

MEMORANDUM

To: Senate Natural Resources Committee
From: Senator Larry Jent 
Re: Senate Bill No. 93 – Why passage is necessary.
Date: February 9, 2009

SENATE BILL 93 AND THE IMPORTANCE OF MITIGATION

Senate Bill 93 embodies the recognized protections afforded senior water right holders by the Montana Constitution and the Water Use Act. From 1990 until 1999 the Legislature or the DNRC determined that surface water had been fully appropriated in some 15 river basins and closed them new appropriations with some small exceptions. E.g., 85-2-343, MCA. These closures included the major basins of the Upper Missouri, Teton, Jefferson & Madison, Upper Clark Fork and Bitterroot River basins. These basins are closed for a reason, and the adjudication is not yet complete.

SB93 protects the resource and senior water right holders. It will further avoid at least some of the litigation that will undoubtedly come as a result of HB831. After the adjudication is complete, the legislature could revisit this issue and determined whether any surface water is available in these closed basins. In April 2006, the Montana Supreme Court issued a decision in Trout Unlimited v. DNRC which recognized the interconnectivity of ground water and surface water and that ground water appropriations can capture (deplete) water otherwise discharged to surface water as well as pull from surface water. DNRC and applicant hydrogeologists agree that it is a fundamental principle of hydrology that all ground water is ultimately connected to surface water.

Under current law only that amount of depletion that causes “adverse affect” must be mitigated. (85-2-360, MCA, HB 831). Under SB 93 there is a presumption that in a closed basin, depletions to surface waters cause “adverse affects”. The reason the change is needed is because applications are received which predict depletion of surface water, but no adverse affect to others, purportedly because the timing and manner of depletion is difficult to predict, and therefore depletion cannot be quantified. Certainly, the argument is not that there will be no depletion of the connected to surface water.

It is the cumulative effect over time of all of these small individual depletions that will have a detrimental effect on surface water right holders in closed basins; it may be 2,5, 10, or 20 years, but there will be an effect. The effect of individual uses must be addressed at the time of permitting. Waiting until the cumulative effect becomes obvious it is too late. The law already in place in the Montana Constitution and in the Water Use Act requires that the affect of a new use on senior water right holders be addressed at the time of the application. This bill requires the recognized cumulative effect of ground water depletion on connected surface water in closed basins at the time of application.