Montana
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Political Affairs

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August 21, 2012

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

RE: Comments on Water Policy Interim Committee Report/LC8011 and LC8012

Dear Mr. Kolman:

The following are comments of the Montana Association of REALTORS® ("MAR") to LC8011 and LC8012 as those bill drafts are included in the Water Policy Interim Committee's ("WPIC") report entitled "*The Exemption, To Change or Not to Change?*." On behalf of MAR's members, we appreciate the opportunity to comment on these proposed bill drafts.

The following also comments on certain aspects of WPIC's report and, generally, on the subject of permitting exemptions for certain groundwater wells and appropriations in Montana. MAR's comments are designed to provide WPIC with MAR's view on the proposed legislative drafts, as well as to give WPIC MAR's views on the subject of the existing permit exemption for certain groundwater wells under the Montana Water Use Act ("MWUA").

I. General Comments

As a threshold matter, MAR has consistently advocated that any discussions concerning the existing permit exemption on groundwater developments be grounded in science and based upon the best available information. Because the available information on exempt well development has historically been minimal, MAR has supported efforts by the Montana legislature to obtain science-based information on groundwater developments and the effect of such developments on Montana's surface and groundwater supplies. These efforts have led to additional information being available to policy makers and the public on the subject of exempt wells and the effect of such wells on Montana's water supplies. MAR believes these efforts should continue to guide policy makers in considering the issue of exempt wells.

MAR's continued support for an information-based approach to the subject of exempt wells or, for that matter, groundwater development in general, is because MAR firmly believes that the subject of groundwater development is largely misunderstood by the public and many times is clouded by simplistic assumptions or, at times, by goals not directly related to water development. It is only with a sound understanding of the issue that wise policy decisions may be made. MAR believes real progress has been made in this regard through the efforts of the Montana legislature, and through studies such as those commissioned by MAR that add to the information base. MAR believes these efforts have enlightened four basic principles that should largely be undisputed:

1. Montana is blessed with abundant groundwater and surface water supplies on a statewide basis;

2. Use of groundwater by household use from exempt wells or otherwise is relatively non-consumptive compared to other uses of water as approximately 95% of the water returns to the system;

3. Available groundwater aquifers in Montana are highly divergent in terms of water supplies available, level of development or non-development of this resource, and in terms of the relationships of those aquifers to area surface water systems; and

4. Policy decisions and Montana's water policy regulations should recognize the divergent nature of groundwater resources and groundwater availability in the state.

It is with these basic principles in mind that MAR provides the following comments.

II. Specific Comments

A. The MWUA allowance for groundwater permit exemptions is based on a sound premise; that is, certain groundwater developments likely do not affect other water uses, whether surface or groundwater.

As WPIC's report recognizes, less than 3% of water withdrawals across the state are related to groundwater. Of those, only 8% are withdrawn by exempt domestic wells and, because of the nature of such withdrawals, even less water is actually consumed.[1] On such a scale, the effect of exempt wells on groundwater or surface water supplies would appear to be negligible.

Given this information, it would appear that MWUA's allowance that certain groundwater developments be exempt from permitting requirements rests on a sound premise. *See,* Mont. Code Ann. § 85-2-306. In other words, by providing an exemption from the permitting requirements, the MWUA properly recognizes that certain groundwater withdrawals likely have no impact on other users of the water resource.

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[1] WPIC Report at page 9.

MAR would suggest that on a statewide level, and on a basin-wide level, technical data or information presently available does not support a conclusion that the exemption provision is flawed. In fact, given the de minimus quantities of water associated with the present exemption (35 gallons per minute ("gpm") up to 10 acre-feet per year), when compared to available water supplies on a statewide or even basin-wide scale, MAR believes there is little scientific support to modify the present statutory exemption threshold for groundwater developments in Montana. As such, MAR believes the legislature should avoid proposals for legislation that modify the existing permit exemption on large scale regions of the state.

B. The MWUA provides an existing statutory and regulatory remedy for addressing groundwater developments that may threaten groundwater aquifers or surface water availability to existing users.

