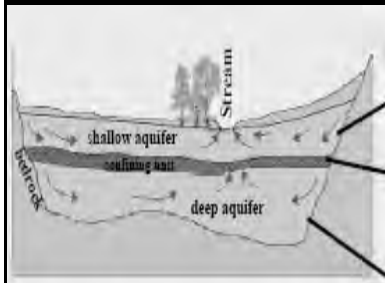


Water Policy in Montana

A Report to the 60th Legislature
of the State of Montana
October 2006



Prepared by Krista Lee Evans
Legislative Research Analyst

Cover photo credits

from top to bottom

Box 1

Deep Creek after restoration

Photo courtesy of the Montana Department of Environmental Quality

Box 2

Water monitoring

Photo courtesy of the Montana University System Water Center

Box 3

Ground water, surface water connectivity

Graphic by the John LaFave, Montana Bureau of Mines and Geology

Box 4

New well

Photo courtesy of the Montana University System Water Center

Box 6

St. Mary River siphon

Photo by Mike Dailey

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1. Introduction—Environmental Quality Council Study Subcommittee Study—A Review of the Interim

The Environmental Quality Council (EQC) is a 17-member, interim committee of the Montana Legislature. At the first EQC meeting of each interim between legislative sessions, the EQC members discuss the study resolutions that have been assigned to the EQC by the Legislative Council as well as issues raised by members of the EQC. After reviewing and discussing the issues, the EQC determines the interim work plan by analyzing issues and their complexity, committee resources available, staff resources available, and financial resources available. The EQC then ranks the studies and the member-requested issues and determines how the EQC will address the workload throughout the interim.

For the 2005-06 interim, the EQC decided to split some of the issues into subcommittees appointed by the co-chairpersons. The "Study Subcommittee" was assigned the task of looking into various water policy issues.

The water policy duties of the EQC that are set forth in 85-2-105, MCA, are paraphrased below.

1. Advise the Legislature on the **adequacy of Montana's water policy.**
2. Advise the Legislature on **important state, regional, national, and international developments** that affect Montana's water resources.
3. Oversee **policies and activities of Executive Branch agencies** and other state institutions that affect Montana's water resources.
4. Assist with **interagency coordination** related to Montana's water resources.

5. **Communicate with the public** about water policy and water resources.
6. Analyze and comment on the **State Water Plan**, when prepared by the Montana Department of Natural Resources and Conservation (DNRC).
7. Analyze and comment on the **Renewable Resource Grant and Loan Program** report.
8. Analyze and comment on **water-related research** undertaken by state entities.
9. Analyze, verify, and comment on the information in the **Water Information System of the Natural Resource Information System**.
10. Report to the Legislature.

Background

Water quality monitoring, assessment, and improvement (TMDLs)

Water quality monitoring, assessment, and improvement (TMDLs). The 1997-98 EQC recommended that the next EQC continue to provide oversight of the Montana Department of Environmental Quality's (DEQ) implementation of House Bill No. 546, a bill passed in 1997 that addressed water quality monitoring, assessment, and improvement, including total maximum daily loads, or TMDLs. U.S. District Court Judge Molloy has issued an order that requires the U.S. Environmental Protection Agency (EPA) to approve or establish TMDLs for each pollutant that impairs or threatens a water quality limited segment on the state's 1996 list of impaired and threatened water bodies by May 5, 2007. The DEQ is prohibited from issuing new permits or increasing permitted discharge for permittees to a water quality limited segment under the Montana Pollutant Discharge Elimination System (MPDES) permitting program until all necessary TMDLs are developed. The timelines affecting the DEQ and the completion of TMDLs were extended to 2012 by House Bill No. 89 in the 2003 Legislature and were subsequently extended by the court to 2012.

Water Rights in Montana revision

Water Rights in Montana revision. *Water Rights in Montana* is a primer for citizens that addresses frequently asked questions regarding water rights. This primer was revised last interim. Montana's water laws have been amended during the four legislative sessions since 1997—fairly significantly during the 2005 session. Because the guide is general and amendments to Montana law have been fairly narrow, the guide continues to be a generally accurate and useful document. However, new questions have arisen, and the laws have been amended. Last interim, the EQC coordinated with the DNRC to publish one booklet rather than two separate booklets as had been done in the past.

