

SENATE BILL NO. 178

INTRODUCED BY B. USHER, S. VINTON

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR TEMPORARY LEASES OF A WATER RIGHT;
REVISING A DEFINITION; EXTENDING RULEMAKING AUTHORITY; ~~AND~~ AND AMENDING SECTIONS 85-
2-102 AND 85-2-404, MCA; ~~AND PROVIDING A DELAYED EFFECTIVE DATE.~~"

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

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

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

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

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

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

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

(iv) may not be leased for more than ~~20-40~~ days a year; AND

(v) MAY ONLY BE LEASED FOR A BENEFICIAL USE AS DEFINED IN 85-2-102.

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

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

(4) ~~An THE PORTION OF THE ORIGINAL WATER appropriation right THAT HAS BEEN LEASED may not be~~
~~used on the place of use associated with a leased THE ORIGINAL WATER appropriation right during the term of the~~
~~lease~~ THE USE OF AN APPROPRIATION RIGHT ON A PLACE OF USE ASSOCIATED WITH LEASED WATER IS PROHIBITED
DURING ANY YEAR THAT LEASED WATER IS PUT TO BENEFICIAL USE.

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

(6) This section does not apply to change in an appropriation right that would result in leased water 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~~ A STATEMENT of potential adverse effect and a description of planned actions to mitigate potential adverse effects THAT, IN AGGREGATE, DEMONSTRATE NO ADVERSE EFFECT; AND
- (j) A COPY OF THE EXECUTED LEASE AGREEMENT; AND
- (k) A DESCRIPTION OF HOW THE EXISTING BENEFICIAL USE OF THE APPROPRIATION RIGHT WOULD CEASE AT THE PLACE OF USE DURING THE LEASE PERIOD, INCLUDING THE NUMBER AND LOCATION OF ACRES TO BE REMOVED FROM IRRIGATION, IF APPLICABLE.

(9) ~~The IF AN APPLICATION MEETS THE REQUIREMENTS SET FORTH IN SUBSECTION (8), THE department shall approve an THE application within 30 days after receipt if the application meets the requirements of this section~~ WITHIN 10 DAYS OF RECEIPT OF AN APPLICATION, THE DEPARTMENT SHALL PROVIDE WRITTEN NOTICE TO

POTENTIALLY AFFECTED APPROPRIATORS IDENTIFIED BY THE DEPARTMENT THAT ARE PROXIMATE TO THE POINT OF DIVERSION.

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

(I) DETERMINE WHETHER THE APPLICATION IS CORRECT AND COMPLETE;

(II) EVALUATE WHETHER THE APPLICATION MEETS THE REQUIREMENTS OF SUBSECTIONS (2), (3), AND (8);

AND

(III) APPROVE OR DENY THE APPLICATION.

(B) THE DEPARTMENT MAY APPROVE AN APPLICATION WITH CONDITIONS.

(C) LEASED WATER MAY NOT BE USED UNTIL THE DEPARTMENT APPROVES AN APPLICATION.

(11) (A) THE DEPARTMENT MAY TERMINATE A TEMPORARY LEASE OF APPROPRIATION RIGHT IF THE APPLICANT VIOLATES THE TERMS OF THE EXECUTED LEASE AGREEMENT PROVIDED TO THE DEPARTMENT UNDER THIS SECTION FOR A PERIOD OF 30 DAYS FROM A DATE AN APPLICATION IS AUTHORIZED PURSUANT TO SUBSECTION (10), THE DEPARTMENT SHALL ACCEPT CORRECT AND COMPLETE OBJECTIONS TO A PROPOSED LEASE FROM A PERSON WHOSE PROPERTY, WATER RIGHTS, OR INTERESTS WOULD BE ADVERSELY AFFECTED BY THE PROPOSED APPROPRIATION. THE OBJECTION MUST BE MADE ON A FORM PROVIDED BY THE DEPARTMENT.

(B) WITHIN 5 BUSINESS DAYS OF RECEIPT OF A CORRECT AND COMPLETE OBJECTION, THE DEPARTMENT SHALL DETERMINE WHETHER THE OBJECTION IS VALID. A VALID OBJECTION MUST CONTAIN FACTS INDICATING THAT THE RIGHTS OF OTHER APPROPRIATORS WOULD BE ADVERSELY AFFECTED BY THE LEASE OF THE APPROPRIATION RIGHT. IF THE DEPARTMENT DETERMINES THAT AN OBJECTION IS VALID, THE AUTHORIZATION OF THE LEASE IS SUSPENDED AND NO WATER MAY BE PUT TO BENEFICIAL USE PURSUANT TO THE LEASE.

