TO: Jason Mohr, Erin Bills, WPIC Members
FROM: Andrew Gorder, The Clark Fork Coalition
DATE: 2/19/18
RE: Application of CFC's Groundwater Policy Principles to Other Legislative Proposals

Introduction

During the committee's January 2018 meeting, the Clark Fork Coalition shared a letter with committee members outlining our policy position and offering options for improving the current framework with respect to exempt wells and, more broadly, Montana's groundwater policy. The letter outlined four principles that represent the core concepts that the Coalition feels are crucial to ensure that any groundwater policy proposal is protective of Montana's water resources and its water users while also complying with Montana law. In question form, those four principles can be re-phrased as follows:

1) Does the policy fall outside of the *de minimus* threshold for exempt appropriations?
2) Does the policy give adequate notice of exempt appropriations to existing water users?
3) Does the policy give existing water users an opportunity to defend their property interests?
4) Does the policy treat all water uses equally?

The following memorandum was prepared in response to Vice Chair Zach Brown, who requested that the Coalition prepare a memo that applies these four principles to two existing policy proposals (HB 339 and Trout Unlimited's "Buffer Zone" proposal) to get a better understanding the strengths and weaknesses of each proposal, from the Coalition's perspective. Each of the existing policy proposals is addressed in turn:

House Bill 339-

Does the policy fall outside of the *de minimus* threshold for exempt appropriations?

Yes. In our view, HB 339 falls outside of this threshold for two main reasons. First, the policy would adopt the rejected definition of "combined appropriation" that impermissibly allowed large quantities of water to be appropriated without a permit. When this definition,

which requires wells to be physically connected in order to be considered "combined," was challenged in Court, the District Court found that it violated "not only the spirit of the legislative intent behind the Act, but that it also violated the legislative intent in the enactment of the exempt well statute." *Clark Fork Coalition v. Tubbs*, No. BDV-2010-87, at 4 (Mont. First Jud. Dist. Ct. Lewis and Clark Cnty. Oct. 17, 2014). The Montana Supreme Court ultimately upheld the District Court, holding that an exemption from the permitting requirements of the Montana Water Use Act only squares with the underlying intent of the Act if it allows a *de minimus* quantity of water to be appropriated without a permit. *Clark Fork Coalition v. Tubbs,* 2016 MT 229 at ¶ 24. Incorporating this faulty definition of "combined appropriation" into statute would not remedy the fact that it is inconsistent with the Montana Water Use Act[1] and the Montana Constitution.[2]

Secondly, while HB 339 attempts to address the potential impacts to other water users via spacing requirements between exempt wells, the policy would continue to allow for significant quantities of water to be appropriated via exempt wells without any meaningful limitation. This is particularly concerning given that there are no metering requirements or quantitative accountability for these exempt appropriations. The result is untenable because the exempt well statute was established for a specific purpose: to allow for small uses of water that will not impact senior appropriators to avoid the burden of the expensive permit process. *Tubbs*, No. BDV-2010-87, at 9.

[1] *Clark Fork Coalition v. Tubbs,* 2016 MT 229 at ¶ 24 ("Accordingly, based upon the plain language of the statute and the stated purpose of the Act, we conclude that 'combined appropriation' refers to the total amount or maximum quantity of water that may be appropriated without a permit and not to the manner in which wells or developed springs may be physically connected.").

[2] There are several provisions of the Montana Constitution that are implicated by proposed groundwater policy, including: Art. IX, Sec. 3 (recognizing and confirming all existing rights to the use of any waters for any useful or beneficial purpose); Art. IX, Sec. 3 (directing the legislature to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."); Art. II, Sec. 17 (no person shall be deprived of property without due process of law).

Does the policy give adequate notice of exempt appropriations to existing water users?

No. This policy does not provide for notice to other water users who may be affected by exempt appropriations. This is problematic because it keeps existing water users in the dark about the drilling of exempt wells on nearby properties and possible threats to their own water source. It also implicates potential concerns about due process of law for existing water users seeking to protect their property interests. Art. II, Sec. 17. See *In re Valley Center Drain District, Big Horn County*, 64 Mont. 545, 551, 211 P. 218, 221 [emphasis added] (landowner cannot be deprived of property interests without notice and opportunity to be heard "*before* he may be affected adversely.").

As noted by other stakeholders, there are several examples of how this notice could be afforded that have already been codified in Montana law. For example, when the DNRC determines to grant a change pursuant to the Temporary Lease statute, it must personally notify water users identified by the department in the area of impact as well as notify the general public by posting notice on its website. Section 85-2-427(8), (9) and (10), MCA. Another example of notice to existing water users can be found in Section 85-2-307, MCA, which discusses notice procedures for a water right permit or a proposed change to an existing right.

Does the policy give existing water users an opportunity to defend their property interests?

No. Here again, the policy does not provide water users who may be affected by exempt appropriations an opportunity to object and be heard. This is problematic for the same reasons listed above regarding lack of notice. In addition, while the legislature has previously recognized that the development of exempt wells "may have an adverse effect on other water rights" [Section 85-2-381(1)(d), MCA], there are no existing statutory safeguards that offer actual protection to senior water users from encroaching exempt appropriations. The existing enforcement provisions found in Section 85-2-381 are inadequate for at least two reasons: 1) there is no practical way for a surface water right holder to make call on one or more exempt appropriators; 2) these provisions force existing water users to experience adverse impacts before they can seek a remedy. Section 85-2-381(4)(a)-(c), MCA; *In re Valley Center Drain*

District, 64 Mont. at 551, 211 P. at 221 [emphasis added] (landowner must be given notice and opportunity to be heard "*before* he may be affected adversely.").

