

**Unofficial Draft Copy**

As of: August 14, 2008 (6:59am)

LC5012

\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the \*\*\*\*\*

A Bill for an Act entitled: "An Act providing for the issuance of a certificate of water right for aquatic resource activities carried out by the department of transportation in compliance with and as required by the federal clean water act of 1977; amending sections 85-2-102, 85-2-306, and 85-2-360, MCA; and providing an immediate effective 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:

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(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 as provided in 85-2-360 and 85-2-362; ~~or~~

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

(h) in the case of the department of transportation, aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, as provided in 85-2-306(9).

(2) "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.

(3) "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

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allowed to naturally drain away for a beneficial use.

(4) "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 as provided in 85-2-360 and 85-2-362; ~~or~~

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

(g) a use of water by the department of transportation for aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, as provided in 85-2-306(9).

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

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(6) "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.

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

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

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

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

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

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

(13) "Ground water" means any water that is beneath the

ground surface.

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

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

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

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

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

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

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

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

(21) "State water reservation" means a water right created

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under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

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

(23) "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.

(24) "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.

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

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

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

(28) "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.

(29) "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."

{Internal References to 85-2-102:

82-4-355x

85-2-141x

85-2-340x

85-2-506x}

**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~~ subsections (1)(b) and (9)(a), 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

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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 an order issued pursuant to 85-2-507.

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



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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.

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

(5) An appropriation under subsection (4) is an existing

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

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

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

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

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

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

(7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Subject to subsection (7) (b), upon receipt of a correct and complete application for a stock water provisional permit, the department shall automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to

modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

(b) If the impoundment or pit is on national forest system lands, an application is not correct and complete under this section until the applicant has submitted proof of any 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 permit.

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

(9) (a) The department of transportation is not required to obtain a permit before appropriating ground water or diffuse surface water to conduct aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387, if the appropriation is to **restore** a functional a wetland with the intent to substantially replicate the predisturbance conditions by filling in or removing constructed ditches, drains, or similar structures **that drained a historically functional wetland. The restored wetland must be designed to not exceed the size of the original wetland.**

(b) (i) Within 30 days of completion of the appropriation for beneficial use, the department of transportation shall file a notice of completion with the department on a form provided by

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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 refiling a correct and complete notice with the department.

(iv) The certificate of water right must document the proposed number of applied for credits attached to the wetland as assigned under the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387.

(c) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof that the aquatic resource activities were carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387 and proof of a possessory interest of the place of use. The original of the certificate must be sent to the department of transportation. 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) To define the nature and extent of the water right the

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certificate of water right must state:

(i) the date of the priority of the right;

(ii) the purpose for which the water included in the right is used;

(iii) the place of use and description of the land to which the right is appurtenant;

(iv) the number of applied for credits attached to the wetland as assigned under the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387 and certified to the department by the department of transportation.

(e) In addition to any remedy available to a certificate of water right holder, the issuance of a certificate of water right under this subsection (9) entitles the department of transportation to protect the credits set forth in the certificate of water right against any appropriation of water in any subsequent permit or change authorization proceeding conducted under this chapter. Proof of the diminishment of credits is prima facie proof that water is not reasonably legally available under 85-2-311(1) (a) (ii) and of adverse effect under 85-2-402 in any proceeding conducted under this chapter.

(f) The purpose of a certificate of water right issued under this subsection (9) may not be changed."

{*Internal References to 85-2-306:*

85-2-102*x	85-2-113x	85-2-236x	85-2-302x
85-2-322x	85-2-330x	85-2-341x	85-2-343x
85-2-401x	85-20-601 x	85-20-901 x	85-20-901x
85-20-901x	85-20-901 x	85-20-901x	85-20-901x
85-20-901	85-20-901x	85-20-901x	85-20-901x
85-20-901x	85-20-901x	85-20-901 x	85-20-901x
85-20-901x	85-20-901x	85-20-901x	85-20-901x
85-20-901x	85-20-901x	85-20-901x}	

**Section 3.** Section 85-2-360, MCA, is amended to read:

**"85-2-360. Ground water appropriation right in closed basins.** (1) An application, other than an application for the purposes of 85-2-306(9), for a ground water appropriation right in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or administratively closed pursuant to 85-2-319 must be accompanied by a hydrogeologic assessment that has been conducted pursuant to 85-2-361 to predict whether the proposed appropriation right will result in a net depletion of surface water and must be accompanied by a plan as provided in 85-2-362, if necessary.

(2) If the hydrogeologic assessment conducted pursuant to 85-2-361 predicts that the proposed appropriation right will not result in a net depletion of surface water, the department shall proceed under the criteria provided in 85-2-311.

(3) (a) If the hydrogeologic assessment predicts that the proposed appropriation right will result in a net depletion of surface water, the applicant shall analyze whether the net depletion results in an adverse effect on a prior appropriator. If the applicant provides a correct and complete application, the department shall proceed to process the application as provided in 85-2-363.

(b) If the applicant has used the water for the purpose of conducting the hydrogeologic assessment, the applicant shall terminate the use of the water. Failure to terminate use of the water must result in a fine of not more than \$1,000 for each day

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of the violation.

(4) If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection (3)(a), the department may proceed to process the application pursuant to 85-2-363 if, in addition to other applicable criteria, the applicant complies with 85-2-362.

(5) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

(6) The priority date for an appropriation right that is granted to an entity whose permit application was returned after April 11, 2006, and before May 3, 2007, because of the department's interpretation of a court decision is the date of the initial application to the department."

{*Internal References to 85-2-360:*

85-2-102x	85-2-102x	85-2-311 x	85-2-311x
85-2-330 x	85-2-336x	85-2-341x	85-2-343x
85-2-344 x	85-2-360*x	85-2-361*x	85-2-364x
85-2-364 x	85-2-368*x	85-2-369* x	85-2-370*x
85-2-370*x }			

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NEW SECTION. **Section 4. {standard} Effective date.** [This act] is effective on passage and approval.

- END -

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