

# MEMORANDUM

**TO:** Members, Clark Fork Basin Water Management Task Force (Task Force)  
**FROM:** Gerald Mueller  
**SUBJECT:** Summary of the August 30, 2010 Task Force Meeting  
**DATE:** September 14, 2010

## Participants

The following people attended the Task Force meeting:

### *Task Force Members:*

Harvey Hackett	Bitterroot Irrigation District
Steve Hughes	Flathead Irrigation Project Joint Board of Control
Holly Franz	PPL Montana, LLC
Jim Dinsmore	Upper Clark Fork River
Marc Spratt	Flathead Conservation District/Flathead Chamber of Commerce
Arvid Hiller	Mountain Water Company
Brianna Randall	Clark Fork Coalition
Gail Patton	Sanders County
Ted Williams	Flathead Lakers
Nate Hall	Avista
Senator Dave Wanzenried	Senate District 49

### *Agency*

Ann Schwend	Montana Department of Natural Resources and Conservation (DNRC)
Tim Bryggman	DNRC
Ethan Mace	DNRC

### *Public*

Ross Miller	Mountain Water Company
Lance Elias	PPL Montana, LLC
Deb Maloney	PPL Montana, LLC

### *Staff*

Gerald Mueller	Consensus Associates
----------------	----------------------

## Meeting Agenda

- Introduction
- June 7, 2010 Meeting Summary
- Administration
  - Membership Update
  - Budget and Expenditure Update
- Water Policy Interim Committee Draft Report and Legislation
- Hungry Horse Initiative
- Flathead Lake Drought Management Plan
- Amended Kerr Hydropower and Storage Water Right Claims
- Petition to DNRC Concerning Exempt Well Rule Making
- 2010-2011 Roundtables/Conference Planning
- Proposed Flathead Reservation Water Management Board
- Public Comment
- Next Meeting

## **Introduction**

Arvid Hiller introduced Ross Miller who has recently joined Mountain Water as an officer. Mountain Water has asked DNRC Director Mary Sexton to designate Mr. Miller as the Task Force representative of Mountain Water and the middle Clark Fork subbasin (the reach of the Clark Fork River between the confluence of the Blackfoot River and the Clark Fork River and the confluence of the Clark Fork River and the Flathead River).

## **June 7, 2010 Meeting Summary**

No changes were made to the June 7, 2010 meeting summary.

## **Administration**

Membership Update - Gerald Mueller reported that DNRC Director Sexton has appointed Senator Dave Wanzenried as an ex officio Task Force member. Senator Wanzenried is the co-chair of the Interim Water Policy Committee and sponsored SB303, the state water plan bill, in the 2009 legislative session. Senator Elliott has formally resigned from the Task Force. Mr. Mueller has been unable to contact Bill Gardner by email or telephone. Since he has not attended a Task Force meeting since being appointed in 2009, he will no longer be considered a Task Force member.

Ann Schwend reported that Director Sexton will be sending letters to all current Task Force members asking if they are interested in being reappointed to the Task Force. She asked that Task Force members respond to this letter. Letters of support for member appointments to Director Sexton from any group represented would also be helpful. 85-2-350 specifies that Task Force members serve two year terms with an opportunity for reappointment. Ms. Schwend suggested that half of the members be designated for an initial one year appointment to create staggered two-year terms. No one present objected to this arrangement.

Mr. Mueller reported that Director Sexton requested that the opportunity for Task Force appointment be advertising in basin newspapers and to potentially interested water groups. Mr. Mueller has drafted a notice for DNRC's review.

Ms. Schwend also suggested a greater effort be made to notify the public of Task Force meetings and activities. Notices could be sent to the community calendar sections of basin newspapers and organization newsletters and web pages. She asked that members be active in reporting on the Task Force to the groups that they represent. Mr. Mueller asked that members send to him contact information and deadlines for posting notices through newsletters and web pages.

Budget and Expenditure Update - Gerald Mueller reviewed the Task Force 2010-2011 FY budget and expenditures for FY2010 using the summary included below in Appendix 1.

*Comment by Ann Schwend -The budget summary includes only the Resources Grant and Loan Program (RRGLP) grant amounts and omits the funding in the DNRC base budget, \$8,369 per year. The total amount available is therefore \$43,369 for each of the two fiscal years.*

*Question - Is there flexibility to move funding between categories?*

Answer by Ann Schwend - Yes, however funds unspent for travel expenses probably should revert. If too much money has been included in the some of the categories, future budgets should be reduced to reflect this fact.

*Comment by Gerald Mueller - The Task Force RRGLP grant was made toward the end of the legislative session. It did not result from a Task Force grant request, nor a detailed budget request. We have submitted a RGLP application with a detailed budget for the 2012-13 biennium.*

### **Water Policy Interim Committee Draft Report and Legislation**

The final meeting of the Water Policy Interim Committee (WPIC) will take place on September 8 and 9, 2010. At this meeting, WPIC will finalize its report to the 62<sup>nd</sup> legislature entitled, "Boiling It Down, A Study of Water Policy in Montana." It will also take final action on legislative bill drafts that the committee will sponsor in the next legislative session. Both the report and the legislation will be subject to public comment at the meeting.

In a July 30, 2010 memorandum, Mr. Mueller highlighted sections of the draft report and summarized the bill drafts. This memo is attached below in Appendix 2. Mr. Mueller asked for Task Force member discussion of the draft report and bill drafts and a Task Force decision about what testimony, if any, it wishes be made on its behalf at the meeting. Highlights of the member questions and comments follow.

