

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<p><b>PETITION FOR DECLARATORY RULING AND REQUEST TO AMEND RULE 36.12.101(13)</b></p>	<p>) ) ) )</p>	<p><b>DECLARATORY RULING</b></p>
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A Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13) by Katrin R. Chandler, Betty J. Lannen, Polly Rex, Joseph Miller, and the Clark Fork Coalition, dated November 30, 2009. The Petition requested, under Sections 2-4-501 and 2-4-308, MCA, and Rules 1.3.227 and 1.3.308, ARM, that the current administrative rule definition of “combined appropriation” set forth in Rule 36.12.101(13), ARM be declared invalid and that the Department initiate rulemaking to amend the definition.

**Procedural History**

The Department issued an Order on January 28, 2010 that bifurcated the issues raised in the Petition. In that Order, the Department granted the Petition for Declaratory Ruling and deferred consideration of the request for rulemaking until after the Petition for Declaratory Ruling was considered.

On March 9, 2010, the Department issued a Notice of Appointment of Hearing Examiner, Order Scheduling Briefing from all Interested Parties, and Setting Public Hearing on Petition for Declaratory Ruling. The Department determined that the issue raised was of statewide importance and would have statewide implication. To provide input to all interested persons statewide, the Department provided opportunity to file briefs or statements of position (filed by April 30, 2010), response briefs or statements of position (filed by June 4, 2010), or give comments during a public hearing (held June 17, 2010). The March 9, 2010 Notice was mailed first-class to all persons on the Water Resources Division’s interested parties and rule-making list, posted on the Department’s

website ([www.dnrc.mt.gov](http://www.dnrc.mt.gov)), and published in newspapers of general circulation, including Helena, Bozeman, Billings, Great Falls and Missoula.

Briefs or statement of positions were filed with the Department by:

- Petitioners
- Alstad and Lannen
- Art Hayes of the Brown Cattle Company
- Cottonwood Environmental Law Center
- Missoula County, Board of County Commissioners
- Montana Department of Fish, Wildlife and Parks
- Montana Water Well Drillers Association
- Mountain Water Company
- Northern Plains Resources Council
- Richard Hixon, City Engineer for Bozeman
- Stillwater Protective Association
- Tongue River Water Users Association
- Trout Unlimited
- Comments and signature page by a group of Ranchers, including Gate, Scaff, and Scott.

All briefs and statements of position were posted on the Department website following receipt.

Response briefs were filed with the Department by:

- Petitioners
- Montana Water Well Drillers Association
- Montana Association of Realtors and Montana Building Industry Association
- Trout Unlimited.

All response briefs were posted on the Department website following receipt.

Comments were presented at the June 17, 2010 public hearing from those in support of the Petition, those opposed to the Petition, and those who did not have a position on the Petition but wanted to comment on the issue.

Comments given at the public hearing in support of the Petition were presented by:

- Matthew Bishop, Western Environmental Law Center, Attorney for Petitioner
- Laura Zeimer, Trout Unlimited Attorney
- Meg Casey, Trout Unlimited Summer Associate
- Brianna Randall, Clark Fork Coalition
- Katrin Regina Chandler, Petitioner
- Polly Rex, Petitioner
- Steve Brown, Mountain Water Company.

Comments given at the public hearing in opposition to the Petition were presented by:

- Abigail St. Lawrence, Montana Association of Realtors and Montana Building Industry Association
- Ronda Wiggers, Montana Water Well Drillers Association
- Will Hayes, Hayes Drilling, Montana Water Well Drillers Association
- Rick Byrne, Great Falls well driller.

One comment was given at the public hearing neither in support of nor in opposition to the Petition, but to inform the Department of the Department of Transportation's use of exempt wells and interest in the issue. The comment was presented by:

- Jolyn Eggart, Department of Transportation Attorney.

### **Preliminary Procedural Issue**

As a preliminary procedural matter, in response briefs the Montana Water Well Drillers Association and the Montana Association of Realtors and Montana Building Industry Association question the authority of an administrative agency to issue a declaratory ruling as to the validity of the agency's administrative rule.

The Montana Administrative Procedure Act, Section 2-4-501, MCA addresses declaratory rulings by agencies and states in full:

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A copy of declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.

The attorney general has prepared model rules of practice for agencies to use as a guide for declaratory rulings under the Montana Administrative Procedure Act. Section 2-4-202, MCA. The model rules are set out in Rules 1.3.101 through 1.3.233, ARM. The Department has adopted the model rules. Rule 36.2.101, ARM. Model Rule 1.3.226, ARM covers agency declaratory rulings and provides: "A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights."

