

Combined Appropriation Guidance



[Updated 03/23/22]

Overview:

The following document is intended to provide *general guidance* in applying the Montana First Judicial Court's recent Order on Petition for Judicial Review in *Clark Fork Coalition, et al. v. Tubbs et al.*, Cause No. BDV-2010-874 (issued October 17, 2014) (**CFC decision**). The CFC decision concluded that the Department's rule defining "combined appropriation" of "exempt" wells as "an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system," was inconsistent with applicable law and therefore invalid. Admin. Rule Mont. (ARM) 36.12.101(13). Neither the Department's underlying Declaratory Ruling nor the Court action challenged the validity of the permit exception provided for in § 85-2-306(3), MCA, for wells not to exceed 35 gallons per minute (GPM) and 10 acre-feet (AF) per year.

Important Point:

One can still seek a water right for one or more "exempt" wells pursuant to § 85-2-306(3), MCA, and other statutory provisions including a beneficial water use permit under § 85-2-311, MCA.

Moving Forward:

The CFC decision ordered that the DNRC's 1987 Rule defining a "combined appropriation" of two or more "exempt" wells be reinstated. This order took effect on October 21, 2014. This 1987 rule states:

An appropriation of water from the same source aquifer by means of two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."

HB 168:

HB 168 was passed during the 2015 Legislature in order to create an applicability date for the CFC decision. HB 168 stated that if a project, development, or subdivision existed before October 17, 2014 (the date of the Order) or an application for a project, development, or subdivision was submitted to DEQ or a local government with the required review fee by that date then 1993 rule definition of combined appropriation would apply so that only wells that are physically manifold together would be considered a combined appropriation that cannot exceed 10-acre feet per year. If a project, development, or subdivision was submitted after that date then 1987 rule definition of combined

appropriation above would apply. The Department is using the DEQ definition of a subdivision under MCA 76-4-102 so that it is only considering lots that are less than 20 acres to be part of a subdivision either in existence prior to October 17, 2014 or created after that date.

"Subdivision" means a division of land or land so divided that creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and any condominium or area, regardless of size, that provides permanent multiple space for recreational camping vehicles or mobile homes.

This definition includes parcels created by a family transfer or via a District Court order. These types of property subdivision will likely not come in front of DNRC until sanitary restrictions are being lifted from a parcel. Boundary line adjustments (BLA) are not considered a subdivision of property because they do not create any new parcel; review of BLAs will be based on when the parcels going through the BLA were originally created.

As a result of both the Order and the passage of HB 168, the Department in its judgement has determined the following four scenarios are combined appropriations of two or more wells from a same source aquifer that may not exceed 10 AF:

- 1) Any two or more exempt wells that are physically manifold together are considered a combined appropriation in all cases, regardless of ownership. Physically manifold includes any storage shared between multiple groundwater developments.
- 2) Any lots less than 20 acres in size in existence or part of a subdivision application submitted on or prior to October 17, 2014, are grandfathered in under HB 168 so only exempt wells that are physically manifold together are considered a combined appropriation.
- 3) For lots that are greater than or equal to 20 acres, either in existence prior to October 17, 2014 or created after that date, any wells within 1,320 feet of one another on a lot are considered to be a combined appropriation. *If there are any lots that are 20+ acres in the new arrangement, those lots will not be considered part of the subdivision, will not be reviewed by DNRC, and will not be required to share the 10 AF limit for the subdivision.*
- 4) Any subdivision of land as defined under 76-4-102 (see definition above) created after October 17, 2014, or for which a subdivision application was submitted to DEQ after that date, is considered a combined appropriation that must receive a pre-determination from DNRC determining that all exempt wells proposed for the subdivision will stay at/under a combined appropriation of 10 AF.

All subdivisions using exempt wells will be required to allocate the full 10 AF of volume across the subdivision for planning purposes (though lot owners will not be required to perfect the full volume allocated as part of the review). If there is unallocated water, DNRC will split the unallocated portion evenly amongst the lots. DNRC will outline volumes requested by the applicant for each purpose in the pre-determination letter. **All future Notices of Completion filed within the subdivision will be limited to the total volume per lot identified in the pre-determination notice.

Water use standards:

The Department typically uses the water use standards found in ARM 36.12.115 or on Department Form

615 when quantifying water use standards related to exempt wells. The Department will accept variations from these standards on a case-by-case basis as well. For the Department to accept a variation from the standard, calculations must be provided which justify the variance from standards. The DEQ minimum domestic standard is 250 GPD/household, which equals 0.28 AF/household/year. The Department will not accept an applicant proposal for less than this amount unless they have requested and received prior approval from DEQ.

Reducing existing Groundwater Certificates:

The Department has a Request to Reduce a Groundwater Certificate form that may be used to reduce the flow rate, volume, place of use, period of use, and/or purposes of use for a Groundwater Certificate. Once processed, a new Certificate will be issued for the reduced amount. Once a new Certificate with the reduced elements is issued, the elements listed on the original Certificate may not be reinstated.

Any right to use of water under the original Certificate will be permanently relinquished and/or abandoned in an amount equal to the reduction.

Questions:

The Department encourages and welcomes anyone with questions about this guidance or the water right permitting process to contact their local Regional Water Resources Office so they can discuss your situation and answer questions. You can find your Regional Office at the following link:

<http://dnrc.mt.gov/divisions/water/water-rights/water-resources-regional-offices>

You may also contact our New Appropriations program staff—contact information can be found at:

<http://dnrc.mt.gov/divisions/water/water-rights/new-appropriations-program>