dave Lewis	Senate District 42
Jules Waber	Powell County
Stan Bradshaw	Montana Trout Unlimited (TU)

Public

Darryl Barton	Clark Fork River Technical Assistance Committee (CFRTAC)
Damon Pellicori	Montana Water Trust
Barbara Hall	Montana Water Trust
Ellie Newell	TU
Dennis Workman	

Agency Personnel

Ann Schwend	Montana Department of Natural Resources and Conservation (DNRC)
Bill Schultz	DNRC
Jason Lindstrom	Montana Department of Fish, Wildlife and Parks (DFWP)
Bob Lane	DFWP

Staff

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

Agenda

- Review summary of the April 30, 2009 Meeting
- CFRTAC Update
- Joint Upper Clark Fork River Basin Newsletter
- Butte Silver Bow-Anaconda Industrial Water Use
- Milltown Dam Water Rights
- Qualitative Assessment of Habitat in Eight Tributaries to the Upper Clark Fork River
- Issues for the Legislative Water Policy Committee
- DNRC Rule Proposal
- Public Comment
- Next Meeting

April 30, 2009 Meeting Summary

The Steering Committee made no changes to the meeting summary.

Clark Fork River Technical Advisory Committee (CFRTAC) Update

Darryl Barton reported that the Montana Department of Environmental Quality (DEQ) and the Department of Justice Natural Resource Damage Program (NRDP) will hold the Upper Clark Fork River Cleanup Public Forum, on Tuesday, June 23, 2009 at 6:00 p.m. in the Deer Lodge Community Center. The meeting will be public and will address the results of soil sampling at the Deer Lodge Trestle area in 2008 and upcoming activities for the rest of the project. The agencies recently released the *Sampling and Analysis Plan, Soils and Wastes Chemical Characterization for Remedial Design/Remedial Action Clark Fork River Operable Unit Milltown Reservoir/Clark Fork River NPL Site Powell, Deer Lodge, and Granite Counties, Montana*. A copy of the report is available at http://www.cfrtac.org/images/pdf/may2009/final_cfr_%20sap.pdf.

Joint Upper Clark Fork River Basin Newsletter

Gerald Mueller reported that in May 2009 the Clark Fork River Basin Task Force, the DNRC, and the University of Montana Department of Geography convened a meeting of the watershed groups operating in the Clark Fork River Basin as well as those agencies and non-governmental organizations that work with them. One of the recommendations from this meeting was that the watershed groups and other entities working in the basin initiate a joint newsletter to inform basin water interests about the activities of the groups and other entities. Mr. Mueller noted that the Steering Committee budget for FY2010-2011 includes \$2,100 for publications and projects. He asked if the Steering Committee should attempt to coordinate development of a joint newsletter and if some portion of the \$2,100 might be dedicated to it.

Question - How would the newsletter be distributed?

*Answer - It might be distributed through mailings and through web sites. In the 1990s, the Steering Committee published and sent out a newsletter, *The Upper Clark Fork River Water News*.*

Comment by Ann Schwend - I like the idea of a joint newsletter under the umbrella of the Steering Committee. A newsletter could help publicize the Steering Committee's mandate and activities. A number of groups might be interested in participating, including: the Watershed Restoration Coalition, Granite Headwaters Watershed Group, the Little Blackfoot Watershed Group, the Montana Water Trust, the Clark Fork Coalition, and the Butte Restoration Alliance.

Steering Committee Action - Those Steering Committee members present at this meeting authorized Mr. Mueller to convene a meeting of interested groups to explore creation of a joint upper Clark Fork River basin newsletter. The members also agreed to contribute funding to it.

Butte Silver Bow-Anaconda Industrial Water Use

Jon Sesso provided a history of the water system developed by the Anaconda Company to provide water to its Butte and Anaconda mining, smelting, and concentrating operations and the current status of municipal, irrigation and industrial water uses supplied by the system.

History - Beginning in the early 1900s, the Anaconda Company installed the Georgetown, Silver Lake and Meyers dams and the pumps, pipeline and viaduct system that transported water from Storm, Twin, and Moose Lakes and to its Anaconda and Butte mining, concentrating and smelting operations. In 1976, ARCO purchased the Anaconda Company. In 1980, it ceased its operations in Butte and Anaconda and sold most of its Butte and Anaconda assets including its water storage and distribution system and the Butte municipal water system to Dennis Washington. In 1989, problems on the municipal water system resulted in a “boil order” requiring the system’s customers to boil water prior to using it. In 1990, customers of the municipal system filed a class action lawsuit against Mr. Washington for the system’s failure to deliver clean water. The Butte-Silver Bow local government took ownership of the municipal water system in 1991 and the next year borrowed \$40 million to repair it. In 1996, the class action lawsuit was settled and the ownership of the Georgetown-Silver-Storm Lake water storage and distribution system (System) and all associated water rights were transferred to Butte-Silver Bow. Butte-Silver Bow also received \$12 million to assess and update the System. Brian Shovers, a historian with the Montana Historical Society, is writing a history of the System.

