

## LC5007

**Pomnichowski** -- Perhaps add, in Section 1(2). The groundwater assessment steering committee...shall prioritize subbasins for investigation based upon...housing, ~~and~~ commercial activity, and adjudication. Comments from Water Court may help to determine if this would help or hinder the groundwater assessment steering committee.

**CFC** -- LC 5007 - Ground water investigation program: The Coalition is in favor of collecting accurate, accessible scientific data to help the State and counties allocate, measure, and monitor water withdrawals. Though the costs of a comprehensive statewide hydrogeologic study are not feasible, focusing money and MBMG efforts in the high-growth sub-basins will allow more informed permitting for water use. We hope that an expanded MBMG study would be focused narrowly enough to provide data on surface-groundwater interactions. To this end, we recommend defining a list of "prioritized subbasins" in Section 1 (2), which the steering committee can then further narrow. The Coalition also urges the WPIC to consider directing MBMG to provide the public with a **basic model for predicting impacts from future water withdrawals/changes in the studied sub-basin**, as a practical component of the data collected and analyzed. ~~¶~~ **MAR** - The development of statewide groundwater and aquifer data would certainly be useful to water users and applicants for beneficial use permits, particularly given the dearth of such information at present and the requirement for specific aquifer and sub-basin data in the hydrogeologic assessments that applicants for beneficial use permits in closed basins must now submit to the Montana Department of Natural Resources and Conservation ("DNRC"). LC 5007 does have the potential to develop useful and meaningful information on groundwater resources statewide. However, because the information that could be developed under LC 5007 does affect so many stakeholders in the issue of water rights in Montana, membership in the ground water assessment steering committee

**FWP** -- Establishment of a groundwater investigation program. FWP supports this bill but urges that it be modified to emphasize generation of information that informs applicants and other basin water right holders of ground and surface water interactions and connectivity.

**TU** --

TU supports an expanded MBMG study. However, in order to ensure that the hydrogeologic study provided in LC5007 is not duplicative of MBMG's currently-funded program to collect and analyze groundwater data, LC5007 should explicitly require the MBMG to create a hydrogeologic model that can be used to help predict and understand ground and surface water interactions in each subbasin analyzed.

**TU Recommendation:** In LC5007, on page 1, New Section 1(1), the last sentence should be amended to read: The program shall develop a monitoring plan and hydrogeologic model for each subbasin for which a report is prepared.

## LC5009

**MAR** - As presently drafted LC 5009 has the potential to have far-reaching and perhaps unintended impacts on mitigation plans. A mitigation plan under Mont. Code Ann. § 85-3-

362(2) can include something as simple as purchasing surface water rights and leaving those rights in-stream. Leaving a surface water right instream rather than diverting it does not have any significant impact on water quality, as it does not discharge any water or other substances to the stream that are not already present in the stream upstream of the historic point of diversion for the surface water right to be converted to instream use for mitigation. As LC 5009 is currently written, there is no assurance that such a simple mitigation plan would not be required to obtain a discharge permit. Although Department of Environmental Quality ("DEQ") administrative rules under Title 76, Part 6, Chapter 4 do set forth standards for determining nonsignificant changes in water quality, an applicant for a new beneficial use permit that is mitigating adverse effect through the conversion of a surface water right to an instream right still has to at least go through the process of determining whether they meet the criteria for nonsignificant changes in water quality set forth in Admin. R. Mont. 17. 30.715. LC 5009 could be significantly improved and clarified by inserting language that mitigation plans which consist of converting surface water rights to instream use are not subject to the provisions of LC 5009. For example, in Section 2 could be revised as follows (suggested changes in CAPS): **Section 2.** Section 75-5-410, MCA is amended to read: "**75-5-410. Water quality of return flows and discharges associated with aquifer recharge or CERTAIN mitigation plans—minimum requirements.** (1) A person who proposes to use sewage from a system requiring a water quality permit for the purposes of aquifer recharge pursuant to 85-2-362 or plans to use sewage from a system requiring a water quality permit as a return flow to minimize the amount of water necessary to offset adverse effects resulting from net depletion of surface water through an aquifer recharge plan or mitigation plan pursuant to 85-2-362 shall obtain, if necessary, a current permit pursuant to this chapter. A MITIGATION PLAN THAT CONSISTS OF A CHANGE OF PURPOSE IN A SURFACE WATER RIGHT TO INSTREAM FLOW FOR MITIGATION PURPOSES PURSUANT TO 85-2-362 AND 85-2-402 IS NOT SUBJECT TO PERMITTING PURSUANT TO THIS CHAPTER. The above-suggested revision to Section 2 of LC 5009 would eliminate unnecessary evaluations for both water users and, possibly, DEQ, by making clear that although a conversion of a surface water right to instream flow for mitigation purposes is technically an addition of water to a source, it does not discharge any water or contaminants to the source that are not already present upstream of the historic point of diversion. Pursuant to Mont. Code Ann. § 85-2-402, objectors may still raise valid objections to a change application on the basis of water quality, thereby assuring that the water quality of senior appropriators will not be adversely affected.

FWP supports this bill.

