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TO: Water Policy Interim Committee, Sen. Elliott, Chair

FROM: Montana Association of REALTORS®

RE: Comments on Water Policy Interim Committee draft legislation and reports

DATE: July 30, 2008

The Water Policy Interim Committee ("WPIC") has recently published for public comment draft legislation covering a number of topics within WPIC's purview, WPIC's draft report to the 61st Legislature as required by House Bill ("HB") 304 and findings and options for recommendations, and the draft case study report by the Montana Bureau of Mines and Geology ("MBMG") as required by HB 831. The following comments are respectfully submitted on behalf of the Montana Association of REALTORS® ("MAR"). MAR may provide additional comments after further review or upon revisions to the draft legislation. MAR appreciates the opportunity to comment on the draft legislation at this early stage and look forward to working with WPIC to develop viable solutions for all Montana's water users.

BILL DRAFTS

I. LC 5007

The development of statewide groundwater and aquifer data would certainly be useful to water users and applicants for beneficial use permits, particularly given the dearth of such information at present and the requirement for specific aquifer and sub-basin data in the hydrogeologic assessments that applicants for beneficial use permits in closed basins must now submit to the Montana Department of Natural Resources and Conservation ("DNRC"). LC 5007 does have the potential to develop useful and meaningful information on groundwater resources statewide. However, because the information that could be developed under LC 5007 does affect so many stakeholders in the issue of water rights in Montana, membership in the ground water assessment steering committee should be expanded to include a representative from the development community.

II. LC 5009

As presently drafted LC 5009 has the potential to have far-reaching and perhaps unintended impacts on mitigation plans. A mitigation plan under Mont. Code Ann. § 85-3-362(2) can include something as simple as purchasing surface water rights and leaving those rights in-stream. Leaving a surface water right instream rather than diverting it does not have any significant impact on water quality, as it does not discharge any water or other substances to the stream

that are not already present in the stream upstream of the historic point of diversion for the surface water right to be converted to instream use for mitigation.

As LC 5009 is currently written, there is no assurance that such a simple mitigation plan would not be required to obtain a discharge permit. Although Department of Environmental Quality (“DEQ”) administrative rules under Title 76, Part 6, Chapter 4 do set forth standards for determining nonsignificant changes in water quality, an applicant for a new beneficial use permit that is mitigating adverse effect through the conversion of a surface water right to an instream right still has to at least go through the process of determining whether they meet the criteria for nonsignificant changes in water quality set forth in Admin. R. Mont. 17. 30.715. LC 5009 could be significantly improved and clarified by inserting language that mitigation plans which consist of converting surface water rights to instream use are not subject to the provisions of LC 5009. For example, in Section 2 could be revised as follows (suggested changes in CAPS):

Section 2. Section 75-5-410, MCA is amended to read:

“75-5-410. Water quality of return flows and discharges associated with aquifer recharge or CERTAIN mitigation plans—minimum requirements. (1) A person who proposes to use sewage from a system requiring a water quality permit for the purposes of aquifer recharge pursuant to 85-2-362 or plans to use sewage from a system requiring a water quality permit as a return flow to minimize the amount of water necessary to offset adverse effects resulting from net depletion of surface water through an aquifer recharge plan or mitigation plan pursuant to 85-2-362 shall obtain, if necessary, a current permit pursuant to this chapter. A MITIGATION PLAN THAT CONSISTS OF A CHANGE OF PURPOSE IN A SURFACE WATER RIGHT TO INSTREAM FLOW FOR MITIGATION PURPOSES PURSUANT TO 85-2-362 AND 85-2-402 IS NOT SUBJECT TO PERMITTING PURSUANT TO THIS CHAPTER.

The above-suggested revision to Section 2 of LC 5009 would eliminate unnecessary evaluations for both water users and, possibly, DEQ, by making clear that although a conversion of a surface water right to instream flow for mitigation purposes is technically an addition of water to a source, it does not discharge any water or contaminants to the source that are not already present upstream of the historic point of diversion. Pursuant to Mont. Code Ann. § 85-2-402, objectors may still raise valid objections to a change application on the basis of water quality, thereby assuring that the water quality of senior appropriators will not be adversely affected.

III. **LC 5012**

At this time, MAR takes no position on this bill draft.

IV. **LC 5014**

Although community water and sewer systems may be preferable in certain developments or subdivisions, granting local governing bodies the authority to require such systems creates two problematic issues that should be seriously considered before adopting legislation such as LC 5014. The proposal of LC 5014 creates the very real possibility of 56 different standards for exempt wells, with each county setting its own criteria for when, where, and how exempt wells will and will not be allowed. Additionally, LC 5014 disregards the reality of community water system development post-HB831. By setting up a permitting system that is costly in terms of both time and money, exempt wells are often a more cost-efficient solution to providing domestic water within certain housing developments. However, by allowing counties to require

public water systems, LC 5014 sets up a very real possibility that some counties will force developers into water solutions and a permitting process that are unfeasible in terms of both cost and technology.

Furthermore, it must be kept in mind that scientific data have clearly demonstrated that if there is a groundwater shortage in Montana, a hypothesis that has not yet been proven and, in fact, has evidence to the contrary, exempt wells constitute an extremely small portion of the demand for groundwater and of water demands in closed basins and statewide.

V. LC 5015

As presently drafted, LC 5015 provides no assistance to those developers who desire to use public water and sewer systems in new subdivisions. Section 3(2) of LC 5015 limits applicants for loans from the proposed sustainable development revolving fund program to “an incorporated city or town, a county, a consolidated local government, a tribal government, a county or multicounty water or sewer district, or an authority as defined in 75-6-304” (a regional water and/or wastewater authority). Private developers may neither apply for nor receive loans under LC 5015. If the intent of LC 5015 is to encourage the use of public water and sewer systems where they may be appropriate, without the inclusion of private developers in that class of persons who may apply for and receive revolving fund loans, LC 5015 cannot achieve that goal.

Additionally, LC 5015 contains legislative findings that are unsupported by available scientific data. Specifically, Section 2(2)(b) of LC 5015 finds that “public water and sewer systems in subdivisions are preferable to individual wells and septic systems in order to protect water quality and the holders of senior water rights.” The information brought before WPIC during the 2007-2008 interim has not supported such a broad finding. Rather, WPIC has received information from DEQ that, in addition to cost considerations, lot size, build-out schedules, and aquifer characteristics are all factors to consider in choosing whether to use a community system or individual wells. (“Community Wells vs. Single Family Wells” presented by Eric Regensburger, October 24, 2007, Choteau) Further, WPIC has also received information that cumulative effects of individual wells on water quantity and availability, if any, are not reasonably projected to result “in any discernable, detectable or measurable adverse impact to any prior surface water appropriator.” (“Update on Evaluations Significance of Exempt Wells” presented by Michael Nicklin, January 15, 2008). Findings that are unsupported by available data and are actually contrary to data presented to WPIC should not be included in legislation proposed by WPIC.

VI. LC 5019

HB 831 as codified is clear that mitigation or aquifer recharge is required for a new groundwater appropriation in a closed basin only to the extent that net depletion results in adverse effect. LC 5019 eliminates the distinction between net depletion and adverse effect for any applicant for a new beneficial use permit that proposes to appropriate groundwater to provide domestic water within a subdivision. See, LC 5019 Sec. 1(1), Sec. 2(23). In short, LC 5019 requires mitigation or aquifer recharge in excess of what is necessary to ensure no adverse effect on the water rights of senior appropriators. Such excessive mitigation or aquifer recharge would artificially accelerate the exhaustion of available surface water supplies, which would in turn quickly create an inflated water market in the state. LC 5019 would also leave less water available for both new and existing appropriators by encouraging mitigation and aquifer recharge in excess of adverse effect, leading to over-utilization of surface water resources. By requiring mitigation or

aquifer recharge “to offset net depletion” with no consideration of adverse effect, LC 5019 encourages an applicant for a new groundwater right to provide domestic water in a subdivision to buy up existing surface water rights (typically irrigation rights) in excess of the amount of the proposed withdrawal that may result in net depletion and the amount of that net depletion that may be adverse effect on senior water users and leave that water instream, leaving formerly irrigated ground “high and dry” without any showing or knowledge of the actual need to draw water away from productive agricultural property. In short, by requiring mitigation or aquifer recharge of any net depletion absent consideration of actual adverse effect, LC 5019 encourages the purchase of excessive surface water rights, which could quickly drive up the value of surface water rights, pricing developers of workforce housing as well as agricultural users out of the market.

In requiring mitigation or aquifer recharge for any net depletion, not just adverse effect, LC 5019 also disregards the available data, which indicates that the idea that any change in stream conditions in closed basins (*i.e.*, any net depletion) is *de facto* adverse effect is false. Rather, what a proper water balance does indicate is that both ground and surface water are available to meet present and future demands in closed basins without any discernable impact to senior water users. See, May 2008 Water Resource Evaluation Water Rights in Closed Basins prepared by Nicklin Earth and Water. To equate any net depletion with adverse effect is to allow existing appropriators to “command a source,” preventing any changes in the condition of water occurrence, regardless of whether prior appropriators can reasonably exercise their water rights under changed conditions. Mont. Code Ann. § 85-2-401 plainly states that the right to so command a source is not within the scope of priority of appropriation. However, LC 5019 eliminates this distinction within closed basins for subdivisions that use a public water supply system. Not only is such elimination contrary to existing law, but it is unsupported by the available data.

LC 5019 also introduces considerable increased uncertainty into the application process by exempting an application for a new beneficial use permit that proposes to use groundwater within a closed basin to supply domestic water to a subdivision from the clear criteria for permit issuance set forth in Mont. Code Ann. § 85-2-311. See, LC 5019, Section 1(2). Is an applicant still required to demonstrate physical and legal availability, adequacy of appropriation works, that the proposed use is a beneficial use, and possessory interest in the place of use? Absent the applicability of Mont. Code Ann. § 85-2-311, this is unclear.

VII. LC 5020

Before undertaking significant revisions of a permit process that, up until the very recent past, has worked relatively well for both applicants and objectors, it is worthwhile to determine exactly what the source of the significant increase in the time, cost, and frustration required to process a permit application is. Under existing statute, DNRC must notify the applicant of any defects in any application within 180 days of receipt. Mont. Code Ann. § 85-2-302(5). Upon notice of any deficiencies, the applicant has 90 days to correct those deficiencies. Mont. Code Ann. § 85-2-302(7). Upon correction of the deficiencies, DNRC can then deem the application correct and complete, which means that the application contains “substantial credible information” showing that each of the criteria for permit issuance set forth in Mont. Code Ann. § 85-2-311 (new beneficial use permit applications) or Mont. Code Ann. § 85-2-402 (change applications) has been met. See, Admin. R. Mont. 32.12.1601. Even a cursory examination of the applicable regulations setting the guidelines for a correct and complete determination reveal that it is more than just simply making sure all blanks are filled in. If that were the case, there would be no

requirement that the information provided be “substantial credible information,” only that something be filled in. Such is not the case.

Following a correct and complete determination, the application goes out for public notice. Mont. Code Ann. § 85-2-307. After such notice, DNRC must either grant, deny, or condition the application within 120 days if no objections are received or within 180 days if objections are received or a hearing is held, with an extension of up to 60 additional days. Mont. Code Ann. § 85-2-310. Such a process allows for significant scrutiny of the application prior to public notice, the opportunity for any senior appropriators that believe they will be adversely affected to object, and for timely hearing and decision, as long as the applicable statutes and regulations are followed.

Section 1(8) of LC 5020 would amend the statutory definition of “correct and complete” such that it merely means that DNRC can “begin” to evaluate the “information.” Given the significant guidelines for a correct and complete determination at present (*see, i.e.*, Admin. R. Mont. 32.12.1701 to 1707), it begs the question of exactly what evaluation DNRC is doing during the period providing for in Mont. Code Ann. § 85-2-302, which is not affected by LC 5020, if not “evaluating” the application. Ostensibly, under LC 5020, an applicant could go through a 270-day period of receiving deficiency notices from DNRC and responding to those notices, only to then have DNRC “begin” to evaluate the application, leaving one to wonder exactly where any expediting of the process is, particularly when the “evaluation” is not required to take place within any given timeframe. *See*, LC 5020, Sections 2 and 5.

Any amendment to the permitting process should also consider the role of those agency personnel who actually conduct hearings on permit applications, formal or otherwise. At present, DNRC has adopted a practice of issuing statements of opinion on those applications where there either is no objector or any objections have been withdrawn. The applicant’s opportunity for hearing is then typically to the author of the statement of opinion. LC 5020 proposes significant changes to the hearing opportunities available to applicants, without addressing the need for neutral and independent evaluators. Any change to the permitting process should consider the appropriate role for hearing examiners and removing those agency personnel who serve as hearing examiners from the rest of the agency’s evaluation process.

VIII. LC 5021

At this time, MAR takes no position on this bill draft.

FINDINGS AND RECOMMENDATIONS

At this time, MAR has no significant comments on either WPIC’s draft report or MBMG’s draft case study report. However, the following are comments and suggestions on WPIC’s draft Findings and Options for Recommendations.

I. General Water Quantity and Quality

A. Finding 2

During the June 2008 WPIC meeting, both DNRC and MAR discussed proposals for reform of the existing controlled groundwater area statutes. Mont. Code Ann. §§ 85-2-501, *et seq.* Legislative hearings and debate during the 2007 session on HB 203 and 205 evidenced

significant difficulty and frustration on the part of both DNRC and the public with the existing statutes. To recommend no action at this time ignores one area of water law that, at present, is unworkable for all parties involved. MAR continues to work with DNRC and other stakeholders to develop a proposal for revising the controlled groundwater area statutes to make them more practical and usable for all parties. WPIC should reconsider its recommendation to take no action on controlled groundwater area statutes.

B. Finding 6

MAR refers to its comments above on LC 5009. LC 5009 should be modified to clarify that discharge permits are not necessary for mitigation plans that consist of converting surface water rights to instream purposes.

II. Government Issues

A. Finding 3

Neither current statute nor applicable regulations prevent DNRC from meeting with applicants “informally” during the permitting process. However, given that a determination on a permitting decision is reviewable by a district court based only on the administrative record, it is extremely important that the record contain all information submitted by an applicant demonstrating that the relevant statutory criteria are met. Additionally, it is equally important that the administrative record contain a full written record of the basis for DNRC’s decision on any permit application. Consequently, “informal” discussions and decisions could result in only greater confusion and more room for arbitrary and capricious decision-making. MAR further refers to its comments on LC 5020 above.

III. Water Supply & Sewage Disposal

A. Finding 4

As discussed in comments on LC 5015 and LC 5019 above, data presented to WPIC does not support a finding that exempt wells result in a discernable cumulative adverse impact on senior appropriators, either at present or reasonably projected into the future. This is the result of both overall water availability and the relative consumptive rate from exempt wells, particularly in comparison with other water uses such as agricultural irrigation. As also discussed above, a mere change in the condition of water occurrence is not an adverse effect as long as a prior appropriator can reasonable exercise their water right under the changed conditions. Mont. Code Ann. § 85-2-401(1).

