Final Response to Public Comments on the Draft UCFRB Aquatic and Terrestrial Resources Restoration Plans

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Table of Contents

Section I. Introduction

On September 27, 2012, the Natural Resource Damage Program (NRDP) released the *Draft Upper Clark Fork River Basin (UCFRB) Aquatic and Terrestrial Resources Restoration Plans* (hereafter referred to collectively as "*Draft Plans*") for public comment through October 26, 2012. For outreach on this public comment period, the NRDP sent notices of this opportunity for public comment to 427 individual/entities on our mailing lists, issued a press release, placed two sets of display ads in four basin-area newspapers, and held a public hearing on October 17, 2012 in Deer Lodge. The NRDP also summarized the *Draft Plans* at the September 26, 2012 meeting of the UCFRB Remediation and Restoration Advisory Council (Advisory Council) and the October 12, 2012 meeting of the Trustee Restoration Council. The draft plans were subject of further explanation/consideration at the October 17, 2012 Advisory Council meeting.

The NRDP received a total of 120 comment letters during the public comment period and four late comment letters. An additional eight entities/individuals provided public hearing comments. See Appendix 1 for a list of commenters, identified by a specific number that serves as a reference to the comment throughout this document. Appendix 1 also provides copies of the comment letters and public hearing testimony, which are also available on the NRDP website at: https://doj.mt.gov/lands/ucfrb-restoration-plans/.

Sixty-five of the 132 total comments received either indicated general support of or appreciation for the *Draft Plans* and the process used to develop those plans. Of these, many letters offered comments specific to a particular section(s) of the plan, some of which involved requested clarifications or suggested changes to the plans. An additional 59 comments were specific in their support for certain proposed action(s) or concept proposal(s) included in the plan without expressing a position on the plans as whole. The remaining 7 comments suggested changes to the *Draft Plans* without expressing a position of the plans as a whole.

This document further summarizes the comments received, with similar comments grouped together by category, and provides the State's responses organized by these categories. Those categories are reflected in Attachment A, as well as the table of contents, of this document. The State's responses explain what changes to the draft plans were incorporated in final restoration plans or why some of the suggested changes were not incorporated in the final restoration plans. The concluding section of this document provides a summary of the State's recommended changes to the *Draft Plans,* which are also reflected in bold text throughout the responses.

The State's draft responses to public comment on the *Draft Plans*[1] were considered at a November 28, 2012 meeting of the Advisory Council and a December 3, 2012 meeting of the Trustee Restoration Council. Both Councils concurred with the staff's proposed changes to the *Draft Plans*. The *Final UCFRB Aquatic and Terrestrial Resources Restoration Plans* approved by the Governor in December 2012 incorporate the changes identified herein that were proposed in the State's draft response document.

[1] The November 21, 2012 *Draft Response to Public Comments on the Draft UCFRB Aquatic and Terrestrial Resources Restoration Plans* is available from the NRDP upon request.

Section II. Comment Summary and Response by Category

Category 1: Comments in general support of the *Draft Plans* or the *Draft Aquatic Plan* specifically

Comments: Sixty-five (65) comments indicate general support of the *Draft Plans* or the *Draft Aquatic Plan* specifically, and appreciation for the process used to develop the plans (# 7, 33, 34, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 57, 66, 69, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98a, 99, 100, 102, 103, 104a/b, 105, 107a, 108, 109a, 110, 112, 115, 116, 117, 118, 119, 121, 125, PH3, PH7, PH8a). Some of the comments request clarifications of, or suggest changes to, particular portions of the *Draft Plans* that are addressed later in this document. Some of reasons for support or appreciation of the *Draft Plans* offered in these comments included:

- The plans are well-conceived, well-done, comprehensive, scientifically rigorous, ecologically based, well-balanced and forward looking;
- The plans are consistent with and faithful to the intent and purpose of the NRD settlements/litigation;
- The plans were derived from a comprehensive, scientifically based process that thoroughly involved public;
- The plans are sufficiently detailed to guide restoration efforts, yet flexible enough to seize unforeseen opportunities;
- The plan's scientific and comprehensive allocation of funds ensures the NRD settlement dollars achieve basin-wide restoration;
- Development of the plans has been an inclusive process that built on the 80 ideas that citizens and communities throughout the Basin brought forward, as well as eligible ideas from Silver Bow Creek Restoration Plan;
- The plans build from the framework provided by the *2011 Long Range Guidance Plan*, the *2011 Prioritization Plans*, and the *2012 Process Plan* and are compliant with CERCLA regulations governing the use of NRD settlement funds in the UCFRB;
- Development of the plans engaged basin residents/affected parties and led to applying funds where opportunities are best for maximum ecological benefits; and
- The plans strategically lay out how the state will deliver the biggest bang for the restoration buck based on the best available information to date.

Response: The State appreciates this acknowledgement of appreciation and support for the *Draft Plans*.

Category 2: Comments specific to the timing and funding of Clark Fork River Mainstem vs. tributary restoration

Comments: Forty (40) comments expressed an opinion about the timing and funding of Clark Fork River mainstem versus tributary restoration: a) four (4) comments question work on the tributaries before the results of the Clark Fork River mainstem remediation efforts are known (#104d, 109c, 122a/b and 123b); and b) thirty six (36) comments support work on the tributaries as proposed in *Draft Plans (#*33, 34, 38, 40, 41, 43, 44, 45, 47, 48, 52, 53, 76, 77, 78, 80, 81, 82, 83, 84d, 85, 86, 88, 93, 94, 95, 96, 99, 100, 102, 105, 107a, 110, 116, 119, and 121).

a) The major questions/comments concerning working on the tributaries before the integrated remediation/restoration work has been completed on the Clark Fork River mainstem included:

- Why work on the Clark Fork River tributaries before the remediation/restoration work is complete on the mainstem and the results of the remediation/restoration success are known?

- Metals contamination will exist after remediation is done, what happens then?

- In the past, the NRDP has not wanted to implement restoration before remediation actions are complete.

- Mainstem work should be a priority before working on tributaries since trout recruitment to the mainstem is not known and the mainstem fishery may never be able to support a native trout fishery.

b) Some of the 36 comments supporting work on the tributaries note:

- that the life history and life stage requirements for trout require different habitat, and healthy tributaries are key to the revival of any mainstem fishery (#84d);

- that the watershed approach also recognizes that tributary restoration integrated with mainstem remediation efforts offers the largest potential for meeting the restoration goals (#100);

- that without the tributary investment, the mainstem remediation/restoration will not be realized (#38 and 41); and

- that concentrating the restoration work in smaller portions of the basin or only a few tributaries would severely limit the potential ecological impact of the *Draft Plans'* actions (#107a).

Eighteen (18) of these comments also emphasize that flow augmentation on the tributaries is as important as flow augmentation on the mainstem (#33, 43, 46, 53, 76, 77, 81, 83, 84d, 85, 86, 88, 93, 95, 99, 107d, 110, 121).

Response: The State recognizes that not all contamination will be removed from the Clark Fork River floodplain as part of the planned integrated remediation and restoration actions. The integrated remediation and restoration actions instead focus on cost-effectively addressing, through removal or treatment, the impacted and severely impacted soils and their effects. Removal of all the contamination is cost prohibitive. The *Draft Plan*'s aquatic restoration goals (section 3.1.1) are to assist the integrated remediation/restoration actions on the mainstems to provide instream flow augmentation and tributary habitat enhancement and protection so all of the actions combined will be successful and meet restoration goals.

The Clark Fork River mainstem construction work begins in 2013. Upon completion of the integrated remediation and restoration, water quality and sediment quality should rapidly improve. The State believes a rapid ecological response will occur, based on measuring and observing the rapid responses to the aquatic resources that occurred on Silver Bow Creek and at the Milltown site following remediation/restoration. Thus, with the new watershed schedule proposed (see Category #16), work on tributaries to the Clark Fork River mainstem will initially occur after remediation/restoration mainstem actions in the area of those tributaries. This schedule will be assessed and updated in the next plan update, which will occur two years after approval (see response to Category #18).

The State agrees with the many support comments stating that properly functioning tributaries are necessary for restoration of the mainstem. Tributaries with viable habitats and fish populations will support mainstem fishery populations and replace lost angling opportunities. Having multiple tributaries as sources of fish provides an increased buffer to unforeseen events that could lead to the collapse of the Clark Fork River mainstem fisheries. As recognized in the *Aquatic Prioritization Plan* and the *2012 Process Plan*,[2] the State does not know all the mainstem fishery recruitment needs or issues; however, it is known that currently relatively few tributaries provide high numbers of fish to the river. In addition, the mainstem does not provide all the spawning, rearing, or refuge habitat that is needed for all life stages of trout. The tributaries provide these missing habitats and recent data from the telemetry study shows that mainstem trout populations use the tributaries of the Clark Fork River to complete their life cycles.

One of the aquatic restoration goals (section 3.1.1) is to: "maintain or improve native trout populations in UCFRB to preserve rare and diverse gene pools, and improve the diversity and resiliency of the trout fishery." Working on the tributaries is the best method to achieve this goal, as this is where the native fish populations currently exist. It is recognized that remediation and restoration may never be able to restore the mainstem of the Clark Fork River to a condition that allows for the reestablishment of a native trout population, due to residual contamination and other constraints that currently exists on the mainstem. Thus, tributary restoration actions will not only improve the native trout populations, but also improve the health of the mainstem trout fishery.

[2] See section A, Mainstem Priorities, in the *2011 Aquatic Prioritization Plan* and section 5.3 in the *2012 Process Plan*.

With respect to the comments suggesting that flow augmentation is equally important on the tributaries as the Clark Fork River mainstem, it should be understood that restoration of the mainstem Clark Fork River and Silver Bow Creek fisheries is the primary aquatic restoration goal and the goals for tributary restoration are aimed at how best to achieve restoration of mainstem fisheries, as further explained in the aquatic goals section of the *Draft Plans* (section 3.1.1). The prioritization of the flow projects (e.g., Group 1, 2, 3) (section 3.2.1) was done to focus the initial flow augmentation efforts and funding on the highest priority areas, and is based on this overarching goal for the mainstem trout fishery. Consistent with the identification of flow augmentation on the mainstem as the highest priority in the *2011 Aquatic Prioritization Plan*,[3] the Group 1 projects entail those that are located on, or have a high likelihood of providing flow to, the dewatered reach of the Clark Fork River between Galen and Deer Lodge.

The *Draft Aquatic Plan* also recognizes that tributary restoration is an important part of restoring the Clark Fork River fishery, and that flow is a key part of several of the tributary projects. As such, it specifies that in some watersheds (Mill Creek, Willow Creek, Dempsey Creek, and Lost Creek) instream flow needs must be met prior to funding/implementation of other non-flow restoration actions. For these areas, flow augmentation is the significant limiting factor to the fishery, and unless flow augmentation is obtained first, funding for the development and implementation of non-flow enhancement or protection actions would not have the desired benefits. For the remaining priority watersheds, the State determined that non-flow projects are worth implementing, even though flow augmentation may be delayed or not possible. In this way, funds will be expended for flow augmentation where flow is needed most and the proposed restoration actions will derive the greatest benefits.

Category 3: Comments on areas/focus of proposed actions/funding in *Draft Plans*

Comments: Thirty six (36) comments expressed an opinion about the areas or focus of proposed actions or funding. These comments fell into two categories: a) six (6) comments suggesting more focus and funding for work in the upper part of the UCFRB and associated changes to the *Draft Plans* (#18, 25, 32c, 73, 113, 123a/d; and b) thirty (30) comments supportive of the focus of work/funding as proposed in the *Draft Plans* (#33, 41, 42, 43, 44, 46, 47, 49, 53, 76, 78, 80, 81, 83, 84g, 85, 86, 87, 88, 91 93, 94, 95, 99, 107a, 110, 115, 119, 121, PH8d).

a) Following are the major reasons offered in the six (6) comments suggesting greater focus/funding in the *Draft Plans* for restoration work in the areas of the UCFRB upstream of Warm Spring Ponds:

- Projects in the upper part of the UCFRB should be given a higher priority than projects further downstream because this upper part suffered the greatest impacts from mining-related damages, and because restoration in the upper part of the UCFRB will benefit further downstream whereas the reverse is not necessarily true.

- It appears the *Draft Plans* have compromised a fundamental principle of the *2011 Long Range Guidance Plan* of having the focal point of restoration investments in the

[3] See Section B in the *2011 Aquatic Prioritization Plan*, p. 5.

headwaters area where the majority of the damages occurred, given the lack of any terrestrial projects in the headwaters area, coupled with several recommended aquatic projects well downstream of any mining impacts.

- The prioritized restoration needs identified in the *2005 Silver Bow Creek Watershed Restoration Plan* were not considered or included in the *Draft Plans*; they should be incorporated into the *Draft Plans* and given higher priority, due to their location in highly damaged areas.

- Although there is significant need for aquatic and terrestrial improvements throughout the Basin, more funds should be spent in the Silver Bow Creek watershed because the fishery is the most impacted in the upper part of the UCFRB, with little to no fishing opportunities. In particular, more funds should be invested in the German Gulch, Browns Gulch, and Blacktail Creek tributaries that have native westslope cutthroat trout, given the planned fish barrier on the Silver Bow Creek mainstem.

- Many of the lower basin priorities can and should be funded with the 2008 settlement funding of $96 million and $27 million, plus interest, which is dedicated to the remediation and restoration of the Clark Fork River, respectively. It would seem more reasonable to wait and realize the benefits of that remediation/restoration work before commencing projects in Reach A of the River.

- Mining-related damage should be fixed first, then fund other priorities; leaving mining wastes in place is not a good long-term policy for the citizens of Montana.

- Over 1/3 of the aquatics funding and 1/2 of the terrestrial funding is earmarked for replacement projects outside of/not connected to injured areas; this funding should instead be used for the restoration of injured aquatic and terrestrial resources, of which the most injured and needy are in the upper part of the UCFRB.

- Project ideas submitted for Butte Area One restoration funding should have been considered for aquatic and terrestrial funding since many of them are eligible for and equally pertinent to funding under the *Draft Plans*.

One of these comments (#73) requests an earmark of three million in additional funds from the Aquatics Priority Fund for stream restoration activities near the center of Butte. The commenter notes that this would expand the restoration of Blacktail Creek downstream from the Butte Country Club to the start of Streamside Tailing Operable Unit (SSTOU), and allow the Butte Natural Resource Damage Restoration Council (BNRC) to reconsider the use of limited Butte Area One (BAO) restoration funds for storm water priorities. Two of these comments suggest greater contingency of work in upstream areas be set aside for future use in the headwaters area (comments #113, 123d).

b) The major reasons offered in the thirty (30) comments supportive of the focus of work/funding as proposed in the *Draft Plans* include:

- The holistic approach of looking at the entire UCFRB reflected in the *Draft Plans* matches the intent of the lawsuit and its settlements that covered injuries in the entire UCFRB, from Butte to the Idaho border, and not just one area of the watershed.

- The upper part of the UCFRB deserves significant funding and that, even with the recommendations in the *Draft Plans*, this upper part will still, in the end, receive the overwhelming majority of total NRD funds for local projects.

- It is true that the majority of the injuries occurred in the upper part of the UCFRB, and it is noted that both funding to date and proposed future funding reflects that.

- The injury downstream has been so severe, and the loss of use has occurred for such a long period, that it is clear the best investment of limited dollars is often found in replacement projects in tributaries below Warm Springs Ponds.

- The waters of the Upper Clark Fork, along with the wildlife and fisheries they support, are part of a heritage of and belongs to all Montanans; that the trust fund belongs to all Montanans, and that no single community or interest should dictate how money is spent.

- Funding should be distributed equitably throughout the injured river system to be effective, and needs to benefit the entire basin and not have all the value concentrated in a single portion of the watershed.

- In order to achieve the goal of recovery, resources must be directly applied to address limiting factors throughout the watershed, including in downstream reaches.

Response: The four (4) responses below address the major emphasis of both sets of comments regarding the focus of funding, as well as the comments specific to the Butte Area One restoration funds and scoping process, the *2005 Silver Bow Creek Watershed Restoration Plan*, and the 2008 Clark Fork River settlement funds. For responses specific to the suggested changes regarding additional contingency funds and the lack of terrestrial projects in the headwaters area, see Category 10 and 12, respectively.

1) Responses regarding focus of funding in the *Draft Plans*:

The issue of where and what type of actions should be the focus of limited restoration funds was the subject of significant public comment and also of the deliberation by the various entities involved in making recommendations to the Governor regarding NRD funding throughout the multi-year process that culminated in the Governor's approval of the *2011 Long Range Guidance Plan* and the associated *2011 Aquatic and Terrestrial Prioritization Plans*. The State addressed many comments similar to those summarized above under (a) that advocate for a greater focus of funding to the upper part of the UCFRB in its response to similar comments on those draft plans. This response builds on those past responses, which can be referred to for further explanation.[4]

[4] The multiple response documents in which this issue is addressed include: 1) December 2011 Final State of Montana's Response to Public Comments on the "Draft Upper Clark Fork River Basin Trustee Restoration Council Long Range Restoration Priorities and Fund Allocation Guidance Plan, dated 8/29/11"; 2) December 2010 Draft State of Montana Response to Public Comments on the "Resolution by the UCFRB 2010 Advisory Council for Adoption of a Long Range Restoration Priorities and Fund Allocation Guidance Plan," dated 9/15/10; 3) Final State

The support comments summarized in (b) above are accurate regarding the goals and intent of the NRD lawsuit: the lawsuit covered injuries to natural resources in the UCFRB from Butte to the Idaho border, and covered losses to all Montanans. It is also accurate that the majority of the injuries covered under the lawsuit arose because of releases of hazardous substances originating in the Silver Bow Creek and Warm Springs Creek drainages, and that the majority of those injuries occurred in the upper part of the UCFRB, which the State defines as the drainage above Garrison.

When considering the complete picture of past and proposed future allocations of the various NRD settlement funds acquired for restoration work in the UCFRB, it is clear that the majority of restoration funds have been or will be dedicated to restoration actions in the upper part of the UCFRB where the majority of injuries occurred. Of the $198.7 million approved in restoration funding through December 2011, about $176.4 million, approximately 90% will be for restoration actions that will occur in the upper part of the UCFRB. This proportional funding picture remains the same after adding in the additional $65.5 million of funding as proposed in the *Draft Plans*, and the additional $40.1 million of funding covered in the final county groundwater restoration plans approved by the Governor in October 2012. The majority of the injuries occurred in the upper part of the UCFRB and the majority of both past and proposed future funding has been or will be dedicated to restoration in the upper part of the UCFRB. Even considering solely the $65.5 million covered in the *Draft Plans*, the majority of this future funding (about 90%) will be dedicated to restoration in the upper part of the UCFRB. Under both past and future funding analyses that consider all the settlement funds, about 70% of all funding will be for actions occurring in the two upper counties of the UCFRB (Butte-Silver Bow and Anaconda-Deer Lodge County).

