

Unofficial Draft Copy

As of: January 4, 2008 (9:50AM)

LC5005

**** Bill No. ****

Introduced By *****

By Request of the *****

A Bill for an Act entitled: "An Act providing for the issuance of state water reservations for aquatic resource activities carried out in compliance with and as required by the federal clean water act of 1977 in all closed basins for surface water and ground water; providing that the water reservations may not be used for dilution and are not subject to a change of use; exempting applicants for state water reservations for aquatic resource activities from the requirement of preparing a hydrological assessment or providing a mitigation plan; amending sections 85-2-330, 85-2-331, 85-2-336, 85-2-341, 85-2-343, 85-2-344, and 85-2-360, MCA; and providing an immediate effective date."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 85-2-330, MCA, is amended to read:

"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 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:

Unofficial Draft Copy

As of: January 4, 2008 (9:50AM)

LC5005

(a) an application for a permit to appropriate ground water if the applicant complies with the provisions of 85-2-360;

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

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306;

(ii) stock use; or

(iii) use of surface water by or for a municipality;

(d) an application to store water during high spring flows;

(e) temporary emergency appropriations as provided for in 85-2-113(3); ~~or~~

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

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7; or

(g) an application for a state water reservation to appropriate surface water or ground water to conduct aquatic resource activities carried out in compliance with and as

required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(f) or a state water reservation under subsection (2)(g) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), (2)(e), or (2)(f) or a state water reservation issued pursuant to subsection (2)(g)."

{*Internal References to 85-2-330:*

85-2-329x}

Section 2. Section 85-2-331, MCA, is amended to read:

"85-2-331. Reservations within Missouri River basin and Little Missouri River basin. (1) Except as provided in 85-20-1401 and subsection (5) of this section, the state, an agency or political subdivision of the state, or the United States or an agency of the United States that desires to apply for a state water reservation in the Missouri River basin or in the Little Missouri River basin shall file an application pursuant to 85-2-316 no later than:

(a) July 1, 1989, for reservation of water above Fort Peck dam; or

(b) July 1, 1991, for reservation of water below Fort Peck dam and in the Little Missouri River basin.

(2) Subject to legislative appropriation, the department

shall provide technical and financial assistance to other state agencies and political subdivisions in applying for state water reservations within the Missouri River basin and the Little Missouri River basin.

(3) Except as provided in 85-20-1401 and subsection (5) of this section, the department shall:

(a) make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1989, for state water reservations in the Missouri River basin above Fort Peck dam.

(b) make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1991, for state water reservations in the Missouri River basin below Fort Peck dam and in the Little Missouri River basin.

(c) determine which applications or portions of applications are considered to be above or below Fort Peck dam.

(4) Except as provided in 85-20-1401 and subsection (5) of this section, state water reservations approved by the department under this section have a priority date of July 1, 1985, in the Missouri River basin and a priority date of July 1, 1989, in the Little Missouri River basin. If the department issued a permit under Title 85, chapter 2, part 3, prior to the granting of a state water reservation under this section, the department may subordinate the state water reservation to the permit if it finds that the subordination does not interfere substantially with the purpose of any state water reservation. If the department issued a certificate for ground water development under Title 85,

chapter 2, part 3, prior to the granting of a reservation under this section, the department may subordinate the reservation to the certificate if it finds that the subordination does not interfere substantially with the purpose of any reservation and the reservant consents to the subordination. The department shall by order establish the relative priority of applications approved under this section.

(5) A public agency may apply for an application for a state water reservation to appropriate surface water or ground water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387. A state water reservation issued to conduct aquatic resource actions may not be used for dilution and may not have its use changed."

{*Internal References to 85-2-331:*

85-2-316x}

Section 3. Section 85-2-336, MCA, is amended to read:

"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 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 if the applicant complies with the provisions of 85-2-360;

(b) an application for a permit or state water reservation

to appropriate surface water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387. A permit or state water reservation issued to conduct aquatic resource actions may not be used for dilution.

(c) an application for a permit to appropriate water for stock use;

(d) an application to store water;

(e) an application submitted pursuant to 85-20-1401, Article VI; or

(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 or state water reservation issued pursuant to subsection (2) (b), ~~or (2) (c)~~, or (6).

(4) Except as provided in 85-20-1401 and subsection (6) of this section, 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.

(5) Except as provided in 85-20-1401 and subsection (6) of this section, 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.

(6) A public agency may file for an application for a state water reservation to appropriate surface water or ground water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387."