*Question - What is the definition of the mixing zone addressed in LC9004?*

*Answer by Ross Miller and Marc Spratt - The mixing zone is the area in which nitrate concentrations from a septic system are reduced to 5 milligrams per liter (mg/l). Depending on lot size, mixing zones may be 100, 200, or 500 feet in size.*

*Comment - Ambient soil conditions affect the ability to add nitrates. Current regulations allow adding up to 5 mg/l of nitrates. No additional treatment, beyond that which occurs naturally in the soil, is required.*

*Comment - An unintended consequence of the current regulation is incentive to use larger lot sizes so that exempt wells can be used instead of community water systems.*

*Comment - The real estate market is driving developers to smaller lots. Larger lots are not selling. Septic systems on smaller lots may impact neighboring property up to 5 mg/l.*

*Comment - Ravalli County is moving forward to require community wells and septic systems.*

*Comment - In some places, community wells will not work because not enough ground water is available to support larger wells.*

*Comment - Local government needs to take more responsibility; however, the current legal requirements are too complicated and uncertain. Sanders County had a subdivision decision appealed to the Montana Supreme Court. The Court remanded the decision because the county did not follow the appropriate legal steps in making its decision.*

*Comment - The existing requirements for community systems are too restrictive.*

*Comment - In Michigan, state agencies have more authority to administer and enforce water rights.*

*Question - Historically, what was the driving force behind the cost and attorney fee recovery legislation? Was it eliminating frivolous law suits?*

*Answer by Holly Franz - In 1995, the Upper Clark Fork River Basin Steering Committee successfully sought legislation sought to allow traditional water right holders who faced objecting to new water right permits and changes to protect their water rights the ability to*

recover their court costs and attorney fees for doing so. The Steering Committee thought that the award of costs and fees would encourage people to participate in the water rights process. The 1995 statute applied only in the upper Clark Fork River basin and was temporary, expiring in 2005. In 2005, the legislature passed the existing statute which mandates awards of costs and fees to a prevailing party in an appeal of a final DNRC decision on an application for a new water right permit.

*Comment - I am aware of instances in which existing water right holders have not appealed a DNRC decision because of the potential for having to pay costs and fees in the event that they lose the appeal.*

*Comment - DNRC water right enforcement is a hot topic. The trend is for less DNRC enforcement because of staffing and budgetary issues. The Task Force should review the department's enforcement policy.*

*Comment - DNRC should conduct an initial investigation of complaints so that water rights holders know if they have a basis to object to a claim or appeal an permit or change application or seek an enforcement action in court.*

*Comment - DNRC lacks funding to monitor water use.*

*Comment - In the last legislative session, a bill was passed eliminating the requirement on DNRC to conduct informal processes before taking an enforcement action.*

*Question - What are the criteria for a DNRC investigation?*

*Answer - DNRC responds to a written complaint. Once a complaint is filed, DNRC conducts an investigation to determine if an issue exists.*

*Comment - There is a ground swell to recreate a state engineer with centralized authority regarding water rights administration and enforcement.*

***Task Force Action - Those Task Force members present at today's meeting agreed that Mr. Mueller should present testimony at the upcoming WPIC meeting to encourage DNRC to exercise its existing water right enforcement authority. To do this, the department must have adequate funding and staffing. Also, WPIC should take a hard look during the next biennium at administrative and enforcement needs after the adjudication is completed.***

## **Hungry Horse Initiative**

Tim Bryggman discussed DNRC's comments on the Bureau of Reclamation (BOR) cost allocation report sent to the BOR in an August 23, 2010 letter from Mary Sexton to William Gray. These comments were circulated to Task Force members prior to this meeting and are included below in Appendix 3.

*Question - Did the BOR depreciate the Hungry Horse project costs in the cost reallocation analysis?*

*Answer - The BOR converted the costs to 1956 dollars.*

*Question - Does DNRC expect a response from the BOR to its comments?*

*Answer - Yes.*

*Question - What are the next steps in the contracting process?*

Answer - The next steps would be to: wrap up the draft cost reallocation report; conduct the basis of negotiation (BON); and conduct the National Environmental Policy Act review of a contract; finalize the contract; and seek Congressional approval of the cost reallocation.

*Comment by Gerald Mueller - As I previously reported to the Task Force, the state announced at the June negotiating session for the Confederated Salish and Kootenai Tribes (CSKT) reserved water rights compact that it intends to pursue Hungry Horse water through the compact and will not pursue a contract with the BOR at this time.*

*Comment - Commenting on the draft cost reallocation report is still necessary because the report may be used in the determination of the value of water for uncompensated damages to the CSKT.*

**Task Force Action - Those Task Force members present at today's meeting directed Mr. Mueller to draft a letter to the BOR commenting on the May 2010 version of the Hungry Horse cost reallocation report. The letter should make the following points:**

- ***Because the cost reallocation report will remain a draft and will not be submitted to the Congress for approval until a contract is negotiated, the utility of the report is not clear.***
- ***The BOR should respond to the DNRC comments, including the apparent overstatement of project costs by about \$44 million in 1956 dollars or \$279 million in 2009 dollars and the overestimate of the value of municipal and industrial water.***

***The draft letter should be circulated to Task Force members for their review, revised reflecting Task Force comments, and sent to the BOR.***

## **Flathead Lake Drought Management Plan**

Lance Elias and Deb Mallowney with PPL Montana, LLC and Ted Williams with the Flathead Lakers discussed two topics, the final environmental impact statement (FEIS) prepared by the Bureau of Indian Affairs to evaluate various alternatives for a drought management plan for Flathead Lake, and the final drought management plan that is under development by PPL Montana and CSKT in consultation with the US Army Corps of Engineers (COE), BOR, and BIA. The drought management plan will attempt to balance lake elevations and minimum flows below the dam under drought conditions. If the COE considers that it is necessary for flood control purposes, they may supersede the drought management plan directives. Five articles of the current FERC license for Kerr Dam are particularly relevant to the operation of the dam. Article 43 addresses lake regulation and flood control. Article 56 specifies minimum flow requirements below the dam. (During low water years, there may be an insufficient volume of water to achieve Article 43 Lake levels while maintaining minimum instream flow requirements of Article 56). Article 57 specifies maximum daily ramp rates. Article 58 specifies maximum hourly ramp rates. Article 60 requires a drought management plan.