## LC5012

**CFC** — The Coalition is **not in favor** of creating an exemption under 85-2-306 for the Montana Department of Transportation to appropriate ground or diffuse surface water without a permit from the DNRC. Concerns include: No set limit on the volume allowed for the proposed MDT appropriation exemption. Creating additional exemptions from the permitting process when many of our streams and rivers are already over-appropriated, many are chronically dewatered, and the State is already struggling to monitor and manage existing groundwater withdrawals, much less additional unregulated withdrawals. Any "recreated" wetlands constructed under the Clean Water Act should also be subject to statewide performance standards to ensure that the State's water is being used for

scientifically valid, and ecologically beneficial wetland mitigation. The Coalition **recommends an expedited DNRC permitting process for MDT** to ensure road construction activities comply with the Clean Water Act, but not an exemption for water appropriation.

**FWP** was initially concerned with this proposed legislation primarily because FWP felt its scope was too broad. However, FWP and MDT have discussed FWP's concerns and MDT has agreed to modify its proposal. FWP believes that the current bill draft is acceptable.

## TU

TU supports the narrow exception for the Montana Department of Transportation (MDT) to obtain a water right permit solely for wetland *restoration* that is found in LC5012. TU would not support reading the narrow scope of LC5012 to include *created* wetlands. Including created wetlands in LC5012 would expand water demands on

already-overappropriated streams, harming senior water rights and reducing streamflows. TU therefore suggests making the intended scope of LC5012's exception more explicit, to ensure that only *restored* wetlands are included within its scope.

**TU Recommendation:** Amend the language in LC5012, New SubSection (9)(a), on page 11, that provides for an automatic water right, "if the appropriation is to restore ~~recreate~~ a functional wetland with the intent to substantially replicate the predisturbance conditions by filling in or removing constructed ditches, drains, or similar structures that drained an historically functional wetland."

## Pomnichowski

p 11, (9)(a) I wonder if we should give some allowance for repairs: "...if the appropriation is to re-create a functional ~~a~~ wetland with the intent to substantially replicate the predisturbance conditions by filling in, ~~or~~ removing, or replacing constructed ditches, drains, culverts, or similar structures." p 13, (iii) I wonder if this should include the legal description of the plat filing, or is that included in "the place of use"? I don't think so. Should we have a street address, as well as the legal description of the site?

## LC5014

**CFC** -- The Coalition supports this bill draft. It's a valuable first step in allowing counties to assume more control over their water resources through the use of centralized water and sewer systems. However, since most county planning and health departments lack the necessary resources, money, and data to practically execute the authority granted by LC 5014, we recommend **considering additional incentives for local governments to preferentially approve subdivisions with central water/wastewater systems**—such as a DEQ/DNRC funding program designated to providing counties more staff resources if they choose to enact this authority.

**MAR** - Although community water and sewer systems may be preferable in certain developments or subdivisions, granting local governing bodies the authority to require such systems creates two problematic issues that should be seriously considered before

adopting legislation such as LC 5014. The proposal of LC 5014 creates the very real possibility of 56 different standards for exempt wells, with each county setting its own criteria for when, where, and how exempt wells will and will not be allowed. Additionally, LC 5014 disregards the reality of community water system development post-HB831. By setting up a permitting system that is costly in terms of both time and money, exempt wells are often a more cost-efficient solution to providing domestic water within certain housing developments. However, by allowing counties to require public water systems, LC 5014 sets up a very real possibility that some counties will force developers into water solutions and a permitting process that are unfeasible in terms of both cost and technology. Furthermore, it must be kept in mind that scientific data have clearly demonstrated that if there is a groundwater shortage in Montana, a hypothesis that has not yet been proven and, in fact, has evidence to the contrary, exempt wells constitute an extremely small portion of the demand for groundwater and of water demands in closed basins and statewide.

**FWP** believes this bill takes a small step toward giving local governments the tools they need to deal with the challenges of growth, but it is a step in the right direction. **FWP** supports this legislation. However, **FWP** suggests one change. Proposed Section 76-3-504(3) should be modified to state: In implementing the provisions of subsection (1)(g)(iii), the governing body may, as provided in 76-3-511, require public water systems **AND/OR** public sewer systems. **FWP** believes that this change would more accurately reflect the intent of the proposed legislation.

**TU** supports increased coordination between the DNRC and DEQ. **TU** also supports local governments' efforts to promote the use of central water and sewer systems, progressive water metering, the use of treated waste water for lawn and garden irrigation, and the restoration of natural-vegetation infiltration galleries and permeable pavement for mediating stormwater collection that encourages slow groundwater recharge.

**TU Recommendation:** Support LC5014 to provide local government with clear authority to preferentially approve subdivisions with central water and sewer systems.

## **LC5015**

**MAR** - As presently drafted, LC 5015 provides no assistance to those developers who desire to use public water and sewer systems in new subdivisions. Section 3(2) of LC 5015 limits applicants for loans from the proposed sustainable development revolving fund program to "an incorporated city or town, a county, a consolidated local government, a tribal government, a county or multicounty water or sewer district, or an authority as defined in 75-6-304" (a regional water and/or wastewater authority). Private developers may neither apply for nor receive loans under LC 5015. If the intent of LC 5015 is to encourage the use of public water and sewer systems where they may be appropriate, without the inclusion of private developers in that class of persons who may apply for and receive revolving fund loans, LC 5015 cannot achieve that goal. Additionally, LC 5015 contains legislative findings that are unsupported by available scientific data. Specifically, Section 2(2)(b) of LC 5015 finds that "public water and sewer

