

HOUSE BILL NO. 542

INTRODUCED BY GUTHRIE, AKLESTAD, HAYNE, WESTLAKE,
CAMPBELL, COBB, ELLIOTT, WILLIAMS, DEMARS, KOEHNKE

IN THE HOUSE

FEBRUARY 2, 1989

INTRODUCED AND REFERRED TO COMMITTEE
ON NATURAL RESOURCES.

FIRST READING.

ON MOTION BY CHIEF SPONSOR, SENATOR
WILLIAMS AND REPRESENTATIVES HAYNE,
WESTLAKE, CAMPBELL, COBB, ELLIOTT,
DEMARS, AND KOEHNKE ADDED AS SPONSORS.

FEBRUARY 14, 1989

COMMITTEE RECOMMEND BILL
DO PASS AS AMENDED. REPORT ADOPTED.

FEBRUARY 15, 1989

PRINTING REPORT.

FEBRUARY 18, 1989

SECOND READING, DO PASS.

FEBRUARY 20, 1989

ENGROSSING REPORT.

FEBRUARY 21, 1989

THIRD READING, PASSED.
AYES, 95; NOES, 1.

TRANSMITTED TO SENATE.

IN THE SENATE

FEBRUARY 28, 1989

INTRODUCED AND REFERRED TO COMMITTEE
ON AGRICULTURE, LIVESTOCK & IRRIGATION.

FIRST READING.

MARCH 20, 1989

COMMITTEE RECOMMEND BILL BE
CONCURRED IN AS AMENDED. REPORT
ADOPTED.

MARCH 21, 1989

SECOND READING, PASS CONSIDERATION.

MARCH 22, 1989

SECOND READING, CONCURRED IN AS
AMENDED.

MARCH 27, 1989

THIRD READING, CONCURRED IN.
AYES, 34; NOES, 15.

RETURNED TO HOUSE WITH AMENDMENTS.

IN THE HOUSE

MARCH 31, 1989

RECEIVED FROM SENATE.

SECOND READING, AMENDMENTS
CONCURRED IN.

APRIL 1, 1989

THIRD READING, AMENDMENTS
CONCURRED IN.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

1 HOUSE BILL NO. 542
2 INTRODUCED BY Sullivan ARLESTAD
3

4 A BILL FOR AN ACT ENTITLED: "AN ACT CHANGING THE BURDEN OF
5 PROOF FROM SUBSTANTIAL CREDIBLE EVIDENCE TO CLEAR AND
6 CONVINCING EVIDENCE FOR CERTAIN WATER PERMIT CRITERIA IF A
7 VALID OBJECTION TO THE APPLICATION IS FILED; REQUIRING THE
8 APPLICANT TO SUBMIT INDEPENDENT EVIDENCE TO MEET THE CLEAR
9 AND CONVINCING EVIDENCE STANDARD; AMENDING SECTION 85-2-311,
10 MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."
11

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

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

14 "85-2-311. Criteria for issuance of permit. (1) Except
15 as provided in subsections (2) ~~through--(4)~~ and (3), the
16 department shall issue a permit if the applicant proves by
17 substantial credible evidence, or by clear and convincing
18 evidence if a valid objection to the application is filed
19 according to this part, that the following criteria are met:

20 (a) there are unappropriated waters in the source of
21 supply:

22 (i) at times when the water can be put to the use
23 proposed by the applicant;

24 (ii) in the amount the applicant seeks to appropriate;
25 and

1 (iii) throughout the period during which the applicant
2 seeks to appropriate, the amount requested is available;

3 (b) the water rights of a prior appropriator will not
4 be adversely affected;

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

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

8 (e) the proposed use will not interfere unreasonably
9 with other planned uses or developments for which a permit
10 has been issued or for which water has been reserved.

11 (2) The department may not issue a permit for an
12 appropriation of 4,000 or more acre-feet of water a year and
13 5.5 or more cubic feet per second of water unless the
14 applicant proves by clear and convincing evidence that:

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

16 (b) the rights of a prior appropriator will not be
17 adversely affected;

18 (c) the proposed appropriation is a reasonable use.
19 Such a finding shall be based on a consideration of the
20 following:

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

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

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

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

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

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

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

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

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

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

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

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

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

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

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

(iv) the demands placed on the applicant's supply in

1 the state where the applicant intends to use the water.

