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Water Policy Interim Committee

62nd Montana Legislature

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TO: **Water Policy Interim Committee**
FROM: **Helen Thigpen, Staff Attorney**
DATE: **August 30, 2011**
RE: **Ground water, exempt wells, and enforcing a water right through a call.**

A call is an oft-invoked solution to concerns associated with water supply in the face of the proliferation of ground water wells in the West. The solution is based on the premise that a senior water right holder can simply make a call on a junior ground water user if water is scarce. This memorandum analyzes the legal and practical feasibility of using a call to address the water needs of senior water right holders in Montana as a means of addressing depletions associated with ground water wells.

In light of this review, it is relatively clear that calls can be made against junior ground water rights. However, there are significant challenges associated with making calls against junior ground water rights in Montana. Calls are potentially even more challenging in the context of exempt wells, given that many exempt wells are used for domestic purposes and do not go through the normal permitting process in which legal availability and impacts on senior users are determined. These challenges are outlined in more detail below.

1. Background

The prior appropriation doctrine to which Montana subscribes affords water rights to those who first apply a particular quantity of water to a beneficial use. As such, time is an integral part of the prior appropriation doctrine. The date of the application of water to a beneficial use determines the user's priority in the water, i.e. the first user to obtain the right is the first user who gets to use the water in times of shortages.

This notion of "first in time, first in right" is the bedrock of Western water law and has been recognized by courts throughout Montana's history. In 1911, for example, the Montana Supreme Court recognized the concept of "first in time, first in right" in a decision involving a change of use from power to agricultural.[1] In 1953, the Montana Supreme Court stated the rule as follows: "The rule is that he who first diverts the water to a beneficial use has the prior right thereto where the right is based upon the custom and practice of the early settlers as here . . ."[2] The concept of "first in time, first in right" has been integrated into the Montana Water Use Act. Section 85-2-401, MCA, specifically provides that "[a]s between appropriators, the first in time is the first in right."

[1] Featherman v. Hennessy, 43 Mont. 310, 316, 115 P. 983, 986 (1911).
[2] Midkiff v. Kincheloe, 127 Mont. 324, 328, 263 P.2d 976, 978 (1953).

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WPIC
September 13, 2011
Exhibit 12

To enforce a water right under the prior appropriation doctrine, a senior user can make a call on the source. When this occurs, water users with the most junior rights must cease using the water in reverse order of priority so that the more senior right is fulfilled first. In some cases each junior user upstream from the senior's point of diversion may be required to curtail their use.

Because the concept of a call is rooted in practice and judicial common law, the concept does not appear consistently throughout Montana's statutes. The concept is defined, in a section codifying a water compact, as "the right of the holder of a water right with a senior priority and an immediate need for a recognized use to require a holder of a water right with a junior priority to refrain from diverting water otherwise physically available."[3] Section 85-2-351, MCA, which addresses requirements for notices to provisional permit holders in the Clark Fork River basin, provides that "[i]n accordance with Montana law, you may be subject to a call by senior water right holders, in which case you may be required to discontinue your use of water for the period of the call."

In the context of surface water, a senior user will contact junior users upstream from the senior's point of diversion to notify them that a call is being made. The senior will call each user in the order of the most junior to the most senior until the right is satisfied. If the junior user does not yield to the senior's request, the senior may seek a judicial remedy, usually an injunction. In addition to private enforcement by the senior user, the Department of Natural Resources and Conservation (DNRC) is authorized to petition a district court supervising the distribution of water among appropriators to order the person to cease using the water.[4] The DNRC may direct the attorney general or a county attorney to bring a suit to enjoin the unlawful use, or the attorney general or a county attorney may bring the action on their own initiative.[5] Either way, priority must be given to protecting the rights of prior appropriators.

