

CLARK FORK BASIN WATER MANAGEMEME

- SUMMARY REPORT -

INTRODUCTION

Concern over water availability led the 2001 Montana Legislature to pass House Bill 397, creating a task force to develop a water management plan for the Clark Fork River basin. The legislature directed the task force to draft a plan that **(1) identifies options to protect the security of water rights; (2) provides for the orderly development of water; and (3) provides for the conservation of water in the future.** The task force was also required to examine existing laws, rules, plans, and policies affecting water management in the Clark Fork River basin.

In addition to addressing the three mandatory tasks, the *Clark Fork Basin Water Management Plan* includes a vision statement to guide water management in the Clark Fork basin, a profile of each basin watershed, a description of economic and demographic trends in the basin, a brief outline of the legal framework for managing water, and a description of the existing legal and regulatory constraints on basin water management.

This report summarizes the findings and recommendations developed by the Clark Fork River Basin Task Force. The full plan is available on the Web at www.dnrc.state.mt.us/clarkfrkbasincover.htm. Copies can also be requested from the Montana Consensus Council, 1301 Lockey, Suite 301, Helena, MT 59620; phone: 406-444-2075.

HYDROPOWER WATER RIGHTS AND BASIN WATER USE

Water users in the Clark Fork basin face a problem that has not been resolved. Under existing laws, hydropower and other senior water rights pose a potential constraint on junior water rights, and on water available for future use in the basin. The risk that these constraints will actually be imposed is unknown. As of May 2004, hydropower right holders in the basin had not objected to new permit applications, nor had they made a call on junior water right holders. In June 2004, Avista for the first time objected to an application for a new surface water right permit. Ongoing changes in the basin may make it more likely that the utilities will object to other new permits and make calls on junior water rights holders.

Avista Corporation holds hydropower water rights for its Noxon Rapids Dam on the Clark Fork River near the Idaho border. These rights may pose a limitation on the water available for future use in the basin upstream. Avista's water rights total 50,000 cubic feet per second (cfs), almost all of the flows leaving the basin. Clark Fork River flows greater than 50,000 cfs occur only 6 to 8 percent of the time over the period of record. Flows greater than 50,000 cfs generally occur 22 days in May and June of wetter years. This suggests that surface water (and groundwater connected to surface water) is legally available for future appropriation in the basin only during the period when Avista's water rights are filled. Also, all water users with rights junior to Avista and the hydropower rights at two PPL Montana dams (Kerr and Thompson Falls) appear to be at risk much of the time.

Given this situation, we face a choice. We can continue to ignore the potential constraints posed by hydropower water rights. Or we can explore possible strategies to address the issue.

The task force identified several options that would either eliminate the potential constraints posed by the hydropower water rights or allow continued water development in the face of them. Those options include:

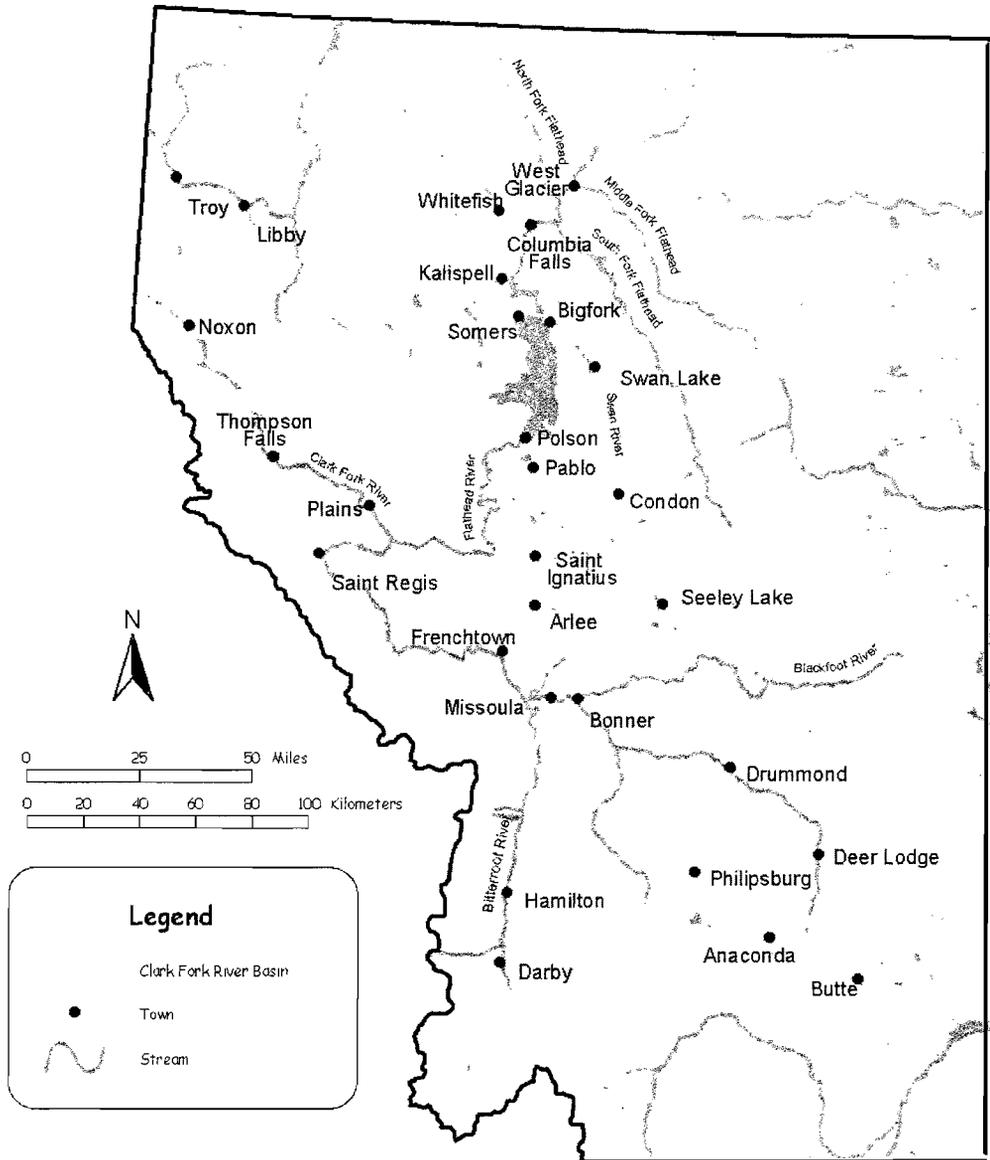
- Opportunity to Object to Hydropower Water Rights – Existing water rights holders may object to the hydropower water rights and seek to demonstrate that they are not valid in the ongoing legal process that is adjudicating all pre-1973 water rights.
- Water Marketing - Individuals or political subdivisions can purchase existing water rights from willing sellers and convert them to new uses. Even if new water rights are available, however, water right purchases likely will occur because any new economic activity dependent on water use probably could not be based on the basin's most junior water right. The risk that use of this junior water right would be interrupted would be too high.
- Basin Closure - Over-appropriated basins can be closed to the issuance of new water rights. A closure would eliminate the need for existing basin water rights holders to spend time and money objecting to new uses because no additional water is legally available. In a closed basin, water users could obtain water for new uses through water marketing, contracting for stored water, or condemning existing rights.
- Condemnation of Existing Rights - By law, municipalities may condemn existing water rights for public purposes. Any rights condemned would be purchased at fair market value. The state might provide the condemnation opportunity if it had condemnation authority. This authority has not been established.
- Subordination of Hydropower Rights - The state might require hydropower water rights to be subordinated to other water uses and thereby eliminate opportunities for hydropower water rights holders to make call on junior users and to object to new water right permits and changes. This action may require payment by the state to the utility for the subordinated rights, probably through a condemnation action.
- Store More Peak Runoff In the Ground – During periods when the hydropower water rights are filled, water could be stored in the ground for later use. An advantage of such storage is that it is much cheaper than new dams. A potential disadvantage is that the state currently lacks the legal ability to regulate groundwater storage, and, depending on the location, also lacks the necessary information to actively manage groundwater.
- Contracting for Water from Hungry Horse Reservoir - Under certain conditions, public entities such as irrigation districts, state and local governments, and individuals can contract with the U.S. Bureau of Reclamation (USBR) for water stored in the reservoir. The contracts may provide water over a long-term period or for temporary service on an annual basis. Only public entities with taxing authority can enter into long-term contracts. The availability of these contracts may be restricted by reservoir operating constraints, including flood control, fish and recreation, and the biological opinion on salmon arising from the federal Endangered Species Act. The price of water provided under any contract would have to be negotiated with USBR.

COMPETING WATER USES

The constraint that existing hydropower development might have on existing and future development was a predominant issue when HB 397 was developed. The Task Force, as it deliberated over the last three years, identified additional potential constraints on water availability.