Section 2.2 of the *Draft Plans* describes the connectedness of the multiple restoration funding sources and restoration plans for work in the UCFRB. The funding summary provided in section 2.4, however, only covers the 2012 allocations for aquatic and terrestrial resource priority and reserve funds. **To help clarify the comprehensive picture of all NRD settlement funds dedicated to restoration work in the UCFRB, the attached October 2012 update to the funding summary flow chart provided in the *2011 Long Range Guidance Plan* (see Attachment B of this response document) will be added to funding tables in Appendix B and described in a revised Section 2.4.**

An even more important factor to consider than the above funding analyses are the goals and science behind the State's prioritization of certain areas in the UCFRB reflected in the *2011 Aquatic and Terrestrial Prioritization Plans*, and the State's identification of encouraged aquatic and terrestrial restoration projects in the *2012 Process Plan*, that led to State's proposed aquatic and terrestrial actions in the *Draft Plans*. Section 2.2 of the *Draft Plans* provides a summary of the previous restoration planning efforts that entailed analysis of restoration alternatives and helped form the basis for the 2011 prioritization plans. The following excerpts address the

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of Montana's Response to Public Comment on the Draft Final Upper Clark Fork River Basin Tributary Prioritization Plan, dated December 2011; and 4) Final State of Montana's Response to Public Comment on the August 2010 Draft Final Upper Clark Fork River Basin Terrestrial Wildlife Resource Prioritization Plan, dated December 2011.

connection between the prioritization plans and restoration plans specific to injured areas (p. 2-3 and 2-4):

> …The prioritization plans built on the restoration actions already conducted or planned for the Silver Bow Creek, Clark Fork River, Smelter Hill Area Uplands, Butte Area One, and Milltown injured area sites. As part of the changes to the draft prioritization plans that were based on public comment, additional clarification was provided on the connections between the work in the priority areas designed in this plans and the work already funded/planned for the restoration of injured aquatic and terrestrial areas. As part of the changes to the draft prioritization plans that were based on public comment, additional clarification was provided on the connections between the work in the priority areas designed in this plans and the work already funded/planned for the restoration of injured aquatic and terrestrial areas.
>
> The *2011 Aquatic Prioritization Plan* focused on a combination of restoration and replacement alternatives. It prioritized tributary areas based on helping restoration of the Silver Bow Creek and Clark Fork River mainstem fisheries. It also identified increasing flows by acquiring water rights on the mainstems as a priority in considering what additional measures along the mainstems, beyond those already conducted or planned and funded, were needed to restore the mainstem fisheries.[5] The *2011 Terrestrial Prioritization Plan* focused on replacement alternatives, taking into consideration the remediation and restoration efforts funded through other efforts that will cost-effectively address the terrestrial resource injured areas.
>
> These previous restoration planning efforts that entailed analysis of alternatives all were conducted based on achieving an overall goal of restoring or replacing injured natural resources in a timely, cost-effective, and prioritized manner. The resource allocation and prioritization efforts initiated after the final 2008 Montana v. ARCO settlement focused on determining, within available funding limits, what additional actions would best augment the already completed or planned integrated remediation and restoration efforts being conducted with settlement funds earmarked to the injured areas that focus on addressing hazardous substance contamination. It should be understood that injuries to natural resources of the UCFRB from over 100 years of extensive mining and mineral processing are pervasive and extensive and that no amount of money can restore fully all the injured resources of the UCFRB as captured in the following excerpt from the State's *1995 Restoration Determination Plan*:[6]
>
> "It must be observed that the State of Montana harbors no illusions about what can practically be accomplished in the Upper Clark Fork River Basin given the type and pervasiveness of contamination and the magnitude of the injures to the State's natural resources. Restoration will be difficult if for no other reason than the fact that metals and metalloids like arsenic, which are responsible for much of the contamination in the Upper Clark Fork River Basin, do not degrade, rather they must be removed, otherwise isolated,

[5] See pp. 2-4 of the *2011 Aquatic Prioritization Plan*.
[6] See pp. 1-5 in the *Restoration Determination Plan for the Upper Clark Fork River Basin*, prepared by the State of Montana NRDP and Rocky Mountain Consultants, October 1995.

> or leave the system naturally for injuries to be mitigated. Although it may be possible in some instances of natural resource injury for human intervention to restore resources and services to baseline levels in year or even decades, for the most part this is not such a case. Generally, the most that can be achieved in the way of restoration of the Upper Clark Fork River Basin within the lifetimes of persons alive today is to ameliorate natural resource injuries, enabling the resource and the services provided by the resources to recover substantially."

This limitation to full restoration of injured resources was an underlying assumption of the resource funding allocations and prioritization efforts incorporated into the *2011 Long Range Guidance Plan*. Sections 3.1.1 and 4.1.1 of the *Draft Plans* further explain the goals and methodology of these prioritization efforts. These sections, as well as many other sections of the *Draft Plans,*[7] explain how the determination of the proposed actions in the *Draft Plans* involved evaluation of what actions would most cost-effectively restore or replace injured resources, beyond the work already funded/planned for restoration of injured aquatic and terrestrial actions. While a majority of the proposed actions in the *Draft Plans* entail work outside these injured areas, the science behind the aquatic and terrestrial prioritization efforts indicates that the best investment of limited dollars, beyond already approved investment to those injured areas, is often found in replacement projects.

For the reasons stated above, the State believes a greater focus in the *Draft Plans* and associated funding for projects in the headwaters area of the Basin is not warranted.

2) Responses specific to Butte Area One Restoration funding and scoping process:

The State believes that the proposed funding allocation in the draft *Butte Area One (BAO) Restoration Plan,*[8] developed by the BNRC for improvements to the restoration of upper Silver Bow Creek and stream restoration, should be adequate for restoration activities near the center of Butte and, therefore, that the additional $3 million requested in aquatic funding for these restoration activities (comment #73) is not necessary or appropriate. The proposed funding allocations in the BAO Plan is $4 million for stream restoration in Butte, plus $10 million for restoration in the Butte area as a whole, which may be matched with other funding to remove tailings in the historic Silver Bow Creek channel. The $4 million for stream restoration should be adequate to restore areas of Blacktail Creek downstream of Father Sheehan Park to the Silver Bow Creek confluence, whereas restoration on Blacktail Creek upstream of Father Sheehan Park to Thompson Park will be addressed by a $957,000 earmark in the *Draft Aquatic Plan*.

Regarding funding for stormwater priorities in Butte, as stated in both the *BAO Restoration Plan* and the *Draft Plans*, any needed stormwater management is either normal government function or should be part of the approved remedial actions for Butte Priority Soils Operable Unit. It should also be noted that, in his presentation of Butte-Silver Bow's concept proposal for $30 million in stormwater improvements at the Advisory Council's 8/1/12 abstract forum, Jon Sesso indicated this request should be considered as a placeholder for contingency funds, due to

[7] See, for example, section 3.2.1(p. 3-11), section 3.3.2 (p. 3-21 to 3-23), section 4.2.4.7 (p. 4-32), and section 4.4.4.9 (p. 4-37).
[8] *Butte Area One Draft Restoration Plan*, dated October 11, 2012, prepared by the BNRC and NRDP.

incomplete status of the stormwater improvements that will be completed under remedy and Butte-Silver Bow municipal investments.[9]

The State does not concur with the comment (#113) that the 100+ concept proposals submitted by the public for BAO restoration funds should have been also considered for aquatic and terrestrial funding. This request was previously considered by the NRDP in response to a June 2012 request from Butte-Silver Bow to consider these concept proposals, as well as ideas covered in a 2008 restoration planning document developed by the Butte Restoration Alliance, be considered under the aquatic and terrestrial scoping process.[10] It was also a subject of discussion at the 6/20/12 Advisory Council meeting.[11]

The BNRC conducted a separate scoping process in March/April 2012 that was specific to restoration or replacement of the Butte Area One injured groundwater and surface water resources. That process did not serve the same scope or purpose as the scoping process for the aquatic and terrestrial priority funds/plans. Examples of such differences in these separate scoping processes include, but are not limited to: 1) the BAO process covered groundwater resources, whereas the aquatic/terrestrial process did not; 2) the aquatic/terrestrial process was confined to injured areas and Priority 1 and 2 areas identified in the 2011 prioritization plans, whereas the BAO process was targeted to areas in or near Butte; 3) recreational projects were required to have a resource benefit under the aquatic/terrestrial process, but not the BAO process; and 4) educational projects were eligible for consideration under the BAO process, but not the aquatic/terrestrial process.

Separately, Butte-Silver Bow submitted three concept proposal abstracts specific to the aquatic/terrestrial scoping process. Three other individuals/entities also submitted separate abstracts for both scoping processes, and recognized the different submittal requirements. The 100 ideas for the BAO process came from other individuals/entities, not Butte-Silver Bow. To consider these ideas would not be proper, and unfair to the 80 individuals/entities that submitted abstracts for the aquatic and terrestrial process in accordance with the requirements specific to that process. For similar reasons, it would also be inappropriate to consider the 2008 Butte Restoration Alliance document, which covers priority ideas for improving Butte, including many ideas that are not specific to restoration or NRD funding, such as ideas for historic preservation, housing, aesthetics, economic development, and area parks.

[9] This presentation is available on the NRDP website at: https://doj.mt.gov/lands/advisory-councils/.

[10] A 6/15/2012 e-mail from Jon Sesso of Butte-Silver Bow to Carol Fox of the NRDP that transmitted two aquatic/ terrestrial concept proposals from Butte-Silver Bow included this request.

[11] At the June 20, 2012 Advisory Council meeting, Carol Fox of the NRDP indicated that these additional ideas that were not submitted as aquatic and terrestrial concept proposal abstracts would not be subject to further consideration in the aquatic and terrestrial plans. Jon Sesso of Butte-Silver Bow provided public comments at that meeting explaining why he believed that the BAO ideas should be considered. The Advisory Council did not further consider including the BAO concept proposals. The Advisory Council's 6/20/12 final meeting summary provides further documentation on this issue.

3) Responses specific to consideration of the *2005 Silver Bow Creek Watershed Restoration Plan*[12]

The State previously indicated how the *2011 Aquatic and Tributary Prioritization Plans* considered the priorities identified in the *2005 Silver Bow Creek Watershed Restoration Plan,* (*2005 Silver Bow Creek Plan),* in its responses to comment documents on those plans. Attachment C provides relevant excerpts of those documents. Since the *Draft Plans* rely heavily on the *2011 Prioritization Plans*, those past responses are applicable to recently submitted comments on this issue (comments #32c, 73, and 123d). As noted in those responses, the draft prioritization plans were revised to explain how the *2005 Silver Bow Creek Plan* was considered in the basin-wide prioritization efforts and there was general agreement between the *2005 Silver Bow Creek Plan* and the *2011 Aquatic Prioritization Plan* with regards to priority tributaries in the Silver Bow Creek Watershed.

The Priority 1 and 2 tributary stream areas in the Silver Bow Creek watershed that were eligible for consideration for project work/funding in the *Draft Plans* were German Gulch, Browns Gulch, Blacktail Creek, and some of the tributaries to these creeks. These are the same streams suggested for additional funding in comment #32c. The *Draft Plans* incorporate all of the public concept proposals submitted for these three watersheds, for a total estimated funding of $2.2 million, and indicate that the concept proposals adequately focused on the factors within these watersheds that limit restoration of the Silver Bow Creek fishery, such that there was no need for reliance on additional State-generated alternatives (see sections 3.2.2.3, 3.2.2.4, and 3.3.2.8).

In multiple sections of the *Draft Plans*, the State indicates that no additional restoration actions or recreation projects are proposed along the Silver Bow Creek mainstem because the integrated remediation and restoration work under the Streamside Tailings Operable Unit ($91 million spent and $68 million fund balance as of 10/1/12) and the Silver Bow Creek Greenway project ($23.6 approved) will accomplish the needed aquatic and terrestrial resource protection and enhancement and recreational enhancement efforts judged to be cost-effective.

Finally, to further consider these comments, the State reviewed the 28 restoration needs prioritized as "very high" or "high" in the *2005 SBC Plan*. Most of these 28 needs that are eligible for consideration for aquatic and terrestrial funds have already been addressed, are addressed in the draft BAO or aquatic/terrestrial plans, or are actions that should be covered under remedy. Attachment C provides a summary table of this information.

4) Responses specific to the option of using 2008 Clark Fork River settlement funds

Comment #32c suggests use of the 2008 settlement funds dedicated to the State's integrated remediation and restoration of the Clark Fork River as an alternative to use aquatic and terrestrial priority funds for proposed actions in the *Draft Plans* that are downstream of the Silver Bow Creek watershed. There are few areas of potential overlap between the *Draft Plans* and the *2008 Clark Fork River Restoration Plan* (*CFR Restoration Plan*), which sets forth the use of those

[12] *Silver Bow Creek Watershed Restoration Plan*, dated December 2005, prepared by the NRDP, with assistance from Confluence Consulting, Inc. and DTM Consulting, Inc.

settlement funds. One area of potential overlap is land acquisitions and conservation easements, which are contemplated in the *CFR Restoration Plan*. However, *CFR Restoration Plan* land acquisitions and conservation easements are limited to a specified riparian zone, in order to provide longer term protection in the areas of the remedy and restoration actions. The proposed Clark Fork Meadows acquisition and Dry Cottonwood easement projects contained in the *Draft Plans* both have some acreage within and outside of the scope of the *CFR Restoration Plan*. In fact, Dry Cottonwood easement has a significant amount of acreage outside of the specified riparian zone. Nonetheless, both projects to some degree could overlap with the *CFR Restoration Plan*. In general, each individual conservation easement will have agreed upon terms specific to the landowner's anticipated future management of the property. As such, if the agreed upon terms of the easements are acceptable to the goals of the Clark Fork River cleanup efforts, funding of these projects could involve some Clark Fork River restoration settlement funds for the areas of overlap within the specified riparian zone. The other proposed actions in the *Draft Plans* along the mainstem downstream of Garrison and on the priority tributaries to the Clark Fork River are also not within the scope or budget of the *CFR Restoration Plan*.

One other area of potential overlap between the *Draft Plans* and the *CFR Restoration Plan* is flow augmentation, which is contemplated in the *CFR Restoration Plan*. However, for augmentation, the *CFR Restoration Plan* solely identified the costs of a water commissioner within its budgeted actions. Therefore, the only overlap between the *Draft Plans* and the *CFR Restoration Plan* with regards to flow augmentation is the hiring of a water commissioner. The *CFR Restoration Plan* estimated a 50 year term, at a total cost of $827,000.

In the *2012 Process Plan,* the State identified flow augmentation and acquisition projects as the examples of projects that would not interfere with integrated remediation and restoration actions planned for the Clark Fork River mainstem. The Group 1 flow projects in the *Draft Plans* are anticipated to increase flows in the dewatered reach of the Clark Fork River from Galen to Deer Lodge. See also the response under category #3 regarding the timing of proposed work on the Clark Fork River mainstem and its tributaries in Reach A.

Category 4: Support for Drummond Riverside Park

Comments: Twenty (20) comments express general support for the funding and development of Drummond Riverside Park acquisition project (#8, 9, 11, 13, 17, 26, 28, 29, 35, 36, 37, 39, 50, 51, 54, 58, 67, 101, 125, and 126). Favorable project aspects suggested by these comments include: that it will provide river access for both locals and tourists, benefits to the river and community of Drummond, and provide learning opportunities for the Drummond schools; that it has ties to the nearby community park; and that it will preserve habitat for wildlife that inhabit the area and protect wetland and riparian areas.

Response: The State acknowledges these support comments. As indicated in the *Draft Plans,* the Drummond Riverside Park is proposed for funding of up to $100,000, subject to the subsequent review and approval process specified in Section 6.0 that applies to all acquisition projects.

Category 5: Comments Specific to Silver Lake Water System Proposal

Comments: The State received nineteen (19) comments specific to Butte-Silver Bow's (BSB) Silver Lake Water System (SLWS) proposal. These comments fall into two categories: a) fifteen (15) comments supportive of the proposal, many of which advocate for a more definitive approval/funding decision on this project than what is provided for in the *Draft Aquatic Plan (*comments #14, 15, 16, 19, 20, 21, 22, 24, 25, 27, 30, 56, 103,106, and 123c); and b) four (4) comments supportive of the proposal, but with necessary due diligence (comments #107g, 113, 120, and PH8c).

The major reasons offered in support of the SLWS project include that it will: augment the instream flows in dewatered areas in the UCFRB more than any of the other proposed projects; will aid in the recovery of native trout species, including bull trout; enhance fish spawning and rearing habitat and fish passage; provide a means to deliver water when it is needed most to where it is needed most; improve recreational fishing access; provide flood control to protect downstream remediation and restoration work; and dovetail with other improvements to Warm Springs Creek watershed.

BSB comments (#30, 123c) emphasize how well the project matches the priorities and guidance for aquatic restoration identified in the *2011 Aquatic Prioritization Plan* and *2012 Process Plan* and how the stored water features of the project offer several advantages over other water flow augmentation prospects that entail direct flow rights. The advantages noted include the ability to control releases to best fit fishery needs and to protect the stored water for downstream diversions/users, and that these water rights have already been designated for instream flow beneficial use through the DNRC change process. BSB comments also emphasize the need for advancing the project for a decision by Governor by the end of this year, indicate why the county believes it has provided the State with adequate information to make a decision by then, and express concerns that the *Draft Aquatic Plan* unnecessarily prolongs the decision-making process and the NRDP's lack of response to the considerable due diligence information that BSB had provided to the NRDP on the SLWS.

Comments from the Clark Fork Coalition note many of the benefits listed above but also note the complexity of the issues that need to be worked out and the need for the State to make sure we're going to get the water that is promised at a fair price and consider the project in context of other alternatives that can get the same benefit (#107g and PH8c).

Comments from the Butte Citizens Technical Environmental Committee (CTEC) note similar benefits as those listed above and recommend the advancement of the project, after due diligence, as soon as possible, "as its impact to restore the resource is proven and urgently needed."

Comments from Montana Resources (MR) recommend that the State gain familiarity with the 1996 Water Services Agreement between BSB and MR, note that MR has certain priority rights to the water and storage in the SLWS, and indicate that discussions continue with BSB on a mutually acceptable alternative that both protects MR's interests in a reliable water source from that system and provides BSB greater flexibility and opportunities to manage the system (#120).

Response: The State believes the SLWS project is a worthwhile prospect to pursue based on the potentially substantial fishery benefits it may provide to the high priority stream areas in the UCFRB and agrees with many of the potential benefits of this project noted in the support comments. While the NRDP has devoted significant resources to reviewing the information BSB has provided on the project, it is an extremely complex project that requires a lot more due diligence and negotiations with BSB than can be accomplished to reach a decision by year end. The difficulties with the DNRC change process on two previously NRDP-funded water rights projects, the German Gulch and Racetrack projects, reiterate the importance of proper due diligence of such transactions prior to funding such projects.

The original proposal submitted in June 2012 by BSB involved a request of $15 million for various infrastructure upgrades to the SLWS and an additional $5 million for operation and maintenance of the system. In exchange for this funding, BSB indicates it would allocate and guarantee 10,000 acre-feet of stored water from the SLWS that the State could use for instream flow augmentation for the benefit of the fisheries in Warm Springs Creek and the Upper Clark Fork River fisheries. BSB also indicates that it can provide this instream flow at the rate and during the months as specified by State, in both wet and dry years, and that this instream flow is legally enforceable from Myers Dam downstream to the Clark Fork River at Gold Creek. In multiple communications with the NRDP, BSB has indicated its openness to alternate proposals based on feedback from the State, and indicated various provisions that could be subject to negotiation. A recent revision of that proposal now seeks about $11.6 million to pay for upgrades, without any funds requested for operation and maintenance.[13]

As proposed in the *Draft Aquatic Plan* (section 3.2.1), the SLWS proposal is in the first priority group of seven (7) potential instream flow augmentation proposals (Group 1) to be further evaluated, developed, and decided upon collectively next year, or thereafter, after all necessary due diligence has been performed as to this group of proposals. The *Draft Aquatic Plan* indicates that, while the flow augmentation portion of the Silver Lake project has been approved through the DNRC change process, the project requires further due diligence analysis, such as quantifying how much augmentation could occur in low flow and drought conditions, as well as other due diligence steps.[14] The NRDP seeks to ascertain whether BSB can deliver the 10,000 acre-feet on an annual basis during the irrigation season and whether it is protectable to Gold Creek. If it turns out that this amount of stored water cannot be annually delivered and protected as BSB asserts, the NRDP will seek to determine what amount of stored water may reasonably be expected to be delivered and protected as instream flow to Gold Creek and to negotiate a reasonable price with BSB for this instream flow.

In the course of its due diligence, the NRDP has identified several significant issues that must be resolved before it can recommend that the State accept the SLWS proposal or any other related proposal. These issues, which are quite complex, can be summarized as follows:

[13] This reduced request was set forth in a 10/4/12 memo from Rick Larson of BSB to Carol Fox of NRDP and also communicated by Mr. Larson to the UCFRB Advisory Council at its 10/17/12 meeting.
[14] See section 3.2.1, p. 3-12.

1) Economic Sustainability of the SLWS: Can the SLWS be economically sustained in the long-term or is it likely that BSB will run out of money to sustain the system in the foreseeable future? BSB's *2011 SLWS Master Plan* identified an estimated $90 million in capital improvements and operations and maintenance that will be needed by the water system over the next nine years in order to sustain the system during this time period and into the future.[15] However, except for the funding BSB seeks from the State for needed improvements, BSB has not identified where the rest of this $90 million would come from.[16] As described in the supplemental background information provided in Attachment D, the economic sustainability of the SLWS has been a significant issue since BSB's acquisition of the system in 1996.

2) Quantity of Water Available: One of the most complex issues that needs to be further assessed and fully understood is whether the State can really expect to receive the 10,000 acre-feet in stored water that BSB guarantees in dry years. BSB claims that its computer modeling of the SLWS shows that this is obtainable; however, annual studies performed by ARCO a number of years ago, and other studies, make this claim questionable. In addition, if the existing and potential "new" industrial users were to exercise their collective priority rights, under the existing water service agreements, to the stored water in dry years, BSB's model indicates that the State would not receive adequate water to reach the instream flow targets in Warm Springs Creek. The State needs to complete its own independent modeling of the basin yield to further address this question. Furthermore, BSB has indicated that, to meet its guarantee of 10,000 acre-feet per year, it needs to increase the "active" storage capacity of the SLWS by more than 4,000 acre-feet. This may require new water rights permits and other water rights due diligence, as further summarized under bullet #5 below.

