

**Testimony of Gerald Mueller
To the Joint Appropriation Long-Range Planning Subcommittee**

Chairman McNutt, members of the Committee, my name is Gerald Mueller. I am the facilitator of the Clark Fork River Basin Task Force. I testify today on behalf of the Task Force in support of the DNRC Water Resources Division's Renewable Resource Grant and Loan Program grant request. The Water Resources Division requested \$72,000 to support the work of the Task Force during the FY2012-2013 biennium. The Department of Natural Resources and Conservation has recommended approval of only \$32,000 for the biennium. As I will discuss below a \$32,000 grant is not sufficient for the Task Force to carry out the statutory responsibilities assigned to it, and we are requesting instead a grant of \$63,000, an amount that would be a 20% reduction from our existing funding level.

The Clark Fork River Basin Task Force is a statutory entity. It was created pursuant to 85-2-350, which was enacted in 2001. By this statute, members of the Task Force must be representative of the Clark Fork River basin in terms of geography and interests. A list of the current Task Force members is attached to this testimony.

As the members of this committee know, water in Montana is owned by the state and allocated for beneficial use by Montanans in accordance with the prior appropriation doctrine: first-in-time, first-in-use. The application of this doctrine poses two significant challenges to water use in the Clark Fork basin as our population grows, industries expand, and new industries emerge.

The first challenge results from the hydropower water rights that exist at the bottom of the basin. These rights, which the hydropower companies are required by both state and federal regulations to hold and defend in a size equal to the capacity of the generators, are large enough to use almost all of the flow of the Clark Fork and Flathead Rivers all or most of the time. This means that water may not be available for appropriation in the Clark Fork and Flathead basins and any existing appropriation with a priority date junior to the hydropower rights, is potentially subject to a water right call by the hydropower utilities all or most of the time.

Addressing this challenge is the reason that the Clark Fork Task Force was created. 85-2-350 directed the Task Force to write a water management plan that identified options for protecting the security of existing basin water rights and for the development and conservation of basin water in the future. The Task Force completed the plan, the *Clark Fork Basin Watershed Management Plan*, in September 2004 and presented it the Governor and the Legislature. Much of the *Plan* was subsequently adopted into the State Water Plan. The *Plan* identified water stored in Hungry Horse Reservoir as a possible source for new appropriations while protecting the lower basin hydropower rights and increasing the security of water uses based on rights junior to the hydropower rights. At the request of the Task Force and the legislature, DNRC began the process of contracting for a block of Hungry Horse water from US Bureau of Reclamation.

Although its studies since the 1980s have identified the hydropower water right constraint, DNRC has not acted to close the lower Clark Fork and Flathead basins to new appropriations in the absence of action by the utilities to enforce their hydropower rights. However, in 2005,

Avista objected to an application for a new appropriation by the Thompson River Lumber Company, and DNRC denied the application based on adverse affect to the Avista Noxon Rapids hydropower water right. In 2008, Avista clarified that its objection was based on numerous unique factors within the Thompson River Lumber application, and as such would not likely object to a new water right permit if one of the following four conditions hold: the point of diversion is in the Flathead River basin upstream of where the Flathead River leaves the Flathead Reservation; or the amount of water proposed to be diverted is deminimus; or the proposed use of water is largely nonconsumptive, such as domestic use inside the home; or an aquifer recharge or mitigation plan is developed to offset adverse impacts. In 2009 DNRC clarified that the Thompson River Lumber Company decision applies below the CSKT Reservation but not above it, so that Flathead basin remained open to new appropriations.

Which brings me to the second challenge regarding basin water uses and water rights, the Confederated Salish and Kootenai Tribes' reserved water rights. The state, the Tribes and the federal government are negotiating the Tribes' reserved and aboriginal water rights. The Tribes' reserved water right will have an 1855 priority date and will be senior to all water uses above the reservation. Thus even if the lower basin hydropower water rights do not impact appropriations above the CSKT reservation, the Tribes' reserved rights probably will. As a part of the compact negotiations, the CSKT Tribes have requested a block of Hungry Horse water. In light of this request, the DNRC opted to defer pursuit of a Hungry Horse contract with the BOR. Whether through a BOR contract or the CSKT compact, water stored in Hungry Horse will likely be critical for future water uses throughout the Flathead and Lower Clark Fork basins.

