

**MONTANA CODE ANNOTATED**

**PROPOSED CHANGES FOR CONSIDERATION  
BY THE WATER POLICY INTERIM COMMITTEE**

**Submitted by TROUT UNLIMITED, December 14, 2011**

**85-2-506. Controlled ground water areas -- designation or modification.** (1) The department may by rule designate or modify permanent or temporary controlled ground water areas as provided in this part. The rule for each controlled ground water area must designate the boundaries of the controlled ground water area.

(2) The rulemaking process for designation or modification of a controlled ground water area may be initiated by:

- (a) the department;
- (b) submission of a correct and complete petition from a state or local public health agency for identified public health risks; or
- (c) submission of a correct and complete petition:
  - (i) by a municipality, county, conservation district, or local water quality district formed under Title 7, chapter 13, part 45; or
  - (ii) signed by at least one-third of the water right holders in a proposed controlled ground water area.

(3) (a) A correct and complete petition must:

(i) be in a form prescribed by the department and must contain analysis prepared by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer concluding that one or more of the criteria provided in subsection (5) are met; and

(ii) describe proposed measures, if any, to mitigate effects of the criteria identified in subsection (5) that are alleged in the petition.

(b) When the department proposes a rule pursuant to this section, the place for the hearing must be within or as close as practical to the proposed or existing controlled ground water area.

(c) (i) The department shall notify the petitioner of any defects in a petition within 180 days. If the department does not notify the petitioner of any defects within 180 days, the petition must be treated as correct and complete.

(ii) A petition that is not made correct and complete within 90 days from the date of notification by the department of any defect is terminated.

(4) (a) Within 60 days after a petition is determined to be correct and complete, the department shall:

- (i) deny in writing the petition in whole or in part, stating the reasons for denial;
- (ii) inform the petitioner that the department will study the information presented in the petition for a period not to exceed 90 days before denying or proceeding with the petition; or
- (iii) initiate rulemaking proceedings in accordance with Title 2, chapter 4, part 3.

(b) Failure of the department to act under subsection (4)(a) does not mandate that the department grant the petition for rulemaking.

(c) In addition to the notice requirements of Title 2, chapter 4, parts 1 through 4, the department shall provide public notice of the rulemaking hearing by:

(i) publishing a notice at least once each week for 3 successive weeks, with the first notice not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the proposed controlled ground water area is located;

(ii) serving by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from an examination of the records of the department to be a water right holder with a diversion within the proposed controlled ground water area, all landowners of record within the proposed controlled ground water area, and each well driller licensed in Montana whose address is within any county in which any part of the proposed controlled ground water area is located; and

(iii) serving by mail a copy of the notice upon any other person or state or federal agency that the department feels may be interested in or affected by the proposed designation or modification of a controlled ground water area.

(d) The notice under subsection (4)(c) must include a summary of the basis for the proposed rule. Publication and mailing of the notice as prescribed in this section, when completed, is considered to be sufficient notice of the hearing to all interested persons.

(5) The department may designate a permanent controlled ground water area by rule if it finds by a preponderance of the evidence that any of the following criteria have been met and cannot be appropriately mitigated:

(a) current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled ground water area will cause ground water levels to decline to the extent that water right holders cannot reasonably exercise their water rights;

(b) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have reduced or will reduce ground water levels or surface water availability necessary for water right holders to reasonably exercise their water rights;

(c) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have induced or altered or will induce or alter contaminant migration exceeding relevant water quality standards;

(d) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have impaired or will impair ground water quality necessary for water right holders to reasonably exercise their water rights based on relevant water quality standards;

(e) ground water within the proposed controlled ground water area is not suited for beneficial use; or

(f) public health, safety, or welfare is or will become at risk.

(6) Gallatin, Lewis and Clark, Missoula and Ravalli counties are designated as permanent controlled groundwater areas for the purpose of providing a mitigation water exchange for wells exempt from permitting pursuant to MCA § 85-2-306(3)(a).

~~(6)~~ (7) (a) If the department finds that sufficient facts are not available to designate a permanent controlled ground water area, it may designate by rule a temporary controlled ground water area to allow studies to obtain the facts needed to determine whether or not it is appropriate to designate a permanent controlled ground water area. The department shall set the length of time that the temporary controlled ground water area will be in

effect. Subject to subsection (6)(c), the term of a temporary controlled ground water area may be extended by rule.

(b) A temporary controlled ground water area designation is for the purpose of study and cannot include the control provisions provided in subsection (7), other than measurement, water quality testing, and reporting requirements.

(c) A temporary controlled ground water area designation may not exceed a total of 6 years, including any extensions.