systems in subdivisions are preferable to individual wells and septic systems in order to protect water quality and the holders of senior water rights." The information brought before WPIC during the 2007-2008 interim has not supported such a broad finding. Rather, WPIC has received information from DEQ that, in addition to cost considerations, lot size, build-out schedules, and aquifer characteristics are all factors to consider in choosing whether to use a community system or individual wells. ("Community Wells vs. Single Family Wells" presented by Eric Regensburger, October 24, 2007, Choteau) Further, WPIC has also received information that cumulative effects of individual wells on water quantity and availability, if any, are not reasonably projected to result "in any discernable, detectable or measurable adverse impact to any prior surface water appropriator." ("Update on Evaluations Significance of Exempt Wells" presented by Michael Nicklin, January 15, 2008). Findings that are unsupported by available data and are actually contrary to data presented to WPIC should not be included in legislation proposed by WPIC.

**FWP** generally supports this program. The program provides some incentive for community systems as opposed to individual wells. Generally, those systems are metered, which tends to result in more conservative use of water.

**2. Amend LC5015.** In a similar vein, TU also recommends amending LC5015, so that the revolving fund for central water and sewer systems is funded, at least in part, by a substantial fee on the use of an exempt well on a tract of land less than 100 acres.

In addition, TU recommends amending LC5015 to preferentially fund those applications to the revolving fund that include such additional measures as progressive water metering, the use of treated waste water for lawn and garden irrigation, or the restoration of natural-vegetation infiltration galleries and permeable pavement for mediating stormwater collection that encourages slow groundwater recharge.

**Pomnichowski -- p2, (b) "in high-growth areas"—is there a definition of high-growth area? There should also be consideration (read: ability to deny) for over-appropriated areas and for closed basins with respect to availability for high-growth areas.**

p3, the numbering is hinky. (4), then (8), (9), (14), (2), (17).

p3, (2) Is there consideration for number of lots or users? How about for the distance to connect to a municipal or community system? the text says 15 service connections, then to serve 25 year-round residents. Does that jive? We should go by connection, not people in a household.

p5, numbering on the page—(c) should be (b), (d) should be (c), (e) should be (d)

p9 has the WPIC discussed the term of the loans? I don't think the fund can last over a project's "structural and material design life". When subdivisions are approved, the term for that approval is three years, and build-out must occur in that time, otherwise the applicant must re-apply. How about a term for a loan limited to a specific length of time, with repayment beginning as soon as ??? units are connected and being served by the system?

p10, (2) "...the first of which must be received not more than 1 year after construction commences or the first users are connected to the system, and before the completion date of the project and the last of which must be received not more than 20 five years after the completion date." p13, (3)(a) will municipalities be invited to apply with info like the

number of subdivisions or lots platted by the city? will developers and subdividers submit info based on the criteria in this section?

p17, "A creation of state debt would requires a 2/3 vote of each house..."

## **LC5019**

**FWP** opposes this bill. If enacted, this bill would seriously impact the rights of existing water right holders by eliminating their ability to object to new water rights. The bill would also eliminate Mont. Code Ann. Sections 85-2-307 through 311 and 85-2- 363 for subdivision applicants. This includes the requirement for notice of application to other water right holders, allowance for objections and hearing procedures and existing permit criteria. It would overhaul the application process. Further, the bill would severely restrict the ability of another water right holder to obtain judicial review of DNRC's decision. This bill is a major affront to the rights of existing water right holders and would most likely soon face a constitutional challenge. There may also be an unintended consequence for DNRC. DNRC will still be subject to the requirements of the Montana Environmental Policy Act (MEPA). Because there would be no administrative appeal process, the public's only opportunity to comment on the proposal would be on the MEPA-associated environmental analysis. DNRC would likely be forced to write more comprehensive environmental analyses, which would take additional staff time and budget. FWP feels that the better approach is to concentrate on fine-tuning LC 5020. It should provide the more predictable and faster process that applicants seek without completely eliminating the right of existing water right holders to participate in the process.

**PPLM** — PPLM cannot support LC 5019 in its current form. PPLM's primary concern regarding LC 5019 is its exemption of subdivision water use from the permitting process. As drafted, water use permits and change authorizations for water used in a subdivision are not subject to the objections of other water users. This is a drastic change that will, for the first time since the adoption of the Montana Water Use Act, prevent existing water users from protecting their water rights in the permitting process. The bill draft not only exempts new water permits from objection, but it also includes changes. This may allow a senior water right to be changed in a manner that expands the senior right to the detriment of all junior users. While the bill draft requires DNRC to review subdivision permits and changes, DNRC simply is not as familiar with local water conditions as the actual users in the area. Existing senior water users should not be shut out of the permitting review process. In addition, PPLM is unaware of any rationale for treating subdivision water rights different from water rights for other purposes. Why should the irrigation of lawns and gardens in a subdivision have a preference over the irrigation of crops? Quite frankly, Montana does not need another exemption to the water permitting process. A secondary concern is the definition of domestic use contained in LC 5019. That definition includes garden and landscaping irrigation up to five acres. In these water tight times, Montana should not be encouraging lawns of this size.

