

HOUSE BILL NO. 642

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING EXCEPTIONS TO WATER RIGHT PERMIT REQUIREMENTS; AMENDING SECTIONS 85-2-306 AND 85-2-381, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY 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 (1)(b), 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

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

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

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

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

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

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

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

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

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

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

28 (C) for each 20-acre increment of an original lot, parcel, or tract of record that has been

1 subsequently subdivided pursuant to Title 76, chapter 4, part 1, into lots, parcels, or tracts of record of less than
2 20 acres on or after October 17, 2014; or

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

6 (iv) when outside a stream depletion zone, the exempt appropriation is 35 gallons a minute or less
7 and does not exceed 2 acre-feet a year for a new lot or parcel created by a family transfer division of land
8 provided for in 76-3-207(1)(b); or

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

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

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

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

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

27 (4) An appropriator of ground water by means of a well or developed spring first put to beneficial
28 use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in

1 force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in
2 subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is
3 sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the
4 filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

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

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

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

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

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

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

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

18 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a
19 permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete
20 application for a stock water provisional permit, the department shall automatically issue a provisional permit. If
21 the department determines after a hearing that the rights of other appropriators have been or will be adversely
22 affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make
23 the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights
24 of other appropriators. [For purposes of an adverse effects determination under this subsection, the department
25 may not consider adverse effects on any water right identified in a written consent to approval filed pursuant to
26 85-2-311.]

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

1 required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,
2 impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

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

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

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

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

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

16 (13) For the purposes of this section:

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

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

20

21 **Section 2.** Section 85-2-381, MCA, is amended to read:

22 **"85-2-381. Water right enforcement of ground water uses exempt from permitting -- findings**
23 **and purpose.** (1) The legislature finds that:

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

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

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

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

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

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

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

10 (3) The purpose of this section is to continue allocating water under the exemptions provided for in
11 85-2-306 while providing a process by which senior water right holders may protect their rights under the prior
12 appropriation doctrine. Nothing in this section is intended to limit the ability of a senior water right holder to
13 enforce a water right or limit that enforcement to a specific area. Creation of a stream depletion zone is not a
14 prerequisite to an enforcement action.

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

17 (a) any remedy legally available;

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

19 or

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

21 (5) For each certificate issued pursuant to 85-2-306(3)(a), (10), or (12) after October 1, 2013, the
22 department shall include written notice of the provisions of this section."
23

24 **NEW SECTION. Section 3. Effective date.** [This act] is effective on passage and approval.

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