B. Finding 14

In regard to Recommendation A that an applicant for a new beneficial use permit for groundwater in a closed basin to provide domestic water within a subdivision be required to offset net depletion, MAR refers to its comments on LC 5019 above. Eliminating the distinction between net depletion and adverse effect is contrary to both legal precedent and available science. As to Recommendation B on a revolving loan program, MAR refers to its comments on LC 5015 above. As presently drafted, LC 5015 provides no assistance to private developers who may choose to use public water and sewer systems in subdivision development.

Once again, MAR thanks WPIC for the opportunity to provide comment on draft legislation at this early stage and looks forward to working with the committee and staff to develop viable solutions to challenges facing current and future Montana water users.

TO: Joe Kolman

FROM: Sarah Bond

RE: LS 5021 Draft legislation regarding water rights enforcement

DATE: July 29, 2008

As discussed during the telephone conference with the subcommittee, I met with some folks in the AG's office and DNRC about the logistics of the Attorney General's office performing work specific to water rights enforcement, and LC 5021.

1. The group expressed grave reservations about the provision in 85-2-122. "A person who violates or refuses or neglects to comply with the provisions of this chapter, any order of the department, or any rule of the department is guilty of a misdemeanor." It is thought that the lack of definition would likely doom any attempt to prosecute under this provision. For example, the section does not specify the requisite mental state, generally an essential element of any crime. Nor have the due process issues arising in criminal prosecutions been fully thought through. The suggestion is to eliminate 85-2-122(1) altogether, or, think those issues through and add the specificity required to proceed under the criminal statutes. The remainder of the penalty section provides for civil penalties, which seems appropriate.
2. It was suggested that if our office begins to help more in prosecutions, 85-2-122 should be amended to require that any fines collected as a result of one of our prosecutions be deposited into an AG water enforcement account for use in the prosecutions. A statutory appropriation would also be required for us to spend out of that account. This seems parallel to 85-2-122(3) (a) which establishes an account for collections from DNRC prosecutions and (3) b which requires the money collected from a county attorney action to be deposited into the county general fund.
3. It was noted that there is a model already for a statutory section that could establish an enforcement program here. Chapter 4 of Title 44 establishes miscellaneous functions of the department of justice. Among the other functions is a fish wildlife and parks enforcement program. 44-4-115 provides: "There is a fish, wildlife, and parks enforcement program in the department of justice, which must be administered by the entity in the department that assists county attorneys with prosecutions. The program staff may investigate and may prosecute criminal cases concerning the

violation of the laws administered by the department of fish, wildlife, and parks. The program is under the supervision and control of the attorney general and consists of a half-time attorney licensed to practice law in Montana who may prosecute, or assist county attorneys and the department in the prosecution of, criminal violations of Title 87." If the committee wants to ensure that there is a warm body here who can take on some enforcement cases without being pulled into other kinds of cases, this kind of mechanism could assure that at least one half-time person would be available to do the work. Presumably the program would be run by the water unit, because of the unique nature of water law.

4. I could not remember what the intent was behind the new subsection 5 in LC 5021. It provides that the department, county attorney, and AG shall give priority in enforcing this section, to protecting the water rights of a prior appropriator. The decision to prosecute is extremely complex, and our office must retain its prosecutorial discretion based on evidence and other issues specific to the cases. Legislative priorities are certainly appropriate but we were hoping this could be fleshed out a little more. Something more clearly expressive of legislative intent would be useful.

Please feel free to call if we can be of further assistance.

Kolman, Joe

From: Dr Vicki Watson [vicki.watson@umontana.edu]
Sent: Wednesday, July 30, 2008 8:35 PM
To: Kolman, Joe
Subject: water

Joe -- please let me know that comment were received. Thanks, VW

Comments on the Water Policy Interim Committee's draft report

I regret that I have not had the time this summer to give this report the attention deserved by such important policy issues.

I appreciate the history of Montana water policy & law that the report provides. The report also makes clear that Montana's limited water resources face growing threats, and that our economy and way of life depend on how we address those challenges.

I have just a few general comments to the committee.

First, I think that aquifer recharge and injection have grave risks for groundwater contamination, and should be allowed only under the most extraordinary circumstances (if at all).

Instead, we should accept that more and more basins have reached the limit of their ability to provide water for human demands. And that new water demands associated with new development will require the purchase of land with water rights and the conversion of those rights to different uses. In addition, developers and municipalities can pay for water conservation measures for existing water users, and then lease the salvaged water. We are fooling ourselves if we think that we can continue to increase our demand for water, and meet those demands by interbasin transfers of water and/or injecting wastewater. Moving water from one basin to another just transfers the shortage to another basin. Before injecting any treated wastewater into groundwater, that treated wastewater should be clean enough to use directly. And if it is, why inject it? Simply use it directly.

I was concerned to see the statement that aquifer recharge plans would require that total nitrogen in the discharge should be 24 mg/L or less. This far exceeds the drinking water standard of 10 mg/L of nitrate nitrogen. Once again, we should not inject or recharge undrinkable water into our groundwater. Some particulate contaminants can be removed, but nitrate is not filtered out.

Second, Land use planning must be contingent on water availability. If the water is not available to support denser development, the land is not suitable for more dense development.

Third, one area of concern that I feel the report neglects is how climate change will increase water shortage problems. The report points out the increased demands associated with population growth and development. But says little about the impact of climate change. Climate change will likely result in the closure of more basins. And in increased conflicts over water. Hence it is essential to recognize all demands placed on water. There should be no exemptions for water uses. All water users (including all domestic wells), must apply for water rights, and must be included in water budgets. As water supply to existing users dwindles, we want to be sure that climate change is the cause and not the incremental loss to many small users exempted from regulation and accounting. In order to identify where we can best conserve water, we need a complete picture of how & where it is being used.

Fourth, Riding herd on more water rights, and performing increasingly complex hydrologic analyses (including assessing prestream capture of tributary groundwater, for example), means that DNRC needs more resources to perform these duties in a timely and competent fashion. Developers complain about the time required to obtain permits. Adequate analysis requires time and money. Permit application fees should be increased to cover these costs. We cannot wish the costs away. We must provide DNRC with the resources to do this critical job well. I would prefer that those requesting new water rights pay DNRC for hydrologic analyses and then DNRC contracts for the work. Rather than hoping that someone hired directly by the developer will provide an objective assessment.

I thank the WPIC for their hard work on this important issue and for the opportunity to pass along these general thoughts.

Dr. Vicki Watson, Professor of Environmental Studies
University of Montana. Missoula, MT 59812

To: All members of WPIC committee

Montana needs a water resources report!!! The enormous amount of surface and ground water leaving the State must be published if we are to have an honest discussion on water policy.

REPORT MADE EASY:

1. All water in our streambeds are monitored through out the State and stream flows are reported.
2. Groundwater can be determined by review of thousands of public well log reports.
3. The report should also include, when needed , ways of capturing our water for the benefit of Montana. Don't let it escape through N. Dakota and Idaho.
4. Our water should be advertised as a valuable resource element available to promote economic growth in Montana and quality of life. Stop the no water scare tactics.

A WATER RESOURCE REPORT MAY REVEAL:

1. We have more irrigation then any State in the union.
2. We ship out (14 Trillion Gallons) of water a year (net). A huge water gift.
3. Montana is a water rich State. We use less than 2% of our water.
4. Domestic wells use less through .01% of our water supply.
5. Hydroelectric appropriations do not consume water (just in stream use). In stream use it does not create shortage.
6. 2,500,000 cows equal to 25,000,000 people are not effecting water supply.
7. Irrigation and permitted uses today in Montana have a miniscule effect on our State water supply. Evaporation is the biggest use.

9. Senior water rights are not threatened by Montana water users.
 10. We have huge water storage behind dams. (Produce storage numbers).
 11. We have flood control issues every year. (Indicating water leaving the State).
 12. For thousand of years all water in Montana has been replaced each year through massive hydrologic weather cycles and mountain snowfall.
- Etc. etc, this list can go on for another 10 pages. Another fact example: 95% of Montana water is underground unseen and barely used.

Comes now Montana WPIC Legislation to protect Montana rights for our citizens.

1. Abolish closed basins in Montana.
2. Stop the punitive permit process.
3. Use Montana water resource report as the Club for growth.

We've got water - Lets Use It - Don't lose it downstream.

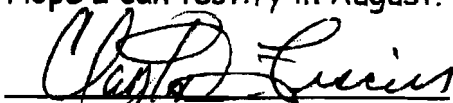
Example: (A) Butte my home County, in South Dakota has running water to farmers sheep and cattle pens provided by one well in Nisland, South Dakota. (They don't have Montanas huge water supply).

When needed build more Storage. Advertise our water as an economic growth benefit Montana has got more water than we will ever use in 200 years. Equal to our supply of coal supply. Our water is renewable our coal is not.

Billings should be included as the public hearing WPIC site for Eastern Montana.

Thanks for your attention.

Hope I can testify in August. Getting time off from Billings is hard.



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Kolman, Joe

From: Geneva McClain [gmccclair@HQ.SportsInc.com]
Sent: Monday, July 07, 2008 12:06 PM
To: Kolman, Joe
Subject: Water

To Whom It May Concern:

There is a great tragedy at Fort Peck Lake. The barge traffic on the Missouri River continues to draw down our water with their requirement for the 200 feet wide 9 feet deep channel.

Montana provides 75% of the water for the Missouri River but we have never received our fair share.

I hop that you will give this strong consideration.

Don Pfau
Fort Peck Advisory Committee
P O Box 780
Lewistown, MT 59457
Phone: 406-366-2422

Managing Montana's Water: Challenges Facing the Prior Appropriation Doctrine in the 21st Century

By the Clark Fork River Basin Task Force

July 2008

This paper is prepared by the Clark Fork River Basin Task Force (Task Force)¹ to review the status of Montana's water allocation and management system and then to examine the challenges facing it. Montana water law is based on the prior appropriation doctrine which is commonly summarized by "first-in-time, first-in-right."² First-in-time, first-in-right means that water use is based on water rights with a priority determined by when water was first put to a beneficial use. Increased competition for water resources and increased management complexity are creating challenges for implementation of this doctrine. The challenges result from reliance on individual water users for administration and enforcement that threatens the viability of water rights, groundwater development that impacts surface water, choices related to domestic water sources, and federal statutes and regulations that constrain the operation of federal water projects and river flow.

History of Montana Water Allocation and Management

Pre-1973

Prior to the passage in 1973 of the Montana Water Use Act, the right to use water in Montana was obtained simply by putting it to a beneficial use.³ No central compilation of water rights existed. Resolution of water right disputes and adjudication of water rights occurred in local courts in actions brought by individuals.⁴

¹The Clark Fork River Basin Task Force was created in 2001 pursuant to a state statute, 85-2-350 MCA. This statute requires that members of the Task Force be representative of the water interests and sub-basins in the Clark Fork River basin. It charged the Task Force with developing a water management plan for the basin that identified options to protect the security of water rights and provided for the orderly development and conservation of water in the future. The Task Force presented the *Clark Fork Basin Watershed Management Plan* to Montana's governor and legislature in September 2004. The *Plan* was subsequently adopted by the Montana Department of Natural Resources and Conservation into the State Water Plan. For more information about the Task Force see http://dnrc.mt.gov/wrd/water_mgmt/clarkforkbasin_taskforce/default.asp.

²In 1894, the Montana Territorial Legislature established the riparian doctrine as the means of allocating water. In this system, title to water is granted to landowners whose property is adjacent to rivers and streams. It was not until 1921 that the Montana Supreme Court rejected the riparian system in favor of prior appropriation. See Shovers, "Diversions, Ditches, and District Courts," *Montana - The Magazine of Western History*, Spring 2005.

³Stone, *Selected Aspects of Montana Water Law*, 1978, page 28.

⁴In 1903, the Montana Legislature established the Montana State Engineer's Office and charged the State Engineer with surveying the state's water systems to determine annual flows and with overseeing implementation of an 1894 federal statute that allowed private companies to develop irrigation systems. In 1934, the Legislature created the Montana State Water Conservation Board (SWCB) and authorized it to investigate and fund water storage and irrigation projects. In 1965, the Legislature abolished the Montana State Engineer's Office. Two years later, it replaced the Montana State Water Conservation Board with the Montana Water Resources Board (MWRB) and directed it to prepare a state water plan. See Shovers, "Diversions, Ditches, and District Courts," *Montana - The Magazine of Western History*, Spring 2005. According to Shovers, the same 1967 statute required "...that all water-right holders must make a declaration of their appropriation to their county clerk, who, in turn, would forward them to the board in Helena to be compiled into a comprehensive inventory of water resources." The Board did not compile a comprehensive inventory. Neither the State Engineer, SWCB, or MWRB had the authority to resolve

Post 1973

In 1972, Montanans adopted a revised Constitution. Article IX, Section 3 of the new Constitution includes several provisions regarding water and water rights. It recognizes and confirms existing water rights. It asserts that “All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people...” It subjects state waters “...to appropriation for beneficial uses as provided by law,” and requires the legislature both to “...provide for the administration, control, and regulation of water rights and ... establish a system of centralized records, in addition to the present system of local records.” In response to latter directive, the Montana legislature passed the Montana Water Use Act in 1973. This Act established a centralized record system for water rights and required that all water rights existing prior to July 1, 1973 must be finalized through a state-wide water rights adjudication in state courts. It also provided that a new water right or a change to an existing right requires a permit from the Montana Department of Natural Resources and Conservation (DNRC).⁵

Adjudication

To “expedite and facilitate” the state-wide water right adjudication, the legislature passed SB 76 in 1979. SB 76 mandated a comprehensive adjudication of all pre-1973 water rights in a newly created Montana Water Court. It also created the Montana Reserved Water Rights Compact Commission and charged it with negotiating federal and tribal reserved water rights.⁶ Twenty-five years later, the Water Court had issued 42 temporary preliminary decrees, 14 preliminary decrees, and 6 decrees that are sometimes labeled as final, but will have to be re-opened.⁷ A major reason for the slow pace of the adjudication was insufficient staff and funding for the DNRC to carry out its claims examination responsibilities.⁸ In 2005, the legislature passed a water rights fee to increase funding to DNRC and the Montana Water Court in an attempt to complete the adjudication by 2020. DNRC hired 30 additional staff and was on pace to complete its examination work by 2015.

Surface Water Appropriations

Historically, under the prior appropriation doctrine, Montanans obtained water for new uses by acquiring new surface water rights. However, by 2007 the era of new surface water rights supporting new uses was essentially over. Many of Montana's major river basins were closed to

water right disputes or adjudicate water rights. This authority remained in local courts.

⁵*Water Rights in Montana*, published by the Montana Department of Natural Resources and Conservation, the Legislative Environmental Quality Council, and the Montana University System Water Center, February 2006, page 3.

⁶Federal reserved water rights were created by the United States Supreme Court in its ruling in *Winters v. United States* [206 U.S. § 564 (1908)]. The Supreme Court held that when Congress or the President sets aside land out of the public domain for a specific federal purpose, such as an Indian reservation, National Park, or National Forest, a quantity of water is impliedly reserved which is necessary to fulfill that primary federal purpose. A federal reserved water right has a priority date as of the date the land was withdrawn and the reservation was created; it cannot be lost through nonuse.

⁷See Mont. Code Ann. § 85-2-237 (reopening and review of decrees).

