

Unofficial Draft Copy

As of: April 28, 2008 (10:50am)

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; and providing an immediate effective date."

Be it enacted by the Legislature of the State of Montana:

Section 1. 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 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 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 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 does not require a permit before appropriating ground water or water that is from a source other than a perennial flowing stream 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:

(i) less than or equal to 50 acre-feet a year for a wetland;

or

(ii) to restore a wetland by filling in constructed ditches or drains.

(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 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 landowner notification or a written federal special use authorization, if the department of transportation does not have 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 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 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

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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 section 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}	

NEW SECTION. **Section 2. {standard} Effective date.** [This act] is effective on passage and approval.

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