Hungry Horse dam is part of the Federal Columbia River Power System, and its operation has been determined by System needs. Prior to the 1980s, these needs were flood control and power generation. Since the 1980s, downstream anadromous fish and, more recently, native Montana fish have also affected the operation of Hungry Horse. The Task Force has essentially requested that Clark Fork basin consumptive water needs be a factor in Hungry Horse operation. The need for water for future users is clear and identifying such water is a legislative mandate of the Task Force. The Task Force is presently considering how storage of flood or peak flow water from Hungry Horse in the ground might meet basin consumptive water needs and Columbia River Power System flood control obligations.

The 2009 legislature amended 85-1-203 by directing the DNRC to develop by 2015 basin wide plans that "...set out a progressive program for the conservation, development, utilization, and sustainability of the state's water resources and propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses." In developing the plan for the Clark Fork basin, DNRC is to solicit recommendations from the Task Force. As mentioned above the Task Force wrote a water management plan for the Clark Fork basin in 2004 that was adopted into the State Water Plan. This plan did not, however, address one of the new provisions of 85-1-203. It did not analyze the effects of frequent drought on the availability of future water supplies. The Task Force is therefore embarked on revising the 2004 plan to update it and address drought. A copy of the plan revision work plan topics is attached.

The Task Force was funded initially from the Resource Indemnity Trust Fund. In 2007, the Water Resources Division general fund appropriation included \$45,000 annually for the Task Force for FY2008-09. However this funding was coded as One-Time-Only (OTO) funding. In 2009, all OTO was deleted from the Governor's budget. The 2009 legislature appropriated \$70,000 to the Task Force through the Reclamation and Development Grants Program for FY2010-11. In addition to this grant, the DNRC Water Management Bureau provided the Task Force \$8,369 annually during FY2010-11.

To fund the Task Force for FY2012-13, the DNRC Water Resources Division applied for an RRGLP grant of \$72,000, or \$36,000 per year. The grant anticipated continuation of the \$16,738 of DNRC base funding. The Renewable Resource Grant and Loan Program recommended reducing this grant to \$32,000 for the biennium by eliminating funding for Task Force facilitation, suggesting instead that the DNRC assume the facilitation responsibility. However, the Water Management Bureau has neither the staff nor the funding to do so. Eliminating the facilitation dollars would be tantamount to eliminating the Task Force. In addition because of existing and anticipated budget cuts, the Water Management Bureau is unable to commit any base funding to the Task Force for the coming biennium so that the RRGLP grant will be the Task Force's sole source of funding.

Given the Task Force's statutory responsibilities in basin water planning and the role it has and is continuing to play in developing a supply of water for the basin's future consumptive needs while meeting the needs of existing users and in a manner consistent with existing lower basin hydropower and Tribal water rights, we ask that this committee provide the modest amount of money requested, \$63,000 for the biennium via the RRGLP grant. This amount would be a 20% reduction from the Task Force's existing funding. A budget showing the original \$72,000 grant request and the revised \$63,000 request for the biennium is also attached.

Thank you.

Clark Fork River Basin Task Force October 2010

Name	Organization	Area/Interest Represented	Date Appointed
Marc Sprati	Flathead Conservation District	Flathead Basin above Flathead Lake	2001
Nate Hall	Avista	Hydropower Utilities	2006
Holly Franz	PPL Montana	Hydropower Utilities	2001
Gail Patton	Sanders County Commissioner	Basin Local Governments	2001
Ross Miller	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	2005
Caryn Miske	Flathead Basin Commission	Flathead Lake	2007
Ted Williams	Flathead Lakers	Flathead Lake	2007
Steve Hughes	Joint Board of Control	Flathead River watershed below Flathead Lake to the	2007
Harvey Hackett	Bitter Root Irrigation District	Bitterroot River watershed	2001
Fred Lurie	Blackfoot Challenge	Blackfoot River watershed	2001
Jim Dinsmore	Granite Conservation District & Upper Clark Fork River Basin Steering Committee	Upper Clark Fork River watershed	2001
Brianna Randall	Clark Fork Coalition	Conservation/environmental organizations	2008
Verdell Jackson, <i>Ex Officio</i>	State Senator	Senate District 5	2001
David Wanzenried <i>Ex Officio</i>	State Senator	Senate District 49	2010