⁸“White Paper on the Montana Water Rights Adjudication” issued by the Upper Clark Fork River Basin Steering Committee on March 2, 2004, page 8.

new surface water rights, with specific exceptions for some uses. The closed basins included the upper Missouri, Jefferson, Madison, Teton, upper Clark Fork, Bitterroot, and the Musselshell. The mainstem of the Milk River was closed. The unquantified Salish and Kootenai Tribal water rights and a 2006 DNRC hearing's officer ruling may have effectively closed the Clark Fork River basin to new surface water rights.⁹ Several individual creeks were also closed by petition and administrative orders during a portion of each year. Water right compacts with federal agencies and Indian tribes had closed certain water sources to new appropriations.¹⁰ Even in areas not closed, a new surface water right would be the most junior for a given water source. The new user would be entitled to "wet" water only after all other senior rights are satisfied.

Water Reservations

The 1973 Water Use Act allowed state or federal agencies or political subdivisions of the state to apply to the Board of Natural Resources and Conservation to reserve surface and ground water for present and future beneficial uses, including municipal, irrigation, instream flows, and water quality.¹¹ Large instream flow reservations were granted for the upper and lower Missouri River basins and the Yellowstone River basin. No reservations have been granted in Montana basins west of the Continental Divide to reserve water for future use.¹²

Mechanisms to Provide for New Water Uses

The ending of the era of new surface water rights means that new water uses will depend on one or more of three mechanisms: changes to existing water rights, contracting for stored water, or using ground water. Ground water will be discussed in the next section of this paper. The efficacy of changes to or purchases of existing rights depends on two things, completion of the water right adjudication so that one can be confident in the status of a pre-1973 water right and the user friendliness of the administrative system for changing water rights. While some water may be available from privately or state owned reservoirs and other water bodies, the most likely source of storage for new water uses is the large federally owned reservoirs: Fort Peck, Tiber, Canyon Ferry, Hungry Horse, Koocanusa, and Yellowtail. Contracts from these reservoirs will also be discussed below. Another possibility is aquifer storage and recovery - injection of surplus surface water into aquifers for latter drafting by wells.

⁹In denying water the right permit Application No. 76N-30010429 submitted by the Thompson River Lumber Company, DNRC found additional water from the Clark Fork River not to be "reasonably available" and that the proposed diversion would adversely affect a prior appropriation at Noxon Dam. DNRC determined that the applicant proved that water is "...only available when Clark Fork River flows exceed 50,000 cfs which is only on average 16-24 days per year." Outside of this period, the applicant would be subject to a call by Avista. DNRC also concluded that the applicant did not prove that Avista would not be adversely affected by diminished flows in the amount of the applicant's proposed diversion on the days where flows do not exceed 50,000 cfs. DNRC's decision was not appealed to district court.

¹⁰For a complete listing of closures created by statute, administrative action, and compact, see *Water Rights in Montana*, February 2006, pages 36-40.

¹¹Draft Environmental Impact Statement, Upper Clark Fork Basin Water Reservation Applications, Montana DNRC, December 1988, page 1 -2,85-2-316(1) MCA.

¹²In 1987, Granite Conservation District and the Montana Department of Fish, Wildlife and Parks filed competing applications for reservations of surface water in the upper Clark Fork River basin. Processing these applications was suspended by basin closure established by 85-2-336. This same statute sets the priority date for these applications to be May 1, 1991. Pursuant to 85-20-1401, the United States Forest has applied for a reservation of the waters of Chicken Creek, a tributary to the West Fork of the Bitterroot River. Forest Service reservations must be for instream flow only.

Ground Water Appropriations

Montana first began to regulate ground water development in 1961 when the legislature passed a ground water code establishing a system for appropriation of ground water.¹³ The 1973 Water Use Act required DNRC permits for ground water developments of 100 gallons per minute or more. In 1991, the legislature recognized the significance of ground water as a supply for Montana water users and passed the Montana Ground Water Assessment Act establishing the Montana Ground Water Assessment Program to characterize and monitor the state's ground water and conduct long-term, statewide monitoring of ground water quality and water levels.¹⁴ Also in 1991, the legislature changed the definition of ground water developments exempt from DNRC water right permitting to 35 gallons per minute or less and 10 acre-feet per year or less.¹⁵

Federal Storage Reservoirs

Beginning in the 1930s and continuing through the 1970s, the federal government constructed several large dams and reservoirs in Montana. In order of construction, these included the Fort Peck, Hungry Horse, Canyon Ferry, Tiber, Yellowtail, and Libby Dams. The agencies charged with operating these dams, the United States Bureau of Reclamation (BOR) and the United States Army Corp of Engineers (COE) filed water rights with the state claiming the right to store water to market it to water users for various purposes.¹⁶ In response to concerns about the marketing of Montana water for industrial purposes, especially for coal slurry pipelines, the 1983 Montana legislature created the Select Committee on Water Marketing (Committee). In response to recommendations from the Committee,¹⁷ the 1985 legislature created a state water leasing program for the purposes of limiting the total amount of water that the state could lease and providing revenue to the state. The limit was 50,000 acre-feet. The Committee recommended and the legislature authorized the state to obtain water for any beneficial use from existing federal reservoirs, Fort Peck, Hungry Horse, Canyon Ferry, Tiber, and Yellowtail, provided that the state had an agreement between the state and federal government to share the revenue from marketing the water.¹⁸ The state negotiated a contract with the COE for Fort Peck water, but did not market any of it. This contract expired in 1980s, and was not renewed.

In 2007, the Task Force successfully sought legislation to raise the cap from 50,000 to 1,000,000 acre-feet on the amount of water that the state can lease for beneficial uses when the source of the water is a federal reservoir and when the water leased is not used out of the basin in which the reservoir is located. The legislation also eliminated the requirement that water marketing

¹³"Managing Montana's Water" at <http://water.montana.edu/pdfs/headwaters/headwaters6.pdf>, page 4. Prior to the effective date of the ground water code, January 1, 1962, ground water could be appropriated only if it flowed in a "permanent, defined, and known channel." See Doney, *Montana Law Handbook*, published by the State Bar of Montana, October 1981, page 13-14 and 18-19.

¹⁴<http://www.mbmgt.mtech.edu/grw/grwassessment.asp>.

¹⁵Montana Session Laws Sec. 4, Ch. 805, L. 1991.

¹⁶COE constructed and operates Fort Peck and Libby Dams, and BOR constructed and operates Hungry Horse, Canyon Ferry, Tiber, and Yellowtail Dams.

¹⁷*Summary of the Report of the Select Committee on Water Marketing to the 49th Legislature*, January 1985.

¹⁸85-2-141(3) MCA.

revenue be shared between the state and federal government. The Task Force sought this legislation to use Hungry Horse water to provide for future water uses in the Clark Fork River basin and to protect uses of water in the basin that are junior to lower basin hydroelectric water rights.¹⁹

Challenges Facing the Prior Appropriation System

Administrative and Enforcement Challenges

Article IX, Section 3(3) states, “All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.” However, the authority of DNRC, the agency assigned with the task of providing for the administration, control, and regulation of water rights, is limited. In his article entitled “Diversion, Ditches, and District Courts” published in *Montana the Magazine of Western History*, Brian Shovers wrote that Montana irrigators historically “... preferred the uncertainty and cost of litigation to established limits imposed by a centralized system.” Rather than DNRC, the responsibility for adjudicating and enforcing water rights and resolving water disputes has been “...entrusted to ditch riders, water masters, and district court judges.”²⁰

In the adjudication process, DNRC’s role is limited to examining water rights claims, and placing remarks identifying problems on them. DNRC does not act as an institutional objector, an entity assigned with examining all claims and filing objections to errant claims. Individual water right holders in a given decree bear this burden. In a policy paper discussing the implications of completing the state-wide water rights adjudication, the Upper Clark Fork River Basin Steering Committee wrote, “In larger basins with thousands and in some instances tens of thousands of water rights claims, individual water users cannot be expected to have the knowledge, willingness, and financial resources necessary to scrutinize every claim and to pursue more than a few objections.”²¹ Ameliorating this concern somewhat is the fact that claims with DNRC issue remarks to which no objections are filed by individual water right holders must be heard before the Water Court. DNRC staff must appear and explain their remarks. The Montana Water Court must address DNRC issue remarks prior to the issuance of final decrees.²²

DNRC is not the state’s water cop. It plays a limited role in enforcing pre-1973 water rights. Since the passage of the 1973 Water Use Act, it can seek to enforce water right permits by filing actions in district court. However, because of staffing and funding limitations, DNRC has almost never used its authority to go to court.

¹⁹*Clark Fork Basin Watershed Management Plan*, Chapter 6, Hydropower Water Rights and Basin Water Use, pages 73-78, September 2004.

²⁰Shovers, “Diversion, Ditches, and District Courts,” *Montana - The Magazine of Western History*, Spring 2005, page 14.

²¹“White Paper on the Montana Water Rights Adjudication” issued by the Upper Clark Fork River Basin Steering Committee on March 2, 2004, pages 5-6.

²²*Water Rights in Montana*, page 12-13.

The enforcement burden falls almost entirely on individual water right holders. Individuals can make calls on junior users and file lawsuits in district court to enforce their water rights. Water users within an enforceable water rights decree can petition district court to appoint a water commissioner to act as the court's agent and allocate the available supply of water according to the decree water right priority dates. The cost of the water commissioner is borne only by those water users receiving water pursuant to the commissioner's action rather than by all those subject to the decree. Water commissioners generally work only during the irrigation season and are not provided benefits such as health insurance, sick leave, or worker's compensation insurance. While the existing water commissioner mechanism has worked in some areas, in others, finding someone willing to serve as a commissioner has already been a challenge. As local water right decrees are integrated in the adjudication process, enforcing decrees will become more challenging and may involve a hierarchy of commissioners.

DNRC's administrative permit process for obtaining and changing water rights also places a substantial time and cost burden on water users. As is the case with the adjudication process, individual water rights holders have the right to object to permit applications for new or changed uses. Because these objections are heard in a contested case procedure, participants generally choose to be represented by legal counsel. DNRC has estimated that the average time for processing a water right permit application is 245 days. If an objection is filed to it, processing takes more time.²³

Because of Montana's reliance on the judicial system and contested case administrative processes, the burden on individual water users to adjudicate, enforce, protect, and make changes to existing rights can literally take years and tens of thousands of dollars. This burden is increasingly problematic for traditional water users such as farmers and ranchers.

Water administration and management has generally followed a more centralized approach in the other western states than has been the case in Montana.²⁴ An example of the centralized model is Wyoming. Article 8, Section 2 of Wyoming's 1889 constitution provides:

There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.²⁵

Granting DNRC more authority to administer and enforce water rights could reduce the burden on individual water users. DNRC could be directly authorized to investigate and enforce existing water rights and resolve disputes. It could, for example, hire, train, and provide technical and administrative support to water commissions who would enforce water rights decrees. Given clear criteria for doing so, DNRC could also play a more authoritative role in

²³Permit processing time was reported by John Tubbs to the Water Policy Interim Committee meeting on April 29, 2008.

²⁴Shovers, pages 6-7. Also, see "How Will Completion of the Adjudication Affect Water Management in Montana?" prepared by the Upper Clark Fork River Basin Steering Committee, February 2006, pages 6-9. This paper is available at http://dnrc.mt.gov/wrd/water_mgmt/clarkfork_steeringcomm/completionof_adjud_rpt.pdf.

²⁵A copy of the Wyoming Constitution is available at <http://soswy.state.wy.us/informat/05Const.pdf>.

administration processes reducing the role of objections to expedite decisions. Individuals could be allowed to appeal DNRC decisions to district court.

These changes to create a more centralized water right process would require legislation to increase DNRC's authority, staffing and budget. They would also require a greater willingness on the part of individual water right holders to trust and accept a more assertive and intrusive DNRC. Maintaining the existing system based on local control with its burden on individual responsibility may come at the cost of an effective loss of water rights by those for whom the time and expense of hiring attorneys and pursuing court action is increasing unaffordable.

The State of Idaho provides somewhat of a middle ground between state and local control. Water users within local water districts elect water masters, who are charged with distributing water in the order of priority to those water users entitled to its use. The water district sets the level of compensation for water masters, who, once hired, become state employees.²⁶

Another portion of the State Constitution may complicate water right enforcement. Article II, Section 3 states that Montanans' inalienable rights include, "...the right to a clean and healthful environment and the rights of pursuing life's basic necessities..." Although neither statute nor court rulings have done so, the clean and healthful environment provision might be construed to prevent DNRC from allocating or managing water in a manner detrimental to "a clean and healthful environment," irrespective of the prior appropriation doctrine. As will be discussed below, Article II, Section 3 may also affect appropriations of water for people's "basic necessities."

Groundwater and Surface Water Interactions

Another challenge to the first-in-time, first-in-use, prior appropriation system is the increased acknowledgment of ground and surface water interactions.

In a recent decision, *Montana Trout Unlimited (TU) vs. DNRC*, the Montana Supreme Court clarified the regulation of those interactions. The Court noted that Montana basin closure laws recognized the close relationship between surface and ground water, and defined ground water to mean "...water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water."²⁷

Because these statutes did not define "immediately or directly connected," DNRC interpreted this phrase to mean "...that a ground water development could not pull surface water directly from a stream or other source of surface water."²⁸ The Montana Supreme Court invalidated this interpretation in the *Montana Trout Unlimited (TU) vs. DNRC* case because it "...recognizes only immediate connections to surface flow caused by induced infiltration and ignores the less immediate, but no less direct, impact of the prestream capture of tributary groundwater."²⁹ This

²⁶*Webmaster Handbook*, Idaho Department of Water Resources, page 8. This publication is available at http://www.idwr.idaho.gov/water/districts/Water%20District%20Publications/watermaster_handbook.pdf.

²⁷See 85-2-342(3) MCA, 2005. This language was included in the basin closure statutes for the Upper Missouri, Teton, Jefferson, Madison, Teton, and Upper Clark Fork River basin closures.

²⁸Montana Supreme Court decision in Case Number 05-069, *Trout Unlimited vs. DNRC*, page 6, April 11, 2006.

²⁹*Ibid*, page 19.

decision halted DNRC processing of water right permit applications in statutorily closed basins incorporating the “immediate and direct” definition of ground water.

In response to this Supreme Court decision, the 2007 legislature passed House Bill 831. HB 831 was entitled:

"An act revising water laws in closed basins; defining terms in water use laws; amending requirements for an application to appropriate ground water in a closed basin; providing that certain applications to appropriate surface water are exempt from closed basin requirements; providing requirements for hydrogeologic assessments, mitigation plans, and aquifer recharge plans; providing minimum water quality standards for certain discharges of effluent; requiring that previously approved plans that were not located in the Clark Fork basin must meet certain criteria; requiring that data be submitted to the Bureau of Mines and Geology; providing for rulemaking; providing for a case study and requirements and a fee for participation in the case study; recognizing and confirming existing appropriation rights in certain instances; providing an appropriation; amending sections 85-2-102, 85-2-302, 85-2-311, 85-2-329, 85-2-330, 85-2-335, 85-2-336, 85-2-337, 85-2-340, 85-2-341, 85-2-342, 85-2-343, 85-2-344, 85-2-402, and 85-2-506, MCA; repealing section 85-2-337, MCA; directing the amendment of ARM 36.12.101 and 36.12.120; and providing an immediate effective date and applicability dates an applicability date."

