PONDS

CONCEPTS FOR POSSIBLE LEGISLATIVE CHANGES
Provided for comments -- 1-26-04

Objective: Study pond issues pursuant to HJR 40, and see if general agreement among stakeholders can be obtained to legislatively define when ponds are beneficial uses of water under Montana law, and to describe the process for obtaining water rights for ponds.

Possible Legislative Changes may include:

(1) Amend law to limit *wildlife* beneficial uses to DFWP, USFWS, and DOT by permit, and clarify that wildlife includes migratory waterfowl.

Reason: Wildlife uses are best determined by public agencies with expertise and responsibility in the area of wildlife management, and by DOT for required federal mitigation for federally funded highway projects. Private uses may conflict with public management of wildlife resources. Additionally, wildlife uses for private uses are hard to quantify, and if left open-ended, could claim vast amounts of water and thereby impact existing as well as future uses. As it presently stands, when would a private wildlife use be too large to permit? **Further defining** wildlife would make clear wetlands for waterfowl are included in the wildlife definition.

(2) Amend law to clarify that beneficial use does not include building ponds for purely aesthetic (e.g., simply to view) purposes .

Reason: Water is too scarce in the West and too badly needed for existing and future beneficial uses to be tied up for purely aesthetic uses. Most western states take this view.

(3) Amend law to define ponds as consumptive uses of water.

Reason: All ponds consumptively use water, even if only for evaporation, which can be significant factor in water short areas. Ponds would clearly and consistently be considered as consumptive uses along with irrigation and other consumptive uses, and this change would eliminate the erroneous impression that ponds cannot have potential adverse impacts on watersheds. What some may consider a small offstream pond with an identified flow rate and a volume that needs12 fillings a year for turnover, and which is located at the lower end of a stream, can in fact be a very significant water right that could restrict much future upstream development. Ponds can have adverse impacts on watersheds, and should have to prove their beneficial use as much as any other use.

(4) Amend law to define stockwater pond to mean the beneficial use of water by storing water in a pond for the watering of a minimum of _____x or more head of stock.

Reason: Stockwater ponds can be used as a loophole by some water users who have one or two horses or a cow to build a pond that is really for no more than aesthetic uses. This legislation is not intended to in any way interfere with the use of ponds for legitimate agricultural stockwater ponds. The idea is to not let water users who can otherwise provide water for one or two stock animals through existing water rights, or an exempt well and a stock tank, evade the ordinary requirements of law pertaining to obtaining pond permits.

Surface water

Small ponds

(5) Amend law to:

-allow small offstream fish and recreation ponds through the permit process with a statutory maximum size (e.g., .2 maximum acre surface area, _____ x max. volume, ___ x depth)

-require DFWP to first approve design of fish ponds and use of water as producing a net increase in public benefit in order to be considered a beneficial use

Large ponds

(6) Amend law to:

-allow larger (>.2 acre surface area and > ___x acre feet, but no larger than __x acre feet and ___x volume) offstream fish and recreation ponds by permit if:

-applicant proves MCA ' 85-2-311 criteria by clear and convincing evidence

-DFWP first approves design of pond and use of water as producing a net increase in public benefit in order to be considered a beneficial use

-clarify exempt wells under MCA ' 85-2-306 cannot be used to make up for evaporative losses. The applicant must prove lack of adverse impact from that ground water use.

-require an applicant prove aeration is not a feasible alternative to the larger requested water volumes if needed for turnover.

Reason: If ponds are to be allowed for fish and recreation beneficial uses, existing and future uses require a reasonable limit to the sizes of these ponds. The legislature by statute can put a maximum size on ponds much more easily than agencies can through rulemaking. The legislative intent would be to preserve a scarce resource, and it can choose a maximum size. An agency through rulemaking may not be able to justify a maximum size without being subject to attack as being arbitrary and capricious if it cannot scientifically justify a given pond size.

Small ponds would be easier to permit than large ones, and the hope would be that smaller ponds would therefore be sought. Larger ponds which arguably have a greater impact on the source must be proven by higher standard of proof. The desire is to have smaller ponds with less impact on the resource, but leave the door open for larger ponds for those who want to spend the extra time and money to prove by clear and convincing evidence the need for a larger pond.