As the WPIC report correctly recognizes, on a statewide scale, there is little agreement or evidence to suggest the existing statutory exemption is detrimental to senior water right holders.[2] As the report also correctly finds, consumption by domestic household wells is minimal.[3] Finally, as the WPIC report also correctly finds, current law allows for local water users and others concerned with groundwater development to establish controlled groundwater areas wherein all groundwater developments, or targeted groundwater developments, would be subject to permitting review.[4]

MAR believes the controlled groundwater area ("CGA") provisions of MWUA, and the existing process for establishing any such areas, provides the proper mechanism to alter the existing groundwater permit exemption. *See*, Mont. Code Ann. §§ 85-2-506, 508. Under the terms of the existing CGA statutes, and the process associated with implementing the provision, areas where groundwater or surface water availability may be impacted by well development may be specifically targeted and assessed. Under these existing statutory provisions, should exempt (or even permitted) well development cause concern, the Montana Department of Natural Resources and Conservation ("DNRC") may designate or modify temporary or permanent controlled groundwater areas. If designated by DNRC, well development in any such areas may be required to obtain permits, thereby altering or eliminating the use of exempt wells in designated areas or designated aquifers.

MAR believes the soundness of CGA provisions and processes in addressing concerns with groundwater development should not be overlooked. As the existing CGA process requires, scientific-based information will be reviewed by DNRC associated with any petition to designate any such area. Under the process, areas or aquifers that anyone believes may be at risk from development could be properly assessed. Also under the process, all interested persons could submit information and data to DNRC for consideration. Under the CGA process, DNRC may also properly tailor a remedy, including permitting of all groundwater developments, as appropriate to the situation presented.

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[2] WPIC Report at page 21.
[3] *Id.*
[4] *Id.*

MAR believes such an approach to modifying the groundwater well exemption is far superior to broad scale statutory modifications or elimination of the exempt well provisions. Because water supplies (whether groundwater or surface water) vary greatly within basins or even sub-basins, and because groundwater/surface water interactions may also vary greatly in small-scale regions, using the existing CGA provisions provides a more comprehensive approach to tailoring site specific modifications to the permitting requirements for groundwater developments than does large scale or broad scale statutory changes. In other words, the existing CGA process recognizes the reality that groundwater resources in Montana vary greatly, as does the relationship between groundwater development and existing groundwater or surface water supplies. MAR would encourage WPIC to highlight Montana's existing CGA provisions as the proper solution to address any concerns with the groundwater permitting exemption. As WPIC's report notes, such an approach is recognized as a "scalpel" rather than a "hammer" for addressing the issue of exempt wells.[5] Given the wide array of hydrologic and hydrogeologic conditions in Montana's basins and sub-basins, the issue of exempt wells requires a "scalpel" approach.

C. MAR disagrees with the WPIC report's recommendations that it is reasonable to restrict the use of exempt wells in new subdivisions in Montana's so-called "closed basins."

At page 22 of WPIC's report, Recommendation B notes that in basins where surface water uses are "mostly limited," it is "reasonable to restrict the use of exempt wells for new subdivisions." Under this recommendation, LC8011 and LC8012 are highlighted as proposals to implement the recommendation.

Prior to addressing LC8011 and LC8012, MAR believes the proposed draft recommendation is inconsistent with the body of the information provided by the balance of WPIC's report and flawed in the focus on new subdivisions as the target for restricting the use of the existing exemption.

First, as WPIC's report notes, there is no sound scientific basis to suggest that on a broad scale basis the groundwater exemption is having any effect on existing groundwater or surface water uses. By making a recommendation that Montana's so-called "closed basins" are the appropriate locale for restricting the use of exempt wells, the recommendation applies a broad scale approach to vast areas of western Montana. Such a recommendation appears to be at odds with the balance of WPIC's report that recognizes the divergent nature of aquifer and surface water interactions, and the fact that broad scale conditions on the effect of exempt well development is not proper based on the existing science and data.

Second, the recommendation also is inconsistent with WPIC's report by targeting new subdivisions. As WPIC's report correctly recognizes, domestic household use is largely non-consumptive with the vast majority of diverted groundwater returning directly to the source.

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[5] WPIC Report at page 18.

Because the existing exemption includes other uses (*i.e.*, stockwater, irrigation, mining, or any other use up to 10 acre-feet per year) specifying new subdivisions, which encompasses household domestic use, places the target on restricting the exemption on the least likely activity of concern. MAR believes WPIC should reexamine Recommendation B prior to final approval of the report.

D. Comments to LC8011.

The following are MAR's comments to LC8011. In addition to the following specific comments to the draft proposal, MAR incorporates the foregoing comments as applicable to LC8011.

