

HOUSE BILL NO. 339

INTRODUCED BY C. GLIMM

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO CERTAIN EXEMPT APPROPRIATIONS OF WATER; PROVIDING A DEFINITION FOR A "COMBINED APPROPRIATION"; CLARIFYING CONDITIONS FOR EXEMPT APPROPRIATIONS OF WATER; LIMITING THE PHYSICAL LOCATION OF CERTAIN EXEMPT APPROPRIATIONS OF WATER; PROVIDING THAT A COMBINED APPROPRIATION REQUIRES A WATER RIGHT PERMIT; AND AMENDING SECTIONS 85-2-102, 85-2-306, AND 85-2-381, 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" 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) "Combined appropriation" means an appropriation of water from the same source aquifer by two or
24 more ground water developments that are physically manifold into the same system.

25 ~~(7)~~(8) "Commission" means the fish and wildlife commission provided for in 2-15-3402.

26 ~~(8)~~(9) "Correct and complete" means that the information required to be submitted conforms to the
27 standard of substantial credible information and that all of the necessary parts of the form requiring the
28 information have been filled in with the required information for the department to begin evaluating the
29 information.

30 ~~(9)~~(10) "Declaration" means the declaration of an existing right filed with the department under section

1 8, Chapter 452, Laws of 1973.

2 ~~(10)~~(11) "Department" means the department of natural resources and conservation provided for in Title
3 2, chapter 15, part 33.

4 ~~(14)~~(12) "Developed spring" means any point where ground water emerges naturally, that
5 has subsequently been physically altered, and from which ground water flows under natural pressures or is
6 artificially withdrawn.

7 ~~(12)~~(13) "Existing right" or "existing water right" means a right to the use of water that would be protected
8 under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water
9 rights created under federal law and water rights created under state law.

10 ~~(13)~~(14) "Ground water" means any water that is beneath the ground surface.

11 ~~(14)~~(15) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption
12 of abandonment under 85-2-226.

13 ~~(15)~~(16) "Mitigation" means the reallocation of surface water or ground water through a change in
14 appropriation right or other means that does not result in surface water being introduced into an aquifer through
15 aquifer recharge to offset adverse effects resulting from net depletion of surface water.

16 ~~(16)~~(17) "Municipality" means an incorporated city or town organized and incorporated under Title 7,
17 chapter 2.

18 ~~(17)~~(18) (a) "National forest system lands" means all lands within Montana that are owned by the United
19 States and administered by the secretary of agriculture through the forest service.

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

23 ~~(18)~~(19) "Permit" means the permit to appropriate issued by the department under 85-2-301 through
24 85-2-303 and 85-2-306 through 85-2-314.

25 ~~(19)~~(20) "Person" means an individual, association, partnership, corporation, state agency, political
26 subdivision, the United States or any agency of the United States, or any other entity.

27 ~~(20)~~(21) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or
28 district created pursuant to state law or other public body of the state empowered to appropriate water.

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

30 ~~(24)~~(22) "Salvage" means to make water available for beneficial use from an existing valid appropriation

1 through application of water-saving methods.

2 ~~(22)~~(23) "State water reservation" means a water right created under state law after July 1, 1973, that
3 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
4 throughout the year or at periods or for defined lengths of time.

5 ~~(23)~~(24) "Stream depletion zone" means an area where hydrogeologic modeling concludes that as a
6 result of a ground water withdrawal, the surface water would be depleted by a rate equal to at least 30% of the
7 ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35
8 gallons a minute.

9 ~~(24)~~(25) "Substantial credible information" means probable, believable facts sufficient to support a
10 reasonable legal theory upon which the department should proceed with the action requested by the person
11 providing the information.

12 ~~(25)~~(26) "Waste" means the unreasonable loss of water through the design or negligent operation of an
13 appropriation or water distribution facility or the application of water to anything but a beneficial use.

14 ~~(26)~~(27) "Water" means all water of the state, surface and subsurface, regardless of its character or
15 manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

16 ~~(27)~~(28) "Water division" means a drainage basin as defined in 3-7-102.

17 ~~(28)~~(29) "Water judge" means a judge as provided for in Title 3, chapter 7.

18 ~~(29)~~(30) "Water master" means a master as provided for in Title 3, chapter 7.

19 ~~(30)~~(31) "Watercourse" means any naturally occurring stream or river from which water is diverted for
20 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

21 ~~(31)~~(32) "Well" means any artificial opening or excavation in the ground, however made, by which ground
22 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."
23

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

25 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b), ground
26 water may be appropriated only by a person who has a possessory interest in the property where the water is
27 to be put to beneficial use and exclusive property rights in the ground water development works.

28 (b) If another person has rights in the ground water development works, water may be appropriated with
29 the written consent of the person with those property rights or, if the ground water development works are on
30 national forest system lands, with any prior written special use authorization required by federal law to occupy,

1 use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation,
2 withdrawal, use, or distribution of water under the certificate.

3 (c) If the person does not have a possessory interest in the real property from which the ground water
4 may be appropriated, the person shall provide to the owner of the real property written notification of the works
5 and the person's intent to appropriate ground water from the works. The written notification must be provided to
6 the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are
7 proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice
8 requirement only and does not create an easement in or over the real property where the ground water
9 development works are located.