The Montana Association of Realtors and Montana Building Industry Association argue that the agency is limited to issuing a declaratory ruling that a rule is inapplicable in a specific factual context and is prohibited from considering whether the rule is consistent and not in conflict with applicable law. Response Brief, Montana Association of Realtors and Montana Building Industry Association, Dated June 3, 2010, p. 2. In other words, even though the Petitioners allege individual harm and violation of their legal rights based on the agency's interpretation of the statute contained in the rule, the agency is prohibited from ruling on the applicability of a rule generally (i.e. validity) and must limit declaratory rulings to specific application of rule to individual factual

circumstances. The Montana Water Well Drillers Association and the Montana Association of Realtors and Montana Building Industry Association argue that to consider the validity of a rule that an action must be brought to the district court under Section 85-2-506, MCA. Response Brief, Montana Association of Realtors and Montana Building Industry Association, Dated June 3, 2010, p. 2; Response Brief, Montana Water Well Drillers Association, Dated June 4, 2010, p. 2.

The Department has express authority to adopt suitable rules for the administration of the Water Use Act. Section 85-1-201, MCA. The agency has the power necessary for effective exercise of powers and duties expressly confirmed. State ex Rel. Dragstedt v. State Board of Education, 103 Mont. 336 (1936). The agency must adopt rules in accordance with Sections 85-2-302 through 2-4-305, MCA of the Montana Administrative Procedure Act. The agency has a duty to ensure its rules continue to be consistent with statutory language and legislative intent and, if not, adopt, modify or repeals its rules. Section 2-4-314(1), MCA. The Petitioner initiated, through Petition for Declaratory Ruling, the Department's review of the validity of the current administrative rule based the general applicability of the rule that can affect Petitioners' legal rights. A declaratory ruling in this instance is consistent with Section 2-4-501, MCA, Rule 1.3.226, ARM, and the rulemaking authority expressly conferred on the agency.

Petitioner could have brought this action in district court under Section 2-4-506, MCA , but chose to Petition the Department for a declaratory ruling. Section 2-4-506(3), MCA states that: "A declaratory judgment may be rendered [by the court] whether or not the plaintiff has requested the agency to pass upon the *validity* or applicability of the rule in question" (emphasis added). Although it is by negative implication, the statute anticipates that persons with legal rights that are alleged to be affected by the rule may petition the agency for declaratory ruling on the validity of the rule. The Department finds that it has the authority to issue a declaratory ruling on the validity of its administrative rule.

The Department agrees with the Montana Water Well Drillers Association and the Montana Association of Realtors and Montana Building Industry Association, that the requisite rulemaking process under the Montana Administrative Procedure Act, including published notice and opportunity to comment, was not incorporated in this declaratory ruling proceeding. The Department clearly has power to adopt, modify or a rule under Sections 85-2-302 through 2-4-305, MCA. However, if the declaratory ruling requires subsequent rulemaking in accordance with the ruling, this two step process does not make the relief requested from the agency substantially different than what could be sought in district court under Section 2-4-506, MCA.

### **Issue for Declaratory Ruling**

The sole issue to be decided by Declaratory Ruling was set forth in the March 9, 2010 Notice as follows:

**Whether the ‘combined appropriation’ administrative rule definition (Rule 36.12.101(13) ARM) is consistent with applicable law under the Montana Water Use Act, Section 85-2-101 et.seq, MCA.**

### **Department’s Declaratory Ruling**

The Department rules that:

the “combined appropriation” administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with applicable law under the Water Use Act, Section 85-2-101 et. seq, MCA, for reasons discussed below.

The Department further rules that:

while the current “combined appropriation” administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with the

Water Use Act, Section 82-2-101 et.seq, MCA, increasing demands on water resources in Montana warrant repeal of Rule 36.12.101(13), ARM. The Department will, within eight months, initiate rulemaking to propose repeal of Rule 36.12.101(13), ARM and adoption of a new “combined appropriation” administrative rule definition pursuant to Section 2-4-302, MCA, for reasons discussed below.

### **Reasons for Department’s Declaratory Ruling**

Petitioner has requested that the Department declare the definition of “combined appropriation” contained in Rule 36.12.101(13), ARM invalid.

