EXHIBIT 2
DATE 1/21/09
HB 201

Testimony in Support of HB 201
Before the Joint Appropriation Committee
By Gerald Mueller
January 21, 2009

Chairman Sesso and members of the Committee, my name is Gerald Mueller. I live at 440 Evans Avenue in Missoula.

I testify in favor of HB 201 on behalf of two basin scale water management groups, the Clark Fork River Basin Task Force (Task Force) and the Upper Clark Fork River Basin Steering Committee (Steering Committee). As amended, this bill would provide funding so that both groups can continue to carry out their statutory mandates found at 85-2-350 and 85-2-338 MCA, respectively. As amended, this bill would provide $35,000 annually for the coming biennium to fund the Task Force and $16,000 annually for the Steering Committee.

As I just wrote, both groups are established pursuant to state statutes and both have continuing statutory mandates. The members of both groups must be broadly representative of the basins they address, both geographically and in terms of water interests. Both were funded during the last biennium through the DNRC Water Resources Division budget. Although DNRC proposed continued funding for both groups through the department budget for this coming biennium, the Governor's Budget Office removed the funding for the Task Force because it was categorized during 2008-2009 as one-time-only funding. It is my understanding that funding for the Steering Committee is in the DNRC base budget, but HB 201 would remove any ambiguity regarding funding for both groups.

The $37,500 for the Task Force would be a 16% cut over its 2009 fund level, and the $16,000 would be a 20% cut for the Steering Committee over its 2009 funding level. To repeat, both groups are asking for significantly less money than they received for FY2009.

Because these are separate funding requests, I will now discuss each of these groups separately.

Clark Fork River Basin Task Force

The Task Force was created in 2001 pursuant to 85-2-350 MCA in response to concern about the availability of water in the Clark Fork River basin for future use and the security of existing basin water rights. The Task Force has worked to address this concern, but it is not yet resolved. In 2004, The Task Force completed the *Clark Fork Basin Watershed Management Plan* (*Plan*) and DNRC adopted most of its provisions into the *Montana State Water Plan*. The *Plan* found that lower basin hydropower water rights "...pose a potential constraint on junior water rights, and on water available for future use in the basin." This constraint was confirmed in 2006 by a DNRC hearings examiner's denial of a water right permit application by the Thompson Falls Lumber Company (76N-30010429) because additional water from the Clark Fork River would not to be "reasonably available" and the proposed diversion would adversely affect existing hydropower water rights at Noxon Rapids Dam.

The *Plan* also identified a potential solution to this constraint. Water stored in Hungry Horse Reservoir, a large federal reservoir located on the South Fork of the Flathead River at the top of the basin, could supply future water uses and increase the security of water uses based on water

rights junior to the lower basin hydropower rights. In 2005, at the request of the Task Force, the legislature passed House Joint Resolution 3 which urged the DNRC to enter into negotiations with the United States Bureau of Reclamation (USBOR) to determine the availability and cost of water stored behind Hungry Horse Dam for which the State of Montana might contract to support future water development and existing water use in the Clark Fork River basin. In 2007, the Task Force sought and won approval of a $260,000 appropriation by the legislature to DNRC to begin the process of contracting with the USBOR for water stored in Hungry Horse Reservoir. The Task Force also successfully sought a statutory change to the requirements for the state to lease water for beneficial purposes from large federal reservoirs. This change was necessary for the state to contract for Hungry Horse water and use it to meet water needs in the Clark Fork basin. The first step in the process for contracting for Hungry Horse water has only just begun.

By statute, the members of the Task Force are broadly representative of the range of basin water users in terms of geography and water interests. The list of Task Force members is attached. Members volunteer their time. The only compensation they receive is lunch and mileage to attend monthly meetings. Most have not opted to take the mileage payment. Over just the last two years, individual Task Force members have dedicated over 700 hours to Task Force meetings, not counting travel time or time preparing for meetings.

Obtaining an allocation of Hungry Horse water to support new and existing water uses in the Clark Fork is not the only issue addressed by the Task Force. Attached with this testimony is a copy of a recent Task Force publication, *Managing Montana's Water: Challenges Facing the Prior Appropriation Doctrine in the 21st Century.* The Task Force has also addressed ground water policy and data and growth and water management in the Clark Fork basin. It is interested in focusing attention on the state of the basin's water supply infrastructure. This coming spring, the Task Force plans to convene a round table of all of the basin's watershed groups and a conference focused on implementing the provisions of HB831 passed by the 2007 legislature.

The Task Force is the only entity with the specific statutory mandate of planning for water management in the entire 22,000 square mile Clark Fork River basin, one of the fastest growing areas in the state. We ask you to provide the modest amount of funding we have requested so that the Task Force can continue to do so in a collaborative and cooperative manner. A breakdown of the budget request follows:

Consultant and professional services	
Coordinator salary and expenses	$20,000
Annual conference	$10,000
Publications and education	$4,000
Member mileage and meals	$3,500
Annual total	$37,500

Upper Clark Fork River Basin Steering Committee

The Steering Committee is tasked with addressing comprehensive water management for the upper Clark Fork River basin, the area of the basin above the confluence of the Blackfoot and Clark Fork Rivers. The Steering Committee is one of Montana's oldest collaborative watershed groups. It was created in 1991pursuant to 85-2-338 MCA. Its 22 members are appointed six by the basin's county commissions, six by the basins conservation districts, and ten by the DNRC Director to ensure that the range of basin water interests are represented on it. A list of current Steering Committee members is attached.

The Steering Committee was created to resolve a conflict between agricultural and fishery interests over conflicting water reservation applications before the then Board of Natural Resources and Conservation. Rather than engage in a million dollar contested case hearing, the parties reached an agreement calling for the creation of the Steering Committee together with a mandate for it to write a water management plan for the upper Clark Fork River basin, that portion of the basin above Milltown Dam just upstream of Missoula.

In 1994, the Steering Committee completed and sent to the governor and the legislature the *Upper Clark Fork River Basin Water Management Plan.* The goal of the *Plan* is twofold: to provide for continued water planning and management of the waters of the upper Clark Fork River Basin rooted at the local level; and to balance all of the basin's beneficial water uses. The *Plan* has been adopted as a section of the *State Water Plan.* Key recommendations in the *Plan* have been implemented through passage of statutes, adoption of rules, and actions by local governments. The most significant of these was the closure of the basin to most new surface water rights by the legislature in 1995.

Because of the inclusive nature of its membership and the experience and dedication of its volunteer members, the Steering Committee has made contributions to water law, regulations, and management that have benefited the upper Clark Fork River basin and the state at large. The Steering Committee led the way in addressing water leasing by entities other than DFWP. In 1995, it successfully sought the first statutory requirement for a hydrologic report to accompany ground water right applications and to authorize augmentation of surface water with ground water. This requirement was a predecessor of HB 831 passed by the 2007 legislator addressing ground water permitting in closed basins. The Steering Committee also successfully sought a rule change from the DNRC that clarified that no one has a right to the water in the outflow of a sewage treatment plant, thereby enabling land application of sewage effluent to benefit water quality. In 2004, it released a policy paper that helped focus attention on the need to speed up the state-wide adjudication of water rights. In 2006, it released another paper exploring how completion of the adjudication may result in fundamental changes to water rights enforcement, water administration and water management.

