

Milltown Dam Water Right

**By Gerald Mueller
Facilitator of the Upper Clark Fork
River Basin Steering Committee and
Clark Fork River Basin Task Force
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Upper Clark Fork River Basin Steering Committee

- Statutory Entity – 85-2-338
- Responsibilities included first writing and then updating a water management plan for that portion of the Clark Fork Basin above the confluence of the Blackfoot and Clark Fork Rivers.
- Also directed to identify short-term and long-term water management issues and problems and identify alternatives for resolving them.
- Members must be representative of the basin and are appointed by the basin county commissions, conservation districts and DNRC Director.

Milltown Dam Water Rights



Removal of the dam and toxic sediments and restoration of the channel has dramatically changed the Clark Fork & Blackfoot Rivers.

- Removal of the Milltown Dam may also have profound effects in a less immediately visible way.
- Fate of the Milltown Dam hydropower water right may affect how water is used throughout the upper Clark Fork basin.

To understand significance of the Milltown Dam hydropower right, examine:

- Milltown water right claim hydropower.
- Water rights junior to Milltown.
- Clark Fork River flows above Missoula.

Milltown Dam Hydropower Right

- Large and old
- MPC hydropower claim
 - Priority date – December 11, 1904
 - Flow rate – 2,000 cfs
 - Period of use – year round
- Claim not included in a final water right decree and is still subject to objection

Water Rights Junior to Milltown Hydropower Right

- 12,650 water rights located above Milltown Dam have priority dates junior to December 11, 1904.
- 3,938 of the junior rights are for surface water uses.
- Surface use with the largest number of junior rights is stock water, followed closely by irrigation.

Water Rights Junior to Milltown Hydropower Rights

- Distribution of junior surface water rights by subbasin:

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|-----------------------|-------|
| ■ Rock Creek | 320 |
| Blackfoot | 2,058 |
| Flint Creek | 329 |
| Upper Basin/ Mainstem | 1,310 |

Junior Water Rights Subject to Call by Senior Users

Under Montana water law a senior user can place a call on junior users whenever the senior's right is not filled.

Clark Fork River Historic Flows

- The river above Missoula flows on average above 2,000 cfs the last 10 days of March, all of April, May and June, and all but the last 4 days of July, a total of 130 days per year.
- On the average, the Milltown Dam hydro power water right was not filled 235 days per year.

Historically Hydropower Right Not Enforced

Neither MPC nor NorthWestern Energy acted to enforce the hydropower right.

Future of Milltown Hydropower Right

- Pursuant to a Superfund lawsuit settlement agreement, the Milltown right is about to be transferred to the State of Montana.
- Water right will be transferred along with land at the Milltown site.
- Water right must be maintained as an instream use.
- Governor will designate the state agency that will hold and manage the right.
- The likely candidate is DFWP for a fishery beneficial use.

Water Right Change

- State agency will have to file for a change of use permit from DNRC for a new beneficial use.
- Statutory change criteria include:
 - The proposed use will not adversely affect the use of other water rights.
 - Enforcing a right does not constitute an adverse affect.
 - The proposed change is a reasonable use.
 - 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second.
 - Criteria not previously applied in a water right change permit.

85-2-311 (3)(b) Reasonable Use

- A reasonable use finding must be based on a consideration of the following:
 - (i) the existing demands on the state water supply, as well as projected demands, such as reservations of 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 beneficial 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.

New Beneficial Use

- Change applicant must demonstrate how much water would be used for the new purpose.
- This means that the state will not necessarily retain the 2,000 cfs flow claimed for the hydropower right.
- DFWP would have to demonstrate the amount of water for the fishery beneficial use.
- How DFWP would do this is not known.
 - Wetted perimeter or another methodology?
 - Objective, minimum or optimal flows?

New Beneficial Use

- To meet reasonable use criterion, DFWP would probably have to provide a plan for managing the water right.
 - Will and how would water right be enforced?
 - How often would it be enforced?
 - Under what conditions would it make a call on juniors?
- Possible management alternatives might include:
 - Making call based on priority dates; or
 - Drought plan that shares any shortage equitably throughout the basin.

Drought Plan Management Option

- Involve some or all of the 6 sub-basins above Milltown Dam, the lower Clark Fork mainstem, the Blackfoot River, Rock Creek, Flint Creek, the Little Blackfoot, and the upper Clark Fork mainstem and tributaries.
- The drought plan could be triggered when the Clark Fork River flow falls below the changed Milltown instream flow water right.
- The drought plan could include a target flow for each sub-basin.
 - If the actual flow into the Clark Fork from the sub-basin was less than its target, then 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.

Drought Plan Management Option

- Sub-basin targets might be set from average contribution to the Clark Fork above Missoula flow:

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|--------------------------------|------|
| ➤ Blackfoot | 52 % |
| ➤ Rock Creek | 17% |
| ➤ Flint Creek | 4% |
| ➤ Clark Fork above Drummond | 22% |

Milltown Water Right Summary

- Milltown hydropower water right is large and old.
- The State of Montana is about to become the owner of this right.
- State will have to file for a change of use permit.
- How the state manages the new right will be of critical importance to the 12,000 water uses above Milltown, including 4,000 surface rights, that are junior to the hydropower right.