

1 SENATE BILL NO. 178

2 INTRODUCED BY S. VINTON, B. USHER

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR TEMPORARY LEASES OF A WATER RIGHT;
5 REVISING A DEFINITION; EXTENDING RULEMAKING AUTHORITY; AND AMENDING SECTIONS 85-2-102
6 AND 85-2-404, MCA."

7
8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

9
10 NEW SECTION. Section 1. Temporary lease of appropriation right. (1) Applications to temporarily
11 lease an appropriation right that comply with the requirements of this section are not subject to the provisions of
12 85-2-402, 85-2-407, 85-2-408, 85-2-410, or 85-2-436. After obtaining approval pursuant to this section, an
13 appropriator may temporarily lease an appropriation right.

14 (2) The amount of water leased may not exceed the total consumptive use of the appropriation
15 right. For an irrigation right, the consumptive volume may not exceed 2 acre-feet per acre irrigated.

16 (3) (a) Each appropriation right leased pursuant to this section:

17 (i) must have been in use within 5 years prior to the application date;

18 (ii) may be leased only during the period of diversion for the appropriation right;

19 (iii) may not be leased for more than 5 years one time during any consecutive 10-year period; and

20 (iv) may not be leased for more than 20 days a year.

21 (b) The volume of water leased may not exceed 2,000 acre-feet a year.

22 (c) The point of diversion for the appropriation right may not be changed.

23 (4) An appropriation right may not be used on the place of use associated with a leased
24 appropriation right during the term of the lease.

25 (5) Storage may be added to the leased appropriation right at the point of diversion of the original
26 place of use.

27 (6) This section does not apply to change in an appropriation right that would result in leased water
28 being transported outside Montana. Proposed out-of-state uses are subject to the provisions of 85-2-402.

(7) Water leased pursuant to this section must be measured at the point of diversion by a meter approved by the department. The appropriator shall report the amount of water measured at the end of the year in which the lease occurred or upon request of the department.

(8) An applicant proposing to lease an appropriation right pursuant to this section shall submit an application on a form provided by the department and a fee as established by rule. The application must include:

- (a) the name and address of each lessee;
- (b) the names of all owners of each appropriation right;
- (c) the number of each appropriation right;
- (d) the proposed use and the place of use for the leased water;
- (e) the source of water to be appropriated;
- (f) the start and end dates of the proposed lease;
- (g) the flow rate of the proposed diversion and the volume of water to be used during the lease;
- (h) evidence that the appropriation right has been used within the last 5 years; and
- (i) an analysis of potential adverse effect and a description of planned actions to mitigate potential adverse effects.

(9) The department shall approve an application within 30 days after receipt if the application meets the requirements of this section.

(10) The lessee shall provide the department with a copy of the executed lease agreement before the leased water is put to use.

(11) Violations of this section are subject to the provisions of 85-2-114 and 85-2-122. This subsection does not limit the remedies available to an appropriator to enjoin or seek damages from the owner of an appropriation right who leased the water or from a lessee.

(12) The department shall report annually to the water policy interim committee provided for in 5-5-231 in accordance with 5-11-210. The report must include the number of leases, the amount of water leased, and the number of irrigated acres taken out of production.

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

1

2 **Section 2.** Section 85-2-102, MCA, is amended to read:

3 **"85-2-102. Definitions.** Unless the context requires otherwise, in this chapter, the following definitions
4 apply:

5 (1) "Appropriate" or "appropriation" means:

6 (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a
7 beneficial use;

8 (b) in the case of a public agency, to reserve water in accordance with 85-2-316;

9 (c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to
10 instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with
11 85-2-436;

12 (d) in the case of the United States department of agriculture, forest service:

13 (i) instream flows and in situ use of water created in 85-20-1401, Article V; or

14 (ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream
15 flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

16 (e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit
17 the fishery resource in accordance with 85-2-408;

18 (f) a use of water for aquifer recharge or mitigation; or

19 (g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

20 (2) "Appropriation right" has the same meaning as "water right" as defined in this section.

21 (3) "Aquifer recharge" means either the controlled subsurface addition of water directly to the
22 aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to
23 offset adverse effects resulting from net depletion of surface water.

24 (4) "Aquifer storage and recovery project" means a project involving the use of an aquifer to
25 temporarily store water through various means, including but not limited to injection, surface spreading and
26 infiltration, drain fields, or another department-approved method. The stored water may be either pumped from
27 the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

28 (5) "Beneficial use", unless otherwise provided, means:

1 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not
2 limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power,
3 and recreational uses;

4 (b) a use of water appropriated by the department for the state water leasing program under 85-2-
5 141 and of water leased under a valid lease issued by the department under 85-2-141;

6 (c) a use of water by the department of fish, wildlife, and parks through a change in an
7 appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource
8 authorized under 85-2-436;

9 (d) a use of water through a temporary change in appropriation right or lease to enhance instream
10 flow to benefit the fishery resource in accordance with 85-2-408;

11 (e) a use of water through a temporary lease of an appropriation right approved by the department
12 pursuant to [section 1];

13 (e)(f) a use of water for aquifer recharge or mitigation; or

14 (f)(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

15 (6) "Certificate" means a certificate of water right issued by the department.

16 (7) (a) "Change in appropriation right" means a change in the place of diversion, the place of use,
17 the purpose of use, or the place of storage.

18 (b) The term does not include a change in water use related to the method of irrigation.

