WGMGROUP

Beyond Exempt Wells

Water Rights, the 65th Montana Legislature and the Future of Water Rights Mitigation

by Julie A. Merritt, Water Resources Specialist, WGM Group, Inc.
September 28, 2017

The 65th Regular Session of the Montana State Legislature has come and gone. After all was said and done, five (5) bills directly associated with water rights survived the process and became law. Those were:

- HB 48 – Clarify definition of a water right change
- HB 99 – Limit adverse effects analysis
- HB 110 – Revise laws for filing exempt claims
- HB 337 - Require water reservation report by 2026
- SB 28 – Allow Water Court review of certain DNRC decisions

Two (2) other bills were approved by the Legislature but vetoed by the Governor.

- HB 339 – Revise laws related to exempt appropriations of water
- HB 433 – Prohibit condemnation of agricultural water

Perhaps the bills that survived the legislative process but suffered the Governor's veto are more telling than those that received the approval of both the legislative and executive branches. The passage and subsequent veto of these bills seems to speak directly to the ongoing struggle over management of growth and development and the water use that is an integral to that growth.

House Bill 339 was an attempt to loosen the restrictions on exempt wells after Judge Sherlock's decision striking the "physically manifold" test to determine the existence of combined appropriations. Several agricultural organizations joined the real estate professionals and building industry groups in support of the bill. The Montana Department of Natural Resources and Conservation and several environmental groups spoke out against the bill.

The most common argument during this session and in past sessions against the combined appropriations allowed under current law has been that multiple exempt wells allow large subdivisions to be developed without going through the water right permitting process. As a result, senior appropriators are denied the opportunity to object to the issuance of a new permit and thereby protect their senior rights. That is a valid concern. The answer, some suggest, is for new residential developments to apply for beneficial water use permits or connect to an existing water system if one is nearby.

In open basins, the permitting process is relatively predictable. In the Flathead Basin for example, a water right permit for a residential development can be obtained in a year or less for a reasonably certain cost. In comparison, obtaining a water right permit for a new residential subdivision in a closed basin, which requires mitigation through retirement of an equivalent amount of water (both in voulume and timing), typically takes well over a year and costs are highly unpredicatable. It has proven exceedingly difficult to meet the mitigation requirements for new permits in closed basins.

In the past five (5) years (from 2011 through 2016), seven (7) beneficial water use permits were applied for and issued in closed basins for residential developments (defined as Multiple Domestic or Municipal uses). This is in comparison to 48 permits that have been issued in open basins (33 of those in the Flathead) for the same purposes. Two of the permits in closed basins were able to purchase water from the Bureau of Reclamation for mitigation. The other five (5) achieved mitigation through applications to change existing private water rights. There is no data available for the number of new residential developments that, after exploring the feasibility of obtaining a permit, opted to go the exempt well route.

However, given that development in Gallatin, Ravalli, and Missoula counties, areas with closed basins, has continued at a rapid pace, I would argue that the lack of permits issued in these areas is due to a continued reliance on exempt wells. In the past, development with exempt wells as the water source has contributed to sprawl and allowed continued appropriation of water without the oversight provided by the permitting process. I suggest that new options need to be considered. In particular, I believe we need to examine the water right change process as it relates to mitigation.

Mitigation in water rights means retirement of existing water rights to offset the anticipated depletions associated with a new use. In water rights, a mitigation project must match:

- the Location
- the Amount AND
- the Timing

of the depletions related to your proposed new use.

Meeting all three of these requirements has proven difficult for many applicants. For some, the existence of year-round instream flow water rights make it difficult to meet the 'Timing' requirement when the only water rights available to utilize for mitigation are for seasonal irrigation use. For others, such as housing developments in remote locations, there may be no existing water rights in the area, making it difficult to meet the 'Location' requirement. The following discussion will focus on the timing issue.

The Town of Stevensville and the City of Missoula are two prime examples of recent projects attempting to do the "right thing" and connect new subdivisions to the existing water systems. While both were ultimately successful, the water right process in each case was lengthy, expensive and unpredictable. Both projects proposed to retire existing irrigation rights and leave the water in the stream. The common obstacle was DNRC's estimation methodology that identified possible depletions in the Bitterroot River in the wintertime. These projected depletions

were deemed unacceptable because Montana Fish, Wildlife and Parks (FWP) has a year-round instream flow water right in the Bitterroot.

