

Flathead Reservation Office of the Water Engineer

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Topic: Policy Clarification: The Use of Existing Wells for new Domestic Allowance Appropriations

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There is a persistent and recurring water right compliance issue on the Flathead Reservation pertaining to existing state-based water users that failed to file registrations pursuant to the Unitary Administration and Management Ordinance (MCA 85-20-1902 and CSKT Ordinance 111-A) (hereinafter “UAMO” or “Ordinance”) § 2-1-106 & 107, which focuses on authorizing small domestic wells that serve homes and businesses. UAMO § 2-1-108 states that the failure to register existing water uses divests the holder of any legal protections under the Ordinance or the Compact.

The Flathead Reservation Water Management Board has instructed the Office of the Engineer to better characterize this issue and provide options, under the existing process for these water users to become compliant.

One option for these existing water users is to file for a new Domestic Allowance use pursuant UAMO § 2-2-117. Prospective appropriators of Domestic Allowances need advance approval before appropriating and, more specifically, before drilling a well or developing a spring. See UAMO § 2-2-117(8). Specific wording in the authorizing language for Domestic Allowances emphasize scenarios where the proposed use is assumed to be a completely new use of water for which there is no existing diversion or development. Thus, there is a question as to whether UAMO § 2-2-117 allows an applicant with an existing, unauthorized use, to apply for a new Domestic Allowance.

Having framed the issue and the need, this policy clarification seeks to specifically establish the following:

1. Clarify that there are opportunities to apply for new Domestic Allowances where the point of diversion is an existing well or developed spring, so long as the use adheres to the maximum quantities and stipulations under UAMO § 2-2-117.
2. Set terms for using an existing well as a diversion for a new Domestic Allowance.

The issues of resource impact and economic implications of this policy are also discussed, as are considerations of fairness amongst water users with particular comparison between water users that have complied with the registration filing timelines for existing state-based uses and those seeking a Domestic Allowance for purposes of becoming compliant after failing to file for a registration of an existing state-based use during the open filing period.

Finally, other benefits of this policy will be discussed as they relate to changing uses on existing wells that do have authorization either under existing water right or registration of existing use as per Ordinance §§ 2-1-101 through -108.

Ordinance Requirements of Advance Approval

This first instance of specific language requiring advance approval from the Engineer is imbedded in the following sections for Individual, Shared, and Development Domestic Allowances:

UAMO § 2-2-117(4). Before appropriating water for Domestic Use for an Individual Domestic Allowance, approval from the Engineer is required.

UAMO § 2-2-117(5). Before appropriating water for a Shared Domestic Allowance, approval from the Engineer is required.

UAMO § 2-2-117(6). Before appropriating water for a Development Domestic Allowance, approval from the Engineer is required.

While it is clear is that preapproval is required for individuals intentionally seeking a new Domestic Allowance. The language does not necessarily prevent an applicant from requesting authorization from the Office of the Engineer to use an existing unauthorized well as the point of diversion for a new application for an **authorized use**. “Appropriation” and “Appropriate” are both defined by the Ordinance and characterize water quantities used for a Beneficial Use on the Flathead Indian Reservation **under color of law** and accordingly, any water use occurring before having a water right would not be characterized as such.

UAMO § 2-2-117(4)-(6) was intended to distinguish the requirements of the Domestic Allowances application and authorization as compared to its similar off-Reservation appropriation counterparts, which uses “notices of completion” such as allowed under MCA § 85-2-306, and for which a notice of completion of Groundwater development (DNRC Form 602) is required.

This second instance of specific language requiring advance approval from the Engineer is imbedded within UAMO § 2-2-117(8):

An applicant must file a completed Application for a Domestic Allowance and obtain approval from the Engineer before drilling any Well(s) or developing any spring(s) and putting water to use pursuant to this Section. A completed application shall also include:

a. proof that the applicant has a possessory interest or the written consent of the Person(s) with possessory interest in the property where the point of diversion is located and where the water is to be put to beneficial use, and property rights in the diversion Works; and

b. a site-map that shows, in addition to the requirements of Section 1-1-110(12) of this Ordinance, the location of all proposed Wells and Developed Springs including latitude and longitude in decimal degrees. The map must include the entire property boundaries where the Well associated with the Domestic Allowance is proposed, or a minimum of 500 feet in radius around the proposed Well(s) or Developed Spring(s), whichever is greater, and include any existing or proposed by the applicant:

i. Well(s) and Stock Tanks, including purpose of each well;

ii. sewage facilities including septic tanks and drainfields;

iii. buildings on the site, including identification of Well connections;

iv. property lines and ownerships;

v. irrigated acres per lot or unit Well(s); and

vi. means of conveyance, water right points of diversions, and surface water features.

The primary intent of the preapproval step is to ensure the following:

1. The applicant is aware of and agreeing to the maximum flow rate, maximum volume, means of diversion, and use restrictions of these types of Domestic Allowances;
2. The well isn't located within a Groundwater Management Area pursuant UAMO 1-1-109 or other confining appropriation feature;
3. The well is located on property of which the applicant has possessory interest or the permission of someone with possessory interest; and
4. The well meets construction standards set forth in UAMO 1-1-111;

In a scenario where an applicant is using an existing well that predated the Effective Date, there would be no violation of UAMO § 2-2-117(8) because the well was drilled or the spring developed prior to the requirement for preapproval. Similarly, an applicant would not be in violation of the requirement under UAMO 2-2-117(8) for preapproval before water is put to use because the water was put to use prior to the requirement for preapproval. Compliance with the Domestic Allowance Sections under the Ordinance can be achieved after application review and approval.

