

HOUSE BILL NO. 441

INTRODUCED BY R. MINER, W. GALT, J. SECKINGER, M. BERTOGLIO, W. MCKAMEY, D. HARVEY, K.

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING WATER LAWS TO ALIGN PROVISIONAL WATER RIGHTS WITH FINAL DECREES; CLARIFYING PROCESSES FOR POST-DECREE PETITIONS TO REDUCE, MODIFY, OR REVOKE PERMITS; CLARIFYING POST-DECREE VERIFICATION OF PERMITS AND CHANGES IN APPROPRIATION RIGHTS; AND AMENDING SECTIONS 85-2-313, 85-2-315, AND 85-2-402, MCA."

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

Section 1. Section 85-2-313, MCA, is amended to read:

"85-2-313. Provisional permit. ~~(1) A permit issued prior to a final determination of existing water rights is provisional and is subject to that final determination. Upon petition, the amount of the appropriation granted in a provisional permit must be reduced, modified, or revoked by the department following a show cause hearing in which it is determined that reduction, modification, or revocation is necessary to protect and guarantee existing water rights determined in the final decree. Because a provisional permit is issued on a reasonable determination of legal availability under 85-2-311(1)(b), in a show cause hearing under this section, legal availability must be determined on a consideration of the final decree in the affected basin or subbasin. A permit authorized prior to the issuance of a final decree pursuant to 85-2-234 in the basin where the permit is located is provisional and is subject to that final decree. A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where in which the permit would have been denied or modified if the final decree had been available to the department.~~

~~(2) (a) Within 60 days after the issuance of a final decree pursuant to 85-2-234, the department shall serve, by first-class mail, owners of record of existing water rights and provisional permits within the decreed basin with a notice of final decree and opportunity to petition for the reduction, modification, or~~

1 revocation of a provisional permit located in the decreed basin.

2 (b) The department shall also provide notice to other interested persons who request service of the
3 notice of final decree from the department.

4 (c) For basins in which a final decree was issued prior to January 1, 2026, the department shall
5 provide notice by January 31, 2026, in accordance with subsections (2)(a) and (2)(b).

6 (3) (a) An owner of an existing water right in the decreed basin may file a correct and complete
7 petition to reduce, modify, or revoke a provisional permit issued prior to the final decree in the subject basin.
8 Within 180 days of issuance of the notice required under subsection (2), the petition must be:

9 (i) made on a form prescribed by the department;

10 (ii) filed with the department; and

11 (iii) served by first-class mail on all owners of record of the provisional permit.

12 (b) The department shall notify the petitioner of any defects in a petition within 60 days of the close
13 of the petition period described in subsection (3)(a). A petition that is not corrected and completed within 30
14 days of the notice of the defects is terminated. If the department does not notify the petitioner of any defects
15 within 60 days, the petition must be treated as correct and complete.

16 (c) The department shall provide notice of a correct and complete petition to the petitioner and
17 each owner of record of the provisional permit identified in the petition by first-class mail. Within 60 days of the
18 notice, the owner of a provisional permit identified in a petition may file a response to the petition with the
19 department and serve the response on the petitioner by first-class mail.

20 (d) The petitioner shall prove by a preponderance of the evidence that:

21 (i) reduction, modification, or revocation of the provisional permit is necessary to protect the
22 petitioner's existing water right determined in the final decree;

23 (ii) the provisional permit would have been denied or modified if the final decree had been
24 available to the department; and

25 (iii) based on the findings of the final decree, water could not be considered legally available at the
26 time of issuance of the permit.

27 (e) Within 120 days of the close of the 60-day response period provided in subsection (3)(c), the
28 department shall deny the petition or propose to reduce, modify, or revoke the provisional permit based on the

1 information in the petition, the response, the final decree, the records of the department, and other evidence
2 submitted to the department. The department shall consider whether, based on the final decree, unappropriated
3 waters or legally available water existed at the time the provisional permit was issued.

4 (i) If the department proposes to reduce, modify, or revoke a provisional permit, the department
5 shall provide the owner of the provisional permit with an opportunity to show cause why the department should
6 not take the proposed action. If the owner of the provisional permit fails to show sufficient cause, the
7 department shall reduce, modify, or revoke the provisional permit in accordance with the department's findings
8 and conclusions.

9 (ii) A department determination to deny a petition is final.

10 (4) If no petition to reduce, modify, or revoke a provisional permit is filed pursuant to subsection
11 (3), the department shall issue a certificate of water right in accordance with 85-2-315."