Surface water/ground water interaction

Surface water/ground water interaction. This was a member-defined issue regarding the interaction between surface water and ground water. There have been numerous lawsuits recently regarding ground water use in closed basins and the impacts that this ground water use may be having on surface water rights. A bill in the 2005 session attempted to address this issue but eventually failed. The DNRC has committed to working with the interested and affected parties to review Montana's statutes and suggest any changes.

Domestic well exemption for the filing of a water right

Domestic well exemption for the filing of a water right. This is also a member-defined issue regarding current law that states that a water user who drills a domestic water well that produces less than 35 gallons a minute and uses less than 10 acre-feet in a year is not required to file for a water right. A water user with this type of water well must instead file a certificate of completion so that the well is on record with the DNRC. There is some concern that with development in Montana, these types of wells may be having an adverse impact on existing water rights that goes against the prior appropriation doctrine. If water users with wells of this capacity were required to file for a water right, then the process for objecting to the water right that currently exists in statute would apply.

**Water
adjudication
chronology**

Water adjudication chronology. During the 2003-04 interim, the EQC developed a detailed chronology of water adjudication in Montana. Since the study was completed, there has been significant actions taken in Montana's water adjudication, and the Subcommittee felt that it would be appropriate to update this chronology with recent actions by the Legislature, the DNRC, and the Water Court.

**St. Mary Canal
project**

St. Mary Canal project. The St. Mary Canal in Northern Montana is in dire need of repair. Significant funds were directed toward this project during the 2005 session. The Subcommittee recognizes that federal funds will be necessary to complete the renovation of the project. Because of the significance of the St. Mary Canal to the Hi-Line of Montana, the Subcommittee would like to receive updates and briefings on the condition of the various aspects of the project and planned actions.

The Study Subcommittee Work Plan provided that the Subcommittee would accomplish the following elements:

- Receive an update on progress of TMDLs in Montana
- Revise *Water Rights in Montana* handbook
- Schedule work group meetings to determine findings and recommendations
- Coordinate the organization of a work group to address surface water/ground water statutes
- Provide background information regarding case law, statutes, and recent legislation with regard to surface water/ground water interaction
- Review domestic well exemption background, including statutes and past practice, implications if statutes were changed, and, if not the existing volume and flow rate, then what numbers are more appropriate
- Update water adjudication chronology

- ❑ Receive updates on St. Mary Canal project
- ❑ Review and make final decisions regarding findings, recommendations, and any legislation by the work groups presented to the Subcommittee
- ❑ Submit for full EQC review, rejection, or approval findings, recommendations, and any legislation

Review of the Interim

To carry out the work plan that the EQC Study Subcommittee adopted, the Subcommittee outlined the goals and tasks necessary to complete the trust lands study, in addition to its other responsibilities, by September 15, 2006. The Subcommittee made an effort to include an opportunity for public comment regarding trust land management and invited concerned trust beneficiaries to be part of the discussion. The Subcommittee also allowed for public comment on issues that were not covered on each meeting's agenda. The Subcommittee's study process throughout the interim is outlined below.

Nature and Scope of the EQC Study Subcommittee Trust Land Administration Study

The Montana University System campuses are the beneficiaries of five separate land grants given by Congress at the time of statehood. The common schools are recipients of similar grants as well as the School for the Deaf and Blind, Pine Hills School, and the Veterans Trust. The Legislature has allowed the DNRC to assess fees from the earnings realized from these trust lands to cover the expenses of administering these lands. Over the past decade, the legality of these assessments has come increasingly into question. This issue was discussed in detail prior to the 2005 session, and a bill draft was written. However, the draft was never introduced.

The issues before the Study Subcommittee varied from basic oversight and information gathering to updating existing publications and educational materials and discussing surface water/ground water interaction in detail before deciding whether or not to proceed with work group recommendations.

Because of the number of water policy-related issues, the Subcommittee chose to address many of the issues related to water policy, with work groups conducting a majority of the research and reporting back to the Subcommittee.

The primary issue that was submitted to a work group was whether or not the statutes that provide for closed basins need to be amended to adequately address surface water/ground water issues in those basins. The surface water/ground water work group was organized by the DNRC because it has a vested interest in the outcome of any statutory changes and is responsible for managing water rights in Montana. The work group met often throughout the interim and usually had a good representation of various interest groups that would be affected by potential legislation. Over the course of the interim, interest groups came and went from the process.