A listing of the Steering Committee's specific accomplishments is attached. I will highlight only one here. The Milltown Dam located just upstream of Missoula was removed in 2008. Land and water rights formerly owned by the Montana Power Company and its successor NorthWestern Energy at Milltown are in the process of being transferred to the State of Montana. Except for a paper issued by the Steering Committee, almost no public discussion of the significance of the transfer of the existing Milltown Dam storage and hydropower water rights to the state has

occurred. The hydropower water rights have a flow of 2,000 cubic feet per second and a priority date of December 11, 1904. According to the DNRC water rights data base, 12,650 water rights located above Milltown Dam have priority dates junior to December 11, 1904. Almost 4,000 of these junior rights are for surface water uses. While owned by the utilities, the hydropower water rights were not enforced. When transferred to the state, these rights will presumably be for an instream flow use, probably for the Clark Fork River fishery. Should the state opt to enforce instream fishery rights by making call on upstream junior users, management of water in the upper basin would be significantly changed. In November 2007, the Steering Committee issued a policy paper that identified and explored alternatives regarding the purpose and ownership of the Milltown Dam water rights and explained why and how the ultimate disposition of those rights may be of crucial importance to upper Clark Fork basin water users. A copy of this paper is attached with this testimony.

The Steering Committee requests that funding be included in DNRC's budget so that it can continue its work on behalf of upper Clark Fork River basin water users. A breakdown of the annual budget request for the Steering Committee follows.

Coordinator salary and expenses	$10,000.00
Meeting Expenses	
Room rental (9 meetings @ $100)	$900.00
Member travel & lunches	$3,000.00
Publications & Projects	$2,100.00
Total	$16,000.00

Thank you.

Clark Fork River Basin Task Force

Name	Organization	Area/Interest Represented
Marc Spratt	RLK Hydro	Flathead Basin above Flathead Lake
Nate Hall	Avista	Hydropower Utilities
Holly Franz	PPL Montana	Hydropower Utilities
Gail Patton	Sanders County Commissioner	Basin Local Governments
Arvid Hiller	Mountain Water Company	Municipal water companies and the Clark Fork River Watershed between the confluence of the Blackfoot River and the Clark Fork River and the confluence of the Clark Fork River and the Flathead River
Caryn Miske	Flathead Basin Commission	Flathead Lake
Ted Williams	Flathead Lakers	Flathead Lake
Steve Hughes	Joint Board of Control	Flathead River watershed below Flathead Lake to the confluence with the Clark Fork River
Harvey Hackett	Bitter Root Water Forum	Bitterroot River watershed
Fred Lurie	Blackfoot Challenge	Blackfoot River watershed
Jim Dinsmore	Granite Conservation District & Upper Clark Fork River Basin Steering Committee	upper Clark Fork River watershed
Brianna Randall	Clark Fork Coalition	Conservation/environmental organizations
George Culpepper Jr.	Western Montana Association Of REALTORS	Real estate
Verdell Jackson, *Ex Officio*	State Representative	Senate District 5

Upper Clark Fork River Basin Steering Committee Members

Name	Area or Organization Represented	Appointment Entity
Bob Benson	Clark Fork-Pend Oreille Coalition	DNRC Director
Stan Bradshaw	Trout Unlimited	DNRC Director
Bob Bushnell	Lincoln Area Rancher	Lewis and Clark Conservation District
Jim Dinsmore	Hall Rancher	Granite Conservation District
Holly Franz	PPL Montana	DNRC Director
Carol Fox	Natural Resource Damage Program	DNRC Director
Nate Hall	Avista Corporation	DNRC Director
Sen. Dave Lewis	Lewis and Clark County	Lewis and Clark County Commission
Jim C. Quigley	Little Blackfoot Rancher	DNRC Director
Pat Saffel	DFWP	DNRC Director
Marci Sheehan	ARCO	DNRC Director
Rep. John Sesso	Butte/Silver Bow Planner	Butte/Silver Bow Commission
Jim Struna	Granite County	Granite County Commission
Dan Ueland	Mile High Conservation District	
Rep. Dan Villa	HD 86	DNRC Director
Jules Waber	Powell County Superintendent of Schools	Powell County Commission

Upper Clark Fork River Basin Steering Committee
Accomplishments
December 2008

Changed Water Management Climate

Although it can point to many specific legal, policy, and on-the-ground water-related accomplishments, perhaps the most significant change to which the Steering Committee has contributed is the changed climate for managing water in the upper Clark Fork River basin. As the following excerpt from the Steering Committee's report to 1999 Montana Legislature discusses, the climate has changed from one of distrust and contention between and among local water users and government water planners and managers to one characterized by partnership and cooperation. This does not mean that all water issues have been resolved, all disputes ended, and water rights attorneys are without work. It does mean that the Steering Committee and other basin groups such as the Blackfoot Challenge and the Tri-State Implementation Council have demonstrated that respectful, collaborative approaches involving the broad spectrum water interests can and have successfully implemented innovative approaches to water management. The Steering Committee is not the only group to practice inclusive collaboration among local water users and interests and government water managers and regulators, but it was one of the first to do so.

> In 1990, prior to the creation of the Steering Committee, a contested case hearing was scheduled to address competing water use issues in the upper Clark Fork Basin. Emotions ran high and trust low as water users prepared to make their arguments and defend their positions. Fish and wildlife managers, recreation and conservation groups argued that to protect the fishery and other instream values, additional diversions of water from the River and its tributaries should not be allowed. Ranchers and irrigators, hydroelectric utilities, and industrial interests were concerned about their livelihoods, water rights, and the availability of water for future development. A series of drought years and prevailing low streamflow conditions heightened the competition and the universal concern that all water uses could not be sustained indefinitely.
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> At the same time, water quality concerns in the basin were mounting. The area from Butte to Milltown Dam was designated as the nation's largest Superfund complex due to impacts from historic mining activities. The effects of wastewater discharges on water quality became more apparent as drought reduced the amount of streamflow available for dilution. Nonpoint source pollution from a variety of land use practices continued to impair beneficial water uses in many miles of basin streams, and a host of new development activities were being proposed. Congress responded to citizen concerns of declining water quality by calling for a major pollution study of the Clark Fork Basin in amendments to the federal Clean Water Act. The State designated the Clark Fork Basin's water quality problems as among its highest priorities.
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> In 1991, the Steering Committee was officially convened and charged with the daunting task of addressing all of these water supply and water quality problems through a comprehensive, locally-based planning process.

Water resources management in the upper Clark Fork basin presents a much different picture today. In the span of eight years, much has been accomplished to address the many and varied water use and water quality issues of the basin. The Steering Committee, affiliate groups, local partners and basin water users have proven that collaborative approaches can work when all interests are involved in and committed to finding common ground and workable solutions to problems.

Awards

On May 16, 2006, the Montana Watershed Coordinating Council awarded its 2006 Montana Watershed Stewardship Award to the Steering Committee.

Specific Accomplishments

The following list highlights actions taken by the Steering Committee over the past seventeen years either to address basin water issues directly or to assist or stimulate others to do so.

