



Water Policy Interim Committee

60th Montana Legislature

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TO: Water Policy Interim Committee

FROM: Greg Petesch

RE: Closed Basin Legal Issues

DATE: June 18, 2007

As part of the administration and statewide adjudication of water rights under the provisions of Title 85, chapter 2, MCA, for determining the priority of post-1973 claims to water, it became clear that there were significantly more adjudicated and legitimate nonadjudicated claims to water than there was available water. The Legislature responded to this fact by enacting a moratorium on new applications in the overappropriated basins. The Legislature enacted basin closures for the Teton River basin, sections 85-2-329 and 85-2-330, MCA, the Upper Clark Fork River basin, sections 85-2-335 through 85-2-338, MCA, the Jefferson River basin and Madison River basin, sections 85-2-340 and 85-2-341, MCA, and the Upper Missouri River basin, sections 85-2-342 and 85-2-343, MCA, and a temporary subbasin closure for Bitterroot River subbasins, section 85-2-344, MCA. In addition, section 85-2-319, MCA, provides that in a highly appropriated basin or subbasin, the Department of Natural Resources and Conservation (DNRC) may by rule reject permit applications or modify or condition permits already issued.

With certain statutory exceptions, each basin closure statute provides that the DNRC may not process or grant an application for a permit to appropriate water within the closed basin. New ground water applications represent one of the statutory exceptions. The Legislature recognized, however, that some ground water bears a close relationship with surface water and that allowing unrestricted appropriations of ground water would defeat the purpose of the basin closure laws. Each basin closure law, with the exception of the Upper Clark Fork River basin, defines ground water in a way that forbids the processing of new applications for ground water that is "immediately or directly connected" to the basin's surface water. See sections 85-2-329(2), 85-2-340(2), and 85-2-342(2), MCA. In the Upper Clark Fork River basin, an application for a ground water permit must be accompanied by a report prepared by a professional engineer or hydrologist addressing the hydrologic connection between the source of the ground water and surface water. The DNRC may not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of section 85-2-311, MCA, that the source of the ground water is not a part of or

substantially or directly connected to surface water. The DNRC may issue a permit to appropriate ground water if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of section 85-2-311, MCA, that the augmentation plan provides sufficient augmentation water in amount, time, and location to replace depletions to senior water rights. The legislative history for the basin closure statutes provides little insight with regard to the exceptions to the basin closure statutes and indicates that most of the concerns giving rise to the bills related to surface water.

A dispute arose over applications for new ground water permits in the Smith River drainage, part of the Upper Missouri River closed basin. The DNRC prepared a supplemental environmental assessment for the Smith River basin in February of 2003 and noted that the Smith River and its principal tributaries are hydrologically connected to ground water. The supplemental environmental assessment further noted two ways that ground water pumping affects surface stream flows. First, pumping may intercept ground water that otherwise would have entered the stream, thereby causing a reduction in surface flows. This phenomenon is called the prestream capture of tributary ground water. Second, ground water pumping may pull surface water from the stream toward the well. The DNRC refers to this pulling as induced infiltration. The DNRC's hydrogeologist reported that a stream takes longer to recover from prestream capture of its tributary ground water than from depletion through induced infiltration. Under the basin closure law, the DNRC must determine whether an application for ground water includes ground water that is "immediately or directly connected to surface water" for the application to qualify under the ground water exception. The Legislature did not define "immediately or directly connected to surface water" in any of the basin closure laws. DNRC interpreted the language to mean that a ground water well could not pull surface water directly from a stream or other source of surface water. This interpretation made no mention of the potential influence of the prestream capture of tributary ground water on surface flow. The DNRC processed new applications before making a threshold determination that the applications fell within an exception to the Upper Missouri River basin closure law. Trout Unlimited and other interested parties initiated suit against the DNRC. During the litigation, DNRC adopted ARM 36.12.101(33), defining "immediately or directly connected to surface water" to mean ground water "which, when pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration." The definition again ignored water diverted from streams through prestream capture of tributary ground water.

In Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (2006), the Montana Supreme Court stated that the Upper Missouri River basin closure law serves, in part, to protect senior water rights holders in the Upper Missouri River basin. See section 85-2-308(3), MCA, providing standing to object to water use applications to individuals whose property, water rights, or interests are adversely affected by the proposed application. The restriction on processing

applications saves appropriators the time and expense of having to defend their water rights every time a new applicant seeks to appropriate water in the basin. The Legislature provided interested parties with greater protection than the right to file objections and proceed to contested case hearings by insulating them from the burden and expense of the objection process. The Court noted that the DNRC's interpretation of "immediately or directly" indicated that the DNRC considered ground water to have an immediate or direct connection to surface water if ground water "pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration." This formal interpretation embodied in ARM 36.12.101(33) comported with the informal interpretation embodied in a letter from former Director Clinch to the Meagher County Conservation District Administrator. The DNRC's interpretation of "immediately or directly connected" failed to account for impacts to surface flow caused by the prestream capture of tributary ground water.

