



Water Policy Interim Committee

65th Montana Legislature

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TO: Water Policy Interim Committee
FROM: Erin Bills, Legal Staff
DATE: December 8th, 2017
RE: Effect of controlled ground water areas and stream depletion zones on exempt wells

I. Introduction

During its October 2017 meeting, the Water Policy Interim Committee (WPIC) directed committee staff to analyze the legal question of whether the definition of "combined appropriation," as set forth in 1987 by the Department of Natural Resource and Conservation (DNRC), impedes designation of controlled ground water areas, § 85-2-506, MCA, or stream depletion zones, § 85-2-380, MCA. Legal staff analyzed each of these statutorily defined provision of Montana water law in relation to the rule and submits this memorandum to the WPIC for its consideration.

A. Short answer

As enacted, both controlled ground water areas and stream depletion zones were designed to limit use of water under certain circumstances. In order for either a controlled ground water area or stream depletion zone to be designated, the DNRC will rely heavily on scientific analysis to establish whether certain statutorily defined criteria are met. If a controlled ground water or stream depletion zone is designated, all appropriations may be regulated, including those previously exempt from the permitting process. In short, the definition of "combined appropriation" as set forth in 1987 by the DNRC does not impede designation of either a controlled groundwater area or a stream depletion zone.

II. Background

The phrase "first in time, first in right" is the bedrock of Western water law known as the prior appropriation doctrine. Montana subscribes to this doctrine, which affords water rights to those who first apply a particular quantity of water to a beneficial use. Time is the essential element of the prior appropriation doctrine. As such, the date of the application of water to a beneficial use determines the user's priority in the water. Basically, the first user to obtain the right is the first user who gets to use the water in times of water scarcity.

The prior appropriation doctrine has been recognized by courts throughout Montana's history. In 1911, the Montana Supreme Court recognized the concept of "first in time, first in right" in a

decision involving a change of use from power generation to agricultural.¹ The Montana Supreme Court in 1953 stated the rule as follows: "The rule is that he who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers as here . . ."² The concept of "first in time, first in right" has been integrated into the Montana Water Use Act. Section 85-2-401, MCA, specifically provides that "[a]s between appropriators, the first in time is the first in right."

To enforce a water right under the prior appropriation doctrine, a senior user can make a call on the source. When this occurs, water users with the most junior rights must cease using the water in reverse order of priority so that the more senior right is fulfilled first. In some cases, each junior user upstream from the senior's point of diversion may be required to curtail their use. With surface flows, it is relatively easy to predict when a senior will receive water pursuant to a call. In the context of ground water, timing can be a significant challenge because it could take several days or weeks for water to reach the surface source depending on the connection.

A. Montana does not distinguish between surface water and ground water for purposes of priority enforcement.

Historically, Montana law distinguished ground water from surface water. Over time, both the Legislature and the courts began to recognize the connection between ground water and surface water and treat them similarly for purposes of water appropriation and management. In 1966, the Montana Supreme Court issued a decision that explicitly recognized the connection between ground water and surface water. In the decision, the Court stated that "[m]odern hydrologic innovations have permitted more accurate tracing of groundwater movement."³ The Court also stated that "traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists."⁴

In 2006, the Montana Supreme Court issued a decision that squarely addressed the connection between surface water and ground water.⁵ At issue in the case was the DNRC's interpretation of the state's closed basin law in the Upper Missouri River basin, which prohibited the DNRC from granting permits within the Upper Missouri River basin until the issuance of the final decrees.⁶ The DNRC was not prohibited, however, from processing applications for the appropriation of ground water unless the ground water was "immediately or directly connected" to surface water.⁷ In interpreting the meaning of "immediately or directly connected" to surface water, the DNRC determined that a well for ground water could not pull surface water directly from the source.

¹ *Featherman v. Hennessy*, 43 Mont. 310, 316, 115 P. 983, 986 (1911).

² *Midkiff v. Kincheloe*, 127 Mont. 324, 328, 263 P.2d 976, 978 (1953).

³ *Perkins v. Kramer*, 148 Mont. 355, 363, 423 P.2d 587, 595 (1966).

⁴ *Id.*

⁵ *Montana Trout Unlimited v. DNRC*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224.

⁶ Section 85-2-343, MCA.

⁷ Section 85-2-342, MCA. The definition of ground water was deleted from section 85-2-342, MCA, in 2007. Prior to 2007, section 85-2-342, MCA, defined ground water as "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."