3) Negotiation of New Water Service Agreements with the State and the Other SLWS Users: If the State joins the SLWS, there must be a detailed negotiation of the State's rights and responsibilities in the system and a renegotiation of certain provisions of the existing water service agreements with the three current SLWS water users (MR, North Western, and REC Advanced Silicon Materials (formerly ASiMI)). While these users are primarily allocated direct flow rights, their agreements give them priority to stored water should the direct flow rights be inadequate to meet their guaranteed flow and stored water be available. Prior to its termination of its water service agreement with BSB, ARCO paid for a large majority of the SLWS capital improvements and about 83% of the operation and maintenance costs. For a satisfactory flow outcome for the State, the three remaining industrial users need to be willing to bear a more substantial share of the SLWS costs and give up some of their priority rights to stored water. For example, the provisions allowing MR to take out of storage up to 7 mgd for "planned upsets" and up to 18 mgd for "unplanned upsets," and BSB's priority right to take up to 12 mgd for "new" industrial users needs to be renegotiated. The need for such a negotiation and new agreements is recognized in MR's comment letter (#120).

4) Valuation of the Water to be Provided for Instream Flow and Payments for the Flow: The State needs to conduct its own market valuation based on results of modeling efforts and

[15] *Silver Lake Water Master Plan*, prepared for the City and County of Butte-Silver Bow by DOWL HKM, September 2011. This Master Plan includes a Capital Inventory and Replacement Plan and an Operations and Maintenance Plan.

[16] BSB cannot call upon its municipal water system rate payers for this money.

negotiated terms of the deal. How much the State should pay for an annual, perpetual delivery of 10,000 acre-feet of guaranteed stored water is also a difficult question, particularly because it is questionable as to whether the amount can be provided on a yearly basis. The State has initiated its own valuation; however, that valuation cannot be completed until the water quantity and agreement negotiation issues summarized above are concluded. The valuation also depends on how payment would occur. While BSB's proposal is based on a lump-sum payment, BSB has indicated its willingness to consider other payment options in some meetings/phone conversations with NRDP. It would be in the State's best interest that it pay on an annual basis, as the water is actually delivered by BSB for instream flow. Another valuation issue involves whether the State should be responsible for paying 100% for certain improvements to the SLWS, which, in fact, may only benefit the industrial users of the system, and for other improvements that would benefit both instream flow and the other users of the system.

5) Water Rights: There are a number of water rights issues that are unresolved and for which BSB should bear the risk. The highest priority water rights in the Warm Spring Creek basin are still owned by ARCO and various irrigators, such as Ueland Ranches. These owners have priority over BSB's direct flow rights, which it uses, prior to using stored water, to provide water to its industrial users, such as MR. There are also questions about how much stored water from SLWS will be available for instream flow from a water rights standpoint and how protectable that water is, once it is released by BSB down Warm Springs Creek at Myers Dam. There are applicable water rights laws and regulations that specify processes that could lead to a change/reduction in the amount of future instream flow that require further evaluation. Those include, but are not limited to:

   a) BSB's plan to increase the active storage capacity of the SLWS by more than 4,000 acre-feet may require a beneficial water use permit or a change of use authorization from DNRC, depending on the adequacy of historical use records. If BSB is required to obtain a permit or authorization from DNRC, the members of the Granite County Water Users Association (pursuant to a 2002 stipulation with BSB) and other water users, including downstream irrigators and Georgetown Lake homeowners, can make objections to the increase in storage on grounds that such a change will interfere with their water rights in Georgetown Lake and Flint Creek, Warm Springs Creek, or the Clark Fork River. BSB may also face a serious challenge that it has abandoned any right to increase this active storage.

   b) The changes in SLWS storage water rights to include instream flow, which were approved by DNRC in 2006, were temporary authorizations, which expire in 2016. At that time, when BSB seeks to renew these authorizations for another 10 years, objections can be raised again in the DNRC renewal process. Also, as further explained in the supplemental information provided in Attachment D, a recent preliminary DNRC legal opinion indicating that "imported water" should be treated as an area of origin water, although not directly on point, potentially could raise the issue of whether stored water can be legally protected past its points of release.

c) In order to protect the instream flow in Warm Springs Creek and the Clark Fork River down to Gold Creek, an enforceable decree must be issued by the Water Court, which could give rise to another series of objections by downstream users. As recognized in the *Draft Aquatic Plan*, a water commissioner would then need to be hired and measuring devises would need to be installed to enforce the decree and protect that instream flow from other users as it travels down these streams.[17]

Attachment D to this response document contains supplemental information from NRDP legal counsel that provides additional historical background on the SLWS and from the NRDP's consulting water rights legal counsel that provides more details on the water rights issues summarized above.

In conclusion, there are many complex issues associated with BSB's SLWS proposal that need to be addressed to fully understand what the State can reasonably expect for "wet water in a dry year." The potential risks and liabilities need to be fully determined and taken into consideration, plus independent modeling and valuation work needs to be conducted. The State then needs to conduct substantial negotiations with BSB that will likely require them to conduct negotiations with some of their existing users. Given the numerous complex and significant issues summarized above that need to resolved with respect to BSB's Silver Lake instream flow augmentation proposal, the State is not in a position to make an informed and responsible decision concerning funding of SLWS proposal by year-end. The provisions of the *Draft Aquatic Plan* for the SLWS proposal and the other flow proposals to be approved for funding once results of the State's further due diligence is available and duly considered.

Category 6: Requests to move some flow projects up in priority to Group 1

Comments: Eleven (11) comments request moving two of the Group 2 flow projects up in priority to Group 1. Of those, ten (10) comments request that the Racetrack Pipeline be moved from Group 2 to Group 1 (#31, 59, 60, 61, 62, 63, 64, 65 107f, and 114), and one comment requests that the Pauley Ranch Project be moved from a Group 2 to a Group 1 Project (#107e).

Response: Group 1 flow projects are those projects that may supply instream flows to the area of the Clark Fork River between Galen and Deer Lodge, and therefore receive the highest priority in the *Draft Plans*. The State, after further discussion with the Clark Fork Coalition[18] (the entity that submitted the two concept proposals), has a reasonable expectation that the Racetrack Pipeline and the Pauley Ranch projects, though not located on the Clark Fork River, could offer some amount of instream flow to the dewatered reach of the Clark Fork River. The State was able to make this judgment because it seems these projects may be fairly well developed. **Thus, the State will add both of these projects to the list of Group 1 projects.** However, if upon further development of these projects, the State determines that they do not meet the goal of supplying water in the dewatered reach of the Clark Fork River, then these projects would revert to consideration and development funding consistent with the Group 2 projects. Since the

[17] The State has provided for funding of a water commissioner both in the *Draft Aquatic Plan* and in the *2008 Clark Fork River Restoration Plan*.

[18] Personal communication via phone between Andy Fischer, Clark Fork Coalition, and Tom Mostad, NRDP, on 11/11/12.

Racetrack Pipeline has several phases, with some phases more developed than others, each phase individually needs to have the ability to reach the goal of providing water to the dewatered reach of the Clark Fork River in order to remain within the Group 1 projects. Like all flow projects, these flow projects will need full due diligence, be cost-effective, and must have a positive relationship of expected costs to the expected benefits, as explained in Section 3.2.1 of the *Draft Plans*.

To reflect the above changes, the State will revise the appropriate parts of section 3.2.1 (Eligible Flow Projects; p. 3-14) and Table 3-2 (Aquatic Flow Groups; pp. 3-17&18) of the *Draft Plans* accordingly, with the following additions: "Though the Racetrack Pipeline and the Pauley Ranch projects are not located on the Clark Fork River, there is a reasonable expectation that they could offer some amount of instream flow to the dewatered reach of the Clark Fork River. If upon further investigation, a Group 1 project remains viable but is determined not to likely provide instream flow to the dewatered reach of the Clark Fork River, it will be reclassified as a Group 2 project and be evaluated with the Group 2 projects."

Category 7: Support for Little Blackfoot River restoration

Comments: Ten (10) comments support restoration of the Little Blackfoot River as proposed in the *Draft Plans* (#34, 38, 40, 46, 52, 87, 89, 92, 102, and 105). Common statements in these support letters are that the Little Blackfoot River is a "unique and major tributary to the Clark Fork River" and "has been a critical tributary and watershed and must continue to be emphasized in this restoration plan."

Response: The State acknowledges these support comments and agrees that the Little Blackfoot River is an important tributary for the restoration of the Clark Fork fishery. While the State does not plan to change the restoration actions proposed for the Little Blackfoot River in the *Draft Plans*, the State proposes changes to the schedule regarding the Little Blackfoot River and other priority watersheds that are addressed under Category #16.

Category 8: Comments specific to flow issues (section 3.1) in general but not project-specific

The State received ten (10) comments specific to flow augmentation projects in general or to the proposed methodology for accomplishing flow augmentation specified in suggesting changes to the flow restoration plan section of the *Draft Aquatic Plan* (#7, 71, 77, 84b, 100, 107d, 109b, 117, 122d, and PH8b). Comments #77 and 100 from Montana State TU representatives request consideration of the input provide by the Montana TU Water Project (#77), so these comments are grouped as 77/84b/100. Comments about the same or similar issues are addressed together below.

Comments: Two (2) comments recommend that selected flow projects should not include projects that require perpetual management or maintenance, such as those constructing irrigation pivots or those requiring pumping (#7 and 117).

Response: As indicated in the *Draft Aquatic Plan*, the State seeks to obtain instream flow in a cost-effective manner, and it is expected that all of the projects will need some oversight, management, and/or maintenance activities to ensure that the flow which has been purchased/leased remains instream as required. Because the opportunities to obtain significant amounts of water for instream flow are limited, the State will not limit the types of projects in which water can be obtained. The valuation of each project will take such long-term operation and maintenance costs into consideration and the collective valuation of each group of projects together will allow for selection of the most cost-effective projects that offer the best cost:benefit relationship.

Comment: One (1) comment notes the uncertainty in the theoretical or conceptual nature of most of the flow augmentation projects, and that the *Draft Aquatic Plan* does not address contentious issues associated with enforcing the instream flow agreements (#122d).

Response: The aquatic plan does not detail how potential contentious issues are addressed because of the conceptual nature of most of the projects at this time. Any such issues will be determined as each specific project is further investigated and will be addressed as a part of the process. As indicated in the *Draft Aquatic Plan,*[19] generally the State anticipates that a water commissioner will be needed to assist in ensuring that purchased/leased water rights for instream flow are used as they are intended. Furthermore, the State will conduct due diligence on each specific potential project. If the project proves to be viable, the State will present potential benefits and any potential contentious issues, and make a recommendation on the funding for consideration by the Advisory Council, the Trustee Restoration Council, and the Governor will make the final decision. The public will have an opportunity to comment on the recommendations several times during the approval process.

Comment: One (1) comment remarks that the proposed aquatic actions will not contribute to the restoration of the Clark Fork River (#122d).

Response: Actions that can be funded under federal Superfund law and NRD regulations are those that restore, replace, or acquire the equivalent of the injured natural resource. The three types of actions are designed to return injured resources to baseline conditions. As explained under Category #2 and #3, the overarching goal behind the aquatic prioritization process was restoration of the injured mainstem fisheries. The outcome of that process was a determination of what areas and types of actions would best augment the integrated remediation/restoration work on Silver Bow Creek and Reach A of the Clark Fork River. The proposed action in the *Draft Aquatic Plan* will contribute to the restoration of the habitat and Clark Fork River fishery by dedicating $20.5 million (50% of the available funds) for instream flow augmentation in the river. The benefits of instream flow to the Clark Fork River will be to improve aquatic habitat in the low flow times of the year and to dilute any possible effects from residual metal contamination. In addition, the non-flow actions of enhancement and protection in the tributaries indirectly contribute to restoration of the Clark Fork River fishery by providing for the entire life-cycle of the fish, which use the tributaries for spawning and rearing. Together these activities will have a positive synergistic effect on the restoration of the river.

[19] See p. 3-15 of the *Draft Plans*.

Comment: One (1) comment describes the potential Dutchman wetland project and suggests that, should this transaction be completed as proposed, instream flow in Warm Springs and Lost Creeks should not be an issue but such additional flow would benefit the Clark Fork River fishery upstream of Deer Lodge (#122d).

Response: In comment #122d, there are several inaccuracies in the description of the State's commitments in the 1998 consent decree. The wetland/riparian area requirement in the 1998 consent decree resulted from a common interest of the UCFRB trustees (the United States, the State of Montana, and the Tribes) in the creation, restoration, and enhancement of wetlands and riparian areas. The State committed to create up to 400 acres of new wetlands, restored wetlands, or enhanced riparian areas, with DOI involvement. The State limited this required expenditure to $3.2 million.

The consent decree does not name a specific project. In May 2005, FWP and ARCO outlined terms which could lead to State ownership interest in the Dutchman wetland property and water rights in the Warm Springs Creek, Dutchman Creek, and Lost Creek drainages, with the expectation that this ownership interest would fulfill the State's 1998 Consent Decree commitments. State ownership interest in the Dutchman wetland property was to enhance and better protect the 3,700 acre area. The anticipated use of the water rights was to augment flows and benefit fisheries in the specific drainages and UCFRB. However, the FWP/ARCO outline occurred at the beginning of the process, and anticipated State due diligence, such as water rights quantification and DNRC involvement. To date, the State has been unable to reach an agreement with ARCO regarding this transfer that would be in the public's interest. The proposed actions in the *Draft Aquatic Plan* for flow augmentation in Warm Springs Creek and Lost Creek are specific to the known current conditions and restoration needs and not based on an unknown outcome related to this potential transfer.

Comment: One (1) comment notes that there could be unanticipated consequences of changing irrigation water to instream flow (#122d).

Response: The *Draft Aquatic Plan* makes clear that all instream flow projects need due diligence prior to funding implementation. As such, the State will evaluate potential consequences to changing irrigation practices. In addition, the DNRC's change authorization process involves a very thorough review of the possible adverse effects to water right holders in the area of the change of use. As a part of this process, water right holders in the area have an opportunity to object to the proposed change in the use of a water right. The possible results of the change in water use will be identified and this information will be used in the State's recommendation of whether to fund project implementation.

Comment: One (1) comment suggests that the proposed three year time period for implementation of flow projects is likely not feasible due to the conceptual nature of the projects and the complexities associated with such projects (#122d).

Response: The State agrees that most of the proposed flow projects are conceptual in nature and require numerous steps to develop and implement them. The three year flow implementation schedule in the *Draft Aquatic Plan* is specific the Group 1 projects and represents the State's best

estimate at this time. It is recognized that all projects may not progress on schedule, so additional update to each project schedule will occur with every future update of the *2012 Final Restoration Plans*, where needed. As set forth in the *2012 Process Plan*, the State will review and revise these plans two years after the Governor's approval.

Comments: Two (2) comments suggest that the valuation process for flow augmentation should be done before the DNRC process (#77/84b/100 and 107d).

Response: The State expects to develop projects with cooperating entities that have completed many purchases and leases and are well informed about the market values of regional and area water right transactions. In addition, DNRC's Trust Land Management Division has recently completed a water right valuation of water rights under their authority that provides a range of values for a type of water right.[20] This type of information, along with any other useful information on the value of water that is discovered by or provided to the State, will be shared with prospective water right sellers/leasers to give them an idea of what other projects paid for water right purchases/leases. However, the value of each specific water right will be done individually and will depend upon the specific attributes of the specific water right(s) in question. As such, the amount of water that can remain for instream flow will be known only after the DNRC process is completed, so a final valuation will not be done until that process has been completed. Nonetheless, it is likely that a reasonable range of values and a ballpark estimated value will be available to all those involved to assist in development of other projects based on the applicability of a specific water right using all of the data gathered from other projects.

In addition, the State may be willing to conduct preliminary negotiations regarding the valuation of a particular flow project, which may lead to a preliminary buy-sell agreement.[21] If this occurs, such an agreement would have conditional language indicating that whatever preliminary value is negotiated in advance of conclusion of the DNRC change process must be reevaluated to determine of final price based on the outcome of the DNRC change process.

In the future, Group 1 valuations could assist subsequent Group 2 projects with similar water rights and will give water right holders an idea of the applicability of their water right to the needs of the restoration process and possibly the range of values of their water rights. Also, the lessons learned in the development of the Group 1 projects, which will include more knowledge about the likely outcomes of the DNRC change process, can be applied to the planned revision of the final restoration plans two years after the Governor's approval.

Comment: One (1) comment expresses a concern that worthy Group 2 projects that have willing landowners could be delayed or never start if Group 2 projects have to wait for Group 1 projects to be completed (#77/84b/100). Another comment expresses concerns that waiting to seize flow opportunities on the tributaries may result in incomplete restoration, and that too much of the

[20] Montana Department of Natural Resources and Conservation, Trust Land Management Division, Water Right Valuation,1/ 8/12 by DMS Natural Resources.

[21] This additional provision was added to the draft response document based on additional public comment at the November 28, 2012 Advisory Council meeting.

funding will be spent on the mainstem, which would undermine other aquatic restoration efforts in the tributary watersheds (#107d).

Response: The *Draft Aquatic Plan* recognizes the importance of flow in both the mainstems and the tributaries of the UCFRB, and the responses under Category #2 address the importance of flow and other stream restoration actions on the tributaries. However, mainstem and tributary instream flow needs together far exceed the funds available for acquiring flow. This is demonstrated by the total budget estimate for the 24 flow-related public concepts of over $85 million, which far exceeds the $20.5 million set aside for flow in the aquatic plan. Thus, based on the aquatic restoration goals (section 3.1.1), the *Draft Aquatic Plan* prioritized the areas that were in most need of flow augmentation and that would benefit the injured Clark Fork River fishery the most, thus the highest priority is the dewatered reach of the Clark Fork River between Galen and Deer Lodge. Projects that can supply water in this reach are the Group 1 projects that will be the first to be evaluated for funding for instream flow. The flow project included in the *Draft Aquatic Plan* that could supply water in other reaches or tributaries (Group 2 and 3) are of lessor priority and will be developed after Group 1, if the opportunity and funding still exists. All of the Group 2 projects are conceptual in nature and, as such, are less likely to be delayed because they have to wait for the Group 1 projects to be funded. As indicated in the *Draft Aquatic Plan*, the State recognizes that some of the lower priority flow projects may not be funded because there are insufficient funds or a water holder is not willing to wait for funding.

With its limiting factor approach to other aquatic restoration efforts in other watersheds (section 3.2.2 of the *Draft Aquatic Plan*), the State adequately proposes the sequencing of these actions based on flow needs. Category #16 further addresses the timing of flow project and non-flow projects.

Comment: One (1) comment suggests that that the NRDP conduct a Request for Proposal (RFP) process that would ask potential landowners interested in providing instream flow to participate in a project and that short-term water leasing be a part of the early stages of the change process to help gage the effects of a potential longer term water purchase/lease (#109b).

Response: The *Draft Aquatic Plan* has some flexibility that will allow the State to determine what is needed to develop a specific project since each project is unique. As a part of development, the State will consider conducting short-term forbearance agreements as one of several ways to assist with the development of a project. These short-term (1-2 years) agreements may be used if the State determines it is necessary to determine some of the benefits of a project. Longer agreements or leases would have to be approved by the Governor, following consideration of input from the public, Advisory Council, and Trustee Restoration Council.

Similarly, the *Draft Aquatic Plan* allows the State to consider conducting RFP's for conceptual projects in which additional landowners would be encouraged to participate. However, participation by landowners in this process may be limited because some landowners may not want to be involved in a public process when the outcome, at least in early stage of the process, is so unclear.

Comments: Three (3) comments note support of certain provisions in flow restoration section (section 3.2.1) of the *Draft Aquatic Plan*:

- Two (2) comments agree with evaluating all of the Group 1 flow augmentation proposals together in order to compare projects (#107b and PH8b).

- One (1) comment supports the due diligence requirement of obtaining a change authorization from DNRC prior to a fair market determination of the proposed instream flow transaction (#71).

- One (1) comment supports the 50% aquatic fund allocation to aquatic flow projects, and also supports additional funding for flow projects provided that such funding is not taken away from existing funds allocated for specific projects (#107d).

Response: The State appreciates this acknowledgement of support. To allocate additional funding for flow augmentation would take away from the funding proposed for other proposed stream restoration actions (section 3.2.2); however, and as part of the project development process, opportunities for matching funds for aquatic flow projects will be pursued, as recognized in the *Draft Aquatic Plan*.

