

**Upper Clark Fork River Basin Steering Committee
Presentation to the Montana Environmental Quality Council
May 19, 2006**

Dear EQC Member:

The Upper Clark Fork River Basin Steering Committee was created in 1991 pursuant to 85-2-338 MCA. This statute specifies how the Steering Committee's members are to be appointed and sets out its mandate. Current members of the Steering Committee include:

Name	Area or Organization Represented	Appointed Entity
Bob Benson	Clark Fork-Pend Oreille Coalition	DNRC Director
Stan Bradshaw	Trout Unlimited	DNRC Director
Robin Bullock	ARCO	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
Steve Fry	Avista Corporation	DNRC Director
Brent Mannix	Big Blackfoot Rancher	North Powell Conservation District
Jim C. Quigley	Little Blackfoot Rancher	DNRC Director
Pat Saffel	DFWP	DNRC Director
John Sesso	Butte/Silver Bow Planner	Butte/Silver Bow Commission
Dan Ueland	Silverbow Rancher	Mile High Conservation District
Jules Waber	Powell County Superintendent of Schools	Powell County Commission

According to 85-2-338 MCA, the Steering Committee's mandate includes:

(5) The steering committee, consistent with the Upper Clark Fork River basin comprehensive management plan, shall:

(a) review the Upper Clark Fork River basin closure and exceptions as provided in 85-2-336 no less than every 5 years after April 14, 1995, and make recommendations to the legislature regarding necessary changes;

(b) prepare and submit a report evaluating the Upper Clark Fork River basin instream flow pilot program as provided in 85-2-439;

(c) prepare and submit a report concerning the relationship between surface water and ground water and the cumulative impacts of ground water withdrawals in each subbasin;

(d) provide a forum for all interests to communicate about water issues;

(e) provide education about water law and water management issues;

(f) identify short-term and long-term water management issues and problems and identify alternatives for resolving them;

(g) identify the potential beneficiaries of and a funding mechanism for new and expanded water storage sites;

(h) assist in facilitating the resolution of water-related disputes;

(i) provide coordination with other basin management and planning efforts;

(j) advise government agencies about water management and permitting activities;

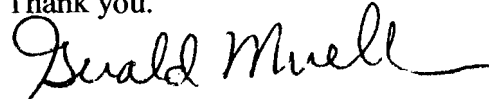
(k) consult with local governments within the Upper Clark Fork River basin; and

(l) report periodically to the legislature.

This following packet includes four documents related to my presentation to you on behalf of the Upper Clark Fork River Basin Steering Committee:

- The Steering Committee's February 2006 policy paper entitled, "How Will Completion of the Adjudication Affect Water Management in Montana?"
- A response to this paper from Gallatin and Musselshell water users
- A summary of the April 2006 survey of Blackfoot and Flint Creek water users about the ongoing water rights adjudication; and
- A summary of the Steering Committee accomplishments.

Thank you.

A handwritten signature in cursive script that reads "Gerald Mueller". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

Gerald Mueller

Steering Committee Facilitator

How Will Completion of the Adjudication Affect Water Management in Montana?

Prepared by the Upper Clark Fork River Basin Steering Committee

February 2006

Introduction

The 2005 Legislature has set the state on a course to complete the state-wide water rights adjudication by 2020. It has done so by passing two bills, HB 22 and HB 782. HB 22 establishes a water right fee designed to raise up to \$31 million over ten years. Fee receipts are to be used to fund the Montana Department of Natural Resources and Conservation (DNRC) and the Montana Water Court so that DNRC can complete its examination of all claims filed in the adjudication by 2015 and the Water Court can issue water rights decrees for all basins by 2020. HB 782 will help ensure the accuracy of the adjudication by requiring the Water Court to address all issue remarks made by the DNRC as a result of its claims examination before issuing final decrees.

The need for the state-wide water rights adjudication and the history of its implementation was addressed in a previous paper issued by the Upper Clark Fork River Basin Steering Committee (Steering Committee)¹ on March 2, 2004, "White Paper on the Montana Water Rights Adjudication."² The paper noted that the adjudication has been underway for 25 years, but because of inadequate funding for both the DNRC and the Water Court, no one could predict when it might be finished. The paper concluded that, "Without a complete and accurate state-wide water rights adjudication, the status of Montana's water rights is uncertain. This uncertainty threatens the livelihoods of farmers and ranchers, the viability of water dependent industries, the value and marketability of real property, and the health of fisheries and aquatic ecosystems." The Steering Committee, therefore, applauds the actions of 2005 Legislature aimed at removing this uncertainty.

Although completion of the adjudication remains several years away, the Steering Committee believes that this event will result in fundamental changes to water rights enforcement, water administration and water management. This paper is written to stimulate discussion by Montana water users, water managers, and policy makers of these changes and their implications so that appropriate responses to them can be identified, discussed and put in place before the final water rights decrees are issued.

¹ 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*.

² A copy the paper is available from Gerald Mueller, 440 Evans, Missoula, MT 59801.