When this occurs, it is called induced infiltration. The DNRC's interpretation did not prohibit wells that captured ground water that would otherwise end up in the stream (i.e., prestream capture). The Supreme Court held that both pumping methods reduced surface flows and that DNRC's interpretation did not protect senior water right holders.⁸

Unique challenges for making a call to enforce a water right exist, as Montana law does not distinguish between surface water and ground water for purposes of priority enforcement. Dan Tarlock, an expert in water law, has noted that “[i]n the western states that apply the prior appropriation system to ground water, priority has proved impossible to administer in practice for basins that are not directly hydrologically connected to surface systems.”⁹ The problem, according to Tarlock, “is that a causal connection between a victim senior well and a junior well is extremely difficult, if not impossible, to establish. All wells contribute to mining and it is difficult to insulate the causal connection between a well and the relevant cone of depression.”¹⁰

Because a call may be made in an area where the connection between surface and ground water is not immediately known and because water may not be received immediately, a call against a ground water development may not be a practical or timely means of enforcing a senior surface right. The Legislature has, in part, addressed these type of challenges by enacting controlled ground water areas and stream depletion zones.¹¹

B. Appropriations exempt from the permitting process may affect both surface and ground water use and are subject to senior water right enforcement.

The Water Use Act, passed in 1973, established a process for formally permitting water rights in Montana. Among other things, permit requirements include an analysis of physical availability at the point of diversion, legal availability, and whether there are any adverse effects on existing water right holders. Because ground water and surface water are managed under the same permitting system, an applicant for a ground water permit must go through the same permitting process as a surface water applicant unless the appropriation is exempt from the permitting requirements. This is significant because, like a surface water applicant, a ground water applicant must demonstrate that “the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.”¹² It also means that senior users have the opportunity to formally object to the application. As such, Montana law recognizes that a senior water right may be affected by both surface and ground water uses and presents unique challenges to resolving disputes between permitted and exempt uses.

III. Does the definition of "combined appropriation" as set forth in 1987 by the DNRC impede controlled groundwater areas or stream depletion zones?

⁸ *Montana Trout Unlimited v. DNRC*, ¶ 43.

⁹ Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric*, 76 N. Dak. L. Rev. 881, 102, (2000).

¹⁰ *Id.* at 102-103.

¹¹ Sections 85-2-506 and 85-2-380, MCA.

¹² Section 85-2-311(1)(b), MCA.

The Legislature carved out an exception to the Water Use Act for small ground water developments (*i.e.*, exempt wells). Currently, a permit is not required to develop a well or a ground water spring that uses 35 gallons per minute or less or up to 10 acre-feet per year, unless it constitutes a “combined appropriation.”¹³ What constitutes a “combined appropriation” is the crux of the issue with exempt wells. The term is used but is not defined in the Water Use Act. The Legislature delegated authority to the DNRC to define "combined appropriation." If an agency is given express, delegated authority to promulgate rules to implement a statute, the rules carry the "force of law."¹⁴ In 1987, the DNRC adopted a rule which defined combined appropriation as:

"an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which , in the department's judgement, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.' They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the 'combined appropriation.'"¹⁵

To align with controlling judicial opinion, the DNRC has engaged in rulemaking. In September 2016, the Montana Supreme Court reinstated the 1987 rule until a new rule is initiated at the discretion of the DNRC.¹⁶ On September 8, 2017, the DNRC initiated the rulemaking process and proposed the 1987 definition of "combined appropriation" as provided above.¹⁷ The WPIC informally objected to the proposed definition on October 10, 2017. An informal objection is lodged pursuant to 2-4-305(9), MCA, when a majority of the Committee notifies the chair that they object to a proposed administrative rule. The effect of this objection is that it can delay the adoption of a proposed rule for up to approximately 6 months from the date of the publication of the proposed rule if, every time that the Committee meets in the 6-month period, the Committee decides to sustain the objection. This objection delayed the adoption of the rule until publication of the last issue of the Montana Administrative Register that is within the 6-month period: the adoption of MAR notice number 36-22-196 (published September 8, 2017) is delayed until late March 30, 2018.

After making the informal objection, the WPIC requested the following analysis of the interplay between the 1987 "combined appropriation" exemption and two provisions of Montana water law: controlled ground water and stream depletion zones.

¹³ Section 85-2-402(15)(a)(iii)(B), MCA.

¹⁴ Section 2-4-102(14)(a), MCA.

¹⁵ Mont. Admin. R. 36.12.101 (1987).

¹⁶ *Clark Fork Coalition v. Tubbs*, 384 Mont. 503, ¶ 45 (Mont. 2016).

¹⁷ 17 Mont. Admin. Reg. (Sept. 08 2017).

A. The 1987 "combined appropriation" definition does not impede controlled ground water area designation or modification.

Controlled ground water areas were created to prevent overappropriation of water. Under § 85-2-506, MCA, a controlled ground water area may be designated to protect water quality and quantity. An area may be designated or modified by the DNRC on its own motion, by petition of a state or local public health agency, municipality, county, conservation district, or local water quality district. In addition, a controlled ground water area may be proposed by petition of at least one-third of the water right holders in the proposed controlled ground water area.

