

HOUSE BILL NO. 45

INTRODUCED BY Z. BROWN

BY REQUEST OF THE WATER POLICY INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING CRITERIA FOR A WATER RIGHTS PERMIT OR CHANGE RELYING ON A WAIVER OF ADVERSE EFFECTS; AND AMENDING SECTION 85-2-311, MCA."

WHEREAS, the determination of legal availability is a critical analysis when determining if there is sufficient water for new beneficial use; and

WHEREAS, the determination of legal availability is a test that is conducted independent of the test to determine if a new use will cause adverse effect; and

WHEREAS, the analysis for determining legal availability is provided in section 85-2-311(1)(a)(ii), MCA; and

WHEREAS, it is redundant to further state that the department must conduct a legal availability analysis in section 85-2-311(9), MCA; and

WHEREAS, the Montana Legislature finds that removing the statement that the department conduct a legal availability analysis pursuant to section 85-2-311(9), MCA, simplifies and clarifies the requirement for legal availability analysis pursuant to section 85-2-311(1)(a)(ii), MCA.

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

Section 1. Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) A permit may be issued under this part prior to the adjudication of existing water rights in a source of supply. In a permit proceeding under this part, there is no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the department may not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the



1 applicant seeks to appropriate; and

2 (ii) water can reasonably be considered legally available during the period in which the applicant seeks
3 to appropriate, in the amount requested, based on the records of the department and other evidence provided
4 to the department. Legal availability is determined using an analysis involving the following factors:

5 (A) identification of physical water availability;

6 (B) identification of existing legal demands on the source of supply throughout the area of potential
7 impact by the proposed use; and

8 (C) analysis of the evidence on physical water availability and the existing legal demands, including but
9 not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal
10 demands on the supply of water.

11 (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state
12 water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined
13 based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the
14 applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. [The
15 applicant is not required to prove a lack of adverse effect for any water right identified in a written consent to
16 approval filed pursuant to subsection (9) in connection with a permit application.]

17 (c) the proposed means of diversion, construction, and operation of the appropriation works are
18 adequate;

19 (d) the proposed use of water is a beneficial use;

20 (e) the applicant has a possessory interest or the written consent of the person with the possessory
21 interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of
22 diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use
23 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of
24 diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

25 (f) the water quality of a prior appropriator will not be adversely affected;

26 (g) the proposed use will be substantially in accordance with the classification of water set for the source
27 of supply pursuant to 75-5-301(1); and

28 (h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance
29 with Title 75, chapter 5, part 4, will not be adversely affected.

30 (2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met

1 only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the
2 satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met.
3 For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality
4 district established under Title 7, chapter 13, part 45, may file a valid objection.

5 (3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a
6 year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence
7 that:

8 (a) the criteria in subsection (1) are met;

9 (b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the
10 following:

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

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

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

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

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

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

21 (4) (a) The state of Montana has long recognized the importance of conserving its public waters and the
22 necessity to maintain adequate water supplies for the state's water requirements, including requirements for
23 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in
24 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes
25 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
26 with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (4) must be
27 met before out-of-state use may occur.

28 (b) The department may not issue a permit for the appropriation of water for withdrawal and
29 transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

30 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of

1 subsection (1) or (3) are met;

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

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

5 (c) In determining whether the applicant has proved by clear and convincing evidence that the
6 requirements of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following factors:

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

8 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water
9 shortages within the state of Montana;

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

12 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
13 water.

14 (d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the
15 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and
16 use of water.

17 (5) Subject to 85-2-360, to meet the preponderance of evidence standard in this section, the applicant,
18 in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit
19 hydrologic or other evidence, including but not limited to water supply data, field reports, and other information
20 developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources
21 conservation service and other specific field studies.

22 (6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,
23 impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or
24 employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation,
25 diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally
26 or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or
27 control waters within the boundaries of this state except in accordance with this section.

28 (7) The department may adopt rules to implement the provisions of this section.

29 (8) For an application for ground water in a basin closed pursuant to 85-2-319, 85-2-321, 85-2-330,
30 85-2-336, 85-2-341, 85-2-343, or 85-2-344, the applicant shall comply with the provisions of 85-2-360 in addition

1 to the requirements of this section.

2 [(9) The department may not conduct an adverse effects analysis on a water right if the water right holder
3 files a written consent to approval of an application for a permit. ~~However, the department shall determine if water
4 is legally available to satisfy the proposed use.~~] (Bracketed language in subsections (1)(b) and (9) terminates
5 September 30, 2023--sec. 8, Ch. 243, L. 2017.)"

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