Comment: One (1) comment urges flexibility in providing up-front investment in unique circumstances of some water right purchases/leases (#107d).

Response: Since the comment is urging flexibility in a hypothetical situation, it is difficult to determine what kind of flexibility would be needed for a potential project or the likelihood it would ever occur at some time in the future. As proposed in the *Draft Aquatic Plan*, after completion of project development efforts, which include a DNRC change process determination, each flow project has to be approved by the Trustee, following consideration of input from the public, Advisory Council, and Trustee Restoration Council. Based on its negative experience with the up-front funding approach to the Racetrack project, and because the unique circumstances might be considered to exist with any one project, the State does not propose to change this requirement. As the State gains more experience in the next two years with development of flow projects, it can reconsider this issue as part of its review associated with the planned review of the *2012 Final Restoration Plans* two years after their approval by the Governor that is provided for in the *2012 Process Plan*.

Category 9: Comments specific to Milltown State Park funding

Comments: Eight (8) comments support the proposed funding in the *Draft Plans* of $2.45 million for the development of the Milltown State Park (#4, 72, 74, 98c/e, PH1, PH4, and PH5). These comments also support additional funding for a pedestrian bridge at the Milltown State Park for $3.0 million, asserting that the bridge would help protect the natural resources on both sides of the Clark Fork River, as well as provide public access. In addition, two (2) comments note that the State originally proposed a pedestrian bridge in the *2003 Draft Conceptual Restoration Plan for the Clark Fork and Blackfoot Rivers in the Milltown Dam*, but later changed the location of the bridge to downstream locations (#74 and 98c).

One (1) comment supports the Milltown State Park funding as proposed, without the bridge funding (#12).

Response: The State does not propose to fund this bridge in the *Draft Plans*, which indicates that the bridge "offers minimal, if any resource benefits, has high costs with uncertain recreational benefits, and is not considered cost-effective at this time because of remaining uncertainties."[22] For these reasons and the further explanations provided in this response, the State does not propose any increased funding for a pedestrian bridge at the Milltown State Park.

As indicated in FWP's funding request (see p. 5-8) in the *Draft Plans*, although the pedestrian bridge is an important feature for the greater Milltown State Park, it is not their top priority. After completion of the preliminary design stages, FWP prioritized needs at the Park recognizing the base park project was underfunded. The primary issue they are addressing as a priority is to complete the base Park features with the $2.4 million.

The *2011 Long Range Guidance Plan* and *2012 Process Plan* require that recreational projects must be natural-resource based and offer resource benefits in addition to recreational benefits. The requirement of resource benefits for recreational projects was not in place when the 2009 NRD grant was approved that included funding of the preliminary design of the bridge. The *2012 Process Plan* indicates general preferred types of recreational projects that offer resource benefits, including those that: 1) prevent resource degradation by the user public; 2) enhance existing recreational projects; and 3) provide fishing and hunting access in a resource-protective manner. At this time there are uncertainties remaining at the Milltown State Park associated with site access. Based on available information at this time and uncertainties that exist at the current stage of Park development, the NRDP believes that the proposed pedestrian bridge would only enhance existing recreational opportunities and not offer resource benefits and that it would provide low benefit/high cost recreational access. The public can access the south side of the river, although it would need to drive to the south side of the river via Deer Creek Road.

While the State did propose a pedestrian bridge in its *2003 Draft Conceptual Restoration Plan for the Clark Fork and Blackfoot Rivers in the Milltown Dam (2003 DCRP)* at a location upstream of the confluence, it did not propose this bridge in any of the subsequent versions of the Milltown Restoration Plans. The State also suggested to the Milltown Redevelopment Working Group that if such a bridge were to be constructed at the Milltown State Park, it should be moved downstream of the confluence because placement of the bridge at the location proposed in the *2003 DCRP* would have impacted the natural resources that the State was trying to restore. The State does not concur that a pedestrian bridge was guaranteed as presented in the *2003 DCRP*. There were numerous aspects of the *2003 DCRP* that were not implemented or included in the *2004 Draft Final* or the *2008 Final Restoration Plan for the Clark Fork and Blackfoot Rivers in the Milltown Dam* that were presented to the public and subject of public review.

[22] See section 5.2.1, p. 5-3, of the *Draft Plans*.

Category 10: Comments specific to *Draft Terrestrial Plan* (section 4) in general (not project-specific)

The State received nine (9) comments specific to the *Draft Terrestrial Plan* (#66, 68, 97, 104e, 109e, 113, 117, 122h, and 123a). The comment summary and responses below are organized and grouped below based on the issued raised in the comments.

Comments: Two (2) comments note support of certain provisions in the *Draft Terrestrial Plan.*

- One (1) comment notes the goals and general policies outlined in the *Draft Terrestrial Plan* on pages 4-1 through 4-3 were appropriate (122h).

- One (1) comment indicates that there are very worthwhile terrestrial monitoring and resource protection plans and projects described in the *Draft Terrestrial Plan* (97).

Response: The State appreciates this acknowledgement of support.

Comment: A comment suggests that terrestrial projects should be prioritized to restore wildlife habitat elements that presently limit the abundance of wildlife and that, since these limited habitats occur primarily on private lands, easements or private land acquisition should be considered (#66).

Response: The State agrees that easements or acquisitions on private lands should be considered to conserve wildlife habitat. As indicated in the *Draft Terrestrial Plan* (sections 4.1.1 and 4.2.2), private lands were specifically identified as the focus of restoration and replacement. This focus is also reflected in the *2011 Terrestrial Prioritization Plan*, which did not prioritize federal lands in the UCFRB because they are already managed for natural resource conservation, and because the habitat types most in need of protection (native grasslands, shrub grasslands, and riparian) are most common on private lands.

Comment: A comment requests a summary table be provided that indicates whether or not a submitted concept proposal is included as part of the proposed terrestrial actions (#68).

Response: The State will add a new column the summary table on concept abstracts provided in Appendix A of the *Draft Plans* that indicates which concept proposals are included as part of the proposed terrestrial or aquatic actions. Similar information was requested by and provided to the Advisory Council on November 9, 2012.

Comment: A comment requests clarification about what will happen if projects in one priority landscape do not come to fruition and asks whether any leftovers of a budget allocation for one landscape area can be used for proposed actions in other landscape areas (#68).

Response: The allocations for each priority watershed and landscape area are qualified as estimates that are subject to change based on further project development efforts and, as indicated in the *Draft Terrestrial Plan,* final allocations for each landscape area may vary as

projects are considered.[23] The estimation of costs played an important role in the evaluation of the different alternative's cost-effectiveness and cost:benefit, and in making allocation decisions for aquatic and terrestrial resource priority and reserve funds. However, the role of the cost estimates and their reliability lessens when focusing on the individual actions within priority watershed and landscape areas. The development, design, and implementation of the final Restoration Plans will focus on the actions set forth for each priority watershed and landscape area, rather than a set dollar amount required for each area or landscape.

In most priority watershed and landscape areas, the cost of completing all actions would exceed available funds. As stated in the explanation of costs for each aquatic priority area (sections 3.2.2.1 through 3.2.2.14): "Funding of individual projects within aquatic priority areas will be based on cost-effectiveness and cost:benefit, rather than on concept proposal estimates." **For clarification purposes, the State will add a similar statement in the restoration budget explanation for each of the terrestrial priority landscapes (sections 4.2.4.1 through 4.2.4.9) and also add the following text to section 6:**

> **"The development, design, and implementation of the final Restoration Plans will focus on the actions set forth for each aquatic priority area and priority landscape, rather than a set dollar amount required for each area or landscape. Funding of individual projects within aquatic priority areas and terrestrial priority landscapes will be based on cost-effectiveness and cost:benefit, rather than on concept proposal estimates."**

Unlike the aquatic and terrestrial actions, which focus on the cumulative restoration effects of the projects, the budget amounts for recreational projects were selected on a project- specific basis. The proposed funding amounts reflected in Table 5-1 (p. 5-5) and Table 6-1 (p. 6-3) represent the maximum amount that is available for each proposed recreational projects. This is reflected in the *Draft Plans*' Section 5.2 cost language, which states: "The State proposes funding of up to…" for each of the recreational projects included in the *Draft Plans*. Thus, no additional clarification is needed regarding budgets for recreations projects.

As indicated in Section 6 of the *Draft Plans*, easements or acquisitions will require a subsequent approval of the proposed transaction, once it is fully developed, by the Trustee, following consideration of input from the public, Advisory Council, and Trustee Restoration Council. The State will issue annual reports that will describe the status of all project development efforts and implementation conducted pursuant to the proposed actions covered in this plan. **The State will add a statement to Section 6.0 that indicates the NRDP will also provide quarterly updates on project implementation.**

Comment: A comment questions whether ten years is adequate for maintenance and monitoring for the terrestrial resources (104e).

Response: See response under Category #17.

[23] See footnote #4 in the budget summary in section 4.2.7 (p. 4-44).

Comment: One (1) comment asks the NRDP to not focus solely on projects in the most impacted sub-watersheds, but to consider purchasing some conservation easements on the healthiest streams in the upper part of the UCFRB, such as Modesty or Gold Creek (#117).

Response: The *Draft Terrestrial Plan* does not solely focus on projects in the most impacted sub-watersheds. It focuses on areas that contain valuable wildlife habitat, which include riparian areas within the designated priority landscape areas. Conservation easements on Modesty Creek may be considered since this creek is in the Flints East Face landscape area (section 3.2.2.7). Gold Creek is not within a designated priority landscape area, nor were easements/acquisitions in Gold Creek the subject of a concept proposal submitted by the public. However, such work could be considered in the next update to the *2012 Final Restoration Plans* (see Category #18).

Comment: A comment questions if existing (current and historic) wildlife data was used for prioritization of terrestrial resources in the north Flint Mountains/foothills and near Mill Creek and states that actual wildlife data should have been utilized when identifying Priority 1 and 2 areas (#122h).

Response: The State used wildlife data on big game distribution and abundance going back to the 1970s. Nongame wildlife data was more limited, but where available, it was used to develop models of wildlife distribution. To address information gaps, the State completed a Terrestrial Resource Assessment in 2009, and completed extensive GIS analysis to evaluate the value of distinct portions of the watershed for wildlife. One of the primary criteria to evaluate areas was their "landscape integrity," which is a relative measure of development in an area. The State recognizes the value of wildlife habitats near Anaconda and in the North Flints, but with limited funds available, these habitats were not the highest priority habitats for wildlife protection and enhancement efforts in the UCFRB. In the case of Mill Creek and the Anaconda area, there are already extensive state and federal lands protected from development, including the Mt. Haggin (25,000 acres in the UCFRB) and Garrity Mountain (8,969 acre) Wildlife Management Areas.

Comments: Four (4) comments suggest a greater focus of proposed terrestrial actions and funding to injured areas or the upper part of the UCFRB (#109e, 113, 122h, and 123a).

- A comment recommends that terrestrial restoration funds be expended for restoration of just injured terrestrial resources in the upper part of the UCFRB (#113).

- A comment expresses a concern that terrestrial projects are not allocated to the headwaters area where the majority of injuries occurred (#123a).

- Two (2) comments express a concern that large amounts of proposed funding for terrestrial projects are being proposed for areas not injured by mining (109e and 122h), particularly the Phillipsburg West priority landscape area, where most of the land is owned by "out of state trophy ranch owners," and there is limited legal access (122h).

Response: See responses under Category #3 that address the comments suggesting a greater focus of the *Draft Plans* in general to the headwaters area of the UCFRB. These responses cover these similar comments that are specific to proposed terrestrial actions.

Replacement of natural resources injured by hazardous substance releases caused by the Anaconda Company's mine and mineral processing activities in Anaconda and Butte is a key element of the *2011 Terrestrial Prioritization Plan* and the *Draft Plans.* In some areas, the natural resources are so injured that restoration of them to their original condition would either be cost prohibitive or impossible to achieve, such as is the case with the Opportunity Ponds.[24]

Terrestrial injured areas in the upper part of the UCFRB have and will continue to receive considerable funding for restoration along injured riparian and in upland areas through existing funding allocations. Actions taken to remediate and restore areas impacted by hazardous substance releases are to be cost-effective, pursuant to both the remedial and restoration provisions in federal Superfund law and associated regulations. Appendix B of the *2011 Terrestrial Prioritization Plan* summarizes the planned remediation and restoration at the four terrestrial injured areas and the significant budget for this work, where the State is using dedicated settlement funds pursuant to the 1998 and 2008 Consent Decrees. The planned actions, which have or will occur over decades, include major removal, revegetation, stabilization, and/or treatment actions to jump start the recovery to baseline vegetation conditions, with further natural recovery to occur over time. The *Draft Terrestrial Plan* proposes an estimated budget of $2.4 million for areas surrounding injured areas, such as around the Anaconda and Flints East Face Landscape areas.

The terrestrial injuries covered in Montana v. ARCO were caused by releases of hazardous substances that originated in the Butte and Anaconda areas. The major source for upland terrestrial injury was caused by hazardous substance releases from the Anaconda Smelter operations. The State believes that specific settlement funding for the Smelter Hill Area Uplands injured areas, along with the expected remedial actions, will significantly remediate and restore these injured upland areas. Hazardous substance releases from tailings that came from mining and mineral processing activities in both the Butte and Anaconda area are the major cause for riparian injury along Silver Bow Creek and the Clark Fork River. Significant land acquisition efforts have been successfully implemented within the Silver Bow Creek injured area to protect these floodplain areas and offer recreational opportunities, in addition to the significant remedy and restoration funds allocated for the Silver Bow Creek injured area. Settlement funding for the Clark Fork River injured area is also significant and is expected to adequately address any terrestrial injury along the upper Clark Fork River. Also located in the "headwaters area" between Anaconda and Butte are substantial national forest and State lands, which are protected from development including the substantial Mt. Haggin Wildlife Management Area, which has 25,000 acres in the UCFRB. As also noted in the Draft Terrestrial Plan,[25] the State has also, through its restoration grants process, already acquired large areas for conservation purposes within this landscape, such as Garrity Mountain.

Enhancing wildlife resources in existing urban areas such as Butte, which was not subject of a terrestrial resource claim, is likely not cost-effective because impacts related to urbanization will reduce the effectiveness of wildlife restoration or enhancement efforts. Further discussion of

[24] See section 4.2.4.7 of the *Draft Plans* on p. 4-32.
[25] See Section 4.4.4.7, p. 4-32, of the *Draft Terrestrial Plan*.

why urban areas lack functioning wildlife habitat can be found in the *2011 Terrestrial Prioritization Plan* (p. 7-8).

The *Draft Terrestrial Plan* recognizes the importance of gaining access for wildlife-related recreational use as an important component of easements and acquisitions: One of the three goals for terrestrial restoration (section 4.1.1, p. 4-2) is to: "replace lost hunting, wildlife viewing, bird watching, and other wildlife-related outdoor recreational opportunities by enhancing wildlife habitat, and consequently, wildlife populations, and ensuring public access to these wildlife resources," and the importance of gaining access for wildlife-related recreational use is indicated as an important component of easements/acquisitions (see 4-14). The State acknowledges public access for hunting and other terrestrial recreational services in the Philipsburg area, as well as other parts of the UCFRB, can or will be challenging. See also the response above regarding budgets for priority landscape areas.

Category 11: Comments specific to recreation section/projects in general (section 5)

Comments: The State received seven (7) comments specific to the funding of recreation projects in general (#32d, 84f, 98b, 107b, 109f, 113, and 116). Of those, five (5) support the funding of recreation projects as proposed in section 5 of the *Draft Plans*. These support comments:

- express agreement with recreational project requirements and the 10% budget allocation for recreation projects;

- note the great public interest in recreation sites and appreciation that the ideas for recreation projects came from the public; and

- note the importance of public access and interpretive facilities at these sites to help educate people of the scale of the remediation and restoration that has been directed at these sites, so the mistakes that caused the problems will never happen again.

Two (2) other comments request changes:

- One (1) comment recommends more than $1 million be budgeted for fishing access sites and more sites upstream of Warm Springs Creek, noting that the cost to acquire/develop the Paracini Ponds fishing access site exceeded $1 million. (#32d).

- One (1) comment suggests the $6.5 million allocation proposed for recreation projects go instead to restoration of injured resources (#113).

Response: The State does not propose to change the proposed recreation projects or the funding for these projects in the *Draft Plans*. The proposed recreation projects meet the criteria for recreation projects specified of the *2011 Long Range Plan* and the *2012 Process Plan* as stated in the comments.

The State believes the proposed $1 million for fishing access sites is adequate because FWP developed the concept proposal and budget estimates for these sites. Some of the sites FWP

proposes to develop are already at locations that are in public ownership, thus costs to develop them as fishing access sites do not entail the land acquisition costs, such as that of the Paracini Ponds site. The State does not propose to develop additional fishing access sites upstream of Warm Springs Creek, since a majority of Silver Bow Creek is public land and access is already available through the Silver Bow Creek Greenway project, as indicated in the *Draft Plans*.

The *2011 Long Range Guidance Plan* and the *2012 Process Plan* indicate recreational projects that provide for replacement of lost recreational services covered under Montana v. ARCO and have additional natural resource benefits are allowable restoration activities. Section 5.1 of the *Draft Plans* provides the State's rationale for recreation projects to be considered secondary to resource projects, and proposes limiting the total budget allowed for recreational projects to about 10% of the available funds. The States believes that the recreational projects proposed in the *Draft Plans*, some of which will assist in protecting restored areas, are worthwhile projects that fit well with the purposes of the NRD litigation. This proposed limited recreation funding does not diminish the restoration of injured resources. See also the responses to Category #3 regarding adequacy of funding for restoration of injured resources.

Category 12: Comments specific to contingency or reserve funds

Comments: The State received seven (7) comments specific to contingency or reserve funds that offer various suggestions to:

- keep a substantial portion of funds in reserve and earn interest to afford monitoring, maintenance, and adaptive management (#7 and 117);

- increase the contingency to account for future unidentified restoration needs (#32b and 73);

- set aside greater reserves to address restoration needs of the Clark Fork River mainstem (#109d);

- set aside restoration funding for areas where remediation is not complete or started, such as the Westside Soils Operable Unit (#113); and

- set aside a substantial portion of the aquatic and terrestrial contingency funds for future use in the Silver Bow Creek Watershed or, alternatively, earmark sufficient funds from the Silver Bow Creek remainders for worthy projects in that watershed that have been overlooked (#123d).

Response: The *2011 Long Range Guidance Plan* specifies that: 1) "15% of the funds allocated to the aquatic and terrestrial restoration categories shall be set aside as a reserve fund and will be ineligible for expenditure until such time as the aquatic and terrestrial priority funds have been exhausted;" and 2) "should there be any unexpended money in the SSTOU/SBC Remediation Fund, that excess will be transferred to the general UCFRB Restoration Fund and allocated to a reserve fund for specific projects to be determined based on the overall status of the restoration of resources and services within the Upper Clark Fork River drainage at and above Deer Lodge,

with the Cottonwood Creek drainage being the northern boundary, including the Silver Bow Creek and Warm Springs Creek drainages."

With respect to the excess Silver Bow Creek remediation funds, the *2012 Process Plan* (section 7.3) specifies that: 1) "The State will defer developing a restoration plan specific to the expenditure of these excess remediation funds until the amount to be transferred to the UCFRB Restoration Fund is known. This future plan would be subject of the standard restoration planning review and approval process specified in Section 2; and 2) "The transfer of the excess amount to the UCFRB Restoration Fund would also trigger an associated update/revision to the Aquatic and Terrestrial Restoration Plans."

Both the *2011 Long Range Guidance Plan* and *2012 Process Plan* were the subject of public review and consideration by the Advisory Council and Trustee Restoration Council prior to final approval by the Governor.

DEQ is the lead agency for the Silver Bow Creek remediation effort, and is required to set aside a long-term monitoring and maintenance fund for the remediation project that will address future issues. The current estimate of the potential Silver Bow Creek remediation remainder amount is $30 million.[26]

The *Draft Plans* (section 2-6) indicate the reserve funds have an initial allocation as of 7/1/2012 of $8,059,445 for the aquatic reserve and $3,513,470 for the terrestrial reserve. The State believes that these reserve funds, which will earn interest, are sufficient, plus the *Draft Plans* provide for an additional contingency for the proposed aquatic and terrestrial actions (see Table 6-1).

