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HOUSE BILL NO. 114

INTRODUCED BY S. VINTON

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE APPLICATION PROCESS AND DEPARTMENT CONSIDERATION OF A PERMIT OR CHANGE IN AN APPROPRIATION RIGHT; REVISING TIMELINES FOR DEPARTMENT CONSIDERATION OF AN APPLICATION FOR A WATER RIGHT OR A CHANGE OF WATER RIGHT; REVISING NOTICE; PROVIDING FOR PRELIMINARY DETERMINATIONS OF A WATER RIGHT APPLICATION OR A CHANGE OF WATER RIGHT; PROVIDING FOR PUBLIC COMMENT; REVISING THE OBJECTIONS PROCESS; REVISING DEPARTMENT HEARINGS; EXTENDING RULEMAKING AUTHORITY; PROVIDING AN APPROPRIATION; AMENDING SECTIONS 85-2-302, 85-2-307, 85-2-308, 85-2-310, AND 85-2-401, MCA; AND PROVIDING EFFECTIVE DATES AND A TERMINATION DATE."

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;

(a) \_\_\_\_\_ for the premeeting application process pursuant to subsection (3)(b);

(b) \_\_\_\_\_ that are necessary to determine whether or not an application is correct and complete, based on the provisions applicable to 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; and~~

(c) \_\_\_\_\_ in compliance with Title 2, chapter 4.

(3) (a) The application must be made on a form prescribed by the department. The department

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1 shall make the forms available through its offices.

2 (b) Prior to filing the application, an applicant may participate in a preapplication meeting with the  
3 department to discuss the application process. During this meeting, the applicant and the department will  
4 discuss the technical analyses to be completed for the application and if the applicant or the department will  
5 complete the technical analyses. A preapplication meeting must be documented on a form provided by the  
6 department and included with the application.

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

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

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

20 (5) (a) The department shall notify the applicant of any defects in an application within: 180 days

21 (i) 15 business days of receipt of the application if the applicant has participated in a  
22 preapplication meeting; or

23 (ii) 30 business days of receipt of the application if the applicant has not participated in a  
24 preapplication meeting.

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

27 (c) If the department does not notify the applicant of any defects within 180 days the time allowed  
28 in subsection (5)(a), the application must be treated as a correct and complete application.

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1           ~~(6)~~ (a) An application ~~does not lose priority of filing because of defects if the application is~~  
2 ~~corrected or completed~~ applicant shall submit a deficiency response to the defects identified in subsection  
3 ~~(5)(a)~~ within 120 days of the date of initial notification of the defects. If the applicant does not provide a  
4 deficiency response within 120 days, the application must be terminated.

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

7           (b) The department shall determine if the application is correct and complete or terminate the  
8 application within 30 days of receipt of a deficiency response. An application not terminated within 30 days of  
9 the deficiency response is considered correct and complete.

10           ~~(8)(7)~~ Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior  
11 boundaries of the Flathead Indian reservation."  
12

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

14           **"85-2-307. Notice of receipt of application for permit or change in appropriation right -- draft**  
15 **preliminary determination -- extensions -- updated draft preliminary determination -- public comments --**  
16 **issuance of preliminary determination.** (1) ~~Upon~~ On receipt of an application for a permit or a change in  
17 appropriation right, the department shall publish notice of receipt of the application on the department's website.  
18 The notice must be updated on the website when an application is determined to be correct and complete.

