From:	Towlerton, Al
To:	Kolman, Joe
Cc:	Mumford, David; McInnis, Amanda; Clark, Dave
Subject:	Water Policy
Date:	Tuesday, August 24, 2010 3:13:46 PM

Mr. Kolman:

We offer the following comments on the WQIC draft report and specifically on the proposed legislative items as follows:

- LC 9004 – We support this proposed bill with the recommendation that the language allowing the designation of a mixing zone easement be deleted. While we recognize this language may make it more palatable to the development community, we believe developers will merely designate an easement throughout the subdivision during the platting process. Thus the intent of the bill will be usurped.
- LC 9005 – We support this bill.

Thank you for the opportunity to comment on these proposals.

Cordially,

Alan Towlerton
Deputy Public Works Director
2224 Montana Avenue
Billings, MT 59101
(406) 657-8314
towlertona@ci.billings.mt.us

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

BRIAN SCHWEITZER, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074
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PO BOX201601
HELENA, MONTANA 59620-1601

August 10, 2010

Environmental Quality Council
Honorable Chas Vincent, Chairman

Dear Representative Vincent:

I appreciated the Committee's interest and discussions regarding LC 8002 that pertains to the state's ownership and management of navigable waters. I have reviewed the draft legislation and offer the following observations and comments.

The State holds title to the beds of navigable waters, and this asset is administered by the Board of Land Commissioners for the benefit of the public land trust. The Board is obligated to manage all navigable rivers, and must obtain full market value for any use of the beds of these rivers under Art. X, Section 11 of the 1972 Montana Constitution. See, PPL Montana, LLC v. State, 355 Mont. 402, 444, 229 P.3d 421, 450 (2010). In order for the Board to fulfill these Constitutional fiduciary duties, I suggest the following revisions to the legislation:

1. In Section 1 (b) strike "must" and replace with "may."

   Comment: The State Land Board retains the Constitutional authority to determine whether it will grant or deny any application for a lease, license, or an easement.

2. Strike Section 1 (d) in its entirety.

   Comment: The payment of taxes does not and cannot represent compensation to the public land trust for use of a navigable riverbed owned by the State and held in trust for the public. Property taxes are assessed to satisfy local taxing jurisdictions' functions and expenses. The Montana Supreme Court in PPL Montana, LLC v. State held that the State must obtain the full market value for any use of the beds of navigable waters.

3. In Section 2 (3) add:

   Rivers or lakes that are navigable in fact must be regarded as navigable in law; and rivers or lakes are navigable in fact when they are used, or were susceptible of being used at the time of statehood, in their natural and ordinary condition, as highways for commerce over which trade and travel were, or may be conducted in the customary modes of trade and travel on water.

   Comment: This legal definition is consistent with the accepted judicial definition of navigable waters provided by the U.S. Supreme Court in The Daniel Ball, 10 Wall. 557, 77 U.S. 557, 19 L.Ed. 999 (1870), and the same definition was utilized by the Montana Supreme Court in PPL Montana, LLC v. State, 355 Mont. 402, 414, 229 P.3d 421, 431 (Mont.,2010). The List of Navigable Rivers that the DNRC developed not only satisfies, but exceeds, the legal definition of "susceptible for use in commerce" because it lists those waters for which there is documented actual historic use of the river for commerce at the time of statehood.

As noted in the Department's fiscal note for SB 507 in 2009, we would anticipate that the state would receive 200 easement applications a year at an average easement fee of $500 per year, generating $100,000 annually to Common Schools. We would anticipate issuing 150 land use licenses annually at $150 each for an annual revenue stream of $22,500 each year. The State claims ownership of approximately 3,361 miles of navigable waterways on stretches of 38 streams, lakes, and rivers. Nine of the rivers have been judicially determined to be navigable. Historically, eight out of ten permanent easements issued have been across non-adjudicated waterways. Additionally, the trust receives an additional $25,000 annually on non- adjudicated and meandered waters for oil and gas leasing activities. **Based on the Department's analysis, the annual income from non-adjudicated waterways could be in the range of $125,000.**

Sincerely,

Mary Sexton
Director, DNRC

cc: Candace F. West, Tom Schultz, Joe Lamson, Jeanne Holmgren

From: niki@redquillranch.com
To: Kolman, Joe
Subject: Our Rivers
Date: Thursday, July 29, 2010 11:20:04 AM

Comments on SB 507

Dear Committee,

Simple me -

1. Who ever pays land tax on the river bottom owns the land.

2. If the State of Montana owns the river bottom = the people own the river bottom.

3. The Citizens of Montana shouldn't have to pay a tax (license, for an easement) to float across the land they own.

4. The State of Montana provides no services along these fee rivers, (bathrooms, campgrounds, etc) how would the fees collected to be used?

Are they redistributed to all Citizens?

I thought all Montanans have the right to go on all waterways.

Don't close off river use with SB507.

Thankyou,

Niki Sardot

From:	Towlerton, Al
To:	Kolman, Joe
Cc:	Mumford, David; Heisler, Vern; Rubich, Mike
Subject:	Use of stream beds bill draft
Date:	Tuesday, August 24, 2010 3:18:41 PM

Mr. Kolman:

We offer the following comment on the proposed bill in the draft WQIC draft report:

LC 8002 – We suggest that the bill language be clarified regarding when the fair market value of the riverbed applies. SB 507 from the 2009 legislature contained the same confusing language. For example, Section 1(1)(e) says that an applicant "…shall apply to the state for a lease, license or easement and pay full market value for the use of the riverbed…". Yet Section 2(2) indicates that the annual payment for a license shall be $150, apparently unrelated to the full market value.

Thanks for the opportunity to comment and let me know if you have questions.

Cordially,

Alan Towlerton
Deputy Public Works Director
2224 Montana Avenue
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(406) 657-8314
towlertona@ci.billings.mt.us

Senior Water Rights Coalition
PO Box 7325 Helena, MT 59604
(406)439-2215 blakecrk@Gmail.com

August 30, 2010

Rep. Walt McNutt, Chairman
Water Policy Interim Committee
PO Box 201706
Helena, MT 59620-1706

Dear Representative McNutt and WPIC Committee Members,

The Senior Water Rights Coalition welcomes and appreciates the opportunity to provide public comment on legislation that the WPIC is considering for introduction in the 2011 Legislature.

LC 8002 – Use of River Beds

The SrWRC strongly supports the language of LC 8002 as currently drafted. We believe that this piece of legislation is critical to provide a clear, fair, and defensible process for assessing users a fee for the use of a river bed below the low water mark on rivers that are navigable for title.

The water users of Montana who are irrigators have a Constitutional right to exercise their water rights. It is imperative that the process of assessing fees associated with owning a structure that is located on a river that is navigable for title is not so onerous that water right holders can no longer exercise their water rights. We believe the LC8002 provides a fair and reasonable process.

The definition of "navigable river" in Section 2 subsection (3) makes it very clear that a court is the only entity that can determine whether or not a river is navigable for title. Because the determination is very fact intensive and site specific it makes sense to have a court determine whether or not a river was navigable at the time of statehood. Additionally, absent a navigability determination by a court of competent jurisdiction there is no legal mechanism for riparian property owners to defend their property rights or even be made aware that an assertion of ownership by the state is being made.

We believe that LC 8002 applies only to the determination of navigability for title under the equal footing doctrine and does not apply to navigability for recreation purposes under the public trust doctrine. We believe that these are two separate and distinct determinations. Additionally, LC8002 makes it clear that the bill does not apply to those uses related to hunting, fishing, or trapping.

LC 9002 – Water Marketing

The SrWRC supports LC 9002. We believe that the process outlined for changing a water right to marketing will facilitate the use of leased water for mitigation purposes. Additionally, the process outlined for changing a water right to a mitigation purpose will provide a mechanism for water right sellers and water right buyers to meet. The ability of new developments to find and use mitigation water to offset adverse affect is critical to continued growth and development in Montana.

Sincerely,

Krista Lee Evans

AGAI

www.AGAIMT.com

Association of Gallatin Agricultural Irrigators

August 30, 2010

Rep. Walt McNutt, Chairman
Water Policy Interim Committee
PO Box 201706
Helena, MT 59620-1706

Dear Representative McNutt and WPIC Committee Members,

Thank you for the opportunity to comment on legislation that the WPIC is considering. Our ability to exercise and protect our water rights is crucial to our livelihoods. Changes in Montana's water laws can have incredible economic impacts to our businesses. We take our responsibility to be informed water users very seriously.

