

# CLARK FORK BASIN WATER MANAGEMENT PLAN

## A

### STATE WATER PLAN SECTION

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#### PREAMBLE

The 2001 Montana Legislature passed HB 397 to establish a Clark Fork River Basin Task Force (Task Force) and authorized the Task Force to prepare a water management plan for the Clark Fork River Basin. The Legislature further directed the Department of Natural Resources and Conservation (DNRC) to consider the management plan as an additional component of the State Water Plan (85-1-103 MCA [2003]).

After two years of work, the Task Force prepared the *Clark Fork Basin Watershed Management Plan (Clark Fork Plan)* with recommendations. DNRC reviewed the plan, held public hearings, reviewed public comments and met with the Task Force on its recommendations. Based on this information, the DNRC adopts, with modifications, the following recommendations from the *Clark Fork Basin Watershed Management Plan (Clark Fork Plan)* as a section of the State Water Plan.

#### INTRODUCTION

For years, there have been questions about the availability of water in the basin for future uses and the potential for conflicts between the owners of downstream senior hydropower rights and upstream junior water users in Montana's portion of the Clark Fork Basin. It is this issue that led the 2001 Montana Legislature to pass House Bill 397. This bill created a Task Force comprised of citizens and public entities and directed it to develop a basin water management plan.

#### BACKGROUND

As part of the water management plan, the legislature directed the Task Force to: (1) **identify options to protect the security of water rights;** (2) **provide for the orderly**

**development of water; and (3) provide for the conservation of water in the future.**

The task force was also required to examine existing laws, rules, plans, and policies affecting water management in the Clark Fork River basin.

In its plan, the Task Force included (1) a vision statement to guide water management in the Clark Fork basin, (2) a profile of each basin watershed, (3) a description of economic and demographic trends in the basin, (4) a brief outline of the legal framework for managing water, (5) a description of the existing legal and regulatory constraints on basin water management and (6) their recommendations for management.

The full plan is available on the web at [www.dnrc.state.mt.us/clarkforkbasincover.htm](http://www.dnrc.state.mt.us/clarkforkbasincover.htm). A limited number of paper copies are available and can be requested from the DNRC, Water Resources Division.

As part of the public involvement process, The *Clark Fork Plan* was noticed in the *Kalispell Daily Inter Lake*, *Lake County Leader*, *Mineral Independent*, *Sanders County Ledger*, *Missoulian*, *Ravalli Republic*, *Silver State Post*, *Philipsburg Mail*, *Montana Standard*, *Anaconda Leader*, and *Independent Record* and display ads were published three times in each of these papers. Copies of the plan were also sent to each County Commissioner's Office and Conservation District in the Clark Fork Drainage. Press releases were provided to all Clark Fork Basin media. The Draft Plan, Final Plan, and Summaries were posted on DNRC's web site and an email address was included to facilitate public comment. DNRC held public hearings in Kalispell, Ronan, Deer

Lodge, Missoula, Hamilton, and Thompson Falls.

## THE CLARK FORK PLAN RECOMMENDATIONS

The Task Force made twenty-eight recommendations in its *Clark Fork Plan*. These recommendations form a strategy for improving watershed management in the basin. Its recommendations are intended to accomplish the following:

- Complete the state’s general stream adjudication, including quantifying the tribal right. Water users need to know who has the legal right to use water, the volume used, and the place and purpose of the use;
- Require DNRC and the water users to take a more active role in enforcing water rights so that enforcement becomes a reality;
- Dedicate more resources to water rights administration so Montanans do not have to wait years to obtain the necessary permits to use water; and
- Dedicate more resources to acquire basic information about our water resources, particularly ground water.

These recommendations are described in greater detail in the *Clark Fork Plan* (Chapters 6, 7, 8, 9, 10, 11) and in the Summary Report. Recommendation numbers are based on the chapters of the *Clark Fork Plan* in which they can be found. For more information on the recommendations, refer to the corresponding chapters within the *Clark Fork Plan*.

The *Clark Fork Plan* is built upon and reinforces Montana’s statutory model of prior

appropriation and water right management and administration. Recommendations are designed to protect existing water rights, rely upon the adjudication of water rights, allocate water by priority, and resolve disputes through existing statutory authorities.