Upon taking ownership, Butte-Silver Bow conducted an assessment of the capacity of the System to deliver water. During the three driest years on record, 1988, 1989, and 1990, the System produced 55-60 million gallons of water per day (Mga/d). Butte-Silver Bow is currently evaluating whether the System can continue to supply the 55-60 Mga/d amount. For the last five years, the water supply has been sufficient so that Butte-Silver Bow has not had to use any stored water to meet its water supply obligations.

Water Contracts - Butte-Silver Bow currently has five contracts to deliver water from the System, including:

- ARCO contract - ARCO paid \$7 million for 24 Mga/d for a four month period for water used to maintain instream flow as a part of its Natural Resource Damage litigation settlement responsibility. This amount converts to 8 Mga/d on an annual basis.
- ASME/REC contract - ASME, which is now the Renewable Energy Corporation (REC), paid \$5 million for 3.86 Mga/d to supply water to its silicon plant located in the Butte-Silver Bow industrial park near Ramsay. Of this amount, REC is currently using about 1 Mga/d.
- Montana Resources (MR) contract - MR has a contract for 1 Mga/d for use in the mine plus another 6 Mga/d for a sixty day period in the fall after the ARCO four month period. Converting this 60 day supply to an annual basis results in 1 Mga/d, so MR’s total delivery is 2 Mga/d annually.
- Irrigation contract - The Uelands and Ikorns have the right to up to 20 Mga/d of direct flow water only. No stored water is provided via this contract. DFWP has purchased the Uelands’ rights to maintain instream flow in Warm Springs Creek below Meyers Dam.
- New industrial uses - Butte-Silver Bow has 11-12 Mga/d for marketing at its industrial park. Anaconda-Deer Lodge can market up to 2 Mga/d of the 11-12 Mga/d total if it is available.

These contracts were for a 13 year period that ends in January 2010. Butte-Silver Bow is currently renegotiating these contracts to determine who would pay how much to maintain the System. We expect that each user will continue to pay its proportionate share of the System costs.

New Uses - There are two potential users of the 11-12 Mga/d. REC has requested 7-9 Mga/d to supply a coal gasification plant to be located adjacent to the existing silicon plant. The coal gasification plant would provide fuel for electricity generation that REC would use for expanded silicon production. Carbon dioxide produced by the gasification plant would be piped to eastern Montana for enhanced oil recovery. The second additional use would be 0.5 Mga/d for NorthWestern Energy's (NWE's) gas-fired electricity generation plant to be located at Mill Creek outside Anaconda.

Question - Why does REC want to build the coal gasification plant here and pipe CO₂ to eastern Montana? Why not build the plant in eastern Montana and transmit the electricity to Butte?

Answer - We have asked REC this question, and their answer is that water is available for the plant here.

Question - How do the irrigators feel about the potential new industrial uses?

Answer - All parties to the contracts are aware of all of the arrangements for water use from the System. The water rights supporting the new industrial uses would be senior to the irrigators' rights. The irrigators are friendly to the new industrial uses.

Question - Is MR expected to provide water instream flow in Silver Bow Creek?

Answer - A portion of the water for Silver Bow Creek instream flow is expected to come out of the new industrial use amount. About 3 Mga/d enters Silver Bow Creek from the Butte Metro storm system. About 1.5 Mga/d for Silver Bow Creek will come from ARCO and another 1.5 Mga/d from the new industrial supply.

Question - Will a change of use permit be filed for the NWE Mill Creek gas-fired generation plant?

Answer - Yes.

Question - NWE has targeted the end of 2010 for the Mill Creek plant on-line date. Will a change of use permit be obtained by then?

Answer - We are optimistic that the change of use can be completed by then.

Question - At some point in the future, ARCO will pump water from the Berkeley Pit and, after treating it, will discharge the water to Silver Bow Creek and eventually the Clark Fork River. Would this water be an addition to the existing Butte-Silver Bow water supply?