Clark Fork Basin Watershed Management Plan Revision Work Plan Topics
April 6, 2010

Chapter Six - Hydropower Water Rights and Basin Water Use

- 6.1 Monitor contracting process, including:
 - Finalize the Bureau of Reclamation Cost Reallocation study;
 - Conduct the NEPA analysis;
 - Negotiate the contract;
 - Obtain required Congressional approvals.
- 6.2 Review interim contracting products such as the cost reallocation study.
- 6.2 Ensure that the means exist to implement leases of Hungry Horse water to basin water users through the following steps:
 - DNRC legal analysis of BOR Hungry Horse water rights and the state's authority to contract with the BOR and lease water to basin water users;
 - DNRC staffing and budgeting analysis to negotiate the contracts and implement the leases;
 - Develop a model to schedule Hungry Horse releases to supply the consumptive amounts of new uses and to of junior users;
 - Convene the Clark Fork Basin Hydrologic Modeling Technical Advisory Committee.

Chapter Seven - Options to Protect the Security of Water Rights

- 7.1 Examine the relationship between the adjudication and the DNRC water right change process.
- 7.2 Examine the process for determining the historic beneficial use of water by the Water Court and DNRC.
- 7.3 Identify options to reduce the burden on existing water rights holders to protect their rights.
- 7.4 Consider asking that the entire Clark Fork River basin be closed to new water rights as well as conditions on such a closure.

Chapter 8 - Options for the Orderly Development of Water

- 8.1 Continue to monitor status of the adjudication of Clark Fork basin water rights.
- 8.2 Consider the scale of the impact that would be a concern and the area over which the impact would occur for a cumulative impact analysis prior to the issuance of new surface and ground water rights.
- 8.3 Continue to monitor exempt well issues and proposed statutory changes.
- 8.4 Define the need for additional water storage in the basin.
- 8.5 Evaluate the options for increased water storage or increased use of water now stored should be evaluated.
- 8.6 Prioritize areas in the basin where additional storage would be worthwhile.
- 8.7 Assess the fate of existing water rights associated with dams that have been removed or other water uses have ceased.
- 8.8 Identify and assess options for providing mitigation water such as use of existing storage or the Grass Valley marketing proposal.
- 8.9 Examine basin water management needs.

Chapter 9 - Options for Conserving Water

- 9.1 Seek clarification regarding a county's authority to require community wells.
- 9.2 Review the model subdivision regulations under development by Montana Department of Fish, Wildlife and Parks.

Chapter 10 - Drought Planning

- 10.1 Analyze the effects of frequent drought and new or increased depletions on the availability of future water supplies.
- 10.2 Determine the amount of water now allocated to instream flows in the basin should be identified.

Clark Fork Task Force FY2012-13 Budget

	Original Grant Request		\$31.5K RRGLP Grant	
	FY12	FY13	FY12	FY13
Revenues				
RRGLP Grant	\$36,000	\$36,000	\$31,500	\$31,500
Expenditures				
Facilitation Services	\$20,000	\$20,000	\$20,000	\$20,000
Conference (two per year)	\$6,000	\$6,000	\$1,500	\$1,500
Technical Services	\$5,000	\$5,000	\$5,000	\$5,000
Publications and Education	\$2,000	\$2,000	\$2,000	\$2,000
Meeting & Travel Expenses	\$3,000	\$3,000	\$3,000	\$3,000
Total	\$36,000	\$36,000	\$31,500	\$31,500