Administration of enforceable decrees is a key management tool relied upon in the *Clark Fork Plan*. The plan does make recommendations to improve Montana’s current programs and, in some cases, management structure. The plan suggests, in some cases, an expansion of, or transfer of, authorities to improve future water right administration and management.

The Task Force did not develop detailed implementation strategies for most of its recommendations.

### ADOPTED RECOMMENDATIONS

DNRC adopts the following Task Force recommendations as part of the State Water Plan.

The first ten recommendations listed below (6-1, 7-1, 8-1, 7-2, 7-3, 7-6, 8-6, 8-7 10-1 and 10-2) are priorities for implementation. DNRC’s decision to identify these as a priority is based on public comments, consultation with the Task Force, and knowledge of other ongoing issues and activities.

**RECOMMENDATION 6-1.** The State of Montana should open discussions with US Bureau of Reclamation (USBR) to determine the availability and cost of temporary and long-term contracting options and to determine a quantity of firm storage available

Task Force members represented each of the watersheds and many perspectives within the Clark Fork Basin. Its membership includes the following.

Gail Patton, Sanders County Commission	Eugene Manley, Granite County
Elna Darrow, Flathead Basin Commission	Bill Slack, Joint Board of Control
Marc Spratt, Flathead Conservation District	Harvey Hackett, Bitter Root Water Forum
Steve Fry, Avista Corporation	Matt Clifford, Clark Fork Coalition
Fred Lurie, Blackfoot Challenge	Holly Franz, PPL Montana
Jay Stuckey, Green Mountain Conservation District	
Phil Tourangeau, Confederated Salish and Kootenai Tribes	
Jim Dinsmore, Granite Conservation District and the Upper Clark Fork River Basin Steering Committee	

from Hungry Horse Reservoir for Montana uses other than hydropower.

#### Implementation Strategy

##### Legislative Action:

The Montana Legislature should direct and fund DNRC to open discussions with the USBR for establishing temporary and long-term contracts to use stored water from Hungry Horse Reservoir for meeting future needs or to mitigate impacts caused by upstream junior uses.

**RECOMMENDATIONS 7-1 AND 8-1.** The State of Montana should complete the statewide adjudication of water rights by:

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

**RECOMMENDATION 7.2.** All reasonable efforts should be made to ensure that the adjudication results in durable and accurate water rights. To improve the accuracy of the water rights adjudication, the Montana Water Court should formally announce that it will examine claims with DNRC issue remarks to which no objections have been filed and resolve those it finds to be inaccurate.

#### Implementation Strategy

##### Legislative Action:

The Task Force recommendations are similar to the Legislative interim Committee the Environmental Quality Council's (EQC) recommendations for expediting the state's general stream adjudication. EQC legislation addresses many of these same issues. DNRC recommends that the Legislature consider the *Clark Fork Plan* recommendations in conjunction with those of EQC and its legislation.

##### Administrative Actions:

DNRC should continue assisting the Montana Water Court in the adjudication process and the Reserved Water Rights Compact Commission in its resolution of federal reserved water rights.

**RECOMMENDATION 7.3.** The State of Montana and the Confederated Salish and Kootenai Tribes should move as rapidly as possible to resolve the status of tribal reserved water rights through negotiation or litigation.

#### Implementation Strategy

##### Legislative Action:

In 1993, the Montana legislature reauthorized the Montana Reserved Water Rights Compact Commission and extended its authorization to July 1, 2009. If a compact with the Confederated Salish and Kootenai Tribes is not legislatively approved by July 2009, their reserved water right claims must be filed and included in the process for establishing preliminary decrees in the state's general stream adjudication process (85-2-702 MCA [2003]). The Legislature will need to continue supporting and funding the efforts of the Reserved Water Rights Commission.

**RECOMMENDATION 7-6.** The Montana Legislature should explicitly authorize judges to award attorney fees to private parties that bring successful actions against illegal uses of water when water is being diverted without a water use permit or existing water right.

#### Implementation Strategy

##### Legislative Action:

The Montana Legislature should consider passing a bill that authorizes judges to award attorney fees to private parties that bring successful actions against illegal users of water. This authority does not exist today.