The paper that follows first briefly identifies and discusses the fundamental changes. It then provides context for understanding their implications by reviewing existing water administration and management and the experience of our neighboring states that have completed or are nearing completion of an adjudication process. The paper concludes by describing options by which the state and water users might prepare for the changes.

Primary Changes

Based on discussions with Montana Water Court Chief Judge and staff of DNRC, the Steering Committee has identified three fundamental changes that will result from completion of the adjudication: almost all water rights will be decreed,³ all decrees in a basin and the water rights they contain will be tied together, and diversions of water will be measured.

Water Rights Will Be Decreed

The purpose of the adjudication is to determine who has what water right. At its completion, with the exception of some instream stock watering and domestic rights, information about who has the right to use how much water, over what period, where, and for what purpose will be documented.

Decree Integration

A critical result of the adjudication will be integrating all existing decrees and all water rights in each of Montana's major river basins, thereby creating new relationships among water rights and water users. For example, all water rights in the Clark Fork River basin, an area of about 22,000 square miles, will be tied together for the first time, perhaps in a single decree.⁴ In fact, after the adjudication, Montana will have final decrees for each of the five major basins, one for the Kootenai, Clark Fork, Missouri, Yellowstone, and St. Mary River Basins. Each of those final decrees will have been noticed throughout the basin and integrated to be binding. Except for determining the water rights themselves, this change is likely to have the greatest significance for water rights administration, water management and water rights enforcement.

Diversion Measurements

Because the adjudication will result in enforceable water rights decrees, a pre-condition for the appointment of water commissioners, provisions of state law requiring diversions to be measured will be more likely to be implemented.⁵

³ The only exceptions will be some instream stock watering and domestic rights. Claims for these uses were not required to be filed in the adjudication, and as a result, only some were filed. Final decrees resulting from the adjudication will, therefore, include only some instream stock watering and domestic rights. It is not clear how, when or in what court those unclaimed instream stock and domestic water rights will be adjudicated during or after the present adjudication.

⁴ Private communication with Judge Loble on December 16, 2003.

⁵ 85-5-302 MCA provides that "All persons using water from any stream or ditch whereon a water commissioner is appointed are required to have suitable headgates at the point where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in the ditch."

Existing Water Rights Administration and Enforcement and Water Management

The basis for allocating water in Montana is rooted in the Montana Constitution. 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.

(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.

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).⁶ Regardless of priority date, a right holder must use only that amount of water necessary to fulfill a legally recognized beneficial use.⁷ For example, an irrigation right is capped by the amount of water needed by the crop grown on a specific piece of ground. If the crop does not need water, such as when hay is being cut, the water right holder cannot continue to divert the water and must leave it in the stream for use by junior water rights

⁶ Pre-1973 beneficial uses are defined by case law. For post-1973 permits and water right changes, 85-2-102 MCA defines "beneficial use" to mean, unless otherwise provided:

(a) a use of water 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;

(b) a use of water appropriated by the department for the state water leasing program under §85-2-141 and of water leased under a valid lease issued by the department under §85-2-141;

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under §85-2-436; or

(d) a use of water to maintain and enhance streamflows to benefit the fishery resource in the Upper Clark Fork River basin as part of the Upper Clark Fork River basin instream flow pilot program authorized under 85-2-439.

⁷ The quantity of water attached to a water right is limited in time and in volume by the capacity of the appropriation facilities, actual use, actual need, or original intent, whichever is less. Doney, *Montana Law Handbook*, page 27 (1981).

holders. Both case law and statute provide water cannot be wasted.⁸ If a user stops putting water to a beneficial use, the water right can be lost or abandoned. Also, if the historical beneficial use underlying a water right was 10 cubic feet per second on a specific field, the right holder cannot expand his or her use to more than that amount without obtaining a new right. A Montana statute establishes 10 years of non-use as a rebuttable presumption of abandonment of a water right.⁹

The Water Resources Division of the DNRC administers water rights. It maintains a data base accessible to the public about the status of existing water rights. Since the passage of the Montana Water Use Act in 1973, it also issues permits for new water rights as well as for changes to all water rights. Also since 1973, DNRC has statutory authority to stop violations of the Water Use Act by pursuing court enforcement of water rights, but that authority does not extend to parceling out water among water users. Because of staffing and funding limitations, it almost never uses its authority to go to court.¹⁰ DNRC is now seeking ways to partner with local county attorney offices for more enforcement of violations of the Water Use Act. DNRC supported the passage of HB 609 in 2005 to help empower water users on a stream to police illegal uses.

DNRC's lack of enforcement resources means that the burden of enforcing water rights falls almost entirely on individual water right holders. Individuals can make call on junior users and file lawsuits in district court to enforce their rights. In a basin with an enforceable water right decree, individuals can petition district court to appoint a water commissioner to act as the court's agent and allocate the available supply of water according to the decree water right priority dates. Because of the expense and time associated with individual law suits, use of a water commissioner is generally the preferred means of enforcement. The cost of a water commissioner is now borne only by those water right holders who receive water pursuant to commissioner action. Thus in drier years, the cost will be paid only by the most senior users, in proportion to the amount of water received. Given this funding mechanism and the nature of their work, commissioners today work part time, without benefits such as health insurance, sick leave, retirement funding, etc. These working conditions tend to limit the people available to serve as water commissioners.

