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Memorandum

Date: May 27, 2008
To: Joe Kolman, Water Policy Interim Committee
From: John E. Bloomquist
Subject: Application of M.C.A. §85-2-401

I. INTRODUCTION

In response to Sen. Perry's request at the April, 2008 meeting of the Water Policy Interim Committee, I provided the following analysis of the application of M.C.A. §85-2-401 to water permitting decisions of the DNRC, and DNRC's proposal to modify H.B. 831 to require mitigation for all "net depletions" to surface water resulting from new groundwater appropriations in so-called "closed basins."

II. DISCUSSION

A. History of M.C.A. §85-2-401

M.C.A. §85-2-401 has been a part of the Montana Water Use Act since the statutory provisions were implemented by the legislature in 1973. See, Sec. 27, Ch. 452, L. 1973, codified in R.C.M. §89-891 (1973). The provision of M.C.A. §85-2-401 discussed at the April, 2008 WPIC meeting states as follows:

"(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 stream flow 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.**"

M.C.A. §85-2-401(1) (emphasis supplied).

Subsection (1) is the codification of the basic principles of the prior appropriation doctrine. First, in times of shortage of water, the first in time is the first in right. In other words, a senior water right is entitled to curtail or limit junior diversions if the senior user is not able to utilize the senior water right due to junior diversions and the senior is in need of water. Second, priority of appropriation does not allow a senior water right holder to “command the source” to prevent junior appropriations, provided the senior appropriator can reasonably exercise the senior right under any changed conditions on the source (i.e. groundwater or surface water).

B. Application of §85-2-401(1)

The prohibition on allowing a senior water right holder to “command the source” simply to prevent a change in the condition of water occurrence has been recognized by DNRC in different settings. The most common circumstance has been in groundwater permitting proceedings involving objectors who may complain of lowering of groundwater levels, or a concern over a loss of artesian pressure in other settings. DNRC decisions have affirmed the policy of §85-2-401(1) in groundwater settings by authorizing junior groundwater appropriations which may result in lowering of groundwater levels, or result in a reduction of artesian pressure. Montana, as well as other western states, have recognized this principle of prior appropriation which requires a senior user to maintain a reasonably efficient diversion system which precludes the senior from commanding an entire source simply to maintain a convenient diversion.

In basic terms, in groundwater settings, a senior water well owner is not entitled to maintain a shallow well in a deep aquifer, and thereby prevent junior users from appropriating from the same source, if the senior’s shallow well would “command the source.” In such a setting, the shallow well may not be viewed as a protectable means of diversion if the result is the entire aquifer source is tied up simply to allow the shallow well owner to maintain his/her diversion. In artesian well settings, the same principle has been applied to prevent senior users who enjoy artesian pressure from monopolizing an entire source simply to maintain a convenient diversion system. In surface water settings, the principle has been applied to prevent a downstream senior water user from commanding the whole or a substantial portion of a stream merely to facilitate the taking of a fraction of the flow to which the senior is entitled.

The protections afforded senior water right holders to groundwater levels or stream flow is not absolute under the prior appropriation doctrine. As embodied in 85-2-401(1), priority of appropriation does not equate to the right to prevent a change in the occurrence of water availability caused by junior users, if the prior appropriator can reasonably exercise the senior right under the changed conditions present from the allowance of the junior users.

The policy of 85-2-401(1) is also consistent with the State of Montana’s policy to maximize the beneficial use of water, M.C.A. §85-2-101(3), and the Montana Constitution. Under the Montana Constitution, all waters of the State are the property

of the State for the use of its people and are subject to appropriation for beneficial use as provided by law. Mont. Const. Art. IX, Sec. 3(3).

The provisions of 85-2-401(1) should not be applied or interpreted to result in any senior water right being deprived of water provided two conditions exist. First, the senior must have a reasonably efficient diversion system, and second the senior must be exercising the senior right for beneficial use. If these conditions are met, changes in water occurrence may be legitimately precluded if the senior's water right cannot be reasonably exercised under the changed conditions on the source caused by the junior appropriator.

C. Application of §85-2-401(1) and “depletion” of surface water occasioned by new groundwater developments.

In the context of H.B. 832, basin closure statutes, and the discussion of WPIC during the interim, regarding the impacts of groundwater developments on senior water rights, 85-2-401(1) should provide continuing guidance to the legislature and DNRC in addressing the issue of “depletions” attributable to new groundwater developments.

As to senior groundwater users, a new groundwater development may be objectionable if the new well depletes aquifer levels and if the senior has a reasonable diversion system (i.e., a well that sufficiently taps the aquifer), and the senior well user cannot reasonably exercise the right when the junior user is pumping from the aquifer.

