

DNRC must respond this month to senior water rights holders' petition

Ranchers aim to protect water

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Katherine Chandler and Polly Rex discuss the possible threat to their water rights by new wells drilled without permit, as allowed under existing DNRC policy. The two were at Rex's ranch on Stillwater Road Thursday, Jan. 7.

By the numbers

35 — The maximum gallons per minute a well can produce and still be exempt from the permitting process.

32 — The percent of Montana's population that relies on a nonpublic water source.

3 — Montana's rank, nationally, for the percent of its population relying on a nonpublic water source. Maine, comes in first at 44 percent, followed by New Hampshire, with 42 percent.

78 — The number of gallons per day per capita supplied by domestic wells in Montana.

125 — The cost, in dollars, to file for an exempt well.

109,000 — The number of exempt wells in Montana on file with the Department of Natural Resources and Conservation. It is widely acknowledged, however, that the required notice of completion has not been filed for all exempt wells.

Sources: Effects of Exempt Wells on Existing Water Rights, report for Water Policy Interim Committee, Jan. 2008; and Drilling Down, report for WPIC, Jan. 2010.

ABSAROKEE — Polly Rex holds water rights dating back more than a century. But the Absarokee-area rancher wonders what they'll be worth if the state doesn't change its policy regarding new wells.

"My water rights are probably the most important component on my place," she said. "I've been told since I was a little kid that they're like gold. Now I'm finding they're not worth the paper they're printed on."

Her neighbor Betty Lannen agrees. The octogenarian remembers her grandfather taking pride in his senior water rights.

"That's what they talked about," she recalls.

Now, they say, Montana's time-honored doctrine of "first in time, first in right" is threatened by a Department of Natural Resources and Conservation rule that applies to "exempt wells." The rule, as it currently stands, allows for the drilling of any number of new exempt wells — without regard for their impact on existing water rights.

"We don't feel it's consistent with Montana's Water Use Act," Rex said. "We can't overdevelop our resources — that's what's happening here."

In an attempt to change that policy, Rex, Lannen and several other senior water rights holders petitioned the DNRC in early December. The department has until the end of this month to respond.

Too many exemptions

The concept of exempt wells traces back to Montana's 1973 Water Use Act, which allowed small domestic and agricultural wells to be drilled without a review or assessment of impacts. In order to appropriate water using the exempt-well provision, a person need only drill a well, file a notice of completion with the DNRC and pay a \$125 fee. Once the requirements are met, the user is issued a certificate of water right with a priority date recorded as the day of the filing.

The exempt-well definition has changed over time, but today new wells can qualify provided they don't exceed 35 gallons a minute or 10 acre-feet a year. A January 2010 report compiled by staffer Joe Kolman for the state's Water Policy Interim Committee, says there are 109,000 exempt wells on file with the DNRC. And it is estimated that nearly a quarter of them are concentrated in five major river basins that are already closed to further appropriations. A similar report published for the WPIC two years ago projects 70,000 more exempt wells by 2060.

Though the new wells are most commonly associated with new developments, Rex said the petitioners do not oppose development. Rather, she said, they're striving to protect the springs and water sources that they've depended on for years.

"We're not even against exempt wells," she said. "But not in such concentrated areas."

Katrin Chandler, another petitioner from the Absarokee area, compares the situation to allowing cattle to overgraze.

"On my ranch, I know I can run 100 cow/calf pairs," she said. "Two hundred doesn't work. They overgraze and then there are weeds. Any rancher knows that."

'Death by 1,000 cuts'

The petitioners see the DNRC rule as a loophole whereby developers can drill an unlimited number of new, exempt wells without measuring or mitigating their cumulative impacts — in other words, the proverbial death by 1,000 cuts to their sources of water. And it's not just their ranches they're thinking about, Lannen said. She figures many of their new neighbors have invested their life's savings in their new homes. What happens if their well goes dry?

"We're not the enemy," she said, referring obliquely to some local sentiment. "We're just fighting for our water. It's so important for future generations. Don't wait until it's gone."

Matthew Bishop, an attorney with the Western Environmental Law Center, is representing the petitioners. He argues that the agency “cannot and should not create a water right out of thin air or where no water exists in order to appease developers and accommodate new subdivisions.”

The 2008 WPIC report seems to substantiate the petitioners’ concerns, noting that the current situation could, during times of water shortages, create an anomaly where a surface water right holder with a 1920 priority date has to shut down his irrigation while a groundwater right holder with a 2007 priority date can continue pumping, “even though their water use depletes stream flow.”

Change in definition

Although water itself is one of the most basic of necessities, laws and rules regarding the resource can get complex. For the petitioners, their suit actually targets only two key terms in the DNRC policy.

The Montana Water Use Act prohibits exempt well status to “combined appropriations” of two or more wells when they draw water from the same source. Under the original definition, the petitioners say, a proposed subdivision with multiple wells would be considered a combined appropriation and would therefore require a review and permit.

In 1993, however, the DNRC narrowed its definition of “combined appropriation” to only wells that are “physically manifold,” or theoretically plumbed together by pipes. The WPIC report says the agency adopted the change to clarify what it deemed a definition that was too ambiguous.

But the petitioners say very few, if any, groundwater developments in Montana even fit that description, rendering the language meaningless.

“There is absolutely no reason why a developer would install a groundwater system that is ‘physically manifold’ and go through the DNRC’s permitting and review process when it can simply install hundreds of individual wells for free, without a permit and without any environmental review,” Bishop wrote.

Their petition requests that the agency declare the definition invalid and amend it to come into compliance with the Water Use Act.

12 years of effort

For Rex and her neighbors, the lawsuit represents the latest step in a 12-year effort to protect their water. In 2004, they worked through the DNRC to earn a temporary controlled groundwater designation for the Horse Creek Drainage south of Absarokee, where a new development had created 65 potential new home sites. The purpose of the designation was to gather data about the aquifer and monitor new wells drilled into it.

The landowners spent tens of thousands of dollars and one day each month for four years conducting the study, only to have the designation lapse due to agency oversight, Rex said. Now, she added, she doubts they’d get sufficient support from neighboring landowners to reinstitute it.

An issue revisited

The exempt-well issue is nothing new to Montana, nor to the West.

DNRC Director Mary Sexton said it’s come before the Legislature during the past three sessions and is being studied by the WPIC.

“This is certainly an issue that’s been a topic of discussion,” she said. “Does the rule actually reflect the statute? That’s the question here.”

The January 2010 WPIC report lists five failed legislative attempts to amend the statute or limit the use of the exemption. It also notes two petitions — the current petition and a similar petition filed in 2006 by Gallatin County — seeking a change in the DNRC rule. Like the current effort, Gallatin County argued that the definition did not represent the Legislature’s intent and that it encouraged a proliferation of exempt wells. The DNRC denied the county’s petition, saying the suggested change was too complex and would halt development in closed basins. In addition, the department said, the change could result in the need to hire 50 additional employees just to process new permits.

Rex doesn’t buy that rationale.

“Everybody is short of money,” she said. “But you can’t shirk your duty.”