Legislation

- In 1991, interests whose representatives were subsequently appointed to the Steering Committee successfully sought legislation to suspend the upper Clark Fork basin water reservation process, temporarily close the basin to most new water rights, and create the Steering Committee and charge it with writing a basin water management plan.
- In 1995, after receiving the *Upper Clark Fork River Basin Water Management Plan,* the legislature enacted into law the *Plan's* recommendations to close the basin permanently to most new surface water rights and to create a pilot instream flow water leasing program.
- In 1997, at the Steering Committee's recommendation, the Legislature amended the basin water rights closure to allow development of surface water when stream flows are augmented with groundwater.
- Also in 1997, the legislature, at the Steering Committee's request, provided that a majority of the Steering Committee members would be appointed by the basin's counties and conservation districts.
- In 2001, in response to the Steering Committee's request that the state not walk away from a negotiated agreement between the state and Avista concerning Avista's hydropower water rights and Clark Fork basin water rights holders junior to Avista, Governor Racicot directed DNRC to draft legislation authorizing creation of a Clark Fork Basin Task Force charged with preparing a water management plan for the entire Clark Fork River basin. The legislature enacted this legislation.
- In 2005, the Steering Committee supported a permanent extension of the state-wide water leasing program, based on the results of the upper Clark Fork basin instream flow pilot program.
- Also in 2005, the Steering Committee's paper entitled "White Paper on the Montana Water Rights Adjudication" helped to stimulate action by the legislature to substantially increase funding for the Montana Department of Natural Resources and Conservation and the Montana Water Court so that the state-wide water rights adjudication can be completed within fifteen years.

Administrative Rules

- In 1997, the Steering Committee convinced DNRC to adopt a rule clarifying that no one has a right to the use of water discharged as effluent from a sewage treatment plant, thereby making land application of nutrient laden sewage treatment plant effluent possible.

- In 2005, the Steering Committee worked with the Natural Resources Conservation Service to modify its EQIP application material to ensure coordination with DNRC water rights administrators.

Instream Flow/Drought Management

- The Steering Committee retained consultant, Dennis Workman, for five years to pursue mitigation of dewatering of the mainstem of the Clark Fork River in the general area below the Warm Springs Ponds and above the City of Deer Lodge. The consultant identified the dewatered reaches critical to the fishery, specified the nature of the dewatering, identified the water rights holders in the effected stretch of the river, identified possible mechanisms to address the dewatering, determined the amount of minimum flows needed by the fishery, convened a group of local water users in an attempt to stimulate development of a local drought management plan for the effected reach, and obtained grant funds to install and record two years of data from flow measuring devises in the effected reach.
- The Steering Committee assisted water rights holders on the Morrison Ditch with obtaining measurements of ditch losses by the Montana Department of Natural Resources and Conservation. Reducing or eliminating these losses may reduce dewatering of Racetrack Creek.

Point Source Water Pollution Reduction

- The Steering Committee hosted a meeting between officials of the City of Philipsburg and the Director of the Montana Department of Environmental Quality (DEQ) concerning the need for and the design of a new City sewage treatment plan. Communication between the City and DEQ improved substantially as a result of this meeting.
- Members of the Steering Committee worked with the City of Deer Lodge, the National Parks Service, and DEQ to develop, fund, and implement land application of Deer Lodge sewage treatment effluent that would otherwise be discharged directly to the Clark Fork River.
- After issuance of the *Upper Clark Fork River Basin Water Management Plan* which recommended that basin communities ban phosphate detergent, Butte-Silver Bow did so.

Non-Point Water Pollution

- The Steering Committee assisted DEQ's efforts to implement its TMDL responsibilities in the basin by co-sponsoring meetings on the 303(d) list and pilot tests of voluntary water quality planning on Racetrack and Fred Burr Creeks.

New Water Storage

- The Steering Committee identified promising sites for new water storage and assisted local water users in considering restoring a former dam on Douglas Creek.

Repair and Restoration of Basin Water Storage Projects

- The Steering Committee helped to facilitate communication between DNRC and local Rock Creek residents when a sink hole threatened the East Fork Dam on the east fork of Rock Creek and during the subsequent repair activities.
- The Steering Committee supported funding by the Montana Legislature for the repair of East Fork and Nevada Creek Dams.

Water Dispute Resolution

- The Steering Committee sponsored the formation of the Georgetown Lake Watershed Committee in response to controversy concerning the operation of Flint Creek Dam and its

effects on Georgetown Lake.

- The DEQ included in its 2002 record of decision for the Silver Bow Generation Project direction to the project developer that it ask the Steering Committee to develop a water management plan for Warm Springs Creek that adequately addresses minimum instream flows for the protection of the fishery. Because the Generation Project is on hold, the Steering Committee has not yet been asked to begin development of the management plan.
- The Steering Committee assisted Granite Conservation District as it sought enforcement of 310 violations causing discharge of old mine tailings into Fred Burr Creek.

Fishery

- The Steering Committee helped to involve water users in Rock Creek with the state bull trout recovery effort.
- The Steering Committee sponsored a grant request to a private foundation for a preliminary plan view, preliminary design and budget analysis for a stream renaturalization project on a portion of Rock Creek.
- As discussed above, the Steering Committee is currently sponsoring work to reduce chronic dewatering of the mainstem of the Clark Fork River.

Studies and Surveys

- The Steering Committee conducted studies of the basin's groundwater resources, including management of groundwater resources in other western states and summarizing records of existing groundwater development.
- The Steering Committee helped to initiate study of return flows in the Flint Creek Valley to understand and document the role of irrigation return flows by the Montana Department of Natural Resources and Conservation, the U.S. Geological Survey, and the Bureau of Reclamation.
- The Steering Committee also helped to stimulate measurements of losses in the ditches which affect flows in the mainstem of the Clark Fork River in the upper Deer Lodge Valley.
- The Steering Committee conducted a survey of water right holders in two of the basin's sub-basins to assess their experience with the state-wide water right adjudication process and their expectations after this process is completed.
- In August 2006, the Steering Committee published the *Upper Clark Fork River Flow Study.* This study told the story of the flows in the upper Clark Fork began with a vision of a fishery the quality of Rock Creek or the Blackfoot Rivers and continued agricultural water use. It examined current flow conditions including the location, amount and frequency of dewatering and its importance for the fishery, and it identified alternatives for addressing the dewatering and enhancing instream flows and ended with an assessment of how these alternatives might be achieved.
- The Steering Committee is currently surveying basin cities and towns to assess the adequacy of their existing water rights to provide for existing and future municipal and domestic water uses. Because of the existing basin closure, new water rights are not an option to provide for additional uses.
- The Steering Committee is also currently interviewing basin water commissioners to document current water management and allow it to be compared with management activities in surrounding states.

Policy Papers

- "Conservancy District, An Option for the Management of Georgetown Lake Dam" in February 2004 - This paper was drafted to discuss how a conservancy district might help resolve issues that have arisen as a result of the ownership and management of the

Georgetown Lake Dam by Granite County. Drafts of the paper were discussed with the Granite County Commission and the final paper was presented to the Commission and the Flint Creek Advisory Committee.