Water management today has a local focus. Water users deal primarily with their immediate neighbors or with fellow members of water user organizations such as irrigation districts. In areas without enforceable water rights decrees and/or that are not facing regular water supply short-falls, water management also tends to be based on informal agreements among neighbors. Even when disagreements and/or supply short-falls result in enforcement actions through water rights calls or use of water commissioners, allocation decisions are generally limited to a local

⁸ See 85-2-102(18) and 85-2-505 MCA.

⁹ 85-2-404 MCA. However, for pre-1973 water rights this statute applies only after the issuance of a final decree by the Montana Water Court.

¹⁰ DNRC has only two attorney positions to seek court enforcement of water rights state-wide while carrying out the Department's other water related legal responsibilities. DNRC regional offices routinely obtain voluntary compliance with water rights by providing information about legal requirements and discussing issues/complaints with water users.

area such as a creek or a specific reach of the mainstem of a river.¹¹

Implications of the Primary Changes

The three primary changes resulting from completion of the adjudication will have significant implications for water rights administration and enforcement and for water management. Some of the implications are easy to foresee and are clearly positive. Others, although likely to be profound, are more difficult to predict in detail. Completing the adjudication will at least reduce, if not eliminate, the uncertainty about who has an existing legal right to use water. This is a necessary first step to protecting the water uses based on existing rights. To achieve meaningful protection, however, documentation must be accompanied by a practical means for enforcing water rights.

Water Rights Enforcement

After the adjudication is completed and all water rights in a basin are tied together into one decree, enforcing water rights is likely to be more difficult. As previously mentioned, whether through actions by individual water rights holders or by water commissioners, traditional water rights enforcement has almost always involved nearby water uses and users. For example, water use in the Flint Creek valley has traditionally been subject to multiple decrees, including decrees addressing the upper and lower portions of the valley and lower Willow Creek.¹² In the post-adjudication era, not only will the three major existing Flint Creek decrees be tied together, all Flint Creek Valley water rights will be integrated with the other rights throughout the entire Clark Fork River basin, the 22,000 square mile area incorporating the entire Clark Fork River and all of its tributaries, including the Flathead, Bitterroot, and Blackfoot Rivers.

Tying water rights together will change relationships among water rights.¹³ Historically, Montana water was often developed first in the lower portions of a watershed. A senior right in a local area such as the upper Flint Creek Valley may, therefore, be junior to a right located downstream on lower Flint Creek or even downstream on the mainstem of the Clark Fork River. Prior to completion of the adjudication, these areas were most likely subject to different, independent decrees that were managed separately. After the adjudication, formerly senior upper Flint Creek water rights may be subject to interruptions to meet the needs of earlier rights in the lower Flint Creek or even downstream on the Clark Fork River. Deciding the targets of a water rights call and who must be notified as a potentially affected water rights holder may also involve more than the traditional local area, and a call will likely become more expensive and

¹¹ 85-2-406 provides for enforcement of temporary preliminary water rights decrees on the whole or only a part of a stream.

¹² Flint Creek is a tributary of the Clark Fork River. The confluence of Flint Creek with the Clark Fork occurs near Drummond, Montana. Water use on numerous individual creeks have been decreed. The three major decrees affecting the Flint Creek are: No. 655 of US Federal District Court, the Mary Schuh Decree, dated March 31, 1906; No. 719 of the Third Judicial District of the State of Montana, the Featherman Decree, dated September 18, 1909; and No. 3046 of the Third Judicial District of the State of Montana, the Willow Creek Dam Decree, dated May 3, 1960.

¹³ 85-2-234(4) states that a final basin decree "... must establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all water rights and their relative priorities."

more difficult. A water user may be subject to a call by a water rights holder located far downstream. For example, a Flint Creek water user could receive a call to cease using water from a senior water right holder located near the Montana-Idaho boarder.

Similarly, petitioning and paying for a water commissioner is likely to be more complicated. Presently, fifteen percent of the holders of water rights under a decree may petition district court for the appointment of a commissioner. After the water rights and old decrees are combined, how the fifteen percent requirement would be defined is not clear. Also, instead of one commissioner implementing a single decree for a specific stream, a hierarchy of commissioners will likely be required to enforce the combined decree. The actions of the commissioners will have to be coordinated in some manner. For example, sub-basins such as Flint Creek, the Little Blackfoot, or the Blackfoot may have flow targets set to protect downstream senior users and water users in other areas. How the cost of the multiple commissioners will be allocated is not clear.

