

1 HOUSE BILL NO. 642

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11

12 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING EXCEPTIONS TO WATER RIGHT PERMIT

13 REQUIREMENTS; ASSESSING A FEE FOR NOTICES OF COMPLETION; AMENDING SECTIONS SECTION

14 85-2-306 AND 85-2-381, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE

15 APPLICABILITY DATE."

16

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

18

19 **Section 1.** Section 85-2-306, MCA, is amended to read:

20 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b),

21 ground water may be appropriated only by a person who has a possessory interest in the property where the

22 water is to be put to beneficial use and exclusive property rights in the ground water development works.

23 (b) If another person has rights in the ground water development works, water may be

24 appropriated with the written consent of the person with those property rights or, if the ground water

25 development works are on national forest system lands, with any prior written special use authorization required

26 by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,

27 impoundment, storage, transportation, withdrawal, use, or distribution of water under the certificate.

28 (c) If the person does not have a possessory interest in the real property from which the ground

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1 water may be appropriated, the person shall provide to the owner of the real property written notification of the
2 works and the person's intent to appropriate ground water from the works. The written notification must be
3 provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded
4 works are proposed, 30 days prior to appropriating the water. The written notification under this subsection is a
5 notice requirement only and does not create an easement in or over the real property where the ground water
6 development works are located.

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

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

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

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

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

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

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

25 (A) for a ~~lot, parcel, or~~ tract of record in existence on or after October 17, 2014, of less than 20
26 acres;

27 (B) for each 20-acre ~~increment of an original lot, parcel, or fraction of a~~ tract of record of more than
28 20 acres ~~either in existence prior to October 17, 2014, or created on or after that date, except that remaining~~

1 fractions of less than 20 acres may appropriate 1 acre-foot a year for each 2-acre increment, and provided that
2 the ground water developments are spaced at least 1,320 feet apart; or

3 (C) for each 20-acre ~~increment of an original lot, parcel, or fraction of a tract of record that has~~
4 been ~~subsequently subdivided pursuant to Title 76, chapter 4, part 1, into lots, parcels, or tracts of record of~~
5 ~~less than 20 acres on or after October 17, 2014 divided on or after October 17, 2014, into a subdivision as~~
6 ~~defined in 76-4-102, except that remaining fractions of less than 20 acres may appropriate 1 acre-foot a year for~~
7 ~~each 2-acre increment and that no more than four exempt appropriations may be used on the original tract of~~
8 ~~record; or~~

9 (D) for each 20-acre increment of an original lot, parcel, or tract of record in phased development
10 pursuant to 76-3-617 that is subdivided into lots, parcels, or tracts of record of less than 20 acres, except that
11 no more than four exempt appropriations may be assigned to the phased development;

12 (iv) when outside a stream depletion zone, the exempt appropriation is 35 gallons a minute or less
13 and does not exceed 2 acre-feet a year for a new lot or parcel created by ~~order of a court of record pursuant to~~
14 ~~76-3-201(1)(a) or a family transfer division of land provided for in 76-3-207(1)(b); or~~

15 (iv)(v) when the appropriation is within a stream depletion zone, the exempt appropriation for each
16 circumstance described in subsections (3)(a)(iii)(A) through (3)(a)(iii)(C) 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. The department shall assess a fee of \$150 for each notice of
22 completion filed with the department.

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

28 (iii) If a notice is not corrected and completed within the time allowed, the priority date of

1 appropriation is the date of refileing a correct and complete notice with the department.

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

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

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

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

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

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

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

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

26 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a
27 permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete
28 application for a stock water provisional permit, the department shall automatically issue a provisional permit. If

1 the department determines after a hearing that the rights of other appropriators have been or will be adversely
2 affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make
3 the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights
4 of other appropriators. [For purposes of an adverse effects determination under this subsection, the department
5 may not consider adverse effects on any water right identified in a written consent to approval filed pursuant to
6 85-2-311.]