The Court noted that the DNRC's own hydrogeologist recognized the impact to surface flows caused by the prestream capture of tributary ground water. The Court quoted the DNRC's hydrogeologist as stating that ground water pumping produces two separate components that contribute to total streamflow depletion. The first component, ground water capture, is the interception of ground water flow tributary to the stream that ultimately reduces the hydraulic gradient near the stream and baseflow to the stream. Streamflow depletion from ground water capture usually continues after pumping ends and may require long periods of time to recover. The second component, induced streambed infiltration, usually has less impact on streamflow depletion, and its effects dissipate soon after pumping ends.

The Court determined that the DNRC had failed to account for the direct connection between surface flows and the prestream capture of tributary ground water in its implementation of the Upper Missouri River basin closure law despite possessing a wealth of information supporting the connection. The Court stated that the DNRC's interpretation of the Upper Missouri River basin closure law conflicted with the statute and did not provide sufficient protection to reasonably effectuate its purpose--the protection of senior water rights holders and surface flows along the Smith River basin. The Supreme Court reversed the District Court and remanded for further proceedings.

A separate issue has arisen with regard to another exemption from the Upper Missouri River basin closure law. In addition to the ground water exception contained in section 85-2-343(2)(a), MCA, an exception for a permit to appropriate water for domestic, municipal, or stock use is contained in section 85-2-343(2)(c), MCA. On September 23, 2004, the DNRC published Notice No. 36-12-101 in Issue No. 18, of the 2004 Montana Administrative Register regarding a public hearing on the proposed amendment of ARM 36.12.101 concerning definitions and adoption of new Rules I through XXIX concerning a complete and correct application, department actions, and standards regarding water rights. Among other changes to ARM 36.12.101, the DNRC

proposed to define "municipal use" as "uses associated with a water system for municipalities and incorporated or unincorporated towns and cities". In Issue No. 24 of the 2004 Montana Administrative Register, the DNRC published notice of the adoption of the proposed rule changes to be effective January 1, 2005. The DNRC received 239 comments on the proposed rules, including an extensive comment on the change to the proposed definition of "municipal use". In its response to that comment, the DNRC noted that it had amended the "municipal use" definition from "uses associated with a water system for municipalities and incorporated or unincorporated towns and cities" to "water appropriated by and provided for those in and around a municipality or an unincorporated town". The DNRC did not include the entities suggested by one comment because the DNRC felt that those entities' actual appropriation and water use was better defined as water for rent, sale, or distribution or combined as water marketing. The DNRC also responded that if it were to define the water use by the entities suggested by the comment as "municipal use", then those entities would be considered exempt from the basin closure statutes. The DNRC stated that it believed the Legislature only intended to exempt municipal uses by cities and towns.

On November 23, 2005, in Issue No. 22 of the 2005 Montana Administrative Register, the DNRC proposed to strike the definition of "municipal use", effective December 23, 2005. The rulemaking notice stated that the purpose of the proposed amendment was to eliminate a section that may conflict with applicable law. The notice also stated that the DNRC was repealing the section pending further study and that a new section would be adopted at a later date. On January 26, 2006, in Issue No. 2 of the 2006 Montana Administrative Register, the DNRC noticed a public hearing to be held on February 16, 2006, because of requests for a hearing regarding the proposed amendment. On June 1, 2006, in Issue No. 11, of the 2006 Montana Administrative Register, the DNRC adopted the rule amendment exactly as proposed. The DNRC received 26 comments on the proposed rule change. The DNRC responded to the comments by stating that it believed that the rule defining "municipal use" might be in conflict with law. The DNRC also stated that the rule might limit municipal use beyond that intended by the Legislature and that the DNRC had been issuing water rights for municipal purposes without a definition in rule since 1973. Removing the municipal definition allowed the DNRC to return to the way the statute had been implemented from 1993 to 2005. Since 1973, the DNRC had issued numerous permits with municipal use to entities that were not a town or city. The DNRC cited Mountain Water Company, a public utility that supplies water to the town of Missoula, as an example. The DNRC stated that the Legislature would have been aware of those water rights when it enacted the basin closure laws in 1991 and 1993. Therefore, DNRC believed that it was prudent to revert to the historical practice rather than enforce a rule that might be illegal. The DNRC stated that it would propose a new rule definition, with the opportunity for public comment, after further considering legislative intent, or that the DNRC might seek clarification directly from the Legislature. The DNRC also stated that until a final determination was promulgated, the DNRC would continue to operate under its historic practice, accepting

applications for municipal use from entities who are providing water for uses that are similar to a municipality such as commercial, fire protection, watering parks, and household uses.