- "White Paper on the Montana Water Rights Adjudication" in March 2004 - The adjudication paper resulted from discussions with Montana's Chief Water Judge Bruce Loble and officials of the DNRC and the Attorney General's Office. The final version of the paper was circulated to Judge Loble, the Adjudication Advisory Committee, the Environmental Quality Council, the Montana Association of Conservation Districts, and several water user organizations. This paper helped stimulate action by the legislature to increase funding to the DNRC and the Montana Water Court to speed completion of the state-wide water rights adjudication.
- "How Will Completion of the Adjudication Affect Water Management in Montana?" in February 2006 - The third paper was written to stimulate discussion by Montana water users, water managers, and policy makers of changes that will result from completion of the water rights adjudication as well as the implications of these changes so that appropriate responses to them can be identified, discussed and put in place before the final water rights decrees are issued.
- "Milltown Dam Water Right Paper" in November 2007 - Because of the removal of the Milltown dam and power house, the existing Milltown Dam storage and hydropower water rights must be changed or they will be void. The hydropower water rights have a flow of 2,000 cubic feet per second and a priority date of December 11, 1904. This paper identified and explored alternatives regarding the purpose and ownership of the Milltown Dam water rights and explained why and how the ultimate disposition of those rights may be of crucial importance to upper Clark Fork basin water users.

Education

- Through well over a hundred publicly noticed and open meetings and other subbasin meetings, ten issues of a basin-wide news letter, the *Upper Clark Fork River Basin Water Management Plan,* and sponsorship of a master thesis, the Steering Committee has provided education on numerous water quantity, quality, and fishery related topics including water law, water rights, the on-going state water rights adjudication, the public trust doctrine, basin water rights closure, the basin's ground water resources, the status of the basin's water supply infrastructure, basin annual water supply, basin water use, basin hydropower production, water quality standards, the state TMDL law and planning process, water rights leasing for instream flow, grazing best management practices, utility irrigation efficiency programs, fish habitat needs and restoration projects, fish screens, irrigation return flows, the basin Superfund project, and the Natural Resource Damage Program.

Grant Requests

- In 2008, the Steering Committee drafted two successful grant applications to the Natural Resource Damage Program. Neither funded the Steering Committee. One application on behalf of the Westside Ditch Company was for a $25,000 project development grant to examine the structure and operation of the Westside Ditch to identify opportunities for increasing the flow of the Clark Fork River to enhance the fishery as a result of increasing ditch water conveyance efficiency, improvements in water management and/or changes to the use of water. The second on behalf of Granite Conservation District, Granite Headwaters Watershed Group, and the Georgetown Lake Homeowners Association (GLHA) was for $109,447.57 to implement a study of the state of Georgetown Lake.

Milltown Dam Water Right Paper
November 2007

Introduction

As a part of the Clark Fork River Superfund remediation, the Milltown Dam power house and spillway are scheduled to be removed in 2008 and 2009, respectively.[1] Associated with this dam are hydropower water right claims to both store water and generate electricity. The removal of the dam will mean that the purpose of the existing rights will cease to exist. Because the hydropower right is large with a relatively old priority date, its fate is important to many upper Clark Fork River basin[2] water users. The Upper Clark Fork River Basin Steering Committee[3] (Steering Committee) has written this paper to identify and explore alternatives regarding the purpose and ownership of the existing water rights and the implications of the alternatives for upper basin water users.

This paper begins by summarizing Montana water law relevant to the Milltown Dam water rights. It details those rights and discusses how they may be affected by the Milltown Dam Consent Decree. It then identifies alternatives for changes to the Milltown Dam water rights. Next, the paper sets forth the river hydrograph above Missoula, the basin water budget, and the number of water rights junior to the Milltown Dam rights by subbasin. Finally, it discusses how the most likely water right change alternatives might be managed and enforced so that basin users can consider how they may be affected by them.

Montana Water Law

Montana's Constitution establishes the basis for allocating water in the state. Article 9, section 3, paragraphs (3) and (4) of the Constitution provide:

> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
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> (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

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[1] US EPA Montana Office, Milltown Reservoir Sediments Superfund Site Weekly Update, Issue #39, November 28, 2007.

[2] The upper Clark Fork River basin is defined in state statues as that portion of the Clark Fork River basin above the confluence of the Blackfoot and Clark Fork Rivers.

[3] The Steering Committee is a watershed group formed in 1991 pursuant to a 1991 Montana statute. Its members include six people appointed by the upper Clark Fork basin's (the area of the Clark Fork River basin above Milltown Dam) six counties, six appointed by the basin's six conservation districts, and ten appointed by the DNRC Director to ensure representation of a balance of basin water interests. The Steering Committee's 1991 statutory mandate included drafting a water management plan for the basin which it completed in December 1994. In 1995, the mandate was changed to include implementing and revising the initial plan. See §85-2-338 MCA and *The Upper Clark Fork River Basin Water Management Plan.*

Thus while ownership of water remains with the state, Montanans can acquire a water right pursuant to state law authorizing them to appropriate water for a beneficial use. The legal framework for water rights is the prior appropriation doctrine which is based on two general rules summarized by the phrases "first in time, first in right" and "use it or lose it".

"First in time, first in right" determines who may use water. Each water right has a priority date which is the date on which the water was first put to beneficial use. The earlier the priority date, the better the water right. A senior water right holder with an earlier priority date is entitled to use the full amount of his or her water right before any junior water right holder can use any water. In times of shortage, the senior user whose right is "first in time" can place a "call" on water to junior users and take all of the available water until his or her right is filled without sharing it with other users.

"Use it or lose it" refers to the requirement that water must be used beneficially or can eventually be alleged to have been lost (abandoned). This requirement is relevant to the Milltown Dam water rights because the dam will be removed and not replaced. Unless the existing rights are changed to a new beneficial use, they will be void. State law provides that a use qualifies as a beneficial use if it falls within one of four categories[4]:

- Water used for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;
- Water appropriated by the Montana Department of Natural Resources and Conservation (DNRC) under the state water leasing program;
- Water used by the Montana Department of Fish, Wildlife and Parks (DFWP) pursuant to a water right lease; or
- Water used through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource.

Prior to enactment of the 1973 Montana Water Use Act (Act), a water right could be acquired simply by diverting water and putting it to a beneficial use. Since passage of the Act, a new water right or a change to an existing right requires either a permit or an authorization for a change in appropriation right, respectively, from DNRC. A change authorization must be obtained if a change is made to the point of diversion, place of use, purpose of use, or place of storage. If the Milltown Dam rights are kept alive, they must go through the change process.

[4] §85-2-102 MCA.

To obtain a change, the owner of a water right must file an application with DNRC and demonstrate[5] compliance with the following criteria:

- The proposed use will not adversely affect the use of other water rights or other planned developments for which a permit or certificate has been issued or water has been reserved.
- The proposed means of diversion, construction, and operation of the appropriation works are adequate.
- The proposed use of the water is a beneficial use.
- The applicant owns or has permission from the person who owns the property where the water is to be used.[6]

If a valid objection to the change application pertaining to water quality is received, the applicant must also prove one of the following:

- The water quality of an appropriator will not be adversely affected.
- The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, MCA.

In addition, for a proposed change in purpose or place of use of an appropriation to divert 4,000 or more acre-feet annually and 5.5 or more cubic feet per second (cfs), the applicant must prove the criteria in section §85-2-402(4), MCA. If the change involves the transport of water out of state, the applicant must prove the criteria listed in section §85-2-402(6), MCA, and obtain legislative approval.[7]

It is important to note that changing a water right's point of diversion, place of use, purpose of

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[5] The applicant must prove by a preponderance of the evidence that the criteria for issuance of an authorization are met. See *Water Rights in Montana*, page 28, February 2006, published by jointly by DNRC, the Legislative Environmental Quality Council, and the Montana University System Water Center. This publication is available via the internet at http://dnrc.mt.gov/wrd/water_rts/wr_general_info/waterrights_in_montana.pdf.