LC 8002 – Use of River Beds

AGAI strongly supports the language of LC 8002 as currently drafted. AGAI members have diversions, ditches, tip ups, pump sites, etc located in or on the Gallatin River. How DNRC and the State Land Board determine which rivers are navigable for title and how footprint users will be assessed for that use has a direct impact on our members. Currently, the process for assessing users a fee for the use of a river bed below the low water mark on rivers that are navigable for title is confusing and not always applied equally across the landscape. LC 8002 provides a process that is fair to users as well as the State of Montana.

Our ability to continue to produce agricultural crops hinges upon our ability to irrigate in an economical manner. The protections and confirmation of our water rights that Article IX, section 3 of the Montana Constitution provides are critical. LC8002 takes the necessary step of balancing Constitution provisions in a way that is fair and equitable to all parties. It is imperative that the process of assessing fees associated with owning a structure that is located on a river that is navigable for title is not so onerous that water right holders can no longer exercise their water rights. We believe the LC8002 provides a fair and reasonable process.

AGAI strongly supports the definition of "navigable river" in Section 2 subsection (3). This definition makes it very clear that a court is the only entity that can determine whether or not a river is navigable for title. The determination of navigability is a very fact specific determination. It is appropriate that a court weigh all the evidence and provide an opportunity for those who believe they own the property to provide their evidence. When the question surrounds the legal ownership of property it is unheard of to make that determination based solely on an assertion by one of the parties

We believe that LC 8002 applies only to the determination of navigability for title under the equal footing doctrine and does not apply to navigability for recreation purposes under the public trust doctrine. These are two separate and distinct determinations. Additionally, LC8002 makes it clear that the bill does not apply to those uses related to hunting, fishing, or trapping.

Sincerely,

/s/

Walt Sales, President
Association of Gallatin Agricultural Irrigators

From:	Bruce Williams
To:	Kolman, Joe
Cc:	"Icenogle, Joe"; jonmetro@gsjw.com; "Forrester, Gary"; "Olson, Dave"
Subject:	Comments on WPIC Draft Report
Date:	Monday, August 30, 2010 10:39:47 AM

Joe:

I have reviewed the portion of the Water Policy Interim Committee Draft Report that dealt with Water and Coal Bed Methane (pages 43-52 of the report). I offer the following comments on behalf of Fidelity Exploration & Production Company (Fidelity).

Page 43 Water and Coal Bed Methane – It should be noted in the report that the water produced in conjunction with CBM in the Powder River Basin is generally of good quality (i.e. low salinity) and suitable for use for agricultural, domestic and industrial purposes. That is not true of water from all CBM basins. While the quality of water will always be an issue in discussing how to use or dispose of CBM produced water, the issue of quantity of water produced and effects on useable aquifers and existing water rights only arises when the water quality is good. No one seems to care how much water is produced in basins where the water quality is poor.

Page 44 – Montana Regulations – I think the first three paragraphs should be reorganized because the reference to the Controlled Groundwater Area statute (Footnote 93) in the discussion of the MBOGC jurisdiction is confusing. A suggested rewording follows:

> "The Montana Board of Oil and Gas Conservation (MBOGC) oversees most facets of CBM development in the same way it does other oil and gas operations. The production, use, or disposal of ground water within a designated controlled ground water area is under the "prior jurisdiction" of the Board of Oil and Gas Conservation, but the DNRC can petition for hearings on the operations." (fn 94, citing 85-2-510)
>
> "In addition, the DNRC can hold a hearing to take evidence related to whether it should create a controlled ground water area (CGWA) to address existing or anticipated ground water issues. (fn 93, citing 85-2-506, stating that a variety of factors may lead to the creation of a CGWA). DNRC implemented this statute in 1999 specifically to address anticipated ground water withdrawals associated with CBM production. After public notice and multiple hearings, DNRC issued an order creating the Powder River Basin Controlled Ground Water Area. Noting that water levels in targeted aquifers could be reduced near CBM project areas for long periods of time in an area where water is scarce, the order required extended monitoring of ground water data." (fn 95, citing Final Order)

Page 45, Footnote 99 – The description of the May 2010 Supreme Court decision in Northern Cheyenne Tribe, et al v. DEQ says that DEQ violated the Clean Water Act by issuing Fidelity's discharge permits "without requiring the treatment of CBM ground water prior to discharge into the Tongue River." I think the word "requiring" should be changed to "evaluating". The regulatory step the Court held the DEQ had missed was to exercise its Best Professional Judgment (BPJ) to determine whether a Technology-Based Effluent Limitation (TBEL)--essentially pre-discharge treatment--is technically and economically viable. DEQ is now going through that process. The decision to require treatment is not, therefore, a foregone conclusion. Although some of the language in the opinion could be read as assuming that result, the Court simply ordered DEQ to conduct the BPJ analysis, not to reach any particular conclusion. In the draft permits issued by DEQ

the permit writer requires pre-discharge treatment but a significant portion of Fidelity's comments on the draft permits point out that DEQ did not do adequate economic analysis to determine if the required treatment is "economically achievable". I suggest changing the final sentence of the footnote to read "The Court originally gave DEQ 90 days to re-evaluate the permit applications under pretreatment standards and subsequently amended its order to give DEQ 180 days to complete the permitting process."

Page 45, Footnote 100 – "Reinjection is regulated by MBOGC." That is not a totally correct statement. Injection into Class II wells is regulated by MBOGC. Authority for injection into a fresh water aquifer under a different class (e.g. Class V) has not been delegated to any state agency in Montana and is regulated by EPA. Injection into fresh water aquifers under Class II wells requires an aquifer exemption from EPA. Fidelity currently has two Class V permit applications pending before EPA. While I have not been personally involved in those applications, Fidelity has advised that the process with EPA is onerous, time consuming, and, in some cases, totally unreasonable. One recommendation the committee might consider is to have MBOGC seek primacy from EPA for Class V wells related to oil and gas development. MBOGC has a well-established Underground Injection Control program and has the technical staff with the knowledge and experience to manage the Class V program for oil and gas-related activities.

Page 46 – I suggest modifying the last sentence in the second full paragraph to read "… law statutorily specifying legal methods of managing CBM water are constitutional."

Page 47 – I suggest modifying this one sentence paragraph to read "… water through one of the other means provided in the statute, a beneficial …".

Thanks for the opportunity to comment on the WPIC Draft Report. If you have any questions, please don't hesitate to contact me.

Bruce Williams
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Sheridan, WY 82801
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bruce@foresightwy.com

MRA
Montana River Action

Comments to WPIC Draft Report "Boiling It Down" July 2010.

Submitted by Montana River Action, 304 North 18th Ave., Bozeman, MT, 59715

Joe Gutkoski and Stephen Hunts.

Comments on Draft Findings and Recommendations.

Agency and Program Monitoring-Water right ownership update- *MRA agrees that the water right adjudication process linking parcels of land with water rights is a priority and should be completed in a timely manner. Water cannot be owned but is permitted by the state. Many streams are over appropriated and many water permit holders will loose their water permits. MRA believes that the adjudication period will be a painful one for many people who believed they held legal water rights.*

Agency and Program Monitoring-Ground water investigation program- *MRA agrees that ground water resources must be further studied and researched with designating responsibility for research and task to the Montana Bureau of Mines and Geology to research the 39 sub basins. Further drilling of wells must be controlled and minimized with the objective of moving new non agricultural property to hook up to municipal water delivery systems within municipalities. We also would like to see included in the database being compiled an easy to find reference of historical flows of surface waters within each basin. MRA would like to see the investigation program provided with full funding needed to achieve completion.*

Overview of Water Management-Future administration of water rights and Enforcement- *MRA believes that the role of DNRC and DEQ should be one of research and advising and not one of enforcement. MRA also believes that a right to use water cannot be considered real property. Enforcement of water rights should be conducted by district judges, water courts, water commissioners, water masters, ditch riders, ditch corporations, and ditch companies. also, legally elected or appointed water management systems shall have authority to manage, investigate and enforce irrigation law. A water right for irrigation should be limited to the period of actual plant need. This would reduce wasting of water which occurs when permit holders try to use 100% of the amount of water allowed by the water right to avoid a negative effect upon their future water rights.*

Ground water permitting-Mixing Zones- *Mixing zones are permitted on the idea that dilution is the solution to pollution. This is faulty planning. In effect mixing zones are a license to pollute and a bad idea in general. Waste water effluent flowing back to the land and streams should be free of pollution. Treatment standards should require that*

the quality of the effluent is at least equal to that of the receiving water. Developers of new subdivisions should pay impact fees that are used to support and build municipal waste treatment plants. Homes built on land that was previously used for agriculture should pay fees that will discourage sprawl and encourage home buying in towns(hopefully with municipal treatment centers). These fees should be used by the county and towns to address future quality standards of their drinking water and waste treatment water. Water use permits should be revokable in instances where there is a threat to the groundwater and surface water by the permit holder.

