

1 HOUSE BILL NO. 435

2 INTRODUCED BY J. FITZPATRICK

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4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT THE CONSTRUCTION OF A WATER SUPPLY  
5 SYSTEM USING AN EXEMPT WATER RIGHT IS PROOF OF BENEFICIAL USE FOR ISSUANCE OF A  
6 CERTIFICATE OF WATER RIGHT; AMENDING SECTION 85-2-306, MCA; AND PROVIDING AN IMMEDIATE  
7 EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

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

10  
11 Section 1. Section 85-2-306, MCA, is amended to read:

12 "85-2-306. Exceptions to permit requirements. (1) (a) Except as provided in subsection (1)(b),  
13 ground water may be appropriated only by a person who has a possessory interest in the property where the  
14 water is to be put to beneficial use and exclusive property rights in the ground water development works.

15 (b) If another person has rights in the ground water development works, water may be  
16 appropriated with the written consent of the person with those property rights or, if the ground water  
17 development works are on national forest system lands, with any prior written special use authorization required  
18 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 certificate.

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

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

- 1 (a) according to a permit received pursuant to 85-2-508; or
- 2 (b) according to the requirements of a rule promulgated pursuant to 85-2-506.
- 3 (3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before
- 4 appropriating ground water by means of a well or developed spring:
- 5 (i) when the appropriation is made by a local governmental fire agency organized under Title 7,
- 6 chapter 33, and the appropriation is used only for emergency fire protection, emergency fire training, and
- 7 emergency fire-related operations, which may include enclosed storage;
- 8 (ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive
- 9 geothermal heating or cooling exchange applications, all of the water extracted is returned without delay to the
- 10 same source aquifer, and the distance between the extraction well and both the nearest existing well and the
- 11 hydraulically connected surface waters is more than twice the distance between the extraction well and the
- 12 injection well;
- 13 (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and
- 14 does not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or
- 15 more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or
- 16 (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and
- 17 does not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more
- 18 wells or developed springs exceeding this limitation requires a permit.
- 19 (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground
- 20 water for beneficial use, the appropriator shall file a notice of completion with the department on a form
- 21 provided by the department through its offices.
- 22 (ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a
- 23 certificate of water right, return a defective notice for correction or completion, together with the reasons for
- 24 returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and
- 25 refiled with the department within 30 days of notification of defects or within a further time as the department
- 26 may allow, not to exceed 6 months.
- 27 (iii) If a notice is not corrected and completed within the time allowed, the priority date of
- 28 appropriation is the date of refiled a correct and complete notice with the department.

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

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

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

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

12 (iv) When the appropriation is for a water supply system that is subject to Title 75, chapter 6, part  
13 1, and is located outside of a stream depletion zone and does not exceed 10 acre-feet a year:

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

16 (B) A copy of the department of environmental quality approval for the water supply system must  
17 be submitted with the notice of completion. This section does not preclude the public water supply developer or  
18 any subsequent owners from expanding the water system or from revising the water use restrictions within the  
19 subdivision, provided that the total amount does not exceed 10 acre-feet per year.

20 (C) Water appropriated under this exception must be measured and reported annually to the  
21 department.

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

28 (5) An appropriation under subsection (4) is an existing right, and a permit is not required.

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

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

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

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

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

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

13 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a  
14 permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete  
15 application for a stock water provisional permit, the department shall automatically issue a provisional permit. If  
16 the department determines after a hearing that the rights of other appropriators have been or will be adversely  
17 affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make  
18 the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights  
19 of other appropriators. [For purposes of an adverse effects determination under this subsection, the department  
20 may not consider adverse effects on any water right identified in a written consent to approval filed pursuant to  
21 85-2-311.]

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

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

28 (9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior

**Amendment - 1st Reading-white - Requested by: John Fitzpatrick - (H) Natural Resources**

- 2023

68th Legislature 2023

Drafter: Joe Kolman, 406-444-3747

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1 boundaries of the Flathead Indian reservation. (Bracketed language in subsection (7)(a) terminates September  
2 30, 2023--sec. 8, Ch. 243, L. 2017.)"

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

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6 NEW SECTION. **Section 3. Retroactive applicability.** [This act] applies retroactively, within the  
7 meaning of 1-2-109, to water supply systems constructed after December 31, 2000.

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- END -