



Changes, Mitigation, and Exceptions

Defining Terms

[MCA 85-2-102](#)

(3) "**Aquifer recharge**" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(4) "**Aquifer storage and recovery project**" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(12) "**Developed spring**" means any point where ground water emerges naturally, that has subsequently been physically altered, and from which ground water flows under natural pressures or is artificially withdrawn.

(14) "**Ground water**" means any water that is beneath the ground surface.

(16) "**Mitigation**" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

(19) "**Non-consumptive use**" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(25) "**Stream depletion zone**" means an area where hydrogeologic modeling concludes that as a result of a ground water withdrawal, the surface water would be depleted by a rate equal to at least 30% of the ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35 gallons a minute.

(28) "**Water**" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(34) "**Well**" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

[ARM 36.12.101](#)

(7) "**Basin closure area**" means a hydrologic drainage basin area within which applications for certain water use permits cannot be accepted. Basin closure areas can be designated by statute, administrative rule, or in compacts.

(12) "**Combined appropriation**" means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate developed

springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."

(14) "**Consumptive use**" means the annual volume of water used for a beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products that does not return to ground or surface water.

(16) "**Controlled groundwater area**" means an area that has additional management controls applied to new groundwater uses pursuant to [85-2-506](#) through [85-2-508](#), MCA.

(32) "**Hydraulically connected**" means a saturated water-bearing zone or aquifer in contact with surface water or other water-bearing zone where rate of exchange of water between the two sources depends on the water level of the water-bearing zone or aquifer.

(38) "**Net depletion**" for the purposes of [85-2-360](#), MCA, means the calculated volume, rate, timing, and location of reductions to surface water resulting from a proposed groundwater appropriation that is not offset by the corresponding accretions to surface water by water that is not consumed and subsequently returns to the surface water.

(40) "**Off-stream reservoir**" means a reservoir that is not located on the source of supply and is supplied with water from a diversion means such as a pipe, headgate and ditch, or other means.

(41) "**On-stream reservoir**" means a reservoir that is located on the source of supply.

(51) "**Pit, pit-dam, or pond**" means a body of water that is created by man-made means, which stores water for beneficial use.

(52) "**Place of storage**" means a reservoir, pit, pit-dam, or pond.

36.12.113 Reservoir Standards

(6) **Place of storage** does not include:

(a) reservoirs, pits, pit-dams, or ponds with a capacity of less than 0.10 acre-feet; or

(b) the use of a temporary or permanent diversion structure within a canal or ditch designed to raise water surface elevation for primary diversions or to direct flows to a secondary conveyance facility.

(53) "**Potentially affected area**" for the purposes of [85-2-361](#), MCA, means, as referred to in basin closure rules and in the context of a hydrogeologic assessment, the area or estimated area where groundwater will be affected by a proposed project. The identified area is not required to exceed the boundaries of the drainage subdivisions established by the Office of Water Data Coordination, United States Geological Survey, and used by the Water Court, unless the applicant chooses to expand the boundaries.

(59) "**Project**" means a place of use that has its own identifiable flow rate, volume, and means of diversion.

(73) "**Surface water**" means all water of the state at the surface of the ground, including but not limited to any river, stream, creek, ravine, coulee, undeveloped spring, lake, and other natural surface source of water regardless of its character or manner of occurrence.

Other Definitions

Water Bank - a voluntary, market-based tool that could facilitate water transactions between willing sellers and buyers (<https://www.coloradoriverdistrict.org/water-banking/>).

- Can be private for-profit, non-profit, or governmental in nature
- Benefit can be a known quantity of water that has already been defined through a MT DNRC change process (e.g. "marketing for mitigation" purpose was intended to open the door in Montana for water marketing/water banking for mitigation of new uses, aka a "mitigation bank")
- Could be a temporary, intermittent, or permanent sale of water
 - Temporary can also include partial season lease
- Smart market: a water banking method that uses an algorithm that takes a jurisdiction's rules and regulations into account to match buyers and sellers. Smart markets have been implemented in three Natural Resources Districts in Nebraska as well as in Washington's Yakima Basin. (From

Exemptions (an aside)

The term Exemption/Exempt is used in reference to three different water right topics

1. **Exempt Rights** – historical water rights (pre-1973) that are valid water rights that were exempt from the claim filing process. (Valid Non-Filed Water Rights, typically stock or domestic uses)
2. **Exemptions/"Exempt Wells"** – in new appropriations, this common term refers to one type of water right that is exempted/excepted from the permitting process. (Form 602 – Notice of Completion of Groundwater Development – applies to small use groundwater from wells, pits, or developed springs)
3. **Exempted/Severed Water Rights** – this is a water right ownership term referring to water rights that have been exempted from a land transfer or removed from being appurtenant to the land.

Mitigation Discussion

Augmentation was the first term used but is no longer used. The general term mitigation is now used collectively for all types in a general sense, but statutory definitions are more specific (see *mitigation* and *aquifer recharge* above), as the statutory definitions are specific to a water right purpose.

Mitigation essentially keeps a surface and/or groundwater source with no available water “whole” when a new use of water is proposed. “Old” water is changed in such a way to contribute the amount of the impact of the new use on the water system. Montana has many closed basins and fully appropriated sources where new water is not available for appropriation.

Change Manual Mitigation Information

The purpose of a Mitigation Change is to change the purpose and place of use of an existing water right to offset the adverse effects to an identified reach of a surface water source that are predicted 1) from use of groundwater requested in a pending application for a beneficial water use permit, or 2) as a result of a proposed change to an existing water right.

For permits that require a change for mitigation, a mitigation plan must be included in the permit application and must state the mitigation details and explain why the mitigation plan is adequate to offset adverse effects. There cannot be a complete evaluation in the adverse effect section if there has not been a discussion of the adequacy of their plan as it relates to exercise of the permit. Also remember that in the permit application, in the mitigation plan, the amount, timing and location of mitigation water has to be analyzed. Under the Adverse Effect section, include the following sub-sections for permit applications that include a mitigation plan: Mitigation Strategy; Mitigation Amount; Mitigation Duration; and Mitigation Location.

Marketing for Mitigation was specifically approached by the 2011 legislature as HB24, and now codified in 85-2-420, MCA. Marketing for mitigation allows a water right owner to change the purpose on their water right, or add a marketing for mitigation purpose, prior to having any projects requiring mitigation water. By completing this change prior to securing a use, the water remains available for mitigation for a period of up to 20 years while not subjecting the water right to abandonment proceedings. The owner may sell or lease all or a portion of the water for mitigation, depending upon the project needing mitigation. DNRC will not dictate the sale of the water for mitigation; however, DNRC must assess the mitigation water required and determine if the water provided is adequate with regard to quantity, timing, and location, as with any other mitigation water.