

TESTIMONY OF BRENDA LINDLIEF HALL  
ON BEHALF OF THE TONGUE RIVER WATER USERS' ASSOCIATION

SB 233  
HEARING, HOUSE JUDICIARY COMMITTEE  
JANUARY 24, 2007

The Tongue River Water Users' Association (TRWU) opposes Senate Bill 223 which adds a new subsection (8) to § 85-2-306, MCA. The new subsection turns the prior appropriations doctrine on its head, overturning over 100 years of case law defining and refining the prior appropriations doctrine. It also is contrary to other sections of the Montana Water Use Act, infringes the rights of TRWU and its members, and offends the Montana Constitution as well as the United States Constitution.

1. The Prior Appropriation Doctrine

Montana, like most western states, adopted the prior appropriation doctrine under which water is apportioned on the basis of use. Most everyone is familiar with the expression that "as between appropriators, the first in time is the first in right." The prior appropriation doctrine is embodied in over 100 years worth of case law in Montana, and is codified in the Montana Water Use Act. *See* Section 85-2-401(1), MCA. An appropriator is generally entitled to a specified quantity of water so long as actual, beneficial use is made of the water. *See* Section 85-2-404, MCA. In Montana, a person desiring to appropriate water for a beneficial use must submit an application to the Department of Natural Resources and Conservation (DNRC). § 85-2-302, MCA. When a person submits an application to the DNRC, persons with pre-existing water rights must be notified and given an opportunity to file an objection if their pre-existing water rights, as to either quantity or quality may be adversely affected. § 85-2-311, MCA.

There are limited exceptions to the application and permit requirements for the appropriation of groundwater. Where an appropriation of groundwater is for a well or spring that does not exceed 35 gallons per minute (gpm) and is not in excess of 10 acre feet per year. § 85-2-306, MCA. That is not the case with coal bed methane production of produced water. Producing coal bed methane (CBM) results in pumping enormous amounts of groundwater and bringing it to the surface. The Powder River Basin is the

area where CBM development is primarily occurring in Montana, describes the effects of CBM production on groundwater.

2. **Coal Bed Methane Production Requires the Production of Tremendous Volumes of Groundwater that Could Deplete Aquifers That Ranchers Rely on For Domestic Use and Livestock Watering for Many Decades**

In 1999, the Montana Department of Natural Resources (DNRC) established the Powder River Basin Controlled Groundwater Area. (Exhibit 10, Powder River Basin Controlled Groundwater Area Final Order.) The Final Order establishing the Controlled Groundwater Area contains Findings of Fact and Conclusions of Law revealing that the DNRC is well aware of the adverse impacts associated with CBM ground-water withdrawal. (*See generally*, Ex. 10.) For example, the Findings of Fact state in part that:

1. Coal bed methane extraction technology requires groundwater withdrawal to lower groundwater levels and reduce water pressures in the coal beds. . . . The wells are pumped continuously with the specific intent of lowering water pressures in the coal bed. Lowering water pressures will lower levels in the aquifer.

2. During coal bed methane development, water is removed only from coal aquifers. Other aquifers in an area in a coalbed methane development area may or may not be affected depending upon connections between aquifers.

3. **Coal beds are important regional aquifers in water-scarce southeastern Montana. The coal aquifers are often the only practical source of fresh water for domestic, stock, and agricultural uses by the people.**

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5. [C]oal bed methane development is of limited duration, 20 to 30 years . . . . However, **even if an aquifer were not to recover rapidly after development, the long period of development could cause severe hardship to local water users.**

#### CONCLUSIONS OF LAW

1. **Excessive groundwater withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals of groundwater from within the area proposed for controlled groundwater designation. By "excessive," the Department means that water level in targeted**

**aquifers could be reduced near project areas for long periods of time in a water-scarce area.**

Likewise the statutes that provide for creation of a controlled groundwater area provide that **a controlled groundwater area can only be designated where there are facts showing that groundwater withdrawals are in excess of recharge, that excessive withdrawals of groundwater are likely to occur in the near future, and that there are likely to be disputes regarding the priority of groundwater rights and amounts of groundwater in use.** § 85-2-506, MCA.