**MAR-** HB 831 as codified is clear that mitigation or aquifer recharge is required for a new groundwater appropriation in a closed basin only to the extent that net depletion results in adverse effect. LC 5019 eliminates the distinction between net depletion and adverse effect for any applicant for a new beneficial use permit that proposes to appropriate groundwater to provide domestic water within a subdivision. See, LC 5019

Sec. 1(1), Sec. 2(23). In short, LC 5019 requires mitigation or aquifer recharge in excess of what is necessary to ensure no adverse effect on the water rights of senior appropriators. Such excessive mitigation or aquifer recharge would artificially accelerate the exhaustion of available surface water supplies, which would in turn quickly create an inflated water market in the state. LC 5019 would also leave less water available for both new and existing appropriators by encouraging mitigation and aquifer recharge in excess of adverse effect, leading to over-utilization of surface water resources. By requiring mitigation or 4 aquifer recharge "to offset net depletion" with no consideration of adverse effect, LC 5019 encourages an applicant for a new groundwater right to provide domestic water in a subdivision to buy up existing surface water rights (typically irrigation rights) in excess of the amount of the proposed withdrawal that may result in net depletion and the amount of that net depletion that may be adverse effect on senior water users and leave that water instream, leaving formerly irrigated ground "high and dry" without any showing or knowledge of the actual need to draw water away from productive agricultural property. In short, by requiring mitigation or aquifer recharge of any net depletion absent consideration of actual adverse effect, LC 5019 encourages the purchase of excessive surface water rights, which could quickly drive up the value of surface water rights, pricing developers of workforce housing as well as agricultural users out of the market. In requiring mitigation or aquifer recharge for any net depletion, not just adverse effect, LC 5019 also disregards the available data, which indicates that the idea that any change in stream conditions in closed basins (*i.e.*, any net depletion) is *de facto* adverse effect is false. Rather, what a proper water balance does indicate is that both ground and surface water are available to meet present and future demands in closed basins without any discernable impact to senior water users. See, May 2008 Water Resource Evaluation Water Rights in Closed Basins prepared by Nicklin Earth and Water. To equate any net depletion with adverse effect is to allow existing appropriators to "command a source," preventing any changes in the condition of water occurrence, regardless of whether prior appropriators can reasonably exercise their water rights under changed conditions. Mont. Code Ann. § 85-2-401 plainly states that the right to so command a source is not within the scope of priority of appropriation. However, LC 5019 eliminates this distinction within closed basins for subdivisions that use a public water supply system. Not only is such elimination contrary to existing law, but it is unsupported by the available data. LC 5019 also introduces considerable increased uncertainty into the application process by exempting an application for a new beneficial use permit that proposes to use groundwater within a closed basin to supply domestic water to a subdivision from the clear criteria for permit issuance set forth in Mont. Code Ann. § 85-2-311. See, LC 5019, Section 1(2). Is an applicant still required to demonstrate physical and legal availability, adequacy of appropriation works, that the proposed use is a beneficial use, and possessory interest in the place of use? Absent the applicability of Mont. Code Ann. § 85-2-311, this is unclear.

DNRC –

**LC5019: Permit Process for Subdivisions**

The Department understands the motivation of the committee to identify a fast-path permitting process encouraging public water supply wells. However the LC 5019 has a number of provisions that raise serious concerns. The Department raises these concerns now so that the Committee is aware that the draft legislation, if enacted, may not withstand a legal challenge.

Further, a recent district court case in New Mexico may create significant uncertainty West- wide as to the validity of any exception to the permit and change process ( *Bounds v. State Engineer of New Mexico*, Judge J.C. Robinson Sixth Judicial District Court of New Mexico). LC 5019 creates a 3,000 acre-foot exception for subdivision development, greatly expanding the current exception, a move in stark contrast to the move to reduce exceptions in other states.

**New Section 1. Subdivision water systems in closed basins**

**Subsection (1)**

This Subsection singles out one type of beneficial water use above all others for an expedited process, subdivision water systems. Neither the Montana Constitution nor the Water Use Act has a preference for any particular type of use. It should be noted that subdivisions of a certain size are generally required to create parkland. Water use for these types of subdivisions would not be allowed under this Subsection because the provision includes only lawn and garden associated with a household.

The change application submitted with the permit application would have to be for the sole purpose of providing mitigation water for the permit. The applicant could not include changing part of his right to mitigation and another part to other purposes, points of diversion or place of use.

An application under this Subsection would be processed under the Department's "correct and complete" process §85-2-302, MCA, like all other applications for permits and changes. If the combined application also included a change application for a mitigation plan, both the permit and the change application would have to be determined to be correct and complete before the combined application would be determined to be correct and complete and ready to move forward to be analyzed under the terms of this statute. A correct and complete determination would not be a determination by the Department that the applicant met all of the criteria necessary for issuance of the permit and change, but only a determination that the combined application could move forward for analysis.

### **Subsections (2) and (3)**

The Department has constitutional concerns with Subsection (2) where the application for permit as well as the application for change (if necessary) will not be public noticed and existing water right holders will not be provided opportunity to file an objection. Our concern is that this section, especially the change provision, may run afoul of the Constitutional right to due process (Art. II, §17), Constitutional right to know and participate prior to agency action (Art. II, §8 and Title 2 Chapter 3 Part 1, MCA), and the Constitutional protection of existing water rights (Art. IX, §3).