LC8011 proposes to amend various statutes concerning subdivision regulations (Mont. Code Ann. § 76-3-504); the statute directing that local regulations not be more stringent than state regulations (Mont. Code Ann. § 76-3-511); the statute dealing with preliminary plat applications (Mont. Code Ann. § 76-3-601); the statute regarding review of subdivision applications (Mont. Code Ann. § 76-3-604); the statute concerning water and sanitation information accompanying a preliminary plat application (Mont. Code Ann. § 76-3-622); and the permit exemption statute (Mont. Code Ann. § 85-2-306).

In amending Mont. Code Ann. § 76-3-504, it is proposed that for residential subdivisions in so-called "closed basins," and for which the subdivision will create 20 or more lots with an average lot size of less than 3 acres, the standards must require the subdivision to:

1. install a public water supply system and public sewer system; or

2. seek approval from the local governing body to install an "alternative" to a public water and sewer system.

Importantly, the proposal states that the provisions of Mont. Code Ann. § 76-3-511 do not apply to the requirement set forth above in amending Mont. Code Ann. § 76-3-504. As such, it would appear that local governing bodies would be authorized to adopt regulations more stringent than those provided by the proposed statutory amendment.

MAR's concerns with the proposed amendment to Mont. Code Ann. § 76-3-504 are three-fold. First, the threshold numbers (20 lots on more with an acreage lot size of less than 3 acres) appear wholly arbitrary. Second, by exempting the provisions of subsection (2)(c) from Mont. Code Ann. § 76-3-511, local governing bodies would be authorized to modify the thresholds to more stringent levels than set forth in the draft (*i.e.*, the number of lots or the size of lots). Such an approach creates confusion and regulatory uncertainty. Third, establishing the requirements proposed creates different water system requirements in so-called "closed basins" from those that would exist outside these areas. Again, such a broad scale approach fails to acknowledge the fact that groundwater availability is highly divergent and that groundwater/surface water interactions cannot be characterized on such a broad scale.

MAR also has concerns with Section 5 of LC8011 amending Mont. Code Ann. § 76-3-622. Under proposed subsection (4), a subdivider who would propose an alternative to the public water and sewer system requirements of Mont. Code Ann. § 76-3-504(2)(c) would be required to provide "peer reviewed scientific studies" that the alternative system would meet the requirements of new subsections (a) and (b). Such studies would require a multiplicity of technical studies on the proposed alterative systems that, depending on site conditions, could be cost prohibitive to the project.

The proposed amendments to Mont. Code Ann. § 85-2-306 are also of concern. Under the proposed amendments, subdivisions not subject to Mont. Code Ann. § 76-3-504(2)(c) (public water supply requirements) in closed basins would be limited to 10 gpm or less not to exceed 1 acre-foot consumption per year to comply with the permit exemption. The proposed amendment is of concern for three reasons.

First, allowing exemptions for certain non-subdivision appropriations at 35 gpm up to 10 acre-feet, while restricting new subdivision use to 10 gpm and less than 1 acre-foot of consumption is arbitrary. If the concern is water supply related, there is no difference between the type of use to which the water is placed. Targeting subdivision use to a 10 gpm/less than 1 acre-foot threshold is unsupportable on a basin-wide level.

Second, the less than 1 acre-foot consumed threshold would not allow for anything else but household use of water. Lawn or garden watering would likely be precluded in most instances without a sound scientific-based justification for such a limitation. WPIC should avoid forwarding such a proposal.

Third, basin-wide application of the restriction again fails to recognize the divergent nature of groundwater supplies and groundwater/surface water interactions that exist on such a broad scale level. Depending on the aquifer and depending on surface water interactions, 35 gpm/10 acre-feet wells may have no effect on surface water or groundwater availability. Applying restrictions on the exemption at a basin-wide level seems contrary to the hydrologic and hydrogeologic information and data WPIC has reviewed, or been provided. MAR would again strongly suggest WPIC avoid broad scale approaches to the groundwater exemption issue. MAR would urge WPIC to not endorse LC8011.

E. Comments to LC8012.

The following are MAR's comments to LC8012. Like LC8011, this proposal targets subdivision use from exempt wells and proposes limits be imposed on a broad scale, basin-wide level. Similar to MAR's comments to LC8011, MAR opposes targeting one use of groundwater (*i.e.*, domestic use in subdivisions) under the permit exemption from other exempt uses, and further opposes limiting the use of exempt wells on a broad scale, basin-wide level. Those concerns will not be repeated below, but are also of concern with LC8012.