A summary prepared by the Flathead Lakers of the alternative selected by the BIA in the FEIS is contained below in Appendix 4.

Two climate review indicators (indices) will be used for early forecasting of drought conditions. One index is called the Multivariate ENSO Index (MEI) and the other the Flathead Precipitation Runoff Index (FPRI). The latter will be based on observations of precipitation in specific stations located in key sub-basins affecting the Flathead basin..

*Question - What are the minimum flow requirements that PPL Montana must be met below Kerr Dam under non-drought conditions?*

Answer - Prior to April 15, the minimum flow is 3,200 cubic feet per second (cfs). From April 16 to April 30, the minimum flow increases by 120 cfs per day to 5,000 cfs. From May 1 to May 15, the minimum flow increases by 510 cfs per day to 12,700 cfs. The minimum flow of 12,700 cfs stays in place from May 16 to June 30. From July 1 to July 15, the minimum flow requirement is reduced by 420 cfs per day to 6,400 cfs. From July 16 to July 31, the minimum flow requirement drops by 200 cfs per day to 3,200 cfs.

*Question - What role will Hungry Horse storage play in the Flathead drought plan?*

Answer - PPL Montana can request the BOR to release Hungry Horse water but there is no obligation for Hungry Horse to provide additional releases.

*Question - What would trigger a request a BOR request for Hungry Horse water?*

Answer - If the April analysis indicates that a minimum stream flow deviation is needed, a request to BOR for additional Hungry Horse flow releases must be made before this step can move forward. In the 2008 FCRPS Biological Opinion, the Hungry Horse traditional draft of 3540.0 feet in August was modified to a draft of 3550.0 feet in September with the exception of years when the May Final volume runoff forecast for April-August is in the 20<sup>th</sup> percentile at the Dalles. When this forecast is in the 20<sup>th</sup> percentile or at 71.8 maf, Hungry Horse will draft to 3540.0 in September.

*Question - What was the rationale for choosing the 2892.2 foot lake elevation target?*

Answer by Lance Elias - I do not know.

Answer by Ted Williams - I believe it was a committee decision.

*Question - How much water is stored in the top foot of Flathead Lake?*

Answer - 120,000 acre-feet.

*Question - Does Flathead Lake elevation have a potential affect on Eurasian Millfoil?*

Answer - Flathead Lake has a deep cycle draft. Lake elevations change by ten feet per year.

*Question - Once the drought plan is implemented, can the COE enforce lowering lake levels?*

Answer - The COE flood control operations cannot be constrained by the drought plan.

*Question - Will the development of the drought plan include public involvement?*

Answer - No. PPL Montana and the CSKT will develop the plan which will be subject to Department of Interior (through the Bureau of Indian Affairs) approval.

*Question - Will any specific rain or snow events change the drought plan triggers?*

Answer - Current conditions will be evaluated.

*Question - Will the drought plan tie Flathead Lake operation to the two indices?*

Answer - Yes for the initial five year period. At five years, the indices will be reviewed.

*Question - Who will conduct the five year review?*

Answer - The licensee, PPL Montana, will conduct the review and submit the results to the Department of Interior Secretary.

## **Amended Kerr Hydropower and Storage Water Right Claims**

Holly Franz summarized the amended power generation and storage water right claims recently submitted by PPL Montana for Kerr Dam. The claim for power generation originally filed by the previous owner of the dam, the Montana Power Company (MPC), specified a flow of 14,540

cfs up to 614,200 acre-feet per year. This volume amount would have limited operation of the generation to 21 days per year at 14,540 cfs. PPL Montana reviewed the Kerr records to determine the highest hourly average flow used for power generation and the maximum flow through the dam in a calendar year in acre-feet. During 1955-67 the maximum flow was 15,590 cfs and the maximum calendar flow was 7,890,523 acre-feet. These values were used in the amended claim.

MPC had based the storage claim for all of its dams on a flow rate determined by a methodology resulting from a federal court case from the 1940s, MPC versus Broadwater Irrigation District. The federal judge in this case ruled that the storage claim should be based on flow rate required to refill the reservoir in a 24-hour period. This ruling was overturned by the Ninth Circuit Court of Appeals because state court, not federal court, has jurisdiction in water right cases. MPC's original claim for storage at Kerr was 614,700 cfs. The amended claim is for 2,132,337 acre-feet per year, an amount that provides for a little more than one refill per year. The Kerr reservoir volume is 1,791,000 acre-feet. In its claim examinations, DNRC includes an issue remark if the claim would result in more than two refills per year.

*Question - What is the maximum flow through the Kerr Dam turbines?*

Answer - 15,590 cfs on an hourly average.

*Question - What is the source of data on the inflow to the Kerr reservoir?*

Answer - Inflows are calculated, not measured.

*Question - Is the claim being negotiated with DNRC?*

Answer - The claim was submitted and is being examined by DNRC. If DNRC finds a problem with the claim it appends an issue remark to it. The Kerr claim is not being negotiated.

*Question - In 2015, ownership of the dam may pass to the CSKT. If ownership transfers will the water right also transfer?*

Answer - Yes.

