

Attachment 1

Declaratory Ruling, August 17, 2010

Agency Response to Comments

Many of the issues raised in the Petition, briefs and statements of position filed, or comments made at the public hearing in this Declaratory Ruling proceeding have been addressed in the Declaratory Ruling. The remaining issues raised or comments made will be addressed in this Response to Comments. Due to the nature of the proceeding, the similarity of comments provided, and the volume of documents, rather than respond to each individual person or entity that filed a brief or statement of position or made a comment at the public hearing, the Department will group the issues raised or comments made into categories.

Issue or Comment

The first category of issues raised or comments made concerns factual information. Generally, there were two types of factual information presented to the Department in this proceeding. The first type was presented by the Petitioners to show potential affect on their legal rights in support of their Petition. The second type was factual information offered to show the serious impacts to water resources from the proliferation of small exempt wells or offered to show that small exempt wells have had no serious impacts to water resources.

Response

This is a declaratory ruling proceeding before Department, not an evidentiary hearing. The Department's review of the specific facts asserted by the Petitioners was limited to considering alleged harm sufficient to raise the issue before the Department and sufficient to show potential affect of the rule on individual legal rights. Section 2-4-501, MCA; Rules 1.3.226 and 1.3.227(2)(c), ARM.

Petitioners must provide sufficient facts to allege potential affects of a rule to their legal rights and to warrant review of the rule in a declaratory ruling proceeding. Petitioners have established that they have individual water rights in Montana. Petitioners Katrin R. Chandler and Betty J. Lannen, have water rights in the Horse Creek Watershed. Petitioner Joseph Miller has water rights in the West Gallatin River valley and Petitioner the Clark Fork Coalition has water right interests in the Clark Fork River valley. Other persons filing briefs, statements of position, or making public comment have water rights to surface water, ground water, or instream flows in various basins in Montana. Thus, the Petitioners have individual legal rights at issue.

Individual Declarations were filed by the Petitioners Katrin R. Chandler, Betty J. Lannen, Polly Rex, Joseph Miller, and Karen Knudsen, for the Clark Fork Coalition. Petition for Declaratory Ruling, Exhibits 18, 19, 20 and 22. All of these declarations contain information about their individual water rights and facts to support allegations of adverse affect to their water rights from neighboring ground water use developed under the exempt well statute. Petitioners Katrin R. Chandler and Betty J. Lannen, have water rights that are within an area that was covered by a temporary Controlled Groundwater Area (February 12, 2004). The Horse Creek Temporary Controlled Groundwater Area expired on February 12, 2010, but the Department is in the process of developing a proposed designation of Horse Creek as a permanent Controlled Groundwater Area under Section 85-2-506, MCA. Department studies conclude that increased small ground water withdrawals will likely impact springs and Horse Creek within the expired Controlled Groundwater Area. Petitioners and other participating persons have alleged that their water rights have been or may be affected by ground water use from exempt wells. Petitioners have provided facts to establish that their legal rights will be affected or potentially affected by the “combined appropriation” administrative rule definition (Rule 36.12.101(13), ARM) sufficient to warrant review of the rule in a declaratory ruling proceeding.

Other factual information showing past trends in use of exempt wells, predictions of future use of exempt wells, water resource impacts of small ground water wells,

alleged abuses of the exempt well statute, economic impact from use of exempt wells, or lack of impact from use of small exempt wells was contained in briefs or statements of position, and exhibits thereto, and exhibits offered at the public hearing. Because this was not an evidentiary hearing, the Department made no findings of fact and did no fact-finding review of the general factual information presented. During the course of rulemaking or other appropriate administrative proceeding, the Petitioners and other interested persons may present this information for the Department's consideration, but this was not the proper time or proceeding. The Department's Declaratory Ruling was based on review of changes to Water Use Act, in particular enactment of basin closures since the adoption of the "combined appropriation" administrative rule definition (Rule 36.12.101(13) ARM), the Department's acknowledgment of the need for rule change in the Petition for Rulemaking by Gallatin County Commission, and Department's own records, not on any specific factual information presented by the Petitioners or any person in this proceeding.

Issue or Comment

The second issue raised in the Petition and by several supporters of the Petition is the constitutionality of the exempt well statute because the statute undermines the prior appropriation doctrine and/or denies due process of law.

Response

The Department has ruled that the 'combined appropriation' administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with applicable law under the Water Use Act, Section 85-2-101 et.seq, MCA. Therefore, the question presented but not addressed is whether the statute that allows an appropriator to acquire a water right that is excepted from the permitting process is constitutional. An administrative agency can not rule on the constitutionality of the statutes it implements. Jarrusi v. Board of Trustees of School Dist. No. 28, Lake County, 204 Mont. 131, 664 P.2d 316 (1983)(constitutional questions are properly decided by judicial body, not

administrative agency). This is a matter that must be raised in the district court. Mont. Const., Art III(1).