2 (d) When applying for a permit or a lease to withdraw
3 and transport water for use outside the state, the applicant
4 shall submit to and comply with the laws of the state of
5 Montana governing the appropriation, lease, and use of
6 water.

7 (4) To meet the clear and convincing evidence standard
8 in this section, the applicant shall submit independent
9 hydrologic or other evidence demonstrating that the criteria
10 are met.

11 (5) An appropriation, diversion, impoundment, use,
12 restraint, or attempted appropriation, diversion,
13 impoundment, use, or restraint contrary to the provisions of
14 this section is invalid. No An officer, agent, agency, or
15 employee of the state may not knowingly permit, aid, or
16 assist in any manner such an unauthorized appropriation,
17 diversion, impoundment, use, or other restraint. No A person
18 or corporation may not, directly or indirectly, personally
19 or through an agent, officer, or employee, attempt to
20 appropriate, divert, impound, use, or otherwise restrain or
21 control waters within the boundaries of this state except
22 in accordance with this section."

23 NEW SECTION. Section 2. Extension of authority. Any
24 existing authority to make rules on the subject of the
25 provisions of [this act] is extended to the provisions of

1 [this act].

2 NEW SECTION. Section 3. Effective date. [This act] is
3 effective on passage and approval.

-End-

APPROVED BY COMM. ON
NATURAL RESOURCES

HOUSE BILL NO. 542

INTRODUCED BY GUTHRIE, AKLESTAD, HAYNE, WESTLAKE,
CAMPBELL, COBB, ELLIOTT, WILLIAMS, DEMARS, KOEHNKE

A BILL FOR AN ACT ENTITLED: "AN ACT CHANGING THE BURDEN OF
PROOF FROM SUBSTANTIAL CREDIBLE EVIDENCE TO CLEAR AND
CONVINCING EVIDENCE FOR CERTAIN WATER PERMIT CRITERIA IF A
VALID OBJECTION TO THE APPLICATION IS FILED; REQUIRING THE
AN APPLICANT FOR A WATER USE PERMIT TO SUBMIT INDEPENDENT
EVIDENCE TO MEET THE CLEAR AND CONVINCING SUBSTANTIAL
CREDIBLE EVIDENCE STANDARD; AMENDING SECTION 85-2-311, MCA;
AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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) Except
as provided in subsections (2) through (4) and (3), the
department shall issue a permit if the applicant proves by
substantial credible evidence, ~~or by clear and convincing~~
~~evidence if a valid objection to the application is filed~~
~~according to this part~~, that the following criteria are met:

(a) there are unappropriated waters in the source of
supply;

(i) at times when the water can be put to the use
proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate;
and

(iii) throughout the period during which the applicant
seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not
be adversely affected;

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

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

(e) the proposed use will not interfere unreasonably
with other planned uses or developments for which a permit
has been issued or for which water has been reserved.

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

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

(b) the rights of a prior appropriator will not be
adversely affected;

(c) the proposed appropriation is a reasonable use.
Such a finding shall be based on a consideration of the
following:

(i) the existing demands on the state water supply, as
well as projected demands such as reservations of water for
future beneficial purposes, including municipal water

supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

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

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

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

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

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

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this

subsection (3) must be met before out-of-state use may occur.

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

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

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

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

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

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

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

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

1 the water; and

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

4 (d) When applying for a permit or a lease to withdraw
5 and transport water for use outside the state, the applicant
6 shall submit to and comply with the laws of the state of
7 Montana governing the appropriation, lease, and use of
8 water.

9 (4) To meet the clear--and--convincing SUBSTANTIAL
10 CREDIBLE evidence standard in this section, the applicant
11 shall submit independent hydrologic or other evidence,
12 INCLUDING WATER SUPPLY DATA, FIELD REPORTS, AND OTHER
13 INFORMATION DEVELOPED BY THE DEPARTMENT, THE U.S. GEOLOGICAL
14 SURVEY, OR THE U.S. SOIL CONSERVATION SERVICE AND OTHER
15 SPECIFIC FIELD STUDIES, demonstrating that the criteria are
16 met.