Among those is the need to decide who has the right to use how much water, where, when, and for what purpose. This raises the concern of the completion and accuracy of the state's water rights adjudication and the quantification of federal reserved water rights, such as those held by the

General Area Map of the Clark Fork River Basin



NOTE: The following lists the resources for the datasets used in this map: basin boundary, DNRC-Water Resources Division-GIS; towns, highways, streams, lakes, Montana State Library Natural Resources Information System.
Map generated by DNRC-WRD-GIS, June 2004.

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Measured by discharge volume where it leaves the state, the Clark Fork is Montana's largest river. The river and its tributaries drain 21,833 square miles, with a mean annual discharge of 20,504 cubic feet per second or 14,818,240 acre-feet.

Confederated Salish and Kootenai Tribes and the U.S. Forest Service. Quantification of these rights is key to defining the availability of existing and future water supplies. The status of federal reserved rights is presently in the hands of the Montana Compact Commission. This process cannot be rushed because haste may easily compromise the position of either the state or holder of the reserved water right. If an agreement cannot be reached and ratified by the Montana Legislature, the issue will end up in state court and ultimately the U.S. Supreme Court.

Environmental issues associated with other federal and state laws, such as the Endangered Species Act, and federal permitting actions, such as those by the Federal Energy Regulatory Commission, may place additional constraints on water management. Such actions affect water releases for salmon, reservoir levels, water releases from storage, wetland mitigation, and minimum flow conditions for fisheries and other environmental conditions below dams.

The Task Force's examination of existing water rights management raised questions associated with water right administration and water rights enforcement. Water uses and patterns of development are changing in western Montana. Future demands will be different from those of the past. The recommendations set forth in this plan reflect the deliberation of these issues. A larger discussion is available in the full plan.

TASK FORCE RECOMMENDATIONS

The task force identified the following options and recommendations for watershed management in the Clark Fork River basin. Chapter numbers and titles correspond to the watershed management plan.

Chapter 6 - Hydropower Water Rights and Basin Water Use

6-1 The State of Montana should open discussions with USBR to determine the availability and cost of temporary and long-term contracting options and to determine a quantity of firm storage available from Hungry Horse Reservoir for Montana uses other than hydropower.

Chapter 7 - Options to Protect the Security of Water Rights

For water rights to be secure, several conditions must be met. The rules governing water allocation must be predictably applied, and the rules themselves must be unchanging. The process for enforcing water rights must be timely and affordable. And new water uses cannot impair existing uses.

7-1 The State of Montana should complete the state-wide adjudication of water rights by:

- Establishing a reasonable goal, such as 5 years, for achieving enforceable water rights decrees in the Clark Fork Basin.
- Providing additional resources for the adjudication process by:
 - Providing additional funding for the Water Court and DNRC; and
 - Prioritizing DNRC resources to focus on the adjudication.

7-2 All reasonable efforts should be made to ensure that the adjudication results in durable and accurate water rights. To improve the accuracy of the water rights adjudication, the Montana Water

Court should formally announce that it will examine claims with DNRC issue remarks to which no objections have been filed and resolve those it finds to be inaccurate.

7-3 The State of Montana and the Confederated Salish and Kootenai Tribes should move as rapidly as possible to resolve the status of tribal reserved water rights through negotiation or litigation.

7-4 The Montana Legislature and DNRC should work together to ensure that DNRC has adequate funding and staffing to carry out its water related responsibilities in a prompt and efficient manner.

7-5 The State of Montana should act to reduce the burden on existing water rights holders to protect their rights through:

- Direction from the Montana Legislature to DNRC to investigate and enforce water rights.
- Direction from the Montana Legislature to DNRC to provide mediators to resolve water right disputes.
- Administration by DNRC of a program that trains, selects, and evaluates water commissioners.
- Sharing the cost of water commissioners by all rights holders according to their share of the total basin water rights rather than just those receiving water.

7-6 The Montana Legislature should explicitly authorize judges to award attorney fees to private parties bringing successful actions against illegal uses of water when diversions are made without a water use permit or existing water right.

7-7 DNRC should expeditiously complete the rules it is currently developing to establish criteria for objecting to water rights permit and change applications that increase the burden on applicants, while reducing the burden on existing rights holders.

Chapter 8 - Options for the Orderly Development of Water

The orderly development of water requires a process for quantifying the physical availability of water, and providing for its long-term, sustainable use by the various competing existing and future users. To accomplish these ends, the task force identified the following regulatory, management, and research and education strategies.

8-1 While the adjudication does not determine either the legal or physical availability of water for future appropriations, full knowledge of water rights cannot exist until the adjudication is complete. Also, additional water development may be at risk to future adjudicatory rulings by the Water Court, particularly in the Flathead and Blackfoot sub-basins, in which preliminary decrees have not been issued. The adjudication should, therefore, be completed.