Because there were comments that indicated confusion about the ability to call a junior appropriator that acquired their water right under the exempt well statute, the Department will point out that the case from another state cited by the Petitioner and Trout Unlimited in support of the Petition¹ addresses a preference in enforcement concerning domestic use. Such a legal preference does not exist in Montana. Ground water appropriations of 35 gpm or less, not to exceed 10 acre-feet a year, are “exempt” from the permitting process, but if the appropriator follows the statutory procedures for filing the requisite notice of completion under Section 85-2-306(3)(b), MCA, the appropriator has a protectable water right under the prior appropriation doctrine with a priority date as of the date of filing a correct and complete notice of completion. The water right is also subject to enforcement under the prior appropriation doctrine. Therefore, a “call” can be placed on any junior water users in order of priority (based on priority date). This includes water rights acquired under Section 85-2-306(3)(a), MCA.

Issue or Comment

The third issue has to do with the impact to development in Montana from ruling on the validity of the “combined appropriation” administrative rule definition (Rule 36.12.101(13), ARM) or any changes to the administrative rule.

Comments concerning the impact to development in Montana from ruling on the validity of the Department’s administrative rule are at odds. The opponents to the Petition say that the Petition is a “backdoor attempt” to halt growth and hamper the development of affordable housing in Montana and that the Petitioner’s requested relief essentially amends the statute so that the use of exempt wells will be eliminated in almost

¹ Horace Bounds, Jr. et al. v. State of New Mexico, CV-2006-166 (July 10, 2008).

all situations.² One opponent reads the Petition as suggesting that any two wells in the same aquifer exceeding the statutory limit would be a “combined appropriation” regardless of the owner and purpose of the appropriation.³ Concerns were raised that proposed new language would allow only one well for only one purpose (i.e. a domestic well or a stock well, but not both) and thus is too restrictive for ranch use contrary to legislative intent. Opponents also state that the present rule has been in place for 17 year and any new rule would create uncertainty, and that the 1987 “combined appropriation” administrative rule definition (Rule 36.12.101(7), ARM (1987)) contains overly-broad and undefined terms.

At public hearing, the Petitioner stated that the Petition was not intended to shut down development or prohibiting the use of individual wells but only to lay out the circumstances for which a permit is required.⁴

Response

The Department ruled that the current ‘combined appropriation’ administrative rule definition (Rule 36.12.101(13) ARM) is valid and all certificates of water right issued under this rule are valid.

The Department will be proposing a new rule changing the “combined appropriation” administrative rule definition. The new rule may preclude some current uses of exempt wells because they will be combined appropriations. The Department does not interpret the Petition, Petitioner’s brief, or documents filed in support of the Petition as saying two wells in the same aquifer exceeding the statutory limit would be a “combined appropriation” regardless of the owner and purpose of the appropriation. Depending on the factual nature of the ground water aquifer, to adopt such an interpretation could mean that only one exempt well would be allowed in an entire basin

² Response Brief, Montana Association of Realtors and Montana Building Industry Association, Dated June 3, 2010, p. 7. Statement of Position, Montana Water Well Drillers Association, Dated June 4, 2010, p. 8.

³ Statement of Position, Montana Water Well Drillers Association, Dated June 4, 2010, p. 3-5.

⁴ Mathew Bishop, Attorney for Petitioners, June 17, 2010.

or subbasin. An interpretation of the statutes and rules in such a fashion would lead to an absurd result. See, State v. Brendal, 351 Mont. 395, 402, 213 P.3d 448, 452 (2009). Any rule adopted by the Department can not lead to an absurd result.

The statute itself allows a ranch to have an exempt well for domestic use and an exempt well for stock use.⁵ Thus, consistent with legislative intent, small dispersed uses located in remote areas for ranch use will be allowed under agency rule.

Opponents to the Petition point out that the current “combined appropriation” administrative rule definition (Rule 36.12.101(13), ARM) has been in place for 17 years. The Department has ruled that the current administrative rule needs to be repealed and a new rule adopted in order for the Department’s rules to continue to serve the purposes of the Water Use Act into the future.

Petitioners and other supporters of the Petition urge the Department to return to the 1987 “combined appropriation” administrative rule definition (Rule 36.12.101(7), ARM (1987)). The Department has previously found that the 1987 administrative rule definition (Rule 36.12.101(7), ARM (1987)) “was too ambiguous and therefore difficult to administer . . . fairly and consistently throughout the state. It required the department to make assumptions when determining whether developments were considered combined appropriations. . . .” Montana Administrative Register, June 24, 1993. The 1987 administrative rule definition (Rule 36.12.101(7), ARM (1987)) is not sufficiently precise to ensure that the Department’s rules to continue to serve the purposes of the Water Use Act into the future.

The Department will adopt a new administrative rule definition of “combined appropriation” that will be consistent with the purpose of the statute. The terms of the new rule will be unambiguous so that administration of the rule will be fair and consistent throughout the State. The Department has ruled that, within eight months and by separate agency order, the Department will initiate rulemaking for the repeal of Rule

⁵ Sections Section 85-2-306(1)(a), 85-2-102(1) and 85-2-102(4)(a), MCA.

