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Donald Snow

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**BUILDING COMMUNITY AROUND WATER:
THE SHIFT FROM ICON TO SUBSTANCE IN THE LOCAL POLITICS OF WATER**

Donald Snow

**Executive Director
Northern Lights Research & Education Institute, Inc.**

**Water Organizations in a Changing West
Natural Resources Law Center
University of Colorado School of Law**

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I. SUMMARY

In Montana's Upper Clark Fork River Basin, an effort is underway to create a new, cooperative management plan for the river and its major tributaries. Guided by enabling legislation passed in 1991, a Clark Fork Basin Steering Committee is working with water users to resolve conflicts over water allocations, increase trust and understanding between irrigators and environmentalists, and provide for innovative mechanisms that will protect instream flows while recognizing diversionary uses of the basin's streams. These efforts are the result of three years of painstaking work by the Northern Lights Institute and the original group of water users convened by the Institute to resolve water allocation conflicts in the beleaguered Upper Clark Fork River, a 160-mile-long Superfund site contaminated with mining and smelter waste from a century of copperworks in Butte and Anaconda. The current effort to create a basin management plan comes in lieu of an instream flow reservation proceeding initiated by the Montana Department of Fish, Wildlife and Parks. Instead of the junior water right that may have been created by the contested water reservation proceedings, the new management planning effort seeks to accomplish both conservation and economic objectives that work, precisely because they are informed and supported by intense knowledge of local conditions. The new process is, in one sense, an evocation of what Major John Wesley Powell told Congress in 1878: that the only water policy that makes sense in the American West is a policy founded upon the sensitive response to the imperatives of the watersheds themselves.

II. A CROSSROADS IN WATER POLICY

A. Montana water codes include two important but little-used provisions to create environmentally sensitive water allocations:

1. A state water planning process designed to include copious public participation.
2. A water reservation provision that allows any agency of state government to reserve unallocated flows of Montana's rivers and streams for specified future uses, including fish, wildlife and conservation uses.

B. These provisions, while progressive and conservationist in their reach, have encountered numerous obstacles:

1. Statewide water planning so far has focused on multiple-use basin plans that have generated volumes of technical information, but little or no guidance in resolving complex water use disputes. In the words of one policy analyst, they have "ended up as shelf-art" in the offices of state agencies. In the day-to-day lives of rivers, no one pays much attention to the state water plans.

2. Until 1992, the water reservation program had been invoked on a single river, the Yellowstone, where it proved to be effective but highly controversial. By early 1992, it appeared that efforts to place reservations on both the Clark Fork and the Missouri Rivers would be blocked by agricultural interests.

3. The strong conservationist sentiments that impelled both the planning process and the water reservation system were still hostage to the doctrine of prior appropriation: no matter how progressive, instream flows are still bound to be very junior water rights.

C. By 1991, Montana had reached an obvious crossroads in water allocation: Would the state continue to rely solely on water reservations, despised by agriculture, to "guarantee" instream flow rights (but not necessarily "wet water" that can make those paper rights effective)? Or would the state, its legislature and water-related agencies, be willing to experiment with new approaches to the allocation and management of water?

III. THE MARKET-SOLUTION STALEMATE

A. Unlike some prior appropriation states that allow water to be sold or leased for instream flows, Montana resolutely resists the market approach. Under current Montana law, one can transfer rights to any beneficial use of water *except for instream flows*.

B. Despite the potential for lucrative leases of agricultural water to protect rivers, farmers, ranchers and water developers continue to oppose this simple market solution to one of the most vexing environmental problems in the West. Why?

1. The very notion of non-diversionary water rights violates tradition and precedent. To many traditional users, legal (as opposed to accidental) instream flows suggest the creation of a radical social architecture.

2. Many traditional water users greatly fear the implications of the Public Trust Doctrine applied to water; they view non-diversionary rights as rights that attach broadly to notions of a public trust in water.

3. Many irrigators fear that even temporary instream leases will lead to the the permanent loss of water to downstream states.

4. Some irrigators, sensitive to local hydrological conditions, insist that planned instream flows will ruin the ground water "re-charge" which they claim keeps local streams alive through hot summers. They contend that instream flows will actually lead to *depleted* rivers over time.

5. Some Montana ranchers gravely declare "the end of agriculture" if fish are allowed to enjoy old water rights. They seem to feel that non-diversionary water use threatens the very economic vitality of agriculture.

C. These arguments and others like them hold the market solution to instream flows at bay. There is little indication that the legislature will soon pass a more innovative policy regarding the lease or sale of water to preserve rivers.

D. In such a political atmosphere, how, then, can instream flows be protected? Clearly, if the choices are policy shifts or market solutions, the answer so far in Montana is that in most cases instream flows cannot be protected.

IV. THE "THIRD WAY"

A. What we need now is a Third Way. Much environmental debate today boils down to a clash between decentralizing market forces and centralizing environmental policies. But neither one works very well alone. We need a third way, a form of cooperation that allows for market forces to work under the mantle of environmental policy. The Third Way in Montana will likely involve a new form of local self-determination and cooperation.