(C) (I) THE OWNER OF AN APPROPRIATION RIGHT WHOSE AUTHORIZATION IS SUSPENDED UNDER SUBSECTION (11)(B) MAY REQUEST A HEARING ON THE OBJECTION PURSUANT TO THE INFORMAL PROCEEDINGS PROVIDED FOR IN 2-4-604 WITHIN 15 DAYS OF NOTICE OF THE SUSPENSION. AT THE HEARING, THE OWNER OF THE APPROPRIATION RIGHT HAS THE BURDEN OF PROOF TO PROVE LACK OF ADVERSE EFFECTS.

(II) IF THE OWNER PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT THE WATER RIGHTS OF OTHER APPROPRIATORS WILL NOT BE ADVERSELY AFFECTED BY THE LEASE, THE DEPARTMENT SHALL ISSUE AN ORDER REINSTATING THE AUTHORIZATION FOR THE BENEFICIAL USE OF THE LEASED APPROPRIATION RIGHT.

(III) IF THE DEPARTMENT DETERMINES THAT THE WATER RIGHTS OF OTHER APPROPRIATORS HAVE BEEN OR WILL BE ADVERSELY AFFECTED BY THE LEASE, THE DEPARTMENT MAY REVOKE THE AUTHORIZATION OR MODIFY ITS APPROVAL WITH NECESSARY TERMS, CONDITIONS, RESTRICTIONS, OR LIMITATIONS.

(D) A PERSON WHO PURPOSELY, WITH MALICIOUS INTENT, CAUSES THE SUSPENSION OF A TEMPORARY LEASE PURSUANT TO THIS SECTION THROUGH AN OBJECTION FOUND INVALID AND FRIVOLOUS IS, UPON CONVICTION, GUILTY OF A MISDEMEANOR AND SHALL BE FINED AN AMOUNT NOT TO EXCEED \$500.

~~(11)~~(12) 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)~~(13) 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)~~(14) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation.

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

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

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

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

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

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

- 1 (d) in the case of the United States department of agriculture, forest service:
- 2 (i) instream flows and in situ use of water created in 85-20-1401, Article V; or
- 3 (ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream
- 4 flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;
- 5 (e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit
- 6 the fishery resource in accordance with 85-2-408;
- 7 (f) a use of water for aquifer recharge or mitigation; or
- 8 (g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.
- 9 (2) "Appropriation right" has the same meaning as "water right" as defined in this section.
- 10 (3) "Aquifer recharge" means either the controlled subsurface addition of water directly to the
- 11 aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to
- 12 offset adverse effects resulting from net depletion of surface water.
- 13 (4) "Aquifer storage and recovery project" means a project involving the use of an aquifer to
- 14 temporarily store water through various means, including but not limited to injection, surface spreading and
- 15 infiltration, drain fields, or another department-approved method. The stored water may be either pumped from
- 16 the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.
- 17 (5) "Beneficial use", unless otherwise provided, means:
- 18 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not
- 19 limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power,
- 20 and recreational uses;
- 21 (b) a use of water appropriated by the department for the state water leasing program under 85-2-
- 22 141 and of water leased under a valid lease issued by the department under 85-2-141;
- 23 (c) a use of water by the department of fish, wildlife, and parks through a change in an
- 24 appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource
- 25 authorized under 85-2-436;
- 26 (d) a use of water through a temporary change in appropriation right or lease to enhance instream
- 27 flow to benefit the fishery resource in accordance with 85-2-408;
- 28 (e) a use of water through a temporary lease of an appropriation right approved by the department

1 pursuant to [section 1];

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

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

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

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

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

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

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

13 (10) "Declaration" means the declaration of an existing right filed with the department under section
14 8, Chapter 452, Laws of 1973.

15 (11) "Department" means the department of natural resources and conservation provided for in Title
16 2, chapter 15, part 33.

17 (12) "Developed spring" means any point where ground water emerges naturally, that has
18 subsequently been physically altered, and from which ground water flows under natural pressures or is
19 artificially withdrawn.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 providing the information.

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

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

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

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

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

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

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

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

17

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

19 **"85-2-404. Abandonment of appropriation right.** (1) If an appropriator ceases to use all or a part of
20 an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases
21 using the appropriation right according to its terms and conditions with the intention of not complying with those
22 terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately
23 expire.

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

28 (3) If an appropriator ceases to use all or part of an appropriation right in compliance with a

candidate conservation agreement initiated pursuant to 50 CFR 17.32 or because the land to which the water is applied to a beneficial use is contracted under a state or federal conservation set-aside program:

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

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

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

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

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

NEW SECTION. SECTION 5. EFFECTIVE DATE. [THIS ACT] IS EFFECTIVE JANUARY 1, 2026.

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