12
13 **Section 2.** Section 85-2-315, MCA, is amended to read:

14 **"85-2-315. Certificate of water right. (1) (a) ~~Upon~~ On** actual application of water to the proposed
15 beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been
16 completed. The notification must contain a certified statement by a person with experience in the design,
17 construction, or operation of appropriation works describing how the appropriation was completed. The
18 department shall review the certified statement and may ~~then~~ inspect the appropriation, ~~and if it determines that~~
19 ~~the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a~~
20 ~~certificate of water right to verify whether the appropriation was completed in substantial accordance with the~~
21 ~~terms of the permit, including any reduction or modification pursuant to 85-2-313. The original of the certificate~~
22 ~~shall be sent to the permittee, and a duplicate shall be kept in the office of the department in Helena.~~

23 (b) If the department determines that the appropriation has been completed in substantial
24 accordance with the terms, conditions, restrictions, and limitations of the permit approval and any reduction or
25 modification pursuant to 85-2-313, the department shall issue a certificate of water right for the permit.

26 (c) If the department determines that the appropriation was not completed in substantial
27 accordance with the terms, conditions, restrictions, and limitations of the permit approval, including any
28 reduction or modification pursuant to 85-2-313, the department may, after notice, require the permittee to show

1 cause why the permit should not be modified or revoked pursuant to 85-2-314.

2 (2) After a final decree is issued in a basin pursuant to 85-2-234, the department shall issue a
3 certificate of water right for a change in appropriation right that is verified or modified pursuant to 85-2-402(9)
4 and (10).

5 (3) The original of a certificate of water right must be sent to the owner of the permit or change in
6 appropriation right and a duplicate must be maintained in the department's centralized database."

7

8 **Section 3.** Section 85-2-402, MCA, is amended to read:

9 **"85-2-402. Changes in appropriation rights -- definition.** (1) (a) The right to make a change in
10 appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water
11 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there
12 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect
13 prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in
14 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an
15 appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall
16 submit a correct and complete application.

17 (b) If an application involves a change in a point of diversion, conveyance, or place of use located
18 on national forest system lands, the application is not correct and complete until the applicant has submitted
19 proof to the department of any written special use authorization required by federal law for the proposed
20 change in occupancy, use, or traverse of national forest system lands for the purpose of diversion,
21 impoundment, storage, transportation, withdrawal, use, or distribution of water.

22 (2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable,
23 subject to subsection (17), the department shall approve a change in appropriation right if the appropriator
24 proves by a preponderance of evidence that the following criteria are met:

25 (a) The proposed change in appropriation right will not adversely affect the use of the existing
26 water rights of other persons or other perfected or planned uses or developments for which a permit or
27 certificate has been issued or for which a state water reservation has been issued under part 3. For purposes of
28 this section, adverse effects analysis is specific to the proposed change in appropriation right and a

1 determination that water is not legally available pursuant to 85-2-311 does not necessarily mean that an
2 adverse effect will occur.

3 (b) The proposed means of diversion, construction, and operation of the appropriation works are
4 adequate, except for:

5 (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;

6 (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

7 (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

8 (c) The proposed use of water is a beneficial use.

9 (d) The applicant has a possessory interest, or the written consent of the person with the
10 possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change
11 involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any
12 written special use authorization required by federal law to occupy, use, or traverse national forest system lands
13 for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

14 This subsection (2)(d) does not apply to:

15 (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;

16 (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

17 (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

18 (e) If the change in appropriation right involves salvaged water, the proposed water-saving
19 methods will salvage at least the amount of water asserted by the applicant.

20 (f) The water quality of an appropriator will not be adversely affected.

21 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in
22 accordance with Title 75, chapter 5, part 4, will not be adversely affected.

23 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been
24 met only if a valid objection is filed. A valid objection must contain substantial credible information establishing
25 to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

26 (4) The department may not approve a change in purpose of use or place of use of an
27 appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless
28 the appropriator proves by a preponderance of evidence that:

1 (a) the criteria in subsection (2) are met; and

2 (b) the proposed change in appropriation right is a reasonable use. A finding of reasonable use
3 must be based on a consideration of:

4 (i) the existing legal demands of water rights on the state water supply, as well as projected legal
5 demands of water rights for future beneficial purposes, including municipal water supplies, irrigation systems,
6 and minimum streamflows for the protection of existing water rights and aquatic life;

7 (ii) the benefits to the applicant and the state;

8 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

9 (iv) the availability and feasibility of using low-quality water for the purpose for which application
10 has been made;

11 (v) the effects on private property rights by any creation of or contribution to saline seep; and

12 (vi) the probable significant adverse environmental impacts of the proposed use of water as
13 determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

14 (5) The department may not approve a change in purpose of use or place of use for a diversion
15 that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being
16 consumed unless:

17 (a) the applicant proves by clear and convincing evidence and the department finds that the
18 criteria in subsections (2) and (4) are met; and

19 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department
20 then petitions the legislature and the legislature affirms the decision of the department after one or more public
21 hearings.

