

1 SENATE BILL NO. 178
2 INTRODUCED BY B. USHER, S. VINTON
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~~ AND AMENDING SECTIONS 85-
6 2-102 AND 85-2-404, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE."

7

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

9

10 **NEW SECTION. Section 1. Temporary lease of appropriation right -- NOTICE.** (1) Applications to
11 temporarily lease an appropriation right that comply with the requirements of this section are not subject to the
12 provisions of 85-2-402, 85-2-407, 85-2-408, 85-2-410, or 85-2-436. After obtaining approval pursuant to this
13 section, an 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 ~~20-40~~ days a year; AND
21 (v) MAY ONLY BE LEASED FOR A BENEFICIAL USE AS DEFINED IN 85-2-102.

22 (b) The volume AND FLOW RATE of water leased may not exceed ~~2,000 acre feet a year~~ THE
23 APPROPRIATOR'S ORIGINAL WATER APPROPRIATION RIGHT.

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

25 (4) An THE PORTION OF THE ORIGINAL WATER appropriation right THAT HAS BEEN LEASED may not be
26 ~~used on the place of use associated with a leased THE ORIGINAL WATER~~ appropriation right during the term of the
27 ~~lease~~ The use of an appropriation right on a place of use associated with leased water is prohibited during any

Amendment - 1st Reading/2nd House-blue - Requested by: Wylie Galt - (H) Natural Resources

- 2025

69th Legislature 2025

Drafter: Jason Mohr

SB0178.002.002

1 year that leased water is put to beneficial use.

2 (5) Storage may be TEMPORARILY added to the leased appropriation right at the point of diversion
3 of the original place of use DURING THE TERM OF THE LEASED APPROPRIATION RIGHT IF THE WATER IS DIVERTED AT
4 THE ORIGINAL POINT OF DIVERSION AND SUBSEQUENTLY PUT TO A BENEFICIAL USE.

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

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

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

13 (a) the name and address of each lessee;
14 (b) the names of all owners of each appropriation right;
15 (c) the number of each appropriation right;
16 (d) the proposed use and the place of use for the leased water;
17 (e) the source of water to be appropriated;
18 (f) the start and end dates of the proposed lease;
19 (g) the flow rate of the proposed diversion and the volume of water to be used during the lease;
20 (h) evidence that the appropriation right has been used within the last 5 years; and
21 (i) an analysis A STATEMENT of potential adverse effect and a description of planned actions to
22 mitigate potential adverse effects THAT, IN AGGREGATE, DEMONSTRATE NO ADVERSE EFFECT; AND
23 (j) A COPY OF THE EXECUTED LEASE AGREEMENT; and
24 (k) a description of how the existing beneficial use of the appropriation right would cease at the
25 place of use during the lease period, including the number and location of acres to be removed from irrigation, if
26 applicable.
27 (9) The IF AN APPLICATION MEETS THE REQUIREMENTS SET FORTH IN SUBSECTION (8), THE department

Amendment - 1st Reading/2nd House-blue - Requested by: Wylie Galt - (H) Natural Resources

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1 shall approve an THE application within 30 days after receipt if the application meets the requirements of this
2 section Within 10 days of receipt of an application, the department shall provide written notice to potentially
3 affected appropriators identified by the department that are proximate to the point of diversion.

4 (10) (a) The lessee shall provide the department with a copy of the executed lease agreement
5 before the leased water is put to use THE DEPARTMENT SHALL PROVIDE WRITTEN NOTICE WITHIN 30 DAYS OF THE
6 APPROVAL OF THE TEMPORARY LEASE OF APPROPRIATION RIGHT BY CERTIFIED MAIL TO EACH PERSON KNOWN FROM AN
7 EXAMINATION OF THE DEPARTMENT'S RECORDS TO BE A WATER RIGHT HOLDER WITH A DIVERSION ON THE SAME SOURCE
8 AS THE TEMPORARY LEASE. Within 30 days of receipt of an application, the department shall

9 (i) determine whether the application is correct and complete;
10 (ii) evaluate whether the application meets the requirements of subsections (2), (3), and (8); and
11 (iii) approve or deny the application.

12 (b) The department may approve an application with conditions.

13 (c) Leased water may not be used until the department approves an application.

14 (11) (a) THE DEPARTMENT MAY TERMINATE A TEMPORARY LEASE OF APPROPRIATION RIGHT IF THE APPLICANT
15 VIOLATES THE TERMS OF THE EXECUTED LEASE AGREEMENT PROVIDED TO THE DEPARTMENT UNDER THIS SECTION For a
16 period of 30 days from a date an application is authorized pursuant to subsection (10), the department shall
17 accept correct and complete objections to a proposed lease from a person whose property, water rights, or
18 interests would be adversely affected by the proposed appropriation. The objection must be made on a form
19 provided by the department.

20 (b) Within 5 business days of receipt of a correct and complete objection, the department shall
21 determine whether the objection is valid. A valid objection must contain facts indicating that the rights of other
22 appropriators would be adversely affected by the lease of the appropriation right. If the department determines
23 that an objection is valid, the authorization of the lease is suspended and no water may be put to beneficial use
24 pursuant to the lease.

25 (c) (i) The owner of an appropriation right whose authorization is suspended under subsection
26 (11)(b) may request a hearing on the objection pursuant to the informal proceedings provided for in 2-4-604
27 within 15 days of notice of the suspension. At the hearing, the owner of the appropriation right has the burden

1 of proof to prove lack of adverse effects.

2 (ii) If the owner proves by a preponderance of the evidence that the water rights of other
3 appropriators will not be adversely affected by the lease, the department shall issue an order reinstating the
4 authorization for the beneficial use of the leased appropriation right.

5 (iii) If the department determines that the water rights of other appropriators have been or will be
6 adversely affected by the lease, the department may revoke the authorization or modify its approval with
7 necessary terms, conditions, restrictions, or limitations.

8 (d) A person who purposely, with malicious intent, causes the suspension of a temporary lease
9 pursuant to this section through an objection found invalid and frivolous is, upon conviction, guilty of a
10 misdemeanor and shall be fined an amount not to exceed \$500.

11 (11)(12)Violations of this section are subject to the provisions of 85-2-114 and 85-2-122. This
12 subsection does not limit the remedies available to an appropriator to enjoin or seek damages from the owner
13 of an appropriation right who leased the water or from a lessee.

14 (12)(13)The department shall report annually to the water policy interim committee provided for in 5-5-
15 231 in accordance with 5-11-210. The report must include the number of leases, the amount of water leased,
16 and the number of irrigated acres taken out of production.

17 (13)(14)Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior
18 boundaries of the Flathead Indian reservation.

19

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

21 **"85-2-102. Definitions.** Unless the context requires otherwise, in this chapter, the following definitions
22 apply:

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

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

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

27 (c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to

1 expire.

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

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

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

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

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

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

21

22 **NEW SECTION. Section 4. Codification instruction.** [Section 1] is intended to be codified as an
23 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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25 **NEW SECTION. Section 5. Effective date.** [THIS ACT] IS EFFECTIVE JANUARY 1, 2026.

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- END -