TROUT UNLIMITED

Patrick Byorth
Director of Montana Water, Western Water & Habitat Project

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Exhibit 5

Representative Zachary Brown

Transmitted by electronic mail to: brownformontana@gmail.com

May 10, 2018

Dear Rep. Brown,

I appreciated your taking the time to discuss my perspectives on the process to change water rights with the Department of Natural Resources and Conservation (DNRC). I agreed to summarize my perceptions and offer some conceptual amendments for your consideration in hopes of clarifying the Montana Water Use Act and improving the change process. Over the past twenty-one years, Trout Unlimited's Montana Water and Habitat Program has processed over 30 change applications before the DNRC, providing a wealth of experience on which to base our comments. The primary issues I discuss here focus on the concepts of legal availability and adverse effects, which are often conflated contrary to law. They are separate analyses and play separate roles. Combining the two analyses leads to conflicts, misapplies the law, and frustrates applicants.

The analysis of legal availability is one criterion for the **issuance of a new permit** (Mont. Code Ann. § 85-2-311(1)(a)(ii)). The legal availability analysis asks: *if we assume maximum demands on the source, is there likely water periodically or consistently available for the applicant's new use?* A second criterion for **issuance of a new permit** asks *whether the proposed new water use could cause an adverse effect to another water user* (Mont. Code Ann. § 85-2-311(1)(b)). These are two different criteria, for two different purposes.

LEGAL AVAILABILITY

Under DNRC administrative rules, legal availability is determined by comparing the physical water supply on the source (ARM §36.12.1704) with existing legal demands (ARM §36.12.1705). The construct of the rule makes logical sense, but the application of the rule is fraught with error. The problem lies in the calculation of existing legal demand, which presumes **maximum use** of the full **flow rate and volume** of all ***claimed*** water rights on the source and that all water rights are fully exercised at all times during the entire period of use. The prior appropriation doctrine does not contemplate full use at all times, otherwise there would be no need for a priority date, relative seniority, return flows, or calls.

Further complicating the analysis is that while maximum water **use** is presumed, only averages of water **supply** are presumed. In fact, physical water supply is estimated as "the median of the mean monthly flow rates (calculated by averaging mean daily flows) and volumes for the stream gaging station period of record during the proposed months of diversion at the source of supply in the amount the applicant seeks to appropriate." (ARM §36.12.1702). Comparing an

exaggerated maximum use against an estimated median of a mean of a mean flow is perhaps a useful index of over-appropriation, and is appropriately used to raise red flags that require further analysis. However, this legal availability index is misapplied as an exact quantity of water available for new appropriation.

In addition, in closed basins there is no water legally available, unless there is a specific statutory exception, or for permit-exempt wells. For example, in the Upper Missouri River Basin, appropriations for non-consumptive uses are allowed, as are appropriations for storage during high spring flows. Mont. Code Ann. § 85-2-343. In order to appropriate new groundwater in a closed basin, HB831 (*codified at* Mont. Code Ann. §§ 85-2-360 to 363) created an exception to the rule that water had to be legally available for a new groundwater appropriation, and the statute sets out a pathway for avoiding adverse effects. The legal availability test has no application to a new groundwater pumping permit in a closed basin, where the permit applicant is following the steps to avoid adverse effects under HB831.

ADVERSE EFFECT

Once it is determined whether water can be considered legally available in an open basin, or there exists a statutory exception to the legal availability requirement (e.g. mitigation plan for a new or changed groundwater right in a closed basin), only then does the review move to an adverse effect analysis. Under Section 311(11)(b), this separate and distinct analysis of " . . . adverse effect must be determined 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 satisfied***. . ." (emphasis added).

No clear definition of adverse effect appears in either statute or administrative rules. In *Quigley v. McIntosh*, the Montana Supreme Court articulated adverse effects, or the "no-injury rule," in terms of expansion of use of water beyond historic use that cause injury to junior water users. *Quigley v. McIntosh*, 110 Mont. 495 (Mont., 1940). Two more recent cases illustrate confusion caused by the lack of a legal definition of adverse effects. In *Bostwick II* and *Hohenlohe,* much discussion was dedicated to whether the respective applicants had met their burden of proving to a preponderance of evidence that their proposal would not cause an adverse effect, yet neither the Montana Supreme Court, DNRC, nor the parties apparently fronted a definition. *Bostwick Props., Inc. v. Mont. Dep't of Natural Res.*, 369 Mont. 150, 296 P.3d 1154 (Mont., 2013); *Hohenlohe v. State, Mont. Dep't of Natural Res.*, 357 Mont. 438, 240 P.3d 628, 2010 MT 203 (Mont., 2010). In *Bostwick II,* DNRC focused its adverse effects analysis on surface water depletions caused by groundwater pumping and effects on water users including diminishment of instream flow. *Bostwick II* at ¶12. In *Hohenlohe,* DNRC focused on the applicant's lack of analysis of historic crop consumption and return flow necessary to determine whether adverse effects by expansion of use might occur. *Hohenlohe* at ¶38. In both cases, the district courts found that DNRC had abused its discretion in applying the Section 311(1)(b) criteria for adverse effect, yet DNRC had no clear legislative benchmark on which to determine adverse effects.

