

SENATE BILL NO. 37

INTRODUCED BY J. WELBORN

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING AN EXCEPTION TO WATER RIGHT PERMIT REQUIREMENTS FOR APPROPRIATIONS FROM THE BERKELEY PIT; PROVIDING AN EXCEPTION TO THE CLARK FORK RIVER BASIN CLOSURE; AND AMENDING SECTIONS 85-2-306 AND 85-2-336, MCA."

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

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

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

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

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

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

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

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

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

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

28 (c) A certificate of water right may not be issued until a correct and complete notice has been filed

1 with the department, including proof of landowner notification or a written federal special use authorization as  
2 necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department  
3 shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date  
4 of priority of the right.

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

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

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

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

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

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

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

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

1 the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights  
2 of other appropriators. [For purposes of an adverse effects determination under this subsection, the department  
3 may not consider adverse effects on any water right identified in a written consent to approval filed pursuant to  
4 85-2-311.]

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

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

11 (9) A permit to appropriate water is not subject to 85-2-311 if:

12 (a) the source of water is from the "mine flooding site" as defined in the Butte mine flooding operable  
13 unit consent decree of 2002;

14 (b) the appropriator is a party to the Butte mine flooding operable unit consent decree of 2002;

15 (c) the appropriation is agreed to in writing by the parties to the Butte mine flooding operable unit  
16 consent decree of 2002; and

17 (d) the department of environmental quality provides written confirmation to the department of natural  
18 resources and conservation that the appropriation is consistent with the Butte mine flooding operable unit  
19 consent decree of 2002. The written confirmation must identify an approved point of diversion and a maximum  
20 volume and flow rate for the appropriation.

21 (10) (a) An applicant for a permit to appropriate water pursuant to subsection (9) shall file a correct  
22 and complete permit application to the department on a department form. After the department determines the  
23 application is correct and complete pursuant to subsection (9), the department shall issue a provisional permit.

24 (b) If the department of environmental quality provides written notification to the department of natural  
25 resources and conservation and the appropriator exercising a permit issued pursuant to subsection (9) that the  
26 appropriation is inconsistent with the Butte mine flooding operable unit consent decree of 2002, the appropriator  
27 shall cease appropriating water.

28 (9)(11) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior

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 **Section 2.** Section 85-2-336, MCA, is amended to read:

5 **"85-2-336. Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions of  
6 subsection (2) of this section, the department may not grant an application for a permit to appropriate water  
7 within the upper Clark Fork River basin.

8 (2) The provisions of subsection (1) do not apply to:

9 (a) an application for a permit to appropriate ground water if the applicant complies with the provisions  
10 of 85-2-360;

11 (b) an application for a permit to appropriate surface water to conduct aquatic resource activities  
12 carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through  
13 1387. A permit issued to conduct aquatic resource actions may not be used for dilution.

14 (c) an application for a permit to appropriate water for stock use;

15 (d) an application to store water;

16 (e) an application submitted pursuant to 85-20-1401, Article VI; or

17 (f) an application for power generation at existing hydroelectric dams. The department may not  
18 approve a permit for power generation if approval results in additional consumption of water.

19 (g) a permit to appropriate water pursuant to [section 1(9) and (10)].

20 (3) A change of use authorization for changing the purpose of use may not be issued for any permit  
21 issued pursuant to subsection (2)(b) or (2)(c).

22 (4) Except as provided in 85-20-1401, applications for state water reservations in the upper Clark  
23 Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991.  
24 The filing of a state water reservation application does not provide standing to object under 85-2-402.

25 (5) Except as provided in 85-20-1401, the department may not process or approve applications for  
26 state water reservations in the upper Clark Fork River basin filed pursuant to 85-2-316."

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