

Surface Water / Ground Water Work Group
Recommend for Statutory Change
Augmentation, Ground Water Analysis & Basin Closure Amendments
March 3, 2006

85-2-102 New Definition: "Augmentation Plan" means an arrangement, either temporary or permanent, to make water available for a new beneficial use in a water source or tributary through the development of a new or alternative water supply that reasonably prevents depletions to surface water where required or adverse effect to any water rights, or both.

New Section: "Municipality" means any incorporated city or town in the state organized and incorporated under Title 7 chapter 2 Montana Code Annotated.

New Section: "Stock water" means the use of water to provide drinking water for livestock which includes, but is not limited to, cattle, sheep, swine, goats, horses, mules, asses, llamas, alpacas, bison, ostriches, rheas, emus, and domestic ungulates.

85-2-102. (Temporary) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

- (1) "Appropriate" means:
 - (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;
 - (b) in the case of a public agency, to reserve water in accordance with 85-2-316;
 - (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436; or
 - (d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408.
- (2) "Beneficial use", unless otherwise provided, means:
 - (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;
 - (b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;
 - (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; or
 - (d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408.
 - (e) a use of water for augmentation.

85-2-329. Definitions. Unless the context requires otherwise, in 85-2-330 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or~~

~~directly connected to surface water.~~

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the confluence of the Teton and Marias Rivers.

85-2-330. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the Teton River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal municipalities~~ or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) emergency temporary appropriations as provided for in 85-2-113 (3) .

(f) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, e and f.

85-2-335. Definitions. Unless the context requires otherwise, in 85-2-335 through 85-2-338, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

(2) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its tributaries above Milltown dam.

85-2-336. Basin closure -- exception. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application filed prior to January 1, 2000, for a permit to appropriate surface

water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial action.

(c) an application for a permit to appropriate surface water to conduct aquatic resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376). A permit issued to conduct mitigation actions may not be used for dilution.

(e d) an application for a permit to appropriate surface water for stock use;

(d e) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e f) an application for power generation at existing hydroelectric dams. The department may not approve a permit for power generation if approval results in additional consumption of water.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, d, and f.

(3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing to object under 85-2-402.

(4) The department may not process or approve applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316.

85-2-337. Ground water permit applications -- report required. (1) During the period of basin closure provided in 85-2-330, 85-2-336(1), 85-2-340, 85-2-342, 85-2-344, or any administratively closed basin pursuant to 85-2-319, an applicant for a ground water permit in the Upper Clark Fork River a closed basin shall submit a report prepared by a professional engineer or hydrologist person educated and experienced in ground water science, addressing that analyzes the hydrologic hydraulic connection between the source of the ground water and surface water and that quantifies depletions to surface water that result from the proposed appropriation. If the applicant fails to submit the report required in this section, the application is considered defective and must be processed pursuant to 85-2-301.

~~(2) Except as provided in subsection (3), the department may not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the source of the ground water is not a part of or substantially or directly connected to surface water.~~

~~(3 2) The department may issue a permit to appropriate ground water if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the augmentation plan provides for sufficient augmentation water in amount, time, and location to replace reasonably prevent depletions to surface water senior water rights.~~

(3) Where an augmentation plan requires an “Application for Change of Appropriation Right” under 85-2-402, that change application will be submitted with the “Application for Beneficial Water Use Permit” and its attached hydrologic report and augmentation plan. These applications will be evaluated in a combined proceeding.

85-2-339. Terminated. Sec. 6, Ch. 281, L. 1999.

85-2-340. Definitions. Unless the context requires otherwise, in 85-2-341 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the confluence of the Jefferson and Missouri Rivers.

(4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the confluence of the Madison and Jefferson Rivers.

(5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

85-2-341. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal, municipalities~~ or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) temporary emergency appropriations as provided for in 85-2-113(3).

(f) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, e, and f.

85-2-342. Definitions. Unless the context requires otherwise, in 85-2-343 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam.

85-2-343. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal municipalities~~ or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more;

(e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage; or

(f) temporary emergency appropriations as provided for in 85-2-113 (3).

(g) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, d, e, f, and g.

85-2-344. Bitterroot River subbasin temporary closure -- definitions -- exceptions.

(1) Unless the context requires otherwise, in this section, the following definitions apply:

(a) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(b) "Bitterroot River basin" means the drainage area of the Bitterroot River and its

tributaries above the confluence of the Bitterroot River and Clark Fork of the Columbia River and designated as "Basin 76H".

(c) "Bitterroot River subbasin" means one of the following hydrologically related portions of the Bitterroot River basin:

- (i) the mainstem subbasin, designated as "Subbasin 76HA";
- (ii) the north end subbasin, designated as "Subbasin 76HB";
- (iii) the east side subbasin, designated as "Subbasin 76HC";
- (iv) the southeast subbasin, designated as "Subbasin 76HD";
- (v) the south end subbasin, designated as "Subbasin 76HE";
- (vi) the southwest subbasin, designated as "Subbasin 76HF";
- (vii) the west central subbasin, designated as "Subbasin 76HG"; or
- (viii) the northwest subbasin, designated as "Subbasin 76HH".

(2) As provided in 85-2-319, the department may not process or grant an application for a permit to appropriate water or for a state water reservation within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to subsection (3) of this section, except for:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a ~~municipal~~ a municipality's water supply;

(c) temporary emergency appropriations pursuant to 85-2-113 (3); or

(d) an application to store water during high spring flow in an impoundment with a capacity of 50 acre-feet or more.

(e) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) Each Bitterroot River subbasin is closed to new appropriations and new state water reservations until 2 years after all water rights in the subbasin arising under the laws of the state are subject to an enforceable and administrable decree as provided in 85-2-406 (4).

(5) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, and e.