An agency rule is not valid unless the rule is consistent and not in conflict with the statute and is reasonably necessary to effectuate the purpose of the statute. Section 2-4-305(6). MCA; Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 493, 133 P.3<sup>rd</sup> 224, 231 (2006). An agency rule must be consistent and not in conflict with the statute it implements. Safeway, Inc. v. Montana Petroleum Release Compensation Board, 281 189, 194, 931 P.2d 1327, 1330 (1997). In order for a rule to be invalid, the rule must be plainly and palpably inconsistent with the statute. Moe v. Wesen, 172 F.Supp. 259, 263 (Mont. 1959), citing, Boske v. Comingore, 177 U.S. 459, 470 (1900).

The statute at issue in this proceeding deals with exceptions to water right permit requirements as set forth in Section 85-2-306(3)(a), MCA.<sup>1</sup> Providing for exceptions to the permitting process was a legislative decision. The language of the statute reads:

Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a combined

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<sup>1</sup> Wells under 35 gallons per minute (gpm) and less than 10 acre-feet per year are exceptions to the permitting process but are commonly called “exempt wells” and that term will be used herein.

appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.

The current administrative rule at issue is the definition of “combined appropriation” (Rule 36.12.101(13), ARM), that reads:

"Combined appropriation" means an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system.

First, we review the plain language of the statute and whether the administrative rule is inconsistent or in conflict with the plain language of the statute. Powell County v. Country Village, 352 Mont. 291, 296 (2009). The statute does not define “combined appropriation.” Section 85-2-306(3)(a), MCA. The Petitioners argue that the term “combined appropriation” in the statute is inconsistent with and in conflict with the “physically manifold” requirement contained in the administrative rule definition (Rule 36.12.101(13), ARM). The Department’s administrative rule definition interprets and makes specific the statutory term “combined appropriation” to implement the provisions of the statute. Petitioners point out a variety of definitions for “combined” that they say support the contention that the administrative rule is inconsistent and in conflict with the plain language of the statute. Petition for Declaratory Ruling, p. 12. However, a common, perhaps the most common definition, of “combined” is physically joined together.<sup>2</sup> Therefore, the ‘physically manifold’ requirement under the administrative rule is not inconsistent or in conflict with the plain language of the statute, and certainly not plainly and palpably inconsistent with the statutory language.

To be consistent and not in conflict with the plain language of the statute, the administrative rule must also not insert words that are not contained in the statute or omit words that are contained in the statute. Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 494, 133 P.3<sup>rd</sup> 224, 232 (2006). In this instance, the administrative rule is more specific in that the statute refers to the “same source” and the rule refers to the “same source aquifer.” Ground

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<sup>2</sup> Webster’s Ninth New Collegiate Dictionary (1989).

water aquifers are the specific source of water supply for ground water wells. The addition of “same source aquifer” to the language in the administrative rule clarifies the term “same source” in the statute and does not add to or change the plain language of the statute. This language is consistent with and not in conflict with the plain language of the statute. The rule does not assume that wells pump from the same source aquifer. More than one well, each from different aquifers, even if physically manifold would not be a “combined appropriation.” Nothing in the treatment of wells from different aquifers adds to or omits words contained in the statute. The language is consistent with and not in conflict with the plain language of the statute.

The statute refers to “wells or developed springs.” The administrative rule does not refer to developed springs. Developed springs are defined in the Department’s rules as ground water, so to repeat the statutory “developed springs” language would be redundant and confusing. Rule 36.12.101(62), ARM. Therefore, developed springs are treated in the same fashion as ground water wells, and the administrative rule language is consistent with and not in conflict with the plain language of the statute.

The Department finds that the definition of “combined appropriation” (Rule 36.12.101(13), ARM) is consistent with and not in conflict with the plain language of the statute (Section 85-2-306(3)(a), MCA).

Second, we review whether the rule is reasonably necessary to effectuate the purpose of the statute. Section 2-4-305(6), MCA.; Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 493, 133 P.3<sup>rd</sup> 224, 231 (2006). This requires an evaluation the legislative intent and the purpose the statute. In the Matter of the Formation of East Bench Irrigation District, 350 Mont. 309, 316, 207 P.2d 1097, 1102 (2009)(statute construed “to ascertain the legislative intent and to give effect to the legislative will”).

The Water Use Act was passed in 1973 in response to the adoption of the 1972 Montana Constitution. The 1972 Constitution required that the legislature “shall provide

for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local record.” Art. IX, Sec. 3(4), Mont. Const.; Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 485, 133 P.3<sup>rd</sup> 224, 226 (2006). The Water Use Act specifies that after July 1, 1973, a permit from the State of Montana is required in order to obtain a right to use water. Section 85-2-301, MCA. Generally, “a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the department.” Section 85-2-302(1), MCA. There are some exceptions to permitting requirements enacted by the legislature, including the exempt well provision at issue here.<sup>3</sup>

When the Water Use Act was enacted in 1973 the language concerning exempt wells read, in pertinent part:

Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than one hundred (100) gallons per minute. . . .

