

HOUSE BILL NO. 44

INTRODUCED BY Z. BROWN

BY REQUEST OF THE WATER POLICY INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE USE OF ADVERSE EFFECTS ANALYSIS FOR A CHANGE IN WATER RIGHT; AND AMENDING SECTION 85-2-402, MCA."

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

**Section 1.** Section 85-2-402, MCA, is amended to read:

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

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

[(c) The applicant is not required to prove a lack of adverse effect for any water right identified on a written consent to approval filed pursuant to subsection (19) in connection with an application.]

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection[s (1)(c) and] (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has

1 been issued or for which a state water reservation has been issued under part 3. For purposes of this section,  
2 adverse effects analysis is specific to the proposed change in appropriation right and a determination that water  
3 is not legally available pursuant to 85-2-311 does not necessarily mean that an adverse effect will occur.

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

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

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

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

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

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

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

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

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

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

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

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

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

27 (4) The department may not approve a change in purpose of use or place of use of an appropriation of  
28 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator  
29 proves by a preponderance of evidence that:

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

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

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

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

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

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

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

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

13 (5) The department may not approve a change in purpose of use or place of use for a diversion that  
14 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  
15 unless:

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

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

21 (6) 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 following criteria must be met before  
27 out-of-state use may occur:

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

1 hearings that:

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

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

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

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

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

11 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be  
12 transported to alleviate water shortages within the state of Montana;

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

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

17 (c) When applying for a change in appropriation right to withdraw and transport water for use outside  
18 the state, the applicant shall submit to and comply with the laws of the state of Montana governing the  
19 appropriation and use of water.

20 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a  
21 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change  
22 in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance with  
23 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall  
24 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it  
25 determines that the proposed change in appropriation right might adversely affect the rights of other persons[,  
26 except for any right for which a written consent to approval has been filed pursuant to subsection (19) in  
27 connection with the application].

28 (8) The department or the legislature, if applicable, may approve a change in appropriation right subject  
29 to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this  
30 section, including limitations on the time for completion of the change in appropriation right. The department may

1 extend time limits specified in the change in appropriation right approval under the applicable criteria and  
2 procedures of 85-2-312.

3 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the  
4 appropriator shall notify the department that the appropriation has been completed. The notification must contain  
5 a certified statement by a person with experience in the design, construction, or operation of appropriation works  
6 describing how the appropriation was completed.

7 (10) If a change in appropriation right is not completed as approved by the department or legislature or  
8 if the terms, conditions, restrictions, and limitations of the change in appropriation right approval are not complied  
9 with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why  
10 the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show  
11 sufficient cause, the department may modify or revoke the change in appropriation right approval.

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

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

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

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

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

24 (i) the appropriation right is for:

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

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

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

30 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of

1 the well being replaced and do not exceed:

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

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

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

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

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

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

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

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

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

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

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

26 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under  
27 85-2-404.

28 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well  
29 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to  
30 37-43-202.

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

3 (16) (a) An appropriator may change an appropriation right without the prior approval of the department  
4 for the purpose of constructing a redundant water supply well in a public water supply system, as defined in  
5 75-6-102, if the redundant water supply well:

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

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

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

10 (c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of  
11 construction of the well with the department on a form provided by the department. The department may return  
12 a defective notice of construction to the appropriator for correction and completion. If the redundant water supply  
13 well is located on national forest system lands, the notice is not correct and complete under this subsection until  
14 the appropriator has submitted proof of any written special use authorization required by federal law to occupy,  
15 use, or traverse national forest system lands for the purpose of constructing the redundant water supply well.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 (c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under  
29 85-2-404.

30 (d) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right



1 that meets the requirements of subsection (18)(a).

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

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

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

12 [(19) The department may not conduct an adverse effects analysis on a water right if the water right  
13 holder files a written consent to approval of an application for a change in appropriation right.] (Bracketed  
14 language in subsections (1)(c), (2), (7), and (19) terminates September 30, 2023--sec. 8, Ch. 243, L. 2017.)"

15 - END -