Specifically, LC8012 proposes that subdivisions located in the so-called "closed basins" that are using one or more wells under Mont. Code Ann. § 85-2-306(3)(a)(i)(A) (*i.e.*, 35 gpm up to 10 acre-feet) be limited to no more than 10 acre-feet per year. *See*, Section 1, amending Mont. Code Ann. § 76-3-504. LC8012 also proposes that if the proposed subdivision will use one or more exempt wells that "pre-approval" from DNRC be required allowing a total appropriation in the subdivision of up to 10 acre-feet, and that this pre-approval accompany the preliminary plat. *See,* Section 5, amending Mont. Code Ann. § 76-3-622. This latter provision would appear to apply statewide.

MAR is concerned with either provision that would appear to limit use of exempt wells in any subdivision to no more than 10 acre-feet per year. MAR is aware of no information available to WPIC that would support a conclusion that limiting use within an entire subdivision to 10 acre-feet from an exempt well(s) is necessary given the availability of groundwater in many areas of Montana, whether closed basins or otherwise. Again, such a broad scale limitation is unnecessary and unsupportable from the information presented to WPIC on groundwater availability in Montana.

MAR is also concerned with the pre-approval requirement being linked to the preliminary plat process. *See*, Section 5 amending Mont. Code Ann. § 76-3-622; Section 6 amending Mont. Code Ann. § 85-2-306. Under the proposed pre-approval process, a subdivider would need to apply for pre-approval from DNRC to use the exemption under Mont. Code Ann. § 85-2-306(3)(a)(i)(A). Under the proposal, DNRC would determine if the total water appropriated for the subdivision would exceed 10 acre-feet per year. In addition, DNRC could include conditions on the pre-approval.

The provision to apply for pre-approval exemption in effect eliminates the exemption for subdivision use. Under the proposal, the subdivision applicant for an exemption would need to fill out a form provided by DNRC, who would then make a determination on the application. In addition, since DNRC could condition the use of water from a 35 gpm up to 10 acre-feet per year well, the entire process proposed (*i.e.*, "pre-approval") is in effect an application and approval process for the use of presently exempt wells in a subdivision. The process proposed effectively means the subdivision must apply to DNRC for a 35 gpm/10 acre-feet well and receive approval from DNRC. Such a proposal effectively eliminates the exemption for subdivision use, not only basin-wide, but apparently statewide. MAR opposes such a proposal as envisioned in LC8012. As with LC8011, MAR would urge WPIC to not endorse LC8012.

III. Conclusion

On behalf of MAR's membership statewide, we appreciate the opportunity to provide WPIC with comments. MAR would continue to urge WPIC to approach the issue of exempt wells from a science/information based standpoint. When approached from such a perspective, neither LC8011 nor LC8012 present sound legislative approaches to the issue of the groundwater well permit exemption.

MAR further believes the existing provisions of the MWUA concerning establishment or modification of controlled groundwater areas provides the appropriate process and remedy for those concerned with exempt well development. Under the CGA provisions, site specific concerns may be properly reviewed with appropriate remedies and requirements being tailored to specific areas. Such an approach seems better suited to address the issue of exempt well development than do large scale, basin-wide proposals.

Thank you for the opportunity to comment.

Sincerely,

Amy Fisher

Amy Jo Fisher
Government Affairs Director
Montana Association of REALTORS®

CLARK FORK COALITION

August 24, 2012

Joe Kolman
Water Policy Interim Committee
PO Box 201704
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RE: Comments on LC 8011 and LC 8012

Dear Mr. Kolman and Members of the Montana Water Policy Interim Committee:

The Clark Fork Coalition (CFC) appreciates the opportunity to submit comments on the Water Policy Interim Committee's (WPIC) report and bill drafts related to permit-exempt wells. We appreciate the Committee's hard work during this interim on crafting a workable solution to the permit exempt well loophole. As discussed in more detail below, CFC believes WPIC should recommend LC 8012 for passage by the 2013 Montana Legislature, as it will go a long way toward addressing many of our concerns regarding the impacts of permit-exempt wells on existing water rights and streamflows in over-appropriated basins.

CFC, founded in 1985, is a non-profit organization dedicated to protecting and restoring the 14 million-acre Clark Fork River watershed. We are comprised of 2,700 members who are united behind the belief that clean water is integral to the health of our communities.