Sec. 16(4), Ch. 452, L. 1973; RMC, Sec. 89-880(4)(1973). There is no specific discussion in the legislative history concerning this provision. However, the legislative intent can be gleaned from looking at the overall structure of the Water Use Act.

The Water Use Act provides a framework for administration, control, and regulation of water rights. Pre-July 1, 1973 water rights were recognized and confirmed and a system to adjudicate those rights was initiated. Art. IX, Sec. 3(1), Mont. Const.;

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<sup>3</sup> Exceptions to the permitting process are set forth in Section 85-2-306, MCA. These exceptions are currently limited to ground water wells or developed springs of less than 35 gpm and less than 10 acre-feet per year and impoundments or pits used by livestock on non-perennial streams with a 15 acre-foot capacity and a maximum appropriation of 30 acre-feet per year. It is important to note that these uses are “exempt” from the permitting process, but if the appropriator follows the statutory procedures for filing the requisite notice of completion under Section 85-2-306, MCA (Form 602), the appropriator has a protectable water right under the prior appropriation doctrine and use of the water is also subject to enforcement under the prior appropriation doctrine. There are also exceptions to the permitting process that are temporary in nature and do not establish water rights under the prior appropriation doctrine. Sections 82-2-113(3) and 85-2-369, MCA.

Sections 85-5-201 through 85-2-282, MCA. After July 1, 1973 the legislature set forth a permit system to acquire a water right as previously discussed. The legislature decided that water uses under 100 gpm did not need to go through advance approval in order to obtain a water right. RMC, Sec. 89-880(4)(1973). Montana is a rural state and small wells are often located in remote areas. Exempt ground water wells typically serve small dispersed uses with low probability of adverse affect to neighboring water rights. It is apparent that the legislature intended to allow small ground water appropriations for discrete purposes, especially to provide for domestic and stock uses, without the burden and expense of going through the permitting process. While still under the prior appropriation doctrine, these small appropriations would not go through an initial approval process but are subject to enforcement based on priority date the same as any other water right under the prior appropriation doctrine.

This legislative intent is evidenced by similar treatment of domestic and stock uses in the adjudication process. In the adjudication process “[c]laims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources . . . are exempt from the filing requirements of 85-2-221(1). Such claims may, however, be voluntarily filed” Section 85-2-222, MCA. Although exempted from the claim filing process, these pre-1973 water rights for individual domestic and stock uses are recognized and confirmed and are subject to enforcement based on priority date the same as any other water right under the prior appropriation doctrine. Art. IX, Sec. 3(1), Mont. Const. This is entirely consistent with how post-1973 exempt wells are treated under the Water Use Act.

The Montana Water Use Act treatment of exempt ground water wells is also in line with the water appropriation structure in many other western states. Most western states following the prior appropriation doctrine provide an exemption from the permitting process targeted at domestic and stock use through a flow rate and/or volume limits for the exception or a statutory preference in permitting or enforcement under the

prior appropriation system for domestic or stock use.<sup>4</sup> See, Petition for Declaratory Ruling, Exhibit 12.

The legislature intended that small ground water uses, primarily to provide for individual domestic and stock uses, could continue to be appropriated under the Water Use Act without the burden and expense of going through the permitting process. It follows that the purpose of the exempt well statute is to establish the dividing line below which ground water wells are excepted from the permitting process and above which a permit is required. There was no administrative rule concerning exempt well provision based on the 1973 language because the statute was very specific. Any well used for domestic, agricultural, or livestock purposes with a maximum yield of less than 100 gpm did not need a permit.<sup>5</sup>

In 1987, the exempt well statute, Section 85-2-306(1), MCA (1987), was amended to read:

Groundwater may be appropriated only by a person who has either exclusive property rights in the groundwater development works or the written consent of the person with those property rights. Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than 100 gallons per minute, *except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. . . .* (Amended language emphasized.)

Sec. 2, Ch. 535, L. 1987 (H.B. 642).

Legislative history on the 1987 amendment to Section 85-2-306(1), MCA, is limited. However, it is clear that the legislature was concerned with appropriators using the exempt well statute to avoid applying for a permit, especially for irrigated agriculture.

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<sup>4</sup> There is no statutory preference for any specific beneficial use of water in Montana.