{*Internal References to 85-2-336:*

85-2-335* 85-2-337 85-2-338 }

Section 4. Section 85-2-341, MCA, is amended to read:

"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 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 if the applicant complies with the provisions of 85-2-360;

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

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306;

(ii) stock use; or

(iii) use of surface water by or for a municipality;

(d) an application to store water during high spring flows;

(e) an application submitted pursuant to 85-20-1401,

Article VI;

(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 for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7; or

(h) an application for a state water reservation to appropriate surface water or ground water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387.

(3) A permit or state water reservation issued to conduct remedial actions or aquatic resource activities under subsection (2)(g) or (2)(h) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to

subsection (2)(b), (2)(c), (2)(f), or (2)(g) or a state water reservation issued pursuant to subsection (2)(h)."

{*Internal References to 85-2-341:*

85-2-340}

Section 5. Section 85-2-343, MCA, is amended to read:

"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 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 if the applicant complies with the provisions of 85-2-360;

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

(c) an application for a permit to appropriate water for:

(i) domestic use from surface water or pursuant to 85-2-306;

(ii) stock use; or

(iii) use of surface water by or for a municipality;

(d) an application to store water during high spring flows;

(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;

(f) an application submitted pursuant to 85-20-1401, Article VI;

(g) temporary emergency appropriations as provided for in 85-2-113(3); ~~or~~

(h) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7; or

(i) an application for a state water reservation to appropriate surface water or ground water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2) (h) or a state water reservation issued under subsection (2) (i) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), (2)(e), (2)(g), (2)(h) or a state water reservation issued pursuant to subsection (2)(i)."

{*Internal References to 85-2-343:*

85-2-342x}

Section 6. Section 85-2-344, MCA, is amended to read:

"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 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 if the applicant complies with the provisions of 85-2-360;

(b) an application for a permit to appropriate water for use of surface water by or for a municipality;

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

(d) an application submitted pursuant to 85-20-1401, Article VI;

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

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

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

(ii) aquatic resource activities carried out in compliance

with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7; or

(i) an application for a state water reservation to appropriate surface water or ground water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387.

(3) A permit issued to conduct remedial actions or aquatic resource activities under subsection (2)(f) or a state water reservation issued under subsection (2)(h) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsection (2)(b), (2)(c), or (2)(f) or a state water reservation issued pursuant to subsection (2)(i).

(5) 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)."

{*Internal References to 85-2-344:*

85-2-350x}

Section 7. Section 85-2-360, MCA, is amended to read:

"85-2-360. Ground water appropriation right in closed basins. (1) ~~An~~ Except for an application for a state water reservation to appropriate ground water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, an application for a ground water appropriation right in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or administratively closed pursuant to 85-2-319 must be accompanied by a hydrogeologic assessment that has been conducted pursuant to 85-2-361 to predict whether the proposed appropriation right will result in a net depletion of surface water and must be accompanied by a plan as provided in 85-2-362, if necessary.

(2) If the hydrogeologic assessment conducted pursuant to 85-2-361 predicts that the proposed appropriation right will not result in a net depletion of surface water, the department shall proceed under the criteria provided in 85-2-311.

(3) (a) If the hydrogeologic assessment predicts that the proposed appropriation right will result in a net depletion of surface water, the applicant shall analyze whether the net depletion results in an adverse effect on a prior appropriator. If the applicant provides a correct and complete application, the department shall proceed to process the application as provided in 85-2-363.

(b) If the applicant has used the water for the purpose of

conducting the hydrogeologic assessment, the applicant shall terminate the use of the water. Failure to terminate use of the water must result in a fine of not more than \$1,000 for each day of the violation.

(4) If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection (3)(a), the department may proceed to process the application pursuant to 85-2-363 if, in addition to other applicable criteria, the applicant complies with 85-2-362.

(5) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

(6) The priority date for an appropriation right that is granted to an entity whose permit application was returned after April 11, 2006, and before May 3, 2007, because of the department's interpretation of a court decision is the date of the initial application to the department."

{*Internal References to 85-2-360: None.*}

Unofficial Draft Copy

As of: January 4, 2008 (9:50AM)

LC5005

NEW SECTION. **Section 8. {standard} Effective date.** [This act] is effective on passage and approval.

- END -

{Name : Greg Petesch
Title : Director of Legal Services
Agency : LSD
Phone : 444-3064
E-Mail : gpetesch@mt.gov }