

**Exhibit Number: 2**

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The goal of this legislation is to protect existing groundwater resources and to protect existing groundwater users, and their rights and investments in water infrastructure from development that may, taken together, surpass recharge rates.<sup>2</sup>

This Bill requires that all major subdivisions and any subsequent minor subdivision obtain all the necessary permits for water allocation prior to final plat. Family transfers are not included in this Bill. This Bill will not completely remove the domestic use exemption, but will merely require a party seeking to develop land where the anticipated water source is from individual wells, to acquire a permit for the water right allocation for each parcel created by the subdivision prior to final plat approval by the local governing body.

In addition, this bill will only apply to major subdivisions and subsequent minor subdivisions proposed after the date of enactment. This Bill will not require owners of existing parcels to obtain a permit, nor will this Bill require those who currently have a permit under the domestic use exemption to obtain a permit.

This Bill is proscriptive in nature – requiring the water permitting process to work hand-in-hand with the subdivision process. Adopting changes to the statute governing final plat will ensure that local governments, concerned citizens, and other water users, in addition to the purchasers of the parcels within the subdivision, are aware of availability of water and the potential withdrawal before the subdivision obtains final approval. By adopting changes to the minor subdivision statute, this Bill will enable local governments to participate in management of groundwater resources that are affected by changes in land use. Finally, this Bill will shift the burden from the consumer purchasing a parcel to the developer.

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<sup>2</sup> See MCA § 85-2-902 (Purpose of Groundwater Assessment Act is based on the importance of groundwater to Montana and uncertainty of volume and contamination).

## I. Introduction:

In the western United States, the availability and quality of water are the most important forces driving economic development. Particularly true in draught-stricken Montana, only where there is sufficient water of a suitable quality can growth and commerce exist. As regions of Montana experience economic expansion, real property owners convert ever-greater amounts of land from agricultural to residential uses. An ever-increasing demand for water accompanies these changes in land use. Where once land required water for irrigation, or existing land uses did not require groundwater withdrawals for agricultural or timber production, new residential and commercial uses may require tapping into groundwater resources. Where groundwater resources are scarce or groundwater hydrology uncertain, major residential or commercial development designed to rely on groundwater may negatively affect groundwater resources and existing users.

Montana recognizes the importance of water as a unitary resource. Over time, the law of Montana has evolved to recognize the interaction between surface and groundwater. Montana law recognizes that some water appropriations may affect existing uses. As more land is developed, more water is required, yet there is a finite, and dwindling, supply of water.

The Montana Legislature intended the domestic use exception, MCA § 85-2-306, to provide for small withdrawals for multiple purposes, to provide water for small-scale irrigation, and to facilitate rural development. Unfortunately, the domestic use exception is increasingly being used for purposes other than for small domestic withdrawals. The exception is being used to supply water to residential subdivisions.<sup>1</sup>

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<sup>1</sup> See *Draft Clark Fork River Basin Watershed Management Plan*, Chapter 11, pg. 2.; see also Caldwell, *Six-Packs for Subdivisions: The Cumulative Effects of Washington's Domestic Well Exemption*, 28 *Envl. L.* 1009, 1106 (Winter, 1998).

obtained, the local governing body will be positioned to ensure adequate water supply is available for all proposed wells in the development. As a result, this Bill may encourage applicants for major and minor subdivisions to use community wells.

The Montana Legislature recognized the importance of protecting groundwater resources in the Clark Fork River basin. In 2003 the Legislature, through HB 397, directed the Governor to "... designate an appropriate entity to convene and coordinate a Clark Fork River basin task force to prepare a water management plan for the Clark Fork River basin..."<sup>5</sup> In response to this legislation, on July 2, 2001, Governor Martz asked the Montana Consensus Council ("MCC") to "take the lead in organizing, convening, and facilitating a task force to develop a water management plan for the Clark Fork River basin in Montana."<sup>6</sup> The MCC, as the entity charged by the Governor with implementing this statute, was directed to "... identify options to protect the security of water rights and provide for the orderly development and conservation of water in the future."<sup>7</sup>

MCC's plan is titled "Draft Clark Fork River Basin Watershed Management Plan" ("Plan").<sup>8</sup> The Plan addresses numerous issues related to protecting groundwater in the Clark Fork River basin. Important to this legislation, the Plan "...identifies options to protect the security of water rights."<sup>9</sup> In addition, the Plan identifies regulatory options for the orderly development of water.<sup>10</sup>

Of these options, the Plan identifies potential problems associated with the exemption from the permitting requirements for wells or developed springs that withdraw less than 35 gpm:

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<sup>5</sup> MCA § 85-2-350 (temporary).

<sup>6</sup> *Draft Clark Fork River Basin Watershed Management Plan*, Chapter 1, pg. 1.

<sup>7</sup> MCA § 85-2-350(3).

<sup>8</sup> The Plan is available at <http://www.dnrc.state.mt.us/clarkfrkbasincover.htm>; visited November 1, 2004.

<sup>9</sup> *Draft Clark Fork River Basin Watershed Management Plan*, Chapter 1, pg. 1.

<sup>10</sup> *Draft Clark Fork River Basin Watershed Management Plan*, Chapter 8, pg. 4.

## II. Need for Legislation

This Bill directly confronts the problem of groundwater contamination and depleted groundwater resources by focusing on a primary cause of water quality and quantity problems: residential and commercial subdivisions.