Terms for Using an Existing Well for a New Domestic Allowance

The following are terms and conditions that would need to apply to any new Domestic Allowance that uses an existing well:

1. The well was drilled before September 17, 2021, which is the Effective Date of the Compact
2. The well construction standards must meet UAMO § 1-1-111
3. The proposes use must meet parameters of UAMO § 2-2-117, including, but not limited to:
 - a. Maximum volumes;
 - b. Maximum yard sizes;
 - c. Connection requirements;
 - d. Maximum flow rates;
 - e. Stock tanks requirements;
 - f. No ponds, pits, or reservoirs; and
 - g. Possessory interest in the diversion, conveyance, and place of use.
4. Any violations of parameters of UAMO § 2-2-117 must be remedied before an approval for a Domestic Allowance for an existing well will be issued.
5. Wells with existing water rights
 - a. For wells with existing exceptions to a permit pursuant MCA § 85-2-306 or Ordinance § 2-1-106(2)-(3). (DNRC Form 602 or Office of the Engineer form 602F), new authorizations for a Domestic Allowance may not, when combined with the existing flow rate and volume of the existing right, exceed 2.4 AF and 35 GPM when the new Domestic Allowance being added to the existing right is for an

Individual and Shared Domestic Allowance, or 10 AF and 35 GPM when the new Domestic Allowance being added to the existing right is for a Development Domestic Allowance. New buildings attached to the existing well must restrict lawn and garden sizes and comports with all other requirements of UAMO § 2-2-117. In circumstances where existing exceptions/registrations account for a large portion of the allowable max volume of a Domestic Allowance, lawn and garden for new uses may need to be additionally limited. Priority dates of the existing use will be retained and priority dates for new uses added to an existing use will be the date of the application – the use in total may have two separate priority dates for two separate water rights collocated at the same diversion point of existing well or developed spring.

b. For wells with existing claims or permits, new Domestic Allowances may be added to the existing use for flow rates and volumes up to the maximums allowed for Individual, Shared, and Development Domestic Allowances respectively. New buildings attached to the existing well must restrict lawn and garden sizes and comport with all other requirements of UAMO § 2-2-117. Priority dates of the existing use will be retained and priority dates for new uses will be the date of the application.

c. For existing uses of all types, an applicant may voluntarily choose to withdraw their existing water right and apply for a new Domestic Allowance to replace the previous use, so long as the new use comports with the requirements of UAMO § 2-2-117. Priority dates of the new Domestic Allowances will be the date of the application.

Resource and Economic Impacts

Under the circumstances described above, the policy of allowing an applicant to use an existing well for purposes of applying for a new Domestic Allowance recognizes circumstances where an applicant could drill a new well and be granted a new Domestic Allowance for their existing or additional use; rather than requiring the expense of drilling a new well, this policy circumvents an unnecessary infrastructure addition. The result reduces the number of wells, which decreases potential aquifer contamination point sources and conserves well drilling resources, such as steel casing and conveyance piping. Regardless of whether a new Domestic Allowance uses an existing well or a new well, the net additional water impact on water supply will be equivalent.

A Consideration of Fairness

An immediate question of fairness arises, with consideration to existing water users who complied with the rules and registered their existing state-based water uses pursuant Ordinance § 2-1-106(2)(3) or obtained a water right from the Montana DNRC prior to the mid-1990s. The above policy will allow those who failed to register to become complaint, but their water use will be more restrictive under the new Ordinance rules for Domestic Allowance. Additionally, priority dates of those that failed to register and alternatively file for a new Domestic Allowance will be earlier in time and junior to the priority dates of filed registrations of state-based rights issued under Ordinance.

A Consideration of Practicality

Applicants that have missed the deadlines for the registration of their existing state-based uses often request the extension of those deadlines as set forth in the Ordinance. Unfortunately, those deadlines are fixed in the Ordinance, and the changing of any portion of the Ordinance requires formal action from both the Montana Legislature and the CSKT Tribal Council (Ordinance § 1-1-101(2)).

Flexibility Toward Compliance in the Face of Changing Needs

Regarding small domestic uses, people have changing needs. Absent adoption of the above policy, issuances are static and fixed. Conversion from an Individual Well to a Shared Well arrangement can be a difficult process. For example, the option of updating water uses from those described by an exception for a single-home from the late 1970's to a modern recognition of added guest homes, businesses, or stock needs to be accommodated. Adoption of this policy makes it possible to bring these updated uses into compliance through a method that: (1) imposes the negotiated terms of exceptions to a permit/new appropriations as set forth in Ordinance § 2-1-117; and (2) avoids the comparatively onerous application criteria standards set forth in the Ordinance for changing an existing water right, which requires analysis of potential adverse effects to existing water uses and is designed for larger consumptive use water rights.

Summary

The language of the Ordinance envisions an ideal application for Domestic Allowances, while not expressly preventing scenarios where an existing well can be used as a point of diversion for a new Domestic Allowance. Furthermore, the overall intent of the Ordinance is to promulgate and promote the orderly and legal use of water on the Flathead Indian Reservation and enforce maximum volume and flow rate stipulations provided by the Compact. The practical reality is that water users on the Reservation require a more liberal interpretation of the Ordinance as it relates to Domestic Allowance point of diversions in order to come into compliance with water right laws on the Reservation.