Answer - Yes. The treatment plant is scheduled to come on line in 2020 and will supply an additional 7 Mga/d to the Clark Fork River.

Question - Will the water quality classification of Silver Bow Creek be changed?

Answer - After the cleanup is finished, it is likely that Silver Bow Creek and the upper Clark Fork will be reclassified to B1 (like the rest of the Clark Fork below the confluence with the Little Blackfoot). Then the tougher water quality standards for B1 streams will apply. Those standards appear in the bulletin WQB-7 (now called DEQ-7).

Question - Do you expect that negotiating the new water supply contracts for 2010 to be difficult?

Answer - The provisions of the existing contracts apply until they are amended. All of the parties are working together so we do not anticipate that negotiating the new contracts will be a problem. We do face challenges to maintaining a healthy system. The viaduct which transports water from Storm and Twin Lakes to Silver Lake needs work and the pipeline from Silver Lake to Meyers Dam loses a lot of water.

Question - Do you know what the renewal period for the new contracts will be?

Answer - No. It is under discussion.

Comment - The Butte-Silver Bow industrial water rights and the System would be a good topic for the joint upper Clark Fork River basin newsletter.

Milltown Dam Water Rights

Bob Lane, the DFWP Chief Legal Counsel, discussed the status of the Milltown Dam water rights. As a part of the NRD litigation settlement, the NorthWestern Corporation (NWC) will transfer ownership of the former Milltown Dam hydropower water rights to the state. The transfer may occur in a couple of months. The governor will make the decision about which state agency will receive the rights, presumably based on recommendations from the NRD Program and the Upper Clark Fork River Basin Remediation and Restoration Education Advisory Council (Advisory Council). Governor Schweitzer is in the process of reappointing the Advisory Council. Because it has the authority and expertise to hold and manage water rights, DFWP is the likely agency to receive the Milltown rights.

Neither NWC or the previous owner of the Milltown Dam, the Montana Power Company, enforced these rights by making a call on junior users or by objecting to new permits. It is reasonable, therefore, to ask how the state might manage and enforce these rights. Several factors will constrain the state's management and enforcement. First, the settlement agreement provides that the Milltown Dam water rights may not be transferred to a consumptive use. Even without this provision, state water law would prohibit changing the non-consumptive Milltown hydropower rights to a consumptive use. Assuming that the rights are assigned to DFWP, the likely new use for them will be to maintain fish habitat. If this is the case, then the amount of the changed right for a fishery beneficial use may be less than the historic hydropower right, the claim for which was 2,000 cubic feet per second. In the late 1980s, DFWP applied for water reservations in the upper Clark Fork River basin. The analysis conducted for the reservation applications may provide some insight about the amount of water needed for the fishery. The reservation application included 700 cfs the Blackfoot River and about 600 cfs for upper Clark Fork River. Since the dam was located just below the confluence of the Blackfoot and the Clark Fork, the fishery need for a changed Milltown Dam water right might be the sum of these two, about 1,300 cfs. Because water rights must be based on historic beneficial use, during the parts of the year when the river flows less than 1,300 cfs, the new right will likely be less than this value during the low flow periods. Also, the fishery water right is not likely to conflict with up stream storage water rights junior to the 1904 Milltown priority date, because the storage is probably filled only during periods of high flows. Finally, because the Milltown Dam rights are

above 5.5 cfs, changing them will be subject to specific statutory public interest criteria, including the effects on existing and future water users.

Should DFWP receive the rights, it would have a public trust obligation to enforce them. This does not mean that the department would necessarily choose to make water right calls on junior users. DFWP has forty years of experience with its Murphy instream flow water rights. During this period we have chosen to work as partners with other water right holders to protect our rights through mechanisms such as drought planning.

Question - Could NWC transfer the Milltown Dam water rights downstream to the owners of Noxon Rapids Dam?

Answer - The consent decree provides that the rights must be offered to the state.

Question - Since the dam and its hydropower generators have been removed, why isn't the right abandoned?

Answer - Under Montana law abandonment requires a number of years of non-use and the intent to abandon the rights. Under the settlement agreement, NWC was required to offer the rights to the state, so there has not been the intent to abandon them.

Question - You said that the hydropower rights were not enforced. Without enforcement, what value do the rights have?

Answer - Rights do not disappear because they have not been enforced. Irrigators do not always enforce their rights. If the validity of water rights depended on enforcement, then the state-wide water rights adjudication would not have a benefit.