One difficulty both of these applications faced may be alleviated by HB 99. In both the Missoula and Stevensville cases, FWP was prepared to agree to the permit and mitigation plan, due to the small size of the reductions in winter time flows that were projected to result from groundwater development. However, there was no provision in the law that would allow FWP to simply accept the estimated depletions despite the fact that FWP's concerns were addressed. Under HB 99, existing water right holders, such as FWP, will be allowed to consent to approval of change and permit applications even when the DNRC's estimates indicate the possibility of adverse effect. In situations similar to the recent applications in Missoula and Stevensville, this provision would allow the parties to negotiate an agreement with FWP and move forward with the permit and mitigation process.

Beyond allowing existing users to determine for themselves if a potential depletion constitutes an adverse effect, there are fundamental questions about the DNRC's methodology for estimating surface water and groundwater depletions. The DNRC's position has been that if a proposed change of use alters the pattern of direct flow or return flow such that there is a ***calculable*** effect on an existing water right, then the change cannot be approved. In other words, the impact need not be observable or measurable in real life, it need only be theoretical.

Some knowledgeable professionals would describe the estimation methodology that is currently employed as crude, at best. This is not due to a lack of skill on anyone's part rather, there is an almost complete lack of information available to achieve a high level of precision. Yet negative determinations are made when calculated depletions are as small as 30 gpm. Viewed in the context of the flow of the Bitterroot River, a flow of 30 gpm is difficult to discern. This appears to be at least one of the major obstacles to successful permit and mitigation applications and because mitigation is so difficult to achieve, developers will continue to find ways to circumvent the permit and change process.

During this session, Rep Zach Brown had proposed HJ 3, a request for a study of the water right change process. While this bill did not make it out of committee, the change process may be a topic that the Water Policy Interim Committee would like to study of its own accord. A substantial amount of time and effort has been spent over the past two sessions attempting to modify the exempt well rules, and as discussed above, the change process is very relevant to the exempt well controversy.

It may be time to approach this problem from a different angle. Judging by the large number of permits that have been issued in the Flathead basin over the last five (5) years, it appears developers are willing and able to go through the process to obtain permits in open basins. It seems likely that developers would be more willing to comply with the permit and mitigation process in closed basins if it were less time consuming, less expensive and, most importantly, more predictable.

A more functional regulatory process has the potential to benefit senior water right holders in multiple ways. For one, the opportunity to protect senior water rights is more accessible when water rights for new developments go through the permitting process. In addition, the value of existing rights is protected and made more predictable when the regulatory process works more smoothly. The market for buying and selling water rights can evolve in the proper regulatory environment. When the process prevents changes from being approved, the development of a market is stymied.

