

SENATE BILL NO. 436

INTRODUCED BY C. GLIMM

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS FOR WATER RIGHTS EXEMPT FROM PERMITTING; DEFINING "COMBINED APPROPRIATION"; PROVIDING RULEMAKING AUTHORITY; AND AMENDING SECTIONS 85-2-102 AND 85-2-306, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 85-2-102, MCA, is amended to read:

**"85-2-102. Definitions.** Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" or "appropriation" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;

(d) in the case of the United States department of agriculture, forest service:

(i) instream flows and in situ use of water created in 85-20-1401, Article V; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(f) a use of water for aquifer recharge or mitigation; or

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(2) "Appropriation right" has the same meaning as "water right" as defined in this section.

(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.

(5) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(6) "Certificate" means a certificate of water right issued by the department.

(7) (a) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(b) The term does not include a change in water use related to the method of irrigation.

(8) "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. A combined appropriation:

(a) does not need to be physically connected or have a common distribution system;

1           (b) may be individual developed springs or wells feeding separate parts of a project or  
2 development;

3           (c) may contain wells and springs that are developed gradually or in increments and not  
4 simultaneously; and

5           (d) is the amount of water appropriated for the entire project or development from these  
6 groundwater developments in the same source aquifer.

7           ~~(8)~~(9) "Commission" means the fish and wildlife commission provided for in 2-15-3402.

8           ~~(9)~~(10) "Correct and complete" means that the information required to be submitted conforms to the  
9 standard of substantial credible information and that all of the necessary parts of the form requiring the  
10 information have been filled in with the required information for the department to begin evaluating the  
11 information.

12           ~~(10)~~(11) "Declaration" means the declaration of an existing right filed with the department under section  
13 8, Chapter 452, Laws of 1973.

14           ~~(11)~~(12) "Department" means the department of natural resources and conservation provided for in Title  
15 2, chapter 15, part 33.

16           ~~(12)~~(13) "Developed spring" means any point where ground water emerges naturally, that has  
17 subsequently been physically altered, and from which ground water flows under natural pressures or is  
18 artificially withdrawn.

19           ~~(13)~~(14) "Existing right" or "existing water right" means a right to the use of water that would be  
20 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian  
21 reserved water rights created under federal law and water rights created under state law.

22           ~~(14)~~(15) "Ground water" means any water that is beneath the ground surface.

23           ~~(15)~~(16) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption  
24 of abandonment under 85-2-226.

25           ~~(16)~~(17) "Mitigation" means the reallocation of surface water or ground water through a change in  
26 appropriation right or other means that does not result in surface water being introduced into an aquifer through  
27 aquifer recharge to offset adverse effects resulting from net depletion of surface water.

28           ~~(17)~~(18) "Municipality" means an incorporated city or town organized and incorporated under Title 7,

1 chapter 2.

2 ~~(18)~~(19)(a) "National forest system lands" means all lands within Montana that are owned by the United  
3 States and administered by the secretary of agriculture through the forest service.

4 (b) The term does not include any lands within the exterior boundaries of national forest system  
5 units that are not owned by the United States and administered by the secretary of agriculture through the  
6 forest service.

7 ~~(19)~~(20)"Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the  
8 source of supply and in which substantially all of the water returns without delay to the source of supply,  
9 causing little or no disruption in stream conditions.

10 ~~(20)~~(21)"Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-  
11 2-303 and 85-2-306 through 85-2-314.

12 ~~(21)~~(22)"Person" means an individual, association, partnership, corporation, state agency, political  
13 subdivision, the United States or any agency of the United States, or any other entity.

14 ~~(22)~~(23)(a) "Political subdivision" means any county, incorporated city or town, public corporation, or  
15 district created pursuant to state law or other public body of the state empowered to appropriate water.

16 (b) The term does not mean a private corporation, association, or group.

17 ~~(23)~~(24)"Salvage" means to make water available for beneficial use from an existing valid appropriation  
18 through application of water-saving methods.

19 ~~(24)~~(25)"State water reservation" means a water right created under state law after July 1, 1973, that  
20 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water  
21 throughout the year or at periods or for defined lengths of time.

22 ~~(25)~~(26)"Stream depletion zone" means an area where hydrogeologic modeling concludes that as a  
23 result of a ground water withdrawal, the surface water would be depleted by a rate equal to at least 30% of the  
24 ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35  
25 gallons a minute.

26 ~~(26)~~(27)"Substantial credible information" means probable, believable facts sufficient to support a  
27 reasonable legal theory upon which the department should proceed with the action requested by the person  
28 providing the information.

(27)(28)"Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(28)(29)"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.

(29)(30)"Water division" means a drainage basin as defined in 3-7-102.

(30)(31)"Water judge" means a judge as provided for in Title 3, chapter 7.

(31)(32)"Water master" means a master as provided for in Title 3, chapter 7.

(32)(33)"Water right" means the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or a compact.