[6] *Ibid*, page 28.

[7] *Ibid*, page 28. The additional criterion in §85-2-402(4) is that the proposed change is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing demands on the state water supply, as well as projected demands for water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;
(ii) the benefits to the applicant and the state;
(iii) the effects on the quantity and quality of water for existing uses in the source of supply;
(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;
(v) the effects on private property rights by any creation of or contribution to saline seep; and
(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

use, or place of storage, does not change its priority date.

Because prior to 1973 water rights did not have to be filed with the state, no centralized records of Montana water rights existed when the 1972 Constitution was adopted. In response to the Constitutional mandate, the 1973 Water Use Act established a centralized record system for water rights and required that all water rights existing prior to July 1, 1973 must be finalized, documented and quantified through statewide water rights adjudication in state courts. This adjudication is on-going. The Milltown Dam water rights have not yet been quantified by the Montana Water Court.

Milltown Dam Water Rights

Existing Water Rights

When Montana Power Company (MPC) owned Milltown Dam, it filed two water right claims associated with the dam, one for power generation and one for storage. The DNRC abstract for claim 76M 94404-00 includes the following information:

- Purpose of the water right - power generation
- Maximum flow rate - 2,000 cfs
- Maximum volume - 1,451,556.00 acre-feet
- Period of use - January 1 through December 31
- Priority date - December 11, 1904.

This water right was included in a temporary preliminary decree issued for the Middle Clark Fork Basin (76M) in 1984. However, as noted on the abstract, the Montana Water Court will not take final action on this water right claim until final decrees are issued in all three basins involving the dam, the upper and middle Clark Fork River basins (76G and 76M) and the Blackfoot River basin (76F). The Milltown hydro power claim continues to be subject to objection in each basin. The abstract also notes that the power generation use "...may consume some water, but until that amount is quantified, it is presumed that the use is non-consumptive."[8] DNRC received a notice of change in the claim's ownership on June 2, 2005 after NorthWestern Corporation (NWC) acquired the dam from MPC.

The second claim, 76M 94405-00, is for storage.[9] The priority date, period of use and the point of diversion and its location are the same as for the power generation claim. MPC claimed a flow rate of 940 cfs up to the amount necessary to fill the storage reservoir at any time. Information submitted by MPC with the claim indicates the surface area of the reservoir was 500 acres, the maximum depth was 28 feet, and the total storage was 820 acre feet. The DNRC abstract for the Milltown storage right claim includes two remarks:

- The water court finds no legal basis for this purpose to be considered a beneficial use or an appropriation of water.
- On June 7, 1985 the Montana Power Company filed late objections to the purpose of right and "other". These will be heard after proper notice on the next objection list.

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[8] General Abstract 76M 94404-00, which is available from the DNRC Water Rights Bureau.

[9]The DNRC General Abstract 76M 94405-00 does not list a purpose or a maximum flow rate or maximum volume for this right.

The first remark reflects the fact that the Water Court has not determined whether storing water constitutes a beneficial use. The 1984 temporary preliminary decree for 76M did not recognize the storage claim, and MPC objected to it. The status of storage associated with hydro power is an unresolved issue for dams in both the Clark Fork and Missouri River basins. However, in a 1986 decree, Montana Water Judge Holter upheld storage rights associated with the Thompson Falls hydro power facility. As was the case with the hydropower right, DNRC received a notice of change in the claim's ownership on June 2, 2005 after NWC acquired the dam.

Consent Decree Obligations

NWC has obligations related to its Milltown water rights under the Consent Decree filed to settle Superfund litigation related to the Milltown Reservoir/Clark Fork River NPL Site.[10] In settlement of the natural resource damages claims against it, NWC has an outstanding obligation to the pay the State of Montana (State) $1.4 million. Pursuant to the Consent Decree, it can meet this obligation in one of two ways.

One way is to use some or all of three funding sources: an insurance policy[11] and the sale of its Milltown Dam lands and water rights. After using the insurance policy proceeds, NWC must appraise and attempt to sell on the open market and at fair market value first the Milltown lands and then the water rights until its $1.4 million obligation is met. The State has the right to approve of any sale of the lands and the water rights. NWC must offer any unsold portion of the water rights to the State no later than September 2008. The State then has one year following the completion of Remedial Action or 1290 days after February 8, 2006, whichever is later, to accept the water rights. If the State does not accept the water rights, then NWC must offer them to the United States and the Confederated Salish and Kootenai. These other parties would then have one year from the date of the offer to accept it in whole or part. Any governmental entity accepting the water rights must guarantee that the rights will not be changed to a consumptive use. As of August 2007, NWC had completed but not made public an appraisal of the Milltown Dam water rights.

The second way to meet the $1.4 million obligation is for the State to acquire NWC's land and water rights at Milltown prior to their sale. After the dam is removed and the State receives the insurance proceeds, the State may exercise an option to acquire those land and water.[12] In this event, NWC would receive full credit in the amount of the remaining balance of the $1.4 million obligation and this obligation shall be considered to be fully satisfied.

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[10]Consent Decree for the Milltown Site, United States of America vs. Atlantic Richfield Company (ARCO) and Northwestern Corporation (NWC), Civil Action No. CV89-039-BU-SHE, United States District Court for the District of Montana Butte Division. The parties to the consent decree include: ARCO, NWC, the United States, the State of Montana, and the Confederated Salish and Kootenai Tribes.

[11] The expected value of an insurance premium refund which would be transferred to the State is about $400,000.

[12]NRD Program Fact Sheet entitled "Northwestern's Compensation For Natural Resource Damages At The Milltown Site."

Milltown Dam Water Right Change Alternatives

The Steering Committee has identified several alternatives for changes to the Milltown Dam water rights, including abandonment, withdrawal, transfer to a downstream hydropower facility, transfer to new consumptive or instream use, and/or transfer of ownership to a new private entity and/or the State or the United States and the Confederated Salish and Kootenai Tribes. Each of these alternatives will now be discussed.

Abandonment

The 2006 edition of *Water Rights in Montana* defines abandonment as the "...intentional, prolonged nonuse of a water right, resulting in its loss."[13] Precisely when the abandonment occurs is not clear. A Montana statute, §85-2-404 MCA, reads in part:

> Abandonment of appropriation right. (1) If an appropriator ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately expire.
> (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for use, there is a prima facie presumption that the appropriator has abandoned the right for the part not used...
> (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined in accordance with part 2 of this chapter (i.e. the state-wide water rights adjudication by the Montana Court).

Since the adjudication of the Milltown Dam water rights is not final, the above statute does not apply.

Former DNRC Chief Legal Council Donald MacIntyre has reviewed the court decisions regarding abandonment. He concludes:

> One clear conclusion to be drawn from the more recent abandonment cases is that in Montana, once an objector establishes a long period of nonuse, the burden shifts to the appropriator to give a reason for the nonuse. A long period of nonuse is established by a showing of 23 years of nonuse...§85-2-404, concerning the prima facie proof of abandonment after ten years once the adjudication is completed, may lead to the conclusion that any nonuse for ten or more years will meet the standard for shifting the burden of proof.[14]

It appears obvious, however, that if the dam is removed and the owner has no intention to rebuild it, at some point the dam water rights will be abandoned. As explained above, under the provisions of the Milltown Site Consent Decree, the present owner, NWC, must either transfer the rights to the State or attempt to sell at least a portion of the rights to a private party and then offer any unsold rights first to the State and then to the United States and the

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[13] *Water Rights in Montana*, page 39, February 2006.