Environmental Quality Council Study Subcommittee Interim Study Process

September 15, 2005

- Update on TMDLs in Montana
- Approval of work plan

January 26, 2006

- Review *Water Rights in Montana* revision
- Surface water/ground water work group report
- Review staff paper related to surface water/ground water case law and statutes

- Update on St. Mary Canal project
- Review work plan. Make changes if necessary.
- Identify areas where more information is needed
- Public input

March 16, 2006

- Surface water/ground water work group report
- Domestic well exemption panel discussion
- Review updated water adjudication chronology
- Review and discussion of any findings, recommendations, or proposed legislation
- Review of progress related to specific issues identified in the work plan
- Review work plan. Make changes if necessary.
- Public comment

May 18, 2006

- Final review and decision, prior to public comment, on bill draft regarding surface water/ground water work group recommendations
- Update on St. Mary Canal project
- Review and discussion of findings, recommendations, or proposed legislation
- Public comment

June 1, 2006

- Send out findings, recommendations, and draft study report for public comment

July 3, 2006

- Compile and distribute comments on draft documents to Subcommittee members

July 17, 2006

- Review public comment regarding draft findings, recommendations, and draft study report
- Last date to revise draft reports and concepts for proposed legislation

September 11-12, 2006 (EQC meeting)

- EQC final decision on water policy-related findings, recommendations, and any legislation
- Selection of bill sponsors if necessary. Development of strategy.
- Briefing on potential legislative proposals (if any) related to Subcommittee topics

2. Findings and Recommendations

Water quality monitoring, assessment, and improvement (TMDLs)

Findings:

1. The DEQ is proceeding in an organized and efficient manner to complete all TMDLs in Montana.
2. TMDLs must be done in a way that encourages on-the-ground implementation of the watershed restoration plan once the TMDL is completed.
3. It is important that the DEQ be as efficient and effective as possible when working with stakeholders.
4. Stakeholder involvement is critical to implementation of TMDLs.
5. The DEQ is currently operating under the conditions of a consent decree and a court order that require reassessments of all water delisted from the 1996 303(d) list by July 2006 and completion of all TMDLs by 2012.
6. A TMDL is a component of a watershed restoration plan.
7. It is important to complete as many TMDLs as possible while at the same time developing the "Phase I" elements and tools, including reassessment of waters delisted from the 1996 list, to facilitate completion of all TMDLs by 2012.
8. Field work, including site visits and sampling, has been completed for the reassessment requirement. Analysis of the

field data and completion of the reassessment must be finalized by July 2006.

Recommendations:

1. The DEQ should continue to use as many resources and programs as possible in a coordinated way to facilitate TMDL completion without unduly burdening ancillary programs.
2. The DEQ should work to complete "Phase I" of the TMDL program as quickly as possible while ensuring accuracy and accountability.

Water Rights in Montana revision

Findings:

1. Water rights and the adjudication of water in Montana are high profile issues.
2. With the passage of House Bill No. 22 in the 2005 session and the resulting water right bills being sent out in January 2006, there are many water users with questions regarding water rights and processes associated with obtaining and changing water rights and other water right issues.
3. It is critical that the water users of Montana fully understand the nature and value of their water rights.

Recommendations:

1. Revise the *Water Rights in Montana* handbook, in a cooperative manner with DNRC, to include changes made to water right laws in the 2005 session and any rule changes.
2. Distribute the revised handbook as quickly as possible through DNRC field offices, the Montana Water Center, and

the Legislative Environmental Policy Office to water users who need or want the information.

Surface water/ground water interaction

Findings:

1. Montana, as do other western states, manages and distributes water based on the prior appropriation doctrine.
2. Surface water/ground water interaction appears to be most contentious in closed basins.
3. Surface water/ground water connectivity is a very emotional, complex, and diverse issue.
4. The presence or absence of a connection between surface water and ground water in basins in Montana could significantly affect the ability to develop new water rights in closed basins.
5. The measurement of adverse effect, as provided in the prior appropriation doctrine, is an important element in determining whether a new appropriation may be allowed by the DNRC.
6. It is important to work with all interested parties if a solution to concerns or problems regarding surface water/ground water connectivity is going to be addressed in a way that will not harm senior water right holders.

Recommendations:

1. The DNRC work group should continue to work to try to find a consensus solution to address surface water/ground water connectivity concerns in closed basins.

