

**CD-ROM Draft Copy**

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

\_\_\_\_ Bill No. \_\_\_\_

Introduced By \_\_\_\_\_

By Request of the Department of Natural Resources and  
Conservation

A Bill for an Act entitled: "AN ACT INCREASING THE  
EFFICIENCIES OF THE WATER PERMIT AND CHANGE PROCESS; AND  
AMENDING SECTIONS 85-2-302, 85-2-307, 85-2-308, AND 85-2-  
310, MCA."

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

**Section 1.** Section 85-2-302, MCA, is amended to read:

**"85-2-302. Application for permit or change in  
appropriation right.** (1) Except as provided in 85-2-306 and  
85-2-369, a person may not appropriate water or commence  
construction of diversion, impoundment, withdrawal, or  
related distribution works unless the person applies for  
and receives a permit or an authorization for a change in  
appropriation right from the department.

(2) The department shall adopt rules that are  
necessary to determine whether or not an application is  
correct and complete, based on the provisions applicable to

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

issuance of a permit under this part or a change in appropriation right pursuant to Title 85, chapter 2, part 4. The rules must be adopted in compliance with Title 2, chapter 4.

(3) The application must be made on a form prescribed by the department. The department shall make the forms available through its offices.

(4) (a) Subject to subsection (4)(b), the applicant shall submit a correct and complete application. The determination of whether an application is correct and complete must be based on rules adopted under subsection (2) that are in effect at the time the application is submitted.

(b) If an application is for a permit to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, the application is not correct and complete under this section until the applicant has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

(c) If an application is for a permit or change in appropriation right from a shared point of a diversion or through a shared means of conveyance, the application is not correct and complete until the applicant submits proof to the department that a written notice of the application was provided to each owner of an appropriation right sharing the point of diversion or means of conveyance. For purposes of this subsection (4), "conveyance" means a canal, ditch, flume, pipeline, or other constructed waterway.

(5)(a) The department shall notify the applicant of any defects in an application within ~~180 days~~ 15 business days of receipt if the applicant has a pre-application meeting and 30 days without a pre-application meeting. A pre-application meeting includes an informal meeting prior to application submittal where the applicant and the department coordinate on the application process. Documentation of a pre-application meeting includes completion of a form provided by the department.

(b) The defects in an application must be identified by reference to the rules adopted under subsection (2).

(c) If the department does not notify the applicant of any defects within ~~180 days~~ the time allowed in (5)(a),

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

the application must be treated as a correct and complete application.

(6) (a) An ~~application applicant~~ does not lose priority of filing because of defects if the application must submit a deficiency response is corrected or completed within 120 days of the date of initial notification of the defects. If the applicant does not provide a deficiency response within 120 days, the application is terminated.

(b) The department has 30 days from receipt of a deficiency response to terminate the application. An application not terminated within 30 days of the deficiency respond is determined correct and complete.

~~(7) An application not corrected or completed within 120 days of the date of initial notification of the defects is terminated.~~

(8) Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation."

**Section 2.** Section 85-2-307 , MCA, is amended to read:

**"85-2-307. Notice of application for permit or change in appropriation right.** (1) Upon receipt of an application for a permit or a change in appropriation right, the department

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

shall publish notice of receipt of the application on the department's website.

(2) (a) Within ~~120 days of the receipt of~~ 60 days of a correct and complete application if the applicant has completed a pre-application meeting, or within 120 days of a correct and complete application if the applicant has not completed a pre-application meeting, ~~a correct and complete application for a permit or change in appropriation right,~~ the department:

(i) may meet informally with the applicant, the persons listed in subsection (2)(d), and persons who may claim standing pursuant to 85-2-308 to discuss the application;

(ii) shall make a written draft preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; and

(iii) may include conditions in the written draft preliminary determination to satisfy applicable criteria for issuance of a permit or change in appropriation right.

~~(b) If the preliminary determination proposes to grant an application, the department shall prepare a notice containing the facts pertinent to the application,~~

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

~~including the summary of the preliminary determination and any conditions, and shall publish the notice once in the newspaper of general circulation in the area of the source.~~

(b) An applicant has 15 days from issuance of a draft preliminary determination to file an objection or request an extension of time to submit additional information. If no objection or extension is requested, the department shall provide notice of the draft preliminary determination pursuant to (2) (c).

(i) The department may grant an extension of up to 180 days. The department shall provide written notice of the deadline by which the applicant must submit additional information. Within 60 days of the extension deadline, the department shall issue an updated draft preliminary determination. An applicant may not object or request an extension to supply additional information regarding an updated draft preliminary determination.

(ii) An applicant has 60 days from an objection to a draft preliminary determination to provide all supporting materials to the department. The department has 60 days to evaluate the new materials and update the draft preliminary determination.

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

(iii) If following an extension or objection pursuant to (2)(b)(i) or (2)(b)(ii) the draft preliminary determination proposes to deny an application or grant in modified form, the process provided in 85-2-310(1)-(2) must be followed.

(iv) If the draft preliminary determination proposes to grant an application or grant in modified form following a show cause hearing pursuant to (2)(b)(iii), the department shall provide notice pursuant to (2)(c).