This title befitted the complexity of the legislation’s content. HB 831 required an applicant for a new well in a closed basin to provide a hydrologic assessment conducted by a hydrologist, qualified scientist, or qualified licensed professional engineer demonstrating whether the new appropriation would result in a net depletion of surface water. If a net depletion would result, the applicant must also assess whether it would result in an adverse effect on an existing water right. If an adverse effect is predicted, the applicant must file a plan for mitigating that impact. The bill also appropriated \$500,000 to the Montana Bureau of Mines and Geology to conduct a case study to determine minimum standards and criteria for the hydrologic assessments.

Although the TU vs. DNRC decision and HB 831 apply strictly only to basins closed to most new surface water rights, the requirement to address prestream capture of tributary groundwater, i.e., the interception of ground water that would otherwise flow to a surface water body, and for mitigation plans may be applied to all ground water permitting. DNRC cannot issue a permit for a new water right or a change to an existing right without finding that the new or changed use would not adversely affect any existing right. Applying the adverse affects test to new ground water developments requires assessing prestream capture. Ground water applicants whose development would result in both prestream capture and an adverse effect will likely have the opportunity to offer plans to mitigate it.

DNRC’s proposed rules for determining net depletions pursuant to HB 831 require an applicant to determine the “Propagation of draw down from a well or other groundwater diversion and rate, timing, and location of any resulting surface water depletion effects.”³⁰ Timing is a key issue for managing and enforcing surface and ground water rights in a prior appropriation system. The

³⁰DNRC, “Notice of Public Hearing On Proposed Amendment in the Matter of the Proposed Amendment of Arm 36.12.101, Definitions and Arm 36.12.120, Basin Closure Area Exceptions and Compliance,” August 13, 2007, available at http://dnrc.mt.gov/About_Us/notices/august/36-22-12.pdf.

impacts of ground water development on surface flows may take place over months or years rather than immediately.³¹ Although Montana's laws may not specifically provide for conjunctive management or enforcement of surface and ground water, neither do they preclude it. As ground water development continues, surface water holders may decide that protecting their rights requires enforcement of their priority dates against wells. Water rights calls on wells have occurred in Idaho to protect surface rights. Montana law allows junior users to defend against calls by seniors if the call would be futile, i.e., that the call would not result in water for use by the senior right holder.³² How futile calls would be applied to ground water wells with a delayed impact on surface water is not known. DNRC has written, "Ground-water use is difficult to curtail to avoid impacts to surface water users during water shortages under a prior appropriations system."³³

The complexity of ground water development and use and its interaction with surface water does not bode well for the strict application of the prior appropriation doctrine.

Adverse Affects Test

The nature of the test to determine whether an adverse affect has occurred has become controversial. Before DNRC issues a permit to appropriate water or to change an existing water right, it must find that no existing right would be adversely affected. In his March 30, 2006 Proposal for Decision in the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company, a DNRC Hearing Examiner, wrote, " Adverse affect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of water will be controlled so the water rights of a prior appropriator will be satisfied." DNRC evaluates the adverse affect test on a calculated rather than a measured basis, i.e., an adverse effect need not be measurable. For example, measuring the impact of a small upstream diversion on a hydropower generator's use of water to produce electricity may not be possible. Measuring devices are generally accurate only to within 5-10% of the flow. However, as long as the hydropower water right holder can show a calculable impact of the diversion, an adverse effect would exist. The impact of ground water withdrawals on surface water is also generally calculated rather than measured. An attempt was made unsuccessfully in the 2007 legislature to overturn DNRC's calculated rather than measured interpretation by defining adverse effect quantitatively such as a percentage reduction in water supply to a senior user.

Domestic Water Supply

As previously noted, Article II, Section 3 of the Montana Constitution recognizes the right to pursue "life's basic necessities" as one of Montanans' inalienable rights. Some may argue that because water is a basic necessity, Montana water law should give domestic use priority. All other states subject to the prior appropriation doctrine except Washington provide such a priority to some extent in either their constitution or by statute.³⁴ In Montana, with two exceptions,

³¹Kendy, E. and J.D. Bredehoeft, 2006, "Transient effects of groundwater pumping and surface-water irrigation returns on stream flow," *Water Resources Research*, V. 42.

³²*Clark Fork Basin Watershed Management Plan*, Chapter 4, Legal Framework for Water Management, page 66, September 2004.

³³DNRC unpublished paper provided to the Water Policy Interim Committee for its January 15-16, 2008 meeting.

³⁴Arizona and California apply prior appropriation to surface water, but not ground water. Colorado exempts small

priority of water use depends only on the date on which water was first put to a beneficial use or on which a permit was acquired. One exception applies within a controlled ground water area. In such an area, "...preferences can be imposed on existing rights to withdraw ground water, with domestic and livestock uses having first preference."³⁵ The other exception is a priority of water reservations in the Yellowstone River basin over certain water permits.³⁶ Cities and towns have the right to condemn water rights to provide a water supply for municipal and domestic water systems.³⁷ Individuals cannot. Condemnation requires "just compensation" to those whose rights are taken.³⁸

Some western states have incorporated the "growing communities doctrine" into their statutes. Under this doctrine, a city or town maintains the right to more water than it is actually using so that it can meet the expanding domestic water needs of growing populations. This doctrine appears to contradict the prior appropriation doctrine because municipal water rights would not be limited to historic beneficial use and would not be subject to abandonment for nonuse. DNRC has written that neither the Montana Water Use Act nor Montana case law provides for this doctrine.³⁹

One aspect of current Montana water law has had a large impact on the way people develop water for domestic use. As previously mentioned, since passage of the 1973 Water Use Act,

wells outside of designated ground water basins from water rights administration under the priority system. In designated ground water basins, in-house uses are exempt, while outdoor lawn watering, etc., is not. See Division of Water Resources, Colorado Department of Natural Resources, Guide to Colorado Well Permits, Water Rights, and Water Administration, January, 2008, pg. 2. Article XV, Sec. 3, Constitution of the State of Idaho states "...priority of appropriation shall give the better right as between those using water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to the limitations as may be prescribed by law) have the preference over those claiming for any other purpose..." This provision applies to all water including ground water. In Nevada, the only ground water rights that are subject to curtailment are those that are in "designated ground water basins," and even in those basins, domestic uses are exempt. See Nevada Revised Statutes Sec. 534.180. With the exception of two specially designated domestic well management areas, domestic wells in New Mexico are generally not subject to curtailment. See 72-12-1.1 New Mexico Statutes Annotated and 19.27.5.14 New Mexico Administrative Code (adopted in 2006). Section 536.310(12) of Oregon's statutes provides "When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire them, preference shall be given to human consumption purposes over all other purposes and for livestock consumption over any other use..." Section 83-3-21 of the Utah Code states "...[I]n times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes..." Wyoming Statutes provide in Section 41-3-102(b) that "Preferred water uses shall have preference rights in the following order: (i) water for drinking purposes for both man and beast; (ii) water for municipal purposes..."

³⁵Doney, *Ibid*, page 3485-2-507(4)(c) MCA.

³⁶85-2-603(2) provides, "A reservation established before an application for permit is granted is a preferred use over the right to appropriate water pursuant to the permit, and the permit, if granted, must be issued subject to that preferred use."

³⁷Doney, *Ibid*, page 33.

³⁸70-31-301 MCA.

³⁹See the January 31, 2008 letter from DNRC Regional Manager Bill Schultz to Stephen R. Brown, Garlington, Lohn & Robinson.

certain ground water developments have been exempt from DNRC permit requirements. Current law provides that:

Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute (gpm) or less, not to exceed 10 acre-feet a year (ac-ft/yr), except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.⁴⁰

To obtain a water right for a beneficial use of ground water subject to this exemption, the developer need only file a notice of completion with DNRC within 60 days of completing the well or developed spring.⁴¹

This exemption, together with DNRC's interpretation of "combined appropriation," has influenced how subdivisions have been developed in Montana, particularly in the fastest growing areas in the western portion the state. DNRC rules provide that a combined appropriation means, "...an appropriation of water from the same source aquifer by two or more groundwater developments, that are *physically manifold into the same system*."⁴² (Emphasis added.) This definition and the exemption allows a subdivision developer to avoid the time and expense of obtaining DNRC permits before water can be developed and used.⁴³ Instead of providing the subdivision with a community water supply and system, the developer can sell lots and leave each purchaser to dig an individual well. Over the last five years, 80% of the lots approved by DEQ had exempt wells rather than community water systems.⁴⁴

Between July 1, 1973 and September 1, 2007, DNRC issued 104,142 certificates of water rights for exempt ground water developments. Seventy-five percent of all of the 104,142 certificates listed domestic use as a purpose of use.⁴⁵ DNRC estimates that by the end of 2007, it will have issued about 40,000 certificates for exempt wells using the 35 gpm/10 ac-ft/yr definition that came into effect in 1991. Over half of the 40,000 will have been issued in Gallatin, Lewis and Clark, Missoula, Ravalli, and Flathead Counties, and over 80% will have been issued in just 14 counties, only 3 of which are outside of western Montana.⁴⁶ DNRC estimates that if the current ground water permit exemption remains in effect, somewhere between 32,000 and 78,000 additional certificates for exempt wells will be issued by January 1, 2020.

⁴⁰85-2-306(3)(a) MCA.

⁴¹85-2-306(3)(b) MCA.

⁴²36.12.101(14) ARM.

⁴³*Water Rights in Montana*, page 18 and 17.38.202(5) ARM.

⁴⁴Private communication from Curt Martin, December 19, 2007. This information was provided by the DEQ Subdivision Bureau to the Water Policy Interim Committee on October 24, 2007.

⁴⁵"Wells Exempt from the Permitting Process", presentation by Curt Martin to the Water Policy Interim Committee on the September 13, 2007.

⁴⁶The 14 counties are Ravalli, Flathead, Gallatin, Lewis and Clark, Missoula, Yellowstone, Lincoln, Madison, Park, Lake, Jefferson, Carbon, Cascade, and Sanders.

While an individual 35 gpm/10 ac-ft/yr ground water development may have a negligible impact on an aquifer and surface water connected to it, the impact of multiple exempt wells may be significant. As written above, before DNRC issues a permit to appropriate water or to change an existing water right, it must determine whether any existing right would be adversely affected.⁴⁶ Existing right holders have the opportunity to object to a permit application to protect their rights. However, because they do not require DNRC permits, exempt ground water users avoid these tests. DNRC has noted that new exempt wells are not subject to the provisions of HB 831 which were designed to ensure that ground water pumping does not adversely affect senior surface water right users.⁴⁷ Senior water rights holders can make call on junior exempt wells. However, the delayed impact of ground water withdrawals on surface water may make calls problematic and be expensive to prove in court.

Another important source for local domestic water supplies is irrigation which charges local aquifers. In Montana, two changes are occurring that may threaten this source. First, irrigated lands are being sold and converted to other land uses. Second, flood irrigation has been converted to sprinklers to better match water application to crop needs. Both changes reduce the flow of water to the aquifer and may, therefore, reduce the amount of water available for domestic wells depending on local conditions. The eastside benches in the Bitterroot Valley below the Bitterroot Irrigation District ditches, Daly ditches, and the Supply ditch and areas west of Billings are examples of areas in which reductions in irrigated agriculture are adversely affecting domestic wells. Current law does not provide tools for domestic ground water users to protect against such changes.

Domestic water use inside a house is for the most part non-consumptive. Use outside the home is more consumptive. Depending on the method of waste water treatment, individual septic system or sewage treatment plant, in-house domestic use may recharge the local aquifer or be discharged to surface water.

The demand for water for domestic use will continue to increase. In portions of western Montana, water use by people for their homes, lawns, and gardens may be the predominant new use. Ground water permit exemptions do not create a domestic use priority. They are, however, providing an incentive resulting in development of individual wells rather than community public water supply systems. Large scale increases in individual wells are likely to further complicate water allocation under the “first-in-time, first-in-use” system.

Federal Constraints

The 1952 McCarran Amendment subjected federal water rights to state general water right adjudications and administration.⁴⁸ However, water use in Montana is subject not only to state water law, but also to federal statutes, regulations and licenses. Several Montana rivers host dams and reservoirs constructed by the federal government as well as private parties such as investor-owned utilities. The operation of dams and reservoirs and the river flows that they support are affected by laws such as the Endangered Species Act (ESA), the Clean Water Act, and Flood Control Acts, by licenses issued by the Federal Energy Regulatory Commissions, by

⁴⁷ Unpublished DNRC paper entitled “Effects of Exempt Wells on Existing Water Rights” provided to the Water Policy Interim Committee at is January 15-16, 2008 meeting.

⁴⁸66 Stat. 560, 43 U.S.C. § 666.

federal treaties, and by contracts among utilities.⁴⁹ These constraints are outside of the state water right framework and, in theory, do not conflict with water rights. However, by requiring reservoir drawdowns, spill at dams, and flow augmentation measures, these requirements affect the physical and/or legal availability of water. Because of the Supremacy Clause of the United States Constitution, conflicts between implementation of federal statutes and state law may be resolved in favor of federal obligations.

The operation of Hungry Horse and Libby dams in the Clark Fork River and Kootenai River basins are illustrative. Both are subject to requirements resulting from the listing of anadromous fish stocks downstream in the Columbia Basin. As a result of litigation, a United States District Judge has rejected the 2000 and 2004 biological opinions for the Federal Columbia River Power System written by the National Marine Fisheries Service (NMFS) to satisfy the legal requirements of the ESA. In the absence of an acceptable biological opinion, this judge has adopted specific requirements for the operation of the Columbia River dams, including Hungry Horse and Libby, addressing reservoir drawdowns, spill, and flow augmentation. The judge has recently written that should NMFS fail again to produce an acceptable biological opinion, he may issue a "...permanent injunction directing the Federal Defendants to implement additional spill and flow augmentation measures, to obtain additional water from the upper Snake and Columbia River, or to implement reservoir drawdowns to enhance in-river flows."⁵⁰ Because the Libby and Hungry Horse reservoirs are two of the four largest storage reservoirs in the Columbia River basin, these spill, flow, and drawdown measures may limit the water available from them for use by Montana water users. The Montana Department of Fish, Wildlife and Parks has proposed a draw down limit to benefit bull trout in Hungry Horse reservoir that has been included in the Columbia River Basin Fish and Wildlife Program adopted by the Northwest Power and Conservation Council and in the recently released NOAA Fisheries Federal Columbia River Power System Biological Opinion.⁵¹ ESA and other constraints also affect the operation of federal resources east of the Continental Divide in the Missouri River basin.

Summary

Montana water law is governed by the doctrine of prior appropriation, first-in-time, first-in-use. As this paper has shown, the lack of institutional capabilities and resources and growing demands for a limited resource are eroding the effect of this doctrine. The era in which new and expanded water uses are provided via new surface water rights is essentially over. The growing development of ground water and recent court rulings and legislation increases both the importance and complexity of managing ground and surface water interactions. Unlike other

⁴⁹For specific examples of such constraints applicable to the Clark Fork River Basin, see *Clark Fork Basin Watershed Management Plan*, Chapter 5, Legal and Regulatory Constraints to Water Management, pages 68-72, September 2004.