2. The EQC should explore whether requesting a study resolution to address this issue is reasonable or feasible.

Domestic well exemption for the filing of a water right

Finding:

1. Any changes to the <35 gallons per minute/<10 acre-feet domestic well exemption should be done with caution because it would affect many people and could have an impact on commercial and residential development in Montana.

Recommendation:

1. None at this time.

Water adjudication chronology

Finding:

1. The water adjudication chronology, initially developed in 2004, is an important source that outlines where the adjudication program has been and the steps that it has been through.

Recommendation:

1. Update the chronology as time is available and make it available on the EQC website.

St. Mary Canal project

Findings:

1. Rehabilitation of the St. Mary Canal project is critical to the Hi-Line of Montana.

2. This project provides not only irrigation water crucial to maintaining the economy of this region, but it also provides water for municipal purposes and directly benefits recreation and fish and wildlife in the area.

Recommendation:

1. Send a letter to the Montana Congressional Delegation to encourage and request support for federal funds directed toward the St. Mary rehabilitation project and any congressional authorization that may be necessary to ensure a timely response to the serious issues associated with this project.

3. Water Quality Monitoring, Assessment, and Improvements (TMDLs)¹

The Study Subcommittee received updates from the DEQ on the progress of TMDL completion in Montana. The update covered funding, program reorganization, and progress toward completion of TMDLs in Montana.

The Montana TMDL program is unique and complicated because the program is operating under three lawsuits and a consent decree. Because of a lawsuit in the 1990s, the 1996 303(d) list is the list of waters that must have TMDLs completed. In addition, the Montana Legislature passed a law that required sufficient and credible data requirements for a stream reach to be placed on the 303(d) list. The DEQ is in the process of reassessing the streams from the 1996 303(d) list to determine whether or not they meet the sufficient and credible data requirement of Montana law.

The Montana TMDL program is unique and complicated because the program is operating under three lawsuits and a consent decree.

The vast geographic size of Montana, in comparison to other states, also adds to the uniqueness of the program. Montana has single watersheds that are as big, if not bigger, than some eastern states. The state also has a diverse landscape from the east side of the state to the west side of the state. The water bodies are different, and the types of causes of impairments are different.

Montana is at the headwaters of the Missouri River and the Columbia River Basins, shares a border with a foreign country, has seven Indian reservations within its borders, and has two significant wilderness areas. This adds complexity to the stakeholders involved with and showing an interest in the TMDL process. The

¹Information obtained from presentation by George Mathieus, Bureau Chief, Water Quality Planning Bureau, Montana Department of Environmental Quality, September 15, 2005, Study Subcommittee meeting.

DEQ stated that it is striving to balance research time with the efficiency and timeliness of completing the TMDLs. The DEQ's primary goals are to meet EPA criteria and to ensure that water quality standards are met and maintained.

The "TMDL lawsuit" is entitled *Friends of the Wild Swan v. EPA*, No. CV-97-35-M-DWM (D.C. Mont. 1999) The State of Montana (DEQ) intervened in that lawsuit in 1997. A second lawsuit was filed in 2002 challenging EPA's approval of Montana's 2000 and 2002 lists of impaired waters. The second lawsuit is entitled *American Wildlands v. EPA*, No. CV-02-197-M-DWM (D.C. Mont. 2004). The State of Montana did not intervene in the second lawsuit.

A settlement agreement was signed by the Environmental Protection Agency (EPA), the DEQ, and the plaintiffs in *Friends of the Wild Swan*, and a consent decree was entered by the EPA and the plaintiffs in the second lawsuit.

Program Reorganization

The DEQ has developed a new approach to facilitate completion of TMDLs. The DEQ recognized that it didn't have the tools necessary to complete TMDLs effectively and efficiently. Therefore, the DEQ reorganized its process to help facilitate accurate completion of TMDLs. Phase I of the new approach is scheduled to take place from 2004-07. **Phase I** provides for the following:

1. Build and implement a number of foundational elements to expedite the process and increase confidence in DEQs results.
2. Complete reassessment on all waters delisted from the 1996 303(d) list by 2006 and reflect the results in the 2006 303(d) list.
3. Complete a subset of the total TMDL workload using the current approach with the 1996 list (including eight priority TMDL planning areas specified by the plaintiffs in the lawsuit).

