



ADMINISTRATIVE RULES OF MONTANA



36.16.107A ACTION ON APPLICATIONS

- (1) The department may approve, deny, or condition any requested reservation subject to such terms it considers appropriate. The department may grant a reservation for less than the amount of water requested in an application, but in no case may it grant a reservation for more water than is requested.
- (2) If an order reserving water is issued with conditions, the department shall allow the applicant a prescribed period of time to revise its management plan in response to those conditions.
- (3) The applicant must prove, by a preponderance of the evidence, that:
 - (a) the purpose of the reservation is a beneficial use as defined in 85-2-102(4), MCA; and
 - (b) the reservation is needed, as required in 85-2-316(4)(a)(ii), MCA, through evidence that:
 - (i) there is a reasonable likelihood that future instate or out-of-state competing water uses would consume, degrade, or otherwise affect the water available for the purpose of the reservation; or
 - (ii) if information regarding the effect of future water uses on a proposed reservation is not available;
 - (A) the applicant is not eligible to apply for a water use permit and water resource values warrant reserving water for the requested purpose; or
 - (B) the applicant would be eligible for a permit, but that there are constraints that would restrict the applicant from perfecting a water permit for the intended purpose of the reservation; or
 - (c) the amount requested is needed to fulfill the purpose of the reservation, as required in 85-2-316(4)(a)(iii), MCA, through evidence that:
 - (i) the methodologies and assumptions used to determine the requested amount are accurate and suitable;
 - (ii) water-use efficiencies associated with diversionary uses are reasonable, and there are no other reasonable cost-effective measures that could be taken within the reservation term to increase the use efficiency and lessen the amount of water required for the purpose of the reservation; and
 - (iii) for instream flow purposes on gaged streams, the amount does not exceed the limit provided by 85-2-316(6), MCA; and

- (d) the reservation is in the public interest, as required in 85-2-316(4)(a)(iv), MCA, based on evidence and analysis of each of the following factors:
 - (i) whether the expected benefits of water to beneficial use are reasonably likely to exceed the costs where:
 - (A) benefits include all direct and indirect benefits where any non-market benefits are quantified and valued to the extent reasonably possible;
 - (B) costs include all direct and indirect costs where any non-market costs are quantified and valued to the extent reasonably possible; and
 - (C) benefits and costs that may not be reasonably quantified are considered;
 - (ii) whether the net benefits associated with granting a reservation exceed the net benefits of not granting the reservation;
 - (iii) whether there are no reasonable alternatives to the proposed reservation that have greater net benefits;
 - (iv) whether failure to reserve the water will or is likely to result in an irretrievable loss of a natural resource or an irretrievable loss of a resource development opportunity;
 - (v) whether there are no significant adverse impacts to public health, welfare, and safety; and
 - (vi) any other relevant considerations based on the evidence.
- (4) If the purpose of the reservation proposes the withdrawal and transport of water for use outside the state, in addition to (3), the applicant must prove by clear and convincing evidence that the proposed out-of-state use of water is not contrary to water conservation in Montana and is not detrimental to the public welfare of citizens of Montana by considering the following factors:
 - (a) whether there are present or projected water shortages within the state of Montana;
 - (b) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;
 - (c) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
 - (d) the demands placed on the applicant's supply in the state where the applicant intends to use the water.
- (5) A department order reserving water must make findings regarding the applicant's proof regarding the applicable factors of (3) and (4). A department order reserving water must also find:
 - (a) the applicant is qualified to reserve water pursuant to 85-2-316, MCA;
 - (b) the reservation, as proposed for adoption, will not adversely affect existing water rights, including reservations; and
 - (c) the applicant is capable of exercising reasonable diligence toward financing projects contemplated in the application and applying the reserved water to beneficial use in accordance with a management plan as required in ARM 36.16.106(1).

- (6) If the purpose of the reservation requires the diversion of water from one of the basins designated in 85-2-316(2)(a), MCA, for use in another of the designated basins, a department order reserving water must find that stored water under the water leasing program is not reasonably available for the proposed use because the applicant(s) project does not meet the statutory terms, conditions, or requirements of a lease under 85-2-141, MCA.

Authorizing statute(s): 85-2-113, MCA

Implementing statute(s): 85-2-316, 85-2-331, 85-2-605, MCA

History: NEW, 1986 MAR p. 1584, Eff. 9/26/86; AMD, 1988 MAR p. 2396, Eff. 11/11/88; AMD, 1994 MAR p. 1297, Eff. 5/13/94; AMD, 2015 MAR p. 1909, Eff. 10/30/15.