

SENATE BILL 264

Introduced by Bengtson, et al.

1/27	Introduced
1/27	Referred to Agriculture, Livestock & Irrig.
2/13	Hearing
	Died in Committee

1 *Senate* BILL NO. *264*
2 INTRODUCED BY *Bentley, Stenrod, Stearns, Galt*
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING AN APPLICANT
5 FOR A PERMIT OR CHANGE IN APPROPRIATION RIGHT TO HAVE
6 EXCLUSIVE OWNERSHIP IN THE DIVERSION OR DEVELOPMENT WORKS,
7 WRITTEN CONSENT OF EACH PERSON WITH RIGHTS TO THE DIVERSION
8 OR DEVELOPMENT WORKS, OR A DISTRICT COURT DETERMINATION
9 ENABLING THE APPLICANT TO USE THE DIVERSION OR DEVELOPMENT
10 WORKS UPON PAYMENT OF JUST COMPENSATION; AMENDING SECTIONS
11 85-2-311 AND 85-2-402, MCA; AND PROVIDING AN APPLICABILITY
12 DATE."

13
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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

16 "85-2-311. Criteria for issuance of permit. (1) Except
17 as provided in subsections (2) through ~~(4)~~ and (3), the
18 department shall issue a permit if the applicant proves by
19 substantial credible evidence that the following criteria
20 are met:

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

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

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

1 and

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

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

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

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

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

12 (f) the applicant has:

13 (i) exclusive property rights in the diversion or
14 development works;

15 (ii) written consent of the person or persons with
16 property rights in the diversion or development works; or

17 (iii) an order pursuant to Title 70, chapter 30, and
18 85-2-414, from the district court having jurisdiction, that
19 enables or will enable the applicant to use the diversion or
20 development works upon payment of just compensation.

21 (2) The department may not issue a permit for an
22 appropriation of 4,000 or more acre-feet of water a year and
23 5.5 or more cubic feet per second of water unless the
24 applicant proves by clear and convincing evidence that:

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

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

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

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

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

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

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

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

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

23 (3) (a) The state of Montana has long recognized the
24 importance of conserving its public waters and the necessity
25 to maintain adequate water supplies for the state's water

1 requirements, including requirements for reserved water
2 rights held by the United States for federal reserved lands
3 and in trust for the various Indian tribes within the
4 state's boundaries. Although the state of Montana also
5 recognizes that, under appropriate conditions, the
6 out-of-state transportation and use of its public waters are
7 not in conflict with the public welfare of its citizens or
8 the conservation of its waters, the criteria in this
9 subsection (3) must be met before out-of-state use may
10 occur.

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

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

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

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

23 (c) In determining whether the applicant has proved by
24 clear and convincing evidence that the requirements of
25 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 the state where the applicant intends to use the water.

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

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

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

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

"85-2-402. Changes in appropriation rights. (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature.

(2) Except as provided in subsections (3) through (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

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

(d) The applicant has:

(i) exclusive property rights in the diversion or development works;

(ii) written consent of the person or persons with property rights in the diversion or development works; or

(iii) an order pursuant to Title 70, chapter 30, and

1 85-2-414, from the district court having jurisdiction, that
 2 enables or will enable the applicant to use the diversion or
 3 development works upon payment of just compensation.

4 (3) The department may not approve a change in purpose
 5 of use or place of use of an appropriation of 4,000 or more
 6 acre-feet of water a year and 5.5 or more cubic feet per
 7 second of water unless the appropriator proves by
 8 substantial credible evidence that:

9 (a) the criteria in subsection (2) are met;

10 (b) the proposed change is a reasonable use. A
 11 finding of reasonable use must be based on a consideration
 12 of:

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

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

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

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

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

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

5 (4) The department may not approve a change in purpose
 6 of use or place of use for a diversion that results in 4,000
 7 or more acre-feet of water a year and 5.5 or more cubic feet
 8 per second of water being consumed unless:

9 (a) the applicant proves by clear and convincing
 10 evidence and the department finds that the criteria in
 11 subsections (2) and (3) are met; and

12 (b) the department then petitions the legislature and
 13 the legislature affirms the decision of the department after
 14 one or more public hearings.

15 (5) (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 following criteria must

1 be met before out-of-state use may occur:

2 (b) The department and, if applicable, the legislature
3 may not approve a change in appropriation right for the
4 withdrawal and transportation of appropriated water for use
5 outside the state unless the appropriator proves by clear
6 and convincing evidence and, if applicable, the legislature
7 approves after one or more public hearings that:

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

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

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

16 (c) In determining whether the appropriator has proved
17 by clear and convincing evidence that the requirements of
18 subsections (5)(b)(ii) and (5)(b)(iii) will be met, the
19 department and, if applicable, the legislature shall
20 consider the following factors:

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

23 (ii) whether the water that is the subject of the
24 proposed change in appropriation might feasibly be
25 transported to alleviate water shortages within the state of

1 Montana;

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

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

7 (d) When applying for a change in appropriation right
8 to withdraw and transport water for use outside the state,
9 the applicant shall submit to and comply with the laws of
10 the state of Montana governing the appropriation and use of
11 water.

12 (6) For any application for a change in appropriation
13 right involving 4,000 or more acre-feet of water a year and
14 5.5 or more cubic feet per second of water, the department
15 shall give notice of the proposed change in accordance with
16 85-2-307 and shall hold one or more hearings in accordance
17 with 85-2-309 prior to its approval or denial of the
18 proposed change. The department shall provide notice and may
19 hold one or more hearings upon any other proposed change if
20 it determines that ~~such-a~~ the change might adversely affect
21 the rights of other persons.

22 (7) The department or the legislature, if applicable,
23 may approve a change subject to ~~such~~ terms, conditions,
24 restrictions, and limitations as it considers necessary to
25 satisfy the criteria of this section, including limitations

1 on the time for completion of the change. The department
2 may extend time limits specified in the change approval
3 under the applicable criteria and procedures of 85-2-312(3).

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

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

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

20 (11) A change in appropriation right contrary to the
21 provisions of this section is invalid. No An officer,
22 agent, agency, or employee of the state may not knowingly
23 permit, aid, or assist in any manner such the unauthorized
24 change in appropriation right. No A person or corporation
25 may not, directly or indirectly, personally or through an

1 agent, officer, or employee, attempt to change an
2 appropriation right except in accordance with this section."

3 NEW SECTION. Section 3. Extension of authority. Any
4 existing authority to make rules on the subject of the
5 provisions of [this act] is extended to the provisions of
6 [this act].

7 NEW SECTION. Section 4. Severability. If a part of
8 [this act] is invalid, all valid parts that are severable
9 from the invalid part remain in effect. If a part of [this
10 act] is invalid in one or more of its applications, the part
11 remains in effect in all valid applications that are
12 severable from the invalid applications.

13 NEW SECTION. Section 5. Applicability. [This act]
14 applies to all permit and change in appropriation right
15 applications received by the department of natural resources
16 and conservation on or after October 1, 1989.

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