In most cases a junior user cannot ignore a call by a senior user. However, this is not an absolute rule. The futile call doctrine may relieve a junior surface or ground water user from complying with the call. The futile call doctrine holds that a call may be denied if a junior user can prove that the water would not actually reach the senior to satisfy the call, i.e. if the call is futile. Courts have recognized the doctrine, but according to some, the doctrine can be difficult to establish, especially if some water will eventually reach the senior user.[6]

The case most often cited to illustrate the difficulty of establishing the futile call doctrine is State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N.W. 239 (1940). In Cary, junior users alleged that a call by downstream seniors would be futile because of substantial losses from seepage and evaporation along the way to the seniors' point of diversion. The Nebraska Supreme Court refused to apply the doctrine even though the juniors would be required to let 700 cfs of water go

[3] Section 85-20-1501, MCA.
[4] Section 85-2-114, MCA.
[5] Section 85-2-114 (3) and (4), MCA.
[6] Dan Tarlock, *Law of Water Rights and Resources* 5:33 (Clark Boardman Callaghan 1988 & Supp. 1989-2009).

by to satisfy senior users who needed only 162 cfs. Because some water would actually reach the seniors, the court reasoned that the call would not be futile even though the result created significant waste.

The futile call doctrine has been recognized by courts in Montana. In 1892, the Montana Supreme Court recognized the concept, stating that:

> Under the theory of the law of this State relating to water rights, the prior appropriator may insist that the water remain in the stream, from which he has the right of prior appropriation, so long as any useful quantity thereof would reach his point of diversion, if allowed to remain. He is entitled to insist that all of such water remain, in order to carry the flow down to his point of diversion, although a large portion of it would be lost by evaporation and percolation. He has the right to the prior use of the water of the creek, and while he may be entitled to a stated quantity only, it may require much more than that quantity in the creek to carry the amount he is entitled to down to his point of diversion.[7]

In a later decision, the Montana Supreme Court again recognized the futile call concept.[8] In Irion v. Hyde, 105 P.2d 666, 674 (Mont. 1940), the Court reversed and remanded a district court finding that junior users were entitled to use any of the water flowing in the creek at their property that, if permitted to flow, would not reach the senior user's point of diversion in any useful quantity. The Supreme Court concluded that the district court erred because it seemed to "make the test the volume of the flow at defendant's dam." The Supreme Court held that the diversion is justified only if the juniors could prove that the seniors received their full appropriation or if no water would reach the seniors.

Not all Western states have recognized the futile call doctrine. For example, courts in Washington have consistently rejected the doctrine, choosing instead to rely on the language of decrees and priorities. Most recently, in 2006, the Washington Supreme Court reaffirmed its position that the futile call doctrine is best left to the Legislature, stating that "[w]ater management is a huge issue in this state."[9] The Washington court went on to say that "[t]here is clearly controversy as to the best way to manage this state's water resources. However, policy decisions are the province of the Legislature, not of this court."[10]

The State of Idaho has incorporated the futile call concept into the state's conjunctive management rules, which apply to areas that share a common ground water supply. In 1994, Idaho adopted a set of conjunctive management rules for the management of surface water and ground water. The rules "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury

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[7] Raymond v. Wimsette, 12 Mont. 551, 31 P. 537, 559 (1892).
[8] Irion v. Hyde, 110 Mont. 570, 105 P.2d 666, 674 (Mont. 1940).
[9] Fort v. State Dept. of Ecology, 133 Wash. App. 90, 135 P.3d 515 (Div. 3 2006).
[10] Id.

to uses of water under senior-priority water rights."[11] Under the rules, a call may be denied if it is considered futile, but the Department of Water Resources may require mitigation or staged curtailment if the diversion causes material injury to a senior user. This may be true even though the hydrological connection is remote. With respect to exempt wells, the rules provide that a call is not effective against any ground water right used for domestic purposes or stock water right so long as the amount used is within the limits of Idaho's exemption statute.[12] The Idaho Supreme Court has upheld the constitutionality of the rules. For more information, see American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources, 143 Idaho 862, 154 P.3d 433 (2007).