**RECOMMENDATIONS 8-6 AND 8-7.** In 8-6 the *Clark Fork Plan* proposes that "(t)he Legislative Water Policy Committee should be re-established to increase the focus on water issues and water education for legislators. In recommendation 8-7 it is proposed that "(t)he Montana Legislature should appoint interim committees to consider:

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

Implementation Strategy

Legislative Action:

The Montana Legislature should consider re-establishing the Water Policy Committee either as a separate committee or as a subcommittee within the EQC. Such a committee would develop the in-house expertise to address and stay abreast of water policy issues. Further a Water Policy Committee would provide guidance in solving water related problems.

**RECOMMENDATION 10-1 AND 10-2.** In 10-1 it is proposed that the Clark Fork Task Force mandate should be continued and explicitly extended by the legislature to implement and to evaluate the implementation of the Clark Fork River Basin Watershed Management Plan. To accomplish this 10-2 suggests that the Task Force should be provided an annual budget to carry out its mandate.

Implementation Strategy

Legislative Action:

The Montana Legislature should consider extending the sunset date for the Task Force and facilitating its efforts with funding (85-2-350 (5) MCA [2003]). The Task Force recommended reauthorization. Further, members volunteered to continue participation and would aid with implementation. Appropriate and meaningful implementation of the *Clark Fork Plan* would be greatly enhanced by their involvement.

Administrative Actions:

DNRC should continue providing staff support and technical assistance to the Task Force.

The following fourteen recommendations (7-7, 8-4, 8-5, 8-8, 8-9, 8-10, 8-11, 9-1, 9-2, 9-3, 9-4, 9-5, 9-6, and 9-7) are also adopted. Many of these recommendations, such as those

related to stream flow and snow data, are ongoing activities that the Task Force, in its vision of management, sees as critical ongoing needs. DNRC agrees. Other recommendations are suggestions for management and water conservation directed at individuals, cities, water user organizations and others where no legislative action or budget is needed. Finally, there are recommendations where implementation can be addressed in the future, beginning two or more years after adoption.

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

Implementation Strategy

Administrative Actions:

The 2001 Montana Legislature directed DNRC in HB 720 to complete rules for defining correct and complete applications for new appropriations and changes of existing rights. DNRC should continue defining and clarifying these processes through administrative rules and, as a priority, address those criteria for objecting to new permits. These rules should seek to protect the rights of existing users and reduce their burdens to object to new permits or changes.

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

Implementation Strategy

Administrative Actions:

Montana law provides DNRC with the authority to develop and lease water from existing and future reservoirs to meet future water demands. (85-2-141 MCA [2003]). To implement the program, DNRC will need to acquire rights or agreements for contract water from Hungry Horse Reservoir. As noted above, exploring the potential for acquisition of this water is a priority.

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

Implementation Strategy

Administrative Actions:

DNRC should, perhaps as a component of the State Water Plan, explore opportunities to augment groundwater supplies. Further, DNRC should consider rules that evaluate the feasibility, administrative oversight, and management of such “non-structural groundwater storage”. Irrigation is a common source of groundwater recharge and may be critical to sub-basin water management. DNRC should identify constraints and opportunities with regard to existing water use practices and attempt to identify those instances where formalizing such practices might provide a protected source of recharge and storage. DNRC does not currently have rules or guidelines addressing augmentation, augmentation plans, or ground water augmentation plans. There are statutory references to augmentation (85-2-337 (3) MCA [2003]) and groundwater augmentation has been specifically allowed in some Controlled Ground Water areas.

**RECOMMENDATION 8.8.** Single- and multi-purpose organizations such as conservancy or irrigation districts that can manage or participate in the management of water quantity should be created when they would be effective at the scale at which the management would occur.

**RECOMMENDATION 8-9.** Individual and water user organizations should evaluate ways to provide more water for existing and future uses by:

- Examining options for increasing the use of high spring flows and snow melt (rain on snow events);
- Increasing water storage;
- Identifying and managing areas where return flows are important;

- Continuing to use water leasing and water marketing as management tools; and
- Protecting and rehabilitating wetlands through active floodplain and wetland management, bank storage, etc.

Implementation Strategy

Administrative Actions:

Existing water managers frequently use or consider all of the water management considerations listed in recommendation 8-9. As discussed in the implementation strategy for recommendation 8-5, the ability to protect or to intentionally irrigate for the sole purpose of groundwater storage is typically not a protected component of ones water right. At the same time there is value in managers considering return flows and recharge when structural improvements are made to water use systems.

