

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

March 9 and 10, 2004

Ex. No. 5



MARC RACICOT, GOVERNOR

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STATE OF MONTANA

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TELEFAX NUMBER (406) 444-8731PO BOX 202201
HELENA, MONTANA 59620-2301

December 14, 1993

Larry Peterman, Administrator
Fisheries Division
Department of Fish, Wildlife and Parks
1420 East Sixth Avenue
P.O. Box 20071
Helena, MT 59620-0701

Dear Larry:

Thank you for your October 13, 1993, letter inquiring into DNRC's policy in processing permit applications under the Upper Missouri River Basin Closure (HB395). Your concern focused on ground water permits for consumptive use in the Gallatin Valley. You apparently objected to permit Application No. 83286-41H by Frederick and Betsy Fehsenfeld for a ground water well for irrigation of 29 acres.

The Fehsenfeld permit application was received on October 13, 1992. The Upper Missouri Closure was effective on April 16, 1993. The legislation applies to all permit applications received by DNRC after the effective date. As such the Fehsenfeld permit was not subject to the closure requirements. In addition, one of the five exceptions that apply to the Upper Missouri River Basin Closure is ground water. "Ground water" is defined as "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." The key words in the ground water definition are "immediately or directly connected to surface water." "Immediately or directly" simply means instantly without an interval of time or without the intervention of another object or cause. "Immediately or directly" may embrace appropriation of water by means of a well or infiltration gallery placed horizontally beneath the stream bed or vertically adjacent to the stream bed, where surface water exists. In such an instance, appropriation would induce surface water into the appropriation system. This ground water interpretation is consistent for the five current DNRC surface water rule closures in highly appropriated basins.

Unlike the Upper Clark Fork River Basin Closure, the Upper Missouri River Basin Closure does not require the submission of a report prepared by a professional engineer or hydrologist verifying the relationship between surface and ground water. In the Upper Missouri River Basin Closure area the DNRC requires information from the permit applicant as to whether the applicant's proposed well uses ground water that is directly or immediately connected to surface water. DNRC would refuse to accept the application if it determined that the ground water use is immediately or directly connected to surface water. An applicant, choosing to not accept DNRC's determination, may appeal the determination.

If the Department determines that it has jurisdiction over the application and provides public notice of the application, objectors have the opportunity to address whether the application

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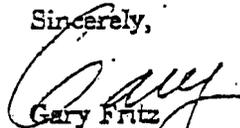
Larry Peterman
December 14, 1993
Page 2

meets the criteria for issuance and may also question the Department's determination regarding connection to surface water. * good

Consistent with our interpretation of the definition of ground water in other closed basins, we do not feel the ground water definition for the Upper Missouri Basin Closure includes those appropriations such as the Fehsenfeld proposed well that is one-third to one-half mile from the Gallatin River. Larry, the statutory requirement seems quite narrow; that is, very few ground water applications will be covered by the closure. You may want to seek an amendment to the statute if you feel instream values are being impacted by ground water use. *

I hope this letter clarifies our interpretation of ground water appropriations in the upper Missouri River Basin Closure area. If not or if I can be of further assistance, feel free to contact me.

Sincerely,


Gary Fritz
Administrator
Water Resources Division

GF/pb

Copy: Bozeman Regional Office

MEMORANDUM

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C.J.

RECEIVED

JAN 10 1994

MONTANA D.N.R.C.
LEWISTOWN FIELD OFFICE

TO: Scott Compton, Manager
Bozeman Water Resources Regional Office
Bob Larson, Manager
Havre & Glasgow Water Resources Regional Offices
T.J. Reynolds, Manager
Helena Water Resources Regional Office
~~Sam Rodriguez, Manager~~
Lewistown Water Resources Regional Office

FROM: *RJL* Ronald J. Guse, Supervisor
New Appropriations Program

DATE: January 6, 1994

SUBJECT: DNRC's Policy Concerning Consumptive Groundwater Permit Applications in the Upper Missouri River Basin Closure Area

Attached is a copy of a letter dated December 14, 1993, from Gary Fritz to Larry Peterman of FW&P. Please read it carefully.

This letter sets forth our interpretation of the Upper Missouri River Basin Closure, that specifically concerns consumptive groundwater permit applications.

If we get an application for groundwater for a consumptive use (except for domestic, municipal, or stock uses) where we determine, by using reasonable information available to us, that it is "immediately or directly" connected to surface water, we cannot process it under the closure, because it would be considered surface water.

If you cannot determine from information available, that the source by definition is surface or groundwater, you should request the applicant to provide additional information to prove that it is groundwater. Lack of sufficient information to show the source is groundwater would require us under the closure to reject the application. You could also request assistance from Division hydrogeologists in reviewing available information in each case.

If available information convinces you that the source is groundwater you can process it. As you would expect, the types of wells that we're concerned about here would be located fairly close to a surface source. Each application in this category must be reviewed and assessed on its own factual information before we can decide if we can accept the application for processing or not.

If you have specific questions or concerns related to this topic, please call.

NOTE: All managers sent this memo with attachment needs to make sure that all your staff, who may be processing this type of permit application, has an opportunity to read this memo and attachment, and retain a copy for future reference. Be aware that this same memo and attached letter would apply in the same manner to the Teton River Closure (Sections 85-2-329 and 85-2-330, MCA), the Jefferson/Madison River Closure (Section 85-2-340 and 85-2-341, MCA), as well as the Upper Missouri River Basin Closure found in Section 85-2-342 and 85-2-343, MCA. You should also refer to my memos of April 1, 21 and 23, 1993, that implemented the three legislative river basin closures.

see above

RG/pb
Attachment (1)
Copies to:

- Larry Holman
- Terri McLaughlin
- Kim Overcast
- Hal Peck
- Terry Scow
- Vivian Lighthizer

Does this include 85-2-342?