

# CONSIDERATION OF MULTIPLE APPROPRIATIONS UNDER THE CONFEDERATED SALISH & KOOTENAI TRIBES-MONTANA COMPACT AND UNITARY ADMINISTRATION AND MANAGEMENT ORDINANCE

---

## INTRODUCTION

The Confederated Salish and Kootenai Tribes–Montana Compact (Compact), through the Unitary Administration and Management Ordinance (Ordinance), contemplates well exemptions through its provisions regarding Domestic Allowances, specifically within Development Domestic Allowances. The Ordinance, however, purposefully excludes the concept of combined appropriation, as used by Montana’s agencies, in considering multiple appropriations within close proximity to one another. Combined appropriation is a heavily-litigated concept that may not be well suited for the implementation and efficiency of the Compact and Ordinance. As such, this paper will evaluate the process for considering Existing Uses and Domestic Allowances together within the Compact and Ordinance.

This paper is intended to provide an analysis of Development Domestic Allowances within the Compact and Ordinance, while also providing background on how Montana agencies have interpreted and evaluated state-based concepts like combined appropriations and exempt wells within similar circumstances. This paper is not intended to be decisional, but rather it is to be used as an informative resource for members of the Flathead Reservation Water Management Board (Board) and Office of the Engineer (Office).

## BACKGROUND & ANALYSIS

### Compact & Ordinance

The Compact and Ordinance do not adopt the state-based concepts of combined appropriation or exempt wells. Any evaluation of those concepts must look at the plain language of relevant provisions of the Compact and Ordinance. In particular, the Board and the Office have raised questions and uncertainty as to considerations of multiple appropriations within a close proximity to each other (i.e., a combination of Existing Uses and new Domestic Allowances). While the Ordinance, specifically, does not account for the combination of different appropriations on the same source, the following Compact and Ordinance definitions may provide some context as to how the Board and Office may consider multiple appropriations.

A “Domestic Allowance” means “an entitlement to use water issued to households and small businesses pursuant to the provisions of Section 2-2-117 of this Ordinance; Domestic Allowances include Individual Allowances, Shared Domestic Allowances, and Development Domestic Allowances.” Ordinance, § 1-1-104(18).

Under Ordinance, § 1-1-104(23), “Existing Use” is defined as “a use of water under color of Tribal, State or Federal law in existence as of the Effective Date, including uses in existence on that date that are eligible for either of the registration processes set forth in Sections 2-1-101 through 2-1-108 of this Ordinance; provided that any portion of a Water Right Arising Under State Law within the Reservation that is, at any point after the date the ratification of the Compact by the Montana Legislature takes effect under State law, voluntarily relinquished or is legally determined to be abandoned, relinquished, or have otherwise ceased to exist, shall be stricken from the relevant basin decree as a Water Right Arising Under State Law and be entitled to no further protection as such a right or as an Existing Use.”

“Development” is defined as: “contiguous or closely grouped parcels of land under the same or affiliated ownership, including, but not limited to, housing subdivisions or any combination of business and residential units.” Ordinance, § 1-1-104(16). Additionally, “Well” means: “any artificial opening or excavation in the ground, however made, by which Groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.” Ordinance, § 1-1-104(69).

The Board and Office’s uncertainty involving the consideration of multiple appropriations, including Existing Uses and new Domestic Allowances came up in the context of Development Domestic Allowances. For purposes of this paper, the evaluation of this concept will be viewed under the Development Domestic Allowance framework as described under Ordinance, § 2-2-117(6). The Ordinance provides: before appropriating water for a Development Domestic Allowance, approval from the Engineer is required, and approval is granted if:

- (a) the Well construction complies with the requirements of Section 1-1-111;
- (b) the maximum flow rate from each Well or Developed Spring is 35 gallons per minute or less;
- (c) the combined maximum annual diverted volume from all Wells and Developed Springs is 10 acre-feet or less;
- (d) Measurement devices approved by the Engineer and capable of recording cumulative volumes are installed on each Well or Developed Spring;
- (e) the means of diversion is one or more Wells and/or Developed Springs not to exceed one Well or Developed Spring per Home or Business within the Development;
- (f) the means of diversion includes Well Shaft Casing;
- (g) the allowance is physically connected to multiple Homes and/or Businesses that together constitute a Development;
- (h) Stock Water use associated with the allowance is dispensed using Stock tanks;
- (i) the amount of land to be irrigated with the allowances is limited to 0.25 acres or less for each Home or Business within the Development;
- (j) the application includes a copy of any Shared Well Agreement(s) signed by all parties, if applicable;
- (k) the water supply requirements for all Homes and Businesses within the Development are satisfied by the allowance; and
- (l) the applicant includes a

copy of the development plan, plat, or equivalent as required by the associated county government.

Ordinance, § 2-2-117(6)(a)-(l).

Notably, the Ordinance does not utilize terms such as “combined appropriation,” “physically manifold,” “physically manifold into the same system,” or other such similar terms as used by Montana agencies to define or describe the concept of evaluating the combination of Existing Uses and new Domestic Allowances which are in close proximity to one another. While it is likely intentional that the drafters of the Compact and Ordinance excluded any mention of the terms above, this paper will provide the relevant state-based combined appropriations rules.

### State Law

The Montana Legislature created an exception to the permitting requirements under the Montana Water Use Act (WUA) relating to exempt wells. Under the WUA, a permit is not required before appropriating ground water by means of a well or developed spring . . . “*except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit . . .*” Mont. Code Ann. § 85-2-306(3) (2021) (emphasis added). The term “combined appropriation” is not a statutorily-defined term under the WUA. Thus, the Department of Natural Resources and Conservation (DNRC) promulgated rules regarding combined appropriation in an attempt to define the Legislature’s exception.

DNRC’s first combined appropriation rule provided that a combined appropriation is “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 single appropriation” and that “groundwater developments need not be physically connected nor have a common distribution system to be considered a ‘combined appropriation.’” Admin.R.M. 36.12.101(7) (1987) (emphasis added). Then in 1993, the DNRC provided that the term “combined appropriation” means “groundwater developments, that are physically manifold into the same system.” Admin.R.M. 36.12.101(13) (1993) (emphasis added). DNRC’s combined appropriation rules have been continuously litigated in state court as to the meaning of the words in conjunction with the requirements of the WUA and the Montana Constitution. *See, i.e., Clark Fork Coalition v. Tubbs*, 2016 MT 229, 384 Mont. 503, 380 P.3d 771.

In *Tubbs*, the Montana Supreme Court held the DNRC’s 1993 combined appropriation rule frustrated the plain language of the WUA and inserted requirements, specifically that combined appropriations shall be “physically manifold into the same system,” that the WUA did not intend for. *See Tubbs*, ¶ 24. Therefore, the Court reinstated the 1987 rule requiring that combined appropriations need not be physically connected nor have a common distribution system. *See generally Tubbs*, ¶ 24 (“Accordingly, based upon the

plain language of the statute and the stated purpose of the Act, we conclude that ‘combined appropriation’ *refers to the total amount of maximum quantity of water that may be appropriated without a permit and not to the manner in which wells or developed springs may be physically connected.*” (emphasis added)).

Subsequent to *Tubbs*, the DNRC issued a guidance document as to how it would implement the 1987 rule when considering combined appropriations for new projects, developments, or subdivisions. This guidance document stated that the DNRC’s rule including the language “physically manifold into the same system,” was inconsistent with applicable law and therefore invalid. The guidance document also provided scenarios, based on the DNRC’s judgment, that constitute “combined appropriations of two or more wells from a same source aquifer that may not exceed 10 acre-feet.” As a result, DNRC reinstated the 1987 rule in full, which states:

“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 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.”