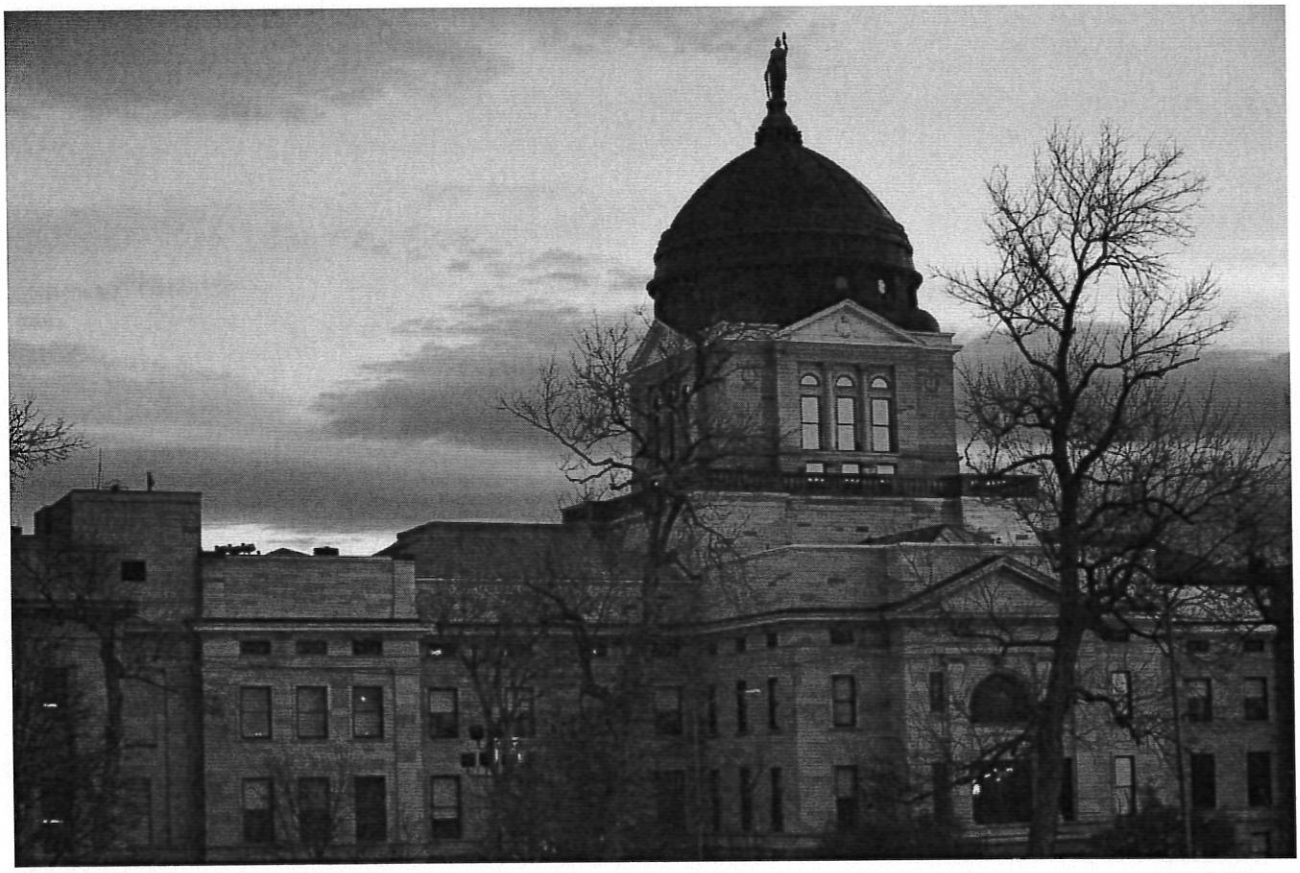
By changing the focus from the "exempt well problem" to the "change problem", we can begin looking at ways to encourage the use of the permit/mitigation process. A more accurate and realistic method for determining estimated depletions is needed along with possible reconsideration of the importance of altered return flow patterns. While the permit and mitigation process will always be more costly than the use of exempt wells, if the outcome is more predictable, then it is more likely to be accepted and employed. As a result, senior water users will be protected and the value of their existing rights is likely to be enhanced.

http://helenair.com/news/state-and-regional/concerns-raised-over-whether-some-proposed-state-cuts-are-legal/article_116370cc-27e8-5b96-9088-6dc3c98c3e03.html

TOPICAL

Concerns raised over whether some proposed state cuts are legal

HOLLY K. MICHELS holly.michels@lee.net Sep 30, 2017 Updated Oct 2, 2017



The Montana State Capitol building in Helena.

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Some budget cuts recommended by the governor's office to reduce spending across nearly all state agencies may have legal conflicts or put state contracts at risk.

A report from the Legislative Fiscal Division on Friday said while most proposed cuts fall in line with legal requirements, some raise concerns, either through conflict with state law, the Constitution or contracts the state has with entities like the privately run prison in Shelby.

The report comes just less than a week before a group of lawmakers gather in Helena to make their own recommendations on state budget cuts required to make up for the state bringing in less revenue than expected. While the amount of money the state brings in from taxes is still increasing, it's at a rate less than estimates adopted by the Legislature. In the fiscal year that ended this summer, the state collected $75 million less than expected. Some predict that figure could be $131 million less than expected in the current fiscal year, which started in July, and even more the following year.

Under state law, when revenues fall short the governor is authorized to make reductions of up to 10 percent. The governor has the authority to dictate cuts within agencies he oversees, but not led by officials that are elected or appointed by the Board of Regents. Those agencies' budgets will be reduced by the average amount of other agencies, and the cuts are to be determined by the

elected or appointed officials. At this point, the cuts still are just proposed, but could become real as soon as the end of next week, barring Gov. Steve Bullock calling a special session to bring back lawmakers to explore raising taxes to make up some of the difference.

Ronja Abel, a spokesperson for the governor's office, said Friday the office will review the comments over the weekend and looks "forward to solutions being offered by the Legislative Finance Committee next week."