However, as provided above, under 85-2-401, if the senior groundwater user can still exercise the senior right in a manner which maintains the historic use of the senior's diversion (i.e., well), in spite of any depletion to aquifer levels caused by the new well, the junior well should be authorized. Also, under 85-2-401(1), if the senior well user is only tapping a fraction of the aquifer (i.e., a shallow well), and the junior well is merely lowering the water table, the senior well owner may be precluded from complaining of the “depletion” as the senior is not maintaining a sufficient diversion system.

As to senior surface water users, the same rationale should apply in determining whether “depletion” from the new groundwater development should be objectionable or not. As this committee has heard on several occasions, groundwater in most settings is hydrologically connected to surface water somewhere at sometime. However, merely because “depletion” to surface water may occur, or may be a mathematically calculable result of a new groundwater development, does not in and of itself mean the senior surface water right holder can prevent the new groundwater development.

Again, if the senior right holder can reasonably exercise the right under any changed condition on the stream caused by “depletion” occasioned by the pumping of the new groundwater development, the well should be allowable. However, if the senior right holder is unable to exercise the senior water right when needed because the depletion caused by the new groundwater development affects the senior's use of surface water, the new well should be precluded, unless the senior's use is mitigated or

off-set in some other means. This principle appears to be embodied in H.B. 831 as passed in 2007.

What the foregoing discussion of the principles the prior appropriation doctrine as embodied in 85-2-401(1) demonstrates is that mere depletion in and of itself is not objectionable by senior water right holders. If that was the case, there would be no junior users in any streams or in any aquifers as the first appropriator could command the entire source simply for their own use. Such is not the law under prior appropriation principles or the Montana Water Use Act.

D. Adequate protections are afforded senior water right holders under §85-2-401(1), the water permitting criteria, by priority of appropriation, and under the basin closure statutes for any real effect which may occur from new appropriations on a source of supply.

Under the prior appropriation doctrine, and Montana law, senior appropriators are provided several levels of protection associated with junior appropriators. Those protections include the following:

I. M.C.A. §85-2-401:

As provided for above, 85-2-401(1) embodies a basic principle of the prior appropriation doctrine which allows prior appropriators to prevent junior appropriators from affecting the occurrence of water in the source of supply when development or exercise of the junior appropriation affects the senior's ability to reasonably exercise the senior right under any changed conditions caused by the junior. This protection has been unchanged by H.B. 831, or other legislative amendments to the Water Use Act since it was originally enacted.

2. M.C.A. §85-2-311 (permit criteria):

Under 85-2-311, any applicant for a new water appropriation (*i.e.*, water use permit) has the burden to prove all elements of the permit criteria. Chief among these is the element of demonstrating no adverse affect on senior appropriations. Under 85-2-311(1)(b), an applicant must demonstrate that the applicant's use of water will be controlled so that the water right of a prior appropriator will be satisfied.

Stated another way, the applicant must show that use of the new appropriation will not deprive a senior user of water which the senior would otherwise have available at a time when the senior user is able to place the senior right to beneficial use. This provision, when read in conjunction with 85-2-401(1), reflect the underlying principle of the prior appropriation doctrine which allows new uses of water from a source of supply, provided the senior user can reasonably exercise the senior water right when the same is required for beneficial use.

3. Priority of Appropriation:

As recognized in 85-2-401(1), and Montana common law, the fundamental rule of Montana water law remains first in time, is first in right. This rule of priority is an incident of the property right afforded any water right holder. The rule allows the senior user to curtail or prevent junior appropriators from exercising their rights when the senior is in need of water during a time of shortage, and cessation of the junior use will supply the senior appropriator with water to satisfy the senior's needs. Mechanisms to enforce the senior's rights are afforded under M.C.A. §§85-5-101 *et. seq.* (water commissioner appointment and administration), and M.C.A. §85-2-406 (District Court jurisdiction over water distribution controversies).

4. Basin Closure Statutes:

The basin closure statutes further protect senior water rights in certain basins by preventing certain applications for new permits pending final adjudication by the Water Court of existing water rights in those basins. Further, as amended by H.B. 831, groundwater applications which result in net depletions which cause adverse effect to a senior user are not allowed, unless the net depletion resulting in adverse effect is otherwise mitigated. See, M.C.A. §§85-2-360, 85-2-362.

H.B. 831 as presently codified, to some extent, recognizes the basic prior appropriation principle embodied in 85-2-401-(1) that mere "depletion" is not in and of itself adverse effect. DNRC's proposal to require mitigation to offset all "net depletion" conflicts with the direction of H.B. 831 in this regard, and further conflicts with the prior appropriation principles reflected under 85-2-401(1).

III. CONCLUSION

Senior water right holders (whether for groundwater or surface water) have several levels of protection under Montana law designed to protect those rights from interference by junior uses or new uses. Included among these protections is the ability to prevent changes in the water occurrence in a source of supply by new uses, if that change interferes with the reasonable use of the senior right.

However, as recognized by 85-2-401(1), the senior right is not absolute, and cannot be used to command an entire source of water if the senior right can still be reasonably exercised even with the allowance of junior uses on the source.