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

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

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

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

15 (i) when the appropriation is made by a local governmental fire agency organized under Title 7, chapter
16 33, and the appropriation is used only for emergency fire protection, which may include enclosed storage;

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

21 ~~(iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does~~
22 ~~not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells~~
23 ~~or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or when the~~
24 ~~appropriation is outside a stream depletion zone and within a basin closed pursuant to 85-2-319, 85-2-321,~~
25 ~~85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344, is 35 gallons a minute or less, and does not exceed 10~~
26 ~~acre-feet a year and an additional 0.25 acre-feet a year for a gray water system as defined in 15-24-3201. The~~
27 ~~appropriation may not be located within 660 feet, measured as a radius, of another well or developed spring that~~
28 ~~was appropriated pursuant to subsection (3)(a)(iii) through (3)(a)(v) or (3)(b):~~

29 (A) within a tract of record as defined in 76-3-103 in existence on October 18, 2014; or

30 (B) within a tract of record as defined in 76-3-103 in existence on October 18, 2014, that has been

1 subsequently divided.

2 (iv) when the appropriation is outside a stream depletion zone and is outside a basin closed pursuant to
 3 85-2-319, 85-2-321, 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344, is 35 gallons a minutes or less, and
 4 does not exceed 10 acre-feet a year and an additional 0.5 acre-feet a year for a gray water system as defined
 5 in 15-24-3201. The appropriation may not be located within 330 feet, measured as a radius, of another well or
 6 developed spring that was appropriated pursuant to subsection (3)(a)(iii) through (3)(a)(v) or (3)(b):

7 (A) within a tract of record as defined in 76-3-103 in existence on October 18, 2014; or

8 (B) within a tract of record as defined in 76-3-103 in existence on October 18, 2014, that has been
 9 subsequently divided.

10 ~~(iv)~~(v) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does
 11 not exceed 2 acre-feet a year and an additional 0.25 acre-feet a year for a gray water system as defined in
 12 15-24-3201. The appropriation may not be located within 660 feet, measured as a radius, of another well or
 13 developed spring that was appropriated pursuant to subsection (3)(a)(iii) through (3)(a)(v) or (3)(b):

14 (A) within a tract of record as defined in 76-3-103 in existence on October 18, 2014; or

15 (B) within a tract of record as defined in 76-3-103 in existence on October 18, 2014, that has been
 16 subsequently divided, except that a combined appropriation from the same source by two or more wells or
 17 developed springs exceeding this limitation requires a permit.

18 (b) A combined appropriation from the same source by two or more wells or developed springs
 19 exceeding the volume limitations in subsections (3)(a)(iii) through (3)(a)(v) requires a permit.

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

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

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

30 ~~(c)~~(d) A certificate of water right may not be issued until a correct and complete notice has been filed with

1 the department, including proof of landowner notification or a written federal special use authorization as
2 necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department
3 shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date
4 of priority of the right.

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

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

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

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

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

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

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

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

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

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

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

10 **Section 3.** Section 85-2-381, MCA, is amended to read:

11 **"85-2-381. Water right enforcement of ground water uses exempt from permitting -- findings and**
12 **purpose.** (1) The legislature finds that:

13 (a) the state of Montana has managed the allocation of water under the prior appropriation doctrine for
14 more than 100 years;

15 (b) Article IX, section 3, of the Montana constitution recognizes and confirms all existing water rights;

16 (c) the right to the use of water through a water right is a recognized property right;

17 (d) the development of ground water wells that are exempt from permitting may have an adverse effect
18 on other water rights;

19 (e) the Water Use Act requires the department to coordinate the development and use of the water
20 resources of the state so as to effect full utilization, conservation, and protection of its water resources; and

21 (f) the ability to develop ground water wells that are exempt from permitting contributes to the full
22 utilization of the water resources of the state.

23 (2) The establishment of a stream depletion zone pursuant to 85-2-380 provides a conclusive, scientific
24 basis for determining where ground water rights that are exempt from permitting are affecting senior surface water
25 rights.

26 (3) The purpose of this section is to continue allocating water under the exemptions provided for in
27 85-2-306 while providing a process by which senior water right holders may protect their rights under the prior
28 appropriation doctrine. Nothing in this section is intended to limit the ability of a senior water right holder to
29 enforce a water right or limit that enforcement to a specific area. Creation of a stream depletion zone is not a
30 prerequisite to an enforcement action.

1 (4) Any use of water granted by a certificate of water right pursuant to 85-2-306(3)(a) or (3)(b) is subject
2 to enforcement according to priority by:
3 (a) any remedy legally available;
4 (b) the department, upon receiving a complaint, through the provisions of 85-2-114 and 85-2-122; or
5 (c) a water commissioner appointed pursuant to 85-5-101.
6 (5) For each certificate issued pursuant to 85-2-306(3)(a) or (3)(b) after October 1, 2013, the department
7 shall include written notice of the provisions of this section."

8 - END -