In Lohmeier v. State of Montana, Department of Natural Resources and Conservation, Cause No. ADV-2006-454, First Judicial District (March 2007), the plaintiffs sought to have the decision to eliminate the definition of "municipal use" from ARM 36.12.101 declared invalid. In Lohmeier, Judge McCarter stated that application of liberal definitions to any of the enumerated exceptions to the basin closure laws would clearly undermine the purpose of the laws, which is to protect the existing water rights. Expanding the definition of "municipal use" to permit private developers in the Upper Missouri River basin to appropriate water for new subdivisions would most likely take a significant amount of water away from the already overappropriated water source, resulting in not enough water for the owners of the existing water. Judge McCarter concluded that the Legislature intended to preserve the existing water rights by closing the Upper Missouri River basin to new appropriations. She also concluded that the exceptions to the closure must be interpreted narrowly to comply with the legislative intent. The striking of the narrowly defined term "municipal use" in order to enable the DNRC to apply a more liberal definition contravened the legislative intent and placed the existing water rights of the plaintiffs in jeopardy. The plaintiffs were granted summary judgment, which had the effect of reinstating the definition of "municipal use" in ARM 36.12.101.

There were several applications for water permits pending in closed basins at the time of the Lohmeier decision. The DNRC asked applicants to opine on whether they thought the Lohmeier decision applied retroactively to their application and whether the definition of "municipal use" applied to their application. The DNRC also cited Pollard v. Montana Liquor Control Board, 114 Mont. 44, 131 P.2d 974 (1942), as potentially helpful because that case provided a definition of an "unincorporated town". The DNRC required these comments to be received by April 20, 2007. The DNRC has appealed Lohmeier to the Montana Supreme Court.

Other cases involving the closed basin statutes are also currently pending or have recently been decided in District Court. Faust v. DNRC & Zoot Properties, LLC, First Judicial District, Cause No. BDV-05-443, on appeal from the DNRC administrative decision, involves permits for six wells. Judge Sherlock upheld the DNRC granting of three nonconsumptive cooling wells and recently upheld the DNRC denial of three other wells because they were immediately or directly connected to surface water and could therefore not be processed.

In Montana River Action Network and Faust v. DNRC, First Judicial District, Cause No. CDV-2007-47, the issues on appeal from the DNRC determination involve whether augmentation is a beneficial use of water under the Montana water law, whether Montana water law allows augmentation to mitigate adverse effects to prior appropriators, whether augmentation is permissible in the Upper Missouri River basin because section 85-2-342, MCA, does not allow

augmentation, whether the DNRC augmentation rules are invalid and beyond the DNRC's statutory authority, and whether the DNRC should have done an EIS on cumulative effects in the ecosystem of granting changes to allow augmentation for adverse effects to other appropriators.

In Faust v. DNRC, First Judicial District, Cause No. CDV-2006-886, the DNRC moved to stay the proceedings pending resolution of Lohmeier. The issues on appeal from the DNRC involve whether the DNRC wrongfully processed and granted permits to Utility Solutions within the Upper Missouri River basin under the exceptions for "municipal use" contained in section 85-2-343, MCA, whether the DNRC wrongfully granted permits to Utility Solutions conditioned to avoid adverse effect by requiring that water be supplied from another source to offset any effects to surface water in the Gallatin River from the ground water permits, and whether the DNRC should have done an EIS on cumulative effects in the ecosystem of granting permits under the "municipal use" basin closure exception and allowing augmentation for adverse effects to other appropriators.

As you are aware, House Bill No. 831, enacted as Chapter 391, Laws of 2007, revised the exemptions in the closed basin statutes. For example, section 85-2-343(2)(c)(iii), MCA, now contains an exemption for use of "surface water by or for a municipality" and section 85-2-102, MCA, defines a "municipality" as an incorporated city or town organized and incorporated under Title 7, chapter 2. However, pursuant to section 31, Chapter 391, Laws of 2007, the revised provisions concerning use of surface water by or for a municipality only apply to applications for an appropriation right in a closed basin filed on or after May 3, 2007. Therefore, the applications for permits filed prior to that date will still be governed by the prior version of the closed basin statutes. The prior version of the closed basin statutes will apply in all of the District Court cases discussed in this document, because the applications for permits were all filed prior to May 3, 2007. However, the changes to the closed basin laws contained in Chapter 391, Laws of 2007, appear to have rendered similar issues moot for the purposes of future permit applications.

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