

1 HOUSE BILL NO. 36

2 INTRODUCED BY R. LYNCH

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING A CHANGE OF A WATER RIGHT PERMIT VOLUME
6 FOR FAILURE TO COMPLETE APPROPRIATION WITHIN THE PERMIT TIME LIMIT; AMENDING SECTIONS
7 85-2-312 AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

8
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 **Section 1.** Section 85-2-312, MCA, is amended to read:

12 **"85-2-312. Terms of permit.** (1) (a) The department may issue a permit for less than the amount of
13 water requested, but may not issue a permit for more water than is requested or than can be beneficially used
14 without waste for the purpose stated in the application. The department may require modification of plans and
15 specifications for the appropriation or related diversion or construction. The department may issue a permit
16 subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in
17 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be
18 issued subject to existing rights and any final determination of those rights made under this chapter.

19 (b) If the permit is for use of water with a point of diversion, conveyance, or place of use on national
20 forest system lands, the permit is subject to any written special use authorization required by federal law to
21 occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage,
22 transportation, withdrawal, use, or distribution of the water under the permit and any terms, conditions, and
23 limitations related to the use of water contained in any special use authorization required by federal law.

24 (2) The department shall specify in the permit or in any authorized extension of time provided in
25 subsection (3), the time limits for commencement of the appropriation works, completion of construction, and
26 actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall
27 consider the cost and magnitude of the project, the engineering and physical features to be encountered, and,
28 on projects designed for gradual development and gradually increased use of water, the time reasonably
29 necessary for that gradual development and increased use. The department shall issue the permit or authorized
30 extension of time subject to the terms, conditions, restrictions, and limitations it considers necessary to ensure

1 that the work on the appropriation is commenced, conducted, and completed and that the water is actually applied
2 in a timely manner to the beneficial use specified in the permit.

3 (3) The department shall by rule or by condition to a permit establish a process allowing for the extension
4 of the time limits specified in the permit for commencement of the appropriation works, completion of construction,
5 and actual application of water to the proposed beneficial use.

6 (4) (a) If commencement of the appropriation works, completion of construction, or the actual application
7 of water to the proposed beneficial use is not completed within the time limit specified or within an extension of
8 that time limit, the permit ~~is void upon lapse of the time limit~~ must be for the amount of water applied to the
9 proposed beneficial use, not to exceed the amount authorized by the permit EXPIRES.

10 (B) THE DEPARTMENT SHALL REINSTATE AN EXPIRED PERMIT IF THE PERMITTEE FILES A WRITTEN REINSTATEMENT
11 REQUEST AND A PROJECT COMPLETION NOTICE ON FORMS PROVIDED BY THE DEPARTMENT. THE REINSTATEMENT
12 REQUEST AND PROJECT COMPLETION NOTICE MUST ESTABLISH THE AMOUNT OF WATER ACTUALLY APPLIED TO THE
13 PROPOSED BENEFICIAL USE PRIOR TO EXPIRATION OF THE PERMIT. REINSTATEMENT OF AN EXPIRED PERMIT UNDER THIS
14 SUBSECTION (4)(B) MAY NOT EXCEED THE AMOUNT OF WATER ACTUALLY APPLIED TO THE PROPOSED BENEFICIAL USE
15 UNDER THE TERMS OF THE PERMIT PRIOR TO EXPIRATION OF THE PERMIT.

16 (b)(C) The department may SHALL reinstate the full amount of water originally permitted under this section
17 AUTHORIZED BY THE EXPIRED PERMIT, INCLUDING ANY PORTION THAT WAS NOT ACTUALLY APPLIED TO THE PROPOSED
18 BENEFICIAL USE PRIOR TO EXPIRATION OF THE PERMIT, if the permittee:

19 (i) files a written REINSTATEMENT request with the department to reinstate the permit on a form provided
20 by the department;

21 (ii) proves by clear and convincing evidence that the failure to comply with the PERMIT time limit was the
22 result of excusable neglect; and

23 (iii) demonstrates that the requirements for an extension of the time limit as set forth by rule or permit
24 condition are satisfied.

25 (c)(D) A written request to reinstate the full amount of water originally permitted REINSTATEMENT REQUEST
26 FOR AN EXPIRED PERMIT must be filed within 2 years of the expiration of the permit time limit.