19           (2)   ~~(a)~~ (a) Within 120 days of the receipt of a correct and complete application for a permit or change  
20 in appropriation right 60 days of receiving a correct and complete application if the applicant has completed a  
21 preapplication meeting and the department has prepared the technical analyses or within 120 days of receiving  
22 a correct and complete application if the department has not prepared the technical analyses, the department:

23           (i)(a) may meet ~~informally~~ with the applicant, the persons listed in ~~subsection (2)(d)~~ subsection (4)(f),  
24 and persons who may claim standing pursuant to 85-2-308 to discuss the application;

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

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

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1           ~~(b) If the preliminary determination proposes to grant an application, the department shall prepare a~~  
2 ~~notice containing the facts pertinent to the application, including the summary of the preliminary determination~~  
3 ~~and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the~~  
4 ~~source.~~

5           ~~(c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310~~  
6 ~~must be followed.~~

7           (3) (a) An applicant has 15 business days from issuance of a draft preliminary determination to  
8 request an extension of time to submit additional information. The department may grant an extension of up to  
9 180 days for the applicant to submit additional evidence. The department shall provide the applicant with written  
10 notice of the extension deadline.

11           (b) The department may revise its draft preliminary determination based on information received  
12 under subsection (3)(a). The department shall issue an updated draft preliminary determination within 60 days  
13 after the earliest date of:

14           (i) the extension deadline set pursuant to subsection (3)(a); or

15           (ii) the department's receipt of written notice from the applicant stating submittal of all additional  
16 information to the department is considered correct and complete.

17           (c) If the department's updated draft preliminary determination:

18           (i) is to deny the application, the department shall hold a hearing as provided in 85-2-310; or

19           (ii) is to grant the application or grant the application in modified form, the department shall provide  
20 notice of the opportunity to provide public comment pursuant to subsection (4).

21           (d) If the applicant does not request an extension of time, the department shall:

22           (i) provide notice of the draft preliminary determination to grant the application or grant the  
23 application in modified form and also provide notice of the opportunity to provide public comment pursuant to  
24 subsection (4); or

25           (ii) adopt a draft preliminary determination to deny the application as the final determination.

26           (4) (a) The department shall prepare a notice of the opportunity to provide public comment on a  
27 draft preliminary determination or an updated draft preliminary determination issued for an application.

28           (b) The notice of the opportunity to provide public comment must:

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1 (i) state that no more than 30 days after the date of publication, a person may file a public  
2 comment about the application with the department on a form provided by the department; and

3 (ii) contain facts pertinent to the application, including a summary of the draft preliminary  
4 determination and any conditions.

5 (c) The department shall publish the notice once in a newspaper of general circulation in the area  
6 of the source of the appropriation right and post the notice on the department website.

7 (d) A public comment must identify how one or more criteria for the issuance of a permit of a  
8 change in appropriation right is not adequately addressed in a draft preliminary determination issued for the  
9 application. The department may adopt additional rules for public comments.

10 (e) A person has standing to file a public comment pursuant to this section if the property, water  
11 rights, or interests of the person would be adversely affected by the proposed appropriation.

12 (d)(f) Before the date of publication of the notice of the opportunity to provide public comment, the  
13 department shall also serve the notice by first-class mail upon on:

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

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

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

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

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

23 ~~(3) The notice must state that by a date set by the department, not less than 15 days or more than 60~~  
24 ~~days after the date of publication, persons may file with the department written objections to the application.~~

25 (5) (a) Within 30 days after the date of publication of the notice of the opportunity to provide public  
26 comment, the department shall consider the public comments, respond to the public comments, and issue a  
27 preliminary determination to grant the application, grant the application in modified form, or deny the  
28 application.

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1           **(b)** If, after considering the public comments subject to subsection (5)(a), the department's  
2 preliminary determination is to:

3           **(i)** deny the application, the department shall hold a hearing as provided in 85-2-310; or

4           **(ii)** grant the application or grant the application in a modified form, a person may file an objection  
5 to an application pursuant to 85-2-308.

6           **(c)** If no public comments are received pursuant to subsection (4), the department's preliminary  
7 determination is adopted as the final determination."

8

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

10           **"85-2-308. Objections.** (1) (a) The department shall provide notice of the opportunity to object to a  
11 preliminary determination issued pursuant to 85-2-307(5). The notice must state that no more than 30 days  
12 after the date of publication of the notice, a person may file a written objection to the application with the  
13 department.