[14] Don MacIntyre, unpublished memorandum dated August 23, 2007.

Confederated Salish and Kootenai Tribes. Abandonment could occur in this case only if no entity either purchases or accepts transfer of the water rights.

Withdrawal

The owner of a water right can voluntarily withdraw it. In theory, since they have not been finally adjudicated, the current owner could simply withdraw its water right claims. However, as explained above, the Milltown Site Consent Decree commits the company to either sell the Milltown Dam water rights on the open market and/or offer them to the State of Montana or the United States or the Confederated Salish and Kootenai Tribes. Withdrawal of the Milltown Dam water rights is, therefore, not an option.

Transfer to a Downstream Hydropower Facility

The Consent Decree would, under certain conditions, allow NWC to sell at least a portion of the Milltown Dam water rights to a downstream hydropower utility.[15] To transfer the Milltown Dam to a downstream dam, the new owner would have to apply for a change authorization from DNRC and demonstrate compliance with the criteria listed on page 3 above. The first criterion that must be satisfied is no adverse effects on any existing water right holder. Because of the transfer, any water user located between Milltown Dam and the downstream hydropower facility with a right junior to December 11, 1904 would be subject to a water rights call by the new owner. A call would adversely affect these junior users. Given this fact, unless arrangements would be made to prevent such a call, transfer of the Milltown Dam water rights to a downstream hydropower facility appears unlikely. No owner of a downstream hydropower facility has publicly expressed interest in purchasing the Milltown rights.

Transfer to New Consumptive or Instream Use by NWC

Because of the Consent Decree, NWE cannot retain ownership of the Milltown Dam water rights and seek a change to a consumptive or instream use. The Consent Decree requires NWC to transfer the rights to the State or attempt to sell some portion of the right to a new entity and offer any unsold water rights first to the State and then to the United States and Confederated Salish and Kootenai. This alternative therefore is not applicable to the Milltown Dam rights.

Transfer of Ownership

The final change alternative would be a transfer of the Milltown Dam water rights to a new owner for a new use, perhaps at a new location. Because of the Consent Decree, this is the most likely alternative to occur. NWC must either transfer all of the water rights to the State, or attempt to sell a portion of the water rights on the open market and offer any unsold rights to the State and then the United States and the Confederated Salish and Kootenai Tribes.

If a private party purchases some portion of the water rights, it would have to obtain an authorization from DNRC to change the rights to a new consumptive or instream use. Because of

[15] The two hydropower utilities owning facilities on the Clark Fork River downstream of Milltown Dam are PPL Montana, which owns the Thompson Falls Dam, and Avista, which owns the Noxon Rapids project.

the no adverse effects test, a change of the hydro power right to a consumptive use does not appear feasible. The purchaser might successfully change the purpose of the right to a new instream flow right with a fish or recreation beneficial use. However, the entire existing right, 2,000 cfs and 1,451,556 acre-feet, may not be necessary to support the new beneficial use. If it is not, a portion of the existing hydro power right may not transfer to the new owner and would be lost.

The situation would be similar if the State, United States, or the Confederated Salish and Kootenai Tribes assumes ownership of all or a portion of the Milltown hydro power right. In this case, the Milltown Dam Consent Decree expressly forbids transfer of the right to a consumptive use. A new governmental owner would also have to obtain a DNRC authorization for a change of use for a new instream purpose which would require demonstrating first that the change would not adversely affect any existing water rights and second the amount of water that would be put to the new beneficial use. Again, one cannot assume that the entire 2,000 cfs and 1,451,556 acre-feet right would transfer to the governmental entity. If, for example, the State would take ownership of all or a portion of the hydro power right, in the change process it would have to demonstrate how much of the existing right would be put to a beneficial use for fish or recreation or another instream use.

The situation is not as clear for the Milltown Dam storage water right. As stated above, the Montana Water Court has not decided if storage constitutes a beneficial use. However, assuming that the storage right at Milltown exists, it would include a consumptive portion due to evaporation from the reservoir surface. Information submitted by MPC with its Milltown Dam water rights claim lists the surface area of the reservoir at 500 acres. Assuming 3.2 acre-feet per year of evaporation per acre of reservoir surface,[16] the Milltown reservoir would evaporate 1,600 acre-feet per year. Should either a private party or the State or another governmental entity take ownership of the storage right, it would appear, therefore, to include a consumptive right of 1,600 acre-feet per year. Removing the dam and eliminating the reservoir would make available for a new consumptive use the 1,600 acre-feet of water per year, the amount that would have been otherwise lost through evaporation. Because the 1,600 acre-feet is in effect "new water," the new water right owner may be able convert the place of use for consumption of this amount of water to a location upstream of the former Milltown Dam without adversely affecting existing water rights. This alternative will be discussed further in the section on enforcement and management alternatives.

Upper Clark Fork River Hydrograph and Basin Water Budget

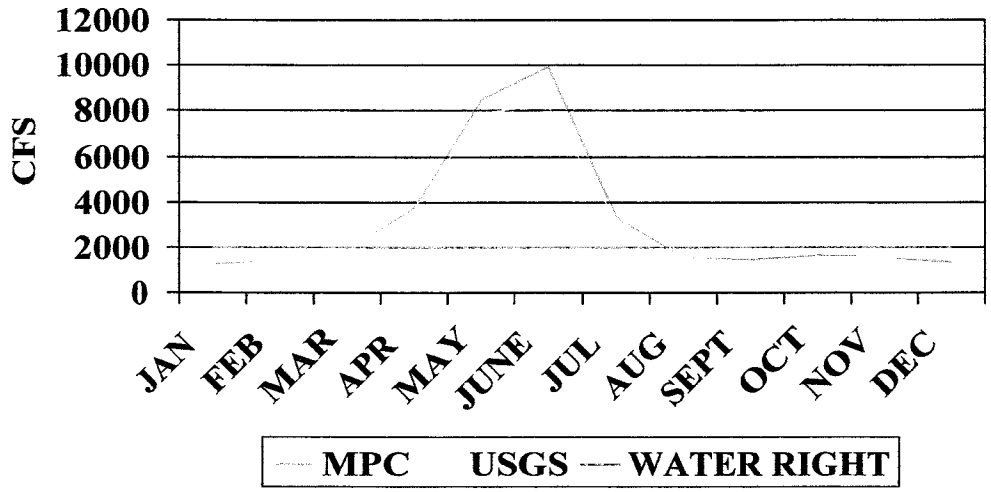
Before considering how an instream flow right replacing the Milltown Dam water rights might affect water users upstream, the river hydrograph above Missoula and the major contributors to the flow of the Clark Fork River at Milltown Dam will be identified.

River Hydrograph

The hydrograph showing the average annual flow of the Clark Fork River from 1930 to 2006 is shown in the following figure.

[16] Claim No. 76M-w-094404-00 questionnaire for power generation claims.

STREAMFLOW AT MILLTOWN DAM



The figure shows that on the average the river above Missoula flows above 2,000 cfs, the level of the power generation water right claim, the last ten days of March, all of April, May and June, and all but the last four days of July, a total of 130 days per year. Thus, on the average, the Milltown Dam power generation water right is not filled 235 days per year.