Some of the legal concerns raised include reductions within the Department of Public Health and Human Services, where one proposed cut would eliminate health care case management for foster children in Missoula, Cascade and Yellowstone counties. That could make the state not compliant with a federal act to improve outcomes for children in foster care.

If the Department of Environmental Quality eliminates an employee who works in the opencut mine permitting process, it could put the state at risk of missing deadlines for processing permits.

The Department of Justice has proposed to close the state crime laboratory in Billings, but opening the lab is required by state law.

Within the Office of the State Public Defender, a proposed reduction would eliminate the use of contract attorneys, something that office said "may cause speedy trial issues and disruption to the judicial system." If the office cannot provide adequate representation, it may be in conflict with state law and federal and state constitutional rights.

To cut spending in the Department of Corrections, officials proposed several cuts to not implement laws passed by the most recent Montana Legislature. That includes funding for six new pre-sentencing investigators. Unless those laws are amended, the department must comply with them, Julie Johnson, staff attorney for the Legislative Services Division, wrote.

The Office of Public Instruction is led by an elected official, Elsie Arntzen, and is not an agency where the governor's office can dictate cuts. The office offered up cutting combined block grants to school districts by $2.8 million, but the grants are written into state law. To make that reduction, the Legislature would need to vote to allow it.

Some local school funding, such as basic payments to districts and special education funding are explicitly exempt from cuts, but Johnson noted even some non-exempt funds have similar protections to the block grants. That includes things like transportation reimbursements. She noted it may be difficult for the office to make its targeted cuts in that area without Legislative approval.

The analysis found the Montana Historical Society has been asked to reduce general fund spending in two of its programs by more than 10 percent — 13.8 percent in the museum program and 48.8 percent in its publication programs in this fiscal year. Next fiscal year, those numbers jump to 18.8 percent and 50.5 percent.

There also were several issues with contracts noted.

The Department of Corrections has proposed reducing the rate it pays the operators of the private prison in Shelby, but if both parties don't agree that contract could be breached.

Next Wednesday and Thursday the Legislative Fiscal Committee meets and must make recommendations to Bullock, a Democrat, about the proposed cuts. After the governor receives the recommendations, he can start making cuts. He also could call a special session, though it's unclear if the Republican-majority Legislature has any appetite for tax increases. The longer it takes to take action, the deeper cuts could end up being as agencies continue to spend under their existing budgets.

Holly Michels

TEMPORARY
PARKING PERMIT

Trailer Type	**2009 Sprinter 30' camper**
Name	**Dave Matoon**
Address	**727 Granite Ave**
Phone #	**(406) 424-8629**
Date(s) Valid	**October 5-9, 2017**
Permit Number	**2017-028**

Larry J Bonderud MAYOR

CONDITIONS OF THIS PERMIT:

1. *Valid ONLY for date(s) indicated.*
2. *Must be displayed while parked at all times.*
3. *The acceptance of this permit relieves the City of Shelby of any responsibility for damages to or loss of vehicle, its contents or accessories from any cause whatsoever.*

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CITY OF
SHELBY
MONTANA

CITY OF SHELBY
MONTHLY ANIMAL CONTROL REPORT

Sept. (Month) 2017 (Year)

		Dog - Cat
Animal Control Calls and/or Complaints		
City Hall or Public Works	6	5 - 1
Sheriff's Office	11	11 - 0
On Patrol	13	9 - 4
Fees Collected by Animal Control Officer		
Destroyed- Animals brought in	Ø	
License	30.00	
Pound	120.00	
Rabies Shot	40.00	
Pound Activity		
Animals in pound at end of last month	3	3 - 0
Impounded +	2	
Destroyed - Animals from pound -	0	
Destroyed - Animals brought in +	0	
Released/Returned to owner -	1	
Total in Pound Month End - - - - - - - - >	4	2 - 2
Dead Animals		
Marias Vet Clinic	0	
Other (list where picked up):		
Skunk - 12th Ave S	1	
Vehicle Log		
Gallons of Gas	17-02	
Mileage - current month reading	89850	
Mileage - previous month reading	89585	
Total Mileage	265	
Warnings and/or Citations		
Verbal Warnings	10	
Written Warnings	4	
Citations Issued	1	
Licenses Issued		
Month	~~367~~ 5	
Year to Date	367	

Animal Control Officer

cc: City Superintendent
City Council (deliver to City Hall 1st of month)
Animal Control file

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