



Montana Fish, Wildlife & Parks

February 24, 2004

Mr. Larry Mitchell
Legislative Environmental Policy Office
P.O. Box 201704
Helena, MT 59620-1704
(via facsimile)

Dear Mr. Mitchell:

Bob Lane, your official contact at FWP for HJR 40 input, requested that I provide some preliminary input to you on your January 30th e-mail request for comment. He or another staff member at FWP may follow up with additional information or suggestions at a later date. FWP appreciates your interest in this topic.

Background

Private ponds are proliferating (especially in western Montana) at an amazing rate. Although such a landscape feature may seem innocuous, they can lead to significant problems. FWP has authority to approve or deny stocking permits for private fish ponds, so we are involved in the review of many of these. And many are built illegally. Issues that arise with private ponds include issues of holding water away from downstream (often senior) users, stocking of fish that can escape to Montana's wild fisheries and introduce disease or genetic problems, the warming of pond water prior to discharge (and other water quality problems), the potential increase in risk of whirling disease in Montana streams that ponds can bring, and the potential failure of pond impoundments and associated physical and resource risks. Pond diversions often dewater valuable public fisheries, only to provide a limited, private recreation or aesthetic resource that in turn puts additional risk on natural systems. Many of the participants in permitting dialogues (thought the DNRC water right process) seem to think there is something wrong with allowing public waters to be used for such a private purpose.

FWP appreciates the efforts of EQC and DNRC staff to provide a selection of ideas on how to address private pond proliferation issues in Montana. We are also working hard on the issue, including participation in related water permitting reviews, working with DNRC on their overall pond-related policy, initiating and helping with a Montana Watercourse educational publication on ponds, and trying to inform landowners of the realities of pond effects and risks. There are likely some policy changes that could assist in this regard. These are discussed below.

- 1. Increase public interest element of Montana water law.** Some manipulation of water impounds are beneficial, such as wetland restoration, community fishing ponds where such ponds don't negatively impact wild fisheries, etc. However, some ponds evoke similar

responses across agency staff, irrigators, neighbors and others – these are the ones that effect a significant cost on public resources for a very limited-access facility. The January “concepts” paper refers to this concept in the “increase in public benefit” language. Montana’s statutes currently define beneficial use as “a use of water for the benefit of the appropriator, other persons, *or* the public, including but not limited to...” I understand that case law has interpreted this definition to include the ability of someone to fill a swimming pool from a live stream. Montana’s flowing rivers have likely attained a higher importance since that case. One way to address the increased demand on Montana’s rivers for “luxury” uses would be to change the “or” to an “and” or otherwise infuse slightly more public interest criteria into our water law. This could be done to clearly recognize that private uses are for public benefit, such as irrigated agriculture, etc., but that there is a limit. Montana has public interest criteria (in the “reasonable use” portion of the Act), but it is only triggered by very large proposals, rather than some type of consideration of relative public costs and benefits.

2. **Eliminate the stockwater exemption.** As noted in the concepts paper, some are making mischief with the stockwater exemption (85-2-306(3), MCA). FWP and DNRC staff have worked hard to try to close the loophole that some have discovered in this section, and DNRC staff have noted that they think most of the constituents this section was intended to serve have likely built their impoundments. It may be that eliminating this section could solve some problems without creating much in the way of new ones.
3. **Develop policy that does not directly place the burden of water rights review of ponds on FWP.** FWP staff have worked hard over the past 5 years to help DNRC develop guidance for their review of the varied types of ponds for which they receive applications. We have some authority over what fish to stock in ponds, but do not wish to be in the business of reviewing pond design, etc., for water right applications. When we have significant issues with a pond proposal, we have worked independently with the applicant under our own authority, or have participated in the water right review through the objection process. We wish to continue to choose the extent of our involvement in the water right elements of pond proposals.
4. **“Turnover” of water is not necessary.** There is excessive reliance on the need for fresh water inputs to ponds that is not necessary. Aeration may help, and many ponds survive just fine with neither. The reliance on “turnover” results in excessive stream depletions for ponds.
5. **DNRC should not be absolved of pond-related enforcement duties.** The last suggestion in the concepts paper discusses enforcement, and may be helpful. But, nothing should be implemented that absolves DNRC of enforcement duties or authorities related to ponds.
6. **It is unclear what the exchange/augmentation concept includes.** It is unclear to me what the impediment is to changes and exchanges of water (p. 3 of concept paper). It is my understanding that, through the change process, water can be altered from one location and use to another. The limitation to the number of such exchanges in Montana may not be the ability to do so, but the predilection of people towards new water in already over-appropriated basins. Exchanges can and should occur, of existing water rights, where new ones can’t be supplied. I assume the reference to augmentation plans is for the Upper Missouri Basin. If specific authority for augmentation plans is added to that statute, the wording should be specific to ensure that the augmentation is “real”, such that water right

holders and others are not caught in an unending process of reviewing proposals that are only augmentation on paper and not for the stream.

7. **Care should be taken to ensure incentives to create ponds are not invoked.** Interestingly, the need to ensure that consumption of water is not increased can mean that the best place to get a pond permitted is an area where consumption of water is already high – a functioning wetland. There is some incentive already in closed basins to place ponds in these locations. That should be eliminated, and any discussion of “consumption” or non-consumption should consider this potential inadvertent effect.

Thank you for the opportunity to provide these preliminary comments. Please contact myself or Bob Lane with any questions you might have.

Sincerely,



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