⁵⁰James A. Redden, United States District Judge, District of Oregon, memorandum to Counsel of Record in Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., CV 01-640 RE, and American Rivers v. NOAA Fisheries, CV 04-00061 RE, December 7, 2007.

⁵¹See 2003 Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program, Columbia River Basin Fish and Wildlife Program, Portland, Oregon, 2003, available at <http://www.nwcouncil.org/library/2003/2003-11.pdf>.; and the NOAA Fisheries Federal Columbia River Power System Biological Opinion, May 5, 2008 page 6, available at https://pcts.nmfs.noaa.gov/pls/pcts-pub/sxn7.pcts_upload.download?p_file=F21451/200505883_FCRPS%20Ch9-Ap%20pendix.pdf.

prior appropriation states, Montana does not provide a general priority for domestic water uses. The ground water permit exemption and DNRC's interpretation of combined appropriations of ground water has increased reliance on individual wells for domestic water supply. The burden measured in time and dollars on individual water right holders to define, enforce, protect, and/or change water rights threatens the viability of the rights themselves. A right that cannot be defined, enforced, protected, and/or changed, has little or no value. In addition, federal laws, regulations and licenses increasingly constrain water management and use outside the framework of state water law.

Kolman, Joe

From: Holly Franz [holly@franzdriscoll.com]
Sent: Thursday, July 31, 2008 10:29 PM
To: Kolman, Joe
Subject: Water

Dear Mr. Kolman:

I am writing to provide PPL Montana, LLC's ("PPLM") initial comments on LC 5019 and LC 5020.

PPLM cannot support LC 5019 in its current form. PPLM's primary concern regarding LC 5019 is its exemption of subdivision water use from the permitting process. As drafted, water use permits and change authorizations for water used in a subdivision are not subject to the objections of other water users. This is a drastic change that will, for the first time since the adoption of the Montana Water Use Act, prevent existing water users from protecting their water rights in the permitting process. The bill draft not only exempts new water permits from objection, but it also includes changes. This may allow a senior water right to be changed in a manner that expands the senior right to the detriment of all junior users. While the bill draft requires DNRC to review subdivision permits and changes, DNRC simply is not as familiar with local water conditions as the actual users in the area. Existing senior water users should not be shut out of the permitting review process.

In addition, PPLM is unaware of any rationale for treating subdivision water rights different from water rights for other purposes. Why should the irrigation of lawns and gardens in a subdivision have a preference over the irrigation of crops? Quite frankly, Montana does not need another exemption to the water permitting process.

A secondary concern is the definition of domestic use contained in LC 5019. That definition includes garden and landscaping irrigation up to five acres. In these water tight times, Montana should not be encouraging lawns of this size.

Turning to LC 5020, PPLM is generally in favor of the concept outlined in this bill draft. This draft addresses the problems potentially created by the recent *Bostwick v. DNRC* district court decision while maintaining the burden of proof on the applicant. The Water Use Act's requirement that an applicant prove the statutory criteria for a permit or change is a key protection for senior water users that must be maintained.

Thank you for the opportunity to provide comments on these bill drafts.

Holly Franz
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Chamber of Commerce

Your Business Advocate

Webb Brown
President/CEO
Montana Chamber of Commerce
PO Box 1730
Helena, MT 59624

To members of the Water Policy Interim Committee,

One very important issue that has become a part of the committee's running agenda is exempt wells. We understand that some members of the committee believe exempt wells are to blame for reduced water quantity and water quality.

The business community is opposed to changes in the exempt well statute at this time. Numerous small businesses depend on exempt wells to open their doors and serve their customers. But this is not just an issue that affects small business. More specifically, we are very concerned about how changes to exempt wells will also have a direct impact on the issue of affordable workforce housing.

Many communities in western Montana have seen real estate prices increase substantially over the past decade. Prices of new starter homes and existing homes have climbed to unattainable levels for average workers, making it difficult for all employers to attract new employees to the area. But the issue of housing is also an issue in rural areas, especially in eastern Montana. In places like Sidney and Glendive, there are simply no houses available. Affordable workforce housing is a problem affecting the whole state.

Changes to the exempt well statute would have a negative impact on the price of new homes in some areas and the availability of homes in other areas. Without providing proven, predictable and cost-effective alternatives, narrowing or removing the exempt well statute will only exacerbate the housing problem facing many working Montana families.

Not only would changes have a negative impact on development and affordable housing, but scientific data shows the changes would have no significant impact on water quantity. A study conducted by Nicklin Earth & Water, Inc., on the effects of exempt wells in the Gallatin Valley showed little impacts to water quantity:

“Ground-water use from wells is inconsequential when compared to stream flows. For instance, total domestic (household) consumption of ground-water from exempt wells is negligible and equates to about 0.01% of Gallatin River flow

entering the valley annually. A worst case estimate for consumption from lawn and garden irrigation in the Gallatin County associated with exempt wells equates to about 0.02% of the water entering the valley annually. For another perspective, the total amount of consumptive use from all exempt wells combined in Gallatin County equates to about 3 to 9 percent of the total ground-water consumption lost to cottonwoods and willows in the Gallatin Valley. A worst case estimate of consumption from other irrigation wells equates to less than 1.7% of the water entering the valley annually.”¹

Before the state takes the exempt well option off the table, reforms should be made to the current water permitting process, which often does not allow for timely or cost effective permitting of community water systems. Once the state has shown it can provide timely and cost effective alternatives to exempt wells, the state could revisit the exempt well statute if negative impacts can be shown with scientific data.

Thank you for your attention to our concerns on exempt wells. We are grateful for the work you have done on this important issue. Your service to the people of Montana is greatly appreciated.

Sincerely,

Webb Scott Brown
President/CEO
Montana Chamber of Commerce

¹ *Gallatin Valley Water Resources Evaluation: A Test of the Rationale of Montana Department of Natural Resources & Conservation Proposed Legislation to Amend Montana Water Law*, Nicklin Earth & Water Inc., (January 2007).

Kolman, Joe

From: JP Pomnichowski [pomnicho@montanadsl.net]
Sent: Wednesday, July 30, 2008 5:51 PM
To: Kolman, Joe
Cc: 'JP Pomnichowski'
Subject: WPIC questions and comments

Hello, Mr. Kolman,

Thanks for your time today when I called. I've reviewed the packet of materials sent June 30: your report entitled Water—Montana's Treasure and appendices, WPIC findings and options, and bill drafts, and I have some questions, comments, and suggestions. Please do answer what you can, or refer me elsewhere, and send any pertinent comments to the WPIC.

In Water—Montana's Treasure (WMT), page 6, you discuss tribal water compacts.

Do you know where tribal water compacts are available online or at a state or federal agency?

[WMT page 7] Who is required to maintain the St. Mary project? (part of the Fort Belknap Compact)

Where can I find info on the permitting freeze on the Flathead Reservation (per the MT Supreme Court?)

Does a state reserved water right lapse from lack of use? If so, is there a timeframe that must be met, or a measure of water that has not been used?

[WMT page 8] The second bullet point describes exempt wells used primarily for domestic use, with the exception that "...a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation [35gpm or 10 af/y] requires a permit."

Is there an administrative rule or other requirement to measure depth to aquifer or otherwise determine that multiple wells are drawing from the same water source? If all wells are drawing from the same depth, presumably (or proved to be) from the same aquifer, that would mean, I believe, that that would be a combined appropriation from the same source [of water].

Is this requirement not met because the cumulative impact and combined appropriation is made by many people instead of one user?

[WMT page 11] Where induced infiltration and pre-stream capture have been established as detrimental effects to surface water from subsurface waters (the basis for the TU Smith River decision), is there a rule or procedure for cumulative effect from combined appropriations like subdivisions?

Today in our conversation you mentioned that the Montana Bureau of Mining and Geology (MBMG) has stated that subsurface characteristics may define connectivity between surface water and groundwater. Indeed, if substrata is bedrock, or a clay layer, or another broad and impervious layer from the surface to a groundwater aquifer, then the subterranean aquifer may not contribute to surface waters.

Where can I get a copy of the DNRC EA for the Smith River (2003)?

[WMT page 14] Is there a date for the Montana Supreme Court to consider DNRC's appeal of Lohmeier v. State of Montana?

Has the DNRC withdrawn its motion for appeal?

[WMT page 17, second-to-last paragraph] New non-exempt wells located 600 feet from any other production well—

Is there a measurement to depth of the aquifer?

Is there required water sampling?

[WMT page 24, paragraph 3] Today on the phone we talked about drainfields, mixing zones, and distance from wells. To my knowledge, there is no requirement in state code other than a required minimum LINEAR distance of 100 feet from well head to septic drainfield. There should be a requirement for slope/grade!! And for cumulative mixing zones; I wouldn't want the guy farthest downhill in the subdivision—or in the household a quarter mile away—to be drinking well water. Eeeeeuww.

[WMT page 30] Does Legislative Services or another state entity subscribe to Water Strategist?

Are the issues in the state library or at the capitol?

[WPIC Findings and Options]

p2, re: Controlled Groundwater Areas (CGWA)

Bozeman has many CGWAs. For more than ten years, there has been a CGWA in the heart of Bozeman, right off of Main Street in a shopping complex. In the 1990s, groundwater was contaminated by a dry cleaning operation that disposed of its chemicals incorrectly, and there has been a restriction on groundwater use ever since. Bozeman residents are still waiting, ten years later, for a groundwater management plan from the state. Currently, there is no plan in place to clean or remove material contaminated by the pollutants, although oily, toxic material seeps up through the concrete floors of the stores on site, and of some of the homes in the plume. The material has spread northeast as the slope allows, and residents and city government are still waiting for a clean-up plan and mitigation from our state agencies.

The grade of the area is such that groundwater and surface water drains to tributary creeks and, through storm drains and natural percolation, directly to the East Gallatin River. The Gallatin, Madison, and Jefferson are the headwater rivers of the Missouri. For limited quantity and overappropriation, ALL are in closed basins! This makes a threat to water quality all the more problematic.

The WPIC recommended No Action on proposed actions to revise CGWA statutes. I would ask for your support for Option B, Revise CGWA statutes.

p4, re: DNRC enforcement

Has the DNRC pursued a procedure or process to enforce statutory limits on exempt wells?

Can counties be empowered to exercise enforcement?

p5, Finding 1 states that "A combined appropriation from the same source is interpreted to mean the

wells are physically connected by a pipe.”

Who has made this finding?

A combined appropriation should not be interpreted based upon the method by which the water is drawn (one or more pipes), BUT ON THE DRAW FROM A SINGLE SOURCE OF WATER.

p5, Finding 3 states that less than 5 percent of total statewide water consumption is drawn by exempt wells.

This measure determined statewide is far too general. What is true for Broadus is not true for Bozeman. The intensity of use in high-growth areas averaged out with rural, very low use areas does not serve to establish low statewide consumption, especially if intensive use occurs in over-appropriated basins and closed basins, and in areas in which there is far more population to serve.

There should be county-specific determinations, or determinations by BASIN. Legislation and administrative rules should apply with intensity of use and available supply.

p5, Finding 7 Does the DNRC support metering new exempt wells?

p5, Finding 8 Are there definitions and measures of water for each listed use? (domestic, stock watering, etc.)

p5, Findings 9,10 Domestic water use includes ¼ acre lawn irrigation, but subdivisions require open space, parks, boulevards, etc.

For irrigation wells for public open space and parks, who maps and measures those wells?

A change in subdivision regulations may be in order to require some active parkland (game fields, playgrounds, etc.) to a certain proportion, and with a certain allowable irrigation, and passive parkland and open space planted in native drought-resistant grasses and not irrigated. There could be considerations for boulevard trees (again, drought-tolerant species) and for open space water consumption not to exceed XX amount annually. Bozeman city regs address these requirements; perhaps for developments anywhere of a certain density, they should apply, too, since the density of population and water consumption will trigger more usage.

p5, Finding 12 In the 07 regular session, the House Natural Resources committee heard HB104 proposing to change exempt wells from 10 acre feet/year to 1 acre foot/year (and keep 35 gpm pumping). Evidence shows that the vast majority of users on exempt wells pump less than 1 acre foot/year. The bill died in committee, but this standard jives with the allowances of Colorado (15gpm for 1 acre), Idaho (18 gpm for ½ acre), North Dakota (7.6gpm for one acre), and Wyoming (25gpm for one acre).

The WPIC should support and advance the changes proposed in HB104 (07 session).

p6, Finding 14, Option H recommends requiring minor subdivisions to undergo environmental assessment for effects on water supply. There is precedent to require minor and major subdivisions to meet the same requirements for public health and safety. In the 07 session, HB415 (Reinhart) passed, and requires that minor subdivisions dedicate parkland, just as major subdivs do. I have served on the Bozeman Planning Board and Zoning Commission for many years, and the requirements for water and sewer must be met for homesites.

The WPIC should support and advance requiring environmental assessment for water supply in minor subdivs.

p6, Finding 14, Option K The WPIC should propose to change the rate or volume for exempt wells per HB104 (as above).

p6, Finding 14, Option L The WPIC should strongly advocate to change the definition of a combined appropriation!!!

p6, Finding 14, Option M The WPIC should support and advance a minimum lot size for exempt wells, and increase the minimum lot size for an individual septic system. Also, consideration for grade/slope from wellheads, depth to aquifer, mixing zones, etc.

p6, Finding 14, Option P The WPIC should support and advance legislation to limit or prohibit the use of exempt wells for fish ponds.

I'll send remarks on the bill drafts in a separate email.

Thanks,

JP Pomnichowski

Montana State Representative

House District 63, Bozeman/Gallatin County

406 587 7846 pomnicho@montanadsl.net

Kolman, Joe

From: Kathleen Shaw [kathleeninthewoods@gmail.com]
Sent: Monday, July 07, 2008 12:35 PM
To: Kolman, Joe
Subject: Water

Dear Sir,

I don't know if what I am asking is included in the plans for the water policy, but it should be.

When I moved here three years ago, a water line brought spring water from a spring four lots uphill, and went beyond me to a residence three lots below me. Then a man bought the property and the next three lots between us and just recently cut off my water supply. He pipes it to his house, which is just behind my property. He removed the pipes that led to my line. Then he went back home to Louisiana, and all of the extra water, what isn't coming from his sprinkler hoses, is running down a ditch in the road, while I am forced to drive 25 miles to town to fill 50 gallon drums with water for myself and my animals. It does seem fair that he can do what he wants with his water, however, it is not fair to waste the extra and put me in a serious bind. It costs me \$15 each trip for gas for my truck. I am too young for a rural improvement grant. I do not have a positive cash flow for a rural improvement loan. I have no income. I have been trying to get SSI for three years, and I just found out after waiting seven months that I won't get a new hearing for another 12 months. Water is a necessity, and I desperately need it. No one should be allowed to waste it and deprive their neighbors. His overflow is more than enough for me. There needs to be a provision in the law to protect people like me who need water.

