

Flathead Reservation Office of the Water Engineer

IMPACT ANALYSIS OF PARCEL SIZE FOR PERMIT EXCEPTIONS IN THE WP&Ps Prepared by the OE Staff & Legal Counsel

ISSUE/NEED

The Board requested the Office of the Engineer Staff and legal counsel to conduct an impact analysis on public comments it received relating to parcel size, specifically to determine the appropriate parcel size for maximum number of connections within a Permit Exception. The public comments received provided the Board with two legitimate and substantiated options: 20 or 40-acre parcels.

An immediate note for the Board's consideration is that any policy determination must be evaluated within the jurisdiction and scope of the exterior boundaries of the Reservation. A policy determination which impacts the Reservation must consider available science-based criteria and variable existing policy based on needs and impacts to existing water rights. Additionally, this policy only applies to future subdivisions, meaning Developments, individual parcels, or subdivisions that were established prior to the Compact's Effective Date (Sept 17, 2021) will not be affected by this policy.

The WP&P section sent for public comment, pertaining to this impact analysis reads:

Large parcels of land that are under the same or affiliated ownership, including, but not limited to, housing subdivisions or any combination of business and residential units, are entitled to up to 10 AF in Permit Exceptions for each **[the Board is considering 20.01-acre or 40-acre]** apportionment of land within the Development. Applicants applying for multiple 10 AF amounts based on parcel size are responsible for providing a map that demarks each #-acre apportionment. These developments, however, will encumber the property for future domestic allowances in perpetuity or until the developments are removed and the water rights withdrawn.

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PUBLIC COMMENTS¹

- 1) *“Maximum Number of Connections for Large Parcels are entitled to up to 10 [acre-feet]. This allowance should be for every 20-acres as this would be consistent with historic numbers and allow landowners for flexibility.”*

Pursuant to Ordinance, § 2-2-117(6), “the combined maximum annual diverted volume from all wells and Developed Springs is 10 acre-feet or less.” A designation of 10 acre-feet refers to the volume measurement when considering new uses and existing uses within the same parcel. Parcel size is factored in when considering apportionment of land within a Development. This comment, therefore, supports a 20-acre parcel size within a volume limitation of 10 acre-feet per 20-acre parcel.

- 2) *“The Department of Environmental Quality only reviews parcels that are less than 20 acres in size. So, parcels greater than 20 acres will be created without any predetermination for water rights.”*

This comment utilizes current Department of Environmental Quality practices to substantiate it. Specifically, this comment provides background on developments within a land-strapped area, e.g., cluster developments. Cluster developments are legislatively afforded options for a local government to promote and preserve open space. See Mont. Code Ann. § 76-3-509. Typical cluster developments range from parcels of five to 10 acres in size and are targeted at minimizing overcrowding and often require parcels to within the development to be designated as agricultural use.

- 3) *“This [40 acre] perspective is based on consideration of cumulative uses of water in lower yield aquifer systems, the intent to maintain the viability of the assessed acreage under the Flathead Indian Irrigation Project, and the Tribes’ interest in preserving the open space character of the Reservation for various purposes.”*

This comment discusses the need and desire for “open space,” like that of the previous comment, however, it requests a 40-acre parcel size based on long-standing use by the CSKT and its departments.

¹ The OE and the Board’s legal staff shall not attempt to assume, guess, or extrapolate what a person’s intentions were in a public comment. Any analysis performed is based on the technical and legal expertise of the OE, its Staff, and legal staff.

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IMPACT OF COMMENTS

History of State Agency Policies in Favor of 20 Acre Parcels

The DNRC has, historically, utilized the definition of subdivision under section 76-4-102, MCA, when considering lots that are less than 20 acres to be a part of a subdivision created after October 17, 2014. Due to the *Upper Missouri Waterkeepers v. DNRC* litigation, in which the district court ruled that DNRC incorrectly applied the law when it determined that a developer was entitled to appropriate up to 10 acre-feet of water for each phase of a four-phased subdivision under the permit exception, the DNRC is currently reevaluating their processes. DNRC implemented the following changes: (1) DNRC will no longer issue predetermination letters for a DEQ subdivision review; (2) DEQ is to rescind its rules regarding the predetermination letters; and (3) DNRC rescinded its guidance regarding combined appropriation.