The foundational elements include creation of tools, such as creating a reference database that includes information from other agencies and entities, for narrative water quality standards and identifying short-term, near-term, and long-term monetary needs to design an effective funding strategy. Phase I is essentially a ramping-up process prior to producing TMDLs at an accelerated pace.

Phase II is scheduled from 2008-12 and is the actual completion of the remaining TMDL workload by 2012. For Phase II and the completion of TMDLs, the DEQ will be using the 2006 303(d) list and will employ a diversified approach to accomplish the completion by the consent decree deadline of 2012.

Reassessment

Under the initial court order, the DEQ was required to reassess all of the streams on the 1996 303(d) list. The DEQ has been working diligently to complete reassessment. A total of 498 stream segments were initially in need of reassessment. All streams on the reassessment list have been visited and sampled in the field. The sufficient credible data/beneficial use determination status is as follows:

- 18% were completed between 2002 and 2004;
- of the remaining 82%, 6% have been completed to date and the remaining will be finalized by July 2006.

Implementation

TMDLs are essentially water quality restoration plans that, if implemented, will result in maintaining or obtaining water quality standards.

The DEQ is looking for ways to be more effective and more efficient in working with stakeholders and the public. The DEQ is not

TMDLs are essentially water quality restoration plans that, if implemented, will result in maintaining or obtaining water quality standards.

interested in excluding stakeholder involvement. However, the DEQ recognizes that there is a certain amount of work to be done in a limited amount of time, but without stakeholder involvement in development of TMDLs, it is probable that the plans will not be implemented.

The DEQ feels that it can develop the TMDLs, work with the stakeholders, and then implement the TMDLs with the stakeholders. The DEQ is committed to helping the stakeholders implement the TMDLs in their area by helping them identify priorities and opportunities for project funding.

Progress

The program appears to be on track to achieve both the consent decree and the court order. The DEQ has shown more successes in the past 1 to 2 years than in all other years combined. However, much work remains, and budgetary shortfalls will impact the program.

Within each basin, there could be from 1 to 100 TMDLs that need to be completed. A TMDL addresses a pollutant/water body combination. For example, a tributary such as Deer Creek may be impaired by metals—this would count for one TMDL. In 2004, the following basins were completed:

- Swan Basin
- Blackfoot Metals
- Sun River
- Bobtail
- Ninemile
- Bitterroot Headwaters
- Flathead Headwaters
- Big Spring

In 2005, the DEQ planned to complete the following TMDLs:

- Lake Helena—more than 100 TMDLs within the one water quality restoration plan document

- Ruby River—between 40 and 45 TMDLs
- Prospect Creek

Funding

The 2005 Legislature provided \$1.7 million in general fund money and \$3.4 million in federal fund authority to provide 9 FTE, database improvements, and base adjustments for contracted services. Two appropriations were made only for the 2007 biennium. They were for database enhancements and 4 FTE.

Department of Environmental Quality 2007 Biennium TMDL Funding²			
Purpose	General Fund	Federal Special Revenue	Total Appropriation
Base Adjustment for Contracted Services	\$81,540	\$565,003	\$646,543
Database Improvements (One Time Only)	\$330,000		\$330,000
5 Permanent FTE & Operations	\$894,905	\$2,865,758	\$3,760,663
4 Temporary FTE & Operations (One Time Only)	\$365,286		\$365,286
Total	\$1,671,731	\$3,430,761	\$5,102,492

²Barbara Smith, Associate Fiscal Analyst, paper presented on 9/15/05.

4. *Water Rights in Montana* Revision

The *Water Rights in Montana* handbook is a handbook that has been produced in conjunction with the DNRC since 2004. Before that time, each entity had its own handbook. The *Water Rights in Montana* handbook was revised to reflect statutory and rule changes that had occurred since the last printing of the handbook in 2004. The Subcommittee chose to update and reprint the handbook as quickly as possible because of the demand that was being expressed through DNRC field offices.

The HB 22 (2005) water adjudication fee notices and bills were being sent, and the need for the updated information was critical to water users. The Subcommittee worked in conjunction with the DNRC to redraft the handbook and coordinated with the DNRC and the Montana Water Center to try to achieve as much distribution to water users as possible.

A copy of the handbook can be obtained from the Legislative Environmental Policy Office, DNRC field offices and the state office, and the Montana Water Center. A copy is available for download on the EQC website at:

<http://leg.mt.gov/css/publications/Environmental/default.asp>.

