

OBJECTORS VIEW

Perspective: Prior to the 2007 Legislature in closed basins DNRC did not have authority to process a new application except for groundwater that was NOT immediately or directly connected to surface water.

This restriction protected existing water rights in over appropriated non-adjudicated basins.

The “Smith River” case clarified that DNRC was required to consider both prestream capture and induced infiltration in considering a new application and where present not process such an application.

The Supreme Court enumerated the importance of the Basin Closure Law in protecting senior water right holders. “The proscription against processing applications saves appropriators the time and expense of having to defend their water rights every time a new applicant seeks to appropriate water in a basin.”

Following this ruling, it is my understanding that there was concern that all subdivision activity in the state was halted. A committee then worked to draft new legislation.

I followed this legislation, HB 138, 373 LC 1383, HB 831 three to four versions and am concerned about the ramifications for objectors. This viewpoint that “senior appropriators should not be forced to spend resources defending their senior water rights” was reflected in the early versions of HB 831 and then deleted.

DNRC is now allowed to process applications. The huge financial burden is now on Senior Water Users who must become objectors. My greatest concern is that it has been expanded for it allows for an application to proceed even if it knowingly diminishes the quantity of surface water available to existing water right holders by proposing a mitigation or aquifer recharge plan. Such an act merely shifts the burden of impact to another set of users. There is nothing to prevent the applicant from seeking 2,5,10 changes in appropriations to fill the mitigation/aquifer recharge plan. This plan can expand the number of impacted senior water rights and thus increases dramatically their cost in time effort and attorney fees. The legislature should be legislating ways to lessen not increase this burden. Current time frames within the process are not realistic as well.

I will detail below my concerns with specific parts of HB 831:

Section 17 of HB 831 (MCA 85-2-363) spells out the applicant process:

MCA 85-2-363 (1) Applicant submits hydrogeologic assessment with analysis of net depletion, mitigation or aquifer recharge plan if necessary and application for beneficial use or change application.

Section 15. States that model test data, monitoring well data be submitted to Dept but does not specify any time frame. This should also be part of 85-2-363(1)

The language in the bills changed: the first bill stated “adverse affect,” then changed to “depletion”, and then later to “net depletion.” How will this be defined? And how is the public notified and involved? Will changing the language to “net depletion” allow a gain during one time of the year be allowed to offset a loss at another time of the year? And the objector that suffers the loss has no recourse?

MCA 85-2-363 (2) The department shall review applications to determine if correct and complete under §85-2-302.

The Department has 180 days to determine if the application is correct and complete. Since correct and complete is defined as credible information DNRC should conduct the research to make this determination not the objectors.

In version LC 1383 it specified “The department shall analyze the plan submitted (mitigation and monitoring). If the Department determines that adverse affect will not be offset and if the monitoring plan is not submitted, the department shall deny the application.” The monitoring is for five years. The omission of this clause in the final bill is a blow to senior water users. Applicant acknowledges net depletion that is not offset. The process should stop here. The burden should not pass to prior appropriators, or to other objectors. There is no provision in this final bill to monitor the mitigation or aquifer recharge plans nor recourse if they fail. There in no enforcement and no accountability for the applicant.

Is the only recourse for senior water right holders if mitigation fails, to employ an attorney and proceed through district court?

The mitigation and aquifer recharge plans only require that the application for a beneficial water use permit, or a change in appropriation right be submitted. These plans may involve a different and separate set of objectors. No ground water application should proceed until this change application has been permitted for if it is denied the groundwater application is denied. If the applicant cannot offset adverse impact, time and costs should have not been wasted by the objectors reviewing the hydrogeologic assessment.

MCA 85-2-363 (3a) Once an application has been determined to be “correct” and complete, §85-2-307 provides: Department may give not less than 15 days or more than 60 days after date of objection for objectors to file. Tradition has been that the department gives objectors thirty days. A time frame less than sixty days is unfair to objectors for the following reasons:

1. The applicant has had unlimited time to prepare the lengthy documentation.
2. Objectors may have full time jobs and have limited access to the regional office where the application is located A copy of the entire file should be made available in the town nearest the water users.
3. Often maps and diagrams are coded in color. Some offices have no color copier and the objector must color by hand. Copying costs should be kept at a minimum for objectors.
4. Most objectors are unprepared when they receive notice in the mail. Reading, the application and seeking assistance in determining the extent of the impact on their wells,

surface water rights or possibly impacted by the mitigation plan or all of these. and seeking assistance in responding takes more than thirty days.

