Guidance on Combined Appropriations

(Updated 06/26/2024)

Section 85-2-306(3)(a), MCA, provides:

> 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:
>
> (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does not exceed 10 acre-feet a year, ***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; or

ARM 36.12.101(12) defines the term "Combined appropriation" as:

> 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."

There have been two cases focused on the combined appropriation definition and application that DNRC must consider when making future combined appropriation determinations.

In *Clark Fork Coalition v. Tubbs*, the Montana Supreme Court concluded that "combined appropriation" refers to the maximum quantity of water (10 acre-feet) that may be appropriated by multiple groundwater developments from the same aquifer without a permit. DNRC's then-rule limiting the definition of combined appropriation to groundwater developments that are physically manifold or connected improperly allowed an appropriator to avoid the permit process for an infinite number of appropriations so long as the wells were not physically connected. The Court determined that this definition effectively swallowed the 10-acre-foot volume limit of the exception and rendered it meaningless. The Court reinstated the 1987 definition which remains in effect today. *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶¶ 24 – 28, 384 Mont. 503, 380 P.3d 771.

In *Upper Missouri Waterkeeper, et al v. DNRC,* Cause No. BDV-2022-38, Montana's First Judicial District Court concluded that the blackletter law is clear that multiphase developments are one combined appropriation. Treating phases of the same subdivision or project as separate appropriations impermissibly allows an infinite number of exempt groundwater developments so long as they are developed in small enough sequential phases. Accordingly, the District Court concluded that DNRC's treatment of each phase of a multiphase subdivision as a separate appropriation violated the law. *Upper Missouri Waterkeeper v DNRC*, pp 77-79.

These cases establish the exempt groundwater development permit exception is a narrow exception and any interpretation or application of the combined appropriation definition that allows for expanded use under the permit exception is likely to be found inconsistent with statute.

Whether groundwater developments constitute a combined appropriation is determined when a Notice of Completion for Groundwater Development (Form 602) is filed pursuant to §85-2-306(3), MCA. The subject groundwater development is part of a combined appropriation if:

1. **The groundwater development provides water for the same purpose, project, or development as one or more existing groundwater development;**
2. **The groundwater developments appropriate water from the same source aquifer; and**
3. **The groundwater developments could have been accomplished by a single appropriation.**

Questions to ask and factors to consider in evaluating if multiple groundwater developments are a combined appropriation:

1. **Is the subject groundwater development part of the same project or development as another groundwater development?**
    a. Purpose: Are there multiple groundwater developments being used for the same purpose?
    b. Place of Use: Does the subject groundwater development serve a shared or adjoining place of use served by an existing groundwater development?
    c. Timing: When were the existing groundwater developments being considered completed?
    d. Ownership: Is the place of use for the subject groundwater development currently owned by the same person as another place of use served by an existing groundwater development?
    e. Tract Information: Is the place of use for the subject groundwater development on a separate tract from the place of use for the other groundwater developments being considered? Was the place of use part of a larger tract that was subdivided?[1] When was the subdivision project supplied by the subject groundwater development created?[2]
        i. DNRC staff will review certificates of survey or plats provided by the appropriator and may request additional information in a deficiency letter as needed.

2. **Do the groundwater developments divert water from the same source aquifer?**
    a. Evaluate the following information:
        i. Points of diversion
        ii. Well logs, including well depths
        iii. Aquifer source codes
    b. If the water right files for existing or pending groundwater certificates do not contain well logs or other sufficient information to determine whether the diversions are in the same source aquifer, DNRC staff may need to request additional information in a deficiency letter.
    c. If DNRC staff have questions about whether two groundwater developments are diverting from the same source aquifer, they will consult with the Water Sciences Bureau Groundwater Section.

3. **Could the multiple groundwater developments have been accomplished as one appropriation?**
    a. Timing: When were other groundwater developments being considered completed?
    b. Distance: What is the distance between the subject groundwater development and other groundwater developments being considered? What is the distance between the subject groundwater development and the place of use for other groundwater developments being considered?
    c. Physical Connection: Are the groundwater developments connected or manifold?
    d. Shared Infrastructure: Does the project or development have other shared infrastructure?
    e. Barriers: Are there physical, topographical, or legal barriers that would make a single appropriation not feasible? How large is the tract?

---

[1] If the tract of land was created through phased development, all lots created in all phases should be considered one single combined appropriation, per the Upper Missouri Waterkeeper decision, except for those subdivisions created prior to 10/17/2014 (see other footnote below).

[2] HB 168 (2015 Legislative Session) established that if the water supply for a project, development, or subdivision was in existence prior to 10/17/2014, or if a pending project, development, or subdivision for which the application and required fees were received by DEQ in accordance with §76-4-125, MCA or by the local reviewing authority (County) in accordance with §76-3-604(1)(a), MCA on or before October 17, 2014, water use for that project as a whole only constitutes a combined appropriation if the groundwater developments are physically manifold. For subdivisions to which HB 168 applies, groundwater developments on each individual lot would still be evaluated for combined appropriation, and the developments within a single lot do not need to be manifold to be considered a combined appropriation.