Water Marketing- *MRA advocates a system of water sharing as opposed to marketing. There should be no detachment of water rights from the land. Users should share in stream flow of up to 75% of average annual flow. The remaining 25% of flow would remain in the waterway to protect important fisheries listed as chronically dewatered by Montana Fish, Wildlife, and Parks dewatered streams list.*[1]

In addition, irrigation water rights should not be sold if a change of use is part of the sale. A request for any other change of use should be approved only if the change does not impact the natural flow of the base stream and does not reduce the flow below 25% of the average annual flow. A water permit or certificate is characterized by the permittees opportunity to use the water, beneficially rather than by ownership. Water marketing is the same as water speculation. The permitting of water use is a privilege through permitting of the state for beneficial use and the change of that use is subject to state review. Beneficial use is the use of water when it does not deplete the productivity of a stream beyond where the depletion impacts aquatic life productivity and important fisheries. Flowing water can be thought of like wildlife where one acquires land and one accepts the wildlife as public owned whether it stays or moves off your land like wind or precipitation.

MRA agrees with WPIC's draft report citation that "Many states, including Montana, have determined that leaving water in a stream under certain conditions- meaning there is no diversion- is also a beneficial use".[2]

Because our state law considers that beneficial use of Montana's water should include "a use of water for the benefit of fish and wildlife."[3] *MRA feels that the state of Montana is compelled to provide for stream flows.*

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[1] FWP Dewatering Concern Areas,Revised May 2005, Montana Fish, Wildlife, and Parks Information Services Unit, Helena, MT.

[2] Water Laws and Policies for a Sustainable Future: A Western State's Perspective, Western States Water Council, 2008. http://www.westgov.org/wswc/publicat.html

[3] Section 85-2-102(4), Montana Code Annotated.

NORTHERN PLAINS
RESOURCE COUNCIL

August 30, 2010

Legislative Services Division
P.O. Box 201704
Helena, MT 59620-1704

Dear Mr. Joe Kolman:

Northern Plains Resource Council (Northern Plains) submits the following comments in response to the August 2010 edition of *Boiling it Down*.

Northern Plains is a grassroots conservation and family agriculture group. We organize Montana citizens to protect our clean water, family farms and ranches, and unique quality of life. These comments are submitted on behalf of the organization and our members, especially those who own property and reside in Montana counties downstream of the proposed discharges. These members are dependent on ground and surface waters for their livelihoods as farmers and ranchers. These waters include not only the Tongue River *but also* its tributaries. Our members are directly affected by coal bed methane discharges and believe that enforcement of comprehensive water quality standards is imperative.

We oppose the recommendation option on pages 10 and 11 of the August 2010 edition of *Boiling it Down* and the proposed legislation LC9002. This legislation would expand the legal marketing of water to allow water to be sold to the highest bidder without first identifying and analyzing to whom it is being sold. Currently, under MC 85-2-310, water can be sold or marketed only if contracts are in place and requirements are filled. This bill would exempt water marketing for aquifer recharge or mitigations from these requirements, allowing private entities greater latitude in selling the state's water, while reducing the state's capacity to provide broad oversight of water allocation in Montana.

Water belongs to the state and should be regulated by the state. The DNRC must become more active in water management to assure that water is reallocated where it needs to be. The DNRC must set up checks and balances to conserve water and utilize it in the best way possible. Allowing water to be marketed to unknown buyers will increase the potential for illegal speculation in water, and will reduce the state's ability to properly allocate water resources. Please drop LC9002 from your recommendations.

We also oppose the recommendation option on page 12 of the August 2010 edition of *Boiling it Down* and the proposed legislation LC9999. This bill would allow private entities to mess with water rights and not pay the consequences if they lose. Please drop the proposed LC9999.

In regards to the Water and Coal Bed Methane section beginning on page 43, the Honzel ruling on page 44–48 needs to be updated to the ruling by Judge Seeley, July 2010, which

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reaffirmed Honzel's decision. Also, the case Diamond Cross Properties v. State of Montana, Pinnacle Gas Company et al., decided in July 2008, ruling that groundwater withdrawals, and therefore evaporation ponds, were unconstitutional should be included in this summary of Montana regulations.

Thank you for taking our comments into consideration.

Sincerely,

Mark Fix, Chair
Coal Bed Methane Task Force

From: Kilbreath, Steve
To: Kolman, Joe
Subject: LC9004
Date: Monday, August 30, 2010 12:39:29 PM

Joe - DEQ supports LC9004 with the following suggestions.

In both new sections (i) & (j) add the word proposed in front of drainfield so when we are reviewing existing systems they will not be held to this standard. We would like to see the following exempted from this new requirement.

Those divisions spelled out in 76-3-207(a), (d), (e), and (f). We see difficulty in requiring mixing zones to be contained to aggregations and boundary relocations due to the fact that you have certain set parcel sizes that may not be able to be changed to accommodate the mixing zones. Easements may solve this problem or may not.

We would like to see existing sanitary restriction lots exempt from this. 76-4-104(8) gives us the authority to deal with these lots and if they can't meet current standards to look back in time to the rules in place when they were created. Most of these lots are small and on the sides of lakes or rivers and most of the ones we deal with are already developed.

Make sense?

Steve

Steve Kilbreath, Program Manager
Subdivision and PWS Engineering
Montana DEQ
406-444-3638

From:	Nick Kaufman
To:	Kolman, Joe
Subject:	Water Policy
Date:	Monday, August 30, 2010 11:06:27 AM

Joe,

Thank you for the opportunity to comment. I found the WIPC Report to be well written and informative. Below are my comments.

Groundwater Permitting

Mixing Zones : Second Finding Option - This option seems to correlate increased density of single wells and drainfields as an indicator for potential impact to water quality. I agree that as an initial screen, perhaps. However, volume and depth of the aquifer, geology, soils and setting are much more important indicators of the potential for loss of water quality and should also be a consideration as studies are completed.

Recommendation Options - "Require mixing zones to be confined to the property with the drainfield." Perhaps require the mixing zone to remain on the property of the drainfield ***unless*** the applicant can show that there is no ***significant*** impact to the adjoining land owner. Noise form our cows or our lawn mower, smoke when we barbeque, dust from our cars and light from our homes all impact adjoining property. We cannot isolate all of our impacts and applying absolute standards may not be reasonable.

Other Issues

Local Government Powers: "A local government may require a public sewer or water system." I am in agreement with this as long as there are specific criteria to related to public health and safety to justify the action.

Comments on Appendix G. This slide from a PowerPoint presentation seems to indicate that the beneficial water use from an irrigated field exceeds the beneficial water use from a development of family homes using exempted wells and that the home wells should be permitted. The slide was apparently used in a presentation to WIPC to disparage, in some way, the use of exempt wells for family homes. I find the comparison, without any quantification, simply illustrates an unfounded view that irrigating a field is a good water use and homes with individual wells, that 32 percent of Montanans rely on for domestic water, is not a good use of water. This is simply false and misleading.

A study, "The Economic Impact of Home Construction on Montana Counties, 2007" by Ann L. Adair Ph.d., MSU Billings, allows us to quantify the beneficial use derived from the approximately 150 homes shown in the slide. According the the MSU study, in Gallatin County, each home represents four full time jobs over the year the home is constructed. That represents 600 jobs. The study suggest that in Gallatin County there are 1.3 on-going jobs for every home built or 195 on-going jobs for these 150 homes. The estimated tax revenue generated from a home during the construction year is about $8,600 dollars a year for $1,303,350 a year in state and local tax revenue.

I am not sure the value of the crop, the water usage, the tax revenue or the employment associated with irrigated farm field that adjoins the residential development in the slide or how many families live on that land. However, from a water use, jobs, tax revenue and family home perspective, there is siginificant beneficial use from the approximately 150 homes and the wells they rely on. I do agree with the WIPC that we need to find a balance of benefit and fairness in our water policy.