36.12.101(13) ARM, and adoption of a new administrative rule definition of “combined appropriation” and any other necessary rule changes. All interested persons will be noticed and provided an opportunity to comment on the proposed rule change.

Issue or Comment

The fourth category of issues raised or comments made concern the use of exempt wells for a particular purpose or place and the impacts from exempt wells for that purpose or place.

Most supporters of the Petition commented about the use of exempt wells to serve domestic uses within a large, relatively dense subdivision. Their concerns were impact to the water resource and existing water rights from multiple ground water withdrawals and degradation to the water resource from multiple septic systems. Some supporters of the Petition commented on the use of exempt wells for coal bed methane development and the impacts to the water resource and existing water rights from multiple ground water withdrawals and the degradation to surface water resources from discharge of lower quality water. Some supporters of the Petition commented about instances where exempt wells are used instead of municipal water supply, interfering with existing rights and making municipal water planning more difficult or creating economic impacts to the community from people who use community resources but rely on individual wells instead of community water supplies. Other comments were that there is no cap on the number of exempt wells, no evaluation of impact on existing water rights, and no consideration of the cumulative impact to water resources from exempt wells.

Response

It was the legislature’s decision to create an exception to the permitting statute for ground water appropriations of 35 gpm or less, not to exceed 10 acre-feet a year. The only limitation on use of exempt wells is that they can not be “a combined appropriation from the same source from two or more wells or developed springs.” Section 85-2-

306(3)(a), MCA. The Department is limited in its discretion concerning exempt wells. The Department can only ensure that the definition of “combined appropriation” in the administrative rules is consistent with the plain language of the statute and legislative intent. The beneficial uses for which exempt wells can be used and the total number of exempt wells are issues beyond the Department’s authority. This is a legislative decision.

As specified in the Declaratory Ruling, the Department will issue a separate order to initiate rulemaking for the repeal of the “combined appropriation” administrative rule definition (Rule 36.12.101(13) ARM) and adoption of a new administrative rule definition of “combined appropriation” and any other necessary rule changes. The Department believes that some of the concerns raised by Petitioners and persons in support of the Petition can be addressed by administrative rule. However, many of the issues raised comments made are beyond the scope of any definition of “combined appropriation” and can only be addressed through legislative amendment of the exempt well statute, Section 85-2-306, MCA, or through changes to subdivision law or other regulatory statutes.

Issue or Comment

The fifth category of issues raised has to do with the availability of other forums to address problems identified in the Petition. Opponents to the Petition state that there are other more appropriate means of addressing concerns raised by Petitioners rather than an administrative rule change that has statewide application. Opponents to the Petition state that specific aquifer problems should be addressed through creation of a controlled groundwater area, and issues at a regional level or with a specific subdivision development should be addressed through zoning regulations or through local subdivision review. Finally, they assert that the Petitions should seek change of the statute through the legislature.

Response

The availability of other forums or remedies to address concerns raised by the Petitioner does not relieve the Department from its duty to ensure its rules continue to be consistent with statutory language and legislative intent and, if not, to adopt, modify or repeal its rules. Section 2-4-314(1), MCA. Controlled groundwater areas still complement the exempt well statute by providing a means to deal with site-specific problems. Other land use statutes and regulations are beyond the authority of the Department and beyond the scope of this Declaratory Ruling proceeding.

Issue or Comment

Finally, some comments in support of the Petition state that there is no monitoring or oversight of exempt wells once they are completed.

Response

Outside the boundaries of a controlled ground water area, ground water appropriations of 35 gpm or less, not to exceed 10 acre-feet a year, are “exempt” from the permitting process. The appropriator must follow the statutory procedures for filing the requisite notice of completion under Section 85-2-306(3)(b), MCA (Form 602). The priority date for the exempt well water right is the date of filing a correct and complete notice of completion. Since the Department does not approve any permit, a certificate of water right has no conditions or requirements for water measuring devices. The majority of exempt wells are used for domestic purposes. Domestic purposes typically use much

less than 35 gpm or 10 acre-feet per year.⁶ It is probably not cost effective to monitor small wells statewide to see if they are exceeding the statutory limit.⁷

In a controlled groundwater area, small wells can be monitored and oversight provided by the designation creating the controlled groundwater area, on a site-specific basis. Of course, the legislature could provide for water measuring devices and oversight of exempt wells.

⁶ Water needs for domestic use, for one household, is 1 acre-foot per year. Rule 36.12.115(2)(a), ARM. Stockwater use is .017 acre-feet per year per animal unit. A cow is one animal unit. One exempt well will serve 588 cows or 176,400 chickens. Rules 36.12.101(3) and 36.12.115(2)(c), ARM.

⁷ An appropriator only has a water right up to a maximum of 35 gpm and a maximum of 10 acre-feet a year. Any amount over this limit is not a recognized water right and is an illegal use of water subject to legal sanctions.