



Laura Ziemer
Senior Counsel and Water Policy Advisor

Memorandum

TO: Jason Mohr and Water Policy Interim Committee
FROM: Laura Ziemer, Brian Ohs, Montana Trout Unlimited, and Ben Almy, University of Montana Law School intern for Trout Unlimited.
DATE: December 15, 2017
RE: Trout Unlimited Exempt-Well Legislative Proposal

Trout Unlimited's Exempt Well Legislative Proposal

Summary

Trout Unlimited's exempt well legislative proposal has three prongs:

- An exemption from permitting must meet both the **Water Use Act's and the Montana Constitution's protections for senior water rights;**
- **Protect rural use of permit-exempt wells:** new wells up to 10 acre-feet per year of water withdrawal do not require a permit if used on a tract of record larger than 40 acres, or an area greater than 40 acres contained within a larger parcel; and,
- **Provide for greater water withdrawal and more flexibility than the current rule for new projects or developments:** Allow any number of 35 gpm permit-exempt wells in any project or development proposed on any tract of record that is 40 acres or less, so long as there is a 3:1 ratio of designated buffer area to water-developed tract.

Below, Trout Unlimited provides its rationale for this three-pronged approach, expands on the three prongs, and presents examples of its application.

I. Senior Water Rights are Property Rights Protected by the Water Use Act and the Montana Constitution: Exempt-Well Legislation Must Be Within These Protections.

Water rights in Montana are property rights. They are afforded the protection of the United States and Montana Constitutions just like any other property right. Water rights have value and water users cannot be deprived of their property without due process of law. In 1973, the Montana Legislature instituted the current water rights system by adopting the Montana Water Use Act. §§ 85-1-101 MCA et seq. The Act establishes the statutory framework under which water rights are obtained, administered, and adjudicated. The Act created a permitting system to be administered by the DNRC for all future appropriations of water rights. The primary function of this permit system

is to protect senior water rights from adverse effects by new appropriators and changes in water use. § 85-2-101(4). As the Montana Supreme Court emphasized last year in its ruling on permit-exempt wells, “the Water Use Act’ was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior water rights.” *Clark Fork Coalition, Horse Creek Water Users, et al v. Tubbs*, 2016 MT 229 at ¶ 24 (hereinafter, “*Tubbs*,”)(quoting *Mont. Power Co. v. Carey*, 211 Mont. 91, 98, 685 P.2d 336, 340 (1984)).

Trout Unlimited’s legislative proposal for permit-exempt wells meets both the Water Use Act’s and the Montana Constitution’s protections for senior water rights.

II. Protect Rural Use and Reliance on Permit-Exempt Wells.

The stakeholders to discussions around permit-exempt water use have agreed that dispersed, rural use of permit-exempt wells should be continued under any changes to the law, § 85-2-306(1)-(9) MCA. The DNRC’s *Guidance on Combined Appropriation* explains that wells separated by a distance of 1,320 feet (¼ mile) will not be considered capable of being accomplished by a single appropriation, and should therefore not be subject to water rights permitting. *DNRC Guidance on Combined Appropriation*, Montana Dep’t Natural. Res. Conservation, 4 (12/9/2014). *DNRC Guidance*, 4. This is a good approximation of dispersed, rural uses, and new water uses not part of a new project or development. The ¼ mile spacing is, of course, the length of one side of a quarter-quarter section, or 40 acres.

This guides Trout Unlimited’s first prong of a proposed exempt well standard: use of wells up to 10 acre-feet per year of water withdrawal do not require a permit if used on a tract of record larger than 40 acres, or an area greater than 40 acres contained within a larger parcel.