As explained in the *2012 Process Plan*, DEQ anticipates that major remediation construction activities will be completed by 2014. Following that, the State will determine what unexpended money would be available for transfer to the UCFRB Restoration Fund, after taking into consideration the funds needed for future remediation operation and maintenance and monitoring needs. Pursuant to the 1999 Consent Decree for the Streamside Tailings Operable Unit, which provides for Silver Bow Creek remediation, the State's determination of what amount can be transferred to the UCFRB Restoration Fund is subject of approval by the U.S. Environmental Protection Agency. For these reasons, and to take advantage of the greater knowledge that will be available at the time this remainder amount is determined, the State does not believe any additional earmarking of contingency or excess remediation funds is warranted at this time. See also the responses under Category #2 that are specific to work in the Silver Bow Creek watershed.

[26] Joel Chavez of DEQ provided this estimate in October 2012 based on 1/1/2012 financial reports. The exact amount of the remainder remains to be determined.

Category 13: Support for Washoe/Hafner Park proposals

Comments: Seven (7) comments express general support for funding the Washoe/Hafner Park, offering that the local community as well as others will enjoy this Park that provides fishing, wildlife viewing, walking, and general outdoor recreation opportunities (#5, 6, 10, 18, 23, 103, and PH2).

Response: The State acknowledges these support comments. As indicated in the *Draft Plans*, these recreational projects are proposed for funding of up to $1.5 million, subject to State concurrence about what recreational enhancement will best fit the funding requirements of being natural resource-based and of resource benefit, in addition to recreational benefit.

Category 14: Comments supportive of Confluence project

Comments: Three (3) comments offer support for the proposal for the Confluence Project at Rock Creek advanced by Five Valleys Land Trust (FVLT) (#84e, 91 and 107c). Positive aspects noted in these comments include the project's great value because of its location and benefits to both terrestrial and important aquatic resources, and its substantial matching funds and numerous contributing partners.

Comment: FVLT advocates that the *Draft Plans* be more definitive in allowing this project to proceed as proposed in their concept proposal abstract if: 1) the State confirms that the purchase price is at or below the fair market value as determined by an appraisal; and 2) the State approves of FVLTs' due diligence documents and procedures (#91). Reasons offered for this greater assurance include that the project is fully developed, with completed appraisal, title commitment, environmental assessment, and other needed land transaction documents; that they have secured matching funds for the project at a nearly 3:1 ratio; and that time is of the essence since they entered into a purchase agreement that expires on December 31, 2012, due to a pending subdivision.

Response: The Confluence project (abstract #48) involves a 201-acre land purchase near the confluence of Rock Creek and the Clark Fork River about 20 miles east of Missoula. It has an estimated budget for $400,000 and is included in the *Draft Plans* as a proposed action to be funded with a combination of terrestrial (80%) and aquatic (20%) priority funds (see sections 3.2.2.1 and 4.2.4.9). As noted in the *Draft Plans*, the project will contribute towards meeting restoration needs, and the State agrees with these commenters that the project has significant matching funds and numerous contributing partners and is a well-developed project, unlike the majority of other acquisition concept proposals.

As proposed in the *Draft Plans* (section 4.2 and section 6), this project, as well as ALL other potential acquisition projects, requires subsequent decision-making: "Each project involving property and/or water rights acquisitions will require a subsequent approval of the proposed transaction, once fully developed in accordance with the plans, by the Trustee following consideration of input from the public, Advisory Council, and Trustee Restoration Council." The State proposed this subsequent decision-making process for acquisition projects in the *Draft*

Plans because of the complexity and controversies that acquisition projects typically involve and because of the conceptual nature of the majority of the acquisition proposals.

While the State agrees that FVLT has provided most, if not all, of the needed land transaction documents, the State is not prepared to complete a full evaluation of this project by the end of the year. The State believes that the more detailed information regarding acquisition projects that is acquired through its due diligence is important to assessing the overall merits of project funding, including their cost-effectiveness and benefits. For this reason, and from a consistency standpoint for all potential acquisitions, the State does not recommend the more definitive funding approval language requested by FVLT for this particular project. In early 2013, the State will review the recently submitted appraisal and all of the other documents relating to the Confluence project that FVLT has submitted, together with other relevant information about the proposed acquisition, and be in a position to make a final funding recommendation in the spring 2013. FVLT correctly recognized in its comments the needed State approvals associated with land transaction documents.

Category 15: Comments supportive of other proposals included in the *Draft Plans*

Comments: Seven (7) comments express support for four (4) other concept proposals included in the *Draft Plans*.

- Comment #PH6 supports funding of the Deer Lodge Trestle Park proposal.
- Comments #96, 97, and 111 support funding of the Concept Proposal #56, "Mapping suitable habitat for Passive Restoration of the Upper Clark Fork Basin," as being a low cost proposal that may have a high payoff.
- Comments #112 and 116 support funding of the proposed Harvey Creek Watershed actions.
- Comment #116 supports the Flint Creek flow and watershed proposed actions.
- Comments #72, 74, 98d support the funding of the removal of the remaining portions of the Bonner Dam on the Blackfoot River arm of the former Milltown Reservoir.

Response: The State appreciates this acknowledgement of support for these proposed actions included in *Draft Plans*.

Category 16: Comments specific to Implementation/Timeline

Comment: The *Draft Plans* rely on non-government organizations to develop and implement the restoration projects, and fair bidding practices are unclear (#122f).

Comment: There does not appear to be enough local decision making, and it is unclear if local groups or communities will be able to develop, design, or implement projects (#123e).

Response: The process proposed for project implementation in section 6 of the *Draft Plans* is consistent with provisions specific to implementation set forth in the *2012 Process Plan*.[27] It also meets procurement requirements and is consistent with past guidance adopted by the Trustee Restoration Council that limited the amount of money ($25,000) that private entities, including non-profit entities, can be funded to manage projects. Certain aspects of projects (engineering, construction) will need to be bid out or procured per State procurement requirements, similar to the past process followed in the NRD grants program. The public scoping process also involved a solicitation process that was similar to a typical request for proposal solicitation process.

Section 6 of the *Draft Plans* describes how groups that submitted concept proposals will be given the opportunity to manage the projects, if they desire. Many of the submitters are local members or communities of the UCFRB. Local FWP biologists will also play an important role in all aquatic and terrestrial projects. Landowners will be important decision-makers for aquatic and terrestrial projects, as landowner acceptance is required on all projects located on private land.

Comments: Two (2) comments suggest that the three year timeframe indicated in the *Draft Aquatic Plan* for the development and implementation of watershed projects is optimistic considering the amount of assessment work that is needed (#100 and 122f).

Response: The *Aquatic Draft Plan* has assessment actions scheduled to be implemented in nine of the twelve watersheds in 2013. The watershed implementation schedules also propose that implementation of actions in these watersheds be started in 2014.

The State agrees with these comments that the schedule is aggressive and proposes to slightly revise certain watershed evaluations and project implementation schedules in the *Draft Aquatic Plan* (sections 3.2.2.3 through 3.2.2.14): the State proposes to complete the habitat assessments and validate the fish passage and entrainment assessment data already available on five watersheds in 2013: Blacktail Creek, Browns Gulch, German Gulch, Warm Springs Creek, and Harvey Creek. In 2013, the State also proposes to complete the fish passage and entrainment studies on three watersheds: Blacktail Creek, Flint Creek, and the Little Blackfoot River, which are the only watersheds where fish passage and entrainment assessments have not been completed. Upon completion of these watershed evaluations, project implementation will begin in 2014, where warranted.

Several actions are ready to be implemented in 2013: installation of a new canal crossing with fish ladder on the Kohrs/Manning canal and installation of a fish screen downstream of crossing on Cottonwood Creek; removal of 7,000 cubic yards of mine tailings and fencing on German Gulch; and completion of the integrated restoration actions designed for Harvey Creek.

In 2014, the habitat assessments and validation of the fish passage and entrainment assessments will be completed on three to six watersheds, the number to be determined based on the 2013 evaluation success. Selection of watersheds to be evaluated in 2014 will be based on the proximity to the Clark Fork River mainstem remediation/restoration completed work and the level of information available on individual watersheds. Watersheds upstream of completed

[27] See section 5.3.3 of the *2012 Process Plan.*

mainstem remediation/restoration will be given priority (see Category #2). Evaluation of additional information that may be available, such as DEQ TMDL program data, may assist in watershed selection.

The watershed evaluations in Lost Creek, Dempsey Creek and Mill/Willow Creek watersheds will depend on when the flow is increased within these watersheds. The schedule for flow is not known at this time, so non-flow project scheduling remains marked as "To Be Determined."

The following table provides a revised watershed evaluation and implementation schedule.

Watershed	Evaluation Schedule	Implementation Schedule
Blacktail Creek	2013	2014
Browns Gulch	2013	2014
Cottonwood Creek	TBD	TBD
Dempsey Creek	TBD	TBD
Flint Creek	2013	TBD
German Gulch	2013	2013
Harvey Creek	2013	2013
Little Blackfoot River	2013	TBD
Lost Creek	TBD Flow	TBD Flow
Mill/Willow Creek	TBD Flow	TBD Flow
Racetrack Creek	TBD Flow	TBD Flow
Warm Springs Creek	2013	2014
Silver Bow Creek	2013	2014
CFR Study/Implementation	2013	TBD

TBD: To Be Determined; TBD Flow: To Be Determined based on flow improvements

Category 17: Comments specific to monitoring and maintenance

Comments: The State received three (3) comments specific to proposed monitoring and maintenance actions:

- One (1) comment notes the importance of monitoring in order to ensure the environment is protected (#90).

- One (1) comment suggests that adequate funding be available (or was not enough) for monitoring and adaptive management, since costs will increase with time (#117).

- One (1) comment questions whether the Clark Fork River mainstem study and restoration between Flint Creek and Rock Creek (State-generated alternative #G-4) was coming out of the aquatic monitoring and maintenance fund and whether 10 years was adequate for maintenance and monitoring (#104e).

Response: The State agrees with these comments about the importance of appropriate funding to maintain and monitor the implemented restoration actions. As indicated in the *Draft Plans*, the State will develop monitoring and maintenance plans for the aquatic and terrestrial resources.

Monitoring and maintenance for the proposed restoration actions is included as separate line items on Table 6-1: flow projects ($500,000), other aquatic projects ($1,500,000), and terrestrial projects ($2,360,000). The budget for the Clark Fork River mainstem study and restoration between Flint Creek and Rock Creek is a separate line item budget. The $1,500,000 proposed for monitoring and maintenance does not affect the amount of money for the mainstem actions.

In its presentation of a preliminary version of the *Draft Plans* at the 9/26/12 Advisory Council meeting, the NRDP learned that it had incorrectly omitted the $770,860 proposed for restoration work in the Racetrack Creek watershed from the budget summary table (Table 6-1). To adjust for this error, the NRDP reduced the proposed budget for Clark Fork River mainstem study and related restoration actions on the reach of the river between Flint Creek and Rock Creek from $1,500,000 to $875,000. This reduced budget of $875,000 was the amount in version of the *Draft Plans* that were issued for public comment on 9/27/12.[28]

After further consideration, the State now proposes to reduce the aquatic contingency by $770,860 instead of the budget for the Clark Fork River study and related restoration actions. The mainstem fish population study is estimated to cost $300,000, which would leave $575,000 remaining to implement any necessary actions under the $875,000 indicated in the *Draft Plans*. For a river the size of the Clark Fork in the Flint to Rock Creek section, $575,000 would not likely address the issues impacting this reach of the river, since it is more expensive to work on large rivers than smaller streams. For this reason, the State proposes to reduce the 20% aquatic contingency of $2,780,714 that is in the *Draft Plans* to $2 million (15%) and reinstate the Clark Fork River mainstem fishery evaluation and follow up action funding to $1.5 million. The budget for the Racetrack watershed actions would remain at the $770,860 budgeted for in the *Draft Plans*. Section 3.2.2.1 and Table 6-1 will be revised to reflect these changes in the *2012 Final Restoration Plans*.

The aquatic and terrestrial plans propose 10 year monitoring programs. The State may increase the amount of time for maintenance and monitoring if necessary. For example, a certain percentage of the reserve funds may be allocated for further monitoring past 10 years. Any decision regarding the use of reserve funds would subject to the applicable requirements set forth in the *2011 Long Range Guidance Plan* and *2012 Process Plan* specific to reserve fund, such as the requirement that reserve funds are ineligible for expenditure until such time as aquatic and terrestrial priority funds have been exhausted. Any necessary increase in maintenance and monitoring can be evaluated at a future time when the *2012 Final Restoration Plans* are revised (see Category #18).

Category 18: Comments specific to future work and plan reviews

Comments: The State received three (3) comments regarding future work and reviews to the restoration plans. One (1) comment regarding future work and future restoration plan reviews supports the initial two year review and recommends subsequent reviews every two years (#32a). Two (2) comments indicate support for biennial review of restoration plans (#109d and 123e).

[28] This revision is indicated in footnote #2 on p. 3-22 of the *Draft Plans*.

Response: The *2012 Process Plan* (section 5.4) states that: "The Aquatic and Terrestrial Restoration Plans be reviewed and revised two years after the Governor's approval. The frequency of later reviews/revisions after this initial two year review can be addressed in subsequent plans. The revisions to the restoration plans will include a public solicitation of conceptual restoration proposals." Thus, the two comments that reference a review schedule of every two years are not accurate.

The State believes that it is premature to specify the frequency of future revisions beyond the two year update that is already planned. This frequency should be variable based on the status of implementation of approved restoration actions. The schedule for subsequent review will be the subject of public comment. **For clarification purposes, the State will add the above provisions specified in the *2012 Process Plan* to section 6 of the *Draft Plans*.**

Category 19: Comments specific to watershed evaluations

Comments: Three (3) comments (#84c, 100, and 122g) remark that each watershed proposes several types of projects, although some watersheds may not have problems that warrant restoration action with the listed projects, i.e., fish passage or fish entrainment.

Response: The *Draft Plans* recognize and emphasize that additional watershed evaluations are necessary, as well as review of readily available information (i.e., telemetry study) to determine where actions will be implemented "if warranted." The State agrees with these comments that evaluations are needed to determine the most cost-effective method to implement actions and determine where actions are not needed, and the *Draft Plans* reflect the need for these evaluations.

Category 20: Comments specific to FWP/Normal Government Function

Comment: One (1) comment suggests that the Clark Fork River fish population assessment of the mainstem reach between Flint Creek and Rock Creek and assessing fish loss down irrigation diversions should be considered as a normal government function and the responsibility of FWP (#122c).

Response: The proposed evaluations and actions to determine why the fish population is depressed between Flint Creek and Rock Creek and determine the amount of fish loss down irrigation diversions could be conducted by FWP; however; the level of effort and expertise proposed to complete this work as proposed in the *Draft Plans* is beyond FWP's normal staffing and funding levels. FWP is not required to conduct this proposed study, and the study and related action proposed will advance restoration of the Clark Fork River fishery. FWP acknowledges PhD level expertise may likely be needed to evaluate this reach of the Clark Fork River, and estimates a crew of three additional staff (1.75 FTE) will be needed to implement the monitoring proposed.

The great amount of work that is proposed in the *Draft Plans*, including the needed watershed evaluations of fish loss, will require the State to use agency staff, non-profit organization staff,

and procured engineers and scientists to work together. Section 6.0 proposes to use interested conceptual submitters to complete some of the actions they propose.

Category 21: Comments specific to native species restoration

Comment: One (1) comment (#122e) expresses concerns regarding the Silver Bow Creek fish barrier proposed in the *Draft Aquatic Plan* to enhance native trout populations in Silver Bow Creek, even though non-native fish currently reside in Brown's Gulch, German Gulch, and Blacktail Creek, and maintaining a cutthroat fishery in Silver Bow Creek may not be possible without catch and release regulations. This commenter also notes that water quality in Silver Bow Creek and the Clark Fork River may not be suitable to support a native fishery, given that restoring a native fishery may not be the best use of these funds (#122b).

Response: As stated in the responses provided under Categories #2 and 16, restoring a native trout fishery cannot occur without working in the tributaries. As for creating a native fishery within Silver Bow Creek, FWP proposes the fish barrier as a first step in the process. It is acknowledged that to establish a Silver Bow Creek native fishery, there are issues that need to be addressed: non-native fish in Silver Bow Creek tributaries, and the water quality issue caused by the Butte-Silver Bow wastewater treatment plant. Native fish exist and have survived in the tributaries of Silver Bow Creek during the time when Silver Bow Creek mainstem was not able to support fish. With the remediation and restoration on Silver Bow Creek, fish, including native fish, have returned to Silver Bow Creek. Recent monitoring and research has shown that westslope cutthroat trout are re-colonizing and utilizing Silver Bow Creek. Rainbow trout pose a hybridization risk to westslope cutthroat trout, and brown trout pose a competition and predation threat. There are miles of fishable brown trout water in the Upper Clark Fork River and the opportunity to pursue a fishery that could have a major native component is highly desirable. The fish barrier will eliminate rainbow and brown trout from moving into the Silver Bow Creek watershed and will give an opportunity for native fish to re-establish. FWP indicates that Silver Bow Creek may not become a native fishery; however, the barrier provides a chance for a native fishery to be established.[29] The Butte-Silver Bow wastewater treatment plant issues are the responsibility of Butte-Silver Bow. DEQ has required the county to upgrade their treatment plant to address the water quality discharge issues and upgrades are planned/underway pursuant to a consent order between the county and DEQ.

The State also recognizes that the Clark Fork River mainstem will most likely not be a native trout fishery. The goal stated in the *Draft Plans* referencing native fish is specific to "maintaining and improving existing populations to protect diversity." Water quality in both the Clark Fork River and Silver Bow Creek mainstems will ultimately determine if native trout will return to these waters; however, the restoration of the mainstem fisheries is not based solely on native trout restoration.

[29] See Section D in the *2012 Aquatic Prioritization Plan*, p. 14.

Category 22: Comment requesting reconsideration of City of Deer Lodge proposals

Comment: The City of Deer Lodge (#124) requests reconsideration of their proposals for Cottonwood Creek restoration within the City of Deer Lodge (abstracts #45 and 46) and their wastewater treatment plant upgrade (abstract #38).

- The City of Deer Lodge requests that: "rather than completely making our project (Cottonwood Creek) ineligible for funding on the basis of normal government function because of the flood aspect of the project, we want to respectfully ask that the NRDP consider allowing Deer Lodge to develop a project that would address our concerns regarding fish habitat and vegetation improvements."

- The City of Deer Lodge comments that they understand that wastewater treatment plant upgrades are normal government function, but their upgrades, costing approximately $11 million total, go beyond normal government function. They request $2 million to slip-line their sewer lines to decrease groundwater from infiltrating into their system and replace the City's UV disinfection system.

Response: The Cottonwood Creek urban channel proposals are not included for funding in the *Draft Plans* because the proposed work: "serves more for flood control planning and mitigation purposes, than restoration purposes, with minimal aquatic benefits, and involves actions considered to be normal government responsibility."[30] The new proposed implementation schedule is provided in responses under Category #16. Under that schedule, the watershed assessments to determine what restoration actions to implement would not occur on Cottonwood Creek until 2014 or 2015 at the earliest, except for the Kohrs/Manning canal fish passage project. As provided in the *2012 Process Plan*,[31] the *2012 Final Restoration Plans* are scheduled to be reviewed and revised two years after the Governor's approval. That revision process will include a public solicitation of new conceptual restoration proposals for potential inclusion into revised restoration plans. The State believes that this would be the best time to reconsider a revised enhancement project for the urban portion of Cottonwood Creek in the City of Deer Lodge.

As set forth in the *2012 Process Plan*, under the policy criterion addressing normal government function:[32] "The State will not fund restoration activities for which a governmental agency would normally be responsible or that would receive funding in the normal course of events. With this criterion, the State will evaluate whether a particular restoration plan alternative would be implemented if recovered natural resource damages were not available. The Restoration Fund may be used to augment funds normally available to government agencies to perform a particular action if such cost sharing would result in the implementation of a restoration action that would not otherwise occur through normal agency function."

