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Memorandum

To: Environmental Quality Council

From: Krista Lee Evans, Research Analyst

RE: Surface Water/ Ground Water Connectivity

Date: January 9, 2006

At its January meeting, the study subcommittee will be hearing from a work group that has been working on surface water/ground water issues. This group, organized and facilitated by DNRC, was formed after surface water/ground water legislation was introduced and failed in the 2005 session. The group includes representatives from agencies, agriculture, environmental, and scientific communities. The subcommittee decided during the work plan development process that there is no need to duplicate efforts and requested that the SW/GW working group provide regular updates to the subcommittee. The work group has been meeting at least monthly since August and have identified specific areas that they feel need attention. The issue of surface water/ground water connectivity is most controversial in the statutorily closed basins. Closed basins meaning there can be no new water permits issued in the basin except for certain instances and exemptions. I am going to provide you with some background information so that you are more prepared for the discussion. In this paper I will discuss the following:

- Statutory guidance
- Administrative cases
- Court cases

This is just a brief summary. The group that you will hear from has been working throughout the interim and will be able to provide more detailed information on the issues they are addressing.

Statutory Guidance

The statutory guidance related to surface water/ ground water connectivity is contained in Title 85, chapter 2 Surface Water and Ground Water. The issue has emerged recently with regards to closed basins. However, the discussion of whether or not ground water and surface water are connected and to what extent apply to all areas of Montana, whether the basin is closed or not.

Section 85-2-319, MCA allows the legislature, by law, to preclude permit applications in highly appropriated basins or sub-basins. The Legislature has closed the Teton River Basin (85-2-330, MCA), the Upper Clark Fork River Basin (85-2-336, MCA), the Jefferson River Basin and the Madison River Basin (85-2-341, MCA), the upper Missouri River basin (85-2-343, MCA), and the Bitterroot River sub-basin (85-2-344, MCA). Each of these basin closures provide exemptions, in statute, to the closure requirements. All of the closed basins have exemptions for an application for a permit to appropriate groundwater. The Clark Fork closure is a little bit more detailed in what must be done for the groundwater permit application to be process but they all have an exemption provision. Each of the basin closures is different. The Teton, Upper Clark Fork, and the Jefferson & Madison closures are permanent. The Upper Missouri closure ends when final decrees have been issued in the basin and the Bitterroot closure ends 2 years after all water rights in the sub-basin are subject to an enforceable and administrable decree. Section 85-2-319, MCA also allows the department, by rule, to reject permit applications or modify or condition permits already issued. DNRC has exercised this right in 36.12.1012, ARM through 36.12.1021, ARM. In these rules the DNRC states that it shall reject applications for surface water permits in certain instances and within certain times of use within the following basins: Grant Creek Basin, Rock Creek Basin, Walker Creek Basin, Towhead Gulch Basin, Musselshell River, Sharrott Creek Basin, Willow Creek Basin, Truman Creek Basin, Sixmile Creek Basin, and the Houle Creek Basin.

One important element to remember is that the basin closure statutes preclude DNRC from processing applications in closed basins. If an application falls under one of the exemptions, groundwater for example, that means that DNRC can process the application. The application can not be approved if there is adverse impact to an existing water right. So, essentially there is a two tiered process when it comes to permit applications in closed basins.

Ground water is defined for these sections as meaning "water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water" (emphasis added). You can tell by reading the definition that the determination of whether or not the ground water is connected to the surface water has a direct impact on whether or not

the permit can even be processed by DNRC. It is imperative that DNRC accurately determine if ground water and surface water are directly and immediately connected. The Smith River lawsuit addresses this very issue. The Smith River lawsuit is discussed at more length later in this paper.

"The meaning of 'immediately or directly connected to surface water' is interpreted by DNRC to imply a physical capture of surface water by inducing streambed infiltration. To assess whether the source of water for a proposed appropriation is ground water, an applicant must determine whether the source aquifer is hydraulically connected to surface water and whether the proposed well creates sufficient draw down beneath a stream to induce infiltration through the streambed."¹

DNRC has been working on updating and revising their rules. In the most recent rules the following definitions apply:

- (33) "Immediately or directly connected to surface water" means ground water which, when pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration.
- (34) "Induced surface water infiltration" means that water being pumped from a ground water source is pulling surface water into the cone of depression.

Relationship with water rights and burden of proof

The connectivity or lack thereof is of significant importance when discussing potential impacts on surface water rights. Pursuant to section 85-2-311, MCA, it is up to the applicant for a new water right permit to prove that if a new water right is granted, there will be no adverse impacts on other existing water right holders. Section 85-2-402(2)(a), MCA applies the same requirement before a change in a water right can be approved. If there is an impact, then the permit or change cannot be granted by DNRC.

Based on the above information, the DNRC has to evaluate any change application or new water right application based on the potential for adverse affect on other water right holders. If the application for a new permit is for a well, DNRC has to determine that this new well wouldn't have an adverse impact -- not only on other wells but also on surface water rights. If the determination regarding the interaction between surface water and ground water is not adequate, a new ground water right can be issued for a

¹Department of Natural Resources and Conservation Proposal for Decision in the matter of the application for beneficial water use permit number 41H-30003523 and the application for change number 41H-30000806 by Montana Golf Enterprises, LLC, page 16, November 19, 2003.

well that may adversely affect existing surface water rights. If this does in fact happen, the burden would then shift to the existing right holder to prove that the new water right is affecting their preexisting right. There are of course costs associated with being the party responsible for the burden of proof.

