

November 5, 2007

TO: Water Policy Committee

FROM: Greg Petesch

RE: Enforcement of Senior Rights in Relation to Ground Water Rights

The purpose of this memorandum is to fulfill Representative Cohenour's request at the Choteau meeting of the Water Policy Committee to formally address additional issues related to ground water rights. Tim Hall, Chief Counsel for the Department of Natural Resources and Conservation, accurately and succinctly described the enforcement mechanisms available to senior water right holders under current law.

Montana does not appear to have had much experience with the impact of a call by senior surface water right holders on junior ground water right holders. Under the prior appropriation doctrine and the decision in Montana Trout Unlimited v. Department of Natural Resources and Conservation, 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (2006), a call by a senior water right holder must be enforced against junior water right holders in the order of the least priority of the junior water right holders, whether those water rights are surface water rights or ground water rights. The state of Idaho is experiencing protracted litigation over this issue. See American Falls Reservoir District No. 2 v. Idaho Department of Water Resources, 2007 Opinion 40, Case No. 33249 (Id. March 5, 2007). In its decision, the Idaho Supreme Court stated that the priority ordering of the state's version of the prior appropriation doctrine is not absolute, and that an as yet undefined reasonableness standard merits consideration when administering the use of hydrologically connected surface and ground water. An additional factor is Article XV, section 3, of the Idaho Constitution, which gives priority to domestic water rights but requires that junior water right holders must compensate senior water right holders for any taking of their water.

In Montana, there is no prioritization among types of water rights. However, it is much easier to close a headgate on a ditch during a call by a senior appropriator than it is to shut off wells. An additional complicating factor is the legal ability to continue to develop ground water through the use of nonpermitted exempt wells, even in closed basins in which it is recognized that water is overappropriated. During a call for water by a senior appropriator, all junior water right uses are supposed to be curtailed according to their priority under sections 85-2-406(1) and 85-5-101, MCA.

It has long been established that the appropriator of water does not become the owner of water by the act of appropriation. The appropriator acquires the right of the use of the water for some useful purpose. The appropriator for one useful purpose has no preference or superior right in law to an appropriator for any other purpose. While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public. Fitzpatrick v. Montgomery, 20 Mont. 181, 50 P. 416 (1897). Fitzpatrick bases this conclusion on Basey v. Gallagher, 20 Wall. 670 (1875), an appeal from Gallagher v. Basey, 1 Mont. 457 (1872), in which the United States Supreme Court said:

Water is diverted to propel machinery in flour mills and saw mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.

Even though Montana does not constitutionally or statutorily prioritize water rights, a de facto priority for domestic or municipal use may exist. It does not require much imagination to foresee a potential public health crisis if junior domestic or municipal water rights were curtailed by a senior appropriator's call for water. A call for water that implicated domestic or municipal water supplies may require that the applicable government intervene to protect the public health. State and local governments have inherent power to enact reasonable legislation for the health, safety, welfare, or morals of the public, even though the legislation is an infringement of individual rights. Police power regulations are presumed reasonable, and a clear showing is required for a finding that they are unreasonable. State v. Deitchler, 201 Mont. 70, 651 P.2d 1020 (1982).

The police power of the state, which enables the state to pass laws for the health, safety, and general welfare of the people, must be reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare. See In the Matter of the Adjudication of the Existing Water Rights of the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), citing Yellowstone Valley Electric Cooperative v. Ostermiller, 187 Mont. 8, 608 P.2d 491 (1980). Although compensation may be owed to the senior appropriator if the senior appropriator's beneficial use is curtailed to protect the public health pursuant to the police power, that issue will probably be resolved on a factually specific basis.

It is even possible that the police power of the state can be exercised even though provision for compensation to the owner of property has not been made. Ruona v. Billings, 136 Mont. 554, 323 P.2d 29 (1958).

During his presentation in Choteau, Mr. Hall described a decision by the Fourteenth Judicial District Court for Musselshell County involving a water purchase contract, in which the District Court ruled that the "remaining stored water level in Deadman's Basin Reservoir has reached a critical level" and that the reservoir water was needed to maintain the Musselshell River flow "to supply domestic, municipal, stock and wildlife water usage." The District Court prohibited the irrigation of crops from the Musselshell River between August 12 and September 30, 2000, so long as the reservoir maintained its critically low level. On appeal, the Montana Supreme Court determined that the District Court simply made a priority determination regarding domestic and irrigation water consumption based on its own inclinations. In so doing, the District Court exceeded its authority to simply "fill in" a water decree with further delineations. The Supreme Court ruled that the case was merely one of contractual interpretation and enforcement. Because the case was reversed and remanded, the Supreme Court declined to address the issue of whether

the water right holder was entitled to compensation for a "taking" of the water for public purposes. In the Matter of the Petition of the Deadman's Basin Water Users Association to Appoint a Water Commissioner to Distribute Stored Water, 2002 MT 15, 308 Mont. 168, 40 P.3d 387 (2002).