Wells directly or immediately connected to the surface water should not be able to make up for pond evaporation without proof that the use of that ground water will not adversely impact other water users.

For fish to thrive, either turnover or aeration is needed. Monthly turnover of a pond=s volume can result in a large yearly volume. If aeration can provide the same benefits to fish and save water, it should be required, and anyone desiring a larger pond and such large volumes without aeration should have to justify it.

Ground water

(7) Amend law:

- to clarify an exemption under MCA ' 85-2-306 from the DNRC permit process is allowed for small ponds for fish and recreation if:
  - not in a CGWA (controlled ground water area)
  - not in basins closed to new appropriations
  - if pond is not greater than .2 acres surface area, flow rate is 35 gpm or less, and volume does not exceed 10 A/F year
  - if the pond is ____x feet or miles from the high water mark of the stream

- to require larger ponds than above from ground water sources comply with the same permit requirements listed above for surface water ponds (and be subject to the same maximum size limitations, etc.)

Reason: Small ponds from ground water sources may be preferred over ponds from surface water sources because surface waters are often already appropriated, and use of surface water for ponds may immediately impact senior users as well as fish and wildlife and riparian habitat. If the ponds are small enough and do not require turnover, they can fit into the process that exempts some water uses from the DNRC permit process. Such ponds would not be allowed in areas where water is seriously short, such as CGWAs or in closed basins.

The .2 acre surface size was chosen because a pond of that size would remain within the < 10 acre foot volume limitation of MCA ' 85-2-306. A pond of that surface size could be expected to meet the needs of many water users who want ponds for fish and recreational purposes, and that surface size would have surface water evaporative losses of 3 A/F year, and evaporative losses of 3 A/F year for the wetland fringe, all within the < 10 A/F limitation.

Basin closures and controlled ground water areas

(8) Amend law to:

-prohibit ponds in closed basins (except through changes)

-prohibit ponds in controlled ground water areas (except through changes)

Changes

(9) Amend law to clarify that exchanges and augmentation plans are allowed

under Montana law.

Reason: Water law needs to be flexible enough for any water user to either change their own water right, or buy someone else=s water right, and change it to any beneficial use allowed under Montana law anywhere, even in closed basins and CGWAs. As long as someone can prove pursuant to MCA ' 85-2-402 that their change of use will not adversely effect any other water uses, they should be able to implement that change. Water law needs to maintain the flexibility for new uses within the requirement that no change can adversely effect anyone else. Exchanges of water and the use of augmentations plans to mitigate impacts to other water rights should be explicitly provided for in order to provide for that flexibility and cut down on litigation over whether or not exchanges of water and augmentation plans are allowed by law. Exchanges and augmentation plans are commonly provided for in other western states.

Account for existing consumptive uses existing prior to building pond

(10) Amend law to clarify that existing consumptive uses at a proposed pond site can be accounted for in a new permit or change proceeding and an applicant can get a credit for that existing consumptive use.

Reason: Before a pond is built, there are often existing consumptive uses at that site. If a pond is to be built where there is already a bog or extensive plant growth, there is already natural consumption of water at that site due to evaporation of the pond and evapotranspiration by the plants. Therefore, in a new permit or change proceeding a pond applicant should be able to subtract that naturally occurring consumption from the amount of water that would be calculated to fill that pond.

Enforcement

(11) Amend law to mandate payment of attorney fees to water users who successfully enjoin unlawful uses by other water users.

Reason: Illegal pond use is proliferating across the state, and the cumulative effect of illegal ponds in a basin can be deleterious to other water users. The DNRC is not staffed or funded for enforcement, and often does not know of many of illegal uses concealed on private property. Furthermore, most streams do not have court-appointed water commissioners administering water. Local water users are in the best position to know of illegal water uses, and a statute providing for the payment of their attorney fees when they stop illegal uses of water would empower legal water users to police illegal uses on a stream. This builds in an incentive for people to comply with the law before they put water to use in areas where many feel there are few disincentives to illegal water use. Legal water users will not suffer continuing economic damage from repeated court proceedings when a piece of property keeps changing hands and each successive new land owner attempts illegal uses of water. Legal water users are kept whole no matter how many times they stop illegal uses in court, and to a certain extent the enforcement of water rights is privatized.