We can look to existing law to see how an objection process might look. Using the Temporary Lease statute as an example, if the Department receives an objection and finds that there are sufficient facts in the objection to support a showing of adverse effect, no water lease is issued. Section 85-2-427(11)(b), MCA. The person seeking the use is then offered the opportunity of a hearing to prove (by a preponderance of the evidence) that the proposed lease would not adversely impact other water users. *Id.* at (11)(c). This statutory approach properly recognizes the Montana Water Use Act's intent to "protect senior water rights holders from encroachment by junior appropriators" and correctly places the burden on the person seeking the appropriation, not the other way around. *Clark Fork Coalition v. Tubbs,* 2016 MT 229 at ¶ 24.

Does the policy treat all water uses equally?

No. Whether intended or not, this policy favors groundwater uses over surface water uses. This approach makes little scientific sense given the hydrologic connection between groundwater and surface water. Both sources of water are subject to consumption and depletion; "… groundwater and surface water are two manifestations of a unitary resource, and an increase in consumption of groundwater can reduce surface flows by intercepting water that would otherwise recharge a stream or by capturing water from the stream itself." *Bostwick Properties, Inc. v. Mont. Dept. of Nat. Resources*, 296 P.3d 1154, 1160 (Mont. 2013). Further, the Water Use Act defines water as "**all** water of the state, surface and subsurface regardless of its character or manner of occurrence…." Section 85-2-102(6), MCA. A policy approach that elevates one type of water use over another runs the risk of violating the Montana Water Use Act and the Montana Constitution's equal protection clause.[3]

[3] For an in-depth discussion of Constitutional issues, see Carolyn A. Sime, *Public Water, Private Rights: All Are Not Equally Protected When the State Allows Some to Divert Small Quantities of Groundwater Outside the Permitting System,* 75 Mont. L. Rev. 237 (2014).

Trout Unlimited's "Buffer Zone" Proposal-

In some respects, a detailed analysis of Trout Unlimited's Buffer Zone policy proposal is premature because it is not a finalized legislative proposal and leaves certain aspects open to further input and development. Nonetheless, TU's proposal offers an interesting approach to mitigating the impacts of exempt wells on Montana's water resources as well as development patterns. Therefore, rather than scrutinize this proposal using each of the four principles outlined above, this memo offers some general critique along with suggestions for improving upon the proposed framework.

Trout Unlimited (TU) bases its Buffer Zone proposal on the 1987 Rule and the Department's guidance for this rule. This is an important distinction from the framework of HB 339 because TU's proposal is based on the Montana Supreme Court's guidance. TU's proposal also illuminates a problem with the Department's guidance under the 1987 rule as it is being applied on the ground; i.e. by approximating "dispersed, rural use" of exempt wells via ¼ mile (1,320 feet) spacing requirements, the rule may end up dictating inefficient, inflexible or undesirable land use decisions. To combat this, TU's proposal would allow for any number of exempt appropriations for any project/development on 40-acres or less so long as the outlined 3:1 buffer zone is maintained.

Ultimately, the Clark Fork Coalition views this proposal as a step in the right direction. TU's proposal recognizes that the impact of exempt wells that are used to promote development is a crucial factor in building groundwater policy. The proposal recognizes weaknesses in the current regulatory framework and seeks to improve that framework. That being said, we feel that are some key considerations and additional safeguards that would be necessary additions to protect senior water users from the quantitative impacts of developments using multiple exempt wells.

First, there is risk in continuing to allow developers to approximate rural use of exempt wells because it does not protect or promote the *actual* rural and dispersed use of exempt wells. While it is true that the "10-acre-feet per quarter-mile" guidance is a reasonable approach to what a dispersed, rural use of an exempt well *might* be in a vacuum, we should not assume that this approach protects existing water users. Put another way, the "10-acre-feet per quarter mile"

approach may produce negligible impacts to existing water users in some hydrologic basins, but not others. This is even more important given Montana's projected potential for growth in the coming years. Montana faces huge challenges in relation to increasing demand for a finite (and decreasing) resource. Given this context, additional triggers for a permitting process, such as a defining "rural use" and/or the notice and objection procedures detailed above, are necessary in order to protect existing water users from the impacts of exempt wells.

Second, TU's proposal relies on the authority and capacity of individual counties in order to enact plans to address the buffer zones. It is unclear at this time how this requirement would be addressed in the legislative proposal. Additionally, the proposal would require that each subdivided parcel that is part of a project or development have no more than one 35 GPM well with up to 2.25 acre-feet of water withdrawal. CFC supports this aspect of the proposal because it recognizes the need for some kind of metering or quantitative accountability for exempt appropriations. However, it is unclear who would be responsible for monitoring or enforcing these limitations.

Ultimately, the Coalition needs additional time to digest different proposals that are currently being formulated and talk with Trout Unlimited, our other partner groups, agricultural water users and others about their ideas. We appreciate the committee's continued interest in this topic as well as the opportunity to offer comments.

Sincerely,

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