

Provisional Permits and Changes Bill Draft FDT subworking group updated as of 4.4.24

85-2-313. Provisional permit.

(1) A permit issued prior to a final determination of existing water rights the issuance of a final decree in that basin is provisional and is subject to that final determination decree.

(2) After issuance of a final decree, the Department shall review all provisional permits in that basin and propose any reduction, modification, or revocation is necessary to protect and guarantee existing water rights determined in the final decree. Provide notice to any changes/no changes proposed.

(3) 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.

(a) A person has standing to file a petition under this section if a water right of the Petitioner is adversely affected by the permit authorized prior to the Final Decree or they are the permittee.

(b) A person may not file a petition under this section unless the petition is allowed for any of the following reasons:

(i) mistake, inadvertence, surprise, or excusable neglect;

(ii) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), Montana Rules of Civil Procedure;

(iii) fraud, misrepresentation, or other misconduct of an adverse party;

(iv) the judgment is void;

(v) any other reason justifying relief from the operation of the judgment.

(c) a correct and complete petition must be submitted on a form designated by the department within 120 days after the notice from above.

(d) 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], a correct and complete petition must be submitted on a form designated by the department within 120 days after the notice from above.

(4) The department will issue a certificate of water right for the provisional permit based on outcome of the petition process.

New Section: Changes and final decrees

(1) The department will review the project completion notice for a change in appropriation right and may conduct a site inspection to verify whether the appropriation was completed in substantial accordance with the terms of the change authorization. For a change in appropriation right authorized before the final decree of the underlying water right, the department will determine whether the notice of completion is consistent with the elements of the water right in the final decree. Following verification, the department will propose:

- (a) to issue a certificate water right in the amount of the project completion notice,
- (b) to issue the certificate of water right for a reduced or modified amount; or
- (c) to revoke the change in appropriation right.

(2) The department's proposal pursuant to subsection 1 will be accompanied by a draft verified abstract.

(3) If the department proposes to reduce, modify, or revoke the change in appropriation right pursuant to subsection 1(b) or (c), the department will provide written notice of the proposed action to the owner of the change in appropriation along with the draft verified abstract. The owner of the change in appropriation right may request a hearing to show cause why the proposed action should not be taken within 45 days of the notice.

(a) If a show cause hearing is requested, the department will hold a hearing for the owner of the change in appropriation right to show cause why the proposed action should not be taken.

- (i) the department will enter an order on the proposed action 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.

(b) If a show cause hearing is not requested, the department will issue a final verified abstract.

(4) The department will issue a certificate of water right for the change in appropriation right based on the final verified abstract.

(5) (a) A person may not file a petition under this section unless the petition is allowed for any of the following reasons:

- (i) mistake, inadvertence, surprise, or excusable neglect;
- (ii) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), Montana Rules of Civil Procedure;
- (iii) fraud, misrepresentation, or other misconduct of an adverse party;
- (iv) the judgment is void;
- (v) any other reason justifying relief from the operation of the judgment.
- (vi) only if expansion of volume
- (vii) change in POD

(b) A correct and complete objection must be submitted on a form designated by the department within 120 days after the notice from above. A correct and complete objection application must contain:

- (i) information on if the objector objected before and how information/details have changed since issuance of final decree

85-2-314. Revocation or modification of permit or change in appropriation right. (1) (a) If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension of the time stated in the permit, if the water is not being applied to the beneficial use contemplated in the permit or change in appropriation right, or if the permit or change in appropriation right is otherwise not being followed, the department may, after notice, require the permittee or the holder of the change in appropriation right to show cause why the permit or change in appropriation right should not be modified or revoked.

(b) If the permittee or holder of the change in appropriation right fails to show sufficient cause, the department may modify or revoke the permit or change in appropriation right.

(2) (a) A permittee or holder of a change in appropriation right may petition the department to modify or remove a condition of approval or reduce the amount of the permit or change authorization.

(b) The petition must be submitted on a form designated by the department, is subject to the criteria of **85-2-311** and **85-2-402**, and must be processed in the same manner as an application made pursuant to **85-2-302**, **85-2-307** through **85-2-309**, and **85-2-310**(1) through (5) except that:

(i) the department may waive the public notice of a preliminary determination to grant the petition if the department finds, on the basis of information reasonably available to it, that the petition as proposed in the application will not adversely affect the rights of other appropriators;

(ii) if the department issues a preliminary determination to grant the petition and waives public notice, the determination becomes final;

(iii) the department may condition a preliminary determination to grant the petition in order to meet the criteria under **85-2-311** and **85-2-402**; and

(iv) a preliminary determination to deny a petition is final. Denial of a petition does not affect the permit or change authorization.

History: En. Sec. 23, Ch. 452, L. 1973; R.C.M. 1947, 89-887; amd. Sec. 13, Ch. 448, L. 1983; amd. Sec. 8, Ch. 70, L. 2005; amd. Sec. 5, Ch. 335, L. 2013.

85-2-315. Certificate of water right. Upon 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. The department shall review the certified statement and may then inspect the appropriation, 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.

History: En. Sec. 24, Ch. 452, L. 1973; R.C.M. 1947, 89-888; amd. Sec. 14, Ch. 448, L. 1983; amd. Sec. 7, Ch. 805, L. 1991; amd. Sec. 10, Ch. 370, L. 1993.

Original prior to 1997 amendments: 85-2-313. Provisional permit. A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination. The amount of the appropriation granted in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights determined in the final decree. 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.