April 17, 2017

The Honorable Steve Bullock
Governor State of Montana
PO Box 200801
Helena, MT 59620-0801

RE: HB 339

Dear Governor Bullock,

On behalf of the groups listed below, I am writing to respectfully ask you to veto HB 339, a bill that would re-open the controversial “exempt well loophole” and encourage irresponsible use of Montana’s vital water resources.

The exempt well loophole has already been through a decade of administrative and Court proceedings, culminating on September 13, 2016 with the Montana Supreme Court decision in Clark Fork Coalition v. Tubbs (2016 MT 229). In that decision, the Supreme Court affirmed that the exempt well loophole—created in 1993 by a DNRC rule defining “combined appropriation”—was invalid. In summary, the Court held that DNRC’s 1993 rule specified that projects with multiple wells drawing less than 35 gallons per minute (and no more than 10 acre feet a year) from the same water source only had to get a permit if those wells were physically piped together. As a result, the rule allowed large consumptive water users to evade review, notice, objection, and permitting processes, which the Court determined was in direct conflict with the purpose of the Montana Water Use Act to protect senior water rights. The Court emphasized that the primary function of this permit-based system is the protection of senior water rights from encroachment by prospective junior appropriators adversely affecting those rights.

As the record showed, the exempt well loophole had opened the door to a proliferation of subdivisions and put groundwater supplies and stream flows at risk. After the adoption of the 1993 rule, three of four new homes built in Montana were exempt from permitting. That resulted in 110,000 new exempt wells getting drilled into aquifers without a water right, without assurances that there would be no harm to other senior water rights, without notice to senior water rights users, and without any process provided for senior water right users to object. During the two decades under the 1993 rule, large subdivisions on individual exempt wells proliferated in fast-growing areas located in water basins otherwise closed to new water development, such as Ravalli, Gallatin, and Madison counties. The Montana Supreme Court decision recognized that DNRC’s 1993 rule was at odds with the prior appropriation doctrine and jeopardized how Montanans work together to share and care for our water resources.

Just seven months after this landmark decision, HB 339 from Representative Carl Glimm is headed to your desk. This bill would essentially overturn the Supreme
Court’s decision and revive the exempt well loophole. While HB 339 purports to impose some sideboards—e.g., wells must be spaced at least 330 feet apart in open basins and 660 feet in closed basins—HB 339 once again requires a permit only if wells are physically piped together. Further, the spacing requirement is illusory with respect to the ability to serve large subdivisions through exempt wells. Instead of drilling one well per residential unit, developers could easily drill one well and connect multiple units to that well without following any spacing requirements. It would again allow for the proliferation of exempt wells, with no consideration of impacts to water resources or water users, no notice to permitted water users, and no ability of permitted water users to object.

HB 339 has other problems:

- **The 330-/660-foot spacing between exempt wells is arbitrary.** This one-size-fits-all approach is not based on site-specific hydrologic science or any analysis of whether water is physically or legally available. The arbitrary spacing requirement could lead to over-pumping of some aquifers, while other aquifers could accommodate more. Furthermore, it dictates a “checkerboard” development pattern across the state, which may not provide the quality of life that many Montanans desire.

- **It gives senior water right holders no viable recourse if their well dries up.** While it may be legal to make call on an unregulated and unmonitored exempt well, it is functionally impossible to do so. The practical effect of HB 339 is that it strips existing water users of the means to protect and assert their rights.

- **It grants special privilege to one industry.** By allowing the development industry to cut in line in front of all other water users, HB 339 benefits one type of water use over all others. This is not sound public policy.

- **It does not provide for any public notification or public participation.** Consequently, HB 339 will keep existing water users in the dark about the drilling of exempt wells on nearby properties and possible threats to their own water source.

- **It will increase costs of water treatment in our municipalities.** Exempt wells typically go in side-by-side with individual septic systems, which are pathways for nutrient pollution getting into local aquifers. HB 339 would allow continued unchecked exempt well-driven development in unincorporated areas, leaving cities and towns to bear the cost of cleaning up non-regulated non-point source pollution through increasingly expensive standards on public wastewater treatment systems.

HB 339’s proponents tout the bill as “compromise” legislation, hammered out by all stakeholders. This is not true. None of the signatories to this letter were invited to the table to draft this bill. While a select few of us received presentations on HB 339 and were invited to react to the provisions, the bill was presented as a fait accompli.
Furthermore, there is a perception that the Supreme Court decision to invalidate the 1993 rule has eliminated exempt wells as a viable option, stymied development in Montana, and created a problem that requires HB 339 as a legislative remedy. This also is not true. DNRC testimony in opposition to HB 339 shows that exempt wells—under the 1987 rule—are alive and well and being used as intended: for projects using a de minimus quantity of water and therefore having minimal impact to senior water rights users and the environment.

HB 339 will continue the system struck down by the Supreme Court last fall. It incorporates language that the Supreme Court determined is invalid, allows the development community to lock up large quantities of water without review and without the permitting process that all other water users must follow, and puts irreplaceable water resources—owned by the State of Montana for the use of its people—at risk. Instead of moving away from the unfair and unlawful system struck down by the Court, HB 339 would move the State back to that system and to future litigation.

For the reasons above, we strongly urge you to veto HB 399. Thank you for your consideration.

Sincerely,

Karen Knudsen
Executive Director

Clayton Elliot, Executive Director          Derf Johnson, Staff Attorney
MT Conservation Voters                    MT Environmental Information Center

Tim Burton, Executive Director            Randy Carpenter, Board of Directors
MT League of Cities & Towns               MT Smart Growth Coalition

Kate French, Board of Directors Chair
Northern Plains Resource Council

cc: John Tubbs, Director, Montana Department of Natural Resources and Conservation