(33)(34)"Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(34)(35)"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."

**Section 2.** Section 85-2-306, MCA, is amended to read:

**"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b), ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works.

(b) If another person has rights in the ground water development works, water may be appropriated with the written consent of the person with those property rights or, if the ground water development works are on national forest system lands, with any prior written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the certificate.

(c) If the person does not have a possessory interest in the real property from which the ground water may be appropriated, the person shall provide to the owner of the real property written notification of the works and the person's intent to appropriate ground water from the works. The written notification must be

provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice requirement only and does not create an easement in or over the real property where the ground water development works are located.

(2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

(a) according to a permit received pursuant to 85-2-508; or

(b) according to the requirements of a rule promulgated pursuant to 85-2-506.

(3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring:

(i) when the appropriation is made by a local governmental fire agency organized under Title 7, chapter 33, and the appropriation is used only for emergency fire protection, emergency fire training, and emergency fire-related operations, which may include enclosed storage;

(ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive geothermal heating or cooling exchange applications, all of the water extracted is returned without delay to the same source aquifer, and the distance between the extraction well and both the nearest existing well and the hydraulically connected surface waters is more than twice the distance between the extraction well and the injection well;

(iii) when the appropriation is outside a stream depletion zone, is ~~35 gallons a minute or less, and does not exceed 10 acre-feet a year~~ 35 gallons a minute or less and 1 acre-foot a year or less for every 2 acres of a parcel, not to exceed a total of 10 acre-feet a year for the parcel, except that a combined appropriation from the same source by two or more wells or developed springs or a physically manifold water system exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

(iv) when the appropriation is within a stream depletion zone, is ~~20 gallons a minute or less, and does not exceed 2 acre-feet a year~~, 20 gallons a minute or less and 1 acre-foot a year or less for every 2 acres of a parcel, not to exceed a total of 10 acre-feet a year for the parcel, except that a combined appropriation from the same source by two or more wells or developed springs or a physically manifold water system exceeding ~~this limitation 2 acre-feet, regardless of flow rate~~, requires a permit.

(b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department through its offices.

(ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refileing a correct and complete notice with the department.

(c) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof of landowner notification or a written federal special use authorization as necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(d) (i) Construction of a water supply system subject to Title 75, chapter 6, part 1, and use of a permit exception for the appropriation of water pursuant to this section is proof of beneficial use.

(ii) The department shall allocate a volume of 10 acre-feet a year to the system and issue a certificate of water right after the conditions in subsection (3)(d)(i) are met.

(iii) The department shall consider a water right as perfected after the conditions in subsection (3)(d)(i) are met.

(iv) When the appropriation is for a water supply system that is subject to Title 75, chapter 6, part 1, and is located outside of a stream depletion zone and does not exceed 10 acre-feet a year:

(A) For the purposes of subsection (3)(b)(i), the appropriation will be considered perfected upon completion of construction of the water supply system.

(B) A copy of the department of environmental quality approval for the water supply system must be submitted with the notice of completion. This section does not preclude the public water supply developer or any subsequent owners from expanding the water system or from revising the water use restrictions within the



1 subdivision, provided that the total amount does not exceed 10 acre-feet per year.

2 (C) Water appropriated under this exception must be measured and reported annually to the  
3 department.

4 (4) An appropriator of ground water by means of a well or developed spring first put to beneficial  
5 use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in  
6 force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in  
7 subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is  
8 sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the  
9 filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

10 (5) An appropriation under subsection (4) is an existing right, and a permit is not required.  
11 However, the department shall acknowledge the receipt of a correct and complete filing of a notice of  
12 completion, except that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year,  
13 the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate  
14 need not be issued under the adjudication proceedings provided for in 85-2-236.

15 (6) A permit is not required before constructing an impoundment or pit and appropriating water for  
16 use by livestock if:

17 (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

18 (b) the appropriation is less than 30 acre-feet a year;

19 (c) the appropriation is from an ephemeral stream, an intermittent stream, or another source other  
20 than a perennial flowing stream; and

21 (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is  
22 owned or under the control of the applicant and that is 40 acres or larger.

23 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a  
24 permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete  
25 application for a stock water provisional permit, the department shall automatically issue a provisional permit. If  
26 the department determines after a hearing that the rights of other appropriators have been or will be adversely  
27 affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make  
28 the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights



1 of other appropriators.

2 (b) If the impoundment or pit is on national forest system lands, an application is not correct and  
3 complete under this section until the applicant has submitted proof of any written special use authorization  
4 required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,  
5 impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

6 (8) A person may also appropriate water without applying for or prior to receiving a permit under  
7 rules adopted by the department under 85-2-113.

8 (9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior  
9 boundaries of the Flathead Indian reservation."

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11 **NEW SECTION. Section 3. Notification to tribal governments.** The secretary of state shall send a  
12 copy of [this act] to each federally recognized tribal government in Montana.

13 - END -