

Water Rights, Conservation Districts, Water Reservations & the Oil Boom

November 28, 2011

MONTANA CONSERVATION DISTRICTS' SPECIAL CONSIDERATIONS

Conservation districts (CDs) have water reservations for agricultural water for future use. The reserved water can only be used for agricultural purposes, as that was the intent of the CDs' water reservations as applied for and subsequently granted. CDs can apply for beneficial water use permits (permits) and change of appropriation water rights (changes) just like any other individual or entity. A permit grants a new right for a specific amount of water and purpose of use, 85-2-311, MCA. A change allows a water right holder to change the purpose, place of use, point of diversion or place of storage for an existing right, including a CD water reservation.

If you intend to change the purpose for a CD water reservation you would need to:

- Prove by a preponderance of evidence (85-2-402, MCA):
 - The amount of water established and available in the water reservation
 - There is no adverse effect to senior or junior appropriators
 - The means of diversion is adequate
 - The beneficial use of the water
 - Possessory interest
- Beyond meeting the aforementioned criteria a CD that intends to change the purpose of their water reservation must also prove that the criteria in 85-2-316(4), MCA will be met under the approved change. Section 85-2-316(4), MCA requires that the applicant establishes by a preponderance of evidence:
 - The purpose of the reservation
 - The need for the reservation
 - The amount of water necessary for the purpose of the reservation
 - That the reservation is in the public interest
- A change application must include the information required under ARM 36.16.104 through ARM 36.16.106
- In determining the public interest, the department shall issue a water reservation (or change on that reservation) for withdrawal and transport outside the state if the applicant proves by clear and convincing evidence:
 - The proposed out of state use of water is not contrary to water conservation in Montana
 - The proposed out of state use of water is not otherwise detrimental to the public welfare
- Others can object to these changes and a hearing before the Department will likely be required

WATER MARKETING (85-2-310(g), MCA)

Water marketing is considered a beneficial use of water in Montana. In a water marketing scenario water is sold or leased to another individual who uses that water for some other beneficial use. For example, let us focus on the concept of a water depot. A water right can be acquired allowing you to construct a water depot through both the permit or change application process. Either way the process will involve following the procedures and timelines established in HB40 set out in statute in 85-2-302, -307, -310, MCA. You will also need to provide contractual agreements showing the amount of water for each person to be marketed. You will also need to define a service area for where the marketed water will be used. If the water will be used out of state you must meet a higher burden and provide clear and convincing evidence showing that, among other things, that the proposed out of state use is not contrary to water conservation in Montana. With regard to establishing a water depot by changing an agricultural purpose, it is important to point out that the agricultural purpose likely has a period of water use defined by the growing season. The period of use is not something that can be changed on a water right. This means that any change on an agricultural purpose would inherit and be limited to the agricultural period of use as well.

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MAN CAMPS

The beneficial use of water for a man camp depends on how that water will be used beneficially at the man camp. A multiple domestic purpose could be used where beneficial water use can be quantified based on the number of men at the camp and the facilities found at the camp. A water right for a man camp can be applied for through a permit or change. It may even be possible to acquire water for a man camp through a permit exception with a Notice of Completion of Groundwater Development (Form 602) as long as you were using groundwater at a rate **35GPM or less up to 10AF** of volume per year.

SHORT TERM LEASE OF APPROPRIATION RIGHT (85-2-410, MCA)

A water right holder may lease for a term **not to exceed 90 days** within the defined period of use all or part of an appropriation right for road construction or dust abatement without prior approval of the department, subject to the following. The lease must include the following information:

- The name and address of the lessee
- The name of the owner of the appropriation right
- The number of the appropriation right
- The purpose of use of water for which the lease is being made
- The source of water to be appropriated
- The starting and ending date of the proposed use of water
- The proposed point of diversion
- The proposed place of use
- The diversion flow rate and volume of water to be used during the period of use
- A description of how the existing use of water will be reduced to accommodate the temporary change of use including number of acres retired if applicable.

The short term lease shall not exceed 60,000 gallons a day or the amount of the appropriation right, whichever is less. Any combination of leases cannot exceed 120,000 gallons a day for one project. The temporary proposed use of the water must be noticed in a local newspaper 30 days prior to the use of the water and or individual notices mailed to appropriators whom may be affected. The notice must contain all of the information required in the lease. At least 2 days prior to the temporary use of water the department requires a copy of the lease agreement, a copy of the public notices, and for appropriations over 60,000 gallons a day an analysis of adverse effects and a description of planned mitigation actions.

CLOSURE CONSIDERATIONS

With regard to the "oil boom" area of interest the Fort Belknap Compact Closure is the main area that could affect the manner in which water must be appropriated. The Fort Belknap Compact closure closes all of the Milk River drainages from the headwaters to the Missouri River to new appropriations of water. The exceptions to this closure are: Form 602 (Notice of Completion of Ground Water Development), Form 605 (Application for Provisional Permit for Completed Stock water Pit or Reservoir), or Municipal uses and groundwater appropriations which are not connected to surface water. Outside of this closure the "oil boom" area is composed of open basins and permit applications for new appropriations are subject to the criteria under 85-2-311, MCA.

FOR MORE INFORMATION ON THE ABOVE OPTIONS CONTACT YOUR LOCAL DNRC WATER RESOURCES OFFICE - <http://dnrc.mt.gov/FieldOperations/regionaloffices/Default.asp>