



# LOOPHOLE LIMBO

Legislative inaction could send subdivision exemption to court

By LAURA LUNDQUIST • Chronicle Staff Writer

**W**hen he looks to the future, Barney Hallin worries about water. His 270-foot-deep household well is still providing water, but he doesn't know if it will continue now that another nearby subdivision has been approved.

Hallin bought his house in the Ranch subdivision north of Belgrade a quarter century ago, just as development in the Gallatin Valley was beginning. When he moved in, only five houses dotted the slope bracketed by Springhill and Sypes Canyon roads.

Hallin has watched more subdivisions spring up around him. Almost all have taken advantage of a 1973 state law that allows small wells to be drilled without a water-rights permit.

For more than a century, anyone who uses Montana's water — farmers, miners, towns and hydropower dams — has had to buy a water right. Older water rights have priority over newer rights when water is limited, such as during drought years.

Any farmer irrigating with, say, 1,000 acre-feet a year would have to own a water right and could be subject to constraints in low-water years.

But on the same land, a subdivision of 100 units, each with an exempt well, could use the same amount of water with no regulation.

As subdivisions have

multiplied throughout the West, their wells have been a growing threat to nearby water-rights owners.

Well-enabled development might have been slowed if a recently proposed Montana Department of Natural Resources Conservation rule had imposed some limits on small wells.

But after being blocked last month by a legislative committee, the rule is probably headed to court in less than 30 days, where it may end up with even tighter well restrictions.

**S**mall wells are exempt from water-rights requirements as long as they don't extract more than 10 acre-feet a year.

That's a lot of water, enough to flood a football field to the depth of 10 feet.

The Environmental Protection Agency estimates that a family of four requires only 3 percent of that for indoor uses. The remainder is often used to maintain large lawns.

So when Hallin recently heard that Gallatin County was considering approval of the 76-unit Springhill Reserve subdivision west of his house, he opposed it mainly because of the increased demand on local groundwater, which has shown signs of depletion.

Some regions contain more groundwater than others, but each well adds to the demand. No one can accurately predict when that demand will become too great.

Drier regions of the country such as southern Idaho and Texas have seen drastic drops in the water table, due mostly to agricultural wells. But subdivisions are a relatively new phenomenon so their effect is just beginning to show.

## Wells/from A1

The Montana Groundwater Investigation Program has just started conducting intensive groundwater studies around the state. Recent results indicate subdivision wells are lowering the water table in developed areas near Helena.

A 2007 DNRC report concluded that continued development in the Springhill area could cause some well levels to drop as much as 20 feet and could decrease flows in the East Gallatin River and Bridger Creek.

Two earlier subdivisions had to impose limits on their water usage.

In 1993, the residents of Summer Ridge agreed to limit their monthly water use, allowing six wells to be metered.

Four years later, the developer of Spirit Hills decided against using exempt wells and got a water permit for a community-well system.

But, on Jan. 28, Gallatin County commissioners approved the Springhill Reserve development along with 76 exempt wells. The proposed DNRC rule would have limited that to five wells.

"They basically said you can't look at the water issues," Hallin said. "I said at the very minimum, they should require what was on the most recent subdivisions."

The Springhill area isn't the only part of the state with groundwater worries posed by large subdivisions.

Growth is accelerating in much of western Montana enabled by a well exemption that was written before subdivision development became a factor in the state.

In 1987, a "combined appropriation" law was passed, requiring larger subdivisions with wells to buy water rights. But the law was changed during the Mark Racicot administration to require a water right only if the wells of a subdivision were physically connected.

"I've tried to find out how that happened, but it was all very quiet. There

### EXEMPT WELL TIMELINE

**1973** – Well exemption created.

**1987** – Combined-appropriation law required water permit for two or more exempt wells in a development that used more than 35 gallons a minute and 10 acre-feet.

**1993** – Combined-appropriation law changed to require water permit only if wells were piped together.

**2010** – Water-rights owners sue DNRC in district court to tighten combined-appropriation law. A settlement

requires a new combined appropriation rule by Dec. 31, 2013.

**September 2013** – After two Legislatures failed to pass a law, the DNRC writes its own rule. The EQC objects, delaying the rule six months.

**December 2013** – Settlement deadline passes without a new combined appropriation rule.

**January 2014** – EQC objects again and DNRC withdraws proposed rule.

**March 2014** – Deadline for petitioners to decide to file lawsuit.

was very little discussion about it," said Helena attorney Matt Bishop, who represents five petitioners challenging the requirement of physical connection.

The change allowed developers to continue building homes with separate wells, which has led to ongoing legislative contention and an impending court battle.