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

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

13 (9) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior
14 boundaries of the Flathead Indian reservation.

15 ~~(10) For exempt appropriations pursuant to this section for which a notice of completion was filed on~~
16 ~~or after October 17, 2014, and [the effective date of this act], the appropriator may submit an application to the~~
17 ~~department to modify the exemption under the terms of this section.~~

18 ~~(11)~~(10) An appropriation of ground water by means of a well or a developed spring under subsection
19 (3)(a)(iii)~~(D)(C)~~ must be measured by a functioning water meter with recording capacity. The appropriator is
20 responsible for maintaining the meter and reporting the data to the department annually.

21 ~~(12) In addition to the exempt appropriation provided for in subsection (3)(a)(iii)(B) for a lot, parcel,~~
22 ~~or tract of record of more than 20 acres outside a stream depletion zone, an exempt appropriation may be~~
23 ~~increased by 1 acre-foot a year for every 2-acre increment of the lot, parcel, or tract of record over 20 acres.~~

24 ~~(13)~~(11) For the purposes of this section:

25 (a) ~~"Phased development" has the meaning provided in 76-3-103.~~

26 (b) ~~"Tract of record" "tract of record" has the meaning provided in 76-3-103. (Bracketed language~~
27 ~~in subsection (7)(a) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)"~~

28

1 ~~Section 2. Section 85-2-381, MCA, is amended to read:~~

2 ~~"85-2-381. Water right enforcement of ground water uses exempt from permitting—findings~~
3 ~~and purpose. (1) The legislature finds that:~~

4 ~~(a) the state of Montana has managed the allocation of water under the prior appropriation~~
5 ~~doctrine for more than 100 years;~~

6 ~~(b) Article IX, section 3, of the Montana constitution recognizes and confirms all existing water~~
7 ~~rights;~~

8 ~~(c) the right to the use of water through a water right is a recognized property right;~~

9 ~~(d) the development of ground water wells that are exempt from permitting may have an adverse~~
10 ~~effect on other water rights;~~

11 ~~(e) the Water Use Act requires the department to coordinate the development and use of the water~~
12 ~~resources of the state so as to effect full utilization, conservation, and protection of its water resources; and~~

13 ~~(f) the ability to develop ground water wells that are exempt from permitting contributes to the full~~
14 ~~utilization of the water resources of the state.~~

15 ~~(2) The establishment of a stream depletion zone pursuant to 85-2-380 provides a conclusive,~~
16 ~~scientific basis for determining where ground water rights that are exempt from permitting are affecting senior~~
17 ~~surface water rights.~~

18 ~~(3) The purpose of this section is to continue allocating water under the exemptions provided for in~~
19 ~~85-2-306 while providing a process by which senior water right holders may protect their rights under the prior~~
20 ~~appropriation doctrine. Nothing in this section is intended to limit the ability of a senior water right holder to~~
21 ~~enforce a water right or limit that enforcement to a specific area. Creation of a stream depletion zone is not a~~
22 ~~prerequisite to an enforcement action.~~

23 ~~(4) Any use of water granted by a certificate of water right pursuant to 85-2-306(3)(a), (10), or (12)~~
24 ~~is subject to enforcement according to priority by:~~

25 ~~(a) any remedy legally available;~~

26 ~~(b) the department, upon receiving a complaint, through the provisions of 85-2-114 and 85-2-122;~~

27 ~~or~~

28 ~~(c) a water commissioner appointed pursuant to 85-5-101.~~

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Drafter: Jason Mohr, 406-444-1640

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1 ~~(5) — For each certificate issued pursuant to 85-2-306(3)(a), (10), or (12) after October 1, 2013, the~~
2 ~~department shall include written notice of the provisions of this section."~~

3

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

5

6 ~~NEW SECTION. Section 4. Retroactive applicability. [This act] applies retroactively, within the~~
7 ~~meaning of 1-2-109, to exempt appropriations made pursuant to 85-2-306 on or after October 17, 2014.~~

8

- END -

AMENDED