14           **(b)** A person who has standing pursuant to this section, including the applicant, may object only to  
15 issues already identified in a public comment properly filed with the department pursuant to 85-2-307(4) or  
16 raised in a hearing pursuant to 85-2-310.

17           ~~(1)(2)~~ (a) An objection to an application under this chapter must be filed by the date specified by the  
18 department under 85-2-307(3) subsection (1).

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

21           ~~(2)(3)~~ For an application for a change in appropriation rights, the objection must state the name and  
22 address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402,  
23 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

24           ~~(3)(4)~~ A person has standing to file an objection under this section if the property, water rights, or  
25 interests of the objector would be adversely affected by the proposed appropriation.

26           ~~(4)(5)~~ For an application for a reservation of water, the objection must state the name and address of  
27 the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

28           ~~(5)(6)~~ An objector to an application under this chapter shall file a correct and complete objection on a

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

9 ~~(6)(7)~~ An objection is valid if the objector has standing pursuant to ~~subsection (3)~~ subsection (4), has  
10 filed a correct and complete objection within the prescribed time period, and has stated the applicable  
11 information required under this section and rules of the department."  
12

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

14 **"85-2-310. Action on application for permit or change in appropriation right.** (1) (a) If the  
15 department ~~proposes~~ issues an updated draft preliminary determination or a preliminary determination to deny  
16 an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the  
17 application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-  
18 class mail ~~upon~~ on the applicant for the applicant to show cause by a preponderance of the evidence as to why  
19 the permit or change in appropriation right should not be denied.

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

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

24 (c) A decision to deny a permit or change in appropriation right following a hearing under this  
25 subsection (1) is final.

26 ~~(2)\_\_\_\_\_ (a) A proposal to grant a permit or change in appropriation right with or without conditions~~  
27 ~~following a hearing on a proposal to deny the application must proceed as if the department proposed to grant~~  
28 ~~the permit or change in appropriation right in its preliminary determination pursuant to 85-2-307. A hearing under~~

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1 subsection (1) is limited to the evidence presented in support of the application considered by the department  
2 pursuant to 85-2-302 and 85-2-307.

3 (b) If the department determines at a hearing held under subsection (1) that an application may  
4 proceed as a draft preliminary determination to grant or a draft preliminary determination to grant in a modified  
5 form, then the department shall modify the draft preliminary determination consistent with the determination of  
6 the hearing and proceed to provide notice of the opportunity to provide public comment pursuant to 85-2-  
7 307(4).

8 (c) The department shall issue its determination on a hearing held under subsection (1) within 90  
9 days of the close of the administrative record.

10 (3) If valid objections filed pursuant to 85-2-308 are not received on an application or if valid  
11 objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or  
12 change in appropriation right, the department shall grant the permit or change in appropriation right as  
13 proposed in the preliminary determination pursuant to 85-2-307.

14 (4) If valid objections filed pursuant to 85-2-308 to an application are received and withdrawn with  
15 conditions stipulated with the applicant and the department preliminarily determined to grant the permit or  
16 change in appropriation right under 85-2-307, the department shall grant the permit or change in appropriation  
17 right subject to conditions as necessary to satisfy applicable criteria.

18 (5) The department shall deny, grant in a modified form, or grant with or without conditions a  
19 permit under 85-2-311 or a change in appropriation right under 85-2-402 by issuing a final determination within  
20 90 days after the administrative record is closed for a hearing held pursuant to 85-2-309.

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

27 ~~(7) (a) Except as provided in subsection (6), if the department proposes to grant a permit or change~~  
28 ~~in appropriation right in modified form, the applicant must be given an opportunity to be heard. The addition of~~

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1 ~~conditions or changes to conditions required for approval does not constitute a modification of the application.~~

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

8 ~~(8)(7)~~ The department may cease action ~~upon~~on an application for a permit or change in  
9 appropriation right and return it to the applicant when it finds that the application is not in good faith or does not  
10 show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these  
11 reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit  
12 application there is not a right to a priority date based ~~upon~~on the filing of the application. Returning an  
13 application pursuant to this subsection is a final decision of the department.