In sum, where coal bed methane development is concerned, the amounts of groundwater that are being withdrawn are staggering. They are not merely amounts of water that are produced through domestic wells and livestock watering, which are exempted from the permit requirements. The Final Environmental Impact Statement that prepared jointly by the BLM and State of Montana predicts groundwater drawdowns of between 20 to 30 feet extending 5 to 7 miles from the edges of producing fields and drawdowns extending as far as 20 miles from the edges of producing fields. FEIS at 41-45.

**3. The Exemption from Permit Requirements Offends the Montana Constitution**

The Montana Constitution, Article IX, Section 3, reposes in the State trustee obligations to hold Montana's water resources in trust for the people of Montana requires that it protect the state's water resources for the beneficial use of the people of Montana. Article IX, Section 3 (1) of the Montana Constitution provides that the people of Montana who had water rights at the time of the adoption of the 1972 Montana Constitution, were thereby granted vested water rights. Article IX, Section 3(3) provides:

All surface, underground and atmospheric waters within the boundaries of the state are the property of the state **for the use of its people and are subject to appropriation for beneficial use as provided by law.**

Given the staggering volume of water that is involved in the coal bed methane production process, and given the findings in the Statewide Environmental Impact statement as well as the Powder River Basin Controlled Groundwater Area, it is foreseeable that there will be impacts, and likely significant impacts, to the constitutionally vested water rights of the ranchers like the members of the Tongue River Water Users' Association.

4. **Exempting Coal Bed Methane Producers from the Application and Permit Requirements of the Montana Water Use Act Violates Prior Appropriators' Due Process Rights and Right to Equal Protection of the Laws**

A. **Article II, Section 17 and the Fourteenth Amendment to the U.S. Constitution Guarantee Due process**

Water rights are property rights, which may not be taken without due process of law. Article II, Section 17 of the Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." The Montana Supreme Court has stated that "**due process generally requires notice of a proposed action which could result in depriving a person of a property interest and the opportunity to be heard regarding that action.**" *Pickens v. Shelton-Thompson*, 2000 MT 131, ¶ 13, 300 Mont. 16, ¶ 13, 3 P.3d 603, ¶ 13 (quoting *Dorwart v. Caraway*, 1998 MT 191, ¶ 76, 290 Mont. 196, ¶ 76, 966 P.2d 1121, ¶ 76). As to water rights, the Montana Supreme Court held that Article IX, Section 3(1) "prevents the State from affecting rights vested at the time the Constitution was adopted . . . **without affording due process of law . . .**" *Adjudication of Rights of Yellowstone River* (1992), 253 Mont. 167, 174 832 P.2d 1210 (quoting *Department of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948.) Due process of law is guaranteed by Article II, Section 17 of the Montana Constitution and by the Fourteenth Amendment to the U.S. Constitution.

The requirements for procedural due process are (1) notice; and (2) an opportunity for a hearing appropriate to the circumstances and the interests at stake. *Montanans for Justice v. State*, 2006 MT 277, ¶ 30 (citations omitted); see also *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 58, 312 Mont. 320, ¶ 58, 59 P.3d 398, ¶ 58. SB 223 would deprive those with water rights of the requirements of notice and the opportunity to be heard. The interests at stake for TRWU and its members and other ranchers and people who depend on the water are significant.— interference with their vested water rights which implicates their ability to raise livestock, interference with their critical domestic water supplies, diminution of water supplies that are critical to protect the wildlife on their lands, and the potential loss of significant value of their lands, this situation demands the highest level of notice and opportunity for hearing. *Montanans for Justice v. State*, 2006 MT 277, ¶ 30. SB 223 clearly does not comport with the notice and hearing requirements that due process demands.

#### **B. Equal Protection of the Laws**

Equal protection is guaranteed by the Montana Constitution's Declaration of Rights at Article II, Section 4, and the Fourteenth Amendment to the U.S. Constitution. The uniform application of laws to all citizens is the most basic tenet of a just society. The constitutional defects of the amendment proposed in SB 223 are openly revealed when viewed in light of its application to all similarly situated people in Montana—those who wish to appropriate groundwater. The statute operates unequally on ranchers such as TRWU's members who need the groundwater for their ranching operations and CBM developers. Ranchers need an appropriation right and are subject to the constraints in the Montana Water Use Act, while under the proposal, CBM companies would be allowed to withdraw Montana's scarce and precious groundwater without any constraints. SB 223 is therefore unconstitutional for violating the right to equal protection of the laws.