The State indicates in the *Draft Plans* that treating the City of Deer Lodge wastewater effluent is normal government function and eliminating groundwater from entering the sewer lines does not

[30] See p. 3-29 of section 3.2.2.5 in the *Draft Aquatic Plan*.
[31] See section 5.4, p. 18 of the *2012 Process Plan*.
[32] See section 6.2, p. 22 of the *2012 Process Plan.*

affect the flows in the Clark Fork River as these waters will eventually return to the river. The NRDP believes slip-lining and the treatment facility upgrades constitutes normal government function because these needed upgrades are typically required of all community treatment systems, entail expenditures that would not exceed what would be considered "normal" due to natural resource injuries in and around the communities of the UCFRB, and do not involve going above compliance levels to advance restoration on injured resources. Similar treatment upgrades are being required by DEQ of the other counties in the UCFRB. NRDP previously communicated its determination regarding this issue of normal government function to the City in 2010.[33]

Category 23: Miscellaneous Comments

Comments: Three (3) letters covered issues outside the scope of the *Draft Plans*:

- A comment from County Water and Sewer District of Rocker requests that Butte-Silver Bow's groundwater plan include an allocation of $250,000 to replace portions of the drinking water system lines in Rocker that are believed to be eroding due to acid mine drainage, and $60,000 to explore a potential alternate water supply (#1);

- A comment remarks about irresponsible mining company management decisions and accountability of mine owners/managers (#3);

- A comment notes support of an unspecified project (#19);

Response: The State separately responded to comment #1 in its response to comments on the *2012 Butte-Silver Bow Groundwater Restoration Plan*.[34]

Comment: A comment asks whether other options were considered besides the three alternatives discussed in the *Draft Plans* (#104c).

Response: Section 2.2 of the *Draft Plans* explains how the previous analysis of alternatives were built upon and taken into consideration in the alternatives analysis provided in the *Draft Plans*. Sections 3.1 and 4.1 of the *Draft Plans* provide further discussion regarding, respectively, the aquatic and terrestrial components.

[33] 8/13/10 memo from Carol Fox of NRDP to Darryl Barton, consultant for the City of Deer Lodge.
[34] *Final Response to Public Comment on Draft Groundwater Restoration Plans prepared by Butte-Silver Bow and Anaconda-Deer Lodge City/County Government*, prepared by the NRDP, dated October 2012.

Section III. Summary of Proposed Changes to the *Draft Plans*

Following is a summary of all the proposed changes to the *Draft Plans* reflected in this response document:

Category 3: Comments on areas/focus of proposed actions/funding in *Draft Plans (*p. 8):

To help clarify the comprehensive picture of all NRD settlement funds dedicated to restoration work in the UCFRB, the attached October 2012 update to the funding summary flow chart provided in the *2011 Long Range Guidance Plan* (see Attachment B of this response document) will be added to funding tables in Appendix B and described in a revised Section 2.4.

Category 6: Requests to move some Group 2 flow projects up on priority to Group 1 (pp. 18 and 19)

To reflect the changes covered in the this Category, the State will revise the appropriate parts of section 3.2.1 (Eligible Flow Projects; p. 3-14) and Table 3-2 (Aquatic Flow Groups; pp. 3-17&18) of the *Draft Plans* accordingly, with the following additions: "Though the Racetrack Pipeline and the Pauley Ranch projects are not located on the Clark Fork River, there is a reasonable expectation that they could offer some amount of instream flow to the dewatered reach of the Clark Fork River. If upon further investigation, a Group 1 project remains viable but is determined not to likely provide instream flow to the dewatered reach of the Clark Fork River, it will be reclassified as a Group 2 project and be evaluated with the Group 2 projects."

Category 10: Comments specific to draft Terrestrial Resource Plan (Section 4) in general (not-project specific (pp. 25 – 27)

- The State will add a new column the summary table on concept abstracts provided in Appendix A of the *Draft Plans* that indicates which concept proposals are included as part of the proposed terrestrial or aquatic actions.

- For clarification purposes, the State will add a similar statement in the restoration budget explanation for each of the terrestrial priority landscapes (sections 4.2.4.1 through 4.2.4.9) and also add the following text to section 6:

    - "The development, design, and implementation of the final Restoration Plans will focus on the actions set forth for each aquatic priority area and priority landscape, rather than a set dollar amount required for each area or landscape. Funding of individual projects within aquatic priority areas and terrestrial priority landscapes will be based on cost-effectiveness and cost:benefit, rather than on concept proposal estimates."

- The State will add a statement to Section 6.0 that indicates the NRDP will also provide quarterly updates on project implementation.

Category 16: Comments specific to Implementation /Timeline (p. 34-36)

The following table provides a revised watershed evaluation and implementation schedule that would be reflected in changes to the 12 aquatic priority watershed sections (sections 3.2.2.3 through 3.2.2.14)

Watershed	Evaluation Schedule	Implementation Schedule
Blacktail Creek	2013	2014
Browns Gulch	2013	2014
Cottonwood Creek	TBD	TBD
Dempsey Creek	TBD	TBD
Flint Creek	2013	TBD
German Gulch	2013	2013
Harvey Creek	2013	2013
Little Blackfoot River	2013	TBD
Lost Creek	TBD Flow	TBD Flow
Mill/Willow Creek	TBD Flow	TBD Flow
Racetrack Creek	TBD Flow	TBD Flow
Warm Springs Creek	2013	2014
Silver Bow Creek	2013	2014
CFR Study/Implementation	2013	TBD

TBD: To Be Determined; TBD Flow: To Be Determined based on flow improvements

Category 17: Comments specific to monitoring and maintenance (pp. 36 – 37)

The State proposes to reduce the 20% aquatic contingency of $2,780,714 that is in the *Draft Plans* to $2 million (15%) and reinstate the Clark Fork River mainstem fishery evaluation and follow up action funding for the reach between Flint and Rock Creek to $1.5 million. The budget for the Racetrack watershed actions would remain at the $770,860 budgeted for in the *Draft Plans*. Section 3.2.2.1 and Table 6-1 will be revised to reflect these changes in the *2012 Final Restoration Plans*.

Category 18: Comments specific to future work and plan reviews (pp. 37 – 38)

The State will add the following provisions specified in Section 5.4 of the *2012 Process Plan* regarding subsequent review to section 6 of the Draft Plans:

"The Aquatic and Terrestrial Restoration Plans be reviewed and revised two years after the Governor's approval. The frequency of later reviews/revisions after this initial two year review can be addressed in subsequent plans. The revisions to the restoration plans will include a public solicitation of conceptual restoration proposals."

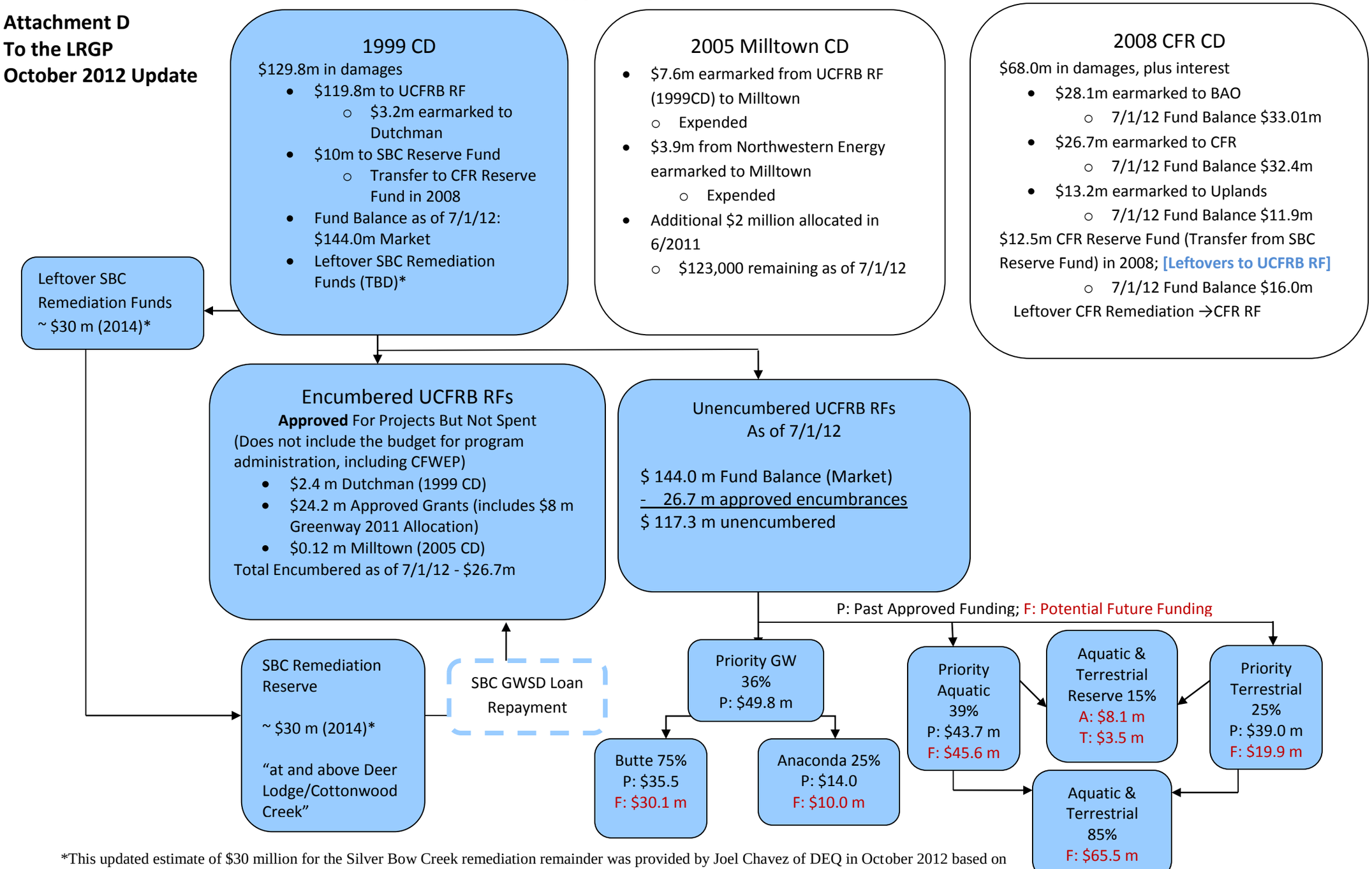
Attachment A. Categorical Breakdown of Public Comments

Category No.	Category Title	Letter Number	# of Comments
1	Comments in general support of both draft Aquatic and Terrestrial Plans or draft Aquatic Plan specifically (some of these letters request changes)	7, 33, 34, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 57, 66, 69, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98a, 99, 100, 102, 103, 104a/b, 105, 107a, 108, 109a, 110, 112, 115, 116, 117, 118, 119, 121, 125, PH3, PH7, PH8a	65
2	Comments specific to timing and funding of CFR mainstem vs. tributary work		40
	a) work on mainstem before tributaries – 4 comments	a: 104d, 109c, 122a/b, 123b	
	b) work on both as proposed – 36 comments	b: 33, 34, 38, 40, 41, 43, 44, 45, 47, 48, 52, 53, 76, 77, 78, 80, 81, 82, 83, 84d, 85, 86, 88, 93, 94, 95, 96, 99, 100, 102, 105, 107a, 110, 116, 119, 121	
3	Comments on areas/focus of proposed actions/funding in *Draft Plans*		36
	a) comments supportive of more focus and funding in upstream injured areas – 6 comments	a: 18, 25, 32c, 73, 113, 123a/d	
	b) comments supportive of basin-wide funding/focus as proposed in draft – 30 comments	b: 33, 41, 42, 43, 44, 46, 47, 49, 53, 76, 78, 80, 81, 83, 84g, 85, 86, 87, 88, 91, 93, 94, 95, 99, 107a, 110, 115, 119, 121, PH8d	
4	Support for Drummond Riverside Park	8, 9, 11, 13, 17, 26, 28, 29, 35, 36, 37, 39, 50, 51, 54, 58, 67, 101, 125, 126	20
5	Comments Specific to Silver Lake Water System Proposal		19
	a) support comments – 15 comments	a: 14, 15, 16, 19, 20, 21, 22, 24, 25, 27, 30, 56, 103,106, 123c	
	b) comments supporting proposal with due diligence – 4 comments	b: 107g, 113, 120, PH8c	
6	Requests to move some flow projects up in priority to Group 1		11
	a) Racetrack project – 10 comments	a: 31, 59, 60, 61, 62, 63, 64, 65, 107f, 114	
	b) Pauly project – 1 comment	b: 107e	
7	Support for Little Blackfoot River restoration	34, 38, 40, 46, 52, 87, 89, 92, 102, 105	10
8	Comments specific to flow issues (Section 3.1) in general but not-project specific	7, 71, 77, 84b, 100, 107d, 109b, 117, 122d, PH8b	10

Category No.	Category Title	Letter Number	# of Comments
9	Comments specific to Milltown State Park funding		9
	a) support of proposed funding, plus additional funding for bridge – 8 comments	a: 2, 4, 72, 74, 98c/e, PH1, PH4, PH5	
	b) opposition to bridge funding – 1 comment	b: 12	
10	Comments specific to draft Terrestrial Resource Plan (Section 4) in general (not-project specific)	66, 68, 97, 104e, 109e, 113, 117, 122h, 123a	9
11	Comments specific to recreation section/projects in general (Section 5)	32d, 84f, 98b, 107b, 109f, 113, 116	7
12	Comments specific to contingency	7, 32b, 73, 109d, 113, 117,123d	7
13	Support for Washoe/Hafner Park proposals	5, 6, 10, 18, 23, 103, PH2	7
14	Comments supportive of Confluence Project	84e, 91, 107c	3
15	Comments supportive of other proposals included in draft plans		1 to 3 per proposal
	Deer Lodge Trestle Park proposal	PH6	
	Beaver Mapping proposal	96, 97, 111	
	Proposed work in Harvey Creek	112, 116	
	Proposed work in Flint Creek	116	
	Bonner Dam Removal	98d, 72, 74	
16	Comments specific to Implementation /Timeline	100, 122f, 123e	3
17	Comments specific to monitoring and maintenance	90, 104e, 117	3
18	Comments specific to future work and plan reviews	32a, 109d, 123e	3
19	Comments specific to watershed evaluations	84c, 100, 122g	3
20	Comments specific to FWP/Normal Government Function	122c	2
21	Comments specific to native species restoration	122b, 122e	2
22	Comment requesting reconsideration of City of Deer Lodge proposals	124	1
23	Miscellaneous Comments	1, 3, 19, 104c	4

Attachment B

Attachment D
To the LRGP
October 2012 Update



*This updated estimate of $30 million for the Silver Bow Creek remediation remainder was provided by Joel Chavez of DEQ in October 2012 based on 1/1/2012 financial reports. The exact amount of the remainder remains to be determined.

ATTACHMENT C. SUPPLEMENTAL INFORMATION SPECIFIC TO 2005 SILVER BOW CREEK WATERSHED RESTORATION PLAN

1) Excerpt from Final Response to Comments on Terrestrial Prioritization Document specific to 2005 Silver Bow Creek Plan[31]

Category #4: Consideration of 2005 Silver Bow Creek Watershed Restoration Plan

Comments: Jocelyn Dodge, the Butte Restoration Alliance, and the Butte Silver Bow Council of Commissioners, advocate for greater consideration of the 2005 Silver Bow Creek Watershed Restoration Plan (Silver Bow Creek Plan) in the prioritization process, and for making it of equal importance to the prioritization plan (letters T-9, T-15, and T-19, respectively).

Response: We have revised the Terrestrial Wildlife Assessment Methods section of the document (p. 4) to indicate how this more recent prioritization effort considered the background information from the Silver Bow Creek Plan. However, as recognized in these comments, the Silver Bow Creek Plan was not a primary driver in terrestrial prioritization. The following bullets explain why:

a. The major difference between the two plans is that the Draft Terrestrial Plan was developed for the entire Basin, whereas the priorities developed in the Silver Bow Creek Plan are strictly for that watershed; thus, the two plans address priorities on different scales (Silver Bow Creek watershed vs. UCFRB). The Silver Bow Creek Plan makes it clear that the restoration needs identified in that plan would likely change in the context of all restoration needs within the UCFRB.

b. The Silver Bow Creek Plan identified priorities for improvements to natural resources and natural-resource based recreational opportunities, whereas the Draft Terrestrial Plan identified priority areas for wildlife habitat protection and enhancement efforts. The Silver Bow Creek Plan identified restoration needs without consideration of funding restrictions and indicated that some of these needs may not meet the requirements for NRD funding.

c. The Silver Bow Creek Plan involved compiling existing information on the natural resources of that watershed, with only limited available data on wildlife. The Draft Terrestrial Plan was based on a system-wide assessment of terrestrial resources in the Basin that involved collecting up-to-date information on wildlife, including nongame, and a refined mapping of wildlife habitat.[32] As a result, the 2010 prioritization effort provides a more robust scientific analysis than the 2005 effort. From a habitat perspective, the Draft Terrestrial Plan was based on a revised land-cover map fitted to the UCFRB. This improved map is more

[31] Final State of Montana's Response to Public Comment on the August 2010 Draft Final Upper Clark Fork River Basin Terrestrial Wildlife Resource Prioritization Plan, dated December 2011.

[32] In 2008, FWP and its contractors characterized the geographic extent and condition of wildlife species and their habitats in the UCFRB. The final report of this Basin-wide assessment summarizes and provides links to eight assessment reports that will be used to identify areas to focus wildlife habitat protection and enhancement efforts in the Basin. This report is available at: http://doj.mt.gov/wp-content/uploads/2011/06/2010ucfrbterrestrialresourceassessment.pdf.

accurate than the statewide GAP layer used for the Silver Bow Creek Plan; also, the Draft Terrestrial Plan is informed by more accurate wetland/riparian mapping completed after the Silver Bow Creek Plan was written.

d. The Silver Bow Creek Plan did not make as strong of a connection between injured wildlife resources identified in the damage assessment and their wildlife-related goals for the watershed as is made in the Draft Terrestrial Plan.

Some of the wildlife priorities identified in the Silver Bow Creek Plan match the priorities in the Draft Terrestrial Plan. Both plans place a high priority on restoring, protecting, and enhancing riparian and wetland habitats. The high priority restoration needs for wildlife resources in the Silver Bow Creek watershed identified in the Silver Bow Creek Plan include protection of critical wildlife winter range, in the Mill and Willow Creek sub-basins, and the lower portions of German Gulch, plus restoration of injured wildlife habitat in the riparian corridor of Silver Bow Creek and in upland areas around Anaconda. The latter two injured areas are designated high priority in the Draft Terrestrial Plan and will be addressed with dedicated funding sources. Mill and Willow Creek will benefit from planned restoration activities in the nearby uplands. Portions of Mill Creek and German Gulch winter range are already in FWP ownership (Mt. Haggin Wildlife Management Area). Other areas may be considered for conservation on a project specific basis.

2) Excerpt from *Final Response to Comment on Aquatic Prioritization Document specific to 2005 Silver Bow Creek Plan*[33]

Category 4: 2005 Silver Bow Creek Watershed Restoration Plan and priority for areas near Butte

Comments: Jocelyn Dodge (A-8), the Butte Restoration Alliance (A-15), and the Butte Silver Bow Council of Commissioners (A-20), advocate for greater consideration of the *2005 Silver Bow Creek Watershed Restoration Plan (2005 Silver Bow Creek Plan)* in the prioritization process. Dodge and the Butte Restoration Alliance also maintain that the Draft Tributary Plan focuses too much on current value of the fishery and not enough on the Butte area, even though it is the most injured (A-8, A-15). Kris Douglass (A-19) notes that there are many functioning habitats that are very close to the major source of the injury, near Butte, and suggests that these areas be high priority areas.

Response: The Draft Tributary Plan indicated how the *2005 Silver Bow Creek Plan* was considered in the 2010 prioritization effort and the Final Aquatic Prioritization Plan has a new Section D (Strategies for Fishery Management) that connects to the fishery goals of the 2005 Silver Bow Creek Plan. For directing Basin-wide efforts, we do not, however, believe the *2005 Silver Bow Creek Plan* should be given equal weight as the 2010 prioritization plans for the following two reasons:

1. The aquatic and terrestrial priorities identified in our tributary and terrestrial prioritization plans were developed for the entire basin, whereas the priorities developed in the *2005 Silver*

[33] *Final State of Montana's Response to Public Comment on the Draft Final Upper Clark Fork River Basin Tributary Prioritization Plan*, dated December 2011.

Bow Creek Plan were identified strictly for that watershed. The *2005 Silver Bow Creek Plan* and Draft Tributary Plan address priorities on different scales (UCFRB watershed vs. Silver Bow Creek watershed). The *2005 Silver Bow Creek Plan* makes it clear that the relative priorities of restoration needs identified in that plan would likely change in the broader context of all restoration needs within the entire UCFRB.

2. The *2005 Silver Bow Creek Plan* involved a compilation of existing information on the natural resources of that watershed, and was limited to a limited a number of tributaries. The *2010* Draft Tributary Plan was based on a basin-wide methodical assessment of fisheries and riparian habitat that involved collecting comparable data from each stream area.[34] Thus the 2010 prioritization effort involved a more robust scientific analysis than the 2005 effort. The fish populations and riparian habitat assessment data used for 2010 prioritization effort incorporated and expanded upon the fishery information provided by FWP and USFS for the *2005 Silver Bow Creek Plan*.