Sincerely,
Kathleen Shaw
25 Spring Valley Road (Clarkston)
P.O. Box 871
Three Forks, MT 59752



Montana Fish, Wildlife & Parks

The Honorable Jim Elliott,
Chairman, Water Policy Interim Committee

July 31, 2008

Dear Senator Elliot and members of the Water Policy Interim Committee,

Thank you for the opportunity to comment on the Water Policy Interim Committee's (WPIC) Draft Report to the 61st Legislature (Water – Montana's Treasure, An analysis of water management in Montana), and the eight proposed bill drafts. The Water Policy Committee had a very difficult task. Montana water policy, law and regulations are extremely complicated. There are a myriad of political interests involved in water allocation and policy, and not all uses of water are compatible with each other.

FWP would like to commend the Committee for its efforts to first understand these important issues and to find solutions that work for everyone. FWP offers the following comments in hopes that they will help guide the Committee to broadly accepted policy reform.

I. Comments on Water Policy Interim Committee Draft Legislation.

LC 5007: Establishment of a groundwater investigation program. FWP supports this bill but urges that it be modified to emphasize generation of information that informs applicants and other basin water right holders of ground and surface water interactions and connectivity.

LC 5009: Requirement that a discharge permit must be obtained, if necessary, for an aquifer recharge plan or a mitigation plan in a closed basin. FWP supports this bill.

LC 5012: Providing for the issuance of a certificate of water right for aquatic resource activities carried out by the department of transportation in compliance with and as required by the federal clean water act of 1977. FWP was initially concerned with this proposed legislation primarily because FWP felt its scope was too broad. However, FWP and MDT have discussed FWP's concerns and MDT has agreed to modify its proposal. FWP believes that the current bill draft is acceptable.

LC 5014: Clarifies the authority of local governments to require public water supply systems and public sewer and wastewater systems for subdivisions. FWP believes this bill takes a small step toward giving local governments the tools they need to deal with the challenges of growth, but it is a step in the right direction. FWP supports this

legislation. However, FWP suggests one change. Proposed Section 76-3-504(3) should be modified to state:

In implementing the provisions of subsection (1)(g)(iii), the governing body may, as provided in 76-3-511, require public water systems AND/OR public sewer systems.

FWP believes that this change would more accurately reflect the intent of the proposed legislation.

LC 5015: Sustainable development revolving fund program. FWP generally supports this program. The program provides some incentive for community systems as opposed to individual wells. Generally, those systems are metered, which tends to result in more conservative use of water.

LC 5019: Provides a water right permit application process for a subdivision water system. FWP opposes this bill. If enacted, this bill would seriously impact the rights of existing water right holders by eliminating their ability to object to new water rights.

The bill would also eliminate Mont. Code Ann. Sections 85-2-307 through 311 and 85-2-363 for subdivision applicants. This includes the requirement for notice of application to other water right holders, allowance for objections and hearing procedures and existing permit criteria. It would overhaul the application process. Further, the bill would severely restrict the ability of another water right holder to obtain judicial review of DNRC's decision. This bill is a major affront to the rights of existing water right holders and would most likely soon face a constitutional challenge.

There may also be an unintended consequence for DNRC. DNRC will still be subject to the requirements of the Montana Environmental Policy Act (MEPA). Because there would be no administrative appeal process, the public's only opportunity to comment on the proposal would be on the MEPA-associated environmental analysis. DNRC would likely be forced to write more comprehensive environmental analyses, which would take additional staff time and budget.

FWP feels that the better approach is to concentrate on fine-tuning LC 5020. It should provide the more predictable and faster process that applicants seek without completely eliminating the right of existing water right holders to participate in the process.

LC 5020: Allows DNRC to issue a preliminary determination on a water right permit or a change in appropriation right, and provides for objections to be heard in an informal hearing. FWP recognizes that water use permit applicants are dissatisfied with the permit process because it is complicated and lengthy. FWP believes that LC 5020, while not perfect, is a well-reasoned approach to making the permit process work for applicants and existing water right holders alike. Moreover, with this proposal, there is no reason to take the drastic measures called for in LC 5019.

This bill needs to be clarified to state that DNRC may (and should) rely on more information than what is presented in the application. DNRC needs to be able go outside the application to consider the best available information and generate the application record. Further, objectors must retain the right to engage in discovery and present expert testimony to the decision-maker.

LC 5021: Revision of water enforcement laws.

3-7-311. Duties of water masters. It would appear that this proposed legislation is a good-faith effort to make judicial enforcement of water rights more accessible by providing state district courts with the help from the water court. FWP does not oppose this idea but urges a cautious approach.

Currently, water masters are primarily responsible for drafting temporary preliminary decrees, which involves hearings on objections. A water master who is going to impartially review a claim, for purposes of adjudication or amendment, should not then be able to sit on a case in which enforcement of those decreed rights is sought prior to a final decree being issued. FWP is also aware that once a water commissioner is appointed, that commissioner often asks the advise of the water master who worked on the decree. A water master should not be allowed to first work on the decree, give advise to water commissioners and then adjudicate a dispute between water right holders when the water rights in the basin have yet to be finally adjudicated through a final decree. The potential for conflict of interest is too great. Furthermore, a party has limited ability to disqualify a water master who may be privy to ex party information. FWP is merely suggesting that water masters' roles with respect to a particular basin be defined such that one master does not have both adjudication and enforcement duties.

FWP supports the proposed modification to 85-2-114 (involvement of the attorney general).

II. General Comments.

Throughout the course of WPIC's meetings, several members mentioned that they would like to provide water users, water right applicants and developer with incentives and disincentives in addressing Montana's major water policy challenges; i.e. Committee members appeared to favor a "carrot and stick" approach. This approach was mentioned for two of the biggest issues to emerge from the Committee's discussions; residential wells and septic systems in close proximity to one another, and the use of exempt water wells with no analysis of affects on surface water and surface water right holders. Though FWP believes that the former issue is extremely important, the latter is of even more immediate importance to FWP and other existing water right holders. Overall, the proposed legislation provides a number of "carrots": a loan program for community systems, an overhaul of the application and objection process for new water right applications, and a state-funded study to gain more information on the availability of groundwater. Unfortunately, in spite of voluminous testimony about the problems associated with exempt wells, WPIC has not proposed the corresponding "stick."

DNRC experts and other testified repeatedly that any withdrawal of groundwater will have an impact on surface water availability. In areas of extremely limited surface water availability, any reduction in surface water supply will impact existing water users, even if that reduction is not measurable in terms of gross monthly stream discharge.

FWP urges WPIC to propose legislation that would amend Mont. Code. Ann. Section 85-2-306(1) to reduce the amount of water available from an exempt well to one acre-foot per year and to consider eliminating their use for subdivisions, or at the least require that their collective impacts be mitigated, particularly in basins closed to new surface water appropriation.

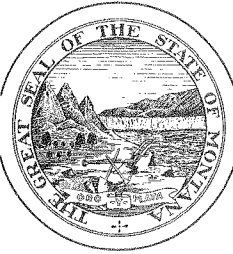
Thank you for considering FWP's comments.

Sincerely,

S/ William A. Schenk

William A. Schenk
Agency Counsel

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



BRIAN SCHWEITZER
GOVERNOR

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MEMORANDUM

TO: Water Policy Interim Committee

FROM: John E. Tubbs, Administrator

RE: WPIC Proposed Legislation LC 5019, LC5020, LC5021

I thank the committee for providing the opportunity for comment on its legislation drafts. The following are our comments or concerns.

LC5019: Permit Process for Subdivisions

The Department understands the motivation of the committee to identify a fast-path permitting process encouraging public water supply wells. However the LC 5019 has a number of provisions that raise serious concerns. The Department raises these concerns now so that the Committee is aware that the draft legislation, if enacted, may not withstand a legal challenge.

Further, a recent district court case in New Mexico may create significant uncertainty West- wide as to the validity of any exception to the permit and change process (*Bounds v. State Engineer of New Mexico*, Judge J.C. Robinson Sixth Judicial District Court of New Mexico). LC 5019 creates a 3,000 acre-foot exception for subdivision development, greatly expanding the current exception, a move in stark contrast to the move to reduce exceptions in other states.

**New Section 1. Subdivision water systems in closed basins
Subsection (1)**

This Subsection singles out one type of beneficial water use above all others for an expedited process, subdivision water systems. Neither the Montana Constitution nor the Water Use Act has a preference for any particular type of use. It should be noted that subdivisions of a certain size are generally required to create parkland. Water use for these types of subdivisions would not be allowed under this Subsection because the provision includes only lawn and garden associated with a household.

The change application submitted with the permit application would have to be for the sole purpose of providing mitigation water for the permit. The applicant could not include changing part of his right to mitigation and another part to other purposes, points of diversion or place of use.

An application under this Subsection would be processed under the Department's "correct and complete" process §85-2-302, MCA, like all other applications for permits and changes. If the combined application also included a change application for a mitigation plan, both the permit and the change application would have to be determined to be correct and complete before the combined application would be determined to be correct and complete and ready to move forward to be analyzed under the terms of this statute. A correct and complete determination would not be a determination by the Department that the applicant met all of the criteria necessary for issuance of the permit and change, but only a determination that the combined application could move forward for analysis.

Subsections (2) and (3)

The Department has constitutional concerns with Subsection (2) where the application for permit as well as the application for change (if necessary) will not be public noticed and existing water right holders will not be provided opportunity to file an objection. Our concern is that this section, especially the change provision, may run afoul of the Constitutional right to due process (Art. II, §17), Constitutional right to know and participate prior to agency action (Art. II, §8 and Title 2 Chapter 3 Part 1, MCA), and the Constitutional protection of existing water rights (Art. IX, §3).

With the application not being subject to §85-2-311, MCA, no analysis would be required or could be conducted of impacts to existing ground water rights within the area of potential effect. In Subsections (2) and (3), the only analysis and determination to be made is that the applicant's mitigation plan will meet §85-2-362, MCA, such that surface water rights are protected and depletion fully mitigated. A proposed ground water well could pump and take water from another well and the Department could not address this issue in the permitting process because of the inapplicability of the §85-2-311, MCA criteria.

In Subsection (3)(a), it is important that the legislation retain the language expressly giving the Department the right to determine depletions and that the depletions would be fully offset by the applicant's plan. It is also important to retain the language giving the Department the right to review a proposed change in appropriation right against the applicable criteria in §85-2-402, MCA

Subsection (3)(b) requires the applicant to require each connection to install a water meter. However there is no provision requiring the meters be read or recorded. If it is a condition of the permit, the information gathered should be sent into the Department annually, and it then becomes public record. Otherwise, the public may have difficulty accessing water right records if there is a concern.

Subsection (2)(f) requires the applicant to have a plan for monitoring and enforcing the uses of water under the permit and the conditions. What is the Department's role in enforcing the permit conditions? Is the applicant required to have covenants addressing the requirements under the statute, ex lawn size. What happens if water use records are not kept?

Subsection (5) provides for judicial review of the department's action. How long does a party have to file a petition with the court in this review outside of the traditional review under the Montana Administrative Procedure Act (MAPA), Title 2 Chapter 4 Part 7. Under MAPA, one has 30 days to file for a judicial review.

85-2-102 Definitions:

In Subsection (12) we would suggest limiting the irrigation to 1/4 acre. In Subsection (23) a suggested cap of 3,000 acre-feet (AF) is made. At .73 AF per household, subdivisions of 4100 lots would be allowed under this new Subsection. This volume of water could certainly have an impact to existing ground water users in some areas. This volume far exceeds the amount applied for by most applicants.

LC5020: Preliminary Determinations and Informal Objection Process

The Department thanks the Committee for its consideration of this legislation. We believe that the proposed changes will improve water right processing for all parties. Existing water right holders will particularly benefit by keeping the burden of proof on applicants to meet the permitting and change criteria and by minimizing the need to object to applications that the Department seeks to grant.

In 85-2-307 there appears to be a format problem. Sub-section (b) is missing.

85-2-308(2) cross references the criteria in -320, -402, and -436. There should be a cross reference to -407 and -408 the provision for temporary changes and temporary changes for instream flow.

LC5021: Special Masters for Judicial Enforcement

85-2-114 says the Department may petition the district court to:

We suggest inserting new (a)

(a) appoint a water master as a special master. Then current (a) becomes (b).

(b) regulate the controlling works

Kolman, Joe

From: WmGBallinger [wgb@mt.net]
Sent: Sunday, July 06, 2008 1:20 PM
To: Kolman, Joe
Subject: Water

I write only to congratulate the committee for their foresight in tackling this problem, especially in view of California's recent awareness of a drastic shortage of water this summer.

Respectfully yours,

William G. Ballinger, M.D.



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The Honorable Jim Elliott,
Presiding Officer of the Water Policy Interim Committee

July 31, 2008

Re: TU Comments on WPIC Draft Findings and Conclusions.

Dear Senator Elliott:

Trout Unlimited (TU) has been an active participant in the WPIC's meetings and discussions, and appreciates the work that legislative members of, and staff supporting the work of, the WPIC have put in over the last year. TU submits these comments on the draft WPIC Findings and Options for Recommendations in the hopes of continuing the good work of the WPIC, and ensuring that Montana's water policy respects the rights of senior appropriators and protects our state's water supply.

I. Water Policy

TU supports an expanded MBMG study. However, in order to ensure that the hydrogeologic study provided in LC5007 is not duplicative of MBMG's currently-funded program to collect and analyze groundwater data, LC5007 should explicitly require the MBMG to create a hydrogeologic model that can be used to help predict and understand ground and surface water interactions in each subbasin analyzed.

TU Recommendation: In LC5007, on page 1, New Section 1(1), the last sentence should be amended to read: The program shall develop a monitoring plan and hydrogeologic model for each subbasin for which a report is prepared.

II. General Water Quantity and Quality

TU supports the narrow exception for the Montana Department of Transportation (MDT) to obtain a water right permit solely for wetland *restoration* that is found in LC5012. TU would not support reading the narrow scope of LC5012 to include *created* wetlands. Including created wetlands in LC5012 would expand water demands on

already-overappropriated streams, harming senior water rights and reducing streamflows. TU therefore suggests making the intended scope of LC5012's exception more explicit, to ensure that only *restored* wetlands are included within its scope.

TU Recommendation: Amend the language in LC5012, New SubSection (9)(a), on page 11, that provides for an automatic water right, "if the appropriation is to restore ~~recreate~~ a functional wetland with the intent to substantially replicate the predisturbance conditions by filling in or removing constructed ditches, drains, or similar structures that drained an historically functional wetland."

III. Government Issues

TU supports increased coordination between the DNRC and DEQ. TU also supports local governments' efforts to promote the use of central water and sewer systems, progressive water metering, the use of treated waste water for lawn and garden irrigation, and the restoration of natural-vegetation infiltration galleries and permeable pavement for mediating stormwater collection that encourages slow groundwater recharge.

TU Recommendation: Support LC5014 to provide local government with clear authority to preferentially approve subdivisions with central water and sewer systems.

IV. Water Use Enforcement

TU supports efforts to increase effective monitoring and enforcement of water use. TU would encourage the Water Policy Interim Committee to continue to think about ways to promote accurate measurement and monitoring of water use, particularly the development of systems that would develop the capacity to monitor and adjust water use remotely. The Bureau of Reclamation has implemented this kind of system with water users in the Sevier River Basin in Utah, and a trial of a similar system in a Montana river basin could be a good first-step to more efficient water use and management.

In terms of additional enforcement capacity, it is not realistic that county attorneys are going to take on complex water enforcement actions. But it is a possibility the State Attorney General's office should develop the expertise and capacity to take on a limited number of water rights enforcement actions.

