DNRC Guidance on Combined Appropriation

{12-09-2014}

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[1] 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 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 11-21-2014. 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."

Application of the 1987 Rule will be broken down into four elements:

1. **Are two or more exempt wells part of a project or development?**
2. **Do the exempt well or wells withdraw water from the same source aquifer as another exempt well in the project or development?**
3. **In the department's judgment, could the purpose served by the exempt wells have been accomplished by a single appropriation?**
4. **If a combined appropriation, does it exceed 10 acre-feet per year?**

Elements 1 through 3 must be answered affirmatively for exempt wells to be considered a "combined appropriation."

[1] For the purposes of this Guidance, the term "well" will be used to refer generally to groundwater developments such as wells, developed springs, and pits or ponds that appropriate groundwater.

1. Project or Development

In examining what constitutes a "project or development" the Department will begin with an evaluation of the ownership interest of the groundwater development works and place of use. Pursuant to § 85-2-306(1), MCA, a groundwater appropriation may only be made by a person who has possessory interest in the property where the water is to be put to beneficial use and the exclusive property rights (or the consent of the person with those rights) in the groundwater development works. In order for two or more wells to be considered part of a "project or development" the "appropriator" must have the requisite possessory/ownership interest in the place of use and wells. Absent this unitary possessory/ownership interest in the place of use and wells, the prerequisites for a valid groundwater "appropriation" do not exist. This is consistent with the language of § 85-2-306(3)(b), MCA, that defines the permit exception in terms of an "appropriation" and an "appropriator."

Subdivisions were a primary focus of the CFC decision. The question becomes at what point in the subdivision process would the § 85-2-306, MCA "combined appropriation" restriction apply – at what point in time did the requisite unitary possessory/ownership interest in the place of use and wells exist?

Typically, a single person/entity has possessory interest in all of the lots of a subdivision at the time the land goes through the subdivision review process. Just because lots are later sold to individuals each individual's lot does not become a separate "project or development" at the time of subdivision review for the purposes of the 1987 Rule.

Subdivision approval varies across the State and according to the type of subdivision. Not all divisions of land require approval by a county or the Department of Environmental Quality (DEQ). The Department is not part of subdivision approval across the State nor can it require counties to report to it regarding potential subdivision approval.

> However, DEQ Rule 17.36.103, ARM, provides in relevant part as follows:
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> 17.36.103 APPLICATION--CONTENTS (1) In addition to the completed application form required by ARM 17.36.102, the following information must be submitted to the reviewing authority as part of a subdivision application: ...
> (s) except for connections to existing public systems addressed under ARM 17.36.328(2)(b)(iv), if the proposed water supply is from wells or springs, either:
> (i) a letter from the Department of Natural Resources and Conservation stating that the water supply is exempt from water rights permitting requirements; or
> (ii) proof of a water right, as defined in 85-2-422, MCA.

The Department's review under the above rules is referred to as the "DEQ water rights review" for the purposes of this guidance.

Moving forward, the Department will apply the 1987 Rule definition of "combined appropriation" in two distinct manners when considering what constitutes a "project or development":

1. During a DEQ water rights review the Department will determine what a "project or development" is by looking at ownership on the ground at the time of the subdivision review. The Department will not determine what a "project or development" is for these reviews by looking at what the ownership on the ground will be at the time when the groundwater appropriations are completed.
2. In contrast outside of DEQ water rights review the Department will determine what a "project or development" is by looking at ownership on the ground at the time when the exempt groundwater appropriations are completed.

Please note that this Guidance will apply to subdivision applications submitted to DEQ after or pending before DEQ at the time the CFC decision is enforceable (11-21-2014); this may include subdivision applicants that have already received a letter from the Department but DEQ approval is still pending at the time the CFC decision is enforceable (11-21-2014). DEQ approval includes both Certificate of Subdivision Approval (COSA) and Public Water Supply Approval. An exception to the application of the Guidance at the DEQ stage is that the Guidance will not apply to applications for subdivisions that have received preliminary plat approval prior to the date that the CFC decision is enforceable.

With regard to the DEQ water rights review process the Department will evaluate ownership on the ground at the time of the review to determine what is a "project or development" in context of the 1987 Rule definition of "combined appropriation". Consistent with the CFC decision and the 1987 rule, the Department must consider the amount of water needed for the "entire" subdivision during the DEQ water rights review.

For exempt groundwater development works that take place outside of the aforementioned DEQ water rights review the Department will evaluate ownership on the ground at the time and place of an application for a certificate of water right under § 85-2-306(3), MCA. That said the Department will be verifying whether or not such applications are subject to any limitations imposed by a past DEQ water rights reviews.

Consistent with the Montana Water Use Act, it is also important to point out that the Department considers multiple contiguous or non-contiguous parcels owned by one individual or entity to compose just one "project or development". Each individual parcel does not constitute a unique project or development.

If common ownership/permission in the groundwater development works and place of use exists with certificates of water right § 85-2-306(3), MCA, the appropriation moves forward in the "combined appropriation" analysis to Element .

2. Same Source Aquifer

The Department will apply the same analysis that is currently used to determine whether a groundwater development is in the same source aquifer as an existing or proposed appropriation. For the purposes of this Guidance, a "same source aquifer" means:

(a) Unconsolidated sediments throughout the state and underlying basin-fill sediments and/or sedimentary rocks in intermontane valleys, unless the applicant demonstrates that the aquifers are separate and not connected; or

(b) Bedrock consisting of all consolidated geologic units not identified in (a) unless the applicant demonstrates that the individual geologic units are separate and not connected; and,

(c) Aquifers under (a) and (b) are not presumed to be a same source aquifer.

Applicants for a § 85-2-306(3), MCA appropriation claiming separate source aquifers will need to submit well logs to support that a well is not in the same source aquifer as another § 85-2-306(3), MCA, appropriation. If the new groundwater development is part of the "project or development" and is in the same source aquifer as an existing certificate of water right issued pursuant to § 85-2-306(3), MCA, the appropriation moves forward in the "combined appropriation" analysis to Element 3.

3. Project/Development Could in the Department's Judgment be Accomplished by a Single Appropriation?

The Department will not consider wells separated by a distance of 1,320 feet (1/4 mile) or greater to be capable of being accomplished by a single appropriation unless they are physically manifold together. Two or more wells that are manifold together will be considered able to have been accomplished by a single appropriation regardless of the distance separating the wells.

Wells within a distance of 1,320 feet of one another will be considered able to have been accomplished by a single appropriation and therefore is a "combined appropriation". If applicants believe that a project or development could not be or have been accomplished in a single appropriation then they will need to explain why not.. In these cases the Department will exercise its professional judgment when determining if the project of development could be accomplished in a single appropriation. The criterion does not have a financial or purpose limitation.

A single appropriation (water right) can have multiple points of diversions (wells).

If the new groundwater development is part of the "project or development", is in the same source aquifer as an existing certificate of water right issued pursuant to § 85-2-306(3), MCA, and could be (or have been) accomplished by a

single appropriation, then the appropriation is considered a "combined appropriation" and moves forward in the analysis to Element 4.

4. Does the Combined Appropriation Exceed 10 acre-feet/year?

Applicants would need to designate the amount of water for which they seek a certificate of water right and why this amount combined with any other certificate of water right § 85-2-306(3), MCA appropriation does not exceed 10 acre-feet per year. Appropriators may voluntarily reduce amounts/flow rates on prior certificates of water right so as to meet this limitation for the purposes of a new groundwater development and combined appropriation. The appropriator must explain why the existing certificate of water right should and can be reduced.