Recent enforcement activity in the Musselshell sub-basin may provide a glimpse of the post-adjudication future. Four years ago, Musselshell water users successfully petitioned the Water Court to issue an enforceable decree encompassing the entire mainstem of the Musselshell River, which is about 200 miles in length. For these four years, the basin has been divided into six zones and a water commissioner has been assigned to work in one or more of the zones. One commissioner has served as the chief commissioner, coordinating the activities of the others. Depending on the year, either five or six commissioners have successfully worked together and allocated both contract and decreed water. Costs of the commissioners were compiled and divided among the water rights holders receiving water through commissioner actions. In a briefing of the Steering Committee, the chief commissioner and a representative of Musselshell water users identified the following challenges/problems with administering the commissioners:

- Commissioners do not wish to wait until the irrigation season ends to receive payment for their services. As mentioned above, current law provides that only those water rights holders who actually receive water pay the commissioner costs, and the total bill is divided according to the proportion of the water received to the total amount delivered.
- Whether the commissioners are independent contractors or are employees of some government entity is in dispute. Independent contractors are exempt from the Workers Compensation Program, whereas government employees are subject and their agencies must pay into the Workers Compensation fund.
- Finding enough people willing to serve as commissioners has been a challenge.
- Because upper and lower basin water rights holders are tied together in one decree, lower basin users often feel compelled to try to protect their interests by objecting to management activities of upper basin water users, and visa versa.

While this experience gives some idea of how the commissioner system might work when more than just the water rights in a local area are involved, it does not fully represent the complexity of the post-adjudication situation. Commissioners are presently employed only on the mainstem of the Musselshell River. Water rights on the tributaries are not addressed, although discussions are underway to do so. When final decrees are someday issued for Montana's five major river basins, mainstem water use will be tied legally to what happens on the tributaries. It seems unlikely that enforcement actions on the mainstem will be divorced from tributary water rights,

especially if tributary rights are junior to mainstem rights. The hierarchy of commissioners, will, therefore, likely have more layers and interactions than the five or six commissioners looking after one or more zones on the Musselshell mainstem.

Management Flexibility

Two of the three changes resulting from the adjudication will work against the existing level of management flexibility. The post-adjudication integrated water decrees addressing the five major river basins will likely expand the focus of water management beyond independent, local areas. This fact combined with the increased likelihood of required water diversion measurements may preempt informal management agreements among neighbors, replacing them with actions directed by a hierarchy of water commissioners.

Experience of Other States

Wyoming

As is the case in Montana, the Wyoming Constitution provides that the state owns the state's waters and is in charge of its allocation, and that water allocation is governed by prior appropriation doctrine.¹⁴ However, unlike Montana, after the date of statehood (July 10, 1890), the only method for Wyoming water users to obtain a water right was to obtain a permit from the state engineer. Prior to statehood, a Wyoming water user could obtain a right by using water and filing a claim with territorial officials.¹⁵ Thus unlike Montana, Wyoming has not had the uncertainty about water rights or the need for a state-wide adjudication process. In effect, Wyoming is an example of one approach to a post-adjudication future.

Along with a state engineer, the Wyoming Constitution also provides for the division of the state into four water divisions and the appointment of a supervisor for each division.¹⁶ It also creates "...a Board of Control composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith."¹⁷ The Board of Control acts, as does Montana Water Resources Division, to finalize water rights and to approve changes to existing rights.¹⁸ If water users elect

¹⁴ Wyoming Constitution, Titles 97-8-001 through 97-8-003.

¹⁵ "Wyoming Water Law - a summary", Jacobs, Tyrrell, and Brosz, University of Wyoming, B-849R, May 2003, p. 2.

¹⁶ Wyoming Constitution, Title 97-8-004.

¹⁷ Wyoming Constitution, Title 97-8-002.

¹⁸ The steps to finalizing a water right are as follows. An application for a permit is filed with the state engineer. Upon approval of the application, the state engineer issues a permit for developing the proposed water project. After the water has been put to beneficial use (or a reservoir constructed) and the construction completion and beneficial use notices have been submitted, a final proof of appropriation or construction must be submitted to the appropriate water division superintendent. This proof is then advertised in a local newspaper, and an inspection of the project is made. If the paperwork is in order and no protests are filed, a proof is submitted to the Board of Control. If the Board approves the application, a certificate of appropriation and/or construction is issued and recorded in the county clerk's office in the county where the project is located as well as in the state engineer's office. It is then listed in the tabulation of adjudicated rights for the respective division as evidence of an adjudicated water right. Once adjudicated, the water right is permanently attached to the specific land or place of use described on

state regulation, state personnel who serve the division superintendents regulate the distribution of water, the role of court-appointed water commissioners in Montana.¹⁹ Thus in Wyoming, state government has closely controlled the issuance of water rights, as has Montana since 1973. Unlike Montana, when requested to do so by water users, Wyoming state government actively administers water pursuant to water rights and the prior appropriation doctrine. Prior to the 2005-2006 biennium, funding for the state engineer's office was provided primarily from earmarked coal severance and oil and gas royalties accounts. Beginning with the 2005-2006 biennium funding was shifted to the state general fund.

