

HOUSE BILL NO. 286

INTRODUCED BY A. REDFIELD

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4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING WATER RIGHT LAWS IN CONNECTION
5 WITH STATE LAND LEASES; DECLARING THAT THE USE OF PRIVATE WATER RIGHTS DERIVED FROM
6 A WELL OR DEVELOPED SPRING WHOSE DIVERSION WORKS IS LOCATED ON PRIVATE LAND FOR USE
7 ON STATE LAND IN CONNECTION WITH A STATE LAND LEASE DOES NOT RESULT IN AN OWNERSHIP
8 INTEREST IN THE STATE OF MONTANA; CREATING A NOTICE PROCEDURE FOR WATER RIGHTS
9 HOLDERS WISHING TO USE PRIVATE WATER RIGHTS ON STATE LAND; PROVIDING RULEMAKING
10 AUTHORITY; AMENDING SECTION 85-2-306, MCA; AND PROVIDING EFFECTIVE DATES AND
11 APPLICABILITY DATES."

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13 WHEREAS, the use of water derived from a well or developed spring whose diversion works is not
14 located on state-owned land to provide stock water on state-owned land is in the best interest of the state land
15 lessee and the state; and

16 WHEREAS, the ability to manage livestock grazing and improve grazing management through the use
17 of stock tanks is a benefit to state lands and the income received by the state from grazing leases; and

18 WHEREAS, the state of Montana asserting ownership over privately held water rights derived from a well
19 or developed spring whose diversion works are located wholly on private land serves as a disincentive to
20 improving grazing management on state-owned lands through the use of water tanks; and

21 WHEREAS, the Montana Water Court in Case No. 43A-A found that the temporary use of a privately
22 owned water right on state land did not equate to state ownership of all or a part of the water right; and

23 WHEREAS, a water right that is diverted, developed, and perfected on private land is not subject to the
24 holding in Department of State Lands v. Pettibone; and

25 WHEREAS, the right to use water is a property right that cannot be taken without due process of law.

26 THEREFORE, the Legislature of the State of Montana finds that the use of water from a well or
27 developed springs that is diverted from a privately owned diversion works located on private land and utilized on
28 state land does not create an ownership interest in the water right in the state of Montana.

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



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2 **NEW SECTION. Section 1. Temporary use of a water right on state-owned land.** (1) A water right
3 owner may put water from a well or developed spring whose diversion works is located on private land to
4 beneficial use on state-owned land for the duration of any state land lease held by the water right owner.

5 (2) The state of Montana does not obtain an ownership interest in a water right or the diversion works
6 of a water right that is diverted from a well or developed spring located on private land and placed to beneficial
7 use on state land in conjunction with a state land lease held by the water right owner.

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9 **NEW SECTION. Section 2. Water right abstract reflecting temporary use of private water right**
10 **on state-owned land.** (1) A state land lessee who temporarily puts water to beneficial use on state land pursuant
11 to [section 1] shall submit a notice to the department containing:

12 (a) the legal description of the temporary place of use of the water right;
13 (b) the nature of the temporary beneficial use of the water right; and
14 (c) a statement that the maximum flow rate or volume indicated on the water right abstract will not be
15 increased.

16 (2) The department shall issue a temporary water right abstract with the information provided in
17 subsection (1).

18 (3) The water right owner shall notify the department when:

19 (a) the state land lease is no longer held by the water right holder; or
20 (b) the water right owner no longer intends to utilize the water right on the state land parcel.

21 (4) Upon receiving notification pursuant to subsection (3), the department shall designate the temporary
22 abstract as void and reissue the previous abstract showing that the state land parcel is not a place of use
23 associated with the subject water right. The department shall provide the water right owner with a copy of the
24 reissued abstract.

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26 **NEW SECTION. Section 3. Rulemaking authority.** The department shall adopt rules to implement the
27 provisions of [section 2].

28
29 **Section 4.** Section 85-2-306, MCA, is amended to read:

30 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b), ground

1 water may be appropriated only by a person who has a possessory interest, including a lease, in the property
2 where the water is to be put to beneficial use and exclusive property rights in the ground water development
3 works.

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

9 (c) If the person does not have a possessory interest in the real property from which the ground water
10 may be appropriated, the person shall provide to the owner of the real property written notification of the works
11 and the person's intent to appropriate ground water from the works. The written notification must be provided to
12 the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are
13 proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice
14 requirement only and does not create an easement in or over the real property where the ground water
15 development works are located.

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

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

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

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

21 (i) when the appropriation is made by a local governmental fire agency organized under Title 7, chapter
22 33, and the appropriation is used only for emergency fire protection, emergency fire training, and emergency
23 fire-related operations, which may include enclosed storage;

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

28 (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does
29 not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells
30 or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

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

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

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

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

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

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

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

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

1 by livestock if:

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

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

4 (c) the appropriation is from an ephemeral stream, an intermittent stream, or another source other than
5 a perennial flowing stream; and

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

8 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit
9 as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete application for a
10 stock water provisional permit, the department shall automatically issue a provisional permit. If the department
11 determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may
12 revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit
13 subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other
14 appropriators. [For purposes of an adverse effects determination under this subsection, the department may not
15 consider adverse effects on any water right identified in a written consent to approval filed pursuant to 85-2-311.]

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

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

22 (9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of
23 the Flathead Indian reservation. (Bracketed language in subsection (7)(a) terminates September 30, 2023--sec.
24 8, Ch. 243, L. 2017.)"

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26 **NEW SECTION. Section 5. Codification instruction.** [Sections 1 through 3] are intended to be codified
27 as an integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [sections 1 through 3].

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29 **NEW SECTION. Section 6. Effective dates.** (1) Except as provided in subsection (2), [this act] is
30 effective on passage and approval.

1 (2) [Section 2] is effective October 1, 2019.

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3 NEW SECTION. Section 7. Applicability -- retroactive applicability. (1) [Section 2] applies to water
4 rights being used on leased lands on or after October 1, 2019.

5 (2) [Section 1] applies retroactively, within the meaning of 1-2-109, to water from a well or developed
6 spring whose diversion works is located on private land put to a beneficial use on state-owned land before [the
7 effective date of this act].

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