22 (6) The state of Montana has long recognized the importance of conserving its public waters and
23 the necessity to maintain adequate water supplies for the state's water requirements, including requirements for
24 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in
25 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes
26 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
27 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before
28 out-of-state use may occur:

1 (a) The department and, if applicable, the legislature may not approve a change in appropriation
2 right for the withdrawal and transportation of appropriated water for use outside the state unless the
3 appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or
4 more public hearings that:

5 (i) depending on the volume of water diverted or consumed, the applicable criteria and
6 procedures of subsection (2) or (4) are met;

7 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

8 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the
9 citizens of Montana.

10 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
11 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature
12 shall consider the following factors:

13 (i) whether there are present or projected water shortages within the state of Montana;

14 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
15 transported to alleviate water shortages within the state of Montana;

16 (iii) the supply and sources of water available to the applicant in the state where the applicant
17 intends to use the water; and

18 (iv) the existing legal demands of water rights placed on the applicant's supply in the state where
19 the applicant intends to use the water.

20 (c) When applying for a change in appropriation right to withdraw and transport water for use
21 outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the
22 appropriation and use of water.

23 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of
24 water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed
25 change in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance
26 with 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall
27 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it
28 determines that the proposed change in appropriation right might adversely affect the rights of other persons.

(8) The department or the legislature, if applicable, may approve a change in appropriation right subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change in appropriation right. The department may extend time limits specified in the change in appropriation right approval under the applicable criteria and procedures of 85-2-312.

(9) ~~Upon~~On actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed. The department shall review the certified statement and may inspect the appropriation to verify whether the appropriation was completed in substantial accordance with the terms of the change in appropriation right.

(a) For a change in appropriation right of an existing water right granted prior to issuance of a final decree in the basin where the existing water right is located, the department shall verify that the elements and conditions of the change in appropriation right are in substantial accordance with the elements of the existing water right as adjudicated in the final decree. If the notice of completion of the change in appropriation of an existing water right was verified prior to issuance of a final decree in the basin where the existing water right is located, the department shall verify that the elements and conditions of the change in appropriation right are in substantial accordance with the elements of the existing water right as adjudicated in the final decree. The department verification is subject to any modifications to the final decree based on an appeal under 85-2-235.

(b) For a change in appropriation right on a provisional permit granted before issuance of a final decree in the basin where the provisional permit is located, the department shall verify that the elements and conditions of the change in appropriation right are in substantial accordance with any modification or reduction of the provisional permit pursuant to 85-2-313. If the notice of completion for a change in appropriation right was verified by the department prior to an order reducing or modifying the provisional permit pursuant to 85-2-313, the department shall verify that the elements and conditions of the change in appropriation right are in substantial accordance with the reduction or modification of the provisional permit.

(10) If a change in appropriation right is not completed as approved by the department or legislature, ~~or~~ if the terms, conditions, restrictions, and limitations of the change in appropriation right approval

1 are not complied with, or if the elements of the change in appropriation right are not in substantial accordance
2 with the elements of the existing water right in the final decree or with the reduction or modification of the
3 provisional permit pursuant to 85-2-313, the department may, after notice and opportunity for hearing, require
4 the appropriator to show cause why the change in appropriation right approval should not be modified or
5 revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change in
6 appropriation right approval.

7 (11) The original of a change in appropriation right approval issued by the department must be sent
8 to the applicant, and a duplicate must be kept in the office of the department in Helena.

9 (12) A person holding an issued permit or change in appropriation right approval that has not been
10 perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an
11 application for change in appropriation right pursuant to this section.

12 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer,
13 agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized
14 change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an
15 agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

16 (14) The department may adopt rules to implement the provisions of this section.

17 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior
18 approval of the department if:

19 (i) the appropriation right is for:

20 (A) ground water outside the boundaries of a controlled ground water area; or

21 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of
22 the rule establishing the controlled ground water area do not restrict a change in appropriation right;

23 (ii) the change in appropriation right is to replace an existing well and the existing well will no
24 longer be used;

25 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than
26 that of the well being replaced and do not exceed:

27 (A) 450 gallons a minute for a municipal well; or

28 (B) 35 gallons a minute and 10 acre-feet a year for all other wells;

1 (iv) the water from the replacement well is appropriated from the same aquifer as the water
2 appropriated from the well being replaced; and

3 (v) a timely, correct and complete notice of replacement well is submitted to the department as
4 provided in subsection (15)(b).

5 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial
6 use, the appropriator shall file a notice of replacement well with the department on a form provided by the
7 department.

8 (ii) (A) The department shall review the notice of replacement well and shall issue an authorization
9 of a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is
10 correct and complete.

11 (B) If the replacement well is located on national forest system lands, the notice is not correct and
12 complete under this subsection (15) until the appropriator has submitted proof of any written special use
13 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of
14 constructing the replacement well.