<sup>5</sup> In 1974, the legislature amended RMC, 89-880(4) to delete the phrase “for domestic, agricultural, or agricultural purposes.” Sec. 2, Ch. 238, L. 1974. The relevant portion of the S.B. 650 stated: “An act to amend Section[] . . . 89-880 . . . by providing for an exemption from the permit requirements for all wells less than one-hundred (100) gallons a minute . . .”

The testimony at the hearing on House Bill 642 articulated concerns with irrigation.<sup>6</sup> A single well or developed spring pumping at 100 gpm without a volume limitation is more than adequate to provide for domestic and stock uses. Irrigated agriculture was really the only common beneficial use of water that would use multiple wells of this size for the same purpose in contravention of legislative intent.<sup>7</sup> By limiting the use of the groundwater well exception to one well or developed spring less than 100 gpm from the same source, the legislature restricted the use of exempt wells for agricultural use. The legislative history and the effect of the legislative amendment show that the legislative intent was to prevent irrigated agriculture on a significant level to avoid permitting process through the use of exempt wells while maintaining the exemption to the permitting statute for small ground water development.

In 1987, the Department adopted an administrative rule to implement Section 85-2-306(1)(1987). The 1987 administrative rule definition read:

“Combined appropriation” means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department’s judgment, could have been accomplished by a

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<sup>6</sup> The only testimony on Section 2 of H.B. 642 was from a lobbyist, but he speaks to the concern about use of the exempt well statute for irrigation. “Ted Doney, an attorney who specializes in water law represented the Water Development Association. . . . Mr. Doney disliked the word “combined” because he didn’t know what the word meant in the bill. He thought it meant that two wells that were irrigating the same tract but not physically connected. Mr. Doney would rather the bill would read ‘wells from the same source’.” Senate Natural Resources Committee, March 23, 1987, Page 9. Rep. Spaeth, the sponsor of House Bill 642, supported the amendment. *Id.* at p. 10. The Petitioners and Trout Unlimited cite to testimony on H.B. 642 offered by Mr. Flynn, on behalf of the Department of Fish, Wildlife and Parks. However, Mr. Flynn’s testimony was on Section 7 of the bill that concerned subordinating the priority dates of the Missouri River water reservations (including instream flow water reservations) to *permits* issued by the Department. (Trout Unlimited also testified in opposition to Section 7.) House Natural Resources Committee Minutes, H.B. 642, Exhibits 5 and 6 (February 13, 1987). The legislature passed Section 7 of H.B. 642 despite the concerns Mr. Flynn expressed. Section 85-2-331, MCA (1987). There is no basis to show that Section 2 of H.B. 642 was added as a result of Mr. Flynn’s testimony.

<sup>7</sup> “The first exception, for wells and developed springs with a maximum appropriation of less than 100 gpm, covers the vast majority of new wells in Montana, although many irrigation wells will exceed 100 gpm. A typical household well will yield less than 20 gpm. The exemption does not apply within the boundaries of a controlled groundwater area . . . , at present there is only one such area, near Terry in eastern Montana. Montana Water Law Handbook, Ted J. Doney, p. 95 (1981). Mr. Doney was Chief Legal Counsel at the Department when the Water Use Act was passed and was involved in drafting the Act.

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 for the entire project or development in the same source aquifer is the “combined appropriation.”

Rule 36.12.101(7), ARM (1987). The administrative rule definition of “combined appropriation” reflected the 1987 amended statutory language, and the legislative intent that multiple 100 gpm wells not be used for larger scale irrigation operations or other large water consumptive uses.

The most significant change to the exempt well statute occurred in 1991. The legislature amended Section 85-2-306(1), MCA to read:

Ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development, works or, if another person has rights in the ground water development works, the written consent of the person with those property rights. Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with *a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year*, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. . . .

Sec. 4, Ch. 805, L. 1991 (S.B 266)(emphasis added).

The 1991 amendment significantly lowered the threshold on the amount of water that could be appropriated without going through the permitting process. The amendment not only changed the flow rate limit from 100 gpm to 35 gpm, but also added a *volume limit* of 10 acre-feet per year. Even though water could be appropriated for any beneficial use under the exempt well statute, introducing a volume limit had the direct effect of limiting the use of the exempt wells for larger water uses with correspondingly larger impacts.

