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Members of House Natural Resources Committee

Re: HB 138, HB 373, et al

Dear Honorable Representatives,

I attended the hearing on these bills last Friday. As a former Member (and Chairman) of Senate Natural Resources (understanding the dynamics of legislative hearings), I'm sure you are all aware that a number of the witnesses last Friday (whether consultants or citizens who have invested in projects) have a lot at stake in what you do with this whole general area of state policy.

It's important to remember that the purpose of closing basins was *not* to provide de facto instream flow in the rivers of western Montana. It was *not* to protect the status quo of stream flows. It was *not* to implement the "clean and healthful environment" provisions of the Montana Constitution. It was *not* to stop groundwater development or growth. It *was* simply to provide for an efficient water adjudication, protective of seniors, that is, to provide a moratorium (on new permits *that would adversely affect seniors*) until the adjudication becomes final so that better decisions can be made regarding water availability. I might add that this was done in the context of an adjudication that was envisioned to be completed within a few years.

It's also helpful to remember that the Missouri River flows some 7 to 8 million acre feet annually into North Dakota. All our rivers flow a total in excess of 40 million acre feet out of Montana every year. Being "out of water" has never been Montana's problem—we are "water rich." Our problem is more about having water in the right place at the right time.

Instead of "immediately or directly connected to" (the problematic language in statute that the Supreme Court used to shut down our permitting system in closed basins), I urge the committee to fashion a definition of "depletion" of surface water caused by ground water withdrawals that is oriented towards impacts on seniors and that is focused on "net" depletion. It should consider drought, return flows, depth and lateral distance of wells from the surface water, timing of any impacts, and cumulative quantity of the water to be pumped. For example, a 500 GPM (gallons per minute) public water supply well for a subdivision in an area where there has been a recent 10 cfs (or 4,500 GPM) reduction in irrigation should not generally be considered a depletion of surface water supply requiring augmentation or other mitigation. And in any case, a well like this does not deplete at 500 times 60 minutes times 24 hours times 365 days. Even if you consider average metered use for each household in the subdivision (which will be a small fraction of the formula result from the preceding sentence), a huge percentage of that actual metered use returns through the wastewater treatment facility to ground water (generally in geographical proximity to the point of diversion), which again is not net depletion.

In the end, there should be no need to put seniors in a better position than they were before a groundwater permit is granted, rather only to keep them whole according to their actual historical uses. Where there is depletion, *unless there is adverse effect to senior water right holders*, there should be no problem under the law with granting permits. Our Constitution urges development of our water in Article IX, Section 3 ("All ... waters ... are subject to appropriation...."). The "Policy Considerations" enumerated in the beginning of our water statutes confirm this repeatedly (85-1-101, MCA).

Where net depletion of surface water that adversely affects senior water rights *does* occur from ground water withdrawals, it still may not be necessary to preclude new permits. There are several

mitigation alternatives. One potentially useful mitigation tool is augmentation, but it is also a slippery slope—for several reasons. For example, it is next to impossible to augment replacement water accurately because our ground water system is so complex. You heard the testimony regarding impacts to agriculture and irrigated acreage. Using a (summer) irrigation right to augment a (year around) subdivision is very tricky. It also raises water quality, monitoring, and many other issues. One of my concerns is that a number of people who testified at the hearing were from the Bozeman area, and were affiliated with consultants or firms who stand to gain from an augmentation world. On the other hand, several hydrologic studies have shown that the Gallatin Valley is not where the problem is, as this area is rich in groundwater.

Finally, many of Montana's river basin closures were probably broader than they needed to be. One size fits all for the entire upper Missouri River basin, including all its tributaries in all soil and aquifer types, for example, is probably way overbroad. A hydrologic study of the closures, and development of a mechanism whereby geographic or quantitative exceptions could be granted wherever net depletions to surface waters adversely affecting seniors would *not* be a problem would be advisable.

In the meantime, I hope you can find some way this session to get our permitting system operable again, and to make whole those people who invested with diligence and in good faith under the law.

Respectfully,



Lorents Grosfield