The statute that comes closest to defining adverse effect is Section 401(1):

> As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, *if the prior appropriator can reasonably exercise the water right under the changed conditions* (emphasis added).

While certainly not an exhaustive legal review, these authorities suggest an appropriate definition of adverse effects should focus DNRC's analysis on how an action might deprive other water users of the reasonable exercise of their rights within the area of impact. That analysis should not presume an adverse effect based on legal availability. The analysis should not presume that any change in groundwater level or lowering streamflow is an adverse effect. In fact, the Montana Water Use Act specifically states, ". . . there is no presumption that an applicant for a change in appropriation cannot establish lack of adverse effect. . ." Mont. Code Ann. § 85-2-402(1)(a). Applying the legal availability analysis to the adverse effects analysis effectively acts as a presumption of adverse effect in most highly appropriated basins. Legal availability is not a statistically precise number and cannot do more than raise cause for further review. Furthermore, in closed basins, by law, there is no water legally available. The legal availability analysis is superfluous in a closed basin, other than for the few, explicit statutory exceptions, such as for an application to store water during high spring flows. Mont. Code Ann. § 85-2-343(2)(d). Similarly, Mont. Code Ann. §§ 85-2-360 to 363 provide a pathway for avoiding adverse effects for new groundwater pumping in a closed basin, and provide an exception to the rule that water is not legally available in a closed basin.

POTENTIAL REFORMS

Unfortunately, DNRC's practice of conflating legal availability and adverse effects has expanded the question of legal availability beyond its role as a 311(1)(ii) indicator of over-appropriation. Clarification of the purpose and limits of legal availability analyses may be useful:

> (1). . .[T]he department shall issue a permit if the applicant proves by a preponderance of the evidence that . . .
>
> > (ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. <u>Legal availability does not determine adverse effects.</u> Legal availability is determined using an analysis involving the following factors . . .

Mont. Code Ann. § 85-2-311(1)(ii).

Clarifying the purpose of adverse effects analysis in Section 311(1)(b) may also be useful:

> (b) 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. In this subsection (1)(b), adverse effect must be determined 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 not unreasonably interfere with exercise of the water right of a prior appropriator.

Adding a definition of adverse effects to Section 101 could clarify:

(2) Adverse Effect means an unreasonable interference with the legal appropriation of another appropriator through the change in use of an existing water right or a new appropriation.

Mont. Code Ann. §85-2-101.

Finally, the presence of legal availability in the "waiver" of adverse effects causes confusion. The "waiver bill", passed in the 2017 legislature, intended to allow water users, who possess unique knowledge about their water rights, to negotiate with an applicant to avoid adverse effects. If a water user negotiated advantageous conditions, it could waive the adverse effects analysis.

[(9) The department may not conduct an adverse effects analysis on a water right if the water right holder files a written consent to approval of an application for a permit. ~~However, the department shall determine if water is legally available to satisfy the proposed use.~~].

Mont. Code Ann. § 85-2-311(9).

The second sentence struck through, is redundant, repeating the legal availability analysis already required in Section 311(1)(a)(ii). A suggested amendment would delete the second sentence from Subsection 9. While seemingly innocuous, blending legal availability with adverse effects in Subsection 9 only adds confusion. A waiver under Subsection 9 precludes DNRC from analyzing adverse effects on a particular water right claim—not inviting another legal availability analysis. As described above, the legal availability analysis is separate and should not be tied into a waiver of adverse effects. The waiver provision of Section 311(9) does not preclude the DNRC from considering adverse effects on other water right holders on a source. For example, if the DNRC is worried that if one water right holder accepts a payment from an applicant for a new appropriation to by-pass the adverse effects analysis, but the depletion of the source will have adverse impacts on other water users, the DNRC is still obligated to consider those adverse impacts on other users and can either condition or deny the application for a new appropriation, despite the waiver with one water right holder.

CONCLUSION

The permit and change process is critical for managing water in Montana, especially as demands continue to increase and supply diminishes. An efficient permit and change process should be predictable, consistent, and minimize transaction costs. This memorandum identifies an area where the change and permitting process has caused confusion, unpredictability, and inconsistent outcomes while increasing transaction costs. Providing more clarity in the separation of legal availability and adverse effects analyses is an area where inefficiencies might be corrected.