TU Recommendation: TU supports LC 5021.

V. Water Supply and Sewage Disposal

The increasing use of exempt groundwater wells in major and minor subdivision development has been one of the WPIC's central areas of study. Because the DNRC does not analyze---nor require mitigation of---the collective impact of individual wells the potential for harm to streamflows and senior water rights is not addressed.

Indeed, a district court in New Mexico made headlines just this month when the New Mexico exempt-well statute was declared unconstitutional for precisely that reason. In New Mexico, a long-time ranching family challenged a new exempt-well subdivision proposed near their ranch on the grounds that the exempt wells would not even be analyzed for their impact on the ranch's water supply. The district court agreed with the ranchers, citing New Mexico's constitutional protection for senior water users, that new water use cannot adversely affect existing rights. *Bounds v. State of New Mexico*, CV-2006-166 (July 10, 2008). An editorial in the *Sante Fe New Mexican* noted that the district court judge expressed that, "*It doesn't work for the Bounds and other irrigators to sit around waiting until they're out of water . . . When the water is gone, it will be too late.*" In New Mexico, as in Montana, previous efforts to pass new legislation to treat individual, domestic wells like other water withdrawals had stalled before the legislature. In the wake of the court ruling, the New Mexico State Engineer's office is now scrambling to come up with a solution to having to process thousands of additional permits each year, in order to analyze each individual well permit application.

TU Recommendation:

1. Amend Exempt Well Statute. Rather than wait for a Montana court to force the Montana DNRC into a similarly difficult situation, the Committee should amend MCA § 85-2-306(1) as follows:

~~“Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 40-0.75 acre-feet per year for the purpose of a stockwater tank or for domestic use, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation a well on a tract of record that is created by subdivision after [the effective date of this legislation] requires a permit.”~~

This amendment will stop the use of multiple, individual wells *exempt from DNRC review* in the development of subdivisions. Under the amended statute, a developer may still use individual wells on lots created from a subdivision of land, but the cumulative impact of those individual wells must be evaluated in a DNRC permit proceeding. As amended, the statute would essentially grandfather in the use of exempt wells on all existing lots, or lots that have already been subdivided.

The WPIC's draft Findings and Options for Recommendations, under "Finding 14: Incentives are needed to encourage public water and sewer systems," lists as an option to

“Require that exempt wells purchase a mitigation credit.” (Option “O” on page 5). This option could work in concert with the above amendment of Section 306(1) by allowing individual wells to purchase a “mitigation credit” that would satisfy the requirement for addressing the individual well’s “net depletion” in closed basins. Under this scenario, the “mitigation credit” would be used to purchase a larger block of mitigation water that is held by the DNRC or by local government, and the purchase of the “mitigation credit” would in effect be a “purchase” of a very small slice of mitigation water. This would decrease the transaction costs for a person who needs only a small amount of mitigation water in order to satisfy DNRC’s groundwater permitting requirements in closed basins. Such an approach would also significantly reduce the burden on DNRC for permit review and processing of individual wells.

2. Amend LC5015. In a similar vein, TU also recommends amending LC5015, so that the revolving fund for central water and sewer systems is funded, at least in part, by a substantial fee on the use of an exempt well on a tract of land less than 100 acres.

In addition, TU recommends amending LC5015 to preferentially fund those applications to the revolving fund that include such additional measures as progressive water metering, the use of treated waste water for lawn and garden irrigation, or the restoration of natural-vegetation infiltration galleries and permeable pavement for mediating stormwater collection that encourages slow groundwater recharge.

3. Do Not Introduce LC 5019 A foundation of the New Mexico’s court ruling was the constitutional protection for senior water right holders that is fundamental to the prior appropriation system. LC5019 undermines this fundamental aspect of Montana’s prior appropriation doctrine by eliminating the ability of existing water right holders to object to those aspects of a new water right permit that may adversely affect their water rights. *See*, New Section 1, sub-section (2), that eliminates the application of MCA §§ 85-2-307 through 311 and 85-2-363.

Of equal concern is sub-section (5) of New Section 1, that prevents a senior water right holder from even obtaining judicial review of a newly-granted permit that may harm his or her water rights. Sub-section (5) allows judicial review only when “. . . substantial rights of an aggrieved party have been prejudiced . . .” On its face, this language appears to limit judicial review to an applicant or the agency, as the only two entities that have been “parties” to the permit process. LC5019 makes no provision for senior water right holders to comment on the permit application or otherwise be involved in shaping the administrative record that would go before the district court, and give them clear standing to even participate in judicial review of a permit application. For these reasons, TU does not believe that LC5019 would make any positive contribution to sound water policy or management in Montana.

VI. DNRC Permit Review

LC5020 makes changes in the way that the DNRC review permit applications. Specifically, LC5020 does five things:

- (1) It allows DNRC to meet informally with an applicant for a new permit or a change to discuss the application;
- (2) It requires the department to make a written preliminary determination as to whether the application satisfies the criteria for a permit or change to be awarded;
- (3) Specifically recognizes the department's authority to impose conditions that would allow the issuance of an approval;
- (4) If DNRC proposes to grant an application, it requires the agency to describe the rationale for that proposed decision; and
- (5) It provides for a two tiered hearing process, depending on whether the preliminary recommendation is for grant or denial.

TU supports the concept embodied in this draft, and in fact had proposed something similar during the 2007 discussions on HB 831. This idea appeals to us because it creates some transparency in the decision-making process that does not currently exist. Currently, DNRC, for fear of being accused of pre-judging the process, closely holds its opinions about an application until the very end of the process. This poses its own series of problems for applicants.

“Preliminary” is the key word here. By requiring a preliminary determination LC 5020 compels the agency to provide everybody—applicant and potential objectors alike--some advance notice of how the department is tilting, based on the evidence they have seen, with some description of the rationale behind the preliminary determination. This can provide the applicant some chance to at least make its case to the hearing examiner that the department's preliminary finding is wrong, and it can provide potential objectors some indication of how difficult it may be to successfully prosecute an objection.

One concern TU has is that, as currently drafted, section 5(1) of LC 5020 sets up a two-tiered hearing process which might actually encumber the process needlessly. In effect, if DNRC's preliminary determination is that the application should be denied, it will issue notice of that to the applicant, and the applicant can seek a hearing. If the applicant prevails at the hearing, section 5(1) appears to require a second hearing, to notify potential objectors of the decision to grant. It would seem more economical to fold all of that process into one hearing.

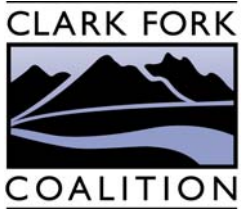
TU Recommendation: Pursue a bill that captures the concept of a preliminary decision obligation, but reduce the amount of process to a single opportunity for a hearing for both applicant and objector.

Conclusion

TU supports the work of the WPIC, and would be happy to discuss these recommendations further with any member of the WPIC.

Sincerely,

Mark Aagenes Conservation Director
Montana Trout Unlimited
Laura Ziemer Director Montana Water
Project of Trout Unlimited
Stan Bradshaw Staff Attorney Montana
Water Project of Trout Unlimited



August 4, 2008

Water Policy Interim Committee
Senator Jim Elliott, Chair
Senator Gary L Perry, Vice Chair
Senator Larry Jent
Senator Terry Murphy
Representative Scott Boggio
Representative Jill Cohenour
Representative Bill McChesney
Representative Walter McNutt
cc: Joe Kolman, Staff

**Re: Clark Fork Coalition Comments on Water Policy Interim Committee
Draft Legislation and Findings**

Thank you for the opportunity to comment on the WPIC's Findings and Options for Recommendations, as well as the Committee's draft legislation. The Clark Fork Coalition appreciated participating in the WPIC's meetings and discussions over the past year, and applauds the Committee's dedicated efforts to learn more about the intricacies of our state's ground and surface water.

Please find below the Coalition's comments on the options and draft legislation relevant to our members and residents of the Clark Fork watershed. We look forward to working with you to continue the conversation on how best to address the challenges and opportunities facing Montana's water resources.

Water Policy

>> The Coalition supports making the WPIC a permanent interim committee. This step will help create institutional knowledge of the science and history behind Montana's water supply, and also aid in generating proactive policies to address future water needs.

LC 5007 - Ground water investigation program:

The Coalition is in favor of collecting accurate, accessible scientific data to help the State and counties allocate, measure, and monitor water withdrawals. Though the costs of a comprehensive statewide hydrogeologic study are not feasible, focusing money and MBMG efforts in the high-growth sub-basins will allow more informed permitting for water use.

We hope that an expanded MBMG study would be focused narrowly enough to provide data on surface-groundwater interactions. To this end, we recommend

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defining a list of “prioritized subbasins” in Section 1 (2), which the steering committee can then further narrow.

The Coalition also urges the WPIC to consider directing MBMG to provide the public with a **basic model for predicting impacts from future water withdrawals/changes in the studied sub-basin**, as a practical component of the data collected and analyzed.

General Water Quantity and Quality

>> We recommend updating the Controlled Groundwater Area petition process in 85-2-506 to allow local governments a more flexible and less costly way to petition for such an area. Controlled Groundwater Areas are an important, tried-and-true tool for managing water, particularly in many regions of the quickly-growing Clark Fork Watershed, and will become more relevant as the demand on our water resources increases.

LC 5012 - MDT water rights for wetland mitigation

The Coalition is **not in favor** of creating an exemption under 85-2-306 for the Montana Department of Transportation to appropriate ground or diffuse surface water without a permit from the DNRC. Concerns include:

- No set limit on the volume allowed for the proposed MDT appropriation exemption.
- Creating additional exemptions from the permitting process when many of our streams and rivers are already over-appropriated, many are chronically dewatered, and the State is already struggling to monitor and manage existing groundwater withdrawals, much less additional unregulated withdrawals.
- Any “recreated” wetlands constructed under the Clean Water Act should also be subject to statewide performance standards to ensure that the State’s water is being used for scientifically valid, and ecologically beneficial wetland mitigation.

The Coalition **recommends an expedited DNRC permitting process for MDT** to ensure road construction activities comply with the Clean Water Act, but not an exemption for water appropriation.

Government Issues

>> The Coalition supports increased coordination between DEQ, DNRC, and MBMG. We also recommend **requiring a central reporting system for all exempt wells**, especially for new subdivisions and for wells drilled near individual septic systems. This is critical for monitoring and managing water quality and quantity.

LC 5014 - Local government authority to require public water/wastewater systems

The Coalition supports this bill draft. It’s a valuable first step in allowing counties to assume more control over their water resources through the use of centralized water and sewer systems.

However, since most county planning and health departments lack the necessary resources, money, and data to practically execute the authority granted by LC 5014, we recommend **considering additional incentives for local governments to preferentially approve subdivisions with central water/wastewater systems**—such as a DEQ/DNRC funding program designated to providing counties more staff resources if they choose to enact this authority.

Water Use Enforcement

>> We'd like to note that in order to effectively enforce water rights, the State must require reporting of all water use, including exempt wells (as stated above), and also actively **monitor future exempt wells' and permitted groundwater wells' water use.**

LC 5021 – Revising water enforcement laws

The Coalition strongly supports WPIC's attention to better enforcing water use in the state to ensure that senior water rights are protected. The Coalition supports LC 5021, especially 3-7-311(4). However, we believe that **water enforcement should stay at the state level** – such as with the Attorney General as proposed in 5021 – rather than at the county level. County staff, including attorneys, are already over-stressed and ill-equipped to deal with the complex intricacies of water law.

Water Supply and Sewage Disposal

>> The Coalition commends the WPIC on the many in-depth discussions and presentations on the status of individual wells exempt from the permitting process. We believe **the cumulative impact of exempt wells is the single biggest challenge facing the Clark Fork basin's water resources**, as the “free giveaway” of water threatens senior water right holders, water quality, fish and wildlife, and future water supplies.

We recommend amending 85-2-306(1) to reflect today's changing demands on our groundwater—this means the exemption cannot be applied to subdivisions. In addition, the well volume of 10 acre-feet per year designated in this statute is excessive for domestic or stockwater tank needs. The Coalition recommends amending the exempt volume to one or less acre-feet per year. These suggestions correlate to Options J, K, and L in the WPIC report.

Option P—not allowing fish/private ponds to utilize the exemption—is also important to the Coalition and our members. Private ponds are more and more popular with residents moving to the Clark Fork watershed, adding to the unregulated water withdrawals plaguing our already-dewatered tributaries, particularly in the Bitterroot Valley. Solutions include: 1) amending the total volume allowed for individual exempt wells to one or less acre-feet per year, and 2) requiring the reporting of all exempt wells to better track and monitor water use.

We don't believe that Options M and N are valid solutions to best encourage public/community water and wastewater systems. However, Option O has merit for tracking and mitigating new subdivisions' water use in closed basins in a timely, cost-effective way. In effect, a "mitigation credit" for groundwater withdrawals could be modeled after the federal Clean Water Act's wetland mitigation program, where MDT can purchase wetland credits from a mitigation bank—a landowner/private entity that has restored a wetland in a nearby region, such as the Upper Clark Fork Mitigation Bank (http://www.ecosystempartners.com/projects_ucfmb.htm)—to offset the destruction of any wetlands during road construction.

A groundwater mitigation credit would be purchased by the developer to offset the net depletion as part of the DNRC's permitting process. Mitigation water could come from a large block of reservoir water or retired senior water rights transferred to instream use within a pre-determined radius—the region appropriate to provide mitigation water can be designated geographically by subbasin. The water would be readily available in a "bank" administered by the DNRC, a local authority, or a private entity, cutting down on the current costly and time-consuming process under 85-2-362 of locating, purchasing, and transferring the mitigation water.

LC 5019 – Permits for subdivision water systems

While an interesting first step at creating a solution for subdivisions seeking a new groundwater appropriation, this draft bill ultimately **falls short of addressing the exempt well problems** discussed above.

The Coalition appreciates that this bill recognizes a "subdivision water system" as a withdrawal of groundwater by 2+ wells. This is crucial in acknowledging that multiple individual wells constitute a combined appropriation (even if not physically manifold).

The main reason the Coalition does not support LC 5019 is because it violates Montanans' constitutional rights under the prior appropriation system. This bill would limit the ability of water right holders to object or comment during the permitting process by eliminating 85-2-307 to 311 for subdivision water rights. We believe this is an unacceptable method of administering water use permits.

However, we would be supportive of creating other incentives for streamlining the permitting process for a "subdivision water system," especially if this streamlined permit requires residential/urban water conservation practices, such as grey water systems or rainwater catchments for lawn and garden irrigation, and water metering for each unit.

If the bill is introduced, the Coalition urges the WPIC to make sure any "baselines" defining what constitutes a subdivision water system (as outlined in 85-2-102 (23)) are a reasonably low threshold for requiring a permit. Setting numbers on minimum volumes or lot sizes will only encourage subdivisions to find "loopholes" that fall under that specified threshold rather than applying for the groundwater permit.

>> LC 5020 – DNRC permitting/change revisions

The Coalition supports the proposed changes to the DNRC permitting process. These changes would provide much-needed expedition and streamlining of permit requests for those looking to appropriate new water supplies, while still allowing public process and transparency for existing water users. Our hope is that a more time- and cost-efficient system will encourage developers and water users to apply for groundwater permits rather than opt toward unregulated and unmonitored exempt wells.