Because combined appropriation is a state-agency term, the Board decided to apply similar concepts through its references to “existing uses” and “permit exceptions.” However, while there is no mention of combined appropriation or DNRC/DEQ guidance terms within the Compact, Ordinance, or current WP&Ps, the DNRC’s decision to rescind its combined appropriation guidance and to terminate the memorandum of understanding between it and DEQ, for subdivision assessments, should be noted in the Board’s determination of parcel size.

The public comment requesting 20-acre parcel sizes significantly relies on state policy. Given the uncertainty of the state-based policies, the Board may want to base its parcel size determination on alternate supporting information.

Ordinance Water Conservation Considerations in Favor of 40 Acre Parcels

The Ordinance suggests a more conservative approach to Permit Exceptions evidenced by the 2.4 AF allowance annual volume limits they describe, compared to the State-Based 10 AF limits. The Compact contemplates conservation, management, and protection of water resources essential to the health and welfare of all residents of the Reservation. The 40-acre parcel size option mirrors this conservative approach and would promote increased water conservation (see technical report below).

Any evaluations as to volume or parcel size must be considered within the exterior boundaries of the Reservation. Given the jurisdictional limitations, the Board’s determination should contemplate existing tribal conservative approaches to best implement the conservation requirements of the Compact.

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TECHNICAL REPORT

Using the MT Cadastral data² there are a total of 10,163 established parcels within the exterior boundaries of the Flathead Reservation as of July 22, 2024. Of these parcels 1,375 of them are greater than 20.01 acres, 706 are greater than 40 acres, and 512 of them are between 20.01 and 40 Acres.

Maximum Volume Calculations

20 Acre Cutoff Option: Land(s) that are under the same or affiliated ownership, including, but not limited to, housing subdivisions or any combination of business and residential units, that are 20.01 acres or less as of Sept 17, 2021, would receive 10 AF/YR in Permit Exceptions. This option would allow for half an acre-foot (6 inches) or 163,000 gallons of water annually to be applied per acre for various purposes without a New Appropriations Permit.

- All existing parcels < 20.01 Acres [8,776] = **87,760 AF/YR** (allotting 10 AF for these parcels in this scenario)
- 20.01 < All Existing Parcels < 40 [512] = **10,240 AF/YR** (allotting 20 AF for these parcels in this scenario)
- All existing Parcels > 40 [706] = **21,180 AF/YR** (allotting 30 AF for all parcels over 40 for this scenario)
- Total maximum volume = **119,180 AF/YR**

40 Acre Cutoff Option: Land(s) that are under the same or affiliated ownership, including, but not limited to, housing subdivisions or any combination of business and residential units, that are 40 acres or less as of Sept 17, 2021 would receive 10 AF/YR in Permit Exceptions. This option would allow for a quarter acre-foot (3 inches) or 81,500 gallons of water annually to be applied per acre for various purposes without a New Appropriations Permit.

- All existing parcels < 40 Acres [9,300] = **93,000 AF/YR** (allotting 10 AF for these parcels in this scenario)
- 40 < All Existing Parcels < 80 [273] = **5,460 AF/YR** (allotting 20 AF for these parcels in this scenario)
- All existing Parcels > 80 [309] = **9,270 AF/YR** (allotting 30 AF for all parcels over 40 for this scenario)
- Total maximum volume = **107,730 AF/YR**

Impact of Maximum Projected Water Usage Between Options

20 Acre Option [**119,180 AF/YR**] – 40 Acre Option [**107,730 AF/YR**] = **11,450 AF/YR**

² Montana State Library Geographic Information, Montana Department of Revenue: <https://www.arcgis.com/home/item.html?id=a96ce1911a87401e933fb922f8d0e4be>. This data source may not contain every parcel on the Flathead Reservation, including Tribal parcels.