**RECOMMENDATION 8-10 AND 9-7.** The *Clark Fork Plan* identified areas where addition research is needed. In recommendation 8-10 it was proposed that “(a)dditional research is needed to:

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

In 9-7 is was proposed that “(s)pecific research topics that should be pursued include:

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

### Implementation Strategy

#### Legislative Action:

The Legislature in its review of the Renewable Resource Grant and Loan Program should give appropriate consideration to research priorities listed in the *Clark Fork Plan* and as adopted as a State Water Plan section when approving loans and grants (85-1-601 MCA [2003]).

#### Administrative Actions:

DNRC in its administration of the Renewable Resource Grant and Loan Program should give appropriate consideration to those applications meeting one of the research priorities identified in the *Clark Fork Plan* as adopted as a State Water Plan section (85-1-601 MCA [2003]).

DNRC, as an advisor on technical committee and grant review committees should, when appropriate, recommend and support research efforts that characterize groundwater, ground water / surface water interactions, and artificial ground water recharge. DNRC, as priorities and funding allow, should investigate site-specific ground water conditions.

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

### Implementation Strategy

#### Legislative Action:

The Legislature should continue and, when possible, increase support for the monitoring of stream flow, groundwater, and snow pack through programs such as USGS Cooperative Stream Gaging Program

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

- Protect areas where surface waters recharge groundwater;

- Require water meters in new subdivisions and government-owned water systems; and
- Promote conservation through adoption of model conservation ordinances that regulate water use during periods of water distribution shortfalls.

**RECOMMENDATION 9-2.** DNRC should promote water conservation by:

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

### Implementation Strategy

#### Administrative Actions:

Recommendation 9-2 a. DNRC Water Management Bureau should explore options to publish or otherwise post data collected from its hydrologic investigations. DNRC Water Rights Bureau should investigate options to make water diversion or water level data collected under permit or change of use authorization conditions available and accessible to the public and researchers.

Recommendation 9-2b. DNRC is statutorily given the power to require the owner or operators of an appropriation facility to install and maintain control and measuring devices. Further DNRC may require the owners or operators to report to the Department readings of measuring devices at reasonable intervals and to file reports on appropriations. (85-2-113 2b, 2c MCA [2003]) DNRC should evaluate or establish the conditions under which appropriators are required to install and submit measurements. Further, DNRC should evaluate the cost, impacts, and value of collected data resulting from such requirements on all appropriation works.

Recommendation 9-2 c. DNRC should meet with DEQ to determine the best way to compare and evaluate pump test and aquifer

testing requirements from their respective permitting or review processes. Where appropriate, the agencies should coordinate these efforts.

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

Implementation Strategy

Administrative Actions:

The Forest Service's authorizing legislation placed a primary responsibility on the agency to optimizing water flow conditions on its lands. Subsequent congressional and administrative directives have created additional and multiple obligation and responsibilities. In Clark Fork drainage the Forest Service has land management responsibilities on a great deal of the headwaters. In the Clark Fork drainage, with its snow-dominated hydrology, these lands are important features of the basin's hydrologic system.

While recognizing the Forest Service multiple responsibilities, the State of Montana, when commenting on and reviewing U.S. Forest Service *Forest Plans* or other management activities, should suggest and recommend that the Forest Service remain vigilant and evaluate the effects new management actions have on water yields.

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

- Measuring water uses and diversions;
- Improving water conveyance efficiency;
- Managing groundwater provided by irrigation;
- Identifying, managing, and protecting areas in which surface waters recharge groundwater; and

Managing the supply side, e.g., using artificial recharge.

Implementation Strategy

Legislative Action:

The Legislature in its review and approval of the Renewable Resource Grant and Loan Program should give appropriate consideration to water conservation proposals when they fulfill or support an adopted State Water Plan section (85-1-601 MCA [2003]).

Administrative Actions:

DNRC in its administration of the Renewable Resource Grant and Loan Program should give appropriate consideration to those water conservation priorities identified in the *Clark Fork Plan* as adopted as a State Water Plan section when providing recommendations (85-1-601 MCA [2003]). DNRC's *Water Measurement Program* should continue to provide support to individuals and water user organizations in their efforts to improve water measurement and water management.