Idaho

The Idaho Constitution and statutes provide that all of the waters of the state when flowing in their natural channels and state ground waters are public waters subject to diversion for beneficial uses. Water law is based on the prior appropriation doctrine. As is the case in Montana, prior to the date on which the state established a permit requirement (May 20, 1971 for surface water and March 25, 1963 for ground water), a water right could have been obtained by diverting water and putting it to a beneficial use. Prior to their respective permit requirement dates, both surface and ground water rights could also have been established by complying with the statutory method in effect at the time the water right was established.²⁰ Idaho, like Montana, decided to confirm its pre-permit water rights through a court adjudication process. However, Idaho has not instituted a state-wide adjudication; instead, a decision by the Idaho Attorney General at the request of the Director of the Idaho Department of Water Resources (IDWR) triggers the adjudication in a specific basin. A general adjudication, somewhat similar to Montana's state-wide adjudication, is underway in the Snake River Basin. The IDWR Director also can approve applications to change the point of diversion, place of use, period of use, or nature of a water right.

Pursuant to Idaho law, the IDWR Director has a duty to distribute water in water districts through water masters supervised by the Director, or in parts of the state not included in a water district directly by IDWR employees.²¹ Water districts are created and can be modified or abolished by the IDWR Director.²² Thus, as is the case in Wyoming, but not in Montana, state

the certificate of appropriation and cannot be removed or changed except by action of the Board of Control. "Wyoming Water Law - a summary", Jacobs, Tyrrell, and Brosz, University of Wyoming, B-849R, May 2003, page 3. Thus water right decrees in Wyoming are up-to-date or "living" documents.

¹⁹ Ibid, p. 11. The state will regulate water distribution if requested to do so by one senior water rights holder who believes that she or he is not receiving her or his full appropriation due to water use by a junior user (email from Sue Lowry to Gerald Mueller on May 20, 2005).

²⁰ "Idaho Water Rights A Primer , A Water Users Information Guide," Idaho Department of Water Resources, 1301 N. Orchard, Boise, ID 83720.

²¹ Idaho Code 42-602.

²² Idaho Code 42-604. CREATION OF WATER DISTRICTS. The director of the department of water resources shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two (2) or more water districts, irrespective of the distance between the

employees distribute water. Water districts allow a local focus and provide for involvement of local water users in water management. Idaho currently has over 100 water districts, more than 70 of which are active. Districts vary in both geographical size and number of water users. The state's largest district covers most of the Upper Snake River basin and includes numerous streams and tributaries with thousands of individual water users. Smaller districts may include only one tributary stream with no more than a half dozen users.²³ Each district must by statute hold an annual meeting at which the district water users present by majority vote²⁴ elect the water commissioner and set his or her compensation.²⁵

Colorado

Colorado's Constitution declares the water of "...every natural stream...to be the property of the public..." and "(p)riority of appropriation shall give the better right..."²⁶ Water allocation is, therefore, governed by the prior appropriation doctrine. Water rights are decreed by a water court, which is a District Court that hears "...matters related solely to water."²⁷ Water rights are administered by the state engineer's office, also known as the Colorado Division of Water Resources. Colorado is divided into seven water divisions, each of which is headed by an engineer in the state engineer's office and each of which is served by two water judges. Division engineers supervise water commissioners who allocate surface and ground water pursuant to water court decrees. Since 1957, ground water permitting and regulation has been the responsibility of the Colorado Ground Water Commission. Funding for the state engineer's office is provided from the state general fund. In 2003, Colorado implemented a water

extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.

The director may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry of an order if such action is required in order to properly administer uses of the water resource.

²³ IDWR Web Site, <http://www.idwr.state.id.us/>, "What is a Water District?"

²⁴ Idaho Code 42-605 4) Voting shall be by majority vote of the water users present at the meeting unless one (1) or more water users requests voting using the procedure which follows in this subsection. In such case the meeting chairman shall appoint a credentials committee to determine the number of votes each water user present is authorized to cast. If requested, each person present, owning or having the use for the ensuing season of any water right in the stream or water supply comprising such water district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources, shall be entitled to a number of votes equal to the average annual dollar amount and any fraction thereof assessed for that person's qualifying water right for the previous five (5) years, or such lesser number of years as the right has been assessed. If a right has not previously been assessed, a person present, owning or having the use of the right for the ensuing season shall be entitled to a number of votes equal to the dollar amount and any fraction thereof which the right would have been assessed had it existed and been reasonably used when water was available under the priority of the right during the previous season.

²⁵ Idaho Code 42-605 (3) .

²⁶ Colorado Constitution, Article XVI Section 5 and 6.

²⁷ "How Do I Obtain a Water Right", *Guide to Colorado Well Permits, Water Rights, and Water Administration*, State Of Colorado Department of Natural Resources Division of Water Resources, June 2002, page 15.

administration fee to support the state engineer's office, but this fee was repealed the next year.

Options for the Post-Adjudication Era

As stated above, the adjudication will integrate existing water rights decrees and previously non-decreed rights into one decree for each of Montana's major river basins. This integration will expand the focus of water rights enforcement beyond the traditional local areas creating new relationships among water rights. Changes will be necessary to the existing mechanisms for enforcing water rights, action by individual water users or by water commissioners. The following are options identified by the Steering Committee for addressing these changes.