Even with the limited application of the *2005 Silver Bow Creek* Plan for these reasons, there is general agreement between the *2005 Silver Bow Creek Plan* and the 2010 prioritization effort with regards to priority tributaries in the Silver Bow Creek Watershed. As a result of the comments received, the Final Aquatic Prioritization Plan now includes areas near Butte that were assessed but not prioritized in the Draft Tributary Plan. The Final Aquatic Prioritization Plan now includes the following Silver Bow Creek tributaries as either a Priority 1 or a Priority 2 area: German Gulch, Browns Gulch, Upper and Beef Straight Creek, Blacktail Creek, Alaska Gulch, American Gulch, and Flume Gulch. These tributaries constitute nearly all of the major perennial tributaries in the Silver Bow Creek Watershed and even some tributaries that were not discussed in the *2005 Silver Bow Creek Plan*. In addition, we added text to clarify the high priority of the mainstem Silver Bow Creek and Clark Fork River fishery restoration. The Final Aquatic Prioritization Plan discusses these areas in more detail in Section A (Mainstem Priorities) and Section B (Prioritization of Tributaries).

With regards to the comment regarding too much focus of current fishery conditions, it needs to be understood that the driver of the prioritization is how best to restore the mainstem fisheries, building on what are the already completed or planned mainstem remediation and restoration efforts (see Background and Purpose Section). Also, the adaptive management approach allows for adjustment of priorities as conditions change and new information is obtained.

[34] 2008 and 2009 Assessment of Fish Population and Riparian Habitat in Tributaries of the Upper Clark Fork River Basin Phase I and Phase II.
http://doj.mt.gov/wp-content/uploads/2011/06/2009phase1report.pdf.
http://doj.mt.gov/wp-content/uploads/2011/06/2009phase2report.pdf.

Attachment C. Updated on prioritized restoration needs identified in the 2005 Silver Bow Creek Watershed Restoration Plan

Note: The first four columns of this table are excerpts from the executive summary table in the 2005 Plan; the last column (shown in grey) is updated information. The September 2012 Draft Aquatic and Terrestrial Resources Plan is referred to as "A/T Plan" in this column.

Rank	*Restoration Importance*	*Planning Area and Issue/Problem*	*Restoration Needs*	*Status relative to 2012 Restoration Plans*
1	Very High	**Basin and Blacktail creeks:** Limited drinking water sources for the city of Butte make **Basin Creek** a critical source of water.	Protect Basin Creek from potential pollution sources and activities that may threaten water quality. Mitigate risk of wildfire and potential sediment loading.	Basin Creek not eligible under A/T Plan.
2	Very High	**Butte Area:** Limited drinking water supplies for the city of Butte make Moulton Reservoir a critical source of water.	Protect Yankee Doodle Creek from potential pollution sources and activities that may threaten water quality.	Not eligible for A/T Plan.
3	Very High	**Mill and Willow creeks and Silver Bow Creek corridor:** The future configuration of connections between Mill Creek, Willow Creek, the Mill-Willow Bypass, Silver Bow Creek, the Warm Springs Ponds, and the Clark Fork River is unknown.	Investigation should be conducted as to the ultimate fate and the implications of changing the configuration of the connections between Mill Creek, Willow Creek, the Mill-Willow Bypass, Silver Bow Creek, the Warm Springs Ponds, and the Clark Fork River prior to EPA's determination of a final remedy for the Ponds. See also deferred category #59.	Remedy is responsible for investigation; A/T propose work on Mill/Willow Creeks.
4	Very High	**Basin and Blacktail creeks:** Genetically pure population of native westslope cutthroat trout exist in focal habitat in upper **Basin Creek** and need protection.	Activities to protect the upper Basin Creek water supply will help protect westslope cutthroat trout. Reservoirs form a fish passage barrier to prevent introgression of non-native species. Evaluate adjunct westslope cutthroat trout habitat in other parts of Basin Creek.	Basin Creek not eligible in A/T plan; some.
5	Very High	**Butte Area and Silver Bow Creek corridor:** Mining related contaminants continue to enter Silver Bow Creek and degrade water quality. Storm water from the Butte area and groundwater in Butte Area One are the primary sources.	Ongoing and future remediation and the outcome of current litigation may address some of these sources of contamination. Seek effective remediation of the Butte Priority Soils Operable Unit. Following the Record of Decision, update the State's restoration plan for Butte Area One. Eliminate or isolate remaining sources of water quality impairment.	Remedy on-going; further work beyond remedy is focus of draft BAO plan.
6	Very High	**Silver Bow Creek corridor:** Remediation and restoration actions along the Silver Bow Creek floodplain on private lands need to be protected from potentially detrimental land management activities in the long term.	Acquire land or conservation easements along the Silver Bow Creek corridor to protect restored areas. Subarea 2 contains about 320 acres and Subarea 4 contains about 500 acres of private lands that should be considered for acquisition or easements.	SBC Greenway project fully funded.
7	Very High	**German Gulch:** A significant native westslope cutthroat trout population needs preservation and protection. Chronic competition from brook trout may jeopardize native westslope cutthroat trout populations.	Continue actions by Montana FWP and USFS to suppress brook trout. See deferred need #57 associated with Beal Mine.	Past funded grant project; further work proposed in A/T plan.

Rank	*Restoration Importance*	*Planning Area and Issue/Problem*	*Restoration Needs*	*Status relative to 2012 Restoration Plans*
8	Very High	**German Gulch:** Much of German Gulch is diverted for irrigation just before reaching Silver Bow Creek. This water could significantly help water quality problems in Silver Bow Creek, especially during low flows.	Explore the best alternative for obtaining adequate flows for connectivity with Silver Bow Creek. Alternatives include water conservation, water leasing, alternative irrigation source, or acquisition. In 2005 the State approved funding of a project to provide for fish passage and this connectivity.	Fish passage/flow augmentation project completed.
9	Very High	**Browns Gulch:** Current conditions of fisheries are not well understood.	Conduct additional fisheries assessment in the upper and lower reaches of Browns Gulch and major tributaries. In 2004 the State approved funding for such assessment work.	Subject of additional grant funds and proposed work in A/T Plans.
10	Very High	**Silver Bow Creek corridor:** Recreational opportunities are minimal due to historic mining impacts.	Implement a greenway trail system along the entire length of Silver Bow Creek. Acquire/develop access for fishing and water recreation. Create a series of trails connecting to nearby communities (Anaconda and Butte). These needs reflected in the 1998 Silver Bow Creek Greenway design document. Public land managers believe this trail should be low impact where it bisects important wildlife habitat and should allow foot, bicycle, or horse access only.	SBC Greenway project fully funded.
11	Very High	**Butte Area:** Additional connecting trails between the Greenway and urban residential areas are desired.	Develop additional connecting trails.	Not eligible in A/T Plans but being addressed through other funding sources.
12	High	**Mill and Willow creeks:** Critical wildlife winter range exists along the public land/private land boundary and could be developed.	Protect these critical lands from potentially detrimental development through land acquisition and conservation easements.	The upper part of Mill Creek covered in A/T Plans but Willow Creek is not.
13	High	**Mill and Willow creeks:** Dewatering for irrigation impairs fisheries and exacerbates water quality problems.	Increase instream flow during critical life stages of fish through water leasing, conservation and other measures.	Subject of proposed actions in A/T Plans.
14	High	**Browns Gulch:** Stream flow is inadequate for fisheries in the lower reaches of Browns Gulch. Lack of flow is the greatest limiting factor to fishery improvements.	Identify and implement means to augment stream flow. Water conservation and water leasing are possibilities. In 2004 the State approved funding for a project to conduct needed flow studies.	Subject of additional grant funds and proposed work in A/T Plans.
15	High	**Silver Bow Creek corridor:** Remedial actions will fall short of creating an optimal fishery.	Enhance fish habitat diversity and structural complexity; improve substrate in future reaches where appropriate. Approved Greenway funding will address this need in Reaches A - I. Coordinate with installation of migration barriers as needed to promote native fishery.	SBC Greenway fully funded; SBC fish barrier proposed in A/T Plans.
16	High	**Basin and Blacktail creeks:** Genetically pure westslope cutthroat are likely present in upper Blacktail Creek.	Evaluate focal and adjunct westslope cutthroat trout habitat in Blacktail Creek. Take appropriate measures to improve/protect these habitats.	Work proposed in Blacktail Creek in A/T Plans.

Rank	*Restoration Importance*	*Planning Area and Issue/Problem*	*Restoration Needs*	*Status relative to 2012 Restoration Plans*
17	High	**Butte Area:** The Westside Soils Operable Unit area currently has a high level of recreational use but has impacts from this use and hazards associated with historic mining activity, such as abandoned mine dumps.	EPA decisions on the needed remediation, if any, of the Westside Soils Operable Unit has been deferred until the Agency is funded to address this area. Restoration planning should be deferred until completion of a final remedy decision. ARCO owns the majority of lands and seeks a recreational land use scenario. Anticipated recreational needs are likely to be limited to trails for dispersed recreation.	Pending remedy investigations and decisisons.
18	High	**Butte Area:** The upper reaches of Silver Bow Creek were obliterated by historic mining activities. A replacement surface water feature is desired.	Create a surface water feature with adjacent parkland and trails along the upper reaches of Silver Bow Creek between Texas Ave and the Blacktail Creek confluence. Plans are under way to accomplish this using water from the Silver Lake water system. Treated Berkeley Pit water is also a possible future water source if this treated water is not needed for mining operations. Current mining operations consume all of the current output of the Horseshoe Bend treatment plant.	Suggested idea in BAO scoping process; could possible be funded under BAO plan.
19	High	**Butte Area:** Butte area residents have not had access to a variety of recreational features as a result of mining activities and contamination.	Develop a variety of recreational features such as parks, open spaces, swimming areas and trails that are readily accessible for citizens of all ages. Benefits will vary based on number and magnitude of these features; cost assumes 3 of these features.	Some projects funded in past; not eligible in A/T plan.
20	High	**Basin and Blacktail creeks:** Thompson Park recreation facilities are in need of upgrade or repair. A consistent funding source is needed to maintain these facilities.	Obtain funding for renovation and maintenance of facilities. Undertake renovation activities.	Funded by past NRD grant.
21	High	**Mill and Willow creeks:** Storm water runoff from smelter fallout contaminated hillslopes continues to deliver metals to Mill Creek and to a lesser extent, Willow Creek.	The outcome of pending remedial action/remedial design and litigation may address part of this issue. The State's restoration claim and plan cover the needed actions.	The State's Uplands claim and plan parly cover these actions; others are remedy or NGF.
22	High	**German Gulch:** Private lands along lower German Gulch adjacent to the Fleecer Mountain and Mt. Haggin Wildlife Management Areas are at risk for potentially detrimental development. These lands are part of the elk and deer winter range in this area.	Protect these critical lands from potentially detrimental development through land acquisition and conservation easements.	Not covered in the A/T Plans.
23	High	**Browns Gulch:** Establish focal habitat for westslope cutthroat trout.	Assess feasibility of and establish isolated westslope cutthroat trout habitat in headwater areas, particularly in Alaska Gulch, via fish passage barriers and limited habitat improvement.	Subject of additional grant funds and proposed work in A/T Plans.

Rank	*Restoration Importance*	*Planning Area and Issue/Problem*	*Restoration Needs*	*Status relative to 2012 Restoration Plans*
24	High	**Silver Bow Creek corridor:** Remedial actions will fall short of restoring a healthy riparian vegetation zone along Silver Bow Creek and its floodplain. Wildlife populations are limited in the corridor.	Enhance riparian vegetation. Wetlands creation may be appropriate locally and will have a beneficial impact on water quality. Establishment of a healthy riparian zone along Silver Bow Creek will create the opportunity for wildlife to reoccupy this area. Approved Greenway funding will address Reaches A-I and P-R.	SBC Greenway fully funded.
25	High	**Butte Area:** Contaminated soils and lack of fresh water supplies have prevented vegetation from surviving and thriving in the Butte area. Entryway corridors and open spaces are in need of "greening."	Identify limiting factors to vegetation survival and address these issues. Develop alternative water sources that will enable vegetation to survive. One option is to utilize water that flows from upper Silver Bow Creek and Yankee Doodle Creek into the Yankee Doodle tailings impoundment. Use of this water is limited by current mining operations. Plant metals-tolerant trees, shrubs, and grasses (preferably native species) along entryway corridors and open spaces.	Partially covered in draft BAO plan.
26	High	**Mill and Willow creeks:** Smelter emissions have caused widespread contamination of soils with metals and arsenic in upland areas around Anaconda, degrading vegetation and wildlife habitat.	The outcome of current remediation and litigation is anticipated to address this problem. Restoration of the upland areas is addressed in the State's 2002 restoration plan.	Remediation and restoration of uplands funded by 2008 settlement and underway.
27	High	**German Gulch:** Public input indicates a desire for trail access from Silver Bow Creek.	Examine feasibility and appropriateness of a trail from Silver Bow Creek to German Gulch. In 2005 the State approved funding for a footbridge and 2 mile trail in lower German Gulch.	Funded by NRD grant.
28	High	**Butte Area:** Nearby recreational fishing opportunities are not available to local residents.	Develop recreational (stream and/or pond) fishing opportunities in the Butte area. One such opportunity in Butte is currently being considered.	Hillcrest FAS funded by NRD grant; other sites possibly funded via BAO Plan.

Attachment D

Supplemental Information Specific to Silver Lake Water System Flow Proposal

STATE OF MONTANA
DEPARTMENT OF JUSTICE
Natural Resource Damage Program
1301 East Lockey, P.O. Box 201425
Helena, MT 59620-1425
(406) 444-0205/FAX 444-0236

MEMORANDUM

TO: Carol Fox

FROM: Rob Collins, NRDP

DATE: November 19, 2012

SUBJECT: Background Regarding Butte's Interest in the Silver Lake Water System

Butte Silver Bow (BSB) has submitted a proposal, which it asks to be included in the State's Aquatic and Terrestrial Resources Restoration Plans (ATRP), that would provide millions of dollars for the capital improvements to the Silver Lake Water System (SLWS). In its original proposal, BSB sought $15 million from the Restoration Fund for these upgrades and an additional $5.0 million for operation and maintenance (O & M) of the system. A recent revision of that proposal now seeks about $11.6 million to pay for upgrades, without mention of O & M. In return for this consideration, BSB says that it will guarantee that the State will perpetually receive an annual 10,000 acre-feet of stored water to be delivered at Meyers Dam for instream flow for the benefit of Montana's fishery in Warm Springs Creek (WSC) and the Clark Fork River (CFR) at the rate and during the months as specified by the State.[1] BSB further claims that the right to keep this flow in WSC and the CFR to Gold Creek is legally enforceable.

In the course of performing its due diligence, the NRDP has come across a number of significant issues that raise questions relating to whether BSB can make good on its guarantee, including the most significant issue of whether the SLWS is economically sustainable over the long-term. In order to fully understand this and the other issues raised by BSB's Silver Lake proposal, it is important to understand the recent history of the SLWS, including the basis upon which BSB acquired its rights in the system in late 1996.

Background

The actual transfer of the SLWS, which was owned by Montana Resources (MR), to BSB occurred as part of the settlement of the lawsuit, Sister Mary Jo McDonnell, et al v. Dennis Washington and the Butte Water Company, filed in 1990 as a consequence of the Butte Water Company's failure to adequately provide for the BSB municipal drinking water system. That lawsuit was resolved in late 1996 in accordance with a comprehensive settlement that not only involved the plaintiffs and defendants in the lawsuit, but also involved ARCO, BSB, ASiMI, MR, Anaconda-Deer Lodge County, and certain WSC irrigators, namely Ueland Ranches and Jess Eighorn. This settlement involved a court-approved stipulation resolving the lawsuit, and also a

[1] See Paul Babb's October 25, 2012 and Jon Sesso's October 26, 2012 letters to Vivian Hammill, Chair, NRD Restoration Trustee Council.

very complicated series of other agreements among the above parties, relating to their water rights in Warm Springs Creek (WSC) and the SLWS. These agreements, which together constitute about a one-inch thick stack of double-sided paper, were incorporated by reference in the court-approved stipulation.

The driving force behind this expansive "SLWS settlement" was ARCO, who saw this as a way to counter Montana's NRD claims against it, which were concurrently being litigated in United States District Court. As part of this settlement, MR agreed to convey its direct flow and storage water rights in the WSC basin and in SLWS to BSB on the condition that BSB take responsibility for the operation of the SLWS and provide certain water deliveries to MR at its concentrator in Butte for so long as MR's mining operations continue.[2] In order to induce the other parties to join the SLWS settlement, ARCO agreed to invest a substantial amount of money in the water system for capital improvements, for ongoing O & M, and for payments to the irrigators. In return, ARCO was granted various direct flow rights by the irrigators and entered into water service agreements with BSB under which ARCO was to be provided with additional WSC direct flow and the right, subject to subordination to the industrial water users, to utilize SLWS stored water. As part of the SLWS settlement, it also was agreed that ASiMI would receive a constant water supply of 3.68 million gallons per day (mgd) for use at its new manufacturing plant near Butte and that $5.0 million from BSB's Tax Increment Financing Industrial District (TIFID) bond proceeds, which had been earmarked for ASiMI's use, would be used for SLWS improvements.

ARCO expected to use much of the water that it was receiving as a result of the SLWS settlement for instream flow in Silver Bow Creek, WSC and the CFR. ARCO believed that it could then argue to the Federal District Court, as a defense to the State's NRD claims, that because this instream flow was restoring the fisheries in these streams, it should not have to pay restoration damages to the State for the natural resource injuries to these fisheries that had resulted from its mining operations in Butte and Anaconda.[3] Subsequently, however, and before ARCO could present this defense at trial, there was a partial settlement of the State's NRD claims against ARCO, which was approved in 1999, and then a final settlement of the lawsuit in 2008. Consequently, there was no specific agreement in those settlements that provided for SLWS stored water to be used for instream flow.

After the final settlement of the NRD lawsuit in 2008, ARCO was no longer motivated by the lawsuit to maintain its involvement in the SLWS in order to provide instream flow to WSC and the CFR. Less than three years later, in 2011, very soon after BSB presented the SLWS Capital Inventory and Replacement and O & M Plans to ARCO, with their $90 million price tag, ARCO exercised its option to terminate its role in the SLWS. ARCO's departure from the SLWS has led BSB to make its current proposal to the State.

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[2] In addition, as part of the SLWS settlement, MR agreed to make an annual payment to BSB of $238,000, which was to be used to improve BSB's municipal water system in Butte. The settlement, however, did not provide that MR would have any obligation to pay for capital improvements or O & M on the SLWS.

[3] In Article XI of the SLWS water service agreement with ARCO, BSB agreed to "confirm" that its newly found ownership of the SLWS, provided "real and direct public benefits to the BSB community," and BSB also agreed that it would ask that ARCO's role in contributing to these benefits "be proportionally recognized in the context of the natural resource damage claim." ARCO intended to introduce these admissions at the trial of the NRD lawsuit.

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MEMORANDUM

TO: **Rob Collins**
Supervising Assistant Attorney General
Department of Justice
Natural Resource Damage Program

FROM: **Don MacIntyre**

RE: **Silver Lake Water System**
Instream Flow for Fisheries
Water Service Agreement Issues

DATE: **November 13, 2012**

Underlying Facts:

The City and County of Butte-Silver Bow (BSB) owns the Silver Lake Water System (SLWS). The SLWS is a surface water resource system located in the Warm Springs Creek drainage in Deer Lodge County, Montana. In November 1996, BSB entered into water service agreements with Montana Resources, ARCO Environmental Remediation, and REC Advanced Silicon Materials. In September 2010, BSB entered into a water service agreement with Northwestern Energy. Pursuant to its agreement, ARCO Environmental Remediation terminated its agreement effective in June, 2012. As a result, BSB is offering to make stored water available to the State of Montana under a water service agreement for instream flow augmentation in Warm Springs Creek. BSB would retain ownership and operational responsibility for the system. Under BSB's proposal the State of Montana would determine the timing and volume of releases of stored water.

Historically, from 1882[1] through 1983 when mining operations in Butte ceased, the SLWS was used primarily for the purpose of providing water for mining, smelting and related industrial purposes. Starting in 1989, Montana Resources operated the SLWS on a minimal basis with some minimal system

[1] Anaconda Copper Mining Company began diverting water from Warm Springs Creek to supply water to its Anaconda smelter in 1882. The first storage began in 1898 with the construction of the Storm Lake Dam. The Silver Lake West Dam was constructed in 1902, and the Silver Lake East Dam in 1918.

maintenance or repairs. As the result of a class action law suit (commonly referred to as the "McDonald Class Action") a Stipulation and Compromise Settlement Agreement dated October 7, 1996, transferred the SLWS to BSB. During the summer of 1997, BSB began system repairs.