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

Implementation Strategy

Administrative Actions:

DNRC should continue to provide technical assistance to local organizations such as watershed committees in developing water related sub basin plans and drought management plans.

**RECOMMENDATION 9.6.** Government agencies and water user organizations should provide long-term, coordinated education for water users, including information about activities that might affect groundwater recharge and quality and the connection between wasting water and wasting electricity.

Implementation Strategy

Legislative Action:

The Legislature in its review of the Renewable Resource Grant and Loan Program proposals should give appropriate consideration to water education activities, listed in the *Clark*

*Fork Plan* and as adopted as a State Water Plan section when approving loans and grants (85-1-601 MCA [2003]).

Administrative Actions:

Water-related education activities should be supported and, where possible, coordinated to target more water users. To facilitate coordinated educational activities DNRC should continue its participation and support of the Montana Watershed Coordination Council's Information and Education Work Group. To aid in the delivery of water related education DNRC should support and fund the Montana Watercourse.

## RECOMMENDATIONS

### NOT ADOPTED

The following recommendations, 7-4, 7-5, 8-2 and 8-3, are not adopted by DNRC as a component of the State Water Plan as they all require additional study either by the Task Force or by a statewide group under the auspices of the State Water Plan. These recommendations are significant water issues. Many of these recommendations have statewide implications.

**RECOMMENDATIONS 7-5.** This recommendation suggests that "(t)he State of Montana should act to reduce the burden on existing water right holders to protect their rights through:

- Direction from the Montana Legislature to DNRC to investigate and enforce water rights.
- Direction from the Montana Legislature to DNRC to provide mediators to resolve water right disputes.
- Administration by DNRC of a program that trains, selects, and evaluates water commissioners.
- Sharing the cost of water commissioners by all right holders according to their shares of the total basin water rights rather than just those receiving water." (see page 81 and 82 *Clark Fork Plan*).

**RECOMMENDATION 7-4.** The Clark Fork Plan suggests that "(t)he Montana Legislature and DNRC should work together to ensure that DNRC has adequate funding and staffing to carry out its water related responsibilities in a prompt and efficient manner." To ensure that DNRC has adequate funding the plan on page 82 suggests an earmarked appropriation.

The above two recommendations have considerable statewide implications and require additional specificity to evaluate or implement. The appointment of water mediators and water commissioners is currently the duty of the District Court (85-5-101 and 110 MCA [2003]). Water Commissioner fees are set by the District Court judges as directed by statute. The water commissioner expenses are apportioned by order of the judge (85-5-201-206 MCA [2003]) and the allocation of costs is defined by the record of daily water distribution (85-5-107, MCA [2003]). DNRC has a responsibility to provide water commissioner and mediator training (85-5-111 MCA [2003]). DNRC currently has responsibility to prevent the waste of water, to prevent the unlawful uses of water, and to assure the passage of water to prior appropriators (85-2-144 (1) MCA [2003]). This section of statute allows DNRC, after attempts at voluntary compliance, to petition the District Court, for injunctive action.

The proposed modifications of existing court and agency enforcement authorities listed in the *Clark Fork Plan* and referenced in recommendations 7-4 and 7-5 above have merit and DNRC feels the analysis and discussion of the issues raised in these recommendations should include a broader range of constituencies throughout the state. A continued and expanded discussion could result in more specific recommendations and greater clarification of responsibilities for both the District Court and DNRC. Recommendations of 7-5 as delineated in the third and fourth bullet will become more meaningful after the establishment of enforceable decrees. Such decrees are not widely available at this time, providing the opportunity for additional evaluation. DNRC



proposes additional examination of these concepts by the Task Force or as a future State Water Plan investigation.

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

This recommendation proposes an evaluation of cumulative impacts before granting surface or groundwater permits. In some cases, the cumulative impacts of water appropriations may be evaluated in an Environmental Analysis under MEPA but are not included among the criteria for the issuance of a new permit to appropriate water (85-2-311 MCA [2003]) or authorization of a change of appropriation right (85-2-402 MCA [2003]). This recommendation has statewide implications as well as significant budgetary repercussions. DNRC also recognizes that cumulative impacts are a significant issue for downstream senior appropriators. DNRC recommends additional evaluation of this recommendation by the Task Force with specific focus upon Clark Fork Basin conditions.

