

MONTANA'S WATER POLICY:  
INNOVATIONS, REALITIES, AND PROSPECTS

DEBORAH B. SCHMIDT  
Executive Director  
Montana Environmental Quality Council

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Deborah B. Schmidt

Montanans have historically characterized our homeland as "The Treasure State", indicative of our hard-rock mining heritage. Montana's mineral resources have consistently been the source of both wealth and controversy. In recent years, other natural values have received nationwide attention, such as the "Big Sky" that gives its name to Chet Huntley's famous resort near Yellowstone Park.

One of those "other values" is Montana's water resource, which includes the rising of the Missouri River and of the Kootenai-Clark Fork, major branches of the Columbia River. Montana is now known as a "Headwaters State" as well. But although large quantities of water rise in Montana and leave its borders, the distribution of those waters results in scarcity in the arid plains that cover much of the state.

The variety of values placed on Montana's natural resources is a topic currently much debated by citizens of the state. According to some economic indicators, we are a depressed state with stagnant growth (almost last among the 50 states), out-migration of talented individuals (especially young native Montanans), and shrinking public services. Critics blame our system of environmental protection, our tax

rate on natural resource extraction and other businesses, and a so-called "anti-business climate."

Other people point to a different set of indicators: our environment, though sometimes harsh, that is seldom toxic; scenery that is world famous; landscape described in some of our travel literature as the "last of what's best about America;" and a tourism industry that has surpassed all but agriculture in economic predominance.

While Montana's debate about the economic and noneconomic values of natural resources continues daily, the state legislature, over the last fourteen years, has forged public policy decisions around these competing values in the water management area. Certain events and trends provided the impetus for this relatively recent development of a comprehensive water policy:

- \* Predictions of rapid and full-scale development of Montana's vast coal reserves that would require huge amounts of water from the Yellowstone River, one of the last free-flowing major western rivers.

- \* Perceptions of increased demand from downstream states, some involving interstate transfers, that transformed earlier complacency based on perceptions of abundance.

- \* Strong initiatives to assert federal and Indian water claims reserved under the Winters doctrine in a state with major proportions of tribal and public lands.

- \* The 1982 U.S. Supreme Court decision in Sporhase v. Nebraska indicating, among other things, that water is a

commodity not unlike other commercial goods that move interstate relatively unimpeded.

\* The 1982 announcement by South Dakota that it had sold 50,000 acre-feet of water per year to the ETSI coal slurry pipeline consortium for a prospective \$1.4 billion.

\* Efforts within Montana to remove statutory restraints on the exportation of water so that Montana could also profit from ETSI-type deals.

\* Increasing conflict among the states in the Missouri River basin that fuels both a "race to the waters" and instability in management.

Responding to these forces, the legislature enacted a series of water management innovations that comprise what is today a fairly comprehensive water policy for Montana. These enactments occurred in two phases: those developed in the 1970's during the period of anticipated full-scale energy development; and those crafted in the post-Sporhase scramble.

In the first phase, four major policy initiatives became law: a process for reserving water for future beneficial uses; the adjudication and quantification of existing water rights and permitting for new water uses; establishment of a reserved water rights compact commission; and a major water development program backed by coal tax revenues. The second phase saw adoption of a water leasing program that incorporated strong public interest criteria; negotiations with Missouri Basin states; and an increased emphasis on planning for future uses of water.

Throughout this fourteen year period, the Montana legislature attempted to accommodate our state's economic and noneconomic values and private and public rights in developing a water policy. This presentation will describe the innovations that resulted from that balancing act and attempt to assess the practical realities of their implementation in today's setting. Finally, this paper will briefly speculate on prospects for Montana's water future.

#### Innovations

1) Water Reservations--Perhaps the first major initiative worthy of description as an innovation is Montana's process for ensuring water supplies for intended future uses of water. First adopted in 1973, the water reservation program allows governmental entities to file applications with the Department of Natural Resources and Conservation to reserve quantities of water for future beneficial uses. Water may be reserved for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or length of time designated by the Board of Natural Resources and Conservation.

Applicants under this program include municipalities (representing domestic uses), conservation districts (representing agriculture), the Department of Fish, Wildlife, and Parks (representing instream fish and wildlife interests), and the Department of Health and Environmental Sciences (representing water quality). The water reservation

process thus fully recognizes the integration of water quantity and water quality concerns and the need to plan effectively for Montanans' water future.

The process for securing a water reservation does not allow for mere speculation, however. Applicants must demonstrate: the purpose, the need, the amount of water necessary for the reservation; and that the reservation is in the public interest. Further, reservations are subject to Board review at least every ten years to determine whether their objectives are being achieved. Water reservations may be modified not more than once every five years to better achieve their intended purposes.

