SENATE NATURAL RESOURCES
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House Bill 24
Revising Laws Related to Aquifer Mitigation and Recharge

Testimony of Mary Sexton, Director
Montana Department of Natural Resources and Conservation
Before
House Natural Resources Committee
March 4, 2011

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear and present testimony in support of this legislation. I am Mary Sexton, Director of the Montana Department of Natural Resources and Conservation (Department). As you know, my Department is responsible for processing applications for new water right permits and changes of use under the Montana Water Use Act. My Department will be charged with implementing the revisions to water law in this Bill. The Department supports House Bill 24 as further explained below.

Background:

- In April 2006, the Montana Supreme Court issued a decision in Trout Unlimited v. DNRC that impacted the ability to acquire a new ground water right. The Court recognized the interconnectivity of ground water and surface water and that ground water appropriations can capture (deplete) water before it can flow into surface waters as well as pull water from a surface water source. This decision recognizes that new ground water appropriations can affect surface water flows.
- House Bill 831 (2007) was passed in part to address the decision in Trout Unlimited, which essentially closed many basins to new ground water wells.
- House Bill 831 created, in part, another way that new water permits be issued in closed basins and offset depletions of surface water through use of mitigation and aquifer recharge plans under §§85-2-360 and 85-2-362, MCA.
- Mitigation and aquifer recharge plans serve to protect existing surface water right holders from the effects of depletions to surface water caused by new ground water appropriations.
- Under House Bill 831 and the Trout Unlimited decision, an applicant for a new ground water development must prove under the permit criteria of §85-2-311, MCA, among other things, that any depletions to surface water are both legally available and will not cause adverse effect to existing water right holders.

House Bill 24:

House Bill 24 was produced through the efforts of the Water Policy Interim Committee (WPIC). The Department participated during WPIC hearings and provided comments on the drafting of this Bill. The Department believes that House Bill 24 will make it easier for existing water right holders to change their water rights to use for mitigation and aquifer recharge. This in turn makes water more readily available to new permit applicants seeking water to offset

depletions of surface water. Offset of depletions occurs through mitigation and aquifer recharge plans.

The Department believes that it is important to present its understanding as to how the changes in the law under this Bill would be implemented.

This Bill would facilitate a two-step process under which: 1) water can be made available through marketing for the purposes of aquifer recharge and mitigation as part of a change application; and 2) marketed water can then be purchased and used as mitigation or aquifer recharge in a new water right permit application. .

Change Authorization

Under New Section 1, an applicant can apply to the Department to change an existing water right for use as mitigation or aquifer recharge. The applicant would be required to go through the Department's regular change analysis under §85-2-402, MCA. This includes the Department's review as to how the existing water right was historically used, and in particular the consumptive use of the water right. Analysis of consumptive use of the historic water right is critical because this is generally the only portion of the water right that can be used for offset of depletions under a mitigation or aquifer recharge plan. Water historically diverted but not consumed generally belongs to the source to which it returns for use by the next water right holder.

The applicant would have to provide hydrogeologic and other scientific evidence and analysis detailing the geographic area where the use of the mitigation water or aquifer recharge would provide effective offset of depletions, (i.e. in what stretch or reach of stream this water would provide an offset for depletion and in what amount). If the applicant intends to retire its existing use of the water in stages or proportionally as it moves water to mitigation and aquifer recharge under New Section 1(2), the applicant must present that plan for staged development as part of its change application. For example, an applicant with an existing irrigation right could present its analysis as an amount of mitigation/aquifer recharge water per acre retired.

Under New Section 1(4), an applicant would have an initial period of up to 20 years to complete the change. The Department could set an initial completion period for less than 20 years. If an applicant demonstrated reasonable diligence in completing the change, the Department could approve an extension of the completion period past 20 years. A condition of the change would be that the change applicant notifies the Department within 30 days each time a portion of the change is completed. Based on the analysis by the Department in the change process, the Department will track the amount of water that remains available for mitigation/aquifer recharge under the change authorization.

Under New Section 1(3), it is important to understand that the amount of a change authorization that is not completed is not a simple paper subtraction from the amounts on a water right claim. Because the focus of a change of an existing water right is the consumptive use made available to offset depletions to surface water, an analysis of what remains uncompleted will include the amount of consumptive use that remains, not simply a flow rate. The

Department must track flow rates and consumptive use amounts in order to ensure that the change authorization does not expand the overall historic use of the existing water right when the change authorization is partially completed.

Amendments to §§85-2-310 and 402, MCA, provide flexibility to the current laws. The amendment in Section 3 to add §85-2-310 (10), MCA, clarifies that changes of use to market water to others for mitigation and aquifer recharge do not have to have commitments by third parties to purchase that water in place at the time of the change application. This allows the change authorization to be approved prior to the identification of specific projects that will need the water. The amendments in Section 4 to §85-2-402(2)(b) and (d), MCA, recognize that in the case of water to made available for mitigation water left instream, the requirements for an "adequate diversion" where there is none, and "possessory interest" in the streambed are inapplicable.

Consistent with the anti-speculation doctrine (which prompted the requirements in §85-2-310(9), MCA) and §85-2-311(1)(d), MCA, however, an applicant will need to present evidence that a need for the mitigation/aquifer recharge water in the particular area can reasonably be anticipated.

Permit Application

An applicant who intends to use mitigation or aquifer recharge water must still provide the scientific analysis necessary to demonstrate that purchased water will offset the depletions caused by the proposed new appropriation. This includes the analysis of timing, amount, and location of potential depletions and how the proposed mitigation/aquifer recharge will offset those depletions to protect existing water rights.

Conclusion

The Department supports this Bill and believes that the statutory changes facilitate the ability of the Department to approve changes to market water for the use of mitigation and aquifer recharge. Thank you again for opportunity to comment on this legislation.