Question - Under the water right change statute, a change must not adversely affect any existing water right holder regardless of whether they are senior or junior. Wouldn't existing water users be adversely affected if DFWP enforces the changed Milltown Dam water rights?

Answer - Under Montana law enforcing water rights does not constitute an adverse affect.

Question - You seemed to tie the instream flow right to the river hydrograph. In the case of the Noxon River Dam and the impact of its hydropower water rights on legal availability in the Clark Fork basin, DNRC has not limited the water rights to the hydrograph. Since the amount of flow in any given day has varied since 1904, wouldn't the historic beneficial use of the hydropower right be determined by the maximum amount of flow on each day up to the turbine capacity of 2,000 cfs?

Answer - An entity changing a water right to a new use cannot change more than what was historically used under the old right. Therefore, there are dates when the water flow has always been below the capacity of the turbine. This is then the historic limit of the right for that date. However, it does not really matter because the amount of water needed for the fishery is likely to be less than the historic maximum flows during the irrigation season. Further, the change process will be the place where the amount of flow that can be converted to an instream flow will be determined by DNRC.

Question - For the recent Montana Conjunctive Water Management Conference, Mike McLane

provided a paper listing many different methods for determining the amount of water needed by the fishery. He also argued that this amount is not equal to the minimum amount of water necessary for the fish merely to survive. How will the amount of water used for a fishery beneficial use for a changed Milltown water right be determined?

Answer - 85-2-436 MCA requires DNRC to address the "... critical streamflow or volume needed to protect, maintain, or enhance streamflow to benefit the fishery resource." Historically, DFWP has used the wetted permitted methodology to assess fishery flow needs. This methodology sometimes determines two amounts, a minimum level and more of an optimum level. The amount of water needed for the fishery will be subject to professional judgment.

Comment by Dennis Workman - The wetted perimeter methodology was selected for use in the water reservation applications because it required the least amount of field work of the available assessment methodologies.

Question - The flows in the Blackfoot River are protected by a Murphy right. Since the Milltown right includes water from both the Blackfoot and the Clark Fork, would a fishery use result in greater emphasis on the Clark Fork River flows?

Answer - Enforcing and managing a Milltown water right to benefit the fishery will be more complicated because of the confluence of the two rivers.

Question - DEQ has water quality responsibilities. Is DEQ a possible recipient of the Milltown water rights?

Answer - DEQ will likely be the initial recipient of the land at the former Milltown Dam site transferred to the state pursuant to the settlement agreement. DEQ does have water reservations to protect water quality; however, the governor will decide which state agency receives the right.

Question - When the change application is filed for the Milltown Dam water rights, who will be notified?

Answer by Bill Schultz - The notification list is likely to be huge. I'm not sure what notification method DNRC will use.

Question - Are the Milltown Dam water rights senior to the Butte-Silver Bow industrial water rights?

Answer by Jon Sesso - Yes.

Comment - I am not sure that DFWP will want these water rights. If a large new industrial user in the Butte-Anaconda area files for a change of use permit, maintaining an instream flow right for the fishery will not be a walk in the park.

Qualitative Assessment of Habitat in Eight Tributaries to the Upper Clark Fork River

Dennis Workman summarized the results of his study of the qualitative habitat in eight tributaries to the upper Clark Fork River that he recently conducted for the NRD Program using a PowerPoint presentation. A copy of his study is available from the NRD Program. The study focused on the 81 miles of Clark Fork River between the mouths of the Big Blackfoot River and

the Little Blackfoot River and eight of its tributaries. The study assessed the channel conditions and habitat, identified fish passage barriers, and located irrigation diversions. Based on these factors, the study prioritized the streams for future restoration efforts. The study findings are included in the following table:

List of streams, their priority ranking, with their locations, problems and comments.

Clark Fork River Diversion	HIGH	1.8 miles east of exit 130 I-90	Fish passage barrier when in place, in place only during irrigation season, determine effects on fish migrations
Cramer Creek I-90 to mouth	HIGH	¼ mile west of exit 126 I-90	Fish passage at mouth, habitat degradation, irrigation pump station fish entrapment. Could be important spawning tributary to the Clark Fork River
Tyler Creek USFS Boundary to mouth	HIGH	1 mile west exit 138 I-90	Fish passage at mouth, lack of stream channel forest boundary to mouth, irrigation ditch fish entrapment, irrigation uses all of the water Spawning tributary to Clark Fork River needed in this area
Flint Creek Mullan Trail to mouth (reach 5)	HIGH	1 mile south of Drummond	Habitat degradation, streambank erosion, loss of woody riparian vegetation, possible metals problem from Boulder Creek Could be important for spawning trout from Clark Fork River
Flint Creek Hall Bridge to Mullan Trail (reach 4)	MEDIUM	¾ mile east of Hall	Habitat degradation, streambank erosion, loss of woody riparian vegetation, irrigation ditch fish entrapment, fish passage during irrigation season Could be important for spawning trout from Clark Fork River
Flint Creek Douglas Creek to Hall Bridge (reach 3)	MEDIUM	2.6 miles southwest of Hall	Habitat degradation, streambank erosion, loss of woody riparian vegetation, irrigation ditch fish entrapment Improve fish population in Flint Creek

