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Ravalli County Commissioners

Overview

In 1993 the Montana Department of Natural Resources and Conservation (DNRC) put in place an Administrative Rule defining “combined appropriation of exempt wells” as an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifolded into the same system (ARM 36.12.101(13)). Under this rule an individual well that produced less than 35 gallons per minute and used less than 10 acre-feet of water per year and was not connected to other wells was exempt from obtaining water rights from the DNRC. The Clark Fork Coalition sued the DNRC (*Clark Fork Coalition, et al. v. Tubbs et al.* Cause No. BDV-2010-874) in 2010. The lawsuit was settled in 2010 with the requirement that the rule be amended by DNRC. After several attempts by DNRC the rule was not amended and in 2014 the Clark Fork Coalition proceeded with a petition for judicial review. The Montana First Judicial Court ruled that the 1993 rule was inconsistent with applicable law and therefore invalid. The court action essentially struck down the automatic exemption of multiple individual wells not exceeding 35 gallons per minute and 10 acre-

feet per year, and removed the requirement for the wells to be manifolded together to be considered a combined appropriation.

What this Means

The sharp increase in large subdivision developments throughout Montana using individual wells for each lot since the mid 1990’s has been successful because of the 1993 DNRC exempt well rule. Under the rule, large subdivision developments could propose individual wells on each lot within the development and as long as they did not exceed 35 gallons per minute and 10 acre-feet per year and were not manifolded to other wells, they did not need to be reviewed as a combined appropriation and did not need a water right. Opponents of the rule have argued that a subdivision should be reviewed as a combined appropriation and that the excessive amounts of individual wells under the 1993 rule has affected surface water quantities and senior surface water rights holders. According to DNRC there are more than 110,000 exempt wells throughout Montana.

The recent court case striking down the 1993 rule has caused DNRC to go back to

the 1987 rule defining a combined appropriation of two or more exempt wells be reinstated. 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. 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”. The permit exception under MCA 85-2-306(3) is still valid and a development can still seek a water right from DNRC for one or more exempt wells pursuant to MCA 85-2-306(3) as long as the combined appropriation of all wells within the development is less than 35 gallons per minute and 10 acre-feet per year. A development can also petition DNRC for a beneficial water use permit under MCA 85-2-311.

This means that every development, whether large or small, must go through DNRC review to determine if it meets the exemption criteria

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under MCA 85-3-306(3), beneficial water use permit under MCA 85-2-311 or water rights will be necessary for the development. If a development that contains two or more exempt wells shows that they will use less than 35 gallons per minute and 10 acre-feet per year for all proposed wells within the development, then they would fall under exemption criteria. Otherwise a development *would be required* to obtain a beneficial water use permit from the DNRC and provide mitigation for water used for the development if the development falls within a controlled or closed river basin. DNRC has identified a number of controlled or closed river basins within Montana where water rights can only be obtained through mitigation due to water availability problems, water contamination problems, and/or a concern for protection of existing water rights. Water rights can be mitigated through DNRC in several ways, but the most common method is to provide mitigation using existing surface water rights to retire them in

lieu of the new water use.

Moving Forward

This court action has essentially created an additional level of review for the development of subdivisions or even individual lots that have not been reviewed by the Montana Department of Environmental Quality (MDEQ). DNRC indicates in its combined appropriation guidance that any development approved prior to the ruling date of October 17, 2014 is considered approved and is grandfathered under the 1993 rule. Any development that has not been approved prior to the ruling date would be subject to the 1987 rule for combined appropriation. MDEQ has put out guidance on the water rights requirements as part of the subdivision review process. The guidance can be found on the MDEQ website. MDEQ, working with DNRC, developed a format for submitting water rights inquiries to DNRC for developments. MDEQ and DNRC are working together to integrate the

new water rights process into the current subdivision review process in an attempt to make it as user friendly as possible.

Although MDEQ has integrated this into their review process, reviewing authorities and developers should be aware of this requirement and take the appropriate steps to ensure that water rights for a development are being addressed. For subdivisions that are required to go through MDEQ review, this can be addressed with a condition of approval that MDEQ approval be obtained prior to final plat approval. Since MDEQ does not issue approval until a letter is received from DNRC on water rights, this should ensure that water rights are addressed prior to final plat. Some developments do not require MDEQ review if the lots will be over 20 acres. If MDEQ review is not required for a development, a condition of approval that the developer provide water rights information from DNRC prior to final plat approval should

be included as part of the review process. Developers should work with engineers and the reviewing authorities to ensure that water rights are part of the process.

Conclusion

Water rights throughout the west are becoming increasingly contentious as droughts continue and surface water becomes less available for agriculture, municipal, and recreational uses. As housing needs increase across Montana, subdivision development is inevitable. It will be critical moving forward that developers and reviewing authorities work together to address the water impacts from development. Will this new requirement push development closer to existing public water systems where those systems can be expanded? It is too soon to tell how this new requirement will shape the development trends in Montana. However, it is clear that developers and reviewers will need to work together to come up with solutions to this critical issue.

Helpful Links:

<http://www.deq.mt.gov/wqinfo/Sub/documents/2014/PublicGuidance-COSA-WR-Request%20.pdf>
http://dnrc.mt.gov/divisions/water/water-rights/docs/combined_appropriation_guidance.pdf