8-2 DNRC should change the water rights permitting requirements and process by requiring an evaluation of cumulative impacts before granting surface or groundwater permits.

8-3 The regulation and management of surface and groundwater should conform to the legal standard that water is a unitary resource by:

- Amending the 35 gpm/10 acre-feet exemption to require a permit for groundwater wells that are developed as part of a common project, such as a subdivision.
- Developing a legally defensible definition of a hydrologic connection between surface and groundwater.

- Requiring applicants for a groundwater permit to provide information demonstrating the nature of the surface-groundwater connection.

8-4 Assuming that leasable water is available, the State of Montana should issue water leases as well as new water right permits to allow new water developments.

8-5 The State of Montana should develop appropriate rules for authorization and management of groundwater augmentation to enhance basin water supplies or recharge groundwater resources.

8-6 The Legislative Water Policy Committee should be re-established to increase the focus on water issues and water education for legislators.

8-7 The Montana Legislature should appoint interim committees to consider:

- The ongoing water rights adjudication; and
- Establishing specialized water courts to oversee water administration instead of relying district courts.

8-8 Single- and multi-purpose organizations such as conservancy or irrigation districts that can manage or participate in the management of water quantity should be created when they would be effective at the scale at which the management would occur.

8-9 Individual and water user organizations should provide for water use by existing and future users by:

- Examining options for increasing water use through use of high spring flows and snow melt (rain on snow events);
- Increasing water storage;
- Identifying and managing areas where return flows are important;
- Continuing to use water leasing and water marketing as management tools; and
- Protecting and rehabilitating wetlands through active floodplain and wetland management, bank storage, etc.

8-10 Additional research is needed to:

- Evaluate the availability of the basin's groundwater, its recharge rate, and groundwater-surface water interrelationships.
- Define more accurately sub-basin hydrology and water, biological, and economic relationships.
- Study water availability to identify places of stress and the impacts of sewer system installations on water quality.

8-11 Ongoing monitoring of stream flow, groundwater, and snow pack is critical to both research and water management. Funding should be provided to state and federal agencies to continue this monitoring.

Chapter 9 - Options for Conserving Water

Water conservation means the long-term, sustainable use of water resources. Water can be used beneficially in-stream or off-stream. Water can be conserved by preserving the qualities that maintain in-stream uses as well as those that allow long-term sustained use for off-stream uses. The task force identified the following strategies for conserving water.

9-1 Cities and counties should use their zoning and subdivision review powers to:

- Protect areas in which surface waters recharge groundwater.
- Require water meters in new subdivisions and government-owned water systems.
- Promote conservation through adoption of model conservation ordinances that regulate water use during periods of a water distribution shortfall.

9-2 DNRC should help to promote water conservation by:

- Improving its system for handling and managing water data to make the data more accessible to the public.
- Requiring measurement of water use for new water permits and change authorizations.
- Reaching agreement with DEQ to coordinate information required from groundwater pump tests.

9-3 Pursuant to the mandate of its organic act, the USFS should optimize favorable flow conditions in its management.

9-4 Individuals and water user organizations should take additional actions to provide for the long-term, sustainable use of water by:

- Measuring water uses and diversions;
- Improving water conveyance efficiency;
- Managing groundwater provided by irrigation;
- Identifying, managing, and protecting areas in which surface waters recharge groundwater; and
- Managing the supply side, e.g., using artificial recharge.

9-5 Individuals, organizations, and, where appropriate, government agencies should work together to form sub-basin planning entities which in turn can and should develop and implement drought plans targeted at the objectives of local water users.

9-6 Government agencies and water user organizations should provide long-term, coordinated education for water users, including information about activities that might affect groundwater recharge and quality and the connection between wasting water and wasting electricity.

9-7 Specific research topics that should be pursued include:

- The connection between groundwater infiltration and base stream flow;
- The connection between the basin vegetation and base flow;
- Quantification of water conservation activities; and
- The 7-day average low flow in a 10-year period (sometimes known as 7Q10).

Chapter 10 - Plan Implementation

10-1 The Task Force mandate should be continued and explicitly extended by the legislature to include continuing implementation oversight and evaluation of the Clark Fork River Basin Watershed Management Plan.

10-2 The Task Force should be provided an annual budget of \$20,000 to carry out its mandate.