B. The organization I direct -- the Northern Lights Institute -- is working earnestly on a Third Way program in water allocation. In our Clark Fork Project, we are trying to create a new management plan that will take

into account all kinds of water users, including instream users, in the 160-mile-long Upper Clark Fork Basin.

C. Accomplishments of the Clark Fork Project to date:

1. The Project created an agreement among representatives of the principal water user and management groups in the Upper Basin. Irrigators, water developers, hydropower and municipal interests, agencies of state and local government, environmentalists and trout enthusiasts were all represented in the initial agreement. Northern Lights was named as the group facilitator.

2. The agreement, signed in 1991, led to legislation that accomplished the following:

a. Indefinitely postponed the State's instream flow reservation proceedings for the Clark Fork River.

b. Closed the Upper Basin to the granting of most new water rights for a four-year period.

c. During those four years, mandated the preparation of Upper Basin management plan, to be written by the representatives of the major water interests in the Basin, including irrigators and environmentalists.

d. Called for the appointment of a new Steering Committee to oversee the drafting of the management plan, and specified the kinds of interests to be represented on the Committee.

3. The current status of the Project:

a. We are now in the second year. A 21-member Steering Committee has been appointed.

b. There are now six sub-basin groups organized locally around five of the major tributaries, plus the mainstem. These six groups are organized as follows: the Upper Mainstem, the Lower Mainstem, the Little

Blackfoot River, the Big Blackfoot River, Flint Creek and Rock Creek.

c. Public meetings have been conducted in six locations corresponding to the sub-basin community groups.

d. The central Steering Committee continues to meet on a regular basis. Its representatives include ranchers from the mainstem and tributary communities; leaders of the most prominent environmental groups of the Basin (the Clark Fork Coalition and Trout Unlimited); representatives from four state agencies, the City of Missoula, and the Environmental Protection Agency; the head of the Montana Water Development Association; and representatives from three of the leading private companies of the basin, Arco, the Washington Water Power Corporation, and the Montana Power Company.

V. THE POTENTIAL FOR SUCCESS

A. If it works, this plan will not merely be a paper success; it will instead alter a number of longstanding practices in ways that, collectively, could have an enormous positive impact on the river and its tributaries. Possible strategies and outcomes from the local planning effort may include the following:

1. Alteration in the timing of irrigation withdrawals to benefit both irrigators and fish.
2. Alteration in the filling and emptying of delivery canals to protect trout and other fish species.
3. The pursuit of innovative, low-cost solutions to water storage, including the storage of water underground, in certain situations, by altering the timing of irrigation and subsequent underground recharge.

4. Innovative water transfers that will collectively add water to the river and its tributaries during times of greatest need.

5. The creation of local boards or other bodies to resolve disputes quickly instead of relying on the slow and labyrinthine courts.

6. The creation of public forums to discuss the long-term health of the Clark Fork River and the economies of the basin communities.

B. The potential power of such face-to-face exchange is enormous. If the West's rivers are to be saved as living ecological systems, they will not be saved through continuing reliance on reflexive, mechanistic approaches to resource allocation and protection. Intense knowledge of local conditions and a willingness to cooperate in innovation must accompany needed policy shifts.

VI. WHY HAS THE PROJECT WORKED SO FAR?

A. The plan and the commission that is now working on it creates a new system of local cooperation that in at least one respect resembles the vision John Wesley Powell had for the American West: that its communities would revolve around water and a sensitive understanding of hydrologic basins. Whether it will ultimately produce measureable ecological improvements in the Clark Fork remains to be seen, but already it has produced positive *political* outcomes of a kind which I believe are necessary precursors to environmental improvements. It has done so because of the process used to hold the Steering Committee together and get it to work on the heart of the matter. In summary form, the process:

1. Advocates listening ahead of judgment.
2. De-emphasizes single-interest politics -- even when the single interest is as broad as environmentalism or agriculture.

3. Takes into account economics, the need for livelihood, and the strong personal identification that residents of natural resource-based communities feel for their work and their homes.

4. Seeks to understand and use market forces where and when they seem appropriate.

5. Avoids demonizing one's traditional opponents; it refuses to expect the very worst of those with whom earnest advocates normally disagree.

6. Abandons the outmoded and pernicious language of warfare to characterize political discourse. We do not speak of "victories and losses;" we do not participate in "battles;" we refuse to "defeat the opposition." The lexicon of the project is a lexicon of cooperation. As we speak, so we behave.

7. Tries always to move beyond icons and into substance.

VII. Conclusion

At Northern Lights, we do not believe in the goodness of environmental battles won at the expense of local communities. We do not take comfort in "victories" that result in the immediate loss of livelihood, or the invasion of personal identity, or liberty, in the name of environmental quality. We prefer to innovate, to be sensitive to both the real and perceived needs of local communities, and whenever possible, to find the means to cooperate at the local level.

The Clark Fork Project speaks to the need to build community around water -- to use what may be the thorniest issue of all, water allocation, as the core of efforts to create a sound politics in the American West. We hope that the Project contributes to a new model of public cooperation to create

sound politics and better environmental and economic outcomes through local water management and watershed protection.

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