With regard to the Draft Findings and Recommendations:

Overview of Water Management (P.7) The second Finding Option deals with changing uses and limiting the water right for new uses to the consumptive water usage of the new use. I hope we

consider appropriations for new uses that allow for some growth of a new use, whether agriculture, business or adding an appartment to an existing home. We would hope that as the economy strenghtens that our business can grow.

Thank You for Considering My Comments,

Nick Kaufman

Nick Kaufman
Vice President , Principal Planner

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Trout Unlimited's Comments
on
Boiling it Down: A Study of Water Policy in Montana
for the Water Policy Interim Committee
(Montana Legislative Services, August 2010)

By

Laura Ziemer, Director
Trout Unlimited's Montana Water Project
(406) 522-7291 ext 103
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and
Mark Aagenes, Conservation Director
Montana Trout Unlimited
(406) 543-0054
mark@montanatu.org

Introduction

The hallmark of 21st century water management is the transfer of water from one use to another. In a time of growing water demand and growing water scarcity, it is one of the only feasible ways to meet the needs of new uses without devaluing existing senior water rights. Trout Unlimited (TU) applauds the excellent gathering of information and analysis that is displayed in *Boiling it Down,* and its identification of the priority water issues in Montana today. In particular, *Boiling it Down's* chapters on Exempt Wells (pages 33-42) and Changing Water Use (pages 53-63) provide the context and background to support the draft bills on which TU comments today: LC9002 (water marketing); LC9004 (mixing zones); LC9005 (public water and sewer), and LC 8002 (navigability).

1. TU Supports LC9002

As *Boiling it Down* explains, the 2007 legislative integration of ground and surface water management through HB 831 has meant that existing surface water rights have provided mitigation for the impacts of new groundwater pumping in Montana's basins closed to new surface water appropriations. This new requirement has focused a spotlight on changes in use of water right claims. And it has challenged both applicants and the reviewing agency (the Montana Department of Natural Resources and Conservation or DNRC).

Boiling it Down also traces the increasing attention that has been focused on permit-exempt groundwater wells, and the need to address their cumulative impact on senior water right claims. Creating a feasible method of providing mitigation water for exempt wells' cumulative impacts has also highlighted transfers in water use and mitigation banking.

With these pressures in mind, the Water Policy Interim Committee produced a draft water banking bill, LC9002, specifically focused on helping to facilitate providing mitigation water for new groundwater pumping.

Krista Lee Evans, in her paper *Water Banking—A General Description and Policy Issues,* on page 1, quoted Professor Lawrence MacDonnell's description of a water bank:

> "[A water bank is] . . . an institutionalized process specifically designed to facilitate the transfer of developed water to new uses. The primary objective of a water bank is to bring together those holding legally valid water use entitlements interested in making the water available to those needing to obtain additional supplies of water for their uses. Broadly speaking, a water bank is an intermediary. Like a broker, it seeks to bring together buyers and sellers. Unlike a broker, however, it is an institutionalized process with known procedures and with some kind of public sanction for its activities." L. MacDonnell, *Water Banks: Untangling the Gordian Knot of Western Water.*

While LC9002 facilitates buyers and sellers of water for a mitigation purpose, it sets up something that is more like private water-marketing than a bank. It allows a water rights holder to change his or her water to a mitigation purpose, and then market that water within a hydrologic area designated during the change process. An applicant for new groundwater pumping within that hydrologic area could than purchase mitigation water from the water marketer.

LC9002 sets up a free-market exchange of water, between private parties. Its resemblance to a bank is that the mitigation water goes through the DNRC's change-in-use review process, and there is reporting to the DNRC as the water is sold for a mitigation purpose. These kinds of market transactions in water rights are becoming more common across the West. *See,* R. Glennon et al., *Transferring Water in the American West, 1987-2005,* 40 U. of Mich. J. L. Reform 1021 (2007). If passed by the 2011 Montana Legislature in some form, LC9002 would facilitate the transfer of water in Montana for a mitigation purpose, and hopefully relieve the bottleneck of DNRC-application approval. For these reasons, TU supports LC9002.

2. TU Supports LC9004. TU supports this bill draft's effort to require mixing zones to remain within the border of the landowner's property. Responsible, state-wide water management is critical and TU believes the problem this bill seeks to solve is directly connected to the proliferation of exempt wells. Therefore, continued efforts to encourage responsible water management as is discussed below under "Boiling it Down's Treatment

of Exempt Wells" becomes more important with the passage of bills such as this one that could, in effect, increase lot sizes and potentially create numerous smaller subdivisions. Despite the potential drawback of larger lot sizes and potentially more lawn and garden irrigation demand, small steps forward are critical and LC9004 is such a step. LC9004 will improve water quality and prevent contamination of rural drinking water supplies, which are both important public purposes. TU supports LC9004.

3. TU Supports LC9005, with amendment. TU also supports the thesis of bill draft LC9005, that county government should be able to require central water and sewer in appropriate circumstances. However, practically speaking, requiring the county to go through 511 rule-making in order to require central water or sewer does not provide local government with any more authority than they already have. A county's aversion to 511 rule-making is well placed. It is expensive, time-consuming, and controversial—in short, a serious distraction from the pressing day-to-day needs of county government. For this reason, TU supports providing county government with the authority to require central water and sewer, but without making it subject to 511 rule-making.

4. TU's Reading of LC 8002. This bill clearly and specifically deals with navigability for title and taxation purposes--not navigability for recreation. A priority for TU is making sure that the limited scope of LC8002 remains clear throughout the legislative process. According to *Montana Stream Access Coalition, Inc. v. Hildreth*, recreational navigability has remained independent from federal and state navigability classifications and this bill doesn't change that--nor do we think it should.

In addition, we initially had concerns that certain protective permits were only required on navigable waterways, such as the Army Corps of Engineers' 404 permitting. However, for these required permits "navigability" is more dependent upon the definition of the term under the federal Rivers and Harbors Act, and less upon the state's classification of navigability. TU will continue to watch LC8002 to make sure federal and state permits that protect riparian habitat remain intact. We will similarly make sure that Montanans ability to recreate on our waterways is safe and strong.

5. *Boiling it Down's* Treatment of Exempt Wells.

As *Boiling it Down* ably chronicled, whether, and to what extent, permit-exempt wells need to provide mitigation water for their impact on surface flows and existing, senior water rights has been hotly debated in Montana for the last half-decade. (Permit-exempt wells are those pumping 35 gpm and 10 acre-feet/year, pursuant to MCA 85-2-306(3)(a)). *Boiling it Down* also demonstrates that this question is at its core not a legislative question. Rather, assessing the cumulative impact of permit-exempt wells is a matter of DNRC's implementation of the exempt well statute.

In 2006, the Gallatin County Commission petitioned the DNRC to change their regulation governing permit-exempt wells, to require that their cumulative impact be

reviewed through water rights permitting. The agency denied the petition. Then again in 2009, ranchers across three Montana river basins petitioned the DNRC to change their rule definition. This time the ranchers specifically requested that the agency return to their original, 1987 rule governing permit-exempt wells.

The DNRC's 1987 rule *did* require that the cumulative impact of exempt wells be analyzed through the permitting process. It did so by requiring that wells for a single "project or development," even if developed in phases over time, be reviewed for their cumulative impact.

In August of this year, the DNRC again denied the petition. However, this time the agency did acknowledge that its current exempt-well management was not working. The DNRC found that:

> " . . . the proliferation of exempt wells for individual domestic purposes developed in a way that was not anticipated at the time the legislation was passed and needs to be addressed.[1] The legislative intent that exempt wells be small dispersed uses with low probability of adverse affect to neighboring water rights must continue to be reflected in the Department's rule. Specifically, the Department is concerned that the administrative rule of 'combined appropriation' continues to serve the purposes of the Water Use Act into the future."

DNRC Declaratory Ruling, *Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13)*, at 18-19, August 17, 2010. As a result, the DNRC concluded that the "Department will, within eight months, initiate rulemaking to propose repeal of Rule 36.12.101(13), ARM, and adoption of a new 'combined appropriation' administrative rule definition." *Id.* at 20.