Enhanced State Role

State Enforcement - The burden for enforcing water rights could be shifted from individual water rights holders to the state, the situation in the other three western states examined above. This shift could occur either by providing DNRC adequate staffing and funding so that it could either use its existing authority to pursue court action to stop illegal water use or by empowering the agency to enforce water rights directly by issuing administrative penalties for illegal use. The past session of the Montana Legislature lessened the existing enforcement burden on individual water right holders by authorizing them to recover court and attorney fees in successful court actions to halt use of water not supported by a water right. However, given the narrow scope of this remedy, the time and monetary expense litigation requires, and the new water rights relationships that will result from completing the adjudication, continuing to rely on individual water rights holders will likely not be a viable means of enforcing water rights.

State Water Commissioners - Montana could also change the water commissioner mechanism so that commissioners would be DNRC employees rather than district court employees compensated by water users receiving water pursuant to commissioner actions. This change would allow upgrading the expertise, training, pay, and benefits of commissioners. Given the increased complexity of its role, an upgrade of the position of commissioner seems inevitable.

Modified Court Role

New Water Judges - Today, specially designated district court judges bear the responsibility for overseeing water administration in Montana. These judges, however, are not relieved of their responsibility to hear other criminal and civil cases. If it decides to retain court water administration responsibilities, Montana could follow the Colorado example and designate additional district court judges with the sole duty of hearing water right cases. Doing so would improve both the water law expertise of the judges hearing water cases and the timeliness of their water administration decisions.

Court Appointed Water Commissioner Administration and Support - If water commissioners continue to be independent contractors acting as court agents rather than DNRC employees, some means should be found to increase their administrative and technical support commensurate with the increased complexity of the post-adjudication water rights decrees. This support might be supplied directly by DNRC or by a combination of court appointed water masters and DNRC.

Conclusion

Change is coming to Montana water rights administration and enforcement and water management. The present course of the adjudication will lead to clarity about existing water rights, but it will also tie together and create new relationships among water rights that have been managed in independent, local areas. This change will likely mean that Montana's historical reliance on courts, court appointed water commissioners, and actions by individual water right holders to administer and enforce water rights will no longer be adequate. To remedy this situation, Montana could follow the example of other western states such as Wyoming, Idaho, and Colorado and empower a state agency, likely DNRC, to distribute water. It could also shift the enforcement burden from individual water rights holders to the DNRC and/or to district court judges hearing only water cases. Whether or not water distribution authority remains with court appointed water commissioners or shifts to commissioners employed by DNRC, the job of the water commissioner will become more complex and require additional time, information, skills, and administrative support.

All of these options will likely require more state staffing and funding for either DNRC or the courts or both. This funding might be provided through the general fund, as occurs now in Wyoming, Idaho, and Colorado, or through fees on water users or some other mechanism such as the Coal Tax. By the Montana Constitution, water is owned by the state, and the legislature must provide for the administration, control, and regulation of water rights. The legislature and the executive branch therefore have a responsibility to work with water right holders, water user organizations, and others interested in water to use the time available prior to completion of the adjudication to prepare for the pending change. Completing the adjudication so that water rights are certain is necessary, but for water rights to have value, a practical means for administering and enforcing them is also required.



**RESPONSE TO FEBRUARY 2006 WHITE PAPER
REGARDING WATER MANAGEMENT FOLLOWING ADJUDICATION**

3-31-06

From: Dave Pruitt, former Chief Water Commissioner for Gallatin County's 18th Judicial District; George Alberda, West Gallatin Water Commissioner; Peter Marchi, Musselshell Water Commissioner; Walt Sales, Chair of AGAI; Dorothy Bradley, District Court liaison to the Gallatin Water Commissioners.

During a telephone conference call on March 20, 2006, Gerald Mueller and Mike McLane invited our group to submit our concerns regarding their White Paper for the record and for further discussion. We appreciate this. They are as follows:

- 1) Our water enforcement systems for the Musselshell, West Gallatin, Willow Creek, and Middle Cottonwood are working well.
- 2) We believe that any centralization of the water commissioner function, particularly turning commissioners into state employees, would neither improve water regulation nor be acceptable to water rights owners.
- 3) We have not thought of any hypothetical situation which would be better resolved by a different enforcement scheme than the one we have.
- 4) The relationship of commissioners with district judges has not only worked adequately and efficiently, but, coupled with a system of water mediation, has kept litigation to a minimum.

Decree Integration

The authors anticipate "decree integration" as the most significant change that will come with the completion of adjudication. They presume that decree enforcement will be integrated into the five major basins of Montana. While we agree that changes will come with completion, the expected date is 15-20 years in the future. And the outcome may not be integrating enforcement into five large basins.