Senate Bill 266, sponsored by Senator Grosfield at the request of the Department, as introduced did not contain amendments to Section 85-2-306, MCA. S.B. 266, 1991 Leg. Sess. (introduced February 4, 1991). S.B. 266 primarily dealt with changes to the statutory definition of ground water. During the hearing before the House Natural Resources Committee, Rep. O’Keefe raised questions about the use of ground water for *irrigation* and the interrelationship with surface water and the potential impact to surface water rights. Mr. Fritz (from the Department) responded there may be a problem if the upstream water user’s well is less than 100 gallons per minute.<sup>8</sup> In the closing by the bill sponsor at the House hearing, “Sen. Grosfield said Rep. O’Keefe brought up the 100 gallon per minute limit threshold, which is addressed on Page 9 of the bill. The 100 gallon limit language was struck and a new line was inserted that is tighter.<sup>9</sup> *There was some discussion in the Senate committee about whether the threshold should be lowered. The most common figure heard was 35 gallons per minute.* The Department’s position has been that 100 gallons per minute is a reasonable threshold.” S.B. 266, House Natural Resources Committee, March 14, 1991, Page 15 of 23 (emphasis added). No amendments were made to S.B. 266 concerning the exempt well provision before the bill passed out of the House Natural Resources Committee. However, during a Free Conference Committee on S.B. 266, the Committee inserted Section 4 to the bill amending the Section 85-2-306(1) to change exempt wells from a maximum of 100 gpm

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<sup>8</sup> “Rep. O’Keefe asked what protects a water user’s right to surface water if an upstream water user decides to tap into existing groundwater to build a well for irrigation. The language describing the interrelationship with surface water seems to be struck. Mr. Fritz [from the Department] said there may be a problem in the permitting process if the upstream user’s well is less than 100 gallons per minute. There is always recourse if it is believed someone has adversely impacted the water supply. If use is under 100 gallons per minute, the certificate does not go through the permit process. In such a case, any adverse impact would have to be addresses in the courts.

Rep. O’Keefe said that is one problem. He asked how the change affects the downstream user’s right to object to the upstream user’s use of the water, and if the downstream user has to show the upstream user’s activities will have an adverse impact. Mr. Fritz said SB 266 and the definition do not change the burden of proof or process if groundwater use is more than 100 gallons per minute. The upstream user would have to apply for a permit and the downstream user would still have the right to object to it.” S.B. 266, House Natural Resources Committee, March 14, 1991, Page 14 of 23.

<sup>9</sup> Page 9 of S.B. 266 contained a change to the definition of well, removing the language referring to 100 gallons a minute and adding a reference to “the limitation contained in 85-2-306(1),” thereby bringing the exempt well provision under the heading of the bill.

to 35 gpm not to exceed 10 acre feet per year.<sup>10</sup> Both Senator Grosfield and Rep. O’Keefe served on the Free Conference Committee. The Free Conference Committee report was adopted by both the House and Senate on April 25, 1991 and the bill was signed by the Governor on May 17, 1991.

The 1991 amendment again addressed the legislature’s primary concern that the exempt well provision could be used to irrigate larger parcels of land with correspondingly larger impacts to water resources. A single well with a flow of 100 gpm without a volume limitation can irrigate in excess of 20 acres. With a 35 gpm and 10 acre-feet per year limitation, only about 4 acres of land can be irrigated from a single well.<sup>11</sup> The 1991 statutory amendment of Section 85-2-306(3), MCA effectively closed the door on multiple wells with separate distribution systems for irrigation. Separate wells with separate distribution systems every 4 acres was simply not economical or practical for irrigation on a commercial level.

In response to the 1991 statutory amendment of Section 85-2-306(1), MCA (1991), the Department changed the administrative rule definition to the current rule. Montana Administrative Register, June 24, 1993; Rule 36.12.101(13), ARM. Use of exempt wells for irrigation had been the legislature’s primary concern. Under Section 85-2-306(3)(a), MCA after the 1991 amendment, the only way to evade the permit process to irrigate larger parcels was to physically connect multiple wells with a single distribution system. Individual small wells with separate distribution systems would not be practical or economically feasible for irrigated agriculture. However, individual small wells that were physically combined or manifold together to create a single water development and distribution system could still evade the permitting process and be inconsistent with the legislative purpose of the statute if not addressed by rule. Thus, the current rule prevents irrigation or, any larger water consumptive uses, from avoiding the permitting process by drilling more than one 35 gpm well and “combining” or

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<sup>10</sup> Free Conference Committee on Senate Bill No. 266, Report No. 1, April 24, 1991.