2) Quantification of Existing Rights--Responding to the events of the 1970s (described above), the legislature enacted a water permitting statute in 1973 and a revised general stream adjudication program in 1979. The Water Use Act applies to all new (post-1973) uses of water, while the adjudication program purports to quantify and secure all pre-1973, constitutionally guaranteed, water rights. Although these programs are not particularly innovative in their approaches, they form an essential element of Montana's modern water policy. They demonstrate how adjudication of water rights has moved from an essentially private matter between individual owners to an issue of broad public concern. These programs are seen as a means to document, affirm, and protect those water rights that are so essential

to the economic well-being of both individuals and the community.

Some important elements of these programs include: a centralized system of records; clear definitions of beneficial uses; requirements that transfers of rights to different uses require DNRC approval, as do changes in existing water rights; and provisions for declaring abandonment of a right after ten years of non-use. The adjudication program is supervised by the Montana Water Courts, and the Chief Water Judge coordinates the judicial elements of the program with the administrative aspects undertaken by DNRC.

3) Indian and Federal Reserved Rights--A major innovation associated with the adjudication of existing water rights achieved passage in 1979 through establishment of the Reserved Water Rights Compact Commission. The legislature established a commission composed of nine members to negotiate compacts for the equitable division and apportionment of water between the state and its people and the several Indian tribes (seven in Montana) claiming water rights reserved under the Winters doctrine, as well as with the federal agencies claiming reserved rights. This negotiation process represents a major departure from the history of costly litigation experienced by neighboring states. The legislature recognizes that Indian and federal rights needed to be integrated into an overall quantification of water needs and hopes that the animosities generated by

court battles can be avoided. Faith in this process has been renewed each legislative session since its original enactment, despite U.S. Supreme Court decisions favorable to adjudication within the state system.

4) Water Development--Recognizing the importance of balancing development of Montana's mineral resources with more sustainable renewable resource development, the legislature enacted in 1981 a comprehensive water development program. The program represents confirmation of the principle that the best way to secure Montana's water resource is to put it to actual use. The program provides for grants and loans funded primarily through resource indemnity trust interest proceeds, and a bonding mechanism backed by coal tax revenues. The purposes of the water development program include: rehabilitation of state-owned projects; development of hydropower potential on state-owned dams; development of water reservations for conservation districts; promotion of off-stream storage; promotion of state-tribal and state-federal water development; and payment of certain administrative expenses.

5) Water Leasing and Public Interest Considerations--The second water policy innovations phase in Montana is highlighted by the water leasing program and other related elements enacted in 1985. HB 680 was the product of an exhaustive two-year study created after our legislature refused to be panic-stricken by South Dakota's sale of water to the ETSI pipeline consortium. Legislators were told that

the state would lose both money and water if Montana did not undertake similar water sales. Fortunately the legislature paused. Study committee members began their work believing their task was to fashion a water marketing program and fix-up some sections of the water code rendered suspect by Sporhase. But the task soon broadened to incorporate a review of many more features of Montana's water policy.

What emerged was a major rethinking, revision, and restatement of an interlinked and interdependent water policy. For instance, water leasing could provide much needed revenues and increase water efficiency while giving the state greater proprietary control over its water. Previously unrestrained private appropriations of large quantities of water could be reviewed to ensure their compatibility with the broader public interest. Water could be reserved for future use through a planning process that laid the foundation for sound water management.

Some of the details include:

- \* the adoption of public interest criteria for new water permits as well as applications for changes in the use of larger amounts of water; these are criteria developed in response to New Mexico's experience with out-of-state movements of water;

- \* the regulation of large pipelines under the state's Major Facility Siting Act, enabling rigorous environmental review of consequences of proposals to move water in or out-of-state;

\* adoption of a water leasing program that allows Montana to regulate the intra- and interstate movement of water through lease terms and conditions; and

\* acceleration of water reservations on the Missouri River.

6) Negotiations with Missouri Basin States--Building on the 1985 legislation, the legislature recognized the need to prevent undue concern among other states over our new water leasing program. Wishing to avoid the panic that ensued after South Dakota's water sale and the accompanying legal battles, the legislature urged that efforts toward reducing conflict among the states of the Missouri River Basin be undertaken. Negotiations among representatives of those states have proceeded on two fronts: through the efforts of the Missouri Basin States Association and through legislative efforts sponsored by a special project of the National Conference of State Legislatures. Although subject to peaks and valleys, both processes continue.