27 (E) A PERMIT MUST BE REINSTATED ONCE PURSUANT TO THIS SUBSECTION (4) IF THE CRITERIA IN THIS
28 SUBSECTION (4) HAVE BEEN MET. A REINSTATED PERMIT UNDER SUBSECTION (4)(C) MUST ESTABLISH TIME LIMITS FOR
29 COMMENCEMENT OF THE APPROPRIATION WORKS, COMPLETION OF CONSTRUCTION, AND ACTUAL APPLICATION OF THE
30 WATER TO THE PROPOSED BENEFICIAL USE.

1 ~~(4)~~(5) The original of the permit must be sent to the permittee, and a copy must be kept in the office of
2 the department in Helena. THE DEPARTMENT SHALL RETAIN AN EXPIRED PERMIT IN THE CENTRALIZED RECORD SYSTEM
3 FOR 2 YEARS."

4

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

6 **"85-2-402. Changes in appropriation rights -- definition.** (1) (a) The right to make a change in
7 appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water
8 reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there
9 is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior
10 to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410
11 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right
12 without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and
13 complete application.

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

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

22 (a) The proposed change in appropriation right will not adversely affect the use of the existing water
23 rights of other persons or other perfected or planned uses or developments for which a permit or certificate has
24 been issued or for which a state water reservation has been issued under part 3.

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

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

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

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

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

1 (d) The applicant has a possessory interest, or the written consent of the person with the possessory
2 interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point
3 of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special
4 use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose
5 of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d)
6 does not apply to:

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

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

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

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

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

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

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

18 (4) The department may not approve a change in purpose of use or place of use of an appropriation of
19 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator
20 proves by a preponderance of evidence that:

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

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

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

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

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

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

1 (v) the effects on private property rights by any creation of or contribution to saline seep; and
2 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined
3 by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

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

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

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

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

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

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

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

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

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

- 1 (i) whether there are present or projected water shortages within the state of Montana;
- 2 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
3 transported to alleviate water shortages within the state of Montana;
- 4 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
5 use the water; and
- 6 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
7 water.
- 8 (c) When applying for a change in appropriation right to withdraw and transport water for use outside
9 the state, the applicant shall submit to and comply with the laws of the state of Montana governing the
10 appropriation and use of water.
- 11 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a
12 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change
13 in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance with
14 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall
15 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it
16 determines that the proposed change in appropriation right might adversely affect the rights of other persons.
- 17 (8) The department or the legislature, if applicable, may approve a change in appropriation right subject
18 to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this
19 section, including limitations on the time for completion of the change in appropriation right. The department may
20 extend time limits specified in the change in appropriation right approval under the applicable criteria and
21 procedures of 85-2-312~~(3)~~.
- 22 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the
23 appropriator shall notify the department that the appropriation has been completed. The notification must contain
24 a certified statement by a person with experience in the design, construction, or operation of appropriation works
25 describing how the appropriation was completed.
- 26 (10) If a change in appropriation right is not completed as approved by the department or legislature or
27 if the terms, conditions, restrictions, and limitations of the change in appropriation right approval are not complied
28 with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why
29 the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show
30 sufficient cause, the department may modify or revoke the change in appropriation right approval.

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

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

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

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

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

13 (i) the appropriation right is for:

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

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

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

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

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

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

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

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

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

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

1 and complete.

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

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

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

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

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

15 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
16 85-2-404.

17 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
18 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
19 37-43-202.

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

22 (16) (a) An appropriator may change an appropriation right without the prior approval of the department
23 for the purpose of constructing a redundant water supply well in a public water supply system, as defined in
24 75-6-102, if the redundant water supply well:

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

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

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

29 (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of
30 construction of the well with the department on a form provided by the department. The department may return

1 a defective notice of construction to the appropriator for correction and completion. If the redundant water supply
2 well is located on national forest system lands, the notice is not correct and complete under this subsection until
3 the appropriator has submitted proof of any written special use authorization required by federal law to occupy,
4 use, or traverse national forest system lands for the purpose of constructing the redundant water supply well.

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

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

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

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

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

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

15 (iv) there are no points of diversion or intervening water rights between the existing point of diversion and
16 the replacement point of diversion or the appropriator obtains written waivers from all intervening water right
17 holders;

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

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

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

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

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

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

30 (ii) The department shall review the notice of replacement point of diversion and shall issue an

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

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

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

13 (A) cease appropriation of water from the replacement point of diversion pending approval by the
14 department; and

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

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

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

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

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

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

1

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

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- END -