Most recently, the First Judicial District Court of Montana followed the precedent set by the *Tubbs* Court and made clear that no language anywhere in the WUA suggests that systems are required to be manifold or connected in the same source aquifer to be considered a combined appropriation. *See Upper Missouri Waterkeeper v. Broadwater County*, Cause No. BDV-2022-38, at 67 (First Jud. Dist. Ct., Feb. 14, 2024) (“the evident intent of the Legislature was to limit exempt well appropriation to only a *de minimis* quantity of water, determined by the Legislature to be 10 acre-feet per year. The term combined appropriation refers to the *total amount or maximum quantity of water that may be appropriated without a permit . . .*”) (internal citations omitted) (emphasis added).

The *Broadwater* court took issue with the DNRC’s guidance document because although it correctly restated the 1987 rule, it concluded, based on the DNRC’s judgment that a project could be entitled to a combined exempt well appropriation for *each* phase of a project. *Broadwater*, at 69; *see also Broadwater*, at 78 (“Likewise, DNRC’s current application of the law allows projects with an infinite number of exempt wells so long as they are developed in small enough sequential phases, a decision DNRC’s interpretation places entirely in the hands of the developer.”). Thus, the court invalidated DNRC’s guidance document as it conflicts with the plain language of the WUA and the 1987 rule.

To date, the 1987 rule is the applicable DNRC rule regarding the concepts of combined appropriations and exempt wells.

### Board and Office Interpretation

One of the fundamental intents of this paper is to highlight the consideration of Existing Uses and new Domestic Allowances within the framework of the Compact and Ordinance. Neither the Compact nor Ordinance uses terms such as “physically manifold” or “physically manifold to the same system” to describe Development Domestic Allowances, but rather simply provides thresholds as to what the *combined* maximum annual diverted volume, maximum flow rate, means of diversion, and other considerations must be. See, e.g., Ordinance, § 2-2-117(6)(a)-(l) (requiring maximum flow rate from each Well or Developed Spring to be 35 gallons per minute or less; the combined maximum annual diverted volume from all Wells or Developed Springs to be 10 acre-feet or less; and requiring the allowance to be physically connected to multiple Homes and/or Businesses constituting a Development). The key to considering multiple appropriations within close proximity of one another may lie within the definition of “Development.” Again, the definition of “Development” within the Ordinance includes considerations of proximity, ownership, and the type of projects (i.e., housing subdivisions or any combination of businesses and residential units). “Development,” as defined, does not contemplate considerations as to whether the combination of wells is within the same source aquifer or whether it is physically manifold to the same source. Absent such language, the simplest interpretation would be the plain language of the definition.

Based on the plain language within the Development Domestic Allowance provisions of the Ordinance, it is likely that the drafters of the Compact and Ordinance intended to apply the ideas of the 1987 rule, without inclusion of terms such as “combined appropriation.” As such, any Board or Office policy pertaining to considerations of multiple appropriations in the context of a Development may contemplate the limitations of a Development Domestic Allowance as prescribed within the Ordinance. For example, a policy within this framework may provide that: “For Development Domestic Allowances, the OE’s consideration of Existing Uses and new Domestic Allowance together does not necessitate a permit so long as the combined maximum annual diverted volume is 10 acre-feet or less. If, together, the Existing Uses and new Domestic Allowance have a total volume which exceeds 10 acre-feet, then the new Development shall require a permit.”

A policy structured as above accounts for the Development Domestic Allowance requirements and limitations under the Ordinance and does not add anything additional to the plain language of the Ordinance. Moreover, the combination of Existing Uses and Domestic Allowances in this context would rightfully only refer to the total amount or maximum quantity of water that may be appropriated without a permit, taking into account availability of water within the source. In sum, the language of the Ordinance, specifically the provisions describing Development Domestic Allowances, and the definition of

“Development” provide the guidance for how to consider multiple appropriations within close proximity to one another in the Development.

## **CONCLUSION**

The Board has the authority to promulgate rules and policies to better define, describe, and determine the manner in which the Board and the Office operate under and interpret the language of the Compact and Ordinance. The state-based concept of combined appropriation makes no appearance in the Compact or Ordinance and, as such, the plain language of the Ordinance should guide the Board when considering how to evaluate Existing Uses and new Development Domestic Allowances together.

DRAFT