### **Petition to DNRC Concerning Exempt Well Rule Making**

Brianna Randall reported on the petition and DNRC's recent ruling on it. The Clark Fork Coalition, which owns water rights in the upper Clark Fork basin, and four other senior water rights holders, petitioned DNRC to issue a declaratory ruling that the current administrative rule definition of "combined appropriation" set forth in Rule 36.12.101(13) ARM be declared invalid and the department initiate rule making to amend the definition. DNRC recently ruled on the petition determining that the existing definition is consistent and not in conflict with applicable law. It also ruled that increasing demands on Montana water resources warrant repeal of 36.12.101(13), and the department will within eight months initiate rule making to adopt a new definition of "combined appropriation." At the end of the ruling, the DNRC hearings examiner wrote:

The Department is evaluating a new "combined appropriation" administrative rule definition that would allow an exempt well to serve up to twelve residential lots with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year. The Department will consider other factors such as closed basins and geographic area.

Ms. Randall stated that the petitioners are likely to appeal the DNRC ruling to district court.

### **2010-2011 Roundtables/Conference Planning**

Gerald Mueller asked Task Force members for topics for roundtables and/or conferences for the 2010-2011 period. One possibility is the proposal made by Jesse Aber for an early season water supply/climate outlook meeting around May 1 each year followed by a season-end session in the first half of October. Mr. Aber's proposal was set forth in Mr. Mueller's August 5, 2010 memorandum to the Task Force. This memorandum is included below as Appendix 5. Mr. Mueller also stated that Dr. David Shively, a UM Department of Geography faculty member, who previously worked with the Task Force to convene round tables and conferences is on sabbatical this year. The Chair of the Geography Department, Dr. Sarah Halvorson, is willing to step in for Dr. Shively to arrange for use of UM facilities and for a student to assist with the round tables/conferences.

*Comment - Mr. Aber's idea is a good one, and we should consider convening the early season water supply/climate outlook meeting this next spring. Before this meeting, however, we should bring together all of the entities that make water supply/climate outlook forecasts to discuss what each entity does and how they do it.*

*Question - What has happened regarding the Task Force's Modeling Technical Advisory Committee?*

*Answer - Our purpose in convening this group was to provide the Task Force advice about a hydrologic model of the Clark Fork River basin that might be used to schedule and manage water releases from Hungry Horse reservoir. Our plan was to convene the group this past summer; however, I was unable to identify a workable date for the meeting. Because the state has decided not to pursue a contract for Hungry Horse water now and rely instead on the CSKT compact to obtain access to Hungry Horse water, I am not sure what role a hydrologic model may play. I therefore decided to wait to arrange a committee meeting until after we discuss the state's compacting approach with Bill Schultz, the new reserved water rights program manager.*

*Comment - Continuing to seek the advice of this committee regarding modeling is still useful.*

*Comment - We could use the assistance of a graduate student to help the Task Force think about what we need to know to develop and implement a drought plan. What tools should we use and how would they be applied?*

Next Steps - Gerald Mueller will meet with Dr. Halvorson to discuss supporting a student to assist the Task Force with thinking through how to approach addressing drought in the revision of the basin watershed management plan and to provide assistance with round table/conferences during 2010-11. The Task Force will invite Dr. Halvorson and a student to the next meeting to continue its discussion of conference topics and schedules.

### **Proposed Flathead Reservation Water Management Board**

Steve Hughes, who is president of the Flathead Irrigation System Joint Board of Control, discussed the Unitary Management Board (Board) that is contained in Article IV of the working draft of the CSKT Water Rights Compact. Quoting from Article IV, "The Board shall administer and enforce all water rights on the Reservation pursuant to the Compact and the Law of Administration." The working draft also provides that the "Board shall consist of five voting members: two members selected by the Governor of the State, after consultation with holders of Water Rights Arising Under State Law located on the Reservation; two members appointed by the Tribal Council; and one member selected by the other four members." The federal government is apparently interested in having a federal voting member. The position of the Joint Board of Control is that all Board members must be residents of the Reservation and opposes a federal voting member. At the July negotiating session, the state opposed both the Reservation

residency requirement as unduly restrictive and the inclusion a federal voting member. Mr. Hughes asked the Task Force to send a letter to the chairman of the Compact Commission and of the CSKT Council supporting the Joint Board of Control position on Board Membership.

*Task Force Action - Those Task Force members present at today's meeting directed Mr. Mueller to draft a letter to the chairman of the Compact Commission and of the CSKT Council opposing the inclusion of a federal voting member on the Board. Also, rather than supporting an explicit Reservation residency requirement, the letter should emphasize the local control. Mr. Mueller will draft a letter and circulate it to the Task Force for comments, and send a letter reflecting them.*

### **Public Comment**

There was no additional public comment.

### **Next Meeting**

The Task Force's normal meeting day, the first Monday of the month, will not work in October. Mr. Mueller will therefore work with Task Force members to schedule an October meeting. The agenda may include a discussion with Bill Schultz about the status of the CSKT compact negotiations and the role of Hungry Horse stored water in them, a report on the DNRC's analysis of the legal availability of water in the Flathead basin, a discussion of possible work on drought by a UM Department Geography student, continued discussion of conference topics and schedules for 2010-11, and a report on WPIC sponsored bills for the next legislative session.

**Appendix 1**  
**Clark Fork Task Force**  
**FY 2010-2011 Budget and Expenditure Summary**

	FY 2010		FY 2011	
Category	Budget	Expenditures	Budget	Expenditures
Facilitation Services	\$20,000.00	\$20,000.00	\$20,000.00	
Conferences	\$6,000.00	\$2,805.06	\$6,000.00	
Publications	\$3,000.00	\$0.00	\$3,000.00	
Meeting Expenses	\$3,000.00	\$1,175.10	\$3,000.00	
Travel Expenses	\$3,000.00	\$894.16	\$3,000.00	
<b>Totals</b>	\$35,000.00	\$24,874.32	\$35,000.00	

FY 10-11 funds were provided by a Renewable Resources Grant and Loan Program grant directed by the 2009 legislature. The Task Force has applied for a similar grant for FY12-13.