**RECOMMENDATION 8-3 (A).** “The regulation and management of surface and groundwater should conform to the legal standard that water is a unitary resource by amending the 35 gpm/10 acre-feet exemption to require a permit for groundwater wells that are developed as part of a common project, such as a subdivision.”

This recommendation proposes to amend the 35 gpm/10 acre-feet exemption to require a permit for groundwater wells that are developed as part of a common project, such as a subdivision and to improve the regulation and management of surface and groundwater as a unitary resource. Clark Fork Basin water development now emphasizes the use of ground water. The *Clark Fork Plan* identifies 67,000 uses of ground water in the Clark Fork Basin documented by a claim, permit or certificate of water right. Ninety-seven

percent of these were developed after 1970. Further, 57 percent are for domestic, urban, and municipal uses (see page 19 and 21 *Clark Fork Plan*).

DNRC believes the *Clark Fork Plan's* recommendation to eliminate the use of this exemption for wells less than 35 gpm for a common project requires additional examination prior to implementation. This issue could affect the subdivision review process. Because of this, DNRC proposes that this recommendation requires additional study and may be more appropriately addressed through water law or a subdivision review process. There are also questions relative to a statewide application of this recommendation.

**RECOMMENDATION 8-3 (B) (C)** suggests that “(t)he regulation and management of surface and groundwater should conform to the legal standard that water is a unitary resource by:

- Developing a legally defensible definition of a hydrologic connection between surface and groundwater; and
- Requiring applicants for a groundwater permit to provide information demonstrating the nature of the surface-groundwater connection.”

Currently, the relationship of surface and groundwater may be raised in evaluations of adverse effect as the result of an objection in a water right permit or change of water right review process. However, the relationship of surface and groundwater connection is most closely and regularly examined as a criterion in those areas designated as a “closed basin”. In such designated areas, ground water is typically open to appropriation so long as the ground water is not

- “immediately or directly connected to ground water” (85-2-329, 340, and 342 MCA [2003]); or
- “part of or substantially or directly connected to surface water” (85-2-337 MCA [2003]).

In the Upper Clark Fork River Basin (the entire drainage above Milltown Dam), a designated closed basin, all applicants for a

proposes additional examination of these concepts by the Task Force or as a future State Water Plan investigation.

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- Developing a legally defensible definition of a hydrologic connection between surface and groundwater; and
- Requiring applicants for a groundwater permit to provide information demonstrating the nature of the surface-groundwater connection.”

Currently, the relationship of surface and groundwater may be raised in evaluations of adverse effect as the result of an objection in a water right permit or change of water right review process. However, the relationship of surface and groundwater connection is most closely and regularly examined as a criterion in those areas designated as a “closed basin”. In such designated areas, ground water is typically open to appropriation so long as the ground water is not

- “immediately or directly connected to ground water” (85-2-329, 340, and 342 MCA [2003]); or
- “part of or substantially or directly connected to surface water” (85-2-337 MCA [2003]).

In the Upper Clark Fork River Basin (the entire drainage above Milltown Dam), a designated closed basin, all applicants for a

permit to appropriate ground water are required to submit a report demonstrating the nature of the surface-groundwater connection (85-2-337 (1) MCA [2003]).

On December 16, 2004, the Secretary of State published administrative rules developed by DNRC that provide guidance and criteria for the evaluation of ground water -surface water relationships within closed basins. DNRC recommends that the effectiveness of the new rules be evaluated before additional actions are taken. The Task Force or a future State Water Plan investigation could monitor and evaluate these recent changes and propose modifications to either statute or administrative rule.

## INVESTIGATION OPTIONS FOR RECOMMENDATIONS NOT ADOPTED

*Clark Fork Plan* recommendations not adopted are significant water issues as stated above. They merit additional review and investigation. The following proposals have been identified as actions necessary begin that analysis and address the concerns listed above.

**Recommendations 7-5.** DNRC will work with the Task Force, the public, water users, representatives of the judicial system, and other appropriate entities to:

- Examine DNRC's existing water right enforcement policy, to determine if that policy is meeting the agency's responsibilities as identified in 85-2-144 (1) MCA (2003) and, if warranted, modify that policy;
- Evaluate the DNRC's water commissioner training and water mediator activities;
- Evaluate the District Court's authorities to appoint, select and oversee mediators and water commissioners; and
- Develop specific alternatives for legislative study and consideration relative to water commissioner fees.