III. Allow New Water Uses—Without Mitigation or Permits—on 40 Acres or Less through Cluster Development.

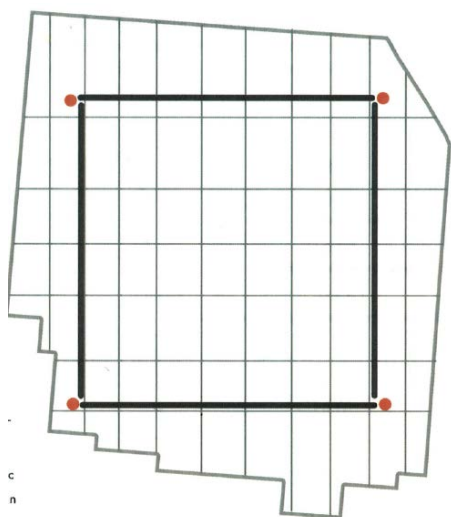
Neighboring Washington State has similarly been working on permit-exempt well legislation in the wake of the Washington State Supreme Court’s “*Hirst*” ruling: in: *Whatcom County v. Eric Hirst et al*, Case Number 91475-3 (October 6, 2016). The *Hirst* ruling by the Supreme Court in Washington, similar to the *Tubbs* decision in Montana, affirmed the protection of senior water rights as property rights and limited the water withdrawals allowed by permit-exempt wells.

In Washington, the legislative proposals have started with the proposition that *no* new water withdrawals are allowed without mitigation, even permit-exempt water withdrawals. The Washington state legislative proposals have come up with a variety of ways to provide for water trading, watershed planning, water conservation, new state funding, and additional water dedicated to off-setting streamflow depletions due to new, permit-exempt water use. Although we have had a lot of discussion within the Water Policy Interim Committee of water exchanges and efforts to provide mitigation water at a basin or sub-basin scale, the approach that Washington State is taking has not proven workable in Montana with our more rural population, and without as much agency experience in promoting water exchanges.

In the absence of a workable, 100% mitigation or off-setting approach as in Washington State, a Montana approach must limit the cumulative impact of multiple, permit-exempt wells in a way that avoids triggering the requirement to mitigate for new groundwater withdrawals through water rights permitting. The Montana Supreme Court's *Tubbs* decision provides direction on where that line is that triggers permitting on water withdrawals. The *Tubbs* decision directs the DNRC to use the original, 1987 interpretation of the exempt-well statute. Under this interpretation, the DNRC requires permitting for (1) two or more exempt wells which are part of a project or development, which (2) withdraw water from the same source aquifer that (3) could have been accomplished by a single appropriation and (4) the combined appropriation exceeds 10 acre-feet per year. *DNRC Guidance on Combined Appropriation*, Montana Dep't Natural. Res. Conservation, 1 (12/9/2014).

The DNRC created the below example on a hypothetical 77-acre parcel to illustrate allowable water withdrawals without triggering water rights permitting:

Current Rule Example



77-acre Subdivided Parcel Example: 40 acre-feet of new water withdrawal.

Under the current DNRC *Guidance Document*, directed by the *Tubbs* Supreme Court ruling, the ¼ mile spacing requirements dictate this map: Each red dot represents a 10 ac-ft per year well; the 77 acre parcel could subdivide and develop 40 ac-ft of water through exempt wells separated by 1,320 feet. The grid represents one-acre lots.

Cluster Development with 3:1 Ratio of “Buffer Area” to Area of New Water Use

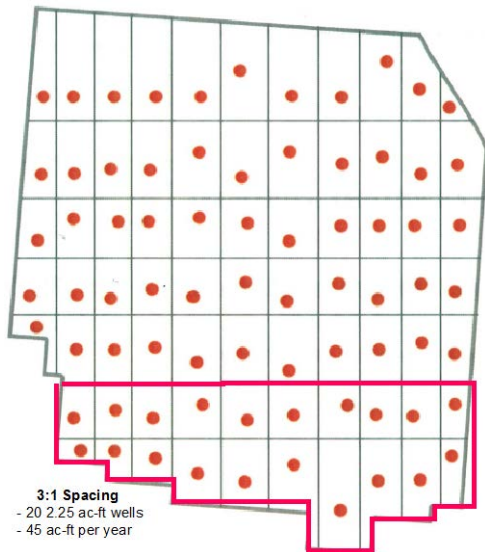
Trout Unlimited proposes a middle ground between the need for protection of senior water rights and the need for economic development and flexibility relying on permit-exempt wells through the vehicle of cluster development. Rather than require a strict spacing, Trout Unlimited's cluster development concept provides flexibility in how new water use is developed:

Allow any number of 35 gpm permit-exempt wells in any project or development proposed on any tract of record that is 40 acres or less, so long as there is a 3:1 ratio of designated buffer area to water-developed tract, consistent with the following requirements:

- a. The County in which the project or development is proposed has an approved plan in place to address aligning designated buffer areas to: (1) minimize noxious weeds; (2) minimize County road construction and maintenance; and, (3) minimize emergency services response times; and
- b. Each subdivided parcel that is part of the project or development has no more than one 35 gpm well with up to 2.25 acre-feet of water withdrawal.

Using the same hypothetical 77-acre tract of record used to illustrate the current DNRC rule, the cluster development proposal would allow more water withdrawal and greater flexibility in how the new water use is developed:

Cluster Development Example, 3:1 ratio



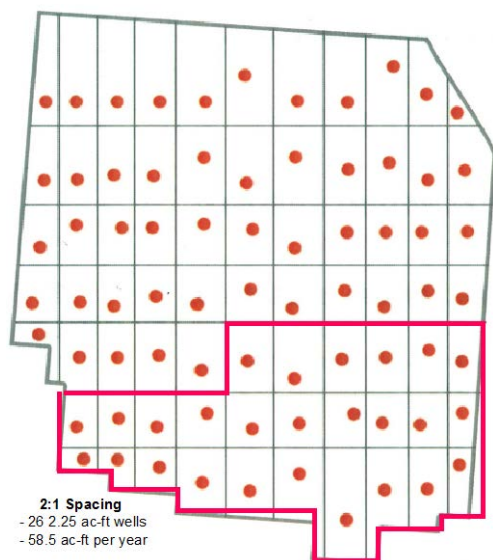
77-acre Subdivided Parcel Example: 45 acre-feet of new water withdrawal.

Each red dot represents a 2.25 ac-ft per year well, enough for a single residence and lawn and garden use on a one-acre lot; the 77 acre parcel could develop 45 ac-ft of water through exempt wells within the highlighted boundary. The subdivided lots outside the boundary are designated buffer area, and would not have permit-exempt wells. This example allows 20, 2.25 ac-ft wells on one-acre lots, with 3:1 ratio of buffer area to area of new water development on the 77-acre parcel.

The designated buffer area between concentrated areas of new water development ensures that the trigger for water use permitting is not crossed by the cumulative impact of new, small, permit-exempt water development. The particular circumstances of each county in Montana are accommodated through the local planning requirement. Each county will determine how to implement the designated buffer area requirement in its plan.

Cluster Development Example, 2:1 Ratio Rejected

A 2:1 ratio of buffer area to area of new water development was rejected. A 2:1 ratio of buffer area to area of new water development is not a viable option because the level of cumulative impact it allows triggers the requirement for water rights permitting. In our 77-acre subdivided parcel example, it allows 58.5 ac-ft per year of new water development, almost half again more than the 40 ac-ft of water withdrawal under the current DNRC rule:



77-acre Subdivided Parcel Example: 58.5 acre-foot of new water withdrawal would trigger water rights permitting.

Each red dot represents a 2.25 ac-ft per year well, enough for a single residence and lawn and garden use on a one-acre lot; the 77 acre parcel would develop 58.5 ac-ft of water through exempt wells within the highlighted boundary. The subdivided lots outside the boundary are designated buffer area, and would not have permit-exempt wells. This example shows 26, 2.25 ac-ft wells on one-acre lots, with 2:1 ratio of buffer area to area of new water development on the 77-acre parcel.

Conclusion

This legislative proposal has three important aspects. First, it fits within the side boards articulated by Montana's Supreme Court for protecting the property rights of senior water users from un-permitted new water development. Second, it protects dispersed, rural reliance on permit-exempt wells, and leaves unchanged the exemption for new water development in rural settings. Third, in new water development relying on a more concentrated use of permit-exempt wells, the proposal does not require a strict, minimum spacing of new wells, but instead provides a more flexible approach of buffer areas between areas of more concentrated well use.