Warm Springs Creek	LOW	0.3 miles east of exit 170 I-90 (Phosphate)	Stream Channel and fish habitat in good condition. Possible water temperatures problem. Beaver dam near mouth may be a temporary fish passage barrier
Hoover Creek	LOW	At exit 161 I-90 (Jens)	No direct connection to the Clark Fork River, entire flow captured by irrigation ditch, fish passage blocked at the railroad
Turah Creek	LOW	0.2 miles east of exit 113 I-90	Man-made channel no fish habitat features, fish passage from Clark Fork River blocked near mouth, water all used for irrigation in summer, possible flow augmentation from CFR water right
Flint Creek Hyw 1 bridge to Douglas Cr (reach 2)	LOW	4.1 miles southwest of Hall	Stream channel and habitat condition good
Flint Creek Allendale Div to Hyw 1 bridge (reach 1)	LOW	4.5 miles southwest of Hall	Stream channel and habitat condition good
Antelope Creek	LOW	4.9 miles east of exit 138 I-90	Ephemeral stream does not connect to the Clark Fork River except during high flow periods.
Brock Creek	No priority	At exit 170 I-90	No survey done, insufficient time.
Carten Creek	No priority	1 mile west exit 166 I-90	No survey done, insufficient time.
Deer Creek	No priority	1 mile southeast of Milltown	No survey done, insufficient time.
Dog Creek	No priority	2.5 miles east of Elliston	No survey done, insufficient time.

Question - In your study did you evaluate physical habitat in terms of native versus non-native fish?

Answer - No.

Question - Does DFWP have good fish count data for this portion of the Clark Fork River?

Answer by Jason Lindstrom - A recent fish count of the upper Clark Fork River found results similar to the 1987 count. However, this year our counts are significantly down, and we don't know why. The bigger fish have left and smaller sized fish population has crashed.

Issues for the Legislative Water Policy Committee

Gerald Mueller passed out copies of a list of issues posted on the Legislative Water Policy Committee (WPC) web site. WPC will consider this list at its July 9, 2009 meeting. The list included:

- Closed basin permitting (SB93, SB94)
- General permitting (HB40)
- Adjudication oversight*
- Water right enforcement (HB39)
- Water marketing
- DNRC rules (other permitting issues)*
- DEQ rules (septic mixing zones, other issues)*
- Water related subdivision issues (SB17)
- Ground water investigation oversight (HB52)
- State water plan oversight (SB303)*
- Coal bed methane water use (HB575)
- Implementation of the phosphorus ban (SB200)
- Nutrient Work Group oversight (SB95)*
- Municipal water use (HB379, SB149)

In this list, HB and SB numbers refer to House and Senate bills, respectively, considered in the 2009 legislative session. The asterisks(*) note those subjects under the jurisdiction of the Environmental Quality Council.

Mr. Mueller asked Steering Committee members for issues they would like WPC to consider. The two identified were:

- Exempt wells - Separate domestic wells from irrigation and other purposes and reduce the amount of water included in the exemption.
- Water banking - Develop a water banking structure and study how water banks might be used. Facilitate use of water banking where users agree that it would be beneficial.

DNRC Rule Proposal

Ann Schwend stated that DNRC will hold a hearing on proposed rule changes addressing water right change application and calculation of historic consumptive uses in such applications on June 29, 2009 at the Water Resources Division office in Helena. Mr. Mueller previously emailed to Steering Committee members the notice and proposed rule changes. The subject matter of these rules was addressed in presentations at past Steering Committee meetings.

Public Comment

There was no public comment.

Next Meeting

The next meeting was scheduled for Wednesday, September 9, 2009 in Deer Lodge. The agenda will include the joint newsletter, the status of the state's actions regarding the Milltown Dam water rights, and a report on the WPC meeting.