<sup>11</sup> 10 acre-feet per year can irrigate between 3 and 8 acres depending on climatic area and irrigation efficiency, with around 4 acres being a typical size base on climatic areas and common irrigation efficiencies in Montana. Rule 36.12.115, ARM.

manifolding the wells together to operate as a single water development sharing a common distribution system. The fact that there are no manifold small wells to serve irrigation shows that the rule effectively prevented this practice. The Department's "combined appropriation" administrative rule definition (Rule 36.12.101(13), ARM) is consistent with legislative intent and is reasonably necessary to effectuate the purpose of the statute. Section 2-4-305(6), MCA

The vast majority of the 110,024 exempt wells are single wells of less than 35 gpm and 10 acre-feet per year for domestic use.<sup>12</sup> The exempt well statute and the administrative rule apply statewide. For areas where the statewide approach does work because the area is experiencing local problems with exempt wells, the Water Use Act is structured to address problems on a site specific basis through controlled ground water areas.<sup>13</sup>

This administrative rule definition of "combined appropriation" (Rule 36.12.101(13), ARM) has been in place for 17 years.<sup>14</sup> The administrative rule has been easy for the public to understand and the Department's Regional Offices to administer consistently.<sup>15</sup> The purpose of the exempt well statute is to provide for small uses of water with limited potential for impact to the water resource, typically for domestic and stock uses, without the burden and expense of the permit process. The legislature

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<sup>12</sup> Petition for Declaratory Ruling, Exhibit 12.

<sup>13</sup> Section 85-2-506, MCA. Currently there are 15 controlled groundwater areas. Other statutory provisions can also address local impact, such as special zoning districts

<sup>14</sup> Deference to the agency's interpretation of the statute was not accorded in this Declaratory Ruling and we do not rule on whether deference to an agency interpretation in an administrative proceeding is appropriate. We do point out that the rule was adopted 17 years ago, there has been no objection to the rule from Legislative Administrative Rules Committee, and that the exempt well statute and the Department's rule has been discussed and considered by the legislature a substantial number of times. See, Petitioners Brief, Exhibits 9 and 25.

<sup>15</sup> In response to a comment from the Legislative Rules Committee, the Department responded "Rule 36.12.101 was amended to more concisely define what is considered a combined appropriation. The past definition was too ambiguous and therefore difficult to administer 85-2-306(1) fairly and consistently throughout the state. It required the department to make assumptions when determining whether developments were considered combined appropriations. The amended rule clearly defines what is a combined appropriation without any supposition." Montana Administrative Register, June 24, 1993.

intended that larger, more water consumptive uses, especially irrigated agriculture, go through the permitting process. The definition of “combined appropriation” in Rule 36.12.101(13), ARM is reasonably necessary to prevent large water consumptive uses from circumventing the permit process by inappropriately using the exempt well statute. This administrative rule was rationally aimed at the practicality and economic feasibility of water use development and has successfully prevented wells for irrigated agriculture and other large water consumptive uses from using the exempt well statute to acquire a water right.

The Department finds that the definition of “combined appropriation” (Rule 36.12.101(13), ARM) is consistent and not in conflict with the plain language and the purpose of the statute and is reasonably necessary to effectuate the purpose of the statute. Section 85-2-306(3), MCA. Therefore, the Department rules that the “combined appropriation” administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with applicable law under the Water Use Act, Section 85-2-101 et.seq, MCA, and the certificates of water right issued pursuant to the statute and the rule are valid.

Having ruled that the current administration rule definition of “combined appropriation” (Rule 36.12.101(13), ARM) is valid and the certificates of water right issued by the Department for exempt wells under the rule are valid, the Department acknowledges that Petitioners raise issues that the Department has been reviewing for some time. See, Department Order, Petition for Rulemaking by Gallatin County Commission (2006). The legislature’s primary concern in amending the exempt well statute in 1987 and 1991 was to limit larger appropriations of water, especially for irrigation. However, the proliferation of exempt wells for individual domestic purposes developed in a way that was not anticipated at the time the legislation was passed needs to be addressed.<sup>16</sup> The legislative intent that exempt wells be small dispersed uses with low probability of adverse affect to neighboring water rights must continue to be reflected in the Department’s rule. Specifically, the Department is concerned that the

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<sup>16</sup> Petition for Declaratory Ruling, Exhibit 12.

administrative rule of “combined appropriation” continues to serve the purposes of the Water Use Act into the future.

