HOUSE BILL NO. 35

INTRODUCED BY R. MINER, T. SHARP, B. GILLESPIE, E. TILLEMAN, S. GIST, G. PARRY, S. KLAKKEN, G. OBLANDER, L. DEMING, J. GILLETTE, W. CURDY, J. SECKINGER, T. MILLETT, F. MANDEVILLE, M. DUNWELL, B. CARTER, B. PHALEN, A. GRIFFITH, J. CLEVELAND, J. WEBER, M. MITCHELL, J. ISALY, K. FIRE THUNDER, J. LORANG, R. CALDWELL, J. COHENOUR

BY REQUEST OF THE WATER POLICY INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: “AN ACT CLARIFYING THE CRITERIA REQUIRED FOR CERTAIN TRACTS OF RECORD TO BE ELIGIBLE FOR A WATER RIGHT PERMIT EXCEPTION; AMENDING SECTION 85-2-306, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.”

WHEREAS, from October 2014 to February 2024, the Department of Natural Resources and Conservation coordinated with the Department of Environmental Quality through a memorandum of understanding on issuing subdivision review letters that included whether a proposed subdivision had a water right or was entitled under section 85-2-306, MCA, to appropriate water under an exemption to the permitting process; and

WHEREAS, on February 14, 2024, Montana's First Judicial District Court issued an order in Upper Missouri Waterkeeper v. Broadwater Co., Cause No. BDV-2022-038, ruling that the Department of Natural Resources and Conservation erred in determining that each phase of a four-phase subdivision development was entitled to a separate combined appropriation of 10 acre-feet per year under section 85-2-306, MCA; and

WHEREAS, after the First Judicial District Court decision in Upper Missouri Waterkeeper v. Broadwater County in February 2024, the Department of Natural Resources and Conservation and the Department of Environmental Quality terminated the memorandum of understanding on issuing subdivision review letters; and

WHEREAS, tracts of record in the development process between October 2014 and February 2024 may be impacted due to actions taken in response to the Upper Missouri Waterkeeper v. Broadwater County decision.

THEREFORE, the Legislature of the State of Montana intends to allow owners of tracts of record who received a letter from the Department of Natural Resources and Conservation between October 2014 and

February 2024 indicating that they were entitled to appropriate water through an exemption from the permitting process under section 85-2-306, MCA, who received a certificate of subdivision approval from the Department of Environmental Quality, and who file a notice of completion by January 1, 2032, to receive the certificate of water right as contemplated in the letter from the Department of Natural Resources and Conservation.

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

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

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

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

(3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before

appropriating ground water by means of a well or developed spring:

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

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

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

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

(b) (i) Before appropriating groundwater by means of a well or developed spring pursuant to subsection (3)(a)(iii) or (3)(a)(iv), a person shall file with the department, on a form provided by the department, a correct and complete notice of intent to appropriate groundwater.

(ii) The department shall notify the person of any defects in the notice of intent to appropriate groundwater within 10 business days.

(iii) A notice of intent to appropriate groundwater that is not corrected and completed within 60 days of a notice of defects is terminated.

(iv) Within 10 business days of determining that a notice of intent to appropriate groundwater is correct and complete, the department shall review the notice for compliance with subsection (3)(a) and shall authorize or deny the notice of intent to appropriate groundwater. If the department denies the notice of intent to appropriate groundwater, the department shall include the reasons for the denial.

(v) Unless extended by the department, an appropriation under subsection (3) must be completed within 5 years from the date the notice of intent to appropriate groundwater is authorized. One extension may

be granted by the department for up to 5 additional years. The request for an extension must be filed on a form provided by the department and must demonstrate that progress has been made toward putting the water to beneficial use.

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

(ii) Water use by a public water supply system subject to Title 75, chapter 6, part 1, is considered perfected and the appropriation of water for beneficial use complete when construction of the public water supply system is finished, at which time a notice of completion may be filed and must include a copy of the approval of the public water supply system by the department of environmental quality. All water use by a public water supply system pursuant to subsection (3)(a)(iii) or (3)(a)(iv) must be measured using a totalizing metering device, and measurements must be reported annually on a form prescribed by the department. Noncompliance with metering and reporting requirements may result in a fine determined by the department.

(iii) On receipt of the notice of completion, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A correct and complete notice of completion for an appropriation under subsection (3)(a)(iii) or (3)(a)(iv) must establish that the appropriation was completed in substantial accordance with the notice of intent to appropriate groundwater authorized by the department under subsection (3)(b). A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 60 days of notification of defects.

(iv) If a notice is not corrected and completed within the time allowed, the department authorization expires and a new notice of intent to appropriate groundwater is required to use water under subsection (3)(a)(iii) or (3)(a)(iv).

(d) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof of landowner notification or a written federal special use authorization as necessary under subsection (1). The original of the certificate must be sent to the appropriator and a duplicate must be maintained in the department's centralized database. The date of filing of the notice of completion is the date of priority of the right.

(4) A tract of record as defined in 76-3-103 created after October 17, 2014, qualifies for the exemption allowed in subsection (2), (3)(a)(iii), or (3)(a)(iv) if:

(a) before February 14, 2024, the tract of record received a letter from the department that was not rescinded stating that the water supply is either exempt from water rights permitting requirements or has a water right, as defined in 85-2-102. The appropriation may not exceed the volume identified and must be for the purpose of use allowed to the tract of record as provided in the letter.

(b) when required under Title 76, chapter 4, the tract of record has received a certificate of subdivision approval from the department of environmental quality; and

(c) the appropriator files a notice of intent before January 1, 2032.

~~(4)~~ (5) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

~~(5)~~ (6) An appropriation under subsection ~~(4)~~ (5) is an existing right, and a permit is not required. However, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

~~(6)~~ (7) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

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

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

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

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

~~(7)~~ (8) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Subject to subsection ~~(7) (b)~~ (8)(b), upon receipt of a correct and complete application for a stock water provisional permit, the department shall automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

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

~~(8)~~ (9) A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the department under 85-2-113.

~~(9)~~ (10) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation."

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

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