Consider a hypothetical in which a call is made by a senior water rights owner down the Yellowstone River east of Billings for junior water in the Shields Valley. The junior user would likely invoke the Doctrine of Futility, and argue that his forbearance of use would never benefit the senior user. If the burden of proof of futility is on the junior user, he might be forced to sacrifice his operation for an entire season, baking his fields in the sun, to prove the point. Rigid enforcement of seniority from the top to bottom of such an immense drainage would not seem practical.

The Water Court is expected to adjudicate 85 decrees for the 85 Montana hydrologic basins, and this number may increase for convenience into more sub-basins. In the meantime, enforcement might well continue in many separate sources or drainages, without encompassing an entire basin decree. Accordingly, the system of judicial appointments would continue to be appropriate.

The example raised by Mike and Gerald -- a call for senior water by downstream hydropower interests -- is a dreaded possibility and could shake the whole system to the core. While the present system of judicially appointed commissioners is not prepared to deal with this eventuality, neither is the entire state, nor would a centralized system of regulation appear to offer easy answers.

The Judicial Connection

Temporary preliminary decrees of the Montana Water Court are now being enforced for several of Gallatin County's major drainages. Little has changed after 100 years of enforcing prior decrees, except legally secure and readily available numbers, records, quantities, use types, dates of use, names and

addresses. Local flexibility and judicial involvement are key ingredients to success. On the occasion of commissioner turnover, the district court judge selects a new commissioner following applications, interviews, and consultation with the users who will be paying the bill. Considering the task of watching 35 West Gallatin ditches between the mouth of Gallatin Canyon and the Interstate, the commissioner must intimately know the lay of the land. To their immense credit, the irrigators have voluntarily gone beyond the letter of the law with their water use, becoming the central watchdog that assures a sufficient flow in even their greatest time of need. Rarely do users need more than a phone call from their commissioner to shut their headgates when the water drops. Bills are calculated by the commissioners, mailed by the Clerk of District Court in October, and mostly paid by the users to the commissioners by December. The commissioners sometimes include requests to improve headgates or upgrade measuring devices, and the requests are generally met. There is no shortage of applicants for the job. Bi-annual meetings with the district court judge, water judge, and users assure open communications and respected expectations. Even with the completion of adjudication, we do not see what improvements would be gained by scrapping this system.

Disputes

Water rights disputes do arise, and will always arise. The question is how to resolve them inexpensively and quickly, considering that haste is often of the essence. Our experience is that local control is a viable approach if not the best approach. Water mediation is enabled by §85-5-110, MCA. The 18th Judicial District has encouraged it by assuring that mediation training is provided to water commissioners, who, with their wealth of knowledge from the trenches, frequently serve as excellent mediators. Resolving a water dispute quickly may be more of an art than a science, involving a little give here and there that will avoid protracted litigation. In any case, whether enforcement is local or centralized, a bank of well trained mediators as an important component for present and future enforcement and dispute resolution.

Issues in need of Answers

We believe the present system of court-appointed commissioners has problems in need of resolution. For example, Workers Compensation was superimposed on top of water commissioners to solve one of the unintended consequences of state assumption of district courts. While some kind of accident insurance is advised, Workers Compensation is not well suited for commissioners. A commissioner may be petitioned for work that will involve a handful of users and only a few hours of work scattered over a few months. Adding a \$600 workers comp bill to an otherwise small fee will discourage users from utilizing a system that protects their seniority and resolves their conflicts. However, replacing local commissioners with a system of state employees would be like doctoring a few small cuts with a hip replacement – the new hip is not needed, and the cuts may continue to be unaddressed.

Adjudication Survey Results
Upper Clark Fork River Basin Steering Committee
April 2006

Survey Data

- 181 surveys were mailed, 112 to Flint Creek and 69 to Blackfoot sub-basins.
- 11 letters returned because of bad addresses, 10 from Flint Creek and 1 from the Blackfoot.
- 31 (18%) surveys completed and returned.

Survey Question 1 - Do you hold a pre-1973 water right from the State of Montana?

- The majority of respondents answered "yes."

Survey Question 2 - What water uses are provided by your water rights?

- The water uses in order of most use were: irrigation, stockwater, and domestic.
- No responses to mining and other uses.

Survey Question 3 - Have you or your representative participated in the statewide adjudication of water rights?

- Half responded "yes,"
- Half said either "no," "don't know" or left this question blank.

Survey Question 4 - If the previous answer was yes, how have you participated?

- The majority either filed a claim or filed an objection to a claim.
- Others hired an attorney, and a couple testified in a hearing.

Survey Question 5 - What is the estimated cost of your participation in the adjudication process in time and dollars?

- A few people said \$500 while other expenses were listed at \$60, \$100, \$600, \$800, \$1500, \$2000, \$3800, 5,000, \$100,000.
- Only a few responded to the time involved. Some of the hours listed were 25hrs, 40hrs, 80hrs.

Survey Question 6 - Is your pre-1973 water right included in a water right decree issued by the Montana Water Court in the current state-wide adjudication process?

- The majority responded "yes" that their pre-1973 water right was issued in a water right decree by the Montana Water Court.

