Water Policy Interim Committee

68th Montana Legislature

March 11, 2024

To: Water Policy Interim Committee
From: Alexis Sandru, Staff Attorney
Re: Exempt Groundwater Wells: Summary of *Upper Missouri Waterkeeper v. Broadwater County*

Last month, in *Upper Missouri Waterkeeper v. Broadwater County*[1], the Montana First Judicial District Court (Court) held that Broadwater County's decision to approve a proposed subdivision's preliminary plat application was unlawful and that the Montana Department of Natural Resources and Conservation (DNRC) ignored administrative rule, statute, and recent court decisions in erroneously concluding that the proposed subdivision was entitled to a combined appropriation of 10 acre-feet a year for each of the four phases of development. This paper summarizes the Court's order.

Factual Background

71 Ranch, L.P., proposed to subdivide 442 acres in Broadwater County, located on the east side of Canyon Ferry Reservoir near Lower Confederate Creek. Under the proposal, the subdivision would be completed over four phases of development and would include 39 residential lots, 2 commercial lots, and 1 open space lot. The lots would have their own exempt well, septic, and stormwater system. The DNRC reviewed the subdivision's proposals to use exempt wells inside the administratively closed Upper Missouri River Basin, concluding that each phase of the development was entitled to an exempt water right. The Broadwater County Commissioners reviewed the subdivision proposal and approved the preliminary plat application.[2] Upper Missouri Waterkeeper and surrounding landowners sued, alleging that Broadwater County violated the Montana Subdivision and Platting Act and that DNRC unlawfully concluded that the subdivision's proposed appropriation fit within the rules and laws pertaining to the filing of an exempt water right.

Violations of Montana Subdivision and Platting Act

Plaintiffs alleged that Broadwater County's approval of the proposed subdivision violated the Montana Subdivision and Platting Act because:

(1) the environmental assessment submitted by 71 Ranch was deficient, lacking analysis of groundwater impacts, impacts to Confederate Creek, and probable impacts to existing water users; and

[1] Order for Summary Judgment, Upper Missouri Waterkeeper v. Broadwater Co., BDV-2022-38 (Mont. First Jud. Ct., Feb. 14, 2024).
[2] Order, p. 4, l. 10-20.

(2) Broadwater County failed to adequately evaluate 76-3-608, MCA, criteria, which requires that a subdivision proposal must undergo review for specific, documentable, and clearly defined impacts on agriculture, agriculture water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety.

The Court agreed on both counts. Regarding the environmental assessment, the Court concluded:

> The environmental assessment is deficient in numerous ways, particularly the repeated failure to assess impacts to nearby landowners and water. The barest minimum of information is disclosed about nearby surface waters and basically nothing is disclosed about the aquifer which would supply the project. No mention is made of the health of these waters, despite them being officially classified by the State as impaired under the federal Clean Water Act. The interaction of these waters is ignored entirely, as is the impact of either new wells or sanitary and storm wastewater, which is pawned off on DEQ's future determination. The environmental assessment is abjectly deficient.[3]

The Court also concluded that Broadwater County failed to adequately evaluate most of the 76-3-608, MCA, criteria. First, the County erroneously limited review its review of impacts on agriculture water user facilities by relying on a restrictive definition of "facilities". Second, the County erroneously limited its consideration of agricultural impacts to only impacts on the property being developed rather than considering nearby agricultural land as well. Third, no analysis was conducted concerning the natural environment, including any analysis on wastewater discharge and nitrogen pollution. Fourth, the County avoided mentioning or reviewing concerns that dozens of wells would dewater and impact aquatic life and proposed few mitigating conditions. And, finally, while the Court found the County's analysis of traffic safety lacking, the Court couldn't conclude that the County arbitrarily failed to review the public health and safety criteria.

In addition, the Court found the County erroneously relied on DNRC's determination (discussed below) about the legal availability of water for the subdivision, concluding that under 76-3-501 and 76-3-603, MCA, the County had an independent duty to examine the legal and factual availability of water for the proposed subdivision.

Exempt Wells

Under ARM 17.36.103, if a subdivision's proposed water supply is from wells or springs, the developer must include a letter from DNRC in the information submitted to the reviewing authority, stating whether the proposed water supply is located in a controlled groundwater area and whether it is exempt from water rights permitting requirements or has a water right. Section 85-2-306, MCA, sets forth the exceptions to permit requirements, providing, in part, that a permit is not required outside the boundaries of a controlled ground water area before appropriating water by means of a well "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*."[4]

[3] Order, p. 24, l. 13-21.

[4] 85-2-306(3)(a)(iii), MCA. (Emphasis added.)

The term "combined appropriation" is not defined in statute. In 1987, the DNRC defined the term in administrative rule, providing that a "combined appropriation" means an "appropriation of water from the same source aquifer by means of two or more groundwater developments, the purpose of which, in the [DNRC'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'".[5] Later, in 1993, the DNRC revised the definition, providing that the term means "groundwater developments, that are physically manifold in the same system".[6] In 2009, the 1993 definition was challenged and invalided by the First Judicial District Court, and the 1987 definition was reinstated. The decision was appealed and upheld by the Montana Supreme Court in *Clark Fork Coalition v. DNRC*,[7] which concluded, "'combined appropriation' refers to the total amount or 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."[8]

Plaintiff's challenged DNRC's conclusion that each phase of the development was entitled to an exempt well, arguing DNRC's interpretation of statute and administrative rule was erroneous. The Court agreed, concluding, "[t]here is no basis in law for DNRC to treat the four phases of 71 Ranch's subdivision project separately, a conclusion which is absolutely clear from statute, administrative rule, Montana Supreme Court precedent, and even DNRC's letters in this matter. Any and all phases of this project are one single combined appropriation."[9] The District Court further noted that DNRC guidance, issued after the *Clark Fork Coalition* case, likely led DNRC to misapply the exempt well statute and administrative rule. That guidance, which the District Court noted is not law, provided examples of combined appropriations of two or more wells from a same source aquifer that may not exceed 10 acre-feet a year. The Court rejected DNRC's justification for limiting its review to lots smaller than 20 acres in its internal guidance, concluding that the DNRC erroneously relied on statutes outside the Water Use Act defining the term subdivision and erroneously engrafted an additional requirement on the statute by excluding review of parcels 20 acres or larger. In short, the Court held that all four phases of the subdivision should share 10 acre-feet per year -- not the 40 to 50 acre-feet per year calculated by the DNRC.

Conclusion

In summary, the Court held that the County's approval of the subdivision's preliminary plat application was arbitrary, capricious, and unlawful because the environmental assessment submitted by the developer was deficient, the County failed to adequately review 76-3-608, MCA, criteria, and the County failed to analyze the factual existence and legal appropriability of water for the proposed subdivision. In addition, the Court concluded that DNRC erred in determining that each of the four phases of development was entitled to a separate combined appropriation of 10 acre-feet per year. No notice of appeal has been filed as of March 11, 2024.

[5] Order, p. 68, l. 9-18.
[6] Order, p. 62, l. 11-21 (quoting *Clark Fork Coalition v. DNRC*, 2016 MT 229, ¶¶2-3).
[7] 2016 MT 229, 384 Mont. 503, 380 P.3d 771.
[8] Clark Fork, ¶ 24.
[9] Order, p. 79, l. 16-20.