In order to determine whether water is being wasted, a complete and accurate petition must contain analysis prepared by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer addressing one or more of the following criteria:

- current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled ground water area will cause ground water levels to decline to the extent that water right holders cannot reasonably exercise their water rights;
- current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have reduced or will reduce ground water levels or surface water availability necessary for water right holders to reasonably exercise their water rights;
- current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have induced or altered or will induce or alter contaminant migration exceeding relevant water quality standards;
- current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have impaired or will impair ground water quality necessary for water right holders to reasonably exercise their water rights based on relevant water quality standards;
- ground water within the proposed controlled ground water area is not suited for beneficial use; or
- public health, safety, or welfare is or will become at risk.¹⁸

If the DNRC finds that it is more likely than not that one or more of the criteria described above are met, the department may designate a permanent controlled ground water area by rule. But if sufficient facts are not available to designate a permanent controlled ground water area at the time of petition, the department may designate by rule a temporary controlled ground water area to allow further study to determine if criteria are met. The public will be notified of the proposed rules and may provide comment.

The effect of a controlled ground water area designation depends on whether a permanent or temporary status is required. A temporary controlled ground water area may include control provisions of measurement, water quality testing, and reporting requirements while further

¹⁸ Section 85-2-506(5)(a)-(f), MCA.

studies are being conducted, but the designation may not exceed six years.¹⁹ Logically, a temporary designation may become permanent based on study conclusions.²⁰ A permanent controlled ground water area designation may include more severe control provisions such as:

- banning further appropriations of ground water;
- restricting the development of future ground water appropriations by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other criteria;
- requiring measurement of future ground water or surface water appropriations;
- requiring notice on land records within a permanent controlled ground water area to inform prospective holders of a property interest of the permanent controlled ground water area;
- requiring spacing restrictions on certain wells;
- mitigating ground water withdrawals;
- testing water quality; and
- requiring data reporting.²¹

Designation of a controlled ground water area is scientifically based and requires analysis of all water withdrawals. Therefore, if a temporary or permanent controlled ground water area is designated, all water appropriations, including an exempt well, will be subject to the control provisions defined in statute regardless of how an appropriation is defined.

B. The 1987 "combined appropriation" definition does not impede stream depletion zones.

Stream depletion zones were created to reduce the exemption for ground water appropriations by clarifying enforcement by senior water right holders against ground water appropriations exempt from permitting. As defined, a "stream depletion zone" means:

"an area where hydrogeologic modeling concludes that as a result of a ground water withdrawal, the surface water would be depleted by a rate equal to at least 30% of the ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35 gallons a minute."²²

Under § 85-2-306(3)(a)(iv), MCA, the maximum flow rate for all ground water appropriations that meet the exception to the permit requirement in § 85-2-306 and are located within the stream depletion zone is 20 gallons per minute and the maximum volume is 2 acre-feet per year. In short, the zones were designed to protect senior water right holders in areas where hydrogeologic evidence supports that senior water right holders are being adversely impacted by ground water rights exempt from permitting.²³

¹⁹ Section 85-2-506(6), MCA.

²⁰ Section 85-2-506(6)(d), MCA.

²¹ Section 85-2-506(7), MCA.

²² Section 85-2-102(23), MCA.

²³ Section 85-2-381(2), MCA.

In order to determine if a senior water right holder is being adversely impacted, the following criteria must be met before the DNRC may establish a stream depletion zone:

- the stream depletion zone lies within a closed basin;²⁴ and
- there exists a hydrogeologic assessment where the stream depletion zone is proposed that was conducted by either the ground water investigation program²⁵ or by a hydrogeologist or a qualified, licensed professional engineer.

Like controlled ground water areas, a stream depletion zone designation is scientifically based. If the hydrogeologic assessment concludes that senior water right holders are being adversely impacted by ground water rights exempt from permitting, the holder of an exempt appropriation will be required to curtail water use in accordance with the statute. Stream depletion zone designation allows for regulation of all wells, including an exempt well, regardless of how the appropriation is defined.

IV. Conclusion

As enacted, controlled ground water areas and stream depletion zones are mechanisms to limit overappropriation of water under certain statutorily defined criteria. The 1987 definition of "combined appropriation" specifies an appropriation exempt from the DNRC permitting process; however, if a controlled ground water area or stream depletion zone is designated, all appropriations may be regulated including those previously exempt from the permitting process. In conclusion, the definition of "combined appropriation" as set forth in 1987 by the DNRC does not impede designation of either provision of Montana water law.²⁶

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²⁴ Pursuant to sections 85-2-319, 85-2-321, 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344

²⁵ Established by § 85-2-525, MCA.

²⁶ Chief Legal Counsel, Todd Everts, reviewed this memorandum and agrees with the legal conclusions in this memorandum.