15 (iii) The department may not issue an authorization of a change in appropriation right until a correct
16 and complete notice of replacement well has been filed with the department. The department shall return a
17 defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall
18 refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a
19 further time as the department may allow, not to exceed 6 months.

20 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

21 (A) cease appropriation of water from the replacement well pending approval by the department;
22 and

23 (B) submit an application for a change in appropriation right to the department pursuant to
24 subsections (1) through (3).

25 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
26 85-2-404.

27 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
28 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-

1 43-202.

2 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation
3 right that meets the requirements of subsection (15)(a).

4 (16) (a) An appropriator may change an appropriation right without the prior approval of the
5 department for the purpose of constructing a redundant water supply well in a public water supply system, as
6 defined in 75-6-102, if the redundant water supply well:

7 (i) withdraws water from the same ground water source as the original well; and

8 (ii) is required by a state or federal agency.

9 (b) The priority date of the redundant water supply well is the same as the priority date of the
10 original well. Only one well may be used at one time.

11 (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a
12 notice of construction of the well with the department on a form provided by the department. The department
13 may return a defective notice of construction to the appropriator for correction and completion. If the redundant
14 water supply well is located on national forest system lands, the notice is not correct and complete under this
15 subsection until the appropriator has submitted proof of any written special use authorization required by
16 federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the
17 redundant water supply well.

18 (d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that
19 meets the requirements of this subsection (16).

20 (17) The department shall accept and process an application for a change in appropriation right for
21 instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320 and this section and to benefit
22 the fishery resource pursuant to 85-2-436 and this section.

23 (18) (a) An appropriator may change an appropriation right for a replacement point of diversion
24 without the prior approval of the department if:

25 (i) the existing point of diversion is inoperable due to natural causes or deteriorated infrastructure;

26 (ii) there are no other changes to the water right;

27 (iii) the capacity of the diversion is not increased;

28 (iv) there are no points of diversion or intervening water rights between the existing point of

1 diversion and the replacement point of diversion or the appropriator obtains written waivers from all intervening
2 water right holders;

3 (v) the replacement point of diversion is on the same surface water source and is located as close
4 as reasonably practicable to the existing point of diversion;

5 (vi) the replacement point of diversion replaces an existing point of diversion and the existing point
6 of diversion will no longer be used;

7 (vii) the appropriator can show that the existing point of diversion has been used in the 10 years
8 prior to the notice for change of appropriation right for a replacement point of diversion;

9 (viii) the appropriator can show the change will not increase access to water availability, change the
10 method of irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and

11 (ix) a timely, correct and complete notice of replacement point of diversion is submitted to the
12 department as provided in subsection (18)(b).

13 (b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file
14 a notice of replacement point of diversion with the department on a form provided by the department.

15 (ii) The department shall review the notice of replacement point of diversion and shall issue an
16 authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met and
17 the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under
18 subsection (18)(a) have been met. If the department issues an authorization of a change in an appropriation
19 right for a replacement point of diversion, the department shall prepare a notice of the authorization and provide
20 notice of the authorization in the same manner as required in 85-2-307 for applications.

21 (iii) The department may not issue an authorization of a change in appropriation right until a correct
22 and complete notice of replacement point of diversion has been filed with the department. The department shall
23 return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator
24 shall refile a corrected and completed notice of replacement point of diversion within 30 days of notification of
25 defects or within a further time as the department may allow, not to exceed 6 months.

26 (iv) If a notice of replacement point of diversion is not filed and completed within the time allowed or
27 if the department determines the criteria under subsection (18)(a) have not been met, the appropriator shall:

28 (A) cease appropriation of water from the replacement point of diversion pending approval by the

1 department; and

2 (B) submit an application for a change in appropriation right to the department pursuant to
3 subsections (1) through (3).

4 (c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under
5 85-2-404.

6 (d) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation
7 right that meets the requirements of subsection (18)(a).

8 (e) (i) An appropriator may file a correct and complete objection with the department alleging that
9 the change in appropriation right for a replacement point of diversion will adversely affect the use of the existing
10 water rights of other persons or other perfected or planned uses or developments for which a permit or
11 certificate has been issued or for which a state water reservation has been issued under Title 85, chapter 2,
12 part 3.

13 (ii) If the department determines after a contested case hearing between the appropriator and the
14 objector that the rights of other appropriators have been or will be adversely affected, it may revoke the change
15 or make the change subject to terms, conditions, restrictions, or limitations necessary to protect the rights of
16 other appropriators.

17 (iii) The burden of proof to prove lack of adverse effect at the hearing is on the appropriator
18 changing the point of diversion."
19

20 NEW SECTION. **Section 4. Notification to tribal governments.** The secretary of state shall send a
21 copy of [this act] to each federally recognized tribal government in Montana.

22 - END -