CFC's members help support our work with private landowners, irrigation districts, and water user groups to develop instream flow restoration projects that benefit clean water, healthy fisheries, and working lands. Our members are concerned about the cumulative impact on streamflows and senior water rights that has and will continue to result from the unchecked use of permit exempt wells for large new groundwater appropriations – mainly for new residential development in over-appropriated basins.

Our members are also concerned about the use of exempt wells due to our organization's ownership interest in a 2,300-acre working cattle ranch located east of the Clark Fork River in the Deer Lodge Valley near Galen, Montana. The ranch holds a number of senior irrigation water rights. As a senior water rights holder in the upper Clark Fork watershed—a closed basin that is already fully appropriated — our members are concerned about how the use of permit exempt wells in the closed basin may impact our ranch's water rights.

While both bills attempt to address CFC's concerns over the use of permit-exempt wells by limiting the exemption for residential development and encouraging public water and sewer systems, CFC believes that LC 8012 provides a much more logical, fair and workable framework for both developers and for water right holders.

CFC believes that LC 8011 will create an uncertain process for both the subdividers and the local governing body who will be charged with assessing all manners of "alternatives" to public water and sewer systems that, for all intents and

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purposes, will likely be proposed to avoid the requirement for obtaining a new water use permit from the DNRC. CFC believes this will result in a preservation of the status quo and a continuation of the proliferation of multiple of exempt wells for new large-scale developments. We also believe that the 20-lot/ 3-acre trigger seems arbitrary and allowing the exemption for developments with less than 20 lots would not guarantee protection to existing water right holders. In short, CFC believes LC 8011 does not go far enough to addressing the concerns over cumulative effects of multiple exempt wells.

On the other hand, CFC believes LC 8012 gets at the heart of our most significant concern over the use of permit exempt wells – namely the cumulative effect of multiple unpermitted and unmonitored wells for large residential subdivisions in over-appropriated basins. LC 8012's straight-forward approach to limit the exemption for new subdivisions to 10 acre feet of water per year provides both predictability for subdividers and protection for existing water right holders. The bill's requirement that a subdivider obtain an expedited answer on the request for exemption from the Montana Department of Natural Resources and Conservation (DNRC) provides further certainty for the development community.

We agree with the approach in LC 8012 to limit its application to legislatively closed basins. However, we recommend including language in the bill that would enable local governments outside of closed basins to opt-in to the process through appropriate legislative action. Our primary concern is that a portion of Missoula County, one of the fastest growing counties in the state, is not located within a legislatively closed basin. There may be other counties in similar positions that may wish to apply the exemption requirements in LC 8012. We believe WPIC should recommend passage of the LC 8012 in the 2013 Legislative Session.

Thank you for considering these comments.

Sincerely,

-s-

Barbara Hall
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Kolman, Joe

From: Lovelace, Bonnie
Sent: Wednesday, August 15, 2012 10:42 AM
To: Kolman, Joe
Cc: Madden, Jim; Kingery, Barbara
Subject: DEQ Comments on draft bill: LC8011

Joe: I am submitting the following comments on behalf of the DEQ. We have looked over the draft bills and discussed them with the help of staff attorney, Jim Madden.

LC 8011 has two minor technical problems that could be addressed as this draft is finalized. This bill amends the Subdivision and Platting Act to require subdivisions with 20 or more lots to have public water and sewer systems.

1. The draft bill states that the public water and sewer systems in these subdivisions must meet regulations adopted by DEQ "under 76-4-104". This is a reference to the Sanitation in Subdivisions Act. See amendment 76-3-504(2)(c)(i). However, DEQ rules adopted under the Sanitation Act (ARM Title 17, chapter 36) don't contain the requirements that DEQ applies to public water or sewer systems. When DEQ reviews a subdivision, we review any public water and sewer systems under the public water and sewer rules (ARM Title 17 chapter 38 subchapter 1). These rules are adopted under the authority of the public water/sewer laws at Title 75 chapter 6, MCA. The reference to "under 76-4-104" probably should be to "under 75-6-103".

DEQ is planning to amend the Sanitation Act rules to make it clear that the applicable rules for public systems are those set out in ARM Title 17 chapter 38.