With the application not being subject to §85-2-311, MCA, no analysis would be required or could be conducted of impacts to existing ground water rights within the area of potential effect. In Subsections (2) and (3), the only analysis and determination to be made is that the applicant's mitigation plan will meet §85-2-362, MCA, such that surface water rights are protected and depletion fully mitigated. A proposed ground water well could pump and take water from another well and the Department could not address this issue in the permitting process because of the inapplicability of the §85-2-311, MCA criteria.

In Subsection (3)(a), it is important that the legislation retain the language expressly giving the Department the right to determine depletions and that the depletions would be fully offset by the applicant's plan. It is also important to retain the language giving the Department the right to review a proposed change in appropriation right against the applicable criteria in §85-2-402, MCA

Subsection (3)(b) requires the applicant to require each connection to install a water meter. However there is no provision requiring the meters be read or recorded. If it is a condition of the permit, the information gathered should be sent into the Department annually, and it then becomes public record. Otherwise, the public may have difficulty accessing water right records if there is a concern.

Subsection (2)(f) requires the applicant to have a plan for monitoring and enforcing the uses of water under the permit and the conditions. What is the Department's role in enforcing the permit conditions? Is the applicant required to have covenants addressing the requirements under the statute, ex lawn size. What happens if water use records are not kept?

Subsection (5) provides for judicial review of the department's action. How long does a party have to file a petition with the court in this review outside of the traditional review under the Montana Administrative Procedure Act (MAPA), Title 2 Chapter 4 Part 7. Under MAPA, one has 30 days to file for a judicial review.

### **85-2-102 Definitions:**

In Subsection (12) we would suggest limiting the irrigation to 1/4 acre. In Subsection (23) a suggested cap of 3,000 acre-feet (AF) is made. At .73 AF per household, subdivisions of 4100 lots would be allowed under this new Subsection. This volume of water could certainly have an impact to existing ground water users in some areas. This volume far exceeds the amount applied for by most applicants.

### **TU**

**3. Do Not Introduce LC 5019** A foundation of the New Mexico's court ruling was the constitutional protection for senior water right holders that is fundamental to the prior appropriation system. LC5019 undermines this fundamental aspect of Montana's prior appropriation doctrine by eliminating the ability of existing water right holders to object to those aspects of a new water right permit that may adversely affect their water rights. See, New Section 1, sub-section (2), that eliminates the application of MCA §§ 85-2-307 through 311 and 85-2-363.

Of equal concern is sub-section (5) of New Section 1, that prevents a senior water right holder from even obtaining judicial review of a newly-granted permit that may harm his or her water rights. Sub-section (5) allows judicial review only when "... substantial rights of an aggrieved party have been prejudiced ...". On its face, this language appears to limit judicial review to an applicant or the agency, as the only two entities that have been "parties" to the permit process. LC5019 makes no provision for senior water right holders to comment on the permit application or otherwise be involved in shaping the administrative record that would go before the district court, and give them clear standing to even participate in judicial review of a permit application. For these reasons, TU does not believe that LC5019 would make any positive contribution to sound water policy or management in Montana.

**CFC --** While an interesting first step at creating a solution for subdivisions seeking a new groundwater appropriation, this draft bill ultimately **falls short of addressing the exempt well problems** discussed above. The Coalition appreciates that this bill recognizes a "subdivision water system" as a withdrawal of groundwater by 2+ wells. This is crucial in acknowledging that multiple individual wells constitute a combined appropriation (even if not physically manifold). The main reason the Coalition does not support LC 5019 is because it violates Montanans' constitutional rights under the prior appropriation system. This bill would limit the ability of water right holders to object or comment during the

permitting process by eliminating 85-2-307 to 311 for subdivision water rights. We believe this is an unacceptable method of administering water use permits. However, we would be supportive of creating other incentives for streamlining the permitting process for a "subdivision water system," especially if this streamlined permit requires residential/urban water conservation practices, such as grey water systems or rainwater catchments for lawn and garden irrigation, and water metering for each unit. If the bill is introduced, the Coalition urges the WPIC to make sure any "baselines" defining what constitutes a subdivision water system (as outlined in 85-2-102 (23)) are a reasonably low threshold for requiring a permit. Setting numbers on minimum volumes or lot sizes will only encourage subdivisions to find "loopholes" that fall under that specified threshold rather than applying for the groundwater permit.

**Pomnichowski** -- p2, In Section 1(3)(d), I assume this includes irrigation wells for public open space and parkland. The item says that exempt wells will not be allowed in the public water system; that should include irrigation wells. Water needed for fire service, public space watering, etc. should be on the system. (For fire, it must be so as to have sufficient pressure.) In Section 1(3)(e), perhaps add the DNRC or DEQ for water quality testing and monitoring, unless the MBMG will do that, too.

In Section 1(4), was there discussion among the WPIC to change 'may' to 'must'? "Wells permitted pursuant to this section ~~may~~ must be included in the ground water monitoring program..."

In Section 2(12)(g), do you mean acres of land or acre feet of water? "Domestic purposes means those water uses common to a household including: (g) garden and landscaping irrigation to ??? acres. p8, In Section 2(23), change two to one: "...water from the same source aquifer by ~~two~~ one or more wells..." and for amounts, consider this: "...that is estimated to supply at least ~~????~~ 4.5 acre feet of water per year. (1 house and 1/4 acre = .73 acre feet) and not more than ~~3,000~~ 1,000 acre feet per year based on availability of water in the basin. (Subject to legislative approval..." I calculate these amounts like this: minor subdivision is 5 lots or fewer, any other subdiv is 6 or more; so .75 x 6 = 4.5 acre feet/year. This is the minimum. For a 150 home subdivision at .75 acre feet/home, that's 225 acre feet/year. (Are you figuring what's needed for sewage treatment? If not, I'd estimate 775 af/y for 1,000 af/y) It'd be worthwhile to check with a wastewater engineer about that, especially with the TMDL allowances into watercourses.