Administrative cases

There are 2 administrative cases that are pertinent to this discussion. I will briefly outline each case and where they are at in the process and the potential future actions. Administrative cases are those cases that are being addressed through the DNRC hearing process and are not in the judicial arena at this point.

- **In the matter of the application for beneficial water use permit number 41H-30003523 and the application for change number 41H-30000806 by Montana Golf Enterprises, LLC (Montana Golf)**

The Montana Golf case involves a property owner that submitted a permit application for the appropriation of ground water through a well. The property owner and DNRC both agreed that there was to some extent an immediate and direct effect to surface water. However, the property owner offered to mitigate this impact by "augmentation". To augment the water that would be lost to the surface water, the property owner submitted a change of water right permit. The property owner planned to remove a certain number of acres from irrigation, leaving the water in the stream, thus offsetting any loss of water caused by the ground water well. My interpretation of this decision by the DNRC hearing examiner wasn't whether or not the surface water and ground water were connected but whether or not the amount of acreage to be taken out of irrigation was enough to offset the impacts caused by the well. The DNRC hearings examiner therefore recommended in the proposal for decision that the water use permit be denied. The applicant in this case did not request a final decision so it is still listed as a proposal for decision.

- **In the matter of application for beneficial water use permit No. 41H-11548700 by PC Development (PC Development)**

In the PC Development case DNRC denied the application because the applicant failed to prove by a preponderance of evidence that water is legally available and no adverse effect would occur to prior appropriators. The applicant raised a procedural exception to the hearings process and also asserted the adequacy of the applicant's aquifer testing, methodology, and analysis and presented some additional legal arguments that the hearings officer was failing to follow previous hearings orders in his interpretation of the law. This case did not specifically address surface water/ground water connectivity. The primary issue argued in this case was whether the aquifer tests that

were done were sufficient to prove legal availability and no adverse effect to other water right holders. This case has not been appealed.

Court cases

- **Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation 2003 ML 3725 (2003)**

This case is the "Smith River case" that has been in the newspapers and leading the charge with regard to the interpretation of what "direct and immediate" connection of surface water and ground water means. In this discussion I will refer only to the issues that are directly related to surface water/ground water connectivity. The petitioners also addressed other issues relating to rule development and due process in their complaint.

In this case, Trout Unlimited (TU) filed a petition for Writ of Mandate. Writ of Mandate means an order issued from a court requiring the performance of a specified act for which legal duty exists or where the law gives authority to have the act done.² In addressing the legal standard that must be followed, the district court provided the following information. The Montana Supreme Court scrutinizes the relevant statutory wording to find a clear legal duty. Where a statute is sufficiently specific, a clear legal duty will be found to exist. Huttinga v. Pringle, 205 Mont. 482, 668 P.2d 1068 (1983). An additional requirement for mandamus relief is that there is no speedy or adequate remedy in the ordinary course of law. State ex rel. Konen v. City of Butte, 144 Mont. 95, 394 P.2d 753 (1964).

TU asked the court to order the DNRC to cease processing ground water applications until it first determines whether or not the water is immediately or directly connected to surface water. The first step that the district court had to do was to identify a clear legal duty on the part of DNRC with respect to the determination of ground water/surface water connectivity. TU asserted that DNRC has a clear legal duty to determine specifically that the subject water in the applications is groundwater before processing the applications. Since the Smith River is within a closed basin, only ground water claims can be processed by DNRC. If DNRC determined that the proposed wells were immediately or directly connected to the surface water, DNRC couldn't process the claims.

According to the court, there is no question that DNRC has a clear legal duty to comply with the statutes that place a limit on DNRC's actions if there is a connection between the surface water and ground water. The legislature did not say how ground water

²Black's Law Dictionary, 5th Edition and section 27-26-102, MCA.

connectivity is to be determined, nor did it place the burden of proof on anyone. These procedures were left to the agency to promulgate. It appears that DNRC requires applicants for water rights in the Upper Smith River Basin to prove that the ground water they intend to pump is not "immediately or directly" connected to surface water. DNRC has required the applicant to make that showing through a "cone of depression" test. There was evidence presented in the case regarding whether or not DNRC follows this procedure at all times or if it is not addressed until after a permit has been issued and the concern is raised through the objection process.

The court stated, "If DNRC in fact does not make a finding that the requested ground water use satisfies section 85-2-342, MCA, mandamus would lie to compel the agency to make that determination before issuing a permit. However, the Court does not have enough evidence at this time to determine if DNRC in fact circumvents its duty to determine if the applicant's water use is ground water under the statute." (emphasis added) The District Court granted summary judgement to DNRC stating that the petitioners did not exhaust all administrative remedies before bringing their declaratory judgement case before the district court.

Therefore, this case doesn't do a lot with regard to answering whether or not surface water and ground water are connected in this particular area. The case has been appealed to the Montana Supreme Court. Briefs were filed in July of 2005 and a decision has not been issued by the Court.

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