2. Further, there is a minor problem with one of the existing provisions in 76-3-504. This bill would move that provision but would not substantially change it. The provision requires local subdivision rules to contain standards for water, sewer, and solid waste that meet DEQ standards, or if DEQ standards do not apply, that meet standards set out in sections 604 and 622 of the Platting Act. See amendment 76-3-504(2)(b). The provision refers to subdivisions that create "one or more parcels". The problem is that some subdivisions don't create new parcels: e.g., condominiums and mobile home or RV parks. For these subdivisions, the statute does not tell us which regulations are the minimum requirements. Probably it should be DEQ regulations, since they apply to those subdivisions.

A possible fix would be to amend (2)(b)(i) to say "for subdivisions that will create one or more parcels containing less than 20 acres or that create a condominium or area, regardless of size, that provides permanent multiple space for recreational camping vehicles or mobile homes". This tracks the Sanitation Act definition of "subdivision" in 76-4-102(16), MCA.

3. Clarification is needed for 85-2-306 (3)(a) (iii) (B) - PAGE 22. Does this section refer to the subdivision as a whole or to individual lots within the subdivision? This language is confusing.

Bonnie Lovelace
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Laura Ziemer
Director, Montana Water Project

August 14, 2012

Joe Kolman
Water Policy Interim Committee
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Sent electronically to jkolman@mt.gov

Re: TU Comments on LC 8011 and LC8012, and TU's Support for LC8012.

Dear Members of the Water Policy Interim Committee:

Trout Unlimited,(TU), appreciates the breadth of information and analysis contained in the Water Policy Interim Committee's (WPIC's) report on the issue of permit-exempt wells, "*The Exemption: To change or not to change?*" (WPIC, 2012). As its Executive Summary notes, this is the fourth consecutive interim during which the WPIC has considered permit-exempt wells, and the expertise developed and the care the WPIC has taken to consider carefully the issue of permit-exempt wells is evident.

Montana Trout Unlimited (Montana TU) is a membership organization, comprised of anglers dedicated to conservation, protection, and restoration of coldwater fish, including Montana's wild and native trout. Montana TU's approximately 3,400 members enjoy angling on rivers and streams across the state, and volunteer hundreds of hours each year to restore streams, educate youth and the broader community about the benefits of healthy rivers and streams, and to protect river and stream flows.

Montana TU's members care about permit-exempt wells because of their impact on stream and river flows in over-appropriated river basins, and because of the ground water pollution problems associated with a concentration of septic fields. These issues come to the forefront when blue-ribbon trout water flows through high-growth areas. The Bitterroot and Gallatin Rivers continued to gain in popularity during the two decades (from 1990 to 2010) that Ravalli and Gallatin counties grew by 61% and 70%, respectively. *The Exemption: To change or not to change?* at p. 7. Over the last 7 years, (2004-2011), two-thirds of the lots the Montana Department of Environmental Quality approved for subdivisions were slated to be served by exempt wells. *Id.* at p. 7. For these reasons, Montana TU supports the WPIC's efforts to restrict the proliferation of permit-exempt wells and concentrated septic fields in over-appropriated

river basins. In particular, TU urges members of the WPIC to recommend LC8012 for passage in the 2013 Montana Legislative Session.

LC8011, Burdensome to Local Governments. Bill draft LC8011 recognizes the problem of proliferation of permit-exempt wells in over-appropriated basins. Without replacing the water that multiple, exempt wells capture, these wells deplete streamflows and senior irrigation supplies. LC8011 takes a positive step forward by favoring public water and sewer systems for subdivisions of 20 or more lots, where the lots are less than 3 acres in size. TU, however, does not support LC8011 for passage in the 2013 Montana Legislative Session because TU believes that LC8011 places too high a burden on local governing bodies to review alternatives to public water and sewer systems for subdivisions.

The bill's proposed amendment to MCA 76-3-504(c)(ii), (at page 8 of LC8011 bill draft), allows an applicant to propose an alternative to providing a public water and sewer system for subdivisions of 20 or more lots with lots of less than 3 acres in size. TU believes local government's review of such proposals would require substantial staff time, development of expertise, and process to hold a hearing on the proposal as required. In addition, LC8011 does not contain clear guidelines for local governing bodies to make a determination of what an acceptable alternative to a public water and sewer system might be, to guide the expenditure of local government staff time and resources. For these reasons, TU believes that LC8011 would be expensive and frustrating for both local governments and applicants--without providing a workable solution for permit-exempt wells.

