



History of Exempt Wells in Montana

1973

The Montana Water Use Act passed and became effective on July 1, 1973.

The Water Use Act established a permit system to be administered by the DNRC for any appropriation of water after July 1, 1973. Outside a controlled groundwater area, groundwater uses for domestic, agricultural, or livestock purposes that were appropriated by means of a well under 100 gallons per minute (gpm) were exempt from the permit process. RCM, § 89-880(4) (1973).

1974

RCM § 89-880(4) was amended to remove exemption restrictions for “domestic, agricultural or livestock purposes.”

1987

Section 85-2-306(1), MCA, provided an exemption to the permit requirement as follows—Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of less than 100 gallons per minute, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.

Administrative Rules of Montana (ARM) 36.12.101(7)(1987) defined “Combined appropriation”—An appropriation of water from the same source aquifer by two or more ground water developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Ground water 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 for the entire project or development from these ground water developments in the same source aquifer is the “combined appropriation.”

1991

Section 85-2-306(1) MCA, was amended—[A] permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.



1991

ARM 36.12.101(13) was amended—Definition of “combined appropriation”: An appropriation of water from the same source aquifer by two or more ground water developments that are physically manifold into the same system.

2013

Section 85-2-306(3)(a)(iii), MCA (2013), was amended—[W]hen 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.

2014

Montana’s First Judicial District Court, Judge Sherlock, invalidated the 1993 Administrative Rule defining “combined appropriation” and reinstated the 1987 rule defining combined appropriation. *Clark Fork Coalition v. Tubbs*, Cause No. BDV-2010-874, Order on PJR (1st Jud. Dist. Oct. 17, 2014). This is often referred to as the *Sherlock Decision*.

2015

House Bill (H.B.) 168 is a Session Law that grandfathered any project, development, or subdivision that relied on DNRC’s 1993 definition limiting combined appropriations to physically manifold into the same system if: 1) the project, development, or subdivision was in existence on or before October 17, 2014 or 2) the application and required fees for the project, development, or subdivision were received by the Department of Environmental Quality in accordance with § 76-4-125, MCA, or by the local reviewing authority in accordance with § 76-3-604(1)(a), MCA, on or before October 17, 2014.

2016

Montana Supreme Court in *Clark Fork Coal. v. Tubbs* upheld the district court and concluded “that the 1993 rule was inconsistent with the plain language of § 85-2-306(3)(a)(iii), MCA, and that it grafted an additional requirement on the exempt well statute that wells or developed springs be ‘physically manifold into the same system.’ By narrowing the exception to only those wells or developed springs physically connected, the 1993 rule expanded the narrow exemption to the permitting process provided by § 85-2-306(3)(a)(iii), MCA, and was inconsistent with the stated statutory purpose of the Act.” 2016 MT 229, ¶ 28.

Reference

For more detailed information about Exempt Wells go to the DNRC website:

<https://dnrc.mt.gov/Water-Resources/Water-Rights/Apply-for-Water-Rights/Water-Rights-Permit-Exceptions>