~~(c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310 must be followed.~~ (c) If the draft preliminary determination proposes to grant an application or grant in modified form and the applicant does not file an objection pursuant to (2)(b), the department shall prepare a notice containing the facts pertinent to the application, including the summary of the draft preliminary determination and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the source.

(d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

(e) The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation.

(f) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

(3) The notice must state that ~~by a date set by the department, not less than 15 days or more than 60~~ no more than 30 days after the date of publication, persons may file with the department ~~written objections~~ public comment to the application.



## **CD-ROM Draft Copy**

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

(4) The department has 30 days to consider comments and issue a preliminary determination either to grant, grant with modifications, or deny the application. If the department proposes to grant or grant in modified form an application pursuant to (2)(c) and no comments are received pursuant to (3), the department's draft preliminary determination is adopted as the preliminary determination.

(5) For applications that receive public comment under (3), the department shall prepare a notice concerning the facts pertinent to the application, including the summary of the preliminary determination and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the source. Public notice will be consistent with 85-2-307(2)(d)-(f). If no public comment is received under (3) and the draft preliminary determination is adopted as the preliminary determination under (4), no additional notice will occur and the preliminary determination becomes final.

(6) The notice must state that 30 days after the date of publication, a person may file with the department a written objection to the application. Any interested person who has standing, including the applicant, may only

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

object to issues already brought forward during the public comment period related to criteria."

**Section 3.** Section 85-2-308, MCA, is amended to read:

**"85-2-308. Objections.** (1) (a) An objection to an application under this chapter must be filed by the date specified by the department under 85-2-307(3).

(b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402, 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

(3) (a) A person other than the applicant has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

(b) An applicant has standing to file an objection under this section if the preliminary determination proposes to grant the application in modified form or deny

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

the application following public comment pursuant to 85-2-307(3) and (4).

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. In order to assist both applicants and objectors, the department shall adopt rules in accordance with this chapter delineating the components of a correct and complete objection. For instream flow water rights for fish, wildlife, and recreation, the rules must require the objector to describe the reach or portion of the reach of the stream or river subject to the instream flow water right and the beneficial use that is adversely affected and to identify the point or points where the instream flow water right is measured and monitored. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

(6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under this section and rules of the department."

**Section 4.** Section 85-2-310 , MCA, is amended to read:

**"85-2-310. Action on application for permit or change in appropriation right.** (1) (a) If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied. The show cause hearing on a draft preliminary determination to deny is limited to the evidence of record presented in support of the application pursuant to 85-2-307(2)(b).

(b) (i) Upon request from the applicant, the department shall appoint a hearing examiner who did not participate in the preliminary determination.

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

(ii) The applicant may make only one request pursuant to this subsection (1)(b) for a different hearing examiner.

(2) (a) A decision to deny a permit or change in appropriation right following a hearing on a draft preliminary determination or preliminary determination to deny an application is final.

(b) A proposal to grant or grant in modified form a permit or change in appropriation right with or without conditions following a hearing on a ~~proposal~~ draft preliminary determination to deny the application must proceed as if the department proposed to grant the permit or change in appropriation right in its draft preliminary determination pursuant to 85-2-307.

(3) If valid objections are not received on an application or if valid objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right as proposed in the preliminary determination pursuant to 85-2-307.

(4) If valid objections to an application are received and withdrawn with conditions stipulated with the applicant and the department preliminarily determined to grant the

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

permit or change in appropriation right, the department shall grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

(5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

(6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

(7) (a) Except as provided in subsection (6), if the ~~department~~ draft preliminary determination proposes to grant a permit or change in appropriation right in modified form, the applicant must be given an opportunity to be

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

heard. The addition of conditions or changes to conditions required for approval does not constitute a modification of the application.

(b) The department shall serve notice of a draft preliminary determination to grant a permit or change in appropriation right in a modified form by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing pursuant to 2-4-604 to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be preliminarily determined to be granted in the modified form by filing a request within 30 days after the notice is mailed. The notice must state that the permit or change in appropriation right will be preliminarily determined to be granted as modified unless a hearing is requested.

(c) A show cause hearing on a draft preliminary determination to grant in modified form is limited to the evidence of record presented in support of the application pursuant to 85-2-307(2)(b).

(d) A proposal to grant a permit or change in appropriation right with or without conditions following a hearing on a draft preliminary determination to grant the application with conditions must proceed as if the

## CD-ROM Draft Copy

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

department proposed to grant the application with  
conditions in its draft preliminary determination pursuant  
to 85-2-307.

(8) The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

(9) For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

(a) an application is not corrected and completed as required by 85-2-302;

(b) the appropriate filing fee is not paid;

(c) the application does not document:

(i) a beneficial use of water;



## **CD-ROM Draft Copy**

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

(ii) the proposed place of use of all water applied  
for;

(iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application of the water to a beneficial use.

(iv) for appropriations not covered in subsection (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use; and

(v) except as provided in subsection (10), if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

**CD-ROM Draft Copy**

Last printed 9/22/2022 1:45:00 PM

Application for permit or change bill.docx

(D) each firm contractual agreement for the specified amount of water for each person using the water; or

(d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124.

(10) If water applied for is to be marketed by the applicant to other users for the purpose of aquifer recharge or mitigation, the applicant is exempt from the provisions of subsection (9)(c)(v). The applicant must provide information detailing the proposed place of use."

-END-