Since the last amendment to the exempt well statute in 1991, there have been changes to Water Use Act that have a bearing on Section 85-2-306(3)(a), MCA. Prior to 1991 there were one legislatively authorized basin closure<sup>17</sup> for the Milk River basin<sup>18</sup> and three basin closures adopted through administrative rule.<sup>19</sup> Over the course of years the legislature has enacted permanent or temporary basin closures for the Teton River Basin (Section 85-2-330, MCA (1993)), the Upper Clark Fork River Basin (Section 85-2-336, MCA (1995)), the Jefferson River and Madison River Basins (Section 85-2-341, MCA (1993)), the Upper Missouri River Basin (Section 85-2-343, MCA (1993)), and the Bitterroot River Basin (Section 85-2-344, MCA (1999)). There are also legislatively approved basin closures in compacts for the Northern Cheyenne Reservation (Section 85-20-301, MCA (1991)), the Rocky Boy’s Reservation (Section 85-20-601, MCA (1997)), the Crow Reservation (Section 85-20-901, MCA (1999)), the Blackfeet Reservation (Section 85-20-1501, MCA (2009)), U.S. Fish and Wildlife Service (Section 85-2-701, MCA (1991)), U.S. National Park Service (Section 85-20-401, MCA (1994)). Since 1991, the Department has also closed 7 more basins through rulemaking, including the Musselshell River, and issued another legislatively authorized order closing the southern tributaries of the Milk River.<sup>20</sup>

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<sup>17</sup> Basin closure is the term often used for legislative or Department actions under Section 85-2-319(1), MCA (“With regard to a highly appropriated basin or subbasin, . . . the legislature may by law preclude permit applications or the department may by rule reject permit applications or modify or condition permits already issued.”)

<sup>18</sup> Section 85-2-321, MCA. Department Order closing the Mainstem of the Milk River to surface water appropriations (January 1, 1983).

<sup>19</sup> Basin closures for surface water appropriations for Grant Creek Basin (Rule 36.12.1011, ARM, January 26, 1990). Rock Creek Basin (Rule 36.12.1013, ARM, February 9, 1990), and Walker Creek Basin (Rule 36.12.1014, ARM, September 28, 1990).

<sup>20</sup> Towhead Gulch (Rule 36.12.1015, ARM, January 17, 1992), Musselshell River (Rule 36.12.1016, ARM, June 26, 1992), Sharrott Creek Basin (Rule 36.12.1017, ARM, July 16, 1993), Willow Creek Basin (Rule 36.12.1018, ARM, September 23, 1994), Truman Creek Basin (Rule 36.12.1019, ARM, February 9, 1995), Sixmile Creek Basin (Rule 36.12.1020, ARM, December 8, 1995), Houle Creek Basin (Rule 36.12.1021, ARM, September 20, 1996), and Department Order Southern Tributaries of the Milk River (September 1, 1991).

As a result of basin closures, appropriation of surface water is restricted in a significant portion of Montana. Many of the basin closures allowed for continued appropriation of ground water. However, following the Supreme Court ruling in 2006 in Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 133 P.3<sup>rd</sup> 224 (2006) and subsequent changes to the Water Use Act (i.e., Section 85-2-360, MCA) it has become increasingly difficult to obtain a permit for either surface water or ground water.

Exempt wells are still allowed in closed basins. Because permits for surface water or ground water permits may not be available or may be very costly to obtain due to mitigation requirements, it is likely that more people will look to exempt wells as a means to appropriate water. Where it has been impractical or not cost-effective in the past to obtain water through multiple small exempt wells not physically attached, it may become so where there are no other practical or cost-effective means to obtain water. While the current “combined appropriation” administrative rule definition has been effective and simple to administer, increased pressure to use the exempt well statute will likely lead to more people attempting to use this provision in new and creative ways that are not consistent with the purpose of the statute. In the face of changing times, the administrative rule needs to be more flexible to determine whether two or more wells are a “combined appropriation” prohibited by the statute.

The Department will, within eight months, initiate rulemaking to propose repeal of Rule 36.12.101(13), ARM and adoption of a new “combined appropriation” administrative rule definition and any other necessary rules pursuant to Section 2-4-302, MCA. The decision on Petitioners’ request to adopt a new administrative rule definition for “combined appropriation” (Rule 36.12.101(13), ARM) will be addressed in a separate agency order. The Department is evaluating a new “combined appropriation” administrative rule definition that would allow an exempt well to serve up to twelve residential lots with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year. The Department will consider other factors such as closed basins and geographic area.

Agency Response to Comments (Attachment 1) is incorporated herein by this reference.

Dated this 17<sup>th</sup> day of August, 2010.

/Original signed by Joe Lamson/

Joe Lamson  
Hearings Examiner