**I**n 2006 at the height of the housing boom, Gallatin County was the first to petition the DNRC to redefine "combined appropriation" – the county suggested that each subdivision be allowed only one exempt well.

The DNRC denied that in 2006, but seven years later, the rule the DNRC proposed in September isn't much different.

The rule would have allowed one exempt well for every 40 acres. If the households in a subdivision could share the water provided by one well, no water right would be needed.

That probably would have satisfied the five water-rights owners represented by Bishop, who in 2009 petitioned the DNRC to put more limits on the combined-appropriation definition.

Four of the petitioners are senior water-rights

owners from the Horse Creek area where a subdivision was being built near Billings.

Rancher Polly Rex said she felt she had to defend her water rights. She had no idea in 2009 that four years later, nothing would have changed.

In 2010, the petitioners sued the DNRC to force the creation of a new rule.

The resulting settlement required the DNRC to enact a new rule by the end of 2013.

**T**he rule the DNRC proposed in September was unacceptable to development groups, mainly the Montana Association of Realtors, the Montana Building Industry Association and the Montana Water Well Drillers Association.

The associations lobbied fiercely against the rule, just as they have in every hearing since 2006 when bills or rules would have restricted exempt wells.

"The new definition is using water law to basically do land-use planning," said Realtor association lobbyist Abigail St. Lawrence. "The Realtors support the current rule (that requires physical connection). In Bozeman, it's easy to forget that there's the whole rest of the state where it works very well."

While some in the burgeoning western part of the state would curtail well exemptions, St. Lawrence was referring to people in the sparsely populated east who don't see the need. Some in eastern Montana see the new rule as infringing on private-property rights.

Sen. John Brendan, R-Scobey, summed up the attitude in a September meeting of the legislative Environmental Quality Council, which objected to the DNRC rule.

"There are less than 2,000 people in Daniels County. One size doesn't fit all," Brendan said. "I own lots in western Montana near a lake that I can't develop. I just subdivided and it's taken forever. Where's my property right?"

**R**ealtor association lobbyists appear to have the backing of 3,500 members. But Realtor association spokeswoman Amy Fisher said it's the board that determines the association's stand on various issues without polling their members.

No member has indicated that they oppose the association's stand on combined appropriation, Fisher said.

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## Wells/from A8

Lifelong Bozeman resident and real estate agent Dave Carson thinks that's because many agents haven't been educated about the issue.

Carson's concerns arose after only recently delving into the issue himself.

If other agents did the same, Carson thinks they'd support modest efforts to regulate exempt wells. Then the Realtor association would withdraw its opposition, and that might tip the balance.

He noted that 92 percent of the comments submitted on the DNRC proposal were favorable but still, the DNRC rule had been blocked.

"You're not going to find 100 percent support for anything. The DNRC is supposed to be making good scientifically based decisions, but they're unwilling because of influence from groups like the Montana Association of Realtors, apparently," Carson said.

The Montana Farm Bureau Federation, which defends Montana's long-held system of water rights, has long lobbied for restrictions on the use of wells in subdivisions.

The federation uses a democratic process to choose the issues it wants to support, and the majority of its members support more restrictions on subdivision wells, said federation spokesman John Youngberg.

"It's a matter of fairness – they have paid for a water right that's just like a property right," Youngberg said. "Someone else shouldn't be able to take the same amount of water without the same requirements and the same accountability."

**T**he Environmental Quality Council has no authority to change rules proposed by an agency – it can only object. An ob-

jection delays the rule by six months, and few at the Capitol can remember the council ever using that power.

But in September, the council objected, delaying the DNCR rule past the Dec. 31 settlement deadline to enact the rule.

Brendan justified the objection by claiming that Gov. Steve Bullock had put the Legislature in a bad position when he vetoed a 2013 bill that would have ended the debate by codifying the current definition of "combined appropriation."

In his veto, Bullock asked for amendments that resemble the proposed DNRC rule.

"I think it's time we take back our authority," Brendan said.

In January, the council sent a letter to the DNRC reiterating its objection after the DNRC made adjustments to its September proposal.

In response, Water Resources Administrator Tim Davis took the DNRC rule off the table, concluding that continued efforts "would be futile."

With no rule, the settlement is void, and the petitioners can move forward with their lawsuit. They might add other petitioners such as Hallin, Bishop said.

If they decide to do so by March 14, Bishop said they would probably ask the judge to insist that the DNRC write a more restrictive definition.

That's not much different than the current situation except it would have the power of the court behind it.

The past four years have been squandered, Bishop said.

"We never would have settled knowing what we know now and dealing with EQC. We're just trying to close a loophole. Seems like it's more of a politically motivated approach than anything based on science," Bishop said.