**Appendix 2**  
**Clark Fork River Basin Task Force**  
C/O Gerald Mueller  
440 Evans  
Missoula, MT 59801  
(406)543-0026

**MEMORANDUM**

**Date:** July 30, 2010  
**To:** Harvey Hackett  
**From:** Gerald Mueller  
**RE:** Draft WPIC Report and Legislation

---

The Water Policy Interim Committee (WPIC) has issued a draft report including draft legislation and is soliciting public comment on it until August 30, 2010. Portions of the draft report are enclosed. The full draft report is available at:

[http://leg.mt.gov/content/Committees/Interim/2009\\_2010/Water\\_Policy/Meeting\\_Documents/September2010/boiling-it-down-public-comment.pdf](http://leg.mt.gov/content/Committees/Interim/2009_2010/Water_Policy/Meeting_Documents/September2010/boiling-it-down-public-comment.pdf).

The WPIC will also take public comment at its September 8 and 9, 2010 meeting in Helena.

The report addresses some areas that the Task Force has considered and some that we have not. Based on our past discussions, I enclosed the following sections of the draft: Draft Findings and Recommendations, Water and the Way of the West, Water Rights as Property: Who Enforces the Right?, Exempt Wells - No Permit Necessary, and Changing Water Use. Four of the bills address areas of particular interest: LC9002 (water marketing), LC9004 (Mixing zones), LC9005 (Local government authority), and LC9999 (award reasonable costs and attorney fees). I will attempt to summarize the areas of addressing past Task Force interests and key provisions of the four bills below.

Water Right Enforcement - The section on water rights enforcement states:

There are a variety of possible explanations for the emphasis on private rather than government enforcement. The primary reason may stem from the legal characterization of water rights as a form of real property. On one hand, the classification of water rights as real property has resulted in the recognition that water rights have value and can be transferred, inherited, devised, encumbered, and disposed of in much the same way as real property. On the other hand, it may be why much of the enforcement burden has been placed upon private individuals. Real property rights are usually enforced through private party actions without government involvement.

The report does not discuss the time and expense necessary for individual water right holders to access and get a decision from district court and that for at some water right holders the time and expense can render enforcement moot.

Exempt Wells - At present, the report contains a discussion, but no findings or recommendations regarding exempt wells. Two of the draft bills relate to ground water topics discussed at past Task Force conferences. LC9004 changes the requirements for the location of septic system

mixing zones. LC9005 clarifies the authority of local governments to require public water and sewer systems.

Changing Water Use - The section includes a detailed examination of water right changes, water marketing, and water banking.

LC9002 (water marketing) - The full title of this bill is "An Act generally revising water laws related to aquifer recharge and mitigation; providing up to 20 years to complete a of use to aquifer recharge or mitigation; clarifying that nonuse of an appropriation right during a completion period does not create a prima facie presumption of abandonment; and amending sections 85-2-102, 85-2-310, 85-2-402, and 85-2-404, MCA." Key provisions of the bill include authorizing a water right change for water marketing for aquifer recharge and mitigation and specifying that during the period approved by DNRC for marketing the water (up to 20 years), nonuse of an appropriation right does not create a prima facie presumption of abandonment and may not be added to a previous period of nonuse to create a prima facie presumption of abandonment. A change application for marketing must specify the place of use but need not have the detail about the person(s) that would use the water required in other changes.

LC9004 (Mixing zones) - The full title of this bill is "A Bill for an Act entitled: "An Act requiring drainfield mixing zones be located wholly within the lot or subdivision where the drainfield is located; amending section 76-4-104, MCA; and providing an immediate effective date and an applicability date." This bill adds the following to 76-4-104 (6):  
(i) for a drainfield serving one lot in a subdivision, adequate evidence that the drainfield mixing zone is located wholly within the boundaries of the lot on which the drainfield is located or that an easement for the drainfield mixing zone outside the boundaries of the lot has been obtained;  
(j) for a drainfield serving more than one lot in a subdivision, adequate evidence that the drainfield mixing zone is located wholly within the boundaries of the subdivision on which the drainfield is located or that an easement for the drainfield mixing zone outside the boundaries of the subdivision has been obtained.

LC9005 (Local government authority) - The full title of this bill is ""An Act clarifying the authority of local governments to require public water supply systems and public sewer and wastewater systems for subdivisions; and amending sections 76-3-504, 76-3-601, and 76-3-604, MCA." This bill adds the following language to 76-3-504 (3), "A governing body implementing the provisions of subsection (1)(g)(iii) may, subject to the requirements of 76-3-511, require public water systems, public sewer systems, or both."

LC9999 (cost and attorney fee awards) - The full title of this bill is "An Act providing the district court discretion to award reasonable costs and attorney fees incurred as a result of an appeal of a final decision on a permit application or change in appropriation right; amending section 85-2-125, MCA; providing an immediate effective date and an applicability date." The Task Force has been interested in the award of costs and attorney fees in water right proceedings as a way of easing the burden of enforcing water rights through district court actions. In 1995, the legislature passed a temporary statute authorizing the award of costs and attorney fees in hearings and decisions involving the Upper Clark Fork basin. This temporary statute expired in 2005 and was replaced with provisions allowing recovery of costs and allowing a party who has obtained injunctive relief enforcing a water right to recover costs and attorney fees. LC9999 provides the

district court the discretion to award costs and attorney fees to the prevailing party in an appeal of a final DNRC decision on an application for water right permit or change. LC9999 does not change the existing statutory provisions requiring the award of costs and attorney fees to a water right holder who obtains injunctive relief to enjoin the use of water by a person that does not have a water right.