Survey Question 7 - On a scale of 1 to 10 with 1 meaning very dissatisfied and 10 meaning extremely satisfied, how would you rate the adjudication process?

- Left blank: 23%. Some said the adjudication process was non applicable.
- 1: 17%
- 2: 17%
- 3: 3 %
- 4: 10%
- 5: 23%
- 7: 7%
- Zero responses from 8-10.

Survey Question 8 - Do you expect that completion of the adjudication will make your use of water easier, harder, or have no effect?

- Majority replied that it will make water use harder.

Survey Question 9 - How will completion of the adjudication affect your use of water?

- One respondent said easier because adjudication would “protect current water rights and document actual use prior to 1973.”
- Most said harder for the following reasons:
 - Combining several decrees into one is not practical and not historical in use.
 - More complicated, more expensive but more secure.
 - More paperwork, wasted time, no help.
 - Installation of measuring devices.
 - Lose the use of some water.
 - More bureaucratic, less collaboration with local users.

Survey Question 10 - Is your water right regularly administered by a water commissioner?

- The majority responded “no.”

Survey Question 11 - Would you support requiring all water rights holders in the decree that the commissioner is enforcing to help pay for the commissioner?

- The majority responded “yes.”

Survey Question 12 - Do you expect that enforcing your water right(s) will be easier or harder after the adjudication process is completed?

- The majority said it would be harder after the adjudication process.

Survey Question 13 - Should the DNRC be more active in enforcing water rights?

- Most said that the DNRC should be more active in enforcing water rights.

Survey Question 14 - About how much time and money have you spent defending your water rights?

- For the majority, there was zero cost in defending water rights.
- Some mentioned the following costs and hours:
 - \$500 (2)
 - ~\$1000(5)
 - \$2,000
 - \$12,000(2)
 - \$25,000
 - \$28,000
 - Over 100,000
 - Hrs 10
 - Hrs over 100

Survey Question 15 - Do you feel that your water right is threatened by interests in Montana?

- Majority feels their water right is threatened by interests in Montana and in downstream states.

Survey Question 16 - Other comments or concerns about the adjudication process or how water rights are currently administered?

- Local process is not contentious now. Will it be after the adjudication?
- Development pressure is not legally available water.
- Adjudication process is a tax on water for which I have a legal right, and this confirms that the DNRC is not doing its job. Why would adjudication be necessary had DNRC already kept its files current and accurate?
- Concerned about losing my local control.
- Water rights now are administered appropriately. A new adjudication will complete upheaval of system. Too complicated and too large of an area to administer.
- Get it done once and for all.
- From my personal experience] water rights ran through the courts twice. [I] see no need to go through courts again.
- New decrees will be a huge unknown to most of us. There will be more and more pressure on current water users due to changes in population and land use.”
- Hiring more people and spending more money on this process in all likelihood will create a bigger mess than we are already in. If recent history is any indication of what we right holders are facing, God help us.
- Original decree dates should be considered. [For example,] Flint Creek was decreed in 1906. Lower Flint Creek in 1909. Lower valley users with prior rights could have appeared in court in 1906 but chose not to. Therefore, their priority dates should not prevail over later dates decreed in 1906.
- The water rights are better administered by the District Courts than by any bureaucratic arm of the government such as the DNRC.
- It’s working now why change it? It appears the ‘new process’ is going to be an attorney’s ‘heyday’ and give several more jobs. Someone will have to pay for them.
- I question what has been done with our adjudication tax. We were told that action would take place in fall 2005. To date nothing has happened. Is our money being misused?
- My concern is that if the irrigation is changed any with a new decree the entire system will fail, as it has worked fairly well for 100 years plus.
- DNRC doesn’t seem to do much as it is. So it is hard to assess the benefit of an expanded role.
- [The] system appears to be manipulated by certain moneyed special interest groups [which is] a conflict of interest [between] government and special interest groups.
- It’s a joke.
- DNRC will not enforce without an attorney raising hell. [It] should not be this way.



Upper Clark Fork River Basin Steering Committee

Accomplishments

May 2006

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, recreationists 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.

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.

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 fifteen 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.

Clark Fork Basin Water Management Planning

- Several members of the Steering Committee (Jim Dinsmore, Holly Franz, Steve Fry, and Eugene Manley) are participating on the Clark Fork River Basin Task Force that developed the *Clark Fork Basin Watershed Management Plan* in September 2004 and is working to arrange a contract between the State of Montana and the Bureau of Reclamation for water from Hungry Horse Reservoir to provide a long-term source of water for the Clark Fork Basin.

Instream Flow/Drought Management

- The Steering Committee has for five years retained consultant, Dennis Workman, 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 has 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 devices 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 is conducting 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.

Policy Papers

- The Steering Committee has produced three policy papers, the "Conservancy District, An Option for the Management of Georgetown Lake Dam" in February 2004, the "White Paper on the Montana Water Rights Adjudication" in March 2004, and "How Will Completion of the

Adjudication Affect Water Management in Montana?” in February 2006. The first 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. 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 users 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. 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.

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.

