

Draft Pond Legislation

85-2-319. Permit action in highly appropriated basins or subbasins. (1) With regard to a highly appropriated basin or subbasin, the legislature may by law preclude permit applications or the department may by rule reject permit applications or modify or condition permits already issued.

(2) A rule may be adopted under this section only upon a petition that is signed by at least 25% or 10, whichever is less, of the users of water in the source of supply within a basin or subbasin or upon petition of the department of environmental quality that alleges facts under subsection (2)(d). The petition must be in a form prescribed by the department and must allege facts showing that throughout or at certain times of the year or for certain beneficial uses:

- (a) there are no unappropriated waters in the source of supply;
- (b) the rights of prior appropriators will be adversely affected;
- (c) further uses will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; or
- (d) in the case of a petition filed by the department of environmental quality:
 - (i) the water quality of an appropriator will be adversely affected by the issuance of permits;
 - (ii) further use will not be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); or
 - (iii) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will be adversely affected by the issuance of permits.

(3) Within 60 days after submission of a petition, the department shall:

- (a) deny the petition in writing, stating its reasons for denial;
- (b) inform the petitioners that the department shall study the allegations further before denying or proceeding further with the petition; or
- (c) initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305.

(4) Title 2, chapter 4, parts 1 through 4, govern rulemaking proceedings conducted under this section, except that in addition to the notice requirements of those parts, the department notice of the rulemaking hearing must be published at least once in each week for 3 successive weeks, not less than 30 days before the date of the hearing, in a newspaper of general circulation in the county or counties in which the source is located. The department shall serve by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from the examination of the records of the department to be a claimant, appropriator, or permit holder of water in the source.

(5) The department may adopt rules to implement the provisions of this section.

(6) For purposes of a law or rule adopted pursuant to subsection (1), the use of water in a pond is considered a consumptive use unless the law or rule specifically provides otherwise.

Drafted by Holly Franz
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HJR 40 – Artificial Ponds and Water Rights

The issue is not ponds in general, but ponds in closed basins.

A number of basins have been closed to most new permits due to existing over appropriation of water. An example is the Upper Missouri River basin. This basin, along with the Madison-Jefferson and the Teton basins, was closed in 1993 after the final decision was issued on the applications for water reservations in the Upper Missouri River Basin. Evidence submitted at the water reservation hearing by agricultural groups showed that the Beaverhead, Red Rock, Big Hole, Ruby, Boulder, Jefferson, Gallatin, East Gallatin, Smith, Dearborn and Sun Rivers are all fully appropriated based on agricultural uses alone. DNRC prepared a computer model which confirmed that no additional water is legally available in the Upper Missouri River except during high spring flows. In addition, in the water reservation process additional irrigation, municipal and instream flow water rights were issued, including a right for 50% of the average annual flow of the Missouri River for arsenic dilution.

All of the various basin closures include exceptions, generally allowing permits to be issued for groundwater use, storage projects, non-consumptive uses, and domestic, municipal and stock use. Most of the basin closures prohibit the issuance of new permits for surface water irrigation.

The issue is not that ponds are being treated unfairly and not equal with irrigation. If anything, ponds are receiving special treatment in closed basins since they are processed on the assumption that they will be filled once in the spring and will simply be operated on a non-consumptive, flow through basis for the rest of the year. Due to evaporation and the need for turnover, most ponds are not operated in a non-consumptive manner. As a result, fish and wildlife and recreational ponds are being permitted in areas where other consumptive uses are prohibited.

Fish and wildlife and recreational ponds should be treated like other consumptive uses in closed basins. If the pond falls into another exception, such as those for groundwater use, storage, or domestic, municipal and stock uses, they should be exempt. Ponds should not, however, be allowed in closed basins on the assumption that they are non-consumptive.

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