

1 SENATE BILL NO. 436
2 INTRODUCED BY C. GLIMM
3

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

7

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

9

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

11 **"85-2-102. Definitions.** Unless the context requires otherwise, in this chapter, the following definitions
12 apply:

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

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

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

17 (c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to
18 instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with
19 85-2-436;

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

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

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

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

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

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

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

1 (27)(28)"Waste" means the unreasonable loss of water through the design or negligent operation of an
2 appropriation or water distribution facility or the application of water to anything but a beneficial use.

3 (28)(29)"Water" means all water of the state, surface and subsurface, regardless of its character or
4 manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage
5 effluent.

6 (29)(30)"Water division" means a drainage basin as defined in 3-7-102.

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

8 (31)(32)"Water master" means a master as provided for in Title 3, chapter 7.

9 (32)(33)"Water right" means the right to appropriate water pursuant to an existing right, a permit, a
10 certificate of water right, a state water reservation, or a compact.

11 (33)(34)"Watercourse" means any naturally occurring stream or river from which water is diverted for
12 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

13 (34)(35)"Well" means any artificial opening or excavation in the ground, however made, by which
14 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially
15 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),
19 ground water may be appropriated only by a person who has a possessory interest in the property where the
20 water is 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
22 appropriated with the written consent of the person with those property rights or, if the ground water
23 development works are on national forest system lands, with any prior written special use authorization required
24 by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,
25 impoundment, storage, transportation, 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
27 water may be appropriated, the person shall provide to the owner of the real property written notification of the
28 works and the person's intent to appropriate ground water from the works. The written notification must be

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

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

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

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

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

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

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

19 (iii) when the appropriation is outside a stream depletion zone, is ~~35 gallons a minute or less~~, and
20 ~~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
21 of a parcel, not to exceed a total of 10 acre-feet a year for the parcel, except that a combined appropriation
22 from the same source by two or more wells or developed springs or a physically manifold water system
23 exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

24 (iv) when the appropriation is within a stream depletion zone, is ~~20 gallons a minute or less~~, and
25 ~~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~~
26 of a parcel, not to exceed a total of 10 acre-feet a year for the parcel, except that a combined appropriation
27 from the same source by two or more wells or developed springs or a physically manifold water system
28 exceeding ~~this limitation~~ 2 acre-feet, regardless of flow rate, requires a permit.

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

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

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

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

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

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

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

26 (B) A copy of the department of environmental quality approval for the water supply system must
27 be submitted with the notice of completion. This section does not preclude the public water supply developer or
28 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.

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