5. Surface Water/Ground Water Interaction

As a result of the numerous surface water/ground water bills during the 2005 session, the DNRC established a working group to discuss water policy in Montana as it relates to surface water and ground water and, if necessary, to develop proposals to submit to the Study Subcommittee. Because both the DNRC and the Subcommittee were interested in looking into this issue more closely, they chose to work together through a work group, organized by the DNRC, that would report to the Subcommittee on its progress. The DNRC work group provided updates on its work at each Study Subcommittee meeting throughout the interim.

Mission and Goals

The mission defined by the work group members was:

Examine and evaluate existing law and rules related to water rights, with emphasis upon the management and interaction of surface waters and groundwater, and make recommendations, if necessary, to improve future conditions.

The goals that the group identified were:

1. Identify and evaluate current state policy related to surface water and ground water administration.
2. Determine if senior water rights are adequately protected.
3. Define the adequacy of existing statutes and rules for water administration and water right enforcement as they relate to surface water and ground water interactions.
4. Craft a summary document, including any recommendations for policy adjustments, statutory amendments, and rule development or funding adjustments.

Representation³

Representation came and went through out the interim, but a majority of the types of interests listed in the following chart were consistently represented at the work group meetings. The group held meetings on a monthly basis throughout the interim.

The interests that were represented on the word group included:

Montana Rural Water	Montana Tech
Citizens	Professional Engineers
Montana Department of Environmental Quality	Montana Association of Realtors
Private Water Law Attorneys	Friends of the Wild Swan
Alliance for the Wild Rockies	Association of Gallatin Area Irrigators
Montana Association of Conservation Districts	Montana Water Resources Association
Trout Unlimited	Montana Farm Bureau
Montana Stockgrowers Association	County Government/Planning Departments
Montana Building Industry Association	Montana Department of Natural Resources and Conservation
Montana Fish, Wildlife, and Parks	

Summary and Background Information

The issue of surface water/ground water connectivity is most controversial in the statutorily closed basins. Closed basins means that there can be no new water permits issued in the basin except for certain instances and exemptions.

³Surface Water/Ground Water Work Group—DNRC Advisory Group, paper presented to Study Subcommittee on 9/15/05.

The statutory guidance related to surface water/ground water connectivity is contained in Title 85, chapter 2, MCA, Surface Water and Ground Water. The issue has emerged recently with regards to closed basins. However, the discussion of whether or not surface water and ground water are connected and to what extent applies to all areas of Montana, whether the basin is closed or not.

The discussion of whether or not surface water and ground water are connected and to what extent applies to all areas of Montana, whether the basin is closed or not.

Section 85-2-319, MCA, allows the Legislature, by law, to preclude permit applications in highly appropriated basins or subbasins. The Legislature has closed the Teton River Basin (85-2-330, MCA), the Upper Clark Fork River Basin (85-2-336, MCA), the Jefferson River Basin and the Madison River Basin (85-2-341, MCA), the Upper Missouri River Basin (85-2-343, MCA), and the Bitterroot River subbasin (85-2-344, MCA). Each of these basin closures provides exemptions, in statute, to the closure requirements. All of the closed basins have exemptions for an application for a permit to appropriate ground water. The Clark Fork closure is a little bit more detailed in what must be done for the ground water permit application to be processed, but they all have an exemption provision. Each of the basin closures is different. The Teton, Upper Clark Fork, and the Jefferson and Madison closures are permanent. The Upper Missouri closure ends when final decrees have been issued in the basin, and the Bitterroot closure ends 2 years after all water rights in the subbasin are subject to an enforceable and administrable decree.

Section 85-2-319, MCA, also allows the DNRC, by rule, to reject permit applications or modify or condition permits already issued. The DNRC has exercised this right in ARM 36.12.1011 and 36.12.1013 through 36.12.1021. In these rules, the DNRC states that it shall reject applications for surface water permits in certain instances and within certain times of use within the following basins: Grant Creek Basin, Rock Creek Basin, Walker Creek Basin, Towhead Gulch Basin, Musselshell River, Sharrott Creek Basin, Willow Creek Basin, Truman Creek Basin, Sixmile Creek Basin, and Houle Creek Basin.

One important element to remember is that the basin closure statutes preclude the DNRC from processing applications in closed basins. If an application falls under one of the exemptions, ground water for example, that means that the DNRC can process the application. The application cannot be approved if there is adverse impact to an existing water right. So, essentially, there is a two-tiered process when it comes to permit applications in closed basins.