At this time, the cumulative impact of multiple, permit-exempt wells do not require mitigation water. However, with the prospect of a DNRC rule-change on the horizon in less than a year, and the ranchers' likely appeal of the petition's denial to district court, it is worthwhile to look at how other states have grappled with this issue. Trout Unlimited's Montana Water Project undertook this analysis, and produced a report authored by Sarah Bates, *Blueprint for a Ground Water Mitigation Exchange: A Pilot Project in Montana* (September 2009).

The *Blueprint* examines three case studies of facilitating mitigation water for new groundwater pumping in other states, and then analyzes how their models might be applied in Montana. One of these case studies is reproduced below. What emerges from the case study excerpted below--and the thesis of the *Blueprint*-- is that LC9002 is a first step toward facilitating the provision of mitigation water. But to make it more feasible for entities to mitigate the cumulative impact of exempt wells, a more formalized water exchange in those places the most appropriate for low-density, exempt well development would be necessary.

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[1] Petition for Declaratory Ruling, Exhibit 12.

The *Blueprint's* Walla Walla River Case Study. The Walla Walla River basin covers portions of southeastern Washington and northeastern Oregon. Most of the basin's summer flows are diverted for irrigation. In 1976, the Washington Department of Ecology seasonally closed most streams and rivers, limiting future surface water withdrawals in this basin. In order to protect existing water rights, virtually no new surface or ground water rights have been issued in the basin since 1996. However, small wells— each withdrawing up to 5,000 gallons/day—have been allowed pursuant to Washington's exempt well statute.[2]

Concerns for the survival of the bull trout and steelhead (both listed as "threatened under the Endangered Species Act) sparked community members in Walla Walla basin to begin work on a watershed plan to address the needs of the basin, including streamflow protection and the restoration of fisheries.[3] The group adopted a comprehensive watershed plan for the Walla Walla watershed in May of 2005, recommending the state take action to control new appropriations of water.

In 2007, the Washington Department of Ecology adopted amendments to Chapter 173-532 Wash. Ann. Code (the Water Resources Program for the Walla Walla River Basin). The amendments established new instream flow levels, modified existing stream closures, and authorized the use of winter and spring high flows for water storage projects that improve stream flows for salmon production.
Most relevant to this analysis is the amended rule's provisions for permit-exempt wells tapping the shallow gravel aquifer that underlies the entire basin. The rule did not place any restrictions on deep wells drawing from the basalt aquifer, of which little is known about the hydrologic connection to surface waters. It did, however, limit new exempt wells in the following ways:

- Homeowners who have access to municipal water supplies are required to connect to those and may not access the gravel aquifer.
- Homeowners living outside the designated high-density areas (see Fig. 1) may install permit-exempt wells to access the gravel aquifer as previously allowed under state law (Figure 1).
- Homeowners within the designated high-density areas may install a permit-exempt well for combined domestic uses and irrigation of lawn and garden limited to 1,250 gallons per day (gpd) for one residence, and 5,000 gpd for multiple residences in one development, and are required to obtain mitigation for outdoor watering from May 1 to November 30.

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[2] R.C.W. 90.44.050. State law allows up to six houses developed on a single tract of land to depend on a single exempt well—the so-called "six-pack" rule—and limits outdoor use of this water to irrigation of no more than a half acre of land. Additionally, wells tapping the deep basalt aquifer and some family farm wells have been allowed.

[3] The state encourages and supports watershed planning with financial and administrative support. See 90.82 RCW and further information at the Department of Ecology's Watershed Planning website.

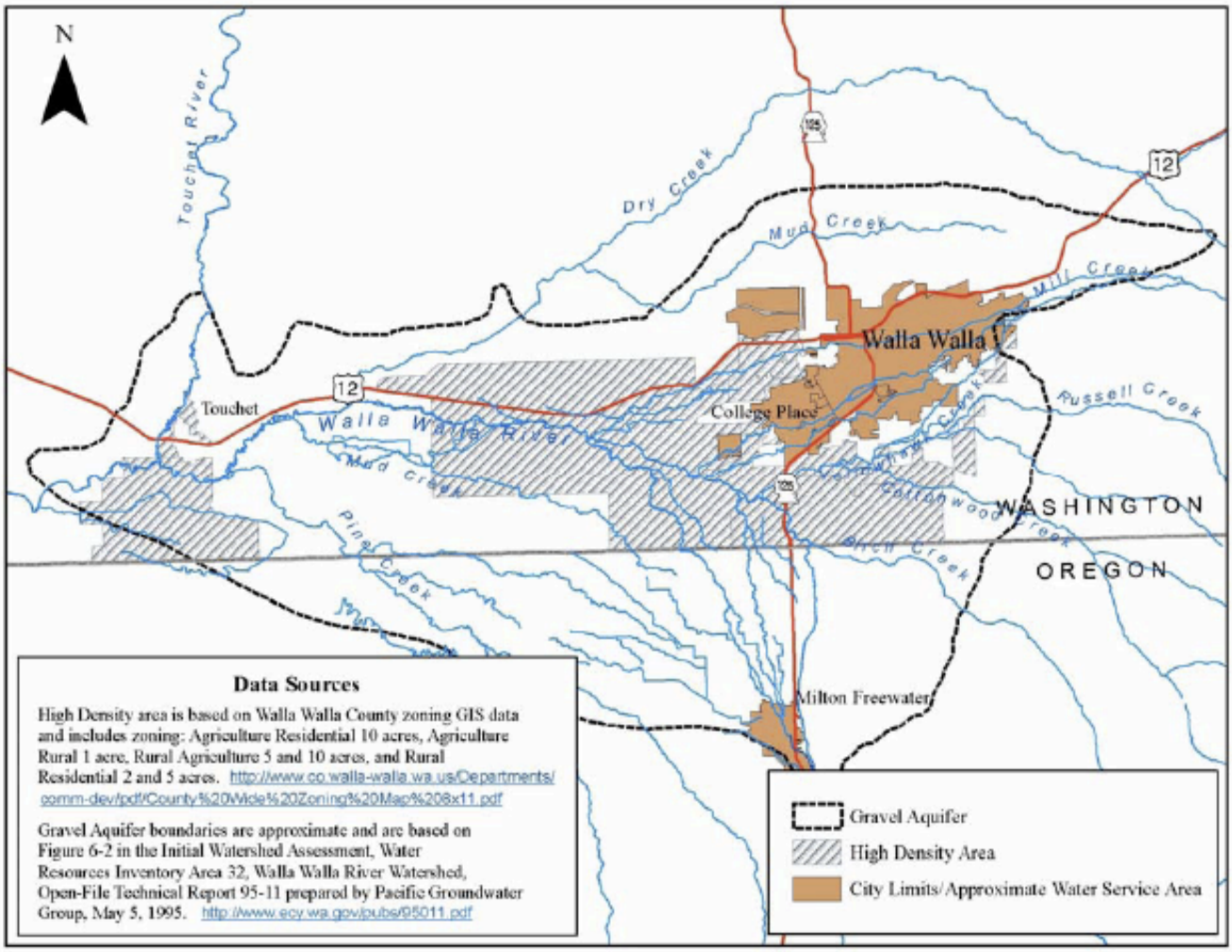

Fig. 1. Designated high-density areas in which ground water mitigation is required. A "high density area" is defined as an area zoned for one residence in ten acres or denser, and includes areas zoned as Agriculture Residential 10 acres, Agriculture Rural 1 acre, Rural Agriculture 5 and 10 acres, and Rural Residential 2 and 5 acres.

The mitigation requirement for permit-exempt wells in high-density areas can be satisfied in several ways. A homeowner can purchase existing surface or ground water rights and transfer them to the state's trust water rights program to offset the quantity of water to be withdrawn by the new well. More likely, a homeowner will participate in a mitigation program administered by the Washington Water Trust, which obtains water rights ("credits") and holds them in a state-assisted water exchange to be applied as offsets for new wells.

The Washington Department of Ecology and the Washington Water Trust published the *Mitigation Guide for Future Outdoor Water Use in the Walla Walla Basin* to provide information about implementation of the mitigation requirement. The focus here is on the operation of the ground water mitigation exchange.

The Walla Walla ground water mitigation exchange is a relatively simple model. The mitigation requirement is based on a formula of estimated outdoor water use during the summer and fall, calculated at 1,000/gallons/day, or 180,000 gallons/year, which translates to 0.55 acre-feet/year per residence.