7) Water Planning--The most recent innovation developed as part of an overall effort to secure Montana's water in the post-Sporhase scramble is a reinforcement and rejuvenation of the state's water planning process. One of the important components of the Sporhase decision envisioned that sound planning is a justifiable means of regulating the flow of waters out-of-state. Part of Montana's effort includes an acceleration of water reservations on the Missouri River.

Montana policy-makers believe that reservations are evidence of the planning process sanctioned by the court.

Another part of the effort to shore up Montana's planning process is a restructuring based on the Kansas approach. This program involves substantial public involvement at both regional and state levels and promotes analyses of feasible solutions for specific problems. The resulting plan is meant to be dynamic, problem-oriented, and have both basin and statewide components.

While Montana has had a statutory planning process since 1967, the results have been unsatisfactory. Montana water managers believe that these new efforts will provide a stronger basis for management decisions that will withstand judicial scrutiny and meet the competing needs of water users.

#### Practical Realities

The pieces of Montana's water policy described above constitute what we believe is a rational and sometimes innovative framework for managing Montana's water future. But now that the vision has become reality (at least to a certain extent), what are the limits on its implementation? Every manager knows the answer: money. But other realities constrain application of innovative policy techniques. This section sets forth some of those realities and looks at where we are in Montana with the various elements of our water policy.

None of the realities water managers and policy makers face stands on its own; each is related and interlinked to the next. The factors that limit implementation of water policy in Montana are familiar throughout the region, and perhaps nationwide. Earlier speakers described the federal context in which state water policy functions, and changing federal roles do indeed impact the states.

In thinking about practical realities, the first that comes to mind is the difficulty of predicting what the future holds. For example, many of the predictions that drove establishment of many of Montana's innovations have simply not come true. The dream (or nightmare, depending on one's perspective) of the industrialization of Montana through massive energy development never reached fruition. Full implementation of several policy initiatives stalled because of the reality of the eighties.

Water managers in Montana face the reality of the public's desire for a minimalist government. State government grew rapidly in the 1970s, but the eighties ushered in public skepticism over how much government should be involved in decisions affecting water users' property rights.

Most of Montana's water policy innovations involve substantial public participation. Montana clings to a citizen legislature, citizen boards, and advisory councils. Montana's 1972 constitution requires active public notice and an open government. While this level of participation makes

for better policies, it slows their application. As one water manager recently quipped: "If I could be king, I know I could get this done a lot faster!" Citizen commissioners simply cannot devote intensive time to negotiations and other complex administrative tasks.

The final and most obvious limitation is money. Montana's economy, having boomed in the seventies, is busted in the eighties. Declines in all of Montana's basic industries (mining, agriculture, forestry, oil and gas) except tourism, have meant shrinking state revenues and more demand for them.

The national economy also affects implementation of water policy options. Much of that policy assumes a demand for Montana's water, and that demand does not exist in today's economy.

How have these realities affected specific elements of our water policy? The water reservation process is proceeding, but more slowly than anticipated. Reservations have been completed on the Yellowstone River (although not developed) and are in progress on the Clark Fork of the Columbia and on the Missouri.

The effort to quantify existing rights is embroiled in controversy. The legislature recently appropriated \$75,000 to hire a consultant to do a midstream evaluation; the water courts and the DNRC differ markedly on how the adjudication should proceed.

The Reserved Water Rights Compact Commission has successfully negotiated only one compact (with the Fort Peck tribe) since 1979. However, compacts with the federal government and perhaps another Indian tribe near agreement.

The water development program has seen modest success. While few major projects have been developed, many smaller projects have resulted from the program. Again, a poor farm economy has tempered application of the program to the agricultural sector, although municipal water and sewer projects have benefited.

Montana's highly touted water leasing program hasn't seen any takers, demonstrating that it is not enough to simply remove institutional barriers to water marketing.

In the Missouri Basin, negotiations toward agreement on a process for allocating water among the states nearly succeeded last December, but failed in the end. The Missouri Basin States Association recently agreed to disband its staff.

Montana's new water planning effort did not receive full funding from the legislature and is off to a slow start. These are the present realities of our innovations.

#### Prospects

While the previous status report sounds a bit gloomy, there is also reason for optimism. Despite the current economic slump, Montana has in place a body of water policy that awaits better times. Interest in water management is high. The public recognizes the importance of protecting

instream as well as consumptive uses for Montana's future. More efficient and economic use of water now receives considerable discussion in Montana's new water planning process, which is underway. Relationships with the Indian tribes remain relatively good, and the state is not embroiled in costly litigation.

The current realities give us time to carefully evaluate our innovations, to fine-tune them to secure a bright water future for Montana--in good times and in bad.