Ground water is defined for these sections 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" (emphasis added). You can tell by reading the definition that the determination of whether or not the ground water is connected to the surface water has a direct impact on whether or not the permit can even be processed by the DNRC. It is imperative that the DNRC accurately determine if surface water and ground water are directly and immediately connected. The Smith River lawsuit addresses this very issue. The Smith River lawsuit is discussed at more length later in this paper.

The meaning of 'immediately or directly connected to surface water' is interpreted by DNRC to imply a physical capture of surface water by inducing streambed infiltration. To assess whether the source of water for a proposed appropriation is ground water, an applicant must determine whether the source aquifer is hydraulically connected to surface water and whether the proposed well creates sufficient draw down beneath a stream to induce infiltration through the streambed.⁴

⁴Department of Natural Resources and Conservation Proposal for Decision in In the Matter of the Application for Beneficial Water Use Permit Number 41H-30003523 and the Application for Change Number 41H-30000806 by Montana Golf Enterprises, LLC, page 16, November 19, 2003.

The DNRC has been working on updating and revising its rules. In the most recent rules, the following definitions apply (ARM 36.12.101):

(33) "Immediately or directly connected to surface water" means ground water which, when pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration.

(34) "Induced surface water infiltration" means that water being pumped from a ground water source is pulling surface water into the cone of depression.

Relationship with water rights and burden of proof

The connectivity or lack thereof is of significant importance when discussing potential impacts on surface water rights. Pursuant to 85-2-311, MCA, it is up to the applicant for a new water right permit to prove that if a new water right is granted, there will be no adverse impacts on other existing water right holders. Section 85-2-402(2)(a), MCA, applies the same requirement before a change in a water right can be approved. If there is an impact, then the permit or change cannot be granted by the DNRC.

Based on the above information, the DNRC has to evaluate any change application or new water right application based on the potential for adverse effect on other water right holders. If the application for a new permit is for a well, the DNRC has to determine that this new well won't have an adverse impact—not only on other wells but also on surface water rights. If the determination regarding the interaction between surface water and ground water is not adequate, a new ground water right can be issued for a well that may adversely affect existing surface water rights. If this does in fact happen, the burden would then shift to the existing water right holder to prove that the new water right is

affecting the holder's preexisting right. There are, of course, costs associated with being the party responsible for the burden of proof.

On April 11, 2006, the Montana Supreme Court issued its decision in the Montana Trout Unlimited v. DNRC, 2006 MT 72 (2006), case. This case was based on issues arising out of the Smith River area—part of a closed basin. In its decision, the Supreme Court addressed the terms "direct" and "immediate". In its opinion, the court stated:

The legislature provided an exception to the Basin Closure Law for groundwater, provided it is not 'immediately or directly connected to' the Upper Missouri River's surface flow. DNRC's interpretation of the Basin Closure Law conflicts with the statute, and does not provide sufficient protection to reasonably effectuate its purpose. Section 2-4-305(6), MCA. DNRC's interpretation recognizes only immediate connections to surface flow caused by induced infiltration and ignores the less immediate, but no less direct, impact of the prestream capture of tributary groundwater. The Basin Closure Law serves to protect senior water rights holders and surface flows along the Smith River basin. It makes no difference to senior appropriators whether groundwater pumping reduces surface flows because of induced infiltration or from the prestream capture of tributary groundwater. The end result is the same: less surface flow in direct contravention of the legislature's intent.

The Supreme Court reversed and remanded the case to the District Court for further proceedings consistent with its opinion.

6. Domestic Well Exemption for the Filing of a Water Right

The work group identified in Section 5 also looked into the 35 gallon a minute/10 acre-feet exemption that is provided in 85-2-306, MCA. There were numerous meetings discussing the adequacy or inadequacy of this exemption throughout the interim. However, the work group was not able to come to agreement on a proposal to submit to the Study Subcommittee.

7. Water Adjudication Chronology

The Subcommittee reviewed the water adjudication that was compiled during the 2003-04 interim study. There have been activities since the chronology was published, including the passage of HB 22 in the 2005 session, the water adjudication fee being imposed, the Water Court rules, and Montana Supreme Court decisions.