19 (8) "Commission" means the fish and wildlife commission provided for in 2-15-3402.

20 (9) "Correct and complete" means that the information required to be submitted conforms to the
21 standard of substantial credible information and that all of the necessary parts of the form requiring the
22 information have been filled in with the required information for the department to begin evaluating the
23 information.

24 (10) "Declaration" means the declaration of an existing right filed with the department under section
25 8, Chapter 452, Laws of 1973.

26 (11) "Department" means the department of natural resources and conservation provided for in Title
27 2, chapter 15, part 33.

28 (12) "Developed spring" means any point where ground water emerges naturally, that has

1 subsequently been physically altered, and from which ground water flows under natural pressures or is
2 artificially withdrawn.

3 (13) "Existing right" or "existing water right" means a right to the use of water that would be
4 protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian
5 reserved water rights created under federal law and water rights created under state law.

6 (14) "Ground water" means any water that is beneath the ground surface.

7 (15) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption
8 of abandonment under 85-2-226.

9 (16) "Mitigation" means the reallocation of surface water or ground water through a change in
10 appropriation right or other means that does not result in surface water being introduced into an aquifer through
11 aquifer recharge to offset adverse effects resulting from net depletion of surface water.

12 (17) "Municipality" means an incorporated city or town organized and incorporated under Title 7,
13 chapter 2.

14 (18) (a) "National forest system lands" means all lands within Montana that are owned by the United
15 States and administered by the secretary of agriculture through the forest service.

16 (b) The term does not include any lands within the exterior boundaries of national forest system
17 units that are not owned by the United States and administered by the secretary of agriculture through the
18 forest service.

19 (19) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the
20 source of supply and in which substantially all of the water returns without delay to the source of supply,
21 causing little or no disruption in stream conditions.

22 (20) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-
23 2-303 and 85-2-306 through 85-2-314.

24 (21) "Person" means an individual, association, partnership, corporation, state agency, political
25 subdivision, the United States or any agency of the United States, or any other entity.

26 (22) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or
27 district created pursuant to state law or other public body of the state empowered to appropriate water.

28 (b) The term does not mean a private corporation, association, or group.

1 (23) "Salvage" means to make water available for beneficial use from an existing valid appropriation
2 through application of water-saving methods.

3 (24) "State water reservation" means a water right created under state law after July 1, 1973, that
4 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
5 throughout the year or at periods or for defined lengths of time.

6 (25) "Stream depletion zone" means an area where hydrogeologic modeling concludes that as a
7 result of a ground water withdrawal, the surface water would be depleted by a rate equal to at least 30% of the
8 ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35
9 gallons a minute.

10 (26) "Substantial credible information" means probable, believable facts sufficient to support a
11 reasonable legal theory upon which the department should proceed with the action requested by the person
12 providing the information.

13 (27) "Waste" means the unreasonable loss of water through the design or negligent operation of an
14 appropriation or water distribution facility or the application of water to anything but a beneficial use.

15 (28) "Water" means all water of the state, surface and subsurface, regardless of its character or
16 manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage
17 effluent.

18 (29) "Water division" means a drainage basin as defined in 3-7-102.

19 (30) "Water judge" means a judge as provided for in Title 3, chapter 7.

20 (31) "Water master" means a master as provided for in Title 3, chapter 7.

21 (32) "Water right" means the right to appropriate water pursuant to an existing right, a permit, a
22 certificate of water right, a state water reservation, or a compact.

23 (33) "Watercourse" means any naturally occurring stream or river from which water is diverted for
24 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

25 (34) "Well" means any artificial opening or excavation in the ground, however made, by which
26 ground water is sought or can be obtained or through which it flows under natural pressures or is artificially
27 withdrawn."
28

1 **Section 3.** Section 85-2-404, MCA, is amended to read:

2 **"85-2-404. Abandonment of appropriation right.** (1) If an appropriator ceases to use all or a part of
3 an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases
4 using the appropriation right according to its terms and conditions with the intention of not complying with those
5 terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately
6 expire.

7 (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the
8 appropriation right according to its terms and conditions for a period of 10 successive years and there was
9 water available for use, there is a prima facie presumption that the appropriator has abandoned the right for the
10 part not used.

11 (3) If an appropriator ceases to use all or part of an appropriation right in compliance with a
12 candidate conservation agreement initiated pursuant to 50 CFR 17.32 or because the land to which the water is
13 applied to a beneficial use is contracted under a state or federal conservation set-aside program:

14 (a) the set-aside and resulting reduction in use of the appropriation right does not represent an
15 intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the terms
16 and conditions attached to the right; and

17 (b) the period of nonuse that occurs for part or all of the appropriation right as a result of the
18 contract may not create or may not be added to any previous period of nonuse to create a prima facie
19 presumption of abandonment.

20 (4) The lease of an existing right pursuant to 85-2-436, ~~or a temporary change in appropriation~~
21 right pursuant to 85-2-407 or 85-2-408, or a temporary lease of an appropriation right pursuant to [section 1]
22 does not constitute an abandonment or serve as evidence that could be used to establish an abandonment of
23 any part of the right.

24 (5) Subsections (1) and (2) do not apply to existing rights until they have been finally determined in
25 accordance with part 2 of this chapter."
26

27 NEW SECTION. **Section 4. Codification instruction.** [Section 1] is intended to be codified as an
28 integral part of Title 85, chapter 2, part 4, and the provisions of Title 85, chapter 2, part 4, apply to [section 1].

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