High-density areas without sewers are a significant source of groundwater contamination. Many subdivisions using individual wells also use individual septic systems. A 1996 study of septic systems in the Missoula Valley found that between 9.4% and 15.4% of sampled wells had bacteria contamination from septic wastes.<sup>3</sup> That contamination puts several parts of the valley at risk from waterborne disease outbreaks. Other areas of Montana show wells with high levels of nitrates. These areas include the Summit Valley area in Silver Bow County and the Four Corners area in Gallatin County. In the Upper/Lower River Road areas outside Great Falls, more than 700 homes, most with individual septic systems and individual wells are scattered over a 3 square mile area. After studying the area's groundwater, the state of Montana and local governments found the pollution so great that they recommended homeowners pay for a community water system and sewer system at a cost of millions of dollars.<sup>4</sup>

Local water users may currently address the water quality and quantity impacts of subdivision proposals through the preliminary plat process. The Bill will not affect the ability of local water users to comment on potential impacts of groundwater resources. However, the Bill will allow local governing bodies, before final approval of the subdivision, to ensure adequate water supply exists, a level of review currently unavailable. By requiring the applicant for a major or subsequent minor subdivision to obtain a record that all needed permits have been

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<sup>3</sup> Missoula Valley Water Quality District, Environmental Health Division, Missoula City-County Health Department, *Evaluation of Unsewered Areas in Missoula, Montana*, <[www.co.missoula.mt.us/wq/FAQ/Reports/unsew.pdf](http://www.co.missoula.mt.us/wq/FAQ/Reports/unsew.pdf)> visited November 27, 2004.

<sup>4</sup> See Tim Davis, *Drowning in Development, Thirsting for Water*, Queen City News, Nov. 13, 2002.

Application Criteria – Adverse Effect” includes a requirement for an applicant for groundwater withdrawals that exceed the 35 gpm exemption to show the “...operation of the proposed project can be properly regulated during times of water shortage so that the water rights of prior appropriators will be satisfied.”<sup>14</sup> In addition, those seeking a permit for a groundwater allocation must provide “...a written narrative addressing potential adverse effects on existing water users”<sup>15</sup> as well as “...describe how water levels in wells of prior water rights will be lowered and the rate and timing of depletions...”<sup>16</sup>

These proposed rules do not apply to wells withdrawing 35 gpm or less. This Bill will require this new rule on permit application criteria to apply to all major subdivisions and any minor subdivision, thus ensuring the state protects existing water users.

### **III. What the Bill Requires and What the Bill Does Not Require.**

This legislation provides a statutory basis for eliminating the groundwater exemption. The legislation requires all major subdivisions, as defined by the code, and all subsequent minor subdivisions to obtain all permits for every allocation the subdivision will require before the appropriate local governing body may approve the final plat.

The Bill will simply require applicants for all major subdivisions and all subsequent minor subdivision to obtain a permit for each proposed well site *prior to final plat approval*. Thus, the local governing body will have adequate assurance that the proposed subdivision provides ample water supply to the subdivision.

The Bill does not require a permit before preliminary plat, but rather, creates a parallel path for approval of final plat with the water permit process. Once the developer has preliminary

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<sup>14</sup> *Id.* at 2182; New Rule XX, subsection (1).

<sup>15</sup> *Id.* New Rule XX, subsection (1).

<sup>16</sup> *Id.* New Rule XX, subsection (4).

Although water law acknowledges that water is a unitary resource, in practice surface and groundwater are often regulated and managed as if they are separate resources. Conforming practice to the unitary standard would facilitate quantification of physically available water and provide for its use by the various competing existing and future uses. For example, wells that withdraw less than 35 gallons per minute (gpm) and 10 acre-feet per annum are exempt from permitting requirements. This exemption would be appropriate if we could be sure that additional development of smaller wells would be unlikely to affect groundwater availability. *As domestic use continues to increase, however, the number of wells may become significant. Subdivision developers also sometimes forgo opportunities for community wells that would be more efficient and cost-effective than individual wells to avoid groundwater permit requirements. Eliminating the 35 gpm/10 acre-feet exemption would allow the state the means to track groundwater development, ensure that it does not affect other groundwater users, and improve the efficiency of the use of groundwater.*<sup>11</sup>

Thus, the Clark Fork River Basin Watershed Management Task Force (“Task Force”), comprised of members representing diverse interests, recognizes the domestic exemption from permitting requirements may have a potentially significant effect on existing users and groundwater resources. In fact, the Plan, in its “Recommendations and Conclusions” calls for “Elimination of the 35 gpm/10 acre-feet exemption to allow the state the means to track groundwater development, ensure that it does not affect other groundwater users, and improve the efficiency of the use of groundwater.”<sup>12</sup>

By calling for an elimination of the exemption, the Task Force members recognize, where residential and commercial development is dependant upon groundwater resources, the impact to existing users and the resource should be taken into consideration when development projects are proposed.

The DNRC is proposing new rules on standards regarding waters rights.<sup>13</sup> These new rules include a rule addressing permit application criteria. The new rule entitled “Permit

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<sup>11</sup> *Id.* (Emphasis added).

<sup>12</sup> *Id.* at Chapter 11, pg. 2.

<sup>13</sup> Montana Department of Natural Resources and Conservation, *Notice of Public Hearings on Proposed Adoption And Amendment*, MAR Notice No. 36-12-101, 9/23/04, pg. 2163 – 2199. See Appendix A.