LC8012, Clear and Concise. One of the strengths of bill draft LC8012--in contrast to the ambiguity of LC8011—is its clear direction and ease of implementation. LC8012 amends MCA 76-3-504(m), (at page 5 of LC8012 bill draft), stating that a subdivision cannot appropriate more than 10 acre-feet a year, if it is located in an over-appropriated basin closed to new surface water rights. LC8012 also provides an expedited process for the DNRC to determine within 30 days whether the proposed subdivision will appropriate 10 acre-feet or less. The definition of "appropriate" in the Water Use Act, MCA 85-2-102(1)(a), also informs LC8012's implementation, clarifying that "'appropriate' means: to divert, impound or withdraw, including by stock for stockwater, a quantity of water for a beneficial use."

TU urges the WPIC to recommend LC8012 for passage in the 2013 Session of the Montana Legislature. While LC8012 does not prevent multiple, subsequent subdivisions in the same area, each using 10 acre-feet or less, it does require each development phase to go through subdivision review. This will help level the playing field in terms of cost and planning between exempt-well subdivisions and subdivisions on public water and sewer systems. While LC8012 may be only a first step, providing an incremental improvement over exempt-well management, it is a good first step that is worthy of broad-based support.

Conclusion. There is no easy solution to balancing permit-exempt wells against harm to senior water rights. If there were, it would not have taken the WPIC four consecutive

interims to arrive at a set of recommendations. TU supports the WPIC's recommendation "to restrict the use of exempt wells for new subdivisions" in over-appropriated river basins where "senior water rights may be most susceptible to adverse effect." *The Exemption: To change or not to change?*" Recommendation B, at p. 22. As a frequent applicant to the DNRC for a change-in-use of a water right claims, TU has first-hand experience with the frustrations many applicants feel in trying to navigate the increasingly complex permit and change process with the agency. TU supports the WPIC's recommendation that the DNRC "should continue to work with water use applicants to identify specific issues that may unnecessarily impede the permit and change process." *Id.*, Recommendation A. LC8012 is a good step toward implementation of these two recommendations

Please don't hesitate to contact me at lziemer@tu.org or (406) 522-7291 ext 103 if I can be of assistance to you or otherwise clarify any points made in these comments. Thank you for your consideration.

Yours truly,

Laura Ziemer

Cc: Krista Lee Evans, Senior Water Right Holders Coalition
Bill Schenk, FWP Legal Counsel
Holly Franz, PPL Legal Counsel
Barbara Hall, Clark Fork Coalition Legal Counsel
Mark Aagenes, Montana TU Conservation Director

From: Ted Williams
To: Kolman, Joe
Subject: Exempt well comments
Date: Sunday, June 24, 2012 11:17:13 AM

The following comments are based on professional experience with the State of Michigan and experience sitting on the Governor's Clark Fork River Task Force.

1) There appears to be some implication that the rate of pumping allowed for exempt wells is related to the volume of water allowed under the exemption. In the Michigan program, the water right is based on use, while maximum pumping rate is based on needs for emergency response (usually fire protection). In many cases, the maximum rate needed was required by regulation for a well to be certified for a particular use.

2) As I'm sure you know, there is massive confusion in all water policy over the meaning and logical conflicts between the following terms: legally available water, physically available water, legally mitigated water, water right use (beneficial?), and consumptive use. Added to that, legally available water is divided into non-adjudicated, adjudicated, and that under endless Compact Negotiations. One example of this confusion is the several locations where non-consumptive use of legally exempt wells is actually adding to the water physically available to senior right water users. Hopefully, the WPIC can work on this general confusion that is deeply imbedded in existing law and begin to simplify the issue. I have noticed that where there is sufficient physically available water most of existing regulatory water policy is not needed.

3) Exempt wells used for non-residential purposes (e.g. industry or agricultural) do need to be controlled as conflicts arise between needs for physically available water. I hope such issues can be treated with legislative authority to resolve these individual problems rather than a blanket, one-size-fits-all regulatory approach.

4) Finally, it appears (to me at least) that all the state's citizens have a right to an adequate residential water supply under the state constitution. This assumes that the constitution supports the welfare of all citizens and also names the state as the owner of all waters within our boundaries. To my knowledge, the exempt well provision is the only recognition of such a constitutional right. I hope the WPIC will keep this central concept in mind and not get lost in existing or proposed regulatory wording.

Thanks for the opportunity to comment. Hope these ideas assist in developing legislation and related language.