The Subcommittee stated that it would hate to let the document "go" because that would make it more difficult for others in the future to add to it and make it complete—it might lose its continuity. The Subcommittee felt that if one had to go back, the chance of getting the information accurate is less likely. It is a worthwhile product that others, including new legislators in the future, may find useful. It is a great source of information, and it helps legislators and others understand the process that has been followed with regard to the adjudication and what has happened over time.

The Subcommittee chose to keep the water adjudication chronology current and available on the EQC website, <http://leg.mt.gov/css/publications/environmental/default.asp>.

8. St. Mary Canal Project

The Study Subcommittee heard updates from the DNRC regarding the progress toward rehabilitating the St. Mary Canal. The St. Mary Canal is located on Montana's Hi-Line and is a vital source of water for multiple purposes, including irrigation, domestic, wildlife, and municipal uses. The St. Mary Canal is a federal project, and the St. Mary rehabilitation working group is working on alternatives for funding the rehabilitation, including asking the federal government for money to assist with the work. The cost of rehabilitation is estimated at over \$100 million.

Funding

To date, the project has received the following federal support (2006 authority):

- \$500,000 from the Energy and Water Appropriations Subcommittee of the Senate Appropriations;
- \$8 million from the Senate Transportation Committee to construct a new bridge across the St. Mary River and to address bank stabilization along Swiftcurrent and Boulder Creeks.

The following is federal support that has been requested for 2007:

- \$8.5 million—environmental impact statement
 - \$2 million—engineering services
 - \$1 million—Blackfeet participation in cultural and environmental review
 - \$1 million—Milk River Basin infrastructure investigation
 - \$1 million—Blackfeet irrigation project investigation
 - \$750,000—Blackfeet vocational training
 - \$1.2 million—Ft. Belknap rural water investigation
- \$15.45 million total requested

State support of the project to date includes:

- \$100,000 environmental contingency account grant to start engineering review
- \$10 million in bonding toward nonfederal cost-share for construction activities
- \$500,000 toward nonfederal cost-share for replacing county bridge over the St. Mary River
- \$900,000 for engineering studies and support to the St. Mary working group
- \$100,000 to install new structural supports and replace expansion joint in Hall's Coulee siphon
- funding to support a new senior-level engineering and senior-level hydrologist dedicated to the St. Mary rehabilitation project
- expending approximately \$10,000/month assisting basin water users and Blackfeet Tribe in their efforts to rehabilitate St. Mary diversion facilities

Local support has included:

- \$142,089 in local contributions raised to support the efforts of the St. Mary rehabilitation working group (as of 11/1/05)
- \$101,049 of in-kind contributions (as of 10/26/05)
- approximately \$5,565/month spent by members of the St. Mary rehabilitation working group to attend meetings and promote the project

Next Steps

The working group is working towards congressional authorization. Its approach includes two concepts—either a stand alone appropriation or requesting that Congress reopen the Pick/Sloan to provide for an appropriation.

The group is also working on trying to obtain congressional office support and working with the National Water Resources Association and the Family Farm Alliance and is attending meetings

and briefings in Washington, D.C., to try to educate as many lawmakers as possible.

Subcommittee and EQC Action

The EQC drafted a memo to each member of the Montana Congressional Delegation requesting that they do whatever they can to try to obtain funding for the project. The memo is provided on the next page.



ENVIRONMENTAL QUALITY COUNCIL

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TODD EVERTS, Legislative Environmental Analyst

February 6, 2006

Senator
Attn:

Dear Senator:

As co-chairs of the Environmental Quality Council, a statutory legislative committee of the Montana Legislature, we are writing to encourage and request your support for federal funds directed towards the St. Mary Rehabilitation Project and any Congressional Authorization that may be necessary to ensure a timely response to the serious issues associated with this project.

As we are sure you are aware, rehabilitation of the St. Mary Project is critical to the hi-line of Montana. This project provides not only irrigation water crucial to maintaining the economy of this region it also provides water for municipal purposes and directly benefits recreation, and fish and wildlife in the area.

Please consider this letter as an official request from the members of the Council for your full support of whatever actions may be necessary to ensure federal participation through funding and appropriate authorization. We respect the work that you do on behalf of Montana's citizens and we are confident that your actions will help significantly to ensure that the St. Mary Rehabilitation is completed in a timely manner.

Sincerely,

Rep. Christopher Harris
EQC Co-Chair

Rep. Debby Barrett
EQC Co-Chair

C:
John Tubbs, DNRC
Larry Mires