(d) Prior to expiration of a temporary controlled ground water area, the department may amend or repeal the rule establishing the temporary controlled ground water area or may designate a permanent controlled ground water area through the rulemaking process under this section.

(e) Studies for temporary controlled ground water areas may be considered for funding under the renewable resource grant and loan program in Title 85, chapter 1, part 6.

(f) If there is a ground water investigation program within the bureau, the ground water assessment steering committee established by [2-15-1523](#) shall consider temporary controlled ground water areas for study.

~~(7)~~ (8) A controlled ground water area may include but is not limited to the following control provisions:

(a) a provision closing the controlled ground water area to further appropriation of ground water;

(b) a provision restricting the development of future ground water appropriations in the controlled ground water area by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other criteria that the department determines necessary;

(c) a provision requiring measurement of future ground water or surface water appropriations;

(d) a provision requiring the filing of notice on land records within the boundary of a permanent controlled ground water area to inform prospective holders of an interest in the property of the existence of a permanent controlled ground water area. Notice of the designation must be removed or modified as necessary to accurately reflect modification or repeal of a permanent designation within 60 days.

(e) a provision for well spacing requirements, well construction constraints, and prior department approval before well drilling, unless the well is regulated pursuant to Title 82, chapter 11;

(f) a provision for mitigation of ground water withdrawals;

(g) a provision for water quality testing;

(h) a provision for data reporting to the department; and

(i) other control provisions that the department determines are appropriate and adopts through rulemaking.

**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 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 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; or

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

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

(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) "Combined appropriation" requiring a permit means an appropriation of water in a closed basin exceeding the flow rate and volume limitation of MCA § 85-2-306(3)(a) from the same source by two or more wells on a single tract of record in existence as of

the effective date of this act, or on a tract of record created through subdivision after the effective date of this act for any purpose other than stockwatering. Outside of a closed basin, a “combined appropriation” requiring a permit means an appropriation of water exceeding the flow rate and volume limitation of MCA § 85-2-306(3)(a) from the same source by two or more wells on a single tract of record in existence upon passage and approval, or on a tract of record created through subdivision upon passage and approval of this act for any purpose other than stockwatering, if the department finds potential adverse impact on any existing water right claim.

~~(8)~~ (9) "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 for the department to begin evaluating the information.

~~(9)~~ (10) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

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

~~(11)~~ (12) "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)~~ (13) "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)~~ (14) "Ground water" means any water that is beneath the ground surface.

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

~~(15)~~ (16) "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)~~ (17) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

~~(17)~~ (18) "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)~~ (19) "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)~~ (20) (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)~~ (21) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

~~(21)~~ (22) "State water reservation" means a water right created 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)~~ (23) "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)~~ (24) "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)~~ (25) "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)~~ (26) "Water division" means a drainage basin as defined in [3-7-102](#).

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

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

~~(28)~~ (29) "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)~~ (30) "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.

### **Two Statutory Provisions that Inform The Above Proposed Changes:**

MCA § 76-4-103: "What constitutes a subdivision' A subdivision shall comprise only those parcels of less than 20 acres which have been created by a division of land, and the plat thereof shall show all such parcels, whether contiguous or not. The rental or lease of one ore more parts of a building, structure, or other improvement, whether existing or proposed, is not a subdivision, as that term is defined in this part, and is not subject to the requirements of this part."

MCA § 76-3-103 (16) (a): "'Tract of record' means an individual parcel of land, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office."

### **Who Determines Whether a Lot is Eligible for an Exempt Well?**

Because this approach only requires determining whether the particular lot has been created through a subdivision after the effective date of the rule, and since DEQ has to approve a well and septic field for development of the lot in any event, DEQ will be able to verify whether a particular lot is eligible for an exempt well or not.

**Does this rule apply to lots that are 20-acres or larger?**

No, because of Chapter 4's definition of "subdivision," all lots larger than 20 acres would still be entitled to an exempt well.

**Are First Minor Subdivisions Entitled to an Exempt well?**

No. Because DEQ does not track first minor subdivisions, this approach does not allow exempt wells for the first minor subdivision.

**Are there any exceptions to subdivided lots having to go through DNRC permit review?**

Yes. For lots subdivided after the effective date of the rule, this approach allows exempt wells on all lots larger than 20 acres.

In addition, there are a number of other exemptions, required by MCA § 76-4-125. Section 125's exemptions generally do not contemplate the use of water on the newly-subdivided lot. These exemptions include newly-subdivided lots that: already have sewer and water hook-ups; create cemetery lots; are created by lease or rental for farming and agricultural purposes; and are created by court order; among others.

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