Historically, Montana law distinguished ground water from surface water. Gradually, both the Legislature and the courts began to recognize the connection between ground water and surface water and treat them similarly for purposes of water appropriation and management. For example, in 1966, the Montana Supreme Court issued a decision that explicitly recognized the connection between ground water and surface water. In the decision, the Court stated that "[m]odern hydrologic innovations have permitted more accurate tracing of groundwater movement."[13] The Court also stated that "traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists."[14]

In 2006, the Montana Supreme Court issued a decision that squarely addressed the connection between surface water and ground water.[15] At issue in the case was the DNRC's interpretation of the state's closed basin law in the Upper Missouri River basin, which prohibited the DNRC from granting permits within the Upper Missouri River basin until the issuance of the final decrees.[16] The DNRC was not prohibited, however, from processing applications for the appropriation of ground water unless the ground water was "immediately or directly connected" to surface water.[17] In interpreting the meaning of "immediately or directly connected" to surface water, the DNRC determined that a well for ground water could not pull surface water directly from the source (i.e. induced infiltration). The DNRC's interpretation did not prohibit wells that captured ground water that would otherwise end up in the stream (i.e. prestream capture). The Supreme Court held that both pumping methods reduced surface flows and that DNRC's interpretation did not protect senior water right holders.[18]

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[11] Idaho Admin. Code 37.03.11.020.01.

[12] Idaho Admin Code 37.03.11.020.11.

[13] Perkins v. Kramer, 148 Mont. 355, 363, 423 P.2d 587, 595 (1966).

[14] Id.

[15] Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224.

[16] Section 85-2-343, MCA.

[17] Section 85-2-342, MCA. The definition of ground water was deleted from section 85-2-342, MCA, in 2007. Prior to 2007, section 85-2-342, MCA, defined ground water as "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."

[18] Montana Trout Unlimited v. DNRC, ¶ 43.

Under current Montana law, ground water and surface water are managed under the same permitting system. This means that an applicant for a ground water permit must go through the same permitting process as a surface water applicant unless the appropriation is exempt from the permitting requirements. This is significant because, like a surface water applicant, a ground water applicant must demonstrate that "the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected."[19] It also means that senior users have the opportunity to formally object to the application. As such, Montana law recognizes that a senior water right may be affected by both surface and ground water uses. In addition, Montana law does not prioritize any water use over any other, regardless of whether the use is for domestic, agricultural, or municipal purposes. The result is a strict adherence to the prior appropriation doctrine – first in time, first in right – applied to both ground water and surface water, and without prioritization of use.

2. Challenges

While senior users may legally make a call against more junior ground water users under the framework outlined above, there are significant practical and legal challenges associated with implementing and enforcing the call, especially if the call is made against a well that is exempt from the permitting process under the Montana Water Use Act.

As noted above, Montana law does not distinguish between surface water and ground water for purposes of priority enforcement, which presents unique challenges for making a call to enforce a water right. Dan Tarlock, an expert in water law, has noted that "[i]n the western states that apply the prior appropriation system to ground water, priority has proved impossible to administer in practice for basins that are not directly hydrologically connected to surface systems."[20] The problem, according to Mr. Tarlock, "is that a causal connection between a victim senior well and a junior well is extremely difficult, if not impossible, to establish. All wells contribute to mining and it is difficult to insulate the causal connection between a well and the relevant cone of depression."[21]

Additionally, a senior user will only make a call on a source when a water shortage exists, and thus, timing is a significant issue in the context of using a call to enforce a water right. With surface flows, it is relatively easy to predict when a senior will receive water pursuant to a call. In the context of ground water, timing can be a significant challenge because it could take several days or weeks for water to reach the surface source depending on the connection. The Montana Bureau of Mines and Geology has illustrated this problem in a report issued to WPIC in 2008. In the report the Bureau stated that:

> There may be a considerable time lag between the start of pumping and any reduction in stream flow depending upon the location of the pumping well (distance and depth)

[19] Section 85-2-311(1)(b), MCA.
[20] Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric*, 76 N. Dak. L. Rev. 881, 102, (2000).
[21] *Id.* at 102-103.

> relative to the stream, the hydraulic characteristics of the aquifer, and the pumping rate. Furthermore, the effect of ground-water pumping on stream flow may persist long after pumping has stopped. This is a simplified scenario; in the real world there will be other hydrogeologic factors such as ET, recharge variability, the presence of disconnected streams or reaches, low-permeability streambeds, and deep confined ground-water systems that complicate the stream–aquifer interactions.[22]

Because a call may be made in an area where the connection between surface and ground water is not immediately known and because water may not be received immediately, a call against a ground water development may not be a practical or timely means of enforcing a senior surface right.