P11, (2) "The applicant is required to prove in his application that the criteria in subsections (1)(f) through (1)(h) have been met ~~only if a valid objection is filed. If a~~ valid objection is filed, the objection must contain substantial credible information..."

## **LC5020**

**CFC** -- The Coalition supports the proposed changes to the DNRC permitting process. These changes would provide much-needed expedition and streamlining of permit requests for those looking to appropriate new water supplies, while still allowing public process and transparency for existing water users. Our hope is that a more time- and cost-efficient system will encourage developers and water users to apply for groundwater permits rather than opt toward unregulated and unmonitored exempt wells.

## **DNRC**

The Department thanks the Committee for its consideration of this legislation. We believe that the proposed changes will improve water right processing for all parties. Existing water right holders will particularly benefit by keeping the burden of proof on applicants to meet the permitting and change criteria and by minimizing the need to object to applications that the Department seeks to grant.

In 85-2-307 there appears to be a format problem. Sub-section (b) is missing.

85-2-308(2) cross references the criteria in -320, -402, and -436. There should be a cross reference to -407 and -408 the provision for temporary changes and temporary changes for instream flow.

**FWP** recognizes that water use permit applicants are dissatisfied with the permit process because it is complicated and lengthy. FWP believes that LC 5020, while not perfect, is a well-reasoned approach to making the permit process work for applicants and existing water right holders alike. Moreover, with this proposal, there is no reason to take the drastic measures called for in LC 5019. FWP's comments on WPIC draft report. 3 This bill needs to be clarified to state that DNRC may (and should) rely on more information than what is presented in the application. DNRC needs to be able go outside the application to consider the best available information and generate the application record. Further, objectors must retain the right to engage in discovery and present expert testimony to the decision-maker.

**PPLM** - Turning to LC 5020, PPLM is generally in favor of the concept outlined in this bill draft. This draft addresses the problems potentially created by the recent *Bostwick v. DNRC* district court decision while maintaining the burden of proof on the applicant. The Water Use Act's requirement that an applicant prove the statutory criteria for a permit or change is a key protection for senior water users that must be maintained.

**MAR** - Before undertaking significant revisions of a permit process that, up until the very recent past, has worked relatively well for both applicants and objectors, it is worthwhile to determine exactly what the source of the significant increase in the time, cost, and frustration required to process a permit application is. Under existing statute, DNRC must notify the applicant of any defects in any application within 180 days of receipt. Mont. Code Ann. § 85-2-302(5). Upon notice of any deficiencies, the applicant has 90 days to correct those deficiencies. Mont. Code Ann. § 85-2-302(7). Upon correction of the deficiencies, DNRC can then deem the application correct and complete, which means that the application contains "substantial credible information" showing that each of the criteria for permit issuance set forth in Mont. Code Ann. § 85-2-311 (new beneficial use permit applications) or Mont. Code Ann. § 85-2-402 (change applications) has been met. See, Admin. R. Mont. 32.12.1601. Even a cursory examination of the applicable regulations setting the guidelines for a correct and complete determination reveal that it is more than just simply making sure all blanks are filled in. If that were the case, there would be no requirement that the information provided be "substantial credible information," only that something be filled in. Such is not the case. Following a correct and complete determination, the application goes out for public notice. Mont. Code Ann. § 85-2-307. After such notice, DNRC must either grant, deny, or condition the application within 120 days if no objections are received or within 180 days if objections are received or a

hearing is held, with an extension of up to 60 additional days. Mont. Code Ann. § 85-2-310. Such a process allows for significant scrutiny of the application prior to public notice, the opportunity for any senior appropriators that believe they will be adversely affected to object, and for timely hearing and decision, as long as the applicable statutes and regulations are followed. Section 1(8) of LC 5020 would amend the statutory definition of "correct and complete" such that it merely means that DNRC can "begin" to evaluate the "information." Given the significant guidelines for a correct and complete determination at present (see, *i.e.*, Admin. R. Mont. 32.12.1701 to 1707), it begs the question of exactly what evaluation DNRC is doing during the period providing for in Mont. Code Ann. § 85-2-302, which is not affected by LC 5020, if not "evaluating" the application. Ostensibly, under LC 5020, an applicant could go through a 270- day period of receiving deficiency notices from DNRC and responding to those notices, only to then have DNRC "begin" to evaluate the application, leaving one to wonder exactly where any expediting of the process is, particularly when the "evaluation" is not required to take place within any given timeframe. See, LC 5020, Sections 2 and 5. Any amendment to the permitting process should also consider the role of those agency personnel who actually conduct hearings on permit applications, formal or otherwise. At present, DNRC has adopted a practice of issuing statements of opinion on those applications where there either is no objector or any objections have been withdrawn. The applicant's opportunity for hearing is then typically to the author of the statement of opinion. LC 5020 proposes significant changes to the hearing opportunities available to applicants, without addressing the need for neutral and independent evaluators. Any change to the permitting process should consider the appropriate role for hearing examiners and removing those agency personnel who serve as hearing examiners from the rest of the agency's evaluation process.

