

# Interpreting the Basin Closure Law in Montana: The Permissibility of "Prestream Capture" -- Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation

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## Interpreting the Basin Closure Law in Montana: The Permissibility of “Prestream Capture”

*Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224

Matthew Hibbs

In *Mont. Trout Unlimited v. Mont. Dept. of Nat. Resources and Conserv.*, the Montana Supreme Court clarified when the Montana Department of Natural Resources and Conservation (“DNRC”) may process an application for groundwater under the Upper Missouri River basin moratorium (“the Basin Closure Law”).<sup>1</sup> The Court interpreted the Basin Closure Law to forbid the DNRC from processing applications for groundwater which would result in either “induced infiltration” or “prestream capture” of groundwater.<sup>2</sup> As a result, the Court helped to ensure the fulfillment of the water rights of senior appropriators in the basin by better protecting the surface flow of the Upper Missouri River from depletion.

In 1973, in response to judicial complexities arising from an increase in appropriators claiming water rights in Montana (“the state”), the Montana legislature (“the legislature”) revised the state’s dated water appropriation system.<sup>3</sup> The legislature directed all holders of claims to existing water rights to file their claims with DNRC.<sup>4</sup> The Montana Water Use Act then required DNRC to determine priority dates for the filed claims and inspect conflicts pertaining to the priority of the claims.<sup>5</sup> Water courts were established to adjudicate disputed claims, and new claimants were allowed to establish water rights by filing applications with DNRC.<sup>6</sup>

As the new appropriation system developed, it became apparent there were significantly more claims to water than available water in many of the state’s river basins.<sup>7</sup> Accordingly, the legislature enacted a moratorium on new water right applications in over-appropriated basins.<sup>8</sup> One such moratorium, the Basin Closure Law, forbade DNRC from “process[ing] or grant[ing]. . . application[s] for permit[s] to appropriate water . . . within the Upper Missouri River basin until . . . final decrees [had] been issued.”<sup>9</sup> The legislature made an exception for new applications to appropriate “water that is beneath the land surface or beneath the bed of a stream, lake, reser-

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1. 133 P.3d 224, 232 (2006).

2. *Id.*

3. *Id.* at 226; Mont. Code Ann. § 85-2-101 et. seq. (1973).

4. *Mont. Trout Unlimited*, 133 P.3d at 226.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

voir, or other body of surface water and that is not immediately or directly connected to surface water" ("the groundwater exception").<sup>10</sup> However, the legislature failed to define what constituted an immediate or direct connection to surface water.<sup>11</sup>

Groundwater pumping depletes surface water flow via "induced infiltration" and "prestream capture."<sup>12</sup> Induced infiltration refers to groundwater pumping that pulls surface water directly from a stream toward a well.<sup>13</sup> Pream capture refers to groundwater pumping that reduces surface flow by intercepting groundwater that otherwise would have entered a stream.<sup>14</sup>

DNRC interpreted the Basin Closure Law as a prohibition of the processing of applications permitting groundwater wells to "pull surface water directly from a stream or other source of surface water."<sup>15</sup> This interpretation protected the Upper Missouri River basin's surface flow from induced infiltration but failed to protect it against the effects of prestream capture.<sup>16</sup> As a result, DNRC began processing new groundwater applications which could potentially deplete the Upper Missouri River basin's surface flow via prestream capture, "before making a threshold determination that the applications fell within [the groundwater exception] to the Basin Closure Law."<sup>17</sup>

Accordingly, Montana Trout Unlimited ("Trout Unlimited") brought action against DNRC in the Lewis and Clark County District Court ("the District Court").<sup>18</sup> Trout Unlimited "sought a writ of mandate to require DNRC to refrain from processing groundwater applications on the Upper Missouri River basin until it had made the threshold determination that the groundwater [sought to be appropriated] was not immediately or directly connected to surface water."<sup>19</sup> Trout Unlimited also challenged DNRC's interpretation of the "immediately or directly connected to surface water" language in the Basin Closure Law.<sup>20</sup>

Ultimately, the parties entered a stipulation wherein DNRC agreed to make a threshold determination of whether an application for a groundwater permit was for the appropriation of groundwater immediately or directly connected to surface water.<sup>21</sup> However, DNRC adhered to its interpretation of the Basin Closure Law, formally defining "immediately or directly connected to surface water" as "groundwater which, when pumped at a flow

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10. *Id.* at 231.

11. *Id.* at 227.

12. *Id.* at 226-227.

13. *Id.* at 227.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 224.

