

SENATE BILL NO. 38

INTRODUCED BY C. VINCENT

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT DEFINING "STREAM DEPLETION ZONES"; REDUCING THE EXEMPTION FOR GROUND WATER APPROPRIATIONS WITHIN STREAM DEPLETION ZONES; LIMITING AREAS WHERE STREAM DEPLETION ZONES MAY BE ESTABLISHED; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTIONS 85-2-102 AND 85-2-306, MCA; AND PROVIDING AN APPLICABILITY DATE."

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" 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) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or

1 controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse
2 effects resulting from net depletion of surface water.

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

7 (4) "Beneficial use", unless otherwise provided, means:

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

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

13 (c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right
14 for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under
15 85-2-436;

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

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

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

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

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

23 (7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

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

27 (9) "Declaration" means the declaration of an existing right filed with the department under section 8,
28 Chapter 452, Laws of 1973.

29 (10) "Department" means the department of natural resources and conservation provided for in Title 2,
30 chapter 15, part 33.

1 (11) "Developed spring" means any artificial opening or excavation in the ground, however made,
2 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
3 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
4 natural pressures or is artificially withdrawn.

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

8 (13) "Ground water" means any water that is beneath the ground surface.

9 (14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of
10 abandonment under 85-2-226.

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

14 (16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter
15 2.

16 (17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303
17 and 85-2-306 through 85-2-314.

18 (18) "Person" means an individual, association, partnership, corporation, state agency, political
19 subdivision, the United States or any agency of the United States, or any other entity.

20 (19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district
21 created pursuant to state law or other public body of the state empowered to appropriate water.

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

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

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

28 (22) "Stream depletion zone" means an area where hydrogeologic modeling concludes that as a result
29 of a ground water withdrawal, the surface water would be depleted by a rate equal to at least 50% of the ground
30 water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35 gallons

1 a minute with an annual volume of 10 acre-feet.

2 ~~(22)~~(23) "Substantial credible information" means probable, believable facts sufficient to support a
3 reasonable legal theory upon which the department should proceed with the action requested by the person
4 providing the information.

5 ~~(23)~~(24) "Waste" means the unreasonable loss of water through the design or negligent operation of an
6 appropriation or water distribution facility or the application of water to anything but a beneficial use.

7 ~~(24)~~(25) "Water" means all water of the state, surface and subsurface, regardless of its character or
8 manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

9 ~~(25)~~(26) "Water division" means a drainage basin as defined in 3-7-102.

10 ~~(26)~~(27) "Water judge" means a judge as provided for in Title 3, chapter 7.

11 ~~(27)~~(28) "Water master" means a master as provided for in Title 3, chapter 7.

12 ~~(28)~~(29) "Watercourse" means any naturally occurring stream or river from which water is diverted for
13 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

14 ~~(29)~~(30) "Well" means any artificial opening or excavation in the ground, however made, by which ground
15 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."
16

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

18 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b), ground
19 water may be appropriated only by a person who has a possessory interest in the property where the water is
20 to be put to beneficial use and exclusive property rights in the ground water development works.

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

26 (c) If the person does not have a possessory interest in the real property from which the ground water
27 may be appropriated, the person shall provide to the owner of the real property written notification of the works
28 and the person's intent to appropriate ground water from the works. The written notification must be provided to
29 the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are
30 proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice

1 requirement only and does not create an easement in or over the real property where the ground water
2 development works are located.

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

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

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

6 (3) (a) ~~(i) Except as provided in subsection (3)(a)(ii), outside~~ Outside the boundaries of a controlled
7 ground water area, a permit is not required before appropriating ground water by means of a well or developed
8 spring:

9 ~~(A) with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year,~~
10 ~~except that a combined appropriation from the same source from two or more wells or developed springs~~
11 ~~exceeding this limitation requires a permit; or~~

12 ~~——(B)(i) when the appropriation is made by a local governmental fire agency organized under Title 7,~~
13 ~~chapter 33, and the appropriation is used only for emergency fire protection, which may include enclosed storage;~~

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

18 (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does
19 not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells
20 or developed springs exceeding this limitation requires a permit; or

21 (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does
22 not exceed 1 acre-foot a year, except that a combined appropriation from the same source by two or more wells
23 or developed springs exceeding this limitation requires a permit.

24 ~~(ii) Outside the boundaries of a controlled ground water area, a permit is not required before appropriating~~
25 ~~ground water by means of a well or developed spring with a maximum appropriation of 350 gallons a minute or~~
26 ~~less for use in nonconsumptive geothermal heating or cooling exchange applications if all of the water extracted~~
27 ~~is returned without delay to the same source aquifer and if the distance between the extraction well and both the~~
28 ~~nearest existing well and the hydraulically connected surface waters is more than twice the distance between the~~
29 ~~extraction well and the injection well.~~

30 (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water

1 for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the
2 department through its offices.

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

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

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

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

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

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

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

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

30 (c) the appropriation is from a source other than a perennial flowing stream; and

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

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

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

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

16
17 **NEW SECTION. Section 3. Stream depletion zones -- establishment -- rulemaking.** (1) The
18 department may establish a stream depletion zone by rule if:

19 (a) the stream depletion zone lies within a basin closed pursuant to 85-2-319, 85-2-321, 85-2-330,
20 85-2-336, 85-2-341, 85-2-343, or 85-2-344; and

21 (b) there exists a hydrogeologic assessment for the area where the stream depletion zone is proposed
22 that was conducted by either the ground water investigation program established by 85-2-525 or by a
23 hydrogeologist, a qualified scientist, or a qualified licensed professional engineer.

24 (2) The department shall initiate rulemaking to establish a stream depletion zone upon receipt of a petition
25 signed by at least one-third of the water right holders in a proposed stream depletion zone provided that the
26 provisions of subsections (1)(a) and (1)(b) are met.

27 (3) In establishing rules related to stream depletion zones, the department shall consult with the ground
28 water investigation program and the ground water assessment steering committee established by 2-15-1523.

29
30 **NEW SECTION. Section 4. Codification instruction.** [Section 3] is intended to be codified as an

1 integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3, apply to [section 3].

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3 NEW SECTION. **Section 5. Applicability.** [This act] applies to an appropriation exempt from permitting

4 pursuant to 85-2-306 that is completed after the date a stream depletion zone is adopted by rule.

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