Conclusion

Again, the Clark Fork Coalition commends the WPIC members and staff for their commitment to protecting Montana’s water resources. We’ve enjoyed working with you this past year, and look forward to continued dialogue on how to best meet the needs of all water users in the Treasure State, including fish and wildlife. Please feel free to call anytime to discuss these recommendations and comments.

Sincerely,

Brianna Randall
Water Policy Director

Karen Knudsen
Executive Director

Appendix A. Clark Fork Coalition’s general water policy recommendations.

Protecting Montana’s Valuable Water Resources

1. Water resource planning must always take into account the West’s hydrologic variability, recognizing that our supply is not fixed.
2. Link land-use decisions to water availability, especially in fast-growing counties that rely on groundwater for new development. New developments must provide water supply assessments that analyze: (1) sustainable, long-term supply; (2) impacts on other water users, including fish and wildlife; and (3) alternative sources.
3. Set a goal of “no net increase” of natural water use for new developments (i.e. no new dams for storage), and encourage conservation as the main source of “new” water.
4. Create incentives and mandates that boost both urban/residential and rural/agricultural water conservation: i.e. enable creative re-use of water with local goals for developing rainwater catchments and grey water systems as sources for irrigation and lawn/garden water.

5. Recognize linkage between energy and water demands by accounting for: (1) the energy costs of developing new water supply options; and (2) impacts on water use from oil, coal, hydropower, and gas development.
6. Foster regional cooperation among existing public and private water managers, and encourage the creation of new watershed management authorities.
7. Clarify relative rights of existing water users by streamlining and expediting state water departments' permitting and adjudication processes, and by completing negotiated settlements of Native American reserved water rights.
8. Fund local watershed groups and water districts that initiate stream restoration, water conservation, and education efforts through grants and loans.
9. Encourage public dialogue and community-supported policy changes by educating policy makers and the public about the impacts of growth and climate on our water supply: For examples, see Clark Fork Coalition's *Low Flows, Hot Trout* report, available at www.clarkfork.org and details on the upcoming "Headwaters Summit," available at www.northernrockies.org.
10. Restore and protect rivers, floodplains, and wetlands to benefit the overall public safety, water quality, and ecosystem services in the West's inter-connected watersheds.

From: JP Pomnichowski [pomnicho@montanadsl.net]
Sent: Monday, August 04, 2008 3:09 PM
To: Kolman, Joe
Subject: WPIC bill drafts--comments, suggestions

Hello, Mr. Kolman,

Here are my questions and suggestions for the WPIC bill drafts. Sorry not to have gotten this to you with my first email. Some of these are questions for you, most are recommendations or questions or considerations for the committee.

BILL DRAFTS

LC5007

Perhaps add, in Section 1(2). The groundwater assessment steering committee...shall prioritize subbasins for investigation based upon...housing, ~~and~~ commercial activity, and adjudication.

Comments from Water Court may help to determine if this would help or hinder the groundwater assessment steering committee.

LC5019

p2, In Section 1(3)(d), I assume this includes irrigation wells for public open space and parkland. The item says that exempt wells will not be allowed in the public water system; that should include irrigation wells. Water needed for fire service, public space watering, etc. should be on the system. (For fire, it must be so as to have sufficient pressure.)

In Section 1(3)(e), perhaps add the DNRC or DEQ for water quality testing and monitoring, unless the MBMG will do that, too.

In Section 1(4), was there discussion among the WPIC to change 'may' to 'must'? "Wells permitted pursuant to this section ~~may~~ must be included in the ground water monitoring program..."

p6, In Section 2(11) is a definition for "developed spring". Does that definition apply to fish ponds, or to opencut mining operations ("wet pits")? Just curious.

In Section 2(12)(g), do you mean acres of land or acre feet of water? "Domestic purposes means those water uses common to a household including: (g) garden and landscaping irrigation to ??? acres.

p8, In Section 2(23), change two to one: "...water from the same source aquifer by ~~two~~ one or more wells..."

and for amounts, consider this: "...that is estimated to supply at least ~~????~~ 4.5 acre feet of water per year. (1 house and ¼ acre = .73 acre feet) and not more than ~~3,000~~ 1,000 acre feet per year based on availability of water in the basin. (Subject to legislative approval..."

I calculate these amounts like this: minor subdivision is 5 lots or fewer, any other subdiv is 6 or

more; so $.75 \times 6 = 4.5$ acre feet/year. This is the minimum. For a 150 home subdivision at .75 acre feet/home, that's 225 acre feet/year. (Are you figuring what's needed for sewage treatment? If not, I'd estimate 775 af/y for 1,000 af/y) It'd be worthwhile to check with a wastewater engineer about that, especially with the TMDL allowances into watercourses.

p9, (30) is a definition for watercourse; should it include canals? or are farmers' canals interpreted to be included in 'ditches'?

p10, 85-2-311 (a)(ii)(C) states that legal availability of water is determined on physical water availability and existing legal demands; is there a requirement for specific lengths of time? (if ag use, need for irrigating fields in the summer, but no call for water in winter; but domestic or municipal uses are constant (you get the idea))

Does the DNRC or extension service or someone have numbers for typical amounts for a specific use? Number of gallons or acre feet for an acre of irrigated alfalfa, or for a municipality of a certain population?

p11, (e) does this section suffice for water leases?

P11, (2) "The applicant is required to prove in his application that the criteria in subsections (1) (f) through (1)(h) have been met ~~only if a valid objection is filed. If a~~ valid objection is filed, the objection must contain substantial credible information..."

p12, (3)(iv) this criteria for an appropriation as a reasonable use includes "the availability and feasibility of using low-quality water for the purpose for which the application has been made;"

does this allow for aquifer recharge or another use of coal bed methane water? That can be highly salinated, mineralized water, unsuitable for other uses because of its mineral and saline content.

Is there a definition of potable water?

p12, (3)(v) mentions saline seep. Is there a definition of saline seep, including measurements over land area, and a statement of existing conditions before a proposed appropriation is found to be a reasonable use? (baseline data from which to determine if the seep worsens)

p12, (3)(vi) says "significant adverse environmental impacts". Is there a definition or measure for 'significant'?

p13, (4)(c)(i) mentions projected water shortages. Does the department consider condition-limiting or time-limiting applications and appropriations?

p15, 85-2-360—these sections direct that studies or the applicant must predict net depletion. What if a net depletion is not predicted, but the appropriation actually DOES result in a net depletion? I assume it's action based on a complaint from another appropriator, but perhaps there should be some other or more consequence from the applicant's understated prediction of net depletion.

p18, (1)(b)(ii) refers to 'any amounts that will likely be lost in conveyance'. Is there a requirement or recommendation in statute for canals to be lined?

This same section (ii) directs a prediction of net depletion and amounts that might be returned to a system through percolation or other means. Is there any requirement for water samples from and a measure of distance to the "first level" groundwater aquifer (assumed to be the receiving water level of any surface water

percolating down to groundwater)? Along with depth to aquifer, is there any requirement for baseline data of the water profile for chemical, nutrient, mineral content? Does the department require soil samples to help determine percolation or subsurface flow? Any requirement to measure the rate of percolation? (It'd be very different through hydric soils vs water soaking into the ground, then running along a deposit of shale!) Any reporting or mapping requirement of floodplains or soil types?

p19, items (D) and (E)(vi) in particular, hooray! Glad to see transmissivity and locations of other wells included.

p20, (4) says the hydrogeo assessment, model, test well data, monitoring well data, etc. must be submitted to the dept. Does this include oil and gas uses? Is this required of opencut mining operations, or no, because there's no appropriation of water? (there is exposure of the groundwater to surface runoff and surface environmental effects for wet pits) Also, is this required of coal bed methane drilling operations?

p22, (5) same question about prediction vs actual net depletion: What if a net depletion is not predicted, but the appropriation actually DOES result in a net depletion?

LC5012

p2, (h) refers to aquatic resource activities and the federal Clean Water Act. Is there a definition of aquatic resource activities in state code?

p11, (9)(a) I wonder if we should give some allowance for repairs: "...if the appropriation is to re-create a functional wetland with the intent to substantially replicate the predisturbance conditions by filling in, ~~or~~ removing, or replacing constructed ditches, drains, culverts, or similar structures."

p13, (iii) I wonder if this should include the legal description of the plat filing, or is that included in "the place of use"? I don't think so. Should we have a street address, as well as the legal description of the site?

p13, (e) is the water permit held by MDOT or by DNRC?

LC5009

p1, (b) states, "...The board may not require a permit for a water conveyance structure or for a natural spring if the water discharged to state waters does not contain industrial waste, sewage, or other wastes. Discharge to surface water of ground water that is not altered from its ambient quality does not constitute a discharge requiring a permit if:..."

I have a concern about "ground water that is not altered from its ambient quality" because water drawn from coal beds in coal bed methane drilling can be highly salinated and mineralized, so much so that the receiving waters are degraded (polluted). This is the situation of the Powder and Tongue Rivers from discharges of groundwater to those watercourses from drilling activities in Wyoming and Montana. We should require baseline data in a water profile of ground water for its chemical, nutrient, and mineral content, and parameters for acceptable levels both of the groundwater drawn AND of the receiving waters; if a river is already carrying too much content, then there should be a provision that the release of groundwater "that is not altered from its ambient quality" will not be allowed.

This is addressed to an extent on

p2, (ii) states, "the water discharged does not cause the receiving waters to exceed applicable standards for any parameters..." but I don't see in the previous text a requirement for baseline data and water composition for either the released waters or receiving waters. Is there one, somewhere?

p2, (5)(a) references the federal underground injection control program; does that cover all five classes of EPA underground injection wells?

p3, (5)(c) "...disposing of their own normal household wastes..." is there a definition for 'normal' household wastes? Considerations for toxic substances, paint, motor oil, etc.?

LC5020

One of my most primary concerns about this draft, just upon reading the intent "For an act allowing the DNRC to issue a preliminary determination on a water right permit or a change in appropriation right..." was for requirements of public notice, public hearings, release of finding (by the dept.) and preliminary recommendations. I'm glad to see some of this addressed on

p7, I recommend in (2) "...shall publish a notice ~~once~~ twice in a newspaper of general circulation..."

in (2)(b), I'd recommend language requiring the applicant to compile and submit to the dept. the addresses of appropriators, property owners, and specified area water users so that "...the department shall also serve notice by first-class mail..."

I serve on the Planning Board and Zoning Commission in Bozeman, and Bozeman's public notice requirements (of the city and of applicants) are beefier than the minimums in state statute. They serve us well. To do something like a zoning change, or a remodel of a home, or a minor subdivision, or to apply for a variance, public notice requires these things:

1. a yellow sign posted on the site (requirements of the contents of the notice are specified in our code) in a conspicuous place and for a term before any public meeting and before construction begins

2. publication once or twice in the local newspaper

3. and one of the most important, in my opinion, letters mailed first-class to adjacent property owners with the public notice. Our code, the Bozeman Unified Development Ordinance, 18.76.020.D, states: The applicant shall provide for the purposes of noticing a list of names and addresses of property owners within 200 feet of the site, using the most current known property owners of record as shown in the records of the County Clerk and Recorder's Office and stamped, unsealed envelopes (with no return address) addressed with names of above property owners, and/or labels with the names of the above property owners, as specified on the appropriate application.

Notice must be sent to adjacent property owners within 200 feet of the site. Keep in mind that this is for projects like building garages into backyard setbacks! I think a sliding scale based on the size of the operation or release of water (and the presumed impact on neighbors) could be established. Notice could follow water users along a watercourse, or those drawing water from the same aquifer.

The applicant is responsible for researching the names and addresses of adjacent and nearby property owners; the dept. should not spend its time on this. Failure of an applicant to provide a complete list can stall the whole project. I've rescheduled hearings and ordered re-noticing when property owners have not been adequately notified.

4. PUBLIC MEETINGS. All applications for subdivisions, zoning changes, etc. are heard in a public meeting, allowing public comment, by the city commission or Board of Adjustment. People come and have their say. We very rarely deny a project; instead, we place conditions of approval on

them to mitigate their impacts. The same could, and should, be done with proposals for water appropriation. Local public meetings to present the proposal and explain all of the related effects (surface water runoff, groundwater protection, times of heavy use, mitigation plans, etc.) must be scheduled and held.

p7, perhaps add an item (iv) adjacent property owners within ??? of the proposed site, or users who draw water from the same aquifer, or along the receiving watercourse at a distance of ??? downstream from the release point for which the appropriation proposes a permit or change in appropriation right.

this would reach a different group than item (i), which specifies “an appropriator of water”. For people on exempt wells, (i) does not apply, right? so (iv) might serve that purpose.

p8, (4) states in part, “...if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons.”

What if information, or an adverse affect, is found after the appropriation is made? Should there then be a requirement for notice to other appropriators and users, and objections filed?

p10, (1) “If the department determines...it shall hold a hearing pursuant to 2-4-604”

is this a public hearing? If not, then I propose adding the word “public” before the word “hearing”.

In the rest of this section, I’m so pleased to see the language changed to accommodate regular citizens without formal representation in causes. But do we still need—or do we still allow somewhere—for the department to hold contested case hearings?

p12, (1) “...it shall hold a hearing pursuant to 2-4-604...” again, is this hearing a public hearing?

p13, (2) is there public notice on this objection period?

p18, (7) is this a public hearing?

(8) specifies that “The hearing shall be conducted under the contested case procedures...”

Is this the only provision for the contested case hearing? Or is this supposed to be a hearing, per the changes from contested case hearing to hearing in other sections?

LC5021

p3, (2) “...the department may attach to the controlling works a written notice, properly dated and signed...”

Does this serve as public notice? Is there a need for public notice?

p3, (5) “A county attorney...may request assistance from the attorney general or the department.”

p4, (7) can extensions be granted if remedies are being done?

LC5015

p2, (b) “in high-growth areas”—is there a definition of high-growth area? There should also be consideration (read: ability to deny) for over-appropriated areas and for closed basins with respect to availability for high-growth areas.

How does the revolving loan fund affect, if at all, the TSEP prioritization, size of projects, etc.?

p3, the numbering is hinky. (4), then (8), (9), (14), (2), (17).

p3, (2) Is there consideration for number of lots or users? How about for the distance to connect to a municipal or community system? the text says 15 service connections, then to serve 25 year-round residents. Does that jive? We should go by connection, not people in a household.

p5, numbering on the page—(c) should be (b), (d) should be (c), (e) should be (d)

p9 has the WPIC discussed the term of the loans? I don't think the fund can last over a project's “structural and material design life”. When subdivisions are approved, the term for that approval is three years, and build-out must occur in that time, otherwise the applicant must re-apply. How about a term for a loan limited to a specific length of time, with repayment beginning as soon as ??? units are connected and being served by the system?

p10, (2) “...the first of which must be received not more than 1 year after construction commences or the first users are connected to the system, and before the completion date of the project and the last of which must be received not more than ~~20~~ five years after the completion date.”

p13, (3)(a) will municipalities be invited to apply with info like the number of subdivisions or lots platted by the city? will developers and subdividers submit info based on the criteria in this section?

p17, “A creation of state debt would require a 2/3 vote of each house...”

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