5. All potentially affected objectors may not have been notified or not notified in a timely manner. Junior water right holders in other parts of the drainage may be impacted. I know of an example where a municipality whose water system depended on water rights was not served notice.

6. A publication such as Montana Water Law 2003 including the rules should be available for public purchase. As an objector I was directed by DNRC toward the internet for access to these rules. It was impossible to print, would not print both sides and many water users do not have access or can use the internet. The web site is exceedingly difficult to use.

MCA 85-2-363(3c) If no valid objection is filed and the applicant has not proved that the criteria of §85-2-311 or 85-2-402 if necessary, have been satisfied, the application must be denied. This is out of place in the process. This should not be dependent on the filing of an objection and should be part of Section 2. The application must be denied in this instance before objectors become involved.

MCA 85-2-363 (3d)... If a valid objection is filed the Department proceeds to steps §85-2-308 through 85-2-311. §85-2-3009 stipulates that a hearing date shall be within 60 days from the date for filing objections. This 60 day period set by the legislature is both unrealistic to impose on DNRC and the objectors.

There are not enough trained hearing examiners to meet this requirement. If DNRC cannot comply can the applicant then claim an approved application because the time frame was not met? Objectors then lose by default.

An objector who cannot afford legal counsel has an almost impossible task in responding to hydrology reports, discovery, motions, copying and mailing to every person on the certificate of service. The legislature has a responsibility to allow objectors to protect their water rights without making it impossible for them to comply with all the legal requirements. This cannot be accomplished in a sixty day period.

Those who can afford to object find that there is a shortage of water specialists, hydrologists and attorneys. Those who cannot may need to respond as a group in order to be able to afford hydrologic and legal assistance. Sixty days is not enough time for a group to be gathered and assistance located to respond.

MCA 85-2-360 (2). This Section states that if no net depletion, the department shall proceed to criteria 85-2-311.

This appears to bypass the entire objection process that protects prior appropriators that begins at 85-2-307. There may be errors in the hydrogeologic assessment which determine the “net” depletion. The timing of any depletion is critical to the affect on prior appropriators.

The passage of HB 831 is forcing the impact of groundwater wells to the mitigation or aquifer recharge plans. These plans may rely on a change in appropriations which is governed by MCA 85 -2 -402. No level of evidence such as the hydrogeologic assessment is required. The applicant is only to show that they do not affect a prior appropriation. The applicant may say anything. The burden again falls to the objector to show that there is no adverse impact. The department adopts rules which govern the implementation of this section. The timing of the objection process is unclear.

Since the burden of the impact of groundwater development may fall here, the state hydrologist should review and comment on any change in appropriation related to a mitigation or aquifer recharge plan. Any adverse impact should result in immediate denial of the change in application and resulting groundwater application. This analysis should occur prior to any objection process commencing and appear in MCA 85-2-360(2).

In conclusion

I understand the long hours the legislatures put in to HB 831. I believe as the bill progressed many improvements were made. Yet some vital parts to objectors were changed or left out.

I do not believe the legislature met the spirit of the Supreme Court Ruling. The burden, financial and time, has been placed on the senior water right holders forcing them into the role of objector.

To rectify this injustice the following changes need to be made by the 2009 Legislature:

1. DNRC should review and deny all applications that do not meet criteria 85-2-311 or 85-2-402 or fail to mitigate any depletion prior to any objection process commencing. The review shall include the analysis by the state hydrologist. Only if an application is then approved should it proceed through 85-2-307 to 85-2-311.

2. Monitoring and termination procedures for all mitigation and aquifer recharge plans as proposed in LC 1383 must be put into law. The burden of enforcement should not fall on Objectors. No mitigation or aquifer recharge plan shall be approved until the results of the Bureau of Mines Case studies are concluded.

3. All test well data, monitoring well data, model and model input must be submitted with the application.

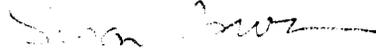
4. Time frames for DNRC and objectors must be changed to realistic amounts.

5. Resources must be provided Objectors commensurate to the task.

6. Post all groundwater applications at a website by county at their date of submission stating: applicant, flow rate, location, mitigation or aquifer recharge plan, change in appropriation request and status.

Thank you for the opportunity to address this Water Policy Interim Committee,

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Brown", with a long horizontal flourish extending to the right.

Susan Brown
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Stevensville, Mt 59870