17 (5) An appropriation, diversion, impoundment, use,
18 restraint, or attempted appropriation, diversion,
19 impoundment, use, or restraint contrary to the provisions of
20 this section is invalid. No An officer, agent, agency, or
21 employee of the state may not knowingly permit, aid, or
22 assist in any manner such an unauthorized appropriation,
23 diversion, impoundment, use, or other restraint. No A person
24 or corporation may not, directly or indirectly, personally
25 or through an agent, officer, or employee, attempt to

1 appropriate, divert, impound, use, or otherwise restrain or
2 control waters within the boundaries of this state except
3 in accordance with this section."

4 NEW SECTION. Section 2. Extension of authority. Any
5 existing authority to make rules on the subject of the
6 provisions of [this act] is extended to the provisions of
7 [this act].

8 NEW SECTION. Section 3. Effective date. [This act] is
9 effective on passage and approval.

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AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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) Except
as provided in subsections (2) through (4) and (3), the
department shall issue a permit if the applicant proves by
substantial credible evidence, ~~or by clear and convincing
evidence if a valid objection to the application is filed
according to this part,~~ that the following criteria are met:

(a) there are unappropriated waters in the source of
supply:

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proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate;
and

(iii) throughout the period during which the applicant
seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not
be adversely affected;

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

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with other planned uses or developments for which a permit
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(2) The department may not issue a permit for an
appropriation of 4,000 or more acre-feet of water a year and
5.5 or more cubic feet per second of water unless the
applicant proves by clear and convincing evidence that:

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

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Such a finding shall be based on a consideration of the
following:

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well as projected demands such as reservations of water for
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1 supplies, irrigation systems, and minimum streamflows for
 2 the protection of existing water rights and aquatic life;
 3 (ii) the benefits to the applicant and the state;
 4 (iii) the effects on the quantity and quality of water
 5 for existing beneficial uses in the source of supply;
 6 (iv) the availability and feasibility of using
 7 low-quality water for the purpose for which application has
 8 been made;
 9 (v) the effects on private property rights by any
 10 creation of or contribution to saline seep; and
 11 (vi) the probable significant adverse environmental
 12 impacts of the proposed use of water as determined by the
 13 department pursuant to Title 75, chapter 1, or Title 75,
 14 chapter 20.

15 (3) (a) The state of Montana has long recognized the
 16 importance of conserving its public waters and the necessity
 17 to maintain adequate water supplies for the state's water
 18 requirements, including requirements for reserved water
 19 rights held by the United States for federal reserved lands
 20 and in trust for the various Indian tribes within the
 21 state's boundaries. Although the state of Montana also
 22 recognizes that, under appropriate conditions, the
 23 out-of-state transportation and use of its public waters are
 24 not in conflict with the public welfare of its citizens or
 25 the conservation of its waters, the criteria in this

1 subsection (3) must be met before out-of-state use may
 2 occur.

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

7 (i) depending on the volume of water diverted or
 8 consumed, the applicable criteria and procedures of
 9 subsection (1) or (2) are met;

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

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

15 (c) In determining whether the applicant has proved by
 16 clear and convincing evidence that the requirements of
 17 subsections (3)(b)(ii) and (3)(b)(iii) are met, the
 18 department shall consider the following factors:

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

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

24 (iii) the supply and sources of water available to the
 25 applicant in the state where the applicant intends to use

1 the water; and

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

4 (d) When applying for a permit or a lease to withdraw
5 and transport water for use outside the state, the applicant
6 shall submit to and comply with the laws of the state of
7 Montana governing the appropriation, lease, and use of
8 water.

9 (4) To meet the ~~clear--and--convincing~~ SUBSTANTIAL
10 CREDIBLE evidence standard in this section, the applicant
11 shall submit independent hydrologic or other evidence,
12 INCLUDING WATER SUPPLY DATA, FIELD REPORTS, AND OTHER
13 INFORMATION DEVELOPED BY THE DEPARTMENT, THE U.S. GEOLOGICAL
14 SURVEY, OR THE U.S. SOIL CONSERVATION SERVICE AND OTHER
15 SPECIFIC FIELD STUDIES, demonstrating that the criteria are
16 met.