Next Task Force Meeting - I am presently polling Task Force members about meeting on Monday, August 30, instead of the scheduled Monday, September 13 date. Not all members have responded yet. The responses so far are mixed. I will make a decision about the meeting date soon.

**Appendix 3**  
**DNRC COMMENTS ON**  
**DRAFT COST REALLOCATION REPORT FOR HUNGRY HORSE PROJECT, MONTANA**  
**US. DEPARTMENT OF INTERIOR. BUREAU OF RECLAMATION**  
**MAY 2010**

**GENERAL COMMENTS**

The References include a citation for “Interim Cost Reallocation Report - Columbia Basin Project WA” from May 2000. Is this the most recent cost reallocation analysis conducted in the Columbia Basin?

Through numerous quarterly reports, contract schedules, electronic correspondence, and phone conversations over the course of the development of the Draft Cost Reallocation Analysis, considerable effort was reported to be directed toward hydrologic modeling. The results of such efforts, however, are not evident in the Report. The absence of hydrologic modeling from the cost reallocation analysis was confirmed in a conversation with BOR staff in Missoula on June 29, 2010. *Please explain when and why it was determined that hydrologic modeling was not necessary to complete the analysis. Please provide information pertaining to the level of effort for activities that were reported to be dependent on the results of hydrologic modeling that were ultimately not included in the analysis. Please provide information regarding the expenses for those activities.*

*In tables reporting estimates in 1956 dollars, it would be helpful to readers if titles or footnotes were used to identify that estimates were in 1956 dollars.*

**INTRODUCTION**

**Purpose of Study.**

It would be useful if the introduction described more fully the relationship between a project’s cost allocation and project financing - particularly with respect to contract terms for a use such as Municipal and Industrial (M&I). What portion of Hungry Horse’s costs have been repaid by hydropower users and by federal taxpayers on behalf of flood control beneficiaries? Once a project’s costs have been reimbursed, is the allocation of capital costs relevant for determining terms for serving project uses?

**COST ALLOCATION METHODOLOGY**

Page 3, Paragraph 2. Is the Separable Costs-Remaining Benefits (SCRB) methodology being used for reasons other than to “be consistent” with the 1960 Allocation of Costs? Perhaps a stronger justification for this method over other methods might be provided.

**PROJECT COSTS**

**Operation, Maintenance, and Replacement**

What is the point of reporting capitalized OM&R?

**BENEFITS**

Please provide the spreadsheets of tables presented in Appendix A.

**Flood Control.**

Page 7, Last Paragraph. It is unclear why the Hungry Horse percentage of system-wide flood storage should be divided by the Grand Coulee percentage and that figure should be multiplied by the total system flood control benefit estimate. The result implies that Hungry Horse provides 57 percent of total system flood control benefits. If the intent is to assign a proportionate share of flood control benefits for the Lower Columbia River to Hungry Horse based on flood control space provided by Hungry Horse and

Grand Coulee, the assumption that storage space is the only factor in determining such benefits may be overly simplistic. The timing of the storage of flood waters and of other operational considerations at Hungry Horse as well as its location in the basin would seem to be significant factors determining the contribution of Hungry Horse to flood control benefits in the Lower Columbia. Estimating the percentage of system flood control provided by Hungry Horse may be problematic because inflows from the South Fork of the Flathead vary somewhat independently from the Columbia system as a whole.

The analysis assumes that flood control benefits will remain constant over the period 2008-2055. What is the basis for this assumption? Is it likely that flood control benefits would remain constant if the population grows in the project areas?

Page 8, Paragraph 3. The text notes that the flood damage curves are dated and are currently being updated. An indication of the likely outcome of the revision of the damage curves would be helpful. Quite possibly, the revised damage curves might increase flood control benefits substantially.

### **Hydropower.**

Page 9, Paragraph 2. Are the H/K factors assumed to be constant for each project over the period from 1956-2008? What is the basis for the assumption that all flows from Hungry Horse are used to generate hydropower and are not spilled at Hungry Horse and at hydropower facilities downstream?

Page 10. First Paragraph. Please explain how Hungry Horse operations were adjusted to reflect the “additional M&I pumping from zero to 100 KAF In 2060.” In which months were adjusted operations at Hungry Horse assumed to occur? Were they adjusted from July through November as suggested on Table 8.1? Does this additional M&I pumping affect hydropower production at Hungry Horse or production at downstream facilities? If so, how?

Page 10, Paragraph 2. Why were BPA power rates not used for the period 1956 through the late 1990s?

Appendix A, Table B.2, Pages 15 and 11. What does HGH mean? Hungry Horse Generation?

### **M&I.**

The M&I benefits rely on an estimate of the value of M&I water of \$244.14 found in “2006 M&I Water Rate Survey Data by Reclamation’s Office of Program and Policy Services. This estimate is problematic for various reasons. Primarily, it is unclear how the wholesale portion of a water system’s costs is derived. Some concerns regarding that document follow.

#### 2006 M&I Water Rate Survey Data

Table 1 identifies expenses related to a “Water source” as comprising 6.9 percent of average water system costs. Why is this figure not used?

The last paragraph on page 1 of Appendix A states, “it was assumed that one-half of the labor expenses are attributable to source water supply activities without providing any justification for this assumption.