With financial assistance from the Washington Department of Ecology, the Washington Water Trust (WWT) has acquired the rights to 12-15 acre-feet of water as of mid-2009. All of the mitigation water comes from shallow aquifer ground water rights, purchased from willing sellers in the basin. Each right retains its original priority and is placed in trust (flowing instream) for future mitigation needs, while enhancing the shallow aquifer and streamflows. This acquisition of water is an important element in establishing a new ground water mitigation exchange. At the outset of the program, the Department of Ecology committed to funding the acquisition of water for the first two years of the exchange's operation, up to 55 acre-feet of water. This is enough water to mitigate for seasonal outdoor use in 50 new household wells in the regulated portion of the basin. The downturn in the housing market in the past year prompted an adjustment downward in the target for acquisition of mitigation water.

The WWT acts as a water bank, negotiating for the acquisition of water rights through purchase or lease and keeping track of these water rights ("credits") which are available for purchase by those required to mitigate for outdoor water use from a permit-exempt well in the high-density area.

New homebuilders who do not opt to obtain mitigation water on their own pay the WWT a flat fee, presently calculated at $2,000 per credit.[4] The WWT will use this money to pay for future acquisitions to keep the bank operational. The homeowner is also required to install a meter on the new well, provide documentation of the mitigation credit purchase, and report to the state annually on actual water usage.

[4] Water acquisition costs are relatively low at present—approximately $600/acre-foot—but the transaction costs add considerably to the cost of obtaining mitigation water. The $2,000/credit charge may be adjusted over time as the program matures.

Between its inception in 2007 and mid-2009, the exchange obtained three credits and issued just one mitigation credit. The slow pace of mitigation demand reflects several realities, according to program manager Amanda Cronin, who expected to see more activity. She explains, "This is primarily because no one is building houses and those few that are have other sources of mitigation. They may already have a well or a water right to cover irrigation. Or the building permits may be for remodels, additions or garages where there is already a well available and a new one isn't needed."[5]

Because the Walla Walla basin is relatively small and entirely connected to a single shallow aquifer, there is no requirement that mitigation water be applied in close proximity to the site of a new use. There is a preference for mitigation water to be obtained upstream from the impacts of new uses, but no mandatory link between mitigation and impact zones.

This is a new program, and is relatively untested. The simple formula for mitigation (similar to an impact fee) offers the advantage of a low cost and easy application, but it can be criticized as not directly based on the actual impacts of new wells on streamflows and other water rights. Regulation of permit-exempt wells always raises questions of enforcement, as state regulators are already stretched thin to address issues of permitted water uses and will depend largely on voluntary compliance.

The economic slowdown dampened demand for mitigation credits, so it remains to be seen whether the exchange will be able to acquire sufficient water rights in a timely fashion to meet projected demands in the future. For the time being though, the banked credits do supplement streamflows and benefit the environment and the security of other water users in the basin as a result.

Walla Walla Ground Water Mitigation Exchange at a Glance

- Mitigation required for new permit-exempt wells accessing shallow aquifer in designated high-density areas
- Exchange administered by Washington Water Trust
- Mitigation formula based on estimate of seasonal outdoor uses, not quantified year-round actual use
- Mitigation can occur anywhere in basin, though there is a preference for geographic nexus to the area of impact

[5] Amanda Cronin, Washington Water Trust, pers. comm., 6/24/09.

Montana Association of REALTORS®

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TO: **Water Policy Interim Committee, Rep. McNutt, Chair**

FROM: **Montana Association of Realtors**

RE: **Comments on Water Policy Interim Committee draft legislation**

DATE: **August 27, 2010**

The Water Policy Interim Committee ("WPIC") has recently made available for comment revised drafts of LC 9002, 9004, and 9005. The Montana Association of REALTORS® ("MAR") appreciates the opportunity to comment on the draft legislation at this early stage and respectfully submits the following comments on the draft legislation. MAR may provide additional comments after further review or upon any additional revisions to the draft legislation. MAR takes no position and has no comment at this time on LC 8002 or LC 9999

I. LC 9002

As MAR advised in earlier comments to WPIC, any proposal for a mitigation bank or to otherwise simplify the process of mitigating for that amount of net depletion from new groundwater appropriations that results in adverse effect to senior water rights, as required by Mont. Code Ann. § 85-2-362(1), should meet the following criteria:

1. Any mitigation bank should be constructed and operated so as to not provide sole or primary benefit to any one particular group.
2. Any mitigation bank proposal should not create a price monopoly on existing water rights to be used for mitigation.
3. Contribution of existing water rights for mitigation or participation in a mitigation bank should be voluntary.
4. Existing water rights contributed to a mitigation bank should be protected from a claim of abandonment while the right is in a mitigation bank.

As presently drafted, LC 9002 does not create a formal mitigation bank. Rather, it allows any owner of an existing water right to apply for a change authorization to change the purpose of an existing water right to marketing for mitigation. *See,* LC 9002, Sec. 1. Once the change is authorized, the applicant (*e.g.*, owner of the existing water right to be marketed for mitigation) would have up to 20 years to complete the change (LC 9002, Sec. 1(4)(a)), during which period, the existing water right would be protected from a *prima facie* presumption of abandonment due to non-use. *See*, LC 9002, Sec. 5(5).

Because LC 9002 does not create a formal mitigation bank, but, rather, allows for existing water rights to be bought and sold for mitigation purposes among private parties, LC 9002 does not create a mitigation bank that would benefit one interest group over another. LC 9002 does not appear to create a price monopoly on existing water rights offered for mitigation, and changing the purpose of existing water rights to marketing for mitigation is a voluntary process. Finally, water rights the purpose of which is changed to marketing for mitigation or mitigation are protected from a presumption of abandonment during the period for completion of the change. Consequently, LC 9002 does meet all of MAR's initial criteria for a mitigation bank or mitigation proposal.

However, as MAR has also stated in previous comments to WPIC, MAR seriously questions the utility of LC 9002 for simplifying the process of obtaining mitigation water and receiving approval for mitigation plans such that it is feasible to obtain a permit for a new groundwater appropriation in a closed basin in a timely and cost-effective manner. The issue in mitigating for that amount of net depletion that is adverse effect on existing water rights is not finding water rights available for mitigation. Willing sellers and buyers have no significant impediments now to meeting up in the open market. Rather, the more significant hurdle is receiving approval for a mitigation plan, which entails approval of an application to change an existing water right for mitigation, a process that, even when successful, is long and costly. As written, LC 9002 does not appear to overcome that hurdle at all.

In particular, pursuant to LC 9002, Sec. 1(1), an existing appropriator may apply to change the purpose of a water right either to mitigation or to marketing for mitigation. If the existing appropriator changes the purpose only to marketing for mitigation, it is unclear whether the purchaser of such a water right would then have to apply for an additional change authorization to change the purpose to mitigation. As WPIC is well aware, imprecise language in water use statutes is an invitation for trouble that should be avoided if at all possible.

Further and more significant from MAR's perspective is that fact that LC 9002 makes no changes at all to the statutes that actually require mitigation of that amount of net depletion that is adverse effect in obtaining a permit for a new appropriation of groundwater in a closed basin, Mont. Code Ann. § 85-2-362. The Montana Department of Natural Resources and Conservation ("DNRC") has stated to WPIC that where a water right that is changed to marketing for mitigation under LC 9002 is proposed to be used as a mitigation plan under Mont. Code Ann. § 85-2-362, review of that mitigation plan would simply happen as part of the application for a new beneficial use permit. At present, the mitigation plan (including the necessary change application) and an application for a new beneficial use permit are already to be submitted as a combined application and considered as such. *See*, Mont. Code Ann. § 85-2-363. Absent some express amendment to the closed basin permitting statutes on mitigation (Mont. Code Ann. § 85-2-362), it appears that even if an applicant for a new beneficial use permit in a closed basin were to purchase a water right that had been changed under LC 9002, there would be no noticeable modification or simplification of the permitting process. Rather, as set out in the preceding paragraph, LC 9002 may only inject more confusion into the process, perhaps requiring one more change application if the purpose of the existing water right that is changed under LC 9002 is only changed to marketing, not mitigation, as both are options. *See,* LC 9002, Sec. 1(1).

Given the lack of clarity in LC 9002 and the fact that LC 9002 does not simplify the process of permitting in closed basins, the utility of the bill is questionable. While MAR does not necessarily oppose LC 9002 at this time, MAR simply raises the question of how effective or useful the proposal will be. Certainly, there may be some benefit to an existing water right

holder seeking to protect a water right from abandonment, as a successful application to change an existing water right purpose to marketing or mitigation buys another 20 years during which non-use does not lead to a presumption of abandonment. However, beyond that, it is questionable how useful the bill will prove in making it more feasible to permit a new appropriation and a mitigation plan.