Ted Williams Ph.D. (aka. Ted)

From: Harold Blattie
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Cc: Kolman, Joe; Thigpen, Helen; kevinmccue2@mt.gov
Subject: WPIC Comment
Date: Friday, June 22, 2012 6:33:09 AM

Water Policy Interim Committee members,

During the 30 years we ranched near Molt Mt, we experienced about half of those years with less than average precipitation. In those years we would reduce the size of our herd to fit the available pasture. We simply managed our resource - given its availability in relation to precipitation.

As I listened to the testimony in Bozeman, and from the information presented at the earlier WPIC meetings, it appears to me that there really isn't too much concern about household use for washing, bathing and cooking and that the real "culprit" is lawn watering.

Are we collectively overlooking the obvious?

Municipalities, residential water districts and water users associations have been managing their water supply for years, by simply imposing lawn watering restrictions, i.e. odd and even day watering.

See the recent article from Butte Standard below:

Sprinkling rules go into effect next week

Because of the recent hot weather and the possibilities of experiencing low pressure in the county's water transmission system, Butte-Silver Bow is requiring residents to observe odd-even sprinkling restrictions starting Wednesday, June 27.

Houses with odd-numbered addresses sprinkle on odd-number days, houses with even numbers sprinkle on even-number days.

People are asked not to sprinkle from 10 a.m. to 6 p.m., the hottest part of the day. Failure to observe the restrictions could result in fines and fees up to $150 and the loss of sprinkling privileges.

For details, call the Butte Water Division at 497-6540 or 497-6500.

Municipal water providers generally know how much water is available and their water plant capacity so to keep usage within that capacity, they manage their water usage, just like I used to manage my pastures.

Several different alternatives could be considered such as:

Statutorily requiring subdivides to place odd-even watering restrictions in homeowners association covenants

Statutorily restricting owners of exempt wells to only water lawns on odd-even days. Would probably need to provide for a civil penalty with citations being written by law enforcement.

In reality, few citations would ever be issued and they would probably be complaint driven. Deputies and JP's have much more important things to do than deal with watering violations so actual enforcement would be minimal. I believe that voluntarily compliance would fairly high because fundamentally most people want to do the right thing and want to be law-abiding. Even if there was

only 75% compliance, the reduction in usage would be significant.

A variant could be that DNRC or the Governor's Drought Advisory Task Force could look at individual drainages and determine if conditions warranted imposing restrictions or not.

So far, I really have not heard any discussion about addressing different times of water availability. When precipitation is high, there is a lot more water available than during periods of drought. It seems that all of the discussion assumes a constant water supply while in reality water availability during wet years and dry years and also different times of the year is probably the biggest variable in the whole equation.

Not a silver bullet by any means but perhaps worth considering as a piece of the puzzle.

This is not a suggestion from the Montana Association of Counties, just a comment from a resident.

Thank you,

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Cc:	Kolman, Joe; Thigpen, Helen; kevinmccue2@mt.gov; "Harold Blattie"; "Susan Swimley"
Subject:	WPIC Comment
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Attachments:	85-2-506 Controlled ground water areas -- designation or modification.htm 85-2-508 Controlled ground water areas -- permits to appropriate.htm 36_12_905 HORSE CREEK CONTROLLED GROUNDWATER AREA - Administrative Rules of the State of Montana.mht.msg

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Water Policy Interim Committee Members,

On behalf of MACo, we would like for the committee to considering using the existing Controlled Groundwater Area (CGWA) statutes, 85-2-506 and 85-2-508, MCA, as a starting point to draft legislation regarding exempt wells. While these statutes may require modification to shorten timeframes or the application review process to establish a CGWA, the statute in its existing format allows a CGWA boundary to be designated by the local community, water right holders or DNRC based on whether there are impacts to a specific aquifer that can be mitigated. The petition for a CGWA must contain an analysis by a hydrogeologist, qualified scientist or qualified licensed professional engineer documenting the scientific need for a CGWA. Exempt wells can be addressed through a CGWA such as they were addressed in the Horse Creek CGWA south of Absarokee.

A CGWA process to address exempt wells would not be a "one-size" fits all solution as the need would be determined by the local communities and a CGWA would be based on scientific evidence for a particular aquifer. This would seem to be a better solution than altering the Montana Subdivision and Platting Act to address a water issue.

For your convenience, I have attached a copy of the statutes and the Horse Creek CGWA designation. If you have any questions or would like further information, please let me know.

Thank you.

Tara

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