19. *Id.* at 227.

20. *Id.*

21. *Id.*

rate requested in the application and during the proposed period of diversion, induces surface water infiltration."<sup>22</sup> Accordingly, Trout Unlimited sought declaratory judgment that DNRC's interpretation of the Basin Closure Law contradicted the law's clear statutory language.<sup>23</sup>

The District Court granted DNRC summary judgment, holding Trout Unlimited failed to exhaust its administrative remedies before bringing the action, and the court was required to defer to DNRC's interpretation of the Basin Closure Law as "the definitions and methods involved in processing water use applications lie within DNRC's discretion."<sup>24</sup> Subsequently, Trout Unlimited appealed to the Montana Supreme Court.<sup>25</sup>

On appeal, the first issue regarded "whether Trout Unlimited was required to exhaust its administrative remedies before seeking judicial relief [from DNRC's decision to process applications for the appropriation of groundwater alleged to be immediately or directly connected to the Upper Missouri River basin's surface water]."<sup>26</sup> In an earlier case, *Wiser v. St. Dept. of Commerce*, the Court had held "if a statute provides for administrative relief, an aggrieved party must seek that relief from the administrative body . . . before seeking judicial relief."<sup>27</sup> Accordingly, the District Court held Trout Unlimited was required to object to an approved groundwater application with DNRC, and thus create a contested case proceeding, before pursuing judicial relief.<sup>28</sup> However, in *DeVoe v. Dept. of Revenue*, the Montana Supreme Court held "we will not require exhaustion of administrative remedies . . . when resort[ing] to an administrative remedy would be futile" ("the futility exception").<sup>29</sup> Accordingly, Trout Unlimited argued that waiting to contest DNRC's approval of groundwater applications was futile, and thus not required, as such action "flout[ed] the legislature's intent" behind the Basin Closure Law, which forbids "the processing of applications for groundwater that is immediately or directly connected to surface water."<sup>30</sup>

In constructing a statute such as the Basin Closure Law, the Court is "simply to ascertain and declare what is in terms or in substance contained therein; [the Court is] not to omit what has been inserted or insert what has been omitted."<sup>31</sup> Therefore, because the Basin Closure Law expressly prohibited DNRC from processing new groundwater applications for the appropriation of groundwater immediately or directly connected to the Upper

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22. *Id.*

23. *Id.*

24. *Id.* at 228.

25. *Id.*

26. *Id.*

27. 129 P.3d 133, ¶ 30 (2006).

28. *Montana Trout Unlimited*, 133 P.3d at 228.

29. 866 P.2d 228, 238 (1993).

30. *Montana Trout Unlimited*, 133 P.3d at 228.

31. *Id.* at 229.

Missouri River basin's surface water, the Court determined Trout Unlimited could seek judicial relief from DNRC's decision to process an application without waiting for DNRC to approve the application.<sup>32</sup> Holding otherwise would be "ineffective in preventing immediate harm to [the Upper Missouri River basin's] surface water" and would force senior appropriators in the basin to "defend their water rights every time a new applicant [sought] to appropriate [groundwater] in the basin."<sup>33</sup> As a result, the Court decided "requir[ing] Trout Unlimited or other objectors to wait for DNRC to process applications, the very act prohibited by [the Basin Closure Law,] . . . [before seeking judicial relief, was] futile."<sup>34</sup> Consequently, the Court held "the futility exception to the exhaustion requirement relieve[d] Trout Unlimited from having to exhaust [its] administrative remedies before seeking judicial relief."<sup>35</sup>

The second issue on appeal was "whether DNRC's interpretation of 'immediately or directly connected to surface water' in the Basin Closure Law [was] correct as a matter of law."<sup>36</sup> In determining whether an agency's interpretation of statutory language was correct as a matter of law, courts evaluate whether the interpretation was consistent with the legislature's intent behind enacting the statute.<sup>37</sup> Trout Unlimited contended because DNRC's interpretation of the Basin Closure Law failed to recognize the impact of prestream capture of tributary groundwater on the Upper Missouri River basin's surface flow, it was inconsistent with the legislature's intent and incorrect as a matter of law.<sup>38</sup>

DNRC argued its statutory interpretation was entitled to deference and respect.<sup>39</sup>

The Court rejected DNRC's contention that its interpretation was entitled to deference because DNRC's interpretation of the Basin Closure Law had not yet "stood unchallenged for a considerable length of time, thereby creating reliance in the public and those having an interest in the interpretation of the law."<sup>40</sup>

DNRC's own hydrogeologist conceded that "prestream capture of tributary groundwater . . . has a more significant and longer lasting impact [on surface flows] than does induced infiltration." The Court concluded DNRC's interpretation of the Basin Closure Law conflicted with the statute and "[did] not provide sufficient protections to reasonably effectuate its

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32. *Id.*

33. *Id.* at 230.