It is also unclear what a senior would have to demonstrate upon making a call against a ground water user. As discussed above, upon making a call in Idaho senior users must allege that they have been materially injured by the ground water pumping. Under the Idaho rules "material injury" is defined as "[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law . . ."[23] The Idaho Department of Water Resources looks at several factors in determining whether material injury exists, including "[w]hether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right."[24]

Unlike other Western states, Montana law does not prioritize certain water uses over others. This strict enforcement of the prior appropriation doctrine means that a call could be made against a junior permitted well used for agricultural purposes or a junior exempt well used for domestic purposes. From a practical standpoint, however, a senior surface user will likely run into several challenges in attempting to enforce the call, including the futile call doctrine. For example, if a call is made in an area where the hydrological connection between surface water and ground water is unclear, a ground water user could invoke the futile call doctrine and argue that the senior would not receive any water to fulfill the senior's right despite curtailment of the use. Even if the hydrological connection between the surface and ground water source was relatively clear, a junior user could argue that the senior would not receive the water in time to prevent the call from being futile or that seepage or evaporation would prevent the senior from receiving a usable quantity. However, in attempting to invoke the futile call doctrine, a junior ground user would have to overcome the general rule that a call is futile only if the senior will not receive any water pursuant to the call.

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[22] See Final Case Study Report to the 60th Legislature Water Policy Committee at: http://www.mbmg.mtech.edu/gwip/gwip.asp.

[23] Idaho Admin. Code 37.03.11.10.14.

[24] Idaho Admin. Code 37.03.11.42.01.

3. Exempt Wells

Each of the challenges outlined above would also apply to calls made against exempt wells. However, these challenges may be even more pronounced in the context of exempt wells. The most significant challenge with making a call against an exempt well is likely attempting to assess how the well is affecting the senior user and determining which well or wells caused the depletion.

The common concern with exempt wells is not necessarily the use by a few individual users but rather the cumulative effect of numerous exempt wells in a particular area or development. The question in the context of call, then, is how a senior user would actually make a call to ensure water availability. If the surface depletion is a result of numerous exempt wells in an area, a senior user would theoretically need to make a call on the wells in the entire area to enforce the senior's right. This could include making a call against a subdivision that relies exclusively on exempt wells for domestic water supply. In this context, would the senior make the call against the subdivision as a whole (i.e. against the homeowner's association if one exists) or against each individual user? What if a subdivision has 200 wells?

In addition, there could be serious health and safety problems with making a call on an exempt well. Because of the nature of the exemption itself, many exempt wells are used primarily for domestic purposes, including for drinking water. It is not practical for a senior user to attempt to enforce a call against these wells when shutting off the wells may result in a lack of drinking water for individuals and families. Courts are likely to take a dim view of such attempts. Idaho has prioritized the use of water for domestic purposes over other uses. Therefore, a call from a surface irrigator against a well used primarily for domestic purposes is not effective in Idaho.

Beyond practical problems associated with attempting to curtail the use of an exempt well, there may be constitutional provisions that would limit the ability of a senior user to enforce a water right through a call. The Montana Constitution broadly recognizes that "All persons are born free and have certain inalienable rights", which includes the right to pursue life's basic necessities and seek safety, health, and happiness.[25] Water is one of life's most essential basic necessities, and it does not take much to see that a user that relies solely on a well for water would likely invoke Montana's constitutional protections for relief from compliance with a call.

Finally, it is worth noting that the permitting process itself may alleviate the need for a senior to make a call. To receive a surface or ground water permit from the DNRC, an applicant must demonstrate that an existing right will not be adversely affected. Oftentimes this requires applicants to mitigate effects on senior users. Whether an adverse effect exists is "based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be

[25] Mont. Const. Article II, section 3.

satisfied".[26] Because permitted ground water users are required to first demonstrate that senior users will not be harmed by the development, many of the issues that would have otherwise resulted in a senior attempting to enforce a water right through a call may be addressed through the permitting process. Nevertheless, because the individual exemption is relatively small, a larger permitted ground water well may have a greater effect on the source than a certain number of exempt wells.

Cl0070 1242hhea.

[26] Section 85-2-311, MCA.