**Recommendation 8-2.** The evaluation of cumulative impacts of individual water right

permits is not currently addressed in criteria for the issuance of a new water right permit (85-2-311 MCA 2003) or the authorization of a change in water use (85-2-402 MCA). Just how such an evaluation might be effectively and meaningfully carried out without creating an undue burden or delays in a water right permit review process is not clear. DNRC should work with the Task Force, public, and other appropriate entities to examine cumulative impacts could be evaluated. Any new criteria would have to be adopted statutorily by the legislature.

**Recommendation 8.3 a.** DNRC should assist the Task Force or a State Water Plan advisory committee to examine the statutory exemptions allowed in the development of small ground water wells outside of the water right permitting process and the administrative rules defining a combined appropriation.

**Recommendation 8.3 b.** DNRC should, as a State Water Plan investigation, examine the legal and administrative activities governing the appropriation and allocation of surface and ground water. Montana water law governs surface and groundwater appropriations within a unified framework. (A unified system is one where surface and groundwater appropriations are administered and allocated with the same legal requirements.) Existing legal definitions of surface and groundwater, as found in Montana water law, should be examined to evaluate their adequacy for future administration in a unified system of water appropriation. Existing processes, as found in administrative rules, that evaluate or define interaction between surface and groundwater, should be examined to determine if existing rights are adequately protected. Finally, the state should prepare for water allocation activities in areas where ground and surface water are closely related so that rights can be managed effectively by priority.

**Recommendation 8.3 c.** DNRC should assist the Task Force to examine the requirement that applicants for a groundwater permit provide information demonstrating the

nature of the surface-groundwater connection. Together they should assess the implications of expanding this requirement beyond the Upper Clark Fork Basin Closure Area to the entire Clark Fork Basin.

**SUMMARY**

After public notice, hearings, review of public comment, discussion with the Task Force, DNRC adopts most of the recommendations made in the *Clark Fork Plan*. Ten of the *Clark Fork Plan* recommendations have been identified as priorities for implementation.

These priority recommendations include those that are corner stones to the plan and its success or appear to be items that are likely to be presented to the Legislature in the immediate future. Four recommendations and their three associated subsets were not adopted. Further study and analysis by the Task Force or as a future State Water Plan process is recommended. The remaining fourteen recommendations will assist DNRC and the State with future management decisions.

DECISION SUMMARY		
REFERENCE NUMBER	TOPIC REFERENCE	STATUS
6-1	Seek contracts to use Hungry Horse water	Adopted Priority
7-1	Expedite the adjudication process	Adopted Priority
7-2	Increase the accuracy of the adjudication	Adopted Priority
7-3	Quantify federally reserved water rights	Adopted Priority
7-4	Water Management funding and staff resources	Not Adopted
7-5	Enforcement of water rights	Not Adopted
7-6	Capture of Attorney Fees	Adopted Priority
7-7	Objection Rules	Adopted
8-1	Expedite and fund Adjudication	Adopted Priority
8-2	Cumulative Impact Review on new water rights and Changes	Not Adopted
8-3	35 gpm wells & surface Ground/surface water interactions	Not Adopted
8-4	State Managed Water Leasing Program	Adopted
8-5	Ground water augmentation Rules	Adopted
8-6	Re-establish the Water Policy Committee	Adopted Priority
8-7a	Direct appointment of Interim Committee - Adjudication	Adopted Priority
8-7b	Direct appointment of Interim Committee – Specialized Courts for water administration	Adopted
8-8	Supporting Water Districts & Organizations	Adopted
8-9	Improving Water Supply – Individual activities	Adopted
8-10	Needed Water Supply Research	Adopted
8-11	Needed Water Data - Ongoing	Adopted
9-1	Conservation Recommendations for cities	Adopted
9-2	Conservation Recommendations - DNRC	Adopted
9-3	Water Supply and Yield Recommendations for USFS	Adopted
9-4	Conservation Recommendations for Individuals	Adopted
9-5	Support of Watershed Groups	Adopted
9-6	Support and Coordinated Water Education	Adopted
9-7	Water Conservation Research	Adopted
10-1	Task Force – Reauthorization	Adopted Priority
10-2	Task Force - funding	Adopted Priority