34. *Id.*

35. *Id.*

36. *Id.* at 231.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

purpose."<sup>41</sup> The Basin Closure Law was enacted to protect the water rights of senior appropriators in the Upper Missouri River basin by ensuring a sufficient surface flow remained in the basin.<sup>42</sup> Accordingly, DNRC's interpretation, which failed to protect surface flow against the effects of pre-stream capture, was "in direct contravention of the legislature's intent" behind the Basin Closure Law.<sup>43</sup> As a result, the Court reversed the District Court's decision and remanded the case for further proceedings consistent with the majority opinion.<sup>44</sup>

Chief Justice Karla M. Gray dissented from the majority opinion and was joined by Justice Jim Rice.<sup>45</sup> Chief Justice Gray contended the majority erred in concluding Trout Unlimited need not exhaust its administrative remedies before seeking judicial relief.<sup>46</sup> In her opinion, the Basin Closure Law's prohibition against processing applications did not apply to applications for permits to appropriate groundwater.<sup>47</sup> Accordingly, Chief Justice Gray agreed with the District Court that Trout Unlimited was required to object to an approved groundwater application with DNRC, and thus create a contested case proceeding, before pursuing judicial relief.<sup>48</sup> Similarly, Chief Justice Gray contended exhausting these procedures was not futile because the processing of groundwater applications, upon which the contested case proceedings would be based, was not prohibited by the Basin Closure Law.<sup>49</sup>

Justice John Warner specially concurred with the majority opinion.<sup>50</sup> Justice Warner agreed with the dissent that the Basin Closure Law's prohibition against processing applications did not apply to applications for permits to appropriate groundwater.<sup>51</sup> However, he contended water immediately or directly connected to surface water was "simply not groundwater."<sup>52</sup> Accordingly, Justice Warner argued DNRC was required to process every application for a new appropriation of alleged groundwater in order "to determine if the proposed appropriation [was] truly for groundwater or whether the water . . . [was] actually connected to surface water, either immediately or directly."<sup>53</sup> Further, Justice Warner agreed with the majority that DNRC's interpretation of "immediately or directly connected to sur-

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41. *Id.* at 232.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 233 (Gray, C.J., dissenting).

46. *Id.*

47. *Id.*

48. *Id.* at 234.

49. *Id.* at 235.

50. *Id.* at 235. (Warner, J., concurring).

51. *Id.*

52. *Id.*

53. *Id.* at 236.

face water" erroneously failed to "account for impact to surface flow caused by prestream capture of tributary groundwater."<sup>54</sup> Accordingly, Justice Warner contended the District Court, upon remand, should "examine the record concerning the application in question, in the context of this Court's correction of DNRC rules and policy, the Administrative Procedure Act, and the law . . . [and] either remand to DNRC for further hearings or decide the matter itself."<sup>55</sup>

### CONCLUSION

Overall, the decision in *Mont. Trout Unlimited* was an important step in further defining when an application for the appropriation of groundwater may be processed under the Basin Closure Law. The Court held DNRC could process applications for the appropriation of groundwater that was not immediately or directly connected to the Upper Missouri River basin's surface water via induced infiltration or prestream capture. As a result, the Court better protected the surface flow of the Upper Missouri River basin from depletion and thus helped to ensure the fulfillment of the water rights of senior appropriators in the basin.

However, the fact that the case was remanded to the District Court should cause senior appropriators to remain concerned about the fulfillment of their water rights. It is conceivable that the District Court will remand the matter to DNRC in accordance with Justice Warner's concurrence. If this happens, the rights of senior appropriators will once again be in the hands of the DNRC, whose prior decisions regarding this matter suggest that the senior appropriator's water rights are not beyond depletion. Likewise, DNRC could conceivably process and grant new groundwater applications for groundwater permits that would deplete the Upper Missouri River basin's surface flow via prestream capture in the interim between the Court's decision to remand the case and the District Court's final judgment. Accordingly, while the water rights of senior appropriators in the Upper Missouri River basin have been better protected by the Court's decision, the protection provided does not guarantee that these appropriators' water rights will be fulfilled.

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54. *Id.*

55. *Id.*