

Provisional Permits and Changes Bill Draft

Edited on 6/11/2024

BILL NO. ____

INTRODUCED BY _____

BY REQUEST OF __ (Agency or Department) _____

A BILL FOR AN ACT ENTITLED: “AN ACT PROVIDING FOR THE RECONCILIATION OF PROVISIONAL PERMITS AND CHANGE AUTHORIZATIONS AFTER THE ISSUANCE OF A FINAL DECREE; _____; _____; _____; AMENDING SECTIONS; AND PROVIDING FOR AN EFFECTIVE DATE.

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

Section 1. Section 85-2-313, MCA, is amended to read:

85-2-313. Provisional permit. ~~(1) A permit issued prior to a final determination of existing water rights the issuance of a final decree pursuant to 85-2-234 in that basin is provisional and is subject to that final determination decree. Upon petition, the amount of the appropriation granted in a provisional permit must be reduced, modified, or revoked by the department following a show cause hearing in which it is determined that reduction, modification, or revocation is necessary to protect and guarantee existing water rights determined in the final decree. Because a provisional permit is issued on a reasonable determination of legal availability under 85-2-311(1)(b), in a show cause hearing under this section, legal availability must be determined on a consideration of the final decree in the affected basin or subbasin. A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department.~~

(2) Within 60 days after the issuance of a final decree in a basin pursuant to 85-2-234, the department shall serve by mail a notice of all provisional permits issued to each owner of record of an existing right, a provisional permit, and a certificate of water right within the decreed basin. The department shall also serve the notice on those granted a reservation within the decreed basin pursuant to 85-2-316 and other interested persons who request service of the notice of availability from the department.

(3) Upon petition to the department and following a show cause hearing in which it is determined that reduction, modification, or revocation of the provisional permit is necessary to protect existing water rights

determined in the final decree, the amount of the appropriation in the provisional permit must be reduced, modified, or revoked. Because a provisional permit is issued on a reasonable determination of legal availability under 85-2-311(1)(b), in a show cause hearing under this section, legal availability must be determined on a consideration of the final decree in the decreed basin.

(a) A correct and complete petition may be filed by the department or a person with an existing water right and must demonstrate that the provisional permit would have been denied or modified if the final decree had been available to the department at the time of issuance of the provisional permit.

(b) A correct and complete petition must be submitted on a form designated by the department within 180 days after issuance of the notice provided for in subsection (2).

(c) In basins for which a water judge has entered a final decree pursuant to 85-2-234 prior to [the effective date of this act], the department shall serve notice under subsection (2) within 60 days of [the effective date of this act]. Upon notice provided in subsection (2), a correct and complete petition must be submitted on a form designated by the department within 180 business days.

(4) If no petition is filed pursuant to subsection(3) the department shall issue a certificate of water right in accordance with 85-2-315.

[NEW SECTION] Section 2. Changes and final decrees.

(1) The department will review the project completion notice for a change in appropriation right for existing water rights and may conduct a site inspection to verify whether the appropriation was completed in substantial accordance with the terms of the change authorization. For change in appropriation right granted before issuance of a final decree pursuant to 85-2-234, the department shall reconcile the elements and conditions of a change authorization with the elements of the water right in the final decree. Following reconciliation, the department shall:

(a) issue a certificate of water right consistent with the change authorization;

(b) issue a certificate of water right in a manner that reduces or modifies the change authorization consistent with the final decree; or

(c) revoke the change authorization.

(2) If the department determines to issue the certificate of water right consistent with the change authorization under subsection (1)(a), the department shall provide written notice of its determination to the owner of record of the change authorization and issue the certificate of water right in accordance with 85-2-315.

(3) If the department determines to reduce, modify, or revoke the change authorization pursuant to subsection (1)(b) or (c), the department shall provide written notice of the determination to the owner of record of the change authorization along with the draft verified abstract.

(5) (a) If a show cause hearing is requested, the department will hold a hearing for the petitioner to show by a preponderance of the evidence why the preliminary determination to reduce, modify or revoke a change authorization should not be granted.

(i) the department will enter an order on the preliminary determination within 90 days after the administrative record is closed;

(ii) the order will be accompanied by a final verified abstract;

(iii) the order constitutes a final agency action; and

(iv) the department will issue a certificate of water right in accordance with 85-2-315.

(b) If a show cause hearing is not requested, the department will issue a certificate of water right in accordance with 85-2-315.

(6) In basins for which a water judge has entered a final decree pursuant to 85-2-234 prior to [the effective date of this act], the department shall complete its review under subsection (2) within 120 days. Upon notice provided in subsection (4), a correct and complete petition must be submitted on a form designated by the department within 120 days.

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

Section 3. Section 85-2-315, MCA, is amended to read:

85-2-315. Certificate of water right. ~~Upon~~ (1) On actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed. If the permit is reduced or modified pursuant to 85-2-313, the permittee must include a certified statement describing how the appropriation complies with the reduction or modification. The department shall review the certified statement and may then inspect the appropriation to verify whether the appropriation was completed in substantial accordance with the terms of the permit, including any reduction or modification pursuant to 85-2-313. ~~and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right. The original of the certificate shall be sent to the permittee, and a duplicate shall be kept in the office of the department in Helena.~~

(a) If the department determines that the appropriation has been completed in substantial accordance with the permit and any reduction or modification pursuant to 85-2-313, it will issue a certificate of water right for the permit.

(b) If the department determines that permit was not completed in substantial compliance with the terms, conditions, restrictions, and limitations of the permit approval, including any reduction or modification pursuant to 85-2-313, the department may require the permittee to show cause why the permit should not be modified or revoked pursuant to 85-2-314.

(2) The department will issue a certificate of water right for a change in appropriation right that is verified or modified pursuant to 85-2-402 (9) and (10).

(3) The original of the certificate will be sent to the permittee or owner of the change in appropriation right, and a duplicate will be maintained in a centralized database.

Section 4. 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.

...

(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed. The department will review the certified statement and may inspect the appropriation to verify whether the appropriation was completed in substantial accordance with the terms of the change in appropriation right. For a change in appropriation right for an existing water right that was granted before final decree, the department will verify that the elements and conditions of the change in appropriation right are in substantial accordance with the elements of the existing water right as adjudicated by the final decree.

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

NEW SECTION. Section 5. Notifications to tribal governments. The secretary of state shall send a copy of [this act] to each federally recognized tribal government in Montana.

NEW SECTION. Section 6. Codification instruction. [Section 2] is intended to be codified as an integral component of Title 85, chapter 2, and the provisions of Title 85, chapter 2

NEW SECTION. Section. 7. Effective date. [This act] is effective on passage and approval.