14 ~~(9)(8)~~ For all applications filed after July 1, 1973, the department shall find that an application is not in  
15 good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

- 16 (a) an application is not corrected and completed as required by 85-2-302;
- 17 (b) the appropriate filing fee is not paid;
- 18 (c) the application does not document:
- 19 (i) a beneficial use of water;
- 20 (ii) the proposed place of use of all water applied for;
- 21 (iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a  
22 detailed project plan describing when and how much water will be put to a beneficial use. The project plan must  
23 include a reasonable timeline for the completion of the project and the actual application of the water to a  
24 beneficial use.
- 25 (iv) for appropriations not covered in subsection ~~(9)~~ ~~(8)~~(c)(iii), a general project plan stating when  
26 and how much water will be put to a beneficial use; and
- 27 (v) except as provided in subsection ~~(40)~~ ~~(9)~~, if the water applied for is to be appropriated above  
28 that which will be used solely by the applicant or if it will be marketed by the applicant to other users,

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1 information detailing:

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

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

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

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

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

9 ~~(40)(9)~~ If water applied for is to be marketed by the applicant to other users for the purpose of aquifer  
10 recharge or mitigation, the applicant is exempt from the provisions of subsection ~~(9)~~ (8)(c)(v). The applicant  
11 ~~must~~ shall provide information detailing the proposed place of use."  
12

13 **Section 5.** Section 85-2-401, MCA, is amended to read:

14 **"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after**

15 **July 1, 1973.** (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not  
16 include the right to prevent changes by later appropriators in the condition of water occurrence, such as the  
17 increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior  
18 appropriator can reasonably exercise the water right under the changed conditions.

19 (2) Priority of appropriation made under this chapter dates from the filing of an application for a  
20 permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, 85-2-  
21 310~~(8)~~(7), and 85-2-313.

22 (3) Priority of appropriation perfected before July 1, 1973, must be determined as provided in part  
23 2 of this chapter.

24 (4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized  
25 and confirmed subject to this part and any terms, conditions, and limitations placed on a change in  
26 appropriation authorization by the department."  
27

28 NEW SECTION. **Section 6. Appropriation.** (1) There is appropriated ~~\$1,276,597~~ \$638,299 from the

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1 general fund to the department of natural resources and conservation in fiscal year 2024 and ~~\$1,208,050~~  
2 ~~\$604,025~~ in fiscal year 2025. The appropriation is intended to partially fund 13.00 FTE and associated  
3 operating costs.

4 ~~(2) There is appropriated \$638,299 to the department of natural resources and conservation from~~  
5 ~~a state special revenue account to the credit of the department of natural resources and conservation in fiscal~~  
6 ~~year 2024 and \$604,025 in fiscal year 2025. The appropriation is intended to partially fund 13.00 FTE and~~  
7 ~~associated operating costs.~~

8 ~~(2)(3)~~ It is the intent of the legislature that the appropriation for fiscal year 2025 and the 13.00 FTE be  
9 included as part of the base budget for the department of natural resources and conservation for the biennium  
10 beginning July 1, 2025, ~~and that the state special revenue would be derived from fees charged to applicants.~~

11  
12 NEW SECTION. Section 7. Notification to tribal governments. The secretary of state shall send a  
13 copy of [this act] to each federally recognized tribal government in Montana.

14  
15 NEW SECTION. Section 8. Effective dates. (1) Except as provided in subsection (2), [this act] is  
16 effective January 1, 2024.

17 (2) [Section 6] and this section are effective July 1, 2023.

18  
19 NEW SECTION. Section 9. Termination. [This act] terminates June 30, 2031.

20 - END -