II. LC 9004

As revised, LC 9004 requires a drainfield mixing zone serving a single individual lot within a subdivision to be fully contained within the boundaries of the lot, while a drainfield mixing zone serving more than one lot in a subdivision must be fully contained within the boundaries of the subdivision. If a drainfield extends beyond the prescribed boundaries, an easement must be obtained. These requirements would only apply to new subdivisions subject to review under the Sanitation in Subdivisions Act (Mont Code Ann. § 76-4-101, *et seq.)*, not existing drainfields, including replacement systems.

MAR generally opposes any changes to the existing mixing zone requirements. If the motivating concern behind LC 9004 is wellhead protection, legislation narrowly tailored at ensuring that wellheads are properly located and cased in may be the more appropriate solution. As currently drafted, LC 9004 only increases the need for larger lot sizes, thereby resulting in larger cost for housing development as well.

Should LC 9004 go forward, the provision that easements can be obtained for mixing zones crossing property boundaries is essential, as is the limitation that the bill only apply to new systems in new subdivisions undergoing review under the Sanitation in Subdivisions Act. MAR also suggests that if LC 9004 does go forward, there be included an exemption for drainfields that serve an individual lot within a subdivision. In particular, if the subdivision plan calls for individual drainfields for each lot, and the mixing zones cross the boundaries of the lots within the subdivision, but overall, the mixing zones are contained within the boundaries of the subdivision, requiring a developer to obtain easements over each lot within the subdivision is merely superfluous paperwork where no lots have yet been transferred to private ownership. Additionally, as presently drafted, LC 9004 does not appear to allow for a situation where mixing zones serving individual lots may cross lot lines into undeveloped spaces within a subdivision, such as park lands. Should LC 9004 go forward, MAR suggests revising the bill to allow utilization of open spaces within a subdivision for mixing zones and to avoid surplus paperwork.

III. LC 9005

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 9005. The proposal of LC 9005 creates the very real possibility of 56 different standards for individual wells, with each county setting its own criteria for when, where, and how such wells will and will not be allowed. Additionally, LC 9005 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, individual wells can be a more cost-efficient solution to providing domestic water within certain housing developments. However, by allowing counties to require public water and sewer systems, LC 9005 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.

Additionally, under Mont. Code Ann. §76-3-504(1)(g)(iii) and (iv), respectively, local governments already do have the authorization to prescribe standards for water supply, sewage and solid waste disposal, and location and installation of public utilities. To now include a specific provisions that local governments have the authority to require public water and/or sewer systems under Mont. Code Ann. § 76-3-504(1)(g)(iii), while not spelling out any other specific actions allowed, could be interpreted to exclude other actions, as the specific prevails over the general in statutory construction and interpretation, and where the statute expressly includes a specific, it implies exclusion of other items not specified. *See*, Omimex Canada, Ltd. v. State Dept. of Revenue, 2008 MT 403, ¶ 21, 347 Mont. 176, 201 P.3d 3 (internal citations omitted). To specifically state that local governments have the authority to require public water and sewer systems in the implementation of Mont. Code Ann. § 76-3-504(1)(g)(iii) could actually introduce more problems for local governments than it purports to solve, as any other action taken in implementing Mont. Code Ann. § 76-3-504(1)(g)(iii) outside of requiring a public water and/or sewer system could be interpreted to be beyond the scope of the statute, as it is not specified.

CLARK FORK COALITION

August 27, 2010

Water Policy Interim Committee
Representative Walter McNutt, Chair
Senator Dave Wanzenreid, Vice Chair
Senator Terry Murphy
Senator Debby Barrett
Senator Bradley Hamlett
Representative JP Pomnichowski
Representative Russell Bean
Representative Bill McChesney
cc: Joe Kolman, Staff

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

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to comment on the WPIC's Draft Report, *Boiling it Down*, 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 political, scientific, and social aspects related to our state's ground and surface water.

The Coalition is dedicated to protecting and restoring the Clark Fork River basin, a 22,000 square-mile watershed that covers much of western Montana. The Clark Fork River is the largest by volume in the state, and is home to one-third of Montana's population. Please find below the Coalition's comments on the findings, recommendations and draft bills relevant to our 1,500 members who live, work, and play in 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.

Draft Findings and Recommendations

Ground Water Investigation Program:
The Coalition supported GWIP during the previous interim and during the 2009 Legislative Session. We believe it's imperative to collect and disseminate accurate, accessible scientific data to help public agencies and private landowners allocate, measure, and monitor water withdrawals. With 39 subbasins prioritized for hydrogeologic study and only seven subbasin studies now underway, it's abundantly clear that we need to continue funding MBMG's GWIP, especially in high-growth sub-basins. Our hope is these studies will Montanans to better predict impacts from water withdrawals in the study basins, and lead to more informed and efficient water use permitting.

The Coalition recommends requesting funding to ensure MBMG can finish the seven studies now underway, and **add four new subbasin studies during the 2011-2013**

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interim. At the estimated cost of $600,000 per study basin, this request would total $2.4 million.

Completion of Adjudication and Future Administration of Water Rights:
We appreciate WPIC looking into the progress of the water right adjudication. The Coalition is especially interested in whether the Water Court is prepared to handle the volume of objections enforcement issues that will likely arise post-adjudication, and steps the Legislature might take to alleviate the potential burden on the Court. Similarly, we stress the importance of directing DNRC to take a hard look at whether it is adequately staffed and ready to handle administering water rights and compacts post-adjudication. An interim study on the impacts and results of completing the adjudication process would be a valuable next step.

The Coalition also urges WPIC members to push for preserving the $12 million earmarked for this important adjudication process. If this money reverts back to the general fund, tens of thousands of Montana water rights holders will remain in limbo, uncertain about the amount of water legally available in the state. This presents risk for all business, development, and conservation interests looking to secure water for current and future uses.

Water Planning:
The Coalition was disappointed in the budget cuts associated with the state water plan update related to SB 303. With careful, collaborative attention to where, when, and how water is used and needed in different parts of Montana, the State can be proactive rather than reactive when faced with conflicts over limited water resources. Planning is also a more cost-effective way to manage our resources—it's much cheaper to direct money to local watershed groups to prioritize and identify next-steps on water management rather than paying later for litigation, Water Court enforcement, or expensive infrastructure upgrades.

Unfortunately, without the funds to dedicate to collaborative water planning, the State will likely end up spending more resources fighting battles over water. We hope WPIC will recommend funding for an update to the State water plan during the 2011 Session.

Enforcement:
The value of any property right depends upon the owner's ability to define—and enforce—the parameters of the right. Water rights are not worth nearly as much if they can't be enforced against someone attempting to claim or use the water, especially in over-appropriated basins. The Coalition holds several senior water rights in the upper Clark Fork and Bitterroot basins. We urge WPIC to recommend an interim study that examines the potential for better enforcing water rights and explores how best to fund that enforcement. This would include an analysis of the effectiveness of the current "hybrid scheme" for Montana water right enforcement, which combines private options like appointing water commissioners with DNRC and Water Court oversight. This could be part of any post-adjudication interim study, as well, since enforcement requests may ramp up after final decrees are issued in basins.

The Coalition strongly supports WPIC's attention to better enforcing water use in the state to ensure that senior water rights are protected. We believe that water enforcement should be the responsibility of the state once rights are finally adjudicated, and that DNRC should embrace its statutory authority to enforce water rights, particularly focusing on investigating complaints regarding water use. Private parties or county government are often ill-equipped to deal with the

complex intricacies of water law. In addition, we would also like to point out that monitoring is a key component of effective enforcement. Although we recognize the cost associated with actively monitoring surface and groundwater use, the Coalition encourages the State to help water users (including exempt well users) track and report their use.

Mixing Zones and LC 9004:

The Coalition supports LC 9004. We believe that keeping drainfield mixing zones within the property boundaries of the septic system's owner is important for protecting water quality and rural drinking water supplies, as well as the value of private property. It's common sense: no one wants a neighbor's wastewater pollution seeping onto his or her property.

