

## Rules change for well permits

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HELENA — The Montana Department of Natural Resources and Conservation is set to amend its rules regarding water well permit exemptions following an agreement with state ranchers last week.

In exchange for the DNRC's revision of its permit policy, five individuals with senior water rights in the Absarokee and Manhattan areas have agreed to dismiss a lawsuit filed against the agency in September. Judge Jeffrey Sherlock signed off on the settlement on Friday, and the DNRC has 15 months to change its rules.

The Montana Water Use Act dictates that groundwater wells and springs with yields of less than 35 gallons per minute can operate without a permit and are exempt from environmental review requirements. The DNRC's current policy does not take into account whether a number of those small individual wells are being used for the same project or development, recognizing "combined appropriation" only when those wells are physically joined together into a larger distribution system.

That's created a loophole for subdivision developers and others who want to avoid the state's permitting system, said Matthew Bishop, one of the attorneys representing the landowners who filed the suit. The concern is that allowing entities to drill multiple wells in one location without oversight will diminish the amount of available water in the area, threatening senior water rights.

Montana law states that when water supplies are running short, holders of the oldest water rights are entitled to the water first. Polly Rex, one of the ranchers in the lawsuit, owns property southwest of Absarokee with water rights dating to the late 1800s and early 1900s. With a developer planning to build a subdivision with 67 wells adjacent to her land, she was concerned that her water supply would dwindle and she'd be forced to utilize a new water system, which would have rights junior to the developer's.

"How can 67 small wells be OK?" she said.

What Bishop and the lawsuit argue is that the DNRC policy used to define "combined appropriation" as at least two wells taking water from the same source for the same project, even if they weren't physically connected. If those wells together exceeded what was then a 100-gallons-per-minute threshold, a permit was necessary. That rule was established in 1987, following the passage of a House bill that essentially stated the same thing. The maximum yield for a permit exemption was reduced from 100 gallons to 35 gallons in 1991. Two years later, the definition of "combined appropriation" was amended to its current form.

The landowners filed a petition with the DNRC earlier this year, asking it to reinstate the 1987 policy and declare the 1993 rule invalid. In August, the agency issued a declaratory ruling stating that it didn't find its definition of "combined arbitration" to be in conflict with the state's water use act, but did acknowledge that "increasing demands on water resources in Montana warrant repeal" of its current rule.

Nevertheless, the landowners filed the district court suit less than a month later.

DNRC Chief Legal Counsel Candace West said the agreement that arose from the lawsuit simply reaffirmed the agency's plan to change its rules. The agreement states that the DNRC's amended definitions of "combined appropriation" will be "broader and not be limited solely to wells or developed springs that are physically manifold or connected together" and consider the collective impacts that multiple, unconnected wells can have on water resources.

Both Bishop and West noted that it's possible that the Montana Legislature could consider redefining the term "combined appropriation" or revising the Montana Water Use Act during its upcoming session, which would override the DNRC's obligations. For now, the agency is expecting to hold public meetings for feedback and start drafting a new policy, West said. The first of those gatherings took place Tuesday morning.

Though Rex said she would have liked to have seen changes under way sooner, she deems the current action a step in the right direction.

"It's hopeful, I think," she said.