

BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the adoption of New ) NOTICE OF ADOPTION  
Rule I regarding the Rye Creek )  
Stream Depletion Zone )

To: All Concerned Persons

1. On December 24, 2015, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-182 pertaining to the public hearing on the proposed adoption of the above-stated rule at page 2235 of the 2015 Montana Administrative Register, Issue Number 24. On February 19, 2016, the department published a notice of extension of comment period on the proposed adoption at page 297 of the 2016 Montana Administrative Register, Issue No. 4.

2. The department has adopted New Rule I (36.12.2205) as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the written comments and oral testimony received and the department's responses are as follows:

COMMENT 1:

Commenters stated excess use and stream depletion are due to surface water diversions on the stream.

RESPONSE 1:

The purpose of the Rye Creek stream depletion zone (SDZ) is not to address depletions to Rye Creek caused by existing irrigation practices. It is to limit the flow rate and volume for future wells developed under the groundwater exception to the permit requirements provided for by 85-2-306(3)(a), MCA, in order to reduce surface water depletions and their impact on senior water right holders. Current permitted wells will not be affected by an SDZ designation. No further designations are contemplated by statute. The designation to include upstream lands is not due to the current practice of over-pumping of water which may be connected to Rye Creek.

COMMENT 2:

Commenters stated the petitioners cause the greatest reduction in flows to Rye Creek due to their irrigation practices. The petitioners take more water than they can use or have a legal right to use.

RESPONSE 2:

The purpose of the Rye Creek SDZ is not to address depletions to Rye Creek caused by existing irrigation practices (see Response 1). Any allegation of overuse by irrigators is properly directed to the DNRC Missoula Water Regional Office (WRO) through a water use complaint.

COMMENT 3:

Commenters stated the SDZ infringes on property rights and may impose an unwanted covenant on private property.

RESPONSE 3:

All waters in the state of Montana are the property of the state. A water right only allows the holder of a water right to use that water. The Montana Legislature has directed DNRC to administer and apply the provisions of the Montana Water Use Act, including establishment of an SDZ pursuant to 85-2-380, MCA. Establishment of an SDZ will not affect existing water rights. A person may still obtain a new beneficial water use permit in accordance with the applicable provisions of the Water Use Act. A person may still obtain a certificate of groundwater development consistent with the Rye Creek SDZ and 85-2-306(3)(a), MCA.

COMMENT 4:

Commenter stated petitioners filed a water use complaint against them that was investigated by DNRC. The commenter further stated the DNRC report, which resulted from that investigation, shows the proposed Rye Creek SDZ does not meet the minimum criteria for an SDZ. That report showed the commenter's ponds/pits would equate to a depletion of 5.33 gallons per minute (gpm). That is 15% (or half) of what the definition of stream depletion zone requires.

RESPONSE 4:

The letter from Missoula WRO regional manager Jim Nave addressed compliance with the Water Use Act and quantified the consumption of water uses from the ponds as 5.33 gpm during July (the month of highest consumption). The letter does not quantify the amount of water withdrawn from the source or the timing of depletions from the source. That evaluation would be necessary to determine whether depletion from the use would constitute 30% within 30 days as specified in the statutes. The letter implies the use of 5.33 gpm is 15% of the withdrawal. This is apparently relevant to the 35 gpm limit on a groundwater certificate and not actual withdrawal. This is different from the SDZ analysis contained in the petition materials.

COMMENT 5:

Commenter stated they fully support the petition for the creation of the Rye Creek SDZ. Such a designation will help protect these important tributaries to the Bitterroot River as well as protect every property owner and water right holders along the SDZ.

RESPONSE 5:

The purpose of the Rye Creek SDZ is to limit the flow rate and volume for future wells developed under the groundwater exception to the permit requirements provided for by 85-2-306(3)(a), MCA, in order to reduce surface water depletions and their impact on senior water right holders. Other values may experience secondary benefits.

COMMENT 6:

The rule hearing should have been held in Hamilton or Missoula instead of Helena in January. Holding the hearing in Helena causes a hardship to attend.

RESPONSE 6:

DNRC is not obligated to hold a hearing in any specific area. All written comments submitted carry the same weight as oral comments received at a hearing.

/s/ John E. Tubbs

JOHN E. TUBBS

Director

Natural Resources and Conservation

/s/ Brian Bramblett

BRIAN BRAMBLETT

Rule Reviewer

Certified to the Secretary of State on May 4, 2016.