The Coalition also recommends that WPIC explore other options for water quality issues related to septic systems in Montana. As a mainly rural state, individual wastewater treatment systems are abundant, and an important tool for maintaining public health and safety. That's why it's also important to keep better tabs on the status of individual septic systems. The Coalition recommends requiring a central reporting system in each county that stores up-to-date records on any maintenance, inspections, or changes for all septic systems. This could be housed within county planning or public health departments. Another option worth considering is requiring a septic inspection during property sales (before the title transfer). This ensures the new buyer is fully apprised of what to expect regarding the wastewater treatment system on site. Several states have adopted similar septic inspection measures within the last few years in order to help manage and monitor water quality.

The Coalition believes LC 9004 is a good step for avoiding nutrient pollution. We hope WPIC continues to explore additional avenues for septic maintenance programs to prevent drinking water contamination, as well as costly and unexpected problems for future property owners.

Exempt Wells:

The Coalition commends WPIC on its dedication to learning more about the status of individual permit-exempt wells, and appreciates the many conversations on the various concerns about the expanded use of these unregulated wells. In the Clark Fork basin, permit-exempt wells are no longer used solely on an individual basis as the law (85-2-306) intended. Due to the proliferation of exempt wells installed during the past two decades, the cumulative impact of exempt wells is one of the biggest challenges facing the Clark Fork basin's water resources. The "free giveaway" of water threatens senior water right holders, water quality, fish and wildlife, and future water supplies.

The lack of regulation or monitoring of permit-exempt wells also raises concerns about the potential for drinking water contamination, negative impacts to healthy streams and fisheries, and the ability of Montana's communities to plan for adequate water supplies to meet population projections. A quick look at the numbers shows why the Coalition is concerned about the exempt well rule, and demonstrate how it conflicts with the intent of the statute in the Montana Water Use Act to limit the scope of these exemptions:

- 58,000: wells recorded in the Clark Fork basin
- 40%: of those wells were installed since 1990
- 30,400: of those wells are located within one mile of a stream

- 29,880: permit-exempt wells drilled in Montana between 2000 and 2008
- 75%: lots created in Montana in the past decade using permit-exempt wells and septic systems
- 50%: of the lots created with permit-exempt wells and septics are on less than two acres

The Coalition does ***not*** believe that the root problem of these exempt well issues requires a legislative fix. The current statute (85-2-306) is very clear on how and when exempt wells should be used, and largely consistent with the values and uses associated with Montana's water. That's why the Coalition joined five other water users to file a petition with the DNRC in December 2009 requesting its administrative rule defining "combined appropriation" be declared invalid. The Coalition holds several water rights as owner of Dry Cottonwood Creek Ranch in the Deer Lodge Valley, as well as several instream water rights that protect and restore flows in tributaries critical for fish and wildlife. Unfortunately, the DNRC's August 17th Declaratory Ruling on the petition upheld the rule, rather than addressing the competing demands on Montana's valuable water. By upholding the current rule, the DNRC is maintaining a status quo that is inconsistent with 85-2-306, and leaves ranchers and rivers at risk.

The only potential legislative action the Coalition foresees on 85-2-306(1) would be further examining the 10 acre-feet per year volume assigned to the exemption. This amount is excessive for domestic or stockwater tank needs, and is an amount that is rarely withdrawn by the majority of exempt well users. However, the Coalition only recommends amending the volume to a lesser amount (such as one acre-foot per year) if there's a concurrent commitment to monitoring and enforcing these exempt wells and their water withdrawals.

Water Marketing and LC 9002:

The Coalition supports LC 9002 because it allows voluntary, private-party solutions to address some of the competing water use issues affecting certain regions of the state. This bill draft sets up the framework for a "water exchange," a tool that is becoming more common in Western states where water demands are changing or increasing. LC9002 allows water right holders to change their rights to mitigation and then market the water to willing buyers within a designated hydrologic area. An applicant for new groundwater well/use within that hydrologic area could potentially purchase mitigation water from a seller (the water marketer). This bill is also important if the exempt well rule is addressed through rulemaking or other avenues, as LC9002 would hopefully facilitate more efficient transfers of water for mitigation in closed basins when DNRC receives permit requests for new groundwater appropriations.

Local Government Options and LC 9005:

The Coalition supports the concept behind this bill. It's valuable to help counties better manage their water resources by giving them more discretion on when centralized water and sewer systems are appropriate for protecting public health and safety. However, most county planning or health departments in the Clark Fork watershed lack the necessary resources, money, and data to practically execute the authority granted under LC 9005. In fact, we have heard concerns that the arduous and expensive rulemaking process under 76-3-511 would actually be a deterrent rather than an incentive for counties to more proactively manage water resources.

The Coalition encourages amending this bill draft to provide county government with the authority to require central water and sewer without making it subject to 511 rulemaking. These changes would amend 76-3-504(3) to read: *"A governing body implementing the provisions of subsection (1)(g)(iii) may require centralized public water or public wastewater systems."*

Conclusion

Again, the Clark Fork Coalition thanks 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.

Thank you for your time. Please feel free to call anytime to discuss these recommendations and comments.

Sincerely,

Brianna Randall
Water Policy Director

APPENDIX A.

Clark Fork Coalition's 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 and ultimately enhance flows in streams and rivers: 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.

AUGUST 31, 2010

TO: WATER POLICY INTERIM COMMITTEE

FROM: LARRY LULOFF, DECREED WATER ADVOCATES

SUBJECT: 2009-2010 INTERIM COMMITTEE REQUEST FOR PUBLIC COMMENT.

At this time Decreed Water Advocates wishes to thank all members of the committee for its unselfish commitment of time and resources for the benefit of Montana citizens.

The control and allocation of Montana/s most important resource takes a broad spread of opinions and deep thinking to arrive at a consensus. This is an ever changing environment and we must all try to benefit all citizens and still stay within the confines of the law.

The work of the Water Policy Interim Committee should have started thirty years ago. So now it is faced with not only catching up with a half done program of allocation, but has to anticipate problems of the future.

We can't copy the failed water policies of our surrounding states. A classic example is Colorado, where the water has been transferred from agriculture, fishing and the tax basis of surrounding cities and counties of the South Platte River to flushing toilets in Denver.

To make sure this doesn't happen, all legislative bills must pass the smell test. 1. Does the Bill improve the quality of my family's life? 2. Does the Bill improve the quality of life for the majority of the families I know? If a bill doesn't have a positive answer to either question, I then ask who does the Bill benefit? If it is a bill written for a minority of Montana's citizens and has an adverse affect on the majority, it does not belong on the legislative agenda.

The Montana Legislature neglected to take the time necessary to completely explore the effects of the Electric deregulation and look at the effect it had on Montana and its citizens.

Again this happened on proposed buy-back of the Missouri power dams. We could have purchased the dams with coal tax money and lived happily ever after. But the lobbyists clouded the thinking of all Montana citizens.

Why do I see the same ghosts in the background of the sale of Water Rights that were involved in the Electricity Deregulation?

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POLICY OFFICE

That having been said, the Decreed Water Advocates must oppose LC-9002.

1. It will be impossible to administer as written without adverse effect. It is too cumbersome and contradictory.

2. There is no enforcement procedure or penalty for non-compliance.

3. It will involve the sale of water rights which historically are tied to the land.

4. Most of LC-9002 concerns the established water rights that are to be traded or sold. Established water rights must have a beneficial use to be viable.

LC-9002 ignores the historical decrees, judicial decisions and uses of the water rights. Beyond being against the Montana Constitution, it does not address the parameters for the transfer of these water rights. For example: basin restrictions, mileage restrictions, future trades of the water, etc.

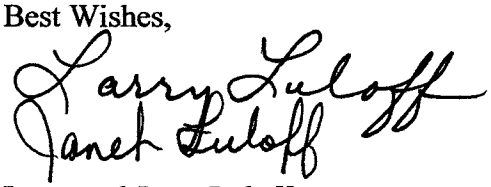
LC-9999 - Decreed Water Advocates approve this proposed change as written.

LC-8002 - Decreed Water Advocates object to any restrictions, licenses, or fees that apply to Senior Water Right Holders. This includes, but is not restricted to, all users of water or streambeds that are protected by the Montana Constitution.

Montana Constitution, 'Section 3. Water Rights (1) all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.'

Again, I wish to thank all participating members of the Legislature, the Legislative Services division, members of cooperating bureaus, and members of the public who testified at the meetings. I feel we have established a beach-head. I also know the journey ahead will remain very contentious and will take years to complete.

Best Wishes,



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