Water right claims were timely filed for the SLWS in Montana's general stream adjudication.

Stored Water Rights:

The Department of Fish, Wildlife and Parks has stated that stored water is a preferred source of water for augmenting fish flows. As such, stored water deserves general discussion. From a constitutional perspective, Montana has traditionally favored the storage or impoundment of water. Both Article IX, section 3(2), 1972 Constitution and Article III, section 15, 1899 Constitution provide that reservoir sites "shall be held to be public uses." Likewise, the judicial branch has favored storing or impounding water. *See, e.g., Anaconda Nat'l Bank v. Johnson*, 75 Mont. 401 244 P. 141 (1925). As concerns the rights of senior and junior water right holders versus a holder of stored water the general rules are:

- A junior storage right is not required to provide water from storage to a senior water right holder. The junior must release water from the impoundment to the senior water right holder only to the extent that the natural flows of the stream are maintained. *Gwynn v. Phillipsburg*, 156 Mont. 194, 478 P.2d 855 (1971). In other words, the senior is entitled to the natural flow into the reservoir and not to any water stored in the reservoir.

- A senior storage right holder must release the natural flow waters to a junior appropriator if the senior storage water rights are fulfilled. *Witcomb v. Helena Water Works*, 151 Mont. 443, 444 P.2d 301 (1968). Essentially, once the reservoir is full, a junior water user is entitled to the natural flow into the reservoir and not to any water stored in the reservoir.

- Reservoir owners are entitled to construct and maintain reservoirs capable of holding more water than would be required in any one year in order to retain an extra supply during wet years for use in dry years. The amount of carryover supply has never been precisely defined in Montana law. A reservoir owner may store the amount the owner has the right to use in any given year, and also any additional amount that others do not have the right to use and that would otherwise go to "waste". *Federal Land Bank v. Morris*, 112 Mont. 445, 116 P.2d 1007 (1941).

- Water may be turned into the natural channel from a reservoir and withdrawn or diverted at a point downstream for beneficial use. Water stored in a reservoir which is turned into a natural channel shall not be considered part of the natural flow of that stream. Mont. Code Ann. §85-2-411.

These general rules effectively establish the principle that a prior appropriator has no right to stored waters where there is no intent to abandon the stored water, for the stored waters are not part of the natural flow. This principle is explains the chief value of stored water.[2]

Risk Issues:

1. **Water Supply:**

While stored water creates a reliable source of water for the protection of instream flows, it needs to be determined whether there is sufficient water in the drainage to meet the contractual obligations created under the various water service agreements and, if so, whether the stored rights under consideration are burdened with any legal impediments to its use. Because the existence of wet water is the goal, there must be assurance that there is an adequate source of water in the drainage basin. This is a due diligence issue to be addressed a hydrologist or a water resource engineer. It is the highest risk to be evaluated.

A second water supply issue concerns the water service agreement with Montana Resources. Montana Resources has first priority water from the SLWS during temporary "planned" or "unplanned upset" conditions at the MR facilities. BSB is contractually obligated to deliver up to 18mgd (27.9 cfs) in the event of an unplanned upset; and up to 7mgd (10.85 cfs)[3] in the event of a planned upset. The fact is that as a contractual right the failure to use all or any portion of the water for upset conditions will not result in the total or partial abandonment of the contract right to the water. Unlike the water service agreements with ARCO Environmental Remediation and REC Advanced Silicon Materials, which have fixed terms of twenty years with an automatic extension of an additional twenty years, the Montana Resources' water service agreement has a perpetual term until Montana Resources elects to terminate its rights to receive water under the water service agreement. As such, the Montana Resources' first priority contract right and the perpetual term with a condition subsequent exposes the State of Montana to the risk that water will not be available for instream flows during periods of "planned" and or "unplanned" upset conditions throughout the term of a water service agreement between the State and BSB. This risk should be taken into consideration in any negotiation of a water service agreement with BSB.

A third water supply issue that must be addressed is BSB's claim to increase the volume of water available in Silver Lake. BSB claims it has the right to replace its pumping system which presently cannot pump below the 6400 foot elevation. BSB's proposed rebuild would allow pumping down to the 6,380

[2] The Department of Natural Resources and Conservation developed a September 17, 2012 Memorandum asserting imported water should be treated the same as area of origin water in change authorization proceedings. While the law concerning stored water was not analyzed in the memorandum, a potential exists that the Department of Natural Resources and Conservation may want to treat stored water and imported water in a like manner. The listed rules do not appear to support treating stored water the same as imported water.

[3] The settlement agreement does not have a volume cap on the amount of water that must be delivered to Montana Resources. The lack of a volume cap may compound the risk associated with the Montana Resources' water service agreement.

foot elevation effectively increasing the volume of water available for marketing. BSB's claim is based on the assertion that there are records establishing Anaconda Copper Mining Company, later renamed the Anaconda Company, (ACM) used the greater volume during its operations. This issue raises factual and legal issues.

The issue is whether a person with a stored water right has the right to increase the volume of its appropriated right by replacing its pump in a lake thereby increasing the volume of water it may divert in filling its contract obligations under water service agreements. The succinct statement of pre-1973 water law concerning beneficial use of water, which is the basis, limit and measure of the water right, is that beneficial use is limited by time and volume. Time limits use during the period of actual need, and then only within the periods of time established by the original appropriation. Volume is limited by the amount of water claimed, by ditch capacity, by head gate capacity or diversion capacity, by the actual amount used (which is limited by the amount reasonably necessary), and by the appropriator's original intent, whichever is the lesser. A determination of which is lesser is a question of fact.

Without having the opportunity to review the BSB's historical evidence alleged to support the higher volume, it is difficult to assess the risk related to accepting the claim in negotiations. If BSB has records establishing ACM using a greater volume during its operations then BSB can establish as a fact matter a basis to entitlement to the maximum historical use. Nevertheless, legal issues may be encountered if the volume is greater than claimed in statements of claim filed in the general adjudication. While the Water Court may allow BSB to amend or object to its own claims to raise the volume cap, potential legal hurdles exist. Objections could be raised as to forfeiture of the greater volume (for failure to claim the maximum amount). Assuming BSB's (its predecessors-in-interest) statement of claims support the use of a volume of water below the 6400 foot elevation of Silver Lake there remains the issue of partial abandonment (since mining operations in Butte ceased in 1983, a sufficient period of time having elapsed to shift the burden to BSB to establish an intent not to abandon that portion of the right BSB claims to support the higher volume).

It is my understanding that the Department of Natural Resources and Conservation has not encountered a similar situation in the administration of the Water Use Act as is presented herein. However, If BSB does not have the records to support the rebuilding of pumps to divert the greater volume of water, given the Department of Natural Resources and Conservation's general position that any increase burden on the source of supply requires a permit, it is more probable than not a permit would be required before BSB could increase the volume of water available from Silver Lake.

Regardless of the information BSB supplies, a risk remains that the information is not sufficient to support an increase in volume pending: (1) the completion of the adjudication in the basin, where forfeiture and partial abandonment issues can be resolved, if raised; (2) a determination by the Department of Natural Resources and Conservation upon issuance of a permit increasing the volume; or (3) a determination by the Department of Natural Resources and Conservation that a permit is not required to lower pumps in lake storage to increase the volume of water that may be diverted from storage. It is unlikely that the adjudication will be completed during the pendency of negotiations. It may also be problematic that the risk will be clarified by the Department of Natural Resources and

Conservation in a timely manner. Consequently, if the volume of water increase is a central issue to assure the instream flows bargained for in a water service agreement between the State of Montana and BSB, then the risk is more probable than possible. As such, the risk must be addressed in negotiations and the burden of the risk assigned to BSB.

A complicating factor in BSB's plan to increase storage by replacing the pumps is the Amended Stipulation and Agreement (2002 Stipulation) between BSB and a group identified as Esther McDonald, the Granite County Water Users Association, and its individual members (McDonald, *et al*). The 2002 Stipulation allows McDonald, *et al*, to object to using storage below the 6400 foot elevation. BSB asserts that such an objection can only be made in a Department of Natural Resources and Conservation permit or change authorization proceeding, and BSB is not required to obtain either since it will be using the greater volume of water as it was historically used. The Natural Resource Damage Program (NRDP) is not the forum to make a determination as to the viability of BSB's position.

If the increase of Silver Lake storage can only occur through a change authorization or a permit proceeding before the Department of Natural Resources and Conservation there is a significantly high probability that Esther McDonald, et al, will exercise their right to object to a proposal to use any of the capacity of Silver Lake below an elevation of 6400 feet level (NAD 27). There is a high probability of objections to a plan replacing the pumps and lowering the pump intakes to the so-called "historic drawdown" of Silver Lake to 6380 feet. While the parties were able to agree to eliminate the limitation on withdrawals from Silver Lake below the 6455 foot elevation in a 1991 Stipulation (later amended by the 2002 Stipulation) based on a compensation arrangement, there is considerable doubt as to a further agreement to allow withdrawals below the 6400 foot elevation. Without any information to establish that either a financial resolution is likely or that lack of adverse effect can be established if objections are raised, there is a significant risk that water will not be available from storage below the 6400 foot elevation in Silver Lake.

If the increase of Silver Lake storage does not require a permit or change authorization there remains the issue of abandonment. The historic evidence concerning the period of nonuse relied upon by BSB to establish it and its predecessor-in-interest did not abandoned the right to store water below the 6400' elevation should not exceed 10 years of successive nonuse. If it does the question of abandonment must be overcome by establishing a lack of intent of abandonment. As noted above, the NRDP cannot definitively determine the issue of abandonment. Only a judicial determination can eliminate the risk associated with relying on a storage right that has not been actively used in recent history (the number of years greater than ten successive years of nonuse increases the difficulty in proving lack of abandonment). If the right to pump below the 6400' elevation fails under an abandonment argument, then BSB would need a permit from DNRC subject to the objections by McDonald, *et al*. Unless, BSB can establish abandonment has not taken place, there will remain a significant risk that water will not be available from storage below the 6400 foot elevation in Silver Lake.

2. <u>Water Right Concerns:</u>

The first potential legal impediment is whether the stored rights were statutorily forfeited. By filing the statements of claim in Montana's general adjudication any argument as to the forfeiture of the water rights has been settled. *See, In the Matter of the Adjudication of the Yellowstone River,* 253 Mont. 167 (1992), 832 P.2d 1210 (the failure to file a statement of claim under Montana's general adjudication works as a forfeiture of the water right). Consequently, there has been no statutory forfeiture of BSB's SLWS water rights.

A second potential legal impediment that must be addressed when considering acquiring an interest in a water right is whether the water right been abandoned. As noted in the previous section dealing with storage, abandonment requires both the act of nonuse and the intent to abandon the right. While the law of abandonment is not as black and white as the law of forfeiture, It appears from a facial review of the (1) history of use of the water right for mining and industrial purposes; (2) the use and maintenance of the system, albeit minimal through 1997; and, (3) the immediate action of BSB in repairing, maintaining, and placing of the water to beneficial use that there is support for the argument that abandonment of the direct flow rights and storage, including above the 6400 foot elevation in Silver Lake has not occurred. In other words, it does not appear that either element of abandonment exists.[4] This conclusion is further supported by the fact that abandonment of the subject water rights was not an issue of concern in either the adjudication proceedings (Montana Water Court) or in the change of use authorization process (Department of Natural Resources and Conservation).

With a conclusion that forfeiture and abandonment of the storage rights are not viable issues, the next inquiry is whether storage rights for mining and industrial use can be used to augment instream flows. The answer is yes, if a change of use authorization is approved by the Department of Natural Resources and Conservation. BSB has received change authorizations. The change authorizations are temporary changes. As temporary change authorizations they expire on a fixed date – December 31, 2016. See, Mont. Code Ann. § 85-2-407 governing temporary changes. Although specifically providing that a temporary change may not be approved for a period to exceed 10 years; there is no limitation on the number of renewals. Mont. Code Ann. § 85-2-407(2), (3).

Nevertheless, because the change authorization to instream flow to enhance fisheries in Warm Springs Creek and the Clark Fork River is a temporary change a certain degree of risk is inherent in entering into a water service agreement that is dependent upon the permanency of the underlying change. One risk is that the Department of Natural Resources and Conservation during the term of the original temporary change authorization, on its own or on objection by an appropriator,[5] may determine that the right of an

[4] For a more exhaustive discussion of the law of abandonment see "Trust Group's Claimed Water Rights, Montana Water Law, Abandonment" memorandum attached to MONTANA ENVIRONMENTAL TRUST GROUP, LLC TRUSTEE OF THE MONTANA ENVIRONMENTAL CUSTODIAL TRUST WATER RIGHTS REPORT for BASINS 41I, 76F, 76GJ and 76M, on file with the Natural Resource Damage Program.

[5] An appropriator may object (i) during the initial temporary change application process, (ii) during the change renewal process, and (iii) once during the term of the temporary change permit. Mont. Code Ann. § 85-2-407(4)(b).

appropriator (other than a permittee with a priority of appropriation after the date of the filing of the application for a temporary change authorization) is adversely affected. Mont. Code Ann. § 85-2-407(4)(a). Since the original term extends through December 31, 2016, the potential risk should be recognized and addressed in any water service agreement entered into prior to the expiration date.

As noted above, a temporary change authorization may be renewed without limitation. For each renewal notice filed by an applicant with the Department of Natural Resources and Conservation, the agency must give notice to other appropriators potentially affected by the renewal and allow 90 days for submission of new evidence of adverse effects to other water rights. Mont. Code Ann. § 85-2-407(3). The temporary change authorization may not be renewed if the agency determines that the right of an appropriator (other than a permittee with a priority of appropriation after the date of the filing of the application for a temporary change authorization) is adversely affected. *Id*. Consequently, unless a temporary change authorization to an instream flow is made permanent,[6] a potential risk in the underlying water right reverting to its permanent purpose, place of use, point of diversion, or place of storage will exist. It should be expected BSB will assert the risk is minimal given the rigor of the administrative process in acquiring a temporary change authorization and the complex negotiations during the hearing phase of the temporary decree stage before the Water Court. While BSB assertion are cogent, nevertheless, this risk should be recognized and BSB assume the burden of the risk in any water service agreement entered into by the State of Montana with BSB. The extent and nature of the burden of risk would be a matter of negotiation of the water service agreement.

Assuming the soundness of the temporary change authorization, protection of instream flow augmentation is an issue of concern. Without adequate institutional controls the likelihood of maintaining instream flows throughout the stretch of stream being protected is problematic. While mechanical controls, such as measuring devices and gaging stations, can be installed, the key to protection is the appointment of a water commissioner. For example, the Water Court in its General Abstract remark to Water Right Number 76G 124870 00 (change authorization version) recognizes this wherein it states:

> This right is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay his proportionate share of the fees, compensation and expenses, as fixed by the district court, incurred in the distribution of the water.

As it stands there is not a court appointed water commissioner on the stretch of stream and river that the State of Montana seeks to protect by entering into water service agreement. The adjudication in Basin 76G is in the temporary preliminary decree stage. Fortunately, Montana law provides that a temporary preliminary decree or portion of a temporary preliminary decree as modified after objections and hearings is enforceable and administratible. Mont. Code Ann. § 85-2-406(4). The appointment of a

[6] For example, by amendment to Mont. Code Ann. § 85-2-407.

water commissioner is essential to protecting instream flows. The appointment of a water commissioner should not create an insurmountable hurdle in an effort to protect instream flows where funding of a water commissioner is provided for in the CFR restoration plan and where a timely appointment of a water commissioner can be made.[7]

The validity of the underlying water rights to the change authorization also needs to be examined. There are a myriad of water rights associated with Warm Springs Creek. These rights have been subject to objections, stipulations, subordination agreements, joint proceedings before a water master, entry of an order approving the water master's report, and scrutiny through the temporary change authorization process. An initial examination of the entire list of water rights leaves one with the definite impression that a number of the water rights may be paper water rights. However, for purposes of this memorandum, the only water rights of interest are those that BSB bases its offer of a entering into a water service agreement with the State of Montana. Each of these latter rights was initially a mining or an industrial water right. BSB has applied for and received temporary change authorizations to use the water for instream flow for fisheries from the Department of Natural Resources and Conservation, in addition to other beneficial uses. Effectively, the Department of Natural Resources and Conservation has undertaken the historical use analysis required to determine the validity of the water rights upon which the water service agreement is to be based. For example, in ¶ 38, Conclusions of Law, Preliminary Determination to Grant Change, Application to Change Water Right No. 76G 30047471, the agency states:

> The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. *McDonald v. State* (1986), 220 Mont. 519, 722 P.2d 598; *Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1170 (Colo. 2002).

Likewise, consumptive use of water may not increase when an existing right is changed. The applicant is required to provide evidence of the historical amount consumed and the amount to be consumed under the proposed change. The Department of Natural Resources and Conservation in evaluating the information must determine that there will not be an increase in consumptive use as a result of the change.

When the Department of Natural Resources and Conservation approved Change No. 30013721-76G for the use of 40cfs up to 15.580 acre feet per year for fisheries purposes in Warm Springs Creek and the Clark Fork River (including 76G 91528-00, 76G-91530-00, 76G-91531-00, 76G-91557-00, 76G-124864-00, 76G-124867-00, 76G-124868-00, 76G-124869-00, 76G-124870-00, 76G-124871-00, 76G-124872-00,

[7] The Department of Fish, Wildlife and Parks has experience in the timely appointment of water commissioners. Statement by Mike McLane in July 11, 2012 meeting.

76G-126480-00, 76G-126484-00, and 76G-126508-00) the agency necessarily reviewed and evaluated the water right information provided by BSB regarding historic use (including storage and the right to fill the reservoirs continually throughout the year), adverse effect, and consumptive use. Short of a judicial determination, the agency's evaluations and determinations in granting temporary changes under the statutory criteria of the Montana Water Use Act are at a minimum a sufficient proxy for an independent legal analysis of the water rights at issue. An evaluation of the water rights by independent legal counsel would at best result in a qualified legal opinion of the validity of the subject water rights as changed.

Given the tortious history of the temporary decree phase of Basin 76G, specifically the Warm Springs drainage from source to mouth, one can reasonably expect that the final decree more likely than not will resemble the listing of water rights as agreed to by the parties and adopted in water master's report. Nevertheless, given that a final decree has not been entered, the possibility exists that the underlying rights could be challenged. Such a challenge should be viewed as a remote possibility and not as a probability. While this creates a risk factor, it is no greater a risk than exists with all water rights for which no final decree has been entered.

Summary:

The greatest risk to entering into a water service agreement with BSB for water from the SLWS is being convinced that there is a sufficient water supply to fulfill the water demands set forth in a water service agreement. This risk is exemplified by the issue of whether BSB can increase the volume of water available for a water service contract by rebuilding the outtake pumps in Silver Lake.

Storage water is a preferred source of water for providing instream flows for fisheries in Warm Spring Creek. The SLWS has a storage component that can better provide for instream flows than would reliance on direct flow rights alone. Nevertheless, storage without adequate measuring and monitoring facilities and without the appointment of a water commissioner is insufficient to assure the instream flows can or will be maintained.

The historical information leads to the conclusion that the underlying water rights upon which the temporary change authorizations are premised have not been forfeited since timely filed claims were made in the general adjudication. The historical information leads to the conclusion that abandonment of the underlying water rights has not occurred since the elements of act and intent to abandon would be difficult to establish. Nevertheless, there remains a question as to whether BSB may market water below the 6400 foot elevation in Silver Lake.

While it may appear that a number of water rights in the Warm Springs drainage may be paper water rights, the underlying water rights upon which the temporary change authorizations have been given appear to be viable water rights. However, it must be noted that there is no final decree in the basin. The basin is subject to further examination. This risk that further scrutiny by the water court may result in a reordering of the water rights can be seen as a possibility rather than a probability. The duty to defend the water right remains with the owner of the water right.

Assuming the viability of the underlying water rights, the water rights BSB relies on in its offer to the State of Montana to enter into a water service agreement for instream flow protection of fisheries in the basin are based on temporary change authorizations. Because permanency of instream flow is in the best interest of the State of Montana, a risk the temporary change authorization may be revoked exists. This risk can be seen as a possibility rather than a probability. Nevertheless, the risk should be assigned to BSB and addressed in a water service agreement.