The cost residual allocated to wholesale water is inconsistent with rate information for the example that is railed upon for the Draft Cost Reallocation Analysis. Mountain Water Company in Missoula. Mountain Water does not purchase water, but relies on ground water for its water source. Virtually all of its expenses are related to the distribution, transmission, and treatment of water. To suggest that 31.61

percent of its recoverable expenses are unrelated to those activities implies that a regulated utility such as Mountain Water enjoys a considerable profit margin at the expense of Its customers. In its cost of service analysis submitted to the Montana Public Service Commission (Final Report: Mountain Water Company; Test Year 2004; Comprehensive Water Cost of Service Rate Study. November 2006. HDR Engineering, Inc.) Mountain Water's costs for pumping and treating water are reported to be ten percent of total costs (Exhibit JK-2). Only a small portion of these costs are related to water supply - approximately one percent of total costs. For total costs of \$880 per acre-foot, water supply costs for Mountain Water customers would be estimated to be \$8.80 per acre-foot.

The City of Helena relies on a contract with BOR for water from Canyon Ferry for part of its water supply. Exhibit A in the Water Service Contract between the United States and the City of Helena Providing for a Municipal and Industrial Water Supply reports that the cost per acre foot was \$13.68 in 2006. The Information in this contract would appear to be relevant to the Draft Cost Reallocation Analysis given the source of supply and its proximity to the project area.

The information provided In Appendix B would appear to be minimally germane to the Draft Cost Reallocation Analysis given the sample of a small number of spot prices during a dry period, largely along the front-range of Northern Colorado.

#### **Recreation.**

The rationale for excluding recreation benefits from the allocation of costs is unclear. The report states that costs are not to be allocated to recreation because Reclamation incurs neither construction nor O&M costs specifically for the purpose of recreation. By the same reasoning, should M&I be excluded from the set of purposes to which project costs are allocated? If Hungry Horse were to provide M&I water, Reclamation would incur no construction or O&M costs specifically for M&I.

#### **ALLOCATION OF COSTS**

Is this the correct title for this section? A correct title would appear to be, "Single Purpose Costs."

Page 13, Paragraph 3. A hydrologic study is mentioned but is not cited in the references. Please provide the study.

Page 13, Paragraph 4. It is assumed that a spillway would be included among the construction costs for the M&I alternative but the flood control alternative makes no mention of a spillway. Are the costs of a spillway included for the construction and O&M costs for the flood control alternative?

It is surprising to see that the single purpose alternative for M&I storing 140 KAF costs nearly as much (\$42 million) as the single purpose alternative for flood control (\$57 million) which stores 2 MAF. What is the reason for the relative similarity of costs for projects of such vastly different sizes?

#### **SEPARABLE COSTS**

##### **Power.**

Why would the 2 MAF project for flood control not be sufficient for the dual purpose flood control and M&I project? It would seem that most if not all of the storage requirements of the flood control project could serve the 100 KAF M&I and 40 KAF dead pool requirements of the M&I purpose.

#### **ALLOCATION OF COSTS FOR REPAYMENT**

Page 16, Paragraph 4. Attachments 2 and 3 in Appendix B present indexed and discounted construction costs for the period 1956-2008 and non-indexed and non-discounted construction costs for the period 1956-2008. The cumulative cost attributed to the project from 1957 to 2008 (\$47,559,177) reported in this paragraph is neither indexed nor discounted. This is at variance with other estimates in the analysis.

Table 1 reports indexed and discounted construction costs from 1957 to 2008 of \$4,019,175. Those costs are added to construction costs from 1956 (\$101,600,129) to yield Total Construction Cost of \$105,619,304. Table 5 uses the indexed and discounted estimate of construction costs for this period as well. The selection of the non-indexed and non-discounted estimate of construction costs for this period as reported in this and subsequent sections, as well as in Tables 6, 7, and 8, results in an overstatement of project costs of \$43,540,002 in 1956 dollars or \$278,568,933 in 2009 dollars.

### **COST ALLOCATION COMPARISON**

Page 21, First Paragraph. The report explains why OM&R costs are not displayed in Table 8 but it is unclear why capitalized OM&R is discussed and presented in previous sections and tables. If it is not included among the costs to be allocated, then why include it in the report?

Perhaps this section could present the allocation amounts on an annualized basis as was done in Table 2. Also, it would be helpful to have the results indexed to present year dollars and presented on a per acre-foot basis.

### **REPAYMENT**

#### **Power.**

Page 22, First Paragraph. This paragraph is unclear. Does this mean that hydropower uses will be credited for payments already remitted?

#### Flood Control.

Page 22, Paragraph 3. While costs associated with this use are non-reimbursable, are outstanding project costs reduced in the amounts associated with the costs allocated to this use?

## Appendix 4

### Final Drought Management Plan FIS Preferred Alternative

#### 1) *October-December Climate Review*

If the climate indicators from October through December forecast drought conditions, the licensee would activate the Drought Management Plan (DMP).

#### 2) *Lake Drawdown Deviation*

Once the DMP is authorized, the licensee may deviate from the provisions of Article 43 (of the FERC license for Ken Dam - flood control requirements) to achieve a minimum lake elevation of 2,888<sup>±</sup> from December 31 through April 15. This higher lake elevation would require less water for spring refill.

#### 3) *January-April Climate Review*

In the months of January through April, the licensee would review climate indicators each month. Depending on the ongoing and projected severity of the drought, the DMP would either remain in force or be deactivated.

#### 4) *Lake Refill Deviation*

Beginning April 15 and through June 15, when the DMP is activated, the licensee will be required to maintain lake elevations as high as flood control conditions would allow.