Upper Basin Water Budget

The upper Clark Fork River from its beginning below the Warm Spring ponds to the Milltown Dam site has four major tributaries, the Little Blackfoot River, Flint Creek, Rock Creek, and the Blackfoot River. Table 1 lists the annual discharge of each of these tributaries to the Clark Fork, as well as that of the Clark Fork River above its confluence with the Little Blackfoot at Garrison. The source of the Table 1 data is the USGS Water Data for Montana which is available via the internet at http://waterdata.usgs.gov/mt/nwis/annual/.

Table 1 - Upper Clark Fork River Basin Stream Flows

USGS Gauge Location	USGS Site Number	Average Annual Discharge (cfs)	Years of Data	Contribution to the Clark Fork Above Missoula Flow
Clark Fork Above Missoula	12340500	2946	1930-2006	
Blackfoot River Near Bonner	12340000	1,555	1940-2006	52 %
Rock Creek Near Clinton	12334510	510	1973-2006	17%
Flint Creek Near Drummond	12331500	118	1991-2002, 2004	4%
Clark Fork River Near Drummond	12331800	673	1994-2006	22%

As indicated in Table 1, on an average annual basis, 52% of the flow of the Clark Fork River measured at the USGS gauge above Missoula is contributed by the Blackfoot River, 17% by Rock Creek, 4% by Flint Creek, and 22% by that portion of the Clark Fork River above the USGS gauge near Drummond. However, under Montana water law, the obligation to support an instream flow right that would replace the Milltown Dam hydro power right would not be apportioned based on the average annual discharge of the river's tributaries. Instead, the obligation would fall on water rights junior to the instream flow water right, i.e. December 11, 1904. The next section of this paper identifies the number and location of water rights above Milltown Dam that have a priority date after December 11, 1904.

Junior Water Rights above Milltown Dam

According to the DNRC water rights data base, 12,650 water rights located above Milltown Dam have priority dates junior to December 11, 1904.[17] The Montana Water Court has issued Temporary Preliminary Decrees on three of the four basins above Milltown Dam. The basins are Flint Creek (76GJ), Rock Creek (76E), and Clark Fork above the Blackfoot (76G). The water right claims in the fourth basin, Blackfoot River (76F) have been examined and a summary report provided to the Water Court. A Preliminary Decree is forthcoming. Of the total junior rights, 3,938 are for surface water. The break down of these rights by sub-basin is shown in Table 2. Table 3 lists the junior surface rights by purpose of use. The purpose with the largest number of rights is stock water, followed closely by irrigation. The storage in Georgetown Lake and the East Fork, Nevada Creek, and Lower Willow Creek reservoirs is a specific example of water use based on rights junior to the Milltown Dam water rights. Details of these rights taken from the DNRC claim abstracts are shown in Table 4.

[17] Letter from Curt Martin to Gerald Mueller, August 31, 2007.

Table 2 - Distribution of Junior Water Rights by Subbasin

Sub-basin	All Junior Rights	Junior Surface Rights
Rock Creek	667	320
Blackfoot	4,595	2,058
Flint Creek	1,810	329
Upper Basin/Mainstem	6,156	1,310

Table 3 - Surface Water Rights Junior to December 11, 1904 Located Above Milltown Dam Listed by Purpose of Use

Number of Rights	Purposes of Use
7	Augmentation, irrigation
17	Commercial
1	Domestic, fish & wildlife, & lawn & garden
1	Domestic, fish & wildlife, & power generation
1	Domestic & industrial
1	Domestic, irrigation, & stock
12	Domestic & irrigation
1	Domestic, lawn & garden, & stock
9	Domestic & lawn & garden
1	Domestic & other purpose
1	Domestic & recreation
1	Domestic & stock
372	Domestic
12	Fire protection
1	Fish & wildlife & fish raceways
1	Fish & wildlife, irrigation, & recreation
1	Fish & wildlife, irrigation, & stock
1	Fish & wildlife & irrigation
1	Fish & wildlife, lawn & garden, & stock
1	Fish & wildlife & mining

1	Fish & wildlife & power generation
1	Fish & wildlife & recreation
3	Fish & wildlife & stock
131	Fish & wildlife
1	Fish raceways & fishery
3	Fish raceways
2	Fishery, industrial, & irrigation
1	Fishery & industrial
1	Fishery, irrigation, & stock
4	Fishery & irrigation
1	Fishery & other purpose
4	Fishery
20	Industrial
9	Institutional
1	Irrigation & other purpose
1	Irrigation, recreation, & stock
2	Irrigation & recreation
16	Irrigation & stock
1	Irrigation, wildlife, & waterfowl
1278	Irrigation
1	Lawn & garden & multiple domestic
1	Lawn & garden & other purpose
3	Lawn & garden & stock
31	Lawn & garden
1	Mining, wildlife, & waterfowl
117	Mining
133	Multiple domestic
4	Municipal

2	Observation & testing
1	Other purpose
5	Pollution abatement
9	Power generation
2	Recreation & stock
82	Recreation
1	Sale
2	Stock, wildlife, & waterfowl
1456	Stock
4	Storage
1	Unknown
153	Wildlife
5	Wildlife & waterfowl
3938	**Total**

Table 4 - Examples of Specific Junior Rights

Storage Facility	Water Right Claimant	Maximum Volume (Acre-Feet)	Priority Date
Flint Creek Dam	Granite County	28,180	December 31, 1919
East Fork Rock Creek	DNRC	18,457	Oct. 22, 1935
Nevada Creek	DNRC	22,844	September 1, 1937
Lower Willow Creek	Lower Willow Creek Irrigation District	5,100	May 3, 1960

Changed Milltown Water Right Enforcement and Management Alternatives

As discussed above, some portion of the Milltown Dam right may, with the approval of the State, be sold to a private party. A more likely outcome is that the rights will be transferred to the State or, if the State declines them, to the United States or the Confederated Salish and Kootenai Tribes. If a new owner obtains a change of the water rights to a new purpose how might they be enforced and/or managed?

Enforcement of the Changed Water Right

To date, past owners of the Milltown Dam rights, MPC and NWC, have not acted to enforce their rights either by making call on junior users when the right was not filled or by objecting to new

permit or change applications. Steering Committee members have wondered if ninety-six years of non-enforcement have rendered the rights unenforceable. This does not appear to be the case. Non-enforcement is not the same thing as non-use. Until the recent removal of the hydropower generators, the Milltown rights were used to generate electricity. As discussed above, the rights have not been and, pursuant to the Superfund Consent Decree, may not be abandoned by their current owner. Apparently, no court cases have found that a prolonged period of non-enforcement renders water rights unenforceable.

After the adjudication is completed, and all water rights above Milltown Dam are decreed, enforcing the rights through a call on junior users may be easier than today. Information on all upstream junior rights, e.g. flows and volumes, place of diversion, type of use, etc., will be finalized and the relationship among the rights will be determined and integrated into one decree. This information and integration may facilitate the call process.

A new owner of changed Milltown Dam water rights may, therefore, opt to enforce the rights the traditional way, through calls on juniors and by objecting to new permit or change applications.[18] Any call on a junior user above Milltown would be subject to a futile call defense. If a junior user could demonstrate that his or her water would not reach the location of the new Milltown instream flow right, he or she would not need to comply with the call. For example, if the stream goes dry before reaching the senior right holder's place of use, the call would be futile. The fact that the effect of a particular junior use would not be measurable at the senior's place of use is not an adequate defense, however.[19] Because the change process may reduce the flow and volume of the rights, one cannot now predict the frequency of potential calls, but assuming the river's hydrograph does not change, calls would be more likely outside of the period when river flows are normally at their highest, mid-March to mid-July.

