

SENATE BILL NO. 346

INTRODUCED BY C. VINCENT

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4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER LAWS RELATED TO GROUND
5 WATER APPROPRIATIONS EXEMPT FROM PERMITTING; DEFINING "STREAM DEPLETION ZONE";
6 REDUCING THE EXEMPTION FOR GROUND WATER APPROPRIATIONS WITHIN STREAM DEPLETION
7 ZONES; LIMITING AREAS WHERE STREAM DEPLETION ZONES MAY BE ESTABLISHED; CLARIFYING
8 ENFORCEMENT BY SENIOR WATER RIGHT HOLDERS AGAINST GROUND WATER APPROPRIATIONS
9 EXEMPT FROM PERMITTING; PROVIDING RULEMAKING AUTHORITY; AND AMENDING SECTIONS
10 85-2-102 AND 85-2-306, MCA."

11
12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13
14 **Section 1.** Section 85-2-102, MCA, is amended to read:

15 **"85-2-102. Definitions.** Unless the context requires otherwise, in this chapter, the following definitions
16 apply:

- 17 (1) "Appropriate" means:
 - 18 (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial
19 use;
 - 20 (b) in the case of a public agency, to reserve water in accordance with 85-2-316;
 - 21 (c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream
22 flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;
 - 23 (d) in the case of the United States department of agriculture, forest service:
 - 24 (i) instream flows and in situ use of water created in 85-20-1401, Article V; or
 - 25 (ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow
26 to protect, maintain, or enhance streamflows in accordance with 85-2-320;
 - 27 (e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the
28 fishery resource in accordance with 85-2-408;
 - 29 (f) a use of water for aquifer recharge or mitigation; or
 - 30 (g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

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

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

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

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

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

14 (c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right
15 for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under
16 85-2-436;

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

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

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

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

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

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

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

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

30 (10) "Department" means the department of natural resources and conservation provided for in Title 2,

1 chapter 15, part 33.

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

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

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

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

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

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

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

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

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

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

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

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

29 (22) "Stream depletion zone" means an area where hydrogeologic modeling concludes that as a result
30 of a ground water withdrawal, the surface water would be depleted by a rate equal to at least 30% of the ground

1 water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35 gallons
 2 a minute.

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

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

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

10 ~~(25)~~(26) "Water division" means a drainage basin as defined in 3-7-102.

11 ~~(26)~~(27) "Water judge" means a judge as provided for in Title 3, chapter 7.

12 ~~(27)~~(28) "Water master" means a master as provided for in Title 3, chapter 7.

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

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

17

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

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

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

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

1 proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice
 2 requirement only and does not create an easement in or over the real property where the ground water
 3 development works are located.

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

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

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

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

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

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

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

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

23 or

24 (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does
 25 not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells
 26 or developed springs exceeding this limitation requires a permit.

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

1 ~~nearest existing well and the hydraulically connected surface waters is more than twice the distance between the~~
2 ~~extraction well and the injection well.~~

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

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

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

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

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

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

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

- 1 (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;
2 (b) the appropriation is less than 30 acre-feet a year;
3 (c) the appropriation is from a source other than a perennial flowing stream; and
4 (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned
5 or under the control of the applicant and that is 40 acres or larger.

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

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

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

19
20 **NEW SECTION. Section 3. Stream depletion zones -- establishment -- rulemaking.** (1)
21 Notwithstanding the provisions of subsection (2), the department may establish a stream depletion zone by rule
22 if:

23 (a) the stream depletion zone lies within a basin closed pursuant to 85-2-319, 85-2-321, 85-2-330,
24 85-2-336, 85-2-341, 85-2-343, or 85-2-344; and

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

28 (2) If the provisions of subsection (1) are met, the department shall initiate rulemaking to establish a
29 stream depletion zone upon receipt of a petition signed by:

30 (a) a municipality, county, conservation district, or local water quality district formed under Title 7, chapter

1 13, part 45; or

2 (b) the owners of at least 15% of the flow rate of the surface water rights in the area estimated to be
3 affected, the boundary of which cannot exceed the boundaries of the drainage subdivisions established by the
4 office of water data coordination, United States geological survey, and used by the water court.

5 (3) The department shall provide notice of the rulemaking by first-class mail to an appropriator of water
6 who, according to the records of the department, may be affected by the proposed stream depletion zone.

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

9
10 **NEW SECTION. Section 4. Water right enforcement of ground water uses exempt from permitting**

11 **-- findings and purpose.** (1) The legislature finds that:

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

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

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

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

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

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

22 (2) The establishment of a stream depletion zone pursuant to [section 3] provides a conclusive, scientific
23 basis for determining where ground water rights that are exempt from permitting are affecting senior surface water
24 rights.

25 (3) The purpose of this section is to continue allocating water under the exemptions provided for in
26 85-2-306 while providing a process by which senior water right holders may protect their rights under the prior
27 appropriation doctrine. NOTHING IN THIS SECTION IS INTENDED TO LIMIT THE ABILITY OF A SENIOR WATER RIGHT HOLDER
28 TO ENFORCE A WATER RIGHT OR LIMIT THAT ENFORCEMENT TO A SPECIFIC AREA. CREATION OF A STREAM DEPLETION
29 ZONE IS NOT A PREREQUISITE TO AN ENFORCEMENT ACTION.

30 (4) Any use of water granted by a certificate of water right pursuant to 85-2-306(3)(a) is subject to

1 enforcement according to priority by:

2 (a) any remedy legally available;

3 (b) the department, upon receiving a complaint, through the provisions of 85-2-114 and 85-2-122; or

4 (c) a water commissioner appointed pursuant to 85-5-101.

5 (5) For each certificate issued pursuant to 85-2-306(3)(a) after [the effective date of this act], the
6 department shall include written notice of the provisions of this section.

7
8 **NEW SECTION. Section 5. Codification instruction.** [Sections 3 and 4] are intended to be codified
9 as an integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, part 3, apply to [sections
10 3 and 4].

11 - END -