17 (5) An appropriation, diversion, impoundment, use,
18 restraint, or attempted appropriation, diversion,
19 impoundment, use, or restraint contrary to the provisions of
20 this section is invalid. No An officer, agent, agency, or
21 employee of the state may not knowingly permit, aid, or
22 assist in any manner such an unauthorized appropriation,
23 diversion, impoundment, use, or other restraint. No A person
24 or corporation may not, directly or indirectly, personally
25 or through an agent, officer, or employee, attempt to

1 appropriate, divert, impound, use, or otherwise restrain or
2 control waters within the boundaries of this state except
3 in accordance with this section."

4 NEW SECTION. **Section 2.** Extension of authority. Any
5 existing authority to make rules on the subject of the
6 provisions of [this act] is extended to the provisions of
7 [this act].

8 NEW SECTION. **Section 3.** Effective date. [This act] is
9 effective on passage and approval.

-End-

SENATE STANDING COMMITTEE REPORT

March 20, 1989

MR. PRESIDENT:

We, your committee on Agriculture, Livestock, and Irrigation, having had under consideration HB 542 (third reading copy -- blue), respectfully report that HB 542 be amended and as so amended be concurred in:

Sponsor: Guthrie (Aklestad);

1. Title, line 8.

Following: "~~FILED,~~"

Insert: "CHANGING THE BURDEN OF PROOF FROM SUBSTANTIAL CREDIBLE EVIDENCE TO CLEAR AND CONVINCING EVIDENCE FOR CERTAIN WATER PERMIT CRITERIA IF A VALID OBJECTION TO THE APPLICATION IS FILED;"

2. Title, lines 10 and 11.

Following: "~~CONVINCING~~"

Strike: "SUBSTANTIAL CREDIBLE"

Insert: "CLEAR AND CONVINCING"

3. Page 1, line 21.

Following: "~~part,~~"

Insert: ", or by clear and convincing evidence if a valid objection to the application is filed according to this part,"

4. Page 5, lines 9 and 10.

Following: "~~convincing~~" on line 9

Strike: "SUBSTANTIAL CREDIBLE"

Insert: "clear and convincing"

AND AS AMENDED BE CONCURRED IN

Signed: 

Thomas A. Beck, Chairman

HB 542

SENATE

SENATE COMMITTEE OF THE WHOLE AMENDMENT

March 22, 1989 9:58 am

Mr. Chairman: I move to amend HB 542 (third reading copy -- blue)
as follows:

1. Strike: The Senate Committee on Agriculture, Livestock, and
Irrigation amendments to HB 542 (third reading copy -- blue) dated
March 20, 1989, in their entirety

ADOPT

REJECT

Signed: _____


Senator Mazurek

**SENATE
HB 542**

HOUSE BILL NO. 542

INTRODUCED BY GUTHRIE, AKLESTAD, HAYNE, WESTLAKE,
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evidence if a valid objection to the application is filed
according to this part, or by clear and convincing evidence

~~IF A VALID OBJECTION TO THE APPLICATION IS FILED ACCORDING
TO THIS PART,~~ that the following criteria are met:

(a) there are unappropriated waters in the source of
supply;

(i) at times when the water can be put to the use
proposed by the applicant;

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1 and in trust for the various Indian tribes within the
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16 CREDIBLE CLEAR-AND-CONVINCING SUBSTANTIAL CREDIBLE evidence
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21 SOIL CONSERVATION SERVICE AND OTHER SPECIFIC FIELD STUDIES,
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8 control waters within the boundaries of this state except
9 in accordance with this section."

10 NEW SECTION. Section 2. Extension of authority. Any
11 existing authority to make rules on the subject of the
12 provisions of [this act] is extended to the provisions of
13 [this act].

14 NEW SECTION. Section 3. Effective date. [This act] is
15 effective on passage and approval.

-End-