Almost all water rights are enforced based on one value of flow and, when volume caps are specified, one volume value at one location during a specified period of use. Flow values specified relate to peak historic use. For example, the Milltown Dam hydropower right is for 2,000 cfs year round, regardless of the river hydrograph. In other words, NWC could presumably enforce its rights by issuing calls on junior users anytime the flow at the Milltown turbines was less than 2,000 cfs, even if the flow in the river would normally be less than this value. Instream flow rights owned by the DFWP are different. The flow amounts of these rights, known as Murphy rights, can vary throughout the year at the same location. When the State or another new owner of the Milltown water rights seeks a change of use authorization to an instream flow other than power generation, DNRC would have significant latitude to condition the permit.[20] One such condition might tie the flow of the water right to the river hydrograph in a manner similar to Murphy Rights. However,

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[18] The new owner of the Milltown water rights would not be precluded from enforcing the changed water right by the change adverse affect criterion because existing users were subject to a call under the hydropower and storage rights.

[19] See the *Clark Fork Basin Watershed Management Plan*, page 75, September 2004.

[20] Private communication from Bill Schultz, October 9, 2007.

from the perspective of an irrigator, the critical enforcement period will probably remain the late summer period when river flows are normally the lowest.

Management of the Changed Water Right

As has been the case with the existing Milltown Dam water rights, the right to enforce does not necessarily translate into actual enforcement. If the Milltown Dam rights are transferred to the State or another owner for an instream flow use, the new owner may opt not to enforce the rights through water rights calls on junior users in return for a consideration such as a drought plan that shares any shortage equitably throughout the basin.

DFWP owns Murphy Rights on the mainstem of the Blackfoot River. It also participates in a voluntary drought plan on the Blackfoot River. The plan includes voluntary action by water users to reduce their use when river flows fall below certain trigger values. As a part of the plan, DFWP has agreed not to issue calls on users with rights junior to the Murphy rights if they comply with the drought plan. The Blackfoot Murphy rights and drought plan might serve as a model for managing a Milltown water right changed to an instream flow.

Applying this model to the upper Clark Fork basin, a drought plan could be developed involving some or all of the six sub-basins above Milltown Dam, i.e. the lower Clark Fork mainstem, the Blackfoot River, Rock Creek, Flint Creek, the Little Blackfoot, and the upper Clark Fork mainstem and tributaries.[21] The drought plan would presumably be triggered when the flow of the Clark Fork River flow falls below the changed Milltown instream flow water right. The drought plan could include a target flow for each of the six sub-basins. If the actual flow into the Clark Fork from the sub-basin was less than its target, then under the drought plan sub-basin water users would have to act to increase the flow to the target level. Each sub-basin would develop its own plan for meeting the target flow. The plan might involve a series of voluntary steps as is the case in the Blackfoot drought plan, or it might involve appointing one or more water commissioners to administer cutbacks consistent with existing water right priority dates.

One way to set the target flows would use sub-basin production targets and the average hydrograph at the Milltown Dam site. Sub-basin production targets might be set at the annual percentage contribution to the flow of the Clark Fork River above Missoula. See Table 1 above. This percentage could then be multiplied by the average flow of the Clark Fork River above Missoula over a specified period to determine a sub-basin target flow. Consider an example for the Blackfoot sub-basin using a daily average hydrograph. According to Table 1 data, the Blackfoot contributes 52% of the average annual flow of Clark Fork River above Missoula. Assume that the average daily flow on August 31 at Milltown is 1,130 cfs and that this flow is less than the changed Milltown water right so that the drought plan would be triggered. On August 31, the Blackfoot would then

[21] The lower Clark Fork mainstem would include all of the area that drains the Clark Fork mainstem between the mouths of the Little Blackfoot and Blackfoot Rivers, exclusive of Rock and Flint Creeks. The upper Clark Fork mainstem and tributaries includes the area drained by the Clark Fork mainstem above the confluence of the Little Blackfoot River.

have a responsibility to produce 52% of 1,130 cfs at its mouth, or 760 cfs. If the actual flow from the Blackfoot into the Clark Fork River was less than 760 cfs, sub-basin water users would implement their plan for cutting back usage until the 760 flow would be met.

Under this management approach, the shortage of flow would be shared between the Milltown water right owner and upstream water users because the drought plan would be designed to produce the sum of sub-basin target flows instead of the changed Milltown water right flow.[22] Sub-basin water users would have the flexibility to decide themselves on the actions necessary to meet the target flow. The new Milltown water right owner could opt to enforce its rights through calls on junior users in any sub-basin not participating in the drought plan.

Management of the Consumptive Right

As discussed above, the existing Milltown storage right, if found to be valid by the Montana Water Court, may provide a source of water for new consumptive uses. Because the reservoir caused evaporation losses and removal of the reservoir eliminates these losses, the new instream flow water right holder may be able to consume up to the total evaporation loss, estimated above at 1,600 acre-feet per year, without adversely affecting other water users. One use of this consumptive water right might be for mitigation water required by HB 831 passed by the 2007 Montana legislature. Under this bill, if a new ground water use in a closed basin would result in a net depletion of surface water that adversely affects existing surface water rights, then the ground water user would have to develop a plan for mitigating the adverse impact. The upper Clark Fork River basin was closed to the issuance of most new surface water rights in 1995. If the State becomes the new Milltown water right holder, it could use its "consumptive" right as a source for mitigation.

Summary

Because of the removal of the dam and power house, the existing Milltown Dam storage and hydropower water rights must be changed or they will be void. Because of the Consent Decree for the Milltown Site, ownership of these rights is most likely to transfer to the State for a new instream use sometime after removal of the dam. This transfer must be accompanied by a water right change authorization.

To be granted a change authorization, the State or any new owner of these rights will have to demonstrate two things, first that the change will not adversely affect any existing water right holder and second the amount of water necessary for the new beneficial use. Under existing law, enforcing the new rights would not constitute an adverse effect, and a change permit would not change the existing December 11, 1904 priority date. Above the Milltown Dam site, 3,938 surface water rights are junior to the of the Milltown rights. The purpose of most of the junior uses is either stock water or irrigation. The new owner of the Milltown rights could enforce the changed rights whenever they are not filled by making calls on junior users. Because the amount of water that would be put to a

[22] This approach would be equivalent to setting the Milltown right at the average hydrograph if flows dropped below some value.

new beneficial use under the changed right is not known, one cannot predict the frequency of potential calls on junior users. Given the hydrograph of the Clark Fork River above Missoula, calls would be most likely outside of the mid-March through mid-July period. The new owner could also object to changes in upstream water rights or to new water right permits.

However, the right to enforce does not necessarily translate to enforcement. A new owner may opt not to make calls, perhaps in return for a quid quo pro such as a drought plan that manages water to share shortages among some or all of the basin's water users.

The purpose of this paper is not to advocate any position regarding the Milltown Dam water rights. Its purpose is to explain why and how the ultimate disposition of those rights may be of crucial importance to upper Clark Fork basin water users.