## TU

LC5020 makes changes in the way that the DNRC review permit applications. Specifically, LC5020 does five things:

- (1) It allows DNRC to meet informally with an applicant for a new permit or a change to discuss the application;
- (2) It requires the department to make a written preliminary determination as to whether the application satisfies the criteria for a permit or change to be awarded;
- (3) Specifically recognizes the department's authority to impose conditions that would allow the issuance of an approval;
- (4) If DNRC proposes to grant an application, it requires the agency to describe the rationale for that proposed decision; and
- (5) It provides for a two tiered hearing process, depending on whether the preliminary recommendation is for grant or denial.

TU supports the concept embodied in this draft, and in fact had proposed something similar during the 2007 discussions on HB 831. This idea appeals to us because it creates some transparency in the decision-making process that does not currently exist. Currently, DNRC, for fear of being accused of pre-judging the process, closely holds its opinions about an application until the very end of the process. This poses its own series of problems for applicants.

"Preliminary" is the key word here. By requiring a preliminary determination LC 5020 compels the agency to provide everybody—applicant and potential objectors alike—some advance notice of how the department is tilting, based on the evidence they have seen, with some description of the rationale behind the preliminary determination. This can provide the applicant some chance to at least make its case to the hearing examiner that the department's preliminary finding is wrong, and it can provide potential objectors some indication of how difficult it may be to successfully prosecute an objection.

One concern TU has is that, as currently drafted, section 5(1) of LC 5020 sets up a two-tiered hearing process which might actually encumber the process needlessly. In effect, if DNRC's preliminary determination is that the application should be denied, it will issue notice of that to the applicant, and the applicant can seek a hearing. If the applicant prevails at the hearing, section 5(1) appears to require a second hearing, to notify potential objectors of the decision to grant. It would seem more economical to fold all of that process into one hearing.

**TU Recommendation:** Pursue a bill that captures the concept of a preliminary decision obligation, but reduce the amount of process to a single opportunity for a hearing for both applicant and objector.

**Pomnichowski --** One of my most primary concerns about this draft, just upon reading the intent "For an act allowing the DNRC to issue a preliminary determination on a water right permit or a change in appropriation right..." was for requirements of public notice,

public hearings, release of finding (by the dept.) and preliminary recommendations. I'm glad to see some of this addressed on p7,

I recommend in (2) "...shall publish a notice ~~once~~ twice in a newspaper of general circulation..."

in (2)(b), I'd recommend language requiring the applicant to compile and submit to the dept. the addresses of appropriators, property owners, and specified area water users so that "...the department shall also serve notice by first-class mail..."

I serve on the Planning Board and Zoning Commission in Bozeman, and Bozeman's public notice requirements (of the city and of applicants) are beefier than the minimums in state statute. They serve us well. To do something like a zoning change, or a remodel of a home, or a minor subdivision, or to apply for a variance, public notice requires these things:

1. a yellow sign posted on the site (requirements of the contents of the notice are specified in our code) in a conspicuous place and for a term before any public meeting and before construction begins

2. publication once or twice in the local newspaper

3. and one of the most important, in my opinion, letters mailed first-class to adjacent property owners with the public notice. Our code, the Bozeman Unified Development Ordinance, 18.76.020.D, states: The applicant shall provide for the purposes of noticing a list of names and addresses of property owners within 200 feet of the site, using the most current known property owners of record as shown in the records of the County Clerk and Recorder's Office and stamped, unsealed envelopes (with no return address) addressed with names of above property owners, and/or labels with the names of the above property owners, as specified on the appropriate application.

Notice must be sent to adjacent property owners within 200 feet of the site. Keep in mind that this is for projects like building garages into backyard setbacks! I think a sliding scale based on the size of the operation or release of water (and the presumed impact on neighbors) could be established. Notice could follow water users along a watercourse, or those drawing water from the same aquifer.

The applicant is responsible for researching the names and addresses of adjacent and nearby property owners; the dept. should not spend its time on this. Failure of an applicant to provide a complete list can stall the whole project. I've rescheduled hearings and ordered re-noticing when property owners have not been adequately notified.

4. PUBLIC MEETINGS. All applications for subdivisions, zoning changes, etc. are heard in a public meeting, allowing public comment, by the city commission or Board of Adjustment. People come and have their say. We very rarely deny a project; instead, we place conditions of approval on them to mitigate their impacts. The same could, and should, be done with proposals for water appropriation. Local public meetings to present the proposal and explain all of the related effects (surface water runoff, groundwater protection, times of heavy use, mitigation plans, etc.) must be scheduled and held.

p7, perhaps add an item (iv) adjacent property owners within ??? of the proposed site, or users who draw water from the same aquifer, or along the receiving watercourse at a distance of ??? downstream from the release point for which the appropriation proposes a permit or change in appropriation right.

p10, (1) "If the department determines...it shall hold a hearing pursuant to 2-4-604"

is this a public hearing? If not, then I propose adding the word "public" before the word "hearing".

In the rest of this section, I'm so pleased to see the language changed to accommodate regular citizens without formal representation in causes. But do we still

need—or do we still allow somewhere—for the department to hold contested case hearings?

p12, (1) "...it shall hold a hearing pursuant to 2-4-604..." again, is this hearing a public hearing? p13, (2) is there public notice on this objection period? p18, (7) is this a public hearing?