#### 5) *Minimum Instream Flows Deviation Decision Process*

By no later than April 10, the licensee will obtain runoff volume forecasts to assist in determining whether drought management procedures should be terminated, maintained without a deviation from the minimum instream flow requirements of Article 56, or maintained with a deviation from minimum instream flow requirements. The licensee will request a deviation if runoff volume forecasts indicate that a June 15 lake elevation of 2892.2<sup>±\*</sup> could not be met if minimum instream flows are maintained. This decision will be made by the licensee following coordination with BOR to determine what, if any, additional water may be available from the Hungry Horse Project. Under these conditions, the licensee would submit a notice of intent to deviate from the flow requirements to the Secretary, BOR, and USACE as follows:

##### a) **Requirements of Notice of Intent to Deviate from Article 515**

The notice of intent to deviate from Article 56 will include the forecasted runoff percent and volume, the proposed minimum stream flow curve, the June 15 forecasted Flathead Lake elevation, and the expected average summer Flathead Lake elevation (June 16 to September 15). The notice will also include the rationale for the deviation and a summary of the consultation process including discussions with BOR regarding water availability from the Hungry Horse Project and CSKT<sup>±</sup>'s position regarding the deviation.

##### b) **Secretary Approval to Reduce Peak Minimum Instream Flows**

The Secretary or approved designee will have 10 working days to approve, modify, or deny the proposed deviation. If the Secretary or designee has not responded after 10 working days, the proposed deviation will be considered approved. If approved, the licensee will be allowed to reduce peak minimum

---

*\*The BIA evaluated the effects of various lake level targets under drought conditions through modeling, data analysis, and qualitative reviews of recreational and economic impacts. As a result of this analysis, the target lake elevation of 2892.2<sup>±</sup> was selected as being a reasonable value that is both achievable, and minimizes recreational and economic impacts.*

instream flows to as low as 8,000 cubic feet per second (CFS), and will be allowed to shift the minimum Stream flows peak period by up to two weeks early to coincide with the spring runoff event.

#### **6) Lake Elevation Goals under Minimum Instream Flows Deviation**

The licensee will make every reasonable effort to achieve a June 15 lake elevation no lower than 2,892.2' (higher if possible) and will make every reasonable effort to maintain this minimum lake elevation from June 16 to September 15.

#### **7) Adaptive Management**

Monitoring actual effects on key economic, social, and environmental indicators during periods of drought will help to identify actual effects of, and identify possible improvements to, the DMP. As such, within one year of the Record of Decision, the licensee will develop an adaptive management plan for review and approval by the Secretary that will assess: (1) assumptions and indicators used in developing and implementing the Drought Management Plan; (2) estimates and predictions made in the analysis including environmental, social and economic effects; and (3) recommendations regarding potential modifications to the DMP in an effort to minimize adverse effects.

#### **8) Five-Year Review**

The licensee will reexamine the climate indicators and runoff characteristics of the F Flathead Basin every five years to determine whether the indices need to be modified to account for climatic changes.

#### **Significant Revisions from the Draft EIS**

- Additional assessment of increased flood risk under the preferred alternative. This assessment involved modeling and analysis of the I 964 flood event (an example of floods produced from rain or rain and snow events) and additional requirements in the preferred alternative to coordinate with official forecasting agencies prior to deviating from the flood control requirements of article 43.
- Additional assessment of effects on docks (e.g., ice damage, access) under the preferred alternative, specifically, use of bathymetric mapping, wind data and water level data to qualitatively assess specific areas on Flathead Lake that have a greater tendency for damage.
- Additional statistical analyses to confirm the accuracy and reliability of the forecasting indices.
- Modifications to the preferred alternative include an adaptive management plan, coordination with Hungry Horse operations, an Article 56 deviations request, and a five-year update requirement of drought indicators.

**Appendix 5**  
**Clark Fork River Basin Task Force**  
C/O Gerald Mueller  
440 Evans  
Missoula, MT 59801  
(406)543-0026

**MEMORANDUM**

**Date:** August 5, 2010  
**To:** Clark Fork Task Force  
**From:** Gerald Mueller  
**RE:** Jesse Aber's Proposal for a Task Force Drought Activity

---

The following is the content of an email message that Jesse Aber sent to me on June 15, 2010. I forwarded his message to you the same day. I will ask that the Task Force discuss this idea under the Round Table/Conference agenda topic on the August 30 meeting agenda. Please think about this suggestion as well as other topics for Task Force round tables and/or conferences for 2010-2011.

Re drought planning for the CFB, I think your group could take a basin-wide role by hosting an early season water supply / climate outlook around May 1 each year followed by a season-end session in the first half of October.

Experts in weather, climate, water supply, agriculture, wildfire, hydropower, and planning could provide a report specifically focused on the west side using expertise from the same agencies we have for the state committee. You could have the water supply and the climate outlook at each session and the watershed group reps (or simply interested professionals such as resource managers) from west of the Divide hear the information and ask the experts questions.

Part of each meeting could be dedicated to hearing how the various sub-basins fared with drought planning and response over the course of the closing water year and as the next one begins. You could have the plenary session in the a.m. where the planner / coordinators are together hearing the outlooks from the various experts and Q & A.

That could be followed by an afternoon session where one or two basins share their well-established local plans and perhaps a report from a basin that is in the first few years of implementation. You would be promoting shared learning for the entire Columbia Basin, truly a unique region.

Expert reporting guests could stay or leave for the p.m. You could invite reporters from the larger regional daily, weekly, ad monthly pubs and some live media to create initial immediate awareness. The power point presentations of the water / climate experts could be posted on your site with media attention drawn to that resource.

I think that your announcement would draw an audience from all corners of the state's west side. Attendees could arrive the evening before and you could have a block of rooms set aside in town. And perhaps even a social or poster session reception the evening before.

Let me know if you would like assistance organizing a west side reporting function. I think that state climatologist Don Potts, Ray Nickless NWS, Roy Kaiser NRCS Snow Survey, USGS, USFS, Reclamation, FWP, USFWS, Northern Rockies Coordination Center - at the Smokejumper Mssla

## **REVIEW DRAFT**

airport Ray Nelson, etc. would all be happy to provide a reports under the auspices of the CFTF.