PLAN IMPLEMENTATION FUNDING

The plan recommendations offer policy guidance regarding water regulation, management, and use. Implementing these recommendations will require action by the Montana Legislature, state agencies, local governments in the basin, and local water users and organizations. With one exception, the recommendations do not include sufficient detail to estimate implementation costs. The plan does include a proposed annual budget of \$20,000 to allow the Task Force to oversee implementation of the plan and to evaluate the plan itself on a continuing basis.

Six potential sources exist to fund implementation of the plan recommendations: reprioritizing existing state agency budgets (ESAB), new state funding (NSF), fees or assessments on water use (FA), local government budgets (LGB), federal grants (FG), and private expenditures (PE). The following table notes which potential funding sources may be relevant to each plan recommendation. The designation NA means that no additional funding should be required. Specific funding sources may become evident as the state, local government, and/or local water organizations or users take specific actions to implement a given recommendation.

Plan Recommendation	Funding Source					
	ESAB	NSF	FA	LGB	FG	PE
6-1	X					
7-1		X				
7-2	X					
7-3	X	X				
7-4	X	X				
7-5	X	X	X			
7-6	NA					
7-7	X					
8-1		X				
8-2	X					
8-3	X	X				
8-4			X			
8-5	X					
8-6		X				
8-7		X				
8-8			X			
8-9						X
8-10	X	X			X	
8-11	X	X			X	
9-1				X		
9-2	X					
9-3	NA					
9-4						X
9-5		X			X	X
9-6	X				X	X
9-7	X	X			X	
10-1	NA					
10-2		X				

PUBLIC MEETINGS

Prior to adopting the plan, the Task Force held meetings to take public comments and questions on the draft plan at Deer Lodge, Hamilton, Ronan, Kalispell, and Thompson Falls. Written comments were also taken during and after the meetings. A summary of the oral and written comments from and after the meetings is included on the Web at www.dnrc.state.mt.us/clarkfrkbasincover.htm.

PLAN ADOPTION

After considering the oral and written public comments, the Task Force adopted the plan by majority vote on August 16, 2004. The Confederated Salish and Kootenai Tribes declined to sign as accepting the Plan. The Tribes' reason for declining is plainly stated in their letter: "[Clark Fork River] Basin adjudication and subsequent effective water management planning are dependent upon quantification and settlement of Basin reserved water rights. As [...] pointed out above, the Tribes, the United States, and the State of Montana are in the process of negotiating a compact to effect the quantification and settlement of Tribal reserved rights. Because of this ongoing process, the Tribes have determined that it would be premature for the Tribes to sign as accepting the Plan. The Tribes have also determined, for the same reasons, that it would be premature for the Tribes to participate in the implementation phase of the Task Force as contemplated in Chapter 10." A copy of the letter from the Tribes explaining their position on plan adoption is included as Appendix to the full version of the plan.

STATE WATER PLAN

The statute that authorized the Task Force and established its mandate provides that the plan be considered for adoption as part of the Montana Water Plan. Adoption requires that DNRC hold formal public hearings on the plan and that the DNRC director recommend to the legislature that all or a portion of the plan be included in the Montana Water Plan. The public meetings must be noticed in all newspapers of general circulation in the basin. The Task Force recommends that DNRC hold the public hearings in Deer Lodge, Missoula, Hamilton, Ronan, Kalispell, and Thompson Falls. The plan as proposed by the DNRC director is adopted into the Montana Water Plan unless the legislature passes a resolution directing that all or a portion of the plan not be included. The legislature can also by resolution incorporate portions of the plan adopted by the Task Force that are not recommended for inclusion by the DNRC director.

CLARK FORK BASIN TASK FORCE MEMBERS

HB 397 provided that the task force must include representatives of all watersheds and viewpoints within the basin. Members and their contact information are listed below.

Matt Clifford, Clark Fork Coalition, phone: 542-0539.

Elna Darrow, Flathead Basin Commission, phone: 837-4400.

Jim Dinsmore, Granite Conservation District and Upper Clark Fork River Basin Steering Committee, phone: 288-3393.

Marc Spratt, Flathead Conservation District, phone: 752-2025.

Steve Fry, Avista Corporation, phone: (509) 495-4084.

Holly Franz, PPL Montana, phone: 442-8560.
Harvey Hackett, Bitter Root Water Forum, phone: 777-3214.
Fred Lurie, Blackfoot Challenge, phone: 859-3461.
Eugene Manley, Granite County, phone: 288-3409.
Gail Patton, Sanders County Commission, phone: 827-6924.
Bill Slack, Joint Board of Control, phone: 745-2090.
Jay Stuckey, Green Mountain Conservation District, phone: 827-3824.
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