## **LC5021**

**CFC --** The Coalition strongly supports WPIC's attention to better enforcing water use in the state to ensure that senior water rights are protected. The Coalition supports LC 5021, especially 3-7-311(4). However, we believe that **water enforcement should stay at the state level** – such as with the Attorney General as proposed in 5021 – rather than at the county level. County staff, including attorneys, are already over-stressed and ill-equipped to deal with the complex intricacies of water law.

### **DNRC -**

**85-2-114 says the Department may petition the district court to:**

We suggest inserting new (a)

(a) appoint a water master as a special master. Then current (a) becomes (b).

(b) regulate the controlling works .....

**Attorney General --** The group expressed grave reservations about the provision in 85-2-122. "A person who violates or refuses or neglects to comply with the provisions of this chapter, any order of the department, or any rule of the department is guilty of a misdemeanor." It is thought that the lack of definition would likely doom any attempt to prosecute under this provision. For example, the section does not specify the requisite mental state, generally an essential element of any crime. Nor have the due process issues arising in criminal prosecutions been fully thought through. The suggestion is to eliminate 85-2-122(1) altogether, or, think those issues through and add the specificity required to proceed under the criminal statutes. The remainder of the penalty section provides for civil penalties, which seems appropriate.

2. It was suggested that if our office begins to help more in prosecutions, 85-2-122 should be amended to require that any fines collected as a result of one of our prosecutions be deposited into an AG water enforcement account for use in the prosecutions. A statutory appropriation would also be required for us to spend out of that account. This seems parallel to 85-2-122(3) (a) which establishes an account for collections from DNRC prosecutions and (3) b which requires the money collected from a county attorney action to be deposited into the county general fund.

3. It was noted that there is a model already for a statutory section that could establish an enforcement program here. Chapter 4 of Title 44 establishes miscellaneous functions of the department of justice. Among the other functions is a fish wildlife and parks enforcement program. 44-4-115 provides: "There is a fish, wildlife, and parks enforcement program in the department of justice, which must be administered by the entity in the department that

assists county attorneys with prosecutions. The program staff may investigate and may prosecute criminal cases concerning the violation of the laws administered by the department of fish, wildlife, and parks. The program is under the supervision and control of the attorney general and consists of a half-time attorney licensed to practice law in Montana who may prosecute, or assist county attorneys and the department in the prosecution of, criminal violations of Title 87." If the committee wants to ensure that there is a warm body here who can take on some enforcement cases without being pulled into other kinds of cases, this kind of mechanism could assure that at least one half-time person would be available to do the work. Presumably the program would be run by the water unit, because of the unique nature of water law.

4. I could not remember what the intent was behind the new subsection 5 in LC 5021. It provides that the department, county attorney, and AG shall give priority in enforcing this section, to protecting the water rights of a prior appropriator. The decision to prosecute is extremely complex, and our office must retain its prosecutorial discretion based on evidence and other issues specific to the cases. Legislative priorities are certainly appropriate but we were hoping this could be fleshed out a little more. Something more clearly expressive of legislative intent would be useful.

**FWP** -- It would appear that this proposed legislation is a good-faith effort to make judicial enforcement of water rights more accessible by providing state district courts with the help from the water court. FWP does not oppose this idea but urges a cautious approach. Currently, water masters are primarily responsible for drafting temporary preliminary decrees, which involves hearings on objections. A water master who is going to impartially review a claim, for purposes of adjudication or amendment, should not then be able to sit on a case in which enforcement of those decreed rights is sought prior to a final decree being issued. FWP is also aware that once a water commissioner is appointed, that commissioner often asks the advise of the water master who worked on the decree. A water master should not be allowed to first work on the decree, give advise to water commissioners and then adjudicate a dispute between water right holders when the water rights in the basin have yet to be finally adjudicated through a final decree. The potential for conflict of interest is too great. Furthermore, a party has limited ability to disqualify a water master who may be privy to ex party information. FWP is merely suggesting that water masters' roles with respect to a particular basin be defined such that one master does not have both adjudication and enforcement duties. FWP supports the proposed modification to 85-2-114 (involvement of the attorney general).

TU supports efforts to increase effective monitoring and enforcement of water use. TU would encourage the Water Policy Interim Committee to continue to think about ways to promote accurate measurement and monitoring of water use, particularly the development of systems that would develop the capacity to monitor and adjust water use remotely. The Bureau of Reclamation has implemented this kind of system with water users in the Sevier River Basin in Utah, and a trial of a similar system in a Montana river basin could be a good first-step to more efficient water use and management.

In terms of additional enforcement capacity, it is not realistic that county attorneys are going to take on complex water enforcement actions. But it is a possibility the State Attorney General's office should develop the expertise and capacity to take on a limited number of water rights enforcement actions.

**TU Recommendation:** TU supports LC 5021.

**CFC --** The Coalition strongly supports WPIC's attention to better enforcing water use in the state to ensure that senior water rights are protected. The Coalition supports LC 5021, especially 3-7-311(4). However, we believe that **water enforcement should stay at the state level** – such as with the Attorney General as proposed in 5021 – rather than at the county level. County staff, including attorneys, are already over-stressed and ill-equipped to deal with the complex intricacies of water law.